

1 THE HONORABLE RICHARD A. JONES
2 Noted for Consideration on September 19, 2008
3 Without Oral Argument
4
5
6

7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 MICHAEL SPAFFORD, JR., individually and on
11 behalf of a class of Washington residents
12 similarly situated,

13 Plaintiff,

14 v.

15 ECHOSTAR COMMUNICATIONS
16 CORPORATION, a Nevada corporation; et al.,

17 Defendants.

18 ECHOSTAR COMMUNICATIONS
19 CORPORATION, a Colorado corporation, et
20 al.,

21 Third-Party Plaintiffs,

22 v.

23 SATELLITE SYSTEMS NETWORK, LLC., a
24 California limited liability corporation,

25 Third-Party Defendant.
26

NO. CV06-0479 RAJ

DECLARATION OF KIM D.
STEPHENS IN SUPPORT OF JOINT
MOTION FOR CERTIFICATION OF A
SETTLEMENT CLASS AND
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT
AGREEMENT

I, Kim D. Stephens, declare as follows:

1. I am a member in good standing of the Washington State Bar. I am the lead attorney from Tousley Brain Stephens PLLC representing Plaintiff Michael Spafford, Jr., in this matter. I make this declaration based on my personal knowledge and in support of the

DECLARATION OF KIM D. STEPHENS IN SUPPORT OF
JOINT MOTION FOR CERTIFICATION OF A SETTLEMENT
CLASS AND PRELIMINARY APPROVAL OF CLASS ACTION
SETTLEMENT AGREEMENT [NO. CV06-0479 RAJ] - 1
4419/001/221054.1

TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, Washington 98101
TEL. 206.682.5600 • FAX 206.682.2992

1 parties' Joint Motion for Certification of a Settlement Class and Preliminary Approval of
2 Settlement Agreement. If called to testify concerning the content of this declaration, I would
3 competently testify as follows:

4 2. EchoStar markets satellite television services under the trade name "DISH
5 Network."

6 3. This class action alleges that EchoStar and its third-party retailers ("Retailers")
7 solicited DISH Network subscriptions using automatic dialing and announcing devices
8 ("ADADs").

9 4. Attached hereto as Exhibit 1 is a true and correct copy of *Spafford v. EchoStar*
10 *Commc'n Corp.*, No. C06-479JLR, 2007 WL 2055838 (W.D. Wash. July 16, 2007).

11 5. Attached hereto as Exhibit 2 is a true and correct copy of *Spafford v. EchoStar*
12 *Commc'n. Corp.*, 448 F. Supp. 2d 1220 (W.D. WA 2006).

13 6. Attached hereto as Exhibit 3 is a true and correct copy of the operative
14 complaint in this matter.

15 7. Attached hereto as Exhibit 4 is a true and correct copy of the Settlement
16 Agreement with attachments.

17 8. Attached hereto as Exhibit 5 is a true and correct copy of the Proposed Form of
18 Notice.

19 9. The Settlement calls for Class Members to release damage claims they have
20 against EchoStar, including statutory damages.

21 10. Plaintiff agreed to release damages because of the paucity of proof linking
22 EchoStar and specific Retailers to specific Class Members.

23 11. Except as discussed above, EchoStar has consistently denied that anyone in any
24 of its corporate divisions ever used an ADAD device to solicit Washington residents. Without
25 the ability to link specific Class Members to EchoStar or specific Retailers, Plaintiff faced
26 difficult proof issues to prevail on a claim for statutory damages.

1 12. The impracticality of identifying Class Members supports a *cy pres* payment of
2 \$50,000.

3 13. The Class will not be releasing third-party Retailers from *any* liability. Hence,
4 Class Members retain their right to pursue damage claims, including statutory damage claims,
5 against those parties who likely placed the calls to Washington consumers.

6 14. Pursuant to the Settlement Agreement, the parties will arbitrate the issue of
7 attorneys' fees and costs at Judicial Arbitration and Mediation Services before the Hon.
8 William Cahill (Ret.), formerly of the San Francisco (California) Superior Court.

9 15. Regardless of the ultimate award, Class Counsel will seek this Court's approval
10 of the arbitrator's decision.

11 16. Under the Settlement, EchoStar will pay for the cost of notice to the Class,
12 which will be published over a 14-day period in seven newspapers of general circulation
13 throughout the state.

14 17. Notice will be published no later than October 17th for one day in the following
15 newspapers of general circulation: (1) *Vancouver Columbian*, (2) *Seattle Times/Post-*
16 *Intelligencer*; (3) *Spokane Spokesman-Review*, and (4) *Tri-City Herald*. Fourteen days later,
17 the same notice will be published for one day in each of the following newspapers of general
18 circulation: (1) *Vancouver Columbian*, (2) *Tacoma News Tribune*, (3) *Bellingham Herald*,
19 (4) *Spokane Spokesman-Review*, and (5) *Yakima Herald-Republic*. Class Counsel will monitor
20 and track those Class Members seeking exclusion or objecting to the proposed Settlement.

21 18. Class Counsel and EchoStar chose these counties because of the major
22 metropolitan areas present in them and the breadth of distribution.

23 19. I am informed and believe and on that basis allege that the *Seattle Times* and the
24 *Seattle Post-Intelligencer* have over 1 million readers daily. These newspapers primarily cover
25 Snohomish and King County, however, circulation also reaches into Clallam, Douglas, Grays
26

1 Harbor, Island, Jefferson, Kitsap, Lewis, Mason, Pacific, Pierce, San Juan, Skagit, Thurston,
2 and Whatcom Counties.

3 20. Attached hereto as Exhibit 6 is true and correct copy of a printout from the
4 *Seattle Times* website describing the readership levels and geographical coverage of the both
5 the *Seattle Times* and the *Seattle Post-Intelligencer*.

6 21. I am informed and believe and on that basis allege that the *Tri-City Herald* has
7 readership equal to 55% of Franklin and Benton Counties with over 81,000 daily readers.

8 22. Attached hereto as Exhibit 7 is a true and correct copy of a printout from the *Tri-*
9 *City Herald* website describing its readership levels and geographical coverage.

10 23. I am informed and believe and on that basis allege that the *Vancouver*
11 *Columbian* delivers 46,203 papers directly to homes on a daily basis in Clark County.

12 24. Attached hereto as Exhibit 8 is a true and correct copy of an email dated
13 September 10, 2008, from the *Vancouver Columbian* describing its readership levels and
14 geographical coverage.

15 25. I am informed and believe and on that basis allege that the *Bellingham Herald*
16 delivers 23,372 papers directly to homes on a daily basis in Whatcom County.

17 26. Attached hereto as Exhibit 9 is a true and correct copy of a website printout
18 from the *Bellingham Herald* website describing its readership levels and geographical
19 coverage.

20 27. I am informed and believe and on that basis allege that the *Yakima Herald*
21 delivers 36,416 papers directly to homes on a daily basis in Yakima and Kittitas Counties.

22 28. Attached hereto as Exhibit 10 is a true and correct copy of an email dated
23 September 10, 2008 from the *Yakima Herald* describing its readership levels and geographical
24 coverage.

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26

1 29. I am informed and believe and on that basis allege that the Tacoma News
2 Tribune has daily readership of 116,150 and serves not only Pierce County, but also South
3 King County and Thurston, Mason, Kitsap and Lewis Counties.

4 30. Attached hereto as Exhibit 11 is a true and correct copy of a printout from the
5 Tacoma News Tribune website describing its readership levels and geographical coverage.

6 31. I am informed and believe and on that basis allege that the Spokane Spokesman-
7 Review has a daily readership of over 148,000 and covers not just Spokane County, but also the
8 Washington Counties of Pen Oreille, Stevens, Ferry, Grant, Lincoln, Adams, and Whitman.

9 32. Attached hereto as Exhibit 12 is a true and correct copy of a printout from the
10 Spokane Spokesman-Review website describing its readership levels and geographical
11 coverage.

12 33. From a total population perspective, published notice in these seven newspapers
13 has the potential to reach 96% of Washington's population (5,646,560 out of a total population
14 of 5,894,121 based on 2000 census data that includes children and adults).

15 34. Attached hereto as Exhibit 13 is a true and correct copy of a website printout
16 from Washington's Office of Fiscal Management containing the 2000 census numbers, by
17 county, for the state of Washington.

18 35. This Settlement is the result of intensive, arm's-length negotiations between
19 experienced attorneys who are familiar with class action litigation in general, and with the legal
20 and factual issues of this case in particular.

21 36. Counsel for both parties are particularly experienced in the litigation,
22 certification, trial, and settlement of nationwide class actions similar to this case.

23 37. In negotiating this Settlement, Plaintiffs' counsel had the benefit of years of
24 experience combined with their familiarity with the facts of this case.

1 38. Settlement negotiations in this case were advanced by three intense mediation
2 sessions, which culminated in a memorandum of understanding. The parties continued to
3 negotiate the details of the Settlement Agreement for several months thereafter.

4 39. I support this Settlement as fair and as providing reasonable relief to the
5 members of the Class.

6 40. The *cy pres* funds to be paid by EchoStar will go to the Legal Aid for
7 Washington Fund ("LAW Fund"), which helps low-income and vulnerable individuals access
8 the justice system.

9 41. Donating to the LAW Fund dovetails with the concept of expanding access to
10 the justice system through the use of class actions for individuals whose claims are unlikely to
11 be prosecuted.

12 42. Because Class Members cannot be easily identified, a *cy pres* award of \$50,000
13 to the LAW Fund adequately compensates the Class by helping to make justice in Washington
14 more accessible.

15 43. Attached hereto as Exhibit 14 is a true and correct copy of a July 2007 article
16 from the Washington State Bar Association's website discussing the passage of Washington's
17 Civil Rule 23(f) requiring that *cy pres* funds be paid to the Legal Aid Foundation of
18 Washington, which administratively merged with the LAW Fund in 2004.

19 44. Plaintiff requests that the Court set a date for a hearing on final approval on
20 November 20, 2008.

21 45. I am one of Tousley Brain Stephens PLLC's ("Tousley") senior litigators. I
22 received my law degree (with honors) in 1981 from the University of Washington, and served
23 as a judicial extern clerk for the Honorable Eugene A. Wright, Ninth Circuit Federal Court of
24 Appeals. After that clerkship, I joined Haggard, Tousley & Brain, the predecessor to Tousley.
25 At Tousley, I concentrate my practice in complex commercial and class action litigation with
26 special emphasis on consumer, securities, financial, construction products, and business law

DECLARATION OF KIM D. STEPHENS IN SUPPORT OF
JOINT MOTION FOR CERTIFICATION OF A SETTLEMENT
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SETTLEMENT AGREEMENT [NO. CV06-0479 RAJ] - 6

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1 matters. I have been appointed special attorney general to handle cases for the state of
2 Washington, lead counsel to manage both state and federal class actions, and have extensive
3 experience in litigating multiple plaintiff and class action cases involving securities fraud,
4 environmental, products liability, and consumer fraud issues in state and federal courts.
5 Attached hereto as Exhibit 15 is my résumé.

6 46. Tousley is a Seattle, Washington, law firm with a focus on complex civil and
7 commercial litigation emphasizing securities, financial, environmental, product liability,
8 consumer, employment, and real estate matters. Tousley has extensive experience in class
9 action matters and has both prosecuted and defended numerous multi-million dollar class
10 actions. Tousley has been co-lead counsel in numerous consumer, product liability, securities,
11 and employment cases.

12 47. The attorneys of Tousley have extensive experience in class action litigation,
13 including complex unfair business practices and consumer protection cases. For example, I
14 served as co-lead counsel in *Grays Harbor Adventist Christian School et al. v. Carrier Corp.*,
15 USDC W.D. WA at Tacoma Cause No. CV05-5437-RBL (successfully representing over three
16 million national consumers who alleged Carrier Corporation sold defective high efficiency
17 furnaces); as sole lead counsel in *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173 (2007)
18 (successfully representing purchasers of vehicles, parts, and services against automobile dealers
19 in Washington who illegally charged and collected B&O tax); as co-lead counsel in *Richison v.*
20 *American Cemwood Corp.*, California Superior Court, San Joaquin County, Civil Action
21 No. 005532 (successfully resolving national (excluding Colorado) class of Cemwood shake
22 property owners who alleged they had purchased defective shakes); as sole lead counsel in *Wolf*
23 *et al. v. Asiamerica et al.*, USDC W.D. Wash. at Seattle, Cause No. CV91-00385-WLD
24 (successfully representing plaintiff class of investors in securities fraud action against
25 international leveraged buyout corporation); as co-lead counsel in *Zwicker et al. v. General*
26 *Motors Corporation*, USDC W.D. Wash. at Seattle, Cause No. CV07-00291-JCC [consolidated

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1 MDL No. 1896] (successfully resolving, pending final approval, national class of vehicle
2 purchasers with defective speedometers); as co-lead counsel in *Williams v. Weyerhaeuser*,
3 No. 995787 (Superior Court of San Francisco County, Ca.) (successfully resolving nationwide
4 class involving defective hardboard siding); and as lead counsel in *Barrett et al. v. Pacific*
5 *Coast Building Products, Inc., d/b/a PABCO Roofing Products*, King County Superior Court
6 Cause No. 03-2-40234-6 SEA (successfully resolving a national roofing shingles case that
7 settled on an unlimited claims-made basis).

8 I declare under penalty of perjury under the laws of the state of Washington and the
9 United States that the foregoing is true and correct, and that this declaration was executed in
10 Seattle, Washington, dated this 18th day of September, 2008.

11
12 /s/ Kim D. Stephens, P.S.
13 Kim D. Stephens, P.S., WSBA #11984
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1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that on September 18, 2008, I electronically filed the foregoing with
4 the Clerk of the Court using the CM/ECF system, which will send notification of such filing to
5 the following:
6

7 Daniel C. Gallagher
8 seattlelaw@hotmail.com
9 GALLAGHER LAW OFFICE, P.S.
10 10611 Battle Point Drive NE
11 Bainbridge Island, WA 98110-1493

12 *and*

13 Michael F. Ram
14 mfr@lrolaw.com
15 Erica L. Craven
16 elc@lrolaw.com
17 Karl Olson
18 ko@lrolaw.com
19 LEVY RAM & OLSON LLP
20 639 Front Street, Fourth Floor
21 San Francisco, CA 94111-1913

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*Attorneys for Third-Party Defendant Satellite
Systems Network*

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DECLARATION OF KIM D. STEPHENS IN SUPPORT OF
JOINT MOTION FOR CERTIFICATION OF A SETTLEMENT
CLASS AND PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT AGREEMENT [NO. CV06-0479
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1 DATED this 18th day of September, 2008.

2 TOUSLEY BRAIN STEPHENS PLLC

3 By: /s/ Kim D. Stephens

4 Kim D. Stephens, P.S., WSBA #11984

5 kstephens@tousley.com

6 Attorney for Plaintiff

7 TOUSLEY BRAIN STEPHENS PLLC

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DECLARATION OF KIM D. STEPHENS IN SUPPORT OF
JOINT MOTION FOR CERTIFICATION OF A SETTLEMENT
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— EXHIBIT 1 —

Spafford v. EchoStar Communications Corp.
W.D.Wash.,2007.

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
at Seattle.

Michael SPAFFORD, Jr., Plaintiff,

v.

ECHOSTAR COMMUNICATIONS CORP., et al.,
Defendants.

No. C06-479JLR.

July 16, 2007.

Daniel Charles Gallagher, Bainbridge Island, WA,
Erica L. Craven, Karl Olson, Michael F. Ram, Levy
Ram & Olson LLP, San Francisco, CA, Kim D.
Stephens, Chase Christian Alvord, Kimberlee L.
Gunning, Ferguson Sell PLLC, Seattle, WA, for
Plaintiff.

James C. Grant, Shelley Hall, Stokes Lawrence,
Seattle, WA, Joseph H. Boyle, Richard R. Olsen, T.
Wade Welch & Associates, Houston, TX, for
Defendants.

ORDER

JAMEIS L. ROBERT, United States District Judge.

*1 This matter comes before the court on Defendants'
motion for summary judgment (Dkt.# 72). The court
finds the motion premature and DENIES it without
prejudice. The court grants Plaintiff's request to
continue the motion in order to pursue additional
discovery. See Fed.R.Civ.P. 56(f). The court declines
Defendants' invitation, raised for the first time in
reply, to impose limitations on discovery.

In denying Defendants' motion, the court must
address two of Defendants' legal contentions that
relate to whether Plaintiff may pursue additional
discovery on the question of vicarious liability. First,
Defendants argue that Plaintiff failed to sufficiently
plead the existence of an agency relationship in his
complaint. The Ninth Circuit has reasoned that
claimants need not allege agency in order to satisfy
notice-pleading requirements. See Greenberg v. Sala,
822 F.2d 882, 886 (9th Cir.1987) ("A person legally
responsible for an act may be alleged to have

committed it without going into the theories which
support that ultimate fact."). Thus, the court rejects
this basis for granting summary judgment.

Second, Defendants contend that Plaintiff may not
pursue an agency theory of liability under the statute
at issue in this case, RCW § 80.36.400 (holding
persons liable for use of automatic dialing and
announcing devices ("ADADs") for commercial
solicitation purposes). No Washington court has
determined whether the ADAD statute encompasses
agency liability. Nevertheless, because the court finds
persuasive the rationale of other courts that recognize
vicarious liability in the context of similar statutory
schemes, the court denies summary judgment on this
basis and directs the parties to proceed with
discovery. See, e.g., Accounting Outsourcing, LLC v.
Verizon Wireless Pers. Comm'n, L.P., 329
F.Supp.2d 789, 806 (M.D.La.2004) (finding vicarious
liability under federal Telephone Consumer
Protection Act where advertisers hired third-parties to
fax unsolicited advertisements in contravention of
statute).

For the reasons stated, the court DENIES Defendants'
motion without prejudice (Dkt.# 72).

W.D.Wash.,2007.

Spafford v. EchoStar Communications Corp.
Slip Copy, 2007 WL 2055838 (W.D.Wash.)

END OF DOCUMENT

— EXHIBIT 2 —

Spafford v. EchoStar Communications Corp.
W.D.Wash.,2006.

United States District Court, W.D. Washington,
at Seattle.

Michael SPAFFORD, Jr., Plaintiff,

v.

ECHOSTAR COMMUNICATIONS CORP., et al.,
Defendants.

No. C06-479JLR.

Sept. 1, 2006.

Background: Telephone call recipient filed suit against commercial telephone solicitor under Washington statute restricting commercial use of automatic dialing and announcing devices (ADAD). Solicitor moved to dismiss.

Holdings: The District Court, Robart, J., held that:
(1) statute was content-based restriction on speech;
(2) Washington had significant interest in protecting privacy; and
(3) fact that public would continue to receive non-commercial messages from ADADs did not preclude statute from bearing reasonable relationship to protecting privacy.

Motion denied.

West Headnotes

[1] Constitutional Law 92 ↪1509

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1508 Time, Place, or Manner

Restrictions

92k1509 k. In General. Most Cited

Cases

(Formerly 92k90(3))

Constitutional Law 92 ↪1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited

Cases

(Formerly 92k90(3))

The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech; conversely, when regulation of speech is based on the speech's content, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law 92 ↪1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited

Cases

(Formerly 92k90(3))

The District Court's determination of whether a statute is content-based does not turn on whether the government has expressed animus toward a particular message; rather, the Court looks to the commonsense implication of the law on protected speech. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law 92 ↪2145

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and

Computers

92k2143 Telephones

92k2145 k. Solicitation; Telemarketing;
Automated Dialing. Most Cited Cases
(Formerly 92k90.1(9))

Washington statute restricting commercial use of automatic dialing and announcing devices (ADAD), which greet phone call recipients with prerecorded messages, was content-based restriction on speech subject to *Central Hudson* test; statute differentiated between messages that contained sales pitch and those that did not. U.S.C.A. Const.Amend. 1; West's RCWA 80.36.400.

[4] Constitutional Law 92 ↪1541

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)2 Commercial Speech in General

92k1541 k. Reasonableness; Relationship to Governmental Interest. Most Cited Cases

(Formerly 92k90.2)

Content-based restrictions on commercial speech must satisfy the four-part *Central Hudson* test: (1) the speech concerns lawful activity that is not misleading; (2) the government interest is substantial; (3) the regulation directly advances that interest; and (4) the regulation is not more extensive than necessary. U.S.C.A. Const.Amend. 1.

[5] Constitutional Law 92 ↪2145

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2143 Telephones

92k2145 k. Solicitation; Telemarketing;
Automated Dialing. Most Cited Cases
(Formerly 92k90.1(9))

Telecommunications 372 ↪730

372 Telecommunications

372III Telephones

372III(A) In General

372k727 Constitutional and Statutory Provisions

372k730 k. Validity. Most Cited Cases

State of Washington had significant interest in protecting privacy at home and at work, as required for statute restricting commercial use of automatic dialing and announcing devices (ADAD), which greet phone call recipients with prerecorded messages, to pass *Central Hudson* test for content-based restriction on speech. U.S.C.A. Const.Amend. 1; West's RCWA 80.36.400.

[6] Constitutional Law 92 ↪1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited Cases

(Formerly 92k90(3))

Although the fit between the ends and means chosen need not be perfect in order for a content-based restriction on speech to pass the *Central Hudson* test, it must be reasonable. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law 92 ↪1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited Cases

(Formerly 92k90(3))

In a challenge to a content-based restriction on speech, the state bears the burden to establish a reasonable fit between the ends and the means chosen. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law 92 ↪2145


92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(W) Telecommunications and Computers

92k2143 Telephones

92k2145 k. Solicitation; Telemarketing; Automated Dialing. Most Cited Cases (Formerly 92k90.1(9))

Telecommunications 372  730

372 Telecommunications

372III Telephones

372III(A) In General

372k727 Constitutional and Statutory Provisions

372k730 k. Validity. Most Cited Cases

Fact that public would continue to receive non-commercial messages from automatic dialing and announcing devices (ADAD) despite Washington's passage of statute restricting commercial use of ADADs did not preclude statute from bearing reasonable relationship to protecting privacy, as required for statute to pass *Central Hudson* test for content-based restriction on speech. U.S.C.A. Const.Amend. 1; West RCWA 80.36.400.

191 Constitutional Law 92  1517

92 Constitutional Law

92XVIII Freedom of Speech, Expression, and Press

92XVIII(A) In General

92XVIII(A)1 In General

92k1516 Content-Based Regulations or Restrictions

92k1517 k. In General. Most Cited

Cases

(Formerly 92k90(3))

For a fit to exist between the ends and means chosen, as required for a content-based restriction on speech to pass the *Central Hudson* test, the government is not required to legislate in such a way as to wholly eliminate a particular problem; rather, it may advance its goals in piecemeal fashion. U.S.C.A. Const.Amend. 1.

*1221 Daniel Charles Gallagher, Bainbridge Island, WA, Erica L. Craven, Karl Olson, *1222 Michael F. Ram, Levy Ram & Olson LLP, San Francisco, CA, Kim D. Stephens, Chase Christian Alvord, Kimberlee

L. Gunning, Tousley Brain Stephens, Seattle, WA, Bennet McConaughy, Linda Rae Larson, Sandler Ahern & McConaughy, PLLC, Mercer Island, WA, for Plaintiff.

Bruce E.H. Johnson, Jonathan Mark Lloyd, Davis Wright Tremaine LLP, Seattle, WA, for Defendants.

ORDER

ROBART, District Judge.

I. INTRODUCTION

This matter comes before the court on Defendants' motion to dismiss (Dkt.# 5). The court has considered the papers filed in support and in opposition to this motion and has heard oral argument. For the reasons stated below, the court DENIES Defendants' motion.

II. BACKGROUND

In 1986, the Washington Legislature made it much more difficult for commercial telephone solicitors to interrupt people at home and at work. It did so by enacting a law that severely restricts the use of automatic dialing and announcing devices ("ADADs"), which greet recipients (or their answering machines) with a prerecorded message. RCW § 80.36.400 (the "ADAD statute"). Violation of the ADAD statute is a per se violation of Washington's Consumer Protection Act and entitles the recipient of such a call to statutory damages in the amount of five hundred dollars. *Id.*

Plaintiff Michael Spafford filed suit alleging that Defendants Echostar Communications Corporation and Echostar DBS Corporation (collectively, "Echostar") contacted him and other Washington residents via ADADs in order to advertise satellite television services. Echostar now moves to dismiss Spafford's claim pursuant to Fed.R.Civ.P. Rule 12(b)(6) ("Rule 12(b)(6)") on grounds that the ADAD statute is an unconstitutional infringement of its First Amendment right to free speech.^{FNL} Because Echostar's motion raises a constitutional challenge to a state statute, the court previously granted the State of Washington ("the State") the right to intervene (Dkt. # 27).

FNL. The First Amendment provides, in

