

**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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DISH NETWORK, LLC, a  
Colorado limited liability  
company,

Plaintiff - Appellee,

v.

SUJIT GHOSH, an individual  
resident of New York,

Defendant - Appellant,

and

OPEN ORBIT CORPORATION,  
a New York company,

Defendant.

No. 18-1131  
(D.C. No. 1:16-CV-  
02083-LTB)  
(D. Colo.)

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**ORDER AND JUDGMENT\***

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(Filed Oct. 11, 2018)

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\* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Before **TYMKOVICH**, Chief Judge, **McKAY** and **MATHESON**, Circuit Judges.

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Mr. Sujit Ghosh, appearing pro se, appeals the district court's judgment granting DISH Network, LLC's amended motion to confirm an arbitration award against him based on his personal guaranty of defendant Open Orbit Corporation's performance under an agreement with DISH, even though he was not a party to the arbitration. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

## **BACKGROUND**

On March 12, 2012, Mr. Ghosh, then President of Open Orbit, agreed to the terms of a Personal Guaranty whose purpose was "to induce DISH . . . to enter into the DISH Network Retailer Agreement" with Open Orbit. R., Vol. 2 at 195. The Personal Guaranty provided that Mr. Ghosh "personally, unconditionally and irrevocably guarantee[d] the full and timely performance of and by [Open Orbit] for all purposes under the Retailer Agreement." *Id.* DISH and Open Orbit entered into a Retailer Agreement effective January 1, 2013, which authorized Open Orbit to market, promote, and solicit orders for DISH subscription satellite television programming. *Id.* at 188. The Personal Guaranty provided that "[a]ny and all disputes, controversies or claims arising out of or in connection with this Personal Guaranty shall be resolved by arbitration . . . in accordance with both the substantive and

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procedural laws of Title 9 of the U.S. Code ('Federal Arbitration Act') and the Commercial Arbitration Association," and that the arbitration would be conducted by a three-arbitrator panel whose decision would be "final and binding on the parties." *Id.* at 195. The Retailer Agreement contained materially identical arbitration provisions. *See id.* at 190.

In 2015, DISH initiated an arbitration proceeding against Open Orbit based on violations of the Retailer Agreement. Mr. Ghosh was not a party to the arbitration, but in February 2016, he emailed the arbitrator a request to remove his name from the case and "from all kind[s] of responsibilities." R., Vol. 1 at 85. He asserted that as of the effective date of the Retailer Agreement, he was not an Open Orbit officer or shareholder, that the alleged violations of the Retailer Agreement occurred after he had parted from the company, and that the company's current president and sole owner had issued an indemnity bond that purported to indemnify Mr. Ghosh from claims against Open Orbit and release him from any personal guarantees as of January 1, 2013. He reiterated his position a couple of weeks later in a second email.

Because Mr. Ghosh was not a party to the arbitration, the arbitrator treated the request to remove his name from the case as a request to remove him as a witness and denied it. The arbitrator also treated the request as seeking nullification of the Personal Guaranty and denied it because the Personal Guaranty expressly provided that any changes had to be "'agreed to and signed by all Parties to [it],'" and there was no

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later agreement between DISH and Mr. Ghosh canceling the Personal Guaranty. *Id.*, Vol. 2 at 198 (quoting *id.* at 195). The arbitrator later denied two requests by Mr. Ghosh for reconsideration of his request to cancel his Personal Guaranty. *Id.* at 199, 200. In denying the second such request, the arbitrator informed Mr. Ghosh that unless he produced evidence of a written agreement signed by DISH releasing him from the Personal Guaranty, the arbitrator would not respond to any more requests from Mr. Ghosh for the same relief.

Ultimately, the arbitrator entered an award in favor of DISH and against Open Orbit for just over \$220,000, plus post-award interest. *Id.* at 204. In his decision, the arbitrator noted that in response to DISH's motion for fees and costs, Mr. Ghosh had submitted a letter "again voicing disagreement with [the] prior order regarding his Personal Guaranty." *Id.* at 203.

DISH then sought confirmation of the arbitration award in federal court, naming both Open Orbit and Mr. Ghosh as defendants. Open Orbit did not appear, and DISH sought a default judgment against it. A magistrate judge recommended granting default judgment against Open Orbit in the full amount of the award. Mr. Ghosh filed a motion for relief from the award, arguing, among other things, that he was not a party to the arbitration. The magistrate judge recommended granting Mr. Ghosh's motion for relief in part and dismissing him from the case without prejudice to DISH's ability to file either a separate action against Mr. Ghosh or an amended application to confirm the

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arbitration award against him in accordance with caselaw allowing confirmation against nonparties under certain circumstances. Among the circumstances the magistrate judge identified is where “the person seeking confirmation pleads a claim in the confirmation proceeding to extend liability without involving extensive factual issues.” R., Vol. 2 at 60 (*citing Orion Shipping & Trading Co. v. E. States Petrol. Corp.*, 312 F.2d 299, 301 (2d Cir. 1963)).

The district judge accepted the magistrate judge’s recommendations. DISH then filed an amended confirmation application asserting that the court could confirm the arbitration award against Mr. Ghosh without extensive factfinding and based on the Personal Guaranty, the validity of which Mr. Ghosh could not deny because the arbitrator, at Mr. Ghosh’s request, had determined that there was no later agreement between DISH and Mr. Ghosh cancelling the Personal Guaranty.

Based on Mr. Ghosh’s argument that he could not be compelled to pay the award against Open Orbit unless there was a specific award entered against him pursuant to the arbitration clause in the Personal Guaranty, the court ordered DISH to show cause why it should not compel the two parties to arbitrate their dispute. DISH responded that the court could determine Mr. Ghosh’s liability under the Personal Guaranty based on documents and admissions already before the court and without extensive factfinding, and therefore DISH should not have to go through another arbitration. DISH observed that Mr. Ghosh had

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purposefully availed himself of the arbitrator’s authority and jurisdiction when he repeatedly asked the arbitrator to cancel the Personal Guaranty with the understanding that the arbitrator’s decision would be “final and binding on the parties,” *id.*, Vol. 3 at 50, and Mr. Ghosh had expressed “full confidence in [the arbitrator’s] judgment,” *id.*, at 51, and admitted he had provided “all the required documents and evidences [sic] in support of [his] claim,” *id.* at 55.

The district court concluded that even though Mr. Ghosh was not a party to the arbitration, the award should be confirmed against him because he had notice of the arbitration and participated in it, the arbitrator decided the issue against Mr. Ghosh, and issue preclusion barred Mr. Ghosh from relitigating the issue before another arbitrator. The court therefore granted the amended application to confirm the arbitration award against Mr. Ghosh, who now appeals.

## DISCUSSION

“Judicial review of arbitration . . . decisions is extremely limited” and “among the narrowest known to law.” *Dominion Video Satellite, Inc. v. Echostar Satellite L.L.C.*, 430 F.3d 1269, 1275 (10th Cir. 2005) (internal quotation marks omitted). That said, we are not called on in this appeal to review the arbitrator’s denial of Mr. Ghosh’s request to nullify the Personal Guaranty. Instead, Mr. Ghosh challenges the district court’s decision to confirm the arbitration award against him even though he was not a party to the arbitration. In

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considering that challenge, we examine the “district court’s factual findings in confirming the award for clear error and its legal conclusions *de novo*.” *Id.* And because Mr. Ghosh is pro se, we construe his filings liberally but do not act as his advocate. *Yang v. Archuleta*, 525 F.3d 925, 927 n.1 (10th Cir. 2008).

Mr. Ghosh’s primary arguments focus on the fact that he was not a party to the arbitration and that the Personal Guaranty contains its own mandatory arbitration provision. He first contends that an award could not be confirmed against him unless there was an arbitration in accordance with the procedure outlined in the Personal Guaranty—one where he receives written notice of the arbitration, the arbitration is conducted by a panel of three arbitrators, and an arbitration award is entered specifically against him. We disagree.

Although it is undisputed that Mr. Ghosh was not a party to the arbitration, he had notice of it and requested specific relief from the arbitrator—nullification of the Personal Guaranty because the Retailer Agreement was executed after Mr. Ghosh was no longer an Open Orbit officer or shareholder and because the company’s current owner had indemnified Mr. Ghosh from any liability arising from the Personal Guaranty. The arbitrator concluded that only the parties could alter the terms of the Personal Guaranty by a written, signed agreement, and there was no evidence that had occurred. Mr. Ghosh has not challenged that conclusion. And rather than initiating an arbitration to dispute liability under the Personal Guaranty,

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Mr. Ghosh elected to appear in the existing arbitration, where he professed faith in the arbitrator, claimed to have provided all the evidence relevant to his request to nullify or cancel his liability under the Personal Guaranty, and acknowledged that the arbitrator's decision would be final and binding. Moreover, before the district court, Mr. Ghosh stated that "there is no allegation of any wrong doing by the Arbitrator nor any procedure was flawed." R., Vol. 2 at 221. For these reasons, Mr. Ghosh cannot now be heard to argue that he should have been afforded the opportunity to separately arbitrate his liability under the Personal Guaranty before a three-member panel of arbitrators.<sup>1</sup>

Next, Mr. Ghosh attempts to distinguish two cases the district court relied on, *United States ex rel. Skip Kirchdorfer, Inc. v. M.J. Kelley Corp.*, 995 F.2d 656 (6th Cir. 1993), and *United States ex rel. Aurora Painting, Inc. v. Fireman's Fund Insurance Co.*, 832 F.2d 1150 (9th Cir. 1987). Mr. Ghosh observes that there is no indication that the nonparty in either of those cases had a separate guaranty in favor of the party seeking confirmation that contained a mandatory arbitration provision. We agree with his reading of those cases, but the district court relied on them only for the general "proposition that a non-party surety *can* be bound by the outcome of arbitration proceedings," R., Vol. 3 at 85 (emphasis added). The court then examined whether

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<sup>1</sup> The parties have not explained, nor does the record reflect, why the arbitration between DISH and Open Orbit was decided by only one arbitrator rather than a panel of three arbitrators, as specified in the Retailer Agreement.

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the circumstances of Mr. Ghosh’s case warranted enforcing the arbitration award against him and concluded that they did because, despite not being a party to the arbitration, he “had notice of it and participated in it” and “specifically and repeatedly asked the arbitrator to address the validity of the personal guaranty he signed.” *Id.* We therefore conclude that the district court did not improperly rely on the two cases.

Mr. Ghosh further argues that because he was not a party to the arbitration, one of the four elements of issue preclusion is not present—that “the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication,” *Park Lake Res. Ltd. Liab. Co. v. U.S. Dep’t of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004) (internal quotation marks omitted).<sup>2</sup> The district court concluded that this element was met because Mr. Ghosh “raised and actually litigated the validity of his personal guaranty in the arbitration” even though he “was not a party to the arbitration itself.” R., Vol. 3 at 86. We see no error.

In limited circumstances, “the rule against non-party preclusion is subject to exceptions.” *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008). Two are relevant

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<sup>2</sup> The other three elements are “the issue previously decided is identical with the one presented in the action in question,” “the prior action has been finally adjudicated on the merits,” and “the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.” *Park Lake Res. Ltd. Liab. Co.*, 378 F.3d at 1136 (internal quotation marks omitted). Mr. Ghosh has not challenged the district court’s conclusion that these elements were met.

here. First, “‘a person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement.’” *Id.* (brackets omitted) (quoting 1 Restatement (Second) of Judgments § 40 (1980)). As noted, Mr. Ghosh acknowledged that the arbitrator’s decision regarding nullification of the Personal Guaranty would be “final and binding on the parties.” R., Vol. 3 at 50. Second, “a nonparty is bound by a judgment if [he] ‘assumed control’ over the litigation in which that judgment was rendered,” *Taylor*, 553 U.S. at 895 (brackets omitted) (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)). “Because such a person has had ‘the opportunity to present proofs and argument,’ he has already ‘had his day in court’ even though he was not a formal party to the litigation.” *Id.* at 895 (quoting Restatement (Second) Judgments § 39, cmt. a (1980)). Although Mr. Ghosh did not assume control over the arbitration on behalf of Open Orbit, he did so on his own behalf by affirmatively and repeatedly asking the arbitrator to nullify the Personal Guaranty, and he made multiple efforts to present proofs and argument.

Either of these exceptions is sufficient to support the district court’s determination that the party/privy element of issue preclusion was met. We therefore conclude that the district court properly considered the role of issue preclusion in deciding that Mr. Ghosh was “bound by the arbitrator’s decision that the guaranty was valid,” that there “were no factual or legal issues regarding [his] liability for Open Orbit’s obligations to DISH,” and that the only thing remaining was for the

"court to enforce the arbitration award against [him]." R., Vol. 3 at 86. *Cf. Orion Shipping & Trading Co.*, 312 F.2d at 301 (declining to extend confirmation of award to nonparty because whether nonparty was alter ego of party to arbitration or had consented to arbitration was too complex to hear in a confirmation action).

Further, because Mr. Ghosh elected to present his proofs and argument in the arbitration between DISH and Open Orbit, we will not now consider his challenges to the validity of the Retailer Agreement and its relation to the Personal Guaranty, none of which he raised in the arbitration.<sup>3</sup>

Finally, Mr. Ghosh alleges that Open Orbit's owner had settlement discussions with DISH, and Open Orbit has liability insurance to cover the award. These alleged facts, unsupported by any record citation, are irrelevant to the issue on appeal.

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<sup>3</sup> Those challenges are: (a) he never signed the Retailer Agreement (he in fact told the arbitrator he had signed it, *see R.*, Vol. 3 at 48); (b) DISH doctored the Retailer Agreement by manually entering the effective date without knowledge or consent of the other parties; (c) he never consented to linking the Retailer Agreement with the Personal Guaranty; and (d) a retailer number that appears on the Retailer Agreement had to be mentioned in the Personal Guaranty to show that the Retailer Agreement was part of the Personal Guaranty.

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**CONCLUSION**

The district court's judgment is affirmed.

Entered for the Court

Monroe G. McKay  
Circuit Judge

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO  
LEWIS T. BABCOCK, JUDGE

Civil Case No. 1:16-cv-02083-LTB

DISH NETWORK L.L.C., a Colorado limited liability  
company

Plaintiff,

v.

OPEN ORBIT CORPORATION, a New York  
Company and SUJIT GHOSH, an individual  
resident of New York

Defendants.

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**MEMORANDUM OPINION AND ORDER**

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Babcock, J.

This case is before me on Plaintiff DISH Network LLC's amended application to confirm an arbitration award. (ECF No. 38.) DISH asks this Court to enforce an arbitration award against Defendant Sujit Ghosh even though he was not a party to the arbitration.

After initially reviewing the application and Mr. Ghosh's pro se response, I entered a show cause order asking DISH to show cause why this case should not be sent to arbitration in light of an arbitration provision in the relevant contract between DISH and Mr. Ghosh. DISH argues that a second arbitration is not needed because of a prior arbitration award in its favor

against Defendant Open Orbit Corporation and Mr. Ghosh's promise to guarantee Open Orbit's performance. (ECF No. 38-2 at 1.)

I conclude that even though Mr. Ghosh was not a party to the arbitration between DISH and Open Orbit, the award can be enforced against him under the unique factual circumstances of this case. I thus GRANT DISH's application.

## **I. BACKGROUND**

DISH operates a direct broadcast satellite system and broadcasts movies, sports, and general entertainment programming to consumers who pay a subscription fee to DISH. Open Orbit was an authorized retailer for DISH, meaning it was allowed to market, promote, and solicit orders for DISH.

To become a retailer for DISH, Open Orbit signed a "DISH Network Retailer Agreement," which set forth the terms of the relationship between DISH and Open Orbit. (ECF No. 38-1.) To "induce [DISH] to enter into the DISH Network Retailer Agreement" with Open Orbit, Mr. Ghosh signed a personal guaranty in which he "personally, unconditionally and irrevocably guarantee[d] the full and timely performance of and by [Open Orbit] for all purposes under the Retailer Agreement." (ECF No. 38-2 at 1.)

In July 2015, DISH initiated arbitration against Open Orbit for various violations of the retailer agreement. A few months later, Mr. Ghosh asked the

arbitrator to remove his name from the pending arbitration because he was neither an officer nor a shareholder of Open Orbit and to “nullify” his personal guaranty. (ECF No. 38-3.) The arbitrator denied Mr. Ghosh’s request to nullify his personal guaranty, as well as his repeated requests for reconsideration. (ECF Nos. 38-3, 38-4, 38-5.) However, the arbitrator recognized that Mr. Ghosh was “not a party to this arbitration.” (ECF No. 38-3.)

In June 2016, the arbitrator held an evidentiary hearing regarding DISH’s claims against Open Orbit. Neither Mr. Ghosh nor Open Orbit appeared at the hearing. After the hearing, the arbitrator awarded DISH \$220,609.54, comprised of \$177,817.24 in actual damages and \$42,792.30 in administrative expenses, costs and attorneys’ fees. (ECF No. 38-7 at 2.) The arbitrator also awarded post-judgment interest. *Id.* The award was “in favor of Claimant DISH Network L.L.C., as against Respondent Open Orbit Corporation.” (*Id.*)

DISH filed a motion to confirm the arbitration award with this Court under the Federal Arbitration Act (ECF No. 1), and Mr. Ghosh filed a motion for relief from the award (ECF No. 7). Magistrate Judge Shaffer recommended granting the motion to confirm the arbitration award against Open Orbit and entering default judgment against Open Orbit, which had not appeared in this Court to defend the case. (ECF No. 28.) With respect to Mr. Ghosh, Magistrate Judge Shaffer recommended granting his motion (in pertinent part) and dismissing the claim against him under Federal Rule of Civil Procedure 12(b)(6) without prejudice. (*Id.*)

Judge Shaffer reasoned that because Mr. Ghosh was not a party to underlying arbitration and because DISH had not argued the award should be enforced against him as a non-party, its application to enforce the award against Mr. Ghosh was deficient. (*Id.* at 2-8). I accepted Judge Shaffer's recommendations in full. (ECF No. 31.)

DISH then filed an amended application to enforce the award, arguing that in light of Mr. Ghosh's personal guaranty, this Court should enforce the arbitration award against him even though he was not a party to the underlying arbitration. Mr. Ghosh opposed the amended application. After reviewing those materials, I entered a show cause order directing DISH to address why the case should not be sent back to arbitration, consistent with arbitration provision in the personal guaranty signed by both DISH and Mr. Ghosh. (ECF No. 42.) Both DISH and Mr. Ghosh responded to the show cause order. (ECF Nos. 43-44.)

## **II. ANALYSIS**

Confirming an arbitration award is usually perfunctory. As provided in section nine of the Federal Arbitration Act ("FAA"), a party submits an application, the district court reviews the award, and the district court "must" grant the application except in unusual circumstances:

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the

arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9. Section nine does not address whether a district court can confirm an arbitration award against someone who, like Mr. Ghosh, was not a party to the arbitration proceeding. The Tenth Circuit has not addressed this issue either. Accordingly, unlike in the usual section nine case, determining whether to grant DISH's application to confirm the award against Mr. Ghosh requires some analysis.

Federal courts have concluded that, in some limited circumstances, a district court may enforce an arbitration award against a non-party if the non-party's liability can be confirmed without implicating extensive factual issues. *See Diana Compania Mar., S.A. of Panama v. Subfreights of S. S. Admiralty Flyer*, 280 F. Supp. 607, 616 (S.D.N.Y. 1968) (enforcing arbitration award against non-party subfreights); *Overseas Private Inv. Corp. v. Marine Shipping Corp.*, No. 02 CIV. 475TPG, 2002 WL 31106349, at \*2 (S.D.N.Y. Sept. 19, 2002). For instance, in *Overseas Private Inv. Corp. v. Marine Shipping Corp.*, the district court held that an action to enforce an arbitration agreement against a non-party (who was the principle of a corporation that was a party) could proceed. The court reasoned that the

arbitration agreement against the corporation was already decided, the nonparty had the opportunity to raise defenses, and the court would have jurisdiction and venue over a separate action against the non-party. *Overseas Private Inv.*, 2002 WL 31106349, at \*2.

In addition, courts have enforced arbitration agreements against a party who guaranteed a debt, so long as that party had notice of the proceedings. *United States ex rel. Aurora Painting, Inc. v. Firemen's Fund Ins. Co.*, 832 F.2d 1150, 1151 (9th Cir. 1987) (in separate action, holding that surety was bound by an arbitration award decision later ratified by a state court, even though the surety "was not a named party in the arbitration and made no appearances" because the surety had actual notice of the state court action, tendered its defense to the principal, and used the same counsel as the principal); *United States ex rel. Skip Kirchdorfer, Inc. v. M.J. Kelley Corp.*, 995 F.2d 656, 660-61 (6th Cir. 1993) (surety was bound by a confirmed arbitration award because the surety had notice of the arbitration proceedings against the principal, was named as a defendant in the district court complaint, and shared an attorney with the principal). While these cases are not wholly analogous to the circumstances here because the party seeking to enforce the award filed a *separate* action against the surety, they nevertheless stand for the proposition that a non-party surety can be bound by the outcome of arbitration proceedings.

In light of this precedent, I conclude that the arbitration award against Open Orbit can and should be

enforced against Mr. Ghosh. While Mr. Ghosh was not a party to the arbitration, he both had notice of it and participated in it. He specifically and repeatedly asked the arbitrator to address the validity of the personal guaranty he signed. (ECF Nos. 38-3, 38-4, 38-5.) The arbitrator decided this issue against him and determined that he was personally liable for Open Orbit's obligations to DISH. (ECF Nos. 38-3, 38-4, 38-5.) The arbitrator also found that "[t]here is no subsequent agreement between DISH and Ghosh cancelling his Personal Guaranty," and warned that future attempts to try and invalidate the guaranty would be rejected absent new evidence. (ECF Nos. 38-3 at 2, 38-5.) Rather than accepting this outcome, Mr. Ghosh now wants to return to arbitration where a (presumably different) arbitrator would reexamine this issue.

But the arbitrator determined the personal guaranty Mr. Ghosh signed was valid, and that determination precludes Mr. Ghosh from relitigating the guaranty's validity in another proceeding. Issue preclusion generally applies when four elements are satisfied:

- (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication, and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

*Park Lake Res. Ltd Liab. v. US. Dep't of Agric.*, 378 F.3d 1132, 1136 (10th Cir. 2004) (quotation omitted). These elements are all satisfied here. The first and second elements are met because the validity of Mr. Ghosh's personal guaranty was presented and decided in the prior arbitration. While Mr. Ghosh was not a party to the arbitration itself, he raised and actually litigated the validity of his personal guaranty in the arbitration, which meets the third element's requirement. Mr. Ghosh had a full and fair opportunity to litigate the validity of the personal guaranty in the arbitration, meeting the fourth element. *See B-S Steel Of Kansas, Inc. v. Texas Indus., Inc.*, 439 F.3d 653, 662 (10th Cir. 2006) ("This circuit has previously applied collateral estoppel to a confirmed arbitration award."). Because Mr. Ghosh is bound by the arbitrator's decision that the guaranty was valid, there are no factual or legal issues remaining regarding Mr. Ghosh's liability for Open Orbit's obligations to DISH.

All that remains is for a district court to enforce the arbitration award against Mr. Ghosh, as DISH requests. Mr. Ghosh consented to personal jurisdiction in this Court, (ECF No. 38-2 at 1), and I have subject matter jurisdiction even outside of the confines of the FAA, *see* 28 U.S.C. § 1332 (diversity jurisdiction). Mr. Ghosh had an adequate opportunity, both in this Court and before the arbitrator, to object to the enforcement of the award against him. Having fully considered his arguments, I find them unpersuasive. Mr. Ghosh is liable to DISH based on the personal guaranty he signed. Because Open Orbit is liable to DISH for \$236,034.08,

with post-judgment interest to accrue at 1.07% (see ECF No. 31), Mr. Ghosh is liable to DISH for that same amount.

### **III. CONCLUSION**

I GRANT DISH's amended application. (ECF No. 38.) Judgment for \$236,034.08, with post-judgment interest to accrue at 1.07% until paid, is entered in favor of DISH and against Mr. Ghosh.

Dated: March 19, 2018 in Denver, Colorado.

BY THE COURT:

s/Lewis T. Babcock  
LEWIS T. BABCOCK

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02083-CBS

DISH NETWORK, L.L.C.,

Plaintiff,

v.

OPEN ORBIT CORPORATION, and  
SUJIT GHOSH,

Defendants.

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ORDER AND RECOMMENDATION

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Magistrate Judge Craig B. Shaffer

On August 17, 2016, Plaintiff Dish Network, L.L.C. (“Dish”) filed an application to confirm an arbitration award. Doc. #1 (the “Application”). The case is presently before the court on two motions: *pro se* Defendant Mr. Sujit Ghosh’s motion for relief from the arbitration award (doc. 7, filed September 12, 2016) and Dish’s motion for default judgment against Defendant Open Orbit Corporation (“Open Orbit”). Doc. 19 (filed October 24, 2016).

On September 21, 2016, Dish and Ghosh filed consent paperwork (doc. 8), but the signature for Open Orbit is that of a lawyer, Stephen Fink, Esq., who does not represent it in this case. Mr. Fink attended a status conference of September 30, 2016 in a limited capacity on behalf of a nonparty (Mr. Uday Saha, an officer of

Open Orbit) and did not represent Open Orbit. Doc. 12 (minutes). Open Orbit has not appeared by an attorney and has not consented to magistrate jurisdiction. Therefore, pursuant to D.C.COLO.LCivR 40.1(c)(3)(a), the court ORDERS that the clerk of court shall reassign this case to a district judge. Pursuant to D.C.COLO.LCivR 72.1(a), the court issues this ruling on the pending motions as a Recommendation to the district judge.

On March 28, 2017, the court set an in-person hearing on the pending motions for May 8, 2017. Doc. 22. Two business days before that hearing, Ghosh filed a motion (which Dish did not oppose) to continue until he could retain an attorney. Doc. 24. The court converted the in-person hearing to a telephonic status conference. Doc. 25. At the May 8, 2017 conference, Ghosh and Saha (the latter as a non-lawyer officer of Open Orbit) requested more time to retain a lawyer. The court noted (as it has previously done, doc. 22) that because Saha is not an attorney, he cannot appear on behalf of Open Orbit.<sup>1</sup> The court further noted from the bench that both Ghosh and Open Orbit have had since August 2016 in which to retain an attorney. To postpone the case at this point would be unfair to Dish. However, the court indicated that if an attorney entered an appearance within one week while the court worked on the motions, the court would consider

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<sup>1</sup> A “corporation must be represented by an attorney to appear in federal court.” *Tal v. Hogan*, 453 F.3d 1244, 1254 (10th Cir. 2006); *see also Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 556 (10th Cir. 2001); Fed. R. Civ. P. 11; D.C.Colo.LAttyR 5(a)(5).

whether the attorney's appearance warranted further delay of the case. On May 12, 2017, the court received a letter from Saha stating that Open Orbit has engaged the services of Ronnie Fischer, Esq. Doc. 27. However, neither Mr. Fischer nor any other attorney has entered an appearance for either Open Orbit or Ghosh. The court therefore proceeds with this Recommendation.

*I. Defendant Ghosh's Motion*

Ghosh requests relief from the arbitration award that Dish seeks in this action to confirm against him, and argues among other things that he was not a party in the arbitration. Doc. 7 ¶ 7. Because he is *pro se* and not a lawyer, the court liberally construes Ghosh's filings. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). However, the court cannot advocate for a *pro se* litigant. *Id.*

Ghosh brings the motion pursuant to Rule 12. Both sides attached documents to their briefs on Ghosh's motion for relief, but Ghosh's motion can be resolved by considering only the Application and the documents that Dish attached to it. The court can consider the attachments to the Application at the Rule 12(b)(6) phase without converting to summary judgment. *Tal*, 453 F.3d at 1264 n. 24 (“Exhibits attached to a complaint are properly treated as part of the pleadings for purposes of ruling on a motion to dismiss.”). *See also Gee v. Pacheco*, 627 F.3d 1178, 1186

(10th Cir. 2010). The court therefore does not consider the exhibits attached to the parties' briefs, and thus considers Ghosh's motion under Rule 12(b)(6). That rule provides that a court may dismiss a complaint for "failure to state a claim upon which relief can be granted."

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). The court construes the fact allegations and reasonable inferences from them in the light most favorable to the non-moving party. *Sanchez v. Hartley*, 810 F.3d 750, 754 (10th Cir. 2016).

The arbitration award is attached to Dish's Application. It is the "Final Award" dated July 7, 2016 in *Dish Network L.L.C., Claimant v. Open Orbit Corporation, Respondent*, American Arbitration Association Case # 01-15-0004-1330, by Federico C. Alvarez, Arbitrator. Doc. 1-8. Dish alleges that it "initiated arbitration against Open Orbit and Mr. Ghosh on July 1,

2015,” and that on “November 20, 2015, the American Arbitration Association formally appointed Federico C. Alvarez . . . to adjudicate the arbitration proceeding between DISH, Open Orbit and Sujit Ghosh.” Application, Doc. 1 ¶¶ 10, 11. However, Ghosh is not named as a respondent in the Final Award, nor in any of the other orders attached to the Application. Doc. 1-4 (order #3, March 14, 2016); Doc. 1-5 (order #6, March 24, 2016); Doc. 1-6 (order #7, April 5, 2016); Doc. 1-7 (interim award, June 22, 2016). Indeed, in Order #3, the arbitrator states:

By letter dated February 25, 2016, Sujit Ghosh requests that the Arbitrator remove his “name from this case” since he is neither an officer or [sic] shareholder of Respondent Open Orbit Corporation (“Open Orbit.”) The Arbitrator interprets this request as two parts. The first is a request to be excluded from participation in this arbitration as a witness, as *he is not a party to this arbitration*. The next is a request to nullify a March 12, 2012 Personal Guaranty that Mr. Ghosh executed in favor of Claimant Dish Network L.L.C. (“DISH.”) As described below, the Arbitrator denies both requests.

Doc. 1-4 at p. 1 (emphasis added). After Ghosh again filed the same request again, the arbitrator further states:

For future purposes, the Arbitrator explains that, if Mr. Ghosh cannot show a written agreement signed by DISH that releases him from his Personal Guaranty, any new requests

for this same relief will fail. The Arbitrator will no longer respond to new requests by Mr. Ghosh that are similarly deficient, having now done so three times. *To do so would only impose unnecessary expense on the Parties, which Mr. Ghosh is not presently financing.*

Out of consideration for the Parties, the Arbitrator will not submit a bill for this Order #7.

Doc. 1-6 at p. 1 (order #7, emphasis added). The Final Award specifies that it is against only one respondent, Open Orbit:

On June 22, 2016, the Arbitrator issued an award in favor of . . . DISH . . . as against Respondent Open Orbit Corporation (“Open Orbit”) of damages in the amount of \$177,817.24. \* \* \* [T]he Arbitrator exercises his discretion to supplement the award of damages to . . . DISH . . . with an additional award . . . against Respondent Open Orbit Corporation. \* \* \* The Arbitrator also exercises his discretion to supplement the award to . . . DISH . . . with an additional award . . . against Respondent Open Orbit Corporation. \* \* \* Therefore, the sum of the above components constitutes the total Final Award in the amount of \$220,609.54 in favor of . . . DISH . . . as against Respondent Open Orbit Corporation.

Doc. 1-8 at pp. 1, 2. Thus, the arbitrator found that Open Orbit was the sole respondent, and that Ghosh was not a party.

As Dish recognizes, except in limited circumstances, the court cannot modify the arbitrator's findings.

Absent extraordinary circumstances, which are not present here, a court may not alter the findings, conclusions, or award of an arbitrator[or].... An award may be vacated or amended only for reasons enumerated in the Federal Arbitration Act at 9 U.S.C. § 10, which include arbitrators acting in excess of their powers.

*White River Vill., LLP v. Fid. & Deposit Co. of Maryland*, No. 08-cv-00248-REB-MEH, 2014 WL 942998, at \*3 (D. Colo. Mar. 10, 2014) (citing *Hollern v. Wachovia Sec., Inc.*, 458 F.3d 1169, 1172 (10th Cir. 2006)). Dish has not argued that circumstances permit the court to modify or vacate the arbitrator's finding that Ghosh was a non-party. Dish nonetheless argues that it

specifically pled in the "Demand for Arbitration" that Ghosh is responsible for the monies defrauded by Open Orbit because he 'personally, unconditionally and irrevocably guarantee[d] the full and timely performance of and by [Open Orbit] for all purposes under the Retailer Agreement' pursuant to the terms of the Personal Guaranty. (See Application to Confirm ¶¶ 9–10; Motion for Relief ¶ 7.) A contract that Ghosh describes as an 'integral part of the Retailer Agreement.' (See Motion for Relief ¶ 6.)

Doc. 13 (Response to Ghosh's motion) at p. 7. Dish further notes that Ghosh recognized his guaranty

agreement contained an arbitration clause and that Ghosh himself argued the arbitrator had the authority to resolve the guaranty dispute. *Id.* at p. 3.

Dish did not attach the demand for arbitration to its Application or its response brief. The paragraphs in its Application that Dish cites do not allege that Dish's demand actually named or served Ghosh as a respondent. Application, Doc. 1 ¶ 9 ("Sujit Ghosh entered into the Personal Guaranty with DISH to "personally, unconditionally and irrevocably guarantee[] the full and timely performance of and by [Open Orbit] for all purposes under the Retailer Agreement.""). As noted above, in Paragraphs 10 and 11 of the Application, Dish alleges that it initiated the underlying arbitration against both Open Orbit and Ghosh, but the arbitrator's orders find that Open Orbit was the sole respondent and Ghosh was not a party.<sup>2</sup> Having attached the arbitral orders to its Application, Dish's allegation that it arbitrated against Ghosh is not plausible. Nor does Paragraph 7 of Ghosh's motion support that Dish sought relief against him in the arbitration. In that paragraph, Ghosh states that "DISH initiated arbitration on July 1st 2015 against Open Orbit Corporation. DISH didn't initiate any arbitration against SUJIT GHOSH as an individual." Doc. 7 (Ghosh's motion) ¶ 7.

Dish also argues that Ghosh made himself a *de facto* respondent by requesting that the arbitrator release him from his personal guaranty. Doc. 13

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<sup>2</sup> The declaration in support of the Application does not assert that Ghosh was a party in the arbitration. Doc. 1-9.

(response) at *e.g.*, p. 8. Ghosh's requests to the arbitrator do not change the fact that the arbitrator found him to be a non-party. Dish also cites four cases for the proposition that "a party cannot 'await the outcome and then later argue that the arbitrator lacked authority to decide the matter," (doc. 13 at p. 9) but this presumes, rather than shows, that Ghosh was a party to the arbitration. In *Lewis v. Circuit City Stores, Inc.*, 500 F.3d 1140, 1149 (10th Cir. 2007); *AGCO Corp. v. Anglin*, 216 F.3d 589, 593 (7th Cir. 2000); and *Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Bodylines Inc.*, 320 F.3d 362, 368 (2d Cir. 2003), the person who later objected to an arbitrator's authority was clearly a named party in the arbitration. In *Slaney v. International Amateur Athletic Federation*, 244 F.3d 580 (7th Cir. 2001), the plaintiff appears to have formally joined an arbitration as a party, withdrawing after an interim ruling imposed a burden of proof on her. *Id.* at 587. The issue was not whether the arbitral decision could be confirmed against the plaintiff, but rather, whether claim preclusion under 9 U.S.C. § 201 barred her later suit against the arbitral tribunal for issuing that decision. *Id.* at 587–89. These cases have no bearing on whether the arbitration award can be confirmed against a non-party.

Meanwhile, Dish does not cite any cases regarding requests to confirm an arbitration award against a person who was not a party in the arbitration. The Tenth Circuit does not appear to have addressed this issue. Several courts find that arbitration awards cannot be confirmed against a person who was not a party in the

arbitration unless (a) that person consents, (b) the person seeking confirmation pleads a claim in the confirmation proceeding to extend liability without involving extensive factual issues, or (c) files a separate action. *See, e.g., Orion Ship & Trading Co. v. E. States Petrol. Corp.*, 312 F.2d 299, 301 (2d Cir. 1963) (claim to extend confirmation of arbitration award based on alter ego liability is too complex for court to hear in a confirmation action); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46–47 (2d Cir. 1994) (court could hear claim to extend arbitration award against company as successor in interest to the respondent in the arbitration); *Int'l Bhd. of Elec. Workers, Local No. 265 v. O.K. Elec. Co.*, 793 F.2d 214, 216 (8th Cir. 1986); *Lumber Liquidators, Inc. v. Sullivan*, No. Civ.A. 10-11890-NMG, 2011 WL 5884252, at \*4 (D. Mass. Sept. 27, 2011) (“Even if Wholesale Wood were a party to these proceedings, this court could not confirm an injunction against it because Wholesale Wood was not a party to the arbitration.”); *Dist. Council 1707 v. Ass'n of Black Soc. Workers Day Care*, No. 09 Civ. 5773 (DLC), 2010 WL 1049617, at \*2–3 (S.D.N.Y. Mar. 22, 2010) (parent organization of the respondent in the arbitration agreed to the court confirming the award against parent as well); *cf. Stolt-Nielsen S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 686–87 (2010) (recognizing that arbitrators’ awards should “bind just the parties to a single arbitration agreement” and should not “adjudicate[] the rights of absent parties as well.”); *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1287 (9th Cir. 2009) (“arbitrator lacked the authority to enjoin these non-parties”); *Nationwide Mut. Ins. Co.*

*v. Home Ins. Co.*, 330 F.3d 843, 846 (6th Cir. 2003) (affirming vacation of award because “[a]n arbitration panel may not determine the rights or obligations of non-parties to the arbitration.”).

Here, Ghosh’s contract with Dish contained an arbitration clause, but the arbitrator found that Ghosh was never joined as a party in the arbitration. Accordingly, the court recommends granting in part Ghosh’s motion to the extent it seeks dismissal because he was not a party in the arbitration, and otherwise denying the motion because it raises issues that were not decided in the Final Award. That ruling would not prejudice Dish’s ability to file (a) a separate action against Ghosh on his personal guaranty; or (b) a motion to amend the Application if Dish can do so in accordance with the caselaw that the court notes above, to be filed within 14 days of the district judge adopting this Recommendation.

## *II. Dish’s Motion for Default Judgment Against Open Orbit*

Defendant Open Orbit has not answered or otherwise defended this case. On Dish’s request, the clerk of court entered default pursuant to Federal Rule of Civil Procedure 55(a). Doc. 17 (October 19, 2016). Pursuant to Rule 55(b), after the entry of default against a defendant, the plaintiff may apply for a default judgment. A party is not entitled to entry of default judgment as a matter of right. *Greenwich Ins. Co. v. Daniel Law Firm*, No. 07-cv-02445-LTB-MJW, 2008

WL 793606, at \*2 (D. Colo. Mar. 22, 2008) (quoting *Cablevision of S. Conn. Ltd. P'ship v. Smith*, 141 F. Supp. 2d 277, 281 (D. Conn. 2001)). Even after the entry of default, “it remains for the court to consider whether the unchallenged facts constitute a legitimate basis for the entry of a judgment.” *McCabe v. Campos*, No. 05-cv-00846-RPM-BNB, 2008 WL 576245, at \*2 (D. Colo. Feb. 28, 2008) (citing *Black v. Lane*, 22 F.3d 1395, 1407 (7th Cir. 1994)). “In determining whether a claim for relief has been established, the well-pleaded facts of the complaint are deemed true.” *Id.* The decision whether to enter judgment by default is committed to the sound discretion of the district court. *Olcott v. Del. Flood Co.*, 327 F.3d 1115, 1124 (10th Cir. 2003). “[A] court may not enter a default judgment without a hearing unless the amount claimed is a liquidated sum or one capable of mathematical calculation.” *Niemi v. Lasshofer*, 770 F.3d 1331, 1352 (10th Cir. 2014) (internal quotation marks omitted).

Because the parties agreed to arbitration subject to the Federal Arbitration Act (see *infra*), the court’s review of the Final Award is governed by that statute.

Section 9 of the Federal Arbitration Act (“FAA”) can be broken into the following elements: (1) the parties must have agreed to binding arbitration; (2) the petition to confirm the award must be brought within one year of the award; (3) notice of the petition must be served on the adverse party; and (4) the petition must be brought in an appropriate court. *See* 9 U.S.C. § 9. Provided those elements are met and there are no grounds for vacatur,

modification, or correction as prescribed in §§ 10 & 11 of the Act, the Court “must” enter judgment confirming the award. *Id.*

*Morgan Stanley Smith Barney LLC v. Monaco*, No. 14-CV-00275-RM-MJW, 2014 WL 5353628, at \*1 (D. Colo. Aug. 26, 2014), *report and rec. adopted as modified*, 2014 WL 5390677 (D. Colo. Oct. 21, 2014); *see also Fisher v. Gen. Steel Domestic Sales, LLC*, No. 10-cv-01509-WYD-BNB, 2011 WL 5240372, at \*2 (D. Colo. Oct. 31, 2011).

Confirmation of an arbitration award under § 9 of the FAA is intended to be summary; a district court does not sit to hear claims of factual or legal error by an arbitrator as if it were an appellate court reviewing a lower court’s decision. . . . Thus, arbitral awards must be confirmed even in the face of errors in factual findings, or interpretation and application of the law.

*Morgan Stanley*, 2014 WL 5353628, at \*1 (internal quotation marks and citations omitted, citing *Morrill v. G.A. Mktg., Inc.*, 2006 WL 2038419, at \*1 (D. Colo. July 18, 2006); *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 37–38 (1987); *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997)). Thus, “the standard of review of arbitral awards is among the narrowest known to law. . . . Once an arbitration award is entered, the finality of arbitration weighs heavily in its favor and cannot be upset except under exceptional circumstances.” *White River Vill.*, 2014 WL 976881, at \*1 (internal quotation

marks and citations omitted, citing *Brown v. Coleman Co.*, 220 F.3d 1180, 1182 (10th Cir. 2000); *Burlington N. & Santa Fe R. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562, 567 (10th Cir. 2010)).

The first and fourth elements of 9 U.S.C. § 9 are met – and the court has subject matter jurisdiction over Open Orbit – because its arbitration agreement with Dish provides for binding arbitration subject to the FAA. Doc. 1-2 at § 15.3. The agreement does not specify a particular federal court in which an enforcement action should be filed; in that circumstance, the FAA provides jurisdiction in the judicial district in which the underlying arbitration was filed and the final award was made. 9 U.S.C. § 9. The Final Award was made in this judicial district. The parties also agreed that “any award of the Arbitrator(s) may be entered and enforced as a final judgment in any state or federal court of competent jurisdiction in the United States.” Doc. 1-2 at § 15.3.2.

As to the second element of the statute, Dish filed the Application within one year of the Final Award. Specifically, Dish filed the Application within less than a month of the Final Award issuing. Likewise, the court finds that the third element – notice of the petition must be served on the adverse party – is met. The court finds that Open Orbit was properly served notice of the Application. Doc. 5 (summons returned executed); Doc. 19 at p. 3 (motion for default judgment). “If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like

manner as other process of the court.” 9 U.S.C. § 9. Dish states that it served notice of the Application to Open Orbit by having the sheriff’s office for the County of Westchester, State of New York, personally hand the summons to Ghosh on August 29, 2016 as “authorized to accept” for Open Orbit at the address that Open Orbit registered with the Division of Corporations, New York State Department of State. Docs. 5, 19-7. In Ghosh’s other filings in this case he asserts that he left Open Orbit on December 31, 2012, and since January 1, 2013 has been “neither an officer nor even a shareholder of Open Orbit Corporation.” Doc. 7 at p. 2 ¶ 5. He attaches a 2013 Schedule K-1 of Open Orbit in support of this assertion; the document identifies only Saha as a shareholder. *Id.* at p. 5. The Final Award also refers to Ghosh as the “former president” of Open Orbit. Doc. 1-8 at p. 1.<sup>3</sup>

However, Open Orbit agreed to “waive personal service of all process and . . . consent[ed] that any such service may be made by registered or certified mail directed to Retailer . . . at the Retailer’s business address reported to the state of incorporation.” Doc. 1-2 at § 15.5. *See, e.g., Collins v. D.R. Horton, Inc.*, 361 F. Supp. 2d 1085, 1092 (D. Ariz. 2005), *aff’d*, 505 F.3d 874 (9th Cir. 2007) (service by mail of the notice of application sufficed because “[t]he parties agreed to waive formal service . . . in . . . their . . . agreement[.]”). In addition, Saha (the current officer of Open Orbit)

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<sup>3</sup> Based on the Division of Corporations registration, Ghosh does not appear to be a registered agent for Open Orbit. Doc. 19-7.

has communicated with the court on behalf of Open Orbit regarding both the Application and the motion for default judgment.<sup>4</sup>

Thus, all four elements of § 9 of the FAA are met, and unless the record reflects a basis for vacating or modifying the Final Award under §§ 10 or 11, Dish is entitled to default judgment. 9 U.S.C. § 9 (“the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title”). The court can vacate an arbitration award only where

the award was procured by corruption, fraud, or undue means; . . . there was evident partiality or corruption in the arbitrators, or either of them; . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or . . . where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a)(1)-(4). For ruling on Dish’s motion, the court has reviewed the entire case file – the Application, the arbitrator’s interim and final awards, the

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<sup>4</sup> Dish’s motion for default judgment also reflects service of that motion by certified mail to Open Orbit at two addresses in New York. Doc. 19 at p. 8.

other attachments to the Application, Ghosh's filings and documents attached thereto, and the motion for default judgment with its attachments. The court finds that nothing in the record suggests any basis to vacate the Final Award.

The court can modify an arbitration award only where

there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; . . . the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; . . . the award is imperfect in matter of form not affecting the merits of the controversy.

9 U.S.C. § 11(a)-(c). Based upon the court's review of the court file, with one possible exception regarding the rate of interest after the court enters judgment (an issue that the court does not need to reach, *see infra*), nothing suggests any basis for modifying the Final Award. Thus, the court finds that the Final Award in the amount of \$220,609.54 in favor of Dish should be confirmed against Open Orbit.

Based on the parties' agreement to apply Colorado law, the arbitrator also awarded post-award interest to Dish pursuant to C.R.S. § 5-12-102. Application, Doc. 1 at p. 5 ¶ 20 (citing *Farmers Reservoir & Irrigation Co. v. City of Golden*, 113 P.3d 119, 133 (Colo. 2002) ("In contract actions . . . moratory interest, or prejudgment

interest, is employed to compensate the plaintiff for the monetary losses sustained on wrongfully withheld money or property from the accrual of a claim for relief until entry of judgment"); and C.R.S. § 5-12-102(1)(a)-(b) ("When money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money;" and therefore, "[i]nterest shall be at the rate of eight percent per annum compounded annually for all moneys or the value of all property after they are wrongfully withheld . . . to the date of payment or to the date judgment is entered, whichever first occurs."). Specifically, the arbitrator awarded "eight percent per annum, compounded annually, from July 7, 2016 and until paid." Doc. 1-8 at p. 2.

In its Application and motion, Dish does not request confirmation of eight percent interest to accrue after this court enters judgment. *See, e.g.*, Application at pp. 6-7. "A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." Fed. R. Civ. P. 54(c). Therefore, the court need not address the arbitrator's award of eight percent interest for the post-judgment phase.<sup>5</sup>

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<sup>5</sup> The court does not reach whether the arbitrator's extension of C.R.S. § 5-12-102's interest rate beyond the date that the court enters judgment could be modified due to manifest disregard of the law (or any other grounds). Whether "manifest disregard" continues to be a basis for vacating or modifying an arbitration award is murky at present. *See Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 585 (2008); *Hicks v. Cadle Co.*, 355 F. App'x 186, 195–96 (10th Cir. 2009) (noting but not deciding that issue);

Pursuant to 9 U.S.C. § 13,<sup>6</sup> the court awards post-judgment interest to accrue from the date that judgment enters until the award is paid in full, at the current rate provided on federal court judgments: the “weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of judgment.” 28 U.S.C. § 1961. The court takes judicial notice from the website of the district court for the District of Utah that the applicable weekly average rate for the week ending May 19, 2017 is 1.07%. <http://www.utd.uscourts.gov/documents/int2017.html>.

The Application avers that the Final Award was not satisfied by the Application’s filing date. Doc. 1 at p. 6 ¶ 23. Nothing in the record suggests that Open Orbit or anyone else has paid any portion of the Final Award to date. On October 31, 2016, Saha filed a letter requesting a payment plan for Open Orbit in settlement (doc. 20), a request that he repeated in the May 8, 2017 conference. Dish’s counsel stated that in earlier discussions of settlement, Open Orbit’s attorney (who has not appeared in this case) indicated that no one was able to pay the amount for which Dish offered to settle.

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*Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672, n.3 (2010) (same).

<sup>6</sup> “The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action.” 9 U.S.C. § 13.

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Thus, pursuant to Rule 55(b)(2), the court finds that Dish is entitled to default judgment against Open Orbit in the amount of: \$220,609.54 – the sum awarded in the Final Award dated July 7, 2016 – *plus* \$15,424.54 in post-award, prejudgment interest at eight percent interest per annum (compounded annually, calculated through May 22, 2017), for a total sum of \$236,034.08. The court further finds that Dish is entitled to post-judgment interest at 1.07% until the judgment is paid in full.

Finally, because the court recommends granting leave for Dish to file a motion to amend its Application with respect to Ghosh (if it can do so consistent with the caselaw cited in this opinion), unless the court finds “no just reason for delay,” the default judgment against Open Orbit must wait for final resolution as to Ghosh. Fed. R. Civ. P. 54(b). Dish has not briefed whether circumstances exist that would justify entering judgment against Open Orbit without awaiting a final judgment resolving the action as to Ghosh. The court therefore finds that Dish has not proved that entry of a judgment resolving this action only as to Open Orbit is justified. The court recommends confirming the arbitration award as to Open Orbit but delaying entry of default judgment until after the deadline for Dish to file a motion to amend passes or upon final resolution of any amended application as to Ghosh. *See, e.g., White River Village, 2014 WL 976881, at \*2.*

*III. Conclusion*

It is ORDERED that the clerk of court shall assign this case to a district judge; it is

FURTHER RECOMMENDED that Sujit Ghosh's motion for relief from arbitration award be granted to the extent that Ghosh should be dismissed without prejudice, and without prejudice to Dish filing a motion to amend in accordance with the analysis set forth in this order **within 14 days of the district judge adopting this recommendation**; it is

FURTHER RECOMMENDED that Dish's Application to confirm arbitration award as to Open Orbit be granted and that pursuant to 9 U.S.C. § 9, the Final Award issued by the American Arbitration Association (Federico C. Alvarez, Arbitrator) in AAA Case #01-15-0004-1330 on July 7, 2016 in favor of Dish against Open Orbit be confirmed; and it is

FURTHER RECOMMENDED that Dish's motion for default judgment against Open Orbit be granted but that pursuant to Rule 54(b), entry of judgment should be delayed to await a resolution of any motion to amend its Application that Dish may file with regard to Defendant Ghosh; the court recommends that the clerk of court enter default judgment in favor of Dish against Open Orbit in the amount of \$236,034.08, with post-judgment interest to accrue at 1.07 percent until paid.

### **Advisement to the Parties**

Within fourteen days after service of a copy of the Recommendation, any party may serve and file written objections to the Magistrate Judge's proposed findings and recommendations with the Clerk of the United States District Court for the District of Colorado. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *In re Griego*, 64 F.3d 580, 583 (10th Cir. 1995). A general objection that does not put the District Court on notice of the basis for the objection will not preserve the objection for *de novo* review. “[A] party’s objections to the magistrate judge’s report and recommendation must be both timely and specific to preserve an issue for de novo review by the district court or for appellate review.” *United States v. One Parcel of Real Property Known As 2121 East 30th Street, Tulsa, Okla.*, 73 F.3d 1057, 1060 (10th Cir. 1996). Failure to make timely objections may bar *de novo* review by the District Judge of the Magistrate Judge’s proposed findings and recommendations and will result in a waiver of the right to appeal from a judgment of the district court based on the proposed findings and recommendations of the magistrate judge. *See Vega v. Suthers*, 195 F.3d 573, 579-80 (10th Cir. 1999) (District Court’s decision to review a Magistrate Judge’s recommendation *de novo* despite the lack of an objection does not preclude application of the “firm waiver rule”); *Int’l Surplus Lines Ins. Co. v. Wyo. Coal Refining Sys., Inc.*, 52 F.3d 901, 904 (10th Cir. 1995) (by failing to object to certain portions of the Magistrate Judge’s order, cross-claimant had waived its right to appeal those portions of the ruling); *Ayala*

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*v. United States*, 980 F.2d 1342, 1352 (10th Cir. 1992) (by their failure to file objections, plaintiffs waived their right to appeal the Magistrate Judge's ruling). *But see, Morales-Fernandez v. INS*, 418 F.3d 1116, 1122 (10th Cir. 2005) (firm waiver rule does not apply when the interests of justice require review).

DATED this 25th day of May, 2017.

BY THE COURT:

*s/Craig B. Shaffer*

United States Magistrate Judge

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[SEAL] American Arbitration Association  
*Dispute Resolution Services Worldwide*

**American Arbitration Association**

**FINAL AWARD**

**AAA Case #: 01-15-0004-1330**

**DISH NETWORK L.L.C., Claimant,  
v. OPEN ORBIT CORPORATION, Respondent.**

**Introduction**

On June 22, 2016, the Arbitrator issued an award in favor of Claimant DISH Network L.L.C. (“DISH,”) and as against Respondent Open Orbit Corporation (“Open Orbit”) of damages in the amount of \$177,017.24, incorporated herein by reference.

As prevailing party, DM, pursuant to its Network Retailer Agreement’s section **15.3.3 Arbitration Costs**, is entitled to recover from Respondent “. . . any and all costs, fees and expenses arising from any Arbitration hereunder, including without limitation, all costs, fees and expenses of the arbitrator selected by (or for) the prevailing party, . . . administrative fees, and all other fees involved (including but not limited to reasonable attorneys’ fees of the prevailing party(ies)); . . . ”; and pursuant to the Agreement’s section **17.11 Attorneys’ Fees**, Claimant is also entitled to recover its “. . . costs, expenses and reasonable attorneys’ fees . . . ”

On June 23, 2016, counsel for DISK timely submitted in affidavit claiming \$33,920.00, \$6,100.00 and \$327.55 in attorney fees, arbitration expenses and costs, respectively. On June 30, 2016, Mr. Uday Saha,

for Open Orbit, submitted an email again voicing disagreement with the Interim Award, and Mr. Sujit Ghosh, former president of Open Orbit, submitted a letter again voicing disagreement with a prior order regarding his Personal Guaranty. Thy issues have already been resolved and neither addresses DISH's affidavit.

### Discussion

First, the Arbitrator finds Richard R. Olsen's billing rate of \$200 per hour to be eminently reasonable. The Arbitrator is familiar with billing rates for counsel locally, with almost 30 years of experience of reviewing claims for attorneys' fees as a judge and arbitrator, reviewing outside counsel's bills as a corporate attorney, and billing clients for services rendered as an attorney in private practice.

Next, the Arbitrator finds the hours that counsel invested in this case, totaling 169.6 to be reasonable for the prosecution of this case. Initially, the Arbitrator notes that this case required a review of DISH's detailed audit of its services provided through Open Orbit on an interstate basis. Next, this case required significant attention before the actual hearing.

The Arbitrator notes having issued twelve orders addressing various pre-hearing items. The Arbitrator accommodated Open Orbit once its counsel withdrew from this case, granting some extensions on deadlines. DISH had to seek discovery repeatedly from Open Orbit, which ultimately failed to comply with the

discovery requests. And Open Orbit disregarded a pre-hearing status conference without advising anyone, such that DISH prepared for and appeared at the conference unnecessarily. Last, Open Orbit and its former president submit arguments repeatedly without any additional or even any relevant substance. And, having presided at the hearing the Arbitrator notes that DISH made its presentation efficiently, evidencing appropriate preparation for it.

Accordingly, the Arbitrator finds DISH's claim for \$33,920.00 in attorney fees to be reasonable and necessary for the prosecution of this case. The Arbitrator also finds the costs of \$327.55 for the copying of documents and for postal expenses to be reasonable and awards them to DISH, pursuant to *City of Aurora ex rel. Utility Enterprise v Colorado State Engineer*, 105 P.3d 595 (Colo. 2005).

#### FINAL AWARD

For the reasons described above, the Arbitrator exercises his discretion to supplement the award of damages to Claimant DISH Network L.L.C. of \$177,817.24 with an additional award of \$33,920.00 in reasonable attorney fees and \$327.55 in costs, as against Respondent Open Orbit Corporation.

The Arbitrator also exercises his discretion to supplement the award to Claimant DISH Network L.L.C. with an additional award of its costs of the arbitration that it has incurred, comprised of the administrative fees and expenses of the American Arbitration

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Association of \$5,350.00 and the compensation and expenses of the Arbitrator of \$3,194.75, as against Respondent Open Orbit Corporation.

Therefore, the sum of the above components constitutes the total Final Award in the amount of \$220,609.54 in favor of Claimant DISH Network L.L.C., as against Respondent Open Orbit Corporation.

Pursuant to C.R.S. § 5-12-102, the balance on this Final Award of \$220,609.54 shall accrue post award interest at the rate of eight percent per annum, compounded annually, from July 7, 2016 and until paid.

This Final Award is in full settlement of all claims and counterclaims admitted to this Arbitration. All claims and counterclaims not expressly granted herein are hereby denied.

DATE this 7th day of July 2016.

/s/ Federico C. Alvarez  
FEDERICO C. ALVAREZ, ARBITRATOR

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[SEAL] American Arbitration Association  
*Dispute Resolution Services Worldwide*

**American Arbitration Association**

**Order # 7 on Next Motion**

**Re: Ghosh Personal Guaranty**

**AAA Case #: 01-15-0004-1330**

**DISH NETWORK L.L.C., Claimant,  
v. OPEN ORBIT CORPORATION, Respondent.**

By email dated April 5, 2016, Sujit Ghosh requests the Arbitrators reaction to his requests submitted on March 23 and 29, 2016. In them, Mr. Ghosh seeks to avoid liability arising from his Personal Guaranty executed on behalf of Claimant DISH Network, LLC (“DISH”) and also to be removed as a witness in this matter.

The Arbitrator denied Mr. Ghosh’s first request for this relief in the Arbitrator’s Order of March 14 2016. On March 24, 2016, the Arbitrator denied Mr. Ghosh’s second request of March 23, 2016, which is typically denominated a motion for reconsideration, in the Order # 6, wherein the Arbitrator also denied a similar request by Mrs. Archna Saha.

On March 29, 2016, Mr. Ghosh essentially repeats his requests. However, he pointedly declines to address the basis on which the Arbitrator has previously denied him relief. Specifically, Mr. Ghosh fails to document or even allege that he was relieved of his liability arising from his Personal Guaranty by written agreement

signed by a representative of DISH. Accordingly, the Arbitrator denies Mr. Ghosh's third request.

For future purposes, the Arbitrator explains that if Mr. Ghosh cannot show a written agreement signed by DISH that releases him from his Personal Guaranty, any new requests for this same relief will fail. The Arbitrator will no longer respond to new requests by Mr. Ghosh that are similarly deficient, having now done so three times. To do so would only impose unnecessary expense on the Parties, which Mr. Ghosh is not presently financing.

Out of consideration for the Parties, the Arbitrator will not submit a bill for this Order # 7.

DATED this 5th day of April 2016.

/s/ Federico C. Alvarez  
FEDERICO C. ALVAREZ, ARBITRATOR

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**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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DISH NETWORK, LLC, a  
Colorado limited liability  
company,

Plaintiff - Appellee,

v.

SUJIT GHOSH, an individual  
resident of New York,

No. 18-1131

Defendant - Appellant,

and

OPEN ORBIT CORPORATION,  
a New York company,

Defendant.

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**ORDER**

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(Filed Nov. 6, 2018)

Before **TYMKOVICH**, Chief Judge, **McKAY** and  
**MATHESON**, Circuit Judges.

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This matter is before the court on Appellant's "Request for Rehearing," received but not filed as it was untimely. The "Request for Rehearing" is accepted as a petition for panel rehearing and will be filed as of

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the date of receipt, October 26, 2018. The petition for panel rehearing is denied.

Entered for the Court

/s/ Elisabeth A. Shumaker  
ELISABETH A. SHUMAKER, Clerk

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## **PERSONAL GUARANTY**

In order to induce DISH Network L.L.C., formerly known as EchoStar Satellite L.L.C. (“DISH”), to enter into the DISH Network Retailer Agreement by and between Open Orbit Corp (“Retailer”) and DISH effective as of March 12, 2012 (the “Retailer Agreement”) and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the undersigned guarantor, Sujit Ghosh (“Guarantor”), hereby personally, unconditionally and irrevocably guarantees the full and timely performance of and by Retailer for all purposes under the Retailer Agreement and the Trademark License Agreement attached thereto. Solely for purposes of this Personal Guaranty, “Affiliate” means any person or entity directly or indirectly controlling, controlled by or under common control with another person or entity.

Guarantor hereby waives any and all statutory and common law rights and defenses of guarantors and notices thereto, including without limitation, presentment, notice or dishonor and exhaustion of remedies against Retailer.

This Personal Guaranty, together with any documents and exhibits given or delivered pursuant to this Personal Guaranty, constitutes the entire agreement between the parties to this Personal Guaranty. Except as expressly provided by this Personal Guaranty, no party shall be bound by any communications between them on the subject matter of this Personal Guaranty unless the communication is: (i) in writing; (ii) bears a

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date contemporaneous with or subsequent to the date of this Personal Guaranty; and (iii) is agreed and signed by all parties to this Agreement. Guarantor specifically acknowledges that there are no unwritten side agreements or oral agreements between the parties that alter, amend, modify or supplement this Personal Guaranty. This Personal Guaranty shall inure to the benefit of DISH's assigns, successors, parents, subsidiaries, predecessors and Affiliates.

Any and all disputes, controversies or claims arising out of or in connection with this Personal Guaranty shall be resolved by arbitration (an "Arbitration"). In accordance with both the substantive and procedural laws of Title 9 of the U.S. Code ("Federal Arbitration Act") and the Commercial Arbitration Rules of the American Arbitration Association. The Arbitration shall be initiated by written notice from the initiating party to the other party stating the initiating party's intent to initiate arbitration ("Notice of Arbitration"). The Arbitration shall be conducted in the City and County of Denver, Colorado by a panel of three (3) arbitrators who shall be selected as follows: (i) one arbitrator shall be selected by the claimant(s) within thirty (30) days of sending the Notice of Arbitration; (ii) one arbitrator shall be selected by the respondent(s) within thirty (30) days of the claimant(s) notifying respondent of the identity of claimant's arbitrator; and (iii) the third arbitrator shall be selected by the arbitrators chosen by the claimant(s) and the respondent(s) within thirty (30) days of the appointment of the respondent(s)' arbitrator. The decision of the arbitrators shall

be final and binding on the parties and any award of the arbitrators may be entered and enforced as a final judgment in any state or federal court of competent jurisdiction in the United States. The following shall be borne equally by the parties during any Arbitration hereunder: (i) all administrative costs, fees and expenses assessed or imposed by the person(s) and/or entity administering the arbitration arising from or in connection with such Arbitration; and (ii) all costs, fees and expenses of the arbitrators arising from or in connection with such Arbitration. Notwithstanding the immediately preceding sentence, the party(ies) determined by the arbitrators to be prevailing party(ies) shall be entitled to recover from the non-prevailing party(ies) any and all costs, fees and expenses arising from any Arbitration hereunder, including without limitation all costs of the record or transcripts thereof, if any, administrative fees, and all other fees involved (including without limitation reasonable attorney's fees of the prevailing party(ies)); provided, however, that such costs and expenses may otherwise be allocated in an equitable relief in any state or federal court of competent jurisdiction. DISH may immediately enforce this Agreement upon breach by Retailer without regard to the dispute resolution procedures or claim process requirements set forth in the Retailer Agreement or the Distributor Retailer Agreement(s) by and between Retailer and DISH (if any). Nothing contained herein shall alter, amend or supersede Retailer's requirement to adhere to the Claims for Breach or Default, Mediation and Arbitration provisions set forth in the Retailer Agreement or the Distributor Retailer

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Agreement with respect to any claim by Retailer that it is due any payments, or that any chargeback was incorrect, under the Retailer Agreement, any Promotional Program (as defined in the Retailer Agreement) or Business Rules (as defined in the Retailer Agreement). Such claims by retailers shall be governed by the dispute resolution procedures set forth in the Retailer Agreement.

This Personal Guaranty shall be governed by and construed in accordance with the laws of the State of Colorado, applicable to contracts to be made and performed entirely within the State of Colorado by residents of the State of Colorado, without giving any effect to its conflict of law provisions. The parties and their present and future Affiliates consent to the *in personam* jurisdiction of the United States District Court for the District of Colorado and waive, fully and completely, any right to dismiss and/or transfer any action pursuant to Title 28 U.S.C.S. 1404 or 1406 (or any successor statute). In the event the United States District Court for the District of Colorado does not have subject matter jurisdiction over any such matter, then such matter shall be litigated solely and exclusively before the appropriate state court or competent jurisdiction located in the City and County of Denver, State of Colorado.

Guarantor hereby acknowledges and agrees that, in the event that DISH and/or its Affiliates prevails in any suit or action to enforce or interpret this Personal Guaranty or any provision hereof, DISH and/or its Affiliates shall be entitled to recover its costs, expenses

and reasonable attorney fees, both at trial and on appeal, in addition to all other sums allowed by law.

RETAILER, HEREBY REPRESENTS, WARRANTS AND ACKNOWLEDGES THAT: (A) HIS/HER INDEPENDENT COUNSEL HAS REVIEWED, OR HE/SHE HAS BEEN GIVEN A REASONABLE OPPORTUNITY FOR HIS/HER INDEPENDENT COUNSEL TO REVIEW (BUT DECLINED SUCH REVIEW), THIS PERSONAL GUARANTY; (B) THE TERMS AND CONDITIONS OF THIS GUARANTY, AND EACH AND EVERY PARAGRAPH AND EVERY PART HEREOF, HAVE BEEN COMPLETELY AND CAREFULLY READ BY, AND EXPLAINED TO, HIM/HER; (C) THE TERMS AND CONDITIONS OF THIS GUARANTY ARE FULLY AND COMPLETELY UNDERSTOOD BY EACH PARTY AND EACH PARTY IS COGNIZANT OF ALL OR SUCH TERMS AND CONDITIONS AND THE EFFECT OF EACH AND ALL OF SUCH TERMS AND CONDITIONS; (D) THIS PERSONAL GUARANTY IS MADE AND ENTERED INTO VOLUNTARILY BY GUARANTOR, FREE OF UNIQUE INFLUENCE, COERCION, DURESS, MENACE OR FRAUD OF ANY KIND WHATSOEVER, AND HAS BEEN EXECUTED BY GUARANTOR OF HIS/HER OWN FREE WILL.

IN WITNESS WHEREOF, Guarantor has executed this Personal Guaranty as of this 12th day of March, 2012.

**GUARANTOR**

/s/ Sujit Ghosh

*In his or her individual capacity*

Name: SUJIT GHOSH

Street Address: 613 White Plains Road

City, State, ZIP Code: East Chester, NY 10709

Telephone: 718-429-2583

Fax: 714-464-4496

STATE OF N.Y. )

COUNTY OF QUEENS )

Personally came before me this 12th day of March,  
2012, the above named Sujit Ghosh, to me known to be  
the person who executed the foregoing Personal Guar-  
anty and acknowledged the same. Witness my hand  
and official seal.

/s/ Ira Dorfman

Name: Ira Dorfman

Notary Public

My Commission Expires: \_\_\_\_\_

[SEAL]

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Retailer Number **26910398**

**DISH NETWORK RETAILER AGREEMENT**

This DISH Network Retailer Agreement (this "Agreement") is made and effective as of 1/1/2013 (the "Effective Date"), by and between DISH Network L.L.C. ("DISH"), having a place of business at 9601 S. Meridian Blvd., Englewood, Colorado 80112, and **OPEN ORBIT CORPORATION**, having a place of business at **495 CENTRAL PARK AVE, SCARSDALE, NY 10583** and fax number: **(714) 464-4496** ("Retailer").

**INTRODUCTION**

**A.** DISH is engaged, among other things, in the business of providing digital direct broadcast satellite ("DRS") services and other video, audio, data and interactive programming services under the name DISH Network®.

**B.** Retailer, acting as an independent contractor, desires to become authorized on a non-exclusive basis to market, promote and solicit orders for Programming (as defined below) (an "Authorized Retailer"), in accordance with and subject to the terms and conditions of this Agreement.

**C.** DISH desires to appoint Retailer as an Authorized Retailer in accordance with and subject to the terms and conditions of this Agreement.

## AGREEMENT

**1. DEFINITIONS.** In addition to the terms defined elsewhere in this Agreement, the following definitions shall apply to this Agreement.

**1.1** “Additional Incentives” means Additional Residential Incentives, Additional Residential MDU Incentives, Additional Commercial Incentives and Additional Bulk Incentives, as such terms are defined in Sections 6.2.1, 6.2.2, 6.2.3 and 6.2.4, respectively.

**1.2** “Affiliate” means any person or entity directly or indirectly controlling, controlled by or under common control with another person or entity, provided that DISH’s Affiliates shall not include EchoStar Corporation or any of its subsidiaries.

**1.3** “Agreement” has the meaning set forth in the preamble above.

**1.4** “Any Time” means any time and from time to time.

**1.5** “Authorized Retailer” has the meaning set forth in the introduction above.

**1.6** “Bulk Incentives” means Monthly Bulk Incentives and Additional Bulk Incentives, as such terms are defined in Sections 6.1.4 and 6.2.4, respectively.

**1.7** “Bulk Programming” means the Programming that DISH makes generally available for viewing in Guest Properties and bulk-billed MDU Properties, in each case assuming one hundred percent (100%) penetration, subject to any restrictions (geographic,

blackout or otherwise) as DISH may impose on some or all of such programming services at Any Time in its Solo Discretion. DISH reserves the right to change the Bulk Programming offered and/or any restrictions applicable to such Bulk Programming at Any Time in its Sole Discretion.

**1.8** “Bulk Subscriber Account” means the customer account set up and maintained by DISH for a Qualifying Bulk Subscriber who purchased a DISH System directly from Retailer or leased a DISH System from DISH (the terms of such lease shall be determined by DISH at Any Time in its Sole Discretion), and for whom Eligible Bulk Programming has been activated by DISH and which customer account remains active and in good standing.

**1.9** “Business Rule(s)” means any term, requirement, condition, condition precedent, process or procedure associated with a Promotional Program or otherwise identified as a Business Rule by DISH which is communicated to Retailer by DISH or an Affiliate of DISH either directly (including without limitations via e-mail) or through any method of mass communication reasonably directed to DISH’s retailer base, including without limitation, a “Retailer Char,” e-mail, facts blast or posting on DISH’s retailer web site. Retailer agrees that DISH has the right to modify, replace or withdraw all or any portion of any Business Rule at Any Time in its Sole Discretion, upon notice to Retailer.

**1.10** “Chargeback” means DISH’s right to reclaim Incentives pursuant to the terms and conditions of this Agreement, any

\* \* \*

possessions, excluding Puerto Rico (the “Territory”).

**2.3 Acceptance.** Retailer hereby accepts its appointment as an Authorized Retailer and agrees to use its best efforts to continuously and actively advertise, promote and market Programming and to solicit orders therefor, subject to and in accordance with all of the terms and conditions of this Agreement. Retailer understands that it may hold itself out to the public as an Authorized Retailer of DISH only after fulfilling and for so long as it continues to fulfill, all of the duties, obligations, requirements and other terms and conditions contained in this Agreement and all Business Rules, and only during the Term of this Agreement.

**2.4 Non-Exclusivity.** Retailer acknowledges that: (i) nothing in this Agreement is intended to confer, nor shall it be construed as conferring any exclusive territory or any other exclusive rights upon Retailer; (ii) DISH and its Affiliates make absolutely no statements, promises, representations, warranties, covenants or guarantees as to the amount of business or revenue that Retailer may expect to derive from participation in this Agreement or any Promotional Program; (iii) Retailer may not realize any business, revenue or other economic benefit whatsoever as a result of its participation in this Agreement or any Promotional Program; (iv) nothing contained herein shall be construed as a guarantee of any minimum amount of Incentives or any minimum amount of other payments, income, revenue or other economic benefit in

any form whatsoever; (v) DISH currently offers, and at Any Time, in the future may offer in its Sole Discretion, others the opportunity to act as an Authorized Retailer or to solicit orders for Programming in the same geographic area in which Retailer is located and elsewhere; (vi) DISH and its Affiliates shall be entitled, among other things, to: (a) market, promote and solicit orders for programming, (b) distribute, sell, lease and otherwise transfer possession of receivers, related accessories and other equipment and (c) perform installation and maintenance services (directly and indirectly through subcontractors or otherwise) for receivers, related accessories and/or other equipment, in each case throughout the Territory and in direct or indirect competition with Retailer, without any obligation or liability to Retailer whatsoever, and without providing Retailer with any notice thereof; and (vii) DISH shall be free to cease or suspend provision of the Programming offered in whole or in part at Any Time in its Sole Discretion, and shall incur no liability to Retailer by virtue of any such cessation or suspension.

**2.5 Certain Purchases by Retailer.** In the even that Retailer orders any DISH Systems, related accessories and/or other equipment from Echosphere L.L.C. or any of its Affiliates (collectively, "Echosphere" for purposes of this Section 2.3), Retailer shall order such products by phone order, via Echosphere online ordering or by written purchase order (each, a "Purchase Order") issued during the Term of this Agreement. A Purchase Order shall be a binding commitment by Retailer. Any failure to confirm a Purchase Order shall

not be deemed acceptance by Echosphere. Purchase Orders of Retailer shall state only the: (i) identity of goods; (ii) quantity of goods; (iii) purchase price of goods; and (iv) requested ship date of goods. Any additional terms and conditions stated in a Purchase Order shall not be binding upon, and may be ignored by, Echosphere unless expressly agreed to in writing by Echosphere. In no event shall Echosphere be liable for any delay, or failure to fulfill, any Purchase Order (or any portion thereof), regardless of the cause of such delay or failure. In the event of any conflict between the terms and conditions of a Purchase Order and the terms and conditions of this Agreement, the terms and conditions of this Agreement shall control. In the event of any ambiguity between or among the terms and conditions of this Agreement and the terms and conditions of any Purchase Order, DISH shall have the sole and exclusive authority to interpret and/or make a final determination in its Sole Discretion concerning any issue arising from such ambiguity. Echosphere shall be considered a third party beneficiary of Retailer's obligations under this Agreement. Retailer hereby acknowledges and agrees that neither Echosphere nor any Affiliate of Echosphere has any obligation to repurchase any receivers, related accessories or other equipment sold or otherwise transferred to Retailer by Echosphere or any other DISH Affiliate or third party (including without limitation, a Third-Party Manufacturer) at Any Time and for any reason or no reason.

**2.6 Certain Prohibited Transactions.** Retailer agrees that as a condition precedent to its eligibility to

receive Incentives from DISH, it will not directly or indirectly sell, lease or otherwise transfer possession of a DISH System to any person or entity whom Retailer knows or reasonably should know: (i) is not an end user and/or intends to resell, lease or otherwise transfer it for use by another individual or entity; (ii) intends to use it, or to allow others to use it, to view Residential Programming at a location other than a Residential Location or Institutional/Residential Location; (iii) intends to use it, or to allow others to use it, to view Residential MDU Programming at a location other than a non-bulk-billed MDU Property; (iv) intends to use it, or to allow others to use it, to view Commercial Programming at a location other than a Commercial Location; (v) intends to use it, or to allow others to use it, to view Bulk Programming at a location other than a Guest Property or bulk-billed MDU Property; (vi) intends to use it or to allow others to use it in Canada, Mexico or at any other location outside of the Territory; or (vii) intends to have, or to allow others to have, Programming authorized for a DISH System under a single DISH Network's account that has or will have Programming authorized for multiple receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account, and except in the case of a Guest Property or bulk-billed MDU Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the

method and manner of connectivity authorized in respect of the relevant receiver as set forth in applicable Business Rules. It shall be Retailer's sole and exclusive responsibility to investigate and determine whether any direct or indirect sale, lease or other transfer by Retailer would be in violation of this Section 2.6. In the event that Retailer directly or indirectly sells, leases or otherwise transfers possession of a DISH System to a person or entity who uses it or allows others to use it to: (a) view Residential Programming at a location other than a Residential Location or Institutional/Residential Location; or (b) view Residential MDU Programming at a location other than a non-bulk-billed MDU Property, then Retailer agrees to pay to DISH upon demand: (1) the difference between the amount actually received by DISH for the Programming authorized for the corresponding DISH System, as applicable, and the full applicable commercial rate for such

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precedent to recovery. Notwithstanding the foregoing, with respect solely to a dispute, controversy or claim not otherwise barred or resolved under Section 15.1 above or exempted, under Section 15.4 below that directly arises from or in connection with the automatic termination of this Agreement under Section 10.4 above, the parties acknowledge and agree that either of them shall have the right (but not the obligation) to initiate an Arbitration pursuant to Section 15.3 below without first initiating a Mediation under this Section 15.2.

**15.3 Arbitration.** Except as set forth to the contrary in this Section 15.3 or Section 15.4 below, any and all disputes, controversies or claims between Retailer and/or any of its Affiliates, on the one hand, and DISH and/or any of its Affiliates, on the other hand, including without limitation any and all disputes, controversies or claims arising out of or in connection with this Agreement, including without limitation the validity of Section 15 of this Agreement, the circumstances concerning the execution and delivery of this Agreement (whether via signature or electronic acceptance), and any allegations of fraud in the inducement, or which relate to the parties' relationship with each other or either party's compliance with any Laws, which are not settled through negotiation, the claim process set forth above in Section 15.1, or the mediation process set forth above in Section 15.2, shall be resolved solely and exclusively by binding arbitration (an "Arbitration") in accordance with both the substantive and procedural laws of Title 9 of the U.S. Code ("Federal Arbitration Act") and the Commercial Arbitration Rules of the American Arbitration Association (the "Commercial Arbitration Rules"). In the event of an conflict or inconsistency between or among the Federal Arbitration Act, the Commercial Arbitration Rules, and/or the terms and conditions of this Agreement, such conflict or inconsistency shall be resolved by giving precedence in the following order: (i) this Agreement; (ii) the Federal Arbitration Act; and (iii) the Commercial Arbitration Rules. In consideration of DISH entering into this Agreement with Retailer, Retailer agrees that it will not serve as a class representative in any class action

lawsuit brought by any person or legal entity concerning this Agreement in any respect. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THE LAST SENTENCE OF SECTION 15.2 ABOVE WITH RESPECT TO MEDIATION, NEITHER PARTY NOR ANY OF ITS AFFILIATES MAY BRING ANY DEMAND FOR ARBITRATION AGAINST THE OTHER PARTY AND/OR ANY OF ITS AFFILIATES IF IT AND/OR ANY OF ITS AFFILIATES HAS FAILED TO FULLY COMPLY WITH THE PROCEDURES SET FORTH IN SECTIONS 15.1 AND 15.2 OF THIS AGREEMENT; provided, however, that nothing contained herein (excluding the provisions of Section 2.10 above, which shall apply in full force and effect) shall limit or restrict the rights of either party and/or any of its Affiliates to file a Notice of Arbitration and/or bring a request for injunctive relief against the other party and/or any of its Affiliates for any violations of Section 2.2, 2.6, 2.7, 2.8, 2.12, 5, 6.10, 7.2, 7.3, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 11 and/or 14 of this Agreement, or any provision of the Trademark License Agreement (without limitation of any rights therein) or any Other Agreement.

**15.3.1 Initiation of Arbitration; Selection of Arbitrators.** The Arbitration must be initiated within ninety (90) days following the final day of the Mediation, or one hundred fifty (150) days following the Notice of Mediation in the event that the Mediation is not concluded within sixty (60) days following the Notice of Mediation, and shall be initiated by written notice from the initiating party to the other party

pursuant to Section 17.10 below stating the initiating party's intent to initiate arbitration ("Notice of Arbitration"). The Arbitration shall be conducted in the City and County of Denver, Colorado by a panel of three (3) arbitrators who shall be selected as follows: (i) one (1) arbitrator shall be selected by the claimant(s) within thirty (30) days following sending the Notice of Arbitration ("Claimant's Designated Arbitrator"); (ii) one (1) arbitrator shall be selected by the respondent(s) within thirty (30) days following the claimant(s) notifying respondent of the identity of claimant's arbitrator ("Respondent's Designated Arbitrator"); and (iii) the third (3rd) arbitrator shall be selected by the arbitrators chosen by the claimant(s) and the respondent(s) within thirty (30) days following the appointment of the respondent(s) arbitrator ("Designated Nontrial Arbitrator"). The parties acknowledge and agree that each party shall have the option, exercisable upon written notice to the other party, to designate the arbitrator selected by such party as a non-neutral arbitrator in which event such arbitrator shall not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence. Notwithstanding the foregoing, in the event that either party fails to timely select an arbitrator pursuant to Section 15.3 of this Agreement: (a) such party shall be deemed to have waived its right to a three (3) member arbitration panel and shall be required to participate in the arbitral proceedings with the one (1) arbitrator selected by the other party without any objection; and (b) the one (1) arbitrator selected by the other party shall thereunder be deemed a neutral arbitrator with

whom neither party shall communicate *ex parte* concerning the Arbitration.

**15.3.2 Authority of the Arbitrator(s); Awards.** The parties hereby agree that the arbitrator(s) selected pursuant to Section 15.3.1 above (the “Arbitrator(s)”) are not authorized to: (i) conduct “class arbitration” in any form; and/or (ii) arbitrate any dispute on a representative basis in any form. The parties hereby agree that the Arbitrator(s) have the authority to entertain and rule upon dispositive motions, including without limitation default judgments as governed by Rule 55 of the Federal Rules of Civil Procedure, motions for summary judgment as governed by Rule 56 of the Federal Rules of Civil Procedure and motions to dismiss as governed by Rule 12 of the Federal Rules of Civil Procedure. The decision of the Arbitrator(s) shall be final and binding on the parties and, notwithstanding the last sentence of this Section 15.3.2, any award of the Arbitrator(s) may be entered and enforced as a final judgment in any state or federal court of competent jurisdiction in the United States. The parties agree that in no event shall be Arbitrator(s)’ decision include a recovery under any theory of liability, or award in any amount not expressly allowed under this Agreement, any Promotional Program or applicable Business Rules, including without limitation, punitive or treble damages. In furtherance (and without limitation) of the foregoing, any award made by the arbitrator(s) shall be within the limitation set forth in Section 12 above. The parties further agree that the Arbitrator(s) may not award damages, injunctive relief or any

other remedy to any person or legal entity who is not present at the Arbitration or who does not submit proof of any alleged damages at the Arbitration. Unless otherwise agreed by the parties in writing, all pleadings, discovery (oral and written), decisions, orders and awards resulting from the Arbitration shall be kept confidential.

**15.3.3 Arbitration Costs.** The parties agree that, subject to this Section 15.3.3, each of them will bear their own costs and expenses arising from or in connection with an Arbitration pursuant to this Agreement including without limitation all costs and expenses of the individual arbitrator selected by (or for) each party. Accordingly, the party initiating such Arbitration shall pay all costs, fees, and expenses of Claimant's Designated Arbitrator, and the responding party shall pay all costs, fees, and expenses of Respondent's Designated Arbitrator. Notwithstanding the foregoing, the following shall be borne equally by the parties during any Arbitration hereunder: (i) all administrative costs, fees and expenses assessed or imposed by the entity administering the arbitration arising from or in connection with such Arbitration; and (ii) all costs, fees and expenses of the Designated Neutral Arbitrator arising from or in connection with such Arbitration. Notwithstanding the immediately preceding sentence, the party(ies) determined by the Arbitrator(s) to be the prevailing party(ies) shall be entitled to recover from the non-prevailing party(ies) any and all costs, fees and expenses arising from any Arbitration hereunder, including without limitation, all costs, fees and

expenses of the arbitrator selected by (or for) the prevailing party, all costs of the record or transcripts thereof, if any, administrative fees, and all other fees involved (including but not limited to reasonable attorneys' fees of the prevailing party(ies); provided, however, that such costs and expenses may otherwise be allocated in an equitable manner as determined by the Arbitrator(s).

**15.3.4 Remedies for Non-Participation.**

The parties acknowledge and agree that: (i) in addition to (and without limitation of) the other provisions of this Section 15, each party is relying upon the provisions of this Section 15.3 to efficiently address and resolve any and all disputes, controversies and claims arising out of or relating to this Agreement and (ii) any failure or refusal by a party (the "Non-Participating Party") to: (a) pay any amount to the American Arbitration Association ("AAA") when due ("Arbitration Payment Default") or (b) otherwise participate in or attend an Arbitration that has been properly initiated pursuant to this Section 15 ("Other Arbitration Default") will cause substantial and irreparable harm and injury to the other party (the "Participating Party"), for which monetary damages alone would be an inadequate remedy, including without limitation the termination of arbitral proceedings by the AAA. Accordingly, each party agrees that, in the event of an Arbitration Payment Default or Other Arbitration Default (each a "Non-Participation Event"), the Participating Party shall have the right (but not the obligation), in addition to (and without limitation of)

any other rights and remedies available to such party at law, in equity, under contract (including without limitation this Agreement) or otherwise (all of which are hereby expressly reserved), to obtain immediate relief from the Arbitrator(s) or a court of competent jurisdiction located in the State of Colorado, as delineated in Section 15.5 below, in each case in the form of specific performance and/or a preliminary or permanent injunction, whether prohibitive or mandatory, against any violation or threatened violation of this Section 15.3, and without the necessity of posting or filing a bond or other security to restrain the threatened or actual violation of this Section 15.3 by the Non-Participating Party. In addition to (and without limitation of) the foregoing, in the event of a Non-Participation Event, the Participating Party shall have the option, exercisable upon written notice to the Non-Participating Party, to have the underlying dispute, controversy or claim resolved solely and exclusively before a court of competent jurisdiction located in the State of Colorado, as delineated in Section 15.5 below. In the event that the Participating Party elects to resolve the underlying dispute, controversy or claim in court pursuant to this Section 15.3.4, the parties agree that the Non-Participating Party shall be deemed to have waived its right to pursue any affirmative claims or counterclaims in such court proceeding as fully participating in an Arbitration pursuant to this Section 15.3 is a condition precedent to recovery.

**15.4 Exceptions.** Notwithstanding the foregoing, any request by either party for preliminary or

permanent injunctive relief, whether prohibitive or mandatory, shall not be subject to mediation or arbitration and may be adjudicated solely and exclusively in the United States District Court for the District of Colorado or in the appropriate state court of competent jurisdiction located in Arapahoe County, Colorado pursuant to Section 15.5 below; provided, however, that nothing contained herein (excluding the provisions of Section 2.10, which shall apply in full force and effect) shall limit or restrict the rights of either party and/or any of its Affiliates to file a Notice of Arbitration and/or bring a request for injunctive relief against the other party and/or any of its Affiliates for any violations of Section 2.2, 2.6, 2.7, 2.8, 5, 6.3, 7.2, 7.3, 9.1, 9.2, 9.3, 9.4, 9.5, 9.8, 11 or 14 or any provision of any Other Agreement.

**15.5 Choice of Law; Exclusive Jurisdiction.**  
The relationship between the parties and their present and future Affiliates, including without limitation all disputes, controversies or claims, whether arising in contract, tort, under statute or otherwise, shall be governed by and construed in accordance with the laws of the State of Colorado, applicable to contracts to be made and performed entirely within the State of Colorado by residents of the State of Colorado, without giving any effect to its conflict of law provisions. In the event that a lawsuit is brought for injunctive relief pursuant to Section 15.2, 15.3, or 15.4 above or as otherwise permitted in clause (C) of Section 15.2 or the penultimate sentence of Section 15.3.4, such lawsuit shall be litigated solely and exclusively before the

United States District Court for the District of Colorado. The parties and their present and future Affiliates consent to the *in personam* jurisdiction of the United States District Court for the District of Colorado and the appropriate State Court located in Arapahoe County, State of Colorado for the purposes set forth in this Section 15 and waive, fully and completely, any right to dismiss and/or transfer any action pursuant to Title 28 U.S.C. Section 1404 or 1406 (or any successor statute). Further, Retailer agrees to waive personal service of all process and hereby consents that any such service may be made by registered or certified mail directed to Retailer at the address listed on the first page of this Agreement, or such other address as Retailer may designate in writing delivered to DISH in accordance with Section 17.10.1 below, or at the Retailer's business address reported to the state of incorporation, if applicable. For purposes of Section 15 of this Agreement, in the event that the United States District Court for the District of Colorado does not have subject matter jurisdiction over any matter for which it is specified herein as the proper venue then such matter shall be litigated solely and exclusively before the appropriate state court of competent jurisdiction located in the City and County of Denver, Colorado.

**15.6 Survival.** The provisions of this Section 15 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

## **16. INSURANCE**

**16.1** Retailer shall, at its sole cost and expense, procure and maintain throughout the Term of this Agreement the following insurance coverages:

**16.1.1** Workers' Compensation or similar employee benefit act coverage with statutory limits as prescribed by the laws of all states in which Retailer conducts business operations in connection with this Agreement and Employers' Liability coverage with limits and a deductible that are reasonable and adequate for businesses involved in the sale, installation, service and repair of consumer electronics.

**16.1.2** Commercial General Liability coverage including, without limitation, coverage for Premises/Operations, Product/Completed Operations, Blanket Contractual Liability, Independent Contractors, Broad Form Property Damage, and Personal/Advertising Injury with limits and a deductible that are reasonable and adequate for businesses involved in the sale, installation, service and repair of consumer electronics.

**16.1.3** Commercial Automobile Liability coverage which includes coverage for all owned, hired, and non-owned vehicles with limits and a deductible that are reasonable and adequate for businesses involved in the sale, installation, service and repair of consumer electronics.

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**16.2** All such policies and coverages shall: (i) be primary and non-contributory, and issued by insurers licensed to do business in all states in which Retailer

conducts business operations in connection with this Agreement; (ii) be endorsed to provide DISH at least thirty (30) days prior notification of cancellation or material change in coverage; (iii) name DISH as an additional insured; and (iv) be endorsed to provide DISH with written notice of Retailer's failure to renew any coverage not later than the anniversary date for each coverage. All such insurance shall be evidenced by a certificate of insurance acceptable to DISH, which shall be provided to DISH upon request.

**16.3** All insurance policies required by this Section 16 (except Workers' Compensation) shall designate DISH, DNSLLC, their Affiliates, and their respective directors, officers, and employees (all hereinafter referred to in this Section 16.3 as "Company") as additional insureds. All such insurance policies shall be required to respond to any claim and pay any such claim prior to any other insurance or self-insurance which may be available. Any other coverage available to Company shall apply on an excess basis. Retailer understands and agrees that DISH, DNSLLC and their Affiliates and their respective directors, officers and employees are third party beneficiaries of Retailer's obligations under this Section 16. No deductible amount on any insurance policy required by this Section 16 shall exceed ten percent (10%) of the coverage amount of the policy.

**17. MISCELLANEOUS.**

**17.1 Waiver.** Except as otherwise expressly set forth to the contrary herein, the failure of any party to insist upon strict performance of any provision of this Agreement shall not be construed as a waiver of any subsequent breach of the same or similar nature. In addition to (and without limitation of) the foregoing, the failure of DISH or any of its Affiliates to insist upon strict performance of any provision of any agreement between DISH and/or any of its Affiliates on the one hand and another retailer on the other hand, shall not be construed as a waiver of DISH's right to insist upon strict performance of each and every representation, warranty, covenant, duty and obligation of Retailer hereunder. In addition to (and without limitation of) the foregoing, the election of certain remedies by DISH or any of its Affiliates with respect to the breach or default by another retailer of any agreement between DISH and/or any of its Affiliates on the one hand and such other retailer on the other hand shall not be deemed to prejudice any rights or remedies that DISH may have at law, in equity, under contract (including without limitation this Agreement) or otherwise with respect to a similar or different breach or default hereunder by Retailer (all of which are hereby expressly reserved).

**17.2 Successor Interests; No Assignment by Retailer; Third-Party Beneficiaries.** This Agreement is binding upon the heirs, legal representatives, successors and permitted assigns of DISH and Retailer. In addition to (and without limitation of) the

prohibition against assignment of payments set forth in Section 6.14 above, neither party shall assign this Agreement without the prior written consent of the other party, except that DISH may assign this Agreement to any of its Affiliates in whole or in part and at any time and from time to time in DISH's Sole Discretion without the consent of Retailer. Because this Agreement is made and entered into by DISH in reliance on the financial, business and personal reputation of Retailer and its ownership and management, any merger, reorganization (including without limitation any change of form of entity, for example changing from a corporation to an LLC) or consolidation of Retailer shall be deemed an assignment requiring DISH's consent

\* \* \*

the case of Retailer Chats) shall constitute the giving thereof. It shall be Retailer's sole responsibility to keep itself informed of all notices, changes and other information set forth in any facts class, e-mail, "Retailer Chat" or posting on DISH's retailer web site.

**17.10.3 Survival.** The provisions of Section 17.10 of this Agreement shall survive expiration or termination of this Agreement (for any reason or no reason) indefinitely.

**17.11 Attorneys' Fees.** In the event of any suit, action or arbitration between Retailer and/or of its Affiliates, on the one hand, and DISH and/or any of its Affiliates, on the other hand, including without any and all suits, actions, or arbitrations to enforce this

Agreement, any Business Rules, any Promotional Program or any provisions herein or thereof, subject to Section 15.3.3 above, the prevailing party shall be entitled to recover its costs, expenses and reasonable attorneys' fees, at arbitration, at trial and on appeal, in addition to (and without limitation of) all other sums allowed by law. The provisions of this Section 17.11 shall survive expiration or termination of this Agreement (for any reason or no reason) indefinitely.

**17.12 Modifications.** Retailer acknowledges that DISH competes in the multi-channel video distribution market, which is highly competitive, fluid and volatile and that DISH must make changes to its marketing, promotion and sales of products and services from time to time to stay competitive. Therefore, Retailer agrees that DISH may, at Any Time in its Sole Discretion, change, alter, delete, add or otherwise modify Incentives, Incentive schedules, Incentive structures, Promotional Programs, and/or Business Rules, payment terms or the Chargeback rules associated therewith, upon notice to Retailer, without the need for any consent written or otherwise, from Retailer. IF ANY SUCH CHANGE, ALTERATION, DELETION, ADDITION OR OTHER MODIFICATION IS MATERIAL AND UNACCEPTABLE TO RETAILER, RETAILER AGREES THAT ITS SOLE AND EXCLUSIVE REMEDY IS TO TERMINATE THIS AGREEMENT. RETAILER'S CONTINUED PERFORMANCE UNDER THIS AGREEMENT FOLLOWING RECEIPT OF NOTICE OF A CHANGE, ALTERATION, DELETION, ADDITION OR OTHER MODIFICATION.

**17.13 Interstate Commerce.** The parties acknowledge that the transactions contemplated by this Agreement involve interstate commerce.

**17.14 General Provisions.** The exhibit(s) hereto and hereby incorporated into this Agreement by reference in their entirety.

**17.15 Power and Authority.** Retailer represents and warrants to DISH that it has full power and authority to enter into this Agreement and perform its obligations hereunder and that its execution and delivery of this Agreement (whether via signature or electronic acceptance) and performance of its obligations hereunder does not and will not violate any Laws or result in a breach or, or default under, the terms and conditions of any contract or agreement by which it is bound.

**17.16 Consent to Receive Faxes.** Retailer hereby acknowledges that this Agreement serves as Retailer's express written consent to receive facsimile transmittals from DISH and its Affiliates, including without limitation facsimile transmittals which contain unsolicited advertisements. For the avoidance of doubt, such permitted facsimile transmittals from DISH or any of its Affiliates may include without limitation information about the commercial availability or quality of products, goods or services; notices of conferences and seminars; and new product, programming or promotion announcements. This written consent shall include (without limitation) all facsimile

transmittals regulated by future Federal Communications Commission action.

**17.17 Waiver of Evidence.** No course of dealing, course of performance or usage of trade shall be considered in the interpretation or enforcement of this Agreement. Both parties waive any right they may have to introduce evidence of any such course of dealing, course of performance or usage of trade.

**17.18 Correction of Spelling, Typographical or Clerical Errors.** Retailer hereby grants to DISH a limited power of attorney to correct and/or execute or initial all spelling, typographical and clerical errors discovered in this Agreement, the Trademark License Agreement, any Other Agreement and any amendments to any of the foregoing, including without limitation, errors or inconsistencies in the spelling of Retailer's name, address, phone number or the number of the spelling of the name or title of the duly authorized representative signing or electronically accepting each such agreement on Retailer's behalf.

**17.19 Alteration of Terms and Conditions.** Retailer acknowledges and agrees that, because among other things DISH has thousands of authorized retailers, it is in each party's best interest to establish an orderly process for Retailer to propose additions, deletions, changes, alterations and/or other modifications to the terms and conditions set forth in the Agreement and for DISH to receive such proposals prior to the parties entering into an agreement. Therefore, Retailer further acknowledges and agrees that any additions,

deletions, changes, alterations and/or other modifications to the terms and conditions of this Agreement proposed by Retailers must be sent to DISH solely and exclusively via an e-mail message addressed to proposedchanges@dish.com (or such other e-mail address(es) as may be expressly specified by DISH at Any Time in its Sole Discretion in applicable Business Rules) with the subject line "Proposed Changes to DISH Network Retailer Agreement" (a "Proposal") and that such Proposals must be received by DISH prior to Retailer executing this Agreement (whether via signature or electronic acceptance). RETAILER ACKNOWLEDGES AND AGREES THAT (I) ANY AND ALL PROPOSALS RECEIVED BY DISH AFTER RETAILER HAS EXECUTED THIS AGREEMENT SHALL BE OF

\* \* \*

The parties have caused this Agreement to be signed and/or accepted electronically by their duly authorized representatives effective as of the date first written above.

**DISH NETWORK L.L.C.**

By: /s/ \_\_\_\_\_  
Name:  
Title:

**RETAILER**

Retailer Number: **26910398**

Retailer Company Name:  
**OPEN ORBIT CORPORATION**

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Street Address: **495 CENTRAL PARK AVE**  
(please print)

City, State, Zip Code: **SCARSDALE, NY 10583**  
(please print)

Fax Number: **(714) 464-4496**  
(for notice to Retailer pursuant to Section 17.10.2 of  
this Agreement)  
(please print)

By: /s/ \_\_\_\_\_  
(signature)  
Name (please print): **SUJIT GHOSH**  
Title (please print): **PRESIDENT**  
\_\_\_\_\_

**THE DEED OF INDEMNITY**

THIS DEED of indemnity made \_\_\_\_\_ on this 1st day of January, 2013 between Sujit Ghosh resident of 613 White Plains Road, Eastchester, NY 10709, USA(hereinafter referred to as “A”) of the ONE PART and Uday Shankar Saha resident of 1445 Lakeside Estates Drive, STE 3103, Houston, TX 77042 (hereinafter referred to as “B”) of the OTHER PART.

WHEREAS A and B had entered into a under the name and style of Open Orbit Corporation, situated at 495 Central Park Avenue, STE 204, Scarsdale, NY 10583

AND WHEREAS certain A decided to leave the partnership and so as the company dated December 31st 2012.

AND WHEREAS A and B dissolved the said partnership with effect from vide Deed of Dissolution dated January 1st 2013.

AND WHEREAS the said A has requested B to indemnity the said A from any claim which may be made against him by the creditors of the partnership, to which B has agreed.

NOW THIS DEED WITNESSES THAT;

1. In pursuance of the said agreement and in consideration of the Company matters, the said B hereby agrees to indemnify and keep indemnified the said A, his heirs, successors or assigns from and against all claims, demands, actions, proceedings, losses, damages, law suits, recoveries, judgments, costs, charges and

expenses which may be made or brought or commenced against the said A or his heirs, successors or assigns or which the said A or his heirs, successors or assigns may or may have to bear, pay, or suffer directly or indirectly on account of the debts and liabilities of the said dissolved partnership for the period upto the date of dissolution of partnership and thereafter.

2. The said B hereby covenants that he shall pay the income-tax, sales tax in respect of the partnership business upto the date of dissolution, but A shall be liable to pay income-tax on his income as a partner up to the date of dissolution of the partnership and liability on that account is not covered by indemnity herein contained.

/s/ [Illegible]

3. The said B hereby releases the said A from all sorts of personal guarantees issued on behalf and for any purpose related to the company Open Orbit Corporation. The said B also requests though this bond to all and any concerned party or parties to release said A from all kind of personal guarantee and said B will be responsible for all those personal guarantee in lieu of said A.

IN WITNESS WHEREOF, the parties hereto have signed these presents on the day, and year hereinabove written.

/s/ Sujit Ghosh  
Signed and delivered by the  
within named A

**dish**  
BUSINESS

October 23, 2014

*VIA CERTIFIED MAIL AND VIA FACSIMILE TO  
[FAX NUMBER IN THE DISH NETWORK RE-  
TAILER AGREEMENT]*

Open Orbit Corporation  
Sujit Ghosh  
495 Central Park Avenue  
Scarsdale, NY 10583

Re: Demand to Cease and Desist/Notice of Breach  
of the DISH Network Retailer Agreement

Dear Mr. Ghosh

As you are aware, on September 29, 2014, DISH Network L.L.C. (“DISH”) terminated its Retailer Agreement with Open Orbit Corporation (“Retailer”) based in part on Retailer’s breach of Section 9.2. DISH has subsequently learned that Retailer is converting and/or attempting to convert existing DISH Network Subscribers to services offered by other DBS providers (the “Conversion Activities”) in further breach of Retailer’s surviving obligations under Section 9.4 of the Retailer Agreement.

DISH hereby demands that Retailer immediately cease and desist any and all Conversion Activities. In addition to breach of contract, Retailer’s Conversion Activities may also give rise to claims against Retailer for, among others: (1) breach of the duty of good faith and fair dealing; (2) unjust enrichment; (3) intentional

interference with contractual obligations; (4) civil conspiracy; (5) nondisclosure/concealment; (6) false representation; (7) negligent misrepresentation causing financial loss; and (9) violation of the Colorado Consumer Protection Act. To the extent that Retailer continues to engage in Conversion Activities, DISH will take all necessary actions to preserve its rights, including seeking injunctive relief and monetary damages.

This letter is without prejudice to any rights and remedies that may otherwise be available to DISH and/or any of its Affiliates whether arising at law, in equity, under contract (including without limitation the Retailer Agreement) or otherwise. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Retailer Agreement.

Sincerely,

**DISH NETWORK L.L.C.**

By: /s/ [Illegible]

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**Open Orbit Corporation**

[LOGO]

**US Office**

495 Central Park Avenue, Suite 204,  
Scarsdale, New York 10583.  
Phone- 001- 914-885-1670.  
Email: infoPooenorbitcoro.com

October 6, 2014

Mr. Blake Van Ernst

Vice President, Retail Services, Dish Network,

**Re: Notice of Automatic Termination of Dish Network Retailer Agreement.**

Dear Mr. Ernst,

This is to inform you that we have destroyed all the subscribers information related to our dealership with Dish Network.

I would also like to mention here that the undersigned here is the sole owner and only point of communication with Open Orbit Corporation. Mr. Sujit Ghosh left our Organization in 2013 and now way related to us. Would appreciate if he is released from all kind of responsibilities and communication.

Sincerely,

/s/ Uday Shankar Saha  
Uday Shankar Saha,

For Open Orbit Corp

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671113

Final K-1  Amended K-1 OMB No. 15450130

**Schedule K-1**  
**(Form 1120S)**

**2013**

**Department of the Treasury**  
**Internal Revenue Service**

**For calendar year 2013, or tax  
your beginning \_\_\_\_\_, 2013  
ending \_\_\_\_\_, 20 \_\_\_\_**

**Shareholder's Share of Income, Deductions,  
Credits, etc.**

**► See back of form for separate instructions.**

**Part I**

A Corporation's employer identification number  
27-2256951

B Corporation's name, address, city, state, and ZIP  
code  
OPEN ORBIT CORPORATION  
495 CENTRAL PARK AVE STE 204  
SCRSDALE, NY 10583

C IRS Center where corporation filed return  
Cincinnati, OH 45999-0013

**Part II**

D Shareholders identifying number	Shareholder: 1 097-88-3501
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E Shareholder's name, address, city, state, and ZIP code	UDAY SHANKAR SAHA 64-15 29TH STREET OAKLAND GARDENS, NY 11364
--	---

F Shareholder's percentage of stock ownership for tax year	..... <u>100.00000%</u>
--	-------------------------

For IRS Use Only
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**Part III**

1	Ordinary business income (loss)	13	Credits
	-125,433		
2	Net rental real estate income (loss)		
3	Other net rental income (loss)		
4	Interest income		
5a	Ordinary dividends		
5b	Qualified dividends	14	Foreign transactions
6	Royalties		

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7	Net short-term capital gain (loss)		
8a	Net long-term capital gain (loss)		
8b	Collectibles (28%) gain (loss)		
8c	Unrecaptured section 1250 gain		
9	Net section 1231 gain (loss)		
10	Other income (loss)	15	Alternative [illegible] tax (AMT) [illegible]
11		16	[Illegible] affecting shareholders [illegible]
12			
		17	Other information

\*See attached statement for additional information.

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**DTF-96      New York Department of  
(2/11)      Taxation and Finance  
Report of Address Changes  
for Business Tax Accounts**

**For office use only**

The fastest and easiest way to report an address change is online (not available for all tax types). Visit our Web site (see *Need help?*) and select the option to change your address. See the instructions on page 2

**Step 1** Identify your business as currently on file with the NYS Tax Department

Identification number <i>(with suffice, if any)</i> 27-2255951	Legal name <i>(see instruction)</i> OPEN ORBIT CORPO- RATION		
For corporations – Year of income – <u>2010</u> State of Incorporation <u>NY</u>	Trade Name (DBA)		
Physical address (number and street) 613 WHITE PLAINS ROAD			
City <u>EASTCHESTER</u>	County <u>WESTCHESTER</u>	State <u>NY</u>	Zip Code <u>10739</u>
County If not in U.S. <i>(see instructions)</i>			

**Step 2** Select tax type(s) to change in Step. 3.

All business tax types on file with NYS Tax Dept.  
 Corporation  Sales and use  Withholding/  
MCTMT  IFTA  Highway use  Petroleum  
business (all fuels)  Alcoholic beverages  Ciga-  
rettes/Tobacco products  Limited Liability Com-  
pany (LLC) or Limited Liability Partnership (LLP)  
 Other (list below)

Tax Type	Account number

**Step 3** List your new address(es); enter only if different from current information

<b>New physical address</b>			
<b>Note:</b> To change the physical address for petroleum businesses, alcoholic beverages, and cigarette tax types, see <i>Legal specifications for petroleum-, alcohol-, and cigarette-related businesses</i>			
Physical location of business (number and street) – Do not enter a PO box here. <u>405 CENTRAL PARK AVENUE, STE 204</u>			
City <u>SCARSDALE</u>	County <u>WESTCHESTER</u>	State <u>NY</u>	ZIP Code <u>10583</u>

Effective date of this address change <u>01-01-2013</u>
New telephone number <u>(917) 440-2537</u>
County if not U.S. ( <i>See instructions</i> )

New mailing address			
Business or firm name to which NYS Tax Department mailings are to be sent <b>OPEN ORBIT CORPORATION</b>			
Name of person to whom NYS Tax Department mailings are to be sent (optional) <b>UDAY S SAHA</b>			
New number and street or PO box <b>495 CENTRAL PARK AVENUE, STE 204</b>			
City <b>SCARSDALE</b>	County <b>WESTCHESTER</b>	State <b>NY</b>	ZIP Code <b>10583</b>
Effective date of this address change <b>01-01-2013</b>			
New contact telephone number <b>(917) 440-2537</b>			
County if not U.S. ( <i>See instructions</i> )			

**Step 4** Sign and mail your report. For where to file see instructions

<b>Sign here</b>	I certify to the best of my knowledge and belief that this report is true, correct, and completed, and that I am authorized to report address changes	
	Signature <i>/s/ Uday Shankar Saha</i>	
	Title <b>PRESIDENT</b>	Date <b>10-30-2014</b>
	Print contact name <b>UDAY S SAHA</b>	Contact's daytime telephone number <b>(917) 440-2537</b>