No. ___

IN THE

Supreme Court of the United States

AT HOME CORPORATION,
Petitioner,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENT, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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July 27, 2006

QUESTIONS PRESENTED

1. In a case involving one of the largest insider profits ever realized (over $600 million), where the complaint properly alleges a matching "sale" and "purchase" of securities within a six-month period, may statutory insiders escape liability under § 16(b) of the Securities Exchange Act of 1934 because of a judicial interpretation that establishes the date of creation of a so-called hybrid derivative instrument as the only "sale" date, thereby opening a large loophole for speculative abuse of the precise type § 16(b) was intended to prevent?

2. Does a "purchase" of securities for purposes of § 16(b) of the Securities Exchange Act of 1934 occur when a statutory insider of an issuer acquires securities of the issuer through its acquisition of another company which, in turn, owns securities of the issuer given the plain language of § 3(a)(13) of the Exchange Act, which expressly defines "purchase" to include "any contract to buy, purchase or *otherwise acquire*" a security, 15 U.S.C. § 78c(a)(13) (emphasis added)?

PARTIES TO THE PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding in the United States Court of Appeals for the Second Circuit were (a) plaintiff-appellee At Home Corporation, and (b) defendants-appellants Cox Communications, Inc., Cox@Home, Inc., Comcast Corporation, Comcast Online Communication, Inc., Comcast PC Investments, Inc., Brian L. Roberts and David M. Woodrow.

At Home Corporation certifies that it is not a publicly held corporation and that there is no publicly held company owning 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—CONTINUED

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES, REGULATIONS, AND RULES

TABLE OF AUTHORITIES—CONTINUED

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In this era of outsized corporate benefits to insiders, § 16(b) of the Exchange Act, passed over 70 years ago as part of a sweeping reform of our securities markets, must continue to play a large role in restraining insiders from profiting at the expense of the corporation. The Second Circuit's decision, however, has created new tests based on hindsight and the subjective intent of the parties that have no basis in the statute itself and conflict with the statute's primary purpose. This new approach badly damages the enforceability of § 16(b) and creates loopholes that invite abusive speculation by corporate insiders to the detriment of corporations and their shareholders.

In affirming the dismissal of a claim seeking to recover one of the largest insider profits ever recorded, an admitted profit of over $600 million by two of the largest cable companies in the United States, the Second Circuit transformed a "strict liability" statute into a "no liability" statute. It erroneously concluded that corporate insiders could create agreements to sell securities at a future date at an unknown price and yet have the § 16(b) clock begin ticking immediately—thus avoiding all § 16(b) liability when those shares were actually sold. The Second Circuit also refused to apply the plain language of the statutory definition of one of the most critical terms in the federal securities laws—"purchase," and, instead, judicially legislated a new definition.

It has been over 15 years since the Court last addressed § 16(b).[1] The Court should grant the petition for writ of certiorari to resolve important unsettled questions of federal law involving the application of § 16(b) and to close dramatically expandable loopholes created by the Second Circuit's decision. *See* SUP. CT. R. 10(c). The Court should grant certiorari to make clear that courts must avoid judicial legislation concerning the securities laws.

OPINIONS AND ORDERS BELOW

The Second Circuit's opinion, App. 1a, is reported at *At Home Corp. v. Cox Communications, Inc.*, 446 F.3d 403 (2d Cir. 2006). The District Court's opinion, App. 17a, is reported at *At Home Corp. v. Cox Communications, Inc.*, 340 F. Supp. 2d 404 (S.D.N.Y. 2004).

JURISDICTION

The Second Circuit issued its judgment and opinion on April 28, 2005. The Court has jurisdiction under 28 U.S.C. § 1254.

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[1] *See Gollust v. Mendell*, 501 U.S. 115 (1991).

STATUTORY PROVISIONS INVOLVED

Section 16(b) of the Exchange Act provides:

> "For the purpose of preventing the unfair use of information which may have been obtained by [a statutory insider (*e.g.*, a person or group owning 10% or more of the company's stock or a director or officer of the company)] by reasons of his relationship to the issuer, any profit realized [by an insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such [insider] in entering into such transaction . . . ." 15 U.S.C. § 78p(b).

Section 3(a)(13) of the Exchange Act defines "purchase" as including "any contract to buy, purchase or *otherwise acquire*" a security. 15 U.S.C. § 78c(a)(13) (emphasis added).

In 1991, the Securities and Exchange Commission enacted rules concerning § 16(b)'s applicability to derivative securities such as the Put instrument at issue here. The relevant rules are set forth below and included in the appendix in their entirety:

- Rule 16a-1(c) defines "derivative securities" as "any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security." 17 C.F.R. § 240.16a-1(c).
- Rule 16a-1(c)(6) *excludes* from its definition of a derivative security a security "with an exercise or conversion privilege at a price *that is not fixed*." 17 C.F.R. § 240.16a-1(c)(6) (emphasis added).
- Rule 16b-6(a) provides that the establishment of a "put equivalent position" is "deemed a sale" for purposes of § 16(b). 17 C.F.R. § 240.16b-6(a).

- Rule 16a-1(h) defines a "put equivalent position" as "a *derivative security* position that increases in value as the value of the underlying equity decreases." 17 C.F.R. § 240.16a-1(h) (emphasis added).
- Rule 16b-6(b) provides that the "closing of a derivative security position as a result of its exercise or conversion" is exempt from § 16(b) and does not constitute a separate § 16(b) event. 17 C.F.R. § 240.16b-6(b).

STATEMENT OF THE CASE

At Home Corporation was formed by cable companies and a venture-capital firm in the mid-1990s as a joint venture to develop the first nationwide high-speed Internet service delivered over cable infrastructure. App. at 41a-42a. At Home scored a significant technological and marketplace success. By the fall of 2001, over 4 million cable company subscribers connected to the Internet via the At Home network. *Id*. at 43a. At Home "went public," selling billions of dollars of its common stock to public investors. *Id*. at 44a. Despite public ownership of its stock, At Home continued to be controlled by three cable companies: AT&T Corp. and defendants Cox Communications, Inc. and Comcast Corporation. *Id*. at 45a.

At Home filed for bankruptcy in September 2001. App. at 43a. At Home's causes of action against its former controlling stockholders were assigned by order of the Bankruptcy Court to a Trustee.

This case addresses a seminal corporate event in the life of At Home: the sale of corporate control by Cox and Comcast to AT&T in a series of complex transactions in March 2000 which resulted in AT&T obtaining sole control over the At Home Board of Directors and an admitted profit of more than $600 million for Cox and Comcast. App. at 37a, 54a. It is

that profit At Home seeks to recapture pursuant to § 16(b) for the benefit of its creditors and former shareholders.

The Complaint alleges that Cox and Comcast agreed in March 2000 to "put" (sell) all of their At Home stock (approximately 60 million shares) to AT&T for a total of $2,897,653,440 pursuant to a written term sheet (the "Put"). App. at 49a-50a.[2] Although hardly a model of clarity, the Put provided that the actual number of shares to be sold *and* the price per share to be paid would not be set until 15 days after notice by Cox/Comcast of their intent to put their At Home shares and that the shares could not be put (sold) to AT&T until after January 2001—more than ten months after creation of the Put. *Id*. Specifically, the Put provided that "[t]he per share purchase price under the Put will be the greater of (1) $48 and (2) the average per share trading price of the [At Home stock] during the 30 consecutive trading day period beginning 15 days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of the Put." App. at 73a; *see also* App. at 49a-50a.

Thus, if the price of At Home stock increased, the number of shares subject to the Put decreased but AT&T never paid more than the "Maximum Number" of $2,897,653,440 in consideration. App. at 72a; *see also* App. at 49a-50a. Of critical importance for analysis under § 16(b) and the applicable SEC rules, neither Cox nor Comcast knew in March 2000 how many At Home shares would ultimately be sold or at what price per share—a critical fact alleged in the Complaint and rejected by both the District Court and the Second Circuit in their application of an impermissible hindsight test. App. at 49a-50a, 53a.

On January 11, 2001, Cox and Comcast each notified AT&T that they intended to put their At Home shares in accordance with the pricing formula set forth in the under-

[2] This term sheet is included in the Appendix at 72a.

lying Put Term Sheet—and *not* at a fixed $48 per share purchase price and not for a fixed number of shares. App. at 52a. After these notices were presented to AT&T, the 30-day period for fixing the price and number of shares—*i.e.*, 15 trading days before and after the date of the notice—ran out on February 2, 2001. *Id*. at 53a, 58a. At Home alleges that a "put equivalent position" was established on that date under SEC rules, which is the equivalent of a sale for § 16(b) purposes. *Id*. at 58a. At the time of this sale, Cox and Comcast continued to own as a "group" more than 10% of At Home's securities and, therefore, were statutory insiders under § 16(b). *Id*. They also continued to be two of At Home's largest cable company customers with access to inside information of At Home. *Id*. at 37a-38a.

On May 18, 2001, apparently for "tax purposes," Cox and Comcast each entered into new (and virtually identical) agreements with AT&T under which the parties: (1) cancelled the Put, (2) Cox and Comcast kept—not sold—their approximately 60 million underlying shares of At Home common stock (on May 18, 2001, worth approximately $237 million), and (3) Cox and Comcast received 155.3 million shares of AT&T common stock, worth approximately $3.43 billion at the time. App. at 53a. The elimination of the put equivalent position constituted a "purchase" under § 16(b) at a time when Cox and Comcast continued to be statutory insiders. *Id.* at 58a.

The first count of the Complaint "matches" the § 16(b) sale on February 11, 2001 with the subsequent § 16(b) purchase approximately three months later in May 2001 when the "put equivalent position" was eliminated by virtue of the new Cox/Comcast/AT&T agreement. App. at 57a-59a. Comcast recorded and announced a pre-tax gain of $296.3 million on these transactions involving the Put, and Cox recorded and announced a pre-tax gain of $307.4 million. *Id*. at 54a. At Home seeks disgorgement of this profit under § 16(b). Any

recovery would be distributed under At Home's plan of liquidation to creditors first and then to former shareholders of At Home.

The second count pleads an alternative § 16(b) claim against Comcast alone. App. at 59a. Count two assumes that the § 16(b) sale with respect to the Put occurred, as Cox and Comcast contend, when the Put Term Sheet was first created in March 2000 and not when the number of shares and price per share were fixed 11 months later in February 2001. *Id*. The Complaint "matches" this sale with Comcast's unquestioned acquisition of At Home common stock within six months. Specifically, Comcast purchased cable companies whose assets (worth potentially as much as approximately $243 million according to the record below) included warrants to purchase 8.9 million shares of At Home common stock. *Id.*; *see also id*. at 29a. Count two seeks disgorgement of the profit earned on this matching sale and purchase within a six-month period by a statutory insider. *Id.* at 59a.

After requesting and receiving an *amicus curiae* brief from the SEC, the Second Circuit affirmed the District Court's dismissal of At Home's two § 16(b) claims pursuant to Federal Rule of Civil Procedure 12(b)(6). App. at 3a. With respect to count one, the Second Circuit, like the District Court, erroneously determined that the Put contained a "fixed" $48 price per share so that the sale for § 16(b) purposes occurred only in March 2000—more than six months before the purchase in May 2001 when the Put was eliminated. *Id*. at 8a-9a. It accordingly concluded that At Home had not alleged a "matching" purchase and sale within the required six-month period. *Id*.

Refusing to apply the Exchange Act's definition of "purchase," which includes "any contract to buy, purchase or *otherwise acquire*" a security, 15 U.S.C. § 78c(a)(13) (emphasis added), the Second Circuit also affirmed the District Court's dismissal of count two, concluding that Comcast did

not "purchase" At Home securities when it acquired them as part of its acquisition of the assets of other cable companies. App. at 11a-13a. The Second Circuit impermissibly crafted a new judicial definition of "purchase," holding "that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of the risk and opportunities that inhere in the stock of the issuer." *Id*. at 12a.

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES IMPORTANT AND UNSETTLED QUESTIONS UNDER THE FEDERAL STATUTE PROHIBITING INSIDER, SHORT-SWING TRADING PROFITS AND ADDRESSES ONE OF THE LARGEST INSIDER PROFITS EVER RECORDED.

The paramount goal of § 16(b), as set forth in the text of the statute itself, is to prevent statutory insiders—officers, directors or shareholders owning more than 10% of a company's outstanding stock—from profiting based on their access to inside information. *See* 15 U.S.C. § 78p(b). To further this statutory purpose, which is as relevant today, if not more so, than in 1934 when Congress enacted the Exchange Act, the statute provides for strict liability; it does not require proof of misuse of inside information or bad faith on the insiders' part. *See id*. Section 16(b) is "a flat rule" that is "sweeping" in its coverage. *Reliance Elec. Co. v. Emerson Elec. Co*., 404 U.S. 418, 422 (1972).

Because § 16(b) is a strict liability statute, the Court has applied "a literal, 'mechanical' application of the statutory text in determining who may be subject to liability." *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Simply put, "*any* profit realized [by an insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall

inure to and be recoverable by the issuer . . . ." 15 U.S.C. § 78p(b) (emphasis added). And the statute expressly provides for enforcement in private suits such as this one. *Id*.

A. Count One

Both the District Court and Second Circuit assumed for purposes of analyzing the Complaint that: (1) Cox/Comcast constituted a statutory insider because they owned more than 10% of At Home's stock as a "group," and (2) a purchase under § 16(b) occurred when AT&T, Cox, and Comcast eliminated the Put in May 2001.

The driving issue was *when* the matching "sale" occurred for § 16(b) purposes: (i) on March 28, 2000 when the Put was created as the District Court and Second Circuit found, (ii) on February 2, 2001, when the price per share and number of shares subject to the Put were set for the first time as alleged in the Complaint, or (iii) on *both* dates as At Home argued to the Second Circuit.

The operative SEC rules provide that a security with an exercise price that is set by reference to a *future* market price (a so-called floating price because it moves with the market price of the underlying security) is *not* deemed a "derivative" security; the creation of such a security is *not* considered a purchase or sale under § 16(b). *See* 17 C.F.R. § 240.16a-1(c)(6). If a true "derivative" position is established with a fixed conversion exercise price, then a sale (if a "put") or a purchase (if a "call") occurs when the derivative is established and a subsequent "exercise" or "closing out" of the derivative position is not a separate § 16(b) event, *i.e*., the closing of a put position is not a sale and the closing of a call position is not a purchase. *See* 17 C.F.R. § 240.16b-6.[3]

[3] In articulating the rationale for treating the exercise—as opposed to the creation—of a "floating" derivative as the operative event for § 16(b) purposes, the SEC explained that "the primary potential for abuse arises at the time of exercise for a floating price derivative security because only at

The Second Circuit concluded—without meaningful analysis and in disregard of the Complaint's allegations—that the Put contained a "fixed component" setting "the exercise price at $48 per share if the options are executed while At Home is trading below $48 per share." App. at 4a. Using hindsight, the Court reasoned that because "Comcast and Cox exercised their put options at the $48 fixed price" and because "[t]he floating price mechanism did not affect the calculation of the exercise price" (*Id*. at 8a), the only § 16(b) sale occurred when the Put was first created in March 2000 and the actual setting of the number of shares to be sold (and the price) 11 months later was merely the supposed "exercise" of a derivative security and not a separate § 16(b) sale. *Id*. at 8a-9a.

This analysis ignored the risk of speculative abuse with respect to the Put—a risk which dramatically increased as Cox and Comcast approached the point when they could file a notice under the Put and when the number of shares and the price per share would be set for the first time. Marketplace realities, which the Second Circuit refused to consider, reflect that when the Put was created in March 2000 all Cox and Comcast knew was that AT&T would pay a total pot of consideration of $2,897,653,440 for the At Home stock held by Cox and Comcast and that this amount had been calculated using a $48 per share price. But no effective hedging and speculation could have been done at that time because, under the pricing formula in the Put, if At Home's stock price had continued to rise, the number of At Home shares sold by Cox

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exercise is the price fixed and, therefore, the extent of the profit opportunity defined." *Ownership Reports and Trading by Officers, Directors and Principal Security Holders,* Exchange Act Release No. 28869, 1991 WL 292000, [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,709, at n.148 (Feb. 8, 1991) ("SEC Release No. 28869"). Thus, "[b]y treating the exercise of the floating price derivative security as the 'acquisition' of the underlying security, the rules mitigate the incentives for insiders to abuse their informational advantage." *Id*.

and Comcast in exchange for the same $2.9 billion pot of consideration would have dropped dramatically. Hedging and speculation do not work when a party has no idea of the number of shares to be hedged.

Consider the following example which highlights the increased potential for speculative abuse as the 10-month waiting period came to an end:

> Assume that the 10-month waiting period has just passed and At Home's stock is trading at around $48 per share, but Cox/Comcast, as insiders, know that At Home will be shortly issuing news of adverse developments to be followed by an improving environment and a release of positive news. Cox/Comcast time their "exercise" after the release of bad news when the stock drops to $24. Cox/Comcast's At Home position would then be sold out at the $48 per share "fixed" price. Cox/Comcast can then immediately buy back At Home shares at the much lower price *before* the release of good news and a stock price increase.

Many other examples could be given.[4]

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[4] Indeed, as we argued to the Second Circuit, an opportunity for speculative abuse existed *both* on March 28, 2000, when the Put instrument was created, *and* on February 2, 2001, when the price and number of shares subject to the Put instrument became fixed for the first time. Given this marketplace reality, a hypothetical sale for § 16(b) purposes of the *maximum* number of shares first occurred when the instrument was created on March 28, 2000 based on a $48 price even though the Put instrument could not be exercised for 10 months. But an *actual* sale, and a separate § 16(b) event, would occur when the price and number of shares subject to the Put instrument are first established on February 2, 2001 by virtue of the market formula in the Put instrument and not, contrary to the Complaint, by virtue of an election by Cox/Comcast to "exercise" pursuant to a "fixed component." This "dual" approach, rejected by the Second Circuit below, offers maximum protection for curbing speculative abuse and precludes future insiders from crafting similar instruments in the hopes of scrupulously evading § 16(b) liability.

In short, the Second Circuit refused to adopt a consistent non-hindsight approach for assessing complex derivative instruments under § 16(b). If allowed to stand, the ruling below opens expandable loopholes and signals that courts have abdicated their responsibility to enforce a statute which perhaps has more relevance today than at any time since its passage more than 70 years ago.

B. Count Two

The Second Circuit's decision concerning count two raises an important issue of statutory construction applicable to the key definitions of both "purchase" and "sale" in the Exchange Act. Inexplicably, the Second Circuit bypassed clear statutory language in favor of crafting its own definition of "purchase." Then applying that definition, the Second Circuit dismissed count two of the Complaint.

At Home alleges that if, as Cox and Comcast contend, a § 16(b) sale occurred only on March 28, 2000 when Cox and Comcast entered into the "put" arrangement with AT&T, this "sale" matches with Comcast's *acquisition* of At Home warrants to purchase approximately 8.9 million additional shares of At Home common stock through its purchase of three cable companies between January and August 2000. App. at 59a. The driving issue here is whether Comcast's acquisition of cable companies that owned warrants of At Home stock constitutes a § 16(b) "purchase" of At Home securities. It does.

Section 3(a)(13) of the Exchange Act defines "purchase" to include "any contract to buy, purchase *or otherwise acquire*" a security. 15 U.S.C. § 78c(a)(13) (emphasis added). The Second Circuit declined to apply the plain language of the definition of "purchase" and instead created its own definition concluding "that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks

and opportunities independent of the risk and opportunities that inhere in the stock of the issuer." App. at 12a. It even created an exception to this judicially created definition stating that "a different analysis may control if an indirect sale or purchase is nothing but a tactic to evade section 16(b), as, for example, if an insider acquires a holding company that has no appreciable assets other than shares of the issuer, or that holds a certain proportion of its assets in the stock of the issuer." *Id*. This test improperly defers to the subjective intent of the parties to the transaction and requires factual findings that are nowhere to be found in the text of the Exchange Act.

For all practical purposes, the Second Circuit declined to treat the unquestioned "acquisition" of At Home securities by Comcast as a "purchase" under the Exchange Act—even though before the transaction Comcast did not own these At Home securities and, after it purchased the other cable companies, Comcast "acquired" the At Home securities. This falls squarely under the plain language of the Exchange Act's definition of "purchase" and is what the Complaint clearly alleges. App. at 59a.

The Second Circuit's approach to interpreting the definitions in the Exchange Act is at odds with the Court's prior rulings and the approach of other Circuits; it is precisely the kind of issue the Court has taken up in order to clarify definitions within the securities laws. *See Landreth Timber Co. v. Landreth*, 471 U.S. 681, 690 (1985) (holding that when an instrument falls plainly within the statutory definition of a security, "[t]here is no need . . . to look beyond the characteristics of the instrument to determine whether the Acts apply"); *Reves v. Ernst & Young*, 494 U.S. 56, 62-63 (1990) (providing test to define "any note"); *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946) (providing test to define "investment contract").

Consistent with the Court's directives, other Circuit courts have continued to interpret definitional terms in the Exchange Act and Securities Act of 1933 based on their plain meaning, and the Second Circuit's departure from that methodology with respect to "purchase" places it at odds with other Circuits.[5] *See*, *e.g.*, *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1007-08 (9th Cir. 2005) (interpreting "person" as used in 15 U.S.C. § 78bb(f)(5)(D) in line with the statute's "plain language" and refusing to adopt a definition that was "inconsistent with the statute's plain language"); *Bass v. Janney Montgomery Scott, Inc.*, 210 F.3d 577, 586 (6th Cir. 2000) (applying plain meaning to the term "warrant" as used in the Securities Act and the Exchange Act, noting that "[t]he Securities Acts define warrants as securities no matter what the context in which they change hands and put parties on notice that the securities laws will apply to an exchange of warrants," and stating that "[a]n analysis that departs from the plain language of the statutory definition in order to give effect to the apparent underlying intentions of the parties to a transaction is an inappropriate application of judicial authority and flies in the face of the fundamental purpose for which the federal securities laws were drafted"); *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1580 nn.22-23 (10th Cir. 1990) (finding that the phrases "'fractional undivided interest in oil, gas or other mineral rights'" and "'certificate of interest or participation in any profit-sharing agreement or in any oil, gas or other mineral royalty or lease'" as used in the definition of "security" in both the Securities Act and the Exchange Act were "unambiguous" and therefore "susceptible to plain meaning").

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[5] While this Court interpreted the plain language of the statute's definitional terms with respect to the definition of "any note" to restrict its breadth, it only did so after recognizing that notes "are used in a variety of settings, not all of which involve investments." *Reves*, 494 U.S. at 62.

The Second Circuit's decision departs from this "plain meaning" approach and because the vast predominance of § 16(b) cases are filed in the Second Circuit, it sows substantial confusion under the Exchange Act. In fact, the Second Circuit's newly announced definition of "purchase," in disregard of the plain statutory definition, creates a sizeable loophole in § 16(b) enforcement. Any person or company with inside information may now acquire the stock of the issuer without regard to § 16(b) as long as the purchase is in connection with the acquisition of another company which holds the issuer's stock. Should an insider escape liability as long as its primary purpose was to acquire the other company and not the stock of the issuer held by that company? What if the insider valued the stock as part of its purchase of the target company even though acquisition of the stock was not the only motivating factor in the purchase of the company which owned the stock?

Contrary to the Second Circuit's new test, § 16(b) liability attaches whatever the motivation given its clear statutory language and the Court's prior holdings. *See* 15 U.S.C. § 78p(b); *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 424 n.4 (1972).[6] It was not the Second Circuit's prerogative to disregard the plain language of the statute.

[6] The Second Circuit's judicially crafted definition of "purchase" creates an additional exception to § 16(b) for unorthodox transactions above and beyond that set forth by this Court in *Kern County*, which exempts transactions falling technically within the reach of § 16(b) if the insider (i) lacks access to inside information and (ii) has neither control nor voluntariness over the transaction at issue. *See Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 593-600 (1973). Here, Comcast unquestionably had both inside information of At Home at the time of the challenged transactions—the purchase of the other cable companies—and voluntarily engaged in each of them.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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July 27, 2006

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
August Term 2005

(Argued: October 17, 2005 Decided: April 28, 2006)

Docket No. 05-0115-cv

AT HOME CORPORATION,
PLAINTIFF-APPELLANT,
v.
COX COMMUNICATIONS, INC., COX @ HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,
DEFENDANTS-APPELLEES,

Before: JACOBS, CABRANES, and SACK, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Buchwald, J.) dismissing claims brought under section 16(b) of the Securities Exchange Act of 1934. Plaintiff claims that a section 16(b) sale occurs at exercise for a hybrid option containing both fixed and floating price components. In the alternative, plaintiff contends that if (in such a case) sale occurs when the option is granted, the sale should be matched with the insider's subsequent acquisition of third-party companies which in turn owned warrants to purchase the issuer's stock. We affirm.

JOSEPH S. ALLERHAND (Richard W. Slack, Etan Mark, on the brief), Weil, Gotshal & Manges LLP, New York, NY, for Plaintiff-Appellant At Home Corporation

MICHAEL D. HAYS (Michael D. Rothberg, Daniel D. Prichard, on the brief), Dow, Lohnes & Albertson, PLLC, Washington, DC, for Defendants-Appellees Cox Communications, Inc and Cox @ Home, Inc.

SHERON KORPUS, (James T. Cain, on the brief), White & Case, LLP, New York, NY, for Defendants-Appellees Comcast Corporation, Comcast Online Communication, Inc., Comcast PC Investments, Inc., and Brian L. Roberts.

DENNIS JACOBS, Circuit Judge:

This appeal raises two questions under section 16(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78p(b) (2005), which provides for disgorgement of short-swing profits earned by an insider who buys and sells the issuer's equity securities within six months. The questions concern the applicability of section 16(b) to [i] a hybrid transaction involving a fixed and floating price component; and [ii] a purchase of a company holding warrants in the issuer within six months of the granting of a put. The transaction that gives rise to these questions took place when American Telephone & Telegraph ("AT&T"), as holder of a large block of shares in At Home Corp., granted a put to two companies--Cox Communications and Comcast Online Communications--whose holdings in At Home were an impediment to AT&T's exercise of effective control over that company. The exercise price was the greater of $48 or the 30-day trading average of At Home shares for the 15 days before and 15 days after exercise of the put; the maximum number of shares was the number that could be bought at the exercise price for a specified (enormous) dollar amount. Within six months of the granting of the put, Comcast purchased three cable systems that held warrants for At Home stock (among other considerable assets).

In count one of the complaint, At Home as plaintiff seeks disgorgement on the theory that a section 16(b) sale occurred at exercise for these put options. The district court dismissed this claim, identifying the grant of the hybrid option as the relevant section 16(b) event, At Home Corp. v. Cox. Commc'ns, Inc., 340 F. Supp 2d 404, 410 (S.D.N.Y 2004), and we agree. In count two, At Home seeks disgorgement on the theory that an acquisition of a third-party company should be treated as a section 16(b) purchase when the acquisition target owned warrants to purchase stock of the issuer. The district court declined to match shares of different issuers to impose section 16(b) liability. Id. at 411. Although we disagree with the district court's reasoning with respect to this count, we conclude that in the context of this case there was no matching sale and purchase. We therefore affirm.

BACKGROUND

Because the district court dismissed the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), all facts are construed in At Home's favor. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

A

At Home Corporation ("At Home") was a provider of "always on" high-speed internet to home users. Cox and Comcast, which allegedly acted together as a "group," see 15 U.S.C. § 78m(d), collectively owned more than 17 percent of At Home's outstanding common stock. By June 1998, AT&T owned 35 percent of At Home's common stock. Although AT&T held the largest block of At Home stock, Cox and Comcast together could prevent AT&T from unilaterally controlling At Home's board of directors.

To consolidate its control of At Home, AT&T granted put options to Cox and Comcast.[1] A letter agreement entered March 28, 2000 ("Letter Agreement") set out the options' terms:

> AT&T grants to each of Cox and Comcast the right to put to AT&T . . . exercisable at any time . . . from January 1, 2001 through June 4, 2002, up to an aggregate number of shares of [At Home] stock . . . equal to the Maximum Number . . . [T]he "Maximum Number" with respect to Cox will be a number of [shares] having an aggregate purchase price under the Put equal to $1,397,500,800 and the "Maximum Number" with respect to Comcast will be a number of [shares] having an aggregate purchase price under the Put equal to $1,500,152,640. . . .
>
> The per share purchase price under the Put will be the greater of (1) $48 and (2) the average per share trading price of the [shares] on the Nasdaq . . . during the 30 consecutive trading day period beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of Put.

The Letter Agreement grants a "hybrid option," because the pricing formula has both fixed and floating components. The fixed component sets the exercise price at $48 per share if the options are executed while At Home is trading below $48 per share; if At Home shares trade consistently above $48 per share, the exercise price is calculated using the floating price mechanism. In either event, the total sale price is capped by the "maximum number": $1.4 billion for Cox and $1.5 billion for Comcast. (At Home contends, erron-

[1] A "put option" is the right to sell a security at a specified price. Magma Power Co. v. Dow Chem. Co., 136 F.3d 316, 321 n 2 (2d Cir. 1998).

eously, that the fixed aggregate transaction amount means that there was no real fixed-price component.[2])

Comcast and Cox exercised the put options on January 11, 2001. This opened the 30-day window during which At Home's share price would be tracked for comparison to the $48 dollar price in order to determine both the final per-share price and the number of shares to change hands. Because At Home shares traded well below the $48 per share guaranteed price ($7.72 on January 11, 2001 to $6.00 on February 2, 2001), the exercise price was calculated at the $48 fixed price.

At Home argues that, for the purposes of section 16(b), the sale date was the exercise date (January 11, 2001), in which case Cox and Comcast would each be liable for profits earned on any At Home shares purchased between July 11, 2000 and July 11, 2001. Cox and Comcast argue (and the district court agreed) that because the Letter Agreement option was exercised at the fixed price, the date of sale for the purposes of section 16(b) was the date that the option was granted.

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[2] At Home argues that "the only fixed component at issuance was not the number of shares or price per share, but the total consideration to be paid by the grantor of the option (AT&T)." Appellant's Br. at 27 (emphasis in original). As the district court noted, this argument is spurious. As with many hybrid options containing floating and fixed price components, the Letter Agreement options contained a possible fixed price ($48 per share) payable depending on the market price at the time of exercise. The prospect of a higher exercise price does not mean that there is no fixed-price component; the prospect of a higher exercise price is what makes the option a "hybrid" in the first place. The maximum number of shares is likewise fixed: Where the put specifies both the maximum total payment and the fixed price per share, the number of shares in the transaction is fixed by long division—the maximum compensation divided by $48 per share equals the maximum numbers of shares to be sold at the fixed-price.

B

If the section 16(b) sale occurred as of the granting of the Letter Agreement option, it is undisputed that At Home's short-swing insider trading claim fails as to Cox: Cox purchased no shares of At Home in the six months before or after the date on which the option was granted. As to Comcast, however, At Home asserts in the alternative a theory of liability that treats the grant of the option as a sale, and would match that sale with Comcast's purchase of three cable systems whose holdings included warrants to purchase At Home stock.

Between January and August 2000, Comcast acquired three cable systems (Prime Communications, Jones Intercable, and Garden State Cablevision) for approximately $10 billion. The acquired companies allegedly held warrants to purchase 8.9 million shares of At Home stock, and the acquisitions thus had the effect of placing those warrants in Comcast's hands At Home Corp. v. Cox Commc'ns., Inc., 340 F Supp. 2d 404, 411 (S.D.N.Y. 2004). At Home argues that these acquisitions satisfy the purchase requirement of section 16(b).

DISCUSSION

The district court dismissed both claims pursuant to Fed. R. Civ. P. 12(b)(6). At Home Corp v. Cox Communications, Inc., 340 F. Supp. 2d 404 (S.D.N Y 2004). In dismissing count one, the district court reasoned that the *grant* of a hybrid option--rather than its *exercise*--is the only relevant section 16(b) event if the option is eventually exercised pursuant to the fixed-price mechanism. In dismissing count two, the district court applied the "unorthodox transaction" rule of Kern County Land Co v. Occidental Petroleum Corp., 411 U.S. 582 (1973), and determined that in the absence of any showing of manipulative intent, a sale of shares in one company cannot be matched for section 16(b) purposes with

a purchase of shares in another company, regardless of the holdings of either company.

We review de novo. Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

I

Section 16(b) of the Securities Exchange Act of 1934 requires insiders to disgorge profits earned in short-swing trading.

> For the purpose of preventing the unfair use of information which may have been obtained by [an insider] by reason of his relationship to the issuer, any profit realized by him from any purchase, and sale, or any sale and purchase. of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such [insider] in entering into such transaction . . .

15 U.S.C. § 78p(b) (2005) (emphasis added). Section 16(b) operates mechanically, with no required showing of intent, see Steel Partners II, L.P. v Bell Indus., Inc., 315 F.3d 120, 123 (2d Cir 2002), but as applied to complex financial arrangements (such as hybrid options), the mechanism has wheels within wheels. When one transaction is a put option, there are two alternative potential dates of sale: the acquisition date and the date of execution.

In 1991, the SEC promulgated new rules to answer section 16(b) questions posed by options. As to options with fixed price components, the SEC is of the view that the greatest risk of short-swing profiteering arises at the point in time nearest the establishment of the option. See Ownership Reports and Trading By Officers, Directors and Principal Securities Holders, Exchange Act Rel. No. 28869 56 Fed. Reg. 7242, 7250, 7253 (Feb. 21, 1991), see also, At Home

v. Cox Commc'ns, Inc., 340 F. Supp. 2d 404, 410 n 10 (S.D.N.Y. 2004). The SEC's 1991 amendments to Rule 16b-6(a) account for that risk by providing that "the establishment of . . . a put equivalent position . . . shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act." 17 C.F.R. § 240.16b-6(a) (2005) (emphasis added). Correspondingly, under Rule 16b-6(b), "the disposition of underlying securities at a fixed price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) of the Act." 17 C.F.R § 240.16b-6(b) (emphasis added). Read together, the two rules treat the acquisition date of a put as the only sale date if the option is ultimately exercised according to a fixed price mechanism.

These rules decide this case. Comcast and Cox exercised their put options at the $48 fixed price. These options were "put equivalent positions" within the meaning of SEC rules.[3] The floating price mechanism did not affect the calculation of the exercise price.[4] Thus, the section 16(b) sale in this case occurred only with the acquisition of the letter agreement options, dated March 28, 2000. Cox, having purchased no

[3] The SEC rules define a "put equivalent position" as "a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option." 17 C.F.R. § 240.16a-1(h) (emphasis added). Thus, the term specifically covers put options such as those involved in this case. Additionally, the puts at issue here are within the definition because their value increased as the value of At Home shares decreased: with a locked-in sale price, the option holders realized profit as At Home declined in price.

[4] We need not consider the § 16(b) ramifications of an option exercised according to a floating price mechanism. Judges of the Southern District of New York have taken varying approaches to this question. Compare Lerner v. Millenco, L.P., 23 F.Supp. 2d 337 (S D N.Y. 1998) (treating acquisition of put option as only § 16(b) sale) with Schaffer v. CC Invs., LDC, 280 F.Supp. 2d 128 (S.D.N.Y. 2003) (treating floating-price exercise as second § 16(b) event).

shares of At Home within six months of this date, is therefore not liable under section 16(b).

II

At Home alleges in the alternative--against Comcast only--that (for the purposes of section 16(b)) Comcast purchased shares of At Home by acquiring three cable systems whose assets included warrants to purchase At Home stock. It is an issue of first impression in the federal courts whether an insider's acquisition of stock in the issuer *by acquisition of a third-party intermediary company* gives rise to section 16(b) liability for short-swing profits (when matched with a sale of the issuer's stock).

A

The district court treated indirect acquisition as a "borderline transaction" within the meaning of Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 594 (1973), and therefore analyzed whether such transactions serve as a "vehicle for the evil which Congress sought to prevent--the realization of short-swing profits based upon access to inside information." Id. This analysis was misplaced. Kern County presented a borderline case because--although Occidental owned more than 10 percent of Kern County shares, and sold and purchased Kern County shares within six months--Occidental was an atypical insider in two ways: (i) it lacked access to inside information and (ii) its shares were sold involuntarily. *Id*. at 596-598, 600. Section 16(b) liability was inappropriate because the Supreme Court saw "nothing . . . to indicate either the possibility of inside information being available to Occidental . . . or the potential for speculative abuse of such inside information." Id. at 599 (emphasis added). This Circuit has suggested that these factors--an involuntary transaction by an insider having no access to inside information--are prerequisites to use of the

Kern County analysis. See American Standard Co. v. Crane Co., 510 F.2d 1043, 1054-55 (2d Cir. 1974).

At Home presents a novel theory of insider purchasing; but novelty alone does not justify resort to Kern County's "borderline transaction" framework. Kern County controls when the insider is atypical as well as the transaction. Comcast, however, was a garden-variety insider. Kern County therefore does not resolve this case.

B

Section 16(b) speaks of matching transactions in the equity securities of one issuer, and disgorging "any profit realized . . . from any purchase and sale, or any sale and purchase, of any equity security of such issuer." 15 U.S.C. § 78p(b) (2005) (emphasis added). Use of the singular ("any equity security" and "such issuer") supports an inference that a transaction in the equity securities of one company cannot be matched with a transaction in the equity securities of another. That inference is reinforced by Congress's intent that the statute "be simple and arbitrary in its application." Whiting v. Dow Chem. Co., 523 F 2d 680, 687 (2d Cir 1975).

The Securities and Exchange Commission ("SEC"), as amicus curae, argues that the same result is compelled by contrasting [i] the "evils of insider trading" that concerned Congress, see Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972), with [ii] the risks that arise when the issuer's stock is acquired indirectly by merger with another company.[5] SEC Br. at 12-14. The SEC reminds us that Congress enacted section 16(b) out of concern for the "class of transactions in which the possibility of abuse was believed

[5] The SEC claims that this Court "owes controlling deference to the . . . interpretation of . . . Section 16(b) . . . provided in [the SEC's] amicus brief." SEC Br. at 18. Because we are persuaded by the SEC's argument, we need not decide whether the amicus brief would otherwise command deference.

to be intolerably great." Id. at 12 (quoting Kern, 411 U.S. at 592 (internal citations omitted)). The SEC (an agency uniquely experienced in confronting short-swing profiteering) convincingly argues that a typical change-of-control transaction does not present an intolerable risk of abuse

> An insider who seeks to profit from inside information typically will engage in a purchase or sale in the issuer's securities, and then engage in an opposite-way transaction when the information becomes public, and the securities' price is affected. A change in control, however, is typically motivated by a desire to acquire control of a company. It also involves complex negotiations, and many strategic corporate considerations, and often involves regulatory review and approval. While it is not beyond possibility that an acquiror would tailor a change in control transaction to obtain short-swing profits from insider trading, it is certainly not going to be a common scenario. Good faith change in control transactions are not ones "in which the possibility of abuse [is] intolerably great."

Id. at 13-14 (emphasis added; emendation in original)

No one seeking an insider's edge speculating in the shares of an issuer would pursue that advantage by acquiring other companies if no more than a small fraction of the purchase price could be (notionally) attributed to the shares of the issuer. It would be like speculating in tractors by buying a farm.

The acquisition of three operating cable systems for $10 billion entails great risk and high transaction costs. See Carol B. Swanson, The Turn in Takeovers: A Study in Public Appeasement and Unstoppable Capitalism, 30 Ga. L. Rev. 943, 954-55 (1996) (estimating transaction costs in leveraged buyout to reach "four percent of the company's purchase price and more than five percent of the market value at the

time of the offer"); Louis Lowenstein, Opinion, 2 Merger & Acquisitions L. Rep. 427, 430 (1989) (estimating transaction costs as four to five percent of acquisition price, regardless of the size of the deal); see also Robert Smiley, Tender Offers, Transaction Costs and the Theory of the Firm, 58 Rev. Econ. & Stat. 22, 29-30 (1976) (calculating median transaction costs at over thirteen percent of post-tender offer market value). As the district court observed, Comcast's maximum profit from the indirect purchase of At Home warrants would constitute less than five percent of the price Comcast paid for the cable companies. See At Home, 340 F.Supp.2d at 411 n.12.

We cannot generalize from the risk calculus of the particular transactions at issue on this appeal. We appreciate that indirect purchasers may on occasion seek to take advantage of inside information, and may succeed in doing so. However, "while there may be evils to be redressed arising out of [a] kind of corporate maneuvering, § 16(b) is simply not an antidote to all the ills that may plague the securities market." Heublein, Inc. v. Gen Cinema Corp., 722 F.2d 29, 31 (2d Cir. 1983). The various prohibitions on insider trading work together: The more a transaction is crafted to evade section 16(b), the stronger the case for holding an insider liable under section 10(b). Moreover, a different analysis may control if an indirect sale or purchase is nothing but a tactic to evade section 16(b), as, for example, if an insider acquires a holding company that has no appreciable assets other than shares of the issuer, or that holds a certain proportion of its assets in the stock of the issuer. However, we do not consider such pass-through transactions. We conclude that section 16(b) generally does not take account of transactions in which an insider's acquisition of an enterprise holding the issuer's stock entails appreciable risks and opportunities independent of the risks and opportunities that inhere in the stock of the issuer.

We therefore reject At Home's effort to treat Comcast's cable system acquisitions as section 16(b) purchases Since At Home has alleged no other purchase to match Comcast's March 28, 2000 sale of At Home stock, the claim against Comcast fails, and was properly dismissed by the district court.

CONCLUSION

We have considered the parties' remaining arguments and find each of them to be without merit. For the foregoing reasons, the judgment of the district court is affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Filed June 6, 2006]

AT HOME CORP.

v.

COX COMMUNICATIONS, INC.

05-0115-cv

ERRATA

PAGE	LINE	DELETE	INSERT
2710	29 (after existing list of attorneys, before the centered half-line, add the following in the same format)		BRIAN G. CARTWRIGHT, General Counsel of the Securities and Exchange Commission (Jacob H. Stillman, Solicitor, Eric Summergrad, Deputy Solicitor, Allan A. Capute, Special Counsel to the Solicitor), Washington, D.C., for Amicus Curiae Securities and Exchange Commission.
2713	7	Maximum Number [T]he "Maximum Number. . . ." with respect to Cox	Maximum Number. . . . [T]he "Maximum Number" with respect to Cox
2720	5	amicus curae	amicus curiae

Distribution:
X Judges Cabranes and Sack
X West Publishing Co.
X Clerk

SO ORDERED:
/s/ Dennis Jacobs
DENNIS JACOBS
Circuit Judge
Date: June 5, 2006

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed April 28, 2006]

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 28th Day of April, two thousand and six.

Before: Hon. Dennis Jacobs,
Hon. José A. Cabranes,
Hon. Robert D. Sack,
Circuit Judges

Docket No. 05-0115-cv

AT HOME CORPORATION,
PLAINTIFF-APPELLANT,

v.

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATION, INC., COMCAST PC INVESTMENTS, INC., BRIAN L. ROBERTS and DAVID M. WOODROW,
DEFENDANT-APPELLEES.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby is AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

by /s/ Arthur M. Heller
ARTHUR M. HELLER
Motions Staff Attorney

ISSUED AS MANDATE: 5/26/06

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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03 Civ. 8094 (NRB)

AT HOME CORPORATION,

Plaintiff,

against

COX COMMUNICATIONS, INC., COX @ HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS INC., BRIAN L. ROBERTS, DAVID M. WOODROW,

Defendants.

AMENDED MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD,
UNITED STATES DISTRICT JUDGE

Plaintiff At Home Corporation has brought this action against defendants Cox Communications, Inc., Cox@home, Inc. (collectively, "Cox"); Comcast Corporation, Comcast Online Communications, Inc., Comcast Pc Investments Inc. (collectively, "Comcast"); Brian L. Roberts; and David M. Woodrow, asserting two causes of action for insider "short swing" profits in violation of § 16(b) of the Securities Exchange Act of 1934 and a third cause of action for breach of fiduciary duty. Now pending are motions by defendants Comcast and Cox to dismiss the two § 16(b) causes of action. We heard oral argument on defendants' motions on June 16, 2004. For the reasons set forth below, defendants' motions are granted.

BACKGROUND

At Home was founded by cable companies to provide cable-based high-speed internet access to customers. According to the complaint, during the relevant period, defendants Cox and Comcast collectively owned more that ten percent of the outstanding shares of At Home Series A common stock and acted as a group, thereby qualifying as "insiders" subject to trading restrictions. The other controlling shareholder was Tele-Communications, Inc., which was acquired by AT&T on June 23, 1998.

The transactions giving rise to plaintiff's § 16(b) causes of action were, according to the complaint, part of an effort by AT&T to expand its control over At Home. Compl. ¶ 40. On March 28, 2000, AT&T, Cox and Comcast entered a letter agreement ("the Agreement") under which defendants acquired certain puts (rights to sell shares) ("the Puts"). Specifically, Cox acquired the right to sell At Home shares to AT&T for up to $1.4 billion, and Comcast acquired the same right up to $1.5 billion. Opp'n, Ex. B. Although the number of shares to be sold was not fixed, the Agreement specified a share price containing a fixed and a floating component. Id. Specifically, defendants acquired the right to sell their shares to AT&T for "the greater of (1) $48 and (2) the average per share trading price . . . during the 30 consecutive trading day period beginning 15 trading days immediately prior to . . . AT&T's receipt of the notice of exercise of the Put." Id.

Around the time when defendants reached the above agreement with AT&T, defendant Comcast acquired several cable companies by stock purchase: Garden State Cablevision, L.P. (January, 2000); Jones Intercable, Inc. (March, 2000); and Prime Communications-Potomac, LLC and Chicago, LLC (August, 2000). These companies collectively owned warrants to purchase approximately 8.9 million shares of At Home.

On January 11, 2001, defendants notified AT&T of their intention to exercise their Puts, in two nearly identical letters. Opp. Exs. C and D. Defendants stated that "[b]ased on current market conditions, [they had] assumed that the purchase price under the Put [would] be $48 per share." Id. At that time, At Home common stock shares were selling at $7.72. According to the complaint, because AT&T faced enormous tax liabilities if it purchased defendants' shares, the parties entered into a new agreement on May 18, 2001 whereby defendants canceled the Puts in exchange for 155.3 million shares of AT&T stock, at that time worth 3.43 billion. Compl. ¶ 56. As a result of this modified agreement, Comcast recorded a pre-tax gain of $296.3 million and Cox recorded pre-tax gain of $307.4 million. Id. at ¶ 57.

This action followed.

DISCUSSION

I. Legal Standard

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), we accept as true all material factual allegations in the complaint, Atlantic Mutual Ins. Co. v. Balfour Maclaine Int'l, Ltd., 968 F.2d 196, 198 (2d Cir. 1992), and may grant the motion only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996); see Conley v. Gibson, 355 U.S. 41, 48 (1957). At the same time, we are not required to accept any legal conclusions contained in the complaint. Papasan v. Allain, 478 U.S. 265, 286 (1986); Joint Council, etc. v. Delaware L. & W. R.R., 157 F.2d 417, 420 (2d Cir. 1946).

In addition to the facts set forth in the complaint, we may also consider documents attached thereto and incorporated by reference therein, Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d Cir. 1998), as well as matters of public record, Pani v. Empire Blue Cross

Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998), cert. denied, 525 U.S. 1103 (1999).

II. Section 16(b) of the Exchange Act

Section 16(b) of the Exchange Act[1] provides that "a beneficial owner of more than ten percent of any class of equity security must turn over any profits earned, regardless of intent, from a purchase and sale of the securities occurring within six months." Global Intellicom, Inc. v. Thomson Kernaghan & Co., 1999 WL 544708, *13 (S.D.N.Y. July 27, 1999). The purpose of the statute is to "prevent[ ] the unfair use of information" which such beneficial owners, as well as officers and directors, are presumed to possess "by reason of [their] relationship to the issuer." 15 U.S.C. § 78p(b) (emphasis added). Thus, 16(b) is not aimed at any benefits (such as plaintiff implies defendants derived) from an insider's market power.

Because § 16(b) is a strict liability penalty (applying regardless of whether the insider actually used its access to inside information), the Supreme Court has expressed a "reluctan[ce] to exceed a literal, "mechanical" application of the statutory text in determining who may be subject to liability, even though in some cases a broader view of statutory liability could work to eliminate an 'evil that Congress sought to correct through § 16(b).'" Gollust v. Mendell, 501 U.S. 115, 122 (1991) (quotation omitted).

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[1] Section 16(b) reads in pertinent part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner . . . any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner . . . in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months.

III. Plaintiff's Causes of Action

A. First Cause of Action

Plaintiff's first cause of action alleges that § 16(b) requires defendants to disgorge the profits they made by creating the Puts and then cancelling them.

At issue is the character of the Agreement under § 16(b). In 1991, the SEC amended its rules to provide that the acquisition of "derivative" securities, i.e., instruments that derive their value from the value of the underlying stock, falls within § 16(b). 17 C.F.R. § 240.16a-1(d). The securities acquired by defendants through the Agreement were a type of derivative: an option to sell At Home shares at some future date (also known as a "put").[2] Under SEC regulations, while the establishment of a put is a § 16(b) "sale," see 17 CFR § 240.16b-6, the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position shall be exempt from the operation of section 16(b) . . ." 17 C.F.R. § 240.16b-6(b) (emphasis added).

Sections § 240.16b-6 and 240.16b-6(b) conform to the purpose of 16(b) because they target the point in the transaction series when the threat of insider trading is greatest. Just as, under the traditional scenario, an insider who learns of an imminent dip in stock value might sell his shares and then repurchase them at a profit once the stock dips, that same insider might achieve the same results by purchasing fixed-price puts.[3] By contrast, an insider with the same information

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[2] A put derives its value inversely from the value of the underlying stock. That is, as the value of the stock declines, the value of the option to sell that stock at a pre-fixed price increases.

[3] As the Second Circuit explained in Magma Power Co. v. Dow Chemical Co., 136 F.3d 316, 322 (2d Cir. 1998), "[i]n essence, an insider who takes an option position is making a bet on the future movement of the price of the underlying securities; the odds in the insider's favor are foreshortened if the wager is backed by inside information."

who already possesses puts need not trade on the information because his sale price is already locked in and will not be affected by the imminent dip; for this reason, the exercise of a fixed-price option is a non-event under § 16(b).

The calculation is different for another common type of derivative: the "floating price" derivative, or option to buy or sell at a price keyed to the market price at the time of exercise. This type of option does not pose a risk of insider trading at the time of its creation because it does not lock in a price that may profitably diverge from the market price (i.e., once the inside information reaches the market). Instead, the greatest risk occurs when a holder exercises floating options. For example, if Company A, an insider of company B, holds options to buy shares of Company B at 95 percent of their market price and later learns that the price of B stock is about to briefly surge, A may exercise its right, and then promptly resell its shares just after the surge.

The SEC has responded to the different risks posed by floating-price derivatives by interpreting § 16(b) such that

> a right with a floating exercise price is not required to be reported and will not be deemed to be acquired or purchased, for Section 16 purposes, until the purchase price of the underlying securities becomes fixed or established, which commonly occurs at exercise. Thus, a right to purchase an equity security is deemed acquired as of the date the exercise or conversion price becomes fixed, and the acquisition, absent an exemption, would be matchable for Section 16(b) purposes with a disposition within six months of the fixing of the price.

Ownership Reports and Trading By Officers, Directors and Principal Security Holders, Exchange Act Release No. 28869 [1990-1991 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,709, at 81,265 (Feb. 8, 1991).

The question presented by the instant case, which has been addressed (in defendants' favor) by three courts of this district, see infra, but which has not yet been addressed by the Second Circuit, is how to apply § 16(b) to options containing both a fixed and a floating component ("hybrids"). Plaintiff's first cause of action alleges that § 16(b) requires defendants to disgorge the profits from their May 18, 2001 agreement to cancel their puts because this purchase-equivalent transaction occurred within six months of defendants' sale-equivalent decision on February 11, 2001 to exercise the Puts. Defendants move for dismissal of this cause of action on the ground that, even if all the facts alleged in the complaint were true, the sole proper 16(b) sale-equivalent event would still be the March 28, 2000 creation, not the exercise, of the Puts.[4] We agree.

As noted earlier, defendant's characterization of the Puts is supported by the three opinions of this Court that address the question of how to treat hybrid options under § 16(b).[5] In

[4] The following chart may clarify the sequence of events:

Date	Event
March 28, 2000	The Puts are created.
February 11, 2001	Defendants notify AT&T of their decision to exercise the Puts.
May 18, 2001	Defendants agree to cancel the Puts in exchange for AT&T stock.

[5] We are wholly unpersuaded by plaintiff's argument that, because the Agreement specified as the per share price "the greater of (1) $48 and (2) the average per share trading price . . . during the 30 consecutive trading day period beginning 15 trading days immediately prior to . . . [defendants'] exercise of the Put" (emphasis added), and the agreements at issue in the other cases use the term "or" to connect the fixed and floating price-components, these cases are thereby distinguishable. See Opp'n at 24-26. This linguistic distinction is an empty one; the phrase "the greater of X and Y," whether or not it is grammatically correct, is clearly meant to express the same thing as "the greater of X or Y," because there is no other logical interpretation.

Lerner v. Millenco, 23 F. Supp.2d 337 (S.D.N.Y. 1998), the interest consisted of certain debentures convertible into common stock under a hybrid pricing structure. Specifically, the debentures were convertible at the lesser of "(1) 80 percent of the average of the closing price of EA common stock as traded on the New York Stock Exchange on the five days immediately preceding the date on which the holder provided EA with notice of conversion; or (2) $4.00 per share." Id. at 339. Lerner argued that, even though defendants had exercised their options under the fixed price, the options more closely resembled floating options and therefore the date of their exercise should be deemed a § 16(b) event. The court rejected this argument, finding that the hybrid options at issue functioned more like fixed options because they could be acquired for the purpose of locking in a minimum profit at the time of creation. Accordingly, the court found that defendants' exercise of their options was not a § 16(b) event.

Judge Schwartz, in Levy v. Oz Master Fund, Ltd., No. 00-7148 (AGS), 2001 WL 767013 (S.D.N.Y. July 9, 2001), reached the same conclusion with respect to preferred stock which was convertible to common stock under a hybrid pricing structure. The court found that, regardless of whether the options were ultimately exercised under the floating rate or the fixed rate,[6] the creation of the options was the sole § 16(b) event. Id. at *8. As in Lerner, the Oz court viewed the ability to lock in a profit at the creation of the options as far more significant, and therefore worthy of § 16(b) treatment, than any presumed enhancement of profits when hybrid options are exercised at the floating rate.

Since Lerner and Oz, the SEC has provided guidance on the treatment of hybrid instruments in an amicus brief submitted in Levy v. Southbrook Intern. Investments, Ltd., 263

[6] In Oz, defendants had exercised their option under the floating rate.

F.3d 10 (2d Cir. 2001) (00-7630).[7] Although the SEC did not specify exactly how to apply § 16(b) to hybrids, the SEC did explain that

> [The defendant] acquired an indirect pecuniary interest in that minimum number of common shares at the time [the defendant] acquired the convertible preferred stock. However, [the defendant] would not acquire a pecuniary interest in any additional shares of common stock through the convertible preferred stock before its conversion, at which time the conversion price would fix to determine what – if any – additional shares of common would be obtained through the floating price component.

(Emphasis added.)

This characterization suggests that the proper way to treat hybrids under 16(b) is as two separate transactions. The first transaction, the creation of the interest, is equivalent to fixed price options, and is always a § 16(b) event. The second transaction is a theoretical modification of the fixed price, but the value of this modification is measured as the difference between the initial fixed price and the exercise price. Where the initial fixed price becomes the exercise price (because it is more advantageous than the floating price), the date of exercise has no § 16(b) significance.[8]

At least one other judge in this Court has read the SEC brief in this way. See Schaffer ex rel. Lasersight Inc. v. CC Investments, LDC, 280 F. Supp.2d 128, 139-140 (S.D.N.Y. 2003) ("[U]nder the SEC's reasoning, the acquisition (or disposition) of a hybrid instrument results in (1) an immediate

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[7] Although the brief clarified the SEC's position on hybrids, this issue was not ultimately the basis for the Second Circuit's holding.

[8] This conclusion is fully consistent with the holding of the primary case relied on by plaintiff, Levy v. Clearwater Fund IV, Ltd., No. 99-004 (SLR), 2000 WL 152128 (D. Del. Feb. 2, 2000), as in that case, unlike here, defendants exercised their options at the floating price, id. at *2.

acquisition (or disposition) of a derivative security with respect to the minimum number of shares of underlying common stock that can be acquired under the fixed rate component, and (2) a subsequent purchase (or sale) at the time of conversion of any additional shares acquired (or disposed of) at that time under the floating rate component.") (emphasis added).

This reading also comports with the language of 17 C.F.R. § 240.16b-6(b), which exempts from § 16(b) "the disposition of underlying securities at a fixed exercise price due to the exercise of a put equivalent position" (emphasis added), without requiring that the price be fully fixed from the moment the put is created.

In the instant case, it is undisputed that, at the time defendants exercised their options, the floating price was irrelevant because it was far below the fixed minimum of $48 per share. Plaintiff argues that we should nonetheless treat the interest in this case as a purely floating derivative because the initial Puts agreement, while it fixed a maximum overall price and a minimum price-per-share, never fixed the precise number of shares to be sold.[9] However, this characterization is misleading. The specified maximum overall price of $2.9

[9] During oral argument, plaintiff stressed, as further support for their position, that the structure of the Agreement was such that defendants could not have completed the SEC disclosure form, Form 4, which insiders are required to file for any purchase or sale of stock, because the Agreement did not specify an exact price-per-share (a required category of the Form 4). Tr. 3-5. However, as we pointed out at oral argument, any hybrid derivative would give rise to the same problem. Tr. 33. Moreover, as defendants observed, see id., this problem is not insurmountable. Since a Form 4 filed at the time a hybrid is created is required because of the danger that an insider might be locking in a minimum profit via the fixed-price-component, it is that component which is the relevant price-per-share and which therefore should be disclosed on the form. In this case, therefore, defendants could have filed an effective Form 4 specifying $48 as the price-per-share.

billion, when combined with the specified minimum per-share price of $48, dictated that defendants could sell, at most, 60.4 million shares. Thus the initial agreement did limit the number of shares which AT&T would be required to buy. Moreover, plaintiff has not offered any policy reason for treating hybrids differently depending on whether they specify a maximum number of shares or a maximum overall price, or for targeting the exercise of options under the fixed-price component.[10]

For these reasons, we find that neither defendants' January 11, 2001 decision to exercise their Puts nor the February 2, 2001 date on which the (by then irrelevant) floating price component became fixed qualifies as a 16(b) event. Thus, the only sale-equivalent event was the March 28, 2000 Agreement, which occurred more than six months before the only conceivable purchase-equivalent event: the May 18, 2001 cancellation of the Puts. As plaintiff's first cause of action fails to identify matching transactions occurring within six months of each other, defendants' motions to dismiss the first cause of action are granted.

B. Second Cause of Action

As an alternative to its first cause of action, plaintiff has pled that the creation of the Puts can be matched, under 16(b), with defendant Comcast's purchase of several cable companies that themselves possessed warrants to purchase At Home stock. As set forth supra, around the time when defendants entered the Agreement with AT&T, Comcast ac-

[10] During oral argument, we repeatedly asked plaintiff to articulate a scenario in which the floating component, though practically irrelevant at the time of exercise, created a risk of short-swing insider trading. Plaintiff was unable to do so. Tr. 34-35, 41-42, 61-63. Judge Schwartz asked the same question in Levy, and concluded that "from the perspective of Rule 16(b), the security with the hybrid conversion feature is no different from a security with a fixed price option when the market price is below the fixed conversion price." Levy, 2001 WL 767013, at *7.

quired, through stock purchases, three cable companies: Garden State Cablevision, L.P. (January, 2000); Jones Intercable, Inc. (March, 2000); and Prime Communications-Potomac, LLC and Chicago, LLC (August, 2000). These companies collectively owned warrants to purchase approximately 8.9 million shares of At Home. The second cause of action is only against Comcast, not Cox.

As used in § 16(b), "[t]he terms 'buy' and 'purchase' each include any contract to buy, purchase, or otherwise acquire" any equity security. 15 U.S.C. § 78c(a)(13). Whether this definition covers the situation in which Company A, an insider of Company B, buys Company C, and among the assets of Company C are warrants to purchase Company B shares, appears to be an issue of first impression.[11] We agree with defendants that, if anything, this absence of precedent favors them. It is unlikely that, until now, no insider has gained warrants to purchase stock in a company (in the manner described above) within six months of selling (or engaging in a sale-equivalent transaction involving) shares of the company.

"In deciding whether borderline transactions are within the reach of the statute, the courts have come to inquire whether the transaction may serve as a vehicle for the evil which Congress sought to prevent—the realization of short-swing profits based upon access to inside information." Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 594 (1973). We can conceive of situations where an insider could acquire one company simply (or mainly) to obtain its interests in the subject company, as when the

[11] Plaintiff obscures this dearth of authority by citing to cases in which an insider specifically and directly purchased warrants for the subject company from a third company. Magma Power Co. v. Dow Chemical Co., 136 F.3d 316, 322 (2d Cir. 1998); Morales v. Mapco, Inc., 541 F.2d 233, 236 (10th Cir. 1976), cert. denied sub nom. Ross v. Morales, 429 U.S. 1053 (1977). Such cases are totally inapposite to the facts at hand.

acquired company has few other assets or exists for the sole purpose of trading in shares of the subject company. However, plaintiff has failed to plead any facts giving rise to such a possibility here.

According to the complaint, Comcast's purchases yielded warrants to purchase approximately 8.9 million shares of At Home. It is undisputed that Comcast paid nearly $10 billion to acquire the cable companies, and that Comcast was previously a part owner of one company, a controlling shareholder of another, and a creditor of the third. Korpus Dec. Ex. C. It is also undisputed that, during the period in which Comcast inherited these warrants, At Home's share price was in the range of $13.31 to $43.44. Id. Ex. A.[12]

Given these undisputed facts, we can conceive of no set of further facts which would demonstrate that the transactions were of a type warranting § 16(b)'s presumption of abuse. Accordingly, Comcast's motion to dismiss plaintiff's second cause of action is granted.[13]

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[12] Given the figures involved, it is inconceivable that Comcast could have purchased these companies for their warrants. For present purposes, we will assume that the warrants were extremely valuable, e.g., were warrants to purchase shares for $1. These warrants would then have been worth approximately $27.38/share, as the average between the trading high and low during that period was $28.38. Their overall value would then have been $243.64 million, less than 3% of the price Comcast paid for the cable companies.

[13] Because we agree with defendants on the merits, we need not reach defendants' argument that the second cause of action is not timely. We note, however, that had we agreed with plaintiffs that defendants' acquisition of the cable companies was a § 16(b) event, the recently decided Second Circuit opinion Litzler v. CC Investments, L.D.C., 362 F.3d 203, 205 (2d Cir. 2004), which holds that the two-year statute of limitations is tolled whenever a defendant fails to comply with § 16(b) disclosure requirements, would seem to apply.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss plaintiff's first and second causes of action are granted. The parties are directed to appear for a conference in Courtroom 21A on September 9, 2004 at 11:30 a.m.

SO ORDERED.

DATED: New York, New York
August 17, 2004

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing have been mailed on this date to the following:

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Filed Jan. 4, 2005]

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03 CIVIL 8094 (NRB)

AT HOME CORP.,

Plaintiff,

-against-

COX COMMUNICATIONS INC., et al.,

Defendants.

AMENDED JUDGMENT

Defendants having moved this Court to dismiss the first and second causes of the action, and the Court, on August 12, 2004, having issued a Memorandum and Order dismissing the first two causes of action, the Court, on December 3, 2004, having issued its Order dismissing the third cause of action and directing the Clerk to enter judgment dismissing the action without prejudice and without costs, it is,

ORDER, ADJUDGED AND DECREED: That for the reasons stated in the Court's Memorandum and Order dtd. Aug. 12, 2004, the first two causes of action are dismissed, and for the reasons stated in the Court's Order of Dismissal, dated, Dec. 3, 2004, the third cause of action is dismissed without prejudice and without costs.

Dated: New York, New York
December 8, 2004

J. Michael McMahon
Clerk of Court

By: /s/ [Illegible]
Deputy Clerk

APPENDIX F

Section 3(a)(13) of the Securities Exchange Act of 1934
15 U.S.C. § 78c(a)(13)

(a) Definitions

When used in this chapter, unless the context otherwise requires--

(13) The terms "buy" and "purchase" each include any contract to buy, purchase or otherwise acquire. For security futures products, such term includes any contract, agreement, or transaction for future delivery.

Section 16(b) of the Securities Exchange Act of 1934
15 U.S.C. § 78p(b)

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not re-purchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of

competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

SEC Rule 16a-1(c)(6)
17 C.F.R. § 240.16a-1(c)(6)

Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(c) The term derivative securities shall mean any option, warrant, convertible security, stock appreciation right, or similar right with an exercise or conversion privilege at a price related to an equity security, or similar securities with a value derived from the value of an equity security, but shall not include:

(6) Rights with an exercise or conversion privilege at a price that is not fixed.

SEC Rule 16a-1(h)
17 C.F.R. § 240.16a-1(h)

Definition of Terms.

Terms defined in this rule shall apply solely to section 16 of the Act and the rules thereunder. These terms shall not be limited to section 16(a) of the Act but also shall apply to all other subsections under section 16 of the Act.

(h) The term put equivalent position shall mean a derivative security position that increases in value as the value of the underlying equity decreases, including, but not limited to, a long put option and a short call option position.

SEC Rule 16b-6(a)
17 C.F.R. § 240.16b-6(a)

Derivative securities.

(a) The establishment of or increase in a call equivalent position or liquidation of or decrease in a put equivalent position shall be deemed a purchase of the underlying security for purposes of section 16(b) of the Act, and the establishment of or increase in a put equivalent position or liquidation of or decrease in a call equivalent position shall be deemed a sale of the underlying securities for purposes of section 16(b) of the Act: Provided, however, that if the increase or decrease occurs as a result of the fixing of the exercise price of a right initially issued without a fixed price, where the date the price is fixed is not known in advance and is outside the control of the recipient, the increase or decrease shall be exempt from section 16(b) of the Act with respect to any offsetting transaction within the six months prior to the date the price is fixed.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

[Filed Sept. 24, 2002]

02-1486

AT HOME CORPORATION,

Plaintiff,

- against -

COX COMMUNICATIONS, INC., COX@HOME, INC., COMCAST CORPORATION, COMCAST ONLINE COMMUNICATIONS, INC., COMCAST PC INVESTMENTS INC., BRIAN L. ROBERTS AND DAVID M. WOODROW,

Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff At Home Corporation ("At Home" or the "Company"), by the Official Committee of Unsecured Bondholders of At Home Corporation (the "Bondholders Committee"), and its attorneys, Weil, Gotshal & Manges LLP and The Bayard Firm, for its complaint against defendants Cox Communications, Inc., Cox@Home, Inc. (collectively, "Cox"), Comcast Corporation, Comcast Online Communications, Inc., Comcast PC Investments Inc. (collectively, "Comcast"), Brian L. Roberts and David M. Woodrow (all defendants collectively referred to as "defendants") alleges, upon knowledge as to itself and upon information and belief as to defendants, as follows:

NATURE OF THE ACTION

1. This action arises from (a) the realization of at least $600 million of illegal "short swing" profits by defendants

Cox and Comcast in violation of Section 16(b) of the Securities Exchange Act of 1934 (the "Exchange Act") from transactions in the common stock of now bankrupt At Home, and (b) related breaches of fiduciary duties owed to At Home that paved the way for these massive insider profits.

2. Acting at all times in a closely coordinated fashion as a "group" under the federal securities laws, Cox and Comcast together beneficially owned more than 10% of At Home's common stock, thus qualifying as a statutory "insider" under Section 16(b). Together Cox and Comcast negotiated for the valuable right to "put" some or all of their At Home shares (depending on the market price) to AT&T; together they gave notice to AT&T that they were selling their At Home shares pursuant to the "put" (thus fixing the number of shares subject to the "puts" and the price per share that AT&T would pay); and together they cancelled this "put"—thus retaining their At Home Shares—in exchange for a payment from AT&T of approximately 53.4 billion worth of AT&T common stock. As a result of these insider transactions, Cox and Comcast have admitted publicly to at least $600 million of profits, and their unlawful profits under Section 16(b) may be far greater. Comcast also has admitted in Bankruptcy Court that Section 16(b) imposes liability on corporate insiders (like Comcast and Cox), who profit from the short swing purchase and sale of securities, without regard to the intent of the insider. Cox and Comcast must now repay their "short swing" profits to At Home's estate.

3. As explained below, Cox and Comcast reaped their tremendous windfall as a direct result of egregious breaches of their fiduciary duties owed to At Home as controlling shareholders. The three controlling shareholders of At Home —AT&T Corporation ("AT&T"), Cox and Comcast—each used their insider positions to force the Company to enter into a series of convoluted and interconnected agreements in March 2000 (the "March 2000 Transactions" or "Trans-

actions") that benefited the controlling shareholders, but left At Home critically weakened.

4. The March 2000 Transactions transferred complete control to AT&T over At Home's Board of Directors, and allowed Cox and Comcast to sever their relationship with At Home both as shareholders and major customers on very favorable terms. First, the March 2000 Transactions afforded Cox and Comcast an enormously lucrative financial exit from their At Home investment in the form of their $3 billion "put" to AT&T of their At Home common stock. Second, the March 2000 Transactions allowed Cox and Comcast to escape critical contractual ties that required Cox and Comcast to offer their cable customers high speed internet access exclusively on At Home's system. As part of the March 2000 Transaction, Cox and Comcast also demanded that if they decided to escape from their contractual commitments with At Home, At Home would assist Cox and Comcast in moving their cable subscribers to a competing high speed internet access service. Absent these transition services, Cox and Comcast could not terminate their relationships with At Home without the risk of tremendous service disruptions and substantial losses of customers. By providing Cox and Comcast with not only the ability to escape their contractual agreements with At Home, but also to obtain At Home's help in transferring their customers to a competitor, At Home gave away critical leverage with Cox and Comcast to keep them as customers and to have them pay as high a price as this leverage would require that they pay for the services provided by At Home.

5. In short, At Home's controlling shareholders obtained enormous benefits from the March 2000 Transactions: AT&T acquired complete control over At Home's Board of Directors; Cox and Comcast received the right at a future date (ultimately worth billions of dollars) to sell some or all of their At Home stock to AT&T, as well as an exit strategy

from their contractual ties to At Home. The only "loser" was At Home itself which received unfair and inadequate consideration for participating in the Transactions. The Transactions left At Home in a weakened bargaining position with Cox and Comcast, two of their largest cable company customers, concerning the future use by Cox and Comcast subsidiaries of the At Home system. Indeed, on June 18, 2001, within days of realizing their enormous "short-swing" profits from At Home stock, Cox and Comcast notified At Home of their decision to cancel their agreement to use At Home's high-speed Internet service on an exclusive basis for their cable customers—a decision only made possible by the March 2000 Transactions.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action and the claims asserted herein pursuant to § 27 of the Exchange Act, 15 U.S.C. § 78aa, as this action arises under the federal securities laws, and pursuant to 28 U.S.C. §§ 1331 and 1367.

7. Venue lies in the United States District Court for the District of Delaware pursuant to § 27 of the Exchange Act, 15 U.S.C. § 78 aa, and 28 U.S.C. § 1391(b)-(c).

8. Defendants Brian Roberts and David Woodrow served as directors of At Home, a Delaware corporation, and are therefore subject to suit in Delaware for alleged breaches of the fiduciary duties they owed to At Home. 10 Del. C. § 3114.

PARTIES

9. Plaintiff At Home is a corporation organized and existing under the laws of the State of Delaware, and at all relevant times herein had its principal place of business in Redwood City, California. At Home was formed to develop and provide high-speed Internet access to cable companies. At Home filed for bankruptcy under Chapter 11 of the U.S. Bankruptcy Code on September 28, 2001.

10. Pursuant to the May 13, 2002 Order of the United States Bankruptcy Court for the Northern District of California, the Bondholders Committee has been appointed provisional representative of At Home for the express purpose of asserting claims belonging to At Home (including the claims alleged herein) against Cox, Comcast and others.

11. Defendant Cox Communications, Inc. ("CCI") is a company organized and existing under the laws of the State of Delaware. CCI's principal place of business is located at 1400 Lake Hearn Drive, N.E., Atlanta, Georgia. CCI is engaged in the business of communications, cable television and telecommunications technology. As of March 28, 2000, CCI claimed beneficial ownership of 29,114,600 shares of At Home Series A common stock, representing 8.3% of the outstanding shares of At Home Series A common stock (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, CCI beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Comcast entities.

12. Defendant Cox@Home, Inc., f/k/a Cox Teleport Providence, Inc., ("Cox@Home"), a wholly owned subsidiary of CCI, is organized and existing under the laws of the State of Delaware with its principal place of business also located at 1400 Lake Hearn Drive, N.E., Atlanta, Georgia. As of March 28, 2000, Cox@Home claimed legal and beneficial ownership of the 29,114,600 shares of At Home Series A common stock, discussed above in paragraph 11 (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, Cox@Home beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Comcast entities.

13. Defendant Comcast Corporation is a corporation organized under the laws of the State of Pennsylvania, and has its principal place of business at 1500 Market Street, Philadelphia, Pennsylvania. Comcast Corporation is engaged principally in the development, operation and management of telecommunications and cable television including in the State of Delaware. As of March 28, 2000, Comcast Corporation claimed beneficial ownership of 31,118,924 shares of At Home Series A common stock, representing 8.8% of the outstanding shares of At Home Series A common stock (Comcast Corporation claimed ownership of 31,253,180 shares of At Home Series A common stock, representing 9.8% of the outstanding shares of that series as of January 11, 2001). As alleged below, Comcast Corporation beneficially owned in excess of 17% of the At Home's outstanding Series A common stock because it was part of a group which at least included At Home shares owned by Cox entities.

14. Defendant Comcast Online Communications, Inc. ("Comcast Online") is a wholly owned subsidiary of Comcast Corporation and is a company organized and existing under the laws of the State of Delaware. Comcast Online's principal place of business is located at 1500 Market Street, Philadelphia, Pennsylvania. As of March 28, 2000, Comcast Online owned 100% of Comcast PC Investments Inc. and claimed beneficial ownership of 29,114,600 shares of At Home Series A common stock, representing 83% of the outstanding shares of At Home Series A common stock (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, Comcast Online beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Cox entities.

15. Defendant Comcast PC Investments Inc. ("Comcast PC") is a wholly owned subsidiary of Comcast Online and an

indirect wholly-owned subsidiary of Comcast Corporation, and is a company organized and existing under the laws of the State of Delaware. Comcast PC's principal place of business is located at 1201 North Market Street, Wilmington, Delaware. As of March 28, 2000, Comcast PC had legal and beneficial ownership of 29,114,600 shares of At Home Series A common stock, representing 8.3% of the outstanding shares of At Home Series A common stock (those same shares representing 9.2% of the Series A common stock as of January 11, 2001). As alleged below, Comcast PC beneficially owned in excess of 17% of the outstanding shares of At Home Series A common stock because it was part of a group which at least included At Home shares owned by Cox entities.

16. Defendant Brian L. Roberts ("Roberts") is and at all relevant times herein was President and a director of Comcast Corporation. From August 1996 through August 28, 2000, Roberts was Comcast's designee on the At Home Board of Directors (the "At Home Board" or the "Board") and, as an At Home director, owed fiduciary duties to At Home.

17. Defendant David M. Woodrow was Executive Vice President of Business Development with Cox Communications Inc. at all relevant times alleged herein. From August 1996 through August 28, 2000, Woodrow was Cox's designee on the At Home Board and, as an At Home director, owed fiduciary duties to At Home.

FACTUAL ALLEGATIONS

A. Formation of At Home and the Master Distribution Agreements

18. Tele-Communications, Inc. ("TCI") and others incorporated At Home in Delaware in March 1995. At Home was founded on the premise that cable infrastructure could provide the fastest, most cost-effective delivery mechanism for Internet services. At Home's cable media service not only

was supposed to provide data transmission over 100 times faster than a telephonic dial-up modem but the system was "always on," providing a customer with instantaneous access to the internet and eliminating the time consuming dial-up procedure required by a telephone connection.

19. At Home's controlling shareholders, TCI, Cox and Comcast, invested in At Home for the purpose of developing this high-speed Internet service with debt that would appear on At Home's balance sheet, but not on the controlling cable companies' balance sheets. The controlling cable companies raised capital to develop cable modem technology through the sale of At Home stock and bonds to the public, but they retained control over At Home's Board.

20. At Home provided high-speed Internet access to the cable companies' customers pursuant to Master Distribution Agreements ("MDAs"). The original MDAs were entered into in June 1996 by At Home with Cox, Comcast and TCI. Under the MDAs, At Home received a share of subscription revenues paid by the cable company subscribers to the cable companies for high speed Internet access provided by At Home. At Home generally received 35% of the fees paid by the subscribers to the cable companies in the United States. This split in revenue, which was highly unfavorable to At Home, was dictated by the controlling cable companies, including defendants Cox and Comcast.

21. The MDAs were unfair and disadvantageous to At Home for numerous reasons. The MDAs allowed Cox, Comcast and the other cable companies—and not At Home—to control the customer relationship and the flow of revenue from the customer. For example, if the cable companies offered any discounts or promotions, At Home lost its share of revenue that would have been collected. Thus, if Cox or Comcast offered a new subscriber three months free high speed Internet access on the At Home system in order to induce that customer to purchase other cable services, At

Home literally received no revenue from that customer for three months even though it had to absorb the capital cost of adding the customer to the system. Moreover, At Home could not raise prices to consumers even though At Home's product was underpriced in the marketplace. Pricing decisions were controlled by Cox, Comcast and the other cable companies who controlled At Home.

22. In addition, as noted above, the revenue split of 65% to the cable companies and 35% to At Home was uneconomical and unfair to At Home. After discounts are factored in, At Home typically received about $10-$15 per month per subscriber under the unfair MDAs. At this rate, At Home's cost to build out its system per subscriber exceeded its revenue per cable company subscriber. Given the backwards economics imposed on At Home by the controlling cable companies pursuant to the MDAs, At Home experienced a deteriorating financial condition even as it successfully added subscribers from approximately 26,000 in 1997 to approximately 4 million when it filed for bankruptcy in September of 2001.

23. Simply put, the one-sided MDAs ensured that At Home bore the brunt of building out its high speed Internet access system while Cox, Comcast and the other cable companies reaped the rewards.

B. Cox's and Comcast's Investment In At Home

24. Cox and Comcast acquired identical equity stakes in At Home on the same day for the exact same price.

25. On June 4, 1996, Comcast PC and Cox@Home entered into a letter agreement and term sheet with At Home whereby each would acquire 727,865 shares of At Home preferred stock for $10 per share (for a total cost of $7,278,650). The purchases contemplated by the letter agreement took place on August 1, 1996, when those same Cox and Comcast subsidiaries jointly entered into a Stock

Purchase and Exchange Agreement with At Home and the other At Home equity holders, TCI and Kleiner, Perkins, Caufield and Byers VII Associates ("KPCB") and certain of their affiliates. Pursuant to that purchase agreement, Cox purchased 727,865 shares of At Home Series AX preferred stock and Comcast purchased 727,865 shares of At Home Series AM preferred stock. Cox's and Comcast's preferred stock was convertible into At Home Series A common stock ("At Home common stock").

26. In connection with their acquisition of At Home preferred stock, Cox and Comcast entered into the MDAs (discussed above) and a stockholders agreement with TCI, KPCB and certain of their affiliates.

27. By December 1996, both Cox and Comcast began offering At Home's high speed Internet access to service some of their residential customers.

C. At Home's IPO

28. In July of 1997, At Home completed its initial public offering ("IPO"). At Home issued 10,350,000 shares of At Home common stock to the public at $10.50 per share. At Home received net proceeds of approximately $99.8 million.

29. At the time of the IPO, all of Cox's and Comcast's preferred stock was converted into At Home common stock on a 20 for 1 basis. As a result of the IPO, Cox became the beneficial owner of 14,557,300 shares of At Home common stock, representing 16.46% of the outstanding At Home common stock. Comcast also became the beneficial owner of 14,557,300 shares of the outstanding At Home common stock. Cox and Comcast's ownership percentage was subsequently diluted somewhat, to the levels alleged in paragraphs 11-15, by, inter alia, the issuance of stock in connection with the Company's acquisitions, such as the acquisition of Excite, Inc.

30. In addition to the publicly traded At Home common stock (Series A); the Company also issued Series B common stock, which carried 10 votes per share. TCI owned all of the Series B common stock and thus, after the IPO, it controlled in excess of 70% of the voting power of At Home stock.

31. Both before and after the IPO, the Company's controlling stockholders were TCI, Cox and Comcast, all of which were parties to stockholders agreements that provided for this joint control. At the same time as the IPO, on or about July 16, 1997, At Home, Cox, Comcast, TCI and KPCB entered into an Amended and Restated Stockholders' Agreement (the "Stockholders' Agreement").

D. The Stockholders Agreement

32. Although Cox and Comcast had always acted jointly in purchasing and holding their At Home equity, the Stockholders' Agreement contractually joined Cox and Comcast into a stockholder group with each other and with other stockholder signatories, including TCI. The Agreement controlled how Cox, Comcast and the other signatories would acquire, hold, vote and dispose of their shares of At Home common stock.

33. For example, the Stockholders' Agreement contains an agreement between Cox, Comcast and the other signatories requiring them to vote all their At Home common stock in favor of any action required by the Stockholders' Agreement, including the election of At Home's Chief Executive Officer to the At Home board of directors. Cox and Comcast agreed with TCI that as long as Cox and Comcast each had 5,000,000 shares of At Home common stock (2,500,000 before a June 1999 stock split), they each had the right to select one Series B director to At Home's Board. TCI had the right to elect 3 of the other 5 Series B directors. At that time, all actions by the Company's Board had to be approved by a majority of the Series B directors. Thus, TCI, Cox and Comcast controlled the At Home Board.

34. Pursuant to the Stockholders' Agreement, from 1996 through August 28, 2000 (when they simultaneously resigned from the Board), Comcast appointed Brian L. Roberts (the President of Comcast Corporation) and Cox appointed David M. Woodrow (a Senior Vice President of CCI) to the Board as Series B directors.

35. Cox and Comcast also agreed to certain restrictions concerning their sales or other dispositions of At Home common stock. The Stockholders' Agreement prohibited the transfer of At Home securities, unless expressly permitted by the terms of the Stockholders' Agreement. Additionally, Cox and Comcast agreed to rights of "first offer" with respect to dispositions of At Home securities—that is, both Cox and Comcast were permitted to sell their At Home common stock in the public market only after they first offered it to each other and to the other cable companies that were parties to the Stockholders' Agreement. Cox and Comcast also had a pre-emptive right to acquire At Home common stock to maintain their proportional ownership for all transactions involving any new issuance of common stock by At Home.

36. Cox and Comcast also agreed with each other and with the other parties to the Stockholders' Agreement to what are commonly known as "Tag-Along" and "Drag-Along" rights in connection with certain transactions involving At Home common stock. The "Tag-Along" right gave Cox and Comcast the right to participate if there was a proposed sale of a control block of At Home shares by TCI (subsequently AT&T). The "Drag-Along" could be used to require Cox or Comcast to sell a pro rata portion of their At Home securities to a third party if AT&T and any two other parties to the Stockholders' Agreement proposed a certain type of control block sale to that third party.

E. AT&T Acquires TCI and Gives Cox and Comcast "Blocking" Power Over Board Actions

37. On June 23, 1998, AT&T signed an agreement to acquire TCI and that transaction was completed later that year. As a result of its acquisition of TCI, AT&T also acquired and succeeded to TCI's equity interest in At Home.

38. Cox and Comcast had the right to terminate their obligation, under the MDAs, to have At Home be the only provider of high speed internet access if, by June 4, 1999, AT&T and its affiliates had not brought to At Home a certain number of high speed internet customers. (This "Exclusivity Obligation" required Cox and Comcast to offer its cable customers high speed Internet access exclusively through the At Home access system pursuant to the MDAs.)

39. AT&T failed to meet this requirement. To induce one or both of Cox and/or Comcast not to terminate the Exclusivity Obligation, AT&T agreed to amend At Home's Certificate of Incorporation to provide that any board action required the vote of 4 of the 5 Series B directors. As two of the five Series B directors were appointed by Cox and Comcast, the Cox/Comcast directors, voting together, had the ability to block any proposed Board action, including action sought by AT&T which, at that time, controlled over 70% of the voting power of At Home's shareholders. Acting together, AT&T, Cox and Comcast had full control of At Home's Board.

40. Apparently, AT&T's inability to exercise sole, complete control over the At Home Board led AT&T, Cox and Comcast in March 2000 to enter into a series of convoluted agreements which transferred complete control over the At Home Board to AT&T and provided, at the same time, a lucrative "exit strategy" for Cox and Comcast from their At Home investment and contractual arrangements.

F. The March 2000 Transactions

41. On March 28, 2000, AT&T, Cox and Comcast, through their domination of At Home and their representatives on the At Home Board, caused the Company to enter into a series of interconnected and intricate agreements that greatly benefited each of the controlling shareholders at the expense of At Home. Pursuant to the March 2000 Transactions, (a) AT&T gained complete control of At Home's Board (and did not relinquish that control until well after the filing of At Home's bankruptcy proceeding); (b) Cox and Comcast (acting together and procuring the exact same deal) gained, among other things, the ability to "put" their At Home shares to AT&T which ultimately allowed them to realize more than $3 billion, and certain rights to break their contractual arrangements to use At Home's high speed Internet access service (and to do so with help from At Home); and (c) the controlling shareholders forced At Home to perpetuate the uneconomical MDAs that gave AT&T, Cox and Comcast an unfair split of the revenue generated from customers of the At Home service (the same contracts that the Bankruptcy Court later found to be uneconomical in upholding At Home's "rejection" of the contracts).

42. In essence, Cox and Comcast jointly determined that if they were to cede control over At Home's Board of Directors to AT&T, then they did not want to be bound to an At Home controlled by AT&T—their arch rival in the cable business. In order for AT&T to take complete control of At Home and for Cox and Comcast to reap hundreds of millions in profits, AT&T, Cox and Comcast caused At Home to give up critical leverage with Cox and Comcast which allowed them to revoke their Exclusivity Obligations, terminate their MDAs and even to obtain certain assistance from At Home in transitioning customers off the At Home network when Cox and Comcast terminated the MDAs.

43. Specifically, the March 2000 Transactions entered into on March 28, 2000 encompassed a number of interrelated agreements, including: (1) a "covering" agreement which referenced and attached various term sheets; (ii) "put" rights granted by AT&T to Cox and Comcast (the "Puts"), and a joint agreement by Cox and Comcast to waive most (but not all) of their rights under the Stockholders' Agreement; (iii) a new MDA between AT&T and At Home that perpetuated the same unfair economics of the previous MDA; (iv) an agreement to seek to obtain stockholder approval to amend At Home's Certificate of Incorporation to eliminate all supermajority and unanimous voting requirements and to give AT&T complete control over At Home's Board; and (v) a new MDA between Cox and Comcast and At Home (with the same uneconomical terms as the new MDA with AT&T) which gave Cox and Comcast warrants to purchase in excess of 44 million shares of At Home common stock. The new MDA referred to Cox and Comcast as a single entity "Cox/ Comcast" throughout the agreement and provided both Cox and Comcast with essentially identical rights and obligations.

44. The $2.9 Billion "Put": Pursuant to the terms of the Puts, AT&T granted Cox and Comcast the right to sell to AT&T their At Home common stock for up to $1,397,500,800 (in the case of Cox) and $1,500,152,640 (in the case of Comcast)—a total of nearly $2.9 billion. But this was no run of the mill "put." Although the total amount to be paid by AT&T was set, two critical components of any put transaction remained completely up in the air: (1) the price per share and (2) the number of shares subject to the put.

45. Pursuant to the Puts, at any time from January 1, 2001 through June 4, 2002, Cox and Comcast could elect to exchange At Home shares for cash (or AT&T stock) at a per share sale price equal to the higher of (1) $48 per share or (2) the average per share trading price of At Home common stock during the thirty (30) consecutive trading day period

beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of notice of the exercise of the Puts. If the per share price was $48 per share, then the total consideration AT&T had agreed to pay would result in Cox and Comcast effectively selling all of the At Home common stock they owned ($2.897 billion ÷ $48 per share = 60,367,780 shares, which slightly exceeded the total shares which Cox and Comcast reported owning as of March 28, 2000). But, if the per share price exceeded $48 per share as a result of a continued rise in the price of At Home common stock, Cox and Comcast would receive the same payment from AT&T ($2.9 billion) and would also retain some number of At Home common stock, thus increasing the overall value or consideration of the transaction. For example, if the per share price doubled from $48 to $96 per share, a not uncommon phenomenon in the heady days of the Internet stock boom, Cox and Comcast would have received the $2.9 billion from AT&T for half of their At Home shares ($2.897 billion ÷ $96 per share = 30,183,890 shares), and would have retained in excess of 30 million shares worth an additional $2.9 billion. Thus, while the aggregate value of the At Home stock AT&T would be required to purchase was $2.9 billion, the total consideration to be realized by Cox and Comcast would easily exceed $2.9 billion if the price per share rose above $48 per share.

46. The Stockholders' Agreement: As part of the March 2000 Transactions, Cox and Comcast jointly agreed to waive most (but not all) of their rights under the Stockholders' Agreement. Cox and Comcast gave up their right to cause AT&T to vote its shares in favor of the election of a Cox designee and a Comcast designee as Series B members of the At Home Board. The March 2000 Transactions did not however, cancel or terminate the Stockholders' Agreement, and all the parties to the Transactions agreed to vote all their shares of voting stock in favor of the amendment to At Home's Certificate of Incorporation. Subsequent to the March

2000 Transactions, Cox and Comcast remained as parties to the Stockholders' Agreement and retained valuable rights under that Agreement including their "Tag-Along" rights, in the event of a sale of At Home.

47. The March 2000 Transactions effectively destroyed any long-term value of At Home by permitting Cox and Comcast, who together accounted for a substantial portion of the cable customers using At Home's high speed Internet access service, to escape their Exclusivity Obligations with At Home while providing Cox and Comcast with certain rights which would make their transition off the At Home system easier. Indeed, as part of the March 2000 Transactions, At Home agreed to enter into a "Transition and Service Level Plan" with Cox and Comcast which would provide for an "exit plan" for Cox and Comcast to unwind their relationship with At Home in the event they terminated the MDA. As part of a Cox and Comcast exit plan, At Home agreed to sell, at bargain-basement prices, certain critical hardware and proprietary software to Cox and Comcast which was necessary for Cox and Comcast to provide high speed Internet access to their customers.

48. In addition, as part of the March 2000 transactions, AT&T, Cox and Comcast, caused At Home to allow AT&T to exchange its Series A common stock (which had one vote per share) for Series B common stock (which had 10 votes per share). As a result, AT&T was permitted to obtain 450 million more votes, increasing its voting power over At Home's voting shares from approximately 55% to over 70%, without paying adequate or fair consideration to At Home.

49. Although certain of the March 2000 Transactions were purportedly subject to the effectiveness of the amendment of the At Home Certificate of Incorporation, which would include shareholder approval, such approval was a mere formality since AT&T, Cox and Comcast, who, at that time, together controlled more than 63% of At Home's voting

stock, had jointly agreed to vote their stock to approve the March 2000 Transactions.

50. The March 2000 Transactions were not conditioned on approval by a majority of the public shareholders. Nor were the Transactions conditioned on the negotiation and approval of a properly functioning independent special committee of directors.

G. Comcast Obtains Additional At Home Securities

51. In January, March and August of 2000 (separate and apart from the March 2000 Transactions and the At Home warrants obtained therein), Comcast acquired warrants to purchase approximately 8.9 million additional shares of At Home common stock through its acquisition of the cable systems of Prime Communications-Potomac, LLC, Prime Communications-Chicago LLC. (on or about August 1, 2000); Jones Intercable, Inc. (on or about March 2, 2000) and Garden State Cablevision L.P (on or about January 18, 2000). (These cable companies had previously acquired warrants for At Home common stock.)

H. Cox and Comcast Jointly Fix the Price for the Puts and the Number of At Home Shares Subject to the Puts

52. The Puts held by Cox and Comcast first became capable of having the critical terms of the Puts fixed on January 1, 2001. Ten days later—on January 11, 2001—Cox and Comcast each sent a written letter, in substantially the same form, notifying AT&T that they were selling their At Home shares to AT&T pursuant to the Puts. Specifically, CCI notified AT&T of its election to sell all the At Home common stock, owned directly or indirectly by it or Cox@Home, to AT&T. Comcast Corporation notified AT&T of its election to sell 31,253,180 shares of At Home common stock (which was all of the shares it admitted owning) to AT&T. Cox and Comcast both demanded that consideration be paid by AT&T in the form of shares of AT&T common stock.

53. On January 11, 2001, At Home common stock closed at $7.72 per share.

54. Pursuant to the terms of the Puts, the per share sale price and the number of shares to be purchased by AT&T could not be determined until the fifteenth trading day following AT&T's receipt of such notice—February 2, 2001. At Home common stock, on February 2, 2001, closed at $6.00 per share. The average closing price for At Home securities for the 30 trading-day period preceding and following the January 11th notice was less than $48 per share, so the sale price for the Puts was then locked in at $48 per share pursuant to the hybrid pricing mechanism of the Puts. At that sale price ($2.897 billion ÷ $48 per share) Cox and Comcast could sell 60,367,780 shares of At Home common stock to AT&T.

I. Cancellation Of The Puts

55. Because the Puts, as originally structured, would have subjected AT&T to enormous tax liabilities, AT&T negotiated with both Cox and Comcast to cancel the Puts. This "cancellation" yielded an extra $700 million windfall to Cox and Comcast.

56. Specifically, on or about May 18, 2001, Cox and Comcast each entered into share issuance agreements with AT&T whereby Cox and Comcast: (1) cancelled the Puts, (2) agreed to retain their shares of At Home common stock (worth $237 million) rather than force AT&T to purchase them, and (3) received 155.3 million shares of AT&T common stock, approximately 21 million more shares (worth approximately $470 million) than required under the January 11th notices. Cox received approximately 75 million shares of AT&T stock, and Comcast received approximately 80.3 million AT&T shares. The total value of 155.3 million shares of AT&T common stock, at its closing price on May 18, 2001, was approximately $3.43 billion.

57. Comcast recorded a pre-tax gain of $296.3 million and Cox recorded and announced a pre-tax gain of $307.4 million as a result of the cancellation of the Puts. In fact, their short swing profits may have far exceeded these amounts.

J. Cox/Comcast Terminate The MDA

58. On June 1, 2001, Comcast and Cox each entered into agreements with At Home to extend the deadline for giving notice to At Home of their intent to terminate the Exclusivity Obligations of the MDA to June 18, 2001.

59. On June 18, 2001, Cox and Comcast, shortly after reaping enormous short-swing profits from the Puts, provided notice to At Home of their intent to terminate the Exclusivity Obligations of the MDA effective on December 4, 2001.

60. On August 28, 2001, Cox and Comcast provided notices of their intent to terminate the MDA with At Home.

COX AND COMCAST ACTED AS A "GROUP" UNDER THE FEDERAL SECURITIES LAWS

61. At all relevant times, Cox and Comcast acted jointly in acquiring, holding, voting or disposing of At Home securities so as to be considered a "group" under Section 13(d) of the Exchange Act, 15 U.S.C. § 78m(d). To summarize:

- Comcast and Cox, through wholly owned subsidiaries, entered into an agreement with At Home on June 4, 1996 to purchase preferred shares of At Home, and on August 1, 1996 each entity purchased the same amount of stock for the same price.
- Cox and Comcast entered into the Stockholders' Agreement which contained, inter alia: (i) agreements by each party to vote all its shares in favor of certain matters; (ii) the right by Cox and Comcast each to designate one Series B director to the At Home Board; (iii) rights to acquire At Home common stock to

maintain proportional ownership; (iv) restrictions on disposing of common stock as well as rights of first offer; and (v) rights to sell shares together or to force another to sell shares in certain transactions. Although Cox and Comcast waived certain rights under the Stockholders' Agreement pursuant to the March 2000 Transactions, the Stockholders' Agreement remained in effect at all relevant times, including when Cox and Comcast reaped their "short swing" profits from the cancellation of the Puts.

- When AT&T acquired TCI's interest in At Home, Cox agreed with AT&T not to terminate the Exclusivity Obligations and extracted from AT&T an agreement to change the Company's governance so that, acting jointly, Cox and Comcast had veto power over any Board action.

- On March 28, 2000, CCI and Comcast Corporation, on behalf of themselves and their wholly owned subsidiaries, jointly negotiated and entered into a new MDA with At Home, whereby Cox and Comcast acquired warrants to purchase in excess of 44 million shares of At Home common stock and such agreement provided Cox and Comcast with identical rights and, in fact, refers to "Cox/Comcast" throughout the agreement.

- Cox and Comcast jointly and collectively agreed to the terms of the March 2000 Transactions (including terms concerning the disposition of their At Home common stock) and such terms were virtually identical for both Cox and Comcast. In connection with the Puts, Cox and Comcast jointly agreed to waive the exact same provisions of the Stockholders' Agreement (concerning the election of two directors to At Home's Board) and thereby agreed to relinquish their shared veto power over At Home Board action.

- On March 28, 2000, Cox and Comcast agreed to vote all of their At Home shares in favor of the March 2000 Transactions.
- On August 28, 2000, Cox's and Comcast's designees to At Home's Board simultaneously resigned their positions.
- On January 11, 2001, both Cox and Comcast provided notice to AT&T of the exercise of their Puts and both requested AT&T stock as consideration instead of cash.
- On or about May 18, 2001, Cox and Comcast agreed to cancel the Puts, while both retained their At Home common stock, and entered into Share Issuance Agreements with AT&T whereby they each received tens of millions of shares of AT&T common stock.
- On June 1, 2001, Cox and Comcast each entered into identical agreements with At Home to extend the deadline for giving notice to At Home of their intent to terminate the Exclusivity Obligations of the MDA.
- On June 18, 2001 Cox and Comcast both notified At Home of their intent to terminate the Exclusivity Obligations of the MDA effective December 4, 2001.

62. All of the above actions by Cox and Comcast did not "coincidentally" occur on the same date and to the same effect; rather, Cox and Comcast, as beneficial owners of At Home common stock, at all times acted in concert with respect to the acquisition, holding, voting or disposition of their At Home securities.

63. As a direct result of the concerted course of conduct by Cox and Comcast, At Home's senior officers who dealt with Cox and Comcast correctly perceived that Cox and Comcast acted "as one" and were pursuing the same course of conduct vis-a-vis their beneficial ownership of shares in At Home.

FIRST CAUSE OF ACTION
(Violation of Section 16(b) of the Exchange Act
Against the Cox and Comcast Defendants)

64. Plaintiff repeats and realleges paragraphs 1 through 63 as if fully set forth herein.

65. At Home's Series A common stock was registered pursuant to Section 12(g) of the Exchange Act (15 U.S.C. § 781) and constituted an "equity security" for the purposes of Section 16 of the Exchange Act.

66. Section 16(b) of the Exchange Act prohibits the "beneficial owner" of more than ten percent (10%) of a class of securities registered under § 12 of the Exchange Act, or a director of an issuer of such a § 12 security, from profiting from any sale and purchase or purchase and sale of such securities within a six month period.

67. In determining who is a "beneficial owner" of more than 10 percent of a class of equity securities, Rule 16a-1(a)(1) (17 C.F.R. § 240.16-1(a)(1)) adopts the definition provided by Section 13(d) of the Exchange Act and rules adopted thereunder. Section 13(d)(3) states that, "[w]hen two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such . . . group shall be deemed a 'person' for the purposes of this subsection." 15 § 78m (d)(3) (emphasis supplied). To implement Section 13(d)(3), Rule 13d-5 defines beneficial ownership by a "group" as follows: "when two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the [Exchange] Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons." 17 C.F.R. § 240.13d-5(b)(1) (emphasis supplied).

68. As alleged above, defendants Cox and Comcast at all times were members of a Section 13(d)(3) group with respect to acquiring, holding, voting or disposition of the At Home common stock beneficially owned by the Cox and Comcast entities, and as members of a 13(d) group, each of Cox and Comcast beneficially owned the shares beneficially owned by the other. At all times from July 1997 until July 2001, Cox and Comcast were each the beneficial owner of more than 10% of At Home's Series A common stock and, therefore, each was subject to the strict liability provisions of Section 16(b) concerning short swing profits.

69. The January 11, 2001 notices triggered the 30 day pricing period for the Puts and such period concluded on February 2, 2001. As of February 2, 2001, the number of shares subject to the Puts and the price per share became fixed, and AT&T had a binding obligation to buy such shares at the determined price. For Section 16(b) purposes, this was equivalent to a "sale" by Cox and Comcast of the underlying At Home common stock. Cox and Comcast continued to retain their beneficial ownership of more than 10% of At Home's Series A common stock pending the closing of the "sale" transaction.

70. Cox's and Comcast's May 18, 2001 cancellation of the Puts occurred within six months of the February 2, 2001 fixing of the Puts' per share price and the shares subject to the Puts, at a time when Cox and Comcast continued to beneficially own more than 10% of At Home's Series A common stock. For Section 16(b) purposes, the cancellation of the Puts was the equivalent of a "purchase" by Cox and Comcast.

71. Pursuant to Section 16(b), Cox and Comcast engaged in a matched "sale" and "purchase" within six months when Cox and Comcast were statutory insiders by virtue of their beneficial ownership of more than 10% of At Home's Series A common stock. At Home is entitled to receive at least the

$600 million of pre-tax profit Cox and Comcast publicly claimed to have realized from these transactions.

72. In fact, Cox and Comcast received almost $3.7 billion from the cancellation of the Puts: (a) $3.43 billion of AT&T stock (valued as of May 18, 2001) and (b) $237.9 million of At Home common stock (valued as of May 18, 2001). Thus, it is likely that Cox and Comcast's short swing profits far exceed the $600 million they reported.

SECOND CAUSE OF ACTION
(Violation of Section 16(b) of the Exchange Act
against the Comcast Defendants)

73. Plaintiff repeats and realleges paragraphs 1-63, and 65-68 as if fully set forth herein.

74. In the alternative, if the Puts were otherwise deemed a "sale" under Section 16(b) on March 28, 2000, then such "sale" by Cox and Comcast of At Home common stock, may be matched with Comcast's acquisitions of warrants to purchase 8.9 million shares of At Home common stock through its acquisitions of Garden State Cablevision L.P., Jones Intercable Inc., Prime Communications—Potomac LLC and Prime Communications—Chicago LLC. The acquisitions of warrants are deemed "purchases" under Section 16(b).

75. The "sales" and "purchases" described above occurred when Comcast beneficially owned more than 10% of the outstanding Series A common stock of At Home and when it was also a statutory insider by virtue of its appointment of defendant Roberts to At Home's Board of Directors.

76. As a result of the acquisition of the Puts and 8.9 million warrants within six months of each other, Comcast earned short swing profits in violation of Section 16(b) in an amount to be determined.

THIRD CAUSE OF ACTION
(breach of fiduciary duties
Against all Defendants)

77. Plaintiff repeats and realleges paragraphs 1-63 as if fully set forth herein.

78. Defendants Roberts and Woodrow, as At Home directors, owed fiduciary duties to At Home to exercise the utmost good faith, to act with due care and with absolute loyalty to At Home.

79. At all times, Cox and Comcast controlled the actions of their designees on the At Home Board of Directors (Roberts and Woodrow) and are liable for any breaches of fiduciary duty committed by Roberts and Woodrow during their tenure as At Home directors.

80. Roberts and Woodrow breached their fiduciary duties by the acts described above, including:

(a) causing At Home to enter into the lopsided, unfair and self-dealing March 2000 Transactions which were not "entirely fair" to At Home, and which enriched Cox and Comcast at the expense of At Home;

(b) perpetuating unfair and uneconomical MDAs which benefited Cox and Comcast (and the other controlling shareholder, AT&T) at the expense of At Home; and

(c) providing Cox and Comcast the ability to terminate both their relationship and/or their exclusivity with At Home, mandating that At Home provide certain transition support to Cox and Comcast so as to ease the transition of Cox and Comcast to a competing system, and permitting Cox and Comcast to purchase certain critical At Home assets for unfair prices.

81. In addition, Cox and Comcast owed fiduciary duties to At Home as controlling shareholders because (a) they were part of the controlling shareholders' group, along with AT&T

and (b) because they had the ability through their two designees on the At Home board to block any board action.

82. Because Cox and Comcast were controlling shareholders of At Home in March 2000, they and their director designees on the At Home Board had an obligation to ensure that the March 2000 Transactions, including the terms of the MDAs executed in connection therewith, were "entirely fair" to At Home. The March 2000 Transactions were structured so that At Home received inadequate consideration while Cox and Comcast reaped extraordinary benefits.

83. As a direct, proximate and foreseeable result of the defendants' breaches of fiduciary duties and obligations owed to At Home, defendants have jointly and severally damaged At Home in an amount to be determined at trial.

84. In addition, the actions of defendants were willful, wanton, malicious and oppressive and thus plaintiff is entitled to exemplary and punitive damages appropriate to punish and make an example of all of the defendants.

WHEREFORE, plaintiff prays for judgment against defendants Cox and Comcast, Roberts and Woodrow and for damages for the violations of Section 16(b) of the Exchange Act of at least $600 million, and damages for the claims for breach of fiduciary duties in an amount to be determined at trial, as well as attorneys' fees, prejudgment interest, post judgment interest and such other and further relief as this Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury for all issues in this action.

Dated: September 23, 2002

THE BAYARD FIRM

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Attorneys for Plaintiff At Home Corporation,
by the Official Committee of Unsecured Bondholders

APPENDIX H

EXHIBIT B

AT HOME CORPORATION
425 Broadway Street
Redwood City, CA 94603

March 28, 2000

AT&T Corp.
Comcast Corporation
Cox Communications, Inc.

Ladies and Gentlemen:

Reference is hereby made to the term sheets attached hereto as Annexes A, B and C (the "Term Sheets") regarding certain agreements among At Home Corporation ("Excite@ Home"), AT&T Corp. ("AT&T"), Comcast Corporation ("Comcast"), Cox Communications, Inc. ("Cox") and certain of their respective subsidiaries (collectively, the "Parties").

1. The Term Sheets set forth the agreements of the Parties in respect of the transactions contemplated hereby and thereby. The Parties intend that the covenants and agreements set forth in the Term Sheets will be superseded by definitive agreements and instruments or definitive waivers or amendments of existing instruments, which will contain provisions incorporating and expanding upon the agreements set forth in the Term Sheets, together with provisions customary in the case of transactions of the type described herein and therein, and such other provisions as are reasonable and appropriate in the context of the transactions contemplated hereby and thereby. The foregoing notwithstanding, the Parties expressly acknowledge and agree that this Letter Agreement (including the Term Sheets) constitutes a binding agreement among them, subject to the terms and conditions set forth in this Letter Agreement and the Term Sheets, until definitive documentation is executed and delivered (except that the effec-

tiveness and enforceability of the provisions of the Term Sheets is subject to certain conditions set forth in paragraph 3 below). If definitive documentation is not executed and delivered with respect to any matter contained in the Term Sheets within 90 days from the date of this Letter Agreement, then this Letter Agreement and the relevant provisions of the Term Sheets shall be deemed to be such definitive documentation with respect to such matter, commencing on the date hereof (subject to paragraph 3 below). Each party hereto agrees to act in good faith and to use all reasonable efforts to consummate the transactions contemplated by this Letter Agreement and the Term Sheets, and to complete the related definitive agreements, waivers or amendments; *provided* that the foregoing will not require Cox or Comcast to incur any cost or detriment in connection with satisfaction of the condition set forth in paragraph 3(c) below.

2. (a) As promptly as practicable after the date hereof, Excite@Home shall take all such action as may be necessary, including seeking all requisite stockholder approvals under applicable law and the Restated Certificate of Incorporation of Excite@Home (the "Charter"), to cause the Charter to be amended (collectively, the "Charter Amendment") as provided in Section 3(a) of Annex B.

(b) Each Party hereto agrees to take all steps necessary to implement the Charter Amendment and any other action provided for in the Term Sheets that under applicable law or the Charter requires action of or approval by the stockholders of Excite@Home (each, an "Approval Item"), including, without limitation, voting at any meeting of stockholders all shares of Voting Stock (as defined in the Amended and Restated Stockholders' Agreement, dated as of July 16, 1997, as amended by the letter agreements dated October 2, 1997 and October 10, 1997 (the "Stockholders Agreement"), among Excite@Home and the stockholder signatories thereto) held by it or any member of its Stockholder Group (as defined in the Stockholders Agreement) in favor of such

Charter Amendment (and any other Approval Item) and/or executing or causing to be executed, as promptly as practicable, a consent in writing to the Charter Amendment (and any other Approval Item).

3. The effectiveness of all the provisions of the Term Sheets (and any definitive documentation related thereto) shall be subject to (a) effectiveness of the Charter Amendment, (b) receipt of any required approval of the Nasdaq Stock Market, Inc. or an alternative national securities exchange, including with respect to the extra voting power attached to shares of Series B Common Stock to be issued pursuant to Annex B (including pursuant to the warrants contemplated by Annex B), and (c) receipt of any other consents, approvals and waivers as may be necessary to consummate the transactions contemplated by the Term Sheets in a manner that results in the economic effects contemplated thereby.

4. If the Effective Date shall not have occurred on or prior to September 30, 2000, then any Party hereto (other than any Party whose failure to comply with its obligations hereunder shall have caused such failure to occur) may terminate this Letter Agreement by sending written notice to each of the other Parties (a "Termination"). Following any such Termination, this Letter Agreement (including the Term Sheets) shall be null and void and of no further force or effect.

5. Each Party hereto severally represents to each of the other parties hereto that this Letter Agreement (including the Term Sheets) has been duly authorized, executed and delivered by such Party and constitutes the legal, valid and binding obligation of such Party and, to the extent applicable, the members of such Party's Stockholder Group, enforceable against such Party and the applicable members of its Stockholder Group, except as such enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium

and similar laws affecting the rights of creditors generally and by general principles of equity.

6. Each of AT&T, Comcast and Cox acknowledges and agrees that its execution of this Letter Agreement shall constitute the consent of their respective Stockholder Affiliates listed in Schedule I hereto to the transactions contemplated by this Letter Agreement and the Term Sheets and each of them agrees to use all reasonable efforts to cause their respective subsidiaries and affiliates, including the Stockholder Affiliates, to comply with the provisions, terms and obligations applicable to them as set forth in this Letter Agreement and the Term Sheets. Each Party also agrees to waive, and cause its applicable subsidiaries and affiliates to waive, any most favored nations provisions to which they might otherwise be entitled with respect to such arrangements as may be entered into by Excite@Home in connection with satisfaction of the conditions to the effectiveness of the Term Sheets.

This Letter Agreement (including the Term Sheets) shall be governed by, and construed in accordance with, the laws of the State of Delaware, without regard to the conflicts of law rules of such state. The Parties hereto agree that irreparable damage would occur in the event any provision of the Letter Agreement or the Term Sheet was not performed in accordance with the terms hereof or thereof, and that the Parties shall be entitled to specific performance (subject to the moving party sustaining the applicable burden necessary to obtain such relief including as to the inadequacy of money damages) of the terms hereof and thereof in addition to any other remedy at law or in equity.

This Letter Agreement may be executed in counterparts, each of which shall be deemed an original and all of which shall constitute one and the same instrument. This Letter Agreement shall not be effective as to any Party until executed and delivered by all of the Parties.

[Remainder of Page Intentionally Left Blank]

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ Thomas A. Jermoluk
Name: THOMAS A. JERMOLUK
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By:_____
Name:
Title:

COMCAST CORPORATION

By:_____
Name:
Title:

COX COMMUNICATIONS, INC.

By:_____
Name:
Title:

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ _____
Name: Thomas A. Jermoluk
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By: /s/ John C. Petrillo
Name: JOHN C. PETRILLO
Title: EVP – CS & BD

COMCAST CORPORATION

By: _____
Name:
Title:

COX COMMUNICATIONS, INC.

By: _____
Name:
Title:

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ _____
Name: Thomas A. Jermoluk
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By: _____
Name:
Title:

COMCAST CORPORATION

By: /s/ Robert S. Pick
Name:
Title:

COX COMMUNICATIONS, INC.

By: _____
Name:
Title:

If the foregoing is in accordance with your understanding please indicate your agreement by signing below, at which time this letter will constitute a binding Letter Agreement among us.

Very truly yours,

AT HOME CORPORATION

By: /s/ _____
Name: Thomas A. Jermoluk
Title: Chairman of the Board of Directors

Accepted and Agreed as of
the date first above written:

AT&T CORP.

By: _____
Name:
Title:

COMCAST CORPORATION

By: _____
Name:
Title:

COX COMMUNICATIONS, INC.

By: /s/ David M. Woodrow
Name: DAVID M. WOODROW
Title: EVP

SCHEDULE I
STOCKHOLDER AFFILIATES

AT&T
AT&T Broadband, LLC
TCI Internet Services, Inc.
TCI Communications, Inc.
TCI Cable Investments Inc.
TCI.NET, Inc.

Comcast
Comcast Cable Communications, Inc.
Comcast Online Communications, Inc.

Cox
Cox Enterprises, Inc.

Annex A

Term Sheet among AT&T, Comcast, Cox and Excite@Home

(Certain capitalized terms used herein and not otherwise defined have the meanings ascribed to them in the Letter Agreement, dated March 28, 2000, to which this term sheet is attached).

1. Put Right

(a) AT&T grants to each of Cox and Comcast the right to put to AT&T or a subsidiary designated by AT&T (the "Put"), exercisable at any time or from time to time from January 1, 2001 through June 4, 2002, up to an aggregate number of shares of Excite@Home Series A common stock ("Series A Shares") currently owned by Cox or Comcast or their respective subsidiaries, as the case may be, equal to the Maximum Number. For this purpose, the "Maximum Number" with respect to Cox will be a number of Series A Shares having an aggregate purchase price under the Put equal to $1,397,500,800 and the "Maximum Number" with respect to Comcast will be a number of Series A Shares having an aggregate purchase price under the Put equal to $1,500,152,640. In the event of any exercise of the Put by Cox or Comcast, as the case may be, that would cause the aggregate number of Series A Shares purchased to exceed the Maximum Number with respect to Cox or Comcast, as the case may be, such exercise shall be deemed to apply only to a number of Series A Shares that (together with all Series A Shares previously purchased pursuant to exercises of the Put by Cox or Comcast, as the case may be) would equal the Maximum Number and, upon the consummation of such Put exercise, the Put shall be deemed fully satisfied with respect to Cox or Comcast, as the case may be. If AT&T designates a subsidiary as provided in the first sentence of this paragraph (a), AT&T will unconditionally guarantee the subsidiary's obligations under the Put.

(b) The per share purchase price under the Put will be the greater of (1) $48 and (2) the average per share trading price of the Series A Shares in the Nasdaq National Market System (or the principal trading market or securities exchange on which the Series A Shares are then traded) during the 30 consecutive trading day period beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of the Put. Each of Cox and Comcast shall have the right upon any exercise of the Put, as specified in the notice of exercise, to require that AT&T (or its designee) pay the purchase price therefor in cash or in shares of AT&T common stock ("AT&T Shares") having an aggregate value equal to such purchase price, based on the average per share trading price of the AT&T Shares on the New York Stock Exchange (or the principal trading market or securities exchange on which the AT&T Shares are then traded) during the 30 consecutive trading day period beginning 15 trading days immediately prior to and ending 15 trading days immediately following AT&T's receipt of the notice of exercise of the Put.

(c) If the Put is exercised for AT&T Shares, AT&T and Cox or Comcast, as the case may be, will use their respective reasonable best efforts to assure that the transactions pursuant to the Put qualify as a tax-free reorganization under Section 368 of the Internal Revenue Code.

(d) Any exercise of the Put will be consummated as promptly as practicable following AT&T's receipt of the notice of exercise and the determination of the purchase price as set forth above, subject to receipt of any necessary approvals and the absence of any legal prohibition for such consummation. The purchase and sale shall also be subject to receipt of certificates containing representations and warranties substantially the same as those set forth in Section 11.9(a) and (b) of the Stockholders Agreement and to any rights of first offer or preemptive rights that may be applicable to

the sale of Series A Shares by Cox or Comcast, as the case may be.

(e) The provisions of this Section 1 will be subject to appropriate adjustments to reflect stock splits, stock dividends and other extraordinary transactions.

(f) In the event that Excite@Home separates its portal/content businesses from its platform/connectivity businesses, through a tracking stock or otherwise, AT&T, Excite@Home and Cox or Comcast, as the case may be, if requested by Cox or Comcast, as the case may be, will work together to effect a tax-free exchange, if feasible, of up to all of the Series A Shares currently owned by Cox or Comcast, as the case may be, for shares reflecting the separated portal/content businesses ("Portal Shares") on a basis that provides the same economic result to each party as would have resulted from exercise of the Put for the Maximum Number of Series A Shares then remaining subject to the Put with respect to Cox or Comcast, as the case may be. For example, if Cox or Comcast were then entitled to exercise the Put with respect to $1 billion of Series A Shares, the foregoing exchange, if elected, would entitle Cox or Comcast, as the case may be, to exchange a number of Series A Shares that would have a purchase price under the Put of $1 billion in exchange for Portal Shares having a value of $1 billion. In such event, AT&T will waive its rights with respect to a number of Portal Shares that it would otherwise have had the right to receive in an amount sufficient to compensate Excite@Home for the excess of the value of the Portal Shares issued over the value of the Excite@Home shares acquired. Alternatively, AT&T will waive its rights with respect to a number of Portal Shares that it would otherwise have had the right to receive in an amount equal to the number of Portal Shares issued to Cox or Comcast, as the case may be, and Excite@Home will issue to AT&T a number of Series A Shares equal to the number of Series A Shares exchanged by Cox or Comcast, as the case

may be, for such number of Portal Shares. In any event, such exchange will be deemed to satisfy the Put in full with respect to Cox or Comcast as the case may be.

2. Stockholders' Agreement

(a) Each of Cox and Comcast (including its applicable subsidiaries and members of its Stockholder Group and Stockholder Affiliates) hereby waives all its rights under the Stockholders Agreement, other than the provisions of Article X thereof, *provided* that Cox's and Comcast's rights under Section 4.5 of the Stockholders Agreement will survive until June 4, 2002. Without limiting the foregoing, each of Cox and Comcast hereby waives its rights under the Stockholders Agreement to representation on the Excite@Home board of directors (the "Board") and will immediately cause the resignation or removal of its current representative on the Board. When and as necessary to give effect to the intention of the parties expressed in this paragraph, each of Cox and Comcast (for itself and members of its Stockholder Group) agrees to vote (or execute consents with respect to) all shares of Voting Stock (as defined in the Stockholders Agreement) held by it or any member of its Stockholder Group in such manner as may be necessary to give effect to such waivers.

(b) Each of AT&T (including its applicable subsidiaries) and Excite@Home hereby waives all its rights under the Stockholders Agreement as against each of Cox and Comcast including its applicable subsidiaries and members of its Stockholder Group and Stockholder Affiliates), other than the provisions of Article X thereof; *provided* that, as set forth above, the provisions of Section 4.5 of the Stockholders Agreement will survive until June 4, 2002.

(c) Each of the parties hereto acknowledges that the foregoing waivers shall not constitute an amendment to the Stockholders Agreement, which shall continue in full force and effect, subject to such waivers. The parties agree that

such waivers shall be irrevocable, except as otherwise expressly set forth in the Letter Agreement to which this term sheet is an annex. In the event the parties to the Stockholders Agreement determine to terminate the Stockholders' Agreement, the relevant provisions thereof that are not waived pursuant to this Section 2 (or otherwise waived by agreement of the parties to the Stockholders Agreement) will be incorporated into this term sheet or the definitive documentation contemplated by the Letter Agreement.

3. Portal Arrangements

In the event AT&T enters into negotiations with any third party prior to June 4, 2002 with respect to a portal arrangement involving distribution over AT&T's cable facilities, AT&T will notify the third party of Cox's and Comcast's interest in exploring comparable arrangements for distribution over Cox's and Comcast's cable facilities. In such event, AT&T will also use its commercially reasonable efforts to facilitate concurrent discussions between such third party and Cox and Comcast with respect to such comparable arrangements.

4. Noncompete

Until June 4, 2006, but only for so long as Cox or Comcast, as the case may be, continues to use Excite@Home as its provider of platform/connectivity services used in its residential high-speed ISP services over cable in substantially all its United States cable systems, AT&T will not provide wireline (*e.g.*, DSL or hybrid-fiber/coaxial) high-speed Internet access services to residential customers in the territories served by the United States cable systems of Cox or Comcast, as the case may be. For the avoidance of doubt, the foregoing will not apply to any wireless high-speed Internet access services, including fixed wireless, and will not apply to any Internet access services at or below 128 Kbps.