

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Philip J. Charvat, :
 :
 Plaintiff : Civil Action 2:07-cv-1000
 :
 v. : Judge Holschuh
 :
 Echostar Satellite LLC, : Magistrate Judge Abel
 :
 Defendant :

Scheduling Conference Order

On May 5, 2013, counsel for the parties participated in a telephone scheduling conference with the Magistrate Judge. Counsel discussed the status of the case following the United States Court of Appeals for the Sixth Circuit's October 17, 2013 Order remanding this case for consideration of Charvat's claims in light of the Federal Communication Commission's May 9, 2013 declaratory ruling interpreting the Telephone Act. *In re Dish Network, LLC*, 28 FCC Rcd. 6574 (2013).

Discovery. Plaintiff argues that when granting summary judgment this court relied on a narrow vicarious liability test that has now been rejected by the FCC. The FCC's ruling opened up broader theories of liability based on apparent authority, apparent agency, and ratification. Now that the contours of the case law requirements are clear, plaintiff would like to reopen discovery to develop facts necessary to demonstrate that defendant ratified the telephone solicitation practices of the independent contractor retailers who were selling DISH Network® brand satellite television programming.

Defendant responds that plaintiff had 13 months in which to conduct that discovery before the parties briefed the ratification issues on summary judgment. There is no good

cause to reopen discovery. Plaintiff briefed ratification on summary judgment. Defendant further argues that because the United States Court of Appeals for the District of Columbia recently held that the FCC's declaratory ruling in this case is persuasive, but not binding, this court should now proceed to reaffirm its grant of summary judgment.

Order. I have not had the opportunity to read the FCC's declaratory ruling. I do not know what discovery was conducted before summary judgment. I have no way to determine whether the FCC's ruling changed the legal framework for decision to such an extent that fairness requires that the court reopen discovery.

Within the next two weeks, plaintiff is free to serve written discovery regarding ratification. Defendant is free to respond that such discovery would be burdensome because plaintiff had a full and fair opportunity to conduct that discovery before the parties briefed summary judgment.

If the parties are able to reach an agreement about reopening discovery, they should email me (Mark_Abel@ohsd.uscourts.gov) their proposed scheduling order on or before **May 28**. If they unable to reach agreement, counsel should call my office (614.719.3370) on or before **May 28** to schedule a telephone conference with me. Before the conference, they should email me defendant's responses to plaintiff's written discovery and their communications back and forth about whether discovery should be reopened.

s/Mark R. Abel _____
United States Magistrate Judge