UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, 325 7th Street, N.W. Suite 300 Washington, D.C. 20530, Plaintiff, v. **GEMSTAR-TV GUIDE INTERNATIONAL, INC.,** 135 North Los Robles Avenue, Suite 800 Pasadena, CA 91101, and **TV GUIDE, INC.,** 7140 South Lewis Avenue Tulsa, OK 74136, Defendants.	Civil Action No. 1:03CV00198 Judge: James Robinson Date: 02/06/2003

COMPLAINT FOR EQUITABLE RELIEF AND CIVIL PENALTIES

The United States of America, by attorneys acting under the direction of the Attorney General of the United States, brings this civil antitrust action to obtain equitable relief and civil penalties against Gemstar-TV Guide International, Inc. ("Gemstar-TV Guide") and its subsidiary TV Guide, Inc. ("TV Guide").

I. NATURE OF THE ACTION

1. The United States of America brings this action for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, which prohibits agreements in restraint of trade, and Section 7A of the Clayton Act, as amended, 15 U.S.C. § 18a, which prohibits, *inter alia*, the acquisition of

assets by would-be merging parties prior to the expiration of statutory waiting periods.

2. Until mid-1999, Gemstar International Group, Ltd. ("Gemstar") and TV Guide competed to provide interactive program guides, or "IPGs," to companies that provide packaged subscription television services to consumers ("service providers").

3. In mid-1999, Gemstar and TV Guide entered into negotiations to settle long-standing patent infringement litigation. These discussions eventually led to an agreement to merge in October 1999. This merger was subject to Section 7A of the Clayton Act, which prohibits certain acquisitions until a notification has been filed with the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") and a prescribed waiting period has expired. The DOJ conducted an investigation of the merger, after which it informed Gemstar and TV Guide that it would not seek a preliminary injunction. The merger was consummated on or about July 12, 2000.

4. Under both Section 7A of the Clayton Act and Section 1 of the Sherman Act, Gemstar and TV Guide were required to remain separate and independent economic actors prior to expiration of the Section 7A waiting period and prior to consummation of the merger, respectively. They failed to do so. Beginning in June 1999, when they first began negotiations that would lead to the merger agreement, and continuing throughout the waiting period, Gemstar and TV Guide entered into agreements eliminating or reducing competition between them. Among other things, they agreed to "slow roll" two large service providers; to allocate markets, customers and other responsibilities between the two firms; and to fix the prices and contract terms offered to customers. Further, they effectively merged most of their IPG operations prior to the expiration of the statutory waiting period.

5. Such conduct amounts to unlawful restraint of trade under Section 1 of the Sherman Act and unlawful pre-merger asset acquisition, sometimes referred to as "gun-jumping," under Section 7A of the Clayton Act.

II. JURISDICTION AND VENUE

6. This complaint is filed under Section 4 of the Sherman Act, as amended (15 U.S.C. § 4) and 28 U.S.C. § 2201(a) in order to declare, prevent and restrain violations, as hereinafter alleged, by the defendants of Section 1 of the Sherman Act (15 U.S.C. § 1), and under Section 7A(g)(1) of the Clayton Act (15 U.S.C. § 18a(g)(1)), as amended by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), to recover civil penalties for violations of Section 7A(a) thereof. This Court has jurisdiction over this action and the Defendants under Section 7A(g) of the Clayton Act, 15 U.S.C. § 18a(g), and 28 U.S.C. §§ 1331 and 1337(a), 1345, 1355 and 2201(a).

7. Defendants Gemstar-TV Guide and TV Guide are engaged in interstate commerce and in activity substantially affecting interstate commerce.

8. Defendant Gemstar-TV Guide is incorporated under the laws of Delaware, with a principal place of business in Pasadena, California. It conducts business, and is found, in the District of Columbia.

9. Defendant TV Guide is a wholly owned subsidiary of Gemstar-TV Guide, incorporated under the laws of Delaware, with a principal place of business in Tulsa, Oklahoma. It conducts business, and is found, in the District of Columbia.

10. Venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22 and 28 U.S.C. §§ 1391 (b), (c) and (d), 1395(a).

III. THE DEFENDANTS

11. Defendant Gemstar-TV Guide was formed when Gemstar and TV Guide merged on or about July 12, 2000. The merger involved a transfer of stock valued at over $7 billion at the time the merging parties notified the Department of Justice of their intention to merge in November 1999.

12. Until July 12, 2000, both Gemstar and TV Guide were separately engaged in commerce or activity affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 7A(a)(1) of the Clayton Act, 15 U.S.C. § 18a(a)(1).

IV. TRADE AND COMMERCE

13. Service providers assemble and offer to subscribers multi-channel packages of programming ranging from "basic" packages (*e.g.*, the major broadcast networks plus forty channels of non-broadcast networks such as CNN, ESPN, and MTV) to higher-priced packages with far more channels and other programming options (*e.g.*, pay-per-view movies, audio music channels, and various interactive applications). Depending on the sophistication of the service provider's systems, and on the subscriber's willingness to pay, the subscriber could have access to hundreds of entertainment and information options.

14. During 1999 and 2000, the relevant period of this complaint, approximately 80 million U.S. households subscribed to a television service offered by a service provider. Of these, 67 million households subscribed to a television service that delivered programming via cable lines running directly into the subscriber's home, and about ten million subscribed to a direct broadcast satellite ("DBS") service, which delivered programming by beaming a signal from a satellite directly to a small dish on the subscriber's premises.

15. During the relevant period, cable service providers were in the process of upgrading their networks to allow for the provision of enhanced television services, including the provision of digitally transmitted signals. The adoption of digital transmission allowed cable service providers the ability to provide more programming options than they had been able to provide by using analog technology and allowed them to better compete with DBS service providers (which were already using digital technology) as well as offer more attractive services that could generate higher revenue. Today, the vast majority of cable service provider systems offer digitally delivered programming along with more traditional analog programming.

16. In order to receive digital television services and other enhanced television services, the television viewer needs a digital set-top box installed in his home. Among other things, a digital set-top box converts digital signals into a format that analog television sets can receive and display.

17. While many service provider subscribers welcome the additional programming and information choices, they increasingly need a navigational tool to properly take advantage of the expanded range of options. An IPG serves this navigation function.

18. An IPG is a software application that works in conjunction with a set-top box. The IPG allows television viewers to display and sort program listings on the television screen. Depending on the IPG, the functionality incorporated into the set-top box, and the package of services a subscriber has paid for, the IPG may also be used to order pay-per-view movies, call up more information about specific television programs, set a "reminder" to notify the subscriber that a desired program is about to begin, set the VCR to record a program in the future, engage in "T-commerce" (*e.g.*, ordering a pizza with a remote control), or accessing the Internet.

19. Service providers regard IPGs as navigational tools that must be made available to their subscribers and for which there is no reasonable substitute.

V. THE RELEVANT MARKETS AND THEIR PARTICIPANTS

20. A relevant product market consists of the provision of IPG technology and services to service providers for use in digital cable and satellite television.

21. A separate and distinct relevant product market consists of providing IPG technology and services to cable television companies that had, during the relevant period, committed one or more of their systems to the GI/Motorola digital technology "platform." In this context, a "platform" consists of a particular category of digital set-top boxes along with the supporting hardware and software that needs to be installed at various points in the cable television system. A cable television company that has committed one or more of its systems to a particular platform does not regard an IPG that does not work with that platform to be a reasonably available substitute for such system(s) because it is too expensive to "switch out" the platform. During the relevant period, Gemstar and TV Guide were the only established providers of IPG technology and services that were compatible with the GI/Motorola digital platform.

22. The relevant geographic market is the United States. During the relevant period, service providers located in the United States generally did not regard foreign IPG providers as reasonable alternatives to U.S.-based IPG providers. Among other things, IPG providers would need an established reputation among U.S. service providers and would, in addition, need to work closely with U.S. technology platform providers and to provide close technical support to U.S. service providers' systems.

23. The relevant markets are characterized by numerous significant barriers to entry, including the difficulty and cost associated with inventing around existing intellectual property (and the consequent legal costs of researching and defending against patent infringement claims, as well as the legal costs of indemnifying service provider customers against such claims); the cost and delay associated with software development; and the need for technical cooperation from set-top box manufacturers and other providers of hardware or software with which an IPG must interact. The actual time needed to develop and bring to market an IPG (or to adapt an existing IPG to a new platform) has ranged between eighteen months and three years.

24. During the relevant period, demand for IPGs capable of operating on the GI/Motorola digital platform spiked among cable television services because of the commitment by many such firms to substantially complete the upgrade to digital transmission by the end of the Year 2000.

25. Prior to June 1999, Gemstar and TV Guide actively competed to provide IPG technology and services to service providers. Both sought to enter into long-term contracts with cable television service providers pursuant to which they would supply IPG technology and services to the service providers' digital cable systems.

26. TV Guide was actively engaged in negotiations for long-term IPG contracts with a number of large cable television service providers, including Charter, Time Warner, Cox, and Comcast. TV Guide also had a ten-year contract to provide IPGs for AT&T's cable television service, and had deployed IPGs to numerous service providers, including seven of the largest cable television service providers, on a non-contractual basis.

27. As of June 1999, Gemstar provided IPG technology and services to several service

providers, including Cox Communications, Inc. ("Cox"), one of the largest cable television systems, which had entered into a long-term IPG contract with Starsight Telecast, Inc., prior to Starsight's acquisition by Gemstar in May 1997. Gemstar was actively engaged in negotiating a superseding contract with Cox that would extend further into the future and incorporate Gemstar's intellectual property, and Gemstar was attempting to negotiate possible long-term IPG contracts with other large service providers. Gemstar had also recently unveiled its new and improved IPG, called "Nova," actively marketing the new guide to potential customers.

28. In addition to competing for the business of cable television companies, Gemstar and TV Guide -- prior to executing their merger agreement in October 1999 -- actively competed to become the provider of IPGs or IPG technology to DBS service providers Echostar and DirecTV.

VI. CONDUCT

A. BACKGROUND

29. As of late Spring 1999, Gemstar and TV Guide (or their predecessors in interest) had been in litigation since 1993 in federal district court. In two separate actions, one filed in 1993 and the other in 1998, Gemstar alleged that TV Guide's IPGs infringed Gemstar's patents. TV Guide denied any infringement and, further, alleged patent invalidity, patent misuse, inequitable conduct before the patent office, and antitrust violations. These actions were pending at the time of the merger agreement.

30. Gemstar and TV Guide periodically engaged in negotiations to resolve their pending litigation. In June 1999, they discussed the formation of a joint venture through which they would jointly market IPGs. As part of these negotiations, Gemstar and TV Guide reached a

comprehensive agreement as to the prices and material terms that the proposed joint venture would offer to its service provider customers. This agreement was reflected in a model "service provider" term sheet negotiated between the parties.

31. By early August, the parties found that they could not reach final agreement on the proposed joint venture, and they began discussing the possibility of merging and/or entering into a cross-license agreement.

32. On or about October 4, 1999, Gemstar and TV Guide entered into a written contract entitled "Agreement and Plan of Merger" ("merger agreement"). The merger agreement included various conduct-of-business restrictions that gave each merging firm some level of control of the other's assets during the period prior to consummation.

33. The merger agreement and related documents included a covenant that, after consummation of the merger, the merged firm would abide by a model "Standard Service Provider Agreement" in its offers of IPGs to service providers. The terms of the draft Standard Service Provider Agreement then being considered were substantially similar to those that Gemstar and TV Guide had negotiated in the context of their joint venture discussions three months earlier. Gemstar and TV Guide would continue to fine tune the details of the Standard Service Provider Agreement for the next four months.

34. Simultaneously with the execution of the merger agreement, Gemstar and TV Guide also entered into an agreement to cross-license their patents (the "Back-Up Cross License"). The Back-Up Cross License would become effective only if the merger failed to close by a certain date and if TV Guide, at its sole option, elected to trigger the agreement. Once triggered, the Back-Up Cross License would have, *inter alia*, granted to each company a non-

exclusive license of the other's intellectual property in return for royalty payments, and would have released TV Guide of liability for all claims of patent infringement arising prior to the date TV Guide elected to trigger the agreement.

35. The Back-Up Cross License did not contain any restriction on the price that either Gemstar or TV Guide could charge for its IPG, nor did it restrict the non-price terms that Gemstar could offer to service providers. It contained only one restriction on the terms that TV Guide could offer to service providers, requiring, as a condition of the license flowing from Gemstar to TV Guide, that the TV Guide customer agree to allow unimpeded passage of certain data transmitted in the vertical blanking interval ("VBI") by television networks under agreement with Gemstar. (Gemstar used this data passage to electronically update Gemstar IPGs that resided in consumer electronics ("CE") devices such as high-end television sets and video cassette recorders.)

B. TRADE RESTRAINING AGREEMENTS

36. Beginning on or about June 10, 1999, and continuing through the consummation of the merger agreement, Gemstar and TV Guide entered into a number of agreements that unreasonably restrained trade in the relevant markets.

1. THE "SLOW ROLL" AGREEMENT

37. In the Spring of 1999, Gemstar was in the final phases of negotiating a long-term IPG agreement with Cox that would have superseded an existing IPG agreement between Cox and Starsight, Gemstar's subsidiary. TV Guide was also vying for Cox's business, and it sent a draft long-term IPG contract proposal to Cox in April. On June 10, 1999, the Cox negotiating team recommended to senior management that Cox enter into a long-term IPG agreement with

Gemstar based on the most recently negotiated prices and terms.

38. Similarly, in Spring 1999, both Gemstar and TV Guide were competing to sign Charter Communications, Inc. ("Charter") to a long-term IPG deal. Charter had initially chosen to deploy TV Guide's IPG without a long-term contract. However, when TV Guide's long-term contract offer included an increase in price relative to the previous verbal quotes, Charter began actively considering Gemstar as an alternative IPG provider. Gemstar quoted a contract price that was lower than TV Guide's latest offer.

39. On June 10, 1999, Peter C. Boylan III, then President and Chief Operating Officer of TV Guide, met with Dr. Henry Yuen, then Chief Executive Officer of Gemstar, to discuss the possibility that the two firms form a joint venture that would jointly sell their IPG services.

40. In a contemporaneous memorandum summarizing the June 10 meeting, Mr. Boylan stated that he and Dr. Yuen had "both acknowledged the need to slow roll Charter and Cox," to exchange term sheets by no later than Sunday, June 13, and to then meet again on June 16.

41. Acting on that agreement, by e-mailed letter dated Sunday, June 13, 1999, Dr. Yuen informed Cox that "we will not be able to guarantee that the terms presently being negotiated can continue to be kept open beyond June 15." The letter specifically linked this turn of events to Gemstar's settlement discussions with TV Guide and explained that Gemstar was approaching a "decision point" on June 16.

42. On June 24, 1999, Dr. Yuen informed Cox that the negotiated draft contract could no longer be the basis for an agreement between Gemstar and Cox. Thereafter, Gemstar did not attempt to continue negotiations with Cox, except for a brief period following the merger agreement. Similarly, after the "slow roll" agreement, Gemstar did not engage in any further

substantive discussions with Charter.

43. After the slow roll agreement, TV Guide ceased negotiations with Cox until after the merger agreement. TV Guide did not send any new contract proposals to Charter, nor engage in any significant substantive negotiations with Charter, until late August 1999, when it sent draft contracts that included some prices and terms that had been agreed to with Gemstar during joint venture discussions.

2. <u>THE MARKET AND CUSTOMER ALLOCATION AGREEMENTS</u>

a. The General Agreement Not to Compete

44. At least as early as the execution of the merger agreement, most competition between Gemstar and TV Guide in the relevant markets ceased pursuant to a general agreement that Gemstar would phase out its marketing operations in the relevant markets in order to focus on sales and licensing of IPGs to consumer electronics ("CE") firms while TV Guide negotiated IPG agreements with most service providers.

b. Allocations of Specific Customers

45. Within days after agreeing to merge, Gemstar and TV Guide agreed to allocate specific service provider customers between them, reaching specific understandings as to whether TV Guide or Gemstar would approach and negotiate with particular customers during the period between the merger agreement and the consummation of the merger (the "interim period"). Dr. Yuen prepared a table detailing this division of responsibilities.

46. Specifically, Gemstar and TV Guide agreed that TV Guide would negotiate with most service providers during the interim period, adhering to prices and terms developed in coordination with Gemstar.

47. In furtherance of the agreements set forth above, Gemstar phased out (with minor exceptions) its attempts to market IPGs to service providers. The exceptions were small service providers that used technology platforms that were different from those used by traditional cable and satellite television service providers. TV Guide had not previously marketed IPGs to this segment and had not adapted its IPG to these platforms.

3. <u>AGREEMENTS TO FIX PRICES AND MATERIAL TERMS</u>

48. Prior to the consummation of the merger agreement, Gemstar and TV Guide entered into agreements fixing or substantially affecting the prices and material terms of IPG agreements offered during the interim period.

49. Soon after entering into the merger agreement, TV Guide and Gemstar agreed that TV Guide's offers to service providers would generally adhere to the "standard terms" that they had previously agreed upon, with details and responses to counter-offers to be worked out through further discussion between the merging parties. For example, as detailed in the table prepared by Dr. Yuen, TV Guide was to approach several major cable television or satellite television companies with offers based on "standard terms" while Dr. Yuen planned to "re-confirm new terms" with TV Guide before re-opening discussions with Cox.

50. To effectuate this agreement, TV Guide and Gemstar shared detailed and specific information about many offers and counter-offers to large service providers and kept each other apprised of various individual contacts with customers. Mr. Boylan of TV Guide forwarded to Dr. Yuen electronic correspondence relating to IPG contract negotiations between Mr. Boylan and prospective service provider customers. TV Guide also provided Gemstar with its "rate card," which included both rates and terms, and, on at least two occasions, provided Gemstar

with full drafts of proposed IPG contracts before they were sent to service providers. Dr. Yuen and Jon Orlick of Gemstar separately sent to TV Guide red-line comments on TV Guide's draft IPG contracts, and TV Guide incorporated some of these comments. These red-line comments were detailed enough to include substituting Gemstar's late payment penalty provision for TV Guide's. TV Guide subsequently offered IPG agreements that included, word for word, Gemstar's late payment provision.

51. The extensive coordination on prices and terms set forth above was not necessary to protect any legitimate interests that Gemstar may have had in preserving the TV Guide assets to be acquired, or in preventing any material adverse change in TV Guide's conduct that might affect the value of the to-be-acquired business. Nor was the coordination required by the Standard Service Provider Agreement or the Back-Up Cross License. By its terms, the Standard Service Provider Agreement would have set a maximum price that the merged entity would charge, not prices to be offered during the interim period. Further, the Back-Up Cross License, which also was not in effect, would not have set price at all, nor would it have established non-price terms for customers (other than the VBI pass-through obligation described above).

52. In December 1999, and at other times during the interim period, TV Guide sent out new draft contract proposals to many service providers. These proposals contained the prices and terms upon which Gemstar and TV Guide had agreed. The offered prices and terms differed from the offers that TV Guide had made prior to coordinating with Gemstar.

53. Some of the new terms in TV Guide's draft contracts were primarily for Gemstar's benefit or were included at the direction or insistence of Gemstar. For example, the new contract proposals contained a "covenant not to sue" that would have required the service provider to

agree not to sue TV Guide, any of TV Guide's parents, or any other person that had agreed to a similar provision with TV Guide or its parents. Gemstar, which was to become the parent of TV Guide under the merger agreement, had always insisted that its licensees sign such a provision.

54. During the interim period, TV Guide discussed entering into short-term (*e.g.*, six-month) IPG agreements with some service providers. However, even with respect to these interim agreements, TV Guide's offers conformed to many of the "standard terms," including the agreed-upon rate structure, the covenant not to sue, and the VBI data passage obligation. The data passage obligation in these short-term offers would have benefitted only Gemstar and would have survived the expiration of the short-term IPG agreements being contemplated.

55. During the interim period, TV Guide entered into IPG agreements with eight cable television service providers. These agreements conformed to Gemstar and TV Guide's agreements on prices and terms set forth above.

C. GEMSTAR'S PRE-MERGER ASSUMPTION OF CONTROL OVER TV GUIDE

56. Pursuant to the agreements and conduct set forth above and pursuant to other actions taken by the parties, Gemstar and TV Guide effectively merged most of their IPG decision-making processes, and each acquired substantial operational control over important assets of the other before July 12, 2000.

57. TV Guide submitted for Gemstar's review and approval numerous decisions relating to TV Guide's marketing of IPGs to service providers. These included the submission of entire drafts of IPG contracts to be sent to service providers, a request to extend a deadline for a price discount, and requests for guidance in how to respond to service provider counter-proposals.

58. TV Guide acted as Gemstar's agent in negotiations with service provider customers

and at least one set-top box manufacturer. Thus, TV Guide informed service providers that it was acting on Gemstar's behalf and that the two companies had agreed on the prices and terms that TV Guide was offering. Some of the terms TV Guide included in its contract offers (such as the covenant not to sue and the requirement of data passage even in negotiations for short-term agreements) primarily would have benefitted Gemstar. TV Guide also from time to time offered incentives to customers (such as forgiveness from liability for past infringement of Gemstar patents) that only Gemstar could offer.

59. TV Guide's Pete Boylan also undertook to negotiate a settlement of litigation between Gemstar and GI/Motorola during the interim period. TV Guide used its goodwill with GI/Motorola to try to persuade that firm to enter into a settlement agreement, even though some of the terms of that settlement (such as restrictions on using a non-Gemstar IPG) would have made it more difficult for TV Guide to deploy IPGs on the GI/Motorola platform in the event that neither the merger nor the Back-Up Cross License came into effect.

60. A nascent, but potentially large, revenue stream for both Gemstar and TV Guide was the sale of space on the IPG screen to advertisers. During the interim period, Gemstar and TV Guide shared confidential information on prices and IPG advertising capabilities, met jointly with consultants retained by TV Guide to develop pricing and marketing strategies, and discussed the optimum prices and capacity for their IPG advertising business.

61. During the interim period, Gemstar and TV Guide shared information and acted jointly with respect to numerous business opportunities.

62. By, *inter alia*, disclosing substantial amounts of confidential information, shutting down much of Gemstar's competitive marketing operations, and sharing business opportunities,

the defendants merged their operations and substantially scrambled their assets at a time when they were required by law to remain independent economic actors.

63. Gemstar and TV Guide executives continued to engage in the conduct described herein after having been advised by counsel that "gun-jumping" during the merger review process was illegal.

VI. FIRST OFFENSE:

(VIOLATION OF SECTION ONE OF THE SHERMAN ACT: "SLOW ROLL")

64. The allegations of Paragraphs 1 through 63 of this Complaint are re-alleged and incorporated by reference here with the same force and effects as though set forth here in full.

65. On or about June 10, 1999, Gemstar and TV Guide were direct competitors in the relevant markets.

66. On or about June 10, 1999, Gemstar and TV Guide engaged in a contract, combination or conspiracy in restraint of trade that was unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1), by agreeing that, if they proceeded with negotiations to combine their IPG businesses in a joint venture, they would "slow roll" one or more service providers, *i.e.*, to cease or suspend competition for that business.

67. This agreement harmed competition in the relevant markets by foreclosing the possibility that these customers would have obtained lower prices and secured better contract terms but for the collusion; and this agreement was not related to any legitimate business purpose.

VIII. <u>SECOND OFFENSE</u>:

(VIOLATION OF SECTION ONE OF THE SHERMAN ACT: MARKET AND CUSTOMER ALLOCATION)

68. The allegations of Paragraphs 1 through 63 of this Complaint are re-alleged and incorporated by reference here with the same force and effects as though set forth here in full.

69. During the interim period, Gemstar and TV Guide were direct competitors in the relevant markets.

70. During the interim period, Gemstar and TV Guide engaged in a contract, combination, or conspiracy in restraint of trade that was unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1) by agreeing, with minor exceptions, to allocate the relevant market(s) to TV Guide and, more specifically, not to compete for particular service provider customers.

71. These agreements harmed competition in the relevant markets by foreclosing the possibility that these customers would have obtained lower prices and secured better contract terms but for the collusion; and these agreements were unrelated to any legitimate business purpose.

IX. <u>THIRD OFFENSE</u>:

(VIOLATION OF SECTION ONE OF THE SHERMAN ACT: AGREEMENTS ON PRICE AND TERMS)

72. The allegations of Paragraphs 1 through 63 of this Complaint are re-alleged and incorporated by reference here with the same force and effects as though set forth here in full.

73. Beginning at least as early as June 1999 and continuing through July 12, 2000, direct competitors Gemstar and TV Guide engaged in a contract, combination, or conspiracy in restraint of trade that was unlawful under Section 1 of the Sherman Act (15 U.S.C. § 1).

74. Specifically, Gemstar and TV Guide agreed on the prices and terms to be offered and charged to service providers in contracts offered and executed prior to the consummation of the merger agreement.

75. This agreement harmed competition in the relevant markets by foreclosing the possibility that customers would have obtained lower prices and secured better contract terms but for the collusion; and this agreement was unrelated to any legitimate business purpose.

X. FOURTH OFFENSE:

(VIOLATION OF SECTION 7A OF THE CLAYTON ACT)

76. The allegations of Paragraphs 1 through 63 of this Complaint are re-alleged and incorporated by reference here with the same force and effects as though set forth here in full.

77. Section 7 of the Clayton Act prohibits stock or asset acquisitions affecting commerce where "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18.

78. To reduce problems associated with undoing anticompetitive acquisitions after-the-fact, Congress enacted the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"), which amended the Clayton Act to compel would-be acquiring and acquired persons meeting certain criteria to notify the regulatory authorities of a contemplated acquisition and to observe a waiting period.

79. Section 7A provides that if, as a result of an acquisition an acquiring person would hold voting securities or assets beyond certain thresholds, the acquiring person, and in most circumstances the acquired person, must file pre-acquisition Notification and Report Forms with the DOJ and FTC. In addition, Section 7A requires that the merging parties observe a designated

waiting period before the acquiring person can acquire, directly or indirectly, the voting securities or assets. Section 7A thus prohibits such acquisitions prior to the expiration of the waiting period. The purpose of the waiting period is to give the antitrust agencies an opportunity to investigate proposed transactions before they are consummated and to determine whether to seek an injunction to prevent acquisitions that violate the antitrust laws.

80. The merger between Gemstar and TV Guide was subject to Section 7A's notification and waiting requirements.

81. Gemstar and TV Guide entered into and implemented an agreement to eliminate competition between their two firms, to act jointly for their common benefit prior to the expiration of the statutory waiting period, and to effectively combine their IPG businesses. This amounted to a *de facto* acquisition by each firm of assets exceeding the statutory thresholds, thereby violating Section 7A of the Clayton Act.

82. Gemstar assumed unlawful control over TV Guide's IPG business, thereby acquiring that business, which exceeded in value the dollar thresholds set forth in Section 7A. The TV Guide assets acquired included TV Guide's IPG marketing operations, its IPG advertising operations, its ability to set prices and terms, its customer goodwill, and its customer relationships.

83. Through the effective combination of their IPG businesses, TV Guide also assumed unlawful control over various Gemstar assets, as set forth herein, including Gemstar's business opportunities and customer relationships. Upon information and belief, these assets, taken individually or in the aggregate, exceeded in value the dollar thresholds set forth in Section 7A.

84. Gemstar and TV Guide were continuously in violation of Section 7A from the date of the merger agreement until the expiration of the statutory waiting period. Each defendant is liable

to the United States for a maximum civil penalty of $11,000 per day.

XI. REQUEST FOR RELIEF

WHEREFORE, the United States prays that final judgment be entered against each Defendant declaring, ordering and adjudging:

a. that the Defendants' agreements in restraint of trade are illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1;

b. that each Defendant pay civil penalties as appropriate under Section 7A of the Clayton Act, 15 U.S.C. § 18a;

c. that the Court grant such other relief as the United States may request that the Court deems just and proper; and

d. that the United States recover its costs in this action.

Respectfully submitted,

FOR PLAINTIFF UNITED STATES OF AMERICA:

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