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FOR THE DISTRICT OF COLORADO DISTRICT OF COLORADO

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Civil Action No. 00-K-212

JAMES R. MANSPEAKER
CLERK

ECHOSTAR COMMUNICATIONS CORPORATION, a
Nevada corporation, *et al.*,

BY _____ DEP. CLK

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation, *et al.*

Defendants.

AND RELATED COUNTERCLAIMS

**REPLY IN SUPPORT OF DIRECTV'S AND HUGHES'
MOTION TO DETERMINE SUFFICIENCY OF PLAINTIFFS'
RESPONSE TO REQUEST FOR ADMISSION NO. 2**

Sometimes the facts speak for themselves. Here, the absurdity of EchoStar's continued efforts to avoid admitting that it "competes with cable for subscribers" is revealed simply by setting forth, in dialogue form, the conversation that has so far occurred on this issue:

DIRECTV: Do you compete with C-Band satellite for subscribers?

EchoStar: No.¹

DIRECTV: Do you compete with Multichannel Multipoint Distribution Service for subscribers?

EchoStar: No.²

¹ See Ex. 2, at 3.

² See *id.*

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DIRECTV: Do you compete with Satellite Master Antenna TV for subscribers?

EchoStar: No.³

DIRECTV: Do you compete with cable for subscribers?

EchoStar: I can't say. That question is vague and ambiguous.⁴

DIRECTV: How can it be vague and ambiguous? The question is practically the same as the three previous ones.

EchoStar: Well, then, they are vague and ambiguous, too.⁵

DIRECTV: How is it vague and ambiguous?

EchoStar: We compete in several different markets and/or sub-markets.⁶

DIRECTV: I didn't ask you that. I just want to know if you compete with cable for subscribers in any of those markets.

EchoStar: The nature, extent and relevancy of our competition varies depending on the products, product components, services or service components offered by each market/sub-market participant.⁷

DIRECTV: I didn't ask you about the nature, extent and relevancy of your competition. My question is this: Do you compete with cable at all for subscribers?

EchoStar: When PrimeStar was owned by cable companies, we competed indirectly with cable for *satellite* subscribers.⁸

DIRECTV: I didn't ask you about when the cable companies owned PrimeStar. Right now, do you compete with cable for subscribers?

³ See *id.*

⁴ See *id.*

⁵ See Ex. 5, at 3.

⁶ See Opp. at 4.

⁷ See *id.*

⁸ See Ex. 2, at 3.

EchoStar: We do not compete directly with cable for *satellite* subscribers.⁹

DIRECTV: I didn't ask about competition for *satellite* subscribers. Do you compete with cable for *any* subscribers?

EchoStar: We do not compete with cable for the sale of DBS receivers or antennas.¹⁰

DIRECTV: I didn't ask about the sale of DBS receivers or antennas. Do you compete with cable for subscribers?

EchoStar: We do not compete with cable for retail outlet customers.¹¹

DIRECTV: I didn't ask about retail outlet customers. Do you compete with cable for any subscribers?

EchoStar: We do not compete with cable for customers that are not "passed" by cable lines.¹²

DIRECTV: I didn't ask about "non-passed" customers. Do you compete with cable for any subscribers?

EchoStar: We are still gathering evidence to show that DBS is better than cable in some respects.¹³

DIRECTV: That doesn't answer my question. Do you compete with cable for subscribers?

EchoStar: We are DIRECTV's closest competitor.¹⁴

DIRECTV: I didn't ask who was your closest competitor. I just want to know if you compete with cable for subscribers.

EchoStar: I don't understand what you mean by "compete."¹⁵

⁹ See *id.*

¹⁰ See *Opp.* at 4.

¹¹ See *id.*

¹² See *id.*

¹³ See *id.* at 6.

¹⁴ See *id.*

¹⁵ See *id.* at 7.

DIRECTV: You have talked about who does and does not compete with you eight times in this conversation. How can you not understand what the word "compete" means?

EchoStar: You have to tell me the precise product and geographic market to which you are referring.¹⁶

DIRECTV: My question is not restricted to any specific market. Do you compete with cable for any subscribers at all?

EchoStar: I cannot fairly answer that question. It involves a question of fact and/or a mixed question of fact and law.¹⁷

DIRECTV: That's not any reason not to answer.

EchoStar: Your question is ultimately for the Court and/or the jury to decide.¹⁸

DIRECTV: While that may be true, you still have to answer the question.

EchoStar: I cannot answer it. It involves a complex question that is at the very heart of this entire litigation.¹⁹

DIRECTV: I agree it goes to the very heart of the litigation. Now please answer my question.

EchoStar: I cannot answer it. The question will require expert testimony.²⁰

DIRECTV: That doesn't matter. Please answer the question.

EchoStar: I cannot answer it.

This conversation reveals more than evasiveness; it reveals EchoStar's awareness that if it now admits -- as it has sworn so often in the past -- that it competes with cable, the antitrust claims in

¹⁶ See *id.* at 5.

¹⁷ See Ex. 5, at 2.

¹⁸ See *id.*

¹⁹ See Opp. at 2.

²⁰ See *id.* at 5.

this case are over. That, however, is not a basis for refusing to respond to a simple and straightforward request for admission.

EchoStar's Rule 36 arguments are also baseless, and easily disposed of. Its Opposition suggests that RFA No. 2 is patently vague and ambiguous in its use of the word "compete," and that it raises countless complex issues that EchoStar is unable to sort through. Opposition at 3. These are meritless, as other statements in EchoStar's own responses and in its Opposition demonstrate. In addition, EchoStar's Opposition raises another new objection: that it needs more discovery and expert testimony to answer this question. But EchoStar waived any such objection by failing to raise it in its initial responses. That objection likewise fails on the merits.

ARGUMENT

A. EchoStar's Belated Efforts To Make This RFA Appear "Vague" By Claiming It Doesn't Understand What "Compete" Means And By Injecting Side Issues Should Be Rejected.

As DIRECTV's motion pointed out, EchoStar's Responses or Amended/Supplemental Responses nowhere identify a single term or concept in RFA No. 2 that was vague or ambiguous, nor did either document provide any explanation for how the RFA was allegedly vague or ambiguous. Motion at 7-8. EchoStar's Opposition offers no explanation or excuse for its failure either to make the required specific objections or to explain them, as the Rules and caselaw require. Instead, EchoStar tries to belatedly justify its vagueness objection by implausibly suggesting that the term "compete" is so vague as to preclude a response and by injecting numerous irrelevant side issues. The Court should reject these arguments.

EchoStar's initial Responses, including its response to Request No. 2, reveal that it knows what it means to "compete." As DIRECTV pointed out in its Motion and in its meet-and-confer correspondence,²¹ EchoStar denied RFAs 3, 4 and 5 cleanly, without objection, even though each request used the term "compete" and was framed almost identically to RFA No. 2. EchoStar's Opposition does not even try to explain this obvious incongruity.²² Additionally, EchoStar uses the term "compete" on three more occasions in its Opposition, again betraying that it understands full well what the term means.²³ And as DIRECTV pointed out in its pending motion for summary judgment, EchoStar's own Vice President testified in a declaration under oath before the FCC that EchoStar competes directly with cable operators for subscribers. See Full Appendix in Support of Motion for Summary Judgment, Ex. B at 42. Indeed, despite its objection about vagueness and ambiguity, EchoStar stated in its original answer to RFA No. 2 itself: "EchoStar does not compete directly with cable for satellite subscribers." Although this response did not answer the question asked, it discredits any objection that the term "compete" in the RFA is vague. Given these prior statements about how it competes, EchoStar cannot now switch gears and claim that it is unable to answer a simple question about whether it competes with cable.

In both its response and its Opposition, EchoStar has also volunteered all kinds of nonresponsive information to avoid the substance of the question. For example, in its original

²¹ See Motion at 2-3, Ex. 3.

²² Nor does EchoStar attempt to justify or defend its belated effort to add "vague and ambiguous" objections to its Amended/Supplemental Responses when none appeared in its initial Responses.

²³ See Opposition at 4 ("[C]able providers do not sell DBS satellite receivers or antennas, so EchoStar does not compete against cable in that respect"); *id.* ("EchoStar obviously does not compete with cable for retail outlet customers"); *id.* ("[B]ecause cable is only sold to homes 'passed' with cable lines, EchoStar does not compete for 'non-passed' customers").

response, EchoStar only addressed competition for satellite subscribers, an issue never mentioned in the request. This was a bad-faith evasion prohibited by the Rules. *See Poole ex rel. Elliott v. Textron, Inc.*, 192 F.R.D. 494, 499 (D. Md. 2000) ("Rule 36 expressly permits a party to qualify an answer, but only 'when good faith requires.'"). What EchoStar is really attempting to accomplish by this is to dodge addressing the specific matter of the request. The Rules prohibit such evasions. *See Herrera v. Scully*, 143 F.R.D. 545, 549-550 (S.D.N.Y. 1992) (a response to a request for admission that makes an evasive answer -- i.e., one that does not admit or deny the specific matter requested -- is inadequate); *see also Jaffe v. Grant*, 793 F.2d 1182, 1190 (11th Cir. 1986) (censuring party for nonresponsive, evasive and incomplete answers to requests for admission).

This evasive conduct has continued throughout EchoStar's Opposition. Rather than addressing the substance of RFA No. 2, EchoStar raises irrelevant side issues, injecting tangential information to create false ambiguity. For example, EchoStar claims that it "competes in several different markets and/or sub-markets." Opposition at 4. Interesting as this may be, it does not address DIRECTV's request for admission. The pertinent question -- and the one that EchoStar dodges -- is whether EchoStar competes *with cable* in any of those alleged markets and/or sub-markets. EchoStar also states that "[t]he nature, extent and relevancy of such competition varies" depending on certain factors. *Id.* Again, DIRECTV did not ask about "the nature, extent and relevancy" of EchoStar's competition with cable for subscribers.²⁴ Nor did DIRECTV inquire about

²⁴ Indeed, the nature, extent and relevancy of the competition between EchoStar and cable presupposes that such competition exists. If EchoStar believes that the "nature, extent and relevancy" of competition with cable is important, it must have already determined that it does in fact compete with cable for subscribers.

"the precise product or geographic markets."²⁵ The request had no such limitations, which EchoStar tried to add for the first time in its Opposition. None of these issues raised by EchoStar relates to the question that DIRECTV asked: whether there is any competition with cable for subscribers.

EchoStar's Opposition goes on to observe that, because cable providers do not sell DBS equipment and do not sell their product in retail outlets, EchoStar does not compete with cable in those two respects. Opposition at 4. Neither of these newly-minted observations appeared in any of EchoStar's responses to RFA No. 2. More important, DIRECTV did not ask whether EchoStar competed with cable for sale of DBS equipment; such a question would be ridiculous. Nor did DIRECTV ask whether EchoStar competed with cable for retail outlet customers. DIRECTV only asked whether EchoStar competed with cable for subscribers at all. In sum, none of these observations by EchoStar addresses the specific matter of DIRECTV's request. Rather, they all attempt to avoid the question and to complicate this discussion with superfluous issues. This Court should disregard them. *See Herrera*, 143 F.R.D. at 549-550; *Jaffe*, 793 F.2d at 1190.

B. EchoStar Does Not Need Additional Discovery or Expert Testimony to Answer RFA No. 2.

EchoStar now claims that it has not yet had enough discovery to answer the simple question of whether it competes with cable, and that it anticipates designating an expert. These new objections are frivolous. EchoStar did not raise them in either its initial or supplemental responses and they are, therefore, waived. *See Motion at 5-6; Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 661-62 (D. Colo. 2000); *Baker v. Dorfman*, 2000 WL 420551 at *5 (S.D.N.Y. April 17, 2000); *see*

²⁵ EchoStar pleaded that the appropriate geographic market for analysis of its claims is "the continental United States." Complaint ¶ 124. In light of that admission, what relevance different "geographic markets" may have is anybody's guess.

also 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure: Civil 2d* § 2262 at p. 561.

Even if these objections were somehow preserved, EchoStar could not plausibly argue that it needs more discovery to respond to Request No. 2. The request concerns EchoStar's own competitive strategy and an analysis of its own competitors. As explained more fully in DIRECTV's Motion for Summary Judgment and its Reply, the information and documents necessary for EchoStar to assess who competes with it are primarily in EchoStar's possession and control. They would include its advertisements, where it targets cable subscribers, its internal strategy documents, where it assesses how best to increase its market share by marketing to cable subscribers, and its annual statements to the FCC, where it explains how it competes with cable providers. If those options fail, it can simply ask Mr. Schwimmer, its Vice President of Programming, who testified under oath to the FCC that EchoStar competes directly with cable for subscribers.

EchoStar's suggestion that it needs expert testimony to respond to this request is equally flawed. A request for admission may cover any matters within the scope of Rule 26(b)(1) "that relate to statements or opinions of fact or the application of law to fact." Fed. R. Civ. P. 36(a) (emphasis added). "[A]n objection based on the fact that a request seeks an opinion is excluded by the express terms of Rule 36." *Booth Oil Site Admin. Group v. Safety-Kleen Corp.*, 194 F.R.D. 76, 81 (W.D.N.Y. 2000); see also 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure*, Civ. 2d § 2255 (Rule 36(a) permits requests regarding opinions and conclusions). A request for admission is not improper merely because it relates to matters of expert opinion. See, e.g., *Lumpkin v. Meskill*, 64 F.R.D. 673, 677 (D. Conn. 1974) (plaintiff's request for admission of validity of techniques employed by plaintiff's expert is not improper); *Anderson v. United Air Lines, Inc.*, 49

F.R.D. 144, 149 (S.D.N.Y. 1969) (overruling objection that RFA called for opinions or conclusions of experts). Also, as demonstrated above, it doesn't take an expert to read one's own documents, advertisements, or testimony.

Finally, EchoStar's other new objection, that Request No. 2 "involv[es] a complex question that is at the very heart of this entire litigation" (Opposition at 2) is little different from the dead-in-the-water objection that the request "is for the Court and/or jury to decide." See Motion, Ex. 4 at 2; Ex. 5 at 2.²⁶ The mere fact that a request for admission involves "the very heart of this entire litigation" is not a valid objection. See *Booth Oil Admin. Group*, 194 F.R.D. at 80 ("the fact that an admission, provided in response to a request, may prove decisive to the case is no ground for refusal to respond"); *Cereghino v. Boeing Co.*, 873 F. Supp. 398, 403 (D. Or. 1994) ("a request for admission under Rule 36, and a resultant admission, are not improper merely because they, as here, relate to an 'ultimate fact,' or prove dispositive of the entire case").

CONCLUSION

EchoStar's Opposition, like its previous responses, reads like the testimony of a witness looking for a way around a question that he doesn't want to answer. EchoStar has invented false ambiguities, raised irrelevant side issues and released a fusillade of frivolous objections, all to avoid answering a simple question. EchoStar understands what the question means, and it knows what the answer is. EchoStar cannot avoid this RFA merely because it does not like the answer. The Court

²⁶ EchoStar does not even try to defend its belated objection in its Amended and Supplemental Responses that "Plaintiffs cannot fairly respond to this request as it involves a question of fact and/or a mixed question of fact and law, which is for the Court and/or jury to decide." As DIRECTV pointed out in its Motion, Rule 36 expressly permits such questions.

should strike EchoStar's objections and order EchoStar to answer Request For Admission No. 2
without objection.

Dated: November 30, 2000

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 30, 2000, **REPLY IN SUPPORT OF DIRECTV'S AND HUGHES' MOTION TO DETERMINE SUFFICIENCY OF PLAINTIFFS' RESPONSE TO REQUEST FOR ADMISSION NO. 2**, was served by facsimile and Federal Express on:

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-212

ECHOSTAR COMMUNICATIONS CORPORATION, a
Nevada corporation, *et al.*,

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation, *et al.*,

Defendants.

AND RELATED COUNTERCLAIMS

**DIRECTV'S AND HUGHES' MOTION TO DETERMINE
SUFFICIENCY OF PLAINTIFFS' RESPONSE
TO REQUEST FOR ADMISSION NO. 2; CERTIFICATION
PURSUANT TO LOCAL RULE 7.1A**

As described at length in DIRECTV's summary judgment motion, EchoStar has clearly and unequivocally admitted on dozens of occasions in the past that satellite providers compete with cable. In contrast here, EchoStar refuses to give a straightforward response to a simple request for admission: "Admit that EchoStar competes with cable for subscribers." At first, EchoStar ducked by simply answering a different question than the one DIRECTV asked. When pressed, EchoStar withdrew that response, but added several new meritless objections qualifying its answer. These objections are waived. They also fail on the merits.

Rule 36 requires EchoStar to give a straightforward response that "fairly meets the substance" of DIRECTV's request. It also requires EchoStar to state its objections within 30 days of receiving the request, and to make its objections specific so the Court can understand in

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what way the request is objectionable. EchoStar's responses to Request For Admission No. 2 do none of these things. DIRECTV therefore asks this Court to order EchoStar to admit or deny, without objection, Request for Admission No. 2 from DIRECTV's First Set of Requests for Admission.¹

I. Background

On August 7, 2000, DIRECTV served its first set of Requests for Admission on EchoStar. See Ex. 1 to Certification Pursuant to Local Rule 7.1.² That set included five questions asking about EchoStar's competition with other technologies. EchoStar answered three of these five questions cleanly, without objection:

Request No. 3: Admit that EchoStar competes with C-Band satellite for subscribers.

Response: Denied.

Request No. 4: Admit that EchoStar competes with Multichannel Multipoint Distribution Service for subscribers.

Response: Denied.

Request No. 5: Admit that EchoStar competes with Satellite Master Antenna TV for subscribers.

Response: Denied.

But, EchoStar was not nearly as forthcoming on an RFA that could potentially harm its case:

Request No. 2: Admit that EchoStar competes with cable for subscribers.

Response: EchoStar admits that when PrimeStar was owned by cable companies, EchoStar competed indirectly with cable (by virtue of its PrimeStar ownership)

¹ DIRECTV does not ask the Court to order EchoStar to *admit* this request. It is up to EchoStar to either admit the request, or to deny the request and subject itself to DIRECTV's claim for costs if and when DIRECTV proves that EchoStar competes with cable.

² All Exhibits accompany the Certification Pursuant to Local Rule 7.1, attached to this motion.

for **satellite** subscribers. Now that PrimeStar is owned by DIRECTV, EchoStar does not compete directly with cable for **satellite** subscribers.

Ex. 2, at 3-5 (emphasis added). This meaningless response was neither an admission nor a denial of the request DIRECTV wrote; rather, EchoStar inserted the word "satellite" before "subscribers" and thus answered a different question than the one DIRECTV asked. The whole point of *DIRECTV's* question was to ascertain whether EchoStar competes for the business of consumers who could subscribe *either* to cable or DBS service.

EchoStar also interposed boilerplate "vagueness" and "ambiguity" objections to Request No. 2. EchoStar, of course, failed to state specifically what was vague or what was ambiguous.

DIRECTV's counsel sent EchoStar's counsel a written explanation of why the objections were unfounded and asked EchoStar to supplement its response to RFA No. 2.³ See Ex. 3. DIRECTV did not complain about EchoStar's responses to RFAs 3, 4, and 5 (the questions asking about competition with other technologies), nor did DIRECTV ask EchoStar to supplement those responses.

EchoStar served amended responses on October 4, 2000.⁴ See Ex. 4. EchoStar's new responses again failed to cleanly admit or deny RFA No. 2. See Ex. 4, p. 2. Instead, EchoStar larded its answer with new objections, not included in its original responses:

Plaintiffs cannot fairly respond to this request as it involves a question of fact and/or a mixed question of fact and law, which is for the Court and/or the jury to decide. Whether

³ That letter also asked EchoStar to supplement the answer to Request No. 1. That request is not subject to this motion.

⁴ The cover letter from EchoStar's counsel contains a typographical error. Although the face of the letter reads "September 14," it was sent on October 4, as both the facsimile transmittal line and the verification for the responses indicate.

or not EchoStar competes with "cable" depends on how the Court and/or jury determine the relevant product and geographical market, and can also depend on a variety of other factors, such as location, offerings, etc. There is not enough information in this request which would allow Plaintiffs to admit or deny, and so Plaintiffs deny this request for admission.

Ex. 4, at 2. In addition, EchoStar attempted to assert, for the first time, "vagueness" and "ambiguity" objections to RFAs 3, 4, and 5, which it had previously found not objectionable.

See Ex. 4 at 3.

The same day it received EchoStar's first amended responses, DIRECTV's counsel called EchoStar's counsel to meet and confer. In that discussion, EchoStar's counsel indicated that EchoStar would stand on its objections, and would provide no further response. EchoStar's counsel also articulated its "vagueness" objection more fully. See Exs. 6 and 7.

Just for good measure, EchoStar submitted yet another different response a day later, on October 5. See Ex. 5. That response was the same as EchoStar's October 4 response, except that the responses themselves were called "supplemental" responses instead of "amended" responses. In the cover letter, EchoStar's counsel indicated that the October 4 responses were not intended to "replace or alter" the original (September 7) responses in any way. Taken literally, EchoStar now appears to stand on both its September 7 answer and its October 5 answer to RFA No. 2, even though those answers are very different.

II. Argument

Rule 36 requires a party on whom requests for admission are served to respond by admitting or denying in a way that "fairly meets the substance of the request." See Fed. R. Civ. P. 36(a). Strictly speaking, Rule 36 is not a discovery procedure. See 8A C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure: Civil 2d §2253 at p. 524. Rather, it functions to

define and limit the matters in controversy between the parties. See Fed. R. Civ. P. 36, Advisory Committee Notes on 1970 Amendment; see also 8A C. Wright, A. Miller & R. Marcus, Federal Practice and Procedure: Civil 2d §2252 at p. 522.

DIRECTV's RFA No. 2 is designed to accomplish these goals by eliminating the issue of whether EchoStar competes with cable for subscribers and thus sparing the parties the expense of litigating it further. Of course, EchoStar is certainly entitled to deny the request, but may later then become liable to DIRECTV for fees and costs incurred in proving the truth of the matter. See Fed. R. Civ. P. 37(c)(2).

Although EchoStar knows perfectly well that it competes with cable (see DIRECTV's Motion for Summary Judgment, filed 10/6/2000), EchoStar does not want to admit that fact, lest it lose the pending motion for summary judgment. As a consequence, EchoStar's initial response simply evaded the question. EchoStar's supplemental response is little better. It shrouds the question in a cloak of false ambiguity and asserts additional spurious and improper objections. DIRECTV now asks this Court to order EchoStar to, once and for all, admit or deny under oath and without objection whether it competes with cable for subscribers.

A. EchoStar Has Waived the New Objections it Attempts to Assert in its Supplemental Responses

Four (Nos. 2, 3, 4, and 5) of EchoStar's five Supplemental Responses contain objections not contained in EchoStar's original response. See Ex. 5 at 3. Specifically, EchoStar's "Supplemental" response to No. 2 says that the request "involves a question of fact or a mixed question of fact and law, which is for the Court and/or jury to decide." EchoStar also adds

vagueness and ambiguity objections to Nos. 3, 4, and 5. These objections are nowhere to be found in EchoStar's initial responses.

Because EchoStar failed to timely assert these objections in its initial responses, they are waived. *See Pham v. Hartford Fire Insurance Co.*, 193 F.R.D. 659, 661-62 (D.Colo. 2000) (failure to object to discovery requests, including requests for admission, within the time permitted by the federal rules constitutes waiver of the objection); *Baker v. Dorfman*, 2000 WL 420551 at *5 (S.D.N.Y. April 17, 2000) (defendant waived right to object to requests to admit by failing to assert objections within 30 days of service of requests); *see also* 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure: Civil 2d* § 2262 at p. 561 ("Objections must be made in writing within the time allowed for answering the request [for admission]"). The Court should disregard EchoStar's new objections.

B. EchoStar's Objections To Request No. 2 Fall On Their Merits.

EchoStar has asserted several objections to No. 2: vagueness, ambiguity, and the statement that "Plaintiffs cannot fairly respond to this request as it involves a question of fact and/or a mixed question of fact and law, which is for the Court and/or jury to decide." Ex. 4, at 2; Ex. 5, at 2. All are meritless.

EchoStar's "vagueness" and "ambiguity" objections should be overruled for several reasons. First, EchoStar's ambiguity objection to No. 2 is entirely implausible, given EchoStar's ability to answer Nos. 3, 4, and 5. As simply reading them demonstrates, these questions are in no way different than No. 2, which asks about cable -- except that the cable question matters to EchoStar. Substantive importance, however, is not a basis to object under the Federal Rules. In a transparent attempt to protect this indefensible position, EchoStar's "amended" responses add

"vagueness" objections to Requests No. 3, 4, and 5.⁵ Tellingly, EchoStar did not object to these requests until after DIRECTV pointed out that EchoStar had understood the word "compete" in Nos. 3, 4, and 5 but thought that same term was vague on No. 2. See Ex. 3.⁶ Of course, DIRECTV never asked EchoStar to supplement its answers to 3, 4, or 5, nor could it: EchoStar gave simple, clear, objectionless answers to those RFAs.

Second, EchoStar's responses fail anywhere to identify a single term or concept in the request that is vague or ambiguous.⁷ A party objecting to discovery cannot rely on mere

⁵ Here's what EchoStar said once it realized it had a problem (the questions and EchoStar's original answers are set out in the text):

Response No. 3: Plaintiffs object that this request for admission is vague, ambiguous, and contains insufficient information, such that any response given by Plaintiffs may be misleading in light of the objectionable request. Subject to the aforementioned objection, Plaintiffs deny this request for admission.

Response No. 4: Plaintiffs object that this request for admission is vague, ambiguous, and contains insufficient information, such that any response given by Plaintiffs may be misleading in light of the objectionable request. Subject to the aforementioned objection, Plaintiffs deny this request for admission.

Response No. 5: Plaintiffs object that this request for admission is vague, ambiguous, and contains insufficient information, such that any response given by Plaintiffs may be misleading in light of the objectionable request. Subject to the aforementioned objection, Plaintiffs deny this request for admission. Ex. 4, at 3.

⁶ In its meet-and-confer letter, DIRECTV wrote: "Moreover, EchoStar's objection that this request is somehow 'vague and ambiguous' is not plausible. After all, Requests for Admission Three, Four, Five, and Six are stated in exactly the same form as this request for Admission, Number Two, yet, curiously, there was no 'vague and ambiguous' objection to these".

⁷ In the meet-and-confer call that took place after EchoStar served its "amended" responses on October 4, EchoStar's counsel articulated some specific ambiguities to DIRECTV's counsel on the phone. That effort is too little, too late.

boilerplate general objections; it must make specific objections so a court can understand in what way the discovery is objectionable. See, e.g., *Coregis Ins. Co. v. Baratta & Fanerty, Ltd.*, 187 F.R.D. 528, 530 (E.D. Pa 1999) (overruling "blanket" objections of vagueness, undue burden, overbreadth, among others); *Burns v. Imagine Films Entertainment, Ltd.*, 164 F.R.D. 589, 592-93 (W.D.N.Y. 1996) (overruling "overbroad, vague, unduly burdensome" objections—objections to interrogatories "must be specific and supported by detailed explanation of why the interrogatories are objectionable."); *Chubb Integrated Sys., Ltd. v. National Bank of Washington*, 103 F.R.D. 52, 58 (D.D.C. 1984) (overruling generalized "irrelevant" objection, because it does not "fulfill [a party's] burden to explain its objections."); see also *Taylor v. Los Angeles Police Dept.*, 1999 WL 33101661 at *4 (C.D. Cal.); *Swift v. First USA Bank*, 1999 WL 1212561 at *7 (N.D. Ill.). EchoStar's boilerplate objection cannot stand.

EchoStar's other newly-minted objections, even if they are not waived, are frivolous. EchoStar now claims that it can't answer because the RFA "involves a question of fact and/or a mixed question of fact and law, which is for the Court and for the jury to decide." But the very text of Rule 36(a) expressly permits requests for admission either on issues of fact or on questions of mixed fact and law. Fed. R. Civ. P. 36(a)(RFAs may "relate to statements or opinions of fact or of the application of law to fact . . ."). As if the text alone were not enough, the Advisory Committee Note and the case law confirm that precise point. See Fed. R. Civ. P. 36, Advisory Committee Notes on 1970 Amendment ("[T]he subdivision provides that a request may be made to admit any matters within the scope of 26(b) that relate to statements or opinions of fact or of the application of law to fact . . . This change resolves conflicts in the court decisions as to whether . . . matters involving 'mixed law and fact' is proper under the rule");

Marchand v. Mercy Medical Center, 22 F.3d 933, 937 (9th Cir. 1994) (stating Rule 36 permits questions of mixed law and fact).

EchoStar's suggestion that it need not respond to No. 2 because "it is for the Court and/or jury to decide," is just as silly. A party may not object to requests "on the grounds that they go to a disputable matter presenting a genuine issue for trial." *M&L Business Machine Co., Inc.*, 184 B.R. at 368 (citing Fed. R. Civ. P. 36, Advisory Committee Note); *see also* 8A C. Wright, A. Miller & R. Marcus, *Federal Practice and Procedure* § 2262 at 562 (2d ed. 1994) ("A party cannot object on the ground that the request goes to a disputable matter that presents a genuine issue for trial nor can it object that the requests relates to opinions of fact or of the application of law to fact").

III. Conclusion

EchoStar seeks to avoid a clear and simple RFA. But EchoStar has waived its "vagueness" objections by answering other RFAs that are phrased just the same way as No. 2. EchoStar's other objections are likewise frivolous. The Court should strike EchoStar's objections and order EchoStar to admit or deny the request at issue without objection, within ten days.

DATED: October 19, 2000

Respectfully submitted,

By: 
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**Attorneys for DIRECTV Enterprises, Inc., DIRECTV Merchandising, Inc.,
DIRECTV Operations, Inc. and Hughes Electronics Corporation**

CERTIFICATE OF SERVICE

The undersigned certifies that on October 20, 2000, the foregoing **DIRECTV'S AND HUGHES' MOTION TO DETERMINE SUFFICIENCY OF PLAINTIFFS' RESPONSE TO REQUEST FOR ADMISSION NO. 2; CERTIFICATION PURSUANT TO LOCAL RULE 7.1A** was served by Federal Express, on:

T. Wade Welch, Esq.
T. Wade Welch & Associates
2401 Fountainview, Suite 215
Houston, Texas 77057

Mark A. Nadeau, Esq.
Squire, Sanders & Dempsey LLP
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David Boies, Esq.
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and by Hand Delivery on:

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Denver, Colorado 80202


Aileen Aicherson

FCC000000114

CERTIFICATION PURSUANT TO LOCAL RULE 7.1A

I, CHRISTOPHER J. HECK, certify, pursuant to D. Colo. Rule 7.1A, as follows:

1. I am an attorney duly licensed to practice before this Court. I am a partner with the law firm of Kirkland & Ellis, counsel of record for Defendant DIRECTV in this action. The statements in this declaration are made on the basis of my own personal knowledge and I could, and would, competently testify thereto if called upon to do so.
2. Attached hereto as Exhibit 1 is a true and correct copy of DIRECTV's and Hughes' First Set of Requests for Admission propounded on EchoStar in this matter.
3. Attached hereto as Exhibit 2 is a true and correct copy of EchoStar's Responses to DIRECTV's and Hughes' First Set of Requests for Admission.
4. On September 19, 2000, I called counsel for EchoStar to discuss EchoStar's responses to DIRECTV's First Set of Requests for Admission. I left a voicemail message for Ross Wooten, Esq.
5. Neither Mr. Wooten nor any other counsel for EchoStar ever returned my phone call.
6. On September 21, 2000, I sent Mr. Wooten a letter explaining why EchoStar's objections to DIRECTV's First Set of Requests for Admission, Nos. 1 and 2, were unfounded and that EchoStar's responses needed to be supplemented. A true and correct copy of that letter is attached hereto as Exhibit 3. Shortly thereafter, EchoStar's counsel, T. Wade Welch, called Eric Liebele, another partner at Kirkland & Ellis, and agreed to supplement the responses.
7. EchoStar sent its "Amended" Responses on October 4, 2000. Attached hereto as Exhibit 4 is a true and correct copy of those Supplemental

Responses to DIRECTV's and Hughes' First Set of Requests for Admission, with a cover letter from EchoStar's counsel, misdated September 14, 2000.

8. The next day, EchoStar "replaced" its Amended responses with "Supplemental" responses. These responses are the same as the "Amended" Responses, but were accompanied by a cover letter from EchoStar's counsel claiming that these new responses were not intended to "replace or alter" the original September 7, 2000 responses. A true and correct copy of EchoStar's "Supplemental" Response, with accompanying cover letter, is attached hereto as Exhibit 5.

9. I am informed that Mr. Liebler called Mr. Welch and requested, once again, that EchoStar supplement its responses by straightforwardly admitting or denying Request No. 2. Mr. Welch refused, stating that the request was objectionable, and Mr. Liebler confirmed the parties' positions in a letter dated October 5, 2000, a true and correct copy of which is attached hereto as Exhibit 6. Mr. Welch wrote back that same day, purporting to "clarify" the matter, and adding other new objections found nowhere in the responses. A true and correct copy of Mr. Welch's October 5, 2000 letter is attached as Exhibit 7.

Executed on October 19, 2000 at Los Angeles, California.


Christopher J. Heck

EXHIBIT 1

FCC000000117

FOR PUBLIC INSPECTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-212

ECHOSTAR COMMUNICATIONS CORPORATION,
a Nevada corporation; ECHOSTAR SATELLITE
CORPORATION, a Colorado corporation; and ECHOSTAR
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation;
DIRECTV, Inc., a California corporation;
DIRECTV MERCHANDISING, Inc., a Delaware corporation;
DIRECTV OPERATIONS, Inc., a California corporation;
HUGHES NETWORK SYSTEMS, a Delaware corporation; and
THOMSON CONSUMER ELECTRONICS, Inc.,
d/b/a RCA, a Delaware corporation,

Defendants.

AND RELATED COUNTERCLAIMS

**FIRST SET OF REQUESTS FOR ADMISSION
OF DIRECTV ENTITIES AND HUGHES ELECTRONICS
CORPORATION TO PLAINTIFFS**

Pursuant to Federal Rule of Civil Procedure 36, Defendant and Counterclaimant
DIRECTV, Inc., Defendants DIRECTV Enterprises, Inc., DIRECTV Merchandising, Inc., and
DIRECTV Operations, Inc. (collectively "DIRECTV") and Defendant and Counterclaimant
Hughes Electronics Corporation ("Hughes") (incorrectly named in EchoStar's complaint as

FCC000000118

FOR PUBLIC INSPECTION

Hughes Network Systems) request that Plaintiffs Echostar Communications Corporation, Echostar Satellite Corporation, and Echostar Technologies Corporation (collectively "Echostar") admit in writing under oath the truth of each of the following requests for admission within thirty (30) days.

For purposes of these requests for admission, the following terms shall have the meaning set forth below:

- A. "Echostar" means Echostar Communications Corporation, Echostar Satellite Corporation, Echostar Technologies Corporation, and all predecessors (merged, acquired, or otherwise), subsidiaries, parents, affiliates, and all directors, officers, agents, employees, attorneys and other persons acting on their behalf.
- B. "DIRECTV" means DIRECTV Enterprises, Inc., DIRECTV, Inc., DIRECTV Merchandising, Inc., DIRECTV Operations, Inc., and all officers, directors, agents, employees, attorneys and other persons acting on their behalf.
- C. "Hughes" means Hughes Electronics Corporation, Hughes Network Systems, and all predecessors, subsidiaries, parents, directors, officers, agents, employees, attorneys and other persons acting on their behalf.
- D. The term "you" and "your" refer to Echostar, as defined above.
- E. The terms "and" and "or" shall be construed conjunctively and disjunctively so as to acquire the broadest possible meaning.

F. The terms "satellite TV equipment" shall mean decoder and receiver boxes, satellite dishes, and any and all other mechanical hardware, used to obtain satellite TV programming.

G. The terms "any" and "all" also include "each" and "every."

H. The past tense includes the present tense where the clear meaning is not distorted by change of tense.

I. The term "cable" means companies, including but not limited to Time Warner, AT&T Broadband & Internet Services, Comcast Cable Communications, Inc., Adelphia Communication Corporation, Cox Communications, Inc., Cablevision Systems Corporation, Charter Communications, and Media One, that provide multiple channels of programming by transmitting those signals to subscribers through wires or lines connecting to the subscriber's television.

REQUESTS FOR ADMISSION

1. Admit that Charlie Ergen stated the following on or about October 5, 1997: "You can't back down when the cable bully starts demanding your lunch money," as quoted in the attached Denver Post article. (Exhibit A)
2. Admit that EchoStar competes with cable for subscribers.
3. Admit that EchoStar competes with C-Band satellite for subscribers.
4. Admit that EchoStar competes with Multichannel Multipoint Distribution Service for subscribers.
5. Admit that EchoStar competes with Satellite Master Antenna TV for subscribers.
6. Admit that EchoStar competes with Home Satellite Dish for subscribers.
7. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with the National Football League.
8. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with the National Basketball Association.
9. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with the National Hockey League.
10. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with Major League Baseball.
11. Admit that EchoStar distributes its satellite TV equipment and service directly to consumers through its dishnetwork.com website.
12. Admit that EchoStar distributes its satellite TV equipment and service through the retailers identified on its dishnetwork.com website.

-4-

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13. Admit that EchoStar distributes its satellite TV equipment and service directly to consumers through its 1-800-333-DISH (3474) toll-free number.

14. Admit that, before the date that EchoStar signed an agreement to merge with (or acquire) Kelly Broadcasting Systems, EchoStar knew that DIRECTV and Kelly Broadcasting Systems had signed a contract granting DIRECTV the exclusive right to distribute certain ethnic programming supplied by Kelly Broadcasting Systems.

15. Admit that, before the date that EchoStar signed an agreement to merge with (or acquire) Kelly Broadcasting Systems, EchoStar knew that Kelly Broadcasting signed an agreement with DIRECTV under which Kelly Broadcasting had agreed to become a sales agent for DIRECTV.

16. Admit that, on or before the date that EchoStar signed an agreement to merge with (or acquire) Kelly Broadcasting Systems, EchoStar knew that the agreement between DIRECTV and Kelly Broadcasting could not be assigned or otherwise transferred by Kelly Broadcasting to any competitor of DIRECTV.

Dated: August 7, 2000

Respectfully submitted,

KIRKLAND & ELLIS

By



Christopher J. Heck
777 South Figueroa Street
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(213) 680-8400

Attorneys for DIRECTV Enterprises, Inc., DIRECTV, Inc., DIRECTV Merchandising, Inc., DIRECTV Operations, Inc. and Hughes Network Systems

EXHIBIT 'A'

FCC000000123

Citation
 10/5/97 DENVERPOST J01
 10/5/97 Denv. Post J01
 1997 WL 13879313

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Rank 1 of 1

Database
 CONEWS

Denver Post
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Sunday, October 5, 1997

Business

ERGEN ON THE EDGE EchoStar's hopes for future riding on nose of satellite
 Stephen Keating Denver Post Business Writer

Forty years ago this week, 4-year-old Charlie Ergen stood outside with his father near their home in Oak Ridge, Tenn. They watched Sputnik I, weighing no more than a grown man, tumble around the earth every 96 minutes.

The launch of the Soviet Union's satellite on Oct. 4, 1957, set off the Space Race.

Since then, humans have walked on the moon and flown in space shuttles. This past summer, a robot surveyed the surface of Mars. This month, the plutonium-powered NASA spacecraft Cassini will head toward Saturn.

Less dramatic, but as significant for life on Earth, Sputnik kicked off the era of commercial satellites that now beam TV, photo, data and telephone signals around the globe. Such communications technology has shrunk the world and launched billion-dollar businesses.

Charlie Ergen, now 44 and chairman of EchoStar Communications Corp., has reaped some of that whirlwind, recently landing on the Forbes list of the 400 richest Americans - on paper.

The question is whether the satellite business will be Ergen's undoing - for real.

This afternoon, Ergen and several hundred people associated with his Colorado-based company will watch from Cape Canaveral, Fla., as EchoStar's third communications satellite is scheduled to blast into orbit atop an Atlas rocket.

With all the risks he continues to take, Ergen might as well be strapped on top.

His company carries roughly \$1.6 billion in debt and loses \$300

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initially for every new subscriber who buys its pizza-sized satellite-TV dish.

"Our sleep test wouldn't be met with that kind of debt," said Stanley E. Hubbard, president of U.S. Satellite Broadcasting in St. Paul, Minn., an EchoStar competitor. "I don't think their debt structure allows them to have any kind of blip in their business plan."

The naysaying only fuels Ergen's bravado.

"People have dismissed EchoStar as not being financially viable for years," he said last week at his company's headquarters at Inverness Business Park. "They used to piss all over it. But now people have to tell a story of how they're going to compete with EchoStar."

Ergen and his 1,500 employees are fighting on many fronts to capture customers. They have to battle USSB and its partner, DirecTV, which is backed by General Motors. Then they confront Primestar, which is owned primarily by cable-TV companies.

Also, there is the cable industry itself, with 65 million subscribers and \$25 billion in annual revenues to defend.

"Old, analog, rotting miles of cable," said Ergen, as if tasting something unpleasant. "Once you've experienced digital satellite, you're not rushing out to get cable."

In case you miss the message, Ergen concluded, "I don't like cable."

And cable doesn't like him. The industry is gearing up to offer new digital channels that could make satellite service much less attractive.

Ergen remains undaunted.

"You can't back down when the cable bully starts demanding your lunch money," said Ergen, dressed in typically casual clothes and dancing around the balcony of his company's headquarters. "We've got the public's support, to the extent they're educated about it. We're fighting a battle for the hearts and minds of consumers."

EchoStar, though still a bit player in the pay-TV industry, has gained momentum. It shocked the industry in the summer of 1996, lowering the price of its satellite system from several hundred dollars to \$199, plus programming. Competitors had to follow suit. EchoStar had one of its best months in September, adding 105,000

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new subscribers for a total of 820,000. Though each new subscriber costs EchoStar \$300 in equipment and marketing, keeping a customer for five years represents revenues of \$1,000 to \$1,500.

EchoStar's stock, always volatile, has ticked up \$5 in the past two weeks to \$24. "They're winning the business," said Ted Henderson, an analyst with Janco Partners in Englewood.

But Henderson and others remain skeptical of Ergen's latest gamble to provide broadcast networks to home satellite viewers.

It helps to understand what he's up against.

Satellite companies like EchoStar, Primestar, DirecTV and USSB offer 100 to 200 channels of programming, many more than most cable-TV systems. That's how they've attracted 5 million subscribers in just three years.

But regulatory and technical hurdles have prevented satellite firms from carrying broadcast networks like ABC, CBS, NBC and Fox, or those channels' local news and sports programming.

That's a big problem. Seven out of 10 people who don't buy satellite TV systems cite the lack of broadcast networks as the reason, even though most can get those signals with basic cable or an antenna.

Ergen wants to change the game.

By launching EchoStar III today, and EchoStar IV next year, his company could have the capacity to offer broadcast channels in the top 20 markets, including Denver. Regulatory approvals and a second satellite dish would be required, while Ergen would have to keep the total price competitive with cable.

"If Charlie's right about the local channel issue and can pull it off, he'll tap pent-up demand," said Jimmy Schaeffler, an analyst with the Carmel Group in Carmel, Calif.

If he's wrong, Ergen must still attract several million more subscribers in the next few years to begin paying back \$1.6 billion in accumulated debt. Interest payments of \$46 million come due next year, with interest and principal ramping up to \$1.3 billion by 2004.

"I put the company in the nose of a Chinese rocket," said Ergen, referring to EchoStar's first satellite launch in 1995 by a Chinese firm with an iffy track record. "We bet our company that people want digital TV and we were right. I'm willing to bet the company

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again on local signals."

The two satellites, which together cost more than \$500 million. Foreign language programming, data services to the home and the leasing of satellite space to businesses are all on tap. The launches also provide insurance in case either of the two satellites already in orbit fail.

Ergen, a former financial analyst for Frito-Lay before forming EchoStar with his wife and a friend in 1980, has found some support on Wall Street.

EchoStar raised \$575 million in debt and preferred stock over the past four months, albeit at double-digit interest rates. This came after EchoStar's proposed satellite merger with Rupert Murdoch's News Corp. nosedived in May. The matter now is in federal court.

"We were given up for roadkill in June," said Ergen. "Today, our bonds are at an all-time high. Our stock is double what it was. Does that sound like the financial community thinks we're committing harikari?"

Whatever Ergen's future, he's going solo for now.

Prior to the Murdoch venture, EchoStar turned down investment proposals by Sprint Corp. and US West, according to several sources. Now, few suitors are lining up.

Ergen, who controls 72 percent of EchoStar's stock, claims the company can succeed on its own by staying hungry.

"You're not looking at a parking lot full of Porsches and Mercedes," he said. "We have major hurdles against us, financially and operationally. We're not telling Wall Street or anyone else that we're without risk as a company. We're not declaring victory."

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

Caption: PHOTOS: EchoStar chairman Charlie Ergen stands on a balcony at company headquarters under a model of EchoStar's third satellite, to be launched today from Cape Canaveral, Fla. The device is a key part of the direct-broadcast-satellite company's strategy for competing with its cable-television rivals. Stanley E. Hubbard, president of rival U.S. Satellite Broadcasting: "I don't think their (EchoStar's) debt structure allows them to have any kind of slip in their business plan." GRAPHIC: The Denver Post/Jonathan Moreno
EchoStar's gamble

---- INDEX REFERENCES ----

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FOR PUBLIC INSPECTION

10/5/97 DENVERPOST J01

COMPANY (TICKER): Echostar Communications Corp. (DISH)

KEY WORDS: COMPANIES; SATELLITES; TECHNOLOGY; EXECUTIVES; CABLE TV;
METRO

NEWS SUBJECT: High-Yield Issuers (HIY)

INDUSTRY: Communications Technology; Telecommunications, All (CMT TEL)

SIC: 1040, 6021, 6712

EDITION: ROCKIES

Word Count: 1172
10/5/97 DENVERPOST J01
END OF DOCUMENT

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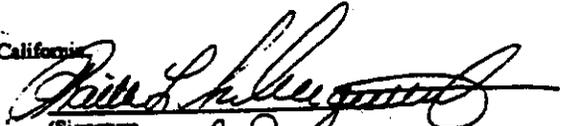
I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 777 South Figueroa Street, 37th Floor, Los Angeles, California 90017.

On August 7, 2000, I served the foregoing document described as **FIRST SET OF REQUESTS FOR ADMISSION OF DIRECTV ENTITIES AND HUGHES ELECTRONICS CORPORATION TO PLAINTIFFS**

T. Wade Welch, Esq. T. Wade Welch & Associates 2401 Fountainview, #215 Houston, Texas 77057 Fax: (713) 952-4994 Phone: (713) 952-4334	Mark A. Nadeau, Esq. Squires, Sanders & Dempsey, LLP 40 North Central Avenue, #2700 Phoenix, Arizona 85004 Fax: (602) 253-8129 Phone: (602) 528-4000	Greg Kerwin, Esq. Gibson Dunn & Crutcher 1801 California Street, #4100 Denver, Colorado 80202 Fax: (303) 296-5310 Phone: (303) 298-5700
--	---	--

- By transmitting via facsimile, the document(s) listed above to the fax number set forth above on this date. I am aware that service is presumed invalid unless the transmission machine properly issues a transmission report stating the transmission is complete and without error.
- By placing the document(s) listed above in a sealed overnight courier envelope addressed as set forth above and routing the envelope for pick up with Federal Express for overnight delivery.
- By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid in the ordinary course of business.
- I personally served such envelope by hand to the person at the address set forth above.
- (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed August 7, 2000, at Los Angeles, California.


(Signature)
FAITH L. JOHNSON
(Print Name)

FCC000000129

EXHIBIT 2

FCC000000130

FOR PUBLIC INSPECTION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-K-212

ECHOSTAR COMMUNICATIONS CORPORATION, et. al.,

Plaintiffs,

v.

DIRECTV Enterprises, Inc., et. al.,

Defendants.

**PLAINTIFFS' RESPONSE TO DIRECTV'S AND HUGHES'
FIRST SET OF REQUESTS FOR ADMISSIONS**

In accordance with Rule 36 of the Federal Rules of Civil Procedure, Plaintiffs EchoStar Satellite Corporation ("ESC"), EchoStar Communications Corporation ("ECC"), and EchoStar Technology Corporation ("ETC") (collectively, "EchoStar") respond to Defendants DIRECTV, Inc., DIRECTV Enterprises, Inc., DIRECTV Merchandising, Inc., DIRECTV Operations, Inc., and Hughes¹ (collectively "DIRECTV") First Set of Admissions as follows:

DEFINITIONS

1. "Irrelevant" means not relevant to the subject matter of this action and not reasonably calculated to lead to the discovery of admissible evidence, and as such outside the scope of discovery pursuant to Rule 26 of the Federal Rules of Civil Procedure.

¹ Plaintiffs named "Hughes Network Systems" in their Complaint. DIRECTV responded that there is no such legal entity and that "Hughes Electronics Corporation" is the proper party.

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2. "Produce" means make available for inspection and copying documents that are in the possession, custody, or control of Plaintiffs and that Plaintiffs could identify after a reasonable search, at a place, date, and time mutually agreeable to counsel for all parties. The word "produce" should not be construed as an admission that any particular document exists.

OBJECTIONS TO DEFINITIONS AND INSTRUCTIONS

1. EchoStar objects to DIRECTV's Requests for Admissions, including the definitions and instructions, to the extent they: (a) contain questions which exceed the scope and requirements of the applicable federal and local rules; (b) purport to require discovery not provided for by these rules, including, but not limited to discovery on subjects not at issue in this case; and (c) purport to require discovery of documents and information protected from discovery by the attorney-client privilege, the work product doctrine or any other applicable privilege.
2. EchoStar objects to DIRECTV's definitions to the extent that they are inconsistent with the ordinary and customary meaning of such words and phrases.

RESPONSES TO FIRST SET OF REQUESTS FOR ADMISSIONS

1. Admit that Charlie Ergen stated the following on or about October 5, 1997: "You can't back down when the cable bully starts demanding your lunch money," as quoted in the attached Denver Post article. (Exhibit A)

ANSWER:

EchoStar admits that the October 5, 1997 edition of the Denver Post does attribute the quoted sentence to Mr. Ergen. However, as that the event that is being reported occurred approximately three years prior to the date of these requests for admissions, EchoStar can neither admit nor deny.

2. Admit that EchoStar competes with cable for subscribers.

Answer:

EchoStar objects that this request for admission is vague and ambiguous, such that any response given by EchoStar may be misleading in light of the objectionable request. Subject to the aforementioned objection, EchoStar responds as follows.

EchoStar admits that when PrimeStar was owned by cable companies, EchoStar competed indirectly with cable (by virtue of its PrimeStar ownership) for satellite subscribers. Now that PrimeStar is owned by DIRECTV, EchoStar does not compete directly with cable for satellite subscribers.

3. Admit that EchoStar competes with C-Band satellite for subscribers.

Answer:

Denied.

4. Admit that EchoStar competes with Multichannel Multipoint Distribution Service for subscribers.

Answer:

Denied.

5. Admit that EchoStar competes with Satellite Master Antenna TV for subscribers.

Answer:

Denied.

6. Admit that EchoStar competes with Home Satellite Dish for subscribers.

Answer:

EchoStar objects to this request for admission in that the term "Home Satellite Dish" is undefined in DIRECTV's Requests for Admission and EchoStar cannot understand exactly what is being asked. However, EchoStar does admit that it competes with DIRECTV and HUGHES for the sale and distribution of "satellite TV equipment," as that term is defined in DIRECTV's Requests for Admissions.

7. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with the National Football League.

Answer:

Denied.

8. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with the National Basketball Association.

Answer:

Denied.

9. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with the National Hockey League.

Answer:

EchoStar admits that it submitted one bid in 1999 for the 1999-2000 season, but was told by the National Hockey League that DIRECTV had increased its payment to the National Hockey League in order to induce the National Hockey League to exclude EchoStar.

10. Admit that EchoStar had the opportunity to bid on the programming and distribution of sporting events with Major League Baseball.

ANSWER:

Denied.

11. Admit that EchoStar distributes its satellite TV equipment and service directly to consumers through its dishnetwork.com website.

ANSWER:

EchoStar admits that it distributes very small quantities of satellite TV equipment and service directly to consumers through its dishnetwork.com website.

12. Admit that EchoStar distributes its satellite TV equipment and service through the retailers identified on its dishnetwork.com website.

ANSWER:

EchoStar admits that it distributes its satellite TV equipment and service through the retailers identified on its dishnetwork.com website.

13. Admit that EchoStar distributes its satellite TV equipment and service directly to consumers through its 1-800-333-DISH (3474) toll-free number.

ANSWER:

EchoStar admits that it distributes very small quantities of its satellite TV equipment and service directly to consumers through its 1-800-333-DISH (3474) toll-free number.

14. Admit that, before the date that EchoStar signed an agreement to merge with (or acquire) Kelly Broadcasting Systems, EchoStar knew that DIRECTV and Kelly Broadcasting Systems had signed a contract granting DIRECTV the exclusive right to distribute certain ethnic programming supplied by Kelly Broadcasting Systems.

Answer:

Denied.

15. Admit that, before the date that EchoStar signed an agreement to merge with (or acquire) Kelly Broadcasting Systems, EchoStar knew that Kelly Broadcasting signed an agreement with DIRECTV under which Kelly Broadcasting had agreed to become a sales agent for DIRECTV.

Answer:

Denied.

16. Admit that, on or before the date that EchoStar signed an agreement to merge with (or acquire) Kelly Broadcasting Systems, EchoStar knew that the agreement between DIRECTV and Kelly Broadcasting could not be assigned or otherwise transferred by Kelly Broadcasting to any competitor of DIRECTV.

Answer:

Denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 8th day of September, 2000, a true and correct copy of the foregoing has been forwarded via U.S. Mail to the following attorney(s) of record, in accordance with the Federal Rules of Civil Procedure:

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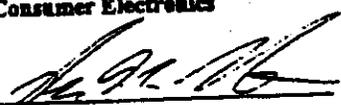
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