Before the

Federal Communications Commission

Washington, DC 20554

In the Matter of	)	
	)	
CHESAPEAKE TELEVISION LICENSEE, LLC	)	
(Sinclair Broadcast Group, Inc.)	)	
	)	
Licensee of WBFF-DT Baltimore, MD	)	File No. 0000115674
	)	Facility Id. No. 10758
BALTIMORE (WNUV-TV) LICENSEE, INC.	)	
(Cunningham Broadcasting Corporation)	)	
	)	
Licensee of WNUV-DT Baltimore, MD	)	File No. 0000115578
	)	Facility Id. No. 7933
DEERFIELD MEDIA (BALTIMORE), INC.	)	
(Deerfield Media, Inc.)	)	
	)	
Licensee of WUTB-DT Baltimore, MD	)	File No. 0000115626
	)	Facility Id. No. 60552

To: The Commission

REPLY TO OPPOSITION TO PETITION TO DENY THE RENEWAL APPLICATIONS OF CHESAPEAKE TELEVISION LICENSEE, LLC, LICENSEE OF WBFF-DT BALTIMORE, MD; BALTIMORE (WNUV-TV) LICENSEE, INC., LICENSEE OF WNUV-DT BALTIMORE, MD; AND DEERFIELD MEDIA (BALTIMORE), INC., LICENSEE OF WUTB-DT BALTIMORE, MD

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Ihor Gawdiak, by his attorneys, hereby files this "Reply to Oppositions to Petition To Deny the renewal applications of Chesapeake Television Licensee, LLC, licensee of WBFF-DT Baltimore, MD; Baltimore (WNUV-TV) Licensee, Inc., licensee of WNUV-DT Baltimore, MD; and Deerfield Media (Baltimore), Inc., licensee of WUTB-DT Baltimore, MD" (Reply).

The Oppositions filed by Sinclair Broadcast Group, Inc. (Sinclair), Cunningham Broadcasting Corporation (Cunningham) and Deerfield Media, Inc. (Deerfield) (collectively, Opposition) to the Petition to Deny (Petition) of Ihor Gawdiak (Petitioner) can be broken down into several themes. One theme is that there is nothing new here. Petitioner is merely dredging up claims that have been addressed and disposed of over the years without disturbing Sinclair's lawful relationships with Cunningham and Deerfield or impugning Sinclair's character qualifications as a Commission licensee. A second theme is that when the arrangements between Sinclair and the others are examined individually, such as their Local Marketing Agreements (LMA), Joint Sales Agreements (JSA) and Shared Services Agreements (SSA) or joint representation by a law firm, the Commission has decided that similar setups do not amount to de facto control. Others are standard industry practice. A third theme is that the stations have served their community well. Sinclair has acted in good faith, despite mistakenly having committed past violations for which it has made redress. The licensees have complied with Commission rules and have met the legal standard for renewal.

Lest the Opposition's ramblings obscure Petitioner's claims, it is important to reiterate what he is seeking. His Petition documents Sinclair's extensive ties with Cunningham and Deerfield, which raise substantial and material questions of fact whether Sinclair exercises unlawful de facto control of these other two Baltimore licensees that must be resolved at a

hearing.[1] If Sinclair's de facto control is established in the hearing, the Commission must deny the applications for license renewal for violation of its rules limiting ownership of stations in a market. Additionally, the Petition recounts Sinclair's history of misrepresentations to the Commission, demonstrating a pattern of abuse and raising substantial and material questions as to its character qualifications to hold Commission licenses.

The Commission's Hearing Designation Order on the Sinclair-Tribune merger applications found substantial and material questions of fact involving real party-in-interest (de facto control in the renewal context) and misrepresentation that could only be resolved at a hearing.[2] The Commission lacked authority to make a secret deal with Sinclair in lieu of holding a public hearing on Sinclair's misrepresentations. Similarly, Sinclair continues its unlawful control over licensees it cannot own directly in order to evade Commission rules. The Commission has allowed this charade to persist far too long, depriving viewers of the diversity of programming that is the policy basis for the Commission's rules.

The Opposition's piecemeal approach to justifying each of Sinclair's business arrangements with Cunningham and Deerfield ignores the Commission's test for evaluating de facto control. While the Opposition argues for the legitimacy of each aspect of the relationship in isolation, the Commission looks at an array of factors in its analysis of control, the totality of circumstances. The rigorous application of this test leaves little doubt that Sinclair exerts de facto control over the other two stations. Certainly, the relationships raise substantial and material questions of fact mandating a hearing. This is especially true as Sinclair has not been

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[1] 47 U.S. Code § 309(d) and (e).

[2] *Applications of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. for Transfer of Control of Tribune Media Company and Certain Subsidiaries, WDCW(TV) et al.*, Hearing Designation Order, 33 FCC Rcd 6830 (2018) (HDO).

forthcoming with documents, nor has it provided a reasonable explanation for what is prima facie evidence of de facto control. Even examining arrangements individually, the Opposition falters.

As an example, while joint representation by the same law firm may be permitted under certain conditions (Petitioner does not claim otherwise), the Commission has found common use of counsel to be relevant to the question of de facto control, a finding the Opposition conveniently omits.[3] The Opposition cites decisions in which joint representation was not dispositive of control, failing to point out that these situations were heavily fact dependent and the decisions hinged on such circumstances as the high regard in which a family member held a particular lawyer. That Sinclair, Cunningham and Deerfield use the same law firms is not excused by the circumstance that other broadcasters and their affiliates may do so, as the Opposition suggests. Moreover, it does not address how the same law firm can represent both parties engaged in complex contract negotiations. As discussed below, such representation is absolutely forbidden by the District of Columbia Bar's Code of Ethics.

The Opposition argues for dismissal or denial of the Petition, claiming that Sinclair and Cunningham provided extensive information on HDO issues in the investigation leading up to the Order and Consent Decree (OCD) in which the Commission found no substantial and material question of fact as to Sinclair's character qualifications.[4] It argues that all other allegations against Sinclair have likewise been resolved by consent decrees in which the

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[3] *Sevier Valley Broadcasting Inc.*, 10 FCC Rcd 9795, 9798 (1995) "Accordingly, while Mrs. Barton's use of the same law firm as her husband is relevant, we do not find it to be of any more than minor significance in this case, particularly since Mrs. Barton indicates that she has known the attorney personally for a number of years and that the choice to use him as her counsel was her own."

[4] *Sinclair Broadcast Group*, Order and Consent Decree, 35 FCC Rcd 5877 (2020).

Commission found no character qualifying questions. According to the Opposition, Petitioner has provided no new or additional evidence. It further relies on the OCD's representation that the Commission will not initiate proceedings in response to a third-party filing "based on the matters that were the subject of the Investigations," and similar language in other consent decrees between Sinclair and the Commission.

The Opposition's arguments here fail for several reasons. First, the HDO found substantial and material questions of fact that required a hearing on whether Sinclair was the real party-in-interest and had made misrepresentations to the Commission. It stated unequivocally at ¶ 27 "those questions cannot be otherwise resolved." Following withdrawal of those applications, the Administrative Law Judge's order terminating the hearing confirmed the need for a hearing in an appropriate proceeding, such as on these renewal applications.[5] Instead of following this prudent and necessary course, the Commission commenced a secret investigation/negotiation that produced the OCD, which essentially erased all of the findings in the HDO in the most cursory and oblique fashion. It is shameless for Sinclair to contend that the OCD was based on thorough Commission review of information (to which the public was denied access) and that the OCD's exoneration of Sinclair was anything more than a backroom settlement having no precedential value.

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[5] *Tribune Media Company and Sinclair Broadcast Group, Inc.*, MB Docket 17-179, Order, FCC 19M-01 (ALJ 2019) p.4. "That is not to say that Sinclair's alleged misconduct is nullified or excused by the cancellation of its proposed deal with Tribune. Certainly, the behavior of a multiple-station owner before the Commission "may be so fundamental to a licensee's operation that it is relevant to its qualifications to hold any station license." That broad inquiry, however, would be more appropriately considered in the context of a future proceeding in which Sinclair is seeking Commission approval, for example, involving an application for a license assignment, transfer, or renewal. At that time, it may be determined that an examination of the misrepresentation and/or lack of candor allegations raised in this proceeding is warranted as part of a more general assessment of Sinclair's basic character qualifications to be a Commission licensee."

Next, the Opposition is wrong in asserting that Petitioner merely repeats allegations made in the HDO, which the Commission supposedly resolved in the OCD. The Petition contains far more specific allegations than in the HDO, discovered through exhaustive research of publicly available material. Additionally, even if the OCD's resolution of the HDO questions is legitimate (which it is not), the OCD involved different stations than are the subject of these renewal applications. Petitioner previously expressed concern that the Commission's refusal to allow his participation in the investigation together with the unsupported findings it made in the OCD could prejudice petitions to deny renewal applications that he planned to file.[6] In opposition Sinclair argued that the OCD would not prejudice petitions to deny renewal applications.[7] It is therefore untoward for Sinclair now to seek dismissal of the Petition on the ground that the OCD and other consent decrees resolved all outstanding questions. Sinclair's unlawful de facto control of Cunningham and Deerfield stations in Baltimore raises independent substantial and material questions of fact that require a hearing.

The Opposition cannot rely on the boilerplate language the Commission accedes to in virtually every consent decree to immunize Sinclair from future violations. Sinclair's unlawful conduct persists in Baltimore and other markets. The investigation/negotiation was held behind closed doors and the OCD was devoid of explanation or evidence for its scanty findings. It is impossible for the public to know what information Sinclair presented to the Commission,

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[6] See Petition for Reconsideration of OCD of Ihor Gawdiak, June 8, 2020; Application for Review of Ihor Gawdiak, May 22, 2020

[7] Sinclair Broadcast Group, Inc.'s Opposition to Petitions for Reconsideration, June 18, 2020, pages 4-5 "Petitioners' intent to file petitions to deny the license renewal applications of two stations that were not the subjects of the Media Bureau's investigation or the Commission's Consent Decree...Whatever right Petitioners may (or may not) have to file petitions to deny Sinclair's license renewals and to participate in those proceedings remains unaffected by adoption of the Consent Decree." [Footnote omitted]

and to what information the Commission attached significance in the OCD's findings of no substantial questions. The customary non-prosecution recitation the parties included in the OCD and other consent decrees certainly has no bearing on this Petition, which seeks denial of the renewal applications of different licenses. Petitioner has raised substantial and material questions of fact that require a hearing in which the public may participate. This hearing involves two core issues: 1) Whether Sinclair exerts de facto control over the Cunningham and Deerfield stations in Baltimore; and 2) Whether Sinclair's long-standing pattern of abuse of Commission rules, as evidenced by repeated violations and consent decrees, as well as its continuing misrepresentations and unlawful control of stations in Baltimore, render it unqualified by character to hold Commission licenses. The boilerplate is no bar to a full airing of these questions at a hearing.[8]

The Commission's concern in evaluating the impact of wrongdoing on a licensee's character is the licensee's probable future behavior.[9] The sheer number of enforcement actions

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[8] *See New York State Dep't of Law v. F.C.C.*, 984 F.2d 1209, 1220 (D.C. Cir. 1993) "Based on the Commission's assurances in its Reconsideration Order and on extensive discussion of this issue in oral argument, we conclude, along with the FCC, that Allnet "overstate[s] the scope and effect of the settlement language contained in the consent decree." Reconsideration Order, 6 F.C.C.Rcd. at 3306 (para. 28). The Commission has insisted that its pledge not to *institute* proceedings does not limit its ability or responsibility to *respond* to pending or future complaints raised by third parties. *See* Reconsideration Order, 6 F.C.C.Rcd. at 3306 (para. 26) ("the consent decree did not abridge the rights of third persons concerning pending or future Section 208 complaints about the NTCs' affiliate transactions"); *id.* (para. 28) ("**the settlement in no way impedes our ability to address any other violations of the Communications Act or our rules by the NTCs, even if such violations raise issues similar to those presented in this proceeding** (*i.e.*, alleged overcharges by affiliates and improper accounting for affiliate transactions)"). Counsel for the FCC reiterated at oral argument that other claims are not foreclosed, and that the FCC was still obligated to consider those complaints. *See* 47 U.S.C. §§ 207-209." [Emphasis added]

[9] *In the Matter of Viacom Inc., Infinity Radio, Inc., et al*, Order on Reconsideration, 21 FCC Rcd 12223 (2006), ¶7 and n. 26, "Policy Regarding Character Qualifications in Broadcast Licensing, Report, Order, and Policy Statement, 102 FCC 2d 1179, 1183 ¶ 7 (1986), recon.

against Sinclair over the years demonstrates a record of recidivism. While the Commission has addressed its chronic misbehavior through fines and consent decrees until now, it is fair to conclude that the company is likely to continue to violate Commission rules going forward. The fines and consent decrees are simply a cost of doing business for Sinclair and do not deter its misconduct and ongoing misrepresentations to the Commission, as evidenced by its spurious claims that Cunningham and Deerfield are independent actors in Baltimore.

The Opposition recites several facts about Sinclair's relationships with Cunningham and Deerfield, which it states have been publicly known for years, in an effort to minimize the Petition's allegations. Despite this characterization, the Commission nevertheless found in the HDO that these "well-known" arrangements raised substantial and material questions of fact of real party-in-interest and misrepresentation that warranted a hearing. That it brushed these questions aside in the OCD after secret dealings with Sinclair does not diminish the force of the HDO findings. Further the Petition raises new evidence that the Commission has not previously considered. Sinclair's complex web of agreements and methods of control needs to be carefully reviewed by the Commission and probed through the hearing process.

The Opposition Does Not Rebut or Diminish Petitioner's Showing that Sinclair is in De Facto Control of Cunningham, Deerfield and Its Other Front Companies.

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denied, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. National Association for Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. Jun. 11, 1987) (character inquiries "focus on the likelihood that an applicant will . . . comply with the Communications Act and our rules and policies."); id. at 1189, ¶ 21 (character inquiries "should be narrowly focused on specific traits which are predictive of an applicant's propensity to . . . comply with the Communications Act or the Commission's rules and policies."). See also Policy Regarding Character Qualifications in Broadcast Licensing, Amendment of Part 1, the Rules of Practice and Procedure, Relating to Written Responses to Commission Inquiries and the Making of Misrepresentation to the Commission by Applicants, Permittees, and Licensees, and the Reporting of Information Regarding Character Qualifications, Policy Statement and Order, 5 FCC Rcd 3252 (1990), recon.granted in part, denied in part, 6 FCC Rcd 3448 (1991), modified, 7 FCC Rcd 6564 (1992) ("1990 Modifications of Character Policy Statement")"

Television transactions increasingly have featured complex combinations of sharing arrangements and financial ties such as options and loan guarantees linking stations that the parties assert are separately owned. Determining the full economic effects of these complex arrangements requires careful analysis, including review of the agreements and financial documents, to determine whether the arrangements together give the dominant station a level of operational and financial influence over the subordinate station such that the Commission should treat the two as co-owned. The Petition sets forth a compelling argument, based on documents filed with the Commission and the U.S. Securities and Exchange Commission (SEC), that Sinclair impermissibly controls Cunningham and Deerfield. The Opposition does little to address the facts presented or to rebut Petitioner's showing.

As discussed in the Petition to Deny and as further discussed herein, Sinclair has concealed key documents and impermissibly redacted others. Despite its failure to produce unredacted documents, it claims in the Opposition that Petitioner "misinterprets the language in the contracts and offers unsubstantiated speculation about the operation of the stations in order to mischaracterizes Sinclair's contractual relationships."[10] This is not the case. Examining Sinclair's claims seriatim shows that Sinclair has misstated and obfuscated the facts concerning its long-term, controlling relationships with Cunningham and Deerfield; that Sinclair has repeatedly attempted to mislead the Commission and; that it has made material misrepresentations concerning those relationships.

Petitioner, relying on Sinclair's own documents, has demonstrated that Sinclair controls Cunningham's finances and that all of Cunningham's budgets must be "mutually approved" by

[10] Sinclair Opposition at p. 7-8.

Sinclair and Cunningham.[11] The Opposition concedes that Sinclair does have the right to veto any budget Cunningham may propose.[12] What is clear from the available documents is that Cunningham has no financial stake in the operation of the stations it ostensibly owns. As discussed below, Sinclair is responsible for paying all expenses of the Cunningham stations, including any Commission fines. All the profits from the operation of the stations, excluding Mr. Anderson's salary and perhaps a small token amount, are exclusively for the benefit of Sinclair.

The Petition states "Sinclair also reimburses all extraordinary non-budgeted expenses."[13] Sinclair claims this is untrue: "The Petition also attempts to raise questions about Sinclair's reimbursement of certain non-budget expenses, but it overlooks that reimbursement on non-budgeted expenses was limited to certain expenses incurred in 2009, the year the Master Agreement was executed..."[14] While the Master Agreement does address certain 2009 non-budgeted expenditures, it also provides for regular, ongoing, payment of non-budgeted expenses. Section 2(a) states in pertinent part:

> any non-Budgeted Expenses in any manner associated with (directly or indirectly) SBG's or a SBG Subsidiary's performance under any applicable LMA (by way of example, but not by way of limitation, to fines or penalties imposed or assessed by the FCC relating to programming), shall be reimbursed directly by SBG.... Still further (with regard to the 2009 Budget only), all one-time non-Budgeted Expenses associated with ...

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[11] Master Agreement dated October 28, 2009, First Amendment to the Master Agreement, dated July 20, 2010, and Second Amendment to the Master Agreement, dated April 1, 2016, (together Master Agreement or MA) MA, Section 2.

[12] This admission presupposes that Cunningham is a sufficiently constituted entity to prepare and propose a budget, a fact that is not part of the record of this proceeding.

[13] Petition at p. 16.

[14] Sinclair Opposition at p. 11.

The 2009 one-time non-budgeted items all had to do with the drafting of the Master Agreement and bank refinancing. However, Sinclair's unsubstantiated claim that reimbursement of non-budgeted expenses was limited to certain expenses incurred in 2009 is a misrepresentation of the unambiguous language of the Master Agreement.

Recently, the Commission proposed forfeitures of more than nine million dollars on fifteen licensees in eight television broadcast station groups for failing to negotiate in good faith for consent to carry the signals of their television stations.[15] Each of these stations has one or more agreements with Sinclair, pursuant to which Sinclair "operates, programs [and/] or provides sales services" to the stations. NAL, para.10 For example, Deerfield's Baltimore JSA states that Sinclair shall act as Deerfield's agent with respect to negotiation of any retransmission consent agreement.[16] While the Commission no longer permits such arrangements, the agreement has never been amended to remove this provision. Nonetheless, these eight ostensibly unrelated and independent companies pooled their resources and hired an agent to negotiate collectively on their behalf. Can there be any serious doubt that Sinclair was behind this conspiracy to violate the Communications Act? The Sinclair front companies have no economic stake in the outcome of the negotiations, nor do they much care if the Commission fines them. Any monetary forfeitures the Commission levies on Cunningham, Deerfield and the other Sinclair front companies automatically becomes Sinclair's financial responsibility. Their agreements with Sinclair leave them without any financial resources (other than salaries for their fronts). Sinclair takes all of the profits. Therefore, any financial loss or non-Budgeted expense must be Sinclair's obligation.

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[15] *In the Matter of DIRECTV, LLC; AT&T Services, Inc.*, MB Docket No. 19-168, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, released September 15, 2020 (NAL).

[16] Deerfield Baltimore JSA Section 5.1(g)

The Opposition claims that Sinclair does not employ Michael Anderson or set his salary.[17] But it does. Perhaps the only financial compensation Mr. Anderson will receive for his role as Potemkin voting shareholder and president of Cunningham is his salary. As part of the 2009 restructuring Mr. Anderson was given an increase in salary. The Master Agreement goes on to state that Sinclair agrees that Mr. Anderson's salary will be "consistent and part of the Budget, subject to any applicable cost of living increases, going forward."[18] By claiming that Mr. Anderson does not work for Sinclair, Sinclair is engaging in semantics. Mr. Anderson's salary is set and paid by Sinclair. Sinclair has the power to terminate his employment, simply by exercising its controlling shareholder options and transferring Cunningham's voting shares to another factotum. Sinclair is correct in stating in the Opposition that Sinclair does not directly employ Mr. Anderson, but that is a distinction without a difference. Mr. Anderson is an employee of Cunningham, which is in effect Sinclair's wholly owned subsidiary.

Sinclair next takes umbrage at Petitioner's statement that LMA payments are, in part, credited toward the reduction of the purchase price. Here again, Sinclair's Opposition seeks to mislead the Commission. Cunningham has bank debt, facilitated and guaranteed by Sinclair, which it must repay. Cunningham's only source of income is the money it receives from Sinclair in the form of LMA payments. It is beyond question that the LMA payments are being used to reduce Cunningham's outstanding debt. As the debt is reduced, so too is the purchase price for Cunningham's stations. The Asset Purchase Agreement for WNUV-TV, available for public inspection, has the purchase price information redacted.[19]

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[17] Sinclair Opposition at p. 11.

[18] MA Section 2(a)

[19] Sinclair, Cunningham and Deerfield must be required to remove these types of unnecessary and obstructive redactions from their public files.

Sinclair, however, uses the same form of the APA in most of its transactions. In Sinclair's failed attempt to acquire KDAF-TV in Dallas on behalf of Cunningham, the APA clearly states that the purchase price is based, in part, on the amount of outstanding indebtedness. As the debt goes down so does the purchase price. Sinclair claims that the aggregate purchase price for the five Cunningham's television stations covered by the Master Agreement increases by 6% per year. However, Sinclair offers no evidence to support this statement. Instead it quotes from its SEC10K report that the aggregate purchase price for these stations is approximately $54 million. The Sixth Amended and Restated Credit Agreement, dated July 31, 2014, between Sinclair and JPMorgan Chase Bank shows that the Cunningham purchase options for the five stations covered by the Master Agreement was $60,143,949. This is after 2012, when Sinclair claims it stopped crediting the LMA payment toward the purchase price. Yet, the purchase price has gone down and not up as Sinclair claims.

In the HDO the Commission found that according to filings made with the SEC, Sinclair had guaranteed $53.6 million of Cunningham's debt. Thus, if Cunningham is required to sell the stations to Sinclair at a purchase price of approximately $54 million, that money will be used to pay down its existing debt of approximately $54 million. It appears that should Cunningham sell its stations, Mr. Anderson will receive nothing more than the salary he earned and a small gratuity for services rendered, if that. What is beyond any doubt is that any financial gain that accrues from the ownership of these stations is for the benefit of Sinclair and not Cunningham. Regardless of how long Cunningham owns the stations, or how valuable the stations become, any profit from the sale will inure to the benefit of Sinclair and not Cunningham.

The same is true of Deerfield's stations. The Opposition claims that Petitioner makes "the unsupported allegation that the option price for WUTB is too low."[20] On October 25, 2012, Sinclair entered into an Asset Purchase Agreement (APA) with Fox that gave Sinclair the right to purchase WUTB for $2,711,000. Sinclair is barred by the Commission's multiple ownership rules from owning WUTB. On October 26, 2012, Sinclair executed a separate APA with Deerfield in which it assigned to Deerfield its rights under the Fox APA for a purchase price of $330,000 and included an option for Sinclair to purchase WUTB for $330,000 at any time during a 30-year period. This is prima facie evidence that the option price is too low. More importantly, it is further evidence that Deerfield has no stake in the financial success or failure of the station. Regardless of how valuable the station may become, Mr. Mumblow will never profit from his nominal ownership of the station. Conversely, he will not suffer a financial loss. Mr. Mumblow is not a stakeholder; he is a placeholder who receives a salary for being Sinclair's front man.

The Opposition relies on a similar, fully executed, APA Sinclair has with Cunningham in an attempt to justify the restrictions Sinclair places on Cunningham's ability to dispose of assets or enter into contracts. It states that such provisions are similar to those found in other agreements. While this is true, most APAs do not remain unconsummated for 12 years and counting. In Sinclair's defense the Opposition points out that Cunningham can enter into contracts that "in the aggregate" do not exceed $25,000. First, Sinclair, in its public inspection file, inappropriately redacted the dollar limit set forth in Section 7 of the Sinclair-Cunningham APA and only disclosed the $25,000 spending limit when it suited Sinclair's interests to do so. Second, very little can be done with $25,000 at a television station. Cunningham would not be able to buy television equipment or perform any functions normally associated with television

[20] Sinclair Opposition at p. 19.

ownership. For the first 12 years of the contract Sinclair has given Cunningham the discretion to enter into contracts that average just $2,083 per year, a pittance in the world of television. At this juncture, it is worth noting that neither Cunningham nor Deerfield actually own any broadcast equipment or other tangible assets. They are mere shells that hold Commission licenses for Sinclair's benefit and under Sinclair's complete control.

The Petition stated: "In 2014 Sinclair had guaranteed $42,900,000 of Deerfield's debt. However, Deerfield's current ownership report does not disclose a loan or credit facility with any bank or lending institution. This needs to be examined in greater detail, but it appears that Deerfield has been completely consolidated into Sinclair. All it holds are bare licenses to give the FCC the false impression that it is an independent and viable licensee."[21] Deerfield in its Opposition states that a copy of the 2012 Credit Agreement is not in its public file because Deerfield is no longer a party to that agreement.[22] Neither Deerfield nor Sinclair elaborates on this point.

It appears that Sinclair has fully absorbed Deerfield. See Discussion of Variable Interest Entities (VIEs), Petition at p.22-4. In response, Sinclair merely states that "Reporting a JSA or LMA station as a "Variable Interest Entity" in an SEC filing is not indicative of "control" for purposes of compliance with the Commission's rules, as FCC and SEC attribution rules are different." But it most certainly is a clear indication of control, as a public company must consolidate an entity when it (i) has the power to direct the VIE's activities that most significantly impact the VIE's economic performance, and (ii) has the obligation to absorb losses of the VIE or the right to receive benefits from the VIE that could potentially be significant to the

[21] Petition at p. 24.

[22] Deerfield Opposition p. 7 n. 20

VIE. As the Petition and this Reply demonstrate, Sinclair absorbs all of Deerfield and Cunningham's losses including non-budgeted expenses such as FCC fines. As the VIE's primary beneficiary, the public company is required to consolidate the VIE and include the VIE's assets, liabilities and results of operations in its consolidated financial statements. It appears that Sinclair has fully consolidated Deerfield's $42,900,000 loan. This is why Deerfield's counsel can represent that Deerfield is no longer a party to the loan agreement. Sinclair no longer is guaranteeing Deerfield's debt; Deerfield's debt is now Sinclair's debt. The same is true of other Sinclair front companies and true, in part, for Cunningham.

These arrangements raise substantial and material questions of fact concerning de facto control and additionally potential violations of the Commission's debt equity plus rule (EDP). Section 73.3555 of the Commission's rules, Note 2 provides, in pertinent part:

> the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if: A. The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and B.(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules…

While further inquiry is required, there is sufficient evidence for the Commission to find that there is a substantial and material question of fact as to whether Sinclair has violated the EDP rule, and consequently its interests in Cunningham and Deerfield are fully attributable. Sinclair, Cunningham and Deerfield had an opportunity in the Opposition to clarify the financial relationship between Sinclair and its consolidated entities. Rather than being forthcoming, they chose to obfuscate. This question, therefore, can be resolved only in an evidentiary hearing.

The Opposition argues that law firms of Pillsbury Winthrop Shaw Pittman LLP and Thomas & Libowitz, P.A. can represent Sinclair and its front companies notwithstanding the existence of a conflict of interest, if the lawyer or law firm believes that it will be able to provide competent and diligent representation to each affected client, and the clients consent to joint representation.[23] Petitioner concurs that the law firms can represent Sinclair, Cunningham, Deerfield and other front companies in their transactions with one another, albeit not for the reasons given, but rather because Deerfield and Cunningham are the functional equivalent of wholly owned subsidiaries of Sinclair, the joint representation of which does not create a conflict under the ethics rules.

The District of Columbia Rules of Professional Conduct, Section 1.7 (a) states: "A lawyer shall not advance two or more adverse positions in the same matter." Section 1.1 defines matter as: "any litigation, administrative proceeding, lobbying activity, application, claim, investigation, arrest, charge or accusation, the drafting of a contract, a negotiation, estate or family relations practice issue, or any other representation, except as expressly limited in a particular rule." (Emphasis added) Comment 3 to Section 1.7 states: "The same lawyer (or law firm, *see* Rule 1.10) should not espouse adverse positions in the same matter during the course of any type of representation, whether such adverse positions are taken on behalf of clients or on behalf of the lawyer or an association of which the lawyer is a member." Comment 32 to Rule 1.7 makes it clear that the requirements of Section 1.7(a) cannot be waived. However, Comment 6 provides that "The prohibition of paragraph (a) relates only to actual conflicts of positions, not to mere formalities."

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[23] Sinclair Opposition at p.22, n.56.

Thus, if Sinclair and Cunningham on the one hand and Sinclair and Deerfield on the other are engaged in actual negotiations, where terms and conditions are debated and conflicting positions are stated and contract provisions are negotiated, the Pillsbury and Thomas firms cannot represent both parties in what is an adverse matter. If, as Petitioner contends, the contracts are mere formalities, and the only purpose of the contracts is to make it appear that the parties are complying with the Commission's rules, Pillsbury and Thomas can continue their joint representation because they are not adverse, i.e. they are not negotiating agreements. Pillsbury, a large international law firm with 20 offices around the world and over 700 attorneys, has come to the conclusion that their simultaneous representation of Sinclair, Cunningham and Deerfield is not adverse within the meaning of the D.C. Bar Ethics Rules. The Commission should take Pillsbury at their word. What is now beyond doubt is that the JSAs, LMAs, Options, APAs and other agreements are sham documents designed to give the appearance to regulators that Sinclair has an arm's length relationship with companies that, in fact, are under Sinclair's complete control.

In the Opposition Sinclair argues that the existence of one or another contract or provision does not demonstrate that Sinclair is in de facto control of Cunningham or Deerfield. In the HDO the Commission rejected such a piecemeal approach:

> While each of the individual agreements discussed herein (e.g., JSAs, SSAs, options, and loan guarantees) would not, standing alone, give rise to a substantial and material question as to the issues of real party in interest, they do give rise to such a question when considered together and combined with the other factors discussed herein. *See 2014 Quadrennial Regulatory Review et al.*, Order on Reconsideration, 32 FCC Rcd 9802, n.298 (2017) (explaining that television JSAs will no longer be attributable as a result of the amount of advertising time brokered, but "we remind licensees that they must retain ultimate control over their programming and core operations"); *id.* at n.307 ("While we

> decline to attribute television JSAs for the reasons set forth herein, we note that, under *Ackerley*, the Commission could still find that the terms of an individual television JSA (either alone or in conjunction with other agreements) rise to the level of attribution.") (*citing Shareholders of the Ackerley Group, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 10828 (2002) (finding that a specific television JSA, in conjunction with other agreements, created an attributable interest)).[24]

A recent Media Bureau order described the Commission's process for determining de facto control:[25] The Opposition, of course, makes no reference to the Commission's multi-factor analysis because Sinclair would fail the test, at least to the extent of raising substantial and material questions of fact. Among the factors the Commission considers are:

- who controls daily operations;
- who carries out policy decisions;
- who is in charge of employment, supervision, and dismissal of personnel;
- who is in charge of paying financial obligations, including operating expenses; and
- who receives monies and/or profits from the operation of the station.[26]

The answer to each of these questions is Sinclair. Sinclair handpicks its front men, usually based on a previous long-term relationship with Sinclair or one of its controlling shareholders. For example, every member of Cunningham's board of directors has a connection to Sinclair, as does Deerfield's Mr. Mumblow. Sinclair owns all of Cunningham and Deerfield's

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[24] *Applications of Tribune Media Company (Transferor) and Sinclair Broadcast Group, Inc. (Transferee) for Transfer of Control of Tribune Media Company and Certain Subsidiaries, WDCD(TV) et al., Hearing Designation Order*, 33 FCC Rcd 6830, 6835 n.41 (2018) (HDO).

[25] *In the Matter of Entertainment Media Trust*, MB Docket No. 19-156, Hearing Designation Order and Notice of Opportunity for Hearing, 2019 FCC LEXIS 1481 (2019).

[26] *See Ronald Brasher*, 15 FCC Rcd 18462, para. 8 (2004) (citing *Intermountain Microwave*, 24 RR 983 (1963)).

physical assets. Sinclair decides what station its front company will buy. Thus, in Baltimore, Sinclair transferred its right to buy WUTB to Deerfield. Deerfield was able to purchase the station at a substantial discount, but was required to execute an option agreement that gives Sinclair the right to purchase the station at the same price for 30 years. Deerfield has no chance of making a profit from WUTB, and also has no obligation to cover any losses the station may sustain. The same is true for Mr. Anderson, who receives a salary set by Sinclair. He, too, has no ability to earn a profit from his ownership of Cunningham. Sinclair has the right to buy him out for what he paid for his stock in Cunningham, plus one percent. Sinclair controls the stations' operations. The entire arrangement consists of a series of sham agreements designed to give the Commission the impression that Sinclair's fronts actually have some say in the operations of the stations they own on paper. The Pillsbury and Thomas firms could not jointly represent the parties if their agreements were genuine, negotiated business arrangements.

The fronts are trusted Sinclair retainers, who are paid a salary for playing the role of the station licensee before the Commission, and have no stake in the enterprise. They serve at the pleasure of Sinclair, who can replace them by exercising its options. Mr. Anderson and Mr. Mumblow carry out their duties without financial risk. So, for example, when the Commission fines the stations for failing to negotiate retransmission consent agreements in good faith, it is Sinclair, not Cunningham or Deerfield, that bears the financial burden. It is Sinclair that collects and keeps the retransmission fees. To be clear, the sole responsibility of Mr. Anderson and Mr. Mumblow is to execute any document Sinclair's lawyers place before them. They have no say in policy decisions, day-to-day operations, supervision or dismissal of personnel, nor do they have any expectation of profits. As stated in the Petition, these individuals are empty suits with nothing on the line.

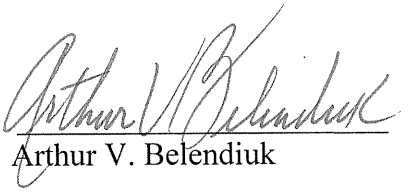
Conclusion

The Opposition's weak defense of Sinclair's arrangements with Cunningham and Deerfield does little to rebut Petitioner's specific factual allegations showing Sinclair's de facto control of these front entities in violation of the Commission's multiple ownership rules. Applying the Commission's test for analyzing control, Sinclair fails on every factor. The Petition raises substantial questions of Sinclair's de facto control over the Cunningham and Deerfield stations in Baltimore that the Commission must set for hearing.

The renewal applications for the Baltimore stations of Sinclair's sham entities are in themselves material misrepresentations to the Commission. They are just the latest instance of Sinclair's long-standing and continuing pattern of deception to get around ownership limitations. The Commission's concern in evaluating the impact of wrongdoing on a licensee's character is the licensee's probable future behavior. It is clear from this history that Sinclair's entire business model is founded on perpetuating its unlawful conduct for as long as it can in order to maintain its broadcast empire. That Sinclair's future behavior is certainly more of the same must elevate the Commission's concern over its character.

The Commission's chosen means of addressing Sinclair's many transgressions over the years through consent decrees and fines has not deterred the company from repeatedly violating the Communications Act and the Commission's rules. Enough is enough. It is time for the Commission finally to hold Sinclair accountable for its poor character, rather than continue to give it a pass with boilerplate language in consent decrees. The Petition raises substantial questions of Sinclair's character qualifications to hold Commission licenses that must be set for hearing in accordance with the provision of the Communications Act.

Respectfully Submitted,

By: 
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October 21, 2020

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2020, a true and correct copy of the forgoing was caused to be served on the following, as indicated:

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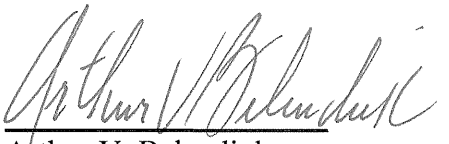

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