IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court No. 81704

District Court No. A-17-763397-B

JOINT APPENDIX
Vol. 5 of 85
[JA000869-JA001093]

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

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

Second, the TSR Letter pointed out that both the history of the TSR and the related rulemaking process demonstrated that "'cause' means active conduct, such as [a] directing another person to; or [b] providing the instrument to; or [c] triggering the mechanics for violating the Rule."[468] With respect to causing a violation by directing another person to violate the TSR, the TSR Letter explained that this had previously been found where a seller had directed a telemarketer to refuse to add consumers to an internal do not call list, or had directed similar conduct that necessarily violated the TSR.[469] The only direction that the FTC asserted on DISH's part was permitting telemarketing.[470] The TSR Letter observed that, if hiring someone who telemarketed were sufficient to trigger the "directed" aspect of causing violations, then every seller would be strictly liable for the misconduct of every telemarketer.[471]

With respect to causing a violation by providing an instrument to violate the TSR, the TSR Letter noted that this had been found where a seller provided a telemarketer with a list of consumers to call that had not been scrubbed.[472] DISH did not provide call lists to Retailers, except for limited test cases.[473] The TSR Letter explained that there was no authority for the

468 *Id*. at 687 (emphasis omitted).

469 *Id*.

470 *Id*. at 691 (quoting Compl. ¶ 58).

471 *Id*. at 688.

472 *Id*. at 687.

473 Ex. 194, Email from D. Lindsey to E. Carlson, et al. (July 18, 2007), SLC DNC Investigation 0010611. The SLC identified two instances in which DISH provided a call list to a Retailer, specifically Defender Direct, Inc. and Marketing Guru; Ex. 194, Email from D. Lindsey to E. Carlson, et al. (July 18, 2007), SLC DNC Investigation 0010611; Ex. 141, Email from E. Carlson to J. DeFranco, et al. (Mar. 20, 2006), SLC DNC Investigation 0012803. This practice was not repeated unless the Retailer signed an agency agreement. *See* Ex. 194, Email from D. Lindsey to E. Carlson, et al. (July 18, 2007), SLC DNC Investigation 0010611 at 612.

proposition that DISH could be "at risk for strict liability for the unknown, unprompted, unassisted actions of a telemarketer."[474]

With respect to causing TSR violations by triggering the mechanics for the violation, the TSR Letter noted that the drafting history for the TSR's rules discusses this issue in the context of a seller placing calls, which the telemarketer never picked up to speak with the customer.[475] The TSR Letter pointed out that the Commission never stated that "engaging generally in business with another entity in a manner that is not related to any unlawful practices, and does not involve providing the mechanics that make unlawful outbound calls ring," would constitute causing violations of the TSR.[476]

The TSR Letter further noted that "causing" violations of the TSR had in the past been found to require, "conduct such as abandoning calls[,]" or conduct that necessarily brought about the violations.[477] Conversely, "Dish's purchase of customers from independent dealers has nothing to do with Rule violations—indeed, nothing to do with telemarketing at all—other than in a strict liability sense for doing business with an entity that telemarketed on its own."[478]

Third, the TSR Letter noted that the FTC's position that DISH "(1) provided 'substantial assistance or support' to a telemarketer while (2) 'know[ing] or consciously avoid[ing] knowing'" that the telemarketer was violating the TSR was similarly unsupported by the TSR or its rules. The TSR Letter observed that "[g]eneral business dealings do not amount to substantial

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474 Ex. 365, Letter from L. Rose to Hon. J. Leibowitz (Jan. 21, 2009), SLC DNC Investigation 0000682 at 687.

475 *Id*. at 689.

476 *Id*.

477 *Id.*

478 *Id*. at 691.

assistance."[479] "The Commission has made clear that, for liability to attach, there must be a link between the 'substantial assistance' and the violation."[480] The TSR Letter further noted that the standard of knowledge required either active knowledge or deliberate ignorance:[481] "[I]t is not enough to show that a defendant was negligent or should have known of another party's violation, as the Commission itself noted in the SBP for the Original Rule[.]"[482] The issues that the FTC raised with DISH's conduct based upon the FTC Investigation did not meet this standard, Kelley Drye explained in the TSR Letter.

In making each point, the TSR Letter cited the TSR, regulations and drafting history or case law as support for the proposition. The TSR Letter concluded with the view that:

> At bottom, there is no evidence that [DISH] assisted and facilitated [Retailers] in unlawful telemarketing activities, if in fact they did engage in such activities. Even if the [Retailers] are found to have violated the Rule, [DISH] was not aware of such activities, nor did it take steps to avoid discovering it, or deliberately ignore evidence of the alleged unlawful conduct. If anything, [DISH] had (and has) an entire program designed to identify and discipline dealers who engage in unlawful conduct, and [DISH] has taken reasonable steps to make itself aware of any unlawful, unapproved conduct by rogue dealers and promptly address it.[483]

Despite multiple meetings and discussions following the TSR Letter, DISH was unable to convince the FTC to abandon its demands and the FTC was unable to convince DISH to abandon its legal position.

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479 *Id*. at 692.

480 *Id*.

481 *Id*. at 694.

482 *Id*. at 695 (emphasis omitted).

483 *Id*. at 697.

The FTC was only willing to abandon its demand that DISH accept strict liability for Retailer conduct if DISH agreed to terminate any Retailer for any DNC complaint.[484] DISH was unwilling to blindly terminate every Retailer for any DNC complaint, without regard to the particulars of the situation.[485] Among other things, Retailers could attempt to sue for wrongful termination if DISH terminated them for minor, unintentional mistakes.[486] Even the Court in *U.S. v. DISH* observed that a "requirement to fire any Retailer that made one violation of any Do-Not-Call Laws could be harsh in some circumstances."[487] DISH urged the FTC to accept something akin to the discipline provisions that it negotiated in the 2009 AVC (described in Factual Findings Section VI.C.4 below). But, the FTC was unwilling to accept any disciplinary scheme that left DISH with discretion in addressing DNC complaints linked to a Retailer.[488]

5. The Retailer Issue Necessitated Litigation

After almost four years of negotiating and providing information, the Department of Justice (the "DOJ"), representing the FTC, told DISH that it intended to file suit against DISH—not to litigate issues related to DISH's DNC compliance, but because DISH and the FTC could not settle the issue of DISH's liability for Retailer DNC violations. DISH could otherwise have

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484 Ex. 371, Email from S. Dodge to C. Ergen (Mar. 12, 2009), SLC DNC Investigation 0001034 (stating that the DOJ and FTC "want [DISH] to take extreme measures (terminating retailers) for *de minimus* violations rather than allowing us to have some discretion to tailor appropriate punishment").

485 Ex. 395, Letter from D. Crane-Hirsch to L. Rose (Sept. 3, 2009), SLC DNC Investigation 0004617 (rejecting DISH's proposal to terminate Retailers if issues are not cured within 10 days of notice).

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

487 *U.S. v. DISH*, 256 F. Supp. 3d 810, 910 (C.D. Ill. 2017).

488 Ex. 395, Letter from D. Crane-Hirsch to L. Rose (Sept. 3, 2009), SLC DNC Investigation 0004617.

resolved the investigation for $12 million and did not view the risk incurred in litigating as an order of magnitude higher than that.

On March 12, 2009, Dodge informed Ergen that during a meeting between the DOJ and DISH, the DOJ made it clear that it was going to file a complaint against DISH.[489] As the DOJ had told Dodge, the DOJ understood DISH's approach and liked DISH's internal policies and procedures.[490] But, the FTC had concluded that settlement was impossible because of the FTC's demand for DISH to assume responsibility for the Retailers.[491] Despite negotiating for years before and during the *U.S. v. DISH* litigation, Dodge, Blum, Rose, and Hutnik explained to the SLC that DISH was never able to settle with the FTC due to the disagreement over DISH's responsibility for Retailers.

D. The AGs' Investigation

On June 19, 2006, while DISH was addressing the FTC Investigation, 31 state AGs jointly issued their own CID (the "AGs' CID") to DISH, also seeking to investigate telemarketing by DISH and Retailers selling DISH service (the "AGs' Investigation").[492] DISH responded to the AGs' Investigation concurrently with the FTC Investigation and negotiated a

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489 Ex. 371, Email from S. Dodge to C. Ergen (Mar. 12, 2009), SLC DNC Investigation 0001034.

490 *Id*.

491 *See* Ex. 425, Letter from L. Rose to L. Greisman (Mar. 14, 2011), SLC DNC Investigation 0007475.

492 Ex. 289, AG Joint Civil Investigative Demand (June 19, 2006), SLC DNC Investigation 0004483. The 31-state investigation was preceded by a single state investigation by Texas in January of 2006; Ex. 139, Letter from W. Lanford to Dish Network (Jan. 3, 2006), SLC DNC Investigation 0013066. Texas participated in the AGs' Investigation. Vermont launched a stand-alone CID in 2006 (Ex. 145, Civil Investigative Subpoena Duces Tecum Pursuant to Title 9 Vermont Statutes Annotated § 2460, *In re EchoStar Satellite, L.L.C.* (June 28, 2006), SLC DNC Investigation 0013334; Ex. 152, Letter from D. Steele to E. Burg (July 27, 2006), SLC DNC Investigation 0013438), but ultimately signed the 2009 AVC.

resolution of the AGs' Investigation while trying to negotiate a resolution of the FTC Investigation.

The AGs' Investigation was a broad-based inquiry into the AGs' concerns with DISH's telemarketing practices.[493] DNC was one aspect of the AGs' Investigation, but the AGs were more focused on DISH's disclosures surrounding termination fees, the size of the small print in the customer agreements, limiting changes to the services DISH offered post-contract, and addressing and resolving each of the consumer complaints that had been submitted to the AGs' offices.[494]

1. Management of the AGs' Investigation

Neither the AGs' CID nor the AGs' Investigation posed a particular concern to DISH when brought. Multi-state investigations such as the AGs' Investigation were and remain quite common.[495] State AGs convene twice a year at meetings of the National Association of Attorneys General (the "NAAG") to discuss relevant legal issues affecting their states.[496] Through the NAAG, AGs "bring multistate cases to protect competition and consumers" and

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493 Ex. 289, AG Joint Civil Investigative Demand (June 19, 2006), SLC DNC Investigation 0004483.

494 *Id*. at 493-99, 504-511.

495 Over 100 multistate investigations filed in the antitrust area alone from 1990 to present. *See* Ex. 55, National Association of Attorneys General, Antitrust Committee, Multistate Litigation Database, http://app3.naag.org/antitrust/search/ (last visited Nov. 21, 2018).

496 Ex. 56, National Association of Attorneys General, Frequently Asked Questions, When does the Association meet?, http://www.naag.org/naag/about_naag/faq/when_does_the_association_meet.php (last visited Nov. 21, 2018); Ex. 57, National Association of Attorneys General, Frequently Asked Questions, What do the attorneys general do at NAAG meetings?, http://www.naag.org/naag/about_naag/faq/what_do_the_attorneys_general_do_at_naag_meetings.php (last visited Nov. 21, 2018).

investigate/prosecute common complaints received by their respective state citizens.[497] Multistate cases "allow [AGs] to tackle major cases that might otherwise swamp the limited resources of an individual state office."[498] Multi-state investigations are generally led by an executive committee composed of a subset of the AGs that take an active role in the investigation. Other AGs join the investigation nominally in order to reap potential benefits for their citizens while minimizing expense. The AGs' Investigation was noteworthy because it was made up of 31 state AGs rather than the more typical 50 state AG investigation.

When DISH received the AGs' CID, Moskowitz and Ergen were promptly informed.[499] But, the SLC's Investigation found no evidence that the full Board was informed when DISH received the AGs' CID. The AGs' CID was viewed as ordinary course regulatory activity.

2. Settlement Discussions with the AGs

The AGs' Investigation focused on addressing consumer complaints.[500] DISH shared the AGs' goal of reducing consumer complaints.[501] Thus, throughout the AGs' Investigation, DISH proactively solicited suggestions, requests and recommendations from the AGs involved on ways in which DISH could improve its customer service while resolving the AGs' concerns.[502]

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497 Ex. 58, National Association of Attorneys General, Antitrust Committee, Multistate Task Force, http://www.naag.org/naag/committees/naag_standing_committees/antitrust-committee/multistate_task_force.php (last visited Nov. 21, 2018).

498 *Id*.

499 Ex. 291, Email from D. Moskowitz to C. Ergen (June 28, 2006), SLC DNC Investigation 0002179.

500 Ex. 289, AG Joint Civil Investigative Demand (June 19, 2006), SLC DNC Investigation 0004483.

501 Ex. 251, DNC Investigation Team Manual, SLC DNC Investigation 0011983 at 984; Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 874-75.

502 *See* Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543.

By late 2007, the state AGs had shifted from investigating DISH's telemarketing issues to negotiating a settlement of those issues.[503] The Washington State AG led the negotiations on the states' side.[504] Outside counsel for DISH, Mac Murray, Cook, Peterson & Shuster LLP, represented DISH in these discussions, working with Blum and Kalani from DISH's Legal Department.[505] In an effort to have a single agreement in place with respect to as many states as possible, DISH solicited participation by AGs beyond those that had previously issued CIDs to DISH.[506] Within Management, DISH's business people, including DeFranco, were consulted on what was or was not feasible for DISH to accomplish through settlement with the state AGs.

DISH and the AGs spent more than a year discussing injunctive relief.[507] The negotiations were productive. Because DISH wanted to reduce customer complaints—regardless of the outcome of negotiations with the AGs—DISH adjusted its processes, informed by advice of counsel, throughout negotiations.[508] These changes included improving DISH's DNC

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503 *See* Ex. 332, Email from S. Petersen to L. Kalani and H. Mac Murray (Nov. 7, 2007), SLC DNC Investigation 0014765.

504 *See* Ex. 289, AG Joint Civil Investigative Demand (June 19, 2006), SLC DNC Investigation 0004483; Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543.

505 *See* Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543 at 549; Ex. 347, Email from S. Petersen to H. Mac Murray, et al. (Sept. 8, 2008), SLC DNC Investigation 0014761.

506 *See id*. Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543 at 547 n.1 ("DISH has made significant effort to encourage states to join the multistate so that one uniform agreement will exist nationally.").

507 *See* Ex. 332, Email from S. Petersen to L. Kalani and H. Mac Murray (Nov. 7, 2007), SLC DNC Investigation 0014765 (sending proposed agreement, Ex. 333, SLC DNC Investigation 0014766); Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543.

508 *See U.S. v. DISH*, 256 F. Supp. 3d at 833, 835; Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 470-73; Ex. 183, Quality Assurance Manual (Feb. 2007), SLC DNC Investigation 0010871.

compliance in parallel with the AGs' requests.[509] The process of negotiating and adjusting and negotiating more made DISH's telemarketing processes better, lowering DISH's churn, and improving DISH's sales script.

3. Resolution of the Retailer Issue with the AGs

At the start of negotiations, the AGs wanted DISH to assume responsibility for Retailer DNC compliance. However, through the negotiations, Blum persuaded the AGs that DISH could not do so. DISH agreed to facilitate the *AGs'* enforcement of the Retailers' DNC compliance and compliance with other telemarketing requirements, such as by sharing information with the AGs upon request.[510] The 2009 AVC that DISH signed allowed DISH to retain the position that the Retailers were not DISH's agents.[511]

Having implemented the feasible requests made by the AGs during negotiations and refusing those requests that would be impossible to implement, by the time DISH signed the 2009 AVC, Management believed that DISH was already in compliance with most of its terms, discussed in more detail in Factual Findings Section VI below. DISH resolved the monetary aspect of the AGs' Investigation for a payment of less than $6 million to all 46 states—an amount far below the materiality threshold for discussion by DISH's Board. DISH's Board as a whole played no role in DISH's response to the AGs' Investigation.

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509 *See U.S. v. DISH*, 256 F. Supp. at 833, 835.

510 *See,* Ex. 29, 2009 AVC, SLC DNC Investigation 001387.

511 *Id*. at 878.

IV. DISH Took Steps to Improve Its Own DNC Compliance (2006-2009).

The Claims allege that the Named Defendants[512] knowingly caused DISH to violate DNC Laws. But, the facts identified by the SLC demonstrate that between 2006 and 2009, DISH Management made numerous changes to improve DISH's compliance with DNC Laws.[513] Management, with guidance of counsel, determined that DNC compliance did not require Board involvement, particularly in light of the fact that consumer complaints—DISH's main indicator for DNC noncompliance—dropped precipitously. The Board *qua* Board and most of the Director Defendants remained uninvolved in DISH's DNC compliance, as described in Factual Findings Section II.A.4 above. Where certain Director Defendants were involved, they demanded and drove efforts to improve DNC compliance.

A. DISH Management Made DNC Compliance a Priority.

In 2006, the same levels of customer complaints that triggered the FTC Investigation and the AGs' Investigation convinced DISH that customer dissatisfaction from DNC issues was a critical issue to address.[514] As one employee explained, "[t]he stakes are already very high. We

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512 Plaintiffs include Brokaw as a Named Defendant, but the allegations do not include any action or inaction taken by Brokaw.

513 Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217 at 217 ("In early 2006, we experienced a significant increase in consumer complaints regarding telemarketing violations (both by consumers and AGs/BBB/FTC on their behalf) by parties claiming to to be 'DISH Network' and failing to provide legitimate information on their companies. . . . In efforts to discover the identieis of these entities, EchoStar initiated multiple new processes to communicate with the consumers. . . .").

514 *Id.*

have no time to lose."[515] In 2006, consumer complaints escalated to the point that Ergen even suspected industrial sabotage.[516]

In response, Ergen directed DISH employees to prepare an analysis of the steps taken to manage DISH's DNC compliance and the Retailers' DNC compliance. Ergen directed employees to review the concerns raised in the then-ongoing FTC and AGs' Investigations to ensure that DISH was not doing anything problematic. Ergen also directed employees to review consumer DNC complaints with particular focus on addressing any DISH processes that might be contributing to complaints.[517]

Between 2006 and 2009, DNC compliance at DISH was an evolving process.[518] Whenever Management discovered a mistake with DISH's DNC compliance, it took steps to fix the issue that caused the violation.[519] In September 2006, Dana Steele informed Moskowitz of implemented processes to respond to the consumer complaints.[520] Steele informed Moskowitz

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515 Ex. 703, Email from M. Metzger to Vendor Inquiries, et al. (July 13, 2006), SLC DNC Investigation 0013057 at 057.

516 Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217 at 217 ("We have not yet been able to confirm any industrial sabotage. . . .").

517 Ex. 297, Email from D. Moskowitz to C, Ergen, et al. (Aug. 8, 2006), SLC DNC Investigation 0005004; Ex. 715, Email from B. Delaney to B. Delaney, et al. (Nov. 19, 2010), SLC DNC Investigation 0002074 at 075.

518 *See* Ex. 201, DNC Escalations Procedure (2003-2007), SLC DNC Investigation 10996; Ex. 337, Retail Services Time Line TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573.

519 *U.S. v. DISH*, 256 F. Supp. 3d at 847 ("In December 2007, Dish retained a company called PossibleNOW, Inc. (PossibleNOW) to assist it in complying with Do-Not-Call Laws.").

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

that Customer Service, Retail Services, and Legal implemented new processes for dealing with customer complaints.[521] Specifically, Steele noted that:

- [Customer Service] [p]rovided updated scripts and training for CSRs to deal with angry consumers and explain EchoStar policies; provide info to consumers re: DNC registrations.
- [Customer Service] [c]reated escalations process to handle consumer complaints. . . :
- Retail Services investigates each complaint to determine if retailer is involved, including working with the consumer to perform "stings" of retailers by making purchase (which is cancelled and refunded) to determine the true identity of the retailer
- Retailer Services is monitoring calls of OE retailers to ensure compliance with Scripts and processes
- [Retail Services] [d]emands info from every retailer associated with a complaint regarding their telemarketing practices (Do Not Call policies, outbound sales scripts, DNC list registrations, ect.). Retailers that fail to comply are dealt with by both Retail Services and Legal
- [Legal] [u]pdated documentation of policies and procedures to provide to AGs/FTC
- [Legal] [f]iled 'John Doe' lawsuit in TX to have civil subpoena power to get phone records for calls made to consumers which can't be traced by caller ID, etc.
- [Legal is] [t]racking all efforts and actions with consumers and retailers to provide to AGs/FTC to defend our practices
- [Legal is working] with AGs willing to help to obtain information on consumer call records to identify retailers
- [Legal is working] with Retail Services to correspond with retailers and consumers[522]

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[521] Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217.

[522] Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217 at 217-18.

Moskowitz forwarded this email to Charlie Ergen on September 21, 2006.[523]

Ergen believed that DISH fully and completely reviewed issues raised by the FTC and AGs' Investigations and determined that DISH was not violating telemarketing laws. Part of that conclusion was validated by the eventual analysis performed in response to the FTC CID.[524] But, part of the conclusion was simple logic. Much of the activity driving consumer DNC complaints was not calculated to sell DISH services. For example, "[s]ome companies hung up on individuals who asked to be put on an Internal Do-Not-Call List and then called the individuals back in direct contravention to the call recipients' requests."[525] Some companies would call consumers and simply verbally harass them.[526] DISH was unsuccessful in identifying these companies. But, DISH did what it could to ameliorate the situation.

In April of 2006, DeFranco led a meeting with other DISH executives to develop a process to address DNC complaints, particularly those generated by third parties.[527] Among other things, DISH trained its inbound call center customer service representatives to address consumer complaints about calls not made by DISH.[528]

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

524 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 470.

525 *U.S. v. DISH*, 256 F. Supp. 3d at 847.

526 *See, e.g.*, Ex. 285, Email from A. Stallone to D. Steele (Apr. 13, 2006), SLC DNC Investigation 0005861 at 862-65; Ex. 485, Email from D. Steele to S. Dodge, et al. (Apr. 19, 2006), SLC DNC Investigation 0012208 at 210-215.

527 Ex. 285, Email from A. Stallone to D. Steele (Apr. 13, 2006), SLC DNC Investigation 0005861 at 861-62.

528 Ex. 288, Email from B. Werner to R. Origer (May 18, 2006), SLC DNC Investigation 0010317.

B. Legal Took Ownership of DNC Compliance.

In 2006, responsibility for DNC compliance was delegated to DISH's Legal Department.[529] Ergen gave DISH's Legal Department a mandate to reduce customer DNC complaints, regardless of whether they were from calls made by DISH, Retailers or unknown third parties, to achieve DNC compliance by DISH and drive DNC compliance by Retailers.

Moskowitz, as head of the Legal Department, in turn impressed the importance of resolving DNC problems to his department and cooperating departments. Each person interviewed by the SLC that had knowledge of the situation, agreed that DISH's Legal Department was given all the resources that they requested to address DNC issues.[530] Blum, Dodge, Carol Im, and Mills began having formal "DNC Discussions" with Moskowitz every Friday to update Moskowitz on DNC issues. These discussions continued until Moskowitz resigned as General Counsel in 2007. Moskowitz was involved in DISH's material steps to drive DNC compliance by DISH and Retailers, such as reviewing the "Facts Blasts" and suggesting language for instructing Retailers on how to comply with the laws. But, Moskowitz did not get personally involved in the day-to-day meetings with Retailers, and he was not involved with the details of specific Retailers or specific DNC problems.

The people interviewed by the SLC believed that DISH intended to fix any DNC compliance problems with its own calls. They believed, during the Investigation Period that DISH had great telemarketing compliance, particularly from 2006 onward.

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529 Ex. 308, Email from D. Moskowitz to D. Steele (Sept. 28, 2006), SLC DNC Investigation 0001142 at 142 ("Moskowitz owns this . . . he has carte blance [sic] to demand results from the rest of the organization."). These matters were discussed in the SLC's interviews of Ergen, Moskowitz, Blum, and Kitei.

530 The people confirming this included Ergen, DeFranco, Moskowitz, Blum and Kitei.

In 2007, DISH settled DNC and TCPA related allegations with the state of North Carolina for $100,000.[531] Ergen approved the settlement upon advice of counsel. But, by that time, Ergen explained to the SLC, he believed that DISH had resolved its DNC issues and that its policies and procedures complied with state and federal law. He saw the 2007 North Carolina settlement as the last time that DISH should ever have to settle a DNC claim.

C. Outbound Operations Took Ownership of DISH's Calling Campaigns.

In 2006, DISH also reorganized the group scrubbing DISH's outbound calling into Outbound Operations.[532] Outbound Operations took control of DISH's call list scrubbing process and automatic dialer. Outbound Operations maintained current, updated copies of the National Registry, the state DNC registries, DISH's internal DNC list, and lists of wireless numbers. On February 6, 2006, Outbound Operations updated DISH's do not call policy for scrubbing calls.[533] Concurrently, DISH updated its internal procedure for adding a consumer phone number to DISH's Internal List.[534]

From 2006 onward, when another business unit within DISH wanted to make a calling campaign, it would send the proposed script to Outbound Operations.[535] Outbound Operations

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531 Ex. 334, Email from C. Ergen to S. Dodge, et al. (Nov. 12, 2007), SLC DNC Investigation 0002575.

532 *U.S. v. DISH*, 256 F. Supp. 3d at 830.

533 Ex. 62, EchoStar Satellite, L.L.C. "Do-Not-Call" Policy (Feb. 6, 2006), SLC DNC Investigation 00011042.

534 Ex. 140, EchoStar Satellite L.L.C. "DO NOT CALL" Internal Procedure (Jan. 23, 2006), SLC DNC Investigation 0010969.

535 *U.S. v. DISH*, 256 F. Supp. at 830.

determined which scrubbing process to apply based on the script provided, as discussed in Factual Findings Section II.C.1.c above.[536]

Despite the senior level direction that Outbound Operations control all of DISH's outbound calling, in several instances salespeople within DISH's foreign language programming department did not use Outbound Operations. Between 2007 and 2010, DISH's foreign language programming department launched 15 outbound telemarketing campaigns to DISH customers to sell foreign language programming using pre-recorded calls.[537] "A total of 98,054 of these prerecorded calls were answered by individuals and resulted in Abandoned Prerecorded Calls in violation of the TSR" for which damages were awarded in *U.S. v. DISH*.[538] Management viewed these calls as a regrettable mistake resulting from high turnover in the foreign language programming department.

In 2008, DISH continued its consolidation of its DNC compliance by consolidating scrubbing for all calling campaigns to its current customers not just to Outbound Operations, but to Outbound Operations within DISH's headquarters in Englewood, Colorado.[539] Similarly, DISH devoted effort and resources to ensuring that the people responsible for scrubbing its calling campaigns followed the correct process to do so.[540] DISH continued to rely on those experienced employees to apply the appropriate scrub to each campaign depending upon whether

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536 *Id.* at 830-32.

537 *Id.* at 833.

538 *Id.*

539 *Id.* at 830.

540 *Id.* at 831 ("Dish employees manually reviewed the Dish files to determine whether Dish had a Transaction-based Established Business Relationship with current and former customers whose telephone numbers were listed in Account Number Campaigns. Dish formulated calling campaign lists based on this manual review. "); Ex. 259, Email from E. Allwein to S. Cartwright, et al. (Feb. 11, 2003), SLC DNC Investigation 0005850 (making IT's number one priority support for call scrubbing).

the campaign targeted individuals with whom DISH had an established business relationship.[541] But, DISH did not develop extensive documentation for its scrubbing policies, relying instead on the training it gave the limited number of employees authorized to perform scrubbing.[542]

D. DISH Brought in PossibleNow to Consult on DNC Issues.

In June 2007, DISH also started to work with PossibleNow on DNC compliance issues.[543] PossibleNow provided consulting services to DISH in two separate contexts. First, PossibleNow advised DISH on improvements in its day-to-day DNC compliance.[544] Second, PossibleNow also performed the data analysis necessary for DISH to respond to the FTC CID, as discussed in Factual Findings Section III.C.2 above. Later, PossibleNow served as DISH's expert witness in both of the Underlying DNC Actions discussed in Factual Findings Section X.D below.

In early 2008, as part of its compliance work for DISH, PossibleNow began performing a second scrub on DISH's outbound telemarketing campaigns as a belt and suspenders approach to Outbound Operations' scrub.[545] PossibleNow also began maintaining DISH's Internal List, National Registry, State Registries, and list of wireless numbers.[546] PossibleNow's scrub of DISH's calling lists included checking for an established business relationship.[547] To this end,

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541 *Id.* at 831.

542 *Id.* at 833 ("Outbound Operations' unwritten practices allowed a scrubbed calling list to be called for a 15-day period from the date of the scrub.").

543 *See* Ex. 192, Email from R. Musso to R. Origer, et al. (June 8, 2007), SLC DNC Investigation 0013585. The Illinois Court found that DISH retained PossibleNow for scrubbing in December 2007. *U.S. v. DISH*, 256 F. Supp. 3d at 835.

544 *See, e.g.*, Ex. 443, PowerPoint: FCC Amends TCPA (Feb. 2012), SLC DNC Investigation 0008179.

545 *U.S. v. DISH*, 256 F. Supp. 3d at 835.

546 *Id.* at 835-36.

547 *Id.* at 836.

informed by PossibleNow's advice, in 2008, DISH began including a data field for a customers' last payment date or a non-customers' date of inquiry about DISH programming in its calling lists.

Beginning in April 2008, PossibleNow also provided a platform on which DISH could share internal do not call lists not just with its Authorized Telemarketers, but with the Retailers, without the participants in the exchange seeing one another's lists.[548] DISH had not previously shared its Internal List with Retailers, and Retailers were unwilling to share their internal DNC lists with DISH, because internal DNC lists could mistakenly be used to identify leads. DISH and its Retailers competed for new pay TV activations. Many Retailers sold DirecTV as well as DISH. Thus, DISH could not share internal DNC lists directly with Retailers. But, PossibleNow provided a platform for DISH and its Retailers to scrub their call lists against one another's internal DNC lists without seeing one another's internal DNC lists or call lists. DISH Management did not believe that this type of cross-scrubbing was legally required, but implemented the process to improve customer service and protect its goodwill.

Starting in 2009, DISH required larger Retailers to also use PossibleNow's services.[549]

Ergen and DeFranco believed that PossibleNow improved what they understood to be DISH's already best in class DNC compliance.[550] DeFranco explained at his interview that DISH retained PossibleNow as a consultant because Management believed that PossibleNow was the best DNC consultant in the market, the gold standard. Although Ergen was not directly involved in the engagement, he told the SLC at his interview that he understood PossibleNow to

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548 *Id.*

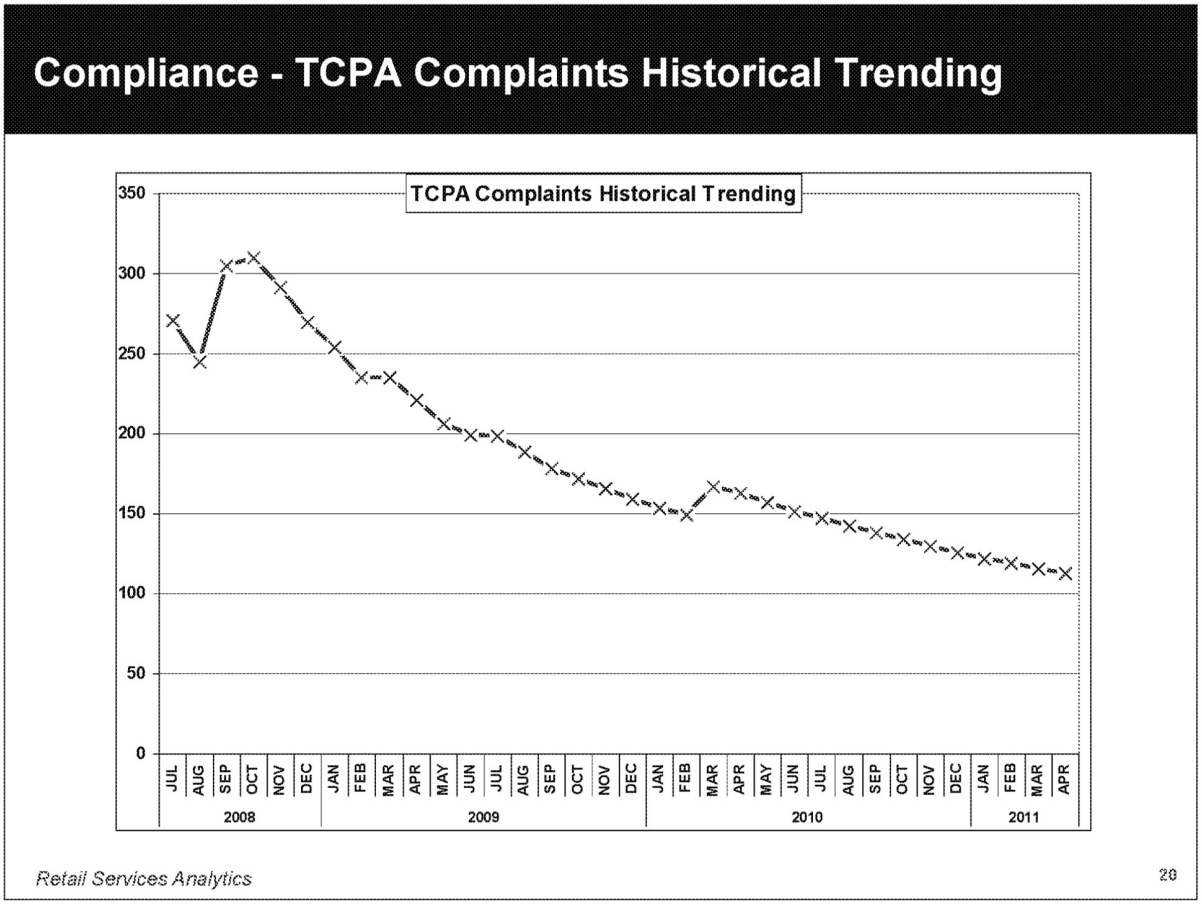
549 *U.S. v. DISH*, 256 F. Supp. 3d at 921-22.

550 Moskowitz retired as DISH's General Counsel at the end of 2007. By 2008, he had become an outside director, with no operational role at DISH. Thus his experience with PossibleNow was limited.

be a consultant engaged to ensure that DISH's DNC compliance was consistent with best practices.

E. DISH's DNC Compliance Improved.

Throughout the Investigation Period, whenever Management suspected a problem with DISH's system for DNC compliance, Management investigated the issue and prevented it from reoccurring if possible.[551] DISH's compliance improvements reduced the numbers of DNC-related complaints between 2008 and 2011: [552]



551 *See, e.g.*, Ex. 702, Email from R. Bangert to T. Gattone, et al. (Apr. 10, 2006), SLC DNC Investigation 0012977.

552 Ex. 429, Indirect Sales Channel Analysis (Apr. 25, 2011), SLC DNC Investigation 0001091 at 110.

Kelley Drye performed an audit of DISH's outbound calls in 2008, which was reviewed by PossibleNow as an independent expert.[553] The audit reviewed 97,836,722 calls placed by DISH during April and October of the years 2004 through 2007 and 9,360,463 calls placed by DISH in the months of April and September 2005. The audit analyzed whether the phone numbers called were on the DNC Registry, whether the calls were subject to any exemption, such as an inquiry or transaction-based established business relationship or if the phone number was on the DNC Registry but called during the applicable grace period and, finally, whether the calls were completed.[554] The audit confirmed that only a small percentage of DISH's calls violated DNC Laws.[555]

V. DISH Management Approached Retailers' DNC Compliance as a Customer Service Issue (~2006-2009).

DISH's response to Retailers' DNC violations has limited relevance to the question of whether the Director Defendants knowingly caused or permitted DISH to violate the DNC Laws. As discussed elsewhere, the Board and Management believed in good faith that DISH was not legally responsible for ensuring DNC compliance by Retailers, who they believed to be independent contractors. Nonetheless, the SLC investigated how DISH addressed DNC compliance by Retailers during the Investigation Period, primarily for two purposes: first, to determine whether the Board or any Director Defendant was aware of Retailers' violations or otherwise involved in the decisions giving rise to the willfulness determinations in *U.S. v. DISH* and *Krakauer*; and second, to understand the basis for the extent of the Board's involvement.

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553 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468.

554 Ex. 345, Letter from L. Rose to R. Deitch (Aug. 14, 2008), SLC DNC Investigation 0004762.

555 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468.

DISH had thousands of Retailers and dozens of OE Retailers—DISH's relationships with particular Retailers were not discussed at the Board level. And, as with DISH's own DNC compliance, Retailer DNC compliance was not a Board level issue either. Instead, Management, including certain Director Defendants, addressed Retailer DNC compliance as a customer service issue. Acting within the bounds of the independent contractor relationship, Management tried to drive Retailers to comply with DNC Laws in various ways, including by reducing the Retailer pool, educating Retailers, and devoting more resources to enforcing DISH's contractual rights under the Retailer Agreement. The sheer number of Retailers disciplined and terminated for DNC violations strongly rebuts the notion that anyone within DISH *wanted* Retailers to violate DNC Laws—independent of the question of legal responsibility.

A. DISH Management Resolved to Drive Retailer DNC Compliance.

As discussed in Factual Findings Section II.B.4.i above, DISH's Board and Management believed during the Investigation Period (and continues to believe today notwithstanding the Underlying DNC Actions) that the Retailers were independent contractors who were responsible for their own DNC compliance.[556] Thus, DISH's Board and Management did not believe that the law required DISH to control and enforce legal compliance by Retailers.

Nonetheless, DISH's Board and Management cared that the Retailers complied with the law.[557] DISH believed that compliance with the law was good business practice.[558]

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[556] *See, e.g.*, Ex. 274, Email from M. Cohen to J. DeFranco (Mar. 17, 2004), SLC DNC Investigation 0005844 (DeFranco writes, "Certainly, [the consumer] should understand that we don't have control over independent retailers and that we do honor a [DNC] list once he requests being placed on it.").

[557] The SLC inquired, but found no evidence supporting the allegation made by one former retailer that "Dish allowed and showed other retailers how to bend the rules." Ex. 450, Email from C. Ergen to S. Dodge (Aug. 28, 2012), SLC DNC Investigation 0004596; Ex. 313, Email from D. Moskowitz to Charlie Ergen (Oct. 18, 2006), SLC DNC Investigation 0006079

Management wanted Retailers to have high volumes of sales that were sustainable and complied with the law.[559] Management further wanted Retailers to manage their telemarketing to avoid upsetting consumers, even when the law permitted the types of calls that the Retailer was making.[560] The existence of DNC Laws prohibiting calls that DISH wished to avoid in any event gave DISH more leverage to demand what DISH Management viewed as better business practices. Thus, Management urged Retailer compliance with DNC Laws, while trying to avoid exerting so much control over Retailers that Retailers could legally be considered DISH's agents.[561]

Management believed that only a small minority of Retailers had DNC compliance issues. DISH terminated several Retailers, which it determined to have DNC compliance issues.

(Moskowitz stating that he "plan[s] to go visit O/E retailers . . . I want to hear more about how they operate, how they see the business . . . and talk to them about Do Not Call/Call Center issues."); Ex. 407, Email from A. Ahmed to T. Cullen (June 20, 2010), SLC DNC Investigation 0001087 at 087 (stating, following a meeting with two OE Retailers that were then unkown to Ergen to be five times "over the next OE retailer in TCPA complaints:" "ok…wish I had known we had these issues before I met with him…these guys are smart but not aligned with our long term goals").

558 *See, e.g.*, Ex. 214, OE Risk Management Presentation (2009), SLC DNC Investigation 0012536 at 556; Ex. 474, Compliance OE Retailers PowerPoint, SLC DNC Investigation 0014901.

559 Ex. 131, Email from A. Ahmed to E. Myers (Oct. 25, 2005), SLC DNC Investigation 0012482 at 482 ("It's not all about huge sales but rather quality customers that want to be DISH Network subscribers for a long time.").

560 *See, e.g.*, Ex. 135, Email from M. Oberbillig to J. Nenejian, et al. (Nov. 23, 2005), SLC DNC Investigation 0012829; Ex. 355, DISH Network Retailer Development Forum Presentation (Sept. 25, 2008), SLC DNC Investigation 0010079.

561 Ex. 312, Facts Blast (Oct. 17, 2006), SLC DNC Investigation 0001146 at 154; Ex. 315, Facts Blast (Nov. 10, 2006), SLC DNC Investigation 0001156; Ex. 348, Important Notice re: Limitations and prohibitions on retailer use of pre-recorded telephone solicitations (Sept. 15, 2008), SLC DNC Investigation 0008360; Ex. 143, EchoStar Retailer Agreement with JSR (Apr. 12, 2006), SLC DNC Investigation 0012502 at 521; Ex. 325, Email from M. Rosenblatt to E. Carlson, et al., (Apr. 10, 2007), SLC DNC Investigation 0014995; Ex. 474, Compliance OE Retailers PowerPoint, SLC DNC Investigation 0014901.

During the Investigation Period, uninformed by the discovery that would occur in the Underlying DNC Actions, Ergen and the others interviewed by the SLC believed that many of the DNC violations by Retailers that DISH uncovered were isolated incidents that likely fell within the safe harbors included in DNC Laws.[562] Thus, despite noting occasional Retailer DNC compliance issues, Management did not believe that a systemic change to DISH's business model was called for. Nonetheless, DISH took multiple steps to encourage DNC compliance by Retailers. As a result of the steps that DISH took to improve its own DNC compliance and improve Retailer DNC compliance, by the middle of 2008, DNC complaints were down by 80%.[563] Absent a systematic audit or discovery, DNC complaints served as DISH's best guidepost for DNC compliance.

B. DISH Trimmed the Ranks of Retailers.

DISH reduced its Retailer ranks by more than half starting roughly in 2006. In 2006, DISH had approximately 8,000 Retailers.[564] Between 2006 and 2011, DISH terminated more

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562 *See* 47 C.F.R. § 64.1200 (c)(2)(i)-(iii) (protecting error calls where certain DNC procedures in place); 16 C.F.R. § 310.4(b)(3) (safe harbor applies to certain abandoned calls constituting less than 3% of all calls during campaign and to other calls if certain procedures are in place and the violative call is not repeated); Cal. Bus & Prof Code § 17593(d) (protecting accidental violations of state DNC law).

563 *See* Ex. 474, Compliance OE Retailers PowerPoint (Aug. 6, 2013), SLC DNC Investigation 0014901 at 914 (complaints declined 44% for year end 2007); Ex. 334, Email from C. Ergen to S. Dodge, et al. (Nov. 12, 2007), SLC DNC Investigation 0002575 at 575 ("Our TCPA complaints are down 80% from last year."); Ex. 429, Indirect Sales Channel Analysis (Apr. 25, 2011), SLC DNC Investigation 0001091 (attorney general and BBB compliance complaints decreased from 200 in 2007 to almost 0 in 2011).

564 Ex. 786, Trial Transcript, at 1085:2-34, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 27, 2016) (D.I. 619) (B. Werner Testimony) ("[A]t the time I came on [in 2004] there were somewhere near 8,000 individual full-service retailers perhaps, including the OE guys."); Ex. 786, Trial Transcript, at 1157:16-21, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 27, 2016) (D.I. 619) (B. Werner Testimony) (estimating that in 2005 and 2006, there were approximately 8,000 Retailers).

than 320 Retailers.[565] In at least 40 cases, DNC violations were the basis for the termination.[566] When DISH terminated a Retailer, particularly for DNC violations, it often issued a press release alerting other Retailers to the termination for an *in terrorum* effect.[567] DISH allowed its Retailer Agreements with other Retailers to lapse, without renewal. By 2009, DISH had approximately 3,500 Retailers.[568]

OE Retailers were included in this trimming. In 2006, DISH had 53 different OE Retailers.[569] In the summer of 2006, an Audit and Risk group within DISH's Retail Services began preparing executive summaries for proposed terminations.[570] "From October 2008 until March 2009, Dish terminated 40 Retailers, some of which were [OE] Retailers, for defrauding Dish or for making misrepresentations to consumers[.]"[571] In 2009, DISH reduced the number of

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565 Ex. 429, Indirect Sales Channel Analysis (Apr. 25, 2011), SLC DNC Investigation 0001091 at 099, 121.

566 Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076. These DNC issues included TCPA violations as well as the unauthorized use of third parties, specifically, Lead Generators. *See*, *infra* Factual Findings § V.F.4. The terminations of Retailers working with Lead Generators were an effort by DISH to decrease the DNC complaints caused by Lead Generators.

567 *See* Ex. 211, Dish Network Terminates Retailers (Oct. 3, 2008), SLC DNC Investigation 0011815; Ex. 190, EchoStar Takes Action Upon Do-Not-Call Violations (Feb. 14, 2007), SLC DNC Investigation 0011796; Ex. 730, Email from K. Hubbard to J. DeFranco, et al. (Feb. 16, 2007), SLC DNC Investigation 0005058.

568 *See* Ex. 83, Trial Transcript, at 89, *Krakauer*, C.A. No. 1:14-cv-333 (M.D.N.C. Jan. 10, 2017) (Plaintiffs' Opening Statement) ("[DISH] ha[s] lots of retailers. The evidence will be in 2011 [DISH] had about 3,500."); Ex. 83, Trial Transcript, at 107, *Krakauer*, C.A. No. 1:14-cv-333 (M.D.N.C. Jan. 10, 2017) (DISH's Opening Statement) ("[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.").

569 Ex. 725, Chart of EchoSphere OE Retailers (Oct. 27, 2006), SLC DNC Investigation 0014789.

570 Ex. 717, Audit and Risk Accomplishments Week Ending 06/14/06, SLC DNC Investigation 0002768.

571 *U.S. v. DISH*, 256 F. Supp. 3d at 853.

OE Retailers from 76 to 32, eliminating Retailers for fraud and high churn.[572] As of May 15, 2010, DISH had 35 OE Retailers.[573] "Dish representatives focused on eliminating fraud and reducing churn rates of the remaining [OE] Retailers. The result was an increase in monthly activations from 71,000 to 100,000 and a significant reduction in churn rates."[574]

C. DISH Educated Retailers about Their DNC Obligations.

The Retailer Agreement required Retailers to comply with laws, including the DNC Laws.[575] Management expected Retailers to investigate the DNC Laws relevant to the Retailer's business and to comply.[576] Retailers could not excuse noncompliant behavior by claiming that they did not know what to do.[577]

Nonetheless, Retail Services had ongoing discussions about how to impress the importance of DNC compliance on Retailers. DeFranco wanted to make sure that Retailers were taking responsibility for their DNC compliance and educating themselves on the laws that

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572 *Id*. DISH was also contracting with new OE Retailers during this time period, such that the reduction in the OE Retailer ranks is not amenable to simple subtraction.

573 Ex. 406, 2010 Q2 OE Financial Review (May 15, 2010), SLC DNC Investigation 0014836 at 2.

574 *U.S. v. DISH*, 256 F. Supp. 3d at 853.

575 Ex. 143, EchoStar Retailer Agreement with JSR (Apr. 12, 2006), SLC DNC Investigation 0012502 at 12506, 12518, 12520.

576 Ex. 312, Facts Blast (Oct. 17, 2006), SLC DNC Investigation 0001146 at 154; Ex. 315, Facts Blast, SLC DNC Investigation 0001156; Ex. 348, Important Notice re: Limitations and prohibitions on retailer use of pre-recorded telephone solicitations (Sept. 15, 2008), SLC DNC Investigation 0008360; Ex. 143, EchoStar Retailer Agreement with JSR (Apr. 12, 2006), SLC DNC Investigation 0012502 at 12521; Ex. 325, Email from M. Rosenblatt to E. Carlson, et al., (Apr. 10, 2007), SLC DNC Investigation 0014995; Ex. 474, Compliance OE Retailers PowerPoint, SLC DNC Investigation 0014901 at 904-6.

577 *See, e.g*., Ex. 465, Team Summit Presentation (May 14, 2013), SLC DNC Investigation 0008685 at 687 ("We reiterate this expectation time and again to protect your business and your relationship with DISH. . . . [Y]ou are responsible for your business and that includes knowing the laws . . . Do you see how not knowing the rules could create problems for you?").

applied to them. During the Investigation Period, DISH spent millions of dollars to educate Retailers on telemarketing compliance and to help them achieve compliance.[578]

In that effort, DISH periodically sent notices, such as "Facts Blasts," to Retailers reminding them to comply with telemarketing laws.[579] One Facts Blasts warned that "Retailers who engage in telemarketing should familiarize themselves with applicable federal, state, local and other laws, including without limitation state "No-Call" statutes and Telephone Consumer Protection Acts." Another noted, "[w]e strongly encourage you to read the attached press release [regarding amendments to the TSR], visit the FTC's website. . . and to familiarize yourself with all Laws applicable to your performance under your Retailer Agreement(s), including, but not limited to, do-not-call Laws and other Laws related to telemarketing activities and use of prerecorded messages."[580] DISH referenced telemarketing compliance in Retailer Chats, such as the April 10, 2007 Retailer Chat where DISH noted, "The Retailer Agreement prohibits Retailers from violating any applicable laws, including without limitation in connection with telemarketing of DISH Network products and services." [581] And, DISH's Retail Services and Legal Departments held trainings at DISH's annual "Team Summit" in-person Retailer

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578 *See, e.g.*, Ex. 474, Compliance OE Retailers PowerPoint (Aug. 6, 2013), SLC DNC Investigation 0014901.

579 *See, e.g.*, Ex. 312, Facts Blast (Oct. 17, 2006), SLC DNC Investigation 0001146 at 154; Ex. 315, Facts Blast (Nov. 10, 2006), SLC DNC Investigation 0001156.

580 Ex. 348, Important Notice: Limitations and Prohibitions on Retailer Use of Pre-recorded Telephone Solicitations (Sept. 15, 2008), SLC DNC Investigation 0008360.

581 Ex. 325, Email from M. Rosenblatt to E. Carlson, et al. (Apr. 10, 2007), SLC DNC Investigation 0014995. *See also* Ex. 206, EchoStar PossibleNow Retailer Chat (Mar. 12, 2008), SLC DNC Investigation 0011368.

conferences.[582] The SLC's interviews confirmed that DeFranco was not directly involved in Retail Services' efforts, but was supportive of them.

In 2009, PossibleNow proposed that DISH hire PossibleNow to audit Retailers' outgoing calls in addition to the compliance services that PossibleNow was providing to DISH for DISH's own calls.[583] DISH discussed the proposal, but decided not to purchase those services.[584] Blum explained to the SLC that DISH rejected PossibleNow's pitch because Management's major goal in 2009 was catching rogue Retailers that were deceiving DISH and flouting DNC Laws.[585] PossibleNow's auditing was well suited to capture modified or omitted call records or inadvertent miscalculation of exception periods. But, auditing by PossibleNow would not have detected whether a Retailer had fabricated records of an existing business relationships with consumers called, which would provide a justification for calls that appeared to violate DNC Laws.[586] What PossibleNow could do was provide consulting and scrubbing services to support

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582 Ex. 474, Compliance OE Retailers PowerPoint, SLC DNC Investigation 0014901; Ex. 355, DISH Network Retailer Development Forum Presentation (Sept. 25, 2008), SLC DNC Investigation 0010079.

583 Ex. 393, PossibleNow Telemarketing Monitoring and Enforcing Solutions for [DISH] Network (Aug. 26, 2009), SLC DNC Investigation 0004248.

584 *See* Ex. 357, Do Not Call Compliance for DISH Network Retailers, Distributor Program Overview (Oct. 2008), SLC DNC Investigation 0002536; Ex. 206, EchoStar PossibleNow Retailer Chat (Mar. 12, 2008), SLC DNC Investigation 0011368.

585 *U.S. v. DISH* criticized DISH for focusing solely on consumer complaints, suggesting that it indicated that DISH did not care about legal compliance, and indicating DISH should have been auditing Retailers. *See U.S. v. DISH*, 256 F. Supp. 3d at 987, 992-93. Management viewed responding to consumer complaints as a way of identifying which Retailers were not complying with DNC Laws. Moreover, the AGs and the FTC itself relied upon consumer complaints to guide the targets of their investigations. *See infra* Factual Findings §§ III.C and III.D above.

586 47 C.F.R. § 64.1200(f)(12)(ii); 16 C.F.R. § 310.4(b)(1)(iii)(B)(2).

Retailer compliance. So, rather than pay for ineffective audits, DISH arranged for PossibleNow to provide a bulk discount to Retailers for PossibleNow compliance services.[587]

D. DISH Formed a Compliance Department within Retail Services.

In August 2006, Retail Services formed a compliance department (the "Compliance Department") to "monitor . . . Retailers' compliance with the standard Retailer Agreement, Dish's rules, and applicable laws and regulations,"[588] including DNC compliance.[589] "The Compliance Department was tasked with ensuring that . . . Retailers accurately described the terms and conditions of Dish Network programming packages and made all required disclosures during telephone sales presentations. . . . . The Compliance Department also handled consumer complaints about . . . Retailers."[590] To accomplish this, Compliance Department employees visited Retailers to review their operations, call flows, and sales scripts, and listened to Retailers' phone calls for compliance with the Retailer Agreement and laws.[591]

1. The Compliance Department Formalized a Quality Assurance Program to Address Retailer Disclosures.

In September 2006, the Compliance Department started a Quality Assurance Program ("QA Program").[592] "The Quality Assurance Program focused on the accuracy and completeness

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587 *See* Ex. 357, Do Not Call Compliance for DISH Network Retailers, Distributor Program Overview (Oct. 2008), SLC DNC Investigation 0002536 at 536; Ex. 206, EchoStar PossibleNow Retailer Chat (Mar. 12, 2008), SLC DNC Investigation 0011368; Ex. 339, Retailer Business Rules (Apr. 29, 2008), SLC DNC Investigation 0014762.

588 *U.S. v. DISH*, 256 F. Supp. 3d at 849; Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 874.

589 Ex. 728, Managing Reports of Telemarketing Violations (July 23, 2006), SLC DNC Investigation 0014988; Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 874.

590 *U.S. v. DISH*, 256 F. Supp. 3d at 849-50.

591 Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871.

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

of statements made during telemarketing calls."[593] One aspect of the QA Program was "insuring [sic] that [Retailers] were making accurate representations and making all required disclosures in their sales presentations."[594] Another aspect of the QA Program was auditing Retailers' advertisements to ensure DISH trademarks were used properly and that advertisements were not misleading.[595] This effort to improve Retailers' disclosures dovetailed with DISH's discussions with the AGs, in connection with the AGs' Investigation.

The QA Program did not involve auditing Retailers' DNC compliance.[596] The Retailers had contractual obligations under the Retailer Agreement to comply with the DNC Laws.[597] Management viewed auditing the calls made by Retailers for DNC compliance as inconsistent with the Retailers' status as independent contractors. And, in any event, reviewing Retailer call lists would be problematic given the fact that Retailers, particularly OE Retailers, were competing with DISH for new customer activations.

By 2009, the Compliance Department evaluated OE Retailers weekly on their Quality Assurance scores, several of which addressed concerns raised by the AGs.[598] "Dish scored telemarketing calls on 45 criteria. The Quality Assurance criteria focused on accurately

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593 *Id.* at 852; Ex. 183 Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 10874.

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

595 Ex. 134, Email from M. Mills to E. Myers (Nov. 3, 2005), SLC DNC Investigation 0012428; Ex. 310, Retail Services Audit and Risk (Oct. 1, 2006), SLC DNC Investigation 0008753 at 8762.

596 *U.S. v. DISH*, 256 F. Supp. 3d at 852 ("The Compliance Department . . . did not audit Order Entry Retailers with respect to Do-Not-Call compliance.").

597 *See, e.g.*, Ex. 277, EchoStar Retailer Agreement with Donald King dba Digital Satellite Connections § 9.1 (Dec. 31, 2004), SLC DNC Investigation 0006542 at 558, discussed in detail *infra* Factual Findings § II.B.4.b.

598 *See, e.g.*, Ex. 226, OE Partner QA Action Plans (2010), SLC DNC Investigation 0013172; *U.S. v. DISH*, 256 F. Supp. 3d 810, 854 (C.D. Ill. 2017).

describing Dish products and promotions (including any limitations on promotional pricing), and providing complete, accurate disclosures during sales calls. The Quality Assurance criteria also covered . . . asking questions about the household television watching patterns to accurately evaluate the potential customer's needs in order to offer the appropriate Dish programming packages. The Quality Assurance program also sought to ensure that the sales agents interacted with the consumer in an appropriate, professional manner."[599] DISH required OE Retailers to make the changes necessary to conform to the QA Program,[600] which in some cases involved substantial investments in new systems.[601]

2. The Compliance Department Formed an Inter-Department Compliance Team with Legal to Address DNC Issues.

Rather than address DNC compliance through the Quality Assurance Program, the Compliance Department formed an Inter-Department Compliance Team (the "Team") with members of the Legal Department, including Blum and Kitei. This Team met regularly in 2006 to discuss improving DNC compliance across the board, including DISH's processes and procedures, consumer complaints, issue reporting, Retailer termination, sales disclosures, the "sting" program, and building the compliance staff.[602] The Team's efforts to investigate consumer complaints and discipline Retailers are discussed in more detail below.

DeFranco and Moskowitz, who Retail Services and the Legal Department ultimately reported up to, respectively, generally did not attend these Inter-Department Compliance Team

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599 *U.S. v. DISH*, 256 F. Supp. 3d at 854; Ex. 183, Quality Assurance Presentation (Feb. 2007), SLC DNC Investigation 0010871 at 874.

600 *U.S. v. DISH*, 256 F. Supp. 3d at 854.

601 Ex. 339, Retailer Business Rules (Apr. 29, 2008), SLC DNC Investigation 0014762.

602 *See, e.g.*, Ex. 486, Legal TCPA Meeting Discussion Topics (Oct. 24, 2006), SLC DNC Investigation 0011271.

meetings.[603] When DeFranco did attend, he gave the Team a big picture sense of what he wanted in terms of Retailer compliance, and relied on the Team to carry it out. Moskowitz delegated leadership of the Team on the Legal Department side to Blum.

E. DISH Investigated Every Consumer DNC Complaint.

Starting in 2006, DISH systematized its processes to investigate DNC complaints, which generally concerned Retailers or Lead Generators rather than DISH itself.[604] Management prepared an Escalation Process Flowchart, reflecting DISH's process for escalating DNC complaints - except that in practice DISH took a more qualitative and contextual approach to Retailer discipline than the Flowchart might suggest.[605] As part of this process, Retail Services tracked every customer complaint that DISH received,[606] linking the complaints to particular Retailers wherever possible.

1. Identifying Potential DNC Violations

The first step in DISH's DNC complaint investigation was determining whether a violation had occurred. Blum explained at his interview that a consumer complaint provides notice that there may be an issue, not that there is an issue. Because of the complexity of the

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603 *See, e.g.*, Ex. 388, Calendar Invitation from R. Musso to J. Blum (July 21, 2009), SLC DNC Investigation 0014255; Ex. 352, Calendar Invitation from K. Berridge to B. Van Emst (Sept. 19, 2008), SLC DNC Investigation 0014256.

604 *See* Ex. 286, Email from M. Metzger to B. Werner (May 5, 2006), SLC DNC Investigation 0010314.

605 Ex. 305, "Do Not Call" Complaint—Escalation Process (Sept. 20, 2006), SLC DNC Investigation 0007577.

606 *See, e.g.*, Ex. 166, Do Not Call Investigation Form (Nov. 1, 2006), SLC DNC Investigation 0012595; Ex. 287, Retailers Associated with TCPA Complaints (May 15, 2006), SLC DNC Investigation 0011278.

DNC Laws, some consumers were mistaken about whether the call in question had been a DNC violation.[607]

If the consumer provided a phone number, DISH could determine whether the number was added to the relevant DNC registries and when.[608] At times, consumers would be mistaken as to whether their number was in fact on a DNC Registry or would have added their number so recently that the call fell within the grace period for callers to update their copies of the Registry.[609] However, confirming that the consumer's phone number was on the relevant DNC Registry at the relevant time did not establish that anyone had violated DNC Laws.

As discussed above, DNC Laws include numerous contexts in which numbers on the DNC Registries may be called, such as the established business relationship exception.[610] Consumers were not always aware of these exceptions or aware of when these exceptions applied to them. Even if none of these exceptions applied, it was still possible that the call fell within a safe harbor.[611] Thus, the caller's information about its relationship (if any) with the consumer was necessary for DISH to assess whether there had been a violation of DNC Laws.

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607 Ex. 293, Email from D. Moskowitz to C. Ergen, et al. (Aug. 2, 2006), SLC DNC Investigation 0002211 (consumer called was not on DNC Registries).

608 Ex. 718, "DNC" (Do Not Call) Escalation Flow Chart (Oct. 12, 2006), SLC DNC Investigation 0002795.

609 Ex. 293, Email from D. Moskowitz to C. Ergen, et al. (Aug. 2, 2006), SLC DNC Investigation 0002211 (complaining consumer was not on federal or state DNC registries); Ex. 154, SLC DNC Investigation 0012929 (noting "[i]t is unclear that any laws have been broken without speaking with [the consumer]"); Ex. 62, EchoStar DNC Policy (Feb. 6, 2006), SLC DNC Investigation 0011042 § II.A., III.

610 Ex. 62, EchoStar DNC Policy (Feb. 6, 2006), SLC DNC Investigation 0011042 § III; Ex. 251, DNC Investigation Team Manual, SLC DNC Investigation 0011983 at 11992.

611 See 47 C.F.R. § 64.1200 (c)(2)(i)-(iii); 16 C.F.R. § 310.4(b)(3); Cal. Bus & Prof Code § 17593(d).

2. Resolving DISH's Own Calls

Where DISH itself or an Authorized Telemarketer had called the consumer, DISH could investigate the basis for the call in its "Brio" system, which tracked every call that DISH made or directed be made to a particular phone number.[612] If the call was recorded in the Brio system, DISH could determine the purpose for the call. The information in the Brio system then allowed DISH to determine whether the call presented an issue under any DNC Laws.[613] DISH also considered whether the call presented an issue from a customer service perspective—even if the call complied with the law.[614]

DISH and its Authorized Telemarketers did make some inadvertent calls to numbers on DNC Registries ("Registry Calls") during the Investigation Period.[615] A 2007 audit revealed "that Dish made 2,334, 5,324, and 3,405 Registry Calls in June, July, and August 2005 respectively."[616] A 2009 audit showed "showed that Dish made 291,000 Registry Calls from October to December 2008."[617] When DISH discovered that it had made a Registry Call without a relevant exception (a Potentially Violative Call), DISH employees worked to adjust procedures to prevent whatever had caused that Potentially Violative Call from causing further Potentially

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612 Ex. 359, Email from D. Laslo to L. Kalani (Nov. 12, 2008), SLC DNC Investigation 0009941 (email sending Brio Report in response to consumer complaint); SLC DNC Investigation 0009942 (Brio report); Ex. 110, Email from D. Murphy to R. Bangert, et al. (Feb. 12, 2004), SLC DNC Investigation 0012861.

613 Ex. 162, Email from L. Gardner to J. Greaney (Oct. 2, 2006), SLC DNC Investigation 0013134.

614 Ex. 251, DNC Investigation Team Manual, SLC DNC Investigation 0011983 at 11995, 12003; Ex. 728, Managing Reports of Telemarketing Violations (July 23, 2006), SLC DNC Investigation 0014988; Ex. 62, EchoStar DNC Policy (Feb. 6, 2006), SLC DNC Investigation 0011042.

615 *See, e.g.*, Ex. 203, Email from B. Davis to R. Munger (Nov. 9, 2007), SLC DNC Investigation 0003291 at 291.

616 *U.S. v. DISH*, 256 F. Supp. 3d at 838.

617 *Id.*

Violative Calls.[618] DISH believed during the Investigation Period that the number of Potentially Violative Calls that it made was within the safe harbors for the relevant DNC Laws, in light of the number of calls that DISH made overall.[619]

3. Identifying the Source of Calls Not Made by DISH

Very few of the DNC complaints DISH received concerned calls made by DISH or Authorized Telemarketers.[620] Where DISH had not made or directed the call, Retail Services would attempt to track down the caller through information provided by the consumer.[621]

If the consumer had recorded the phone number called from and the number was not spoofed, DISH could identify any Retailer involved from the number.[622] But, often, the phone number shown on the consumer's caller ID was "spoofed" to present false identifying information.[623] Identifying callers was further complicated by the abundance of third parties calling consumers and claiming to be DISH, often while also spoofing the number called from.[624]

Sometimes, despite a spoofed number, Retail Services was able to identify the caller based on some other characteristic of the call. For example, in one instance, the caller left a call

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618 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 470-473.

619 *Id.* at 469.

620 *See* Ex. 150, Email from R. Origer to M. Metzger (July 19, 2006), SLC DNC Investigation 0013102 at 102.

621 Ex. 151, Email from T. Stingley to M. Metzger (July 19, 2006), SLC DNC Investigation 0013778.

622 Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 470-73; Ex. 162, Email from L. Gardner to J. Greaney (Oct. 2, 2006), SLC DNC Investigation 0013134; Ex. 404, Email from D. Laslo to S. Lanning, et al. (Apr. 2, 2010), SLC DNC Investigation 0008472.

623 *U.S. v. DISH*, 256 F. Supp. 3d at 847; Ex. 712, Email from R. Calbert to J. DeFranco (Mar. 12, 2009), SLC DNC Investigation 0011270 ("The issue is that he was illegally telemarketing using spoofed caller ID's.")

624 Ex. 151, Email from T. Stingley to M. Metzger (July 19, 2006), SLC DNC Investigation 0013778.

back number in pre-recorded voicemail messages.[625] In other instances, the source of the call might be identifiable based on the accent of the caller.[626] In most instances, DISH was unable to identify a non-DISH caller from the information provided by the consumer.[627]

In 2006, to try to address these unidentifiable callers, DISH began a "sting program."[628] DISH's Executive Resolution Team invited consumers who had been called multiple times by an unidentified telemarketer to participate.[629] "If the offending telemarketer called again, the participating consumer agreed to purchase Dish Network programming using a credit card provided by Dish along with specified identifying information. When the order came through on the Order Entry Tool, Dish could identify the Order Entry Retailer involved in the participating consumer's 'sting' transaction."[630] To create the sting program, DISH developed partnerships with third parties, including the credit bureaus, so that participating consumers would be able to

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625 Ex. 275, Email from S. McElroy to S. Novak, et al. (Apr. 14, 2004), SLC DNC Investigation 0005847.

626 Ex. 149, Email from M. Mills to E. Carlson, et al. (July 18, 2006), SLC DNC Investigation 0012997.

627 *See, e.g.*, Ex. 261, Email from M. Davidson to J. DeFranco (Feb. 25, 2003), SLC DNC Investigation 0009615; Ex. 151, Email from T. Stingley to M. Metzger (July 19, 2006), SLC DNC Investigation 0013778 at 778 ("Unfortunately, most of the time, we are not able to identify the caller and therefore we are not able to offer a complete resolution to the consumer."); Ex. 374, Email from R. Musso to J. Blum and B. Van Emst (Apr. 16, 2009), SLC DNC Investigation 0008486.

628 *See, e.g.*, Ex. 305, "Do Not Call" Complaint—Escalation Process (Sept. 20, 2006), SLC DNC Investigation 0007577; Ex. 254, Sting Flow, SLC DNC Investigation 0012255; Ex. 196, Acknowledgment Form: Do Not Call (DNC) Sting Procedures (Aug. 18, 2007), SLC DNC Investigation 0012260.

629 *See, e.g.*, Ex. 361, Email from L. Kalani to R. Egan (Nov. 19, 2008), SLC DNC Investigation 0010050; Ex. 254, Sting Flow, SLC DNC Investigation 0012255; Ex. 196, Acknowledgment Form: Do Not Call (DNC) Sting Procedures (Aug. 18, 2007), SLC DNC Investigation 0012260; Ex. 253, Sting Process, SLC DNC Investigation 0011405.

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

complete their "purchase" without alerting the caller.[631] DISH's sting program successfully identified some Retailers behind the otherwise unidentifiable calls.[632]

4. Gathering Information from an Identified Retailer

When DISH identified a Retailer as the source of a DNC complaint, Retail Services would contact the Retailer for explanation.[633] For example, in its letter to Retailer American Satellite, DISH demanded that American Satellite "[i]mmediately provide verifiable information demonstrating that you are in compliance with Do Not Call laws" and that it "[c]ontinue to institute procedures and document corrective measures for full compliance with all laws . . . ."[634] DISH gave Retailers a certain number of days to respond to these requests.[635]

When the Retailer responded, DISH did not simply accept any plausible explanation offered.[636] Instead, Retail Services would gather sufficient information to determine if there had been a Potentially Violative Call (to a number on a DNC Registry that did not meet an exception) and, if so, to assess, among other things, (a) whether it was a simple mistake or an intentional violation, (b) whether it was an isolated incident or something requiring the Retailer

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631 Ex. 253, Sting Process, SLC DNC Investigation 0011405 (teamed up with Equifax); Ex. 360, Email from M. Metzger to L. Kalani (Nov. 18, 2008), SLC DNC Investigation 0009936.

632 *See* Ex. 178, TCPA Retailer Activity—Internal Stings (Jan. 12, 2007), SLC DNC Investigation 0011146; *U.S. v. DISH*, 256 F. Supp. 3d at 851 ("Through the sting program, Dish identified several Order Entry Retailers that were violating the Do-Not-Call Laws.").

633 *See, e.g.*, Ex. 171, Email from R. Musso to JSR Satellite (Dec. 20, 2006), SLC DNC Investigation 0012365; Ex. 487, Letter from R. Goodale to Retail Audit and Risk Attention (Jan. 22, 2017), SLC DNC Investigation 0013504; Ex. 216, Email from Vendor Inquiries to G. Jones (Mar. 3, 2009), SLC DNC Investigation 0011600.

634 Ex. 187, Letter from R. Origer to T. Diroberto, et al. (Feb. 12, 2007), SLC DNC Investigation 0014107.

635 *See, e.g.*, Ex. 205, Email from P. Jaworski to A. Tehranchi, et al. (Jan. 2, 2008), SLC DNC Investigation 0010501.

636 *See, e.g.*, Ex. 301, Letter from D. Steele to J. Hughes (Aug. 17, 2006), SLC DNC Investigation 0015680.

to provide additional training to its employees, (c) whether it stemmed from a particular location or agent or was a widespread issue for the Retailer and (d) whether the Retailer did not understand the DNC Laws or understood them, but did not care that it was breaking the law.[637]

Sometimes, a Retailer responded to Retail Services' inquiry by explaining that, although the number called was on a DNC Registry, the call was not a Potentially Violative Call because the Retailer had an established business relationship with the consumer or that the call was made in response to a specific inquiry by the customer.[638] If the Retailer said it was using PossibleNow, DISH would verify that. If the call was a Potentially Violative Call, Retail Services would also ask what the Retailer had done about the call.[639] Then, Retail Services documented its investigations, the issues found (if any) and any action taken.[640]

The Court in *U.S. v. DISH* interpreted Retail Services' inquiry as simply accepting whatever excuse the Retailer gave.[641] The situation was more complex than that.[642] A consumer complaint that a number on a DNC Registry had been called demonstrated a Registry Call, which

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637 *See, e.g.*, Ex. 223, Email from R. Musso to R. Calbert (Apr. 3, 2009), SLC DNC Investigation 0012230 at 231 (discussing Musso's questioning regarding Retailer's call records); Ex. 257, Retailer SSN: Timeline, SLC DNC Investigation 0011608; Ex. 251, DNC Investigation Team Manual, SLC DNC Investigation 0011983; Ex. 305, "Do Not Call" Complaint - Escalation Process (Sept. 20, 2006), SLC DNC Investigation 0007577.

638 *See, e.g.*, Ex. 232, Email from R. Musso to R. Quader, et al. (May 17, 2010), SLC DNC Investigation 0012023; Ex. 224, Email from A. Olival to R. Musso, et al. (May 4, 2009), SLC DNC Investigation 0011932.

639 *See, e.g.*, Ex. 224, Email from A. Olival to R. Musso, et al. (May 4, 2009), SLC DNC Investigation 0011932.

640 *See, e.g.*, Ex. 370, Email from B. Van Emst to S. McElroy (Mar. 5, 2009), SLC DNC Investigation 005442); Ex. 220, Executive Summary of Apex Satellite, Inc., SLC DNC Investigation 012989; Ex. 282, Email from A. Ahmed to C. Willis, et al. (Oct. 26, 2005), SLC DNC Investigation 0005910.

641 *See, e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d 810, 849 (C.D. Ill. 2017).

642 Ex. 251, DNC Investigation Team Manual, SLC DNC Investigation 0011983; Ex. 305, "Do Not Call" Complaint—Escalation Process (Sept. 20, 2006), SLC DNC Investigation 0007577.

might be permitted under various exceptions to the DNC Laws. If the Registry Call met no exceptions, it would be a Potentially Violative Call. But an isolated Potentially Violative Call made by a business otherwise complying with DNC Laws would likely fall within the DNC Laws' safe harbors.

Some Retailers outright lied to DISH, hiding their unlawful activity.[643] Retail Services did not have anything akin to the discovery process or CIDs to *prove* that a Retailer that appeared compliant was not complying with DNC Laws. Retail Services had only DISH's contractual right to expect legal compliance from its contractual counterparty under the Retailer Agreement.[644] None of the documents reviewed by the SLC reflected DISH continuing to do business with a Retailer that clearly had no intention of complying with the DNC Laws in the future.

F. DISH Addressed Retailer Discipline on a Case-by-Case Basis.

When Retail Services determined that a Retailer had made an unacceptable call, Retail Services "employed an array of disciplinary measures that included warnings, probation, fines, withholding access to the [OE] Tool (known as putting on hold), and termination."[645] Retail

643 *See, e.g.*, Ex. 175, Email from R. Origer to R. Musso, et al. (Dec. 22, 2006), SLC DNC Investigation 0012283 at 284 ("If they aren't forthcoming [with information]—I have less interest in a progressive discipline track."); Ex. 382, Email from A. Ahmed to M. Mills, et al. (July 10, 2009), SLC DNC Investigation 0005925 at 926 (Retailer lied about its marketing).

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

645 *See, e.g.*, Ex. 340, Email from J. Blum to S. Dodge, et al. (May 13, 2008), SLC DNC Investigation 0001139 ("We do have a process and it has worked in reducing complaints by 80% in the past year. The team will investigate what retailer is involved here and take appropriate action if we learn the identity of the retailer."); Ex. 212, Email from M. Mills to R. Musso (Oct. 13, 2008), SLC DNC Investigation 0013199; *U.S. v. DISH*, 256 F. Supp. 3d at 843.

Services determined the discipline appropriate to each situation on a case-by-case basis.[646] Given the complexity of DNC compliance, Management did not believe that it was reasonable to terminate a Retailer in response to the first DNC violation—if Retail Services believed that the Retailer was acting in good faith and intended to fix the problem.[647] But, DISH did terminate many Retailers for DNC or other telemarketing violations during the Investigation Period, as listed in Factual Findings Section V.F.4 below.[648]

DISH's outside Director Defendants told the SLC when interviewed that, to the extent that they had a view on the situation, they understood that Management disciplined Retailers in a reasonable manner designed to minimize DNC violations. They relied on the judgment and good faith of Management to drive legal compliance.

Ergen, Moskowitz and DeFranco, were aware of the approach that Management took with respect to Retailer discipline. They understood that DISH addressed Retailers that generated consumer complaints on a case-by-case basis.[649] They understood that Management tried to bring Retailers into compliance with DNC Laws where Management believed that was

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646 *See, e.g.*, Ex. 217, Telephone Call Notes following Apex "Hold" Status (Mar. 4, 2009), SLC DNC Investigation 0012632 (placing retailer on hold status); Ex. 176, Chart of Retailer Disciplinary Actions (May 2006-June 2007), SLC DNC Investigation 0010701; Ex. 208, Email from B. Van Emst to R. Musso, et al. (Sept. 2, 2008), SLC DNC Investigation 0011603 (imposing fine at government rate per call); Ex. 350, Email from T. Stingley to L. Kalani (Sept. 17, 2008), SLC DNC Investigation 0010645 (removing access to OE tool); *U.S. v. DISH*, 256 F. Supp. 3d at 848, 855.

647 *See, e.g.*, Ex. 208, Email from B. Van Emst to R. Musso, et al. (Sept. 2, 2008), SLC DNC Investigation 0011603 ("[N]ot sure what is to be gained if we penalize the 'good retailers' beyond what is fair and reasonable.").

648 *See, e.g.*, Ex. 221, Email from B. Van Emst to B. Werner (Mar. 24, 2009), SLC DNC Investigation 0011982.

649 *U.S. v. DISH*, 256 F. Supp. 3d at 848.

possible.[650] And, they understood that Management terminated Retailers where Management believed that the Retailers could not be brought into compliance with DNC Laws.[651] To the extent that any Director Defendant had more substantive involvement in any aspect of Retailer discipline, that role is discussed below.

1. Retail Services' Role

When Retail Services identified the Retailer behind a probable DNC violation or calls that complied with the letter of the law but particularly irritated consumers, Retail Services would attempt to resolve the situation with the Retailer.[652] DeFranco gave broad instructions to Retail Services on how to approach Retailer discipline, but was not involved in the day-to-day workings of driving DNC compliance by Retailers.[653] Retail Services would involve the Legal Department, and possibly DeFranco or Moskowitz personally, only if the situation demanded, as discussed below. Retail Services resolved many Retailer situations without the need for approval of others within DISH.[654]

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650 *See, e.g.*, Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217 at 217 ("In early 2006, we experienced a signicant increase in consumer complaints regarding telemarketing violations (both by consumers and AGs/BBB/FTC on their behalf) by parties claiming to to be 'DISH Network' and failing to provide legitimate information on their companies. . . . In efforts to discover the identities of these entities, EchoStar initiated multiple new processes to communicate with the consumers. . . .").

651 S*ee* Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

652 For example, Retail Services met personally with Retailers to work through issues. *See, e.g.,* Ex. 187, Letter from R. Origer to T. Diroberto (Feb. 12, 2007), SLC DNC Investigation 0014107; Ex. 191, Email from T. Pyle to R. Musso, et al. (Feb. 20, 2007), SLC DNC Investigation 0011964. See also *U.S. v. DISH*, 256 F. Supp. 3d at 861.

653 *See, e.g*., Ex. 154, Email from J. DeFranco to M. Metzger, et al. (Aug. 7, 2005), SLC DNC Investigation 00012929.

654 *See, e.g*., Ex. 208, Email from B. Van Emst to R. Musso, et al. (Sept. 2, 2008), SLC DNC Investigation 0011603 (imposing monetary fine related to alleged TCPA violations by Retailer).

DISH Management expected Retailers who made compliance mistakes to commit to making changes designed to prevent the problem from repeating itself.[655] DeFranco's direction to Retail Services was that Retailers who had violated DNC Laws must admit their mistakes to DISH and present a proposal to DISH of the things that the Retailer would do to avoid any reoccurrence of the problem.[656]

If a Retailer had made a good-faith mistake and presented a proposal to avoid a reoccurrence that seemed reasonable to Retail Services, Retail Services could set the appropriate discipline, from a warning letter to a fine or a requirement that the Retailer take certain action.[657] In selecting discipline, Retail Services considered whether the problem resulted from a single error or reflected a systematic issue.[658] The amount of revenue the Retailer was generating was not a factor; the number of complaints compared to the volume of calls that the Retailer was making was a factor.[659]

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655 *See, e.g.*, Ex. 712, Letter from R. Origer to A. Tehranchi (Dec. 28, 2006), SLC DNC Investigation 0012166 (directing Retailer to "completely and thoroughly address the circumstances surrounding the allegation(s) and furnish information relative to the specific circumstances that has created this issue and the corrective actions that will eliminate recurrences").

656 *See* Ex. 84, Trial Transcript, at 174:1-178:12, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 11, 2017) (D.I. 302) (A. Ahmed Testimony).

657 *See, e.g.*, Ex. 208, Email from B. Van Emst to R. Musso, et al. (Sept. 2, 2008, SLC DNC Investigation 0011603 (imposing monetary fine related to alleged TCPA violations by Retailer); Ex. 137, Retailer Audit Notification & Summary—Dish TV Now (Dec. 20, 2005), SLC DNC Investigation 0013544 (placing Retailer on hold); Ex. 193, Retailer Audit Notification & Summary—SSN (June 27, 2007), SLC DNC Investigation 0015583.

658 *See, e.g.*, Ex. 208, Email from B. Van Emst to R. Musso, et al. (Sept. 2, 2008, SLC DNC Investigation 0011603 (Musso comparing appropriate discipline for retailer with two isolated incidents versus Retailer with systemic issues).

659 *See, e.g.*, Ex. 99, Email from N. Myers to B. Neylon, et al. (Mar. 11, 2002), SLC DNC Investigation 0012201.

Retailers who lied to DISH or hid ongoing misconduct were handled far more harshly when caught.[660] DeFranco had no tolerance for Retailers caught lying to DISH and expected Retail Services to have a similar lack of tolerance.[661]

Retail Services' employees were authorized to decide to warn, discipline, or terminate Retailers without outside input from Legal, DeFranco or anyone else.[662] Indeed, any DISH employee at the director level or above had the authority to discipline or terminate a Retailer.[663] When a Retailer was terminated, the Legal Department would become involved to manage the termination, but the Legal Department's input was not necessary to select termination as the appropriate discipline.[664]

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660 *See, e.g.*, Ex. 175, Email from R. Origer to R. Musso, et al. (Dec. 22, 2006), SLC DNC Investigation 0012283 at 284 ("If they aren't forthcoming [with information]—I have less interest in a progressive discipline track.").

661 *See, e.g.*, Ex. 221, Email from B. Van Emst to B. Werner (Mar. 24, 2009), SLC DNC Investigation 0011982 (forwarding an email in which DeFranco wrote to a soon-to-be-terminated Retailer, "You should have considered the consequences when you decided not to follow proper procedures."); Ex. 154, Email from J. DeFranco to M. Metzger, et al. (Aug. 7, 2006), SLC DNC Investigation 00012929 ("[A]ll retailers who use the Web should be required to disclose who they are so consumers do not believe they are on the Dish Network site.").

662 *See, e.g.*, Ex. 185, Email from R. Origer to B. Neylon (Feb. 8, 2007), SLC DNC Investigation 0013368; *see also* Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

663 *See* Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076. For example, Senior VP of Sales Ahmed addressed DNC complaints without further sign-off, and the SLC learned during interviews that Ahmed never needed to escalate DNC complaints to, nor was required to discuss DNC complaints with; DeFranco, Ergen or Moskowitz. *See, e.g.*, Ex. 407, Email from A. Ahmed to T. Cullen and J. DeFranco (June 20, 2010), SLC DNC Investigation 0001087; Ex. 278, Email from N. Jessen to A. Ahmed, et al. (Mar. 7, 2005), SLC DNC Investigation 0005908. Ahmed had the authority to address complaints without further sign-off.

664 *See* Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076; Ex. 185, Email from R. Origer to B. Neylon (Feb. 8, 2007), SLC DNC Investigation 0013368.

2. The Legal Department's Role

If the Retailer did not seem to be taking its contractual compliance obligations seriously or the question of discipline was otherwise more complicated in some manner, the question of appropriate discipline was escalated from Retail Services to the Compliance Team.[665] Escalating the situation from Retail Services to the full Compliance Team involved Blum and other members of the Legal Department in the question of appropriate discipline.[666]

When a matter was escalated to the full Compliance Team, "executives in Retail Sales and Retail Services discussed the complaint among themselves and with members of [DISH]'s Legal Department. A person from either the Legal Department or Retail Sales contacted the [Retailer]" for more information about the situation.[667] The Compliance Team met weekly with the Legal Department and discussed the information gathered. "The meetings covered all areas of Order Entry Retailer compliance, including telemarketing."[668]

The Compliance Team made it clear to Retailers that failure to comply with DNC Laws could result in termination of their Retailer Agreement.[669] Retailers were reminded of this in Facts Blasts, where they were also given examples of Retailers who had been terminated.[670] For example, DISH's November 11, 2006 Facts Blast stated that, if a Retailer is engaged in any form of telemarketing sales of DISH, "AT A MINIMUM, it must: Comply with all applicable state

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

666 *See, e.g.*, Ex. 200, Letter from R. Origer to W. Martin (Sept. 28, 2007), SLC DNC Investigation 0014108 (copying Blum on discipline letter).

667 *U.S. v. DISH*, 256 F. Supp. 3d at 848.

668 *Id.*

669 *See, e.g.*, Ex. 465, Team Summit Presentation (May 14-16, 2013), SLC DNC Investigation 008685 at 691.

670 *See, e.g.*, Ex. 290, Excerpt from June 22, 2006 Dealer Communication Memo "Fax Blast" from EchoStar, LLC to its dealers, SLC DNC Investigation 0010189.

and federal 'Do Not Call' laws, including, but not limited to, the Telemarketing Sales Rule, the Telephone Consumer Protection Act, and any and all state laws governing telemarketing for the state to which calls are placed."[671]

While Moskowitz was DISH's General Counsel, Blum met weekly with Moskowitz. Among other things, Blum kept Moskowitz apprised of the Compliance Team's progress. Moskowitz was not otherwise involved in the weekly Compliance Team meetings or (with certain exceptions) the Compliance Team's decisions with respect to individual Retailers.[672]

The Compliance Team was authorized to make disciplinary decisions on its own, including, if appropriate, terminating a Retailer.[673] During the Investigation Period, the Compliance Team terminated dozens of Retailers without approval by any Director Defendant.[674]

3. Director Defendants' Roles

If a Retailer's conduct was "particularly egregious," involving blatant lies or intentional violations of law, the Compliance Team had the option of escalating the matter to DeFranco or Moskowitz.[675] For example, both DeFranco and Blum recounted an instance a Retailer had blatantly lied to the Compliance Team and then requested a meeting with DeFranco to ask him to

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671 Ex. 315, Facts Blast (Nov. 10, 2006), SLC DNC Investigation 0001156.

672 For example, where a consumer complaint was made directly to Ergen, Moskowitz became involved, in a discrete manner, in the resolution and discipline of the specific retailer at issue; Ex. 711, Email from B. Werner to R. Origer (Sept. 29, 2006), SLC DNC Investigation 0010356.

673 *See, e.g.*, Ex. 369, Email from T. Rukas to J. Slater, et al. (Mar. 5, 2009), SLC DNC Investigation 0013370; Ex. 185, Email from R. Origer to B. Neylon (Feb. 8, 2007), SLC DNC Investigation 0013368. *See also* Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

674 *See* Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

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

override the Compliance Team's decision. The meeting was granted. The Retailer flew out to Denver and repeated the lies told to the Compliance Team to DeFranco—who terminated the Retailer on the spot.

DeFranco explained to the SLC that he would also get personally involved in the termination of some large Retailers.[676] When he became involved, he emphasized that DISH did not want to do business with Retailers who lied to DISH or who did not take DNC compliance obligations seriously. In most instances, Retail Services simply informed DeFranco of Retailer terminations after the fact.[677]

Moskowitz became directly involved in individual Retailer discipline only where Moskowitz or Ergen had personally received the original consumer complaint.[678] Indirectly, Moskowitz and Blum each told the SLC that while Moskowitz was DISH's General Counsel they generally met to discuss Blum's projects weekly. Retailer discipline may have come up in those meetings. But, neither Blum nor Moskowitz recalled discussing any particular Retailers.

Ergen had a broad awareness of DISH's approach to Retailer discipline, but did not become involved in how individual Retailers were handled.[679] Ergen explained to the SLC that

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676 *See, e.g.*, Ex. 240, Email from J. DeFranco to B. Neylon (Apr. 27, 2011), SLC DNC Investigation 0003269.

677 *See, e.g.*, Ex. 137, Retailer Audit Notification & Summary— Dish TV Now (Dec. 20, 2005), SLC DNC Investigation 0013544. Ex. 209, Email from R. Musso to B. Werner, et al. (Sept. 5, 2008), SLC DNC Investigation 0012946 at 947 (Retail Services employees drafting an email to inform DeFranco that they terminated a Retailer).

678 *See, e.g.*, Ex. 711, Email from B. Werner to R. Origer (Sept. 29, 2006), SLC DNC Investigation 0010356.

679 *See* Ex. 349, Voice Message from C. Ergen to R. Dye, et al. (Sept. 16, 2008), SLC DNC Investigation 0005905.

he expected repeat violators of DNC Laws to be terminated.[680] Management was empowered to take aggressive action and to terminate Retailers as appropriate; Ergen's approval was not required.[681]

The remaining Director Defendants had little, if any, awareness of Retailers' DNC compliance during the Investigation Period. Neither DNC compliance nor Retailers was an issue that Vogel addressed in his role as Vice Chairman. When interviewed, most Director Defendants had no recollection of discussing the issue at the Board level. Two Director Defendants recalled discussion by the Board regarding issues with DNC compliance by some Retailers at some point in time, which may have followed the filing of *U.S. v. DISH*; other Director Defendants did not share this recollection. There is no written documentation to confirm whether or when the discussion occurred or to add detail to what the Director Defendants recalled at their interviews.

4. Examples of Retailer Discipline

DISH's termination of United Satellite as an OE Retailer on August 20, 2006, for making Prerecorded Calls provides a good example of DISH's disciplinary process during the Investigation Period.[682] First, Retail Services identified United Satellite as the source of Registry Calls (calls to numbers on DNC Registries) through two separate stings.[683] Second, United Satellite failed to provide sufficient documentation to the Compliance Team that the Registry Calls were permitted and failed to show that it was taking steps to remediate the apparent DNC

680 *See also* Ex. 308, Email from D. Moskowitz to D. Steele (Sept. 28, 2008), SLC DNC Investigation 0001142 at 142 ("I expect we will cut off repeat offenders and that we will FIND offenders.").

681 Ex. 137, Retailer Audit Notification & Summary—Dish TV Now (Dec. 20, 2005), SLC DNC Investigation 0013544.

682 *U.S. v. DISH*, 256 F. Supp. 3d at 862-63.

683 Ex. 178, TCPA Retailer Activity—Internal Stings (Jan. 12, 2007), SLC DNC Investigation 0011146; Ex. 303, Audit and Risk Accomplishments (Week Ending Aug. 23, 2006), SLC DNC Investigation 0002772.

issues.[684] Finally, DISH terminated United Satellite, despite the fact that it was one of DISH's highest volume OE Retailers.[685] DeFranco may have participated in the decision.[686]

United Satellite was far from the only Retailer disciplined for DNC Law violations during the Investigation Period.[687] The chart below reflects the Retailers, predominantly OE Retailers, that the SLC identified as having been terminated or otherwise disciplined during the Investigation Period for DNC violations:

Date	Retailer	Discipline	Reason Provided
6/12/02	SSN[688]	Violation Letter[689]	Prerecorded calls
6/23/03	HESStronics, Inc. d/b/a Sandpoint Satellite[690]	Cease and Desist Letter	Prerecorded calls

[684] Ex. 157, EchoStar Satellite L.L.C. Risk Summary (Week Ending Sept. 5, 2006), SLC DNC Investigation 0013005.

[685] Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

[686] Ex. 304, Email from R. Origer to C. Voorhies and M. Mills (Sept. 14, 2006), SLC DNC Investigation 0014795; Ex. 300, Email from R. Origer to B. Werner (Aug. 15, 2006), SLC DNC Investigation 0014994.

[687] *U.S. v. DISH*, 256 F. Supp. 3d at 852 ("Dish terminated some Order Entry Retailers after starting the Compliance Department. In February 2007, Dish announced that it had terminated three Order Entry Retailers for Do-Not-Call violations. . . . In early October 2007, two additional Order Entry Retailers were terminated for using unauthorized third party affiliates for lead generation. . . . . In July 2008, Musso identified two additional Order Entry Retailers that had been terminated since she started the Compliance Department and two more that were not renewed but would have been terminated.").

[688] Ex. 103, Letter from M. Davidson to A. Tehranchi (June 12, 2002), SLC DNC Investigation 0012364 (regarding violation of § 9.3 of the Retailer Agreement); *U.S. v. DISH*, 256 F. Supp. 3d 810, 858 (C.D. Ill. 2017).

[689] With the exception of the Violation Letter to SSN dated June 12, 2002 (Ex. 103, SLC DNC Investigation 0012364), the Violation Letters referenced in this chart generally were substantively the same. Each Violation Letter noted that DISH had received a consumer complaint regarding the Retailer. Each Letter informed the Retailer of the alleged violation. And, most violation Letters demanded that the Retailer provide documents and an explanation to DISH. *See e.g.*, Ex. 207, Letter from R. Musso to P. Cain (Aug. 6, 2008), SLC DNC Investigation 0012262.

Date	Retailer	Discipline	Reason Provided
2005	Advantage Satellite[691]	Terminated	TCPA violation
8/2/05	United Satellite[692]	Investigation	DNC and TCPA violation.
8/16/06-8/17/06	Sterling Satellite[693]	Letter requiring Sterling Satellite to take action with consumer $10,000 Penalty	DNC Violations.
~8/14/06	Allsat OE[694]	"Warning Letter"	DNC violations
9/5/06	Satellite Systems Now[695]	Violation Letter	TCPA violations
9/8/06[696]	United Satellite[697]	Terminated	TCPA violations

690 Ex. 270, Email from S. Novak to M. Oberbillig, et al. (June 23, 2003), SLC DNC Investigation 0005920.

691 Ex. 281, Email from E. Carlson to B. Pecham, et al. (Aug. 23, 2005), SLC DNC Investigation 0010313.

692 Ex. 280, Email from M. Oberbillig to A. Ahmed, et al. (Aug. 2, 2005), SLC DNC Investigation 0005969.

693 Ex. 301, Letter from D. Steele to J. Hughes (Aug. 17, 2006), SLC DNC Investigation 0015680 at 681 ("the sum of $10,000 [will be] assessed as reimbursement to EchoStar for its efforts expended investigating Mr. Rawal's claims[.]"); Ex. 299, Risk Summary TCPA/Do Not Call Allegations Progress (Week Ending Aug. 14, 2006), SLC DNC Investigation 0002770; Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573.

694 Ex. 299, Risk Summary TCPA/Do Not Call Allegations Progress (Week Ending Aug. 14, 2006), SLC DNC Investigation 0002770.

695 Ex. 157,EchoStar Satellite L.L.C. Risk Summary (Week Ending Sept. 5, 2006), SLC DNC Investigation 0013005; Ex. 156, EchoStar Satellite L.L.C. Legal TCPA Meeting Notes (Aug. 29, 2006), SLC DNC Investigation 0010693.

696 The Court in *U.S. v. DISH* found that DISH terminated United Satellite on Aug. 20, 2006. *U.S. v. DISH*, 256 F. Supp. 3d at 862-63. *But see* Ex. 304, Email from R. Origer to C. Voorhies et al. (Sept. 14, 2006), SLC DNC Investigation 0014795 at 795 ("Please terminate United Satellite . . . effective Sept. 8, 2006.").

697 Ex. 299, Risk Summary TCPA/Do Not Call Allegations Progress (Week Ending Aug. 14, 2006), SLC DNC Investigation 0002770; Ex. 176, Chart of Retailer Disciplinary Actions (May 2006 to June 2007), SLC DNC Investigation 0010701; Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573; Ex. 159, Risk Summary-TCPA/Disclosures (Week Ending Sept. 12, 2006), SLC DNC Investigation 0011348

Date	Retailer	Discipline	Reason Provided
10/5/06	JSR Enterprises[698]	Warning Letter	DNC violation
11/15/06	JSR Enterprises[699]	No action taken due to pending termination	DNC violation
11/17/06 12/7/06	Atlas Assets[700]	Terminated	TCPA violations
11/21/06	Blu Kiwi (I Dish)[701]	$10,000 Penalty[702]	TCPA violations
1/4/07	Global Wizards[703]	Terminated	TCPA violations
1/4/07	NW Dish TV LLC[704]	Terminated	TCPA violations
1/17/07	Sterling Satellite[705]	$52,000 Penalty[706]	TCPA violations

(termination letter delivered on Sept. 8, 2006); Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

698 Ex. 177, Chart of Complaints Regarding JSR (2006-2007), SLC DNC Investigation 0012623.

699 *Id.*

700 Ex. 735, Termination Matrix Chart (1999-2013), SLC DNC Investigation 0014849; Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573.

701 Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573 (indicating no further incidents as of Dec. 14, 2007); Ex. 318, Email from R. Musso to D. Steele, et al. (Nov. 20, 2006), SLC DNC Investigation 0007586.

702 The Penalty assessed against the Retailer was a reimbursement for investigation costs into the Retailer's compliance. Ex. 170, Letter from R. Origer to A. Earl, et al. (Nov. 21, 2006), SLC DNC Investigation 0014110.

703 Ex. 735, Termination Matrix (1999-2013), SLC DNC Investigation 0014849 at 855 (listing, among other things, terminations in 2007), at 855; Ex. 197, Email from D. Mason to B. Werner, et al. (Aug. 23, 2007), SLC DNC Investigation 0013482; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

704 Ex. 735, Termination Matrix (1999-2013), SLC DNC Investigation 0014849 at 855; Ex. 197, Email from D. Mason to B. Werner, et al. (Aug. 23, 2007), SLC DNC Investigation 0013482; Ex. 178, TCPA Retailer Activity-Internal Stings (Jan. 12, 2007), SLC DNC Investigation 0011146 at 148; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

705 Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573.

Date	Retailer	Discipline	Reason Provided
2/12/07	American Satellite[707]	$10,000 Penalty[708] and Demand to appear at DISH	TCPA violations
2/13/07	JSR Enterprises[709]	Terminated[710]	TCPA violations
6/21/07	Brandon Adams Investments d/b/a/ Dish Central[711]	Terminated	TCPA complaint and duplicate accounts
8/16/07	Brandvein Communications[712]	Violation Letter	TCPA violations

[706] The Penalty assessed against the Retailer was a reimbursement for investigation costs into the Retailer's compliance. Ex. 320, Letter from B. Neylon to J. Hughes (Jan. 17, 2007), SLC DNC Investigation 0015008.

[707] Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573; Ex. 176, Chart of Retailer Disciplinary Actions (May 2006 to June 2007), SLC DNC Investigation 0010701; Ex. 186, Email from R. Musso to B. Neylon, et al. (Feb. 9, 2007), SLC DNC Investigation 0012071; Ex. 187, Letter from R. Origer to T. DiRoberto, et al. (Feb. 12, 2007), SLC DNC Investigation 0001407 (discussing investigation and $10k reimbursement for investigation); Ex. 191, Email from T. Pyle to R. Musso, et al. (Feb. 20, 2007), SLC DNC Investigation 0011964 (stating that American Satellite terminated all outside marketing contracts and is re-training sales associates).

[708] The Penalty assessed against the Retailer was a reimbursement for investigation costs into the Retailer's compliance. Ex. 187, Letter from R. Origer to T. DiRoberto, et al. (Feb. 12, 2007), SLC DNC Investigation 0014107 (discussing investigation and reimbursement).

[709] Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573; Ex. 188, Letter from R. Origer to J. Grider (Feb. 13, 2007), SLC DNC Investigation 0012688; Ex. 190, EchoStar Takes Action Upon Do-Not-Call Violations (Feb. 14, 2007), SLC DNC Investigation 0011796; Ex. 189, Retailer Audit Notification & Summary - JSR(Feb. 14, 2007), SLC DNC Investigation 0010705 (termination approved by B. Werner and R. Origer within Retail Services); Ex. 730, Email from K. Hubbard to J. DeFranco, et al. (Feb. 16, 2007), SLC DNC Investigation 0005058; Ex. 197, Email from D. Mason to B. Werner, et al. (Aug. 23, 2007), SLC DNC Investigation 0013482; Ex. 255, Retailer JSR: Timeline (Apr. 2006 to Feb. 2007), SLC DNC Investigation 0011579.

[710] DISH terminated JSR as an OE Retailer, but JSR continued selling DISH services through another OE Retailer until March 2007. *See U.S. v. DISH*, 256 F. Supp. 3d at 866. *See also* Ex. 256, Retailer Star Satellite: Timeline, SLC DNC Investigation 0011602.

[711] Ex. 735, Termination Matrix (1999-2013), SLC DNC Investigation 0014849 at 855; Ex. 198, Email from C. Voorhies to D. Mason, et al. (Sept. 18, 2007), SLC DNC Investigation 0012983; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

[712] Ex. 195, Letter from R. Origer to A. Brandvein (Aug. 16, 2007), SLC DNC Investigation 0012296 (requesting information for investigation).

Date	Retailer	Discipline	Reason Provided
9/28/07	Atoll Media[713]	Retailer voluntarily ceases business with DISH	DISH sent Notice of Imposition of Discipline
11/7/07	SSN[714]	Violation Letter	DNC violation
8/6/08	Defender Security[715]	Violation Letter	TCPA violations
9/17/08	I Satellite[716]	Revoked OE tool access	TCPA violation and churn
11/20/08	SSN[717]	Violation Letter	TCPA violation
3/24/09	Apex Satellite, Inc.[718]	Terminated	Pre-recorded calls into states prohibiting such calls and failure to respond to TCPA complaints.
3/27/09	SSN[719]	Violation Letter	TCPA violations
5/27/09	SSN[720]	Violation Letter	TCPA violations
8/14/09	RPM Technologies & Satellite LP[721]	Terminated	TCPA violations; unapproved third party affiliates; and duplicate accounts

[713] Ex. 337, Retail Services Time Line: TCPA Compliance Initiatives (Dec. 14, 2007), SLC DNC Investigation 0002573.

[714] Ex. 202, Letter from R. Origer to A. Tehranchi (Nov. 7, 2007), SLC DNC Investigation 0003230 (requesting information for investigation); Ex. 64, Retail Services Retailer Compliance File (SSN) (May 24, 2007), SLC DNC Investigation 0015334 at 391.

[715] Ex. 207, Letter from R. Musso to P. Cain (Aug. 6, 2008), SLC DNC Investigation 0012262 (requesting information for investigation).

[716] Ex. 350, Email from T. Stingley to L. Kalani (Sept. 17, 2008), SLC DNC Investigation 0010645.

[717] Ex. 213, Letter from R. Musso to A. Tehranchi (Nov. 20, 2008), SLC DNC Investigation 0003232 (requesting information for investigation).

[718] Ex. 220, Executive Summary of Apex Satellite, Inc. (Mar. 6, 2009), SLC DNC Investigation 0012989; Ex. 735, Termination Matrix (1999-2013), SLC DNC Investigation 0014849 at 855; Ex. 369, Email from T. Rukas to J. Slater, et al. (Mar. 5, 2009), SLC DNC Investigation 0013370; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

[719] Ex. 222, Letter from R. Musso to A. Tehranchi (Mar. 27, 2009), SLC DNC Investigation 0003234 (requesting information).

[720] Ex. 225, Letter from R. Musso to A. Tehranchi, et al. (May 27, 2009), SLC DNC Investigation 0013624 (requesting information).

Date	Retailer	Discipline	Reason Provided
12/16/09	Defender Security d/b/a Direct DISH[722]	$5,000 Penalty[723]	DNC violation
5/12/10	SSN[724]	Violation Letter	DNC violation
11/22/10	Big Dog Satellites[725]	Apology letter to consumer required	Consumer complaint
4/26/11	Brandvein Companies Inc.[726]	Terminated	TCPA violations
5/24/13	Digital Tailwind LLC[727]	Terminated	TCPA violations
7/18/13	National Satellite Systems[728]	Settlement with customer required	Consumer telemarketing complaint
9/16/13	Dish One Satellite LLC	Violation Letter	DNC violation

The substantial number of Retailers warned, disciplined and terminated for DNC violations weighs strongly against any inference that Management or the Board wanted Retailers to violate

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721 Ex. 735, Termination Matrix Chart (1999-2013), SLC DNC Investigation 0014849; Ex. 403, Email from B. Werner to B. Kitei (Mar. 26, 2010), SLC DNC Investigation 0002616; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

722 Ex. 227, Letter from B. Van Emst to D. Lindsey (Dec. 16, 2009), SLC DNC Investigation 0015246.

723 The Penalty assessed against the Reatiler was a reimbursement for investigation costs into the retailer's compliance. *Id.*

724 Ex. 231, Letter from R. Musso to A. Tehranchi, et al. (May 12, 2010), SLC DNC Investigation 0003240 (requesting information).

725 Ex. 419, Email from R. Musso to B. Van Emst, et al. (Nov. 22, 2010), SLC DNC Investigation 0005801; Ex. 418, Email from C. Ergen to S. Dodge, et al. (Nov. 19, 2010), SLC DNC Investigation 0009723.

726 Ex. 735, Termination Matrix Chart (1999-2013), SLC DNC Investigation 0014849; Ex. 240, Email from J. DeFranco to B. Neylon (Apr. 27, 2011), SLC DNC Investigation 0003269.

727 Ex. 735, Termination Matrix Chart (1999-2013), SLC DNC Investigation 0014849.

728 Ex. 470, Email from Vendor Inquiries to B. Kitei, et al. (July 18, 2013), SLC DNC Investigation 0006132.

the DNC Laws. DISH's actions may have failed to eliminate Retailer violations of the DNC Laws, but DISH's actions are wholly inconsistent with encouraging violations.

Despite the provisions of DISH's Retailer Agreement permitting termination for convenience, multiple Retailers had attempted to sue DISH for wrongful termination.[729] So, DISH wanted to have a written record proving that it had taken the necessary steps before every termination. In some cases, this led DISH to put a Retailer on hold, preventing further sales, until the Retailer Agreement expired on its own terms rather than terminate the Retailer.

5. The Subject Retailers at Issue in the Underlying DNC Actions

The Underlying DNC Actions awarded damages against DISH for DNC violations caused by calls placed by five different OE Retailers, the Subject Retailers. To justify those awards, the Underlying DNC Actions found that DISH knew or should have known about the Subject Retailers' DNC violations. In *Krakauer*, the North Carolina Court held that "Dish knew that SSN had committed many TCPA violations over the years," and that DISH's demands that SSN comply with DNC Laws "were empty words."[730] In *U.S. v. DISH*, the Illinois Court held that "[b]y 2006, Dish admitted it was overwhelmed with consumer complaints about these operators. . . [and] started to address the mess in the second half of 2006, but by 2009, Dish's own legal department still viewed the Order Entry program as fraught with illegal and shady practices."[731] DISH disputed these findings.[732]

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729 *See, e.g.*, Ex. 383, Letter from L. Joseph to M. Martinez (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).

730 *Krakauer*, 2017 WL 2242952, at *10, 11.

731 *U.S. v. DISH*, 256 F. Supp. 3d at 978.

Neither court addressed its determinations to any particular individual within DISH, let alone a Director Defendant. The SLC finds that neither the evidence reviewed by the courts nor the evidence available to the SLC shows that a Director Defendant was aware of DNC violations by a Subject Retailer and thereafter participated in a decision to not terminate that Retailer.

a. American Satellite

American Satellite, Inc. became a DISH Retailer on October 19, 2005 and an OE Retailer in 2006.[733]

In September 2006, a DISH sting identified American Satellite as a source of an unwanted and possibly violative prerecorded call to a consumer.[734] The Illinois Court found that the call was an abandoned prerecorded call made in violation of the TSR.[735] Upon Retail Services' inquiry to American Satellite about the call, American Satellite blamed the violation on a separate company (referred to in the industry as an "affiliate") that it had hired to market on its behalf.[736]

Retail Services determined that the September 2006 complaint and other consumer complaints about American Satellite were "attributable to lead generation activities performed by

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732 Ex. 790, Brief of Appellant at 45, *U.S. v. Dish Network LLC*, No. 17-3111 (7th Cir. Feb. 22, 2018) (D.I. 33).

733 Ex. 130, Echostar Retailer Agreement with American Satellite Inc. (Oct. 19, 2005), SLC DNC Investigation 0012072; Ex. 244, Declaration of Todd Diroberto, *Donaca v. DISH Network, LLC*, C.A. No. 11-cv-2910-RBJ-KLM (D. Col. Dec. 28, 2012).

734 Ex. 178, TCPA Retailer Activity—Internal Stings (Jan. 12, 2007), SLC DNC Investigation 0011146.

735 *U.S. v. DISH*, 256 F. Supp. 3d at 866-67.

736 Ex. 184, Email from R. Musso to T. Pyle, et al. (Feb. 4, 2007), SLC DNC Investigation 0012235.

third parties on [American Satellite's] behalf."[737] Retail Services demanded that American Satellite (1) "provide verifiable information demonstrating that [it is] in compliance with Do Not Call laws" and (2) "institute procedures and document corrective measures for full compliance with all laws and the [Retailer Agreement]."[738] Retail Services also scheduled an in-person meeting at DISH's headquarters and imposed a $10,000 fine against American Satellite. Finally, American Satellite was informed that "[f]ailure to comply with any of the demands or requests . . . could result in immediate termination of [the Retailer Agreement]."[739]

In response, American Satellite affirmed to DISH that it had "taken direct and total control of all [its] marketing operations," that it was "investing a tremendous amount of time and money to adhere to all compliance rules and regulations" including "another complete retraining of all sales associates" and that DISH would soon "be receiving official notification of termination of all outside marketing contracts" for American Satellite.[740]

In September 2008, Retail Services received new information from several sources alleging concerns about American Satellites' practices, including a complaint from a consumer alleging that American Satellite had made a pre-recorded call to his phone number, which was on the DNC Registries.[741] Upon receipt of the complaint, DISH's Legal Department requested that Retail Services contact American Satellite to investigate whether American Satellite was, despite its commitment otherwise, using a third-party call center.

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737 Ex. 187, Letter from R. Origer to T. Diroberto and T. Pyle (Feb. 12, 2007), SLC DNC Investigation 0014107.

738 *Id.*

739 *Id.*

740 Ex. 191, Email from T. Pyle to R. Musso, et al. (Feb. 20, 2007), SLC DNC Investigation 0011964.

741 Ex. 704, Email from K. Berridge to R. Musso, et al. (Sept. 16, 2008), SLC DNC Investigation 0012488.

On September 23, 2008, DISH's press department forwarded to DISH Management an email from a consumer alleging similar behavior and alleging that American Satellite was defrauding DISH by purchasing pre-paid credit cards to fraudulently approve consumers for DISH accounts.[742] Tom Stingley reported that a separate Retailer had made similar allegations about American Satellite's fraudulent tactics.[743] DeFranco was informed and immediately instructed Retail Services to investigate American Satellite's practices.[744] Retail Services initiated an investigation into fraudulent account activations by American Satellite.[745]

In early 2009, DISH received a report from a former employee alleging that American Satellite was making calls to phone numbers on the DNC Registries, working with third parties and continuing to defraud DISH.[746] An Internal Audit employee, upon receiving the report, was instructed to "write it up and send it all the way to the top of the sales channel."[747] The Illinois Court heard testimony from the former employee that American Satellite was intentionally

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742 Ex. 353, Email from T. Stingley to J. DeFranco, et al. (Sept. 23, 2008), SLC DNC Investigation 0009632.

743 Ex. 353, Email from T. Stingley to J. DeFranco, et al. (Sept. 23, 2008), SLC DNC Investigation 0009632.

744 Ex. 354, Email from J. DeFranco to B. Han, et al. (Sept. 23, 2008), SLC DNC Investigation 0005822.

745 Ex. 727, Email from K. Knight to J. DeFranco (Sept. 23, 2008), SLC DNC Investigation 0014899 at 899.

746 Ex. 766, Email from M. Castillo to B. Eichhorn (Jan. 7, 2009), SLC DNC Investigation 0015331; Ex. 398, Email from R. Corvello to J. Blum, et al. (Dec. 7, 2009), SLC DNC Investigation 0014257 (alleging that Corvello received "sworn written statement" from former DISH and American Satellite employee that American Satellite, Inc. "purchased, Pre-paid credit cards to secure new subscribers and boost sales for Dishnetwork services").

747 Ex. 766, Email from M. Castillo to B. Eichhorn (Jan. 7, 2009), SLC DNC Investigation 0015331.

hiding these actions from DISH, going as far as sending fake records of phone calls to Retail Services to hamper DISH's investigation.[748]

The DISH internal auditor responded to the former employee that he had been "so focussed [sic] on fraud" and "need[ed] to look into [voice broadcasting] violations."[749] From this, the Illinois Court concluded that DISH was not interested in the allegations relating to DNC violations, only those regarding American Satellite defrauding DISH.[750] The SLC did not find indication that any Director Defendant was involved in complaints regarding American Satellite in 2009.

In December 2009, DISH audited American Satellite, specifically looking at its creation of fraudulent duplicate accounts.[751] The audit reviewed 5,217 accounts created by American Satellite between December 1, 2009 and January 31, 2010 and found a low 3% fraud rate. The audit was closed on April 9, 2010 without further action.

In April 2009, Retail Services learned, through investigating another consumer complaint, that due to server capabilities, American Satellite was keeping only six weeks of records of its outbound calls. Retail Services found this to be an unsatisfactory practice; Robert

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748 *Id.*; Ex. 398, Email from R. Corvello to J. Blum, et al. (Dec. 7, 2009), SLC DNC Investigation 0014257 (alleging that Corvello received "sworn written statement" from former DISH and American Satellite employee that American Satellite, Inc. "purchased, Pre-paid credit cards to secure new subscribers and boost sales for Dishnetwork services").

749 Ex. 766, Email from M. Castillo to B. Eichhorn (Jan. 7, 2009), SLC DNC Investigation 0015331.

750 *U.S. v. DISH*, 256 F. Supp. 3d 810, 867 (C.D. Ill. 2017).

751 Ex. 230, Retailer Profile and Notification—American Satellite Inc. (Apr. 9, 2010), SLC DNC Investigation 0015261.

Calbert, a DISH employee, noted internally that "[American Satellite is] going to have to make some decisions about whether to invest in [its] infrastructure or stop doing business."[752]

DISH did not renew its Retailer Agreement with American Satellite after that, terminating the relationship on May 7, 2010 pursuant to Section 10.4 of the Retailer Agreement, which allowed for automatic termination when the Retailer failed "to comply with any applicable Laws, or engages in any practice substantially related to the business conducted by Retailer in connection with this Agreement that is determined to be an unfair trade practice or other violation of any applicable Laws."[753]

b. Dish TV Now

Dish TV Now, Inc. (Dish TV Now) became a DISH Retailer in June 2001. In October 2003, Ahmed reached out to David Hagen, the principal of Dish TV Now, to offer Dish TV Now the opportunity to become DISH's first OE Retailer. Dish TV Now accepted, submitting a Retailer application[754] and business plan. [755]

In response to a question on the Retailer application asking, "has the Company or any Principal, Partner, or Officer of the Company ever been convicted of a felony?" Hagen responded, "No."[756] Hagen's answer was not truthful as he was, in fact, a convicted felon.[757]

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752 Ex. 223, Email from R. Musso to R. Calbert (Apr. 3, 2009), SLC DNC Investigation 0012230.

753 Ex. 244, Declaration of T. Diroberto, *Donaca v. DISH Network, LLC*, C.A. No. 11-cv-2910-RBJ-KLM (D. Col. Dec. 28, 2012); Ex. 456, Sample DISH Network Retailer Agreement § 10.4 (Dec. 31, 2012), SLC DNC Investigation 0008582 at 601-602.

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

755 Ex. 107, DISH Network Retailer Contact Information Form and EchoStar Retailer Application (Oct. 3, 2003), SLC DNC Investigation 0015247.

756 *Id*.

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

Dish TV Now did not specify on the Retailer application the percentage breakdown of its planned marketing by newspaper, television, direct mail, telemarketing or internet. But, in its proposal letter to DISH, Dish TV Now represented that it would focus on online marketing and inquiry based marketing, noting that "[a]pproximately 90% of consumers are unwilling to respond to a DRTV ad by telephone."[758] Dish TV Now would "employ established Internet marketing techniques to capture significant market share by directing prospect response both to the call center and website."[759] The Illinois Court concluded from these documents that Dish TV Now made DISH aware that it would use all of these methods: newspaper, television, direct mail, telemarketing or internet.[760]

On August 2, 2004, DISH received a consumer complaint alleging that Dish TV Now was making violative prerecorded calls; the consumer threatened litigation.[761] The Legal Department responded by explaining that DISH had researched the complaint and confirmed that DISH did not make the call.[762] But, the Legal Department also informed the consumer that "[i]n a further attempt to respect your wishes, the above numbers have been placed on Dish's internal 'Do Not Call' list," and included a copy of DISH's Do Not Call policy. The letter further explained though, that "Dish does business with many independent retailers and each retailer is solely responsible for their own actions"; the Legal Department wrote that it would forward the

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758 Ex. 108, Letter from D. Hagen to A. Ahmed (Oct. 7, 2003), SLC DNC Investigation 0015253 at 253.

759 *Id*.

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

761 Ex. 111, Letter from R. Swanberg to DISH (July 26, 2004), SLC DNC Investigation 0007290; *see also* Ex. 722, Retailer Dish TV Now: Timeline, SLC DNC Investigation 0011594.

762 Ex. 113, Letter from D. Steele to R. Swanbger (Sept. 14, 2004), SLC DNC Investigation 0012900.

complaint to Dish TV Now so "so that they will have an opportunity to resolve this issue directly with you."[763]

Ahmed investigated the situation on behalf of DISH, sharing the results with DeFranco. In the course of his investigation, Ahmed learned that, contrary to Dish TV Now's marketing plan, Dish TV Now was actively telemarketing. Ahmed made clear to Dish TV Now that any telemarketing by Dish TV Now could not involve "using predictive dialers and leaving messages trying to sell the customers DISH Network. [DISH is] not interested in this type of marketing."[764] Dish TV Now acknowledged that it used a predictive dialer but stated that it used the dialer only to make inquiry-based outbound calls and did not leave messages for consumers: "We have a list of over five million past and current customers that scrub against the Do Not Call List. In addition we maintain a Dish TV Now Do Not Call List. Any customer who wishes to opt out on future solicitations is immediately added to the list. *Dish TV fully complies with the TCPA*[.]"[765]

Dish TV Now convinced Ahmed that the telemarketing it was doing complied with DNC Laws. Thus, Ahmed did not pursue disciplinary action against Dish TV Now. From these exchanges, the Illinois Court found that DISH did not take disciplinary actions against Dish TV Now despite learning that Dish TV Now had misrepresented its marketing methods in the

763 *Id*.

764 Ex. 491, Email from C. Kuelling to S. Dodge and S. Novak, et al. (Sept. 16, 2004), SLC DNC Investigation 007184.

765 *Id.* (emphasis added).

business proposal.[766] DISH renewed the Retailer Agreement with Dish TV Now on December 31, 2004.[767]

The Illinois Court found that Ahmed (and therefore Retail Services and DeFranco) did not know that Dish TV Now was lying to DISH; Dish TV Now, in fact, continued using its predictive dialer to leave messages.[768] Worse still, thereafter "Dish TV Now hired a company called Guardian Communications (Guardian) to make "press 1" Prerecorded Calls to market Dish Network programming. From May 2004 to August 10, 2004, Guardian made on behalf of Dish TV Now 6,637,196 Prerecorded Calls" for which DISH was found liable in *U.S. v. DISH*.[769]

On April 7, 2005, DISH received a consumer complaint through the Illinois AG's office regarding a call from DISH TV Now.[770] DISH responded to the AG, explaining that Dish TV Now was an independent contractor, not an affiliate or partner of DISH. DISH encouraged the AG to reach out to Dish TV Now directly regarding the calls.

On December 12, 2005, DISH put Dish TV Now's account on hold for failing to retain legal representation for Dish TV Now and DISH (despite indemnification obligations) in a legal action against both for alleged violations of the Ohio TCPA and for failing to promote DISH

766 *U.S. v. DISH*, 256 F. Supp. 3d at 857.

767 *See* Ex. 117, EchoStar Retailer Agreement with Dish TV Now (Dec. 31, 2004), SLC DNC Investigation 012039.

768 *U.S. v. DISH*, 256 F. Supp. 3d at 857.

769 *Id*. at 856.

770 *See* Ex. 121, Letter from M. Gutierrez to S. Schackmann (Apr. 12, 2005), SLC DNC Investigation 012104.

products.[771] For these reasons, Mills, with guidance from Ahmed, requested that Dish TV Now be terminated, which DISH did on January 20, 2006.[772]

c. JSR Enterprises

Jerry Dean Grider, d/b/a JSR Enterprises, ("JSR") became a DISH Retailer in April 2006.[773] Grider formed JSR with Richard Goodale and Shaun Gazzara.[774]

From testimony, the Illinois Court found that before forming JSR, Gazzara and Goodale had each worked for some amount of time (Goodale ten days) for a separate DISH Retailer, United Satellite.[775] In September 2005, DISH received complaints regarding United Satellite, including an allegation that United Satellite was making "press 1" violative pre-recorded calls.[776] These "press 1" calls were essentially telemarketing robocalls where a dialer made the call with a prerecorded message, if a consumer pressed 1 on the phone the consumer would be connected to a live sales agent.[777] Retail Services was involved in resolving these complaints.[778]

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

772 Ex. 137, EchoStar Retailer Audit Notification & Summary—Dish TV Now (Dec. 20, 2005), SLC DNC Investigtion 0013544 (termination approved by B. Werner and R. Origer); Ex. 138, Email from M. Mills to A. Ahmed (Dec. 22, 2005), SLC DNC Investigation 0006028; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076; Ex. 722, Retailer Dish TV Now: Timeline, SLC DNC Investigation 0011594.

773 Ex. 143, EchoStar Retailer Agreement with JSR (Apr. 12, 2006), SLC DNC Investigation 0012502.

774 *U.S. v. DISH*, 256 F. Supp. 3d at 863.

775 *Id*.

776 Ex. 129, Email from M. Oberbillig to A. Ahmed, et al. (Sept. 30, 2005), SLC DNC Investigation 0012263.

777 Ex. 245, Declaration of R. Goodale (July 30, 2013), SLC DNC Investigation 0011942.

778 Ex. 129, Email from M. Oberbillig to A. Ahmed, et al. (Sept. 30, 2005), SLC DNC Investigation 0012263. Also in August 2006, after JSR became an OE Retailer, DISH terminated United Satellite for DNC violations. *See* Ex. 190, EchoStar Takes Action Upon Do-No-Call Violators (Feb. 14, 2007), SLC DNC Investigation 0011796; Ex. 158, Email from S. Keller to B. Neylon, et al. (Sept. 8, 2006), SLC DNC Investigation 0012583.

Through testimony, the Illinois Court found that a DISH employee, Doug Tchang, encouraged Goodale to form a new Retailer, JSR, and work through other OE Retailers until JSR could become an OE Retailer. The Illinois Court found, also through testimony, that Tchang had been aware of the violative actions of United Satellite, but the Court made no finding as to whether Gazzara and Goodale worked at United Satellite when these complaints were made. Consistent with Tchang's advice, when formed, JSR initially worked through another DISH OE Retailer, Dish Nation, in order to access the OE tool.[779]

In August 2006, JSR became an OE Retailer.[780] JSR's marketing plan did not note "that [it] would be doing any marketing other than outbound out of their office."[781]

DISH began to receive consumer complaints about JSR's practices in September 2006, connecting JSR to the complaints through several stings.[782] Responding to the first complaint in September 2006, Goodale explained to DISH's Legal Department that internal error had caused the download of a corrupted DNC file which was used by third party call center working for JSR. JSR represented that it had "since fixed [its] DNC removal protocols," terminated the third party and "will continue to maintain any and all State or Federal guidelines pursuant to the

779 Ex. 245, Declaration of Richard Goodale, *U.S. v. DISH*, C.A. No. 09-3073 (C.D. Ill. July 30, 2013), SLC DNC Investigation 0011942.

780 Ex. 146, Retailer Order Entry Promotional Program July 1, 2006), SLC DNC Investigation 0012567 at 569 (setting forth JSR's incentive rates); Ex. 158, Email from S. Keller to B. Neylon, et al. (Sept. 8, 2006), SLC DNC Investigation 0012583 at 585; Ex. 255, Retailer JSR: Timeline, SLC DNC Investigation 0011579 at 579.

781 Ex. 172, Email from R. Musso to M. Mills, et al. (Dec. 21, 2006), SLC DNC Investigation 0011962.

782 Ex. 161, Email from D. Steele to H. Klein (Sept. 28, 2006), SLC DNC Investigation 0012578; Ex. 719, Email from R. Musso to R. Origer, et al. (Jan. 10, 2007), SLC DNC Investigation 0008091.

telemarketing act."[783] Retail Services followed up with JSR, demanding "proof of [its] compliance with all outbound telemarketing laws, including, but not limited to [its] Do Not Call Policy, Proof of Do Not Call Registrations, a list of Affiliate Companies with contact information and Outbound Telemarketing Scripts for employees and affiliates."[784]

The complaints about JSR continued between October and December 2006. Retail Services notified JSR of these complaints and demanded explanations.[785] Each time, Goodale provided an explanation and a promise that the issue had been resolved.[786] In December 2006, the Compliance Team discussed the appropriate disciplinary action in light of JSR's actions.[787] Mills, Neylon and Musso did not believe JSR's practices were connected to the previously terminated United Satellite.[788] In early January 2007, Retail Services determined that a fine was appropriate in light of JSR's responsiveness and implementation of changes in its business practice.[789]

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783 Ex. 160, Email from R. Goodale to D. Steele (Sept. 28, 2006), SLC DNC Investigation 0012830.

784 Ex. 163, Letter from R. Origer to J. Grider (Oct. 6, 2006), SLC DNC Investigation 0012361.

785 Ex. 165, Letter from R. Origer to R. Goodale (Oct. 31, 2006), SLC DNC Investigation 0012653; Ex. 719, Email from R. Musso to R. Origer, et al. (Jan. 10, 2007), SLC DNC Investigation 0008091.

786 *See* Ex. 174, Email from R. Musso to B. Neylon, et al. (Dec. 21, 2006, 9:09 PM), SLC DNC Investigation 0013525 ("he said he really didn't know that he needed to let us know" that JSR was using an affiliate and Goodale represented that he "cancelled the logins for this call center today"); Ex. 741, Chart of Internal Stings (July-Dec. 2006), SLC DNC Investigation 008576 (noting complaints caused by third party no longer under contract by JSR).

787 Ex. 173, Email from R. Musso to B. Neylon, et al. (Dec. 21, 2006, 9:24 PM), SLC DNC Investigation 0012643; Ex. 175, Email from R. Origer to R. Musso, et al. (Dec. 22, 2006), SLC DNC Investigation 0012283.

788 Ex. 172, Email from R. Musso to M. Mills, et al. (Dec. 21, 2006), SLC DNC Investigation 0011962.

789 Ex. 719, Email from R. Musso to R. Origer, et al. (Jan. 10, 2007), SLC DNC Investigation 0008091.

In January 2007, DISH received a consumer DNC complaint from the Louisiana Attorney General, which Retail Services forwarded to JSR, demanding a response.[790] Retail Services also sent JSR a letter regarding multiple complaints received since September 2006, demanding that JSR provide "a detailed explanation specific to each complaint and furnish information relative to specific actions that created these issues and the corrective measures that will eliminate recurrences[.]"[791] Retail Services directed JSR to add each consumer's phone number to JSR's internal DNC registry.[792]

On January 22, 2007, JSR responded to Retail Services' letter, providing the information requested, noting that the numbers were removed from internal call lists and representing that "JSR has taken additional steps to ensure ethical marketing for our sales team, with the employ of a Call Center Compliance Corporation, which enables us to fully comply with all the current 16 states that maintain their own DNC rules."[793]

The Illinois Court found that "DISH took no action against JSR in January 2007."[794] The Illinois Court found that Dish did not investigate further after receiving the various representations from JSR.[795] The Illinois Court found from testimony that Goodale had been lying to DISH, just "[telling] Musso in the Compliance Department what she wanted to hear

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790 *See* Ex. 181, Email from R. Musso to R. Goodale (Jan. 17, 2007), SLC DNC Investigation 0013481; Ex. 255, Retailer JSR: Timeline, SLC DNC Investigation 0011579 at 579.

791 Ex. 180, Letter from R. Origer to R. Goodale (Jan. 17, 2007), SLC DNC Investigation 0013303.

792 *Id*.

793 Ex. 160, Email from R. Goodale to D. Steele (Sept. 28, 2006), SLC DNC Investigation 0012830 at 844-846.

794 *U.S. v. DISH*, 256 F. Supp. 3d 810, 865 (C.D. Ill. 2017).

795 *Id*. at 864-65.

without regard to its accuracy."[796] The Illinois Court found that between July 2006 and December 2006, JSR made 2,349,031 calls that violated the TSR.[797]

On February 8, 2007, Musso (Retail Services) sent other members of the Compliance Team (Nelyon, Origer, Mills and Werner) a press release from the Missouri Attorney General stating that a Missouri court had issued a preliminary injunction in December prohibiting JSR from making telephone solicitations to Missouri consumers.[798] Immediately upon receiving notice of the press release, Neylon directed that JSR be terminated.[799] DISH formally terminated JSR as an OE Retailer on February 13, 2007 for TCPA violations, releasing a press release about the termination on February 14, 2007.[800]

The Illinois Court found from these documents and testimony that: (1) DISH knew from the high volume of calls being made by JSR that JSR was using an autodialer; (2) Tchang and Oberbillig, in their roles as sales representatives in the Southern California area, knew that many OE Retailers in Southern California used pre-recorded calls; (3) Oberbillig and Tchang had incentive to encourage this practice because it increased activations; (4), Mills, Oberbillig and Tchang knew that United Satellite carried out violative pre-recorded calls; and (5) Tchang knew

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796 *Id*. at 865.

797 *Id*. at 866.

798 Ex. 185, Email from R. Origer to B. Neylon (Feb. 8, 2007), SLC DNC Investigation 0013368.

799 *Id*.

800 Ex. 188, Letter from R. Origer to R. Grider (Feb. 13, 2007), SLC DNC Investigation 0012688; Ex. 189, Retail Audit Notification & Summary - JSR (Feb. 14, 2007), SLC DNC Investigation 10705; Ex. 190, EchoStar Takes Action Upon Do-No-Call Violators (Feb. 14, 2007), SLC DNC Investigation 0011796.

the connection between United Satellite and Goodale and Gazzara.[801] The Illinois Court made no findings as to any DISH personnel's knowledge other than Oberbillig, Mills and Tchang.[802]

However, the Illinois Court concluded that based on its findings as to the knowledge of Oberbillig, Mills and Tchang, DISH knew that JSR intended, from the start, to make violative "press 1" pre-recorded calls and that DISH permitted these violative calls to occur.[803] All in all, JSR was a Retailer for less than a year, including about six months as an OE Retailer.[804]

d. Satellite Systems Network (SSN)

SSN became a DISH Retailer in 2001.[805] SSN informed DISH that it intended to purchase new homeowner leads and then "use telemarketing and direct mail to close the deals."[806]

In 2002, DISH received a customer complaint that SSN had left a telemarketing voicemail.[807] At the time, there was some uncertainty as to whether telemarketing voicemails were illegal.[808] Thus, Retail Services sent SSN a letter asserting that SSN was in violation of the

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801 *U.S. v. DISH*, 256 F. Supp. 3d at 863-864.

802 *Id*. at 864.

803 *Id*. at 863.

804 Ex. 143, EchoStar Retailer Agreement with Jerry Dean Grider dba JSR Enterprises (Apr. 12, 2006), SLC DNC Investigation 0012502; Ex. 146, Retailer Order Entry Promotional Program (July 1, 2006), SLC DNC Investigation 0012567 at 569; Ex. 158, Email from S. Keller to B. Neylon, et al. (Sept. 8, 2006), SLC DNC Investigation 0012583 at 585; Ex. 188, Letter from R. Origer to R. Grider (Feb. 13, 2007), SLC DNC Investigation 0012688.

805 Ex. 97. Echostar Satellite Corporation Retailer Agreement with SSN (Mar. 7, 2001), SLC DNC Investigation 0012341; Ex. 257, Retailer SSN: Timeline, SLC DNC Investigation 0011608 at 608.

806 Ex. 98, Email from R. Wargo to Central File Request, et al. (June 4, 2001), SLC DNC Investigation 0012493.

807 *See* Ex. 99, Email from N. Myers to B. Neylon, et al. (Mar. 11, 2002), SLC DNC Investigation 0012201 at 12202-03.

808 *See id*.; Ex. 104, Email from M. Davidson to N. Myers, et al. (Jan. 17, 2003), SLC DNC Investigation 0007268.

Retailer Agreement and reiterating that SSN "must comply with all applicable federal, state, and local laws, including but not limited to those specifically pertaining to telemarketing[,]" but DISH did not terminate SSN.[809]

On June 28, 2004, Ergen received a voicemail message from SSN offering DirecTV programming.[810] Ergen contacted Ahmed about the call, noting that the caller used a "good script" and suggested DISH "copy their techniques."[811] Ahmed told Ergen that SSN was a Retailer and that [SSN] used "message broadcasting with [DirecTV] as their primary source to generate sales."[812] Oberbillig contacted SSN, who asserted that *live* callers leave messages for consumers but that SSN's "focus [wa]s moving to TV, Newspaper, and an aggressive [direct mail] campaign" and that in the next six months SSN expected that telemarketing would constitute only 1% of its marketing practices.[813]

About a month later, SSN, which had been a Traditional Retailer, became an OE Retailer.[814]

Ahmed soon began hearing consumer complaints about SSN's telemarketing.[815] So, Ahmed directed Mills and Oberling to work with SSN on that and other issues.[816] Ahmed's

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809 Ex. 103, Letter from M. Davidson to A. Tehranchi (June 12, 2002), SLC DNC Investigation 0012364.

810 Ex. 781, Email from M. Oberbillig to A. Ahmed, et al. (June 30, 2004), SLC DNC Investigation 0007363 at 364.

811 *Id*.

812 *U.S. v. DISH*, 256 F. Supp. 3d at 858.

813 Ex. 781, Email from. Oberbillig to A. Ahmed, et al. (June 30, 2004), SLC DNC Investigation 0007363 at 363. Except under certain circumstances, including express written consent from the consumer, DNC Laws did not permit pre-recorded calls.

814 *See* Ex. 112, Email from A. Ahmed to M. Mills, et al. (July 29, 2004), SLC DNC Investigation 0013015 at 016; *U.S. v. DISH*, 256 F. Supp. 3d at 858.

815 Ex. 112, Email from A. Ahmed to M. Mills, et al. (July 29, 2004), SLC DNC Investigation 0013015.

subordinate, Spreitzer, who was working with SSN directly, believed that SSN was focused on television commercials.[817] In September, Ahmed convinced DISH to increase the activation incentives paid to SSN and certain other OE Retailers,[818] and on December 31, 2004, DISH renewed the Retailer Agreement with SSN.[819]

In October 2005, Retail Services learned that SSN was using message broadcasting to market DISH.[820] SSN claimed the practice complied with the law because the messages were directed to consumers who had purchased DirecTV from SSN.[821] Oberbillig (Retail Services) "informed [SSN] that [it] must STOP using message broadcasting and leaving messages even if [it] has followed do not call lists, and even if [it] has a prior relationship with that customer, and is following Federal telemarketing guidelines."[822] SSN did not do so. Oberbillig emailed SSN again at the end of November, writing that "to stay in the good graces of DISH and our legal team you MUST stay away from any marketing that can cause AG issues, customer complaints and push the outer borders of marketing."[823] Oberbillig then threatened SSN with probation or termination unless SSN provided "detailed action items" to correct the issues.[824]

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816 *Id*.

817 Ex. 114, Email from J. Spreitzer to A. Ahmed (Sept. 15, 2004), SLC DNC Investigation 0007388.

818 *Id*. at 389.

819 Ex. 701, EchoStar Retailer Agreement with SSN (Dec. 31, 2004), SLC DNC Investigation 0012367.

820 Ex. 133, Email from M. Oberbillig to A. Ahmed, et al. (Oct. 27, 2005), SLC DNC Investigation 0012484.

821 *Id*.

822 Ex. 136, Email from M. Oberbillig to A. Tehranchi (Nov. 29, 2005), SLC DNC Investigation 0013170.

823 *Id*.

824 *Id*.

In September 2006, DISH discovered that "[i]n November 2004, a Florida state court ordered [SSN] to pay $25,500 in civil penalties under its other name Vitana Financial Group, Inc. (Vitana) for violating Florida Do-Not-Call Laws," including making violative prerecorded calls. [825] The press release touting the state's victory made no mention of the name SSN.[826] In March 2005, Vitana agreed to pay $15,000 in civil penalties to North Carolina for violating state Do-Not-Call Laws, again without reference to the name SSN.[827] SSN had not disclosed in its application to DISH that it was also operating under the name Vitana.[828] The Illinois Court and the North Carolina Court found that DISH took no action against SSN after learning about these fines.[829] The North Carolina Court further found that Musso (Retail Services) believed that there was not "'any reason to be concerned' because [Musso] purportedly believed SSN had stopped using prerecorded calls."[830]

In November 2006, Ergen and Moskowitz received a message from a consumer complaint of unwanted calls from SSN.[831] Ergen immediately instructed Moskowitz to

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825 Ex. 775, Email from R. Dufault to L. Vallejos, et al. (Sept. 21, 2006), SLC DNC Investigation 0013109; Ex 314, Email from R. Musso to B. Werner (Nov. 7, 2006), SLC DNC Investigation 0008766; *U.S. v. DISH*, 256 F. Supp. 3d 810, 858 (C.D. Ill. 2017).

826 Ex. 116, Florida Department of Agriculture and Consumer Services, Department Press Release (Nov. 4, 2004), SLC DNC Investigation 0007366.

827 Ex. 61, Judgment by Consent and Stipulated Permanent Injunction, *North Carolina v. Vitana Fin. Grp., Inc.*, File No. 04-CV0-08799 (Mar. 21, 2005), SLC DNC Investigation 0007085; *U.S. v. DISH*, 256 F. Supp. 3d at 858.

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

829 *U.S. v. DISH*, 256 F. Supp. 3d at 859; *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *5 (M.D.N.C. May 22, 2017).

830 *Krakauer*, 2017 WL 2242952, at *5.

831 Ex. 316, Email from C. Ergen to D. Moskowitz (Nov. 10, 2006), SLC DNC Investigation 0002680; Ex. 317, Fax message from M. Wallace to C. Ergen, D. Moskowitz and D. Steele (Nov. 10, 2006), SLC DNC Investigation 0002681; Ex. 745, Letter from R. Origer to A.

determine the source of the calls and if it is not DISH, then to sue the third party.[832] The SLC found no indication that Ergen had any personal involvement with SSN beyond this email exchange.

DISH received two consumer complaints regarding SSN in December 2006 and January 2007; in each instance, Retail Services notified SSN and directed SSN to "completely and thoroughly address the circumstances surrounding the allegation(s) and furnish information relative to the specific circumstances that has created this issue and the corrective actions that will eliminate recurrences[.]"[833] In late 2007, Retail Services advised SSN of a complaint related to another call made in September 2006 alleging a TCPA violation by SSN. This time, in addition to requesting an explanation and corrective measures, Retail Services demanded that SSN "provide proof of [its] compliance with all outbound telemarketing laws, including, but not limited to your Do Not Call Policy, Proof of Do Not Call Registrations, a list of Affiliate Companies with contact information and Outbound Telemarketing Scripts and Caller Identification Numbers for you and your affiliates."[834]

In late 2008 and first half of 2009, DISH received at least three consumer complaints (including one from Krakauer) related to calls by SSN.[835] In connection to these complaints,

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Tehranchi (Dec. 28, 2006), SLC DNC Investigation 0003223 (notification of consumer complaint regarding call from 2005).

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

833 Ex. 745, Letter from R. Origer to A. Tehranchi (Dec. 28, 2006), SLC DNC Investigation 0012166; Ex. 179, Letter from R. Origer to A. Tehranchi (Jan. 17, 2007), SLC DNC Investigation 0003227; Ex. 257, Retailer SSN: Timeline, SLC DNC Investigation 0011608 at 608.

834 Ex. 202, Letter from R. Origer to A. Tehranchi (Nov. 7, 2007), SLC DNC Investigation 0003230.

835 *See* Ex. 64, Retail Services Retailer Compliance File (SSN) (May 24, 2007), SLC DNC Investigation 0015334.

Retail Services directed SSN to provide information regarding the "[o]rigination of the lead"; "[c]ontact information for the Lead Generation company" "[d]ata loads [that] were srcubbed through PossibleNow"; and "[d]ialer records for the consumer[‘s] phone number."[836]

In April 2009, SSN informed Retail Services that it had taken actions in response to these consumer complaints so that such complaints could be avoided in the future, such as changing SSN's compliance consultant from a different company to PossibleNow and removing the consumers' numbers from their internal database.[837]

SSN's OE Retailer agreement was amended in December 2006[838] and renewed again in 2010.[839]

In 2010 (before the *Krakauer* class period) and 2011 (after the *Krakauer* class period), Retail Services was aware that SSN continued to have sporadic DNC issues.[840] For example, on May 12, 2010, Retail Services sent SSN notification of a complaint sent through the Pennsylvania Attorney General, requesting detailed information regarding the exception that

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836 Ex. 213, Letter from R. Musso to A. Tehranchi (Nov. 20, 2008), SLC DNC Investigation 0003232; Ex. 222, Letter from R. Musso to A. Tehranchi (Mar. 27, 2009), SLC DNC Investigation 0003234; Ex. 225, Letter from R. Musso to A. Tehranchi, et al. (May 27, 2009), SLC DNC Investigation 0013624.

837 Ex. 746, Email from S. Tehranchi to Vendor Inquiries (Apr. 8, 2009), SLC DNC Investigation 0003236. Ex. 64, Retail Services Retailer Compliance File (SSN) (May 24, 2007), SLC DNC Investigation 0015334. *See* Ex. 226, Email from S. Tehranchi to S. Snyder, et al. (May 28, 2009), SLC DNC Investigation 0007413.

838 Ex. 63, OE Retailer Amendment to EchoStar Retailer Agreement with SSN (Dec. 31, 2006), SLC DNC Investigation 0006971.

839 Ex. 68, DISH Network Retailer Agreement with SSN (Dec. 31, 2010), SLC DNC Investigation 0006974.

840 *See, e.g.*, Ex. 67, Email from Vendor Inquiries to S. Shaffer (May 4, 2010), SLC DNC Investigation 0015466; Ex. 435, Letter from J. Mitchell to DISH (Aug. 16, 2011), SLC DNC Investigation 0010504; Ex. 501, Email from K. Berridge to B. Kitei (Aug. 18, 2011), SLC DNC Investigation 0007369; *U.S. v. DISH*, 256 F. Supp. 3d 810, 860 (C.D. Ill. 2017); Ex. 64, Retail Services Retailer Compliance File (SSN) (May 24, 2007), SLC DNC Investigation 0015334.

SSN claimed permitted its Registry Call.[841] SSN responded, noting that they believed they had an "existing business relationship" exception to the alleged complaint.[842] Retail Services cautioned SSN "to be cognizant of the EBR . . . some states do not even honor it. PossibleNOW can help or your own legal counsel—particularly if you are calling nationwide."[843] The North Carolina Court found that between 2010 and 2011, SSN made 50,000 telemarketing calls that violated the TCPA.[844]

In 2011, DISH's Legal Department received a complaint from a "TCPA frequent flyer wanting money" claiming a violative call from SSN.[845] In response, the Legal Department noted that it would draft its standard letter explaining that SSN was an independent Retailer and instructing the consumer to "go after SSN."[846] The Illinois Court found that by 2011 "Dish had developed a standard letter to send out to consumers complaining about Satellite Systems' violations of Do-Not-Call Laws."[847] The North Carolina Court found that DISH did not check to ensure that SSN actually removed phone numbers that DISH or a consumer instructed SSN to remove from its call lists.[848] The North Carolina Court found that between 2006 and 2011, DISH did not discipline SSN,[849] setting aside the Violation Letters sent by DISH.[850]

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841 Ex. 231, Letter from R. Musso to A. Tehranchi, et al. (May 12, 2010), SLC DNC Investigation 0003240.

842 Ex. 232, Email from R. Musso to R. Quader (May 17, 2010), SLC DNC Investigation 0012023.

843 *Id*.

844 *Krakauer*, 2017 WL 2242952, at *1.

845 Ex. 501, Email from K. Berridge to B. Kitei (Aug. 18, 2011), SLC DNC Investigation 0007369.

846 *Id*.

847 *U.S. v. DISH*, 256 F. Supp. 3d at 860.

848 *Krakauer*, 2017 WL 2242952, at *7.

849 *Id*. at *8.

In 2013, upon legal advice and in relation to the *Donaca v. DISH Network, L.L.C.* C.A. No. 11-cv-2910-RBJ-KLM (D. Colo.) action, DISH put SSN "on hold" by removing its access to the OE tool, ultimately terminating SSN later that same year.[851] Musso testified that Retail Services had not initially terminated SSN because each time DISH received a complaint, SSN promptly provided an explanation.[852] Retail Services believed that SSN's prompt responses meant that SSN took the issues seriously, was trying in good faith to comply with DNC Laws and was improving its compliance in response to DISH's demands.[853]

The SLC's Investigation did not identify evidence that the Director Defendants knew that SSN had violated DNC Laws and chose not to terminate SSN. The decision for DISH to continue doing business with SSN was made within Retail Services and later by the Compliance

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[850] *See* Ex. 745, Letter from R. Origer to A. Tehranchi (Dec. 28, 2006), SLC DNC Investigation 0012166 (directing Retailer to "completely and thoroughly address the circumstances surrounding the allegation(s) and furnish information relative to the specific circumstances that has created this issue and the corrective actions that will eliminate recurrences"); Ex. 202, Letter from R. Origer to A. Tehranchi (Nov 7, 2007), SLC DNC Investigation 0003230 ("[P]rovide proof of your compliance with all outbound telemarketing laws, including, but not limited to your Do Not Call Policy, Proof of Do Not Call Registrations, a list of Affiliate Companies with contact information and Outbound Telemarketing Scripts and Caller Identification Numbers for you and your affiliates."); Ex. 222, Letter from R. Musso to A. Tehranchi (Mar. 27, 2009), SLC DNC Investigation 0003234 ("Please immediately insure that this phone number has been added to your internal DNC registry."); Ex. 225, Letter from R. Musso to A. Tehranchi, et al. (May 27, 2009), SLC DNC Investigation 0013624 (same); Ex. 231, Letter from R. Musso to A. Tehranchi, et al. (May 12, 2010), SLC DNC Investigation 0003240 (demanding a "detailed explanation" within five days of the origination of the lead, contact information for the Lead Generation company, date leads were scrubbed through PossibleNOW, Dialer Records for the consumer, and caller ID used to make outbound phone calls).

[851] Ex. 758, Deposition Transcript, at 37:10-38:3, *Krakauer,* C.A. No. 14-cv-333 (M.D.N.C. Mar. 17, 2015) (D.I. 229) (Werner Testimony); *U.S. v. DISH*, 256 F. Supp. 3d at 860.

[852] *See* Ex. 85, Trial Transcript, at 98:8-17, 100:15-20, *Krakauer*, No. 14-cv-333 (M.D.N.C. Jan. 12, 2017) (D.I. 303) (R. Musso Testimony) ("[SSN] took [telemarketing issues] very seriously. She responded quickly."); *see also* Ex. 787, Trial Transcript, at 1272:13-1273:7, *U.S. v. DISH*, C.A. No. 09-03073 (C.D. Ill. Jan. 28, 2016) (D.I. 620) (R. Musso Testimony).

[853] *See* Ex. 85, Trial Transcript, at 98:8-17, 100:15-23, 129:11-20, 138:4-8, *Krakauer*, No. 14-cv-333 (M.D.N.C. Jan. 28, 2017) (D.I. 303) (R. Musso Testimony).

Team.[854] A Retailer as small as SSN would not generally have been on any Director Defendant's radar given its relative insignificance to DISH's overall business. Moskowitz would not have addressed matters with Retailers of that size. Ergen had no recollection of meeting SSN or having been aware of DNC issues or lawsuits involving SSN during the Investigation Period. DeFranco did not have a specific recollection of SSN, and the SLC found no record of him having such involvement.

e. Star Satellite

Star Satellite, run by Walter Eric Meyers, became a DISH Traditional Retailer in March of 2003.[855] "Star Satellite stated in its application to Dish that it planned to use newspapers and direct mail advertising. Star Satellite did not indicate that it would engage in telemarketing."[856] DISH eventually learned that Star Satellite was telemarketing. At that point, Jordan Anderson, an employee in Retail Services, sent Meyers call scripts explaining "I did find some call scripts for outbound calling that you may be able to adapt and work with, if you want."[857] Anderson sent the scripts because "Dish representatives wanted Retailers to make all of the required disclosures to consumers."[858] DISH did not require Star Satellite to use the sample scripts that Anderson sent, but later in the relationship required Star Satellite to submit its scripts to Retail

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854 *U.S. v. DISH*, 256 F. Supp. 3d at 852. *See, e.g.*, Ex. 388, Calendar Invitation from R. Musso to J. Blum (July 21, 2009), SLC DNC Investigation 0014255; Ex. 352, Calendar Invitation from K. Berridge to B. Van Emst (Sept. 19, 2008), SLC DNC Investigation 0014256.

855 *U.S. v. DISH*, 256 F. Supp. 3d at 860.

856 *Id*.

857 Ex. 125, Email from J. Anderson to E. Myers (July 28, 2005), SLC DNC Investigation 0012270.

858 *U.S. v. DISH*, 256 F. Supp. 3d at 860.

Services for review.[859] The purpose of the review was confirming the adequacy of the disclosures and respect for DISH's trademarks.[860]

Then, unbeknownst to DISH, "Star Satellite had Guardian make 400,000 to 600,000 'press-1' Prerecorded Calls a day."[861]

> In May 2004, Star Satellite hired Guardian to make Prerecorded Calls on its behalf to sell Dish Network programming. Guardian started making prerecorded 'press 1' telemarketing calls selling Dish products and services for Star Satellite. . . . Myers did not tell Dish that Star Satellite used Guardian's services. Myers considered marketing methods to be trade secrets that he did not want to share with any competitor. Myers viewed Dish as a competitor because Dish had its own internal marketing department. Myers believed that he could choose the marketing methods because Star Satellite was a separate business from Dish.[862]

Through testimony, the Illinois Court found that Star Satellite purposely misrepresented its marketing practices to DISH:[863]

> In 2004, Star Satellite applied to be an Order Entry Retailer. . . . Myers represented that Star Satellite would primarily use direct mail, with some phone sales. Myers . . . suspected that Dish did not like telephone sales. Myers did not want scrutiny from [DISH] about whether Myers was complying with Do-Not-Call Laws. . . . Guardian's principal Kevin Baker stated that he told Myers a rumor that Dish did not allow Order Entry Retailers to make Prerecorded Calls. . . . Myers, however, believed that Dish became aware of the fact that Star Satellite was using telemarketing.[864]

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859 Ex. 125, Email from J. Anderson to E. Myers (July 28, 2005), SLC DNC Investigation 0012270.

860 *See* Ex. 134, Email from M. Mills to E. Myers (Nov. 3, 2005), SLC DNC Investigation 0012428.

861 *U.S. v. DISH*, 256 F. Supp. 3d at 861.

862 *Id*. at 860.

863 *Id*.

864 *Id*. at 860-61.

"Myers [also] told Dish personnel that Star Satellite's calling lists were scrubbed for the Registry, but did not give any details on Star Satellite's telemarketing."[865] The Illinois Court found that Myers was relying on Guardian for scrubbing.[866]

On January 25, 2005, a customer complained to DISH that Star Satellite was making prerecorded calls and demanded a payment of $1,000 from DISH or Star Satellite.[867] Another customer reached out to DeFranco directly, explaining that Star Satellite was calling multiple times a day from a spoofed number with "a recorded message that ends with instruction to press a key to hear more or order the product."[868]

DeFranco directed Origer (Retail Services) to investigate.[869] Origer reported back to DeFranco that Star Satellite claimed that it made only live calls, but had promised to adjust its business practices to address DISH's customer service concerns. Star Satellite's application to become an OE Retailer was still pending at this time. Despite Star Satellite's promises that its practices had changed, Origer wanted to hold off on recommending Star Satellite as an OE Retailer. Responding to DeFranco, Origer stated, "[W]e will use March to test their sales process before making the suggestion to make Star Satellite a candidate for [the OE] tool."[870]

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865 *U.S. v. DISH*, 256 F. Supp. 3d 810, 861 (C.D. Ill. 2017).

866 *Id*.

867 Ex. 119, Letter from D. Caplan to K. Myers, et al. (Jan. 25, 2005), SLC DNC Investigation 0012411.

868 Ex. 279, Email from R. Origer to D. Anderson (Mar. 11, 2005), SLC DNC Investigation 0010310 at 311-312.

869 *Id*. at 311.

870 *Id*.

In March 2005, DISH received another customer complaint.[871] Star Satellite reiterated its claim that it had ceased autodialing in February at DISH's request. Ahmed was upset. In instructing his team to investigate whether Star Satellite was behind the calls he noted, "Fix it or it's all over. No excuses, I want an email from Erik [Myers] if it's them."[872]

On March 11, 2005, DISH employees called Star Satellite pretending to be prospective customers and came away believing that the Retailer was not making outbound calls.[873] Star Satellite became an OE Retailer on April 4, 2005.[874]

But, then in May 2005, DISH received another consumer complaint that Star Satellite was making prerecorded calls.[875] Retail Services investigated further.[876] In August 2005, a consumer, Jay Connor, sued DISH and Star Satellite for Star Satellite's prerecorded calls.[877] DISH's Legal Department contacted Star Satellite, demanding that it "defend and indemnify" DISH against any complaint related to a violation of the TCPA and reminding Star Satellite that "pursuant to Section 7.1 of [its] Retailer Agreement, [it is] required, among other things, to use

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871 Ex. 278, Email from N. Jessen to A. Ahmed (Mar. 7, 2005), SLC DNC Investigation 0005908.

872 *Id*.

873 Ex. 279, Email from R. Origer to D. Anderson (Mar. 11, 2005), SLC DNC Investigation 0010310.

874 Ex. 324, Email from R. Musso to J. Blum, et al. (Mar. 22, 2007), SLC DNC Investigation 0010366.

875 Ex. 123, Email from M. Williams to J. Medina (May 27, 2005), SLC DNC Investigation 0012443.

876 *Id*. ("I forwarded this information to Regina Thomas for further investigation.").

877 Ex. 126, Verified Complaint, *Connor v. Star Satellite, LLC* Case No. 05-SC-86-1748 (S.C. Small Claims Ct. Aug. 11, 2005), SLC DNC Investigation 0015256; Ex. 127, Letter from D. Steele to D. Myers (Aug. 12, 2005), SLC DNC Investigation 0012452.

[its] best commercial efforts to further EchoStar's business, reputation and goodwill."[878] Star Satellite settled the lawsuit.[879]

In October 2005, Ahmed received a complaint from Congressman Fred Upton of Michigan about calls by Star Satellite to phone numbers on the DNC Registry.[880] Ahmed warned Star Satellite "to become very serious about the business and the methods you are using to market the types of customers you are bringing us. . . . It's not all about huge sales but rather quality customers that want to be DISH Network subscribers for a long time."[881]

Ahmed did not stop there: "Ahmed told Myers that he would shut Star Satellite down if he received another complaint like this."[882] He followed up with letter correspondence to Star Satellite, again stating "[f]ailure to comply with applicable laws will result among other things in the termination of the Retailer Agreement" and noting that Star Satellite has "confirmed that [it] ha[s] halted all telemarketing activities involving persons named on the [DNC Registry] as necessary to comply with applicable telemarketing/do-not-call and other laws."[883] The Illinois Court found that Ahmed committed to terminating Star Satellite for any further issues.[884]

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878 Ex. 127, Letter from D. Steele to D. Myers (Aug. 12, 2005), SLC DNC Investigation 0012452.

879 Ex. 282, Email from A. Ahmed to C. Willis, et al. (Oct. 26, 2005), SLC DNC Investigation 0005910.

880 Ex. 131, Email from A. Ahmed to E. Myers (Oct. 25, 2005), SLC DNC Investigation 0012482; Ex. 256, Retailer Star Satellite: Timeline, SLC DNC Investigation 0011602.

881 Ex. 131, Email from A. Ahmed to E. Myers (Oct. 25, 2005), SLC DNC Investigation 0012482 at 482.

882 *U.S. v. DISH*, 256 F. Supp. 3d at 862.

883 Ex. 132, Letter from A. Ahmed to E. Myers (Oct. 26, 2005), SLC DNC Investigation 0012491.

884 *Id*.

Star Satellite "took Ahmed's threat seriously. . . . Star Satellite stopped using Guardian on November 22, 2005."[885] In November 2005, Star Satellite submitted call scripts to DISH for approval.[886] "Dish reviewed these and the detailed disclosures DISH required to be read to customers during telephone sales. Dish representatives visited Star Satellite's call center in Provo, Utah, weekly. Michael Mills went to Star Satellite's offices a few times. . . . Mills worked on Star Satellite scripts to include disclosures required by Dish."[887]

"On January 20, 2006, Star Satellite was terminated as [OE] Retailer, but remained a [Traditional] Retailer."[888]

VI. DISH and the AGs Entered into the 2009 AVC (July 2009)

While it made improvements to its DNC compliance (Factual Findings Section IV above) and tried to drive Retailer DNC compliance (Factual Findings Section V above), DISH continued negotiating a resolution of the AGs' Investigation (Factual Findings Sections III.D.2-3 above). By 2009 at the latest, Management believed that DISH's DNC compliance was best in class and Retailers' DNC complinace was being addressed.[889] Then DISH resolved the AGs' Investigation by entering into the 2009 AVC.

The 2009 AVC is not a DNC Law. None of the damages in the Underlying DNC Actions were awarded for violations of the 2009 AVC. None of the signatories to the 2009 AVC claim that DISH violated the DNC provisions in the AVC. The 2009 AVC explicitly provided that it

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885 *U.S. v. DISH*, 256 F. Supp. 3d at 862; Ex. 256, Retailer Star Satellite: Timeline, SLC DNC Investigation 0011602.

886 Ex. 134, Email from M. Mills to E. Myers (Nov. 3, 2005), SLC DNC Investigation 0012428.

887 *U.S. v. DISH*, 256 F. Supp. 3d at 861.

888 *Id.* at 862; Ex. 256, Retailer Star Satellite: Timeline, SLC DNC Investigation 0011602.

889 Ex. 340, Email from J. Blum to S. Dodge, et al. (May 13, 2008), SLC DNC Investigation 0001139.

was "not intended to confer upon any person any rights or remedies, shall not create any third-party beneficiary rights and may not be enforced by any person, entity or sovereign except the [AGs]."[890]

Nonetheless, *Krakauer* relied on 2009 AVC's requirements that DISH monitor and discipline Retailers, as the North Carolina Court interpreted them, to find that DISH knew or should have known of SSN's willful disregard of the DNC Laws—the basis for trebling damages in *Krakauer*.[891] In turn, Plaintiffs would have DISH rely on DeFranco's testimony in *Krakauer* concerning DISH's compliance with the 2009 AVC to support the Claims that the Director Defendants knowingly caused DISH to violate the DNC Laws.[892] Thus, the questions of what the 2009 AVC required, whether DISH complied, and whether the Director Defendants were involved are relevant to the SLC's Investigation.

The 2009 AVC was not presented to the DISH Board—in 2009 DNC compliance was not considered a material risk to DISH. The SLC found no evidence that DeFranco or any other Director Defendant believed that DISH failed to comply with the 2009 AVC—or believed that the 2009 AVC required the level of monitoring or form of discipline that the North Carolina Court interpreted the AVC to require. DISH Management, including DeFranco and the Legal Department, believed that DISH brought its DNC practices and its conduct in connection with Retailers' DNC practices into compliance with the 2009 AVC while negotiating the 2009 AVC, through the changes discussed in Factual Findings Sections IV and V above. The SLC found no

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890 Ex. 29, 2009 AVC § 7.2, SLC DNC Investigation 0013874 at 903.

891 *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *13 (M.D.N.C. May 22, 2017) ("Dish did not take seriously the promises it made to forty-six state attorneys general, repeatedly overlooked TCPA violations by SSN, and allowed SSN to make many thousands of calls on its behalf that violated the TCPA. Trebled damages are therefore appropriate.").

892 Compl. ¶ 44 ("[DeFranco] testified that the [2009 AVC] did not change Dish's procedures at all.").

factual basis to conclude from the 2009 AVC that any Director Defendant knowingly caused DISH to violate DNC Laws.

A. DISH Entered into the 2009 AVC with 46 State AGs.

DISH and the AGs agreed in principle on the injunctive provisions of the 2009 AVC by September 2008.[893] When it reached agreement with the AGs involved in the investigation, DISH recruited additional states that had not participated in the AGs' Investigation to join in the 2009 AVC.[894] The four states that would not join the 2009 AVC were those focused on DNC issues rather than the disclosure issues at the heart of the AGs' Investigation and the 2009 AVC. The 2009 AVC was fully signed on July 16, 2009.[895] Primarily, as reimbursement for the fees and costs of the investigation associated with entering the 2009 AVC, DISH paid $5,991,000 to the states that entered the 2009 AVC.[896] The 2009 AVC did "not constitute an admission by DISH Network for any purpose of any fact or of a violation of any law, rule or regulation, nor [did it] constitute evidence of any liability, fault or wrongdoing."[897]

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893 *See* Ex. 351, Letter from H. Mac Murray to K. Tassi (Sept. 19, 2008), SLC DNC Investigation 0002543.

894 *Compare* Ex. 289, AG CID, SLC DNC Investigation 0004483 at 483 *with* Ex. 29, 2009 AVC § 6.1, SLC DNC Investigation 0013874 at 903.

895 Ex. 384, Email from J. Blum to C. Ergen, et al. (July 15, 2009), SLC DNC Investigation 000992; Ex. 386, Abstract of 2009 Attorney General AVC (July 20, 2009), SLC DNC Investigation 0005788.

896 Ex. 29, 2009 AVC § 6.1, SLC DNC Investigation 0013874 at 903 ("[S]aid payment shall be used by the Attorneys General for attorneys' fees and other costs of investigation and litigation and/or for future public protection purposes, or be placed in, or applied to, the consumer protection enforcement fund, consumer education, litigation or local consumer aid fund or revolving fund, used to defray the costs of the inquiry leading hereto, or for other uses permitted by state law, at the sole discretion of each of the Attorneys General.").

897 *Id.* § 7.2.

B. The Board's View of the 2009 AVC

The Board was not provided with a copy of the 2009 AVC and it is unclear whether there was a formal discussion of the 2009 AVC at the Board level. Most Director Defendants learned about the 2009 AVC around the time that DISH entered into it from various sources.[898]

The 2009 AVC did not require that a copy be provided to DISH's Board. Section 3.1 of the 2009 AVC required DISH to "provide a copy of this Assurance to . . . the officers, directors, employees, shareholders, agents, servants, and assigns who have managerial-level responsibilities for performing the obligations outlined in this Assurance."[899] And Section 11.2 of the 2009 AVC required DISH to "submit a copy of this Assurance to each of its officers, directors, and any employee necessary to ensure DISH Network's compliance with the terms of this Assurance."[900]

The Board did not have "managerial-level responsibilities for performing the obligations"[901] set forth in the 2009 AVC, and the Board having a copy of the 2009 AVC was not necessary to ensure DISH's compliance: the "Managerial-level responsibilities" fell to Management, which had the authority necessary to ensure DISH's compliance with the 2009 AVC. In their capacities as officers, Ergen and DeFranco formally received a copy of the 2009 AVC because in those roles they had "managerial-level responsibilities for performing the

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898 *See, e.g.*, Ex. 384, Email from J. Blum to C. Ergen, et al. (July 15, 2009), SLC DNC Investigation 000992; Ex. 747, Press Release (July 16, 2009), SLC DNC Investigation 0005278.

899 Ex. 29, 2009 AVC § 3.1, SLC DNC Investigation 0013784 at 882.

900 *Id.* at §11.2.

901 *Id.* at § 3.1. DISH refers to certain managerial employees at a specific level of Management below officer as "directors"; the use of that term did not mean to refer to members of the Board. *See, e.g.*, Ex. 475, What is Internal Audit? (November 20, 2013), SLC DNC Investigation 0006264 at 269 (internal audit organizational chart); Ex. 69, Indirect Sales (June 6, 2011), SLC DNC Investigation 0007047 at 049 (indirect sales organizational chart).

obligations outlined in this Assurance" and were officers "necessary to ensure DISH Network's compliance with the terms of this Assurance."[902]

The Director Defendants did not view the 2009 AVC as an indication that DISH had a systematic problem with DNC compliance. The relatively low settlement amount influenced their view that the issues addressed by the AVC were not material. Furthermore, the Board understood DISH's Management to be taking the steps required to comply with the 2009 AVC. Among other things, Ergen and DeFranco were copied on emails in which DISH's Legal Department provided business people within DISH with legal advice concerning 2009 AVC.[903]

The 2009 AVC made no determination as to the sufficiency of DISH's Pre-2009 DNC compliance or as to DISH's responsibility for Retailer DNC compliance. Instead, the 2009 AVC separately stated the AGs' position and DISH's position on the facts giving rise to the 2009 AVC.[904] In their position, as relevant to the SLC's investigation, the AGs asserted that "DISH Network has failed to comply with federal, state and/or local laws regarding Telemarketing, including, but not limited to, those which prohibit calling Consumers who are on federal, state, or local do-not-call lists."[905] The AGs also alleged that, "as either actual or apparent agents, DISH Network is responsible for the conduct of its Third-Party Retailers and is bound by the representations made by its Third-Party Retailers to Consumers."[906] The majority of the AGs' position in the 2009 AVC concerned disclosures and representations, rather than DNC issues.

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902 Ex. 29, 2009 AVC §§ 3.1, 11.2, SLC DNC Investigation 0013784 at 882, 907; Ex. 384, Email from J. Blum to C. Ergen, J. DeFranco, et al. (July 15, 2009), SLC DNC Investigation 0000992.

903 Ex. 387, Email from B. Kitei to C. Ergen, J. DeFranco, et al. (July 20, 2009), SLC DNC Investigation 0005787.

904 Ex. 29, 2009 AVC §§ 1.5-1.14, SLC DNC Investigation 00013874 at 875-78.

905 *Id.* at § 1.8.

906 *Id.* at § 1.7.

In its position in the 2009 AVC, DISH denied these assertions by the AGs.[907] DISH declared that "nothing in the Assurance is intended to change the existing independent contractor relationships between DISH Network and its authorized retailers who sell DISH Network products and it believes that no agency relationship is created by the agreements set forth herein."[908] DISH denied any wrongdoing by it or the Retailers: "DISH Network believes its business practices exude the highest ethical conduct."[909] DISH asserted that "the requirements it has agreed to by signing this Assurance are policies, procedures and actions that exceed applicable legal and common law standards, and that it met all legal standards prior to the Attorneys General beginning their investigation."[910] "[B]y entering into this Assurance, DISH Network does not intend to create any legal or voluntary standard of care and expressly denies that any practices or policies inconsistent with those set forth in this Assurance violate any legal standard."[911]

The 2009 AVC made no attempt to reconcile the AGs' position with DISH's position on any of these issues; DISH did not agree to the AGs position by entering into the 2009 AVC.

C. Relevant Provisions of the 2009 AVC

The 2009 AVC applied different requirements to DISH's conduct with respect to its Authorized Telemarketers and different subsets of the Retailers. Authorized Telemarketers are defined in the 2009 AVC, as in this Report, as "a business or other entity that is hired by DISH Network to conduct Telemarketing on DISH Network's behalf in connection with the offer, sale

907 *See id.* at §§ 1.13-1.14.

908 *Id.* at § 1.14.

909 *Id.* at § 1.13.

910 *Id.* at § 1.14.

911 *Id*.

and/or lease of DISH Network Goods and/or DISH Network Services."[912] The 2009 AVC defined all Retailers as Third-Party Retailers;[913] it imposed certain requirements on DISH in DISH's dealings with any Retailer. DISH agreed to more rigorous requirements with respect to its dealings with OE Retailers and Retailers with 51 or more activations per month, defined as "Covered Marketers."[914] DISH was able to assume some obligations under the 2009 AVC with respect to the roughly 384 Covered Marketers,[915] that it could not have assumed with respect to the remaining thousands of Retailers.

1. DISH Compliance with DNC Laws

The 2009 AVC reiterated DISH's obligation to comply with pre-existing DNC Laws. For example, Section 4.67 of the 2009 AVC states: "DISH Network shall comply with all federal, state and local laws regarding Telemarketing, including, but not limited to, those which prohibit calling Consumers who are on any federal, state, or local do-not-call lists unless otherwise exempted by such laws."[916] These requirements were extended to DISH's Authorized Telemarketers.[917]

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912 *Id.* at § 2.3.

913 *Id.* at § 2.15.

914 *Id.* at § 2.9.

915 *See id.* (defining Covered Marketers as retailers with 51 or more activations per month); Ex. 341, Letter from L. Rose to R. Deitch (May 21, 2008), SLC DNC Investigation 0002468 at 473-74 (stating that there are nearly 9,592 retailers with zero to fifty activations per month and 384 retailers with over fifty-one activations per month).

916 *Id.* at § 4.67.

917 *Id.* at § 4.73 ("DISH Network shall issue business rules to its Authorized Telemarketers and Covered Marketers, requiring them to comply with the terms of this Assurance.").

2. Retailer Compliance with the 2009 AVC

The 2009 AVC included multiple provisions requiring DISH to "require its Covered Marketers to comply with the terms and conditions of this Assurance[.]"[918] DISH was required, "[w]ithin thirty (30) days of the date of the execution of [the 2009 AVC][,] [to] provide each Authorized Telemarketer and each Covered Marketer with a copy of [the 2009 AVC] and inform them that in order to continue acting as DISH Network Authorized Telemarketers or Covered Marketers, they must abide by the terms and conditions of [the 2009 AVC]."[919]

DISH provided a copy of the 2009 AVC to the Retailers on August 13, 2009, within 30 days of the entry of the 2009 AVC.[920] DISH's Retail Services employees told Retailers that requirements from the 2009 AVC were incorporated into the Retailer Agreement as new business rules.[921]

3. Affirmative Investigation of DNC Complaints

Section 4.74 of the 2009 AVC required DISH to:

> affirmatively investigate Complaints regarding alleged violations of federal, state and local laws regarding Telemarketing, including, but not limited to, those which prohibit calling Consumers who are on any federal, state, or local do-not-call lists, unless otherwise exempted by such laws, and shall take appropriate action as soon as reasonably practicable against any Authorized Telemarketers

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[918] *Id.* at § 3.3 ("DISH Network shall require its [Retailers] to comply with the terms and conditions of this assurance."); *id.* at § 4.56 ("DISH Network shall require its Third-Party Retailers to offer, lease, Advertise, install, and/or sell DISH Network Goods and/or DISH Network Services, and to make representations to Consumers in connection therewith, in a manner consistent with the terms of this Assurance."); *id.* at § 4.57 (requiring DISH to "require [Retailers] to use telemarketers who comply with the provisions of this Assurance.").

[919] *Id.* at § 4.75.

[920] Ex. 66, Email from R. Musso to R. Calbert, et al. (Aug. 13, 2009), SLC DNC Investigation 0006854.

[921] *Id.*; Ex. 709, OE Retailer Business Rules, Certain Requirements for OE Retailers Effective Date: Aug. 11, 2009, SLC DNC Investigation 0002581; s*ee also* Ex. 392, Email from N. Martinez to R. Calbert (Aug. 11, 2009), SLC DNC Investigation 0010104.

> and Covered Marketers it has determined to be in violation of the requirements of this Assurance.[922]

Management understood Section 4.74 to require DISH to continue its pre-existing business practices in this regard. For years, before it entered into the 2009 AVC, DISH had affirmatively investigated complaints of telemarketing violations by all Authorized Telemarketers or Retailers, including Covered Marketers, as discussed in Factual Findings Section V.E above.[923] Based on both the plain language of the 2009 AVC and negotiations with the AGs, Management did not believe that Section 4.74 required any modification to DISH's investigation process as it existed in 2009.

Section 4.74 was also designed to permit AGs to perform their own investigations and directly prosecute Covered Marketers and Authorized Telemarketers for alleged DNC violations. It provided that:

> Upon request from an Attorney General, DISH Network shall provide the Attorney General with the following information: (i) the name, address, and phone number of the Consumer who made the allegation or Complaint; (ii) a copy or description of the allegation or Complaint; and (iii) the name, address and phone number of the Authorized Telemarketer or Covered Marketer against whom the allegation or Complaint was lodged. Further, DISH Network shall be required to notify the Attorney General of the specific action it took regarding the Complaint or allegation if so requested.[924]

DISH had communicated with AGs' in the past, but this provision converted a courtesy into a concrete obligation to do so to a specified standard.

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922 Ex. 29, 2009 AVC § 4.74, SLC DNC Investigation 0013874 at 897.

923 *See, e.g.*, Ex. 171, Email from R. Musso to JSR Satellite, (Dec. 20, 2006), SLC DNC Investigation 0012365; Ex. 301, Letter from D. Steele to J. Hughes (Aug. 17, 2006), SLC DNC Investigation 0015680; Ex. 732, Termination Chart (1999-2012), SLC DNC Investigation 0014076.

924 Ex. 29, 2009 AVC § 4.74, SLC DNC Investigation 0013874 at 897.

4. Discipline of Covered Marketers and Authorized Telemarketers

Sections 4.76 and 4.79 of the 2009 AVC required DISH to "appropriately and reasonably discipline" an Authorized Telemarketer or Covered Marketer, respectively.[925] In negotiating these particular provisions, Blum explained to the AGs that some Retailers made innocent mistakes; a three-strikes-you're-out termination policy for Retailer DNC violations made no sense; he ultimately convinced the AGs to accept that proposition. The 2009 AVC is drafted accordingly.

Section 4.79 of the 2009 AVC, addressing Covered Marketers provides:

> DISH Network shall appropriately and reasonably discipline a Covered Marketer if DISH Network reasonably determines that, in connection with Telemarketing DISH Network Goods and/or DISH Network Services, the Covered Marketer has: (a) failed to fulfill contract requirements with respect to compliance with federal, state, or local telemarketing laws; (b) violated federal, state, or local telemarketing laws; and/or (c) failed to comply with the terms of this Assurance as they relate to this Telemarketing and Do Not Call section. Such disciplinary action shall include one or more of the following remedies:
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> 1) termination;
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> 2) imposing monetary fines;
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> 3) withholding of compensation;
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> 4) suspending the right to Telemarket for a period of time;
>
> 5) prohibiting Telemarketing;
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> 6) requiring the Covered Marketer to improve its process and procedures for compliance with the TCPA and/or any other federal, state and local laws regarding Telemarketing;
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> 7) requiring the Covered Marketer to terminate certain employees involved in TCPA violations and/or violations

925 *See id.* §§ 4.74, 4.79.

> of any other federal, state and local laws regarding Telemarketing;
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> 8) requiring the Covered Marketer to terminate Telemarketing affiliates;
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> 9) requiring the Covered Marketer to retrain employees in TCPA compliance and/or compliance with any other federal, state and local laws regarding Telemarketing; and/or
>
> 10) other appropriate and reasonable discipline under the circumstances.
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> In determining what disciplinary action shall be taken, DISH Network shall take into consideration the egregiousness of the Covered Marketer's conduct, the number of violations, the Covered Marketer's willingness to cure the problem, and whether DISH Network has previously disciplined the Covered Marketer.[926]

Section 4.79 of the 2009 AVC did not require DISH to change the way in which it managed the Retailers' DNC compliance. DISH had a longstanding practice of, in its view, appropriately and reasonably disciplining Retailers for DNC violations, as discussed in Factual Findings Section V.F above. Prior to entering into the 2009 AVC, DISH had (1) terminated Retailers,[927] (2) imposed fines,[928] (3) withheld compensation (in the form of chargebacks),[929] (4) suspended,[930] (5) prohibited Retailers from telemarketing,[931] (6) required Retailers to change

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926 *Id.* at § 4.79. Section 4.76 of the 2009 AVC applies identical requirements to Authorized Telemarketers.

927 *U.S. v. DISH*, 256 F. Supp. 3d 810, 852 (C.D. Ill. 2017).

928 *Id.* ("Between August 2006 and February 2007, Dish fined Order Entry Retailers Blu Kiwi, LLC and American Satellite $10,000.00 each, and fined Sterling Satellite $53,901.00.").

929 *See, e.g.*, Ex. 736, Email from B. Werner to B. Kitei, et al. (Oct. 14, 2009), SLC DNC Investigation 0006083.

930 *See, e.g.*, Ex. 217, Telephone Call Notes following Apex "Hold" Status (Mar. 4, 2009), SLC DNC Investigation 0012632 (placing retailer on hold status).

processes,[932] (7) required Retailers to terminate affiliates[933] and (8) required further Retailer employee training.[934] And, Section 4.79 (or its Authorized Telemarketer counterpart, Section 4.76) of the 2009 AVC gave DISH an additional option of imposing "other appropriate and reasonable discipline."[935]

Following its entry into the 2009 AVC, DISH continued its practice of disciplining Retailers on a case by case basis. No signatory to the 2009 AVC has contended that DISH's management of Retailers violated Section 4.79 or that DISH's management of Authorized Telemarketers violated Section 4.76.

5. Monitoring Telemarketing Compliance

Section 4.78 of the 2009 AVC required DISH to monitor Covered Marketers (OE Retailers and Larger Traditional Retailers).[936] Section 4.78 provides:

> DISH Network shall monitor, directly or through a third-party monitoring service approved by DISH Network, its Covered Marketers to determine whether they are Telemarketing Consumers and, if so, to determine whether the Covered Marketer is complying with all applicable federal, state, and local do-not-call laws. . . . DISH Network states that it has had persons pose as potential subscribers in order to engage in "sting"-type operations to determine if certain Covered Marketers are complying with its do not call policies. Among other things, DISH Network will

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931 *U.S. v. DISH*, 256 F. Supp. 3d at. 843 ("DISH employed an array of disciplinary measures that included warnings, probation, fines, withholding access to the Order Entry Tool (known as putting on hold), and termination.").

932 *Id.* at 853 ("Dish required some Order Entry Retailers to use PossibleNOW scrubbing services.").

933 *Id.* at 925 ("In November and December 2006, Dish told JSR to stop using affiliates in the Philippines.").

934 *See, e.g.,* Ex. 200, Letter from R. Origer to W. Martin (Sept. 28, 2007), SLC DNC Investigation 0014108 ("Atoll must re-train all of its employees engaged in telemarketing on TCPA compliance . . . ").

935 Ex. 29, 2009 AVC §§ 4.76, 4.79, SLC DNC Investigation 13874 at 897-899.

936 *Id.* § 4.78.

> continue engaging in such practices as part of the monitoring process described above.

The statements made by the AGs negotiating the 2009 AVC indicated that Section 4.78 required DISH to continue its pre-existing monitoring process of responding to consumer DNC complaints, as discussed in Factual Findings Section V.E above. DeFranco explained at his interview that, after receipt of legal advice, he believed that the 2009 AVC did not require DISH to audit or sample Retailer call lists or otherwise modify the monitoring that it had in place by the summer of 2009, with it signed the 2009 AVC. The SLC reviewed the drafting history of the 2009 AVC and did not find anything to suggest that DISH had reason to believe that Section 4.78 of the 2009 AVC required DISH to change its management of Retailers' DNC compliance. Indeed, Section 4.78 explicitly referred to a cornerstone of DISH's pre-2009 Retailer monitoring, stings.

D. Compliance with the 2009 AVC

Numerous provisions in the 2009 AVC required DISH to take action, change its business practices, or assume new expenses; these provisions concerned, among other things, disclosures and resolution of customer complaints—not DNC issues.[937] DISH made substantial changes in an effort to comply with these provisions after signing the 2009 AVC. Conversely, on the day that DISH signed the 2009 AVC, Management believed that (with the benefit of the changes made while negotiating the 2009 AVC) DISH was already doing essentially everything required with respect to DNC compliance. DISH's agreement to continue these practices provided a benefit to the AGs that signed the 2009 AVC; the 2009 AVC set a floor for DNC compliance.

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[937] *See, e.g.*, *id.* § 4.28 ("DISH Network shall Clearly and Conspicuously disclose the following information to all Consumers . . . ."); *id.* § 5.1 ("DISH Network agrees to pay restitution and/or other appropriate relief to Consumers who have Eligible Complaints.").

DISH took its obligation to comply with the 2009 AVC seriously. When interviewed by the SLC, each Director Defendant confirmed that he or she believed that DISH fully complied with the 2009 AVC after its entry. Based upon the SLC's Investigation, no AG that was a signatory to the 2009 AVC contended that DISH failed to comply with Sections 4.67, 4.73, 4.74, 4.76, 4.78 or 4.79 of the 2009 AVC.

VII. DISH and the DOJ Litigated *U.S. v. DISH* (2009-2013)

Plaintiffs' demand that DISH pursue the Claims can be traced entirely to the Board's decision to allow DISH to litigate *U.S. v. DISH*. As discussed in Factual Findings Sections III.C.4-5, DISH could have settled *U.S. v. DISH* for $12 million if it had been willing to accept liability for Retailers' DNC compliance on a going forward basis. And, had DISH done so, and somehow halted Retailer DNC violations thereafter, DISH could have avoided *Krakauer* entirely: DISH's liability in *Krakauer* was entirely the result of calls made by Subject Retailer SSN.

The evidence shows that the Board believed in good faith throughout the Investigation Period that DISH was being managed to comply with DNC Laws itself and was not responsible for enforcing Retailers' compliance with the DNC Laws. The Board received advice of counsel, informed by expert outside counsel Kelley Drye, on DISH's liability before reaching that conclusion. There were a number of factors at the time, including the minimal amounts that the FTC had demanded in settling the same calls in other litigation and DirecTV's demonstrated inability to obtain DNC compliance from its Retailers, that affirmed the reasonableness of the Board's decision to litigate *U.S. v. DISH* rather than voluntarily accept liability for Retailers' DNC compliance. The SLC found no evidence that the Board *knowingly* caused DISH to violate the DNC laws by permitting Management to conduct DISH's business consistent with DISH's

legal position in *U.S. v. DISH* (that DISH was not responsible for Retailer's DNC compliance) while litigating *U.S. v. DISH*.

A. The DOJ Filed the *U.S. v. DISH* Complaint.

Starting in December 2008, the FTC began sending DISH drafts of the complaint that the DOJ would file on behalf of the FTC if DISH and the FTC were unable to negotiate a resolution of the FTC Investigation.[938] On January 29, 2009, the FTC informed Kelley Drye, that the FTC had authorized the filing of a complaint by the DOJ.[939] In a meeting between Kelley Drye and the DOJ, the DOJ "made it clear [that] they really don't have an issue with DISH's internal/direct telemarketing compliance. The disagreement lies with our responsibility for retailers[.]"[940] Dodge promptly passed the FTC's message along to Ergen.[941]

On March 25, 2009, the DOJ and the states of California, Illinois, North Carolina and Ohio filed *U.S. v. DISH*, with a 29-page complaint against DISH in the United States District Court Central District of Illinois Springfield Division (the "Illinois Court").[942] The *U.S. v. DISH* complaint included twelve claims against DISH for violating, "either directly or indirectly" through a third party, the TSR, TCPA and telemarketing laws of California, North Carolina, Illinois and Ohio.[943] The FTC and the four states ("Four States") collectively sought damages in an unspecified amount for violations of the TSR and TCPA and a permanent injunction to

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938 *See* Ex. 364, Email from J. Blum to S. Dodge (Dec. 29, 2008), SLC DNC Investigation 0014289.

939 Ex. 366, Email from J. Blum to S. Dodge and C. Ergen (Jan. 29, 2009), SLC DNC Investigation 0004903.

940 Ex. 371, Email from S. Dodge to C. Ergen (Mar. 12, 2009), SLC DNC Investigation 0001034.

941 *Id*.

942 Ex. 776, Complaint, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Mar. 25, 2009).

943 *Id*.

prevent future violations of the TSR, the FTC Act, the TCPA and the relevant laws of California, Illinois, Ohio and North Carolina by DISH.[944] The Four States each alleged an individual claim for violations of their respective consumer protection or DNC Laws.[945]

The FTC and the Four States amended their complaint three times to assert additional violations of the TSR and remove certain allegations asserting violations of Ohio telemarketing laws.[946] The original and third amended complaints were otherwise substantively the same.[947] The case primarily concerned DNC violations that Retailers had hidden from DISH.

After the complaint was filed, Kelley Drye and the Legal Department continued to negotiate a potential settlement. DISH Management still expected to settle with the FTC (and the four states).

B. The DOJ Settled Claims against DirecTV Similar to Those Brought in *U.S. v. DISH* for $2.31 Million.

On April 16, 2009, shortly before the FTC filed *U.S. v. DISH*, the FTC settled similar litigation against DirecTV for $2.31 million and Comcast for $900,000.[948] The FTC announced these settlements through a press release.

When announcing the settlement, FTC Chairman Jon Leibowitz explained, "What makes DIRECTV's actions especially troubling is that it is a two-time offender: DIRECTV violated not

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944 *Id.* at 23-27.

945 *Id.* at 17-23.

946 *Compare id.* at 15-16, 22-23, *with* Ex. 777, Third Amended Complaint and Demand for Jury Trial at 15, 23, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Feb. 27, 2015).

947 *Compare* Ex. 776, Complaint, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Mar. 25, 2009), *with* Ex. 777, Third Amended Complaint and Demand for Jury Trial, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Feb. 27, 2015).

948 Ex. 26, Federal Trade Commission, Press Release, DIRECTV, Comcast to Pay Total of $3.21 Million for Entity-Specific Do Not Call Violations (Apr. 16, 2009), https://www.ftc.gov/news-events/press-releases/2009/04/directv-comcast-pay-total-321-million-entity-specific-do-not-call.

only the FTC's Do Not Call Rules, but also a previous federal court order barring it from exactly this type of conduct. Simply put, we won't tolerate firms that disregard consumers' specific requests not to be called, and we will be especially tough on companies that ignore their obligations under prior court orders." [949] The "previous federal court order" that Leibowitz referred to was DirecTV's 2005 settlement of TSR issues with the FTC. In that 2005 settlement, DirecTV had assumed responsibility for DNC compliance by its retailers.[950] DISH Management had believed in 2005 that DirecTV would not be able to ensure its retailers' DNC compliance. In 2009, that belief was born out through DirecTV's second settlement.

Between the 2005 settlement and 2009 settlement with the FTC, DirecTV paid a bit more than $7.6 million to resolve its DNC liability. The DirecTV and Comcast settlements were consistent with the view that DISH would be able to settle *U.S. v. DISH* for an amount that was not material in the context of DISH's overall business, if it could address liability for Retailers' DNC violations.

C. DISH's General Counsel Informed the Board of *U.S. v. DISH*.

When the DOJ filed the complaint in *U.S. v. DISH*, Stanton Dodge sent an email (the "Dodge Email") to inform the DISH Board of the lawsuit.[951] He told the Board that the DOJ was offering to settle the matter for $12 million. Dodge provided the Board with legal advice concerning the strength of DISH's positions that it had not violated DNC Laws and was not legally responsible for any violations of the DNC Laws by Retailers. The legal advice that Dodge provided to the Board was prepared in consultation with DISH's outside counsel, Kelley

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949 *Id*.

950 *See* 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).

951 Ex. 372, Email from S. Dodge to C. Ergen, et al. (Mar. 25, 2009), SLC DNC Investigation 0000004.

Drye, which had specific expertise in FTC enforcement actions. The Dodge Email also reported the finding by PossibleNow that DISH's own telemarketing was 99.8% compliant with the DNC Laws.

Following the Dodge Email, the Board discussed whether the Retailers were agents for whose actions DISH could be held liable.[952] The Board concluded that they were not.[953] Howard had confidence in Dodge as General Counsel to provide the Board with appropriate information and legal advice. After receiving the Dodge Email and the legal advice therein, Howard, Goodbarn and Mrs. Ergen specifically recall concluding that DISH was complying with DNC Laws. Ergen and DeFranco also believed that, while DISH was complying with the DNC Laws, DISH would not be able to comply with the injunction that the FTC was demanding. They believed that DISH would not be able to enforce DNC compliance by every one of its more than 3,500 Retailers. The Board accepted Management's recommendation that DISH continue to litigate.

Then, DISH litigated *U.S. v. DISH*.

D. The DOJ Settled Claims Against Retailers for the Calls at Issue in *U.S. v. DISH* For $20,321,364 in Total, with all but $245,000 Suspended.

The FTC settled its claims against multiple DISH Retailers named in the *U.S. v. DISH* complaint for calls at issue in *U.S. v. DISH*.[954] These settlements included calls made by Subject

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952 Ex. 378, DISH Minutes of Regular Board Meeting (May 5, 2009), SLC DNC Investigation 0002852 at 855 (Litigation Update).

953 The SLC confirmed this by asking each Director Defendant in turn.

954 Ex. 776, Complaint at 40, 59, 61, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Mar. 25, 2009) (alleging Vision Quest, LLC, New Edge Satellite, Inc., Planet Earth Satellite, Inc., Dish TV Now, and Star Satellite acted on behalf of Dish).

Retailers. These settlements appeared to confirm that the potential damages at issue in *U.S. v. DISH* were not material to DISH.

Specifically, on November 7, 2007, the FTC settled Guardian Communications, Inc.'s liability for placing approximately 49,000,000 of the same calls it made for Subject Retailers Star Satellite and Dish TV Now at issue in *U.S. v. Dish*,[955] for $7,892,242, all but $150,000 of which was suspended contingent on the accuracy of financial disclosures and continued compliance with the agreement.[956] And, on June 19, 2008, the FTC settled Subject Retailer Star Satellite's liability for placing the same 43,100,876 calls at issue in *U.S. v. DISH*,[957] for $4,374,768, all but $75,000 of which was suspended contingent on the accuracy of financial disclosures and continued compliance with the agreement.[958]

In addition to settling calls at issue in *U.S. v. DISH*, on July 15, 2008, the FTC settled Planet Earth Satellite, Inc.'s liability for allegedly placing an unknown number of calls in violation of the TSR, for $7,094,354, all but $20,000 of which was suspended contingent on the accuracy of financial disclosures and continued compliance with the agreement.[959] On August 10, 2009, the FTC settled Vision Quest, LLC's liability for allegedly placing an unknown number of calls in violation of the TSR, for $690,000, full payment of which was completely suspended contingent on the accuracy of financial disclosures and continued compliance with the

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955 *U.S. v. DISH*, 256 F. Supp. 3d 810, 979 (C.D. Ill. 2017).

956 Ex. 17, Stipulated Judgment and Order for Permanent Injunction at 6, *United States v. Guardian Comm., Inc.*, (C.D. Ill. 2007) (No. 052-3166).

957 *U.S. v. DISH*, 256 F. Supp. 3d at 979.

958 Ex. 24, Stipulated Judgment and Order for Permanent Injunction, at 9, *United States v. Star Satellite LLC* (D. Nev. June 19, 2008) (No. 2:09-cv-00797).

959 Ex. 789, Stipulated Judgment and Order for Permanent Injunction at 6, *United States v. Planet Earth Satellite, Inc.*, No. 2-08-cv-1274 (D. Ariz. 2008).

agreement.[960] And, on August 28, 2009, the FTC settled New Edge Satellite, Inc.'s liability for allegedly placing an unknown number of calls in violation of the TSR, for $570,000, full payment of which was also completely suspended contingent on the accuracy of financial disclosures and continued compliance with the agreement.[961] The FTC's $12 million settlement demand exceeded the amounts that it was demanding from the callers themselves to resolve liability for violations of the TSR and in any event was not sufficiently material to require Board review.

E. DISH Addressed Disclsure of *U.S. v. DISH* Litigation.

In 2009, when *U.S. v. DISH* was filed, Management determined that it was not material in the overall context of DISH's business and therefore did not need to be disclosed in DISH's financial statements or SEC filings. This view was supported by the FTC's settlement demand and the amounts paid to settle similar liability by DirecTV and the Retailers identified above. KPMG, DISH's independent auditor, determined that Management's decision was reasonable, as reflected in KPMG's approval of DISH's audited financial statements. DISH's Management and auditor thus did not propose, to DISH's Audit Committee and Board, disclosing *U.S. v. DISH* in DISH's public filings.

In considering the disclosures set forth in DISH's subsequent SEC filing, the Audit Committee and Board considered whether the *U.S. v. DISH* was material litigation requiring disclosure.[962] Based in part on the FTC's settlement demand, the advice of KPMG and DISH's

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960 Ex. 30, Stipulated Judgment and Order for Permanent Injunction at 8-9, *United States v. Vision Quest, LLC* (E.D. Mich. 2009) (No. 2:09-cv-11102).

961 Ex. 31, Stipulated Judgment and Order for Permanent Injunction at 8, *United States v. New Edge Satellite, Inc.*, (E.D. Mich. 2009) (No. 2:09-cv-11100).

962 Ex. 396, DISH Agenda for Regular Audit Committee Meeting (Nov. 2, 2009), SLC DNC Investigation 14813 at 814 (Item 14. Private Discussion with KPMG).

Legal Department, which had consulted with Kelley Drye before advising the Board, the Audit Committee and Board approved a subsequent SEC filing that did not identify *U.S. v. DISH* as material litigation or a material risk to DISH.[963]

DISH's Management, Audit Committee and Board, upon advice of counsel and auditors, continued to believe that *U.S. v. DISH* was not material litigation until the summary judgment in *U.S. v. DISH* in 2014, discussed in Factual Findings Section X.D.1 below.

F. DISH Unsuccessfully Moved to Dismiss *U.S. v. DISH*.

On May 21, 2009, DISH moved to dismiss Counts I-V in *U.S. v. DISH*, which alleged violations of the TSR and TCPA, to the extent they were "based on acts by a [Retailer] rather than directly by Dish Network."[964] DISH argued, among other things, that the plaintiffs had "failed to state claims that Dish Network is liable for the actions of the [Retailers]."[965] DISH also sought dismissal of state law claims in Counts VI-XI based on interstate calls on the grounds that the "TCPA preempts all state laws regulating interstate telephone solicitation."[966] On November 4, 2009, following briefing and without oral argument, the Illinois Court denied both aspects of DISH's motion to dismiss.

First, the Illinois Court determined that DISH's motion to dismiss the claims under the TSR premised on Retailers' calls "turn[ed] on the meaning of the verb 'cause'" in the following provision of the TSR: "'It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in,' certain

963 *See Id.* at 813-14 (listing on the agenda a litigation update from DISH's associate general counsel and a discussion with KPMG).

964 *U.S. v. DISH*, 667 F. Supp. 2d 952, 957 (C.D. Ill. Nov. 4, 2009).

965 *Id.*

966 *Id.*

prohibited acts[.]"[967] In interpreting the word "cause", the Court "defer[ed]" to the FTC's interpretation of the TSR in a 2004 "guide to help sellers comply with the TSR[,]" entitled "Complying with the Telemarketing Sales Rule" (the "FTC's 2004 Guide")[968] The FTC's 2004 Guide provided:

> If a seller or telemarketer calls a consumer who has:
>
> - placed his number on the National [DNC] Registry [the List]
> - not given written and signed permission to call
> - either no established business relationship with the seller, or has asked to get no more calls from or on behalf of that seller . . .
>
> the seller and telemarketer *may be* liable for a Rule violation. If an investigation reveals that neither the seller nor the telemarketer had written [DNC] procedures in place, both will be liable . . . If the seller had written [DNC] procedures, but the telemarketer ignored them, the telemarketer will be liable . . . ; the seller also *might be* liable, unless it could demonstrate that it monitored and enforced [DNC] compliance and otherwise implemented its written procedures. . . . [969]

The Illinois Court interpreted this language to mean that "a seller 'causes' the telemarketing activity of a telemarketer by retaining the telemarketer and authorizing the telemarketer to market the seller's products and services."[970] The Court therefore found that the "TSR's use of the verb 'cause' without limitation arguably created strict liability for sellers for the actions of its telemarketers."[971] In the alternative, the Illinois Court held that the allegations that "Dish Network allegedly knew, or consciously avoided knowing, that the [Retailers] were violating the

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967 *Id.*

968 *Id.* at 957-59.

969 *Id.* at 959.

970 *Id.*

971 *Id.* at 958.

TSR, but kept paying them to continue the violations" were sufficient to state a claim that DISH violated the TSR by providing substantial assistance to the Retailers' violations.[972]

Second, with respect to the claims that DISH was liable for violations of the TCPA by third parties, the Illinois Court determined that DISH's dismissal request "turn[ed] on the meaning of the phrase 'on whose behalf' or 'on behalf of'" as it is used by the FCC Rule to "impose responsibility on the person 'on whose behalf' a telephone solicitation is made."[973] The Court found that, if the allegations that DISH "authorized the [Retailers] to use Dish Network's name[,]" DISH "provided various types of support for the [Retailers] to facilitate the marketing of Dish Network products through telephone solicitations[,]"and that "[Retailers] made illegal telephone solicitations to sell Dish Network products and services under these arrangements" were true, they "could plausibly establish that the [Retailers] acted on behalf of Dish Network."[974] Thus, the Court denied DISH's motion to dismiss the TCPA claims for Retailers' calls.

Finally, the Illinois Court held that the TCPA did not preempt state laws with respect to intra state calls.[975] The Court explained that the TCPA's "Effect on State law" provision "states that the TCPA does not preempt state laws that[] (1) impose more restrictive intrastate requirements or regulations; or (2) prohibit" the following conduct: "(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or

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972 *Id.* at 961.

973 *Id.* at 962.

974 *Id.* at 963.

975 *Id.* at 964.

(D) the making of telephone solicitations."[976] And the Court determined that the state laws at issue "prohibit[ed] conduct that fits within subclauses (A) through (D)."[977]

The Illinois Court's denial of DISH's motion to dismiss did not change DISH's view that it was not legally responsible for violations of the DNC Laws by Retailers. DISH continued to expect to prevail at trial or on summary judgment, based upon a more fully developed record. This view was reinforced one month later, on December 15, 2009, when DISH prevailed on a summary judgment record in *Charvat*, discussed below. DISH also continued to believe that *U.S. v. DISH* was not material to DISH,[978] as reflected in its SEC filings.

G. DISH Continued Negotiating a Possible Settlement of *U.S. v. DISH*.

DISH continued discussing settlement with the FTC after *U.S. v. DISH* was filed, while litigating the motion to dismiss, and after the motion to dismiss was denied.

For example, in late 2010, DISH and the FTC discussed a general injunction that simply required DISH to comply with the DNC Laws.[979] Such an injunction would have deferred the question of DISH's liability for Retailers' DNC compliance to a later time. The FTC never agreed to such an injunction, because the FTC was not willing to defer that question.[980]

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976 *Id.* at 963.

977 *Id.* at 964.

978 *See* Ex. 34, DISH Network Corp., Annual Report (Form 10-K) at 32-38 (Mar. 1, 2010) (not identifying *U.S. v. DISH* as material litigation or a material risk).

979 *See* Ex. 425, Letter from L. Rose to L. Greisman (Mar. 14, 2011), SLC DNC Investigation 0007475.

980 Ex. 426, Letter from L. Greisman to L. Rose (Mar. 17, 2011), SLC DNC Investigation 0009435 (rejecting vicarious liability language).

VIII. Post-2009 AVC DNC Developments Suggested that DISH Was Complying with the DNC Laws.

The SLC's Investigation did not identify any events within the Investigation Period after the 2009 AVC was signed and *U.S. v. DISH* was filed contradicting the Board's view that Management was operating DISH to comply with the DNC Laws and DISH was not legally responsible for Retailers' DNC compliance. By 2009, DISH believed DNC compliance was not an area of risk on a going-forward basis. Complaints from AGs had declined.[981] DISH's Better Business Bureau scores had improved from a "C" to an "A." Ergen stated, when interviewed, that he was aware of these improvements at a high level, and believed that they reflected Management having addressed and resolved any DNC-related issues. DISH was litigating *U.S. v. DISH*, but when filed on March 25, 2009, *U.S. v. DISH* concerned calls made "[s]ince on or about" October 2003.[982] Management believed that DISH had resolved any issues that may have led to the AGs' Investigation, the 2009 AVC, the FTC Investigation and *U.S. v. DISH* litigation.

Between 2009 and the end of the Investigation Period, the information provided to the Director Defendants was consistent with this view.

A. *Charvat v. EchoStar Satellite, LLC* (*Charvat*) Held That DISH Is Not Liable for Retailer Calls (December 2009).

On December 15, 2009, one month after the Illinois Court denied DISH's motion to dismiss in *U.S. v. DISH*, the United Stated District Court for the Southern District of Ohio,

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981 Ex. 429, Indirect Sales Channel Analysis (Apr. 24, 2011), SLC DNC Investigation 0001091 at 099.

982 Ex. 776, Complaint, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Mar. 25, 2009).

Eastern Division granted DISH's motion for summary judgment in *Charvat v. EchoStar Satellite, LLC* ruling that DISH was not liable for calls made by a Retailer in violation of the TCPA.[983]

Philip J. Charvat, the plaintiff in *Charvat,* allegedly received 30 calls between June 2004 and August 2007, likely from Retailers, attempting to sell DISH services.[984] Charvat "requested on several occasions to be placed on the do-not-call list[,]" but continued to receive calls.[985] Charvat alleged that the Retailers' calls violated, among other laws, the TCPA and Ohio telemarketing laws and that DISH should be held vicariously liable for the violations "because the calls were made by authorized agents acting 'on behalf of' [DISH]."[986] DISH argued that "because it did not initiate the calls, and because the Retailers who did initiate the calls are independent contractors, [DISH] cannot be held liable for the alleged violations."[987]

The court in *Charvat* ruled that "[r]egardless of whether someone is labeled an independent contractor, when the hiring party retains 'the right to control the manner or means' by which a particular job is completed, it may be said that the hired party is actually an employee or agent who is acting 'on behalf of' the hiring party."[988] Examining the evidence of DISH's control over the Retailers, the court found insufficient evidence from which a reasonable jury could find that DISH retained the right to control the telemarketing activities of the Retailers and could therefore be subject to liability for the Retailers under the TCPA.[989]

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983 676 F. Supp. 2d 668 (S.D. Ohio 2009). At the time of the filing of the complaint in *Charvat*, DISH was known as EchoStar Satellite, LLC ("EchoStar") and is therefore referenced as EchoStar in the *Charvat* Opinion.

984 *Id.* at 670-71.

985 676 F. Supp. 2d at 670.

986 *Id.* at 671, 674.

987 *Id.*

988 *Id.* at 674-75 (citation omitted).

989 *Id.* at 676, 678.

The *Charvat* court found provisions of the Retailer Agreements providing DISH with control over the type of programming offered, control over the prices to be charged, ownership of subscribers' contact information and the right to accept or reject any programming orders submitted by Retailers to be "irrelevant to the question of whether [DISH] controls the manner or means by which the Retailers *market* the product."[990]

Charvat expressly found the Illinois Court's November 4, 2009 opinion in *U.S. v. DISH* denying DISH's "motion to dismiss similar claims under the TCPA" unpersuasive. *Charvat* explained that the Illinois Court "simply decided that the allegations contained in the Complaint, 'if true, could plausibly establish that the Dealers acted on behalf of Dish Network." [991] In contrast, DISH's motion in *Charvat* was a motion for summary judgment, thereby allowing the court to make its decision on the merits based on the evidence presented.[992]

DISH did not deem *Charvat* to be material litigation for disclosure purposes.[993] DISH's Legal Department informed Ergen of the decision in *Charvat* promptly in Ergen's role as DISH's Chairman.[994] Because of the manner in which the litigation updates to DISH's Board and Audit Committee are documented, it is uncertain whether the full Audit Committee or Board was contemporaneously informed of the outcome in *Charvat.* In any event, *Charvat* was consistent

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990 *Id.* at 676 (emphasis in original).

991 *Id.* at 677.

992 At the end of the Investigation Period, on October 17, 2013, the United States Court of Appeals for the Sixth Circuit vacated the December 2009 *Charvat* Opinion and remanded the case for consideration in light of the FCC Order. *Charvat v. EchoStar Satellite,* 535 Fed. Appx. 513 (6th Cir. 2013) (Mem.).

993 *See* Ex. 34, DISH Network Corp., Annual Report (Form 10-K) at 32-38 (Mar. 1, 2010) (not disclosing *Charvat*); Ex. 35, Dish Network Corp., Quarterly Report (Form 10-Q), at 48-53 (May 10, 2010) (same).

994 Ex. 399, Email from E. Pastorius to C. Ergen (Dec. 17, 2009), SLC DNC Investigation 0002077.

with the Director Defendants' understanding that DISH was not legally responsible for DNC violations by Retailers.

B. The 2010 CompliancePoint Audit Certified DISH's DNC Compliance.

In 2010, CompliancePoint, a subsidiary of PossibleNow, audited and certified DISH's DNC processes to "demonstrate to the FTC that DISH was doing a good job . . . to show our good faith."[995] In providing the certification to DISH, Ken Sponsler from CompliancePoint wrote, "We have seen firsthand that DISH is taking compliance very seriously and has made significant investments in technology and personnel."[996]

PossibleNow's 2010 audit indicated that "DISH Network's compliance processes, procedures and policies indicates full compliance with relevant federal and state DNC and telemarketing requirements. . . . DISH appears to be exerting sufficient procedures to remain in full compliance and contractually obligates third parties to comply as well." PossibleNow recommended only that "DISH Network could benefit from bolstering its written policies documentation to more accurately reflect its actual due diligence efforts."[997]

Ergen was not involved in the process, but recalled believing at the time that CompliancePoint certified DISH's DNC procedures as complying with all DNC Laws.

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995 Ex. 408, Email from J. Blum to B. Kitei, et al. (July 8, 2010), SLC DNC Investigation 0011971; Ex. 410, Email from B. Kitei to B. Davis (July 8, 2010), SLC DNC Investigation 0008542 ("We just received the certification from Compliance Point.").

996 Ex. 408, Email from J. Blum to B. Kitei, et al. (July 8, 2010), SLC DNC Investigation 0011971.

997 Ex. 409, DISH Network Corporate Telemarketing Compliance Certification (July 8, 2010), SLC DNC Investigation 0001044.

C. *Zhu v. DISH Network, LLC* ("*Zhu*") Found DISH Not Liable for DNC Violations.

On April 22, 2011, the United States District Court for the Eastern District of Virginia, Alexandria Division granted DISH summary judgment on claims that DISH had violated Virginia telemarketing laws as a result of calls marketing DISH services.[998]

Plaintiff Mantian Zhu alleged that he received calls in July 2009 from callers who identified themselves as sales persons representing DISH trying to sell the company's services.[999] Zhu had "specifically instructed Dish not to contact his home telephone number with solicitations for services from Dish" and registered his telephone number on the National Registry.[1000] Zhu did not assert that DISH or an Authorized Telemarketer had made the calls. Instead, Zhu alleged that DISH "caused the calls [he received in July 2009] to be made in violation of the Virginia Telephone Privacy Protection Act" ("VTPPA"), which prohibit[ed] unwanted telephone solicitation and provide[d] for individual actions against violators including monetary damages and costs."[1001] Zhu "contend[ed] that 'because the telephone solicitors identified themselves as calling on behalf of Dish Network, Dish Network is liable for the actions of the telephone solicitors.'"[1002]

The court held that under the VTPPA, "[e]ven assuming that an independent contractor or agency relationship could be shown [as to the offending callers]"—which could not be shown, DISH was protected from liability because it "ha[d] established reasonable practices and procedures to prevent actions in violation of the privacy act, including procedures in accordance

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998 *Zhu v. DISH Network, LLC*, 808 F. Supp. 2d 815 (E.D. Va. 2011).

999 *Id.* at 816.

1000 *Id.* at 817.

1001 *Id*.

1002 *Id.* at 818.

with the National Do Not Call Registry and/or federal regulations."[1003] The Court specifically found that DISH's Retailer Agreement's "prohibit[ion] [on] calls to individuals on the Do Not Call Registry constitute[d] a 'reasonable practice[] and procedure[] to effectively prevent [unlawful] telephone solicitation calls."[1004]

DISH did not deem *Zhu* to be material litigation for disclosure purposes.[1005] DISH's Legal Department informed Ergen of the decision in *Zhu* promptly in Ergen's role as DISH's Chairman.[1006] Because of the manner in which the Litigation updates to DISH's Board and Audit Committee are documented, it is uncertain whether the Audit Committee or Board was contemporaneously informed of the outcome in *Zhu.*

IX. The DISH Board Had an Oversight Structure to Monitor Compliance.

Plaintiffs limit their Claims to the question of whether the Board knowingly caused DISH to violate DNC Laws in bad faith. Nonetheless, the SLC did not confine its inquiry to that question but also considered the related claim, pled in the Complaint but later withdrawn, that the Board knowingly, in bad faith, failed to implement any system to monitor DISH's legal compliance.

During the Investigation Period, issues related to DISH's DNC compliance were rarely brought to the Board's attention. The SLC's Investigation identified at most a handful of instances in which the Board was made aware of DNC issues, all of which were discussed above. Numerous interviews confirmed that DNC compliance was generally part of management's

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1003 *Id*. at 819-20.

1004 *Id.* at 820.

1005 Ex. 39, Dish Network Corp., Quarterly Report (Form 10-Q) at 53 (May 2, 2011) (not disclosing *Zhu*); Ex. 42, Dish Network Corp., Annual Report (Form 10-K), at 37 (Feb. 23, 2012) (same).

1006 Ex. 428, Email from B. Kitei to C. Ergen (Apr. 22, 2011), SLC DNC Investigation 0002176.

ordinary course duties. However, the SLC's investigation confirmed that this was not because the Board knowingly abdicated its oversight duties with respect to DNC compliance. It was because, as discussed above, DNC issues were not viewed as a material risk to DISH at any point during the Investigation Period.

DISH's Board has a robust and redundant system to monitor and address any material compliance risks, including, if necessary, DNC compliance.

A. Board Meetings

DISH's Board holds four regularly scheduled board meetings a year ("Regular Board Meetings").[1007] The Regular Board Meetings are scheduled to permit the Board to review and approve DISH's quarterly and annual SEC filings.[1008] DISH's Board holds additional "special meetings" as warranted by circumstances.[1009] Special Meetings may be in person or telephonic.

Regular Board Meetings address four different formal sources of information that would alert the Board to any material legal compliance issue: (a) a report from DISH's General Counsel on material legal matters, including both regulatory issues and litigation, reflected on the Board meeting agendas as "Litigation Update;" (b) a discussion of DISH's upcoming SEC filing, which necessarily included a section on the regulatory and litigation risks facing DISH,

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1007 *See, e.g.*, Ex. 706, Schedule of Board and Audit Committee Meetings (2009), SLC DNC Investigation 0015310; Ex. 368, DISH Minutes of Regular Board Meeting (Feb. 24, 2009), SLC DNC Investigation 0002828; Ex. 378, DISH Minutes of Regular Board Meeting (May 5, 2009), SLC DNC Investigation 0002852; Ex. 390, DISH Minutes of Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870; Ex. 397, DISH Minutes of Regular Board Meeting (Nov. 3, 2009), SLC DNC Investigation 0015683.

1008 *See, e.g.*, Ex. 445, DISH Minutes of Regular Board Meeting (Feb. 13, 2012), SLC DNC Investigation 0005221; Ex. 378, DISH Minutes of Regular Board Meeting (May 5, 2009), SLC DNC Investigation 0002852; Ex. 296, DISH Minutes of Regular Board Meeting (Aug. 7, 2006), SLC DNC Investigation 0005126.

1009 Ex. 53, Amended and Restated Bylaws of DISH Network Corporation §§ 4.7, 4.8 (Mar. 28, 2018); Ex. 20, Amended and Restated Bylaws of EchoStar Communications Corporation, at §§ 4.7, 4.8 (May 8, 2007).

reflected on the agenda as the "SEC Filing Review;" (c) a discussion, led by Ergen of the material issues that he believed were facing DISH at the time, reflected on the agenda as the "Chairman's Report" and (d) a report from DISH's Audit Committee on the material points raised in the course of the Audit Committee's separate monitoring and oversight, reflected on the agenda as the "Audit Committee Report."[1010] The Audit Committee in turn had additional formal sources of information informing its report, as discussed below. Finally, in addition to all of these formal systems, multiple executives of DISH sat on the DISH Board. If any of these executives had become aware of a material issue with DISH's compliance that somehow slipped through the cracks of all of the Board's formal oversight mechanisms, they would have raised it informally with the rest of the Board.

Each Director Defendant interviewed by the SLC explained that the information provided by these sources ensured that material compliance issues were brought to the Board's attention during the Investigation Period. DNC compliance risk simply did not require discussion at the Board level, possibly subject to occasional exceptions, because it was not material.

B. Report by DISH's General Counsel

DISH's General Counsel made a presentation to the Board at each Regular Board Meeting during the Investigation Period.[1011] These presentations, described as Litigation

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[1010] *See, e.g.*, Ex. 342, DISH Minutes of Regular Board Meeting (July 24, 2008), SLC DNC Investigation 0015553 at 557-559; Ex. 390, DISH Minutes of Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870 at 878-80; Ex. 411, DISH Minutes of Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411 at 416-418; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0015651 at 662-63; Ex. 453, DISH Minutes of Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565 at 569-71; Ex. 460, DISH Minutes of Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886 at 903-05.

[1011] *See, e.g.*, Ex. 342, DISH Minutes of Regular Board Meeting (July 24, 2008), SLC DNC Investigation 0015553 at 557; Ex. 390, DISH Minutes of Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870 at 877-78; Ex. 411, DISH Minutes of Regular Board Meeting

Updates on the agendas for the Board Meetings, were not limited to pending litigation. Through the Litigation Update, the General Counsel apprised the Board of all legal matters material to DISH. For example, the Litigation Update addressed regulatory changes at the FCC that were expected to affect DISH's spectrum acquisition on occasion.[1012] And, in 2003, the Audit Committee was informed of DISH's entry into the 2003 AVCs concerning TCPA issues, addressed in Factual Findings Section III.B above, through the Litigation Update.[1013]

The General Counsel's presentations did not address every single lawsuit, compliance or regulatory issue that DISH was involved in; due to its size, DISH was involved in hundreds of different lawsuits at any point in time, in addition to ongoing compliance and regulatory concerns. Instead, the General Counsel's presentations addressed matters, whether or not litigation, that the General Counsel viewed as material. Developments could be material either (i) from a quantitative perspective based on the likely risk-adjusted damages or (ii) from a qualitative perspective, if, for example, a lawsuit had a reasonable possibility of resulting in a material injunction or a new regulation of imposing a specific performance requirement. The Director Defendants uniformly believed that the General Counsel kept them appropriately apprised of all material legal matters within DISH.

(Aug. 3, 2010), SLC DNC Investigation 0005411 at 416; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0015651 at 662; Ex. 453, DISH Minutes of Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565 at 579; Ex. 460, DISH Minutes of Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886 at 903.

[1012] Ex. 469, DISH Minutes of Special Board Meeting (July 8, 2013), SLC DNC Investigation 0000592 at 594 ("Mr. Cullen then discussed, among other things, the history of the TerreStar Acquisition; the FCC process, noting among toher things, that the rules applicable to our [ ] wireless spectrum licenses no longer require an integrated satellite component. . . .").

[1013] Ex. 271, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 11, 2003), SLC DNC Investigation 0003314 at 319-20.

Both Moskowitz and Dodge, who each served as DISH's General Counsel during a portion of the Investigation Period, confirmed in their interviews that if they had viewed DNC compliance as a material risk to DISH, they would have presented the issue to DISH's Board during the Litigation Update. Moskowitz and Dodge instead determined that DNC compliance did not present a material issue meriting the Board's consideration. Dodge, nonetheless advised the Board of the FTC's filing of *U.S. v. DISH*.[1014]

The General Counsel's presentations consisted almost entirely of advice of counsel. Thus, during the Investigation Period, DISH did not document the contents of Litigation Updates presented to the Board. DISH did not want to risk a waiver of its attorney client privilege by detailing its counsel's advice in minutes. Instead, DISH's Board minutes record the fact that a Litigation Update was presented, without discussing the privileged contents of the update.[1015] DISH did not keep any alternate written record of the matters presented to the Board through Litigation Updates.

C. Review and Discussion of DISH's SEC Filings

Regular Board Meetings during the Investigation Period included review, discussion, and approval of DISH's upcoming quarterly or annual SEC filing.[1016] Members of the DISH Legal

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1014 *See supra* Factual Findings § VII.C.

1015 *See, e.g.*, Ex. 411, DISH Minutes of Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411 at 416; Ex. 453, DISH Minutes of Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565 at 579.

1016 *See, e.g.*, Ex. 342 DISH Minutes of Regular Board Meeting (July 24, 2008), SLC DNC Investigation 0015553 at 557-59; Ex. 390, DISH Minutes of Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870 at 878-80; Ex. 411, DISH Minutes of Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411 at 416-18; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0015651; Ex. 453, DISH Minutes of Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565 at 569-571; Ex. 460, DISH Minutes of Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886 at 903-05.

Department routinely reviewed DISH's draft SEC filings with the Board and the Board members discussed any questions related to those filings or the material information contained therein with one another and counsel.

SEC regulations generally require DISH to disclose material information.[1017] DISH's SEC filings are distilled from information contained across DISH's business units viewed through the prisms of DISH's accounting team and Legal Department. The preparation of DISH's Form 10-Qs and 10-Ks involves, among other things, meetings between DISH's accounting and finance and Legal Departments to discuss legal and business developments. Management's report to the Board concerning each quarterly and annual SEC filing ensures that the Board is apprised of all developments considered material by Management for SEC purposes, on at least a quarterly basis.[1018]

During the Investigation Period, DISH's SEC filings did not disclose issues, risks, or litigation related to DNC compliance as material to DISH (apart from identifying "significant regulatory oversight" in general as a risk factor).[1019] Specifically, DISH's SEC filings did not include DNC compliance in the multi-page list of material risks disclosed to DISH

[1017] 17 C.F.R. § 240.12b-20 ("In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.").

[1018] *See* 17 C.F.R. § 240.12b-20 ("In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.").

[1019] *See, e.g.,* 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.").

stockholders.[1020] The Underlying DNC Actions were not included in the list of material litigation in any of DISH's SEC filings during the Investigation Period. Waldron, DISH's Audit Partner at KPMG during the Investigation Period, confirmed to the SLC that there was never any material disagreement among the Legal Department, KPMG and the Audit Committee as to the materiality of risks or of pending litigation in which DISH was involved. KPMG was apprised of the litigation by DISH's outside counsel in the course of its audits.[1021]

D. Report by DISH's Chairman or Vice Chairman

Each regularly scheduled Board meeting includes a report from DISH's chairman, Ergen.[1022] These "Chairman's Reports" address the issues of primary concern to Ergen with respect to DISH. Ergen was always abreast of significant developments in DISH's day-to-day business, including with respect to litigation and revenue.[1023] In addition to information gained

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[1020] *See, e.g.*, Ex. 6, EchoStar Communications Corp., Annual Report (Form 10-K/A), at Part I (Mar. 29, 2004); Ex. 10, EchoStar Communications Corp. (Form 10-K), at Part I (Mar. 16, 2005); Ex. 18, EchoStar Communications Corp., Annual Report (Form 10-K), at Part I (Mar. 15, 2006); Ex. 19, EchoStar Communications Corp. (Form 10-K/A), at Part I (Mar. 6, 2007); Ex. 22, DISH Network Corp. (Form 10-K), at Part I (Feb. 26, 2008); Ex. 23, DISH Network Corp. (Form 10-K/A), at Part I (Mar. 3, 2008); Ex. 25, DISH Network Corp. (Form 10-K), at Part I (Mar. 2, 2009); Ex. 34, DISH Network Corp. (Form 10-K), at Part I (Mar. 1, 2010); Ex. 37, DISH Network Corp. (Form 10-K), at Part I (Feb. 24, 2011); Ex. 42, DISH Network Corp. (Form 10-K), at Part I (Feb. 23, 2012).

[1021] *See, e.g.*, Ex. 452, Letter from Kelley Drye to KPMG (Nov. 1, 2012), SLC DNC Investigation 0008851 at 851.

[1022] *See, e.g.*, Ex. 342, DISH Minutes of Regular Board Meeting (July 24, 2008), SLC DNC Investigation 0015553 at 563; Ex. 390, DISH Minutes of Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870 at 884; Ex. 411, DISH Minutes of Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411 at 422; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0015651 at 672-74; Ex. 453, DISH Minutes of Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565 at 582; Ex. 460, DISH Minutes of Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886 at 913.

[1023] *See, e.g.*, Ex. 368, DISH Minutes of Regular Board Meeting (Feb. 24, 2009), SLC DNC Investigation 0002828 at 850 ("Ergen presented a report on the general state of the business of the Corporation . . .").

from within DISH, Ergen spoke to DISH customers through "Charlie Chats."[1024] If Ergen learned of a serious issue with any type of compliance that was not addressed in the Litigation Update, he would inform the Board. DISH's Board relied upon Ergen to identify material issues for Board discussion.[1025]

During the Investigation Period, Ergen's Chairman's Reports often focused on potential strategic transactions or satellite launches.[1026] DISH's Board Minutes do not reflect DNC issues ever being discussed as part of Ergen's Chairman's Reports. This does not definitively demonstrate that Ergen never discussed DNC issues in his Report, as DISH's Board minutes do not purport to document every issue touched upon.

On occasion, when Vogel served as Vice Chairman of DISH, he would present a Vice Chairman's Report to the Board if Ergen was not present.[1027] The Vice Chairman's Report addressed the issues that Vogel viewed most material at the time, to the extent not addressed

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[1024] *See, e.g.*, Ex. 743, Retailer Charlie Chat Transcript (Nov. 23, 1999), http://www.dishretailer.com/charliechat/chat.html (last visited Nov. 21, 2018)

[1025] Ex. 53, Amended and Restated Bylaws of DISH Network Corporation § 3.6 (Mar. 28, 2018); Ex. 20, Amended and Restated Bylaws of EchoStar Communications Corporation § 3.6 (May 8, 2007).

[1026] *See, e.g.*, Ex. 342, DISH Minutes of Regular Board Meeting (July 24, 2008), SLC DNC Investigation 0015553 at 563; Ex. 390, DISH Minutes of Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870 at 884; Ex. 411, DISH Minutes of Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411 at 422; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0015651 at 672-74; Ex. 453, DISH Minutes of Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565 at 582; Ex. 460, DISH Minutes of Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886 at 913.

[1027] *See, e.g.*, Ex. 296, DISH Minutes of Regular Board Meeting (Aug. 7, 2006), SLC DNC Investigation 0005126 (containing Vice Chairman's Report); Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 5 (Mar. 28, 2018) ("Mr. Vogel has served on the Board since May 2005 and is currently a Senior Advisor to us . . . He served as our President from Sept. 2006 to Feb. 2008 and served as our Vice Chairman from June 2005 to Mar. 2009.").

elsewhere. During the Investigation Period, Vogel's Vice Chairman's Report did not include DNC issues.

E. DISH's Audit Committee Report and Separate Oversight

The Audit Committee of DISH's Board provided the Board with monitoring tools. Generally, the Audit Committee met the day before every Regular Board Meeting.[1028] As chair of the Audit Committee, before each Regular Audit Committee Meeting, Ortolf reviewed the Audit Committee agenda as prepared by DISH's General Counsel, communicated the agenda to the Audit Committee members, and sought input for additional agenda matters.[1029] The chair of the Audit Committee then reported on the Audit Committee's activities at every Regular Board Meeting.[1030] Broadly speaking, the Audit Committee's role was to ensure DISH functioned in an ethical and lawful manner, that internal controls were in place and that reporting was proper.[1031]

The Audit Committee's specific responsibilities and scope of authority were set by its charter.[1032] The Audit Committee and the Board reviewed the Audit Committee's charter

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[1028] *See, e.g.*, Ex. 706, Schedule of Board and Audit Committee Meetings (2009), SLC DNC Investigation 0015310 at 310-321; Ex. 420, Schedule of Board and Audit Committee Meetings (2010-2011), SLC DNC Investigation 0015325 at 325; Ex. 441, Schedule of Board and Audit Committee Meetings (2011-2012), SLC DNC Investigation 0015325 at 326; Ex. 478, Schedule of Board and Audit Committee Meetings (2013-2014), SLC DNC Investigation 0000603 at 603.

[1029] *See* Ex. 377, Amended and Restated Charter of the Audit Committee of the Board (as revised through May 5, 2009), SLC DNC Investigation 0001521.

[1030] *See, e.g.*, Ex. 368, DISH Minutes of Regular Board Meeting (Feb. 24, 2009), SLC DNC Investigation 0002828; Ex. 402, DISH Minutes of Regular Board (Feb. 23, 2010), SLC DNC Investigation 0005068; Ex. 411, DISH Minutes of Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411 at 416-18; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0014323; Ex. 445, DISH Minutes of Regular Board Meeting (Feb. 13, 2012), SLC DNC Investigation 0000966; Ex. 460, DISH Minutes of Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886.

[1031] *See* Ex. 377, Amended and Restated Charter of the Audit Committee of the Board (as revised through May 5, 2009), SLC DNC Investigation 0001521.

[1032] *See* Ex. 379, DISH Minutes of Annual Board Meeting (May 11, 2009), SLC DNC Investigation 0002863 ("[T]he duties of the Audit Committee include, without limitation . . .

annually.[1033] In doing so, the Audit Committee compared the Committee's authority and responsibilities to that of similar companies' audit committees.[1034] During the Investigation Period, the Audit Committee Charter was amended on May 6, 2003,[1035] August 7, 2006,[1036] May

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reviewing the adequacy of the Corporation's system of internal accounting controls . . . ."); Ex. 295, Amended and Restated Charter of the Audit Committee as of Aug. 7, 2006, SLC DNC Investigation 0004458 ("The Audit Committee shall provide assistance to the Board of Directors in fulfilling their responsibility to the shareholders, potential shareholders and the investing community relating to corporate accounting, reporting practices, and the quality and integrity of the financial reports of the Corporation. In so doing, it is the responsibility of the Audit Committee to maintain free and open means of communication between the Board of Directors, the independent auditors, the internal auditors and the financial management of the Corporation. The Audit Committee shall provide oversight and review of the Corporation's accounting and financial services, internal operating controls and its ethical standards in consultation with the independent auditors and the General Counsel of the Corporation.").

[1033] *See, e.g.*, Ex. 379, DISH Minutes of Annual Board Meeting (May 11, 2009), SLC DNC Investigation 0002863 at 864; Ex. 405, DISH Minutes of Annual Board Meeting (May 3, 2010), SLC DNC Investigation 0014478 at 479; Ex. 431, DISH Minutes of Annual Board Meeting (May 2, 2011), SLC DNC Investigation 0005248 at 249; Ex. 447, DISH Minutes of Annual Board Meeting (May 2, 2012), SLC DNC Investigation 0014652; Ex. 464, DISH Minutes of Annual Board Meeting (May 2, 2013), SLC DNC Investigation 0000734 at 736; Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166 at 183-84; Ex. 444, DISH Minutes of Regular Audit Committee Meeting (Feb. 13, 2012), SLC DNC Investigation 0014688 at 708-09; Ex. 421, DISH Minutes of Regular Audit Committee Meeting (Feb. 16, 2011), SLC DNC Investigation 0014323 at 341-42; Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133.

[1034] *See, e.g.*, Ex. 457,Compilation of Data From Certain Audit Committee Charters (2013), SLC DNC Investigation 0001485; Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166; Ex. 444, DISH Minutes of Regular Audit Committee Meeting (Feb. 13, 2012), SLC DNC Investigation 0014688 at 708-09; Ex. 421, DISH Minutes of Regular Audit Committee Meeting (Feb. 16, 2011), SLC DNC Investigation 0014323 at 341-42; Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133.

[1035] Ex. 268, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of May 6, 2003, SLC DNC Investigation 0014804.

[1036] Ex. 295, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of Aug. 7, 2006, SLC DNC Investigation 0004458.

5, 2005,[1037] and May 2, 2013.[1038] Amendments to the Audit Committee Charter would first be approved by the Audit Committee, then recommended by the Audit Committee to the full Board and finally approved by the Board.[1039]

Under the Audit Committee's Charter, during the entire Investigation Period, the Audit Committee was responsible for the "Corporation's financial reporting and internal controls."[1040] This included assisting "the Board of Directors in fulfilling their responsibility to the shareholders, potential shareholders and the investing community relating to corporate accounting, reporting practices, and the quality and integrity of the financial reports of the Corporation."[1041] In addition, the Audit Committee is authorized to "review legal and regulatory

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[1037] Ex. 377, Amended and Restated Charter of the Audit Committee as of May 5, 2009, SLC DNC Investigation 0001521.

[1038] Ex. 463, Amended and Restated Charter of the Audit Committee as of May 2, 2013, SLC DNC Investigation 0000404.

[1039] *See, e.g.*, Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166 (recommending revision of audit committee charter); Ex. 378 DISH Minutes of Regular Board Meeting (May 5, 2009), SLC DNC Investigation 0002852 (approving amended and restated audit committee charter); Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133 (recommending revision of audit committee charter); Ex. 464, DISH Annual Board Meeting (May 2, 2013), SLC DNC Investigation 0000734 (approving changes to the Amended and Restated Audit Committee Charter).

[1040] Ex. 268, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of May 6, 2003, SLC DNC Investigation 0014804; Ex. 295, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of Aug. 7, 2006, SLC DNC Investigation 0004458; Ex. 377, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 5, 2009, SLC DNC Investigation 0001521; Ex. 463, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 2, 2013, SLC DNC Investigation 0000404.

[1041] Ex. 268, Amended and Restated Charter of the Audit Committee of the Board of Directors of Echostar Communications Corp. as of May 6, 2003, SLC DNC Investigation 0014804; Ex. 295, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of Aug. 7, 2006, SLC DNC Investigation 0004458; Ex. 377, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 5, 2009, SLC DNC Investigation 0001521; Ex. 463,

matters that may have a material impact on the financial statements, related company compliance policies, and programs and reports received from regulators[.]"[1042] Further, the "Audit Committee shall provide oversight and review of the Corporation's accounting and financial services, internal operating controls and its ethical standards in consultation with the independent auditors and the General Counsel of the Corporation."[1043]

The Audit Committee fulfilled these responsibilities by collecting and reviewing internal information and reports from a number of sources including, as potentially relevant to DNC compliance, (a) reports from DISH's Internal Audit Department, (b) reports from DISH's independent auditors, (c) separate litigation updates to the Audit Committee, (d) a separate review of DISH's SEC filings and (e) reports to DISH's whistleblower hotline. The Audit Committee Chair then presented any items from these sources that it deemed material to the Board during the Audit Committee Report at Board meetings.

Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 2, 2013, SLC DNC Investigation 0000404.

[1042] Ex. 268, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of May 6, 2003, SLC DNC Investigation 0014804; Ex. 295, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of Aug. 7, 2006, SLC DNC Investigation 0004458; Ex. 377, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 5, 2009, SLC DNC Investigation 0001521; Ex. 463, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 2, 2013, SLC DNC Investigation 0000404.

[1043] Ex. 268, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of May 6, 2003, SLC DNC Investigation 0014804;Ex. 295, Amended and Restated Charter of the Audit Committee of the Board of Directors of EchoStar Communications Corp. as of Aug. 7, 2006, SLC DNC Investigation 0004458; Ex. 377, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 5, 2009, SLC DNC Investigation 0001521; Ex. 463, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 2, 2013, SLC DNC Investigation 0000404.

1. Internal Audit Report

The Audit Committee oversees and receives reports from DISH's Internal Audit department ("Internal Audit").[1044] Internal Audit meets, on an annual basis, with managers of the various business areas throughout DISH to identify the areas presenting the highest risk to DISH that year.[1045] Based on that list of high risk areas, Internal Audit develops an annual "audit plan."[1046] Internal Audit presents its proposed annual audit plan to the Audit Committee for review and approval.[1047] The head of Internal Audit reports quarterly to the Audit Committee on the progress of Internal Audit's work throughout the year.[1048] Internal Audit presents the results

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[1044] *See generally*, Ex. 475, *What is Internal Audit?* (Nov. 20, 2013), SLC DNC Investigation 0006264); Ex. 459, Audit Committee Update Internal Audit & SOX 404 (Feb. 11, 2013), SLC DNC Investigation 0001420 ("interviewed over 50 business leaders" in developing audit plan).

[1045] *See generally*, Ex. 475, *What is Internal Audit?* (Nov. 20, 2013), SLC DNC Investigation 0006264; *see also* Ex. 740, Email from T. Beggs to K. Borders, et al. (Mar. 8, 2012), SLC DNC Investigation 0006456; Ex. 439, Audit Committee Update Internal Audit & SOX 404 (Nov. 1, 2011), SLC DNC Investigation 0014712 ("A company-wide risk assessment began in October to develop a risk-based 2012 operational audit plan.").

[1046] *See generally*, *id*.

[1047] *See generally*, *id.*; Ex. 477, Email from P. Halbach to J. Clayton, (Dec. 10, 2013), SLC DNC Investigation 0006391 (sending draft 2014 audit plan and presentation to audit committee); Ex. 417, Audit Committee Update Internal Audit & SOX 404 (Nov. 2, 2010), SLC DNC Investigation 0014448 (presenting proposed audit plan).

[1048] *See generally*, Ex. 475, *What is Internal Audit?* (Nov. 20, 2013), SLC DNC Investigation 0006264. *See also, e.g.*, Ex. 294, EchoStar Communications Audit Committee Update (Aug. 2, 2006), SLC DNC Investigation 0009711; Ex. 329 EchoStar Minutes of Regular Audit Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078 (former head of Internal Audit, Kathy Knight, provided update to the Audit Committee on ongoing internal audit investigation); Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166 (former head of Internal Audit, Tim Beggs, provided update to the Audit Committee regarding the role of Internal Audit and results of certain internal audits); Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133 (head of Internal Audit, Halbach, provided update to Audit Committee regarding certain internal audit projects).

of each individual audit to the Audit Committee as well as the relevant executives within DISH.[1049]

Internal Audit did not identify DISH's DNC compliance as presenting a level of risk meriting audit during the Investigation Period.[1050] But, at the request of DISH's Legal Department, Internal Audit included an audit of TCPA compliance by DISH and its Authorized Telemarketers as a subject of Internal Audit's 2013 audit plan.[1051] That audit (the "TCPA Internal Audit") is discussed in more detail in Factual Findings Section X.B below.

2. Independent Auditor Report

DISH's outside auditor, KPMG, also reported to the Audit Committee. Each Regular Audit Committee meeting during the Investigation Period included a report from both KPMG and DISH's chief financial officer on DISH's financials.[1052] The Audit Committee members,

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[1049] *See, e.g.*, Ex. 446, Audit Committee Update Internal Audit & SOX 404 (May 2, 2012), SLC DNC Investigation 0006223; Ex. 459, Audit Committee Update Internal Audit & SOX 404 (February 11, 2013), SLC DNC Investigation 0001420.

[1050] *See* Ex. 389, Audit Committee Update Internal Audit & SOX 404 (Aug. 3, 2009), SLC DNC Investigation 0015053 (2009 operational audit plan); Ex. 401, Audit Committee Update Internal Audit & SOX 404 (Feb. 23, 2010), SLC DNC Investigation 0015064 (2010 operational audit plan); Ex. 424, Audit Committee Update Internal Audit & SOX 404 (Feb. 16, 2011), SLC DNC Investigation 0015074 (2011 operational audit plan); Ex. 448, Audit Committee Update Internal Audit & SOX 404 (July 23, 2012), SLC DNC Investigation 0014674 (2012 audit plan); Ex. 459, Audit Committee Update Internal Audit & SOX 404 (February 11, 2013), SLC DNC Investigation 0001420 (2012 audit plan).

[1051] *See* Ex. 468, Email from P. Halbach to T. Beggs, (June 27, 2013), SLC DNC Investigation 0006431; Ex. 479, 2014 Risk Assessment & Audit Plan Report (Feb. 2014), SLC DNC Investigation 0006392.

[1052] *See, e.g.*, Ex. 264, EchoStar Minutes of Regular Audit Committee Meeting (Apr. 24, 2003), SLC DNC Investigation 0003303; Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078; Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166; Ex. 738, DISH Minutes of Regular Audit Committee Meeting (Aug. 3, 2010), SLC DNC Investigation 0014434 at 446; Ex. 430, DISH Minutes of Regular Audit Committee Meeting (April 25, 2011), SLC DNC Investigation 0014410; Ex. 444, DISH Minutes of Regular Audit

DISH's legal counsel, outside auditors and occasionally other Board members would then discuss DISH's draft financial statements and the Audit Committee members would vote on whether to recommend the financial statements to the full Board.[1053] At almost every Audit Committee meeting, the Audit Committee members would also meet with DISH's outside auditor without Management present to have a candid discussion and open dialogue about DISH's financial statements.[1054]

Committee Meeting (Feb. 13, 2012), SLC DNC Investigation 0014688; Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133.

[1053] *See, e.g.*, Ex. 264, EchoStar Minutes of Regular Audit Committee Meeting (Apr. 24, 2003), SLC DNC Investigation 0003303 ("members of the Audit Committee reviewed and discussed the Financial Statements and the Form 10-Q with Mr. McDonnell and the other members of management present at the meeting" and unanimously adopting resolution approving the form and filing of the Form 10-Q); Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078; Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166; Ex. 738, DISH Minutes of Regular Audit Committee Meeting (Aug. 3, 2010), SLC DNC Investigation 0014434 at 437; Ex. 430, DISH Minutes of Regular Audit Committee Meeting (April 25, 2011), SLC DNC Investigation 0014410; Ex. 444, DISH Minutes of Regular Audit Committee Meeting (Feb. 13, 2012), SLC DNC Investigation 0014688; Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133.

[1054] *See, e.g.*, Ex. 264, EchoStar Minutes of Regular Audit Committee Meeting (Apr. 24, 2003), SLC DNC Investigation 0003303 ("The fourteenth item of business was a private discussion between the members of the Audit Committee and KPMG."); Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078 ("The eleventh item of business was a private discussion between the members of the Audit Committee and KPMG."); Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166 (The sixteenth item of business was a private discussion between the members of the Audit Committee and KPMG."); Ex. 738, DISH Minutes of Regular Audit Committee Meeting (Aug. 3, 2010), SLC DNC Investigation 0014434 at 446 ("The fourteenth item of business was a private discussion between the members of the Audit Committee and KPMG."); Ex. 430, DISH Minutes of Regular Audit Committee Meeting (Apr. 25, 2011), SLC DNC Investigation 0014410 ("The ninth item of business was a private discussion between the members of the Audit Committee and KPMG."); Ex. 444, DISH Minutes of Regular Audit Committee Meeting (Feb. 13, 2012), SLC DNC Investigation 0014688 (The fifteenth item of business was a private discussion between the members of the Audit Committee and KPMG."); Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133 ("The fifteenth item of business was a private discussion between the members of the Audit Committee and KPMG.").

If DISH's outside auditor KPMG had any concerns that a material matter that would affect the financial well-being of DISH was not being reasonably presented in DISH's audited financial statements or SEC filings, it would have raised the issues with the Audit Committee.[1055] The relationship partner at KPMG during the Investigation Period does not recall KPMG ever having a material disagreement with the information presented in DISH's financial statements or disclosed in DISH's SEC filings during the Investigation Period.

KPMG received reports of all of DISH's ongoing litigation and other matters where DISH was represented by outside counsel.[1056] Those reports included the DNC Investigations (described below) and the Underlying DNC Actions.[1057] During the Investigation Period, KPMG expressed no concerns to the Audit Committee with the manner in which DISH was accounting for its DNC compliance risk or potential DNC liability.[1058] KPMG did not conclude that it was unreasonable for DISH to view the Underlying DNC Actions as immaterial during the Investigation Period.[1059]

1055 *See, e.g.*, Ex. 338, KPMG DISH 2008 Integrated Audit Plan, SLC DNC Investigation 0008864 ("The independent auditor may make suggestions about the form or content of the financial statements. . . . If we conclude that management has not fulfilled its responsibilities, then we communicate in writing to management and the audit committee[.]").

1056 *See, e.g.*, Ex. 449, Letter from Coblentz, Patch, Duffy & Bass LLP to KPMG LLP (July 30, 2012), SLC DNC Investigation 0008848.

1057 *See, e.g.*, Ex. 452, Letter from Kelley Drye to KPMG (Nov. 1, 2012), SLC DNC Investigation 0008851.

1058 *See, e.g.*, Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078.

1059 *See* Ex. 25, DISH Network Corp., Annual Report (Form 10-K), at F-2–F-3 (Mar. 2, 2009) (Report of Independent Registered Public Accounting Firm); Ex. 34, DISH Network Corp., Annual Report (Form 10-K), at F-2–F-3 (Mar. 1, 2010) (Report of Independent Registered Public Accounting Firm); Ex. 37, DISH Network Corp., Annual Report (Form 10-K) at F-2–F-3 (Feb. 24, 2011) (Report of Independent Registered Public Accounting Firm); Ex. 42, DISH Network Corp., Annual Report (Form 10-K), at F-2–F-3 (Feb. 23, 2012) (Report of Independent Registered Public Accounting Firm); Ex. 43, DISH Network Corp., Annual Report (Form 10-K), at F-2–F-3 (Feb. 20, 2013) (Report of Independent Registered Public Accounting Firm); Ex. 47,

3. General Counsel's Reports to the Audit Committee

Similar to the Board, the Audit Committee received a presentation from DISH's General Counsel at each regular meeting.[1060] These oral reports to the Audit Committee consisted of detailed conversations between members of the Audit Committee and the General Counsel or, as appropriate, other members of DISH's Legal Department regarding regulatory and compliance matters and the status of material lawsuits and the manner in which DISH's position on those lawsuits should be reflected in DISH's annual or quarterly SEC filings.[1061]

4. Review of DISH's SEC Filings

With the benefit of the input from DISH's independent auditor and Legal Department, the Audit Committee reviewed DISH's draft SEC filings, prepared by Management, at regular Audit Committee meetings.[1062] As discussed in Factual Findings Section IX.C above, DISH's SEC filings provided a compilation of all of DISH's material legal and financial issues.

DISH Network Corp., Annual Report (Form 10-K), at F-2–F-3 (Feb. 21, 2014) (Report of Independent Registered Public Accounting Firm).

[1060] *See, e.g.*, Ex. 264, EchoStar Minutes of Regular Audit Committee Meeting (Apr. 24, 2003), SLC DNC Investigation 0003303; Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078; Ex. 367, DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166.

[1061] *See, e.g.*, Ex. 264, EchoStar Minutes of Regular Audit Committee Meeting (Apr. 24, 2003), SLC DNC Investigation 0003303; Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078; Ex. 367 DISH Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166.

[1062] *See, e.g.*, Ex. 264, Echostar Minutes of Regular Audit Committee Meeting (Apr. 24, 2003), SLC DNC Investigation 0003303; Ex. 329, EchoStar Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078; Ex. 367, Minutes of Regular Audit Committee Meeting (Feb. 23, 2009), SLC DNC Investigation 0004166; Ex. 738, DISH Minutes of Regular Audit Committee Meeting (Aug. 3, 2010), SLC DNC Investigation 0014434; Ex. 430 DISH Minutes of Regular Audit Committee Meeting (April 25, 2011), SLC DNC Investigation 0014410; Ex. 444, DISH Minutes of Regular Audit Committee Meeting (Feb. 13, 2012), SLC DNC Investigation 0014688; Ex. 461, DISH Minutes of Regular Audit Committee Meeting (Feb. 11, 2013), SLC DNC Investigation 0004133.

In consultation with counsel, the Audit Committee would make any appropriate adjustments to the draft SEC filings.[1063] If the Audit Committee was not able to internally resolve any concerns or issues about the manner in which information was disclosed or the question of whether information should be disclosed in DISH's SEC filings, the chair of the Audit Committee would present the issue to the full DISH Board.[1064] However, no Audit Committee member specifically recalled raising any concerns of that type to the Board during the Investigation Period.

The Audit Committee members stated when interviewed that they believed that during the Investigation Period that DISH's SEC filings accurately disclosed material matters with respect to DISH's legal and financial status. They believed that they received information sufficient to perform their oversight function in this regard, including with respect to the decision that compliance with the DNC Laws did not present a material risk to DISH during the Investigation Period.

5. "Whistleblower Hotline" Review

DISH's whistleblower hotline provided yet another path by which DISH's Audit Committee monitored potential issues with DISH's legal compliance. Any DISH employee could anonymously raise concerns with potentially illegal or unethical behavior at DISH through the whistleblower hotline if they felt uncomfortable doing so through typical management

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[1063] *See, e.g.*, Ex. 377, Amended and Restated Charter of the Audit Committee as of May 5, 2009, SLC DNC Investigation 0001521; Ex. 329, DISH Minutes of Regular Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078.

[1064] *See, e.g.*, Ex. 343, DISH Agenda for Regular Board (July 24, 2008), SLC DNC Investigation 0015566 at 567 (Item 7 Report on Activities of Audit Committee); Ex. 708, Agenda for Regular Board Meeting (May 5, 2009), SLC DNC Investigation 0015084 at 084 (Item 5 Report on Activities of Audit Committee); Ex. 412, DISH Agenda for Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0014459 at 459 (Item 5 Report on Activities of Executive Compensation Committee).

channels.[1065] The Audit Committee reviewed potentially material items reported through the Whistleblower Hotline.[1066] If any of those reports were genuinely material and not otherwise addressed, the Audit Committee chair would present the issue to the full Board and recommend an appropriate response.[1067]

None of the complaints made through the whistleblower hotline during the Investigation Period concerned DNC compliance.

F. Informal Reporting

In addition to this formal oversight structure, scheduled and repeated at each Board Meeting, DISH Board members also held fulsome discussions about the issues facing DISH.[1068] DISH's executive Board members invariably learned of numerous aspects of DISH's business in their executive roles. The executive Board members, Ergen, DeFranco and, at times, Moskowitz and Vogel, confirmed in their interviews that if they were aware of any material risks not otherwise presented to the Board, they would have informed the outside directors of the situation.

[1065] Ex. 295, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of Aug. 7, 2006, SLC DNC Investigation 0004458 (requiring the establishment of an anonymous submission system for complaints).

[1066] *Id.*

[1067] Ex. 377, Amended and Restated Charter of the Audit Committee of the Board of Directors of DISH Network Corp. as of May 5, 2009, SLC DNC Investigation 0001521; Ex. 329, DISH Minutes of Audit Committee Meeting (Aug. 2, 2007), SLC DNC Investigation 0004078.

[1068] *See, e.g.*, Ex. 342, DISH Regular Board Meeting (July 24, 2008), SLC DNC Investigation 0015553; Ex. 390, DISH Regular Board Meeting (Aug. 4, 2009), SLC DNC Investigation 0002870; Ex. 411, DISH Regular Board Meeting (Aug. 3, 2010), SLC DNC Investigation 0005411; Ex. 422, DISH Minutes of Regular Board Meeting (Feb. 16, 2011), SLC DNC Investigation 0015651; Ex. 453, DISH Regular Board Meeting (Nov. 2, 2012), SLC DNC Investigation 0001565; Ex. 460, DISH Regular Board Meeting (Feb. 11, 2013), SLC DNC Investigation 0002886.

Non-executive members of the Board also learned relevant information outside of formal Board meetings which they too relayed to the entire Board. For example, Moskowitz continued speaking and exchanging emails with DISH's Legal Department even after he retired as DISH's General Counsel in 2007.[1069] If any of those communications suggested an issue requiring Board discussion, Moskowitz raised the issue with the full Board, potentially as part of the Litigation Update. Ortolf learned about developments with DISH's business at Team Summit Meetings. And, Mrs. Ergen consulted occasionally with DISH Management, in particular with respect to personnel issues.[1070]

X. Post Claims Period Developments

The final calls at issue in the Underlying DNC Actions were placed in 2011. The Named Defendants' actions after that point had no effect on the judgments at issue in the Claims and on which DISH would necessarily base any claims that it brought. Nonetheless, some events after 2011 remain relevant to whether it would be in DISH's best interests to litigate against the Director Defendants.

A. The FCC Clairified the Agency Standard Applied by the TCPA.

In 2011, DISH filed a joint petition with the FTC and the Four States involved in *U.S. v. DISH* for a ruling from the Federal Communications Commission (FCC), the entity charged with interpreting the TCPA, for guidance on the standard for agency applied by the TCPA. DISH sought confirmation that federal common law agency principles applied to a seller's liability for

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[1069] *See, e.g.*, Ex. 358, Email from D. Moskowitz to K. Culig and B. Ehrhart (Nov. 4, 2008), SLC DNC Investigation 0014812; Ex. 380, Email from D. Moskowitz to J. Blum (May 26, 2009), SLC DNC Investigation 0014521.

[1070] Ex. 284, Email from Candy Ergen to Charlie Ergen (Apr. 4, 2006), SLC DNC Investigation 0014753.

a telemarketer's violations under the TCPA.[1071] The FTC in turn argued that under the TCPA, sellers are directly liable for telemarketers' calls, seeking to bolster its lawsuit in *U.S. v. DISH*.

1. The FCC Issues a Declaratory Ruling Providing that Federal Common Law Agency Principles Govern Liability Under the TCPA.

On May 9, 2013, the FCC issued a declaratory ruling (the "FCC Order"), accepting DISH's argument that the question of whether a seller is liable for TCPA violations by third-party telemarketers is governed by federal common law agency principles.[1072] The FCC rejected arguments by the FTC and the four states that the TCPA rendered sellers directly liable for the violations of third-party telemarketers. But in describing how the federal common law of agency applied to the TCPA, the FCC made certain comments adverse to DISH. For example, it stated, "We see no reason that seller should not be liable under those provisions for calls made by a third-party telemarketer when it has authorized that telemarketer to market its good or services."[1073] It added that the "ability by [an] outside sales entity to enter consumer information into the seller's sales or customers systems, as well as the authority to use the seller's trade name, trademark and service mark" may be relevant to the agency analysis.[1074]

2. The D.C. Circuit Determines that the FCC Order Is Not Entitled to *Chevron* Deference.

On May 17, 2013, DISH petitioned the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") to review the FCC Order. [1075] DISH asked the D.C. Circuit to

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1071 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).

1072 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.

1073 *Id.* at 20.

1074 *Id.* at 19.

1075 Ex. 716, Petition for Review, *Dish Network, LLC v. FCC* (D.C. Cir. May 17, 2013).

vacate "the FCC's 'guidance' to courts on federal common-law principles of agency and the application of those principles in TCPA cases . . . because the [FCC] lacks the authority and expertise to opine on the common law of agency and the [FCC's] 'guidance' directly conflicts with the common-law principles it purports to explain."[1076] In response, the FCC conceded that the terms in its Order did not extend beyond common law agency.[1077] On January 22, 2014, following briefing and argument, the D.C. Circuit dismissed DISH's petition on the ground that the FCC's concession that the commentary it provided about the application of federal common law of agency "has no binding effect on courts, that it is not entitled to deference under *Chevron* . . . , and that 'its force is dependent entirely on its power to persuade'" eliminated any controversy.[1078]

B. The 2013 TCPA Internal Audit

In the second quarter of 2013, Kitei, within DISH's Legal Department, directed Internal Audit to prepare the TCPA Internal Audit of DISH and its Authorized Telemarketers eCreek and Stream Global Services ("Stream").[1079]

Patrick Halbach, the head of Internal Audit, presented Internal Audit's 2013 TCPA Internal Audit determinations to the Audit Committee in August 2013.[1080] The TCPA Internal

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1076 Ex. 717, Brief for Petitioner Dish Network LLC, at 1-2, *Dish Network, LLC v. FCC* (D.C. Cir. Sept. 3, 2013).

1077 *Dish Network, LLC v. FCC*, 552 Fed. Appx. 1, 2 (D.C. Cir. 2014) ("In particular, the FCC held that the principles of the federal common law of agency govern the determination of whether such a seller is liable for the actions of a telemarketer.").

1078 *Id*.

1079 *See* Ex. 459, Audit Committee Update Internal Audit & SOX 404 (Feb. 11, 2013), SLC DNC Investigation 0001420 at 453; Ex. 468, Email from P. Halbach to T. Beggs (June 27, 2013), SLC DNC Investigation 0006431.

1080 *See* Ex. 473, PowerPoint: Audit Committee Update Internal Audit & SOX 404 (Aug. 1, 2013), SLC DNC Investigation 0006360 at 364.

Audit found DISH's existing controls and processes to be Partially Effective in ensuring compliance with the TCPA.[1081] This rating reflected Internal Audit's determination that certain controls and processes were effective in ensuring compliance with the TCPA, while other controls and processes did not fully mitigate risk to acceptable levels and required improvement. Partially effective is a common audit outcome.

Internal Audit conducted a follow-up TCPA compliance audit in 2014 to assess the progress made in implementing the changes recommended in the TCPA Internal Audit.[1082] In his interview, Halbach stated that Internal Audit determined that the risks identified in the TCPA Internal Audit have been partially mitigated. For example, the approval process for call scripts was strengthened and dialer technology was updated to take time zones into account to ensure calls were made at proper times; but, instead of updating software to record the dates of customer requests to be added to the Internal DNC List as Internal Audit recommended, all calls were recorded to ensure DISH maintained a record of the dates of such requests. A rating of partially mitigated is very typical of Internal Audit's follow-up audits.

C. Brokaw Joined DISH's Board Effective October 2013.

On September 17, 2013, DISH's Board appointed Brokaw as an independent member of the Board effective October 7, 2013.[1083] The Board concluded that Brokaw should serve on the Board due, among other things, to his financial experience, acquired, in part, during his tenure with Highbridge Principal Strategies, LLC, Lazard Frères & Co. LLC and Perry Capital,

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1081 Ex. 473, PowerPoint: Audit Committee Update Internal Audit & SOX 404 (Aug. 1, 2013), SLC DNC Investigation 0006360 at 364.

1082 *See* Ex. 476, 2014 Risk Assessment (Nov. 26, 2013), SLC DNC Investigation 15600 at 606.

1083 Ex. 46, DISH Network Corp., Current Report (Form 8-K), at 2 (Sept. 17, 2013).

L.L.C.[1084] Upon joining the Board, Brokaw also joined the Audit, Nominating and Executive Compensation Committees of the Board.[1085] At no time prior to October 2013, had Brokaw served DISH as a member of the Board or otherwise.

The Complaint makes no specific allegations regarding any conduct of the Board or the Director Defendants after Brokaw joined the Board.

D. The Underlying DNC Actions

1. In *U.S. v. DISH*, the Illinois Court Issues Summary Judgment Decision Holding DISH Liable for Certain OE Retailer Calls Made In Violation of the TSR.

On December 11, 2014, following discovery, the Illinois Court issued an Opinion denying in part and granting in part cross-motions by DISH and the *U.S. v. DISH* plaintiffs (the FTC and the Four States) for summary judgment.[1086] Contrary to the earlier *Charvat* decision and DISH's understanding of its relationship with Retailers, the Illinois Court held that DISH was liable for OE Retailer telemarketing calls made in violation of the TSR.[1087]

"The TSR stated, 'It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in . . . .' certain specific prohibited acts," including calling a telephone number on the Natioanl Registry

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1084 *Id.*

1085 *Id.*

1086 DISH sought summary judgment on all twelve counts asserted in the then-operative Second Amended Complaint. Ex. 785, Defendant DISH Network LLC's Motion for Summary Judgment, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Jan. 6, 2014). The plaintiffs sought summary judgment on all but one count. Ex. 784, Plaintiffs' Motion for Summary Judgment, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. May 30, 2014).

1087 *U.S. v. DISH*, 75 F. Supp. 3d 942, 952 (C.D. Ill. 2014). The Illinois Court further found DISH liable for certain telemarketing calls made by DISH and its Authorized Telemarketers in violation of DNC Laws. *Id.* at 952-53.

and abandoning a call.[1088] The Illinois Court explained that, to establish DISH's liability for violative OE Retailer calls under the TSR, the plaintiffs must establish that DISH "caused" the OE Retailers to make the violative calls.[1089] DISH argued that under a plain meaning reading, it did not cause OE Retailers' violative calls because "DISH took no specific action that resulted in any of the Independent Retailers violating [DNC Laws]."[1090] There was no "nexus between conduct engaged in by DISH and the alleged wrongful telemarketing conduct of the Independent Retailer (for example, DISH's providing a calling list to an Independent Retailer who uses that list to make violative calls)."[1091] DISH's Retailer Agreement instead "require[d] each Independent Retailer to comply with 'all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders,' and ma[de] clear that each Independent Retailer is 'solely responsible for compliance with all Laws that apply to its obligations under' the Retailer Agreement."[1092]

DISH further argued that the Illinois Court should not give deference to the FTC's 2004 Guide interpreting the word "cause" to impose strictly liablity on sellers for telemarketers' TSR violations.[1093] In support, DISH argued, among other things, that "[s]ince the denial of [its] motion to dismiss in 2009, the Supreme Court[, in other cases,] has called into doubt the validity

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1088 *Id.* at 956-57.

1089 *See id.* at 1007.

1090 Ex. 783, Defendant DISH Network LLC's Memorandum of Law In Support of Its Motion for Summary Judgment, at 139, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Jan. 16, 2014) ("DISH's *U.S. v. DISH* Summary Judgment Brief").

1091 Ex. 791, Defendant DISH Network LLC's Supplemental Memorandum of Law Regarding Agency Deference at 19, *U.S. v. DISH*, No. 09-3073 (C.D. Ill. Aug. 8, 2014) ("DISH's Brief on Agency Deference").

1092 Ex. 783, DISH's *U.S. v. DISH* Summary Judgment Brief, at 139.

1093 *See* Ex. 782, DISH's Brief on Agency Deference at 2.

of [deference pursuant to] *Auer* [*v. Robbins*, 519 U.S. 452 (1997)] . . . as a matter of law."[1094] And DISH argued that the FTC's 2004 Guide language providing that the seller "might be liable" for telemarketers' conduct failed to provide notice that "a seller will be considered to have 'caused' independent retailers to have violated the TSR simply because the seller contracted with an independent retailer to offer the seller's goods or services as part of its general business strategy . . . ." [1095] Still further, DISH argued that because the "FTC ha[d] confirmed [in a notice] that seller liability under the TSR [for calls to the National Registry and pre-recorded] should be coextensive with seller liability under the TCPA" and the FCC had confirmed that TCPA regulations required "an agency relationship is required to hold a seller liable" for such calls, "cause" should not be interpreted to make sellers strictly liable for telemarketers' conduct.[1096]

The Illinois Court rejected DISH's position. It concluded that absent an overruling of *Auer* deference by the Supreme Court, "this Court must at this point . . . defer to the FTC interpretation of 'cause'" in the FTC's 2004 Guide.[1097] Based on the Guide, the Illinois Court ruled that to establish liability for DISH over Retailers' calls, the plaintiffs "must show that (1) Dish retained the Retailers, (2) Dish authorized the Retailers to market Dish products and

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1094 *Id.* at 1, 6-7 (citing concurrence of J. Scalia in *Talk America v. Mich. Bell Tel.*, 131 S. Ct. 2254, 2266 (2011) stating "'while I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly doubtful of its validity'" and decision in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) declining to give deference to an agency interpretation and noting that deference 'creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit.'").

1095 *Id.* at 20.

1096 *Id.* at 32.

1097 *U.S. v. DISH*, 75 F. Supp. 3d at 1012.

services and (3) the Retailers violated the TSR by initiating Dish telemarketing calls to numbers on the [National DNC] Registry."[1098]

In contrast to its ruling on DISH's liability for Retailers' TSR violations, the Illinois Court rejected the plaintiffs' position that DISH was liable for Retailers' TCPA violations.[1099] Noting that the FCC Order provided that the FCC Rule's "'on whose behalf' language imposes liability on the seller for the actions of the telemarketer if an agency relationship existed between the seller and telemarketer,"[1100] the Illinois Court held that under the FCC Rule promulgated pursuant to the TCPA, the plaintiffs "must show that the Retailers had an agency relationship with Dish in order to show that the Retailers acted on behalf of [DISH]."[1101] In considering whether an agency relationship existed, the court noted that there are two key aspects to Restatement's definition of agency: "(1) the principal and agent agree that the agent acts for the principal; and (2) the agent is subject to the control of the principal."[1102] Ultimately, the court determined that issues of fact existed regarding whether OE Retailers were agents of DISH.[1103]

The Illinois Court found that DISH "exerted some control over Retailers. Musso's office monitored Retailers. . . . Her superiors disciplined Retailers who did not comply with the Retailer Agreements. Dish, however, did not control all aspects of the Retailers' activities." However, the court noted that some evidence also indicates that OE Retailers could place orders and schedule installations for DISH through an Order Entry Tool. The court found that this

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1098 *Id.* at 1013.

1099 *Id.* at 1025.

1100 *Id.* at 1015.

1101 *Id.* at 1025.

1102 *Id.* at 1016.

1103 *Id.* at 1025.

"conflicting evidence shows that an issue of fact exists regarding whether the authorized retailers were agents of Dish."[1104]

The plaintiffs argued that "even if express agency did not exist, the [Illinois] Court can find an agency based on apparent authority or ratification."[1105] And the plaintiffs asked the Court to follow "examples [provided in the FCC Order] of evidence that would be sufficient to prove an implied agency or agency by ratification."[1106] The Court found that the plaintiffs' theory faced "significant problems of proof[,]" because the plaintiffs had presented "almost no evidence on what the recipients of OE Retailers' telemarketing calls reasonably believed, whether DISH affirmed the OE Retailers' actions, or what representations the OE Retailers made during their telemarketing calls. And the Court declined to follow the FCC Order's guidance on agency law; the Court explained that the "FCC is not an expert on federal common law of agency and its comments about agency law in the FCC [Order] are not entitled to deference."[1107]

2. DISH Litigates *Krakauer* from the filing of the Complaint, through the Treble Damages Opinion.

a. The *Krakauer* Complaint Is Filed

On April 18, 2014, plaintiff Thomas H. Krakauer filed a 12-page Class Action Complaint against DISH in the United States District Court for the Middle District of North Carolina, Durham Division (North Carolina Court).[1108] Krakauer amended his complaint on December 1,

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1104 *Id*. at 1017.

1105 *Id.* at 1017-18.

1106 *Id.* at 1018.

1107 *Id.*

1108 Ex. 70, Class Action Complaint, *Krakauer*, No. 14-cv-333 (M.D.N.C. Apr. 18, 2014) (D.I. 1).

2014.[1109] Krakauer asserted two counts for violations under the TCPA. Specifically, he asserted that OE Retailer SSN, in violation of the TCPA, made calls to Krakauer and class members whose numbers were on the National Registry and on DISH's and SSN's internal DNC lists, and that DISH was responsible for these calls by SSN.[1110]

b. The North Carolina Court Grants in Part and Denies in Part DISH's Motion for Summary Judgment as to Vicarious Liability.

On May 7, 2015, DISH moved for summary judgment in *Krakauer*.[1111] Among other things, DISH sought summary judgment on Krakauer's "theories of vicarious liability" on the grounds that "SSN lacked actual authority to act on Dish's behalf" and "that there is no evidence to support vicarious liability under the theories of apparent authority and ratification."[1112]

In September 2015, the North Carolina Court granted the motion for summary judgment "to the extent it [was] based on lack of evidence of apparent authority or ratification."[1113] "The Court conclude[d] as a matter of law that [Krakauer had] not presented evidence sufficient to give rise to a disputed question of material fact" as to these theories of vicarious liability.[1114]

1109 Ex. 71, First Amended Class Action Complaint, *Krakauer*, No. 14-cv-333 (M.D.N.C. Dec. 1, 2014) (D.I. 32).

1110 *Id.* ¶¶ 54-59.

1111 On May 7, 2015, the *Krakauer* plaintiff also filed a motion for summary judgment. The plaintiff's motion sought summary judgment on DISH's "affirmative defenses of prior express consent and established business relationship" on the ground that these defenses were rejected in *U.S. v. DISH* by the Illinois Court's Summary Judgment Opinion. Ex. 75, Order at 1, *Krakauer*, No. 14-cv-333 (M.D.N.C. Apr. 19, 2016) (D.I. 169). In April 2016, the North Carolina Court denied the plaintiff's motion without prejudice because "it [was] not clear that the Illinois district court's decision on partial summary judgment [was] final." *Id.* at 1-2.

1112 Ex. 73, Order at 1-2, *Krakauer*, No. 14-cv-333 (M.D.N.C. Sept. 22, 2015) (D.I. 113).

1113 Ex. 74, Order at 1, *Krakauer*, No. 14-cv-333 (M.D.N.C. Sept. 29, 2015) (D.I. 118).

1114 *Id.*

The Court denied DISH's request for summary judgment based upon DISH's contention that SSN lacked actual authority to act for DISH, concluding that disputed questions of material fact existed on this issue.[1115]

c. The North Carolina Court Issues Evidentiary Ruling Prohibiting the Plaintiff from Using the 2009 AVC to Show That DISH Did Not Fulfill the Agreement.

Prior to trial, the parties disputed the extent to which Krakauer could use the 2009 AVC at trial. Krakauer sought to reference the 2009 AVC in his opening statement to establish that (1) DISH did not fulfill its obligations under the 2009 AVC and DNC Laws, and (2) DISH had the right to control OE Retailers such as SSN.[1116] DISH moved to exclude the 2009 AVC on the grounds that it was prejudicial to allow Krakauer to use a settlement document from an enforcement action by state AGs.[1117] DISH explained that Krakauer's use of the 2009 AVC, which contained allegations by the AGs and provided for a $5.9 million payment by DISH, would suggest DISH "did things" incorrectly even though the 2009 AVC was "not in any way an admission of anything[.]"[1118] Furthermore, DISH argued that Krakauer would attempt to use the 2009 AVC "to say, in essence, that this contract was breached," even though "there's no claim by any attorney general that this contract was breached."[1119]

1115 Ex. 73, Order at 1-2, *Krakauer*, No. 14-cv-333 (M.D.N.C. Sept. 22, 2015) (D.I. 113). The Court denied the remaining aspect of DISH's summary judgment motion, which concerned the plaintiff's internal DNC list violations claims, finding that there were questions of material fact. *Id*.

1116 Ex. 82, Transcript of Telephone Conference at 11, 15, *Krakauer*, No. 14-cv-333 (M.D.N.C. Jan. 6, 2017) Pre-Trial Conference) (D.I. 316).

1117 *Id.* at 10.

1118 *Id.* at 9-10.

1119 *Id.* at 17.

On January 6, 2017, the North Carolina Court granted DISH's motion to exclude in part, and denied the motion in part. The Court ruled that Krakauer could reference in his opening statement "those parts of [the 2009 AVC] relevant to control," but that he could not "go beyond that and say, you know, all these attorneys generals said DISH did something wrong and in response DISH compromised."[1120] This ruling thus precluded Krakauer from using the 2009 AVC to establish that DISH violated DNC Laws. The ruling also made clear that DISH's compliance with the 2009 AVC was not at issue in the *Krakauer* litigation, and DISH therefore did not present evidence to establish its compliance with the 2009 AVC.[1121]

d. The *Krakauer* Parties Submit Competing Proposed Jury Instructions on the Question of Whether SSN Was DISH's Agent.

Over the course of 2016, the parties submitted multiple competing proposals for jury instructions and related briefing.[1122] These proposals differed over, among other things, how to instruct the jury to assess the question of whether Subject Retailer SSN was DISH's agent. Following the submission of the initial proposals, the Court instructed the parties to submit revised proposals and, as guidance, provided the parties with "the simplest jury instructions [it] could find."[1123]

DISH ultimately proposed that the agency instruction should inform the jury that "[i]n order to prove that SSN was DISH's agent, [Krakauer] must show that (1) DISH and SSN agreed that SSN had the authority to act as DISH; and (2) SSN agreed to be subject to DISH's day-to-

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1120 *Id.* at 22.

1121 *See* Ex. 94, Public Redacted Page Proof Opening Brief for Defendant-Appellant DISH Network LLC, *Krakauer*, No. 18-1518 (4th Cir. Oct. 4, 2018) (D.I. 38).

1122 *See* Exs 77-78, 80-81, Docket Nos. 164-65, *Krakauer*, No. 14-cv-333 (M.D.N.C.).

1123 Ex. 76 Transcript of Pretrial Settlement Conference Tr. at 5-6, *Krakauer*, No. 14-cv-333 (M.D.N.C. Apr. 21, 2016) (D.I. 174).

day direction and control over the method and the means by which SSN carried out marketing activities."[1124] DISH further sought to instruct the jury that if there is an agency relationship, DISH is not liable for actions of SSN "outside the scope of [SSN's] authority" or "adverse[] to DISH interests[.]"[1125] DISH's proposal explained that "[i]n considering the scope of authority, you can consider whether an agent went beyond the limited authority given to it by the principal."[1126] DISH's proposal also explained that "Where the conduct of the agent is adverse to the interests of the principal, or the agent has a motive in concealing its conduct from the principal. Then the principal is not responsible for that conduct."[1127]

Krakauer, in contrast, proposed the following agency instruction: "if you find by the greater weight of the evidence that Dish, by its actions granted SSN actual authority that included the authority to telemarket," then SSN was DISH's agent.[1128] Krakauer further sought to instruct the jury, among other things, that "if you find that Dish had the *authority or right* to control the manner and means of SSN's telemarketing, whether or not that control was ever exercised, then Dish may be vicariously liable."[1129] And Krakauer proposed instructing the jury

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[1124] Ex. 77 Defendant DISH Network L.L.C.'s Revised Proposed Jury Instructions, at 4, *Krakauer*, No. 14-cv-333 (M.D.N.C. May 12, 2016) (D.I. 174); Ex. 80, Defendant DISH Network LLC's Second Revised Proposed Jury Instructions at 5, *Krakauer*, No. 14-cv-333 (M.D.N.C. Aug. 29, 2016).

[1125] Ex. 77 Defendant DISH's Revised Proposed Jury Instructions, at 4-5, *Krakauer*, No. 14-cv-333 (M.D.N.C. May 12, 2016) (D.I. 174); Ex. 80, Defendant DISH's Second Revised Proposed Jury Instructions, at 5, *Krakauer*, No. 14-cv-333 (M.D.N.C. Aug. 29, 2016) (D.I. 228).

[1126] Ex. 80, Defendant DISH's Second Revised Proposed Jury Instructions, at 5, *Krakauer*, No. 14-cv-333 (M.D.N.C. Aug. 29, 2016) (D.I. 228).

[1127] *Id.*

[1128] Ex. 78, Plaintiff's Revised Proposed Jury Instructions, at 6-7, *Krakauer*, No. 14-cv-333 (M.D.N.C. May 12, 2016) (D.I. 174); Ex. 81, Plaintiffs' Second Revised Proposed Jury Instructions, at 7, *Krakauer*, No. 14-cv-333 (M.D.N.C. Aug. 29, 2016) (D.I. 228).

[1129] *Id.*

that "written limits" on conduct, such as written prohibitions on illegal conduct, "are not effective if the parties' conduct is not consistent with the written limits."[1130]

Following multiple meetings about jury instructions, after trial, the North Carolina Court issued the jury instructions setting forth its articulation of the agency issue and the governing principles. The North Carolina Court asked: "Was SSN acting as DISH's agent when it made the telephone calls at issue from May 11th, 2010, through August 1, 2011?"[1131] As guidance for answering this question, the Court accepted certain language proposed by Krakauer and provided that "[i]f [Krakauer] proves to you by the greater weight of the evidence that SSN was acting on behalf of DISH in connection with its telemarketing, that is, that SSN was DISH's agent and was acting in the course and scope of that agency, then you would answer this issue 'yes.'"[1132] The Instructions explained that authority to act on one's behalf "may be expressly granted" or "it may be implied from the circumstances[.]"[1133] The Instructions also explained: "[i]n order for agency to exist, the principal must have the power to direct and control the agent's actions, but it is not necessary that that power be exercised."[1134]

With respect to the scope of an agent's authority, the North Carolina Court instructed:

> Generally speaking, actions taken against the principal's interest are not within the scope of the agent's authority. The agent's determination that an action is in the principal's interest must be reasonable . . . . . If the principal consents or acquiesces in the conduct, even if the conduct or act is illegal, then the agent may reasonably conclude that the conduct is in the principal's best interests. To decide that the principal acquiesced or consented,

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1130 *Id.*

1131 Ex. 87, Trial Transcript, at 101:19-21, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 18, 2017) (D.I. 306) (Jury Instructions).

1132 *Id.* at 102:7-11.

1133 *Id.* at 102:24-103:1.

1134 *Id.* at 127:9-11.

> you must find that the principal knew of prior similar activities by the agent and consented [to them] or did not object [to them].[1135]

The North Carolina Court added that written limits on SSN's authority, including DISH's characterization of its relationship with SSN, are not "binding or controlling," but may be considered."[1136]

The Jury Instructions did not state that the agent must be empowered to act on the principal's behalf in the area leading to the violations at issue, nor that the principal's control over the agent must be with respect to the actions causing the violations.

e. The Jury Enters a Verdict Against DISH.

On January 19, 2017, following a six day trial, the jury issued its verdict. First, it found that SSN was "acting as Dish's agent when it made the telephone calls at issue from May 11, 2010, through August 1, 2011." Second, it found that SSN made and Krakauer and class members received calls in violation of the TCPA—specifically, "at least two telephone solicitations to a residential number in any 12-month period by or on behalf of Dish, when their telephone numbers were listed on the National [DNC] Registry."[1137] Finally, the jury awarded $400 for each call made in violation of the TCPA.[1138]

f. The North Carolina Court Trebles Damages Against DISH.

On May 22, 2017, the North Carolina Court issued a Memorandum Opinion and Order trebling damages awarded by the jury against DISH.

1135 *Id.* at 128:6-17.

1136 *Id.* at 103:19.

1137 Ex. 88, Jury Verdict Sheet at 1, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 19, 2017) (D.I. 292).

1138 *Id.* at 2.

The Court held that to recover treble damages, Krakauer had to show that DISH "'willfully or knowingly violated' the relevant provisions of the TCPA and must persuade the Court, acting in its discretion, that trebling is appropriate."[1139] While noting that "a finding of willfulness does not require bad faith," the Court stated that "it does require that the caller 'have reason to know, or should have known, that his conduct would violate the statute.'"[1140] And a "principal is liable for the willful acts of his agent committed within the scope of the agent's actual authority."[1141] Applying this standard, the Court found that SSN willfully and knowingly violated the TCPA and that DISH was liable for SSN's willful acts.[1142] In support, the Court found that SSN made tens of thousands of violative calls to numbers on the National Registry, including multiple calls to Krakauer despite knowing that he had asked not to receive further calls, and knew its calling lists had not been scrubbed in any relevant time period.[1143]

The Court found that its willfulness finding would be the same if it looked at the willfulness of DISH's conduct. The Court explained that DISH "knew that SSN had committed many TCPA violations over the years[,]" "knew SSN's uncorroborated and conclusory explanations—that violations were inadvertent or the product of rogue employees—were not credible[,]" "knew SSN was not scrubbing all its lists or keeping call records[,]" and "ignored SSN's compliance with telemarketing laws and, despite promises to forty-six state attorneys general, it made no effort to monitor SSN's compliance with telemarketing laws."[1144]

1139 *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *9 (M.D.N.C. May 22, 2017).

1140 *Id*.

1141 *Id.* at *10.

1142 *Id.* at *12-13.

1143 *Id.* at *10.

1144 *Id.* at *11.

Accordingly, DISH "knew or should have known that its agent, SSN, was violating the TCPA, and Dish's conduct thus willfully and knowingly violated the TCPA."[1145]

While its willfulness findings alone did not require the North Carolina Court to treble damages, the Court concluded that "treble damages are appropriate here because of the need to deter Dish from future violations and the need to give appropriate weight to the scope of the violations."[1146] It stated: "Dish's TCPA compliance policy was decidedly two-faced. Its contracts allowed it to monitor TCPA compliance, and it told forty-six state attorneys general that it would monitor and enforce marketer compliance, but in reality it never did anything more than attempt to find out what marketer had made a complained-about call."[1147] "According to DISH's co-founder [DeFranco], the Compliance Agreement changed nothing: 'This is how we operated even prior to the agreement as it related to telemarketing.'"[1148]

The North Carolina Court trebled the jury's $400/violation award to $1,200/violation, for a total award of $61,342,800.[1149]

Nature of Violation	Number of Calls by SSN	Total Civil Penalty for TCPA Violations
Calls to Numbers on the National Registry	51,119	$61,342,800

3. In *U.S. v. DISH*, the Illinois Court Issues Findings of Fact and Conclusions of Law.

On June 5, 2017, following trial, the Illinois Court issued Findings of Fact and Conclusions of Law ("Post-Trial Opinion") awarding $280 million and a permanent injunction

1145 *Id.* at *10.

1146 *Id.* at *12.

1147 *Krakauer*, 2017 WL 2242952, at *12.

1148 *Id.* at *7 (citing Ex. 86, Trial Transcript, at 168:17-169:6, *Krakauer*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 13, 2017) (DeFranco Testimony).

1149 *Id.* at *13.

against DISH for calls by the Subject Retailers as well as calls by DISH and its Authorized Telemarketers made in violation of DNC Laws. As reflected in the charts below, approximately $257.5 million of the monetary award was attributable to calls made by the Subject Retailers and approximately $22.5 million was attributable to calls made by DISH (directly or through Authorized Telemarketers).

a. The Illinois Court Finds DISH Responsible for the Subject Retailer Calls Made in Violation of the TCPA.

With its December 2014 Summary Judgment Opinion, the Illinois Court left open the question of whether the Subject Retailers' were DISH's agents and DISH was therefore liable for the Subject Retailers' TCPA violations. In its Post-Trial Opinion, the Illinois Court ruled against DISH to determine that the Subject Retailers were DISH's agents.[1150]

Looking to the general agency legal principles discussed in the Summary Judgment Opinion (*see* Factual Findings Section X.D.2.b), the Illinois Court specifically determined that DISH had an agency relationship with the Subject Retailers with respect to marketing DISH programming because DISH "had the authority to exert control over the marketing of Dish Network programming conducted by [OE] Retailers."[1151] The Illinois Court based this determination on, among other things, the following findings: the Subject Retailers entered into a Retailer Agreement by which they agreed to act for DISH to market DISH service and by which DISH obtained authority to control all aspects of such marketing; the Subject Retailers used DISH's logo with the phrase "authorized dealer"; and DISH, around 2008 and 2009, began exerting control and increasing monitoring of the Subject Retailers' telemarketing, including by

[1150] The Illinois Court's ruling as to the Subject Retailers' agency relationship with DISH also resulted in DISH being held liable under the TSR for making calls to numbers of persons who told Subject Retailers that they wished to be placed on the Subject Retailers' DNC Lists. *U.S. v. DISH*, 256 F. Supp. 3d at 937-39.

[1151] *Id.* at 922.

requiring the Subject Retailers to provide their internal DNC lists to PossibleNow, visiting the Subject Retailers weekly, and implementing a Quality Assurance program for OE Retailers, including the Subject Retailers.[1152]

The Illinois Court rejected each of DISH's arguments that it did not control the Subject Retailers and thus had no agency relationship:

First, "Dish argue[d] that Dish did not control marketing methods by [OE] Retailers because [OE] Retailers wrote their own scripts and secured their own leads."[1153] But the Illinois Court found that "Dish representatives revised scripts and required [OE] Retailers to follow the revisions."[1154] The Illinois Court noted that "[t]he fact that Dish may rarely have exercised these indicia of authority to control does not matter[;] [t]he issue for purposes of agency analysis is the existence of the authority, not the actual use of the authority."[1155]

Second, DISH argued that the Retailer Agreement did not give DISH the authority to control the Subject Retailers' marketing of DISH programming. The Illinois Court disagreed based on Section 7.3 of the Retailer Agreement, which stated that Retailers "'shall take all actions and refrain from taking any action, as requested by [DISH] in connection with the marketing, advertisement, promotion and/or solicitation of orders for Programming and the sale of DISH DBS systems.'"[1156] Dubbing this Section the "absolute power clause," the court found that it meant that Dish Sales Managers could direct [Retailers] to act by telling [Retailers],

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1152 *Id.* at 921-22.

1153 *Id.* at 922.

1154 *Id*.

1155 *Id*.

1156 *Id*.

'Because I said so[.]'"[1157] The Illinois Court interpreted Section 7.3 as applying to any Retailer conduct, not simply disclosures or the terms of the DISH service, and found the Retailers to be DISH's agents on that basis.[1158] The SLC did not find evidence that Management interpreted Section 7.3 of the Retailer Agreement to be an "absolute power clause" in the manner found by the Illinois Court during the Investigation Period.

Third, DISH argued that "[OE] Retailers were completely separate companies and as such were independent contractors."[1159] The Illinois Court agreed, but found that an independent company "can be an agent with respect to work performed for a principal."[1160]

The Illinois Court further rejected DISH's argument that "even if the [OE] Retailers were marketing agents of DISH, their illegal telemarketing practices" were outside the scope of their authority.[1161] The court explained that "[a]n agent has authority to act to further the principal's objectives, 'as the agent reasonably understands the principal's manifestations and objectives[,]'" and that "the principal is liable for the acts of the agent to further the principal's purposes unless the agent acts entirely for the agent's benefit only."[1162] Because the Subject Retailers marketed DISH programming, the court found that the Retailers "acted at least partially for Dish's benefit."[1163] Because the Retailers acted in part for DISH's benefit, the Illinois Court found them to be DISH's agents.

1157 *Id*. at 855 ("Musso testified that [Section 7.3] meant that Mason could tell the Retailer, 'Because I said so.'").

1158 *Id*. ("The Court finds that the 'absolute power' clause meant that Dish Sales Managers could direct Order Entry Retailers to act by telling Order Entry Retailers, 'Because I said so.'").

1159 *Id*. at 922.

1160 *Id*. at 923.

1161 *Id*.

1162 *Id*.

1163 *Id*.

Because it found that OE Retailers were DISH's agents, the Illinois Court held that DISH was liable for the Subject Retailers' violations.[1164]

b. The Illinois Court Finds That DISH, Authorized Telemarketers and the Subject Retailers Made Calls Made In Violation of DNC Laws and Awards $280 Million.

Based on the evidence presented,[1165] the Illinois Court found that the Subject Retailers made over 90 million calls in violation of DNC Laws, including calls to numbers on the National Registry, calls to numbers on internal DNC lists and pre-recorded calls.[1166] The Illinois Court further found that DISH and its Authorized Telemarketers made approximately 7.6 million calls in violation of the DNC Laws.[1167] Based on these findings and its rulings as to DISH's liability for the Subject Retailer's violations in its Summary Judgment Opinion and Post-Trial Opinion, the Illinois Court awarded $280 million against DISH, of which only $22.5 million was attributable to DISH (including its Authorized Telemarketers).

[1164] Based on its determination that the Subject Retailers' were DISH's agents, the Illinois Court also determined that DISH was responsible for the Subject Retailers' state DNC Law violations. *Id*. at 956.

[1165] *U.S. v. DISH* included multiple discovery disputes. One discovery dispute resulted in the Illinois Court precluding DISH "from using at summary judgment or trial any documents or information about the creation and scrubbing of telemarketing campaigns that [DISH] did not provide to [the] [p]laintiffs in discovery." *U.S. v. DISH*, 292 F.R.D. 593, 603 (C.D. Ill. 2013). This ruling restricted DISH's ability to present evidence of its practices to prevent violative calls. And in considering whether DISH was entitled to protection by certain DNC law safe-harbors, the Court determined that DISH failed to present sufficient evidence of practices in place to prevent violative calls. *See, e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d at 931-32, 954, 959.

[1166] *See, e.g.*, *id.* at 914-15, 918, 919, 943-48.

[1167] *See, e.g.*, *id.* at 913, 917-18, 915, 919-20, 930, 943-45, 948, 953-54. The Illinois Court also found that DISH, in violation of the TSR, "knew about" or "consciously avoided knowing about" an OE Retailer's use of violative prerecorded calls and therefore provided "substantial assistance or support" to the Retailer. *Id.* at 928-29. The court based this determination on its findings that DISH employees, but not officers or directors, were aware that the Retailer was making the violative prerecorded calls and continued paying the OE Retailer. *Id.* at 913, 917-18, 915, 919-20, 930, 943-45, 948, 954.

The following three tables set forth "the number of calls for which Dish [was found to be] liable for monetary relief,"[1168] and allocate the Illinois Court's total monetary awards for each set of violations (TSR, TCPA and State DNC Laws) pro rata amongst the calls within that category:[1169]

Violations Found and Monetary Awards

TSR Violations: Counts I-IV		
Nature of Violation	**Subject Retailer Calls[1170]**	**DISH Calls[1171]**
National Registry Calls	2,730,842	3,140,920
Internal DNC List Calls	8,072,766	1,043,595
Abandoned Calls	51,023,452	98,054
Total TSR Violations	**61,827,060**	**4,282,569**
Approximate Allocation of Penalties	**$157,116,992**	**$10,883,008**
Total TSR Penalty Awarded[1172]	**$168,000,000[1173]**	

[1168] 256 F. Supp. 3d at 919, 968.

[1169] In awarding monetary relief, the court considered primarily the following factors: (1) the statutory maximum civil penalty per violation, (2) DISH's culpability, (3) history of prior conduct, (4) ability to pay and (5) ability to continue business. *Id.* at 976-84. The Court awarded multiple monetary awards for certain calls made in violation of multiple DNC Laws, but exercised its discretion not to issue multiple awards for other such calls. *Compare id.* at 919 (declining to award double penalties for calls made in violation of two provisions of the TSR), *with id.* at 882, 948, 969, 972 (awarding penalties for 98,054 abandoned calls found to violate the TSR and further penalties for a subset of those calls found to violate the TCPA). Where the Court awarded multiple penalties for a call, that call is reflected in the tables multiple times.

[1170] "Subject Retailer Calls" in the following three tables include both calls made by Subject Retailers and calls made by DISH that were found to violate the DNC Laws based on the finding that the Subject Retailers were DISH's agents. *Id.* at 920, 924. For example, Subject Retailer Internal DNC List Calls includes calls "that Dish made to persons who told one or more [OE] Retailers that they did not wish to be called by or on behalf of Dish[,] *id.* at 919, and calls that Subject Retailers made "to persons who stated to Dish or the [Authorized Telemarketers] that they did not wish to receive telemarketing calls by or on behalf of Dish[.]" *Id.* at 924.

[1171] "DISH Calls" in the following three tables include calls by DISH and calls by DISH's Authorized Telemarketers that were found to have violated DNC Laws. *See, e.g.*, *id.* at 933, 943.

[1172] Under the FTC Act, the plaintiffs were entitled to "seek civil penalties" for TSR violations "committed 'with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by [the TSR].'" *Id.* The Illinois Court found that DISH acted with knowledge or knowledge fairly implied when it caused the Subject Retailers to make violative calls and when DISH and its Authorized

TCPA Violations: Counts V - VI		
Nature of Violation[1174]	**Subject Retailer Calls**	**DISH Calls**
National Registry and Internal DNC List Calls to Residents of Plaintiff States	1,043,981	1,607,976[1175]
Prerecorded Calls to Residents of Plaintiff States	13,523,115	32,892[1176]
Total TCPA Violations	**14,567,096**	**1,640,868**[1177]
Approximate Allocation of Penalties	**$75,495,976**	**$8,504,024**
Total TCPA Penalty Awarded	**$84,000,000**[1178]	

Telemarketers made violative calls. *Id.* at 915, 931, 935-38, 940-42. The Court reasoned that "Dish was a sophisticated enterprise with knowledgeable counsel" and therefore "would have known that it would be liable for telemarketers' actions." *Id.* at 932. With respect to DISH and its Authorized Telemarketers' violations, the Court added that "[t]he fact that Dish employees acted in *good faith* when they knowingly made such calls or that industry standards would allow such illegal calls is not a defense." *Id.* at 931 (emphasis added).

[1173] *Id.* at 983.

[1174] *See id.* at 971-72 (setting forth numbers of National Registry and Internal DNC List Calls found to violate TCPA); *id.* at 972-73 (enumerating Prerecorded Calls found to violate TCPA).

[1175] 614,332 of these calls were part of what the Illinois Court referred to as the "2,386,386 Registry and Internal List Calls", calls made by DISH to numbers that were on both the National Registry and on Retailers' Internal Lists. With respect to these calls, DISH attempted to present evidence that it had established business relationships, permitting Registry Calls to those numbers. The Illinois Court declined to consider DISH's defenses (*id.* at 944) on the grounds that approximately 97% the numbers called were on Retailers' Internal Lists and approximately 3% were on DISH's Internal List. *Id.* at 881.

[1176] DISH asserted that its "Prerecorded Calls did not violate the FCC Rule or TCPA because Dish had a Transaction-based Established Business Relationship with the intended recipients." Noting that for DISH to prove this exception to liability it "must show that the intended recipient purchased goods or services from Dish within 18 months of the call to establish a Transaction-based Established Business Relationship," the Illinois Court determined that DISH failed to provide sufficient evidence of such a relationship because its evidence did not provide the "last dates of purchase of Dish Network programming" by the call recipients. *Id.* at 949.

[1177] The Illinois Court found DISH not liable under California's DNC Laws for calls DISH and its Authorized Telemarketers made in violation of the TCPA because DISH established that it had an Existing Business Relationship with the recipients of those calls. *Id.* at 956-70. Unlike the TSR, California law did "not require [the] call to be within any certain time period since the last transaction, only that the person be a customer." *Id.* at 956.

[1178] *Id.* at 983.

State DNC Law Violations: Counts VII-X and XII[1179]		
Nature of Violation[1180]	**Subject Retailer Calls**	**DISH Calls**
Calls to Numbers on the National Registry Belonging to California Residents	None	374,584
Calls Resulting in Unfair Competition Under California Law	11,952,036	1,183,968
National Registry Calls to North Carolina Residents	18,250	85,093
Prerecorded Calls to North Carolina Residents	1,716,457	None
Internal DNC List Calls to Ohio Residents	None	41,788
Total State DNC Laws Violations	**13,686,743**	**1,685,433**
Approximate Allocation of Penalties	**$24,930,030**	**$3,069,970**
Total State DNC Laws Penalty Awarded	**$28,000,000**[1181]	

c. Permanent Injunction Granted

The Illinois Court also awarded the FTC and the Four States an injunction (1) requiring "Dish, its [Authorized Telemarketers], and major Retailers [i.e., high volume Retailers] to comply with the safe harbor provisions of the TSR and FCC Rule,"[1182] and (2) requiring DISH to "employ a telemarketing compliance expert to formulate a long-term plan to ensure compliance with the [DNC] Laws and to provide status reports"[1183] But, "tak[ing] into account Dish's concerns that certain of Plaintiffs' proposed injunctive provisions w[ould] drive Dish or its retailers out of business[,]" the Court rejected plaintiffs' proposals to, among other things,

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1179 The Illinois Court granted DISH judgment on Illinois's claims in Count XI that DISH or its Authorized Telemarketers made prerecorded calls in violation of the Illinois Telephone Dialers Act, 815 Ill. Comp. Stat. 505/2Z. *U.S. v. DISH*, 256 F. Supp. 3d at 962. The Illinois Court disagreed, finding that DISH had a valid Established Business Relationship defense. DISH's evidence showed that the calls at issue "were made to individuals who were at some time customers of Dish." *Id*. The Illinois law did not require the call to be "within any certain time period since the last transaction, only that the person be a customer or have a relationship." *Id.*

1180 *See id.* at 974-75 (setting forth numbers of calls in violation of state DNC laws).

1181 *Id.* at 983-84.

1182 *Id.* at 889.

1183 *Id.* at 990.

"impose an immediate ban on Dish's telemarketing" or require DISH to terminate a Retailer for a single mistake.[1184]

4. The North Carolina Court Denies DISH's Post-Trial Motions Seeking Judgment in its Favor or a New Trial.

On June 6, 2017, in *Krakauer*, the North Carolina Court denied post-trial motions filed by DISH seeking judgment as a matter of law or, in the alternative, a new trial.[1185] Through its motions, DISH argued, among other things, that "the verdict [was] against the clear weight of the evidence," the award of treble damages was excessive and the *U.S. v. DISH* decision precluded recovery by plaintiffs.[1186] With respect to the evidence, DISH emphasized its position that there was insufficient evidence to support the jury's finding that SSN was DISH's agent and that SSN acted within the scope of its authority.[1187] DISH contended, among other things, that "it lacked control over SSN's telemarketing" and "told SSN not to contact any person on the Registry and to scrub its lists with PossibleNow."[1188] DISH also pointed to contracts and written communications between DISH and SSN, "all of which stated that SSN was an independent contractor."[1189]

1184 *Id.* at 989.

1185 Ex. 90, Memorandum Opinion and Order at 1, *Krakauer*, No. 14-cv-0333 (M.D.N.C. June 6, 2017) (D.I. 341).

1186 Ex. 89, Brief in Support of Defendant DISH Network L.L.C.'s Motion For New Trial, at 1, *Krakauer,* No. 14-cv-0333 (M.D.N.C. Mar. 7, 2017) (D.I. 320); Ex. 91, Brief in Support of Defendant DISH Network L.L.C.'s Motion for Judgment as a Matter of Law and Remittitur, at 7, 15, *Krakauer,* No. 14-cv-0333 (M.D.N.C. July 19, 2017) (D.I. 347); Ex. 92, Memorandum Opinion and Order, *Krakauer,* No. 14-cv-0333 (M.D.N.C. Oct. 3, 2017) (D.I. 370).

1187 Ex. 90, Memorandum Opinion and Order at 1, *Krakauer,* No. 14-cv-0333 (M.D.N.C. June 6, 2017) (D.I. 341).

1188 *Id.* at 5, 8.

1189 *Id.* at 5-6, 8.

The North Carolina Court disagreed with DISH, explaining that "while a jury could have accepted Dish's evidence and contentions, it was not required to do so," and that the jury resolved conflicts in the evidence in favor of [Krakauer], as was its privilege."[1190] And the Court held that the damages were reasonable in light of the evidence presented.[1191] With respect to the *U.S. v. DISH* decision, the North Carolina Court held that "Dish waived its right to assert res judicata" and "failed to establish that it applies."[1192]

5. DISH Appeals the Judgments Entered by the Illinois and North Carolina Courts and Currently Awaits an Appellate Rulings.

DISH and its Director Defendants were surprised by the outcome of the *U.S. v. DISH* and *Krakauer* lawsuit. DISH has appealed both cases.

On October 6, 2017, DISH filed a Notice of Appeal from all judgments entered by the Illinois Court to the U.S. Court of Appeals for the Seventh Circuit. Appellate briefing commenced on February 22, 2018, and concluded on August 10, 2018. This briefing included two *amicus curiae* briefs filed by Cruise Lines International and the Product Liability Advisory Council in support of DISH's appeal. On September 17, 2018, the Seventh Circuit held oral argument on the appeal. The Seventh Circuit has yet to issue its ruling.

On May 4, 2018, DISH filed a Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit[1193] from orders entered by the North Carolina Court granting class

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1190 *Id.* at 5.

1191 *Id.* at 6, 9.

1192 Ex. 92, Memorandum Opinion and Order at 1, *Krakauer,* No. 14-cv-0333 (M.D.N.C. Oct. 3, 2017) (D.I. 370).

1193 Ex. 93, Notice of Appeal, *Krakauer*, No. 14-cv-0333 (M.D.N.C. May 4, 2018).

certification,[1194] denying DISH's motion to dismiss or decertify on standing grounds,[1195] trebling damages,[1196] denying DISH's post-trial motions under Federal Rules of Civil Procedure 50(b) and 59,[1197] denying Defendant's motion for judgment as a matter of law and remittitur[1198] and establishing post-trial procedures.[1199] On October 4, 2018, DISH filed its opening brief.[1200] Two *amicus curiae* briefs were filed, one by DRI, The Voice of the Defense Bar,[1201] and one by PLAC, the Product Liability Advisory Counsel.[1202] Krakauer's answering brief is due to be filed on or before January 4, 2019.

E. The Putative Derivative Action

1. Procedural History

On October 19, 2017, Plaintiff Plumbers Local Union No. 519 Pension Trust Fund filed a putatively derivative complaint in the Eighth Judicial District Court for the State of Nevada

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1194 Ex. 72, Memorandum Opinion and Order, *Krakauer*, No. 14-cv-0333 (M.D.N.C. Sept. 9, 2015) (D.I. 111).

1195 Ex. 79, Order, *Krakauer*, No. 14-cv-0333 (M.D.N.C. Aug. 5, 2016) (D.I. 218).

1196 *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952 (M.D.N.C. May 22, 2017).

1197 Ex. 90, Memorandum Opinion and Order, *Krakauer*, No. 14-cv-0333 (M.D.N.C. June 6, 2017) (D.I. 341).

1198 Ex. 92, Memorandum Opinion and Order, *Krakauer*, No. 14-cv-0333 (M.D.N.C. Oct. 3, 2017) (D.I. 370).

1199 Ex. 720, Memorandum Opinion and Order, *Krakauer*, No. 14-cv-0333 (M.D.N.C. July 27, 2017) (D.I. 351); Ex. 721, Order on Claims and Procedures, *Krakauer*, No. 14-cv-0333 (M.D.N.C. Apr. 5, 2018) (D.I. 441).

1200 *See* Ex. 94, Public Redacted Page Proof Opening Brief for Defendant-Appellant DISH Network *LLC*, *Krakauer*, No. 18-1518 (4th Cir. Oct. 4, 2018) (D.I. 38).

1201 *See* Ex. 95, Amicus Curiae Brief of DRI-The Voice of the Defense Bar in Support of Defendant and Appellant DISH Network LLC, *Krakauer*, No. 18-1518 (4th Cir. Oct. 10, 2018) (D.I. 41).

1202 *See* Ex. 96, Amicus Brief of Product Liability Advisory Council ("PLAC") in Support of Defendant-Appellant DISH Network's Appeal to Reverse the Judgment Against DISH Network, *Krakauer*, No. 18-1518 (4th Cir. Oct. 11, 2018) (D.I. 44).

against the Named Defendants.[1203] On November 13, 2017, Plaintiff City of Sterling Heights Police and Fire Retirement System, putatively derivatively on behalf of DISH Network Corporation, also filed a complaint against the Named Defendants.[1204] The District Court consolidated these two cases and required Plaintiffs to file a consolidated complaint by January 12, 2018.[1205]

On January 12, 2018, Plaintiffs filed a *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* (the Complaint).[1206]

On February 26, 2018, the Named Defendants filed a Motion to Dismiss the Verified Consolidated Shareholder Derivative Complaint. Nominal Defendant DISH Network Corporation filed a separate Motion to Dismiss on February 26, 2018 as well. Plaintiffs filed an Omnibus Opposition to the Motions to Dismiss on April 12, 2018. On May 3, 2018, the Named Defendants and DISH each filed a Reply in Support of the Motions to Dismiss.

On April 24, 2018, the SLC filed a Motion for Stay Pending Investigation of the Special Litigation Committee of DISH Network Corporation. Plaintiffs filed an Opposition on May 8, 2018, and the SLC filed a Reply on May 11, 2018. On May 15, 2018, the Court granted the SLC

1203 *See* Verified Shareholder Derivative Complaint for Breach of Fiduciary Duties of Loyalty and Good Faith, Gross Mismanagement, Abuse of Control, Corporate Waste and Unjust Enrichment, Eighth Judicial Dist. Court, Clark Cty., Nev., Case No. A-17-763397-B (Dist. Ct. Oct. 19, 2017).

1204 *See* Verified Stockholder Derivative Complaint for Breach of Fiduciary Duty, Waste of Corporate Assets, and Unjust Enrichment, Eighth Judicial Dist. Court, Clark Cty., Nev., Case No. A-17-764522-B (Dist. Ct. Nov. 13, 2017).

1205 *See* Stipulation Re Service of Process, Consolidating Cases and Appointing Lead and Liaison Counsel and [Proposed] Order Thereon (Dec. 22, 2017).

1206 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 (the Complaint), Eighth Judicial Dist. Court, Clark Cty., Nev., Case No. A-17-763397-B (Dist. Ct. Jan. 12, 2018).

a six-month stay until November 27, 2018, to conduct its investigation, and required the SLC to file its Report on or before November 13, 2018. By a Stipulation and Order to Extend Stay and the SLC's Deadlines to File Report and Motion, the Court extended the stay to January 7, 2019, the deadline for the SLC to file its Report to November 27, 2018, and the SLC's deadline to file any Motion based upon its Report to December 19, 2018.

2. Claims Asserted in the Complaint

The Complaint asserts five "Causes of Action" against all of the Named Defendants: (1) Breach of Fiduciary Duties of Loyalty and Good Faith; (2) Gross Mismanagement; (3) Abuse of Control; (4) Corporate Waste; and (5) Unjust Enrichment.[1207] However, Plaintiffs subsequently requested leave to withdraw the claims for abuse of control and gross mismanagement.[1208] The SLC has separately analyzed each of the remaining individual claims set forth in the "Causes of Action."

a. Breach of Fiduciary Duties of Loyalty and Good Faith

Plaintiffs' breach of fiduciary duty claim alleges that the Named Defendants breached their fiduciary duties of loyalty and good faith to DISH, thereby causing damage to DISH. Specifically, the Complaint alleges that DISH's "disdainful approach towards the [2009 AVC], as well as the [TCPA] could not have flourished within Dish's operations in general, and its so-called 'Compliance Department' in particular, without the knowledge and consent of Dish's directors."[1209] Plaintiffs allege that the Named Defendants "participated in, approved and/or permitted" violations by DISH of the TCPA and the 2009 AVC.[1210] Plaintiffs allege that the

1207 *Id.*

1208 *See* Pls.' Opp. at 5 n.2.

1209 Compl. ¶ 55.

1210 *Id.* ¶ 59.

"[Named] Defendants' disdain for legal compliance has severely damaged the Company and their leadership has unnecessarily exposed Dish to massive liability for violating the federal telemarketing laws."[1211]

In a claim that Plaintiffs have since withdrawn,[1212] the Complaint also alleges that the Named Defendants breached their fiduciary duties by failing to adequately supervise DISH Management's compliance with the TCPA and the 2009 AVC. In this regard, the Complaint alleged that "[d]espite the [2009] AVC's requirements, while under the stewardship of Defendants, DISH failed to implement systems or controls to ensure TCPA compliance" and compliance with the provisions of the 2009 AVC.[1213]

The Complaint alleges that DISH has been damaged as a result of the Named Defendants' conduct, including: (i) the losses DISH may suffer as a result of findings made by the United States District Court for the Middle District of North Carolina in *Krakauer*[1214] that DISH breached the TCPA and 2009 AVC in 2010 and 2011; (ii) any amounts that DISH is required to pay as a result of the 2003-2011 violations of the TCPA, 2009 AVC and the Telemarketing Consumer Fraud and Abuse Prevention Act ("TCFAPA") found by the United States District Court for the Central District of Illinois in *U.S. v. DISH*; and (iii) any damages

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1211 Compl. ¶ 8.

1212 *See* Pls.' Opp. at 27 (In a section titled "This Is Not a *Caremark* Claim" Plaintiffs state that "Under *Caremark*, 698 A.2d 959, director liability is predicated upon ignorance of liability-creating activities. That is not the case here. The Compliance Agreement reflects the Dish's Board knowledge [that] the Company's telemarketing practices did not comply with legal requirement of the TCPA. . . . Unlike in *Caremark*, plaintiffs here seek to hold defendants' accountable for their own actions, which exposed Dish to $65.1 million in damages.").

1213 Compl. ¶¶ 65, 70 (alleging Director Defendants "abandoned and abdicated their responsibilities and fiduciary duties to competently direct and manage Dish's business in accordance with the laws applicable to its operations in general and the Compliance Agreement and the TCPA in particular").

1214 *Id.* ¶¶ 48-49.

awarded in other potential lawsuits brought against DISH. The Complaint also seeks to recover punitive damages against the Named Defendants.[1215]

Despite this expansive description of the damages sought, the Complaint alleges only that the Named Defendants breached their fiduciary duties in a manner that has caused damage to DISH with respect to the Claims Period: July 2009 (when DISH entered into the 2009 AVC) to the end of 2011 (when the last calls for which the judgments provided damages were made). The SLC has evaluated whether DISH may have claims arising from these issues throughout the Investigation Period, but Plaintiffs have proposed no theory for any recovery outside of the Claims Period.

b. Corporate Waste

Plaintiffs' claim for corporate waste alleges that the Named Defendants committed waste by "causing the Company to pay improper compensation . . . to themselves and other Dish insiders who breached their fiduciary duties owed to Dish."[1216] Plaintiffs allege that the payments were "not justified," and therefore "improper compensation," because the Named Defendants committed the breaches of fiduciary duty identified in Count I.[1217] The Complaint alleges that DISH "received no benefit" from the compensation paid to the Named Defendants.[1218] As damages for the claim, the Complaint appears to seek restitution from the Named Defendants of this compensation and benefits.[1219]

1215 *Id.* ¶ 26.

1216 *Id.* ¶¶ 77-79.

1217 *Id.* ¶¶ 33, 78.

1218 *Id.* ¶ 78.

1219 *Id.*

c. Unjust Enrichment

Plaintiffs' unjust enrichment claim alleges that the Named Defendants were "unjustly enriched at the expense of and to the detriment of Dish."[1220] The Complaint alleges that the unjust enrichment was in the form of compensation paid to the Defendants.[1221] Specifically, Plaintiffs allege that Defendants received "$24,536,520 in salaries, bonuses, fees, stock awards and other incentive-based compensation not justified by Dish's lawless behavior while under their direction."[1222] The Complaint alleges that the Named Defendants' compensation was unjust because the Named Defendants committed breaches of their fiduciary duties.[1223]

Apparently as part of their Claim for unjust enrichment, Plaintiffs allege in the Complaint that certain Director Defendants sold DISH stock while in possession of the allegedly material non-public awareness of DISH's alleged DNC violations.[1224]

XI. Director Stock Trading

Because the Plaintiffs included allegations that the Named Defendants sold DISH stock while in possession of non-public material information in the Complaint, the SLC's Investigation included a review of DISH's insider trading policies as they applied to the Director Defendants during the Investigation Period and the Director Defendants' compliance with those policies.

A. DISH's Insider Trading Policy

DISH applied the insider trading policy dated May 14, 2003 during the Investigation Period.[1225] The insider trading policy applies to all DISH employees and non-employee Board

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1220 *Id.* ¶¶ 80-84.

1221 *Id.* ¶¶ 82, 83.

1222 *Id.* ¶ 10.

1223 *Id.* ¶¶ 82-83.

1224 *Id.* ¶¶ 19-23, 25, 50, 81.

members.[1226] The policy prohibits insider trading. Thus, if any Board member or employee of DISH possesses material non-public information, they are generally prohibited from purchasing, selling or otherwise trading in DISH stock.[1227]

Pursuant to DISH's insider trading policy, absent a 10b5-1 Plan, Board members who are not in possession of material non-public information are permitted to trade in DISH stock at any time other than during announced Blackout Periods.[1228] Effectively, Board members may only trade during what is referred to as an "open window." The window for trading is typically opened two days after DISH files a Form 10-Q and is kept open for two to three weeks until the end of the month. The trading window is opened for this period because this is the period when the market has the most information about DISH given the recent filing of the Form 10-Q. If DISH has a development it believes is material, but which is not disclosed in the Form 10-Q, DISH will not open the trading window after the filing of the Form 10-Q. In other words, DISH will impose a Blackout Period during which certain employees and all Board members are prohibited from trading in DISH's stock. For example, DISH sometimes does not open the trading window for individuals with relevant non-public knowlege after filing a Form 10-Q when a strategic transaction is ongoing.

Even when the trading window is open, Board members must first clear trades in DISH stock with DISH's inside counsel before executing any trades. When DISH's inside counsel provides trading approval, the approval will typically state that the trading window is open, but

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1225 Ex. 792, EchoStar Insider Trading Policy and Related Conduct (May 14, 2003); Ex. 454, DISH Network Corporation Insider Trading Policy and Related Conduct (Nov. 27, 2012). The name of the policy was changed when EchoStar Corp. changed its name to DISH.

1226 *Id.*

1227 *Id.*

1228 *Id.*

that the Board member must independently determine whether he or she possesses material non-public information. Board members are not allowed to trade in DISH's stock when they believe there may be an insider trading issue. The clearance provided to Board members states that the Board members are clear to trade, subject to their own determination that they do not possess material non-public information about DISH.

The Director Defendants cleared their trades with DISH's inside counsel during the Investigation Period.[1229]

B. Additional Controls to Prevent Insider Trading

DISH's insider trading policy was made available on an internal website, and Board members were advised to review the policy. DISH has also emailed the policy to individuals on the "insider trading list" at various times At the present time, DISH's inside counsel emails this policy to those on DISH's "insider trading list" on a quarterly basis to remind them of the policy and advise them that they should contact DISH's Legal Department for trading approval.

Moreover, DISH's Legal Department has additional control over insiders' ability to trade in DISH stock. Before a trading window opens, DISH's in-house counsel will place flags on insiders' Fidelity accounts. With these flags in place, the insiders cannot make trades unless they make a "live" call requesting a trade. Furthermore, Board members seeking to trade shares kept at places other than Fidelity (e.g., Charles Schwab) must inform their brokers that they are

[1229] *See, e.g.*, Ex. 737, Email from J. DeFranco to B. Ehrhart (Aug. 15, 2011), SLC DNC Investigation 0010681 (approval to DeFranco for trading on Aug. 12, 2011 and Aug. 15, 2011); Ex. 432, Email from K. Ward to N. Primack (May 9, 2011), SLC DNC Investigation 0010682 (approval to Moskowitz for trading on May 9, 2011); Ex. 455, Email from E. Pagels to R. Rosales (Dec. 3, 2012), SLC DNC Investigation 0010687 (approval to Clayton for trade on Nov. 30, 2012); Ex. 466, Email from E. Pagels to S. Goodbarn (May 16, 2013), SLC DNC Investigation 0010689 (noting trades including by Clayton).

"Section 16 insiders[.]" After receiving this disclosure, brokers will typically call in-house counsel at DISH to confirm that the trading window is open before placing a trade.

The SLC discovered no evidence suggesting that, during the Investigation Period, any Director Defendant had executed trades in DISH stock without pre-clearing it with DISH's in-house counsel.

C. 10b5-1 Plans/Structured Trading Plans

Board members sometimes trade in DISH stock through 10b5-1 plans (also known as structured trading plans), which are contracts to trade based upon pre-arranged triggers concerning price and dates (i.e., triggers outside of the stockholder's control).[1230] While Board members are obligated to file Form 4s themselves, to the extent DISH is aware of directors' planned purchases or sales of stock, DISH provides the service of filing Form 4s for Board members; Board members generally accept DISH's offer of assistance.

[1230] Stock can be traded pursuant to a 10b5-1 Plan during a blackout period because the decision to make the trade was made when the Plan was created, not when the trade occurred. Ex. 454, DISH Network Corp. Insider Trading Policy and Related Conduct (Nov. 27, 2012), SLC DNC Investigation 0000411 at 414-15.

ANALYSIS AND CONCLUSIONS[1231]

The SLC has determined that it would not be in the best interests of DISH to pursue the Claims: There is no significant possibility that DISH might prevail on the Claims, and the Claims or similar issues that DISH might raise lack sufficient merit to justify litigation. The Claims also are likely barred by the statute of limitations; their pursuit would be complicated by the pendency of the Underlying DNC Actions and would burden DISH; and pursuing the Claims would increase the risk to DISH of further DNC liability and interfere with DISH's appeals from the Underlying DNC Actions.

Plaintiffs would have DISH pursue Claims for: (1) breach of fiduciary duties of loyalty and good faith (the "Fiduciary Duty Claim") (Compl. ¶¶ 64-68), (2) corporate waste (the "Waste Claim") (*id*. ¶¶ 77-79) and (3) unjust enrichment (the "Unjust Enrichment Claim") (*id*. ¶¶ 80-84)—all premised on the theory that the Director Defendants knowingly caused DISH to violate DNC Laws. Through these Claims, Plaintiffs would have DISH attempt to recover tens or hundreds of millions of dollars in money damages from the individual Director Defendants personally for losses that may be incurred by DISH, if the judgments in *Krakauer* and *U.S. v. DISH* are not reversed on appeal.

[1231] Because Brokaw did not join DISH's Board until October 2013—two years after the end of the Claims Period, the SLC has determined DISH cannot prevail on the Claims asserted against Brokaw. The Claims are predicated on the Named Defendants being put on notice of potential DNC violations by DISH through DISH's entry into the 2009 AVC in July 2009 and the Named Defendants then allegedly knowingly causing DNC violations found to have occurred after July 2009 in the Underlying DNC Actions. *See, e.g.*, Compl. ¶¶ 2, 9. As Brokaw was not on the Board during the Claims Period, he could not have committed any breaches of fiduciary duties during the Claims Period necessary to support the Claims alleged against him. For these reasons, the SLC has determined that Brokaw faces no material likelihood of personal liability and it is not in DISH's best interest to pursue the Claims against Brokaw, separate and apart from the other reasons identified by the SLC as to why it is not in DISH's best interest to pursue the Claims against the Director Defendants discussed herein.

To prevail on the Fiduciary Duty Claim under Nevada law, DISH would need to prove that the Director Defendants *knowingly* caused DISH to violate the DNC Laws—necessarily that the Director Defendants *knew* that DISH was violating the DNC Laws. The Complaint alleges that the Director Defendants knowingly caused DISH to violate the DNC Laws.[1232]

Outside of Nevada, courts considering whether directors should be held liable for judgments against the corporation apply a "*Caremark*" standard to assess whether the directors may be held personally liable. Even if the events at issue were considered under the arguably less demanding *Caremark* standard, DISH would still need to prove that the Director Defendants acted in bad faith, by either (a) consciously disregarding "red flags" that DISH was violating the DNC Laws or (b) knowingly failing to implement any information and reporting systems to detect such violations.

The fundamental flaw in any of these Claims is that the Director Defendants never believed that DISH was violating the DNC Laws, let alone intended for DISH to violate the DNC Laws. The SLC's Investigation uniformly showed that the Director Defendants believed that DISH and its Authorized Telemarketers were complying with the DNC Laws and that DISH was not legally responsible for any violations of the DNC Laws by Retailers, including OE Retailers, which include the Subject Retailers. The evidence shows that, to the extent they had involvement in DISH's DNC compliance, the Director Defendants acted to cause compliance with the law. The evidence further shows that the Director Defendants did not fail to act in the face of "red flags" that DISH was violating the DNC Laws. Finally, the evidence shows that DISH had information and reporting systems to alert the Board to material risks related to legal compliance, including compliance with the DNC Laws.

[1232] Compl. ¶ 66.

The Waste and Unjust Enrichment Claims that Plaintiffs would have DISH assert are predicated on the proposition that DISH compensated the Director Defendants while the Director Defendants were breaching their fiduciary duties. (Compl. ¶¶ 78, 81, 83). Absent the alleged fiduciary breaches, Plaintiffs have identified no basis for DISH to claim that the Director Defendants' compensation constituted corporate waste and unjust enrichment, and DISH has no such basis. Plaintiffs' vague assertion of insider trading likewise fails in the face of the Director Defendants' genuine belief that DISH was not violating the DNC Laws.

I. The Fiduciary Duty Claim

The primary Claim that Plaintiffs would have DISH assert is that the Director Defendants breached their fiduciary duties of good faith and loyalty by knowingly "participat[ing] in, approv[ing] and/or permit[ing]" violations by DISH of the TCPA and 2009 AVC.[1233] Plaintiffs' Complaint also alleged that the Director Defendants "failed to implement systems or controls to ensure TCPA compliance[,]"[1234] violating what have been called *Caremark* duties thereby, but Plaintiffs have since abandoned that assertion.[1235] The SLC has determined that the Fiduciary Duty Claim and related claims that DISH might raise under *Caremark* lack merit.

[1233] Compl. ¶ 59; *see also id.* ¶ 55.

[1234] *Id.* ¶ 65 ("[W]hile under the stewardship of defendants, Dish failed to implement systems or controls to ensure TCPA compliance and also utterly failed to comply with the provisions of the Compliance Agreement.").

[1235] *See* Pls.' Opp. at 27 (In a section titled "This Is Not a *Caremark* Claim" Plaintiffs state that "Under *Caremark*, 698 A.2d 959, director liability is predicated upon ignorance of liability-creating activities. That is not the case here. The Compliance Agreement reflects the Dish's Board knowledge [that] the Company's telemarketing practices did not comply with legal requirement of the TCPA. . . . Unlike in *Caremark*, plaintiffs here seek to hold defendants' accountable for their *own* actions, which exposed Dish to $65.1 million in damages.").

A. Liability for Knowing Violations of the Law

By statute, directors of a Nevada corporation generally are not liable for judgments entered against the corporation—even those judgments resulting from the directors' own decisions. Nevada applies the business judgment rule to directors' conduct by statute: "[D]irectors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation[,]" except with respect to changes or potential changes in corporate control. NRS 78.138(3)-(7). The rule's presumption of good faith must be rebutted to find that directors breached their fiduciary duties. NRS 78.138(7).

Even if the presumption is rebutted and directors are found to have breached their fiduciary duties, under NRS 78.138(7)(b)(2), directors still may not be held personally liable for money damages unless they are found to have *knowingly* violated the law. NRS 78.138(7)(b)(2) provides, with irrelevant exceptions, that

> a director or officer is not individually liable to the corporation . . . for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless . . . [s]uch breach involved *intentional misconduct, fraud or a knowing violation of law*.

(emphasis added); *see also Shoen v. SAC Holding Corp.*, 122 Nev. 621, 640, 137 P.3d 1171, 1184 (2006) ("[D]irectors and officers may only be found personally liable for breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law.").

Although Nevada courts have yet to apply Nevada law specifically to a claim to hold directors liable for a judgment against the corporation, courts in other jurisdictions have applied their laws to hold—consistent with NRS 78.138(7)(b)(2)—that directors of a corporation generally are not liable for judgments against the corporation. *See, e.g.*, *In re Caremark Int'l Inc.*

Deriv. Litig., 698 A.2d 959, 967 (Del. Ch. 1996) (The claim that the "directors allowed a situation to develop and continue which exposed the corporation to enormous legal liability and that in so doing they violated a duty to be active monitors of corporate performance" is "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win judgment.").[1236] This is true no matter the size of the judgment. *See, e.g.*, *In re Gen. Motors Co. Deriv. Litig.*, 2015 WL 3958724, at *2, *12-17 (Del. Ch. June 26, 2015) (dismissing complaint seeking to hold directors personally liable for costs of recalls resulting in approximately $1.5 billion charges against earnings, nearly $35 million in fines and an unknown amount in products liability and personal injury lawsuits).[1237] This remains true even when *the corporation* is found to have acted intentionally, willfully or otherwise in bad faith. *See, e.g.*, *L.B. Indus., Inc. v. Smith*, 817 F.2d 69, 71 (9th Cir. 1987) (applying Idaho law: "to be held liable [for fraud or other tortious wrongdoing committed by the corporation,] a corporate director must specifically direct, actively participate in, or knowingly acquiesce in the fraud or other wrongdoing of the corporation or its officers.").[1238] It remains true even when *the corporation* is found liable for treble damages. *See, e.g.*, *In re Gen. Motors*, 2015 WL 3958724, at *1-*2, *17 (even though

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[1236] *See also In re Massey Energy Co. Deriv. and Class Action Litig.*, 2011 WL 2176479, at *22 (Del. Ch. May 31, 2011) ("Begin with the reality that in the absence of an improper motive or facts showing self-interest, when management decisions do not turn out well and a company suffers a loss in profits (or a decline in its trading multiple), this does not ordinarily translate into any basis to hold corporate fiduciaries liable in damages."); *Maul v. Kirkman*, 637 A.2d 928, 937 (N.J. Super. Ct. App. Div. 1994) ("The business judgment rule protects a board of directors . . . except in instances of fraud, self-dealing, or unconscionable conduct.").

[1237] *See also In re ITT Corp. Deriv. Litig.*, 588 F. Supp. 2d 502, 514 (S.D.N.Y. 2008) (applying Indiana law) (even "violations of law . . . [that] caused massive damage" to the company and were "of utmost seriousness" did "not establish either deficient controls or a sustained and systematic failure of oversight").

[1238] *Cf. Sethness-Greenleaf, Inc. v. Green River Corp.*, 1994 WL 67830, at *7 (N.D. Ill. Feb. 11, 1994) (concluding that company's controlling, if not only, stockholder who was "solely responsible for managing [company's] activities" could be personally liable for corporation's intentional patent infringement).

"GM has been and will be held liable for any wrongdoing[,]" including $35 million in government fines — "the highest in history[,]" damages and *punitive damages*, and even though employees knew of an automotive defect, there was no substantial likelihood of personal liability on the part of the directors) (emphasis added).[1239] It has been applied to criminal penalties against the corporation as well. *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *21 (Del. Ch. Dec. 18, 2017) (dismissing claim that "the defendants consciously allowed [the corporation] to violate the law so as to sustain a finding that they acted in bad faith" even though the corporation paid $2.2 billion in fines and pleaded guilty to conspiracy to violate federal antitrust laws) (emphasis in original).

Directors are expected to cause corporations to take risks, sometimes resulting in losses. *See, e.g.*, *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006) ("Even a bad decision is generally protected by the business judgment rule's presumption that the directors acted in good faith, with knowledge of the pertinent information, and with an honest belief that the action would serve the corporation's interests."); *In re Citigroup Inc. S'holder Deriv. Litig.*, 964 A.2d 106, 131 (Del. Ch. 2009) ("Oversight duties . . . are not designed to subject directors, even expert directors, to personal liability for failure to predict the future and to properly evaluate business risk."); *In re Massey Energy*, 2011 WL 2176479, at *22 ("An essential purpose of the business judgment rule is to free fiduciaries making risky business

[1239] S*ee also Horman v. Abney*, 2017 WL 242571, at *5 (Del. Ch. Jan. 19, 2017) ("After carefully reviewing the Complaint . . . I am satisfied that Plaintiffs have conflate[d] concededly *bad outcomes* from the point of view of the Company [including potentially $180 million in damages, civil penalties and treble damages] with *bad faith* on the part of the Board.") (internal quotations omitted); NRS 78.138(3) ("A director or officer is not individually liable for damages as a result of an act or failure to act in his or her capacity as a director or officer except under circumstances described in subsection 7.").

decisions in good faith from the worry that if those decisions do not pan out in the manner they had hoped, they will put their personal net worths at risk.").

This principle extends to legal risk. Directors do not violate fiduciary duties, much less knowingly violate the law, by causing the corporation to engage in conduct that involves legal risk. *See, e.g.*, *Resolution Tr. Corp. v. Heiserman*, 839 F. Supp. 1457, 1463 (D. Colo. 1993) ("The business judgment rule holds that directors and officers of the corporation will not be held liable for errors or mistakes in judgment, pertaining to law or fact, when they have acted on a matter calling for the exercise of their judgment or discretion, when they have used such judgment and have so acted in good faith.") (quoting *Fin. Indus. Fund, Inc. v. McDonnel Douglas Corp.*, 474 F.2d 514, 518 (10th Cir. 1973)), *overruled on other grounds*, *F.D.I.C. v. Schuchmann*, 235 F.3d 1217 (10th Cir. 2000).[1240] This is particularly true where directors act with the benefit of guidance from advisors that the board believes to be competent. *See, e.g.*, *Bailey v. Babcock*, 241 F. 501, 514 (W.D. Pa. 1915) (holding that directors were not liable for an *ultra vires* act where they had relied on the legal advice of trusted counsel); NRS 78.138(2).[1241] In short, directors may not be held personally liable, even if the legal risk incurred ultimately results in a judgment against the corporation. *See, e.g.*, *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *12 (Del. Ch. Aug. 1, 2016) (finding directors not at material risk of personal liability where they caused the corporation to take a risky legal position

[1240] *See also Reiter v. Fairbank*, 2016 WL 6081823, at *1 (Del. Ch. Oct. 18, 2016) (directors received reports noting that risk level "escalated from 'low' . . . to 'high'" but "the same reports explained . . . initatives management was taking to ameliorate" that risk and thus the facts failed to support allegation that directors "consciously allowed" the Company to violate the law).

[1241] *See also Koch v. Koch Indus., Inc.*, 37 F. Supp. 2d 1231, 1242 (D. Kan. 1998), *aff'd in part, rev'd in part on other grounds*, 203 F.3d 1202 (10th Cir. 2000) ("The individual defendants who lacked actual knowledge and were not in a position where they would be expected to know about the details of these accounting transactions could have relied in good faith upon the auditor's opinion regarding compliance with GAAP.").

and incur millions of dollars in damages.); *In re Las Vegas Sands Corp. Deriv. Litig.*, 2009 WL 6038660, at *19 (Nev. Dist. Ct. Nov. 4, 2009) (recognizing "[t]he necessity of allowing a board of directors freedom in making high-risk investments in a competitive marketplace . . . .").[1242]

Consistent with NRS 78.138(7)(b)(2), courts around the country have held that directors of a corporation may be liable for a judgment, if they *knowingly* caused the corporation to violate the relevant law. *See, e.g.*, *Massey*, 2011 WL 2176479, at *20 ("Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue 'lawful business' by 'lawful acts.' As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law."); *Teachers' Ret. Sys. of Louisiana v. Welch*, 664 N.Y.S.2d 38, 39 (N.Y. App. Div. 1st Dept. 1997) (stating that New York law "shields GE's directors for negligent acts or omissions occurring in their capacity as directors, with certain exceptions (intentional misconduct, bad faith, knowing violation of law)"); *Maul v. Kirkman*, 637 A.2d 928, 937 (N.J. Super. Ct. App. Div. 1994) ("The business judgment rule protects a board of directors . . . except in instances of fraud, self-dealing, or unconscionable conduct. . . .").

Thus, as directed by NRS 78.138(7)(b)(2), and consistent with the law of other jurisdictions, the SLC evaluated whether the Director Defendants knowingly caused DISH to violate DNC Laws. As explained below, the SLC has determined that there is no evidence that the Director Defendants did so.

[1242] *See also In re JPMorgan Chase & Co. Deriv. Litig.*, 2014 WL 3778181 at *1-2 (S.D.N.Y. July 30, 2014) (finding complaint did not adequately allege directors consciously acted in bad faith or disregarded red flags signaling "facially improper . . . business risks.").

B. Liability Under Other Jurisdictions' *Caremark* Standard

Courts in other jurisdictions have also found directors personally liable for judgments against the corporation under an arguably less onerous standard than that required by NRS 78.138(7)(b)(2). They have held that directors of a corporation may be liable for a judgment against the corporation under the "*Caremark* standard," if the directors act in bad faith by (a) consciously disregarding "red flags" that the corporation is violating the law or (b) utterly failing to implement any information and reporting system to detect such violations. To meet this standard,

> a plaintiff must plead with particularity "a sufficient connection between the corporate trauma and the board." One way to plead the requisite connection is to plead particularized facts which, if proven, would establish the first *Caremark* prong for imposing oversight liability—that the directors "utterly failed to implement any reporting or information system or controls." A second, alternative, way "[t]o establish such a connection [is to] plead that the board knew of evidence of corporate misconduct—the proverbial 'red flag'—yet acted in bad faith by consciously disregarding its duty to address that misconduct.

Horman v. Abney, 2017 WL 242571, at *7 (Del. Ch. Jan. 19, 2017) (quoting *Reiter v. Fairbank*, 2016 WL 6081823, at *8 (Del. Ch. Oct. 18, 2016)).[1243] Neither prong of this *Caremark* standard

[1243] *See also, e.g.*, *TVI Corp. v. Gallagher*, 2013 WL 5809271, at *15 (Del. Ch. Oct. 28, 2013) (quoting *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006)) ("'Violation of a board of directors' obligation to exercise proper oversight requires: (1) that 'directors utterly failed to implement any reporting or information system or controls,' or (2) that directors, 'having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention.'"); *Blake v. Friendly Ice Cream Corp.*, 2006 WL 2714976, at *4 (Mass. Super. Aug. 24, 2006) (Massachusetts court using *Caremark* standard for director liability); *Francis v. United Jersey Bank*, 432 A.2d 814, 822-23 (N.J. 1981) (holding that "[d]irectors may not shut their eyes to corporate misconduct and then claim that because they did not see the misconduct, they did not have a duty to look. The sentinel asleep at his post contributes nothing to the enterprise he is charged to protect." Further, "a director cannot protect himself behind a paper shield bearing the motto, dummy director'" because "[a] director may have a duty to take reasonable means to prevent illegal conduct by co-directors.").

may be met by negligence, even gross negligence; a plaintiff must establish "that the directors knew that they were not discharging their fiduciary obligations[.]" *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) ("Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith.").[1244]

The *Caremark* standard is not perfectly consistent with NRS 78.138(7)(b)(2): hypothetically, a conscious disregard of fiduciary duties, incurring liability under *Caremark*, might, somehow, not involve "intentional misconduct, fraud, or a knowing violation of law[,]" as NRS 78.138(7)(b)(2) requires. Nonetheless, DISH might persuade a Nevada Court that Nevada law encompassed *Caremark* liability.[1245] And there is sufficient overlap between the standards that a Nevada court may find the *Caremark* authority persuasive, helpful, or relevant in interpreting the application of Nevada law in this context. Thus, the SLC evaluated the conduct of the Director Defendants under the *Caremark* standard in an abundance of caution.

Finding a director liable for consciously disregarding a duty to address red flags, under the second prong of *Caremark* is closer to the straightforward analysis under the plain language of Nevada law. To state a claim under this prong, a plaintiff

> must "plead [particularized facts] that the board knew of evidence of corporate misconduct—the proverbial 'red flag'—yet acted in bad faith by consciously disregarding its duty to address that misconduct." In this context, bad faith means "the directors were

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[1244] *See also Oakland Cty. Emp. Ret. Sys. v. Massaro*, 772 F. Supp. 2d 973, 977 (N.D. Ill. 2011) ("The *Caremark* standard 'requires conduct that is qualitatively different from, and more culpable than, the conduct giving rise to a violation of the fiduciary duty of care (i.e., gross negligence).'") (quoting *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines*, 534 F.3d 779, 789 (D.C. Cir. 2008)).

[1245] Only one Nevada court appears to have cited *Caremark*, but it was only in the context of analyzing demand futility in a shareholder derivative action. *In re Las Vegas Sands Corp. Deriv. Litig.*, 2009 WL 6038660, at *7 (Nev. Dist. Ct. Nov. 4, 2009) (Earl, J.). The Nevada Supreme Court has never addressed whether Nevada would adopt the *Caremark* standard.

> conscious of the fact that they were not doing their jobs, and that they ignored red flags indicating misconduct in defiance of their duties.

Horman, 2017 WL 242571, at *10 (quoting *David B. Shaev Profit Sharing Account v. Armstrong,* 2006 WL 391931, at *5 (Del. Ch. Feb.13, 2006)).[1246]

This standard cannot be satisfied by imputing knowledge of misconduct somewhere within the corporation to a director—the plaintiff must prove that the director had actual personal knowledge of the wrongdoing. *In re Wal-Mart Stores, Inc. Delaware Deriv. Litig.*, 2016 WL 2908344, at *6 (Del. Ch. May 13, 2016) ("Courts may not impute knowledge of wrongdoing based on directors' board service, their membership on board committees, or because the corporate governance structure of the company requires that information about misconduct must be brought to the board.").[1247]

This standard likewise cannot be met if directors took *any* action, no matter how ineffective to address the misconduct.

> But the question is not whether Citigroup's board adopted effective AML controls. As [Delaware's] Supreme Court has recognized, "directors' good faith exercise of oversight responsibility may not invariably prevent employees from violating criminal laws, or from causing the corporation to incur significant financial liability, or both." . . . At issue is the duty of loyalty; a board's efforts can be ineffective, its actions obtuse, its results harmful to the corporate weal, without implicating bad faith. Bad faith may be inferred where the directors knew or should have known that illegal conduct was taking place, yet "took *no steps* in a good faith effort to prevent or remedy that situation."

1246 *See also In re SAIC Deriv. Litig.*, 948 F. Supp. 2d 366, 382 (S.D.N.Y. 2013) (*Caremark* claim requires allegation of "particularized facts showing that the directors consciously acted in bad faith by failing to take action despite actual or constructive knowledge of illegal activity . . . .").

1247 *See also DEV Indus., Inc. v. Rockwell Graphic Sys., Inc.*, 1992 WL 100908, at *3 (N.D. Ill. May 4, 1992) ("Personal liability must be based upon personal knowledge or wrongdoing, and cannot be imputed due to an individual's membership in a broader organizational structure.").

Oklahoma Firefighters Pension & Ret. Sys. v. Corbat, 2017 WL 6452240, at *17 (Del. Ch. Dec. 18, 2017); *see also In re Impax Labs., Inc. S'holder Deriv. Litig.*, 2015 WL 5168777, at *6 (N.D. Cal. Sept. 3, 2015) ("Plaintiffs' allegations imply that the . . .Board took some remedial action in response to the alleged 'red flags'; that those remedial actions allegedly did not immediately fix all of the compliance problems identified by the FDA is not sufficient to cast reasonable doubt on the presumption that the Director Defendants are entitled to the protections of the business judgment rule."). To trigger liability for ignoring "red flags" under *Caremark*, directors must take no action whatsoever to respond to wrongdoing of which they are actually aware.

To bring a claim under the other prong of *Caremark*, a plaintiff must show that:

> the directors utterly failed to implement any reporting or information system or controls[.] . . . [The] imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations.

Stone v. Ritter, 911 A.2d 362, 369-70 (Del. 2006).[1248] Such a claim fails in the face of any—even an ineffective—system of monitoring and oversight. *In re Gen. Motors Co. Deriv. Litig.*, 2015 WL 3958724, at *14 (Del. Ch. June 26, 2015) (finding that plaintiff failed to plead that the board "utterly failed to implement any reporting or information system or controls" because the complaint "does not allege a total lack of any reporting system at GM; rather, the [p]laintiffs allege the reporting system . . . should have been a better system"); *Oklahoma Firefighters*, 2017 WL 6452240, at *17 ("But the question is not whether [the] board adopted *effective* [ ] controls.") (emphasis in original). It is not clear whether a Nevada Court would find a knowing failure to implement an oversight system to constitute "intentional misconduct, fraud, or a knowing violation of law[,]" as NRS 78.138(7)(b)(2) requires for the imposition of personal

[1248] *See also In re ITT Corp. Deriv. Litig.*, 588 F. Supp. 2d 502, 508 (S.D.N.Y 2008) (applying *Caremark* standard of complete failure to implement any reporting or information system or controls).

liability on directors under Nevada law. Nonetheless, the SLC also investigated the possibility that DISH may have a claim under this standard as well.

Assuming *arguendo* that Nevada law would apply personal liability to directors under *Caremark*, the SLC determined that DISH does not have a claim that the Director Defendants acted in bad faith, either by (a) consciously disregarding "red flags" that DISH was violating the DNC Laws or (b) utterly failing to implement any information and reporting system to detect such violations.

C. The Directors Defendants Did Not Knowingly Cause DISH to Violate the DNC Laws.

The SLC has determined that DISH would be unable to prove that the Director Defendants knowingly caused DISH to violate DNC Laws. The evidence is uniformly to the contrary. The evidence shows that the Director Defendants intended for DISH to comply with DNC Laws and believed DISH was complying with them, with no material exceptions.

1. The Director Defendants Had No Incentive to Violate the DNC Laws.

The Director Defendants had no incentive to cause DISH to violate DNC Laws. As stockholders of DISH, in some cases large stockholders of DISH, the Director Defendants had strong financial incentives to serve DISH's business and to avoid judgments against DISH that could diminish the value of their DISH stock.[1249]

The Director Defendants were not compensated as directors or officers of DISH in a manner that might have incentivized them to cause DISH to violate DNC Laws.[1250] Their

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[1249] Collectively, the Director Defendants own more than 49.9% of DISH's outstanding Class A Common Stock. Ex. 52, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 9 (Mar. 28, 2018).

[1250] Ex. 44, DISH Network Corp., Definitive Proxy Statement (Schedule 14A), at 26 (Mar. 22, 2013) ("With respect to equity incentive compensation, DISH Network attempts to ensure

stockholdings dwarfed any other compensation that they received. Their interests were therefore aligned with those of Plaintiffs and DISH's other stockholders.

2. The Evidence Uniformly Shows that the Director Defendants Wanted DISH to Comply with the DNC Laws.

The Director Defendants wanted DISH to comply with the DNC Laws. The record of the SLC's investigation is replete with evidence on this point. During their interviews, the Director Defendants uniformly told the SLC that they wanted DISH to comply with DNC Laws: Ergen, DeFranco, Goodbarn, Howard and Moskowitz believed that legal violations, particularly of DNC Laws, were bad for business. And, Vogel saw no upside to violating DNC Laws. Mrs. Ergen and Goodbarn further viewed compliance with the laws generally as a matter of DISH's integrity and corporate culture. For similar reasons, despite believing that the Retailers' compliance or non-compliance with the DNC Laws would not affect DISH's own compliance, the Director Defendants wanted the Retailers also to comply with all DNC Laws. The other interviewees uniformly told the SLC that, when they received direction on the issue from one of the Director Defendants, the direction was to ensure DISH's compliance with the DNC Laws.

The documentary evidence is consistent with the statements made during the SLC's interviews. The written record shows, that during the Investigation Period, whenever a Director Defendant learned of a complaint that DISH may have made a violative call, the Director Defendant pressed Management to investigate the matter, to rectify the situation and to avoid any

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that each executive officer retains equity awards that at any given time are significant in relation to such individual's annual cash compensation to ensure that each of its executive officers has appropriate incentives tied to the value realized by our shareholders.").

future non-compliance.[1251] There is no evidence that the Director Defendants wanted DISH to violate the DNC Laws or were even ambivalent as to whether DISH complied.[1252]

3. The Evidence Uniformly Shows that Director Defendants Believed that DISH Was Complying with the DNC Laws.

Of equal importance, the evidence uniformly shows that during the Claims Period, the Director Defendants believed that DISH was complying with the DNC Laws, with no material exceptions. During their interviews, the Director Defendants explained that, after receiving advice of counsel, they believed DISH was materially complying with the DNC Laws. The Director Defendants' stated beliefs are consistent with the remainder of the evidentiary record. There is no evidence to the contrary. As explained below, this is true both with respect to calls made by DISH and its Authorized Telemarketers and calls made by the Retailers.

a. The Director Defendants Believed that DISH and Its Authorized Telemarketers Complied with DNC Laws.

Where they were involved in DNC issues, the Director Defendants were informed by Management that DISH and its Authorized Telemarketers were materially complying with the DNC Laws.[1253] Management indeed believed that DISH and its Authorized Telemarketers were

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[1251] *See, e.g.*, Ex. 307, Email from L. Barrons to C. Ergen (Sept. 27, 2006), SLC DNC Investigation 005901 (email discussing call to customer on DNC list from unknown caller); Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 001142; Ex. 316, Email from C. Ergen to D. Moskowitz (Nov. 11, 2006), SLC DNC Investigation 0002680; Ex. 349 Voice Message from C. Ergen to R. Dye, et al. (Sept. 16, 2008), SLC DNC Investigation 0005905 ("I don't care if we need to get outside help. We need to put something that works."); *see also* Ex. 133, Email from A. Ahmed to M. Oberbillig, et al. (Oct. 27, 2005), SLC DNC Investigation 012484.

[1252] *See supra* Factual Findings §§ II.A.4., IV.A.

[1253] *See* Ex. 372, Email from S. Dodge to C. Ergen, et al. (Mar. 25, 2009), SLC DNC Investigation 0000004 at 004 ("[W]e have submitted evidence that 99.8% of the calls initiated by [DISH] were made in compliance with the FTC'[s] Do Not Call Rules.").

materially complying with the DNC Laws.[1254] DISH's Legal Department and the Board were aware of PossibleNow's 2009 analysis showing that at least 99.8% of DISH's calls were made in compliance with DNC Laws.[1255] Management and some of the Director Defendants were aware of CompliancePoint's 2010 certification that DISH and its Authorized Telemarketers had good DNC compliance.[1256] The immaterial $6 million amount that DISH was required to pay under the 2009 AVC with 46 states covering all issues with marketing (only a subset of which concerned DNC) reaffirmed that DISH did not have a material compliance problem with the DNC Laws. Ergen and DISH's Legal Department were told that the FTC did not "have a issue with DISH's internal / direct telemarketing compliance."[1257] The FTC had offered to settle all liability for $12 million (provided DISH took responsibility for Retailers going forward).[1258] There is no evidence that any Director Defendant was aware of any material non-compliance by DISH or its Authorized Telemarketers with the DNC Laws during the Investigation Period. An immaterial amount of non-compliance does not demonstrate that the Board was aware of, let

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[1254] *See, e.g.*, Ex. 429, Indirect Sales Channel Analysis (2011), SLC DNC Investigation 0001091 at 109 (AG and BBB compliance complaints decreased from 200 in 2007 to almost 0 in 2011).

[1255] Ex. 372, Email from S. Dodge to C. Ergen et al. (Mar. 25, 2009), SLC DNC Investigation 0000004.

[1256] *See* Ex. 408, Email from B. Blum to B. Kitei, et al. (July 8, 2010), SLC DNC Investigation 0011971; Ex. 409, DISH Network Corporate Telemarketing Compliance Certification (July 8, 2010), SLC DNC Investigation 0001044 at 045 ("Our findings indicate that DISH Network has employed sufficient policies, procedures and processes to ensure compliance with relevant federal and state telemarketing rules. The company has employed a compliance department staff at the corporate level that oversees campaign compliance including scripting reviews, campaign life cycle management, DNC suppression and third party monitoring and oversight.").

[1257] Ex. 371, Email from S. Dodge to C. Ergen (Mar. 12, 2009), SLC DNC Investigation 0001034.

[1258] Ex. 372, Email from S. Dodge to C. Ergen, et al. (Mar. 25, 2009), SLC DNC Investigation 0000004 at 004.

alone intended DISH to violate, the DNC Laws. *See Horman v. Abney*, 2017 WL 242571, at *14 (Del. Ch. Jan. 19, 2017) (finding no inference of bad faith based on the allegation that "UPS made approximately 78,000 shipments of illegal cigarettes between 2010 and 2014[,]" where UPS shipped millions of packages daily).

Moreover, none of the *Krakauer* judgment resulted from calls made by DISH or its Authorized Telemarketers, and only $24,943,579 of the *U.S. v. DISH* judgment resulted from calls made by DISH or its Authorized Telemarketers.[1259] And, with respect to some of the violative calls found in *U.S. v. DISH*, DISH attempted to present evidence that the calls were not violations, but was precluded from doing so based on discovery rulings.[1260] Some of the violations resulted primarily from a difference of views between Management, after advice of counsel, and the *U.S. v. DISH* court concerning compliance requirements.[1261] After taking these issues into account, the number of calls that Management recognized as having been made in violation of DNC Laws did not present a material issue meriting escalation to the Board,

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[1259] *See supra* Factual Findings § X.D.3.b; *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, at *9 (M.D.N.C. May 22, 2017) ("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.").

[1260] *See, e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d 810, 837 (C.D. Ill. 2017) ("The [Illinois] Court barred Dish from producing evidence of scrubbing procedures that was not produced in discovery. . . . To the extent that Dish presented [certain] testimony at trial (or any other witness's testimony not produced in discovery) to prove Dish maintained documentation to comply with safe harbor procedures, the testimony is barred by Opinion 279."); *id.* ("Dish employee Montano testified that Dish met all requirements for compliance with TSR and TCPA safe harbor provisions. . . . Montano testified that Outbound Operations maintained documentation of its scrubs. . . . Dish, however, failed to produce in discovery or at trial written scrubbing procedures or documentation that such scrubbing procedures were followed. Such documentation is required to meet safe harbor requirements.").

[1261] *See, e.g.*, *id.* at 930-31 (While "Dish personnel looked to lists of current customers and disconnect dates" to determine whether it had an EBR with intended call recipients, the Illinois Court found that DISH should have known to determine whether an EBR existed "by checking the last date a call recipient paid for goods and services.").

particularly when Management was already acting to rectify the issues and believed that errant and isolated Potentially Violative Calls would fall within the safe harbor of the TSR.[1262]

b. The Director Defendants Believed that DISH Was Not Legally Responsible for Retailers' Compliance with the DNC Laws.

During the Claims Period, the Director Defendants believed that DISH was not legally responsible for Retailers' compliance with the DNC Laws. Put differently, the Director Defendants believed, upon advice of counsel, that DISH would not violate the DNC Laws if it failed to stop Retailers, including OE Retailers, from violating the DNC Laws. The Director Defendants each affirmed this belief when interviewed by the SLC. The belief that DISH was not legally responsible for Retailers' compliance with the DNC Laws was consistent with the views expressed by the DISH employees and external advisors interviewed by the SLC.[1263] The SLC found no evidence contradicting these statements.

Various evidence from DISH's conduct and communications during the Investigation Period in general and the Claims Period in particular confirmed that the Board and Management genuinely believed that DISH was not legally responsible for Retailers' violations of the DNC Laws:

[1262] Ex. 437, Email from S. Dodge to B. Kitei (Aug. 30, 2011), SLC DNC Investigation 0004237 at 237 ("Pls make sure to use this as a teaching moment . . . . We need zero defects on do not call implementation"); Ex. 436, Email from B. Kitei to A. Dexter, et al. (Aug. 30, 2011), SLC DNC Investigation 0002638 (noting that "heads will roll" if there were further DNC missteps).

[1263] *See, e.g.*, Ex. 365, Letter from L. Rose to the Honorable J. Leibowitz (Jan. 21, 2009), SLC DNC Investigation 0000682 at 682 (stating DISH's legal position as "In sum, the TSR only permits the FTC to hold an entity liable for the acts of a third party when the FTC can prove that the entity caused the third party to violate the Rule, or where the entity provided substantial assistance to the third party while it knew or consciously avoided knowledge of the third party's telemarketing violations.").

First, DISH's negotiations with state AGs were consistent with this view. The 2003 AVC stated: "[N]othing in the Assurance is intended to change the existing independent contractor relationships between [DISH] and authorized retailers who sell [DISH] products and no agency relationship is created by the agreements set forth herein."[1264] In negotiating the 2009 AVC, the AGs initially asked DISH to accept liability for Retailer violations, but DISH never agreed to this. The 2009 AVC states DISH's position that: "[N]othing in the Assurance is intended to change the existing independent contractor relationships between DISH Network and its authorized retailers who sell DISH Network products and it believes that no agency relationship is created by the agreements set forth herein."[1265] Although, in the 2009 AVC, DISH agreed to investigate complaints about OE Retailers, monitor them and, in some cases, discipline them, DISH did not accept direct or vicarious liability for any Retailers' DNC violations.[1266] Under the 2009 AVC, DISH was legally responsible only for its own conduct.

Second, the belief that DISH was not legally responsible for the Retailers' DNC compliance was consistent with DISH's experience in *Charvat* and *Zhu*, the only cases during or prior to the Claims Period in which DISH had litigated this issue. DISH prevailed on the issue in the only case to have reached a final judgment on the issue, *Charvat v. EchoStar Satellite, LLC*,

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1264 Ex. 29, 2003 AVC § 5, SLC DNC Investigation 0015271, at 273; *see also* Ex. 105, Assurance of Voluntary Compliance with State of Indiana (Apr. 11, 2003), SLC DNC Investigation 0004119 at 120 ("By entering into this AVC, [DISH] admits no wrong doing. Additionally, this AVC does not constitute that [DISH] has engaged in any methods, acts, uses, practices or solicitations declared to be unlawful . . . .").

1265 Ex. 29, 2009 AVC § 1.14, SLC DNC Investigation 00013874 at 878.

1266 Ex. 426, Letter from L. Greisman to L. Rose (Mar. 17, 2011), SLC DNC Investigation 0009435 (rejecting vicarious liability language). Instead, DISH stated in the 2009 AVC that it would "require its Third-Party Retailers to comply with the terms of this Assurance." Ex. 29, 2009 AVC § 3.3, SLC DNC Investigation 0013874 at 882.

676 F. Supp. 2d 668 (S.D. Ohio 2009), *vacated*, 535 F. App'x 513 (6th Cir. 2013).[1267] In that case, 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." *Id.* at 676. It elaborated:

> Regardless of whether someone is labeled an independent contractor, when the hiring party retains the "right to control the manner or means" by which a particular job is completed, it may be said that the hired party is actually an employee or agent who is acting "on behalf of" the hiring party. . . . Under these circumstances, the hiring party may be held vicariously liable for its agent's wrongdoing. *[But,] [i]t is undisputed that [DISH] maintains no control over the method of advertising or the means by which the Retailers carry out their marketing activities. . . . For the reasons stated above, [DISH] is entitled to summary judgment* on all of Plaintiff's claims predicated on the TCPA, its accompanying regulations, and the corresponding OCSPA claims.

Id. at 674-75, 678-79 (emphasis added). *Zhu,* which also touched on the issue, was similarly resolved in DISH's favor, but on slightly different grounds. *Zhu v. DISH Network, LLC*, 808 F. Supp. 2d 815, 819-20 (E.D. Va. 2011). No court would hold otherwise until 2017, years after the Claims Period, when *U.S. v. DISH* departed from *Charvat* to hold DISH liable for the conduct of the Subject Retailers. *U.S. v. DISH*, 256 F. Supp. 3d 810, 932-37 (C.D. Ill. 2017).

Third, the belief that DISH was not legally responsible for Retailers' DNC compliance was consistent with DISH's Retailer Agreement, which was provided to the Board.[1268] The Retailer Agreement stated:

> The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor . . . . Notwithstanding anything in this Agreement to the contrary, Retailer . . . shall not, under any circumstances, hold

[1267] DISH is referred to as EchoStar in *Charvat* because *Charvat* was filed before DISH changed its name to DISH and spun off EchoStar.

[1268] Ex. 414, Email from B. Ehrhart to C. Ergen, et al. (Sept. 2, 2010), SLC DNC Investigation 0014457 at 457 (providing copy of DISH's form OE Retailer Agreement).

> itself out to the public or represent that it is an agent, employee, subcontractor or Affiliate of [DISH] or any [DISH] Affiliate. In furtherance of (and without limiting) the foregoing, in no event shall Retailer use [DISH's] name or the name of any [DISH] Affiliate in any manner which would tend to imply that Retailer is an Affiliate of [DISH] or that Retailer is an agent, subcontractor or employee of [DISH] or one of its Affiliates or that Retailer is acting or is authorized to act on behalf of [DISH] or one of its Affiliates. This Agreement does not constitute any joint venture or partnership.[1269]

Fourth, during the Claims Period, DISH's counsel, experienced and able FTC practitioners, prepared both in person and written presentations to the FTC presenting DISH's position on DISH's potential liability for Retailer DNC violations.[1270] Those memoranda, including the TSR Letter, presented substantial authority for the proposition that DISH was not responsible for Retailers' DNC compliance under the law as it stood during the Claims Period.[1271]

Fifth, the Board demonstrated the courage of its conviction in the position that DISH was not liable for the Retailers' compliance by litigating the issue in *U.S. v. DISH* rather than entering into a settlement with the FTC. DISH was unable to settle with the FTC because it was

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[1269] Ex. 701, EchoStar Retailer Agreement with SSN § 11 (Dec. 31, 2004), SLC DNC Investigation 0012367 at 386; Ex. 143, EchoStar Retailer Agreement with Jerry Dean Grider dba JSR Enterprises § 11 (Apr. 12, 2006), SLC DNC Investigation 0012502 at 521 (same); Ex. 130, EchoStar Retailer Agreement with American Satellite Inc § 11 (Oct. 19, 2005), SLC DNC Investigation 0012072 at 091 (same); Ex. 277, EchoStar Retailer Agreement with Donald King DBA Digital Satellite Connections § 11 (Dec. 31, 2004), SLC DNC Investigation 0006542 at 561 (same).

[1270] *See, e.g.,* Ex. 365, Letter from L. Rose to the Honorable J. Leibowitz (Jan. 21, 2009), SLC DNC Investigation 0000682; Ex. 440, Letter from S. Augustino to Secretary M. Dortch (Dec. 9, 2011), SLC DNC Investigation 0001068.

[1271] Ex. 365, Letter from L. Rose to the Honorable J. Leibowitz (Jan. 21, 2009), SLC DNC Investigation 0000682 at 691 (explaining that the TSR does not support the FTC's theory of liability relating to retailers because DISH neither: "(1) provided 'substantial assistance or support' to a telemarketer while (2) 'know[ing] or consciously avoid[ing] knowing' by deliberately ignoring that the telemarketer was engaged in DNC violations.") (alterations in original).

unwilling to agree that it was liable for Retailers' DNC compliance. Had DISH conceded that point, it could have resolved the FTC's claims for, at most, $12 million in 2009. It would make little sense for DISH's Board to allow DISH to reject the FTC's settlement proposal unless the Board believed that DISH would be giving up a strong position by agreeing to assume liability for Retailers' DNC violations.

Finally, the *Krakauer* court found that DISH believed its legal position that it was not responsible for violations by the Subject Retailers: It wrote, "The [DISH] compliance department *believed* TCPA compliance was really up to the retailer." *Krakauer*, 2017 WL 2242952 at *8 (emphasis added). The *Krakauer* court trebled damages nonetheless, because it held that, to determine that DISH had acted "willfully or knowingly," it need not determine that anyone at DISH had acted in bad faith. *Id.* at *9.

To prevail on the Fiduciary Duty Claim, as detailed above, DISH would need to prove that the Director Defendants *knew* that DISH's position that it was not legally responsible for the Retailers' DNC compliance was wrong—knew that DISH was legally responsible for Retailers' DNC violations—even though the only court to have addressed the issue at the time, *Charvat*, had agreed with DISH.[1272] Even to the extent that the Director Defendants might have appreciated that there was some risk in DISH's legal position, a board is permitted to undertake such risk without becoming liable for subsequent judgments if it is proven wrong. *See Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *12 (Del. Ch. Aug. 1, 2016) (finding directors not at material risk of personal liability where they caused the corporation to take a risky legal position and incurred millions of dollars in damages.).

[1272] *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 673-78 (S.D. Ohio 2009).

After its thorough investigation, the SLC found no evidence that any Director Defendant believed, during the Claims Period, that DISH was legally responsible for Retailers' compliance with the DNC Laws. Thus, the Director Defendants cannot have knowingly caused DISH to violate the law by failing to prevent or address Retailers' violations of DNC Laws (assuming the Director Defendants knew of such violations). The Director Defendants were surprised by the decisions in *Krakauer* and *U.S. v. DISH* finding that DISH was legally responsible for violations by the Subject Retailers. The Director Defendants continue to believe that the decisions are wrong, and DISH has appealed both decisions.

c. The Director Defendants Also Did Not Know of Uncorrected Violations by the Subject Retailers.

Because during the Claims Period, the Director Defendants believed that DISH was not legally responsible for Retailers' compliance with DNC Laws, it is not relevant *to the SLC's inquiry*, whether any Director Defendant was aware of the Subject Retailers' DNC Law violations during the Claims Period. Awareness of DNC violations by the Subject Retailers could not have caused a Defendant Director to believe that *DISH* was violating the DNC Laws; they would have believed only that the *Subject Retailers* were violating the DNC Laws. That awareness, therefore, would not establish that any Director Defendant *knowingly* caused *DISH* to violate DNC Laws through continued business with a Subject Retailer.

Nonetheless, the Director Defendants had little, if any, awareness that any Subject Retailers violated any DNC Law during the Claims Period. Neither *U.S. v. DISH* nor *Krakauer* addressed who within DISH was aware of the Subject Retailers' DNC violations, let alone specified that the Director Defendants were aware of the violations.[1273] The Director Defendants

[1273] *See generally U.S. v. DISH*, 256 F. Supp. 3d 810, 857-868 (C.D. Ill. 2017) (generally addressing the knowledge of DISH, occasionally referring to information learned by Musso or

were uninvolved in the vast majority of the communications relied upon as evidence in either Underlying DNC Action.[1274] With two exceptions, none of the communications cited in *U.S. v. DISH* or *Krakauer* to establish that DISH was aware of the Subject Retailers' violations of the DNC Laws included any Director Defendant.[1275] Neither of those two exceptions reflects DISH ignoring calls made in violation of DNC laws. The two communications were consumer complaints from 2005; the Director Defendants were not involved in DISH's response. The courts concluded that DISH was aware of the Subject Retailers' violations based upon emails between Management or lower level DISH employees and the Subject Retailers or flip emails among Management and lower level DISH employees. The Underlying DNC Actions did not

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Neylon employees within Retail Services or Ahmed, within DISH Retail Sales); *Krakauer*, C.A. No. 14-cv-333, 2017 WL 2242952, *5 (M.D.N.C. May 22, 2017) (same). Instead, in *U.S. v. DISH*, the Illinois Court found that "Dish was a sophisticated enterprise with knowledgeable counsel" and therefore "would have known that it would be liable for telemarketers' actions." 256 F. Supp. 3d at 932.

[1274] *See* Table A – Documents Relied Upon in *U.S. v. DISH*, and Table B – Documents Relied Upon in *Krakauer*. These Tables are provided after the final page of this Report.

[1275] These two documents reflect that a Director Defendant was personally copied on a consumer complaint. *U.S. v. DISH* PX 203 reflected that Moskowitz was copied on a 2005 settlement demand for $1000 from a consumer claiming to have received a violative call from Star Satellite. Ex. 119, Letter from D. Caplan to K. Meyers and D. Moskowitz (Jan. 25, 2005), SLC DNC Investigation 0012411. *U.S. v. DISH* PX 204 shows that a consumer copied DeFranco and possibly Ergen ("CharlieChat" and "CEO") on a 2005 complaint that Star Satellite was violating DNC Laws. Ex. 120, Email from S. Kramer to FeedBack (Feb. 18, 2005), SLC DNC Investigation 0012419. Only two additional documents relied upon in the Underlying Actions show that a Director Defendant was personally copied on a consumer complaint involving a Retailer other than a Subject Retailer. *U.S. v. DISH* PX 650 shows that a consumer sent DeFranco a complaint alleging that he received harassing phone calls, which DISH determined were made by a Retailer misrepresenting itself as DISH. Ex. 154, Email from J. DeFranco, M. Metzger, et al. (Aug. 7, 2006), SLC DNC Investigation 0012929. *U.S. v. DISH* PX 658 is an email from Ahmed to DeFranco, in which Ahmed notes that "over the past 18 months" he "cleaned up the OE Retailer channel." Ex. 239, Email from A. Ahmed to J. DeFranco, et al. (Mar. 25, 2011), SLC DNC Investigation 0013156. The Illinois Court cites the email for the proposition that the OE Retailer channel had a poor reputation within DISH. *U.S. v. DISH*, 256 F. Supp. 3d at 852.

address, much less show or hold, that the Director Defendants were contemporaneously aware of the Subject Retailers' DNC violations.

Even when reviewing the broader record available to DISH, the SLC found no evidence that Clayton, Mrs. Ergen, Goodbarn, Howard, Vogel or Moskowitz (who retired as DISH's General Counsel in 2007) was aware of any DNC violation by any Subject Retailer during the Claims Period. And, with the exception of Clayton, who was too ill to be interviewed, these Director Defendants confirmed to the SLC during their interviews that they had no familiarity with any of the Subject Retailers during the Investigation Period, let alone awareness of DNC violations by the Subject Retailers during the Claims Period.[1276]

Ergen and DeFranco were more involved in DISH's operations during the Claims Period. Nonetheless, the SLC found no evidence that either was aware of any DNC violation by any Subject Retailer during the Claims Period. With respect to Ergen, the persons interviewed by the SLC uniformly stated that Ergen was not involved in Retailer discipline—he focused on other aspects of DISH's business. The SLC found no evidence contradicting these statements in any of the documents made available to the SLC.

DeFranco had some involvement in the discipline of some Retailers other than the Subject Retailers during the Claims Period. Because Retail Services ultimately reported to him, DeFranco was occasionally consulted in connection with the decision to terminate a Retailer. However, the documents provided to the SLC, which included DeFranco's emails from the Claims Period, did not show DeFranco involved in any communications about the Subject

[1276] These outside Board members were so removed from DISH's DNC compliance that they did not receive a copy of the 2009 AVC, which was not deemed material to DISH as a whole when DISH agreed to it in 2009, as discussed in Factual Findings § VI.B *supra*. Ex. 387, Email from B. Kitei to C. Ergen, J. DeFranco, et al. (July 20, 2009), SLC DNC Investigation 0005787 at 787 (copying only Ergen and DeFranco, who had roles in Management, from among the Director Defendants).

Retailers during the Claims Period. DeFranco did not recall any discussion about the Subject Retailers, let alone a discussion about DNC violations by the Subject Retailers, during the Claims Period. And, the individuals interviewed by the SLC indicated that, when DeFranco was aware of serial or intentional DNC violations by a Retailer such as would exceed the safe harbors under the DNC Laws, he directed his subordinates to terminate the Retailer in question. On balance, the SLC concludes that DeFranco was not aware of the lower level DISH employees' concerns with the Subject Retailers' DNC compliance during the Claims Period.

Members of Retail Services and Legal did have concerns that some of the Subject Retailers were violating DNC Laws and ultimately terminated them, in most cases, for this reason, albeit not as promptly as the trial courts held was necessary. But, this all took place at a management level beneath the Board. The knowledge of Management cannot be attributed to the Board for purposes of imposing personal liability. *See, e.g.*, *In re Wal-Mart Stores, Inc. Delaware Deriv. Litig.,* 2016 WL 2908344, at *6 (Del. Ch. May 13, 2016), ("[C]ourts may not impute knowledge of wrongdoing" from management to directors). Retail Services and Legal had authority to terminate or spare a Retailer without involvement of Ergen, Moskowitz (who retired years before the Claims Period) or DeFranco; no Director Defendant appears to have been involved in those decisions with respect to the Subject Retailers during the Claims Period.

d. <u>The Director Defendants Nonetheless Wanted Retailers to Comply with DNC Laws.</u>

Although the Director Defendants and Management did not believe that DISH was *legally responsible* for violations of the DNC Laws by Retailers, this did not mean that the Director Defendants or Management *wanted* or even tolerated violations of the DNC Laws by Retailers. All DISH personnel interviewed by the SLC viewed violations of DNC Laws by Retailers as damaging to DISH's business. DISH made substantial efforts to induce Retailers to

comply with DNC Laws and terminated those Retailers that it realized could not be so induced. *See supra* V.F.4. The evidence reviewed by the SLC indicates that, if the Director Defendants had been aware of the discussions cited by the *U.S. v. DISH* and *Krakauer* courts and had believed that they indicated, as the courts found, that the Subject Retailers were violating the DNC Laws, the Director Defendants would have acted to halt the Subject Retailers' violations, or if that could not be achieved, to end DISH's business relationship with such Subject Retailers. The Director Defendants would have done so, independent of the threat of any liability to DISH, to prevent harm to DISH's business and reputation.

4. The *Krakauer* Trebling Decision Does Not Demonstrate that the Director Defendants Acted in Bad Faith With Regard to Compliance with the DNC Laws.

As part of its investigation, the SLC carefully considered the decision in *Krakauer*, in which the North Carolina Court trebled the damages against DISH (the "Trebling Decision"). The SLC did so because the Complaint relies heavily upon the Trebling Decision to support the Claims.

The SLC determined that, contrary to the allegations of the Complaint, the Trebling Decision does not demonstrate that any Director Defendant knowingly caused DISH to violate the DNC Laws or otherwise acted in bad faith for three reasons:

First, the finding that *DISH* acted "willfully and knowingly" and that *DISH* should pay treble damages does not mean that the *Director Defendants* acted "willfully and knowingly" or otherwise breached their fiduciary duties. Whether the corporation engaged in misconduct vis-à-vis outside parties raises a separate issue from whether the Director Defendants engaged in

misconduct vis-à-vis the corporation. As previously explained, courts have found directors not personally liable for treble damages or even criminal penalties awarded against a corporation.[1277]

Second, in the Trebling Decision, the North Carolina Court does not purport to address any knowledge or conduct of the Board. The Board's conduct was not at issue in *Krakauer*. Only one Board member, DeFranco, even testified in *Krakauer*.

Finally, in the Trebling Decision, the *Krakauer* court did not determine that even a non-Board member *knew* that DISH was violating the DNC Laws or otherwise acted in bad faith. The *Krakauer* court expressly held that it could find knowing and willful violations of the law without finding bad faith conduct by DISH. *Krakauer,* C.A. No. 14-cv-333, 2017 WL 2242952, at *9 (M.D.N.C. May 22, 2017) (A "finding of willfulness does not require bad faith").

The *Krakauer* court based its determination of willfulness on DISH's part primarily on the notion—contrary to the Director Defendants' previously held good faith belief—that the relevant Subject Retailer, SSN, was DISH's "agent," such that "DISH [was] responsible for any willful or knowing violation of the telemarketing laws by SSN." *Id*. at *9-10 ("Dish knew or should have known that its agent, SSN, was violating the TCPA, and Dish's conduct thus willfully and knowingly violated the TCPA."). In other words, even if DISH believed it was complying with the DNC Laws, the knowledge and willfulness of SSN could simply be *attributed* to DISH to justify trebling damages. The court's primary basis for trebling damages did not implicate the Director Defendants, much less suggest that they knowingly caused DISH to violate the DNC Laws.

Furthermore, the *Krakauer* court did not suggest that during the Claims Period the Director Defendants or anyone at DISH believed that DISH was legally responsible for

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[1277] Analysis § I.A.

Retailers' DNC compliance or knew that DISH was violating DNC Laws if it failed to enforce DNC compliance by all Retailers. And, during the Claims Period, the Director Defendants and Management had ample reason to believe that DISH was not responsible for the Retailers' compliance, particularly in view of the 2009 *Charvat* decision.

The *Krakauer* court based its willfulness determination alternatively on the ground that DISH "knew or should have known" that SSN—not DISH—was violating the DNC Laws.[1278] *Id*. at *10. This, of course, does not suggest that anyone at DISH, much less a Director Defendant, knew that *DISH* was violating the DNC Laws.[1279] During the Claims Period, the Director Defendants and Management did not believe that DISH was legally responsible for violations of the DNC Laws by a Retailer. And *Krakauer* made no determination to the contrary.

5. The DeFranco Testimony Does Not Suggest that the Director Defendants Acted in Bad Faith with regard to Compliance with the DNC Laws.

The SLC also carefully considered the testimony by DeFranco that was cited in the Trebling Decision, as construed by the *Krakauer* court. DeFranco testified as follows:

> Q. [The 2009 AVC] talks about discipline. Do you see that, [Section] 4.79? It talks about a whole series of things. Do you see that?
>
> A. I see that.
>
> Q. And prior to this agreement, were those forms of discipline the kinds of things that were permitted in the way that DISH did business with its OE Retailers?

[1278] The court based this determination primarily upon communications between SSN and members of DISH Management junior to DeFranco, before DISH effectively terminated its contract with SSN. As noted above, the SLC has found no evidence that DeFranco was aware of these communications.

[1279] DISH has appealed the *Krakauer* court's finding that DISH violated the DNC Laws. *See supra* Factual Findings § X.D.5.

> A. Yes. I mean, when you say 'permitted,' this was our process prior to this agreement.
>
> Q. Yeah. And what I mean is, is this the way a business worked in the real world?
>
> A. Yes. This is how we operated even prior to the agreement as it related to telemarketing.[1280]

The *Krakauer* court interpreted DeFranco's testimony as follows: "According to [DeFranco], the [2009 AVC] changed nothing: 'This is how we operated even prior to the agreement as it related to telemarketing.'" *Krakauer,* 2017 WL 2242952, at *7. The Complaint relies on this testimony for the proposition that the Board knew that DISH had failed to comply with DNC Laws by failing to change its conduct in response to the 2009 AVC.[1281]

The SLC concluded that the testimony does not indicate that any Director Defendant knowingly caused DISH to violate the DNC Laws; the testimony (a) does not address the knowledge of the Board, (b) does not address compliance with any DNC Law and (c) even in addressing the 2009 AVC, does not suggest that anybody at DISH believed that DISH had violated it.

With respect to the first point, the testimony was given only by DeFranco; it reflected only his knowledge. DeFranco said nothing about the knowledge of remaining members of the Board, nor did he claim to speak for the Board as a whole.

Second, DeFranco's testimony concerned the 2009 AVC; it did not concern DNC Laws. The Claims seek to hold the Board liable for judgments arising from violations of DNC Laws—not violations of the 2009 AVC. In the 2009 AVC, DISH "affirmatively state[d] that it believes the requirements it has agreed to by signing this Assurance are policies, procedures and actions

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[1280] Ex. 86, Trial Transcript, at 168:20-169:6, *Krakauer v. DISH Network, L.L.C.*, C.A. No. 14-cv-333 (M.D.N.C. Jan. 13, 2017) (D.I. 304) (J. DeFranco Testimony).

[1281] *See, e.g.*, Compl. ¶¶ 4-5.

that exceed applicable legal and common law standards . . . ." [1282] The AG's stated position in the 2009 AVC did not contradict this point.[1283] DISH's compliance with the 2009 AVC therefore does not demonstrate whether DISH complied with DNC Laws.

Finally, the testimony reflects DeFranco's belief that DISH was *complying* with the 2009 AVC, *even before entering it*. The *Krakauer* court strongly disagreed with DeFranco's view that, before entering the 2009 AVC, DISH was already conducting the investigation of OE Retailers required by the 2009 AVC, *Krakauer,* 2017 WL 2242952, at *7 ("That, however, is patently inaccurate . . . ."); [1284] the court believed that the 2009 AVC required greater investigations. *Id*. But, the court did not find that DeFranco held his position in bad faith. *See, e.g.*, *id.* at *8 n. 11. Even if DeFranco was mistaken as to what the 2009 AVC required, his testimony still does not suggest that he or anyone else at DISH believed that DISH was violating the 2009 AVC.

Based upon its thorough investigation, the SLC has determined that the Board and Management, including DeFranco, believed in good faith that DISH was complying with the 2009 AVC. The evidence uniformly shows that, after consultation with counsel, DISH, including DeFranco, believed that the 2009 AVC required DISH to continue conducting the investigations of consumer complaints that DISH was already voluntarily conducting for business purposes. No party to the 2009 AVC—none of the 46 state AGs—has suggested otherwise; none has claimed that DISH has violated the DNC provisions of the 2009 AVC.

[1282] Ex. 29, 2009 AVC § 1.14, SLC DNC Investigation 00013874 at 877-878.

[1283] *Id.* at §§ 1.5-1.12, SLC DNC Investigation 00013874 at 13876-77.

[1284] *See also* 2017 WL 2242952 at *7 ("Despite the promises DISH made to the attorneys general in the Compliance Agreement, DISH did not further investigate or monitor SSN's telemarketing or scrubbing practices.") (internal citation omitted).

The *Krakauer* court did not have before it evidence concerning DISH's compliance with the 2009 AVC. The plaintiff in that case had not asserted a claim that DISH had violated the 2009 AVC. *Krakauer*, 2017 WL 2242952, at *2 ("Dr. Krakauer sued Dish in 2014, alleging that calls to him and others violated the TCPA"). The 2009 AVC did not give individual plaintiffs standing to enforce it.[1285] None of the negotiating or drafting history of the 2009 AVC was introduced or addressed in *Krakauer*.

Days before trial, the plaintiff sought to introduce the 2009 AVC in its opening statement as evidence of DISH's alleged failure to comply with the 2009 AVC and DNC Laws.[1286] DISH objected on the grounds that its compliance with the 2009 AVC was not at issue in *Krakauer*.[1287] The *Krakauer* court agreed with DISH that the 2009 AVC should be excluded, except for limited excerpts relevant to the question of DISH's control over the Retailers.[1288] Having successfully excluded the issue of its compliance with the 2009 AVC from trial, DISH did not present evidence on the topic.

DISH did not anticipate that, after the jury had rendered its verdict, the court would conclude from the absence of evidence concerning DISH's compliance with the 2009 AVC that DISH was not complying with the 2009 AVC. The SLC has now reviewed the evidence that the *Krakauer* court did not see. Without revisiting the *Krakauer* court's conclusion that DISH did

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1285 Ex. 29, 2009 AVC § 7.2, SLC DNC Investigation 00013874 at 13903 (The 2009 AVC explicitly provided that it was "not intended to confer upon any person any rights or remedies, shall not create any third-party beneficiary rights and may not be enforced by any person, entity or sovereign except the Attorneys General.").

1286 Ex. 82, Pretrial Conference Transcript 7:19-25, 10:16-24, 11:8-13, 14:23-15:7, 17:1-8, *Krakauer v. DISH Network, L.L.C.*, No. 14-cv-0333 (M.D.N.C. Jan. 6, 2017) (D.I. 316).

1287 *Id*.

1288 *Id.* at 22:10-15 ("I'm going to let the Plaintiff in opening statement reference those parts of this agreement relevant to control, but, of course, the Plaintiff needs to be careful that they don't start -- they don't go beyond that and say, you know, all these attorney generals said DISH did something wrong and in response DISH compromised.").

not comply with the 2009 AVC, the SLC concludes that DISH believed that it was complying. If DISH were to litigate this issue against the Director Defendants, DISH would need to reckon with the full record, not the limited sections of the 2009 AVC presented to the *Krakauer* court. Thus, DeFranco's testimony from *Krakauer* would not strengthen DISH's position on the Claims.

D. The Director Defendants Did Not Act in Bad Faith by Ignoring "Red Flags."

As noted above, courts outside of Nevada addressing claims similar to the Claims before the SLC have applied the *Caremark* standard. To prevail under the "red flags" prong of *Caremark*, DISH would have to prove that "(1) that the directors knew or should have known that the corporation was violating the law, (2) that the directors acted in bad faith by failing to prevent or remedy those violations and (3) that such failure resulted in damage to the corporation." *Melbourne Mun. Firefighters' Pension Tr. Fund on Behalf of Qualcomm, Inc. v. Jacobs*, 2016 WL 4076369, at *8 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017); *see also* Section I.B above. "Simply alleging that a board incorrectly exercised its business judgment and made a 'wrong' decision in response to red flags, however, is insufficient to plead bad faith." *Id.* at *9. "[I]ntentional dereliction of duty" is required to find liability. *See In re Qualcomm Inc. FCPA S'holder Deriv. Litig.*, 2017 WL 2608723, at *3 (Del. Ch. June 16, 2017) ("As such, to adequately plead bad faith, Plaintiff[s] must plead particularized facts . . . that the [b]oard consciously disregarded its duties . . . . Conscious disregard involves an intentional dereliction of duty which is more culpable than simple inattention or failure to be informed of all

facts material to the decision.") (internal quotations omitted) (bracketed alterations in original).[1289]

As noted above, because the "red flags" standard of liability, which requires a knowing violation of fiduciary duties, is similar to NRS 78.138(7)(b)(2) and has not been rejected by the Nevada courts, the SLC cannot rule out the possibility that DISH could persuade the Court to apply it. And, the Plaintiffs' abandonment of any *Caremark* claims (Opp'n to Mot. to Dismiss at 27) is not binding upon the SLC, which owes fiduciary duties to DISH and all its stockholders. Thus, the SLC has investigated whether the Director Defendants knew or should have known that DISH was violating the law and consciously disregarded their duty to respond, thereby causing DISH to incur a portion of the judgments entered in *U.S. v. DISH* and *Krakauer*.

1. The Director Defendants Did Not Ignore "Red Flags" Concerning Calls Made by DISH or Its Telemarketers.

The Board did not ignore "red flags" concerning calls made by DISH or its Authorized Telemarketers. The SLC found no "red flags" indicating to the Board that DISH was violating the DNC Laws itself or through its Authorized Telemarketers.[1290] As discussed above, the Director Defendants believed that DISH and its Authorized Telemarketers were materially complying with the DNC Laws.

To the extent that the Director Defendants were aware that DISH or its telemarketers may have made an immaterial number of non-compliant calls, they did not ignore the calls. In each such instance identified by the SLC, the Director Defendants directed Management to take action

[1289] *See also In re SAIC Deriv. Litig.*, 948 F. Supp. 2d 366, 382 (S.D.N.Y. 2013) (*Caremark* claim requires allegation of "particularized facts showing that the directors consciously acted in bad faith by failing to take action despite actual or constructive knowledge of illegal activity . . . .").

[1290] *See, e.g.*, *Horman v. Abney*, 2017 WL 242571, at *10-11 (Del. Ch. Jan. 19, 2017) (finding that UPS's assurance of discontinuance with New York government was not a red flag because UPS created programs and policies to avoid future violations).

to prevent such calls in the future.[1291] Such efforts appear to have been largely effective, given DISH's 99.8% DNC compliance rate.[1292] But, it does not matter whether they were effective, for purposes of evaluating the Claims. "At issue [in this claim] is the duty of loyalty; a board's efforts can be ineffective, its actions obtuse, its results harmful to the corporate weal, without implicating bad faith. Bad faith may be inferred where the directors knew or should have known that illegal conduct was taking place, yet 'took *no* steps in a good faith effort to prevent or remedy that situation.'" *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *17 (Del. Ch. Dec. 18, 2017) (allegations that efforts to curb violations were ineffective failed to state a claim) (quoting *Caremark*) (emphasis in original). Because the Director Defendants did not ignore even immaterial non-compliant calls, DISH could not establish that the Director Defendants acted in bad faith by ignoring "red flags."[1293]

[1291] *See, e.g.*, Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 0001142 ("Help me to fix this PERMANENTLY."); Ex. 316, Email from C. Ergen to D. Moskowitz (Nov. 10, 2006), SLC DNC Investigation 0002680 ("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" (ellipses in original); Ex. 427, Email from J. DeFranco to M. Metzger, et al. (Mar. 31, 2011), SLC DNC Investigation 0001127 ("Please handle [customer DNC complaint]."); Ex. 330, Email from J. DeFranco to E. Carlson et al. (Aug. 27, 2007), SLC DNC Investigation 0005834 ("Who are they? Please start the investigation."); 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?").

[1292] Ex. 372, Email from S. Dodge to C. Ergen, et al. (Mar. 25, 2009), SLC DNC Investigation 0000004 ("99.8% of the calls initiated by [DISH] were made in compliance with the FTC's Do Not Call Rules.").

[1293] Some Director Defendants, particularly executive Director Defendants, were aware of numerous complaints that "DISH" had made calls in violation of the DNC Laws. In the vast majority of such cases, Management found that DISH and its telemarketers had not made the call. The call either had been made by (a) rogue telemarketers, such as those in India and Pakistan who were attempting to develop leads, with whom DISH had no relationship, or (b) Retailers, for whom DISH did not believe that it was legally responsible. The Director Defendants believed that the few remaining calls made by DISH or its telemarketers did not suggest a material lack of compliance by DISH and, in all events, directed Management to rectify any inadequacies in DISH's processes as required to prevent such calls in the future.

Nonetheless, to be as thorough as reasonably possible, the SLC further investigated the knowledge and actions of *Management*. The SLC determined that, to the extent that Management was aware of the events that the court in *U.S. v. DISH* found to be violations of the DNC Laws by DISH and its Authorized Telemarketers, Management either did not believe the events were violations of the DNC Laws[1294] or, to the extent that they recognized them as violations, responded to them by changing DISH's procedures in an effort to mitigate similar violations in the future.[1295]

2. The Director Defendants Did Not Ignore "Red Flags" concerning Calls Made by the Subject Retailers.

The Director Defendants also did not ignore "red flags" concerning calls made by the Subject Retailers. This is so for three reasons.

First, this standard requires an "intentional dereliction of duty[.]" *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *17 (Del. Ch. Dec. 18, 2017) (emphasis in original) (internal quotation marks omitted). The Director Defendants did not believe that DISH

[1294] A portion of the liability in *U.S. v. DISH* attributable to calls made by DISH and its telemarketers resulted from DISH's good faith legal positions, such as DISH's reliance on the *Charvat* decision as discussed in Factual Findings Section VIII.A *supra*, and the court's subsequent disagreement with those positions.

[1295] *See* 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 L.L.C. Do-Not-Call Policy (Mar. 12, 2009), SLC DNC Investigation 0011032; Ex. 733, DISH Network L.L.C. Do-Not-Call Policy (June 25, 2013), SLC DNC Investigation 0015643; *see also* Ex. 316, Email from C. Ergen to D. Moskowitz (Nov. 10, 2006), SLC DNC Investigation 0002680 ("we need to nip any of this in the bud at the first indication that someone is violating anything."); Ex. 306, Email from D. Moskowitz to C. Ergen (Sept. 21, 2006), SLC DNC Investigation 0002217 (forwarding summary of new and current processes and procedures regarding telemarketing; Ex. 372, Email from S. Dodge to C. Ergen et al. (Mar. 25, 2009), SLC DNC Investigation 0000004.

was legally responsible for violations of the DNC Laws by Retailers. They therefore could not have been *intentionally* derelict in any duty to cause DISH to prevent Retailer violations of the DNC Laws.

Second, the Director Defendants never failed to act in response to learning of a DNC complaint—regardless of whether the complaint may have been a red flag. On those occasions on which any Director Defendant became aware of any consumer DNC complaints, they directed Management to fix the situation, regardless of who made the call, whether the call violated DNC Laws and whether they believed that DISH could be found liable for the call.[1296] Thus, even in the absence of a reason to believe that a consumer complaint was a red flag, the Director Defendants did not ignore the situation.

Third, even if the Director Defendants had believed that DISH was legally responsible for DNC violations by Retailers, as previously explained, the Director Defendants were not aware of serial violations by the Subject Retailers during the Claims Period.[1297] Nothing that might have been a red flag of Retailer DNC violations during the Claims Period was presented to the Director Defendants. Thus, this claim also lacks a connection between a red flag ignored by the Director Defendants and some injury to DISH.

[1296] *See, e.g.*, Ex. 308, Email from D. Moskowitz to D. Steele, et al. (Sept. 28, 2006), SLC DNC Investigation 0001142 ("Help me to fix this PERMANENTLY."); Ex. 316, Email from C. Ergen to D. Moskowitz (Nov. 10, 2006), SLC DNC Investigation 0002680 ("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 . . . ."); Ex. 427, Email from J. DeFranco to J. Metzger, et al. (Mar. 31, 2011), SLC DNC Investigation 0001127 ("Please handle [customer DNC complaint]."); Ex. 327, Email from J. DeFranco to E. Carlson et al. (Aug. 27, 2007), SLC DNC Investigation 0005834 ("Who are they? Please start the investigation."); Ex. 261, Email from M. Davidson to J. DeFranco (Feb. 25, 2003), SLC DNC Investigation 0009615 (DeFranco stating, "Not much here to go on but please investigate.").

[1297] *See supra* Analysis § I.C.3.c.

It does not matter that the response by the Director Defendants ultimately did not prevent the Subject Retailers DNC violations[1298] or prevent DISH from incurring legal liability:

[1298] The courts in *Krakauer* and *U.S. v. DISH* found that DISH disregarded violations of the DNC Laws by the OE Retailers. Specifically, the *Krakauer* court determined that:

> The result is the same even if one only looks at the willfulness of Dish's conduct. Dish knew that SSN had committed many TCPA violations over the years. It had received many complaints and knew of at least three lawsuits, one of which resulted in a money judgment and two of which resulted in injunctions. It knew SSN's uncorroborated and conclusory explanations —that violations were inadvertent or the product of rogue employees—were not credible. It knew SSN was not scrubbing all its lists or keeping call records. It ignored SSN's misconduct and, despite promises to forty-six state attorneys general, it made no effort to monitor SSN's compliance with telemarketing laws. Dish had the power to control SSN's telemarketing; it simply did not care whether SSN complied with the law or not. . . . Dish would turn a blind eye to any recordkeeping lapses and telemarketing violations by SSN[.]

See 2017 WL 2242952, at *10-11 (M.D.N.C. May 22, 2017) (citations omitted). In *U.S. v. DISH*, the Illinois Court determined:

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

256 F. Supp. 3d 810, 982 (C.D. Ill. 2017). The Illinois Court further held:

> In many cases, Dish knew Order Entry Retailers were violating the Do-Not-Call Laws and did nothing. Dish knew that Satellite Systems made prerecorded abandoned calls as early as 2002. Dish knew Satellite Systems was making Prerecorded Calls in 2004 and made it an Order Entry Retailers anyway. Dish knew in 2005 that

"directors' good faith exercise of oversight responsibility may not invariably prevent employees [or agents] from violating criminal laws, or from causing the corporation to incur significant financial liability, or both." *Oklahoma Firefighters*, 2017 WL 6452240, at *17(internal quotation marks omitted).[1299] "[I]mposition of liability requires a showing that the directors

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> Satellite Systems was continuing to make Prerecorded Calls. Dish knew in August 2005 that United Satellite was making illegal Abandoned Prerecorded Calls in August 2005 and allowed the practice to continue for another year. Dish's Retail Sales managers showed little concern for compliance with the Do-Not-Call Laws. Prior to 2009, their primary concern was generating activations. Their compensation was tied to activations. They knew that numerous Order Entry Retailers were making illegal Abandoned Prerecorded Calls and did little or nothing about it. Prior to August 2006, they did almost nothing to address these problems. Paralegal Hargen in Dish's Legal Department in fact noted that the Order Entry Retailers and the Marketing Department tried to get around the rules.

Id. at 986-87. If true, such conduct by Management would have violated the directive by the executive Director Defendants. As previously explained, the Director Defendants did not believe that Management was doing so. And, in all events, as explained above, it would not matter for purposes of assessing the liability of the Director Defendants. Regardless of whether their directive was effective, they did not personally ignore potential violations by the OE Retailers.

[1299] *See also In re Impax Labs., Inc. S'holder Deriv. Litig*., 2015 WL 5168777, at *6 (N.D. Cal. Sept. 3, 2015) (stating "Plaintiffs' allegations imply that the [ ] Board took some remedial action in response to the alleged "red flags"; that those remedial actions allegedly did not immediately fix all of the compliance problems identified by the FDA is not sufficient to cast reasonable doubt on the presumption that the Director Defendants are entitled to the protections of the business judgment rule."); *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *1 (Del. Ch. Dec. 18, 2017) ("In order to result in liability, the directors' inaction in the face of 'red flags' putting them on notice of systematic wrongdoing must . . . have been in bad faith. The inaction must suggest, not merely inattention, but actual scienter. In other words, the conduct must imply that the directors are knowingly acting for reasons other than the best interest of the corporation."); *see also Black v. Friendly Ice Cream Corp*., 2006 WL 2714976, at *4 (Mass. Super. Aug. 24, 2006) (using Delaware law as guidance to deny a motion to dismiss because the "record supports an inference . . . that [the director] chose to ignore clear 'red flags' . . . . .").

knew that they were not discharging their fiduciary obligations." *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006) (emphasis added).[1300]

The SLC's Investigation did not identify evidence that the Director Defendants consciously disregarded red flags of legal violations by DISH and utterly failed to respond to them. To the contrary, the SLC has determined that the Director Defendants believed that DISH had no duty to act to prevent Retailer DNC violations, but directed a response regardless.

3. The 2009 AVC Was Not a "Red Flag" and the Director Defendants Did Not Fail to Respond to It.

The SLC specifically considered whether the 2009 AVC was a "red flag" to which the Director Defendants failed to respond, because the Complaint claims as much. *See* Compl. ¶ 38[1301] ("After entering into the Compliance Agreement, the [ ] court found that Dish did not change a thing about its TCPA compliance program."). The SLC has determined that 2009 AVC was not a "red flag" demonstrating that DISH was violating the law.

In their interviews, the Director Defendants stated that the 2009 AVC—or whatever they learned of it—did not cause them to believe that DISH had been violating the DNC Laws.[1302] And their correspondence and the SLC's other interviews did not suggest otherwise. Moreover, it made sense to the SLC that the 2009 AVC would not have caused the Director Defendants to believe that DISH had been materially violating the DNC Laws. It was directed primarily at other issues.

1300 *See also* NRS 78.138(7)(b)(2).

1301 *See also* Compl. ¶ 65 ("DISH also failed to comply with the provisions of the Compliance Agreement.").

1302 DISH refers to certain managerial employees at a specific level of Management below officer as "directors" the use of that term did not mean to refer to members of the Board. The Board did not have "managerial-level responsibilities for performing the obligations" set forth in the 2009 AVC, and the Board having a copy of the 2009 AVC was not necessary to ensure DISH's compliance. *See* Ex. 29, 2009 AVC § 3.1, SLC DNC Investigation 0013874 at 882.

Moreover, DISH did not admit liability for violating the DNC Laws in the 2009 AVC. DISH Management told the Director Defendants that DISH had not materially violated the DNC Laws.[1303] On the point most relevant to DISH's subsequent liability, in the 2009 AVC DISH specifically disavowed legal responsibility for the Retailers, and the AGs did not require DISH to accept any such responsibility.[1304] And, as previously explained, the Director Defendants did not believe that DISH could have any liability for violations by the Subject Retailers.[1305]

Through the 2009 AVC, DISH settled with 46 states for just $6 million—an immaterial amount for DISH—numerous claims from 46 states that DISH had violated multiple statutory provisions, of which the DNC Laws were only a small part.[1306] The willingness of so many states to accept such little payment, including for many alleged violations unrelated to the DNC Laws, suggested that DISH had not been engaged in any material violation of the DNC Laws.

After the 2009 AVC, the Director Defendants secured confirmation from Management that DISH would comply with DNC Laws and the 2009 AVC, and they believed that DISH was complying with both because DISH assigned inside counsel, first Kalani and then Kitei, specifically to ensure DISH's compliance. As previously stated, none of the 46 state AGs who are parties to the 2009 AVC has claimed that DISH violated the 2009 AVC's DNC provisions.

4. The Allegations by the FTC and the Four States Were Not "Red Flags."

The SLC has also considered, for potential treatment as "red flags," the allegations in the *U.S. v. DISH* complaint by the FTC and the Four States that DISH was violating the DNC Laws.

1303 *See* Ex. 372, Email from S. Dodge to C. Ergen, et al. (Mar. 25, 2009), SLC DNC Investigation 0000004 at 004.

1304 *See* Ex. 29, 2009 AVC §§ 1.13-1.14, SLC DNC Investigation 0013874 at 877-878.

1305 *See supra* Factual Findings § II.B.4.b.i.

1306 *See* Ex. 29, 2009 AVC § 6.1, SLC DNC Investigation 0013874 at 903.

The SLC has determined that they were not "red flags." This is so, most fundamentally, because the allegations did not cause the Director Defendants to believe that DISH was violating the DNC Laws in any material way. The Director Defendants stated the allegations did not cause them to believe that DISH was violating the DNC Laws, and the SLC found nothing in the remaining interviews or the documentary evidence to suggest otherwise.

The FTC had indicated that it and California, Illinois, North Carolina and Ohio would settle all their claims against DISH for just $12 million, and Management thought this figure too high. The willingness of the FTC and the Four States to accept so little for their claims indicated to the Director Defendants that DISH did not have a significant problem with DNC Law compliance.

Moreover, the Director Defendants understood that the FTC did not believe DISH had a significant compliance problem based upon calls made by DISH and its telemarketers. And, on the primary issue, whether DISH should be liable for DNC violations by the OE Retailers, the Director Defendants, after receiving advice from experienced counsel, thought the FTC and the Four States were simply wrong. They believed that the FTC was improperly attempting to change the law to make DISH, rather than the FTC, the regulator of the OE Retailers.

An investigation is not, in itself, a red flag of legal violations. *See In re Intel Corp. Deriv. Litig.*, 621 F. Supp. 2d 165, 169, 172, 175 (D. Del. 2009) (finding that four different international and domestic government investigations of alleged anti-competitive behavior by the corporation were not red flags that should have alerted the directors to illegal anticompetitive behavior within the corporation).

E. The Director Defendants Did Not Act in Bad Faith by Utterly Failing to Implement Reporting and Information Systems.

The "information systems" standard of liability under *Caremark* is also marginally inconsistent with NRS 78.138(7)(b)(2) because it would permit the imposition of liability upon the Director Defendants, even if they did not *know* that DISH *was* violating the DNC Laws, if they knowingly failed to create any oversight system to monitor DISH's legal compliance. Nonetheless, a court might find this type of claim to meet the standards for personal liability under NRS 78.138(7)(b)(2) because it requires a director to consciously disregard his fiduciary duty to oversee the corporation. For the same reasons as applied to the "red flags" standard, the SLC has considered whether DISH might prevail under the "information systems" standard. The SLC concludes that DISH cannot prevail under the standard.

To prevail under the "information systems" standard, DISH must prove that the Director Defendants "utterly failed to implement any reporting or information system or controls" with respect to compliance with the DNC Laws. *See Melbourne Mun. Firefighters' Pension Tr. Fund on Behalf of Qualcomm, Inc. v. Jacobs*, 2016 WL 4076369, at *7 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017). DISH cannot prevail on such a claim by merely establishing that the information and reporting system that the Director Defendants implemented was inadequate. *See, e.g.*, *In re Gen. Motors Co. Deriv. Litig.*, 2015 WL 3958724, at *14, *17 (Del. Ch. June 26, 2015) (finding no claim where the plaintiffs did not allege "that the Board had knowledge that this system was inadequate or that the Board consciously remained uninformed on this issue"), *aff'd*, 133 A.3d 971 (Del. 2016); *Horman v. Abney*, 2017 WL 242571, at *9 (Del. Ch. Jan. 19, 2017) ("'The one thing that is emphatically not a *Caremark* claim is the bald allegation that directors bear liability where a concededly well-constituted oversight mechanism, having received no specific indications of misconduct, failed to discover fraud.'") Directors cannot be

held liable under this standard if there is some system in place, but management fails to use the system to report issues. *See Horman v. Abney*, 2017 WL 242571, at *10 (Del. Ch. Jan. 19, 2017) ("[A]n inference that employees charged with the responsibility to implement [company]'s oversight systems failed to report issues to the Board. . . . is not enough to sustain a Caremark claim.") To prevail on such a claim, DISH would need to establish that the Director Defendants effectively consciously blinded themselves to any information about DISH's legal compliance.

DISH cannot prevail under the standard because, like similar large United States corporations, DISH had multiple, overlapping information and reporting systems, including systems for legal and specifically DNC compliance:[1307]

- DISH's Legal Department is involved in DISH's business and compliance matters and is required to advise the Board and the Audit Committee of material compliance. DISH's General Counsel provides updates at both Board and Audit Committee meetings addressing litigation and any other material concerns of DISH's Legal Department, which would include material concerns related to compliance with the DNC Laws.

- DISH's Board and Audit Committee both review DISH's SEC filings. The SEC filings are prepared by numerous members of DISH Management and identify any material risks to DISH, including from regulatory issues such as the DNC Laws.

- DISH has an Internal Audit function which advises the Audit Committee on any concerns with respect to financial reporting or internal controls, which would include informing the Audit Committee of any material non-compliance with law.

- DISH has an external independent auditor, KPMG, that advises the Audit Committee if it has any concerns with DISH's internal controls, including any concerns that Management is not reasonably estimating the materiality of litigation.

- DISH's Audit Committee also monitors DISH's whistleblower hotline, which would enable an employee to report concerns about fraud or systematic non-compliance with the DNC Laws.

1307 *See supra* Factual Findings § IX.

- DISH's Chairman and several other executives sit on DISH's Board and would inform the Board of any material developments or risks not otherwise addressed.

To hold a director liable personally for a judgment against the corporation a plaintiff must show bad faith and, under Nevada law, "intentional misconduct, fraud or a knowing violation of law." NRS 78.138(7)(b)(2). For purposes of evaluating the Claims, it does not matter whether the systems of oversight implemented by the DISH Board were adequate. *Oklahoma Firefighters Pension & Ret. Sys. v. Corbat*, 2017 WL 6452240, at *17 (Del. Ch. Dec. 18, 2017) ("[A] board's efforts can be ineffective, its actions obtuse, its results harmful to the corporate weal, without implicating bad faith."). What matters is whether the Board consciously disregarded its duty to implement a system—DISH's Board clearly implemented a system of monitoring and oversight.

Nonetheless, the SLC has not identified any inadequacy in the systems, and it has determined that any such inadequacy could not have resulted in the *Krakauer* and *U.S. v. DISH* judgments. As previously explained, it was primarily DISH's good faith legal position, during the relevant time period, that DISH was not legally responsible for violations of DNC Laws by Retailers and the subsequent contrary court decisions that resulted in the judgments.

II. The Waste Claim

Plaintiffs allege that the Named Defendants committed "corporate waste" by "causing the Company to pay improper compensation, including salaries, bonuses, fees, stock awards and other incentive-based compensation and benefits to themselves and other Dish insiders who breached their fiduciary duties owed to Dish" from which "Dish received no benefit."[1308] In

[1308] *See* Compl. ¶ 78.

other words, Plaintiffs allege that DISH's compensation to the Named Defendants amounted to corporate waste.

The SLC's determination discussed in Analysis Section I above, that the Director Defendants did not breach their fiduciary duties to DISH, either by knowingly participating in, approving, or permitting violations by DISH of the TCPA and 2009 AVC defeats the corporate waste claim. The corporate waste claim is predicated on DISH's provision of compensation and benefits to the Director Defendants "who breached their fiduciary duties to Dish."[1309] Given the SLC's conclusion that the Director Defendants did not breach their fiduciary duties to DISH, the corporate waste claim likewise fails.

Nonetheless, the SLC considered this claim independently of the alleged breaches of fiduciary duty and determined that DISH would not have a viable corporate waste claim. The Nevada Supreme Court has not expressly recognized a cause of action for corporate waste.[1310] However, Delaware courts have described waste as follows:

> [r]oughly, a waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is *any substantial* consideration received by the corporation, and if there is a *good faith judgment* that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude *ex post* that the transaction was unreasonably risky. Any other rule would

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1309 *Id.*

1310 Nevertheless, to comply with Nevada law, directors and officers must comply with NRS 78.138. As noted previously, NRS 78.138 provides that a "director or officer is not individually liable to the corporation or its stockholders . . . for any damages as a result of any act or failure to act in his or her capacity as a director or officer unless: . . . [s]uch breach involved intentional misconduct, fraud or a knowing violation of law." And as also noted previously, the SLC has determined that there is no evidence that the Director Defendants knowingly caused DISH to violate DNC Laws. *Supra* Factual Findings §§ IV-V.

> deter corporate boards from the optimal rational acceptance of risk . . . . Courts are ill-fitted to attempt to weigh the "adequacy" of consideration under the waste standard or, *ex post*, to judge appropriate degrees of business risk.[1311]

"To recover on a claim of corporate waste, the plaintiffs must shoulder the burden of proving that the exchange was 'so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.'" *In re Walt Disney Co. Deriv. Litig*, 906 A.2d 27, 74 (Del. 2006) (quoting *Brehm*, 746 A.2d at 263). Waste "is an extremely difficult claim to prove[.]" *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 975 (Del. Ch. 2001); *see also Espinoza v. Zuckerberg*, 124 A.3d 47, 67 (Del. Ch. 2015) (noting that the "test for waste is extreme and rarely satisfied"); *Steiner v. Meyerson*, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995) ("Absent an allegation of fraud or conflict of interest courts will not review the substance of corporate contracts; the waste theory represents a theoretical exception to the statement very rarely encountered in the world of real transactions. There surely are cases of fraud; of unfair self-dealing and, much more rarely negligence. But rarest of all—and indeed, like Nessie, possibly non-existent—would be the case of disinterested business people making non-fraudulent deals (non-negligently) that meet the legal standard of waste!").

The SLC has determined that DISH would not have a viable claim against the Director Defendants under a theory of corporate waste based upon Plaintiffs' allegations:

First, the SLC found no evidence suggesting that DISH's payment of director compensation was wasteful in the sense that there were no allegations or evidence suggesting that DISH paid grossly excessive compensation to its directors viewing the compensation *ex ante*. *See In re Walt Disney Corp. Deriv. Litig*, 906 A.2d at 74.

[1311] *Lewis v. Vogelstein*, 699 A.2d 327, 336 (Del. Ch. 1997); *accord Brehm v. Eisner*, 746 A.2d 244, 265 (Del. Ch. 2000) (internal citations omitted) (emphasis in original).

Second, the SLC has determined that the Director Defendants have provided valuable services to DISH as a company, including, among other things, attending and participating in substantially all of the quarterly and special meetings of the DISH Board and the Board committees on which they have served. Accordingly, the SLC found that DISH had a rational business purpose for paying compensation to the Director Defendants. *Id*. (concluding that payment of a "non-fault termination" benefit to Disney's former president did not constitute corporate waste because Disney had a rational business purpose for entering the contract); *Friedman v. Dolan*, 2015 WL 4040806, at *11-12 (Del. Ch. June 30, 2015) (dismissing corporate waste claim where there were no allegations that the option awards were "irrational or otherwise impermissible," and because "[t]his is not a case where James and Charles have no work to do for Cablevision, the amounts are shockingly high in comparison to Cablevision's value, or the pricing has been manipulated."); *In re Goldman Sachs Group, Inc. S'holder Litig*, 2011 WL 4826104, at *16-18 (Del. Ch. Oct. 12, 2011) (rejecting plaintiffs' claim that Goldman Sach's compensation levels for each of Goldman's 31,000 employees were so excessive they constituted a corporate waste because the allegations did not show lack of valid business judgment, there was no "shocking disparity" between the schemes that would render them "legally excessive," and the compensation was not "unreasonably risky"). The SLC also disagrees with the Plaintiffs' allegation that DISH received "no benefit" from providing compensation to the Director Defendants during the Investigation Period.

III. The Unjust Enrichment Claim

Plaintiffs allege that the Named Defendants "were unjustly enriched at the expense of and to the detriment of Dish."[1312] Specifically, they allege that "[a]ll the payments and benefits

[1312] Compl. ¶ 81.

provided to defendants were at the expense of Dish. The Company received no benefit from these payments."[1313] Plaintiffs seek "restitution" from the Named Defendants "disgorging all profits, benefits and other compensation obtained by these defendants, and each of them, from their wrongful conduct and fiduciary breaches."[1314] Plaintiffs allege they "have no adequate remedy at law."[1315]

The SLC has determined that DISH would not have a meritorious claim for unjust enrichment against the Director Defendants. As with the Plaintiffs' corporate waste claim, the SLC's determination that the Director Defendants did not breach their fiduciary duties to DISH undermines any claim that the compensation paid by DISH to the Director Defendants amounted to unjust enrichment. The SLC further determined that the compensation paid to the Director Defendants did not constitute unjust enrichment and that the vague allegations of insider trading against the Director Defendants were likewise without merit.

Under Nevada law, "[u]njust enrichment exists when the plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof." *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 381, 283 P.3d 250, 257 (2012) (quoting *Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981)); *see also Unionamerica*, 97 Nev. at 212, 626 P.2d at 1273 ("Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another."). "Where unjust enrichment is found, the law implies a quasi-contract which requires the defendant to pay to plaintiff the value of the benefit

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1313 *Id.* ¶ 82.

1314 *Id.* ¶ 83.

1315 *Id.* ¶ 84.

conferred." *Certified Fire*, 128 Nev. at 380-81, 283 P.3d at 257 (quoting *Lackner v. Glosser*, 892 A.2d 21, 34 (Pa. Super. Ct. 2006)). "An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *LeasePartners Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 755, 942 P.2d 182, 187 (1997).

Courts have allowed claims for unjust enrichment to proceed where the claim was based upon a corporation's officers receiving payments for allegedly breaching their fiduciary duties. *See, e.g.*, *Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 WL 1437308, at *42-*43 (Del. Ch. Apr. 14, 2017) (concluding that the officers may have received bonuses or payouts from certain breaches of their fiduciary duties such that "there would be an absence of justification for the payments" and that a preferred stockholder may have received redemption payments resulting from breaches of fiduciary duties such that "unjust enrichment could provide a vehicle for the Company to claw back some or all of [these payments] . . . ."); *In re HealthSouth Corp. S'holders Litig.*, 845 A.2d 1096, 1105-06 (Del. Ch. 2003) (finding that HealthSouth's CEO had been unjustly enriched when HealthSouth bought back his shares at a price that was "inflated by false financial statements"); *but see Weinfeld v. Minor*, No. 3:14-CV-00513 RCJ-WGC, 2016 WL 4487844, at *5-6 (D. Nev. Aug. 24, 2016) (finding "Plaintiffs have not sufficiently pled unjust enrichment" despite allegations that "all Defendants unjustly enriched themselves in the amount of $15-20 million at the expense of PMMR, which had no meaningful sales, by approving large compensation packages and large consulting fees to themselves 'and those close to them,'" but permitting a breach of fiduciary duty claim also based in part upon these allegations to proceed).

The SLC concluded that DISH would not have viable claims against the Director Defendants under a theory of unjust enrichment. First, the SLC does not believe DISH would have any viable claim against its directors to recover compensation paid to them during the Investigation Period. The Director Defendants provided services to DISH. As noted above, the SLC found no evidence suggesting that the Director Defendants knowingly caused DISH to violate DNC Laws or that the Director Defendants were aware of any "red flags" indicating that DNC compliance was problematic for DISH. Moreover, unlike the defendants' alleged misconduct in either *Frederick Hsu* or *In re HealthSouth Corp. Deriv. Litig.* where the benefits conferred were directly produced by the alleged breaches, here the alleged benefits conferred—salaries, bonuses and benefits—were products of the Director Defendants' directorship services and had no direct relationship to their performance in their oversight of DISH's or the Retailers' telemarketing activities.

Second, the SLC determined that DISH would not prevail on the subset of Plaintiffs' claim for unjust enrichment, in which the Plaintiffs allege that "while Dish shares traded at artificially inflated prices," certain Director Defendants—Clayton, DeFranco, Goodbarn, Moskowitz, Ortolf and Vogel—sold "shares of Dish stock for unlawful insider trading proceeds . . . ."[1316] Again, Plaintiffs' Complaint predicates these allegations on the alleged breaches of fiduciary duties asserted against the Director Defendants.[1317] Those breaches are factually flawed, as discussed above.

Moreover, to prevail on an insider trading claim, a plaintiff "must show that: 1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because [he or] she was motivated,

1316 *See* Compl. ¶¶ 19-23, 25.

1317 *Id.* ¶ 33.

in whole or in part, by the substance of that information." *In re Oracle Corp.*, 867 A.2d 904, 934 (Del. Ch. 2004). "[I]nsider trading claims depend importantly on proof that the selling defendants acted with scienter." *Guttman v. Huang*, 823 A.2d 492, 505 (Del. Ch. 2003) (complaint failed to allege insider trading when it contained no facts to support "a rational inference that these five directors possessed information . . . that was materially different than existed in the marketplace at the time they traded, much less that they consciously acted to exploit such superior knowledge"); *see also Nguyen v. New Link Genetics Corp.*, 297 F. Supp. 3d 472, 492 (S.D.N.Y. 2018) (noting that an insider trading claim under federal law requires "a plaintiff to plead with particularity facts giving rise to a strong inference of scienter, i.e., an intent to deceive, manipulate, or defraud") (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007)). Based upon its review of documents and information obtained during its interviews, the SLC concluded that none of the Director Defendants executed stock trades or exercised options while possessing material, non-public information related to the alleged breaches of fiduciary duties asserted against the Director Defendants.

One of the reasons for this determination is that the Director Defendants believed that DISH was complying with DNC Laws, as discussed above. The Director Defendants did not believe DISH could be held liable for the Subject Retailers' violations of DNC Laws. And, the Director Defendants did not believe that either *Krakauer* or *U.S. v. DISH* would impose material liability on DISH. Thus, as noted above, the Director Defendants were surprised by the liability imposed against DISH in the Underlying DNC Actions. In light of the foregoing, the Director Defendants could not have improperly traded DISH stock based on the expectation of losses from the Underlying Actions. *See In re Oracle Corp.*, 867 A.2d 904, 934 (Del. Ch. 2004).

Another reason for the SLC's conclusion is that none of the Director Defendants possessed material *non-public information* suggesting that DISH would face a significant monetary loss based upon DNC violations. DISH disclosed the Underlying DNC Actions in its SEC filings as soon as Management believed the Actions were material to DISH. DISH's independent auditor agreed with Management's assessment in this regard. Thus, as soon as the risk of losses in the Underlying DNC Actions became material, the risk was disclosed.

These points are buttressed by the evidence of extensive controls in place at DISH to prevent insider trading, as discussed in Factual Findings Section XI above.

Thus, based upon the SLC's consideration of the allegations in the Plaintiffs' Complaint and the evidence obtained during the SLC's investigation, the SLC has determined that the Plaintiffs' claim for unjust enrichment is without merit and that it would not be in DISH's best interest to pursue the claim against the Director Defendants.

IV. Other Concerns Relevant to DISH's Pursuit of the Claims Under Investigation

A. The Statute of Limitations May Bar the Claims.

For DISH to pursue the Claims, it would need to evaluate and potentially overcome a statute of limitations defense, which could bar the Claims as a matter of law. Under Nevada law, a claim for breach of fiduciary duty is subject to a three-year statute of limitations.[1318] NRS

[1318] As discussed in Analysis § II *supra*, a claim for corporate waste has not been recognized in Nevada, so it is unclear what the applicable limitations period would be. Because corporate waste appears to be based primarily upon alleged breaches of fiduciary duty by the Director Defendants, it is likely subject to the same three-year statute of limitations as the breach of fiduciary duty claim. Unjust enrichment is generally subject to a four-year limitations period, NRS 11.190(2)(c). However, because the unjust enrichment claim seeks recovery of compensation from the Director Defendants due to their alleged breaches of their fiduciary duties, the statute of limitations for this claim likely would also be three years. *See, e.g., Blotzke v. Christmas Tree*, 88 Nev. 449, 450, 499 P.2d 647 (1972) (looking past the label of breach of implied contract and finding the gravamen of the action to be in tort and thus subject to dismissal on statute of limitations grounds); *Bugay v. Clark Cty. Sch. Dist.*, No. 63652, 2014 WL 6609508, at *3 (Nev. Sup. Ct. Nov. 20, 2014) (unpublished order) (concluding that claim pleaded as

11.190(3)(d); *In re Amerco Deriv. Litig.*, 127 Nev. 196, 228, 252 P.3d 681, 703 (2011). The statute of limitations is deemed to accrue "upon the discovery by the aggrieved party of the facts constituting" the breach. NRS 11.190(3)(d). In other words, the statute of limitations does not begin to run "until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach." *Amerco*, 127 Nev. at 228, 252 P.3d at 703(quoting *Nev. State Bank v. Jamison P'ship*, 106 Nev. 792, 800, 801 P.2d 1377, 1382 (1990)).

Generally, in a derivative action such as this, the "aggrieved party" is deemed to be the corporation itself. *See Parametric Sound Corp. v. Eighth Judicial Dist. Court,* 133 Nev. Adv. Op. 59, 401 P.3d 1100, 1105 (2017) ("A derivative claim is one brought by a shareholder on behalf of the corporation to recover for *harm done to the corporation*.") (emphasis added) (quoting *Cohen v. Mirage Resorts, Inc.,* 119 Nev. 1, 19, 62 P.3d 720, 732 (2003)); *Lintz v. Blue Goose Dev., LLC*, No. G048325, 2015 WL 1884276, at *14 (Cal. Ct. App. Apr. 24, 2015) ("Because the derivative cause of action belongs to the corporation, and the corporation is the real plaintiff, it is the corporation's, not the shareholder's, discovery of the negligent conduct causing the loss or damage that would be relevant to commencement of the statute of limitations. Further delaying commencement until a shareholder also discovers the conduct is contrary to the purpose of statutes of limitations.").[1319]

"Under Nevada law, a discovery by a corporate officer or agent can be imputed to the corporation ('imputation doctrine')." *In re Rhodes Companies, LLC*, 2013 WL 7020748, at *3

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breach of contract in fact sounded in tort and was therefore barred by two-year statute of limitations).

[1319] *See also Interlake Porsche & Audi, Inc. v. Bucholz*, 728 P.2d 597, 607 (Wash. Ct. App. 1986) ("In a shareholder derivative action, which asserts a corporate cause of action, the corporation is the aggrieved party and the real party plaintiff.") (citing H. HENN AND J. ALEXANDER, *Corporations* § 369, at 1080 (3d ed. 1983); *Bay City Lumber Co. v. Anderson*, 111 P.2d 771 (Wash. 1941)).

(D. Nev. Dec. 27, 2013). "The imputation doctrine is triggered when an agent obtains knowledge 'while acting in the course of his employment and within the scope of his authority' and the corporation is responsible for this knowledge even if 'the officer or agent does not in fact communicate his knowledge to the corporation.'" *Id.* (quoting *Strohecker v. Mut. Bldg. & Loan Ass'n of Las Vegas*, 55 Nev. 350, 34 P.2d 1076, 1077 (1934)) And where the officer or director was acting on behalf of the corporation (and not solely for his or her own benefit, *and* adverse to the corporation),[1320] knowledge of the officer or director may even be imputed to the corporation when that officer or director is culpable for the alleged breach. *Id.* Here, where any breach of fiduciary duty would likely be discovered by the Director Defendants before any other agent of DISH, the statute of limitations accrual date is likely the date that the Director Defendants knew or should have known of the alleged underlying breach.

The conduct at issue in the Claims took place more than six years ago. But even assuming the discovery of the facts giving rise to the Claims likely occurred at a later date, the SLC believes it is likely that the accrual date for the statute of limitations is still more than three years prior to the filing of the original complaint in October 2017.

If the Court were to credit Plaintiffs' allegation that the 2009 AVC demonstrated that the Director Defendants were aware that DISH had DNC compliance issues and that they had a

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[1320] There is "adverse interest exception" to the imputation doctrine "designed to protect the corporation from 'outright theft or looting or embezzlement.'" *In re Rhodes Companies,* LLC, 2013 WL 7020748, at *3 This exception applies only where "an agent is acting solely on his own behalf." *Id.*; *see also In re Amerco Deriv. Litig*., 127 Nev. at 214, 252 P.3d at 695 ("[T]he agent's actions must be completely and totally adverse to the corporation to invoke the exception") (internal citation omitted). The adverse interest exception likely does not apply here. Similarly, Nevada courts have declined to adopt the adverse domination doctrine, which, if adopted, would require "tolling [of] a statute of limitations when a culpable individual, or individuals, are in charge and impose total control over a corporation." *In re Rhodes Companies, LLC, 2013 WL 7020748,* at *4 (citing *USACM Liquidating Trust v. Deloitte & Touche LLP*, 764 F. Supp. 2d 1210, 1232 (D. Nev. 2011)).

"duty" to "direct DISH's business in compliance with the TCPA" and the 2009 AVC, DISH may have had actual or constructive knowledge of facts relevant to the Claims, and therefore the statute of limitations could be deemed to have begun to run, shortly after July 16, 2009—the date that DISH entered into the 2009 AVC and the date the 2009 AVC was publicly filed.[1321]

And even if knowledge of the Director Defendants could not be imputed to DISH, DISH, as well as its shareholders, were likely put on notice of the alleged DNC compliance issues underlying the Claims on, and the statute of limitations could have begun to accrue on, December 23, 2013, when the FTC and the Four States in *U.S. v. DISH* filed a motion for summary judgment, indicating that the state plaintiffs were seeking, in respect of alleged violations from 2003 to 2010,[1322] civil penalties and damages of approximately $270 million and that the federal government was seeking an unspecified amount of civil penalties against DISH based upon alleged violations of DNC laws.[1323]

But even if the foregoing events did not trigger the accrual of the statute of limitations, the statute of limitations likely would have begun to accrue at least by April 18, 2014, the date the *Krakauer* complaint was filed, as the filing of the *Krakauer* lawsuit likely also put DISH, as well as its shareholders, on notice of the alleged DNC compliance issues asserted in the Claims. As discussed above, the *Krakauer* complaint alleged that "Dish failed to take effective action to stop the [TCPA] violations, and instead gratefully accepted the new business its dealers generated through illegal means."[1324] It further alleged that "[b]ecause of scores of consumer

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1321 Ex. 29, 2009 AVC, SLC DNC Investigation 0013874.

1322 *See* Ex. 246, Defendant DISH Network LLC's Opposition to Plaintiffs' Motion for Summary Judgment, at 8, 23 (C.D. Ill. Mar. 6, 2014) (noting that the FTC and the Four States' motion for summary judgment alleged DNC violations from 2003 to 2010).

1323 Ex. 47, DISH Network Corp., Annual Report (Form 10-K), at 44 (Feb. 21, 2014).

1324 Ex. 71, *Krakauer* Compl. ¶ 3.

telemarketing complaints, private TCPA lawsuits and government enforcement actions, Dish has known for years that its dealers violated the TCPA in marketing and selling Dish subscriptions."[1325] Moreover, the *Krakauer* complaint alleged that the FTC and Four States filed suit in 2009 for unlawful telemarketing to consumers on the DNC Registry, and that DISH failed to take effective action to end the telemarketing violations, resulting in Krakauer and the putative class members receiving illegal telemarketing calls.[1326] Thus, these allegations likely would have put DISH and its shareholders on notice of the DNC compliance issues alleged in the Complaint. Accordingly, if any of the foregoing dates were to begin the accrual of the three-year statute of limitations, Plaintiffs' October 2017 complaint would be untimely, and the Claims would be barred by the applicable statute of limitations.

B. Pursuit of the Claims Would Be Costly and Distracting to DISH.

For DISH to pursue the Claims, it would need to sue a majority of its sitting Board members, including its Chairman Ergen and its Executive VP DeFranco. Such a lawsuit would disrupt DISH's operations. It would distract the people at the heart of developing and implementing DISH's strategic plans. If litigation of the Claims survived a motion to dismiss, it could continue for years.

Corporations frequently, very rationally, cite this sort of disruption as a factor weighing against pursuing even meritorious claims. *See In re Primedia, Inc. S'holder Litig.*, 67 A.3d 455, 469 (Del. Ch. 2013) ("[T]he SLC's decision not to pursue relief for this one purchase did not render its recommendation unreasonable, because the costs, burdens, and distractions of pursuing the litigation easily could outstrip the value to Primedia from the limited potential

1325 *Id.* ¶ 31.

1326 *Id.* ¶ 35, 38.

recovery of the profits on that purchase."); *Ironworkers Dist. Council v. Andreotti*, C.A. No. 9714-VCG, 2015 WL 2270673, at *23 (Del. Ch. May 8, 2015) ("Finally, the Committee found that the costs by way of 'significant distraction and impairment of morale for directors, officers, and employees of the Company' further weighed against bringing any claims."). The SLC views this issue as weighing particularly heavily against litigating non-meritorious claims.

C. DISH's Litigation of the Claims Would be Complicated By the Positions Taken in the Underlying DNC Actions.

DISH's litigation of the Claims would be complicated by the factual determinations reached in the Underlying DNC Actions. As a litigant in the Underlying DNC Actions, DISH may be precluded from asserting contrary facts in any litigation that it undertook to prosecute the Claims. *See Delgado v. Am. Family Ins. Group*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009) ("The doctrine of judicial estoppel . . . is invoked . . . when a party argues two conflicting positions . . . ."). A number of the facts found in the Underlying DNC Actions could make it difficult for DISH to prevail on the Claims. For example, in *Krakauer*, the North Carolina Court determined that "[t]he Dish compliance department believed TCPA compliance 'was really up to the retailer.'" *Krakauer*, 2017 WL 2242952, *5 (M.D.N.C. May 22, 2017). And in *U.S. v. DISH*, the Illinois Court found that DISH employees acted in good faith when they made the calls at issue. *U.S. v. DISH*, 256 F. Supp. 3d 810, 931 (C.D. Ill. 2017) (finding that "Dish presented numerous witnesses who testified that Dish acted in good faith and never intentionally made an illegal call," but concluding that such evidence was irrelevant).

Conversely, the Director Defendants were not themselves litigants in the Underlying DNC Actions. The Director Defendants would be able to take different positions on issues than

those found in the Underlying DNC Actions.[1327] Thus, for example, in *U.S. v. DISH*, DISH was precluded from submitting evidence showing that calls fell within exceptions to the TSR.[1328] The Director Defendants would likely be able to submit the evidence in that DISH was precluded from presenting to show that the calls fell within exceptions.

D. Prevailing on the Claims Would Increase DISH's Legal Risk and Be Detrimental to DISH in Other Litigation.

For DISH to prevail on the Claims, it would need to prove that the Director Defendants acted with the bad faith and knowing violations of the DNC Laws necessary to justify imposing personal liability. *See* NRS 78.138(7)(b)(2). If DISH obtained such a judicial determination, DISH would be judicially estopped in future litigation from disputing that it intended to violate the DNC Laws with respect to the Claims Period, and possibly substantially longer. *See Delgado*, 125 Nev. at 570, 217 P.3d at 567 (observing that judicial estoppel applies when a party "has taken two positions" that are "totally inconsistent" in separate judicial or quasi-judicial proceedings).

If DISH were judicially estopped from disputing that it intended to violate the DNC Laws, it would be unable to claim the safe harbor under either the TSR or the TCPA or most

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[1327] *Marcuse v. Del Webb Communities Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468 (2007) ("Judicial estoppel applies when the following five criteria are met: (1) the *same* party has taken two positions . . . .") (emphasis added).

[1328] *See, e.g.*, *U.S. v. DISH*, 256 F. Supp. 3d at 837 ("The [Illinois] Court barred Dish from producing evidence of scrubbing procedures that was not produced in discovery. . . . To the extent that Dish presented [certain] testimony at trial (or any other witness's testimony not produced in discovery) to prove Dish maintained documentation to comply with safe harbor procedures, the testimony is barred by Opinion 279 [D.I. 27 dated Apr. 24, 2013]."); *Id.*("Dish employee Montano testified that Dish met all requirements for compliance with TSR and TCPA safe harbor provisions. . . . Montano testified that Outbound Operations maintained documentation of its scrubs. . . . Dish, however, failed to produce in discovery or at trial written scrubbing procedures or documentation that such scrubbing procedures were followed. Such documentation is required to meet safe harbor requirements.").

state DNC Laws.[1329] And, DISH would be judicially estopped from disputing that any violation of the DNC Laws found was willful. *See Delgado*, 125 Nev. at 570, 217 P.3d at 567. The only defense that DISH would have as to Registry Calls made during the Claims Period would be the statute of limitations.

Even in litigation concerning more recent calls, in which DISH was not strictly judicially estopped from disputing its knowing violation of the DNC Laws (for example with respect to calls made after the Claims Period), DISH would be hard pressed to convince a finder of fact to reach a contrary conclusion. DISH would be serving itself up an ideal target for further DNC class action litigation and encouraging every regulatory body with any interest in the DNC Laws to investigate or prosecute DISH.

For DISH to prevail on the Claims, it would also need to prove that the Retailers were so obviously its agents during the Claims Period, that the Director Defendants knowingly caused DISH to violate the DNC Laws by permitting DISH to proceed as though the Retailers were not DISH's Agents. Establishing this would be detrimental to DISH's further litigation of the Underlying DNC Actions, in which it disputes precisely this point. It would also increase DISH's vulnerability to other litigation seeking to impose liability on DISH for other, as yet unknown, Retailer misconduct unrelated to DNC compliance.

The SLC does not believe, in the exercise of its business judgment, that it would be in DISH's best interest for DISH to attempt to prove (1) that it knowingly violated the DNC Laws at the behest of its Board or (2) that Retailers are its agents.

[1329] The TSR Safe Harbor requires, among other things, that any second call to a number in violation of the TSR be the "result of error" to qualify for protection. 16 C.F.R. § 310.4(b)(3)(vi). Likewise the FCC Rule requires that a violation be "the result of error" in order to fall under its safe harbor provision. 47 C.F.R. § 64.1200(c)(2)(i). California state law has the same requirement. Cal. Bus & Prof Code § 17593(d) (requiring that call be "accidental").

CONCLUSION

Directors are not held liable for litigation losses suffered by a corporation. Boards can, and do, cause corporations to dispute their regulatory liabilities without thereby becoming the guarantors of success in that litigation. Nevada in particular has a clearly articulated public policy of supporting directors' exercise of their business judgments regardless of what the outcome of those judgments is for the corporation. As such, to hold directors personally liable for a judgment against the corporation, the corporation (or its stockholders derivatively) must show that the directors knowingly caused the corporation to violate the law (NRS 78.138(7)(b)(2)) or, perhaps, knowingly disregarded their fiduciary duties to oversee the corporation's legal compliance in bad faith (*Caremark*).

The SLC found no evidence that the Director Defendants knowingly caused DISH to violate the DNC Laws or knowingly disregarded their fiduciary duty to oversee DISH in bad faith. To the contrary, the SLC's Investigation determined that the Director Defendants believed that DISH was complying with the DNC Laws, directed Management to correct the situation whenever they percieved a possibility that someone was not complying and genuinely believed in good faith that DISH was not responsible for enforcing Retailers' compliance with DNC Laws. DISH cannot recover the judgments from the Director Defendants. Nor can DISH recover under the other theories of waste or unjust enrichment advanced by Plaintiffs.

Attempting to litigate claims premised on DISH's Board knowingly causing DISH to violate the DNC Laws would be harmful to DISH. If DISH could overcome the statute of limitations issues, pursuit of the claims would be distracting, costly and complicated by the positions DISH has taken in the Underlying DNC Actions. And, if DISH prevailed, it would have proven that it willfully—at its Board's direction—violated DNC Laws that permit individual plaintiffs to recover $500 per call, potentially trebled. None of those costs is worth

bearing for the unlikely possibility that DISH might, somehow, prevail on claims that the SLC believes to be meritless.

Based on the foregoing, the SLC determines, in the good faith exercise of its business judgment, that it would not be in the best interests of DISH to pursue the Claims asserted by Plaintiffs in the Nevada Action.

Respectfully submitted this 27th day of November, 2018

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