

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM APPELLATE TERM

-----X
VOOM HD HOLDINGS LLC,

Plaintiff,

- against -

ECHOSTAR SATELLITE L.L.C.,

Defendant.

-----X
INDEX NO. 600292/08

60 Centre Street
New York, New York
May 15, 2012

BEFORE:

THE HON. RICHARD B. LOWE, III, J.S.C.

APPEARANCES:

GIBSON DUNN & CRUTCHER LLP
Attorneys for Plaintiff
200 Park Avenue
New York, New York 10166
BY: ORIN SNYDER, ESQ.

- and -

LAW OFFICE OF TIMOTHY A. MACHT
68 Midwood Street
Brooklyn, New York 11225
BY: TIMOTHY A. MACHT, ESQ.

MORRISON & FOERSTER LLP
Attorneys for Defendant
1290 Avenue Of The Americas
New York, New York 10104
BY: CHARLES L. KERR, ESQ.
JAMES P. BENNETT, ESQ.

JACK L. MORELLI
Senior Court Reporter

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1 MR. SNYDER: Good morning.

2 MR. KERR: Good morning.

3 MR. BENNETT: Good morning.

4 MR. SNYDER: It's been a long time.

5 THE COURT: So, where are we?

6 MR. SNYDER: Thank you, Judge.

7 Your Honor, when we were last in this court we
8 were about eight weeks before trial, and that was in
9 February 15th before the stay. The parties now obviously
10 are before the Court for a pretrial conference. We have
11 met and conferred and have discussed amongst ourselves the
12 schedule that we think is necessary to create the most
13 efficient and streamlined trial. Our goal is to try this
14 case in the most streamlined, efficient way with as many
15 stipulations as we can, with as many motions that will cut
16 out all the nonsense that we can. We don't want to be
17 here any longer than we have to. So we have eight
18 weeks --

19 THE COURT: I'm smiling only because this speech
20 is over a significant trial. So whether you're successful
21 or not is, you know.

22 MR. SNYDER: There are two developments that
23 have occurred during this long hiatus. The first is that
24 our damages report has become anachronistic, it's old. We
25 need to update our damages report, submit that to the

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1 other side. They are going to want to submit a rebuttal.
2 We'll have to have some very modest depositions, one of
3 each expert because they are brand new figures. Damages
4 before we based on numbers 2008 and '09. We've now had
5 numbers that make those damages reports obsolete.

6 The second thing is, there are two motions that
7 we intend to file and we can do it promptly. Which, if
8 granted, would, we believe, further streamline the case,
9 reducing the amount of proof that's necessary.

10 This is a long way to say that we would
11 respectfully propose and request that trial commence after
12 Labor Day. September 18th is the date that we picked.
13 And we picked that date because it worked on the calendar.
14 Eight weeks, which is what we have before to prepare for
15 trial, was very compressed already and rushed. We now
16 have this additional time to do the damages update, to
17 have these two motions filed and really, Your Honor, to
18 sit and try to stipulate to as many facts as possible.
19 But the truth is, that the vast majority of the facts in
20 this case are undisputed and should be presented to the
21 jury in a very streamlined way. That's going to take a
22 little time to do. But, I think, that we could do it,
23 there is a very good working relationship here between the
24 parties.

25 So, we've agreed internally, that is the

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1 lawyers, on a schedule for when we would meet and confer
2 on all the issues, stipulations and exhibits and witness
3 lists, et cetera, a motion schedule on these motions, a
4 schedule on the damage's expert and all leading up to,
5 geared toward, of course subject to Your Honor's schedule,
6 and I'm not being presumptuous in any way, a trial of
7 September 18th which we would hope, we told Your Honor
8 four weeks. Frankly, I would hope as the plaintiff that
9 if I'm doing my job, I can present this case in less than
10 two weeks. Or else, I think -- don't hold me to it, I
11 think that maybe I'm doing something wrong. Because the
12 goal is to simplify the facts.

13 It's a fairly simple, straightforward case,
14 breach of contract. What we want to work together in
15 these summer months to do is, figure out a way, again, to
16 stipulate to as much as possible, present Your Honor with
17 a couple of motions which could substantially reduce the
18 scope of the trial. Then be prepared to try the case in
19 September.

20 The other reason we think that this time would
21 be valuable, Your Honor, is on the motions, and I'm happy
22 to tell Your Honor what they are. If granted, again, not
23 being presumptuous, could have a dynamic impact on how the
24 parties view the case and whether they want to try the
25 case or not try the case. So that's where we are.

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1 THE COURT: You want to let me in on what those
2 motions are?

3 MR. SNYDER: Yes, of course. The first, Your
4 Honor, is this case from day one, a year and a half, and
5 Your Honor will remember it was all about did my client
6 spend a hundred million dollars on this business. And the
7 other side said no, because we charged overhead. That was
8 the whole case. After two depositions in the case, their
9 top due diligence expert and our top financial guy, it
10 became clear that that overhead argument wasn't going to
11 carry water. Because they knew full well that we were
12 going to be charging overhead. So, they kind of panicked
13 and came up with a new theory. And this was like 18
14 months into the case. They came up with a new category
15 that they said should be excluded from the hundred million
16 dollars. A category that doesn't appear on a single
17 financial document of the thousands that they reviewed
18 before they did this deal. They made up a category called
19 international shared something.

20 THE COURT: Correct me if I'm wrong, but wasn't
21 this on the subject of a motion which I found that there
22 was a question of fact as to the expenditure of these?

23 MR. SNYDER: Yes, yes.

24 MR. KERR: You did.

25 THE COURT: So we're going to do it again?

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1 MR. SNYDER: No. This is a motion to exclude
2 under Frye and Dalbert (Phonetic) like standards, where we
3 say is a junk science expert report. That basically makes
4 up a category and lo and behold, it brings them under the
5 hundred million dollars.

6 Our concern, because we think that it is junk
7 science and nonsense, is that if the jury hears a
8 professor say with authority, without any, what we believe
9 is scientific or reasonable basis, that this should be
10 excluded, it causes extreme prejudice. That, Your Honor,
11 it's a simple motion. Your Honor could in a handful of
12 weeks, maybe three weeks, four weeks, that if that is
13 excluded from the case, as we think it will be, it
14 radically changes the case because now it's just about
15 overhead. Again, which Your Honor did find was a question
16 of fact. That changes significantly the scope of the
17 trial because the whole category --

18 THE COURT: What's the second motion?

19 MR. SNYDER: The second one is on everyone's
20 favorite topic, spoliation. We believe that the 1st
21 Department has ruled decisively twice on this, both in
22 affirming Your Honor's decision and then again in denying
23 the request for leave to appeal to the Court of Appeals.
24 So, there is a fundamental significant difference of
25 opinion about how spoliation is presented to the jury in

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1 this case.

2 THE COURT: I thought I ruled on that as well.

3 MR. SNYDER: You did but the parties are in
4 disagreement about what Your Honor should instruct the
5 jury. Again, that is something that we think if it's left
6 to the eve of trial will not enable the parties to prepare
7 properly. Also another huge leverage point or case
8 momentum point in case the parties want to sit down.

9 THE COURT: Maybe it's me, but often times, you
10 know, and this strikes me as one of those examples, that
11 there is a straightforward principle on spoliation. There
12 is a standard, straightforward jury instruction with
13 regard to spoliation, which the Appellate Division has
14 affirmed in terms of what my determination of sanction
15 would be, that would be an adverse inference charge. Why
16 do we need motion practice to determine the standard
17 adverse inference charge that's given to the jury with
18 regard to spoliation?

19 MR. SNYDER: It's an excellent question.
20 Because, Your Honor, there are different instructions that
21 different Courts give in different circumstances that
22 deviate substantially from the standard instruction. In
23 this case, this is not a case where we think the facts
24 have already been fully litigated. In other words, Your
25 Honor has already --

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1 THE COURT: Okay, let me cut to the chase at
2 least on this one. It strikes me that there does not need
3 to be motion practice on this. What the two of you will
4 do is submit, and I'll allow you to do it in advance of
5 trial, requested charge. You tell me what you feel is an
6 appropriate charge to give to the jury with regard to this
7 issue. You do the same. Then I will, the way that I
8 conduct the trial is, we have a charging conference in my
9 chambers. Half the time it's on the record more than it's
10 not. It's up to you if you want them on the record,
11 that's fine. You submit your request. I listen to them.
12 I give you an opportunity to challenge his request. I
13 give him an opportunity to challenge your request. I make
14 a decision, it's on the record and that's it.

15 So, all I'm trying say, gentlemen, is that we're
16 making things, just it seems to me that we may be in
17 danger of making things more complicated than they are.
18 It's a trial.

19 MR. SNYDER: That's a fair comment. I could
20 understand Your Honor's point of view. May I just be
21 heard one more moment on this? I'm sorry.

22 THE COURT: Yes.

23 MR. SNYDER: I ask you to indulge me. The
24 reason we wanted to do this in advance, and Your Honor's
25 suggestion obviously is a workable one as well to do it in

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1 advance of trial but not in motion practice, is that it's
2 our position that the parties should not have a trial
3 about whether documents were destroyed because Your Honor
4 has already found that documents were destroyed in bad
5 faith with gross negligence.

6 THE COURT: Why would there be a trial on that
7 issue?

8 MR. SNYDER: Well or evidence to rebut that
9 finding?

10 THE COURT: No, no, that's just not permissible.

11 MR. SNYDER: The second point is that I believe
12 that the other side wants also to put in evidence that
13 this was not a big deal. That somehow this was just
14 inadvertent and they had the best intentions, they just
15 didn't put the hold in place. If they are going to do
16 that, that's going to require us to then put in witnesses.
17 And when we're putting together a witness list, we wanted
18 clarity on that point.

19 The problem with the pattern instruction is that
20 it is a permissive inference. In other words, it says,
21 "That I instruct, ladies and gentlemen of the jury, that
22 you may find but are not required to find that Echostar
23 destroyed documents when they had a duty to preserve. You
24 may find that it was in bad faith or you may not. You may
25 find that there was gross negligence or you may not."

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1 Our point is that is the law of the case, Your
2 Honor has so found. The 1st Department has forcefully and
3 emphatically affirmed. It is our belief that that should
4 not be litigated. They should not, for example, be
5 able --

6 THE COURT: Before I comment on this let me hear
7 from you.

8 MR. KERR: Your Honor, let me --

9 THE COURT: Because I have a very, very, in this
10 regard, this issue, let me just make an observation that
11 you would be treading on very thin ice. Even if you were
12 to persuade me that you would want to put in evidence
13 suggesting that this was not intentional, it was not
14 knowingly done in bad faith, you open up the door to
15 evidence of the prior case in which your client was
16 sanctioned. So, I apologize.

17 MR. KERR: Here is the way we see it, Your
18 Honor. You in the prior motion, you made several
19 findings. We didn't have a hold notice in place at the
20 time, we should have. As a result of that documents were
21 lost, that we did it with gross negligence, you made that
22 finding, and some of the documents that were lost were
23 relevant. That sets the scene for your finding that an
24 adverse inference should be charged to the jury. That
25 Pattern Jury Charge is 177.1 standard charge. We don't

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1 have an issue with that, Your Honor. Whether or not, we
2 took it to the 1st Department and they agreed. What we
3 think that we can do is, we can stipulate to those
4 predicate facts that consistent with Your Honor's
5 findings, that charge which is a standard jury charge
6 that's used in this circumstance is the one that should be
7 used.

8 So we come up with agreed stipulation of facts
9 to set the scene. You can read those to the jury. That
10 charge is given. That's the way to address this issue.
11 Your Honor's suggestion of doing that, whether it's as
12 part of the preface of the charging conference is fine
13 with us, that's works for us. That's how we see it or
14 what we think and what we had planned to do is, we had
15 already gotten some stipulated facts in the prior process
16 on this very issue. We think that several -- most of them
17 we can agree with and we should do it that way.

18 So what we were proposing, Your Honor, is let
19 the parties work on those stipulated facts. Then what
20 we're going to propose is the standard charge should be
21 submitted.

22 THE COURT: Okay, look, as I said, I think that
23 maybe I'm getting ahead of myself. I can understand the
24 position of both sides. So let's just leave it to your
25 submission to me on your version, your version, and we'll

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1 have a conference, we'll talk about it and I'll make a
2 ruling.

3 MR. KERR: Fair enough.

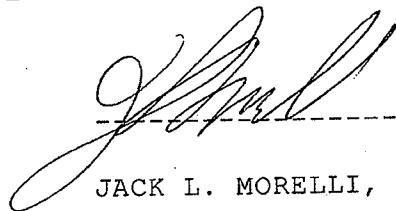
4 MR. SNYDER: Okay. Thank you

5 MR. KERR: Thank you.

6 THE COURT: We will let you know by the end of
7 week, I'll let you know.

8 * * *

9 CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

10
11 
12 JACK L. MORELLI, CM, CSR