

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

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

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

4 -----X

5 VOOM HD HOLDINGS LLC,

6 Plaintiff,

7 -against-

8 ECHOSTAR SATELLITE LLC,

9 Defendant.

10 -----X

11 Index # 600292/08 Trial

12 60 Centre Street
 13 New York, New York
 14 October 3, 2012

15 B E F O R E:

16 HONORABLE RICHARD B. LOWE,
 17 Justice Supreme Court

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

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 OFFICIAL COURT REPORTERS

(Continued next page.)

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

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

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

I will now turn to the categories of documents submitted.

Category 2. The summary of the audit findings.

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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MR. KERR: They all get turned over?

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

MR. SNYDER: Thank you, your Honor.

MR. KERR: One last question.

THE COURT: All right.

MR. KERR: Is there a written decision?

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

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

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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

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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