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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JOINT APPENDIX
Vol. 3 of 85
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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.

calculations the 15,846,402 Registry Calls in his October 2013 Report that he erroneously excluded. Taylor's Tables, therefore, are not probative of the percentage of Registry Calls in any particular campaign.

VIII. Dish Financial Evidence

Dish's financial condition is relevant to the determination of appropriate monetary relief. The Court must consider Dish's ability to pay and its ability to continue operating when determining an appropriate civil penalty under § 5 of the FTC Act in Counts I-IV. 15 U.S.C. § 45(m)(1) (C). The Court must further consider whether an award would be excessive in violation of due process. See St. Louis I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919).[65] The Court, therefore, finds the following facts about Dish's financial situation.[66]

Dish's Annual Report for the period ending December 31, 2016, shows that Dish's parent holding company, Dish Network

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[65] The Court will address the specific applicability of Dish's financial information to each claim in the Conclusions of Law below.

[66] Counsel for the United States stated at one point in the trial, "I just want to point out that we don't agree that the ability to pay in the statute necessarily means current day ability to pay. And that the Court could actually look at different time periods ability to pay to calculate the civil penalties figure. But for the purposes of today I don't think that matters." T 621: 1458 (DeFranco) (Attorney Runkle speaking). The United States has not developed this argument or identified a different relevant period of time. The argument, therefore, is waived. The United States also relied on Dish's most recent public filing regarding its financial situation.

Corporation (Dish Corp.) had a net worth of approximately $28 billion ($28,091,847,000.00); and for 2016, Dish Corp. had total gross revenues of approximately $15 billion ($15,094,562,000.00) and net after-tax income of approximately $1.4 billion ($1,449,853,000.00), or $3.12 per share. DTX 1109, Form 10-K Annual Report Filed February 22, 2017 for the Period Ending December 31, 2016 (2016 10K), at F-3, F-4.

Dish Corp. also had cash and cash equivalents (cash) of approximately $5.3 billion ($5,323,7255,000.00) as of December 31, 2016. 2016 10K, at F-3. On June 13, 2016, Dish Corp. secured $2 billion ($2,000,000,000.00) from a bond issue made by a wholly owned subsidiary of Dish Corp. called Dish DBS Corp. The bonds are unsecured, are due in June 2026, and carry an interest rate of 7.75 %. Id. at F-36, 38, Note 9, Long Term Debt.

On August 8, 2016, Dish Corp. completed a private unregistered offering of $3 billion ($3,000,000,000.00) of convertible notes due in 2026. The notes carry an interest rate of 3.375%. DTX 1085, Form 8-K dated August 8, 2016. Dish Corp. received net proceeds of approximately $2.7 billion ($2,723,000,000.00) from this transaction. Dish Corp. stated in the notice of this private offering that the proceeds would be used for "strategic transactions, which may include wireless and spectrum-related strategic transactions, and for other general corporate purposes." Id.

As of December 31, 2015, Dish Corp. had a net worth of approximately $22.9 billion ($22,886,710,000.00), and had total revenues for 2015 of approximately $15 billion ($15,068,901,000.00) and net after-tax income of approximately $747 million ($747,092,000.00). PX 1440, Dish Corp. Annual Report Form 10K filed February 18, 2016 for the Period ending December 31, 2015 (2015 10K), at F-3, F-4. Dish Corp. had approximately $1 billion ($1,053,158,000.00) in cash as of the end of 2015. 2015 10K, at F-3.

The 2015 annual income reflected a payment of a penalty of approximately $516 million ($515,555,000.00) to the FCC because two affiliates of Dish Corp., Northstar Wireless and SNR Wireless, failed to complete the purchase of a portion of wireless spectrum for which the two affiliates were the successful bidders at an FCC auction. Dish Corp. owned an 85% interest in Northstar Wireless and SNR Wireless. 2015 10K, at F-4 ("FCC auction expense"), and at F-50 through F-53 (Note 15, Commitments and Contingencies);

see T 621: 1462-64 (DeFranco). Dish's annual after-tax income would have been approximately $1.2 billion ($1,262,647,000.00), but for this one-time payment for the affiliates' failure to perform on their bids with the FCC.

Dish had net after-tax income of approximately $1.5 billion ($1,515,907,000.00) in 2011; $945 million ($944,693,000.00) in 2013; and $807 million ($807,492,000.00) in 2014. PX 1092, Dish Corp. Annual Report Form 10K filed February 23, 2012 for the Period ending December 31, 2011 (2011 10K), at F-5; 2015 10K, at F-4. For the first six months of 2012, Dish had net after-tax income of approximately $586 million ($586,042,000.00). PX 1088, Dish Corp. Form 10Q Quarterly Report, filed August 8, 2012, for the period ending June 30, 2012 (June 2012 10Q), at 2. The evidence does not show Dish Corp.'s annual net after-tax income for 2012.

As of the time of trial, Dish had approximately $1 billion ($1,000,000,000.00) per month in operating expenses. T 621: 1539-40 (DeFranco); see 2016 10K, at F-4 (total costs and expenses for 2016 were approximately $12.9 billion ($12,883,453,000.00), including approximately $950 million ($953,146,000.00) in depreciation and amortization.).

Dish made several large one-time payments in the last five years. In 2015, Dish paid $515,555,000.00 to the FCC discussed above. In 2012, Dish paid $700 million ($700,000,000.00) to a company called Voom HD Holding, LLC (Voom), to settle a contract dispute. PX 1440, 2015 10K, at 93 ¶10.47 (referencing Confidential Settlement Agreement and release dated October 21, 2012); T 621: 1455 (DeFranco). In 2011, Dish agreed to pay TiVo, Inc., a total of $500 million ($500,000,000.00), to settle a patent dispute. Dish agreed to make an initial payment of $300 million ($300,000,000.00) in 2011 and to pay the remaining $200 million ($200,000,000.00) in six equal annual installments in 2012 through 2017. PX 1440, 2015 10K, at F-78.

IX. Injunctive Relief

The Court bifurcated the trial in this proceeding. The Court continued the trial on issues regarding injunctive relief to the October and November 2016 trial dates. Both parties attempted to present evidence regarding Dish's current operations. Dish attempted to submit evidence of its current practices to show that it is complying with the Do-Not-Call Laws. The Court excluded this evidence because Dish did not properly disclose the evidence in discovery. The Court gave Dish the option of using the new evidence at trial if it agreed to reopen discovery at its expense. See Opinion entered January 4, 2006 (d/e 575). Dish decided not to reopen discovery. Notice of Defendant Dish Network L.L.C. Declining Additional Discovery (d/e 650). The Court prohibited all parties from submitting new evidence not produced in discovery without leave of court. See Opinion entered October 12, 2016, (d/e 697), at 7-9.

The Plaintiffs sought to produce evidence of new consumer complaints. The Court barred this evidence because the Plaintiffs did not seek leave of Court and the prejudice to Dish from the late disclosure.

The Plaintiffs presented the testimony of David Torok. At the time of trial, Torok had recently retired from the FTC. Before his retirement, Torok was an Associate Director of the FTC's Bureau of Consumer Protection. Torok participated in the launch of the Registry and in the original TSR rulemaking proceeding. Torok later managed the division that ran the Registry and the Consumer Sentinel database of consumer complaints. T 710: 21-23 (Torok).

Torok testified that prior to the launch of the Registry, consumers were clamoring for help because of unwanted telemarketing calls. Internal Do-Not-Call Lists did not work because even if consumers told one telemarketer not to call, another would. State registries were uneven in their effectiveness. T 710: 35 (Torok).

The FTC staff was surprised by consumer response to the launch of the Registry in 2003. Fifteen million consumers registered telephone numbers in the first five days. Within two months of the launch, 40 million consumers had registered their telephone numbers. Currently, 226 million numbers are registered on the Registry. The number of registered telephone numbers has grown every month. About 100 consumers per month remove their telephone numbers from the Registry. T 710: 35-37 (Torok).

The FTC continues to receive complaints about illegal telemarketing calls. The FTC receives 200,000 to 300,000 complaints on the Registry complaint system every month. Torok opined that these complaints are the just tip of the iceberg, that the total violations are much higher. Torok testified that consumers are particularly upset about the proliferation of Prerecorded Calls, which he called robocalls. T 710: 38-42 (Torok).

Torok opined that Registry enforcement, including injunctive relief, was critical. Torok opined that enforcement actions stopped the violator, sent a message to other violators to deter similar practices, and sent a message to consumers that the government was responsive to their complaints and problems. Torok opined that failure to grant injunctive relief would defeat these law enforcement goals and send a bad message to consumers. T 701: 44-47 (Torok).

Dish witnesses opined on the likely impact of the Plaintiffs' proposed injunction on Dish and its Retailers. The Plaintiff United States submitted a proposed injunction in its pretrial submissions. DTX 1097, [Proposed] Judgment and Order for Permanent Injunction filed October 3, 2016 (Proposed Injunction). The Dish witnesses gave lay opinions on the effect of five provisions of the Proposed Injunction: (1) a five-year ban on outbound telemarketing by Dish or any Retailer (Proposed Injunction, § I); (2) a ban on taking orders from any Retailer that was authorized to place order on the Order Entry Tool or a successor system at any time from 2003 to the present (Proposed Injunction § II); (3) a requirement that Dish must terminate any Retailer who violated the Do-Not-Call Laws (Proposed Injunction § V); (4) a requirement that Plaintiffs could perform unannounced inspections of Dish and its Retailers at any time without prior notice (Proposed Injunction § III); and (5) an order directing Dish to hire a telemarketing a compliance expert that had no prior role with Dish or involvement in this case to perform the following tasks: (a) prepare a compliance plan to be implemented once the 5-year ban was over, (b) monitor compliance, and (c) provide regular status reports on compliance (Proposed Injunction, § II A. and B). The last provision would mean that PossibleNOW could not be the compliance expert because of its prior role with Dish and its involvement in this case.

The Dish employees opined that these proposed injunctive provisions would cause Dish to lose all of its Retailers and many customers and would impair Dish's ability to get new customers. Under Proposed Injunction § II, Dish could not take any orders from any Retailer because all TVRO and Order Entry Retailers have for several years used the same computer system called Axiom to place orders. E.g., T 710: 195 (DeFranco); T 711: 353 (Mills); see Opinion 445, at 59 ("All retailers now use the Axiom system as the order entry tool.").

Also, several Dish witnesses testified the ban on telemarketing in Proposed Injunction § I would harm all Retailers, not just Order Entry Retailers. These witnesses testified that TVRO Retailers commonly call customers on the phone. TVRO Retailers return messages from existing and prospective customers inquiring about Dish Network programming. Existing customers contact TVRO Retailers about upgrades or changes in service. Prospective customers leave messages about purchasing Dish Network programming. The ban on all telemarketing would prohibit TVRO Retailers from calling these people back. The Dish witnesses testified that the ban on telemarketing would harm these TVRO Retailers' ability to maintain and develop customers. Several Dish employees opined that the TVRO Retailers would stop selling Dish Network programming and might go out of business, depending on whether the companies could stay in business marketing other products and services. See e.g., T 710: 203-04 (DeFranco); T 711: 289-93 (Van Emst).

Dish employees testified that the Order Entry Retailers would stop selling Dish Network programming if the telemarketing ban went into effect. Dish employees opined that many of those Order Entry Retailers would go out of business. E.g., T 711: 329-30, 334-35 (Mills).

Joshua Slater, a senior vice president of an Order Entry Retailer, Infinity Sales Group, testified that the proposed injunction would put Infinity Sales Group out of business. He testified that Dish sales were 85 percent of Infinity Sales Group's business. He testified that 400 people at Infinity Sales Group would lose their jobs. T 712: 567 (Slater).

Slater said that Infinity Sales Group would be affected by a ban on telemarketing even though Infinity Sales Group engaged inbound telemarketing. Customers may call to inquire about Dish Network, but want to think about the available programming before making a decision. Customers may also call and leave a message requesting a callback. Slater testified that inbound telemarketers, such as Infinity Sales Group, need to be able to call the prospective customer back. Such calls would be telemarketing calls. T 712: 570-71 (Slater).

Dish employees also opined that Proposed Injunction § V would unfairly force Dish to fire a Retailer if it made one mistake that violated a Do-Not-Call Law. Dish employees opined that Retailers would again not work with Dish under those conditions. E.g., T 711: 302-03 (Van Emst); T 711: 344 (Mills).

Dish employees further opined that Retailers would not work with Dish if they were subject to unannounced inspections by federal government officials pursuant to Proposed Injunction § III. Dish employees opined that such inspections would be intimidating and would hurt the reputation of the business under inspection. E.g., T 711: 302 (Van Emst); T 711: 343 (Mills);

Dish employees opined that large numbers of people would lose their jobs if these provisions of the Proposed Injunction were put in effect. Dish employees estimated that TVRO Retailers accounted for 20 percent of Dish's business, and Order Entry Retailers accounted for 25 percent of Dish's activations. T 710: 197-200 (DeFranco); T 711: 288 (Van Emst); T 711: 331 (Mills). Dish employees opined that many Retailer employees would lose their jobs. Dish employees opined that many Dish employees would also lose their jobs, including those directly involved in telemarketing and those who would be terminated because Dish lost business generally. See e.g., T 710: 188, 201 (DeFranco). Consumers would be injured because Dish could not offer the same level of services and products if it lost such a large percentage of its business and retail outlets. T 710: 208-09 (DeFranco); T 711: 300 (Van Emst); T 711: 335-37 (Mills); T 711: 404-05 (Montano).

Finally, CompliancePoint Senior Vice President and General Manager Kenneth Sponsler testified that PossibleNOW and its wholly-owned subsidiary CompliancePoint could perform these telemarketing compliance expert services called for in Proposed Injunction § II A. and B. Sponsler testified that he felt that provision sought to punish PossibleNOW for some reason. He testified that another company would need to invest large amounts of time gaining the necessary expertise to perform the services called for in the Proposed Injunction. See T 715: 77-84 (Sponsler). On questioning by the Plaintiff United States, Sponsler agreed that under the terms of the Proposed Injunction, PossibleNOW could perform the expert services as a subcontractor of some other provider that acted as the telemarketing compliance expert. T 715; 803-04 (Sponsler).

The testimony from the Dish witnesses regarding the possible effects of the Proposed Injunction was speculative, and the witnesses had some bias. Most of the witnesses are Dish employees involved in marketing or Outbound Operations. Witness DeFranco is the co-founder and currently Director and Executive Vice President and, so, has a personal interest the protecting Dish from any restrictive injunction.

Still, some of the Dish witnesses' testimony has some merit. A total telemarketing ban would prohibit anyone in Dish or a Retailer from returning phone calls about purchasing or upgrading Dish Network programming. The ban on taking orders from any Retailer that used the Order Entry Tool's successor Axiom would effectively terminate all Dish Retailers. The requirement to fire any Retailer that made on violation of any Do-Not-Call Laws could be harsh in some circumstances.

Dish witnesses DeFranco and Montano also testified about their attitudes toward illegal telemarketing and the effect on consumers. DeFranco testified that Dish understood the importance of complying with the Do-Not-Call Laws:

Q. There's been a claim here, Mr. DeFranco, the Government's put in papers to the Court, stating that DISH doesn't get it, that DISH is indifferent to the telemarketing laws. Much of your life has been devoted to DISH. Can you address this for the Court, please?

A. DISH definitely gets it. This has been a very -- a very serious thing both to the senior management of DISH, and we've communicated that down through the ranks to anybody that has anything to do with telemarketing. We take it very seriously. You know, many of these violations -- we have made mistakes. The retailers made mistakes. Many of these violations occurred ten years ago. They were hidden from us by certain retailers. When we discovered it, we terminated those retailers. And the people at DISH, the men and women who work at DISH, are good people. We want to do the right thing. We're trying to continually improve, we have improved over the years, and we expect to improve on a going forward basis.

T 710: 226-27 (DeFranco).

Dish's Outbound Operations Manager Montano, however, testified that illegal telemarketing calls in violation of the Do-Not-Call Laws do not harm consumers:

Q. . . . . Now, you talked about how there – how consumers or customers get a benefit from receiving win-back and up-sales; correct?

A. Yes. There's a potential up side for the consumer.

Q. But there's also a group of people who are harmed by these calls. Namely, those consumers who don't want them and have asked the national government as well as DISH Network not to call?

A. I wouldn't say that they are harmed. Certainly, if any consumer, regardless of whether it's a current DISH customer or former DISH customer, communicates to DISH that they don't want to receive calls from our organization, we'll absolutely do everything in our power to abide by that.

Q. But DISH has, in fact, made millions of calls to these consumers, some who have repeatedly told DISH Network not to call them. You would say those consumers weren't harmed?

A. So we talked about that in great detail the last time I was here.

Q. I know we did. My question is are they not harmed?

. . . .

A. I don't know whether they were harmed or not. All I can say, once again, is I apologize for any inconvenience that may have been caused to the consumer. Certainly, it is not our intention to call any consumer that does not wish to receive a phone call from DISH Network.

T 712: 432-34 (Montano). The Court finds that Dish management in 2017 takes Do-Not-Call Law violations seriously as a result of the multistate investigations leading to this action and the July 2009 Assurance of Voluntary Compliance with 46 states, as well as other private lawsuits. The Court also finds that at least some Dish managers involved in telemarketing, such as Outbound Operations

Manager Montano, believe that millions and millions of illegal telephone calls may have caused some inconvenience, but no real harm to anyone.

X. Additional Expert Testimony

The parties presented the testimony of three additional experts, Kenneth Sponsler, Debra Green, and Dr. Avery Abernethy, Ph.D. The Court makes the following findings regarding these opinions.

A. Debra Green

Green opined that Dish's practices did not meet industry standards with respect to Dish's handling of consumer complaints about Order Entry Retailers. T 625: 1978 (Green). The Court finds that Green is qualified to render expert opinions on operating call centers. T 625: 1940 (Green). She is not an expert in compliance with Do-Not-Call Laws. The Court finds that her opinions regarding Dish's handling of Order Entry Retailers represented her opinion based on her general experience. See e.g., T 625: `980-88 (Green). Green did not rely on any empirical research or any recognized or published set of industry standards. Green did not opine on whether Dish complied with the Do-Not-Call Laws, but only whether Dish's practices complied with industry standards. Her opinions about whether Dish's practices meet industry standards have limited probative value. The issue is whether Dish violated the Do-Not-Call Laws.

B. Kenneth Sponsler

In addition to testifying as a fact witness in the injunctive phase of the trial, Kenneth Sponsler also testified as an expert witness. Sponsler is an expert on the telemarketing industry standards.[67] Sponsler opined that Dish acted reasonably in its handling of Order Entry Retailers. T 633: 3400-06, 3419, 3223-25, 3429-32, 3452, 3481, 3502-04 (Sponsler). Like Green, Sponsler's opinions were based on his general experience and not on any empirical research or recognized or published industry standards. Like Green, Sponsler did not opine on whether Dish complied with the Do-Not-Call Laws, but only whether Dish acted reasonably. Like Green, his opinions about Dish's practices with respect to Order Entry Retailers have limited probative value. Again, the issue is not whether Dish complied with industry standards. The issue is whether Dish violated the law.

[67] Sponsler is an employee of CompliancePoint, a wholly owned subsidiary of PossibleNOW.

Sponsler also testified about an audit he conducted of Dish's direct marketing practices in May 2010. Dish did not disclose any expert opinions of Sponsler regarding this audit in discovery. The audit itself, however, was admitted into evidence at trial without objection. PX 33, Email from Sponsler to Dish Corporate Counsel Brett Kitei dated July 8, 2010, attached Compliance Certification Audit dated July 8, 2010 (2010 Audit). Sponsler visited Dish for two days on May 3-4, 2010 in order to prepare the audit. PX 33, 2010 Audit, at 1. Sponsler's findings in the audit were limited to Dish's practices at the time of the audit in May 2010. T 633: 3452 (Sponsler). The audit says nothing about Dish's practices before May 2010. Dish's telemarketing calls at issue were all made before March 12, 2010.

Sponsler's audit may say something about Dish's practices after May 2010. The audit, however, was superficial and was based in large part on hearsay interviews with Dish employees. T 633: 3371, 3379 (Sponsler). Sponsler did not review or audit any call records. As such, Sponsler's conclusions have very little factual support. His opinions in this audit have little probative value.

Sponsler also mentioned in his testimony that some sellers who currently engage telemarketing firms are limiting their monitoring or supervising of telemarketers to avoid findings that the telemarketers are the sellers' agents. T 715:817 (Sponsler); see T 715: 815-20 (Sponsler). This testimony is credible. Sponsler is knowledgeable of developments in the telemarketing industry generally.

C. Dr. Avery Abernethy, Ph.D.

Dr. Abernethy is an economist who has studied the telemarketing industry and the impact of Do-Not-Call Laws on that industry. Dr. Abernethy opined that the Registry is over-inclusive because the FTC Improvements Act of 2007 required the FTC to keep telephone numbers on the Registry until the numbers are both disconnected and reassigned. T 628: 2844-48 (Abernethy). Dr. Abernethy opined that this over-inclusiveness resulted in injury to consumers who would have benefited from receiving telemarketing calls, but who do not receive the calls. Telemarketers did not call these consumers because these consumers' numbers were improperly required to remain on the Registry too long. T 628: 2859-60 (Abernethy).

The Court finds that Dr. Abernethy's opinion is of little or no probative value. The portion of this case related to the Registry is concerns calls made to persons whose numbers were on the Registry. Dr. Abernethy did not offer any opinion at trial regarding telemarketing calls made to persons whose numbers are on the Registry; he only opined on the injury that may result from calls that were not made.[68]

CONCLUSIONS OF LAW

The Plaintiffs allege twelve Counts against Dish. The Court first makes conclusions of law regarding liability for each Count. The Court then makes conclusions of law regarding Dish's liability for monetary relief. The Court finally makes conclusions of law regarding the Plaintiffs' requests for a permanent injunction.

[68] Dr. Abernethy's opinion is also purely qualitative. He did not opine on the magnitude of any injury to people who want to be called by telemarketers, but are not being called because of the statutory requirement to keep numbers on the Registry until the numbers are both disconnected and reconnected.

I. Liability

A. Count I

The Plaintiff United States alleges in Count I:

> In numerous instances, in connection with telemarketing, Defendant DISH Network engaged in or caused a telemarketer to engage in initiating an outbound telephone call to a person's telephone number on the National Do Not Call Registry in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

Third Amended Complaint, ¶ 66. Count I contains two parts: (1) Dish initiated outbound telemarketing telephone calls to persons whose numbers were on the Registry; and (2) Dish caused telemarketers to initiate outbound telemarketing telephone calls to persons whose telephone numbers were on the Registry.

1. First Amendment Challenge

Dish asserts that all claims based on the Registry are unenforceable because "the Registry violates the First Amendment, both facially, and as applied to Dish." Dish Network, L.L.C.'s Proposed Post-Trial Conclusions of Law (d/e 666) (Dish Conclusions of Law), at 44 ¶ 144. Dish cannot make a facial challenge because the Registry only affects commercial speech. Dish may only make an as-applied challenge. Commodity Trend Services, Inc. v.

Commodity Futures Trading Comm'n, 149 F.3d 679, 683 (7th Cir. 1998).

The Seventh Circuit has held that Do-Not-Call Registry laws do not violate the First Amendment. National Coalition of Prayer, Inc. v Carter, 455 F.3d 783, 792 (7th Cir. 2006). The Seventh Circuit ruled on the validity of the Indiana Telephone Privacy Act (Indiana Act). The Indiana Act established a state Do-Not-Call List that is substantially similar to the Registry. The Indiana Act prohibited making telemarketing calls to persons who registered their telephone numbers with the state of Indiana. The Seventh Circuit held that such registry laws did not violate the First Amendment. The Court finds the holding in National Coalition of Prayer is controlling in this case. Should this matter be appealed, Dish may ask the Seven Circuit to reconsider, but this Court will follow the Seventh Circuit's instructions that Do-Not-Call registries do not violate the First Amendment. See also, Patriotic Veterans, Inc. v. Zoeller, 845 F.3d 303, 306 (7th Cir. 2017) (Registry has been "sustained against constitutional challenge.") (citing Mainstream Marketing Services, Inc. v. FTC, 358 F.3d 1228 (10th Cir. 2004)).

Dish argues that the Seventh Circuit did not consider the gist of Dish's First Amendment as-applied challenge. Dish argues that its First Amendment rights were violated because "the Registry was not effectively cleaned." Dish Conclusions of Law, at 46 ¶ 189. The FTC Improvements Act of 2007 directed the FTC to check national databases and remove numbers from the Registry that have been disconnected and reassigned:

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

15 U.S.C. § 6155. Dish argues that the FTC's subcontractor PossibleNOW is not removing from the Registry disconnected and reassigned wireless numbers because the national databases do not include directory information about wireless numbers. Furthermore, Dish argues that the national databases do not include directory information for 25 percent or more of the VoIP telephone lines. As a result, PossibleNOW is not removing from the

Registry many disconnected and reassigned VoIP telephone numbers.

Dish argues that, "the Registry and its implementing regulations are not narrowly tailored because the Registry was not properly cleaned of numbers that DISH and other commercial entities had a right to contact." Dish Conclusions of Law, at 46 ¶ 190. Dish concludes that "the Registry is overbroad." Id. ¶ 191.

The Court still concludes that the Seventh Circuit's decision in National Coalition of Prayer and is controlling even in the face of Dish's new argument. The Seventh Circuit found that Do-Not-Call registries are constitutional. The Seventh Circuit specifically noted in Patriotic Veterans that the Tenth Circuit found that the Registry was constitutional. The Court will follow the Seventh Circuit.

Moreover, even assuming that National Coalition of Prayer and Patriotic Veterans were not controlling, Dish failed to demonstrate a violation of the First Amendment as applied to Dish. Dish must show that the Registry was unconstitutionally applied to Dish to prevail in an as-applied challenge. See e.g., United States v. Phillips, 645 F.3d 859, 863 (7th Cir. 2011). Dish did not present any evidence that any call at issue was made to a telephone number that was improperly on the Registry at the time of the call. As a result, Dish's as-applied First Amendment argument fails for a lack of evidence even if National Coalition of Prayer and Patriotic Veterans were not controlling. The statutes and regulations establishing and implementing the Registry do not violate the First Amendment, and the FTC's maintenance of the Registry did not violate Dish's First Amendment rights to commercial speech.

2. Registry Calls by Dish

To establish the first claim in Count I, the United States must prove that Dish initiated outbound telemarketing Registry Calls. To establish the second claim in Count I, the United States must prove the additional element that Dish caused a telemarketer to initiate outbound Registry Calls. Dish agrees that it is responsible for the actions of its Telemarketing Vendors eCreek and EPLDT, but denies that Dish caused the actions of any Retailer.

The Court determined at summary judgment that the undisputed facts established that Dish and its Telemarketing Vendors made 1,707,713 illegal Registry Calls reflected in the 2007-2010 Calling Records. Opinion 445, at 231-32, 75 F.Supp.3d at 1032. At trial, the United States presented evidence to prove Dish's liability for additional calls made by Dish and its Telemarketing Vendors. The United States sought to prove liability for Registry Calls recorded in the 2003-2007 Calling Records, and additional calls recorded in the 2007-2010 Calling Records.

a. The 2003-2007 Calling Records

The Plaintiffs presented evidence at trial that Dish made millions of calls to persons whose telephone numbers were on the Registry from October 2003 to September 2007. The 2003-2007 Calling Records contain 501,513,302 telemarketing call records, and 94,804,008 of the telemarketing calls reflected in those records were made to persons whose numbers were on the Registry for at least 31 days at the times of the calls. The statute of limitations for the United States' claims is five years. The case was filed on March 25, 2009, so the statute extends back to March 25, 2004. Opinion 445, at 153. Of the 94,804,008 call records, 90,033,575 of the records show telemarketing calls were made to persons whose numbers were on the Registry within the five-year statute.

Dish argues that the 2003-2007 Calling Records do not accurately indicate the total number of calls because the 2003-2007 Calling Records contain duplicate records of the same calls. The

Court agrees. The June 2005 InterImage Hits Files contained duplicate records of the same call to the same number on the same day at the same time. T 615: 542 (L. Steele); PX 772, June 2005 Hits File.

The June 2005 Hits File showed duplicates because that particular Hits File showed the date and times of the calls. Most of the InterImage Hits Files included the dates of the calls, but did not include the times. The InterImage Hits Files contained many instances of multiple calls to the same number on the same date. See e.g., PX 792, February 2006 Hits File; PX 793, March-April 2006 Hits List; PX 794, May 2006 Hits List; PX 799, December 2006 Hits Files. The multiple call records on the same day in the InterImage Hits Files could indicate several calls on the same day to the same number or duplicate records of the same call. The 2003-2007 Calling Records contained the dates and the times of the calls. The United States did not direct Dr. Yoeli to compare the InterImage Hits Files with the 2003-2007 Calling Records to identify hits that were duplicate records of the same call. Instead, Dr. Yoeli treated multiple hits to the same number on the same day as one violation, or one call. The Court finds that Dr. Yoeli's assumption meets the

United States' burden of proof. The assumption probably undercounts the number of violations, but the calls counted under this assumption are more likely than not Registry Calls.

Dr. Yoeli, however, did not opine on the number of calls in the InterImage Hits Files when counted under the assumption that all hits on one day to the same number were one violation. Dr. Yoeli opined on the number of calls that were both hits in the InterImage His files and hits on Dish's internal do-not-call lists. Dr. Yoeli opined that there were 3,022,355 such calls on both the Registry and Dish's Internal Do-Not-Call Lists. Dr. Yoeli opined that 2,919,321 of those calls occurred within the statute of limitations after March 25, 2004. PX 38, Yoeli Declaration, Appendix D, Yoeli October 14, 2013 Report, Appendix A, at PX 0038-125. Dr. Yoeli was not offering any opinions at trial regarding the 2003-2007 Calling Records. T 614: 376-77 (Yoeli). The United States relied on the InterImage analysis, and the Plaintiff States relied on Taylor's analysis, discussed below. 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).

Taylor opined that from March 2004 to August 2007 Dish made 3,632,468 calls were made to persons whose numbers were on the Registry after disregarding his opinions that had no probative value. Taylor worked from a slightly different call set than the 2003-2007 Call Records produced in response to the FTC Demand. Taylor also did not identify the number of calls after March 25, 2004, to persons on the Registry.

Dish did not present any evidence to show that it had an Established Business Relationship with any of the call recipients from October 2003 to September 2007. The Established Business Relationship exception is an affirmative defense, and Dish has the burden of proof on this issue. Opinion 445, at 162-63.

The Court concludes that it is more likely than not that from March 25, 2004 to August 31, 2007, Dish made millions illegal Registry Calls in violation of the TSR, but the United States failed to prove the number of calls with sufficient certainty to impose an civil penalties for specific calls. Dish did not prove that it had an

Established Business Relationship with the recipients of any of these calls.

b. The 2007-2010 Calling Records

The 2007-2010 Calling Records show that, in addition to the 1,707,713 illegal calls determined at summary judgment, Dish made an additional 1,433,207 illegal Registry Calls in violation of the TSR. Dr. Yoeli opined that the Yoeli July 2012 Call Set of 3,342,415 calls in the 2007-2010 Calling Records were Registry Calls to persons who did not have an Established Business Relationship with Dish. The Court entered summary judgment on 1,707,713 calls made by Dish and its Telemarketing Vendors from September 2007 to March 2010. The United States stipulated that the maximum number of additional violations in Count I for this time period was 1,634,702. The stipulated number of 1,634,702 calls was the remaining calls after subtracting the 1,707,713 calls from the Yoeli July 2012 Call Set of 3,342,415 calls.

The United States conceded that 96,100 of the 1,634,702 calls were made to persons who activated service with Dish within 18 months of the dates of the calls. As such, Dish had an Established

Business Relationship with these call recipients. These calls were not violations.

Dr. Yoeli opined that the remaining 1,538,602 calls were all telemarketing calls made to persons whose numbers were on the Registry. Dish presented evidence that 105,395 of the 1,538,602 calls were non-telemarketing calls. The calling campaign codes or the disposition codes showed that these calls were calls to businesses, collection calls, scheduling calls, or informational calls. In light of this evidence, the United States failed to prove that the 105,395 calls were telemarketing calls.

Dr. Yoeli opined that the remaining 1,433,207 were all telemarketing calls made to persons whose numbers were on the Registry. Dish presented no evidence to contradict Dr. Yoeli's opinion with respect to these calls. Therefore, the 1,433,207 calls were illegal Registry Calls in violation of the TSR.

Dish attempted to prove that 1,265,359 of these calls were made to persons who had an Established Business Relationship with Dish. Dish failed to meet its burden on this defense. Taylor opined that Dish had a Transaction-based Established Business Relationship with these calls recipients because the calls were on current customer calling campaigns or because Dish had no disconnect date. These factors are not reliable evidence of a Transaction-based Established Business Relationship for the reasons stated in the Findings of Fact. Dish had the burden to prove the Established Business Relationship exception. Opinion 445, at 162-63. Dish did not meet its burden of proof. The United States proved that the 1,433,207 calls violated the TSR as calls to persons whose numbers were on the Registry at the time of the calls. Dish is liable for making these illegal Registry Calls.

The United States presented evidence that Dish made an additional 2,386,386 illegal calls to numbers in the 2007-2010 Calling Records because the call recipients' telephone numbers were also on the Internal Do-Not-Call Lists of Dish, its Telemarketing Vendors, or one of its Order Entry Retailers. A seller or telemarketer may not call a person who has stated that he did not wish to be called even if the seller or telemarketer has an Established Business Relationship with the person. TSR 16 C.F.R. §§ 310.4(iii)(A) and (B). The 2,386,386 calls are also included in Count II because the calls violated both the probation against Registry Calls and Internal List Calls. See Lary v. Trinity Physician

Financial & Insurance Services, 780 F.3d 1101, 1105 (11th Cir. 2015) (A single action can constitute two separate violations if the action violates more than one part of a regulation (in Lary, the TCPA)).

Dish is liable for a total of 5,527,306 telemarketing calls (1,707,713 plus 1,433,207 plus 2,386,386) to persons whose numbers were on the Registry at the times of the calls in violation of the TSR from September 1, 2007 to March 12, 2010. The 2,386,386 calls also are included in Count II totals below. The court in its equitable discretion, will not impose a double recovery of civil penalties for violation of the TSR in Counts I and II for the 2,386,386 calls.

3. Registry Calls by Order Entry Retailers

The United States must show that the Order Entry Retailers made telemarketing Registry Calls and that Dish caused the Order Entry Retailers to make those calls. To prove the latter element, the United States must show that (1) Dish retained the Order Entry Retailers, (2) Dish authorized the Order Entry Retailers to market Dish products and services, and (3) the Order Entry Retailers violated the TSR by initiating Dish telemarketing calls to numbers on the Registry. Opinion 445, at 176; see Opinion entered November 4, 2009 (Opinion 20), at 15, United States v. Dish Network, LLC, 667 F.Supp.2d 952, 959-60 (C.D. Ill. 2009) (Scott, J., retired).

The Court found at summary judgment that the undisputed evidence showed that Dish was liable for causing JSR to make 2,349,031 Registry Calls, and for causing Satellite Systems to make 381,811 Registry Calls. Opinion 445, at 176, 232.

The Court finds that Dish caused JSR to make 3,315,242 additional Registry Calls in violation of the TSR. Taylor's analysis of the call records show that JSR made these calls from January 2007 through March 2007. The evidence shows that JSR made these calls as an Order Entry Retailer until Dish terminated JSR on February 14, 2007. Thereafter JSR made these calls as an affiliate of another Order Entry Retailer. Goodale testified that JSR continued to operate after February 14, 2007 by using the login of another Order Entry Retailer. Goodale did not identify the other Order Entry Retailer. T 622:1893-94 (Goodale). Regardless, Dish caused the Order Entry Retailer through which JSR worked to make telemarketing calls for Dish. The Order Entry Retailer authorized JSR to market Dish Network programming. The call records show that JSR made the calls. Goodale testified that the calls were made to market Dish Network programming. The Court finds that Dish thereby caused JSR to make the calls after February 14, 2007 for purposes of the TSR. Dish is liable for causing JSR to make a total of 5,664,273 (2,349,031 plus 3,315,242) Registry Calls in violation of the TSR.

The United States claims that Dish is liable for causing Order Entry Retailer Dish Nation to make the same 5,664,273 calls that Dish caused JSR to make. However, the United States failed to show that Dish Nation caused all of these calls. The evidence shows that JSR worked through Dish Nation before August 10, 2006, when JSR became an Order Entry Retailer. PX 239, September 2006 Spreadsheet. The fact that JSR worked through Dish Nation before becoming an Order Entry Retailer in August 2006 does not prove that JSR worked through Dish Nation thereafter. Dish terminated JSR on February 14, 2007. Goodale did not identify the Order Entry Retailer through which JSR worked after February 14, 2007, and no other evidence identifies the Order Entry Retailer that JSR worked through at that time. Yet, the

United States has established Dish caused Dish Nation to make illegal Registry Calls through JSR in July through August 10, 2006. The United States, nonetheless, did not present evidence of the number of illegal Registry Calls that Dish Nation and JSR made before August 10, 2006.

4. Summary

In summary, Dish is liable for the following violations of the TSR in Count I:

2003-2007:	Millions of calls, but specific number was unproven
September 1, 2007, to March 12, 2010	5,527,306 calls
JSR calls caused by Dish	5,664,273 calls
Satellite System Calls caused by Dish	381,811 calls
Total	11,573,390 calls

As noted above, the Court, in its discretion, will not impose a double penalty under the TSR in Counts I and II for 2,386,386 of the calls that are subject to liability in both Counts.

B. Count II

The United States alleges in Count II:

> In numerous instances, in connection with telemarketing, DISH Network has engaged in or caused other telemarketers to engage in initiating an outbound telephone call to a person who has previously stated that he or she does not wish to receive such a call made by or on behalf of DISH Network, in violation of the TSR, 16 C.F.R § 310.4(b)(1)(iii)(A).

Third Amended Complaint, ¶ 67. Count II also contains two parts: (1) Dish initiated outbound Internal List Calls to a person who previously stated that he or she does not wish to receive calls made by or on behalf of Dish; and (2) Dish caused Order Entry Retailers to initiate outbound Internal List calls to persons who previously stated that they did not wish to receive calls made by or on behalf of Dish.

1. Dish Internal Calls

To establish the first claim in Count II, the United States must prove that Dish initiated outbound telemarketing telephone calls to persons who previously stated that they did not wish to be called by or on behalf of Dish. To establish the second claim in Count II, United States must prove that Dish caused an Order Entry Retailer to initiate an outbound telemarketing telephone call to persons who previously stated that they did not wish to be called by or on behalf of Dish. Dish again agrees that it is responsible for the actions of its Telemarketing Vendors eCreek and EPLDT.

The undisputed evidence at summary judgment showed that Dish made 903,246 Internal List Calls to persons who told Dish or its Telemarketing Vendors that they did not wish to be called by or on behalf of Dish. The Court further found that the undisputed evidence showed that Dish was liable for 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 232.

The United States seeks to prove that Dish is liable for 7,321,163 additional Internal List Calls that Dish made to persons who told one or more Order Entry Retailers that they did not wish to be called by or on behalf of Dish. The Court found at summary judgment that the United States needed to show that Dish had an agency relationship with the Order Entry Retailers in order to establish liability for these calls. The Court found that issues of fact remained on this issue. Opinion 445, at 181-84.

The United States asks for reconsideration of the Court's determination that the United States must show an agency relationship with the Order Entry Retailers in this Count. The Court denies that request. The TSR states that the seller is liable for a call made to a person when, "[t]hat person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered . . . ." 16 C.F.R. § 310.4(b)(1)(iii)(A). The TSR does not define to whom the statement must be made. The FTC, however, stated that a do-not-call request was "company-specific" and that the FTC intended § 310.4(b)(1)(iii)(A) to track the approach of the FCC Rule. Opinion 445, at 182 (citing Notice of Proposed Rule Making, Amendments to the Telemarketing Sales Rule, 67 Fed. Reg. 4492, 4516 (January 30, 2002)). The FCC held that the similar "on behalf of" language in the FCC Rule required finding an agency relationship. FCC May 9, 2013 Order, 28 FCC Rcd. at 6574. This Court found that this interpretation should apply here given the FTC's explanation in the 2002 Notice of Proposed Rulemaking. Opinion 445, at 183.

The Court further noted at summary judgment that the United States relied on an FCC interpretation of the "on behalf of" language to support its interpretation of § 310.4(b)(1)(iii)(A). Opinion 445, at

183-84; see Plaintiffs' Motion for Summary Judgment (d/e 341), at 91-92(citing Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,156 (July 25, 2003) (2003 FCC Statement); Plaintiffs' Opposition to Defendant's Motion for Summary Judgment (d/e 378), at 196-97 (citing 2003 FCC Statement); Plaintiffs' Reply in Support of Their Motion for Summary Judgment (d/e 389), at 61 (citing 2003 FCC Statement).

The United States no longer relies on the 2003 FCC Statement, but it now asserts a new interpretation of § 310.4(b)(1)(iii)(A) based on complaints filed in four cases, including this one. United States Proposed Conclusions of Law (d/e 668), at 14-16. The United States argues that this interpretation is entitled to deference under Auer v. Robbins, 519 U.S. 452 (1997). The United States made this change in position for purposes of litigation. As such, the interpretation is not entitled to deference. Christopher v. SmithKline Beecham Corp., 567 U.S.142, 132 S.Ct. 2156, 2166-67 (2012). The January 30, 2002 FTC statement that do-not-call requests are company-specific and that the interpretation of this section should track the FCC approach is a far more accurate representation of the FTC interpretation of this section. The Court will not reconsider its interpretation of §310.4(b)(iii)(A).

The United States has proven that Dish had an agency relationship with the Order Entry Retailers to telemarket Dish Network programming. The Court discussed agency principles in the summary judgment opinion. See Opinion 445, at 185-91. As this Court noted, "Federal law, Illinois law, and the Restatement all agree on general agency legal principles. NECA-IBEW Rockford Local Union 364 Health and Welfare Fund v. A & A Drug Co., 736 F.3d 1054, 1058 (7th Cir. 2013)." Opinion 445, at 185.

This Court set forth the applicable legal principles of express agency:

> The Restatement defines agency as follows:
>
> Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.
>
> Restatement (Third) of Agency, § 1.01 (2006). The Restatement definition contains two key aspects: (1) the principal and agent agree that the agent acts for the principal; and (2) the agent is subject to the control of the principal. See also In re Aquilar, 511 B.R. 507, 513 (Bankr. N.D. Ill. 2014). The principal need only have the

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> right to control the agent; the agency exists even if the principal does not exercise that right. See Schutz v. Arrow Fin. Servs., LLC, 465 F.Supp.2d 872, 877 (N.D. Ill. 2006). The determination of whether an agency exists is a factual issue. See Spitz v. Proven Winners of North America LLC, 759 F.3d 724 (7th Cir. 2014); Chemtool, Inc. v. Lubrication Technologies, Inc., 148 F.3d 742, 746 (7th Cir. 1998).

Opinion 445, at 185-86. Both written agreements and the actual practices of the parties are relevant to determine whether an agency exists. See M&J Partners Restaurant Ltd. Partnership v. Zadikoff, 10 F.Supp.2d 922, 932 (N.D. Ill. 1998).

In this case, Dish and the Order Entry Retailers agreed that the Order Entry Retailers would act for Dish to market Dish Network programming nationwide. The standard Retailer Agreement authorized Order Entry Retailers to market Dish Network programming and present offers to purchase to Dish for Dish's approval. PX 152, Retailer Agreement §§ 3.1, 3.2, 7.2. The Order Entry Retailers marketed Dish Network programming and submitted customer offers to purchase on the Order Entry Tool, and Dish reviewed and decided whether to approve the sale. The Order Entry Retailers used Dish's logo with the added phrase "authorized dealer." Dish and Order Entry Retailers agreed that the

Order Entry Retailers acted for Dish to market Dish Network programming.

Dish also retained extensive authority to control the marketing of its programming and services by Order Entry Retailers. Section 7.3 of the Retailer Agreement gave Dish the authority to control all aspects of marketing of Dish Network programming.

Dish began exerting that control in 2008 and 2009. Dish required Order Entry Retailers to provide their Internal Do-Not-Call Lists to PossibleNOW to be included in a combined Order Entry Retailer Internal Do-Not-Call List. Dish also required certain Order Entry Retailers to use PossibleNOW's scrubbing services. In later part of 2008 and the first part of 2009, Dish fired 40 Retailers for fraud and making misrepresentations to customers. In 2009, Dish fired over half of the Order Entry Retailers for fraud and high churn and required the rest to comply with the more extensive Quality Assurance program or be terminated. Dish's Compliance Manager Musso stated that the Quality Assurance program was authorized by § 7.3 of the Retailer Agreement. PX 553, Email thread between Musso and Sales Manager Mason dated October 25, 2011.

Thereafter, Dish increased the monitoring and control of Order Entry telemarketing. Field Representatives and Account Managers visited Order Entry Retailers on a weekly basis and monitored telemarketing calls. Dish scored Order Entry Retailer telemarketing calls on 45 criteria. The criteria included "right sizing" questions to determine the Dish Network programming that they were to offer the customer. Dish Field Representatives, Account Managers, and Sales Managers required Order Entry Retailers to change their telemarketing practices to increase the Order Entry Retailers' scores for the Quality Assurance program.

Sales Managers on occasion: (1) coached Order Entry Retailers on how to increase scores, (2) changed Order Entry Retailer sales procedures, (3) revised sales scripts, and (3) prescribed the work flow of an Order Entry Retailers that did not use a formal telemarketing script. Sales Managers could discipline Order Entry Retailers that did not comply. Sales Managers could withhold Dish programming offers and could restrict access to the Order Entry Tool.

Finally, Dish Sales Managers had the authority to use the "absolute power" clause. That is, Dish Sales Managers had the authority to tell Order Entry Retailers what to do simply, “because I said so.” PX 553, Email thread between Musso and Sales Manager Mason dated October 25, 2011; T. 620: 1289 (Musso). The Court concludes under all the evidence that Dish had the authority to exert control over the marketing of Dish Network programming conducted by Order Entry Retailers. The Court concludes that Dish had an agency relationship with the Order Entry Retailers with respect to marketing Dish Network programming.

Dish argues that Dish did not control marketing methods by Order Entry Retailers because Order Entry Retailers wrote their own scripts and secured their own leads. The evidence shows, however, that Dish representatives revised scripts and required Order Entry Retailers to follow the revisions. Dish also on rare occasions provided scripts and also provided lead lists to Order Entry Retailers. This evidence shows that Dish had the authority to provide leads and to provide scripts. The fact that Dish may rarely have exercised these indicia of authority to control does not matter. The issue for purposes of agency analysis is the existence of the authority, not the actual use of the authority. Schultz v. Arrow

Financial Services, LLC, 465 F.Supp.2d 465, 477 (N.D. Ill. 2006) (citing Restatement (Third) of Agency § 1.01 comment c).

Dish argues that § 7.3 of the Retailer Agreement did not give Dish the authority to control the Order Entry Retailers' marketing of Dish Network programming. The Court disagrees. Section 7.3 states that Order Entry Retailers "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." Musso cited § 7.3 as authority for the Quality Assurance program. Dish exerted extensive control over Order Entry Retailers through the Quality Assurance program. The plain language of § 7.3 and the Dish's actions beginning in September 2006 and especially after 2008 show that Dish had extensive authority to control the Order Entry Retailers' marketing of Dish Network programming. The after-the-fact, self-serving testimony by several Dish witnesses to the contrary is not credible and does not disprove the actual control exerted by Dish.

Dish also argues that Order Entry Retailers were completely separate companies and as such were independent contractors.

Dish cites § 11 of the Retailer Agreement that stated that Order Entry Retailers were independent contractors. Dish also relies on numerous statements by Dish employee witnesses and principles of Order Entry Retailers such as Goodale and Myers to show that Order Entry Retailers ran their own businesses independently from Dish.

The Court agrees that the Order Entry Retailers were separate, independent companies. An independent company, however, can be an agent with respect to work performed for a principal. See Bridgeview Health Care Center, Ltd. v. Clark, 816 F.3d 935, 938-39 (7th Cir. 2016); Lawlor v. North American Corp. of Illinois, 2012 IL. 112530, ¶43, 983 N.E.2d 414, 427 (Ill. 2012). Telemarketing Vendor eCreek was a separate independent business, yet Dish concedes that eCreek was its agent for telemarketing. Dish's authorization to Order Entry Retailers to sell Dish Network programming and Dish's authority to control the marketing of Dish Network programming by Order Entry Retailers are the relevant questions. Dish authorized Order Entry Retailers to market Dish Network programming nationwide. Dish had the authority to control the Order Entry Retailers' marketing of Dish Network programming. The Order Entry Retailers were marketing agents of Dish. Dish, therefore, was obligated to honor the Do-Not-Call requests made to Order Entry Retailers, just as it was obligated to honor such requests made to Dish's telemarketing agent eCreek.

Dish argues that even if the Order Entry Retailers were marketing agents, their illegal telemarketing practices were not within the scope of their authority. The Court again disagrees. The concept of scope of authority is broad. An agent has authority to act to further the principal's objectives, "as the agent reasonably understands the principal's manifestations and objectives." Restatement (Third) of Agency, § 2.02(1). The principal is liable for the acts of the agent to further the principal's purposes unless the agent acts entirely for the agent's benefit only. Hartmann v. Prudential Insurance Co. of America, 9 F.3d 1207, 1210 (7th Cir. 1993). The Order Entry Retailers marketed Dish Network programming. They acted at least partially for Dish's benefit. They did not act entirely for their own benefit.

Dish cites Bridgeview Care Center for the proposition that Dish is not liable for unauthorized marketing activities. In Bridgeview Care Center, a hearing aid company authorized a telemarketer to send 100 faxed advertisements within a 20 mile radius of Terre Haute, Indiana. The telemarketer sent almost 5,000 faxed advertisements across Indiana, Illinois, and Ohio. The Seventh Circuit determined that the hearing aid company was liable under the TCPA for the 100 faxes it authorized, but not the others. Bridgeview Care Center, 816 F.3d at 937, 939. In this case, Dish authorized the Order Entry Retailers to market Dish Network programming nationally through outbound telemarketing. The telemarketing was done to benefit Dish. The acts were within the scope of authority.

Dish argues that it could not have honored the Order Entry Retailers' Internal Do-Not-Call Lists because it did not have the lists until 2008 when it began requiring certain Order Entry Retailers to give their Internal Do-Not-Call Lists to PossibleNOW. This argument proves too much. If Dish had the authority to require Order Entry Retailers to give Dish access to their Internal Do-Not-Call Lists in 2008, then Dish had the authority to secure access to the Lists in 2003 and 2004 when the Order Entry program began. Dish should have done so. Dish's failure to secure the Internal Do-Not-Call Lists before 2008 does not absolve Dish from responsibility. The Court finds that Dish is liable for 7,321,163 illegal Internal List Calls made to persons who told Order Entry Retailers that they did not wish to receive telemarketing calls on behalf of Dish.

Dish's expert Taylor testified that the set of 7,321,163 Internal List calls overlapped with the 903,246 Internal List calls for which the Court found Dish liable at summary judgment. Taylor provided no explanation of the evidentiary basis of this comment regarding a claimed overlap. Further, Dish does not point to any portion of any of Taylor's reports that mentioned or discussed this claimed overlap. As such, Taylor's comment on the stand about an overlap is unexplained and unsupported by the evidence. The statement has no probative value. Dish is liable for both the 7,321,163 Internal List Calls and the 903,246 Internal List Calls found at summary judgment.

2. <u>Order Entry Retailer Internal List Calls</u>

a. <u>Internal List Calls By JSR to Persons Who Stated to Dish or a Telemarketing Vendor that They Did Not Wish to be Called by or on Behalf of Dish</u>

From August 2006 through December 2006, JSR made 418,228 Internal List Calls to persons who stated to Dish or the Telemarketing Vendors that they did not wish to receive telemarketing calls by or on behalf of Dish. From January through March 2007, JSR made 768,696 Internal List Calls to persons who stated to Dish or the Telemarketing Vendors that they did not wish to receive telemarketing calls by or on behalf of Dish. The United States proved that Dish caused these calls to be made. JSR made the calls before August 10, 2006, through Order Entry Retailer Dish Nation. JSR made the calls as an Order Entry Retailer from August 10, 2006, until Dish terminated JSR on February 14, 2007. Thereafter, JSR made the calls through another Order Entry Retailer authorized by Dish to market Dish Network programming.

JSR made some of these calls as an agent of Dish. JSR was an agent of Dish as an Order Entry Retailer from August 10, 2006, until Dish terminated JSR on February 14, 2007. Prior to August 10, 2006, JSR made the calls through Dish Nation. JSR acted as a subagent of a Dish Order Entry Retailer when it made the calls prior to August 10, 2006. Dish can be held liable for the acts of a subagent. See Lawlor, 983 N.E.2d at 427-28.

However, Dish disputes that JSR was a subagent of Dish. The Retailer Agreement, § 7.2, did not allow Order Entry Retailers to use third party affiliates or subagents without Dish's prior approval. Dish personnel, however, knew that JSR worked through Dish Nation before becoming an Order Entry Retailer. Dish was also aware that Dish Nation used third-party affiliates. Dish personnel referred to "Dish Nation's affiliate program" and to JSR working under "Dish Nation's umbrella." PX 239, September 2006 Spreadsheet. Under these facts, Dish Nation reasonably believed that it had Dish's permission to use third party affiliates as subagents despite the language in § 7.2 of the Retailer Agreement. "An agent has actual authority to create a relationship of subagency when the agent reasonably believes, based on a manifestation from the principal, that the principal consents to the appointment of the subagent." Restatement (Third) of Agency, § 3.15(2). The Court finds that Dish Nation had actual authority to retain JSR as a subagent prior to August 10, 2006. Dish is therefore liable for 418,228 Internal List Calls that JSR made from August through December 2006 to persons who stated to Dish or a Telemarketing

Vendor that they did not wish to receive telemarketing calls by or on behalf of Dish.

The evidence does not establish that Dish allowed JSR to work as subagent from February 14, 2007 through March 2007. Dish terminated JSR on February 14, 2007. JSR thereafter worked for an unidentified Order Entry Retailer into March 2007. By February 2007, Dish began taking steps to discourage Order Entry Retailers' use of third-party affiliates. In October 2006, Dish surveyed the 11 biggest Order Entry Retailers to see how many used affiliates. In November and December 2006, Dish told JSR to stop using affiliates in the Philippines. At some point, Musso started requiring Order Entry Retailer to secure prior approval before hiring affiliates. In light of this evidence, it is not clear that, in 2007, Dish generally allowed Order Entry Retailers to use affiliates without prior authorization. As such, it is not clear that Dish authorized the unidentified Order Entry Retailer to use JSR as a subagent after February 14, 2007. The United States has failed to prove that JSR worked as a subagent of Dish after February 14, 2007. The United States has also failed to prove how many of the 768,696 Internal List Calls in 2007 were made before Dish terminated JSR on

February 14, 2007. While Dish is liable for causing JSR to make hundreds of thousands of Internal List Calls in 2007, the number of such calls has not been proven.

b. Internal List Calls By JSR to People Who Stated to other Order Entry Retailers that They Did Not Wish to be Called by or on Behalf of Dish

Dish is liable for calls made by Dish or its agents to persons who previously told Dish or its agents that they did not wish to receive such calls. Opinion 445, at 183. From August 2006 through December 2006, JSR made 267,439 Internal List Calls to persons who previously told another Dish Order Entry Retailer that they did not wish to receive such calls. JSR was an agent or subagent of Dish during this time period, and the other Order Entry Retailers were also agents of Dish. Dish is liable for these illegal Internal List Calls. From January through March 2007, JSR made 526,956 Internal List Calls to persons who previously told another Dish Order Entry Retailer that they did not wish to receive such calls. The United States did not prove the number of these calls that were made from January through February 14, 2007, when the United States proved that JSR acted as Dish's agent or subagent.

As such, the United States proved that Dish caused JSR to make hundreds of thousands of Internal List Calls in 2007 to persons who previously told another Dish Order Entry Retailer that they did not wish to receive such calls, but the United States did not prove the specific number of violations.

c. Calls by Satellite Systems

In 2010 and 2011, Satellite Systems made 22,946 Internal List Calls to persons who previously told Dish that they did not wish to receive such calls. Satellite Systems was Dish's agent for purposes of marketing Dish Network programming at the time. Dish is liable for causing Satellite Systems to make these calls in violation of the TSR.

In 2010 and 2011, Satellite Systems made 42,990 Internal List Calls to persons who previously told an Order Entry Retailer that they did not wish to receive such calls. Satellite Systems and the other Order Entry Retailers were Dish's agents for purposes of marketing Dish Network programming at the time. Dish is liable for causing Satellite Systems to make these calls in violation of the TSR.

3. Summary

In summary, Dish is liable for Dish is liable for the following violations of the TSR in Count II:

Dish Calls on Dish Internal List	903,246 calls
Dish Calls on eCreek DNC List	140,349 calls
Dish Calls on Order Entry Lists	7,321,163 calls
JSR 2006 Calls on Dish Internal List	418,228 calls
JSR 2006 Calls on Order Entry Lists	267,439 calls
Satellite Systems Calls on Dish Internal List	22,946 calls
Satellite Systems Calls on Order Entry Lists	42,990 calls
Total	9,116,361 calls

Dish is also liable for a portion of the 1,295,652 (768,696 plus 526,956) Internal List calls that JSR made in 2007, but the Plaintiffs did not prove the number of those calls made before February 14, 2007, while JSR was an agent of Dish. In addition, the Court, in its discretion, will not impose a double penalty under the TSR in Counts I and II for the 2,386,386 calls that are subject to liability in both Counts. The total violations are so large and the amount of the potential civil penalty is so high that the Court finds that one penalty for each call is sufficient in this case.

C. Count III

Count III alleges:

> In numerous instances, in connection with telemarketing, Defendant DISH Network has abandoned or caused telemarketers to abandon an outbound telephone call by failing to connect the call to a sales representative within two (2) seconds of the completed greeting of the person answering the call, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iv).

Third Amended Complaint, ¶ 68. Count III contains two claims: (1) Dish abandoned outbound telemarketing telephone calls; and (2) Dish caused Order Entry Retailers to abandon outbound telemarketing telephone calls. In both cases, the abandonment occurred because Dish or the telemarketer made Abandoned Prerecorded Calls. The calls became abandoned because Dish or the telemarketer failed to connect the Prerecorded Call to a sales representative within two seconds of the completed greeting by the recipient of the call.

1. Calls Abandoned by Dish

The Court found at summary judgment that Dish was liable for making 98,054 Abandoned Prerecorded Calls in violation of the TSR. Opinion 445, at 193-94. The United States did not seek to prove that Dish made any additional abandoned telemarketing calls at trial.

2. Calls Abandoned by Order Entry Retailers

The Court found at summary judgment that Dish was liable for causing: (1) Star Satellite to make 43,100,876 Abandoned Prerecorded Calls in violation of the TSR; (2) Dish TV Now to make 6,637,196 Abandoned Prerecorded Calls in violation of the TSR; and (3) American Satellite for making one Abandoned Prerecorded Call in violation of the TSR. Opinion 445, at 193-95.

The United States has also proven that JSR initiated 12,853,478 Prerecorded Calls. These calls only became abandoned calls in violation of the TSR if a person answered and was not connected to a live representative within two seconds of answering. 16 C.F.R. § 310.4(b)(1)(iv). Goodale estimated that 4 out of 10 calls were answered. Dexter estimated that a person answered 16 to 17 percent of Dish's telemarketing calls. Montano estimated that a person answered 30 percent of Dish's telemarketing calls. Taylor opined that 1 in 10 telemarketing calls are answered by individuals. Given all this evidence, the Court finds that it is more likely than not that at least 10 percent of JSR's prerecorded telemarketing calls were answered by individuals and became Abandoned Prerecorded Calls.

Dish caused JSR to make these Abandoned Prerecorded Calls for the same reasons Dish caused JSR to make the Registry Calls proven in Count I. The United States is not required to prove an agency relationship to establish liability for abandoned calls. The United States must only prove that Dish caused JSR to make the abandoned calls. TSR 16 C.F.R. § 310.4(b)(iv). Dish authorized Dish Nation to make calls and to use JSR to make calls before August 10, 2006. Dish authorized JSR to make calls from August 10, 2006 until February 14, 2007. Dish authorized the unidentified Order Entry Retailer to make calls and thereby to use JSR to make these abandoned calls from February 14, 2007, until JSR stopped operating in March 2007. The Court finds that Dish is liable for causing JSR to make 1,285,379 abandoned calls in violation of the TSR.

The United States argues that Goodale's estimate supports liability for 5,141,391 Abandoned Prerecorded Calls. However, the testimony from Montano, Dexter and Taylor, however, indicates that Goodale's estimate may overstate the number of completed calls.

Given the disagreement, the Court finds that the most conservative estimate meets the preponderance standard on this issue. All four witnesses agreed that at least 10 percent of the calls would have been answered. The Court, therefore, finds that Dish is liable for the conservative number of 1,285,379 Abandoned Prerecorded Calls.

The United States also seeks to prove that Dish caused Order Entry Retailer Dish Nation to make the same 1,285,379 abandoned calls that JSR made. The United States has proven that Order Entry Retailer Dish Nation acted with JSR to make the abandoned calls before August 10, 2006. JSR made calls through Dish Nation before JSR became an Order Entry Retailer. The United States failed to prove that JSR continued to work through Dish Nation after it became an Order Entry Retailer or after February 14, 2007, when Dish terminated JSR's Retailer Agreement. The United States has established that Dish caused Dish Nation to make many abandoned calls through JSR. The United States, however, has not proven the number of abandoned calls Dish caused Dish Nation to make through JSR before August 10, 2006.

The United States proved at summary judgment that Dish caused American Satellite to make one Abandoned Prerecorded Call. Opinion 445, at 194-95, 233. The United States also proved that Dish caused American Satellite to make many Abandoned Prerecorded Calls in violation of the TSR. The testimony of Manuel Castillo established this fact. He operated American Satellites' automatic dialer that made the Prerecorded Calls. Castillo also informed Dish personnel of American Satellite's practices. Dish's investigator was interested in American Satellite's practices that defrauded Dish, but he had little interest in Do-Not-Call Law violations. Dish is liable for causing American Satellite to make many prerecorded calls that were abandoned in violation of the TSR.

3. Summary

In summary, Dish is liable for the following abandoned calls in violation of the TSR:

Dish AM calls	98,054 calls
Star Satellite calls	43,100,876 calls
Dish TV Now calls	6,637,196 calls

American Satellite call	1 call
JSR calls	1,285,379 calls
Total	51,121,506 calls

In addition, Dish caused American Satellite to make more abandoned calls, but the number of such calls has not been proven. The 43,100,876 Star Satellite calls also are subject to liability under the TSR in Count IV. The Court, in its discretion, will not impose a double penalty under the TSR in Counts III and IV for these calls. The total violations are so large and the amount of the potential civil penalty is so high that the Court finds that one penalty for each call is sufficient in this case.

D. Count IV

Count IV alleges:

> Defendant DISH Network has provided substantial assistance or support to Star Satellite and/or Dish TV Now even though Defendant DISH Network knew or consciously avoided knowing Defendant Star Satellite and/or Dish TV Now abandoned outbound telephone calls in violation of § 310.4(b)(1)(iv) of the TSR. Defendant DISH Network, therefore, has violated 16 C.F.R. § 310.3(b).

Third Amended Complaint, ¶ 69. Section 310.3(b) of the TSR prohibits providing substantial assistance or support to telemarketers when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates the TSR.

To establish the claims in Count IV, the United States must prove "(1) that the [Order Entry Retailers] were violating the TSR; and (2) Dish knew or consciously avoided knowing that the [Order Entry Retailers] were violating the TSR, but still kept paying the Dealers to continue the violations." Opinion entered February 4, 2010 (d/e 32) (Opinion 32), at 9 n.1, 2010 WL 376774, at *3 (citing Opinion 20, at 20, 667 F.Supp.2d, at 961) (Scott, J. retired).

The Court entered partial summary judgment in favor of Dish on the United States' claim that Dish provided substantial assistance to Dish TV Now. Opinion 445, at 195-99. The claim against Dish for providing substantial assistance to Star Satellite remained for trial.

The United States has established that Star Satellite violated the TSR by making prerecorded calls that were answered and abandoned in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iv). The evidence also proves that it is more likely than not that Dish knew about Star Satellite's use of prerecorded calls, or consciously avoided knowing about such use, and kept paying Star Satellite to continue the violations.

Dish was repeatedly put on notice that Star Satellite was making prerecorded telemarketing calls. The most telling evidence is that Dish's Outbound Operations' Manager Bangert knew about Star Satellite's prerecorded calls. Bangert relayed the message through Dish employee Mark Duffy to the Retail Services Escalations Department. Jeff Medina of the Retail Services Escalations Department commented to Margot Williams of Retail Services Escalations, "Are these your boys again?" Retail Services Escalations did nothing. The activations kept coming, and Dish Sales Department employees kept meeting their quotas and getting their bonuses, and Dish kept paying Star Satellite to keep making prerecorded calls that were abandoned when answered. The Court finds that the United States has proven that Dish violated TSR § 310.3(b) by providing substantial assistance to Star Satellite even though Dish knew or consciously avoided knowing that Star Satellite was making abandoned telemarketing calls in violation of TSR § 310.4(b)(1)(iv).

Dish argues that Star Satellite hid its use of prerecorded calls from Dish. The evidence shows that Star Satellite's principal Myers tried to hide Star Satellite's use of prerecorded calls. Myer, however, believed that Dish knew about the use of prerecorded calls. The evidence also shows that Dish knew of the practice anyway and did nothing about it.

Dish argues that the United States improperly seeks to impose liability on Dish in Count IV for the same 43,100,876 calls for which the Court found Dish liable in Count III at summary judgment. The Court disagrees. Dish's actions violated both sections of the TSR, and the United States is entitled to bring claims under both sections. See Lary, 780 F.3d at 1105 (11^{th} Cir. 2015). The Court, in the exercise of its equitable authority, will limit the United States to one possible civil penalty award for each of these 43,100,876 abandoned calls under the circumstances of this case. Dish's double recovery argument, however, is not a defense to liability.

E. Dish's Liability for Civil Penalties to the United States

The United States asks the Court to impose civil penalties for Dish's violations of the TSR. Dish's violations of the TSR are treated as violations of a rule promulgated under the FTC Act regarding unfair or deceptive acts or practices. 15 U.S.C. § 6102(c)(1). A violation of such a rule promulgated under the FTC Act is considered an unfair or deceptive act or practice in violation of § 5 of the FTC Act. 15 U.S.C. §§ 45(a) and 57a(1)(B). The United States is entitled to seek civil penalties for violation of such a rule committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." FTC Act § 5(m)(1)(A), 15 U.S.C. § 45(m)(1)(A).

This Court previously stated, "A person also commits a knowing violation if, under the circumstances, a reasonable, prudent person would have known of the existence of the rule and that his or her acts or omissions violated the rule." Opinion 445, at 226 (citing United States v. National Financial Services, Inc., 98 F.3d 131, 139 (4th Cir. 1996) ("A defendant is responsible where a reasonable person under the circumstances would have known of the existence of the provision and that the action charged violated that provision."); and S. Conf. Rep. 93-1408, 93d Cong., 2d Sess., 7772 (1974)). The United States must show "'knowledge fairly implied on the basis of objective circumstances' that the conduct was prohibited." Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA, 559 U.S. 573, 584 (2010).

To establish actual knowledge or knowledge fairly implied, the United States must show that, "the defendant or its agent have some knowledge, actual or constructive, of the requirements of the [rule] such that it can be concluded that the defendant or its agent knew or should have known that his conduct was unlawful." United States v. ACB Sales & Service, Inc., 590 F. Supp. 561, 575 n.11 (D. Ariz. 1984); see FTC v. Bonnie & Co. Fashions, Inc., No. 90-4454, 1992 WL 314007, at *7 (D.N.J. 1992).

The maximum civil penalty is $11,000 for each violation before February 9, 2009, and $16,000 for each violation after that date. Federal Civil Penalties Inflation Adjustment Act, 28 U.S.C. § 2461 note, 74 Fed. Reg. 857-01 (January 9, 2009). The evidence that Dish acted with knowledge or knowledge fairly implied is specific to the particular calls at issue.

1. Count I

a. Registry Calls by Dish

i. Dish Direct Telemarketing

Dish personnel knew that the Registry and the TSR prohibited Registry Calls unless Dish had Established Business Relationships with the intended call recipients. Dish went to great lengths to prepare for the launch of the Registry. Dish developed a scrubbing process for Account Number Campaigns to limit Registry Calls.

Dish personnel also knew from as early as 2004 that Dish direct telemarketing was making illegal Registry Calls. Beginning in 2004, Dish received numerous consumer complaints about illegal Registry Calls. Dish conducted audits in 2007 and 2009 and found in three-month periods in 2005 and 2008, Dish made thousands of illegal Registry Calls. Dish personnel further knew that eCreek's scrubbing process did not work correctly sometimes. Dish, therefore, knew that Registry Calls were generally prohibited by the TSR and knew that its outbound telemarketing procedures resulted in Registry Calls in violation of the TSR.

In addition, Dish used ineffective methods to determine whether it had a Transaction-based Established Business

Relationship with current and former customers. Dish knew that the TSR provided that a Transaction-based Established Business Relationship existed if the call recipient purchased goods or services from Dish within the 18 months immediately preceding the date of the call. 16 C.F.R. § 310.2(o). Dish personnel did not follow the clear language of the TSR. Dish personnel did not check the dates that intended call recipients paid Dish for Dish Network programming to determine if Dish had Transaction-based Established Business Relationships. Dish personnel looked to lists of current customers and disconnect dates. According to Taylor's analysis of Dish's calling records from 2007-2010, Dish thereby made over 15 million illegal Registry Calls to persons who had not paid Dish for more than 18 months. Dish did not have Transaction-based Established Business Relationships with these individuals.

Dish is a sophisticated multi-billion dollar business operation. Dish personnel knew the TSR definition of an Established Business Relationship. The definition set the 18-month period from the date of the last purchase or financial transaction. Such an enterprise would have known to determine whether a call recipient purchased goods or services from it within the last 18 months by checking the last date a call recipient paid for goods or services. Dish, however, did not. An enterprise in Dish's position would have known that it was improperly calculating whether it had Transaction-based Established Business Relationships with current and former customers. Such an enterprise under the circumstances would have known that improperly determining the existence of Established Business Relationships would result in making illegal telemarketing calls to persons whose numbers were on the Registry. Dish, therefore, acted with knowledge fairly implied when it made these illegal calls.

Dish personnel also knew that Dish could not call persons on the Lead Tracking System if the telephone number was on the Registry. Dish had the burden to show that it had an Inquiry-based Established Business Relationship to avoid liability. Dish failed to meet its burden of proof. Dish failed to present competent evidence of how it formulated the Lead Tracking System calling campaigns.

Moreover, the scant evidence about the Lead Tracking System indicates that the Lead Tracking System included contact information for any persons who provided such information to Dish for almost any reason. PX117, Email thread regarding Dish Taking a DTV Sale dated August 11, 2004, at PX117-001, 005-006. The Lead Tracking System apparently included contact information for people who started to buy online but did not, and people who already received a telemarketing call but decided not to buy. Id. The TSR stated that an Inquiry-based Established Business Relationship is with individuals who inquired or applied for a product or service offered by the seller within three months of the date of the telemarketing call. 16 C.F.R. § 310.2(o). People who decided not to buy Dish Network programming did not inquire about Dish Network programming. Dish failed to meet its burden of proof for the Established Business Relationship exception for the Lead Tracking System calls. Dish is liable for civil penalties for making the Lead Tracking System Registry Calls.

Dish, therefore, made the millions of illegal Registry Calls from March 25, 2004 to September 2007, and 3,140,920 illegal Registry Calls recorded from September 2007 to March 2010 with knowledge or knowledge fairly implied that it was making calls in violation of the TSR. Dish made an additional 2,386,386 Registry Calls that were also illegal Internal List Calls. The Court will discuss liability for these calls in connection with Count II.

Dish presented numerous witnesses who testified that Dish acted in good faith and never intentionally made an illegal call. Dish's expert Kenneth Sponsler further opined that Dish met industry standards. Neither good faith nor compliance with industry standard is a defense. The issue is whether Dish knew the requirements of the TSR and knew or should have known that its outbound telemarketing practices resulted in illegal Registry Calls. The evidence shows that Dish knew the terms of the TSR and knew or should have known that their outbound calling procedures resulted in Registry Calls to persons who did not have Established Business Relationships with Dish. The fact that Dish employees acted in good faith when they knowingly made such calls or that industry standards would allow such illegal calls is not a defense.

The only applicable defense is the TSR safe harbor defense. Dish's expert Sponsler acknowledged as much in his testimony. See T 633:3451, 3507-08 (Sponsler). Dish did not comply with the TSR safe harbor provisions. Dish did not have written procedures to prevent calling persons whose numbers were on the Registry in

Account Number Campaigns. Dish did not maintain records to document the use of such a process. Dish further did not present competent material evidence concerning any procedures, written or unwritten, that Database Marketing may have used to ensure that the Lead Tracking System and Cold Call calling campaigns complied with the TSR. 16 C.F.R. § 310.4(b)(1)(iii); Opinion 445, at 163-65 75. Dish knew that some of its calls were illegally made to numbers on the Registry, and Dish did not comply with the safe harbor provisions to avoid liability for such calls. Dish made millions of Registry Calls in the 2003-2007 Calling Records from March 25, 2004 to August 2007, and 3,140,920 Registry Calls from September 2007 to March 2010 with knowledge or knowledge fairly implied that it was making calls in violation of the TSR. Dish is liable for civil penalties for these calls.

ii. Calls by Order Entry Retailers to Persons Whose Numbers Were on the Registry

Dish knew the TSR prohibited causing telemarketers to make Registry Calls, Internal List Calls, and abandoned calls. 16 C.F.R. §310.4(b)(1). Dish also had knowledge fairly implied under objective circumstances it could be held liable under the TSR for causing the actions of telemarketers that it authorized to sell its programming and services through telemarketing. Dish was a sophisticated enterprise with knowledgeable counsel. Dish put together the Working Group a year ahead of time to prepare for the TSR. Under these objective circumstances, Dish would have known that it would be liable for telemarketers' actions. In 2004, the FTC published a Guide for complying with the TSR which alerted Dish to its responsibility for its Order Entry Retailers:

> The FTC published a guide to help sellers comply with the TSR. Plaintiffs' Response, (Guide). The Guide discussed the seller's liability for the telemarketer's actions:
>
> **What happens if a consumer is called after he or she has asked not to be called?** If a seller or telemarketer calls a consumer who has:
>
> - placed his number on the National Registry [the List]
> - not given written and signed permission to call
> - either no established business relationship with the seller, or has asked to get no more calls from or on behalf of that seller . . .
>
> the seller and telemarketer may be liable for a Rule violation. If an investigation reveals that neither the seller nor the telemarketer had written Do Not Call procedures in place, both will be liable for the Rule violation. If the

> seller had written Do Not Call procedures, but the telemarketer ignored them, the telemarketer will be liable for the Rule violation; the seller also might be liable, unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures. Ultimately, a seller is responsible for keeping a current entity-specific Do Not Call list, either through a telemarketing service it hires or its own efforts.
>
> Under the FTC interpretation of the TSR, a seller "causes" the telemarketing activity of a telemarketer by retaining the telemarketer and authorizing the telemarketer to market the seller's products and services. According to the Guide, the seller is liable for the telemarketer's violations of the TSR unless the safe harbor provisions apply.

Opinion 20, at 13-15, (quoting excerpts from FTC Guide, Complying with the Telemarketing Sales Rule (January 2004) (FTC Guide) (emphasis in the original)).

A sophisticated enterprise in Dish's position with Dish's legal staff would have known that the FTC Guide stated that the seller was ultimately responsible for the actions of its telemarketers, "unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures." FTC Guide. Dish knew that it did not enforce Do-Not-Call compliance on its Order Entry Retailers and did not require Order

Entry Retailers to implement any written procedures. Dish's only written procedures, the Quality Assurance Program, did not concern or monitor Do-Not-Call Law compliance. Under these circumstances, a person in Dish's position would have known that it was responsible for causing the Order Entry Retailers' violations.

Dish argues that it should not be held vicariously liable for actions of Order Entry Retailers because they were independent contractors. However, Dish's liability for causing the acts of its Order Entry Retailers is not vicarious liability. Rather, sellers cause telemarketers to make Registry Calls, Internal List Calls, and abandoned calls by retaining and authorizing Retailers to market the sellers' products. Opinion 20, at 13-15. Sellers that employ telemarketers direct liability for causing the telemarketers' illegal Registry Calls, Internal List Calls, and abandoned calls.

Vicarious liability, however, may be an alternate basis for imposing liability on sellers such as Dish for the acts of agents. See ACB Sales & Service, Inc., 590 F. Supp. at 575 n.11 (principal may be liable if agent had knowledge of the law and knowledge that the acts violated the law). Dish, for example, has conceded that it is responsible under the TSR for the acts its agents, Telemarketing

Vendors eCreek and EPLDT. Dish is similarly responsible for the actions of the Order Entry Retailers that were also its agents. As discussed above, the Order Entry Retailers were acting within the scope of their agency when they made the illegal Registry Calls, Internal List Calls, and Abandoned Prerecorded Calls.

The TSR civil penalty provisions require not only proof of the illegal acts, but proof of knowledge or knowledge fairly implied under objective circumstances that the acts violated the TSR. The knowledge of the agent about a matter material to an agent's duties is imputed to the principal unless the agent is acting adversely to the principal. National Product Workers Union Insurance Trust v. Cigna Corporation, 665 F.3d 897, 903 (7th Cir. 2011); Pekin Life Insurance Co. v. Schmid Family Irrevocable Trust, 359 Ill. App. 3d 674, 681, 834 N.E.2d 531, 536-37 (Ill. App. 1st Dist. 2005); Restatement (Third) of Agency, § 5.03. An agent acts adversely to the principal when the agent intends to act solely for the agent's own purposes or those of another person. Restatement (Third) of Agency, § 5.04; see Hartman v. Prudential Ins. Co. of America, 9 F.3d 1207, 1210 (7th Cir. 1993). In this case, the Order Entry Retailers were Dish's agents authorized to market Dish Network programming. The manner in which they conducted telemarketing was material to their duties as marketing agents. The Order Entry Retailers' knowledge of telemarketing activities is therefore imputed to Dish.

Dish argues that the Order Entry Retailers were acting adversely to Dish because they were using illegal methods and because they had high churn rates. See Dish Network, L.L.C.'s Proposed Post-Trial Conclusions of Law (d/e 666), at 31 (citing United States v. One Parcel of Land Located at 7326 Highway 45 North, Three Lakes, Onieda County, Wis., 965 F.2d 311, 317 (7th Cir. 1992)). The Court disagrees. In the case cited by Dish, One Parcel of Land, the agent acted adversely because he sold illegal drugs on the principal's property solely for his own benefit. Id. The Order Entry Retailers were acting at least in part for the benefit of Dish because they were selling Dish Network programming. The Order Entry Retailers may have used illegal means and may or may not have been effective, but they were not acting solely for their own benefit. The knowledge of the Order Entry Retailers about the conduct of telemarketing is imputed to Dish.

Dish also cites a case involving an employer-employee relationship to argue that the United States must prove that Order Entry Retailers received the knowledge of their illegal acts while acting within the scope of authority and that they had a duty to speak to Dish. Dish Conclusions of Law (d/e 666), at 31(citing Juarez v. Ameritech Mobile Communications, Inc., 957 F.2d 317, 321 (7th Cir. 1992). The Juarez opinion described principles of imputed knowledge in employer-employee relationships. This case does not involve employment relationships. The general principles of agency apply. Under general agency principles, the knowledge of Order Entry Retailers about the subject of the agency, the marketing of Dish Network programming, is imputed to Dish.

General agency principles do not apply to impose vicarious liability for punitive damages on the principal for the acts of its agents done within the scope of the agency. Under the agency law of the United States and the Plaintiff States, a principal is vicariously liable for punitive damages awarded for the actions of its agents if the principal or a manager of a corporate principal knew of the actions or later ratified the actions. See City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 100 (7th

Cir. 1992) (applying federal law); accord Jannotta v. Subway Sandwich Shops, Inc., 125 F.3d 503, 514 (7th Cir. 1997) (applying Illinois law); Cal. Civ. Code § 3294(b); N.C. Gen. Stat. § 1D-15(c)) Ohio Rev. Code Ann. § 2315.21(C)(1); Restatement (Third) of Agency, § 7.03 comment e (2006) (citing with approval Restatement (Second) of Torts, § 909).

Restatement (Third) of Agency § 7.03 comment e states that with respect to a statute that authorizes a penalty, "unless the language of the statute itself resolves the question, the determination should reflect the purpose of the statute." The Court directed the parties to submit supplemental briefing to address whether agency law regarding a principal's liability for punitive damages for the actions applied to the claims for monetary relief in this action. Opinion entered February 9, 2017 (d/e 766) (Opinion 766).

Upon careful consideration of the parties' supplemental submissions on this issue and the Court's research, the Court concludes that, in light of the purpose of the FTC Act, the special agency rules for punitive damages do not apply to liability for civil penalties under § 5(m) of the FTC Act. The FTC Act serves a markedly different purpose than punitive damages. Punitive damages punish egregious or outrageous conduct done with evil motive or reckless disregard for the rights or interest of others. See Restatement (Second) of Torts, § 908 (1979). Congress authorized FTC Act civil penalties as part of an array of remedial tools to effectuate the purposes of the FTC Act, not to punish outrageous or egregious conduct.

Congress enacted the FTC Act to establish an expert administrative body to stop unfair and deceptive practices in the marketplace. Section 5 of the FTC Act originally prohibited unfair methods of competition and authorized the FTC to issue orders to cease and desist such practices. See FTC Act, § 5, 38 Stat. 717, 719, codified at 15 U.S.C. § 5; H.R. CONF. REP. NO. 1142, 63d Cong., 2d Sess. 19 (1914). In 1938, Congress amended Section 5 the FTC Act to also prohibit unfair and deceptive acts and practices. See Act of March 21, 1938, ch. 49 § 3, 52 Stat. at 111-12 (Wheeler-Lea Amendments) (amending FTC Act, § 5(a)). Congress also authorized civil penalties for violations of cease and desist orders. Wheeler-Lea Amendments § 5(l), 52 Stat. 111, 114, codified as 15 U.S.C. § 45(l). Congress subsequently authorized civil penalties for violations of FTC rules done "with actual knowledge or knowledge fairly implied on the basis of objective circumstances" that the acts violated the rule. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, tit. II § 205, 88 Stat. 2183, 2193, codified at 15 U.S.C. § 45(m).

Congress added civil penalties to ensure compliance with FTC cease and desist orders and FTC regulations, not to punish egregious or outrageous conduct. Section 5(m) does not require proof of outrageous or egregious violations. That section only requires knowledge or knowledge fairly implied under objective circumstances that the acts in question violated the applicable rule. Congress made culpability a factor in determining the amount of penalties, but not to determining liability for penalties.

Applying agency punitive damages principles to FTC Act § 5(m) civil penalties would interfere with the Congressional goals of effective enforcement. Sellers would have incentives to avoid monitoring telemarketers so that they could assert a defense of no actual knowledge to TSR and FTC Act claims for civil penalties. The TCPA requirement to show an agency relationship between seller and telemarketer has already discouraged some sellers from monitoring telemarketers. These sellers have avoided implementing Do-Not-Call monitoring or enforcement procedures over telemarketers in order to assert a defense of no agency to TCPA claims. T 715: 817 (Sponsler). Applying punitive damages principles to TSR civil penalties would create additional incentives to avoid implementing Do-Not-Call Law compliance policies and procedures for telemarketers. This result is directly contrary to Congressional purposes of FTC Act § 5(m) civil penalties. The civil penalties exist to enforce compliance with the TSR, not discourage compliance.

The Supreme Court has determined in the context of Title VII of the Civil Rights Act of 1964 that agency law principles do not apply to statutory claims when the agency law would frustrate Congressional purposes. The Supreme Court stated that applying common law agency principles in Title VII punitive damages "would reduce incentives for employers to implement antidiscrimination programs. . . . Dissuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the purposes underlying Title VII."). Kolstad v. American Dental Association, 527 U.S. 526, 544-46 (1999).

Similarly here, applying agency rules for punitive damages to FTC Act § 5(m) civil penalties would frustrate the purpose of the FTC Act. See Id.; Restatement (Third) of Agency § 7.03 comment e, (The applicability of the punitive damages rules to statutory penalties "should reflect the purposes of the statute."). The agency principles for vicarious liability for punitive damages, therefore, do not apply to FTC Act § 5(m) civil penalties.

Dish may be liable for civil penalties directly for causing Order Entry Retailers to make Registry Calls, Internal List Calls, and Abandoned Prerecorded Calls; and, alternatively, may be liable vicariously for civil penalties for the actions of their agents done within the scope of the agency, including the Order Entry Retailers who violated the TSR by making Registry Calls, Internal List Calls, and Abandoned Prerecorded Calls, when done with the requisite knowledge or knowledge fairly implied under objective circumstances.

Pursuant to these legal principles, Dish acted with knowledge fairly implied when it caused JSR to make 2,349,031 illegal Registry Calls in 2006. Dish retained JSR as an Order Entry Retailer to market Dish Network programming. Dish authorized JSR to conduct telemarketing. Under the objective circumstances of this case, Dish knew or should have known that it was liable under the TSR for causing JSR's illegal Registry Calls. Dish did not provide JSR with written Do-Not-Call compliance procedures. Dish is liable for civil penalties for causing JSR to make these illegal Registry Calls.

Alternatively, Dish is liable because JSR was Dish's agent or subagent for telemarketing Dish Network programming in 2006. Dish was liable for JSR's actions within the scope of the agency. JSR's Registry Calls were within the scope of the agency. Dish and JSR knew that making telemarketing calls to persons whose numbers were on the Registry violated the TSR. One of JSR's partners, Goodale, knew JSR was making illegal Registry Calls. Goodale knew that his partners did not scrub calling lists to remove numbers on the Registry. This knowledge is imputed to Dish. Furthermore, Dish received consumer complaints that JSR was making Registry Calls. Dish acted with knowledge fairly implied under objective circumstances when its agent JSR made 2,349,031 illegal Registry Calls in 2006.

Dish acted with knowledge fairly implied when it caused JSR to make 3,315,242 illegal Registry Calls in 2007. Dish retained JSR as an Order Entry Retailer to market Dish Network programming. Dish authorized JSR to conduct telemarketing through February 14, 2007. Dish retained the other Order Entry Retailer through which JSR conducted telemarketing after February 15 and March 2007. Under the objective circumstances of this, case Dish knew or should have known that it was liable under the TSR for causing JSR's illegal Registry Calls either directly as an Order Entry Retailer or through the other Order Entry Retailer. Dish did not provide any Order Entry Retailer with written Do-Not-Call compliance procedures. Dish is liable for civil penalties for causing JSR to make these illegal Registry Calls.

Dish is vicariously liable for the millions of calls that JSR made as Dish's agent until Dish terminated JSR as an Order Entry Retailer on February 14, 2007. JSR knew it was making Registry Calls and that such calls were illegal. This knowledge is imputed to Dish. Thereafter, JSR made the calls through March 2007 through an Order Entry Retailer. The United States has not shown that Dish had knowledge of these calls or authorized JSR to act as a sub agent when it made these calls. The United States has proven that Dish vicariously liable under agency principles when it acted with knowledge fairly implied through its agent JSR to make millions of Registry calls in 2007, but the United States has not proven the number of calls.

Dish acted with actual knowledge or knowledge fairly implied when it caused Satellite Systems to make 381,811 Registry Calls between May 2010 and August 2011. Dish retained Satellite Systems as an Order Entry Retailer to market Dish Network programming. Dish authorized Satellite Systems to conduct telemarketing. Under the objective circumstances of this, case Dish knew or should have known that it was liable under the Satellite Systems for causing Satellite Systems' illegal Registry Calls. Dish did not provide Satellite Systems with written Do-Not-Call compliance procedures. Moreover, Dish personnel knew that Satellite Systems was making Registry Calls. Dish was receiving so many complaints about these calls that Dish's legal department had developed a standard "go after Satellite Systems" letter to send to complaining individuals. The evidence shows that Dish knew about these calls and decided to keep Satellite Systems as an Order Entry

Retailer. Dish knew that it was causing Satellite Systems to make these 381,811 Registry Calls. Dish is liable for civil penalties for these calls.

Alternatively, Dish is vicariously liable for its agent Satellite Systems' 381,811 illegal Registry Calls. Dish knew Registry Calls violated the TSR. Dish further knew that Satellite Systems was making these illegal calls. Dish consciously decided to do nothing about it. Dish told injured consumers to go after Satellite Systems. Dish therefore is liable for civil penalties for these calls.

2. Count II

a. Internal List Calls to Persons Who Stated to Dish and the Telemarketing Vendors That They did not Wish to Receive Calls by or on Behalf of Dish

Dish acted with knowledge or knowledge fairly implied under objective circumstances when Dish and its Telemarketing Vendors made 903,246 Internal List Calls between September 2007 and March 2010 to persons who previously stated to Dish or one of the Telemarketing Vendors that they did not wish to receive telemarketing calls by or on behalf of Dish. Dish personnel clearly knew that it was not supposed to call individuals who told Dish or its Telemarketing Vendor that they did not wish to receive telemarketing calls by or on behalf of Dish. Dish has maintained an Internal Do-Not-Call List since 1998. Dish further required its Telemarketing Vendor eCreek provide Dish with its Do-Not-Call requests. Telemarketing Vendor EPLDT used Dish's dialers and put its Do-Not-Call requests onto Dish's Internal Do-Not-Call List directly. Dish personnel also knew from its investigations of consumer complaints and its internal audits that it made calls to persons on Internal Do-Not-Call Lists. The Court finds that a person in Dish's position would have known that it was making these illegal calls.

Dish acted with knowledge or knowledge fairly implied under objective circumstances when Dish made 140,349 Internal List Calls between September 2007 and March 2010 to persons who previously stated to Dish's Telemarketing Vendor eCreek that they did not wish to receive telemarketing calls by or on behalf of Dish. Again, Dish personnel knew that Dish was not supposed to call individuals who told its Telemarketing Vendor that he or she did not wish to receive telemarketing calls by or on behalf of Dish. Dish further had eCreek provide Dish with Do-Not-Call requests made to eCreek. Dish personnel also knew from its investigations of consumer complaints that it made calls to persons on Internal Do-Not-Call Lists. The Court finds that a person in Dish's position would have known that it was making these calls.

Dish acted with knowledge or knowledge fairly implied under objective circumstances when Dish and the Telemarketing Vendors made 7,321,163 Internal List Calls between September 2007 and March 2010 to persons who previously stated to Dish Order Entry Retailers that they did not wish to receive telemarketing calls by or on behalf of Dish. Dish knew that it was required to honor do-not-call requests made to its marketing agents. Dish, in fact, honored the do-not-call requests made to eCreek and EPLDT. The Order Entry Retailers were Dish's marketing agents. Under these objective circumstances, a person in Dish's position would have known to honor do-not-call requests made to Order Entry Retailers. Dish made no attempt to honor do-not-call requests to Order Entry Retailers prior to April 2008. Dish did not collect Order Entry Retailers' Internal Do-Not-Call Lists until April 2008. Thereafter, Dish made the illegal calls even with access to some of the Order Entry Retailers' Internal Do-Not-Call Lists. Dish's investigation of consumer complaints showed that it was making calls to people on Internal Do-Not-Call Lists. The Court finds that under the objective circumstances in this case, a person in Dish's position would have known the requirements of the TSR and known that these calls violated those requirements.

Dish argues that it should not be subject to civil penalties for these calls because Dish could not have known that this Court would find that it was obligated to honor do-not-call requests made to Order Entry Retailers. Dish argues that the question of whether it had to honor do-not-call requests to Order Entry Retailers was undecided until the Court made these findings of fact and conclusions of law. Dish argues that the fact that Plaintiffs had to prove an agency relationship with Order Entry Retailers was unknown until the Court entered partial summary judgment. Dish argues that a person in its position in 2004 to 2010 would not have known that it had to honor do-not-call requests to Order Entry Retailers.

The Court disagrees. Dish knew that it had to honor do-not-call requests made to its telemarketing agents. Dish set up procedures to honor Do-Not-Call requests made to its agents eCreek and EPLDT. The Court's conclusion that Order Entry Retailers were Dish's marketing agents was based on well-established principles of agency law. Under the objective circumstances of this case, a reasonable person in Dish's position would have known that Order Entry Retailers were marketing agents. Such a person would have known not to call people who told Order Entry Retailers not to make telemarketing calls by or on behalf of Dish. Dish is liable for civil penalties on these 7,321,163 calls.

b. Internal List Calls by Order Entry Retailers

Dish acted with knowledge or knowledge fairly implied when Dish caused JSR to make 418,228 Internal List Calls in 2006 to persons who stated to Dish or the Telemarketing Vendors that they did not wish to receive telemarketing calls by or on behalf of Dish. JSR was Dish's agent or subagent for telemarketing Dish Network programming in 2006. Dish knew that making telemarketing calls to persons who stated that they did not wish to be called by or on behalf of Dish violated the TSR. Dish further knew that its agents had to honor Do-Not-Call requests made to Dish.

Dish acted with knowledge or knowledge fairly implied when Dish caused JSR to make hundreds of thousands of Internal List

Calls from January through February 14, 2007, to persons who stated to Dish or the Telemarketing Vendors that they did not wish to receive telemarketing calls by or on behalf of Dish. JSR was Dish's agent or subagent for telemarketing Dish Network programming. Dish knew that making telemarketing calls to persons who stated that they did not wish to be called by or on behalf of Dish violated the TSR. Dish further knew that its agents had to honor Do-Not-Call requests made to Dish. The United States proved that JSR made 768,696 such calls from January through March 2007, but did not prove the number made while JSR was an agent of Dish prior to February 14, 2007.

Dish acted with knowledge or knowledge fairly implied when Dish caused JSR to make 267,439 Internal List Calls in 2006 to persons who stated to Order Entry Retailers that they did not wish to receive telemarketing calls by or on behalf of Dish. JSR was Dish's agent or subagent for telemarketing Dish Network programming from July 2006 to February 14, 2007. The other Order Entry Retailers were also Dish's marketing agents. Dish knew that making telemarketing calls to persons who stated that they did not wish to be called by or on behalf of Dish violated the

TSR. Dish further knew that its agents had to honor Do-Not-Call requests made to Dish or its other agents.

Dish acted with knowledge or knowledge fairly implied when Dish caused JSR to make hundreds of thousands of Internal List Calls from January through February 14, 2007, to persons who stated to Order Entry Retailers that they did not wish to receive telemarketing calls by or on behalf of Dish. JSR was Dish's agent or subagent for telemarketing Dish Network programming from July 2006 to February 14, 2007. Dish knew that making telemarketing calls to persons who stated that they did not wish to be called by or on behalf of Dish violated the TSR. Dish further knew that its agents had to honor do-not-call requests made to Dish or its other agents. The United States proved that JSR made 526,956 such calls from January through March 2007, but the United States did not prove the number made while JSR was an agent of Dish prior to February 14, 2007.

Dish acted with knowledge or knowledge fairly implied when Dish caused Satellite Systems to make 22,946 telemarketing calls to persons who stated to Dish that they did not wish to receive telemarketing calls by or on behalf of Dish. Satellite Systems was

Dish's agent for telemarketing Dish Network programming. Dish knew that making telemarketing calls to persons who stated that they did not wish to be called by or on behalf of Dish violated the TSR. Dish further knew that its agents had to honor do-not-call requests made to Dish or its other agents.

Dish acted with knowledge or knowledge fairly implied when Dish caused Satellite Systems to make 42,990 telemarketing calls to persons who stated to Dish that they did not wish to receive telemarketing calls by or on behalf of Dish. Satellite Systems was Dish's agent for telemarketing Dish Network programming. Dish knew that making telemarketing calls to persons who stated that they did not wish to be called by or on behalf of Dish violated the TSR. Dish further knew that its agents had to honor do-not-call requests made to Dish or its other agents.

3. Count III

a. Prerecorded Abandoned Calls Made by Dish

Dish acted with knowledge or knowledge fairly implied when it made 98,054 Abandoned Prerecorded Calls that were answered by a person and abandoned those calls in violation of TSR 16 C.F.R. § 310.4(b)(4)(iv) Dish personnel knew that Prerecorded Calls were illegal. The FTC stated in 2003 and 2004 that Prerecorded Calls that were answered by a person were abandoned calls in violation of the TSR. 2003 TSR Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4644 (January 29, 2003); 2004 Notice, 69 Fed. Reg. 67287 (November 17, 2004); see Opinion 445, at 21-23. The courts that have addressed this issue all agreed that Prerecorded Calls were abandoned calls. The Broadcast Team, Inc. v. F.T.C., 429 F.Supp.2d 1292, 1300-01 (M.D. Fla. 2006); F.T.C. v. Asia Pacific Telecom, Inc., 802 F.Supp.2d 925, 929 (N.D. Ill. 2011).

Dish argues that courts disagree on this issue. Dish cites National Federation of the Blind v. F.T.C., 420 F.3d 331, 341 (4th Cir. 2005). The National Federation of the Blind case addressed the effect of the abandonment provision on First Amendment rights. The case did not mention Prerecorded Calls. The cases that address Prerecorded Calls are not in conflict. Prerecorded Calls that are answered are abandoned calls that violate the TSR.

Dish also notes that the FTC stated in 2006 that some individuals criticized the abandonment provision as ambiguous. Telemarketing Sales Rule, Denial of Petition for Proposed Rulemaking, 71 Fed. Reg. 58716, 58726 (October 4, 2006). The

FTC stated, however, that the provision was not ambiguous and clearly covered Prerecorded Calls. “The Commission continues to think that the plain language of the call abandonment provision itself prohibits calls delivering prerecorded messages when answered by a consumer, a position it has repeatedly stated, and that has been accepted by at least one court.”(Footnotes omitted). Id. The FTC has consistently interpreted § 310.4(b)(4)(iv) to cover Prerecorded Calls that are answered.

A sophisticated business enterprise in Dish’s situation with both in-house and outside counsel would have known that Prerecorded Calls that were answered were Abandoned Prerecorded Calls that violated the TSR. The evidence also proves that Dish personnel in fact knew that Prerecorded Calls were illegal. Dish’s arguments to the contrary are not persuasive.

With this knowledge, Dish made the Prerecorded Calls, and 98,054 of the calls were answered. A person in Dish’s position would have known that these calls violated the TSR. Dish Outbound Operations personnel knew such calls were prohibited. Dish is liable for civil penalties for these calls. Dish acted with knowledge and knowledge fairly implied under objective circumstances.

b. Abandoned Prerecorded Calls Made by Order Entry Retailers

Dish acted with knowledge or knowledge fairly implied based on objective circumstances when it caused Dish TV Now to make 6,637,196 Abandoned Prerecorded Calls that were answered by a person and abandoned in violation of the TSR. Dish TV Now was an Order Entry Retailer. Dish caused Dish TV Now to engage in telemarketing because Dish retained Dish TV Now as an Order Entry Retailers and authorized Dish TV Now to engage in telemarketing Dish Network programming. Dish took no step to enforce or monitor Do-Not-Call compliance. Under the objective circumstances in this case, a person in Dish's position knew or should have known that Prerecorded Calls that were answered by a person were abandoned calls in violation of the TSR. Dish is liable for civil penalties for these calls. Dish is, therefore, liable for civil penalties for causing Dish TV Now to make these illegal Abandoned Prerecorded Calls.

Alternatively, Dish is liable for civil penalties for the actions of its agent Dish TV Now. Dish's agent Dish TV Now made these Abandoned Prerecorded Calls through Guardian. Dish TV Now's knowledge of these Abandoned Prerecorded Calls is imputed to Dish. Under these circumstances Dish is alternatively liable for its agents' illegal calls.

Dish acted with actual knowledge when it caused Star Satellite to make 43,100,876 Abandoned Prerecorded Calls that were answered by a person and abandoned in violation of the TSR. Dish caused Star Satellite to engage in telemarketing because Dish retained Star Satellite as an Order Entry Retailers and authorized Star Satellite to engage in telemarketing Dish Network programming. Dish had actual knowledge that Star Satellite was making Prerecorded Calls. Dish received repeated consumer complaints beginning in late 2004 or early 2005 that Star Satellite was making Prerecorded Calls. Dish Outbound Operations Manager Bangert further knew that Star Satellite was making prerecorded calls. Bangert sent notice of Star Satellite's practices to Dish's Retail Escalations Department. Dish personnel did nothing about Star Satellite's Prerecorded Calls. Under the objective circumstances, a person in Dish's position would have known that Star Satellite was making Prerecorded Calls to sell Dish Network programming and, that when individuals answered such calls, the calls would become Abandoned Prerecorded Calls in violation of the TSR.

Alternatively Dish is liable for civil penalties for the actions of its agent Star Satellite. Star Satellite was an agent of Dish when it had Guardian make these Prerecorded Calls. As Dish's agent, Star Satellite knew that Guardian was making Prerecorded Calls on its behalf. Dish also knew that Star Satellite made these Prerecorded Calls. Dish knew or reasonably should have known that Prerecorded Calls that were answered by a person were abandoned calls in violation of the TSR. Dish is, alternatively, liable for civil penalties for these actions of its agent Star Satellite.

Dish acted with actual knowledge or knowledge fairly implied when it caused JSR to make 1,285,379 Prerecorded Calls that were answered by a person and Abandoned Prerecorded Calls in violation of the TSR. Dish caused JSR and the other Order Entry Retailers through which JSR worked to engage in telemarketing because Dish retained them as Order Entry Retailers and authorized them to engage in telemarketing Dish Network programming. Dish had actual knowledge that Star Satellite was making Prerecorded Calls. Vice President Mills, Regional Sales Manager Oberbillig, and Dish Representative Tchang knew from the beginning that JSR was making "press 1" prerecorded telemarketing calls. Dish, therefore, knew that JSR was making Prerecorded Calls to sell Dish Network programming. A person in Dish's position would have known that when individuals answered those calls, the calls would become Abandoned Prerecorded Calls in violation of the TSR. Dish is liable for civil penalties for these calls.

Alternatively, Dish is liable for the Abandoned Prerecorded Calls that JSR made as Dish's agent. JSR was an agent or subagent of Dish when it made many of these Prerecorded Calls prior to February 14, 2007. Dish personnel knew its agent JSR was making Prerecorded Calls. Dish knew or reasonably should have known that Prerecorded Calls that were answered by a person were Abandoned Prerecorded Calls in violation of the TSR. The United States, however, did not prove the number of calls that were made before February 14, 2007. Under the agency analysis, Dish is liable for penalties for these Abandoned Prerecorded Calls, but the number of calls that JSR made while Dish's agent has not been proven.

Dish acted with knowledge or knowledge fairly implied when it caused American Satellite to make the one Abandoned Prerecorded Call proven at summary judgment, and also, many more Abandoned Prerecorded Calls that were answered and abandoned in violation of the TSR. American Satellite was an Order Entry Retailer. Dish caused American Satellite to engage in telemarketing because Dish retained American Satellite as an Order Entry Retailer and authorized American Satellite to engage in telemarketing Dish Network programming. Under the objective circumstances in this case, a person in Dish's position knew or should have known that Prerecorded Calls that were answered by a person were abandoned calls in violation of the TSR. Dish is liable for civil penalties for the one call.

Dish also acted with actual knowledge when it caused American Satellite to make many more Abandoned Prerecorded Calls. Castillo told Musso and Eichhorn that American Satellite was making Prerecorded Calls. Dish knew or reasonably should have known that Prerecorded Calls that were answered by a person were Abandoned Prerecorded Calls in violation of the TSR. The United States has not proven the number of such Abandoned Prerecorded Calls that it caused American Satellite to make.

Alternatively, Dish is liable for civil penalties for the actions of its agent American Satellite. American Satellite was an Order Entry Retailer and, so, an agent of Dish. As Dish's agent, American Satellite knew that it was making Prerecorded Calls, including the one call proven at summary judgment. This knowledge is imputed to Dish. Under the objective circumstances, a person in Dish's position knew or should have known that the call was an Abandoned Prerecorded Call in violation of the TSR. Dish is liable for civil penalties for this action of its agent American Satellite. Dish is also liable for civil penalties for the many more abandoned calls that American Satellite made, but the number of such calls has not been proven.

4. Count IV

Dish acted with knowledge when it provided substantial assistance to Star Satellite after it knew that Star Satellite was using Prerecorded Abandoned Calls to sell Dish Network programming and continued to pay them and do business with them as an Order Entry Retailer. Dish is liable for civil penalties for providing substantial assistance to Star Satellite to make the 43,100,876 Abandoned Prerecorded Calls in violation of the TSR 16 C.F.R. § 310.3(b). The Court, however, determines that it will impose only one civil penalty for these calls even though the United States proved liability in both Count III and Count IV. The total violations are so large and the amount of the potential civil penalty is so high that the Court finds that one penalty for each call is sufficient in this case.

5. Continual Violations

Dish argues, alternatively, that the violations should be counted as one continual refusal to comply with the TSR rather than separate violations for each call. In cases of a continual refusal to comply with an FTC rule, the FTC Act authorizes a penalty of up to $11,000.00 per day before February 9, 2009, and $16,000.00 per day thereafter. 15 U.S.C. § 45(m)(1)(C). The continual violation provision may apply when a party continues to violate the FTC Rule but the number of violations is unclear. See F.T.C. v. Hughes, 710 F.Supp. at 1529. The FTC Act, however, also authorizes a penalty of up to $11,000.00 before February 9, 2009, and $16,000.00 thereafter for each violation of an FTC rule. 15 U.S.C. § 45(m)(1)(A). The TSR, states that causing an illegal call is a violation. TSR 16 C.F.R. § 310.4(b). The United States has proven millions of calls. Each call proven is a separate violation and, so, Dish may be liable for a separate penalty for each such call. A per violation approach is appropriate in this case for the number of proven illegal calls that Dish caused with knowledge or knowledge fairly implied.

The daily penalty may be appropriate for the millions of illegal calls that Dish made or caused with knowledge or knowledge fairly implied under objective circumstances of this case, but the number of which the United States did not prove with sufficient certainty. The United States, however, did not ask for such an additional penalty so the Court will not award such a sum. The maximum possible penalty for the proven calls is so large that an additional daily penalty is not necessary to serve the interests of justice.

The FTC Act directs the Court to consider several factors when determining the appropriate penalty, including the ability to pay and to continue to do business. 15 U.S.C. § 45(m)(1)(C). Dish's ability to pay and to continue to do business will depend, in part, on the amount of penalties and statutory damages that are appropriate under the other Counts in this case. The Court determines the appropriate amount of the penalties or statutory damages for all Counts below after determining liability generally and liability for penalties or statutory damages in the remaining Counts.

F. Counts V and VI Plaintiff States TCPA Claims

1. Count V

Count V is the first of two claims brought by the Plaintiff States for violations of TCPA. Count V alleges in pertinent part:

> DISH Network, either directly or indirectly as a result of a third party acting on its behalf, has violated 47 C.F.R. § 64.1200(c)(2) and 47 U.S.C. § 227(c), by engaging in a pattern or practice of initiating telephone solicitations to residential telephone subscribers, including subscribers in California, Illinois, North Carolina, and Ohio whose telephone numbers were listed on the National Do Not Call Registry.

Third Amended Complaint, ¶ 72. The Plaintiff States further allege that Dish's violations were willful and knowing. Third Amended Complaint, ¶ 73.

Count V contains two parts: (1) Dish allegedly engaged in a pattern or practice of making telemarketing calls to residents of the

Plaintiff States who registered their residential telephone numbers on the Registry; and (2) Retailers acting on Dish's behalf allegedly engaged in a pattern or practice of making telemarketing calls to residents of the Plaintiff States who registered their residential telephone numbers on the Registry. The statute of limitations is four years under the TCPA, and so, the period of liability extends back to March 25, 2005. 28 U.S.C. § 1658; Sawyer v. Atlas Heating & Sheet Metal Works, Inc., 642 F.3d 560, 561 (7th Cir. 2011).

Dish again agrees that the Telemarketing Vendors were acting on its behalf. Dish disputes that the Order Entry Retailers were acting on its behalf.

a. The 2003-2007 Calling Records

In 2006 and 2007, Dish made the following Registry Calls to telephone numbers with area codes associated with the Plaintiff States:

- 266,514 calls to California area codes;
- 112,769 calls to Illinois area codes;
- 85,093 calls to North Carolina area codes; and
- 98,207 calls to Ohio area codes.

The Plaintiff States rely on Taylor's analysis for these numbers. The numbers are less than the numbers of Registry Calls Dr. Yoeli found were made to numbers with Plaintiff States' area codes after March 25, 2005. See PX 38, Yoeli Declaration, Appendix D, Yoeli October 14, 2013 Report, Appendix A, at PX 0038-125. Based on all this evidence, it is more likely than not that Dish made at least the number of Registry Calls to Plaintiff States area codes set forth above within the statute of limitations.

The preponderance of the evidence established that the intended call recipients Registry Calls were residential telephone subscribers and residents of the respective Plaintiff States associated with the respective area codes. Dish is liable for these Registry Calls in Count V for violation of the FCC Rule and the TCPA.

b. The 2007-2010 Calling Records

i. 1,707,713 Summary Judgment Calls

The Court found at summary judgment that Dish was liable for making 1,707,713 Registry Calls for which Dish did not prove an Established Business Relationship exception. The portion of the

1,707,713 calls made to telephone numbers associated with the Plaintiff States were:

- 216,867 calls to California area codes;
- 83,895 calls to Illinois area codes;
- 52,961 calls to North Carolina area codes; and
- 77,991 calls to Ohio area codes.

The preponderance of the evidence established that the intended call recipients Registry Calls were residential telephone subscribers and residents of the respective Plaintiff States associated with the respective area codes. Dish is liable for these Registry Calls in Count V for violation of the FCC Rule and the TCPA.

ii. <u>2,386,382 Registry Calls and Internal List Calls</u>

The Court found in Count I above that Dish made an additional 2,386,386 Registry Calls that were also Internal List Calls. As explained above, the Order Entry Retailers were agents of Dish for telemarketing purposes. Dish, therefore, is liable for failing to honor the Internal Lists of the Order Entry Retailers as well as its own Internal List and eCreek's Internal List. As a result, Dish could not have an Established Business Relationship exception for any of these Registry Calls. The portion of the 2,386,386 calls made to Plaintiff States area codes were:

- 302,983 calls to California area codes;
- 118,289 calls to Illinois area codes;
- 97,785 calls to North Carolina area codes; and
- 95,275 calls to Ohio area codes.

The preponderance of the evidence established that the intended call recipients Registry Calls were residential telephone subscribers and residents of the respective Plaintiff States associated with the respective area codes. These Registry Calls violated the FCC Rule and the TCPA and Dish is liable for them as alleged in Count V.

The Plaintiff States, unlike the United States, do not seek to impose liability for these calls separately as Internal List Calls. The Court therefore will award statutory damages for these violations in this Count because the award would not result in a double recovery by the Plaintiff States for these calls under the FCC Rule and the TCPA.

iii. 2,475,432 Calls found by Dr. Yoeli

The Plaintiff States failed to prove the source of the set of 4,075,766 calls records which they provided Dr. Yoeli to perform his analysis on this point. The Plaintiff States failed to prove that Dish was liable for those calls in the 2,475,432 call records made to Plaintiff States' area codes. This set of calls was subject to the parties' stipulation to proportionately reduce the number of calls for which Dish would be liable from the Yoeli July 2012 Call Set. Because no calls were proven, the proportional reduction issue is moot.

c. Order Entry Retailer Registry Calls

i. JSR

This Court entered partial summary judgment that Dish caused JSR made 2,349,031 Registry Calls in 2006 in violation of the TSR. Opinion 445, at 176. The portions of the 2,349,031 calls made to telephone numbers with Plaintiff States' area codes were:

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

PX 28, Taylor November 6, 2013 Report, at 13. For the reasons stated above, JSR was Dish's agent or subagent when it made these calls. The preponderance of the evidence also establishes that the intended call recipients were residential telephone subscribers and residents of the Plaintiff States associated with each call recipient's area code. These Registry Calls violated the FCC Rule and the TCPA, and Dish is liable for them as alleged in Count V.

JSR also made 3,315,242 Registry Calls from January through March 2007. For the reasons stated above, the Plaintiffs failed to show that JSR was an agent or subagent of Dish after Dish terminated JSR on February 14, 2007, and failed to prove the number of Registry calls made before February 14, 2007. The Plaintiff States, therefore, proved that JSR made illegal Registry Calls as an agent of Dish in 2007, and made some of those calls to residential telephone subscribers in the Plaintiff States, but they failed to prove the number of violations for which Dish would be liable.

ii. Satellite Systems

This Court entered partial summary judgment that Dish caused Satellite Systems made 381,811 Registry Calls in 2010 and

2011 in violation of the TSR. Opinion 445, at 176. The portions of these 381,811 calls proven to be made to residents of the Plaintiff States were:

- 24,100 calls made to California area codes;
- 10,048 calls made to Illinois area codes;
- 7,290 calls made to North Carolina area codes; and
- 12,803 calls made to Ohio area codes.

The preponderance of the evidence showed that of these calls the number of calls made to residential telephone subscribers of the respective Plaintiff States.

d. Summary

In summary, Dish is liable to the Plaintiff States for Registry Calls in violations of the FCC Rule and TCPA in Count V as follows:

California

2003-2007 Calling Records	266,514 calls
1,707,713 TSR Summary Judgment Calls	216,867 calls
2,386,386 Registry and Internal List Calls	302,983 calls
JSR Calls	473,102 calls
Satellite Systems Calls	24,100 calls
Total	1,283,566 calls

Illinois

2003-2007 Calling Records	112,116 calls
1,707,713 TSR Summary Judgment Calls	83,895 calls
2,386,386 Registry and Internal List Calls	118,289 calls
JSR Calls	369,384 calls
Satellite Systems Calls	10,048 calls
Total	693,732 calls

North Carolina

2003-2007 Calling Records	85,093 calls
1,707,713 TSR Summary Judgment Calls	52,961 calls
2,386,386 Registry and Internal List Calls	97,785 calls
JSR Calls	18,250 calls
Satellite Systems Calls	7,290 calls
Total	261,379 calls

Ohio

2003-2007 Calling Records	98,207 calls
1,707,713 TSR Summary Judgment Calls	77,991 calls
2,386,386 Registry and Internal List Calls	95,275 calls
JSR Calls	129,004 calls
Satellite Systems Calls	12,803 calls

Total	413,280 calls
Grand Total for all Registry Call Violations in Count V	
California	1,283,566 calls
Illinois	693,732 calls
North Carolina	261,379 calls
Ohio	413,280 calls
Grand Total for Count V	2,651,957 calls

2. Count VI

Count VI alleges, in pertinent part:

> DISH Network, either directly or indirectly as a result of a third party acting on its behalf, has violated 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. § 227(b)(1)(B), by engaging in a pattern or practice of initiating telephone solicitations to residential telephone lines, including lines in California, Illinois, North Carolina, and Ohio, using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and where the call was not initiated for emergency purposes or exempted by rule or order of the Federal Communications Commission under 47 U.S.C. § 227(b)(2)(B).

Third Amended Complaint, ¶ 76. The Plaintiff States further alleged that Dish's violations were willful and knowing. Third Amended Complaint, ¶ 77. Count VI contains two parts: (1) Dish allegedly engaged in a pattern or practice of making Prerecorded Calls to residents of the Plaintiff States; and (2) Order Entry Retailers acting on Dish's behalf allegedly engaged in a pattern or practice of making Prerecorded Calls to residents of the Plaintiff States. The statute of limitations is four years under the TCPA, and, so, the period of liability extends back to March 25, 2005. All of the prerecorded calls at issue were placed after March 25, 2005.

a. Dish and the Telemarketing Vendors

The Court entered partial summary judgment that Dish and its Telemarketing Vendors made 98,054 Abandoned Prerecorded Calls in that were answered by persons, and so, were abandoned calls in violation of the TSR. See Opinion 445, at 193-94, 233. The portion of the 98,054 calls made to telephone numbers with Plaintiff States area codes were:

- 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.

These were Prerecorded Calls and the preponderance of the evidence shows that the intended recipients were residential telephone subscribers of the respective Plaintiff States. The Plaintiff

States have established a prima facie case for liability for these calls for violation of the FCC Rule and TCPA as alleged in Count VI.

Dish asserts that the Prerecorded Calls did not violate the FCC Rule or TCPA because Dish had a Transaction-based Established Business Relationship with the intended recipients. Dish has the burden to prove this exception to liability. Dish's only evidence is the translations of the transcripts of the recorded messages. The prerecorded messages were all in different foreign languages. The translations show that the prerecorded messages were directed to Dish customers. Dish, however, must show that the intended recipient purchased goods or services from Dish within 18 months of the call to establish a Transaction-based Established Business Relationship. FCC Rule 47 C.F.R. § 64.1200(f)(5). The translations of the messages do not provide any evidence of last dates of purchase of Dish Network programming. The translations, therefore, do not prove the Transaction-based Established Business Relationship exception. Dish is liable for these calls for violation of the FCC Rule and TCPA as alleged in Count VI.

b. Order Entry Retailers Star Satellite and JSR

The Court entered partial summary judgment that Dish was liable for causing Order Entry Retailers Dish TV Now, Star Satellite, JSR, and American Satellite to make Abandoned Prerecorded Calls that were answered and became abandoned calls in violation of the TSR. See Opinion 445, at 176, 194-95, 233. The Plaintiff States presented evidence of the number of Prerecorded Calls Star Satellite made to Plaintiff States area codes, but not Dish TV Now or American Satellite. The Plaintiff States proved that Dish TV Now and JSR made millions of prerecorded calls nationwide, some of which were directed to residential telephone subscribers in the Plaintiff States; however, the Plaintiff States have not presented evidence of the number of calls made to residents of the Plaintiff States either by number of calls to Plaintiff States area codes or otherwise. The Plaintiff States also proved that American Satellite made numerous prerecorded telephone calls, but the Plaintiff States did not present evidence of the number of calls made. The Plaintiffs proved American Satellite made one prerecorded call during a Dish sting operation, but the call recipient did not reside in a Plaintiff State.

The Court found at summary judgment that Dish caused Star Satellite to make 43,100,876 Abandoned Prerecorded Calls between July and November 2005. The portion of the 43,100,876 calls that Star Satellite made to telephone numbers with Plaintiff States area codes were:

- 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.

For the reasons stated above, the preponderance of the evidence shows that Star Satellite was Dish's agent for telemarketing when it made these calls, the intended recipients of the calls were residential telephone subscribers, and the intended recipients resided in the Plaintiff States associated with the recipients' respective area codes. Dish is liable for these calls made in violation of the FCC Rule and the TCPA, as alleged in Count VI.

c. Summary

Dish is liable for Prerecorded Calls made in violation of the FCC Rule and TCPA in Count VI as follows:

<u>California</u>	
Dish and Telemarketing Vendor Calls	23,020 calls
<u>Star Satellite Calls</u>	<u>5,727,417 calls</u>
Total	5,750,437 calls
<u>Illinois</u>	
Dish and Telemarketing Vendor Calls	5,830 calls
<u>Star Satellite Calls</u>	<u>2,660,066 calls</u>
Total	2,665,896 calls
<u>North Carolina</u>	
Dish and Telemarketing Vendor Calls	2,283 calls
<u>Star Satellite Calls</u>	<u>1,716,457 calls</u>
Total	1,718,740 calls
<u>Ohio</u>	
Dish and Telemarketing Vendor Calls	1,759 calls
<u>Star Satellite Calls</u>	<u>3,419,175 calls</u>
Total	3,420,934 calls

Grand Total for violations in Count VI

California	5,750,437 calls
Illinois	2,665,896 calls
North Carolina	1,718,740 calls

Ohio	3,420,934 calls
Grand Total	13,556,007 calls

3. Liability for Statutory Damages for TCPA Violations

The TCPA authorizes the Plaintiff States to recover $500 per violation. 227 U.S.C. § 227(g). Each illegal call is a separate violation, and if a call violates two or more subsections of the TCPA, the call constitutes two or more violations, one for each subsection violated. Charvat v. NMP, LLC, 656 F.3d 440, 448-49 (6th Cir. 2011). The $500 amount is a compensatory award fixed by Congress and does not require proof of intent or motive. See Alea London Ltd. v. American Home Services, Inc., 638 F.3d 768, 776 (11th Cir. 2011); Penzer v. Transportation Insurance Co., 545 F.3d 1303, 1311 (5th Cir. 2008); Universal Underwriters Ins. Co. Lou Fusz Auto. Network, Inc., 401 F.3d 876, 881 (8th Cir. 2005); see also Ira Holtzman, C.P.A. v. Turza, 728 F.3d 682, 684 (7th Cir. 2013). Dish argues that the award is punitive. The Court disagrees. The $500 is much more in the nature of a liquidated damage amount in circumstances where the actual harm would be hard to calculate. See Universal Underwriters, 401 F.3d at 881. As a result, the special agency rules regarding punitive damages awards for the acts of agents is not relevant to the $500 per violation awards under the TCPA.

Dish argues that the Court should interpret the TCPA to allow an award "up to" $500 per violation the Plaintiff States. At least one district court has accepted this argument. Texas v. American Blastfax, Inc., 164 F.Supp.2d 892, 900-01 (W.D. Tex. 2001). This Court respectfully disagrees. The statute authorizes actions to recover of "actual monetary loss or $500 in damages for each violation, or both such actions." 47 U.S.C. § 227(g)(1). Congress authorized private parties to sue under the TCPA for actual monetary loss or damages "up to $500," whichever is greater. 47 U.S.C. §§ 227(c)(5)(B). Congress also did not include the "up to" language in the statutory damages that states could recover. Congress distinguished between awards for various violations and between awards to private individuals and awards to the states. The Court must honor this language.

The Plaintiff States have proven the following TCPA violations by Dish and its agents Star Satellite and JSR for each Plaintiff

State:

California:	1,283,566 illegal calls in Count V
	5,750,437 illegal calls in Count VI
Illinois:	693,732 illegal calls in Count V
	2,665,896 illegal calls in Count VI
North Carolina:	261,379 illegal calls in Count V
	1,718,740 illegal calls in Count VI
Ohio:	413,280 illegal calls in Count V
	3,420,934 illegal calls in Count VI
Total:	16,207,964 illegal calls in Count VI

At $500 per call, the award would be approximately $8.1 billion ($8,103,982,000.00).

An award of $8.1 billion would be excessive and in violation of due process. A statutory award violates due process "only where the penalty prescribed is so severe and oppressive at to be wholly disproportioned to the offense and obviously unreasonable." St. Louis I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67, (1919); see Maryland v. Universal Elections, Inc., 826 F.Supp.2d 457, 465-66 (D. Md. 2012); Pasco v. Protus IP Solutions, Inc., 865 F.Supp.2d 825, 834 (D. Md. 2011). An $8.1 billion award would represent more than 25 percent of Dish's capital value and more than five years' net after tax profits. That amount is wholly disproportionate to the offense and obviously unreasonable and might put Dish out of business. That award also does not consider the effect of any monetary awards to the United States in Counts I-IV or to the Plaintiff States in the Counts VII-XII. The Court will exercise its discretion and reduce the award to an amount that is proportionate and reasonable under the circumstances. See Universal Elections, 862 F.Supp.2d at 466. The proportionate and reasonable amount depends on the awards in the other Counts. The Court will address the appropriate amount in light of all the Counts after discussing liability for civil penalties in the remaining Counts.

The Plaintiff States argue that the Court should order a remittitur prior to entertaining a due process challenge. The Court disagrees. A remittitur is a procedure used in jury trials. The remittitur offers the plaintiff the choice of accepting a lower damage amount that the one awarded by a jury or a new trial on damages. See Sony BMG Music Entertainment v. Tenenbaum, 660 F.3d 487, 511 (1St Cir. 2011). This is a bench trial, not a jury trial. Moreover, the damages are a straightforward calculation of $500 per violation.

A new trial on damages would not change that number. A remittitur is not appropriate in this case.

The Plaintiff States argue in the alternative that the Court should first entertain the Plaintiff States' voluntary offer to remit the damages award before entertaining the constitutional issues. The case cited by the Plaintiff States involved a situation in which the district court erred by ordering no civil penalties in the circumstances in which the statutory amount was excessive. United States ex rel. Bunk v. Gosselin World Wide Moving, N.V., 741 F.3d 390, 406 (4th Cir. 2013). The Fourth Circuit stated that the district court should have entertained the plaintiff's offer to remit the penalty. The primary error, though, was awarding no penalty at all.

Furthermore, the Fourth Circuit did not address a situation in which the plaintiff did not offer to remit the statutory amount. The Plaintiff States have not offered to remit the statutory damage award in Counts V and VI. Plaintiffs North Carolina offered to remit the amounts in Counts IX and X. State Plaintiffs' Post-Trial Proposed Conclusions of Law (664), at 39-40. No such offer is included in the Plaintiff States' proposed conclusions of Law for

Counts V and VI. The Plaintiff States mentioned the figure of $1 billion in their closing statement, but did not offer to remit any damage award to a specific amount. See State Plaintiffs' Closing Statement (d/e 639), at 20 ("In light of Dish's ability to pay . . . , the millions of violations, and the extended period over which the violations continued to occur, any damages award less than one billion dollars would not raise constitutional concerns."). The question of a voluntary remittance of the damage award is, therefore, moot.

In this case, the statutory damages calculation in Counts V and VI exceeds $8.1billion. That is "wholly disproportionate to the offense and obviously unreasonable." Williams, 251 U.S. at 66-67. No offer to remit that amount has been made. The Court will exercise its discretion to award an amount that is proportionate and reasonable under the facts and circumstances of this case. See Universal Elections, 862 F.Supp.2d at 466

The TCPA provides that the Court may increase the damage award up to $1,500 per violation for a knowing violation. 47 U.S.C. § 227(g)(1). Because the award in excess of $8.1 billion violates due process, the Court will not exercise its discretionary authority to increase the award. The Court, therefore, will not address the split of authority on the requirements to prove knowing violations (see e.g., Lary v. Trinity Physician Financial & Insurance Services, 780 F.3d 1101, 1106-07 (11th Cir. 2015) (must prove actual knowledge that the act violated the TCPA); contra e.g., Sengenberger v. Credit Control Services, Inc., 2010 WL 1791270, at *6 (N.D. Ill. May, 2010) (must only prove the act was intentional, not accidental)) or whether the enhanced award would constitute punitive damages (see Alea London Ltd. v. American Home Services, Inc., 638 F.3d 768, 778 (11th Cir. 2011) (enhanced awards up to $1,500 under the TCPA were more compensatory than punitive).

G. Counts VII and VII California Claims

1. Count VII

Count VII alleges a claim under the California Do Not Call Law. Cal. Bus. & Prof. Code § 17592(c). Section 17592(c) provides, in relevant part, "no telephone solicitor shall call any telephone number" on the California do-not-call list. The California Do-Not-Call List consists of the California numbers on the Registry. A copy of the California Do-Not-Call List is current if it was obtained from the FTC no more than three months prior to the date of the call.

Cal. Bus. & Prof. Code §17592(a)(2). California's Established Business Relationship exception tracks the TSR and FCC Rule's requirement that such relationships exist for 18 months after the last purchase. Cal. Bus. & Prof. Code § 17592(e)(4). Count VII alleges in pertinent part:

> DISH Network, either directly or indirectly as a result of a third party acting on its behalf, is a telephone solicitor pursuant to California Business & Professions Code section 17592(a)(1), and has violated Section 17592(c)(1) by making or causing to be made telephone calls to California telephone numbers listed on the National Do Not Call Registry and seeking to rent, sell, promote, or lease goods or services during those calls.

Third Amended Complaint, ¶ 80. The statute of limitations for Count VII is three years. Cal. Civ. Code § 338(h); see Opinion 445, at 216-17. The claims in Count VII extend back to calls made on or after March 25, 2006, three years before the case was filed.

Dish argues that this claim, and any claim brought by the Plaintiff States that relies on calls made to numbers on the Registry, fails because the Registry violates the First Amendment for the reasons Dish raised in connection with the United States' claims in Count I. The Court rejects this argument for the reasons given above in connection with Count I.

Dish and its Telemarketing Vendors made the following illegal Registry Calls to telephone numbers with California area codes more than 93 days (i.e. more than three months) after registration on the Registry:

2007-2010 Calls:

Yoeli set of 2,386,386 calls;	296,640 calls
Taylor's set of 501,650 calls;	42,019 calls
Taylor's set of not completed calls;	33,970 calls
Taylor's set of wrong number, no English calls;	1,955 calls
Total	374,584 calls

The "not completed calls" and "wrong number, no English calls" are the calls with California area codes that Taylor erroneously eliminated from the Yoeli July 2012 Call Set.

The preponderance of the evidence shows that the intended recipients of these calls were California residents. Dish is liable for making 374,584 Registry Calls in violation of Cal. Bus. & Prof. Code § 17592(c) as alleged in Count VII.

The Plaintiff States did not present evidence on the number of Registry Calls made by Order Entry Retailers JSR and Satellite Systems that were more than three months after the telephone numbers with California area codes were registered on the Registry. The Plaintiffs, therefore, did not prove the number of calls made by JSR and Satellite Systems for which Dish would be liable under Count VII.

California law provides a safe harbor affirmative defense:

> It shall be an affirmative defense to any action brought under this article that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketer instruction and training.

Cal. Bus. & Prof. Code § 17593(d). Dish failed to prove this affirmative defense. Dish failed to present sufficient competent evidence of the procedures used to formulate or scrub Lead Tracking System calling lists and, so, failed to show any illegal Registry calls were accidental or violated procedures. Furthermore, Dish failed to use the last dates of purchase to calculate Transaction-based Established Business Relationships for the Account Number Campaigns. As a result, Dish did not use proper procedures to formulate these calling lists and called millions of numbers on the Registry illegally. Those illegal calls were not accidental. Finally, Dish failed to identify any particular calls that were accidentally made. Some Dish witnesses testified in generalities that accidents happen, and some witnesses indicated that some problems arose when Dish transferred all Account Number Campaign scrubbing to its headquarters in Colorado, but no witness testified that certain calls were accidentally made. Dish failed to prove this affirmative defense. Dish is liable for at least 374,584 calls that violated § 17952 of the California Business & Professions Code.

2. Count VIII

Count VIII alleges a claim for unfair competition under California Business and Professions Code § 17200,

> Section 17200 defines unfair competition as practices that are "unlawful, or unfair, or fraudulent." Acts that violate some other law are "unlawful" and so violate § 17200. See Davis v. HSBS Bank Nevada, N.A., 691 F.3d 1152, 1168 (9th Cir. 2012). The other statutes violated are referred to as "borrowed" statutes. Id."

Opinion 445, at 217. The California Attorney General can bring an action for civil penalties for violations of § 17200. Cal. Bus. & Prof. Code § 17206. The penalties available under § 17206, "are cumulative to each other and to the remedies or penalties available under all other laws of this state." Cal. Bus. & Prof. Code § 17205. Thus, if an act that violates two borrowed statutes, that act constitutes two violations of § 17200 and is subject to two civil penalties.

In this case, Plaintiff California borrowed from the TCPA violations in Counts V and VI, the violations of § 17592(c) in Count VIII, and also violations of California Civil Code § 1770(a)(22)(A). Section 1770(a)(22)(A) prohibits making Prerecorded Calls "without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message."

Count VII alleges, in pertinent part:

> Beginning at an exact date unknown to plaintiff and continuing to the present, Defendant DISH Network has engaged in and continues to engage in unfair competition as defined in California Business & Professions Code section 17200. Defendant's acts of unfair competition include, but are not limited to, the following:
>
> (a) DISH Network, either directly or indirectly as a result of a third party acting on its behalf, has violated the TCPA at 47 U.S.C. § 227(c) and its regulations at 47 C.F.R. § 64.1200(c)(2), by engaging in a pattern or practice of initiating telephone solicitations to residential telephone subscribers, including subscribers in California, whose telephone numbers were listed on the National Do Not Call Registry.

(b) DISH Network, either directly or indirectly as a result of a third party acting on its behalf, has violated 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. § 227(b)(1)(B), by engaging in a pattern or practice of initiating telephone solicitations to residential telephone lines, including lines in California, using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and where the call was not initiated for emergency purposes or exempted by rule or order of the Federal Communications Commission under 47 U.S.C. § 227(b)(2)(B).

(c) DISH Network, either directly or indirectly as a result of a third party acting on its behalf, has violated California Business & Professions Code section 17592(c)(1) by making or causing to be made telephone calls to California telephone numbers listed on the National Do Not Call Registry and seeking to rent, sell, promote, or lease goods or services during those calls.

(d) DISH Network, either directly or indirectly as a result of a third party acting on its behalf, has violated California Civil Code section 1770(a)(22)(A), which makes it an unfair method of competition and unfair or deceptive act or practice to disseminate an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.

Third Amended Complaint, ¶ 82. The statute of limitations is four years. Cal. Bus. & Prof. Code § 17208; see Opinion 445, at 218.

The claim in Count VIII extends back to March 25, 2005, four years before the filing of the Complaint.

Dish is liable for making, either directly or through its agents the Telemarketing Vendors and JSR, 1,283,566 Registry Calls in violation of the TCPA, as proven in Count V. Dish is liable for making, either directly or through its agents the Telemarketing Vendors and Star Satellite, 5,750,437 prerecorded telemarketing calls in violation of the TCPA, as proven in Count VI. Dish is liable for making, either directly or through its agents Telemarketing Vendors, 374,584 Registry Calls as proven in Count VII.

Dish is also liable under § 17200 for the violations of § 1770(a)(22)(A). California proved that Dish or its agents Telemarketing Vendors eCreek and EPLDT and Order Entry Retailers Star Satellite and JSR made these Prerecorded Calls in violation of § 1770(a)(22)(A). The penalties for violation § 17200 are cumulative to each other. Thus, Dish may be liable twice under § 17200 for Prerecorded Calls if the calls violated both § 1770(a)(22)(A) and the TCPA and FCC Rule.

Dish argues that § 1770(a)(22)(A) does not impose liability for the acts of Order Entry Retailers. Dish argues that § 1770(a)(23) specifically authorizes liability for third parties, but § 1770(a)(22)(A) does not. Dish argues that § 1770(a)(22)(A), therefore, is limited to Dish's actions. The Court disagrees. Section 1770(a)(23)(B) establishes an affirmative defense for a third party unless the person who violated § 1770(a)(23)(A) was an agent of the third party or the third party knew of the illegal act. Section 1770(a)(22) contains no similar defense to third party liability. Businesses are liable for the unlawful acts of their agents. See Ford Dealers Association v. Department of Motor Vehicles, 650 P.2d 328, 336 (Cal. 1982); People v. Toomey, 203 Cal.Rptr. 642, 650-51 (Cal. App. 1984).

Dish argues that it is entitled to an Established Business Relationship defense under § 1770(a)(22) for the 23,020 calls that it made directly or through the Telemarketing Vendors. Section 1770(a)(22)(B) provides for such a defense:

> (B) This subdivision does not apply to a message disseminated to a business associate, customer, or other person having an established relationship with the person or organization making the call . . . .

Cal. Civ. Code § 1770(a)(22)(B). This defense requires proof that the intended call recipient was a customer or had an established relationship with Dish. This portion of the California Civil Code does not define either "customer" or "established relationship." See Cal. Civ. Code § 1761, Definitions. The statute does not require proof of a purchase within 18 months of the call like the TSR and the FCC Rule.

Dish argues that the translations of the sales scripts show that the intended recipients were customers. The translations show that the calls offered new foreign language programming packages to existing customers. This evidence tends to show that the calls were made to individuals who were at some time customers of Dish. That evidence was not sufficient proof under Count VI because the FCC Rule requires a call to be within 18 months of the last purchase, and the script text did not prove the last purchase date. California section 1761 does not require that the call to be within any certain time period since the last transaction, only that the person be a customer. Given the language of § 1761, the Court finds that Dish has a valid defense under § 1770(a)(22)(B) for these 23,020 calls.[69] Dish, however, is liable under § 17200 for the

[69] Dish also argues that it is entitled to an unintentional bona fide error defense for the 23,020 calls under California Civil Code § 1784. Dish's foreign language marketing division intended to place these Prerecorded Calls. This division of Dish did not unintentionally record sales

5,727,417 calls that Dish's agent Star Satellite made in violation of § 1770(a)(22)(A).

In summary, Dish is liable for unfair competition by committing the following illegal calls in violation of California Business & Professions Code section 17200:

Violation of TCPA proven in Count V	1,283,566 calls
Violation of TCPA proven in Count VI	5,750,437 calls
Violation of Cal. Bus. & Prof. Code § 17592(c) proven in Count VII	374,584 calls
Violation of Cal. Civ. Code § § 1770(a)(22)(A)	5,727,417 calls
Total	13,136,004 calls

Dish is liable for making directly or through its agents 13,136,004 calls in violation of § 17200 in Count VIII.

3. <u>Civil Penalties under California State Claims in Counts VII and VIII</u>

Pursuant to California Business & Professions Code § 17593(a)(2), California may recover for each violation proven under Count VII a civil penalty up to the penalties available under § 5(m) of the FTC Act, up to a maximum of $11,000 per violation for each

pitches or prepare calling lists for these campaigns. The defense does not apply. Dish, however, proved the other affirmative defense under § 1770(a)(22)(B).

violation before February 9, 2009, and $16,000 for each violation thereafter. In addition, California may recover a separate penalty of up to $2,500.00 for each violation. Cal. Bus. & Prof. Code §§ 17200, 17536(b). California may recover for each violation proven under Count VIII a civil penalty of up to $2,500.00. Cal. Bus. & Prof. Code § 17206(b). The penalties are cumulative. Cal. Bus. & Prof. Code §§ 17205 and 1734.5. A defendant is subject to multiple penalties if he or she violates multiple statutes that authorize such penalties. See People v. Toomey, 203 Cal.Rptr. 642, 656 (Cal. Ct. App. 1984). Dish erroneously refers to some or all of the civil penalties authorized under these statutes as damages. See e.g., Dish Network L.L.C.'s Proposed Post-Trial Conclusions of Law (d/e 666), at 94-95. Dish is incorrect. These statutes authorize civil penalties.

These statutes also impose strict liability without any proof of intent. Community Assisting Recovery, Inc. v. Aegis Security Ins. Co., 112 Cal.Rptr.2d 304, 308 (Cal. Ct. App. 2001). Issues related to culpability are relevant to the amount of the penalty, but not to liability for a penalty. See Cal. Bus. & Prof. Code §§ 17206 and 17536 (willfulness a factor in the amount of the penalty), and §

17593(a) (civil penalties subject to the same considerations as those set forth in FCT Act § 5(m)).

California courts have determined that these civil penalties are not akin to punitive damages. People v. Fremont Life Ins. Co., 128 Cal. Rptr.2d 463, 473-74 (Ct. App. 2002). Moreover, the Supreme Court of California has held in other contexts that civil penalties are not akin to punitive damages under California law. Kizer v. County of San Mateo, 806 P.2d 1353, 1356-60 (Cal. 1991). The California Supreme Court explained that civil penalties are "designed to ensure compliance with a detailed regulatory scheme" and are not akin to punitive damages "even though they may have a punitive effect." Id. at 1357. In addition, civil penalties do not require a showing of actual harm and are "imposed without regard to motive and require no showing of malfeasance or intent to injure." Like the FTC Act § 5(m) penalties, the primary purpose of California civil penalties are to enforce regulations. Id. at 1358.

In light of the Fremont decision and the California Supreme Court's discussion of civil penalties in Kizer, the Court finds under California law that the civil penalties at issue in this case are not akin to punitive damages. The special rules of agency law limiting a principal's liability for punitive damages for the acts of its agent simply do not apply.

California has proven 374,584 violations of Count VII and 13,136,004 violations of Count VIII. The maximum possible penalties for Count VII would be $11,000 per violation prior to February 9, 2009, and $16,000 thereafter; plus $2,500 per violation. The maximum possible penalties for Count VIII would be $2,500 per violation. The total maximum possible civil penalty exceeds $37.8 billion ($37,896,894,000.00).[70] California suggests a civil penalty of $100 million ($100,000,000.00). State Plaintiffs' Post-Trial Proposed Conclusions of Law (d/e 664), at 33. The Court will address the appropriate amount to impose below in conjunction with the amounts to be awarded for all of the claims for monetary relief.[71]

[70] (374,584 x $11,000) + (374,584 x $2,500) + (13,136,004 x $2,500) = $37,896,894,000.00. This calculation assumes $11,000 as the maximum possible penalty for the violations proven under §17593.

[71] Dish states that California sought restitution in its proposed conclusions of law in the Final Pretrial Order. Dish Network L.L.C.'s Proposed Post-Trial Conclusions of Law (d/e 666), at 99-100. The Court could not find such a claim for restitution. See Final Pretrial Order (d/e 564), at 6, and Attachment F, Plaintiffs Proposed Conclusions of Law, ¶¶ 359-71. Regardless, California did not pursue restitution at trial. Restitution is not an issue.

H. Counts IX and X North Carolina Claims

1. Count IX

Plaintiff North Carolina alleges violations of the North Carolina Do-Not-Call Law that prohibits Registry Calls to North Carolina residents whose telephone numbers were on the Registry. Count IX alleges in part:

> 85. DISH Network, and/or third parties acting on DISH Network's behalf, has violated N.C. Gen. Stat. § 75-102(a) by making telephone solicitations to the telephone numbers of North Carolina telephone subscribers when those numbers were in the pertinent edition of the National Do Not Call Registry.
>
> 86. DISH Network also violated N.C. Gen. Stat. § 75-102(d) by failing to monitor and enforce compliance by its employees, agents, and independent contractors in that, as set forth above, those persons made numerous telephone solicitations to the telephone numbers of North Carolina telephone subscribers when those numbers were in the pertinent edition of the National Do Not Call Registry.
>
> 87. DISH Network willfully engaged in the actions and practices described above.

Third Amended Complaint, ¶¶ 85-87.

The Court previously explained the structure of the North Carolina statute,

> North Carolina's Do–Not–Call Law . . . prohibits a telephone solicitor from making a telemarketing call to a

> telephone subscriber's telephone number that appears on the Registry. N.C. Gen.Stat. § 75–102(a). The term “telephone solicitor” means an individual or entity that makes telemarketing calls “directly or through salespersons or agents.” N.C. Gen.Stat. § 75–101(10). The term “telephone subscriber” means an individual who subscribes for residential telephone service from a carrier, including a wireless carrier. N.C. Gen.Stat. § 75–101(11). Section 75–102 also requires telephone solicitors to implement systems and written procedures to prevent making telemarketing calls to numbers on the Registry. N.C. Gen.Stat. § 75–102(d). Count IX alleges a violation of this provision also.

Opinion 445, at 218-19. Thus, North Carolina must show that Dish or its agents made Registry Calls to North Carolina residents who were residential telephone subscribers. The statute of limitations on claims under § 75-102 is four years, and extends back to calls made after March 25, 2005. N.C. Gen. Stat. § 75-16.2. The four-year statute is that same as the limitations period under the TCPA.

For the reasons stated in the Court's discussion of Count V, North Carolina proved that Dish and its agents JSR and Satellite Systems made 261,379 Registry Calls to numbers with North Carolina area codes after March 25, 2005. The preponderance of the evidence further establishes that intended recipients were residential telephone subscribers and residents North Carolina. The 261,379 calls violated § 75-102.

Section 75-102(d) also requires telemarketers to "implement systems and written procedures to prevent further telephone solicitations to any telephone subscriber . . . whose telephone number appears in the "Do Not Call" Registry." Dish did not have written procedures for scrubbing Account Number Campaigns to remove from its calling lists telephone numbers on the Registry. Dish, therefore, also violated § 75-102(d).[72]

Dish argues that it is entitled to Transaction-based and Inquiry-based Established Business Relationship defenses to these calls. The North Carolina uses the same definitions of Transaction-based and Inquiry-based Established Business Relationships as the TCPA and TSR, with the same 18-month and three month time periods respectively. N.C. Gen. Stat. § 75-101(5). The analysis in the Count V TCPA Registry call claims, therefore, applies here, and Dish is not entitled to either Established Business Relationship defense for any of these 261,379 Registry Calls.

[72] The parties presented no competent evidence of Dish's procedures, written or otherwise, used to process its Lead Tracking System calling lists or Cold Call calling lists.

2. Count X

North Carolina alleges a claim in Count X for violation of it Do-Not-Call Law that prohibits use of an automatic dialer to place unsolicited prerecorded calls. N.C. Gen. Stat. § 75-104. Count X alleges in part:

> 89. DISH Network, and/or third parties acting on DISH Network's behalf, has violated N.C. Gen. Stat. § 75-104 by using automatic dialing and recorded message players to make unsolicited telephone calls to North Carolina telephone subscribers without first having live operators inform the telephone subscribers of the nature and length of the recorded message and asking for and obtaining permission to play the message from the person receiving the call, and otherwise not complying with any of the exceptions set forth in N.C. Gen. Stat. § 75-104.
>
> 90. DISH Network willfully engaged in the practices described above.

Third Amended Complaint, ¶¶ 89-90. Liability under § 75-104 extends to calls made by agents. Opinion 445, at 220-22. The intended recipients must be residential telephone subscribers because the North Carolina statute defines the term "telephone subscriber" to mean residential telephone subscriber. Opinion 445, at 220; N.C. Gen. Stat. § 75-101(11). The statute of limitation is four years, extending back to calls made after March 25, 2005. N.C. Gen. Stat. § 75-16.2.

For the reasons stated in the Court's discussion of Count VI, North Carolina proved that Dish and its agent Star Satellite made 1,718,740 Prerecorded Calls to numbers with North Carolina area codes. The preponderance of the evidence further establishes that the intended recipients were residential telephone subscribers and residents North Carolina. The 1,718,740 calls violated § 75-104.

3. Civil Penalties for North Carolina under Counts IX and X

North Carolina authorizes civil penalties for the violations in Counts IX and X as follows: "Five hundred dollars ($500) for the first violation, one thousand dollars ($1,000) for the second violation, and five thousand dollars ($5,000) for the third and any other violation that occurs within two years of the first violation." N.C. Gen. Stat. § 75-105(a)(2). North Carolina established that Dish is liable for 261,379 Registry Calls in violation of N.C. Gen. Stats § 75-102 in Count IX, and 1,718,740 Prerecorded Calls in violation of N.C. Gen. Stat. § 75-104 in Count X. Under § 75-

105(a)(2), the statutory penalty applies to violations that occurred within two years of the first violation.

In Count IX, the Registry Calls in the 2003-2007 Calling Records would be subject to civil penalties if the calls were made within the first two years within the statute of limitations, from March 25, 2005 to no later than March 24, 2007. North Carolina used Taylor's analysis to show that Dish made 85,093 calls between January 2006 and August 2007. These calls are within the two-year window for civil penalties authorized by the § 75-105. This number does not include the Dish direct marketing Registry Calls made during the remainder of 2007, but this is the only number proven with reasonable certainty. North Carolina is also entitled to recover civil penalties on the 18,250 Registry Calls that Dish's agent JSR made to North Carolina residents in 2006 and 2007. These calls were also within the two-year window for civil penalties. North Carolina is entitled to recover civil penalties on 103,343 Registry Calls in Count IX.

All of the Star Satellite 1,716,457 Prerecorded Calls to North Carolina residents were made from July to November 2005. All of these calls were within the statute of limitations and within two years of each other. North Carolina is entitled to recover civil penalties on all these calls. Dish presented evidence at summary judgment that Dish's Prerecorded Calls to North Carolina area codes occurred between September 2007 and March 2008. See Opinion 445, at 127-28; see Defendant Dish Network L.L.C.'s Memorandum of Law in Support of its Motion for Summary Judgment (d/e 349), at 168-69; Defendant Dish Network L.L.C.'s Opposition to Plaintiffs' Motion for Summary Judgment (d/e 374), at 50-51. North Carolina has failed to establish that it is entitled to recover civil penalties on the 2,283 Dish Prerecorded Calls to North Carolina residents.

Section 75-105 states that the penalty would be reduced to $100.00 for each violation within two years of the first violation if Dish "can show that that the violations are the result of a mistake and . . . [Dish] complied with" § 75-102(d). Section 75-102(d) requires telephone solicitors to implement "systems and written procedures" to prevent Registry Calls and Internal List Calls, to train its own sales staff, to monitor and enforce compliance by its own sales staff and by independent contractors, to record consumers' do-not-call requests, and to maintain Internal Do-Not-

Call Lists. N.C. Gen. Stat. 75-102(d). Dish did not have written procedures to scrub Account Number Campaign calling lists to prevent Registry Calls or Internal List Calls. Dish presented no competent evidence on the procedures Dish's Database Marketing used to scrub Lead Tracking System and Cold Call calling lists. Dish, therefore, is not entitled to this reduction in the penalty under § 75-102(d).

Section 75-105 imposes the penalty on telephone solicitors. The definition of telephone solicitor means:

> Any individual, business establishment, business, or other legal entity doing business in this State that, directly or through salespersons or agents, makes or attempts to make telephone solicitations or causes telephone solicitations to be made. "Telephone solicitor" also includes any party defined as a "telemarketer" under the Telemarketing Sales Rule.

N.C. Gen. Stat. Ann. § 75-101(10). Dish's liability as a telephone solicitor extends by this definition to telemarketing performed by its agents. Because the statute extends liability to the actions of agents, special rules limiting a principal's liability for punitive damages do not apply. See Restatement (Third) of Agency § 7.03 comment e (liability for statutory penalty first depends on the language of the statute).

The calculated amount of civil penalties under § 75-105(a)(1) is $516.7 million ($516,706,500.00) for Count IX and $8.6 billion ($8,582,276,500.00) for Count X, for a total of $9.1 billion ($9,098,938,500.00).[73] Civil penalties of $9.1 billion are "wholly disproportionate to the offense and obviously unreasonable" for the same reasons discussed in regarding that calculated $8.1 billion statutory damages in Counts V and VI above. See Williams, 251 U.S. at 66-67. Recognizing this fact, North Carolina has offered to remit its claim for civil penalties to $100 per call. State Plaintiffs' Post-trial Proposed Conclusions of Law (d/e 664), at 39, 42; see Gosselin World Wide Moving, N.V., 741 F.3d at 406. The offer to remit would reduce the civil penalties to approximately $182 million ($181,980,000.00).[74] North Carolina's offer to remit still fails to meet the due process requirements of Williams. A $182 million penalty for the North Carolina state law violations is disproportionate and unreasonable in light of the violations in North Carolina and Dish's total liability in all of the Counts. The

[73] The calculated civil penalties for Count IX are $500 + $1,000 + (103,341 X $5,000) = $516,706,500.00. The calculated civil penalties for Count X are $500 + $1,000 + (1,716,455 X $5,000) = $8,582,276,500.00. The total calculated civil penalties for these two Counts are $516,706,500.00 + $8,582,276,500.00 = $9,098,938,500.00.

[74] (103,343 + 1,716,457) X $100 = $181,980,000.00.

Court will determine a reasonable and appropriate penalty for Counts IX and X below in conjunction with the amounts to be awarded for all of the claims for monetary relief.

I. Count XI Illinois Claim

Plaintiff Illinois alleges a claim for violation of the Illinois Automatic Telephone Dialers Act (IATDA), 815 ILCS 505/2Z. Count XI alleges in part:

> 93. The Defendant, and/or third parties acting on its behalf, has violated 815 ILCS 305/30(b) and 815 ILCS 505/2Z by knowingly playing or causing to be played prerecorded messages placed by an autodialer without the consent of the called party.

Third Amended Complaint, ¶ 93.

Section 505/2Z prohibits playing or causing to be played a prerecorded message by an autodailer without prior consent. Illinois only seeks liability for the 5,830 Prerecorded Calls that Dish or its Telemarketing Vendors placed to telephone numbers with Illinois area codes. Dish concedes that it is responsible for calls made by Telemarketing Vendors. The Court, therefore, does not need to decide the meaning of "cause" under the IATDA.

For the reasons stated in Count VI above, Illinois proved a prima facie case that 5,830 prerecorded telemarketing calls to numbers with Illinois area codes. The preponderance of the evidence further establishes that intended recipients were residential telephone subscribers and residents Illinois.

The IATDA contains an Established Business Relationship exception. The prohibition against autodialer Prerecorded Calls "shall not apply" to "calls made to any person with whom the telephone solicitor has a prior or existing business relationship." 815 ILCS 305/20(a)(2). The IATDA does not define the term "existing business relationship." See 815 ILCS 305/5 Definitions. The Court gives the exception its ordinary meaning. The exception contains no time limit, such as the 18-month limit in the TSR and the TCPA and FCC Rule. The IATDA exception would apply to any current Dish customer or any prior Dish customer no matter when the person was a customer.

Dish argues that the translations of the sales scripts show that the intended recipients were Dish customers. The translations show that the calls offered new foreign language programming packages to existing customers. This evidence tends to show that the calls were made to individuals who were at some time customers of Dish. The evidence was not sufficient proof under

Count VI because the FCC Rule requires a call to be within 18 months of the last purchase and the script text did not prove the last purchase date. The IATDA defense in § 305/20(a)(2) does not require that the call to be within any certain time period since the last transaction, only that the person be a customer or have a relationship. Given the language of § 305/20(a)(2), the Court finds that Dish has a valid defense for these 5,830 calls under 815 ILCS 305/20(a)(2) of the IATDA. Dish is entitled to judgment on Illinois's claims in Count XI.

J. Count XII

1. Liability for Violations

Plaintiff Ohio alleges a claim in Count XII under the Ohio Consumer Sales Practice Act (OCSPA), Ohio Rev. Code § 1345.01 et seq. Count XII alleges in part:

> 95. Defendant, either directly or as a result of a third party acting on its behalf, violated Ohio Revised Code Sections 1345.02(A) and 1345.03(A) by engaging in a pattern or practice of initiating telephone solicitations to residential telephone subscribers in the State of Ohio, whose telephone numbers were listed on the National Do Not Call Registry in violation of the TCPA, 47 U.S.C. § 227(c), and 47 C.F.R. 64.1200(c)(2) and/or in violation of the Telemarketing Sales Rule, 16 C.F.R. § 310.4(b)(1)(iii)(B).

> 96. Defendant, either directly or indirectly as a result of a third party acting on its behalf, violated Ohio Revised Code Sections 1345.02(A) and 1345.03(A) by engaging in a pattern or practice of initiating telephone calls to residential telephone lines using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and without falling within specified exemptions delineated within the TCPA in violation of the TCPA, 47 U.S.C. 227(B)(1)(b) and 47 C.F.R. 64.1200(a)(2).

Third Amended Complaint, ¶¶ 95-96.

In addition, the Final Pretrial Order provides that Ohio also alleges:

> 437. Failing to record a do-not-call request on an internal do-not-call list, and failing to honor a prior do-not-call request, are unfair and deceptive practices in violation of the OCSPA. Opinion 445 at 224–225.
>
> . . . .
>
> 471. Dish is liable for 120,809 violations of the Ohio Consumer Sales Practices Act for which a civil penalty may be imposed because it called consumers on the Registry as well as consumers who asked not to be called. These are Dish calls and are not contingent on an agency analysis.

Final Pretrial Order (d/e 564), Attachment F, Plaintiffs' Conclusions of Law, ¶¶ 437, 471. Ohio referenced Opinion 445 in which the Court stated:

> Ohio Courts have held that failing to record a do-not-call request on an internal do-not-call list and failing to honor

> a prior do-not-call request were unfair and deceptive practices in violation of the Ohio Act. Charvat v. NMP, LLC., 656 F.3d 440, 451 (6th Cir. 2011) and cases cited therein.

Opinion 445, at 224-25.

Dish did not challenge in the Final Pretrial Order Ohio's additional claim based on Internal List Calls on the grounds that the theory was beyond the matters alleged in the Third Amended Complaint. Rather, Dish addressed the substance of the additional basis for the claim:

> 285. This Court has held that "failing to record a do-not-call request on an internal do-not-call list and failing to honor a prior do-not call request" may constitute a violation of the OCSPA. Opinion 445 at 224-25.
>
> 286. Thus, pursuant to the Court's interpretation of Ohio law, Plaintiff Ohio will have to establish for each telephone call for which it seeks to hold DISH liable that the call recipient previously made a do-not-call request to DISH which DISH failed to honor.
>
> 287. In that regard, DISH is not obligated to honor internal do-not-call requests made to the Retailers unless those Retailers are agents of DISH, and vice versa. *See* Opinion 445 at 227. Plaintiff Ohio cannot meet its burden to prove that an agency relationship existed as between DISH and the Retailers at issue.

Final Pretrial Order, Attachment G, Dish's Conclusions of Law, ¶¶ 285-87. The Final Pretrial Order controls the claims at issue at trial. Fed. R. Civ. P. 16(d); Gorlikowski v. Tolbert, 52 F.3d 1439, 1443-44 (7th Cir. 1995). Both parties addressed the substance of Ohio's claims based on Internal List Calls even though Ohio did not allege Internal List Calls as a basis for its claim in Count XII in the Third Amended Complaint. Ohio may proceed on the Internal List Calls in Count XII, as well as the Registry Calls and the prerecorded calls.

The OCSPA prohibits unfair and deceptive practices in consumer transactions:

> No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

Ohio Rev. Code § 1345.02(A). The OCSPA also prohibits unconscionable acts or practices in consumer transactions:

> No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

Ohio Rev. Code § 1345.03(A). The statute of limitations is two years, and so, extends back to calls made after March 25, 2007.

The OCSPA uses the terms "supplier" and "consumer transaction." A "consumer transaction" includes both the solicitation and the sale of goods or services "to an individual for purposes that are primarily personal, family, or household . . . ." Ohio Rev. Code § 1345.01(A). The Retailers Agreements only authorized Order Entry Retailers to sell Dish Network programming to residential customers, and the Order Entry Tool only could be used to place orders for residential service. Further, Dish and its Telemarketing Vendors almost always used outbound telemarketing to sell Dish programming to residential customers. Therefore, the solicitation and sale of Dish Network programming by Dish, its Telemarketing Vendors, and the Order Entry Retailers were consumer transactions to Ohio residents were consumer transactions under the OCSPA.

A "supplier" includes a person "in the business of effecting or soliciting consumer transactions." Ohio Rev. Code § 1345.01(C). Dish, the Telemarketing Vendors, and the Order Entry Retailers were suppliers under the OCSPA when they made outbound telemarketing calls to sell Dish Network programming to Ohio residents.

Courts have held that failing to record a Do-Not-Call request on an internal do-not-call list and failing to honor a prior Do-Not Call request constitutes an unfair or deceptive practice in violation of the OCSPA. Charvat v. NMP, 656 F.3d 440, 451 (6th Cir. 2011) (citing Charvat v. Continental Mortg. Services, Inc., No. 99CVH12-10225, 2002 WL 1270183, at *5 (Ohio Ct. C.P. June 1, 2000) (Ohio Attorney General Public Information File (PIF) no. 1882)). The Court finds that these decisions are an accurate statement of Ohio law. Pursuant to these holdings, Internal List Calls made by Dish to persons who told Dish and its Telemarketing Vendors that they did not want to receive such calls violated the OCSPA. Dish made 41,788 such calls to telephone numbers with Ohio area codes reflected in the 2007-2010 Calling Records. T 633: 3282-83 (Taylor); PX 28, Taylor November 6, 2013 Report, at 11; T 613: 214-15 (Yoeli).[75] The 2007-2010 Calling records contain calls beginning in September 2007. The 41,788 calls were made after March 25, 2007, and so, within the statute of limitations.

[75] The 41,788 calls consist of the 36,598 Internal List Calls to Ohio area codes from the 903,246 calls found by Taylor, plus 5,190 Internal List Calls to Ohio area codes from the 140,349 Internal List Calls made to numbers marked DNC by eCreek, as determined by Dr. Yoeli. T 633: 3282-83 (Taylor); PX 28, Taylor November 6, 2013 Report, at 11; T 613: 214-15 (Yoeli). The sum of 36,598 plus 5,190 equals 41,788.

For the reasons stated in Counts V and VI, the preponderance of the evidence shows that the intended recipients of 41,788 Internal List Calls were Ohio residents and were residential telephone subscribers. Dish is liable for these illegal calls under Count XII in violation of the OCSPA.

Ohio also asks the Court to find that the 77,991 Registry Calls and 1,759 Prerecorded Calls made by Dish and its Telemarketing Vendors to telephones with Ohio area codes also were unfair, deceptive, or unconscionable acts and practices in violation of the OCSPA. Ohio only asks for a judgment on the Registry Calls to Ohio residents that were included in the 1,707,713 calls that the Court found violated the TSR at summary judgment. Ohio does not seek relief for any other calls made by Dish or any calls made by Order Entry Retailers in Count XII. No issues related to Dish's liability for the acts of Order Entry Retailers exist in Count XII.

A violation of the TCPA is not by itself proof of a violation of the OCSPA. See NMP, 656 F.3d at 450; Culbreath v. Golding Enterprises, L.L.C., 114 Ohio St.3d 357, 872 N.E.2d 284, 291 (Ohio 2007). Ohio must establish that the Registry Calls and Prerecorded

Calls made Dish or its agents were unfair, deceptive, or unconscionable.

The OCSPA does not define "unfair," "deceptive," or "unconscionable." The OCSPA includes a list of acts that are deceptive but the list is not exhaustive or exclusive. Ohio Rev. Code § 1345.02(B). The acts on the non-exhaustive list involve situations in which the consumer believes material facts about the transaction are true, when in fact, they are not. E.g., Ohio Rev. Code § 1345.02(B)(1) ("the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have.").

The scope of deceptive acts covered by the OCSPA is broader than the non-exhaustive list. "The boundaries of illegality under OCSPA must remain flexible because it is impossible to list all methods by which a consumer can be misled or deceived." Fletcher v. Don Foss of Cleveland, Inc., 90 Ohio App. 3d 82, 86, 628 N.E.2d 60, 62 (1993).

The OCSPA does not contain a list of acts that are unfair. The OSCPA, however, directs the Court to look to the FTC Act for guidance in interpreting § 1345.02(A) prohibition against unfair and deceptive acts:

> (C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45 (a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

Ohio Rev. Code Ann. § 1345.02(C).

The FTC Act provides that an act is not unfair unless "[the act] is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C.A. § 45(n); see FTC v. Wyndham Worldwide, Inc., 799 F.3d 236, 243 (3d Cir. 2015). The central focus of unfairness analysis is consumer injury. Substantial consumer injury can be established by "showing a small amount of harm to a large number of people." In the Matter of LabMD, Inc., 2016-2 Trade Cases P 79708 (F.T.C.), 2016 WL 4128215 (July 28, 2016), at *8; see Wyndham Worldwide, Inc., at 243. Unfair and deceptive acts do not require proof of intent. Fletcher v. Don Foss of Cleveland, Inc., 90 Ohio App. 3d 82, 86, 628 N.E.2d 60, 62 (1993).

The OCSPA includes a list of unconscionable acts, but again, the list is not exhaustive or exclusive. Ohio Rev. Code § 1345.03(B). The listed acts cover situations in which the supplier has a marked advantage over the consumer and takes advantage of that unequal position to the consumer's detriment. E.g., Ohio Rev. Code § 1345.03(B)(1) ("[T]he supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement.").

The listed unconscionable acts all must be done knowingly. The implication is that a supplier must act knowingly to commit an unconscionable act under the OCSPA. To act knowingly, the supplier must know the impact of his behavior on the consumer, or know that his behavior was proscribed. Clayton v. McCary, 426 F.Supp. 248, 261 (N.D. Ohio 1976).

After careful review of the facts and applicable law, the Court Concludes that Dish's Registry Calls were unfair acts. Registry Calls injure consumers because the supplier calls a consumer who registered his or her telephone number specifically because he or she did not want such calls, and the seller is on notice from the Registry that the consumer does not want the call, but calls anyway. Every such unwanted call causes some injury, "Every call uses some of the phone owner's time and mental energy, both of which are precious." Patriotic Veterans, Inc., v. Zoeller, 845 F.3d 303, 305-06 (7th Cir. 2017). The consumer cannot reasonably avoid the injury because the supplier controls whether to place the call. There is no countervailing economic benefit because the consumer did not want the call. Numerous Dish witnesses testified that it made no business sense to call people who did not want to be called.

The Court also concludes that the 1,759 Prerecorded Calls made by Dish and the Telemarketing Vendors were unfair. Prerecorded telemarketing calls injure consumers because there is no live person on the other end of the line:

> [M]any recipients find [prerecorded telemarketing calls] obnoxious because there's no live person at the other end of the line. The lack of a live person makes the call frustrating for the recipient but cheap for the caller, which multiplies the number of these aggravating calls in the absence of legal controls.

Patriotic Veterans, Inc. v. Zoeller, 845 F.3d at 306. Torok's testimony confirms the accuracy of the Seventh Circuit's observation in Patriotic Veterans. Prerecorded calls currently are the primary cause of consumer frustration with telemarketing. Prerecorded Calls generate large numbers of Do-Not-Call complaints to the FTC. T 710: 39 (Torok). The FTC is actively working to come up with a solution that would stop unwanted Prerecorded Calls. T 710: 80-83 (Torok).

The consumers could not reasonably avoid the injury in this case because Dish controlled whether to place the calls. The evidence before the Court shows no countervailing economic benefit. Dish witness Ahmed testified that these types of sales tactics did not produce good customers and led to high churn rates that cost Dish money. See T 626: 2323-28, 2333-34, 2418-19 (Ahmed). In this case, at least, Prerecorded Calls were unfair.

Dish is liable for the 41,788 Internal List Calls, 77,991 Registry Calls, and 1,759 Prerecorded Calls that Dish or its agents made to Ohio residents in violation of the OCSPA.

2. Civil Penalties for Ohio under Count XII

Ohio has established that Dish violated the OCSPA when it made 41,788 Internal Calls from September 2007 to March 2010. Each call was a separate violation.

Under the OCSPA, the Court may assess civil penalties as follows:

> [I]f the violation is an act or practice that was . . . determined by a court of this state to violate section 1345.02 [or] 1345.03 of the Revised Code and committed after the decision containing the court's determination was made available for public inspection pursuant to division (A)(3) of section 1345.05 of the Revised Code, the attorney general may request and the court may impose a civil penalty of not more than twenty-five thousand dollars against the supplier.

Ohio Rev. Code § 1345.07(D). Section 1345.05(A)(3) provides:

> (A) The attorney general shall:
>
> (3) Make available for public inspection all rules and all other written statements of policy or interpretations adopted or used by the attorney general in the discharge of the attorney general's functions, together with all judgments, including supporting opinions, by courts of this state that determine the rights of the parties and concerning which appellate remedies have been exhausted, or lost by the expiration of the time for appeal, determining that specific acts or practices violate section 1345.02, 1345.03, or 1345.031 of the Revised Code;

Ohio Rev. Code § 1345.05.

The Attorney General made judgments available as early as 2000 that stated that making calls to people who previously stated that they did not want to receive such calls was unfair and deceptive in violation of Ohio Revised Code § 1345.02. Charvat v. Cont'l Mortg. Servs,, Inc., No. 99CVH12-10225, 2002 WL 1270183, at *5 (Ohio Ct. C.P. June 1, 2000) (PIF no. 1882); see Burdge v. Satellite Sys. Network, LLC., No. 2006 CV F 01279, at 3 (Fairfield, Ohio Mun. Ct. March 2, 2007) (PIF No. 2535.); Ohio ex rel. Petro v. Craftmatic Ord., Inc., No 05-CVH-06-06060, at 13 (Ohio Ct. C.P. July 25, 2005) (PIF No. 2347); Burdge v. Satellite Sys. Network, LLC., No. 2005 CV F 00243, at 2 (Fairfield, Ohio Mun. Ct. May 11, 2005) (PIF No. 2344.) Ohio ex rel. Fisher v. Wykle, No. 90-1395, at 4 (Ohio Ct. C.P. Apr 8, 1992) (PIF No. 1141). Ohio is entitled to recover civil penalties for the 41,788 Internal List Calls that Dish and its Telemarketing Vendors made from 2007 to September 2010. The maximum civil penalty exceeds $1 billion (41,788 x $25,000.00 = $1,044,700,000.00). Ohio suggests that 1 percent of this figure, or $10,447,000.00, would be an appropriate penalty.

Dish claims that it is entitled to an affirmative defense to civil penalties under Ohio Rev. Code § 1345.11. Section 1345.11 states that "no civil penalties shall be imposed" if "a supplier shows by a preponderance of the evidence that a violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error." Ohio Rev. Code § 1345.11(A). Ohio objects to Dish raising this affirmative defense. Plaintiffs' Proposed Responsive Conclusions of Law (d/e 682), at 5. Ohio objects because Dish did not raise the defense in its Answer or in its proposed conclusions of law in the Final Pretrial Order. Answer to Third Amended Complaint and Affirmative Defenses (d/e 484), at 19-22, Defenses; Final Pretrial Order (d/e 564), Attachment G, Dish Network L.L.C.'s Proposed Conclusions of Law, at 78-82.

The pretrial conference and pretrial order "are vital parts of the procedural scheme created by the Federal Rules of Civil Procedure." SNA Nut Company v. The Haagen-Dazs Company, Inc., 302 F.3d 725, 732 (7th Cir. 2002). As a result, "a defense not raised in the pretrial order is deemed waived." Id. Dish's possible affirmative defense under § 1345.11(A) is waived.

Dish also argues that Ohio is only entitled to a maximum penalty of $25,000.00. Dish cites two opinions from the Ohio Courts of Common Pleas in which the courts assessed penalties on companies that engaged in years of unfair and deceptive practices. These courts assessed one penalty of $25,000.00 for each type of unlawful practice. State ex rel. Fisher v. Gates, 1995 WL 901458, at *2 (Ohio Ct. Common Pleas Mar. 21, 1995); State ex rel. Celebrezze v. Erdil, 1992 WL 792930, at *1-2 (Ohio Ct. Common Pleas Oct. 28, 1992). Section 1345.07(D) authorizes a penalty for "an act or practice."

The OSCPA "is a remedial law designed to provide various civil remedies to aggrieved consumers and must be read liberally." State ex rel. Celebrezze v. Hughes, 569 N.E.2d 1059, 1062 (Ohio 1991); see Motzer Dodge Jeep Eagle, Inc. v. Ohio Attorney General, 642 N.E.2d 20, 25 (Ohio App. 1994). Read liberally, § 1345.07(D) authorizes a penalty for either an act or a practice. The Ohio Attorney General in Erdil and Gates proved illegal practices, not a specific number of illegal acts, and so, secured one penalty each practice. In this case, Ohio proved a specific 41,788 unfair acts. Ohio is entitled under § 1345.07(D) to secure a penalty for each act. The maximum penalty proven under Count XI is not limited to $25,000.00. The Court will address the appropriate amount to impose below in conjunction with the amounts to be awarded for all of the claims for monetary relief.

K. Summary

In summary, Dish is liable for the calls set forth in the tables below. The tables also list the number of calls for which Dish is liable for monetary relief, either civil penalties or statutory damages.

Table I: Count I: TSR Registry Calls

Calls by Dish from March 25, 2004 through August 31, 2007	Millions of calls, but specific number unproven
Calls by Dish from September 1, 2007 through March 12, 2010	3,140,920
Calls by Dish Order Entry Retailer and agent JSR in 2006	2,349,031
Additional Calls by Dish Order Entry Retailer and agent JSR from January 1, 2007 to February 14, 2007	Millions of calls, but specific number unproven
Calls by Dish Order Entry Retailer and agent Satellite Systems	381,811

Table II: Count II: TSR Internal List Calls

Calls by Dish to persons on Dish's internal do-not-call list	903,246
Calls by Dish to persons on eCreek's internal do-not-call list	140,349

Calls by Dish to persons on Order Entry Retailers' do-not-call lists	7,321,163
Calls by Dish Order Entry Retailer and agent JSR in 2006 to persons on Dish's internal do-not-call list	418,228
Calls by Dish Order Entry Retailer and agent JSR from January through February 14, 2007, to persons on Dish's internal do-not-call list	Millions of calls, but specific number unproven
Calls by Dish Order Entry Retailer and agent JSR in 2006 to persons on Order Entry Retailers' internal do-not-call lists	267,439
Calls by Dish Order Entry Retailer and agent JSR from January through February 14, 2007 to persons on Order Entry Retailers' internal do-not-call lists	Thousands of calls, but specific number unproven
Calls by Dish Order Entry Retailer and agent Satellite Systems to persons on Dish's internal do-not-call list	22,946
Calls by Dish Order Entry Retailer and agent Satellite Systems to persons on Order Entry Retailers' internal do-not-call lists	42,990
Calls by Dish Order Entry Retailer and agent Dish Nation	Included in JSR calls

Table III: Count III: TSR Abandoned Calls

Abandoned calls by Dish	98,054
Abandoned calls by Dish Order Entry Retailer and agent Dish TV Now	6,637,196
Abandoned calls by Dish Order Entry Retailer and agent Star Satellite (calls counted once for civil penalties)	43,100,876
Abandoned calls by Dish Order Entry Retailer and agent JSR	1,285,379
Abandoned call by Dish Order Entry Retailer and agent American Satellite	1

Additional abandoned calls by Dish Order Entry Retailer and agent American Satellite	Many, but specific number unproven
Abandoned calls by Dish Order Entry Retailer and agent Dish Nation	Included in JSR calls

Table IV: Count IV: TSR Substantial Assistance

Calls by Dish Order Entry Retailer and agent Star Satellite (calls counted once for civil penalties)	43,100,876

Total TSR Violations subject to monetary relief:[76] 66,109,628 calls

At $11,000.00 per violation, the maximum amount of civil penalties would be over $727 billion ($ 727,205,908,000.00). The actual maximum penalty is higher than this figure because some of the violations occurred after February 9, 2009, when the maximum penalty per violation was $16,000.00.[77]

[76] The total includes the 43,100,876 calls that Dish caused Star Satellite to make only once, and the 2,386,386 calls that Dish made from September 2007 to March 2010 only once.

[77] Even if the Court disregarded the Order Entry Retailers' activities (including Dish's calls to persons on the Order Entry Retailers' Internal Do-Not-Call Lists), Dish and its Telemarketing Vendors made a total of 4,282,569 illegal calls in violation of the TSR. At $11,000.00 per violation, the maximum amount of civil penalties would still be over $47 billion ($47,108,259,000.00). This amount does not include the millions of illegal calls made from March 25, 2004 through August 2007.

Table V: Count V: TCPA Registry Calls

California

California calls in 2003-2007 Registry Calls	266,514
California calls in 1,707,713 TSR Summary Judgment Registry Calls	216,867
California calls in 2,386,386 Registry and Internal List Calls	302,983
California calls in JSR Registry Calls	473,102
California calls in Satellite Systems Registry Calls	24,100
California Total	1,283,566

Illinois

Illinois calls in 2003-2007 Registry Calls	112,116
Illinois calls in 1,707,713 TSR Summary Judgment Registry Calls	83,895
Illinois calls in 2,386,386 Registry and Internal List Calls	118,289
Illinois calls in JSR Registry Calls	369,384
Illinois calls in Satellite Systems Registry Calls	10,048
Illinois Total	693,732

North Carolina

North Carolina calls in 2003-2007 Registry Calls	85,093
North Carolina calls in 1,707,713 TSR Summary Judgment Registry Calls	52,961
North Carolina Calls in 2,386,386 Registry and Internal List Calls	97,785
North Carolina calls in JSR Registry Calls	18,250
North Carolina calls in Satellite Systems Registry Calls	7,290
North Carolina Total	261,379

Ohio

Ohio calls in 2003-2007 Registry Calls	98,207
Ohio calls in 1,707,714 TSR Summary Judgment Registry Calls	77,991
Ohio calls in 2,386,386 Registry and Internal List Calls	95,275
Ohio calls in JSR Registry Calls	129,004
Ohio calls in Satellite Systems Registry Calls	12,803
Ohio Total	413,280

Grand Total for Count V

California	1,283,566
Illinois	693,732
North Carolina	261,379
Ohio	413,280
Grand Total of Violations in Count V	2,651,957

Table VI: Count VI: TCPA Prerecorded Calls

California

California calls in Dish and Telemarketing Vendor Prerecorded Calls	23,020
California calls in Star Satellite Prerecorded Calls	5,727,417
California Total	5,750,437

Illinois

Illinois calls in Dish and Telemarketing Vendor Prerecorded Calls	5,830
Illinois calls in Star Satellite Calls	2,660,066
Illinois Total	2,665,896

North Carolina

North Carolina calls in Dish and Telemarketing Vendor Prerecorded Calls	2,283
North Carolina calls in Star Satellite Calls	1,716,457
North Carolina Total	1,718,740

Ohio

Ohio calls in Dish and Telemarketing Vendor Prerecorded Calls	1,759
Ohio calls in Star Satellite Calls	3,419,175
Ohio Total	3,420,934

Grand Total for Count VI

California	5,750,437
Illinois	2,665,896
North Carolina	1,718,740
Ohio	3,420,934
Grand Total for Count VI Violations	13,556,007

Total TCPA Violations: 16,207,964

At $500.00 in statutory damages per violation for knowing violations, the maximum statutory damages award would be approximately $8.1 billion ($8,103,982,000.00).

Table VII: Violations of Cal. Bus. & Prof. Code § 17592(c)

2007-2010: Yoeli Set of 2,386,386 Registry Calls	296,640
2007-2010: Taylor's Set of 501,650 Registry Calls	42,019

2007-2010: Taylor's Set of Not Completed Registry Calls	33,970
2007-2010: Taylor's Set of Wrong Number, No English Registry Calls	1,955
Total	374,584

Table VIII: Violations of Cal. Bus. & Prof. Code § 17200

Violations of TCPA Proven in Count V	1,283,566
Violations of TCPA Proven in Count VI	5,750,437
Violations of Cal. Bus. & Prof. Code § 17592(c)	374,584
Violations of Cal. Civ. Code § 1770(a)(22)(A)	5,727,417
Total	13,136,004

The maximum possible penalties for Count VII would be $11,000 per violation prior to February 9, 2009, and $16,000 thereafter; plus $2,500 per violation. The maximum possible penalties for Count VIII would be $2,500 per violation. The total maximum possible civil penalty for California's claims in Counts VII and VIII exceeds $37.8 billion ($37,896,894,000.00).[78] California suggests a penalty of $100 million ($100,000,000.00).

[78] (374,584 x $11,000) + (374,584 x $2,500) + (13,136,004 x $2,500) = $37,896,894,000.00. This calculation assumes $11,000 as the maximum possible penalty for the violations proven under §17593.

Table IX: Violations of N.C. Gen. Stat. § 75-102

North Carolina Registry Calls within 2 years of the first violation proven	103,343 Registry Calls subject to civil penalties

Table X: Violations of N.C. Gen. Stat. §75-104

North Carolina Prerecorded Calls within 2 years of the first violation proven	1,716,457 Prerecorded Calls subject to civil penalties

The civil penalties for the violations in Counts IX and X are $500 for the first violation, $1,000 for the second violation, and $5,000 for the third and any other violation that occurs within two years of the first violation. The calculated penalty would be approximately $9.1 billion ($9,098,938,000.00). North Carolina has offered to voluntarily remit the penalty to $100 per violation or approximately $182 million ($182,980,000.00).

Table XI: Violations of Illinois Automatic Telephone Dialers Act (IATDA), 815 ILCS 505/2Z

No Violations Proven	0

Table XII: Violations of Ohio Consumer Sales Practice Act, Ohio Rev. Stat. Ohio Rev. Code § 1345.02(A)

Ohio Internal List Calls by Dish and Telemarketing Vendors	41,788 Violations subject to civil penalties.

The maximum civil penalty is $25,000.00 per violation. The total possible penalty in Count XII exceeds $1 billion (41,788 x $25,000.00 = $1,044,700,000.00). Ohio suggests 1 percent of the maximum, or $10.4 million ($10,447,000.00), as an appropriate penalty.

Table XIII: Total Maximum Possible Monetary Liability

Counts I-IV TSR Maximum Civil Penalties	$ 727,205,908,000.00
Counts V-VI TCPA Calculated Statutory Damages	8,103,982,000.00
Counts VII-VIII Maximum Civil Penalties	37,896,894,000.00
Counts IX-X Calculated Civil Penalties	9,098,938,000.00
Count XI No Violations	0.00
Count XII Maximum Civil Penalties	1,044,700,000.00
Total Maximum Possible Penalties and Statutory Damages	$ 783,350,422,000.00

Table XIV: Plaintiffs' Suggested Monetary Liability

United States' Suggested Penalty for TSR Counts I-IV	$ 900,000,000.00
Plaintiff States' Suggested Statutory Damages for TCPA Counts V-VI	1,000,000,000.00
California's Suggested Penalty for Counts VII-VIII	100,000,000.00
North Carolina's Suggested Penalty for Counts IX-X	182,980,000.00
Ohio's Suggested Penalty for Count XII	10,447,000.00
Total Suggested Penalties and Statutory Damages	$ 2,193,427,000.00

Table XV: Defendant's Testimony Regarding Penalties

DeFranco's testimony that a $20 million penalty would "be a lot of money" and "more than a slap on the wrist." T 621:1548 (DeFranco).	$ 20,000,000.00

II. The Appropriate Amount of Monetary Relief

The appropriate amount of monetary relief in each Count depends, in part, on the relief awarded in the other Counts. The Court will address the factors for determining the amount of relief in the Counts I-X and XII and then determine the appropriate amount of monetary relief for these Count.

A. <u>Factors for TSR Violations in Counts I-IV</u>

The FTC Act sets forth factors the Court must consider in setting the appropriate amount of civil penalties within the statutory maximum:

> In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

15 U.S.C. § 45(m)(1)(C). The Court considers these factors in order.

1. <u>Culpability</u>

Dish's culpability is significant. Dish has some level of culpability for its direct marketing and a significantly higher level of culpability for the illegal calls made through its Order Entry program.

a. <u>Dish Direct Marketing</u>

Dish made efforts to follow the Do-Not-Call Laws in its Account Number Campaigns. Dish set up a system to scrub Account Number Campaigns through the PDialer. In 2008, Dish started using PossibleNOW's services and software to provide an additional scrub. These efforts weigh in favor of finding that Dish had limited culpability for the calls made in its Account Number Campaigns.

Dish, however, failed to prove that it made similar efforts with its Lead Tracking System and Cold Call campaigns. Dish claimed that it had an Inquiry-based Established Business Relationship with the persons whose numbers were on Lead Tracking System campaigns because these individuals inquired about Dish Network programming. Dish had the burden to prove Established Business Relationship exceptions. Dish failed to demonstrate that the Lead Tracking System was limited to people who inquired about Dish Network programming. Dish presented almost no competent evidence regarding how Lead Tracking System calling lists were formulated. Dish failed to show that it had Established Business Relationships with the persons on the Lead Tracking System.

Dish also failed to present competent evidence to show how Lead Tracking System and Cold Call calling lists were scrubbed. The lack of evidence leaves the Court with no basis to conclude that Dish made any efforts to remove numbers that were on the Registry or on Internal Do-Not-Call Lists from the Lead Tracking System and Cold Call calling lists. The failure of Dish to present competent evidence to show effort to make its Lead Tracking System and Cold Call campaigns comply with the TSR weigh in favor of finding culpability for the illegal calls in these campaigns.

In addition, Dish made millions of illegal calls in Account Number Campaigns because Dish used an unreliable method to determine whether it had Transaction-based Established Business Relationships with current and former customers. The TSR definitions stated that a Transaction-based Established Business Relationship existed for 18 months immediately after the customer's last payment or financial transaction. Dish's expert Sponsler testified that a Transaction-based Established Business Relationship with a current or former customer had to be calculated from the date of the last transaction. Dish did not start using transaction dates until approximately July 2010, after all the calls at issue were made.

Dish's failure to read and properly apply the TSR definitions for Established Business Relationships was a serious error that should have been avoided. This error resulted in millions and millions of illegal calls. Dish's inability to read and follow the TSR demonstrates a lack of care that weighs in favor of finding some level of culpability for the Account Number Campaign calls made by Dish and its Telemarketing Vendors.

Dish presented Taylor's testimony at trial in an attempt to show that it had little culpability for the 1,707,713 calls that the Court found were illegal calls to numbers on the Registry at summary judgment. As explained in the Finding of Facts, the vast majority of these calls were violations. Taylor showed that, at best, 20,387 canceled work order and other non-telemarketing calls may not have been violations.

In addition, Dish made many more illegal calls than those on which the United States has sought liability. Taylor concluded in his October 14, 2013 Report, PX 16, that Dish made 501,650 Registry calls for which Taylor could not find a basis to exclude from liability. The United States asked, and the Court found liability for these calls. Taylor, however, erroneously eliminated at least 15,846,402 calls from liability for reasons that were not supported by the evidence. These 15,846,402 illegal calls show that Dish's errors caused many more illegal calls than those on which the United States secured a finding of liability. The actual magnitude of the illegal conduct speaks to more a significant level of culpability.

Dish further argues that violations as percentage of all of Dish's calls was very small. Dish relies on Taylor's Tables, DTX 626A through 626D, to show that the vast majority of Dish's calling campaigns had very few illegal calls. Dish also relies on Taylor's opinion that an error rate of 5% or less indicated that the calling list was properly scrubbed to remove numbers that should not be called. Taylor's Tables, however, are only based on the 501,650 calls from his October 14, 2013 Report on which the Court granted summary judgment. Taylor's Tables do not take into account the 15,846,402 additional calls in those calling campaigns that violated the TSR. In light of all these additional violations, Taylor's Tables tell the Court little or nothing about the percentage of all of Dish's calls that violated the TSR.

Dish also relies extensively on Sponsler's 2010 audit. The audit says nothing about Dish's culpability. The violations occurred from March 2004 to March 2010. Sponsler only made findings in the audit about Dish's practices in May 2010. The audit also says nothing about the process Database Marketing used to process Lead Tracking System and Cold Call calling lists to comply with the Do-Not-Call Laws. The audit was also at a "high," i.e. superficial, level. Sponsler did not audit calling records to see the rate of errors in Dish's calling processes. The audit is not probative of Dish's culpability for the calls for which Dish is liable.

The Court concludes that Dish's handling of its direct telemarketing requires a finding of some culpability. Outbound Operations Department took many steps to scrub Account Number Campaign calling lists, but Dish failed to properly determine whether Dish had Transaction-based Established Business Relationships with current and former customers. Dish presented no competent evidence of Dish's efforts to ensure that the Lead Tracking System and Cold Call calling campaigns complied with the TSR or other Do-Not-Call Laws. On balance, the failure to read and apply the TSR Established Business Relationship definition and the lack of evidence on the formation and processing of Lead Tracking Systems calling lists merits a finding of culpability for Dish's direct marketing.

b. Order Entry Program

Dish bears significant culpability for the reckless manner in which Dish operated the Order Entry Program before August of 2006, and to a lesser extent thereafter. Dish initially hired Order Entry Retailers based on one factor, the ability to generate activations. Dish cared about very little else. As a result, Dish created a situation in which unscrupulous sales persons used illegal practices to sell Dish Network programming any way they could. By 2006, Dish admitted it was overwhelmed with consumer complaints about these operators. Dish started to address the mess in the second half of 2006, but by 2009, Dish's own legal department still viewed the Order Entry program as fraught with illegal and shady practices. In late 2008 and early 2009, Dish fired 40 Retailers for defrauding Dish and lying to potential customers over the phone. As part of this purge, in 2009, Dish cut the number of Order Entry Retailers from 76 to 32. Dish sowed the wind and reaped the whirlwind when it decided to hire anybody that could get on the phone and bring in activations by whatever means possible.

Part of that whirlwind was the millions and millions of illegal calls in violation of the TSR. The United States has proven that Dish TV Now, Star Satellite, JSR, Satellite Systems, and American Satellite made 54,505,896 illegal calls in violation of the Do-Not-Call Law, including the TSR. The United States has also proven that Order Entry Retailers JSR, American Satellite, Dish Nation, United Satellite, Vision Satellite, LA Activations, and Atlas Assets made many more illegal "press 1" prerecorded telemarketing calls to sell Dish Network programming. Based on the volume of Abandoned Prerecorded Calls made by Star Satellite, Dish TV Now, and JSR, the Court finds it more likely than not that these other operators made hundreds of millions more. Dish's reckless decision to use anyone with a call center without any vetting or meaningful supervision demonstrates a disregard for the consuming public.

2. History of Prior Conduct

The evidence shows some history of Do-Not-Call Law violations before March 25, 2004. Dish made calls to Oregon residents without scrubbing against the Oregon state Do-Not-Call list. In 2003, Dish entered into an Assurance of Voluntary Compliance with Indiana to comply with Indiana Do-Not-Call Laws, and Dish was sued by Missouri for Do-Not-Call Law violations. The history shows that Dish had on-going problems complying with Do-Not-Call Laws even before the Registry launched. The history also shows that Dish understood the potential penalties for Do-Not-Call Law violations could be substantial.

3. Ability to Pay

The evidence also shows that Dish has a significant ability to pay a penalty. Dish is worth $28 billion. Dish's net after tax income, or profits, for 2016 was approximately $1.4 billion. Dish also has consistently made net after tax income between $700 million and $1.5 billion since 2011. Dish has the ability to pay a significant percentage of its annual profits as a penalty.

4. Ability to Continue Business

Dish would be able to pay a significant percentage of its net after-tax income as a penalty and continue operating. Dish has repeatedly demonstrated an ability to make large one-time payments and still maintain operations. In 2015, Dish paid over $515 million to the FCC because its affiliates bid on the wireless spectrum, but they failed to complete the purchase of some spectrum on which they bid. In 2011, Dish agreed to pay TiVo

$500 million in settlement of a patent suit. Dish paid a lump sum of $300 million to TiVo as an initial payment on this settlement. In 2012, Dish paid $700 million to Voom to settle a contract dispute. Dish continued to operate and continued to increase its profits while making these payments. In light of this evidence, Dish can pay a penalty of a significant percentage of its profits and still continue operating.

Dish claims that it is cash-poor because it has invested large portions of its net after tax profits in wireless spectrum to keep the company competitive. Dish's plea of poverty borders on the preposterous. Dish has made net after tax profits of $700 million to 1.5 billion annually for the past several years, and it has had no problems paying the substantial penalties and settlements discussed above. Dish cannot avoid liability because its current business plan calls for buying illiquid assets in the form of broadband spectrum. Dish has the assets and ability to pay the appropriate penalty for its illegal conduct.

5. Other Matters that Justice May Require

Dish has presented evidence that the United States, either directly or through FTC, entered into numerous civil penalty settlements with various companies for violations of the TSR. The United States entered into a stipulated judgment against Star Satellite in the amount of $4,373,768 for the same 43,100,876 calls at issue here. The United States entered into a stipulated judgment with Guardian for $7,892,242 for the approximately 49,000,000 calls it made for Star Satellite and Dish TV Now at issue here. The terms of the stipulated judgment against Star Satellite suspended all but $75,000 of the penalties. The terms of the stipulated judgment against Guardian suspended all but $150,000 of the penalties.

The FTC entered into a stipulated judgment against Dish TVRO Retailer New Edge Satellite for $570,000 in civil penalties, but suspended all of the penalties. The FTC entered into a stipulated judgment against Order Entry Retailer Planet Earth Satellite in the amount of $7,094,354 but suspended all but $20,000 of the penalties. The FTC entered into a stipulated judgment against Caribbean Cruise Line, Inc., for $7,730,000 in civil penalties for making 12 to 15 million illegal calls. The United States entered into a stipulated judgment against Comcast Corporation in the amount of $900,000 in civil penalties for TSR violations. The United States alleged that Comcast Corporation made over 900,000 illegal calls. The United States entered into a stipulated judgment against DirecTV for $2,310,000.00 in civil penalties for TSR violations. The United States alleged that DirecTV was responsible for 1,050,007 calls. Dish argues that fairness requires a penalty commensurate with the penalties awarded in these cases.

These settlements are worth little or no consideration in the calculations of civil penalties in this case. Parties who settle negotiate a settlement sum to avoid the time and costs of litigation. The parties also negotiate a settlement to avoid the risk of a judgment in a fully litigated matter. The plaintiff avoids the risk of a judgment in favor of the defendant, and the defendant avoids the risk of liability from a large judgment in favor of the plaintiff. Settling parties "forego the possibility of fully vindicating their positions." United States v. Phelps Dodge Industries, Inc., 589 F.Supp. 1340, 1367 (S.D. N.Y. 1984). The settlements, therefore, say little or nothing about the amount a court would have entered in judgment if the matters had been fully litigated. As a result, the settlements have little probative value on the appropriate monetary relief in this fully litigated case.

Assuming arguendo that settlements have some probative value, the parties have not admitted any details about the activities of any of the defendants in these settled matters except Star Satellite and Guardian. The Court, therefore, has no basis to compare those cases to this one.

The parties have presented evidence about Star Satellite and Guardian. Dish argues that Star Satellite and Guardian were more culpable that Dish. The Court disagrees. Dish created the situation that allowed Star Satellite and Guardian to act. If Dish had not started the Order Entry program, or if Dish had adequately monitored and supervised the Order Entry program, Star Satellite and Guardian would have never made millions and millions of illegal calls to sell Dish Network programming. Dish's creation of the largely unsupervised Order Entry program and its indifference to the consequences of its actions makes Dish more culpable than either Star Satellite or Guardian.

Dish also presents no evidence about Star Satellite or Guardian's ability to pay a penalty. The ability to pay is a statutory factor that the Court must consider. Dish, thereby, failed to present the necessary evidence to compare these cases.

Dish notes that the FTC issued statements in several of these cases indicating that the settlement amount of civil penalties was the proper penalty under the circumstances. However, the opinion of a party in a case, even the FTC, is not controlling and does not indicate the amount of penalties that a court would have entered if the case had been fully litigated.

Dish argues that it will be punished for exercising its right to trial if the penalties exceed an amount that is consistent with these settlements. This is incorrect. Parties settle to avoid the possible results of full litigation. The parties did not settle here. As a result, the Court must give both parties the right to try the case to a fully litigated judgment. Dish is not being punished for trying the case rather than settling.

6. Res Judicata

Dish argues that an award of civil penalties for the 43,100,876 Prerecorded Calls by Star Satellite and the 6,637,196 Prerecorded Calls by Dish TV Now is barred by the doctrine of res judicata. The doctrine of res judicata holds that once a party has fully litigated a claim, the party cannot litigate the claim again against the same party or their privies. Res judicata, however, does not bar separate actions against joint wrongdoers. The claim against each wrongdoer is a separate and distinct claim for purposes of res judicata. See Minix v. Canarecci, 597 F.3d 824, 829-30 (7th Cir. 2010) (citing Restatement (Second) of Judgments § 49 (1982) ("A judgment against one person liable for a loss does not terminate a claim that the injured party may have against another person who may be liable therefor.")).[79] The claim of the United States against Dish for these illegal calls is separate from its claims against Star Satellite and Guardian for purposes of res judicata. The United States' claim against Dish is not barred by res judicata.

B. The TCPA Violations in Counts V and VI

The calculated amount of more than $8.1 billion in statutory damages under the TCPA is "wholly disproportioned to the offense and obviously unreasonable." St. Louis I.M. & S. Ry. Co. v. Williams, 251 U.S. at 66-67. The TCPA does not list factors for reducing this amount. The parties have at times suggested

[79] The Illinois Supreme Court has agreed with the Restatement (Second) of Judgments approach to res judicata. See River Park, Inc. v. City of Highland Park, 184 Ill.2d 290, 311-12, 703 N.E.2d 883, 893 (Ill. 1998).

applying the statutory factors in the FTC Act § 5(m) discussed above. See Plaintiffs' Motion for Summary Judgment (d/e 402), at 167; Dish Network, L.L.C.'s Proposed Post-Trial Conclusions of Law (d/e 666), at 82. The Court agrees that these factors provide a framework for assessing a proportionate and reasonable penalty that would consistent with the requirements of due process. Therefore, The Plaintiff States are entitled to significant amount of statutory damages for the reasons discussed with respect to Counts I-IV.

Dish renews its arguments that one call may not be subject to multiple statutory damages and penalties even if the call violates multiple statutes and rules. Dish is again incorrect. An act that violates multiple statutes may be liable for multiple awards of statutory damages and penalties. Lary, 780 F.3d at 1105-06.

The Plaintiff States again argue for a remittitur or a voluntary reduction by them. As discussed above a remittitur is not appropriate because this is not a jury trial, and the Plaintiff States did not offer a voluntary reduction. The relevant factors used in the FTC Act § 5(m) support the awarding of a significant penalty.

C. <u>California Civil Penalties in Counts VII and VIII</u>

The amount of civil penalties for Count VII is governed by California Business and Professions Code §§ 17536 and 17592(c). The amount of civil penalties for Count VIII is governed by California Business and Professions Code § 17206. Section 17592(c) states that the amount civil penalties under that provision is governed by the same factors as the penalties under FTC Act § 5(m) discussed in Counts I-IV above. The California Business and Professions Code §§ 17536 and 17206 set forth the same factors for setting the appropriate penalties:

> (b) The court shall impose a civil penalty for each violation of this chapter. In assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant's misconduct, and the defendant's assets, liabilities, and net worth.

Cal. Bus. & Prof. Code §§ 17206(b) and 17536(b) (statutory language is identical in each).

The statutory factors in §§ 17206(b) and 17536(b) weigh in favor of a significant penalty. Dish's persistent misconduct was serious, and the number of violations in California was enormous. From 2003 to 2010, Dish called hundreds of thousands of California consumers who registered their phones on the Registry. The message was clear: these consumers did not want to be annoyed and bothered by incessant telemarketing calls, but Dish made over hundreds of thousands of such calls anyway. The cumulative injury of hundreds of thousands of calls over a seven-year period was substantial.

Dish also hired Star Satellite as its telemarketing agent. Star Satellite bombarded California households with over 5.7 million Prerecorded Calls "that many recipients find obnoxious because there's no live person at the other end of the line." Patriotic Veterans, Inc. v. Zoeller, 845 F.3d at 306.[80] The cumulative injury caused by millions of illegal telemarketing calls also weighs in favor of a significant penalty.

Dish's disregard for Star Satellite's telemarketing practices also contributed to the millions of illegal calls. By spring 2005,

[80] The actual number of Prerecorded Calls made to California residents was much larger. Many of Dish's agents made press 1 Prerecorded Calls, including Dish TV Now, Star Satellite, JSR, Satellite Systems, American Satellite, United Satellite, Vision Satellite, LA Activations, Atlas Assets, and Dish Nation. The combination of autodialers and recorded messaging enabled each of these telemarketers to make hundreds of thousands of calls a day to consumers nationally.

Dish knew that Star Satellite was making Prerecorded Calls to market Dish Network programming. Several consumers complained about these calls. Dish's dialing operations manager Bangert knew. He reported the matter to Retail Services. Jeff Medina in Dish's Retail Escalations forwarded the email to Margot Williams in Retail Escalations. Medina joked, "Are these your boys again?" Retail Services was already well aware of Star Satellite's practices. Dish did nothing to stop the practice. In August 2005, Dish was sued because of Star Satellite's Prerecorded Calls. Dish did nothing. Dish could have prevented millions of illegal calls, but did nothing. This failure to act demonstrates a disregard consumers and the law that merits a significant penalty.

Finally, Dish has significant net worth in excess of $28 billion, and net after tax profits of more than $1.4 billion in 2016. Dish has a track record of net after tax profits in this range. Dish's pleas of being cash poor are not persuasive. A significant penalty is appropriate under the statutory factors in §§ 17206 and 17536. Dish's arguments to the contrary are not persuasive.

D. North Carolina Civil Penalties in Counts IX and X

North Carolina also does not set forth statutory factors for setting the level of civil penalties. The amount of civil penalties under the statutory calculations is approximately $9.1 billion. As explained above this amount is wholly "disproportioned and obviously unreasonable" under the circumstances in violation of due process. Williams, 251 U.S. at 66-67. North Carolina offers to reduce the penalty to $100 per violation, or $175,967,600.00.

The Court will again apply the statutory factors for civil penalties under the FTC Act § 5(m) as a meaningful framework for assessing penalties in these Counts. For the reasons stated above regarding these factors in Counts I-IV, a significant penalty is appropriate. The amount of the penalty will be set below along with the other claims.

E. Ohio Civil Penalties in Count XII

Ohio does not set forth statutory factors for determining the amount of civil penalties. See Ohio Rev. Code § 1345.07(D). The Court will apply the statutory factors for penalties under FTC Act § 5(m). Again, for the reasons stated above regarding these factors in Counts I-IV, a significant penalty is appropriate.

II. <u>Amount of Statutory Damages and Penalties</u>

After careful consideration of all the relevant factors, a total award of civil penalties and statutory damages of $280,000,000.00, representing approximately 20 percent of Dish's 2016 after-tax profits of $1.4 billion, is appropriate and constitutionally proportionate, reasonable, and consistent with due process.

The amount represents a significant penalty for the millions and millions of Do-Not-Call Law violations caused by Dish over years and years of careless and reckless conduct. The amount reflects Dish's culpability for failing to read and follow the TSR and TCPA in its direct telemarketing and for enabling unscrupulous telemarketers in its Order Entry program to violate Do-Not-Call Laws on a massive scale and injure enormous numbers of consumers.

A total award of 20 percent of Dish's annual 2016 profits, is a small percentage of the $2.1 billion requested by the Plaintiffs and a miniscule fraction of maximum possible penalties and damages. The Court limited the monetary relief because Dish made some efforts to avoid violations in its direct marketing and took some actions after mid-2006, and particularly in 2009 when this suit was filed, to monitor its Order Entry Retailers,. The $280,000,000.00 award is consistent with all the relevant circumstances.

The total award is not onerous. Payment of the award will not unreasonably affect Dish's ability to operate. Dish pays operating expenses approximately $1 billion a month, $12 billion annually. The award of $280,000,000.00 will constitute a one-time 2.3 percent increase in those annual expenses. Dish also will retain 80 percent of its annual profits for payment of principal of any indebtedness or for investment into its ongoing operations. As noted above, Dish paid substantially higher penalties and settlements in the recent past, including more than $515 million to the FCC in 2015. Dish has been able to pay such sums and maintain operations. Dish's pleas of poverty and lack of cash are unpersuasive in light of these facts.

The Plaintiffs ask for $2.1 billion in penalties and statutory damages, or approximately 150 percent of Dish's annual profits. This amount could materially affect Dish's ability to continue operations. Such an award would not put Dish out of business, but could adversely affect the many individuals who work for Dish and other companies that do business with Dish.

A total monetary award of $280,000,000.00 is also appropriate in light of other matters that justice may require. Dish caused millions and millions of violations of the Do-Not-Call Laws, and Dish has minimized the significance of its own errors in direct telemarketing and steadfastly denied any responsibility for the actions of its Order Entry Retailers. The injury to consumers, the disregard for the law, and the steadfast refusal to accept responsibility require a significant and substantial monetary award. The total award of $280,000,000.00 meets these requirements.

The Court hereby imposes penalties against Dish and in favor of the Plaintiffs United States, California, and Ohio; and awards statutory damages to Plaintiffs States and North Carolina and against Dish, as follows: 60 percent of the total monetary award, or $168,000,000.00, to the United States as civil penalties in Counts I-IV; 30 percent, or $84,000,000.00, to the Plaintiff States as proportionate and reasonable statutory damages in Counts V and VI; 6 percent, or $16,800,000.00, to California as civil penalties in Counts VII and VIII; 3 percent, or $8,400,000.00, to North Carolina as proportionate and reasonable statutory damages in Counts IX and X; and 1 percent, or $2,800,000.00, to Ohio as civil penalties in

Count XII. The Court apportioned the majority of the award to the United States because the United States' claims address the injuries to consumers nationally. The Court apportioned the second largest award to the TCPA claims because of the large number of illegal calls proven in those claims and to vindicate federal law and to recognize the joint effort of all the Plaintiff States to bring this action. The Court apportioned the remaining portions to California, North Carolina, and Ohio to reflect the different numbers of illegal calls for which each state sought monetary relief.

Dish is jointly and severally liable to the Plaintiff States for the reasonable and proportionate statutory damages of $84,000,000.00 in Counts V and VI. The Plaintiff States shall divide the statutory damages in Counts V and VI proportionately to the number of violations in each state: 43.4 percent or $36,456,000.00 to California; 20.7 percent or $17,388,000.00 to Illinois; 12.2 percent or $10,248,000.00 to North Carolina; and 23.7 percent or $19,908,000.00 to Ohio.

III. Injunctive Relief

The Plaintiffs asks for a permanent injunction pursuant to FTC Act § 13(b), 15 U.S.C. § 53(b), TCPA 47 U.S.C. § 227(g)(2); Cal

Bus. & Prof. Code §§ 17204 and 17593; N.C. Gen. Stat. § 75-105(a) and 7-14; and OCSPA Ohio Rev. Code § 1345.07(A)(2). The parties focus their arguments primarily on whether the United States is entitled to a permanent injunction.

The United States seeks an injunction pursuant to the proviso in the FTC Act § 13(b) which states: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." FTC Act § 13(b),15 U.S.C. § 53(b) (emphasis in the original) (Permanent Injunction Proviso). Violations of the TSR are considered violations of a rule promulgated under the FTC Act. Violations of such rules are unfair and deceptive acts or practices in violation of FTC Act § 5(a). 15 U.S.C. §§ 45(a), 57a(1)(B) and 6102(c)(1). The United States may pursue the remedies available under the FTC Act for these violations, including injunctive relief under the Permanent Injunction Proviso. See F.T.C. v. World Media Brokers, Inc., 415 F.3d 758, 764-66 (7th Cir. 2005).

The Permanent Injunction Proviso authorizes the Court to issue a permanent injunction in a "proper case." United States v. JS & A Group, Inc., 716 F.2d 451, 455-57 (7th Cir. 1983). A proper case "is a straightforward violation of section 5 [of the FTC Act] that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings." F.T.C. v. World Travel Vacation Brokers, Inc., 861 F.2d 1020, 1028 (7th Cir. 1988). Dish's TSR violations are straightforward and do not present a novel regulatory issue that required FTC expertise. This is a proper case under the Permanent Injunction Proviso.

To establish a right to a permanent injunction, the United States must meet the "public interest" test for injunctive relief. This standard applies to actions by the federal government to enjoin violations of federal statutes in the public interest. World Travel Vacation Brokers, 861 F.2d at 1028-29. To meet the public interest test for a permanent injunction, the FTC must prove a violation of the TSR and a reasonable likelihood of future violations. Commodity Futures Trading Commission v. Hunt, 591 F.2d 1211, 1220 (7th Cir. 1979). The Court must also consider a balance of the equities; however, "public equities must receive far greater weight." World Vacation Brokers, 861 F.2d at 1029.

Factors that indicate a likelihood of future violations include "the gravity of harm caused by the offense; the extent of the defendant's participation . . . ; the isolated or recurrent nature of the infraction and the likelihood that the defendant's customary business activities might again involve him in such transactions; the defendant's recognition of his own culpability; and the sincerity of his assurances against future violations." S.E.C. v. Holschuh, 694 F.2d 130, 144 (7^{th} Cir. 1982). Proof of past misconduct is "highly suggestive of the likelihood of future violations." Hunt, 591 F.2d at 1220 (quoting S.E.C. v. Management Dynamics, Inc., 515 F.2d 801, 807 (2^{d} Cir. 1975). Evidence that the violator "continued to maintain that his conduct was blameless" has been considered indicative of a need for an injunction to prevent future violations. Hunt, 591 F.2d at 1220.

Dish argues that the Plaintiffs also must prove scienter in order to secure an injunction. The Holschuh opinion mentioned scienter as a factor. Holschuh, 694 F.2d at 144. The Holschuh case was a securities fraud case. Securities laws require proof of scienter to secure an injunction. Aaron v. S.E.C., 446 U.S. 680, 701 (1980). Scienter is not an element for establishing liability in the applicable Do-Not-Call Laws.

Dish argues that the traditional four-part test for injunctive relief in private actions of irreparable harm, no adequate remedy at law, success on the merits, and a balance of the equities applies to the United States' claim for a permanent injunction. This is incorrect. The Seventh Circuit specifically held in World Travel Vacation Brokers that the public interest test applies to actions for injunctive relief under the Permanent Injunction Proviso.

Dish appeals to other language in FTC Act § 13(b) which authorizes temporary injunctive relief during pending administrative proceedings. The temporary injunctive relief provision in § 13(b) does not apply because the Permanent Injunction Proviso is a separate and distinct authorization for permanent injunctive that is independent of the temporary relief provisions. JS & A Group, Inc., 716 F.2d at 456-57; see World Travel Vacation Brokers, 861 F.2d at 1025-26.

Dish also cites Weinberger v. Romero-Barcelo, 456 U.S. 305, 313-14 (1982) for the proposition that the Court should apply the traditional four-part test for private injunction actions. However, the Weinberger v. Romero-Barcelo decision did not concern an action brought by the federal government to enforce a federal statute. In this case, Congress determined that the FTC should be able to secure injunctive relief for clear violations of the FTC Act without should be subject to "the requirements imposed by the traditional equity standard which common law applies to private litigants." H.R. Conf. Rept. No. 624, 93d Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Admin News, at 2533. See FTC v. Warner Communications, Inc., 724 F.2d 1156, 1159 (9th Cir. 1984); FTC v. Weyehauser Co., 665 F.2d 1072, 1082 (D.C. Cir. 1981). The Weinberger v. Romero-Barcelo decision therefore does not apply. In addition, the Seventh Circuit decided World Travel Vacation Brokers in 1988, six years after the Romero-Barcelo decision. This Seventh Circuit was aware of Romero-Barcelo when it made its decision in World Travel Vacation Brokers. The Seventh Circuit agreed with the other Circuit's decision in Warner Communications and Weyehauser Co. that the public interest test should apply. World Travel Vacation Brokers, 861 F.2d at 1028-29. This Court will follow the Seventh Circuit's decision in World Travel Vacation Brokers and apply the public interest test.

The Plaintiff States seek an injunction under the TCPA 47 U.S.C. § 227(g)(2). Section 227(g)(2) contains language very similar to the Permanent Injunction Proviso, "Upon a proper showing, a permanent or temporary injunction . . . shall be granted without bond." 47 U.S.C. § 227(g)(2). Both statutes authorize the government to secure an injunction to in the public interest. The similar language and purpose supports the inference the TCPA authorizes the Plaintiff States to secure an injunction under the public interest test. See Minnesota ex rel. Hatch v. Sunbelt Communications and Marketing, 282 F.Supp.2d 976, 979 (D. Minn. 2002); Bank v. Caribbean Cruise Line, Inc., 2014 WL 1883586, at *1 and cases cited therein (E.D. N.Y. May 12, 2014), vacated on other grounds, 606 Fed.Appx., 28, 29 (2d Cir. 2015).

The public interest test is also the appropriate standard for injunctive relief under California Business & Professions Code §§ 17204 and 17593; North Carolina General Statutes §§ 17-105(a) and 17-14; and Ohio Revised Code § 1345.07(A)(2). See California Service Station & Automobile Repair Association v. Union Oil Co., 282 Cal. Rptr. 279, 285 (Cal. App. 1st Dist. 1991); State ex rel. Morgan v. Dare To Be Great, Inc., 189 S.E.2d 802, 803 (N.C. App. 1972); Ohio Rev. Code § 1345.07(A)(2); Celebrezze v. Hughes, 479

N.E.2d at 888-89; State ex rel. Fisher v. Warren Star Theater, 616 N.E.2d 1192, 1198 (Ohio App. 1992).[81]

The Plaintiffs have established that Dish, its Telemarketing Vendors, and its Order Entry Retailers violated the applicable Do-Not-Call Laws millions and millions of times. The Plaintiffs have also proven millions more violations, although have not proven the specific amount for these additional violations. The additional violations include Dish's Registry Calls in the 2003-2007 Calling Records. Dr. Yoeli found 2,919,321 calls that were both Registry Calls and Internal List Calls after March 25, 2004. Dr. Yoeli assumed all calls in one day on the calling records were one violation. This was a very conservative assumption. Some of those records reflected multiple illegal calls. The additional Do-Not-Call Law violations also include the millions of calls that JSR made between January 1, 2007 and the day Dish terminated it on February 14, 2007. In addition, many Order Entry Retailers made illegal press 1 Abandoned Prerecorded Calls, including Satellite Systems, LA Activations, United Satellite, American Satellite, Vision Satellite, Dish Nation, and Atlas Assets. This evidence shows that

[81] The Court does not address the injunctive relief standard in Illinois because Illinois did not establish liability for its Count XI claim.

Dish and its agents made many millions more illegal calls that the specific calls proven. The vast quantity of illegal calls provides substantial proof that a reasonable likelihood of future illegal calls without an injunction.

In many cases, Dish knew Order Entry Retailers were violating the Do-Not-Call Laws and did nothing. Dish knew that Satellite Systems made prerecorded abandoned calls as early as 2002. Dish knew Satellite Systems was making Prerecorded Calls in 2004 and made it an Order Entry Retailers anyway. Dish knew in 2005 that Satellite Systems was continuing to make Prerecorded Calls. Dish knew in August 2005 that United Satellite was making illegal Abandoned Prerecorded Calls in August 2005 and allowed the practice to continue for another year.

Dish's Retail Sales managers showed little concern for compliance with the Do-Not-Call Laws. Prior to 2009, their primary concern was generating activations. Their compensation was tied to activations. They knew that numerous Order Entry Retailers were making illegal Abandoned Prerecorded Calls and did little or nothing about it. Prior to August 2006, they did almost nothing to address these problems. Paralegal Hargen in Dish's Legal

Department in fact noted that the Order Entry Retailers and the Marketing Department tried to get around the rules.

In August 2006, Dish started the Compliance Department to limit Dish's exposure for liability from Retailer practices. The Compliance Department systematically documented complaints and secured responses. The Compliance Department apparently had some success in reducing the use off-shore affiliates to telemarket Dish Network. Dish's actions to discipline Order Entry Retailers for Do-Not-Call Law violations, however, remained ad hoc and inconsistent. By 2009, Dish's Legal Department still considered the Order Entry program to be rife with shady, illegal activity.

Any real changes came in late 2008 and 2009. Dish fired numerous Retailers, cut the number of Order Entry Retailers, and instituted changes in the Quality Assurance program. These changes corresponded with mounting pressure from investigations by the FTC and state consumer protection officials. Ultimately, these investigations led to this suit being filed in March 2009 and Dish settling with the remaining 46 states in July 2009 by entering into the Assurance of Voluntary Compliance with them. This evidence shows that Dish reacted to pressure from law enforcement. The evidence supports the conclusion that the pressure needs to be maintained to keep Dish's marketing personnel from reverting to their practice of trying to get around the rules.

The Court is also seriously concerned with the most recent evidence showed that Dish continued to show little or no regard for consumer complaints about Order Entry Retailers' practices. The Satellite System calling records showed that Satellite Systems made 381,811 Registry Calls in 2010 and 2011. Dish received so many complaints that the Legal Department prepared a standard go after Satellite Systems letter. Dish's response to these consumers was essentially: go away, it's not our problem, go after Satellite Systems. Dish's denial of responsibility and lack of regard for consumers are deeply disturbing and support the inference that it is reasonably likely that Dish will allow future illegal calls absent government pressure.

In contrast, Dish's direct marketing channel did not demonstrate such a disregard for the Do-Not-Call Laws. The direct channel established the Working Group to prepare for the launch of the Registry. Outbound Operations scrubbed Account Number

Campaigns to avoid Do-Not-Call violations. The scant competent evidence, however, failed to show what Dish's Database Marketing did to ensure that Lead Tracking System and Cold Call calling campaigns complied with the Do-Not-Call Laws. In 2008, PossibleNOW began assisting Dish's direct marketing with Do-Not-Call Law compliance.

The evidence, however, shows that responsible Dish personnel in direct telemarketing channel did not read the TSR or FCC Rule carefully. There is no evidence that the Working Group attempted to establish the necessary documentation to comply with the safe harbor provisions of either the TSR or the FCC Rule. Dish personnel knew that Dish made mistakes, but they did not try to comply with the safe harbor provisions.

Dish personnel also did not read the Established Business Relationship provisions carefully. Dish personnel did not follow the language of the TSR and FCC Rule and calculate Transaction-based Established Business Relationship exceptions from the last date of purchase or other financial transaction. Dish hired PossibleNOW in 2008 and learned that its Transaction-based Established Business Relationship procedures were flawed, but Dish did not correct the problem for another two years. This lack of care indicates that a reasonable likelihood that future illegal calls will occur without an injunction.

Finally, the Court is convinced that at least some in Dish management do not believe that Dish really did anything wrong or harmed anyone with these millions and millions of illegal calls. Outbound Operations Manager Montano stated that he did not think anyone was really harmed by the millions of illegal calls:

> I wouldn't say that they are harmed. Certainly, if any consumer, regardless of whether it's a current DISH customer or former DISH customer, communicates to DISH that they don't want to receive calls from our organization, we'll absolutely do everything in our power to abide by that.
>
> . . . .
>
> I don't know whether they were harmed or not. All I can say, once again, is I apologize for any inconvenience that may have been caused to the consumer. Certainly, it is not our intention to call any consumer that does not wish to receive a phone call from DISH Network.

T 712: 433-34 (Montano). Dish has even taken the position the evidence did not show that the millions and millions of illegal calls harmed anyone. Dish Network L.L.C's Proposed Conclusions of Law for the Second Phase of Trial (d/e 737), at 37-38. Illegal telemarketing calls clearly harm consumers. Every unwanted illegal telemarketing call robs individuals of the "time and mental energy, both of which are precious." Patriotic Veterans, 845 F.3d at 303.

True, DeFranco testified that Dish "gets it" and now takes telemarketing laws very seriously. See T 710: 225-26 (DeFranco). The evidence shows that Dish's indirect channel, at least, began taking Do-Not-Call Laws seriously only in response to pressure from consumer complaints and law enforcement investigation before. As late as 2011, Dish still did not "get it" when Dish refused to acknowledge any responsibility for Satellite Systems' illegal practices. Montano's 2017 testimony further demonstrates that some Dish managers do not seem to "get it." Montano did not believe that consumers were harmed by Dish's millions of illegal calls. T 712: 433-34 (Montano). This fundamental lack of understanding is a cause for concern about Dish's future conduct. Absent an injunction, Dish will be reasonably likely to make or cause others to make illegal calls in the future in violation of the Do-Not-Call Laws.

Dish presented extensive evidence and made extensive arguments about the balance of the equities. The arguments, however, address aspects of the Plaintiffs' proposed injunction rather than whether to issue an injunction. The Court must give great weight to the public equities. Congress determined that harassing unwanted telemarketing calls injure consumers. The 15,000,000 Americans who registered numbers on the Registry in the first five days after the Registry opened, and the 40,000,000 who registered numbers in the first two months, agreed with Congress. The 226 million who have registered their telephone numbers also agree. See T 710: 35, 37 (Torok). These equities clearly weigh in favor of some type of injunction to prevent future harm.

The Court may include appropriate prophylactic provisions in an injunction to ensure that future violations will not occur. See Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946); FTC v. Febre, 128 F.3d 530, 534 (7th Cir. 1997). The prophylactic provisions may bar otherwise legal conduct. See FTC v. Colgate-Palmolive Co., 380 U.S. 374, 394-95 (1965); United States v. Lowe's, Inc., 371 U.S. 38, 53 (1962), abrogated in part on other grounds, Illinois Tool Works, Inc. v. Independent Ink, Inc., 547 U.S. 28, 42-43 (2006).

The Court will set the parameters of the appropriate injunction, not the Plaintiffs or Dish. The injunction must ensure that the illegal Registry Calls, Internal List Calls, and Prerecorded Calls will not happen in the future. The injunction will take into account Dish's concerns that certain of Plaintiffs' proposed injunctive provisions will drive Dish or its retailers out of business. The primary goal of the injunction, however, is preventing future illegal activity, not saving Dish from incidental or consequential financial pain to achieve that goal.

The Court will not impose an immediate ban on Dish's telemarketing as proposed by the Plaintiffs. Rather, the Court will require Dish, its Telemarketing Vendors, and major Retailers (Primary Retailers) to comply with the safe harbor provisions of the TSR and the FCC Rule. The Primary Retailers shall consist of every Dish Retailer that, during the calendar year 2016, or any subsequent calendar year, has either (1) produced 600 activations or (2) has directly or indirectly used automatic dialing equipment. The safe harbor provisions are designed to ensure compliance with the Do-Not-Call Laws and to allow for inadvertent errors. Requiring compliance with the safe harbor provisions, therefore, will meet the Plaintiffs' justified need for a mechanism to ensure compliance and avoid the potentially dire consequences of a complete telemarketing ban. If Dish cannot demonstrate that Dish, its Telemarketing Vendors, and the Primary Retailer are in compliance with the safe harbor provisions of the TSR and FCC Rule, the Court will bar Dish from accepting activations from the non-complying source.

Limiting the prophylactic aspects of the injunction to Primary Retailers will address Dish's concern that the Injunction Order would affect every Retailer's call to return a customer's call. The prophylactic aspects of the Injunction Order will only affect major Retailers or Retailers who use automatic dialing equipment. The Injunction Order will also prohibit any Retailer from violating the relevant Do-Not-Call Laws.

The Court, further, will not include the Plaintiffs' proposal to require Dish to terminate a Primary Retailer for a single mistake as long as the Primary Retailer is complying with the TSR and FCC Rule safe harbor provisions. Compliance with the safe harbor provisions will minimize errors and, so, meet the Plaintiffs' desire for future compliance. The Plaintiff United States' counsel indicated that Dish would not need to terminate a Retailer who made a mistake if the retailer was complying with the safe harbor provisions. See T 711: 346-47 (Mills) (Attorney Runkle questioning). Compliance with the safe harbor provisions will also meet the goal of limiting violations while avoiding the uncertainty that could exist if a Retailer knew it would be terminated for one mistake.

The Court further will not include the Plaintiffs' proposed provision that would bar Dish from accepting orders from Retailers that previously used the Axiom system to place orders with Dish. All Retailers have used the Axiom system for several years. The Plaintiffs' proposed ban on accepting orders from any Retailer that used the Axiom system would effectively terminate all Retailers. The Court sees no basis for barring 3,000 TVRO Retailers from placing order with Dish when the Plaintiffs presented no material evidence about their activities.

The Plaintiffs implied that Dish hid the fact that all Retailers now used the Axiom system. See T 711:351-53 (Mills). This is incorrect. Dish informed the Plaintiffs years ago that all Retailers used the Axiom system. See Opinion 445, at 59 (citing DX 224, Declaration of Michael Mills, dated January 27, 2014.). The Court will therefore not impose this bar.

The Court will adopt the Plaintiffs' proposed requirement that Dish employ a telemarketing compliance expert to formulate a long-term plan to ensure compliance with the Do-Not-Call Laws and to provide status reports. The reports will include an updated list of Primary Retailers that made 600 activations in a calendar year or used automatic dialing equipment in a calendar year. Such Retailers will become Primary Retailers required to comply with the safe harbor provisions of the TSR and FCC Rule.

The Court, however, will not follow the Plaintiffs' suggestion to bar PossibleNOW or CompliancePoint from serving as the telemarketing compliance expert. PossibleNOW performed services for both sides and PossibleNOW representatives testified for both sides. The Court is not convinced that these services tainted PossibleNOW to make it unable to serve as a telemarketing compliance expert. Moreover, the Plaintiff United States' counsel indicated in his cross-examination of Sponsler on this issue that the United States would have no objection if PossibleNOW performed this role as a subcontractor. T 715: 803-04 (Sponsler)

(Attorney Runkle questioning). If PossibleNOW can perform this role as a subcontractor, there is no reason it cannot perform this role directly. The Court will not include a provision that only imposes form over substance.

Lastly, the Court will include a provision that any Plaintiff make unannounced inspections of Dish, its Telemarketing Vendors, or Primary Retailers, but will require a prior ex parte application to this Court and Court approval for such inspection. An ex parte application to inspect a Dish facility must demonstrate probable cause necessary for administrative warrants to believe that Dish is violating the Injunction Order, the plan developed by the telemarketing compliance expert, the TSR, TCPA, FCC Rule, or any of the State statutes at issue. An ex parte application to inspect a Telemarketing Vendor or Primary Retailer must demonstrate probable cause necessary for administrative warrants to believe that the subject of the requested inspection is violating the TSR, TCPA, FCC Rule, or any of the State statutes at issue. The ex parte application must state with reasonable specificity for administrative inspections the location to be inspected and the information sought from the inspection. Requiring prior application alleviates any

Fourth Amendment concerns, or other concerns, regarding the reasonableness of any inspection. See Marshall v. Barlow's, Inc., 436 U.S. 307, 324-25 (1978); National-Standard Co. v. Adamkus, 881 F.2d 352, 361-63 (7th Cir. 1989). Requiring an ex parte application and approval also alleviates Dish's concerns about random, abusive searches. The searches will only occur when a Plaintiff can demonstrate probable cause to believe that a violation of law or the Injunction Order.

Dish presented no evidence regarding any other provision in the Plaintiffs' proposed injunctions. The Court has reviewed the provisions and has adopted those provisions that the Court found to be reasonable and appropriate to ensure Dish's ongoing compliance with the Do-Not-Call Laws at issue.

CONCLUSION

THEREFORE 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 Network L.L.C. 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 Network L.L.C. on the claim that Defendant provided substantial assistance to Star Satellite as alleged in Count IV of the Third Amended Complaint, and judgment in favor of Defendant Dish Network L.L.C. and against the United States on the claim that Dish Network, L.L.C. provided substantial assistance to Dish TV Now as alleged in Count IV of the Third Amended Complaint. The Court enters judgment in favor of Defendant Dish Network L.L.C. and against Plaintiff State of Illinois on Count XI of the Third Amended Complaint.

The Court awards the following monetary relief in favor of the Plaintiffs United States and the States of California, Illinois, North Carolina, and Ohio and against Defendant Dish Network L.L.C.:

1. Dish Network L.L.C. is hereby ordered to pay a civil penalty to the United States in the sum of $168,000,000.00 for Dish's violation of the TSR done with knowledge or knowledge fairly implied, as alleged in Counts I, II, III, and IV.
2. Dish Network L.L.C. is hereby ordered to pay statutory damages in the sum of $84,000,000.00 to the Plaintiff States of California, Illinois, North Carolina, and Ohio in the following sums for violations of the TCPA and FCC Rule as alleged in Counts V and VI, for which Dish shall be jointly and severally

liable to the Plaintiff States of California, Illinois, North Carolina, and Ohio. The statutory damages shall be divided as follows:

a. California is awarded statutory damages in the sum of $36,456,000.00;

b. Illinois is awarded statutory damages in the sum of $17,388,000.00;

c. North Carolina is awarded statutory damages to in the sum of $10,248,000.00; and

d. Ohio is awarded statutory damages in the sum of $19,908,000,00.

3. Dish Network L.L.C. is hereby ordered to pay a civil penalty to Plaintiff State of California in the sum of $16,800,000.00 for violation of California Business and Professions Code §17200 and 175929(c) as alleged in Counts VII and VIII.

4. Dish Network L.L.C. is hereby ordered to pay a civil penalty to Plaintiff State North Carolina in the sum of $8,400,000.00 for violation of the North Carolina General Statutes §§ 75-102 and 75-104, as alleged in Counts IX and X.

5. Dish Network L.L.C. is hereby ordered to pay a civil penalty to Plaintiff State Ohio in the sum of $2,800,000.00 for violation of Ohio Consumer Sales Protection Act, Ohio Revised Code §§ 1345.02 and 1345.03, as alleged in Count XII.

As additional necessary and appropriate relief, the Court further hereby 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 entered herewith.

All pending motions are denied as moot. This case is closed, except to the extent that the Court retains jurisdiction to enforce the Permanent Injunction.

Enter: June 5, 2017

/s Sue E. Myerscough
UNITED STATES DISTRICT JUDGE