

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:19-cv-03253-WJM-MEH

ALTITUDE SPORTS & ENTERTAINMENT, LLC,

Plaintiff,

v.

COMCAST CORPORATION and
COMCAST CABLE COMMUNICATIONS, LLC,

Defendants.

JOINT STATUS REPORT

On March 16, 2020, the Court granted in part Comcast’s Motion to Stay Discovery and temporarily stayed discovery until April 30, 2020. ECF 50. Pursuant to that order, Plaintiff Altitude Sports & Entertainment, LLC (“Altitude”) together with Defendants Comcast Corporation and Comcast Cable Communications, LLC (“Comcast”) (all together, “the Parties”) file this joint status report stating their positions on how this case should proceed.

ALTITUDE’S POSITION

Altitude contends that the Court should order limited, initial discovery to proceed in light of the COVID-19 virus and while the parties await a decision on Comcast’s motion to dismiss. Altitude’s specific proposal on what discovery should proceed is set forth below. Altitude offers the following argument in support of its position.

In temporarily staying this case, the Court indicated that the COVID-19 virus was its “overriding concern.” ECF 50 at 3. Although the COVID-19 health crisis is ongoing, it does not

prevent the Parties from engaging in limited and reasonable discovery typically undertaken at the beginning phases of a case. In line with the District Court’s aim to “assist in the preservation of public safety and health while effectively administering justice during this period,” District of Colorado General Order 2020-3, and consistent with other federal court cases, it is possible to move forward with limited discovery that does not require travel or in-person contact, including document production and interrogatories.

Nothing in this District’s orders or the social distancing orders in place where the Parties and their counsel are located prevent the Parties from engaging in discovery that can be conducted entirely from home. Counsel for Altitude is working at home and has been preparing for document discovery. Altitude counsel has conducted document custodian interviews and identified locations of relevant documents. Altitude counsel has also conferred with e-discovery vendors to confirm that document discovery work, including document collections, can be done while maintaining stay-at-home status. Further, Altitude counsel has confirmed that document review can be conducted electronically at home.

Nor does the temporary suspension of professional sports leagues’ games lessen Altitude’s interest in proceeding expeditiously in this case. Altitude continues to produce content during this time to serve its customers¹—content that Denver-area Comcast customers cannot view because Comcast continues to foreclose Altitude’s access to these customers. Further, the league suspensions are temporary; games will resume, and when those games

¹ Ryan S. Clark, “Even with everything going on, Altitude TV is staying busy in the new normal,” The Athletic (Apr. 6, 2020), <https://theathletic.com/1722474/2020/04/06/even-with-everything-going-on-altitude-tv-is-staying-busy-in-the-new-normal/>.

resume, Altitude will still be suffering the full effects of Comcast's anticompetitive conduct. If discovery is completely stalled during the COVID-19 crisis, it will exacerbate those effects. Altitude's interests remain focused on resolving this dispute as soon as possible so Denver-area consumers can once again view its content, interests which can only be served by moving discovery in this case forward.

Comcast's arguments that a full stay of discovery is favored by the convenience of the Court and third Parties and Comcast's pending motion to dismiss are unavailing in light of the fact that Altitude is requesting only limited discovery. Altitude's request will not require engaging in any discovery with third parties. Moreover the cost and burden associated with Altitude's proposal is not significant.² As Altitude stated in its opposition to Comcast's stay motion, the mere fact that Comcast has filed a pending motion to dismiss is not sufficient reason to stay discovery. ECF 47 at 4. It is reasonable to move forward with the limited discovery Altitude proposes even while Comcast's motion to dismiss is pending.

For these reasons, Altitude proposes the following limited discovery proceed effective **April 30, 2020** when the Court's temporary stay ends:

1. Comcast will serve its written responses and objections to Altitude's First Set of Requests for Production and First Set of Interrogatories, served on Comcast on February 14, 2020,

² To the extent Comcast is concerned with burdens unique to working remotely, Altitude affirms that it will be reasonable and accommodate needs in light of the current situation. Altitude recognizes that both Parties may be unable to access certain files while working remotely but proposes to proceed with discovery of what is available remotely so as to still make progress during this time.

on or before **May 21, 2020**,³ 21 days after the temporary stay ends. The Parties will meet and confer regarding any disputes as to the scope of Comcast's production and its interrogatory responses and present any disputes that cannot be resolved to the Court.

2. Comcast will begin producing documents not covered by its objections.
3. Comcast will serve its own requests for production and interrogatories on Altitude, and Altitude will respond in accordance with the deadlines set forth in the Federal Rules. Fed. R. Civ. P. 33, 34. The Parties will meet and confer regarding any disputes as to the scope of Altitude's production and its interrogatory responses and present any disputes that cannot be resolved to the Court.
4. Altitude will begin producing documents not covered by its objections.
5. The Parties will meet and confer regarding the Protective Order and the Stipulation regarding discovery of electronically-stored information ("ESI") and present any disputes that cannot be resolved to the Court.

Altitude believes it will be necessary to make further adjustments to the deadlines in the Scheduling Order, ECF 35, but is unable to propose deadlines at this time as the situation surrounding the COVID-19 health crisis is still developing. The Court and the Parties may have a better understanding of the duration of the "enforced work slowdown," ECF 50 at 3, in the coming months and therefore Altitude proposes that the Parties file a further status report in two

³ Comcast's request for a full month to respond to Altitude's requests following the end of the stay is unreasonable in light of the fact that Altitude served its requests on Comcast *two months ago*. That Comcast has not yet served requests on Altitude was Comcast's choice, and requiring Comcast to respond to Altitude's requests on the timeline proposed by Altitude poses no unfairness to Comcast.

months, on **June 30, 2020**, providing an update to the Court on the status of discovery and to propose further modifications to the deadlines set forth in the Scheduling Order as needed. In the meantime, the above tasks can and should proceed as counsel and their respective clients can complete these tasks while working from home. There is no reason to stay this case entirely when there are tasks that can be completed in the near-term that do not require travel or in-person contact.

COMCAST'S POSITION

Comcast respectfully requests a six-week extension of the discovery stay. The Court previously found that a stay was warranted for several reasons: (1) the public health emergency, (2) the suspension of competition within the professional sports leagues in which Altitude's teams compete, (3) convenience to the Court and third parties, and (4) Comcast's pending motion to dismiss. ECF No. 50 at 3-4 (the "Stay Order"). Each of these factors continues to support staying discovery.

As Altitude acknowledges above, "the COVID-19 health crisis is ongoing." The Court has already found this to be good cause to stay discovery in its entirety. Indeed, the crisis is more severe than when the Stay Order was issued on March 16, as reflected by the social distancing orders that were later issued by the Governors of Colorado, Pennsylvania (Comcast's headquarters), and California and New York and the Mayor of the District of Columbia (the locations of the parties' out-of-state counsel). Altitude has not shown any changed circumstances that support requiring discovery to proceed.

The other factors that this Court considered also support extending the stay. The NBA and NHL seasons remain suspended due to COVID-19, which diminishes any interest Altitude claims (or could claim) to have in proceeding expeditiously.⁴ Indeed, even before the public health emergency, Altitude never sought expedited proceedings or any interim relief to try to restore Altitude’s carriage on Comcast’s cable systems before trial, even though the final pretrial conference is not scheduled to take place until May 2021—after another full season of both leagues. ECF No. 35 (Scheduling Order) at 22. The convenience to the Court and the interest of third parties also support continuing the stay during the present “national state of emergency.” Stay Order at 3.

Moreover, the Stay Order anticipated that the Court will “address [Comcast’s] Motion to Dismiss in a very timely fashion.” *Id.* That motion is now fully briefed. As the Court found, staying discovery until the motion has been decided “is an eminently logical means to prevent wasting the time and effort of all concerned, and to make the most efficient use of judicial resources.” *Id.* at 4 (citation omitted). This is particularly true because Altitude has conceded that there is a “presumption” against the type of antitrust claims that it asserts based on Comcast’s refusal to deal with Altitude on Altitude’s preferred terms (ECF No. 47 at 5), and because of Comcast’s demonstration that Altitude seeks to use the burdens of discovery to try to create leverage in the parties’ commercial dispute. *See* ECF No. 45 (Comcast’s stay motion).

⁴ There is no question that live telecasts of Denver Nuggets and Colorado Avalanche games are the mainstays of Altitude’s network, notwithstanding any programming that Altitude has substituted during the suspension of NBA and NHL play.

Altitude's attempt to downplay the burden of its proposed discovery ignores that Altitude has sought to increase that burden by turning its bilateral disagreement with Comcast into an exploration of industrywide practices regarding regional sports networks. For example, Altitude has requested documents concerning *all* of Comcast's negotiations, analyses, and contracts with *any regional sports network in the country*—even though only the Denver area is at issue. ECF No. 49 at 5-6. Altitude has not yet expressed views concerning the custodians whose documents it will demand, and Comcast can only assume that Altitude's approach to custodians and search protocols will be consistent with Altitude's generally overbroad approach. In any event, any discovery will necessarily be more burdensome during the present crisis while people are working remotely and may lack access to their files than during ordinary times.

For all of these reasons, Comcast believes a temporary extension of the existing stay order is warranted and the Court should extend the discovery stay until **June 11, 2020** and direct the parties to submit a further status report on or before **June 8, 2020**.⁵

⁵ If the Court permits any discovery to proceed, however, Comcast requests that the Court (1) limit discovery to written discovery between the Parties and (2) set **June 1, 2020** (the first business day 30 days after the current stay) as the deadline for Comcast's written responses and objections to Altitude's pending discovery requests. The latter deadline would serve the interest of fairness between the Parties because only Altitude has served discovery requests. Comcast notes that Altitude waited until after Comcast filed its *second* stay motion to serve its discovery requests and that Comcast has not yet served discovery requests, consistent with its position that discovery should be stayed. Comcast agrees with Altitude that it is premature to adjust deadlines in the Scheduling Order and proposes that the Parties address that issue following the ruling on the motion to dismiss, if needed.

Dated: April 27, 2020

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