

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

THOMAS MOORE and
RICHARD ANDERSON, individually
and on behalf of others similarly
situated,

Plaintiffs,

v.

NEWS CORPORATION, a foreign
corporation, NEW WORLD
COMMUNICATIONS OF TAMPA, INC., a
foreign profit corporation, FOX
TELEVISION STATIONS, INC., a foreign
profit corporation,

Defendants.

Case No.: 2009-CA-40286

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ORANGE CO., FL.

**PLAINTIFFS' MOTION FOR TEMPORARY INJUNCTION AND INCORPORATED
MEMORANDUM OF LAW**

Plaintiffs, THOMAS MOORE and RICHARD ANDERSON, individually and on behalf of others similarly situated¹, by and through undersigned counsel, pursuant to Rule 1.610, Florida Rules of Civil Procedure, respectfully submit this memorandum of points and authorities in support of their simultaneously filed Motion For Temporary Injunction.

I. INTRODUCTION

At 8:30 p.m. eastern standard time on January 1, 2010, the University of Florida Gators will take on the University of Cincinnati Bearcats in the 76th Annual Sugar Bowl in Tim Tebow's last game for the Gators. This is an event of undeniable public interest and of particular interest to the Plaintiffs. This year, FOX Broadcasting holds the exclusive television broadcast

¹ Plaintiffs are members of the legion of University of Florida alumni and fans known as "Gator Nation". However, the relief is also sought on behalf of fans of the University of Cincinnati Bearcats as well as college football fans throughout the State of Florida.

rights to the Sugar Bowl. Ordinarily, this scenario would mean that every interested American with access to a television, and in particular every Floridian and every alumni or fan of the University of Florida, would be able to watch the game. Indeed, broadcasters like FOX stations WTVT and WOFL, traditionally profit by selling advertising on their free, over-the-air broadcast network, and therefore have a natural business incentive to ensure the widest possible distribution of their television programming.

Shockingly, however, Defendants have threatened to deprive Plaintiffs, along with as many as 1,000,000 other Floridians, of the opportunity to watch the Sugar Bowl – an event of tremendous public interest – as well as other television programming of widespread interest to the viewing public carried by FOX broadcast stations. Plaintiffs depend on their subscriptions to the cable service provided by Bright House Networks, LLC (“BHN”) to obtain and view Defendants’ broadcast signals. According to published news reports, at midnight on December 31, 2009, Defendants will “pull the plug” on BHN’s current retransmission of Defendants’ broadcast television signals. In other words, the cable channels over which BHN subscribers view Defendants’ broadcast signals will be dark at 12:01 a.m. on January 1, 2010². Plaintiffs will be left with no effective alternative means of viewing Defendants’ broadcast signals.

According to media reports, News Corporation’s FOX is using its monopoly control on the broadcast of the Sugar Bowl as a bargaining chip in carriage negotiations with Time Warner Cable’s BHN. According to these reports, the current contract under which BHN is allowed to retransmit FOX’s television broadcasts to BHN’s cable subscribers expires on December 31, 2009. Even though both parties claim to be negotiating a new agreement in good faith, FOX is

² Other popular programming on Fox, including “American Idol”, “House” and “24” will also be lost. However, these programs are not of the same time sensitive nature as the Sugar Bowl. The game cannot be viewed as a repeat.

threatening to pull to plug on BHN at midnight on December 31, 2009 – just hours before the Florida Gators appear in the Sugar Bowl -- unless a new agreement is reached before then.

FOX's imposition of this arbitrary deadline is an unconscionable and unfair act in the conduct of business that also violates FOX's statutory duty as an FCC licensee to broadcast in the public interest. FOX cannot be allowed to ignore its duties as a broadcaster by attempting to leverage its monopoly power over the broadcast of the Sugar Bowl at the expense of the public. Through its threats against BHN, FOX is unconscionably and unfairly exploiting completely innocent Florida consumers, who are obviously anxious to watch the Sugar Bowl.

In fact, innocent Florida consumers will be the only real losers in what appears to be a game of high stakes poker between these companies. Plaintiffs will be denied access not only to the Sugar Bowl, but also to vital news and information of public interest through local FOX News affiliates other popular programs. Instead of fulfilling its duty as a broadcaster to use its FCC license to disseminate programming of public interest, FOX is threatening action that will have the effect of restricting access to this programming. These acts are not only contrary to FOX's duty to broadcast in the public interest, but also constitute unconscionable and unfair acts in the conduct of business that violates the Florida Deceptive and Unfair Trade Practices Act, Florida Code § 501.201 *et seq.* In addition, Plaintiffs will be harmed by the method of unfair competition employed by Defendants in violation of Florida Statute, § 501.201, *et seq.* Because Plaintiffs will be irreparably harmed by Defendants' threatened unconscionable and unfair actions, and because whatever economic interests FOX may claim can be adequately protected through this Court's equitable powers, temporary injunctive relief is appropriate and warranted.

II. FACTUAL BACKGROUND

Plaintiffs, THOMAS MOORE and RICHARD ANDERSON, are Florida residents who, in exchange for a monthly subscription fee, receive cable television service from cable operator Bright House Networks, LLC ("BHN"). (See attached Exhibit "A") Plaintiffs Anderson and Moore are two of approximately one and a half million Floridians who receive cable television service from BHN.

Defendant, NEWS CORPORATION, owns the Fox Television Network. Defendant, NEW WORLD COMMUNICATIONS OF TAMPA, INC. ("New World"), holds the broadcast television license issued by the FCC that allows for the over-the-air transmission of broadcast signals of the broadcast television stations licensed to Tampa, Florida under the FCC-assigned call letters WTVT. Defendant, FOX TELEVISION STATIONS, INC. ("FTS"), holds the broadcast television license issued by the FCC that allows for the over-the-air transmission of broadcast signals of the broadcast television station licensed to Orlando, Florida under the FCC-assigned call letters WOFL. WTVT and WOFL are both part of the FOX Television Network.

Currently, BHN carries WTVT as part of its basic cable package in the Tampa, Florida area. BHN also currently carries WOFL as part of its basic cable package in the Orlando, Florida area. Plaintiffs, receive WTVT/WOFL through BHN's cable service.

According to published news reports, the agreement under which BHN is able to retransmit the free, over-the-air broadcast signals of WTVT and WOFL over BHN's cable system(s) to BHN's subscribers is set to expire at midnight on December 31, 2009. According to these news reports, Defendants are still negotiating a new agreement for the retransmission of WTVT and WOFL over BHN's cable system(s). Also according to these news reports, Defendants will "pull the plug" on BHN's retransmission of their broadcast signals at midnight

on December 31, 2009 if a new agreement is not reached by that time. In other words, the channels over which BHN subscribers view WTVT and WOFL on BHN's cable service will be dark at 12:01 a.m. on January 1, 2010.

As FOX stations, Defendants broadcast FOX Network programming. Some FOX Network programming is created and owned by FOX. However, much of the programming broadcast by FOX stations such as WTVT and WOFL is created and owned by third-parties who are not FOX entities. This year, FOX has the broadcast rights to the 76th annual Sugar Bowl between the Florida Gators and the Cincinnati Bearcats, which is scheduled to take place on January 1, 2010. This is the last game for University of Florida quarterback Tim Tebow (as well as, for the foreseeable future, Coach Urban Meyer), and is an event of undeniable public interest and of particular interest to the Plaintiffs. Other FOX programming of widespread interest to the viewing public in the first week of January 2010 includes "24", "House", Fox Sports Network and NFL games.

Plaintiffs have no effective alternative to BHN's cable service for viewing the transmission of broadcast signals WTVT/WOFL, *at least in the short term*. Defendants are required to transmit their broadcast signals over-the-air through public frequencies and channels administered by the FCC. Historically, viewers within the reach of those broadcast signals could obtain and view those signals via the over-the-air transmission. Today, however, most cable subscribers do not maintain the equipment necessary to readily receive over-the-air broadcasts independent of their cable provider. The federal government mandated that broadcasters cease broadcasting their signals in analog format and begin broadcasting in digital format by June 2009. This analog to digital conversion meant that consumers with analog televisions could no longer receive a broadcaster's over-the-air transmissions. These consumers can receive digital

broadcast signals from BHN over analog television sets only because BHN provides the requisite digital to analog conversion. In fact, at the time of the broadcast industry's federally mandated analog to digital transition, the federal government encouraged consumers to rely on cable operators to receive broadcast signals as an efficient alternative to equipping themselves with digital equipment. As a result, Plaintiffs, and likely a great many other cable subscribers in Florida, depend entirely on their cable provider in order to receive what broadcasters deliver via over-the-air transmission for free. Without cable service, a consumer with an analog television would have to purchase either a new digital television, or a digital converter, and combine that equipment with a properly oriented rooftop antenna in order to receive Defendants' programming via over-the-air reception. In many instances, even a properly equipped consumer still would not be able to receive an over-the-air signal because of restraints of the signal and location of domicile.

The channels and/or frequencies over which broadcast signals are transmitted are an extremely valuable resource that are the property of all Americans, including Plaintiffs, and/or are held in trust for the public. Licenses to broadcast over this public asset are granted by the FCC only if the FCC finds that the public interest, convenience, and necessity would be served by the grant of the license. 47 U.S.C. § 307 (a) and (c)(1). Defendants have a corresponding duty to serve the public interest, convenience and necessity in operating a broadcast station. Defendants' have a duty to serve the public interest which includes the duty to make available to the public programming involving events of broad interest to the general viewing public. As a practical matter today, the vast majority of television viewers receive local broadcast signals not through over-the-air reception, but through reliance on their cable or satellite provider.

Defendants have the exclusive right to broadcast the Sugar Bowl on January 1, 2010. The Sugar Bowl is an event of tremendous public interest in the television markets that Defendants serve. Instead of taking steps to serve the public interest by making sure that Plaintiffs and other consumers in Florida will be able to watch the Sugar Bowl on television, Defendants are using their monopoly over the broadcast of the Sugar Bowl and the threat of Plaintiffs and other Florida residents missing the game as a pawn in negotiations for BHN's continued retransmission of Defendants' broadcast signals.

III. ARGUMENT

A. **Standard of Review**

A preliminary injunction is an appropriate remedy where the moving party establishes "(1) [t]he likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) considerations of the public interest." *Naegele Outdoor Advertising Co., Inc. v. City of Jacksonville*, 659 So.2d 1046, 1047 (Fla. 1995) (internal cites and quotes omitted). As a general rule, a trial court has sound discretion to grant injunctions. *Precision Tune Auto Care, Inc. v. Radcliff*, 731 So.2d 744, 745 (Fla. 4th DCA 1999). The facts demonstrate that the foregoing factors weigh heavily in favor of the issuance of a temporary injunction.

B. **Plaintiffs Will Suffer Irreparable Harm Unless The Injunction Issues**

Irreparable injury is an injury which is of a peculiar nature, so that compensation in money cannot atone for it. *Mullinix v. Mullinix*, 182 So. 2d 268 (Fla. Dist. Ct. App. 4th Dist. 1966); *First Nat. Bank in St. Petersburg v. Ferris*, 156 So. 2d 421 (Fla. Dist. Ct. App. 2d Dist. 1963). In other words, an injury is not irreparable when it can be adequately compensated by a monetary award or money damages. *B.G.H. Ins. Syndicate, Inc. v. Presidential Fire & Cas. Co.*,

549 So. 2d 197 (Fla. Dist. Ct. App. 3d Dist. 1989). As set forth below, Plaintiffs clearly will suffer irreparable harm if the injunction does not issue.

Plaintiffs will be irreparably harmed if Defendants are not enjoined from changing the present status quo and following through on their threat to terminate BHN's retransmission of Defendants' broadcast signals. Once the Sugar Bowl takes place, as well as other programming of public interest that FOX will broadcast in the near future, Plaintiffs can never be made whole. Broadcast programming is widely accepted to be unique and irreplaceable. Obviously, the opportunity to view live sporting events such as the Sugar Bowl, as well as local news broadcasts, are unique, and, once lost, cannot be duplicated or replaced.

Further, BHN subscribers lack the immediate ability to avoid the harm that Defendants have threatened to impose upon them. The federal government required broadcasters to transition from analog broadcasting to digital broadcasting in June 2009. Accordingly, consumers who have analog televisions cannot receive and view digital broadcast signals over-the-air – they instead rely on their cable operators to convert the signals into a form they can view. In fact, during the analog to digital conversion, the federal government responded to consumers' fears about the ability to receive digital television broadcasts by encouraging consumers with analog televisions to rely on their cable operators in exactly this manner. Even consumers with new digital televisions often lack the antenna and reception capabilities to view FOX programming over-the-air. In addition, while BHN subscribers theoretically could switch to a different cable operator or satellite provider that is able to deliver the FOX programming, doing so takes time. As a practical matter, if Defendants deny BHN any extension of the existing carriage agreement, more than one million BHN subscribers in Florida will be denied access to the January 1st telecast of the Sugar Bowl.

In contrast, Defendants will suffer no harm by continuing to allow BHN to retransmit its signals, at least for some brief period of time past the time of the Sugar Bowl, while the parties continue to negotiate. For instance, as FOX acknowledges that negotiations with BHN are ongoing, FOX could simply agree to extend the terms of its current agreement with BHN, at least for a brief period. Alternatively, FOX's interest could be protected by BHN placing in escrow an amount equal to FOX's last negotiating demand for carriage of its broadcast signals in Florida, while negotiations continue. In short, it is unfair and unconscionable to punish innocent consumers and deprive them of the ability to view programming that FOX broadcasts over-the-air for free simply because those consumers happen to be customers of BHN.

C. There Is No Adequate Remedy At Law To Protect Plaintiffs' Interests

As set forth above, Plaintiffs have no adequate remedy in law for the harm Plaintiffs will suffer by losing access to Defendants' programming. Once the Sugar Bowl is broadcast, Plaintiffs can never be made whole if they lose the opportunity through Defendants' actions to view the Sugar Bowl telecast. The same is true for other vital news and information of public interest offered by the FOX stations.

D. Plaintiffs Have A Substantial Likelihood of Succeeding On The Merits Of The Complaint

The courts have identified three elements that must be alleged and proven to prevail on a claim pursuant to the Florida Deceptive and Unfair Trade Practices Act (the "Act"): 1) a deceptive act or unfair practice; 2) causation; and 3) actual damages. *KC Leisure, Inc. v. Haber*, 972 So.2d 1069, 1073 (Fla.App. 5 Dist. 2008) (citing *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F.Supp.2d 1350 (M.D. Fla. 2007)). Based on the facts as they are alleged in the Complaint, Plaintiffs have a substantial likelihood of prevailing on the merits on their claim under the Act.

Plaintiffs have clearly established a likely of success on the first element of their claim. A practice is unfair when it "offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumer." See *Suris v. Gilmore Liquidating, Inc.*, 651 So.2d 1282, 1283, (Fla. 3rd DCA 1995) (citing *Spiegel, Inc. v. Federal Trade Comm'n*, 540 F.2d 287, 293 (7th Cir. 1976)). Florida courts interpreting the Act have found the concept of "unfair and deceptive" to be extremely broad. See, e.g., *Day v. Le-Jo Enterprises*, 521 So.2d 175, 178 (Fla. 3rd DCA. 1988) (citing *Urling v. Helms Exterminators, Inc.*, 468 So.2d 451 (Fla. 1st DCA 1985)). In *D.L.A. v. Father & Son Moving & Storage*, 643 So.2d 22, 24 (Fla. 4th DCA 1994), the court stated that "a specific rule or regulation is not necessary to the determination of what constitutes an unfair or deceptive practice under section 504.204(1). Rather, "the proscriptions against unfair and deceptive acts are flexible and are to be defined with flexibility by the myriad of cases from the field of business." *Id.* (citing *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 85 S.Ct. 1035 (1965)).

As set forth in the Complaint and as demonstrated above, as broadcasters operating broadcast stations over public radio frequencies and channels of communication under the auspices of FCC licenses, Defendants have a statutory duty to serve the public interest, convenience and necessity in operating a broadcast station. This duty to serve the public interest includes the duty to make available to the public programming involving events of broad interest to the general viewing public. Defendants' threats to unnecessarily terminate the ability of completely innocent consumers to obtain and view Defendants' broadcast signals are plainly contrary to Defendants' public interest duties.

Further, the facts and circumstances that Plaintiffs have alleged and will prove demonstrate that Defendants' actions are immoral, unethical, oppressive, and unscrupulous.

BHN is presently retransmitting Defendants' broadcast signals to Plaintiffs and other BHN subscribers pursuant to an agreement. According to news reports, BHN has expressed a desire to continue carrying Defendants' broadcast signal. Defendants could readily protect whatever economic interests they claim to have by agreeing to extend the terms of their existing agreement while the parties continue to negotiate. In fact, Defendants have claimed in the press that the parties are continuing to negotiate in good faith. Instead, Defendants are attempting to leverage their monopoly power over the broadcast of the Sugar Bowl, and the intense local and statewide interest in the game, as a pawn in their negotiations with the cable operator. Defendants' threats don't just violate the public trust – they define the terms “immoral, unethical, oppressive and unscrupulous.” Instead of *servicing* the public interest, Defendants are *abusing and perverting* the public interest by using it as a weapon of corporate warfare.

The unfairness and unconscionable nature of Defendants' conduct is further demonstrated by the disparate and arbitrary impacts it would yield. As discussed in Plaintiffs' filings, Defendants transmit their broadcast signals for free over-the-air using public radio frequencies. Further, since June 2009, all of Defendants' transmissions are in digital format. Some BHN subscribers may have equipment that would allow them to receive Defendants' digital broadcasts via free, over-the-air transmissions without relying on BHN's retransmission of those signals as part of its cable service. Any such individuals, with sufficient time and instructions, would still be able to modify their television reception equipment to view Defendants' broadcasts, including their broadcast of the Sugar Bowl. However, the great majority of the Gator Nation and BHN's subscribers, depend on BHN's retransmission of Defendants' signals to obtain and view Defendants signals. They do not have the equipment in place to receive Defendants' digital broadcasts via over-the-air transmission. It would be unfair and unconscionable to allow

Defendants' to exercise their power as a broadcaster in a manner that produced a result where some BHN subscribers might be able to view Defendants' programming for free via over-the-air transmission, but others would not have any access to the programming at all.

Plaintiffs have also demonstrated a likelihood of success on the second ("cause") and third ("actual damages") elements of their claim. Defendants have the exclusive rights to broadcast the Sugar Bowl, and it is Defendants who have threatened to terminate BHN's ability to retransmit Defendants' broadcast signals. Thus, it is Defendants' unfair and unconscionable acts that give rise to Plaintiffs' irreparable being deprived of the ability to view television programming of important current events of great public interest.

E. Issuance Of A Temporary Injunction Would Not Be Adverse To The Public Interest

As stated above, the temporary injunctive relief requested merely enforces Defendants' already-existing duty to serve the public interest by making available to the public programming involving events of broad interest to the general viewing public. The requested relief will serve the public interest by protecting completely innocent members of the public who have done nothing to justify being cutoff by Defendants. Fans of the Florida Gators will directly benefit by the requested relief, but no member of the public, including Defendants, will be adversely impacted by the requested relief. The creators of television programming content will be benefitted because their programming will continue to be disseminated to the public and the creators will be compensated through the statutory cable compulsory copyright license. Advertisers will benefit by having their advertisements seen by a larger number of viewers.

Finally, the court can use its equitable powers to fashion relief in a manner that will protect Defendants' economic interests. For instance, the terms of the existing agreement under which BHN retransmits Defendants' broadcast signals could be extended for the brief period of

preliminary relief. Alternatively, the Court could condition its relief on BHN paying into escrow (in the court registry perhaps) an amount equal to Defendants' last demand in negotiations in order to cover Defendants for the period of preliminary relief.

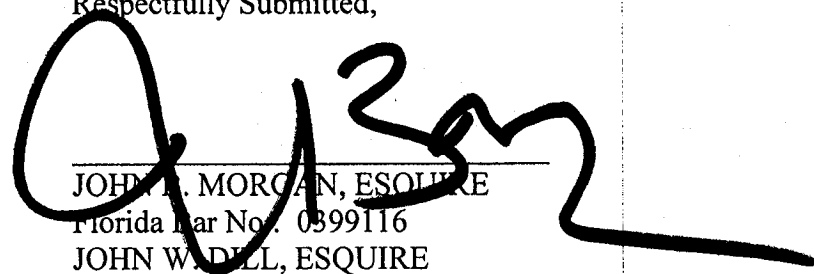
Thus, issuance of a temporary injunction would only further the public interest, whereas Plaintiffs and other innocent members of the public would be irreparably harmed by a lack thereof.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the attached proposed Order granting Plaintiffs temporary injunctive relief.

Dated: December 30, 2009

Respectfully Submitted,



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