

**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) TC06-191
To Register as a Telemarketer and the)
Solicitation it made to those registered on the)
Do Not Call List.)

ECHOSTAR’S REPLY SUPPORTING MOTION FOR SUMMARY JUDGMENT

Comes now, EchoStar Satellite, LLC (“EchoStar”) and respectively submits this Reply to Commission Staff’s Brief in Reply (hereinafter referred to as “Staff’s Reply”) to EchoStar’s Motion for Summary Judgment.

ARGUMENT

Staff’s Reply narrows the focus of the matter before the Commission to the issue of whether or not the unidentified outside parties calling the complainants were in fact agents of EchoStar Satellite, LLC.

Staff concedes that the complainant calls were not made by EchoStar nor were they made by an authorized calling center of the company (Staff’s Reply at 5-6). Rather, in light of the facts on record and documentation produced, Staff focuses on the issue of agency liability asserting that these calls possibly could have been made on behalf of EchoStar by its agent or that pursuant to SDCL 49-31-1(31) the calls were caused to be made by EchoStar.

EchoStar disputes both of these mere possibilities and argues that the facts on the record and on file with Staff warrant Summary Judgment regarding the Order to Show Cause issued by the Commission. EchoStar does not dispute that there are unethical business men and women out there who willfully violate Do Not Call regulations. However, using the term “Dish” or “Satellite” or any derivative thereof does not establish

any relationship with DISH Network™, EchoStar, Direct TV or any other provider. To believe as much accepts the truthfulness of the caller as to his or her identity after the same person has already violated Do Not Call regulations.

EchoStar asserts that there is no agency relationship between itself and its independent authorized retailers ("EchoStar Retailers"). The Court in *Kasselder* laid out a three-part test for an agency relationship to exist. First, the principal must intend for the agent to act for him; second, the agent must agree to do so; and third, the parties must agree that the principal is in control of the acts of the agent. *Kasselder v. Kapperman* 316 NW2d 628, 630 SD 1982 (see also, EchoStar's Brief Supporting Motion for Summary Judgment (hereinafter referred to as "EchoStar Brief") at 8).

Here, all three prongs of the *Kasselder* test fail. Further, Staff as the non-moving party must set forth specific facts to show that a genuine issue of material fact exists in order to preclude Summary Judgment, and they have not done so. (See *Hoaas v. Griffith*, 714 NW2d 61, 65 SD 2006 and *Brodeaux v. Shannon County Schools*, 702 NW2d 123, at 127 SD 2005). The characterization of Staff that these EchoStar Retailers are "dish networks sales people" is misguided. Staff has failed to grasp the nature of the independent retailer business, both as it relates to EchoStar and hundreds of other companies, products and businesses. EchoStar does not intend at any time for its Retailers to act as agents for it, rather EchoStar Retailers are in business for themselves selling a product. EchoStar's Independent Authorized Retailers sell other products, including EchoStar's competitor's products (i.e. DirectTV). EchoStar Retailers do not exclusively sell subscriptions to EchoStar's trade name product DISH Network™. The record is clear as submitted and undisputed in the Staff's original brief that it is not the

intent of EchoStar or the Retailer for the Retailer to act as an agent for EchoStar. (See, EchoStar Brief at 8-10). The first and second prongs of the *Kasselder* test are not met in that: (1) EchoStar does not intend for a Retailer to act as its agent; and (2) that the Retailer does not agree to act as EchoStar's agent. The third factual prong fails as well as EchoStar is not in control of the Retailer's acts absent the first and second prongs being met. (Id)

In citing the standard to find an actor the agent of a principal due to the lack of care on behalf of the principal, Staff fails to recognize the evidence in the record and on file with the Commission regarding the efforts taken by EchoStar to monitor, educate and train the independent contractors in regard to Do No Call regulations. (Id at 10-11). Echostar has terminated several of its largest Retailers for Do Not Call violations. (See, attached Confidential Exhibit 1, a list of terminated EchoStar Retailers and attached Exhibit 2, updated press release regarding the most recent termination.) If EchoStar discovers or is informed of improper activities, it acts to investigate and discipline its Retailers. EchoStar also notifies Retailers of their obligation to comply with all laws and abide by the terms and conditions of the EchoStar Retailer Agreement. (See, attached Confidential Exhibit 3, a *Facts Blast* dated June 19, 2007.) Even if the Commission was to determine that Retailers are in fact EchoStar agents, based on the record and materials on file, there is no reasonable argument that EchoStar does not exercise ordinary care so as to allow third persons to believe that the unauthorized calls are made by individuals authorized to make such calls.

By acknowledging that these calls were not made by EchoStar or its authorized third party call centers, Staff, in light of agreed upon restrictions governing Retailer

conduct as well as Echostar's practices vis-à-vis Do Not Call, attempts to get around *Dahl* by claiming that authority for the acts and hence the creation of the agency occurs through the declarations and acts of the unidentified callers.¹

Once again, to reiterate, the first prong of the *Kasselder* test fails whereby it must be proven that the principal intends for the agent to act for him. EchoStar Retailers are by agreement forbidden from holding themselves out as DISH Network™. (See Staff's Reply, Confidential Exhibit 1 at 21).² EchoStar Retailers are by agreement independent contractors. (See, *Id.*). Retailers are further admonished and contractually have agreed not to violate any laws or rules of the state in which they do business. (See, *Id.* at 18).³ They are further admonished in several manners and forms not to do the same by Echostar. (See, EchoStar Brief at 10-11). EchoStar Retailers contractually agree to subject themselves and their agreement with EchoStar to immediate termination if:

“(the) Retailer fails to comply with any applicable Laws, or engages in any practice, substantially related to the business conducted by Retailer in connection with this Agreement, which is determined to be an unfair trade practice or other

¹ “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.” See, *Dahl v. Sittner*, 429 NW2d 458 at 462 (SD 1998). (citing *Draemel v. Refenacht, Bromagen and Hertz, Inc.*, 392 NW2d 759, 763 Neb 1986, *Kasselder* at 630).

² Section 11 of the Retailer Agreement states, in part: “The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be Retailer's employees only, and not employees or agents of EchoStar or any of its affiliates. Retailer shall prominently state its business name, address and phone number and that Retailer is an “authorized DISH Network retailer” in all communications with the public, including, without limitation, marketing materials, flyers, print ads, television or radio spots, web sites, e-mails, invoices, sales slips, and the like. Notwithstanding anything set forth in this Agreement to the contrary, Retailer (including without limitation 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 sub-agent of EchoStar or any EchoStar affiliate.”

³ Section 9.1 of the Retailer Agreement states, in part: “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.”

violation of any applicable Laws, *including without limitation any telemarketing/do-not-call laws, spam laws, privacy laws*, fair credit reporting laws or warranty laws...” (emphasis added). (Staff’s Reply, Confidential Exhibit 1 at 20).

If ostensible authority could be found to have been granted these Retailers, whom the Staff would like to make agents of EchoStar to have placed the calls in question, that authority could only be seen through the Retailers acts, declarations and conduct countermanding their agreements with EchoStar as well as State and Federal law. *Dahl* says that apparent or ostensible authority cannot be found by such means. (See, previous fn 1.) *Dahl* could allow for the acts of the parties to create that ostensible authority, but the record is complete with undisputed factual evidence that EchoStar forbids, trains and admonishes EchoStar Retailers on Do Not Call and has ultimately terminated Retailers for Do Not Call violations.

As to Staff’s claim that EchoStar would fit under the definition of a telephone solicitor pursuant to SDCL 49-31-1(31), that argument appears strained as well. Petitioner would offer that a reasonable interpretation of the phrase “causes to be made” would turn upon an agency relationship which meets the aforementioned *Kasselder* test. Without agency or outright directive (clearly not the case here) there can be no “causing.” Additionally, and for argument sake, we must consider the logical conclusion of Staff’s position. That conclusion would be that any organization, business or individual who markets or sells a product or service at a retail level is acting as an agent, and thus would subject the owner, manufacturer, financier, licensor, wholesaler, producer or franchisor to a long list of possible liabilities by making all those involved in the delivery of their

products or services agents, thusly in the case of Echostar, creating a telephone solicitor. The fact that an EchoStar Retailer chooses in its independent business plan to offer DISH Network™ products and services does then not make DISH Network™ by extension liable for all acts of that Retailer in the attempt to sell those services. This does not make the Retailer an agent alone, under *Kasselder*, and cannot by that standard then “cause” unauthorized marketing to be done. The fact that the retailer relationship exists can hardly be seen as the “cause” of that person deciding to make solicitation calls, much less calls in violation of Do Not Call statutes against the express written direction, agreement and considered admonition of EchoStar. The logical conclusion of Staff’s argument that, because an EchoStar Retailer is selling the product, any phone call or act conducted by that Retailer can be imputed to EchoStar, is an unreasonably broad interpretation of what a retailer in retailing any product or service is “caused” to do by an owner, manufacturer, financier, licensor, wholesaler, producer or franchisor. If factually you cannot find an unknown caller to be an agent and there is no direction to make calls, you cannot bootstrap liability here under SDCL 49-31-1(31).

CONCLUSION

The Staff’s argument boils down to one issue: whether EchoStar should be held liable for Do Not Call violations of unidentified callers because a voice on the other end of the phone uttered the words “Dish Network,” “Dish,” or some other derivative thereof. Essentially, without any supporting evidence and in light of the evidence on file and on record, Staff summarily concludes that the employees of the unknown company could be “agents” of EchoStar Satellite, LLC. Staff’s arguments are mistaken. The evidence is undisputed that EchoStar did not initiate any telephone calls to the complaining

consumer's phone lines. The evidence is clear that any calls made were not done by the agent of EchoStar. As such, for these reasons and the reasons stated in the original brief of the Petitioner, accordingly, the Commission should grant the Motion for Summary Judgment.

Respectfully submitted this 21st day of August, 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 21st day of August, 2007.

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