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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA**

JOE HAND PROMOTIONS, INC.,

Plaintiff,

vs.

OLEN L. CAMPBELL, et al.,

Defendants.

CASE NO. CV F 10-2296 LJO SMS

**ORDER ON THIRD-PARTY DEFENDANT
DISH NETWORK, L.L.C.’S F.R.Civ.P. 12
MOTIONS TO DISMISS
(Doc. 25.)**

AND RELATED THIRD-PARTY ACTION.

INTRODUCTION

Third-party defendant Dish Network LLC (“Dish Network”) seeks to dismiss defendants/third-party plaintiffs’ breach of contract claim in the absence of Dish Network’s contract with defendants/third-party plaintiffs. Dish Network further seeks to dismiss all of defendants/third-party plaintiffs’ claims for failure to join Superior Satellite, LLC (“Superior Satellite”) as an indispensable party. This Court considered Dish Network’s F.R.Civ.P. 12(b)(6) and 12(b)(7) motions to dismiss on the record without a hearing, pursuant to Local Rule 230(g). For the reasons discussed below, this Court **DISMISSES** with leave to amend defendants/third-party plaintiffs’ claims.

1 **BACKGROUND**

2 **Summary**

3 Defendant/third-party plaintiff Olen L. Campbell (“Mr. Campbell”) owns defendant/third-party
4 plaintiff Camco Investments, Inc. (“Camco Investments”) and operates a Selma bar called the Sports
5 Club.¹ Mr. Campbell arranged for Dish Network television services for the Sports Club. The Campbell
6 parties claim that Dish Network incorrectly set up the account as a residence rather than a business.
7 After Mr. Campbell arranged to show a pay-per-view program, plaintiff Joe Hand Promotions, Inc. (“Joe
8 Hand”), the exclusive distributor of the program, pursued telecast piracy claims against the Campbell
9 parties in this action. The Campbell parties claim that they would not be subject to Joe Hand’s claims
10 had Dish Network correctly set up the account as for a business. Dish Network contends that the target
11 of the Campbell parties’ claims is Superior Satellite, with whom Mr. Campbell arranged the Dish
12 Network service.

13 **The Campbell Parties’ Allegations And Claims**

14 The Campbell parties proceed on their third-party complaint (“TPC”) against Dish Network. The
15 following will summarize the TPC’s allegations.

16 In November or December 2009, a door-to-door salesperson working for Dish Network offered
17 Mr. Campbell a special price for businesses to switch the Sports Club’s service from DirecTV, Inc. to
18 Dish Network. Mr. Campbell decided to switch and was assured by the salesperson and installers that
19 a commercial account would be established and that Mr. Campbell would be charged accordingly.

20 On December 12, 2009, a Sports Club patron requested to view the Ultimate Fighting
21 Championship 107: BJ Penn v. Diego Sanchez (“fight program”). Mr. Campbell ordered the fight
22 program through his Dish Network account on the Sports Club television and paid for it not knowing
23 that the account for the Sports Club was for a residence, not a business. The Campbell parties were
24 charged incorrectly a residential rate to show the fight program and “were inappropriately allowed access
25 to it at a commercial location without first having to contract Joe Hand.”

26 Joe Hand contends that showing the fight program was unlawful and pursues federal

27 ¹ Mr. Campbell, Camco Investments and the Sports Club will be referred to collectively as the “Campbell
28 parties.”

1 communications and related claims against the Campbell parties in this action. The Campbell parties
2 have incurred defense costs due to Dish Network’s failure “to appropriately set up the television service
3 at [the] Sports Club and most importantly charge [the Campbell parties] the correct amount for pay-per-
4 view of the subject fight program.”

5 The TPC alleges:

- 6 1. A (first) negligent misrepresentation claim that Dish Network “negligently made false
7 representations about the television account for [the] Sports Club being set up as a
8 commercial account, when it was in fact set up as a residential account and was billed
9 accordingly”;
- 10 2. A (second) breach of contract claim that Dish Network breached contracts “by failing to
11 install and designate the television account for [the] Sports Club as a commercial account
12 and bill accordingly”;
- 13 3. A (third) unfair business practices claim that Dish Network engaged in unfair and
14 fraudulent acts to violate California Business and Professions Code, §§ 17200, et seq.;
- 15 4. A (fourth) negligence claim that Dish Network “failed to competently and lawfully
16 provide the television signal in accordance with all applicable federal laws and
17 regulations regarding pay-per-view programs, and failed to correctly bill [the Campbell
18 parties] for the subject fight program”; and
- 19 5. A (fifth) fraud and intentional deceit claim that Dish Network “falsely represented that
20 it would lawfully provide the television signal for the subject fight program and would
21 correctly bill” the Campbell parties.

22 The TPC seeks recovery for the Campbell parties’ compensatory and consequential damages.

23 **Commitment And Residential Customer Agreements**

24 Dish Network invites this Court to consider what it characterizes and the “subject contracts”
25 which Mr. Campbell entered into with Superior Satellite, “an independent Dish Network retailer, for
26 residential cable services” and which Dish Network further describes as “separate and independent”
27 from Dish Network. Dish Network points to the 24 Month Commitment Agreement (“Commitment
28 Agreement”), which provides in part:

1 This agreement (“Agreement”) sets forth the terms and conditions of the Digital Home
2 Advantage Promotion. The Residential Customer Care Agreement (“RCA”),
3 incorporated herein by reference contains additional terms and conditions. The RCA is
4 included in your receiver’s user’s guide and is available online at dishnetwork.com.

5 . . .
6 BY SIGNING THIS AGREEMENT, YOU ACKNOWLEDGE AND AGREE THAT
7 YOU HAVE RECEIVED, READ AND UNDERSTAND TO BE BOUND BY ALL
8 THE TERMS AND CONDITIONS SET FORTH IN THIS AGREEMENT,
9 INCLUDING WITHOUT LIMITATION, THE TERMS AND CONDITIONS SET
10 FORTH ABOVE AND IN THE RCA, AND ALL SUCH TERMS WERE DISCLOSED
11 TO YOU PRIOR TO LEASE. (Uppercase in original.)

12 The Commitment Agreement bears Mr. Campbell’s December 11, 2009 signature and lists his
13 Visalia residential address, not the Sports Club’s address.

14 Dish Network further points to the Residential Care Agreement (“RCA”), which is expressly
15 incorporated into the Commitment Agreement and provisions of which will be addressed below.

16 DISCUSSION

17 F.R.Civ.P. 12(b)(6) Motion To Dismiss Standards

18 Relying on F.R.Civ.P. 12(b)(6), Dish Network seeks to dismiss the TPC’s (second) breach of
19 contract claim in the absence of Dish Network’s contract with the Campbell parties for commercial
20 satellite programming.

21 *Pleading Standards*

22 “When a federal court reviews the sufficiency of a complaint, before the reception of any
23 evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether
24 a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the
25 claims.” *Scheurer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Gilligan v. Jamco Development*
26 *Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). A F.R.Civ.P. 12(b)(6) dismissal is proper where there is either
27 a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal
28 theory.” *Balisteri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990); *Graehling v. Village of*
Lombard, Ill., 58 F.3d 295, 297 (7th Cir. 1995). A F.R.Civ.P. 12(b)(6) motion “tests the legal sufficiency
of a claim.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

In addressing dismissal, a court must: (1) construe the complaint in the light most favorable to
the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine whether the

1 plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty Mut. Ins.*
2 *Co.*, 80 F.3d 336, 337-338 (9th Cir. 1996). Nonetheless, a court is not required “to accept as true
3 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In*
4 *re Gilead Sciences Securities Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). A court
5 “need not assume the truth of legal conclusions cast in the form of factual allegations,” *U.S. ex rel.*
6 *Chunie v. Ringrose*, 788 F.2d 638, 643, n. 2 (9th Cir.1986), and must not “assume that the [plaintiff] can
7 prove facts that it has not alleged or that the defendants have violated . . . laws in ways that have not
8 been alleged.” *Associated General Contractors of California, Inc. v. California State Council of*
9 *Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897 (1983). A court need not permit an attempt to amend if
10 “it is clear that the complaint could not be saved by an amendment.” *Livid Holdings Ltd. v. Salomon*
11 *Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005).

12 A “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than
13 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell*
14 *Atl. Corp. v. Twombly*, 550 U.S. 554,127 S. Ct. 1955, 1964-65 (2007) (internal citations omitted).
15 Moreover, a court “will dismiss any claim that, even when construed in the light most favorable to
16 plaintiff, fails to plead sufficiently all required elements of a cause of action.” *Student Loan Marketing*
17 *Ass'n v. Hanes*, 181 F.R.D. 629, 634 (S.D. Cal. 1998). In practice, “a complaint . . . must contain either
18 direct or inferential allegations respecting all the material elements necessary to sustain recovery under
19 some viable legal theory.” *Twombly*, 550 U.S. at 562, 127 S.Ct. at 1969 (quoting *Car Carriers, Inc. v.*
20 *Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)).

21 In *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937,1949 (2009), the U.S. Supreme Court recently
22 explained:

23 . . . a complaint must contain sufficient factual matter, accepted as true, to “state
24 a claim to relief that is plausible on its face.” . . . A claim has facial plausibility when the
25 plaintiff pleads factual content that allows the court to draw the reasonable inference that
26 the defendant is liable for the misconduct alleged. . . . The plausibility standard is not
akin to a “probability requirement,” but it asks for more than a sheer possibility that a
defendant has acted unlawfully. (Citations omitted.)

27 After discussing *Iqbal*, the Ninth Circuit Court of Appeals summarized: “In sum, for a complaint
28 to survive [dismissal], the non-conclusory ‘factual content,’ and reasonable inferences from that content,

1 must be plausibly suggestive of a claim entitling the plaintiff to relief.” *Moss v. U.S. Secret Service*, 572
2 F.3d 962, 989 (9th Cir. 2009) (quoting *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949).

3 The U.S. Supreme Court applies a “two-prong approach” to address dismissal:

4 First, the tenet that a court must accept as true all of the allegations contained in
5 a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of
6 a cause of action, supported by mere conclusory statements, do not suffice. . . . Second,
7 only a complaint that states a plausible claim for relief survives a motion to dismiss. . .
8 . Determining whether a complaint states a plausible claim for relief will . . . be a
9 context-specific task that requires the reviewing court to draw on its judicial experience
10 and common sense. . . . But where the well-pleaded facts do not permit the court to infer
11 more than the mere possibility of misconduct, the complaint has alleged – but it has not
12 “show[n]”-“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

13 In keeping with these principles a court considering a motion to dismiss can
14 choose to begin by identifying pleadings that, because they are no more than conclusions,
15 are not entitled to the assumption of truth. While legal conclusions can provide the
16 framework of a complaint, they must be supported by factual allegations. When there are
17 well-pleaded factual allegations, a court should assume their veracity and then determine
18 whether they plausibly give rise to an entitlement to relief.

19 *Iqbal*, ___ U.S. ___, 129 S.Ct. at 1949-1950.

20 With these standards in mind, this Court turns to Dish Network’s challenges to the breach of
21 contract claim.

22 **Breach Of Contract**

23 *Allegations And Elements*

24 The TPC’s (second) breach of contract claim alleges:

25 [The Campbell parties] entered into contracts with Dish Network L.L.C.
26 Specifically, there was an agreement between [the Campbell parties] and Dish Network
27 L.L.C. that Dish Network L.L.C. would install and provide a television signal and
28 services for the business establishment known as Sports Club, and charge them
appropriately.

29 . . .

30 Despite undertaking specific obligations toward [the Campbell parties], Dish
31 Network L.L.C. breached their contracts by failing to install and designate the television
32 account for Sports Club as a commercial account and bill accordingly. Most importantly,
33 Dish Network L.L.C. failed to charge [the Campbell parties] the correct price for the
34 television signal for the subject fight program.

35 “The standard elements of a claim for breach of contract are: ‘(1) the contract, (2) plaintiff’s
36 performance or excuse for nonperformance, (3) defendant’s breach, and (4) damage to plaintiff
37 therefrom.’” *Wall Street Network, Ltd. v. New York Times Co.*, 164 Cal.App.4th 1171, 1178, 80

1 Cal.Rptr.3d 6 (2008). “To form a contract, an ‘offer must be sufficiently definite . . . that the
2 performance promised is reasonably certain.” *Alexander v. Codemasters Group Limited*, 104
3 Cal.App.4th 129, 141. 127 Cal.Rptr.2d 145 (2002).

4 ***Documents Central To Breach Of Contract***

5 Dish Network faults the TPC’s failure “to attach relevant contracts” or “plead them verbatim.”
6 Dish Network invites this Court to consider the Commitment Agreement and RCA to evaluate dismissal
7 of the breach of contract claim.

8 “As to the contract, where a written instrument is the foundation of a cause of action, it may be
9 pleaded in haec verba by attaching a copy as an exhibit and incorporating it by proper reference.” *Byrne*
10 *v. Harvey*, 211 Cal.App.2d 92, 103, 27 Cal.Rptr. 110 (1962); *Holly Sugar Corp. v. Johnson*, 18 Cal.2d
11 218, 225, 115 P.2d 8 (1941). “Where a party relies in his complaint upon a contract in writing, and it
12 affirmatively appears that all the terms of the contract are not set forth in hæc verba, nor stated in their
13 legal effect, but that a portion which may be material has been omitted, the complaint is insufficient.”
14 *Gilmore v. Lycoming Fire Ins. Co.*, 55 Cal. 123, 124 (1880).

15 For a F.R.Civ.P. 12(b)(6) motion, a court generally cannot consider material outside the
16 complaint. *Van Winkle v. Allstate Ins. Co.*, 290 F.Supp.2d 1158, 1162, n. 2 (C.D. Cal. 2003).
17 Nonetheless, a court may consider exhibits submitted with the complaint. *Durning v. First Boston*
18 *Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987); *Van Winkle*, 290 F.Supp.2d at 1162, n. 2. In addition, a
19 “court may consider evidence on which the complaint ‘necessarily relies’ if: (1) the complaint refers to
20 the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the
21 authenticity of the copy attached to the 12(b)(6) motion.” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir.
22 2006). A court may treat such a document as “part of the complaint, and thus may assume that its
23 contents are true for purposes of a motion to dismiss under Rule 12(b)(6).” *United States v. Ritchie*, 342
24 F.3d 903, 908 (9th Cir.2003). Such consideration prevents “plaintiffs from surviving a Rule 12(b)(6)
25 motion by deliberately omitting reference to documents upon which their claims are based.” *Parrino*

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28 ///

1 v. *FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998).² A “court may disregard allegations in the complaint
2 if contradicted by facts established by exhibits attached to the complaint.” *Sumner Peck Ranch v.*
3 *Bureau of Reclamation*, 823 F.Supp. 715, 720 (E.D. Cal. 1993) (citing *Durning v. First Boston Corp.*,
4 815 F.2d 1265, 1267 (9th Cir.1987)). Moreover, “judicial notice may be taken of a fact to show that a
5 complaint does not state a cause of action.” *Sears, Roebuck & Co. v. Metropolitan Engravers, Ltd.*, 245
6 F.2d 67, 70 (9th Cir. 1956); see *Estate of Blue v. County of Los Angeles*, 120 F.3d 982, 984 (9th Cir.
7 1997). A court properly may take judicial notice of matters of public record outside the pleadings and
8 consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649
9 (9th Cir. 1988).

10 Dish Network notes that the TPC “specifically” references the Commitment Agreement with its
11 allegation that the Campbell parties “entered into contracts with Dish Network L.L.C.” Dish Network
12 points out that the Commitment Agreement “expressly” incorporates the RCA and that Mr. Campbell
13 acknowledged that he was bound to the Commitment Agreement and RCA. Dish Network argues that
14 the Commitment Agreement and RCA are “central” to the Campbell parties’ claims as “the very basis
15 of their breach of contract allegations.” Dish Network notes the absence of a challenge to the
16 authenticity of the Commitment Agreement and RCA.

17 The Campbell parties characterize Dish Network’s reference to the Commitment Agreement and
18 RCA as an improper attempt to convert a F.R.Civ.P. 12(b)(6) motion into a “premature” summary
19 judgment motion. The Campbell parties construe the Commitment Agreement and RCA as “extrinsic
20 to the operative pleadings” to cut off the Campbell parties’ “right to fully explore and develop this
21 rightful claim.” The Campbell parties identify the “basic agreement” as “an oral contract that was
22 formed when the Dish Network L.L.C. salesperson went into the Sports Club and sold the satellite
23 television service.” The Campbell parties continue that the authenticity of the Commitment Agreement
24 and RCA “cannot be assumed.”

25 The Campbell parties fail to demonstrate that the Commitment Agreement and RCA are beyond

26 ² “We have extended the ‘incorporation by reference’ doctrine to situations in which the plaintiff’s claim
27 depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not
28 dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document
in the complaint.” *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing *Parrino*, 146 F.3d at 706).

1 this Court’s consideration. The breach of contract claim alleges that Dish Network “entered into
2 contracts” with the Campbell parties and references the potential of “a written contract.” The Campbell
3 parties offer nothing meaningful to challenge the authenticity of the Commitment Agreement and RCA
4 and merely note such authenticity “cannot be assumed.” The Campbell parties do not challenge Mr.
5 Campbell’s signature on the Commitment Agreement. In the end, the Commitment Agreement and
6 RCA are central to the breach of contract claim, and this Court will consider them.

7 *Absence Of Breach To Provide Commercial Service*

8 Dish Network argues that the TPC fails to allege Dish Network’s breach of a contract in that the
9 Commitment Agreement and RCA reflect provision of residential service for Mr. Campbell, not
10 commercial service for the Sports Club. When a breach of contract claim is based on a contract which
11 “shows unambiguously on its face that the relief prayed for is not merited, then dismissal is appropriate.”
12 *Jacksonville Newspaper Printing Pressmen and Assistants' Union No. 57*, 340 F.Supp. 993, 995 (M.D.
13 Fla. 1972).

14 Dish Network contends that the TPC’s allegation that Dish Network breached the contract by
15 failing to establish a commercial account is a legal conclusion contradicted by the Commitment
16 Agreement and RCA, which provide only residential service. Dish Network points to the Commitment
17 Agreement’s opening paragraph that this “agreement . . . sets forth the terms and conditions of the
18 Digital **Home** Advantage promotion.” (Bold added.) Dish Network notes in the Commitment
19 Agreement an absence to provide commercial service. Dish Network also relies on the Commitment
20 Agreement’s identification of Mr. Campbell as customer at his Visalia residence street address with no
21 reference to commercial service for the Sports Club at its Selma address.

22 To further its cause, Dish Network quotes the following from the RCA:

23 Private Home Viewing Only. DISH Network provides Services to you solely for
24 viewing, use and enjoyment in **your private home**. You agree that no Services provided
25 to you will be viewed in areas open to the public, **commercial establishments** or other
residential locations. Services may not be rebroadcast or performed, and admission may
not be charged for listening to or viewing any Services. . . .

26 . . .

27 Other. No salesperson, installer, customer service representative, authorized
28 retailer, or other similarly situated individual is authorized to change or override this
Agreement. . . . (Underling in original; bold added.)

1 Dish Network concludes that since the Commitment Agreement and RCA “are plainly for residential
2 services,” Dish Network could not have breached a contractual obligation for commercial service “that
3 did not exist.”

4 The Campbell parties argue that from their “perspective,” they had a contract with Dish Network
5 for commercial service for the Sports Club which forms the “basis” of Dish Network’s breach of
6 contract. The Campbell parties rely on the salesperson’s and installers’ “oral representations” to Mr.
7 Campbell. The Campbell parties equate the salesperson and installers as agents to bind Dish Network.
8 The Campbell parties contend that nothing indicates that the Commitment Agreement and RCA were
9 fully integrated to represent “the totality of the agreement” between the Campbell parties and Dish
10 Network.

11 This Court agrees with Dish Network that the Commitment Agreement and RCA expressly
12 contemplate residential service, not commercial service for the Sports Club. The Campbell parties
13 identify no specific contract for the provision of commercial service for the Sports Club. A purported
14 oral agreement with a salesperson is not adequately alleged. Of key importance, the Commitment
15 Agreement and RCA contradict claims for commercial service for the Sports Club. Dish Network has
16 demonstrated that the breach of contract claim is subject to dismissal. However, out of an abundance
17 of caution, the Campbell parties are granted an attempt, if they so choose, to amend their breach of
18 contract claim, keeping in mind F.R.Civ.P. 11(b) obligations.

19 **Failure To Join Indispensable Party**

20 Dish Network seeks F.R.Civ.P. 12(b)(7) dismissal of all TPC claims in that the TPC fails to join
21 indispensable Superior Satellite, “the only party which could have actually made any alleged
22 representations to [Mr. Campbell] regarding satellite programming for [the] Sports Club and the sole
23 party responsible for fulfilling any alleged representations or promotional offers allegedly provided to
24 Mr. Campbell.”

25 F.R.Civ.P. 12(b)(7) authorizes a motion to dismiss for “failure to join a party under Rule 19.”
26 F.R.Civ.P. 19(a)(1)(A) addresses compulsory joinder if feasible of a person who “in that person’s
27 absence, the court cannot accord complete relief among existing parties.”

28 F.R.Civ.P. 19 “requires that if, as a matter of equity the court finds that the lawsuit cannot

1 proceed without the absent party, then that party be considered indispensable and the case dismissed.”
2 If, however, the lawsuit can proceed, the party is only a necessary one.” *Shelton v. Exxon Corp.*, 843
3 F.2d 212, 216 (5th Cir. 1988). To address F.R.Civ.P. 12(b)(7) dismissal, a court considers: (1) whether
4 an absent party is “necessary” to the suit; and (2) if so, and if that party cannot be joined, whether the
5 absent party is “‘indispensable’ so that in ‘equity and good conscience’ the suit should be dismissed.”
6 *Shermoen v. U.S.*, 982 F.2d 1312, 1317 (9th Cir. 1992) (quoting *Makah Indian Tribe v. Verity*, 910 F.2d
7 555, 558 (9th Cir.1990)). “In determining whether a party is ‘necessary’ under Rule 19(a), a court must
8 consider whether ‘complete relief’ can be accorded among the existing parties, and whether the absent
9 party has a ‘legally protected interest’ in the subject of the suit.” *Shermoen v. U.S.*, 982 F.2d 1312,
10 1317 (9th Cir. 1992).

11 Dish Network notes that the Commitment Agreement identifies Superior Satellite as the “retailer
12 and seller” and that Dish Network and Superior Satellite “are two separate and independent entities.”

13 Dish Network points to the RCA, which provides:

14 J. Promotional Offers and Items. If a third party, such as an independent DISH
15 Network retailer, integrator or private cable operator, offered you a promotional offer or
16 item in connection with your subscription to the Services, such third party is wholly
17 responsible for fulfilling such promotional offer or providing such promotional item, and
18 DISH Network is not in any way responsible for such fulfillment. (Underlining in
19 original.)

20 Dish Network equates Superior Satellite’s presence in this action as “essential to the disposition
21 of critical issues.” Dish Network identifies Superior Satellite as the independent retailer which “may
22 have contacted” the Campbell parties about the Digital Home Advantage Promotion and which would
23 have “contracted” with the Campbell parties “for residential cable services rather than Dish Network.”
24 Dish Network further identifies Superior Satellite as the only retailer and seller to have communicated
25 and negotiated with Mr. Campbell.

26 The Campbell parties appear to concede that Superior Satellite is a required party in that they
27 “are not opposed to amending the third-party complaint to include Superior Satellite.” As such, the
28 Campbell parties request leave to amend the TPC “to include additional claims against Superior
Satellite, LLC and to join that entity as a party to this civil action.”

Although the Campbell parties acquiesce to join Superior Satellite, their opposition papers are

1 silent as to the merits of the TPC's claims against Dish Network. The Campbell parties merely seek an
2 opportunity to amend rather than complete dismissal of their claims. Given that Superior Satellite
3 appears as a required party, the need to amend the TPC is clear. What remains unclear is the Campbell
4 parties' intentions as to Dish Network. Out of an abundance of caution, the Campbell parties are granted
5 an attempt, if they so choose, to amend all TPC claims, keeping in mind F.R.Civ.P. 11(b) obligations.

6 **CONCLUSION AND ORDER**

7 For the reasons discussed above, this Court:

- 8 1. DISMISSES without prejudice and with leave to amend the TPC's (second) breach of
9 contract claim for failure to allege a viable claim against Dish Network;
- 10 2. DISMISSES without prejudice and with leave to amend all of the TPC's claims for
11 failure to join Superior Satellite as a required party;
- 12 3. ORDERS the Campbell parties, no later than August 24, 2011, to file and serve a first
13 amended third-party complaint in conformance with the requirements addressed above;
14 and
- 15 4. ORDERS Dish Network, not later than September 16, 2011, to file and serve a response
16 to the first amended third-party complaint if Dish Network is named as a third-party
17 defendant.

18 IT IS SO ORDERED.

19 **Dated: August 5, 2011**

/s/ Lawrence J. O'Neill
UNITED STATES DISTRICT JUDGE