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 8 Attorneys for Plaintiffs
 Fox Broadcasting Company, Twentieth Century
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 9

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

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

15 **Plaintiffs,**

16 v.

17 **DISH NETWORK L.L.C.,
 18 DISH NETWORK CORP., and
 ECHOSTAR TECHNOLOGIES
 19 L.L.C.**

20 **Defendants.**

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

**AMENDED JOINT REPORT OF
 THE PARTIES PURSUANT TO
 FRCP 26**

Scheduling Conference: Dec. 6, 2013
 Time: 11:00 a.m.
 Courtroom: 7 (2nd Floor)

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1 Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, Local Rule
2 26-1, and the Court’s October 2, 2013 order setting the Scheduling Conference
3 (Dkt. 198), plaintiffs Fox Broadcasting Company, Twentieth Century Fox Film
4 Corporation, and Fox Television Holdings, Inc. (jointly, “Fox”) and DISH Network
5 L.L.C., DISH Network Corp. (jointly “DISH”), and EchoStar Technologies L.L.C.
6 (together with DISH, “Defendants”) submit this Amended Joint Report and
7 Discovery Plan¹.

8
9 **1. Neutral Statement of Case**

10 Fox asserts claims for copyright infringement and breach of contract relating
11 to DISH’s PrimeTime Anytime, AutoHop, Sling Adapter, DISH Anywhere, Hopper
12 with Sling, and Hopper Transfers services, features, and/or products. Fox’s
13 copyright claims are for direct and secondary infringement. Fox seeks preliminary
14 and permanent injunctive relief, as well as specific performance, statutory and other
15 damages.

16 Defendants deny each of Fox’s allegations. Defendants deny they are
17 directly or secondarily infringing Fox’s copyrights. Defendants have asserted
18 various affirmative defenses including, but not limited to, fair use. DISH alleges
19 that its conduct is authorized under the parties’ contract.

20
21 **2. Initial Disclosures**

22 The parties exchanged initial disclosures under Rule 26(a)(1) on September
23 21, 2012.

24
25
26 ¹ The parties have agreed to email service in this case and that such service will be
27 treated the same as service via U.S. Mail for purposes of the Federal Rules of Civil
28 Procedure. The parties have also agreed that voluminous filings, as well as manual
filings, shall be personally served.

1 **3. Preservation of Discoverable Information**

2 Counsel have notified their respective clients about their obligations to
3 preserve discoverable information (documentary and electronic). As set forth in the
4 parties' original Rule 26 Report, the parties agree that text messages to mobile
5 phones (MMS and SMS) and voicemail messages need not be preserved or
6 collected.

7
8 **4. Coordination with Other Cases**

9 This case has been related to *NBC Studios LLC, et al. v. DISH Network*
10 *Corp., et al.*, No. CV 12-04536 DMG (SHx) (the "NBC Action"). However, as of
11 March 27, 2013, the NBC Action has been stayed.

12
13 **Fox's Position:**

14 Defendants are also being sued by ABC and CBS in the Southern District of
15 New York (the "SDNY Action"). *See In Re Autohop Litigation*, Case No. 1:12-cv-
16 0415; *CBS Broadcasting Inc. v. DISH Network Corp.*, 1:12-cv-06812. The SDNY
17 Action has never been formally coordinated, consolidated, or related to this case.
18 On July 9, 2012, after dismissing DISH's SDNY declaratory action against Fox as
19 an improper anticipatory filing, Judge Swain wrote that "[t]he parties are directed to
20 use their best efforts to coordinate the taking and use of discovery in the remaining
21 aspects of this action and the California litigation so as to avoid duplication and
22 inefficiency." *Id.* at 13. *See* Dkt. 90, Case No. 1:12-cv-04155.

23 Consistent with Judge Swain's direction, Fox has agreed that depositions of
24 Defendants' witnesses concerning the functionality of any technology at issue in
25 both this action and the SDNY Action can be coordinated so that the same
26 witnesses need not be deposed twice. However, this is the only area of factual
27 inquiry that sufficiently overlaps between this case and the SDNY Action
28 warranting shared depositions of Defendants' witnesses. The lawsuits involve

1 numerous different claims and issues. For example, CBS, ABC, and Fox each have
2 unique contracts with DISH and unique breach of contract claims; each of the
3 parties' contracts was separately negotiated; CBS is suing DISH for fraud; and Fox
4 is suing Defendants over multiple services and products that are *not* at issue in the
5 SDNY Action, including Sling Adapter, DISH Anywhere, Hopper Transfers and
6 Hopper with Sling.

7 Except for depositions concerning functionality of the technology at issue,
8 Fox intends to rely on the maximum number (and duration) of depositions
9 permitted by the Federal Rules of Civil Procedure. It would be inefficient, unfair
10 and prejudicial if Fox were forced to share its depositions with the plaintiffs in the
11 SDNY Action. This action and the SDNY Action have proceeded along very
12 different procedural tracks. The discovery cutoff in the SDNY Action is
13 January 24, 2014. By contrast, the *initial* scheduling conference in this action is set
14 for December 6, 2013, and there is currently no discovery cutoff. Discovery in the
15 NBC Action has not even begun yet. Fox was never consulted on, nor did it agree
16 to, the schedule in the SDNY Action.

17 Fox would be especially prejudiced if forced to depose Defendants'
18 witnesses before the SDNY Action discovery cutoff because Fox has been waiting
19 for DISH to produce documents it agreed to produce five months ago in response to
20 Fox's *First Set of Document Requests* that was served over a year ago. Concerned
21 that DISH would delay its document production until the eve of depositions, Fox
22 filed a motion to compel. In response to the motion to compel, DISH assured the
23 Court that it expected to complete its production by the end of *June 2013*.
24 Magistrate Hillman denied Fox's motion as premature because a scheduling
25 conference had not yet been set in this action. But Magistrate Hillman further
26 instructed DISH that its agreed-to document production should be "*well under way*
27 *by the end of June, 2013.*" DISH continued to drag its feet and, on October 4, 2013,
28 informed Fox that its response to Fox's *First Set of Document Requests* would not

1 be complete until the end of *October 2013*. Despite Fox's request for confirmation
2 on November 15, DISH still has not confirmed whether all responsive documents
3 have been produced. Moreover, Fox has served numerous additional document
4 requests over the past year, all of which remain outstanding.

5 As predicted, Defendants are now trying to force Fox to depose their key
6 witnesses before the January 24 discovery cutoff in the SDNY Action and before
7 Fox has had a reasonable opportunity to complete its document discovery. This is
8 the exact prejudice Fox has been trying to avoid. Defendants are also trying to
9 impose the SDNY schedule on Fox, even though Defendants *never* sought Fox's
10 input on the SDNY schedule. Fox would not have agreed to a discovery cutoff in
11 January 2014, nor would Fox have agreed to delay all depositions until the last two
12 months of discovery, which would require them to be scheduled over Christmas
13 and New Years, when many witnesses and clients are on holiday. Defendants'
14 insistence on forcing Fox to depose Defendants' key witnesses within the next eight
15 weeks is also at odds with Defendants' request to delay trial in this action until
16 April 28, 2015. Defendants want Fox to rush through its depositions without the
17 benefit of full document discovery, while they prepare a defense, gather documents,
18 and notice Fox's depositions at a leisurely pace.

19 Additionally, the pre-trial scheduling order issued by Judge Swain in the
20 SDNY Action (cited by Defendants below) is dated August 3, 2012. Significantly,
21 Fox had already been dismissed from the SDNY Action, so the order was not meant
22 to apply to Fox. More likely, Judge Swain was concerned that CBS and DISH were
23 parties to litigation in both Los Angeles and New York. However, those concerns
24 were alleviated on September 9, 2012, when this Court transferred the CBS Action
25 to SDNY. *See* Dkt. 66, Case No. 2:12-cv-04551.

26 Lastly, Defendants ignore the fact that NBC is also suing Defendants in this
27 District and discovery has not yet commenced in that action because it is currently
28

1 stayed (pending Fox’s appeal of the court’s denial of its preliminary injunction
2 motion).²

3 In short, Defendants *chose* to infringe the copyrights of four separate
4 broadcast networks. Further, Defendants *chose* to force two of the networks to
5 litigate in New York rather than California along with Fox. Having made those
6 strategic choices, Defendants cannot complain about the supposed burden of
7 litigating in two districts at once.

8
9 **Defendants’ Position:**

10 Defendants are parties to a related case pending in the Southern District of
11 New York captioned *DISH Network L.L.C. v. American Broadcasting Companies,*
12 *et al.*, No. 12 Civ. 4155 (LTS) (KNF), involving copyright and contract claims
13 related to PrimeTime Anytime and AutoHop. A Pre-Trial Scheduling Order was
14 entered by Judge Laura Taylor Swain in that case on August 3, 2012³ that, among
15 other things, orders that: “The parties must continue to use their best efforts to
16 coordinate discovery activities in the New York and California proceedings,
17 including notifying judges in both proceedings of problems that implicate both
18 proceedings.”

19 Based upon this direction from Judge Swain, Defendants have made every
20 effort to coordinate discovery in the two actions and to avoid unnecessary
21 duplication of efforts. For example, Defendants have been making coordinated
22 productions of documents in these cases, producing as many documents jointly to
23 all parties as practicable.

24
25 _____
26 ² Fox’s petition for rehearing en banc is still pending. On August 30, 2013, the
27 Ninth Circuit ordered DISH to file a response to Fox’s petition. *See* Dkt. 99, Case
28 No. 12-57048.

³ Amended Pre-Trial Scheduling Orders were entered on March 4, 2013, May 7,
2013, and September 10, 2013.

1 Fox has resisted such coordination. Earlier this year, Magistrate Hillman
2 denied a motion to compel by Fox, which sought to force Defendants to prioritize
3 document production in response to particular Fox requests ahead of Defendants'
4 overall joint production for all actions, finding that:

5 Fox seemingly ignores Judge Swain's direction to
6 coordinate discovery in the New York and California
7 cases, and to avoid duplication and inefficiency. Nothing
8 could flout the spirit and intent of Judge Swain's order
9 more than the filing of this Motion. While Fox
10 understandably is eager to move forward with this
11 lawsuit, the filing of this Motion has served only to force
12 Dish to devote resources opposing the Motion, thus
13 ironically serving to delay the production of documents to
14 which the parties have agreed. (Dkt. 194.)

15 Most recently, Defendants have repeatedly requested that Fox attend and
16 participate in the depositions of DISH and EchoStar employees as they are
17 scheduled and take place in the New York action, and treat those depositions as
18 noticed in this action as well. Defendants are currently in the process of meeting
19 and conferring with ABC and CBS in the New York action on the number of
20 depositions per side, the particular witnesses sought by each party, and the dates for
21 depositions. To date, no deposition dates have been scheduled.

22 Given the significant overlap of issues between the cases, it would be
23 inefficient for individuals to be deposed in both cases on the exact same topics.
24 Despite Fox's assertion to the contrary, the very same direct and indirect copyright
25 infringement claims are asserted with respect to the PrimeTime Anytime and
26 AutoHop features in both actions against the same defendants. ABC, CBS and Fox
27 each claim that through the PrimeTime Anytime and AutoHop features, Defendants
28 "reproduce and distribute" the networks' copyrighted works, that the networks are
suffering substantial harm as a result, and Defendants are directly liable for
copyright infringement. Compare Fox's First Amended Complaint (Dkt. 138) ¶¶

1 64-79 with ABC's Amended Answer and Counterclaims (SDNY Dkt. 133) ¶¶ 64-
2 70 and CBS's Amended Counterclaims (SDNY Dkt. 69-1) ¶¶ 56-62. Similarly,
3 ABC, CBS and Fox each claim, in the alternative, that through the PrimeTime
4 Anytime and AutoHop features, Defendants are inducing DISH subscribers to make
5 unauthorized reproductions of the network's copyrighted works, which is
6 substantially harming the networks, and Defendants are indirectly liable for
7 copyright infringement. Compare Fox's First Amended Complaint (Dkt. 138) ¶¶
8 80-90 with ABC's Amended Answer and Counterclaims (SDNY Dkt. 133) ¶¶ 71-
9 78 and CBS's Amended Counterclaims (SDNY Dkt. 69-1) ¶¶ 63-69. Additionally,
10 the networks have made the very same factual and legal arguments in their
11 preliminary injunction and appellate briefings.

12 Nevertheless, Fox has objected to coordinated deposition discovery, and
13 insists upon reserving its rights to take duplicative depositions. In essence, Fox
14 requests that it be permitted more than the default number of depositions for this
15 case, by piggybacking on all of the deposition discovery from New York action,
16 and then taking another ten depositions of seven-hours' duration in this case alone.

17 Fox's alleged concerns regarding participation in these depositions do not
18 justify its refusal to cooperate. First, with respect Fox's argument that the cases are
19 largely factually and legally distinct, Defendants have no objection to Fox not
20 attending a New York deposition if Fox believes the witness does not have any
21 knowledge relevant to Fox's case. Fox would then, however, need to make a
22 showing of good cause to have the same witness produced for deposition in this
23 case. This should alleviate any concerns that Defendants are requesting that Fox be
24 forced to sit through the deposition of a witness that only has knowledge relevant to
25 ABC's or CBS's contract history. Defendants do not expect Fox to participate in a
26 deposition that is exclusively on CBS's or ABC's contract claims. Second, with
27 respect to Fox's argument that it cannot participate in depositions because of the
28 status of Defendants' document production, Fox is simply wrong in suggesting that

1 Defendants are not far along in their production of documents in response to Fox's
2 nearly 200 requests. Fox fails to mention that Defendants have been making
3 substantial productions on a rolling basis and that Defendants have produced more
4 than 53,000 pages of documents to date, which is more than double the number of
5 pages of Fox's current production. DISH's production has resulted from a process
6 required by the court in New York, where the parties have agreed on custodians and
7 keyword terms. In addition, DISH has supplemented the universal production
8 based on the New York process with additional custodians and keywords
9 specifically relevant to Fox's particular allegations. This process has resulted in
10 production of a substantial set of documents relevant to all common network
11 claims, and the parties in New York are proceeding to depositions on that basis.

12 There is no reason why Fox cannot do the same. Given the actual facts, it is clear
13 that Fox has more than enough documents from DISH to be able to meaningfully
14 participate in depositions. Moreover, Defendants have offered to meet and confer
15 with Fox about limited, additional deposition time should any material evidence be
16 provided to Fox subsequent to the New York depositions. Accordingly, there
17 would be no prejudice to Fox by participating in the depositions, even if its worst
18 fears about Defendants' document production were true (which they are not).

19 Defendants request that this Court instruct Fox to participate in the
20 depositions of DISH and EchoStar employees in the New York action in good faith,
21 as noticed depositions in this case, to the extent that witnesses are being deposed
22 with respect to copyright issues common to both actions, without precluding Fox
23 from requesting additional limited depositions of those witnesses in this action
24 should significant, new information be produced by Defendants subsequent to the
25 New York depositions. There is nothing prejudicial or unfair about Fox
26 cooperating with deposition scheduling. By contrast, Fox's suggested deposition
27 procedure is duplicative, burdensome and unfair.
28

1 **5. Discovery Timing and Cutoff**

2 Subject to Section 4 above (regarding coordination with related cases), the
3 parties agree to conduct written, documentary, and deposition discovery as
4 permitted by the Federal Rules of Civil Procedure. The parties do not believe
5 discovery should be conducted in phases. The parties’ proposed discovery cutoff
6 dates are set forth in Exhibit A.

7
8 **6. Discovery Subject Matter**

9 Without waiver or limitation, Fox will seek discovery on the following
10 subjects: (a) Defendants’ Hopper, PrimeTime Anytime, AutoHop, Sling Adapter,
11 Hopper with Sling, DISH Anywhere, and Hopper Transfers products, services, and
12 features; (b) Defendants’ alleged direct infringement of Fox’s copyrights;
13 (c) Defendants’ alleged secondary infringement of Fox’s copyrights; (d) DISH’s
14 alleged contract breaches; (e) Fox’s alleged irreparable harm; (f) Defendants’
15 alleged fair use defense; (g) Defendants’ alleged affirmative defenses; (h) Fox’s
16 alleged statutory damages; (i) Fox’s alleged reasonable royalty damages.

17 Without waiver or limitation, DISH will seek discovery on the following
18 subjects: (a) Fox’s claims and allegations; (b) fair use; and (c) Fox’s allegations of
19 irreparable harm; and (d) damages.

20
21 **7. Electronic Discovery**

22 The parties have already agreed on an electronic discovery protocol.

23
24 **Fox’s Position:**

25 For reasons unknown to Fox, the SDNY Action was designated as being
26 subject to the SDNY’s “pilot” case management rules for complex cases. The
27 “pilot” program is ill-suited to this case and contrary to the rules of this District.
28 The SDNY’s “pilot” electronic-discovery protocols dramatically alter the burdens

1 of discovery by requiring *plaintiffs* to determine which of *defendants*' employees
2 may have relevant emails and then guess which keywords to use for searching
3 them. Under the normal discovery rules followed by this District, the burden of
4 gathering responsive documents rests on the responding party, i.e., the party with
5 exclusive access to the custodians and documents in question. Defendants never
6 brought a motion in this action to change the rules of discovery or to impose the
7 SDNY's "pilot" electronic discovery in this action. Instead, Fox and Defendants
8 have proceeded to search for, gather, review and produce many thousands of
9 documents without following the SDNY "pilot" rules. Furthermore, in an effort to
10 cooperate and compromise, Fox informed Defendants that, where appropriate to
11 reduce burden, the parties could meet and confer about electronic word searches.
12 Indeed, the parties have already done so on several occasions.

13 14 **Defendants' Position:**

15 In the parties' first Joint Rule 26 Report, they "agree[d] that reasonable
16 limitations should be imposed on the number of custodians subject to electronic
17 discovery as well as the search and review of electronically stored information."
18 Notwithstanding this agreement, Fox refused to meet and confer on custodians and
19 search terms. Fox took the position that each party should independently decide
20 upon its custodians and search terms. Defendants invited Fox to participate in the
21 discussions that took place between Defendants and the other parties to the SDNY
22 Action, where agreement was reached on these issues, but Fox declined to
23 participate.

24 25 **8. Protective Order**

26 A Protective Order governing discovery of confidential information has
27 already been entered by the Court (Dkt. 25). The parties have agreed to amend the
28 existing protective order to allow both parties to designate material for outside-

1 counsel-eyes-only. The parties anticipate providing a revised proposed protective
2 order to the Court prior to the scheduling conference.

3
4 **9. Attorney-Client Privilege and Attorney Work Product**

5 The Protective Order in this action provides that:

6 If any person inadvertently produced in discovery any
7 information subject to attorney-client privilege, work
8 product doctrine or any other privilege, protection, or
9 immunity, and the requirements of Federal Rule of
10 Evidence 502(b) have been satisfied, the producing party
11 may (promptly upon learning of such production) notify
12 the receiving party(ies) of such production and seek the
13 return and/or destruction of such information as set forth
14 below. Upon such notification: the receiving party(ies)
15 shall promptly return to the producing person or shall
16 destroy all such information (including, without
17 limitation, all originals and copies of any documents
18 containing or comprising such information); the
19 information (including, without limitation, all originals
20 and copies of any documents containing or comprising
21 such information) shall continue to be privileged,
22 protected, and/or immune; and no use shall be made of
23 such information (including, without limitation, all
24 originals and copies of any documents containing or
25 comprising such information) by the receiving party(ies),
26 nor shall it be disclosed to anyone by the receiving
27 party(ies). The receiving party(ies) shall promptly provide
28 to the producing person a written certification of the
complete return or destruction of such information
(including, without limitation, all originals and copies of
any documents containing or comprising such
information); provided that, to the extent any receiving
party has incorporated any such information in its own
work product, it may (instead of providing such work
product to the producing person) destroy such information
incorporated in that work product and promptly certify to
such destruction. Nothing herein, however, shall preclude
the receiving party(ies) from subsequently challenging

1 that such materials are privileged, or that any such
2 privilege has not been waived.

3 The parties agree that privilege logs will not be required for communications
4 between parties and their outside counsel that occurred after this lawsuit
5 commenced.

6
7 **10. Complex Case Designation**

8 The parties agree this case should not be designated as a Complex Case. The
9 case presents no unusual legal issues. The Manual for Complex Litigation should
10 not apply to this case.

11
12 **11. Dispositive or Partially Dispositive Motions**

13 The parties anticipate filing summary judgment and/or summary adjudication
14 motions. Specifically, Fox intends to file a motion for summary adjudication on the
15 issue of liability. The parties proposed motion cutoff dates are set forth in
16 Exhibit A.

17
18 **Fox's Position:**

19 Fox does not believe there is any reason to deviate from this Court's
20 proposed time computations for the dispositive motion cutoff. Defendants'
21 proposed schedule requires moving the trial date from December 9, 2014 (proposed
22 by Fox) to April 28, 2015 – nearly three years from the date Fox filed this lawsuit.
23 Given that Fox is seeking a permanent injunction and specific performance, three
24 years is excessive.

25
26 **Defendants' Position:**

27 The parties agree upon a fact discovery cut-off of August 5, 2014 and that
28 expert discovery should begin in September 2014, but the parties' proposed

1 schedules diverge after that point. Fox proposes that dispositive motions be filed in
2 August 12, 2014, a week after fact discovery closes, and before expert discovery.
3 However, the experts will necessarily play an important role in the analysis of the
4 copyright issues here. It makes more practical sense to have summary judgment
5 briefing after the completion of expert discovery.

6 Defendants propose that dispositive motions be filed on December 19, 2014,
7 three weeks after the close of expert discovery. Further, Defendants propose that
8 each party be provided five weeks to prepare oppositions (to account for the
9 multiple holidays in that period), January 23, 2015, and three weeks to prepare
10 replies, February 6, 2015. Defendants propose that the Court be given three weeks
11 to review the papers, prior to a scheduled hearing on the motions, February 27,
12 2015.

13
14 **12. Alternative Dispute Resolution (“ADR”)**

15 The parties have selected ADR Procedure No. 3 (private mediator), as
16 reflected on the parties’ ADR Procedure Selection Form, filed on September 19,
17 2012 (Dkt. 91).

18
19 **Fox’s Position:**

20 Fox believes that ADR is premature until discovery is substantially
21 completed and the pending appeals have been resolved.

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23 **Defendants’ Position:**

24 Defendant is willing to engage in settlement or ADR discussions at this time.
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13. Amendment of Pleadings / Additional Parties

Fox's Position:

The deadline for amending the pleadings and adding additional parties should be no later than 60 days after the December 6, 2013 scheduling conference. However, Fox requests a later deadline (November 11, 2014) for amending the complaint to identify new, copyrighted works that are alleged to have been infringed by DISH up to the time of trial.

Defendants' Position:

Defendants object to any further amendment of the complaint in this action, except to identify new copyrighted works alleged to have been infringed by Defendants. Defendants propose a cut-off date for the identification of any new copyrighted works of 30 days prior to the end of fact discovery to afford Defendant the opportunity to pursue discovery regarding the validity of the alleged copyrights.

14. Expert Witnesses

The parties' proposed deadlines for expert disclosures and reports are set forth in Exhibit A. The parties agree that expert discovery should begin on September 9, 2014.

Fox's Position:

As set forth above, Fox believes this Court's proposed time computations for expert discovery are appropriate. The expert discovery in this case is no different than any other case. Moreover, Defendants' assertions about multiple shifting burdens are incorrect. The disgorgement provisions of the Copyright Act are

1 straightforward, and not nearly as complicated as DISH suggests.⁴ There is no
2 reason why the parties cannot exchange their expert reports at the same time, and
3 then exchange rebuttal reports. In any event, Fox is willing to consider the mutual
4 exchange of sur-rebuttal reports, as long as it does not result in a delay of the trial
5 date. DISH's proposed schedule requires moving the trial date from December 9,
6 2014 (proposed by Fox) to April 28, 2015 – three years from the date Fox filed its
7 lawsuit.

8
9 **Defendants' Position:**

10 Depending on the damages theories that Fox pursues on its copyright claims,
11 there may be shifting burdens of proof, which would necessitate three rounds of
12 expert disclosures. Specifically, if Fox files an expert report in support of a
13 disgorgement claim, then the burden shifts to Defendants to apportion the alleged
14 damages and show their deductible expenses. Thus, Defendants propose that initial
15 expert disclosures be exchanged on the issues for which each party initially bears
16 the burden of proof, followed by a second round of disclosures with rebuttal and
17 any issues for which the burden may have shifted, and then a third round of
18 disclosures to reply to those issues raised in the first instance during the second
19 round. Defendants propose such a three-phased structure in their proposed
20 schedule in Exhibit A.

21 During the parties' conference, Fox stated that it would not object to a third
22 expert disclosure, as long as it did not delay Fox's proposed trial date in this action.
23 However, as set forth in Section 15 below, Fox's proposed trial date of December
24 2014 is unrealistic. Moreover, given the importance of Fox's response to the issues
25

26 ⁴ 17 U.S.C. § 504(b) (“In establishing the infringer's profits, the copyright owner is
27 required to present proof only of the infringer's gross revenue, and the infringer is
28 required to prove his or her deductible expenses and the elements of profit
attributable to factors other than the copyrighted work.”).

1 on which Defendants have the shifted burden of proof, incorporating a third expert
2 report into the schedule is important, even if it does extend expert discovery.

3 Additionally, DISH requests specific separate deadlines be provided for
4 Daubert motions, coordinated with the parties summary judgment motions.
5 Daubert motions in this case will take more time and effort to prepare and respond
6 to than other potential motions in limine, and can be efficiently dealt with in
7 conjunction with summary judgment.

8
9 **15. Jury Trial**

10 The parties have each requested a jury trial. The parties' preliminary
11 estimate for trial is 3 weeks. The parties do not anticipate severance, bifurcation, or
12 other changes in the standard order of proof at trial.

13
14 **Fox's Position:**

15 Fox was never consulted on the trial date in the SDNY Action. Fox filed its
16 lawsuit against Defendants in May 2012. Fox is seeking injunctive relief and
17 specific performance and should not be forced to wait three years for a trial.
18 Furthermore, there is no trial date set in the SDNY Action – merely a trial readiness
19 conference. Depending on Judge Swain's calendar, trial in the SDNY Action may
20 not take place until months later. Furthermore, Defendants and ABC have already
21 disclosed that they are negotiating a new distribution agreement that could result in
22 a settlement of ABC's lawsuit against Defendants. As such, it makes no sense to
23 prejudice Fox and delay trial in this action in order to accommodate the mere
24 possibility that the SDNY Action goes to trial in October 2014. As noted above,
25 Defendants made the decision to violate the rights of multiple parties *and* to litigate
26 these cases in two separate districts. Fox should not have to pay the price for that.

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Defendants’ Position:

Defendants propose an April 28, 2015 trial date in this case. This date allows for the necessary three rounds of expert disclosures and Daubert briefing, as discussed in Section 14, above. This date also provides for an expanded summary judgment briefing schedule, as detailed in Section 11, above, necessitated by the complex issues in this case. Thus, while the trial date proposal deviates from the Court’s template proposal, it does so for good reason, given the nature of this case.

Fox’s proposal of a December 2014 trial date for this case is unrealistic. There is a final pretrial conference scheduled in the NY Action for October 3, 2014, which is also the trial ready date for that case. Fox’s proposed December trial leaves Defendants without time to prepare for a second trial and creates a possibility that the trials may proceed concurrently, which would unfairly prejudice Defendants. Moreover, it provides insufficient time for expert discovery, briefing and decision on summary judgment motions, and Daubert motion practice, considering the complex legal issues involved in this case.

Dated: November 22, 2013

JENNER & BLOCK LLP

By: /s/ David R. Singer

David R. Singer
Attorneys for Plaintiffs

Dated: November 22, 2013

ORRICK, HERRINGTON &
SUTCLIFFE LLP

By: /s/ Annette Hurst

Annette Hurst
Attorneys for Defendants

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EXHIBIT A

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MATTER	REQUESTED DATE	TIME
TRIAL <input type="checkbox"/> Court <input checked="" type="checkbox"/> Jury Duration Estimate: 3 weeks	Fox: Tue., Dec. 9, 2014 Defendants: Tue., April 28, 2015	8:30 a.m.
FINAL PRETRIAL CONFERENCE (“FPTC”) 4 wks before trial	Fox: Tue., Nov. 11, 2014 Defendants: March 31, 2015	2:00 p.m.

MATTER	TIME COMPUTATION	REQUESTED DATE
Amended Pleadings and Addition of Parties Cut-Off	60 days after scheduling conference	Fox: February 4, 2014 Defendants: No further amendment
Non-Expert Discovery Cut-Off (includes hearing on discovery motions)	At least 14 wks before FPTC	August 5, 2014
Motion Cut-Off, including Dispositive Motions (filing deadline)	At least 13 wks before FPTC	Fox: August 12, 2014 Defendants: December 19, 2014 (opening briefs) January 23, 2015 (opposition briefs) February 6, 2015 (reply briefs) February 27, 2015 (hearing date)

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Initial Expert Disclosure & Report Deadline ⁵	At least 9 wks before FPTC	September 9, 2014
Rebuttal Expert Disclosure & Report Deadline ⁶	At least 5 wks before FPTC	October 7, 2014 ⁷
Expert Discovery Cut-Off (includes hearing of discovery motions)	At least 3 wks before FPTC	Fox: October 21, 2014 Defendants: November 28, 2014
Settlement Conference Completion Date	At least 4 wks before FPTC	Fox: October 14, 2014 Defendants: December 1, 2014
Motions in Limine Filing Deadline	At least 3 wks before FPTC	Fox: October 21, 2014 Defendants: Daubert motions: December 19, 2014 All other MILs: March 3, 2015

⁵ Defendant proposes that these first disclosures address issues for which each party initially bears the burden of proof.

⁶ Defendant proposes that these second disclosures address rebuttal, as well as issues on which a burden may have shifted, including apportionment and expenses.

⁷ Defendant proposes a third set of disclosures to provide rebuttal to issues for which the burden shifted and that those disclosures be due on or before October 28, 2014.

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<p>Opposition to Motion in Limine Filing Deadline</p>	<p>At least 2 wks before FPTC</p>	<p>Fox: October 28, 2014</p> <p>Defendants:</p> <p>Daubert motions: Jan. 23, 2015 (oppositions) February 6, 2015 (replies) February 27, 2015 (hearing date) All other MILs: March 17, 2015</p>
<p>Other Dates – Last day to add copyrighted works to complaint</p>		<p>Fox: November 11, 2014</p> <p>Defendants:</p> <p>30 days before non-expert discovery cut-off</p>