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. 22 of 85
[JA004771-JA005020]

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

EXHIBIT 76

EXHIBIT 76

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER	*	Case No. 1:14CV333
	*	
Plaintiff,	*	
vs.	*	Greensboro, North Carolina
	*	April 21, 2016
DISH NETWORK L.L.C.,	*	9:35 a.m.
	*	
Defendant.	*	

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TRANSCRIPT OF PRETRIAL/SETTLEMENT CONFERENCE
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

THE COURT: All right. Good morning.

(Simultaneous response by counsel.)

THE COURT: I'm going to let everybody tell me who they are -- remind me who they are since it has been a while since I have seen many of you.

Okay. For the Plaintiff.

MR. BARRETT: Good morning, Your Honor. I'm John Barrett with Bailey & Glasser, Charleston, West Virginia, here for the Plaintiff and the class. With me is Brian Glasser, one of my law partners. He will be trying the case with me.

THE COURT: Okay.

MR. BARRETT: Also from Charleston, West Virginia, and Washington, DC. Our client, Thomas Krakauer is here and Matthew Norris, our local counsel, is here.

THE COURT: All right. Great. Thank you.

MR. BARRETT: Thank you.

THE COURT: And for the Defendant.

MS. ECHTMAN: Good morning, Your Honor. My name is Elyse Echtman and it's the first time of having the pleasure to appear before you.

THE COURT: Oh, that's right. Defendants have added some more lawyers. I now remember. Go ahead.

MS. ECHTMAN: Yes, yes, we added some more lawyers. My name is Elyse Echtman. I'm with Orrick Harrington &

Sutcliffe. I will be trying the case before you for Dish and I have with me my partner, John Ewald, also of Orrick. We've got Eric Zalud, who you've met before; David Krueger, who has also previously appeared before you; our client, Brett Kitei, from Dish. Our local counsel, Chad Hansen, is here today. On other days we've had Rich Keshian, who could not make it today.

THE COURT: All right. Thank you.

All right. So I believe you all got my order on the motion for partial summary judgment. Everybody is nodding. Good.

I really -- I have to say I really struggled with that, as I think my order probably made clear, and so one of the things I want to talk with you all about is sort of the practical implications of that. I denied it, but as I think my order made clear, the only reason I denied it is because I thought it was about 50-50 on whether or not Judge Myerscough's order was final; and when that's the case, the person who's got to prove it's res judicata loses. I went back and forth on it a lot, but obviously -- it seemed to me obvious anyway -- it's likely to become final. As best I can tell, she's not reconsidering that, but, of course, you know, I don't know.

So I don't really want to waste time trying that if it's something that could easily be cut out and tried later should the need be -- should there be a need. On the other hand, if trying it is really not going to make any difference in our case, it's not going to complicate it or really add any new

issues, well, you know, we might as well just go ahead and do it. So I want to hear from you about that.

I also want to talk about the agency issue; and I have suggested this to you all before and haven't gotten any takers on severing it. So I want you to tell me again why that's a bad idea because it keeps seeming like a good idea to me. If the Plaintiffs lose on agency, we don't have to try the rest of it, right? And if they win on agency, the case is in a very different posture. You know, it might facilitate a settlement for everybody or at least be easier to try what I would -- am calling the liability issues. I appreciate agency is part of liability, but, you know, I've got to separate them somehow. So those are my code words. So -- but there may be some reason not to do that and I want to hear from you all about that, but I believe I can do it on my own motion. So you all -- I'm not saying I'm going to do it. I'm going to listen to you with an open mind, but I really want to hear what you have to say about that. So that's the second thing I want to talk about.

Then I want to talk to you about the jury instructions, which I believe I indicated in my order I was not that -- I didn't find very helpful; and to assist you all, I have given you the simplest jury instructions I could find that I have actually given in a case or more or less given. I didn't go back and read the transcript. This is -- these instructions in the *Honeycutt* case I actually gave. It's a totally different

case, but it will tell you how I am used to doing jury instructions. And for local counsel in the room who appear in state court, they will look very familiar.

They -- we don't have pattern jury instructions in the Fourth Circuit. I found this very hard to believe, but we don't. There are some options out there in criminal court in the Fourth Circuit, but civil we're kind of on our own and, as best I can tell, there's not a lot of consistency across the circuit or even across North Carolina or even across this district in how judges instruct juries in civil cases. So I just continue to do it the way that I think is easiest for juries to understand and I've given you an example. We'll talk about that.

I want to talk about designations of deposition testimony for use at trial, and then we can talk about exhibits and witnesses and voir dire. My inclination is to put those off until we meet early in June, but, you know, we can discuss that, whether there's anything we can productively do today, whether there's some big -- whether there are groupings of objections that maybe briefing would be appropriate. So we'll talk about that.

And finally, at the end of all of that, we'll have some settlement discussions. I don't like to -- I'm just giving you a head's up so you can be churning about this while we talk about other things. I am not going to go back and forth and do

that kind of mediation with you. You just had that kind of mediation a couple of weeks ago. I don't like to do it when I'm going to be the trial judge. I don't think there's anything wrong with it. I just don't like to, so I don't have to do it if I don't want to, so I'm not going to. I'm happy to sit around the table with you all. We can use the jury room and talk about it.

I don't care whether you settle a case or not. I'm happy to try the case. I have not had my quota of trials this year. You all are in line. I'm happy to try the case, but you all might prefer to settle the case. Parties often do. So we'll talk about that at the end.

And that's what I have on my list. Is there anything you all are going to want to talk about that I have not covered? Does the Plaintiff -- can the Plaintiff think of anything?

MR. BARRETT: Your Honor, we haven't addressed motions in limine. Neither party has filed them.

THE COURT: So you want a schedule for that?

MR. BARRETT: I believe that would be appropriate.

And the second matter is the follow-up pretrial conference that you have scheduled. We can address whether that's necessary. We think it would be helpful to address the motions in limine and any other remaining issues.

THE COURT: Uh-huh. All right. What about for the Defendants?

MS. ECHTMAN: Well, Your Honor, I think your list is fairly exhaustive. We don't have anything to add to that.

THE COURT: Okay.

MS. ECHTMAN: We'd be willing to meet and confer about an acceptable motion in limine schedule with you separately so we can all check our calendars. I don't think we should have a drop-dead time. There may be a motion we might need to make during trial, if necessary. Given it's a jury trial, we need to be very careful. We do have motions that we intend to make and some of them will depend on the severance issue.

And I do have to say -- I don't know if you want to go in a particular order, but maybe part of the benefit of having additional counsel and eyes on this case is that Dish believes that the severance of agency is a very good idea and we'd be pleased to try the case that way. We think they're all efficiencies that you see and that it could also facilitate settlement.

THE COURT: All right. Well, good. So I've got a good list.

Why don't we talk about the consent and EBR issues in front of Judge Myerscough. I did not check this week, but I assume you all would have told me if she had miraculously managed to get an order entered, but she hasn't.

MS. ECHTMAN: Your Honor, I'm one of the trial council in the case before Judge Myerscough and there have been no

orders. Indeed, for the first phase of the case, the proposed findings of fact and conclusions of law are due on April 29th. So I don't think we would have anything before then. In any event, there's a second phase of the trial scheduled for October where we'll be addressing the Plaintiff's request for a permanent injunction, as well as some remaining issues on the state TCPA claims.

THE COURT: Okay. Thank you for that update.

So what does the Plaintiff -- you know, the Plaintiff moved for partial summary judgment on that. If -- if I were to sever those -- those very -- it's not all of the consent and EBR defense. It's just some of the class members. So is it really going to make a difference at trial if I sever it or leave it until later or -- you all didn't propose separate issues for those folks.

MR. BARRETT: Right. I think -- let me address your -- your question with kind of an explanation, if I may, and we can just talk this through.

THE COURT: That's what I want to do is, you know, kind of have a conversation about it.

MR. BARRETT: Wonderful. I think that your order of a few days ago changed a lot in terms of our view of the case. Your Honor agreed with us on four of the five elements to find the *U.S. v. Dish* rulings preclusive and all that remains is -- are a couple of things.

And first of all, let me say I'm not counsel in the *U.S. v. Dish* case and I defer to my opposing counsel for very specific recitations of the facts and arguments there.

But I would say that what remains to be decided in *U.S. v. Dish* that would be depositive here would be the agency determination with respect to the SSN clause. That's one issue. That's really the principle issue is the agency determination with respect to the SSN clause. There has been speculation among litigants and a lot of people who are paying close attention to the *U.S. v. Dish* case that before any final verdict or ruling is issued there may be a preliminary finding with respect to vicarious liability, again, because those issues are, as Your Honor said, somewhat separate from the issues regarding the calls themselves. So I don't know and I can't represent that Judge Myerscough would be inclined to issue a ruling on --

THE COURT: So can I be -- can I -- I apologize. I just want to be sure I understand what you're saying. Are you suggesting that if by some chance -- this seems unlikely. If the Plaintiffs -- if the proposed findings of fact from the parties are not coming for another week, but if Judge Myerscough were to issue an opinion before our trial in June that addressed the SSN -- I always think of social security number; it's very distracting to me, those initials -- that SSN was Dish's agent, that at that point you would be

asking me to revisit or to visit the res judicata issue on that question? Is that what you're suggesting to me?

MR. BARRETT: Yes, Your Honor, I am.

THE COURT: Okay. That's kind of a different issue. Let's put that to the side --

MR. BARRETT: Okay.

THE COURT: -- okay, because we're going to talk about the agency issue in a minute. First, I want to just ask you about the EBR and consent issues that are part of Judge Myerscough's case.

MR. BARRETT: First of all, let me address consent.

THE COURT: Okay.

MR. BARRETT: There was no proposed jury instruction on consent that I saw, so I do not believe that -- Dish can only speak to this, but I don't believe that's going to be a defense in this case.

THE COURT: Oh. All right. Okay.

MR. BARRETT: With respect to EBR, Judge Myerscough has ruled -- there is no -- Judge Myerscough has ruled against Dish on summary judgment on the EBR issue, so we don't believe that's an appropriate defense in this case either. We also don't believe that Dish has presented sufficient evidence to support an EBR defense.

THE COURT: Well, I know, but that's kind of what a trial is for. I mean, I've denied your summary judgment motion

so -- because I'm not sure it's final.

MR. BARRETT: Right.

THE COURT: So given that, I'm really talking about, well -- but because it might become final, I don't know when, but she's going to do something, unless they settle that case, which seems unlikely given everything that's gone on in that case. I'm just trying to figure out is it worth pulling out any issues. Does that make sense or does it not make any sense? How does it affect your proof?

MR. BARRETT: Ultimately, I think the big consideration would be efficiency, would it be efficient to pull something out; and if we were to pull out what would not be affected by *U.S. v. Dish,* that would be the charter calls -- so-called charter calls that's a subset of all of the calls at issue that SSN made.

THE COURT: Right.

MR. BARRETT: I believe that would be the only thing that would be pulled out.

THE COURT: And how would that -- if we did that, how does that affect your proof? Does it simplify things at all or not?

MR. BARRETT: It -- it really -- I don't think that it does, Your Honor, because it's sort of like putting on half the damages in a case where you're considering liability and damages. It's kind of like saying we'll consider in a car

accident case the lost wages, but not the medical bills. It -- it -- all of it will address the same issues.

THE COURT: Your proof is not going to be different for the charter calls -- and, of course, I'll need to ask the Defendant because their defense my be different, but you're not going to, in your evidence, separate the charter calls and the rest of them.

MR. BARRETT: That's correct.

THE COURT: Okay.

MR. BARRETT: You know, for that reason, in light of Your Honor's ruling, which, you know, we viewed as positive in that it accepted four of our five elements and reserved the fifth for something that we know is coming -- we don't know when it is coming, but we know that it is coming -- we would not be opposed to postponing the proceedings until Judge Myerscough has issued a final ruling.

THE COURT: The EBR defense or the whole entire thing?

MR. BARRETT: The entire thing. And that is because --

THE COURT: You know, I just hate delay. They told you that, right?

MR. BARRETT: We do too and we have until two days ago resisted any effort to postpone any aspect of this trial.

THE COURT: Well, have you all talked about -- this is news to me, so I'll just respond sort of off the cuff, not with

a decision. But in other cases where other people say, "Oh, there's this other case; and once it's decided, really we'll be in a way better position to move forward," I always say, "Are you telling me you agree to be bound by that other case?"

Because if you're not, what's the point of waiting? If you are agreeing to be bound, well, okay, we can have -- you know, we can really talk about that if it's actually going to resolve things here and I know that it's going to resolve things. If you're not -- I mean, maybe I'll still be with you, I'll still listen to that, but I'm a little -- you have a little harder row to hoe.

I had to set a conference call just tomorrow -- for tomorrow on this exact problem. People want to stay something, you know, but they don't -- nobody -- everybody wants to stay it, but nobody wants to be bound by what this other thing is that's going to happen. Well, explain that to me.

MR. BARRETT: Sure. Under the rules that would apply to issue preclusion in this context, we would not be bound by --

THE COURT: You would not. The Plaintiffs would not.

MR. BARRETT: Correct. Because we were not parties to that litigation.

THE COURT: Right.

MR. BARRETT: Dish was a party to the litigation and, as Your Honor's summary judgment ruling stated, they had full

and fair opportunity to litigate.

THE COURT: Well, I mean, I wasn't looking at agency, so I don't actually know that about agency, but for purposes of discussion.

MR. BARRETT: So that is our position with respect to that.

THE COURT: All right. Okay. Well, since it all appears to be tied up, let me go ahead and hear from you about the agency issue more generally, I cut you off earlier, and then I'll let the Defendants talk to me about all of this. Go ahead.

MR. BARRETT: On the agency issue and severance in particular?

THE COURT: Yes. Imagine I did not put the trial off completely.

MR. BARRETT: And we just tried agency issues?

THE COURT: Well, that had been my thought. I suppose another alternative is we could just try the other what I was call -- have been referring to as liability issue, but --

MR. BARRETT: So our position there, Your Honor, is if we were expecting a lengthy trial and the need for us to put on a lot -- multiple days of evidence, that would be one thing, but that's not the way that we see this case as we prepare for trial. We believe we can put our evidence on, all of it, in two to three days. Three would be on the maximum. So if Your

Honor were to sever, what that would mean is we would try half the case, and we would come back at some later point and try another half of the case, and that would take court time and litigant time and delay the overall resolution.

THE COURT: So are your witnesses going to overlap on agency? I mean, my impression -- and, you know, I did not go back and look at everything I have ever done or you all have submitted before we walked in here today, so feel free to correct me. My recollection is that your agency evidence is going to be general to the time frame. It is going to say: During the class period from this time frame -- and I appreciate you might have some evidence on either side that might be relevant, but you're not going to be saying -- as the Defendant's jury instructions and verdict sheets suggest, you're not going to walk in here and have somebody say, "On this call, SSN was Dish's agent" and on this and 28,000 people -- 1, 2, 3, 4 through 28,000. You're going to be presenting evidence that during this time frame every call SSN made was as an agent for Dish, right?

MR. BARRETT: Correct. Yes, Your Honor.

THE COURT: All right. Good. Not good that you're doing it that way, but good that I understood correctly.

And so the witnesses that you're going to do -- use to prove that, are those witnesses also going to be on the witness stand to speak to what I'm calling the liability issues? You

know, were people on the list -- the Do Not Call list? Were the calls made? That kind of thing.

MR. BARRETT: Yes, that -- well, we would put that evidence on through our expert witness.

THE COURT: Uh-huh. But the expert witness isn't going to testify about agency.

MR. BARRETT: Correct.

THE COURT: Excuse me just one second.

Mr. McLean, I left my two notebooks with all the pleadings in the office somewhere. I don't know where they are.

LAW CLERK: Okay.

THE COURT: They're two little skinny notebooks and Patty can tell you where -- can help you find them.

I'm sorry. I forgot all of you all's paperwork.

MR. BARRETT: I'm amazed they're narrow notebooks.

THE COURT: Well, I was selective in what I put in them.

Okay. So your -- as I understood, your expert is going to be the one who's going to come in and say these calls were made, these people were on the Do Not Call list, right?

MR. BARRETT: I'm sorry. Can you --

THE COURT: The expert is going to say those things, what I'm calling liability, and -- you were on the list -- these people were on the list and these people were called?

MR. BARRETT: The expert is going to say those things.

THE COURT: Right. And the expert is not going to say anything about agency?

MR. BARRETT: That's correct.

THE COURT: Okay. So it sounds like, from your perspective, it would be easy to sever. The downside being we would have to pick a jury twice, we'd have to have two opening statements, we'd have to have two closing arguments, and that would be the downside. And what other downside would there be?

MR. BARRETT: May I have just a moment?

THE COURT: Yes.

(Pause in the proceedings.)

MR. BARRETT: So, Your Honor, we anticipate about four or five witnesses in total. Dr. Krakauer, three or four Dish witnesses, and our expert; and we're not -- I guess I'm struggling to understand, you know, how it would be a substantial savings that would justify multiple trials to sever those issues when we can put them on in just a couple of days. That's what I'm -- I'm resistant to.

THE COURT: Right. No, I understand that and maybe you're right.

MR. BARRETT: And we are putting on our evidence through adverse witnesses, through Dish witnesses. So -- and we have reached an agreement with opposing counsel that they will bring those witnesses here. We will do our examination, and then they will do their direct examination and won't need

to recall those witnesses in their case in chief.

THE COURT: Okay. So you're not -- I know you listed -- at least I think you did, listed some witnesses who you might present by deposition. You're not really anticipating that at least in significant part?

MR. BARRETT: In significant part, correct. There will be a couple of witnesses authenticating the call records and -- that we will put on by deposition, and there may be a few other odds and ends that we will need, but we will absolutely provide page and line designations to counsel and the Court at the appropriate time.

THE COURT: So you're saying four to five live witnesses.

MR. BARRETT: Yes.

THE COURT: Okay. And then some deposition testimony to authenticate documents primarily.

MR. BARRETT: Yes.

THE COURT: And -- I mean, I know the trial is still a couple months away, so you may not have figured out this to the letter. But you're talking about deposition testimony that would be, you know, 10 or 15 minutes per witness?

MR. BARRETT: We have a rule about that, as many judges do, no longer than 20 minutes.

THE COURT: Well, I don't have a firm rule other than to hate them when they're longer than that. Even when they're

in video they're very hard to pay attention to for jurors longer -- longer than that. Jurors try really, really hard, but it's pretty tough. Okay. So some deposition testimony, but it would be relatively short.

MR. BARRETT: Yes, Your Honor.

THE COURT: Even in the context of a short trial, it would be relatively short.

MR. BARRETT: Correct. And just to recall the Court's schedule on the trial, we would be coming in I believe it's on a Friday picking a jury.

THE COURT: Right.

MR. BARRETT: So we would start with opening arguments, I believe, on Monday morning, the first day of trial. We might be done by lunch the next day. We might be done at the end of the day and that's our entire case without severing any issues.

THE COURT: But you wouldn't expect that with cross-examination if the Defendants are going to do their -- essentially their evidence on your cross -- while crossing your witnesses. It would probably take longer than that, wouldn't it?

MR. BARRETT: It probably would, yes.

THE COURT: All right. Well, I have freed up on that Thursday morning, not that afternoon. I still need to leave at one o'clock or something like that. I do have -- I have freed

up that first week, but we can talk later about whether that would be productive.

Okay. Anything else you want to say to me about any of the severance issues?

MR. BARRETT: Your Honor, Mr. Glasser would like to speak on that issue.

THE COURT: Okay. I guess I would put in that category -- you haven't moved to continue the trial.

MR. BARRETT: Correct.

THE COURT: Are you going to do that?

MR. BARRETT: We're not sure.

THE COURT: Okay.

MR. GLASSER: Your Honor, I view the agency issue as the key liability issue in this case, frankly. And I have tried liabilities separately from damages in several cases and it is invariably a nightmare for the plaintiff because the jurors -- all the evidence on agency is actually the reason why the jurors should pick a number closer to $500 than zero; and it is part and parcel of the case what Dish knew willingly, knowingly what they did wrong; and to sever those is to just hamstrung our ability in the second jury to discuss in a -- without putting the whole case back on again, to discuss exactly why they ought to find that it was knowing, that it was willful, and that the damages should be reasonable. So as a practical trial matter, it just hamstrings the plaintiff.

THE COURT: Okay. So you're saying that the agency issue is tied up with damages.

MR. GLASSER: Yes, ma'am.

THE COURT: All right. Tell me a little bit more about that.

MR. GLASSER: So there are two elements of what the jury, I believe, has to determine. One, what is the -- what is the damage between zero and $500. And I submit to the Court that the number is going to be way closer to $500 if all the evidence of Dish's knowing participation, knowing acquiescence, benefiting from the -- the agency relationship explains why the damages should be at one end of the spectrum as opposed to the other. So to me, it's the exact same question.

And, secondly, I understand the jury has to decide whether Dish acted willfully or knowingly; and to me, the evidence of agency is the entire evidence of willfulness and knowingness.

That's all I wanted to add.

THE COURT: Okay. So just -- you know, I think I have said to you all before this is my first Do Not Call, possibly my last. I don't think they're that common a case. And I guess I had just been thinking if they prove the violation it's a -- it's $500, but that's not so. It's -- explain --

MR. GLASSER: I think damages is a jury issue, at least that's our -- that's our safe view. That's our appellate safe view.

THE COURT: I understood that between the $500 and the willfulness. And I'm not disagreeing with you at all. I'm asking you -- let me just look at your jury instructions before I ask you.

(Pause in the proceedings.)

THE COURT: Okay. I don't see any on damages. Did I overlook? I just flipped through. I could easily --

MR. EWALD: Your Honor, on Dish's --

THE COURT: No, I was looking at the Plaintiff's.

MR. EWALD: I'm sorry. They don't have one.

MR. BARRETT: I'm sorry.

THE COURT: He was saying he thinks he might agree with me that you don't have any instructions on damages. I could be wrong so -- I didn't see anything. I'm flipping through and I'm looking at your headings. I'm not actually reading the instructions, obviously.

MR. BARRETT: That sounds correct. I believe that would be an omission on our part, so I apologize for that. But it's our position on that $500 issue is that the statute says up to $500 per violation and there are other provisions of the TCPA that says automatic 500.

THE COURT: Okay.

MR. BARRETT: This says up to 500.

THE COURT: All right. Okay. Let me read the Defendant's proposed instructions on damages.

MR. EWALD: Number 28, Your Honor, page 30.

THE COURT: Thank you.

(Pause in the proceedings.)

MR. BARRETT: And I believe the issue there, Your Honor --

THE COURT: Using the Defendant's language and not ruling that I'm going to adopt it since, obviously, I haven't even looked at it in substance, they say: Damages for Do Not Call violations can be determined based on factors such as the severity or minimal nature, that would be severity versus minimal, you know, whether the violation was severe or minimal, and whether there was actual damage to the recipients.

You're not going to be putting on any evidence of actual damages --

MR. BARRETT: Correct.

THE COURT: -- so -- because it's a class action. We can't have that for 28,000 people. So you're going to be talking about severity and minimal nature, and that's what you were saying to me about the agency issue. Is that -- do I understand you correctly, that's the connection?

MR. GLASSER: Yes, ma'am. And the actions that Dish took, you know, in respect to Dr. Krakauer when they found out what SSN was up to. Their actions speak agency. Those actions are part and parcel what the jury should consider when determining damages.

THE COURT: All right. Thank you.

Okay. So for the Defendants, I guess I'm asking you to address a lot of stuff. Anything you heard the Plaintiffs address or you heard me ask a question about, please feel free to speak to those things.

MS. ECHTMAN: Okay. I'll try to address everything; and if I miss something, please let me know.

THE COURT: I'll ask. All right. Go ahead, Ms. Echtman.

MS. ECHTMAN: Starting with the trial of the established business relationship issue, I have to say that I agree that it can't be separated out. You can't separate out and no one has separated out the charter calls versus all of the other calls, and it would not create any efficiencies in the case because we still -- even if you were to preclude us from putting on EBR evidence with respect to the noncharter calls, these are all interrelated and, in fact, it gets very complicated because for some of the class members there may have been one call to a number under a charter campaign and another call to that same number under a noncharter campaign; and if you take them aside, you don't actually get to two violations within a 12-month period. So it actually complicates things immensely to try to separate out charter versus noncharter calls for the defenses.

And I do also have to just respectfully let the Court know

that we disagree that the EBR issue is tried with respect to the SSN calls in the federal case. In fact -- so EBR is an affirmative defense.

THE COURT: Okay. Well, you know --

MS. ECHTMAN: May I just stick a pin in it? EBR is an affirmative defense. It was not raised by Dish with respect to these calls; and if you have an issue that was conceded or not raised, the Restatement says there is no issue preclusion and nothing prevents you from trying it in another case. So we have that position; and if and when a motion is renewed, we will fully brief that for Your Honor to consider.

The other issue on collateral estoppel generally is Wright & Miller recommends that if you are going to seek to apply collateral estoppel the most prudent course is to stay the action until there is complete and final judgment, even an appeal, in the action you want to follow because if the decision you're relying upon for collateral estoppel or any type of preclusion is later reversed on appeal it undermines the judgment in the case that trails. So it's another thing for the Court to think about if the Court wanted to go that way. We know this case has been on your docket, but there's no particular urgency to the Plaintiffs here.

Going on to the agency issue, we think severance of agency is the right way to go. There are enormous efficiencies and kind of cabining of the proof that should be put on. Dish did

agree under certain conditions to bring its witnesses in the Plaintiff's case and, if necessary, we would bring them back for Phase 2, so they would have that option. But if we get it all done just on agency, we're good, we're over with and, indeed, you don't have to deal with a lot of the issues that come in to the class here. We don't think the Plaintiff really has a path or a feasible plan to try these class issues.

In terms of witnesses, there are few who may overlap and we will bring them back. For many others, there is no overlap. You don't put on the experts. They don't need to get on the stand. The agency issue is an issue, as this Court has recognized, on the relationship between Dish and SSN. You don't need to get into class issues. You don't need to get into the number of calls. In fact, we submit, Dr. Krakauer doesn't even need to testify because his testimony is really about damages and impact. It's not about the relationship between Dish and SSN and how they order their affairs and whether they intended -- Dish and SSN intended that SSN should be Dish's agent.

So we would really cabin the proof significantly and, in fact, I have to say that the reasons why the Plaintiffs don't want to sever are all the reasons why it should be severed, because you shouldn't be getting into knowing and willful on the agency side. You should be getting -- you shouldn't be getting into the specific calls. You shouldn't be getting into

20,000 calls. It should be what was the relationship between Dish and SSN, was there an agreement between them, and what was their intent as to how they would order their affairs.

We submit that willful and knowing is not even an issue for the jury. What the statute says is it's an issue to be decided by the court; and to get into the number of calls and Dish's arguable bad actions or SSN's arguable bad actions is going to taint and unfairly prejudice and confuse the jury about the issues it's actually supposed to be deciding on agency. So what the Court is proposing has extreme efficiencies and, indeed, we don't have to repeat the same testimony.

We think it has to be the same jury. So if you were to sever, you would need to go back to the same jury and we need to have a second phase immediately thereafter or a few days thereafter. Under the Seventh Amendment, you get one jury. So they don't have to worry about repeating testimony. That jury will have heard it all already and you can shorten all of the witness presentations.

THE COURT: So let me see if I understand you. What you're suggesting is not that we try agency, you know, tomorrow with one jury; and if you lose on that, that six months later you come back and pick another jury and try the rest of the case. You're saying it really -- as opposed to severance, bifurcation would be a better word; is that right?

MS. ECHTMAN: I believe bifurcation is the better word

because we would need to have the same jury. So we could have a few days lag time.

THE COURT: So you agree with the Plaintiffs that the jury that decides the damages issue needs to -- assuming they reach it, needs to have heard the evidence on agency?

MS. ECHTMAN: Again, because it's also not just damages in the second phase. It's a lot of liability issues And we will be putting on a robust defense to the claims that there are violations here. We'll be putting on robust EBR evidence. We'll be putting on robust evidence on the residential versus business versus --

THE COURT: So the answer to my question is yes?

MS. ECHTMAN: Yes, it should be the same jury.

THE COURT: Okay.

MS. ECHTMAN: We can do it a week apart. We can come up with a plan where we do have time to assess what just happened and move on to the next phase. So it should not be severance but a bifurcation. You're correct.

THE COURT: Okay. I interrupted you, but I just wanted to be sure I understood the yes or no part of my question. Go ahead.

MS. ECHTMAN: Yeah, so we think that's the best way to order the trial is to do agency first. It will certainly limit our witnesses. We don't have to put on our expert. There are other witnesses we could save for the second round. It would

also cabin the testimony of the witnesses who will be going on on the agency phase and make sure that the jury is not presented with evidence that shouldn't properly be considered in connection with the agency question. That would unfairly prejudice the jury to take other considerations into account, which are the willful and knowing points that are made by the Plaintiff. That shouldn't be part of it. It would actually, in terms of the motions in limine that we're considering, streamline that and help us have a more efficient trial. So that's -- that's Dish's position on those two issues.

THE COURT: Okay. So let me also just follow up on that. If -- if we were to do the agency issue, that would mean we'd also put off until the second phase the defenses, the EBR, consent, whatever else you all have.

MS. ECHTMAN: All of that wouldn't go on until the second phase because we would not be talking about the specific calls.

THE COURT: All right. So in terms of your evidence on agency, what would you anticipate -- how long would you anticipate that taking? How many witnesses? I'm not asking you for exactly, you know, three hours.

MS. ECHTMAN: You know, Your Honor, I tried to rough that out after I received your order, and I'm sorry I don't have a complete plan, but most of our relevant witnesses will be going on in the Plaintiff's case, and we agreed on a plan

with them that we should probably embody in a formal stipulation for those witnesses. We have others that are not on their list.

We're happy to know that the Plaintiffs are not intending to put on too much deposition testimony. In fact, in our back and forth with them, they had said instead of depositions that they intended to use trial testimony from the case in Illinois, which is concerning to us because most of that testimony was not specific to SSN, but I'm glad to know that they're going to be limiting that to depositions and with authentication issues. But we have a few additional witnesses we would put on on the agency issue after they're done with the four that we talked about them putting on in their case.

THE COURT: And -- all right.

MS. ECHTMAN: But we have other witnesses that we're considering putting on who wouldn't need to come on during agency at all. We maybe have two or three more witnesses after they were done and it would significantly shorten the examinations.

THE COURT: All right. Because you've identified, in terms of your "will call" --

MS. ECHTMAN: Right. So we --

THE COURT: -- which always sounds like you're selling tickets, your "will call" list, this is in your pretrial disclosures -- one, two, three, four -- I think you have six

witnesses.

MS. ECHTMAN: Right. So we would not call Debra Aron, who is an expert in that part. You know, and that a significant -- that's a lengthy bit of testimony because Ms. Aron is going to be rebutting the Plaintiff's expert, Ms. V, who's last name I --

THE COURT: We're all going to learn how to pronounce before trial.

MS. ECHTMAN: Yes, we will.

Robert Fenili is another expert who we would not be calling. The other witnesses, these other four on this first page, are all witnesses we agreed to bring in Plaintiff's case with the proviso that we have the opportunity to put on our directs at the same time so they don't have to get up and down off the stand, and that there's an instruction that there's been no shifting of the burden of proof based on the order of examination.

THE COURT: So those four people would all have something to say, in your view, about agency.

MS. ECHTMAN: Yes, they would because they would speak to the nature of the relationship between Dish and SSN and what their intent and understanding is.

In addition, in terms of our "may call" list, we would call Jim DeFranco, who is one of the cofounders of Dish, on that issue, as well as Holly Taber McRae, who was the field sales

representative who was assigned to SSN.

THE COURT: Okay. All right. Anything else?

MS. ECHTMAN: And we would present deposition testimony from Sophie Tehranchi, who is listed as -- her former name is Bahar Tehranchi, who is the principal at SSN.

THE COURT: Okay.

MS. ECHTMAN: But we could avoid testimony from -- from all of the others on our "may call" list.

THE COURT: All right. Anything else you want to say on the issues I've discussed with the Plaintiffs relating to severance, bifurcation? We didn't really -- they didn't really ask me to continue the case, so I suppose we don't have to talk about that, but if you have thoughts on that.

MS. ECHTMAN: Well, I do have thoughts on that. I mean, it's interesting to hear this now. These aren't really new issues. When we'd first come on to this case and were seeking a continuance, I raised this issue with Plaintiff's counsel and said, "Do you want this case to trail the Illinois case because we might want to all put it off until after that case is decided?" And that wasn't what they wanted at that time. If they have changed their minds, we're open to discussing it.

I would prefer that they be bound by whichever way the case turns out. If we win on agency there, we shouldn't have to try it again here. It's the same issue. You have parties with the

same interests as them who were pursuing it in a month-long trial. It -- you know, it always strikes me as a bit unfair that they get multiple bites at the apple and Dish is potentially bound by what happened. We will appeal in that case if we lose and that's going to play out. So I'm open to exploring that with them and finding out what it is that they want to do.

THE COURT: Well, that sounds like I don't need to resolve that then. You all can have some discussions about it and I might have some deadlines for you about that just because, you know, I do set aside this time for your trial and I have a bunch of people sitting in jail who would really like to be sentenced during that time so that they could go to the Bureau of Prisons where there are rehabilitation programs and job training and drug treatment that aren't available in county jails; and if I'm not going to be trying your case, those people would like to be sentenced.

MS. ECHTMAN: As I said, I believe those people might have more urgency.

THE COURT: That's my management issue. I'm ready to try your case. I don't like to put stuff off, especially if I'm just going to have to do it later. I'd rather do it now. If I am eventually going to have to do it, I see no reason not to do it now, generally speaking.

Anything else you want to say to me before I give them a

little rebuttal?

MS. ECHTMAN: I think that's all I have to say at this time on these issues, yes.

THE COURT: All right. Thank you.

And let me just start calling you all by the correct name. Mr. Glasser.

MR. GLASSER: Yes, ma'am. So the only thing I'll say about that antiseptic understanding of how agency ought to be tried is that it bears no relation to our view about how agency will be proved in this case. We will call every one of our witnesses for agency that we would have called for the regular trial.

THE COURT: But you wouldn't call Dr. Verk --

MR. GLASSER: We will call our experts because the fact that they made more than a million calls exclusively for Dish, even though only a subset violated the rules, shows agency. You have got to keep in mind this is a company whose sole job was to make calls for Dish. When it made each of these millions of millions calls, put the caller right into Dish's computer network online. The money went straight to Dish. The records were kept at Dish.

THE COURT: Right. But your expert is not going to testify about that.

MR. GLASSER: The expert is going to say the total number of calls -- our expert talks about the total volume of

calls. So, yes, I would say we're going to call every single witness we would otherwise call in our regular case in our agency case because, to me, the idea that only the call to Dr. Krakauer is relevant for agency and Dr. Krakauer himself doesn't even need to testify about it and really this just boils down to the jury reading the contract and deciding if the no agency disclaimer counts is not the way we will try this case at all.

The way we will try this case is we will look practically at what was going on, the vast volume of calls, the fact that this essentially was just an employment agency for Dish, you know, to find minimum-wage dialers basically and it has -- it bears no relation to the way my colleague has described how agency ought to be tried. So there is no --

THE COURT: But you would not need -- can you just -- I apologize for not remembering the name of your expert. I remember your expert, but I can't remember how to say her last name.

MR. BARRETT: It's hard to pronounce. It's Verkhovskaya.

THE COURT: Ver --

MR. BARRETT: -- khovskaya.

THE COURT: Verkhovskaya.

MR. BARRETT: Yes. We call her by her first name, which is Anya.

THE COURT: Anya. All right. Verkhovskaya. I apologize. I have -- hers is not the only name I have a problem with and it has to do with growing up in a little town where everybody's last name was practically Brown and -- you know, I'm sorry. Verkhovskaya.

Okay. So if you call Dr. Verkhovskaya in -- imagine we bifurcated the case. Just imagine for a minute we did. You would still anticipate calling her, but there would not be a need for her to testify as to everything.

MR. GLASSER: So when I think about it, I think there basically is because, to me, the agency proof boils -- you know, when these Do Not Call violations occur and Dish finds out about them, their actions and response to them affects agency. So we need to prove that there were still -- even though there were lots of calls, there were Do Not Call list calls. There were still complaints to Dish. Dish still reacted in the same way. There is nothing different about the agency trial effectively than there is about the main trial as I think about it.

THE COURT: Well, I was just trying to figure out what Dr. -- she's a doctor, right?

MR. GLASSER: I actually don't know.

THE COURT: I think she is.

MS. ECHTMAN: No.

MR. BARRETT: I believe so.

THE COURT: Okay. Dr. Verkhovskaya, what would she say about those things beyond the number of calls?

MR. GLASSER: That's it.

THE COURT: Okay.

MR. GLASSER: But I mean -- and they violate the Do Not Call list. And then we would put on the evidence of the various complaints to Dish, the complaint about Dr. Krakauer, Dish's reaction to those complaints. I mean, the idea that there are these vast number of calls, many of which violate the Do Not Call list, to me, goes directly to agency. Their agent is out there -- their calling system is out there doing this and they're doing what they're doing. To me, the jury looks at that and says, "Hum, if it's one call, yeah, they could maybe not be their agent. For a million calls, they're probably their agent." Do you see what I mean? It's just a practical way of looking at the world. Like, are we going to look at it through an antiseptic peephole or are we going to look at what really went on here? And we think the best way to try agency is what really went on here.

THE COURT: All right.

MR. GLASSER: And then, as the Court knows, yo-yoing a jury back after a week, there are no efficiencies in that.

THE COURT: All right. Anything else you want to say?

MS. ECHTMAN: Yes, Your Honor. I do have to say that the number of calls, in our view, has absolutely no relevance

to agency. The agency relationship is based on actual authority, as this Court has ruled. That's how the issue is going to be resolved. It's not about apparent authority. It's not about ratification, which are many of the issues the Plaintiffs are discussing here. What matters is the relationship between Dish and SSN. So I disagree that the number of complaints -- that goes to knowledge, doesn't necessarily go to agency.

But the interaction between Dish and SSN, which is more than just the contract, we acknowledge it's the course of dealing, it's the intent between the parties, it's how they interpreted the contract, and the way they ordered their affairs. That's all good and fair on agency. Indeed, I would even say for the bifurcation you only get to actual authority; and then there are other agency-related issues that still apply, which is did SSN act outside the scope of its authority, did Dish say, "Don't do something" or "You must" -- not "you must," but "We want you to do something" and SSN disregarded that. And one example that's been raised to you several times is when Dish got the Krakauer complaint it reached out to SSN and said, "Don't call this person."

THE COURT: Of course, that -- if that's your defense, then the evidence that you're saying should be excluded that goes to ratification becomes relevant.

MS. ECHTMAN: Well, I'm saying this would be after

actual authority is decided so --

THE COURT: I'm sorry. I misunderstood.

MS. ECHTMAN: -- what would be done in Phase 1 is only actual authority and then that's the threshold issue for everything else.

If you go on to Phase 2, you would be looking at did SSN act outside of the scope of its authority. It's not a ratification issue. It's if the jury finds that authority was given did they exceed that scope. And there's a very instructive case out of the Seventh Circuit in the fax context where a company was told don't fax beyond a 20-mile radius and they did and the court found that the principal can't be held responsible for that because it was outside of the scope of authority.

You also get into issues of the adverse interest exception. If SSN was purposely acting contrary to the interests of Dish and, in fact, not doing what it was supposed to do and not scrubbing its calling lists and acting contrary to Dish's wishes, then you get into the issue of whether Dish can be charged with that conduct. That would all be in the next phase.

THE COURT: But you would agree that if whenever you offer that evidence that then this evidence you just told me would be inadmissible on ratification as a theory of agency would -- it would have to become relevant to rebut that

evidence you just told me about. I mean, you couldn't -- that would -- wouldn't it?

MS. ECHTMAN: I think this is separate from ratification.

THE COURT: Well, I agree.

MS. ECHTMAN: You're talking about the fact that an --

THE COURT: Let me clarify my question if I'm not being clear. What I heard you say was the Plaintiff cannot prove agency by proving ratification.

MS. ECHTMAN: Correct.

THE COURT: And you think that's going to exclude some evidence.

MS. ECHTMAN: Correct.

THE COURT: But if you then come in and say they acted outside the agency, we told them to be good boys and girls and they were not, then why are they not going to be able to come back in and say that's wink, wink, nudge, nudge? You people said comply with the law, but you knew they were not. You encouraged them to meet their sales goals. I don't know what they're going to say. I am just imagining.

MS. ECHTMAN: Right.

THE COURT: Why would they not be able to do that in response to what essentially is a defense?

MS. ECHTMAN: So what's good about the bifurcation here is it saves all that to Phase 2 so it doesn't confuse the

actual authority issue. So Phase 1 is only actual authority. If we get to Phase 2, that's only because a jury already found an agency relationship. Then we get into Dish's defenses where it's outside the scope and they're acting adversely, and then we don't have a risk that a jury would get confused with evidence that might relate to ratification or apparent authority that does not belong in the actual authority decision.

THE COURT: All right.

MS. ECHTMAN: So I agree with you that we could -- we could end up in that area where the Plaintiff is saying, "Oh, no, you know, this was lip service and they would need to defend against that." Whether that's necessarily ratification evidence I'm not a hundred percent sure, but certainly they could use your "wink, wink, nod, nod" argument and try to present evidence to the jury on that. But that's another reason why it's cleanest to bifurcate, so we don't confuse the actual authority issue, which is an absolute threshold issue for every other step of the case. After that there is still a number of liability questions that need to be resolved, but it really keeps the actual authority issue clear and pristine for the best type of ruling by a jury.

And it's not a peephole. It's not just the contract. It goes -- we understand it goes beyond the contract, but it doesn't get into millions of calls. I mean, with -- with a

robocall, a company could make a lot of calls in one day. It doesn't make them an agent. You know, it doesn't get into any of the willful and knowing, which, you know, the statute says is decided by the court. I mean, what I'm hearing is they want to put on a lot of evidence just to paint Dish as a bad actor and that's not -- that's not relevant here and that's not what should be going on.

THE COURT: All right. Thank you.

Can I just hear briefly from the Plaintiff on the limited question of whether the willfulness issue is for the Court or the jury? Have you all briefed that? I'm not really remembering that.

MR. GLASSER: I don't think we briefed it in writing. Our revised verdict form consisted of -- you know, last night we were banging out a new verdict form based on your order and we put it in there, so I think our working assumption is it's for the jury because, to me, it looks a little bit like figuring out whether it's punitive damages or not. So that would be my default, but we would have to research it.

THE COURT: All right. Okay. Let me get organized on what I want to talk about next.

(Pause in the proceedings.)

THE COURT: Okay. So we may not really need to talk much about these jury instructions other than to set a time frame up. I've given you something that follows my sort of

usual format and the -- I am not opposed to special interrogatories, you know, when they are needed for some reason, but I do like -- I generally prefer for the jury to have a clear understanding of what they're being called upon to decide and to be able to tell that from the way the issue is worded. You cannot and there is no need to put every single element in the issue on the verdict sheet, but, you know, I don't find "Is the Defendant liable to the Plaintiff?" to say much to the jury.

So -- and then when I am telling them what the law is, I like for them to know what does the Plaintiff have to prove by the greater weight of the evidence. Ordinarily for defenses, what does the Defendant have to prove by the greater weight of the evidence or whatever it is, clear and convincing evidence, whatever the standard is. Just I like that to be laid out. The Plaintiff has to prove these three things; and if you find those things by the greater weight of the evidence, you answer the issue yes, in favor of the Plaintiff. If you do not so find or are unable to say, you answer the issue no, in favor of the Defendant. I'm not telling them what to decide, but I'm telling them what has to be proven to answer the issue in favor of the party with the burden of proof. And as you can tell, I have said these words, like, a million times, so they just roll right off my tongue. That's generally how I like to do it.

So what I would like for you all to do on this is to go

back, take another stab at it. It -- it was -- I did not study the Defendant's instructions. At this point it did appear that the Defendants had done a better job of kind of laying out what the Plaintiff has to prove, not necessarily in the way I'm going to do it with the jury, but laid out a little bit better with too many issues for the jury, too many questions for the jury to decide, but, you know, that is kind of how I have in mind. First you have to find A. Then you have to find B and then have you to find C. If you find all of those things, you rule for the Plaintiff. In terms of the defenses, the Defendant has to prove A, B, and C. If you find all of those things, you rule for the Defendant on the defense. If not, you rule for the Plaintiff. So I'm glad to answer any questions about my preferences on this.

I also norm -- I didn't give you a verdict sheet, but I do normally try to put on the verdict sheet, just for your information, you know: If you answer Issue 1 yes, go to Issue 2. If you answer no, go to Issue 3 or whatever. You know, give them a little road map on the verdict sheet.

And I don't like to give them written instructions in civil cases unless they ask me to. It's my experience in civil cases that written instructions sometimes cause more confusion than they prevent. So I just make an individual decision about that, but I do not automatically give them the written instructions. I have a lot of experience talking to juries and

I think they normally follow me, especially if I've done what I need to on the jury instructions and put them in plain language and that kind of thing. That's just my preference.

So if you have questions about what I'm looking for in the jury instructions, I'm glad to talk to you about that before we move on to a date for you to give me some revisions. Anything that would be helpful?

MR. BARRETT: Well, I think, Your Honor, that what you've provided us is extremely helpful and the format allows us to kind of look at all the instructions as a group. What we had done was provide separate instructions that would allow the Court to decide yes, no or modify them. Would you prefer that we provide separate instructions or a unified set of instructions?

THE COURT: You know, I like the instructions to line up with the issue and I -- you know, I appreciate that within an issue -- have you shown them the North Carolina pattern jury instructions?

MR. NORRIS: I have not, but I can.

THE COURT: Okay. That would be very helpful. Then you all will know where I come from because I was a state court judge for 18 years. We have these absolutely fabulous pattern jury instructions. And if local counsel can provide some assistance to trial counsel, you know, what I would be used to seeing -- for example, if we're looking at these *Honeycutt*

instructions, you might -- on page 2 where it says "Issue 1, Excessive Force," you might see -- in North Carolina it would be a reference to North Carolina Pattern Jury Instruction 101.12 or whatever it is. For you all, since we don't have those, it might say "Issue 1, Excessive Force (Smith versus Jones)" or Ninth Circuit pattern instructions or whatever. I mean, I don't know what you're citing. It is helpful to me to have a reference if you are quoting where from a case or somebody else's pattern jury instructions or the language of the statute, you know, to put that in at the end of a paragraph or in brackets in the middle of the sentence. I don't want to -- you know, that's going to -- that's helpful to me, but it is more helpful to me to have them here's Issue 1, here are the elements. I would like it laid out that way by your issues.

Obviously, if you could agree on the issues, that would be even more helpful and I really don't see why in large part you couldn't. Maybe not completely, but you -- we are going to have to, I think, submit an agency issue to the jury. I cannot imagine that I am going to just lump agency into the rest of the liability questions. That one I'm going to pull out and we are going to submit a separate issue. So if that helps you all, I can say that almost for certain.

So what else? Did I answer your question?

MR. BARRETT: Yes, I think it does, Your Honor.

THE COURT: Anything the Defendant wants to ask me

about the instructions or verdict sheet?

MS. ECHTMAN: No. We really appreciate the guidance. We had actually pulled some of your jury instructions from another case and tried to model them, but these are more streamlined and helpful, and we will revisit, and we'll also look at whether -- we think our verdict sheet breaks down the elements. We'll look at whether we could maybe collapse some of them. We appreciate that guidance.

THE COURT: Yeah, that would be helpful.

So how about I give you all -- let's see. We're coming back, what is it, June 5th? Is that right?

MS. ECHTMAN: I think June 3rd.

THE COURT: Yeah, June 3rd. Yeah, June 3rd. Thank you. So May 12th. All right. That gives you three weeks and then that gives me three weeks. All right. So May 12th I want revised verdict sheets and jury instructions.

And what I would ask you to do is on May 5th exchange, all right, and then talk. Okay. You get my drift? I don't -- I'm not asking you to agree on every single thing. That's what I'm here for, but really you can agree on a lot. So work on that.

MS. ECHTMAN: We will talk. As you may see, we have very different views of the case --

THE COURT: Sure.

MS. ECHTMAN: -- and we've got to preserve those views, but we absolutely will talk and try to work out whatever

we can work out.

THE COURT: That's what I would like for you to do and at least I want you to see what the other person is thinking of so that that can inform what you then present -- you know, present to me. So exchange your drafts on May 5th, have a conversation with each other, let each other know, "Okay. In light of yours, we're going to change this." "In light of yours, we're going to change that." "Here is what we would be willing to agree to." Whatever. If you can submit something joint, do that. Joint or by consent in part, do that. Or if they're total separate, that's okay too.

All right. So May 5th you'll exchange and May 12th you'll submit.

MS. ECHTMAN: Your Honor, if I may, it would probably be helpful if we had some guidance on the bifurcation issue, especially on motions in limine.

I just want to clarify one more thing. I laid out the possibility that we could have a one-week break between. It could be immediate. It could be a day or two. I wouldn't want to create any inefficiencies for a jury, but there would be great efficiencies for a jury if we were done at the end of the agency piece.

THE COURT: Part of the reason I gave you three weeks is so that I can give myself some time to think about the severance or bifurcation issue. You will know well before

May 5th what is going to happen in June and then we'll go from that. All right. That's -- otherwise, I have only given you two weeks and -- we'll see. All right. So now let's -- and I want both verdict sheets and instructions redone. All right. Great.

Now, do you all want a -- it sounds like maybe people want some deadlines for deposition designations and motions in limine. That would need, obviously, to follow my decision on bifurcation or severance because I wouldn't want you to -- you know, I want you to know what we're going to be trying so you don't file a bunch of stuff I don't need to decide.

MS. ECHTMAN: For deposition designations as well, it would be helpful to know if we're going to bifurcate what we want to designate for Phase 1.

THE COURT: Right. That's what I just said. Yes.

MS. ECHTMAN: Okay. Thank you.

THE COURT: Let's see. And we would want those filed, to the extent possible, so that we could talk about them at the hearing on June 3rd. So let's back up from June 3rd. If you filed motions, to the extent possible, by May 20th and responses on May 27th and then the hearing on June 3rd. How does that sound?

MR. BARRETT: I -- honestly, Your Honor, I think we could use about another three days so --

THE COURT: Say again.

MR. BARRETT: I think we could use another two or three days on that. So perhaps the motions in limine would be filed May 17th or May 18th.

THE COURT: Oh, you'd need less time?

MR. BARRETT: Less time to prepare them, more time to respond to them.

THE COURT: Is that all right with the Defendant?

MS. ECHTMAN: Yeah, that's fine. That's acceptable.

THE COURT: All right. So May 17th to file and I will -- you will have a decision on what we're going to be trying on that day -- well before then. You'll file the motions in limine that day, responses on the 27th, and we'll have our hearing on the 3rd.

Are those dates agreeable for the deposition designations or can that be put off a little -- do you all -- let me start over again. That was quite incoherent. One of the things I like to do pretrial, if I can, is rule on objections to deposition designations. Because of how we're trying this case, we could do that on Friday after we select the jury. One of the joys of being in federal court is that picking a jury doesn't take that long over here and -- so I would anticipate having some time on that Friday and we could deal with any objections to deposition testimony that day if June 3rd seems a little early. What do you all think?

MR. BARRETT: I would be agreeable to that, Your

Honor.

THE COURT: Is that agreeable?

MS. ECHTMAN: I'm agreeable to that as well and I think we could work out a schedule to exchange them.

THE COURT: All right. You all do that and just let me know so I can then order you to do what you agreed to. Okay. Hold on. And that would be to designate and counterdesignate and object. I'm going to let you all work that out between -- let me just change what I -- change my mind a bit. I'm going to let you all work that out between and among yourselves and file it all: Designations, counterdesignations, and objections. And if you get it filed by June 13th, I would think that would be good enough. Then you would have narrowed it pretty -- and we can deal with it on the 17th after jury selection.

Were these video depositions that you would be proposing or are you just going to be reading it?

MS. ECHTMAN: Ms. Tehranchi is video. There are others that I'm not sure. I'll have to go back and look. I don't think everything was videoed, but Ms. Tehranchi, who would probably be the lengthiest one, is on video.

THE COURT: All right. Well, I just want to be sure I give you enough time to cut and paste the video. That is -- you know, I appreciate it takes longer than 5 minutes. So as long as it will be enough time if I decide it on June 17th

because you won't have to do it until the next week at the earliest.

MS. ECHTMAN: We have got great people who will do it fast for us.

THE COURT: All right. Good. Those logistical things are a lot easier than they used to be.

So that's deposition designations, motions in limine. The June 3rd pretrial conference we will go forward with. I think I set that for in the morning, but if I didn't, we'll get together at 9:30.

Now, I would put off the disagreements over the exhibits and the witnesses. You know, it's my experience that a lot of objections to exhibits I can't rule on until trial. It just requires me to have a witness on the stand or whatever. So if there are things you all want me to rule on in advance, you'll file a motion in limine. Is that an agreeable way to deal with the objections to the exhibits?

MS. ECHTMAN: Yes.

THE COURT: And to some extent to the witnesses I would think as well. All right. Good.

And I have skimmed you all's proposed voir dire. Not surprisingly, I have my own way of doing those things and I appreciate your suggestions. I do not ever ask jurors what magazines they read or what groups they belong to or what movies they go see. I'm just not doing it. So to the extent

anybody asks me to do that, I'm not doing it because it doesn't inform the decision about whether or not they can be fair and impartial, which is always the focus of the questions that I will be asking them. So I'll look over that; and if there is anything I want to talk to you about in terms of the voir dire, we'll talk about it on June 3rd. So -- unless there's something you all have questions about that you want to address with me today or -- all right.

Now, anything else you want to talk about before we turn to settlement possibilities?

MR. GLASSER: Your Honor, I just have a couple of questions about -- so for nonvideo depos, do you permit just -- I'll call them actors, just put a human being on the stand for the answer?

THE COURT: That's fine. I'm generally agreeable to whatever you all propose. I think it works better to have one person read the answers and one person the questions. I have seen it done where the same person reads question and answer. I find that harder to follow.

MR. GLASSER: Me too.

THE COURT: So I'm totally fine with you just putting a human being in the witness stand and reading it; and to the extent there are counterdesignations, somebody from the other table can read the other side's questions. That just makes it more interesting so --

MR. GLASSER: I don't -- does this Court have its own ELMO system or do we bring it?

THE COURT: Ms. Sanders will be glad to talk to you all about that. You actually have to be trained before.

MR. GLASSER: Does the Court have any special rules about where counsel is supposed to stand or operate from?

THE COURT: I just -- I like for people to do it the same way. You know, I come from North Carolina state court where the lawyers have to sit down while they examine the witnesses. Most lawyers from out of state find this very disorienting and so -- and it is not the tradition in this district. Because there's so many of you all, I probably -- I hadn't really thought about it, but usually when there's a lot of lawyers, I put a -- that lectern right there, we move it back in between the tables and I require the lawyer to stand at the lectern to examine the witness. That's what I would do in this case, unless you all wanted me to do something else.

MR. GLASSER: No, it's just good to know where we're going to be operating from so we know how big a demonstrative needs to be.

THE COURT: We do have a big screen. In this courtroom, we usually put the screen right there on the floor and the jurors can all see it. There's screens for the witness. There's one for me. You all will have screens on your table, so you can see all the exhibits. Yeah. And so I

think that will probably work the best.

And I do have a very firm rule at trial: One lawyer per side per witness. So whoever examines the witness or cross-examines is the lawyer who objects; and if two people on a side try to speak, somebody is going to be unhappy, in addition to me. I don't like that. So -- it's very distracting to a jury and confusing so, you know, be sure you -- you're clear on who on each side is going to be dealing with each witness.

What else?

MR. GLASSER: Those are all my questions, Your Honor.

THE COURT: Questions for the Defendant?

MS. ECHTMAN: Yes. Your Honor, you had mentioned that you would set a deadline for the Plaintiffs -- the Plaintiff to make a decision about whether they're seeking a continuance.

THE COURT: Thank you. I forgot that. I mean, I guess I really can't preclude somebody from making a motion to continue at any time, but if the Plaintiffs are going to move to continue this case on the theory that the agency decision in front of Judge Myerscough has the potential for collateral estoppel or res judicata, I would like for you to make that within two weeks. I just --

MR. GLASSER: No problem.

THE COURT: Nothing is going to happen. I guess she could decide, but if the defendants are -- if the parties are

just now submitting proposed findings and conclusions, my experience is it takes a few weeks, unless you've got an election coming up that you're trying to deal with, you know, that it takes a while to work through that. We're unlikely to have a decision before our trial date. I guess we could.

MS. ECHTMAN: Right. We also do have a second phase. Judge Myerscough has not indicated whether she's going to be issuing multiple opinions or just one. So that is an issue there. So I just appreciate to have some clarity on your position.

We do also have a few housekeeping questions just so we can plan. What are the courtroom hours in which we will be presenting evidence? What time will we start, break for lunch, start up again?

THE COURT: Uh-huh. Hold on. Let me write down what I just told the Plaintiffs to do so I don't forget.

(Pause in the proceedings.)

THE COURT: It is my normal practice in civil cases to start at 9:30, to take an hour and 15 minutes for lunch -- a midmorning break, an hour and 15 minutes for lunch, a midafternoon break, and to stop around five o'clock. I sometimes extend that a little bit if you all get wordy to an hour at lunch. Maybe we'll even go late.

One of the things I have not done in civil cases, but many of my colleagues do, is time limits and I obviously have -- you

know, we have to try this case in the days that I have set aside and so I'm very glad you raised this because that is something we probably do need to talk about. Given -- and we have to give the jury time to deliberate. You know, we can't just finish at five o'clock on Friday and say, oh, the case is over and they -- you know, they need time to think. So we might need to have you all consult about that and then we can finalize it on June 3rd. Is that -- I think I might need to impose some -- some rules on that just to be sure.

MR. GLASSER: I love time limits and am perfectly happy to have them.

THE COURT: All right.

MS. ECHTMAN: You know, we're fine with time limits and we need just some time to consider how long we need for each witness. Sometimes with cross it's harder to anticipate how much time you need to get into a lot of issues. I expect we are going to have a lengthy cross of Ms. Verkhovskaya, so that's something we'll take into account. We'll meet and confer on that to make sure we can get it done.

THE COURT: Right. Well, the time spent on cross would be counted against the defense. I mean, the time for defense cross of Plaintiff's witnesses would be counted against the defense time.

MS. ECHTMAN: Right. And do you want the time broken down by witness?

THE COURT: No. Total.

MS. ECHTMAN: Okay.

THE COURT: Yeah, you get X hours, you get Y. Well, X or Y.

MR. GLASSER: I mean, my experience with juries is they hate long trials.

THE COURT: I think that's true.

Yeah, I would not do it by witness. I would say the Plaintiff has -- not having done any math, I don't want to even say a number because I don't want you to -- but we only have so many days and we really need to finish the evidence to give them at least a full day and I would prefer to give them a little bit more. And your time limits would include your opening statements, your closing arguments, you know, that -- time spent on objections.

MS. ECHTMAN: Right. In terms of time for them to deliberate, the Court had mentioned at one or two of the conferences that the parties should hold July 5th and 6th for deliberation time.

THE COURT: I cannot -- I apologize. Let me see if I've got my order here so that I can remember what I told you and it can be consistent.

MS. ECHTMAN: The order says conclusion of evidence on July 1, and then you had orally advised the parties to hold July 5 and 6 open as well for deliberation.

THE COURT: Okay. Here we go. It says: Presentation of evidence will conclude no later than close of business July 1st, which is a Friday. Right.

So you all talk. If we can get the evidence in in less time than that, that would be good, but apparently I told you you could go until then and -- but -- yeah, 5 and 6 for deliberations.

Okay. So normally I would start at 9:30, an hour and 15 minutes for lunch, stop at 5:00, 15-minute breaks midmorning and midafternoon. So you end up being able to get in not quite six hours a day on that schedule and you have to allow, you know, some time just for the occasional lag, computer problems, a juror who's not here. You know, so we have to build in -- you can't use every single minute. You have to build in some time for those kinds of problems.

So let me ask you all to consult about that with each other and if you -- and to submit something to me in advance of the June 3rd hearing. So how about -- how about May 27th for that as well. If you can agree, you can submit it jointly. If not, you can each submit your suggestions for time -- for the time limit -- division of the trial time.

I will say I norm -- if I say 15-minute break, I'm pretty prompt. We might have to wait on a juror from time to time, but -- and I might be a minute late, but it will not be a 30-minute recess.

So what else?

Okay. So what I would suggest is maybe we take about a 10-minute break and then that we reconvene in the jury room and maybe -- I'm trying to think about what would be most productive for settlement discussions here. Would it be most productive if I just left you all alone for a little while and let you all talk for a little while and then I'll -- whenever you want, I'll come talk to you or do you want me just to start right in with you at 11:15? Anybody -- you know, knowing that I am not really going to mediate this.

MS. ECHTMAN: We did recently have a mediation before a private mediator that I can just say was not successful. So given that that was so recent, I don't know that we need to be put in a room alone together.

THE COURT: All right. I didn't know if my decision a couple of days ago or the events of today have -- have caused anyone to say, "Huh, maybe we should settle." You know, that sometimes happens.

But how about then if 11:20 we will reconvene in the jury room right there. It's incredibly fancy in there, not. It's a pretty basic room, but I believe we can all fit around the table if all of you all want to be in the room. And I would do that, you know, without the court reporter, just an informal discussion.

As I said earlier, I'm not going to break you out into

groups and have discussions with just one side. If that's productive, you all will just have to go back and forth with each other. We do have a couple of rooms -- Ms. Sanders, is that right?

THE CLERK: Yes, ma'am.

THE COURT: Yes, we do have a couple of rooms available out if you all decide you want to split up and try to have some conversations.

So I'll see you all in the jury room in 15 minutes.

(A recess was taken from 11:05 a.m. until 11:25 p.m.)

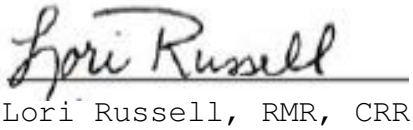
(An off-the-record settlement conference occurred from 11:25 a.m. until 12:15 p.m.)

(Proceedings concluded at 12:15 p.m.)

C E R T I F I C A T E

I, LORI RUSSELL, RMR, CRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.



Lori Russell, RMR, CRR Date: 4/28/16
Official Court Reporter

EXHIBIT 77

EXHIBIT 77

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

THOMAS KRAKAUER, Plaintiff, v. DISH NETWORK LLC, Defendant.	)	CASE NO. 1:14-CV-00333-CCE-JEP

DEFENDANT DISH NETWORK L.L.C.'S
REVISED PROPOSED JURY INSTRUCTIONS

Members of the Jury:[1]

As you know, we are trying a case in which the plaintiff, Thomas Krakauer, seeks to recover money damages, on behalf of himself and two classes of individuals, from defendant DISH Network L.L.C. for telephone calls made by Satellite Systems Network. Thomas Krakauer alleges that the calls violated the Telephone Consumer Protection Act and that SSN was acting as DISH's agent when it made the calls. DISH denies Thomas Krakauer's claims. It is DISH's position that SSN was an independent contractor, not DISH's agent, and that SSN acted adversely to DISH's interests and beyond the scope of any authority from DISH when it made these calls. In addition, it is DISH's position that Thomas Krakauer has not shown that the calls violated the TCPA.

You have heard all the evidence and it will soon be your duty to find the facts of this case and then to apply the law that I am about to give you to those facts. Once I have instructed you

[1] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

on the law, you will go to the jury room and begin your deliberations. You will have the duty to decide at least eight issues relating to the telephone calls made by SSN and DISH's relationship with SSN.

DISH is a limited liability company, otherwise referred to as an LLC. LLC's are entitled to the same impartial treatment by you as is an individual like Thomas Krakauer. Under our system of justice, all parties, including corporations and individuals, stand equal before the law and are to be treated as equals.

You must make your decision only on the basis of the testimony and other evidence presented here in this courtroom during the trial. You must not be influenced in any way by bias, sympathy, or prejudice for or against any of the parties, or by the consequences of our verdict. You are the finders of fact in this case, not me, and nothing in these instructions should be taken by you as indicating I have any opinion about any aspect of this case.

You must follow the law as I explain it to you—whether you agree with that law or not—and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law. If I do not specifically define words or terms, you should apply their ordinary, everyday meanings. The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any difference between the law stated by the lawyers and these instructions, you must follow my instructions.

On all questions but one, the burden of proof is on the plaintiff, Thomas Krakauer, to prove his case. On the remaining question, which is DISH's Established Business Relationship defense, the burden of proof is on DISH. The burden of proof is by preponderance of the evidence. "Establish by a preponderance of the evidence" means evidence that, as a whole, shows that the fact sought to be proved is more probable than not. In other words, a

preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. I may, from time to time, refer to "the greater weight of the evidence." This has the same meaning as "a preponderance of the evidence."

As I mentioned to you at the outset, this case is proceeding as a class action. A class action procedure allows the filing of one lawsuit by a representative or a small number of representatives on behalf of a whole group of plaintiffs who have similar claims. The representative of both classes in this case is Thomas Krakauer.

Your verdict here will be binding on all class members.

The Plaintiff Classes are composed of "(1) all persons whose telephone numbers were on the NDNC list for at least 30 days, but who received telemarketing calls from SSN to promote DISH between May 1, 2010, and August 1, 2011 (the 'NDNC class') and (2) all persons whose telephone numbers were on the IDNC list of DISH or SSN, but who received telemarketing calls from SSN to promote DISH between May 1, 2010, and August 1, 2011 (the 'IDNC class')."[2] The claims are classwide claims and must be proven for all class members and for the entire period of the class.[3] It is not the purpose of this trial to decide claims of individual class members apart from the claims of the class as a whole. If you decide that the Plaintiff has not proven each of the elements of the classwide claims for all members of the class and the class as a whole, then you must return a verdict in favor of DISH.

[2] Dkt. No. 111.
[3] *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525, 550 (D. Md. 2011).

ISSUES

Issue One: Agency

The first issue you are to consider in this case is agency.

Thomas Krakauer contends that the retailer SSN acted as an agent for DISH. An agency relationship exists when, by virtue of an express agreement between two parties, one party (the agent) is authorized to represent or act for the other party (the principal).[4] DISH contends that SSN was not DISH's agent, but was an independent contractor.

Thomas Krakauer has the burden of proof on his claim that SSN was acting as DISH's agent when it made the calls at issue in this case.[5] In order to prove that SSN was DISH's agent, Thomas 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-day direction and control over the method and the means by which SSN carried out marketing activities.[6]

If there is an agency relationship, a principal is only liable for actions of the agent committed within the scope of the authority, and not for actions outside of the scope of the agent's authority.[7] In considering the scope of authority, you can consider whether an agent went beyond the limited authority given to it by the principal.[8] If you find that SSN was an agent of DISH, you must then determine if SSN was acting within the scope of the authority granted to

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[4] *Bridgeview Health Care Ctr., Ltd. v. Clark*, No. 14-3728, 2016 WL 1085233, at *3 (7th Cir. Mar. 21, 2016); *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, No. 1:03CV949, 2005 WL 1610653, at *8 (M.D.N.C. July 8, 2005); RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

[5] *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09 C 5601, 2013 WL 1154206, at *5 (N.D. Ill. Mar. 19, 2013) *aff'd*, No. 14-3728, 2016 WL 1085233 (7th Cir. Mar. 21, 2016).

[6] *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 675 (S.D. Ohio 2009), *vacated on other grounds*, 535 Fed.Appx. 513 (6th Cir. 2013); *Keating v. Peterson's Nelnet, LLC*, No. 1:11CV1775, 2014 U.S. Dist. LEXIS 64920, at *15 (N.D. Ohio May 12, 2014); *Lushe v. Verengo Inc.*, No. CV 13-07632 AB R, 2014 WL 5794627, at *4 (C.D. Cal. Oct. 22, 2014).

[7] *First Tennessee Bank Nat. Ass'n v. St. Paul Fire & Marine Ins. Co.*, 501 F. App'x 255, 260-61 (4th Cir. 2012).

[8] *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09 C 5601, 2014 WL 7717584, at *5 (N.D. Ill. Nov. 21, 2014), *aff'd*, No. 14-3728, 2016 WL 1085233 (7th Cir. Mar. 21, 2016).

it by DISH. If SSN was acting outside of the authority granted by DISH, then DISH cannot be liable for SSN's actions.

If you find that SSN was DISH's agent, you must also then consider whether SSN was acting adversely to DISH's interests. 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.[9]

If you find that SSN was not DISH's agent, or that SSN acted outside of the scope of its authority, or that SSN acted adversely to DISH's interests, then you must find in favor of DISH and will not need to consider any other issues.

Issue 2: TCPA Requirements for Both Claims

The second issue relates to the three elements that Thomas Krakauer must prove for both of his TCPA claims on behalf of himself and the NDNC and IDNC classes. In order to prove any of his TCPA claims, Thomas Krakauer must prove: (1) that every person on whose behalf he brings a claim was the "subscriber" to one of the telephone numbers that SSN called or the "actual recipient" of SSN's calls; (2) that the telephone numbers were residential lines at the time of the calls; and (3) that the calls that SSN made were solicitation calls for DISH goods or services.

Subscriber or Actual Recipient. In order to recover on a TCPA claim, a person must be the "subscriber" to the telephone number or the "actual recipient" of the calls at issue. A "subscriber" is the person who is assigned a particular telephone number that is called more than twice in a twelve (12) month period. An "actual recipient" is the person who physically

[9] *Commscope Credit Union v. Butler & Burke, LLP*, 764 S.E.2d 642, 649-50 (N.C. Ct. App. 2014) *review allowed*, 768 S.E.2d 560 (N.C. 2015) (citing *Sparks v. Union Trust Co. of Shelby*, 256 N.C. 478, 482 (N.C. 1962)).

answered the phone calls at issue, provided that the person was the actual recipient of more than two of the calls in a twelve (12) month period. Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the individuals on whose behalf he has brought these TCPA claims are the subscribers to the telephone numbers or actual recipients of the calls at issue.

A person who is an "intended recipient" of a telephone call, that is the person SSN was intending to contact, is not a proper member of the class unless that person was the subscriber to the telephone number or actual recipient of the telephone calls. An intended recipient of a telephone call may, or may not, be the subscriber to the telephone number or actual recipient of the calls.[10]

Residential Lines. The TCPA distinguishes between residential wirelines (that is, "landlines"), business wirelines, and wireless (that is, cellular) telephone numbers. The TCPA provisions at issue in this lawsuit only apply to calls made to residential landline and wireless telephone numbers that are used primarily for residential purposes. Calls to telephone numbers used by businesses, government entities, or any other type of non-residential subscriber are not violations of the TCPA provisions at issue.

For every telephone call, Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the telephone number was that of a residential landline or wireless subscriber used primarily for residential purposes.[11]

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[10] Dkt. No. 111 at 13-14; *see also In Re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd 7961 ¶ 74 (July 10, 2015); *Cellco P'ship v. Plaza Resorts*, No. 12-81238, 2013 U.S. Dist. LEXIS 139337, *10-15 (S.D. Fla. Sept. 27, 2013).

[11] 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2), (d)(3); *In Re Tel. Consumer Prot. Act of 1991*, 70 FR 19330, 19331 (Apr. 13, 2005); 47 C.F.R. § 64.1200(c), (d)(3); *In Re Tel. Consumer Prot. Act of 1991*, 68 FR 44144, 44146-47 (July 25, 2003).

Solicitations. The TCPA does not prohibit all telephone calls to telephone numbers on the national do-not-call registry or a company-specific IDNC list. Rather, it only prohibits "telephone solicitations" to those numbers. A telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services. Informational calls, such as calls involving payment reminders, past due notifications, service appointments, or consumer surveys, are not solicitations.[12]

Thomas Krakauer bears the burden of proving by a preponderance of the evidence that all of the calls at issue were solicitation calls.

Issue 3: The "National Do-Not-Call" Claim

The third issue is whether the calls that SSN made violated the National Do-Not-Call provisions of the TCPA. This issue is only relevant to the calls for which Thomas Krakauer asserts national do-not-call claims, and he must prove this element in addition to the three elements outlined in Issue 2 in order to recover for the NDNC class.

For the national do-not-call claims, Thomas Krakauer bears the burden of proving by a preponderance of the evidence that he and every one of the NDNC class members had their telephone numbers registered on the national do-not-call registry for more than 30 days at the time that they each received more than one solicitation telephone call from SSN within a 12-month period, and that those calls were received between May 1, 2010, and August 1, 2011.[13]

Issue 4: The "Internal Do-Not-Call" Claim

The fourth issue is whether the calls that SSN made violated the Internal Do-Not-Call list provisions of the TCPA. This issue is only relevant to the calls that are subject to Thomas

[12] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(14).
[13] 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2).

Krakauer's internal do-not-call list claims, and he must prove this element in addition to the three elements outlined in Issue 2 in order to recover for the IDNC class.

If a person or entity making a call for telemarketing purposes receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on its internal do-not-call list. This is also referred to as an IDNC request.

For the IDNC claims, Thomas Krakauer bears the burden of proving by a preponderance of the evidence that he and every one of the IDNC class members had requested not to receive solicitation calls from SSN, and after that time, they each received more than one solicitation telephone call from SSN within a 12-month period, and that those calls were received between May 1, 2010, and August 1, 2011.[14]

Persons or entities making calls for telemarketing purposes must honor a residential subscriber's IDNC request within thirty (30) days from the date of such request. Thus, the TCPA provides a 30-day safe harbor, or grace period, for complying with an individual's IDNC request, and there is no TCPA violation if the calls made were within 30 days of the IDNC request.[15]

Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the calls that SSN made to him and to the IDNC class members occurred more than 30 days after each such individual requested to SSN that they did not want to receive those calls.

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[14] 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(d)(3).
[15] 47 C.F.R. § 64.1200(d)(3); *see, e.g., Wagner v. CLC Resorts & Devs., Inc.*, 32 F. Supp. 3d 1193, 1198-98 (M.D. Fla. 2014); *Southwell v. Mortg. Inv'rs Corp. of Ohio*, No. C13-1289 MJP, 2013 U.S. Dist. LEXIS 164034, at *11 (W.D. Wash. Nov. 14, 2013); *Charvat v. NMP, LLC*, No. 2:09-cv-209, 2012 U.S. Dist. LEXIS 139505, at *13 (S.D. Ohio Sep. 27, 2012).

A person's IDNC request to a specific entity must be honored by that specific entity for five years. If an individual is called more than five years after making an IDNC request, he or she cannot establish a TCPA violation.

Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the calls that SSN made to him and to the IDNC class members were made within five years of each such individual's IDNC request.[16]

Issue 5: Established Business Relationship Defenses

The fifth issue is whether DISH has proven that it is entitled to an Established Business Relationship defense.

Notwithstanding that a phone number may be on the national do-not-call registry or on a company-specific IDNC list, the TCPA allows solicitation calls in situations where a caller has an "established business relationship" with the person who is called. The term established business relationship, also referred to as "EBR," means an existing or prior relationship, and can be formed one of two ways. First, an EBR can be formed by a voluntary communication between a person or entity on the one hand, and a residential subscriber on the other, with or without an exchange of money, based on the subscriber's purchase or transaction with the entity within the 18 months immediately preceding the date of the telephone call. Second, an EBR can be formed on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call.[17] In this

[16] 47 C.F.R. § 64.1200(d)(6); *see also In re Tel. Consumer Prot. Act of 1991*, 68 FR 44144, ¶ 198 (July 25, 2003); *In re Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd 9779, ¶ 15 (June 11, 2008). *See also* 47 C.F.R. § 64.1200(d)(6); *accord, e.g., Stevens-Bratton v. TruGreen, Inc.*, No. 2:15-cv-2472, 2016 U.S. Dist. LEXIS 3365, at *2 (W.D. Tenn. Jan. 11, 2016); *In re Sprint Nextel Corp.*, 29 FCC Rcd 4759, 4762 (May 29, 2014), 3-29A TELECOMMUNICATIONS & CABLE REGULATION, § 29A.03 DO-NOT-CALL LISTS (2015).

[17] 47 U.S.C. § 227(a)(2); 47 U.S.C. § 64.1200(f)(5).

case, the "EBR" defense includes an established business relationship with DISH, as well as with SSN.

An entity is permitted to make solicitation calls to any person with whom it has an EBR even if that person's phone number might be on the national do-not-call registry.[18] In addition, an entity is permitted to make solicitation calls to a person with whom it has an EBR, even if that person's number might be on a company-specific IDNC list, so long as that EBR was created after the time that the person added his or her phone number to the company-specific IDNC list.

DISH has the burden of proving the existence of an EBR by a preponderance of the evidence.[19] For purposes of this case, the EBR may be with DISH or SSN at the time that SSN made a telephone solicitation.

Issue 6: Damages

The sixth issue is damages.

In the event that Thomas Krakauer proves his TCPA claims, the TCPA provides that a residential telephone subscriber or actual recipient may recover up to $500 in damages for each violation—that is, any amount between zero and $500. Damages for do-not-call violations under the TCPA can be determined based on factors such as the severity or minimal nature of the violation and whether there was any actual damage to the residential subscriber or actual recipient.[20]

[18] 47 U.S.C. § 64.1200(f)(14).
[19] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5), (f)(14); *Gottlieb v. Carnival Corp.*, No. 04 CV 4202 ILG VP, 2011 WL 7046904, at *2-3 (E.D.N.Y. Feb. 1, 2011).
[20] 47 U.S.C. § 227(c)(5); *see also Charvat v. NMP, LLC*, No. 2:09-CV-209, 2012 WL 4482945, at *3, *4 (S.D. Ohio Sept. 27, 2012); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 754 (W.D. Tex. 2011).

EVIDENCE[21]

In reaching your verdict, you must consider only the evidence admitted in the case. The term "evidence" includes the sworn testimony of witnesses and the exhibits admitted. The evidence does not include any statement of counsel made during the trial, unless such statement was an admission or stipulation of fact. The opening statements and the closing arguments of counsel are designed to assist you. They are not evidence. A question to a witness is not evidence; rather, it is the witness's answer that constitutes evidence. Your own recollection and interpretation of the evidence is controlling. If I have excluded any evidence or directed you to disregard any evidence, you must not consider it.

Also, nothing that I have said is evidence. You should take what I say about the law and follow it, but you are the sole judges of the facts. The law, as indeed it should, requires the presiding judge to be impartial. You should not draw any inference from any ruling I have made, expression on my face, inflection in my voice or anything I have said or done that I have any opinion about the facts or the evidence. It is your exclusive province to find the facts in this case and to render a verdict reflecting the truth as you the jury find it.

In considering the evidence, you should apply your reason and common sense to the evidence. You may consider the direct evidence and circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that a fact has or has not been proved. In other words, it is appropriate for you to draw inferences from the evidence. The law makes no distinction between the weight you may give to either direct or circumstantial evidence. It requires only that you weigh all of the evidence.

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[21] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

Now, in saying that you must consider all the evidence, this does not mean that you must accept all the evidence as true or accurate. You should decide whether you believe each witness's testimony and how much importance to give to that testimony. In asking those decisions, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as someone who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

In evaluating credibility, you can also consider whether the witness has made inconsistent statements about the events at issue in the past. You might find that, under the circumstances, those inconsistent statements make the witness's in-court testimony less credible. If the witness has made prior consistent statements, then you can consider those as well on the side of credibility.

Another factor to consider as you evaluate credibility is whether the witness has an interest in the outcome of these proceedings. You are entitled to take that into account as you evaluate their testimony.

At an earlier time, the deposition of some of the parties and witnesses were taken under oath. If, in the deposition, the party or witness made contradictory statements or any statements

in conflict with the testimony here in Court, you may consider such conflicts and any explanations therefore in determining the credibility of the witness.

In this trial, some of the witnesses testified by deposition. These witnesses live outside the subpoena power of the Court and thus could not be compelled to come to North Carolina for the trial. Their testimony was taken under oath with both the parties present. You are to take their testimony just as if they were here physically in front of you. Sometimes folks move out of state, but you should not discount their testimony for that reason and you should not consider the deposition testimony differently than the other testimony you heard in Court. The law does not require any party to call as a witness every person who may have been present at any time or place involved in the case, or who may appear to have knowledge of the matters in issue at this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned in the evidence during this trial.

Testimony has been given in this case by experts—that is, by persons who are specially qualified by experience or training and possess knowledge on matters not common to people in general. The law permits such persons to give their opinions regarding such matters.

Before you may accept and rely on the opinion of an expert witness, you must be able to determine from the evidence that his or her opinion is supported by the proper application of the method the expert used, and supported by proper tests and sufficient data. Likewise, you should consider whether the expert's testimony was the result of a reliable method and whether it fit the facts as you find existed in this case. If you determine that the expert's opinion is not based on a reliable method or does not fit the facts in this case, then you may determine that the expert's conclusion or opinion is not reliable.

Experts have been called by each side to give their opinions. The experts disagree on various points. The testimony of experts should be considered like any other testimony, and is to be tried by the same tests, and should receive such weight and credit as you deem it entitled to when viewed in connection with all the other facts and circumstances. If two experts disagree on an issue, you may accept the testimony of one or neither.

After you decide whether you believe a witness, it is still up to you to decide how important the testimony of that witness is. You can make your findings based on the testimony of one witness, if you find that witness to be credible and if that witness's testimony establishes all the elements that must be proven. This is not a decision where you simply add up the number of witnesses on one side, and rule that way. You must evaluate the believability of the witness.

During the trial, various items were admitted into evidence as exhibits. I will send the paper exhibits back into the jury room with you. You may consider them along with the testimony of the witnesses. They are not more important just because they are in writing, and you should consider all of the evidence, not just the exhibits, in reaching your verdict.

Certain facts have been received into evidence by stipulation. That means that both sides have agreed to the existence of the fact to which they have stipulated. As I have told you, statements and arguments of counsel are not evidence in the case unless, however, they are made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

The attorneys for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The attorneys have a duty to object whenever they

think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decisions must be based only on the evidence that you saw and heard here in Court.

Remember that you must make your decision based only on the evidence that you saw and heard here in Court. Do not try to gather any information about the case on your own while you are deliberating.

Do not conduct any experiments inside or outside the jury room. Do not bring any books, such as a dictionary, or anything else with you to help you with your deliberations. Do not conduct any independent research, reading, or investigation about the case. And do not visit any of the places that were mentioned during the trial.

Make your decision based only on the evidence that you saw and heard here in Court.

CAUTIONS[22]

Your deliberations are to be based only on the evidence. You should not be swayed by pity, sympathy, partiality, or public opinion. You must not consider the effect of a verdict on the plaintiff or defendants, or concern yourself as to whether it pleases the Court. Both the plaintiff and the defendants expect that you will carefully and fairly consider all the evidence in the case, follow the law as give to you by the Court, and reach a just verdict, regardless of the consequences.

[22] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

Do not look anything up online or in dictionaries. If you have questions about the meanings of any of the words I have used in these instructions, ask me. Sometimes a word is used in its ordinary English meaning, but when I have defined a word or term for you, you should apply the definition I have given you. If it isn't clear or you need some further guidance, let me know rather than conducting independent investigation.

During this trial, I permitted you to take notes. Of course, you were not obligated to take notes. If you did not take notes, you should not be influenced by the notes of another juror, but should rely upon your own recollection of the evidence.

DELIBERATIONS AND VERDICT[23]

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all six agree.

During your deliberations, you may not talk about the case with anyone other than your fellow jurors. Do not communicate about the case with anyone else, or conduct any independent investigation. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blogs, or website such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You must inform me if you become aware of another juror's violation of these instructions.

[23] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anyone known only by you and not your fellow jurors or the parties in this case. This would unfairly and adversely impact the judicial process.

When you go to the jury room, you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in Court.

You will have with you in the jury room certain interrogatories or questions. Please draw no inference from the manner in which I explain them to you.

The answer to each applicable interrogatory or question must represent the considered judgment of all the jurors. In order to return the answers to the applicable interrogatories or questions, all of you must read and follow the instructions on each interrogatory. The interrogatories or questions must be considered in the exact order in which they are numbered.

Nothing that the Court has said in these instructions and nothing in the manner in which the interrogatories or questions have been prepared or explained to you is intended to suggest or convey in any way a result the Court thinks you should reach.

The answers to the applicable interrogatories or questions are the exclusive duty and responsibility of the jury. I state to you categorically that the Court has no opinion as to the facts

of this case, the liability or legal responsibility of any party, or the appropriateness of any answers to interrogatories or questions that you might return.

Once you reach a unanimous agreement, you will have your foreperson fill in the verdict sheet in ink, sign and date it, and report to the Court Security Officer that you have a verdict. Do not hand the verdict to the Court Security Officer or tell anyone the verdict. We will have you return to the courtroom to deliver your verdict.

If you have any questions about the law or otherwise need to communicate with me at any time, please write down your message or question, have the foreperson write in the date and the time, sign it, and notify the Court Security Officer that you have a note. The Court Security Officer will call Ms. Sanders, who will collect the note and bring it to my attention. I will then talk to the parties and respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, that with regard to any message or question you might send, you should not tell me your numerical division at that time. For example, do not tell me that a certain number favor answering an issue Yes or No.

If, during your deliberations, you would like to examine any non-paper exhibits that you do not have in the jury room, your foreperson should send me a note asking for them. I will either bring you into the courtroom to examine the exhibits or in some circumstances I may send the exhibits back to the jury room.

You may take your notes with you, but you will remember that the notes of any one juror are not evidence and they are not more important than the memory of other jurors.

You should discuss the case only in the jury room and only when all six of you are present. If you would like to take a break, I will be glad to let you do that, but please send a note to the Court security officer and wait for my instruction before leaving the jury room.

Ladies and gentlemen of the jury, thank you for your patience, attentiveness, and continuing service. You will now retire to the jury room to select your foreperson. Shortly I will send back the Verdict Sheet and you may begin your deliberations on your verdict.

EXHIBIT 78

EXHIBIT 78

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,
on behalf of a class of persons,

Plaintiff,

Civil Action No. 1:14-cv-00333-CCE-JEP

v.

DISH NETWORK, L.L.C.,

Defendant.

PLAINTIFF'S REVISED PROPOSED JURY INSTRUCTIONS

General Instructions

[As the Court directed, the parties have conferred on instructions. Plaintiff does not object to Dish's general instructions, or its instructions on "Evidence," "Cautions," "Deliberations and Verdict," except to the extent those instructions depart from those given by the Court in the *Honeycutt* case. For example, Dish's general instructions insert an instruction on expert testimony that Plaintiff contests as an inaccurate statement of the law. Generally speaking, however, Plaintiff does not object to the majority of Dish's proposed general instructions.]

Issue One: National Do Not Call Claim

(Elements)

The first issue on the verdict sheet reads: "Has Dr. Krakauer proven, by a preponderance of the evidence, that he received more than one telephone solicitation in

any 12-month period, by or on behalf of Dish, when his telephone number was listed on the National Do Not Call Registry?"

As you know, Dr. Krakauer alleges that he received certain telephone solicitations from SSN at telephone numbers that were on the National Do Not Call Registry. Specifically, he alleges violations of a federal law that says that "no person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry . . . . Such do not call registrations must be honored indefinitely, or until the telephone number is cancelled by the consumer or removed by the database administrator."[1] Wireless customers may register their wireless telephone numbers on the Registry.[2]

Under the law, "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the [national do-not-call registry] regulations . . . may . . . bring . . . an action . . . to receive up to $500 in damages for each violation[.]"[3]

On issue one, Dr. Krakauer must prove by a preponderance of the evidence (1) that he received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when his telephone number was on the National Do Not Call Registry.

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[1] 47 C.F.R. § 64.1200(c)(2).
[2] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 03-153 (July 3, 2003), 34-36; *United States v. Dish Network, LLC*, 75 F. Supp. 3d 942, 961-62 (C.D. Ill. 2014); 47 C.F.R. § 64.1200(e).
[3] 47 U.S.C. § 227(c)(5)(B).

On the first element, Dr. Krakauer must prove that he received more than one telephone solicitation in *any* twelve month period. A telephone solicitation is "a telephone call or message for the purpose of encouraging the purchase . . . of . . . goods or services which is transmitted to any person."[4]

Second, Dr. Krakauer must prove that the calls he received were "by or on behalf of the same entity." Dr. Krakauer alleges that he received telephone solicitations from SSN, on behalf of Dish.

Third, Dr. Krakauer must prove that when he received these calls, his telephone number was on the National Do Not Call Registry. There is no dispute that Dr. Krakauer's telephone number was on the Registry continuously since 2003. As I instructed, a do not call registration must be honored indefinitely, or until cancelled by the consumer or removed by the Registry database administrator.[5] In other words, a telephone subscriber who registers his or her number never needs to renew his registration; one time is enough.

(Summary)

In summary on issue one, if you find by a preponderance of the evidence that Dr. Krakauer received more than one telephone solicitation in any 12-month period by or on behalf of Dish when his number was listed on the National Do Not Call Registry, then you should mark "Yes" under the first issue on the verdict sheet.

[4] 47 C.F.R. § 64.1200(f)(12); 47 U.S.C. § 227(a)(4).
[5] 47 C.F.R. § 64.1200(c)(2).

If, on the other hand, you find that a preponderance of the evidence does not show that Dr. Krakauer received more than one telephone solicitation in any 12-month period by or on behalf of Dish when his number was listed on the National Do Not Call Registry, then you should mark "No" under the first issue on the verdict sheet.

Issue Two: Internal Do Not Call Registry

(Elements)

The second issue on the verdict sheet reads, "Has Dr. Krakauer proven, by a preponderance of the evidence, that he received more than one telephone solicitation in any 12-month period, by or on behalf of Dish, when his telephone number was listed on Dish's or SSN's internal Do Not Call list?"

As you know, Dr. Krakauer also alleges that he received certain telephone solicitations from SSN, acting as Dish's agent or on behalf of Dish, at a telephone number on SSN's or Dish's internal Do Not Call list.

The law requires SSN and Dish to maintain an internal do-not-call list, which is "a list of persons who request not to receive telemarketing calls made by or on behalf of" the telemarketer.[6] "If [an] entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. [An] entity making calls for telemarketing purposes (or on whose behalf such calls were made) must honor a . . . do-not-call request . . . [within]

[6] 47 C.F.R. § 64.1200(d).

thirty days from the date of such request."[7] "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of [that regulation] may . . . bring . . . an action . . . to receive up to $500 in damages for each violation[.]"[8]

On this issue, Dr. Krakauer must prove by a preponderance of the evidence (1) that he received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when his telephone number was listed on SSN's or Dish's internal Do Not Call list.

The first and seconds elements of the internal Do Not Call claim are the same as with the National Do Not Call claim, and I have instructed you on those matters.

The third element is different. To prove his internal Do Not Call claim, Dr. Krakauer must prove that his telephone number was on Dish's or SSN's internal Do Not Call list for at least thirty days at the time of the calls.

(Summary of Issue Two)

In summary on issue two, if you find by a preponderance of the evidence that Dr. Krakauer received more than one telephone solicitation in any 12-month period, by or on behalf of Dish, when his number was listed on SSN's or Dish's internal Do Not Call list, then you should mark "Yes" under the second issue on the verdict sheet.

If, on the other hand, you find that a preponderance of the evidence does not show that Dr. Krakauer received more than one telephone solicitation in any 12-month period,

[7] *Id.* § 64.1200(d)(3).
[8] 47 U.S.C. § 227(c)(5)(B).

by or on behalf of Dish, when his number was listed on SSN's or Dish's internal Do Not Call list, then you should mark "No" on the second issue on the verdict sheet.

Issue Three: Agency

(General Instruction from N.C. Pattern Instr. Civil 516.05)[9]

The third issue reads, "Was SSN authorized to telemarket on behalf of Dish?"

The burden of proof on this issue is on the plaintiff. This means that the plaintiff must prove that in telemarketing for Dish SSN was acting within the scope of its actual authority. This type of relationship is called an "agency." An agency is a relationship where one person or company empowers another person or company to take act on its behalf. In these situations the person granting the authority to another to act on his behalf is called the "principal." And the person who is authorized to act on behalf of such principal is called the "agent." When an agent acts on behalf of its principal, and within the scope of its authority, then the principal is responsible for the act, so long as the agent has not exceeded his authority. The act of the agent is treated in law as the act of the principal. However, a principal is not bound by the act of an agent unless that act falls within the scope of actual authority granted by the principal to the agent. In order to determine the authority of an agent, it is necessary to look to the conduct and declarations of the principal. An agent may not extend his authority by his own conduct standing alone and in the absence of conduct or acquiescence on the part of the principal.

[9] This instruction, including the statement of the issue, is adopted almost verbatim from the North Carolina Pattern Instruction, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master/civil/c516.05.pdf (last visited Mary 12, 2016).

"Actual authority" exists where the principal has expressly or impliedly authorized the agent to act on the principal's behalf with respect to a particular matter. It is that authority which the agent reasonably thinks it possesses, conferred either intentionally or by want of ordinary care by the principal. It may be granted by the principal by word of mouth, or by writing, or it may be implied by conduct of the principal amounting to consent or acquiescence, or by the nature of the work that the principal has entrusted to the agent.

Finally, I instruct you on this third issue on which the plaintiff has the burden of proof, that 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 it would be your duty to answer this issue, "Yes," in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue, "No," in favor of the defendant.

(Additional Agency Instructions)

Written limits. "Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling."[10] In other words, written limits on a party's authority are not effective if the

[10] *Restatement (Third) of Agency* § 1.02; *see also Wynn's Extended Care, Inc. v. Bradley*, 619 F. App'x 216, 219 (4th Cir. 2015) ("[P]arties' disclaimer of an agency relationship, even in a contract, is not dispositive."); *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 737-38 (D. Md. 2008) (parties cannot "simply disclaim an agency relationship generally to avoid liability to third parties while agreeing to specific provisions that in fact bind each other to an arrangement that is the equivalent of principal and agent."); *United States v. Rapoca Energy Co.*, 613 F. Supp. 1161, 1163 (W.D. Va. 1985) ("What the parties call themselves is immaterial; the law looks to the

parties' conduct is not consistent with the written limits. So, even if a written agreement between Dish and SSN generally prohibits illegal conduct, you may find Dish liable for SSN's telemarketing based on Dish's conduct. And even if the agreement says SSN is not Dish's agent, you may find Dish liable based on its conduct.

Right to control. "A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a [company] may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it."[11] In other words**,** 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.[12]

Issue Four: Number of Calls in violation of the National Do Not Call law

The fourth issue is, "From May 11, 2010 to August 1, 2011, how many calls to the class were made in violation of the National Do Not Call law?"

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actual relationship between the parties."); *Sky Cable, LLC v. Coley*, No. 11-00048, 2013 WL 3517337, at *28 (W.D. Va. July 11, 2013) ("While the agreement expressly disclaims any agency relationship . . .that fact alone is not determinative."); *Washington v. Kass Mgmt. Servs.*, No. 10-4409, 2011 WL 1465581, at *3 (N.D. Ill. Apr. 18, 2011) (paraphrasing President Lincoln: "calling a relationship a non-agency don't make it a non-agency.").

[11] *Restatement (Third) of Agency*, § 1.01 cmt. c.

[12] *Lushe v. Verengo Inc.*, No. 13-07632, 2014 WL 5794627, at *4 (C.D. Cal. Oct. 22, 2014); *McCraw v. Calvine Mills*, 233 N.C. 524, 527, 64 S.E.2d 658, 660 (Sup. Ct. N.C. 1951) ("The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work . . . . If the employer has right of control, it is immaterial whether he actually exercises it.").

As you know, Dr. Krakauer alleges claims on his own behalf, and on behalf of a class, for violations of the national Do Not Call laws. This class is "all persons who were on the National Do Not Call list for at least 30 days, but who received telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011."[13] The Court has admitted into evidence telephone calling records and expert testimony that Dr. Krakauer alleges show violations of the National Do Not Call laws. Dish contests that these records show violations, and has introduced its own evidence.

You must decide how many, if any, of those calls violated the National Do Not Call laws as I have instructed you. The same instructions that I gave you regarding the elements of Dr. Krakauer's National Do Not Call claim also apply to the calls to class members. In summary, as I instructed you earlier, it is a violation of the Do Not Call law if (1) a class member received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when the class member's telephone number was registered on the National Do Not Call Registry.

Dish asserts an affirmative defense to this claim, and alleges that some of the calls are not "telephone solicitations" because, at the time they were made, Dish had an "established business relationship" with the call recipient.[14] An established business relationship is "a prior or existing relationship formed by a voluntary, two-way communication between a person or entity and a residential [telephone] subscriber with or without an exchange of consideration, [1] on the basis of the subscriber's purchase or

[13] Class Cert. Order (ECF No. 111), Sept. 9, 2015, at 4.
[14] 47 U.S.C. § 227(a)(4).

transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call, or [2] on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party."[15]

Dish has the burden of proving the established business relationship not merely by a "preponderance of the evidence," but through clear and convincing evidence.[16] That evidence must be so strong as to produce in your mind the firm belief or conviction, without hesitation, that Dish had an established business relationship with the recipient of the call.[17]

Issue Five: Number of Calls in Violation of Internal Do Not Call Law

The fifth issue is, "From May 11, 2010 to August 1, 2011, how many calls to the class were made in violation of the internal Do Not Call law?"

Again, Dr. Krakauer alleges claims on his own behalf, and on behalf of a class, for violations of the internal Do Not Call laws. This class is "all persons whose telephone numbers were on the IDNC list of Dish or SSN, but who received telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011."[18] The Court has

[15] 47 C.F.R. § 64.1200(f)(4).
[16] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153 ¶ 112, -- FCC Rcd. --, 2003 WL 2157853, 2003 FCC LEXIS 3673 (July 3, 2003) (A telemarketer claiming an EBR exemption "must be prepared to provide clear and convincing evidence of the existence of such a relationship.")
[17] *United States v. Watson*, 793 F.3d 416, 420 (4th Cir. 2015).
[18] Class Cert. Order (ECF No. 111), Sept. 9, 2015, at 4.

admitted into evidence telephone calling records and expert testimony that Dr. Krakauer alleges show violations of the National Do Not Call laws. Again, Dish contests that these records show violations, and has introduced its own evidence.

You must decide how many, if any, of those calls violated the National Do Not Call laws as I have instructed you. The same instructions that I gave you regarding the elements of Dr. Krakauer's National Do Not Call claim also apply to the calls to class members. In summary, as I instructed you earlier, it is a violation of the Do Not Call law if (1) a class member received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when the class member's telephone number was registered on Dish's or SSN's internal do not call list.

However, Dish does not and cannot defend against the internal do-not-call claim based on an existing business relationship with the call recipient, because "[t]he EBR defense does not apply to an individual's internal do-not-call request."[19]

Issue Six: Award

Issue six asks, "What amount, up to $500, do you award for each unlawful call?"

In assessing damages, you are to set an award that serves the purpose of the statute. The statute was passed in 1991 after Congress found that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[,]" and that "[m]any consumers were outraged over the proliferation of intrusive, nuisance calls to their homes from

[19] Class Cert. Order (ECF No. 111), Sept. 9, 2015, at 3 n.1 (citing 47 C.F.R. § 64.1200(f)(5)(i) ("The subscriber's seller-specific do-not-call request . . . terminates an [EBR] for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.").

telemarketers."[20] More specifically, the purpose of awarding damages under the statute "is to prevent repeated unwanted telemarketing calls by punishing those telemarketers who fail to honor do-not-call requests," whether those requests are made directly to the telemarketer or by registering a number on the National Do Not Call Registry.[21]

Issue 7: Willful or knowing violation

Finally, issue 7 reads, "Has Dr. Krakauer proven, by a preponderance of the evidence, that Dish Network or SSN violated the Do Not Call laws willfully or knowingly?"

To find that Dish or SSN violated the laws willfully or knowingly, you do not need to find that they acted in bad faith, but only that they had reason to know, or should have known, that their conduct would violate the statute.[22]

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[20] *See Mims v. Arrow Fin. Servs*., LLC, 132 S. Ct. 740, 745 (2012) ("Voluminous consumer complaints about abuses of telephone technology ... prompted Congress to pass the TCPA. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.").

[21] *Charvat v. ATW, Inc.*, 712 N.E.2d 805, 807 (Ct. App. Oh. 2008) ("The purpose of [47 U.S.C. § 227(c)(5) is to prevent repeated telemarketing calls to someone who has told the telemarketer not to call."; internal DNC claim only); *Charvat v. GVN Michigan, Inc.*, 531 F.Supp.2d 922, 926 (S.D. Ohio 2008) (same).

[22] *Maryland v. Universal Elections, Inc*., 862 F. Supp. 2d 457, 463 (D. Md. 2008) ("The Federal Communications Commission has interpreted 'willful or knowing' under the Telecommunications Act (of which the TCPA is a part), as not requiring bad faith, but only that the person have reason to know, or should have known, that his conduct would violate the statute."; finding willfulness established where defendants knew of TCPA requirements "month, if not years, before" the calls in question) (quoting *Texas v. Am. Blastfax, Inc*., 164 F. Supp. 2d 892, 899 (D. Tex. 2001); *see also In re: Intercambio, Inc.*, 3 FCC Rcd. 7247 (1988), 1988 WL 486783 (FCC 1988)).

Other Instructions

Expert Witnesses

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experiences, the reasons given for the opinion, and all the other evidence in the case.[23]

Respectfully submitted.

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[23] Fed. R. Evid. 602, 701-05; *Smith v. Morgan Drive Away, Inc.*, 985 F.2d 553 (4th Cir. 1993) (unpublished).

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Counsel for Plaintiff Thomas H. Krakauer

CERTIFICATE OF SERVICE

I, John W. Barrett, hereby certify that on May 12, 2016, I caused to be filed the foregoing with the Clerk of the Court using the CM/ECF System, which caused a true and accurate copy of such filing to be served upon all attorneys of record.

/s/ John Barrett
John Barrett

EXHIBIT 79

EXHIBIT 79

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:14-CV-333
	)	
DISH NETWORK L.L.C.,	)	
	)	
Defendant.	)	

ORDER

This matter is before the Court on defendant Dish Network L.L.C.'s motion to dismiss, or, in the alternative, decertify the NDNC and IDNC classes based on *Spokeo, Inc. v. Robins* and insufficient class notice. (Doc. 196). Dr. Krakauer's allegations show a concrete injury to him and to each class member, and the class notice was generally effective. The motion will be denied.

I. Concrete injury

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see generally* U.S. Const. art. III, § 2. To satisfy the doctrine of standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or

imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

In *Spokeo*, the Supreme Court re-affirmed the requirement that an injury must be "concrete." 136 S. Ct. at 1548. That case involved a class action under the Fair Credit Reporting Act where the defendant had moved to dismiss for lack of jurisdiction. *Id.* at 1546. In the Ninth Circuit's decision denying the motion, the court found that the injury was concrete because the plaintiff alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and that the plaintiff's "personal interests in the handling of his credit information are *individualized rather than collective*." *Id.* at 1548 (emphasis added in Supreme Court opinion). The Supreme Court held that this analysis failed to address concreteness and that the Ninth Circuit's analysis was therefore "incomplete." *Id.* at 1548, 1550. In particular, the Court held that a "bare procedural violation [of a statute], divorced from any concrete harm," is not sufficiently concrete. *Id.* at 1549. The Supreme Court vacated the Ninth Circuit decision and remanded but took no position on the ultimate outcome of the standing analysis. *Id.* at 1550.

Spokeo clarified the meaning of a concrete injury, but it did not fundamentally change the doctrine of standing or jurisdiction. *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at *2 (N.D.W. Va. June 30, 2016) ("*Spokeo* appears to have broken no new ground."). A concrete injury must "actually exist," but it can be intangible. *Spokeo*, 136 S. Ct. at 1548-49. Concrete injuries include injuries whose "harms may be difficult to prove or measure," such as libel, and include injuries where there is a "*risk* of real harm." *Id.* at 1549 (emphasis added).

Dish now alleges that neither Dr. Krakauer nor any class member has alleged a concrete injury and that the suit should be dismissed for lack of subject matter jurisdiction. (Doc. 197 at 7). Dish alternately contends that the class should be decertified for the same reason. (*Id.* at 10). The concreteness requirement of constitutional standing has not previously been raised by Dish or discussed by the Court.[1]

Telemarketing calls made in violation of the Telephone Consumer Protection Act ("TCPA") are more than bare procedural violations; here, Satellite Systems Network, Dish's alleged agent, actually called the class members' numbers. These calls form concrete injuries because unwanted telemarketing calls are a disruptive and annoying invasion of privacy. *See* 137 Cong. Rec. 30,821 (1991) ("They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."); *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376-77 (4th Cir. 2013) (recognizing that the TCPA "protects residential privacy" by allowing recipients to stop future calls); *see also Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 342 (4th Cir. 2005) (acknowledging that the Telemarketing Sales Rule's do-not-call provision allows consumers to stop call that might "disturb their peace").

[1] Dish contends that this Court previously addressed standing and made the same mistake as the Ninth Circuit in *Spokeo*. (Doc. 197 at 2). However, this Court's analysis—and Dish's objection—concerned *statutory* standing, not constitutional standing. (Doc. 111 at 13; Doc. 56 at 15). The two doctrines are separate. *See CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011).

While class members did not necessarily pick up or hear ringing every call at issue in this case, each call created, at a minimum, a *risk* of an invasion of a class member's privacy. *Spokeo* clarified that a "risk of real harm" was enough to show concrete injury. 136 S. Ct. at 1549. Therefore, each call made to a class member on a do-not-call list formed a concrete injury by creating a material risk of an injury to privacy.

Post-*Spokeo* cases have consistently concluded that calls that violate the TCPA establish concrete injuries. *See Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (finding that the injury caused by robocalls that violate the TCPA is "sufficiently concrete"); *Mey*, 2016 WL 3645195, at *3 (finding that "unwanted phone calls cause concrete harm"); *Rogers v. Capital One Bank (USA), N.A.*, No. 1:15-CV-4016, 2016 WL 3162592, at *2 (N.D. Ga. June 7, 2016) (finding that calls to cell phone numbers in violation of the TCPA establish concrete injuries). Some of these cases involved robocalls made with a pre-recorded voice message instead of, as is the case here, calls made by a live person; however, from the recipient's point of view, the injury caused is nearly identical.

Because Dr. Krakauer made allegations sufficient to show that he and all class members have suffered a concrete injury to their privacy, the Court will not dismiss the suit or decertify the class based on a lack of concrete injury.

II. Class notice

Separately, Dish moves for decertification of the class based on the results of the class notice process. Dish contends that, because Dr. Krakauer has been unable to locate some of the class members, the classes are not ascertainable. (Doc. 197 at 14).

Dish cites no cases where a class was decertified based on a failure to contact a certain threshold percentage of class members. Instead, Dish cites two cases where a court determined that locating class members had become unmanageable.

In *Thomas v. Baca*, the district court decertified a class when it became clear that the class of inmates in the Los Angeles County jails was "unmanageable" because of the existence of highly individualized questions with no feasible way to identify or notify class members. No. CV 04-08448, 2012 WL 994090, at *3 (C.D. Cal. Mar. 22, 2012). In *Pierce v. County of Orange*, the Ninth Circuit affirmed the decertification of a class of Orange County jail pre-trial detainees because of "expected difficulties identifying class members and determining appropriate damages," given that the only records of detainees were "incomplete." 526 F.3d 1190, 1200 (9th Cir. 2008).

Neither of these cases supports decertification. Dr. Krakauer has successfully contacted approximately seventy-five percent of the class members, (Doc. 206-1 at ¶ 12), which exceeds the representations he made when seeking approval of the class notice plan. (*See* Doc. 153 at 2 (proposing a plan to reach "at least . . . seventy percent" of the class)). By itself, this level of notice does not make the process of notice or classwide resolution of claims unmanageable.

It is **ORDERED** that the defendant Dish Network L.L.C.'s motion to dismiss or in the alternative to decertify the classes, (Doc. 196), is **DENIED**.

This the 5th day of August, 2016.

_____
UNITED STATES DISTRICT JUDGE

EXHIBIT 80

EXHIBIT 80

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF NORTH CAROLINA

THOMAS KRAKAUER, Plaintiff, v. DISH NETWORK LLC, Defendant.	)	CASE NO. 1:14-CV-00333-CCE-JEP

DEFENDANT DISH NETWORK L.L.C.'S
SECOND REVISED PROPOSED JURY INSTRUCTIONS

Members of the Jury:[1]

As you know, we are trying a case in which the plaintiff, Thomas Krakauer, seeks to recover money damages, on behalf of himself and two classes of individuals, from defendant DISH Network L.L.C. for telephone calls made by Satellite Systems Network. Thomas Krakauer alleges that the calls violated the Telephone Consumer Protection Act and that SSN was acting as DISH's agent when it made the calls. DISH denies Thomas Krakauer's claims. It is DISH's position that SSN was an independent contractor, not DISH's agent, and that SSN acted adversely to DISH's interests and beyond the scope of any authority from DISH when it made these calls. In addition, it is DISH's position that Thomas Krakauer has not shown that the calls to absent class members other than himself violated the TCPA.

You have heard all the evidence and it will soon be your duty to find the facts of this case and then to apply the law that I am about to give you to those facts. Once I have instructed you on the law, you will go to the jury room and begin your deliberations. You will have the duty to decide ~~at least eight~~three main issues relating to the telephone calls made by SSN and DISH's relationship with SSN.

DISH is a limited liability company, otherwise referred to as an LLC. LLC's are entitled to the same impartial treatment by you as is an individual like Thomas Krakauer. Under our system of justice, all parties, including corporations and individuals, stand equal before the law and are to be treated as equals.

You must make your decision only on the basis of the testimony and other evidence presented here in this courtroom during the trial. You must not be influenced in any way by bias, sympathy, or prejudice for or against any of the parties, or by the consequences of our verdict. You are the finders of fact in this case, not me, and nothing in these instructions should be taken by you as indicating I have any opinion about any aspect of this case.

You must follow the law as I explain it to you—whether you agree with that law or not—and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law. If I do not specifically define words or terms, you should apply their ordinary, everyday meanings. The lawyers have properly referred to some of the governing rules of law in their arguments. If there is any

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[1] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

difference between the law stated by the lawyers and these instructions, you must follow my instructions.

On all questions but one, the burden of proof is on the plaintiff, Thomas Krakauer, to prove his case. On the remaining question, which is DISH's Established Business Relationship defense, the burden of proof is on DISH. The burden of proof is by a preponderance of the evidence. "Establish by a preponderance of the evidence" means evidence that, as a whole, shows that the fact sought to be proved is more probable than not. In other words, a preponderance of the evidence means such evidence as, when considered and compared with the evidence opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely than not true. This standard does not require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case. I may, from time to time, refer to "the greater weight of the evidence." This has the same meaning as "a preponderance of the evidence."

As I mentioned to you at the outset, this case is proceeding as a class action. A class action procedure allows the filing of one lawsuit by a representative or a small number of representatives on behalf of a whole group of plaintiffs who have similar claims. The representative of both classes in this case is Thomas Krakauer.

Your verdict here will be binding on all class members.

The Plaintiff Classes are composed of "(1) all persons whose telephone numbers were on the NDNC list for at least 30 days, but who received telemarketing calls from SSN to promote DISH between May 1, 2010, and August 1, 2011 (the 'NDNC class')

and (2) all persons whose telephone numbers were on the IDNC list of DISH or SSN, but who received telemarketing calls from SSN to promote DISH between May 1, 2010, and August 1, 2011 (the 'IDNC class')."[2] The claims are classwide claims and must be proven for all class members and for the entire period of the class.[3] ~~It is not the purpose of this trial to decide claims of individual class members apart from the claims of the class as a whole. If you decide that the Plaintiff has not proven each of the elements of the classwide claims for all members of the class and the class as a whole, then you must return a verdict in favor of DISH.~~

ISSUES

Issue One: Agency

The first issue you are to consider in this case is agency.

Thomas Krakauer contends that the retailer SSN acted as an agent for DISH. An agency relationship exists when, by virtue of an express agreement between two parties, one party (the agent) is authorized to represent or act for the other party (the principal).[4] DISH contends that SSN was not DISH's agent, but was an independent contractor.

Thomas Krakauer has the burden of proof on his claim that SSN was acting as DISH's agent when it made the calls at issue in this case.[5] In order to prove that SSN was DISH's agent, Thomas Krakauer must show that (1) DISH and SSN agreed that SSN

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[2] ~~Dkt. No~~Doc. 111.

[3] *Minter v. Wells Fargo Bank, N.A.*, 274 F.R.D. 525, 550 (D. Md. 2011).

[4] *Bridgeview Health Care Ctr., Ltd. v. Clark*, No. 14-3728, 2016 WL 1085233, at *3 (7th Cir. Mar. 21, 2016); *Indem. Ins. Co. of N. Am. v. Am. Eurocopter LLC*, No. 1:03CV949, 2005 WL 1610653, at *8 (M.D.N.C. July 8, 2005); RESTATEMENT (THIRD) OF AGENCY § 2.01 (2006).

[5] *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09 C 5601, 2013 WL 1154206, at *5 (N.D. Ill. Mar. 19, 2013) *aff'd*, No. 14-3728, 2016 WL 1085233 (7th Cir. Mar. 21, 2016).

had the authority to act as DISH; and (2) SSN agreed to be subject to DISH's day-to-day direction and control over the method and the means by which SSN carried out marketing activities.[6]

If there is an agency relationship, a principal is only liable for actions of the agent committed within the scope of the authority, and not for actions outside of the scope of the agent's authority.[7] In considering the scope of authority, you can consider whether an agent went beyond the limited authority given to it by the principal.[8] If you find that SSN was an agent of DISH, you must then determine if SSN was acting within the scope of the authority granted to it by DISH. If SSN was acting outside of the authority granted by DISH, then DISH cannot be liable for SSN's actions.

If you find that SSN was DISH's agent, you must also then consider whether SSN was acting adversely to DISH's interests. 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.[9]

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[6] *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 675 (S.D. Ohio 2009), *vacated on other grounds*, 535 Fed.Appx. 513 (6th Cir. 2013); *Keating v. Peterson's Nelnet, LLC*, No. 1:11CV1775, 2014 U.S. Dist. LEXIS 64920, at *15 (N.D. Ohio May 12, 2014); *Lushe v. Verengo Inc.*, No. CV 13-07632 AB R, 2014 WL 5794627, at *4 (C.D. Cal. Oct. 22, 2014).

[7] *First Tennessee Bank Nat. Ass'n v. St. Paul Fire & Marine Ins. Co.*, 501 F. App'x 255, 260-61 (4th Cir. 2012).

[8] *Bridgeview Health Care Ctr. Ltd. v. Clark*, No. 09 C 5601, 2014 WL 7717584, at *5 (N.D. Ill. Nov. 21, 2014), *aff'd*, No. 14-3728, 2016 WL 1085233 (7th Cir. Mar. 21, 2016).

[9] *Commscope Credit Union v. Butler & Burke, LLP*, 764 S.E.2d 642, 649-50 (N.C. Ct. App. 2014) *review allowed*, 768 S.E.2d 560 (N.C. 2015) (citing *Sparks v. Union Trust Co. of Shelby*, 256 N.C. 478, 482 (N.C. 1962)).

If you find that SSN was not DISH's agent, or that SSN acted outside of the scope of its authority, or that SSN acted adversely to DISH's interests, then you must find in favor of DISH and will not need to consider any other issues.

Issue 2: TCPA Requirements ~~for Both Claims~~

The second issue relates to the ~~three~~ elements that Thomas Krakauer must prove for ~~both of~~ his TCPA claims on behalf of himself and the NDNC and IDNC classes. In order to prove ~~any of~~ his TCPA claims, Thomas Krakauer must prove: (1) that every person on whose behalf he brings a claim was the "subscriber" to one of the telephone numbers that SSN called or the "actual recipient" of SSN's calls; (2) that the telephone numbers were residential lines at the time of the calls; ~~and~~ (3) that the calls that SSN made were solicitation calls for DISH goods or services; and (4) that SSN made two or more such calls within a twelve-month period.

Subscriber or Actual Recipient. In order to recover on a TCPA claim, a person must be the "subscriber" to the telephone number or the "actual recipient" of the calls at issue. A "subscriber" is the person who is assigned a particular telephone number that is called more than twice in a twelve (12) month period. An "actual recipient" is the person who physically answered the phone calls at issue, provided that the person was the actual recipient of more than two of the calls in a twelve (12) month period. Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the individuals on whose behalf he has brought these TCPA claims are the subscribers to the telephone numbers or actual recipients of the calls at issue.

A person who is an "intended recipient" of a telephone call, that is the person SSN was intending to contact, is not a proper member of the class unless that person was the subscriber to the telephone number or actual recipient of the telephone calls. An intended recipient of a telephone call may, or may not, be the subscriber to the telephone number or actual recipient of the calls.[10]

Residential Lines. The TCPA distinguishes between residential wirelines (that is, "landlines"), business wirelines, and wireless (that is, cellular) telephone numbers. The TCPA provisions at issue in this lawsuit only apply to calls made to residential landline and wireless telephone numbers that are used primarily for residential purposes. Calls to telephone numbers used by businesses, government entities, or any other type of non-residential subscriber are not violations of the TCPA provisions at issue.

For every telephone call, Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the telephone number was that of a residential landline or wireless subscriber used primarily for residential purposes.[11]

Solicitations. The TCPA does not prohibit all telephone calls to telephone numbers on the national do-not-call registry or a company-specific IDNC list. Rather, it only prohibits "telephone solicitations" to those numbers. A telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase

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[10] ~~Dkt. No~~Doc. 111 at 13-14; *see also In Re Rules & Regs. Implementing the TCPA*, 30 FCC Rcd 7961 ¶ 74 (July 10, 2015); *Cellco P'ship v. Plaza Resorts*, No. 12-81238, 2013 U.S. Dist. LEXIS 139337, *10-15 (S.D. Fla. Sept. 27, 2013).

[11] 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2), (d)(3); *In Re Tel. Consumer Prot. Act of 1991*, 70 FR 19330, 19331 (Apr. 13, 2005); 47 C.F.R. § 64.1200(c), (d)(3); *In Re Tel. Consumer Prot. Act of 1991*, 68 FR 44144, 44146-47 (July 25, 2003).

or rental of, or investment in, property, goods, or services. Informational calls, such as calls involving payment reminders, past due notifications, service appointments, or consumer surveys, are not solicitations.[12]

Thomas Krakauer bears the burden of proving by a preponderance of the evidence that all of the calls at issue were solicitation calls.

Two or More Calls Within a Twelve-Month Time Period

The TCPA only allows an individual to bring a claim if the person has received more than one improper solicitation call within a 12-month period. Thomas Krakauer bears the burden of proving by a preponderance of the evidence that he and every class member received more than one solicitation telephone call from SSN within a 12-month period, and that those calls were received during the class period, between May 1, 2010, and August 1, 2011.

~~**Issue 3:**~~ **The "National Do-Not-Call" Claim**

The ~~third issue is whether the calls that SSN made violated the National Do-Not-Call provisions of the TCPA. This issue is only relevant to the calls for which Thomas Krakauer asserts national do-not-call claims, and he must prove this element in addition to the three elements outlined in Issue 2 in order to recover for the NDNC class. For the~~ national do-not-call claims~~, Thomas Krakauer bears the burden of proving by a preponderance of the evidence that he and every one of~~ also require that the NDNC class members had their telephone numbers registered on the national do-not-call registry for more than 30 days at the time that they ~~each~~ received two or more ~~than one~~ solicitation telephone ~~call~~calls from SSN

[12] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(14).

within a 12-month period~~, and that those calls were received between May 1, 2010, and August 1, 2011.~~.[13] DISH does not dispute that the telephone numbers at issue for the NDNC class were registered on the national do-not-call registry for more than 30 days at the time of the phone calls at issue.

~~Issue 4:~~ The "Internal Do-Not-Call" Claim

~~The fourth issue is whether the calls that SSN made violated the Internal Do-Not-Call list provisions of the TCPA. This issue is only relevant to the calls that are subject to Thomas Krakauer's internal do-not-call list claims, and he must prove this element in addition to the three elements outlined in Issue 2 in order to recover for the IDNC class.~~

If a person or entity making a call for telemarketing purposes receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on its internal do-not-call list. This is also referred to as an IDNC request.

For the IDNC claims, Thomas Krakauer bears the burden of proving by a preponderance of the evidence that he and every one of the IDNC class members had requested not to receive solicitation calls from SSN, and after that time, they each received two or more ~~than one~~ solicitation telephone ~~call~~calls from SSN within a 12-month period~~, and that those calls were received between May 1, 2010, and August 1, 2011.~~.[14]

Persons or entities making calls for telemarketing purposes must honor a residential subscriber's IDNC request within thirty (30) days from the date of such

[13] 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(c)(2).

request. Thus, the TCPA provides a 30-day safe harbor, or grace period, for complying with an individual's IDNC request, and there is no TCPA violation if the calls made were within 30 days of the IDNC request.[15]

Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the calls that SSN made to him and to the IDNC class members occurred more than 30 days after each such individual requested to SSN ~~that they did~~ not ~~want~~ to receive those calls.

A person's IDNC request to a specific entity must be honored by that specific entity for five years. If an individual is called more than five years after making an IDNC request, he or she cannot establish a TCPA violation.

Thomas Krakauer bears the burden of proving by a preponderance of the evidence that the calls that SSN made to him and to the IDNC class members were made within five years of each such individual's IDNC request.[16]

You may only find one violation for a single telephone call. If the same telephone call is covered by an NDNC claim and an IDNC claim, you may only count it once in rendering your verdict in this case. [17]

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[14] 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(d)(3).

[15] 47 C.F.R. § 64.1200(d)(3); *see, e.g.*, ~~*Wagner v. CLC Resorts & Devs., Inc.*, 32 F. Supp. 3d 1193, 1198-98 (M.D. Fla. 2014);~~ *Southwell v. Mortg. Inv'rs Corp. of Ohio*, No. C13-1289 MJP, 2013 U.S. Dist. LEXIS 164034, at *11 (W.D. Wash. Nov. 14, 2013); *Charvat v. NMP, LLC*, No. 2:09-cv-209, 2012 U.S. Dist. LEXIS 139505, at *13 (S.D. Ohio Sep. 27, 2012).

[16] 47 C.F.R. § 64.1200(d)(6); *see also In re Tel. Consumer Prot. Act of 1991*, 68 FR 44144, ¶ 198 (July 25, 2003); *In re Tel. Consumer Prot. Act of 1991*, 23 FCC Rcd 9779, ¶ 15 (June 11, 2008). *See also* 47 C.F.R. § 64.1200(d)(6); *accord, e.g., Stevens-Bratton v. TruGreen, Inc.*, No. 2:15-cv-2472, 2016 U.S. Dist. LEXIS 3365, at *2 (W.D. Tenn. Jan. 11, 2016); *In re Sprint Nextel Corp.*, 29 FCC Rcd 4759, 4762 (May 29, 2014), 3-29A TELECOMMUNICATIONS & CABLE REGULATION, § 29A.03 DO-NOT-CALL LISTS (2015).

~~Issue 5:~~ Established Business Relationship ~~Defenses~~Defense

~~The fifth issue is whether DISH has proven that it is entitled to an Established Business Relationship defense.~~

Notwithstanding that a phone number may be on the national do-not-call registry ~~or on a company-specific IDNC list~~, the TCPA allows solicitation calls in situations where a caller has an "established business relationship" with the person who is called. The term established business relationship, also referred to as "EBR," means an existing or prior relationship, and can be formed one of two ways. First, an EBR can be formed by a voluntary communication between a person or entity on the one hand, and a residential subscriber on the other, with or without an exchange of money, based on the subscriber's purchase or transaction with the entity within the 18 months immediately preceding the date of the telephone call. Second, an EBR can be formed on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call.[~~17~~18] In this case, the "EBR" defense includes an established business relationship with DISH, as well as with SSN.

An entity is permitted to make solicitation calls to any person with whom it has an EBR even if that person's phone number might be on the national do-not-call registry.[~~18~~19] ~~In addition, an entity is permitted to make solicitation calls to a person with whom it has an EBR, even if that person's number might be on a company-specific IDNC list, so long as that EBR was~~

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[17] *Charvat v. GVN Michigan, Inc.*, 561 F.3d 623, 632 (6th Cir. 2009); *Martin v. PPP, Inc.*, 719 F. Supp. 2d 967, 974 (N.D. Ill. 2010); *Jenkins v. Allied Interstate, Inc.*, No. 5:08-CV-125-DCK, 2009 WL 3157399, at *7 (W.D.N.C. Sept. 28, 2009); *Hamilton v. Voxeo Corp.*, No. CIV.A. 3:07-CV-404, 2009 WL 1868542, at *4 (S.D. Ohio June 25, 2009).

[~~17~~18] 47 U.S.C. § 227(a)(2); 47 U.S.C. § 64.1200(f)(5).

~~created after the time that the person added his or her phone number to the company-specific IDNC list.~~[20]

DISH has the burden of proving the existence of an EBR by a preponderance of the evidence.[19][21] For purposes of this case, the EBR may be with DISH or SSN at the time that SSN made a telephone solicitation.

Issue ~~6~~3: Damages

The ~~sixth~~third issue is damages.

In the event that Thomas Krakauer proves his individual and/or the class TCPA claims, the TCPA provides that a residential telephone subscriber or actual recipient may recover up to $500 in damages for each violation—that is, any amount between zero and $~~500.~~500 per telephone call. Damages for do-not-call violations under the TCPA can be determined based on factors such as the severity or minimal nature of the violation and whether there was any actual damage to the residential subscriber or actual recipient.[20][22] You should select a total monetary amount to be awarded in damages for all telephone calls that you find to violate the TCPA.

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[18][19] 47 U.S.C. § 64.1200(f)(14).

[20] DISH deleted the IDNC portions of this instruction, because Plaintiff has accepted DISH's EBR challenges with respect to the IDNC claims and agreed to dismiss those absent class member claims without prejudice. Should Plaintiff change its position, or should the Court decline to dismiss the claims, DISH reserves all rights to include those portions of this instruction.

[19][21] 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(5), (f)(14); *Gottlieb v. Carnival Corp.*, No. 04 CV 4202 ILG VP, 2011 WL 7046904, at *2-3 (E.D.N.Y. Feb. 1, 2011).

[20][22] 47 U.S.C. § 227(c)(5); *see also Charvat v. NMP, LLC*, No. 2:09-CV-209, 2012 WL 4482945, at *3, *4 (S.D. Ohio Sept. 27, 2012); *Adamcik v. Credit Control Servs., Inc.*, 832 F. Supp. 2d 744, 754 (W.D. Tex. 2011).

EVIDENCE[21][23]

In reaching your verdict, you must consider only the evidence admitted in the case. The term "evidence" includes the sworn testimony of witnesses and the exhibits admitted. The evidence does not include any statement of counsel made during the trial, unless such statement was an admission or stipulation of fact. The opening statements and the closing arguments of counsel are designed to assist you. They are not evidence. A question to a witness is not evidence; rather, it is the witness's answer that constitutes evidence. Your own recollection and interpretation of the evidence is controlling. If I have excluded any evidence or directed you to disregard any evidence, you must not consider it.

Also, nothing that I have said is evidence. You should take what I say about the law and follow it, but you are the sole judges of the facts. The law, as indeed it should, requires the presiding judge to be impartial. You should not draw any inference from any ruling I have made, expression on my face, inflection in my voice or anything I have said or done that I have any opinion about the facts or the evidence. It is your exclusive province to find the facts in this case and to render a verdict reflecting the truth as you the jury find it.

In considering the evidence, you should apply your reason and common sense to the evidence. You may consider the direct evidence and circumstantial evidence. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as

[21][23] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances indicating that a fact has or has not been proved. In other words, it is appropriate for you to draw inferences from the evidence. The law makes no distinction between the weight you may give to either direct or circumstantial evidence. It requires only that you weigh all of the evidence.

Now, in saying that you must consider all the evidence, this does not mean that you must accept all the evidence as true or accurate. You should decide whether you believe each witness's testimony and how much importance to give to that testimony. In ~~asking~~making those decisions, you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

In deciding whether you believe or do not believe any witness, I suggest that you ask yourself a few questions: Did the witness impress you as someone who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

In evaluating credibility, you can also consider whether the witness has made inconsistent statements about the events at issue in the past. You might find that, under the circumstances, those inconsistent statements make the witness's in-court testimony

less credible. If the witness has made prior consistent statements, then you can consider those as well on the side of credibility.

Another factor to consider as you evaluate credibility is whether the witness has an interest in the outcome of these proceedings. You are entitled to take that into account as you evaluate ~~their~~his or her testimony.

At an earlier time, the deposition of some of the parties and witnesses were taken under oath. If, in the deposition, the party or witness made contradictory statements or any statements in conflict with the testimony here in Court, you may consider such conflicts and any explanations ~~therefore~~ in determining the credibility of the witness.

In this trial, some of the witnesses testified by deposition. These witnesses live outside the subpoena power of the Court and thus could not be compelled to come to North Carolina for the trial. Their testimony was taken under oath with both of the parties present. You are to take their testimony just as if they were here physically in front of you. Sometimes folks move out of state, but you should not discount their testimony for that reason and you should not consider the deposition testimony differently than the other testimony you heard in Court. The law does not require any party to call as a witness every person who may have been present at any time or place involved in the case, or who may appear to have knowledge of the matters in issue at this trial. Similarly, the law does not require any party to present as exhibits all papers and things mentioned in the evidence during this trial.

Testimony has been given in this case by experts—that is, by persons who are specially qualified by experience or training and possess knowledge on matters not

common to people in general. The law permits such persons to give their opinions regarding such matters.

Before you may accept and rely on the opinion of an expert witness, you must be able to determine from the evidence that his or her opinion is supported by the proper application of the method the expert used, and supported by proper tests and sufficient data. Likewise, you should consider whether the expert's testimony was the result of a reliable method and whether it fit the facts as you find existed in this case. If you determine that the expert's opinion is not based on a reliable method or does not fit the facts in this case, then you may determine that the expert's conclusion or opinion is not reliable.

Experts have been called by each side to give their opinions. The experts disagree on various points. The testimony of experts should be considered like any other testimony, and is to be tried by the same tests, and should receive such weight and credit as you deem it entitled to when viewed in connection with all the other facts and circumstances. If two experts disagree on an issue, you may accept the testimony of one or neither.

After you decide whether you believe a witness, it is still up to you to decide how important the testimony of that witness is. You can make your findings based on the testimony of one witness, if you find that witness to be credible and if that witness's testimony establishes all the elements that must be proven. This is not a decision where you simply add up the number of witnesses on one side, and rule that way. You must evaluate the believability of the witness.

During the trial, various items were admitted into evidence as exhibits. I will send the paper exhibits back into the jury room with you. You may consider them along with the testimony of the witnesses. ~~They~~Exhibits are not more important just because they are in writing, and you should consider all of the evidence, not just the exhibits, in reaching your verdict.

Certain facts have been received into evidence by stipulation. That means that both sides have agreed to the existence of the fact to which they have stipulated. As I have told you, statements and arguments of counsel are not evidence in the case unless, however, they are made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

The attorneys for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The attorneys have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the rules of evidence, not on how I feel about the case. Remember that your decisions must be based only on the evidence that you saw and heard here in Court.

Remember that you must make your decision based only on the evidence that you saw and heard here in Court. Do not try to gather any information about the case on your own while you are deliberating.

Do not conduct any experiments inside or outside the jury room. Do not bring any books, such as a dictionary, or anything else with you to help you with your deliberations. Do not conduct any independent research, reading, or investigation about the case. And do not visit any of the places that were mentioned during the trial.

Make your decision based only on the evidence that you saw and heard here in Court.

CAUTIONS[~~22~~24]

Your deliberations are to be based only on the evidence. You should not be swayed by pity, sympathy, partiality, or public opinion. You must not consider the effect of a verdict on the plaintiff or ~~defendants~~defendant, or concern yourself as to whether it pleases the Court. Both the plaintiff and the ~~defendants~~defendant expect that you will carefully and fairly consider all the evidence in the case, follow the law as ~~give~~given to you by the Court, and reach a just verdict, regardless of the consequences.

Do not look anything up online or in dictionaries. If you have questions about the meanings of any of the words I have used in these instructions, ask me. Sometimes a word is used in its ordinary English meaning, but when I have defined a word or term for you, you should apply the definition I have given you. If it isn't clear or you need some further guidance, let me know rather than conducting an independent investigation.

[~~22~~24] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

During this trial, I permitted you to take notes. Of course, you were not obligated to take notes. If you did not take notes, you should not be influenced by the notes of another juror, but should rely upon your own recollection of the evidence.

DELIBERATIONS AND VERDICT[~~23~~25]

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all six agree.

During your deliberations, you may not talk about the case with anyone other than your fellow jurors. Do not communicate about the case with anyone else, or conduct any independent investigation. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry, computer, the internet, any internet service, any text or instant messaging service, any internet chat room, blogs, or website such as Facebook, MySpace, LinkedIn, YouTube, or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations. You must inform me if you become aware of another juror's violation of these instructions.

You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social

[~~23~~25] This section was adapted in part from Final Jury Instructions, *Honeycutt v. Rockingham*, No. 09-CV-912 (M.D.N.C.).

media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence that you have. In our judicial system, it is important that you are not influenced by anyone known only by you and not your fellow jurors or the parties in this case. This would unfairly and adversely impact the judicial process.

When you go to the jury room, you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in Court.

You will have with you in the jury room certain interrogatories or questions. Please draw no inference from the manner in which I explain them to you.

The answer to each applicable interrogatory or question must represent the considered judgment of all the jurors. In order to return the answers to the applicable interrogatories or questions, all of you must read and follow the instructions on each interrogatory. The interrogatories or questions must be considered in the exact order in which they are numbered.

Nothing that the Court has said in these instructions and nothing in the manner in which the interrogatories or questions have been prepared or explained to you is intended to suggest or convey in any way a result the Court thinks you should reach.

The answers to the applicable interrogatories or questions are the exclusive duty and responsibility of the jury. I state to you categorically that the Court has no opinion as to the facts of this case, the liability or legal responsibility of any party, or the appropriateness of any answers to interrogatories or questions that you might return.

Once you reach a unanimous agreement, you will have your foreperson fill in the verdict sheet in ink, sign and date it, and report to the Court Security Officer that you have a verdict. Do not hand the verdict to the Court Security Officer or tell anyone the verdict. We will have you return to the courtroom to deliver your verdict.

If you have any questions about the law or otherwise need to communicate with me at any time, please write down your message or question, have the foreperson write in the date and the time, sign it, and notify the Court Security Officer that you have a note. The Court Security Officer will call Ms. Sanders, who will collect the note and bring it to my attention. I will then talk to the parties and respond as promptly as possible, either in writing or by having you return to the courtroom so that I can address you orally. I caution you, however, that with regard to any message or question you might send, you should not tell me your numerical division at that time. For example, do not tell me that a certain number favor answering an issue Yes or No.

If, during your deliberations, you would like to examine any non-paper exhibits that you do not have in the jury room, your foreperson should send me a note asking for them. I will either bring you into the courtroom to examine the exhibits or in some circumstances I may send the exhibits back to the jury room.

You may take your notes with you, but you will remember that the notes of any one juror are not evidence and they are not more important than the memory of other jurors.

You should discuss the case only in the jury room and only when all six of you are present. If you would like to take a break, I will be glad to let you do that, but please

send a note to the Court security officer and wait for my instruction before leaving the jury room.

Ladies and gentlemen of the jury, thank you for your patience, attentiveness, and continuing service. You will now retire to the jury room to select your foreperson. Shortly I will send back the Verdict Sheet and you may begin your deliberations on your verdict.

Document comparison by Workshare Compare on Monday, August 29, 2016 9:43:55 PM

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Description	OLD Jury Instructions
Document 2 ID	file://C:\Users\AAN\Desktop\FINAL EXHIBITS\765762924(5)_Second Revised Jury Instructions 8.29.2016 (3).DOCX
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Padding cell	

Statistics:	
	Count
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Deletions	56
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Moved to	1
Style change	0
Format changed	0

Total changes	111

EXHIBIT 81

EXHIBIT 81

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,
on behalf of a class of persons,

Plaintiff,

Civil Action No. 1:14-cv-00333-CCE-JEP

v.

DISH NETWORK, L.L.C.,

Defendant.

PLAINTIFF'S SECOND REVISED PROPOSED JURY INSTRUCTIONS

General Instructions

[As the Court directed, the parties have conferred on instructions. Plaintiff does not object to Dish's general instructions, or its instructions on "Evidence," "Cautions," "Deliberations and Verdict," except to the extent those instructions depart from those given by the Court in the *Honeycutt* case. For example, Dish's general instructions insert an instruction on expert testimony that Plaintiff contests as an inaccurate statement of the law. Generally speaking, however, Plaintiff does not object to the majority of Dish's proposed general instructions.]

Issue One: National Do Not Call Claim

(Elements)

The first issue on the verdict sheet reads: "Has Dr. Krakauer proven, by a preponderance of the evidence, that he received more than one telephone solicitation in

any 12-month period, by or on behalf of Dish, when his telephone number was listed on the National Do Not Call Registry?"

As you know, Dr. Krakauer alleges that he received certain telephone solicitations from SSN at telephone numbers that were on the National Do Not Call Registry. Specifically, he alleges violations of a federal law that says that "no person or entity shall initiate any telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry . . . . Such do not call registrations must be honored indefinitely, or until the telephone number is cancelled by the consumer or removed by the database administrator."[1] Wireless customers may register their wireless telephone numbers on the Registry.[2]

Under the law, "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the [national do-not-call registry] regulations . . . may . . . bring . . . an action . . . to receive up to $500 in damages for each violation[.]"[3]

On issue one, Dr. Krakauer must prove by a preponderance of the evidence (1) that he received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when his telephone number was on the National Do Not Call Registry.

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[1] 47 C.F.R. § 64.1200(c)(2).
[2] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 03-153 (July 3, 2003), 34-36; *United States v. Dish Network, LLC*, 75 F. Supp. 3d 942, 961-62 (C.D. Ill. 2014); 47 C.F.R. § 64.1200(e).
[3] 47 U.S.C. § 227(c)(5)(B).

On the first element, Dr. Krakauer must prove that he received more than one telephone solicitation in *any* twelve--month period. A telephone solicitation is "a telephone call or message for the purpose of encouraging the purchase . . . of . . . goods or services which is transmitted to any person."[4]

Second, Dr. Krakauer must prove that the calls he received were "by or on behalf of the same entity." Dr. Krakauer alleges that he received telephone solicitations from SSN, on behalf of Dish.

Third, Dr. Krakauer must prove that when he received these calls, his telephone number was on the National Do Not Call Registry. There is no dispute that Dr. Krakauer's telephone number was on the Registry continuously since 2003. As I instructed, a do not call registration must be honored indefinitely, or until cancelled by the consumer or removed by the Registry database administrator.[5] In other words, a telephone subscriber who registers his or her number never needs to renew his registration; one time is enough.

(Summary)

In summary on issue one, if you find by a preponderance of the evidence that Dr. Krakauer received more than one telephone solicitation in any 12-month period by or on behalf of Dish when his number was listed on the National Do Not Call Registry, then you should mark "Yes" under the first issue on the verdict sheet.

[4] 47 C.F.R. § 64.1200(f)(12); 47 U.S.C. § 227(a)(4).
[5] 47 C.F.R. § 64.1200(c)(2).

If, on the other hand, you find that a preponderance of the evidence does not show that Dr. Krakauer received more than one telephone solicitation in any 12-month period by or on behalf of Dish when his number was listed on the National Do Not Call Registry, then you should mark "No" under the first issue on the verdict sheet.

Issue Two: Internal Do Not Call Registry

(Elements)

The second issue on the verdict sheet reads, "Has Dr. Krakauer proven, by a preponderance of the evidence, that he received more than one telephone solicitation in any 12-month period, by or on behalf of Dish, when his telephone number was listed on Dish's or SSN's internal Do Not Call list?"

As you know, Dr. Krakauer also alleges that he received certain telephone solicitations from SSN, acting as Dish's agent or on behalf of Dish, at a telephone number on SSN's or Dish's internal Do Not Call list.

The law requires SSN and Dish to maintain an internal do-not-call list, which is "a list of persons who request not to receive telemarketing calls made by or on behalf of" the telemarketer.[6] "If [an] entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. [An] entity making calls for telemarketing purposes (or on whose behalf such calls were made) must honor a . . . do-not-call request . . . [within]

[6] 47 C.F.R. § 64.1200(d).

thirty days from the date of such request."[7] "A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of [that regulation] may . . . bring . . . an action . . . to receive up to $500 in damages for each violation[.]"[8]

On this issue, Dr. Krakauer must prove by a preponderance of the evidence (1) that he received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when his telephone number was listed on SSN's or Dish's internal Do Not Call list.

The first and seconds elements of the internal Do Not Call claim are the same as with the National Do Not Call claim, and I have instructed you on those matters.

The third element is different. To prove his internal Do Not Call claim, Dr. Krakauer must prove that his telephone number was on Dish's or SSN's internal Do Not Call list for at least thirty days at the time of the calls.

(Summary of Issue Two)

In summary on issue two, if you find by a preponderance of the evidence that Dr. Krakauer received more than one telephone solicitation in any 12-month period, by or on behalf of Dish, when his number was listed on SSN's or Dish's internal Do Not Call list, then you should mark "Yes" under the second issue on the verdict sheet.

If, on the other hand, you find that a preponderance of the evidence does not show that Dr. Krakauer received more than one telephone solicitation in any 12-month period,

[7] *Id.* § 64.1200(d)(3).
[8] 47 U.S.C. § 227(c)(5)(B).

by or on behalf of Dish, when his number was listed on SSN's or Dish's internal Do Not Call list, then you should mark "No" on the second issue on the verdict sheet.

Issue Three: Agency

(General Instruction from N.C. Pattern Instr. Civil 516.05)[9]

The third issue reads, "Was SSN authorized to telemarket on behalf of Dish?"

The burden of proof on this issue is on the plaintiff. This means that the plaintiff must prove that in telemarketing for Dish SSN was acting within the scope of its actual authority. This type of relationship is called an "agency." An agency is a relationship where one person or company empowers another person or company to take act on its behalf. In these situations the person granting the authority to another to act on his behalf is called the "principal." And the person who is authorized to act on behalf of such principal is called the "agent." When an agent acts on behalf of its principal, and within the scope of its authority, then the principal is responsible for the act, so long as the agent has not exceeded his authority. The act of the agent is treated in law as the act of the principal. However, a principal is not bound by the act of an agent unless that act falls within the scope of actual authority granted by the principal to the agent. In order to determine the authority of an agent, it is necessary to look to the conduct and declarations of the principal. An agent may not extend his authority by his own conduct standing alone and in the absence of conduct or acquiescence on the part of the principal.

[9] This instruction, including the statement of the issue, is adopted almost verbatim from the North Carolina Pattern Instruction, https://www.sog.unc.edu/sites/www.sog.unc.edu/files/pji-master/civil/c516.05.pdf (last visited Mary 12, 2016).

"Actual authority" exists where the principal has expressly or impliedly authorized the agent to act on the principal's behalf with respect to a particular matter. It is that authority which the agent reasonably thinks it possesses, conferred either intentionally or by want of ordinary care by the principal. It may be granted by the principal by word of mouth, or by writing, or it may be implied by conduct of the principal amounting to consent or acquiescence, or by the nature of the work that the principal has entrusted to the agent.

Finally, I instruct you on this third issue on which the plaintiff has the burden of proof, that 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 it would be your duty to answer this issue, "Yes," in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue, "No," in favor of the defendant.

(Additional Agency Instructions)

Written limits. "Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling."[10] In other words, written limits on a party's authority are not effective if the

[10] *Restatement (Third) of Agency* § 1.02; *see also Wynn's Extended Care, Inc. v. Bradley*, 619 F. App'x 216, 219 (4th Cir. 2015) ("[P]arties' disclaimer of an agency relationship, even in a contract, is not dispositive."); *Proctor v. Metro. Money Store Corp.*, 579 F. Supp. 2d 724, 737-38 (D. Md. 2008) (parties cannot "simply disclaim an agency relationship generally to avoid liability to third parties while agreeing to specific provisions that in fact bind each other to an arrangement that is the equivalent of principal and agent."); *United States v. Rapoca Energy Co.*, 613 F. Supp. 1161, 1163 (W.D. Va. 1985) ("What the parties call themselves is immaterial; the law looks to the

parties' conduct is not consistent with the written limits. So, even if a written agreement between Dish and SSN generally prohibits illegal conduct, you may find Dish liable for SSN's telemarketing based on Dish's conduct. And even if the agreement says SSN is not Dish's agent, you may find Dish liable based on its conduct.

Right to control. "A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a [company] may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it."[11] In other words**,** 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.[12]

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actual relationship between the parties."); *Sky Cable, LLC v. Coley*, No. 11-00048, 2013 WL 3517337, at *28 (W.D. Va. July 11, 2013) ("While the agreement expressly disclaims any agency relationship . . .that fact alone is not determinative."); *Washington v. Kass Mgmt. Servs.*, No. 10-4409, 2011 WL 1465581, at *3 (N.D. Ill. Apr. 18, 2011) (paraphrasing President Lincoln: "calling a relationship a non-agency don't make it a non-agency.").

[11] *Restatement (Third) of Agency*, § 1.01 cmt. c.

[12] *Lushe v. Verengo Inc.*, No. 13-07632, 2014 WL 5794627, at *4 (C.D. Cal. Oct. 22, 2014); *McCraw v. Calvine Mills*, 233 N.C. 524, 527, 64 S.E.2d 658, 660 (Sup. Ct. N.C. 1951) ("The test is whether the party for whom the work is being done has the right to control the worker with respect to the manner or method of doing the work . . . . If the employer has right of control, it is immaterial whether he actually exercises it.").

Issue Four: Number of Calls in violation of the National Do Not Call law

The fourth issue is, ~~"From May 11, 2010 to August 1, 2011, how many calls to the class were made in violation of the National Do Not Call law?"~~"Do you find that all "National Do Not Call" calls were made in violation of the National Do Not Call law?"

As you know, Dr. Krakauer alleges claims on his own behalf, and on behalf of a class, for violations of the national Do Not Call laws. This class is "all persons who were on the National Do Not Call list for at least 30 days, but who received telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011."[13]

The Court has admitted into evidence telephone calling records and expert testimony that Dr. Krakauer alleges show violations of the National Do Not Call laws. Dish contests that these records show violations, and has introduced its own evidence.

You must decide ~~how many, if any,~~ if all of those calls violated the National Do Not Call laws as I have instructed you. The same instructions that I gave you regarding the elements of Dr. Krakauer's National Do Not Call claim also apply to the calls to class members. In summary, as I instructed you earlier, it is a violation of the Do Not Call law if (1) a class member received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when the class member's telephone number was registered on the National Do Not Call Registry.

~~Dish asserts an affirmative defense to this claim, and alleges that some of the calls are not "telephone solicitations" because, at the time they were made, Dish had an~~

[13] Class Cert. Order (ECF No. 111), Sept. 9, 2015, at 4.

"established business relationship" with the call recipient.[14] An established business relationship is "a prior or existing relationship formed by a voluntary, two-way communication between a person or entity and a residential [telephone] subscriber with or without an exchange of consideration, [1] on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call, or [2] on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party."[15]

Dish has the burden of proving the established business relationship not merely by a "preponderance of the evidence," but through clear and convincing evidence.[16] That evidence must be so strong as to produce in your mind the firm belief or conviction, without hesitation, that Dish had an established business relationship with the recipient of the call.[17]

Issue Five: Number of Calls in Violation of Internal Do Not Call Law

[14] 47 U.S.C. § 227(a)(4).
[15] 47 C.F.R. § 64.1200(f)(4).
[16] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153 ¶ 112, FCC Rcd. , 2003 WL 2157853, 2003 FCC LEXIS 3673 (July 3, 2003) (A telemarketer claiming an EBR exemption "must be prepared to provide clear and convincing evidence of the existence of such a relationship.")
[17] *United States v. Watson*, 793 F.3d 416, 420 (4th Cir. 2015).

The fifth issue is, ~~"From May 11, 2010 to August 1, 2011, how many calls to the class were made in violation of the internal Do Not Call law?"~~"Do you find that all "internal do not call" calls were made in violation of the internal Do Not Call law?"

Again, Dr. Krakauer alleges claims on his own behalf, and on behalf of a class, for violations of the internal Do Not Call laws. This class is "all persons whose telephone numbers were on the IDNC list of Dish or SSN, but who received telemarketing calls from SSN to promote Dish between May 1, 2010 and August 1, 2011."[18] The Court has admitted into evidence telephone calling records and expert testimony that Dr. Krakauer alleges show violations of the National Do Not Call laws. Again, Dish contests that these records show violations, and has introduced its own evidence.

You must decide ~~how many,~~ if all~~any,~~ of those calls violated the National Do Not Call laws as I have instructed you. The same instructions that I gave you regarding the elements of Dr. Krakauer's National Do Not Call claim also apply to the calls to class members. In summary, as I instructed you earlier, it is a violation of the Do Not Call law if (1) a class member received more than one telephone solicitation in any 12-month period, (2) by or on behalf of Dish Network, and (3) when the class member's telephone number was registered on Dish's or SSN's internal do not call list.

Special Questions

If you answer "No" to either Question 4 or Question 5, you will need to answer Questions about specific challenges to the call records. Those questions are listed on the

[18] Class Cert. Order (ECF No. 111), Sept. 9, 2015, at 4.

verdict sheet. You should only answer these questions if you do not find in Plaintiff's favor with respect to all of the class calls.

The questions are:

Do you find for Plaintiff regarding calls to:

1. Numbers where the LexisNexis records designated as "residential" are before May 2010 and/or after August 2011?

   YES NO

2. Numbers where different names were associated with the same number across Microbilt Data, LexisNexis Data, and Five9 Data?

   YES NO

3. Numbers where in the LexisNexis Data the "listing type" designation is always "unknown"?

   YES NO

4. Numbers where the line type designation is both "unknown" and "residential" in the LexisNexis data?

   YES NO

5. Numbers where in the LexisNexis data the listing type designation is residential at least once between May 2010 and August 2011, and "unknown" at least once between May 2010 and August 2011?

   YES NO

6. Numbers where the listing type designation in LexisNexis is populated at least once but never between May 2010 and August 2011?

   YES NO

7. Numbers where the LexisNexis data shows the numbers are identified as cellular or possible cellular?

YES NO

(Summary of Special Questions)

In summary, you should answer the special questions attached to the verdict sheet only if you answer either Question Four or Question Five.

~~However, Dish does not and cannot defend against the internal do-not-call claim based on an existing business relationship with the call recipient, because "[t]he EBR defense does not apply to an individual's internal do-not-call request."[19]~~

Issue Six: Award

Issue six asks, "What amount, up to $500, do you award for each unlawful call?"

In assessing damages, you are to set an award that serves the purpose of the statute. The statute was passed in 1991 after Congress found that "[u]nrestricted telemarketing . . . can be an intrusive invasion of privacy[,]" and that "[m]any consumers were outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers."[20] More specifically, the purpose of awarding damages under the statute "is to prevent repeated unwanted telemarketing calls by punishing those telemarketers

~~[19] Class Cert. Order (ECF No. 111), Sept. 9, 2015, at 3 n.1 (citing 47 C.F.R. § 64.1200(f)(5)(i) ("The subscriber's seller-specific do-not-call request . . . terminates an [EBR] for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.").~~

[20] *See Mims v. Arrow Fin. Servs.*, LLC, 132 S. Ct. 740, 745 (2012) ("Voluminous consumer complaints about abuses of telephone technology ... prompted Congress to pass the TCPA. Congress determined that federal legislation was needed because telemarketers, by operating interstate, were escaping state-law prohibitions on intrusive nuisance calls.").

who fail to honor do-not-call requests," whether those requests are made directly to the telemarketer or by registering a number on the National Do Not Call Registry.[21]

~~Issue 7: Willful or knowing violation~~

~~Finally, issue 7 reads, "Has Dr. Krakauer proven, by a preponderance of the evidence, that Dish Network or SSN violated the Do Not Call laws willfully or knowingly?"~~

~~To find that Dish or SSN violated the laws willfully or knowingly, you do not need to find that they acted in bad faith, but only that they had reason to know, or should have known, that their conduct would violate the statute.[22]~~

[21] *Charvat v. ATW, Inc.*, 712 N.E.2d 805, 807 (Ct. App. Oh. 2008) ("The purpose of [47 U.S.C. § 227(c)(5) is to prevent repeated telemarketing calls to someone who has told the telemarketer not to call."; internal DNC claim only); *Charvat v. GVN Michigan, Inc.*, 531 F.Supp.2d 922, 926 (S.D. Ohio 2008) (same).

[22] ~~*Maryland v. Universal Elections, Inc.*, 862 F. Supp. 2d 457, 463 (D. Md. 2008) ("The Federal Communications Commission has interpreted 'willful or knowing' under the Telecommunications Act (of which the TCPA is a part), as not requiring bad faith, but only that the person have reason to know, or should have known, that his conduct would violate the statute."; finding willfulness established where defendants knew of TCPA requirements "month, if not years, before" the calls in question) (quoting *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 899 (D. Tex. 2001); *see also In re: Intercambio, Inc.*, 3 FCC Rcd. 7247 (1988), 1988 WL 486783 (FCC 1988)).~~

Other Instructions

Expert Witnesses

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions.

Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness's education and experiences, the reasons given for the opinion, and all the other evidence in the case.[23]

Respectfully submitted.

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[23] Fed. R. Evid. 602, 701-05; *Smith v. Morgan Drive Away, Inc.*, 985 F.2d 553 (4th Cir. 1993) (unpublished).

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CERTIFICATE OF SERVICE

I, John W. Barrett, hereby certify that on May 12, 2016, I caused to be filed the foregoing with the Clerk of the Court using the CM/ECF System, which caused a true and accurate copy of such filing to be served upon all attorneys of record.

/s/ John Barrett
John Barrett

EXHIBIT 82

EXHIBIT 82

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,	*	
	*	Case No. 1:14CV333
Plaintiff,	*	
	*	
vs.	*	
	*	Greensboro, North Carolina
DISH NETWORK, L.L.C.,	*	January 6, 2017
	*	10:40 a.m.
Defendant.	*	

****

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Proceedings recorded by stenotype reporter.
Transcript produced by Computer-Aided Transcription.

P R O C E E D I N G S

THE CLERK: Judge Eagles' chambers.

MR. BARRETT: Yes, good morning, Judge. This is John Barrett.

THE COURT: All right. Good. This is Catherine Eagles. We're having a brief pretrial conference on the Krakauer matter in anticipation of the trial next week.

I do have a court reporter just out of an abundance of caution. I'm not sure we really needed her, but she was available so here she is. I would for that reason ask that everybody before they speak please say your name because without a visual cue of who is speaking it can be hard to keep voices separate.

So Mr. Barrett is here for the Plaintiff. Anybody else on the line?

MR. BARRETT: Yes, Your Honor. Brian Glasser is on the phone and Matthew Norris is on the phone.

THE COURT: All right. And who is here for DISH on the line?

MR. BICKS: Good morning, Your Honor. This is Peter Bicks. I'm on, and Elyse Echtman and John Ewald are on as well. Good morning.

THE COURT: Good morning. All right. Thank you all.

So I got distracted this morning with other things and

I don't have my usual list, but the first thing I want to talk about is the weather in North Carolina. We are projected to get several inches of snow tonight and then it's supposed to be really, really cold all weekend and as -- you know, if there's anybody on the line from the Northeast, I apologize. We just don't deal well with snow down here. So I'm contemplating having the jurors, instead of being here at 8:00, which is their normal reporting time, giving them until 10:00 to come in. This is going to slow us down a little bit on Monday, but it's looking a hundred percent certain that we are going to have some bad weather so -- and it's not going to all be cleared up by Monday.

If we have the jurors report at 9:30 or 10:00, we could possibly get a jury -- you know, get an hour of jury selection in, finish up jury selection Monday afternoon. It might cause a delay in the opening statements, depending on how long they're going to be. I'm just afraid if I tell the jurors to be here at 8:00 they aren't going to be able to make it, we're going to have, you know, long delays. It's -- everybody will be aggravated, worried, not us, the jurors, stressed out by weather situations.

So I know now that you've resolved the internal Do Not Call Lists. I would hope that would maybe shorten the trial a little bit so that if we have a couple-hour delay related to the weather that would not cause us to carry over into a

third week.

Does the Plaintiff have any problems with a short delay on Monday?

MR. BARRETT: We do not, Your Honor. This is John Barrett.

THE COURT: All right. What about the Defendants?

MR. BICKS: No. This is Peter Bicks, Your Honor. And I think what you're saying makes sense. The only thing I would just allow is that, you know, a bunch of the DISH witnesses, in fact all of them, are flying in from all different parts of the United States and I don't -- I'm listening to what the Court is saying. I guess I'm just thinking practically that if we somehow over the weekend are finding, you know, just kind of as a nuclear holocaust backup plan, you know, that we can't get our people into town --

THE COURT: Right.

MR. BICKS: -- I just -- I don't know how the Court would want to handle that and I don't -- I just raise it because I feel as -- if I'm sitting there on Saturday with all these folks going crazy about getting in there, I feel my instinct always is I would want to let you know that.

THE COURT: Yeah. No, I appreciate that. And, in fact, if it does turn out to be worse than we expect, you

know, you-all can communicate with Ms. Sanders, who is such a good sport and is available by e-mail this weekend. So we can let the jurors know as late as Friday -- excuse me, Sunday afternoon to -- yeah, early Sunday afternoon to make a change about reporting times. So if we do -- if anybody does end up with significant issues getting here -- or I may decide, if the weather is way worse than expected, to put it off until Tuesday, but, you know, I'll be in communication with you-all. And you can e-mail Ms. Sanders if you do develop some problems. I would not anticipate any witnesses being called to testify on Monday.

So what I think I will do then is have -- subject to the weather being worse than expected, I'll have the jurors report at 9:30 instead of 8:00 and we will hope to be able to start jury selection around 11:00. So if I can ask all of you-all to be here at 10:30 and that will give us time -- you might want to even come a little earlier than that. They're going to start copying the jury questionnaires as soon as they're completed and giving them to you sort of in batches, so you can -- you can come on whenever you want, but I would ask you to please be here no later than 10:30 because I would hope we could get the jury into the courtroom around 11:00 or 11:15.

Is that clear? Anybody have any questions?

MR. BICKS: I would just say, Judge, to your

point, just bigger picture --

THE COURT: That's Mr. Bicks?

MR. BICKS: -- I don't think --

THE COURT: Who is this speaking?

MR. BICKS: -- that the witness --

THE COURT: Stop.

MR. BICKS: This is Peter Bicks.

THE COURT: Okay. Go ahead.

MR. BICKS: Peter Bicks, Your Honor. I'm sorry. That for just big picture planning purposes, I don't -- I don't think either side sees that there's a realistic possibility we would go into a third week.

THE COURT: All right. Great. I had not anticipated really cutting back on your time, though I also anticipate you won't need it all since you-all have very efficiently streamlined some of the issues. So I do want to be sure we have plenty of time for the jury to deliberate during the end of that second week. Thank you for helping me with that.

I got a ruling out yesterday on your deposition objections. Everybody saw that, I take it. Yes?

MR. BARRETT: Yes.

MR. BICKS: Peter Bicks, Your Honor. Yes, we did see it.

THE COURT: All right. And what else do we need

to talk about this morning that would be helpful? Is there anything that I have on my plate that I have not done that the Plaintiff needs me to do before the trial starts? Mr. Barrett?

MR. BARRETT: Your Honor, there are a couple of issues respecting opening statements and there is one matter in dispute with respect to some evidence that we intend to address in the opening statement.

THE COURT: All right. What's that?

MR. BARRETT: That is an exhibit called PX55. And, Your Honor, do you happen to have the notebooks that were delivered to your chambers this morning?

THE COURT: I do, I think. You say 55? Hold on. I see it. Let me get it in front of me.

THE CLERK: Which exhibit is it in the notebook? Which number in the notebook is it?

THE COURT: They've got them labeled.

THE CLERK: It's PX.

THE COURT: PX. It's the one that says "Assurance of Voluntary Compliance" at the top?

MR. BARRETT: Yes, Your Honor.

THE COURT: Okay. So the Plaintiff intends to refer to this and the Defendant objects, is that right, Mr. Barrett?

MR. BARRETT: Yes, it is, Your Honor.

THE COURT: All right. Let me get you, Mr. Barrett or whoever for the Plaintiff, to tell me briefly what you would intend to say about this and why you need to say it.

MR. BARRETT: Okay. So the Assurance of Voluntary Compliance is an extremely important piece of evidence about DISH's ability to control its OE retailers. This is a document that we cited in the complaint when we filed the case more than two years ago. It was not the subject of a motion in limine, but DISH has now objected on several grounds and I can let them discuss this. But it is very important for the purpose of establishing DISH's control, and I can go into that and talk specifically about the Assurance of Voluntary Compliance, if I may.

THE COURT: All right. Well, what are the Defendant's objections to it? Are you going to be objecting to its admissibility and did you object in the pretrial process, the --

MR. BICKS: Yes, Your Honor.

THE COURT: Okay.

MR. BICKS: This is Peter Bicks. We did object to it and we did not file an in limine on it, frankly, because our practice is at least not to file an in limine on everything. I did reach out to Plaintiff's counsel in advance of this to just ask if they were going to use it so

that Your Honor knew about it and I could discuss it with you and they did indicate they were going to reference it.

I'm happy at this point to tell the Court why I don't believe it would be admissible, including the fact that at page 29 of the document in paragraph 7.2 it expressly says that it is not to be admitted or used in court and it's a voluntary agreement that DISH entered into with over 40 attorney generals and is akin to a settlement document, expressly not admissible.

The document, if we look at it -- and I don't know if the time is now. I would really -- one way to handle it, so we don't burden you, is we could get into the details later. We are talking about an opening. I would just suggest that maybe we just don't need to go into it in the opening, but as I say, I'm prepared to take the Court's time now to explain why -- in more detail why it would not be admissible.

But -- so off the bat, it expressly says it is not admissible in court and it's an agreement in the -- in the prefatory language that says that DISH has had certain discussions with state attorneys general and that they've agreed that good suggestions have come up in terms of benefiting consumers through compliance, and it's a voluntary agreement. There is a payment that's made under it that I -- should not be in front of the jury of $5.9

million.

The fact -- my point, Your Honor, is the Plaintiffs can argue that there's agency because DISH did things. The jury doesn't need to know that some of the things that DISH did came out of discussions that happened with state attorneys general as part of a voluntary compliance agreement that on its face would not be admissible. To put in front of a jury an agreement like this, where it's got in it all allegations by the attorney general, denials by DISH, and an express statement that it's not in any way an admission of anything, except that it's in a voluntary agreement, is going to be hugely prejudicial and it's not -- it's not going to be relevant to the case in any particularly meaningful way. The same information can come out through just pointing out what DISH did.

Then to have DISH then go into a position where we've got to explain how this came about, the significance of it, it's going to take us down a sideshow here that I don't think is going to be useful and it's going to be prejudicial because when you look at the document, you know, it is a -- it's a contract with all the states attorneys general. And I say to the Court no parties to this, no one of these states has come in and said DISH didn't do this or DISH did. There's been no dispute among the parties to this agreement.

And so, you know, those are some of the reasons that I

don't think it should be admissible and I think -- until we have an opportunity really to look at it, I would just ask that we not get into it in the opening until, you know, we can fully vet it.

THE COURT: Okay. So for the Plaintiff, which particular paragraphs are you going to be pointing to as showing agency?

MR. BARRETT: Certainly. We're not pointing to the provisions respecting payments by DISH. We are pointing to provisions respecting DISH's express agreements to control OE retailers specifically and more specifically with respect to their Do Not Call compliance. So it is dead on point.

THE COURT: Where is that? Paragraph 4.67?

MR. BARRETT: It's 4.73.

THE COURT: I'm sorry. Say again.

MR. BARRETT: Your Honor, it's 4.73. And to give you the background, an OE retailer is what's called in this agreement a covered marketer. They're not an authorized telemarketer in this agreement. They're a covered marketer.

So this says -- this document lays out that DISH Network, at 4.73, shall issue business rules to its covered marketers requiring them to comply with the terms of this assurance.

Then at 4.74 it lays out exactly what DISH is going to

do when it receives complaints by retailers like SSN about, among other things, Do Not Call violations. They must affirmatively investigate in 4.74.

In 4.75, I think that is the critical piece with respect to DISH's control over OE retailers. You recall, Your Honor, in the last pretrial DISH's counsel said you need to have an express agreement on the part of DISH and the OE retailer to -- you know, to be subject to control and that's what DISH -- 4.75 does. Within 30 days of the date of execution of this assurance, DISH Network shall provide each covered marketer with a copy of this assurance and inform them that in order to continue acting as a covered marketer they must abide by the terms and conditions of this assurance.

Now, critically, covered marketers are not parties to this agreement. DISH is a party to this agreement. It was signed by their general counsel. It is a statement of a party opponent. And DISH's obligation is to reach out to every covered marketer, including SSN, and tell them they have to comply with this, they must abide by this.

Now, this agreement was executed about a month after Dr. Krakauer received the first telemarketing call in May of 2009 and it was about 11 months before the 51,000 illegal telemarketing calls that we will be putting in front of the jury took place, the start of the class period. So it's

4.75.

THE COURT: All right.

MR. BARRETT: It is 4.77 as well on the next page, which is PX55-24: DISH Network shall require any covered marketer to establish written policies and procedures.

Okay. 4.78: DISH Network shall monitor directly, or through a third-party monitoring service, its covered marketers to determine if, among other things, they're complying with federal Do Not Call laws.

And 4.79 establishes DISH's procedure for investigating, handling, responding to, and disciplining to engage in these complaints -- engage in this conduct rather.

So this is the document that lays out DISH's obligation to deal with OE retailers like SSN just 11 months before the calls began. And DISH is going to come in at trial and they're going to say, "We do all of these things. We monitor our dealers. We require our dealers to engage and hire PossibleNOW, a third-party compliance company." Unless this document is admitted, there are going to be painting themselves in a false light.

THE COURT: You need to speak up there a little bit. We were losing you. Are you there?

MR. BARRETT: Yes, I am. Can you hear me?

THE COURT: Yes. You said unless you're allowed to admit this that paints them in a false light?

MR. BARRETT: They will -- yes, DISH will paint itself in a false light. They're going to say, "We have all of these great policies and procedures that we adopted to ensure compliance with the TCPA." Well, the reason they have those policies and procedures and the exact details of the policies and procedures is in the Assurance of Voluntary Compliance. So it's a critical, absolutely critical document to our case.

Regarding paragraph 7.3 -- I'm sorry, 7.2, you need to read the whole thing. Mr. Bicks summarized it, but you need to read it. What it says is -- it's on page 29, PX55-29.

THE COURT: Yes.

MR. BARRETT: It says: This assurance does not constitute an admission by DISH Network for the purpose of any fact or of a violation of any law, rule or regulation, nor does it constitute evidence of liability, fault or wrongdoing. This assurance is entered into without trial or adjudication of any issue of fact or finding of liability of any kind. Neither this assurance, nor any negotiations, statements or documents related thereto -- and this is the important language I think -- shall be offered or received in evidence as an admission of liability or wrongdoing.

We are not going to introduce this document into evidence as an admission of wrongdoing or liability. We're going to enter this document into evidence and address it at

the opening to establish that DISH had the right to control retailers like SSN and that they agreed to do it; and we're going to also introduce evidence at trial that they did not fulfill their agreement, that they did not do those things that they said they agreed to do. They did not -- did not control their retailers in a manner that they said they wanted to control them. So that's our position here, Your Honor. There's also a --

THE COURT: Can I ask you a question? Excuse me. Do you intend to in your opening just reference this agreement and say basically what you just said or are you intending to show them these particular paragraphs? What's your plan in your opening?

MR. BARRETT: We are not intending to show the jury the document. We're intending to talk about the document and we're intending to tell the jury that DISH had established these procedures, agreed to comply with them. They agreed to tell all of their retails like SSN that unless they comply they couldn't telemarket.

THE COURT: Okay. I got you.

All right. Mr. Bicks.

MR. BICKS: Well, a number of things, Your Honor. First of all, to the Provision 7.2, saying that it won't be used in evidence as admission of liability or wrongdoing, for all practical purposes that's what they're trying to do.

They're trying to use it to say that it proves agency and therefore liability. So it's an intermediate step to that exact ultimate admission. So I don't -- I think -- I don't think that's a -- really when you look at the substance and purpose of that, I -- my position is precisely that.

The other point is, Your Honor, that this agreement, if you go back to page 3 of it and paragraph 1.14 at the bottom, what this talks about is -- and it says this is DISH's position, but at 1.14 in the second sentence, it says DISH Network values the suggestions of the attorney generals as a way to improve policies and procedures and it is going to agree to the obligations in here to promote customer relations. That is the purpose of this, again, a voluntary agreement to improve procedures.

The point that Mr. Barrett made -- DISH is going to say that a lot of these procedures that are being discussed here were being done beforehand and we're -- and that will be in my opening. I will be showing things that happened and practices with retailers that occurred before this. We've got no objection to them saying, "DISH did issue business rules. DISH did this. DISH did that." And they can say that they think that constitutes agency.

My point is it's prejudicial and I think is inconsistent with the purpose of this, which is, in essence, to foster companies to try to improve processes and reach

voluntary agreements. For this to then be brought in by a third party when -- contrary to what Mr. Barrett has said, he wants to say, in essence, that this contract was breached, but there's no claim by any attorney general that this contract was breached. And, as the Court knows, DISH has been litigating full out in Illinois with attorneys general and nobody has suggested there's been a breach of the contract. So that is -- is our view of this.

I think they can get to the same point by making the argument, but for us then to get in and start -- and the Court having to say to the jury, "Hold on, ladies and gentlemen. This document, not an admission. You know, you can't look at this part. You can look at this" -- all the redacting process and so on and so forth, I don't think that that's going to be fair to DISH.

And I really fundamentally say when a party then knows that a voluntary agreement that expressly says it can't even use against a party for liability is now going to be essentially been used for that purpose, then that presents issues beyond this case for companies that are going to, you know, try to resolve matters like this. So I think it is really prejudicial for a jury to see that there's an agreement with 47 other states.

And when we dealt with this before when -- the Court said, "How were we going to deal with the Illinois case?"

And the Court's rule was: "You can use testimony, but let's stay away from that other case." I will tell the Court that the counsel on this call brought a class action against DISH involving SSN, the *Donaca* case, that got tossed out by the court. So are we then in a position where for DISH I'm now able to bring in another case that involved SSN and this law firm where they lost the case on a class action basis because --

THE COURT: I don't understand what you're talking about. That seems to be totally irrelevant to the discussion. I'm not following why what you're saying has anything to do with the issue at hand.

MR. BICKS: Well, because I think it has to do with the issue at hand because if we're going to be opening up this litigation to bringing in things that happened outside of this litigation, then I think that arguably is going to open up the door to us bringing in litigation that directly involved SSN because this didn't, this agreement.

MR. BARRETT: Your Honor, may I address that point?

THE COURT: Wait. Stop, stop. Everybody stop talking. In telephone conferences, it is particularly important for only one person to talk at a time. I cannot hear when more of you than one -- you know, when there's more than one person talking, so it does absolutely no good

to talk over each other.

I believe that I was still talking with Mr. Bicks, so if he has anything he wants to say to finish up -- I will certainly, Mr. Barrett, give you a chance to respond, but please do not talk over each other or I'll just have to -- you know, we'll just have to stop using the telephone.

Mr. Bicks, anything you want to say?

MR. BICKS: It --

THE COURT: But let me address it. I don't understand what you're saying. They say that these statements have to do with control. How could anything that happened in other litigation be admissions by a Plaintiff on -- I mean, if there's something out there where Dr. Krakauer or a class member made admissions about DISH's control, okay, I mean, we could talk about that, but I'm not really following what you're saying about this other litigation and why it has anything to do with this specific problem, this specific document, and the purpose it's --

MR. BICKS: I wasn't saying, Your Honor, that it deals with control. I was making a broader point that the Court was careful in some of the prior in limines to make sure that ancillary proceedings were not brought into this case. What I'm saying is when we start going down the path of bringing in ancillary proceedings, particularly this one, then that possibly opens the door to other issues coming

into the case. That's all I was saying.

THE COURT: Okay. Anything else you want to say about this at the moment?

MR. BICKS: No.

THE COURT: All right. Mr. Barrett.

MR. BARRETT: Yes, Your Honor. What I wanted to say was that this Assurance of Voluntary Compliance is not a *U.S. v. DISH* matter. There are 46 state signatories to the Assurance of Voluntary Compliance. My belief is that the four states that are not signatories are the plaintiff states in *U.S. v. DISH*, as well as the Federal Trade Commission, which is not a party to the Assurance of Voluntary Compliance. So this is not injecting *U.S. v. DISH* issues into this case.

And respecting the case that Mr. Bicks referred to, the one that our firm brought and lost, we lost that on class certification grounds, on other issues, and -- and that has no conceivable relevance to what we're talking about here.

And the third thing I wanted to mention, Your Honor, is that in another case DISH itself lost on this very issue. There is -- the case is called *Young versus DISH Network*. It's from the Northern District of Oklahoma. That was a case that did not involve TCPA violations. It involved other sorts of allegedly illegal conduct -- consumer conduct by DISH. It's from the Northern District of Oklahoma. It's

13CV114.

DISH had moved in limine to exclude the Assurance of Voluntary Compliance on paragraph 7.2 grounds, the same grounds that Mr. Bicks is raising. The court rejected that motion in limine to exclude that and said that the plaintiff is not offering the Assurance of Voluntary Compliance into evidence as an admission of liability or wrongdoing. It's being offered for other purposes and the purposes were unique to that case.

But the important point is what are the purposes for which we intend to elicit this evidence and the purpose is control, which is the most important issue in this case.

THE COURT: Okay. Mr. Bicks, any short rebuttal that you haven't already said?

MR. BICKS: Well, yeah. My rebuttal, Your Honor, is consistent with the concerns of the Court on the other in limines. It's prejudicial to DISH to be allowing this document which refers to government agencies making allegations and it's prejudicial to have that in front of a jury and that was the reasoning that Your Honor used in some of the prior in limines when it came to talking about other proceedings.

THE COURT: Okay. Well, I don't -- we may have a lot of things to work through with this very, very long document, 85 pages, and having the entire thing in front of

the jury may indeed cause some 403 concerns, among other things.

But as to the provisions in paragraphs 4.73, 74, 75, 77, 78, 79, that general area, that appears to be relevant to the control issues and to support the Plaintiff's position that DISH did have control over these retailers; and that does not appear to be covered by the provision in 7.2, which is liability or wrongdoing, and here we're talking about agency.

So I will let -- 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. There are ways you can address this in opening statement and I'm going to stop you, but if you limit it to the control aspects and the specific provisions with the minimal amount of context needed to make it comprehensible to the jury, I don't have any problem with that.

When it comes to the entirety of the agreement being admitted into evidence, we'll have to have some, particularly Rule 403, discussions about that, but we can put that off.

All right. Mr. Barrett, what else would the Plaintiff

ask the Court to address today?

MR. BARRETT: We don't have anything that we need to address today that we can't address at the time that documents are introduced into evidence.

THE COURT: Okay. Mr. Bicks, what about for the Defendant?

MR. BICKS: I had just a question -- a couple questions, Your Honor, about the jury selection process and on openings, maybe -- let's just start with the openings. Then the other issue I think Ms. Echtman was going to address was some expert issues and it may come up quickly, so it's probably worth getting on the table.

But let me just start with the first question the Court may -- asked us, were we expecting anything from you. I wasn't expecting anything, but my question is on the pre-instruction. When we, kind of with your help, made changes to the language, my question: Was the Court intending to give the parties the pre-instruction as we revised it kind of on the fly that -- that we were going to use with the jury? And then I also wanted to ask the Court when it came to voir dire --

THE COURT: Stop. Let's just take -- stop. Let's just take one at a time. So I did go back and revise that instruction in light of you-all's comments; and then when I got your stipulation saying that the internal Do Not Call

issues were resolved, I went back through and took the discussion out about the internal Do Not Call claims.

I -- does anybody have any problem with that first? Mr. Bicks?

MR. BICKS: I don't think so, but Ms. Echtman is on the line and she'll correct me if I'm wrong about that, but I don't think we have a problem with that.

MS. ECHTMAN: This is Elyse Echtman. We have no problem with that.

THE COURT: All right. Mr. Barrett, any problem with that?

MR. BARRETT: No, Your Honor.

THE COURT: Okay. I had not really intended to send it back out to you. I think I covered it in a fairly clear way. I did make all the changes that we talked about and it's a good bit shorter now, fortunately, so I'm not really intending to send that back out to you since it's preliminary and I will clearly tell the jury the final instructions govern.

Okay. Your next question was about voir dire, Mr. Bicks?

MR. BICKS: Yes. I only -- my -- this -- I'm not suggesting the Court was -- I'm not giving assignments. It was just a question --

THE COURT: Right.

MR. BICKS: -- which is we went through various -- both sides proposed voir dires, and the Court indicated what you would be inclined to do and what you wouldn't. I was -- I was asking whether or not we will get from you before we do the voir dire what it is that you're going to ask --

THE COURT: No.

MR. BICKS: -- so we can keep track of it kind of against something that we know is going to be happening.

THE COURT: No. You'll just need to -- I will give you an opportunity before I require you to exercise your peremptory challenges to identify anything I have not asked that you would like me to ask, and you'll be able to do that outside the jury's presence, either generally to address with all the potential jurors or something specific as to one juror, but we'll just take that up in the courtroom at the time.

MR. BICKS: Okay. Understood.

And then, Your Honor, can I ask you some questions about the jury selection process again, just the logistics?

THE COURT: Okay.

MR. BICKS: When -- in terms of -- I'm just trying to think practically of our ability to look at the questionnaire and -- and have time to review it before the selection process. Will the Court give us some time to take a look at it -- the questionnaires before we start jury

selection?

THE COURT: Yeah, as I -- I've asked the clerk, as those questionnaires are filled out, to go ahead and copy them and to distribute them. I mean, they won't bring them down to you one at a time, but they'll bring them down to you in small batches as they are completed and you'll have some time to look at them. Now, you know, there may be some that are filled out at the very last minute and you might not have as much time to look at those as the one you got 45 minutes earlier, but, you know, I am anticipating that you will have some time to look through them.

And then, of course, you know, while I'm asking them questions, you'll have them in front of you so -- they're not that complicated. They are really pretty straightforward, so to my mind, there's not a lot -- I mean, it doesn't take but a couple minutes to look at it, which can easily be done while I'm talking to the jurors. So I'm not promising you an hour to look through all these things before we start jury selection, but I think you will have adequate time given how short the questionnaires are.

MR. BICKS: No, that will be perfect and thank you for that.

THE COURT: Uh-huh.

MR. BICKS: On the question of the jury list -- and I know the Court indicated there would be only one copy

of jury questionnaires per side, but I was wondering, because our clients will be there and, you know, other members of our trial team, is it possible to get more than one copy of the jury list so that people can kind of know who we're speaking with during the oral voir dire?

THE COURT: Yeah, I don't have -- the clerk will give you three or four copies of that. That's not a problem.

MR. BICKS: Okay. And thank you for that.

The other thing could I say to the Court is I -- we will be working with a jury consultant and I didn't want the Court to be surprised about that. I wanted to tell you that and then also ask you if it would be permissible for her -- her name is Lee Meihls -- for Lee to sit with me at the counsel table. She's aware of all the Court's rules. Obviously, she's -- has done this before, but I wanted to ask your permission for that and also tell you ahead of time that she would be there.

THE COURT: All right. That's okay. You can have who you want at counsel table. My husband has started watching this horrible show about a jury consultant. Have you-all seen it?

MR. BICKS: Yes.

THE COURT: Oh, my gosh. I cannot bear to watch it. But I assume she will not have an earpiece and whisper

in the courtroom and behave inappropriately. TV is an awful thing sometimes. But subject to her, you know, behaving appropriately, I'm totally fine with her sitting there with you during jury selection. So I do tell jurors during jury selection to disregard what they see on TV because it's so ridiculous. But in any event, that's fine, Mr. Bicks.

MR. BICKS: Thank you. And she will, of course, be a professional. I can assure you of that.

Just again a question on the openings, Judge, in terms of -- the parties exchanged kind of information about what we would be going into in the openings. I guess the Plaintiffs are saying they will not display any documents. I've given them a list of the evidence that I intend to show during my opening. It's exhibits that neither side has objected to and we've worked all that out in -- in a very nice way and I think we're in pretty good shape.

The one issue that just came up prior to this call is I had told Mr. Barrett that I'll also -- I haven't finished them yet, but with the documents that everyone agrees are already fair game, if you will, in the openings, I'm going to put together a graphic timeline of some of the evidence that the jury is going to hear to kind of help them see what's going on and frame the evidence. I had not intended to turn over my timeline, just like I'm not saying to them, "Can you please give me an outline of everything you're

going to say?" And I -- in most courts, because it's based on evidence that everyone agrees is going to be admissible, I haven't had to do that, but I didn't want to have any dispute if I suddenly started showing a timeline and there was some expectation that they had to see it ahead of time.

I will tell the Court I haven't finished it yet because, you know, I'm still working on it, but -- and I did also indicate to the other side -- I gave them a couple things from the DISH's website of products and just a little company history and things like that that I may use, but I wanted to make sure we didn't have any confusion or any kind of objections and we were all on the same page here.

MR. GLASSER: So this is Brian Glasser. I mean, I don't need to see it long in advance, but I don't think I've ever been in a trial in each state where you didn't at least see the demonstratives the other guy was going to use before they showed them to the jury. So I think in the morning you should show it to us.

THE COURT: Mr. Bicks.

MR. BICKS: Yeah, I don't want to have a hullabaloo over it. It's just an interesting thing. I don't -- If they're going to write something -- I think Mr. Glasser said they're using an ELMO or -- you know, I don't see anything that they're even going to say and, you know, things that I may be displaying that are of the

evidence, it's pretty much giving kind of a road map of everything that I'm going to say, which -- but I'll do whatever the Court wants me to do.

THE COURT: Yeah. Well, if you are going to use a prepared document that's not an exhibit during your opening statement, I would ask you to give it to them, you know, before your opening statement starts so they have a hard copy in front of them.

And, you know, I hope we won't have any problems about that because, obviously, you could write on a piece of big white paper your timeline as you are making your opening statement and you wouldn't have to show that in advance, but that's a different experience and occurs in real time. Whereas, when you put a document up there that's been prepared in advance, the whole thing is in front of the jury at one time and seems -- seems only fair to share anything like that with each other in advance.

But that said, you don't have to do it but -- I mean, whenever you get it finished, just if you'd show it to them sometime on Monday. I would hope there wouldn't be any problems about that. I have no problem with your using it, assuming it's accurate. So is that clear?

MR. BICKS: Fine. I will -- yes. Thank you for that guidance. I'm glad we discussed it.

MR. BARRETT: Your Honor, if I may. This is John

Barrett. On that point, we may have some demonstrative exhibits that we intend to use with our expert witness just to explain the process that she employed to do her work. Would the same rule apply there, we would give it to DISH counsel before we, I guess, put the witness on the stand?

THE COURT: I would very much appreciate that. Anything you're going to show to a witness while the witness is on the stand should be disclosed before the witness gets up there. Otherwise, we have delay. So as soon as you can do that, that would be very helpful. You-all have been really good about working through problems and I think it facilitates that if you share those things in advance, so I would definitely expect you to do that.

Okay. I believe, Mr. Bicks, you mentioned Ms. Echtman might have something to raise?

MR. BICKS: Yeah, and let me -- just one other heads up, Your Honor, so you're not -- it's not a surprise. We will probably bring to the Court's attention a recent case that came down by way of just a quick notice of supplemental authority because I think it bears on the jury instructions and everything else. I didn't want the Court to be surprised. It's a recent ruling that came out of the Northern District of West Virginia in an agency case in telemarketing which says that giving scripts -- because telemarketing is legal, giving somebody a script and having

them be an authorized retailer is not evidence of agency. And we'll file it. I just didn't want the Court to see some ECF filing and wondering what's going on.

THE COURT: All right.

MR. BICKS: And we'll be just -- we'll be filing that. I just want to let the Court know that.

THE COURT: Thank you.

MR. BICKS: So I'll turn it over to Ms. Echtman on this other issue.

THE COURT: Okay.

MS. ECHTMAN: Your Honor, first I have one more housekeeping issue that I want to bring up. And this is Elyse Echtman. We have two paralegals who are working with us for DISH, James Cangelosi and Elizabeth Walker. They went to court to get passes to bring electronics into the courtroom and Your Honor had said that paralegals would be eligible to get those passes, but I don't think that the Clerk's office realized that. So I wanted to ask you if we should be getting an order for you -- from you so they can bring their phones and laptops with them into the courthouse.

THE COURT: Okay. Hold on a second.

(Discussion between the Court and Ms. Sanders, not recorded.)

THE COURT: Are they coming today or Monday?

MS. ECHTMAN: They can come back today. I think they had gone in yesterday to get their passes and they were told that the Clerk's office couldn't give them to them. We are delivering our exhibits to the courthouse today, so they could come this afternoon.

THE COURT: Okay. Ms. Sanders will work on that and get that worked out. When they come, if they'll ask for her, she'll facilitate that.

MS. ECHTMAN: Okay. I'll have them come today and ask for Ms. Sanders. Thank you very much.

THE COURT: Uh-huh.

MS. ECHTMAN: The other issue actually was one that Mr. Barrett had said he wanted to raise about exhibits to be used with experts. I don't think any of it actually impacts the opening statements. So if Mr. Barrett still wants to raise these issues, I think we can push this over to Monday. I don't think we need to deal with it over the phone.

THE COURT: All right. Mr. Barrett, that's agreeable?

MR. BARRETT: I think that's fine, Your Honor.

THE COURT: All right. Good.

The -- let's see. I think that covers the main things I wanted to talk to you-all about, which was the weather, the removal of the internal Do Not Call List issues from the

case and the shortening, I hope, a bit on there, and then whatever you-all wanted to talk about. So if there's nothing else, I think we can probably stop.

You can communicate with Marlene about any technical issues, other logistical problems, any weather-related problems. She'll be on the lookout with her e-mail this weekend and be able to get in touch with me. I hope that won't be necessary, but if we do have any changes.

And the court reporter I know has had some discussions with you-all as well. We did get an assignment for the court reporter. She is certified in realtime, so I -- is there anything I need to address with you-all about that? No?

MS. ECHTMAN: Your Honor --

MR. BARRETT: This is John Barrett.

THE COURT: Okay. Mr. Barrett.

MR. BARRETT: No, Your Honor. This is John Barrett.

THE COURT: Okay. Ms. Echtman, were you going to say something?

MS. ECHTMAN: Yes. I was going to say that our team had been reaching out to see if we could get realtime and I think we had initially been told it would not be available, so we're very happy to hear that it is. So we'll just talk with our technical people to make sure we can get

it set up so we can see it. We're also interested in getting dailies. I think with realtime we should be able to get daily transcripts based on the realtime feed. So thank you very much. We're happy to hear that.

THE COURT: All right. I don't know if she is going to be able to do dailies or not, but I think she can comply with the realtime. You-all can set that up either through cables in the courtroom or it might be easier to do it just through an Internet link.

Do you need anything from me, Ms. Sanders, in order to do that?

THE CLERK: I don't think so.

THE COURT: No. All right. I'll let you work that out with the court reporter and Ms. Sanders.

Okay. Anything else for the Plaintiff?

MR. BARRETT: No. Thank you, Your Honor.

THE COURT: The Defendant?

MR. BICKS: No. Thank you, Your Honor, for all your time.

THE COURT: All right. Great. Well, I appreciate everything you-all have done. I feel like we're in great shape to try this case efficiently and fairly and do very much appreciate you-all working through everything in advance. You've done really -- I know it's been -- actually, I am sure I have no idea how much work it has

been, but I think I have some appreciation for how much work it has been. I know it has required a lot of your time and attention, but I do think it's going to make a huge difference in getting the case to the jury in a -- in a fair and clear way, and I really appreciate all the work you-all have done on that, and I'm looking forward to being with you on Monday. I'll anticipate opening court approximately 10:30 and I'll see you then. All right. Thanks.

(Telephone conference concluded at 11:35 a.m.)

C E R T I F I C A T E

I, LORI RUSSELL, RMR, CRR, United States District Court Reporter for the Middle District of North Carolina, DO HEREBY CERTIFY:

That the foregoing is a true and correct transcript of the proceedings had in the within-entitled action; that I reported the same in stenotype to the best of my ability and thereafter reduced same to typewriting through the use of Computer-Aided Transcription.

Lori Russell

Lori Russell, RMR, CRR
Official Court Reporter

Date: 3/1/17

EXHIBIT 83

EXHIBIT 83

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,	*	Case No. 1:14CV333
	*	
Plaintiff,	*	
	*	
vs.	*	Greensboro, North Carolina
	*	January 10, 2017
DISH NETWORK, L.L.C.,	*	11:55 a.m.
	*	
Defendant.	*	

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TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE CATHERINE C. EAGLES,
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:

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Proceedings recorded by stenotype reporter.
Transcript produced by Computer-Aided Transcription.

P R O C E E D I N G S

THE COURT: All right. Good morning. We're ready to get started with jury selection.

My intention is to ask the clerk to send for the jurors and they'll -- we'll need to rearrange a little in here so that the jurors have someplace to sit.

And while we're waiting on them, if there are any housekeeping matters, we can take those up.

I know you all have not -- you all have had maybe 15 minutes to look at the questionnaires and it's noon, so realistically you're going to have the lunch break to look at them as well.

So where -- Marlene, where will the jurors sit, in the --

THE CLERK: On the Plaintiff's side in the back.

THE COURT: In the back. Okay. So everything is all right?

THE CLERK: I believe so.

THE COURT: Okay. All right. So if you would call downstairs and ask them to bring the jurors up.

THE CLERK: I'm going to have to go get them.

THE COURT: You have to go get them. All right. If you would go get them.

That means we can't do anything important while she's gone, but --

MR. GLASSER: Your Honor, after you send the jury to

lunch, we do have a housekeeping matter that may take 10 minutes. We've agreed on 95 percent of the redactions on the assurance of compliance. There's a couple paragraphs we're arguing about we would like to get sorted out so we can clean up the exhibit.

THE COURT: All right. We'll do that at lunch.

And you all saw the questionnaire specific to this case and each got a copy of that, right?

MR. BICKS: Yes.

THE COURT: Okay. And then there were a few jurors who -- I think this was actually mostly duplicative of the specific questionnaire, the one we always have them fill out. A couple of people did indicate some specifics about health issues or family members with court appearances, that kind of thing. So I think she showed that to you as well. Yes. Okay. All right.

(Pause in the proceedings.)

THE COURT: And we probably won't -- we'll stop for lunch certainly no later than one o'clock. We'll see how it goes as to the best time to take a break.

(Pause in the proceedings.)

(Prospective jurors entered the courtroom.)

THE COURT: You can remain seated while the jurors come in.

(Pause in the proceedings.)

THE CLERK: Judge, we have 30 jurors.

THE COURT: All right. Good afternoon, ladies and gentlemen on the jury panel. My name is Catherine Eagles. I'm a United States district judge for the Middle District of North Carolina assigned to this civil term of court, and I want to welcome each of you as you begin your jury service and thank you for braving the elements to get here this morning. I know we had -- we were hoping to get this trial started yesterday, but that probably would have been a bad idea given the weather. So we appreciate you all being here today for us to get started with this case.

I know that when people are summoned for jury service they do so at some sacrifice to other plans in their lives, and for some of you, you have to travel a pretty good distance. This is federal court and the Middle District goes from South Carolina to Virginia. So I know some of you really had a hike to get here this morning. I will certainly do my best to see that your time is used efficiently while you are here.

Our jury system is one of the things that sets this nation apart from others. Jury service is one of the highest callings of citizenship and by participating in this process, you are fulfilling one of the guarantees set forth by our nation's founders over 200 years ago, the right to decide disputes by trial by jury. In our system of justice, jurors, not judges, determine the facts. I'm not going to decide who wins or loses

this case. The jury is going to make that decision.

In this case that we're about to start on, we will select at least eight people for the jury, but before we do that, I will have each of you sworn in for your jury service this -- in this case, so please listen to the clerk.

(The prospective jurors were duly sworn.)

THE COURT: Please say "I do."

(Prospective jurors complied with the request.)

THE CLERK: Thank you. You may be seated.

THE COURT: All right. Ladies and gentlemen, we are ready to try -- I've called for trial the case of Thomas Krakauer against DISH Network, L.L.C. This is a civil case. It is a dispute between the Plaintiff, Thomas Krakauer, and the Defendant, DISH Network, L.L.C. It is not a criminal case where someone might go to jail. If we don't need you in this case, they are picking a jury in a criminal case down on the first floor, so we might be trading off on jurors some. But this case is a civil case.

The Plaintiff, Thomas -- is Thomas Krakauer.

If you would stand, please, Dr. Krakauer.

He's seated -- he's standing there with his hand raised. He is represented by his attorneys in this case.

And if each of you would stand when I call your name: Brian Glasser, John Barrett, Matthew McCue, and Matthew Norris. All right. Thank you. You can be seated.

The Defendant is DISH Network, L.L.C, who is present in court through their representative Lawrence Katzin. There is Mr. Katzin standing on the other side. He is represented -- DISH is represented by Peter Bicks, Elyse Echtman, John Ewald, and Richard Keshian.

All right. Thank you.

Now, this case concerns the federal law which establishes the National Do Not Call Registry. That allows folks to opt out of receiving sales calls on their residential phone lines. This is a class action involving the Telephone Consumer Protection Act. You may hear that referred to as the TCPA. And the Plaintiff, Thomas Krakauer, seeks to recover money damages on behalf of himself and a class of individuals from the Defendant, DISH Network, for telephone calls made by a company called Satellite Systems Network, or SSN, to phone numbers that were allegedly on the National Do Not Call list.

So a class action is a lawsuit that is brought by one or more people on behalf of a larger group of people who have similar legal claims. All of these people together are called a class. In this case, the class is composed of all persons whose telephone numbers were on the National Do Not Call Registry for at least 30 days, but who nonetheless received telemarketing calls from SSN, that's Satellite Systems Network, to promote DISH between May 1st, 2010, and August 1st, 2011. Thomas Krakauer is the representative of this class and his

lawyers are also representing these class members. Your verdict here will be binding on all class members, as well as on DISH.

Now, this statute, the Telephone Consumer Protection Act, allows persons who receive calls -- telephone calls in violation of the Act to recover damages up to $500 each. The Plaintiff contends that DISH is liable for phone calls made in violation of the Act by its agent, SSN. And the Defendant, DISH, contends that SSN was not its agent and was not acting within its authority, but was an independent contractor; and that in any event, Dr. Krakauer has not proven that the phone calls violated the Act.

So that's a two-sentence summary of what the case is about. It's a little more complicated than that, but that gives you a basic overview.

Now, as jurors, it will be your duty to listen to the evidence and determine the truth of this matter. You are the judges of the facts, and you will listen to the witnesses and evaluate their credibility, that is, their believability. You'll consider any exhibits, such as documents or photographs. You will weigh all of the evidence and then you will determine what happened back in 2010 and 2011. You will apply the law that I will give to you to those facts. It is your duty to apply the law as I will give it to you and not as you think it is or might like it to be.

If anything I tell you about the law is different from what you thought based on something you read online or studied in school or saw on TV or different from how you might like the law to be if you were in Congress passing the laws that apply to the citizens of this state, then it is your duty to follow my instructions on the law and to set aside your personal views of what you think the law is or might like it to be. This is important because justice requires that everyone who comes to court on the same issue be treated the same way and have the same law applied.

We don't make it up as we go along. I'm not just sitting up here pulling stuff out of the wind. Congress has passed the laws and that's what we all are supposed to follow. If we made it up as we went along or if we went by personal preferences or personal views, that would be arbitrary and, generally speaking, arbitrary is not good and we don't like to do that in courtrooms. So it's one of the reasons it's important for you to follow the law.

We also don't reach verdicts based on personal biases, stereotypes or general opinions. Juries base their verdicts on evidence offered in the courtroom in the presence of all the parties under oath where the evidence is subject to questioning and examination in the presence of everyone who has an interest in the matter.

I particularly want to caution you about the law you may

have heard about on TV entertainment shows. You know, you can talk about, back in the, day *Perry Mason.* Then you come forward. Maybe there's *Matlock.* Maybe you're a *Law & Order* fan. I think you can watch *Law & Order* 24 hours a day if you have the right cable package, but I'm -- I know this is going to shock everybody, but on television shows, they make stuff up. Okay. Even in reality shows they make things up. On TV they do not know what the law is that applies in this courtroom in this case. So if you've picked anything up from watching television, whether it's *Judge Judy,* who seems to be a very nice lady if a bit stern, or, you know, some other TV show like that, just really, please, put it aside. All right. I'm going to tell you everything you need to know about the law that applies in this case and you should take your instructions from me, not from some TV judge or TV actor, okay?

Now, we're ready to start with jury selection. Fourteen people are going to be called over here in the jury box. There's a couple of seats just right outside the jury box, but if you're in those seats, you're still in the jury as far as we're concerned. I have a number of questions to ask folks. Some folks may be excused if there is a reason they cannot be fair in this case or if one of the parties decides to exercise its right to excuse a juror. If we do have a juror excused, we may refill those seats. So I do need everyone in the courtroom to listen to the questions even if you're not seated in the

jury box at the very beginning.

If at any time you cannot hear or understand me, please raise your hand so I can repeat it. I will ask all of you to listen carefully. Sometimes the second time around, if we have a juror who is excused and another juror takes the place of that juror, I shorten the questions up a little bit to save time and be efficient, so please listen the first time through. You have each filled out a questionnaire that covers a lot of things I might ordinarily ask you to answer out loud in court, but there will be some follow-up questions for those of you who make it into the box.

First, just let me confirm all of you filled out the questionnaire. Is there anyone who did not fill out the questionnaire? Okay. Good.

And I do also want to be sure you filled it out accurately and truthfully. If at any time while you're in the jury box you remember something that you didn't think of when you were filling out the questionnaire, just bring it to my attention. This is not uncommon. You know, we're human beings. We remember what we remember. Sometimes our memory is jogged. So if something comes to your mind that you forgot to put down or that maybe makes one of your answers incorrect, just let me know when you're in the jury box.

Now, the questions I will be asking you are designed to be sure and to find out that -- whether you can be a fair and

impartial juror in this case. They're not designed to pry, but if I do ask something that requires you to give information you'd rather not state in front of the open courtroom, just let me know that, and I'll figure out another way for you to provide that information to me and to the parties.

Now, a fair and impartial juror has not made up his or her mind before hearing the witnesses and seeing the evidence. A fair and impartial juror can listen to the testimony and judge the credibility of the witnesses. A fair and impartial juror follows all of the Court's instructions, not just some of the instructions, and a fair and impartial juror waits until all of the evidence is presented before making up his or her mind. A fair and impartial juror decides the facts of the case based on the evidence, not on bias, sympathy, prejudice or past experience.

Now, we do not ask you to put aside your common sense and life experience when you come into the courtroom. Indeed, we need you to bring that with you as you listen, evaluate, and weigh the evidence. Having jurors with different backgrounds and experiences helps ensure that all the evidence and all aspects of the case are carefully and thoughtfully evaluated during deliberations. Your life experiences provide context and background, but if they mean you cannot listen to a case fairly and impartially, then you do need to let me know that.

I do suspect that everyone in the room has received a sales

call on the telephone at one time or another and that fact alone does not disqualify you as a juror. If it did, I think it would be impossible for me to get a jury in this case. So the question is not whether you've ever gotten a sales call or whether you agree or disagree with the Do Not Call law or whether these calls do or do not bother you. The question is whether you can listen to the evidence in this case with an open mind rendering a verdict based on that evidence and whether you can follow the law that the Court will give you. We do -- we may ask you some questions about your experiences, but that is simply to find out if those experiences are such that -- you know, they're just sort of ordinary life experiences that constitute background or if there's something that's going to prevent you from being fair in this case.

All right. The clerk is going to call 14 of you to come into the jury box and the security officer here will help be sure you get into the right seat. So please listen for your name and come forward if it is called.

THE CLERK: Juror number one, which will be on the first row against the wall, is Colton Wheeler. Juror number two, which will be in the second seat, is Charles Lambis. Juror number three is Tellie Smith. Juror number four is Tiesa Smith. Juror number five is Lorri White. Juror number six is Randall Richter. Juror number seven is Susan White. Juror number eight on the back row against the wall is Kelly Helner.

Juror number nine is Eric Turner. Juror number ten is Karen Dove. Juror number eleven is Jane Frazier. Number twelve is Jean Martin. Number thirteen is Robert Jackson and number fourteen is Larry Cornwell.

(Prospective jurors entered the jury box.)

THE COURT: I forgot to mention something very important. We are going to take a lunch break, okay. So I wanted to go ahead and get started this morning since we had a little bit of a late start due to the weather, but, you know, we're going to see if we can't make some progress here before we all go to lunch, but I'm not going to make anybody starve. All right.

Okay. Good afternoon again to our 14 jurors. First, if I can ask if any of you know the Plaintiff, Thomas Krakauer. That's Mr. Krakauer there raising his hand again. Any of you know him?

Did any of you know his lawyers: Mr. Glasser, Mr. Barrett, Mr. McCue or Mr. Norris? Mr. Norris practices in Raleigh and the other folks are out of state. Okay.

Have any of you or anyone in your close families ever been employed by DISH Network, the people who provide TV services? Nobody.

Have any of you ever worked for a business that did work directly for DISH?

And do any of you have any connection with any of DISH's

lawyers: Mr. Bicks, Ms. Echtman, Mr. Ewald or Mr. Keshian? Mr. Keshian is from North Carolina. The other folks are from out of state. No. Okay.

And based on the little that I have told you, does anybody know anything about this case? I don't think it's been in the newspaper or online, but just in case. All right.

Now, the law does apply to individuals and to corporations, and parties should not be treated differently because of that status. Is there anyone here who would treat an individual different from a corporation or a corporation different from an individual? Anybody just got any biases that way? Everybody can apply the law both to the individuals in this case, Dr. Krakauer and the class members, as well as to DISH, which is a limited liability company? Is there anybody who cannot do that?

Ms. Frazier, you have some concerns about that?

PROSPECTIVE JUROR ELEVEN: I do. I worked in the corporate world former to -- prior to my education world experience and kind of not real favorable opinions.

THE COURT: Okay. And are you concerned that those experiences are going to prevent you from being fair to DISH? Is that what you're saying?

PROSPECTIVE JUROR ELEVEN: I'm going to try very hard for them not to be, but I'm not a big corporate fan.

THE COURT: All right. Thank you for telling us.

PROSPECTIVE JUROR ELEVEN: I'm sorry.

THE COURT: So do you think that that is -- you know, everybody has got their experiences and most of the time people can -- I think they do find that they can put them aside and base their verdict on only what they hear in the courtroom in light of their full life experience.

Do you think that your opinions are such that you would require DISH to prove the case to you? The Plaintiff has the burden of proof in this case, as in all civil cases. So do you think that your experience might prevent you from following that law?

PROSPECTIVE JUROR ELEVEN: In all honesty, DISH would have to prove something to me right now.

THE COURT: All right.

PROSPECTIVE JUROR ELEVEN: I'm sorry.

THE COURT: That's all right. Do you think that's something you can set aside?

PROSPECTIVE JUROR ELEVEN: I can try real hard.

THE COURT: Is that something you would -- you know, just tell me what you think about that. Is it something --

PROSPECTIVE JUROR ELEVEN: I'm having a lot of anxiety at this point just from speaking up and then also about my feelings about the corporate side of things.

THE COURT: All right. Hold on just a second. I think --

PROSPECTIVE JUROR ELEVEN: I want to be fair, but if you ask me can I be certain I will be, I can't be certain at this point.

THE COURT: All right. Just a second.

(Pause in the proceedings.)

THE COURT: All right. Thank you. I may come back to you in a minute.

Now, as I mentioned, this is a class action. This means that all of you, as jurors, will be deciding the case for a substantial number of people who have claims here. Is there anyone who has any views about class actions that would prevent them from being fair or prevent them from following the law? Anybody? No. All right.

Can I just speak with counsel briefly at the court bench here?

(The following bench conference was recorded.)

THE COURT: So she also has some health issues here. I would be inclined to excuse her for cause. Does anyone object to that?

MR. GLASSER: No, ma'am.

MR. BICKS: We don't.

(Conclusion of the bench conference.)

THE COURT: Okay. Ms. Frazier, thank you for your time. You can have a seat back in the courtroom.

(Excused prospective juror left the jury box.)

THE COURT: If the clerk would call one more juror, please.

THE CLERK: To take her position is Amanda Cloninger.

(Prospective juror entered the jury box.)

THE COURT: All right. Good afternoon, Ms. Cloninger. Do you know any of the lawyers or parties in this case?

PROSPECTIVE JUROR ELEVEN: No.

THE COURT: Anybody in your -- you or anyone in your family ever worked for DISH or worked for a business that did work directly for DISH?

PROSPECTIVE JUROR ELEVEN: (Shakes head.)

THE COURT: Do you have any problems applying the law to individuals and corporation?

PROSPECTIVE JUROR ELEVEN: No, ma'am.

THE COURT: Any feelings about class actions that would prevent you from being fair?

PROSPECTIVE JUROR ELEVEN: No, ma'am.

THE COURT: Okay. So now turning back to all the jurors, I'm going to tell you who the witnesses are. Other than Dr. Krakauer, I don't think any of them are from North Carolina.

Is that right?

So you probably don't know any of them, but I'm still going to tell you who they are. If you recognize any of their names or know any of them, please let me know and raise your hand.

There's several folks from DISH who are going to testify: Amir Ahmed, Michael Mills, Bruce Werner. Other folks who might testify are Reji Musso, Bahar Tehranchi, who works for SSN, David Hill, Tonya Maslennikov.

Did I get that more or less right?

Anya Verkhovskaya, Debra Aron, Jim DeFranco, who is also with DISH, Robert Fenili, Joey Montano, also with DISH, Holly McRae, Brian Taylor. No, wrong name. Brian Neylon and Blake Van Emst, also with DISH, both of those folks, and John Taylor, who lives in Duluth, Georgia.

Any of those names sound familiar to anybody?

Now, several of you indicated on your jury questionnaires that you have served on a jury before. If you have served on a jury, just raise your hand please again so we can -- a few of you there. All right. And were any of those juries -- criminal for you? Criminal, criminal, criminal. Okay.

The burden of proof in a criminal case is different. In a criminal case, the Government has to prove a defendant's guilt beyond a reasonable doubt. This is a civil case, so the Plaintiff here has a different burden of proof and it's lower. He must prove the case by the greater weight of the evidence.

Does that cause anybody any problems who has been on a jury before? All right. You still need to be sure, just not beyond a reasonable doubt sure. Okay. All right.

And if I can ask those jurors. Mr. Turner, anything about

your previous jury service that would affect your ability to be fair in this case?

PROSPECTIVE JUROR NINE: I don't feel comfortable, to be honest with you.

THE COURT: Say again.

PROSPECTIVE JUROR NINE: I don't feel comfortable, to be honest with you.

THE COURT: You don't feel confident?

PROSPECTIVE JUROR NINE: Comfortable. I don't at all.

THE COURT: Just generally being in the courtroom?

PROSPECTIVE JUROR NINE: That too and just I don't feel comfortable with none of this. I ain't going to lie to you.

THE COURT: All right. Were you on a jury in a criminal case you told me?

PROSPECTIVE JUROR NINE: Yeah, it was a while ago, like 18.

THE COURT: Eighteen years ago?

PROSPECTIVE JUROR NINE: No, I was 18 years old.

THE COURT: Oh, you were 18. I was going to say, man, how old are you? You don't look that old. Okay. All right. You were 18 years old. All right.

And let me see. Ms. Martin, you were on a criminal jury. Anything about that service that would prevent you from being fair?

PROSPECTIVE JUROR TWELVE: No.

THE COURT: And, Ms. White, anything about your service that would prevent you from being fair in this case?

PROSPECTIVE JUROR SEVEN: No.

THE COURT: So, Mr. Turner, do you want to tell me -- hold on just one second. Let me --

(Pause in the proceedings.)

THE COURT: It looks like you have a traffic matter.

PROSPECTIVE JUROR NINE: Yep.

THE COURT: Yeah. Anything about that that makes you -- that's obviously very different from this case.

PROSPECTIVE JUROR NINE: Yes.

THE COURT: Is there anything about that that makes you think you couldn't be fair?

PROSPECTIVE JUROR NINE: Yes, I'm trying to really take care of --

THE COURT: I'm sorry. Say again.

PROSPECTIVE JUROR NINE: Yes, ma'am. I've got that, you know, over my head right now and then this whole courtroom thing. I just -- this ain't my cup of tea.

THE COURT: Okay. Well, I think it's safe to say everybody would prefer not to be here.

PROSPECTIVE JUROR NINE: And then I feel like -- I had a bad encounter with DISH, too.

THE COURT: You did. Oh, I see that now on your

questionnaire. Is that experience something that would make it difficult for you to be fair to them, to DISH?

PROSPECTIVE JUROR NINE: Yes.

THE COURT: Say again.

PROSPECTIVE JUROR NINE: Yes, ma'am.

THE COURT: All right. Mr. Turner, you can step down.

(Excused prospective juror left the jury box.)

THE COURT: If you would call one more juror, please.

THE CLERK: To take his spot, Robbie Miller.

(Prospective juror entered the jury box.)

THE COURT: Okay. Ms. Miller, good afternoon. Do you know any of the lawyers, parties or witnesses or anything about this case?

PROSPECTIVE JUROR NINE: No, ma'am.

THE COURT: Do you -- have you ever worked for DISH or anyone in your family worked for -- somebody who worked for DISH?

PROSPECTIVE JUROR NINE: No, ma'am.

THE COURT: Any problems being fair to individuals, corporations, and class members?

PROSPECTIVE JUROR NINE: No, ma'am.

THE COURT: No problems following the law about all of that?

PROSPECTIVE JUROR NINE: No, ma'am.

THE COURT: Have you ever been on a jury before?

PROSPECTIVE JUROR NINE: No, ma'am.

THE COURT: Okay. Thank you.

All right. Let me look through some of these questionnaires and talk with folks a little bit about anything that comes -- comes up as a result of that.

Many -- let me just speak generally. I think almost everybody said that they or a family member or someone close to them had worked in sales, not surprisingly since there is a lot of selling that goes on in our economy. Has anybody had any experience with sales work that gives you any reason to think you couldn't be fair in a case in which we'll be talking about telephone calls which are made in an effort to sell a particular product? Anybody with any concerns about that?

All right. And many of you, you know, mentioned that you have occasion -- you know, you've gotten sales calls on your home or mobile phone. Some of you not at all, some of you often. Does anybody have any feelings about those kinds of telephone calls that would prevent them from being fair in this case or prevent them from following the law? All right. Thank you.

Has anybody ever had any training about the law that applies to telephone sales calls?

Ms. Helner, how did that come about?

PROSPECTIVE JUROR EIGHT: I taught law at high school for about ten years. Contract law was one of the things that

we focused most of our time on and so a lot of those contracts were current cases. Some of those were these types of cases.

THE COURT: Okay. And do -- how -- when did you teach -- I take it you're not teaching that now. Or are you?

PROSPECTIVE JUROR EIGHT: I am not teaching that now. My last time that I taught it was two years ago, so pretty recent.

THE COURT: Was that sort of a civics-type class?

PROSPECTIVE JUROR EIGHT: It was actually business law.

THE COURT: And, Ms. Helner, if I should tell you something about the law that relates to these telephone calls that's different from what you understood it to be, would you be able to put aside what you had picked up in your other life and follow my instructions on the law?

PROSPECTIVE JUROR EIGHT: It would be hard to because it has been so ingrained since I taught it for over 10 years. I would do my best, but it would be difficult to marry in my head what I know versus what you might tell me.

THE COURT: This was a business law class for high school students?

PROSPECTIVE JUROR EIGHT: Uh-huh.

THE COURT: Do you yourself have legal training?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: How much time did you spend on the law

that applies to the Do Not Call Registry?

PROSPECTIVE JUROR EIGHT: It usually was embedded within the contracts section of what I taught and I spent probably half of the class on contract law.

THE COURT: On contract law. Okay. And how -- how was it that you talked about the Do Not Call Registry?

PROSPECTIVE JUROR EIGHT: I would try to pull current cases and talk about them, so I would pull different things. So every -- every semester would be a different case and those have been several cases that have been in the news, so I tried to pull those kinds of cases.

THE COURT: All right. Thank you, Ms. Helner.

Anybody else with any training about the Do Not Call Registry?

Let's see. And, Mr. Lambis, it looks like your brother-in-law might be a lawyer; is that right?

PROSPECTIVE JUROR TWO: In Ohio.

THE COURT: In Ohio. Okay. Ever had any conversations with him about the Telephone Consumer Protection Act?

PROSPECTIVE JUROR TWO: No, ma'am.

THE COURT: Anything about that family relationship that would make it hard for you to be fair in this case?

PROSPECTIVE JUROR TWO: No, ma'am.

THE COURT: And you indicated that you have had some

negative experiences with a telemarketer along the way. Would you be able to put that aside and base your verdict on the evidence?

PROSPECTIVE JUROR TWO: Yes.

THE COURT: And, Mr. Smith, you have had a DISH -- you've been a subscriber to DISH's services in the past; is that right?

PROSPECTIVE JUROR THREE: I just put down -- I thought it meant any of them. I don't know if it was them, so I just said yeah because I'm thinking all of them was included in that.

THE COURT: Oh.

PROSPECTIVE JUROR THREE: I was with Direct, which my situation was --

THE COURT: So your situation was with DirecTV, not DISH.

PROSPECTIVE JUROR THREE: Yes.

THE COURT: Thank you for clarifying that. It looks like you maybe had a negative experience with them.

PROSPECTIVE JUROR THREE: Yes.

THE COURT: You won't hold that against DISH?

PROSPECTIVE JUROR THREE: No.

THE COURT: Anything about that that's going to prevent you from being fair and impartial in this case?

PROSPECTIVE JUROR THREE: No.

THE COURT: And did any of those negative experiences have to do with telephone solicitations?

PROSPECTIVE JUROR THREE: (Shakes head.)

THE COURT: And, let's see, Ms. Smith, it looks like you have had a couple of totally different court matters along the way. Anything about those court experiences for you and family members that would make it hard for you to be fair in this case?

PROSPECTIVE JUROR FOUR: No, ma'am.

THE COURT: Thank you.

And, Ms. White, it looks like you've had some negative experiences with telemarketers and other -- maybe some cable or satellite TV companies. Not DISH I take it.

PROSPECTIVE JUROR FIVE: Me? There are two of us.

THE COURT: Two. All right. This is Lorri.

PROSPECTIVE JUROR FIVE: Yes.

THE COURT: And is there anything about those negative experiences that's going to prevent you from being fair in this case?

PROSPECTIVE JUROR FIVE: I don't think so.

THE COURT: You're not going to hold it against DISH that you've had a bad experience with some other cable company?

PROSPECTIVE JUROR FIVE: No.

THE COURT: And you indicated that -- some personal views about the effectiveness of the Do Not Call Registry. Is

that something that you're going to hold against DISH in this case or that would cause you not to be fair?

PROSPECTIVE JUROR FIVE: I don't think so.

THE COURT: Let's see. Mr. Richter, you indicated you have been part of a class action lawsuit before?

PROSPECTIVE JUROR SIX: Well, just in the sense of being one of the class --

THE COURT: Okay. All right.

PROSPECTIVE JUROR SIX: -- and getting some award based on that. Not intimately, just as one of many.

THE COURT: All right. So you've gotten some mailings about it?

PROSPECTIVE JUROR SIX: Yes.

THE COURT: And you recall making some recovery either of money or benefits?

PROSPECTIVE JUROR SIX: Yes, absolutely.

THE COURT: Is there anything about that, Mr. Richter, that's going to prevent you from being fair in this case?

PROSPECTIVE JUROR SIX: No.

THE COURT: Is it going to cause you to be more favorable to the Plaintiff in this case?

PROSPECTIVE JUROR SIX: No.

THE COURT: You indicated some negative experiences with a company, not DISH, that's provided cable or satellite TV services in the past.

PROSPECTIVE JUROR SIX: Just, you know -- just the general getting things hooked up or it not working well or, you know, just maintenance items.

THE COURT: So nothing of a nature that would prevent you from being fair in this case?

PROSPECTIVE JUROR SIX: No.

THE COURT: Thank you. You also said some negative experiences with telemarketers. Anything about that that's going to prevent you from being fair to DISH or to the Plaintiff?

PROSPECTIVE JUROR SIX: No.

THE COURT: And, Mr. Richter, you had a civil matter completely unrelated to anything like this.

PROSPECTIVE JUROR SIX: Yes.

THE COURT: Anything about that court experience that's going to prevent you from being fair in this case?

PROSPECTIVE JUROR SIX: No.

THE COURT: No. I usually don't ask about family law matters because it's kind of like traffic tickets. Everybody has had some experience there. Anything about that that's going to prevent you from being fair?

PROSPECTIVE JUROR SIX: No.

THE COURT: Thank you.

And now turning to the other Ms. White. Your spouse is a retired attorney?

PROSPECTIVE JUROR SEVEN: Yes.

THE COURT: Have you ever had any conversations with him about the Telephone Consumer Protection Act or the Do Not Call Registry?

PROSPECTIVE JUROR SEVEN: No.

THE COURT: Anything about his work that would prevent you from following the law in this case?

PROSPECTIVE JUROR SEVEN: No.

THE COURT: And you, like most -- many folks, have had some negative experiences with companies providing cable or satellite TV services and with telemarketers. I take it that was not with DISH.

PROSPECTIVE JUROR SEVEN: No, it wasn't with DISH.

THE COURT: Anything about those negative experiences that's going to prevent you from being fair or cause you to be harder on DISH or not be fair to them in any way?

PROSPECTIVE JUROR SEVEN: No, ma'am.

THE COURT: Thank you.

(Pause in the proceedings.)

THE COURT: Let's see. Ms. Helner, you mentioned some health concerns.

PROSPECTIVE JUROR EIGHT: Yes, ma'am.

THE COURT: How are you doing?

PROSPECTIVE JUROR EIGHT: (Gesturing.)

THE COURT: If you were selected to serve on the jury,

we could probably move you to a place where you weren't up there in the corner. Would that help? Maybe?

PROSPECTIVE JUROR EIGHT: Maybe.

THE COURT: And would you be able, if your health issues did flare up, to let me know that so we could take a break and you could --

PROSPECTIVE JUROR EIGHT: I believe I would.

THE COURT: All right. And is that a problem that you experience on a daily basis in a way that interferes with your ability to --

PROSPECTIVE JUROR EIGHT: Absolutely.

THE COURT: All right. Thank you, Ms. Helner.

(Pause in the proceedings.)

THE COURT: Ms. Cloninger, you indicated you have had -- you've been a DISH customer in the past; is that right?

PROSPECTIVE JUROR ELEVEN: (Nods head.)

THE COURT: How long ago was that?

PROSPECTIVE JUROR ELEVEN: Probably 30 years.

THE COURT: So a long time. Okay. Anything about that experience that's going to affect you at all in this case?

PROSPECTIVE JUROR ELEVEN: No, ma'am.

THE COURT: You're going to be able to treat DISH just like any other company or business or individual?

PROSPECTIVE JUROR ELEVEN: (Nods head.)

THE COURT: Thank you.

(Pause in the proceedings.)

THE COURT: And, Ms. Martin, you also are on the Do Not Call Registry and have some thoughts about that. Are your personal views about the effectiveness of that such that it would give you any problems in being fair in this case?

PROSPECTIVE JUROR TWELVE: No.

THE COURT: So you understand the question is not whether it's a good law or a law that works, but whether there's been a violation, whether the Plaintiff has proven that by the greater weight of the evidence and whether DISH is responsible for that.

PROSPECTIVE JUROR TWELVE: Right.

THE COURT: Can you hold the Plaintiff to that burden of proof?

PROSPECTIVE JUROR TWELVE: I think so.

THE COURT: Thank you, Ms. Martin.

And, Mr. Jackson, you've had some negative experiences with other cable and satellite TV services and telemarketers. Anything about that that's going to prevent you from being fair to DISH in this case?

PROSPECTIVE JUROR THIRTEEN: I don't think it would prevent me from being fair and weighing the evidence. I do have some very strong opinions about telemarketers in general.

THE COURT: And so, you know, that's -- lots of people have personal views; and if we kicked everybody off with strong

personal views, I won't have any jurors then either.

So -- but I do want to be sure that those personal views are not going to interfere with your ability to be fair to DISH or to the Plaintiff in this case. You're not going to say, "Oh, I don't like telemarketing calls. Therefore, the Plaintiff wins. I don't care what the evidence is," for example. I need to be sure you're not going to do that.

Do you think you can hold the Plaintiff to the burden of proof in this case?

PROSPECTIVE JUROR THIRTEEN: Yes, ma'am.

THE COURT: And can you be fair to DISH and listen to their evidence with an open mind?

PROSPECTIVE JUROR THIRTEEN: I think so, yes, ma'am.

THE COURT: It looks like you are a DISH subscriber now and have not had negative experiences.

PROSPECTIVE JUROR THIRTEEN: Correct.

THE COURT: Is that going to cause you to be un -- to be biased in favor of DISH?

PROSPECTIVE JUROR THIRTEEN: No.

THE COURT: All right. Thank you, Mr. Jackson.

(Pause in the proceedings.)

THE COURT: And, Mr. Cornwell, you're the one I have a little trouble seeing back there.

PROSPECTIVE JUROR FOURTEEN: Yes.

THE COURT: Good afternoon. It looks like you've --

you and your wife both work for the telephone company; is that right?

PROSPECTIVE JUROR FOURTEEN: That's correct.

THE COURT: Okay. And have you had any negative experiences with a company that provides cable or satellite TV services?

PROSPECTIVE JUROR FOURTEEN: No, I haven't.

THE COURT: And you indicated you have had some negative experiences with telemarketers. Is there anything about that that's going to prevent you from being fair in this case?

PROSPECTIVE JUROR FOURTEEN: Nothing at all.

THE COURT: And anything about your views on the effectiveness or lack of effectiveness of the Do Not Call Registry that's going to cause you to be biased or not fair in this case?

PROSPECTIVE JUROR FOURTEEN: No.

THE COURT: All right. If I can speak to counsel at the corner here just briefly.

(The following bench conference was recorded.)

THE COURT: As to Ms. Helner, who is the juror -- so she -- I think given her health issues and her answers to the questions, I'd be inclined to let her go for cause.

MR. GLASSER: No objection.

MR. BICKS: The thing when I was listening, Judge, is

that she -- she's currently working and she's teaching in front of people.

THE COURT: Absolutely.

MR. BICKS: Sometimes you hear people saying things because they're --

THE COURT: She's actually not teaching. She's in school administration now on her chart.

MR. BICKS: She's actively out there.

THE COURT: Absolutely.

MR. BICKS: So, you know, that's my concern.

THE COURT: Yeah. Well, I'm -- you know, I sort of take her at her word and she's expressed concern about her ability to follow the law. I don't require much, but I do require that. That was really my concern about her. With her health -- I tend to agree with you that the health alone would not be enough.

MR. BICKS: When you were saying "follow the law," I didn't quite -- her experience of teaching some classes in high school --

THE COURT: You know, I agree with you. It shouldn't prevent her from following the law, but she said it might. That's really all I can go with, so I think I'm going to let her go.

MR. GLASSER: No objection.

(Conclusion of the bench conference.)

THE COURT: All right. Ms. Helner, if you can get out of there, I'm going to let you step down and have a seat in the back of the courtroom.

(Excused prospective juror left the jury box.)

THE COURT: And would you call one more juror.

THE CLERK: Nancy Burgess.

(Prospective juror entered the jury box.)

THE COURT: As soon as we get Ms. Burgess caught up, we're going to take our lunch break, just so you all know where we all are.

Okay. Ms. Burgess, good afternoon. Do you know any of the lawyers, parties or witnesses in this case?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: Have you or anyone in your close family ever worked for DISH or a business that did work for DISH?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: Do you have any feelings or views that would prevent you from being fair to individuals and corporations and class members?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: Have you ever been -- you've never been on a jury before, right?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: And you've got a landline that you use for a security service; is that right?

PROSPECTIVE JUROR EIGHT: That's right, yeah.

THE COURT: Okay. And have I asked any questions of anyone that have given you any concern or anything you need to bring to my attention?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: All right. And you've not had bad experiences with telemarketers or sales?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: Okay. Anything about the nature of this case that would prevent you from being fair?

PROSPECTIVE JUROR EIGHT: No.

THE COURT: Thank you.

Okay. Before -- we're not done, but we're close -- we're close to being done, but I -- it's almost one o'clock and I would like to give you all a little bit of a lunch break. So what I'm going to ask you to do is to be back -- do they need to come back to the courtroom? Just a second. Let me ask a logistical question of the clerk.

(Discussion between the Court and Ms. Saunders.)

THE COURT: Okay. There -- I'm not exactly sure exactly what's going on, but on your way out of the courthouse, I do need you to stop by Courtroom 2 where you all were checked in this morning and just stop by in there. They have something they need to tell you about the logistics or housekeeping of your jury service unrelated to this case, and then you can go

on and get some lunch. There's several places pretty close by and I think the snow has started melting, so you should be able to get there safely. And I will ask you to be back at 1:15. All right. 2:15. I'm so sorry. 2:15. My goodness. You all were going to be eating nabs in the break room downstairs. Yeah, 2:15.

When you come back, I'll ask you to just gather out in the hallway right out here outside this courtroom here on the third floor; and when everybody is there, they'll bring you back in. You all will sit in your same exact seat, so please notice where you're sitting so you can get in your same exact seat.

And then for those of you on the panel, you'll just sit back in that same general area.

Now, over the lunch recess, please do not talk about the case among yourselves or about anyone else. Now, that's really kind of hard. Here you are. You've been sitting in here for over an hour and you probably would like to talk about this case because you've been, you know, having this sort of unusual experience. But don't do it.

Please do not talk with anyone else about the case either. So if you see any of these lawyers or parties around the courthouse, on the elevators or anything like that, don't speak to them. They won't speak to you. They're not being rude. There's just not supposed to be any contact between the lawyers and parties and the jurors while the trial is going on.

And the reason that I ask you not to talk about the case is because, you know, it's just human nature to express opinions and you haven't heard any evidence. You don't know anything about the law. So we just want you not to talk about the case so that you don't express any opinions and start -- start thinking about things before you know -- know what the evidence is. So that's one of the reasons that I ask you not to do that.

So during the lunch break, you're certainly free to talk to each other about anything else other than this case and you can go to lunch with each other in small groups, that kind of thing. Please feel free.

So I'm going to excuse you. Please stop by Courtroom 2 on your way out of the courthouse and then come back to this space right outside Courtroom 3 around 2:15 and we'll -- yeah, 2:15 and we'll start back at 2:15. The jurors are excused.

If everyone else will remain seated while they step out.

(Prospective jurors left the courtroom at 12:55 p.m.)

THE COURT: Okay. So I believe I have asked the individual questions that I was intending to ask. I will -- I do intend to still ask them if they know any other jurors, about the length of trial, if that's going to cause any problems, and then some general follow -- general fair and impartial questions.

But if I missed anything as to any particular juror that

you want me to follow up on from the questionnaires, you're going to need to let me know when we come back. So I would say that we'll come back at 10 minutes after 2:00 just so we've got a couple of minutes for any specific question that you wanted me to follow up on with a specific juror.

All right. Anything else about jury selection before we turn to the one exhibit that there was still some dispute about?

MR. GLASSER: Not from the Plaintiff, Your Honor.

MR. BICKS: Just in terms of the afternoon, Your Honor, and how you anticipate the schedule, do you think we'll get to openings?

THE COURT: Well, as I recall, you all told me, what, about an hour each on your openings? Is that what you said?

MR. BICKS: Mine is probably a little under an hour, but fairly close.

MR. GLASSER: I'm shorter, Your Honor. I'm probably under 40 minutes.

THE COURT: Okay. Good. I'm hoping we'll get the opening statements made today, especially since we're a little behind because of the weather. You know, I'm almost done with the jury selection and so I'll -- you all should be thinking -- I suppose we might lose one or two when I tell them how long the trial is going to take, but I'm optimistic that we won't. So, you know, you just need to be prepared to exercise your

challenges. I do have to -- I don't want to stay late since the weather -- it is starting to melt out there and it's not supposed to freeze again, but still I would like to let them get on their way.

MR. GLASSER: Remind me, Your Honor, what time is that you get them on their way?

THE COURT: Usually by 5:00. You know, we would stop at 5:00. So I would hope we would be able to get your opening statements done today.

MR. BICKS: The DISH witnesses, Your Honor, they're in town, and they would like to come and be here for the openings. I want to make sure that was all right with you.

THE COURT: Yeah, that's fine.

MR. GLASSER: I kind of object to that. I would like to move to sequester the witnesses. I think that is just a road map to unsequestering basically.

THE COURT: Well, I mean, if you --

MR. BICKS: It's an opening statement, Your Honor. It's not hearing witness testimony and I'm just saying they're in town. They're the ones who --

THE COURT: If you have DISH witnesses who are here, I'll let them be present for the opening statements.

That's a motion to sequester during testimony?

MR. GLASSER: Yes.

THE COURT: I'll allow that.

Obviously, your corporate witness can stay. He's not a witness, right?

MR. BICKS: Right.

THE COURT: But they can be here for the opening statement.

MR. BICKS: Thank you.

THE COURT: The exhibit?

MR. GLASSER: Yes, ma'am. So I'm approaching with a redacted Exhibit 55. We provided a copy to defense counsel and a proposed limiting instruction, which we've also provided to defense counsel.

(Document handed to the Court by Mr. Glasser.)

MR. EWALD: Which redacted version?

MR. GLASSER: I didn't bring another copy with me.

As I understand it, Your Honor, the following matters are in dispute. So it's the Plaintiff's position that paragraph 1.1 ought to be in there.

THE COURT: I'm sorry. Start again.

MR. GLASSER: So paragraph 1.1 actually says who the deal is between, it's the parties, and we propose that paragraph 1.1 be in the exhibit that goes to the jury. Defendants have a different position on that.

And I think the only other matter in dispute in here is -- this is our proposal, so we'll need to pull the actual 7 -- Exhibit 55. In the Exhibit 55, there's also a paragraph 7.2, I

think.

THE COURT: Say again.

MR. GLASSER: Hold on. I'll find the exact paragraph, Your Honor.

(Pause in the proceedings.)

MR. GLASSER: Yeah, in our proposal, Your Honor, paragraph 7.2 in Exhibit 55 is redacted and I can express the reasoning behind our proposal and then maybe the Defendants can talk to why they think it ought to be in there. I think that's our only item in dispute.

MR. EWALD: There's also -- I'll let the Court get the exhibit first.

THE COURT: Say again.

MR. EWALD: I'll let the Court get the exhibit first. We have another area of dispute.

MR. GLASSER: Remind me --

THE COURT: Hold on. Stop. Stop.

(Pause in the proceedings.)

THE COURT: Sorry. It took me a minute to find the --

MR. GLASSER: So it's Exhibit 55 at page 29, Your Honor.

THE COURT: Okay. So the disputes are whether the -- whether paragraph 1.1 and 7.2 --

MR. GLASSER: So the dispute at 1.1 is we would like it in and they would like it out. It follows from the dispute

of 1.1 that they would also like all the signatures, but it's kind of the same dispute.

And then the dispute at page 29 with respect to Section 7.2 is that we think it ought to be out and be covered by a limiting instruction, which we have proposed, because there's parts of 7.2 that I think would be confusing to the jury and I can get into that.

Specifically, the part -- we put in the limiting instruction the part about it not being an admission for any fact or violation of any law or regulation, but the reason we don't think it ought to say that it's not evidence is -- it isn't evidence of liable for a wrongdoing at the time it was entered definitely and it's not evidence of liability for wrongdoing in this case, but it is circumstantial evidence of power and control. It is evidence in this case and I'm concerned that the jury will overinterpret this and say, well, it can't even be evidence. And obviously, because the Court is allowing us to get into the sections in 4, it is evidentiary in this case, just not precisely how this is disclaimed. So I thought a limiting instruction was a more logical way to handle its treatment by the jury than this broad statement in 7.2. That's the essential reason for the redaction.

THE COURT: All right. What does the Defendant say?

MR. EWALD: Well, on the first point, Your Honor, it's Defendant's position that should be referred to as certain

state Attorneys General. There's no reason -- the Court can instruct the jury about that. There's no reason they need to know the 46 different states sued.

Your Honor noted in the MIL ruling relating to the *U.S. v. DISH* case that it would be unfairly prejudicial to say that DISH has been sued by the federal government in another federal court and the court agrees, and that same prejudice I think is evident here. We're trying to minimize that by these being vague as to who has sued or who has entered the agreement with DISH.

THE COURT: Okay. And what about 7.2?

MR. EWALD: 7.2, Your Honor, we think it's important to include this even if there is a limiting instruction that the parties agreed to these points at the time the agreement was entered into. It's also I think important to limiting the prejudice to DISH. On Friday when counsel for Plaintiff got up and argued for the admission of this document, they argued and contended that it did not relate to liability, fault or wrongdoing, and now it seems to me that they are backing away from that. So we think it's appropriate to be included in here.

I would also note there's one other area of disagreement that was not raised by Mr. Glasser and that shows up on page 22, Section 4.67 and 4.68.

MR. GLASSER: Okay. So shall I address why we want it

in and then he can address why he wants it out?

THE COURT: Okay. You all are not speaking up.

MR. GLASSER: Shall I address why we think it ought to be in and then he address why it ought to be out or do you want to hear the opposite?

THE COURT: Let me look at them first. 4.67 and 4.68; is that right?

MR. EWALD: Yes, Your Honor.

THE COURT: And the Defendant says those should be out?

MR. EWALD: Yes, Your Honor.

THE COURT: Okay. Well, I can make the Plaintiff's argument for them, so let me hear from the Defendant.

MR. EWALD: Well, it can be confusing, Your Honor, I think, if you're not familiar with the definitions in the agreement.

This agreement covers three different situations: Calls made directly by DISH Network, calls made by what is called in this agreement an authorized telemarketer. And that is a situation where a vendor is acting on DISH's behalf as an agent. And then a third situation, the one that is relevant here, that is referred to as a covered telemarketer or third-party retailer; and the "covered telemarketer" definition specifically includes OE retailers.

Now, if you look in particular at 4.68, that is referring

explicitly to direct calls made by DISH Network and requirements for DISH to make telemarketing calls. Now, the rest of that section as it goes on to pages 23 and 24, covers other situations; and the part that is left unredacted covers the covered telemarketer, i.e., OE retailer, situation at issue here.

I believe Plaintiff has argued that 4.73, which shows up at the top of page 23, incorporates everything by reference, but I just can't understand how this specific requirement that DISH, for example, purchase National Do Not Call databases before it directly calls consumers is at all relevant to the retailer situation in this case.

THE COURT: All right. What does the Plaintiff say?

MR. GLASSER: So 4.67 says DISH shall comply with all the laws and then 4.73 makes it applicable to the covered marketers. So without 4.67, 4.73 doesn't make much sense. What is it that's being applied? There's not a repeat of the general obligation to comply with the law. So it makes sense the way we've done it because that's -- the 4.73 makes DISH's obligation also applicable through the business rules to the covered marketers. That's it.

MR. EWALD: Your Honor, if I might respond briefly. I didn't hear any reason why 4.68 should be included in that.

MR. GLASSER: The exact same reason, Your Honor.

THE COURT: Okay. Well, one of the problems with

redacting 1.1 is if you take it out completely then you don't even know what the document is. If you redact the names of all the states, then -- I mean, it hardly -- it hardly serves the purpose because it would be so many lines. You know, it seems like it wouldn't really meet the need. I appreciate the Defendant's argument.

I think the best thing to do is we'll leave 1.1 in, but there's really no reason for all these signature pages to go back to the jury. That doesn't seem necessary to me at all. As to 7.2, that can stay in; and as to 4.67 and 4.68, that can stay in.

MR. GLASSER: We'll fix it at lunch, Your Honor, and distribute revised redactions.

THE COURT: All right.

MR. EWALD: Your Honor, just for the record -- I know we obviously objected on Friday to the admission of any part of this document into the record. I would just note again that we are not withdrawing that objection. We object to the document's submission.

THE COURT: That's fine. And when they come to offer it if you want to say, "Objection for the reasons previously stated," I am never offended by you protecting your record.

MR. EWALD: Thank you, Your Honor.

THE COURT: Now, what -- is this limiting instruction agreeable to the Defendant?

MR. EWALD: Your Honor, the limiting instruction, we have two areas of disagreement that were directly tied to the rulings Your Honor just made, one about referencing the specific number of states at issue and the other -- I believe the version in front of you --

(Discussion between counsel.)

MR. EWALD: The only issue, Your Honor, I believe that's remaining is do you see in the third paragraph "the Assurance does not constitute admission by DISH for any purpose of any fact of any violation of any law, rule or regulation"? We would add to that sentence a comma and say "nor does the Assurance constitute evidence of any liability, fault or wrongdoing," which tracks the language of 7.2.

THE COURT: Okay. So wouldn't it be better to just tell the jury this is being offered by the Plaintiff on the question of whether DISH has control over SSN and they are to consider it only for that purpose and not to consider it for any other purpose? I mean --

MR. GLASSER: That would be fine with us, Your Honor.

THE COURT: I mean, I don't mind giving some of the rest of this, but if I'm going to tell them all of the things they shouldn't consider it for, it seems like I should tell them what they can consider it for.

Also, in telling them that it's redacted, you -- you know, we're not hiding anything from them. The parts that we're

redacting have nothing to do with the case and it seems like -- I don't think the jurors want to read this 55-page document, but if I just tell them that we've taken out all the parts that don't have anything to do with this case, you know, that usually makes them understand a little bit better.

So, I mean, I'm not -- but why don't you all talk about this one a little bit further --

MR. GLASSER: Yes.

THE COURT: -- with that guidance from me. I don't mind giving them a limiting instruction, but I like to tell them why they can consider it and limit it to that and also tell them why it's redacted, just, you know, include them in it so they understand.

All right. What else before we take our lunch break?

MR. EWALD: Your Honor, there are three minor issues we wanted to raise with the preliminary instruction. We can do that at some point later today if you like, I don't want to keep everybody from lunch, or we could address it now.

THE COURT: What are -- well, I mean, we may not have an opportunity. I'm going to give them the preliminary instructions as soon as they're impaneled, so what -- if it's something you've already said, you don't need to repeat it.

MR. EWALD: Understood. And in the same vein of my earlier point, we would like to preserve our objection for the doc we filed, Document No. 253, our response objections to the

Court's original draft. To the extent this draft deviates from those objections, we maintain them here.

THE COURT: Okay. Well, certainly, you know, if I misspeak during my preliminary instructions, you need to bring that to my attention; but if I have already overruled your objection, you know, you don't need to tell me that again.

MR. EWALD: Understood. So there are three issues and one of these may have already been addressed. We were editing while in court and we noticed over the weekend that I'm not sure the version --

THE COURT: I have a new version. Just tell me where it is.

MR. EWALD: The paragraph that states "an agent is a person."

THE COURT: Hold on.

(Pause in the proceedings.)

MR. EWALD: The second page.

THE COURT: Okay. "An agent is a person."

MR. EWALD: And then the next paragraph, the last version we saw started with "in these situations."

THE COURT: Yes.

MR. EWALD: And because we modified the preceding sentence in the previous paragraph, it didn't make as much sense now. We are now referring to independent contractor and so I think if that language is still the same it should be

modified to be "in an agency relationship, a person granting the authority."

THE COURT: Okay.

MR. EWALD: And then the second of the three, the next paragraph refers to a principal not being bound by the act of an agent unless that act falls within the scope of actual authority granted by the principal to the agent. And so if you can skip ahead two paragraphs, which begins "if you find SSN was DISH's agent," we believe there should be a comma there and, to be consistent with the preliminary instruction overall, add "in that SSN acted within the scope of actual authority granted by" --

THE COURT: Okay. I already ruled I was not going to give complete and total instructions on every single time this issue came up, so, you know, this is a summary.

MR. EWALD: Understood, Your Honor.

The last point is actually we made a suggestion in the paragraph -- a couple paragraphs down that starts "Dr. Krakauer and the class will be offering evidence from a witness."

THE COURT: Yes.

MR. EWALD: And four lines down we had suggested inserting "and will offer its own witness to support that position."

THE COURT: Yes, I added that.

MR. EWALD: We would like to withdraw that.

THE COURT: Okay. I'll take that out.

MR. EWALD: Thank you, Your Honor.

THE COURT: Anything else?

MR. EWALD: (Shakes head.)

THE COURT: All right.

MR. GLASSER: Just for the record, so I'm right about the redaction, I'm leaving 1.1, I'm putting in 7.2, and I'm taking out all the signatures.

THE COURT: Right.

MR. GLASSER: Okay. All right. No other matters for the Plaintiff, Your Honor.

THE COURT: Okay. So I will see you all back here briefly at 10 minutes after 2:00. In the event you have any individual questions you want me to follow up on with a particular juror, you can let me know then. Then the jurors will be back hopefully 2:15 or soon thereafter. So we will be in recess until 10 after 2:00.

(A noon recess was taken from 1:20 p.m. until 2:10 p.m.; all parties present.)

THE COURT: All right. For some reason, one of the deputy clerks downstairs had the jurors come back to Courtroom 2, so Ms. Sanders is going to go get them.

While she does that -- you can go ahead and go get them -- are there individual questions anyone wanted me to ask a particular juror? For the Plaintiff?

MR. GLASSER: No, ma'am.

THE COURT: No. For the Defendant?

MR. BICKS: Yeah, we had a few questions, Your Honor, if I could walk through it.

THE COURT: All right.

MR. BICKS: So starting with Tellie Smith, I think it was juror 5, I think seat 3.

THE COURT: Just a second.

(Pause in the proceedings.)

THE COURT: I'm out of order here just -- okay. Yes.

MR. BICKS: And just the question on the questionnaire, 17, you know, 17A, the call -- the telemarketing calls really bothered him a great deal. If the Court could just say is that going to in any way -- have thoughts about that.

THE COURT: Okay. I think I asked, didn't I?

MR. GLASSER: Yes, ma'am, that's been covered.

MR. BICKS: It was kind of a general question, Your Honor, not tied to the questionnaire.

THE COURT: Right.

MR. BICKS: And on juror number 12, seat 5, Ms. White --

THE COURT: Juror number --

MR. BICKS: I have seat 5. I have juror 12 on the questionnaire, but seat 5, Ms. White, Lorri White, if the Court

wouldn't mind -- just the Question 12 there's a -- is she close to whoever sued anyone and she says "yes"; and she also had -- the answer to the Question 17A, you know, the calls bothered her a great deal. If -- just a general question from the Court on that we would ask for.

THE COURT: Okay. Let's see. What else?

MR. BICKS: And then juror 28 --

THE COURT: If you could tell me what seat.

MR. BICKS: It's seat 12, Mr. Jackson.

THE COURT: Seat 12 is Ms. Martin.

MR. BICKS: I have one over then. I guess 13. Again, if we could just ask him --

THE COURT: Just a second. That's all right. Step up to the corner, please, while the jurors are coming in.

(Prospective jurors entered the courtroom.)

(The following bench conference was recorded.)

THE COURT: Just whisper because we don't have someone turning on the white noise.

MR. BICKS: (Inaudible.)

COURT REPORTER: Judge, I can't even hear. I can turn on the white noise.

(White noise turned on by the court reporter.)

MR. BICKS: Mr. Jackson, again just 17A. He just says again he's bothered by these calls a great deal. If we can just ask him.

THE COURT: Okay.

MR. BICKS: This Mr. Cornwell, he's seat 14. He works, Your Honor, for AT&T and AT&T owns DISH's biggest competitor, DirecTV. If we could just ask him, "You work for AT&T. Do you know anything about" -- you know, they own DirecTV and it's our client's biggest competitor. We want something in the record.

THE COURT: All right. Well, I'll ask a general question of those three jurors who indicated it bothered them a great deal and I don't mind touching on the other matters.

MR. BICKS: Is there any way, Judge, Ms. White, who is juror 14, you asked her if her husband was an attorney and the only question we were missing is if there's a way -- you know, is he -- did he handle one particular -- in other words, if he's a class action plaintiff's lawyer.

THE COURT: Well, he's retired, but I'll ask it.

MR. BICKS: Just if he was.

THE COURT: Okay. Thank you.

(Conclusion of the bench conference.)

THE COURT: All right. I hope everybody got something to eat and you didn't have to eat too terribly fast.

Just a few more questions here during the jury selection process. Let's see.

Ms. White, I neglected to ask you -- when I was looking at your questionnaire, you indicate that you had been involved in

a lawsuit. This would be Ms. Lorri White.

PROSPECTIVE JUROR FIVE: Yes.

THE COURT: What kind of lawsuit was that?

PROSPECTIVE JUROR FIVE: From a car accident.

THE COURT: Okay. Personal injury?

PROSPECTIVE JUROR FIVE: Personal injury, yes.

THE COURT: Anything about -- did that go to trial?

PROSPECTIVE JUROR FIVE: No, it did not. It settled.

THE COURT: Anything about that that would affect your ability to be fair in this case?

PROSPECTIVE JUROR FIVE: No.

THE COURT: And a few of you, I think it was, let's see, Ms. White -- Lorri White and Mr. Smith and Mr. Jackson, indicated that unwanted sales calls were more of a deal for you all. I just want to be sure. Is there anything about the fact that these calls generally aren't welcome that's going to prevent you from being fair and particularly being fair to DISH in this case? Mr. Jackson?

PROSPECTIVE JUROR THIRTEEN: No, I don't think so, I pointed out previously.

THE COURT: Yes, you did. I just wanted to double-check on that. Ms. White, Lorri White?

PROSPECTIVE JUROR FIVE: No.

THE COURT: Mr. Smith?

PROSPECTIVE JUROR THREE: (Shakes head.)

THE COURT: Thank you.

And let's see. Mr. Cornwell, hello again. I know you told me you worked for AT&T. I think maybe they might own a business that competes with DISH.

PROSPECTIVE JUROR FOURTEEN: They do.

THE COURT: Did you work with that part of the business at all?

PROSPECTIVE JUROR FOURTEEN: No, I didn't.

THE COURT: And are you still working for them now?

PROSPECTIVE JUROR FOURTEEN: Yes.

THE COURT: Is there anything about the fact that AT&T owns a competitor that's going to cause you any problems?

PROSPECTIVE JUROR FOURTEEN: No, ma'am.

THE COURT: All right. Thank you. You can be fair to DISH in this case?

PROSPECTIVE JUROR FOURTEEN: Oh, yes.

THE COURT: All right. And Ms. Susan White, you indicated your husband is a lawyer. He's retired?

PROSPECTIVE JUROR SEVEN: Yes.

THE COURT: What kind of practice did he have?

PROSPECTIVE JUROR SEVEN: He did criminal law.

THE COURT: Criminal law. Okay. Thank you.

All right. I think that covers the individual questions.

Do any of the 14 of you know each other before you got here today? No. Okay.

And this case is going to take the rest of this week and into next week. We will not be here Monday because Monday is a federal holiday. I can't excuse anybody for inconvenience because that's another one of those things that would mean I have no jurors. If any of you do have, you know, nonrefundable airplane tickets to Hawaii --

PROSPECTIVE JUROR FIVE: Actually, I do.

THE COURT: You do?

PROSPECTIVE JUROR FIVE: Yes, but not until the 24th.

THE COURT: Not until the 24th. Okay. Well, man, I wish I was going with you. Okay. We'll be done by the 24th. You're leaving on the 24th?

PROSPECTIVE JUROR FIVE: Yes.

THE COURT: You will be done.

Yes, sir.

PROSPECTIVE JUROR TWO: I have customers coming to see me from overseas all day next Wednesday. They paid for their tickets to see me.

THE COURT: Work related?

PROSPECTIVE JUROR TWO: Yes, work related.

THE COURT: I'm so sorry. I usually just ask people to work around their work-related conflicts in one way or another. It's certainly possible we'll be done by then. Probably not. But I'm going to have to ask you to work around that one.

Anybody else? All right.

Now, can any --

MR. GLASSER: Your Honor, I'm sorry, the juror on the far left.

THE COURT: Oh, I'm sorry. Mr. Wheeler, I didn't see you.

PROSPECTIVE JUROR ONE: I didn't raise my hand high enough. Have there been any exceptions for people who work at nighttime, third-shift employees?

THE COURT: Usually people find they can't work at night and come be here all day and pay attention. I've had problems with jurors falling asleep in that situation. So just like the rest of the jurors, usually you just need to take off.

PROSPECTIVE JUROR ONE: Okay.

THE COURT: But thank you for asking. It's a good question.

I know sometimes people who have flexible work situations find they're able to get in two or three hours, but not everybody has that kind of flexible situation.

So anybody -- all right. Now, based on what little you know about this case, has anybody formed an opinion about this matter or do you have any opinions about this matter that is going to affect your ability to be fair and follow the law?

Is there anything I have not asked about that you think it's important for me to know in deciding if you can be a fair