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10 **UNITED STATES DISTRICT COURT**
11 **CENTRAL DISTRICT OF CALIFORNIA**

12
13 **FOX BROADCASTING COMPANY,**
14 **TWENTIETH CENTURY FOX FILM**
CORP., and FOX TELEVISION
15 **HOLDINGS, INC.**

16 Plaintiffs,

17 v.

18 **DISH NETWORK L.L.C. and**
DISH NETWORK CORP.,

19 Defendants.

Case No. 12-CV-04529-DMG (SH)

**FOX'S SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
MOTION TO COMPEL DISH TO
IMMEDIATELY PRODUCE
DOCUMENTS IT ALREADY
AGREED TO PRODUCE**

Fed. R. Civ. P. 37; C.D. Cal. L.R. 37-2.3

Date: May 7, 2013
Time: 10:00 a.m.
Courtroom: 550

The Honorable Stephen J. Hillman

1 Dish asks the Court to not intervene here, claiming “that day has not come.”
2 Joint Stip. at 4. Dish already escaped court intervention two months ago when it
3 convinced Fox to withdraw its Original Motion to Compel on the understanding
4 that Dish would substantially complete its production of responsive emails and
5 documents within 30 days. *See Singer Decl., Exh. 16 at 181.* It has now been 55
6 *days* since Fox withdrew its Original Motion to Compel and *seven months* since
7 Fox served its document requests. But Dish has produced only *one* responsive
8 email in the entire case. Now Dish says it should not have to produce any
9 responsive emails until the end of *June 2013* – nine months from the date of Fox’s
10 request. Joint Stip. at 23. The day for Court intervention is indeed here.

11 **1. Dish Is Not Excused From Discovery In This Lawsuit Just Because It**
12 **Chose to File Another Lawsuit in SDNY**

13 Dish *chose* to infringe the copyrights of four broadcast networks and *chose* to
14 file duplicative litigation in the Southern District of New York (“SDNY”).¹ And,
15 when Dish’s improper anticipatory action against Fox was dismissed by the SDNY
16 court in favor of this one, Dish could have agreed to transfer all proceedings here.
17 Instead, Dish *chose* to proceed in two jurisdictions.

18 Fox sued Dish in California and sought dismissal of the SDNY claims to
19 avoid litigating in New York. Fox won that motion. That means Fox is *not* subject
20 to the SDNY’s “pilot” electronic-discovery protocols that dramatically alter the
21 burdens of discovery by requiring plaintiffs to determine which of defendants’
22 employees may have relevant emails and guess which keywords to use for
23 searching them. Under the normal discovery rules followed by this District, the
24 burden of gathering responsive documents rests on the responding party, i.e., the
25 party with exclusive access to the custodians and documents in question.

26
27 ¹ After learning that the networks were going to sue, Dish raced to court and filed
28 declaratory relief actions against the networks in SDNY. Dish beat Fox to the
filing window by a mere 29 minutes.

1 Contrary to Dish’s insinuations, this case has *never* been ordered
2 consolidated or coordinated with the SDNY action. Instead, Dish – not Fox – was
3 ordered to coordinate its discovery with this action. But instead of coordinating
4 discovery, Dish has been obstructing it. Dish has taken the untenable position that
5 the SDNY discovery trumps the discovery in this action by refusing to even begin
6 producing admittedly responsive documents until the parties in the SDNY action
7 complete their numerous time-consuming electronic-discovery protocols.

8 However, pursuant to the Standing Order in *this* lawsuit, the parties must
9 “begin to conduct discovery actively before the Scheduling Conference.” Dkt. No.
10 33 (Aug. 2, 2012 Standing Order § 3.b). Fox sued Dish nearly one year ago and
11 served its first set of document requests under Rule 34 on September 20, 2012.
12 Singer Decl., Exh. 1. On their face, and under Rule 34(b)(2)(E), the requests seek
13 emails and electronic discovery. Nonetheless, after many months of prodding and
14 threatened motions by Fox, Dish had produced only *one* email.² Singer Decl. ¶ 25.
15 That is the opposite of “active” discovery. Even worse, Dish has not produced *any*
16 documents concerning Fox’s breach of contract or Sling Adapter claims, which are
17 not even at issue in the SDNY action. With respect to these documents, Dish
18 cannot possibly blame a slow discovery process in SDNY.

19 **2. Dish’s Burden Objections Are Meritless Because Dish Already Agreed to**
20 **Produce Every Document At Issue**

21 Dish claims it is sitting on 1.35 million potentially relevant emails and
22 documents but has been unable to produce any of them because it supposedly must
23 “coordinate discovery between this action and the SDNY Action.” Freilich Decl.
24 ¶ 2; Joint Stip. at 18. Dish claims Fox’s requests are unduly burdensome and
25 complains that it had to answer an amended complaint and oppose two preliminary
26 injunction motions over the past year. Joint Stip. at 18. That is nonsense. First,

27 _____
28 ² Apparently, Dish is delaying discovery in the SDNY action too. The discovery
cutoff is in six weeks, but Dish has not produced any emails in that action.

1 Dish cannot revive its burden objections to the requests at issue because it already
2 agreed to produce the documents. *See* Joint Stip. at 9 & n.4 (citing case law).

3 Second, Dish cannot seriously complain about the burdens of litigating a
4 straightforward copyright infringement and breach of contract case. No fewer than
5 six lawyers from three different offices of Orrick, Herrington and Sutcliffe LLP,
6 plus two more from Durie Tangri LLP, have already appeared on behalf of Dish.
7 Answering two complaints and opposing two motions over a 12-month period is
8 hardly an undue burden for a company as litigious as Dish (it was involved in more
9 than 18 lawsuits in 2012-2013 alone).³

10 **3. Dish's Production of "13,000 Pages of Documents" Is A Sham**

11 It is hornbook law that a party responding to document requests may not
12 "simply dump[] large quantities of unrequested materials onto the discovering party
13 along with the items actually sought." 8B Charles Alan Wright, Arthur R. Miller,
14 et al., *Federal Practice & Procedure* § 2213 (3d ed. 2012); *Rothman v. Emory*
15 *Univ.*, 123 F.3d 446, 455-56 (7th Cir. 1997) (sanctioning party that produced
16 responsive documents in boxes containing "numerous other unrelated,
17 nonresponsive materials" because party "rebuffed his obligation to sort through the
18 documents and produce only those responsive to [the] request").⁴

19 Dish tries to convince the Court it has been diligent in producing documents.
20 But Dish's production has been padded with all sorts of non-responsive clutter.
21 Singer Decl. ¶¶ 23-25. Dish's so-called document production includes nearly 2,000

22
23 ³ *See* Dish Network Corporation, Annual Report (Form 10-K) (Feb. 20, 2013),
available at <http://dish.client.shareholder.com/financials.cfm>.

24 ⁴ *See also Loparex, LLC v. MPI Release Techs., LLC*, 2011 WL 1326274, at *2
25 (S.D. Ind. Mar. 25, 2011) ("Trying to overwhelm opposing counsel with irrelevant
26 documents . . . is, of course, highly improper.") (internal citation omitted);
27 *Hagemeyer N. Am., Inv. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 598
28 (E.D. Wis. 2004) (improper to mingle responsive documents with large numbers of
nonresponsive documents); *Bratka v. Anheuser-Busch Co., Inc.*, 164 F.R.D. 448,
462-63 (S.D. Ohio 1995) (admonishing party that "delivered over one thousand
pages of irrelevant nonresponsive documents to plaintiff's counsel, presenting him
with the tedious and time-consuming task of separating the relevant from the
irrelevant.") (internal citations omitted).

1 pages of News Corp.'s public securities filings (which Fox never requested). *Id.*
2 ¶ 24. A large chunk consists of publicly available case law and administrative
3 proceedings, including a 482-page FCC report on the VOD industry (also not
4 requested). *Id.* Dish's document production even includes more than 1,300 pages
5 that are simply copies of *pleadings from this lawsuit*. *Id.* After Fox withdrew its
6 Original Motion to Compel (believing Dish would begin to produce actually
7 responsive documents), Dish continued to play games. Dish's March 1 production
8 of 150 documents consisted mostly of duplicates (only 20 new documents) and
9 contained one email. *Id.* ¶ 25. Dish's March 7 production did not contain a single
10 document responsive to the requests at issue here. *Id.*

11 Then, on April 2, the day after Fox filed this motion to compel, Dish appears
12 to have gathered a stack of irrelevant documents and sent them to Fox without any
13 review. That production contained 179 pages of trademarks and logos for various
14 cable networks that have nothing to do with this case; 133 pages of non-responsive
15 Dish advertisements for "waiting room" and "business" services to doctors,
16 dentists, and restaurants; more than 80 pages of other advertising materials that
17 make no mention of the infringing services at issue (PrimeTime Anytime,
18 AutoHop, and Sling Adapter); and four documents that are simply blank.
19 Additionally, Dish produced more than 400 videos containing several hours of Dish
20 commercials that have *nothing* to do with this case and were not requested by Fox
21 (such as advertisements about Dish's "Blockbuster Movie Pass"; promotions for
22 third-party cable networks; Dish's "NFL Red Zone" sports channel package; and
23 other services not at issue).⁵ Then, on the eve of this supplemental brief, Dish tried
24 to save face by producing 16 emails, but they were not responsive to any of Fox's
25 document requests either. Obviously Dish is padding its document production to
26 create the illusion of compliance with its discovery obligations. Dish has moved
27

28 ⁵ If requested, Fox can make the documents available for *in camera* inspection.

1 form sheer delay to outright bad-faith obstruction. Dish’s 13,000-page production
2 does not contain any of the documents Dish promised to produce two months ago.⁶

3 **4. The Court Should Reject Dish’s Remaining Excuses**

4 Dish offers one excuse after another. Dish now claims (for the first time)
5 that if it were ordered to immediately produce the documents at issue, it would be
6 forced to go back and review 1.3 million documents a second time in order to
7 respond to Fox’s other requests. No it wouldn’t. Surely Dish’s process for
8 gathering responsive documents involves something more than simply reading
9 every one of its employees’ million-plus emails. Just like Fox (and every other
10 sophisticated litigant), Dish can locate relevant documents by interviewing
11 employees, running electronic word searches, or simply looking in the right places.

12 Dish also claims there is no “rush” for it to comply with its promise to
13 produce responsive documents because no depositions have been noticed and there
14 are no looming deadlines. These excuses must also be rejected. First, Fox is hardly
15 “rushing” Dish. This lawsuit has been pending for a year and, in the meantime,
16 Dish continues to infringe Fox’s copyrights, breach the parties’ contract, and
17 irreparably harm Fox on a daily basis.⁷ Second, the reason Fox has not noticed any
18 depositions is because Dish refuses to produce relevant documents or emails.
19 While Dish may prefer it if Fox were forced to depose Dish’s employees without a
20 reasonable opportunity to read Dish’s relevant emails, Fox specifically sought to
21 avoid that prejudice by serving its document requests seven months ago.

22 DATED: April 23, 2013

JENNER & BLOCK LLP

23
24 By /s/ Richard L. Stone
Richard L. Stone
25 Attorneys for Plaintiffs

26 ⁶ Against this backdrop, Dish’s cheeky request for financial compensation is not
27 worthy of a response. *E.g.*, Joint Stip. at 24 n.12.

28 ⁷ The District Court found that Dish’s conduct was causing “some” irreparable
harm to Fox. *See Singer Decl.*, Exh. 26 at 272, 280.