IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:11-CV-684-FL

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| EXCLAIM MARKETING, LLC,<br><br>Plaintiff,<br><br>v.<br><br>DIRECTV, INC. and DIRECTV OPERATIONS, LLC,<br><br>Defendants. | ) | ORDER<br>(SEALED)[1] |

This matter comes before the court on the parties' cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. (DE 41, 49). Plaintiff seeks dismissal of defendants' counterclaims. Defendants urge in their summary judgment motion that plaintiff cannot succeed on its remaining claims, as a matter of law. Also before the court is defendants' motion to strike, directed against plaintiff's expert report and opinion testimony of Diane P. Lahti ("Lahti") (DE 45), and plaintiff's motion to compel discovery. (DE 58). These motions are fully briefed and ripe for decision. For the following reasons, defendants' motion for summary judgment is granted in part and denied in part, plaintiff's motion for summary judgment seeking dismissal of

[1] Where discovery was conducted pursuant to a consent protective order and stipulation of confidentiality, certain filings on which the parties rely in furtherance of their motions were sealed. Within fourteen (14) days, the parties jointly shall return to the court by U.S. Mail, addressed to the case manager, a copy of this order marked to reflect any perceived necessary redactions. Upon the court's inspection and approval, a redacted copy of this sealed order will be made a part of the public record.

defendants' counterclaims is denied, the motion to strike is granted in part and denied in part, and the motion to compel is denied.

**STATEMENT OF THE CASE**

On October 28, 2011, plaintiff, a marketing company engaged in the consumer satellite television service industry with an emphasis on inbound telephonic sales, filed suit in Wake County Superior Court against defendants, who operate a consumer satellite television system. Plaintiff alleged tortious interference with contract (Count 1), tortious interference with business relationships and prospective advantage (Count 2), defamation (Count 3), and unfair and deceptive trade practices under N.C. Gen. Stat. § 75, *et seq*. (Count 4). The matter was removed to this court on December 1, 2011.

Defendants responded to plaintiff's allegations December 14, 2011, with motion to dismiss for failure to state a claim. On July 24, 2012, the court's order issued granting defendants' motion to dismiss as directed against Counts 1 and 2, and denying it as to the remaining two claims. Exclaim Mktg., LLC v. DIRECTV, Inc., No. 5:11-cv-684-FL, 2012 WL 3023429 (E.D.N.C. July 24, 2012). Thereafter, defendants responded with answer denying those allegations framing plaintiff's remaining claims for defamation and unfair and deceptive trade practices, and asserting counterclaims for federal trademark infringement (Count 1), federal trademark dilution (Count 2), false advertising (Count 3), and a claim of its own for unfair and deceptive trade practices under N.C. Gen. Stat. § 75, *et seq*. (Count 4).[2]

[2] Later, the parties entered into a stipulation filed October 5, 2012, permitting the filing of plaintiff's amended complaint, which made only minor wording changes. They agreed that defendants' answer would adhere to this pleading.

The instant motions followed after a period of discovery. In furtherance of the parties' positions, reliance variously is placed upon testimony of plaintiff's co-owners Rick Stefanik ("Stefanik") and Aaron Zydonik ("Zydonik"), and defendants' Senior Director of Business and Legal Affairs, Kristin Haley ("Haley"). Plaintiff also relies on its challenged expert testimony.

Reliance is placed by defendants also on testimony of their Senior Director of Direct Sales, Evelyn J. Ko ("Ko"), and Bruce Fonte ("Fonte"). Fonte was a DIRECTVArea Sales Manager ("ASM") in 2008, who became a Senior ASM in 2010, and then, pursuant to his testimony, received another promotion in 2012 to Director of National Accounts. For convenience of reference, an index of persons identified in the record with involvement in the matter is attached, including names and occupations or affiliations.

The parties also rely on written discovery. Compact disc recordings of telephone calls between Fonte and representatives of an independent retailer, objected to by defendants, also are before the court.

## STATEMENT OF FACTS

Plaintiff is a North Carolina company that provides marketing services via telephone numbers published throughout the United States. It advertises through media that provide telephone numbers for consumers to call. Consumer satellite television service is one of the primary services for which plaintiff provides marketing. When consumers call one of the listed numbers, a telemarketer employed by plaintiff screens the call to determine what the customer is seeking to purchase, and forwards the customer to one of plaintiff's clients.

Defendants are California corporations doing business in North Carolina.[3] Providing satellite television service since 1994, today they serve approximately twenty million (20,000,000) customers. They offer products and services to residential and commercial customers. They also gain new customers through independent retailers who market, advertise, and promote their products and services. Defendants' primary competitor in the satellite television industry is Dish Network ("Dish").

Defendants' relationships with these retailers are subject to its Independent Retailer Agreement ("IRA"). The IRA includes provisions that require retailers to obtain written approval before using third parties to market defendants' products on behalf of retailers. Defendants never have given plaintiff written approval to allow plaintiff to act as a third-party marketing company.

At this juncture in the case, fifteen (15) oral or written statements by or on behalf of defendants, of which plaintiff complains, come into the analysis.[4] The written statements are memorialized in email transmittals variously exchanged among defendants' employees, retailers of defendants' products, plaintiff's co-owner, Zydonik, and plaintiff's prospective customers, between October 31, 2008, and May 10, 2010. A few of these are claimed by defendants to be inadmissible based on hearsay grounds. It is asserted that the oral statements on which plaintiff relies, objected to in full, were made by Fonte on behalf of defendants during two telephone calls on December 1, 2008. The statements at issue are summarized as follows, and referred to by the below designated statement numbers in succeeding discussion:

[3] DIRECTV Operations, LLC operates now as DIRECTV LLC. Sometimes these defendants collectively are referred to in the record simply as "DIRECTV".

[4] Plaintiff specified twelve (12) of these statements in a response to defendants' interrogatories (statements 1-12). In addition, plaintiff's briefing on summary judgment identified three additional ones (statements 13-15).

1. In a November 3, 2008, email to a retailer, which was subsequently forwarded to plaintiff's owner Zydonik, defendants' employee stated "[Retailer] needs to end it's [sic] DIRECTV relationship with [plaintiff]. DIRECTV legal is sending a Cease and Desist letter to [plaintiff] this week for their white pages marketing activities." (DE 52-3, p. 4; DE 52-5).

2. In an October 31, 2008, email sent to eleven (11) employees of defendants, then forwarded to five more employees of defendants, Haley stated "Please advise ASMs that [plaintiff], located in North Carolina, should not be contracted by any dealer for marketing, lead generation or call center management. We recently found new white page listing violations that link back to [plaintiff] and this appears to be their source of 'qualified leads.' I will issue a cease and desist to [plaintiff] next week but I need to get the word out to ASMs/dealers immediately." The email then lists plaintiff's website and "Aaron Zydonik" as the "Company Contact." (DE 52-3, p. 4; DE 52-6; 52-7).

3. In a May 10, 2010, email sent to nine of defendants' employees, Haley stated that plaintiff "has been linked to some of our recently terminated retailers. My experience with the company is their use of non-compliant marketing and poor sales practices. If retailer's [sic] use this company they do so in violation of their retailer agreement and are subject to termination. Please spread the word and be on the look out." (DE 52-3, p. 4; DE 52-8).

4. In a May 10, 2010, email, defendants' employee forwarded the preceding statement to six employees of defendants, instructing them to "[B]e sure we make our retails [sic] aware that they are not to use [plaintiff] under any circumstances. Kristin [Haley] is correct in associating them with high churn issues including several of the Mid-Atlantic retailers most of which had to be terminated."[5] (DE 52-3, p. 4; DE 52-8).

5. In a June 29, 2009, email, defendants' employee told Haley that plaintiff "has 23% churn rate by tactic. We have a couple hundred customers left in their body of customers." (DE 52-3, p. 4; DE 52-9).

6. In a telephone call December 1, 2008, between Fonte and one of defendants' retailers, Fonte stated that plaintiff was engaged in "wrongful conduct." (DE 52-3, p. 4; DE 52-10).

7. In that same conversation, Fonte stated that plaintiff was engaged in unspecified illegal conduct. (Id.)

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[5] "Churn rate" refers to the rate that subscribers discontinue their subscriptions to a certain service within a given period of time. (DE 50, p. 21).

8. In addition, Fonte stated that "I was just told to call my top dealers and warn them about something. . . .There is a company out there called Exclaim Marketing, owned by some guy named Aaron Zydonik. . . .We recently found new white page listing violations that link back to [plaintiff] and this appears to be their source of 'qualified leads. I'm just calling my dealers and telling them to be careful about a company called that." (Id.).

9. Also in the conversation, Fonte stated that plaintiff was "putting illegal ads out there." (Id.).

10. In that same conversation, Fonte stated that defendants had placed plaintiff on a "blacklist of companies not to deal with." (Id.).

11. Again in that conversation, Fonte stated that "I guess Zydonik had burnt us before in the past." (DE 52-3, p. 5; DE 52-10).

12. In another conversation by telephone December 1, 2008, Fonte relayed the statement from Haley's October 31, 2008, email that "We recently found new white page listing violations that link back to [plaintiff] and this appears to be their source of 'qualified leads.'" (Id.).

13. In an email dated April 6, 2010, a prospective client sent plaintiff's owner Zydonik an email stating that "DISH Network has approved us using your company. DIRECTV was not as kind, so I have some new hesitation that was present earlier." (DE 70-1, p. 6)

14. In an email dated August 5, 2009, a prospective client told plaintiff's owner Zydonik that "They called us telling us that they did not want us to work with Call to Connect because they were terminated for working with [plaintiff]. They told us they would stop our fulfillment dealer if I didn't stop everything and that is what I am doing. They said they saw an illegal ad called it [sic] was put through Call to Connect." (DE 70-1, p. 10).

15. Exhibit 36 in Haley's deposition testimony is an email sent April 1, 2009. This email was not itself entered into evidence. However, the deposition testimony indicates that the email was sent by a retailer to Haley, where the retailer asked if plaintiff was "still on the blacklist." In her reply, Haley stated "We just caught them with more directory listing violations." (DE 71-1, p. 32-33).

Defendants have directly, and through their marketing agency, called plaintiff's call center over one hundred and seventy-five (175) times over the past six years. The callers gave fictitious names in each instance and pretended to be interested in receiving satellite services. There is nothing in the record that suggests during any of the calls that defendants or their marketing agency made disparaging remarks about plaintiff. Upon receiving calls purportedly from interested potential customers, plaintiff's call center would in the regular course transfer them to its clients, allegedly leading to overstated billing of those clients because the callers referred to them had no real interest in purchasing satellite services.

Defendants own a trademark in the word "DIRECTV." The service mark consists of the word itself, without claim to any particular font, style, size or color. In 2008 this mark appeared associated with a certain telephone number in a Tennessee telephone book. Call logs from December 2007 to December 2008 are associated with this number. Plaintiff's co-owner, Stefanik, testified at his deposition that plaintiff owned this number.

On December 8, 2008, plaintiff's counsel, Joseph H. Nanney, Jr. ("Nanney"), wrote Haley an email stating that plaintiff owned twenty-nine (29) telephone number listings where the mark was used, as testified to by Haley. Nanney stated that:

> At no time did [plaintiff] authorize anyone to include the DirecTV [sic] mark in the listing. As of last Thursday, my client had contacted all of the providers for the 29 numbers to have the DIRECTV trademark removed. . . .[Plaintiff] wants to immediately address any issues that you identify as a result of its business activities. To the extent that you have questions or concerns with any other telephone numbers, or anything else, please contact me.

(DE 62-2).

On April 3, 2009, Nanney wrote Haley a letter stating:

> We have attempted to address any and all concerns that DIRECTV has raised regarding our client's business means and methods. Nevertheless, we understand that DIRECTV is continuing to complain to its dealers about the activities of [plaintiff].

> Our client took three employees off of their normal tasks and spent more than two months confirming that none of the telephone numbers [plaintiff] uses are connected in any way with DIRECTV or its trademarks. . . .If DIRECTV disagrees, we ask you to inform us, so that we may address any issues you may have.

(DE 62-3).

Haley testified that she found other directory listings from plaintiff under the name "DIRECTV" or a closely-related term in January 2009, March 2009, and May 2009. On January 7, 2011, Haley wrote Stefanik by email, stating "I am very disappointed to still be finding these directory listing violations." The email referred to a list of directories closing in January and February of 2011. (DE 62-4).

Stefanik responded that the listings included "35 unique numbers. Of these 35, we found 11 that do not belong to [plaintiff] and have never been under our control." (Id.). On January 17, he sent an additional response that, of the twenty-four (24) listings, plaintiff "only found one that had DIRECTV related listings on it. . . .This number was recently sold to Frontier from a Verizon operated territory." (Id.). He added in explanation that "Verizon did not show any branded listings on the account however Frontier had the incorrect data in their systems. I do not know why these listings populated after the number was migrated, but they have been removed." (Id.).

## DISCUSSION

Summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). This standard is met when "a reasonable jury could reach only one conclusion based on the evidence," or when "the verdict in favor of the non-moving party would necessarily be based on speculation." Myrick v. Prime Ins. Syndicate, Inc., 395 F.3d 485, 489 (4th Cir. 2005). On the other hand, when "the evidence as a whole is susceptible of more than one reasonable inference, a jury issue is created," and summary judgment should be denied. Id. at 489-90.

Summary judgment is not a vehicle for the court to weigh the evidence and determine the truth of the matter, but rather contemplates whether a genuine issue exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). Similarly, credibility determinations are jury functions, not those of a judge. Id. at 255. In making this determination, the court must view the inferences drawn from the underlying facts in the light most favorable to the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Nevertheless, such inferences "must still be within the range of reasonable probability" and the court should issue summary judgment "when the necessary inference is so tenuous that it rests merely upon speculation and conjecture." Lovelace v. Sherwin-Williams Co., 681 F.2d 230, 241 (4th Cir. 1982) (quoting Ford Motor Co. v. McDavid, 259 F.2d 261 (4th Cir. 1958)). Only disputes between the parties over facts that might affect the outcome of the case properly preclude the entry of summary judgment. Anderson, 477 U.S. at 247–48. Accordingly, the court must examine the materiality and the genuineness of the alleged fact issues in ruling on a motion. Id. at 248–49.

It is well-established that the party seeking summary judgment bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate with specific evidence that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

A. Admissibility of Certain Evidence

On defendants' motion directed against plaintiff's claims for defamation and unfair and deceptive trade practices, defendants assert that the audio recordings of Fonte's December 1, 2008, telephone calls on which plaintiff repeatedly relies (statements 6-12), are inadmissible. This contention, posited in a footnote, is not accompanied by supportive authority. Without more, the court does not find the recordings to be inadmissible, and will consider them.

Statements 13 and 14, identified above and consisting of email transmittals (sent by retailers to plaintiff about statements that defendants allegedly made), on which plaintiff relies in support of its claims, are offered to prove the truth of the matter, that defendants did in fact make such statements. No hearsay exception is relied on. Defendants implicitly challenge admissibility of these statements on hearsay grounds.

Admissibility issues arise also in the court's consideration of plaintiff's summary judgment motion. Defendants rely in defense of that motion on an email sent by Ko to an employee of Verizon. Defendants attempt to use Ko's email as evidence that plaintiff's employee gave instructions to that telephone company to use defendants' mark with plaintiff's telephone numbers. However, this information does not come from Ko's email, but, rather, from an email forwarded twice within Verizon, and then sent to Ko. Plaintiff raises in reply a hearsay objection.

Where these email transmittals all are examples of out-of-court statements which, in the absence of an exception to the rule against hearsay, cannot be used to prove the truth of the matter asserted, the evidence will not be considered in the absence of any hearsay exception (or some showing why the transmittals do not fall within the hearsay rule). Fed. R. Evid. 802. Where no evidentiary basis for their admissibility has been offered, they are not proper to consider on summary judgment. Kennedy v. Joy Technologies, Inc., 269 F. App'x 302, 308 (4th Cir. 2008) ("In assessing a summary judgment motion, a court is entitled to consider only the evidence that would be admissible at trial."); Md. Highways Contractors Ass'n v. State of Md., 933 F.2d 1246, 1251 (4th Cir.1991) ("[H]earsay evidence, which is inadmissible at trial, cannot be considered on a motion for summary judgment."); see also United States v. Cone, 714 F.3d 197, 219-20 (4th Cir. 2013) (finding that district court erred in giving jury instruction that allowed jurors to consider email statements for the truth of the matter purportedly asserted, when no hearsay exception applied).

B. Defendants' Summary Judgment Motion Against Remaining Claims Brought by Plaintiff

1. Defamation

The court's discussion of the written and oral statements at issue, together with the telephone calls made to plaintiff's call center, will be brief as they relate to plaintiff's defamation claim because none of the statements was made within the applicable limitations period. And there is no issue that the repeated telephone calls were defamatory. For reasons discussed more particularly below, summary judgment will be granted as to this claim.

The court incorporates here its more detailed statement of the law on defamation contained in its July 24, 2012, order, in which the court denied defendants' motion to dismiss plaintiff's defamation claim. Summarily, in order to prevail on a claim of defamation, "a plaintiff must allege that the defendant caused injury to the plaintiff by making false, defamatory statements of or concerning the plaintiff, which were published to a third person." Harrell v. City of Gastonia, 392 F. App'x 197, 206 (4th Cir. 2010) (citing Boyce & Isley, PLLC v. Cooper, 153 N.C. App. 25, 29 (2002), disc. rev. denied, 357 N.C. 163, cert. denied, 540 U.S. 965 (2003)); Andrews v. Elliot, 109 N.C. App. 271, 274 (1993). The term "defamation" encompasses two different torts, that of libel and slander. See Davis v. Askin's Retail Stores, 211 N.C. 551, 553 (1937). Libel includes any false, written publication while slander encompasses a false oral communication. Id.; see also Iadanza v. Harper, 169 N.C. App. 776, 781 (2005)).

North Carolina law sets a one-year statute of limitations for defamation. N.C. Gen. Stat. § 1-54(3). Defendants note that the most recent statement on which plaintiff relies in support of plaintiff's defamation claim was published May 10, 2010, over one year before the October 28, 2011, filing date of plaintiff's complaint.

Plaintiff responds that the defamatory statements amount to unfair and deceptive trade practices, and therefore fall within that statute's four-year statute of limitations. N.C. Gen. Stat. § 75-16.2. Plaintiff cites no case law, however, to support its assertion that defamation claims qualify for an extended statute of limitations if they also constitute unfair and deceptive trade practices, nor has this court located any. Plaintiff's unfair and deceptive trade practices claim is a separate cause of action, and cannot simultaneously save the defamation claim. See Fielder v. Varner, 379 F.3d 113, 118 (3rd Cir. 2004) ("In both civil and criminal cases, statutes of limitations are applied on a claim-by-claim or count-by-count basis."); King v. Otasco, Inc., 861 F.2d 438, 441 (5th Cir.1988) ("When a suit alleges several distinct causes of action, even if they arise from a single event, the applicable limitations period must be determined by analyzing each cause of action separately."); Blackmon v. Perez, 791 F. Supp. 1086, 1091 (E.D. Va. 1992) ("Plaintiffs cannot, however, bootstrap the remainder of their claims beyond the operation of the statute of limitations.").[6]

[6] Plaintiff also complains here that defendants sent additional communications that never were produced in discovery. Plaintiff failed to raise any issue in discovery, however, regarding these alleged communications. Motions to compel for any discovery act or omission were due in this case within thirty (30) days of the act or omission at issue, a time long since passed. (DE 29, at 7). Having never filed a motion to compel production of any such communications, plaintiff cannot now complain in defense of the instant motion about their absence in the record. See Packman v. Chi. Tribune Co., 267 F.3d 628, 647 (7th Cir. 2001) (district court did not abuse discretion in denying motion to compel

Plaintiff also has shown that its call center received repeated telephone calls from defendants from 2008 to 2013, and that some of these calls would fall within the statute of limitations. Yet, as noted above, North Carolina courts have long held that a claim for defamation requires a statement's publication to a third party. McKeel v. Latham, 202 N.C. 318, 320 (1932). Calls directly from defendants to plaintiff do not satisfy this element. Moreover, plaintiff has not identified any statement made during any call to the call center which would constitute defamation. For all these reasons, summary judgment is granted in favor of defendants on plaintiff's defamation claim.

2. Unfair and Deceptive Trade Practices

Plaintiff asserts that the statements at issue and repeated telephone calls made to its call center also constitute unfair and deceptive trade practices, in violation of Chapter 75 of the North Carolina General Statutes. N.C. Gen. Stat. § 75, *et seq.* To establish a *prima facie* claim under this statute, plaintiff must show 1) defendants committed an unfair or deceptive act or practice; 2) the action in question was in or affecting commerce; and 3) the act proximately caused plaintiff injury. Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 71-72 (2007). While the occurrence of the conduct, damages, and proximate cause are questions for the jury, "whether the conduct was unfair or deceptive is a legal issue for the court." Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, Charlotte Branch, 80 F.3d 895, 902 (4th Cir. 1996).

The conduct that comprises an unfair or deceptive trade practice "is a somewhat nebulous concept, and depends on the circumstances of the particular case," but requires "some type of

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submitted after discovery period closed and summary judgment motion filed); Brae Transp., Inc. v. Coopers & Lybrand, 790 F.2d 1439, 1443 (9th Cir. 1986) (references in memoranda to a need for discovery do not qualify as motions to compel, and parties cannot complain if they fail to pursue discovery diligently before summary judgment); Blind Indus. & Servs. of Md. v. Route 40 Paintball Park, No. WMN-11-3562, 2012 WL 4470273, at *2 (D. Md. Sept. 26, 2012) (finding motion to compel untimely when it would require reopening of discovery).

egregious or aggravating circumstances." Belk, Inc. v. Meyer Corp., U.S., 679 F.3d 146, 164 (4th Cir. 2012). "Generally, a trade practice will only be deemed *unfair* when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." Id. "Acts are *deceptive* when they possess the tendency or capacity to mislead, or create the likelihood of deception." Id. (internal quotations omitted).

The court had cause previously also to discuss this area of law, in analyzing the merits of that part of defendant's motion then at issue, directed against plaintiff's unfair and deceptive trade practices claim. As noted in its July 24, 2012, order denying motion to dismiss this claim, "North Carolina courts have recognized that defamation *per se* impeaching a party in its business activities may constitute an unfair or deceptive act in or affecting commerce under § 75-1.1." Exclaim, 2012 WL 3023429 at *9 (internal quotations omitted). The court parses below those thirteen (13) discrete statements on which plaintiff relies, subject to defendants' multiple attacks, variously premised on privilege and substantive or contextual grounds, in support of their motion.

a. Qualified Privilege: Asserted As To All Statements

Defendants argue that the statements at issue are covered by qualified privilege. In North Carolina, qualified privilege protects certain communications made in good faith to a person having a corresponding interest or duty on a privileged occasion, in such manner and circumstances that are "fairly warranted." Stewart v. Nation-Wide Check Corp., 279 N.C. 278, 285 (1971). The essential elements are 1) good faith; 2) an interest to be upheld; 3) a statement limited in its scope to this purpose; 4) a proper occasion; and 5) publication in a proper manner and to proper parties only. Id. The burden is on defendant to establish facts sufficient to support this plea. Id. at 283.

When qualified privilege would form an adequate defense to a defamation claim, courts have found that it also defends against an unfair and deceptive trade practices claim premised on defamation. English Boiler & Tube, Inc., v. W.C. Rouse & Son, Inc., No. 97-2397, 1999 WL 89125 at *3-5, 7 (4th Cir. Feb. 23, 1999) (dismissing defamation claim based on qualified privilege, then noting that plaintiff's unfair trade and deceptive practices claim failed "for the same reasons"); Daimlerchrysler Corp. v. Kirkhart, 148 N.C. App. 572, 583-84, 586 (2001); Market Am., Inc. v. Christman-Orth, 135 N.C. App. 143, 157 (1999). To overcome the defense of qualified privilege, plaintiff may plead and prove malice, or that the publication was prompted by some improper or ulterior motive and not made in good faith. Jones v. Hester, 260 N.C. 264, 269 (1963).

It is not necessary to analyze all the elements of privilege because plaintiff has produced evidence of malice sufficient to establish a genuine issue of material fact as to defendants' assertion of qualified privilege. To show malice, a plaintiff must provide evidence of "ill-will or personal hostility on the part of the declarant" or of publication of the defamatory statement "with knowledge that it was false, with reckless disregard for the truth or with a high degree of awareness of its probable falsity." Dobson v. Harris, 352 N.C. 77, 86 (2000). Evidence to rebut the presumption of good faith "must be sufficient by virtue of its reasonableness, not by mere supposition. It must be factual, not hypothetical; supported by fact, not by surmise." Id., at 85.

Fonte's recorded December 1, 2008, telephone conversations with representatives of an independent retailer disclose some evidence of "ill-will or personal hostility" targeted toward plaintiff. When the retailer asked Fonte for an explanation as to why defendants did not want him to use plaintiff's services, Fonte referred to Haley, saying "With her...I am telling you, it's personal." He then elaborated that "This company is on our blacklist of companies not to deal with, because, um, I guess, now this is not me saying this, I guess Zydonik had burnt us before in the past, and he's re-popped up now, and he's, you know, he's back in the business." Fonte later added about Haley, that "She's not taking it personal, don't quote me on that, I just know that this guy [Zydonik], with the whole PrimeTV and all that, just, it looked really bad upon him." The suggestion that defendants had personal concerns related to Zydonik's prior business relationships gains further corroboration from a June 6, 2011, email where Haley refers to plaintiff as "old PrimeTV boys," and goes on to outline her concerns with plaintiff's marketing tactics.

Furthermore, the record of the parties' communications shows repeated efforts by plaintiff's counsel to address defendants' concerns regarding inappropriate listings, and to inquire of defendants about issues they might have regarding its marketing practices. After receiving notice of the offending telephone listings, plaintiff's counsel sent an email to Haley noting that it had called all of the providers for the numbers to have the offending listing removed. Counsel asked defendants to contact them to address any further issues they might have. Plaintiff sent a separate letter in April of 2009, again noting efforts taken to address defendants' concerns and requesting defendants to contact it with any concerns. Yet the record does not indicate that Haley responded to these requests until January of 2011, and in the meantime continued to make statements accusing plaintiff of ongoing violations. Plaintiff responded to the January 2011, email contesting that it only owned one of the listings noted, and suggesting that the incorrect listing was caused by inaccurate telephone company data.

This evidence creates a genuine issue of material fact on the question of malice. A jury might also reasonably conclude defendants acted with reckless disregard for truth in making statements accusing plaintiff of ongoing violations, "non-compliant marketing," and "poor sales practices" when plaintiff asserted that it had corrected problems and the record indicates that defendants ignored plaintiff's efforts to address their concerns.

b. Non-Deceptive Statements: Asserted As To 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, and 15

Defendants assert that plaintiff was in fact engaged in "violations" and "non-compliant marketing" (statements 2, 3, 8, 12, 15) because defendants' IRA prohibited retailers from engaging third-party marketing agents or placing directory listings that use defendants' trademark or suggest that the company is in fact DIRECTV. Plaintiff responds that defendants have never enforced contractual restrictions against third parties, that it has never had a relationship with defendants, and that it has never placed telephone numbers using defendants' trademark or any derivative. Defendants urge in reply that regardless of whether plaintiff had a business relationship with defendants, it violated defendants' IRA for plaintiff to place listings and use defendants' trademark.

When a publication is subject to two interpretations, only one of which is defamatory, "it is for the jury to determine whether, under the circumstances, the publication was defamatory and so understood by those who saw it." Arnold v. Sharpe, 296 N.C. 533, 537 (1979). The principle can be applied to assessing a statement's deceptiveness for purposes of the Unfair and Deceptive Trade Practices Act. The statements regarding "violations" and "non-compliant marketing" are reasonably susceptible to multiple interpretations. Under one, as advanced by defendants, they may be instructing retailers that the retailers themselves are in violation of their contracts and engaging in "non-compliant" activities through using plaintiff's services. Under another, they may suggest plaintiff itself committed some form of "violation." This is a question in this circumstance for the jury. Defendants also urge that statements 6, 7 and 9 are true because plaintiff violated trademark law in the use of its name. Again, this is for the jury to decide on the law as the court instructs.

Defendants also argue that statements 3, 4 and 5, regarding plaintiff's "churn rate" and "poor sales practices" are defensible as truth. They cite to an email from June 2009 where defendants requested a retailer to provide churn statistics for customers obtained through plaintiff's marketing services. Whether a single statistic from one retailer's email can establish the truth of a general assertion regarding plaintiff's "churn" rate is a genuine issue of material fact best suited for a jury to determine.[7]

As to statement 10, defendants argue that statement, regarding plaintiff's "blacklist" status, is defensible as truth because plaintiff was not an approved third-party marketing company. There is a fine line to be drawn in this part of the analysis. It is undisputed that defendants did not authorize retailers to do business with plaintiff according to the provisions of the IRA. Plaintiff does not dispute that plaintiff was on such a list. Plaintiff does not dispute truth this statement is not actionable as an "unfair and deceptive trade practice" for being deceitful. However, it asserts that defendants used the term "blacklist" to falsely accuse plaintiff of bad acts.

The court declines to credit plaintiff's argument that being "blacklisted" carries a connotation of actually performing bad acts. Nor can there be a genuine issue that defendants acted in an "unfair" manner by truthfully telling retailers about plaintiff's "blacklisted" status. However, the act of placing plaintiff on such a "blacklist" may indeed be considered "unfair," as discussed further below.

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[7] While statement number 4, in describing this churn rate as "high," is not actionable as a deceptive statement because it does not assert a provably false fact or factual connotation, see Chapin v. Knight-Ridder, Inc., 993 F.2d 1087, 1093 (4th Cir. 1993), the statement may be actionable for being "unfair."

c. Non-Factual Statements: Asserted As To 1, 2, and 11

Defendants also assert that the portions of statements 1 and 2, in which defendants' employees state that defendants will be sending "cease and desist" letters, are not actionable because they are statements of future conduct. Plaintiff argues that these statements are defamatory not because of their content, but because they suggest that plaintiff "must have done something bad." North Carolina recognizes that publications "not obviously defamatory" can become libel *per quod* "when considered with innuendo, colloquium, and explanatory circumstances." Arnold, 296 N.C. at 537. It follows that innuendo can also establish whether a particular statement is "deceptive" for purposes of the Unfair and Deceptive Trade Practices Act. Here, the discussion of "cease and desist" letters was made in the context of references to "white pages marketing activities" and "white page listing violations." From this context, it might reasonably be inferred that plaintiff was engaged in some form of wrongful activity.

Defendants argue that statement 11, where Fonte asserts that "I guess Zydonik burnt us before in the past," is non-actionable because it impugns Zydonik himself rather than the company. It is also qualified as Fonte's "guess" and not provable. Defendants also note that a company cannot maintain an action for damages on behalf of its officers, citing to R.H. Bouligny Inc. v. United Steelworkers of Am., AFL-CIO, 270 N.C. 160, 168 (1967). None of these arguments prevail.

As plaintiff notes, the court in R.H. Bouligny Inc. ultimately found that an action can lie when "the statements alleged to have been published by the defendant were such, in words and context, that the reader would impute to the plaintiff the alleged conduct of its representative." Id. This statement was made in the context of a discussion about why defendants had concerns with plaintiff. Zydonik's prior conduct was clearly imputed to plaintiff. As to Fonte's qualification of the statement as a "guess," the Supreme Court has definitively rejected efforts to defend false statements on such grounds. Milkovich v. Lorain Journal Co., 497 U.S. 1, 19 (1990) ("It would be destructive of the law of libel if a writer could escape liability for accusations of defamatory conduct simply by using, explicitly or implicitly, the words 'I think.'") (quoting Cianci v. New Times Pub. Co., 639 F.2d 54, 64 (2d Cir. 1980) (brackets omitted)).

Finally, defendants are correct that the statement that Zydonik "burnt" defendants is not actionable as defamation because it is "loose, figurative, or hyperbolic." See Gibson v. BSA, 163 F. App'x 206, 212-13 (4th Cir. 2005) (finding that a statement that a party was "unfit to serve as a Scoutmaster or be in Scouts" was not actionable because it was unsupported by facts or criteria to determine "fitness"). Yet, a statement personally impugning defendants' owner may be actionable as an "unfair" business practice, for reasons discussed below.

d. Statements Not Published to a Third Party: Asserted As To 2, 3, 4, and 5

Defendants argue that statements 2, 3, 4 and 5 also are not actionable because they were never published to a third-party. While the statements produced were made in internal emails, their content indicates they were circulated to a wider audience than the immediate recipients. Statement 2 directs defendants' employees to "get the word out to ASMs/dealers immediately." (DE 52-6). Statement 3, similarly, instructs its recipients to "spread the word." (DE 52-7). Statement 4 also directs defendants' employees to "make our retails [sic] aware that they are not to use [plaintiff]." (DE 52-8). Other evidence in the record supports that the statements were circulated. Under deposition, Haley did not dispute that retailers did indeed receive communications. (DE 52-18, p. 95) ("Q: How many dealers were contacted as a result of this email . . . .? A: I don't know").

Fonte's telephone call, where he speaks to an independent retailer using language very similar to statement number 2, also supports that this information was being disseminated.

Where a jury might reasonably draw an inference that these statements were re-published to the retailers, they could form a link in the chain of proof. At the very least, on summary judgment, as to these statements there is a genuine issue of material fact.

e. Unfairness

Having considered all of the grounds offered by defendants why plaintiff's unfair and deceptive trade practices claim must fail on the face of the thirteen (13) statements at issue,[8] only two statements fail to create a genuine issue of material fact for being defamatory or deceptive: statements 10 and 11.[9] As to these, the scrutiny continues.

As noted above, an "unfair" practice includes practices that are "immoral, unethical, oppressive, [or] unscrupulous" involving "egregious or aggravating circumstances." Belk, Inc., 679 F.3d at 164. Considering the record and drawing inferences in the light most favorable to the plaintiff, there is evidence that defendants made numerous disparaging statements about plaintiff, in part motivated by a prior conflict with one of plaintiff's officers. Defendants made these statements over a period of several years, while spurning plaintiff's counsel's efforts to resolve disputes or correct misunderstandings. This type of conduct may be considered to meet the criteria noted for an "unfair" trade practice.

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[8] As noted at the start, two of the fifteen (15) statements, numbers 13 and 14, relied on by plaintiff, are out-of-court statements. In the absence of an exception to the rule against hearsay, and where none was offered, the court on this basis has discounted these statements, finding they cannot be used to prove the truth of the matter asserted.

[9] Corresponding portion of statement 15 regarding plaintiff's status on a "blacklist" falls also into this analysis. For the same reasons herein discussed, the portion of statement 15 in which Haley states that "We just caught them with more directory listing violations" may be actionable for both its deceptiveness and unfairness, however.

As to statements regarding plaintiff's "blacklist" status, made reference to in statement 10 and a part of statement 15 complained of, there is, again, no genuine issue of material fact that the true statement describing plaintiff's status on a list of unapproved third-party marketers is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers," when it appears to be an accurate description of plaintiff's true status as an unauthorized third-party marketer. However, the court finds that such statements may be offered as evidence of defendants' allegedly "unfair" pattern of activities towards plaintiff, to the extent they establish that plaintiff was indeed unfairly placed on a "blacklist" due to alleged malice. Statement 11's reference to owner Zydonik, also raise a genuine issue as to whether defendants' activities were "unfair."

f. Proximate Cause of Injury

Defendants also argue that plaintiff has not shown actual injury as a proximate result of any of the statements, and for this reason, they are entitled to judgment as a matter of law. They refer to a North Carolina Court of Appeals case wherein an unfair and deceptive trade practices claim was dismissed because evidence indicated that plaintiff did not rely on defendants' misrepresentations. Pleasant Valley Promenade v. Lechmere, Inc., 120 N.C. App. 650 at 664 (1995).

Reliance is required to show proximate cause for a deceptive trade practice. Bumpers v. Community Bank of Northern Va., 747 S.E. 2d 220, 226 (2013). However, in cases involving deception, reliance can be demonstrated by inference and circumstantial proof. See Causey v. Seaboard Air Line R. Co., 166 N.C. 5, 8 (1914) ("Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it."); Chisholm v. TranSouth Financial Corp., 194 F.R.D. 538, 563 (E.D.Va. 2000) ("Often reliance is a matter that is demonstrated inferentially and by circumstantial proof.").

Plaintiff's co- owner, Stefanik, has testified that he knew retailers did not want to work with them because of defendants' statements "Because the timing of all the events going." (DE 71-3, p. 123). He testified that prior to the statements being made, plaintiff "had a waiting list of people who wanted to get on our program, who wanted to be a part of our program. . . . Following this event we no longer had a waiting list. It became incredibly difficult for us to find clients." (Id.). In one of Fonte's telephone calls, the retailer's representative expressed concern with the statement that plaintiff was engaged in "illegal ads," asking for an explanation of what made the ads illegal and stating "If he's doing something illegal, I want to know what it is and I'll cut ties with him." (DE 52-10).

In contrast to the Pleasant Valley case relied upon by defendants, there does not appear evidence in this record which directly refutes causation. Defendants point to testimony of plaintiff's co-owner Zydonik, regarding his conversations with retailers that ceased doing business with plaintiff. It is interesting to note the seeming inconsistency of defendants' position concerning certain email relied upon by plaintiff, asserted as hearsay, with its reliance here on what Zydonik testified was said to him by retailers, for the truth of those statements. However, as noted above, even if retailers ceased doing business with plaintiff because of defendants' threats or pressure to terminate their contract, the court finds that this does not necessarily refute the unfair and deceptive trade practices claim. See South Atlantic Ltd. P'ship of Tenn. v. Riese, 284 F.3d 518, 536 (4th Cir. 2002) ("Although it may be rare that the exercise of a contractual right will meet this stringent standard, it is possible for such an exercise, when it involves egregious and aggravating conduct, to constitute an unfair or deceptive trade practice.").

Where there is evidence of repeated disparagement and refusal to communicate with plaintiff, along with evidence of personal hostility to one of plaintiff's owners or ongoing reckless publication of statements accusing plaintiff of certain wrongful practices, defendants' conduct in this matter may rise to this standard of "egregious and aggravating conduct." Id. The court is, of course, mindful of its earlier ruling that defendants had a "legitimate business interest" in enforcing its contracts with its retailers. Exclaim, 2012 WL 3023429 at *5-7. However, that decision was premised on plaintiff's failure to allege facts sufficient to show malice. Here, as discussed above, plaintiff has provided evidence that may support a finding of malice. This includes not only the refusal to meet or communicate, but also the continued publication of allegedly untruthful statements while refusing to do so, as well as evidence of hostility towards plaintiff's owner Zydonik arising from a prior business relationship. At this stage, plaintiff's proposed inference is not so speculative or unreasonable as to require that the case be withdrawn from a jury.

Turning now squarely to the fact of those repeated telephone calls to its call center, plaintiff also would seek to show that defendants committed unfair and deceptive trade practices by making over one hundred and seventy-five (175) telephone calls over six years, which caused some of its clients to be incorrectly billed.[10] Haley has admitted that defendants made such calls, but asserts that the calls were made to determine who owned telephone numbers listed as belonging to defendants.

Defendants argue that plaintiff's claim cannot proceed because plaintiff's owner, Zydonik, has testified that if he found a telephone number using plaintiff's trademark he would "Probably call that number, find out who was doing it and ask them to stop." (DE 52-15, p. 168). Argument predicated on this testimony simply does not address the deceptive nature of the telephone calls

[10] Any calls which pre-dated October 28, 2007, would appear, however, not to be actionable to the extent they fall outside of the four-year statute of limitations for unfair and deceptive trade practices. N.C. Gen. Stat. § 75-16.2.

made under the circumstances presented. Defendants also argue that plaintiff has not shown injury from these actions. Yet plaintiff's owner, Stefanik, testified that it caused clients to be billed excessively and lowered the rate at which callers transferred from plaintiff's marketing were converted to actual subscribers.

Regardless of whether plaintiff has presented evidence tending to establish a specific amount of damages in this case, summary judgment on this claim, giving the showing made, would be inappropriate. See United States *ex rel*. S & D Land Clearing v. D'Elegance Mgmt., No 98-2758, 2000 WL 966034, at *5 (4th Cir. June 13, 2000) (citing North Carolina law) (holding that failure to prove damages was not grounds for judgment because proof of other elements entitles a plaintiff to at least nominal damages); Pharmanetics, Inc. v. Aventis Pharmaceuticals, Inc.,No. 5:03-cv-817-FL(2), 2005 WL 6000369, at *17 (E.D.N.C. May 4, 2005).

For all of the above reasons, the court denies summary judgment on plaintiff's claim of unfair and deceptive trade practices.

C. Plaintiff's Summary Judgment Motion Against Defendants' Counterclaims

1. Trademark Infringement

Plaintiff asserts that defendants have not provided the necessary evidence to support their counterclaim for trademark infringement, and, therefore, it is entitled to summary judgment on this claim. First, plaintiff argues that defendants do not have an absolute right to exclude others from using their trademark. Second, it argues that defendants cannot establish a likelihood of confusion from plaintiff's use of defendants' mark. For reasons that follow, plaintiff's motion as to this claim fails.

In support of their claim, defendants present a page from a 2008 telephone directory showing six instances of entries similar to "DIRECTV," which owner Stefanik admitted that plaintiff owned. Defendants also note that plaintiff's own call logs showed telephone calls made to that same number throughout 2008.

Plaintiff argues that the listings represent errors made by telephone companies. It asserts that this evidence is insufficient because defendants cannot show that plaintiff actually placed any order for a telephone listing using the DIRECTV mark. Plaintiff relies on Stefanik, who affirms that plaintiff has not used the mark and that the listings represent errors on the part of the telephone companies.[11]

A plaintiff alleging a cause of action under the Lanham Act for unfair competition and trademark infringement must prove: 1) that the claimant possesses a mark; 2) that the defendant used the mark; 3) that defendant's use of the mark occurred "in commerce;" 4) that the defendant used the mark "in connection with the sale, offering for sale, distribution, or advertising" of goods or services; and 5) that the defendant used the mark in a manner likely to confuse consumers. People for Ethical Treatment of Animals v. Doughney, 263 F.3d 359, 364 (4th Cir. 2001).

There is no dispute that defendants possess a trademark in "DIRECTV," nor is there a dispute that the use of the mark in telephone listings in multiple states occurred "in commerce" in connection with the advertising of goods and services. The parties' dispute turns upon the second and fifth prongs: whether there is evidence that plaintiff used the mark, and whether the plaintiff's use was likely to cause confusion. The telephone listings and admissions from plaintiff's

[11] The court notes that defendants make specific objections to almost every paragraph in the Stefanik affidavit. Yet the court finds it unnecessary to address the admissibility of each objected paragraph, as the ruling below does not rely upon the information they contain.

employees provide evidence of use of the mark. Multiple listings under a similar mark could suggest that the use was no mere isolated error.

As to the fifth prong, to establish confusion of a trademark, the Fourth Circuit directs consideration of nine factors:

> (1) the strength or distinctiveness of the plaintiff's mark as actually used in the marketplace; (2) the similarity of the two marks to consumers; (3) the similarity of the goods or services that the marks identify; (4) the similarity of the facilities used by the markholders; (5) the similarity of advertising used by the markholders; (6) the defendant's intent; (7) actual confusion; (8) the quality of the defendant's product; and (9) the sophistication of the consuming public.

George & Co. LLC v. Imagination Entm't Ltd., 575 F.3d 383, 393 (4th Cir. 2009). Not all factors are of equal importance, or always relevant in a given case. Id.

Many of these factors favor defendants in this case. The strength of a mark considers both its distinctiveness and its commercial strength. Id. at 393-94. As an invented word created for the sole purpose of serving as a trademark, "DIRECTV" is a "fanciful mark" which is inherently distinctive. Id., at 394. In using that mark to provide satellite services since 1994 and to become the largest satellite television provider in the United States, defendants have also met the test for conceptual strength. See CareFirst of Md. v. First Care, P.C., 434 F.3d 263, 269 (4th Cir. 2006) ("The commercial-strength inquiry. . . .looks at the marketplace and asks if in fact a substantial number of present or prospective customers understand the designation when used in connection with a business to refer to a particular person or business enterprise."). Thus, the mark satisfies the first factor.

The listings used a mark nearly identical to defendants' mark (second factor). The services were similar – plaintiff essentially was selling referrals to retailers that sold defendants' product, and defendants sell their product directly (third factor). The parties both use call centers (fourth factor). The parties used the same advertising method of phone books (fifth factor).

The quality of the product and the consuming public's sophistication (eighth and ninth factors) largely are irrelevant in this case. Sara Lee Corp. v. Kayser-Roth Corp., 81 F.3d 455, 467 (4th Cir. 1996) ("Consideration of the quality of the defendant's product is most appropriate in situations involving the production of cheap copies or knockoffs of a competitor's trademark-protected goods. . . .Barring an unusual case, buyer sophistication will only be a key factor when the relevant market is not the public at large.").

Plaintiff argues that the multi-factor test does not apply because plaintiff eventually sent consumers to defendants' authorized dealers. In effect, it argues that any use of the mark was a "nominative fair use." For support, it cites to Trail Chevrolet Inc. v. General Motors Corp., 381 F.2d 353 (5th Cir. 1967), where the court permitted an independent dealer to use the word "Chevrolet" to advertise that it sold and repaired Chevrolets "so long as the registered mark or tradename of Chevrolet is not used in a manner to deceive customers." Id. at 354. Similarly, it points to the Second Circuit's decision in Tiffany Inc. v. eBay Inc., 600 F.3d 93 (2d Cir. 2010), where the court found that eBay did not infringe when it used the "Tiffany" trademark to sell Tiffany jewelry, "so long as the trader does not create confusion by implying an affiliation with the owner of the product." Id. at 103. The cases are not helpful to the cause.

Plaintiff's ownership of a telephone listing which used defendants' trademark creates a genuine issue that plaintiff was representing itself as DIRECTV. Such representation would "deceive customers," or at least "create confusion" as the courts in Trail Chevrolet and Tiffany prohibit. Plaintiff further argues that the implied affiliation would have been between DIRECTV and authorized retailers because plaintiff was providing a conduit for consumers to purchase DIRECTV service. However, Trail Chevrolet directly refutes that contention where the court found the dealer's use of the name "Chevrolet" constituted infringement and unfair competition because it:

> [W]as likely to cause confusion and to mislead and deceive the public into accepting and purchasing used automobiles from Trail Chevrolet in the belief that it (the public) was dealing with one of GM's authorized dealers and that the defendants' business was sponsored or connected with, endorsed or supervised by GM.

381 F.2d at 354.

The confusion and deceit here is of a similar nature, leading the public to believe it was dealing with DIRECTV or one of its authorized retailers, when in fact the public would first communicate with employees of plaintiff. Plaintiff admits that it served retailers of both Dish and DIRECTV. There was a possibility that a customer could be connected with a Dish retailer. Even if plaintiff eventually connected the potential customer with an authorized DIRECTV retailer, the customer was forced into taking the extra step of first speaking with plaintiff's employees.

Plaintiff argues that, if the multi-factor test does apply, it still should prevail because defendants have failed to show actual confusion and intent. Proof of actual confusion is not necessary to show a likelihood of confusion. CareFirst of Md., Inc., 434 F.3d at 269. However, evidence of actual confusion is often paramount. George & Co., 575 F.3d at 393. Plaintiff's own marketing materials note that it receives requests for customer service, billing issues, technical support, pay-per-view, and other services that it does not provide. (DE 52-12). Both Stefanik and Zydonik admitted that plaintiff's call center receives calls from defendants' customers seeking service or billing assistance or other services that are only offered by defendants. This at least suggests that some consumers believed they were calling defendants.

In arguing that defendants have not shown examples of consumers calling plaintiff out of belief that they were calling defendants, plaintiff neglects to draw the logical inference from these misplaced calls. The court need not address the factor of plaintiff's intent where nearly all the other factors as applied underscore the genuine issue of confusion in this case, including the "paramount" factor of evidence of actual confusion. George & Co., 575 F.3d at 393. For these reasons, the court denies plaintiff's motion for summary judgment as to this claim.[12]

2. Trademark Dilution

To establish a trademark dilution claim, a plaintiff must establish "1) that the plaintiff owns a famous mark that is distinctive; 2) that the defendant has commenced using a mark in commerce that allegedly is diluting the famous mark; 3) that a similarity between the defendant's mark and the famous mark gives rise to an association between the marks; and 4) that the association is likely to impair the distinctiveness of the famous mark or likely to harm the reputation of the famous mark." Rosetta Stone Ltd. v. Google, Inc., 676 F.3d 144, 168 (4th Cir. 2012).

The above discussion of defendants' trademark infringement claim also explains that the first, second and third factors here are satisfied. The question remains whether defendants' use of the mark would impair its distinctiveness ("dilution by blurring") or harm its reputation ("dilution by tarnishment"). Id. at 167. To determine whether a mark or trade name can cause dilution by blurring, the court may consider:

> (1) the degree of similarity between the mark or trade name and the famous mark, (2) the degree of inherent or acquired distinctiveness of the famous mark, (3) the extent

[12] In responding to plaintiff's motion for summary judgment on its trademark infringement claim, defendants argue that the court should grant summary judgment on this claim in its own favor. This request was not raised in accordance with proper motions practice. Notwithstanding defendants' view, it necessarily would require reopening of briefing on dispositive motions should the court be willing to raise this up for consideration. At this stage, in a case headed now to trial, there is not good cause so to do.

> to which the owner of the famous mark is engaging in substantially exclusive use of the mark, (4) the degree of recognition of the famous mark, (5) whether the user of the mark or trade name intended to create an association with the famous mark, and (6) any actual association between the mark or trade name and the famous mark.

Id. at 170.

Again, not every factor is relevant in every case, yet a trial court must offer a sufficient indication of which factors are persuasive and explain why. Id. Claimants need only show a likelihood of dilution, not actual economic loss or reputational injury. Id. at 171.

The first, second, fourth and sixth factors all favor defendants, for the reasons explained above, regarding the analysis of similar elements of trademark confusion. However, plaintiff argues that the third factor cannot be satisfied where defendants are not engaged in substantially exclusive use of the mark. Plaintiff argues that defendants have permitted thousands of retailers to sell its services. It also argues that defendants have permitted other parties to use its mark thousands of times in telephone directory listings across the United States, producing evidence of fifty-four (54) telephone listings from a telephone book using the mark "DIRECTV" or some variation. Plaintiff asserts that all of these listings belong to other parties, demonstrating that defendants allow dealers to use its mark.

The requirement of "substantially exclusive use" does not mean use is absolutely exclusive. Rather, requiring substantially exclusive use allows for "use by others which may be inconsequential or infringing." L.D. Kichler Co. v. Davoil, Inc., 192 F.3d 1349, 1352 (Fed. Cir.1999). Defendants have instructed the retailers not to use its trademarks in directory listings. Viewed in the light most favorable to the defendants, there is a genuine issue of whether these other uses are infringing in a manner that does not dispel the "substantially exclusive" factor.

The court need not address the final factor of whether plaintiff intended to make an association between the two marks again where the evidence shows that nearly all factors to be considered favor defendants. Similarly, the court need not reach whether defendants have shown tarnishment, as there is enough evidence for blurring to maintain the claim for trademark dilution. Plaintiff's motion for summary judgment as to this claim also is denied.

3. False Advertising

Plaintiff argues that defendants have not provided sufficient proof of false advertising because plaintiff acted as a "conduit" between consumers and authorized retailers. To show false advertising, a claimant must show that the offending party:

> (1) Made a false or misleading description of fact or representation of fact in a commercial advertisement about his own or another's product; (2) the misrepresentation is material, in that it is likely to influence the purchasing decision; (3) the misrepresentation actually deceives or has the tendency to deceive a substantial segment of its audience; (4) the defendant placed the false or misleading statement in interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the misrepresentation, either by direct diversion of sales or by a lessening of goodwill associated with its products.

PBM Prods., LLC v. Mead Johnson & Co., 639 F.3d 111, 120 (4th Cir. 2011).

There is a genuine issue that the listings were false descriptions in a commercial advertisement, because they implied that plaintiff was DIRECTV. These misrepresentations could be "material" by leading potential consumers to call the numbers in the course of making purchasing decisions. The statements were made in interstate commerce because they were placed in a Tennessee phone book and plaintiff's services routed callers to personnel in other states. Defendants have provided evidence suggesting injury because plaintiff's call center routed customers seeking defendants' services to the retailer of defendants' competitors. Accordingly, plaintiff's motion for summary judgment on this claim also is denied.

4. Unfair and Deceptive Trade Practices

Finally, plaintiff challenges defendants' claim premised on unfair and deceptive trade practices. As noted above, this requires a claimant to show 1) the other party committed an unfair or deceptive act or practice; 2) the action in question was in or affecting commerce, and 3) the act proximately caused claimant injury. Walker, 362 N.C. at 71-72. Regarding the first element of the claim, the Supreme Court of North Carolina has noted that the Unfair and Deceptive Trade Practices Act contemplates cases such as "false advertising, misnaming and misrepresentation, misleading trade or products names, [and] simulation of well known products or names." State *ex rel.* Edmisten v. J.C. Penney Co., Inc., 292 N.C. 311, 318 (1977). See also Microsoft Corp. v. Computer Serv. & Repair, Inc., 312 F. Supp. 2d 779, 785 (E.D.N.C. 2004) (finding trademark infringement to be a deceptive or unfair act).

As discussed above, defendants' evidence showing plaintiff's use of the DIRECTV trademark without authorization falls within these categories of cases. Also, as noted above, plaintiff does not dispute that the listing of defendants' trademark in telephone books occurred in commerce. There is an issue as to whether use of defendants' trademark proximately caused defendants injury by harming their goodwill and consumers' ability to distinguish among products. Microsoft Corp., 312 F. Supp. 2d at 785. Plaintiff's motion for summary judgment is denied on this counterclaim, too.

D. Defendants' Motion to Strike Expert

1. Summary of Lahti's Testimony[13]

The court summarizes the testimony of plaintiff's expert as follows. Lahti describes increasing unit and revenue growth from plaintiff's second year of operation, 2006, to 2009. She promotes an increasing number of satellite television clients from 2005 to 2009, including DIRECTV-only clients, Dish-only clients, and clients who sold both products ("Dual" clients). After 2009, she shows that the number of DIRECTV clients declines. Beginning in 2010, the number of Dual clients declines. She also shows a drop in Dish-only clients from 2011 to 2012.

Lahti describes the relationship between plaintiff and defendant from 2008, noting that defendants' employees instructed retailers to cease business with plaintiff, and that defendants made statements which plaintiff claims to be defamatory. She opines that "The spread of the negative comments is considered to be highly likely because the Dual dealers had relationships with other Dish dealers through trade meetings or other dealings, and there was frequent movement of dealers between the two satellite television service providers." (DE 47-7, p. 7).

Lahti employs a "But For" method which considers the expected changes in revenue and expenses for the business, had the damaging actions not occurred. Lahti identifies two factors that she asserts caused a decline in plaintiff's revenues: a decrease in its revenue per call and a decrease in the number of calls sold. Lahti considers plaintiff's per-call pricing history. She estimates that plaintiff could have raised its expected price per call 6% per year from 2008 to 2013, from $30.00 to $40.00.

[13] Lahti is a certified public accountant who possesses a Masters in Business Administration and creditation in business valuation and financial forensics. She has testified as an expert at trial or deposition in seven cases within the past four years.

Using data supplied by plaintiff's owners that plaintiff's clients convert twenty-two percent (22% ) of calls into orders to install new equipment, Lahti calculates the number of calls necessary to generate new subscriber additions to determine the overall size of the market. Next, she uses the number of calls actually sold by plaintiff over the years 2006 to 2012, to determine plaintiff's share of the Dual satellite market, and of the Dish-only market. Lahti then offers two damages calculations to project the profits plaintiff would have made over the 2010 to 2012, period, absent defendants' alleged unfair and deceptive practices. Because the alleged defamation began to occur at the end of 2008, she calculates the number of calls that plaintiff would have sold to the Dual satellite market and the Dish-only satellite market if plaintiff had maintained the same market shares that it had achieved in 2009, over the 2010-2012 period. She also calculates the number of calls that plaintiff would have sold over this period to the Dual market and Dish-only market, assuming that plaintiff's market share growth would have continued to increase at the same rate that it increased over the period between 2008 and 2009.

Defendants questioned Lahti regarding her analysis of the causal link between plaintiff's damages and defendants' actions. Lahti testified that she did not consider causation. "I'm not hired to link cause and effect or assign liability. That's for someone else in this case. I'm calculating the damage." (DE 47-6, p. 149). She admitted that she did nothing to "separate any damage that would have been caused by DIRECTV's threats to Exclaim's clients that DIRECTV would terminate their dealerships with DIRECTV from the damage caused by the defamatory statements." (Id., pp. 18-19). Furthermore, Lahti testified that her damages model would remain the same regardless of whether the court dismissed all actionable statements but one.

2. Analysis

The admission of expert testimony is governed by Rule 702 of the Federal Rules of Evidence. The proponent of the expert testimony bears the burden of establishing its admissibility by a preponderance of proof. Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001). Rule 702 provides that expert testimony is appropriate when it "will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

Rule 702 further provides that a witness qualified as an expert may be permitted to testify where "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Id. The Supreme Court has distilled the requirements of Rule 702 into two crucial inquiries: whether the proposed expert's testimony is relevant and whether it is reliable. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999); Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 589 (1993). In order to be considered relevant, the proposed expert testimony must appear to be helpful to the trier of fact. See Daubert, 509 U.S. at 591-92. There is a well-considered view that rejection of expert testimony is the exception rather than the rule. Fed. R. Evid.702 advisory comm. note (2000).

The Fourth Circuit has held that the court should exclude opinions that are "based on assumptions which are speculative and are not supported by the record." Tyger Const. Co. Inc. v. Pensacola Const. Co., 29 F.3d 137, 142 (4th Cir. 1994); see also MyGallons LLC v. U.S. Bancorp, 521 Fed. App'x 297, 307 (4th Cir. 2013) (excluding expert's lost profits testimony when he "had no basis for his estimate."). The expert's opinion to damages "must be causally related to the alleged harm." Tyger Const. Co. Inc., 29 F.3d at 142; see also Pharmanetics, Inc. v. Aventis

Pharmaceuticals, Inc., 182 Fed. App'x 267, 272-73 (4th Cir. 2006) (affirming district court's decision to exclude expert testimony on lump sum damages that a jury could not reasonably assign to defendant's conduct). Furthermore, "[s]crutiny of expert testimony is especially proper where it consists of an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." Eastern Auto Distributors, Inc. v. Peugeot Motors of America, Inc., 795 F.2d 329, 338 (4th Cir. 1986).

Defendants assert that Lahti's testimony should be excluded because it assumes that all of plaintiff's lost profits were caused by defendants' statements. However, a damages expert may assume causation if plaintiff can produce other evidence establishing cause. Tyger Const. Co. Inc., 29 F.3d at 142-43 ("Expert opinion evidence based on assumptions not supported by *the record* should be excluded.")(emphasis added); see Tuf Racing Prods., Inc. v. Am. Suzuki Motor Corp., 223 F.3d 585, 591 (7th Cir. 2000) (permitting certified public accountant to calculate lost future earnings from financial information furnished by plaintiff and assumptions regarding the causal effect of contract termination on plaintiff's sales). Nevertheless, plaintiff must still establish a causal link by other evidence.

Assumptions reasonably may be drawn from statements of co-owner Stefanik, indicating that plaintiff began to encounter a stark downturn in business after defendants began their pattern of allegedly unfair and deceptive trade practices, and Fonte's telephone calls during which the representative was heard to say that he would stop working with plaintiff if plaintiff was engaged in illegal activity. Defendants seek to advance their position also on basis that plaintiff's expert fails to exclude other causes of lost profits supported in the record. As herein discussed, even if retailers terminated because of defendants' threats and pressure, it may constitute an unfair or deceptive trade practice. This complaint about Lahti sounds more as one reaching to the weight, if any, of Lahti's testimony in this regard.

However, the record does not support Lahti's assumption of cause that extends to the Dish-only retail market. Lahti testified that "this is a market in which the potential buyers of [plaintiff]'s services interrelate, they talk, they meet, they get together at conferences, they chat, they – information such as a defamatory comment is prone to spread." (DE 47-6, p. 149). She also testified that "there were some of these dealers that at one time were [defendants'] dealers or they became Dish only dealers or they became dual dealers." (DE 47-6, p. 150). However, plaintiff has not established her qualifications or basis of knowledge to make these statements. Nor has plaintiff offered other evidence to support her assertion. Without more, the court limits Lahti's testimony only to the market of retailers that sold defendants' product. This is consistent with Rule 702's requirement that an expert testify on matters where he or she has "scientific, technical, or other specialized knowledge." See Maher v. Cont'l Cas. Co., 76 F.3d 535, 541 (4th Cir. 1996) (disregarding expert testimony on lost profits when the expert was only an expert in analyzing financial statements, rather than an economist, and did not have any expertise in economic forecasting).

As to proposed testimony regarding damages from loss of Dual retailers, defendants argue that Lahti is prohibited from assuming that plaintiff's sales fell because of a decline in its reputation. They also argue that plaintiff should be required to link damage to the particular statements made. They rely heavily upon this court's decision in Pharmanetics Inc., 2005 WL 6000369. In that case, however, evidence in the record clearly showed an alternative, non-actionable cause of at least some of the lost sales that plaintiff claimed. Id. at ** 10-12. As discussed above, clear evidence of an alternative, non-actionable cause is not in the record in this case. Furthermore, the court held in that case that evidence of damages could be provided "whether through direct or circumstantial evidence upon which the jury can infer lost sales or goodwill," and expressly noted that it would not require the plaintiff to "identify, on a one-for-one basis, each and every sale lost to defendants." Id. at *16. Circumstantial evidence provides support that plaintiff's goodwill was damaged by defendants, and the court will not require plaintiff to directly prove each and every client it lost as a result of this loss of goodwill.

Defendants also rely on a string of unpersuasive cases including CIT Group/Business Credit, Inc. v. Graco Fishing & Rental Tools, Inc., 815 F. Supp. 2d 673 (S.D.N.Y. 2011); Arista Records LLC v. Usenet.com, Inc., 608 F. Supp. 2d 409 (S.D.N.Y. 2009); JRL Enters. v. Procorp, Case No. 01-2893, 2003 U.S. Dist. LEXIS 9397 (E.D. La. June 3, 2003); Total Containment, Inc. v. Dayco Prods., 177 F.Supp. 2d 332 (E.D.Pa. 2001); and JMJ Enters. v. Via Veneto Italian Ice, No. 97-cv-652, 1998 U.S. Dist. LEXIS 5098 (E.D. Pa. 1998). None of these cases come from a controlling authority, and all of them involve assumptions that were directly contradicted by the record or were less reasonable than Lahti's.

Defendants argue that plaintiff can only recover for harm "directly and proximately caused" by an actionable statement made by defendants or repeated by a third-party with defendants' authorization. As stated in the case of Sawyer v. Gilmers, Inc., 126 S.E. 183, 187 (N.C. 1925), North Carolina finds damages "directly and proximately" caused for secondary publication or repetition of statements "uttered under such circumstances as to time, place, or conditions as that a repetition or secondary publication is the natural and probable consequence of the original defamation and damage." Id. There is evidence from which a jury reasonably could find that the circumstances of the specific statements identified by plaintiff were naturally and probably communicated to a large number of defendants' retailers.

Defendants argue that Lahti's report fails to account for the nation's economic recession. Yet Lahti's calculations are based on the actual number of new subscribers from 2006 to 2012. Downturn, if any, in the satellite market which occurred during that period would therefore be accounted for in her calculations. Defendants' reference to El Aguila Food Prods. v. Gruma Corp., 301 F.Supp. 2d 612, 625 (S.D. Tex. 2003), where evidence established that plaintiffs could not meet the demands of a growing market, is inapplicable.

Defendants also argue that Lahti projects damages that are not recoverable because they fall outside the statute of limitations period for defamation actions. However, it is the far longer four-year statute of limitations for unfair and deceptive trade practices, N.C. Gen. Stat. § 75-16.2, which will control. All statements were made during this period along with most of defendants' complained of telephone calls to plaintiff's call center.

Defendants argue that Lahti does not use reliable methods because she did not consider other causes, as mentioned, and because her analysis differs from standards underlying her testimony in an earlier case. Lahti's testimony is oversimplified in this part of defendants' presentation and any inconsistency with testimony from prior cases, while perhaps fodder for cross-examination, does not establish that her methods as applied in this case are unreliable.

Defendants also argue that Lahti had no credible evidence on which to assume that plaintiff's customers would have paid up to $40.00 for every call purchased from plaintiff. They assert that she wrongly relied upon information provided by plaintiff's owners to make this projection, and failed to verify the source of that information. However, an expert opinion is not necessarily unreliable because it is based on some unverified or inaccurate information provided by the client. See Lee Valley Tools, Ltd. v. Industrial Blade Co., 288 F.R.D. 254, 267 (W.D.N.Y. 2013). The opposing party has an opportunity to cross-examine the expert on such matters. Id. Furthermore, Lahti personally examined correspondence with a competitor of plaintiff's, indicating that the competitor charged as much as $55.00 for each call it sold. (DE 47-7, p. 17). She did not solely rely upon plaintiff's representations.

Defendants also challenge Lahti because, by beginning her calculations with the total number of annual new subscribers and dividing by a constant of twenty-two percent (22%) (the rate at which plaintiff's clients converted callers sent to them by plaintiff), she appears to assume that all new subscribers come to the markets through third-party marketers such a plaintiff. Yet even if the assumptions Lahti makes in calculating the overall call market are incorrect, the critical question is whether new subscribers bear a fixed proportionate relationship to plaintiff's sales over the relevant 2006-2012 time period.

Because she divides gross subscriber additions by a constant number, Lahti's analysis essentially calculates damages by comparing plaintiff's sold calls to the number of subscribers per year. Lahti calculates damages as a relative measure. As defendants noted, if something in the market changed in 2009, for instance, if customers began to subscribe more frequently via other channels, then Lahti's estimate would be incorrect. However, defendants have not offered evidence that such a shift has occurred. Again, this goes to the question of weight, rather than admissibility. Similarly, defendants' challenges based on the impact, if any, of new competitors to the pay-per-call industry, statistics showing plaintiff experienced more success in obtaining new customers post-2009, and owner Zydonik's testimony regarding how plaintiff determines price are all matters which may reasonably bear on the weight of the evidence. Larson v. Kemper, 414 F.3d 936, 940-41 (8th Cir. 2005) ("The district court must exclude expert testimony if it is so fundamentally unreliable that it can offer no assistance to the jury, otherwise, the factual basis of the testimony goes to the weight of the evidence.").

For the reasons discussed above, therefore, the court grants defendants' motion to strike portions of Lahti's testimony related to damages suffered by loss of sales to Dish. It denies the motion in all other parts. To the extent there remains question as to admissibility of the report, should plaintiff seek to offer it into evidence at trial, subject to some hearsay exception or some other asserted basis for admission, the court will take up and decide the issue then presented.

E. Plaintiff's Motion to Compel

Turning now to the final motion before the court, plaintiff has moved the court for an order compelling defendants to respond completely to interrogatory no. 6 in its second set of interrogatories, and to produce documents in response to plaintiff's second request for production no. 16.

The interrogatory instructs defendants to:

> State the average net income you derive annually from each new consumer household to whom you supply satellite television service. As part of your answer, identify how that income is calculated, whether the income is different for customers who initiate contact with DirecTV [sic] corporate headquarters versus customers who initiate contact with authorized dealers, and if so, explain the difference.

(DE 58, p. 14).

Plaintiff urges that the information is necessary to determine whether defendants have been damaged, and the extent of the damages. Defendants argue that the information is irrelevant because they seek damages in the form of disgorgement of plaintiff's profits, rather than lost profits.

The scope of discovery is limited to "nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). Relevant information need not be admissible at trial, so long as discovery appears reasonably calculated to lead to the discovery of admissible evidence. Id. During discovery, relevance is broadly construed "to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Oppenheimer Fund Inc. v. Sanders, 437 U.S. 340, 351 (1978).

In a Lanham Act claim, a successful plaintiff is entitled to recover 1) defendant's profits; 2) damages sustained by the plaintiff; and 3) the costs of the action, "subject to the principles of equity." 15 U.S.C. § 1117(a). The Fourth Circuit has provided six factors that a court should consider in assessing damages, including:

> (1) whether the defendant had the intent to confuse or deceive, (2) whether sales have been diverted, (3) adequacy of other remedies, (4) any unreasonable delay by the plaintiff in asserting his rights, (5) the public interest in making the misconduct unprofitable, and (6) whether the infringement is a case of "palming off."

Synergistic Int'l., LLC v. Korman, 470 F.3d 162, 175 (4th Cir. 2006).[14]

Plaintiff contends that the information is relevant to the question of "whether sales have been diverted." (DE 60, p. 4). While denying infringement, it believes the information will be useful if that counterclaim survives summary judgment, which it has. In Synergistic, the court explained that the question of diverted sales "involves the issue of whether the plaintiff lost sales as a result of the defendant's trademark infringement activities, and the extent to which the plaintiff had entered the market area where the infringement occurred." 470 F.3d at 175. Plaintiff argues here that:

[14] The Fourth Circuit has described "palming off" as "whether the defendant used its infringement of the plaintiff's mark to sell its products, misrepresenting to the public that the defendant's products were really those of the plaintiff." Synergistic, 470 F.3d at 176.

> [T]he circumstances are that [plaintiff] generated millions of dollars in sales for Defendants by bringing new customers to the Defendants' authorized dealers. Defendants have offered no evidence of any diverted or lost sales. Any remedy that ignores the profit Defendants made as a result of Exclaims' marketing efforts, would be inequitable.

(DE 60, p. 5).

Yet the court finds that plaintiff has not adequately explained how this evidence is relevant to the question of diverted sales and lost profits. It may be true that plaintiff's marketing activities generate new clients for defendants. Plaintiff's marketing activities may bring more customers to initiate contact with defendants' retailers, and these customers may have higher net average incomes for defendants than customers who directly contact defendants. But this does not address whether the specific practice of plaintiff's allegedly infringing use diverted sales. Synergistic, 470 F.3d at 175 (stating that diverted sales "involves the issue of whether the plaintiff lost sales *as a result of the defendant's trademark infringement activities*") (emphasis added). Defendants' claims do not concern the effectiveness of plaintiff's overall business model, but, rather, the harm allegedly caused by plaintiff's listing of telephone numbers using defendants' trademark. On the showing made, the court denies plaintiff's motion to compel.

F. Notice Concerning Involvement of Counsel

The record on which this court has based substantive decisions reveals that plaintiff's attorney, Nanney, personally was involved in communications with defendants that are significant to the merits. Nanney's ability to continue to serve as counsel must be considered in light of North Carolina's Revised Rule of Professional Responsibility. "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness" except in special circumstances. N.C. Rev. R. Prof. Conduct 3.7(a). On the evidence of record, Nanney appears likely to be a necessary witness. Response to this notice shall be made not later than fourteen (14) days from date of entry of this order.

**CONCLUSION**

For the foregoing reasons, defendants' motion for summary judgment is GRANTED IN PART and DENIED IN PART (DE 49), and plaintiff's motion for summary judgment is DENIED (DE 41). Also as set forth above, defendants' motion to strike testimony is GRANTED IN PART and DENIED IN PART (DE 45). Plaintiff's motion to compel is DENIED (DE 58). The parties are directed to confer within fourteen (14) days and make joint report to the court as to estimated trial length, alternative suggested trial date settings, suggested alternative dispute resolution techniques to be employed prior to trial in attempt to resolve remaining issues as between the parties, and any other matter bearing on the parties' pretrial and trial preparations. Within this same period, response to the court's notice of concern regarding Nanney shall be made. The parties are reminded that within fourteen (14) days, they jointly shall return to the court by U.S. Mail, addressed to the case manager, a copy of this order now sealed, marked to reflect redactions perceived necessary.

SO ORDERED, this the 31st day of March, 2014.

Louise W. Flanagan

LOUISE W. FLANAGAN
United States District Court Judge

**INDEX**

Bedel, Adam J......................................Attorney for DIRECTV, Inc. and DIRECTV Operations, LLC

Fonte, Bruce...............................................Area Sales Manager (now Director of National Accounts) for DIRECTV, Inc.

Haley, Kristin L..........................Senior Director of Business and Legal Affairs for DIRECTV, Inc. and DIRECTV Operations, LLC

Ko, Evelyn J......................................................Senior Director of Direct Sales for DIRECTV, Inc. and DIRECTV Operations, LLC

Lahti, Diane P...............................Accountant/Financial Analyst with Thomas Judy & Tucker, P.A. engaged as expert for Exclaim Marketing, LLC

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Stefanik, Rick.........................................................................Co-Owner of Exclaim Marketing, LLC

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