Approved as of August 2, 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 July 6, 2018, beginning at 4:10 p.m. EDT and concluding at 4:54 p.m. EDT.

In attendance for the entirety of the meeting were SLC members Charles Lillis and Anthony Federico; SLC member George Brokaw joined after the meeting had begun. C. Barr Flinn, Emily V. Burton and Lakshmi Muthu of the law firm of Young Conaway Stargatt & Taylor, LLP ("YCST") attended, as did J. Stephen Peek and Robert Cassity of the law firm of Holland & Hart LLP ("H&H").

The SLC and its counsel discussed and approved the draft agenda for the July 6, 2018 SLC meeting. Thereafter, the SLC discussed and approved the draft minutes for the SLC meeting held on May 31, 2018.

The SLC requested and received an update from counsel as to the progress of the collection and review of documents for purposes of the investigation.

The SLC then discussed with counsel the process to plan and schedule interviews. The SLC determined to select a list of interviewees at the SLC meeting scheduled for August 2, 2018.

Mr. Peek informed the SLC of the reassignment of the Nevada litigation from Judge Hardy to Judge Gonzalez. The SLC and counsel then discussed the status reports to be filed by the SLC and the scheduled hearings. The SLC and counsel further discussed the draft status report prepared by counsel, which the SLC approved.

The SLC then discussed with counsel documents relevant to the SLC's investigation. The SLC and counsel discussed the laws relevant to the events under investigation.

Approved as of August 2, 2018

Ms. Burton provided the SLC with an update on the extent to which counsel had collected and performed an initial review of the documents sought through the SLC's document requests. Ms. Burton confirmed for the SLC that DISH had cooperated with the SLC's document requests. The SLC and its counsel discussed the documents that the SLC had identified to be collected, and the SLC confirmed that the correct documents had been requested.

Ms. Burton advised the SLC that counsel recommended that the SLC conduct an interview of Mr. Brandon Ehrhart in the near future to discuss, among other things, any additional records of DISH that the SLC may wish to collect or review. The SLC directed counsel to interview Mr. Ehrhart.

The SLC and counsel discussed the manner in which the SLC's interviews would be documented.

The SLC and counsel then discussed logistics related to the SLC meetings scheduled for August 2 and September 21.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of September 13, 2018

MEETING OF THE SPECIAL LITIGATION COMMITTEE OF THE BOARD OF DIRECTORS OF DISH NETWORK CORPORATOIN

The Special Litigation Committee (the "SLC") met in person on August 2, 2018, beginning at approximately 5:00 p.m. MDT and concluding at approximately 8:45 p.m. MDT.

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

The SLC and its counsel discussed and approved the draft agenda for the August 2, 2018 SLC meeting. Thereafter, the SLC discussed and approved the draft minutes for the SLC meeting held on July 6, 2018.

Mr. Peek provided an update for the SLC regarding recent motion practice and a recent court hearing regarding status hearings and status report deadlines. The SLC and counsel then discussed the status reports to be filed by the SLC and the scheduled hearings. The SLC and counsel reviewed and discussed the draft status report, which the SLC approved.

Mr. Flinn discussed the document collection and reported that the SLC's counsel had received substantially all of the documents that had been requested. Mr. Flinn noted that in advance of the SLC meeting, the SLC members had been provided with documents of particular relevance to its investigation, which the SLC members confirmed that they had reviewed. The SLC and its counsel then discussed the document based portion of the SLC's investigation, including counsel's document review process, the documents made available to the SLC for review to date and further documents to be provided to the SLC members. Thereafter, the SLC and counsel discussed how the SLC would proceed with respect to interviews.

The SLC and its counsel discussed the legal framework of the claims under investigation, including the *Massey* and *Caremark* legal standards. The SLC and counsel discussed various issues for the SLC to consider during the course of its investigation, including the TCPA and TSR.

Ms. Burton discussed specific documents identified by counsel as of particular relevance to the Committee's investigation. Thereafter, the SLC and its counsel discussed the facts suggested by the documents provided to the SLC and its counsel concerning, among other things, DISH's DNC compliance efforts, DISH's communications with retailers concerning retailer DNC compliance, DISH's internal reporting structure related to DNC compliance, DISH's negotiations with the Attorneys General concerning the AVC and the FTC, as well as various provisions of the AVC.

The SLC and its counsel discussed the *U.S. v. DISH Network, LLC* decision, including the court's analysis regarding liability and damages, as it relates to the legal framework of the claims at issue in the Nevada litigation.

The SLC discussed additional documents it would like to obtain to assist in its investigation, and the SLC directed counsel to request and obtain such documents. The SLC discussed logistics related to the preparation of the SLC's report based upon its investigation.

The SLC and its counsel discussed potential individuals to be interviewed in connection with its investigation and identified certain individuals to be interviewed. The SLC directed counsel to promptly prepare a further list of potential interviewees for its consideration.

The SLC discussed and agreed that the next SLC meeting will take place on September 27, 2018 at 12:00 p.m. MDT at DISH's offices in Englewood, Colorado.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of September 26, 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 September 13, 2018, beginning at approximately 6:00 p.m. EDT and concluding at approximately 7:14 p.m. EDT.

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

The SLC and its counsel discussed and approved the draft agenda for the September 13, 2018 SLC meeting. Thereafter, the SLC discussed and approved the draft minutes for the SLC meeting held on August 2, 2018.

Ms. Burton provided the SLC with an update as to the progress of the collection and review of recently requested documents. The SLC and counsel discussed takeaways from the recently collected documents and interviews.

Mr. Flinn provided the SLC with an overview of the status of the investigation. Mr. Flinn noted that documents requested had been received to the extent they existed and could be located, that the SLC had conducted nineteen interviews, and that two more interviews were scheduled to be taken.

The SLC and counsel discussed factual and legal issues to be considered in the investigation and relevant information obtained from documents collected, interviews taken thus far, and papers filed in do-not-call actions involving DISH.

Finally, the SLC and counsel discussed next steps in the investigation, including receiving further documents and meeting in person to discuss the matters under investigation on September 26, 2018.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of October 12, 2018

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

The Special Litigation Committee (the "SLC") of DISH Network Corporation ("DISH") met in person at DISH's offices in Englewood, Colorado on September 26, 2018, beginning at approximately 8:30 a.m. MDT and concluding at approximately 1:53 p.m. MDT. In attendance at the meeting were SLC members Chuck Lillis, George Brokaw and Tony Federico. Counsel for the SLC, C. Barr Flinn and Lakshmi A. Muthu of the law firm of Young Conaway Stargatt & Taylor, LLP ("YCST") and J. Stephen Peek and Robert J. Cassity of the law firm of Holland & Hart LLP ("H&H"), also attended.

The SLC members reviewed and approved the agenda for the meeting.

The SLC members reviewed and approved draft minutes of the September 13, 2018 SLC meeting.

Mr. Flinn discussed with the SLC recent correspondence exchanged with plaintiffs' counsel regarding the SLC's investigation.

Counsel discussed with the SLC the recent status report filed with the Court, the derivative plaintiffs' response to the status report, and the upcoming status hearing currently scheduled for October 8, 2018.

The SLC continued its discussion with counsel of the legal standards governing the SLC's investigation of the derivative plaintiffs' allegations in the Complaint.

Counsel continued its discussion of the background of the derivative plaintiffs' claims and the relevant legal standards applicable to the derivative plaintiffs' claims.

Counsel and the SLC continued their discussion of certain aspects of the evidentiary record from the *Krakauer* trial, including Mr. DeFranco's testimony. Counsel and the SLC also

discussed with the SLC certain provisions of the AVC, DNC compliance and AVC compliance efforts by DISH, the Board's role with respect to and views of DISH's DNC compliance and AVC compliance, and the North Carolina court's ruling in *Krakauer*.

Counsel discussed with the SLC the Court's findings and conclusions in *U.S. v. DISH*, and the bases for DISH's liability for retailers' conduct in the *Krakauer* and *U.S. v. DISH* cases, including liability under the various provisions of the TSR and the TCPA. The SLC also discussed with counsel the legal analysis that had been provided to DISH by DISH's outside counsel.

Counsel then discussed with the SLC members a number of the key events and documents relevant to the SLC's investigation, as well as court opinions entered in the *U.S. v. DISH* case, the *Krakauer* case and other DNC litigation, and certain information that had been obtained during the SLC's interviews.

Finally, the SLC and counsel discussed next steps in the investigation and meeting in person to further discuss the matters under investigation.

The SLC discussed scheduling the next SLC meeting for October 12, 2018 at Holland & Hart's offices in Denver, subject to confirming Mr. Federico's availability. The SLC also discussed scheduling another meeting in early November 2018.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of November 7, 2018

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

The Special Litigation Committee (the "SLC") of DISH Network Corporation ("DISH") met in person at Holland & Hart LLP's ("H&H") offices in Denver, Colorado on October 12, 2018, beginning at approximately 8:35 a.m. MDT and concluding at approximately 11:57 a.m. MDT. In attendance at the meeting were SLC members Chuck Lillis, George Brokaw and Tony Federico. Counsel for the SLC, C. Barr Flinn and Emily V. Burton of the law firm of Young Conaway Stargatt & Taylor, LLP ("YCST") and J. Stephen Peek and Robert J. Cassity of the law firm of Holland & Hart LLP ("H&H"), also attended.

The SLC members reviewed and approved the agenda for the meeting.

The SLC members reviewed and approved draft minutes of the September 26, 2018 SLC meeting.

The SLC's counsel confirmed that the SLC has received virtually all of the documents that had been requested from DISH and from DISH's outside lawyers.

The SLC and its counsel had further discussion of the legal standards applicable to the derivative plaintiffs' claims, including Nevada's statutory scheme.

The SLC and counsel discussed certain factual information obtained during the SLC's investigation, including discussion of certain provisions of the AVC, complaints DISH received regarding retailer DNC violations, and how DISH managed the complaints.

The SLC discussed its preliminary views regarding plaintiffs' claims based upon the documents reviewed and information obtained during the SLC's interviews.

The SLC and counsel discussed issues related to the attorney-client privilege, including legal advice DISH received from DISH's outside counsel regarding DNC laws.

The SLC directed counsel to request certain additional documents from DISH and to provide the SLC with further analysis regarding certain issues under consideration.

The SLC discussed with counsel the upcoming deadlines in the case. The SLC indicated that it will need additional time to complete its investigation and prepare and review a written report regarding the SLC's investigation. The SLC directed counsel to request an additional two weeks until November 27, 2018 to complete its report regarding its investigation and to extend the stay, and to request an extension of the deadline to file any motion based upon its report until December 14, 2018.

Finally, the SLC and counsel discussed next steps in the investigation and meeting in person to further discuss the matters under investigation. The SLC discussed holding a telephonic meeting on or about November 7, 2018 and an in-person meeting on November 12, 2018 at DISH's offices in Englewood, CO.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of November 12, 2018

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

The Special Litigation Committee (the "SLC") of DISH Network Corporation ("DISH") met by telephone on November 7, 2018, beginning at approximately 1:09 p.m. EST and concluding at approximately 2:01 p.m. EST. In attendance at the meeting were SLC members Charles Lillis, George Brokaw and Anthony Federico. C. Barr Flinn, Emily V. Burton and Lakshmi A. Muthu of the law firm of Young Conaway Stargatt & Taylor, LLP ("YCST") attended, as did J. Stephen Peek and Robert Cassity of the law firm of Holland & Hart LLP ("H&H").

The SLC members reviewed and approved the agenda for the meeting.

The SLC members reviewed and approved draft minutes of the October 12, 2018 SLC meeting.

The SLC and its counsel discussed recently requested and received information from DISH. Counsel next provided requested analysis regarding certain issues under consideration.

The SLC and its counsel discussed the status of the SLC's document and information requests. Counsel informed the SLC that no requests were outstanding.

The SLC and its counsel continued their discussion of findings made by federal district courts in *U.S. v. DISH* and *Krakauer*.

The SLC and its counsel continued their discussion of the factual determinations to be made in the draft report and the merits of the allegations and claims asserted by the plaintiffs in the Nevada litigation. The SLC directed counsel that the recently received information did not change its views on the claims and that counsel should continue preparing a draft report consistent with the SLC's preliminary views as to the merits of the plaintiffs' claims.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of November 21, 2018

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

The Special Litigation Committee (the "SLC") of DISH Network Corporation ("DISH") met in person with counsel on November 12, 2018 at DISH's offices in Englewood, Colorado, beginning at approximately 12:00 p.m. MST and concluding at approximately 2:53 p.m. MST. In attendance at the meeting were SLC members Charles Lillis, George Brokaw and Anthony Federico. C. Barr Flinn and Emily V. Burton of the law firm of Young Conaway Stargatt & Taylor, LLP ("YCST") attended, as did J. Stephen Peek and Robert Cassity of the law firm of Holland & Hart LLP ("H&H").

The SLC members reviewed and approved the agenda for the meeting.

The SLC members reviewed and approved draft minutes of the November 7, 2018 SLC meeting.

The SLC and its counsel discussed their edits and comments to the draft of the SLC's Report.

The SLC directed counsel to continue drafting and revising the SLC's Report consistent with the edits and comments discussed during the meeting.

The SLC directed its counsel, upon the SLC's approval of a final draft of the SLC Report (subject to final ministerial or clarification edits), to provide a copy of the SLC's Report to DISH's inside counsel and for review by themselves and outside counsel for DISH prior to filing for the purpose of protecting DISH's privileges and DISH's interests in pending litigation and regulatory matters.

The SLC discussed with counsel next steps in revising the SLC's Report with a planned revised draft to be circulated on or about November 19, 2018.

Approved as of November 21, 2018

The SLC discussed holding a telephonic SLC meeting on November 21, 2018 at 11:30 a.m. MST to discuss a further draft of the SLC's Report.

ATTORNEY-CLIENT PRIVILEGE
ATTORNEY WORK PRODUCT

Approved as of February 19, 2019

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

The Special Litigation Committee (the "SLC") of DISH Network Corporation ("DISH") met by telephone on November 21, 2018, beginning at approximately 11:34 a.m. MST and concluding at approximately 1:22 p.m. MST. In attendance at the meeting were SLC members George Brokaw and Anthony Federico. C. Barr Flinn, Emily V. Burton and Lakshmi A. 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 SLC members Brokaw and Federico reviewed and approved the agenda for the meeting.

The SLC members Brokaw and Federico reviewed and approved draft minutes of the November 12, 2018 SLC meeting.

The SLC members Brokaw and Federico and counsel discussed the draft report of the SLC's investigation, findings and determinations, including edits thereto.

The SLC members Brokaw and Federico approved the draft report subject to receipt of input from DISH's inside counsel regarding DISH's privileges and interests in pending litigation and subject to the implementation of final edits. The SLC member Charles Lillis provided the same approval by email.

The SLC members Brokaw and Federico directed counsel to send to the SLC for final approval the final report, along with a redline comparing the final report to previously circulated draft.

The Special Litigation Committee of
DISH Network Corporation

Report of the Special Litigation Committee of DISH Network Corporation

November 27, 2018

CONFIDENTIAL

SLC Investigation:
Plumbers Local Union No. 519 Pension Trust Fund v. Ergen,
C.A. No. A-17-763397-B

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EXECUTIVE SUMMARY

On October 19 and November 13, 2017, two stockholders of DISH Network Corporation ("DISH"), Plumbers Local Union Number 519 Pension Trust Fund and City of Sterling Heights Police and Fire Retirement System (together "Plaintiffs"), asserted purported derivative claims on behalf of DISH against certain current and former members of DISH's board of directors (the "Board")—Charles Ergen, James DeFranco, Cantey Ergen, Steven Goodbarn, David Moskowitz, Tom Ortolf, Carl Vogel, George Brokaw, Joseph Clayton and Gary Howard (each a "Named Defendant" and, excluding Brokaw, a "Director Defendant")[1]—in the Eighth Judicial District Court for the State of Nevada in and for the County of Clark (the "Court"). On December 19, 2017, the claims were consolidated into one action with one consolidated complaint (the "Complaint"), filed on January 12, 2018. On April 12, 2018, in their opposition to a motion by the Named Defendants to dismiss the consolidated claims (the "Opposition"), Plaintiffs narrowed their claims to a subset (the "Claims") of those in the Complaint.[2]

I. The Claims

Through the Complaint, Plaintiffs seek to hold each of the Named Defendants personally liable to DISH jointly and severally for a substantial portion of $340 million in losses that DISH will suffer if two money judgments entered against DISH are not reversed on appeal. In *Krakauer v. DISH Network LLC* ("*Krakauer*"), the United States District Court for the Middle

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[1] Brokaw is separately situated from the other Named Defendants. All of the allegedly improper acts asserted in Plaintiffs' Complaint took place before the end of 2011. Although named a defendant, Brokaw did not join the DISH Board until November 2013. The remaining Named Defendants, called the Director Defendants herein, were each a member of the Board between 2009 and 2011, when alleged acts that the Complaint asserts caused the judgments occurred.

[2] Plaintiffs "request[ed] leave to withdraw the abuse of control and gross mismanagement claims." Pls.' Omnibus Opp. to Defs.' Mots. to Dismiss Pls.' Verified Consol. S'holder Deriv. Compl., at 5 n.2, Case No. A-17-763397-B (Apr. 12, 2018) (referenced herein as "Plaintiffs' Dismissal Opposition" and "Pls.' Opp.").

District of North Carolina (the "North Carolina Court") entered a $61,342,800 judgment against DISH. And, in *United States v. DISH Network LLC* ("*U.S. v. DISH*," together with *Krakauer*, the "Underlying DNC Actions"), the United States District Court for the Central District of Illinois entered a $280 million judgment against DISH. The money judgments are based upon the district courts' findings of violations between 2004 and 2011 of the Telephone Consumer Protection Act (the "TCPA"), the Telemarketing Sales Rule (the "TSR") and similar do-not-call ("DNC") statutes enacted by states (collectively, the "DNC Laws"). DISH has initiated appeals in both Underlying DNC Actions which are still pending.

The judgments in the Underlying DNC Actions arose primarily from telemarketing calls made, not by DISH or its telemarketers, but by five third-party retailers who sold DISH's pay-TV service (the "Subject Retailers") pursuant to third-party service contracts with DISH. The *Krakauer* judgment resulted entirely from a determination that one Subject Retailer, Satellite Systems Network ("SSN"), was acting as DISH's agent when violating the TCPA. And approximately 92% of the *U.S. v. DISH* judgment resulted from determinations that all five Subject Retailers were DISH's agents or that DISH had become liable for the Subject Retailers' DNC violations when it authorized them to market DISH service. The violative calls found to have been made by the Subject Retailers included calls to telephone numbers on a national DNC registry (the "National Registry") and state DNC registries ("State Registries" and together with the National Registry, the "DNC Registries") and certain pre-recorded calls.

Plaintiffs seek to make the Named Defendants personally liable for a substantial portion of the judgments against DISH on the ground that, according to Plaintiffs, the Director Defendants knowingly caused DISH to violate the DNC Laws, thereby causing the judgments. The portion for which Plaintiffs seek to make the Named Defendants liable is the portion based

upon calls made from July 2009 until the end of 2011, the end of the time period at issue in *U.S. v. DISH* and *Krakauer* (the "Claims Period").[3] It consists of the entire $61,342,800 judgment in *Krakauer* and an unspecified portion of the judgment in *U.S. v. DISH*.

According to Plaintiffs, the Named Defendants should be liable for the post-July 2009 portion of the judgment because in July 2009, DISH entered an Assurance of Voluntary Compliance (the "2009 AVC") with the Attorneys General ("AGs") of 46 states concerning advertising, customer service and other telemarketing issues, including some related to DNC compliance. Plaintiffs contend that the 2009 AVC put the Board on notice that DISH was violating the DNC Laws, through the third-party retailers that sold DISH services (the "Retailers"). Plaintiffs contend therefore that DISH's failure to halt Retailers' violative calls in 2009 demonstrates that the Board thereafter intended for DISH to violate the DNC Laws.

As detailed herein, the 2009 AVC primarily concerned issues other than DNC compliance. And, in the 2009 AVC, DISH affirmatively denied any wrongdoing. DISH also expressly denied direct or vicarious liability for any violations of the DNC Laws by Retailers.[4] Moreover, despite the expansive issues addressed by the 2009 AVC, the majority of which were unrelated to the DNC Laws, DISH paid less than $6 million divided amongst 46 states—an amount immaterial to DISH's financial position—to resolve all issues in the 2009 AVC. The

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[3] *Krakauer* involved calls alleged to have occurred between May 1, 2010 and August 1, 2011. *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *2 (M.D.N.C. May 22, 2017). *U.S. v. DISH* involved calls alleged to have occurred no later than 2011. *See U.S. v. DISH*, 256 F. Supp. 3d 810, 936-37 (C.D. Ill. 2017) ("Dish acted with actual knowledge or knowledge fairly implied when it caused Satellite Systems to make 381,811 Registry Calls between May 2010 and August 2011.").

[4] In the 2009 AVC, DISH did agree to monitor certain Retailers, investigate complaints about them and, under specified circumstances, discipline them. But, the 2009 AVC did not make DISH responsible for any Retailer DNC violations occurring in spite of the monitoring, discipline and investigations undertaken by DISH.

2009 AVC did not put DISH management ("Management"), let alone DISH's Board, on notice that DISH was violating the DNC Laws.

Directors of a corporation generally are not personally liable for judgments entered against the corporation. This remains true no matter the size of the judgment. It remains true no matter how wrongful the conduct by the corporation. And it remains true regardless of whether the board was aware of a substantial risk that the judgment might be entered. A board is permitted to allow a corporation to incur legal risk, provided that the board has a good faith legal position that the corporation is acting lawfully. A board is permitted to allow the corporation to incur legal risk even if a court subsequently disagrees and the risk produces losses. A claim that directors should be personally liable for a judgment against a corporation has been described as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment." *Stone v. Ritter*, 911 A.2d 362, 372 (Del. 2006) (quoting *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 967 (Del. Ch. 1996)); *Halpert Enters. v. Harrison*, 2007 WL 486561, at *5 n.7 (S.D.N.Y. Feb. 14, 2007), *aff'd,* 2008 WL 4585466 (2d Cir. Oct. 15, 2008) (same).[5]

Directors may be held personally liable for a judgment against the corporation only if one or more of three exceptions to the general rule apply. Directors may be liable only if they (1) *knowingly* caused the corporation to violate the law, meaning that they must have *known* that the corporation was violating the law, (2) consciously disregarded *in bad faith* "red flags" indicating that the corporation was violating the law or (3) utterly failed *in bad faith* to

[5] *In re Las Vegas Sands Corp. Deriv. Litig.*, 2009 WL 6038660, at *7-8 (Nev. Dist. Ct. Nov. 4, 2009) (citing *Caremark* standard in dismissing complaint for failure to plead demand futility).

implement any reporting and information system to monitor the corporation's compliance with relevant law.[6]

In the Complaint, Plaintiffs allege that one of these exceptions applies to their Claims: Plaintiffs allege that the Director Defendants knowingly caused DISH to violate the laws that gave rise to the judgment in *Krakauer* and the post-July 2009 portion of the judgment in *U.S. v. DISH*.[7]

II. The Special Litigation Committee (the "SLC") of DISH and Its Investigation

Under Nevada law, a corporation may appoint a special litigation committee of independent persons to investigate potential derivative claims, decide whether pursuit of the claims is in the best interest of the corporation and take appropriate action with regard to the claims. *In re DISH Network Deriv. Litig.*, 133 Nev. Adv. Op. 61, 401 P.3d 1081, 1088 (2017) ("[C]ourts should defer to the business judgment of an SLC that is empowered to determine whether pursuing a derivative suit is in the best interest of a company where the SLC is independent and conducts a good-faith, thorough investigation.").

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[6] It is possible that some conduct satisfying the second and third exceptions, called the *Caremark* standard outside of Nevada, may not satisfy NRS 78.138(7)(b)(2)'s restriction that directors of a Nevada corporation may only be held personally liable for damages for breach of fiduciary duty where "[s]uch breach involved intentional misconduct, fraud or a knowing violation of law." Regardless, there is substantial overlap between *Caremark* and Nevada law, such that a Nevada Court may follow *Caremark* or find authority applying the standard instructive in interpreting Nevada law. Thus, the SLC (defined herein) evaluated the Director Defendants' conduct for both knowing violations of the law and a failure to act in good faith under *Caremark*. Plaintiffs withdrew their assertion that the Named Defendants' conduct failed to comply with *Caremark* in their Dismissal Opposition. *See* Pls.' Opp. at 27 ("This Is Not a *Caremark* Claim").

[7] Compl. ¶¶ 30, 59 ("[E]ach defendant acted with knowledge of the primary wrongdoing[;]" "[M]embers of the Board participated in, approved and/or permitted the wrongs alleged herein to have occurred, or recklessly disregarded the wrongs complained of herein, and participated in efforts to conceal or disguise those wrongs from Dish's shareholders."); *see also id.* ¶ 4.

This process exists to prevent "a single stockholder" from "control[ing] the destiny of the entire corporation." *Zapata Corp. v. Maldonado*, 430 A.2d 779, 785 (Del. 1981) ("Even when demand is excusable, circumstances may arise when continuation of the litigation would not be in the corporation's best interests."); *see also In re DISH Network Corp. Deriv. Litig.*, 2015 WL 13643897, at *12 (Nev. Dist. Ct. Sept. 18, 2015) (Trial Order) ("The SLC Report provides extensive factual, legal, and practical reasons why pursuit of each one of Plaintiff's claims would not be in the best interests of DISH.").

On April 11, 2018, DISH's Board established an independent, three-member SLC, consisting of two current Board members, Charles Lillis and George Brokaw, and an additional, experienced business person, Anthony Federico, who sits on the board of directors of DISH's affiliate, EchoStar Corporation ("EchoStar").[8] The Board authorized the SLC to (1) investigate the Claims and the alleged conduct, (2) determine whether pursuit of the Claims would be in the best interests of DISH and all of its stockholders and (3) take any and all actions on behalf of DISH with respect to the Claims. No member of the SLC was on the DISH Board during the Claims Period.

On April 24, 2018, the SLC moved to stay the Nevada litigation to provide time for the SLC to investigate the Claims and determine whether pursuit of the Claims would be in DISH's best interest. The Court granted the SLC's motion, ultimately staying the case until January 7, 2019, and directed the SLC to submit a report of its investigation and determination. This is that report (the "Report").

[8] Nevada law permits the appointment of an individual who does not sit on a corporation's board to a committee of the corporation's board. *See* NRS 78.125(2) ("Unless the articles of incorporation or the bylaws provide otherwise, the board of directors may appoint natural persons who are not directors to serve on committees.").

Before making the determinations reflected herein, the SLC conducted a thorough investigation of the Claims. As previously explained, the Claims concern conduct occurring after July 2009 and before the end of 2011. Nonetheless, to fully assess the conduct of the Director Defendants relating to the subject matter of the Claims, the SLC has investigated the time period from 2003—the beginning of the time period covering the earliest DNC violations asserted in the Underlying DNC Actions—through 2013—the end of the time period covering Plaintiffs' Claims in this action[9] (the "Investigation Period"). The SLC's investigation included reviewing relevant decisions and filings in *Krakauer*, *U.S. v. DISH* and other cases. It included the review of tens of thousands of emails and other documents exchanged between or among the Director Defendants, DISH Management, DISH's inside and outside counsel, Retailers and DISH's independent auditor during the Investigation Period. The investigation also involved the review of correspondence among DISH and its outside counsel and state AGs, the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC"). The investigation included the review of additional specifically-requested information. And, the investigation finally included interviews of numerous individuals from inside and outside DISH, including all Director Defendants (except Clayton who was unavailable for health reasons), many members of Management, relevant inside and outside counsel, a former employee, and DISH's independent auditor.[10]

The Plaintiffs have made clear that they do *not* allege that the Named Defendants (1) *disregarded* "red flags" that DISH was violating the DNC Laws (Pls.' Opp. at 27) or

[9] By their Complaint, Plaintiffs challenge the conduct of members of the DISH Board serving up through October 2013, but not beyond. *See* Compl. ¶ 67 (asserting Claims against Brokaw, who joined the Board in October 2013, but not current Board members Lillis or Afshin Mohebbi, who joined the Board in November 2013 and September 2014, respectively).

[10] The Plaintiffs declined to be interviewed.

(2) failed to implement any reporting or information system to permit the Board to monitor DISH's compliance with the DNC Laws (Pls.' Opp. at 28). The Claims are premised solely upon the notion that the Named Defendants *knowingly caused* DISH to violate the DNC Laws. Nonetheless, to determine whether DISH has any legal claims arising from these issues, the SLC also investigated the possibility that the Director Defendants disregarded in bad faith any "red flags" that DISH was violating the DNC Laws or that the Director Defendants failed to implement reporting and information systems.

The Plaintiffs have contended that, for purposes of its investigation, the SLC needed to interview only the Director Defendants. The SLC, however, conducted a thorough investigation guided by its business judgment, rather than the lesser inquiry advocated by Plaintiffs. The SLC owes its fiduciary duties to DISH and all of its stockholders—not Plaintiffs alone. Thus, the SLC interviewed persons beyond the Director Defendants to fully understand the relevant events and to assess the accuracy of statements made by the Director Defendants. The SLC likewise reviewed documents beyond the trial records in the Underlying DNC Actions to understand the full record.

III. The SLC's Determination

The SLC has determined that pursuit of the Claims would not be in the best interests of DISH and all of its stockholders for four reasons: (1) DISH almost certainly could not prevail on the Claims, (2) pursuit of the Claims would be costly and distracting to DISH, (3) pursuing the Claims would increase the risk to DISH of further DNC liability and (4) at least for the time being, pursuit of the Claims may be detrimental to DISH's interests in the Underlying DNC Actions.

The SLC has concluded that DISH almost certainly could not prevail on the Claims for the following reasons:

First, and most fundamentally, the allegation that the Director Defendants knowingly caused DISH to violate the DNC Laws is not correct. The SLC's thorough investigation turned up no evidence supporting the allegation. During the Investigation Period, the Director Defendants believed that DISH was complying with the DNC Laws. The Director Defendants believed that DISH was not legally responsible for any violations by Retailers. The Director Defendants received advice from experienced and able counsel on this point. DISH's counsel articulated reasonable bases for this position to the relevant regulatory bodies. The 2009 AVC reaffirmed, rather than altered, that view.

Second, there is no evidence that the Director Defendants disregarded "red flags" that DISH was not complying with the DNC Laws. No "red flags" of DNC Law violations were presented to the Board, much less ignored by the Director Defendants; the 2009 AVC was not such a "red flag." To the contrary, the evidence overwhelmingly shows that the Director Defendants wanted DISH to comply with the DNC Laws. When they heard of any incident, they directed Management to address it immediately. After consultation with counsel, the Director Defendants each contemporaneously believed that DISH was complying with DNC Laws. This was true both before and after the 2009 AVC.

In December 2009, just a few months after the Claims Period began, DISH's position that it was not legally responsible for violations by Retailers was upheld by the only court to have made a final determination on the issue. In *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 676 (S.D. Ohio 2009), the United States District Court for the Southern District of Ohio held: "[I]t cannot be said that the telemarketing calls were made on [DISH]'s behalf such that

[DISH] should be held vicariously liable for the Retailers' conduct."[11] To prevail on the Claims, DISH would need to establish that the Director Defendants *knew* that DISH was legally responsible for Retailer calls despite *Charvat*'s directly contrary holding that DISH was not legally responsible for them.

The Director Defendants did not ignore possible DNC violations. The evidence shows that when any Director Defendant learned of a consumer complaint of potentially violative calls, the Director Defendant expressed no tolerance for potential violations of the DNC Laws, insisted that all necessary actions be taken to prevent future violations and understood that such actions had been undertaken. When confronted with potentially violative calls, Director Defendants' responses included:

> *To DISH personnel*:
>
> "Help me to fix this PERMANENTLY."[12]
>
> "Are we on top of this . . . we need to nip any of this in the bud at the first indication that someone is violating anything . . . ."[13]
>
> "Please handle [customer DNC complaint]."[14]
>
> "Who are they? Please start the investigation."[15]
>
> "Can we be proactive and ask the customer if he wants us to add him to the national DNC list on his behalf?"[16]

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[11] Although, as explained below, *see infra* Factual Findings § VIII.A, the *Charvat* decision was later vacated based on subsequent FCC rulings, *see infra* Factual Findings § X.A.1, it had not been vacated during the relevant time period.

[12] Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 0001142.

[13] Ex. 316, Email from C. Ergen to D. Moskowitz (Nov. 10, 2006), SLC DNC Investigation 0002680.

[14] Ex. 427, Email from J. DeFranco to Metzger, et al. (Mar. 31, 2011), SLC DNC Investigation 0001127.

[15] Ex. 327, Email from J. DeFranco to E. Carlson (Aug. 27, 2007), SLC DNC Investigation 0005834.

To complainants:

> "We do take any call to our customers that [is] not desired as serious."[17]
>
> "We take this very seriously and want to solve this problem."[18]
>
> "You have my office number and you should call me if this persists. My cell is . . . ."[19]
>
> "I apologize for the inconvenience these calls have caused you. . . . [DISH] strictly adheres to all Do Not Call lists. Unfortunately, we have recently been experiencing instances where third parties have been calling consumers and representing themselves as DISH Network. . . . We will continue to work to put an end to these practices."[20]

In addition to these directions, the Director Defendants often referred the matter to DISH's legal department ("Legal Department").

Also, during the Claims Period, neither DNC issues generally nor *U.S. v. DISH* specifically was considered matters for DISH's Board. Neither appeared to threaten DISH with material liability. *Krakauer* had not even been filed. As detailed here, in 2009, the FTC had offered to settle *U.S. v. DISH* for *$12 million*, an amount not financially material in the context of DISH's business as a whole. The FTC's settlement demands remained similar throughout the Claims Period. To Director Defendants, *U.S. v. DISH* and *Krakauer* appeared to raise ordinary course issues on which DISH would likely prevail. There was no discussion of potential liability

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[16] Ex. 274, Email from M. Cohen to J. DeFranco (Mar. 17, 2004), SLC DNC Investigation 0005844.

[17] Ex. 311, Email from C. Ergen to "jaytee" (Oct. 3, 2006), SLC DNC Investigation 0005903.

[18] Ex. 362, Email from C. Ergen to L. Sees (Dec. 2, 2008), SLC DNC Investigation 0009731.

[19] Ex. 302, Email from C. Vogel to C. Kulig, et al. (Aug. 23, 2006), SLC DNC Investigation 0002177.

[20] Ex. 297, Email from D. Moskowitz to C. Ergen, et al. (Aug. 8, 2006), SLC DNC Investigation 0005004.

in the hundreds of millions of dollars during the Investigation Period. The decisions in *Krakauer* and *U.S. v. DISH*, reached after the Claims Period, were surprises to the Director Defendants, both (a) in the determinations that DISH was legally responsible for the Subject Retailers, which departed from the 2009 *Charvat* decision, and (b) in the amounts awarded.[21]

Third, the SLC found that the Board implemented reporting and information systems to permit the Board to monitor DISH's compliance with the DNC Laws. As detailed herein and, as is typical for similarly-large corporations in the United States, DISH had multiple overlapping systems to ensure legal compliance, including compliance with the DNC Laws. Those systems functioned: Management and the Board simply did not believe that DISH was responsible for DNC violations by Retailers, but nonetheless took numerous steps to encourage Retailer compliance and contractually required Retailers to comply with DNC Laws.[22]

IV. The Trebling Decision from *Krakauer*

Plaintiffs' Claims appear to be based on a misunderstanding of the decision in *Krakauer*, in which the court trebled the damages awarded by the jury, from $20,447,600 to $61,342,800. Plaintiffs misunderstand that decision to suggest that *the Board* acted in bad faith because *the Board* knew DISH was violating the DNC Laws. In fact, the decision did not address knowledge of the Board or any individual Director Defendant. Neither the Board's knowledge nor its conduct was at issue in *Krakauer*. Only one Director Defendant even testified.

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[21] *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *9 (M.D.N.C. May 22, 2017) ("SSN was acting as Dish's agent and was acting in the course and scope of that agency when it made the calls at issue[.]"); *U.S. v. DISH*, 256 F. Supp. 3d at 920 ("The United States has proven that Dish had an agency relationship with the Order Entry Retailers to telemarket Dish Network programming.").

[22] Plaintiffs further purport to assert claims for waste and unjust enrichment, including some form of insider trading on the premise that the Director Defendants knowingly caused DISH to violate the DNC Laws. These claims fail because the claims that the Director Defendants knowingly caused DISH to violate DNC Laws lack merit.

The court in *Krakauer* expressly found that to determine that DISH had acted "willfully and knowingly," it need not determine that DISH had acted in "bad faith." *Krakauer*, 2017 WL 2242952, at *9 ("[A] finding of willfulness does not require bad faith.").

The *Krakauer* court based its determination that DISH had acted "willfully and knowingly" primarily on the ground that the single Subject Retailer at issue in that case was DISH's agent, such that DISH was "responsible for any willful or knowing violation of the telemarketing laws by [the Subject Retailer]."[23] In other words, even if DISH believed it was complying with the DNC Laws, the court attributed the bad faith of the Subject Retailer to DISH. This does not demonstrate that *anyone* at DISH had believed that DISH was violating the DNC Laws.

The *Krakauer* court also based its determination on the alternate ground that DISH "knew or should have known" that the *Subject Retailer*—not DISH—was violating the DNC Laws.[24] There was no determination that anyone at DISH knew that *DISH* was violating the DNC Laws, much less that *the Board* knew such a thing. As previously explained, the Director Defendants, after advice of counsel, did not believe that DISH was responsible for violations by Retailers.

The Complaint makes a similar error in asserting that testimony in *Krakauer* by DeFranco, a Director Defendant, suggests that the Board knew that DISH was violating the DNC Laws. DeFranco's testimony did not concern either the Board's knowledge or DISH's compliance with the DNC Laws. DeFranco testified as to DISH's compliance with the 2009

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[23] *Krakauer*, 2017 WL 2242952, at *10.

[24] *Id*. at *10. The court based this determination primarily upon communications between the Subject Retailer and members of Management junior to DeFranco, before DISH effectively terminated its contract with the Subject Retailer. The SLC has found no evidence that DeFranco was aware of these communications. *See infra* Factual Findings § V.F.5.d.

AVC, which is not one of the DNC Laws and did not give rise to the liabilities at issue in the Claims.[25] Because it did not concern compliance with the DNC Laws, DeFranco's testimony cannot establish the Director Defendants' liability for the Claims.

Even as to the 2009 AVC, the *Krakauer* court did not conclude that DeFranco or any other representative of DISH acted in bad faith. The court disagreed with DeFranco's position that, even before entering the 2009 AVC, DISH was already conducting the investigation of Subject Retailers required by the 2009 AVC.[26] *Id.* at *7 ("That, however, is patently inaccurate . . . ."). The court believed that the 2009 AVC required greater investigation.[27] But the court did not find that DeFranco held his position in bad faith—that he or any other representative of DISH *believed* that DISH was violating the 2009 AVC.[28]

Based upon its thorough investigation, the SLC has determined that the Board, Management and DeFranco believed in good faith that DISH was complying with the 2009 AVC. The Board had virtually no involvement in the situation. The evidence uniformly shows that, after consultation with counsel, DISH Management, including DeFranco and Ergen, believed that, before executing the 2009 AVC, DISH was already investigating complaints of Retailer violations of the DNC Laws in the manner required by the 2009 AVC; Management

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[25] *Id.* at *15 ("According to DISH's co-founder, the [2009 AVC] changed nothing: 'This is how we operated even prior to the agreement as it related to telemarketing.'"). Nor did the 2009 AVC reflect requirements of the DNC Laws. Ex. 29, 2009 AVC § 1.14 (DISH "affirmatively states that it believes the requirements it has agreed to by signing this Assurance are policies, procedures and actions that exceed applicable legal and common law standards . . . .").

[26] *See also id.* at *16 ("Despite the promises DISH made to the attorneys general in the [2009 AVC], DISH did not further investigate or monitor SSH's telemarketing or scrubbing practices.") (citation omitted).

[27] *Id*. at *7.

[28] *See, e.g.*, *id.* at *18 ("The DISH compliance department *believed* TCPA compliance was really up to the retailer.") (emphasis added).

believed that the 2009 AVC codified what DISH was already doing in this regard. No party to the 2009 AVC—none of the 46 state AGs—has suggested otherwise.

Whatever the *Krakauer* court may have determined with respect to DISH's actual compliance with the 2009 AVC, the evidence reviewed by the SLC during its thorough investigation shows that DISH, including the Board, Management and specifically DeFranco, *believed* that DISH was complying with the 2009 AVC. No evidence suggested that they believed that DISH was not complying with the 2009 AVC.

Plaintiffs finally misconstrue the absence of evidence in *Krakauer* of DISH's compliance with the 2009 AVC. Plaintiffs rhetorically ask why, if the Board believed that DISH was complying with the 2009 AVC, did it not submit evidence of such compliance?[29] Plaintiffs suggest that, if such evidence existed, it surely would have been submitted.

Putting aside that the Board did not get involved in tactical litigation decisions, the record of *Krakauer* provides the answer to the question posed by Plaintiffs: DISH did not submit evidence concerning compliance with the 2009 AVC in *Krakauer* because DISH's compliance with the 2009 AVC was not at issue in *Krakauer*.

Having determined that pursuit of the Claims would not be in DISH's best interest, the SLC will move for the Court to defer to the SLC's business judgment and dismiss this action.

THE SLC INVESTIGATION

I. The Putative Derivative Action

One of the Plaintiffs filed its initial complaint on October 19, 2017, in *Plumbers Local Union No. 519 Pension Trust Fund v. Ergen, et al.*, Case No. A-17-763397-B. The other Plaintiff filed a separate complaint bringing similar claims in *City of Sterling Heights Police and*

[29] *See* Pls.' Opp. at 2:7-8 ("[A]s the North Carolina Court found, 'the record is silent about any efforts DISH undertook to comply with the promises and assurances it made.'").

Fire Retirement System, v. Ergen, et al., Case No. A-17-764522-B on November 13, 2017. On December 19, 2017, these actions were consolidated. On January 12, 2018, Plaintiffs filed the operative Complaint, styled 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.

II. The Formation of the SLC

DISH's Board deliberated on the merits of forming a special litigation committee to address the Claims multiple times, including during Board meetings held on November 2, 2017, February 12, 2018 and March 28, 2018.[30] DISH's Board formed the SLC by unanimous written consent on April 11, 2018.[31] The SLC is a committee of DISH's Board, formed pursuant to NRS 78.125.[32]

The SLC is composed of Charles Lillis, George Brokaw and Anthony Federico (together the "SLC Members").[33] The SLC Members were appointed "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 provided in its authorizing resolutions.[34]

The SLC was granted the power and authority of the Board 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;

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30 Unanimous Written Consent in Lieu of a Special Meeting of the Board of Directors of DISH Network Corp. as of April 11, 2018, at 1 (attached as Exhibit A to Motion for Stay Pending Investigation of the Special Litigation Committee of DISH Network Corp.).

31 *Id.*

32 *Id.* at 2.

33 *Id.* at 1-2.

34 *Id.* at 2.

> (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.[35]

The SLC was "authorized and empowered to retain and consult with such advisors, consultants and agents, including . . . legal counsel . . . as the SLC deems necessary or advisable . . . ."[36] Management was directed to provide the SLC with whatever information the SLC requested.[37] Finally, the unanimous written consent forming the SLC provided that the SLC's work would be privileged, even as to DISH: "to the fullest extent consistent with law, the deliberations and records of the SLC shall be confidential and maintained as such by each Committee Member and any legal counsel, experts and consultants engaged by the SLC . . . ."[38]

A. The SLC Members

1. Charles Lillis

Charles Lillis joined the DISH Board on November 5, 2013. The Board has determined that Lillis meets the independence requirements of NASDAQ and SEC rules and regulations. He is a member of DISH's Executive Compensation Committee and Audit Committee; he has previously served on the Nominating Committee for the Board.

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35 *Id*.

36 *Id.* at 3.

37 *Id*.

38 *Id.* at 3-4.

Lillis was chief executive officer and chairman of the board of MediaOne from its inception in 1995 through its acquisition by AT&T Inc. ("AT&T"), completed in 2000.[39] Thereafter, Lillis co-founded and was a principal of LoneTree Capital Management LLC, a private equity investing group. Lillis then co-founded and was a managing partner of Castle Pines Capital LLC ("Castle Pines Capital"), a private equity concern and a financial services entity. Castle Pines Capital was acquired by Wells Fargo in 2011. At that point, Lillis became an advisor to Wells Fargo Bank, N.A.

Lillis has served on the board of directors of several other public companies including, Medco Health Solutions, Inc. from 2005 to 2012, SUPERVALU Inc. from 1995 to 2011, The Williams Companies Inc. from 2000 to 2009, Washington Mutual, Inc. from 2005 to 2009 and MediaOne from 1995 to 2000.

Lillis also has a record of public service for academic institutions. The Governor of Oregon appointed Lillis Chair of the Board of Trustees of the University of Oregon. Lillis previously served on the University of Washington Business Advisory Board, the University of Washington Foundation Board and the University of Colorado Foundation Board. Lillis also previously served as the Dean of the University of Colorado's college of business and a professor at Washington State University.

2. George Brokaw

George Brokaw joined the Board on October 7, 2013.[40] The Board has determined that Brokaw meets the independence requirements of NASDAQ and SEC rules and regulations. He is currently the chair of the Executive Compensation Committee and a member of the

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[39] Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 4 (Mar. 28, 2018).

[40] *See infra* Factual Findings § X.C.

Nominating Committee and Audit Committee. Brokaw previously served as the chair of DISH's Nominating Committee.

Brokaw has served or currently serves on the boards of directors of multiple companies, including Consolidated Tomoka, Modern Media Acquisition Corp., Capital Business Credit LLC, Timberstar, Value Place Holdings LLC, Alico, Inc. and North American Energy Partners Inc. (a NYSE-listed company). Brokaw served on numerous audit committees, compensation comittees and nominating committees across these companies.

Until 2005, Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. Between 2005 and 2012, Brokaw was a Managing Partner and Head of Private Equity at Perry Capital, L.L.C. Then, Brokaw became the Managing Director of Highbridge Principal Strategies, LLC, until September 30, 2013, when he left to form Trafelet Brokaw and Co., LLC.

Brokaw currently manages his family capital through several entities.[41]

3. Anthony Federico

Anthony Federico joined the board of DISH's affiliate, EchoStar, in May 2011. The board of directors of EchoStar has determined that Federico meets the independence requirements of NASDAQ and SEC rules and regulations. He serves on the Executive Compensation Committee, Nominating Committee and Audit Committee of EchoStar.

Federico brings to the EchoStar board and to the SLC years of technical and managerial experience. Federico began working for Xerox Corporation in 1968. When he left in 2012, Federico served as Vice President, Chief Engineer, and Graphic Communications Executive Liaison of Xerox. During his time at Xerox, Federico held various product, management,

[41] Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 4 (Mar. 28, 2018).

engineering, solutions, and information management positions including: Vice President/General Manager Production Solutions Businesses, Vice President of Technology for Production Systems, Vice President/General Manager Technology and Document Production Solutions, and Vice President Market-To-Collection and North American Information Management.

B. The SLC's Independence

The SLC is composed of independent and disinterested individuals who are fully capable of evaluating the merits of the Claims that Plaintiffs would have DISH assert. Neither Lillis nor Federico is named as a defendant in the Complaint, and neither is alleged to have been involved in any way in the alleged facts and events set forth in the Complaint. Lillis, who has served on DISH's Board since November 2013, was not a director of DISH at the time of the alleged facts and events set forth in the Complaint. Federico is not and has never been a director of DISH.

While Brokaw is a Named Defendant, Brokaw joined DISH's Board in October 2013, after the Claims Period. Brokaw did not serve on the Board at the time of the facts alleged in the Complaint. Plaintiffs make no specific allegations regarding Brokaw's conduct. Brokaw thus faces no material likelihood of personal liability that might undermine his independence—regardless of what the SLC might have determined to be true with respect to the Director Defendants.

C. The SLC's Independent Counsel

The SLC is advised by independent, competent and experienced counsel. The SLC retained counsel at the Nevada law firm of Holland & Hart LLP ("H&H") to assist it in this matter. H&H has extensive experience in shareholder derivative matters in Nevada and in representing special litigation committees. The SLC also engaged the Delaware law firm of Young Conaway Stargatt & Taylor, LLP ("YCST"), which has extensive experience advising

corporations and their committees on a wide variety of issues relating to corporate governance, and, more particularly, advising special litigation committees.

III. The SLC's Investigation

A. The Investigation Period and the Claims Period

The SLC has thoroughly investigated the Claims and matters asserted in Plaintiffs' Complaint. The SLC investigated matters concerning DISH's DNC compliance and Board oversight generally from 2003 through 2013 (the "Investigation Period"). The Investigation Period begins in 2003 because that is when the earliest calls at issue in *U.S. v. DISH* were allegedly made, although the earliest calls for which damages were awarded in either of the Underlying DNC Actions occurred in 2004.[42] The Investigation Period was extended until 2013 because Plaintiffs insist in their Dismissal Opposition that the alleged breaches of fiduciary duty at issue in the Complaint continue through 2013,[43] although the latest calls for which damages were awarded in the Underlying DNC Actions were placed in 2011.

The Claims articulated by Plaintiffs, however, are premised upon (1) the Board, composed of the Director Defendants, declining to change DISH's DNC compliance and the DNC compliance of the Retailers upon entering into the 2009 AVC and (2) thus, allegedly, knowingly causing DISH to incur the damages awarded in *U.S. v. DISH* and *Krakauer* for

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[42] The Complaint in *U.S. v. DISH* was filed on March 25, 2009. *U.S v. DISH,* 256 F. Supp. 3d 810, 915 (C.D. Ill. 2017). Liability was limited by the applicable statute of limitations of the DNC laws at issue. *Id*. (statute of limitations for claims brought under the TSR is five years, Mar. 25, 2004); *id*. at 943 (statute of limitations for claims brought under the TCPA is four years, Mar. 25, 2005); *id*. at 953 (statute of limitations for claims brought under Ca. Civ. Code § 17592(c) is three years, Mar. 25, 2006); *id*. at 956 (statute of limitations for claims brought under Cal. Bus. & Prof. Code § 17200 is four years, Mar. 25, 2005); *id*. at 959 (statute of limitations for claims brought under N.C. Gen. Stat. Ann. §§ 75-102 is four years, Mar. 25, 2005); *id*. at 960 (statute of limitations for claims brought under N.C. Gen. Stat. Ann. § 75-104 is four years, Mar. 25, 2005); *id*. at 964 (statute of limitations for claims brought under Ohio Rev. Code. Ann. § 1345.03 is two years, Mar. 25, 2007).

[43] *See* Pls.' Opp. at 28-29.

violative calls made after 2009. Neither *Krakauer* nor *U.S. v. DISH* awarded any damages for calls placed after 2011. Thus, while the SLC investigated the full Investigation Period from 2003 to 2013, Plaintiffs' Claims arise only from conduct occurring from July 2009 until the end of 2011—the Claims Period. This Report of the SLC's Investigation addresses matters throughout the Investigation Period, not only the Claims Period, to place into context the conduct occurring during the Claims Period and to address whether that conduct supports other claims arising from the same facts and issues.

B. The Information Reviewed

During the course of its investigation, the SLC's counsel reviewed more than 44,000 documents that were requested and obtained from DISH and DISH's outside law firms, Kelley Drye & Warren ("Kelley Drye") and Orrick Herrington & Sutcliffe ("Orrick"). The SLC Members themselves reviewed more than 1,500 documents, consisting of more than 10,000 pages. The documents reviewed included those subject to work product or attorney client privilege of DISH.[44]

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[44] Under *Wynn Resorts, Ltd. v. Eighth Judicial District Court* (*Wynn Resorts*), the fact that the Director Defendants received advice of counsel is relevant to whether the Director Defendants acted in good faith and otherwise complied with their fiduciary duties. 133 Nev. Adv. Op. 52, 399 P.3d 334, 345 (2017) ("We agree that 'it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance of that advice.'") (citing *In re Comverge, Inc.*, C.A. No. 7368-VCP, 2013 WL 1455827, at *4 (Del. Ch. Apr. 10, 2013)). Although the members of the SLC, as representatives of DISH (including Mr. Federico, for purposes of the SLC's investigation), were entitled to review and did review the content of information that was subject to DISH's attorney-client privilege and attorney work product, under *Wynn Resorts*, such content is not relevant to whether the Director Defendants complied with their fiduciary duties. *Id.* at 343 ("Because we determine that Nevada's statutory business judgment rule precludes courts from reviewing the substantive reasonableness of a board's business decision, we conclude that an evaluation of the substance of the advice the Board received from its attorney, and thus discovery regarding the substance of that advice, is unnecessary in determining whether the Board acted in good faith."). Moreover, any disclosure of the content could give rise to arguments, even if not correct, that might risk a waiver of privilege that could be damaging to DISH's interests in the ongoing litigation in *Krakauer* and

The SLC and its counsel received from Kelley Drye and Orrick documents produced in the underlying *Krakauer* and *U.S. v. DISH* matters, as well as deposition transcripts, trial transcripts, trial exhibits and other court filings. The SLC and its counsel evaluated all of the filings and briefing submitted in connection with Defendants' and DISH's motions to dismiss in this action. The SLC obtained from DISH additional documents relevant to its investigation, including emails and other documents from the following individuals from the Investigation Period: (1) Charles Ergen; (2) David Moskowitz; (3) James DeFranco; (4) Jeffrey Blum; (5) Brett Kitei; (6) Stanton Dodge; (7) Brandon Ehrhart; (8) Lori Kalani; (9) Amir Ahmed; (10) Reji Musso; (11) Mike Mills; (12) Brian Neylon; (13) Blake Van Emst; (14) Bruce Werner; (15) Russell Bangert; (16) Joey Montano; (17) Keri Francavilla; (18) James Hankins; (19) Adam Schuster and (20) Patrick Halbach.[45] The SLC's counsel developed and refined search terms that were applied against the universe of documents collected from these DISH custodians. The documents and information reviewed included communications subject to DISH's attorney-client and work product privileges. The SLC's counsel then conducted three levels of review of the documents to determine which documents were particularly pertinent to the issues that are the subject of the SLC's investigation.

U.S. v. DISH. For these reasons, consistent with *Wynn Resorts*, the SLC relied, in making its determinations, upon the fact that the Director Defendants and Management received advice of counsel and discloses the fact in this Report, but the SLC did not rely upon and does not disclose in this Report the content of such advice or the work product of DISH's attorneys. The SLC and its counsel have made a substantial effort to ensure that this Report does not disclose the content of privileged or work product material. In the unlikely event that the Report nonetheless discloses such material, such disclosure will necessarily have been inadvertent, and no waiver will have been intended. If the SLC subsequently learns that it has disclosed any such material in this Report, it reserves the right to remove the disclosure.

[45] *See, e.g.*, Ex. 742, First Set of Documents Requested from DISH (May 31, 2018); Ex. 713, Email from K. Wener to E. Burton (July 26, 2018); Ex. 480, Email from K. Wener to E. Burton, et al. (June 19, 2018).

The SLC Members were then provided with and personally reviewed the documents that were determined by the SLC's counsel to be pertinent to the SLC's investigation.

C. The Interviews Conducted

During its investigation, the SLC conducted interviews of twenty-two individuals, including Director Defendants, former and current in-house corporate counsel for DISH, outside lawyers who represented or advised DISH, DISH's independent auditor, a third-party vendor, and members (and a former member) of DISH's Retail Services, Internal Audit, and Sales departments, on the following dates: (1) Brandon Ehrhart (July 16, 2018); (2) Steven Goodbarn (August 28, 2018); (3) David Moskowitz (August 28, 2018); (4) James DeFranco (August 28, 2018); (5) Stanton Dodge (August 29, 2018); (6) Tom Ortolf (August 29, 2018); (7) Charles Ergen (August 29, 2018); (8) Cantey Ergen (August 29, 2018); (9) Carl Vogel (August 30, 2018); (10) Patrick Halbach (August 30, 2018); (11) Gary Howard (August 30, 2018); (12) Brett Kitei (August 30, 2018); (13) Blake Van Emst (August 31, 2018); (14) Amir Ahmed (September 4, 2018); (15) Jeff Blum (September 4, 2018); (16) Alyssa Hutnik for Kelley Drye (September 5, 2018); (17) Lewis Rose for Kelley Drye (September 5, 2018); (18) Helen Mac Murray for Mac Murray & Shuster LLP (f/k/a Mac Murray, Cook, Petersen & Shuster LLP) (September 5, 2018); (19) Ken Sponsler for PossibleNow (September 5, 2018); (20) Lori Kalani (September 10, 2018); (21) Reji Musso (September 20, 2018); and (22) Jason Waldron of KPMG (September 21, 2018). These individuals are each described in more detail in Factual Findings Section IV below. With few exceptions, all three members of the SLC attended each of these interviews.

The SLC also requested an interview of Joseph Clayton. However, Clayton was unavailable to participate in an interview with the SLC due to serious personal health issues.[46] He passed away while the SLC was preparing this Report.

The SLC further requested an interview of a representative of the Plaintiffs to obtain any additional facts or insights that Plaintiffs may be aware of relevant to the SLC's investigation.[47] The Plaintiffs, however, declined to be interviewed.[48]

Much of the information set forth in this Report without citation was learned by the SLC in the course of its interviews.[49] Counsel to the SLC documented the SLC's interviews in interview memoranda, which are work product that incorporate the mental impressions of the SLC's counsel. Upon deliberation and discussion with counsel, the SLC elected not to transcribe or to record its interviews in order to facilitate frank and candid discussions with the interview subjects.

D. The SLC Meetings Held

During its investigation, the SLC met numerous times before submitting its Report. In addition to numerous discussions held before, after and during breaks in the interviews, the SLC formally met with counsel in person four times (on August 2, 2018, September 26, 2018, October 12, 2018 and November 12, 2018) and telephonically six times (on May 9, 2018, May 31, 2018, July 6, 2018, September 13, 2018, November 7, 2018, and November 21, 2018). Among other things, the SLC Members received advice concerning their duties as members of

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46 *See* Ex. 483, Email from B. Ehrhart to E. Burton (Sept. 13, 2018).

47 *See* Ex. 481, Email from E. Burton to D. O'Mara, et al. (Aug. 20, 2018).

48 *See* Ex. 482, Email from E. Luedeke to E. Burton, et al. (Aug. 22, 2018); Ex. 484, Letter from C. Flinn to E. Luedeke (Sept. 19, 2018).

49 Where the SLC relies upon information learned through its interviews, it does so specifically in reliance on the interviews themselves, rather than upon the privileged interview memoranda prepared by the SLC's counsel documenting the interviews.

the SLC and the law applicable to the Claims, determined the scope of materials to be collected, reviewed and commented on the material collected, identified additional material to be collected, identified the individuals to be interviewed, discussed the information obtained during the interviews and discussed each of the filings submitted on behalf of the SLC. Throughout its investigation, the SLC repeatedly discussed the substance of its investigation, additional information needed to evaluate the Claims and the merits of the Claims, before ultimately reaching final conclusions on the merits of all of DISH's potential claims and whether it would be in DISH's best interest to assert them.

IV. Individuals Relevant to the SLC's Investigation and Recommendation

A. DISH Board Members, the Director Defendants

1. Charles "Charlie" Ergen

Charlie Ergen is one of the founders of DISH[50] and has served as Chairman of the Board since DISH's formation.[51] He has been integral to the strategic direction of DISH from day one.[52] Ergen has held various executive roles in DISH and its subsidiaries, including Chairman, President and CEO.

Ergen owns 48% of DISH's Class A Common Stock, 85.8% of its Class B Common Stock, and 78.4% of its voting power.[53] Ergen owned 230,783,004 shares of DISH stock at the end of the Investigation Period.[54]

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50 *U.S. v. DISH*, 256 F. Supp. 3d at 820.

51 Ex. 51, DISH Network Corp., Annual Report (Form 10-K), at 17 (Feb. 21, 2018).

52 *See* Ex. 59, Charlie Ergen, DISH Newsroom, http://about.dish.com/Charlie-Ergen (last visited Nov. 20, 2018).

53 Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9-10 (Mar. 28, 2018).

2. Cantey "Candy" Ergen

Candy Ergen is one of DISH's founders.[55] Mrs. Ergen is a member of the Board and acts as a Senior Advisor. [56] Mrs. Ergen is no longer active in day-to-day operations of DISH but is involved in providing strategic direction for DISH and certain personnel issues at a high level.

Mrs. Ergen also serves on the Board of Trustees of Wake Forest University, a position she has held since 2009. She shares beneficial ownership of the stock held by her husband, Ergen.[57]

3. James "Jim" DeFranco

Jim DeFranco is one of DISH's founders. He has been a member of DISH's Board since 1980.

During his 38 years at DISH, he has managed or overseen nearly every aspect of DISH's business, including marketing, purchasing, manufacturing, engineering, sales, distribution, and even programing in the early years of the business. During the Investigation Period, among other things, DeFranco oversaw DISH's "Retail Services," which handled DISH's indirect sales and distribution, including through Retailers. In that context, DeFranco oversaw, at the highest level, DISH's efforts concerning compliance with DNC Laws by Retailers.

DeFranco owned DISH stock throughout the investigation period.[58] He owned 4,576,027 shares of DISH stock at the end of the Investigation Period.[59]

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[54] Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Mr. Ergen also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

[55] Ex. 51, DISH Network Corp., Annual Report (Form 10-K), at 17 (Feb. 21, 2018).

[56] *See* Ex. 723, Board of Directors, https://dish.gcs-web.com/corporate-governance/board-of-directors (last visited Nov. 20, 2018).

[57] Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 10 (Mar. 28, 2018).

4. Joseph P. Clayton

Joseph Clayton served on the Board from June 2011 to March 31, 2015, having served as DISH's President and Chief Executive Officer during that time. Although Clayton was an officer of DISH during the end of the Investigation Period, he was not involved in managing DISH's DNC compliance or overseeing DISH Retailers.

Before joining DISH, Clayton served as Chairman of Sirius Satellite Radio Inc. ("Sirius") from November 2004 to July 2008 and served as Chief Executive Officer of Sirius from November 2001 to November 2004. Prior to joining Sirius, Clayton served as President of Global Crossing North America from 1999 to 2001, as President and Chief Executive Officer of Frontier Corporation ("Frontier") from 1997 to 1999 and as Executive Vice President, Marketing and Sales—Americas and Asia, of Thomson S.A prior to Frontier. Clayton previously served on the Board of Directors of Transcend Services, Inc. from 2001 to April 2012 and on the Board of Directors of EchoStar Corporation ("EchoStar") from October 2008 to June 2011.[60]

Clayton first acquired DISH stock on August 11, 2011 (shortly after joining the Board) and owned DISH stock through the remainder of the Investigation Period.[61] He owned 371,617

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[58] Ex. 4, EchoStar Communications Corp., Definitive Proxy Statement (Schedule 14A), at 6 (Apr. 9, 2002).

[59] Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9-10 (Mar. 22, 2013). As of March 7, 2013, DeFranco also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

[60] Ex. 48, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 4 (Sept. 19, 2014).

[61] Ex. 40, DISH Network Corp., Statement of Changes in Beneficial Ownership (Form 4) (Aug. 15, 2011).

shares of DISH stock at the end of the Investigation Period.[62] As stated herein, Clayton was too ill to participate in an interview with the SLC during its investigation.[63]

5. Steven Goodbarn

Steven Goodbarn served on the Board from July 2002 until May 2018.[64] During his time on the Board, the Board determined that Goodbarn met the independence and "audit committee financial expert" requirements of NASDAQ and SEC rules and regulations. He became a member of the Audit Committee within a few months of joining the Board and remained a member until 2018.[65]

Goodbarn also co-founded Secure64 Software Corporation in 2002, where he served as a director and served as President and Chief Executive Officer from 2005 to 2016. Goodbarn was Chief Financial Officer of Janus Capital Corporation ("Janus") from 1992 to 2000, where he was a member of the executive committee and served on the board of directors of many Janus corporate and investment entities. Goodbarn is a CPA and spent 12 years at Price Waterhouse prior to joining Janus. Goodbarn also served as a member of the board of directors of EchoStar from its formation in October 2007 until November 2008.[66]

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62 Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Clayton also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id*

63 Clayton passed away in early November 2018.

64 Ex. 5, EchoStar Communications Corp., Annual Report (Form 10-K), at 57 (Mar. 4, 2003) ("On December 31, 2002, we filed a Current Report on Form 8-K to announce the appointment of Steven R. Goodbarn to serve on the EchoStar Board of Directors and to serve as a member of the Audit Committee of the Board of Directors."); Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 6 (Mar. 28, 2018) ("Mr. Goodbarn will cease to be a member of the Audit Committee when his term as a director expires at the Annual Meeting.").

65 *Id.*

66 Ex. 49, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 4 (Mar. 22, 2017).

Goodbarn first acquired DISH stock on May 10, 2004 and owned DISH stock through the remainder of the investigation period.[67] He owned 20,000 shares of DISH stock at the end of the Investigation Period.[68]

6. Gary Howard

Gary Howard served on the Board from November 2005 to July 2013, serving on the Executive Compensation Committee, Nominating Committee and Audit Committee. During his time on the Board, the Board determined that Howard met the independence requirements of NASDAQ and SEC rules and regulations.[69]

Howard served on the board of directors of Interval Leisure Group, Inc. Howard served as Executive Vice President and Chief Operating Officer of Liberty Media Corporation from July 1998 to February 2004, as well as serving on Liberty Media Corporation's board of directors from July 1998 until January 2005. Additionally, Howard held several executive officer positions with companies affiliated with Liberty Media Corporation.

Howard owned DISH stock when he joined the Board in 2005 and owned DISH stock through the remainder of the investigation period.[70] He owned 95,100 shares of DISH stock at the end of the Investigation Period.[71]

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67 Ex. 7, EchoStar Communications Corp., Statement of Changes in Beneficial Ownership (Form 4) (May 12, 2004).

68 Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Goodbarn also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

69 *Id.* at 4.

70 Ex. 15, EchoStar Communications Corp., Statement of Changes in Beneficial Ownership (Form 4) (Jan. 4, 2006).

71 Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Howard also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

7. David Moskowitz

David Moskowitz joined DISH's Board in 1998 and remains a Board member today.[72] Moskowitz served as Executive Vice President, Secretary, and General Counsel for DISH until 2007. Although he retired as an executive of DISH in 2007, he informally assisted DISH's Legal Department at times after his retirement.

Moskowitz also serves on the board of directors of several private companies and charitable organizations.

Moskowitz owned DISH stock throughout the investigation period.[73] He owned 944,352 shares of DISH stock at the end of the Investigation Period.[74]

8. Tom Ortolf

Tom Ortolf has served on DISH's Board from 2005 to the present.[75] The Board has determined that Ortolf meets the independence requirements of NASDAQ and SEC rules and regulations.[76] He has chaired the DISH Board's Audit Committee since 2005. Ortolf has also served on the Compensation Committee and the Nominating Committee of the Board since 2005.

Ortolf has also been a member of the board of EchoStar since its formation in October 2007. Ortolf has been President of CMC, a privately held investment management firm, for over twenty years.

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72 Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 5 (Mar. 28, 2018).

73 Ex. 4, EchoStar Communications Corp., Definitive Proxy Statement (Schedule 14A), at 6 (Apr. 9, 2002).

74 Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Moskowitz also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

75 *See* Ex. 723, Tom Ortolf, Board of Directors, https:dish.gcs-web.com/corporate-governance/board-of-directors (last visited Nov. 20, 2018).

76 Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 5 (Mar. 28, 2018).

Ortolf owned DISH stock when he joined the Board in 2005 and owned DISH stock through the remainder of the investigation period.[77] He owned 75,200 shares of DISH stock at the end of the Investigation Period.[78]

9. Carl Vogel

Carl Vogel has served on the Board from May 2005 to the present and is currently a Senior Advisor to DISH. He served as President of DISH from September 2006 to February 2008 and served as DISH's Vice Chairman from June 2005 to March 2009.

Vogel is also a private investor and a senior advisor to KKR & Co. L.P. From October 2007 to March 2009, Vogel served as the Vice Chairman of the board of directors of, and as a Senior Advisor to, EchoStar. From 2001 to 2005, Vogel served as the President and CEO of Charter, a publicly-traded company providing cable television and broadband services to approximately six million customers. Prior to joining Charter, Vogel worked as an executive officer in various capacities for companies affiliated with Liberty Media Corporation from 1998 to 2001. Vogel was one of DISH's executive officers from 1994 to 1997, including serving as President from 1995 to 1997. Vogel is also currently serving on the boards of directors of Shaw Communications Inc. (which he joined in 2006), Universal Electronics, Inc. (which he joined in 2009), Sirius XM Holdings Inc. (which he joined in 2011) and AMC Networks Inc. (which he joined in 2013).

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[77] Ex. 11, EchoStar Communications Corp., Initial Statement of Beneficial Ownership (Form 3) (May 6, 2005) (Ortolf).

[78] Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Ortolf also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

Vogel owned shares of DISH stock when he joined the Board in 2005 and owned DISH stock through the remainder of the investigation period.[79] He owned 357,244 shares of DISH stock at the end of the Investigation Period.[80]

B. DISH's Relevant Legal Counsel

1. Stanton Dodge

Stanton Dodge joined DISH's Legal Department in 1996. In the late 1990s and early 2000s, Dodge worked with DeFranco on distributor and Retailer contracts in addition to other projects in the Legal Department. From 2003 until 2007, Dodge assisted Moskowitz in preparing board books. In 2007, Dodge succeeded Moskowitz as DISH's General Counsel.

As General Counsel, Dodge had authority to settle lawsuits for up to one million dollars without further approval. He did so from time to time, but Dodge also generally updated Ergen when settling matters. At Board meetings, Dodge provided litigation updates including recent developments, DISH's compliance efforts and material litigation against DISH. Dodge also provided litigation updates during regular meetings of the Audit Committee.

2. Jeffrey Blum

Jeff Blum joined DISH in 2005. From 2005 to 2009, he was a vice president responsible for overseeing litigation. Blum was not originally hired to manage the FCC issues, but he took responsibility for FCC issues later.

Blum dealt with DNC issues within DISH's Legal Department from 2005 until the end of the Investigation Period in 2013 and reported to DISH's General Counsel. During this time,

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[79] Ex. 12, EchoStar Communications Corp., Initial Statement of Beneficial Ownership (Form 3) (May 6, 2005) (Vogel).

[80] Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 22, 2013). As of March 7, 2013, Vogel also owned employee stock options that were either "currently" exercisable or that "may become" exercisable. *Id.*

Blum was part of an inter-department compliance team that focused on reducing the number of consumer DNC issues (the "Inter-Department Compliance Team").

3. Lori Kalani

Lori Kalani joined DISH's Legal Department in 2002. She worked on a variety of issues on Capitol Hill out of DISH's Washington, D.C. office. Later, she moved to DISH's Denver office, where she worked on a variety of regulatory issues, including FCC rules regarding spectrum. Outside of her work with regulators, Kalani did not work with Retailers, including on Retailer terminations. Kalani recalls only one interaction with the Board during a Board meeting, the topic of which she did not recall.

Kalani began building relationships with the state AGs around the time the AG Investigation began. As a result of these relationships, Kalani was involved in negotiating the 2009 AVC with the AGs. Kalani left DISH in 2009 to go into private practice; she remains outside counsel to DISH.

4. Brandon Ehrhart

Brandon Ehrhart joined DISH in December 2003. Initially, Ehrhart assisted more senior DISH inside counsel with contract review for commercial transactions and preparing DISH's SEC filings.

Sometime in 2008, Ehrhart became Assistant Secretary of DISH's Board and began preparing materials and books for meetings of the Board and attending and drafting minutes for such meetings. From 2008 through the end of the Investigation Period, Ehrhart attended substantially all meetings of DISH's Board and Board committees; he also played a substantial role in preparing DISH's SEC filings. Today, Ehrhart serves as a Senior Vice President, Deputy General Counsel and Corporate Secretary for DISH.

5. Brett Kitei

Brett Kitei joined DISH's Legal Department as inside counsel in 2008. Initially, Kitei managed discovery for the *U.S. v. DISH* litigation. Over time, Kitei began resolving other DNC lawsuits, monitoring DISH's compliance with the 2009 AVC and addressing other DNC compliance issues. Kitei did not interact directly with the Board.

6. Kelley Drye

In 2007, DISH retained Kelley Drye, specifically attorneys Lewis Rose and Alysa Hutnik, to assist with a civil investigation demand ("CID") from the FTC in 2005 (the "2005 FTC CID"). Rose had decades of experience counseling Fortune 500 companies on FTC compliance. He had built one of the preeminent FTC consumer protections practices in the country. He had worked on the key early DNC cases; and he had experience working with the Chief Attorney for the FTC. Hutnik's practice consisted almost entirely of FTC matters, and she specialized in TSR compliance.

Kelley Drye represented DISH in negotiations with the FTC to attempt to resolve the issues litigated in *U.S. v. DISH*. In that role, Kelley Drye communicated DISH's DNC compliance efforts to the FTC, relayed to DISH information regarding the FTC's receipt of complaints regarding DISH and advised DISH on matters related to DNC. Kelley Drye continues to advise DISH on regulatory matters today.

Lauri Mazzuchetti and Joseph Boyle of Kelley Drye represented DISH in the *U.S. v. DISH* litigation, although Kelley Drye was joined in that representation by Orrick prior to trial.

7. Helen Mac Murray

DISH retained Helen Mac Murray as outside counsel from 2003 through 2011 in response to the investigation by state AGs that led to the 2009 AVC. Specifically, DISH retained Mac Murray to communicate with the AGs, particularly the Washington State AG, who served

as the primary contact for the "executive committee" of the subset of AGs leading the investigation. Mac Murray is a national leader in the consumer protection arena, having consulted with and represented numerous entities regulated by federal and state consumer protection laws. Prior to entering private practice, Mac Murray served as the Chief of the Ohio Attorney General's Consmer Protection Section and the staff lead for enforcement actions brought by the National Association of Attorneys General Consumer Protection Committee.

Mac Murray shared proposals from the AGs with DISH and worked with DISH employees to identify facts to disprove allegations or identify positive information for use in negotiating better terms for DISH. Kalani was Mac Murray's main point of contact at DISH during the negotiation of the 2009 AVC. Mac Murray did not have contact with the Board.

C. DISH's Other Pertinent Employees

1. Amir Ahmed

DISH hired Ahmed in June 1993 as a sales manager. By 2001, DISH promoted Ahmed to VP of Sales, reporting to DeFranco.

During the Investigation Period, Ahmed was responsible for overseeing multiple sales channels for DISH, including the Retailers. Ahmed left DISH on January 31, 2006, but returned in June 2009 as Senior VP of Sales and Distribution. Ahmed left DISH again in August 2013, returning again toward the end of 2015.

2. Reji Musso

Musso joined DISH in 2000. Between 2000 and 2006, Musso, managed DISH's call center, organized the work flow of field technicians and managed key customer accounts such as ADT. In 2006, Musso joined the Retail Sales and Services Department, where she served as Operations Analysis Manager to build a process to manage consumer complaints related to

Retailers, including DNC complaints. In November 2012, Musso transferred to DISH's training department. In spring 2013, Musso retired from DISH.

3. Blake Van Emst

Van Emst joined DISH in 1996. In 2002, Van Emst moved to DISH's Denver office to manage retail sales and operations for all regional offices nationwide. In January 2008, Van Emst became DISH's first VP of Sales Operations, later changed to VP of Retail Services. As the VP of Retail Services, Van Emst handled Retailer on-boarding, payments to Retailers and chargebacks, updating the business rules governing DISH's relationship with Retailers, and managing communications to Retailers, including written "Facts Blasts," and live video "retailer chats," all in conjunction with other business groups at DISH.

4. Patrick Halbach

Halbach has served as DISH's Vice President of Internal Audit since February 2012. In his role in Internal Audit, Halbach monitors business risk at DISH and manages communication between Internal Audit and the various business areas of DISH. Halbach oversees drafting and testing of proposed audit plans and reviews interim results of audits.

Before joining DISH, Halbach spent 28 years in the audit industry, working at U.S. West and Quest Communications.

D. Pertinent Third-Parties

1. Ken Sponsler (CompliancePoint/PossibleNOW)

"PossibleNOW operated a number of web-hosted services to sellers and telemarketers to help them comply with the Do-Not-Call Laws. Beginning in early 2008, [DISH's] Outbound Operations used PossibleNOW's scrubbing services."[81] CompliancePoint, a wholly owned subsidiary of PossibleNow is "focused on providing consultative services to help companies

[81] *U.S. v. DISH*, 256 F. Supp. 3d 810, 835 (C.D. Ill. 2017).

comply with consumer contact regulations . . . our focus is not only on operational compliance with e-mail, mail, fax, debt calling, debt collection, we also provide retainer services and . . . assessment services."[82]

Sponsler began working at PossibleNow in 2005, providing TCPA consulting services. By 2008, Sponsler had built PossibleNow's consulting arm into a material aspect of PossibleNow's services, housed in a subsidiary, CompliancePoint. At that point, Sponsler became a Senior Vice President and General Manager of CompliancePoint. He is currently a Senior Vice President of CompliancePoint's litigation support group, working primarily for defendants in TCPA class actions. Among his credentials, Sponsler is a Certified Information Privacy Professional (CIPP), certified by the International Association of Privacy Professionals (IAPP), a Project Management Professional (PMP) certified by the Project Management Institute (PMI), and a Certified American Teleservices Association Self-Regulatory Organization (ATA-SRO) Auditor.

PossibleNow and CompliancePoint provided DNC compliance and consulting services to DISH and the Retailers during the Investigation Period. Sponsler was DISH's primary point of contact with PossibleNow and CompliancePoint during the Investigation Period. Sponsler was also an expert witness for DISH in the Underlying DNC Actions.

2. Jason Waldron (KPMG)

KPMG was first engaged by DISH in 2002 as DISH's registered public accountant/independent auditor. Waldron joined KPMG in 2002 as a certified public accountant. Around 2003, Waldron became a senior manager on KPMG's account for DISH. Waldron remained on the DISH account through 2005. In 2008, Waldron re-joined the DISH account as

[82] Ex. 719, Trial Transcript, at 765:21-766:14, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Nov. 2, 2016) (D.I. 714) (K. Sponsler Testimony).

the lead engagement partner. He remained in that position until 2012 when he "rolled off" the account in compliance with SEC rules and regulations. At that time, Arnold Foy at KPMG became the lead engagement partner on the DISH account.

KPMG's engagement with DISH is determined on an annual basis by the Audit Committee. In connection with its audit, KPMG reviews DISH's books and records and has discussions with DISH's Management to gain an understanding of DISH's business and to obtain reasonable assurance about whether the financial statements are free of material misstatement and whether effective internal control over financial reporting was maintained in all material respects.

FACTUAL FINDINGS BY THE SLC

I. Background on the DNC Laws

Plaintiffs would have DISH litigate the Claim that the Named Defendants knowingly caused or permitted DISH to violate the DNC Laws directly and through the Subject Retailers' violations.[83] To understand the Director Defendants' knowledge and DISH's compliance efforts, it is necessary to understand, at a high level, the contours of the DNC Laws and the effects of violating them. As discussed below, DNC Laws are very popular with consumers, but complex to comply with, at least in part because each call is governed by two different federal regulatory schemes and a separate state law. The DNC Laws are written to include "safe harbors" in recognition of the reality that there will inevitably be some violative calls caused by unintentional mistakes even when callers make every reasonable effort to comply with the DNC Laws.

[83] Compl. ¶¶ 64-68.

A. DNC Laws Generally

DNC Laws began with the creation of State Registries of phone numbers that telemarketers could not call absent an exception. DISH began purchasing them in 2001.[84] DISH promptly began acquiring the National Registry when it became operational on October 17, 2003 and federal law began to prohibit DISH from placing certain telemarketing calls to persons on the National Registry.[85] Both federal and state law also required DISH to maintain an internal list of consumers who have asked DISH specifically to be placed on DISH's DNC list (the "Internal DNC List").[86] In response, DISH established an Internal DNC List, which it updated repeatedly throughout the Investigation Period.[87] Furthermore, DISH implemented training on DNC compliance, including multiple PowerPoint presentations detailing for employees how to handle consumer requests to be added to DISH's Internal DNC List, which were available to all employees who came into contact with consumers.[88]

Consumers embraced DNC Laws:[89] "The FTC staff was surprised by consumer response to the launch of the Registry in 2003. Fifteen million consumers registered telephone numbers in

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84 *U.S. v. DISH*, 256 F. Supp. 3d at 823.

85 *Id.* at 827 ("The Registry was scheduled to begin operations on Oct. 1, 2003, but the start of operations was delayed on Oct. 17, 2003."); Ex. 204, Email from R. Bangert to B. Davis, et al. (Dec. 10, 2007), SLC DNC Investigation 0013829 at 829 ("Aug. 2003-EchoStar begin subscription to federal DNC list").

86 *U.S. v. DISH*, 256 F. Supp. 3d at 821-23.

87 *Id.* at 822 ("Dish maintained an Internal Do-Not-Call List.").

88 *Id.* ("Dish eventually developed a PowerPoint presentation to explain how to handle an Internal Do-Not-Call Request. Dish made the PowerPoint presentation available to all employees who came in contact with consumers, including telemarking employees and customer service employees.").

89 Ex. 13, Nils Kongshaug, Do-Not-Call List a Success ... Even for Telemarketers, ABC News (Aug. 14, 2005), https://abcnews.go.com/WNT/Business/story?id=1037365 (reporting that the public's response to the National Do-Not-Call Registry was "enthusiastic," with "roughly half the households in the United States" registering their phone numbers).

the first five days. Within two months of the launch, 40 million consumers had registered their telephone numbers."[90] By 2017, "[t]he FTC receive[d] 200,000 to 300,000 complaints on the [National] Registry complaint system every month."[91] State AGs similarly received numerous calls from consumers who were unhappy about telemarketing calls that they believed violated DNC Laws.[92] Consumers developed forums to publicly criticize companies that they believed were failing to comply with the DNC Laws.[93]

The DNC Laws specifically relevant to the SLC's Investigation are the federal Telephone Consumer Protection Act (the TCPA); the federal Telemarketing Sales Rule (the TSR); Cal. Bus & Prof Code § 17592 ("California DNC Law"); the Illinois Automatic Telephone Dialers Act ("Illinois DNC Law"); N.C. Gen. Stat. Ann. § 75-100 ("North Carolina DNC Law"); Ohio Rev. Code. Ann. § 1345 ("Ohio DNC Law," together with the California, Illinois, and North Carolina DNC Laws, the "Relevant State DNC Laws"), in each case as the law stood during the Investigation Period.

B. The TCPA

Between the judgments in *Krakauer* and *U.S. v. DISH*, DISH faces liability of approximately $8.5 million for calls that it (and its Authorized Telemarketers) were found to

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90 *U.S. v. DISH*, 256 F. Supp. 3d at 908.

91 *Id.*

92 *See, e.g.*, Ex. 167, Letter from State of North Carolina Department of Justice to D. Steele (Nov. 9, 2006), SLC DNC Investigation 0012848 ("As you know, this office has received, and continues to receive, numerous complaints from North Carolina consumers alleging that [DISH] Network has violated our do-not-call law. (As of today, we have received over 140 such complaints.).").

93 Ex. 404, Email from S. Lanning to M. Metzger et al. (Apr. 2, 2010), SLC DNC Investigation 0008472 at 474; *see also* Ex. 33, 71446075750—who calls me from 714-607-5750?, http://whocallsme.com/Phone-Number.aspx/7146075750 (last visited on Nov. 23, 2018).

have made in violation of the TCPA and approximately $136.8 million for calls that five Subject Retailers were found to have made in violation of the TCPA.[94]

The TCPA was enacted in 1991 and is enforced by the Federal Communications Commission ("FCC"). The TCPA covers many different aspects of telemarketing, including the disclosures that companies need to make when selling products over the telephone, the use of fax advertisements and DNC issues.[95] The TCPA directs the FCC to "prescribe regulations to implement the requirements" set forth in the TCPA.[96] The FCC's resulting regulation (the "FCC Rule") is codified at 47 C.F.R. § 64.1200.

1. Limitations on Calling under the TCPA

The TCPA regulates the time, manner and recipients of telemarketing calls, which it refers to as "telephone solicitation."[97] Notably, the FCC Rule excludes from the defined term "telephone solicitation" calls or messages to "any person with whom the caller has an established business relationship."[98] Calls that fail to comply with the requirements below ("Potentially Violative Calls" with respect to any DNC Law) are not violations of the TCPA if the caller had an established business relationship with the person called. This established business

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94 Ex. 250, Judgment, *U.S. v. DISH*, Case No. 09-03073 (C.D. Ill. June 5, 2017) (D.I. 799).

95 47 U.S.C.A. § 227 (b)(2)(D); 47 C.F.R. § 64.1200 (b); 47 U.S.C.A. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3).

96 47 U.S.C.A. §§ 227 (b)(2), (c)(2) and (e)(3).

97 "The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." 47 C.F.R. § 64.1200(f)(10).

98 47 C.F.R. § 64.1200(f)(12)(ii).

relationship could include either a transaction within the last 18 months[99] or an inquiry within the last three months.[100]

With respect to calls not protected by an established business relationship, the TCPA and the FCC Rule first prohibit telephone solicitation outside of the hours of 8:00 am to 9:00 pm local time of the person being called.[101]

Second, it is a violation of the TCPA and the FCC Rule to initiate any telephone solicitation to "[a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government."[102]

Third, the FCC Rule requires that any person initiating any telephone solicitation maintain an internal DNC list and have procedures in places related to that Internal List.[103] These procedures must meet certain minimum standards, which include: (1) having a written policy for maintaining the internal DNC list; (2) training personnel about the internal DNC list; and (3) recording requests for phone numbers to be added to the internal DNC list.[104] The FCC Rule then prohibits the person from making any calls to these numbers; the request "terminates an established business relationship . . . even if the subscriber continues to do business with the seller."[105]

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99 47 C.F.R. § 64.1200 (f)(5).

100 47 C.F.R. § 64.1200 (f)(5).

101 47 C.F.R. § 64.1200 (c)(1).

102 47 C.F.R. § 64.1200(c)(2).

103 47 C.F.R. § 64.1200 (d) ("The person or entity must "institute[] procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity.").

104 47 C.F.R. § 64.1200 (d).

105 47 C.F.R. § 64.1200 (f)(5)(i).

Fourth, under the FCC Rule, "no person or entity may initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party" unless certain exceptions are applicable.[106] These exceptions include if the call: "(1) is not made for a commercial purpose; (2) is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing; or (3) is made to any person with whom the caller has an established business relationship at the time the call is made."[107]

Fifth, the FCC Rule prohibits a person or entity from "abandon[ing] more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period."[108] A call is considered abandoned by the FCC Rule if "it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting" or if the person does not receive within two seconds of their completed greeting "a prerecorded identification message" that only states certain information of the telemarketer.[109]

2. Third Party Liability Under the TCPA

It is possible for an entity that does not actually dial a call to be legally responsible for the call if it violates the TCPA's FCC Rule. The FCC Rule provides that the "person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request."[110] Prior to 2012, it was unclear what standard applied to determine when this standard was met. On May 9, 2013, in response to a petition brought by DISH, the FCC clarified

106 47 C.F.R. § 64.1200 (a)(2).

107 47 C.F.R. § 64.1200 (a)(2)(i)-(v).

108 47 C.F.R. § 62.1200 (a)(6).

109 47 C.F.R. § 62.1200 (a)(6).

110 47 C.F.R. § 64.1200 (d)(3).

that the federal common law standard of agency applied to measure when a call was made on behalf of another person or entity.[111] This was the standard that DISH had advocated for in the alternative, believing that Retailers were not DISH's agents.[112]

3. Affirmative Defense and Safe Harbor for Potentially Violative Calls

The TCPA provides that "[i]t shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitation in violation of the regulations prescribed under this subsection."[113]

Calls to numbers on the National Registry that would otherwise violate the TCPA and FCC Rule may also be protected under the FCC Rule's Safe Harbor provision. Under the FCC Rule's Safe Harbor, a call to a number on the DNC Registry will not be a violation of the FCC Rule if:

1. The person or entity can "demonstrate that the violation is the result of error and that as part of [the entity or person]'s routine business practice, it meets" the following standards:

    a. "It has established and implemented written procedures to comply with the national do-not-call rules";

    b. "It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules";

    c. "It has maintained and recorded a list of telephone numbers that the seller may not contact";

    d. "It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version

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111 Ex. 45, Declaratory Ruling, *In the Matter of Joint Petition Filed by DISH Network. LLC*, CG Docket No. 11-50 (FCC May 9, 2013), SLC DNC Investigation 0004386.

112 Ex. 715, Comments of DISH Network, LLC, at 2, *In the Matter of Joint Petition Filed by Dish Network, LLC, et al.*, CG Docket No. 11-50 (FCC May 4, 2011).

113 47 U.S.C.A. § 227 (c)(5)(C).

of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made and maintains records documenting this process"; and

e. "It purchases access to the relevant do-not-call data from the administrator of the national database"

2. "It has obtained the subscriber's prior express invitation or permission"; or

3. "The telemarketer making the call has a personal relationship with the recipient of the call."[114]

4. Potential Damages for Violations of the TCPA

The TCPA gives state AGs and individual consumers standing to bring complaints on their own behalves for alleged violations of the TCPA.[115] During the Investigation Period, the TCPA provided that, subject to the requirements of due process, consumers could recover up to $500 per call made in violation of the TCPA, unless a defense of the Safe Harbor Provision applied.[116] Despite these potential damages, during the Investigation Period, the FTC routinely resolved TCPA actions for less than a million dollars.[117]

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114 47 C.F.R. § 64.1200 (c)(2)(i)-(iii).

115 47 U.S.C.A. §§ 227 (b)(3), (c)(5) and (g) (2018).

116 47 U.S.C.A. § 227(g); *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66-67 (1919) (due process is violated where "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable.").

117 Ex. 41, Consent Decree, *In the Matter of Sprint Nextel Corp. Compliance with the Commission's Company-Specific Do-Not-Call Rules*, EB-09-TC-325 (FCC Oct. 21, 2011) ($400,000); Ex. 36, Order of Forfeiture, *In the Matter of AZ Prime One Mortgage Corp.*, EB-07-TC-578 (FCC June 29, 2010) ($20,000); Ex. 21, Order of Forfeiture, *In the Matter of Dynasty Mortgage, LLC*, EB-03-TC-100 (FCC May 14, 2007) ($748,000); Ex. 28, Order of Forfeiture, *In the Matter of AZ Prime One Mortgage Corp.*, EB-07-TC-578 (FCC June 16, 2009) ($10,000); Ex. 14, Consent Decree, *In the Matter of T-Mobile USA, Inc.*, *Compliance with the Commission's Rules and Regulations Governing the National Do-Not-Call Registry*, EB-04-TC-010 (FCC Nov. 23, 2005) ($100,000); Ex. 9, Consent Decree, *In the Matter of Primus Telecommunications, Inc.*, *Compliance with the Commission's Rules and Regulations Governing the National Do-Not-Call Registry*, EB-03-TC-162 (FCC Sept. 7, 2004) ($400,000); Ex. 8, Consent Decree, *In the Matter of AT&T Corporation Apparent Liability for Forfeiture*, EB-03-TC020 (FCC July 8, 2004) ($490,000). *See also Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 901 (W.D. Tex. 2001).

C. The TSR

In *U.S. v. DISH*, DISH faces liability of approximately $10.9 million for calls that DISH (including its Authorized Telemarketers) was found to have made in violation of the TSR and approximately $157.1 million for calls that five Subject Retailers were found to have made in violation of the TSR.[118]

The FTC promulgated the TSR (the Telemarketing Sales Rule), codified at 16 CFR § 310, pursuant to Chapter 88 of the United States Code, the Telemarketing and Consumer Fraud and Abuse Prevention Act (the "Telemarketing Act"). The Telemarketing Act directs the FTC to "prescribe rules prohibiting deceptive telemarketing acts or practices and other abusive telemarketing acts or practices."[119] The Telemarketing Act further provides that any violation of any rule promulgated by the FTC pursuant to the Telemarketing Act will constitute a violation of Section 45 of chapter 2 of title 15 of the United States Code (the "FTC Act").[120] The FTC Act in turn broadly prohibits "unfair and deceptive acts or practices[,]"[121] and permits the United States government to recover civil penalties for violations under Section 45.[122]

The TSR has been amended substantively several times including in 1995, 2003 and 2008. The 2003 version of the TSR established the National Registry.[123] The creation of the National Registry was later ratified by Congress and codified at 15 U.S.C. § 6151. The National Registry became accessible to consumers and potential callers on October 1, 2003.

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118 *See infra* Factual Findings §§ X.D.2.f, 3.b.

119 15 U.S.C.A. § 6102 (a)(1).

120 15 U.S.C.A. § 6102(c)(1); 15 U.S.C.A. § 57a.

121 *Id.* § 45(a)(1).

122 *Id.* §§ 45(a)(2), (m)(1)(A).

123 16 C.F.R. § 310.4(b)(1)(iii).

1. Limitations on Calling

The TSR prohibits "deceptive telemarketing acts or practices" and "abusive telemarketing act[s] or practice[s]" by a "seller or a telemarketer."[124] A seller is defined in the TSR as "any person who, in connection with a telemarketing transaction, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration."[125] The TSR defines a telemarketer as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor."[126]

Section 310.4(b)(1) provides that it is an "abusive telemarketing act or practice and a violation of [the TSR]" for a telemarketer to initiate any outbound call to a person when (a) the person "previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered" or (b) "that person's telephone number is on the [National Registry]."[127]

It is also an "abusive telemarketing act or practice and a violation of the [TSR]" to abandon any outbound telephone call.[128] A call is abandoned under the TSR if "a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting."[129]

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124 *Id*. §§ 310.3, 310.4.

125 *Id*. § 310.2(dd).

126 *Id*. § 310.2 (ff).

127 *Id*. § 310.4(b)(1)(iii).

128 *Id*. § 310.4(b)(1)(iv).

129 *Id*. § 310.4(b)(1)(iv).

Additionally, it is an "abusive telemarketing act or practice and a violation of [the TSR]" to "initiat[e] any outbound telephone call that delivers a prerecorded message" unless the seller has received certain express approvals from the called person.[130]

The TSR also includes various restrictions on the manner of telemarketing. For example, telemarketing even subject to the restrictions above, is prohibited at any time other than between 8:00 am and 9:00 pm local time of the called person and any telemarketer must make certain disclosures to called persons including (1) the identity of the seller; (2) the purpose of the call; and (3) the nature of the goods or services."[131]

2. Third Party Liability Under the TSR

The TSR also imposes liability, enforceable by the FTC, on a person other than the one who directly placed a violative call. Specifically, it is a violation of the TSR for a seller to "*cause* a telemarketer to engage in the [] conduct" prohibited by Section 310.4(b)(1).[132] It is also a violation of the TSR "for a person to *provide substantial assistance or support* to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates" Section 310.4.[133] Each of these standards has been the subject of litigation over the precise scope of potential third-party liability.[134]

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130 *Id*. § 310.4(b)(1)(v).

131 *Id*. §§ 310.4(c) and (d).

132 *Id*. § 310.4(b)(1).

133 *Id*. § 310.3(b) (emphasis added).

134 *See, e.g.*, *Lucas v. Telemarketer Calling From (407) 476-5670 and Other Telephone Numbers*, 2014 WL 1119594, at *9 n.5 (S.D. Ohio Mar. 20, 2014) ("Plaintiff also has failed to allege the kind of 'substantial assistance or support to any . . . telemarketer' that would constitute a violation of the FTC rule.").

3. Defenses and Safe Harbor for Potentially Violative Calls Under the TSR

As with the TCPA, not every Potentially Violative Call that fails to comply with the limitations on calling discussed above is ultimately treated as a violation of the TSR. The TSR provides an established business relationship defense and a safe harbor for certain Potentially Violative Calls that would otherwise violate the TSR.

First, under Section 310.4(b)(1)(iii)(B)(2), a "seller or telemarketer" will not be liable for a call to a phone number on the National Registry if "the seller has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls" by or on behalf of the seller.[135]

Second, the TSR provides a safe harbor protection from liability for Potentially Violative Calls that would otherwise violate the TSR if the seller or telemarketer implementes specified business practices designed to limit Potentially Violative Calls. Under Section 310.4(b)(3), a "seller or telemarketer" will not be liable for a call to a phone number on the National Registry or on an internal DNC list that would otherwise violate § 310.4(b)(2), if the seller or telemarketer can demonstrate that as part of its "routine business practice" it:

> (1) established and implemented written procedures to comply with § 310.4(b)(iiii);
>
> (2) trained [its] personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);
>
> (3) "the seller, or a telemarketer or another person acting on behalf of the seller [], has maintained and recorded a list of telephone numbers the seller [] may not contact, in compliance with § 310.4(b)(1)(iii)(A);
>
> (4) the seller or telemarketer uses "a process to prevent telemarketing to any telephone number on any list established

[135] 16 C.F.R. § 310.4(b)(1)(iii)(B)(2).

> pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of" the National DNC Registry "no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process";
>
> (5) "the seller or a telemarketer or another person acting on behalf of the seller [], monitors and enforces compliance with the procedures established pursuant to §310.4(b)(3)(i); and
>
> (6) "any subsequent call otherwise violating paragraph (b)(1)(ii) or (iii) of this section is the result of error and not of failure to obtain any information necessary to comply with a request pursuant to paragraph (b)(1)(iii)(A) of this section not to receive further calls by or on behalf of a seller[.]"[136]

The FTC issued a statement in 1995 explaining the application of the TSR Safe Harbor: "If a company is complying in a reasonable manner with the requirements of the safe harbor, any true error should be excused. On the other hand, numerous purportedly 'erroneous' calls to consumers who previously had asked not to be called may be a sign that the seller's adopted procedures are ineffective, and that the safe harbor should no longer be available."[137]

The TSR also offers a safe harbor protection for certain abandoned calls that would otherwise be a violation of § 310.4(b)(1)(iv). A seller or telemarketer will not be liable for violating §310.4(b)(1)(iv) if:

> (1) "The seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured over the duration of a single calling campaign, if less than 30 days, or separately over each successive 30-day period or portion thereof that the campaign continues";
>
> (2) "The seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call";

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136 *Id*. § 310.4 (b)(3).

137 Federal Trade Commission, TSR, 60 Fed. Reg. 43842, 43855 (Aug. 23, 1995) (codified at 16 C.F.R. Pt. 310).

(3) "Whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed"; and

(4) "The seller or telemarketer, in accordance with § 310.5(b)-(d), retains records establishing compliance with § 310.3(b)(4)(i)-(iii)."[138]

4. Civil Penalties for Violations of the TSR

The TSR does not specify the civil penalties that the FTC can recover for violations of the TSR. Instead, TSR violations are addressed under Section 45(m)(1)(A) of the FTC Act, which permits the United States government to "commence a civil action to recover a civil penalty . . . against any person, partnership, or corporation which violates any rule under [Section 45] respecting unfair or deceptive acts or practices" where that violation is done "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule."[139] In such an action, through February 8, 2009, the FTC could recover up to $11,000 for each violation and between February 9, 2009 and April 10, 2014, the FTC could recover up to $16,000 for each violation.[140] Despite these lofty limits, prior to the end of the Investigation Period, litigation of TSR complaints was generally resolved for as little as $1 per call.[141]

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138 16 C.F.R. § 310.4(b)(4).

139 15 U.S.C.A. § 45(m)(1)(A).

140 16 C.F.R. § 1.98(d).

141 *U.S. v. Comcast Corp.*, C.A. No. 09-1589, 2009 WL 1181046, at *1, *3 (E.D. Pa. Apr. 16, 2009) ("Comcast caused its internal call centers and third-party telemarketing vendors to make over 900,000 outbound telephone calls . . . in violation of the [TSR]. . . . Judgment in the amount of [$900,000] is hereby entered against Comcast as a civil penalty[.]").

D. The State DNC Laws at Issue in the Underlying DNC Actions

In *U.S. v. DISH*, DISH (including its Authorized Telemarketers) faces liability of approximately $3.1 million for calls that it and its Authorized Telemarketers were found to have made in violation of the DNC Laws of California, North Carolina and Ohio and approximately $24.9 million for calls that five Subject Retailers were found to have made in violation of these State DNC Laws.[142] *U.S. v. DISH* also considered DISH's potential liability under the DNC Laws of Illinois, but found no violations.[143]

Most states have enacted laws regulating telemarketing above and beyond the federal laws.[144] State DNC Laws vary in terms of scope and requirements. For example, some states

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142 *See infra.* Factual Findings § X.D.3.b. *Krakauer* did not address compliance with State DNC Laws.

143 *U.S. v. DISH*, 256 F. Supp. 3d 810, 962 (C.D. Ill. 2017).

144 *See* Ala. Code Ann. § 8-19C (Alabama); Alaska Stat. Ann. § 45.50.475 (Alaska); Ariz. Rev. Stat. Ann. § 44-1278 (Arizona); Ark. Cod. Ann. § 4-99-405 (Arkansas); Cal. Bus & Prof Code § 17592 (California); Colo. Rev. Stat. Ann. § 6-1-904 (Colorado); Conn. Gen. Stat. Ann. § 42-288a (Connecticut); 6 Del. C. § 2507A (Delaware); Fla. Stat. Ann. § 501.059 (Florida); Ga. Code. Ann. § 46-5-27 (Georgia); Haw. Rev. Stat. § 481P-3 (Hawaii); Idaho Code Ann. § 48-1003 (Idaho); 815 Ill. Comp. Stat. 305/30; 815 Ill. Comp. Stat. 413/15 (Illinois); Ind. Code Ann. § 24-4.7-4-1 (Indiana); Kan. Stat. Ann. § 50-670a (Kansas); Ky. Rev. Stat. Ann. § 367.46955 (Kentucky); La. Rev. Stat. Ann. § 45:844.14 (Louisiana); Me. Rev. Stat. tit. 10, § 1499-B (Maine); Md. Code Ann. § 8-204 (Maryland); Mass. Gen. Laws Ann. Ch. 159C, § 2 (Massachusetts); Mich. Comp. Laws Ann. § 445.111 (Michigan); Minn. Stat. Ann. § 325e.27 (Minnesota); Miss. Code Ann. § 77-3-707 (Mississippi); Mo. Ann. Stat. § 407.1098 (Missouri); Mon. Code. Ann. § 30-14-1602 (Montana); Neb. Rev. Stat. § 86-248 (Nebraska); Nev. Rev. Stat. Ann. § 228.500 (Nevada); N.H. Rev. Stat. Ann. § 359-E:8 (New Hampshire); N.J. Stat. Ann § 56:8-128 (New Jersey); N.M. Stat. Ann. § 57-12-22 (New Mexico); N.Y. Gen. Bus. Law § 399-z (New York); N.C. Gen. Stat. Ann. § 75-102 (North Carolina); N.D. Cent. Code Ann. § 51-28-06 (North Dakota); Ohio Rev. Code. Ann. § 4719 (Ohio); Okla. Stat. Ann. Tit. 15, § 775B.6 (Oklahoma); Or. Rev. Stat. Ann. §§ 646.563; 646.569 (Oregon); 73 Pa. Stat. Ann. § 2245 (Pennsylvania); R.I. Gen. Laws Ann. § 5-61 (Rhode Island); S.C. Code Ann. § 37-21 (South Carolina); S.D. Codified Laws § 49-31-99 (South Dakota); Tenn. Code Ann. § 65-4-404 (Tennessee); Tex. Bus. & Com. Code Ann. § 304.052 (Texas); Utah Code Ann. § 13-25a-103 (Utah); Vt. Stat. Ann. Tit. 9, § 2464a (Vermont); Va. Code. Ann. §§ 59.513, 59.514 (Virginia); Wash. Rev. Code Ann. § 19.158.110 (Washington); Wis. Stat. Ann. § 100.52 (Wisconsin); Wyo. Stat. Ann. § 40-12-302 (Wyoming).

have established their own DNC registry, while others rely exclusively on the National Registry. And, some states also regulate or entirely prohibit automated telemarketing. Overall, the statutory frameworks of California, Illinois, North Carolina and Ohio, which were at issue in *U.S. v. DISH*, are reflective of the national landscape of state telemarketing laws.

1. California DNC Law

In *U.S. v. DISH*, DISH faces liability of approximately $2.8 million for calls that DISH (including its Authorized Telemarketers) was found to have made in violation of California DNC Laws and approximately $21.8 million for calls that the Subject Retailers were found to have made in violation of California DNC Laws.[145]

a. Limitations on Calling

Under California state law, "no telephone solicitor shall call any telephone number on the then current 'do not call' list" for the purpose of "seek[ing] to make any telephone solicitation or attempted telephone solicitation."[146] Certain exceptions to this rule may apply, including if the "telephone solicitor has an established business relationship with the subscriber."[147]

California defines a telephone solicitor as "any person or entity who, on his or her own behalf or through salespersons or agents, announcing devices, or otherwise, makes or causes a telephone call to be made to a California telephone number that . . . seeks to make any telephone solicitation or attempted telephone solicitation."[148] "A person or entity does not necessarily qualify as a telephone solicitor if the products or services of the person or entity are sold or

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145 *See infra.* Factual Findings § X.D.3.b.

146 Cal. Bus & Prof Code § 17592(c)(5).

147 *Id.* § 17592(e)(4).

148 *Id.* § 17592(a)(1).

marketed by an independent contractor whose business practices are not controlled by the person or entity."[149]

b. Safe Harbor

"It shall be an affirmative defense to any action brought under [the California DNC Law] that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketing instruction and training."[150]

2. Illinois DNC Law

In *U.S. v. DISH*, DISH was not found liable for any of the calls that either it or the Subject Retailers were alleged to have made in violation of Illinois DNC Law.[151]

a. Limitations on Calling—Using an Autodialer

The Illinois Automatic Telephone Dialers Act prohibits "play[ing] a prerecorded message placed by an autodialer without the consent of the called party."[152] It is a violation of the Illinois statute "to make or cause to be made telephone calls utilizing an autodialer in a manner that does not comply with Section 15" of the statute.[153] Section 15 sets forth various requirements for the use of an autodialer, including not making calls between 9:00 pm and 9:00 am and disconnecting the call within 30 seconds after the call is terminated by the subscriber or the autodialer.[154] A

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149 *Id.* § 17592(b).

150 *Id.* § 17593(d).

151 *U.S. v. DISH*, 256 F. Supp. 3d at 962 (finding that DISH had an established business relationship with each Illinois citizen that was called. The Illinois statute does not define an "existing business relationship" or provide a time limit to an EBR. Thus, the Illinois Court applied the plain meaning of the term, finding that the calls made were intended for existing DISH customers, and therefore to individuals with whom DISH had an EBR under Illinois state law.).

152 815 Ill. Comp. Stat. 305/30(b).

153 *Id.* 305/30(a).

154 *Id.* 305/15.

violation of Automatic Telephone Dialers Act also constitutes a violation of Illinois' Consumer Fraud and Deceptive Business Practices Act.[155]

The Illinois statute's prohibition on use of autodialers does not apply to "calls made to any person with whom the telephone solicitor has a prior or existing business relationship."[156] But, any call made by an autodialer must still "not be operated in a manner that impedes the function of any caller ID when the telephone solicitor's service or equipment is capable of allowing the display of the solicitor's telephone number."[157]

3. North Carolina DNC Law

In *U.S. v. DISH*, DISH faces liability of approximately $155,000 for calls that DISH (including its Authorized Telemarketers) was found to have made in violation of North Carolina DNC Law and approximately $33,000 for calls that Subject Retailers were found to have made in violation of North Carolina DNC Law.[158]

Under North Carolina DNC Laws, a citizen of North Carolina, in addition to the state, has a right to bring a private action if the citizen "received a telephone solicitation from or on behalf of a telephone solicitor in violation of [the statute]."[159]

a. Limitations on Calling

North Carolina state law prohibits a telephone solicitor from making a telephone solicitation to "a telephone subscriber's telephone number if the telephone subscriber's telephone number appears in the latest edition of the [National Registry] or "if the telephone subscriber

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155 *Id.* 505/2Z.

156 *Id.* 305/20. The court in *U.S. v. DISH* found that DISH had a valid defense under this exception. *U.S. v. DISH*, 256 F. Supp. 3d at 962.

157 815 Ill. Comp. Stat. 305/20(b); 815 Ill. Comp. Stat. 305/15(d).

158 *See infra* Factual Findings § X.D.3.b.

159 N.C. Gen. Stat. Ann. § 75-105(b).

previously has communicated to the telephone solicitor a desire to receive no further telephone solicitations from the telephone solicitor to that number."[160] The prohibitions do not apply where the telephone subscriber has an established business relationship with the telephone solicitor.[161]

A telephone solicitor is defined as "[a]ny individual, business establishment, business, or other legal entity doing business in this State that, directly or through salespersons or agents, makes or attempts to make telephone solicitations or causes telephone solicitations to be made."[162] Telephone solicitors are required to "implement systems and written procedures to prevent further telephone solicitations to any telephone subscriber who has asked not to be called again at a specific number or numbers or whose telephone number appears in the "[National Registry,]" to "train, monitor, and enforce compliance by its employees and . . . by its independent contractors in those systems and procedures" and to "ensure that lists of telephone numbers that may not be contacted by the telephone solicitor are maintained and recorded."[163]

It is also prohibited under North Carolina state law to "use an automatic dialing and recorded message player to make an unsolicited telephone call" unless several requirements are met.[164]

4. Ohio Law

In *U.S. v. DISH*, DISH faces liability of approximately $3.1 million for calls that only Subject Retailers were found to have made in violation of Ohio DNC Law.[165]

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160 *Id*. §§ 75-102(a), (b).

161 *Id*. § 75-103(a)(2).

162 *Id*. § 75-101(10).

163 *Id*. § 75-102(d).

164 *Id*. § 75-104(a).

Ohio did not bring a claim against DISH under a state telemarketing law. Instead, Ohio brought a claim for violating its statute that generally prohibits "unfair or deceptive acts or practices" in connection with a consumer transaction.[166]

II. DISH Business Overview[167]

The Claims seek damages caused by telemarketing calls made by DISH and Retailers that were found to violate the DNC Laws in the Underlying DNC Actions—and seek to hold the Director Defendants personally liable for these damages. The context of DISH's business, and the roles that Retailers and telemarketing played in that business are helpful to understanding DISH's approach to the risks associated with telemarketing, working with Retailers, and allowing Retailers to sell DISH service by telemarketing. As discussed in more detail below, the Board was generally not involved in these issues. DISH Management permitted DISH to take these risks because it believed that DISH's relationship with the Retailers was structured in a way that made Retailers responsible for their own telemarketing compliance and believed that DISH devoted appropriate resources to ensuring its own telemarketing compliance.

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165 *See infra* Factual Findings X.D.3.b.

166 *See* Ohio Rev. Code. Ann. § 1345.

167 DISH's compliance with the TCPA, TSR, and certain state DNC Laws was litigated in the Underlying DNC Actions. Together, the Underlying DNC Actions awarded $341,342,800 in damages against DISH based on findings that DISH or Retailers violated the TCPA, TSR and certain state DNC Laws. Plaintiffs base the Claims that they would have DISH bring against the Named Defendants on the findings made and damages awarded in the Underlying DNC Actions. DISH has appealed those findings; DISH's appeals remain ongoing. Nonetheless, the SLC has proceeded as though the rulings made in the Underlying DNC Actions will stand and were well reasoned based upon the evidence presented and legal standards applied. The SLC's determinations do not depend upon the outcome of DISH's appeals in the Underlying DNC Actions.

A. DISH[168]

Ergen, Mrs. Ergen, and DeFranco formed DISH (then called EcoSphere Corporation) in 1980.[169] DISH, called EchoStar at the time, became a publicly-traded company in 1995. Today, DISH is a publicly-traded company with approximately 17,000 employees, annual revenue over $14 billion and more than 13 million pay-TV subscribers.[170]

DISH's Board takes a long-term approach to management of the company. Charlie Ergen, DISH's Chairman, has been DISH's CEO at various times and is DISH's principal stockholder, with beneficial ownership of approximately 48% of DISH's total equity securities and control over approximately 78.5% of DISH's voting power.[171] The majority of his net worth, Mrs. Ergen's net worth and DeFranco's net worth depends on the long-term value of DISH's equity. Unlike many publicly-traded companies in which the CEO's incentives may be tied to a particular quarter or year, DISH's Chairman's monetary incentives are yoked to DISH's long-term equity value. Each Director Defendant reiterated when interviewed that his or her focus during the Investigation Period was on long-term value. This focus on building something long-lasting informs the manner in which DISH deals with customers, suppliers, employees and Retailers.

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168 DISH operates its pay-TV business through its subsidiary DISH Network LLC; DISH itself operated under different names at different points referenced in the Report or during the Investigation Period. For simplicity, this Report refers to both DISH and DISH Network LLC (as well as DISH Network, LLC's predecessors) as DISH throughout.

169 *U.S. v. DISH*, 256 F. Supp. 3d at 820.

170 Ex. 51, DISH Network Corp., Annual Report (Form 10-K), at 22 (Feb. 21, 2018); Ex. 54, Quick Facts, at 1, DISH Network Corp., *available at* http://about.dish.com/company-info (last visited Nov. 20, 2018).

171 Ex. 51, DISH Network Corp., Annual Report (Form 10-K), at 52 (Feb. 21, 2018).

1. DISH's TV Service

DISH started out as a company installing and selling satellite dish hardware.[172] DISH began offering satellite television service under the DISH name in 1996.[173] In 2008, DISH spun off its technology and set-top box business into a separate company, EchoStar (the "Spin Off").[174] DISH executed the Spin Off to focus on its pay-TV video services business.[175] In 2008, DISH also began acquiring wireless spectrum.[176] But, DISH's consumer offerings remained focused on its pay-TV services throughout the Investigation Period.

DISH sells its pay-TV services subject to term contracts between DISH and the customer. Customer longevity is a key business concern for DISH. Its SEC filings warn stockholders that, "[i]f we do not improve our operational performance and customer satisfaction, our gross subscriber additions may decrease and our subscriber churn may increase."[177] DISH incurs significant upfront costs with each new customer activation, in the form of equipment costs, installation costs, and promotional discounts.[178] If the customer relationship goes as planned, DISH recoups this initial investment over two to three years.[179] But, DISH loses money if the customer cancels before then.[180]

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172 *U.S. v. DISH*, 256 F. Supp. at 820.

173 *Id.*

174 Ex. 25, DISH Network Corp., Annual Report (Form 10-K), at 1 (Mar. 2, 2009).

175 *Id.*

176 Ex. 42, DISH Network Corp, Annual Report (Form 10-K), at 29-30 (Feb. 23, 2012).

177 Ex. 25, DISH Network Corp., Annual Report (Form 10-K), at p. i (Mar. 2, 2009).

178 *U.S. v. DISH*, 256 F. Supp. 3d at 846.

179 *Id.*

180 *Id.*

Two consequences flow from this long-term approach. First, customer satisfaction is a business imperative for DISH.[181] The ways in which DISH telemarketed or otherwise contacted consumers in general and its customers in particular were evaluated through this lens. For example, there were multiple instances in which DNC Laws permitted DISH to make calls to customers at certain times or in certain manners, but DISH had a policy of not making those calls if Management expected a negative effect on consumer satisfaction.[182] DISH's Board and Management both believed that calling someone whose numer was on a DNC list would never be good for business.[183] In DISH's view, consumers who felt badgered would not have a positive perception of DISH; even if they became DISH customers, they would not stay DISH customers for long.[184] Unwanted calls were bad for business and did not fit with DISH's long-term goals.

Second, the "churn" rate—the rate at which DISH customers sign up and eventually cancel their service—is a key business metric for DISH.[185] DISH believed that certain customer

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181 Ex. 42, DISH Network Corp, Annual Report (Form 10-K), at 21 (Feb. 23, 2012).

182 *See, e.g.*, Ex. 416, Email from J. Montano to D. Baretta (Oct. 14, 2010), SLC DNC Investigation 0010165 ("As a business rule and to avoid complaints we historically have not conducted any outbound dialing on Federal holidays."); 16 CFR § 310.4(c) (not prohibiting calls on Federal or state holidays).

183 *See* Ex. 248, Trial Transcript, at 1796:18-22, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 2, 2016) (D.I. 622) (M. Mills Testimony).

184 *See* Ex. 248, Trial Transcript, at 1797:3-10, *U.S. v. DISH*, C.A. No. 09-03073 (Feb. 2, 2016) (D.I. 622) (M. Mills Testimony); Ex. 249, Trial Transcript, at 2133:14-24, *U.S. v. DISH*, C.A. No. 09-03073 (Feb. 3, 2016) (D.I. 625) (B. Neylon Testimony); Ex. 247, Trial Transcript, at 1484:6-24, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

185 *U.S. v. DISH*, 256 F. Supp. 3d at 845-46.

characteristics were associated with lower churn rate and thus higher profitability.[186] More than DISH wanted new activations, DISH wanted quality, loyal customers.[187]

2. DISH's Government Relations

DISH works to foster good relationships with regulators. Both DISH's core satellite TV business and DISH's emerging foray into wireless spectrum are heavily regulated.[188] Throughout the Investigation Period, DISH had employees dedicated to responding to any concerns that regulators had with DISH.[189] In the context of telemarketing, this often took the form of responding to consumer complaints passed along by state AGs. In other contexts, DISH met and spoke regularly with regulators at the FCC and FTC, as well as states' AGs. Throughout these interactions, DISH focused not only on its immediate objectives, but also on the fact that it would need to work with these regulators in the future on a variety of issues.

DISH dealt with state AGs and consumer protection bureaus routinely. Across the country, approximately 14.5% of pay-TV households are DISH TV customers.[190] DISH

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186 *See, e.g.*, Ex. 720, Sales Overview (Nov. 6, 2008), SLC DNC Investigation 0010650 at 655 (listing as a 2009 goal, "obtain[ing] high quality subscribers with correct credit criteria").

187 Ex. 131, Email from A. Ahmed to E. Myers (Oct. 25, 2005), SLC DNC Investigation 0012482.

188 *See* Ex. 27, DISH Network Corp., Quarterly Report (Form 10-Q), at ii (May 11, 2009) ("We are subject to significant regulatory oversight and changes in applicable regulatory requirements could adversely affect our business.").

189 *See, e.g.*, Ex. 128, Letter from D. Steele to R. Deitch (Sept. 22, 2005), SLC DNC 0015586; Ex. 199, Email from L. Kalani to R. Menjivar (FTC Investigator) (Sept. 18, 2007), SLC DNC Investigation 0015333.

190 Ex. 50, Trefis Team, Why Dish Network's Pay TV Revenue Pressure Is Likely to Continue, Forbes (Dec. 20, 2017), https://www.forbes.com/sites/greatspeculations/2017/12/20/why-dish-networks-pay-tv-revenue-pressure-is-likely-to-continue/#4affdd7e29b2 .

provides service in every state in the country.[191] Regardless of how much emphasis DISH places on its reputation and goodwill and on retaining customers, some customers will inevitably be unhappy with their DISH service, some consumers will complain to their consumer protection bureau, and some customers will even sue DISH. Given the sheer volume of interactions that DISH's thousands of employees had with the public, occasional complaints or lawsuits did not indicate a systematic problem, even in the view of the state AGs and consumer protection bureaus.[192]

3. DISH's DNC Compliance

During the investigation Period, DISH Management addressed DNC compliance within DISH and by DISH's Retailers as part of the day to day business operations of DISH:

With respect to DISH's DNC compliance, as discussed in more detail in Factual Findings Section IV below, DISH made substantial efforts. DISH's Legal Department was given the authority to direct the business changes necessary to achieve compliance. Management formed Outbound Operations, a department dedicated to achieving DNC compliance for all of DISH's own calls as well as calling campaigns that DISH directed through its Authorized Telemarketers. And, DISH hired PossibleNow, which Management considered the best DNC compliance consultant in the industry, to perform a second scrub of DISH's calls, to audit DISH's compliance, and to advise DISH's employees on ways to improve compliance.

With respect to Retailers' DNC compliance, as discussed in more detail in Factual Findings Section V below, although Management believed that DISH was not legally responsible

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191 *See* Ex. 720, Sales Overview (Nov. 6, 2008), SLC DNC Investigation 0010650 at 651; *see also* Ex. 247, Trial Transcript, at 1442:25-1443:2, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

192 *See infra* Factual Findings § V.F.4 (chart of disciplinary actions taken by DISH against Retailers).

for DNC compliance by these independent businesses, DISH invested substantial resources in pushing Retailers to comply with the DNC Laws for customer service reasons. Among other things, DISH contractually required Retailers to comply with the DNC Laws. Management formed a Compliance Department tasked with enforcing Retailers' contractual obligations, including Retailers' agreement to comply with DNC Laws. Management provided information to Retailers on changes in DNC laws and reiterated the importance of complying with DNC Laws. Management negotiated for PossibleNow to provide compliance services to Retailers at a discounted rate. Management investigated the telemarketing complaints that it received from consumers. And, DISH terminated Retailers that Management believed would not make the changes necessary to comply with DNC Laws.

4. The Board's Role at DISH

The Board of DISH sets the strategic direction and moral character and tone for the company. The Board makes certain strategic decisions for DISH. The Board also reviews and addresses matters as required by regulation, for example, reviewing and approving DISH's SEC filings.[193] As with all large corporations, the Board is not, however, and cannot be involved in every decision made by DISH or every action taken by DISH.

As is typical of large, publicly-traded companies, the Board relies upon Management to execute the Board's vision and expectations for DISH. The Board also relies on Management, with the benefit of multiple redundant channels of information, to bring material concerns to the Board's attention. For a company as large as DISH, issues may implicate tens of millions of dollars without being so material as to require consideration by the Board.

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[193] *See, e.g.*, Ex. 368, DISH Minutes of Regular Board Meeting (Feb. 24, 2009), SLC DNC Investigation 000828 at 837-38.

The Board has formally delegated authority to DISH's Chairman (Ergen) to approve ordinary course expenditures and to spend up to $50 million per non-ordinary course of business transaction . . . without further need to consult with or seek prior approval from the full Board of Directors[.]"[194] Ergen is authorized to delegate authority within those spending limits to other DISH employees.[195] Ergen and other members of Management handle DISH's day-to-day operations without Board involvement.

Even where DISH's Board does specifically consider an issue, it directs Management to carry out the actions directed. To that end, DISH's Board resolutions routinely include a general enabling resolution that DISH's officers are

> 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[.][196]

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194 Ex. 276, Certificate of the Assistant Secretary (Dec. 2, 2004), SLC DNC Investigation 0004187.

195 *Id.* (stating that "the Chairman and Chief Executive Officer, be, and he hereby is, subject in each case to the per-transaction/expenditure spending limits set forth above, to establish the spending limits for other employees of the Corporation and its subsidiaries, . . . without further need to consult with or seek prior approval from the full Board of Directors. . . .").

196 *See, e.g.*, Ex. 368, DISH Minutes of Regular Board Meeting (Feb. 24, 2009), SLC DNC Investigation 0002828 at 849.

a. DNC Compliance Was Not a Board Level Issue

The Claims assert that the Director Defendants "participated in, approved and/or permitted" violations by DISH and Retailers of DNC Laws.[197] DNC compliance, however, was not a Board-level issue during the Investigation Period.[198] DNC was one of many compliance issues that DISH managed.[199] DISH viewed other compliance issues, such as Retailer disclosures and advertising, as larger potential risks to DISH's business. Thus, with the benefit of a substantial oversight structure, including an SEC reporting process, internal and external auditors, an audit committee and counsel, DISH's Board relied on Management to address DNC compliance during the Investigation Period with limited exceptions discussed below.[200]

In addition to this limited oversight, some consumers called or emailed Director Defendants with their DNC complaints directly. Ergen, DeFranco, Mrs. Ergen, and Vogel were all contacted by customers claiming that DISH had called them in violation of DNC Laws.[201] In each case, the Director Defendant told Management to investigate and fix the issue. For

197 Compl. ¶ 59; *see also id.* ¶¶ 56, 66.

198 There is no documentation reflecting formal DNC discussions at the DISH Board level prior to the filing of *U.S. v. DISH* in 2009. However, DISH's practices with respect to keeping minutes leave open the possibility that such discussions occurred. During his SLC interview, Mr. Goodbarn recalls DNC discussions at the Board level beginning in 2003.

199 Ex. 42, DISH Network Corp., Annual Report (Form 10-K), at 9-16 (Feb. 23, 2012); *see also id.* at iii ("We are subject to significant regulatory oversight[.]"); s*ee,e.g.*, 47 U.S.C.A. § 227 (b)(2)(D) (regulation governing telemarketing disclosures); 47 C.F.R. § 64.1200 (b); 47 U.S.C.A. § 227(b)(1)(C); 47 C.F.R. § 64.1200(a)(3); 16 C.F.R. §§ 310.4(c) and (d).

200 *U.S. v. DISH*, 256 F. Supp. 3d 810, 848-49 (C.D. Ill. 2017) (noting the involvement of the Legal Department, Internal Audit Department, and Retail Services in DNC compliance at DISH).

201 *See, e.g.*, Ex. 293, Email from D. Moksowitz to C. Ergen, et al. (Aug. 2, 2006), SLC DNC Investigation 0002211 (call received at Ergen home); Ex. 154, Email from J. DeFranco to M. Metzger, et al. (Aug. 7, 2006), SLC DNC Investigation 0012929 (email received by J. DeFranco); Ex. 297, Email from D. Moskowitz to C. Ergen, et al. (Aug. 8, 2006), SLC DNC Investigation 0005004 (email received by C. Ergen); Ex. 302, Email from C. Vogel to C. Kulig, et al. (Aug. 23, 2006), SLC DNC Investigation 0002177 (voicemail received by C. Vogel).

example, when Ergen and Moskowitz were contacted by consumers with DNC complaints, they personally responded with assurances that DISH would work to resolve the situation.[202] When DeFranco was contacted by consumers with DNC complaints, he directed Retail Services to investigate.[203] Vogel gave out his cell phone number to an aggrieved consumer.[204] Mrs. Ergen

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[202] *See, e.g.*, Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 0001142 at 142 ("It is unacceptable to continue to have this problem. Who owns this issue and who is going to fix it?"); Ex. 362, Email from C. Ergen to L. Sees (Dec. 2, 2008), SLC DNC Investigation 0009731 ("I would be most grateful if perhaps you would let us contact you and work with us to help discover who this person or company is. We will then take the appropriate action against them. . . . Thank you again for bringing this matter to my attention. We take this very seriously and want to solve this problem."); Ex. 716, Email from B. Han to J. Chambers (Sept. 24, 2008), SLC DNC Investigation 0002174 (C. Ergen writing: "I am sorry about this. you are NOT receiving calls from Dishnetwork but probably someone who wants to sell your name to a retailer against our rules. I will have Bernie Han (our CFO) call you and maybe we can get this stopped."); Ex. 311, Email from "jaytee" to C. Ergen (Oct. 3, 2006), SLC DNC Investigation 0005903 ("Thank you for your email. We do take any call to our customers that [is] not desired as serious. . . . . We would appreciate your help in solving this problem. I can assure you Dishnetwork does not condone these calls."); Ex. 307, Email from L. Barron to C. Ergen (Sept. 27, 2006), SLC DNC Investigation 0005901 ("We would like your assistance to find this company. I have copied our general counsel, David Moskowitz. I would like him to contact you so we can solve this mutual problem. Again, thank you for bringing this to my attention."); Ex. 302, Email from C. Vogel to C. Kulig, et al. (Aug. 23, 2006), SLC DNC Investigation 0002177 at 177-78 (C. Ergen writing: "i am confident this is not dishnetwork calling you but more likely someone who is 'representing' they are dishnetwork and trying to sell you something. If it is ok i would like our general council [sic] to check with you so we can identify the caller. He will check to be sure you are on our do not call list as well to be sure. I am sorry about this problem but thank you for bringing it to my attention."); Ex. 297, Email from D. Moskowitz to C. Ergen, et al. (Aug. 8, 2006), at SLC DNC Investigation 0005004 at 004 ("Again, my apologies for the inconvenience. We will continue to work to put an end to these practices."); Ex. 261, Email from M. Davidson to J. DeFranco (Feb. 25, 2003), at SLC DNC Investigation 0009615 (C. Ergen writing: "[W]e will check it out.").

[203] *See* Ex. 327, Email from J. DeFranco to E. Carlson, et al. (Aug. 27, 2007), SLC DNC Investigation 0005834 ("Please start the investigation."); *see also* Ex. 427, Email from J. DeFranco to M. Metzger (Mar. 31, 2011), SLC DNC Investigation 0001127 ("Please handle."); Ex. 274, Email from M. Cohen to J. DeFranco (Mar. 17, 2004), SLC DNC Investigation 0005844 ("Can we be proactive and ask the customer if he wants us to add him to the national DNC list on his behalf? Certainly, he should understand that we don't have control over independent retailers and that we do honor a [DNC] list one he requests being placed on it."); Ex. 269, Email from J. DeFranco to L. Hess (June 16, 2003), SLC DNC Investigation 0009621 ("I have copied Scott Burden, Director of Retail Services. He will have his team research and take

directed Management to resolve the situation when she was contacted at home by a consumer with DNC concerns.

Throughout the Investigation Period, the Board believed that DISH addressed DNC issues and was complying with DNC Laws.[205] Some Director Defendants were aware of isolated mistakes,[206] but believed that DISH's Management corrected the causes of those mistakes as they occurred.[207]

b. Director Defendants Involved in DISH Management Had Limited Involvement in DNC Compliance

Some Director Defendants involved in DISH Management played peripheral roles in DNC compliance during the Investigation Period.[208] Ergen did not handle day-to-day management of DNC compliance.[209] Compliance could "bubble up" to Ergen or the Board

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appropriate action. Thanks for the feedback, concern and continued support."); Ex. 261, Email from J. DeFranco to M. Davidson (Feb. 19, 2003), SLC DNC Investigation 0009615.

[204] Ex. 302, Email from C. Vogel to C. Kulig, et al. (Aug. 23, 2006), SLC DNC Investigation 0002177 at 177 ("[W]e don't believe this is our employee and we will follow up with you with our general counsel. You have my office number and you should call me if this persists. My cell is []. I apologize for this intrusion.").

[205] Ex. 247, Trial Transcript, at 1477:19-21, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony) ("I think we did a good job investigating. I don't know if we could have done more.").

[206] *Id*. at 1572:14-17 ("I mean we had problems ourself. I mean so—you know, obviously our goal is to have zero. But there was—you know, I mean sometimes there's problems.").

[207] *See* Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 0001142; Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217.

[208] Neither Clayton nor Vogel played a role in DISH's DNC compliance during the limited periods of time in which they were DISH executives in addition to serving on the Board.

[209] *See, e.g.*, Ex. 716, Email from C. Ergen to J. Chambers (Sept. 24, 2008), SLC DNC Investigation 0002174 ("I will have Bernie Han (our CFO) call you and maybe we can get this stopped.").

through multiple avenues.[210] Consumers could raise issues directly with Ergen through "Charlie Chats."[211] To the extent he was involved, Ergen believed that complying with DNC Laws made DISH a more successful and profitable company.[212] He described Retailers that failed to comply with DNC Laws as "not aligned with our long term goals[.]"[213]

From the beginning of the Investigation Period in 2003, until his retirement as General Counsel of DISH in 2007, Moskowitz oversaw the Legal Department; the Legal Department's management of DISH's DNC compliance was one aspect of that role. But, it was not a focus and Moskowitz generally relied on Blum to manage DNC issues as they arose.

DeFranco likewise occasionally had high-level involvement in DNC compliance as it pertained to Retailers. Retail Services ultimately reported to DeFranco. There were occasions where he was consulted in connection with a DNC issue involving a Retailer. The day-to-day work on Retailer compliance, including DNC compliance, however, was conducted by employees several levels below DeFranco in DISH's organization.

B. Retailers

Since DISH began in 1980, when Ergen and DeFranco were personally installing satellite dishes out of the back of a truck, DISH has partnered with "independent retailer[s]" to distribute

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210 *See, e.g.*, Ex. 302, Email from C. Kulig to C. Ergen (Aug. 22, 2006), SLC DNC Investigation 0002177; Ex. 716, Email from B. Han to J. Chambers (Sept. 25, 2008), SLC DNC Investigation 0002174 at 175; Ex. 307, Email from L. Barron to C. Ergen (Sept. 26, 2006), SLC DNC Investigation 0005901-902; Ex. 372, Email from S. Dodge to C. Ergen et al. (Mar. 25, 2009), SLC DNC Investigation 0000004.

211 *See, e.g.*, Ex. 710, Retailer Charlie Chat Transcript (Nov. 23, 1999), http://www.dishretailer.com/charliechat/chat.html (last visited Nov. 21, 2018).

212 *See, e.g.*, Ex. 311, Email from C. Ergen to "jaytee" (Oct. 3, 2006), SLC DNC Investigation 0005903 ("Thank you for your email. We do take any call to our customers that [is] not desired as serious. . . . . We would appreciate your help in solving this problem. I can assure you Dishnetwork does not condone these calls.").

213 Ex. 407, Email from A. Ahmed to T. Cullen (June 20, 2010), SLC DNC Investigation 0001087 at 087.

satellite hardware and later programming to customers in small communities and eventually all across the country.[214]

Retailers selling DISH TV service are independent businesses; they sell DISH's services, and often the hardware necessary to receive the services, to consumers.[215] DISH believed that Retailers wanted to remain independent businesses, with the ability to make their own business decisions.[216] Consistent with this approach, DISH required Retailers to identify their planned marketing methods when they applied to become DISH Retailers,[217] but DISH did not dictate the methods that Retailers used to market DISH service.[218]

Between 2004 and 2010, 60% of DISH's new activations came from Retailers.[219] DISH was far from the only company using retailers to sell its product. DISH's main competitor, DirecTV, also used retailers—indeed some Retailers sold both DISH and DirecTV.[220] But, DISH believed that, at least during the Investigation Period, it was particularly dependent upon

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214 *See* Ex. 1, EchoStar Communications Corp., Annual Report (Form 10-K), at 10-11 (Mar. 31, 1997); Ex. 247, Trial Transcript, at 1482:2-20, 1487:8-1488:8; *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

215 *See* Ex. 456, Form DISH Network Retailer Agreement § 11 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 603; Ex. 247, Trial Transcript, at 1482:2-20, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

216 Ex. 247, Trial Transcript, at 1490:14-25, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

217 *See, e.g.*, Ex. 168, National Satellite Systems' Proposal presented to EchoStar Communications (Nov. 16, 2006), SLC DNC Investigation 0012706 at 710.

218 *See* Ex. 456, Form DISH Network Retailer Agreement §§ 2.1, 3.3(vii) (Dec. 31, 2012), SLC DNC Investigation 0008582 at 586, 590; Ex. 84, Trial Transcript, at 217:19-218:3, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 11, 2017) (D.I. 302) (A. Ahmed Testimony); *see also* Ex. 247, Trial Transcript, at 1490:4-1492:2, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

219 *U.S. v. DISH*, 256 F. Supp. 3d 810, 840 (C.D. Ill. 2017).

220 *See, e.g.*, Ex. 114, Email from J. Spreitzer to A. Ahmed (Sept. 15, 2004), SLC DNC Investigation 0007388 at 389 (SSN); Ex. 109, Email from A. Ahmed to M. Mills, et al. (Jan. 1, 2004), SLC DNC Investigation 0007287 at 287 (Dish TV Now).

the Retailer sales channel, even more so than DirecTV.[221] In its SEC filings, DISH discloses the corporation's reliance on Retailers as a "RISK FACTOR[]," stating:

> A number of our retailers are not exclusive to us and may favor our competitors' products and services over ours based on the relative financial arrangements associated with selling our products and those of our competitors. Furthermore, some of these retailers are significantly smaller than we are and may be more susceptible to current uncertain economic conditions that will make it more difficult for them to operate profitably. Because our retailers receive most of their incentive value at activation and not over an extended period of time, our interests in obtaining and retaining subscribers through good customer service may not always be aligned with our retailers. It may be difficult to better align our interests with our resellers' because of their capital and liquidity constraints. Loss of one or more of these relationships could have an adverse effect on our subscriber base and certain of our other key operating metrics because we may not be able to develop comparable alternative distribution channels.[222]

Of course, saying that Retailers as a sales channel played a material role in DISH's business is far different from saying that DISH was dependent upon a particular Retailer, let alone every Retailer. During the Investigation Period, at some points in time, DISH had between 6,000 and 8,000 Retailers selling DISH pay-TV services.[223] The Subject Retailers in the Underlying DNC Actions collectively generated 2.26% of DISH's activations, in their best year during the Investigation Period.[224] By the end of the Investigation Period, DISH had cut the

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221 *See* Ex. 42, DISH Network Corp., Annual Report (Form 10-K), at 25 (Feb. 23, 2012) ("We depend on third parties to solicit orders for DISH services that represent a significant percentage of our total gross new subscriber activations."); *U.S. v. DISH*, 256 F. Supp. 3d at 840; Ex. 247, Trial Transcript, at 1556:5-15, *U.S. v. DISH* C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I 621) (J. DeFranco Testimony).

222 Ex. 25, DISH Network Corp., Annual Report (Form 10-K), at 17, 21 (Mar. 2, 2009).

223 *See* Ex. 773, Trial Transcript, at 2295:15-23, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 4, 2016) (D.I. 626) (A. Ahmed Testimony).

224 *See infra* Factual Findings § II.B.3.

number of Retailers to approximately 3,500.[225] When DISH terminated a Retailer, it would identify and partner with a different business to fill that marketing hole.[226]

During the Investigation Period, DISH paid a Retailer roughly $180 per new DISH customer activation.[227] DISH also paid Retailers ongoing incentive payments as the customer continued to subscribe to DISH services.[228] These ongoing incentive payments were based upon both the amount of time that the business had been a DISH Retailer as well as the number of customers to whom the Retailer had sold DISH services.[229] The ongoing incentive payments were intended to align Retailers' interests with DISH's interests in identifying long-term DISH customers.[230]

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225 *See* Ex. 83, Trial Transcript, at 89, *Krakauer*, C.A. No. 1:14-cv-333 (M.D.N.C. Jan. 10, 2017) (D.I. 301) (Plaintiffs' Opening Statement) ("[DISH] ha[s] lots of retailers. The evidence will be in 2011 [DISH] had about 3,500."); *id.* at 107 ("[T]here were during this time period approximately 3,500 retailers[.]"); *see also* Ex. 247, Trial Transcript, at 1482:2-12, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony) ("Our independent retailers, we have several thousand of those.").

226 *See, e.g.*, Ex. 462, Email from A. Ahmed to B. Neylon (May 1, 2013), SLC DNC Investigation 0014166; Ex. 707, Email from S. McElroy to M. Kelly, et al. (Mar. 6, 2009), SLC DNC Investigation 00012450.

227 Ex. 146, Retailer Order Entry Promotional Program (July 1, 2006), SLC DNC Investigation 0012567 at 569 ($175); Ex. 312, Facts Blast (Oct. 17, 2006), SLC DNC Investigation 0001146 at 146 ($50 for adding HD); Ex. 451, Highlights from Retailer Chat (Oct. 16, 2012), SLC DNC Investigation 0010203 at 206 ($180); *see, e.g.*, Ex.114, Email from J. Spreitzer to A. Ahmed (Sept. 15, 2004), SLC DNC Investigation 0007388 at 389 ($200).

228 *See, e.g.*, Ex. 42, DISH Network Corp, Annual Report (Form 10-K), at 4-5 (Feb. 23, 2012); Ex. 146, Retailer Order Entry Promotional Program (July 1, 2006), SLC DNC Investigation 0012567at 569.

229 *See* Ex. 456, Form DISH Network Retailer Agreement § 6 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 591; Ex. 84, Trial Transcript, at 117:9-10, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 11, 2017) (D.I. 302) (A. Ahmed Testimony); Ex. 724, Welcome to Retail Services, SLC DNC Investigation 0014522 at 647 (explaining that residuals on customer accounts pay out 15-17% of the revenue on the account).

230 *See* Ex. 456, Form DISH Network Retailer Agreement § 6 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 591; Ex. 42, DISH Network Corp., Annual Report (Form 10-K), at 4 (Feb. 23, 2012).

During the Investigation Period, the Retailers fell into a few categories relevant to the SLC's Investigation:

1. Traditional Retailers

The quintessential DISH Retailer (a "Traditional Retailer") is a bucolic rural store, from which the owner sells live bait, satellite TV, and used tires.[231] But, DISH had Traditional Retailers across the country, including in dense urban centers.[232] Traditional Retailers generally sell customers DISH TV service and equipment, then buy the equipment from DISH, install the equipment for the customer, and service the equipment if it breaks. The advantage for both DISH and its customers is that Traditional Retailers are located in the areas in which they sell.[233] They have established relationships with the community.[234] This arrangement is particularly effective in more rural areas; thus, it has particular synergies with selling satellite TV, which is well suited to those regions.[235]

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231 *See* Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 473-74; Ex. 42, DISH Network Corp, Annual Report (Form 10-K), at 3 (Feb. 23, 2012); Ex. 336, Email from L. Rose to L. Kalani (Dec. 10, 2007), SLC DNC Investigation 0009849.

232 *See, e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d at 821 ("The indirect channel also included national retailers and telecommunications companies that marketed Dish Network programming, such as Radio Shack, Sears, and AT & T.").

233 *See* Ex. 247, Trial Transcript, at 1491:8-1492:2, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony); Ex. 773, Trial Transcript, at 2353:6-2354:12, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 4, 2016) (D.I. 626) (A. Ahmed Testimony).

234 *See* Ex. 773, Trial Transcript, at 2294:25-2295:14, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 4, 2016) (D.I. 626) (A. Ahmed Testimony).

235 *See* Ex. 773, Trial Transcript, at 2299:2-23, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 4, 2016) (D.I. 626) (A. Ahmed Testimony); Ex. 247, Trial Transcript, at 1479:18-1480:1, 1480:10-19, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

Traditional Retailers were independent businesses. They generally did not sell DISH services and equipment in sufficient volume to support their business by selling DISH alone.[236] Even the larger Traditional Retailers sold other products, from gutters to guns to computers, alongside DISH service.[237]

In some cases, DISH had a direct relationship with the Traditional Retailer. In other cases, DISH had a relationship with a distributor that managed Traditional Retailers in a particular geographic area.[238] DISH's form of contract with any type of Retailer (the "Retailer Agreement") is discussed in detail in Factual Findings Section II.B.4.b. below. DISH enforced the Retailer Agreement based on its reasonable business judgment, as discussed in Factual Findings Section V below, but did not otherwise seek to control Traditional Retailers' businesses.[239]

Where Traditional Retailers telemarketed, it was generally by manually dialing calls in response to customer inquiries.[240] DISH's Traditional Retailers generally did not have automatic

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236 *See* Ex. 247, Trial Transcript, at 1491:1-1492:2, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

237 *See, e.g.*, Ex. 38, Whitney Bermes, Hamilton Radio Shack offers free gun with new DISH Network service, Ravalli Republic (Mar. 25, 2011), https://ravallirepublic.com/news/local/article_ad32d46c-5692-11e0-ae2b-001cc4c002e0.html.

238 *See* Ex. 723, From EcoSphere, L.L.C. Distributor Agreement (2008), SLC DNC Investigation 0014211 at 211 Ex. 722, Sample Referral Marketing Service Agreement (2010), SLC DNC Investigation0014170 at 170; Ex. 400, Draft Marketing Services Agreement (Feb. 17, 2010), SLC DNC Investigation 0015514; Ex. 43, DISH Network Corp., Annual Report (Form 10-K), at 4 (Feb. 20, 2013).

239 Ex. 247, Trial Transcript, at 1490:14-25, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

240 *See U.S. v. DISH*, 256 F. Supp. 3d 810, 909 (C.D. Ill. 2017); Ex. 773, Trial Transcript, at 2200:9-17, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 4, 2016) (D.I. 626) (A. Ahmed Testimony).

dialing software, call spoofing systems, or teams of telemarketers.[241] And there were relatively few DNC complaints linked to Traditional Retailers.[242] These complaints generally stemmed from confusion on the part of either the Traditional Retailer or the consumer called about the limits imposed by DNC Laws, such as the ways in which the Established Business Relationship and Inquiry Based Relationship exceptions apply, or do not apply, to a Retailer following up on an in-store inquiry.[243] None of the damages assessed against DISH in the Underlying DNC Actions were based on calls made by Traditional Retailers.[244]

2. National Chain Partners and Telco Partners

In the mid-1990s, consumers began buying TV, phone, and internet bundled together in a single package.[245] DISH only offered TV service.[246] So, DISH began partnering with national telecommunications companies such as AT&T that lacked a TV service ("Telco Partners") to

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241 *See* Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 473-74.

242 *See* Ex. 178, Trial Transcript, at 1221:5-13, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 28, 2016) (D.I. 620) (R. Musso Testimony); Ex. 786, Trial Transcript, at 981:11-19, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 27, 2016) (D.I. 619) (B. Werner Testimony).

243 *See, e.g.*, Ex. 247, Trial Transcript, at 1552:1-1553:2, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony); Ex. 465, Team Summit Presentation, (May 14-16, 2013), SLC DNC Investigation 0008685 at 687 (explaining DNC Law exceptions); Ex. 178, Trial Transcript, at 1255:19-21 *U.S. v. DISH Network, LLC*, C.A. No. 09-03073 (C.D. Ill. Jan. 28, 2016) (D.I. 620) (R. Musso Testimony) ("I think there are also some situation where consumers are confused about the law. They forget that they opt-in[.]").

244 *See U.S. v. DISH*, 256 F. Supp. 3d at 917-19, 926, 928, 936-41, 946-48, 950-53, 957, 959-61, 968-75; *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *1 (M.D.N.C. May 22, 2017).

245 *See* Ex. 1, EchoStar Communications Corp, Annual Report (Form 10-K), at 13 (Mar. 31, 1997).

246 *See id.* (noting that DISH was at a "competitive disadvantage" as a result of AT&T and DirecTV's agreement allowing them to "offer customers a bundled package of digital entertainment and communication services").

provide bundled services to consumers.[247] DISH also developed relationships to sell DISH service through national chain stores such as RadioShack (together with Telco Partners, "National Partners"). Like Traditional Retailers, National Partners sold DISH service in their stores alongside other products.[248]

DISH obviously did not take control of the National Partners' businesses, but DISH retained control over the terms of the DISH services that the National Partners could sell, such as required subscription period, customer pricing, and cancellation terms.[249] DISH did not police its National Partners' DNC compliance, or their other legal compliance for that matter.[250] None of the calls at issue in *U.S. v. DISH* or *Krakauer* was made by a National Partner.[251]

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247 *U.S. v. DISH*, 256 F. Supp. 3d at 821; Ex. 2, EchoStar Communications Corp., Annual Report (Form 10-K), at F-6-F-7 (Mar. 17, 1999) ("EchoStar and MCI also agreed that MCI will have the non-exclusive right to bundle DISH Network service with MCI's telephony service offerings . . . ."); Ex. 69, Indirect Sales, (June 6, 2011) (discussing "National Sales Partner[s]"), SLC DNC Investigation 0007047 at 053.

248 *See, e.g.*, Ex. 3, EchoStar, Sirius Join Forces with RadioShack to Form Satellite Entertainment Alliance (Nov. 18, 1999), https://ir.dish.com/static-files/161a0e12-4b28-4e6f-b666-32ab5db2289b; *see also* Ex. 238, Transcript of Deposition of B. Van Emst, at 74:23-75:4, *U.S. v. DISH*, C.A. No. 09-cv-03073 (Mar. 18, 2011).

249 *See, e.g.*, Ex. 415, Proposed Retailer Agreement Sent to RadioShack Corporation § 5 (Sept. 28, 2010), SLC DNC Investigation 0015470 at 481-82 ("DISH shall determine the retail prices for Programming at Any Time in its sole discretion for any reason or no reason."); Ex. 238, Transcript of Deposition of B. Van Emst, at 74:23-75:14, *U.S. v. DISH Network, LLC*, C.A. No. 09-cv-03073 (Mar. 18, 2011); *U.S. v. DISH*, 256 F. Supp. 3d at 839.

250 *See, e.g.*, Ex. 415, Proposed Retailer Agreement Sent to RadioShack Corporation § 9.1 (Sept. 28, 2010), SLC DNC Investigation 0015470 at 488 ("[E]ach party shall be solely responsible for its compliance with all Laws that apply to its obligations under this Agreement.").

251 *See U.S. v. DISH*, 256 F. Supp. 3d at 917-19, 926, 928, 936-41, 946-48, 950-53, 957, 959-61, 968-75; *Krakauer*, 2017 WL 224952, at *1.

Unlike DISH's Traditional Retailers, National Partners did not have the infrastructure to or interest in installing satellite dishes for customers.[252] DISH handled the hardware and installation aspects of the customer relationships generated through the National Partners.[253]

a. The OE Tool

To support its relationships with the National Partners, in 2003, DISH built a software platform (the "OE Tool") that allowed National Partners to sell DISH services and then enter the customer's information directly onto DISH's system.[254] The OE Tool "prompted the sales person to ask a series of questions to offer the appropriate programming and services, secure the necessary information, and make the required disclosures to make the sale."[255] "Once the customer's information was uploaded onto the [OE] Tool, Dish performed the credit check, approved the sales, supplied all equipment, and performed the installation or arranged for the installation and activation of service. New customers paid Dish directly."[256]

Although DISH built the OE Tool for the National Partners, DISH retained control over the OE Tool.[257] For example, DISH had the power to disable logins to the OE Tool, cutting off access, at any time.[258]

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252 *See* Ex. 238, Transcript of Deposition of B. Van Emst, at 73:19-22, *U.S. v. DISH*, C.A. No. 09-cv-03073 (Mar. 18, 2011); *see also* Ex. 178, Trial Transcript, at 1300:19-1301:5, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 28, 2016) (D.I. 620) (R. Musso Testimony).

253 *See* Ex. 238, Transcript of Deposition of B. Van Emst, at 73:23-74:8, *U.S. v. DISH*, C.A. No. 09-cv-03073 (Mar. 18, 2011).

254 Ex. 283, OE Tool Overview and Setup Procedures (2006), SLC DNC Investigation 0014790; *U.S. v. DISH*, 256 F. Supp. 3d at 839.

255 *U.S. v. DISH*, 256 F. Supp. 3d at 839.

256 *Id.*

257 *See, e.g.*, *id.* ("Dish controlled access to the [OE] Tool by issuing specific logins and passwords (collectively logins) to the national companies.").

258 *See*, *e.g.*, Ex. 350, Email from T. Stingley to L. Kalani (Sept. 17, 2008), SLC DNC Investigation 0010645; Ex. 248, Trial Transcript, at 1820:19-24, *U.S. v. DISH*, C.A. No. 09-

3. OE Retailers

While the OE Tool was built to support the National Partners, DISH quickly saw its potential to support relationships with a new breed of Retailer that could sell at higher volume than Traditional Retailers, but could not or did not wish to handle either installation or the customer relationship on an ongoing basis.[259] On October 7, 2003, Ahmed contacted David Hagen, the principal of Dish TV Now, Inc. ("Dish TV Now") a Traditional Retailer at the time, to offer him the opportunity to begin signing up new DISH customers through the OE Tool and outsourcing the installation to DISH.[260] Hagen accepted, and Dish TV Now became DISH's first OE Retailer.[261]

DISH quickly expanded the OE Retailer program beyond Dish TV Now.[262] OE Retailers entered into the same Retailer Agreement as the Traditional Retailers, discussed below.[263] Like Traditional Retailers, DISH paid OE Retailers a commission for every customer activation that the OE Retailer secured.[264] And, like Traditional Retailers, "[s]ome Order Entry Retailers also

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03073 (Feb. 2, 2016) (D.I. 622) (M. Mills Testimony) (DISH terminated Subject Retailer Star Satellite's access to OE Tool in 2006).

259 *See* Ex. 414, Email from B. Ehrhart to C. Ergen, et al. (Sept. 2, 2010), SLC DNC Investigation 0014457 at 457 (describing OE Retailer).

260 *U.S. v. DISH*, 256 F. Supp. 3d at 856.

261 *Id.*

262 *See, e.g.*, Ex. 309, OE Tool Sales Partners Contact List (Oct. 2006); SLC DNC Investigation 0005030 (Oct. 2006); Ex. 63, OE Retailer Amendment to EchoStar Retailer Agreement with SSN (Dec. 31, 2006), SLC DNC Investigation 0006971; Ex. 346, Order Entry Retailers Executive Summary (Sept. 8, 2008), SLC DNC Investigation 0009635; Ex. 705, Sales Partner Review (2009), SLC DNC Investigation 0013528 at 530.

263 *U.S. v. DISH*, 256 F. Supp. 3d at 841-43.

264 *Id.* at 840 ("Dish paid the [OE] Retailers commissions called 'incentives' for activations."); *see* Ex. 414, Email from B. Ehrhart to C. Ergen, et al. (Sept. 2, 2010), SLC DNC 0014457.

sold other products, including competing services such as DirecTV programming."[265] Many OE Retailers were Traditional Retailers before becoming OE Retailers.

However, most OE Retailers' business models differed from that of most Traditional Retailers. OE Retailers generally did not have a physical storefront.[266] OE Retailers did not confine themselves to a particular geographic area.[267] And, they did not have the same roots in their community as most Traditional Retailers.[268] Some OE Retailers built websites; some sent out traditional mail advertisements; some sent emails; and some telemarketed DISH services.[269] At base, OE Retailers were independent marketing firms more than they were stores.[270]

At its peak, in 2006, the OE Retailer program included between 70 and 80 Retailers.[271] OE Retailers made up roughly 1% of DISH's total Retailers.[272] But, OE Retailers generated a

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265 *U.S. v. DISH*, 256 F. Supp. 3d at 843.

266 *See* Ex. 248, Trial Transcript, at 1667:5-10, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 2, 2016) (D.I. 622) (M. Mills Testimony).

267 *See* Ex. 247, Trial Transcript, at 1558:18-1559:1, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

268 *See Id.*; Ex. 248, Trial Transcript, at 1667:11-15, *U.S. v. DISH*, C.A. No. 09-03073 (Feb. 2, 2016) (D.I. 622) (M. Mills Testimony).

269 Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 877.

270 *U.S. v. DISH*, 256 F. Supp. 3d at 840 ("The [OE] 'Retailers' were marketing businesses[,] Dish engaged . . . to sell Dish Network programming.").

271 *See* Ex. 309, OE Tool Sales Partners Contact List (Oct. 2006), SLC DNC Invvestigation 0005030; Ex. 346, Order Entry Retailers Executive Summary (Sept. 8, 2008), SLC DNC Investigation 0009635; Ex. 705, Sales Partner Review (2009), SLC DNC Investigation 0013528 at 530; Ex. 336, Email from L. Rose to L. Kalani (Dec. 10, 2007), SLC DNC Investigation 0009849; Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 473-74.

272 *U.S. v. DISH*, 256 F. Supp. 3d at 840 ("At its peak, Dish had approximately 80 Order Entry Retailers, compared to 8,000 [Traditional] Retailers at the same time.").

material percentage of DISH's new subscribers.[273] For example, as of February 2007, the top five OE Retailers accounted for 30% of DISH's new activations.[274]

DISH controlled the OE Retailers' access to the OE Tool by activating or deactivating the OE Retailers' logins.[275] DISH focused a higher level of administrative and investigative attention on OE Retailers than on most Traditional Retailers because the OE Retailers tended to sell DISH services in higher volume than Traditional Retailers. But, otherwise, DISH applied the same approach to its OE Retailers' legal compliance as it applied to its Traditional Retailers and its National Partners; DISH contractually required legal compliance, for business reasons, but left Retailers to ensure their own compliance.[276]

The calls at issue in the Underlying DNC Actions were predominantly made by the Subject Retailers, all of which were OE Retailers. In *Krakauer*, all of the calls for which damages were awarded made by a single OE Retailer—Satellite Systems Network (SSN).[277] In

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273 *Id.* ("By 2007, Order Entry Retailers accounted for 30 percent of all of Dish's activations. As of mid-2007, the Order Entry Retailers were producing 70,000 to 90,000 activations per month. Dish direct sales were averaging 45,000 to 60,000 activations per month at the same time period. From 2004 to 2010, 60 percent of new activations came from Retailers, and the lion's share of those came from Order Entry Retailers.").

274 *Id.*; Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 877("OE Tool Retailers typically are large companies that are highly successful in marketing and selling DISH Network.").

275 *U.S. v. DISH*, 256 F. Supp. 3d at 839, 855.

276 *Id.* at 875 (giving direction to DISH compliance employees that "[i]t is important to understand that you are a resource, not a legal expert. If questions arise regarding the laws, you should refer them to their own legal counsel.").

277 *Krakauer*, 2017 WL 2242952, at *9 ("The evidence at trial persuasively demonstrated that SSN made thousands of telephone solicitations during the class period to persons whose numbers were on the Registry.").

U.S. v. DISH, approximately 92% of the calls for which damages were awarded were placed by five Subject Retailers, which included SSN.[278]

While OE Retailers collectively accounted for a material percentage of DISH's new subscribers, the Subject Retailers together accounted for only between 0.06% and 2.26% of DISH's new subscribers during any year from 2003 to 2011, as shown below.[279] The Underlying DNC Actions therefore included only a handful of DISH's OE Retailers accounting for only a small fraction of DISH's sales.

	Activations								
Retailer	2003	2004	2005	2006	2007	2008	2009	2010	2011
Dish TV Now	-	59,834	28,977	5	-	-	-	-	-
Star Satellite	2,002	6,336	23,986	236	13	1,404	3,643	2,479	386
Satellite Systems Network	2	2,819	24,148	6,027	5,948	3,728	3,202	2,298	1,109
JSR	-	-	-	6,262	4,041	-	-	-	-
American Satellite	-	-	1,276	47,950	12,384	31,455	38,391	9,862	-
Total DISH activations	2,933,745	3,532,856	3,466,771	3,667,290	3,606,114	3,156,798	3,326,355	3,140,546	2,607,829
% of overall	0.07%	1.95%	2.26%	1.65%	0.62%	1.16%	1.36%	0.47%	0.06%

4. The Retailer Relationship

DISH's relationship with Retailers, including Traditional Retailers and OE Retailers, was managed by DISH's Retail Sales and Retail Services Department[280] and governed by DISH's Retailer Agreement with the Retailer.[281]

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278 *See infra* Factual Findings § X.D.3.b); *see also U.S. v. DISH*, 256 F. Supp. 3d at 968-75, 982-83.

279 DISH terminated Dish TV Now, JSR Enterprises ("JSR") and American Satellite during the Investigation Period. DISH terminated Star Satellite and SSN after the end of the Investigation Period.

280 *U.S. v. DISH*, 256 F. Supp. 3d at 844 ("The Sales Department was divided into two parts, Retail Sales and Retail Services. Retail Sales worked with Indirect Marketers to facilitate sales. . . . Retail Services handled the payments to Indirect Marketers.").

281 *See id.* ("The relationship between Dish and Order Entry Retailers was governed by a standard Retail Agreement. All Order Entry Retailers signed a substantially similar form Retailer Agreement."); Ex. 456, Form DISH Network Retailer Agreement (Dec. 31, 2012), SLC DNC Investigation 0008582; Ex. 413, Form DISH Network OE Retailer Agreement (Sept. 2010), SLC DNC Investigation 0005867; *see also* Ex. 97, EchoStar Satellite Corporation Retailer Agreement with SSN (Mar. 7, 2001), SLC DNC Investigation 0012341.

a. Retail Sales and Services

The Retail Sales and Services Department (composed of Retail Sales and Retail Services groups) handled DISH's performance of its contractual relationships with all Retailers—and sought to enforce the same from Retailers.[282] The Retail Sales and Services Department reported up to DeFranco during the Investigation Period. [283]

Retail Sales was responsible for driving the sale of DISH services through Retailers. Retail Sales' employees' compensation was influenced by the number of new customer activations generated by the Retailers that the employee managed. However, DISH expected Retail Sales employees to report or address any Retailer issues noted.

Retail Services managed the remaining aspects of DISH's relationship with the Retailers, including payments to Retailers and compliance with the Retailer Agreement. Retail Services used various channels to communicate with Retailers. For example, Retail Services sent "Facts Blasts" to Retailers to address topics such as new promotions, pricing, industry news, and compliance obligations.[284] Retail Services had "Retailer Chats," live video chats with Retailers, often covering the same topics as Facts Blasts.[285] And, Retail Services sent Retailers updated

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282 *U.S. v. DISH*, 256 F. Supp. 3d at 845 ("Risk and Audit audited Indirect Marketers to look for attempts to defraud Dish.").

283 The SLC did not rely exclusively on DeFranco for information about the Retail Sales and Services Department, but also spoke with Ahmed, Senior Vice President of Sales.

284 Ex. 290, Excerpt from June 22, 2006 Dealer Communication Memo "Fax Blast" from EchoStar, LLC to its dealers, SLC DNC Investigation 0010189; Ex. 315, Facts Blast (Nov. 10, 2006), SLC DNC Investigation 0001156.

285 Ex. 247, Trial Transcript, at 1505:25-1506:1-19, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

Business Rules, which were requirements that Retailers were obligated to comply with under the Retailer Agreement,[286] which is discussed in Factual Findings Section II.B.4.b. below.

A substantial aspect of Retail Services' work was combatting Retailer fraud.[287] Some Retailers tried various means to defraud DISH, including opening duplicate accounts for DISH customers, opening new accounts for existing customers, and submitting false credit information with respect to potential customers who would not qualify for DISH services absent the fraud.[288] The Risk and Audit group within Retail Services was responsible for monitoring Retailers' compliance with the Retailer Agreement[289] or other attempts to defraud DISH by auditing Retailers suspected of fraud.[290] DISH dealt with Retailers caught defrauding DISH on a case by case basis, in the same manner discussed in Factual Findings Section V.F. below with respect to DISH's management of Retailers' DNC compliance.[291]

Some Retailers also tried to defraud potential DISH customers, for example, by failing to adequately disclose the terms of the DISH services being sold[292] or otherwise failed to comply with laws governing the Retailer's conduct.[293] DISH understood the Retailers to be independent

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286 *See* Ex. 456, Form DISH Network Retailer Agreement § 1.9 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 582.

287 *U.S. v. DISH*, 256 F. Supp. 3d at 845.

288 *Id.* at 846.

289 *Id.* at 849.

290 *Id.* at 846 ("Risk and Audit audited Indirect Marketers to look for attempts to defraud Dish. . . . Risk and Audit audited [OE] Retailers to detect fraud on Dish, and Dish terminated [OE] Retailers for fraud.").

291 *Id.* at 848.

292 *Id.* at 846.

293 *Id.* at 846-47.

contractors as confirmed through the Retailer Agreement.[294] Thus, DISH approached Retailer legal compliance as an aspect of the services that DISH purchased from Retailers because of its effect on customer satisfaction,[295] rather than a necessity for DISH's own compliance with the law. And, Management viewed ensuring legal compliance by thousands of Retailers as practically impossible.[296]

Nonetheless, DISH believed that Retailers would tarnish DISH's reputation and impair DISH's customer service if Retailers violated laws.[297] DISH also observed that "Customers who purchased Dish Network Programming from these unscrupulous [Retailers] often canceled their services [relatively quickly]."[298] DISH lost money when customers canceled their services quickly.[299] Thus DISH had material business reasons to ensure that Retailers made full, fair, and

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294 *See, e.g.*, Ex. 97, EchoStar Satellite Corporation Retailer Agreement with SSN (Mar. 7, 2001), SLC DNC Investigation 0012341.

295 Ex. 169, Letter from R. Origer to B. Colin (Nov. 17, 2006), SLC DNC Investigation 011976 (terminating Atlas Assets, Inc.); Ex. 312, Facts Blast (Oct. 17, 2006), SLC DNC Investigation 0001146 at 153-154 ("Your Retailer Agreement prohibits you from violating any applicable laws, including without limitation in connection with the telemarketing of DISH Network products and services.").

296 Ex. 247, Trial Transcript, at 1490:4-7, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony) ("Q. And in your experience was it ever contemplated that DISH could control the day-to-day operation of thousands of retailers? A. No.").

297 *See, e.g.*, Ex. 214, OE Risk Management Presentation (2009), SLC DNC Investigation 0012536 at 553 ("After all—it really is about the customer experience—without them, none of us have jobs."); *id*. at 561 ("Respect the wishes of the AGs . . . they protect the consumer, but the good part for us—their attention encourages us to do things right so we get and keep good, well informed customers."); Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 879 ("Decrease churn by continuing to provide the best customer service with the best value in the television industry.").

298 *U.S. v. DISH*, 256 F. Supp. 3d 810, 848 (C.D. Ill. 2017).

299 *Id.*

accurate disclosures to potential new customers and otherwise complied with the law.[300] As discussed in more detail below, DISH managed Retailers' violations of the law as a breach of the Retailer Agreement that was detrimental to DISH and facilitated governmental authorities' efforts to prosecute Retailers for legal violations.[301]

b. The Retailer Agreement

DISH entered into a standard form Retailer Agreement with each Retailer.[302] DeFranco and Moskowitz reviewed proposed modifications to the standard form on occasion. The Board received a copy of DISH's form Retailer Agreement for OE Retailers in at least 2010.[303] Spanning roughly 32 pages, most of the Retailer Agreement is not germane to the SLC's Investigation.[304]

The extent to which the Retailer Agreement allowed DISH to control a Retailer's telemarketing, however, played a substantial role in the determinations made in the Underlying DNC Actions that DISH was legally responsible for the Retailers' DNC violations.[305] Thus, that

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300 *See, e.g.*, Ex. 155, Email from B. Neylon to R. Origer, et al. (Aug. 10, 2006), SLC DNC Investigation 0013588.

301 *See infra* Factual Findings § II.B.4.b.iv (Retailer Compensation).

302 *See, e.g.*, Ex. 456, Form DISH Network Retailer Agreement (Dec. 31, 2012), SLC DNC Investigation 0008582; Ex. 277, EchoStar Retailer Agreement with Donald King dba Digital Satellite Connections (Dec. 31, 2004), SLC DNC Investgation 0006542; Ex. 117, EchoStar Retailer Agreement with Dish TV Now (Dec. 31, 2004), SLC DNC Investigation 0012039; Ex. 236, DISH Network Retailer Agreement with National Satellite Systems (Dec. 31, 2010), SLC DNC Investigation 0012108; Ex. 130, EchoStar Retailer Agreement with American Satellite Inc. (Oct. 19, 2005), SLC DNC Investigation 00120721; Ex. 143, EchoStar Retailer Agreement with JSR (Apr. 12, 2006), SLC DNC Investigation 0012502; Ex. 97, EchoStar Satellite Corporation Retailer Agreement with SSN (Mar. 7, 2001), SLC DNC Investigation 0012341.

303 Ex. 414, Email from B. Ehrhart to C. Ergen, et al. (Sept. 2, 2010), SLC DNC Investigation 0014457.

304 *See* Ex. 456, Form DISH Network Retailer Agreement (Dec. 31, 2012), SLC DNC Investigation 0008582.

305 *U.S. v. DISH*, 256 F. Supp. 3d at 841-43.

aspect of the Retailer Agreement is important. At a high level, the Retailer Agreement divided control over a Retailer's sale of DISH services as follows:[306]

Aspect of Business Relationship:	**Controlled:**	**Section:**
Hiring and firing Retailer employees	Retailer	11
Selecting and managing Retailer facilities and equipment	Retailer	11
Method of marketing used by Retailer	Retailer	2.1
Amount of marketing conducted by Retailer	Retailer	2.1
Lists of consumers called by Retailer	Retailer	9.5
Times at which Retailer placed calls	Retailer	11
Frequency of calls to a particular consumer	Retailer	11
Total mix of products sold by Retailer	Retailer	3.3(vii)
Ensuring legal compliance	Retailer	9.1, 13
Amount paid per new customer activation	DISH	6.1, 6.2, 17.12
DISH programming packages available	DISH	4.1, 7.2
Price the consumer must pay DISH for service	DISH	5
Terms of DISH's contract with consumer	DISH	7.4
Disclosures concerning the DISH TV contract	DISH	7.3
Termination of agreement	Shared	10.2

Those aspects of the Agreement relevant to the SLC's determinations are summarized below.

i. The Independent Contractor Relationship

First, during the Investigation Period, Section 11 of the Retailer Agreement stated: "The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be Retailer's employees only, and not employees or agents of [DISH] or its Affiliates."[307] DISH's Legal Department managed the way in which DISH described and interacted with

[306] Ex. 456, Form DISH Network Retailer Agreement §§ 2.1, 3.3(vii), 4.1, 6.1, 6.2, 7.2, 9.1, 9.5, 11, 13, 17.12 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 586, 590-594, 598-600, 603-604, 611; *see, e.g.*, Ex. 277, EchoStar Retailer Agreement with Donald King dba Digital Satellite Connections §§ 2.3 (vii), 3.1, 4.1, 6.1, 6.2, 7.2, 9.1, 9.5, 11, 13, 17.12 (Dec. 31, 2004), SLC DNC Investigation 0006542 at 546, 549-552, 557-559, 561-562, 567-568 (labeling sections 2 and 3 of the December 31, 2012 Form DISH Network Retailer Agreement as sections 3 and 4, respectively).

[307] Ex. 456, Form DISH Network Retailer Agreement § 11 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 603.

Retailers with a view to maintaining the independent contractor relationship. It was important that the Retailers remain independent contractors for multiple reasons; relevant to the SLC's Investigation, DISH lacked the capacity to control thousands of Retailers either to avoid civil liability or for legal compliance.

Consistent with Retailers' status as independent contractors, the Retailer Agreement gave the Retailer control over the methods by which the Retailer marketed DISH service.[308] "[Retailers] set up their own facilities, purchased their own equipment, paid their own rents, hired and fired their own employees, secured their own leads and calling lists, wrote telemarketing scripts, and prepared marketing materials."[309] Both DISH's Retailer Agreement and its distributor agreement permitted Retailers to sell any other product or service the Retailer desired.[310] Many Retailers, including OE Retailers, relied on this provision to sell other products, including DirecTV.[311]

The Retailer Agreement stated that, as independent contractors, the Retailers were responsible for their own legal compliance.[312] During the Investigation Period, at least two

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308 *See, e.g.*, *id.* at § 3.3(vii) (Retailer represents that "it either sells or could sell other products or services in addition to DISH products or services that compete with DISH products or services."), SLC DNC Investigation 0008582 at 590.

309 *U.S. v. DISH*, 256 F. Supp. 3d at 843. At retailer development forums, DISH would instruct Retailers on proper trademark use. Ex. 237, Deposition Transcript, at 40:1-21, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Mar. 10, 2011) (B. Werner Testimony).

310 Ex. 723, Sample EcoSphere, L.L.C. Distributor Agreement § 1.1.2 (2008), SLC DNC Investigation 0014211 at 212; Ex. 456, Form DISH Network Retailer Agreement § 3.3 (vii) (Dec. 31, 2012), SLC DNC Investigation 0008582 at 590.

311 *U.S. v. DISH*, 256 F. Supp. 3d at 845 ("Some Order Entry Retailers also sold other products, including competing services such as DirecTV programming.").

312 Ex. 456, Form DISH Network Retailer Agreement § 11 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 603.

courts found Retailers to be independent contractors.[313] DISH's Legal Department provided legal advice to Management and the Board on the issue. The advice given by DISH's Legal Department was informed by a memorandum on DISH's potential liability for Retailer DNC violations from Kelley Drye, DISH's outside counsel for TSR/TCPA issues.

Based upon the SLC's Investigation, everyone within DISH, including the Director Defendants, genuinely believed in good faith, with the benefit of legal advice, that Retailers were independent contractors, not DISH's agents. For example, Ergen told the SLC that he believed that Retailers were independent contractors and that DISH was not legally responsible for Retailers' actions. Mrs. Ergen explained that permitting Retailers to sell competing products confirmed the independent contractor relationship in her view. DeFranco believed that Retailers' control over their businesses made them independent contractors; in his view, DISH's ability to terminate the relationship did not allow DISH to control Retailers' actions. The evidence reviewed by the SLC, including the statements made at interviews, demonstrated that Management and DISH's Board believed that DISH would not, itself, be in violation of the law if it failed to ensure all Retailers' compliance with all laws.

ii. DISH's Control Over the DISH Services Marketed

Second, in contrast to the Retailers' control over the manner in which the Retailer operated its own business, the Retailer Agreement gave DISH control over the DISH services that the Retailer sold,[314] the prices at which DISH would provide those services,[315] and the terms

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313 *See Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 670-71 (S.D. Ohio 2009); *Zhu v. DISH Network, LLC*, 808 F. Supp. 2d 815 (E.D. Va. 2011).

314 Ex. 456, Form DISH Network Retailer Agreement § 4 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 590-91.

315 *Id.* at § 5, SLC DNC Investigation 0008585 at 591.

of DISH's relationship with the customer.[316] To ensure that Retailers were indeed selling the DISH service that DISH offered, Section 7 of the Retailer Agreement gave DISH control over the manner in which the product was described to consumers, including the disclosures made to potential customers.[317]

DISH relies upon Section 7, particularly Section 7.3, to control the terms of the DISH services being sold. For example, according to Blum, then Senior Vice President and Deputy General Counsel, through this provision DISH sought to prevent Retailers from promising consumers a television channel package that DISH did not offer or offering DISH service for prices at which DISH was not willing to provide TV service. This explanation of Section 7.3 is consistent with the extent of control that DISH, including the Director Defendants, believed that DISH had over the Retailers.[318]

To improve and monitor the disclosures made with respect to its services, in 2006, DISH implemented a "Quality Assurance Program" (the "QA Program"),[319] discussed in more detail below, in Factual Findings Section V.D.1. In October of 2011, a Retailer questioned DISH's contractual justification for the QA Program.[320] In response, two employees within Retail Services' Compliance Department, Musso and Brett Mason, decided that Section 7.3 of the Retailer Agreement, which permitted DISH to implement Business Rules governing or otherwise

316 *Id.* at § 7, SLC DNC Investigation 0008585 at 598-99.

317 *Id.*

318 *See infra* Factual Findings § V.D.1.

319 *U.S. v. DISH*, 256 F. Supp. 3d at 850.

320 Ex. 242, Email from R. Musso to W. Mason, et al. (Oct. 25, 2011, 12:13 PM), SLC DNC Investigation 0012700 at 701.

applicable to DISH's "Promotional Program," permitted DISH to implement the QA program.[321] DISH's Legal Department does not appear to have had any involvement in the October 2011 exchange.[322] It is unclear if anyone beyond Musso and Mason believed that Section 7.3 provided the authority for which they cited it.

iii. The Legal Compliance Requirement

Third, the Retailer Agreement required the Retailer to "comply with all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives and orders (whether federal, state municipal, or otherwise) and all amendments thereto, now enacted or hereafter promulgated (hereinafter "Laws"), and [provides that the] Retailer is solely responsible for its compliance with all Laws that apply to its obligations under this Agreement."[323] The Retailer Agreement also required the Retailer to represent that "it is not currently violating and has never violated any Laws."[324] Finally, the Retailer Agreement obligated the Retailer to

> indemnify, defend and hold [DISH] and its Affiliates . . . harmless from and against, any and all costs, losses, liabilities, damages, lawsuits, judgments, claims, actions, penalties, fines and expenses . . . that arise out of, or are incurred in connection with . . . [1] Retailer's lawful or unlawful acts or omissions . . . relating to the sale, leasing, transfer of possession, marketing, advertisement, promotion and/or solicitation of orders for . . . products or services of DISH or any of its Affiliates; . . . [2] the failure of Retailer to

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321 Ex. 242, Email from R. Musso to W. Mason, et al. (Oct. 25, 2011, 12:13 PM), SLC DNC Investigation 0012700 at 700; Ex. 243, Email from R. Musso to W. Mason, et al. (Oct. 25, 2011, 12:22 PM), SLC DNC Investigation 0012866 ("The QA process was implemented to support section 7/3 [sic] and as a result of escalated complaints.").

322 *See* Ex. 242, Email from R. Musso to W. Mason, et al. (Oct. 25, 2011, 12:13 PM), SLC DNC Investigation 0012700; Ex. 243, Email from R. Musso to W. Mason, et al. (Oct. 25, 2011, 12:22 PM), SLC DNC Investigation 0012866.

323 Ex. 456, Form DISH Network Retailer Agreement § 9.1 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 599.

324 *Id.* § 9.1, SLC DNC Investigation 0008582 at 599.

> comply with, or any actual or alleged violation of, any applicable Laws[.][325]

DISH enforced this provision against Retailers from time to time.[326]

As noted above, DISH believed that it was not legally responsible for enforcing Retailers' legal compliance. DISH included these provisions requiring legal compliance in the Retailer Agreement because it wanted Retailers to comply with the law for business reasons. When DISH terminated a Retailer for illegal conduct that threatened to tarnish DISH's reputation by association, DISH did so in reliance on these provisions requiring legal compliance.[327]

DISH had no interest in doing business with Retailers who were not complying with laws.[328] The Board believed that DISH acted ethically and demanded the same from its vendors, including the Retailers.[329] Management also believed that the conduct required by the law was best for DISH's business in the long term and necessary from a customer service perspective.[330] DISH managed Retailers' DNC compliance from that perspective, as discussed in more detail in Factual Findings Section V below.

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325 *Id.* § 13, SLC DNC Investigation 0008582 at 603.

326 Ex. 138, Email from M. Mills to A. Ahmed (Dec. 22, 2005), SLC DNC Investigation 0006028.

327 *See* Ex. 86, Trial Transcript, at 174:14-16, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 13, 2017) (D.I. 304) (J. DeFranco Testimony) ("We actually did terminate retailers as a result of [the legal compliance section of the Retail Agreement], and we wanted to make sure retailers knew that, you know, that—that we took it seriously.").

328 Ex. 247, Trial Transcript, at 1502:2-11, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

329 *Id.* at 1490:8-9 ("If you break the law we're gonna terminate your agreement."); *see also* Ex. 456, Form DISH Network Retailer Agreement § 9.1 (Dec.31, 2012), SLC DNC Investigation 0008582 at 599 ("Retailer shall not engage in any activity or business transaction which could be considered unethical . . . .").

330 Ex. 247, Trial Transcript, at 1502:12-25, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

iv. Retailer Compensation

Fourth, Sections 6.1 and 6.2 of the Retailer Agreement provided that DISH paid Retailers a commission at the point of activation and trailing commissions as the customer remained with DISH.[331] The Retailer Agreement allowed DISH to adjust the incentives for future activations while the agreement was in place.[332]

Theoretically, under Section 6.3, the Retailer Agreement permitted DISH to "chargeback" incentives paid to Retailers for activations that proved illusory.[333] If the Retailer had an ongoing relationship with DISH, DISH could recover chargebacks by offsetting them against future payments.[334] But, if DISH did not catch a Retailer's misconduct quickly, the amount involved would escalate beyond DISH's practical ability to recover the payments through chargebacks.[335] And, if DISH needed to terminate the relationship, DISH may not have been able to recover the funds from the Retailer.

Newer Retailers received most of their compensation through the activation incentives.[336] But, the trailing incentives could be substantial for Retailers who had been with DISH for

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331 Ex. 143, EchoStar Retailer Agreement with JSR, § 6.1, 6.2 (Apr. 12, 2006), SLC DNC Investigation 0012502 at 510-511.

332 *Id.* § 17.12.

333 *Id.* § 6.3.

334 *See* Ex. 456, Form DISH Network Retailer Agreement § 6.3 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 594 (Chargeback of Incentives provision); *id.* at§ 6.6.1, 596 ("Specifically, and without limitation of the foregoing, Retailer shall have no right at any time to recoup any Incentives not paid during a period of breach or default").

335 *See, e.g.*, Ex. 209, Email from R. Musso to B. Werner, et al. (Sept. 5, 2008), SLC DNC Investigation 0012946 at 947

336 *See, e.g.*, Ex. 456, Form DISH Network Retailer Agreement §§ 6.1-6.2 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 591-594 (granting incentives for activations).

years.[337] This payment structure provided a deterrent to breaches of the Retailer Agreement and an incentive for Retailers to conform their conduct to the Retailer Agreement and to reform if needed to maintain the business relationship with DISH.

v. Termination of the Retailer Agreement

Fifth, the Retailer Agreement permitted either party to terminate the Agreement "in its sole and absolute discretion for any reason or no reason . . . for its convenience (without cause) by giving the other party no less than sixty (60) days prior written notice."[338] DISH used this provision on occasion, but did so sparingly because Retailers had sued or demanded arbitration claiming wrongful termination.[339] Between November 2007 and December 2017, five Retailers brought suit against DISH for wrongful termination.[340] Five other Retailers brought confidential arbitrations against DISH asserting wrongful termination. When DISH terminated a Retailer, DISH did so with advice of counsel, and with the awareness that it might have been putting a small business out of business and costing people their jobs.

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337 *See* Ex. 209, Email from R. Musso to B. Werner, et al. (Sept. 5, 2008), SLC DNC Investigation 0012946 (discussion of termination of Retailer that justified breaches of the Retailer Agreement by referencing its lack of trailing incentives).

338 *See* Ex. 456, Form DISH Network Retailer Agreement § 10.2 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 601.

339 *See, e.g.*, Ex. 383, Letter from L. Joseph to M. Martinez, et al. (July 13, 2009), SLC DNC Investigation 0015676 (retailer KR Comm LLC alleging wrongful termination); Ex. 471, Letter from Lattitude Group LLC to DISH Network LLC (July 25, 2013), SLC DNC Investigation 0014931(alleging wrongful termination of OE Retailer).

340 *DNA Contractors v. DISH Network LLC*, No. 17-2-02494-37 (Wash. Super. Ct. 2017); *Brandt v. DISH Network Corp.*, No. 4:13-cv-01791 (E.D. Mo. 2013); *Caguas Satellite Corp. v. EchoStar Satellite LLC*, No. 09-2001CCC (D. P.R. 2011); *Ebert v. EchoStar Satellite LLC*, No. 08-04182-rfn (Bankr. N.D. Tex. 2008); *Harden v. EchoStar Satellite LLC*, No. 07-00467-5-ATS (Bankr. E.D.N.C. 2007).

The ability to terminate the Retailer Agreement was not one-sided. Retailers could and did terminate their Retailer Agreements with DISH.[341] Retailers also had the ability to apply pressure to DISH consistently with the Retailer Agreement if they so desired. For example, in 2004, Dish TV Now unilaterally stopped advertising DISH and halted all DISH sales over a dispute about the availability for sale of particular DISH hardware.[342]

C. Calling Campaigns

DISH made millions, if not billions, of calls to consumers during the Investigation Period.[343] Yet, almost all of the complaints DISH received during the Investigation Period concerned calls not made by DISH because DISH was largely complying.[344] Most of the damages in the Underlying DNC Actions were awarded for calls made by persons other than DISH.[345] In addition to DISH's own calls, during the Investigation Period, Authorized Telemarketers called at DISH's direction, Retailers called at their own discretion, and unauthorized third parties called consumers in DISH's name for their own ends.

1. Calls Made by DISH Employees

DISH called consumers, primarily its customers, for a variety of purposes throughout the Investigation Period. Management viewed complying with DNC Laws when making those calls

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341 Ex. 143, EchoStar Retailer Agreement with JSR, § 10.2 (Apr. 12, 2006), SLC DNC Investigation 0012502 at 519.

342 Ex. 109, Email from A. Ahmed to M. Mills, et al. (Jan. 1, 2004), SLC DNC Investigation 0007287.

343 *See, e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d at 915-16.

344 *See, e.g.*, Ex. 716, Email from B. Han to J. Chambers (Sept. 25, 2008), SLC DNC Investigation 0002174 ("I am sorry about this. you are NOT receiving calls from Dishnetwork but probably somebody who wants to sell your name to a retailer against our rules."); Ex. 302, Email from C. Ergen to C. Kulig (Aug. 22, 2006), SLC DNC Investigation 002177 at 178 ("i am confident this is not dishnetwork calling you but more likely someone who is 'representing' they are dishnetwork and trying to sell you something.").

345 *See infra* Factual Findings §§ X.D.3.b and X.D.2.f (demonstrating that Ergen's view that the problematic calls were overwhelmingly not made by Dish was accurate).

as both a regulatory issue and a customer service issue, given the popularity of the DNC Laws.[346] No Director Defendant believed that DISH would *attract* new customers by violating DNC Laws.[347]

Thus, in structuring calling campaigns, DISH even refrained from call practices that were legal, if it believed that the calls would be upsetting to consumers. For example, in 2010, DISH was permitted by law to call customers on federal holidays, but it refrained from doing so to avoid customer complaints.[348] And, whenever it discovered an error in its DNC compliance, Management made the changes that it believed were necessary to fix the problem.[349]

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346 *See, e.g.*, Ex. 249, Trial Transcript, at 2133:14-24, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Feb. 3, 2016) (D.I. 625) (B. Neylon Testimony); Ex. 247, Trial Transcript, at 1484:6-24, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 29, 2016) (D.I. 621) (J. DeFranco Testimony).

347 *See, e.g.*, Ex. 86, Trial Transcript, at 173:2-7, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 13, 2017) (D.I. 304) (J. DeFranco Testimony) ("If a consumer is on a Do Not Call Registry, went out of their way to actually register that they didn't want to get a phone call, then immediately when they got a sales call for any product they weren't going to be—that wasn't going to be a productive call or likely to be a productive call."). This was confirmed through the SLC's interviews of the Director Defendants.

348 *See* Ex. 416, Email from J. Montano to D. Baretta (Oct. 14, 2010), SLC DNC Investigation 0010165 ("As a business rule and to avoid complaints we historically have not conducted any outbound dialing on Federal holidays."); *see, e.g.*, 16 CFR § 310.4(c) (restricting calling time from 8:00 a.m. to 9:00 p.m. local time, but not prohibiting calls on Federal or state holidays).

349 Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 0001142; Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217; Ex. 436, Email from B. Kitei to A. Dexter, et al. (Aug. 30, 2011), SLC DNC Investigation 0002638 ("Our GC is hot to trot on this issue and implied that 'heads will roll' if we have any furure EBR compliance problems. So, please make sure we are 100% buttoned up here with Possible Now and that our EBR filters are current for all states at all times.").

Management believed that the majority of the DNC complaints that DISH received were the result of calls by Retailers or third parties, for which DISH was not legally responsible.[350] Nonetheless, to ensure that DISH's own DNC compliance was effective, in 2002, Management put together a working group of employees from different departments to ensure DISH's compliance with DNC requirements.[351]

a. Non-Telemarketing Calls

The provisions in the DNC Laws at issue in the Underlying DNC Actions apply only to telemarketing calls.[352] Most of DISH's outbound calls during the Investigation Period were not telemarketing calls.[353] During the Investigation Period, most of DISH's outbound calls addressed the logistics of providing customers with satellite television service.[354] For example, DISH called customers to schedule and confirm satellite dish installation, to reschedule canceled

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350 Ex. 100, Email from P. Weyforth to S. Larson, et al. (May 9, 2002), SLC DNC Investigation 0012963 (stating "[w]e realize that retailer may be causing the bulk of the issues but we need to ensure we are buttoned up in each area.").

351 *U.S. v. DISH*, 256 F. Supp. 3d at 829.

352 *Id.* at 817 ("The Plaintiffs alleged twelve counts against Dish for violations of federal and state laws and regulations prohibiting certain outbound telemarketing calls (Do-Not-Call Laws)."); *Krakauer*, C.A. No. 14-cv-333, 2017 WL 224952, at *1 (M.D.N.C. May 22, 2017) ("These calls violated the Telephone Consumer Protection Act . . . . the TCPA prohibits telemarketers from repeatedly calling people who list their phone numbers on the National Do Not Call Registry."); *see also* 47 C.F.R. § 64.1200 (placing restrictions on "any telephone call that includes or introduces an advertisement or constitutes telemarketing"); 16 C.F.R. §§ 310.3, 310.4 (prohibiting "deceptive telemarketing acts or practices" and "abusive telemarketing act[s] or practice[s]" by a "seller or a telemarketer."); Cal. Bus & Prof Code § 17592(c) (California Do-Not-Call Law); 815 Ill. Comp. Stat. 305/1 (Illinois Automatic Telephone Dialers Act); the N.C. Gen. Stat. § 75-102(a) (North Carolina Do-Not-Call Law); N.C. Gen. Stat. § 75-104 (North Carolina Automatic Telephone Dialer Law).

353 *See* Ex. 252, DISH Outbound Operations—Summary of Processes and Procedures, SLC DNC Investigation 0010911 at 912 (classifying outbound calls as 85% informational (Account Notifications), 10% Customer Satisfaction (Surveys & Follow-Up) and 10% Telemarketing (Sales)). DISH has substantially curtailed even its previously-limited outbound calling since the end of the Investigation Period.

354 *Id.*

work orders, to update payment information, to schedule or confirm calls to service satellite equipment, to conduct customer satisfaction surveys, or to collect payment if an account fell delinquent.[355] On the vast majority of these calls, DISH employees spoke to the consumer contacted; however, DISH used pre-recorded messages, called "robocalls," for some of these messages at some points in time.[356] Thus, it was important to DISH from a business perspective that the structures put in place for DNC compliance did not interfere with its non-telemarketing communications.

b. Telemarketing Calls

Most of DISH's marketing during the Investigation Period was not telemarketing.[357] DISH advertised its services through various media, generating inbound calls from customers seeking to purchase or to obtain information about purchasing DISH service.[358]

DISH employees did, however, make some outgoing sales calls, "telemarketing calls" organized into "Telemarketing Campaigns," to individuals during the Investigation Period.[359] DISH considered calls telemarketing whenever the communication to the customer had the potential to impose a cost of some type on the customer. DISH policy required a live DISH

355 *U.S. v. DISH*, 256 F. Supp. 3d at 824-25.

356 *Id.* at 831 ("Prerecorded messages could be used in non-telemarketing calling campaigns, such as payment reminders, or informational calls that did not involve the sale of additional services."). The Underlying DNC Actions did not find any issues with DISH's use of robocalls in the limited circumstances in which DISH used them.

357 *Id.* at 820-21 (discussing different marketing techniques used by DISH).

358 *Id.* at 820 ("Inbound telemarketing involves advertising through various media (e.g., television, radio, print, direct mail) to generate inbound calls from consumers seeking information about the possible purchase of goods and services. Dish engaged in both inbound and outbound telemarketing.").

359 *Id.* at 820-21, 823.

employee to interact with the consumer on any calls that it deemed to be telemarketing.[360] The vast majority of DISH's outbound telemarketing calls (upwards of 90%) were made by DISH to existing customers to sell upgraded DISH services. Where DISH called consumers that were not already DISH customers, it focused heavily on customers who had inquired with DISH about purchasing DISH service.

Two different departments within DISH were primarily responsible for outbound calling. First, Database Marketing created DISH's call lists targeting consumers that were not current DISH customers.[361] Thus, Database Marketing executed "Lead Tracker" campaigns to individuals who contacted DISH about acquiring satellite TV services or who inquired about or began to purchase DISH services without completing the purchase. Lead Tracker calling campaigns were intended to be called within one to two days of the person's contact with DISH.[362] DISH believed it had an inquiry-based established business relationship with these consumers for purposes of complying with the DNC Laws.[363] Database Marketing also handled the relatively small number of "cold calls" that DISH made.[364]

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360 *Id.* at 821.

361 *Id.* at 825 ("Dish's Database Marketing Department . . . created the Lead Tracking System (or LTS) calling lists.").

362 *Id.* at 902 ("This opinion is premised on Dish's representations to Taylor that Lead Tracking System calling campaigns are calls to inquiry leads within a day or two of the inquiry.").

363 *Id.* at 825. Although the court in *U.S. v. DISH* determined that "Dish has failed to present competent evidence regarding the make-up of the Lead Tracking System[,]" the court made no finding as to DISH's subjective view on the existence of an inquiry-based relationship with the individuals in the Lead Tracker. *Id.* at 835, 902. Several witnesses summarily testified that Lead Tracking System calling lists were made up of people who inquired about Dish Network programming. "Dish presumed that it had an Inquiry Based Established Business Relationship with the recipients of these calls." *Id.* at 825.

364 *Id.* at 834 ("Database Marketing was responsible for operating the Do-Not-Call Law compliance system for [the Cold Call campaigns]. Database Marketing also formulated the calling lists for these campaigns.").

A separate team within DISH, eventually called "Outbound Operations," created DISH's call lists for calls to current or former DISH customers.[365] Among other things, Outbound Operations created call lists for "upsell" calling campaigns to sell DISH customers on expanded satellite television service at commensurately expanded prices.[366] And, if customers canceled their DISH service, Outbound Operations would contact the customers in "win back" calling campaigns, generally at 48 hours, 30 days, 60 days, 6 months, 12 months, 18 months, and so on after the cancelation to convince them to restore their DISH subscription.[367]

c. Outbound Call Scrubbing

During the Investigation Period, DISH put processes in place to ensure that its calling campaigns would comply with DNC Laws.[368] To that end, DISH maintained written Do Not Call policies during the Investigation Period, which it updated on February 24, 2004, February 6, 2006, March 20, 2008, March 12, 2009 and June 25, 2013.[369] When states adjusted their DNC

365 Ex. 252, DISH Outbound Operations—Summary of Processes and Procedures, SLC DNC Investigation 0010911.

366 *U.S. v. DISH*, 256 F. Supp. 3d at 823 ("Campaigns that Dish intended to direct at current customers were called Average Revenue Per Unit (ARPU), Upsell, and Premium Upsell campaigns. These campaigns offered additional or upgraded programming or services to existing customers.").

367 *Id.* at 824.

368 *Id.* at 830 ("Dish established two separate systems to address the launch of the Registry and the amended Do-Not-Call Laws generally.").

369 Ex. 101, EchoStar Satellite Corporation "Do-Not-Call" Policy (June 1, 2002), SLC DNC Investigation 0012031; Ex. 60, EchoStar Satellite, L.L.C. "Do-Not-Call" Policy (Feb. 24, 2004), SLC DNC Investigation 0011039; Ex. 62, EchoStar Satellite, L.L.C. "Do-Not-Call" Policy (Feb. 6, 2006), SLC DNC Investigation 0011042; Ex. 721, EchoStar Satellite, L.L.C. "Do-Not-Call" Policy (Mar. 20, 2008), SLC DNC Investigation 0011045; Ex. 65, DISH Network LLC Do-Not-Call Policy (Mar. 12, 2009), SLC DNC Investigation 0011032; Ex. 733, DISH Network LLC Do-Not-Call Policy (June 25, 2013), SLC DNC Investigation 0014802.

Laws, DISH halted telemarketing to those states if it could not immediately comply with the amended DNC Laws.[370]

In an effort to comply with DNC Laws, DISH's employees applied one of three different categories of scrub to an outbound call list depending upon the intended recipients of the calls: (1) "All DNC" or "All Scrub;" (2) "No DNC" or "No Scrub;" and (3) "Standard Scrub."[371] The employee performing the scrub selected the scrub to be applied depending on the script for the outbound calls.[372] For example, in February 2003, the IT department's project to support call scrubbing was its number one priority.[373]

First, DISH employees applied All DNC or All Scrub to telemarketing campaigns aimed at individuals with whom DISH did not have any relationship.[374] An All DNC scrub removed all numbers on the Federal Registry, any State Registry and DISH's Internal List. It also removed wireless numbers and numbers that DISH had added to its own internal list of "suppressed" numbers.[375] All DNC scrub was the most conservative scrub.

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370 *See, e.g.*, Ex. 102, Email from T. Binns to J. Hernandez (June 6, 2002), SLC DNC Investigation 0012955 at 956 (stating "[t]he first No-Call list will be available on June 10, 2002. You must update your list by no later than June 30, 2002[.]"). DISH revised its DNC policy on June 1, 2002 (Ex. 101, EchoStar Satellite Corporation "Do-Not-Call" Policy (Revised June 1, 2002), SLC DNC Investigation 0012031); and, in February 2003, DISH set IT's DNC compliance related project as the department's number one priority. Ex. 260, IT's Project List as of Feb. 11, 2003, SLC DNC Investigation 0005852 (marking DNC Compliance as the number one priority).

371 *U.S. v. DISH*, 256 F. Supp. 3d at 831.

372 *Id.* at 831-32 ("Dish employees manually reviewed the Dish files to determine whether Dish had a Transaction-based Established Business Relationship with current and former customers. . . .").

373 Ex. 260, Prioritized Projects List (Feb. 11, 2003), SLC DNC Investigation 0014351.

374 *U.S. v. DISH*, 256 F. Supp. 3d at 831 ("Outbound Operations intended to apply the All Scrub to telemarketing campaigns directed to individuals with whom Dish concluded that it had no Established Business Relationship.").

375 *Id*. at 832.

Second, DISH employees applied the "Standard Scrub" to Calling Campaigns directed to individuals with whom DISH believed it had an established business relationship.[376] As noted above, many DNC Laws, including the TCPA and TSR permitted calls to numbers on DNC Registries, if an established business relationship existed. During the early part of the Investigation Period, DISH used the disconnect date (if any) associated with a customer account in DISH's computer system to determine when DISH's established business relationship with a former customer expired.[377] Later in the Investigation Period, upon the advice of DNC consultant PossibleNow, discussed in Factual Findings Section IV.D below, DISH measured its established business relationship from a customer's last payment.

The "Standard Scrub" removed telephone numbers on DISH's Internal List; numbers of residents in states in which the state law did not allow for an established business relationship exception; numbers suppressed within DISH's system; and wireless numbers.[378] Outbound Operations applied the Standard Scrub to telemarketing campaigns directed to current or former customers with whom DISH concluded that it had transaction-based established business relationships. Database Marketing applied the Standard Scrub to calls to consumers in DISH's lead tracking database.[379] DISH employees manually reviewed the files from which the call lists

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376 *Id.* ("Outbound Operations applied the Standard Scrub to telemarketing campaigns directed to current or former customers with whom Dish concluded that it had Transaction-based Established Business Relationships").

377 *Id.* (Dish employees, however, did not use the last dates that consumers paid for Dish Network programming to calculate the 18 month Established Business Relationship time period. Rather, Dish used "the disconnect date that was associated with the file name" to formulate these lists.).

378 *Id*.

379 *Id.* at 835.

were generated to confirm that the established business relationship exception applied to call lists given the Standard Scrub.[380]

Third, a DISH employee could remove only wireless numbers and numbers that DISH had suppressed from a call list by applying the "No DNC" scrub.[381] DISH applied the No DNC scrub to calls that employees determined to be non-telemarketing, such as collection calls, payment reminder calls, or calls to schedule service.[382]

DISH employees selected the appropriate scrub for each calling campaign based on the text of the script for the campaign.[383] If the employee could not determine whether a given campaign was telemarketing, the employee consulted with DISH's Legal Department.[384] Regardless of the scrub applied, DISH employees audited the scrubs by inserting numbers into proposed call lists that should be removed by the scrub selected and then confirming afterwards that the inserted numbers had been removed from the finished call list.[385]

For the most part, DISH relied upon institutional knowledge to ensure that this process was applied appropriately to each calling campaign. DISH maintained some documentation of its scrub process,[386] but Outbound Operations did not have a set written policy governing the

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380 *Id.* at 832.

381 *Id.* at 831.

382 *Id*.

383 *Id.* ("Outbound Operations personnel reviewed the campaign descriptions and scripts to determine the type of campaign and the particular scrubbing process to use to remove telephone numbers that could not be called under the particular campaign.").

384 *Id.* ("Outbound Operations consulted with Dish's legal department, if necessary, to determine the appropriate scrubbing process to use.").

385 *Id.* at 833.

386 *See, e.g.*, Ex. 252, DISH Outbound Operations—Summary of Processes and Procedures, SLC DNC Investigation 0010911.

process.[387] After the 2010 CompliancePoint Audit, discussed in Factual Findings Section VIII.B below, DISH substantially expanded its documentation of this process.[388]

In March 2004 and February 2012, DeFranco reviewed DISH's scrub process at a high level.[389] The SLC's Investigation did not indicate any other instances in which any Director Defendants reviewed DISH's scrub process.

d. Outbound Operations' Role

Outbound Operations handled all of DISH's outbound calling and managed DISH's autodialer.[390] For Outbound Operations' calling campaigns to DISH customers, the same system that scrubbed the calls formatted the resulting call list for the autodialer. For calling campaigns directed at consumers that were not DISH customers, Database Marketing prepared and scrubbed its call lists, but then sent them to Outbound Operations to be formatted for the autodialer.[391]

Once a call list was scrubbed, it had a limited useful life to address the possibility that an established business relationship may expire or a consumer may add the consumer's phone

387 *U.S. v. DISH*, 256 F. Supp. 3d at 831.

388 *See, e.g.*, Ex. 442, Email from J. Montano to D. Dudrey (Feb. 2, 2012), SLC DNC Investigation 0006123 at 123.

389 *See* Ex. 273, Email from R. Kondilas to J. DeFranco (Mar. 9, 2004), SLC DNC Investigation 0009617; Ex. 442, Email from J. Montano D. Dudrey (Feb. 2, 2012), SLC DNC Investigation 0006123 at 123 ("[DeFranco] is really interested in how the Do Not Call criteria is applied to our OB campaigns.").

390 *U.S. v. DISH*, 256 F. Supp. 3d at 832-33 ("After completing the scrub, Outbound Operations then either: (1) loaded the scrubbed lists into the automatic dialer, and the automatic dialer made the calls for the various Dish call centers; or (2) sent the scrubbed list to a Dish Telemarketing Vendor such as eCreek."); Ex. 252, DISH Outbound Operations—Summary of Processes and Procedures, SLC DNC Investigation 0010911.

391 *U.S. v. DISH*, 256 F. Supp. 3d at 837 ("Database Marketing sent the finished Lead Tracking System and Cold Call calling lists to Outbound Operations.").

number to the National Registry while a campaign was ongoing.[392] DISH, by unwritten policy, permitted a call list targeting DISH customers to be called for up to 15 days after scrubbing.[393] Call lists targeting consumers who were not DISH customers were called within 24 to 48 hours.[394]

2. Calls Made by Authorized Telemarketers

In addition to its employees, DISH contracted with a few specific "Authorized Telemarketers," such as eCreek Services, Inc. ("eCreek"),[395] to make or receive calls with consumers at DISH's direction.[396] The individuals handling either these outbound or inbound calls were directed to identify themselves as DISH to consumers. From a consumer's perspective, the Authorized Telemarketers' employees were DISH employees—by design.

DISH integrated Authorized Telemarketers' DNC compliance into DISH's own DNC compliance. When an Authorized Telemarketer made calls for DISH, DISH provided the call list, provided the script to be used, and scrubbed the list of individuals to be called for DNC compliance.[397] At times, DISH believed that eCreek also performed an additional, duplicate,

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392 *Id.* at 833 ("Outbound Operations used a 15-day time limit to decrease the possibility that a telephone number on the scrubbed calling list would have been placed on the Registry more than 31 days before the call.").

393 *Id*.

394 *Id.* at 834 ("Outbound Operations dialed Lead Tracking System campaign calling lists within 24 to 48 hours of receipt.").

395 Ex. 153, Master Services Agreement between EchoStar Satellite L.L.C. and eCreek Services, Inc. (Aug. 1, 2006), SLC DNC Investigation 0010559.

396 *U.S. v. DISH*, 256 F. Supp. 3d at 820 ("Dish also retained companies to perform outbound telemarketing services for Dish").

397 *U.S. v. DISH*, 256 F. Supp. 3d at 832-33 ("After completing the scrub, Outbound Operations then either: (1) . . . ; or (2) sent the scrubbed list to a Dish Telemarketing Vendor such as eCreek."); Ex. 229, Email from R. Bagwell to J. Montano, et al. (Jan. 28, 2010), SLC DNC Investigation 0010588.

scrub.[398] However, when DISH asked for eCreek's written DNC policy, the policy provided did not include procedures for duplicate call scrubbing.[399]

Outbound Operations monitored calls by DISH's Authorized Telemarketers, keeping in daily contact with the Authorized Telemarketer.[400] For example, Outbound Operations responded to consumer complaints regarding eCreek's DNC compliance.[401] And, where Outbound Operations identified problems with eCreek's procedures, Outbound Operations tried to correct the problem.[402]

Management generally believed that DISH was legally responsible for DNC violations by eCreek.[403] For example, eCreek, whose calls were at issue in *U.S. v. DISH*, collected names for both its own Internal List and for DISH's Internal List.[404] When eCreek made calls to consumers

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398 *Id.* at 834 ("eCreek performed an additional scrub on the lists it received from Dish"); Ex. 442, Email from J. Montano to D. Dudrey (Feb. 2, 2012), SLC DNC Investigation 0006123 at 123 ("Vendors have an obligation to conduct a 'secondary' scrub as a safeguard to our primary scrub.").

399 *U.S. v. DISH*, 256 F. Supp. 3d at 834 ("In July 2010 . . . eCreek provided a Do-Not-Call Policy consisting of two pages of text and a flow chart [but] did not include procedures for scrubbing calling lists to comply with the TSR or the FCC Rule."); Ex. 709, Email from J. Dang to J. Montano, et al. (July 28, 2010), SLC DNC Investigation 0010923.

400 *U.S. v. DISH*, 256 F. Supp. 3d at 833 ("Outbound Operations kept in daily communication with eCreek."); Ex. 709, Email from J. Dang to J. Montano, et al. (July 28, 2010), SLC DNC Investigation 0010923.

401 *Id.* at 834 ("Outbound Operations responded to consumer complaints regarding eCreek's telemarketing, but did not otherwise check eCreek for Do-Not-Call Law compliance.").

402 *Id*.

403 *Id.* at 923 ("Dish concedes that eCreek was its agent for telemarketing.").

404 *Id.* at 834 ("eCreek also collected names for its internal Do-Not-Call list and for Dish's internal Do-Not-Call list.").

in Mississippi that violated DNC Laws, using a call list provided by DISH, DISH settled the matter rather than assert that it was not responsible for the calls.[405]

3. Calls Made by the Retailers

Most Retailers did not use telemarketing to sell DISH service. But, some did. Retail Services routinely asked Retailers whether they telemarketed and documented the responses. If a Retailer was telemarketing, DISH asked the Retailer follow-up questions, including whether it was recording its calls and, later in the Investigation Period, using a third-party compliance vendor such as PossibleNow to scrub its call lists. DISH Management wanted to ensure that any telemarketing being conducted would not injure DISH's goodwill.[406]

Retailer telemarketing looked dramatically different depending upon the Retailer involved. Where Traditional Retailers telemarketed, it was generally by manually dialing calls to consumers who had expressed an interest in DISH services, for example, by dropping a business card in a fishbowl at the county fair. When OE Retailers telemarketed, they did so on a massive, automated scale, placing tens of millions of phone calls. OE Retailers that telemarketed had automatic dialers and teams of people answering the calls connected.[407] Responsible OE Retailers had the resources necessary to scrub their call lists against all relevant DNC Registries,

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405 Ex. 438, Email from L. Kalani to S. Dodge (Sept. 12, 2011), SLC DNC Investigation 0004232 ("Attached, is the final settlement agreement that you have approved. Please sign one original and fed ex to me at my address below.").

406 *See supra* Factual Findings § V.

407 *U.S. v. DISH*, 256 F. Supp. 3d at 863 (JSR used "automatic dialers to produce 1,000,000 connected calls per month").

other than DISH's Internal List. Unscrupulous OE Retailers operated on a scale sufficient to justify robocalling software, number spoofing software, and offshore call centers.[408]

In contrast to Authorized Telemarketers, DISH generally did not insert itself into the DNC compliance of Retailers that chose to telemarket. If DISH discovered Retailers using unscrupulous or improper telemarketing practices, DISH directed Retailers to stop to protect DISH's goodwill. But, DISH did not scrub or audit Retailers' call lists and, early in the Investigation Period, DISH did not maintain shared Internal Lists with Retailers. As noted elsewhere, DISH believed that it was not responsible for Retailers' DNC compliance.[409]

4. Calls Made By Persons With Whom DISH Had No Relationship

DISH, its Authorized Telemarketers, and Retailers were not the only parties calling consumers about DISH. During the Investigation Period, both "Lead Generators," described below, and individuals intent on various private fraud called consumers claiming to be DISH. Ergen believed that more than 90% of the consumer complaints made to DISH during the Investigation Period, particularly around 2006, fell into this category. The SLC's investigation identified nothing to rebut that understanding. [410]

Lead Generators are companies, largely based overseas, that call consumers hoping to identify those interested in purchasing a particular type of product, such as satellite TV service. These Lead Generators then sell lists of the interested consumers' contact information to authorized retailers of that type of product. Lead Generators plagued DISH by calling

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408 *Id.* at 847 ("Some Order Entry Retailers hid their identities through a process called spoofing."); *id.* at 857 (Dish TV Now "was lying about the use of Prerecorded Calls"); *id.* at 865 (describing DISH discussion of JSR's "unauthorized use of off-shore affiliates").

409 *See supra* Factual Findings Section § II.B.4.b.i.

410 *See, e.g.*, Ex. 344, Email from M. Metzger to J. Blum, et al. (Aug. 4, 2008), SLC DNC Investigation 0007473.

consumers claiming to be DISH to try to verify the consumer's TV status.[411] The Lead Generator would then sell lists of DISH customers or potential DISH customers to Retailers selling DISH or DirecTV service. DirecTV's retailers earned activation fees of hundreds of dollars for converting DISH customers into DirecTV customers; thus they were willing to buy lists that simply reflected DISH customers. Some DISH Retailers would set up new accounts for current DISH customers in order to defraud DISH in paying commissions on new customer activations. A consumer contacted by a Lead Generator would often never discover that DISH itself had not made the call.

DISH had no relationship with Lead Generators. DISH's Retailer Agreement prohibited Retailers from working with a Lead Generator without DISH's express authorization.[412] Despite this prohibition, DISH was aware during the Investigation Period that some Retailers were purchasing leads from Lead Generators or using undisclosed third-party affiliates to act as Lead Generators.[413] "These third parties often made Do-Not-Call Law violations and used misrepresentations to sell Dish Network programming."[414] DISH believed during the Investigation Period that a majority of the DNC complaints that it was unable to associate with a particular Retailer were the result of calls from Lead Generators.

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411 Ex. 147, Email from R. Origer to B. Nylon, et al. (July 12, 2006), SLC DNC Investigation 0007275 ("Csrs are representing themselves as dish network, some have rude behavior and in some instances are flipping accounts."); Ex. 154, Email from J. DeFranco to M. Metzger, et al. (Aug. 7, 2006), SLC DNC Investigation 0012929.

412 *U.S. v. DISH*, 256 F. Supp. 3d at 847 ("The Retailer Agreement provided that Order Entry Retailers could not use third-party affiliates without prior approval from Dish.").

413 *See e.g.*, Ex. 356, Email from D. Adams to B. Van Emst, et al. (Sept. 30, 2008), SLC DNC Investigation 0006797.

414 *U.S. v. DISH*, 256 F. Supp. 3d at 847-48.

DISH made substantial efforts to stop Lead Generators. DISH issued multiple "Fact Blasts" to Retailers warning them away from business with Lead Generators.[415] DISH terminated and made examples out of its termination of Retailers that it discovered contracting with Lead Generators in a manner that violated DISH's Retailer Agreement.[416] In 2008, DISH even investigated litigation or legislative action in India to shut down Lead Generators that the company believed were located there. Lead Generators claiming to be DISH proved an insoluble business problem for DISH during the Investigation Period.[417]

Other third parties also called consumers, claiming to be DISH, for a variety of criminal schemes. Ergen suspected in 2006 that calls in violation of DNC Laws were being made as a form of industrial sabotage. But, Management could not confirm that.[418]

III. Consumer DNC Complaints Led to the FTC Investigation and AGs' Investigation (2003-2006).

The SLC's Investigation Period began in 2003 with the first Potentially Violative Calls addressed in *U.S. v. DISH*. At the start of the Investigation Period, between 2003 and 2006, consumers had embraced DNC laws, but businesses, including DISH, were working to

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415 Ex. 328, Facts Blast: Unauthorized Use of Third Party Lead Generation and Telemarketing Services (June 19, 2007), SLC DNC Investigation 0010020; Ex. 331, Facts Blast: Unauthorized Retailer Use of Third Party Lead Generation and Customer Acquisition Services (Oct. 10, 2007), SLC DNC Investigation 0005906.

416 *See, e.g.*, Ex. 331, Facts Blast: Unauthorized Retailer Use of Third Party Lead Generation and Customer Acquisition Services (Oct. 10, 2007), SLC DNC Investigation 0005906 at 906 ("Newport Satellite Group and Inkor Satellite Inc. were terminated as retailers for violation of our policies regarding lead generation and customer acquisition tactics.").

417 Ex. 731, Email from T. Stingley to S. McElroy, et al. (Jan. 6, 2009), SLC DNC Investigation 0005853 ("How are you going to prevent his affiliates from going to other retailers and then in turn destroying those retailers?"); *see also* Ex. 211, DISH Network Terminates Retailers (Oct. 2008-Mar. 2009), SLC DNC Investigation 0011815 at 815 (announcing "terminat[ion] [of] the following retailers, who the Company believes have engaged in illegal activity").

418 Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217 at 217.

implement the procedures necessary for compliance. DISH settled some DNC complaints, including through AVCs, where Management believed that DISH had made inadvertent mistakes. These settlements and the consumer complaints drove home the idea, for DISH Management and the Director Defendants involved, that DNC compliance was a customer service imperative. The consumer complaints also led the AGs and the FTC to investigate DISH's telemarketing and DNC compliance. Based on the belief that compliance with DNC Laws was necessary for consumer goodwill, Management tried to work with the FTC and AGs to not only settle liability, but to improve DISH's processes to limit further issues. Despite the seriousness with which Management involved approached these issues, they were not considered material to DISH as a whole. DNC compliance remained one issue among many faced by DISH.

A. Consumer Complaints

In 2002, as DNC Laws became ubiquitous, DISH began receiving more complaints about telemarketing calls.[419] Between 2003 and 2006, the number of individuals making DNC complaints to DISH or filing DNC complaints about DISH with the Better Business Bureaus, FTC, FCC and various state AGs steadily increased.[420] Most complaints came from consumers, triggered by inconvenience or harassment. DISH addressed these in the ordinary course.

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419 *See, e.g.*, Ex. 100, Email from P. Weyforth to S. Larson, et al. (May 9, 2002), SLC DNC Investigation 0012963.

420 *See, e.g.*, Ex. 263, Email from S. Novak to D. Moskowitz and C. Kuelling (Apr. 16, 2003), SLC DNC Investigation 0005049; Ex. 111, Letter from R. Swanberg to Dish Network (July 26, 2004), SLC DNC Investigation 0007290; Ex. 122, Letter from M. James to D. Moskowitz (Apr. 28, 2005), SLC DNC Investigation 0012867; Ex. 167, Letter from State of North Carolina Department of Justice to D. Steele (Nov. 9, 2006), SLC DNC Investigation 0012848; Ex. 157, EchoStar Satellite L.L.C. Risk Summary (Week Ending Sept. 5, 2006), SLC DNC Investigation 0013005.

As discussed in Factual Findings Section I.B.4 above, individual consumers could theoretically recover $500 per call made in violation of the TCPA[421] and potentially more based on state laws.[422] So, around this time, certain individuals actively positioned themselves to profit from the civil recoveries available to aggrieved consumers under DNC Laws. These people established multiple phone lines and engaged in conduct designed to trigger potentially violative telemarketing in order to demand settlement payouts.[423] DISH refused to settle claims from these "professional plaintiffs" when it had not made the call at issue. As a result, putative class action lawsuits related to telemarketing issues joined the stable of ordinary course litigation aimed at DISH.[424]

During this time period, Moskowitz as DISH's General Counsel, did approve the settlement of several lawsuits concerning inadvertent DNC violations that DISH had made.[425] The lawsuits were minor; resolved for between $7,500 and $50,000 each.[426] Management viewed these settlements and complaints passed along by AGs as a cost of imperfect DNC

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421 47 U.S.C.A. § 227(g).

422 *See, e.g.*, Cal. Bus & Prof Code §§ 17200, 17536(b), 17206(b) (per violation penalties up to $13,500 for certain violative calls and permitting cumulative civil penalties where a call violates multiple statutes).

423 *See, e.g.*, Ex. 710, Email from D. Steele to D. Moskowitz, et al. (Aug. 11, 2006), SLC DNC Investigation 0007535; Ex. 119, Letter from D. Caplan to K. Myers, et al. (Jan. 25, 2005), SLC DNC Investigation 00012411.

424 Ex. 258, Letter from T.W. Welch to B. Zook (Jan. 15, 2003), SLC DNC Investigation 0008819; Ex. 113, Letter from D. Steele to R. Swanberg (Sept. 14, 2004), SLC DNC Investigation 0012900.

425 *See, e.g.*, Ex. 263, Email from D. Moskowitz to S. Novak (Apr. 16, 2003), SLC DNC Investigation 0005049 at 049; Ex. 265, Email from S. Novak to D. Moskowitz (Apr. 29, 2003), SLC DNC Investigation 0005051.

426 *See, e.g.,* Ex. 266, Consent Judgment, *Oklahoma v. EchoStar Satellite Corp.*, Case No. CJ-2003-01346 (Okla. Dist. Ct. 2003), SLC DNC Investigation 0005052 at 053; Ex. 265, Email from S. Novak to D. Moskowitz (Apr. 29, 2003), SLC DNC Investigation 0005051.

compliance that DISH was working to improve and viewed resolving them as part of DISH's ordinary course of business.

B. 2003 AVCs

In 2003, DISH entered into an agreement or assurance of voluntary compliance ("AVC") with multiple state AGs addressing telemarketing issues. Specifically, DISH entered into separate AVCs with Indiana[427] and Missouri[428] concerning early issues with DISH's compliance with those states' DNC Laws.[429] DISH also entered into a single AVC with thirteen state AGs (the "13 State AVC") that concerned DISH's sales practices.[430] The 13 State AVC addressed the disclosures to consumers that DISH and Retailers were making when selling DISH services as well as the terms that DISH's contracts with consumers imposed with respect to fees, cancellation, and termination of the consumer's contract.[431] The 13 State AVC required DISH to take certain identified actions in connection with Retailers' telemarketing disclosures, but it

427 *See* Ex. 105, Petition for Approval of Assurance of Voluntary Compliance with Indiana, *In re EchoStar Satellite Corporation* (Ind. Cir. Ct. Apr. 11, 2003), SLC DNC Investigation 0004119.

428 *See* Ex. 106, Petition for Approval of Assurance of Voluntary Compliance with Missouri, *Missouri v. EchoStar Commc'ns Corp.*, Cause No. 03CV129088 (Mo. Cir. Ct. May 2, 2003), SLC DNC Investigation 0004108.

429 *U.S. v. DISH*, 256 F. Supp. 3d 810, 829 (C.D. Ill. 2017) (discussing settlements with Indiana and Missouri).

430 Ex. 711, Assurance of Voluntary Compliance or Discontinuance (May 2003), SLC DNC Investigation 0015271 at 272.

431 *See id.*, Sections II-III, SLC DNC Investigation 0015271 at 272, 275-89.

affirmatively declared that the Retailers were not DISH's agents.[432] DISH paid the states involved $5,000,000.[433]

DISH's Board did not negotiate these AVCs. Moskowitz was aware of the 2003 AVCs in his capacity as General Counsel of DISH.[434] DISH's Audit Committee discussed the 13 State AVC as part of its litigation updates at the April 24, 2003 and August 11, 2003 Audit Committee Meetings.[435]

The 2003 AVCs were contemporaneously publicly filed.[436] None of the signatories to the 13 State AVC has brought a complaint against DISH for violation of the 13 State AVC.[437] Neither Indiana nor Missouri has claimed that DISH violated the AVCs with those states.

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[432] *Id.* ¶ 5, SLC DNC Investigation 0015271 at 272-73 ("[N]othing in the Assurance is intended to change the existing independent contractor relationships between EchoStar and authorized retailers who sell EchoStar products and no agency relationship is created by the agreements set forth herein.").

[433] *Id.* ¶ 23(a), SLC DNC Investigation 0015271 at 288-89.

[434] *See* Ex. 262, Email from A. McCallin to J. Feltman, et al. (Apr. 2, 2003), SLC DNC Investigation 0014834; Ex. 105, Petition for Approval of Assurance of Voluntary Compliance with Indiana, *In re EchoStar Satellite Corporation* (Ind. Cir. Ct. Apr. 11, 2003), SLC DNC Investigation 0004119.

[435] Ex. 264, EchoStar Minutes of Regular Audit Committee (Apr. 24, 2003), SLC DNC Investigation 0003303 at 309 ("The eighth item of business was a report by Mr. Moskowitz, in his capacity as General Counsel of the Corporation, regarding . . . the investigation of certain of the Corporation's customer service practices by several state attorneys general.[]"); Ex. 271, EchoStar Minutes of Regular Audit Committee (Aug. 11, 2003), SLC DNC Investigation 0003314 at 319-20 ("The eighth item of business was an update presented by Mr. Moskowitz, in his capacity as General Counsel, regarding . . . the AG settlement[.]").

[436] Ex. 711, Assurance of Voluntary Compliance or Discontinuance (May 2003), SLC DNC Investigation 0015271; Ex. 105, Petition for Approval of Assurance of Voluntary Compliance with Indiana, *In re EchoStar Satellite Corporation* (Ind. Cir. Ct. Apr. 11, 2003), SLC DNC Investigation 0004119; Ex. 106, Petition for Approval of Assurance of Voluntary Compliance with Missouri, *Missouri v. EchoStar Commc'ns Corp.*, Cause No. 03CV129088 (Mo. Cir. Ct. May 2, 2003), SLC DNC Investigation 0004108.

[437] *See* Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543 at 545.

C. The 2005 FTC Investigation

In July 2005, the FTC issued a Civil Investigative Demand ("CID") to DISH.[438] The FTC's CID (the "FTC CID") requested information concerning various aspects of DISH's compliance with the TSR (the "FTC Investigation"), among other things.[439] DISH responded to the FTC CID in September 2005 (based upon an agreed response schedule), enclosing materials requested by the FTC.[440] The SLC learned through interviews that, within DISH, Blum was directly responsible for DISH's strategy and efforts to resolve the FTC Investigation from the beginning. This first response did not resolve the FTC Investigation.

In 2007, DISH hired Rose and Hutnik of Kelley Drye to advise DISH on DNC issues and to represent DISH in further negotiations with the FTC.[441] From that point forward, Kelley Drye represented DISH in negotiations with the FTC, communicated DISH's DNC compliance efforts to the FTC, and relayed information regarding the FTC's receipt of complaints regarding DISH's telemarketing back to DISH.[442]

The attorneys that DISH retained from Kelley Drye were experts in DNC Laws and in dealing with issues such as the FTC Investigation. When DISH retained him, Rose had more than 25 years of experience working on consumer protection issues with and for the FTC. He had spent six years at the FTC, working closely with Lois C. Greisman, the FTC's chief attorney

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438 Ex. 124, Civil Investigative Demand (July 21, 2005), SLC DNC Investigation 0013575.

439 *U.S. v. DISH*, 256 F. Supp. 3d at 868-69.

440 Ex. 128, Letter from D. Steele to R. Deitch (Sept. 22, 2005), SLC DNC Investigation 0015586.

441 *See* Ex. 327, Email from L. Rose to L. Kalani, et al. (June 12, 2007), SLC DNC Investigation 0007968.

442 *See, e.g.*, Ex. 335, Email from L. Rose to R. Deitch, et al. (Nov. 29, 2007), SLC DNC Investigation 0008325; Ex. 363, Email from L. Rose to J. Blum, et al. (Dec. 23, 2008), SLC DNC Investigation 0009900; Ex. 375, Email from L. Rose to D. Crane-Hirsch (May 3, 2009), SLC DNC Investigation 0004720.

at the time of the FTC Investigation.[443] Then, in private practice, Rose had built one of the preeminent FTC practice groups in the country. He had counseled a number of Fortune 500 companies on DNC compliance and had been involved in many of the early DNC cases.[444] Hutnik was a specialist in the TSR, with seven years' experience doing constant work on DNC issues under Rose's guidance.

1. Management of the FTC Investigation

There was nothing unusual or alarming about the FTC Investigation. DISH was involved in FTC investigations on various other topics at the time as well. The FTC Investigation appeared to be inspired by consumer DNC complaints made to the FTC on the basis of the morass of Retailer and malicious DNC violations described in Factual Findings Section III.B above. The FTC Investigation was also part of a push by the FTC to investigate TSR compliance by a number of companies with substantial involvement in telemarketing.[445] The information that Blum gathered and produced in response to the FTC Investigation did not demonstrate that DISH had any systemic problem with telemarketing compliance.

The SLC's Investigation did not identify any evidence that the FTC Investigation or FTC CID was discussed by the Board in 2005. Blum was not aware of any communications concerning the FTC Investigation to the Board. Kelley Drye provided its guidance to Blum or

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443 *See* Ex. 724, Kelley Drye, Lewis Rose, ABOUT, https://www.kelleydrye.com/Our-People/Lewis-Rose (last visited Nov. 21, 2018) ("Prior to entering private practice, Lew served as an attorney with the FTC, where he focused on the enforcement of FTC trade regulation rules and orders, civil penalty actions and consumer redress actions.").

444 *See, e.g.*, *id.*, EXPERIENCE ("Represented Craftmanic in an FTC investigation alleging violationg of "Do Not Call" rules.").

445 *See* Ex. 434, Letter from L. Rose to M. Dortch (July 20, 2011), SLC DNC Investigation 0007494 at 495 ("It is simply an attempt by the USDOJ to transfer the burden to enforce the statutory and regulatory provisions associated with the TCPA from law enforcement agencies, such as the USDOJ, the [FTC], the [FCC] and/or state attorneys general to businesses such as DISH Network.").

Dodge.[446] The Director Defendants interviewed by the SLC believed that the FTC Investigation would not have been considered sufficiently material to merit Board discussion.

2. The 2003-2007 Calling Records

Among other things, the FTC CID requested samples of DISH's telemarketing call records, indicating how many calls were made within the period, how many calls were made to people on the National Registry and how many calls were made to people on the National Registry for telemarketing purposes without a valid exception.[447] Auditing call information is very intensive in terms of both computing power and employee time. In May 2007, DISH retained a third-party vendor, PossibleNow, to analyze its call records to respond to the CID.[448]

In its initial response to the FTC CID, DISH provided call records from 2003 through 2005.[449] DISH described these records in its cover letter responding to the FTC CID as "listing of all outbound telemarketing calls."[450] DISH later came to believe that many of the call records sent in 2005 reflected non-telemarketing calls. [451] In September 2007, upon advice of Kelley Drye, DISH provided the FTC additional records from 2003-2007 (collectively with the records

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446 *See, e.g.*, Ex. 394, Email from L. Rose to J. Blum, et al. (Sept. 3, 2009), SLC DNC Investigation 0004615 (email to Blum, Kalani and Dodge).

447 Ex. 124, Civil Investigative Demand (July 21, 2005), SLC DNC Investigation 0013575 at 583-84.

448 Ex. 326, Email from L. Rose to L. Kalani and D. Hargen (May 30, 2007), SLC DNC Investigation 0014756 (enclosing draft PossibleNow contract).

449 Ex. 128, Letter from D. Steele to R. Deitch (Sept. 22, 2005), SLC DNC Investigation 0015586.

450 *Id*. The Court in *U.S. v. DISH* considered that description an admission by DISH that all of the calls reflected were telemarketing calls and declined to hear evidence to the contrary. *U.S. v. DISH*, 256 F. Supp. 3d at 869-70. This issue was not material to the SLC's Investigation.

451 *See* Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 469; Ex. 345, Letter from L. Rose to R. Deitch (Aug. 14, 2008), SLC DNC Investigation 0004762 (enclosing PossibleNow's data analysis).

provided in 2005, the "2003-2007 Calling Records").[452] In spring 2008, DISH sent the FTC an analysis of the 2003-2007 Calling Records prepared with the assistance of PossibleNow.[453]

Analysis of the 2003-2007 Calling Records confirmed DISH's preexisting belief, informed by the advice of Kelley Drye, that DISH's calls overwhelmingly complied with the DNC Laws.[454] The analysis showed that between June and September 2005 only 0.36% of DISH's calls had potential issues with DNC compliance and that for calls in April/October 2004-2007, only 0.20% of DISH's calls had potential issues with DNC compliance. Kelley Drye explained to the FTC that this low rate of Potentially Violative Calls demonstrated that DISH met the safe harbor of the TSR. Kelley Drye also offered the FTC explanations for why the Potentially Violative Calls existed. Within DISH, Outbound Operations, the department responsible for DISH's calls, adjusted its processes to correct for the deficiencies identified in analyzing the 2003-2007 Calling Records.

The SLC found no evidence that Management believed that the 2003-2007 Calling Records indicated systematic problems with DISH's DNC compliance. To the contrary, the individuals aware of the analysis believed that the 2003-2007 Calling Records confirmed that DISH was generally in compliance with DNC Laws. The Board appears to have had no involvement in analyzing DISH's call records or otherwise responding to the FTC CID.

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452 *U.S. v. DISH*, 256 F. Supp. 3d at 869 n.45.

453 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468; Ex. 345, Letter from L. Rose to R. Deitch (Aug. 14, 2008), SLC DNC Investigation 0004762.

454 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468.

3. Negotiation with the FTC

DISH wanted to settle the FTC Investigation from the begining. The persons interviewed by the SLC explained that DISH believed that resolving the FTC's concerns with DISH's telemarketing would serve DISH's business interests by reducing consumer complaints. To that end, throughout the FTC Investigation, DISH proposed settlements focused on improvements in DISH's telemarketing process.[455] DISH was concurrently negotiating a settlement of the AGs' Investigation (discussed in Factual Findings Sections III.D.2-3 below), which had certain issues in common with the FTC Investigation.[456] The AGs involved in the AGs' Investigation accepted this approach. The FTC did not.

DISH never reached agreement with the FTC on the monetary penalty that DISH would pay to resolve the FTC Investigation and later *U.S. v. DISH*. During the Investigation Period, the FTC's demands wavered between $12 million and $11.5 million, which was substantially in excess of the penalties that it had obtained from other companies.[457] DISH's highest offer, informed by the advice of Kelley Drye, was $5 million. The delta between the bid and ask for settlement was lower than the cost of litigation to either DISH or the FTC. DISH and the FTC could have easily bridged this gap if they could have resolved the question of DISH's liability for

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455 *See, e.g.*, Ex. 376, Draft Stipulated Judgment and Order for Permanent Injunction Against DISH Network LLC (May 3, 2009), SLC DNC Investigation 0004721 (proposing required improvements to DISH's processes); Ex. 425, Letter from L. Rose to L. Greisman (Mar. 14, 2011), SLC DNC Investigation 0007475 (setting forth proposed injunctive provisions).

456 *Compare* Ex. 124, Civil Investigative Demand (July 21, 2005), SLC DNC Investigation 0013575 at 583-84, *with* Ex. 289, AG Joint Civil Investigative Demand (June 19, 2006), SLC DNC Investigation 0004483 at 4491-4511.

457 *Compare* Ex. 426, Letter from L. Greisman to L. Rose (Mar. 17, 2011), SLC DNC Investigation 0009435, *with* Ex. 729, Chart of FTC Settlements, SLC DNC Investigation 0004444 (noting an average penalty of $790,000).

Retailers. But as discussed in Factual Findings Sections III.C.4-5 below, DISH could not resolve that issue with the FTC.

A few Director Defendants had minimal involvement in DISH's negotiations with the FTC. Moskowitz was apprised of negotiations by Blum. DeFranco weighed in on whether proposed terms were achievable from a business perspective. And, Ergen had, at most, a couple of phone calls with Kelley Drye. DISH's negotiations with the FTC were not brought to the Board's attention until just before *U.S. v. DISH* was filed; they were not viewed as sufficiently material to require Board involvement. Even the FTC's $12 million demand fell well below the materiality threshold for presentation to the DISH Board. The SLC found no evidence that DISH believed that the FTC Investigation posed a material risk.

4. Potential Liability for Retailers

The irresolvable point of contention between the FTC and DISH was the FTC's demand that DISH accept strict liability for Retailer DNC violations.[458] Under the TSR, a seller, such as DISH, could be liable for TSR violations of a marketer, such as a Retailer, if the seller "caused" or "provided substantial assistance" to the marketer's violations.[459]

When DirecTV had settled its DNC liability with the FTC in December 2005, it had accepted liability for its retailers' DNC violations and responsibility for its retailers' DNC compliance going forward.[460] The FTC demanded that DISH do the same.[461]

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458 *See, e.g.*, Ex. 395, Letter from D. Crane-Hirsch to L. Rose (Sept. 3, 2009), SLC DNC Investigation 0004617; Ex. 425, Letter from L. Rose to L. Greisman (Mar. 14, 2011), SLC DNC Investigation 0007475; Ex. 426, Letter from L. Greisman to L. Rose (Mar. 17, 2011), SLC DNC Investigation 0009435.

459 16 C.F.R. § 310.4(b)(1); 16 C.F.R. § 310.3(b).

460 Ex. 16, Stipulated Judgment and Order for Permanent Injunction Against DirecTV, Inc., *U.S. v. DirecTV, Inc.* (C.A. No. 8:05-cv-01211) (C.D. Cal. Dec. 13, 2005).

DISH was unwilling to accept strict liability for any Retailer conduct, including DNC compliance. Ergen and DeFranco both explained in their interviews that they viewed controlling Retailer DNC compliance as impossible—DISH worked with approximately 8,000 Retailers. They and others within DISH Management believed that DirecTV would not be able to comply with the settlement that DirecTV struck with the FTC. And, DISH had more Retailers than DirecTV, had more diverse Retailers, and received a larger percentage of its sales from Retailers. Added to the backdrop of that business distinction, Management believed that DISH had no agency relationship with the Retailers; informed by the advice of Kelley Drye, Management believed that the FTC was asking DISH to agree to something that was contrary to all case law on agency.[462]

To support its demand that DISH assume responsibility for Retailer DNC compliance, the FTC argued in negotiations and claimed in draft complaints that it provided to DISH that DISH caused Retailers to violate the TSR by

> (1) directly or indirectly offering to provide or providing financial payments for sales of [DISH] programming; (2) entering into relationships whereby the [Retailers] marketed on behalf of [DISH]; or (3) by directly or indirectly offering to provide or providing financial payments for sales of [DISH] programming, or by entering into relationships whereby the [Retailers] marketed on behalf of [DISH], and failing to monitor and enforce compliance with the [TSR].[463]

The FTC claimed that, in the alternative, DISH provided "substantial assistance" to Retailers, while knowing or consciously avoiding knowing that the Retailers were violating the TSR

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461 Ex. 395, Letter from D. Crane-Hirsch to L. Rose (Sept. 3, 2009), SLC DNC Investigation 0004617 (explaining that the settlement offer's "terms follow the DIRECTV consent decree").

462 Ex. 425, Letter from L. Rose to L. Greisman (Mar. 14, 2011), SLC DNC Investigation 0007475.

463 Ex. 365, Letter from L. Rose to Hon. J. Leibowitz (Jan. 21, 2009), SLC DNC Investigation 0000682 at 683 (citing Compl. ¶ 58).

> by directly or indirectly, including but not limited to, making financial payments to the [Retailers], allowing [Retailers] to market [DISH] goods or services, allowing the [Retailers] to use the [DISH] trade name or trademark, entering into contracts with consumers contacted by the [Retailers], collecting money from consumers contacted by the [Retailers], providing services to consumers contacted by the [Retailers], in some cases, granting some [Retailers] the right and ability to conduct business through [DISH's OE Tool], and in some cases, providing installers so that consumers can receive [DISH] programming.[464]

The FTC's arguments, if an accurate statement of the law, would make any seller liable for any TSR violation by any company that a seller authorized to market its product. Management believed that this could not be the case.

DISH tried numerous approaches to negotiate a resolution to the FTC Investigation that did not involve DISH assuming strict liability for DNC compliance by Retailers:

First, on January 21, 2009, Kelley Drye wrote, on DISH's behalf, to Commissioner Leibowitz of the FTC, to address the absence of legal support for the FTC's position that DISH should assume liability for Retailers' violations of the TSR (the "TSR Letter").[465] Kelley Drye's 16-page TSR Letter addressed each of the theories that the FTC had offered in negotiations or draft complaints, to hold DISH accountable for Retailer misconduct. First, the TSR Letter noted that "When it promulgated the Rule, the Commission twice explained that the Rule's authorizing statute . . . does not make sellers jointly and severally liable for the actions of their telemarketers."[466] The TSR Letter observed that the Commission had reiterated this position elsewhere as well.[467]

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464 *Id.* at 683-684 (citing Compl. ¶ 52).

465 *Id*.

466 *Id*. at 685

467 *Id*.