Appeal No. 15-2901

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NEIL STOKES AND CRAIG FELZIEN,
on behalf of themselves and others similarly situated
Plaintiffs – Appellees

v.

DISH NETWORK, L.L.C.,
Defendant – Appellant.

On Appeal from the United States District Court
for The Western District of Missouri – Jefferson City
Case No. 2:14-CV-04338-NKL

BRIEF OF APPELLEES NEIL STOKES AND CRAIG FELZIEN

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

For nearly a month in 2014, DISH Network, L.L.C., chose not to provide ten Turner and FOX Network channels to millions of subscribers who had selected and paid in advance for such programming, or to provide credits for the tens of millions of dollars paid by subscribers for Turner and FOX. Plaintiffs allege that, in doing so, DISH breached its contract and the implied duty of good faith and fair dealing.

DISH moved to dismiss, arguing its contract gave DISH the unlimited right to delete any and all programming at any time without recourse to subscribers.

The District Court denied DISH's motion. Applying Colorado law, the District Court rejected DISH's proposed construction of the contract on the grounds that: (a) it rendered the contract illusory; (b) it ignored certain provisions of the contract and rendered other provisions meaningless; and (c) DISH's discretion is limited by the express contract terms and the implied duty of good faith and fair dealing, which requires DISH to exercise its discretion reasonably. Consistent with the express terms of the contract, the District Court found plausible Plaintiffs' allegations that DISH violated the duty of good faith and fair dealing when it did not provide Turner and FOX programming, kept the money it would have otherwise paid to Turner and FOX, and provided no credit to subscribers.

Plaintiffs request that this Court affirm the District Court's order.

Plaintiffs request 20 minutes for oral argument.

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STATEMENT OF ISSUES

This Court accepted the following issues certified for appeal by the District Court:

1. Under Colorado law, is the Subscription Agreement between Stokes and DISH, which is comprised of both a Digital Home Advantage Plan Agreement and a Residential Customer Agreement, illusory?

Apposite Authorities:

Cohen v. Clayton Coal Co.,
281 P. 111 (Colo. 1929)

Sentinel Acceptance Corp. v. Colgate,
424 P.2d 380 (Colo. 1967)

Flood v. ClearOne Communications, Inc.,
618 F.3d 1110 (10th Cir. 2010)

Dish Network Corp. v. Arch Specialty Ins. Co.,
989 F. Supp. 2d 1137 (D. Colo. 2013)

2. Under Colorado law, if the Subscription Agreement between Stokes and DISH, which is comprised of both a Digital Home Advantage Plan Agreement and a Residential Customer Agreement, is not illusory, may, in light of the express terms of the Subscription Agreement, the duty of good faith and fair dealing be applied to require DISH to provide any monetary relief when it deletes or changes programming for which subscribers have already paid?

Apposite Authorities:

Occusafe, Inc. v. EG&G Rocky Flats,
54 F.3d 618 (10th Cir. 1995)

Chandler-McPhail v. Duffey,
194 P.3d 434 (Colo. Ct. App. 2007)

Solidfx v. Jeppesen Sanderson, Inc.,
935 F. Supp. 2d 1069 (D. Colo. 2013)

St. Louis & Denver Land & Mining Co. v. Tierney,
5 Colo. 582 (Colo. 1881)

STATEMENT OF THE CASE

I. Plaintiffs' Factual Allegations.

A. DISH's Sale Of Programming Packages.

DISH is a Colorado corporation that markets and sells satellite television nationwide. (Appellant's Appendix ("AA") 4, ¶¶ 8, 12.) DISH purchases programming content from third-party providers, such as Turner Broadcasting System, Inc. ("Turner") and FOX Network ("FOX"), and then aggregates the programming into "packages" which DISH re-sells to subscribers for a monthly price, payable in advance. (AA 4-5, ¶¶ 12-15; AA 7, ¶ 26; AA 9, ¶ 40-41; AA 10, ¶ 44.) The price DISH charges and collects from subscribers incorporates DISH's cost of purchasing the programming content from the third-party providers. (AA 5, ¶ 15.)

B. Plaintiffs' Purchase Of The Turner And FOX Programming.

Plaintiffs Stokes and Felzien are Missouri residents who, throughout 2014, selected and paid DISH for satellite television programming including CNN, Headline News, CNN en Espanol, the Cartoon Network/Adult Swim, Turner Classic Movies, truTV, Boomerang, and The Hub (the "Turner Programming") and the FOX News Channel and FOX Business Network (the "FOX Programming"). (AA 1, ¶ 1; AA 3, ¶¶ 6-7; AA 5, ¶¶ 15-16; AA 9, ¶ 39.)

C. The Subscription Agreement.

After DISH installed satellite equipment at Plaintiffs' residences, Plaintiffs were required to sign a standardized, non-negotiable, two-page form Digital Home Advantage Plan Agreement ("Plan Agreement"). (AA 6, ¶¶ 20-21.) The Plan Agreement contains the following provision:

> You agree to make a monthly payment by the payment due date for the programming you select and for the following fees as applicable depending upon the equipment you select.

(AA 29.)

At the same time, DISH provided Plaintiffs with a Satellite Receiver User's Guide. (AA 7, ¶ 27.) The Appendix of the User's Guide, on pages 146-151, includes a six-page, single-spaced document, in 8.5 font, entitled Residential Customer Agreement ("RCA"). (AA 7, ¶ 28.) The RCA, which is also available online, is a standardized, non-negotiable document that does not require the subscriber's signature. (AA 7, ¶¶ 29-30; AA 9, ¶ 37.)

The Plan Agreement purports to incorporate the RCA, which includes the following relevant provisions:

> 1.I. Changes in Services Offered. We may add, delete, rearrange and/or change any and all programming, programming packages and other Services that we offer, as well as the prices and fees related to such programming, programming packages and Services, at any time, including without limitation, during any term commitment period to which you have agreed. If a change affects you, we will notify you of such change and its effective date. In the event

that we delete, rearrange or change any programming, programming packages or other Services, we have no obligation to replace or supplement such programming, programming packages or other Services. You are not entitled to any refund because of a deletion, rearrangement or change of any programming, programming packages or other Services.

* * * *

3.D. No Credits. If your Services are cancelled or disconnected for any reason, you still must pay all outstanding balances accrued, including without limitation, any applicable fees. Except in certain limited circumstances, charges for Services, once charged to your account, are non-refundable, and no refunds or credits will be provided in connection with the cancellation of Services. If you received a discounted price due to a promotion, and you cancel prior to any applicable expiration of that promotion, you are not entitled to any refund or credit for the unused portions of such discounted price. If you received a discounted price in exchange for your agreement to pay for your Services on a multi-month basis, and you cancel your Services prior to the expiration of your milti-month subscription, you are not entitled to any refund or credit for the unused portions of your multi-month subscription.

* * * *

7.A. Interruptions and Delays. Neither we nor our third-party billing agents, nor any of our or their affiliates, will be liable for any interruption in any service or for any delay or failure to perform, including without limitation: if such interruption, delay or failure to perform arises in connection with the termination or suspension of Dish Network's access to all or any portion of services; the relocation of all or any portion of the services to different satellite(s); a change in the features available with your equipment; any software or other downloads initiated by us; or any acts of God, fires,

> earthquakes, floods, power or technical failure, satellite or uplink failure, acts of any governmental body or any other cause beyond our reasonable control.
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> * * * *
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> 7.F. Damages Limitation. Neither we nor our third-party billing agents, nor any of our or their affiliates, shall have any liability whatsoever for any special, indirect, incidental or consequential damages arising out of or relating to: DISH Network equipment or any other equipment; our furnishing or failure to furnish any services or equipment to you; or any fault, failure, deficiency or defect in services or equipment furnished to you.

(AA 40, 42, 44, 45.)[1]

D. The Turner And Fox Takedowns.

Prior to October 2014, DISH knew that its carriage agreement with Turner for the Turner Programming (the "DISH/Turner Agreement") would expire on October 21, 2014. (AA 9, ¶ 40.) From October 21, 2014, to November 20, 2014, DISH did not renew the DISH/Turner Agreement and did not provide Turner Programming to subscribers (the "Turner Takedown"). (AA 9, ¶ 41.)

Similarly, prior to December 2014, DISH understood that its carriage agreement with FOX for the FOX Programming (the "DISH/FOX Agreement") would expire on December 21, 2014. (AA 10, ¶ 44.) From December 21, 2014 to

[1] The Plan Agreement and the RCA are collectively referred to as the "Subscription Agreement." The RCA also states that it "shall be governed by the laws and regulations of the State of Colorado." (AA 46, ¶ 9.F.)

January 15, 2015, DISH did not renew the DISH/FOX Agreement and did not provide FOX Programming to subscribers (the "FOX Takedown"). (AA 10, ¶ 45.)

During the Turner and FOX Takedowns, DISH retained and continued to charge fees to subscribers for Turner and FOX Programming for the Takedown Periods. (AA 10-11, ¶¶ 42, 46.)

During the Turner and FOX Takedowns, DISH did not pay Turner or FOX for the right to provide those channels to subscribers. (AA 10, ¶ 43.) This, according to DISH's Chairman and 90% owner, provided DISH a "cash positive" by allowing DISH to "save a big, big, big check from a cash flow perspective." (AA 10, ¶ 43.) Plaintiffs allege this saved DISH tens of millions of dollars. (AA 1, 2, ¶¶ 1, 4.)

DISH did not provide subscribers any credit or reduction in fees for the Turner and FOX Programming for which subscribers paid but did not receive during the Turner and FOX Takedowns. (AA 10, ¶ 42.) DISH also refused to permit millions of subscribers who had entered into 12 or 24 month term agreements to cancel their Subscription Agreements without payment of a substantial termination fee. (AA 2, ¶ 2; AA 10-11, ¶¶ 42, 46.)

II. Procedural History.

A. Plaintiffs' Complaint.

Plaintiffs' First Amended Complaint ("Complaint") alleges that DISH's collection and retention of fees for Turner and FOX programming, which DISH chose not to provide, without providing subscribers a credit, constitutes a breach of the Subscription Agreement and DISH's duty of good faith and fair dealing. (AA 1-16.)

Plaintiffs alternatively seek declaratory relief that the Subscription Agreement, which DISH claims gives it the unrestricted right to "delete . . . any and all programming," change prices, and change other material terms of the parties' agreement, at any time and for any reason, without any recourse to subscribers, is illusory, lacking in mutuality, and unconscionable. (AA 22-23.)[2]

1. *Padberg v. DISH Network, LLC*.

This case is similar to the case of *Padberg v. DISH Network, L.L.C.*, 2:11-cv-04035-NKL, pending in the District Court for the Western District of Missouri. *Padberg* involves similar conduct by DISH—collecting money from subscribers

[2] In the event this Court deems DISH's Subscription Agreement illusory, lacking in mutuality, or unconscionable, Plaintiffs seek alternative relief for: (1) unjust enrichment based on DISH's retention of Plaintiffs' payments for the Turner and FOX programming; and (2) violations of the Colorado Consumer Protection Act and the Missouri Merchandising Practices Act for DISH's failure to disclose material information in its marketing of the Turner and FOX Programming to Plaintiffs and the Class, and its retention of monies from Plaintiffs and the Class for such programming, which DISH chose not to provide. (AA 16-22.)

for FOX programming which DISH chose not to provide for one month in 2010—and the same Subscription Agreement at issue in this case. In *Padberg*, the Honorable Nannette K. Laughrey denied (and granted in part) a similar Motion to Dismiss filed by DISH and certified two classes. *See Padberg v. Dish Network LLC*, 2012 U.S. Dist. LEXIS 80543 (W.D. Mo. June 11, 2012); *Padberg*, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 180. The case proceeded to trial and the jury found in favor of Plaintiffs. *Padberg*, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 345, Verdict.

In its Statement of the Case, DISH incorrectly states that the District Court granted a new trial in *Padberg* because "[t]he plaintiff claimed that the damages awarded were grossly insufficient." (Appellant's Brief ("DISH Br.") at 6 n.3.) The District Court granted Plaintiff's motion for new trial because it found that the jury's damage award was: (a) against the weight of the evidence, including DISH's expert's own estimation of damages; and (b) "likely the result of improper considerations" because of DISH's "egregious conduct" in repeatedly injecting an issue into the trial that had been prohibited by the Court's pre-trial rulings and "in violation of repeated orders by the Court." *See Padberg v. Dish Network LLC*, No. 2:11-cv-04035-NKL, 2015 U.S. Dist. LEXIS 72934, *4, 8, 10 (W.D. Mo. June 5, 2015).

> Further, as previously discussed, DISH violated the Court's orders on an issue it clearly regarded as

> important to its position. *See* [Doc. 353, pp. 9-13] (summarizing the 'at least 14 occasions' DISH's counsel and witnesses offered questions or testimony related to subjective intent, which had been excluded by the Court). A verdict against the weight of the evidence is a natural consequence of such conduct and makes it virtually impossible to determine what the jury would have done absent the egregious conduct.

Id. at *8.

Padberg's retrial is currently stayed pending this appeal. *Padberg*, 2:11cv-04035-NKL, Dkt. No. 425, Order.

B. DISH's Motion To Dismiss.

On March 13, 2015, DISH moved to dismiss Plaintiffs' Complaint under Rule 12(b)(6), arguing that (a) the Subscription Agreement provided DISH an unconditional right to delete or change any or all programming, at DISH's sole discretion, without any recourse whatsoever to subscribers; and (b) Plaintiffs' contract claims were contradicted by the express terms of the Subscription Agreement and supplemented the Subscription Agreement with new terms. (AA 53; DISH Br. at 11.)

The District Court denied DISH's Motion to Dismiss with respect to Plaintiffs' breach of contract and breach of good faith and fair dealing claims.[3]

[3] The District Court sustained DISH's motion to dismiss Plaintiffs' alternative Unjust Enrichment and Declaratory Relief claims (Counts III and VI) because it deemed the Subscription Agreement an enforceable contract. (AA 63-64, 67-68.) The District Court likewise dismissed Plaintiffs' Consumer Fraud claims (Counts

Adopting its prior ruling in *Padberg*, the District Court found that DISH's proposed construction of the Subscription Agreement "would, of course, render the contract illusory." (AA 54, 55.) The Court found, however, DISH's contention that "it has total discretion to change or delete programming without recompense to the Plaintiffs" (AA 63) contrary to the language of the Subscription Agreement. (AA 54-63.) In particular, the District Court "looked at Section 7.A in context with the entire contract and concluded that two additional parts of the contract demonstrated that the parties did not intend DISH to have the 'extreme and unexpected breadth of discretion' suggested by the first clause in Section 7.A." (AA 54.)

First, the District Court found that the phrase in Section 7.A "*or any other cause beyond [DISH's] reasonable control*. . . . suggests that Dish Network's liability is limited only when the circumstances are beyond Dish Network's control, a concept completely consistent with the duty of the good faith and fair dealing and most likely to reflect the intentions of the parties at the time the agreement was formed. Further, it is an interpretation that prevents the contract from being illusory." (AA 54-55; s*ee also* AA 56 ("Interpreting Section 7.A to absolve DISH for liability for interruptions in any service for a delay or for a

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IV and V) because it found that the Subscription Agreement was enforceable and served to cure any deception by DISH. (AA 66, 67.)

failure to perform regardless of whether the loss was within its control would render the contract illusory.”))

Second, the District Court reasoned that, “if Section 7.A absolved DISH of all liability, there would be no need for Section 7.F, which limits the types of damages available to a subscriber arising out of DISH’s failure to furnish services or DISH’s fault, failure, deficiency or defect in services.” (AA 56.)

Furthermore, the District Court rejected DISH’s proposed construction of unlimited discretion because, under Colorado law, DISH’s discretion was limited by the implied duty of good faith and fair dealing, which requires DISH to exercise its discretion to change programming and pricing reasonably. (AA 53, 63.)

Finally, the District Court found that Plaintiffs’ claims that DISH breached its contractual obligations by failing to provide a credit did not contradict or supplement the express terms of the Subscription Agreement. (AA 53-58, 63.) Although the Subscription Agreement expressly prohibits refunds for changes in programming, other sections of the Subscription Agreement distinguish between refunds and credits. (AA 58.) The District Court found that DISH, as the author of the contract, “is the Party who differentiated between a credit and a refund in its form contract and cannot now argue the distinction is meaningless.” (AA 58.)

Accordingly, “although a provision in the Subscription Agreement prohibited refunds, that provision did not mean a credit going forward for lost

programming or a future change in price reflecting the lost services was not within the reasonable expectations of the parties." (AA 54.) The District Court, therefore, determined that, when viewed in full, the Subscription Agreement "suggests that other remedies, such as a credit, are available when DISH exercises its discretion to change or delete programming in an unreasonable way." (AA 58.)

In light of the Subscription Agreement's terms and pursuant to the implied duty of good faith and fair dealing, the District Court found Plaintiffs' allegations plausible:

> The operative question is whether it was reasonable for DISH to stop providing Turner and FOX News Programming, keep the payments it would have been paying previously to the providers for those channels, and provide no recompense to its customers. Such a fact question cannot be resolved by a motion to dismiss and is a question for the jury.

(AA 63.)

Because "the Parties disagreed as to the scope and applicability of the duty of good faith and fair dealing" in both this case and *Padberg*, the District Court certified two controlling questions of law to materially advance both *Padberg* and this case by clarifying how the cases will proceed. (AA 68-70.)

On August 31, 2015, the Court entered an order granting DISH's petition for interlocutory review. (AA 184.)

SUMMARY OF ARGUMENT

This action arises out of DISH's failure to provide a credit to subscribers for the tens of millions of dollars in fees paid by subscribers to DISH for Turner and FOX programming, which DISH chose not to provide for nearly one month in late 2014.

Plaintiffs allege that, under Colorado law, DISH's collection and retention of their payments for programming which DISH chose not to provide, without providing a credit, constitutes a breach of DISH's Subscription Agreement and duty of good faith and fair dealing. This case is not unlike other contract cases in which a purchaser does not receive goods or services that he or she has paid for. Plaintiffs seek to recover the value of the Turner and FOX Programming, paid for by subscribers, which DISH failed to provide.

The express terms of DISH's Subscription Agreement: (a) requires subscribers to pay monthly in advance "for the programming [they] select"; (b) defines "services" to include programming; (c) permits direct damages for DISH's "failure to furnish any services . . . to [subscriber]; or any fault, failure, deficiency or defect in services . . . furnished to [subscriber]"; (d) distinguishes between "credits" and "refunds"; and (e) does not preclude credits for programming losses that are within DISH's reasonable control. Under Colorado law, the Subscription

Agreement includes an implied duty of good faith and fair dealing, which requires DISH to exercise its discretion to delete programming reasonably.

DISH construes the Subscription Agreement as conferring on DISH the unlimited right to delete or change "any and all programming" at any time without any recourse to subscribers.

Consistent with Colorado law, the District Court rejected DISH's proposed construction of the contract on the grounds that: (a) it rendered the contract illusory; (b) it ignored certain provisions of the contract and rendered other provisions meaningless; and (c) DISH's discretion is limited by the express contract terms and the implied duty of good faith and fair dealing, which requires DISH to exercise its discretion reasonably.

The District Court appropriately found that, if DISH's discretion to delete or change "any and all programming" is unlimited, as DISH suggests, then the Subscription Agreement is illusory because subscribers have an obligation to pre-pay for the programming they select, but DISH has no obligation to provide "any and all programming." Furthermore, under Colorado law, partial performance does not validate an illusory contract.

Colorado law requires courts to adopt a contract interpretation that preserves a contract over one that renders it illusory. The District Court did not rewrite

DISH's contract, but rather, viewed the contract as a whole in a manner that gave effect to all provisions and, thereby, avoided an illusory result.

Moreover, the District Court appropriately interpreted the Subscription Agreement based on the contract language and the hypothetical effect of DISH's proposed construction. In fact, DISH recently did exactly that, convincing a Colorado District Court that an exclusion in a DISH insurance contract was illusory "by way of a hypothetical showing the absurdity of [the insurance company's] argument." *Dish Network Corp. v. Arch Specialty Ins. Co*., 989 F. Supp. 2d 1137, 1153-54 (D. Colo. 2013).

Furthermore, DISH's proposed construction of unlimited discretion is contrary to the express terms of the Subscription Agreement. The District Court properly found that interpreting Section 7.A to absolve DISH of liability for interruptions in any service for a delay or for a failure to perform regardless of whether the loss was within its control would render the contract illusory. To avoid this illusory result, the District Court properly found that the last phrase of Section 7.A ("*or any other cause beyond [DISH's] reasonable control*") suggested DISH's liability is limited under 7.A only when the circumstances are beyond DISH's reasonable control.

This interpretation also avoids rendering Section 7.F meaningless, because if Section 7.A absolved DISH of all liability, as DISH suggests, there would be no

need for Section 7.F, which limits the types of damages available to a subscriber arising out of DISH's failure to furnish services or DISH's fault, failure, deficiency or defect in services.

DISH argues the District Court misread 7.A, which DISH says limits liability only for temporary or partial programming interruptions and delays. The words "partial," "temporary," or "short-term," however, are not found in 7.A. Rather, 7.A speaks to any failure to perform, including the "termination" (permanent) of "all or any portion of the services."

Finally, DISH's suggestion that it has unlimited discretion is contrary to the implied duty of good faith and fair dealing, which requires DISH to act reasonably in the exercise of its discretion to change programming and pricing. Plaintiffs' claim does not contradict or supplement the Subscription Agreement, which: (a) distinguishes between "refunds" and "credits"; (b) does not provide for refunds when DISH exercises its discretion to change programming; and (c) does not prohibit a credit or price adjustment in the event of such a change.

Accordingly, in light of the Subscription Agreement's terms and pursuant to the implied duty of good faith and fair dealing, the District Court correctly found that the Subscription Agreement suggests other remedies, such as a credit, are available when DISH exercises its discretion to change programming in an unreasonable way. Therefore, the operative question is whether it was reasonable

for DISH to stop providing Turner and FOX News Programming, keep the payments it would have been paying previously to the providers for those channels, and provide no credit to its customers. Because such a fact question is for the jury, the District Court's order denying in part and granting in part DISH's Motion to Dismiss should be affirmed.

STANDARD OF REVIEW

The District Court granted in part and denied in part DISH's Motion to Dismiss. This Court reviews this determination *de novo*, "accepting the allegations contained in the complaint as true and drawing all reasonable inferences in favor of the nonmoving party." *Express Scripts, Inc. v. Aegon Direct Mktg. Servs*., 516 F.3d 695, 698 (8th Cir. 2008); *see also Blankenship v. USA Truck, Inc.*, 601 F.3d 852, 853 (8th Cir. 2010).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (*citing Twombly*, 550 U.S. at 556).

ARGUMENT

I. The District Court Correctly Ruled That The Subscription Agreement Is Not Illusory Because DISH's Discretion To Delete Or Change Any Or All Programming Is Limited By The Express Contract Terms And The Duty Of Good Faith And Fair Dealing, Which Requires DISH To Exercise Its Discretion Reasonably.

A. The District Court Correctly Preserved The Subscription Agreement By Rejecting DISH's Interpretation That The Subscription Agreement Gives DISH The Unfettered Right To Delete Or Change Any Or All Programming At Any Time Without Recourse.

Under Colorado law, an illusory contract is one that binds only one party or makes performance subject to one party's unfettered discretion. *See Acad. of Charter Schs v. Adams County Sch. Dist. No. 12*, 32 P.3d 456, 463 (Colo. 2001) ("A contract is void, a contradiction in terms, when it produces no legal obligation upon the part of a promisor."); Restatement (Second) of Contracts § 77 cmt. a (2010) ("Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise. . . . Where the apparent assurance of performance is illusory, it is not consideration for a return promise."); *H&H Transformer, Inc. v. Battelle Energy Alliance, LLC*, No. 09-cv-00442-WYD-BNB, 2009 U.S. Dist. LEXIS 105753, *14 (D. Colo. Oct. 23, 2009) ("[A]n apparent promise subject to the 'unfettered discretion' of a municipality's governing body to accept or reject is 'a classic example of an illusory promise.'")

(*quoting Heuser v. Kephart*, 215 F.3d 1186, 1191 (10th Cir. 2000)) (additional citations omitted).

Under Colorado law, a court must give a contract a construction that will make it valid and binding, rather than one that will destroy the contract. *See M. R. Mansfield Realty, Inc. v. Sunshine*, 561 P.2d 342, 344 (Colo. Ct. App. 1976) ("[A] contract is to be given that construction which will make it valid and binding, and courts should effectuate and not destroy contracts.") (citations omitted); *Jewel Tea Co. v. Watkins*, 145 P. 719, 721 (Colo. Ct. App. 1915) ("Another wholesome rule of construction requires courts to construe the words of parties so as to effectuate their deeds and contracts, and not to destroy them, for contracts should be supported rather than defeated."); *accord Wilson v. Prudential Ins. Co.*, 97 F.3d 1010, 1013 (8th Cir. 1996) ("We must construe each [contract] provision consistently with the others and as part of an integrated whole so as to render none of them nugatory and to avoid illusory promises.").

Plaintiffs' contract claims are straightforward—Plaintiffs selected and paid DISH in advance for packages that included Turner and FOX Programming; DISH chose not to provide Turner and FOX Programming to Plaintiffs; DISH breached the Subscription Agreement by failing to provide Plaintiffs a credit or price adjustment for the monies DISH collected from Plaintiffs for the Turner and FOX Programming; and Plaintiffs were thereby damaged.

DISH argues that its Subscription Agreement provides DISH the unlimited right to delete or change "any and all programming" at any time without any recourse for subscribers, citing the following provisions:

> 1. THE DISH NETWORK SERVICE
> I. Changes in Services Offered. We may add, delete, rearrange and/or change any and all programming . . . including without limitation, during any term commitment period to which you have agreed. . . . In the event that we delete, rearrange or change any programming . . . we have no obligation to replace or supplement such programming . . . . You are not entitled to any refund because of a deletion, rearrangement or change in programming . . . .
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> * * * *
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> 7. LIMITATION OF LIABILITY
> A. Interruptions and Delays. Neither we nor our third-party billing agents, nor any of our or their affiliates, will be liable for any interruption in any service or for any delay or failure to perform, including without limitation: if such interruption, delay or failure to perform arises in connection with the termination or suspension of Dish Network's access to all or any portion of services; the relocation of all or any portion of the services to different satellite(s); a change in the features available with your equipment; any software or other downloads initiated by us; or any acts of God, fires, earthquakes, floods, power or technical failure, satellite or uplink failure, acts of any governmental body or any other cause beyond our reasonable control.

AA 40, 44, 53-54.

The District Court rejected DISH's interpretation of its contract on the grounds that DISH's claimed unlimited right to delete or change programming, for which Plaintiffs pre-paid, at any time and without any recourse, rendered the

contract illusory. *See, e.g.*, AA 54 ("[W]hile at first blush [the Subscription Agreement] seems to say that DISH cannot be held liable for any interruption or delay of any or all programs for any period of time or for a failure to perform, '[s]uch an interpretation would of course render the contract illusory.'") (*quoting Padberg*, 2012 U.S. Dist. LEXIS 80543 at *12). *See also Jewel Tea*, 145 P. at 721 ("To give to the phrase . . . the broad meaning claimed for it by the defendant would be to invest it with power by which it might defeat what seems to have been the main purpose of the contract. This rule of construction will not ordinarily be applied where by so doing the contract is destroyed and the purpose and object of the parties to it thwarted.").

The District Court, however, found that the Subscription Agreement "was ***not*** illusory because, under Colorado law, DISH's discretion to change the plaintiff's programming was subject to an implied duty of good faith and fair dealing. Pursuant to that duty, DISH's discretion to add, delete, or change programming must be exercised reasonably." AA 53 (*citing Padberg*, 2012 U.S. Dist. LEXIS 80543 at *8-9) (emphasis added).

The District Court identified several provisions of the Subscription Agreement, which, when read in context with the entire agreement, contradict DISH's construction and avoid an illusory result:

> [T]he Court [in *Padberg*] looked at Section 7.A in context with the entire contract and concluded that two

> additional parts of the contract demonstrated that the parties did not intend DISH to have the 'extreme and unexpected breadth of discretion' suggested by the first clause in Section 7.A limiting liability for interruptions, delays and failure to perform.

AA 54.

The District Court explained that "[i]nterpreting Section 7.A to absolve DISH of liability for interruptions in any service for a delay or for a failure to perform regardless of whether loss was within its control would render the contract illusory." AA 56. The District Court, however, found the concluding phrase of 7.A ("or any other cause beyond our reasonable control") "suggests that Dish Network's liability is limited only when the circumstances are beyond Dish Network's control," thus preserving the contract as required by Colorado law:

> Of primary importance is the last phrase in that same sentence [of Section 7.A]. It says: "*or any other cause beyond our reasonable control.*" This suggests that Dish Network's liability is limited only when the circumstances are beyond Dish Network's control, a concept completely consistent with the duty of the good faith and fair dealing and most likely to reflect the intentions of the parties at the time the agreement was formed. Further, it is an interpretation that prevents the contract from being illusory.

AA 54-55 (*quoting Padberg*, 2012 U.S. Dist. LEXIS 80543 at *13).

Moreover, the District Court reasoned that, "if Section 7.A absolved DISH of all liability, there would be no need for Section 7.F, which limits the types of

damages available to a subscriber arising out of DISH's failure to furnish services or DISH's fault, failure, deficiency or defect in services." Section 7.F provides:

> 7.F. Damages Limitation. Neither we nor our third-party billing agents, nor any of our or their affiliates, shall have any liability whatsoever for any special, indirect, incidental or consequential damages arising out of or relating to: DISH Network equipment or any other equipment; our furnishing or failure to furnish any services or equipment to you; or any fault, failure, deficiency or defect in services or equipment furnished to you.[4]

AA 45.

The District Court explained that "[i]f Dish Network had no liability for 'failure to perform' or for interruptions of services over which it had control, there would be no need to talk about how damages will be limited when services are not provided." AA 55; *see also Greater E. Transp. LLC v. Waste Mgmt. of Conn., Inc.*, 211 F. Supp. 2d 499, 502-03 (S.D.N.Y. 2002) ("[W]here two clauses which are apparently inconsistent may be reconciled by a reasonable construction, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions.").

Finally, the District Court found its construction supported by other contract language which distinguishes between "refunds" and "credits" and, thus, "suggests

[4] Section 7.F does not limit liability for direct or general damages, which differ from special, indirect, incidental, and consequential damages. *See Giampapa v. Am. Family Mut. Ins. Co.*, 64 P.3d 230, 237 n.3 (Colo. 2003).

that other remedies, such as a credit, are available when DISH exercises its discretion to change or delete programming in an unreasonable way." AA 58.

Accordingly, the District Court properly interpreted the Subscription Agreement to avoid an illusory result, and its order should be affirmed. *See, e.g. Jewel Tea*, 145 P. at 720 ("Where there is room for it, the court will give a rational and equitable interpretation, which, though neither necessary nor obvious, has the advantage of being just and legal, and supposes a lawful contract which the parties may fairly be regarded as having made.") (citations omitted); *St. Louis & Denver Land & Mining Co. v. Tierney*, 5 Colo. 582, 587 (Colo. 1881) ("[T]he contract is fairly susceptible of a construction which will support it. This construction ought therefore to be adopted, rather than one which would defeat it.").

If this Court should determine, however, that DISH's discretion to delete or change programming is not limited by the other contract terms and the duty of good faith and fair dealing, then the Subscription Agreement is illusory and unenforceable. In such circumstances, the District Court's order dismissing Plaintiffs' alternative counts should be reversed.[5]

[5] The District Court dismissed Plaintiffs' Unjust Enrichment and Declaratory Relief claims (Counts III and VI) because it deemed the Subscription Agreement an enforceable contract. AA 63-64, 67-68. The District Court likewise dismissed Plaintiffs' Consumer Fraud claims (Counts IV and V) because it found that the Subscription Agreement was enforceable and served to cure any deception by DISH. AA 66, 67. *See also Munroe v. Continental Western Ins. Co.*, 735 F.3d 783, 789 (8th Cir. 2013) ("'[A]ppellate jurisdiction applies to the *order* certified to

B. Partial Performance Does Not Validate An Illusory Contract.

Colorado law has long held that even where a contract is partially performed, it is nevertheless illusory if it gives one party unlimited discretion to determine the nature and extent of its obligation. In *Cohen v. Clayton Coal Co.*, 281 P. 111 (Colo. 1929), the Colorado Supreme Court explained that partial performance under an illusory contract does not make the contract valid with respect to the undelivered items:

> [T]he offer contains no measure of the quantity which the plaintiff was to deliver, and consequently no agreement on its part to deliver any whatever. . . . [W]hen parties to a contract, such as the one under consideration in the instant case, have dealt with each other upon the terms and conditions set forth in the contract, ***it does not validate the contract and make it enforceable and binding between the parties, but that the contract is still void for want of mutuality, as to such articles as the one refuses to purchase, or the other refuses to sell and deliver under the terms thereof.***

Id. at 116 (emphasis added). *See also Sentinel Acceptance Corp. v. Colgate*, 424 P.2d 380, 382 (Colo. 1967) (despite partial performance by both parties, "[t]he promise on the part of the seller leaves him with the sole discretion as to whether the buyer shall be paid anything. The promise is illusory, there is no mutuality, and the agreement is therefore inoperative"); *Malasky v. Dirt Motor Sports, Inc.*,

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the court of appeals. . . . [Therefore,] the appellate court may address any issue fairly included within the certified order.'") (*quoting Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205 (1996)).

No. 07-cv-00046-JLK, 2008 U.S. Dist. LEXIS 40111, *16-18 (D. Colo. May 16, 2008) (finding provisions of employment contract illusory even though contract had been partially performed by both parties because they made "performance entirely optional with the 'promisor'"); *Flood v. ClearOne Comm'ns, Inc.*, 618 F.3d 1110, 1119-20 (10th Cir. 2010) ("'One of the most common types of promises that is too indefinite for legal enforcement' . . . is one 'where the promisor retains an *unlimited* right to decide later the nature or extent of his or her performance. This *unlimited* choice in effect destroys the promise and makes it illusory.'") (*quoting* 1 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 4:27, at 804-05 (4th ed. 2007)).

This long line of cases establishes, as DISH acknowledges, that "[u]nder Colorado law, an 'illusory' contract is one that purports to bind only one party, ***or*** is not supported by sufficient consideration." DISH Br. at 25 (emphasis added) (*citing Bernhardt v. Hemphill*, 878 P.2d 107 (Colo. Ct. App. 1994); *Sentinel*, 424 P.2d 380).[6]

DISH, however, then argues that it partially performed by delivering the other channels during the Turner and FOX Takedowns, and that "*some* performance, even if partial, will negate any claim that a contract is illusory."

[6] The "or" is significant because it represents two ways a contract may be illusory: (1) one party has unlimited discretion to determine the nature and extent of its obligation; or (2) lack of consideration.

DISH Br. at 28. In support, DISH relies on *O'Hara Group Denver, LTD. v. Marcor Housing Sys., Inc.*, 595 P.2d 679 (Colo. 1979). DISH Br. 26-27.

In *O'Hara*, a buyer entered into two commercial real estate contracts which provided that: (1) if the buyer failed to close, the seller would receive liquidated damages that were held in escrow; and (2) if the seller failed to close, the contract would be null and void and all money paid into escrow would be returned to the buyer. 595 P.2d at 681, 683. After execution, the seller took the properties off the market for eleven months, granted the buyer two extensions on the closing date, and allowed the buyer to enter on the properties to conduct engineering studies. *Id.* at 684. When the buyer failed to appear at closing, the seller brought suit to recover liquidated damages. *Id.* at 682. The buyer argued that the seller's ability to void the agreement without penalty meant the contract lacked consideration. *Id.* at 683. The court disagreed, finding the seller's actions provided "a sufficient detriment to provide consideration for the contracts to purchase." *Id.* at 684.

O'Hara addressed the issue of consideration. *O'Hara* did not, however, present the situation here, where one party claims unbridled discretion to determine the nature and extent of its performance ***while still retaining the benefits of the contract*** and demanding full payment for less-than-full performance by DISH. The contract in *O'Hara* did ***not*** give the seller the right to not perform and still keep the buyer's money. To the contrary, if the seller failed to perform, the

contract was void and any money previously paid by the buyer would be returned. *See Forest View Acres Water Dist. v. Colo. State Bd. of Land Comm'rs*, 968 P.2d 168, 173 (Colo. Ct. App. 1998) ("When a contract is determined to be void, rescission, if sought, must follow.") (*citing Carpenter v. Hill*, 283 P.2d 963 (Colo. 1955)).

In contrast, here, DISH claims the unfettered right to delete "any and all programming" for which subscribers pre-paid ***and*** the right to retain (and continue to receive) payments for that programming.

> THE COURT: So you agree that if you have an interruption of service, no matter its length, that the customer still has to continue to pay.
>
> MR. PATCH: Under paragraph 7(a), I agree with you that if there's an interruption in service based upon the failure or termination of DISH access's right of access to the programming that they must continue to pay for the remainder of the package, for the package as a whole.

Padberg v. Dish Network LLC, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 61 at 21:6-13, Tr. of 8/11/11 Hr'g on Mot. to Dismiss.

Moreover, in *O'Hara*, because the seller fully performed, the Court did not address whether the seller's discretion was actually limited by principles such as the implied duty of good faith and fair dealing. 595 P.2d at 684. S*ee also* AA 62-63 ("Once the Supreme Court of Colorado determined the contract was enforceable, it did not go on to interpret the contract or the scope of the seller's

right to refuse to perform under that contract because there was no further allegation that the seller breached the contract by refusing to perform."); *cf. H&H Transformer*, 2009 U.S. Dist. LEXIS 105753 at *17-18 (after finding sufficient consideration due to partial performance, court continued its analysis as to whether the contract provided unlimited discretion).

If DISH's interpretation of the Subscription Agreement is accepted and DISH has an unlimited right to delete "any" and even "all programming" for which subscribers have paid, without recompense, then the contract is illusory and not cured by DISH's delivery of some programming.

C. Determining Whether A Proposed Contract Interpretation Is Illusory Is A Standard Principle Of Contract Interpretation, Not An Advisory Opinion On A Hypothetical Situation.

"The Court must construe a contract in a manner that avoids an absurd result." *Solidfx v. Jeppesen Sanderson, Inc*., 935 F. Supp. 2d 1069, 1085 (D. Colo. 2013); *see also Wilson*, 97 F.3d at 1013 (contracts are to be construed "to avoid illusory promises"). Accordingly, determining if a contract interpretation leads to absurd or illusory results necessarily involves considering hypothetical situations. *See, e.g., Atmel Corp. v. Vitesse Semiconductor Corp*., 30 P.3d 789, 793 (Colo. Ct. App. 2001) (rejecting as an absurd result an interpretation that hypothetically "could transform an innocent statement . . . into a violation of the preliminary injunction").

DISH contends that the District Court's contract interpretation was improper because it was premised on a hypothetical scenario that "could theoretically render the Subscriber Agreement illusory." DISH Br. at 25. But DISH just recently, and successfully, employed the same argument it now asks this Court to reject as preposterous before the Colorado District Court, convincing the court that, under Colorado law, an exclusion in a DISH insurance policy was illusory based on a hypothetical scenario:

> DISH points out that upholding the Satellite Exclusion in the manner urged by [the insurance company] would render coverage illegally illusory ***by way of a hypothetical*** showing the absurdity of [the insurance company's] argument: "Under [the insurance company's] interpretation, the Satellite Exclusion would be applicable to a bodily injury due to a slip and fall on DISH Network's premises simply because DISH Network is in the subscription satellite television business." Doc. 173 at p.41.
>
> I, too, can envision no scenario in which the exclusion would not apply under [the insurance company's] logic. . . . ***Colorado law*** will not enforce insurance policies that violate public policy by providing illusory coverage and neither will I.

Dish Network Corp. v. Arch Specialty Ins. Co., 989 F. Supp. 2d 1137, 1153-54 (D. Colo. 2013) (citations omitted) (emphasis added).

Here, consistent with Colorado law, the District Court has taken the same approach as advanced by DISH when it served DISH's purposes, finding that DISH's interpretation of the Subscription Agreement would render it illusory. *See*

also Tierney, 5 Colo. at 587 ("If it be said that Tierney was bound in manner stated, but that the coal company was left free to terminate the engagement at its option, . . . then the contract was unilateral. This would render it void, for want of mutuality. But the contract is fairly susceptible of a construction which will support it. This construction ought therefore to be adopted, rather than one which would defeat it.").

DISH also claims that "Plaintiffs are not entitled to advance" their illusory contract theory because they are suing to enforce the contract, and "[a] case should not be decided based upon a hypothetical situation contrary to a complaint's factual allegations." DISH Br. at 31, 32. (*citing Texas v. United States*, 523 U.S. 296, 299 (1998); *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446-47 (1993)).

First, Plaintiffs' Complaint does specifically allege that the Subscription Agreement is illusory, seeks declaratory relief that the Subscription Agreement is illusory, and contains alternative counts, including unjust enrichment, in the event the Subscription Agreement is deemed illusory. *See* AA 11, ¶ 48; AA 22-23, ¶¶ 111-14.

Second, neither *Texas* nor *U.S. Nat'l Bank* involved contract interpretation.

Third, contrary to DISH's suggestion, in *U.S. Nat'l Bank*, the Supreme Court found that the lower court "had discretion to consider the validity" of a statute even "though the parties had not on their own" raised the issue. 508 U.S. at 444, 447.[7]

DISH finally argues that contracts are deemed illusory only where the party with "unfettered discretion to cease performing its obligations actually had an economic or business incentive to do so." DISH Br. at 33. DISH suggests that all DISH subscribers are free to terminate their subscriptions if DISH did not provide them with programming, and, therefore, it would be "utterly irrational" for DISH not to perform. DISH Br. at 34.

During the Turner and FOX Takedowns, however, "DISH refused to permit Class members to terminate their Subscriber Agreements without payment of a termination fee to DISH." AA 10-11, ¶¶ 42, 46. Moreover, DISH's "economic and business incentive" to not purchase and deliver programming was stated by DISH's Chairman, Charles Ergen, to investors ***during the Turner Takedown***: "When we take something down, we're prepared to leave it down forever. . . .

[7] The Supreme Court explained that "'when an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.'" *Id.* at 446 (*quoting Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991)). Thus, "a court properly asked to construe a law has the constitutional power to determine whether the law exists." *Id.* The *Texas* case—which held Texas did not have standing to seek a declaration that its law permitting the state to sanction local school districts could result in a violation of Section 5 of the federal Voting Rights Act prior to such sanction being implemented against any party—is simply not on-point. *See* 523 U.S. at 299.

[W]e would save a big, big, big check from a cash flow perspective." AA 10, ¶ 43. In *Padberg*, for example, the evidence showed that DISH saved tens of millions of dollars it otherwise would have paid to FOX for two channels it chose not to provide in October 2010. (At DISH's request, the exact amount has been redacted from the *Padberg* trial transcript and the District Court's orders.)

Because a controversy arising out of the Subscription Agreement was properly before the District Court, it was proper for the District Court to examine the validity of the contract and interpret that contract according to standard contract principles. Thus, the District Court's finding that DISH's interpretation of the Subscription Agreement would render it illusory is consistent with the principles of contract interpretation under Colorado law.

II. Under Colorado Law, The Implied Duty Of Good Faith And Fair Dealing May, In Light Of The Express Terms Of The Subscription Agreement, Require DISH To Provide A Credit When It Deletes Or Changes Programming For Which Subscribers Have Already Paid.

A. Plaintiffs' Claim For Good Faith And Fair Dealing Is Consistent With The Express Terms Of The Subscription Agreement.

"Under Colorado law, every contract contains an implied duty of good faith and fair dealing." *Occusafe, Inc. v. EG&G Rocky Flats*, 54 F.3d 618, 624 (10th Cir. 1995); *see also* Colo. Jury Instructions, 4th – Civil, 30:16 (April 2013) ("Every Colorado contract requires the parties to act in good faith and to deal fairly with each other in performing or enforcing the express terms of the contract."). The implied duty requires the party with discretion to exercise it reasonably. *See O'Reilly v. Physicians Mut. Ins. Co*., 992 P.2d 644, 646 (Colo. Ct. App. 1999) (the duty of good faith and fair dealing "requir[es] the parties to the agreement to perform their contractual obligations in good faith and in a reasonable manner. The purpose of the duty is to effectuate the intentions of the parties or to honor their reasonable expectations as expressed in their agreement"); *Bloom v. National Collegiate Athletic Ass'n*, 93 P.3d 621, 624 (Colo. Ct. App. 2004); *Amoco Oil Co. v. Ervin*, 908 P.2d 493, 499 (Colo. 1995) ("[T]he law requires each party to a contract to act in such a manner that each party will attain their reasonable expectations under the contract.").

Plaintiffs' contract claims allege:

- Plaintiffs selected and paid DISH in advance for packages that included Turner and FOX Programming (AA 2, ¶ 3; AA 7, ¶ 26; AA 9, ¶ 39; AA 15, ¶¶ 62-63);

- DISH breached the contract and its duty of good faith and fair dealing when it chose not to provide the Programming, kept the money collected, and chose not to provide a credit or price adjustment for the Programming (AA 2-3, ¶ 4; AA 9-11, ¶¶ 40-46; AA 15-16, ¶¶ 63-64, 67-68); and

- Plaintiffs were thereby damaged (AA 2-3,¶ 4; AA 5, ¶ 15; AA 7, ¶ 26; AA 15, ¶ 65; AA 16, ¶ 69).[8]

Plaintiffs' claims are consistent with the express terms of the Subscription Agreement, which: (a) requires subscribers to pay monthly in advance "for the programming [they] select" (AA 6, ¶ 22; AA 29); (b) includes The Turner and FOX Programming in the definition of "services" (AA 39 ¶ 1.A)[9]; (c) permits direct damages for DISH's "failure to furnish any services or equipment to [the subscriber]; or any fault, failure, deficiency or defect in services or equipment furnished to [the subscriber]." (AA 8, ¶ 34; AA 45 ¶ 7.F); (d) distinguishes between "credits" and "refunds" (AA 8, ¶ 32; AA 9, ¶ 35; AA 40, ¶ 1.I; AA 42, ¶

[8] Contrary to DISH's assertion (DISH Br. at 47), Plaintiffs do not allege a contractual right to continuous, uninterrupted programming.

[9] The Subscription Agreement provides: "'Services' shall mean all video, audio, data, interactive and other programming services and all other services that are currently available from DISH Network (whether subscription, pay-per-view or otherwise) and that we may provide to customers in the future." AA 39, ¶ 1.A.

3.D); and (e) does not preclude credits for changes in programming that are within DISH's reasonable control (AA 8-9, ¶¶ 33-35; AA 40, ¶ 1.I; AA 44-45, ¶¶ 7.A, 7.F).

The District Court found DISH's contention that "it has total discretion to change or delete programming without providing recompense to the Plaintiffs" (AA 63), contrary to the plain language of the Subscription Agreement. AA 54-63.

The District Court also found DISH's interpretation contrary to the implied duty of good faith and fair dealing, which requires DISH to act reasonably in the exercise of its discretion to change programming and pricing. AA 54-63. The District Court found this duty inherent in and consistent with the Subscription Agreement:

> Dish Network then seems to argue that because the Plan Agreement and the Residential Customer Agreement preclude a refund or supplementation of services if Dish Network changes the programming, Dish Network had no duty to reasonably exercise its discretion to make changes. However, these terms do not expressly contradict Dish Network's duty of good faith and fair dealing. They don't say or imply that Dish Network can make changes without regard to the reasonable expectations of the parties. Instead, they relate to what remedy is available if such a breach occurs. Therefore the operative question is whether these contract terms preclude any remedy if the duty of good faith and fair dealing is breached. The answer is no.
>
> Because there is no right to a refund for payments already made does not mean that a credit going forward for lost programming, or a future change in price

> reflecting the lost services, is not within the reasonable expectation of the parties. Indeed, the section of the Residential Customer Agreement dealing with cancellation of service, specifically prohibits both credits and refunds, but the section dealing with changes in programming only prohibits refunds. This suggests that other remedies, such as a credit, are available if Dish Network exercises its discretion to change programming and price in an unreasonable way.

Padberg, 2012 U.S. Dist. LEXIS 80543 at *10-11[10]; *see also* AA 58.

Accordingly, the District Court found Plaintiffs' allegations plausible in light of the terms of the Subscription Agreement and the implied duty of good faith and fair dealing:

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[10] In *Padberg*, the jury was instructed as follows:

> The Court has interpreted the contract between DISH Network and the Plaintiffs as follows: . . .
>
> 3. The contract allowed DISH Network discretion to change programming, packages or prices, but that exercise of discretion was subject to a duty of good faith and fair dealing.
>
> 4. Under the contract, if DISH Network changed the programming or packages being provided, the Plaintiffs were not entitled to a refund or alternative programming.
>
> The contract does not prohibit a credit or price adjustment to the Plaintiffs in the event of such a change. It is for the jury to decide whether the duty of good faith and fair dealing required DISH Network to give an automatic credit or price adjustment.

Padberg, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 343, Jury Instruction No. 9.

> As in *Padberg*, this Court cannot say that Plaintiffs' Counts I and II are implausible. The operative question is whether it was reasonable for DISH to stop providing Turner and FOX News Programming, keep the payments it would have been paying previously to the providers for those channels, and provide no recompense to its customers. Such a fact question cannot be resolved by a motion to dismiss and is a question for the jury.

AA 63.[11]

1. The District Court Correctly Interpreted Section 7 To Avoid Rendering Portions Of Section 7 Meaningless And The Subscription Agreement Illusory.

Section 7.A and 7.F of the Subscription Agreement provide as follows:

> 7.A. Interruptions and Delays. Neither we nor our third-party billing agents, nor any of our or their affiliates, will be liable for any interruption in any service or for any delay or failure to perform, including without limitation: if such interruption, delay or failure to perform arises in connection with the termination or suspension of Dish Network's access to all or any portion of services; the relocation of all or any portion of the services to different satellite(s); a change in the features available with your equipment; any software or other downloads initiated by us; or any acts of God, fires, earthquakes, floods, power or technical failure, satellite or uplink failure, acts of any governmental body or any other cause beyond our reasonable control.
>
> 7.F. Damages Limitation. Neither we nor our third-party billing agents, nor any of our or their affiliates, shall have any liability whatsoever for any special, indirect, incidental or consequential damages arising out

[11] The *Padberg* jury found in favor of Plaintiffs. *Padberg*, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 345, Verdict.

> of or relating to: DISH Network equipment or any other equipment; our furnishing or failure to furnish any services or equipment to you; or any fault, failure, deficiency or defect in services or equipment furnished to you.

AA 44-45.

DISH argues the first clause of Section 7.A absolves DISH of liability for "any . . . failure to perform," regardless of whether the failure to perform was within or beyond DISH's reasonable control. DISH Br. at 35-43.

As discussed above, the District Court found that DISH's interpretation of 7.A "would, of course, render the contract illusory." AA 54. In accordance with basic principles of contract construction, the District Court then "looked at Section 7.A in context with the entire contract and concluded that two additional parts of the contract demonstrated that the parties did not intend DISH to have the 'extreme and unexpected breadth of discretion' suggested by the first clause in Section 7.A." AA 54. *See also Solidfx*, 935 F. Supp. 2d at 1085; *M. R. Mansfield*, 561 P.2d at 344; *Jewel Tea*, 145 P. at 721.

First, the District Court found that the last phrase of Section 7.A ("or any other cause beyond our reasonable control") "suggests that Dish Network's liability is limited only when the circumstances are beyond Dish Network's control, a concept completely consistent with the duty of the good faith and fair dealing and most likely to reflect the intentions of the parties at the time the

agreement was formed. Further, it is an interpretation that prevents the contract from being illusory." AA 54-55.

Second, the District Court found that DISH's proposed construction of 7.A rendered Section 7.F meaningless: "[I]f Section 7.A absolved DISH of all liability, there would be no need for Section 7.F which limits the types of damages available to a subscriber arising out of DISH's failure to furnish services or DISH's fault, failure, deficiency or defect in services." AA 56; *see also* AA 55 ("If Dish Network had no liability for 'failure to perform' or for interruptions of services over which it had control, there would be no need to talk about how damages will be limited when services are not provided."); *Greater E. Transp.*, 211 F. Supp. 2d at 502-03 ("[W]here two clauses which are apparently inconsistent may be reconciled by a reasonable construction, that construction must be given, because it cannot be assumed that the parties intended to insert inconsistent and repugnant provisions.").

a. Section 7.A is not limited to temporary interruptions or failures to perform.

DISH argues Section 7.A—titled "Interruptions and Delays"—applies only to temporary or partial interruptions in service and failures to perform, and that Section 7.F "limits DISH's liability to only direct damages under *other scenarios*, where liability might apply." DISH Br. at 40-43.

First, DISH's argument is contrary to its own assertion (in the same section of its brief) that "[e]ven if . . . DISH ***permanently*** lost access to that particular channel or set of channels, Section 7(A) still would disclaim DISH's liability." DISH Br. at 42 n.10 (emphasis added). DISH's attempt to have it both ways should be rejected.

Second, as noted by the District Court, DISH's argument is contrary to the plain language of Section 7.A:

> Nowhere in Section 7.A are the words "temporary" or "short-term" used. To the contrary, Section 7.A states, in part, that DISH will not be liable for a "failure to perform, including without limitation: . . . if such failure to perform arises in connection with the *termination or suspension* of DISH Network's access to all or any portion of the services." (emphasis added). Section 7.A differentiates between termination and suspension of services, which suggests the Parties contemplated both DISH's permanent (termination) and short-term (suspension) loss of access to programming."

AA 57. *See also* AA 10, ¶ 43 (*quoting* DISH's Chairman and owner: "When we take something down, we're prepared to leave it down ***forever***.") (emphasis added).

DISH also argues that "7.A disclaimed DISH's liability for any interruption or delay resulting from the termination of a *carriage agreement between DISH and a programmer*." DISH Br. at 41 (emphasis added). However, there is no

indication that termination is limited to "carriage agreements," a term not found in Section 7.A.

DISH then argues that Section 7.A "refers to partial interruptions or delays . . . in DISH's transmission, but not a *wholesale* failure to perform." DISH Br. at 42. This ignores the language of Section 7.A, which purports to disclaim liability for the "termination of DISH's access to ***all*** or any portion of ***services***." AA 44 (emphasis added).[12]

Although DISH is free to rewrite its contract of adhesion,[13] its attempt to have the Court do so should be rejected.

b. The District Court's interpretation of Section 7 is entirely logical and reasonable.

DISH argues that it "defies logic" to add "beyond our reasonable control" to certain circumstances listed in Section 7.A that are "plainly within DISH's control," such as DISH-initiated software downloads. DISH Br. at 38-39.

[12] "Section 7.A precludes liability for a failure to perform, 'separate and distinct from interruptions and delays' (when the failure is within DISH's reasonable control)." AA 57 (*citing Chandler-McPhail v. Duffey*, 194 P.3d 434, 437 (Colo. Ct. App. 2007) ("[C]ourts should seek to give effect to all provisions so that none will be rendered meaningless.")).

[13] The Subscription Agreement provides: "No salesperson, installer, customer service representative, authorized retailer, or other similarly situated individual is authorized to change or override this Agreement. DISH Network may, however, change this Agreement at any time . . . ." AA 47, ¶ 9.H.

The District Court, however, applied the "beyond DISH's reasonable control" language to the *introductory clause* of Section 7.A (preceding the colon)—that is, to "any interruption in any service or for any delay or failure to perform." This is entirely logical because, although DISH may "control" certain of the items listed thereafter (i.e. DISH-initiated software downloads), it does not follow that an *interruption* or *failure to perform* in connection with any of those items necessarily is within DISH's control.

For example, if a DISH-initiated software download had to run through a third party's computer or satellite system, and that third party lost power after the software download had been initiated, DISH would have an argument that a resulting interruption was beyond DISH's reasonable control. On the other hand, if DISH knew a particular software download would interrupt programming for three weeks, an argument would exist that such interruption was not beyond DISH's reasonable control.

Thus, the District Court did precisely what DISH says it should have done, by applying the phrase "any other cause beyond our reasonable control" to "things of the same kind or nature as the particular matters mentioned" in Section 7.A—namely interruptions, delays, and failures to perform. DISH Br. at 40 (*quoting URI*

Cogeneration Partners, L.P. v. Bd. Of Governors for Higher Educ., 915 F. Supp. 1267, 1287 (D.R.I. 1996)).[14]

c. The interpretation of Section 7.A is not altered by its punctuation.

"[I]n a contract the words, and not the punctuation, are the controlling guide in its construction." *Commonwealth Casualty Co. v. Aichner*, 18 F.2d 879, 881 (8th Cir. 1927). *See also McKinley v. Colo. Farm Bureau Mut. Ins. Co.*, 431 P.2d 859, 860-61 (Colo. 1967) (affirming trial court's finding that "punctuation will not control or change a meaning which is plain from the consideration of the whole document and the circumstances"); *U.S. Nat'l Bank*, 508 U.S. at 454-55 ("[A] purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning. . . . No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning."); *Aichner*, 18 F.2d at 881 ("'Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning: if that is apparent, on judicially inspecting it, the punctuation will not be suffered to change it.'") (*quoting Lessee of Ewing v. Burnet*, 36 U.S. 41, 54 (1837)).

[14] In *Padberg*, the jury determined that DISH's loss of access to the programming was not beyond DISH's reasonable control. *See Padberg*, No. 2:11-cv-04035-NKL, Doc 343, Jury Inst. No. 11; *Id.* Dkt. 345, Verdict.

Furthermore, the Colorado Supreme Court has recognized that "there is still much uncertainty and arbitrariness in punctuation." *McKinley*, 431 P.2d at 861 (citation omitted). In particular, "[t]he semicolon is among the least used punctuation marks today, perhaps because of a growing uncertainty about its proper uses." Bryan A. Garner, *The Elements of Legal Style* 21 (2d ed. 2002).[15]

DISH argues that Section 7.A is written in the disjunctive "or" and utilizes semicolons, which "indicates that the parties intended each of the categories of service interruptions to be separate and distinct." DISH Br. at 38.[16]

Semicolons in contractual provisions, however, do not always mean that a phrase in a later clause is inapplicable to preceding clauses. For example, in *Sinquefield v. State*, 1 So. 3d 370 (Fla. Dist. Ct. App. 2009), the court found that a modifier at the end of a list separated by semicolons applied to the preceding items in a statute which provided:

> Whoever shall resist, obstruct, or oppose ***any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9)***;

[15] The uncertainty of the punctuation in Section 7.A is further displayed by the misplaced colon, which should follow the phrase "in connection with."

[16] DISH cites cases for the proposition that the use of semicolons "'indicates that the modifier' found in one condition 'applie[d] only to that first condition.'" DISH Br. at 38 (*quoting Greater E. Transp.*, 211 F. Supp. 2d at 500, 504 (determining whether the modifier "all active full time" applies to each item following it in the list: "all active full time home office employees, officers, managers, supervisors, mechanics, technicians, routemen and carpenters")). Such analogy is not applicable here, where the items separated by semicolons are not conditions following a modifier, but rather, a non-exhaustive exemplary list.

> member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or ***in the lawful execution of any legal duty***, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

Id. at 371 n.1 (emphasis added).

Despite the addition of semicolons, the court found "that 'in the lawful execution of any legal duty,' as provided under [the statute], modifies not only any 'other person,' but also 'any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9).'" *Id.* at 372. *See also Morris v. State Farm Mut. Auto. Ins. Co.*, 78 S.E.2d 354, 356-57 (Ga. Ct. App. 1953) ("We do not consider the semi-colon before the last clause beginning with 'or to the insured, etc.' makes any difference whatever. We do not think the meaning would be in any way different if the semicolon was omitted or replaced by a colon or a comma.").[17]

Here, as set forth above, the District Court properly interpreted 7.A by examining the contract as a whole, avoiding illusory promises and giving meaning

[17] *See also* Garner, *The Elements of Legal Style* at 21, 22 (acceptable uses of semicolons include "to separate enumerated items that themselves contain commas" or to "separate[] items listed after a colon"). Thus, in some circumstances, as here, a semicolon is nothing more than a replacement for a comma.

to all words and provisions. The use of semicolons should "not be suffered to change" this interpretation.

2. The Subscription Agreement Distinguishes Between Refunds And Credits.

DISH argues that "[t]he contract says nothing at all" about whether Plaintiffs are entitled to a monetary credit. DISH Br. at 51. At the same time, DISH argues the contract does speak to credits because "it expressly prohibits a refund" and "the 'monetary credit' Plaintiffs seek is substantively identical to the 'refund' that the parties expressly agreed would not be provided in the event of a programming change." DISH Br. at 45, 51.

Contrary to DISH's contradictory argument, DISH chose to distinguish between "refunds" and "credits" in its contract. Section 3.D, regarding cancellation of services, prohibits "refunds" and "credits":

> 3.D. No Credits. . . . . Except in certain limited circumstances, charges for Services, once charged to your account, are non-refundable, and no ***refunds or credits*** will be provided in connection with the cancellation of Services. If you received a discounted price due to a promotion, and you cancel prior to any applicable expiration of that promotion, you are not entitled to any ***refund or credit*** for the unused portions of such discounted price.

AA 42 (emphasis added).

Section 1.I, regarding changes in programming, prohibits only "refunds":

> 1.I. Changes in Services Offered. . . . In the event that we delete, rearrange or change any programming, programming packages or other Services, we have no obligation to replace or supplement such programming, programming packages or other Services. You are not entitled to any refund because of a deletion, rearrangement or change of any programming, programming packages or other Services.

AA 40.

Thus, the District Court properly found that the prohibition of refunds for changes in programming did not preclude a credit:

> [T]he section of the RCA that addresses cancellation of services (Section 3.D) specifically prohibits both 'credits' and 'refunds' while the section dealing with changes in programming (Section 1.I) only prohibits 'refunds.' This suggests that other remedies, such as a credit, are available when DISH exercises its discretion to change or delete programming in an unreasonable way.

AA 58 (*citing Padberg*, 2012 U.S. Dist. LEXIS 80543 at *10-11).

Furthermore, the District Court explained that "DISH, as the author of the RCA, is the Party who differentiated between a credit and refund in its form contract and cannot now argue that the distinction is meaningless." AA 58 (*citing Chandler-McPhail*, 194 P.3d at 437 ("[C]ourts should seek to give effect to all provisions so that none will be rendered meaningless.")). Thus, while a provision in the Subscription Agreement prohibited refunds (RCA, § 1.I), "that provision did not mean a credit going forward for lost programming or a future change in price

reflecting the lost services was not within the reasonable expectations of the parties." AA 54.[18]

This is consistent with DISH's prior argument to the District Court in *Padberg* that "refunds" and "credits" are very distinct: "I believe the credits, refunds, and changes in prices going forward ***are very separate different issues and they're addressed separately in the contract***." *Padberg*, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 74 at 25:17-19, Tr. of 3/2/12 Hr'g on Mot. to Dismiss (emphasis added). Moreover, it is a distinction DISH, as the drafter of the contract, chose to make—and not revise since the District Court's prior ruling in *Padberg* in 2012.[19]

3. The Contracts Of Other Subscription Television Providers Are Beyond The Scope Of DISH's Motion To Dismiss And, In Any Event, Support The District Court's Interpretation Of The Subscription Agreement.

DISH argues that the disclaimers in DISH's Subscription Agreement are common in the subscription television industry and must be construed to provide

[18] A refund is returned money that can be used for whatever purpose the recipient deems appropriate. A credit or price adjustment may be in the same amount as a refund, but is applied to a specific product (i.e. a reduction of the DISH bill, in-store credit, etc.).

[19] DISH also argues that the District Court's interpretation "leaves the parties in a perpetual state of uncertainty, as there would be nothing to bar litigation disputing the *amount* of a required credit." DISH Br. at 23 n.7. Section 3 of DISH's contract, however, already includes this uncertainty by allowing credits "in limited circumstances" without defining the amount or circumstances. AA 42 at ¶ 3.D.

DISH unlimited discretion because "[n]o provider would wittingly guarantee uninterrupted access to programming that it neither owns nor controls. . . . The discretion and disclaimers that Plaintiffs would have the Court disregard are necessary to the operation of the subscription television industry." DISH Br. at 16.

The specific contractual provisions of DISH's competitors are not identified by DISH and are, in any event, beyond the scope of the motion to dismiss. Furthermore, Plaintiffs do not allege that the Subscription Agreement required DISH to provide uninterrupted programming. Rather, Plaintiffs claim that DISH breached its contract and the duty of good faith and fair dealing by choosing not to provide Turner and FOX Programming for nearly one month and not providing subscribers a credit for such programming.

Moreover, contrary to DISH's uncited assertions, DISH's competitors' contracts do, in fact, comport with the District Court's interpretation of DISH's Subscription Agreement because they provide for the very relief sought by Plaintiffs here—monetary credits or price adjustments for programming outages that are within the providers' control. *See, e.g.*, DirecTV Residential Customer Agreement ¶ 8(a) (providing account adjustment "for an interruption of a significant length of time that is within our reasonable control") (*available at* http://www.directv.com/DTVAPP/content/legal/customer_agreement) (last visited Nov. 14, 2015); Time Warner Cable Residential Services Subscriber Agreement ¶

7(b) (providing credit for service interruptions that last "for more than 24 consecutive hours and the cause of the outage was within our reasonable control") (*available at* http://help.twcable.com/twc_sub_agreement.html) (last visited Nov. 14, 2015); Comcast Agreement for Residential Services ¶ 11(e) (Comcast not liable for service interruptions beyond Comcast's reasonable control, but in all other cases, subscriber entitled to "a pro rata credit for any Service(s) interruption exceeding twenty-four consecutive hours") (*available at* http://www.xfinity.com/Corporate/Customers/Policies/SubscriberAgreement.html) (last visited Nov. 14, 2015).

Here, the Subscription Agreement does not prohibit a credit or price adjustment in the event of a programming change within DISH's control, and it suggest credits are available when DISH exercises its discretion to change programming in an unreasonable way. AA 58. Thus, it is for the jury to decide whether the programming change was within DISH's control and whether DISH acted unreasonably in violation of the duty of good faith and fair dealing when it chose not to provide the programming, kept Plaintiffs' money paid for the Turner and FOX Programming, and failed to provide a credit or price adjustment for the programming. *See Von Nessi v. XM Satellite Radio Holdings, Inc.*, No. 07-2820, 2008 U.S. Dist. LEXIS 74345, *12 (D.N.J. Sept. 26, 2008) ("Where the disruption

is immediately addressed and is coupled with a credit offer, that is about all the parties could reasonably expect.").

B. The District Court Properly Interpreted The Subscription Agreement In Accordance With Colorado Law And Did Not Inject Terms That Contradict The Subscription Agreement.

DISH argues that the duty of good faith and fair dealing "cannot be invoked to impose a new and uncontemplated obligation on a contracting party. . . . [and] [t]he 'monetary credit' Plaintiffs seek is precisely the type of new, substantive obligation that Colorado courts—indeed, all courts—refuse to impose pursuant to the implied covenant of good faith and fair dealing." DISH Br. at 50.

DISH relies extensively on *McDonald v. Zions First Nat'l Bank, N.A.*, 348 P.3d 957, 968 (Colo. Ct. App. 2015) for the unobjectionable principle that the covenant of good faith and fair dealing cannot inject terms that "would contradict the express terms of the Agreement." DISH Br. at 51. As explained in *McDonald*, however, (on the same page cited by DISH), the implied duty ***can*** inject terms that do not contradict the Agreement. *McDonald*, 348 P.3d at 968 (a good faith and fair dealing claim "has arguable merit [when] [i]njecting a term . . . would not contradict the terms of the Agreement").

Here, as set forth above, the District Court correctly found that the implied duty of good faith and fair dealing "did not contradict the express terms of the Subscription Agreement because although a provision in the Subscription

Agreement prohibited refunds, that provision did not mean a credit going forward for lost programming or a future change in price reflecting the lost services was not within the reasonable expectations of the parties." AA 53-54.

The District Court further held that the Subscription Agreement "suggests that other remedies, such as a credit, are available when DISH exercises its discretion to change or delete programming in an unreasonable way." AA 58. *See also* AA 54-55 ("Dish Network's liability is limited only when the circumstances are beyond Dish Network's control, a concept completely consistent with the duty of the good faith and fair dealing and most likely to reflect the intentions of the parties at the time the agreement was formed."); *Padberg*, 2012 U.S. Dist. LEXIS 80543 at *10 (the contract "terms do not expressly contradict Dish Network's duty of good faith and fair dealing. They don't say or imply that Dish Network can make changes without regard to the reasonable expectations of the parties"); *Accord Tierney*, 5 Colo. at 587 ("It is not adding anything to a written contract to imply an obligation to do what was intended at the time it was entered into, and which is essential to its vitality and force.").

Accordingly, the District Court properly determined that, without materially altering the terms of the Subscription Agreement, the duty of good faith and fair dealing might plausibly be applied to require DISH to provide a credit or price adjustment when it deletes or changes programming for which subscribers have

already paid. Thus, "whether it was reasonable for DISH to stop providing Turner and FOX News Programming, keep the payments it would have been paying previously to the providers for those channels, and provide no recompense to its customers. . . . is a question for the jury." AA 63.

1. The *Von Nessi*, *Taylor*, And *Kaplan* Cases Are Distinguishable Because, *Inter Alia*, They: (a) Interpreted Different Contracts; And (b) Involved Programming Outages Beyond The Providers' Reasonable Control.

DISH also relies on *Von Nessi v. XM Satellite Radio Holdings, Inc.*, No. 07-2820, 2008 U.S. Dist. LEXIS 74345 (D.N.J. Sept. 26, 2008), *Taylor v. XM Satellite Radio, Inc.*, 533 F. Supp. 2d 1151 (N.D. Ala. 2007), and *Kaplan v. Cablevision of Pa., Inc.*, 671 A.2d 716 (Pa. Super. 1996).

In *Von Nessi* and *Taylor*, XM subscribers suffered a 24-hour interruption in some, but not all, of their satellite radio service after one of XM's satellites inadvertently spun out of control. *Von Nessi*, 2008 U.S. Dist. LEXIS 74345 at *2-3; *Taylor*, 533 F. Supp. 2d at 1152. Immediately after the outage, XM offered all subscribers a credit equal in value to two days' service, which XM nationally advertised and which remained open as of the date of the court's opinion sixteen months later:

> [A]fter the service interruption, XM made an immediate offer of compensation, ***and this offer is still advertised and still available***. . . . The $ 1.00 offer exceeds the pro rata cost of 2 days, or 48 hours, of missed service and

> ***over-compensates*** non-commercial subscribers for the loss they have incurred.

Von Nessi, 2008 U.S. Dist. LEXIS 74345 at *20 (emphasis added); *Taylor*, 533 F. Supp. 2d at 1152 ("XM offered consumer, family, and commercial subscribers credits of $ 1.00, $ 0.50, and $ 2.00, respectively—more than twice the value of each subscriber's potential loss.").

In *Taylor*, the court determined the plaintiffs' claims were moot, and thus the plaintiffs lacked Article III standing, due to XM's credit offer which allowed the plaintiffs to recover more than they would through the lawsuit. 533 F. Supp. 2d at 1153.

Although *Von Nessi* found that the parties' contract did not create liability in this instance, the court was clear to limit its ruling, stating: "The Court is not determining whether XM can disavow responsibility for all interruptions of service. The Court limits its ruling to a single disruption that is presented here." 2008 U.S. Dist. LEXIS 74345 at at *8, n.5.[20]

In *Kaplan*, the plaintiffs sought application of the doctrine of necessary implication to require Cablevision to provide an automatic refund for ***any*** service interruption. *Kaplan*, 671 A. 2d at 720. Under the doctrine, the court, in limited circumstances, "may imply a missing term in a parties' contract only when it is

[20] Neither *Von Ness* nor *Taylor* involved a claim for breach of the implied covenant of good faith and fair dealing. *Von Nessi*, 2008 U.S. Dist. LEXIS 74345 at *6; 533 F. Supp. 2d at 1152.

necessary to prevent injustice and it is abundantly clear that the parties intended to be bound by such term." *Id.*[21] The court found that: (a) no provision of the Subscription Agreement implied a duty to provide credits for all outages; and (b) the court would "not imply a term in the Subscription Agreement that obligates the Cable Companies to provide credits for cable outages when they have no notice that an outage has occurred." *Id.*

Here, unlike *Von Nessi*, *Taylor*, and *Kaplan*:

- Plaintiffs do not claim a contractual right to continuous, uninterrupted programming;
- Plaintiffs allege the Turner and FOX Takedowns were within DISH's reasonable control;
- DISH had advance notice of the Takedowns and the subscribers affected;
- The Takedowns lasted nearly a month;
- DISH did not advertise credit offers; and
- DISH's Subscription Agreement suggests credits are available under these circumstances.

[21] This doctrine differs from the implied covenant of good faith and fair dealing, which, under Colorado law, applies to every contract.

2. The District Court Properly Rejected The Contract Interpretation From *McClamrock*, A Case That Did Not Present The Issue Of Good Faith And Fair Dealing.

DISH argues that *McClamrock v. Dish Network LLC*, No. 1:10-CV-3593-CAP, 2011 U.S. Dist. LEXIS 153685 (N.D. Ga. Sept. 15, 2011), "reached precisely the opposite conclusion as the district court did in this case." DISH Br. at 53. In *McClamrock*, the plaintiff claimed breach of contract arising out of DISH's failure to provide FOX Sports South programming in 2010. *Id.* at *1-2. Plaintiffs did not allege breach of good faith and fair dealing. AA 60. The court reviewed the Subscription Agreement and dismissed the lawsuit.

Here, the District Court "respectfully disagree[d] with the Georgia district court's interpretation of the Subscription Agreement," and found "this case distinguishable from *McClamrock* in at least two important ways." AA 59.

First, in *McClamrock*, unlike here, "plaintiff conceded that 'the RCA contains an unlimited disclaimer which otherwise would absolve DISH of all failures to deliver, including those failures it controls' but argued the RCA's terms were superseded by terms in another form signed by the plaintiff." AA 59-60. The *McClamrock* plaintiff did not bring a good faith and fair dealing claim, and "[t]here is no discussion in *McClamrock* about the duty of good faith and fair dealing." AA 60.

Second, *McClamrock* alleged no facts to support how DISH failed or refused to deliver programming. AA 60. Here, however, "Plaintiffs allege that DISH knew and understood its carriage agreements with Turner Broadcasting System and FOX would expire but chose not to renew the agreements." AA 60; AA 9, ¶¶ 40-41, AA 10 ¶¶ 44-45.

Here, the District Court properly applied Colorado law and found that DISH's contractual discretion to change programming and prices was limited by the implied duty of good faith and fair dealing, which requires DISH to exercise its discretion reasonably. The Court correctly found that the implied duty of good faith did not contradict the express terms of the contract, which suggest credits are available when DISH exercises its discretion in an unreasonable way. Thus, the District Court determined that the jury must decide whether, pursuant to DISH's Subscription Agreement, a credit going forward for lost programming or a future change in price reflecting the lost services was within the reasonable expectations of the parties. Based on similar allegations and facts, a jury in the *Padberg* case found that DISH breached the covenant of good faith and fair dealing, specifically finding that "at the time of entering into the contract, a reasonable customer would expect a monetary credit or price adjustment if DISH Network did not provide the [programming]." *Padberg*, No. 2:11-cv-04035-NKL (W.D. Mo.), Dkt. No. 343, Jury Instruction No. 11; *Id.* Dkt. No. 345, Verdict.

Accordingly, the District Court did not err when it determined that, in light of the express terms of the Subscription Agreement, the duty of good faith and fair dealing might plausibly be applied to require DISH to provide a credit or price adjustment when it deletes or changes programming for which subscribers have already paid.

Plaintiffs respectfully request that this Court affirm the District Court's order.

DATED: November 25, 2015

Respectfully submitted

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CERTIFICATE OF BRIEF LENGTH

The undersigned counsel for Plaintiffs-Appellees Stokes and Felzien certifies that this brief complies with the requirements of Fed. R. App. P. 32(a)(7)(B) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2010 and contains 13,917 words, including headings, footnotes, and quotations.

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CERTIFICATE OF VIRUS CHECK

The undersigned counsel for Plaintiffs-Appellees Stokes and Felzien certifies under Eighth Circuit Rule 28A(h)(2) that the brief has been scanned for computer viruses and that the brief is virus free.

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CERTIFICATE OF SERVICE

The undersigned counsel for Plaintiffs-Appellees Stokes and Felzien hereby certifies that on November 25, 2015, he electronically filed the Brief of Appellees Neil Stokes and Craig Felzien with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. He certifies that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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