

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

Philip J. Charvat, :
 :
 Plaintiff : Civil Action 2:07-cv-01000
 :
 v. : Judge Marbley
 :
 Echostar Satellite, LLC, : Magistrate Judge Abel
 :
 Defendant :

ORDER

This matter is before the Magistrate Judge on plaintiff Phillip J. Charvat's request to reopen discovery based on the May 9, 2013 Order of the Federal Communications Commission ("FCC"). The FCC recognized that "while a seller does not generally initiate calls made through a third-party telemarketer, it nonetheless may be vicariously liable under federal common law agency-related principles for violations of either section 227(b) or 227(c) [of the Telecommunications Act of 1991] committed by telemarketers that initiate calls to market its products or services."

Plaintiff argues that discovery should be reopened because this Court's decision dismissing the case was based on a narrow interpretation of agency law that required Echostar Satellite, LLC ("Echostar") to have actual control over the manner and means of the telemarketing at issue to be liable for the many calls made to plaintiff by defendant's authorized dealers. Plaintiff maintains that the FCC explicitly rejected this

reasoning. Plaintiff notes that throughout this case, defendant has argued that its contract with authorized dealers mandates compliance with applicable laws, but the FCC concluded that the presence of this contract term does not by itself absolve the seller of vicarious liability. Plaintiff's position before this Court had been that defendant was liable for calls made on its behalf. Echostar argued that it was not liable because it did not "initiate" or physically dial the calls. In its December 15, 2009 Order dismissing the case, the Court did not adopt either position. Rather, the Court decided the case on the basis of agency principles.

Plaintiff argues that the discovery exchanged prior to the Court's decision did not focus on apparent agency or ratification. Although the Court's Order referred to ratification, ratification was not a primary focus of plaintiff's brief. Plaintiff further argues that no discovery was produced relating to whether authorized dealers could bind consumers to a contract or access defendant's database and systems, both of which are factors that the FCC recognized as relevant. No discovery was produced as to the amount of money paid to authorized dealers associated with unlawful telemarketing or concerning the nature of the relations between defendants and its authorized dealers beyond its contracts. Plaintiff asserts that if defendant was aware that its authorized dealers were engaged in unlawful conduct and failed to act responsibility then it could be liable under theories of ratification, negligent hiring, or negligent retention. If defendant allowed its authorized dealers to bind it to contracts or allowed dealers to access its systems, defendant could be liable under theories of agency or apparent

authority. Plaintiff maintains none of these theories of liability were pursued earlier in the case and that these potential avenues of recovery were first recognized by the FCC in its May 2013 Order.

In response to plaintiff's request to reopen discovery, Echostar contends that plaintiff already had a fair opportunity to conduct the discovery it now seeks. Echostar maintains that in the Rule 26(f) report, plaintiff stated his intent to pursue such discovery, and he previously propounded the same discovery requests, or substantially similar requests, that encompass the new requests. Echostar also contends that plaintiff set forth arguments and evidence regarding ratification and apparent authority in opposing summary judgment and on appeal to the Sixth Circuit, which took place prior to the FCC ruling upon which plaintiff bases his justification for reopening discovery. Echostar maintains that discovery should not be reopened because the FCC held that sellers could be vicariously liable for telemarketers under theories of apparent authority and ratification, which is what plaintiff previously argued to the Court years before the FCC decision.

Discussion. In his memorandum in opposition to defendant's motion for summary judgment, plaintiff argued that:

- (1) retailers that placed the unlawful telemarketing calls to Plaintiff's residence had the authority from Echostar to place telemarketing calls on its behalf, and were permitted to use the Dish Network name to solicit sales on behalf of Echostar;
- (2) unsuspecting recipients of these telemarketing calls, including Plaintiff, reasonably believed that the retailers have authority to solicit orders on behalf of Echostar, as they do;
- and (3) Echostar has ratified its retailers' acts by retaining the benefits of

their telemarketing practices while failing to repudiate their actions in regard to the 30 calls at issue herein and while failing to take any action to prevent its retailers from violating the telemarketing laws while this case has been in litigation or again in the future.

Doc. 42 at PageID#1383-84. Plaintiff stated that “Defendant has ratified the unlawful acts of its retailers, resulting in ultimate liability resting with Echostar.” *Id.* at PageID# 1388.

Interrogatory No. 1. Plaintiff’s Interrogatory No. 1 states:

Explain in detail your relationship with The Dish Dealers, and include in your answer a summary of whether the relationship was contractual in nature, and how business was transacted between You and the Dish Dealers from January 1, 2000 to the present.

Defendant maintains that this information was previously sought by Plaintiff’s First Set of Discovery, Interrogatory Nos. 2, 3, and 9, which includes both 9 and the second misnumbered 9. Because defendants previously submitted the contracts between it and its dealers, plaintiff had a full and fair opportunity to conduct discovery on this issue prior to summary judgment.

Interrogatory No. 2. Plaintiff’s Interrogatory No. 2 states:

Explain whether or not The Dish Dealers had Your authority to sell Your goods and services to consumers, and disclose the exact factual basis for such authority.

In his response in opposition to the motion for summary judgment, plaintiff stated:

“Echostar’s agents are also authorized to advertise, sell, install and activate Echostar’s equipment and services in consumers’ homes, so that the consumers may view Dish Network’s satellite television program. (Van Ernst Aff. ¶; Echostar Retailer Agreements, Defendant’s Motion, Exhibits C-G, at page 6, paragraph 3.9, Doc. 33).

Doc. 42 at PageID# 1363-64. As a result, plaintiff was aware of this issue and had a full and fair opportunity to conduct the discovery before the parties briefed summary judgment.

Interrogatories Nos. 3, 4, 5, 18, 19, 20, 21 & 22. These interrogatories state:

Interrogatory No. 3. Explain whether or not The Dish Dealers had Your authority to sell Your goods and services to consumers via telemarketing, and disclose the exact factual basis for such authority.

Interrogatory No. 4. Explain whether or not The Dish Dealers had Your authority to use your trade name when selling your goods or services to consumers, and disclose the exact factual basis for such authority.

Interrogatory No. 5. Explain whether or not The Dish Dealers had Your authority to display your trade name or logo on its web-sites, and disclose the exact factual basis for such authority.

...

Interrogatory No. 19: State whether or not the Dish Dealers were authorized by you to set programming of the services they sold to customers.

Interrogatory No. 20: State whether or not the Dish Dealers were authorized by you to set the prices for the programming services they sold to customers.

Interrogatory No. 21: State whether or not you required the Dish Dealers to seek your approval of each customer obtained by them prior to initiation of programming services.

Interrogatory No. 22: State whether or not the Dish Dealers had access to your customer databases for use during telemarketing calls with consumers.

Interrogatory No. 23: State whether or not you performed any level of credit checks on potential customers presented to you by the Dish Dealers prior to approval of those customer leads being approved as customers.

In his response in opposition to the motion for summary judgment, plaintiff stated:

[C]ontrary to Echostar's claims that it retains no control over its retailer sales agents, through its written retailer agreements, Echostar retains significant control over its agents' sales activities. For example, Echostar determines, in its sole discretion, the type of Dish Network programming for which the retailer may solicit orders. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 8, paragraph 4.1, Doc. 33). Echostar determines all pricing for its Dish Network programming, in its sole discretion and without any input from its retailers. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 9, paragraph 5, Doc. 33). Echostar also retains control over all programming orders, prohibits its retailers from selling any programming, and ensures that all relationships with Dish Network subscribers are solely and exclusively Echostar's. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 16, paragraphs 7.2-7.4, Doc. 33).

Echostar retains exclusive ownership of all Dish Network's subscribers' names and addresses, requiring retailers to maintain such information in the strictest confidence. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 18, paragraphs 9.5, Doc. 33). Also Echostar reserves the right, in its sole and absolute discretion, to accept or reject any and all programming orders proffered by its retailers. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 16, paragraph 7.2, Doc. 33). In other words, Echostar can reject for any reason any new customer generated by a retailer through its marketing activities.

Echostar has full knowledge of the fact that its retailers advertise Echostar's Dish Network equipment and services through a variety of means, including the use of telemarketing, as Echostar's retail agreements allow its agents broad authority to market, promote and solicit orders for Echostar. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 1, Introduction paragraph A, Doc. 33).

Finally, Echostar retains control over its authorized agents' marketing efforts, requiring them to comply with all local, state and federal laws that pertain to their advertising and marketing efforts. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page

17, paragraph 9.1, Doc. 33). In fact, Echostar reserves the right to take disciplinary action against any non-complying agent, including the revocation of the agent's right to market Echostar's equipment and services. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 19, paragraph 10.4, Doc. 33). Indeed, Echostar requires that its sales agents indemnify and hold Echostar harmless for any violations of local, state and federal laws that pertain to their advertising and marketing efforts. (Van Ernst Aff. ¶5; Echostar Retailer Agreements, Defendant's Motion, Exhibits C-G, at page 20, paragraph 13, Doc. 33).

Thus, there can be no serious dispute but that Echostar has had significant authority and control over its authorized retailers.

Doc. 42 at PageID# 1364-66. Based on the arguments put forth in his summary judgment briefing, it is apparent that plaintiff was aware of these issues and had a full and fair opportunity to conduct the discovery before the parties briefed summary judgment.

Interrogatory Nos. 6, 7, & 8. These interrogatories are beyond the scope of the discovery related to ratification permitted by my May 6, 2013 Order. *See* doc. 77. Interrogatory No. 6 asks whether or not defendant knew prior to this lawsuit whether the Dish Dealers were engaging in telemarketing. Interrogatory No. 7 seeks information concerning defendant's due diligence efforts to ensure that Dish Dealer's telemarketing was compliant with all applicable laws. Interrogatory No. 8 asks whether "Satellite Sales" was known to Echostar as a trade name used by Marketing Guru. The requests do not seek new information concerning issues that plaintiff was not aware of, and plaintiff has not demonstrated that the FCC ruling necessitates the reopening of discovery with respect to these interrogatories.

Interrogatory No. 9. Plaintiff's Interrogatory No. 9 asks for an explanation of how much Dish Dealers were paid from 2000 through the present. The request does not seek new information concerning issues that plaintiff was not aware of, and plaintiff has not shown how these requests are relevant to the FCC ruling.

Interrogatories Nos. 10, 11, 12, 13 & 16. These interrogatories state:

Interrogatory No. 10. Identify each person employed by You with knowledge of any telemarketing complaints made to You by anyone in regards to the Dish Dealers, Your investigation into such complaints, and the results of such complaints.

Interrogatory No. 11. Identify all persons with knowledge of any sanction, punishment, or discipline imposed by You upon any of the Dish Dealers relating to telemarketing.

Interrogatory No. 12. Describe the manner in which telemarketing complaints submitted or forwarded to You, directly or indirectly, were handled, investigated and resolved, and identify the individuals employed by or affiliated with You with knowledge of such complaints.

Interrogatory No. 13. Identify each consumer complaint or litigation that You are aware of relating to allegations of unlawful telemarketing conducted by the Dish Dealers.

Interrogatory No. 16. Identify by caption any litigation filed by anyone against You and/or The Dish Dealers relating to allegations of illegal telemarketing.

Interrogatories Nos. 5, 6, and 8 and Request from Production No. 5 from Plaintiff's First Set of Discovery demonstrate that plaintiff had a full and fair opportunity to conduct this discovery prior to the summary judgment briefing. Additionally, the requests do not seek new information concerning issues that plaintiff was not aware of, and plaintiff has not shown how the FCC ruling impacts the need for these interrogatories.

Interrogatory No. 14. Plaintiff's Interrogatory No. 14 asks defendant to identify any documents that evidence Mr. Charvat's consent to receive telemarketing conducted by the Dish Dealers. Plaintiff had a full and fair opportunity to seek this information prior to summary judgment briefing.

Interrogatory No. 15. Plaintiff's Interrogatory No. 15 asks defendant to list and describe any awards certificates, honors, incentives or similar recognition given by defendant to the Dish Dealers and state the date and basis for each recognition. In his response in opposition to the motion for summary judgment, plaintiff stated that Echostar paid its authorized agents for each new subscriber they generated through their sales activities and offered its agents various monthly case incentives for their sales of specified products and services. Doc. 42 at PageID# 1364. Plaintiff had a full and fair opportunity to seek this information prior to summary judgment briefing.

Interrogatories 24, 25, & 26. These interrogatories state:

Interrogatory No. 24: State whether you or the Dish Dealers received the revenue paid by the customers obtained by the Dish Dealers who then used your programming services.

Interrogatory No. 25: State whether or not a Dish Dealer could establish a consumer contacted through telemarketing as a customer of yours without your approval or consent given to the Dish Dealer.

Interrogatory No. 26: State whether or not consumers who agreed to accept the sales offers made by Dish Dealers during telemarketing calls were assigned a customer number of yours.

The requests do not seek new information concerning issues that plaintiff was not aware of, and plaintiff has not demonstrated that the FCC ruling necessitates the reopening of discovery with respect to these interrogatories.

Requests for Production. With respect to the requests for production of documents, I conclude that plaintiff had a full and fair opportunity to conduct the discovery prior to the summary judgment briefing. The requests do not seek new information concerning issues that plaintiff was not aware of.

For the reasons stated above, plaintiff Charvat's request to reopen discovery is DENIED.

Under the provisions of 28 U.S.C. §636(b)(1)(A), Rule 72(a), Fed. R. Civ. P., and Eastern Division Order No. 91-3, pt. F, 5, either party may, within fourteen (14) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by the District Judge. The motion must specifically designate the Order, or part thereof, in question and the basis for any objection thereto. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

s/Mark R. Abel
United States Magistrate Judge