

ORIGINAL

No. 2009-0627

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## In the Supreme Court of Ohio

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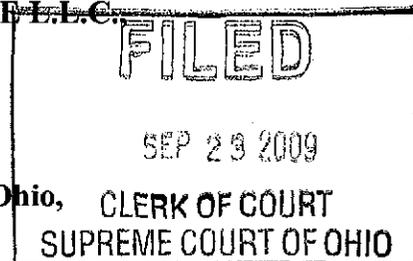
ON APPEAL FROM THE COURT OF APPEALS,  
TENTH APPELLATE DISTRICT  
CASE No. 08AP-32

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DIRECTV, INC., and ECHOSTAR SATELLITE L.L.C.  
*Plaintiffs-Appellants,*

v.

RICHARD LEVIN, Tax Commissioner of Ohio,  
*Defendant-Appellee.*



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### JOINT MOTION TO STAY BRIEFING [EXPEDITED DISPOSITION REQUESTED]

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Plaintiffs-Appellants, DIRECTV, Inc. and EchoStar Satellite L.L.C (“Appellants”) and Defendant-Appellee, Richard Levin, Tax Commissioner of Ohio (“Appellee”), hereby jointly move this Court to stay the current merit briefing schedule in this matter to permit the certified record in this matter to be supplemented and corrected by the 10th District Court of Appeals (the “10th District”). A stay is warranted because the parties have discovered that a substantial number of pleadings, other papers, exhibits, affidavits, deposition and hearing transcripts are missing from the record that was generated during the proceedings below. The parties have identified the missing records and are working jointly with the 10th District to supplement the record with the missing documents. This process should be completed within a few weeks. A stay of the briefing schedule will allow the parties to complete this process, ensuring that the

Court will have a full and completed record for its adjudication of this important constitutional matter.

By way of brief background, on April 6, 2009, Appellants filed a Notice of Appeal and Memorandum of Jurisdiction in this Court from the Judgment Entry issued on February 19, 2009 by the 10th District in Case No. 08AP-32. On July 1, 2009, the Court accepted Appellants' appeal and concurrently ordered the Clerk of the 10th District to prepare and transmit the record to the Clerk of the Ohio Supreme Court.

On August 12, 2009, the Clerk of the 10th District filed a Certificate with the Ohio Supreme Court certifying the submission of the record, but noting that two transcripts and nine depositions were missing from the record. A copy of the Certificate is attached hereto as Exhibit A. Given this certification by the 10th District, on August 18, 2009, the Clerk of the Ohio Supreme Court issued a Notice that the record had been received from the 10<sup>th</sup> District (the "Notice"). A copy of the Notice is attached hereto as Exhibit B. Based upon the date of the Notice issued by this Court, the deadline for Appellants' Merit Brief is Monday, September 28, 2009.

After this Court issued the Notice, counsel for both Appellants and Appellee engaged in an investigation and communications with the Clerk of the Ohio Supreme Court and the Clerk and Court Administration offices of the 10th District to determine what items were missing from the record transmitted and certified by the 10th District. Upon a physical and detailed review of the record submitted by the 10th District to this Court, the undersigned counsel for the parties discovered that the record is in fact missing a substantial number of pleadings, other papers, exhibits, affidavits, deposition and hearing transcripts, and entries (the "Missing Documents"). The Missing Documents include all or part of a couple dozen pleadings (including summary

judgment pleadings), more than ten affidavits, and most of the depositions transcripts from the case were missing from the certified record. A list of the Missing Documents is attached hereto as Exhibit C.

Furthermore, it was recently determined through communications with the 10th District that the Missing Documents were inadvertently recycled and therefore, destroyed. In order for the record filed with the Ohio Supreme Court to contain all of the pleadings, other papers, exhibits, affidavits, transcripts and entries that were originally filed with and considered by the trial court and 10th District on appeal, the parties have prepared a supplement containing the Missing Documents. Pursuant to the Rules of Practice before this Court, the parties are concurrently filing in the 10th District a "Joint Motion to Supplement the Record" and are submitting a supplement attaching a complete copy of all the Missing Documents.

Given the need for the parties to submit the Joint Motion to Supplement, the need for the 10th District to certify the supplement to the record to this Court, and the need for the parties to have the full and complete certified record for citation in their briefs, additional time is necessary to supplement the record prior to Appellants' merit brief deadline of Monday, September 28, 2009.

Therefore, the parties hereby jointly move this Court to issue an Order staying the deadline for the merit briefs in this matter until the certified record is completed and corrected by the 10th District. Given the timing of these issues, the parties respectfully request an expedited disposition of this joint request.

Jointly and respectfully submitted,

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*Attorneys for Appellee Tax Commissioner*

THE SUPREME COURT OF OHIO

Court of Appeals for

Franklin County,

CERTIFICATE

Columbus, Ohio

S.C. Case No. 09-0627

Direct Tv

C.A. Case No. 08AP-32

v.

Richard Levin

In accordance with the order in the above Supreme Court case to transmit the record in the case, I hereby certify that the attached is the record in this case, consisting of the original papers and exhibits to those papers; the transcript of proceedings and exhibits, along with a computer diskette of the transcript, if available; and certified copies of the journal entries and the docket of the case.

I further certify that an index is also attached which lists all items included in the record, and briefly describes all exhibits in the record. Any items that are not being transmitted pursuant to the order of the Supreme Court are identified in the index.

I further certify that I have sent a copy of the index to all counsel of record in this case.

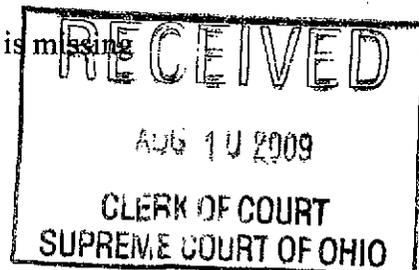
IN TESTIMONY WHEREOF, I have hereunto subscribed my name as Clerk of the Court of Appeals for Franklin County, Ohio, and affixed the seal of the Court, on This 10<sup>th</sup> of Aug, 2009

FILED  
CLERK OF APPEALS  
FRANKLIN CO OHIO  
AUG 12 PM 12:58  
CLERK OF COURTS

CLERK OF THE APPEALS COURT OF THE TENTH DISTRICT COURT OF APPEALS for Franklin County, Ohio

By [Signature], Deputy Clerk

\* Supplementing the record with 9 vols of the Common Pleas record. The record is missing 2 transcripts, 9 depositions\*



# The Supreme Court of Ohio

OFFICE OF THE CLERK

65 SOUTH FRONT STREET, COLUMBUS, OH 43215-3431

CHIEF JUSTICE  
THOMAS J. MOYER

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August 18, 2009

Peter Anthony Rosato  
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1100 Fifth Third Center  
21 East State Street  
Columbus, OH 43215

Re: 2009-0627

DIRECTV, Inc. et al.

v.

(Richard A. Levin), Tax Commissioner of Ohio

Dear Peter Anthony Rosato:

This is to notify you that the record in the above-styled case was filed with the Clerk's Office on August 18, 2009.

If, after reviewing the Supreme Court Rules of Practice, you have any questions about filing deadlines in the case, please feel free to call a deputy clerk at (614) 387-9530.

Sincerely,



Amie Vetter

Records Specialist



**INDEX TO DOCUMENTS SUPPLEMENTING COURT OF APPEALS RECORD**  
**TRANSFERRED TO OHIO SUPREME COURT ON AUGUST 18, 2009**

The following three (3) deposition transcripts were originally filed with the Franklin County Clerk of Courts under seal pursuant to the Amended Stipulated Protective Order dated November 1, 2006:

Michael W. Palkovic Deposition Transcript and Exhibits  
Eric Sahl Deposition Transcript and Exhibits  
Kathleen Wallman Deposition Transcript (Volumes 1 and 2) and Exhibit

The following documents were originally filed with the Franklin County Clerk of Courts and are part of public record:

<b>Tab No.</b>	<b>Description</b>	<b>Date Filed</b>
1.	Instructions for Service	06/26/03
2.	Complaint	06/26/03
3.	Civil Case Information and Clerk's Original Case Schedule	06/26/03
4.	Plaintiffs' Motion for Admission Pro Hac Vice	06/30/03
5.	Order granting Plaintiffs' Motion for Pro Hac Vice	07/01/03
6.	Certified mail information	
7.	Answer of Defendant Thomas M. Zaino	08/12/03
8.	Plaintiff's Initial Disclosure of Witnesses	11/13/03
9.	Defendant's Initial Disclosure of Witnesses	11/13/03
10.	Notice of Substitution of Defendant Tax Commissioner as a Result of Thomas M. Zaino's Resignation	11/13/03
11.	Stipulated Order of Extension of Deadline to File Supplemental Witness Disclosures	01/09/04
12.	Stipulated Scheduling Order Extending Supplemental Witness Disclosure Deadline, Discovery Cut Off, Deadline for Dispositive Motions and Decisions on Motions	02/24/04



<b>Tab No.</b>	<b>Description</b>	<b>Date Filed</b>
13.	Plaintiffs' Joint Motion for Protective Order	02/27/04
14.	Memorandum Contra of Defendant Tax Commissioner to Plaintiffs' Joint Motion for Protective Order filed February 27, 2004	03/12/04
15.	Plaintiffs' Reply Brief in Support of Joint Motion for Protective Order	03/19/04
16.	Defendant's Supplemental Disclosure of Witnesses	03/23/04
17.	Notice of Substitution of Defendant Tax Commissioner	03/23/04
18.	Joint Supplemental Witness Disclosure of Plaintiffs	03/24/04
19.	Stipulated Order (extending page limitations)	04/27/04
20.	Entry re: Plaintiffs' Motion for Protective Order filed 02/27/04	04/27/04
21.	Affidavit of Eric Sahl	05/03/04
22.	Affidavit of Walter S. Ciciora	05/03/04
23.	Affidavit of Michael McDonnell	05/03/04
24.	Affidavit of Teresa Ferguson	05/03/04
25.	Affidavit of Jim Butterworth	05/03/04
26.	Affidavit of Michael Dugan	05/03/04
27.	Affidavit of Michael Palkovic	05/03/04
28.	Affidavit of Mark F. Horning	05/03/04
29.	Affidavit of Thomas C. Green	05/03/04
30.	Plaintiffs' (First) Motion for Summary Judgment	05/03/04
31.	Stipulated Scheduling Order Amending Case Management Schedule	05/13/04
32.	Stipulated Protective Order	05/13/04
33.	Defendant's (First) Motion for Summary Judgment	06/16/04
34.	Defendant Tax Commissioner's Evidentiary Supplement in Support of His (First) Motion for Summary Judgment	06/16/04

<b>Tab No.</b>	<b>Description</b>	<b>Date Filed</b>
35.	Defendant's Memorandum Opposing Plaintiffs' (First) Motion for Summary Judgment	07/09/04
36.	Plaintiffs' Motion to Compel Production of Documents	08/16/04
37.	Defendant Tax Commissioner's Memorandum Opposing Plaintiffs' Motion to Compel (Appendix Attached)	08/25/04
38.	Plaintiffs' Memorandum of Law in Opposition to Defendant's (First) Motion for Summary Judgment	01/05/05
39.	Plaintiffs' Reply Brief in Support of (First) Motion for Summary Judgment	02/04/05
40.	Kathleen MH Wallman Affidavit	12/22/06
41.	Chris Vaughan Deposition Transcript- Volume 1, Exhibits 1-5 and Errata Sheet	12/22/06
42.	Chris Vaughan Deposition Transcript - Volume 2 and Exhibits 6-12	12/22/06
43.	Errata Sheet for Dr. Jeffrey A. Krauss Deposition	12/22/06
44.	Edward F. Kozelek Deposition Transcript	12/22/06
45.	Michael W. Palkovic (Redacted) Deposition Transcript	02/01/07
46.	Eric Sahl (Redacted) Deposition Transcript	02/01/07
47.	Yoram Jerry Wind Deposition Transcript	02/01/07
48.	Kathleen M. H. Wallman Affidavit	02/02/07
49.	Kathleen Wallman (Redacted) Deposition Transcript (Volumes 1 and 2)	02/23/07
50.	Transcript of Proceedings for June 22, 2005	06/22/05
51.	Transcript of Proceedings for March 15, 2007	03/15/07