

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

-----	X	
VOOM HD HOLDINGS LLC,	:	Index No. 600292/08
	:	
Plaintiff-Respondent,	:	<b><u>PRE-ARGUMENT STATEMENT</u></b>
	:	
-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 VOOM 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

SIMPSON THACHER & BARTLETT LLP

By: 

Roy L. Reardon  
Thomas C. Rice  
Ryan A. Kane  
425 Lexington Avenue  
New York, NY 10017  
Telephone: (212) 455-2000

-and-

Charles L. Kerr  
Ronald G. White  
J. Alexander Lawrence  
MORRISON & FOERSTER LLP  
1290 Avenue of the Americas  
New York, New York 10104  
Telephone: (212) 468-8000

James P. Bennett, *pro hac vice*  
Linda E. Shostak  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105

*Attorneys for Defendant-Appellant DISH  
Network L.L.C. f/k/a EchoStar Satellite  
L.L.C.*

# EXHIBIT 1

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION

-----X		
VOOM HD HOLDINGS LLC,	:	Index No. 600292/08
	:	
Plaintiff,	:	I.A.S. Part 56
	:	
-against-	:	Hon. Richard B. Lowe III
	:	
EHOSTAR SATELLITE L.L.C.,	:	<b><u>NOTICE OF APPEAL</u></b>
	:	
Defendant.	:	
	:	
-----X		

PLEASE TAKE NOTICE that Defendant DISH Network L.L.C. f/k/a EchoStar Satellite L.L.C. (“EchoStar”) hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, the Decision and Order of the Supreme Court, New York County (Lowe, J), dated October 3, 2012 and so-ordered on October 4, 2012 (the “Order”), that granted in part the motion of Plaintiff VOOM HD Holdings LLC (“VOOM HD”) 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. A copy of the Order is attached hereto.

PLEASE TAKE FURTHER NOTICE that Defendant hereby appeals from the aforementioned Order insofar as it granted VOOM HD’s motion.

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

SIMPSON THACHER & BARTLETT LLP

By: 

Roy L. Reardon  
Thomas C. Rice  
Ryan A. Kane  
425 Lexington Avenue  
New York, NY 10017  
Telephone: (212) 455-2000

-and-

Charles L. Kerr  
Ronald G. White  
J. Alexander Lawrence  
MORRISON & FOERSTER LLP  
1290 Avenue of the Americas  
New York, New York 10104  
Telephone: (212) 468-8000

James P. Bennett, *pro hac vice*  
Linda E. Shostak  
MORRISON & FOERSTER LLP  
425 Market Street  
San Francisco, California 94105  
*Attorneys for Defendant-Appellant DISH  
Network L.L.C. f/k/a EchoStar Satellite  
L.L.C.*

TO: The Clerk of the County of New York  
60 Centre Street  
New York, New York 10007

Orin Snyder  
GIBSON, DUNN & CRUTCHER LLP  
200 Park Avenue  
New York, NY 10166-0193  
*Attorneys for Plaintiff VOOM HD Holdings LLC*

1

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

4

VOOM HD HOLDINGS LLC,

5

Plaintiff,

6

-against-

7

ECHOSTAR SATELLITE LLC,

8

Defendant.

9

Index # 600292/08

Trial

10

60 Centre Street

11

New York, New York

12

October 3, 2012

13 B E F O R E:

14

HONORABLE RICHARD B. LOWE,  
 Justice Supreme Court

15

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

17

GIBSON, DUNN & CRUTCHER, LLP

200 Park Avenue

18

New York, New York 10166

BY: ORIN SNYDER, ESQ.

19

CHRISTOPHER D. DUSSEAU, ESQ.

DACE CALDWELL MARTINEZ, ESQ.

20

-and-

JOSHUA E. DUBIN, ESQ.

21

212 N.E. 1st Terrace

Ft. Lauderdale, FL

22

-and-

ALMA ASAY, ESQ.

23

Attorneys for Plaintiff

24

DONNA EVANS

DEBORAH A. ROTHROCK

25

OFFICIAL COURT REPORTERS

26

(Continued next page.)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

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

MORRISON & FOERSTER, LLP  
1290 Avenue of the Americas  
New York, New York

BY: JAMES P. BENNETT, ESQ.  
CHARLES L. KERR, ESQ.  
LINDA SHOSTAK, ESQ.  
JOSEPH ALEXANDER LAWRENCE, ESQ.  
Attorneys for Defendant



-Proceedings-

1  
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

-Proceedings-

1  
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

-Proceedings-

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

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.

-Proceedings-

1

2

MR. KERR: They all get turned over?

3

4

THE COURT: Yes, with the exception of those three 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 will preserve your right to appeal, if you so choose.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

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

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

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

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

MR. KERR: Thank you.

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

-Proceedings-

1  
2 timing for this all. I need the opportunity to take the  
3 steps I need to take.

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

7 MR. SNYDER: Thank you.

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

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

17 THE COURT: Mr. Snyder --

18 MR. SNYDER: Yes.

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

23 MR. SNYDER: Thank you, Judge.

24 THE COURT: All right.

25 MR. SNYDER: Just so --

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

-Proceedings-

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