

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

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VOOM HD HOLDINGS LLC,	:	Index No. 600292/08
	:	
Plaintiff-Respondent,	:	<u>PRE-ARGUMENT STATEMENT</u>
	:	
-against-	:	
	:	
ECHOSTAR SATELLITE L.L.C.,	:	
	:	
Defendant-Appellant.	:	
-----X		

Defendant-Appellant DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. (“EchoStar”) respectfully submits this Pre-Argument Statement pursuant to § 600.17 of the Rules of this Court:

1. TITLE OF THE ACTION

The title of the Action is VOOM HD HOLDINGS LLC v. ECHOSTAR SATELLITE L.L.C., Index No. 600292/08.

2. FULL NAMES OF THE ORIGINAL PARTIES

The full names of the original parties appear as above. Defendant-Appellant is now known as DISH Network L.L.C. There has been no other change in the parties’ names.

3. NAME, ADDRESS, AND TELEPHONE NUMBER OF COUNSEL FOR APPELLANT

SIMPSON THACHER & BARTLETT LLP, by Thomas C. Rice, Esq., 425 Lexington Avenue, New York, NY 10017-3954, (212) 455-2000.

MORRISON & FOERSTER LLP, by Charles L. Kerr, Esq., 1290 Avenue of the Americas, New York, NY 10104-0050, (212) 468-8000.

4. NAME, ADDRESS, AND TELEPHONE NUMBER OF COUNSEL FOR RESPONDENT

GIBSON, DUNN & CRUTCHER LLP, by Orin Snyder, 200 Park Avenue, New York, NY 10166-0193, (212) 351-2400.

5. COURT AND COUNTY FROM WHICH APPEAL IS TAKEN

Supreme Court of the State of New York, County of New York, Commercial Division.

6. NATURE AND OBJECT OF THE ACTION

In this Action, Plaintiff-Respondent VOOM HD Holdings LLC (“VOOM HD”) seeks damages for an alleged breach of a contract, an Affiliation Agreement, dated November 17, 2005, between the parties. VOOM HD alleges that EchoStar (i) improperly exercised its rights to terminate the Affiliation Agreement; (ii) failed to comply with its “Packaging Commitment” under the Agreement; and (iii) violated its duty of good faith and fair dealing.

7. RESULT REACHED IN THE COURT BELOW

A copy of the EchoStar’s Notice of Appeal is attached hereto as Exhibit 1, and a true and correct copy of the Decision and Order appealed from (the “Order”) is attached thereto. In its Order, the Court granted in part VOOM HD’s motion to compel EchoStar to produce documents that EchoStar had withheld on the grounds that they were subject to the attorney-client privilege and, in part, prepared in anticipation of litigation.

8. GROUNDS FOR SEEKING REVERSAL

EchoStar seeks reversal of the Order insofar as it granted VOOM HD’s motion to compel EchoStar to produce documents alleged by VOOM HD to be non-privileged on the grounds that the trial court erred as a matter of law in ruling that VOOM HD’s post-note-of-issue discovery-related motion is not untimely; the trial court erred as a matter of law in ruling that certain documents are not subject to the attorney-client privilege and/or are not protected from

disclosure as material prepared in anticipation of litigation; and/or that the trial court's factual determinations are in error and not supported by the record.

9. RELATED PROCEEDINGS

There are no related actions or proceedings now pending between VOOOM HD and EchoStar in any court of this or any other jurisdiction. There are no additional appeals pending in this action.

Dated: New York, New York
October 4, 2012

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L.L.C.*

EXHIBIT 1

PLEASE TAKE FURTHER NOTICE that this Notice and the accompanying papers constitute notice of appeal pursuant to C.P.L.R. § 5515, and the accompanying Pre-Argument Statement satisfies Defendant-Appellant's obligation pursuant to Appellate Division, First Department Rules § 600.17.

Dated: New York, New York
October 4, 2012

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 56
-----X

VOOM HD HOLDINGS LLC,

Plaintiff,

-against-

ECHOSTAR SATELLITE LLC,

Defendant.
-----X

Index # 600292/08 Trial

60 Centre Street
New York, New York
October 3, 2012

B E F O R E:

HONORABLE RICHARD B. LOWE,
Justice Supreme Court

A P P E A R A N C E S:

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A P P E A R A N C E S (Cont.):

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Attorneys for Defendant

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2 THE COURT: As you know, there were requests by the
3 plaintiff for the Court to examine documents that they
4 allege were in the defendant's privilege category, but, in
5 fact, were not privileged, and they were being kept from the
6 plaintiffs. I have reviewed the three categories that were
7 submitted to me and I will issue the following findings and
8 decisions with regard to those requests:

9 Now, under the applicable law, there is a need to
10 apply the attorney-client privilege cautiously and narrowly
11 when you are dealing with corporate staff counsel,
12 otherwise, mere participation of an attorney could be used
13 to seal off disclosure. To be protected, the content must
14 be for the purpose of facilitating the lawyer's rendition of
15 legal advice regarding the conduct that has brought the
16 corporate client to the brink of litigation. Documents
17 generated at the request of counsel, not as a part of a
18 particular problem, or in anticipation of litigation, but
19 rather as part of an ongoing permanent relationship between
20 counsel and corporate which involves both business and legal
21 responsibility are not protected. See, ROSSI VERSUS BLUE
22 CROSS 73 NY2d 588.

23 I will now turn to the categories of documents
24 submitted.

25 Category 2. The summary of the audit findings.
26 Echostar will turn these documents over. They were prepared

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2 by non-lawyers not using legal acumen and not functioning as
3 lawyers. They do not include the lawyer's impressions,
4 conclusions, or opinions. And, further, the defendant
5 cannot claim the audit was prepared in anticipation of
6 litigation, as this contradicts previous arguments made in
7 prior submissions.

8 Category 2. The 2005 negotiation and due diligence
9 documents. These documents were generated by non-lawyers in
10 Echostar's finance department at the direction of counsel.
11 They were generated as part of the day-to-day business
12 responsibility of both of director of finance and counsel,
13 and, therefore, are discoverable.

14 I also note that the defendant does not dispute the
15 fact that previous drafts of the report had, in fact, been
16 turned over to the plaintiff and it was the final draft that
17 has yet to be submitted.

18 The defendant will turned over the related
19 documents, with the exception of Bates Stamp 5999, 6712, and
20 6949, these contain communications between corporate
21 officers and counsel seeking legal advice with respect to
22 the findings in the final report.

23 Category 3. Echostar's handshake e-mail. The
24 e-mail does contain a factual recitation of the deal between
25 the parties. However, within the recitation, counsel for
26 Echostar raises various issues associated with what he

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2 identifies as the three categories compromising the deal.
3 Only defendant's Tab 16, Bates Stamp 32093 will be turned
4 over to show the factual recitation of the handshake deal.
5 It will be redacted to remove counsel's thoughts with
6 respect to potential issues arising within the various
7 categories of the deal. And that should be pretty simple,
8 because from what I read, there's the factual recitation and
9 then counsel says "issues" and counsel lists a series of
10 issues from a legal perspective, so those will not be turned
11 over. The related e-mails corresponding to counsel's
12 recitation of the handshake deal appear to be communications
13 between counsel and corporate officers and they seek legal
14 opinion, therefore, they are protected. And, therefore,
15 because of my analysis, plaintiff's request for sanctions is
16 denied.

17 MR. KERR: Your Honor, if I may, I appreciate the
18 written decision.

19 I want to be clear, how you framed the category and
20 which of the documents we're being directed to turned over.
21 You listed you talked about some due diligence.

22 THE COURT: Category 2 is the 2005 negotiation and
23 due diligence documents.

24 MR. KERR: So, your Honor, other than Bates stamp
25 5999, 6712, and 6949.

26 THE COURT: They get turned over.

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2 MR. KERR: They all get turned over?

3 THE COURT: Yes, with the exception of those three
4 numbers that I said. All right.

5 MR. SNYDER: Thank you, your Honor.

6 MR. KERR: One last question.

7 THE COURT: All right.

8 MR. KERR: Is there a written decision?

9 THE COURT: No, you'll have these minutes, which
10 will preserve your right to appeal, if you so choose.

11 MR. KERR: Your Honor, I have to confer with my
12 clients. With all due respect, your Honor, we may need to
13 take this right up to seek a stay of this, I don't know
14 that, but I'm trying to be forthright with your Honor. If
15 we do that, to do that, I would need to have either a
16 written order or a direction.

17 THE COURT: The minutes will be so ordered. Get
18 the transcript and I will so order the transcript. That is
19 the way we do it.

20 MR. KERR: I will do that, your Honor, I just want
21 the opportunity to get that done. And if I need to go up to
22 immediately to the Appellate Division, I will.

23 THE COURT: They should have it for you at the end
24 of the day because they're transcribing it.

25 MR. KERR: Thank you.

26 I just wanted to make sure. Just in terms of the

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timing for this all. I need the opportunity to take the steps I need to take.

THE COURT: I appreciate it. You don't need my opinion, but I didn't say anything in there that will hurt anyone.

MR. SNYDER: Thank you.

Your Honor, we're prepared to recommence at 2:15 with the witness. We would like the opportunity to have, until such time some other court says otherwise, I would like the documents. I'm about to examine a witness on a key negotiation witness. And so I would like those documents so that my team could look at them while I'm examining the witness and if they cannot self-impose a stay in the middle of a trial.

MR. KERR: Your Honor, I need to --

THE COURT: Mr. Snyder --

MR. SNYDER: Yes.

THE COURT: --that is more than a reasonable request. And if he chooses to take an immediate interlocutory period, then there's no point in me giving you these documents. Okay.

MR. SNYDER: Thank you, Judge.

THE COURT: All right.

MR. SNYDER: Just so --

THE COURT: I need from you, you're going to have

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to tell me tomorrow --

MR. KERR: I will, your Honor.

THE COURT: If tomorrow -- by tomorrow your client says there's no need to take an appeal, then be prepared to turn those documents over tomorrow.

MR. KERR: We will do that.

THE COURT: Very good.

All right. Have the jury come down.

THE COURT OFFICER: Jury entering.

(Whereupon, the jury enters the courtroom and the following is heard inside the hearing and presence of the jury.)

(Continued next page.)

So Ordered:

J. S. C.
JUSTICE RICHARD B. LOWE III