

IN THE SUPREME COURT OF THE STATE OF NEVADA

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND; AND CITY OF
STERLING HEIGHTS POLICE AND FIRE
RETIREMENT SYSTEM, DERIVATIVELY
ON BEHALF OF NOMINAL DEFENDANT
DISH NETWORK CORPORATION,

Appellants,

vs.

CHARLES W. ERGEN; JAMES DEFRANCO;
CANTEY M. ERGEN; STEVEN R.
GOODBARN; DAVID K. MOSKOWITZ; TOM
A. ORTOLF; CARL E. VOGEL; GEORGE R.
BROKAW; JOSEPH P. CLAYTON; GARY S.
HOWARD; DISH NETWORK
CORPORATION, A NEVADA
CORPORATION; AND SPECIAL
LITIGATION COMMITTEE OF DISH
NETWORK CORPORATION,

Respondents.

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District Court No.
A-17-763397-B

JOINT APPENDIX
Vol. 2 of 85
[JA000144-JA000393]

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¹ Volumes 2-85 of the Joint Appendix include only a per-volume table of contents. Volume 1 of the Joint Appendix includes a full table of contents incorporating all documents in Volumes 1-85.

² The Evidentiary Hearing Exhibits were filed with the District Court on July 6, 2020.

**IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION**

**UNITED STATES OF AMERICA,)
and the STATES of CALIFORNIA,)
ILLINOIS, NORTH CAROLINA,)
and OHIO,)**

Plaintiffs,

v.

No. 09-3073

DISH NETWORK LLC,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SUE E. MYERSCOUGH, U.S. District Judge:

This matter came before the Court on January 19, 2016, for a bench trial. The first phase of the bench trial was completed on February 17, 2016. The trial resumed on October 25, 2016. The Court heard testimony on October 25-27, 2016 and November 2, 2016. The Plaintiff United States appeared by Assistant United States Attorneys Patrick Runkle, Lisa Hsiao, and Sang Lee, and also by Federal Trade Commission Attorney Russell Deitch and Gary Ivens; the Plaintiff State of California appeared by Assistant Attorneys General Jinsook Ohta, Jon Worm, and Adelina Acuna;

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the Plaintiff State of Illinois appeared by Assistant Attorneys General Paul Isaac, Elizabeth Backston, and Philip Heimlich; the Plaintiff State of North Carolina appeared by Assistant Attorney General David Kirkman and Teresa Townsend; and the Plaintiff State of Ohio appeared by Assistant Attorneys General Erin Leahy and Jeff Loeser. The Defendant Dish Network, LLC (Dish) appeared by attorneys Peter Bicks, Elyse Echtman, John Ewald, Jamie Shookman, Shasha Zou, Louisa Irving, Joseph Boyle, and Lauri Mazzuchetti.¹ Dish's in-house counsel Stanton Dodge, Larry Katzin, and Brett Kitei also appeared. On November 2, 2016, the parties and the witness appeared by videoconference, except that Dish in-house counsel Dodge's and Kitei's and California's counsel Ohta and Acuna appeared by telephone.

The Plaintiffs alleged twelve counts against Dish for violations of federal and state laws and regulations prohibiting certain outbound telemarketing calls (Do-Not-Call Laws). The term "Do-Not-Call" is also sometimes referred to as "DNC." The Plaintiffs allege that Dish violated the Telemarketing Consumer Fraud and Abuse Prevention Act (Telemarketing Act), 15 U.S.C. § 6101 et seq.;

¹ Not all counsel appeared at every day of trial.

the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227; the Telephone Sales Rule (TSR) promulgated by the Federal Trade Commission (FTC) pursuant to the Telemarketing Act, 16 C.F.R. Part 310; the Rule (FCC Rule) promulgated by the Federal Communications Commission (FCC) pursuant to the TCPA, 47 C.F.R. 64.1200 et seq.; the California Do-Not-Call Law, Cal. Bus. & Prof. Code § 17592(c); the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200; the North Carolina Do-Not-Call Law, N.C. Gen. Stat. § 75-102(a); the North Carolina Automatic Telephone Dialer Law, N.C. Gen. Stat. § 75-104; the Illinois Automatic Telephone Dialers Act (IATDA), 815 ILCS 305/1 et seq.; and the Ohio Consumer Sales Protection Act, Ohio Rev. Code §§ 1345.02 and 1345.03. Third Amended Complaint (d/e 483), Count I-XII. For a detailed discussion of the applicable statutes and rules, see Opinion entered December 14, 2014 (d/e 445) (Opinion 445), at 10-32 and 215-25, 75 F.Supp.3d 942, 954-62, 1026-31 (C.D. Ill. 2014), vacated in part on reconsideration, 80 F.Supp.3d 917 (C.D. Ill. 2015). The Court entered partial summary judgment on some the Plaintiffs' claims. Opinion 445, at 231-38.

For the reasons set forth below, this Court enters judgment in favor of the Plaintiffs United States and the States of California, Illinois, North Carolina, and Ohio and against Defendant Dish on Counts I, II, III, V, VI, VII, VIII, IX, X, and XII of the Third Amended Complaint and judgment in favor of Plaintiff United States and against Defendant Dish on the claim that Defendant provided substantial assistance to Dish Order Entry Retailer Star Satellite as alleged in Count IV of the Third Amended Complaint, and judgment in favor of Defendant Dish and against the United States on the claim that Dish provided substantial assistance to Dish Order Entry Retailer Dish TV Now as alleged in Count IV of the Third Amended Complaint. The Court enters judgment in favor of Defendant Dish and against Plaintiff State of Illinois on Count XI of the Third Amended Complaint.

The Court awards civil penalties and statutory damages in favor of the Plaintiffs United States and the States of California, Illinois, North Carolina, and Ohio and against Defendant Dish in Counts I, II, III, IV, V, VI, VII, VIII, IX, X, and XII of the Third Amended Complaint in the total sum of \$280,000,000.00. The

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amount awarded in each Count is set forth below in the Conclusion.

The Court also enters a Permanent Injunction in favor of the Plaintiffs and against Defendant Dish Network, L.L.C. in the manner set forth in the separate Permanent Injunction Order filed with this Findings of Fact and Conclusions of Law.

The following constitutes findings of fact and conclusions of law for the issues remaining for trial. Fed. R. Civ. P. 52(a).

This case is complex and covers years of telemarketing by Dish and numerous related entities. The Court organizes the findings of fact under various headings. The organizational structure does not limit any findings to any particular issue. Unless otherwise indicated, all findings of fact may be relevant to all issues.

JURISDICTION

This Court has jurisdiction to hear the United States' claims in Counts I-IV pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355; Federal Trade Commission Act (FTC Act), 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57(b); and the Telemarketing Act, 15 U.S.C. § 6105(a) & (b). The FTC authorized the Attorney General to commence this action on behalf of the United States pursuant to

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FTC Act § 56(a). This Court has jurisdiction to hear the Plaintiff States' TCPA claims in Counts V & VI pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355; and exclusive jurisdiction pursuant to TCPA, 47 U.S.C. § 227(g)(2). This Court has supplemental jurisdiction to hear the Plaintiff States' state law claims in Counts VII-XII pursuant to 28 U.S.C. § 1367(a).

Dish argues that the Plaintiff States lack standing to bring the TCPA claims alleged in Counts V and VI. A lack of standing is jurisdictional. Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 93 (1998). To establish standing, a plaintiff must have “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” Spokeo, Inc. v. Robins, __U.S.__, 136 S.Ct. 1540, 1547 (2016).

The TCPA § 227(g) authorizes the Plaintiff States to bring this action. Section 227(g)(1) states that when the State Attorney General, “has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section,” then “the State

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may bring a civil action on behalf of its residents.” 47 U.S.C.A. § 227(g)(1). The Plaintiff States, therefore, are bringing the claims in Counts V and VI in parens patriae to protect the well-being of each Plaintiff State’s populace. The Plaintiff States must demonstrate Article III standing. The Plaintiff States must demonstrate some concrete injury to its residents by Dish that can be redressed by the claims in Counts V and VI. Alfred L. Snapp & Son, Inc., v. Puerto Rico ex rel. Barez, 458 U.S. 592, 602-05 (1982). The Congressional grant of a right to statutory damages in the TCPA § 227(g) is not sufficient by itself to establish standing. The Plaintiff States must show some injury in fact from the unwanted telemarketing calls. Spokeo, 136 S.Ct. at 1543.

Several District Courts have considered whether unwanted calls made in violation of the TCPA cause concrete injury necessary to establish standing. Many of these District Courts have found that the annoyance and distress caused by unwanted calls established concrete injuries sufficient to establish standing. E.g., Krakauer v. Dish Network, L.L.C., 168 F.Supp.3d 843, 845 (M.D. N.C. 2016); Wilkes v. CareSource Management Group Co., 2016 WL 7179298, at *3 (N.D. Ind. December 9, 2016); Mbazomo v.

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Etourandtravel, Inc., 2016 WL 7165693, at *2 (E.D. Cal. December 8, 2016); Griffith v. ContextMedia, Inc., 2016 WL 6092634, at *1-2 (N.D. Ill. October 19, 2016); LaVigne v. First Community Bancshares, Inc., 2016 WL 6305992, at *3 (D. N.M. October 19, 2016); Espejo v. Santander Consumer USA, Inc., 2016 WL 6037625, at *9 n.3 (N.D. Ill. Oct. 14, 2016); Dolemba v. Illinois Farmers Insurance Company, 2016 WL 5720377 (N.D. Ill. September 30, 2016); Juarez v. Citibank, N.A., 2016 WL 4547914, at *3 (N.D. Cal. September 1, 2016); Aranda v. Caribbean Cruise Line, Inc., 2016 WL 4439935, at *5-*7 (N.D. Ill. August 23, 2016); A.D. v. Credit One Bank, N.A., 2016 WL 4417077 (N.D. Ill. August 19, 2016). The Court in Aranda described how unwanted telephone calls cause concrete injuries by invading the privacy of the home:

In any event, section 227 establishes substantive, not procedural, rights to be free from telemarketing calls consumers have not consented to receive. Both history and the judgment of Congress suggest that violation of this substantive right is sufficient to constitute a concrete, *de facto* injury. As other courts have observed, American and English courts have long heard cases in which plaintiffs alleged that defendants affirmatively directed their conduct at plaintiffs to invade their privacy and disturb their solitude. *See, e.g., Mey v. Got Warranty, Inc.*, — F.Supp.3d —, —, 2016 WL 3645195, at *3 (N.D.W.V.2016) (“[T]he TCPA can be seen as merely liberalizing and codifying the application of [a] common

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law tort to a particularly intrusive type of unwanted telephone call.”); *Caudill v. Wells Fargo Home Mort., Inc.*, No. 5:16-066-DCR, 2016 WL 3820195, at *2 (E.D.Ky. July 11, 2016) (“[The] alleged harms, such as invasion of privacy, have traditionally been regarded as providing a basis for a lawsuit in the United States.”).

Aranda, 2016 WL 4439935, at *6. The Aranda Court noted that, “Congress enacted the TCPA to protect consumers from the annoyance, irritation, and unwanted nuisance of telemarketing phone calls, granting protection to consumers' identifiable concrete interests in preserving their rights to privacy and seclusion.” Id.

Each Plaintiff State further presented testimony from residents who personally suffered injury from unwanted calls by Dish or its related entities. E.g., Deposition David Slaby, at 6, 52-53, 69-70 (California resident); T 613: 24-26 (Skala (Illinois resident)); T 618:856-66 (Krakauer (North Carolina resident)); T 617: 574 (Kitner (Ohio resident)).² The Plaintiff States have demonstrated that the calls at issue caused concrete injury necessary to establish standing.

² The Court references the trial transcript as follows: the letter T, the docket entry number of the relevant portion of the transcript, the page number, and the last name of the witness in parentheses. The Court references exhibits by the exhibit number used at trial. The deposition excerpts cited have been admitted into evidence in lieu of live testimony. JA000152

Dish has cited a District Court that found that receipt of unwanted telephone calls did not cause concrete injury necessary to established standing. Romero v. Department Stores National Bank et al. v. Defendants, 2016 WL 41484099 (S.D. Cal. August 5, 2016). The Court respectfully disagrees with the reasoning in the Romero decision and agrees with the reasoning in the Aranda decision, the Krakauer decision, and the other cases cited immediately above. The Plaintiff States therefore have standing to proceed.

FINDINGS OF FACT

I. Background

In 1980, Charles Ergen and James DeFranco formed Dish's predecessor corporation called Ecosphere Corporation (Ecosphere). Ecosphere sold and distributed large satellite dishes 12 feet in diameter designed to receive television signals. T 621: 1478-79 (DeFranco); T 625: 2073 (Neylon). Ecosphere later changed its name to Echostar Communications Corporation (Echostar). Echostar developed a network of local retailers to sell, distribute, and install satellite dishes. T 621: 1487 (DeFranco). In 1995, Echostar made an initial public offering of stock. T 621: 1445

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(DeFranco). As discussed below, in 1996, Echostar started a satellite television service called Dish Network. In 2008, Echostar reorganized its business structure. Echostar became the Defendant business entity Defendant Dish Network, LLC. Dish Network, LLC continued the business of selling and providing Dish Network programming. A business entity called Echostar continued to exist as a separate corporation. Both became owned by a holding company, Dish Network Corporation (Dish Corp.). Echostar currently operates satellites used to transmit Dish Network programming. See Opinion 445, at 2; PX1093, Dish Annual Report dated December 31, 2011, at 6-7; T 621: 1482 (DeFranco). The Court hereafter uses the term “Dish” to refer the business entity selling Dish Network programming (Echostar before 2008 and Dish Network, LLC thereafter).

In 1996, upon launching Dish Network, Dish went into direct competition with DirecTV, another provider of residential satellite pay television services. DirecTV started this type of service two years before Dish. T 621: 1488 (DeFranco). Dish also competed with cable television services and over-the-air broadcast services.

T 621: 1488-89 (DeFranco). By 1999, Dish was offering a 500 channel satellite television service. T 621: 1442 (DeFranco).

Dish marketed Dish Network programming through various means, including direct outbound telemarketing by Dish employees. Dish also retained companies to perform outbound telemarketing services for Dish (Telemarketing Vendors). T 617: 664 (Davis). Outbound telemarketing means making telephone calls to existing or prospective customers to sell products and services. Inbound telemarketing involves advertising through various media (e.g., television, radio, print, direct mail) to generate inbound calls from consumers seeking information about the possible purchase of goods and services. Dish engaged in both inbound and outbound telemarketing. See T 627: 2517 (Dexter). The Plaintiffs' claims all relate to outbound telemarketing only. Unless otherwise indicated, the Court uses the term "telemarketing" to refer to outbound telemarketing.

Dish divided its marketing structure into direct and indirect marketing, sometime referred to as direct and indirect "channels." The direct channel consisted of Dish in-house, or direct marketing, and marketing by Dish's Telemarketing Vendors. The

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Telemarketing Vendors were telemarketing companies hired by Dish to perform telemarketing services for Dish. The indirect channel consisted of marketing by all other entities authorized by Dish to market Dish Network programming. Within the indirect channel, Dish continued to use its network of retailers, called TVRO or Full Service Retailers, to sell Dish Network programming.³ TVRO Retailers generally sold, installed, and serviced satellite dishes and related equipment. Some TVRO Retailers engaged in telemarketing. T 626: 2294-95 (Ahmed).

The indirect channel also included national retailers and telecommunications companies that marketed Dish Network programming, such as Radio Shack, Sears, and AT&T. T 625: 2113 (Neylon).⁴

Dish also developed an indirect marketing program called the Order Entry Program. Through this program, Dish authorized marketing businesses to market Dish Network programming nationally. These marketing businesses secured consumers' offers to purchase Dish Network programming. Dish completed the sales

³ TVRO stands for Television Receive Only. See Opinion 445, at 57.

⁴ The national telephone company accounts were also called "Telco" accounts. See e.g., T 625: 2113 (Neylon).

solicited by these businesses. Dish provided and installed the satellite dishes and related equipment, and Dish provided the programming and related services. Dish called these marketing businesses Order Entry Retailers or OE Retailers. See T 626: 2358, 2283, 2296 (Ahmed); T 621: 1632 (Mills).

The Plaintiffs' claims arise from: (1) Dish's direct telemarketing; (2) the telemarketing activities of Dish's Telemarketing Vendors EPLDT (also known as Libertad), and eCreek Solutions Group (eCreek); and (3) telemarketing activities of certain Order Entry Retailers.

II. Telemarketing by Dish and its Telemarketing Vendors

A. Telemarketing Practices Before 2003

In 1998, Dish began telemarketing Dish Network programming. Dish used an automatic dialer called a predictive dialer to make outbound telemarketing calls. DTX-650, Timeline Email dated December 10, 2007 (Timeline Email). An automatic dialer, or autodialer, can call large numbers of telephone numbers automatically and can distinguish between possible results of each call: either no answer, a busy signal, a response by an answering machine, or an answer by a person. See T 627: 2527-28 (Dexter).

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When a person answers the call, the automatic dialer can connect the call recipient either to a prerecorded message or a live sales person. See T 627: 2655 (Bangert). Dish direct marketing had a policy to connect answered telemarketing calls to live sales persons and not prerecorded messages. T 627: 2690-91 (Bangert); T 617: 624 (Davis).

At the time that Dish began telemarketing in 1998, the TSR and FCC Rule prohibited sellers and telemarketers from initiating telemarketing calls to individuals who previously stated that they did not wish to be called (a “Do-Not-Call Request”). The FCC Rule required sellers and telemarketers to maintain an internal, or entity-specific, Do-Not-Call List of the people who previously asked not to be called again (“Internal Do-Not-Call List”). The FCC Rule required telemarketers and sellers to honor a Do-Not-Call Request. The TSR prohibited making calls to persons who made a Do-Not-Call Request stating that they did not wish to receive telemarketing calls by or on behalf of the seller. The TSR stated that sellers or telemarketers that wished to comply with the TSR safe harbor

provision had to maintain an Internal Do-Not-Call List.⁵ See Opinion 445, at 11, 26. The Court refers to calls made to persons who previously made an Internal Do-Not-Call Request as “Internal List Calls.”

Dish maintained an Internal Do-Not-Call List. Individuals could have their telephone numbers placed on Dish’s Internal Do-Not-Call List by calling or writing Dish; by telling a Dish telemarketer during a sales call; by telling a Telemarketing Vendor telemarketer during a sales call; by registering on Dish’s Internal Do-Not-Call List on Dish’s website; or by calling a toll-free number. If the automatic dialer failed to connect a call recipient to a sales person within two seconds of the recipient’s answer of the call, the automatic dialer played a prerecorded message that provided the toll-free number. T 629: 3024-26 (Montano). Dish eventually developed a PowerPoint presentation to explain how to handle an Internal Do-Not-Call Request. Dish made the PowerPoint presentation available to all employees who came in contact with consumers, including telemarketing employees and customer

⁵ An Internal Do-Not-Call List is also called an “entity-specific do-not-call list.”

service employees. DTX 14, PowerPoint Presentation; see T 627: 2504-16, 2590 (Dexter).

The FCC Rule also restricted making outbound telemarketing calls that played prerecorded sales messages to recipients of telemarketing calls. Calls that play prerecorded messages are called by several different names, including “robocalls,” “prerecorded calls,” “prerecorded messaging,” “message broadcasting,” “automated messaging,” “automessaging,” “AM,” and sometimes “autodialer calls.”⁶ The Court refers to such calls as “Prerecorded Calls.”

The FCC Rule allowed Prerecorded Calls to call recipients who had Established Business Relationships with the seller or telemarketer making the call, unless the recipient’s telephone number was on the seller or telemarketer’s Internal Do-Not-Call List. See Opinion 445, at 25-26.⁷ The FCC Rule defined Established Business Relationship as:

The term established business relationship for purposes of telephone solicitations means a prior or existing

⁶ At least one witness used the term “autodialer” calls to refer to prerecorded calls. See T 622: 1871 (Goodale). Most witnesses used the term autodialer call to refer to any call made by automatic dialing equipment regardless of whether the autodialer played a prerecorded message or connected the call recipient to a live sales representative.

⁷ The FCC amended the FCC Rule in 2012 to eliminate the Established Business Relationship exception. See Opinion 445, at 25.

relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

47 C.F.R. § 64.1200(f)(5). Under this provision, a telemarketer had an Established Business Relationship with a call recipient who was a residential telephone subscriber under one of two conditions: (1) the call recipient made a purchase or engaged in a transaction with the seller within 18 months of the date of the call (Transaction-based Established Business Relationship); or (2) the call recipient made an inquiry or application for the seller's good or services within three months of the date of the call (Inquiry-based Established Business Relationship).

In 1987, States began establishing Do-Not-Call registries for state residents. See Telemarketing Sales Rule, Statement of Basis and Purpose, 48 Fed. Reg. 4580, 4629 n. 592 (January 29, 2003) (citing Fla. Stat. Ann. § 501.059) (2003 TSR Statement of Basis and Purpose); Marguerite M. Sweeney, Do Not Call: The History of Do

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Not Call and How Telemarketing has Evolved, NAGTRTI J., Vol.1, No. 4 (August 2016) available at <http://www.naag.org/publications/nagtri-journal/volume-1-number-4/do-not-call-the-history-of-do-not-call-and-how-telemarketing-has-evolved.php>. Residents registered their telephone numbers on the state registry if the residents did not wish to receive unsolicited telemarketing calls. The state laws restricted sellers and telemarketers from making certain telemarketing calls to telephone numbers on the state registries (State Do-Not-Call Lists). Dish began purchasing State Do-Not-Call Lists in 2001. DTX 650, Timeline Email, at 1.

Dish directed almost all of its outbound telemarketing campaigns at residences rather than businesses. T 628: 2810 (Bangert); T 627: 2555, 2639, 2641 (Dexter) (most campaigns to residences, but some directed to businesses); T 617: 633-34 (Davis) (same); see T 614: 450-51 (Yoeli); PX 38, Declaration of Dr. Erez Yoeli dated December 18, 2013, Appendix C, Revised Rebuttal Report of Dr. Erez Yoeli dated December 14, 2012 (Yoeli December 14, 2012 report), at 7-8 (Dish's calling records from September 2007 to March 2010 indicate that .2% of Dish's direct telemarketing

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calls which Dr. Yoeli opined were violations of the TSR were answered by businesses.).⁸

Dish organized its telemarketing into different types of calling campaigns, depending on Dish's relationship with the intended recipients of the calls and the purposes of the calls. Campaigns that Dish intended to direct at current customers were called Average Revenue Per Unit (ARPU), Upsell, and Premium Upsell campaigns. These campaigns offered additional or upgraded programming or services to existing customers. See PX 0477, Email dated May 9, 2002; T 628: 2708-09 (Bangert); T 617: 592 (Davis). Through approximately July 2010, Dish presumed that it had a Transaction-based Established Business Relationship with the recipients of these calls. See PX 1248, Project Scope Document dated February 2, 2010, (request by Outbound Operations to modify PDialer to use last payment dates); DTX 972, Email thread dated June 30, 2010 to July 2, 2010 between Dish and PossibleNOW representatives; T 633: 3297-99 (Taylor); DTX 670,

⁸Dish employee Joey Montano testified that Dish ran several calling campaigns directed at businesses. T 628: 2960 (Montano). Montano did not testify that Dish directed a significant portion of its telemarketing campaigns at businesses. To the extent that Montano attempted to give the impression that campaigns directed at businesses made up a significant portion of Dish's outbound telemarketing, the Court finds that testimony not to be credible. The overwhelming evidence shows that Dish directed almost all of its outbound telemarketing campaigns at residential households.

PDialer Meeting Minutes dated July 1, 2010, at 2 ¶ 7 (indicating change to last payment date); T 629: 3014-15, 3130-34 (Montano). Dish's calling records from September 2007 through March 2010, however, show that the lists of telephone numbers called (calling lists) in these campaigns included numbers for individuals who had not paid for any programming services from Dish for more than 18 months at the time that Dish called them. The records are discussed in detail below.

Campaigns directed at former customers were called "winback" campaigns. As the name implied, the campaigns sought to win back former customers. The calling lists in winback campaigns were supposed to consist of the telephone numbers of former customers who had their Dish service disconnected on the same day. Dish used disconnect dates to determine when the customer relationship ended. T 633: 3297-99 (Taylor); T 629: 3014-15, 3130-34 (Montano). Dish dialed winback campaign calling lists periodically at certain intervals after the disconnect date, e.g., 48 hours, 30 days, 60 days, 6 months, 12 months, 18 months, and so on up to as long as 61 months after the termination. Dish called winback campaigns "trailing campaigns" because of the periodic

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calling process. T 627: 2637 (Dexter); see DTX 626A through 626D, Summary Table of Dish Campaigns prepared by Dish Expert John Taylor (Taylor Tables). Until approximately July 2010, Dish presumed that it had a Transaction-based Established Business Relationship with the recipients of these calls if the campaign calls were made 18 or fewer months after the disconnect date for the particular campaign. See T 628: 2969 and 629: 3130 (Montano); PX 1248, Project Scope Document dated February 2, 2010 (requesting modification of PDialer to use last payment date); DTX 972, Email thread dated June 30, 2010 to July 2, 2010 between Dish and PossibleNOW representatives; DTX 670, PDialer Meeting Minutes dated July 1, 2010. The calling records from September 2007 to March 2010 discussed below, however, show that winback calling lists included many individuals who had not paid for any programming services from Dish for more than 18 months before the date of the calls. The call records are discussed in detail below.

Dish also directed calling campaigns at individuals who purchased Dish Network programming, but Dish did not complete installation and activation of the services. Some of these calling campaigns were called Canceled Work Order (CWO) campaigns.

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T 617: 588 (Davis); T 628:2708 (Bangert). Dish conducted Canceled Work Order campaigns to reschedule the canceled work orders in order to complete activation of service. T 629: 3075-76 (Montano). Dish employees and former employees sometimes characterized these calling campaigns as telemarketing campaigns and sometimes as non-telemarketing scheduling calls or non-telemarketing calls to collect information. See T 628: 2708-09 (Bangert); T 617: 591 (Davis); T 627: 2522 (Dexter); T 629: 3075-76 (Montano).⁹ Dish produced no scripts for any of these campaigns in discovery and presented no scripts at trial. The limited evidence presented establishes that these calling campaigns were directed at individuals who initially agreed to purchase Dish Network programming, but who canceled the installation. Dish ran Canceled Work Order campaigns to reschedule the canceled work orders and complete the installation of Dish Network programming.

⁹ During discovery, Montano told Plaintiffs' representatives that Canceled Work Order campaigns were telemarketing campaigns. Montano testified at trial that he changed his opinion during discovery and decided that the campaigns were not for the purpose of telemarketing. T 629: 3055-56 (Montano). Dish submitted a letter that Dish attorneys wrote to Plaintiffs' attorneys during discovery alerting Plaintiffs' attorneys that Montano had changed his opinion regarding these calls. DTX 1015, Letter from Mazzuchetti to Hsiao dated November 28, 2012. The Court considers this as evidence of notice to Plaintiffs regarding Montano's change in opinion.

Dish also conducted No Line of Sight (NLOS) and Held Work Order (HWO) calling campaigns. No Line of Sight campaigns were directed at individuals who agreed to purchase Dish programming, but the installer could not find a place to install the satellite dish that had a line of sight to receive the signal. Dish ran these calling campaigns to schedule a time for a field service manager to come out and see if he could find a line of sight to complete installation. T 627: 2544 (Dexter). Held Work Order campaigns were directed to an individual who agreed to purchase Dish programming, but whose work order was placed on hold. Dish made Held Work Order calls to reschedule the Work Order to complete activation of service. T 627: 2546-47 (Dexter); T 629: 3075-76 (Montano). Dish employees also sometimes characterized these campaigns as telemarketing campaigns and sometimes as non-telemarketing scheduling calls. Id.

Campaigns directed at individuals who never indicated any interest in Dish programming or services were called “Cold Call” or “Target Marketing” campaigns. See PX 0477, Email dated May 9, 2002; T 628: 2708-09 (Bangert); T 617: 592 (Davis); T 629: 3117 (Montano).

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Campaigns called LTS or Lead Tracking System campaigns were directed at individuals who were not Dish customers, but who came into contact with Dish and provided contact information. Dish presented very little competent evidence on how the Lead Tracking System was formulated or how calling lists were derived from the Lead Tracking System. Dish's Database Marketing Department maintained the Lead Tracking System and created the Lead Tracking System (or LTS) calling lists. T. 627: 2680 (Bangert).¹⁰ Dish presented no testimony from any representative of Database Marketing or anyone else who had personal knowledge of the working of the Lead Tracking System.

Several witnesses summarily testified that Lead Tracking System calling lists were made up of people who inquired about Dish Network programming. Dish presumed that it had an Inquiry-based Established Business Relationship with the recipients of these calls. See T 627: 2681-82 (Bangert); T 628: 2709-10, 2808 (Bangert); T 627: 2643-44 (Dexter); T 617: 590 (Davis); T 629: 3163-64 (Montano). Dish failed to establish that any of these witnesses

¹⁰ Dish may have changed the name of Database Marketing to Data Analytics or Marketing Analytics. Data Analytics and Marketing Analytics may have also been different departments. The evidence is unclear. The Court refers to this Department as Database Marketing. JA000168

had sufficient personal knowledge to testify regarding the operation of the Lead Tracking System or the make-up of the calling lists derived from the Lead Tracking System. None of these witnesses worked in Database Marketing or had any involvement in the formulation of the Lead Tracking System or the Lead Tracking System calling lists.

The only evidence from Database Marketing cited by the parties that discussed the make-up of the Lead Tracking System consisted of two emails from Database Marketing employees in a single email thread from August 2004. PX117, Email thread regarding Dish Taking a DTV Sale dated August 11, 2004, at PX117-001, 005-006. These two emails indicate that the Lead Tracking System collected the contact information of any individuals who came into contact with Dish and provided such information. According to these two emails, the Lead Tracking System included individuals who requested information about Dish Network programming, but also included individuals who already received a telephone sales pitch for Dish programming and services and did not buy, and individuals who began ordering Dish programming online, but did not complete the purchase.

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See PX117, Email thread regarding Dish Taking a DTV Sale dated August 11, 2004, at PX117-001, 005-006. At one point, the Lead Tracking System included contact information for certain individuals that Order Entry Retailers contacted to sell Dish Network programming, but who decided not to buy. Dish discontinued this latter practice when Order Entry Retailers complained that Dish direct marketing was taking the Order Entry Retailers' leads. See PX 117, Email thread regarding Dish Taking a DTV Sale dated August 11, 2004; T 629: 2711-12 (Bangert). The Court finds that Dish failed to prove that the Lead Tracking System consisted of contact information for the individuals who inquired about Dish Network programming. Rather, the sparse evidence in these two emails seems to indicate that the Lead Tracking System included the contact information for anybody who came in contact with Dish for almost any reason and provided contact information.

By May 2002, Dish had developed a process to scrub certain calling lists. A calling list (or call list) was a list of numbers to be called for a calling campaign. The term "scrubbing" or "scrub" referred to removing from a calling list telephone numbers that could not legally be called under the particular circumstances. In

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2002, Dish scrubbed certain calling lists against its Internal Do-Not-Call List and State Do-Not-Call Lists. See T 627: 2660-61; T 628: 2703-04 (Bangert); DTX 650, Timeline Email, at 1; T 617: 662-63 (Davis).

Dish had some problems with that scrubbing system. In May 2002, Dish was not scrubbing its calling lists against the Oregon State Do-Not-Call List and was still researching the requirements of the other States. Dish in-house attorneys knew that Oregon officials were investigating Dish's telemarketing. Dish in-house attorneys knew that the Oregon statute authorized a \$25,000.00 per call penalty on willful violations. In May 2002, Dish temporarily stopped all telemarketing in Florida, Illinois, Oregon, and Colorado. PX0477, Email from Vice President PJ Weyforth dated May 9, 2002 3:36 p.m.; PX1430, Email dated May 3, 2002, at 004.

In June 2002, Dish limited its outbound telemarketing to residents in 25 states that did not have State Do-Not-Call Lists in effect. PX0473, Email dated June 12, 2002 3:19 p.m. Dish employees who conducted the scrubbing process in Dish's Outbound Operations Department testified that Dish could remove telephone numbers of residents of particular states because Dish

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maintained residential address information associated with the telephone numbers on its various calling lists. See T 628: 2740-41 (Bangert); T 629: 3209-10 (Montano); T 627: 2639-40 (Dexter); T 617: 630 (Davis).

B. Dish Telemarketing Practices Beginning in October 2003

In 2001, Congress authorized the FTC to promulgate regulations to establish a National Do-Not-Call Registry (Registry), and to prohibit initiating outbound telemarketing calls to persons whose telephone numbers were registered on the Registry. TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B); see Opinion 445, at 14, 26-27. In 2003, the FTC established the Registry. Individuals registered their telephone numbers on the Registry if they did not wish to receive telemarketing calls. The FTC and the FCC amended the TSR and FCC Rule to prohibit calling a person whose number was on the Registry (Registry Call). The prohibition did not apply if the person had an Established Business Relationship with the seller or telemarketer. The TSR defined Established Business Relationship as follows:

(o) Established business relationship means a relationship between a seller and a consumer based on:

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- (1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
- (2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

TSR 16 C.F.R. § 310.2(o); see Opinion 445, at 18, 75 F.Supp.3d at 957. Like the FCC Rule, the TSR definition established a Transaction-based Established Business Relationship and an Inquiry-based Established Business Relationship. The TSR definition also used an 18-month time period from the last purchase, rental, lease or financial transaction for the Transaction-based Established Business Relationship and a three-month time period from the last inquiry or application for the Inquiry-based Established Business Relationship.

On September 29, 2003, Congress ratified the establishment of the Registry. Pub. L. 108-82, 117, codified at 15 U.S.C. § 6151. The Registry was scheduled to begin operations on October 1, 2003, but the start of operations was delayed to October 17, 2003. See F.T.C. v. Mainstream Marketing Services, Inc., 345 F.3d 850, 860-

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61 (10th Cir. 2003); see also Mainstream Marketing Services, Inc. v. F.T.C., 358 F.3d 1228, 1250-51 (10th Cir. 2004).

The TSR and FCC Rule contained safe harbor provisions. Sellers and telemarketers who followed the safe harbor procedures would not be liable for certain illegal calls that resulted from errors or mistakes. The safe harbor provisions required, among other things, written procedures for implementing the requirement not to call persons whose telephone numbers were on the Registry, and maintenance of records documenting the use of a process to prevent telemarketing to persons whose numbers were on the Registry. The TSR safe harbor applied to Internal List Calls and Registry Calls. The FCC Rule safe harbor only applied to Registry Calls. 16 C.F.R. § 310.4(b)(3); 47 C.F.R. § 64.1200(c)(2)(i); see Opinion 445, at 164-66, 210-11, 75 F.Supp.3d at 958, 961. Neither safe harbor provision applied to Prerecorded Calls.

The 2003 amendments to the TSR also prohibited abandoning calls. An outbound telemarketing call is abandoned if the person answering a telemarketing call is not connected to a sales representative within two seconds of the person's completed greeting. 16 C.F.R. § 310.4(b)(1)(iv). A Prerecorded Call that is

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answered by a person is an abandoned call under the TSR because the person receiving the call is not connected to a sales representative, but to a recording. See Opinion 445, at 21-22. This Court refers to Prerecorded Calls that are answered by a person as “Abandoned Prerecorded Calls.” The FTC Statement of Basis and Purpose accompanying the final TSR stated that connecting the call recipient to a prerecorded telemarketing message violated the abandonment provisions:

[Under] the prohibition of abandoned calls, . . . telemarketers must connect calls to a sales representative within two seconds of the consumer's completed greeting to avoid a violation of the Rule. Clearly, telemarketers cannot avoid liability by connecting calls to a recorded solicitation message rather than a sales representative. The Rule distinguishes between calls handled by a sales representative and those handled by an automated dialing-announcing device. The Rule specifies that telemarketers must connect calls to a sales representative rather than a recorded message.

2003 TSR Statement of Basis and Purpose, 68 Fed. Reg. at 4644.

On November 17, 2004, the FTC issued a Notice of Proposed Rulemaking (2004 Notice) to amend the TSR to add an additional safe harbor provision to allow some Abandoned Prerecorded Calls under limited circumstances. 69 Fed. Reg. 67287 (November 17,

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2004). The proposed safe harbor amendment would have allowed a seller or telemarketer to make an Abandoned Prerecorded Call to a person with whom the seller or telemarketer had an Established Business Relationship only if the prerecorded message: (1) presented the person with the opportunity to communicate that he or she did not want to be called again within two seconds of the person's completed greeting (e.g., by pushing a number on the telephone keypad); (2) provided all required disclosures; and (3) otherwise complied with all applicable state and federal laws. 69 Fed. Reg. at 67289; see Opinion 445, at 21-22.

The FTC further stated in the 2004 Notice that the FTC would forbear from bringing enforcement actions for prerecorded calls that resulted in abandoned calls if the telemarketer complied with the proposed amendments to the safe harbor provisions:

Therefore, the Commission has determined that, pending completion of this proceeding, the Commission will forbear from bringing any enforcement action for violation of the TSR's call abandonment prohibition, 16 CFR 310.4(b)(1)(iv), against a seller or telemarketer that places telephone calls to deliver prerecorded telemarketing messages to consumers with whom the seller on whose behalf the telemarketing calls are placed has an established business relationship, as defined in the TSR, provided the seller or telemarketer conducts this

activity in conformity with the terms of the proposed amended call abandonment safe harbor.

69 Fed. Reg. at 67290. The FTC ultimately amended the TSR to allow Abandoned Prerecorded Calls only to persons with whom the seller had an Established Business Relationship and only with prior written consent. Final Rule Amendments, 73 Fed. Reg. 51164 (August 29, 2008); see Opinion 445, at 22, 75 F.Supp.3d at 958.

Dish witness Russell Bangert opined that the TSR abandonment provisions did not clearly apply to Abandoned Prerecorded Calls. T 627: 2690 (Bangert). The Court finds this testimony to be of no probative value. Bangert conceded at his deposition that he had only a rudimentary understanding of the federal Do-Not-Call Laws and regulations. T 627: 2686 (Bangert). Bangert's attempt to embellish his knowledge of these laws and regulations at the trial was not credible. Further, FTC publicly stated the 2003 TSR Statement of Basis and Purpose and the 2004 Notice that the TSR abandonment provision applied to Abandoned Prerecorded Calls. Dish employed highly qualified attorneys internally and externally. These attorneys would have been well

aware that the TSR abandonment provision applied to Abandoned Prerecorded Calls.

In addition, Dish employees understood that Prerecorded Calls were prohibited. T 627, 2565-66, 2625 (Dexter) (Dish had a policy not to make prerecorded telemarketing calls); T 617: 624-25 (Davis) (Dish representatives understood that such calls were illegal.). See also PX523, Email from Dexter to Davis dated May 3, 2010, regarding FTC.gov statement regarding abandonment and safe harbor provisions; DTX 662, Email dated March 23, 2010 from Dexter (prerecorded telemarketing calls prohibited); T 619: 985 (Werner) (same).

In 2002, Dish began planning to adjust its telemarketing practices in light of the upcoming launch of the Registry. T 627: 2658 (Bangert). Dish representatives expected the Registry to increase the volume of telephone numbers affected by the Do-Not-Call Laws. Dish put together a group of individuals from interested departments (Working Group) to develop a process to comply with the new regulations and to deal with the expected increase in the size and scope of the process. See T 627: 2658-61 (Bangert).

In April 2003, Dish entered into a settlement with the state of Indiana for violations of Indiana's Do-Not-Call Law. In connection with that settlement, Dish entered into a court-approved Assurance of Voluntary Compliance (AVC). PX 908, Indiana AVC dated April 11, 2003, and Court Order of Approval dated April 15, 2003. Dish thereafter scrubbed lists to remove calls to Indiana residents from its outbound telemarketing. T 628: 2742 (Bangert).

In August 2003, the state of Missouri filed suit against Dish for violation of the Missouri Do-Not-Call Law. PX 52, Missouri Complaint. The Missouri action was settled in 2005. Dish executed an Assurance of Voluntary Compliance and agreed to pay \$50,000.00. PX 544, Missouri ex rel. Nixon v. Echostar Communications Corp., St. Charles County, Mo., Circuit Ct. Case No. 03CV129088, Petition for Approval of Assurance of Voluntary Compliance dated May 4, 2005, attached Assurance of Voluntary Compliance ¶ 16; see PX 53, Email dated April 19, 2006 between Dish Corporate Counsel Steele and Dish SVP Deputy General Counsel Dodge.

In August and September 2003, the Working Group continued to put together a system to comply with the scheduled launch of the

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Registry on October 1, 2003. Dish in-house counsel Steve Novak suggested not making any outbound telemarketing calls to any number on the Registry, even if Dish had an Established Business Relationship with the potential call recipient. PX 689, Email dated September 4, 2003 from Steve Novak. The suggestion was not adopted. Another participant suggested automating the process of determining whether to scrub a calling list against a particular restricted list such as the Registry, Dish's internal Do-Not-Call List, or a state Do-Not-Call List. This suggestion was also rejected. PX1176, Email from Dish Employee Brian Pacini dated September 16, 2003; T 627: 2667-68 (Bangert). In September 2003, Novak stated in an email that "no call center disconnected from the DNC list [i.e., the Registry] should be making any outbound calls." PX688, Email September 10, 2003 from Steve Novak.

Dish cited no evidence that the Working Group ever discussed the safe harbor provisions of the TSR or FCC Rule or developed a plan to comply with those provisions.

Ultimately, Dish established two separate systems to address the launch of the Registry and the amended Do-Not-Call Laws generally. The first system addressed calling campaigns aimed at

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individuals who had Dish account numbers (Account Number Campaigns). The second system addressed campaigns aimed at individuals who never had an account with Dish, primarily Cold Calls and Lead Tracking System Calls.

1. Account Number Campaigns

The Account Number Campaigns included campaigns to existing Dish customers, such as Average Revenue Per Unit, Upsell, and Premium Upsell; campaigns to former customers, such as Winback; and campaigns to individuals who had agreed to purchase Dish Network programming, but did not complete the installation or activation. The last category included Canceled Work Order, No Line of Sight, and Held Work Order campaigns. See Tr. 627: 2680 (Bangert).

Bangert was in charge of scrubbing Account Number Campaign call lists. In 2006, Account Number Campaign scrubbing operations were organized into the Outbound Operations Department (Outbound Operations). T 628: 2949 (Montano). For simplicity, the Court refers to the Dish personnel who performed scrubbing operations for Account Number Campaigns both before and after 2006 as Outbound Operations. Outbound Operations

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scrubbed lists for Dish's call centers in Englewood, Colorado; El Paso, Texas; Pinebrook, New Jersey; and the Philippines; and also for Telemarketing Vendors eCreek and EPLDT. Employees at the Dish call center in Bluefield, West Virginia scrubbed the Account Number Campaign lists for calls made for that call center. Dish employees who scrubbed lists in Bluefield reported to the manager of Outbound Operations. T 617: 647, 680-811 (Davis); T 628: 2949 (Montano). In 2008, Dish moved all Account Number Campaign scrubbing operations to Outbound Operations at Dish corporate headquarters in Englewood, Colorado. T 617: 647, 680-81 (Davis); T 628: 2951 (Montano).¹¹

Outbound Operations also operated Dish's automatic telephone dialers in Englewood, Colorado, and Bluefield, West Virginia. T 627: 2499-2500 (Dexter); T 617: 647-48 (Davis); T 628: 2947-49 (Montano). In 2008, Dish also moved all dialing operations to Outbound Operations in Englewood, Colorado. T 617: 680 (Davis); T 628: 2951 (Montano).¹² Outbound Operations also

¹¹ Dish headquarters is sometimes referred to as the Meridian or Englewood campus, or Meridian. T 628: 2952 (Montano). The offices are located on Meridian Boulevard in Englewood, Colorado.

¹² A few campaigns were dialed manually. T 627: 2636 (Dexter); PX 86, email thread dated August 2011 between Dish Latino Marketing Group, Outbound Operations and Dish JAN 11 10:18 AM

maintained current, updated copies of the Registry, Dish's internal Do-Not-Call list, state Do-Not-Call lists, and lists of wireless numbers. See Tr. 627: 2677-78 (Bangert); T 628: 2948-49 (Montano).

Other Dish departments sent proposed Account Number Campaigns to Outbound Operations with descriptions of the planned calling campaigns, proposed calling lists, and scripts. T 627: 2518-19 (Dexter); T 617: 640-41 (Davis); see e.g., DTX 964, Outbound Campaign Request Form. Outbound Operations did not develop proposed calling lists or scripts. Dish's Data Analytics Department developed the calling lists for Account Number Campaigns. T 627: 2551, 2607, 2610 (Dexter); see T 629: 3021 (Montano).¹³ Dish cited no material evidence to the Court on the process by which Dish departments developed proposed Account Number Campaigns, how departments developed proposed scripts, or how Data Analytics prepared the proposed calling lists. No employee from the Data Analytics Department testified at trial.

Department. The evidence indicates that manually dialed calls were rare aberrations in Dish procedures.

¹³ Montano elsewhere referred to the Marketing Analytics Department. It is unclear whether these were two different departments, or whether the name changed at some point in time. It is also unclear whether Database Marketing is related to Data Analytics.

Outbound Operations personnel reviewed the campaign descriptions and scripts to determine the type of campaign and the particular scrubbing process to use to remove telephone numbers that could not be called under the particular campaign. See DTX-964, Outbound Campaign Request Form; T 627: 2679 (Bangert); T 627: 2518-21, 2525-26, 2531-32 (Dexter); T 617: 628 (Davis). Outbound Operations consulted with Dish's legal department, if necessary, to determine the appropriate scrubbing process to use. T 627: 2684 (Bangert); T 2533: 2564-65 (Dexter); T 628: 2958 and T 629: 3022-23 (Montano).

At some point, Outbound Operations required two individuals in Outbound Operations to approve a campaign. Outbound Operations instituted this policy because a situation occurred in which a telemarketing campaign was allowed to make Prerecorded Calls. PX46, Email dated November 9, 2007; T 617: 673-75 (Davis); see T 629: 3044 (Montano). Prerecorded Calls were not allowed. T 629: 3045 (Montano). Prerecorded messages could be used in non-telemarketing calling campaigns, such as payment reminders, or informational calls that did not involve the sale of additional services. T 629: 3042 (Montano).

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Outbound Operations had no written policies or procedures for scrubbing lists for compliance with Do-Not-Call Laws. T 628: 2807 (Bangert); T 627: 2596-97 (Dexter); see PX0302, Email thread between Joey Montano and Amy Dexter, dated July 28, 2010. Dish also did not produce in discovery any evidence of written scrubbing procedures or documentation of scrubbing results. See Opinion 445, at 163-64. Dish maintained a written Do-Not-Call Policy, but the Policy did not include any procedures for selecting telephone numbers to call in compliance with the TSR and FCC Rule. See Opinion 445, at 164.

In practice, Outbound Operations used three categories of scrubs: (1) “All DNC” or “All Scrub;” (2) “No DNC” or “No Scrub;” and (3) “Standard Scrub.” The “All DNC” or “All Scrub” scrubbed proposed calling lists against all restricted lists, including Dish’s Internal Do-Not-Call List, the Registry, State Do-Not-Call lists, and wireless telephone numbers. A separate provision of the TCPA not at issue in this case generally prohibited using an autodialer to call wireless telephone numbers without prior written consent. 47

U.S.C. § 227(b)(1)(A)(iii). Outbound Operations intended to apply the All Scrub to telemarketing campaigns directed to individuals

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with whom Dish concluded that it had no Established Business Relationship.

The “No DNC” or “No Scrub” only scrubbed calling lists for wireless numbers. Outbound Operations intended to apply the No Scrub to non-telemarketing campaigns such as collection calls, payment reminder calls, informational calls, or calls to schedule service. T 627: 2638-39, 2648-49 (Dexter); T 617: 633-34 (Davis); T 629: 3096, 3117, 3207 (Montano).

The “Standard Scrub” scrubbed calling lists to remove telephone numbers on the Dish Internal Do-Not-Call List; numbers of residents in states in which the state law did not allow for an Established Business Relationship exception for calls to numbers on State Do-Not-Call Lists; and wireless numbers. Outbound Operations applied the Standard Scrub to telemarketing campaigns directed to current or former customers with whom Dish concluded that it had Transaction-based Established Business Relationships. T 627: 2668-69 (Bangert); T 617: 638, 682-83 (Davis); T 629: 3096 (Montano). Outbound Operations scrubbed Canceled Work Order, No Line of Sight, and Held Work Order campaigns with the Standard Scrub. T 6278: 2546-47 (Dexter).

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Dish employees manually reviewed the Dish files to determine whether Dish had a Transaction-based Established Business Relationship with current and former customers whose telephone numbers were listed in Account Number Campaigns. Dish formulated calling campaign lists based on this manual review. Dish employees, however, did not use the last dates that consumers paid for Dish Network programming to calculate the 18 month Established Business Relationship time period. Rather, Dish used “the disconnect date that was associated with the file name” to formulate these lists. T 629: 2969, 3130 (Montano). These lists of former customers then became the basis for the trailing winback campaign calling lists. Dish assumed that a person was a current customer if his or her account did not have a disconnect date regardless of when the person last paid for Dish Network programming. Outbound Operations presumed that Dish had Transaction-based Established Business Relationships with persons whose numbers were on calling lists directed to current customers and trailing winback calling lists until the lists were more than 18 months old. T 629: 3014-15 (Montano); see T 627: 2608-09, 2624 (Dexter); T 617: 596-98 (Davis). Dish used this

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manual process until approximately July 2010. See PX 1248, Project Scope Document dated February 2, 2010 (requesting modification of PDialer to use last payment date); DTX 972, Email thread dated June 30, 2010 to July 2, 2010 between Dish and PossibleNOW representatives; DTX 670, PDialer Meeting Minutes dated July 1, 2010, at 2 ¶ 7; T 628: 2969 and T 629: 3130 (Montano).

Dish ran some recurring outbound telemarketing campaigns. The largest recurring telemarketing campaigns were the trailing winback campaigns. Dish also ran recurring Average Revenue Per Unit campaigns to market premium channels or other additional services to current customers. Outbound Operations did not require detailed script reviews of these recurring campaigns. T 627: 2637 (Dexter).

Outbound Operations used software called “PDialer” to scrub Account Number Campaign calling lists. Tr. 627: 2669-70 (Bangert); T 629: 3010 (Montano). The PDialer software compared proposed calling lists to the set of restricted lists included in the selected scrub (All DNC, No DNC, or Standard Scrub) and removed from the proposed calling lists numbers that were also on the

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applicable restricted lists. An employee in Outbound Operations manually selected the applicable scrub. The PDialer also formatted the calling lists so that they could be loaded into the automatic dialer. T 627: 2670-71 (Bangert). After completing the scrub, Outbound Operations then either: (1) loaded the scrubbed lists into the automatic dialer, and the automatic dialer made the calls for the various Dish call centers; or (2) sent the scrubbed list to a Dish Telemarketing Vendor such as eCreek. T 627: 2678-79 (Bangert); T 628: 2969 (Montano); T 627: 2581 (Dexter); T 617: 664-66 (Davis). Telemarketing Vendor eCreek used its own automatic dialer. Telemarketing Vendor EPLDT used Dish's automatic dialer. See T 627: 2602 (Dexter).

Outbound Operations' unwritten practices allowed a scrubbed calling list to be called for a 15-day period from the date of the scrub. The 15-day limit addressed the possibility that the list would become out-of-date. A person who had a telephone number on a calling list could register that number on the Registry. The TSR and FCC Rule safe harbor provisions required a telemarketer to honor a registration on the Registry no later than 31 days after the registration was made. TSR 16 C.F.R. § 310.4(b)(3); FCC Rule 47

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C.F.R. § 64.1200(c)(2)(i). Outbound Operations used a 15-day time limit to decrease the possibility that a telephone number on the scrubbed calling list would have been placed on the Registry more than 31 days before the call. See T 627: 2580 (Dexter).

Outbound Operations checked scrub results manually. Outbound Operations inserted into proposed calling lists numbers that should be scrubbed by the process. Outbound Operations checked the results to confirm that the scrub properly removed those numbers. T 627: 2678-79 (Bangert); see T 627: 2542 (Dexter). Outbound Operations personnel testified that they tried to fix any problems to improve the system. E.g., T 617: 649 (Davis); T 629: 3137 (Montano).

Outbound Operations used disposition codes to keep track of responses to calls such as no answer, busy signal, answering machine, or answered call. See T 627: 2552-53 (Dexter); DTX 671, Email dated March 16, 2011, attached glossary of response acronyms. The PDialer recorded some disposition codes automatically such as no answer or busy signal. Dish sales representatives (customer service agents) recorded some disposition

codes at the time of the call such as wrong number or business answered. See T 627: 2554 (Dexter).

Outbound Operations was responsible for reviewing and approving Account Number Campaigns to customers interested in foreign language programming. Between 2007 and 2010, Dish employees made prerecorded calls to market foreign language programming in 15 Account Number Campaigns. The telemarketing messages were recorded in the language of the programming offered for sale. The translations of the message scripts show that the prerecorded messages were directed to existing Dish customers. The messages offered additional foreign language programming options. A total of 98,054 of these prerecorded calls were answered by individuals and resulted in Abandoned Prerecorded Calls in violation of the TSR. See Opinion 445, at 127, 193-94, 75 F.Supp.3d at 996-97, 1019.¹⁴

Outbound Operations also monitored eCreek's operations. T 629: 3033 (Montano); see DTX-19, Email thread dated March 9-

¹⁴Outbound Operations had other problems with the departments that conducted foreign language telemarketing. In March 2008, the foreign language marketing department had to be instructed that all calling lists had to be scrubbed by Outbound Operations. T 617: 611-12, 614-17 (Davis); PX 85, email dated March 14, 2008 (stating that all calling lists must be scrubbed by Outbound Operations); DTX 626E, Dish Taylor Table, at 2.

10, 2010.¹⁵ Outbound Operations kept in daily communication with eCreek. See T 629: 3028, 3205 (Montano). ECreek performed an additional scrub on the lists it received from Dish. T 617: 666 (Davis). ECreek also collected names for its internal Do-Not-Call list and for Dish's internal Do-Not-Call list. T 627: 2581 (Dexter). eCreek sent Outbound Operations feedback nightly. The feedback included a "DNC" notation on those call recipients who wanted to be on Dish's internal Do-Not-Call list. T 617: 666-67 (Davis); see T 629: 3026-27 (Montano).

Outbound Operations responded to consumer complaints regarding eCreek's telemarketing, but did not otherwise check eCreek for Do-Not-Call Law compliance. T 627: 2612 (Dexter). Problems existed with eCreek's Do-Not-Call Law compliance in 2009, 2010, and 2011. If Outbound Operations became aware of problems in eCreek's telemarketing procedures, Outbound Operations tried to correct the problem. See T 617: 603 (Davis); T 627: 2617-19 (Dexter); PX59, Email from Montano dated January 28, 2010 regarding eCreek DNC call; PX1079, Email from Montano to eCreek dated January 11, 2011 regarding Call Research.

¹⁵ ECreek was operated by a former Dish employee Scott Larson. Larson had run Dish's call center operations. T 629: 3034 (Montano).

In July 2010, Outbound Operations asked eCreek for a copy of its Do-Not-Call Law policy and procedures. Outbound Operations employee Dexter sarcastically questioned whether eCreek had policies and procedures. See PX302, Email from Dexter dated July 28, 2010, regarding Request for DNC/TCPA Policies and Procedures; T 627, 2571-72 (Dexter). That same day, eCreek provided a Do-Not-Call Policy consisting of two pages of text and a flow chart. DTX 7, Email from eCreek dated July 28, 2010 regarding Request for DNC/TCPA Policies and Procedures. The two-page document did not include procedures for scrubbing calling lists to comply with the TSR or the FCC Rule.

2. Cold Call and Lead Tracking System Campaigns

Dish's second Do-Not-Call Law compliance system addressed Cold Call campaigns and Lead Tracking System campaigns. Database Marketing was responsible for operating the Do-Not-Call Law compliance system for these campaigns. Database Marketing also formulated the calling lists for these campaigns. Bangert testified Database Marketing incorporated the Do-Not-Call Law compliance process into the process that it used to formulate these calling lists. Tr. 627: 2680 (Bangert).

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Neither party presented any meaningful evidence on the process Database Marketing used to comply with the Do-Not-Call Laws. The scant evidence in the record indicates that Database Marketing may have used a lead management system referred to as CRM or a computer system called a Teradata System to perform these tasks.¹⁶ No one from Database Marketing testified, and no exhibits cited by the parties or other competent testimony explained how this process worked. See T 628: 2780 (Bangert) (used CRM to scrub LTS leads); PX 471, Email from Tobias Plumley dated December 29, 2005 (did not use CRM to scrub LTS leads); DTX 650, Timeline Email, at 4; see also PX482, Email from Wade Osborne dated April 17, 2003 regarding DNC Database (DNC scrubbing must be done within CRM tool). Database Marketing did not use the PDialer to scrub lists; the PDialer could only be used to scrub lists of telephone numbers associated with Dish account numbers. See DTX 670, PDialer Meeting Minutes dated July 1, 2010, at 5-6 ¶ 29 PDialer Bypass (New contact and lead calling lists bypassed the PDialer because the PDialer deleted any telephone number not associated with an account number).

¹⁶ The term CRM apparently means "Customer Relations Management." See e.g., U2Logic, Inc. v. American Auto Shield, LLC, 2014 WL 4852094, at *1 (D. Colo. September 30, 2014).

Dish witness Russell Bangert testified that Database Marketing used the same scrubbing options as Outbound Operations. Bangert testified that Cold Call campaigns received an ALL DNC scrub and that Lead Tracking System campaigns received a Standard scrub. T 627: 2680-82 (Bangert). Dish failed to establish that Bangert had personal knowledge on which to base these assertions. Bangert worked in Outbound Operations, and so, did not participate in Database Marketing compliance processes. Database Marketing did not use the PDialer because the PDialer required account numbers. The Court finds that Bangert's testimony about the process used by Database Marketing was not based on sufficient personal knowledge and has no probative value. The Court finds an absence of proof on the methods used by Database Marketing to process Lead Tracking System calling lists and Cold Call lists to comply with the TSR, TCPA, FCC Rule, or any other Do-Not-Call Law. As noted above, the Court also found an absence of proof on the methods used to formulate the Lead Tracking System calling lists.

Database Marketing sent the finished Lead Tracking System and Cold Call calling lists to Outbound Operations. Outbound

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Operations bypassed scrubbing these files with the PDialer and loaded the lists into the automatic dialer or sent these lists to eCreek. T 629: 3088 (Montano); see DTX 670, PDialer Meeting Minutes, at 5-6 ¶ 29 PDialer Bypass. Outbound Operations received Lead Tracking System campaign lists on a daily basis. T 629: 3165 (Montano). Outbound Operations dialed Lead Tracking System campaign calling lists within 24 to 48 hours of receipt. Dish presumed that it had Inquiry-based Established Business Relationships with the recipients of Lead Tracking System campaigns because the calls were made within 24 to 48 hours of receipt. T 629:3087-88 (Montano).

C. PossibleNOW

In December 2007, Dish retained a company called PossibleNOW, Inc. (PossibleNOW) to assist it in complying with Do-Not-Call Laws. T 617: 649-52 (Davis); see Opinion 445, at 71. PossibleNOW operated a number of web-hosted services to sellers and telemarketers to help them comply with the Do-Not-Call Laws. Beginning in early 2008, Outbound Operations used PossibleNOW's scrubbing services. See DTX 144, Master Services Agreement dated December 14, 2007. Outbound Operations scrubbed lists with the

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PDialer and then sent the scrubbed lists to PossibleNOW for a second scrubbing. See e.g., T 617: 655 (Davis); T 628: 2967-68 (Montano).¹⁷ PossibleNOW scrubbed and returned the scrubbed lists, and Outbound Operations loaded the lists into the automatic dialer or sent the list to eCreek. T 627: 2539 (Dexter); T 617: 652-55 (Davis); T 628: 2967-68, and T 629: 3129 (Montano).

PossibleNOW also maintained Dish's Internal Do-Not-Call List, Dish's copy of the Registry, and Dish's copies of State Do-Not-Call Lists. T 617: 653 (Davis); T. 628: 2966-67, 2972-76 (Montano).

PossibleNOW also maintained lists of wireless numbers. Dish used PossibleNOW's services to scrub against all these lists. T 617: 634 (Davis); see T 628: 2972 (Montano).

Beginning in April 2008, PossibleNOW began maintaining a combined Internal Do-Not-Call List for Dish, eCreek, and certain Order Entry Retailers. Dish, eCreek, and participating Order Entry Retailers uploaded Internal Do-Not-Call Lists to PossibleNOW. T 617: 654-55 (Davis); T 627: 2573 (Dexter); T 628: 2975-76, 3027 (Montano); T 622: 1842 (Mills). Dish required Order Entry Retailers

¹⁷ PossibleNOW customers usually used logins and passwords to access PossibleNOW products and services to conduct list scrubbing or other processes. In rare instances, PossibleNOW performed the scrubbing. See T 618:746-48 (Stauffer). Outbound Operations personnel testified that PossibleNOW performed the scrubbing services for Dish.

making 50 activations a month to submit Internal Do-Not-Call Lists to PossibleNOW. T 619: 1018-19 (Werner). PossibleNOW kept an Internal Do-Not-Call List for Dish, an Internal Do-Not-Call List for eCreek, and a combined Internal Do-Not-Call List for all participating Order Entry Retailers. Dish began scrubbing its own calling lists against all three Lists in 2008. T 628: 2975-80 (Montano). Dish also required Order Entry Retailers with 600 activations a year to use PossibleNOW's scrubbing services. T 622: 1841-43 (Mills).

PossibleNOW's scrubbing services also checked calling lists to determine whether telephone numbers were associated with individuals who had Established Business Relationships with Dish. PX-1248, Project Scope Document dated February 2, 2010.

PossibleNOW did not use Dish's manually prepared lists of current customers and lists of former customers based on disconnect dates to identify telephone numbers associated with individuals who had Established Business Relationships with Dish. Instead, PossibleNOW required Dish to add two additional fields to calling lists before conducting scrubs: (1) the last payment date; and (2) the date that a person inquired about Dish programming. During

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the scrubbing process, PossibleNOW identified numbers with whom Dish had: (1) a Transaction-based Established Business Relationship if the last payment date was within 18 months of the campaign calling date, or (2) an Inquiry-based Established Business Relationship if the inquiry date was within three months of the campaign calling date. Id.¹⁸

In approximately July 2010, Dish modified the PDialer to also use the last payment date to check for Transaction-based Established Business Relationships. Dish stopped presuming that it had a Transaction-based Established Business Relationship with all persons whose numbers were on campaigns directed to current customers and winback campaigns that were less than 18 months old. Dish added a field to its calling lists for a last payment date. Dish modified the PDialer to check for this field in a manner similar to the PossibleNOW process. T 629: 3011-15 (Montano); see T 633: 3297-99 (Taylor); PX 1248, Project Scope Document dated February 2, 2010 (request by Outbound Operations to modify PDialer to use last payment dates); DTX 972, Email thread dated June 30, 2010 to

¹⁸ Some states had shorter time periods for determining Established Business Relationships. PossibleNOW scrubbed for those shorter time periods also, when applicable. T 628: 2969 (Montano); PX-1248, Project Scope Document dated February 2, 2010.

July 2, 2010 between Dish and PossibleNOW representatives regarding use of last payment dates; DTX 670, PDialer Meeting Minutes dated July 1, 2010, at 2 ¶ 7 (indicating change to last payment date).

Dish did not add a field for inquiry dates to the PDialer. Dish employee Montano testified that one field was added for simplicity. Montano testified that inquiry dates, if applicable, were entered into the Last Payment Date field. T 629: 3015-16 (Montano). The Court finds this testimony not to be credible. The Court finds that Dish only added a Last Payment Date because Dish only used the PDialer to scrub Account Number Campaigns. Account Number Campaigns were addressed to current and former customers, not individuals inquiring about Dish Network programming. Thus, Dish did not need to add a field for inquiry dates to campaigns run through the PDialer. See T 628: 2780 (Bangert); DTX 670 PDialer Meeting Minutes, at 6 ¶ 29.¹⁹

¹⁹ The testimony is also not credible because it makes no sense to enter an inquiry date into a last payment date field. The length of time that Dish had a Transaction-based Established Business Relationship with a former customer was 18 months from the last payment, and the time that Dish had an Inquiry-based Established Business Relationship was only three months from the inquiry. Placing an inquiry date in the field would erroneously indicate that Dish had an Established Business Relationship with the inquiring party for 18 months. Montano's testimony on this point is not credible.

It is unclear whether Dish used PossibleNOW to scrub Lead Tracking System and Cold Call calling list. Witnesses testified that Outbound Operations scrubbed lists with the PDialer and then sent lists to PossibleNOW for a second scrubbing. See e.g., T 617:655 (Davis); T628:2967-68 (Montano). Outbound Operations only scrubbed Account Number Campaign calling lists through the PDialer. This testimony tends to indicate that Outbound Operations only sent Account Number Calling Lists to PossibleNOW. PossibleNOW's process, however, included a field for inquiry dates. PX 1248, Project Scope Document dated February 2, 2010. Inquiry dates would be used to determine Inquiry-based Established Business Relationships in Lead Tracking System and Cold Call calling campaigns. Dish, however, never provided any inquiry dates to either its expert Taylor or to the Plaintiffs. See T 633: 3300 (Taylor); T 614: 333-35 (Yoeli) (Dish provided activation dates to Plaintiffs, not inquiry dates). The Court finds that the scant, ambiguous evidence does not establish whether Dish used PossibleNOW to scrub Lead Tracking System calling lists or Cold Call calling lists.

D. Safe Harbor

The Court found at summary judgment that Dish did not comply with the TSR or FCC Rule safe harbor. Opinion 445, at 163-65, 75 F.Supp.3d at 1008-09. Dish employee Montano testified that Dish met all requirements for compliance with TSR and TCPA safe harbor provisions. T 628: 2962-65 (Montano). Montano testified that Outbound Operations maintained documentation of its scrubs. T 629: 3183 (Montano). Dish, however, failed to produce in discovery or at trial written scrubbing procedures or documentation that such scrubbing procedures were followed. Such documentation is required to meet safe harbor requirements. See Opinion 445, at 164-66, 210-11. Dish, in fact, had no written scrubbing procedures. T 628: 2807 (Bangert); T 627: 2596-97 (Dexter); see PX0302, Email thread between Joey Montano and Amy Dexter, dated July 28, 2010. Montano's testimony on this point contradicted Dexter's and Davis's testimony and is not credible.

The Court also barred Dish from producing evidence of scrubbing procedures that was not produced in discovery. Opinion entered April 24, 2013 (d/e 279) (Opinion 279), at 43-44. To the extent that Dish presented Montano's testimony at trial (or any

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other witness's testimony not produced in discovery) to prove the Dish maintained documentation to comply with safe harbor procedures, the testimony is barred by Opinion 279.

E. Notice to Dish of Calls to Numbers on the Registry and Internal Do-Not-Call Lists

Beginning in October 2003, Dish personnel periodically discovered that Dish's direct telemarketing operations made Registry Calls and Internal List Calls. On October 7, 2003, Dish personnel tested the scrubbing process and discovered the process failed to remove numerous telephone numbers from the test call list that were on the Registry. PX 478, Email from Todd Binns dated October 7, 2003, regarding Denver DMA DNC Test.

In February and May 2004, Dish personnel investigated consumer complaints and discovered that Dish made Internal List Calls. PX 438, Email from David Murphy dated February 12, 2004, regarding Consumer Complaint; PX 439, Email from John Dy dated May 2, 2004, regarding Do Not Call Issue. In March 2004, Dish personnel discovered Dish made an Internal List Call. PX 440, Email from Leanna Sultan dated March 16, 2004 regarding Telemarketing Calls to Current Subscribers.

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In December 2005, Lead Tracking System calling lists were not being scrubbed because whatever process Database Marketing was using was not working. PX 471, Email from Tobias Plumley dated December 29, 2005, regarding Casper and Cheyenne.

In October 2006, Dish personnel investigated a consumer complaint and discovered Dish made a Registry Call. PX 566, Email from John Greaney dated October 2, 2006, regarding Telemarketing Complaint.

In November 2007, Dish personnel investigated a consumer complaint and discovered that Dish made an Internal List Call. The investigators determined that the calling campaign was improperly scrubbed because the campaign was improperly classified as a non-telemarketing campaign. PX 46, Email from Bob Davis dated November 9, 2007 regarding Tahira Sial.

In 2007, Dish conducted an internal audit of telemarketing calling records. The 2007 audit showed that Dish made 2,334, 5,324, and 3,405 Registry Calls in June, July, and August 2005 respectively. The 2007 audit also showed that Database Marketing campaigns “were scrubbed but the DNC records were not removed.”

PX 695, Email from Todd Binns dated February 1, 2007, regarding

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Notes from DNC Meeting, January 30; see T 617: 626-27 (Davis); see PX 696, Email thread dated January 18-26, 2007 regarding 2007 audit; PX 1404, Email dated January 23, 2007 regarding 2007 audit.

In 2009, Dish conducted another internal audit of its telemarketing call records. The audit showed that Dish made 291,000 Registry Calls from October to December 2008. PX733, Email thread regarding 2009 Audit dated June 2, 2009 to January 5, 2010.

Outbound Operations also knew that eCreek made illegal Registry and Internal List Calls. Dexter testified that eCreek did a good job, but Outbound Operations personnel knew that eCreek's scrubbing process did not work effectively all the time. T 627: 2618 (Dexter). In January 2010, Dish personnel investigated a consumer complaint and discovered eCreek made a Registry Call. PX 59, Email thread regarding eCreek DNC dated January 25, 2010 to January 28, 2010.²⁰

²⁰ In January 2008, an eCreek telemarketer manually called a person who asked not to be called again, and then the eCreek telemarketer who made the call had two other eCreek telemarketers call to the person that same day. PX 1079, Email Thread Regarding eCreek Calling Procedures Dated January 10, 2010 to January 11, 2010.

III. Dish Order Entry Program

A. Dish's Relationship with Order Entry Retailers Generally

By 2003, Dish had developed a website interface called the Order Entry (OE) Tool to facilitate the sale of Dish Network products and services by national companies such as Radio Shack and AT&T.²¹ The Order Entry Tool was designed for telephone sales to residential customers and could not be used to open commercial accounts. Dish controlled the programming packages available for sale through the Order Entry Tool and set the pricing and terms of sale, including all promotions. T 626: 2225 (Neylon). Dish controlled access to the Order Entry Tool by issuing specific logins and passwords (collectively logins) to the national companies.

The Order Entry Tool prompted the sales person to ask a series of questions to offer the appropriate programming and services, secure the necessary information, and make the required disclosures to make the sale. T 626: 2358 (Ahmed); T 621: 1628-32, 1668 and T 622: 1671-73 (Mills); T 626, 2225 (Neylon); PX 1208, Dish Order Entry Tool Instructional Training Guide. The necessary information included customers' addresses, Social

²¹ The Order Entry Tool was also called the Partner Order Entry Tool or POET. See e.g., PX 1294 Email to Werner from YourDish.tv dated June 3, 2010.

Security Numbers, and credit card account numbers. The disclosures included the terms and conditions of sale and legally required disclosures. Dish provided the language for all disclosures and terms and conditions of sale. T 621: 1629-30 (Mills).

Once the customer's information was uploaded onto the Order Entry Tool, Dish performed the credit check, approved the sales, supplied all equipment, and performed the installation or arranged for the installation and activation of service. New customers paid Dish directly. See T 626: 2293-94 (Ahmed); T 621: 1626, and T 622: 1668-72 (Mills); PX 61, Letter from Ahmed to David Hagen dated October 7, 2003. The term "activation" referred to activating new service in a residence; the sale was complete when the service was activated. See T 628:2718 (Bangert); T 629:3052 (Montano).

In 2003, Dish began the Order Entry (OE) program to expand the use of the Order Entry Tool beyond national companies like Radio Shack and AT&T. Under the Order Entry program, Dish authorized marketing businesses to use the Order Entry Tool to sell Dish Network programming. T 626: 2283 (Ahmed). Dish controlled access by issuing logins to the marketing businesses. T 621: 1627 (Mills). Dish called these marketing businesses Order Entry

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Retailers.²² The name Order Entry Retailer was a misnomer. These businesses were not retailers. A retailer acquires inventory at wholesale and markets that inventory to the public at retail. A TVRO Retailer, for example, acquired inventory of satellite dishes, DVRs, cable decoding boxes, and other equipment, and sold or leased that equipment to customers who bought Dish Network programming. The Order Entry “Retailers” acquired no inventory and sold no product. Rather, these businesses marketed Dish Network programming for Dish. The businesses completed the solicitation and provided the customer information to Dish through the Order Entry Tool. Dish ran the credit check; Dish approved the sale; Dish installed the equipment; Dish sold the programming and services directly to the customer; the customers became Dish subscribers; and the customers paid Dish directly. The Order Entry “Retailers” were marketing businesses. Dish engaged these marketing businesses to sell Dish Network programming.²³ The Court will use the misnomer “Order Entry Retailer” because the

²² Dish also referred to Order Entry Retailers as National Sales Partners. See Opinion 445, at 57, 75 F.Supp.3d. at 971.

²³ Some Order Entry Retailers were also TVRO Retailers. Dish, however, completed the sale and installed the equipment for all of the sales these Retailers made through the Order Entry program just like all the other Order Entry Retailers. See Deposition of Walter Eric Myers, at 80-84. Deposition excerpts cited by the Court were admitted at trial in lieu of live testimony. JIA000208

term pervades the exhibits and trial testimony, but the businesses were not retailers.

Dish paid the Order Entry Retailers commissions called “incentives” for activations.²⁴ Dish established the Order Entry program to compete with DirecTV. DirecTV had already implemented a similar program, and Dish was trying to catch up. T 626: 2296 (Ahmed); T 621: 1632 (Mills).

Order Entry Retailers could market nationally because Dish installed the satellites and related equipment. Existing TVRO Retailers could only market in the geographic areas in which the Retailer could deliver and install Dish satellites and related equipment. See T 626: 2295, 2385 (Ahmed). Order Entry Retailers also had no inventory costs and no costs related to installation and delivery because Dish provided those services to the customer. T 626: 2295-96 (Ahmed); see Deposition of Walter Eric Myers, at 82.

Dish employees testified that Dish developed the Order Entry program to “leverage . . . entrepreneurial resources . . . in the marketplace.” T 626:2223 (Neylon). Dish wanted to take advantage

²⁴ Order Entry Retailers were subject to a charge back of the incentive fee if a customer terminated Dish Network within 180 days of subscribing to Dish Network. T 626: 2380 (Ahmed).

of the expertise of marketing companies to sell products.

See T 626: 2289-90 (Ahmed) (“[Order Entry Retailers] bring specific expertise, just like all the independent satellite dealers do to their specific niche. And that’s why these guys were very valuable, and they still are today.”); see also Portela Deposition, at 76 (Dish sought out direct marketers who were good at selling anything.).

The Order Entry program generated large numbers of activations for Dish. By 2005, Order Entry Retailers passed Dish’s direct marketing in producing activations. By 2007, Order Entry Retailers accounted for 30 percent of all of Dish’s activations.

PX 486, Dish Quality Assurance Program Presentation, at 7. As of mid-2007, the Order Entry Retailers were producing 70,000 to 90,000 activations per month. Dish direct sales were averaging 45,000 to 60,000 activations per month at the same time period.

PX 99, Dish Gross Sales Update Report dated August 6, 2007.

From 2004 to 2010, 60 percent of new activations came from Retailers, and the lion’s share of those came from Order Entry Retailers. T 618: 899 (Werner); see also Portela Deposition, at 84.

The number of companies in the Order Entry program was always relatively small. At its peak, Dish had approximately 80

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Order Entry Retailers, compared to 8,000 TVRO Retailers at the same time. T 619: 1157 (Werner). By the end of 2009, Dish reduced the number of Order Entry Retailers to 32. PX 730, 2009 Sales Partner Review, at 13; see also T 619: 1157-58 (Werner). In January 2016, Dish about 3,000 TVRO Retailers and 10 to 20 Order Entry Retailers. T 621: 1558 (DeFranco). As of October 2016, Dish had 17 Order Entry Retailers. T 711; 330 (Mills).

The relationship between Dish and Order Entry Retailers was governed by a standard Retail Agreement. All Order Entry Retailers signed a substantially similar form Retailer Agreement. See PX 152, 180, 200, and 238, Retailer Agreements with various Order Entry Retailers. The Retailer Agreements referred to Order Entry Retailers as “Retailers.” The Retailer Agreements appointed Order Entry Retailers as “Authorized Dealers” for Dish, and authorized Order Entry Retailers to “market, promote, and solicit” orders for Dish throughout the United States. PX 152, Retailer Agreement with Dish TV Now, §§ 3.1-3.2. The Retailer Agreement authorized Order Entry Retailers to use Dish trademarks in their marketing; and gave Dish access to each Retailer’s records with respect to its Dish dealership. Id. § 8.

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Sections 7.1, 7.2, and 7.3 provided as follows:

7.1 Retailer agrees to use its best efforts to promote and enhance EchoStar's business, reputation and goodwill. Retailer shall allow only its employees, and shall not use any independent contractors, Affiliates or sub-agents, to fulfill its obligations hereunder without EchoStar's specific prior written consent, which consent may be withheld in EchoStar's sole and absolute discretion for any reason or no reason. In the event Echostar does grant consent to Retailer to use persons not employed by Retailer to perform activities contemplated hereunder, Retailer shall be responsible for the acts and omissions of such persons under this Agreement to the same extent it is responsible for the acts and omissions of its own employees.

7.2 Retailer shall not sell Programming under any circumstances. All sales of Programming are transactions solely between EchoStar and DISH Network Subscribers. Retailer shall promptly forward to EchoStar all orders for Programming in the manner prescribed by EchoStar from time to time. Retailer understands that EchoStar shall have the right, in its sole and absolute discretion and for any reason or no reason, to accept or reject, in whole or in part, all orders for Programming. Retailer also agrees that it shall not condition, tie or otherwise bundle any purchase of Programming with the purchase of other services or products other than as specifically consented to in writing by EchoStar in advance, which consent may be withheld in EchoStar's sole and absolute discretion for any reason or no reason.

7.3 Retailer shall comply with all Business Rules, including without limitation all Business Rules which govern or are applicable to any Promotional Program in which Retailer participates. Retailer shall disclose to each prospective DISH Network Subscriber the relevant terms of the Promotional Programming which the prospective

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DISH Network Subscriber is interested as well as any other terms as set forth in any applicable Business Rule. Furthermore, Retailer shall take all actions and refrain from taking any action, as requested by EchoStar in connection with the marketing, advertisement, promotion and/or solicitation of orders for Programming and the sale of DISH DBS Systems, and Retailer shall cooperate by supplying EchoStar with information relating to those actions as EchoStar reasonably requests. Failure of Retailer to adhere to any Business Rules may result in disciplinary action up to and including termination of this Agreement and/or any Other Agreement in the sole and absolute discretion of EchoStar for any reason or no reason, and the exercise by EchoStar of any other remedy provided in this Agreement, at law, in equity or otherwise.

Id. §§ 7.1, 7.2, and 7.3 (emphasis added). The Retailer Agreement defined Business Rules as:

1.6 "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 Echostar which is communicated to Retailer by EchoStar or an Affiliate of EchoStar either directly (including e-mail) or through any method of mass communication reasonably directed to EchoStar's retailer base, including, without limitation, a "Charlie Chat", e-mail, facts blast, or posting on EchoStar's retailer web site. Retailer agrees that EchoStar has the right to modify any Business Rule at any time and from time to time in its sole and absolute discretion for any reason or no reason, upon notice to Retailer.

Id. § 1.6.

Section 17.9 of the Retailer Agreement authorized Dish to audit Retailers on two days' notice:

17.9 Records and Audit Rights. During the Term of this Agreement and for a period of three (3) years thereafter, Retailer shall keep and maintain at its principal place of business complete and accurate records and books of account, as well as all documentation of all material processes and procedures in connection with: (i) its performance under this Agreement. . . . EchoStar shall have the right, upon two (2) days prior written notice, to review, audit and make copies of Retailer's books, records and documentation for the purposes of: (a) determining Retailer's compliance with its duties and obligations under this Agreement, Any audit conducted by EchoStar shall be conducted by EchoStar or its representative(s) at Retailer's offices during normal business hours. . . .

Id. § 17.9.

The Retailer Agreement provided for automatic termination if an Order Entry Retailer violated the terms of the Retailer Agreement or "any applicable federal, state or local law or regulation."

Id. § 10.4.

The Retailer Agreement also contained a provision entitled Independent Contractor:

11. INDEPENDENT CONTRACTOR. The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be Retailer's employees only, and not

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employees or agents of EchoStar or its Affiliates. Retailer shall prominently state its business name, address and phone number in all communications with the public, including, without limitation, marketing materials, flyers, print ads, television or radio spots, web sites, e-mails, invoices, sales slips, and the like. Notwithstanding anything in this Agreement to the contrary, Retailer (including without limitation its officers, directors, permitted subcontractors, permitted agents and employees) shall not, under any circumstances, hold itself out to the public or represent that it is an agent, employee, subcontractor or Affiliate of EchoStar or any Echostar Affiliate. In furtherance of (and without limiting) the foregoing, in no event shall Retailer use EchoStar's name or the name of any EchoStar Affiliate in any manner which would tend to imply that Retailer is an Affiliate of EchoStar or that Retailer is an agent, subcontractor or employee of EchoStar or one of its Affiliates or that Retailer is acting or is authorized to act on behalf of EchoStar or one of its Affiliates. This Agreement does not constitute any joint venture or partnership. It is further understood and agreed that Retailer has no right or authority to make any representation, promise or agreement or take any action on behalf of EchoStar or an EchoStar Affiliate.

Id. § 11(emphasis added).

Order Entry Retailers represented themselves to the public as Dish authorized Retailers. See T 622: 1821-22 (Mills). Order Entry Retailers could use the Dish Network logo with the added words “Dish Authorized Retailer.” T 625: 2226 (Neylon); T 620: 1215-16 (Musso). Some Order Entry Retailers improperly represented

themselves to the public to be Dish. See e.g., PX 120 Email Thread
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with Sweeney of Indiana Attorney General's Office regarding Satellite Systems dated September 23-30, 2005 (Order Entry Retailer claims to be Dish); PX 1361, Email thread regarding calls to existing customers, at 8-10; PX 650, Email thread dated August 7, 2006 regarding consumer complaint; T 621: 1474-75 (DeFranco).²⁵

Order Entry Retailers set up their own facilities, purchased their own equipment, paid their own rents, hired and fired their own employees, secured their own leads and calling lists, wrote telemarketing scripts, and prepared marketing materials. Some Order Entry Retailers also sold other products, including competing services such as DirecTV programming. See T 626: 2290-91, 2293 (Ahmed); T 619: 1088-94 (Werner); T 622: 1916-19 (Goodale); T 625: 2099-2100 (Neylon); T 622: 1793-94 (Mills); see DTX 737, Letter from JSR Enterprises to Musso, undated; T 620: 1357-58 (Castillo).

Contrary to § 10.4 of the Retailer Agreement, Order Entry Retailers were not automatically terminated when they violated the

²⁵ On one occasion in 2011, Dish could not keep up with the volume of calls it was receiving. Dish representatives discussed diverting some calls to certain Order Entry Retailers. Dish personnel discussed authorizing those Retailers on that occasion to state that they were Dish. PX 331, Email from Dish marketing head Lana Luth dated October 28, 2011. The proposed use of Order Entry Retailers was not implemented. T 622: 1758-60 (Mills).

terms of the Retailer Agreement or applicable law. E.g., T 625: 2124-25 (Neylon); T 619: 1170-71 (Werner). Rather, Dish employed an array of disciplinary measures that included warnings, probation, fines, withholding access to the Order Entry Tool (known as putting on hold), and termination. See T 625: 2136 (Neylon); T 1627 (Mills).

Dish's Sales Department ran the Order Entry program. T 626: 2301-02 (Ahmed). The Sales Department was responsible for the indirect marketing channel. As discussed above, the indirect channel included Order Entry Retailers, TVRO Retailers, and national accounts such as Sears and AT&T (collectively Indirect Marketers). Dish Vice President of Sales Amir Ahmed developed the Order Entry program. T 626: 2358 (Ahmed). In 2005, Ahmed was promoted to Senior Vice President of Sales and Distribution. Ahmed left Dish on January 31, 2006 and went to work for a Dish Order Entry Retailer called Marketing Guru. T 626: 2283-85 (Ahmed). Dish Vice President for Sales and Distribution Brian Neylon took over direct responsibility for indirect sales, including

the Order Entry program, after Ahmed left. T 625: 2075-76, 2112-13 (Neylon).²⁶

The Sales Department looked for companies to become Order Entry Retailers that demonstrated the ability to generate large numbers of activations of new Dish subscribers. Ahmed solicited the first Order Entry Retailer, Dish TV Now, because its principal David Hagen operated a very large call center that produced thousands of activations for DirecTV. See T 626: 2304-05 (Ahmed); PX 61, Letter from Ahmed to Hagen dated October 7, 2003; PX 148, Dish TV Now proposal dated October 7, 2003 (Dish TV Proposal) (Hagen's DirecTV Retailer Prime TV generated 27,000 new DirecTV subscribers per month). Dish did not perform any background checks on these companies or their principals (such as checking Dunn & Bradstreet Reports or criminal background checks) before making them Order Entry Retailers. E.g., T 626: 2311, 2361, 2477-78 (Ahmed); T 625: 2230-31 (Neylon). The goal was to find outside companies that could generate activations.

²⁶ Neylon left Dish for a brief period while Ahmed was gone, but returned before Ahmed returned. T 621: 1690 (Mills). At the time of trial, Neylon was an Executive Vice President of Dish.

Dish Sales personnel knew that many Order Entry Retailers used outbound telemarketing to generate high volumes of activations. T 622: 1677-78 (Mills). Dish Sales personnel assumed that Retailers selling more than 150 activations per month were using outbound telemarketing. PX 620, Email Thread dated August 17,2007 regarding Retailers. Dish Sales personnel regularly learned that Order Entry Retailers used telemarketing. See DTX 223, Email Thread between Ahmed and Hagen dated September 16, 2004 (Ahmed informed that the first Order Entry Retailer Dish TV Now was using outbound telemarketing); PX80, Email thread between Nick Meyers and Neylon and Ahmed, dated March 10-11, 2002 (Dish knew in 2002 that then TVRO Retailer Satellite System used Prerecorded Calls); T 626: 2410-11, 2417 (Ahmed); PX 190, Email thread between Ergen and Ahmed dated June 28, 2004, and PX 656, Email thread regarding Satellite Systems dated September 14-15, 2004; T 627: 2475-76 (Ahmed knew Satellite Systems used Prerecorded Calls to generate sales for DirecTV, and Ahmed made Satellite Systems an Order Entry Retailer); PX 265, Email from Mills to Neylon dated December 21, 2006 (Order Entry Retailer JSR Enterprises principal Richard Goodale told Mills that JSR planned

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on using outbound telemarketing when JSR became an Order Entry Retailer); PX 129, Email thread between Mills and Werner dated May 17, 2007 (Order Entry Retailer outbound telemarketing accounted for 12,000 activations per month); PX 598, Email to Van Emst re Secret Shopping dated April 8, 2008 (lists several Order Entry Retailers using outbound telemarketing); PX 1347, TCPA Tracker Report dated September 16, 2008 (identified consumer complaints resulted from Order Entry Retailer Prerecorded Calls); see also Deposition of Shawn Portela, at 81-82 (Dish was actively prospecting for call centers to sell Dish Network programming); T 711: 339-40 (Mills) (Mills knew that 9 of 17 current Order Entry Retailers used outbound telemarketing); T 710: 231 (DeFranco) (about half of Order Entry Retailers in October 2016 used outbound telemarketing). The testimony of various Dish witnesses that Dish did not know whether particular Order Entry Retailers used outbound telemarketing was not credible.

The Sales Department was divided into two parts, Retail Sales and Retail Services. Retail Sales worked with Indirect Marketers to facilitate sales. Michael Mills was Vice President in charge of Retail Sales. Retail Services handled the payments to Indirect Marketers.

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Blake Van Emst was Vice President in charge of Retail Services.

Rob Origer was Director of Retail Services.

Retail Sales employed Regional Sales Managers and Area Sales Managers (collectively Sales Managers), Account Managers or Account Representatives (Account Managers), and Field Sales Development Representatives (“Field Representatives” or “FSDRs”), all of whom visited locations that sold Dish through the indirect channel. See T 711: 284-86 (Van Emst). Account Managers and Field Representatives reported to Sales Managers who reported up the chain to Mills in Retail Sales. Initially, Account Managers handled Order Entry Retailers, and Field Representatives handled TVRO Retailers and national accounts. By 2006, Account Managers and Field Representatives both worked with Order Entry Retailers. T 620: 1320-21 (Castillo).

Account Managers and Field Representatives provided training and marketing materials on Dish products and services at Order Entry Retailer facilities. T 621: 1627, 1632 (Mills); T 620: 1302 (Castillo); T621: 1632-34 and T 622: 1703 (Mills); Deposition of Michael Oberbillig, at 68, 83. Account Managers and Field Representatives pitched marketing ideas to Order Entry Retailers.

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See Oberbillig Deposition, at 81. Dish Sales personnel, on occasion, provided sales scripts to Order Entry Retailers and revised Order Entry Retailers' sales scripts. T 621: 1636 and T 622: 1707 (Mills). Mills made comments on scripts regularly. T 621: 1637 (Mills) (quoting deposition testimony).

Dish shared lead lists with Retailers on a few occasions. T 622: 1767-72 (Mills); PX 704, Email thread between Dish Legal Department and Marketing dated May 31- June 7, 2007; PX 58, Email from Davis to Pastorius dated June 6, 2008; PX 621, Email from Erik Carlson to DeFranco and others dated March 20, 2006; T 621: 1519-20, 1560 (DeFranco); PX 621, Email from DeFranco to Carlson, dated March 20, 2006; PX 1220, Email thread from Defender to Eric Carlson dated June 22- July 18, 2007.²⁷

Retail Sales employees' compensation, from Field Representatives and Account Managers up to Vice President Mills, was tied to the number of new activations generated by Indirect Marketers, including Order Entry Retailers. See e.g., T 622: 1798

²⁷ The Plaintiffs present some evidence about an additional set of leads called Glen Gary leads. Dexter in Outbound Operations had heard that Glen Gary leads were distributed to Order Entry Retailers, but she never confirmed this. T 627: 2539-41, 2610 (Dexter); PX1181, Email from Dexter dated June 16, 2011 regarding Glen Gary Leads. Bangert testified that the Glen Gary leads were used in Dish direct marketing. T 628:2714-15 (Bangert). The scant evidence fails to establish whether Glen Gary leads were distributed to Order Entry Retailers. JA000222

(Mills) (part of annual bonus based on number of new activations); T 620: 1299, 1303-04, 13-7-09 (Castillo) (Field Representatives and Account Managers' compensation tied to regional activation goals); Oberbillig Deposition, at 38-39; see also T 626: 2368 (Ahmed) ("[L]ove to see the activation numbers.").

The Retail Services division of the Sales Department included a Risk and Audit unit. T 618: 926 (Werner). Bruce Werner was in charge of Risk and Audit. Risk and Audit audited Indirect Marketers to look for attempts to defraud Dish. Risk and Audit also kept information on "churn." The term "churn" meant the rate at which new customers solicited by a particular marketer terminated their Dish subscriptions. A high churn rate meant that a large percentage of the new customers solicited by particular marketer (either in the direct or indirect channel) terminated their subscriptions after only a brief period of time. See T 618: 915 (Werner); Oberbillig Deposition, at 47-48. High churn rates cost Dish money. Dish incurred significant upfront costs with each activation in the form of equipment costs, installation costs, and promotional discounts. Dish recouped the initial investment over two to three years. Dish could not recoup these upfront costs if the

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customer cancelled after only a short period of time. As a result, Dish lost money on activations from Order Entry Retailers with high churn rates. See e.g., T 626: 2325-28 (Ahmed); T 621: 1692 (Mills); T 621: 1486-86 (DeFranco). Risk and Audit could compare Order Entry Retailer churn rates to the churn rate of Dish's direct marketing. See e.g., PX 1144, Retailer Audit Notification & Summary dated December 20, 2005 (comparing Dish TV Now churn rate with Dish direct marketing churn rate).

For the first several years of the Order Entry program, Dish made little or no effort to monitor or supervise Order Entry Retailers' sales methods. Risk and Audit audited Order Entry Retailers to detect fraud on Dish, and Dish terminated Order Entry Retailers for fraud. T 618: 919 and T 619: 1072 (Werner); PX 1355, Email from Werner dated January 26, 2010. T 618: 916-19 and T 619: 1116 (Werner). Risk and Audit also responded to consumer complaints, but did not otherwise monitor Order Entry Retailers' marketing practices. Sales Managers, Field Representatives, and Account Managers visited Order Entry Retailer facilities to assist in marketing, but they did not closely monitor marketing practices.

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Some of the Order Entry Retailers took advantage of the situation to engage in corrupt practices. The corrupt practices generated problems in at least six areas: fraud on Dish; deceptive, incomplete, or inaccurate representations made to consumers during telephone solicitations; Do-Not-Call Law violations; unauthorized use of third-party affiliates; high churn; and increasing consumer complaints.

Some Order Entry Retailers used various means to defraud Dish. Order Entry Retailers sometimes opened duplicate accounts for existing Dish customers to secure additional commissions. Order Entry Retailers sometimes closed current accounts and opened new accounts for existing customers to secure additional commissions. Order Entry Retailers sometimes submitted false information on the Order Entry Tool to secure Dish approval of customers who would not otherwise be approved for a Dish subscription. Order Entry Retailers sometimes submitted fake Social Security numbers. At least one Order Entry Retailer, American Satellite, Inc. (American Satellite or Am Sat), sometimes put \$1.00 on prepaid debit cards and then falsely submitted numbers from the prepaid cards as the credit card numbers of new

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customers who did not have credit cards. See T 618: 902-14 (Werner); T 621: 1511-12, 1515-17 (DeFranco); PX220, Email Thread dated January 7, 2009 regarding Order Entry Retailers Allegro and American Satellite; see also PX 1306 Email dated September 5, 2008 from Steve McElroy to Bruce Werner and others regarding More Cactus Follow-up.

In addition to defrauding Dish, some Order Entry Retailers made false or misleading statements to consumers during sales presentations. See e.g., T 621:1511-12, 1515-17, 1589 (DeFranco); DTX 746, Collective Exhibit of Five Press Releases dated October 8, 2008 through March 5, 2009, Announcing Terminations of 40 Retailers. Some Order Entry Retailers did not provide required disclosures. Dish incorporated into the Order Entry Tool a set of disclosures that were supposed to be read to purchasers as part of completing the sale. Some disclosures were required by statute or regulation. Some were required by settlements that Dish made with state attorneys general. See e.g., PX 1202, Risk Summary—TCPA/Disclosures for week ending September 12, 2006 (2006 Risk Summary); PX 1044, Letter from Mike Oberbillig to Jerry Grider dated August 10, 2006 (required disclosures enclosed); T 626: 2259

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(Neylon). Some Order Entry Retailers did not give the disclosures. See e.g., PX 1202, 2006 Risk Summary.

Order Entry Retailers also violated the Do-Not-Call Laws. Dish Retail Sales Vice President Mills knew that Order Entry Retailers could be a source of serious Do-Not-Call Law violations. T 621: 1678-79 (Mills). Several Order Entry Retailers initiated Prerecorded Calls in violation of the TSR and the TCPA. These included, among others, Dish TV Now, Satellite Systems, Star Satellite, JSR, American Satellite, United Satellite, Vision Satellite, LA Activations, Dish Nation, and Atlas Assets. See T 625: 2110, 2117, 2170-71 (Neylon); T 620: 2110 (Musso); T 621:1693-95 and T 622: 1728-29 (Mills); T 622: 1883 (Goodale); PX205, Email thread between Bangert and Dish Retailer Escalations, dated May 25-27 2005; PX 120, Email thread between Oberbillig, Ahmed and Novak dated September 26-30, 2005 regarding Dish Network autodialer calls, at PX 120-001, 003-004; PX 168, Letter from Consumer Ryan Swanberg, dated July 26, 2004; PX 1299, Letter from attorney Chad Austin to Dish Senior Corporate Counsel Dana Steele dated March 27, 2007; PX 1298, Letter from North Dakota Assistant Attorney General James Thomas to Echostar and Dish Nation LLC dated

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June 25, 2007, with enclosed North Dakota ex rel. Stenehjem v. Creative Concepts Group, Inc., N.D. Dist. Ct., South Central Judicial Dist., Civ. No. 07C1307, Assurance of Voluntary Compliance Order entered June 21, 2007. Many of these companies used a type of prerecorded call known as a “press 1” or “p-1” call. The prerecorded message asked the call recipient to press the number 1 on the telephone number pad if the recipient was interested in the product. The call recipient who pressed 1 was connected to a live sales person. See e.g., T 622: 1871-72 (Goodale).

Order Entry Retailers also made Registry Calls and Internal List Calls. Some Order Entry Retailers did not maintain Internal Do-Not-Call Lists in direct violation of the TCPA. Some companies hung up on individuals who asked to be put on an Internal Do-Not-Call List and then called the individuals back in direct contravention to the call recipients’ requests. See T 622: 1873 (Goodale); PX 250, Email from Musso dated December 20, 2006 Regarding E-Mail Notice of TCPA Violation.

Some Order Entry Retailers hid their identities through a process called spoofing. Spoofing means falsifying identifying

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information. Telephone spoofing is a process by which the caller causes false identifying information to appear on the call recipient's Caller ID display and phone records. See T 620: 1221-22 (Musso). As a result, the call recipient cannot readily determine the source of the illegal call.

Many Order Entry Retailers engaged third-party affiliates without authorization from Dish. The Retailer Agreement provided that Order Entry Retailers could not use third-party affiliates without prior approval from Dish. Many Order Entry Retailers disregarded this requirement. Many provided their Order Entry Tool Logins to individuals and call centers in this country as well as call centers in the Philippines or other countries. These third parties often made Do-Not-Call Law violations and used misrepresentations to sell Dish Network programming. See DTX 947, Dish Facts Blast, dated October 10, 2007 (warning Order Entry Retailers about the use of unauthorized affiliates); T 620: 1314 (Castillo) (Order Entry Retailers shared logins with other Retailers); T 622: 1875-76 (Goodale) (worked under other Order

Entry Retailer Logins).²⁸ Dish Sales personnel were aware of the use of affiliates by at least some Order Entry Retailers. See e.g., PX 239, Email from Steven Keller dated September 8, 2006, attached Spread Sheet (September 2006 Spread Sheet); PX 1045, Email from Mills dated October 10, 2006, regarding Affiliate Calls (October 2006 Affiliate Calls Email).

Customers who purchased Dish Network Programming from these unscrupulous Order Entry Retailers often canceled their services. As a result, many of these Order Entry Retailers had high churn rates. Dish lost money on activations from Order Entry Retailers with high churn rates because Dish could not recoup over time its initial investment in equipment costs, installation costs, and promotional discounts. See e.g., T 626: 2325-28 (Ahmed); T 621: 1692 (Mills); T 621: 1486-86 (DeFranco).

The unscrupulous practices of largely unsupervised Order Entry Retailers also generated customer complaints. Dish had a long-term problem with consumer complaints about Order Entry Retailers. T 621: 1685 (Mills). Retail Sales, Retail Services, and Dish's Legal Department worked with Dish's Escalations

²⁸ Dish Exhibit DTX 947 is also admitted as Plaintiffs' Exhibit PX 570.

Department to respond to consumer complaints. See T 620: 1220 (Werner); Deposition of Marciedes Metzger, at 31. The Escalations Department included the Executive Resolution Team (ERT). The Executive Resolution Team handled customer complaints that had been “escalated.” The term “escalated” meant that the customer’s complaint had not been resolved by the customer service representative who initially received the complaint and so was sent up, or escalated, to the Executive Resolution Team. Metzger Deposition, at 26-27.²⁹

Representatives of the Executive Resolution Team investigated complaints to ascertain the source of the call that sparked the complaint and whether the complaining consumer’s telephone number was on the Registry. The Executive Resolution Team put the complaining consumer’s telephone number on Dish’s Internal Do-Not-Call List. If Dish direct marketing did not make the call, the Executive Resolution Team attempted to identify the Order Entry Retailer that made the call. In such instances, the Executive Resolution Team told the complaining customer that Dish did not make the call and told the consumer the identity of the Order Entry

²⁹ Dish’s Escalations Department also had a Dispute Resolution Team (DRT). The Dispute Resolution Team handled written complaints. Metzger Deposition, at 31.

Retailer that made the call, if known. The complaint was then filed and marked resolved. PX 1361, Email from July 11-19, 2006, regarding Calls to Existing Dish Network Customers, at 001-002.

Dish dealt with Order Entry Retailers that generated consumer complaints on an ad-hoc, case-by-case basis. T 619: 996 (Werner). If Dish identified the Order Entry Retailer that dealt with a complaining consumer, executives in Retail Sales and Retail Services discussed the complaint among themselves and with members of Dish's Legal Department. A person from either the Legal Department or Retail Sales contacted the Order Entry Retailer. See Oberbillig Deposition, at 79-80. The Order Entry Retailer generally gave some explanation, denial, or apology, and the matter was closed.

Dish's basic approach in matters not involving fraud on Dish was to accept the excuse the Order Entry Retailer gave. For example, Satellite Systems repeatedly violated the Do-Not-Call Laws from 2002 to 2005. Satellite System's principal Alex Tehranchi repeatedly said he would stop the practice. Dish repeatedly accepted Tehranchi's excuses even though Tehranchi repeatedly

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demonstrated that he would not stop the practice. PX 120, Email thread, Email from Novak to Ahmed dated September 26, 2005.

In another example, Dish was told several times in the first eight months of 2005 that Order Entry Retailer Star Satellite was making illegal telemarketing calls. Dish did nothing. In October 2005, the office of a United States Congressman contacted Ahmed about Star Satellite making Registry Calls. In response, Ahmed yelled at Star Satellite's principle Walter Eric Myers and told Myers not to do it again. Ahmed took no other action to stop the illegal calls or to discipline Star Satellite. T 626: 2323-24 (Ahmed); T 622: 1818 (Mills); Myers Deposition, at 138, 184.

Dish witnesses testified that Dish could not discipline an Order Entry Retailer based on isolated consumer complaints. They testified that Dish had to build a case to terminate an Order Entry Retailer or put an Order Entry Retailer on hold. See e.g., T 619: 1125 (Werner); see also T 625: 2254 (Neylon) (placing Order Entry Retailer on hold was a last resort because a hold effectively put the Retailer out of business). Dish may have needed to investigate and verify Order Entry Retailers' excuses and explanations to impose discipline. Dish, however, did not investigate complaints. In most

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cases, Dish uncritically accepted Order Entry Retailers' explanations, told consumers that Dish was not responsible, marked the complaint resolved, and moved on. See PX 1361, Email from July 11-19, 2006, regarding Calls to existing Dish Network Customers, at 001-002. (Once the Executive Resolution Team gave the consumer the name of the Order Entry Retailer involved, if known, and told the consumer that Dish was not responsible, the matter was marked resolved).

By mid-2006, the number of consumer complaints generated by Order Entry Retailers increased dramatically. Werner testified that consumer complaints went "crazy." T 619: 983 (Werner); see T 625: 2129 (Neylon); T 618: 978 (Werner) (the "car came off the wheels"). See also T 621: 1682-83 (Mills). The Sales Department decided that Dish needed a more systematic way to address the practices of Order Entry Retailers to try to reduce the number of consumer complaints.

In August 2006, Retail Services added a Compliance Department to deal with problems associated with Order Entry Retailers in a more systematic way. Reji Musso was hired as Dish's Compliance Manager. Musso reported to Werner in Risk and Audit

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within Retail Services.³⁰ PX 130, Email dated August 21, 2006 announcing hiring of Compliance Manager Reji Musso. The Compliance Department sought to monitor Order Entry Retailers' compliance with the standard Retailer Agreement, Dish's rules, and applicable laws and regulations. T 620: 993-94 (Musso). The Compliance Department was tasked with ensuring that Order Entry Retailers accurately described the terms and conditions of Dish Network programming packages and made all required disclosures during telephone sales presentations. T 619: 993-94 (Werner); T 620: 1194 (Musso). The Compliance Department also handled consumer complaints about Order Entry Retailers. T 625: 2130 (Neylon); T 619: 983 (Werner.).

In September 2006 the Compliance Department started a Quality Assurance (QA) Program. T 620: 1204 (Musso). The Quality Assurance Program was supposed to improve the quality of sales calls by insuring that Order Entry Retailers were making accurate representations and making all required disclosures in their sales presentations. T 621: 1638 (Mills); T 620: 1205 (Musso); PX 1202, Risk Summary—TCPA/Disclosures for week ending

³⁰ Risk and Audit at some point became known as Risk Management. See T 620: 1194 (Musso); PX 1202, Risk Summary—TCPA/Disclosures for week ending

September 12, 2006; PX 1044, Letter from Mike Oberbillig to Jerry Grider dated August 10, 2006 (required disclosures enclosed).

Order Entry Retailers were required to participate in the Quality Assurance Program. T 619: 994 (Werner).

The Quality Assurance program required Order Entry Retailers to allow Field Representatives and Account Managers to listen to sales presentations, either live presentations at the Order Entry Retailer facility or recorded presentations provided by the Order Entry Retailers, and to score the presentations. See T 620: 1310-11 (Castillo); T 620: 1209 (Musso); T 619: 992 (Werner); PX 486, Dish Quality Assurance Field Sales Development document issued on or about March 1, 2007 (2007 Quality Assurance Report), at 9, 17-23.³¹ Field Representatives scored Order Entry sales personnel on whether they identified themselves properly, asked customers about television usage, offered responsive packages of services and programming, made appropriate disclosures, secured necessary information to complete a sale, and made “a polite professional closing on all calls, regardless of if a sale is made.” PX 486, 2007 Quality Assurance Report, at 18, 19, 23.

³¹ PX 486 is undated, but based on its content, the documents seems to have been issued shortly after JSR's termination in February 2007.

The Compliance Department also sent out updated disclosures that Retailers were required to give during sales presentations.

See T 620:1242 (Musso); PX 744, Email from Musso dated October 22, 2006. One such update was entitled, “Agency T&Cs – Q1 2007 Release.” PX 1139.³² The term “T&Cs” meant terms and conditions. T 621: 1652 (Mills).

Musso also worked with the Legal Department, the Executive Resolution Team, and Dish’s DNC Investigation Team to run a sting program. The sting program sought to identify Order Entry Retailers that generated consumer complaints, but hid their identities by spoofing or otherwise. Upon receiving a consumer complaint, Dish attempted to identify the responsible Order Entry Retailer. If the participating Dish Departments could not identify the Retailer, Dish representatives asked the complaining consumer to participate in the sting program. If the offending telemarketer called again, the participating consumer agreed to purchase Dish Network programming using a credit card provided by Dish along with specified identifying information. When the order came through on the Order Entry Tool, Dish could identify the Order

³² The footer on PX 1139 identified the document as a Microsoft Word document entitled “Retail OE TCs Q1 2007.” See T 621: 1652 (Mills).

Entry Retailer involved in the participating consumer's "sting" transaction. See PX 1362, Outline of Sting Process, undated; T 619: 989 (Werner); T 620: 1246 (Werner).³³ Through the sting program, Dish identified several Order Entry Retailers that were violating the Do-Not-Call Laws. T 619: 919 (Werner). PX 1082, Tracker spreadsheet on stings; T 620: 1234-36, 1386 (Musso).

Musso also established a systematic way to notify Order Entry Retailers about consumer complaints. The Compliance Department sent a letter explaining the complaint and requesting a response within seven days. The Compliance Department followed up every week. The Compliance Department placed the response in its files and forwarded copies to the Legal Department and executives within Retail Services and Retail Sales. See T 620: 1238-39 (Musso); T 619: 1022-27 (Werner). Musso kept a tracker spreadsheet of consumer complaints and the results of investigations, and issued weekly TCPA Tracker Reports. T 619: 1027-31 (Werner); PX 1347, TCPA Tracker Report dated September 16, 2008.

³³ The sting program may have predated the establishment of the Compliance Department in 2006.

In 2007, the Compliance Department started the Partner Order Entry (POE) list. The POE list was a list of complaining consumers whose complaints had been unresolved after being escalated to the highest levels of Dish's consumer complaint resolution system. Compliance sent the POE list to Outbound Operations and all companies in the indirect channel, including all Order Entry Retailers. All Dish direct marketing and all entities in the indirect channel were to "suppress" telephone numbers on the POE list. Suppressing a telephone number meant that the number should not be called at all for any reason. T 619: 995-96, 1099 (Werner); T 620: 1213-15 (Musso); see PX 1107, Email dated January 4, 2007 (example POE Notice).

The Compliance Department also began supervising the use of third-party affiliates by Order Entry Retailers. In October 2006, the Sales Department started collecting information from the top eleven Order Entry Retailers on the use of affiliates. At least four of the top eleven admitted using third-parties to make telemarketing calls. PX 1045, Email thread between Mills and Neylon dated October 3-10, 2006 regarding Affiliate Calls. Thereafter, Dish began efforts to

enforce the requirement in § 7.2 of the Retailer Agreement that all

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affiliates had to be approved by Dish. On October 10, 2007, Dish issued a Facts Blast notice to Order Entry Retailers warning against using affiliates without prior approval from Dish. DTX 947, Facts Blast dated October 10, 2007; see also PX 1051, Undated Facts Blast (also warning against using unapproved affiliates).³⁴ Dish began performing background checks on proposed affiliates and denied approval of some proposed affiliates. Musso tracked information on third-party affiliates used by Order Entry Retailers. Musso's tracker included information on whether the affiliate had been approved in the past. T 620: 1201-03 (Musso); e.g., PX 1271 and PX 1272, Affiliate Tracker Spreadsheets identifying affiliates in 2008-11. Pursuant to § 7.2 of the Retailer Agreement, Dish took the position that Order Entry Retailers were liable for the actions of their third-party affiliates. T 619: 1013-14 (Werner); see PX 724, April 15, 2011 Draft Script on Risk Management, Audit, and Compliance, at 1.

The Compliance Department, however, did not audit Order Entry Retailers with respect to Do-Not-Call compliance. The Compliance Department did not review Order Entry Retailer calling

³⁴ The undated Facts Blast, PX 1051, referred to Dish as EchoStar, and so, was distributed before Dish changed its name to Dish Network in January 2008.

records or calling lists. T 625: 2252 (Neylon). The Compliance Department also did not incorporate into the Quality Assurance Program any monitoring for Do-Not-Call compliance. The Quality Assurance Program focused on the accuracy and completeness of statements made during telemarketing calls.

The Compliance Department had weekly meetings with Dish's Legal Department. The meetings covered all areas of Order Entry Retailer compliance, including telemarketing. See; PX 548, Agenda for Legal TCPA Meeting dated October 2006; PX 536, Retail Services Audit and Risk Q4 2006 Report.

Even though Musso and the Compliance Department secured the information more systematically, Dish continued to respond to Order Entry Retailer misconduct through an ad hoc, case-by-case approach. T 620: 1239 (Musso); T 619: 1042 (Werner). Musso and Werner could make recommendations to discipline Order Entry Retailers, but more senior executives in the Sales Department (or even higher level management in some cases) had to approve discipline. T 619: 1032-37 and 1104 (Werner); T 625: 2130-31 (Neylon); T 620: 1260 (Musso); PX 1083, Email thread between

Musso, Neylon, and Origer dated February 8, 2007; PX 492, Email thread between Musso and Van Emst dated September 2, 2008.

In November 2006, Musso suggested using more stings and imposing more fines on Order Entry Retailers. As she put it, “Anything to stop the madness . . . so to speak.” PX 72, Email thread between Musso, Werner, Neylon, and Origer dated November 14, 2006. Between August 2006 and February 2007, Dish fined Order Entry Retailers Blu Kiwi, LLC and American Satellite \$10,000.00 each, and fined Sterling Satellite \$53,901.00. From February 2007 to July 2008, Dish did not impose any fines. In July 2008, Musso reported that the Compliance Department had made two recommendations for fines that were pending. PX 143, Email thread between Musso and Werner dated July 22, 2008. The Court cannot determine whether Dish imposed these two recommended fines.

Dish terminated some Order Entry Retailers after starting the Compliance Department. In February 2007, Dish announced that it had terminated three Order Entry Retailers for Do-Not-Call violations. PX 99, Gross Sales Update Report dated August 6, 2007, at 2 (stating that Dish terminated Order Entry Retailers JSR,

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United Satellite, and Atlas Assets for Do-Not-Call violations); see DTX 674, Press Release dated February 14, 2007 (announcing JSR's termination). In early October 2007, two additional Order Entry Retailers were terminated for using unauthorized third party affiliates for lead generation. DTX 947, Facts Blast dated October 10, 2007. In July 2008, Musso identified two additional Order Entry Retailers that had been terminated since she started the Compliance Department and two more that were not renewed but would have been terminated. Musso did not state the reasons for these terminations. PX 143, Email thread between Musso and Werner dated July 22, 2008.

As a result of the on-going problems with corrupt practices, the Order Entry program had a negative reputation within Dish. PX 658, Email from Ahmed to DeFranco, Thomas Cullen, and Neylon dated March 24, 2009. In 2007, Dish legal department paralegal Denise Hargen asked to be kept informed about Do-Not-Call violations because the Order Entry Retailers or Dish marketing personnel tried to get around the Do-Not-Call Laws: "It would really help to make sure I'm always in the loop on these matters based on my DNC involvement and knowledge base. Makes it harder for

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these folks to get around the ‘rules’ – which they try to do – especially marketing☺.” PX 704 Email thread dated May 31 – June 7, 2007 between Hargen, Dish in-house counsel Emily Pastorius, and Brian Pacini (emoji in the original). By 2009, the Legal Department complained that Order Entry Retailers were engaging in “shady/illegal activity.” Order Entry Retailers continued to make Prerecorded Calls in 2009. PX 730, 2009 Sales Partner Review, at 2, 3.

By 2008, Dish was also the subject of investigations for Do-Not-Call Law violations by the FTC and state consumer protections officials. Dish was also a defendant in several lawsuits brought by both individual consumers and state officials. See e.g., PX 1131, FTC Civil Investigative Demand dated July 21, 2005 (FTC Demand); PX 54, Legal and RS Project Report dated October 7, 2004; T 618: 935-38 (Werner) (listing pending legal investigations and lawsuits); PX 1340, Vermont Attorney General Investigative Subpoena Regarding Order Entry Retailer Satellite Systems Now is sued October 2005; PX 538, Texas Notice of Violation of Texas Do-Not-Call Law dated January 3, 2006; PX 669, December 10, 2007 Email from Dish attorney Jeffrey Blum (referencing ongoing FTC and 31-

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state investigation). The FTC and multi-state investigations culminated in the commencement of this action on March 25, 2009, and the entry of a court approved Assurance of Voluntary Compliance (AVC) on July 16, 2009, between Dish and the forty-six states that are not Plaintiffs in this action. PX 55, Assurance of Voluntary Compliance dated July 16, 2009.

During this time frame in 2008 and 2009, Dish started to impose more control over the Order Entry program. Dish required Order Entry Retailers making fifty activations a month to send their Internal Do-Not-Call Lists to PossibleNOW for compilation into a combined Retailer Do-Not-Call List. See T 619: 1018-21 (Werner). Dish also arranged for Order Entry Retailers to use PossibleNOW scrubbing services. Dish required some Order Entry Retailers to use PossibleNOW scrubbing services. T 622: 1841-43 (Mills); see DTX 741, Email thread between Dish Vendor Inquiries and Satellite Systems dated April 8, 2009. Dish Sales Department maintained information on sales and money spent on advertising on a monthly

basis, as well as monthly updates on each Order Entry Retailer.

See PX 409, Monthly Update; T 626, 2265-66 (Neylon).³⁵

From October 2008 until March 2009, Dish terminated 40 Retailers, some of which were Order Entry Retailers, for defrauding Dish or for making misrepresentations to consumers. DTX 746, Collective Exhibit of 5 Press Releases dated October 8, 2008 through March 5, 2009, Announcing Terminations of 40 Order Entry Retailers. In 2009, Dish reduced the number of Order Entry Retailers from 76 to 32. Dish eliminated Order Entry Retailers for fraud and high churn. Dish representatives focused on eliminating fraud and reducing churn rates of the remaining Order Entry Retailers. The result was an increase in monthly activations from 71,000 to 100,000 and a significant reduction in churn rates. PX 730, 2009 Dish Sales Partner Review, at 13.

In May 2009, Ahmed returned to Dish as Senior Vice President of Sales and Distribution. He again had responsibility for the Order Entry Program. Neylon was Vice President in charge of the Order

³⁵ It is unclear from the evidence when this monthly tracking process started.

Entry Program and Mills was Director of the Order Entry program.

T 626: 2286-88 (Ahmed).³⁶

By 2009, Dish used the Quality Assurance program for both Dish direct telemarketing calls and Order Entry Retailer calls. Dish scored telemarketing calls on 45 criteria. The Quality Assurance criteria focused on accurately describing Dish products and promotions (including any limitations on promotional pricing), and providing complete, accurate disclosures during sales calls. The Quality Assurance criteria also covered “right sizing” customers. Right sizing involved asking questions about the household television watching patterns to accurately evaluate the potential customer’s needs in order to offer the appropriate Dish programming packages. The Quality Assurance program also sought to ensure that the sales agents interacted with the consumer in an appropriate, professional manner. T 625: 2137-38, 2175-77, 2182-84, 2226 (Neylon); T 621: 1642 (Mills); T 627: 2473-74 (Ahmed); PX 560, Email thread regarding Quality Assurance scores dated August 18, 2009; PX 1048, QA Action Plan, at 7.

³⁶ In 2013, Ahmed’s duties changed. He became in charge of door-to-door sales. T 626: 2288 (Ahmed).

A Dish Business Rule required Order Entry Retailers to participate in the Order Entry Program. T 620: 1213 (Musso). Order Entry Retailers were evaluated weekly on their Quality Assurance scores. Order Entry Retailers were required to modify their practices to conform to the Quality Assurance Program. T 621: 1639-40 and 622: 1701 (Mills); T 625: 2137-38, 2171-75 (Neylon); see T 620: 1210 (Musso); PX 559, Email thread between Neylon, Musso, and Ahmed dated August 13, 2009 (Ahmed wanted “no nonsense from my employees or my Retailers” regarding the Quality Assurance program); PX 616, Email thread between Neylon and Mills dated August 13, 2011. Initially, Field Representatives and Account Managers scored calls. At some point, a separate national team within Dish scored all the recorded calls from both Order Entry Retailers and Dish direct marketing. T 620: 1211-12 (Musso).

By August 2009, Ahmed and Neylon wanted the Sales Department to emphasize Order Entry Retailer compliance with Quality Assurance program. Neylon wanted Field Representatives and Account Managers to be “110%” involved in improving Quality Assurance scores. Ahmed also stated that he would hold Account

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Managers responsible. Ahmed stated that he would not tolerate high churn or misrepresentations. PX 559, Email thread between Neylon, Musso, and Ahmed dated August 12, 2009.

Thereafter, Dish Field Representatives, Account Managers, and Sales Managers worked with Order Entry Retailers to get and keep Quality Assurance scores over 90 percent. Field Representatives and Account Managers visited with Order Entry facilities to ensure compliance. Field Representatives and Account Managers coached Order Entry Retailers on how to improve Quality Assurance scores. T 625: 2179 (Neylon). Field Representatives and Account Managers met with Order Entry Retailer salespersons to discuss sales presentations. On occasion, Sales Managers required Order Entry sales staff who worked at home to come to the office once a week so that their calls could be monitored. T 625: 2210 (Neylon); PX 1048, QA Action Plan, at 4. On occasion, Order Entry Retailer personnel who had consistently had failing Quality Assurance scores were removed from the telephones and fined. PX 1048, QA Action Plan, at 6.

Sales Managers, Field Representatives, and Account Managers reviewed and rewrote scripts and ordered Order Entry Retailers to

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change sales procedures to keep scores up. See T 625: 2177-79 (Neylon); T 6212: 1640 (Mills); PX 1048, QA Action Plan, at 3, 5. On one occasion, a Dish Sales Manager wrote a call flow for an Order Entry Retailer who did not use a written sales script and required the Order Entry Retailer to follow the call flow. PX 1048, QA Action Plan, at 4.

Dish could discipline Order Entry Retailers who did not comply with the Quality Assurance Program. Dish Sales Managers, at least, could withhold promotional offers from non-compliant Order Entry Retailers. PX 1048, QA Action Plan, at 3. Mills opined that a Sales Manager's statement in a QA Action Plan (PX 1048) about withholding programming was a flippant comment. T 621: 1641 (Mills). Mills' opinion on this matter is not credible. The QA Action Plan contained a detailed plan of steps to improve an Order Entry Retailer's Quality Assurance score. The Court sees nothing flippant about anything in the document. In addition to restricting available programming, Dish could disable Order Entry Retailer logins to restrict access to the Order Entry Tool. T 625: 2208-09 (Neylon).

One Dish Sales Manager William (Brett) Mason asked Musso for contractual authority for the Quality Assurance Program. Mason quoted Retailer Agreement § 7.3 as a possible source of authority in the email. Section 7.3 required Order Entry Retailers to “take all actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders for” Dish Network programming. Mason then stated that he could use the “absolute power” clause, but it was not his first choice. Musso confirmed that § 7.3 of the Retailer Agreement authorized the Quality Assurance program. PX 553, Email thread between Musso and Mason dated October 25, 2011. See also T 625: 2198-99 (Neylon) (Under Retailer Agreement, Dish personnel could ask Retailers to take any action, or to refrain from taking any action relating to marketing.).

The Plaintiffs suggest that the “absolute power” clause was § 7.3 of the Retailer Agreement. Musso testified that the “absolute power clause” meant that Mason could tell the Retailer, “Because I said so.” T. 620: 1289 (Musso). Musso’s testimony on this point is consistent with Mason’s email. Mason distinguished between Section 7.3 and the “absolute power” clause. Mason quoted 7.3 in

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the email, and then said, as an alternative, that he guessed he could invoke the absolute power clause. Musso's testimony is also consistent with the statement of Dish employee Carlos Prado. Prado told Field Representative Manuel Castillo, "Dish, the way they do things is they have all the power, and then if they – if they want to, they can squash you like a bug." T 620: 1333 (Castillo). Prado was in charge of setting up new Order Entry Retailers at the time that he made the statement. Id. The Court finds that the "absolute power" clause meant that Dish Sales Managers could direct Order Entry Retailers to act by telling Order Entry Retailers, "Because I said so."

Even with the purge of half of the Order Entry Retailers and the imposition of the revised Quality Assurance Program, Dish retained the ad hoc, case-by-case approach to Do-Not-Call Law violations. In 2009, a class-action law suit was filed against Dish for Registry Calls made by Order Entry Retailer Satellite Systems. See T 618: 868-69 (Kraukauer). By 2011, Dish had so many complaints about Satellite Systems that Dish's Legal Department had developed a "standard go after Satellite Systems Network" letter to send complaining consumers. See PX 199, Email from Dish

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litigation paralegal Kimberly Berridge to Dish Corporate Counsel Brett Kitei dated August 18, 2011. No evidence cited by either party indicates that Dish disciplined Satellite Systems for these calls. Satellite Systems remained an Order Entry Retailer until 2013. T 625: 2149-50 (Neylon).

B. Dish's Relationship with Specific Order Entry Retailers

This Court found at summary judgment under Counts I and III that Dish violated the TSR by causing the following illegal calls by Order Entry Retailers: causing Dish TV Now to make 6,637,196 Abandoned Prerecorded Calls; causing Satellite Systems to make 381,811 Registry Calls; causing Star Satellite to make 43,100,876 Abandoned Prerecorded Calls; causing JSR to make 2,349,031 Registry calls; and causing American Satellite to make one Abandoned Prerecorded Call. Opinion 445, at 232-33, 75 F.Supp.3d at 1032-33. At trial, the Plaintiffs presented evidence about these Order Entry Retailers, as well as Order Entry Retailer Dish Nation.³⁷ The Court makes findings regarding Dish Nation along with the other five Order Entry Retailers.

³⁷ The Plaintiffs presented evidence at summary judgment about a TVRO retailer named New Edge Satellite and an Order Entry Retailer named National Satellite Systems. See Opinion 445

1. Dish TV Now

In late 2003 or early 2004, Dish TV Now became Dish's first Order Entry Retailer. T 626: 2304 (Ahmed). On October 7, 2003, Ahmed contacted the principal of Dish TV Now David Hagen to offer him the opportunity to become an Order Entry Retailer. PX 61, Letter from Ahmed to Hagen dated October 7, 2003. At the time, Hagen operated a company called Prime TV that sold DirecTV.

The same day, October 7, 2003, Hagen sent Ahmed a proposal in which he projected that within a year of operation, Dish TV Now would generate 27,000 Dish Network activations per month. Hagen represented in the proposal that Dish TV Now would use television advertising, direct mail, and online advertising to secure inbound telemarketing calls from interested customers. PX 148, Dish TV Now Proposal Letter; DTX 959, Retailer Application from Dish TV Now. Dish did not perform any background checks on Hagen or Dish TV Now. Ahmed did not learn that Hagen was a convicted felon who had been permanently enjoined from committing deceptive practices in actions brought by the FTC. See T 626:2359-62 (Ahmed); PX 145, FTC v. David DeFusco a/k/a David Hagen,

at 114-16. The Plaintiffs have asked for no findings of fact or conclusions of law regarding the activities of New Edge Satellite or National Satellite Systems at trial.

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C.D. Va. Case No 89-1046, Permanent Injunction Order, entered November 3, 1989. In 2004, Hagen was also enjoined by North Carolina in a separate action. PX 150, North Carolina v. Prime TV, LLC, N.C. Wake County, North Carolina Superior Court Case No. 04CVS008148, Consent Judgment, entered June 14, 2004.

Dish TV Now hired a company called Guardian Communications (Guardian) to make “press 1” Prerecorded Calls to market Dish Network programming. From May 2004 to August 10, 2004, Guardian made on behalf of Dish TV Now 6,637,196 Prerecorded Calls that were answered and became Abandoned Prerecorded Calls for which Dish is liable in Count III. Opinion 445, at 88-89. Guardian stopped making these calls because Dish TV Now stopped payment on checks to Guardian. See Opinion 445, at 89-90.

On August 2, 2004, Dish received a consumer complaint about Dish TV Now’s prerecorded telemarketing calls. PX 168, Letter from Consumer Ryan Swanberg, dated July 26, 2004, and marked received August 2, 2004.

On September 16, 2004, Ahmed sent Dish TV Now’s principal Hagen an email which said,

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David,

This is simple. Is Dish TV Now telemarketing customers over the phone, or are you guys using predictive dialers and leaving messages trying to sell the customers DISH Network. We're not interested in this type of marketing. We're receiving complaints on your department doing just this kind of marketing.

Hagen responded,

Amir,

Dish TV Now uses a predictive dialer to make outbound calls to consumers who have previously inquired with us about satellite TV service or are current Dish TV Now DISH Network customers. The intelligent dialer knows the difference between a No Answer, Busy, Answering Machine, or Live Connect. The dialer only connects live customers to a live Dish TV Now agent. We do not leave messages. We have a list of over 5 million past and current customers that we scrub against the do not call list. In addition, we maintain a Dish TV Now do not call list. Any customer who wishes to opt out on future solicitations is immediately added to the list. Dish TV fully complies with the TCPA.

DTX 223, Email thread between Ahmed and Hagen dated September 16, 2004.

Ahmed learned from the September 16, 2004, email that Dish TV Now engaged in outbound telemarketing. Ahmed further learned that Hagen misrepresented in the original marketing plan the methods that Dish TV Now would use to sell Dish Network

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programming. Dish, however, did not take any disciplinary actions against Dish TV Now. T 626: 2370-71 (Ahmed). Dish allowed Dish TV Now to continue operating as an Order Entry Retailer even though Ahmed knew that Hagen misrepresented his marketing methods.

Ahmed also did not check the accuracy of Hagen's representations about Dish TV Now's telemarketing practices, and so, did not learn that Hagen was lying about the use of Prerecorded Calls. Hagen told Ahmed that calls answered by a person were connected to a live sales agent. That was false. The calls were connected to a prerecorded press 1 message. Ahmed did nothing to check Hagen's explanation. He just accepted it and went on.

Dish TV Now continued operating as an Order Entry Retailer until January 2006. On or about December 20, 2005, Dish put Dish TV Now on hold for failure to promote Dish Network programming. While on hold, Dish TV Now could not place orders through the Order Entry Tool. Dish TV Now also had a high churn rate, almost double the Dish direct marketing churn rate. In January 2006, Dish terminated Dish TV Now as an Order Entry Retailer for high churn and failure to promote Dish Network. Dish

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TV Now produced 485 activations in 2002; 2,765 activations in 2003; 78,339 activations in 2004; and 41,688 activations in 2005.

T 626: 2376 (Ahmed); PX 1144, Retailer Audit Notification & Summary dated December 20, 2005;see PX 165, Email from Mills to Ahmed dated December 22, 2005.

2. Satellite Systems Network

In March 2002, Satellite Systems was a TVRO Retailer. Satellite Systems was making Prerecorded Calls. Dish's regional sales director Nick Meyers stated in an email that Satellite Systems' use of Prerecorded Calls "has caused a few concerning calls, but seems to be greatly outweighed by the results." PX80, Email thread between Nick Meyers and Neylon and Ahmed, dated March 10-11, 2002; T 625: 2139 (Neylon); T 626: 2332, 2329 (Ahmed). Meyers made this statement when the TCPA prohibited Prerecorded Calls but before the TSR prohibited abandoned calls. In June 2002, Dish sent Satellite System a notice to comply with telemarketing laws, but took no other action. PX 187, letter dated June 12, 2002.

In June 28, 2004, Dish's co-founder and Chief Executive Officer Charlie Ergen received a Prerecorded Call from Satellite Systems offering DirecTV programming. Ergen contacted Ahmed

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about the call. Ahmed told Ergen that Satellite System was also a Dish Retailer and that Satellite System used “message broadcasting with [DirecTV] as their primary source to generate sales.” At trial, Ahmed denied knowing that Satellite Systems used Prerecorded Calls. T 626: 2337 (Ahmed). The Court finds that denial to not be credible. Ahmed’s statement in the email was unequivocal.

Ergen asked why Dish could not copy Satellite Systems’ technique. Ahmed directed Dish Regional Sales Manager Mike Oberbillig to contact Satellite Systems to ask for the script. Satellite Systems’ principal Alex Tehranchi refused to give Dish the scripts and denied using Prerecorded Calls. Tehranchi stated that Satellite Systems was moving away from telemarketing. PX 190, Email Thread between Ergen, Ahmed, and a Dish West Coast Account Manager Mike Oberbillig, dated June 28-30, 2004.

In July 2004, Satellite System became an Order Entry Retailer. T 626: 2409-10 (Ahmed). Satellite System was selling Dish Network and DirecTV. By the end of July 2004, Ahmed began receiving complaints about Satellite Systems’ outbound telemarketing. PX 503, Email from Ahmed dated July 29, 2004.

In September 2004, Satellite Systems was averaging 9,000 DirecTV activations a month, but only 350 Dish Network activations a month. Ahmed raised the commission paid to Satellite System to increase Dish Network activations. Ahmed stated that Dish needed activations from Satellite Systems. PX 656, Email thread between Ahmed, DeFranco, and Dish Regional Director for West Coast Jim Spritzer, dated September 14-15, 2004.

In November 2004, a Florida state court ordered Satellite Systems to pay \$25,500 in civil penalties under its other name Vitana Financial Group, Inc. (Vitana) for violating Florida Do-Not-Call Laws. PX 191, Florida Department of Agriculture and Consumer Services Press Release dated November 4, 2004.

In March 2005, Tehranchi and Vitana agreed to pay \$15,000 in civil penalties to North Carolina for violating state Do-Not-Call Laws. PX 186, North Carolina v. Vitana Financial Group and Tehranchi, et al., Wake County, North Carolina Superior Court, Case No. 04-8799, Consent Judgment entered March 21, 2005.

In October 2005, Dish again received notice that Satellite Systems was using Prerecorded Calls. PX 504, Email thread dated October 27, 2005. A month earlier in September 2005, Dish in-

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house attorney Novak stated that Satellite Systems had been making Prerecorded Calls for years:

We know that SSN [Satellite Systems] is using autodialers and automessages. Terachi [sic] been warned time and again (by me, by you, by the region, by phone, in writing, in person) that these activities could violate the law. Last time, Teranchi [sic] blamed a “rogue employee,” who he claimed was terminated, but the activities continue. Charter knows he’s doing it, and several state AG’s know he’s doing it as well.

In the past, we have successfully resisted the argument that we are responsible for the conduct of independent Retailers, however, SSN is a problem because we know what he is doing and have cautioned him to stop. There is risk in continuing to give warnings without a follow-through action. Eventually, someone will try to use that against us.

On the range of options, you could give him another written warning, you could put him on probation for a period of time, you could put him on hold and withhold money (presumably to cover “potential fines” running from SSN to us under some agency theory), or you could terminate him now.

I favor probation, provided that there is unanimous understanding that if EchoStar becomes aware of ANY ONE addition (sic) violation, he’s terminated.

PX 120, Email thread, Email from Novak to Ahmed dated September 26, 2005 at 1:24 p.m., at PX 120-003-004 (emphasis in original). Novak made this comment in September 2005 in

connection with an initial investigation of a different Prerecorded

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Call. The September 2005 call was made by another Order Entry Retailer, United Satellite. PX 120, Email Thread with Indiana Attorney General's Office dated September 23-30, 2005. However, a month later, in October 2005, Dish did not follow Novak's recommendation when Satellite Systems was again caught making Prerecorded Calls. Oberbillig orally told Tehranchi to stop using Prerecorded Calls. Dish did not impose any other consequences. T 626: 2348-50 (Ahmed); see Oberbillig Deposition, at 78.

On or before September 21, 2006, Dish knew that Satellite Systems had been fined \$25,500.00 for Do-Not-Call law violations. PX 1086, Email from Ron Dufault of Retail Services dated September 21, 2006 (at 023 of the collective exhibit).³⁸ Dish took no action against Satellite Systems.

In February 2007, two of Dish's stings identified Satellite Systems as violating Do-Not-Call Laws. PX 1086, Email dated February 7-15, 2007, regarding stings involving consumers Jeffrey Mitchell and Gregory Fisher (at 016-018 of the collective exhibit). Dish took no disciplinary action against Satellite Systems.

³⁸ The email, PX1086 at 023, erroneously stated that North Carolina imposed the \$25,500 fine instead of Florida.

In September 2009, Dish's investigation of a consumer complaint showed Satellite Systems was making Registry Calls. PX 282, Email thread dated May 10-19, 2009. The complainant, Dr. Thomas Kraukauer, filed a class action lawsuit against Dish as a result of these calls. T 618:865-66 (Kraukauer).

In 2010 and 2011, Satellite Systems made 381,811 illegal Registry calls. Opinion 445, at 133, 232. Satellite Systems also made 22,946 Internal List Calls to telephone numbers on the Internal Do-Not-Call Lists of Dish and the Telemarketing Vendors. Satellite Systems also made 42,990 Internal List Calls to numbers on the Internal Do-Not-Call Lists of other Order Entry Retailers compiled by PossibleNOW. PX 28, Taylor November 6, 2013 Report, at 13-14d Tables 5b and 5c.

By 2011, Dish had developed a standard letter to send out to consumers complaining about Satellite Systems' violations of Do-Not-Call Laws. The Dish legal department referred to the letter as the "standard go after SSN letter." PX 199, Email from Dish litigation paralegal Kimberly Berridge to Dish Corporate Counsel Brett Kitei dated August 18, 2011. Dish terminated Satellite Systems Network in 2013. T 625: 2149-50 (Neylon).

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3. Star Satellite

Star Satellite became a TVRO Retailer in March 2003. Walter Eric Myers (Myers) was in charge of Star Satellite. Myers previously ran TVRO Retailer called Tenaya Marketing (Tenaya). Tenaya did door-to-door sales primarily. Dish began penalizing Tenaya for high churn rates, so Myers arranged for his brother to start Star Satellite. Deposition of Walter Eric Myers, at 38-40. Myers ran Star Satellite. Star Satellite stated in its application to Dish that it planned to use newspapers and direct mail advertising. Star Satellite did not indicate that it would engage in telemarketing. DTX 335, Retailer Business Questionnaire dated March 11, 2003.

At some point in time, Dish representatives learned that Star Satellite was engaged in telemarketing. Dish representatives sent Myers parts of a script to use in these sales. Dish representatives wanted Retailers to make all of the required disclosures to consumers. Myers Deposition, at 42-43. Myers testified that Star Satellite called telephone numbers from the phone book. Myers Deposition, at 124.

In May 2004, Star Satellite hired Guardian to make Prerecorded Calls on its behalf to sell Dish Network programming.

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Guardian started making prerecorded “press 1” telemarketing calls selling Dish products and services for Star Satellite. Myers used the name Tenaya in Star Satellite’s dealings with Guardian. Myers did not tell Dish that Star Satellite used Guardian’s services. Myers considered marketing methods to be trade secrets that he did not want to share with any competitor. Myers viewed Dish as a competitor because Dish had its own internal marketing department. Myers believed that he could choose the marketing methods because Star Satellite was a separate business from Dish. Myers Deposition, at 73, 76-77, 106, 141, 174-80, 182-83.³⁹

In 2004, Star Satellite applied to be an Order Entry Retailer. Myers testified that he basically begged to be approved for the Order Entry program. Dish personnel asked Myers questions about proposed marketing methods. Myers represented that Star Satellite would primarily use direct mail, with some phone sales. Myers believed telemarketing carried a stigma. He suspected that Dish did not like telephone sales. Myers did not want scrutiny from Dish about whether Myers was complying with Do-Not-Call Laws. Myers

³⁹ Dish cites the deposition of Guardian’s principal Kevin Baker for the proposition that Star Satellite suspended prerecorded calls periodically when Dish personnel were at Star Satellite’s offices. See Deposition of Kevin Baker, at 71, 177-78. The testimony is inadmissible hearsay to prove the truth of Baker’s assertions.

Deposition, at 92-95. Guardian's principal Kevin Baker stated that he told Myers a rumor that Dish did not allow Order Entry Retailers to make Prerecorded Calls. Deposition of Kevin Baker, at 70.⁴⁰

Myers, however, believed that Dish became aware of the fact that Star Satellite was using telemarketing. Myers Deposition, at 181.

Star Satellite became an Order Entry Retailer in late 2004 or early 2005. Star Satellite set up an office and call center in Provo, Utah. Star Satellite still engaged in door-to-door sales in the Los Angeles, California area. T 622: 1815 (Mills); Myers Deposition, at 81, 83, 91. Star Satellite only sold Dish Network except for a brief period of up to three months in 2005 when Star Satellite also sold DirecTV programming and services. Even when Star Satellite sold DirecTV, its sales staff offered Dish Network programming first to customers, and then offered DirecTV if the person was not interested in Dish Network or for some reason could not purchase Dish Network. Myers Deposition, at 143-46.

Dish personnel trained Star Satellite staff on how to use the Order Entry Tool. Dish personnel provided a recommended script to use for telephone sales. Dish provided detailed disclosures to be

⁴⁰ Baker referred to the use of prerecorded calls as autodialing. Baker Deposition, at 70. JA000266

read to customers during telephone sales. Dish representatives visited Star Satellite's call center in Provo, Utah, weekly. Michael Mills went to Star Satellite's offices a few times. Myers Deposition, at 87-90, 93-94. Mills worked on Star Satellite scripts to include disclosures required by Dish. PX 207, Email thread between Mills and Walter Eric Myers dated November 2-3, 2005.

Star Satellite had Guardian make 400,000 to 600,000 "press-1" Prerecorded Calls a day. Myers Deposition, at 103-05, 129-30. Baker testified that Guardian called published numbers "off a CD-Rom you could buy down at Office Max." Baker Deposition, at 50.

Star Satellite greatly increased its sales as a result of the Prerecorded Calls. Myers told Dish personnel, "We're just doing a lot of phone sales and we're having a lot of success." Myers told Dish personnel that Star Satellite's calling lists were scrubbed for the Registry, but did not give any details on Star Satellite's telemarketing. Myers relied on Guardian to scrub the calling lists. Myers Deposition, at 103-05, 129-30.

Dish personnel learned in the first half of 2005 that Star Satellite was using Prerecorded Calls. On January 25, 2005, Dish received a consumer letter complaining that Star Satellite was using

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Prerecorded Calls. PX 203, Letter from Dennis Caplan, dated January 25, 2007. On February 18, 2005, Dish received another consumer complaint about Star Satellite Prerecorded Calls.

PX 204, Email from David Hyde to DeFranco and others dated February 18, 2005. The parties presented no evidence that Dish took any action on either complaint.

In May 2005, Dish Outbound Manager Bangert told Dish employee Mark Duffy that an Order Entry Retailer in Provo, Utah, was using “automated messaging.” Bangert asked Duffy to pass the information on to Retail Services. PX 205, Email thread between Bangert and Dish Retail Escalations, dated May 25-27 2005.

Bangert testified that, when he wrote the email, he did not know that Star Satellite was using Prerecorded Calls. Bangert’s testimony in this regard was not credible. T 628: 2722-23 (Bangert). The email is unequivocal. Bangert knew an Order Entry Retailer in Provo, Utah, was making Prerecorded Calls. Star Satellite was Dish’s Order Entry Retailer in Provo, Utah.

Duffy forwarded Bangert’s email to Jeff Medina in Dish’s Retail Escalations Department. Medina forwarded the email to Margot

Williams in Retail Escalations. Medina wrote in his email, “Are these your boys again?” Williams responded to Medina,

Jeff,

I forwarded this information to Regina Thomas for further investigation. We have received a few complaints for other issues on this Retailer that have also been sent to her for review and assistance.

PX 205, Email thread between Bangert and Dish Retailer

Escalations dated May 25-27 2005. Dish took no disciplinary action against Star Satellite.

In August 2005, an individual consumer sued Dish and Star Satellite for Star Satellite’s use of Prerecorded Calls to sell Dish Network programming. Dish knew of the suit on August 12, 2005.

PX 208, Letter from Dish Counsel Dana Steele to Star Satellite dated August 12, 2005. Dish took no disciplinary action against Star Satellite.

From July 30, 2005, to November 22, 2005, Star Satellite made 43,100,876 completed Abandoned Prerecorded Calls through Guardian selling Dish Network programming. The Court found at summary judgment that these calls violated the TSR. Opinion 445, at 102.

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In October 2005, Ahmed received a complaint from Congressman Fred Upton of Michigan about Star Satellite calling numbers on the Registry. Ahmed had a conference call with Star Satellite's principal Myers about this complaint. Ahmed was very upset about receiving a complaint from a Congressman. Ahmed told Myers not to violate the Do-Not-Call Laws. Ahmed used foul language and raised his voice at the meeting. According to Myers, Ahmed told Myers that he would shut Star Satellite down if he received another complaint like this. T 626: 2323-24 (Ahmed); T 622: 1818 (Mills); Myers Deposition, at 138. Ahmed followed up with a letter to Myers. PX 212 (DTX 237), Letter dated October 26, 2005. Dish took no other disciplinary action against Star Satellite. Myers, however, took Ahmed's threat seriously. Myers Deposition, at 184.

Star Satellite stopped using Guardian on November 22, 2005. Myers Deposition, at 76. Star Satellite stopped because Guardian's principal Kevin Baker received a Civil Investigative Demand from the FTC for telemarketing call records. Myers Deposition, at 148-49.

On January 20, 2006, Star Satellite was terminated as Order Entry Retailer, but remained a TVRO Retailer. T 622: 1820-21 (Mills). However, in September 8, 2006, Dish was notified by another Order Entry Retailer that Star Satellite was still using Prerecorded Calls. PX 386, Email thread dated September 8, 2006; see T 622: 1742 (Mills). Star Satellite remained a TVRO Retailer at least through February 24, 2014, the date of Myer's deposition. Myers Deposition, at 160.

4. JSR Enterprises

In 2006, Jerry Grider, Shaun "Blaze" Gazzara, and Richard Goodale formed JSR Enterprises to sell Dish Network programming. The name JSR came from the initial from each man's first name. T 622: 12877 (Goodale). Goodale had previously worked for ten days at Dish Order Entry Retailer United Satellite in southern California. Gazzara had also worked at United Satellite. T 622: 1874-75 (Goodale). United Satellite used "press 1" Prerecorded Calls. T 625: 2117 (Neylon); see PX 120, Email Thread with Indiana Attorney General's Office dated September 23-30, 2005. Goodale testified that Dish Representative Doug Tchang knew that United

Satellite used illegal Prerecorded Calls. T 622: 1870-74 (Goodale).⁴¹
 Dish terminated United Satellite as an Order Entry Retailer on
 August 20, 2006, for making Prerecorded Calls. T 625:2117
(Neylon); see PX 239, Email thread between Neylon and Steven
Keller dated September 8, 2006 regarding United Satellite Closed
Doors.

Goodale asked Tchang how he could start his own company.
 Tchang referred Goodale to Shawn Portela. Portela formerly worked
 for Dish. Portela operated two Order Entry Retailers, Dish Nation
 and Cactus Concepts.⁴² Tchang told Goodale to set up a call center
 and work through one of Portela's companies. Goodale and his
 partners set up JSR and started working through Portela's company
 Dish Nation. T 622: 1870-76 (Goodale); PX 239, September 2006
Spreadsheet..

On August 10, 2006, Dish authorized JSR to be an Order
 Entry Retailer. PX 1044, Letter from Mike Oberbillig to Jerry Grider

⁴¹ Based on Goodale's testimony, Tchang was either an Account Manager or a Field Representative. Doug Tchang's last name is spelled "Chang" in the trial transcript. See e.g., T 622: 1875 (Goodale). The United States spelled the name "Tchang" in its proposed Findings of Facts and Conclusions of Law. See e.g., United States Amended Proposed Findings of Fact (d/e 667), at 53. No witness testified about the correct spelling. The Court adopts the United States' spelling.

⁴² Goodale testified that Portela's companies were called Dish Nation and Cactus Satellite. T 622: 1875-76 (Goodale). Cactus Concepts was the correct name. See e.g., PX 653, Email thread regarding Cactus Concepts dated October 26, 2007.

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dated August 10, 2006. JSR's written application stated that JSR would use print, telemarketing, and direct mail. PX 235, JSR Business Plan dated February 9, 2006. Goodale, however, told Mills that JSR was going to engage in outbound telemarketing. T 622: 1746 (Mills); PX 265, Email from Mills to Neylon dated December 21, 2006; T 622: 1881 (Goodale).

Mills, Oberbillig, Portela, and Tchang came to JSR's offices when it became an Order Entry Retailer. Goodale testified that Mills, Oberbillig, and Tchang all knew that JSR was going to use "press 1" Prerecorded Calls. Goodale testified that Mills and Oberbillig told him not to use the name of Dish Network in the prerecorded message. T 622: 1883 (Goodale). Mills admitted that Goodale told him JSR used outbound telemarketing. T 622: 12746 (Mills).

Once JSR became an Order Entry Retailer, JSR purchased fifteen more autodialers. JSR had over 1,500 phone lines making prerecorded "press 1" telemarketing calls fifteen hours a day. T 622:1882 (Goodale). By September 2006, Dish knew JSR was using automatic dialers to produce 1,000,000 connected calls per month, and knew that JSR "brought along an ex-employee of

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United Satellite who has great experience in OE Tool program.”

Dish also knew that JSR worked “under Dish Nation’s umbrella” before it became an Order Entry Retailer. T 622: 1748-50 (Mills); PX 239, September 2006 Spreadsheet. JSR was making somewhere between 2,500,000 to 10,000,000 calls per month to get 1,000,000 connected calls. See T 622: 1892 (Goodale) (Goodale estimated four out of ten calls were answered by a live person.); T 633: 3342 (Taylor) (Dish’s expert Taylor opined that in his experience one in ten telemarketing calls are answered).

Based on all the evidence, the Court finds that Dish Representatives Tchang, Mills, and Oberbillig knew that JSR was using automatic dialers to make “press 1” prerecorded telemarketing calls. Dish knew from the high volume of connected calls that JSR was using automatic dialers to make outbound telemarketing calls. Numerous Dish Order Entry Retailers in Southern California used Prerecorded Calls, including United Satellite, Vision Satellite, LA Activations, Dish Nation, and Atlas Assets. T 625:2110, 2170-71 (Neylon); T 620:2110 (Musso); T 621:1693-95 and T 622:1728-29 (Mills); PX 1299, Letter from attorney Chad Austin to Dish Senior Corporate Counsel Dana

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Steele dated March 27, 2007; PX 1298, Letter from North Dakota Assistant Attorney General James Thomas to Echostar and Dish Nation LLC dated June 25, 2007, with enclosed North Dakota ex rel. Stenehjem v. Creative Concepts Group, Inc., N.D. Dist. Ct., South Central Judicial Dist., Civ. No. 07C1307, Assurance of Voluntary Compliance Order entered June 21, 2007. Tchang was a Dish sales representative in the area, and Oberbillig was the Regional Sales Manager. Tchang was responsible for knowing what was going on in their region. Tchang also had an incentive to allow the practice because his compensation was tied to the activations that these Order Entry Retailers produced. Goodale testified that Tchang knew what was going on at United Satellite. Tchang told Goodale how to start his own shop. Goodale testified that Tchang, Mills, and Oberbillig knew JSR was making “press 1” Prerecorded Calls. The Court finds this aspect of Goodale’s testimony to be credible. These Dish representatives knew from the start that JSR planned to violate the Do-Not-Call Laws by using “press 1” Prerecorded Calls. Further, their knowledge of JSR’s telemarketing practices was gained within the scope of their employment with Dish. Further, Mills and Oberbillig at least had managerial

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authority for Dish when they knew and allowed JSR to engage in illegal Prerecorded Calls. Testimony to the contrary by Mills and Oberbillig was not credible.

JSR's calling lists consisted of all published residential numbers in a selected geographical region. JSR secured copies of white pages in electronic format. JSR used call centers in the Philippines ("off-shore calling") and an automatic dialing facility in Texas to make "press 1" Prerecorded Calls. Goodale at one point testified that he knew JSR was calling numbers on the Registry.

T 622: 1879-80, 1887 (Goodale). Goodale later stated that he scrubbed the lists for numbers on the Registry, but his business partners may not have done so. T 622:1906, 1907-08 (Goodale).

The Court finds that JSR did not scrub at least some calling lists, and so, made Registry Calls. Goodale further knew that JSR was making Registry Calls and that Registry Calls were illegal.

From September through December 2006, Dish received several consumer complaints that JSR made Prerecorded Calls and Registry Calls. Dish also caught JSR five to seven times in stings violating Do-Not-Call Laws, including Registry Calls. Each time, the Dish Compliance Department or Legal Department notified JSR of

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the complaint. T 619: 991(Werner); PX 510, Letter to Jerry Grider dated October 6, 2006; PX 247, Memorandum from Wallace to Dish demanding payment for TCPA violations dated October 19, 2006; PX 513 Letter dated October 31, 2006, from Origer to JSR; PX 248 Email to Metzger dated November 15, 2006; PX 420 Musso letter to JSR about consumer complaint, dated December 11, 2006; PX 250 Email from Musso to Goodale requesting information on the complaint dated December 20, 2006; PX 420, Letter to JSR dated December 11, 2006.

Goodale, on behalf of JSR, provided an explanation for each complaint to Dish's Compliance Department or Legal Department. PX 420, Email from Goodale to Dana Steele dated September 28, 2006; DTX 737, Letter from Goodale to Musso, undated; DTX 750, Email from JSR to Musso dated November 6, 2011; DTX 753, Letter from Goodale to Musso, undated. Dish generally did not investigate further after receiving JSR's explanations. T 625: 2117 (Neylon); see e.g., T 620: 1388 (Musso) (JSR explanation was plausible so Dish accepted it on face value).

Goodale testified that he told Musso in the Compliance Department what she wanted to hear without regard to its

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accuracy. He did not consider her to be of any importance at Dish. T 622: 1906-07 (Goodale). Goodale later said that he gave accurate explanations to Musso. T 622: 1912-13 (Goodale). Regardless, Tchang, Mills, and Oberbillig knew that JSR was violating the Do-Not-Call Laws through the use of Prerecorded Calls.

Goodale's explanations to Musso sometimes admitted violations of the Do-Not-Call laws. Goodale sometimes blamed an off-shore affiliate, and sometimes admitted that JSR made an illegal call by mistake. Musso knew that using unauthorized affiliates violated the Retailer Agreement, and also knew that some of Goodale's explanations effectively admitted Do-Not-Call Law violations. On December 21, 2006 Neylon, Mills, and Musso exchanged a series of emails discussing JSR's unauthorized use of off-shore affiliates that were making illegal calls. Neylon asked a series of questions:

What is his volume? Why would I not just terminate? Where is he located? I assume he was made aware when launched on the OE tool that violations of the telemarketing laws of the United States will not be tolerated????

Mills responded that JSR was producing 1,500 to 2,000 activations per month. Mills also stated that JSR had stopped off-shore calling.

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Mills recommended against termination. PX 265, Email thread between Mills, Neylon, and Musso dated December 21, 2006.

Musso stated that Goodale told her that JSR stopped using the offshore calling center and would just use people in his office.

PX 255 and PX 1135, Email thread between Musso and Neylon dated December 21, 2006; see PX 253, email between From Mills to Musso dated December 20, 2006 (Goodale told Musso that JSR was deactivating off-shore affiliates' logins to Order Entry Tool). Dish took no action against JSR in December 2006.

In January 2007, the Louisiana Attorney General's office contacted Dish about repeated telemarketing calls to an individual who had already asked to be put on the telemarketer's Internal Do-Not-Call List. The individual reported that the telemarketer hung up when she asked to be put on an Internal Do-Not-Call List and called back repeatedly. Musso researched the complaint and determined that JSR had made the calls. Musso provided JSR contact information to the Louisiana Attorney General's office. T 620:1404 (Musso). See PX 1113, Transmittal email from Musso to JSR re Louisiana AG complaint dated January 17, 2007.

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On January 17, 2007, Musso sent letter to JSR with list of five consumer complaints for Do-Not-Call Law violation. PX 420, Letter dated January 17, 2007, at exhibit page 015. On January 22, 2007, Goodale responded. Goodale said two of the five were not on the Registry. Goodale said two of the other three calls were from affiliates and the fifth was a mistake. PX 256 letter from Goodale to Musso dated January 22, 2007. Musso thought there was reason to be cautious. T 620: 1406-08 (Musso); see DTX 756, Copy of PX 256 letter from Goodale to Musso with Musso's typed comments. Dish took no action against JSR in January 2007.

February 8, 2007, Musso sent an email to her superiors which included a copy of a Missouri Attorney General press release. The press release announced that on December 7, 2006, a Missouri court issued a temporary restraining order (TRO) against JSR and other Dish Retailers. Upon receiving the email, Neylon directed that JSR be terminated. Neylon also wanted to publicize the termination to other Retailers to put them on notice. T 625: 2096-97 (Neylon); T 619: 1129 (Werner); PX 1083, Email thread between Musso, Neylon, and Robb Origer dated February 8, 2007.

JSR was terminated as an Order Entry Retailer on February 14, 2007. DTX 139, Retailer Audit Notification & Summary dated February 14, 2007. The Retailer Audit Notification & Summary stated that JSR was terminated due to TCPA violations. Dish's press release stated that Dish terminated JSR for Do-Not-Call violations. DTX 674, Press release dated February 14, 2007.⁴³

After February 14, 2007, JSR continued to sell Dish Network programming through another Order Entry Retailer. Goodale did not identify the Order Entry Retailer that JSR worked through at this time. JSR quit operating in March 2007 when it stopped getting paid, either by Dish or the Order Entry Retailer through whom JSR worked. T 622: 1894 (Goodale).

From August 2006 through March 2007, JSR made 1,186,924 Internal List Calls to persons who were on Internal Do-Not-Call Lists of either Dish or a Telemarketing Vendor. Prior to August 10, 2006, JSR placed some of these calls as an affiliate of Dish Nation. PX 28, Taylor November 6, 2013 Report, at 14, Table 6b; PX 239, September 2006 Spreadsheet.

⁴³ The press release also stated that United Satellite was terminated for Do-Not-Call Law violations. That termination had occurred in August 2006.

From July to December 2006, JSR made 2,349,031 Registry Calls that the Court found violated TSR at summary judgment. Opinion 445, at 171, 232, 75 F.Supp.3d at 1011, 1032. Of these Registry Calls, JSR made:

369,384 calls to telephone numbers with area codes associated with Plaintiff Illinois (Illinois area codes);
129,004 calls to telephone numbers with area codes associated with Plaintiff Ohio (Ohio area codes);
18,240 calls to telephone numbers with area codes associated with Plaintiff North Carolina (North Carolina area codes); and
473,102 calls to telephone numbers with area codes associated with Plaintiff California (California area codes).

JSR made some of these calls through Dish Nation prior to becoming an Order Entry Retailer on August 10, 2006. PX 28, Taylor November 6, 2013 Report, at 14 Table 6a; T 622: 1894 (Goodale).

From January to March 2007, JSR made 3,315,242 Registry Calls. Of these calls, JSR made:

557,336 calls to Illinois area codes;
338,352 calls to Ohio area codes;

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4,936 calls to North Carolina area codes; and

50 calls to California area codes.

JSR made at least some of these calls after February 14, 2007, through an unidentified Order Entry Retailer. PX 28, Taylor November 6, 2013 Report, at 14 Table 6a; T 622: 1894 (Goodale).

5. American Satellite

In September 2006, American Satellite made a Prerecorded Call to consumer Robert Parker at his residence on his home telephone. Parker answered the call while participating in a Dish sting operation. The sting identified American Satellite as the telemarketer making the call. The Court found at summary judgment that when Parker answered the call, the call became an Abandoned Prerecorded Call in violation of the TSR. Opinion 445, at 107, 194, 233, 75 F.Supp.3d at 989, 1019, 1033.

In February 2007, Dish fined American Satellite \$10,000 for Do-Not-Call Law violations. T 620: 1409-11 (Musso); DTX 825, Email from Musso to Neylon, Origer, Werner, and Mills Dated February 9, 2007. American Satellite blamed the violations on affiliates. American Satellite promised to terminate all affiliates and

handle all telemarketing in-house. DTX 825, Email from Tim Pyle to Musso dated February 20, 2007.

In 2008, Manuel Castillo was a Dish Field Representative who visited American Satellite on behalf of Dish. At that time, Castillo left Dish to work for American Satellite. Castillo worked at American Satellite for less than a year. Castillo discovered that American Satellite was using a Philippine call center to make “press 1” Prerecorded Calls. T 620: 1328-29 (Castillo).

Castillo discovered that American Satellite also defrauded Dish in various ways. Dish required a consumer to have a credit card in order to qualify for Dish Network programming. American Satellite circumvented this requirement to make sales to individuals who did not have credit cards. American Satellite put \$1.00 on prepaid debit cards. If a customer did not have a credit card, American Satellite sales personnel uploaded the numbers on one of the debit cards onto the Order Entry Tool, misrepresenting the numbers as the credit card number of a new customer. T 602: 1331 (Castillo).

Sometime in late 2008, American Satellite fired Castillo. Within a day or two of being fired, Castillo told Musso about American Satellite’s fraudulent and illegal practices. Musso

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referred Castillo to a Dish internal auditor Bert Eichhorn. Castillo told Eichhorn that American Satellite was making Prerecorded Calls and making a massive number of calls to numbers on the Registry. Eichhorn, however, was not interested in Castillo's information about Do-Not-Call Law violations. He was interested in evidence that American Satellite was defrauding Dish. T 620: 1334-42, 1357 (Castillo); PX 222, Email thread between Castillo and Eichhorn dated January 7, 2009. Castillo provided Dish with this information because he wanted to go back to work for Dish. Dish did not rehire Castillo, and eventually Castillo stopped providing information to Dish. T 620:1345-50 (Castillo).

Castillo testified that when he visited American Satellite as a Dish Field Representative he did not see anything to indicate that American Satellite was engaged in illegal telemarketing. T 620: 1332-34 (Castillo). Once he went to work for American Satellite, he discovered that American Satellite hid its activities from Dish representatives. As he put it, American Satellite put on a show for Dish representatives. T 620: 1334 (Castillo). Castillo testified that American Satellite went so far as to send Dish fake recorded sales

calls for the Quality Assurance program. T 620: 1328-36, 1360-61 (Castillo).

6. Dish Nation

Dish Nation was an Order Entry Retailer operated by a former Dish employee Shawn Portela. The Plaintiffs take the position that Dish caused both JSR and Dish Nation to make all of the calls reflected in JSR's telephone records. However, the evidence does not support this position. From July 2006 through August 10, 2006, JSR ran its telemarketing calls through Dish Nation. Thereafter, JSR operated as a separate Order Entry Retailer until Dish terminated it on February 14, 2007. After February 14, 2007, JSR continued to operate through another Order Entry Retailer until sometime in March 2007. JSR stopped because it was not getting paid.

The evidence also shows that Dish Nation made Abandoned Prerecorded Calls in 2007. PX 1299, Letter from attorney Chad Austin to Dish Senior Corporate Counsel Dana Steele dated March 27, 2007; PX 1298, Letter from North Dakota Assistant Attorney General James Thomas to Echostar and Dish Nation LLC dated June 25, 2007, with enclosed North Dakota ex rel. Stenehjem v.

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Compliance Order entered June 21, 2007.

Plaintiffs, however, have not presented any evidence of that JSR made calls after February 14, 2007 through Dish Nation. The evidence only supports a finding that JSR made calls through Dish Nation from July 2006 until August 10, 2006. The evidence does not show that Dish Nation had any connection with the calls that JSR made after it became an Order Entry Retailer on August 10, 2006.

The evidence supports a finding that Dish allowed Dish Nation to use third party affiliates in 2006. Tchang knew that Dish Nation used affiliates. He told Goodale to operate JSR through one of Portela's Order Entry Retailers. The September 2006 Spreadsheet listed JSR and a company called Direct Promotions as Dish Nation affiliates. The September 2006 Spreadsheet said JSR worked under Dish "Nation's umbrella," and Direct Promotions was part of "Dish Nation's affiliate program." PX 239, September 2006 Spreadsheet.

Dish had not formally approved JSR as a Dish Nation affiliate, yet the Dish Sales Department knew that JSR was a third-party

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affiliate of Dish Nation and allowed the practice. In addition, Musso told Neylon on December 21, 2006, that Dish Nation was using an off-shore call center in the Philippines. PX 1135, Email thread between Musso and Neylon dated December 21, 2006.

IV. Telemarketing Calling Records

The Plaintiffs presented the following telephone call records: (1) calls made by Dish from October 2003 through August 2007 (2003-2007 Calling Records), and from September 2007 through March 10, 2010 (2007-2010 Calling Records); (2) calls made by Guardian on behalf of Star Satellite and Dish TV Now; (3) calls made by JSR through JSR's automatic dialing operation in Texas, and (4) calls made by Satellite Systems. See PX 745-60, 772-74, 776-77, 779-89, 791-805, 807-14, 817, 820-21, 824, 826, 828, 831-85, 890-902, 914-47, Calling Records.⁴⁴ The Court entered partial summary judgment in favor of the Plaintiff United States finding liability for violations of the TSR on some calls listed in most of these calling records. The Court further made findings at summary judgment regarding the Plaintiff States' claims, but did not enter judgment on those claims. Opinion 445, at 231-38. The

⁴⁴ Some of the calls on Dish's calling records could have been made by Telemarketing Vendor EPLDT because it made calls through Dish's automatic dialer.

Plaintiffs did not seek summary judgment on any of the calls in the 2003-2007 Calling Records. The Plaintiffs now seek to prove Dish's liability for the 2003-2007 Calling Records and for additional calls in the other records. The Court makes the following findings of fact regarding these call records.

A. 2003-2007 Calling Records

In July 2005, the FTC sent Dish a Civil Investigative Demand (FTC Demand). The FTC Demand sought information regarding possible violations of the TSR and the FTC Act. In 2005, Dish was still known as EchoStar. The FTC Demand asked for the following call records:

1. Magnetically recorded documents sufficient to show all telemarketing calls to consumers made by EchoStar relating to the marketing of Dish Network. These documents should include the telephone numbers, and the dates of the calls;

PX 1131, FTC Demand dated July 21, 2005, at 6.

In response to the FTC Demand, Dish provided the 2003-2007 Calling Records, consisting of records of calls made from October 2003 through September 2005, December 2005 through December 2006, and January 2007 through August 2007. The cover letter

accompanying the production for the October 2003 through September 2005 records stated, in part,

Per our prior conversation, please find enclosed the following in response to the CID

1. 1 DVD with listing of all outbound telemarketing calls made on behalf of EchoStar From October 17, 2003 through December 31, 2004*
(CONFIDENTIAL);

. . . .

*A second DVD with the listing of calls from January 1, 2005 to the date of the CID request was damaged during copying and will be forwarded to you upon its completion.

PX 317, Letter dated September 22, 2005, from Dana E. Steele, Corporate Counsel, to Russell Deitch, Esq., FTC Counsel (emphasis in the original).⁴⁵

The Court finds that the transmittal letter from Dish in-house counsel Steele constitutes an admission by Dish that the 2003-2007 calling records produced were records of Dish's outbound telemarketing calls. Steele stated in her letter that the records

⁴⁵ Dish's Vice President and Associate General Counsel Jeffrey Blum wrote the other two transmittal letters. Blum stated in the second transmittal letter, "[E]nclosed find nine (9) CD-Rom's (sic) containing EchoStar Call Data" from December, 2005 through December, 2006." Blum stated in the third transmittal letter, "[E]nclosed find six (6) CD-Rom's (sic) containing EchoStar Call Data from January, 2007 through August, 2007." Plaintiffs' Third Motion to Compel Discover Responses (d/e 143, Exhibits 22 and 23, Letters from Jeffrey Blum to Russell Deitch dated August 1, 2007, and September 10, 2007. Attorney Blum's letters do not appear to be admitted as evidence at trial, and no party cited them. The Court does not consider them for purposes of this Findings of Fact and Conclusions of Law. Blum's letters would not change the Court's findings or conclusions even if they were considered.

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provided with her letter were records of telemarketing calls. Steele was an agent of Dish at the time she made the statement, and the statement was within the scope of her agency. The transmittal letter, therefore, constitutes a non-hearsay admission of Dish that the 2003-2007 Calling Records were records of outbound telemarketing calls. Fed. R. Evid. 801(d)(2)(D).

Furthermore, the FTC Demand asked for records of “telemarketing calls made by EchoStar relating to the marketing of Dish Network.” Dish responded by producing the 2003-2007 Calling Records. Dish’s response implies that the records produced were records of telemarketing calls made by Dish (then known as EchoStar) “relating to the marketing of Dish Network.” PX 1131, FTC Demand, at 6.

Dish argues that the 2003-2007 Calling Records contained records of non-telemarketing calls. Dish relies on employee Bangert’s testimony that he doubted that the 2003-2007 Calling Records were all records of telemarketing calls. T 628: 2715-18 (Bangert). Dish also relies on the evidence that the 2007-2010 Calling Records produced in discovery in this case included both

telemarketing and non-telemarketing calls. The 2007-2010 Calling Records are discussed in detail below.

Bangert's speculation regarding the make-up of the 2003-2007 Calling Records has no probative value. Bangert had no personal knowledge of the content of the 2003-2007 Calling Records. Additionally, Bangert did not participate in preparing the response to the FTC Demand. T 628: 2715-18, 2792-94 (Bangert).

The existence of non-telemarketing calls in the 2007-2010 Calling Records may tend to show the 2003-2007 Calling Records may have included non-telemarketing calls. However, the probative value is slight. The two sets of records were produced at different times in response to different document demands. The 2007-2010 Calling Records also included campaign codes. The campaign codes indicated the purpose of the calls made during the particular campaign, such as telemarketing, collection, payment notice, scheduling, etc. See PX 26, Taylor September 20, 2012 Report, at 6. The 2003-2007 Calling Records did not contain campaign codes. See T 613: 219 (Yoeli); see e.g., PX 859 through 861, July 2006 Dish Calling Record. The 2003-2007 Calling Records, therefore, do not indicate that the records included multiple types of calls.

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Dish's expert Taylor stated that he was told by Dish personnel that the 2003-2007 Calling Records included both inbound and outbound telemarketing call records. PX 28, Taylor November 6, 2013 Report, at 7-9. Taylor's recitation of this information is inadmissible hearsay. Taylor may use hearsay as a basis of his opinions under the correct circumstances, but Dish must present competent evidence to prove the truth of the assertion. Fed. R. Evid. 703, 802. Dish has not done so.

In light of the fact that the FTC Demand asked for outbound telemarketing records, Dish attorney Steele stated that the records she sent were records of telemarketing calls, and only minimal competent admissible evidence exists to the contrary, the Court finds that it is more likely than not that the 2003-2007 Calling Records were records of outbound telemarketing calls made by Dish or its Telemarketing Vendors.

The FTC sent the 2003-2007 Calling Records to InterImage, Inc. (InterImage), for processing. InterImage compared each calling record on 2003-2007 Calling Records that had a valid telephone number with the telephone numbers that had been on the Registry for at least 31 days at the date of the call. T 615: 497-500 (L,

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Steele).⁴⁶ InterImage referred to each match of a telephone number on the 2003-2007 Calling Records with a number on the Registry as a “Hit” or “Registry Hit.” T 615: 497 (L. Steele). InterImage’s comparison of the 2003-2007 Calling Records with the Registry showed the following:

	Total Calls In Record	Hits
October 17, 2003 – March 31, 2004	30,328,309	4,770,433
January 3 – May 31, 2005	61,295,734	12,533,684
June 1 – 30, 2005	18,140,971	2,784,629
July 1 – 31, 2005	18,398,923	2,575,019
August 1 – September 18, 2005	30,328,309	4,000,815
December 1, 2005 – January 31, 2006	31,420,403	6,916,143
February 1 – 28, 2006	14,477,981	3,375,472
March 1 – April 30, 2006	32,178,915	4,641,828
May 1 – June 30, 2006	31,368,431	7,586,596
July 1 – August 15, 2006	20,836,297	5,080,115

⁴⁶ The trial witness Leslie Steele was CEO of InterImage. Dana Steele was a Corporate Counsel for Dish.

August 16 – September 30, 2006	20,238,913	4,710,270
October 1 – 31, 2006	18,389,496	3,624,432
November 1– 30, 2006	19,597,026	3,712,816
December 1– 30, 2006	17,462,891	3,002,123
January 2 – February 28, 2007	24,388,302	2,994,525
March 1 – April 30, 2007	26,170,553	4,046,178
May 1 – 31, 2007	15,968,120	3,389,113
June 1 – 30, 2007	18,669,378	4,938,258
July 1 – 31, 2007	17,823,512	4,627,426
<u>August 1 – 31, 2007</u>	<u>20,452,928</u>	<u>5,494,133</u>
Totals	501,513,302	94,804,008

T 615: 501-16 (L. Steele); PX 1417, Summary Chart of InterImage Results. InterImage did not perform any further analysis of the 94,804,008 Registry Hits.

The InterImage Hits files (Hits Files) from the 2003-2007 Calling Records included at least some duplicate entries in which the same call was included two or more times. See T 615: 542 (L. Steele); PX 772, June 2005 Hits File. The June 2005 Hits File contained both the dates and times of the calls. The June 2005

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Hits File showed duplicate entries of the same call on the same date and time.

Most of the InterImage Hits Files from the 2003-2007 Calling Records only identified the dates of calls, but not the times of calls. See e.g., PX 792, February 2006 Hits Files; see also T 613:225-26, 264-65 (Yoeli). As a result, the Hits Files frequently listed multiple calls to the same number on the same date. The 2003-2007 Calling Records produced by Dish contained both the dates and the times of the calls. See e.g., PX 859 through 861, July 2006 Dish Calling Record.

The parties' experts Dr. Yoeli and John Taylor analyzed the Dish calling records for the period. Plaintiffs' expert Dr. Yoeli analyzed the InterImage Hits Files from the 2003-2007 Calling Records. Again, most of the Hits Files provided only the dates of the calls, but not the specific times of the calls. Dr. Yoeli decided to count all calls to the same number on the same date as one call. T 613:225-26, 264-65 (Yoeli). Dr. Yoeli found that 3,022,355 such calls were both Registry Calls and Internal List Calls made to persons whose telephone numbers were on both the Registry and Dish's Internal Do-Not-Call Lists at the times of the call. PX 38,
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Appendix C, Yoeli December 14, 2012 Report, at PX38-112. Dr. Yoeli did not opine on the number of Registry Calls alone even if the numbers were not on an Internal Do-Not-Call List. Dr. Yoeli did not make any comparison of the Hits Files with the Dish 2003-2007 Calling Records to attempt to identify the specific times of the calls on the Hits Files.

The Plaintiffs did not rely on Dr. Yoeli's opinions with respect to the 2003-2007 Calling Records to prove their claims at trial. See State Plaintiffs' Additional Post-Trial Proposed Findings of Fact, at 8-9 ¶¶ 73-80 (Plaintiff States relying on Taylor); United States Amended Proposed Findings of Fact (d/e 667), at 5-7 ¶ 16 (Plaintiff United States relying on Leslie Steele's InterImage analysis). Dish inquired on cross-examination of Dr. Yoeli regarding his opinions of the United States' claims based on the 2003-2007 Calling Records and cited to his opinions in Dish's proposed Findings of Fact. See T 614: 376-77 (Yoeli); Dish Proposed Findings of Fact (d/e 665), at 76 ¶ 276.

Dish's counsel provided its expert Taylor with 581,401,271 calling records from October 17, 2003, to August 31, 2007. Dish provided 501,513,302 calling records to the FTC from this period

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pursuant to the FTC Demand, which made up the 2003-2007 Calling Records. Taylor removed duplicate entries (“de-duplicated”) from the records provided to him. Taylor also removed records with invalid telephone numbers. Taylor eliminated 378,147 calls because the disposition codes indicated calls did not go through due to dialer errors. Taylor eliminated 231,966 calls because he was told that the disposition codes indicated that the calls were inbound telemarketing calls. Taylor eliminated 30,017 calls because the disposition codes indicated that the calls were non-telemarketing calls such as calls for collections or scheduling service. PX 28, Taylor November 6, 2013 Report, at 7-9.

Taylor opined that the remaining 3,220,602 remaining calls were made to persons whose telephone numbers were on the Registry more than 31 days at the time of the call. Taylor opined that of that number, the following calls were made to telephone numbers with area codes associated with the Plaintiff States:

- 327,986 calls to California area codes, of which 93,986 were made in 2006 and 172,930 were made in 2007, for a total of 266,514 in 2006 and 2007;

- 141,620 calls to Illinois area codes, of which 39,459 were made in 2006 and 73,310 were made in 2007, for a total of 112,769 in 2006 and 2007;
- 101,500 calls to North Carolina area codes, of which 25,169 were made in 2006 and 59,924 were made in 2007, for a total of 85,093 in 2006 and 2007; and
- 121,853 calls to Ohio area codes, of which 32,223 were made in 2006 and 65,984 were made in 2007, for a total of 98,207 calls in 2006 and 2007.

PX 28, Taylor November 6, 2013 Report, at 9. The Court finds Taylor analysis of 2003-2007 calls to be probative of the number of Registry calls Dish made from October 2003 through August 2007.

No party presented any evidence regarding whether Dish had either a Transaction-based or Inquiry-based Established Business Relationship with any of the recipients of any of the calls in either the 2003-2007 Calling Records produced to the FTC or the 581,401,271 calling records provided to Taylor.

B. 2007-2010 Calling Records

1. Calls to Numbers on the Registry

Dish produced the 2007-2010 Calling Records in discovery.

The 2007-2010 Calling Records included campaign codes with each calling record. The campaign codes indicated the type of calling campaign. Dish representatives and the Plaintiffs' expert Dr. Yoeli worked together to identify the telemarketing campaign codes in the 2007-2010 Calling Records. Dish also provided Dr. Yoeli with the last payment date, if any, associated with each calling record, and the activation date, if any, associated with each calling record. See PX 1418, Yoeli July 19, 2012 Report, at 3-4.

Dr. Yoeli analyzed the 2007-2010 Calling Records to identify the Registry Calls. Dr. Yoeli received the records in two sets, one with 357,058,136 call records and a second with 76,026,757 call records. Dr. Yoeli combined the two sets and removed any duplicates that were on both lists. Dr. Yoeli also removed any records with invalid telephone numbers. Dr. Yoeli then identified the call records that were on calling campaigns with telemarketing campaign codes. This process resulted in 134,295,177 call records with telemarketing calling campaign codes. Dr. Yoeli's report stated

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that he included campaigns with telemarketing or unknown campaign codes. T 613: 163-65 (Yoeli); PX 1418, Yoeli July 19, 2012 Report, at 8; see T 614: 330-31, 334-35 (Yoeli). Dr. Yoeli testified at trial that the report was in error. He only included records on campaigns with telemarketing campaign codes. T 614: 442-43, 472 (Yoeli). The Court finds Dr. Yoeli's testimony on this point to be credible.

Dr. Yoeli sent the 134,295,177 call records to InterImage to find the total number of Registry Hits. Dr. Yoeli removed the duplicate records in the Registry Hits provided by InterImage. The result was 32.4 million Hits. Dr. Yoeli removed calls made to telephone numbers associated with accounts on which payments were made within 558 days immediately preceding the dates of the calls. The 558 day period is 18 times 31 days, representing the 18 month period in which a seller has a Transaction-based Established Business Relationship with a customer. TSR, 16 C.F.R. § 310.2(o); FCC Rule, 47 C.F.R. § 64.1200(f)(5). Dr. Yoeli also removed calls with no payment records, but with activation dates within 93 days immediately preceding the dates of the calls. The 93 days is three times 31 days, representing the three-month period in which a

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seller has an Inquiry-based Established Business Relationship with a person who made an inquiry about the seller's goods and services. Id. Dr. Yoeli opined as a result that the 2007-2010 Calling Records contained 3,342,415 telemarketing Registry Calls to persons with whom Dish did not have either Transaction-based or Inquiry-based Established Business Relationships (Yoeli July 2012 Call Set). PX 1418, July 19, 2012 Yoeli Report, at 7-10; T 613: 166-71 (Yoeli).

Dish representatives told Dr. Yoeli to use the activation date as an inquiry date. T 614: 330-31, 334-35 (Yoeli). Montano denies this. T 269: 3052-53 (Montano). The Court credits Dr. Yoeli's testimony on this point. Montano's testimony has not been credible on Dish's use of inquiry dates. Montano testified that Dish put inquiry dates in the last payment field in its new procedures adopted in 2010 for scrubbing for Established Business Relationship. T 629: 3015-16 (Montano). This testimony was not credible for the reasons discussed above. Based on the demeanor of the two witnesses and the fact that Montano provided testimony on a related matter that was not credible, the Court credits Dr. Yoeli's testimony in this regard.

Dish's expert John Taylor prepared a rebuttal report to Dr. Yoeli's analysis. PX 26, Revised Expert Report of John Taylor, dated September 20, 2012 (Taylor September 12, 2012 Report).⁴⁷ Taylor examined the results of Dr. Yoeli's analysis. Taylor opined that certain calls did not violate the TSR or the FCC Rule. Taylor "eliminated" or subtracted those calls from the total violations found by Dr. Yoeli.

Taylor first looked at disposition codes for calls. Taylor opined that certain disposition codes indicated that calls did not violate the Do-Not-Call Laws:

- 309,931 calls with disposition codes that indicated that the calls did not go through to ring the recipients' phones (such as busy, no dial tone, etc.) (referred to by Taylor as dialer errors);
- 42,716 calls with disposition codes that indicated that the recipients were businesses or that the call was made for non-telemarketing purposes, such as payment reminders; and

⁴⁷ Taylor is employed by CompliancePoint, a wholly owned subsidiary of PossibleNOW. A000303

- 12,561 calls with disposition codes of wrong number or no English, indicating that the call recipients did not speak English.

PX 26, Taylor September 20, 2012 Report, at 2-8. Taylor eliminated these types of calls on the instructions of Dish's attorneys. T 633: 3292 (Taylor).

Taylor also eliminated 62,679 calls in which the campaign code indicated that the calls were non-telemarketing calls, such as scheduling or confirming work orders. PX 26, Taylor September 20, 2012 Report, at 2-8.

Taylor then eliminated 1,265,359 calls in which the campaign codes indicated that the calls were made to current customers.

Taylor stated that these calling records were associated with valid Dish account numbers and did not have disconnect dates. Taylor opined that Dish had a Transaction-based Established Business Relationship with the call recipients. Taylor did not use the last payment data that Dish provided to Dr. Yoeli because Taylor reviewed the data and found it to be unreliable. Taylor stated that campaign codes were not the preferred way to calculate

Transaction-based Established Business Relationships, but that

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was all he had. T 633: 3297-98 (Taylor); PX 26, Taylor September 20, 2012 Report, at 2-8.

Taylor eliminated 873,551 calls on Lead Tracking Systems calling campaigns. Taylor was informed that the Lead Tracking System contained telephone numbers of people who inquired of information regarding Dish Network programming and that Dish placed these calls within a day or two of each inquiry. Dish did not provide specific dates of inquiries to Taylor. T 633: 3300 (Taylor). Taylor opined that Dish had an Inquiry-based Established Business Relationship with the recipients of these calls. T 633: 3302-03; PX 26, Taylor September 20, 2012 Report, at 2-8.

Taylor then eliminated 67 calls by applying the 558 day limit to calls with activation dates, but no payment date. Taylor opined that an activation was a transaction between Dish and a customer, and so, Dish had a Transaction-based Established Business Relationship with these customers for 18 months. PX 26, Taylor September 20, 2012 Report, at 2-8.

Taylor then eliminated 10,029 intrastate calls. Taylor testified that he eliminated these calls based on instructions from Dish's counsel. T 633:3292 (Taylor).

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Taylor opined that he could not eliminate 765,531 calls found by Dr. Yoeli to be Registry Calls that Dish did not have either Transaction-based or Inquiry-based Established Business Relationships with the intended call recipients. PX 26, Taylor September 20, 2012 Report, at 2-8.

On December 14, 2012, Dr. Yoeli prepared a revised report. PX 38, Appendix C, Revised Rebuttal Report, dated December 14, 2012 (Yoeli December 14, 2012 Report), at 101-116. Dr. Yoeli had mistakenly failed to include a significant number of call records in his first analysis. He incorrectly believed that one of discs provided in the production of the 2007-2010 Calling Records was a duplicate. Dr. Yoeli performed his same analysis with the additional data. Dr. Yoeli also revised his method of determining whether Dish had an Established Business Relationship with a call recipient. Dr. Yoeli applied the 558 day period if the telephone number had an activation date and a payment date even if the activation date was after the payment date. Dr. Yoeli found that Dish made 18,039,631 Registry Calls to persons with whom: (1) Dish did not have any payment date or activation date information; or (2) the call was more than (a) 558 days after the latter of the last

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payment date or activation date associated with the numbers, or (b) more than 93 days after the activation date in those cases in which Dish had an activation date, but no payment date. PX 38, at 105, Yoeli December 14, 2012 Report.

Taylor again prepared a response to Dr. Yoeli's revised report. PX 16, Expert Report of John T. Taylor, dated October 14, 2013 (Taylor October 14, 2013 Report). This time, Taylor did not critique Dr. Yoeli's results. Rather, Taylor performed his own separate analysis of the Dish's calling records and Telemarketing Vendor eCreek's calling records for the years 2007-2010. Taylor concluded that Dish made 501,650 Registry Calls for which he had no basis to believe that the calls were permitted under the Do-Not-Call Laws. PX 16, Taylor October 14, 2013 Report, at 8. The Court discusses Taylor's analysis in this report in detail below.

The United States moved for partial summary judgment on the 501,650 calls remaining at the end of Taylor's October 14, 2013 analysis. The United States also moved for partial summary judgment on the following calls that Taylor eliminated from Dr. Yoeli's finding of 3,342,415 Registry calls in the Yoeli July 2012 Call Set:

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- 873,551 calls Taylor excluded as calls on Lead Tracking Systems calling campaigns;
- 309,931 calls Taylor excluded based on disposition codes that showed that the calls were not completed;
- 12,552 calls to wrong numbers or individuals who did not speak English; and
- 10,029 intrastate calls.

Plaintiffs' Motion for Summary Judgment (d/e 341), at 88-113.

The Court entered partial summary judgment on all these calls. The Court explained that the TSR prohibited initiating telemarketing calls; therefore, dispositions codes showing wrong numbers, no English, or the failure of a phone to ring are not relevant. The violations occurred when the calls were initiated. The Court also explained that the TSR covered intrastate telemarketing calls. The Court also found that Dish failed to present evidence to show that the Lead Tracking System leads were in fact inquiry leads and that the calls were placed within three months of the consumers' inquiries. The Court entered partial summary judgment on 1,707,713 calls made by Dish or its Telemarketing Vendors. See Opinion 445, at 158-70, 231-32.

JA000308

The portions of the 1,707,713 calls made to telephone numbers with area codes associated with the Plaintiff States (Plaintiff State area codes) are as follows:

- 501,650 Calls from Taylor's Analysis:
 - 53,617 calls made to California area codes, of which 42,019 were made more than 90 days after the numbers were registered on the Registry;
 - 24,096 calls made to Illinois area codes;
 - 1,375 calls made to North Carolina area codes; and
 - 23,853 calls made to Ohio area codes.

T 633: 3323-24 (Taylor); PX 28, Taylor November 6, 2013 Report, at 10.

- 873,551 Lead Tracking System Calls:
 - 126,150 calls made to California area codes;
 - 44,191 calls made to Illinois area codes;
 - 39,413 calls made to North Carolina area codes; and
 - 40,401 calls made to Ohio area codes.

T 613: 209 (Yoeli).

- 309,931 calls that were not completed:
 - 34,997 calls made to California area codes, of which 33,970 were made more than 93 days after the numbers were registered on the Registry;
 - 15,228 calls made to Illinois area codes;
 - 11,718 calls made to North Carolina area codes; and
 - 13,294 calls made to Ohio area codes.

T 613: 209, 211 (Yoeli).

- 12,552 calls made to wrong numbers:
 - 2,103 calls made to California area codes of which 1,955 were made more than 93 days after the numbers were registered on the Registry;
 - 470 calls made to Illinois area codes;
 - 455 calls made to North Carolina area codes; and
 - 443 calls made to Ohio area codes.

T 613: 209-12 (Yoeli).

- Totals of Breakdowns of Summary Judgment Calls by Plaintiff States' Area Codes:
 - 216,867 summary judgment Registry Calls made to

California area codes;

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- 83,895 summary judgment Registry Calls made to Illinois area codes;
- 52,961 summary judgment Registry Calls made to North Carolina area codes; and
- 77,991 summary judgment Registry Calls made to Ohio area codes.

T 613: 209 (Yoeli). The Plaintiff States did not present evidence identifying intrastate calls made to numbers with area codes associated with them.

The parties stipulated at trial that the United States is seeking liability for a maximum of 1,634,702 additional Registry Calls from the 3,342,415 calls in the Yoeli July 2012 Call Set. The parties calculated the stipulated maximum of 1,634,702 calls by subtracting the 1,707,713 calls which the Court found to be TSR violations at summary judgment from the 3,342,415 calls in the Yoeli July 2012 Call Set. T 614: 426-30 (Yoeli) (attorneys Runkle and Echtman affirming the stipulation). The Plaintiff States and Dish stipulated to a proportional reduction in the maximum number of calls that the Plaintiff States were seeking liability from Yoeli July 2012 Call Set for illegal Registry Calls beyond those on

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which the Court granted the United States partial summary judgment. T 614: 432 (Yoeli) (attorneys Ohta and Echtman affirming the stipulation).

The United States originally sought to establish liability for 2,864,896 additional Registry Calls from the Yoeli July 2012 Call Set. T 614: 313, 425-26 (Yoeli) (attorney Runkle speaking). The United States' stipulated maximum of 1,634,702 calls is 57% of the 2,864,896 additional calls in the Yoeli July 2012 Call Set for which the United States was seeking liability. Pursuant to the stipulation of the parties, the maximum liability that the Plaintiff States are seeking for Registry Calls from the Yoeli July 2012 Calls Set beyond those on which the Court granted the United States partial summary judgment will be proportionally reduced to 57% of the total amount sought.

Taylor testified at trial that all but 167,848 of the United States' stipulated maximum of 1,634,702 calls were either not telemarketing calls or were telemarketing calls to persons with whom Dish had a Transaction-based Established Business Relationship at the time of the call. Taylor testified that Dr. Yoeli erred in using an activation date as a date that a person inquired

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about Dish Network programming. Taylor opined that an activation date should be considered a customer transaction with Dish. He opined that the relevant time period in which Dish had a Transaction-based Established Business Relationship with such a customer was 18 months, not three months. Taylor opined that Dr. Yoeli erroneously included 96,100 calls in his counts due to this error. The United States conceded that the 96,100 calls should not be included as illegal telemarketing Registry Calls. T 633: 3281 (Taylor); T 633: 3320 (Taylor) (Attorney Runkle conceding the issue).

Taylor also opined at trial that the 1,265,359 calls to individuals on calling campaigns directed at current customers were calls to persons with Transaction-based Established Business Relationships with Dish. Taylor relied on the calling campaign name or code to identify calls made to current customers. Taylor stated that he was told that the intended recipients of these calls had valid Dish account numbers and did not have disconnect dates with Dish. PX 26, Taylor September 20, 2012 Report, at 4. Taylor again used the campaign codes to find Transaction-based Established Business Relationships because he concluded that he had nothing else available. T 633 : 3296-99 (Taylor).

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Campaign names and codes based on disconnect dates are not a valid basis to determine Transaction-based Established Business Relationships. The TSR and FCC Rule define Transaction-based Established Business Relationship for customers as 18 months from the last purchase of goods or services. TSR 16 C.F.R. § 310.2(o); FCC Rule 47 C.F.R. § 64.1200(f)(5). Dish's experts Taylor and Kenneth Sponsler both agreed that the proper way to determine whether Dish had a Transaction-based Established Business Relationship with the intended call recipient was to measure from specific data points that would establish the date of the last purchase of goods or services by the intended call recipient. T 633: 3295-96 (Taylor); T 633 : 3454, 3476 (Sponsler).⁴⁸ Disconnect dates could easily be long after the last purchase date. Campaign codes based on disconnect dates are not a reliable basis for calculated whether a call recipient had a Transaction-based Established Business Relationship with Dish. Taylor used the campaign codes because he did not have anything else. That justification is not based on his expertise and is insufficient to support his opinion. Taylor's reliance on campaign codes is not sufficient to show that

⁴⁸ Sponsler was also employed by CompliancePoint, a wholly owned subsidiary of PostNet.

Dish had Transaction-based Established Business Relationships with Dish.

If Taylor is correct that the date-of-last-payment information that Dish provided to Dr. Yoeli is unreliable, then no evidence presented shows the last dates purchase of goods or services by the intended recipients of Dish's telemarketing calls, and so, no evidence shows that Dish had any Transaction-based Established Business Relationships with any of its call recipients in the 2007-2010 Calling Records.

The Plaintiffs do not argue for such a finding. The Plaintiffs relied on Dr. Yoeli's use of the last payment data supplied by Dish. The Court, therefore, will give Dish the benefit of the doubt and credit the last payment data that Dish supplied in discovery. The Court notes that Taylor actually used the date-of-last-payment information. Taylor started with Dr. Yoeli's conclusions in the July 2012 Report and reduced the number of violations further by his various opinions, including the campaign codes. He therefore started with Dr. Yoeli's figures that were already reduced by the last payment date. See T 633: 3298 (Taylor). Taylor also explicitly used both last-payment-date information in his October 14, 2013 Report. JA000315

See PX 16, Report of John Taylor dated October 14, 2013, (Taylor October 14, 2013 Report), at 6. The Court, therefore, will credit last-payment-date information as reliable for purposes of calculating Transaction-based Established Business Relationship exceptions to liability.

Dish's practice of using calling campaign names or disconnect dates, however, was not a reliable method of determining whether Dish had a Transaction-based Established Business Relationship with intended call recipients. Taylor's reliance on this method in his opinions was similarly not reliable was not based on sufficient facts and data. See Fed. R. Evid. 702(b) and (c). Taylor's opinion regarding the 1,265,359 calls has no probative value. His testimony did not establish that Dish had a Transaction-based Established Business Relationship with the intended recipients of these calls.

The Court credits Taylor's opinion to exclude 42,716 calls as non-telemarketing calls based on disposition codes, and his opinion to exclude 62,679 calls as non-telemarketing calls based on campaign codes. The disposition codes cited by Taylor indicate that the 42,716 calls were received by businesses or were made for non-

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telemarketing purposes. Business and non-telemarketing calls are not covered by the TSR and the relevant portions of the TCPA. The campaign codes on which Taylor relies indicate that the 62,679 calls were made primarily in Held Work Order and Canceled Work Order campaigns. The testimony from Bangert, Davis, Dexter, and Montano was ambiguous concerning whether some of these calls were telemarketing calls designed to close pending sales or just scheduling calls. The Plaintiffs have the burden to prove that a call is a telemarketing call. Given the ambiguity, the Court will credit Taylor's opinion that the calls made in these campaigns were not telemarketing calls. The Court, therefore, finds that 1,433,207 of the remaining 1,634,702 in the Yoeli July 2012 Call Set were Registry Calls to persons whom Dish has not shown had a Transaction-based or Inquiry-based Established Business Relationships with Dish at the times of the calls. The figure 1,433,207 is the sum of the 167,848 calls on which Taylor offered no opinions to exclude from liability plus the 1,265,359 calls for which Taylor offered an opinion that had no probative value.

Plaintiffs' expert Dr. Yoeli also presented an opinion at trial regarding the portion of the 3,342,415 calls in the Yoeli July 2012

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Call Set that were not ruled on by the Court at summary judgment. Dr. Yoeli compared the 3,342,415 call records in the Yoeli July 20-12 Call Set with a set of 4,075,766 call records that the Plaintiffs provided to him. The Plaintiffs told Dr. Yoeli that the set of 4,075,766 call records were the September 2007 to March 2010 call records analyzed by Taylor and on which the Court granted partial summary judgment. See T 616: 172-73, 282-84 (Yoeli). Plaintiffs' demonstrative exhibit entitled "Yoeli Demonstrative Exhibit 2" described the 4,075,766 calls records as, "Appended and de-duplicated Dish 2007-2010 call records for which Dish was found liable in summary judgment (Taylor's 501K National Registry, 10K Interstate (sic), 12K No English / Wrong Number, 310K Not Completed, 873K Lead)." Y-DEM02-001, Yoeli Demonstrative Exhibit 2, 2007-2010 Violations Not Yet Granted in Summary Judgment. By comparing, or merging, the specific call records in these two sets, Dr. Yoeli determined that 2,475,432 of the call records in the Yoeli July 2012 Call Set were not included in the set of 4,075,766 call records. T 613: 173, 293-94 (Yoeli).

Dr. Yoeli testified that of that of the 2,475,432 calls, the following calls were made to telephone numbers with area codes associated with the Plaintiff States:

- 332,115 calls made California area codes, of which 326,125 were made more than 93 days after the numbers were registered on the Registry;
- 114,234 calls made to Illinois area codes;
- 33,496 calls made to North Carolina area codes; and
- 96,531 calls made to Ohio area codes.

T 613: 205-06 (Yoeli). Pursuant to the stipulation discussed above, the maximum sought by the Plaintiff States is stipulated to be 57% of these figures.⁴⁹

The Court finds, however, that Dr. Yoeli's opinion about the 2,475,432 Registry Calls in the Yoeli July 2012 Call Set has no probative value. Dr. Yoeli used a sound methodology to isolate the call records that were not been ruled upon by the Court at summary judgment. He compared the 4,075,766 calls records with

⁴⁹ The Court recognizes that the 57% proportionate reduction figure was calculated from a maximum number of 2,864,896 calls for which the United States sought liability, not the 2,475,432 calls to which Dr. Yoeli testified. The parties, however, based the United States' stipulation with Dish on the 2,864,896 figure, and the Plaintiff States and Dish agreed to a proportionate reduction based on the United States' stipulation with Dish. The 57% proportionate reduction figure, therefore, is correct.

calls in the Yoeli July 2012 Call Set to identify those that were not in the 4,075,766 calls records. The data Dr. Yoeli used, however, was flawed. The Plaintiffs failed to prove or even adequately explain the source of the set of 4,075,766 call records provided to Dr. Yoeli. Dr. Yoeli's testimony and the quote from Yoeli Demonstrative Exhibit 2 both stated that the source was the calls from the 2007-2010 Calling Records on which the Court granted partial summary judgment. The Court entered partial summary judgment on a total of 1,707,713 call records from 2007-2010, not 4,075,766.⁵⁰ Dr. Yoeli's conclusions based on this unproven, unexplained data have no probative value.

2. Internal List Calls to Persons with Telephone Numbers on Dish and Order Entry Internal Do-Not-Call Lists

Dish's expert Taylor compared the 2007-2010 Calling Records with the Internal Do-Not-Call lists of Dish, Dish's Telemarketing Vendor eCreek, and the PossibleNOW combined Internal-Do-Not-Call List for Order Entry Retailers. PossibleNOW had collected

⁵⁰ The Court initially surmised that the 4,075,766 figure was the sum of the 1,707,713 calls and the additional 2,386,386 on which the Court initially granted partial summary judgment, but vacated on reconsideration. See Opinion 445, at 231-32; Opinion entered February 17, 2015 (d/e 478), at 2-11. These two numbers total 4,094,099, not 4,075,766. The Court cannot tell the source of the set of 4,075,766 call records from the evidence.

these lists beginning in 2008 as part of its services for Dish.

PossibleNOW combined all of the Order Entry Retailers' Internal Do-Not-Call Lists into a single combined list. PossibleNOW maintained the Dish Internal Do-Not-Call List and the eCreek Internal Do-Not-Call List separately. Taylor found that Dish made 903,246 Internal List Calls to numbers on the internal do-not-call lists of Dish and eCreek. The Court granted partial summary judgment in Count II for these calls. Opinion 445, at 191-92, 232-33. Taylor also found that Dish made 7,321,163 telemarketing calls to numbers on the Order Entry Retailer combined Internal Do-Not-Call Lists. The number of telemarketing calls to all Internal Do-Not-Call Lists found by Taylor totaled 8,244,409 calls (7,321,163 plus 903,246). T 633: 3284-85 (Taylor); PX 28, Taylor November 6, 2013 Report, at 11.

The Court credits Taylor's opinion that Dish or its Telemarketing Vendors made 8,244,409 Internal List Calls to persons who previously stated that they did not wish to receive telemarketing calls by or on behalf of Dish Network.

Taylor testified that some overlap in the set of 903,246 calls found violations at summary judgment and the set of 7,321,163

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calls to numbers on the Order Entry Retailer combined internal do-not-call lists. T 633: 3285 (Taylor). Taylor did not explain the nature of the overlap, that basis for this statement, or the number of call records that overlapped. The Court does not credit this testimony because Taylor did not provide an explanation or basis for this opinion.

Taylor also opined on the number of Internal List Calls that Dish and its Telemarketing Vendors made to telephone numbers with Plaintiff States area codes. Taylor opined that of the 903,246 Internal List calls on Dish's and eCreek's Internal Do-Not-Call Lists, 36,598 calls were made to telephone numbers with Ohio area codes. T 633: 3282-83 (Taylor); PX 28, Taylor November 6, 2013 Report, at 11. The Court credits this opinion of Taylor.

The Court determined at summary judgment that Dish made an additional 140,349 Internal List Calls made to persons who told eCreek that they did not wish to be called by or on behalf of Dish. Opinion 445, at 179-80. Dr. Yoeli determined that 5,190 of those calls were directed to telephones with Ohio area codes. T 613: 214-15 (Yoeli). The Court credits this opinion of Dr. Yoeli. A total of

41,788 Internal List Calls were initiated to telephone numbers with Ohio area codes (36,598 calls plus 5,190 calls).

Dr. Yoeli compared the 8,244,409 records of Dish's Internal List Calls with calls in the Calling Records from 2007 to 2010 that Dish provided to Taylor and were not part of the 501,650 calls previously identified by Taylor and on which the Court granted summary judgment. T 613: 176, T 614: 255-56 (Yoeli); PX 38, Taylor December 13, 2013, Declaration, at 12. Dr. Yoeli then found the intersection of these two sets. Dr. Yoeli found that there were 2,386,386 calls to telephone numbers that were both on the internal do-not-call lists and on the Registry and were not found to be in the 501,650 calls. Dr. Yoeli found that of the 2,386,386 calls, 71,853 were on the Dish internal do-not-call list and 2,314,533 were on the combined Order Entry Retailer internal do-not-call lists. T 613: 175-76, T 614: 256 (Yoeli); see Y-DEM03-001, Yoeli Demonstrative Exhibit 3.

Dr. Yoeli also found that, of the 2,386,386 calls in this set, the following were made to telephone numbers with area codes associated with the Plaintiff States:

- 302,983 calls made to California area codes, of which 296,640 were more than 93 days after the numbers were registered on the Registry;
- 118,289 calls made to Illinois area codes;
- 97,785 calls made to North Carolina area codes; and
- 95,275 calls made to Ohio area codes.

T 613: 207, 210-11 (Yoeli); Yoeli December 13, 2013 Declaration, at 12.

Dr. Yoeli further broke down the calls to telephone numbers with Plaintiff States' area codes. Of the 71,853 calls made to numbers on the Dish internal do-not-call list:

- 9,783 calls were made to California numbers;
- 5,311 calls were made to Illinois numbers;
- 1,324 calls were made to North Carolina numbers; and
- 1,538 were made to Ohio numbers.

T 613: 208 (Yoeli). Of the 2,314,533 call made to numbers on the Order Entry Retailers' internal do-not-call lists:

- 293,200 calls were made to California numbers;
- 112,978 calls were made to Illinois numbers;

- 96,461 calls were made to North Carolina numbers; and
- 93,737 calls were made to Ohio numbers.

T 613: 207-08 (Yoeli).

The Court credits Dr. Yoeli's opinions as demonstrating that Dish made the 2,386,386 telemarketing calls to persons whose numbers were on both Registry Calls and Internal List Calls to numbers on the internal do-not-call lists of Dish, the Telemarketing Vendors, or an Order Entry Retailer and that these calls were not previously found to be part of the 501,650 calls on which the Court granted summary judgment. The Court also credits Dr. Yoeli's opinions of the breakdown of the number of this set of calls made to numbers with area codes associated with the Plaintiff States.

3. Dish Abandoned Calls

The Court entered summary judgment finding that Dish was liable for making 98,054 prerecorded calls that were answered by a person. Such calls were Abandoned Prerecorded Calls in violation of the TSR. See Opinion 445, at 193-94, 233. The TSR abandonment provisions are not subject to the Established Business Relationship exception. The Plaintiffs presented no

evidence at trial regarding additional Abandoned Prerecorded Calls by Dish.

Dr. Yoeli identified the number of these 98,054 Abandoned Prerecorded Calls that Dish made to telephone numbers with Plaintiff States' area codes:

- 23,020 calls made to California area codes;
- 5,830 calls made to Illinois area codes;
- 2,283 calls made to North Carolina area codes; and
- 1,759 calls made to Ohio area codes.

T 613: 204 (Yoeli); PX 38 Yoeli December 13, 2013 Declaration, Appendix C, Yoeli December 14, 2012 Report, at 10, Table 6.⁵¹

The translations of the texts of the prerecorded messages used in the 98,054 calls show Dish's foreign language marketing group intended to direct the calls to existing Dish customers. Dish

⁵¹ Dr. Yoeli also identified the number of all Prerecorded Calls that Dish made through its autodialer system to telephone numbers with Plaintiff States' area codes:

- 301,002 calls made to California area codes;
- 93,530 calls made to Illinois area codes;
- 30,931 calls made to North Carolina area codes; and
- 22,919 calls made to Ohio area codes.

PX 38 Yoeli December 13, 2013 Declaration, Appendix C, Yoeli December 14, 2012 Report, at 10, Table 6. The FCC Rule prohibits initiating Prerecorded Calls regardless of whether the calls are answered. 47 C.F.R. § 64.1200(a)(3). Dr. Yoeli did not testify regarding the total number of calls, but only the answered calls. The Plaintiff States also do not seek a finding regarding the total number of calls. See Plaintiff States' Proposed Findings of Fact (d/e 662), at 12-13 ¶¶ 122-26. The Court, therefore, makes no findings regarding the total number of Prerecorded Calls made to numbers with Plaintiff States' area codes.

presented no other evidence to show that the recipients of these calls were current customers of Dish at the times of the calls, and no evidence of the number of months that elapsed between the dates that the recipients of these calls last paid Dish for Dish Network programming and the dates of the calls.

C. Order Entry Retailer Call Records

The Court found at summary judgment that Dish was liable for causing the following Order Entry Retailers to make the following telemarketing calls offering Dish Network programming in violation of the TSR:

- 6,637,196 prerecorded calls by Dish TV Now that were answered by individuals and abandoned;
- 381,811 illegal Registry Calls by Satellite Systems;
- 43,100,876 prerecorded telemarketing calls by Star Satellite that were answered by individuals and abandoned;
- 2,349,031 Registry Calls by JSR made in 2006; and
- one prerecorded call by American Satellite that was answered by a person and abandoned.

Opinion 445, at 176, 194-95, 233.

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Dr. Yoeli identified the number of the 43,100,876 Star Satellite calls that were made to telephone numbers with area codes associated with the Plaintiff States:

- 5,727,417 calls made to California area codes;
- 2,660,066 calls made to Illinois area codes;
- 1,716,457 calls made to North Carolina area codes; and
- 3,419,175 calls made to Ohio area codes.

T 613: 203 (Yoeli); PX 38 Yoeli December 13, 2013 Declaration,
Appendix C, Yoeli December 14, 2012 Report, at 12, Table 8b. The Court credits these opinions.

Taylor identified the number of the 381,811 Satellite Systems calls that were made to telephone numbers with area codes associated with the Plaintiff States:

- 37,688 calls made to California area codes;
- 17,357 calls made to Illinois area codes;
- 13,088 calls made to North Carolina area codes; and
- 22,878 calls made to Ohio area codes.

T 633: 3328 (Taylor); PX 28, Taylor November 6, 2013 Report, at 13.

Taylor identified the number of the 2,349,031 JSR Registry calls that were made in 2006 to telephone numbers with Plaintiff States area codes:

- 473,102 calls made to California area codes;
- 369,384 calls made to Illinois area codes;
- 18,250 calls made to North Carolina area codes; and
- 129,004 calls made to Ohio area codes.

T 633: 3329 (Taylor); PX 28, Taylor November 6, 2013 Report, at 13.

The Court credits these findings from Taylor's analysis of these call records.

Taylor also found that JSR made 3,315,242 Registry Calls from January through March 2007. PX 28, Taylor November 6, 2013 Report, at 14. This finding in Taylor's analysis is credible.

Taylor identified the number of the 3,315,242 JSR Registry Calls that were made in 2007 to telephone numbers with Plaintiff States area codes:

- 50 calls made to California area codes;
- 557,336 calls made to Illinois area codes;
- 4,936 calls made to North Carolina area codes; and
- 338,352 calls made to Ohio area codes.

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PX 28, Taylor November 6, 2013 Report, at 13.

Taylor found that in 2006, JSR made 416,221 telemarketing Internal List Calls to numbers on Dish's Internal Do-Not-Call List and 2,007 telemarketing Internal List Calls to numbers on the Internal Do-Not-Call Lists of Dish's Telemarketing Vendors. Taylor found that from January to March 2007, JSR made 765,934 Internal List Calls to numbers on Dish's Internal Do-Not-Call list, and 2,762 Internal List Calls to numbers on the Internal Do-Not-Call lists of Dish's Telemarketing Vendors. PX 28, Taylor November 6, 2013 Report, at 14.

Taylor found that in 2006, JSR made 267,439 Internal List Calls to numbers on other Order Entry Retailers' Internal Do-Not-Call lists. Taylor found that from January to March 2007, JSR made 526,956 Internal List Calls to numbers on other Order Entry Retailers' Internal Do-Not-Call lists. PX 28, Taylor November 6, 2013 Report, at 15. These findings in Taylor's analysis of these records are credible.

Taylor found that the JSR call records consisted of 12,853,478 dials of calls between July 2006 and March 2007 from JSR's autodialer facility in Texas. PX 28, Taylor November 6, 2013

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Report, at 14. Goodale testified that JSR used “press 1” prerecorded calling exclusively in its telemarketing calls. T 622:1886-88 (Goodale). JSR made its telemarketing calls to market Dish Network programming. See T 622: 1880-81, 1888-90 (Goodale); see also Opinion 445, at 170. This testimony is credible. Goodale’s partners allowed third parties to make calls using JSR’s login. Goodale was not involved in hiring these third parties. T 622:1918 (Goodale). The third parties may or may not have used prerecorded calls. The call records, however, are JSR’s call records from its dialing facility in Texas. The 12,853,478 dials, therefore, were made by JSR and not a third party. The Court finds that JSR made “press 1” prerecorded telemarketing calls for Dish Network programming in all of the dials reflected in these call records. The Court further finds that JSR used its autodialers at its Texas facility to make these calls.

The FCC Rule prohibited prerecorded telemarketing calls unless the seller had an Established Business Relationship with the intended recipient of the call. 47 C.F.R. § 64.1200(a)(2)(iv) (version

in effect prior to October 16, 2012).⁵² Dish presented no evidence to show that Dish or JSR had an Established Business Relationship with any of the intended recipients of the 12,853,478 prerecorded calls dialed by JSR to sell Dish Network programming.

A prerecorded telemarketing call is an Abandoned Prerecorded Call under the TSR if a person answers the call because no live salesperson comes on the line. TSR 16 C.F.R. § 310.4(b)(1)(iv). Goodale estimated that four out of ten telemarketing calls made by JSR were answered by a person. T 622: 1982 (Goodale). Montano estimated that thirty percent of Dish's direct telemarketing calls were answered by a person. T 629: 3084 (Montano). Dexter estimated that sixteen to seventeen percent of Dish's direct telemarketing calls were answered by a person. T 627: 2528 (Dexter). Taylor estimated that one in ten telemarketing calls dialed are answered by a person. T633 : 3342 (Taylor). The Court finds that it is more likely than not that the most conservative estimate of ten percent reflects the minimum number of the JSR dialed calls that were answered by a person. The Court finds that at least

⁵² The FCC eliminated Established Business Relationship exceptions for prerecorded telemarketing calls in 2012. Fed. Reg. 34233, at 13741 (June 11, 2012; 77 Fed. Reg. 66935 (November 8, 2012) (correcting the effective date to October 16, 2012); see Opinion 41A000332

1,285,379 of the prerecorded calls dialed by JSR were answered by a person.

V. Make-up of the Registry and Call Recipients

Dish has presented evidence about the operation of the Registry and about the composition of the phone numbers on the Registry. Plaintiffs responded with evidence concerning the makeup of the numbers on Dish calling lists.

In March 2003, the FTC awarded a contract to AT&T to maintain the Registry. DTX 352, Memorandum from Lydia Parnes, Director, Bureau of Consumer Protection dated September 30, 2005 (Parnes Memorandum), at 2. The contract required AT&T to meet a ninety-seven percent performance standard. The FTC did not require AT&T to identify the type of phone numbers that individuals registered on the Registry. AT&T also did not determine the validity of the number that individuals registered on the Registry. Deposition of Linda Miller Lavenda, at 47, 53, 111. The FTC does not currently require its contractors to identify the type of phone numbers that individuals register on the Registry. Deposition of Ami Dziekan, at 100.

AT&T hired a company called Targus as its subcontractor to perform a monthly review of the Registry, which included purging numbers that no longer belonged. Parnes Memorandum, at 2; Miller Lavenda Deposition, at 34. The process of purging numbers is sometimes call “list hygiene.” AT&T did not validate whether Targus accurately captured all the telephone number changes. AT&T personnel had “very high level,” knowledge of how Targus undertook this process. Miller Lavenda Deposition, at 76-77, 148. Lavenda used the term “very high level” to mean a superficial level rather than a deep level of understanding. Id.

In December 2003, AT&T experienced what it labeled a “missing day problem.” If a telemarketer downloaded an updated list of newly registered numbers called a “change list,” the list did not include numbers that were registered the day of the download. If a telemarketer downloaded a full, updated Registry list rather than a change list, then the telemarketer did not experience this missing day problem. AT&T implemented fixes in January 2004 to address the problem. DTX 348, Email thread dated December 30, 2003 to May 24, 2005, at 2, 4. The FTC also did not consider

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erroneous Registry Calls made because of this missing day problem to be a violation. T 710: 59 (Torok).⁵³

On February 17, 2004, Targus notified the FTC for the first time that “Land lines are considered disconnected and are deleted and scrubbed from the registry only when the telephone number is reassigned which can occur anywhere from four weeks to over one year from the time the number is disconnected.” DTX 338, Letter from FTC Contract Specialist Eric Vogt to Carol Brown dated April 16, 2004 (Vogt April 2004 Letter), at 1. Targus also notified the FTC that “No cell phones are being scrubbed. There are approximately 9.7 million wireless phones on the registry.” Vogt April 2004 Letter, at 2. AT&T did not require Targus to remove business or government numbers from the National Registry. Miller Lavenda Deposition, at 138, 141.

The FTC directed AT&T in the Vogt April 2004 Letter to start scrubbing disconnected numbers from the Registry, including disconnected wireless numbers. On May 21, 2004, the FTC accepted the methodology of only removing numbers that were both disconnected and reassigned. DTX 340, Letter from Vogt to Brown

⁵³ The transcript of the trial dates on October 25, 2016 through November 2, 2016, are paginated separately from the trial dates in January 19, 2016 through February 17, 2016. JAO000335

dated May 21, 2004 (Vogt May 2004 Letter). AT&T and Targus took the position that no harm would result from allowing a disconnected number that had not been reassigned to remain on the Registry because telemarketers would not want to call disconnected numbers anyway. Miller Lavenda Deposition, at 193. Vogt also noted in the Vogt May 2004 Letter that Targus had a 10 percent error rate in its scrubbing methodology. Vogt stated that this error rate was not acceptable. On June 1, 2004, AT&T informed the FTC that it had no valid method to scrub for disconnected wireless numbers. Miller Lavenda Deposition, at 196, 200-01.

In 2007, Congress enacted the Do-Not-Call Improvement Act. 15 U.S.C. § 6155. The Act mandates that each number on the National Registry remain indefinitely, unless the individual to whom the number is assigned requests removal, or unless the FTC removed the number as follows:

The Federal Trade Commission shall periodically check telephone numbers registered on the national 'do-not-call' registry against national or other appropriate databases and shall remove from such registry those telephone numbers that have been disconnected and reassigned. Nothing in this section prohibits the Federal

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Trade Commission from removing invalid telephone numbers from the registry at any time.

Id. § 6155(b).

In conjunction with the 2007 legislation, the FTC submitted a report to Congress in 2008 regarding the accuracy of the Registry. As part of this report, the FTC analyzed a sample list of 20,000 numbers submitted by the Direct Marketing Association (“DMA”), which the DMA claimed “had been disconnected and reassigned since the time they had been registered.” The FTC concluded that forty-two percent of these numbers should not have been considered as active registrations on the Registry. DTX 459, Do-Not-Call Improvements Act of 2007, Report to Congress: Regarding the Accuracy of the Do Not Call Registry (October 2008) (FTC 2008 Report), at 3-4.

In 2007, Lockheed Martin replaced AT&T as the FTC’s contractor responsible for maintaining the Registry. Deposition of John Krebs, at 19; Dziekan Deposition, at 52. The FTC lowered the permissible performance standard from 97 percent to 95 percent performance rating in some categories. Deposition of Kathy French, at 68; DTX 180. DTX 180, Lockheed Martin Do Not Call Registry

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Monthly Performance Report for November 2008 (Lockheed Martin November 2008 Report), at 2-4.

In November 2008, Lockheed Martin was rated on 16 performance categories. Lockheed had a 95 percent performance rating or better in 13 of the 16 categories. Lockheed had a 75.54 percent, 71.02 percent, and a 43.9 percent performance rating respectively in the other three categories. DTX 180, Lockheed Martin November 2008 Report, at 8; French Deposition, at 91. This was a one-time event. Lockheed's performance was generally over or very close to the 95 percent performance rating. T 710: 68 (Torok). The FTC monitored Lockheed's performance, but did not terminate its contract with Lockheed for failure to meet the 95 percent performance rating. The FTC imposed a monetary penalty on Lockheed when Lockheed did not meet the required 95 percent performance rating pursuant to the terms of their contract. T. 710: 68 (Torok).

In December 2011, Lockheed Martin delayed adding new registrations to the Registry. The delay occurred because the registrations were "locked in the technical background" of Lockheed Martin's system. As a result, Lockheed Martin took additional steps

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and additional time to place new numbers on the Registry. In February 2012, Lockheed Martin discovered that certain telemarketers did not receive the full version of the Registry upon downloading. This issue affected a few hundred telemarketers. French Deposition at 70, 74, 76, 163-64. The FTC did not consider erroneous Registry Calls made because of this delay in putting numbers on the Registry to be violations. T 710: 60 (Torok).

Lockheed Martin used PossibleNOW as its subcontractor to perform list hygiene on the Registry. French Deposition, at 53. PossibleNOW estimated that approximately five percent of the landline numbers registered prior to December 2007 were still listed on the Registry as of October 2008, but were no longer valid registrations. DTX 459, FTC 2008 Report, at 6. By July 31, 2008, PossibleNOW had removed 7.9 million numbers from the Registry as part of its process of removing inactive numbers. DTX 459, FTC 2008 Report, at 6 n.12; Krebs Deposition, at 92:9-20.

In 2009, PossibleNOW estimated that thirteen percent of the National Registry is attributed to business landlines. DTX 486, Analysis of The Phone Numbers on the National Do Not Call Registry dated March 31, 2009 (PossibleNOW 2009 Report), at 7.

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PossibleNOW made some mistakes in maintaining the Registry. In one instance, PossibleNOW mistakenly dropped 225,000 numbers from the Registry. PossibleNOW had accidentally populated incorrect dates in the course of updating the disconnect/reassign database. Richard Stauffer, CEO of PossibleNOW testified that this occurred as a result of human error. In correcting the issue, PossibleNOW missed 2,668 numbers that should have been added to the Registry. T 618: 761-62 (Stauffer); see French Deposition, at 157-58; DTX 463, Email dated December 19, 2009, re Issue With the November Process Run; DTX 466, PossibleNOW Issue Report Form dated December 22, 2008. The FTC penalized PossibleNOW for any errors by reducing payments pursuant to the terms of the contract. T 710: 86 (Torok).

In 2008, PossibleNOW inadvertently left approximately 10,000 numbers on the Registry that should have been removed. In March 2009, PossibleNOW accidentally dropped 16,000 numbers from the Registry. T 618: 762-63, 764-65 (Stauffer); DTX 583, Analysis of the

Potential Input File Issue for the October 2008 National DNC Registry Reassign Process.⁵⁴

PossibleNOW does not remove disconnected and reassigned wireless numbers from the Registry. DTX 183, Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007, FY 2010 and 2011 (FTC 2010-2011 Report), at 4-5. Pursuant to the Do-Not-Call Improvements Act, PossibleNOW relies on the National Directory Assistance database to perform maintenance of the Registry, but the National Directory database does not contain wireless numbers. DTX 486, PossibleNOW 2009 Report, at 3. Wireless service providers are not required to share their directory assistance data with the FCC. DTX 459, FTC 2008 Report, at 6. PossibleNOW estimated that close to 50 percent of the Registry is comprised of wireless numbers. DTX 486, PossibleNOW 2009 Report, at 7.

Voice over Internet Protocol (VoIP) telephone service providers are also not required to share their directory assistance data with the FCC. DTX 183, FTC 2010-2011 Report, at 5. PossibleNOW estimated in 2009 that seventy-five percent of VoIP numbers were

⁵⁴ Exhibit DTX 583 is not dated and the author is not does not identified. PossibleNOW personnel appear to have conducted the analysis recorded in the Exhibit.

contained within its national directory assistance data. DTX 486, PossibleNOW 2009 Report, at 2; DTX 183, FTC 2010-2011 Report, at 5.

Dish's expert Dr. Robert Fenili, Ph.D., opined as to the makeup of the types of telephone numbers on the Registry. DTX 189, Report of Dr. Robert N. Fenili, Ph.D., dated July 26, 2012 (Fenili Report). Dr. Fenili opined that in 2011, 28.2 percent of the telephone numbers on the Registry were residential landlines, 7.1 percent were inactive residential landlines, 12.2 percent were business landlines, and 52.5 percent were wireless telephones. Dr. Fenili further opined that the residential landlines as a percentage of all of the numbers on the Registry was decreasing over time, the similar percentage of wireless numbers was increasing over time, and the similar percentage of business numbers was remaining relatively stable. DTX 189, Fenili Report, at 8-10; see Deposition of Robert Fenili, at 73-76.

In response, Plaintiffs' expert Dr. Yoeli took samples of calling records to determine the make-up of the types of telephone numbers that Dish and the Order Entry Retailers called. Dr. Yoeli took samples of the 2003-2007 Calling Records; the 2007-2010

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Calling Records; Guardian's records of calls for Star Satellite (identified as Tenaya); Guardian's records of calls for Dish TV Now (identified as WOW TV); and JSR's calling records. Dr. Yoeli sent the sample to Stauffer of PossibleNOW. PossibleNOW maintains historical records of major directories for residential, business, and wireless telephone numbers. T 613: 192-96 (Yoeli).

Stauffer identified the type of telephone number for each sample as follows:

2003-2007 Calling Records

- 5,002 records in the sample
- 2,708 numbers were listed as residential, of which 1 was also listed as wireless and 5 were also listed as business;
- 29 numbers were listed as business, of which 5 were also listed as residential;
- 174 numbers were listed as wireless, of which 1 was also listed as residential; and
- 2,097 numbers were of unknown type.

2007-2010 Calling Records

- 5,001 records in the sample
- 3,434 numbers were listed as residential, of which 11 were also listed as business;
- 43 numbers were listed as business numbers, of which 11 were also listed as residential;
- 425 numbers were listed as wireless numbers; and
- 1,110 numbers were of unknown type.

Star Satellite (Tenaya) Calling Records

- 5,001 records in the sample
- 2,015 numbers were listed as residential, of which 4 were also listed as business;
- 58 numbers were listed as business, of which 4 were also listed as residential;
- 2 numbers were listed as wireless; and
- 2,930 numbers were of unknown type.

Dish TV Now (Wow TV) Calling Records

- 5,001 records in the sample
- 2,550 numbers were listed as residential, of which 7 were also listed as business;
- 20 numbers were listed as business number, of which 7 were also listed as residential;
- 1 number was listed as a wireless; and
- 2,437 numbers were of unknown type

JSR Calling Records

- 5,000 records in the sample
- 4,590 numbers were listed as residential, of which 26 were also listed as business;
- 103 numbers were listed as business, of which 26 were also listed as residential;
- 3 numbers were listed as wireless; and
- 330 numbers were of unknown type.

T 616: 37-39 (Stauffer); PX 1319, Yoeli Rebuttal Report dated October 16, 2012, attached Declaration of Rick Stauffer dated October 16, 2012.⁵⁵

Dr. Yoeli reviewed Stauffer's results and opined as follows:

- The numbers identified as residential in the 2003-2007 Call records were 67 percent of all numbers and 85 percent of the numbers that could be identified as residential, business or wireless;
- The numbers identified as residential in the 2007-2010 Call records were 69 percent of all numbers and 94 percent of the numbers that could be identified as residential, business, or wireless;
- The numbers identified as residential in the Star Satellite records were 40 percent of all numbers and 97 percent of the numbers that could be identified as residential, business, or wireless;
- The numbers identified as residential in the Dish TV Now records were 51 percent of all numbers and 99

⁵⁵ Stauffer's testimony was transcribed separately during the trial. This transcript is paginated separately from the rest of the trial transcript.

percent of the numbers that could be identified as residential, business, or wireless; and

- The numbers identified as residential in the JSR records were 91 percent of all numbers and 98 percent of the numbers that could be identified as residential, business, or wireless.

T 613;195-202 (Yoeli); Y-Dem04, Yoeli Demonstrative Exhibit 4; PX 38, Appendix C, Yoeli December 14, 2012 Report, at 9 (PX 38-110).

The Court finds that Dr. Fenili's opinion about the make-up of the Registry is of little or no probative. Dr. Fenili's opinions are only relevant if Dish and the Order Entry Retailers called a normal distribution of all types of numbers. Dish did not call a normal distribution. Dish called residential telephone numbers. T 628: 2810 (Bangert); T 627: 2555, 2639, 2641 (Dexter); T 617: 633-34 (Davis). Dish knew the address associated with every number called at the time of each call. See T 628: 2740-41 (Bangert); T 629: 3209-10 (Montano); T 627: 2639-40 (Dexter); T 617: 630 (Davis). Dish also scrubbed its lists to remove wireless numbers.

Order Entry Retailers Dish TV Now, JSR and Star Satellite also called residential telephone numbers. JSR called residential

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numbers from published white pages telephone directories. T 622: 1879-80, 1887 (Goodale). Star Satellite initially called numbers out of the phone book. Myers Deposition, at 124. Star Satellite then used Guardian's services to make prerecorded calls. Dish TV Now also used Guardian's services. Guardian called published telephone numbers "off of a CD-Rom you could buy down at Office Max." Deposition of Kevin Baker, at 50. In addition, Order Entry Retailers were only authorized under the Retailer Agreement to solicit potential customers to purchase residential service. The Order Entry Tool could only be used to open residential accounts, not commercial accounts. T 626: 2225 (Neylon).

Dr. Yoeli's samples show that Dish, Dish TV Now, JSR, and Star Satellite did not call a normal distribution of telephone numbers on the Registry. Almost none of the calls from any of the samples were made to identified business telephone or wireless numbers. A very large majority of the identified calls in every set were made to residential numbers.

The Court further finds that the preponderance of the evidence established Dish and the Telemarketing Vendors made telemarketing calls to residential telephone subscribers. Dish

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directed its telemarketing campaigns to sell Dish Network programming to residential customers, whether current, former, or prospective. Dish, further, knew the name and address of every person that Dish and its Telemarketing Vendors called. Dish scrubbed all calling campaigns to remove wireless numbers. The disposition codes in the Calling Records for 2007-2010 showed that approximately .2% of the calls were answered by businesses. See T 3325-27 (Taylor); PX16, Taylor October 13, 2013 Report, at 7 (41,417 out of 17,168,194 calls were to businesses, or .24%); PX 38, Declaration of Dr. Erez Yoeli dated December 18, 2013, Appendix C, Yoeli December 14, 2012 Report, at 7-8 (.2% of calls were answered by businesses). All of this evidence demonstrates that Dish and its Telemarketing Vendors called residential telephone subscribers.

In addition, Taylor used the disposition codes to exclude the Dish calls answered by businesses from the Registry Calls in the Yoeli July 2012 Call Set and in the Registry Calls found by him in his October 13, 2014 Report. Thus, the calling records identified by Taylor on which the Court has found liability excluded calls to businesses.

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The evidence also shows that Order Entry Retailers JSR and Star Satellite called residential telephone numbers. The standard Retailer Agreements only authorized Order Entry Retailers to sell Dish Network programming to residential customers. The Order Entry Tool could only be used to submit orders for residential programming packages to Dish. Goodale, Myers, and Baker testified that both JSR and Star Satellite, either directly or through Guardian, called residential telephone numbers in published telephone directories.

Dr. Yoeli's 2012 sampling data corroborates these witnesses' testimony. The 2012 samples show that the vast majority of the identified calls were directed to residential customers:

- 85 percent of identified numbers in the 2003-2007 Calling Records;
- 94 percent of identified numbers in the 2007-2010 Calling Records;
- 97 percent of identified numbers in the Star Satellite Calling Records; and
- 98 percent of identified numbers in the JSR Calling Records.

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All of this evidence, taken as a whole, shows by a preponderance that Dish, its Telemarketing Vendors, and Order Entry Retailers JSR and Star Satellite placed the vast majority of their outbound telemarketing calls to residential telephone subscribers. The preponderance of the evidence shows that the telemarketing calls made by Dish, the Telemarketing Vendors, JSR, and Star Satellite at issue in this case were directed to residential telephone subscribers.

The percentage of residential calls to all calls in the samples was smaller.

- 67 percent of all calls in the 2003-2007 Calling Records;
- 69 percent of all calls in the 2007-2010 Calling Record;
- 40 percent of all calls in the Star Satellite/Guardian Calling Records; and
- 91 percent of all calls in the JSR Calling Records.

These percentages would be accurate only if all of the unidentified numbers were not residential telephone numbers. The unidentified numbers, however, included unlisted landline residential numbers and unlisted VoIP residential numbers. Furthermore, numerous Dish witnesses, including Bangert, Dexter, and Davis, testified that

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Dish called residential numbers. Goodale, Myers, and Baker testified that JSR and Star Satellite called published residential numbers. Given this testimony, the actual percentage of residential numbers in the call records is far closer to the percentage of identified numbers.

Dish argues that Dr. Yoeli's sampling analysis is not probative because the samples are national samples rather than samples from each of the Plaintiff States. Dr. Yoeli's samples, standing alone, would not establish the number of calls that these telemarketers directed to residential telephone numbers because they are national samples. Dr. Yoeli's sampling, however, corroborates the other evidence, including the testimony of Dish witnesses Bangert, Dexter, and Davis, and others; the testimony of Goodale, Myers, and Baker; the terms of the Retailer Agreements which only authorized sales to residential customers; and the Order Entry Tool could only be used to place residential orders. All of this evidence, without the sampling, would be sufficient to establish that Dish and its Telemarketing Vendors, JSR, and Star Satellite made telemarketing calls to residential telephone numbers. Dr. Yoeli's national sampling corroborates this other evidence. The Court

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finds that it is more likely than not that the telemarketing calls made by Dish, the Telemarketing Vendors, JSR, and Star Satellite were directed to residential telephone subscribers.

The Plaintiff States have also established that it is more likely than not that Satellite Systems called residential telephone subscribers. The Retailer Agreement only authorized Satellite Systems sales to residential customers for Dish Network programming. The Order Entry Tool could only be used to place residential orders. Satellite Systems, therefore, only made money by calling residential telephone subscribers. Absent any contradictory evidence, the reasonable inference is that Satellite Systems called residential telephone subscribers. Dish has not presented any evidence showing that Satellite Systems called businesses or other non-residential numbers.

The Plaintiff States have further submitted post-trial the verdict entered January 19, 2017, in the class action suit brought by Plaintiffs' witness Dr. Krakauer. Krakauer v. Dish Network, L.L.C., M.D. N.C. Case No. 1:14-CV-333. The case concerned 51,166 Registry Calls made by Satellite Systems in 2010 and 2011. Unlike this action, the class action was limited to residential

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telephone subscribers who were called twice within a 12-month period after registering their numbers on the Registry. See 47 U.S.C. § 227(c)(5). The jury found that all of the 51,166 calls were made to residential telephone subscribers. See Letter dated January 30, 2017 (d/e 764), attached Verdict Sheets, at 1-2. The Plaintiffs argue that the verdict determination is persuasive evidence that the Satellite Systems directed its telemarketing calls to residential telephone subscribers.⁵⁶ Id., at 4.

The Court may take judicial notice of the verdict, transcripts, and filings in a public trial. See Village of DePue, Illinois v. Viacom International, Inc., 632 F.Supp.2d 854, 857, n.1 (C.D. Ill. 2009); Fed. Rule Evid. 201. Dish does not object to the Court's consideration of the verdict and other public record material from the Krakauer case. See Letter dated February 10, 2017 (d/e 767). Dish, however, disputes whether the verdict and the other public record documents submitted by the Plaintiffs are relevant or probative of whether the recipients were residential telephone subscribers. Id., at 5.

⁵⁶ The Plaintiffs also argue that the verdict in Krakauer establishes under the doctrine of issue preclusion that Satellite Systems was an agent of Dish. The Court already determined that Order Entry Retailers were marketing agents of Dish. The Court does not need to address the question of issue preclusion.

The verdict has some probative value. A jury heard evidence on the issue and determined that the call recipients were residential telephone subscribers. The probative value is limited, however, because the verdict is subject to review by the trial court under Federal Rule of Civil Procedure 59 and by the Court of Appeals. The verdict, however, is consistent with the terms of the Retailer Agreement and the design of the Order Entry Tool, which both limited sales to residential customers.

With or without the verdict in the Krakauer class action, the Court finds that the preponderance of the evidence shows that Satellite Systems called residential telephone subscribers.

VI. Area Codes and State of Residency

The Plaintiff States alleged that Dish made illegal telemarketing calls directed at residential telephone subscribers residing in the Plaintiff States. Third Amended Complaint, Counts V-XII.

Dr. Yoeli and John Taylor both used telephone area codes to determine whether a call recipient resided in a Plaintiff State. See e.g., Opinion 445, at 124-39. Dish, however, challenged at summary judgment the accuracy of area codes to prove states of

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residency of telephone subscribers. Opinion 445, at 204. The Court found that issues of fact existed regarding whether area codes proved the telephone subscribers' states of residence.

The Plaintiff States established at summary judgment that Dish engaged in a pattern and practice of making illegal telemarketing calls in violation of the TCPA to residents of the Plaintiff States. The evidence regarding the accuracy of area codes to prove telephone subscribers' states of residence was relevant to the appropriate amount of statutory damages or civil penalties under the various counts. Opinion 445, at 205-07.

The North American Numbering Plan Administration (NANPA) assigns telephone area codes to geographic areas within each state, Puerto Rico, Canadian province and territory, and participating Caribbean nation or territory. See PX 1405, NANPA 2014 Annual Report; PX 1406, List of NANPA Area Codes Sorted by Location; T 613: 188-89 (Yoeli). The numbers are assigned to landline, VoIP, and wireless telephone accounts.

Technological changes in telephones allow a telephone customer to have a telephone number with area codes other than the one assigned to their states of residence. Wireless telephone

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account holders can either keep the same number if they move to other states, or may provide a wireless telephone for a relative or friend that lives in another state. Since 2007, the FCC has allowed telephone customers to port, or transfer, a number from one type of telephone account to another, e.g., from a wireless account to a VoIP line. See In re Telephone Number Requirements for IP-Enabled Services, 22 F.C.C.R. 19531, at 19534-35 (2007); see also T 616: 46 (Stauffer). VoIP telephone accounts may also elect to have an area code that is not based on the geographic location of the telephone where the telephone is actually located. See In re Vonage Holdings Corp., 19 F.C.C.R. 22404, at 22408, 22439 (2004); see also In re Numbering Policies for Modern Communications, 28 F.C.C.R. 5842, at 5920 (2013) (FCC Commissioner Jessica Rosenworcel stated, “People now move and take their numbers with them. Case in point: in my office here at the Commission, half of those who work with me have phone numbers with area codes that do not reflect where they live.”). Thus, it is theoretically possible that residential customer’s telephone numbers could contain an

area code other than the ones assigned to his or her state of residency. See Opinion 445, at 145-46.⁵⁷

The mobility of wireless telephones is not relevant in this case because Dish, its Telemarketing Vendors, and Order Entry Retailers Star Satellite, JSR, and Satellite Systems directed their calls to residential telephone subscribers, as discussed above. Dish also scrubbed calling lists for itself and its Telemarketing Vendors to remove wireless numbers, either directly or through PossibleNOW.

The evidence at the January and February 2016 trial proceedings showed a high correlation between area code and state of residence. Taylor agreed that prior to November of 2008, that the match between area codes and states of residence for residential landlines was 97 percent. T 633: 3332-33, 3338 (Taylor). Dr. Yoeli analyzed a sample of consumer complaints compiled in the FTC's online Sentinel Database. The state of residency matched the state assigned to the area code of the consumer in every case where the

⁵⁷ Dish repeatedly states that the Court held at summary judgment that area codes cannot be used to determine state of residency. See e.g., Dish Network L.L.C.'s Propose Conclusions of Law for the Second Phase of Trial (d/e 737), at 38. This is incorrect. The Court only held that area codes did not prove state of residency for purposes of summary judgment. See Opinion 445, at 205-08, 214-25.

consumer provided address information. T 613: 188-89 (Yoeli); PX 38B, Spreadsheet of FTC Sentinel Database Analysis.⁵⁸

Dish's employees disclosed for the first time at the January and February 2016 trial proceedings that Dish had possession of information that could verify the state of residency of the individuals that it called. Montano testified that Dish had address information on every intended recipient of the telemarketing calls that made by Dish and its Telemarketing Vendors eCreek and EPLDT (Dish Telemarketing Call Recipients). T 629: 3209-10 (Montano); see T 628: 2740-41 (Bangert); T 627: 2639-40 (Dexter); T 617: 630 (Davis).

The Court determined that Dish should have produced this address information in discovery. The Court ordered Dish to produce this address information in supplemental discovery (Supplemental Discovery). The Court further continued the trial to October 25, 2016, to allow completion of the Supplemental

⁵⁸ In March 2015, Dr. Yoeli provided Stauffer with a set of 30,354 Dish call records. Stauffer compared those numbers with the PossibleNOW databases and determined that the area code matched that state of residence in 30,314, or 99.87 percent of the time. The 40 that did not match did not include information on state of residence. T 616: 42-49 (Stauffer). Dish employees further testified that Dish just called residences in almost all of its telemarketing campaigns. This evidence has limited probative value. The Plaintiff States did not present sufficient evidence of the source of the 30,054 call records to establish that applicability of these records to Dish's call records generally. Without proof that the 30,054 call records were a random sample or other representative sample, Stauffer's observation has little probative value.

Discovery. Opinion entered February 24, 2016 (d/e 624) (Opinion 624), at 5-6. As noted above, the trial resumed on October 25, 2016, and was completed on November 2, 2016.

During the Supplemental Discovery, Dish produced eleven different sets of data containing address and telephone number information of Dish Telemarketing Call Recipients (Address Data Sets). On May 26, 2016, Dish's counsel sent an email to Plaintiff California's counsel regarding the production. One of the Address Data Sets (data set 10) contained data from a credit reporting agency TransUnion and another (data set 11) contained marketing data company Speedeon. Dish's counsel stated that Dish secured cold call lists from a marketing database operated by credit reporting agency Equifax. Counsel stated that Equifax sold the relevant database to a company named Epsilon. Epsilon no longer retained such information prior to 2011. Dish secured and produced substitute data from TransUnion and Speedeon. PX 1446, Revised Supplemental Expert Report of Dr. Erez Yoeli for Plaintiff States of California, Illinois, North Carolina & Ohio, dated July 7, 2016 (Yoeli July 2016 Report), Appendix C, Email from

Dish's Counsel to Plaintiff California's Counsel dated May 26, 2016 (May 26, 2016 Email).

Counsel for Plaintiff States sent an email to Dish's counsel asking for a description of Address Data Sets 1-9. Plaintiffs' counsel stated that Plaintiffs stated that they understood that the final two Address Data Sets, sets 10 and 11, were data from TransUnion and Speedeon. PX 1446, Yoeli July 2016 Report, Appendix B, Email from Plaintiff States' Counsel to Dish Counsel dated June 9, 2016 (June 9, 2016 Email), ¶ 1.

Dish's counsel responded by email. PX 1446, Yoeli July 2016 Report, Appendix D, Email from Dish's Counsel to Plaintiff State California's Counsel dated June 22, 2016 (June 22, 2016 Email).

Dish's counsel provided a brief description of each of the 11 Address Data Sets:

Sets 1 and 1A contain Customer Account data. This information was pulled from DISH's Customer Account database within DISH's Teradata environment in DISH's Data Warehouse.

"Location begin date" reflects the date when DISH received the location information. It is the first date when the account was associated with the address.

"Location end date" reflects the last date that the account was associated with the address. If the date is in the

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future, such as 2199-12-31, then the address was currently associated with the account at the time that the information was pulled.

Phone “begin” and “end” dates similarly represent the first and last dates that the phone number was associated with the account. If the phone “end” date is in the future, then the phone number was currently associated with the account at the time that the information was pulled.

Set 2 contains lead data pulled from the Lead Tracking System in use at DISH prior to May 22, 2013.

The “Lead creation” field represents the date the record was generated.

Set 3 contains lead data pulled from the Lead Tracking System in use at DISH as of May 22, 2013.

The “Lead creation” field represents the date the record was generated.

Set 4 contains information from DISH’s “Do Not Contact” database. This information was pulled from the “Do Not Mail” portion of DISH’s “Do Not Contact” database. The mailing addresses in this database may be associated with customer account numbers. DISH cross-referenced account numbers associated with phone numbers in the call records to identify addresses associated with those same account numbers within this database.

The “Effective date” field represents the date when the Do Not Contact information became effective.

The “Expiration date” field represents the date when the Do Not Contact information expired.

Set 5 contains MKTG_RAID data. This information was pulled from external hard drives associated with DISH's Marketing Department, which contain historical marketing data.

Set 6 contains SALESCOMM data. This information was pulled from a database containing customer accounts generated by retailers and used to determine retailer compensation. SalesComm is the database of record for all payments that are made to retailers.

. . . .

The "Eff date" field represents the date when the sales commission data became effective.

The "Exp date" field represents the date when the sales commission data expired.

Set 7 contains data from DISH's Siebel database. This information was pulled from a database containing information on customer accounts generated by order entry retailers.

The "Created date" field represents the effective date of the Siebel data.

The "Last updt date" field represents the latest date when the Siebel data was updated.

Set 8 contains data pulled from DISH's Production Operational Data System ("PODS") which was DISH's Operational Data store This specific information came from . . . data tables created . . . for use by the Marketing Department. Those tables contained an association between phone numbers and account numbers. For any phone numbers . . . identified by the State Plaintiffs that appeared within these tables, DISH

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used the associated account numbers to pull address information from its Customer Account data.

“Location begin date” reflects the date when DISH received the location information. It is the first date when the account was associated with the address.

“Location end date” reflects the last date that the account was associated with the address. If the date is in the future, such as 2199-12-31, then the address was currently associated with the account at the time that the information was pulled.

Set 9 contains data from DISH’s Production Operational Data System (“PODS”) (explained above), and specifically from subscriber and address information from DISH’s Billing System-CSG that had been imported into this Production Operational Data System.

Set 10 contains TransUnion data. TransUnion data was only provided for phone numbers that did not have any associated addresses within DISH’s records. . . .

Set 11 contains Speedeon data. Speedeon data was only provided for phone numbers that did not have any associated addresses within DISH’s records or within TransUnion’s data. . .

According to Speedeon, the “I” date represents the date that the address record was created at Speedeon and the “D” date represents a date as of which Speedeon no longer associated the telephone number with that address.

June 22, 2016 Email, at 1-2 (emphasis in the original).

On July 7, 2016, Plaintiffs’ expert Dr. Yoeli issued his report.

Dr. Yoeli relied on the 11 Address Data Sets produced by Dish; the

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May 26, 2016 Email, the June 10, 2016 Email, and the June 22, 2016 Email, and the information regarding the list of geographical assignment of telephone area codes by the NANPA. PX 1466, Yoeli July 7, 2016 Report, at 1; see T 710:99-100 (Yoeli).

Dr. Yoeli made the following assumptions about the time period when address information in any Address Data Set was valid (Valid Address). If the Address Data Set included a type of beginning date and ending date (e.g., the location_begin date and location_end date in Address Data Set 1), then the association of the telephone number with the address was valid between the two dates. If the Address Data Set included a beginning date, but no end date, then the address was valid from the beginning date until the present. If the Address Data Set had no date information, then the address was always valid. PX 1466, Yoeli July 7, 2016 Report, at 3-4.

Dr. Yoeli did not consider the different descriptions of the beginning and ending dates in the Address Data Sets, such as location_begin and location_end in Sets 1 and 1A, the Eff date and Exp date in Set 6, or the “I” and “D” dates in Set 11. Dr. Yoeli

testified that those different descriptions were not material to his analysis. See T 710: 145-48, 152-53, 164 (Yoeli).

Dr. Yoeli also used seven sets of call records admitted at the initial phase of the trial in January and February 2016 (Call Record Sets). The Call Record Sets contained records of telemarketing calls that Dish made from September of 2007 through March of 2010. The first two Call Record Sets made up the Yoeli July 2012 Call Set. The remaining Call Record Sets were the calls records on which the Court granted partial summary judgment as violations of the TSR. The third, fourth, and fifth Call Record Sets were the No English, Uncompleted, and Inquiry calls records. The sixth Call Record Set, called Taylor, contained the 501,650 call records identified by Taylor in his October 2013 Report. The seventh set, called AM Calls, contained Dish's 98,054 Abandoned Prerecorded Calls.

Dr. Yoeli identified the calls in the Call Records made to telephone numbers with area codes assigned to the Plaintiff States by the NANPA (Relevant State Call Records). PX 1466, Yoeli July 7, 2016 Report, at 4.

Dr. Yoeli compared the telephone numbers in the Relevant State Call Records with the Valid Addresses associated with those

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telephone numbers at the times of the calls to determine the extent to which the state of residence in the Address Data Sets agreed with the state assigned to the telephone numbers' area codes by NANPA. Dr. Yoeli identified the times that all Valid Addresses in any of the Address Data Sets matched the NANPA area code geographic assignment (All States Match) and the times that at least one Valid Address in any of the Address Data Sets matched the NANPA area code geographic assignment (Any States Match). The All States Match showed NANPA assigned-state for area codes and state of residency matched 82% to 98% of the time. The Any States Match showed a match 97% to 100% of the time. PX 1466, Yoeli July 7, 2016 Report, Appendix E, Tables 2A-2G.

Dr. Yoeli concluded, "My analysis shows that, for all Call Sets and All Plaintiff States, the percentage of calls to addresses in the Plaintiff State was at least 82%." PX 1466, Yoeli July 7, 2016 Report, at 6; T 710: 100-02, 173-74 (Yoeli). Dr. Yoeli explained the rationale behind his All State Match:

I looked at address data as is and allowed the address to be used if DISH's own records indicate it should be. And because of the fact there's a variety of different data sets being used and they are verifying each other, then I have a lot of confidence in the fact that it doesn't matter if you

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change a particular assumption, you're going to get very similar results. And that these results are conservative.

T 710: 179 (Yoeli).

Dr. Yoeli erroneously failed to analyze the data in Address Data Set 1A in his Report. Dr. Yoeli testified that Address Data Set 1A contained about a 10 percent increase in the new data not already included in the other Address Data Sets. T 710:128-29 (Yoeli). Dr. Yoeli assumed that Dish combined Address Data Sets 1 and 1A before providing them to the Plaintiff States. Yoeli testified that he subsequently reviewed the information in Address Data Set 1A and concluded that the data did not change his conclusions materially. T 710:120-23 (Yoeli). Yoeli testified that the change in the analysis was, “.2, .3 percent. Always less than .5.” T 710: 162 (Yoeli).

Dr. Yoeli also testified that the Address Data Sets contained multiple addresses for the same telephone number, but the addresses were generally all in one state, “[T]he bulk of the data are for people who never move out-of-state.” T 710:149 (Yoeli). Dr. Yoeli testified that the percentage of cases in which that data

showed that people moved from one state to another state was 13 percent. T 710:120 (Yoeli).

The Court credits Dr. Yoeli's All State Match analysis as probative of the connection between area code and states of residence. The analysis cross-checked states of residency against all the Address Data Sets and only counted as matches those calling records in which the state and area code matched in every Valid Addresses that appeared in all Address Data Sets. The cross-checking meant that the information in the various Address Data States corroborated each other. The corroboration confirmed that the match of state of residency and area code was more likely than not accurate. The All States Match analysis supports Dr. Yoeli's opinion that Call Sets and All Plaintiff States, the percentage of calls to addresses in the Plaintiff State was at least 82%.

The conclusion is further supported by Dr. Yoeli's observation that almost all of the consumers who had the telephone numbers in the Call Sets simply did not change states of residence. Only 13 percent of them changed states of residence. Dr. Yoeli's observation is further supported by U.S. Census data that 5.6 percent of the American population moved to a different state during the five-year

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period from 2005 to 2010, an average of 1.1 percent per year. PX 2093, U.S. Census, Geographic Mobility: 2005 to 2010, at 2 (December 2012). The vast majority of consumers did not port their telephone numbers across state lines because they did not move out of state. This fact further supports the inference that area codes agreed with a call recipient's state of residence at least 82 percent of the time.

Dish presented the expert opinions of Rebecca Kirk Fair. Kirk Fair holds an MBA in finance and applied economics. She is an expert with more than 20 years of experience in analyzing large data sets. She opined that Dr. Yoeli should have considered the purpose for which the address data was collected and maintained in each of the 11 Address Data Sets, the purpose of the dates in the Address Data Sets, and the purpose of the calls made to numbers in the various Call Record Sets. She opined that Dr. Yoeli's analysis was unreasonable and unreliable because of these failings. See T 711: 456-65, 494-97 (Kirk Fair); DTX 1096, Revised Responsive Expert Report of Rebecca Kirk Fair (Kirk Fair Report), at 5-6, 44-45. Kirk Fair did not quantify her opinion of the extent to which Dr.

Yoeli's errors affected the validity of his opinions. See T 711: 511, 528 (Kirk Fair).

Much of Kirk Fair's opinions are speculative and not based on her expertise in analyzing large data sets. She based much of her opinions on the relative reliability of the address information in the 11 Address Data Sets. Kirk Fair opined on the reliability of each Address Data Set based on the descriptions in the June 22, 2016 Email. See Kirk Fair Report, at 9-13. Kirk Fair is not an expert in the relative reliability of customer account records, billing data, marketing data from marketing companies such as Speedeon, or any of the other types of information in the Address Data Sets. See T 711: 530, 519-20, 527, 533-35 (Kirk Fair) (no knowledge of the purpose of the various Address Data Sets, and no knowledge of whether information in various Address Data Sets was maintained or kept current). Her speculation of the relative reliability of these different sets of data is not an expert opinion and has no probative value.

Kirk Fair also criticized Dr. Yoeli's use of dates in the Address Data Sets to decide when the address information in a particular call record was valid. Her criticisms have some validity. In JA000371

particular, Kirk Fair is correct to question Dr. Yoeli's assumption that addresses are valid indefinitely if the Address Data set has no end date of any kind. See T 711: 484-85 (Kirk Fair); Kirk Fair Report, at 8-14. The Court, however, finds that the All State Match accommodates for this weakness in Dr. Yoeli's analysis by requiring that the area code and state of residency must match in all Address Data Sets in which it appears at the time of the call.

Kirk Fair also criticized Dr. Yoeli for failing to consider the types of calls and their relationships to data sets. See T 711:465 (Kirk Fair). Kirk Fair relied on Dish witness Joey Montano's trial testimony regarding the types of calling campaigns, including the purposes of the campaigns and the intended call recipients. Kirk Fair opined that "the purpose and date of the call can be used together to assess the relevance and reliability of the addresses" found in particular data sets. For example, she opined that the addresses in current account Address Data Sets 1A should be more relevant and reliable for calls the Dish intended to direct to current customers. Kirk Fair Report, at 17-19; T 711:465 (Kirk Fair). Kirk Fair's observation makes some sense, but depends on her underlying assumption about the relative reliability of the address

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information in the Address Data Sets. If the Address Data Sets were equally reliable, then the relationship between the type of call and the type of Address Data Set would not matter significantly. Kirk Fair is not qualified to opine on the relative reliability of the Address Data Sets.

Kirk Fair offered her own alternative analysis of the data. She used a method she called “triangulation.” Kirk Fair “triangulated” or looked for logical consistencies and inconsistencies between the data in light of her opinions of the purpose and reliability of the data collection and the purpose of the calling campaigns. For example, if a call to a prospective customer in the Inquiry Call Record was followed shortly by the placement of the call recipient in the active accounts (Address Data Set 1A), Kirk Fair inferred that the call recipient decided to purchase Dish Network programming. If the addresses in the Lead Tracking System Address Data Sets 2 and 3 and the active account Address Data Set 1A agreed, then Kirk Fair opined that such a match was a good indication that the address was the call recipient’s address at the time of the call. Kirk Fair opined that such consistencies between the purpose of the calls and the relevant types of data sets corroborated the address

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information in the Address Data Sets. See T 711: 490-96 (Kirk Fair).

Kirk Fair prepared an alternative analysis of the address data and call records using her triangulation method. Kirk Fair Report, 24-32 and Exhibit 11. Kirk Fair divided the calls into ten categories with differing degrees of reliability based on her triangulation method. She also broke the call record data into the seven different Call Records that Dr. Yoeli used in his analysis. Kirk Fair's triangulation method, like her other opinions, is dependent on her assumptions about the reliability of the Address Data Sets. That opinion has no probative value, so the triangulation analysis is not helpful. Kirk Fair also did not offer any quantitative analysis or any conclusions on the question at issue, whether it is more likely than not that an area code indicates that state of residency of the telephone subscriber with that number.

One aspect of Kirk Fair's triangulation analysis, however, was helpful to the Court as the finder of fact. Kirk Fair's triangulation analysis showed only one state of residence associated with a telephone anywhere from 69 to 99 percent of the time, depending on the Call Record. See T 712: 638-52 (Kirk Fair); Kirk Fair Report,
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Revised Exhibit Table 11.⁵⁹ This analysis did not consider the call records for which the only address data were from TransUnion and Speedeon. Kirk Fair Report, 31-32, Revised Table 11 Group I.

Kirk Fair agreed that when a person initially received a residential telephone number, the NANPA geographic assignment of the area code in the number would agree with the subscriber's residency. T 712: 712 (Kirk Fair). Her triangulation analysis showed that the owners of the telephone numbers in the Address Data Sets rarely changed the state of residency. All the addresses were in one state 69 to 99 percent of the time. This finding is consistent with Dr. Yoeli's finding that only 13 percent of the telephone numbers in the Call Records had more than one state of residency. These two findings are also consistent with the U.S. Census data that showed that people changed states of residency at a low rate of 1.1 percent per year. Together, this evidence proves that it is more likely than not that an area code of residential telephone subscribers indicates state of residency of the intended

⁵⁹ In these instances, Kirk Fair stated that one or more of her Groups of Dish internal Address Data Sets in her triangulation method showed an address associated with the phone number "with no contradictory state information in other sources." Kirk Fair Report, Revised Exhibit Table 11, n. 4-7. Kirk Fair testified that her Groups A, B, and C in her triangulation method had only one state of residence associated with the phone number. T 712: 638-41 (Kirk Fair)

recipients of telemarketing calls by Dish and the Telemarketing Vendors.

The preponderance of the evidence also proves that area codes indicate the states of residency of the residential telephone subscribers to whom Order Entry Retailers Star Satellite and JSR initiated illegal calls at issue in this case. Dish's expert Taylor agreed that prior to November 2008 area codes accurately indicated the states of residency 97 percent of the time. Star Satellite and JSR made all of their illegal calls before 2008. Star Satellite made its calls in 2005, and JSR made its calls in 2006 and 2007. Star Satellite and JSR also did not call wireless numbers; rather, both of these telemarketers called residential numbers in published white pages directories. Published telephone directories contain highly accurate address information about the numbers included in the directories. See T 616: 20-21 (Stauffer). The preponderance of the evidence shows that area codes establish the state of residence of JSR and Star Satellite's intended call recipients.

The Plaintiff States also argue area codes show the residency of the intended recipients of Satellite Systems telemarketing calls at issue in this case. The Plaintiff States rely on Taylor's spreadsheet

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of the 381,811 illegal Registry Calls initiated by Order Entry Retailer Satellite Systems. DTX 906, Taylor Satellite Systems Spreadsheet. The Taylor Satellite Systems Spreadsheet contained addresses including state of residency and area code data in 214,376 of the 381,811 call records. Of the 214,376 call records:

- 24,243 call records had California area codes;
- 10,145 had Illinois area codes;
- 7,414 had North Carolina area codes; and
- 12,900 had Ohio area codes.

Almost all of these records had corresponding addresses in the respective Plaintiff States addresses:

- 24,100 of the 24,243 call records with California area codes also had California addresses, or 99.4%;
- 10,048 of the 10,145 call records with Illinois area codes had Illinois addresses, or 99%;
- 7,290 of the 7,414 call records with North Carolina area codes had North Carolina addresses, or 98.3%; and
- 12,803 of the 12,900 call records with Ohio area codes had Ohio addresses, or 99.2%.

The Court finds that the Plaintiff States have failed to show that this calculation can be applied to remaining calls in the 381,811 call records. The Plaintiff States presented no evidence that the 214,376 call records that had addresses were either a random sample or otherwise representative sample of the 381,811 call records. The Plaintiff States needed expert testimony or some other competent evidence to show that the information about the 214,376 call records could be applied generally to all of the 381,811 call records.

The address information in the Taylor Satellite Systems Spreadsheet is sufficient to establish by a preponderance of the evidence the states of residency for holders of the telephone numbers with specific records that included addresses. The Plaintiffs have failed to present necessary to show that anything more can be drawn from this information.

VII. Taylor Analyses Related to Civil Penalties

Dish presented testimony by Taylor regarding the 1,707,713 Dish telemarketing calls from 2007-2010 on which the Court granted partial summary judgment. Dish presented this testimony for the limited purpose of addressing the appropriate amount of

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civil penalties. Dish's culpability is a relevant factor in awarding civil penalties under at least the TSR. See FTC Act § 5(m) (1)(C), 15 U.S.C. § 45(m)(1)(C).⁶⁰ The Court makes the following findings regarding Taylor's trial testimony for the limited purpose of addressing the appropriate amount of monetary remedies. The Court also makes additional findings regarding Taylor October 14, 2013 Report because the Report contains significant additional information relevant to Dish's culpability. The Court addresses the October 14, 2013 Report first because the findings about this Report provides useful background for the findings related to Taylor's testimony.

A. Taylor October 14, 2013 Report

Taylor prepared the October 14, 2013 Report in response to Dr. Yoeli's December 14, 2012 Revised Report. PX 16, (Taylor October 2013 Report). Taylor performed his own separate analysis of Dish's calling records and Telemarketing Vendor eCreek's calling records for the years 2007-2010. Dish provided Taylor with 371,161,704 Dish call records and 85,144,857 eCreek call records

⁶⁰ The Court addresses the applicability of equitable factors in assessing the appropriate amount of statutory damage under the TCPA and applicable state laws later in Conclusions of Law.

for the period from 2007 to 2010. Taylor removed duplicate records and records with invalid telephone numbers, which resulted in a net total of 406,831,605 call records. Taylor eliminated records associated with non-telemarketing calling campaigns. Taylor then compared the remaining calls against the Registry historic database. Taylor found 52,190,030 Registry Calls to numbers that were on the Registry for at least 31 days at the time of the calls. Taylor eliminated 1,317,872 Dish prerecorded telemarketing calls which were not answered by the call recipients. The result was 50,872,178 Registry Calls. Taylor October 2013 Report, at 6.

Taylor then eliminated calls that were made within 558 days of the latter of the last payment date or the activation date. A total of 18,643,695 Registry calls remained. Taylor found that with respect to these calls: (1) Dish had no record of any payments or activations associated with the intended recipients of these calls; or (2) Dish's records showed that the last payments (or activations if Dish had no subsequent payment records) were more than 558 days before the dates of these calls. Taylor October 2013 Report, at 6.

Taylor then eliminated 943,240 calls that were on Lead Tracking System calling campaigns. Taylor again relied on

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representations from Dish personnel that the Lead Tracking System calling campaigns were calls to inquiry leads made within a day or two of the inquiry. See T 633: 3258 (Taylor). The remaining Registry calls totaled 17,700,455. Taylor October 2013 Report, at 6-7.

Taylor then eliminated 532,261 calls because the disposition codes indicated that the telephones of the intended recipients did not ring. The remaining Registry calls totaled 17,168,194. Taylor October 2013 Report, at 7.

Taylor then eliminated 41,417 calls because the disposition codes indicated that the calls were calls to businesses or were non-telemarketing calls, such as related to payment reminders. The remaining Registry Calls totaled 17,126,777. Taylor October 2013 Report, at 7.

Taylor then eliminated 76,740 calls because the disposition codes stated wrong number or no English. The remaining Registry Calls totaled 17,050,037. Taylor October 2013 Report, at 7.

Taylor then eliminated 13,792,511 calls because the campaigns “were only dialed to current customers or former customers within 558 days after their last transaction with DISH.”

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Taylor did not rely on records of transactions to make this statement in the October 2013 Report. He had already eliminated calls based on transaction data to reduce the number of possible violations from 50,872,178 Registry Calls to 18,643,695 Registry Calls. Taylor relied on a spreadsheet containing a list of calling campaigns to identify by campaign name or code the campaigns that Dish intended to direct to current and former customers with disconnect dates within 18 months of the date of the calls. Taylor October 14, 2013 Report, at 7; see T 633: 3298-99 (Taylor). After eliminating 13,792,511 calls on this basis, the remaining Registry Calls totaled 3,257,526.

Taylor then eliminated 2,755,876 calls because “Quality Assurance testing” found that the calls were part of non-telemarketing campaigns. The resulting Registry calls totaled 501,650. Taylor opined that he had no basis that these 501,650 Registry Calls were permitted under the Do-Not-Call Laws. The Court granted partial summary judgment on the 501,650 Registry Calls from Taylor’s analysis in this October 2013 Report. Opinion 445, at 158-67, 231-32.

A number of Taylor's opinions for excluding calls from the set of calls that violated the Do-Not-Call Laws are legally incorrect or are not supported by any evidence in the record. Taylor excluded 532,261 calls which did not ring the intended recipients' phones, and 76,740 calls that were wrong numbers or to individuals who did not speak English. The Court rejected similar opinions by Taylor at summary judgment. See Opinion 445, at 167-168. The TSR and FCC Rule prohibit initiating Registry Calls regardless of whether the calls go through. TSR 16 C.F.R. § 310.4(b)(1)(iii); 47 C.F.R. § 64.1200(c)(2). The 532,261 calls and the 76,740 calls were initiated as telemarketing calls, Taylors' opinions regarding these calls have no probative value.

Taylor excluded 943,240 calls on Lead Tracking System calling campaigns. This opinion is premised on Dish's representations to Taylor that Lead Tracking System calling campaigns are calls to inquiry leads within a day or two of the inquiry. See T 633: 3258 (Taylor). As the Court discussed above, Dish has failed to present competent evidence regarding the make-up of the Lead Tracking System. Dish, therefore, failed to show that the Lead Tracking System in fact consisted of contact information of individuals who

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inquired about Dish Network programming. Taylor's opinion regarding the Lead Tracking System calls is not supported by competent evidence. The opinion has no probative value.

Taylor excluded 13,792,511 calls because those calls were part of Dish calling campaigns with codes that indicated that the campaigns directed toward current customers or customers who made a payment within 18 months (558 days) of the dates of the calls. As the Court has already explained, calling campaign codes and names are not a reliable method of determining whether Dish had a Transaction-based Established Business Relationship with a customer. Taylor's October 2013 Report demonstrates the lack of reliability of calling campaign names. Taylor identified 18,643,695 telemarketing calls directed to individuals for whom Dish had either: (1) no records of activations or payments, or (2) Dish's records showed that the last payments or activations associated with those records were more than 558 days (or 18 months) before the dates of the calls. Taylor October 2013 Report, at 6. The 13,792,511 calls were a subset of those 18,643,695 calls. Thus, Dish had no record that any of the intended recipients of the 13,792,511 calls either activated Dish Network programming or

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paid for Dish Network programming for at least 18 months before the date of the calls. Taylor's opinion that Dish had Transaction-based Established Business Relationships with the intended calls recipients based on calling campaign names has no probative value.

After eliminating Taylor's opinions that have no probative value, Taylor's October 2013 Report supports the finding that from 2007 to 2010, Dish made at least 15,846,402 Registry Calls to individuals with whom Dish had not shown that the calls were made either within three months of inquiries about Dish Network programming, or within 18 months of the intended recipients' last transactions with Dish.⁶¹ Dish, therefore, did not show that it had an Established Business Relationship with the intended recipients of an additional 15,846,402 Registry Calls from 2007-2010. The Court notes that this conclusion has some similarity to Dr. Yoeli's finding in his December 14, 2012 Report that 2007-2010 Calling

⁶¹ The Court does not address the 1,317,872 prerecorded calls that were not answered or the 2,755,876 calls that were excluded by an undefined "Quality Assurance" process. The 1,317,872 calls were still initiated to numbers on the Registry even if they were not answered by a person. The answering requirement only relates to call abandonment. The Court does not include them because Taylor eliminated them before he analyzed whether call recipients paid Dish for programming and services within 18 months of the call. These calls, therefore, might be subject to an Established Business Relationship exception. The Court did not include the 2,755,876 calls because the parties presented no evidence on the Quality Assurance process cited by Taylor, and the purpose of these findings is limited to weighing the factors related to the appropriate amount of monetary relief, rather than the number of calls for which Dish should be held liable.

Records contained 18,039,631 Registry Calls.⁶² The Court will not impose liability for these calls because the Plaintiffs do not seek liability for these calls. The Court will only consider this finding with respect to factors used to determine appropriate monetary relief.

B. Taylor Trial Testimony

1. Taylor's Revised Opinions

At trial, Taylor revised his opinions from the September 20, 2012 Report (PX 26). The Plaintiffs submitted Taylor's opinions to the Court at summary judgment, and the Court relied on those opinions when it entered partial summary judgment against Dish on 1,707,713 calls in the records of Dish's telemarketing calls in the years 2007- 2010. See Opinion 445, at 167, 75 F.Supp.3d at 1010.

Taylor opined in the September 20, 2012 Report that certain of the 3,342,415 calls that Dr. Yoeli found to illegal Registry Calls were not violations for various reasons. When Taylor opined that a portion of the 3,342,415 calls were not illegal Registry Calls for a particular reason, he removed or "eliminated" them from the total.

⁶² Taylor's calculations would actually exceed Dr. Yoeli's findings if the Court included the 1,317,872 prerecorded calls that were not answered or the 2,755,876 calls that were excluded by an undefined "Quality Assurance" process.

Taylor testified that he used a “waterfall” analysis in his assessment. Taylor testified that the waterfall method meant that when he eliminated a set of calls for one reason, he subtracted those calls from the total calls before he considered other reasons for eliminating calls. In this case, Taylor eliminated 309,931 calls because the phones of the intended recipients of the calls did not ring. He subtracted the 309,931 calls from the 3,342,415 calls in the Yoeli July 2012 Call Set to produce a remainder of 3,032,484 calls. He followed this method with each reason on which he opined that calls should be excluded. He subtracted from the 3,032,484 calls the 12,552 calls that were to wrong numbers or because the call recipient did not speak English. This left a remainder of 3,019,932 calls. He continued this waterfall method of subtraction and evaluation of the remainder of calls until he found 765,531 calls for which he could not find a basis to say that the calls did not violate the TSR or the TCPA. T 633: 3253-59 (Taylor); see PX 26, September 20, 2012 Report, at 3-8.

Taylor did not consider whether a call could be eliminated for more than one reason. The Court rejected Taylor’s opinions that telemarketing calls were not illegal Registry Calls if the intended

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recipients' telephones did not ring, if the recipient of the call did not speak English, if the call was intrastate, or if call was part of a Lead Tracking System campaign (collectively Rejected Reasons). See Opinion 445, at 167-68, 75 F.Supp.3d at 1010. Taylor testified at trial that some calls that were eliminated in early parts of the waterfall analysis for these Rejected Reasons should have been eliminated at later points in the analysis for other valid reasons. See T 633: 3255, 3266-67 (Taylor).

Taylor testified that if he had considered multiple reasons for excluding calls, many more calls would have been eliminated. Taylor opined at trial that the following numbers of calls that he eliminated for Rejected Reasons would also have been eliminated for alternative reasons:

- 65,451 calls were Lead Tracking System calls;
- 26,077 calls were directed to individuals who opted to receive information about home services on a website called EP Homes (Dish witness Montano testified Dish received lead from the EP Homes website. T 629: 3120-21 (Montano));

- 16,107 calls were non-telemarketing work orders based on the calling campaign codes (These campaign codes were codes that Montano initially identified as telemarketing campaigns, but later changed his opinion.);
- 4,280 calls that were non-telemarketing calls based on the calling campaign code (These campaign codes were codes that Montano initially identified as telemarketing campaigns, but later changed his opinion.);
- 106,781 calls were calls to current customers based on calling campaign codes;
- 3,559 were calls to current customers to convince them not to terminate service, based again on campaign codes; and
- 78,947 calls were calls to former customers within 18 months of disconnection based on campaign codes.

T 633: 3269-73 (Taylor).

Taylor's opinions regarding the 16,107 calls for work orders and the 4,280 calls for other non-telemarketing reasons may have some merit. Montano's trial testimony that he changed his mind

may provide some basis to consider a lesser degree of culpability by Dish for these calls. Dish did not present Montano's revision of his opinions regarding calling codes at summary judgment, however, so any argument to avoid liability based on Montano's trial testimony is waived.

Taylor's other revised opinions have no probative value. Dish failed to present competent evidence regarding the formation and scrubbing of the Lead Tracking System calling lists. Dish, therefore, failed to present any evidence to show an Inquiry-based Established Business Relationship with any of the recipients of these calls.

The evidence regarding 26,077 calls to leads Dish received from the EP Homes website does not establish the dates that consumers made any inquiries or opt-ins on the EP Homes website. The evidence, therefore, does not show that the telemarketing calls were within three months of the inquiries.

Taylor opined that the recipients of the remaining sets of 106,708 calls, 3,559 calls, and 78,947 calls all had Transaction-based Established Business Relationships with Dish because the calls were part of certain calling campaigns. As discussed above,

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Dish calling campaign names were not a reliable indicator a Transaction-based Established Business Relationship. Taylor's October 2013 Report showed that Dish made at least 13,792,511 calls to people who had not purchased Dish Network programming for at least 18 months, but who were erroneously included in calling campaigns with names that indicated that Dish had Transaction-based Established Business Relationships with them.⁶³ Taylor's opinions of Dish's Established Business Relationships with intended call recipients of these calls have no probative value.

Taylor also again offered at trial his opinion that 873,551 of the calls from the 2007-2010 calls for which Dish was liable at summary judgment were not illegal because the calls were made as part of Lead Tracking System calling campaigns. T 633: 3268-69 (Taylor). Dish presented no competent evidence of the makeup of the Lead Tracking System or the process to scrub calling lists derived from that system. Dish, therefore, presented no competent evidence that it had Inquiry-based Established Business Relationships with the intended recipients of these calls. Taylor's

⁶³ The 13,792,511 figure does not include the 1,317,872 prerecorded calls that were not answered or the 2,755,876 calls that were excluded by an undefined "Quality Assurance" process.

opinions regarding these calls still lack a factual basis and still have no probative value.

Taylor's opinions about the effect of his waterfall analysis technique and his use of Rejected Reasons, at best, show that the 1,707,713 Registry calls for which Dish was found liable may have included 16,107 work order calls and 4,280 non-telemarketing calls. Taylor's waterfall analysis did not affect the accuracy of his conclusions with respect to the remaining 1,687,326 calls. The Court will only consider this analysis for purposes of determining the appropriate amount of monetary relief.

2. Taylor's Additional Opinions that Relate to Culpability

Taylor also testified about a detailed analysis of the 501,650 illegal Registry Calls found at summary judgment based on his October 2013 Report. Dish provided Taylor with the calls records of all the campaigns in which the 501,650 calls were made. Taylor broke down the 501,650 illegal Registry Calls into the number made in each specific campaign. Taylor calculated the percentage of the calls in each campaign that were found to be part of the 501,650 illegal calls. T 633: 3262-66 (Taylor); DTX 626A, 626B, 626C, and

626D, Summary of Campaigns with Violations (Taylor's Tables).

Taylor testified that this analysis showed:

- 334,836 of the 501,650 calls were Registry Calls to persons who had not done business with Dish for at least 18 months before the dates of the calls;
- 125,838 of the 501,650 calls were made in cold calling campaigns and comprised less than 5% of all calls made in those campaigns; and
- 14,579 of the 501,650 calls were made in other campaigns and comprised less than 5% of all calls made in those campaigns.

T 633: 3276-78 (Taylor).⁶⁴ Taylor opined that if the percentage of violations from a particular calling campaign list was less than 5%, then that list was scrubbed to remove numbers on the Registry.

T 633:3277 (Taylor).

Taylor's Tables have no probative value. Taylor's Tables only considered the 501,650 calls from his October 2013 Report found to be violations at summary judgment. Taylor did not include in his

⁶⁴ Taylor offered no opinions regarding 57,707 of the illegal Registry Calls found at summary judgment.