FOR THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

In the Matter of EchoStar Satellite, LCC Owning the Trademark Dish Network's Failure To Register as a Telemarketer and the Solicitation it made to those registered on the Do Not Call List.	))))	TC06-191

ECHOSTAR'S BRIEF SUPPORTING MOTION for SUMMARY JUDGMENT

Comes now, EchoStar Satellite, LLC "EchoStar" and respectively moves for Summary Judgment regarding the Order to Show Cause issued by the South Dakota Public Utilities Commission "Commission", against EchoStar and offers the argument and authorities stated in this brief in support of its Motion.

FACTS

On December 6, 2006, the Commission issued an Order to Show Cause why action should not be taken against Dish Network for failure to comply with SDCL §49-31. Dish Network is not a legal corporate entity but rather a trade name, nevertheless, the parties hereto have acknowledged that EchoStar Satellite, LLC is the proper party in this matter. By Order of the Commission, dated April 24, 2007, Dish Network Service, LLC and Echosphere, LLC were added as parties to the docket. All reference in this brief to "EchoStar" shall for purposes of the motion before the Commission include collectively EchoStar Satellite L.L.C., Dish Network Service L.L.C. and Echosphere L.L.C.

Staff's Motion for the Order to Show Cause included reference to complaints filed with the Commission regarding violations of South Dakota's Do Not Call statutes, specifically, SDCL §49-31-99 through 49-31-108 and ARSD 20:10:35. In Staff's

Motion it was asserted that EchoStar had not paid the annual fee or registered as a telemarketer as required by SDCL §49-31-105 and SDCL §49-31-102, respectively. As EchoStar has since complied with those statutory requirements and registered accordingly, those issues will not be addressed herein as EchoStar considers those concerns moot and no longer an issue before the Commission in either its Order as issued on December 6, 2006, or as subsequently amended.

Staff further asserts in its motion that EchoStar failed to institute procedures to comply with the South Dakota Do Not Call statutes as required by SDCL §49-31-99.

ISSUES

1. Did EchoStar make the phone calls as alleged in the aforementioned complaints and thereby violate the Do No Call statutes of the State of South Dakota?

2. Does EchoStar not have procedures in place to comply with the South Dakota Do Not Call statutes?

3. Is EchoStar liable for the acts of independent contractors and other third parties for violations of the South Dakota Do Not Call statutes?

STANDARD OF REVIEW

A Motion to Dismiss challenges the legal sufficiency of a complaint. *Vitek v. Bon Homme Board of Commissioners,* 650 NW2d 513, 516 (SD 2002); *Schloesser v. Norwest Bank South Dakota,* 506 NW2d 416, 418 (SD 1993). A Motion to Dismiss under SDCL §15-6-12(b)(5) tests the law of a Plaintiff's claim, not the facts which support it. *Thompson v. Sommers,* 567 NW2d 387, 390 (SD 1997). A Court may grant a motion to dismiss under SDCL §15-6-12(b)(5) only if it appears beyond a doubt that the complaint sets forth no facts to support a claim for relief. *Schloesser,* at 418. When a party moves to dismiss for failure to state a claim and matters outside pleadings are presented to and

not excluded by Court, the motion shall be treated as one for summary judgment. *Richards v. Lenz*, 539 NW2d 80, 83 (SD 1995).

Summary Judgment is appropriate when no genuine issue as to any material fact exists and the movant is entitled to judgment as a matter of law. *Behrens v. Wedmore*, 698 NW2d 555, 565 (SD 2005); *Jerauld County v. Huron Regional Medical Center*, 685 NW2d 140, 142 (SD 2004); *Braun v. New Hope Township*, 646 NW2d 737, 739 (SD 2002).

As the court noted in *Jerauld County:* "a standard of review on Summary Judgment is well settled. In *Thiewes*, we noted the guiding principle in determining whether a grant or denial of summary judgment is appropriate"

> (1) The evidence must be viewed most favorable to the non-moving party; (2) the burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law; (3) though the purpose of the rule is to secure a just, speedy and inexpensive determination of the action, it was never intended to be used as a substitute for a court trial, or for a trial by jury where any genuine issue of material fact exists; (4) A surmise that a party will not prevail upon a trial is not sufficient basis to grant the motion on issue which are not shown to be sham, frivolous or unsubstantial that it would be futile to try them; (5) summary judgment is an extreme remedy and should be awarded only when the truth is clear and reasonable doubt touching the existence of a genuine issue as to the material fact should be resolved against the movant; (6) where, however, no genuine issue of material fact exists it is looked upon with favor and is particularly adaptable to expose sham claims and defenses.
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> *Jerauld*, at 142. (citing *Department of Revenue v. Thiewes*, 448 NW2d 1, 2 (SD 1989).

"Summary judgment is authorized 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is

no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law…'The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *St. Onge Livestock Co., Ltd. v. Curtis*, 650 NW2d 537 (SD 2002) (citing *Hayes v. N. Hills Gen Hosp*., 590 NW2d 243, 247 (quoting SDCL §15-6-56(c)).

A nonmoving party in a summary judgment motion cannot rely on general allegations or claims and must set forth specific facts to show that a genuine issue of material fact exists in order to successfully preclude the moving party from succeeding on its motion. *Hoaas v. Griffiths*, 714 NW2d 61, 65 (SD 2006) (citing *Wulf v. Senst*, 669 NW2d 135 (SD 2003). "Those resisting summary judgment must show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof." *Bordeaux v. Shannon County Schools*, 707 NW2d 123, 127 (SD 2005), (quoting *Chem-Age Industries, Inc. v Glover*, 652 NW2d 756, 765.)

ARGUMENT AND AUTHORITIES

1. There is no genuine issue of material fact or for trial on the question of EchoStar's liability for violating South Dakota's Do Not Call statutes. EchoStar did not place the telephone calls to the complainants. Staff has produced a record of the calls and the records relating to the original complaints upon which this action was based and the Order to Show Cause was issued. Those numbers are as follows:

a. 605-432-6403; per consumer Complaint submitted by Kurt Flaig, dated May 2, 2006;
b. 605-335-2241; per consumer complaint submitted by Iver Grove, dated May 8, 2006;
c. 605-338-3043; per consumer complaint submitted by Linda Fowler, dated May 19, 2006;

d. 605-895-2624; per consumer complaint submitted by Robert Christensen, dated June 14, 2006;
e. 605-665-5218; per consumer complaint submitted by F. Ross Shuff, dated October 6, 2006;
f. 605-224-0862; per consumer complaint submitted by James Terwillinger, dated October 7, 2006;
g. 605-882-7081; per consumer complaint submitted by Merle Flottmeyer, dated October 11, 2006;
h. 605-343-6527; per consumer complaint submitted by Theodore Bozanich, dated October 11, 2006;
i. 605-258-2301; per consumer complaint submitted by Charles Anderson, dated October 16, 2006;
j. 605-332-1398; per consumer complaint submitted by Carole Ryden on behalf of Tanner Ensenbach, dated October 20, 2006;
k. 605-482-8151; per consumer complaint submitted by Pam Lutter, dated October 22, 2006.

EchoStar did not contact the telephone numbers listed above as alleged in those complaints. (See, Confidential Affidavit of Robert Munger previously filed with the Commission at para.7.) EchoStar has a computerized telephone system that logs each of its outbound calls to consumers. *Id*. para. 6. EchoStar is able to query this computer system by telephone number and generate reports that show whether a particular phone number has been called and, if so, the date, time and other data associated with such telephone calls. *Id*. EchoStar checked its computerized records for each complaint and the phone number associated with the complaint and was able to determine that the calls were not made by EchoStar. *Id*. para. 7. The testimony of Mr. Munger through the affidavit together with the reports the inquiry produced and filed with the Commission on April 23, 2007, proves that EchoStar did not place any telephone calls to the complainants' telephone numbers. *(Id*. as attached Exhibit A.) Nor does EchoStar lease, own or utilize any of the caller identification numbers as listed in the complaints subject to the Order to Show Cause. (See, Confidential Discovery Response #2, May 17, 2007, Discovery Response to Staff's Second Set of Discovery Requests.)

Even viewing the evidence, most favorably in support of the Order to Show Cause a great deal of which is hearsay in nature (and its admissibility in a contested case suspect), the simple fact is that the alleged calls were not made by EchoStar. EchoStar is entitled to Summary Judgment as a matter of law dismissing the Order to Show Cause. No reasonable doubt touches on the existence of a genuine issue of material fact that could be resolved against EchoStar as to the nature or origin of those calls as they were not placed by EchoStar or an authorized third party call center.

2. EchoStar has produced to Commission Staff a myriad of documents, videos, training manuals, retailer agreements and other such materials and information shared with authorized retailers of EchoStar that clearly demonstrate that those retailers are not to violate any state, local or federal law including Do Not Call as they exist in the State of South Dakota and through the National Do Not Call Registry.

EchoStar itself has an internal do not call policy that applies to itself and its authorized third party call centers as disclosed to Staff. (See, attached Confidential Exhibit 1.) EchoStar obtains state and federal do not call lists and makes best efforts to be in full compliance with those lists and legal requirements. (See, Munger Affidavit at para. 5.) EchoStar further maintains it's own internal do not call lists while at the same time monitoring out bound marketing campaign call lists versus state and federal data bases containing do not call lists. *Id* at para.13, 14.

Further, as indicated in EchoStar's do not call policy, EchoStar does not initiate prerecorded messages on behalf of EchoStar or any of its related entities to any telephone number that is not associated with an individual with whom EchoStar has a preexisting business relationship or that is not associated with an existing subscriber

account. *Id* at para. 11. If any calls were placed as alleged in the subject consumer complaints by an entity or individual claiming to "Dish Network", these calls could have been placed by a competitor or other unknown entity without EchoStar's express knowledge or consent. Nevertheless, EchoStar's internal records establish that the alleged calls were not placed by EchoStar.

EchoStar has also provided documented proof that it does not identify itself to consumers as "Direct Dish" or "Dish Direct".

As previously stated, EchoStar has complied with the requirement of the State of South Dakota and has registered as a telemarketing company. It also has taken reasonable steps to ensure compliance with SDCL §49-31-99.[1]

3. Even though the Commission and Staff have not yet alleged vicarious liability of EchoStar for the violation of the South Dakota Do Not Call statutes, in this case none could be found.

Any liability of EchoStar under the South Dakota Do Not Call Statutes must come from those Statutes. The meaning of those statutes is found in the words and phrases in the statute that have plain meaning and effect. *State v. Johnson*, 691 NW2d 319, 321-322 (SD 2004). South Dakota Law provides that "(n)o telephone solicitor may make an unsolicited telephone call to any number listed on the register." SDCL §49-31-99. SDCL §49-31-1 (31) defines who may be subject to this law as "any person or organization who individually or through salespersons, makes or causes to be made a telephone solicitation call."

[1] SDCL§49-31-99 states in part "Any telephone solicitor who makes unsolicited telephone calls shall institute procedures that comply with the provisions of this chapter for obtaining a list of persons who do not wish to receive unsolicited telephone calls made by or on behalf of the telephone solicitor."

Clearly, as previously state, EchoStar and its authorized third party call centers did not make the calls that are the subject of the Order to Show Cause. EchoStar has its own call centers and also contracts with authorized third party call centers that did not place the calls that are the subject of this docket. A strained agency argument would need to be made to show liability of EchoStar for calls made by others in violation of the Do Not Call statutes.

An agency relationship may either be direct, where there is an express creation of the relationship where the agent acts on behalf of the principal, [2] or an agency may be ostensible where the law will imply an agency relationship.[3] "Whether an agency relationship has in fact been created depends upon the relations of the parties as they exist under their agreement or acts." *Dahl v. Sittner*, 429 NW2d 458, 462 (SD 1998) (citing, *Kasselder v. Kapperman*, 316 NW2d 628, 630 (SD 1982). "Existence of an agency relationship is a fact specific issue." *Action Mechanical, Inc. v. Deadwood Historic Preservation Comm'n*, 652 NW2d 742, 753 (SD 2002).

In order for an agency relationship to exist (1) the principal must intend for the agent to act for him; (2) the agent agrees to do so; (3) the parties agree that the principal is in control of the acts of the agent. See, *Kasselder* at 630.

First, the authorized independent contractor retailers (hereinafter "retailers") are not exclusively working for EchoStar, they are not employees, they are specifically allowed to carry on other businesses and work in fact with, if they choose, EchoStars competitors. (See, generally, EchoStar Retailer Agreement filed confidentially with

[2] SDCL§59-1-4 states in part "Agency is actual when the principal appoints the agent."
[3] SDCL§59-1-5 states in part "Agency is ostensible when by conduct or want of ordinary care the principal causes a third person to believe another, who is not actually appointed, to be his agent."

Staff.)[4] There is an agreement with EchoStar and the retailer that allows the retailer to sell EchoStar products and services however the manner in which the sale is conducted is up to the retailer subject to the retailer agreement of EchoStar. *Id*. EchoStar does not control the business practices or conduct of its authorized retailers. Any calls which would be in violation of do not call law made by a retailer are done so by the retailer or its agents and are not so directed or under the control of EchoStar. Thus said, EchoStar does not tolerate retailers who are found to have violated state and federal do not call laws and has terminated the retailer agreements of those retailers found to have disregarded the law. (See, attached Exhibit 2.) EchoStar continues to monitor its retailers to ensure compliance with Do Not Call statutes in South Dakota and through the country. Further, EchoStar conducts a consumer participation "sting" program in order to help catch those who violate the law and participation in this effort has been made, and will continue to be made to consumers, the Commission and other regulating bodies. (See, attached Confidential Exhibit 3.)

There can be no argument of fact that an agency relationship existed between retailers and EchoStar. Retailers are acting on behalf of themselves selling EchoStar products and services to consumers. With regard to telemarketing activities, a consumer cannot subscribe to EchoStar's services until approved by EchoStar. The retailer does not create the relationship between EchoStar and the consumer, it merely walks the consumer to the door. EchoStar does not control the means or methods by which its

[4] The EchoStar Retailer Agreement states in part, "Retailer, acting as an independent contractor, desires to become authorized on a non-exclusive basis to market, promote and solicit orders for programming…" *Id.* at 1.

retailers go about their business and EchoStar is not obligated to accept any consumers directed to it by a retailer. [5]

Liability and fault for the alleged violations which are the subject of the complaints filed in the matter lies with the entities or individuals who actually made the calls. See again, SDCL §49-31-99. If those callers were acting directly for a retailer who violated their retailer agreement[6] with EchoStar as well as state and federal law on their own accord (whether intentionally or not), the retailer would be liable under South Dakota Law for those unsolicited phone calls.

Even if the retailers were found to be agents, South Dakota law would provide that there would be no liability in this instance. In *Drew v. Stanton*, 603 NW2d 79 (SD 1999), the court stated that a principal cannot be liable for the unauthorized acts of its agent absent knowledge of the acts themselves and the intent to ratify them. *Id.* at 83. (citing *Bank of Hoven v. Rausch*, 382 NW2d 39, 41 (SD 1986). Much as in *Drew*, where a law firm reported the unauthorized act of a member attorney to the state bar and terminated his employment, EchoStar has demonstrated its practice of actively seeking out and investigating retailers who are violating state and federal do not call laws, and in several instances terminating those retailer agreements. (See, attached Exhibit 2.) EchoStar educates its authorized retailers on do not call law and warns of the consequences of violating said laws. EchoStar also proactively addresses the subject of

[5] Section 7.2 of the Retailer Agreement states in part, "Retailer understands that EchoStar shall have the right, in its sole discretion, to accept or reject, in whole or in part, all orders for programming." *Id.* at 17.
[6] Section 9.1 of the Retailer Agreement states in part, "Retailer shall not engage in any activity or business transaction which could be considered unethical, as determined by EchoStar in accordance with prevailing business standards, or damaging to EchoStar's and/or any of its Affiliates' image or goodwill in any way. Retailer shall under no circumstances take any action which could be considered disparaging to EchoStar and/or any of its Affiliates. Retailer shall comply with all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto, now enacted or hereafter promulgated (hereinafter "Laws"), and Retailer is solely responsible for its compliance with all Laws that apply to its obligations under this Agreement." *Id.* at 18.

do not call law violation with retailers. (See, attached Confidential Exhibit 4 (undated "Facts Blasts" sent periodically to retailers, see also, Confidential "Retailer Chat" videos dated January 16, 2007, and February 13, 2007, previously supplied to Staff.))

Further, the use by a caller of the name "Dish Network," "Direct Dish," "Dish Direct," "Satellite Promotions," "Satellite Sales" or any derivative thereof cannot be enough to establish principal liability where the act purporting to link or create such liability is that of the supposed or alleged agent, particularly as in this instance as such an association is clearly in violation of continued warnings and direction of EchoStar (See, attached Confidential Exhibit 4 and aforementioned Confidential "Retailer Chat" videos) and is also a direct violation of the authorized retailer agreement. It is indisputable that EchoStar authorized retailers must identify themselves by their company or business name. (Retailer Agreement at 21.)[7] Retailers are not allowed to market themselves as "Dish Network" or "EchoStar". "If the apparent authority can only be established through the acts, declarations and conduct of the agent and is not in some way traceable to the principal, no liability will be imposed upon him. *Dahl* at 462 (citing *Draemel v. Refenacht, Bromagen & Hertz, Inc*., 392 NW2d 759, 763 (NE 1986), *Kasselder* at 630).[8]

CONCLUSION

For the reasons stated above, EchoStar respectively requests that the Commission grant EchoStar's Motion for Summary Judgment regarding the Commission's Order to

[7] Section 11 of the Retailer Agreement states in part, "Retailer (including without limitation of its officers, directors, employees and permitted subcontractors) shall not, under any circumstances, hold itself out to the public or represent that it is EchoStar or an employee, subcontractor, affiliate, agent or subagent of EchoStar or any EchoStar affiliate" *Id.* at 21.

[8] See also, SDCL §59-5-2 which states in part "One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: (3) When his acts are wrongful in their nature."

Show Cause. EchoStar is entitled to judgment as a matter of law as there is no evidence that creates a genuine issue of material fact on the issue of whether EchoStar placed the alleged telemarketing calls to South Dakota consumers.

Factually, the calls in this matter were not made by EchoStar. EchoStar has sufficient procedures in place to ensure compliance with the South Dakota Do Not Call laws. And lastly, the facts determining the relationship between EchoStar and its retailers do not support an agency relationship.

In the increasing speed with which technology develops, it appears those that would utilize such technology along with multi-jurisdictional hurdles can and have in these instances, prohibited the Commission as well as EchoStar from ascertaining who in some instances made the alleged calls that are the subject of the Order to Show Cause. Were they authorized retailers of EchoStar violating their agreements with EchoStar, such as in the case of JSR Enterprises whose EchoStar retailer agreement has since been terminated for violative telemarketing practices? In some instances the answer may be yes. Were the callers lead generation companies with absolutely no connection with EchoStar or retailers whose business tactics including obtaining potential interested customers and then selling the potential customer information to retailers as "leads"? Perhaps. Is it possible that EchoStar's competitors and their retailers, some of whom are prohibited from telemarketing, may be contacting consumers as "Dish Network" only to attempt to try and sell another product rather than EchoStar's? These potential connections and unknowns are clearly not enough for liability to befall EchoStar under the do not call laws of the State of South Dakota and accordingly an Order for Summary Judgment should be issued by the Commission closing the docket.

Dated this 27th day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Brief in Support of Motion to Dismiss on Order to Show Cause were served electronically on the following by filing them pursuant to Commission rules on this 27th day of July, 2007.

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