

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

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District Court No.
A-17-763397-B

JOINT APPENDIX

Vol. 4 of 85

[JA000619-JA000868]

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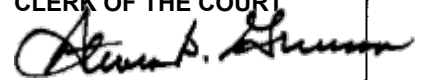
TABLE OF CONTENTS FOR VOLUME 4¹

Document	Vol.	Page No.	Date
<i>Plumbers Local Union No. 519 Pension Trust Fund v. Ergen</i> , No. A-17-763397-B, Verified Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment (Clark Cnty. Nev. Oct. 19, 2017)	4	JA000619- JA000647	10/19/17
<i>City of Sterling Heights Police & Retirement System v. Ergen</i> , No. A-17-764522-B, Verified Stockholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment (Clark Cnty. Nev. Nov. 13, 2017)	4	JA000648- JA000675	11/13/17
<i>Plumbers Local Union No. 519 Pension Trust Fund v. Ergen</i> , No. A-17-763397-B, Stipulation Re Service of Process, Consolidating Cases and Appointing Lead and Liaison Counsel and [Proposed] Order Thereon (Clark Cnty. Nev. Dec. 26, 2017)	4	JA000676- JA000681	12/26/17
<i>Plumbers Local Union No. 519 Pension Trust Fund v. Ergen</i> , No. A-17-763397-B, Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment (Clark Cnty. Nev. Jan. 12, 2018)	4	JA000682- JA000713	01/12/18
Evidentiary Hearing SLC Exhibit 106²			

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.

Document	Vol.	Page No.	Date
Unanimous Written Consent in Lieu of a Special Meeting of the Board of Directors of Dish Network Corporation as of April 11, 2018 Evidentiary Hearing SLC Exhibit 107	4	JA000714- JA000720	04/11/18
Compilation of Minutes of Meetings of the SLC from May 9, 2018 to Nov. 21, 2018 Evidentiary Hearing SLC Exhibit 108	4	JA000721- JA000738	05/09/18
Report of the Special Litigation Committee of DISH Network Corporation and Appendices of Exhibits Thereto (Exs. 1-792; Appx. Vols. 1-50) Evidentiary Hearing SLC Exhibit 102	4-73	JA000739- JA016874	11/27/18



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IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND, Derivatively on
Behalf of DISH NETWORK
CORPORATION,

Plaintiff,

vs.

CHARLES W. ERGEN, JAMES DeFRANCO,
CANTEY M. "CANDY" ERGEN, STEVEN
R. GOODBARN, DAVID K. MOSKOWITZ,
TOM A. ORTOLF, CARL E. VOGEL,
GEORGE R. BROKAW, GARY S. HOWARD
and JOSEPH P. CLAYTON,

Defendants,

– and –

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant.

A-17-763397-B
Case No.
Dept No. Department 15

VERIFIED SHAREHOLDER DERIVATIVE
COMPLAINT FOR BREACH OF
FIDUCIARY DUTIES OF LOYALTY AND
GOOD FAITH, GROSS
MISMANAGEMENT, ABUSE OF
CONTROL, CORPORATE WASTE AND
UNJUST ENRICHMENT

DEMAND FOR TRIAL BY JURY

JA000619

- 1 • *“The evidence shows that Dish’s TCPA compliance policy was decidedly two-*
2 *faced. . . . [I]t told forty-six state attorneys general that it would monitor and*
3 *enforce marketer compliance, . . . but in reality it never did anything more than*
4 *attempt to find out what marketer had made a complained-about call.”*
- 5 • *“[Dish] paid a nearly \$6 million fine as part of the Compliance Agreement in 2009,*
6 *. . . yet Dish’s co-founder [DeFranco] testified that the Compliance Agreement did*
7 *not change Dish’s procedures at all.”*
- 8 • *“Dish did not take seriously the promises it made to forty-six state attorneys*
9 *general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make*
10 *many thousands of calls on its behalf that violated the TCPA. Trebled damages*
11 *are therefore appropriate.”¹*

12 *U.S. District Court Judge Catherine C. Eagles, May 22, 2017.*

13 INTRODUCTION

14 1. This is a shareholder derivative action on behalf of nominal defendant DISH Network
15 Corporation (“Dish” or the “Company”) for breach of fiduciary duties of loyalty and good faith,
16 gross mismanagement, abuse of control, corporate waste and unjust enrichment. Nominal defendant
17 Dish is a satellite television provider that routinely uses third-party marketers, like Satellite Systems
18 Network (“SSN”), to get new customers. Defendants are Dish’s current directors – defendants
19 Charles W. Ergen (“Charles Ergen”), James DeFranco (“DeFranco”), Cantey M. “Candy” Ergen
20 (“Candy Ergen”), Steven R. Goodbarn (“Goodbarn”), David K. Moskowitz (“Moskowitz”), Tom A.
21 Ortolf (“Ortolf”), Carl E. Vogel (“Vogel”) and George R. Brokaw (“Brokaw”); and its former
22 directors – Joseph P. Clayton (“Clayton”) and Gary S. Howard (“Howard”) (together, “defendants”).

23 2. Legal compliance is a basic competency for most boards of directors of U.S.
24 corporations. But apparently not for Dish. While under the stewardship of defendants, Dish has
25 displayed contempt for the Telephone Consumer Protection Act (“TCPA”) and its requirements,
26 which are designed to rid consumers of unwanted telemarketing calls. In July 2009, this disdain for
27 legal compliance resulted in Dish paying a nearly \$6 million fine and signing a TCPA compliance
28 agreement with 46 state attorneys general. *See* Assurance of Voluntary Compliance (“Compliance

¹ Here, as elsewhere, emphasis has been added and citations omitted unless otherwise noted. JAC003620

1 Agreement"). The Dish Board of Directors ("Board") – a majority of the defendants here –
2 authorized the Company's entry into the agreement.

3 3. In the Compliance Agreement, Dish represented that "it had control over its third-
4 party markets" and "agreed to supervise its marketers, determine if they were complying with federal
5 do-not-call laws, and discipline or terminate them if they failed to take steps to prevent violations of
6 the law." Memorandum Opinion and Order at 14, *Krakauer v. Dish Network L.L.C.*, No. 14-cv-0333
7 (M.D.N.C. May 22, 2017) ("Order"); Compliance Agreement at 23-24.

8 Specifically, the Compliance Agreement stated that Dish "shall affirmatively
9 investigate" do-not-call complaints and "take appropriate action . . . against any
10 [marketer] it has determined to be in violation of the requirements of this
11 Assurance." PX 55 at ¶4.74. The Compliance Agreement required Dish to "monitor,
12 directly or through a third-party monitoring service . . . its Covered Marketers . . . to
13 determine whether the Covered Marketer is complying with all applicable federal,
14 state, and local do-not-call laws." *Id.* at ¶4.78. Dish was required to issue business
15 rules to its marketers to require them to comply with the Compliance Agreement. *Id.*
16 at ¶4.73. If a marketer violated do-not-call laws, the Compliance Agreement stated
17 that Dish "shall appropriately and reasonably discipline" that marketer, and that
18 discipline "shall include" at least one of: termination, fines, withholding payment,
19 suspension, prohibiting telemarketing, requiring the marketer to change its
20 procedures/employees/ affiliates/training, or "other appropriate and reasonable
21 discipline." *Id.* at ¶4.79.

22 Order at 14-15. Notably, the Compliance Agreement also requires Dish directors to comply with the
23 TCPA. Compliance Agreement, ¶3.1 ("this Assurance shall apply to DISH Network and all of its
24 . . . *directors*").

25 4. But, as revealed earlier this year, "Dish did not take seriously the promises it made to
26 forty-six state attorneys general, repeatedly overlooked TCPA violations by [its telemarketers], and
27 allowed [certain telemarketers] to make many thousands of calls on its behalf that violated the
28 TCPA." Order at 29. Specifically, on May 22, 2017, a Greensboro, North Carolina federal court
found that, despite paying "a nearly \$6 million fine as a part of the Compliance Agreement in 2009,"
and as Dish co-founder and director, defendant DeFranco, testified, "the Compliance Agreement
did not change Dish's procedures at all." *Id.* at 29-30. As a result, both Dish and its third-party
telemarketers routinely did not complying with the federal telemarketing laws – a fact known at the
highest levels within Dish, as reflected by defendant DeFranco's trial testimony.

JA000621

1 5. Observing that the trial record is “silent” as to Dish’s TCPA compliance efforts, the
2 court wrote, in relevant part:

3 The Compliance Agreement stated that Dish “shall be bound from directly or
4 indirectly engaging in the practices set forth herein and shall be required to directly
or indirectly satisfy the affirmative requirements set forth herein.” PX 55 at ¶4.

5 Beyond sharing the terms of the Compliance Agreement with its marketers,
6 Trial Tr. Jan. 11, Doc. 302 at 73:25-74:10 (Ahmed testimony), the **record is silent**
about any efforts Dish undertook to comply with the promises and assurances it
7 made. According to Dish’s co-founder, **the Compliance Agreement changed**
nothing: “This is how we operated even prior to the agreement as it related to
8 telemarketing.” Trial Tr. Jan. 13, Doc. 304 at 168:17-169:6 (DeFranco testimony).
That, however, is patently inaccurate, as Dish’s compliance department never
9 investigated whether a marketer had violated telemarketing laws. *See discussion*
infra pp. 17-19.

10 Order at 15.

11 6. Explaining its rationale for awarding treble damages against Dish, the court
12 continued:

13 The Court concludes that treble damages are appropriate here because of the
14 need to deter Dish from future violations and the need to give appropriate weight to
the scope of the violations. **The evidence shows that Dish’s TCPA compliance**
15 **policy was decidedly two-faced**. Its contract allowed it to monitor TCPA
compliance, *supra* pp. 8-9, and it told forty-six state attorneys general that it would
16 monitor and enforce marketer compliance, *supra* pp. 14-16, but in reality it never did
anything more than attempt to find out what marketer had made a complained-about
17 call. *Supra* pp. 17-19. It never investigated whether a marketer actually violated the
TCPA and it never followed up to see if marketers complied with general directions
18 concerning TCPA compliance and or with specific do-not-call instructions about
individual persons. *Supra* pp. 12-13, 17-19. Dish characterized people who pursued
19 TCPA lawsuits not as canaries in the coal mine, but as “harvester” plaintiffs who
were illegitimately seeking money from the company. *See supra* p. 19. **The**
20 **Compliance Agreement did not cause Dish to take the TCPA seriously, so**
significant damages are appropriate to emphasize the seriousness of such statutory
21 **violations and to deter Dish in the future**.

22 Order at 28-29.

23 7. Ultimately, the North Carolina federal court concluded that “Dish Network willfully
24 and knowingly violated the TCPA and that treble damages are appropriate to deter Dish and to give
25 suitable weight to the seriousness and scope of the violations Dish committed.” Order at 30. After
26 trebling the jury’s damages award, the court ordered Dish to pay plaintiffs \$65.1 million.

27 8. Defendants’ disdain for legal compliance has severely damaged the Company and
28 their leadership has unnecessarily exposed Dish to massive liability for violations of federal

1 telemarketing laws. Although the North Carolina case involved only one Dish telemarketer – SSN, a
2 smaller Dish telemarketer – the facts of the case are a window into TCPA compliance efforts at
3 Dish, including at the highest levels. And regrettably, those facts reveal a “two-faced” approach to
4 TCPA compliance, where such efforts existed only on paper, if at all, and never in reality.

5 9. Because defendants did not take seriously the promises that Dish made to the 46 state
6 attorneys general in the Compliance Agreement, the Company now also faces exposure to liability in
7 other courts for violations of the TCPA. Indeed, on June 5, 2017, an Illinois federal court found
8 Dish liable for telemarketing calls made to consumers on the national do-not-call registry. *See*
9 *Findings of Fact and Conclusions of Law, United States v. Dish Network LLC*, No. 09-3073 (C.D.
10 Ill. June 5, 2017).

11 10. Although Dish has been injured, defendants have not fared nearly so badly. They
12 collectively pocketed \$24,536,520 in salaries, bonuses, fees, stock awards and other incentive-based
13 compensation not justified by Dish’s lawless behavior while under their direction. Defendants have
14 also retained their positions of power, prestige and privilege at the Company, having been repeatedly
15 re-nominated and re-elected to the Board by votes controlled by defendant Charles Ergen, Dish’s
16 majority shareholder.

17 11. Defendants have not filed suit against the directors, officers and/or senior advisors
18 responsible for this debacle, which to date has cost Dish millions of dollars. Nor will defendants
19 commence such legal action, because doing so would expose them to liability for breaching their
20 fiduciary duties, gross mismanagement, abuse of control, corporate waste and unjust enrichment.
21 Likewise, a majority of the Board is beholden to defendant Charles Ergen for election to the Board
22 and, therefore, will not bring suit against him because it would lead to their expulsion from the
23 Board. Thus, a majority of the Board is disabled from fairly and objectively considering any pre-suit
24 demand that plaintiff may have made. As such, a pre-suit demand is excused as futile.

25 JURISDICTION AND VENUE

26 12. This Court has jurisdiction under Nevada Revised Statutes §§14.065 and 78.135. The
27 amount in controversy, exclusive of interest and costs, exceeds the jurisdictional minimum of this
28 Court. Moreover, each of the defendants has had sufficient contacts with Nevada as a director

JA000623

1 and/or officer of Dish, which makes the exercise of personal jurisdiction over them proper. *Consipio*
2 *Holdings, BV v. Carlsberg*, 128 Nev. 454 (2012); *Sonoro Invest S.A. v. Miller*, No. 15-cv-02286-
3 JAD-CWH, 2017 U.S. Dist. LEXIS 9657 (D. Nev. Jan. 24, 2017).

4 13. Venue is proper in this Court because Dish is a Nevada corporation and has
5 designated Clark County, Nevada as the forum for claims brought on behalf of Dish and/or involving
6 breaches of fiduciary duty by its directors.

7 THE PARTIES

8 14. Plaintiff Plumbers Local Union No. 519 Pension Trust Fund is and has continuously
9 been a shareholder of Dish since January 2008.

10 15. Nominal defendant Dish is a Nevada corporation with its principle executive offices
11 located at 9601 S. Meridian Boulevard, Englewood, Colorado 80112. Dish, through its operating
12 company, Dish Network L.L.C., is a satellite television provider. The Company often uses third-
13 party marketers to get new customers.

14 16. Defendant Charles W. Ergen has been a director of Dish since its inception in 1980.
15 He co-founded the Company with his wife, defendant Cantey M. “Candy” Ergen, and defendant
16 James DeFranco. Charles Ergen has also served as Executive Chairman, Chief Executive Officer
17 and President of the Company during his tenure on the Board. Despite the troubles at Dish while
18 under Charles Ergen’s stewardship, in the Board’s judgment, Charles Ergen “should continue to
19 serve on the Board due to, among other things, his role as [Dish’s] co-founder and controlling
20 shareholder and the expertise, leadership and strategic direction that he has contributed to [Dish]
21 since [its] formation.” Charles Ergen received at least \$6,959,774 in salary, bonus and other
22 incentive-based compensation not justified by the Company’s performance while under his
23 stewardship.

24 17. Defendant Cantey M. “Candy” Ergen has been a director of Dish since 2001. She co-
25 founded the Company with her husband, defendant Charles Ergen, and defendant James DeFranco,
26 in 1980. Candy Ergen has also served as a Senior Advisor to Dish since 1980. Despite the troubles
27 at Dish while under Candy Ergen’s stewardship, in the Board’s judgment, Candy Ergen “should
28 serve on the Board due, among other things, to her knowledge of DISH Network since its inception

JA000624

1 and her service to [Dish] in a multitude of roles over the years.” Candy Ergen received at least
2 \$400,000 in compensation not justified by the Company’s performance while under her stewardship.

3 18. Defendant James DeFranco has been a director of Dish since its inception in 1980.
4 DeFranco co-founded the Company with defendants Charles Ergen and Candy Ergen in 1980.
5 DeFranco has also served as Executive Vice President and one of the Vice Presidents of Dish since
6 1980. Despite the troubles at Dish while under DeFranco’s stewardship, in the Board’s judgment,
7 DeFranco “should serve on the Board due, among other things, to his knowledge of DISH Network
8 since its formation, particularly in sales and marketing.” While serving as Dish’s Executive Vice
9 President and a director, DeFranco received personal benefits, power and prestige not justified by the
10 Company’s performance while under his stewardship. In addition, while Dish shares traded at
11 artificially inflated prices, DeFranco sold 300,000 shares of Dish stock for proceeds of \$23,099,500.

12 19. Defendant Steven R. Goodbarn has been a director of Dish since 2002. He has also
13 served on the Audit and Compensation Committees of the Board. Despite the troubles at Dish while
14 under Goodbarn’s stewardship, in the Board’s judgment, Goodbarn “should serve on the Board due,
15 among other things, to his knowledge of DISH Network from his service as a director since 2002
16 and his expertise in accounting, auditing, finance and risk management that he brings to the Board,
17 in particular in light of his background as a CPA and his prior experience serving as Chief Financial
18 Officer of Janus.” Goodbarn received at least \$515,711 in fees, stock awards and other incentive-
19 based compensation not justified by the Company’s performance while under his stewardship. In
20 addition, while Dish shares traded at artificially inflated prices, Goodbarn sold 18,000 shares of Dish
21 stock for trading proceeds of \$981,510.

22 20. Defendant David K. Moskowitz has been a director of Dish since 1998. He has also
23 served as Executive Vice President of and Senior Advisor to Dish for over a decade. Despite the
24 troubles at Dish while under Moskowitz’s stewardship, in the Board’s judgment, Moskowitz “should
25 serve on the Board due, among other things, to his knowledge of DISH Network from his service as
26 a director since 1998 and his business and legal expertise that he brings to the Board, in particular in
27 light of his service as [Dish’s] General Counsel for 17 years.” While serving as Dish’s Executive
28 Vice President, Senior Advisor, General Counsel and a director, Moskowitz received personal

1 benefits, power and prestige not justified by the Company's performance while under his
2 stewardship. In addition, while Dish shares traded at artificially inflated prices, Moskowitz sold
3 762,000 shares of Dish stock for unlawful insider trading proceeds of \$45,111,085.

4 21. Defendant Tom A. Ortolf has been a director of Dish since 2005. He has also served
5 on the Audit, Compensation and Nominating Committees of the Board. Despite the troubles at Dish
6 while under Ortolf's stewardship, in the Board's judgment, Ortolf "should serve on the Board due,
7 among other things, to his knowledge of DISH Network from his service as a director since 2005
8 and his expertise in finance, business and risk management, in particular in light of his experience as
9 an executive of CMC." Ortolf received at least \$533,711 in fees, stock awards and other incentive-
10 based compensation not justified by the Company's performance while under his stewardship. In
11 addition, while Dish shares traded at artificially inflated prices, Ortolf sold 20,000 shares of Dish
12 stock for unlawful insider trading proceeds of \$1,050,000.

13 22. Defendant Carl E. Vogel has been a director of Dish since 2006. He has also served
14 as a Senior Advisor to Dish for the past several years. Despite the troubles at Dish while under
15 Vogel's stewardship, in the Board's judgment, Vogel "should serve on the Board due, among other
16 things, to his knowledge of DISH Network from his service as a director and officer and his
17 experience in the telecommunications and related industries from his service over the years as a
18 director or officer with a number of different companies in those industries." While serving as
19 Dish's Senior Advisor and a director, Vogel received personal benefits, power and prestige not
20 justified by the Company's performance while under his stewardship. In addition, while Dish shares
21 traded at artificially inflated prices, Vogel sold 315,985 shares of Dish stock for proceeds of
22 \$17,670,702.

23 23. Defendant George R. Brokaw has been a director of Dish since October 2013. He has
24 also served on the Audit and Nominating Committees of the Board. Despite the troubles at Dish
25 while under Brokaw's stewardship, in the Board's judgment, Brokaw "should serve on the Board
26 due, among other things, to his financial experience, acquired, in part, during his tenure with
27 Highbridge, Perry and Lazard." Brokaw received at least \$526,951 in fees, stock awards and other

28 JA000626

1 incentive-based compensation not justified by the Company's performance while under his
2 stewardship.

3 24. Defendant Joseph P. Clayton served as a director of Dish from June 2011 to March
4 2015. He also served as Chief Executive Officer and President of Dish. Clayton received at least
5 \$15,479,936 in salary, bonus and other incentive-based compensation not justified by the Company's
6 performance while under his stewardship. In addition, while Dish shares traded at artificially
7 inflated prices, Clayton sold 556,250 shares of Dish stock for proceeds of \$35,982,248.

8 25. Defendant Gary S. Howard served as a director of Dish from 2005 to July 2013. He
9 also served on the Audit Committee of the Board. Howard received at least \$120,436 in fees, stock
10 awards and other incentive-based compensation not justified by the Company's performance while
11 under his stewardship.

12 **THE FIDUCIARY DUTIES OF DISH'S DIRECTORS**

13 26. By reason of their positions as Dish's directors and/or officers and because of their
14 ability to direct and controls the Company's business and corporate affairs, defendants owe Dish a
15 fiduciary duty to use their utmost ability to control and manage Dish in an honest and lawful manner.
16 Towards this end, Dish's directors owe the Company fiduciary duties to exercise good faith and
17 loyal and reasonable supervision over the Company's management, policies, practices and the
18 internal controls of the Company.

19 27. More specifically, as Dish's directors and officers, defendants' fiduciary duties
20 required them to, among other things: (i) ensure that the Company complied with its legal
21 obligations and requirements, including those arising under the TCPA in general and the Compliance
22 Agreement with the state attorneys general in particular; (ii) conduct the affairs of the Company in
23 an efficient, business-like manner so as to make it possible to provide the highest quality
24 performance of its business, to avoid wasting the Company's assets, and to lawfully maximize the
25 value of the Company's stock; (iii) properly and accurately guide investors and analysts as to the
26 true financial condition of the Company at any given time, including making accurate statements
27 about the Company's financial results and internal controls; (iv) remain fully informed as to how
28 Dish conducted its operations and, upon receipt of notice or information of imprudent or unsound

JA000627

1 conditions or practices, make reasonable inquiry in connection therewith and take steps to correct
2 such conditions or practices and make such disclosures as are necessary to comply with the securities
3 laws; (v) ensure that Dish was operated in a diligent, honest and prudent manner in compliance with
4 all applicable laws, rules and regulations, including the TCPA and similar federal and state
5 telemarketing laws, rules and regulations; and (vi) refrain from breaching their duties of loyalty and
6 good faith to the Company by adopting practices, procedures and controls inconsistent with their
7 fiduciary duties of loyalty and good faith.

8 **CONSPIRACY, AIDING AND ABETTING, AND CONCERTED ACTION**

9 28. In committing the wrongful acts complained of herein, defendants pursued or joined
10 in the pursuit of a common course of conduct and acted in concert with one another in furtherance of
11 a common plan or design. In addition to the wrongful conduct complained of herein giving rise to
12 primary liability, defendants further aided and abetted and/or assisted each other in breach of their
13 fiduciary duties.

14 29. Each of the defendants aided and abetted and rendered substantial assistance in the
15 wrongs complained of herein. In taking such action to substantially assist the commission of the
16 wrongdoing complained of herein, each defendant acted with knowledge of the primary wrongdoing,
17 substantially assisted the accomplishment of that wrongdoing, and was aware of his or her overall
18 contribution to and furtherance of the wrongdoing.

19 **FACTUAL ALLEGATIONS**

20 30. This is a shareholder derivative action on behalf of nominal defendant Dish against
21 certain of its current and former directors for breach of fiduciary duty, gross mismanagement, abuse
22 of control, corporate waste and unjust enrichment. Nominal defendant Dish is a satellite television
23 provider that uses third-party marketers to obtain new customers. Defendants are Dish's current and
24 former directors.

25 31. As Dish directors, defendants owe the Company strict fiduciary duties of good faith
26 and loyalty. Relative to the TCPA, this means that defendants were duty bound to direct Dish's
27 business and affairs in conformity with the federal telemarketing laws, even before the 2009
28 settlement with 46 state attorneys general. After Dish entered into the Compliance Agreement, JA000628

1 defendants undertook a heightened duty not only to direct Dish's business in compliance with the
2 TCPA, but also in accordance with the remedial TCPA compliance measures specified in the
3 Compliance Agreement. Compliance Agreement, ¶3.1. Defendants, however, failed on both counts.

4 32. Due to defendants' fiduciary failures, Dish now faces exposure to massive liability for
5 violating the TCPA. Indeed, on May 22, 2017, a Greensboro, North Carolina federal court ordered
6 Dish to pay \$65.1 million in treble damages for "willfully and knowingly violat[ing] the TCPA."
7 Defendants, by contrast, have not fared nearly so badly. In addition to retaining their positions of
8 power, prestige and privilege as Dish directors, defendants paid themselves \$24,536,520 in salaries,
9 bonuses, fees and stock awards not justified by Dish's lawlessness while under their stewardship.
10 These payments wasted corporate assets and unjustly enriched defendants at the expense of Dish and
11 its non-controlling public shareholders.

12 **The 2009 TCPA Compliance Agreement with 46 State Attorneys General**

13 33. As previously mentioned, Dish sells satellite television services through third-party
14 marketers. After numerous complaints about Dish and its telemarketers making calls to persons on
15 the federal do-not-call registry, the attorneys general of 46 states brought charges against Dish for
16 violating the telemarketing laws, including the TCPA.

17 34. To resolve this dispute, on July 16, 2009, Dish entered into a TCPA settlement
18 agreement, entitled "Assurance of Voluntary Compliance," to resolve the state attorney general
19 actions. As a part of the Compliance Agreement, Dish paid a nearly \$6 million fine, represented that
20 "it had control over its third-party markets" and "agreed to supervise its marketers, determine if they
21 were complying with federal do-not-call laws, and discipline or terminate them if they failed to take
22 steps to prevent violations of the law." Order at 14.

23 35. As a part of the Compliance Agreement, Dish also agreed to adopt TCPA legal
24 compliance reforms designed to ensure the Company's compliance with federal and state
25 telemarketing law in the future. In this regard, the Compliance Agreement states in relevant part:

26 **3. APPLICATION OF ASSURANCE TO DISH NETWORK** 27 **AND ITS SUCCESSORS**

28 3.1 DISH Network's duties, responsibilities, burdens and obligations
undertaken in connection with *this Assurance shall apply to DISH Network and all*

1 *of its subsidiaries*, parents, affiliates, predecessors, successors and assigns of all of
2 the foregoing, and the officers, *directors*, employees, shareholders, agents, servants,
and assigns. . . .

3 * * *

4 4. TERMS OF ASSURANCE

5 Upon execution of this Assurance, *DISH Network shall be bound from*
6 *directly or indirectly engaging in the practices set forth herein* and shall be required
to directly or indirectly satisfy the affirmative requirements set forth herein.

7 * * *

8 Third-Party Retailers

9 4.56 DISH Network shall require its Third-Party Retailers to offer, lease,
10 Advertise, install, and/or sell DISH Network Goods and/or DISH Network Services,
and to make representations to Consumers in connection therewith, in a manner
consistent with the terms of this Assurance.

11 4.57 DISH Network shall require its Third-Party Retailers to use
12 telemarketers who comply with the provisions of this Assurance. *If DISH Network*
13 *learns that any of its Third-Party Retailers are conducting any Telemarketing*
14 *activities, directly or through any other telemarketer, that violate the terms of this*
15 *Assurance, DISH Network shall take appropriate disciplinary action against such*
16 *Third-Party Retailers.* Appropriate disciplinary action may include one or more of
the following remedies:

- 17 1) termination;
- 18 2) imposing monetary fines;
- 19 3) withholding of compensation;
- 20 4) suspending the right to Telemarket (directly or through a third-party) for a
period of time;
- 21 5) prohibiting telemarketing (directly or through a third-party);
- 22 6) requiring the Third-Party Retailer to impose appropriate guidelines on its
Telemarketing activities, such as procedures for compliance with the TCPA and/or
any other federal, state or local laws regarding Telemarketing;
- 23 7) requiring the Third-Party Retailer to terminate a person or entity that is
Telemarketing on its behalf; and/or
- 24 8) other appropriate and reasonable discipline under the circumstances.

25 4.58 *DISH Network shall affirmatively investigate Complaints made to it*
26 *. . . , when such Complaints are brought to the attention of DISH Network, pertaining*
27 *to its Third-Party Retailers' offer, Advertisement, installation, lease, and/or sale of*
28 *DISH Network Goods and/or DISH Network Services, and shall take appropriate*
and reasonable disciplinary action as soon as reasonably practicable, against any
Third-Party Retailer it has determined to be in violation of the requirements of this

1 **Assurance.** Appropriate action may include retraining and other disciplinary action,
2 up to and including termination of the Third-Party Retailer's authority to offer,
3 Advertise, install, lease, and/or sell DISH Network Goods and/or DISH Network
4 Services. . . .

5 4.59 DISH Network shall be bound by and honor any representations that
6 are made to Consumers by its Third-Party Retailers who offer, Advertise, install,
7 lease, and/or sell DISH Network Goods and/or DISH Network Services made with
8 DISH Network's prior authorization, approval, permission or knowledge.

9 4.60 Within thirty (30) days of the date of the entry of this Assurance,
10 DISH Network shall provide each Third-Party Retailer who offers, Advertises,
11 installs, leases, and/or sells DISH Network Goods and/or DISH Network Services
12 with a copy of this Assurance and inform such Third-Party Retailers that in order to
13 continue acting as authorized DISH Network Third-Party Retailers, they must abide
14 by the applicable terms and conditions of this Assurance.

15 * * *

16 **Telemarketing and Do Not Call**

17 4.67 ***DISH Network shall comply with all federal, state and local laws***
18 ***regarding Telemarketing, including, but not limited to, those which prohibit***
19 ***calling Consumers who are on any federal, state, or local do-not-call lists unless***
20 ***otherwise exempted by such laws.***

21 4.68 DISH Network shall comply with all federal, state and local laws
22 requiring the acquisition or purchase of national and state do-not-call databases and
23 shall not make any Telemarketing calls to Consumers in the applicable state or
24 municipality until it has acquired or purchased all do-not-call databases required by
25 federal, state, or local laws.

26 * * *

27 4.73 DISH Network shall issue business rules to its Authorized
28 Telemarketers and Covered Marketers, requiring them to comply with the terms of
this Assurance.

4.74 ***DISH Network shall affirmatively investigate Complaints regarding***
alleged violations of federal, state and local laws regarding Telemarketing,
including, but not limited to, those which prohibit calling Consumers who are on any
federal, state, or local do-not-call lists, unless otherwise exempted by such laws, and
shall take appropriate action as soon as reasonably practicable against any
Authorized Telemarketers and Covered Marketers it has determined to be in
violation of the requirements of this Assurance. . . .

* * *

4.78 ***DISH Network shall monitor, directly or through a third-party***
monitoring service approved by DISH Network, its Covered Marketers to
determine whether they are Telemarketing Consumers and, if so, to determine
whether the Covered Marketer is complying with all applicable federal, state, and
local do-not-call laws. Upon request from an Attorney General, DISH Network shall
provide the requesting Attorney General with a copy of such written policies and
procedures. DISH Network states that it has had persons pose as potential

1 subscribers in order to engage in "sting"-type operations to determine if certain
2 Covered Marketers are complying with its do not call policies. Among other things,
3 DISH Network will continue engaging in such practices as part of the monitoring
4 process described above.

5 4.79 *DISH Network shall appropriately and reasonably discipline a*
6 *Covered Marketer if DISH Network reasonably determines that, in connection*
7 *with Telemarketing DISH Network Goods and/or DISH Network Services, the*
8 *Covered Marketer has: (a) failed to fulfill contract requirements with respect to*
9 *compliance with federal, state, or local telemarketing laws; (b) violated federal,*
10 *state, or local telemarketing laws; and/or (c) failed to comply with the terms of this*
11 *Assurance as they relate to this Telemarketing and Do Not Call section. Such*
12 *disciplinary action shall include one or more of the following remedies:*

13 1) termination;

14 2) imposing monetary fines;

15 3) withholding of compensation;

16 4) suspending the right to Telemarket for a period of time;

17 5) prohibiting Telemarketing;

18 6) requiring the Covered Marketer to improve its process and procedures for
19 compliance with the TCPA and/or any other federal, state and local laws regarding
20 Telemarketing;

21 7) requiring the Covered Marketer to terminate certain employees involved in
22 TCPA violations and/or violations of any other federal, state and local laws regarding
23 Telemarketing;

24 8) requiring the Covered Marketer to terminate Telemarketing affiliates;

25 9) requiring the Covered Marketer to retrain employees in TCPA compliance
26 and/or compliance with any other federal, state and local laws regarding
27 Telemarketing; and/or

28 10) other appropriate and reasonable discipline under the circumstances.

In determining what disciplinary action shall be taken, DISH Network shall take into
consideration the egregiousness of the Covered Marketer's conduct, the number of
violations, the Covered Marketer's willingness to cure the problem, and whether
DISH Network has previously disciplined the Covered Marketer.

* * *

6. PAYMENT TO THE ATTORNEYS GENERAL

6.1 *Within thirty (30) days of entry of this Assurance, DISH Network*
shall pay the sum of Five Million Nine Hundred Ninety-One Thousand Dollars
(\$5,991,000), to the Attorneys General. . .

* * *

JA000632

1 **8. REPRESENTATIONS AND WARRANTIES**

2 8.1 DISH Network represents and warrants that the execution and
3 delivery of this Assurance *is its free and voluntary act*, and that this Assurance *is the*
4 *result of good faith negotiations*.

5 36. Dish did not live up to its obligations under the Compliance Agreement in good faith,
6 however. Instead, the Company engaged in what one federal court recently described as a
7 “decidedly two-faced” TCPA compliance effort. Order at 28. “On paper, Dish was committed to
8 monitoring its marketers’ compliance with telemarketing laws and investigating complaints of
9 violations. In reality, however, Dish repeatedly looked the other way when [its telemarketers]
10 violated the telemarketing laws and when [its telemarketers] disregarded contractual duties related to
11 compliance.” Order at 6.

12 37. After entering into the Compliance Agreement, the same court found that Dish did
13 not change a thing about its TCPA compliance program. “Dish co-founder [DeFranco] testified that
14 the Compliance Agreement did not change Dish’s procedures at all.” ““This is how we operated
15 even prior to the agreement as it related to telemarketing.”” Order at 15, 29-30.

16 ***Krakauer v. Dish Network L.L.C. – The North***
17 ***Carolina TCPA Class Action Lawsuit***

18 38. At all relevant times, Dish used third-party marketers, like SSN, to get new satellite
19 television customers. “Dish had contractual arrangements with these marketers, many of whom,
20 including SSN, solicited new customers for Dish through telemarketing calls.” Order at 5-6. “SSN
21 was an ‘Order Entry Retailer’ with direct access to Dish’s computer system. The OE Retailers
22 collectively generated hundreds of millions of dollars a year in revenue for Dish.” *Id.* at 6.

23 39. “Beginning in May 2009 and over the next two years, SSN called Dr. Thomas
24 Krakauer numerous times in an effort to sell him Dish satellite television programming and related
25 services. The calls continued even after Dr. Krakauer complained to Dish about SSN’s sales tactics
26 and after Dish placed Dr. Krakauer on its internal do-not-call list and told SSN to do the same.”
27 Order at 3.

28 40. In 2014, Dr. Krakauer sued Dish in the U.S. District Court for the Middle District of
 North Carolina, alleging “that calls to him and others violated the TCPA and that Dish was liable as

JA000633

1 SSN's principal." Order at 3. After the district court certified a class on behalf all persons whose
2 numbers were on the national do-not-call registry but who nonetheless received multiple
3 telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011, and
4 summary judgment was mostly denied, the case was tried to the jury in January 2017. Order at 3-4.
5 At the same time, the district court "heard the evidence about willfulness." Order at 4.

6 41. Following six days of testimony, "[i]ssues of agency, liability, and damages were
7 submitted to the jury." Order at 4. "The jury answered the agency issue in favor of the plaintiffs,
8 finding that SSN acted as Dish's agent when it made the calls at issue"; the "liability question in
9 favor of plaintiffs for all of the calls"; and the damages question in favor of plaintiffs, "award[ing]
10 \$400 for each call," or \$25 million. Order at 4-5.

11 42. Thereafter, the parties submitted their "written closing arguments on willfulness."
12 Order at 5. After "consider[ing] those briefs and all of the evidence," on May 22, 2017, the
13 Honorable Catherine C. Eagles found "that Dish Network willfully and knowingly violated the
14 TCPA and that treble damages are appropriate to deter Dish and to give suitable weight to the
15 seriousness and scope of the violations Dish committed." Order at 30. Trebling the jury's damages
16 award, the district court increased damages "from \$400 per call to \$1,200 per call," or to \$65.1
17 million. Order at 30-31.

18 43. The court's nearly 31-page Memorandum Opinion and Order is a window into Dish's
19 TCPA legal compliance efforts, including at the highest levels of the Company. During the trial,
20 Dish director DeFranco testified as to the Company's TCPA compliance efforts, which the court,
21 based on the evidentiary record, found to be "two-faced," existing only on paper. Order at 28. The
22 court wrote: "[Dish] paid a nearly \$6 million fine as part of the Compliance Agreement in 2009, . . .
23 yet Dish's co-founder[, defendant DeFranco,] testified that the Compliance Agreement did not
24 change Dish's procedures at all." Order at 29-30.

25 44. Equally telling, despite the Dish directors' heightened TCPA compliance obligations
26 under the Compliance Agreement, after six days of trial testimony, the court observed that "the
27 record is *silent* about any efforts Dish undertook to comply with the promises and assurances it
28 made." Order at 15. According to Dish co-founder DeFranco's sworn testimony, the Compliance

JA000634

1 Agreement changed nothing: “This is how we operated even prior to the agreement as it related to
2 telemarketing.” Order at 15.

3 **Dish’s Willful and Knowing Violations of the TCPA**

4 45. After setting forth the salient facts, the court addressed the willfulness of Dish’s
5 violations of the TCPA. Concluding that Dish, while under defendants’ stewardship, willfully and
6 knowingly violated the TCPA by allowing tens of thousands of calls to be made by SSN to persons
7 on the national do-not-call registry, the court ruled, in part, as follows.

8 Over the course of approximately fifteen months, SSN made tens of
9 thousands of calls to numbers on the Registry. *Supra* pp. 20-21. . . . It has a long
10 history of acting in disregard of the requirements of the TCPA. *See supra* pp. 10-
11 13. . . .

12 Dr. Krakauer contends that because the jury found that SSN acted as Dish’s
13 agent and SSN’s conduct is imputed to Dish, the determinative question is whether
14 SSN, and not Dish, acted knowingly or willfully. Doc. 308 at 3

15 * * *

16 The Court agrees with that factual finding. *Supra* p. 19. Applying the traditional
17 rule, Dish is responsible for any willful or knowing violation of the telemarketing
18 laws by SSN.

19 ***The result is the same even if one only looks at the willfulness of Dish’s***
20 ***conduct.*** Dish knew that SSN had committed many TCPA violations over the years.
21 It had received many complaints and knew of at least three lawsuits, one of which
22 resulted in a money judgment and two of which resulted in injunctions. *Supra* pp.
23 11-12. It knew SSN’s uncorroborated and conclusory explanations – that violations
24 were inadvertent or the product of rogue employees – were not credible. *See* PX
25 194. It knew SSN was not scrubbing all its lists or keeping call records. *Supra* pp.
26 12-14, 16-17. ***It ignored SSN’s misconduct and, despite promises to forty-six state***
27 ***attorneys general, it made no effort to monitor SSN’s compliance with***
28 ***telemarketing laws.*** *See supra* pp. 14-16, 17-19. Dish had the power to control
SSN’s telemarketing; it simply did not care whether SSN complied with the law or
not. *Cf. United States v. Blankenship*, 846 F.3d 663, 673 (4th Cir. 2017) (holding that
“not caring about adherence to legal requirements amounts to criminal willfulness”
(internal quotation marks omitted)). ***Dish knew or should have known that its***
agent, SSN, was violating the TCPA, and Dish’s conduct thus willfully and
knowingly violated the TCPA.

Order at 21-23.

25 **Dish’s Arguments Against “Willfulness and Knowledge”**

26 46. Turning next to Dish’s arguments that its conduct was neither willful nor knowing,
27 the court ruled, in part, as follows:

28 JA000635

1 **Dish contends its conduct was not willful or knowing for several reasons,**
2 **none of which are persuasive.** Dish first contends that its actions were not willful
3 because it instructed SSN to comply with the law and, specifically, to scrub its lists
4 with PossibleNow. *See, e.g.,* DX 1 at 7; DX 2; DX 3 at 47; DX 5. While there was
5 evidence of this, **the evidence also revealed that these were empty words.** For
6 instance, when SSN told Dish's compliance department that it was, in fact, not using
7 PossibleNow to scrub customer lists in 2009, and again in 2010, Dish did nothing.
8 *Supra* pp. 13-14, 16-17. In context, **Dish only paid lip service to compliance.**

9 * * *

10 Dish maintains that by calling Dr. Krakauer in 2010 and 2011, SSN
11 disobeyed direct instructions from Dish. Doc. 312 at 16-18. This is true, but it does
12 not disprove willfulness or knowledge. **Dish was aware that SSN disregarded other**
13 **instructions from Dish about telemarketing compliance, as discussed supra pp. 12-**
14 **13, but Dish took no disciplinary action against SSN,** did not monitor SSN's
15 compliance, and allowed SSN to keep selling Dish products by telemarketing. *See*
16 Trial Tr. Jan. 12, Doc. 303 at 20:11- 21:12, 22:4-:21, 78:4-79:1, 82:24-83:6 (Musso
17 testimony). . . .

18 Dish contends that the complaints received about SSN were few in number
19 and insufficient to put it on notice that there were widespread violations, and that
20 everyone involved at Dish believed that SSN was complying with telemarketing
21 laws. Doc. 312 at 13-19. **First, the testimony that Dish thought SSN was in**
22 **compliance is not credible and is controverted by Dish's own documents.** *See*
23 generally PX 15. Second, even if some Dish employees did think this, that belief
24 was only possible because Dish ignored the facts and failed to investigate and
25 monitor SSN's compliance. . . . **Given the tens of thousands of violative calls SSN**
26 **made in a span of just over a year, even a cursory investigation or monitoring**
27 **effort by Dish would have uncovered the violations.** Under these circumstances,
28 what Dish calls a mistaken belief **is actually willful ignorance.**

29 Finally, Dish contends that the TCPA requires proof that Dish itself knew that
30 each and every call was made and violated the TCPA. Doc. 312 at 5-6. Dish relies
31 on *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir.
32 2015). . . . It would not be reasonable to apply such a high standard to telemarketing
33 calls, which almost by definition are made in high volume.

34 * * *

35 Dish knew SSN was using unscrubbed lists as a result of the Krakauer and
36 Campbell complaints and it knew SSN had a long history of violations of both the
37 TCPA and Dish's business rules related to TCPA compliance. **Dish easily could**
38 **have discovered the full extent of the violations with a minimal monitoring effort,**
39 **which it had promised forty-six state Attorneys General it would undertake. Dish's**
40 **conduct was willful.**

41 Order at 23-28.

42 **Does Dish Deserve Treble Damages?**

43 47. Lastly, the district court considered the appropriateness of awarding treble damages
44 against Dish. Based on the trial record, including its "silen[ce]" as to Dish's efforts to comply with
45 JA0000636

1 the TCPA, defendant DeFranco's testimony that the Compliance Agreement did not change the
2 Company's TCPA compliance procedures, and Dish's general disdain for the TCPA and TCPA legal
3 compliance, the court trebled the jury's damages award from \$400 per call to \$1,200 per call, or
4 \$65.1 million. The court stated, in part, as follows:

5 The Court concludes that treble damages are appropriate here because of the
6 need to deter Dish from future violations and the need to give appropriate weight to
7 the scope of the violations. *The evidence shows that Dish's TCPA compliance*
8 *policy was decidedly two-faced.* Its contract allowed it to monitor TCPA
9 compliance, *supra* pp. 8-9, and it told forty-six state attorneys general that it would
10 monitor and enforce marketer compliance, *supra* pp. 14-16, but in reality it never did
11 anything more than attempt to find out what marketer had made a complained-about
12 call. . . . *The Compliance Agreement did not cause Dish to take the TCPA*
13 *seriously, so significant damages are appropriate to emphasize the seriousness of*
14 *such statutory violations and to deter Dish in the future.*

15 * * *

16 Dish contends that the Court should not treble the damages because the
17 existing damages are material to Dish and will be adequate to deter. Doc. 312 at 21-
18 22. This appears unlikely. . . . It paid a nearly \$6 million fine as part of the
19 Compliance Agreement in 2009, PX 55 at ¶ 16.1, *yet Dish's co-founder testified that*
20 *the Compliance Agreement did not change Dish's procedures at all.* See Trial Tr.
21 Jan. 13, Doc. 304 at 168:17-169:6 (DeFranco testimony). A damages award that is
22 an order of magnitude larger is warranted here.

23 Dish also contends that the harm caused was only a "minor nuisance" and
24 "inconvenience." Doc. 312 at 21-22. Dish's description has left out "illegal," not to
25 mention "infuriating." *Dish's argument shows a failure to recognize the purpose of*
26 *the law* and is demeaning to consumers who put their names on the Do Not Call
27 Registry and who are entitled by law to have their privacy respected. It also *reflects*
28 *a lack of appreciation for the seriousness of the violations found by the jury:* over
50,000 connected calls to over 18,000 private individuals. Trial Tr. Jan. 12, Doc.
303 at 188:14-:18 (Verkhovskaya testimony)

 * * *

The Court finds that Dish Network willfully and knowingly violated the
TCPA and that treble damages are appropriate to deter Dish and to give suitable
weight to the seriousness and scope of the violations Dish committed.

Order at 28-30.

DAMAGE TO DISH

48. Dish has been severely damaged by defendants' misconduct. In addition to the recent
\$65.1 million verdict against the Company in the North Carolina TCPA class action, the Company
has been exposed to the risk of loss for alleged TCPA violations in other courts as well. In fact, an
Illinois federal court recently issued findings of fact and conclusions of law holding Dish liable for

JA000637

1 violating the TCPA and ordered \$280 million in damages. *See Findings of Fact and Conclusions of*
2 *Law, United States v. Dish Network LLC*, No. 09-3073 (C.D. Ill. June 5, 2017).

3 49. By contrast, defendants have not fared nearly so badly. Despite Dish's dismal
4 performance while under their stewardship, defendants collectively pocketed \$24,536,520 in
5 executive compensation, directors' fees, stock awards and other perquisites. In addition, defendants
6 DeFranco, Goodbarn, Moskowitz, Ortolf, Vogel and Clayton profited handsomely by selling
7 1,972,235 shares of their personal Dish stock for proceeds of \$123,895,045.

8 50. This notwithstanding, the Board has not, and will not, bring legal action against the
9 directors and officers responsible for this debacle. By this action, plaintiff seeks to vindicate Dish's
10 rights against its wayward fiduciaries.

11 **DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS**

12 51. Plaintiff incorporates ¶¶1-50.

13 52. Plaintiff brings this action derivatively on behalf of Dish to redress injuries suffered,
14 and to be suffered, by Dish as a result of defendants' breaches of fiduciary duty, gross
15 mismanagement, abuse of control, corporate waste and unjust enrichment. Plaintiff will adequately
16 and fairly represent the interests of Dish in enforcing and prosecuting these derivative claims.

17 53. The Dish Board of Directors has ten members: defendants Charles Ergen, DeFranco,
18 Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, and non-defendants Charles M.
19 Lillis ("Lillis") and Afshin Mohebbi ("Mohebbi") (together, the "Board"). Based on the
20 particularized facts set forth in this complaint, a pre-suit demand on the Board is legally excused for
21 several reasons

22 54. First, no pre-suit demand on the Board is necessary in this case because a majority of
23 the Board is disabled from fairly, independently and objectively considering such a demand. As
24 evidenced by the district court's findings, Dish did not take the promises it made to the 46 state
25 attorneys general in the Compliance Agreement seriously, but rather did nothing to change its TCPA
26 compliance procedures. Order at 1, 23, 28, 39, 30. This disdainful approach towards the
27 Compliance Agreement, as well as the TCPA, could not have flourished within Dish's operations in
28 general, and its so-called "Compliance Department" in particular, without the knowledge and

JA000638

1 consent of Dish's directors. And, in fact, it did not. Defendants knew – as defendant DeFranco
2 testified from his vantage point as a Dish director – that the Compliance Agreement did not change
3 Dish's TCPA compliance procedures. Order at 30. This reality is only underscored by the district
4 court's finding, after trial, that "the *record is silent* about any efforts Dish undertook to comply with
5 the promises and assurances it made" to the state attorneys general. Order at 15.

6 55. In other words, over the years, defendants did nothing to ensure Dish's compliance
7 with the TCPA or the Compliance Agreement. Under defendants, Dish's purported TCPA
8 compliance was "*decidedly two-faced*." It existed only on paper, and never in reality. Under
9 defendants, Dish and its third-party marketers, like SSN, made untold numbers of calls to persons on
10 the do-not-call registry in violation of the telemarketing laws in general and the TCPA in particular.
11 As a result, Dish has been ordered to pay millions of dollars in damages, including treble damages,
12 due to defendants' disdain for TCPA legal compliance. In short, defendants Charles Ergen,
13 DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, and each of them,
14 breached their fiduciary duties of good faith and loyal legal compliance by ignoring the promises
15 Dish made to the 46 state attorneys general in the Compliance Agreement. As a result, they are each
16 liable to Dish for the massive damages their fiduciary failures have wrought.

17 56. Further, if the Board investigated a pre-suit demand, they would only increase their
18 own exposure to liability for ignoring the promises Dish made to the state attorneys general in the
19 Compliance Agreement and the prohibitions on calls to persons on the do-not-call registry created by
20 the TCPA. And this is not a theoretical risk – defendant DeFranco has already testified, under oath,
21 that "*the Compliance Agreement did not change Dish's procedures at all*." Order at 29-30.
22 Defendant DeFranco was not just speaking for himself when he uttered those words – but rather for
23 the entire Board – because, as a Dish director, he witnessed first-hand the changes made to Dish's
24 TCPA compliance procedures – or, in this case, not made. Therefore, defendants Charles Ergen,
25 DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, and each of them, is
26 interested in the outcome of the derivative claims and cannot fairly and/or objectively consider a pre-
27 suit demand made by plaintiff to bring claims against themselves for the damages their disdain for

28 JA000639

1 TCPA legal compliance has heaped on the Company. Accordingly, a pre-suit demand on the Board
2 is excused as a matter of law.

3 57. Second, a pre-suit demand is also excused as to the entire Board – including the two
4 non-defendant directors Lillis and Mohebbi – as every member of the Board is beholden to
5 defendant Charles Ergen for their nomination and election to the Board. This is because Charles
6 Ergen controls 78.5% of the total voting power of Dish. Defendants Charles Ergen, DeFranco,
7 Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw and non-defendants Lillis and
8 Mohebbi freely admit that Dish is a “controlled” company under NASDAQ Marketplace Rules, and
9 has been for many years. *See* 2017 Proxy Statement at 6 (“We are a ‘controlled company’ within the
10 meaning of NASDAQ Marketplace Rules because more than 50% of our voting power is held by
11 Charles W. Ergen, our Chairman and Chief Executive Officer.”). Therefore, all of Dish’s directors
12 are 100% dependent on Charles Ergen for their seats on the Board and would be expelled from their
13 positions of power and prestige at Dish, and the perquisites derived therefrom, for bringing the
14 derivative claims against defendant Charles Ergen and/or any of his closest allies, including his wife
15 defendant Candy Ergen and fellow Dish co-founder defendant DeFranco. *Cf. Sandys v. Pincus*, 152
16 A.3d 124 (Del. Sup. Ct. 2016). Due to the internal dynamics and structural dependencies
17 surrounding the Board, the entire Board is legally disabled from fairly and objectively considering a
18 pre-suit demand to bring, let alone vigorously prosecute, the claims asserted in this complaint.

19 58. Third, the members of the Board participated in, approved and/or permitted the
20 wrongs alleged herein to have occurred, or recklessly disregarded the wrongs complained of herein,
21 and participated in efforts to conceal or disguise those wrongs from Dish’s shareholders, and are
22 therefore not disinterested parties. As a result of their access to and review of internal corporate
23 documents, or conversations and connections with other corporate officers, employees and directors,
24 and attendance at management and/or Board meetings, each of the defendants knew, or recklessly
25 disregarded, adverse material non-public information regarding Dish’s violations of the TCPA.
26 Therefore, a majority of the members of the Dish Board cannot exercise independent objective
27 judgment in deciding whether to bring this action or whether to vigorously prosecute this action,
28

JA000640

1 because each of the Board's members participated personally in the wrongdoing or is dependent on
2 the other defendants who did.

3 59. Fourth, a majority of the members of the Board has demonstrated an unwillingness
4 and/or inability to act in compliance with the Board's fiduciary obligations and/or to sue themselves
5 and/or their fellow directors and allies in the top ranks of the corporation for the violations of law
6 complained of herein. These are people they have developed professional relationships with, who
7 are their friends and with whom they have entangling financial alliances, interests and dependencies.
8 Therefore, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel
9 and Brokaw are not able to and will not vigorously prosecute any such action.

10 60. Fifth, a majority of the members of the Board, and particularly defendants Charles
11 Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, has financially
12 benefited, and will continue to financially benefit, from the wrongdoing herein alleged, and has
13 engaged in such conduct to preserve the Board members' positions of control and the perquisites
14 derived therefrom, and is incapable of exercising independent objective judgment in deciding
15 whether to bring this action. Therefore, a demand on the Board is excused as futile.

16 61. Sixth, Dish has been and will continue to be exposed to significant losses due to the
17 wrongdoing complained of herein, yet the Board has not filed any lawsuits against defendants or
18 others who were responsible for that wrongful conduct to attempt to recover for Dish any part of the
19 damages Dish has suffered and will suffer thereby.

20 62. Seventh, defendants Charles Ergen, Candy Ergen, DeFranco, Moskowitz and Vogel
21 are employed by the Company as senior executives and advisors and have received, and will
22 continue to receive, substantial monetary compensation as a result of that employment. Defendants
23 Charles Ergen, Candy Ergen, DeFranco, Moskowitz and Vogel will act to preserve and not threaten
24 their positions of control, power and prestige, and the perquisites derived therefrom. Therefore,
25 defendants Charles Ergen, Candy Ergen, DeFranco, Moskowitz and Vogel are incapable of
26 exercising independent objective judgment in deciding whether to bring this action.

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28 JA000641

1 **FIRST CAUSE OF ACTION**

2 **For Breach of Fiduciary Duties of Loyalty and Good Faith**
3 **Against All Defendants**

4 63. Plaintiff incorporates ¶¶1-62.

5 64. As Dish directors, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn,
6 Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton owe Dish fiduciary duties of loyalty and
7 good faith to direct the operations of the Company in accordance with the laws applicable to its
8 business, including the TCPA and related state and federal telemarketing laws. Relative to the
9 TCPA, defendants, in their capacities as Dish directors, faced a known legal duty to act loyally and
10 in good faith to cause Dish and its third-party marketers to comply with the legal requirements of the
11 TCPA's do-not-call requirements. However, defendants failed to satisfy their fiduciary obligations,
12 resulting in significant damages to Dish. Despite the TCPA's requirements, while under the
13 stewardship of defendants, Dish failed to implement systems or controls to ensure TCPA compliance
14 and also failed to comply with the provisions of the Compliance Agreement.

15 65. Defendants, and each of them, failed to act in the face of their known legal duty to act
16 loyally and in good faith to cause Dish and its third-party marketers to comply with the provisions of
17 the TCPA. As a direct and proximate result of defendants' breaches of fiduciary duties alleged
18 herein, Dish has sustained significant damages.

19 66. Accordingly, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn,
20 Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton breached their fiduciary duties of loyalty
21 and good faith owed to Dish and are each liable to the Company for the resulting damages.

22 67. Plaintiff, on behalf of Dish, has no adequate remedy at law.

23 **SECOND CAUSE OF ACTION**

24 **For Gross Mismanagement Against All Defendants**

25 68. Plaintiff incorporates ¶¶1-62.

26 69. Defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf,
27 Vogel, Brokaw, Howard and Clayton, either directly or through aiding and abetting, abandoned and
28 abdicated their responsibilities and fiduciary duties to competently direct and manage Dish's

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1 business in accordance with the laws applicable to its operations in general and the Compliance
2 Agreement and the TCPA in particular. Specifically, while under defendants' stewardship, Dish
3 ignored the promises it made to the 46 state attorneys general in the Compliance Agreement and, as
4 a result, violations of the TCPA flourished at Dish and its telemarketers, like SSN. As a direct and
5 proximate result of defendants' gross mismanagement, as reflected in the adverse jury verdict and
6 treble damages awarded in the North Carolina TCPA class action, and other actions as well, Dish has
7 sustained significant damages.

8 70. Accordingly, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn,
9 Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton breached their fiduciary duties of loyalty
10 and good faith owed to Dish by grossly mismanaging the Company's business and affairs. As a
11 result, each of these defendants is liable to Dish for the resulting damages.

12 71. Plaintiff, on behalf of Dish, has no adequate remedy at law.

13 **THIRD CAUSE OF ACTION**

14 **For Abuse of Control Against All Defendants**

15 72. Plaintiff incorporates ¶¶1-62.

16 73. Defendants' misconduct alleged herein constitutes a breach of their fiduciary duties
17 because they abused their ability to control and influence Dish, for which they are legally
18 responsible.

19 74. As a direct and proximate result of defendants' abuse of control, Dish has sustained
20 significant damages. As a result of the misconduct alleged herein, defendants are liable to the
21 Company.

22 75. Plaintiff, on behalf of Dish, has no adequate remedy at law.

23 **FOURTH CAUSE OF ACTION**

24 **For Corporate Waste Against All Defendants**

25 76. Plaintiff incorporates ¶¶1-62.

26 77. By their wrongful acts and omissions, defendants Charles Ergen, DeFranco, Candy
27 Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton wasted Dish's valuable
28 corporate assets by, among other things, causing the Company to pay improper compensation, JA000643

1 including salaries, bonuses, fees, stock awards and other incentive-based compensation and benefits
2 to themselves and other Dish insiders who breached their fiduciary duties owed to Dish. Dish
3 received no benefit from these improper payments. As a result, defendants damaged Dish and are
4 liable to the Company for corporate waste.

5 78. Plaintiff, on behalf of Dish, has no adequate remedy at law.

6 **FIFTH CAUSE OF ACTION**

7 **For Unjust Enrichment Against All Defendants**

8 79. Plaintiff incorporates ¶¶1-62.

9 80. By their wrongful acts and omissions, Charles Ergen, DeFranco, Candy Ergen,
10 Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton were unjustly enriched at the
11 expense of and to the detriment of Dish.

12 81. All the payments and benefits provided to defendants were at the expense of Dish.
13 The Company received no benefit from these payments.

14 82. Plaintiff, on behalf of Dish, seeks restitution from defendants, and each of them, and
15 seeks an order of this Court disgorging all profits, benefits and other compensation obtained by these
16 defendants, and each of them, from their wrongful conduct and fiduciary breaches.

17 83. Plaintiff, on behalf of Dish, has no adequate remedy at law.

18 **PRAYER FOR RELIEF**

19 WHEREFORE, plaintiff demands judgment in Dish's favor against all defendants as follows:

20 A. Declaring that plaintiff may maintain this action on behalf of Dish and that plaintiff is
21 an adequate representative of the Company;

22 B. Declaring that defendants have breached and/or aided and abetted breaches of their
23 fiduciary duties of loyalty and good faith owed to Dish;

24 C. Determining and awarding to Dish the damages sustained by it as a result of the
25 violations set forth above from each of the defendants, jointly and severally, together with interest
26 thereon;

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1 D. Determining and awarding to Dish exemplary damages in an amount necessary to
2 punish defendants and to make an example of defendants to the community according to proof at
3 trial;

4 E. Awarding Dish restitution from defendants, and each of them;

5 F. Awarding plaintiff the costs and disbursements of this action, including reasonable
6 attorneys' and experts' fees, costs and expenses; and

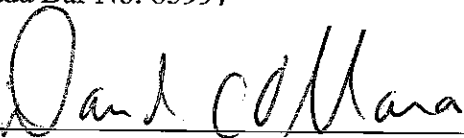
7 G. Granting such other and further equitable relief as this Court may deem just and
8 proper.

9 **JURY DEMAND**

10 Plaintiff demands a trial by jury.

11 DATED: October 19, 2017

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(Nevada Bar No. 8599)

13 
14

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VERIFICATION

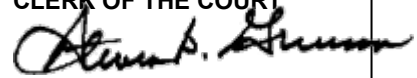
I, Jeff Penniston, Trustee, on behalf of Plumbers Local Union No. 519 Pension Trust Fund hereby verify that I am familiar with the allegations in the Verified Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment ("Complaint"), and that the fund authorized the filing of the Complaint and that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 4th day of October, 2017.

PLUMBERS LOCAL UNION NO. 519 PENSION
TRUST FUND

By: Jeff D. Penniston
Trustee

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IN THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR CLARK COUNTY

CITY OF STERLING HEIGHTS POLICE
AND FIRE RETIREMENT SYSTEM,
Derivatively on Behalf of DISH NETWORK
CORPORATION,

Plaintiff,

v.

CHARLES W. ERGEN, CANTEY M.
ERGEN, JAMES DEFRANCO, STEVEN
R. GOODBARN, DAVID K.
MOSKOWITZ, TOM A. ORTOLF, CARL
E. VOGEL, GEORGE R. BROKAW,
JOSEPH P. CLAYTON, and GARY S.
HOWARD,

Defendants,

-and-

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant.

Case No. A-17-764522-B

Dept. No. Department 27

VERIFIED STOCKHOLDER DERIVATIVE
COMPLAINT FOR BREACH OF
FIDUCIARY DUTY, WASTE OF
CORPORATE ASSETS, AND UNJUST
ENRICHMENT

DEMAND FOR JURY TRIAL

JA000648

1 Plaintiff City of Sterling Heights Police and Fire Retirement System, by its attorneys,
2 submits this complaint against the defendants named herein. Plaintiff alleges upon knowledge as to
3 its own acts and upon information and belief as to all other matters, as follows.

4 **SUMMARY OF THE ACTION**

5 1. This is a stockholder derivative action by plaintiff on behalf of nominal defendant
6 DISH Network Corporation ("Dish" or the "Company") for breach of fiduciary duty, waste of
7 corporate assets, and unjust enrichment.

8 2. In July 2009, Dish entered into an Assurance of Voluntary Compliance ("Compliance
9 Agreement") with forty-six state Attorneys General over the Company's repeated violations of the
10 Telephone Consumer Protection Act ("TCPA").¹ The TCPA was meant to prevent consumers from
11 receiving unwanted telephone calls. Pursuant to this Compliance Agreement, Dish agreed to pay a
12 nearly \$6 million fine and reform its practices to ensure compliance with the TCPA. The Dish
13 Board of Directors (the "Board")—a majority of the defendants here—authorized the Company's
14 entry into the Compliance Agreement.

15 3. In the Compliance Agreement, Dish represented that "it had control over its third-
16 party marketers" and "agreed to supervise its marketers, determine if they were complying with
17 federal do-not-call laws, and discipline or terminate them if they failed to take steps to prevent
18 violations of the law." *Krakauer v. Dish Network L.L.C.*, No. 14-cv-0333, Memorandum Opinion
19 and Order at 14 (M.D.N.C. May 22, 2017) ("Order"); Compliance Agreement at 23-24.

20 Specifically, the Compliance Agreement stated that Dish "shall affirmatively
21 investigate" do-not-call complaints and "take appropriate action ... against any
22 [marketer] it has determined to be in violation of the requirements of this Assurance."
23 PX 55 at ¶4.74. The Compliance Agreement required Dish to "monitor, directly or
24 through a third-party monitoring service ... its Covered Marketers ... to determine
25 whether the Covered Marketer is complying with all applicable federal, state, and
26 local do-not-call laws." *Id.* at ¶4.78. Dish was required to issue business rules to its
27 marketers to require them to comply with the Compliance Agreement. *Id.* at ¶4.73.
28 If a marketer violated do-not-call laws, the Compliance Agreement stated that Dish
"shall appropriately and reasonably discipline" that marketer, and that discipline
"shall include" at least one of: termination, fines, withholding payment, suspension,

¹ Assurance of Voluntary Compliance (July 2009) available at <http://www.nj.gov/oag/newsreleases09/pr20090716a-Assurance-of-Voluntary-Compliance.pdf>.

1 prohibiting telemarketing, requiring the marketer to change its
2 procedures/employees/affiliates/training, or "other appropriate and reasonable
3 discipline." *Id.* at ¶4.79.

4 Order at 14-15. Notably, the Compliance Agreement also requires Dish directors to comply with the
5 TCPA. Compliance Agreement, ¶3.1 ("this Assurance shall apply to DISH Network and all of its ...
6 *directors*").

7 4. As revealed earlier this year, "Dish did not take seriously the promises it made to
8 forty-six state attorneys general, repeatedly overlooked TCPA violations by [its telemarketers], and
9 allowed [certain telemarketers] to make many thousands of calls on its behalf that violated the
10 TCPA." Order at 29. Specifically, on May 22, 2017, the North Carolina federal court found that,
11 despite paying "a nearly \$6 million fine as a part of the Compliance Agreement in 2009," *and as*
12 *Dish cofounder and director, defendant James DeFranco ("DeFranco"), testified*, "the
13 Compliance Agreement did not change Dish's procedures at all." *Id.* at 29-30. As a result, both Dish
14 and its third-party telemarketers routinely did not comply with the federal telemarketing laws—a fact
15 known at the highest levels within Dish, as reflected by defendant DeFranco's trial testimony.

16 5. Observing that the trial record is "silent" as to Dish's TCPA compliance efforts, the
17 federal court wrote:

18 ...The Compliance Agreement stated that Dish "shall be bound from directly or
19 indirectly engaging in the practices set forth herein and shall be required to directly
20 or indirectly satisfy the affirmative requirements set forth herein." PX 55 at ¶4.

21 Beyond sharing the terms of the Compliance Agreement with its marketers, Trial Tr.
22 Jan. 11, Doc. 302 at 73:25-74:10 (Ahmed testimony), the record is silent about any
23 efforts Dish undertook to comply with the promises and assurances it made.
24 According to Dish's co-founder, the Compliance Agreement changed nothing: "This
25 is how we operated even prior to the agreement as it related to telemarketing." Trial
26 Tr. Jan. 13, Doc. 304 at 168:17-169:6 (DeFranco testimony). That, however, is
27 patently inaccurate, as Dish's compliance department never investigated whether a
28 marketer had violated telemarketing laws. *See* discussion *infra* pp. 17-19.

Order at 15.

26 6. Explaining its rationale for awarding treble damages against Dish, the federal court
27 continued:

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1 The Court concludes that treble damages are appropriate here because of the need to
2 deter Dish from future violations and the need to give appropriate weight to the scope
3 of the violations. ***The evidence shows that Dish's TCPA compliance policy was***
4 ***decidedly two-faced.*** Its contract allowed it to monitor TCPA compliance, *supra* pp.
5 8-9, and it told forty-six state attorneys general that it would monitor and enforce
6 marketer compliance, *supra* pp. 14-16, but in reality it never did anything more than
7 attempt to find out what marketer had made a complained-about call. *Supra* pp. 17-
8 19. It never investigated whether a marketer actually violated the TCPA and it never
9 followed up to see if marketers complied with general directions concerning TCPA
10 compliance and or with specific do-not-call instructions about individual persons.
11 *Supra* pp. 12-13, 17-19. Dish characterized people who pursued TCPA lawsuits not
12 as canaries in the coal mine, but as "harvester" plaintiffs who were illegitimately
13 seeking money from the company. *See supra* p. 19. ***The Compliance Agreement***
14 ***did not cause Dish to take the TCPA seriously, so significant damages are***
15 ***appropriate to emphasize the seriousness of such statutory violations and to deter***
16 ***Dish in the future.***

17 Order at 28-29.

18 7. Ultimately, the North Carolina federal court concluded that "Dish Network willfully
19 and knowingly violated the TCPA and that treble damages are appropriate to deter Dish and to give
20 suitable weight to the seriousness and scope of the violations Dish committed." Order at 30. After
21 trebling the jury's damages award, the federal court ordered Dish to pay plaintiffs \$65.1 million.

22 8. Defendants' disdain for legal compliance has severely damaged the Company and
23 their leadership has unnecessarily exposed Dish to massive liability for violating the federal
24 telemarketing laws. Although the North Carolina case involved only one Dish telemarketer—
25 Satellite Systems Network ("SSN"), a smaller Dish telemarketer—the facts of the case are a window
26 into TCPA compliance efforts at Dish, including at the highest levels. And regrettably, those facts
27 reveal a "two-faced" approach to TCPA compliance, where such efforts existed only on paper, if at
28 all, and never in reality.

29 9. Because defendants did not take seriously the promises that Dish made to the forty-
30 six state Attorneys General in the Compliance Agreement, the Company now also faces exposure to
31 liability in other courts for violations of the TCPA. Indeed, on June 5, 2017, an Illinois federal court
32 found Dish liable for telemarketing calls made to consumers on the national do-not-call registry. *See*
33 *United States v. Dish Network LLC*, No. 09-3073, Findings of Fact and Conclusions of Law (C.D.
34 Ill. June 5, 2017). The court in the Illinois federal action ordered Dish to pay \$65.1 million in

statutory damages and penalties, including \$168 million to the federal government—the largest civil penalty ever obtained for a violation of the Federal Trade Commission Act. The federal court also ordered Dish to hire a telemarketing-compliance expert to prepare a plan designed to ensure compliance with telemarketing laws and provide a copy of such plan to the court, and to maintain records relating to telemarketing compliance (including all outbound call records and all consumer complaints received by Dish) and provide copies of such records to the plaintiffs on a semi-annual basis for the next ten years.

10. Although Dish has been injured, defendants have not fared nearly so badly. They collectively pocketed \$24,536,520 in salaries, bonuses, fees, stock awards, and other incentive-based compensation not justified by Dish's lawless behavior while under their direction. Defendants have also retained their positions of power, prestige, and privilege at the Company, having been repeatedly renominated and reelected to the Board by votes controlled by defendant Charles W. Ergen ("Charles Ergen"), Dish's majority stockholder.

11. Defendants have not filed suit against the directors, officers and/or senior advisors responsible for this debacle, which to date has cost Dish millions of dollars. Nor will defendants commence such legal action, because doing so would expose them to liability for breaching their fiduciary duties, waste of corporate assets, and unjust enrichment. Likewise, a majority of the Board is beholden to defendant Charles Ergen for election to the Board and, therefore, will not bring suit against him because it would lead to their expulsion from the Board. Thus, a majority of the Board is disabled from fairly and objectively considering any presuit demand that plaintiff may have made. As such, a presuit demand is excused as futile.

JURISDICTION AND VENUE

12. This Court has jurisdiction over plaintiff's claims for violations of applicable law and jurisdiction over defendants because each defendant, in person or through an agent, maintains operations and/or conducts substantial business in the state of Nevada and thereby renders the exercise of jurisdiction by Nevada courts permissible under traditional notions of fair play and substantial justice.

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13. Venue is proper in this Court because a substantial amount of the transactions at issue in this case, including the defendants' primary participation in the wrongful acts and violation of fiduciary duties owed to Dish took place and/or had an effect in this county.

THE PARTIES

Plaintiff

14. Plaintiff City of Sterling Heights Police and Fire Retirement System was a stockholder of Dish at the time of the wrongdoing complained of, has continuously been a stockholder since that time, and is a current Dish stockholder.

Nominal Defendant

15. Nominal defendant Dish is a Nevada corporation with its principle executive offices located at 9601 S. Meridian Boulevard, Englewood, Colorado. Dish, through its operating company, DISH Network L.L.C., is a satellite television provider. The Company often uses third-party marketers to get new customers.

Individual Defendants

16. Defendant Charles Ergen has been a director of Dish since its inception in 1980. Defendant Charles Ergen cofounded the Company with his wife, defendant Cantey M. Ergen ("Cantey Ergen"), and defendant DeFranco. Defendant Charles Ergen has also served as Executive Chairman, Chief Executive Officer and President of the Company during his tenure on the Board. Despite the troubles at Dish while under his stewardship, in the Board's judgment, defendant Charles Ergen "should continue to serve on the Board due, among other things, to his role as [Dish's] co-founder and controlling shareholder and the expertise, leadership and strategic direction that he has contributed to [Dish] since [its] formation." Defendant Charles Ergen received at least \$6,959,774 in salary, bonus, and other incentive-based compensation not justified by the Company's performance while under his stewardship.

17. Defendant Cantey Ergen has been a director of Dish since 2001. Defendant Cantey Ergen cofounded the Company with her husband, defendant Charles Ergen, and defendant DeFranco, in 1980. Defendant Candy Ergen has also served as a Senior Advisor to Dish since 1980. Despite the troubles at Dish while under her stewardship, in the Board's judgment, Defendant Cantey

1 Ergen "should continue to serve on the Board due, among other things, to her knowledge of DISH
2 Network since its inception and her service to [Dish] in a multitude of roles over the years."
3 Defendant Cantey Ergen received at least \$400,000 in compensation not justified by the Company's
4 performance while under her stewardship.

5 18. Defendant DeFranco has been a director of Dish since its inception in 1980.
6 Defendant DeFranco cofounded the Company with defendants Charles Ergen and Cantey Ergen in
7 1980. Defendant DeFranco has also served as Executive Vice President and one of the Vice
8 Presidents of Dish since 1980. Despite the troubles at Dish while under his stewardship, in the
9 Board's judgment, defendant DeFranco "should continue to serve on the Board due, among other
10 things, to his knowledge of DISH Network since its formation, particularly in sales and marketing."
11 While serving as Dish's Executive Vice President and a director, defendant DeFranco received
12 personal benefits, power, and prestige not justified by the Company's performance while under his
13 stewardship. In addition, while Dish shares traded at artificially inflated prices, defendant DeFranco
14 sold 300,000 shares of Dish stock for proceeds of \$23,099,500.

15 19. Defendant Steven R. Goodbarn ("Goodbarn") has been a director of Dish since 2002.
16 Defendant Goodbarn has also served on the Audit and Compensation Committees of the Board.
17 Despite the troubles at Dish while under his stewardship, in the Board's judgment, defendant
18 Goodbarn "should continue to serve on the Board due, among other things, to his knowledge of
19 DISH Network from his service as a director since 2002 and his expertise in accounting, auditing,
20 finance and risk management that he brings to the Board, in particular in light of his background as a
21 CPA and his prior experience serving as Chief Financial Officer of Janus." Defendant Goodbarn
22 received at least \$515,711 in fees, stock awards, and other incentive-based compensation not
23 justified by the Company's performance while under his stewardship. In addition, while Dish shares
24 traded at artificially inflated prices, defendant Goodbarn sold 18,000 shares of Dish stock for trading
25 proceeds of \$981,510.

26 20. Defendant David K. Moskowitz ("Moskowitz") has been a director of Dish since
27 1998. Defendant Moskowitz has also served as Executive Vice President of and Senior Advisor to
28 Dish for over a decade. Despite the troubles at Dish while under his stewardship, in the Board's

JA000654

1 judgment, defendant Moskowitz "should continue to serve on the Board due, among other things, to
2 his knowledge of DISH Network from his service as a director since 1998 and his business and legal
3 expertise that he brings to the Board, in particular in light of his service as [Dish's] General Counsel
4 for 17 years." While serving as Dish's Executive Vice President, Senior Advisor, General Counsel
5 and a director, defendant Moskowitz received personal benefits, power, and prestige not justified by
6 the Company's performance while under his stewardship. In addition, while Dish shares traded at
7 artificially inflated prices, defendant Moskowitz sold 762,000 shares of Dish stock for unlawful
8 insider trading proceeds of \$45,111,085.

9 21. Defendant Tom A. Ortolf ("Ortolf") has been a director of Dish since 2005.
10 Defendant Ortolf has also served on the Audit, Compensation, and Nominating Committees of the
11 Board. Despite the troubles at Dish while under his stewardship, in the Board's judgment, defendant
12 Ortolf "should continue to serve on the Board due, among other things, to his knowledge of DISH
13 Network from his service as a director since 2005 and his expertise in finance, business and risk
14 management, in particular in light of his experience as an executive of CMC." Defendant Ortolf
15 received at least \$533,711 in fees, stock awards, and other incentive-based compensation not
16 justified by the Company's performance while under his stewardship. In addition, while Dish shares
17 traded at artificially inflated prices, defendant Ortolf sold 20,000 shares of Dish stock for unlawful
18 insider trading proceeds of \$1,050,000.

19 22. Defendant Carl E. Vogel ("Vogel") has been a director of Dish since 2006.
20 Defendant Vogel has also served as a Senior Advisor to Dish for the past several years. Despite the
21 troubles at Dish while under his stewardship, in the Board's judgment, defendant Vogel "should
22 continue to serve on the Board due, among other things, to his knowledge of DISH Network from his
23 service as a director and officer and his experience in the telecommunications and related industries
24 from his service over the years as a director or officer with a number of different companies in those
25 industries." While serving as Dish's Senior Advisor and a director, defendant Vogel received
26 personal benefits, power, and prestige not justified by the Company's performance while under his
27 stewardship. In addition, while Dish shares traded at artificially inflated prices, defendant Vogel
28 sold 315,985 shares of Dish stock for proceeds of \$17,670,702.

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23. Defendant George R. Brokaw ("Brokaw") has been a director of Dish since October 2013. Defendant Brokaw has also served on the Audit and Nominating Committees of the Board. Despite the troubles at Dish while under his stewardship, in the Board's judgment, defendant Brokaw "should continue to serve on the Board due, among other things, to his financial experience, acquired, in part, during his tenure with Highbridge, Perry and Lazard." Defendant Brokaw received at least \$526,951 in fees, stock awards, and other incentive-based compensation not justified by the Company's performance while under his stewardship.

24. Defendant Joseph P. Clayton ("Clayton") served as a director of Dish from June 2011 to March 2015. Defendant Clayton also served as Chief Executive Officer and President of Dish. Defendant Clayton received at least \$15,479,936 in salary, bonus, and other incentive-based compensation not justified by the Company's performance while under his stewardship. In addition, while Dish shares traded at artificially inflated prices, defendant Clayton sold 556,250 shares of Dish stock for proceeds of \$35,982,248.

25. Defendant Gary S. Howard ("Howard") served as a director of Dish from 2005 to July 2013. Defendant Howard also served on the Audit Committee of the Board. Defendant Howard received at least \$120,436 in fees, stock awards, and other incentive-based compensation not justified by the Company's performance while under his stewardship.

26. Collectively, the defendants identified in ¶¶16-25 are referred to herein as the "Individual Defendants."

DUTIES OF THE INDIVIDUAL DEFENDANTS

Fiduciary Duties

27. By reason of their positions as officers and directors of the Company, and because of their ability to control the business and corporate affairs of Dish, the Individual Defendants owe Dish and its stockholders the fiduciary obligations of loyalty and candor, which encompass good faith and trust. The obligations require the Individual Defendants to use their utmost abilities to control and manage Dish in an honest and lawful manner. The Individual Defendants were and are required to act in furtherance of the best interests of Dish and its stockholders and to refrain from unduly benefiting themselves at the expense of the Company.

JA000656

1 28. Each director of the Company owes to Dish and its stockholders the fiduciary duty to
2 exercise good faith and diligence in the administration of the affairs of the Company and in the use
3 and preservation of its property and assets.

4 29. To discharge their duties, the officers and directors of Dish were required to exercise
5 reasonable and prudent supervision over the management, policies, practices, and controls of the
6 financial affairs of the Company. By virtue of such duties, the officers and directors of Dish were
7 required to, among other things:

8 (a) properly and accurately guide the Company's stockholders and the public
9 when speaking about Dish's financial condition at any given time, including making accurate
10 statements about the Company's financial results, and ensuring that the Company maintained an
11 adequate system of financial controls such that the Company's financial reporting would be true and
12 accurate at all times;

13 (b) conduct the affairs of the Company in an efficient, business-like manner in
14 compliance with all applicable laws, rules, and regulations so as to make it possible to provide the
15 highest quality performance of its business, to avoid wasting the Company's assets, and to maximize
16 the value of the Company's stock;

17 (c) remain informed as to how Dish conducted its operations, and, upon receipt of
18 notice or information of imprudent or unsound conditions or practices, make reasonable inquiry in
19 connection therewith, and take steps to correct such conditions or practices and make such
20 disclosures as necessary to comply with applicable laws; and

21 (d) ensure that the Company complied with its legal obligations and requirements,
22 including acting only within the scope of its legal authority and refrain from engaging in deceptive
23 or fraudulent conduct.

24 **Control, Access, and Authority**

25 30. The Individual Defendants, because of their positions of control and authority as
26 directors and/or officers of Dish, were able to and did, directly and/or indirectly, exercise control
27 over the wrongful acts complained of herein, as well as the contents of the various public statements
28 issued by the Company.

JA000657

1 31. Because of their advisory, executive, managerial, and directorial positions with Dish,
2 each of the Individual Defendants had access to adverse, nonpublic information about the financial
3 condition, operations, and improper representations of Dish, including information regarding the
4 several factors negatively impacting the Company's performance.

5 32. At all times relevant hereto, each of the Individual Defendants was the agent of each
6 of the other Individual Defendants and of Dish, and was at all times acting within the course and
7 scope of such agency.

8 **Breaches of Duties**

9 33. Each Individual Defendant, by virtue of his or her position as a director and/or
10 officer, owed to the Company and to its stockholders the fiduciary duty of loyalty and good faith and
11 the exercise of due care and diligence in the management and administration of the affairs of the
12 Company, as well as in the use and preservation of its property and assets. The conduct of the
13 Individual Defendants complained of herein involves a knowing and culpable violation of their
14 obligations as officers and directors of Dish, the absence of good faith on their part, and a reckless
15 disregard for their duties to the Company that the Individual Defendants were aware or reckless in
16 not being aware posed a risk of serious injury to the Company.

17 34. The Individual Defendants breached their duty of loyalty and good faith by allowing
18 defendants to cause, or by themselves causing, the Company to engage in making improper
19 statements to the public and Dish's stockholders, improper practices that wasted the Company's
20 assets, and caused Dish to incur substantial damage.

21 35. The Individual Defendants, because of their positions of control and authority as
22 officers and/or directors of Dish, were able to and did, directly or indirectly, exercise control over the
23 wrongful acts complained of herein. The Individual Defendants also failed to prevent the other
24 Individual Defendants from taking such illegal actions. As a result, and in addition to the damage
25 the Company has already incurred, Dish has expended, and will continue to expend, significant sums
26 of money.

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1 **FACTUAL ALLEGATIONS**

2 36. This is a stockholder derivative action on behalf of nominal defendant Dish against
3 certain of its current and former directors and officers for breach of fiduciary duty, waste of
4 corporate assets, and unjust enrichment. Nominal defendant Dish is a satellite television provider
5 that uses third-party marketers to obtain new customers.

6 37. As Dish directors, the Individual Defendants owe the Company strict fiduciary duties
7 of good faith and loyalty. Relative to the TCPA, this means that the Individual Defendants were
8 duty bound to direct Dish's business and affairs in conformity with the federal telemarketing laws,
9 even before the 2009 settlement with forty-six state Attorneys General. After Dish entered into the
10 Compliance Agreement, the Individual Defendants undertook a heightened duty not only to direct
11 Dish's business in compliance with the TCPA, but also in accordance with the remedial TCPA
12 compliance measures specified in the Compliance Agreement. Compliance Agreement, ¶3.1. The
13 Individual Defendants, however, failed on both counts.

14 38. Due to the Individual Defendants' fiduciary failures, Dish now faces exposure to
15 massive liability for violating the TCPA. Indeed, on May 22, 2017, the North Carolina federal court
16 ordered Dish to pay \$65.1 million in treble damages for "willfully and knowingly violat[ing] the
17 TCPA." The Individual Defendants, by contrast, have not fared nearly so badly. In addition to
18 retaining their positions of power, prestige, and privilege as Dish directors and officers, these
19 defendants paid themselves \$24,536,520 in salaries, bonuses, fees, and stock awards not justified by
20 Dish's lawlessness while under their stewardship. These payments wasted corporate assets and
21 unjustly enriched the Individual Defendants at the expense of Dish and its noncontrolling public
22 stockholders.

23 **The 2009 TCPA Compliance Agreement with Forty-Six State Attorneys General**

24 39. As previously mentioned, Dish sells satellite television services through third-party
25 marketers. After numerous complaints about Dish and its telemarketers making calls to persons on
26 the federal do-not-call registry, the Attorneys General of forty-six states brought charges against
27 Dish for violating the telemarketing laws, including the TCPA.

28 JA000659

40. To resolve this dispute, on July 16, 2009, Dish entered into a TCPA settlement agreement, entitled "Assurance of Voluntary Compliance," to resolve the state attorney general actions. As a part of the Compliance Agreement, Dish paid a nearly \$6 million fine, represented that "it had control over its third-party marketers" and "agreed to supervise its marketers, determine if they were complying with federal do-not-call laws, and discipline or terminate them if they failed to take steps to prevent violations of the law." Order at 14.

41. As a part of the Compliance Agreement, Dish also agreed to adopt TCPA legal compliance reforms designed to ensure the Company's compliance with federal and state telemarketing laws in the future. In this regard, the Compliance Agreement stated:

3. APPLICATION OF ASSURANCE TO DISH NETWORK AND ITS SUCCESSORS

3.1 DISH Network's duties, responsibilities, burdens and obligations undertaken in connection with ***this Assurance shall apply to DISH Network and all of its subsidiaries***, parents, affiliates, predecessors, successors and assigns of all of the foregoing, and the officers, ***directors***, employees, shareholders, agents, servants, and assigns.

* * *

4. TERMS OF ASSURANCE

Upon execution of this Assurance, *DISH Network shall be bound from directly or indirectly engaging in the practices set forth herein* and shall be required to directly or indirectly satisfy the affirmative requirements set forth herein.

* * *

Third-Party Retailers

4.56 DISH Network shall require its Third-Party Retailers to offer, lease, Advertise, install, and/or sell DISH Network Goods and/or DISH Network Services, and to make representations to Consumers in connection therewith, in a manner consistent with the terms of this Assurance.

4.57 DISH Network shall require its Third-Party Retailers to use telemarketers who comply with the provisions of this Assurance. ***If DISH Network learns that any of its Third-Party Retailers are conducting any Telemarketing activities, directly or through any other telemarketer, that violate the terms of this Assurance, DISH Network shall take appropriate disciplinary action against such Third-Party Retailers.*** Appropriate disciplinary action may include one or more of the following remedies:

JA000660

- 1) termination;
- 2) imposing monetary fines;
- 3) withholding of compensation;
- 4) suspending the right to Telemarket (directly or through a third-party) for a period of time;
- 5) prohibiting telemarketing (directly or through a third-party);
- 6) requiring the Third-Party Retailer to impose appropriate guidelines on its Telemarketing activities, such as procedures for compliance with the TCPA and/or any other federal, state or local laws regarding Telemarketing;
- 7) requiring the Third-Party Retailer to terminate a person or entity that is Telemarketing on its behalf; and/or
- 8) other appropriate and reasonable discipline under the circumstances.

4.58 ***DISH Network shall affirmatively investigate Complaints made to it*** ..., when such Complaints are brought to the attention of DISH Network, pertaining to its Third-Party Retailers' offer, Advertisement, installation, lease, and/or sale of DISH Network Goods and/or DISH Network Services, ***and shall take appropriate and reasonable disciplinary action as soon as reasonably practicable, against any Third-Party Retailer it has determined to be in violation of the requirements of this Assurance.*** Appropriate action may include retraining and other disciplinary action, up to and including termination of the Third-Party Retailer's authority to offer, Advertise, install, lease, and/or sell DISH Network Goods and/or DISH Network Services....

4.59 DISH Network shall be bound by and honor any representations that are made to Consumers by its Third-Party Retailers who offer, Advertise, install, lease, and/or sell DISH Network Goods and/or DISH Network Services made with DISH Network's prior authorization, approval, permission or knowledge.

4.60 Within thirty (30) days of the date of the entry of this Assurance, DISH Network shall provide each Third-Party Retailer who offers, Advertises, installs, leases, and/or sells DISH Network Goods and/or DISH Network Services with a copy of this Assurance and inform such Third-Party Retailers that in order to continue acting as authorized DISH Network Third-Party Retailers, they must abide by the applicable terms and conditions of this Assurance.

* * *

Telemarketing and Do Not Call

4.67 ***DISH Network shall comply with all federal, state and local laws regarding Telemarketing, including, but not limited to, those which prohibit calling Consumers who are on any federal, state, or local do-not-call lists unless otherwise exempted by such laws.***

4.68 DISH Network shall comply with all federal, state and local laws requiring the acquisition or purchase of national and state do-not-call databases and shall not make any Telemarketing calls to Consumers in the applicable state or

JA000661

1 municipality until it has acquired or purchased all do-not-call databases required by
2 federal, state, or local laws.

3 * * *

4 4.73 DISH Network shall issue business rules to its Authorized
5 Telemarketers and Covered Marketers, requiring them to comply with the terms of
6 this Assurance.

7 4.74 ***DISH Network shall affirmatively investigate Complaints regarding***
8 ***alleged violations of federal, state and local laws regarding Telemarketing,***
9 including, but not limited to, those which prohibit calling Consumers who are on any
10 federal, state, or local do-not-call lists, unless otherwise exempted by such laws, and
11 shall take appropriate action as soon as reasonably practicable against any
12 Authorized Telemarketers and Covered Marketers it has determined to be in
13 violation of the requirements of this Assurance.

14 * * *

15 4.78 ***DISH Network shall monitor, directly or through a third-party***
16 ***monitoring service approved by DISH Network, its Covered Marketers to***
17 ***determine whether they are Telemarketing Consumers and, if so, to determine***
18 ***whether the Covered Marketer is complying with all applicable federal, state, and***
19 ***local do-not-call laws.*** Upon request from an Attorney General, DISH Network shall
20 provide the requesting Attorney General with a copy of such written policies and
21 procedures. DISH Network states that it has had persons pose as potential
22 subscribers in order to engage in "sting"-type operations to determine if certain
23 Covered Marketers are complying with its do not call policies. Among other things,
24 DISH Network will continue engaging in such practices as part of the monitoring
25 process described above.

26 4.79 ***DISH Network shall appropriately and reasonably discipline a***
27 ***Covered Marketer if DISH Network reasonably determines that, in connection***
28 ***with Telemarketing DISH Network Goods and/or DISH Network Services, the***
Covered Marketer has: (a) failed to fulfill contract requirements with respect to
compliance with federal, state, or local telemarketing laws; (b) violated federal,
state, or local telemarketing laws; and/or (c) failed to comply with the terms of this
Assurance as they relate to this Telemarketing and Do Not Call section. Such
disciplinary action shall include one or more of the following remedies:

- 1) termination;
- 2) imposing monetary fines;
- 3) withholding of compensation;
- 4) suspending the right to Telemarket for a period of time;
- 5) prohibiting Telemarketing;
- 6) requiring the Covered Marketer to improve its process and procedures for
compliance with the TCPA and/or any other federal, state and local laws
regarding Telemarketing;

JA000662

- 1 7) requiring the Covered Marketer to terminate certain employees involved in
2 TCPA violations and/or violations of any other federal, state and local
3 laws regarding Telemarketing;
4 8) requiring the Covered Marketer to terminate Telemarketing affiliates;
5 9) requiring the Covered Marketer to retrain employees in TCPA compliance
6 and/or compliance with any other federal, state and local laws regarding
7 Telemarketing; and/or
8 10) other appropriate and reasonable discipline under the circumstances.

6 In determining what disciplinary action shall be taken, DISH Network shall take into
7 consideration the egregiousness of the Covered Marketer's conduct, the number of
8 violations, the Covered Marketer's willingness to cure the problem, and whether
9 DISH Network has previously disciplined the Covered Marketer.

9 * * *

10 **6. PAYMENT TO THE ATTORNEYS GENERAL**

11 6.1 *Within thirty (30) days of entry of this Assurance, DISH Network*
12 *shall pay the sum of Five Million Nine Hundred Ninety-One Thousand Dollars*
13 *(\$5,991,000), to the Attorneys General.*

13 * * *

14 **8. REPRESENTATIONS AND WARRANTIES**

15 8.1 DISH Network represents and warrants that the execution and
16 delivery of this Assurance *is its free and voluntary act*, and that this Assurance *is the*
17 *result of good faith negotiations.*

18 42. Dish did not live up to its obligations under the Compliance Agreement in good faith,
19 however. Instead, the Company engaged in what the North Carolina federal court described as a
20 "decidedly two-faced" TCPA compliance effort. Order at 28. "On paper, Dish was committed to
21 monitoring its marketers' compliance with telemarketing laws and investigating complaints of
22 violations. In reality, however, Dish repeatedly looked the other way when [its telemarketers]
23 violated the telemarketing laws and when [its telemarketers] disregarded contractual duties related to
24 compliance." *Id.* at 6.

25 43. After entering into the Compliance Agreement, the federal court found that Dish did
26 not change a thing about its TCPA compliance program. "Dish's co-founder [defendant DeFranco]
27 testified that the Compliance Agreement did not change Dish's procedures at all." "This is how we
28 operated even prior to the agreement as it related to telemarketing." Order at 14900663 Eng Trial

Tr. Jan. 13, Doc. 304 at 168:17-169:6 (DeFranco testimony)).

Krakauer v. Dish Network L.L.C. – The North Carolina TCPA Class Action Lawsuit

44. At all relevant times, Dish used third-party marketers, like SSN, to get new satellite television customers. "Dish had contractual arrangements with these marketers, many of whom, including SSN, solicited new customers for Dish through telemarketing calls." Order at 5-6. "SSN was an 'Order Entry Retailer' with direct access to Dish's computer system. The OE Retailers collectively generated hundreds of millions of dollars a year in revenue for Dish." *Id.* at 6.

45. "Beginning in May 2009 and over the next two years, SSN called Dr. [Thomas] Krakauer numerous times in an effort to sell him Dish satellite television programming and related services.... The calls continued even after Dr. Krakauer complained to Dish about SSN's sales tactics and after Dish placed Dr. Krakauer on its internal do-not-call list and told SSN to do the same...." Order at 3.

46. In 2014, Dr. Krakauer sued Dish in the U.S. District Court for the Middle District of North Carolina, alleging "that calls to him and others violated the TCPA and that Dish was liable as SSN's principal." Order at 3. After the federal court certified a class on behalf all persons whose numbers were on the national do-not-call registry but who nonetheless received multiple telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011, and summary judgment was mostly denied, the case was tried by a jury in January 2017. *Id.* at 3-4. At the same time, the federal court "heard the evidence about willfulness." *Id.* at 4.

47. Following six days of testimony, "[i]ssues of agency, liability, and damages were submitted to the jury." Order at 4. "The jury answered the agency issue in favor of the plaintiffs, finding that SSN acted as Dish's agent when it made the calls at issue"; the "liability question in favor of plaintiffs for all of the calls"; and the damages question in favor of plaintiffs, "award[ing] \$400 for each call," or \$25 million. *Id.* at 4-5.

48. Thereafter, the parties submitted their "written closing arguments on willfulness." Order at 5. After "consider[ing] those briefs and all of the evidence," on May 22, 2017, the Honorable Catherine C. Eagles found "that Dish Network willfully and knowingly violated the TCPA and that treble damages are appropriate to deter Dish and to give su

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seriousness and scope of the violations Dish committed." *Id.* at 30. Trebling the jury's damages award, the federal court increased damages "from \$400 per call to \$1,200 per call," or to \$65.1 million. *Id.* at 30-31.

49. The federal court's nearly thirty-one-page Memorandum Opinion and Order is a window into Dish's TCPA legal compliance efforts, including at the highest levels of the Company. During the trial, Dish director defendant DeFranco testified as to the Company's TCPA compliance efforts, which the federal court, based on the evidentiary record, found to be "two-faced," existing only on paper. Order at 28. The federal court wrote: "[Dish] paid a nearly \$6 million fine as part of the Compliance Agreement in 2009, ... yet Dish's co-founder [defendant DeFranco] testified that the Compliance Agreement did not change Dish's procedures at all." *Id.* at 29-30.

50. Equally telling, despite the Dish directors' heightened TCPA compliance obligations under the Compliance Agreement, after six days of trial testimony, the federal court observed that "the record is *silent* about any efforts Dish undertook to comply with the promises and assurances it made." Order at 15. According to Dish cofounder defendant DeFranco's sworn testimony, the Compliance Agreement changed nothing: "'This is how we operated even prior to the agreement as it related to telemarketing.'" Order at 15 (citing DeFranco Trial Tr. Jan. 13, 2017 Doc. 304 at 168:17-169:6).

Dish's Willful and Knowing Violations of the TCPA

51. After setting forth the salient facts, the federal court addressed the willfulness of Dish's violations of the TCPA. Concluding that Dish, while under the Individual Defendants' stewardship, willfully and knowingly violated the TCPA by allowing tens of thousands of calls to be made by SSN to persons on the national do-not-call registry, the federal court ruled, in part, as follows:

Over the course of approximately fifteen months, SSN made tens of thousands of calls to numbers on the Registry. *Supra* pp. 20-21.... It has a long history of acting in disregard of the requirements of the TCPA. *See supra* pp. 10-13....

Dr. Krakauer contends that because the jury found that SSN acted as Dish's agent and SSN's conduct is imputed to Dish, the determinative question is whether SSN, and not Dish, acted knowingly or willfully. Doc. 308 at 3.

JA000665

* * *

The Court agrees with that factual finding. *Supra* p. 19. Applying the traditional rule, Dish is responsible for any willful or knowing violation of the telemarketing laws by SSN.

The result is the same even if one only looks at the willfulness of Dish's conduct. Dish knew that SSN had committed many TCPA violations over the years. It had received many complaints and knew of at least three lawsuits, one of which resulted in a money judgment and two of which resulted in injunctions. *Supra* pp. 11-12. It knew SSN's uncorroborated and conclusory explanations—that violations were inadvertent or the product of rogue employees—were not credible. *See* PX 194. It knew SSN was not scrubbing all its lists or keeping call records. *Supra* pp. 12-14, 16-17. ***It ignored SSN's misconduct and, despite promises to forty-six state attorneys general, it made no effort to monitor SSN's compliance with telemarketing laws.*** *See supra* pp. 14-16, 17-19. Dish had the power to control SSN's telemarketing; it simply did not care whether SSN complied with the law or not. *Cf. United States v. Blankenship*, 846 F.3d 663, 673 (4th Cir. 2017) (holding that "not caring about adherence to legal requirements amounts to criminal willfulness" (internal quotation marks omitted)). ***Dish knew or should have known that its agent, SSN, was violating the TCPA, and Dish's conduct thus willfully and knowingly violated the TCPA.***

Order at 21-23.

Dish's Arguments Against "Willfulness and Knowledge"

52. Turning next to Dish's arguments that its conduct was neither willful nor knowing, the federal court ruled, in part, as follows:

Dish contends its conduct was not willful or knowing for several reasons, none of which are persuasive. Dish first contends that its actions were not willful because it instructed SSN to comply with the law and, specifically, to scrub its lists with PossibleNow. *See, e.g.*, DX 1 at 7; DX 2; DX 3 at 47; DX 5. While there was evidence of this, ***the evidence also revealed that these were empty words.*** For instance, when SSN told Dish's compliance department that it was, in fact, *not* using PossibleNow to scrub customer lists in 2009, and again in 2010, Dish did nothing. *Supra* pp. 13-14, 16-17. In context, ***Dish only paid lip service to compliance.***

* * *

Dish maintains that by calling Dr. Krakauer in 2010 and 2011, SSN disobeyed direct instructions from Dish. Doc. 312 at 16-18. This is true, but it does not disprove willfulness or knowledge. ***Dish was aware that SSN disregarded other instructions from Dish about telemarketing compliance, as discussed supra pp. 12-13, but Dish took no disciplinary action against SSN,*** did not monitor SSN's compliance, and allowed SSN to keep selling Dish products by telemarketing. *See* Trial Tr. Jan. 12, Doc. 303 at 20:11- 21:12, 22:4-:21, 78:4-79:1, 82:24-83:6 (Musso testimony).

JA000666

1 Dish contends that the complaints received about SSN were few in number and
2 insufficient to put it on notice that there were widespread violations, and that
3 everyone involved at Dish believed that SSN was complying with telemarketing
4 laws. Doc. 312 at 13-19. **First, the testimony that Dish thought SSN was in**
5 **compliance is not credible and is controverted by Dish's own documents.** See
6 generally PX 15. Second, even if some Dish employees did think this, that belief
7 was only possible because Dish ignored the facts and failed to investigate and
8 monitor SSN's compliance.... **Given the tens of thousands of violative calls SSN**
9 **made in a span of just over a year, even a cursory investigation or monitoring**
10 **effort by Dish would have uncovered the violations.** Under these circumstances,
11 what Dish calls a mistaken belief **is actually willful ignorance.**

12 Finally, Dish contends that the TCPA requires proof that Dish itself knew that each
13 and every call was made and violated the TCPA. Doc. 312 at 5-6. Dish relies on
14 *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir. 2015)....
15 It would not be reasonable to apply such a high standard to telemarketing calls,
16 which almost by definition are made in high volume.

17 * * *

18 Dish knew SSN was using unscrubbed lists as a result of the Krakauer and Campbell
19 complaints and it knew SSN had a long history of violations of both the TCPA and
20 Dish's business rules related to TCPA compliance. **Dish easily could have**
21 **discovered the full extent of the violations with a minimal monitoring effort, which**
22 **it had promised forty-six state Attorneys General it would undertake.** **Dish's**
23 **conduct was willful.**

24 Order at 23-28.

25 53. Lastly, the federal court considered the appropriateness of awarding treble damages
26 against Dish. Based on the trial record, including its "silen[ce]" as to Dish's efforts to comply with
27 the TCPA, defendant DeFranco's testimony that the Compliance Agreement did not change the
28 Company's TCPA compliance procedures, and Dish's general disdain for the TCPA and TCPA legal
compliance, the court trebled the jury's damages award from \$400 per call to \$1,200 per call, or
\$65.1 million. The court stated, in part, as follows:

The Court concludes that treble damages are appropriate here because of the need to
deter Dish from future violations and the need to give appropriate weight to the scope
of the violations. **The evidence shows that Dish's TCPA compliance policy was**
decidedly two-faced. Its contract allowed it to monitor TCPA compliance, *supra* pp.
8-9, and it told forty-six state attorneys general that it would monitor and enforce
marketer compliance, *supra* pp. 14-16, but in reality it never did anything more than
attempt to find out what marketer had made a complained-about call.... **The**
Compliance Agreement did not cause Dish to take the TCPA seriously.

1 *significant damages are appropriate to emphasize the seriousness of such statutory*
2 *violations and to deter Dish in the future.*

3 * * *

4 Dish contends that the Court should not treble the damages because the existing
5 damages are material to Dish and will be adequate to deter. Doc. 312 at 21-22. This
6 appears unlikely.... It paid a nearly \$6 million fine as part of the Compliance
7 Agreement in 2009, PX 55 at ¶6.1, *yet Dish's co-founder testified that the*
8 *Compliance Agreement did not change Dish's procedures at all.* See Trial Tr. Jan.
9 13, Doc. 304 at 168:17-169:6 (DeFranco testimony). A damages award that is an
10 order of magnitude larger is warranted here.

11 Dish also contends that the harm caused was only a "minor nuisance" and
12 "inconvenience." Doc. 312 at 21-22. Dish's description has left out "illegal," not to
13 mention "infuriating." *Dish's argument shows a failure to recognize the purpose of*
14 *the law* and is demeaning to consumers who put their names on the Do Not Call
15 Registry and who are entitled by law to have their privacy respected. It also *reflects*
16 *a lack of appreciation for the seriousness of the violations found by the jury:* over
17 50,000 connected calls to over 18,000 private individuals. Trial Tr. Jan. 12, Doc.
18 303 at 188:14-:18 (Verkhovskaya testimony).

19 * * *

20 *The Court finds that Dish Network willfully and knowingly violated the TCPA and*
21 *that treble damages are appropriate to deter Dish and to give suitable weight to the*
22 *seriousness and scope of the violations Dish committed.*

23 Order at 28-30.

24 DAMAGES TO DISH

25 54. Dish has been severely damaged by defendants' misconduct. In addition to the recent
26 \$65.1 million verdict against the Company in the North Carolina TCPA class action, the Company
27 has been exposed to the risk of loss for alleged TCPA violations in other courts as well. In fact, an
28 Illinois federal court recently issued findings of fact and conclusions of law holding Dish liable for
violating the TCPA and ordered \$280 million in damages. See *United States v. Dish Network LLC*,
No. 09-3073, Findings of Fact and Conclusions of Law (C.D. Ill. June 5, 2017).

55. By contrast, the Individual Defendants have not fared nearly so badly. Despite Dish's
dismal performance while under their stewardship, the Individual Defendants collectively pocketed
\$24,536,520 in executive compensation, directors' fees, stock awards, and other perquisites. In
addition, defendants DeFranco, Goodbarn, Moskowitz, Ortolf, Vogel, and **JA 000668** profited

1 handsomely by selling 1,972,235 shares of their personal Dish stock for proceeds of \$123,895,045.

2 56. This notwithstanding, the Board has not, and will not, bring legal action against the
3 directors and officers responsible for this debacle. By this action, plaintiff seeks to vindicate Dish's
4 rights against its wayward fiduciaries.

5 **DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS**

6 57. Plaintiff brings this action derivatively in the right and for the benefit of Dish to
7 redress injuries suffered, and to be suffered, by Dish as a direct result of breaches of fiduciary duty,
8 waste of corporate assets, and unjust enrichment, as well as the aiding and abetting thereof, by the
9 Individual Defendants. Dish is named as a nominal defendant solely in a derivative capacity. This is
10 not a collusive action to confer jurisdiction on this Court that it would not otherwise have.

11 58. Plaintiff will adequately and fairly represent the interests of Dish in enforcing and
12 prosecuting its rights.

13 59. Plaintiff was a stockholder of Dish at the time of the wrongdoing complained of, has
14 continuously been a stockholder since that time, and is a current Dish stockholder.

15 60. The current Board consists of the following ten individuals: defendants Charles
16 Ergen, DeFranco, Cantey Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, and Brokaw, and
17 nondefendants Charles M. Lillis ("Lillis") and Afshin Mohebbi ("Mohebbi"). Plaintiff has not made
18 any demand on the present Board to institute this action because such a demand would be a futile,
19 wasteful, and useless act, as set forth below.

20 61. Demand is excused because a majority of the Board faces a substantial likelihood of
21 liability. Defendants Charles Ergen, DeFranco, Cantey Ergen, Goodbarn, Moskowitz, Ortolf, Vogel,
22 and Brokaw knew or in reckless disregard of their fiduciary duties failed to know about the
23 Company's repeated TCPA violations and the Compliance Agreement. Nevertheless, the Company,
24 under these defendants' direction, did nothing to change its TCPA compliance procedures, as
25 revealed by the North Carolina federal court. Order at 1, 23, 28, 39, 30. While the amount of
26 documentation showing the Board and Company's actions after entering into the Compliance
27 Agreement should have been legion, the federal court after trial explained that "the *record is silent*
28 about any efforts Dish undertook to comply with the promises and assurances JA000669 of the state

1 Attorneys General. *Id.* at 15. In fact, defendant DeFranco testified the Compliance Agreement did
2 not change Dish's TCPA compliance procedures. *Id.* at 30. Defendants Charles Ergen, DeFranco,
3 Cantey Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, and Brokaw's failure to take any action to
4 ensure the Company was acting in accordance with the Compliance Agreement is a breach of their
5 fiduciary duty. Accordingly any demand upon any of these defendants is excused.

6 62. Demand is also excused as to the entire Board lacks independence from defendant
7 Charles Ergen. Defendant Charles Ergen controls 78.5% of the total voting power of Dish.
8 Defendants Charles Ergen, DeFranco, Cantey Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, and
9 Brokaw and nondefendants Lillis and Mohebbi freely admit that Dish is a "controlled" company
10 under NASDAQ Marketplace Rules, and has been for many years. Dish's 2017 Proxy Statement on
11 Form Def 14A filed with the U.S. Securities and Exchange Commissions on March 22, 2017, states
12 that Dish is a "'controlled company' within the meaning of NASDAQ Marketplace Rules because
13 more than 50% of [its] voting power is held by Charles W. Ergen, [Dish's] Chairman and Chief
14 Executive Officer." Therefore, all of Dish's directors are 100% dependent on defendant Charles
15 Ergen for their seats on the Board and would be expelled from their positions of power and prestige
16 at Dish, and the perquisites derived therefrom, for bringing the derivative claims against defendant
17 Charles Ergen and/or any of his closest allies, including his wife defendant Cantey Ergen and fellow
18 Dish cofounder defendant DeFranco. The Board has a history of deferring to defendant Charles
19 Ergen's wishes. Most recently, the Board eventually blessed defendant Charles Ergen's purchases of
20 the secured debt of LightSquared LP's debt for his own benefit, despite the Company being in the
21 condition to capitalize on this opportunity. In addition:

22 (a) Defendant Cantey Ergen, a cofounder of Dish, is Charles Ergen's wife.

23 (b) Defendant DeFranco has worked closely with the Ergens for the last thirty
24 years as he has been and continues to be serving as an Executive Vice President of Dish and a
25 member of the Dish Board at the pleasure of the Ergens.

26 (c) Defendant Moskowitz served as Dish's General Counsel between 1990 and
27 2007—receiving more than \$6 million—and has served as a "Senior Advisor" since 2012 receiving
28 compensation of \$250,000 per year. The relationship is so close that the Ergens have selected

1 defendant Moskowitz to serve as trustee for certain trusts established for the benefit of the Ergens'
2 children.

3 (d) Defendant Ortolf served as Dish's President and Chief Operating Officer from
4 1988 until 1991 and, since 2005, as a Dish director. At the pleasure of the Ergens, Dish has also
5 employed defendant Ortolf's children.

6 (e) Defendant Vogel served as a senior Dish executive between 2005 and 2008—
7 receiving more than \$9 million—and has continued to serve as a "senior advisor" while serving as a
8 Dish director. Defendant Vogel also served as a "Senior Advisor" and member of the Board of
9 EchoStar, another company that defendant Charles Ergen controls.

10 63. Plaintiff has not made any demand on the other stockholders of Dish to institute this
11 action since such demand would be a futile and useless act for at least the following reasons:

12 (a) Dish is a publicly held company with over 227 million shares outstanding and
13 thousands of stockholders;

14 (b) making demand on such a number of stockholders would be impossible for
15 plaintiff who has no way of finding out the names, addresses, or phone numbers of stockholders; and
16

17 (c) making demand on all stockholders would force plaintiff to incur excessive
18 expenses, assuming all stockholders could be individually identified.

19 **FIRST CAUSE OF ACTION**

20 **Against the Individual Defendants for Breach of Fiduciary Duty**

21 64. Plaintiff incorporates by reference and realleges each and every allegation contained
22 above, as though fully set forth herein.

23 65. As Dish directors and officers, the Individual Defendants owe Dish fiduciary duties of
24 loyalty and good faith to direct the operations of the Company in accordance with the laws
25 applicable to its business, including the TCPA and related state and federal telemarketing laws.
26 Relative to the TCPA, the Individual Defendants, in their capacities as Dish directors and officers,
27 faced a known legal duty to act loyally and in good faith to cause Dish and its third-party marketers
28 to comply with the legal requirements of the TCPA's do-not-call requirements. However, the

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1 Individual Defendants failed to satisfy their fiduciary obligations, resulting in significant damages to
2 Dish. Despite the TCPA's requirements, while under the stewardship of the Individual Defendants,
3 Dish failed to implement systems or controls to ensure TCPA compliance and also failed to comply
4 with the provisions of the Compliance Agreement.

5 66. The Individual Defendants, and each of them, failed to act in the face of their known
6 legal duty to act loyally and in good faith to cause Dish and its third-party marketers to comply with
7 the provisions of the TCPA. As a direct and proximate result of the Individual Defendants' breaches
8 of fiduciary duties alleged herein, Dish has sustained significant damages.

9 67. Accordingly, the Individual Defendants breached their fiduciary duties of loyalty and
10 good faith owed to Dish and are each liable to the Company for the resulting damages.

11 68. Plaintiff, on behalf of Dish, has no adequate remedy at law.

12 **SECOND CAUSE OF ACTION**

13 **Against the Individual Defendants for Waste of Corporate Assets**

14 69. Plaintiff incorporates by reference and realleges each and every allegation contained
15 above, as though fully set forth herein.

16 70. By their wrongful acts and omissions, the Individual Defendants wasted Dish's
17 valuable corporate assets by, among other things, causing the Company to pay improper
18 compensation, including salaries, bonuses, fees, stock awards, and other incentive-based
19 compensation and benefits to themselves and other Dish insiders who breached their fiduciary duties
20 owed to Dish. Dish received no benefit from these improper payments. As a result, the Individual
21 Defendants damaged Dish and are liable to the Company for corporate waste.

22 71. Plaintiff, on behalf of Dish, has no adequate remedy at law.

23 **THIRD CAUSE OF ACTION**

24 **Against the Individual Defendants for Unjust Enrichment**

25 72. Plaintiff incorporates by reference and realleges each and every allegation contained
26 above, as though fully set forth herein.

27 73. By their wrongful acts and omissions, the Individual Defendants were unjustly
28 enriched at the expense of and to the detriment of Dish.

JA000672

74. All the payments and benefits provided to the Individual Defendants were at the expense of Dish. The Company received no benefit from these payments.

75. Plaintiff, on behalf of Dish, seeks restitution from the Individual Defendants, and each of them, and seeks an order of this Court disgorging all profits, benefits and other compensation obtained by these defendants, and each of them, from their wrongful conduct and fiduciary breaches.

76. Plaintiff, on behalf of Dish, has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment in Dish's favor against the defendants as follows:

A. Declaring that plaintiff may maintain this action on behalf of Dish and that plaintiff is an adequate representative of the Company;

B. Declaring that defendants have breached and/or aided and abetted breaches of their fiduciary duties of loyalty and good faith owed to Dish;

C. Determining and awarding to Dish the damages sustained by it as a result of the violations set forth above from each of the defendants, jointly and severally, together with interest thereon;

D. Determining and awarding to Dish exemplary damages in an amount necessary to punish defendants and to make an example of defendants to the community according to proof at trial;

E. Awarding Dish restitution from defendants, and each of them;

F. Awarding plaintiff the costs and disbursements of this action, including reasonable attorneys' and experts' fees, costs and expenses; and

G. Granting such other and further equitable relief as this Court may deem just and proper.

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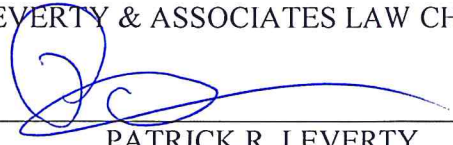
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JURY DEMAND

Plaintiff demands a trial by jury.

Dated: November _9th_, 2017

LEVERTY & ASSOCIATES LAW CHTD.



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Attorneys for Plaintiff

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JA000674


VERIFICATION

I, John Lamerato, hereby declare as follows:

I am a trustee for the City of Sterling Heights Police and Fire Retirement System, plaintiff in the within entitled action. I have read the Verified Shareholder Derivative Complaint for Breach of Fiduciary Duty, Corporate Waste, and Unjust Enrichment. Based upon discussions with and reliance upon my counsel, and as to those facts of which I have personal knowledge, the Complaint is true and correct to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

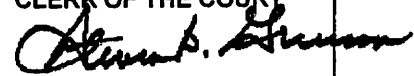
Signed and Accepted:

A handwritten signature in black ink, appearing to read "John Lamerato", is written over a horizontal line.

John Lamerato

Dated: 11/3/2017

JA000675



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Attorneys for Plaintiff

[Additional counsel appear on signature page.]

IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF CLARK

PLUMBERS LOCAL UNION NO. 519
PENSION TRUST FUND, Derivatively on
Behalf of DISH NETWORK
CORPORATION,

Plaintiff,

vs.

CHARLES W. ERGEN, et al.,

Defendants,

- and -

DISH NETWORK CORPORATION, a
Nevada corporation,

Nominal Defendant.

Case No. A-17-763397-B
Dept No. 15

STIPULATION RE SERVICE OF PROCESS,
CONSOLIDATING CASES AND
APPOINTING LEAD AND LIAISON
COUNSEL AND [PROPOSED] ORDER
THEREON

JA000676

1 WHEREAS, on or about October 19, 2017, Plaintiff Plumbers Local Union No. 519 Pension
2 Trust Fund ("Plumbers") filed a Verified Shareholder Derivative Complaint for Breach of Fiduciary
3 Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and
4 Unjust Enrichment on behalf of Dish Network Corporation ("Dish") against defendants Charles W.
5 Ergen, James DeFranco, Cantey M. "Candy" Ergen, Steven R. Goodbarn, David K. Moskowitz,
6 Tom A. Ortolf, Carl E. Vogel, George R. Brokaw, Gary S. Howard and Joseph P. Clayton
7 ("Defendants"), in a case styled as *Plumbers Local Union No. 519 Pension Trust Fund v. Ergen*, No.
8 A-17-763397-B (the "*Plumbers Action*");

9 WHEREAS, on or about November 13, 2017, Plaintiff City of Sterling Heights Police and
10 Fire Retirement System ("Sterling Heights") filed a Verified Shareholder Derivative Complaint for
11 Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment on behalf of Dish
12 against Defendants, in a case styled as plaintiff *City of Sterling Heights Police and Fire Retirement*
13 *System v. Ergen*, No. A-17-764522-B (the "*Sterling Heights Action*");

14 WHEREAS, upon the filing of this Stipulation, defendants and Nominal Party Dish have
15 agreed to accept service of the Summons and Complaints;

16 WHEREAS, the foregoing actions are related cases that name substantially identical
17 defendants and contain substantially similar allegations;

18 WHEREAS, counsel for Plaintiffs Plumbers, Sterling Heights, the Defendants and Nominal
19 Party Dish have conferred and agree that the interests of justice will be served by: (i) consolidating
20 the *Plumbers Action*, the *Sterling Heights Action* and any future derivative actions that may be filed
21 in this Court and which arise from the same or similar subject matter as alleged in the Actions;
22 (ii) designating the *Plumbers Action* as the lead derivative action; and (iii) establishing a schedule
23 for the filing of a consolidated complaint and Defendants' and Nominal Party Dish's response(s)
24 thereto;

25 WHEREAS, Plaintiffs Plumbers and Sterling Heights agree that Robbins Geller Rudman &
26 Dowd LLP should be appointed to serve as Lead Counsel and The O'Mara Law Firm, P.C. should be
27 appointed Liaison Counsel for Plaintiffs in the consolidated action; and
28

JA000677

1 WHEREAS, Defendants and Nominal Party Dish take no position as to the appointment of
2 Lead Counsel or Liaison Counsel for Plaintiffs.

3 NOW THEREFORE, IT IS HEREBY AGREED AND STIPULATED by and among
4 Plaintiffs, Defendants and Nominal Party Dish, by their respective counsel of record, as follows:

5 **A. Consolidation**

6 1. The *Plumbers* Action and *Sterling Heights* Action, as well as any future derivative
7 actions that may be filed in this Court and which arise from the same or similar subject matter as that
8 alleged in the Actions, are hereby consolidated for discovery, pretrial and trial purposes into one
9 action pursuant to Rule 42(a) of the Nevada Rules of Civil Procedure.

10 **B. Designation of Lead Action**

11 2. The *Plumbers* Action shall be designated the lead derivative action ("Consolidated
12 Derivative Action"). Subsequently filed actions relating to the same or similar subject matter shall
13 be related to and consolidated with the Consolidated Derivative Action for all purposes, if and when
14 such actions are brought to the Court's attention.

15 **C. Appointment of Lead Counsel and Liaison Counsel**

16 3. Robbins Geller Rudman & Dowd LLP shall be appointed Lead Counsel for Plaintiffs
17 in the Consolidated Derivative Action. Lead Counsel shall have authority to speak for Plaintiffs in
18 matters regarding pre-trial and trial procedure and settlement negotiations, and shall make all work
19 assignments in such manner as to facilitate the orderly and efficient prosecution of the Consolidated
20 Derivative Action and to avoid duplicative or unproductive efforts.

21 4. The O'Mara Law Firm, P.C. shall be appointed Liaison Counsel for Plaintiffs in the
22 Consolidated Derivative Action.

23 **D. Scheduling**

24 5. Plaintiffs shall file with the Court and serve upon the parties a consolidated complaint
25 by no later than January 12, 2018 (the "Complaint").

26 6. Defendants' and Nominal Party Dish's answer(s) or other responsive pleading(s) shall
27 be filed with the Court and served upon the parties by no later than February 26, 2018.

28 JA000678

1 7. If one or more Defendants and/or Nominal Party Dish file a motion(s) requiring a
2 response, Plaintiffs' opposition to such motion(s) shall be filed with the Court and served upon the
3 parties by no later than April 12, 2018.

4 8. Defendants' and/or Nominal Party Dish's reply(ies) to Plaintiffs' opposition(s) shall
5 be filed with the Court and served upon the parties by no later than May 3, 2018.

6 9. The parties will thereafter schedule a hearing on the pending motion(s).

7 DATED: December 15, 2017

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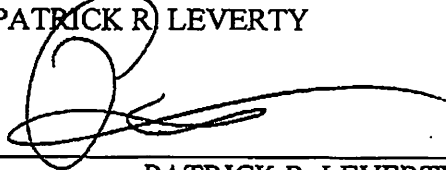
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DATED: December 15, 2017

Attorneys for Plaintiff Plumbers Local Union No.
519 Pension Trust Fund

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JA000680

1 DATED: December 15, 2017

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12 Steven R. Goodbarn, David K. Moskowitz, Tom
13 A. Ortolf, Carl E. Vogel, George R. Brokaw,
14 Gary S. Howard and Joseph P. Clayton and
15 Nominal Defendant Dish Network Corporation

16 * * *

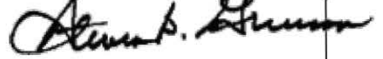
17 ORDER

18 Good cause appearing therefore and upon Stipulation of all parties: the requested
19 consolidation of cases and appointment of Lead Counsel and Liaison Counsel is granted.

20 IT IS SO ORDERED.

21 DATED: December 19, 2017

22 
23 DISTRICT COURT JUDGE



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17 Attorneys for Plaintiffs

18 [Additional counsel appear on signature page.]

19 IN THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA

20 IN AND FOR THE COUNTY OF CLARK

21 PLUMBERS LOCAL UNION NO. 519)
22 PENSION TRUST FUND and CITY OF)
23 STERLING HEIGHTS POLICE AND FIRE)
24 RETIREMENT SYSTEM, Derivatively on)
25 Behalf of DISH NETWORK)
26 CORPORATION,)

27 Plaintiffs,

28 vs.

29 CHARLES W. ERGEN, JAMES DeFRANCO,)
30 CANTEY M. "CANDY" ERGEN, STEVEN)
31 R. GOODBARN, DAVID K. MOSKOWITZ,)
32 TOM A. ORTOLF, CARL E. VOGEL,)
33 GEORGE R. BROKAW, JOSEPH P.)
34 CLAYTON and GARY S. HOWARD,)

35 Defendants,

36 - and -

37 DISH NETWORK CORPORATION, a)
38 Nevada corporation,)

39 Nominal Defendant.)

Case No. A-17-763397-B
Dept. No. 15

(Consolidated with Case No. A-17-764522-B)

VERIFIED CONSOLIDATED
SHAREHOLDER DERIVATIVE
COMPLAINT FOR BREACH OF
FIDUCIARY DUTIES OF LOYALTY AND
GOOD FAITH, GROSS
MISMANAGEMENT, ABUSE OF
CONTROL, CORPORATE WASTE AND
UNJUST ENRICHMENT

DEMAND FOR TRIAL BY JURY

- 1 • *“The evidence shows that Dish’s TCPA compliance policy was decidedly two-*
2 *faced. . . . [I]t told forty-six state attorneys general that it would monitor and*
3 *enforce marketer compliance, . . . but in reality it never did anything more than*
4 *attempt to find out what marketer had made a complained-about call.”*
- 5 • *“[Dish] paid a nearly \$6 million fine as part of the Compliance Agreement in 2009,*
6 *. . . yet Dish’s co-founder [DeFranco] testified that the Compliance Agreement did*
7 *not change Dish’s procedures at all.”*
- 8 • *“Dish did not take seriously the promises it made to forty-six state attorneys*
9 *general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make*
10 *many thousands of calls on its behalf that violated the TCPA. Trebled damages*
11 *are therefore appropriate.”*¹

12 *U.S. District Court Judge Catherine C. Eagles, May 22, 2017.*

13 1. This is a shareholder derivative action on behalf of nominal defendant DISH Network
14 Corporation (“Dish” or the “Company”) for breach of fiduciary duties of loyalty and good faith,
15 gross mismanagement, abuse of control, corporate waste and unjust enrichment. Nominal defendant
16 Dish is a satellite television provider that routinely uses third-party marketers, like Satellite Systems
17 Network (“SSN”), to get new customers. Defendants are Dish’s current directors – defendants
18 Charles W. Ergen (“Charles Ergen”), James DeFranco (“DeFranco”), Cantey M. “Candy” Ergen
19 (“Candy Ergen”), Steven R. Goodbarn (“Goodbarn”), David K. Moskowitz (“Moskowitz”), Tom A.
20 Ortolf (“Ortolf”), Carl E. Vogel (“Vogel”) and George R. Brokaw (“Brokaw”); and its former
21 directors – Joseph P. Clayton (“Clayton”) and Gary S. Howard (“Howard”) (together, “defendants”).

22 2. Legal compliance is a basic competency for most boards of directors of U.S.
23 corporations. But apparently not for Dish. While under the stewardship of defendants, Dish has
24 displayed contempt for the Telephone Consumer Protection Act (“TCPA”) and its requirements,
25 which are designed to rid consumers of unwanted telemarketing calls. In July 2009, this disdain for
26 legal compliance resulted in Dish paying a nearly \$6 million fine and signing a TCPA compliance
27 agreement with 46 state attorneys general. *See* Assurance of Voluntary Compliance (“Compliance
28 Agreement”). The Dish Board of Directors (“Board”) – a majority of the defendants here –
authorized the Company’s entry into the agreement.

¹ Here, as elsewhere, emphasis has been added and citations omitted unless otherwise noted.

1 3. In the Compliance Agreement, Dish represented that “it had control over its third-
2 party marketers” and “agreed to supervise its marketers, determine if they were complying with
3 federal do-not-call laws, and discipline or terminate them if they failed to take steps to prevent
4 violations of the law.” Memorandum Opinion and Order at 14, *Krakauer v. Dish Network L.L.C.*,
5 No. 14-cv-0333 (M.D.N.C. May 22, 2017) (“Order”); Compliance Agreement at 23-24.

6 Specifically, the Compliance Agreement stated that Dish “shall affirmatively
7 investigate” do-not-call complaints and “take appropriate action . . . against any
8 [marketer] it has determined to be in violation of the requirements of this
9 Assurance.” PX 55 at ¶4.74. The Compliance Agreement required Dish to “monitor,
10 directly or through a third-party monitoring service . . . its Covered Marketers . . . to
11 determine whether the Covered Marketer is complying with all applicable federal,
12 state, and local do-not-call laws.” *Id.* at ¶4.78. Dish was required to issue business
13 rules to its marketers to require them to comply with the Compliance Agreement. *Id.*
14 at ¶4.73. If a marketer violated do-not-call laws, the Compliance Agreement stated
15 that Dish “shall appropriately and reasonably discipline” that marketer, and that
16 discipline “shall include” at least one of: termination, fines, withholding payment,
17 suspension, prohibiting telemarketing, requiring the marketer to change its
18 procedures/employees/ affiliates/training, or “other appropriate and reasonable
19 discipline.” *Id.* at ¶4.79.

20 Order at 14-15. Notably, the Compliance Agreement also requires Dish directors to comply with the
21 TCPA. Compliance Agreement, ¶3.1 (“this Assurance shall apply to DISH Network and all of its
22 . . . *directors*”).

23 4. But, as revealed earlier this year, “Dish did not take seriously the promises it made to
24 forty-six state attorneys general, repeatedly overlooked TCPA violations by [its telemarketers], and
25 allowed [certain telemarketers] to make many thousands of calls on its behalf that violated the
26 TCPA.” Order at 29. Specifically, on May 22, 2017, a Greensboro, North Carolina federal court
27 found that, despite paying “a nearly \$6 million fine as a part of the Compliance Agreement in 2009,”
28 ***and as Dish co-founder and director, defendant DeFranco, testified,*** “the Compliance Agreement
did not change Dish’s procedures at all.” *Id.* at 29-30. As a result, both Dish and its third-party
telemarketers routinely did not comply with the federal telemarketing laws – a fact known at the
highest levels within Dish, as reflected by defendant DeFranco’s trial testimony.

 5. Observing that the trial record is “silent” as to Dish’s TCPA compliance efforts, the
court wrote, in relevant part:

1 The Compliance Agreement stated that Dish “shall be bound from directly or
2 indirectly engaging in the practices set forth herein and shall be required to directly
or indirectly satisfy the affirmative requirements set forth herein.” PX 55 at ¶4.

3 Beyond sharing the terms of the Compliance Agreement with its marketers,
4 Trial Tr. Jan. 11, Doc. 302 at 73:25-74:10 (Ahmed testimony), the *record is silent*
5 about any efforts Dish undertook to comply with the promises and assurances it
6 made. According to Dish’s co-founder, *the Compliance Agreement changed*
7 *nothing*: “This is how we operated even prior to the agreement as it related to
8 telemarketing.” Trial Tr. Jan. 13, Doc. 304 at 168:17-169:6 (DeFranco testimony).
That, however, is patently inaccurate, as Dish’s compliance department never
investigated whether a marketer had violated telemarketing laws. See discussion
infra pp. 17-19.

9 Order at 15.

10 6. Explaining its rationale for awarding treble damages against Dish, the court
11 continued:

12 The Court concludes that treble damages are appropriate here because of the
13 need to deter Dish from future violations and the need to give appropriate weight to
14 the scope of the violations. *The evidence shows that Dish’s TCPA compliance*
15 *policy was decidedly two-faced*. Its contract allowed it to monitor TCPA
16 compliance, *supra* pp. 8-9, and it told forty-six state attorneys general that it would
17 monitor and enforce marketer compliance, *supra* pp. 14-16, but in reality it never did
18 anything more than attempt to find out what marketer had made a complained-about
19 call. *Supra* pp. 17-19. It never investigated whether a marketer actually violated the
20 TCPA and it never followed up to see if marketers complied with general directions
21 concerning TCPA compliance and or with specific do-not-call instructions about
individual persons. *Supra* pp. 12-13, 17-19. Dish characterized people who pursued
TCPA lawsuits not as canaries in the coal mine, but as “harvester” plaintiffs who
were illegitimately seeking money from the company. See *supra* p. 19. *The*
Compliance Agreement did not cause Dish to take the TCPA seriously, so
significant damages are appropriate to emphasize the seriousness of such statutory
violations and to deter Dish in the future.

22 Order at 28-29.

23 7. Ultimately, the North Carolina federal court concluded that “Dish Network willfully
24 and knowingly violated the TCPA and that treble damages are appropriate to deter Dish and to give
25 suitable weight to the seriousness and scope of the violations Dish committed.” Order at 30. After
26 trebling the jury’s damages award, the court ordered Dish to pay plaintiffs \$65.1 million.

27 8. Defendants’ disdain for legal compliance has severely damaged the Company and
28 their leadership has unnecessarily exposed Dish to massive liability for violating the federal

1 telemarketing laws. Although the North Carolina case involved only one Dish telemarketer – SSN, a
2 smaller Dish telemarketer – the facts of the case are a window into TCPA compliance efforts at
3 Dish, including at the highest levels. And regrettably, those facts reveal a “two-faced” approach to
4 TCPA compliance, where such efforts existed only on paper, if at all, and never in reality.

5 9. Because defendants did not take seriously the promises that Dish made to the 46 state
6 attorneys general in the Compliance Agreement, the Company now also faces exposure to liability in
7 other courts for violations of the TCPA. Indeed, on June 5, 2017, an Illinois federal court found
8 Dish liable for telemarketing calls made to consumers on the national do-not-call registry. *See*
9 Findings of Fact and Conclusions of Law, *United States v. Dish Network LLC*, No. 09-3073 (C.D.
10 Ill. June 5, 2017).

11 10. Although Dish has been injured, defendants have not fared nearly so badly. They
12 collectively pocketed \$24,536,520 in salaries, bonuses, fees, stock awards and other incentive-based
13 compensation not justified by Dish’s lawless behavior while under their direction. Defendants have
14 also retained their positions of power, prestige and privilege at the Company, having been repeatedly
15 re-nominated and re-elected to the Board by votes controlled by defendant Charles Ergen, Dish’s
16 majority shareholder.

17 11. Defendants have not filed suit against the directors, officers and/or senior advisors
18 responsible for this debacle, which to date has cost Dish millions of dollars. Nor will defendants
19 commence such legal action, because doing so would expose them to liability for breaching their
20 fiduciary duties, gross mismanagement, abuse of control, corporate waste and unjust enrichment.
21 Likewise, a majority of the Board is beholden to defendant Charles Ergen for election to the Board
22 and, therefore, will not bring suit against him because it would lead to their expulsion from the
23 Board. Thus, a majority of the Board is disabled from fairly and objectively considering any pre-suit
24 demand that plaintiffs may have made. As such, a pre-suit demand is excused as futile.

25 JURISDICTION AND VENUE

26 12. This Court has jurisdiction under Nevada Revised Statutes §§14.065 and 78.135. The
27 amount in controversy, exclusive of interest and costs, exceeds the jurisdictional minimum of this
28 Court. Moreover, each of the defendants has had sufficient contacts with Nevada as a director

1 and/or officer of Dish, which makes the exercise of personal jurisdiction over them proper. *Consipio*
2 *Holdings, BV v. Carlsberg*, 128 Nev. 454 (2012); *Sonoro Invest S.A. v. Miller*, No. 15-cv-02286-
3 JAD-CWH, 2017 U.S. Dist. LEXIS 9657 (D. Nev. Jan. 24, 2017).

4 13. Venue is proper in this Court because Dish is a Nevada corporation and has
5 designated Clark County, Nevada as the forum for claims brought on behalf of Dish and/or involving
6 breaches of fiduciary duty by its directors.

7 THE PARTIES

8 14. Plaintiff Plumbers Local Union No. 519 Pension Trust Fund is and has continuously
9 been a shareholder of Dish since January 2008.

10 15. Plaintiff City of Sterling Heights Police and Fire Retirement System is and has
11 continuously been a shareholder of Dish since May 2013.

12 16. Nominal defendant Dish is a Nevada corporation with its principle executive offices
13 located at 9601 S. Meridian Boulevard, Englewood, Colorado 80112. Dish, through its operating
14 company, Dish Network L.L.C., is a satellite television provider. The Company often uses third-
15 party marketers to get new customers.

16 17. Defendant Charles W. Ergen has been a director of Dish since its inception in 1980.
17 He co-founded the Company with his wife, defendant Candy Ergen, and defendant DeFranco.
18 Charles Ergen has also served as Executive Chairman, Chief Executive Officer and President of the
19 Company during his tenure on the Board. Despite the troubles at Dish while under Charles Ergen's
20 stewardship, in the Board's judgment, Charles Ergen "should continue to serve on the Board due to,
21 among other things, his role as [Dish's] co-founder and controlling shareholder and the expertise,
22 leadership and strategic direction that he has contributed to [Dish] since [its] formation." Charles
23 Ergen received at least \$6,959,774 in salary, bonus and other incentive-based compensation not
24 justified by the Company's performance while under his stewardship.

25 18. Defendant Cantey M. "Candy" Ergen has been a director of Dish since 2001. She co-
26 founded the Company with her husband, defendant Charles Ergen, and defendant DeFranco, in 1980.
27 Candy Ergen has also served as a Senior Advisor to Dish since 1980. Despite the troubles at Dish
28 while under Candy Ergen's stewardship, in the Board's judgment, Candy Ergen "should serve on the

1 Board due, among other things, to her knowledge of DISH Network since its inception and her
2 service to [Dish] in a multitude of roles over the years.” Candy Ergen received at least \$400,000 in
3 compensation not justified by the Company’s performance while under her stewardship.

4 19. Defendant James DeFranco has been a director of Dish since its inception in 1980.
5 DeFranco co-founded the Company with defendants Charles Ergen and Candy Ergen in 1980.
6 DeFranco has also served as Executive Vice President and one of the Vice Presidents of Dish since
7 1980. Despite the troubles at Dish while under DeFranco’s stewardship, in the Board’s judgment,
8 DeFranco “should serve on the Board due, among other things, to his knowledge of DISH Network
9 since its formation, particularly in sales and marketing.” While serving as Dish’s Executive Vice
10 President and a director, DeFranco received personal benefits, power and prestige not justified by the
11 Company’s performance while under his stewardship. In addition, while Dish shares traded at
12 artificially inflated prices, DeFranco sold 300,000 shares of Dish stock for proceeds of \$23,099,500.

13 20. Defendant Steven R. Goodbarn has been a director of Dish since 2002. He has also
14 served on the Audit and Compensation Committees of the Board. Despite the troubles at Dish while
15 under Goodbarn’s stewardship, in the Board’s judgment, Goodbarn “should serve on the Board due,
16 among other things, to his knowledge of DISH Network from his service as a director since 2002
17 and his expertise in accounting, auditing, finance and risk management that he brings to the Board,
18 in particular in light of his background as a CPA and his prior experience serving as Chief Financial
19 Officer of Janus.” Goodbarn received at least \$515,711 in fees, stock awards and other incentive-
20 based compensation not justified by the Company’s performance while under his stewardship. In
21 addition, while Dish shares traded at artificially inflated prices, Goodbarn sold 18,000 shares of Dish
22 stock for trading proceeds of \$981,510.

23 21. Defendant David K. Moskowitz has been a director of Dish since 1998. He has also
24 served as Executive Vice President of and Senior Advisor to Dish for over a decade. Despite the
25 troubles at Dish while under Moskowitz’s stewardship, in the Board’s judgment, Moskowitz “should
26 serve on the Board due, among other things, to his knowledge of DISH Network from his service as
27 a director since 1998 and his business and legal expertise that he brings to the Board, in particular in
28 light of his service as [Dish’s] General Counsel for 17 years.” While serving as Dish’s Executive

1 Vice President, Senior Advisor, General Counsel and a director, Moskowitz received personal
2 benefits, power and prestige not justified by the Company's performance while under his
3 stewardship. In addition, while Dish shares traded at artificially inflated prices, Moskowitz sold
4 762,000 shares of Dish stock for unlawful insider trading proceeds of \$45,111,085.

5 22. Defendant Tom A. Ortolf has been a director of Dish since 2005. He has also served
6 on the Audit, Compensation and Nominating Committees of the Board. Despite the troubles at Dish
7 while under Ortolf's stewardship, in the Board's judgment, Ortolf "should serve on the Board due,
8 among other things, to his knowledge of DISH Network from his service as a director since 2005
9 and his expertise in finance, business and risk management, in particular in light of his experience as
10 an executive of CMC." Ortolf received at least \$533,711 in fees, stock awards and other incentive-
11 based compensation not justified by the Company's performance while under his stewardship. In
12 addition, while Dish shares traded at artificially inflated prices, Ortolf sold 20,000 shares of Dish
13 stock for unlawful insider trading proceeds of \$1,050,000.

14 23. Defendant Carl E. Vogel has been a director of Dish since 2006. He has also served
15 as a Senior Advisor to Dish for the past several years. Despite the troubles at Dish while under
16 Vogel's stewardship, in the Board's judgment, Vogel "should serve on the Board due, among other
17 things, to his knowledge of DISH Network from his service as a director and officer and his
18 experience in the telecommunications and related industries from his service over the years as a
19 director or officer with a number of different companies in those industries." While serving as
20 Dish's Senior Advisor and a director, Vogel received personal benefits, power and prestige not
21 justified by the Company's performance while under his stewardship. In addition, while Dish shares
22 traded at artificially inflated prices, Vogel sold 315,985 shares of Dish stock for proceeds of
23 \$17,670,702.

24 24. Defendant George R. Brokaw has been a director of Dish since October 2013. He has
25 also served on the Audit and Nominating Committees of the Board. Despite the troubles at Dish
26 while under Brokaw's stewardship, in the Board's judgment, Brokaw "should serve on the Board
27 due, among other things, to his financial experience, acquired, in part, during his tenure with
28 Highbridge, Perry and Lazard." Brokaw received at least \$526,951 in fees, stock awards and other

1 incentive-based compensation not justified by the Company's performance while under his
2 stewardship.

3 25. Defendant Joseph P. Clayton served as a director of Dish from June 2011 to March
4 2015. He also served as Chief Executive Officer and President of Dish. Clayton received at least
5 \$15,479,936 in salary, bonus and other incentive-based compensation not justified by the Company's
6 performance while under his stewardship. In addition, while Dish shares traded at artificially
7 inflated prices, Clayton sold 556,250 shares of Dish stock for proceeds of \$35,982,248.

8 26. Defendant Gary S. Howard served as a director of Dish from 2005 to July 2013. He
9 also served on the Audit Committee of the Board. Howard received at least \$120,436 in fees, stock
10 awards and other incentive-based compensation not justified by the Company's performance while
11 under his stewardship.

12 **THE FIDUCIARY DUTIES OF DISH'S DIRECTORS**

13 27. By reason of their positions as Dish's directors and/or officers and because of their
14 ability to direct and controls the Company's business and corporate affairs, defendants owe Dish a
15 fiduciary duty to use their utmost ability to control and manage Dish in an honest and lawful manner.
16 Towards this end, Dish's directors owe the Company fiduciary duties to exercise good faith and
17 loyal and reasonable supervision over the Company's management, policies, practices and the
18 internal controls of the Company.

19 28. More specifically, as Dish's directors and officers, defendants' fiduciary duties
20 required them to, among other things: (i) ensure that the Company complied with its legal
21 obligations and requirements, including those arising under the TCPA in general and the Compliance
22 Agreement with the state attorneys general in particular; (ii) conduct the affairs of the Company in
23 an efficient, business-like manner so as to make it possible to provide the highest quality
24 performance of its business, to avoid wasting the Company's assets, and to lawfully maximize the
25 value of the Company's stock; (iii) properly and accurately guide investors and analysts as to the
26 true financial condition of the Company at any given time, including making accurate statements
27 about the Company's financial results and internal controls; (iv) remain fully informed as to how
28 Dish conducted its operations and, upon receipt of notice or information of imprudent or unsound

1 conditions or practices, make reasonable inquiry in connection therewith and take steps to correct
2 such conditions or practices and make such disclosures as are necessary to comply with the securities
3 laws; (v) ensure that Dish was operated in a diligent, honest and prudent manner in compliance with
4 all applicable laws, rules and regulations, including the TCPA and similar federal and state
5 telemarketing laws, rules and regulations; and (vi) refrain from breaching their duties of loyalty and
6 good faith to the Company by adopting practices, procedures and controls inconsistent with their
7 fiduciary duties of loyalty and good faith.

8 **CONSPIRACY, AIDING AND ABETTING, AND CONCERTED ACTION**

9 29. In committing the wrongful acts complained of herein, defendants pursued or joined
10 in the pursuit of a common course of conduct and acted in concert with one another in furtherance of
11 a common plan or design. In addition to the wrongful conduct complained of herein giving rise to
12 primary liability, defendants further aided and abetted and/or assisted each other in breach of their
13 fiduciary duties.

14 30. Each of the defendants aided and abetted and rendered substantial assistance in the
15 wrongs complained of herein. In taking such action to substantially assist the commission of the
16 wrongdoing complained of herein, each defendant acted with knowledge of the primary wrongdoing,
17 substantially assisted the accomplishment of that wrongdoing, and was aware of his or her overall
18 contribution to and furtherance of the wrongdoing.

19 **FACTUAL ALLEGATIONS**

20 31. This is a shareholder derivative action on behalf of nominal defendant Dish against
21 certain of its current and former directors for breach of fiduciary duty, gross mismanagement, abuse
22 of control, corporate waste and unjust enrichment. Nominal defendant Dish is a satellite television
23 provider that uses third-party marketers to obtain new customers. Defendants are Dish's current and
24 former directors.

25 32. As Dish directors, defendants owe the Company strict fiduciary duties of good faith
26 and loyalty. Relative to the TCPA, this means that defendants were duty bound to direct Dish's
27 business and affairs in conformity with the federal telemarketing laws, even before the 2009
28 settlement with 46 state attorneys general. After Dish entered into the Compliance Agreement,

1 defendants undertook a heightened duty not only to direct Dish's business in compliance with the
2 TCPA, but also in accordance with the remedial TCPA compliance measures specified in the
3 Compliance Agreement. Compliance Agreement, ¶3.1 ("DISH Network's duties, responsibilities,
4 burdens and obligations undertaken in connection with *this Assurance shall apply to DISH Network*
5 *and all of its . . . directors . . .*"). Defendants, however, failed on both counts.

6 33. Due to defendants' fiduciary failures, Dish now faces exposure to massive liability for
7 violating the TCPA. Indeed, on May 22, 2017, a Greensboro, North Carolina federal court ordered
8 Dish to pay \$65.1 million in treble damages for "willfully and knowingly violat[ing] the TCPA."
9 Defendants, by contrast, have not fared nearly so badly. In addition to retaining their positions of
10 power, prestige and privilege as Dish directors, defendants paid themselves \$24,536,520 in salaries,
11 bonuses, fees and stock awards not justified by Dish's lawlessness while under their stewardship.
12 These payments wasted corporate assets and unjustly enriched defendants at the expense of Dish and
13 its non-controlling public shareholders.

14 **The 2009 TCPA Compliance Agreement with 46 State Attorneys General**

15 34. As previously mentioned, Dish sells satellite television services through third-party
16 marketers. After numerous complaints about Dish and its telemarketers making calls to persons on
17 the federal do-not-call registry, the attorneys general of 46 states brought charges against Dish for
18 violating the telemarketing laws, including the TCPA.

19 35. To resolve this dispute, on July 16, 2009, Dish entered into a TCPA settlement
20 agreement, entitled "Assurance of Voluntary Compliance," to resolve the actions brought by the
21 state attorneys general. As a part of the Compliance Agreement, Dish paid a nearly \$6 million fine,
22 represented that "it had control over its third-party markets" and "agreed to supervise its marketers,
23 determine if they were complying with federal do-not-call laws, and discipline or terminate them if
24 they failed to take steps to prevent violations of the law." Order at 14.

25 36. As a part of the Compliance Agreement, Dish also agreed to adopt TCPA legal
26 compliance reforms designed to ensure the Company's compliance with federal and state
27 telemarketing law in the future. In this regard, the Compliance Agreement states in relevant part:
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1 7) requiring the Third-Party Retailer to terminate a person or entity that is
2 Telemarketing on its behalf; and/or

3 8) other appropriate and reasonable discipline under the circumstances.

4 4.58 ***DISH Network shall affirmatively investigate Complaints made to it***
5 *... , when such Complaints are brought to the attention of DISH Network, pertaining*
6 *to its Third-Party Retailers' offer, Advertisement, installation, lease, and/or sale of*
7 *DISH Network Goods and/or DISH Network Services, and shall take appropriate*
8 *and reasonable disciplinary action as soon as reasonably practicable, against any*
9 *Third-Party Retailer it has determined to be in violation of the requirements of this*
10 *Assurance.* Appropriate action may include retraining and other disciplinary action,
11 up to and including termination of the Third-Party Retailer's authority to offer,
12 Advertise, install, lease, and/or sell DISH Network Goods and/or DISH Network
13 Services. . . .

14 4.59 DISH Network shall be bound by and honor any representations that
15 are made to Consumers by its Third-Party Retailers who offer, Advertise, install,
16 lease, and/or sell DISH Network Goods and/or DISH Network Services made with
17 DISH Network's prior authorization, approval, permission or knowledge.

18 4.60 Within thirty (30) days of the date of the entry of this Assurance,
19 DISH Network shall provide each Third-Party Retailer who offers, Advertises,
20 installs, leases, and/or sells DISH Network Goods and/or DISH Network Services
21 with a copy of this Assurance and inform such Third-Party Retailers that in order to
22 continue acting as authorized DISH Network Third-Party Retailers, they must abide
23 by the applicable terms and conditions of this Assurance.

24 * * *

25 **Telemarketing and Do Not Call**

26 4.67 DISH Network shall comply with all federal, state and local laws
27 regarding Telemarketing, including, but not limited to, those which prohibit calling
28 Consumers who are on any federal, state, or local do-not-call lists unless otherwise
29 exempted by such laws.

30 4.68 DISH Network shall comply with all federal, state and local laws
31 requiring the acquisition or purchase of national and state do-not-call databases and
32 shall not make any Telemarketing calls to Consumers in the applicable state or
33 municipality until it has acquired or purchased all do-not-call databases required by
34 federal, state, or local laws.

35 * * *

36 4.73 DISH Network shall issue business rules to its Authorized
37 Telemarketers and Covered Marketers, requiring them to comply with the terms of
38 this Assurance.

1 4.74 ***DISH Network shall affirmatively investigate Complaints regarding***
2 ***alleged violations of federal, state and local laws regarding Telemarketing,***
3 ***including, but not limited to, those which prohibit calling Consumers who are on any***
4 ***federal, state, or local do-not-call lists, unless otherwise exempted by such laws, and***
5 ***shall take appropriate action as soon as reasonably practicable against any***
6 ***Authorized Telemarketers and Covered Marketers it has determined to be in***
7 ***violation of the requirements of this Assurance. . . .***

8 * * *

9 4.78 ***DISH Network shall monitor, directly or through a third-party***
10 ***monitoring service approved by DISH Network, its Covered Marketers to***
11 ***determine whether they are Telemarketing Consumers and, if so, to determine***
12 ***whether the Covered Marketer is complying with all applicable federal, state, and***
13 ***local do-not-call laws.*** Upon request from an Attorney General, DISH Network shall
14 provide the requesting Attorney General with a copy of such written policies and
15 procedures. DISH Network states that it has had persons pose as potential
16 subscribers in order to engage in "sting"-type operations to determine if certain
17 Covered Marketers are complying with its do not call policies. Among other things,
18 DISH Network will continue engaging in such practices as part of the monitoring
19 process described above.

20 4.79 ***DISH Network shall appropriately and reasonably discipline a***
21 ***Covered Marketer if DISH Network reasonably determines that, in connection***
22 ***with Telemarketing DISH Network Goods and/or DISH Network Services, the***
23 ***Covered Marketer has: (a) failed to fulfill contract requirements with respect to***
24 ***compliance with federal, state, or local telemarketing laws; (b) violated federal,***
25 ***state, or local telemarketing laws; and/or (c) failed to comply with the terms of this***
26 ***Assurance as they relate to this Telemarketing and Do Not Call section.*** Such
27 disciplinary action shall include one or more of the following remedies:
28

1) termination;

2) imposing monetary fines;

3) withholding of compensation;

4) suspending the right to Telemarket for a period of time;

5) prohibiting Telemarketing;

6) requiring the Covered Marketer to improve its process and procedures for
compliance with the TCPA and/or any other federal, state and local laws regarding
Telemarketing;

7) requiring the Covered Marketer to terminate certain employees involved in
TCPA violations and/or violations of any other federal, state and local laws regarding
Telemarketing;

- 1 8) requiring the Covered Marketer to terminate Telemarketing affiliates;
- 2 9) requiring the Covered Marketer to retrain employees in TCPA compliance
- 3 and/or compliance with any other federal, state and local laws regarding
- 4 Telemarketing; and/or
- 5 10) other appropriate and reasonable discipline under the circumstances.

6 In determining what disciplinary action shall be taken, DISH Network shall

7 take into consideration the egregiousness of the Covered Marketer's conduct, the

8 number of violations, the Covered Marketer's willingness to cure the problem, and

9 whether DISH Network has previously disciplined the Covered Marketer.

10 * * *

11 **6. PAYMENT TO THE ATTORNEYS GENERAL**

12 6.1 *Within thirty (30) days of entry of this Assurance, DISH Network*

13 *shall pay the sum of Five Million Nine Hundred Ninety-One Thousand Dollars*

14 *(\$5,991,000), to the Attorneys General. . . .*

15 * * *

16 **8. REPRESENTATIONS AND WARRANTIES**

17 8.1 DISH Network represents and warrants that the execution and

18 delivery of this Assurance *is its free and voluntary act*, and that this Assurance *is the*

19 *result of good faith negotiations.*

20 * * *

21 **11. MONITORING FOR COMPLIANCE**

22 * * *

23 11.2 *Within thirty (30) days of entry of this Assurance, DISH Network*

24 *shall submit a copy of this Assurance to each of its officers, directors, and any*

25 *employee necessary to ensure DISH Network's compliance with the terms of this*

26 *Assurance.*

27 37. Dish did not live up to its obligations under the Compliance Agreement in good faith,

28 however. Instead, the Company engaged in what one federal court recently described as a

“decidedly two-faced” TCPA compliance effort. Order at 28. “On paper, Dish was committed to

monitoring its marketers’ compliance with telemarketing laws and investigating complaints of

violations. In reality, however, Dish repeatedly looked the other way when [its telemarketers]

1 violated the telemarketing laws and when [its telemarketers] disregarded contractual duties related to
2 compliance.” Order at 6.

3 38. After entering into the Compliance Agreement, the same court found that Dish did
4 not change a thing about its TCPA compliance program. “Dish co-founder [DeFranco] testified that
5 the Compliance Agreement did not change Dish’s procedures at all.” ““This is how we operated
6 even prior to the agreement as it related to telemarketing.”” Order at 15, 29-30.

7 ***Krakauer v. Dish Network L.L.C. – The North***
8 ***Carolina TCPA Class Action Lawsuit***

9 39. At all relevant times, Dish used third-party marketers, like SSN, to get new satellite
10 television customers. “Dish had contractual arrangements with these marketers, many of whom,
11 including SSN, solicited new customers for Dish through telemarketing calls.” Order at 5-6. “SSN
12 was an ‘Order Entry Retailer’ with direct access to Dish’s computer system. The OE Retailers
13 collectively generated hundreds of millions of dollars a year in revenue for Dish.” *Id.* at 6.

14 40. “Beginning in May 2009 and over the next two years, SSN called Dr. Thomas
15 Krakauer numerous times in an effort to sell him Dish satellite television programming and related
16 services. . . . The calls continued even after Dr. Krakauer complained to Dish about SSN’s sales
17 tactics and after Dish placed Dr. Krakauer on its internal do-not-call list and told SSN to do the
18 same.” Order at 3.

19 41. In 2014, Dr. Krakauer sued Dish in the U.S. District Court for the Middle District of
20 North Carolina, alleging “that calls to him and others violated the TCPA and that Dish was liable as
21 SSN’s principal.” Order at 3. After the district court certified a class on behalf all persons whose
22 numbers were on the national do-not-call registry but who nonetheless received multiple
23 telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011, and
24 summary judgment was mostly denied, the case was tried to the jury in January 2017. Order at 3-4.
25 At the same time, the district court “heard the evidence about willfulness.” Order at 4.

26 42. Following six days of testimony, “[i]ssues of agency, liability, and damages were
27 submitted to the jury.” Order at 4. “The jury answered the agency issue in favor of the plaintiffs,
28 finding that SSN acted as Dish’s agent when it made the calls at issue”; the “liability question in

1 favor of plaintiffs for all of the calls”; and the damages question in favor of plaintiffs, “award[ing]
2 \$400 for each call,” or \$25 million. Order at 4-5.

3 43. Thereafter, the parties submitted their “written closing arguments on willfulness.”
4 Order at 5. After “consider[ing] those briefs and all of the evidence,” on May 22, 2017, the
5 Honorable Catherine C. Eagles found “that Dish Network willfully and knowingly violated the
6 TCPA and that treble damages are appropriate to deter Dish and to give suitable weight to the
7 seriousness and scope of the violations Dish committed.” Order at 30. Trebling the jury’s damages
8 award, the district court increased damages “from \$400 per call to \$1,200 per call,” or to \$65.1
9 million. Order at 30-31.

10 44. The court’s nearly 31-page Memorandum Opinion and Order is a window into Dish’s
11 TCPA legal compliance efforts, including at the highest levels of the Company. During the trial,
12 Dish director DeFranco testified as to the Company’s TCPA compliance efforts, which the court,
13 based on the evidentiary record, found to be “two-faced,” existing only on paper. Order at 28. The
14 court wrote: “[Dish] paid a nearly \$6 million fine as part of the Compliance Agreement in 2009, . . .
15 yet Dish’s co-founder[, defendant DeFranco,] testified that the Compliance Agreement did not
16 change Dish’s procedures at all.” Order at 29-30.

17 45. Equally telling, despite the Dish directors’ heightened TCPA compliance obligations
18 under the Compliance Agreement, after six days of trial testimony, the court observed that “the
19 record is *silent* about any efforts Dish undertook to comply with the promises and assurances it
20 made.” Order at 15. According to Dish co-founder DeFranco’s sworn testimony, the Compliance
21 Agreement changed nothing: “This is how we operated even prior to the agreement as it related to
22 telemarketing.” Order at 15.

23 **Dish’s Willful and Knowing Violations of the TCPA**

24 46. After setting forth the salient facts, the court addressed the willfulness of Dish’s
25 violations of the TCPA. Concluding that Dish, while under defendants’ stewardship, willfully and
26 knowingly violated the TCPA by allowing tens of thousands of calls to be made by SSN to persons
27 on the national do-not-call registry, the court ruled, in part, as follows:
28

1 Over the course of approximately fifteen months, SSN made tens of
2 thousands of calls to numbers on the Registry. *Supra* pp. 20-21. . . . It has a long
3 history of acting in disregard of the requirements of the TCPA. *See supra* pp. 10-
13. . . .

4 Dr. Krakauer contends that because the jury found that SSN acted as Dish's
5 agent and SSN's conduct is imputed to Dish, the determinative question is whether
SSN, and not Dish, acted knowingly or willfully. Doc. 308 at 3. . . .

6 * * *

7 The Court agrees with that factual finding. *Supra* p. 19. Applying the traditional
8 rule, Dish is responsible for any willful or knowing violation of the telemarketing
laws by SSN.

9 *The result is the same even if one only looks at the willfulness of Dish's*
10 *conduct.* Dish knew that SSN had committed many TCPA violations over the years.
11 It had received many complaints and knew of at least three lawsuits, one of which
12 resulted in a money judgment and two of which resulted in injunctions. *Supra* pp.
13 11-12. It knew SSN's uncorroborated and conclusory explanations – that violations
14 were inadvertent or the product of rogue employees – were not credible. *See* PX
15 194. It knew SSN was not scrubbing all its lists or keeping call records. *Supra* pp.
16 12-14, 16-17. *It ignored SSN's misconduct and, despite promises to forty-six state*
17 *attorneys general, it made no effort to monitor SSN's compliance with*
18 *telemarketing laws.* *See supra* pp. 14-16, 17-19. Dish had the power to control
SSN's telemarketing; it simply did not care whether SSN complied with the law or
not. *Cf. United States v. Blankenship*, 846 F.3d 663, 673 (4th Cir. 2017) (holding that
"not caring about adherence to legal requirements amounts to criminal willfulness"
(internal quotation marks omitted)). *Dish knew or should have known that its*
agent, SSN, was violating the TCPA, and Dish's conduct thus willfully and
knowingly violated the TCPA.

19 Order at 21-23.

20 Dish's Arguments Against "Willfulness and Knowledge"

21 47. Turning next to Dish's arguments that its conduct was neither willful nor knowing,
22 the court ruled, in part, as follows:

23 *Dish contends its conduct was not willful or knowing for several reasons,*
24 *none of which are persuasive.* Dish first contends that its actions were not willful
25 because it instructed SSN to comply with the law and, specifically, to scrub its lists
26 with PossibleNow. *See, e.g.,* DX 1 at 7; DX 2; DX 3 at 47; DX 5. While there was
27 evidence of this, *the evidence also revealed that these were empty words.* For
instance, when SSN told Dish's compliance department that it was, in fact, *not* using
PossibleNow to scrub customer lists in 2009, and again in 2010, Dish did nothing.
Supra pp. 13-14, 16-17. In context, *Dish only paid lip service to compliance.*

28 * * *

1 Dish maintains that by calling Dr. Krakauer in 2010 and 2011, SSN
2 disobeyed direct instructions from Dish. Doc. 312 at 16-18. This is true, but it does
3 not disprove willfulness or knowledge. *Dish was aware that SSN disregarded other*
4 *instructions from Dish about telemarketing compliance, as discussed supra pp. 12-*
5 *13, but Dish took no disciplinary action against SSN*, did not monitor SSN's
6 compliance, and allowed SSN to keep selling Dish products by telemarketing. *See*
7 *Trial Tr. Jan. 12, Doc. 303 at 20:11- 21:12, 22:4-:21, 78:4-79:1, 82:24-83:6 (Musso*
8 *testimony).* . . .

9 Dish contends that the complaints received about SSN were few in number
10 and insufficient to put it on notice that there were widespread violations, and that
11 everyone involved at Dish believed that SSN was complying with telemarketing
12 laws. Doc. 312 at 13-19. *First, the testimony that Dish thought SSN was in*
13 *compliance is not credible and is controverted by Dish's own documents. See*
14 *generally PX 15. Second, even if some Dish employees did think this, that belief*
15 *was only possible because Dish ignored the facts and failed to investigate and*
16 *monitor SSN's compliance. . . . Given the tens of thousands of violative calls SSN*
17 *made in a span of just over a year, even a cursory investigation or monitoring*
18 *effort by Dish would have uncovered the violations.* Under these circumstances,
19 what Dish calls a mistaken belief *is actually willful ignorance.*

20 Finally, Dish contends that the TCPA requires proof that Dish itself knew that
21 each and every call was made and violated the TCPA. Doc. 312 at 5-6. Dish relies
22 on *Lary v. Trinity Physician Fin. & Ins. Servs.*, 780 F.3d 1101, 1107 (11th Cir.
23 2015). . . . It would not be reasonable to apply such a high standard to telemarketing
24 calls, which almost by definition are made in high volume.

25 * * *

26 Dish knew SSN was using unscrubbed lists as a result of the Krakauer and
27 Campbell complaints and it knew SSN had a long history of violations of both the
28 TCPA and Dish's business rules related to TCPA compliance. *Dish easily could*
have discovered the full extent of the violations with a minimal monitoring effort,
which it had promised forty-six state Attorneys General it would undertake. Dish's
conduct was willful.

Order at 23-28.

Does Dish Deserve Treble Damages?

48. Lastly, the district court considered the appropriateness of awarding treble damages
against Dish. Based on the trial record, including its "silen[ce]" as to Dish's efforts to comply with
the TCPA, defendant DeFranco's testimony that the Compliance Agreement did not change the
Company's TCPA compliance procedures, and Dish's general disdain for the TCPA and TCPA legal

1 compliance, the court trebled the jury's damages award from \$400 per call to \$1,200 per call, or
2 \$65.1 million. The court stated, in part, as follows:

3 The Court concludes that treble damages are appropriate here because of the
4 need to deter Dish from future violations and the need to give appropriate weight to
5 the scope of the violations. *The evidence shows that Dish's TCPA compliance*
6 *policy was decidedly two-faced.* Its contract allowed it to monitor TCPA
7 compliance, *supra* pp. 8-9, and it told forty-six state attorneys general that it would
8 monitor and enforce marketer compliance, *supra* pp. 14-16, but in reality it never did
anything more than attempt to find out what marketer had made a complained-about
call. . . . *The Compliance Agreement did not cause Dish to take the TCPA*
seriously, so significant damages are appropriate to emphasize the seriousness of
such statutory violations and to deter Dish in the future.

* * *

Dish contends that the Court should not treble the damages because the existing damages are material to Dish and will be adequate to deter. Doc. 312 at 21-22. This appears unlikely. . . . It paid a nearly \$6 million fine as part of the Compliance Agreement in 2009, PX 55 at ¶ 16.1, ***yet Dish's co-founder testified that the Compliance Agreement did not change Dish's procedures at all.*** See Trial Tr. Jan. 13, Doc. 304 at 168:17-169:6 (DeFranco testimony). A damages award that is an order of magnitude larger is warranted here.

Dish also contends that the harm caused was only a “minor nuisance” and “inconvenience.” Doc. 312 at 21-22. Dish’s description has left out “illegal,” not to mention “infuriating.” ***Dish’s argument shows a failure to recognize the purpose of the law*** and is demeaning to consumers who put their names on the Do Not Call Registry and who are entitled by law to have their privacy respected. It also ***reflects a lack of appreciation for the seriousness of the violations found by the jury***: over 50,000 connected calls to over 18,000 private individuals. Trial Tr. Jan. 12, Doc. 303 at 188:14-18 (Verkhovskaya testimony). . . .

* * *

21 *The Court finds that Dish Network willfully and knowingly violated the*
 TCPA and that treble damages are appropriate to deter Dish and to give suitable
 22 *weight to the seriousness and scope of the violations Dish committed. . . .*

23 | Order at 28-30.

24 DAMAGE TO DISH

49. Dish has been severely damaged by defendants' misconduct. In addition to the recent \$65.1 million verdict against the Company in the North Carolina TCPA class action, the Company has been exposed to the risk of loss for alleged TCPA violations in other courts as well. In fact, an Illinois federal court recently issued findings of fact and conclusions of law holding Dish liable for

1 violating the TCPA and ordered \$280 million in damages. *See Findings of Fact and Conclusions of*
2 *Law, United States v. Dish Network LLC*, No. 09-3073 (C.D. Ill. June 5, 2017).

3 50. By contrast, defendants have not fared nearly so badly. Despite Dish's dismal
4 performance while under their stewardship, defendants collectively pocketed \$24,536,520 in
5 executive compensation, directors' fees, stock awards and other perquisites. In addition, defendants
6 DeFranco, Goodbarn, Moskowitz, Ortolf, Vogel and Clayton profited handsomely by selling
7 1,972,235 shares of their personal Dish stock for proceeds of \$123,895,045.

8 51. This notwithstanding, the Board has not, and will not, bring legal action against the
9 directors and officers responsible for this debacle. By this action, plaintiffs seek to vindicate Dish's
10 rights against its wayward fiduciaries.

11 **DERIVATIVE AND DEMAND FUTILITY ALLEGATIONS**

12 52. Plaintiffs incorporate ¶¶1-51.

13 53. Plaintiffs bring this action derivatively on behalf of Dish to redress injuries suffered,
14 and to be suffered, by Dish as a result of defendants' breaches of fiduciary duty, gross
15 mismanagement, abuse of control, corporate waste and unjust enrichment. Plaintiffs will adequately
16 and fairly represent the interests of Dish in enforcing and prosecuting these derivative claims.

17 54. The Dish Board of Directors has ten members: defendants Charles Ergen, DeFranco,
18 Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, and non-defendants Charles M.
19 Lillis ("Lillis") and Afshin Mohebbi ("Mohebbi") (together, the "Board"). Based on the
20 particularized facts set forth in this complaint, a pre-suit demand on the Board is legally excused for
21 several reasons

22 55. First, no pre-suit demand on the Board is necessary in this case because a majority of
23 the Board is disabled from fairly, independently and objectively considering such a demand. As
24 evidenced by the district court's findings, Dish did not take the promises it made to the 46 state
25 attorneys general in the Compliance Agreement seriously, but rather did nothing to change its TCPA
26 compliance procedures. Order at 1, 23, 28, 39, 30. This disdainful approach towards the
27 Compliance Agreement, as well as the TCPA, could not have flourished within Dish's operations in
28 general, and its so-called "Compliance Department" in particular, without the knowledge and

1 consent of Dish's directors. And, in fact, it did not. Defendants knew – as defendant DeFranco
2 testified from his vantage point as a Dish director – that the Compliance Agreement did not change
3 Dish's TCPA compliance procedures. Order at 30. This reality is only underscored by the district
4 court's finding, after trial, that "the *record is silent* about any efforts Dish undertook to comply with
5 the promises and assurances it made" to the state attorneys general. Order at 15.

6 56. In other words, over the years, defendants did nothing to ensure Dish's compliance
7 with the TCPA or the Compliance Agreement. Under defendants, Dish's purported TCPA
8 compliance was "*decidedly two-faced*." It existed only on paper, and never in reality. Under
9 defendants, Dish and its third-party marketers, like SSN, made untold numbers of calls to persons on
10 the do-not-call registry in violation of the telemarketing laws in general and the TCPA in particular.
11 As a result, Dish has been ordered to pay millions of dollars in damages, including treble damages,
12 due to defendants' disdain for TCPA legal compliance. In short, defendants Charles Ergen,
13 DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, and each of them,
14 breached their fiduciary duties of good faith and loyal legal compliance by ignoring the promises
15 Dish made to the 46 state attorneys general in the Compliance Agreement. As a result, they are each
16 liable to Dish for the massive damages their fiduciary failures have wrought.

17 57. Further, if the Board investigated a pre-suit demand, they would only increase their
18 own exposure to liability for ignoring the promises Dish made to the state attorneys general in the
19 Compliance Agreement and the prohibitions on calls to persons on the do-not-call registry created by
20 the TCPA. And this is not a theoretical risk – defendant DeFranco has already testified, under oath,
21 that "*the Compliance Agreement did not change Dish's procedures at all*." Order at 29-30.
22 Defendant DeFranco was not just speaking for himself when he uttered those words – but rather for
23 the entire Board – because, as a Dish director, he witnessed first-hand the changes made to Dish's
24 TCPA compliance procedures – or, in this case, not made. Therefore, defendants Charles Ergen,
25 DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, and each of them, is
26 interested in the outcome of the derivative claims and cannot fairly and/or objectively consider a pre-
27 suit demand made by plaintiffs to bring claims against themselves for the damages their disdain for
28

1 TCPA legal compliance has heaped on the Company. Accordingly, a pre-suit demand on the Board
2 is excused as a matter of law.

3 58. Second, a pre-suit demand is also excused as to the entire Board – including the two
4 non-defendant directors Lillis and Mohebbi – as every member of the Board is beholden to
5 defendant Charles Ergen for their nomination and election to the Board. This is because Charles
6 Ergen controls 78.5% of the total voting power of Dish. Defendants Charles Ergen, DeFranco,
7 Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw and non-defendants Lillis and
8 Mohebbi freely admit that Dish is a “controlled” company under NASDAQ Marketplace Rules, and
9 has been for many years. *See* 2017 Proxy Statement at 6 (“We are a ‘controlled company’ within the
10 meaning of NASDAQ Marketplace Rules because more than 50% of our voting power is held by
11 Charles W. Ergen, our Chairman and Chief Executive Officer.”). Therefore, all of Dish’s directors
12 are 100% dependent on Charles Ergen for their seats on the Board and would be expelled from their
13 positions of power and prestige at Dish, and the perquisites derived therefrom, for bringing the
14 derivative claims against defendant Charles Ergen and/or any of his closest allies, including his wife
15 defendant Candy Ergen and fellow Dish co-founder defendant DeFranco. *Cf. Sandys v. Pincus*, 152
16 A.3d 124 (Del. Sup. Ct. 2016). Due to the internal dynamics and structural dependencies
17 surrounding the Board, the entire Board is legally disabled from fairly and objectively considering a
18 pre-suit demand to bring, let alone vigorously prosecute, the claims asserted in this complaint.

19 59. Third, the members of the Board participated in, approved and/or permitted the
20 wrongs alleged herein to have occurred, or recklessly disregarded the wrongs complained of herein,
21 and participated in efforts to conceal or disguise those wrongs from Dish’s shareholders, and are
22 therefore not disinterested parties. As a result of their access to and review of internal corporate
23 documents, or conversations and connections with other corporate officers, employees and directors,
24 and attendance at management and/or Board meetings, each of the defendants knew, or recklessly
25 disregarded, adverse material non-public information regarding Dish’s violations of the TCPA.
26 Therefore, a majority of the members of the Dish Board cannot exercise independent objective
27 judgment in deciding whether to bring this action or whether to vigorously prosecute this action,
28

1 because each of the Board's members participated personally in the wrongdoing or is dependent on
2 the other defendants who did.

3 60. Fourth, a majority of the members of the Board have demonstrated an unwillingness
4 and/or inability to act in compliance with the Board's fiduciary obligations and/or to sue themselves
5 and/or their fellow directors and allies in the top ranks of the corporation for the violations of law
6 complained of herein. These are people they have developed professional relationships with, who
7 are their friends and with whom they have entangling financial alliances, interests and dependencies.
8 Therefore, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel
9 and Brokaw are not able to and will not vigorously prosecute any such action.

10 61. Fifth, a majority of the members of the Board, and particularly defendants Charles
11 Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel and Brokaw, has financially
12 benefited, and will continue to financially benefit, from the wrongdoing herein alleged, and has
13 engaged in such conduct to preserve the Board members' positions of control and the perquisites
14 derived therefrom, and is incapable of exercising independent objective judgment in deciding
15 whether to bring this action. Therefore, a demand on the Board is excused as futile.

16 62. Sixth, Dish has been and will continue to be exposed to significant losses due to the
17 wrongdoing complained of herein, yet the Board has not filed any lawsuits against defendants or
18 others who were responsible for that wrongful conduct to attempt to recover for Dish any part of the
19 damages Dish has suffered and will suffer thereby.

20 63. Seventh, defendants Charles Ergen, Candy Ergen, DeFranco, Moskowitz and Vogel
21 are employed by the Company as senior executives and advisors and have received, and will
22 continue to receive, substantial monetary compensation as a result of that employment. Defendants
23 Charles Ergen, Candy Ergen, DeFranco, Moskowitz and Vogel will act to preserve and not threaten
24 their positions of control, power and prestige, and the perquisites derived therefrom. Therefore,
25 defendants Charles Ergen, Candy Ergen, DeFranco, Moskowitz and Vogel are incapable of
26 exercising independent objective judgment in deciding whether to bring this action.

**FIRST CAUSE OF ACTION
For Breach of Fiduciary Duties of Loyalty and Good Faith
Against All Defendants**

64. Plaintiffs incorporate ¶¶1-63.

65. As Dish directors, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton owe Dish fiduciary duties of loyalty and good faith to direct the operations of the Company in accordance with the laws applicable to its business, including the TCPA and related state and federal telemarketing laws. Relative to the TCPA, defendants, in their capacities as Dish directors, faced a known legal duty to act loyally and in good faith to cause Dish and its third-party marketers to comply with the legal requirements of the TCPA's do-not-call requirements. However, defendants failed to satisfy their fiduciary obligations, resulting in significant damages to Dish. Despite the TCPA's requirements, while under the stewardship of defendants, Dish failed to implement systems or controls to ensure TCPA compliance and also failed to comply with the provisions of the Compliance Agreement.

66. Defendants, and each of them, failed to act in the face of their known legal duty to act loyally and in good faith to cause Dish and its third-party marketers to comply with the provisions of the TCPA. As a direct and proximate result of defendants' breaches of fiduciary duties alleged herein, Dish has sustained significant damages.

67. Accordingly, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton breached their fiduciary duties of loyalty and good faith owed to Dish and are each liable to the Company for the resulting damages.

68. Plaintiffs, on behalf of Dish, have no adequate remedy at law.

**SECOND CAUSE OF ACTION
For Gross Mismanagement Against All Defendants**

69. Plaintiffs incorporate ¶¶1-63.

70. Defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton, either directly or through aiding and abetting, abandoned and abdicated their responsibilities and fiduciary duties to competently direct and manage Dish's business in accordance with the laws applicable to its operations in general and the Compliance

1 Agreement and the TCPA in particular. Specifically, while under defendants' stewardship, Dish
2 ignored the promises it made to the 46 state attorneys general in the Compliance Agreement and, as
3 a result, violations of the TCPA flourished at Dish and its telemarketers, like SSN. As a direct and
4 proximate result of defendants' gross mismanagement, as reflected in the adverse jury verdict and
5 treble damages awarded in the North Carolina TCPA class action, and other actions as well, Dish has
6 sustained significant damages.

7 71. Accordingly, defendants Charles Ergen, DeFranco, Candy Ergen, Goodbarn,
8 Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton breached their fiduciary duties of loyalty
9 and good faith owed to Dish by grossly mismanaging the Company's business and affairs. As a
10 result, each of these defendants is liable to Dish for the resulting damages.

11 72. Plaintiffs, on behalf of Dish, have no adequate remedy at law.

12 **THIRD CAUSE OF ACTION**
13 **For Abuse of Control Against All Defendants**

14 73. Plaintiffs incorporate ¶¶1-63.

15 74. Defendants' misconduct alleged herein constitutes a breach of their fiduciary duties
16 because they abused their ability to control and influence Dish, for which they are legally
17 responsible.

18 75. As a direct and proximate result of defendants' abuse of control, Dish has sustained
19 significant damages. As a result of the misconduct alleged herein, defendants are liable to the
20 Company.

21 76. Plaintiffs, on behalf of Dish, have no adequate remedy at law.

22 **FOURTH CAUSE OF ACTION**
23 **For Corporate Waste Against All Defendants**

24 77. Plaintiffs incorporate ¶¶1-63.

25 78. By their wrongful acts and omissions, defendants Charles Ergen, DeFranco, Candy
26 Ergen, Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton wasted Dish's valuable
27 corporate assets by, among other things, causing the Company to pay improper compensation,
28 including salaries, bonuses, fees, stock awards and other incentive-based compensation and benefits
to themselves and other Dish insiders who breached their fiduciary duties owed to Dish. Dish

1 received no benefit from these improper payments. As a result, defendants damaged Dish and are
2 liable to the Company for corporate waste.

3 79. Plaintiffs, on behalf of Dish, have no adequate remedy at law.

4 **FIFTH CAUSE OF ACTION**
5 **For Unjust Enrichment Against All Defendants**

6 80. Plaintiffs incorporate ¶¶1-63.

7 81. By their wrongful acts and omissions, Charles Ergen, DeFranco, Candy Ergen,
8 Goodbarn, Moskowitz, Ortolf, Vogel, Brokaw, Howard and Clayton were unjustly enriched at the
9 expense of and to the detriment of Dish.

10 82. All the payments and benefits provided to defendants were at the expense of Dish.
11 The Company received no benefit from these payments.

12 83. Plaintiffs, on behalf of Dish, seek restitution from defendants, and each of them, and
13 seek an order of this Court disgorging all profits, benefits and other compensation obtained by these
14 defendants, and each of them, from their wrongful conduct and fiduciary breaches.

15 84. Plaintiffs, on behalf of Dish, have no adequate remedy at law.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, plaintiffs demand judgment in Dish's favor against all defendants as follows:

18 A. Declaring that plaintiffs may maintain this action on behalf of Dish and that plaintiffs
19 are adequate representatives of the Company;

20 B. Declaring that defendants have breached and/or aided and abetted breaches of their
21 fiduciary duties of loyalty and good faith owed to Dish;

22 C. Determining and awarding to Dish the damages sustained by it as a result of the
23 violations set forth above from each of the defendants, jointly and severally, together with interest
24 thereon;

25 D. Determining and awarding to Dish exemplary damages in an amount necessary to
26 punish defendants and to make an example of defendants to the community according to proof at
27 trial;

28 E. Awarding Dish restitution from defendants, and each of them;

1 F. Awarding plaintiffs the costs and disbursements of this action, including reasonable
2 attorneys' and experts' fees, costs and expenses; and

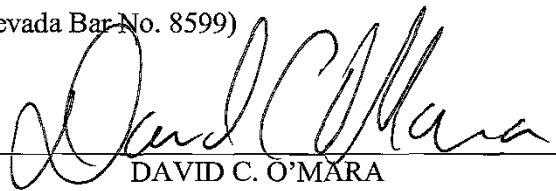
3 G. Granting such other and further equitable relief as this Court may deem just and
4 proper.

5 **JURY DEMAND**

6 Plaintiffs demand a trial by jury.

7 DATED: January 12, 2018

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VERIFICATION

I, Jeff Penniston, Trustee, on behalf of Plumbers Local Union No. 519 Pension Trust Fund hereby verify that I am familiar with the allegations in the Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment ("Consolidated Complaint"), and that the Fund authorized the filing of the Consolidated Complaint and that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this 11th day of January, 2018.

PLUMBERS LOCAL UNION NO. 519 PENSION
TRUST FUND

By: Jeff D. Penniston
Trustee

VERIFICATION

I, John Lamerato, Trustee, on behalf of City of Sterling Heights Police and Fire Retirement System, hereby verify that I am familiar with the allegations in the Verified Consolidated Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment ("Consolidated Complaint"), and that the Fund authorized the filing of the Consolidated Complaint and that the foregoing is true and correct to the best of my knowledge, information and belief.

Executed this __ day of January, 2018.

CITY OF STERLING HEIGHTS POLICE AND
FIRE RETIREMENT SYSTEM

By: 

Trustee

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of The O'Mara Law Firm, P.C., 311 E. Liberty
3 Street, Reno, Nevada 89501, and on this date I served a true and correct copy of the foregoing
4 document on all parties to this action by:

5 X Via Email

6 X Electronically through the Court's Electronic Filing System

7 addressed as follows:

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DATED: January 12, 2018

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Plaintiff



BRYAN SNYDER

**UNANIMOUS WRITTEN CONSENT IN LIEU
OF
A SPECIAL MEETING OF THE BOARD OF DIRECTORS
OF
DISH NETWORK CORPORATION
AS OF
APRIL 11, 2018**

Pursuant to the provisions of the Nevada Business Corporation Act, NRS § 78.315(2), which provide that any action required or permitted to be taken at a meeting of the board of directors of a corporation may be taken without a meeting if a consent in writing setting forth the action so taken shall be signed by all of the directors, the undersigned being all of the members of the board of directors (the "Board of Directors") of DISH Network Corporation (the "Corporation"), a Nevada corporation, do hereby waive any and all notices that may be required to be given with respect to a special meeting of the Board of Directors and do hereby take, ratify, confirm and approve the following actions to have the same force and effect as a unanimous vote of the members of the Board of Directors:

Formation of the Special Litigation Committee

WHEREAS, the Board of Directors previously considered and deliberated extensively upon the potential establishment of a special litigation committee of the Board of Directors regarding the shareholder derivative action filed by the Plumbers Local Union No. 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System in the District Court, Clark County, Nevada (together with any amendments, revisions or other pleadings related thereto or generated thereby) and any similar shareholder derivative actions that may be filed from time to time (collectively, the "Derivative Litigation") for the purposes set forth herein along with potential candidates to serve on such a special litigation committee, on numerous occasions, including without limitation, during meetings of the Board of Directors held on November 2, 2017, February 12, 2018 and March 28, 2018;

WHEREAS, the aforementioned deliberations regarding the potential establishment of a special litigation committee of the Board of Directors for the purposes set forth herein included consultation with management of the Corporation, outside advisors to the Corporation including without limitation, legal counsel, and other parties deemed appropriate by the Board of Directors, as the Board of Directors evaluated, among other things, the benefits to the Corporation anticipated to be derived from, and the risks anticipated to be associated with, the establishment of a special litigation committee of the Board of Directors for the purposes set forth herein along with the qualifications of the candidates considered for service on such special litigation committee;

WHEREAS, the Board of Directors of the Corporation believes it is in the best interests of the Corporation and its stockholders to establish a special committee of the Board of Directors (the "Special Litigation Committee"), consisting of Messrs.

George R. Brokaw, Charles M. Lillis and Anthony M. Federico (each a "Committee Member" and collectively the "Committee Members"), pursuant to NRS 78.125 (the "Nevada Statute") and the applicable provisions of the Amended and Restated Bylaws of the Corporation (the "Bylaws"), for the purposes set forth herein; and

WHEREAS, the Board of Directors has determined that the Committee Members are independent of the claims asserted in the Derivative Litigation and otherwise qualified to serve on the Special Litigation Committee;

NOW, THEREFORE, BE IT RESOLVED, that in light of the foregoing, the Board of Directors has determined, in the good faith exercise of its reasonable business judgment, that it is advisable and in the best interests of the Corporation and its stockholders to establish the Special Litigation Committee to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Special Litigation Committee be, and it hereby is, established, in accordance with the Nevada Statute and the applicable provisions of the Bylaws of the Corporation with all the powers and authority of the Board of Directors to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Board of Directors concludes that each of Mr. Brokaw, Mr. Lillis and Mr. Federico is independent of the claims asserted in the Derivative Litigation and none of them has, or is subject to, any interest that, in the opinion of the Board of Directors, would interfere with the exercise by him of his independent judgment as a member of the Special Litigation Committee and that, all of them be, and they hereby are, appointed as the Committee Members to hold such office for so long as is necessary to carry out the functions and exercise the powers expressly granted to the Special Litigation Committee as shall be authorized in the resolutions herein; and further

RESOLVED, that the Board of Directors hereby delegates to the Special Litigation Committee the power and authority of the Board of Directors to: (1) review, investigate and evaluate the claims asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on behalf of the Corporation that the Special Litigation Committee finds necessary or advisable in connection therewith; (3) determine whether it is in the best interests of the Corporation and/or to what extent it is advisable for the Corporation to pursue any or all of the claims asserted in the Derivative Litigation, taking into consideration all relevant factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on behalf of the Corporation any claims that were or could have been asserted in the Derivative Litigation; and (5) direct the Corporation to formulate and file any and all pleadings and other papers on behalf of the Corporation that the Special Litigation Committee finds necessary or advisable in connection therewith, including, without limitation, the filing of other litigation and counterclaims or cross-complaints, or motions to dismiss or stay the proceedings if the Special Litigation Committee determines that such action is advisable and in the best interests of the Corporation; and further

RESOLVED, that, in furtherance of its duties as delegated by the Board of Directors, the Special Litigation Committee is hereby authorized and empowered to retain and consult with such advisors, consultants and agents, including, without limitation, legal counsel and other experts or consultants, as the Special Litigation Committee deems necessary or advisable to perform such services, reach conclusions or otherwise advise and assist the Special Litigation Committee in connection with carrying out its duties as set forth in the resolutions herein; and further

RESOLVED, in connection with carrying out its duties as set forth in the resolutions herein, the Special Litigation Committee is hereby authorized and empowered to enter into such contracts providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel, accountants and other experts or consultants as the Special Litigation Committee deems necessary or advisable, and that the Corporation is hereby authorized and directed to pay, on behalf of the Special Litigation Committee, all fees, expenses and disbursements of such legal counsel, experts and consultants on presentation of statements approved by the Special Litigation Committee, and that the Corporation shall pay all such fees, expenses and disbursements and shall honor all other obligations of the Corporation and/or the Special Litigation Committee under such contracts; and further

RESOLVED, that, in connection with carrying out its duties as set forth in the resolutions herein: (1) the officers of the Corporation are hereby authorized and directed to provide to the Special Litigation Committee, each Committee Member and any of their advisers, agents, counsel and designees, such information and materials, including, without limitation, the books and records of the Corporation and any documents, reports or studies pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (2) the Special Litigation Committee is authorized and empowered to meet with both present and past members of the Board of Directors who are not members of the Special Litigation Committee and/or with both present and past officers of the Corporation to gather information from such directors and/or officers pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (3) the Special Litigation Committee may but shall not be required to make such reports to the Board of Directors with respect to its deliberations and recommendations at such times and in such manner as it considers appropriate and consistent with carrying out its duties as set forth in the resolutions herein; and (4) to the fullest extent consistent with law, the deliberations and records of the Special Litigation Committee shall be confidential and maintained as such by each Committee Member and any legal counsel, experts and

consultants engaged by the Special Litigation Committee and, without limiting the generality of the foregoing, all statutory and common law privileges shall be available with respect to legal advice rendered to, and documents prepared by counsel to assist, the Special Litigation Committee in its deliberations; and further

RESOLVED, that the Corporation shall indemnify each Committee Member in the manner and to the extent set forth under the current practices of the Corporation under the Articles of Incorporation of the Corporation in effect as of the date of this meeting (the "Current Articles") and under the Bylaws of the Corporation in effect as of the date of this meeting (the "Current Bylaws") regarding indemnification and advancement of expenses to the members of the Board of Directors against permitted items (as set forth in the Current Articles and Current Bylaws) arising out of the fact that the Committee Member is a member of the Special Litigation Committee, regardless of whether the Current Articles and the Current Bylaws are amended or modified in the future and regardless of whether the Committee Member is a member of the Board of Directors; with the sole exception that the advancement of expenses (including, without limitation, attorneys' fees) incurred in defending against any such permitted items shall be determined in the sole discretion of the chairman of the Audit Committee of the Board of Directors (the "Audit Committee") if not a member of the Special Litigation Committee (or the next most senior member of the Audit Committee who is not a member of the Special Litigation Committee if the chairman of the Audit Committee is a member of the Special Litigation Committee (or the Chief Financial Officer of the Corporation if all members of the Audit Committee are members of the Special Litigation Committee)), but otherwise subject to the terms and conditions applicable under the Current Articles and Current Bylaws, including, without limitation, that subject to an undertaking by or on behalf of the Committee Member to repay such amount if it shall ultimately be determined by a final order of a court of competent jurisdiction that he is not entitled to be indemnified by the Corporation for such permitted items; and further

RESOLVED, that for their services on the Special Litigation Committee, each Committee Member shall be entitled to receive compensation as set forth on Schedule A (at the times specified therein), together, during the pendency of their service on the Special Litigation Committee, with prompt reimbursement of expenses reasonably incurred in connection with their service on the Special Litigation Committee; and further

General Enabling Resolutions

RESOLVED, that the Chairman, President and Chief Executive Officer, Executive Vice President and General Counsel and Secretary of the Corporation (each, a "proper officer" and collectively, the "proper officers") be, and each one of them acting alone or with one or more other proper officers hereby is, authorized, empowered and directed, in the name and on behalf of the Corporation and its subsidiaries and under their corporate seals or otherwise, from time to time, to make, execute and deliver, or cause to be made, executed and delivered, all such

other and further agreements, certificates, instruments or documents, to pay or reimburse all such filing fees and other costs and expenses, and to do and perform or cause to be done or performed all such acts and things, as in their discretion or in the discretion of any of them may be necessary or desirable to enable the Corporation and its subsidiaries to accomplish the purposes and to carry out the intent of the foregoing resolutions; and further

RESOLVED, that any and all actions previously taken by any of the proper officers of the Corporation and its subsidiaries within the terms of the foregoing resolutions be, and the same hereby are, ratified and confirmed in all respects.

IN WITNESS WHEREOF, the undersigned, constituting all of the directors of the Corporation, waive all notices, evidence their approval of the foregoing actions and give their full ratification thereto as of the date first written above.

Directors

/s/ Charles W. Ergen
Charles W. Ergen, Chairman

/s/ Candy M. Ergen
Candy M. Ergen

/s/ James DeFranco
James DeFranco

/s/ David K. Moskowitz
David K. Moskowitz

/s/ Carl E. Vogel
Carl E. Vogel

/s/ Steven R. Goodbarn
Steven R. Goodbarn

/s/ Tom A. Ortolf
Tom A. Ortolf

/s/ George R. Brokaw
George R. Brokaw

/s/ Charles M. Lillis
Charles M. Lillis

/s/ Afshin Mohebbi
Afshin Mohebbi

Schedule "A"

Special Litigation Committee Compensation

Each Committee Member will be compensated \$5,000 per month while serving on the Special Litigation Committee; provided that, the Board of Directors shall review the amount of such compensation following the date that is five (5) months after the date of this consent.

Approved as of May 31, 2018

**MEETING OF THE SPECIAL LITIGATION COMMITTEE
OF THE BOARD OF DIRECTORS OF DISH NETWORK CORPORATION**

The Special Litigation Committee (the “SLC”) met by telephone on May 9, 2018, beginning at 2:30 p.m. EDT and concluding at 3:38 p.m. EDT.

In attendance were SLC members Charles Lillis, George Brokaw and Anthony Federico. C. Barr Flinn, Emily Burton and Lakshmi Muthu of the law firm of Young Conaway Stargatt & Taylor, LLP (“YCST”) attended, as did J. Stephen Peek and Rachel Wise of the law firm of Holland & Hart LLP (“H&H”).

The meeting began with a discussion of the SLC’s duties in conducting its investigation of the claims asserted by plaintiffs in the Nevada litigation. Counsel summarized for the SLC its duties under governing law and the standards by which courts have assessed special litigation committee investigations previously.

The SLC and its counsel then discussed the process by which the SLC should assess the independence of the members of the SLC. Counsel summarized a variety of factors considered by the courts in assessing the independence of special litigation committees. The SLC discussed the independence of its members and directed counsel to gather information needed to assess the independence and disinterest of each SLC member. Among other things, the SLC directed counsel to conduct an interview of SLC member Anthony Federico for the purpose of assessing whether Mr. Federico is disinterested and independent.

The SLC and its counsel then discussed the claims asserted by plaintiffs in the Nevada litigation. Counsel summarized plaintiffs’ claims and the relief sought as well as potentially applicable law.

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JUNE 6, 2019 REPLACEMENT IMAGE

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ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Draft of May 24, 2018

The SLC and its counsel also discussed the status of the SLC's motion to stay the Nevada action pending the SLC's investigation (the "Motion to Stay"). Counsel summarized plaintiffs' opposition to the Motion to Stay. Counsel also discussed potential responses to plaintiffs' arguments that might be made by the SLC in its reply in support of the Motion to Stay and at oral argument on the Motion to Stay scheduled for May 15, 2018.

Finally, the SLC and its counsel discussed potential steps for the SLC's investigation, including document collection and review, interviews, and consideration of and preparation of a report on DISH's potential claims. The SLC and counsel discussed the likely steps in the event that plaintiffs challenge any determination by the SLC, including (a) potential discovery by plaintiffs into the SLC's disinterest, independence, and investigation and (b) judicial review of any determination by the SLC. The SLC identified some potential documents and information to review and consider as part of its investigation of plaintiffs' claims. Counsel advised the SLC generally of the background documents and information that counsel had gathered to date. The SLC authorized counsel to continue gathering background documents and information relevant to plaintiffs' claims to aid the SLC in developing an investigation plan. The SLC also directed counsel to prepare a preliminary timeline of the background events relevant to the claims to be investigated.

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Approved as of July 6, 2018

**MEETING OF THE SPECIAL LITIGATION COMMITTEE
OF THE BOARD OF DIRECTORS OF DISH NETWORK CORPORATION**

The Special Litigation Committee (the “SLC”) met by telephone on May 31, 2018, beginning at 11 a.m. EDT and concluding at 11:40 a.m. EDT.

In attendance were SLC members Charles Lillis, George Brokaw and Anthony Federico. C. Barr Flinn, Emily V. Burton and Lakshmi Muthu of the law firm of Young Conaway Stargatt & Taylor, LLP (“YCST”) attended, as did Robert Cassity of the law firm of Holland & Hart LLP (“H&H”).

The meeting began with a discussion of the draft minutes of the May 9, 2018 SLC meeting and the draft agenda for the May 31, 2018 SLC meeting. The SLC approved both the minutes and the agenda.

The SLC and its counsel discussed categories of documents to seek and review as part of the SLC’s investigation. As part of that discussion, the SLC and its counsel discussed the sources from which and time periods for which to seek documents. Following this discussion, the SLC directed its counsel to seek various categories of materials, including, but not limited to, (1) board materials, (2) legal materials, and (3) business materials from 2003 to 2013 concerning DISH’s telemarketing compliance, among other matters.

The SLC and its counsel had a preliminary discussion about the *Krakauer v. DISH Network, L.L.C.* and *U.S. v. DISH Network, L.L.C.* lawsuits. In connection with that discussion, the SLC requested certain information regarding the *Krakauer* action, which counsel agreed to provide.

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ATTORNEY WORK PRODUCT

Draft of July 2, 2018

The SLC and its counsel discussed the proposed timeline for the SLC's investigation, which counsel had provided the SLC in advance of the meeting. The SLC approved the proposed timeline.

The SLC and its counsel discussed the interview that counsel had conducted of Mr. Federico concerning his independence for purposes of serving on the SLC. This interview and corresponding discussion touched on Mr. Federico's career, board service, compensation, and social contacts. Following that discussion, the SLC determined that Mr. Federico is independent and disinterested for purposes of serving on the SLC.

In response to the SLC's request, counsel for the SLC advised the SLC that counsel would prepare for the SLC's review and discussion one or more memoranda addressing the issues related to the independence and disinterestedness of Mr. Lillis and Mr. Brokaw in connection with a prior special litigation committee investigation.

Finally, the SLC and its counsel discussed next steps in the investigation, including issuing document requests, collecting documents, and reviewing documents.