ATTACHMENT

VOOM HD's Proposed Adverse Inference Instruction

As I explained earlier, your job as jurors is to make findings of fact according to the law as I give it to you. That rule, however, has an exception. In this case, there are certain findings that I have already made after conducting hearings separate from the trial. You are bound by those findings in your deliberations. I will now instruct you on those findings and their significance to your deliberations.

I have found that EchoStar, in bad faith, systematically destroyed evidence that is relevant to this case.[1] EchoStar knew of its legal duty to preserve evidence, because it previously had been found to have wrongfully destroyed evidence in another case.[2] And yet, for nearly a year after EchoStar became aware that this lawsuit was likely, EchoStar permanently deleted its employees' emails and other relevant electronic documents, rather than preserve them as the law requires.[3] EchoStar's destruction of documents continued for four months after VOOM HD filed this lawsuit.[4]

I have found that the missing evidence is from a crucial time period during which EchoStar appears to have been searching for a way out of its contract.[5] I have therefore determined that the destroyed emails were relevant to EchoStar's understanding of the terms of the contract in this case, including the meaning of the term "Service," and were also relevant to whether VOOM HD had actually satisfied the spending requirement contained in Section 10 of the Affiliation Agreement.[6] I have further concluded that it is entirely possible the

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[1] Nov. 3, 2010 Order at 42-43 ("[H]ere, EchoStar has systematically destroyed evidence in direct violation of the law and in the face of a ruling by a federal court that criticized EchoStar for the same bad-faith conduct as EchoStar's conduct in the instant action. . . . EchoStar has been on notice of its substandard document retention practices yet continued those practices even *after* this litigation was commenced by VOOM HD. This allowed EchoStar to permanently dispose of correspondence that was relevant to VOOM HD's ability to prove its case and counter EchoStar's defense."); *see also* 1st Dep't Op. (Jan. 31, 2012) at 21-22, 25.

[2] Nov. 3, 2010 Order at 39; 1st Dep't Op. at 18, 21; *see also Broccoli v. EchoStar Commc'ns Corp.*, 229 F.R.D. 506, 512 (D. Md. 2005).

[3] Nov. 3, 2010 Order at 26 ("EchoStar should have reasonably anticipated litigation at this time, that is, on June 20, 2007, especially in light of Blum's testimony that EchoStar knew VOOM HD would sue if EchoStar terminated the Affiliation Agreement."), 29; *see also* 1st Dep't Op. at 17, 24.

[4] Nov. 3, 2010 Order at 29 ("Thus, the evidence demonstrates that, in addition to failing to preserve documents upon reasonable anticipation of litigation, EchoStar permanently deleted employee e-mails for up to four months *after* this action was commenced."), 36; *see also* 1st Dep't Op. at 8, 17.

[5] 1st Dep't Op. at 23 ("[T]he missing evidence is from a crucial time period during which EchoStar appears to have been searching for a way out of its contract."); *see also* Nov. 3, 2010 Order at 41.

[6] Nov. 3, 2010 Order at 41 (The destroyed "e-mails are relevant to EchoStar's understanding of the term 'Service' and whether VOOM HD had actually satisfied the spending requirement contained in section 10 of the Affiliation Agreement."); *see also* 1st Dep't Op. at 22.

documents destroyed by EchoStar demonstrated that EchoStar knew all along that there was no breach of the Agreement.[7] And I have found that the emails may also have been relevant to VOOM HD's damages.[8]

Accordingly, as you consider all the evidence in this case, I instruct you to presume that the destroyed emails and other evidence would have been favorable to VOOM HD's claims and unfavorable to EchoStar's defenses.[9]

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[7] 1st Dep't Op. at 23 ("EchoStar's internal communications undoubtedly concerned issues about what it understood the contract to mean."); Nov. 3, 2010 Order at 35 ("It is entirely possible that the documents destroyed by EchoStar demonstrated that EchoStar knew all along that there was no breach and that the parties intended the definition of 'Service' to include overhead, which would mean that no breach occurred and would prove VOOM HD's case.").

[8] Nov. 3, 2010 Order at 41 ("The[] e-mails may also have been relevant to damages, to the extent that they contained projections of future subscribers or acknowledged EchoStar's evasion of payments to VOOM HD.").

[9] *See, e.g.*, *Einstein v. 357 LLC*, No. 604199/07, 2009 WL 4543044 (N.Y. Sup. Ct. Nov. 12, 2009) (holding that defendants' grossly negligent or willful destruction of emails entitled plaintiffs "to an adverse inference that any deleted emails were unfavorable to [defendants]"); *In re Eno's Will*, 196 A.D. 131, 163 (1st Dep't 1921) ("It is well settled that the deliberate destruction of written evidence gives rise to the inference that the matter destroyed or mutilated is unfavorable to the spoliator" where "it may appear" from "some other evidence" of the documents' contents that "the documents destroyed were in fact relevant to the case."); *Armour v. Gaffey*, 30 A.D. 121, 126 (3d Dep't 1898); *aff'd* 165 N.Y. 630 (1901) (applying the "settled principle" that "[w]here it appears that a party has destroyed an instrument or document, the presumption arises that, if it had been produced, it would have been against his interest, or in some essential particulars unfavorable to his claims under it" (internal quotations omitted)); *Farulla v. Ralph A. Freundlich, Inc.*, 279 N.Y.S. 228, 245 (N.Y. Sup. Ct. 1935) (noting that the destruction of relevant evidence was "sufficient of itself to warrant an unfavorable inference against the defendant that the[] production would tend to establish plaintiff's charges of bad faith and breach by the defendant"); *Gentle v. State*, 778 N.Y.S.2d 660, 662 (Ct. Cl. 2004) (ordering "adverse inference that, had the records been produced, they would have been unfavorable to defendant"); *Davydov v. Zhuk*, 23 Misc.3d 1129(A), *8 (Sup. Ct. Kings Cnty., May 26, 2009) (imposing adverse inference as to the "the mark-up and profit margin of defendant's business"); *Arista Records LLC v. Usenet.com, Inc.*, 608 F.Supp.2d 409, 443-44 (S.D.N.Y. 2009) (allowing the adverse inference that "the spoliated evidence would have been unfavorable to Defendants, with respect to the contentions Plaintiffs seek to advance"); *M&T Mort. Corp. v. Miller*, No. CV 2002-5410, 2007 WL 2403565, at *13 (E.D.N.Y. 2007) (holding that the jury should be instructed that the evidence was unfavorable to the spoliator's position).