

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

vs.

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

Respondents.

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District Court No.  
A-17-763397-B

**JOINT APPENDIX**  
**Vol. 23 of 85**  
**[JA005021-JA005270]**

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Report of the Special Litigation Committee of DISH Network Corporation and Appendices of Exhibits Thereto (Exs. 1-792; Appx. Vols. 1-50)	4-73	JA000739- JA016874	11/27/18
<b>Evidentiary Hearing SLC Exhibit 102<sup>2</sup></b>			

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

<sup>2</sup> The Evidentiary Hearing Exhibits were filed with the District Court on July 6, 2020.

1 and impartial juror?

2 Do any of you have any reason that would make it difficult  
3 for you to be fair and impartial, base your verdict on the  
4 evidence, and follow the law? No.

5 All right. Now, the parties have the opportunity to excuse  
6 a pretty small number of you for no reason that they have to  
7 explain and so I am going to give them just a few minutes to  
8 fill out the form for that purpose and we will just all sit  
9 quietly while they fill that out. It shouldn't take but just a  
10 few minutes.

11 (Pause in the proceedings.)

12 **THE COURT:** And just hand it to Ms. Sanders when  
13 you're finished.

14 (Pause in the proceedings.)

15 **THE CLERK:** Your Honor, the following jurors have been  
16 excused from this proceeding. They need to go to the back of  
17 the courtroom: Tiesa Smith, Lorri White.

18 **THE COURT:** So Ms. Smith and Ms. White -- Lorri White,  
19 you can step down and go to the back of the courtroom.

20 **THE CLERK:** Karen Dove.

21 **THE COURT:** Ms. Dove, the same.

22 **THE CLERK:** And Amanda Cloninger.

23 **THE COURT:** And Ms. Cloninger.

24 (Excused prospective jurors left the jury box.)

25 **THE COURT:** All right. So the ten of you will be our

1 jury.

2 And I'm going to ask Ms. Martin and Mr. Jackson, if you all  
3 will move down one and Mr. Cornwell can step into the -- yeah,  
4 that's good -- get into the jury box.

5 And then, Mr. Richter, yeah, if you would do the same.

6 And, Ms. White, you can move into the jury box and just  
7 have a seat.

8 I'll be back to you all in just a minute. All right.

9 Okay. So for those of you on the jury panel, I want to  
10 thank you for your time and service in this matter. We will  
11 not need you in this case, but I'm not sure what's going on in  
12 the criminal case downstairs and so I will ask you to go back  
13 to Courtroom 2 -- oh, pardon me. You need to go to the jury  
14 assembly room. I'm sorry. That's up on the fourth floor. All  
15 right. The jury assembly room. And the clerk's office up  
16 there will tell you what needs to happen next and whether  
17 you're done with your jury service or need to come back on  
18 another day or call back in on another day. I want to thank  
19 you for your service and you're excused to go up to the jury  
20 assembly room.

21 (Prospective jurors in the gallery left the courtroom at  
22 2:30 p.m.)

23 **THE COURT:** Okay. All right. Good. We're ready to  
24 get started just one day behind because of the weather.

25 The first thing that will happen is that you all will be

1 impaneled to serve as jurors in this particular case, so please  
2 listen to the clerk.

3 (The jury was duly impaneled.)

4 **THE COURT:** All right. Members of the jury, you've  
5 been sworn and impaneled to serve as jurors in this case and at  
6 this time I want to tell you a little about how the trial will  
7 proceed and some of the rules that apply so you will know  
8 what's going on, give you a few instructions about the law that  
9 is likely to apply in this case, and also tell you what the  
10 rules are that govern your conduct while you serve as a juror.  
11 I may also instruct you from time to time while the trial is  
12 going on; and at the end of the case, after all of the evidence  
13 is in, I will give you detailed instructions on the law that  
14 applies in this case.

15 In just a few minutes, we will begin the trial. The  
16 lawyers first have the right to make opening statements. An  
17 opening statement is not evidence and, indeed, nothing that the  
18 lawyers say to you is evidence. The lawyers aren't witnesses.  
19 They don't have firsthand knowledge of what happened, but they  
20 are allowed at the beginning of the case to give you a broad  
21 overview or projection of what they believe the admissible  
22 evidence will be.

23 In order to give you that overview, the Plaintiff will go  
24 first. They tell me about 40, 45 minutes. We'll take a short  
25 recess after that; and then when we come back, we'll have the

1 defense opening statement, which may be about the same length,  
2 maybe a bit longer; and then I anticipate we'll stop for the  
3 day. All right.

4 We'll come back in the morning and start with the evidence  
5 itself. Witnesses will be called to the witness stand and  
6 they'll be sworn or affirmed to tell the truth. They will  
7 answer the questions of the lawyers and tell you what they know  
8 about this matter.

9 It is also likely, in fact, I'm sure, there will be  
10 exhibits offered into evidence and exhibit -- usually it's a  
11 document, but it could be a picture or, you know, in criminal  
12 cases, we see guns, things like that. You're not going to see  
13 any of that, but you may see some demonstrative evidence or  
14 some physical items as exhibits. If an exhibit is admitted  
15 into evidence, you can consider it, along with the testimony of  
16 the witnesses.

17 In some trials, there are stipulations and I believe you  
18 will hear a few in this case. That means the parties have  
19 agreed to a fact so that it is not necessary to put evidence on  
20 to prove that fact. These save a lot of time, as you can well  
21 imagine. So when the parties stipulate to something, you  
22 should accept those stipulations as undisputed facts and they  
23 should not be given less weight merely because everybody  
24 agrees.

25 The Plaintiff will present his evidence first. This is

1 because Dr. Krakauer, as the Plaintiff, has the burden of  
2 proof. He must persuade you by the greater weight of the  
3 evidence that DISH has violated the TCPA and that he and other  
4 class members are entitled to damages. Because he has the  
5 burden of proof he gets to go first in calling his witnesses  
6 and offering exhibits. Counsel for the Defendant may  
7 cross-examine his witnesses. If the Defendant chooses to put  
8 on evidence, it will do so after the Plaintiff has closed his  
9 evidence; and the Plaintiff, of course, can cross-examine the  
10 Defendant's witnesses. In some cases, the Plaintiff can offer  
11 rebuttal evidence after that.

12 Now, during the trial, an attorney may make an objection to  
13 a question asked by another lawyer, to an answer given by a  
14 witness or to the admission of certain evidence. When that  
15 happens, it merely means that the attorney is asking me to  
16 decide whether the testimony or other evidence is proper under  
17 the law. You should not draw any conclusions from such an  
18 objection or from how I rule on that or hold it against the  
19 parties if the attorneys assert an objection. They are allowed  
20 to do so.

21 If I rule on the objection by saying "sustained," that  
22 means you should disregard whatever was objected to, the  
23 question, the answer or whatever it was, the exhibit. On the  
24 other hand, if I rule on the objection by saying "overruled,"  
25 that means you may consider the evidence. So "sustained" means



1 forget it. "Overruled" means remember it. And I'll remind you  
2 of that the first time or two those words are used during the  
3 trial if it is not completely clear from the context.

4 It's also possible, indeed likely, that during the trial I  
5 will need to speak to the lawyers outside your presence. I  
6 always have to do that at the close of all the evidence and a  
7 few other times during the trial. And when the need arises, I  
8 may have the lawyers step over to the end of the bench right  
9 there like we did during jury selection. They'll turn on that  
10 awful white noise so that you can't hear us and we'll whisper  
11 to each other for a little bit. If it's going to take longer  
12 than, you know, 30 seconds, I may excuse you to go into the  
13 jury room while we talk.

14 You shouldn't worry or speculate about our discussions.  
15 I'll either be asking them a legal question or a housekeeping  
16 matter like how long is this witness going to take and when  
17 should we go to lunch. Obviously, you will hear all of the  
18 admissible evidence in the case.

19 Now, certain things are not evidence and should not be  
20 considered by you. Statements, arguments, and questions by the  
21 lawyers are not evidence. Objections are not evidence. If you  
22 are instructed that an item of evidence is received for a  
23 limited purpose only, you must follow that instruction. If I  
24 exclude evidence or tell you to disregard evidence, you must  
25 not consider that evidence.

1       Anything, of course, that you see or hear outside the  
2 courtroom is not evidence. You are to decide the case solely  
3 on the evidence presented here in the courtroom. And if you  
4 think about that, the reason is obvious. If you learn  
5 something on the Internet or out there in the world, it could  
6 be wrong; and the lawyers and the parties have no chance to  
7 test that or raise questions about it or demonstrate to you why  
8 it's not correct. It's also not very fair, which we're all  
9 about here in the courtroom, so please don't consider anything  
10 that you have heard outside the courtroom.

11       Now, as judges of the facts, you must decide which  
12 witnesses to believe, which witnesses not to believe, and how  
13 much of any witness's testimony to accept or reject. This part  
14 of your responsibility is called determining the credibility of  
15 a witness. Now, witnesses themselves are often not familiar  
16 with the rules and sometimes when a party objects to a question  
17 the witness goes ahead and answers it anyway. So if that  
18 happens and I say "sustained," then that means the witness  
19 should not have answered the question and you should disregard  
20 what you have heard. You should not consider that answer or  
21 partial answer in your deliberations.

22       After you have heard all of the evidence, the lawyers get  
23 to make closing arguments at the very end, during which they  
24 are -- during which time they are allowed to attempt to  
25 persuade you to reach a particular verdict. You'll have the

1 questions in front of you at that point that you're  
2 specifically called upon to answer; and after those arguments,  
3 I will instruct you fully on the law that applies to this case.  
4 Then you'll go to the jury room and deliberate towards a  
5 unanimous verdict.

6 Your duty will be to consider all of the evidence fairly  
7 and impartially and to find the facts from this evidence. You,  
8 and you alone, are the judges of the facts. You will then  
9 apply the law as I give it to you and attempt to reach a  
10 unanimous verdict.

11 Generally speaking, we will start court at 9:30 and you'll  
12 need to come from here on out to the jury room that goes with  
13 the courtroom. It's through this door right here and you'll  
14 see it in a little bit. And I'd ask you to be there by 9:20 or  
15 so just in case there's any logistical or housekeeping matters  
16 and we'll start about 9:30. We take a morning break every day  
17 around 11:00. We break for lunch around 12:30. We resume  
18 around 1:45. We take an afternoon break around 3:30 and we  
19 leave for the day around 5:00. That's an approximate schedule,  
20 but I don't ordinarily keep you much past 5:00 and you can --  
21 you might stay five minutes after that. The only time you  
22 would really stay past 5:00 would be if you are deliberating  
23 and you want to stay a bit longer to see if you can reach a  
24 verdict. I may modify this schedule if we fall behind, so  
25 please listen, particularly at the end of the day and at the

1 lunch recess, to just be sure you know exactly when you're  
2 going to come back.

3 All right. Now let's turn and talk briefly about some of  
4 the law that applies in this case and to the meaning of some of  
5 the words you'll hear during the trial.

6 As the presiding judge, I have a number of  
7 responsibilities. The main ones you will see are that I act as  
8 a sort of referee. I will rule on the legal issues and  
9 instruct you on the law, but nothing I say or do during the  
10 trial is intended to indicate that I have any opinion about  
11 what your verdict should be. It is your exclusive province to  
12 find the facts of this case and to render a verdict reflecting  
13 the truth as you find it. I'm in charge of the courtroom  
14 logistics, as you have seen, at least when I'm not overruled by  
15 the important person there in the clerk's office who tends to  
16 be in charge of the housekeeping matters, but I will try to see  
17 that your time is used efficiently.

18 I will give you detailed instructions on the law at the end  
19 of the case and those will control your deliberations, but I do  
20 want to give you an overview to help you follow the evidence of  
21 some of the basic legal principles that apply in cases  
22 involving the Telephone Consumer Protection Act and this case  
23 in particular.

24 You will remember that Dr. Krakauer, the Plaintiff, has the  
25 burden of proof on all issues and he must persuade you by the

1 greater weight of the evidence before you can find in his  
2 favor.

3 Now, one of the questions you'll be asked to answer is  
4 whether the company that made the telephone calls, SSN, was  
5 acting as DISH's agent when it made the telephone calls at  
6 issue. DISH is not liable for telephone calls which were not  
7 made by it or by its agent, and here the issue is whether SSN  
8 was its agent.

9 An agent is a person or company empowered by another person  
10 or company to act on its behalf. The Plaintiff contends that  
11 DISH authorized and empowered SSN to make sales calls on DISH's  
12 behalf and that SSN acted on behalf of DISH in making those  
13 calls. DISH contends that SSN was an independent contractor,  
14 not its agent; and that if SSN was its agent, it acted beyond  
15 the scope of its authority.

16 In an agency situation, the person granting the authority  
17 to another to act on his behalf is called the principal and the  
18 person who is authorized to act on behalf of the principal is  
19 the agent.

20 Actual authority exists when the principal has expressly or  
21 impliedly authorized the agent to act on the principal's behalf  
22 with respect to a particular matter. It may be granted by the  
23 principal by word of mouth or by writing, or it may be implied  
24 by conduct of the principal amounting to consent or  
25 acquiescence or by the nature of the work the principal has

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1 entrusted to the agent.

2 In order for agency to exist, the principal must have the  
3 power to direct and control the agent's actions. When an agent  
4 acts on behalf of its principal and within the scope of its  
5 authority, then the principal is responsible for the act so  
6 long, as I say, the agent has not exceeded his authority. The  
7 act of the agent is treated in law as the act of the principal.

8 However, a principal is not bound by the act of an agent  
9 unless that act falls within the scope of actual authority  
10 granted by the principal to the agent. In order to determine  
11 the authority of an agent, it is necessary to look to the  
12 conduct and statements of the principal, and an agent cannot  
13 extend his own authority by his own conduct standing alone and  
14 in the absence of conduct or acquiescence by the principal.

15 So you will want to listen carefully to the evidence so  
16 you can decide what, if anything, DISH authorized SSN to do on  
17 DISH's behalf considering the written contract between DISH and  
18 SSN, how that relationship worked in practice, whether DISH had  
19 control over SSN's methods, what knowledge, if any, DISH had  
20 about whether and to what extent SSN was violating the TCPA,  
21 and other relevant evidence.

22 So I know that was all kind of abstract, but as you listen  
23 to the evidence, you will get a feel for this and I'll go over  
24 the law with you again after you have heard all of the  
25 evidence.

1        Now, if you find that SSN did act within its authority as  
2 DISH's agent, then you will need to decide if the telephone  
3 calls that SSN made violate the TCPA.

4        Now, by way of background, there is a National Do Not Call  
5 Registry created by the federal government to give consumers a  
6 choice about whether they want to receive telemarketing calls  
7 at home. It allows the consumer to register his or her  
8 residential telephone number on the National Do Not Call  
9 Registry to avoid receiving those calls.

10       Federal law provides that no person or entity shall  
11 initiate any telephone solicitation to a residential telephone  
12 subscriber who has registered his or her number on the National  
13 Do Not Call Registry. Such Do Not Call registrations must be  
14 honored indefinitely or until the telephone number is canceled  
15 by the consumer or removed by the database administrator.  
16 Wireless customers are protected too so as long as the cell  
17 phone is primarily used for residential and not business  
18 purposes.

19       Under the law, a person who has received more than one  
20 telephone call within any 12-month period by or on behalf of  
21 the same entity, in violation of these regulations, may bring  
22 an action to receive up to \$500 in damages for each violation.

23       So as to these Do Not Call Registry claims, the Plaintiff  
24 must prove by a preponderance of the evidence that he and the  
25 class members each received at least two telephone

1 solicitations in any 12-month period, that the numbers called  
2 were residential numbers, that the calls were made by or on  
3 behalf of DISH Network, and that the calls were made when the  
4 telephone numbers had been on the Do Not Call Registry for over  
5 30 days.

6 The Plaintiff and the class will offer evidence from a  
7 witness who has reviewed information in various databases about  
8 who was on the Do Not Call Registry, as well as telephone  
9 records about the telephone calls SSN made. The Plaintiff and  
10 the class contend this evidence establishes by a preponderance  
11 of the evidence that each class member received calls that  
12 violate the TCPA. DISH contends that the evidence is not  
13 reliable and is insufficient to establish that the calls were  
14 made. DISH also challenges some particular subsets of calls,  
15 in particular contending that the evidence does not establish  
16 that the numbers in these particular subsets were residential  
17 numbers. So you'll want to give all the witnesses who testify  
18 about these lists and records your attention.

19 Now, if you decide that SSN made calls that violate the  
20 TCPA and that SSN was DISH's agent, you'll need to decide the  
21 amount of damages each class member will recover. The  
22 statutory maximum is \$500 per call and there will be a place on  
23 the verdict sheet for you to write the amount you decide up to  
24 \$500 if you reach that issue.

25 Now, as I mentioned during jury selection, this is a class



1 action and Dr. Krakauer is suing on behalf of all persons on  
2 the Do Not Call Registry who allegedly received these calls  
3 during the class period. The trial will resolve issues common  
4 to all class members and subsets of class members, and that  
5 decision will be binding on everyone.

6 So I've kind of talked to you a bit about some of the  
7 evidence in this case, but all of the evidence is important or  
8 you would not be hearing it. I'm just trying to give you a  
9 little context for what the issues are that you'll be deciding.  
10 By not mentioning or mentioning a particular piece of evidence,  
11 I'm not making any comment on how important it is. That will  
12 be for you all to decide. You obviously need to listen to all  
13 of the evidence.

14 Okay. I have a few words about your conduct as jurors.  
15 These instructions are necessary for a fair trial and I told  
16 you some of these things before we went to lunch.

17 First, during the trial, you are to avoid contact with any  
18 witness, the Plaintiff, the Defendant's representative, any of  
19 the lawyers or anyone who has any interest in this case. Do  
20 not talk or have any communication to them. Because you may  
21 not know whether a person in the courthouse falls into one of  
22 these categories, during breaks you should not speak to anyone  
23 in the courthouse you do not know. If anyone tries to talk to  
24 you about this case, you will need to bring it to my attention  
25 promptly.

1       Second, during the trial, you should not discuss the case  
2 with anyone or permit anyone to discuss it with you. This  
3 includes your family, your friends, your coworkers. And it  
4 includes any form of communication, not just talking to people.  
5 Don't e-mail, instant message, tweet, post on Facebook or any  
6 other website, no Instagram, no blogging. You know, don't --  
7 none of that kind of thing.

8       People -- and, of course, you don't want to hear what  
9 anybody else might say about the case too, which is part of the  
10 reason you can't even tell anybody what the case is about.  
11 People who aren't in the courtroom could easily be mistaken  
12 about the evidence. I don't know about you, but I know people  
13 who have opinions about everything, particularly when they  
14 don't know the facts, and you don't want to hear those opinions  
15 from any of those people. They may be expressing them based on  
16 personal feelings and -- just don't talk about it, don't  
17 communicate about it, and don't let anybody communicate with  
18 you.

19       Obviously, it's fine to -- you have to -- if you work or  
20 have other obligations that are going to be interfered with  
21 because of this trial, it's certainly fine to let your employer  
22 know "I have been selected for this jury and I will not be able  
23 to come to work until it's over and that will be next week  
24 sometime." But don't say what kind of case it is, don't answer  
25 any questions about it other than that -- you know, scheduling

1 and logistics, to the extent you have to to make your life  
2 work, but nothing about the substance.

3 And if anybody tries to pressure you on that, you just say,  
4 "The judge told me I would go to jail if I talked about the  
5 case." Okay. Now, I'm making a little bit of a joke about it,  
6 but it is really serious and usually if you say that to people  
7 they'll back off and not -- you know, you are subject to  
8 contempt powers, but usually people back off if you tell them  
9 how serious it is.

10 Now, the prohibition about talking about the case includes  
11 your fellow jurors, so you cannot talk to each other about the  
12 case while it's going on. You have to wait to talk to each  
13 other until all the evidence is in, you've heard the closing  
14 arguments of the attorneys, and you've heard my instructions on  
15 the law. One of the main reasons for this is that discussing  
16 the case can lead to forming an opinion and that is not a good  
17 idea before you have heard all of the evidence. Sometimes the  
18 most important evidence is the very last piece that comes in,  
19 so you want to keep an open mind. Even after deliberations  
20 begin you may talk about the case among your fellow jurors only  
21 when all of you are present.

22 Finally, during the trial -- oh, this is not finally. This  
23 is just third. Third, during the trial, you're not to gather  
24 information, investigate or do anything else to learn about the  
25 case outside the courtroom. Do not look anything up on the

1 Internet, call somebody you know who knows something about the  
2 issues in this case, read anything about it, nothing like this.  
3 Everything on the Internet is not true and you could look  
4 something up and it could be wrong or it could be inaccurate or  
5 misleading somehow.

6 You should also avoid exposure to media coverage of the  
7 trial, if there is any. I don't know that we have anybody here  
8 that's going to report on the case, but if you do see anything  
9 in the newspaper, TV, radio or online about this case, do not  
10 read it or listen to it. Just like tweets and Internet posts,  
11 this kind of information is often inaccurate and incomplete,  
12 and it is certainly not given under oath with all the parties  
13 present or subject to cross-examination. I know all of us are  
14 used to looking things up online, but doing any type of  
15 research can cause major problems in a trial and can require us  
16 to start over again, so do not do that.

17 Finally, do not form any opinion until all the evidence is  
18 in. Keep an open mind until I tell you to start your  
19 deliberations.

20 These rules I have given you are necessary for a fair trial  
21 and a violation of these instructions does subject you to  
22 punishment as allowed by law for contempt, as I mentioned to  
23 you earlier. I will repeat or summarize these instructions for  
24 you throughout the trial, not because you weren't paying  
25 attention, but because, in my experience, some of these rules

1 are a little counterintuitive. I don't know of any other  
2 situation in our culture where we ask strangers to sit together  
3 watching and listening to something and then we don't let them  
4 talk about it. So I will be reminding you about these things  
5 from time to time. Please remember the reasons I gave you for  
6 these rules and let me know if there are any problems with  
7 following these instructions either on your own part or by your  
8 fellow jurors.

9 Now, while you're in the courtroom, our priority will be to  
10 proceed with the testimony and I'll try to avoid delays. The  
11 lawyers are coming in early and staying late with me before you  
12 get here and after you leave, so we'll be trying to be as  
13 efficient as we can. That's the reason we start at 9:30 and  
14 not 8:30, and I think you will also find that 9:30 to 5:00 is  
15 about as much as you can absorb during the day.

16 I'll also ask you not to loiter in the corridors of the  
17 courthouse just to avoid any contact with any folks; and if  
18 anyone attempts to talk to you about it, you do need to let me  
19 know immediately. Any contact with me needs to be by way of a  
20 note. So you would just write the note indicating what  
21 happened and either let the security officer or Ms. Sanders  
22 here know that you have something you need to tell me and  
23 Ms. Sanders will come collect the note.

24 If you want to take notes during the trial, I will be glad  
25 to let you do that. Ms. Sanders has pencils, legal pads, and

1 envelopes.

2 Are those around?

3 I'm going to let her hand those out in case any of you want  
4 to take notes. I'm just going to give them to everybody, but  
5 please do not feel like you have to take notes. Some people  
6 actually find it very distracting.

7 You can just give everybody one in case they --

8 (Ms. Sanders complied with the request.)

9 **THE COURT:** Ms. White needs one right there.

10 Everybody got one? Okay.

11 So some people find taking notes very helpful. Other  
12 people, as I say, find it distracting. You don't want to get  
13 so caught up in writing down one thing that you forget to  
14 listen to the next thing because, you know, we really don't  
15 stop, okay. But that said, I know many people do find it  
16 helpful to take notes.

17 Your notes are not evidence and they should not take  
18 precedence over your recollection of the evidence; and if you  
19 do take notes, don't talk about them with anybody, you know,  
20 while the trial is going on. I will let you take your notes  
21 back with you during your deliberations, but, you know, they're  
22 not more important than the memory of a juror who did not take  
23 notes. And, of course, if you don't take notes, you can't turn  
24 over the responsibility to somebody who took notes. It's your  
25 responsibility to listen, too. We depend on the judgment of

1 all the members of the jury.

2 At every break you'll need to just slide your notes back in  
3 the envelope with the pencil and leave them in the chair, and  
4 they'll be right there for you when you come back. So don't  
5 take them with you. At the end of the case I'll let you take  
6 them in the jury room when you deliberate, but up until then  
7 just slide them back in the envelope and leave them in your  
8 chair.

9 Finally, if at any time you cannot hear or understand  
10 someone, you need to let me know. Witnesses mumble sometimes.  
11 The door slams or somebody coughs and you don't hear what's  
12 said. I have heard lawyers talk too fast and occasionally I  
13 talk too fast. So if you have any problems with hearing or  
14 understanding, you just raise your hand; and if nobody notices  
15 you, just say, "Excuse me. Did he say red or blue?" Okay.  
16 It's very important for you to hear all of the evidence. I  
17 know, you know, this is a beautiful courtroom. I come in here  
18 every day, so it's not intimidating to me, but I appreciate,  
19 you know, you may not feel all that comfortable in here. But  
20 please don't hesitate. If you cannot hear or understand, I do  
21 need to know that.

22 All right. So we are going to start with the Plaintiff's  
23 opening statement. Then we will take a short break and come  
24 back with the Defendant's opening statement.

25 And the jury is with the Plaintiff.

1           **MR. BICKS:** Your Honor, can I just ask one question  
2 before we start just because I'm going to be showing graphics?  
3 I'm just wondering, the jurors who are all the way in the  
4 corner --

5           **THE COURT:** We'll get it arranged during the break so  
6 everybody can see.

7           **MR. BICKS:** Okay.

8           **MR. GLASSER:** Does this thing work? Great.

9           Ladies and gentlemen of the jury, we live in a country that  
10 has a rule of law, meaning that its citizens, if we all follow  
11 the laws, will hopefully have a better quality of life for  
12 everybody. One, I will call it quality of life, law passed by  
13 Congress is this National Do Not Call law and that's the law at  
14 issue in the case you're about to hear.

15           I'm sure everyone is familiar with the experience of  
16 getting a call from someone you don't want to hear from trying  
17 to sell you something you don't necessarily need at a time  
18 that's awkward for you. Now, that law -- now, that experience  
19 Congress took account of and they passed a law called -- we  
20 call it the National Do Not Call law. The technical name is  
21 Telephone Consumer Privacy (sic) Act. It covers lots of  
22 things, but the things particularly at issue here in this case  
23 is going to be that Do Not Call list and calling folks that are  
24 on it.

25           Now, officially what the law did is it created a national



1 registry, a big database, and folks can register. And the idea  
2 is that once your number is on there the telemarketers can  
3 check and exclude it and not call you. So the idea is that by  
4 this law -- I mean, Congress is passing all these complicated  
5 laws. This one is like -- called, like, the uninterrupted  
6 dinner law. It's just a very simple law. So you just register  
7 your phone. You can register online. You can call. There's  
8 various ways to register. You have a brief waiting period, as  
9 the Court said, 31 days, and you're off limits to  
10 telemarketers.

11 Now -- so I think of it as the law sets up kind of a no  
12 fishing zone. You can't fish for customers who don't want to  
13 be fished for. They're in this zone, the no-call zone.  
14 Telemarketers all know that they can't fish in those prohibited  
15 waters. The evidence will be, this is Telemarketing 101, you  
16 can't fish the prohibited waters.

17 Now, DISH, their witnesses will admit they know they can't  
18 fish in prohibited waters, but the evidence will be that DISH  
19 wants the customers. DISH wants the fish and so, in this case,  
20 they got someone else to fish for them, this company that the  
21 Court has told you the name of, Satellite Systems Network. But  
22 DISH will come in here and they will ask you to find them not  
23 responsible for that illegal fishing, and we will show the  
24 evidence that should make them responsible, in our view, for  
25 that fishing and this is what I'm about to preview for you,

1 that evidence.

2 And the reason -- you know, it's interesting. The  
3 telephone does not actually disappear when you sign up for the  
4 Do Not Call list, right, so the law -- you know, the -- the --  
5 the rules can still be ignored and so that gets to this -- what  
6 we're doing here. Now, this is not a criminal trial. The  
7 Court told you it's not a criminal trial. It's not a "beyond  
8 the reasonable doubt" trial. It's a "preponderance of the  
9 evidence" civil trial.

10 And so what Dr. Krakauer is is a class representative and  
11 he is bringing a private enforcement action saying that he can  
12 prove that a company broke the law and looking for the penalty  
13 on behalf of all the people who were called in violation of  
14 that law. And the amount the Court told you is a whopping up  
15 to \$500. So it's not a lot of teeth in the law, but the  
16 question is is it going to be enforced or not, is it -- and  
17 that is the question for you at the close of the case.

18 People who bring the enforcement suit, like Dr. Krakauer in  
19 this instance, are the class representative. They stand here  
20 for all the thousands of other people who obviously are not  
21 going to be here because what happened to them is the same as  
22 what happened to others. It typifies what happened. That's  
23 the meaning of being a class representative. And so I kind of  
24 call it the "strength in numbers" lawsuit. Maybe nobody in  
25 their right mind would bring a lawsuit for a mere \$500, but to

1 enforce the law, you will bring a lawsuit. And Dr. Krakauer,  
2 the Court will tell you, does not get to keep the money himself  
3 if you award any. It goes to the class supervised by the  
4 Court. He's treated like the other class members.

5 Dr. Krakauer, who is right here, he lives in Durham,  
6 North Carolina. He is not a medical doctor. He is a  
7 zoologist. He's studied birds. He was the director of the  
8 Museum of Life and Science in Durham, California --  
9 North Carolina, North Carolina Museum of Life and Science. I'm  
10 told it's a fun place to visit. I've never been there. He  
11 retired from there and now, you know, lives near Durham.

12 From 2009 to 2011, Dr. Krakauer got a bunch of  
13 telemarketing calls on behalf of DISH despite the fact that his  
14 number is on the Do Not Call list. Dr. Krakauer has never been  
15 a class representative before. He's never sued anybody before  
16 in his life.

17 The Defendant DISH corporation is a large corporation.  
18 You'll hear from their lawyers what they do. Some of you  
19 probably know they deliver satellite service to roughly  
20 14 million Americans. I understand it's like 3,500 channels  
21 you can choose from. They have 13 satellites in geosynchronous  
22 orbit. Maybe I didn't say that word exactly right, but  
23 stationary orbit above the earth that beam down those channels.  
24 They're a large corporation. The evidence will be you can't --  
25 there's no point in all those satellites, there's no point in

1 any of that without sales. No sales, no DISH. That's going to  
2 be the evidence.

3 Now, Dr. Krakauer got these calls on behalf of DISH even  
4 though he complained to DISH. And this case is about -- not  
5 really as much about, in our view, the 5 illegal calls he  
6 got -- connected calls after he complained or the 10 calls he  
7 got that we have records of -- and I'll get to what we have  
8 records of and what we don't have records of -- but it's about  
9 the 51,000 other calls made during that same period, which is  
10 the period called the class period and I'll get to what that  
11 means. And that's connected calls. 51,000 connected calls in  
12 a 15-month period that went twice to people on the Do Not Call  
13 period. Now, obviously, the telemarketer at issue made a lot  
14 more calls, and we'll go into this, and later in my opening I  
15 kind of walk through how it starts with 1.6 million calls and  
16 works down to the class calls, okay. We'll get into that in a  
17 minute.

18 The class period in this case is defined by the time period  
19 where we actually have the call records and those call  
20 records -- and you'll hear from witnesses. They will actually  
21 be on video because they're from out of state. We can't bring  
22 them in here. A subpoena secured the call records of this  
23 company for a 15-month period. And so while Dr. Krakauer was  
24 first called in a period in 2009, the records that were managed  
25 to be kind of frozen in time are from May 1st, 2010, to

1 August 1st, 2011. So that's the class period where we're  
2 looking for the enforcement on the 51,000 calls.

3 It's not us saying those are the only calls. Obviously,  
4 there were calls in 2009, the evidence will show, because  
5 that's when Dr. Krakauer complained. They have his complaint  
6 recorded. We know they were calling before the class period  
7 and, you know, after the class period, but the damages in the  
8 case have to do with the class period because that's where we  
9 have the telephone records for the proof of the damages.  
10 Anyway, that's why there's a 15-month window called the class  
11 period.

12 Now, this case will also cover and delve into facts in  
13 other time periods. One time period is the summer of 2009,  
14 June of 2009. DISH corporation here entered a settlement  
15 agreement in the summer of 2009 with the Attorneys General, the  
16 chief law enforcement officer, of 46 states saying it would use  
17 its power and control to -- to step up and monitor to determine  
18 if its telemarketers were complying with the Do Not Call law  
19 and, if they found violations, they would cause compliance by  
20 discipline or termination.

21 This agreement that DISH entered with the 46 states was  
22 within a month of the first telephone call Dr. Krakauer  
23 received in the case; and in this case here, I believe they  
24 will stand up and tell you the opposite: That they have no  
25 control over these telemarketers; that the telemarketers are

1 independent, free, independent, not controlled, not under their  
2 authority, they can't police them, free as a bird people I  
3 believe will be their argument in the case.

4       The telemarketer at issue in this case, SSN, is a  
5 telemarketer that DISH paid to make calls on its behalf.  
6 DISH -- SSN only were -- in the class period at issue, frankly,  
7 from the time 2005 on, but certainly at the time Dr. Krakauer  
8 got his call all the way to the end, they only did one thing,  
9 sell DISH. They were branded as a DISH fishing boat because  
10 they were able to use DISH trademarks. They could put DISH  
11 logos out there. The website was my -- yourfreedish.tv or  
12 something like that. The web addresses which you will see  
13 were -- had DISH in the name. In any event, they sold DISH  
14 services only. It was a dedicated company dedicated only to  
15 DISH.

16       The -- according to the Assurance that I talked about, that  
17 agreement with the 46 states, DISH was to monitor to determine  
18 if SSN was complying with the Do Not Call law and if they found  
19 violations shall discipline SSN. The evidence in this case  
20 will be overwhelming that both before and after the  
21 compliance -- I mean the assurance of compliance agreement, in  
22 the summer of '09 that DISH had direct knowledge of SSN's  
23 illegal telemarketing ways both before and after they entered  
24 the Assurance and both before and after DISH promised that they  
25 would use their power and authority to rein in the SSNs of the

1 world and cause SSN to comply with the law or terminate them.  
2 They will say, though, probably, that we ought to be suing that  
3 little, tiny SSN company.

4 The evidence will show that DISH did not in fact monitor  
5 SSN and did not in fact use any of its contractual or practical  
6 power over SSN to change SSN's behavior at all even when they  
7 heard. I believe that the evidence will be that despite this  
8 agreement with 46 states they get complaints and they send  
9 toothless letters to SSN saying, "Hey, we believe there may be  
10 a complaint against you."

11 So the evidence will be that in that 15-month window where  
12 we got the call records -- that 15 months, that's about a year  
13 after the first call with Dr. Krakauer -- one out of five of  
14 the calls made by SSN on DISH's behalf were in those off-limits  
15 fishing waters on the Do Not Call Registry, one out of five.

16 Our evidence will be that any effective system of  
17 monitoring would have stopped that behavior, period. Our  
18 evidence will be that DISH had its eyes wide open when it hired  
19 SSN and knew what kind of outfit it was getting. It learned  
20 along the way in the years prior to 2009 what kind of outfit it  
21 had and it kept the outfit on the payroll.

22 In fact, the evidence will be that in the early 2000s, up  
23 to 2004 and 2005 -- in 2004, the State of Florida sanctioned  
24 SSN for illegal telemarketing activity and DISH knew about it.  
25 In 2005, the State of North Carolina sanctioned SSN for illegal

1 telemarketing activity, and DISH knew about it and kept them on  
2 the payroll. DirecTV, by stark contrast, did the opposite. In  
3 the early 2000s up to 2005, SSN sold for both DirecTV and DISH.  
4 After the events of 2004 and 2005, DirecTV, no, no more.  
5 DirecTV dropped SSN. SSN only sold for DISH after they were  
6 sanctioned by Florida and North Carolina.

7       So when DISH had a decision to make, it made a business  
8 decision; and DISH in fact after 2005 integrated SSN into its  
9 operations in the most comprehensive ways that you can imagine,  
10 such that the evidence will be that SSN was effectively nothing  
11 but a DISH sales arm.

12       Here's how they integrated them. They have lots of  
13 retailers. The evidence will be in 2011 they had about 3,500.  
14 I say 2011 because it's smack dab in the middle of the class  
15 period. Remember the class period is May of '10 to August of  
16 '11. June of '11 3,500 retailers around the country. Lots of  
17 them are storefront, mom-and-pop, small retailers. Forty-five  
18 of the 3,500 are designated national sales partners. You  
19 guessed it. SSN is one of those national sales partners. So  
20 national sales partners were the -- less than 2 percent of all  
21 the retailers.

22       And the national sales partner SSN had access to an  
23 exclusive system called the order entry system and the order  
24 entry system is actually DISH's computer system. So here's how  
25 it works. The telemarketer on the phone, they've got the



1 caller on the phone -- they've got the person on the phone.  
2 They're fired up on their computer. They're on DISH's computer  
3 servers. They're on DISH's network. They put the order right  
4 into DISH's network. The customer gets a DISH installer  
5 assigned. The customer gets a DISH bill. The bill says DISH.  
6 The customer's credit is checked and the credit check is paid  
7 for by DISH. The customer service, if they need customer  
8 service, is back at DISH. Technical support is by DISH. The  
9 contract is formed between DISH and the customer, not between  
10 the retailer and the customer.

11 DISH had trainers come to SSN's call center in person,  
12 listen to calls, monitor calls, upload recordings of calls.  
13 DISH wrote sales scripts for SSN. Frankly, on the order entry  
14 system, the screens would pop up and it was the obligation of  
15 the telemarketer to read exactly what DISH wrote, all crafted  
16 by DISH.

17 So here you have an independent company that has no sales  
18 training capacity it needs of its own, doesn't need it, doesn't  
19 need its own inventory of DISH equipment, doesn't need its own  
20 installers, doesn't need its own customer service personnel.  
21 It's just a DISH telemarketing arm is what our evidence will  
22 show.

23 Frankly, the evidence will be that the DISH/SSN contract,  
24 while it does say the magic words that they're an independent  
25 retailer, is so one-sided and controlling that SSN literally

1 had no legal right to the customers it signed up. They weren't  
2 SSN customers. They were DISH customers. They had no right to  
3 use the data they got about those customers in any way, shape  
4 or form. There is literally one clause in there, I think it's  
5 Clause 7.3, it's -- I call it the absolute power clause. It  
6 literally says: You, SSN, must do or refrain from doing  
7 anything we tell you even if we just send it in a fax or an  
8 e-mail. You must do or refrain from doing anything we tell  
9 you. So our evidence will be that the contract evinces control  
10 at the highest level.

11 DISH will stand up in defense and say, "Well, we ordered  
12 SSN to sign up for a service called PossibleNOW" -- I believe  
13 the words "PossibleNOW" will be used a hundred, maybe a  
14 thousand times in this lawsuit as we, you know, proceed during  
15 the week -- "and that PossibleNOW was going to scrub out all  
16 those bad numbers. So because we told them to sign up with  
17 PossibleNOW, we should not be responsible for the fact that one  
18 out of every five calls they made in this 15-month period was  
19 to illegal fishing waters."

20 But the evidence is going to be that SSN did not actually  
21 run the calls at issue in this case through PossibleNOW scrubs.  
22 They just didn't do it and they told DISH that they didn't do  
23 it and DISH didn't do anything about it, didn't tell them to do  
24 it and didn't care. That's what the evidence is going to be.

25 So, yes, on the right hand, the evidence will be that DISH

1 ordered them to sign up with PossibleNOW; but on  
2 boots-on-the-ground level, the evidence is going to be they  
3 didn't do it and DISH knew they didn't do it. So DISH didn't  
4 care enough to make them do it even after having signed the  
5 assurance of compliance. That's what the evidence is going to  
6 be.

7 So there's going to be evidence about the difference  
8 between telling them to sign up for PossibleNOW and then  
9 actually having them sign up for PossibleNOW or having them use  
10 PossibleNOW, not sign up and drop, whatever.

11 The contemporaneous e-mail traffic at the time will show  
12 that SSN did not scrub the calls at issue in this case through  
13 PossibleNOW or any other scrubbing and that PossibleNOW was not  
14 the monitoring DISH promised. The evidence in this case will  
15 be that time and again DISH found out about behavior it ought  
16 not to have tolerated and let it continue because they wanted  
17 the fish.

18 So when Mr. Bicks, my opponent, stands up and shows you --  
19 flashes contracts and talks about PossibleNOW, I just urge you  
20 to wait, see all the evidence in the case, look at the  
21 boots-on-the-ground facts and make your decision at the end of  
22 the case about how effective or efficient or realistic some of  
23 those things are, because a bedrock fact about this case will  
24 always be one in five calls made over this 15-month period were  
25 in illegal waters.

1 And the evidence will also be that DISH acquiesced in,  
2 allowed, and benefited from all this illegal fishing; and at  
3 the end of the case, you'll have to make the call whether the  
4 existence of SSN -- and Sophie Tehranchi will testify about it,  
5 the owner, she'll describe what it is -- ought to be a  
6 get-out-of-responsibility card in this case.

7 **THE COURT:** Okay. If you'll just limit yourself to  
8 the evidence rather than argument.

9 **MR. GLASSER:** At the end of the class period, SSN was  
10 only selling DISH.

11 Now, let me talk about the calls. The calls that we got  
12 the records on are 1.6 million calls. So the evidence will be  
13 that SSN's telemarketers were calling a little over a hundred  
14 thousand numbers a month. They were using computers, so the  
15 computers could call a lot of people and then, when there's a  
16 connection, shoot it through to a telemarketer. So connections  
17 are materially less than calls. This is not a case about  
18 calls. The 1.6 million calls are kind of the top of the  
19 funnel. 231,000 connections, connected calls.

20 And then we further take out the calls that don't qualify  
21 because there was only one call in a 12-month period or the  
22 number was not on the Do Not Call list or the number was a  
23 business, and so we get down to the calls at issue in the case,  
24 which are 51,000 calls. So there will be some evidence about  
25 that.

1        So you'll hear from Dr. Krakauer. He'll talk about how he  
2 got the first call back in 2009 on behalf of DISH. He called  
3 DISH and told them he was on the Do Not Call Registry. Then in  
4 the class period alone he got ten more calls, five of which  
5 connected.

6        You will also hear from a series of witnesses who work for  
7 DISH and SSN. These are witnesses who will not want to help  
8 our case, but obviously we represent a citizen. We don't know  
9 what goes in -- on inside of DISH or SSN without calling their  
10 witnesses, so we'll be calling what are called adverse  
11 witnesses, that is, we call the other side's witnesses. We put  
12 them on the stand and we ask them questions. Those witnesses  
13 will try and cast what they did in a light that makes them look  
14 better. So you have to think about that when you're observing  
15 their testimony.

16       One of them is Sophie Tehranchi. She is the leading crew  
17 member on that SSN boat I told you about. She is the sister of  
18 the owner, Alex Tehranchi. He's known in the e-mail traffic as  
19 Alex. You'll see e-mail with Alex. That's Alex Tehranchi, the  
20 brother of Sophie Tehranchi.

21       Sophie Tehranchi will explain that SSN sold only DISH at  
22 the relevant time periods for this case after 2005 and  
23 certainly at 2009 on, that all its money came from DISH, that  
24 it used scripts DISH had okayed, that the telemarketing reps  
25 would call people like Dr. Krakauer. When they did that, they

1 were logged on to DISH's computers with a DISH password, and  
2 all the money from the DISH subscriptions they were selling  
3 went straight to DISH. SSN got paid for activations only, so  
4 they got paid when people activated on DISH.

5 The evidence will be that SSN, the national sales partner,  
6 had no power to vary the price, the terms or the conditions of  
7 the DISH sale. So no pricing power, no terms and conditions  
8 power, no -- no power like that to talk about. They sold  
9 exactly what DISH told them to sell at the price DISH told them  
10 to sell it on the terms set by DISH. That's the evidence from  
11 Sophie Tehranchi.

12 You'll hear from her how DISH would sometimes have people  
13 in their call center actually listening in on those calls and  
14 score them to see if they made the sales calls exactly the way  
15 DISH wanted. That DISH person physically present on the boat  
16 would check anything that person wanted.

17 You will hear that DISH had the right to audit the company,  
18 audit its books and records, but, you know, the evidence will  
19 be that DISH never monitored, audited or checked compliance  
20 with the Do Not Call. They never said, "Hey, why don't you  
21 just upload the calls you made in the last 10 days and we'll  
22 just check them against the DNC." Never happened. They never  
23 spot-checked or audited that area of compliance at SSN at all.

24 Another one of the witnesses who will testify is Amir  
25 Ahmed. He's here in the courtroom. He'll tell you about how

1 DISH set up the sales system and how it works and how when he  
2 recruited SSN he had full knowledge that they had telemarketing  
3 issues, consumer complaint issues, AG raising issues, and yet  
4 recruited them anyway.

5       You'll hear from Reji Musso, who is present in the  
6 courtroom here, who was in charge of compliance at DISH. She  
7 was the person who would get these complaints and she would  
8 send form letters back to SSN about these complaints. And  
9 you'll be the judges of the fact of the effectiveness or the  
10 realistic power that these form letters had and whether they  
11 were -- what message they were really sending is what you'll  
12 have to decide in this case.

13       DISH had SSN completely beholden to it. All SSN's money  
14 came from DISH and their sales operations are on DISH  
15 computers, and the evidence will be that in fact DISH takes  
16 none of the obvious steps that they could have taken to reform  
17 the behavior of their telemarketing. So instead of using its  
18 power and authority and control to actually monitor compliance  
19 with the Do Not Call list, DISH would get complaints and they  
20 would send a toothless form letter. As a matter of fact, DISH  
21 sent one of those toothless letters to Dr. Krakauer when he  
22 complained and it didn't stop anything. I'm sorry. Sent one  
23 of those letters not to Dr. Krakauer but to SSN. They actually  
24 didn't send a letter to Dr. Krakauer.

25       Now, you will hear the evidence is that DISH had a written

1 policy that SSN keep its call records, but, no surprise, DISH  
2 never enforced that contractual obligation. The evidence will  
3 be that they learned that SSN was not keeping its call records  
4 and they didn't do anything about it. And so you will have to  
5 judge at the end of the case whether -- why DISH chose not to  
6 enforce the policy about keeping written call records.

7       At the end of the case, our expert will talk about the  
8 process of going through the 1.6 million call records and how  
9 you whittle it down to the 51,000 and taking the Five9 -- oh,  
10 by the way, maybe I didn't say that before. The name of the  
11 computer -- the software company that connected the calls was  
12 called Five9. Five9's computer brain kept the records of the  
13 calls made in the 15-month class period. Those are the  
14 1.6 million calls that our expert looks at and says, okay,  
15 there's 1.6 million calls. Now let's check it against  
16 databases that have records of who is on the Do Not Call list,  
17 check it against databases of businesses to remove businesses.  
18 Let's whittle this thing down to the 51,000 calls. So you'll  
19 hear all that evidence. And you'll hear from our expert that  
20 one out of every five connected calls were made to those  
21 numbers on the Do Not Call list.

22       So I'm getting to the end. It's not that complicated a  
23 case actually from our perspective. It's a case about a  
24 company that basically used another company to do what it knew  
25 it couldn't do. At the close of the case, we will ask you to



1 put real teeth into the telemarketing law and enforce this law.

2 My name is Brian Glasser. I'm from Charleston, West  
3 Virginia, originally, and I appreciate your time and your  
4 effort in this case and the time you give me. Thanks a lot.

5 **THE COURT:** Okay. Thank you, Mr. Glasser.

6 We'll take a short break and come back for the Defendant's  
7 opening statement. If you'll slide your notes in your envelope  
8 and leave them in the chair. I'm going to have the clerk -- if  
9 you all will be seated, please. Everybody sit down. I'm  
10 talking to the jury. Don't get ahead of yourselves.

11 I'm sorry. They distracted me when everybody kind of stood  
12 up there. I'm going to have the clerk take you back here into  
13 the jury room and show you the jury room that goes with this  
14 courtroom. From now on that's where you'll come and go from.  
15 You don't have to go to Courtroom 2. You don't have to go to  
16 the jury assembly room unless there's some unusual thing going  
17 on.

18 So during the break, you're free to stretch your legs. You  
19 can walk around. I'll just remind you not to have any contact  
20 with any of these folks in the courtroom. Don't talk about the  
21 case among yourselves or with anyone else and keep an open  
22 mind. You've only heard one opening statement and you haven't  
23 heard any evidence yet, so don't talk about it or form any  
24 opinion.

25 And we will come back at 3:45. Ms. Sanders will come get

1 you and bring you back into the courtroom at that time. So you  
2 can leave your notes in your chair.

3 And, Ms. Sanders, if you will take the jurors into the --  
4 show them where they're supposed to go.

5 Everybody please remain seated while the jury steps out.

6 (The jury left the courtroom.)

7 **THE COURT:** Okay. So I appreciate in some courtrooms  
8 folks, judges like people to stand when the jurors come and go,  
9 but I actually find it distracting. So I'll ask everybody to  
10 please, particularly because we have a lot of people in the  
11 courtroom, if you'll just remain seated.

12 Anything we need to take up before the jury -- before we  
13 take our recess?

14 **MR. GLASSER:** Not from the Plaintiff, Your Honor.

15 **THE COURT:** And if it's not set up the way you want,  
16 Mr. Bicks --

17 **MR. BICKS:** Well, it's set up fine. I was just saying  
18 the two jurors up against the wall I don't think will be able  
19 to see the screen. Since there were two seats open to the  
20 right, I was just trying to make sure folks could see. That's  
21 what I was saying.

22 **THE COURT:** I see. I'll ask the clerk to check on  
23 that and we can easily move them. They might prefer not to be  
24 next to the wall anyway.

25 **MR. BICKS:** Right. That's why I raised it.

1           **THE COURT:** Thank you for that.

2           Any other logistical, housekeeping matters? No.

3           We'll take a 15-minute recess.

4           (An afternoon recess was taken from 3:31 p.m. until  
5 3:45 p.m.; all parties present.)

6           **THE COURT:** All right. I know there's a couple of  
7 questions about people who want to bring their phones in.  
8 We'll take that up after the jury is gone for the day. Is  
9 there anything we need to do before the jury comes in?

10          All right. If you can get the jurors.

11          I think it probably is a good idea -- well, I'll just tell  
12 them after they get in their seats I'm going to move them down  
13 one. I think that was a good suggestion for both visibility  
14 and ease.

15          You can bring them in.

16          (The jury entered the courtroom.)

17          **THE COURT:** Okay. Before you get too comfortable, I'm  
18 going to ask you to stand up and move -- everybody just move  
19 down one. I think you'll be able to see the screen better  
20 and -- yeah. And also be -- that corner can get a little  
21 squished feeling. Okay. So this is your new seat and we'll  
22 stay in these seats from here through the rest of the trial.  
23 All right.

24          If at any time you can't see -- is the screen down there?  
25 Oh, there it is. If you can't see an exhibit, it's just like

1 not being able to hear. You know, raise your hand. Those of  
2 you on the back row can stand up without permission, but if  
3 anybody has any problems, just let me know.

4 We're ready now for the Defendant's opening statement and  
5 the jury is with DISH.

6 **MR. BICKS:** Thank you, Your Honor. Could I just ask  
7 to have the system on and -- thank you. Excellent.

8 Good afternoon, everyone. My name is Peter Bicks and I'm  
9 here to talk for DISH and I want to thank you before I give my  
10 opening statement for the time that you all have taken to be  
11 here. We know we've taken you away from your lives, your  
12 families, your jobs, and we appreciate it. We know the weather  
13 is tough. So thank you.

14 You probably heard the expression that there are two sides  
15 to every story. Well, in this case, there are two sides to  
16 every story and you just heard one side and now it's my turn to  
17 tell you the other side so you can hear the whole story.

18 What's the case about? Well, it involves some telephone  
19 calls that were made in 2010, that time period. They were made  
20 by a company called SSN. They were not made by DISH, so we're  
21 going to have to look real careful at what the evidence is on  
22 those calls.

23 It's also a class action. Dr. Krakauer is the  
24 representative of the class. The case will rise or fall on the  
25 facts that relate to his situation, so I'm going to ask you all

1 to listen carefully to the facts as they relate to  
2 Mr. Krakauer. The evidence will show that DISH acted  
3 professionally and responsibly when it came to the facts  
4 relating to Mr. Krakauer. Not once did Mr. Krakauer tell DISH  
5 about the calls that are at issue in this case and not once did  
6 he even talk to SSN, even though he knew SSN made the calls and  
7 he bought his DirecTV from SSN, and that's what the evidence  
8 will show.

9 Let me talk to you a little about the burden of proof and  
10 what some of the questions are going to be, and let's talk a  
11 little bit about timing.

12 On this graphic, there are some important dates. I have up  
13 there 2010 to 2011 because those are the time period during the  
14 calls to Dr. Krakauer and there were five calls that are at  
15 issue in this case. On those five calls, you will hear no  
16 evidence that DISH was even mentioned during those calls, no  
17 evidence. The calls lasted in total 2 hours -- 2 minutes 32  
18 seconds, 2 minutes and 32 seconds. And you'll hear evidence  
19 about those calls, a couple messages left on an answering  
20 machine, somebody was polite, and DISH actually never came up  
21 during any of those calls. Two minutes and 32 seconds.

22 Mr. Krakauer has had his deposition taken, so we knew ahead  
23 of time what he would say. And he said, "Frankly, I did not  
24 expect this to be a federal case." And that's what the  
25 evidence will be. Three years 3 months went by, not a peep,

1 not a letter to DISH, not a phone call to DISH, not even an  
2 e-mail. Same as to SSN. No evidence. Three years 3 months go  
3 by. Mr. Krakauer meets with a team of lawyers and a lawsuit  
4 gets filed. Never ever did anyone reach out to DISH about any  
5 of these calls to see if there was a problem and if it could be  
6 corrected and the same as to SSN.

7 Mr. Krakauer will tell you that he's bringing this case to  
8 make things right, it's not about the money; but the evidence  
9 will be that he didn't sue the company that did things wrong,  
10 SSN, even though he bought his DirecTV subscription from SSN.

11 Ladies and gentlemen, at the end of this case, the evidence  
12 will be that the Plaintiff is trying to seek a windfall for a  
13 phone call; and at the end of the case, we will ask you to find  
14 out, based on the evidence, that that doesn't make common  
15 sense. Mr. Krakauer has got the burden of proof and that's  
16 what the judge said. He will not meet his burden of proof.

17 So what's going to be the questions we're going to talk  
18 about? The Court laid it out in some of the things that were  
19 said to you. I want to talk about the evidence on these  
20 questions. The first question is was SSN DISH's agent at all  
21 times. And the word "agent" is going to have specific legal  
22 meaning in this case.

23 **THE COURT:** Okay. You'll need to limit your argument  
24 to the evidence, not the law.

25 **MR. BICKS:** Yes.

1 And the Court is going to instruct on what that means.

2 The next question is going to be was SSN acting within the  
3 scope of actual authority and then the third question is going  
4 to be are the damages in this case warranted.

5 On the first question, was SSN DISH's agent at all times,  
6 the evidence will show that Mr. Krakauer will not meet his  
7 burden of proof. He will not meet his burden of proof.

8 Was SSN acting within the scope of actual authority? The  
9 evidence on this will be absolutely critical. DISH told SSN,  
10 "Do not call Mr. Krakauer."

11 SSN told DISH, "We will not call him. We've taken him off  
12 our list."

13 The evidence will show that the calls that took place,  
14 those five, the 2 minutes and 32 seconds, were outside of the  
15 scope of any authority.

16 And then are the damages warranted. This case, ladies and  
17 gentlemen, for those 2 minutes and 32 seconds of calls, adds up  
18 to over \$25 million; and at the end of this case, we will say  
19 that that's not fair.

20 So let me tell you a little bit about DISH Network, a  
21 little history of the company, so you have things in context.  
22 DISH started about the 1980s. Three folks were involved.  
23 They're on the screen: Charlie Ergen, Cantey Ergen, and Jim  
24 DeFranco. Charlie is the CEO of DISH. Cantey is his wife and  
25 she's on the Board; and Jim DeFranco, who will be a witness in

1 this case, was one of the three cofounders. These folks got  
2 together in about 1980 and had an idea and their idea was to  
3 bring TV to places in rural America and other places. They  
4 started out with the idea of using a satellite, and here's a  
5 picture of Charlie and Cantey with one of the first DISH  
6 satellites. They pooled together \$60,000 to start a company  
7 and they had a dream of competing against General Motors and  
8 that dream became a reality.

9 What were they trying to do? They were trying to use a  
10 satellite to get up into orbit so that signals could come to  
11 places where it would be hard to get the signals, in the  
12 mountains and other places. You couldn't get cables through  
13 the mountains and the old-fashioned rabbit ears would get  
14 the -- the signals wouldn't work. So they had an idea of  
15 launching satellite so the signals could come down.

16 Here is a picture of one of the first satellites, and  
17 that's Jim DeFranco there in the plaid shirt and the jeans.  
18 He's got dark hair. When he testifies, he'll have white hair  
19 because that was a long time ago.

20 That satellite -- they almost lost that satellite and that  
21 was pretty much almost their entire investment. It fell off  
22 almost on the side of a truck. But they made some progress and  
23 they launched a rocket -- the first rocket up into space and  
24 this past December I think they launched either their  
25 eighteenth or nineteenth rocket up into space to serve almost



1 13 million customers around the United States.

2       Some of their products you may have heard from. They  
3 started with that \$60,000. Today they've got over 13 million  
4 subscribers. Here are pictures of some of their products that  
5 you all may have heard of. They were really one of the  
6 pioneers of the DVR technology we use and kind of accept as  
7 something that's out there, but DISH was one of the leaders  
8 there. One of their great products is something called the  
9 Hopper, which allows you to watch eight shows at once from room  
10 to room with only one DVR box. AutoHop, that little kangaroo  
11 you can see, allows you to skip commercials, which many  
12 consumers like. The Tailgater, that white thing over there on  
13 the side, is a device that allows you to watch TV when you're  
14 traveling, a football game or something like that. But these  
15 are some of the products that DISH came out with.

16       And I mention these because customers like them and DISH  
17 has done very, very well with consumers. And I say that  
18 because one of the things that was mentioned early is common  
19 sense and I want to put a commonsense idea out now. DISH's  
20 lifeblood is its relationship with customers. That's why the  
21 company does well and it's got great customer ratings because  
22 of those products. There's nothing that DISH would -- values  
23 more than customer relations.

24       So ask yourself does it make common sense that DISH would  
25 want people who don't want to be called and aren't interested

1 in DISH's products and receiving telemarketing calls to be  
2 called. The evidence will show that DISH does not want that  
3 and DISH does everything that it can to prevent it from  
4 happening. Word travels fast; and when word gets out that  
5 things have happened, it's not good for DISH's business.

6 DISH markets its products using independent retailers and  
7 there were during this time period approximately 3,500  
8 retailers around the United States and many of those retailers  
9 you've -- you've probably heard of: Places like Sears,  
10 RadioShack, Amazon, and companies like that. But there are  
11 also smaller retailers. SSN is one of those retailers. Ladies  
12 and gentlemen, SSN counted for less than one-half of 1 percent  
13 of subscriptions for DISH. They were -- if you want to talk  
14 about fishing, they were a minnow in an ocean and that's what  
15 the evidence will be.

16 Now, here's some of the witnesses and you'll hear from  
17 them. Jim DeFranco I mentioned. There you see he's got white  
18 hair and he's the cofounder of DISH and he's going to testify.  
19 He's going to testify towards the end of the case.

20 Amir Ahmed, he's going to testify. I think he'll be the  
21 second witness and he's over here. Mike Mills. Mike is here  
22 and Mike will be -- he'll be also testifying in the case. Mike  
23 and Amir, they're on the sales side; and you'll hear from them  
24 about why retailers are independent and not agents and how  
25 that's important to DISH's business, because the retailers are,

1 to some extent, competitors of DISH. DISH also sells directly  
2 to consumers and retailers do too, and it's a tricky  
3 relationship because when retailers have their own marketing  
4 strategies they don't always want DISH to know about them  
5 because they're worried because they're competitors. And  
6 they'll talk to you about how DISH uses retailers and how  
7 things worked with SSN and how they were less than one-half of  
8 1 percent, and you'll hear that evidence.

9 Reji Musso. Reji is here. It's Reji Jo Musso. We call  
10 her Reji. She was very important in compliance and she's going  
11 to be a witness in the case. And Bruce Werner, who is over  
12 here as well. Bruce and Reji worked together in compliance and  
13 they're going to be very important witnesses because they were  
14 dealing with SSN on compliance issues, and what you will hear  
15 from them is that they took proactive steps with SSN to do  
16 everything possible to make sure that SSN was doing things  
17 right, and the information they had was that SSN was doing a  
18 pretty decent job.

19 They had some indication of a complaint here or there, but  
20 what you'll learn in this case, ladies and gentlemen, is that  
21 when you're involved in any kind of telemarketing that you're  
22 talking about huge, huge numbers of calls. You heard  
23 1.7 million calls. So if you see a complaint -- one or two  
24 complaints in that kind of volume of calls, it's important when  
25 you hear the evidence to put things in context. And they'll

1 talk to you about the steps that they took when it came to  
2 dealing with SSN and I think, ladies and gentlemen, the  
3 evidence will show that they acted responsibly and DISH did a  
4 pretty good job.

5 So those are going to be some of the five key witnesses on  
6 the DISH side and what I think you all should remember is the  
7 Plaintiff goes first. He's got the burden of proof and he's  
8 going to cross-examine our witnesses first and so our story  
9 won't come out until it's our turn to ask them questions. So I  
10 ask that you be patient, remembering that there are two sides  
11 to every story and we don't get to tell our side until they go  
12 first.

13 So those are five key folks from DISH. They're all here.

14 I'll say one thing about Reji. She's retired from DISH and  
15 she doesn't get paid by DISH. She lives in Michigan and she  
16 came here for this case because what was said about how DISH  
17 handled things goes directly to what she did and she wanted to  
18 come here. She's got no dog in the fight because she's not  
19 even with DISH anymore, but I want you to hear that evidence  
20 and we look forward to telling that story.

21 So the first question I said is was SSN DISH's agent at all  
22 times. And if not, then that's going to be important, but  
23 that's going to be the first question, were they the agent.

24 I want to start with a contract because SSN had a contract  
25 and the contracts are important in this business. This is the

1 way these companies divide up who's responsible for what. And  
2 there was a contract here and you all will have the contract.  
3 If it's a little tough to read on the screen, don't worry  
4 because you're going to have it, but I want to talk a little  
5 bit about it because these parties had a contract and that's  
6 where they set out who was agreeing to what.

7 And the contract makes clear that SSN was an independent  
8 contractor. It's right up in the beginning right in the  
9 introduction to the contract, independent contractor. And it's  
10 also important that the contract says it's a nonexclusive  
11 contract and what that means is that SSN can sell other  
12 products if it wants to. It doesn't have to sell DISH. It can  
13 sell other company's products. And SSN was selling DirecTV.

14 And I heard comments made by Plaintiff's counsel. Ask  
15 yourself are you going to hear from a witness in this case from  
16 DirecTV who's going to come in here and testify. I don't think  
17 you're going to hear anybody from DirecTV about why or why not  
18 SSN didn't deal with them anymore. So be very careful about  
19 what the evidence is, not what a lawyer says. What I'm showing  
20 you here is a contract in the case. This is going to be what  
21 the evidence is, nonexclusive basis.

22 Now, there was an entire section in the contract on  
23 independent contractor and it wasn't something that was kind of  
24 buried somewhere else in the contract. It's right there all as  
25 plain as can be. SSN says that they are an independent

1 contractor and that's what DISH says as well. That's what both  
2 parties agreed to. And it wasn't just that it was there once.  
3 There were three contracts: 2001, 2006, and 2010. Each of  
4 those contracts says that SSN is an independent contractor.

5 They are not employees or agents and one of the questions  
6 that you're going to have to answer is was SSN an agent. The  
7 contract says that SSN was not an agent and that's what the  
8 evidence is going to be, black and white, right in the  
9 contract.

10 So you may be saying, What's the difference between an  
11 independent contractor and an agent? Companies --

12 **THE COURT:** Okay. Well, you're not going to tell them  
13 about the law. I'll tell them about that.

14 **MR. BICKS:** I'm not going to tell them about the law.

15 **THE COURT:** Okay.

16 **MR. BICKS:** If you go to an Apple store -- when you  
17 walk into Apple up at Friendly in the shopping plaza, Apple has  
18 people who wear "Apple" on their shirt. You buy a product, you  
19 want to get a business card, it's going to say "Apple" on it.  
20 If you have a problem with an Apple product, you talk to Apple.  
21 That's the way Apple runs. Best Buy is different.

22 **THE COURT:** Okay. Move on. As to all this Apple and  
23 Best Buy, who aren't here, there's not going to be any evidence  
24 about Apple and Best Buy.

25 **MR. BICKS:** Yes, Your Honor.

1           **THE COURT:** Move on.

2           **MR. BICKS:** You will see the retailer agreement in  
3 this case and you will hear how DISH deals with its retailers  
4 and you will see in all the contracts every time they are  
5 independent contractors. And not only does it call them  
6 independent contractors, but the contract makes it clear that  
7 someone like SSN, it's in their contract, can't go out and say  
8 that "We are DISH". It's very, very clear in the contract and  
9 this is what this provision says. So there's detail about what  
10 an independent contractor means in this contract and, as I say,  
11 you'll have the contract.

12           You've heard the expression "actions speak louder than  
13 words" and what you will see in this case is that it wasn't  
14 just in the contract that DISH made it clear that SSN was an  
15 independent contractor, but there were communications from DISH  
16 to its retailers that made that clear several different times.

17           One of them was something called a Facts Blast. Facts  
18 Blast is how DISH communicates with its retailers. And in this  
19 Facts Blast that you'll see in this case, it says right up in  
20 the front: Important reminder to independent retailers.  
21 Second, no retailer is permitted to represent itself as DISH  
22 Network. And then it says: The retailer agreement clearly  
23 provides that the relationship is that of an independent  
24 contractor. So this is one way that, when you look at how the  
25 parties dealt with each other, DISH reminded SSN you are an

1 independent contractor and this was in a Facts Blast.

2       There will also be evidence of what are called Retailer  
3 Chats, where DISH would communicate with its retailers about  
4 their relationship and what DISH expected. And here's an  
5 example of a Retailer Chat where DISH reminds SSN that  
6 retailers are not agents or employees of EchoStar. You'll hear  
7 the name EchoStar. That was an earlier name related for DISH,  
8 so that for this case is really the same thing as DISH. So  
9 here it is in this Retailer Chat that, again, DISH is making it  
10 clear to SSN that they are not agents or employees of EchoStar  
11 and they're independent contractor. And this is the course of  
12 how the parties dealt with each other, clear communication from  
13 DISH on this point.

14       And you'll also hear evidence from SSN in the case. Here  
15 is Sophie Tehranchi. She's going to be testifying by videotape  
16 deposition and so we know what she's going to say because we  
17 have the testimony. And she's going to say, when asked did  
18 DISH Network ever provide Satellite Systems with any phone  
19 numbers to call -- and the answer is no. Did DISH provide you  
20 with any contact information of any kind for people to call?  
21 And the answer is no. And you will hear that evidence from the  
22 SSN witness herself, Ms. Tehranchi.

23       You will also hear kind of practical, commonsense evidence  
24 about how the parties dealt with each other; and the question  
25 for you all will be was SSN the agent and what was the level of



1 control and what happened.

2 Well, here's an interesting example, ladies and gentlemen,  
3 of evidence you're going to hear. This is an e-mail from  
4 Charlie Ergen. I mentioned who Charlie is. Charlie's the CEO.  
5 And it's kind of an interesting story. Charlie got a call at  
6 his home in Colorado and Charlie got a call from SSN trying to  
7 sell Charlie DirecTV. So the CEO of DISH got a call from SSN  
8 trying to sell him DirecTV. He liked the script. He liked the  
9 message on his answering machine and he wanted to get it. So  
10 he asks his sales guy, Amir Ahmed, "Can you get that script  
11 from SSN?" He wanted it. He liked it.

12 SSN said, "No, we're not going to give you that script that  
13 you want."

14 That will be evidence, practical evidence. The CEO of DISH  
15 asks for a script from SSN and he doesn't get it and common  
16 sense would think -- when a CEO of DISH is trying to get  
17 something from a retailer, you would think the retailer would  
18 probably lean on trying to get something if the CEO wanted it,  
19 but it didn't happen here.

20 So that's kind of the practical evidence of how these  
21 parties dealt with each other. DISH didn't want to control SSN  
22 and SSN didn't want to be controlled by DISH because they were  
23 an independent retailer who had their own marketing strategies  
24 and this is an example of that.

25 This will again be testimony you'll hear from Sophie

1 Tehranchi. Did DISH Network ever provide Satellite Systems  
2 Network with any telephone lines to make calls on? The answer  
3 is no. Does DISH Network own the building where SSN's offices  
4 are? The answer is no. Did DISH Network own any of SSN's  
5 equipment? The answer is no. They're separate companies.

6 And then here's another practical example. Because it's  
7 SSN's facilities and they own things, DISH had trouble getting  
8 into their facilities when DISH wanted to make sure that  
9 communications about DISH's products are accurate. DISH is  
10 proud of the fact that when it deals with consumers it wants  
11 consumers to get accurate information. If you want to get the  
12 Hopper and you're in North Carolina, DISH wants that price to  
13 be the same price that somebody up in Maine is being told about  
14 the Hopper and DISH really wants people to get accurate product  
15 information. SSN wouldn't let DISH into its building to make  
16 sure that that was happening.

17 Again another practical example of how these parties  
18 related to each other and that will be one of the questions  
19 that you all will have to decide, independent contractor or an  
20 agent. The evidence will show, evidence like this, that  
21 Plaintiffs can't meet their burden of proof.

22 The next question is was SSN acting within the scope of  
23 their authority, did they do what they agreed to do and what  
24 DISH asked them to do or did they go outside. That will be one  
25 of the questions. What will be the evidence on that?

1       We start with the contract and here it is again three  
2 times. SSN agrees in writing that it is solely responsible for  
3 complying with the telemarketing laws. And I underlined the  
4 word "solely." "Solely" means one and the one was SSN and this  
5 is what the parties agreed to in writing.

6       And you'll hear that there's a commonsense reason for that.  
7 If you have 3,500 retailers around the United States -- and the  
8 reason there are that many retailers is because the markets are  
9 different and the marketing strategy that may work in  
10 North Carolina is not going to be the same marketing strategy  
11 that's going to work up in the northern parts of Maine, for  
12 example.

13       And when you look at the contract that I showed you, when  
14 it says they're an independent contractor, it says they're an  
15 independent contractor for marketing, not telemarketing,  
16 because the independent retailer decides what kind of marketing  
17 that they want to do.

18       What will work right around here, again, will not work in  
19 some other jurisdiction. Use of radio, use of television, use  
20 of telemarketing, which is legal, is going to be different when  
21 it comes to how effective it is depending on where you're  
22 marketing; and it's that independence which is one of the most  
23 important things of these marketing relationships for DISH; and  
24 that's why the contracts say that the retailer is solely  
25 responsible for complying with the telemarketing law.

1       The evidence will show that DISH does not operate SSN's  
2 phone systems. DISH does not choose what individuals a  
3 retailer will call. It practically would be impossible to do  
4 that even if DISH wanted to and it doesn't and the retailer  
5 doesn't want that to happen either because that's their  
6 business that they run. And this is what the contract says not  
7 just once but, the evidence will be, three times.

8       So I want to start -- and I've kind of divided this part of  
9 my presentation into three chapters because it's important in  
10 this case to keep track of time. This case, as I said,  
11 involves really 14 months, 2010 to 2011; and you'll hear  
12 evidence from the Plaintiff that goes all the way back to 2003.  
13 But I think it's going to be important to break things out and  
14 you'll see why.

15       2003 Mr. Krakauer signs up with DirecTV through SSN. He  
16 signed up through SSN and that's how SSN had his phone number,  
17 because he signed up with them.

18       The National Registry comes out. That's in 2004. That's  
19 that Do Not Call list. And companies like DISH and many  
20 companies were scrambling, I think it's fair to say, to come up  
21 with procedures to deal with this new law because it changed a  
22 lot.

23       SSN, while it was working for DirecTV, had some issues with  
24 prerecorded calls and it also had some issues with some DISH  
25 calls using prerecorded calls, ladies and gentlemen. That's

1 using a telephone system to send a message out, like a robot's  
2 voice, not a person. And SSN was doing that and DISH told them  
3 to stop. This case, ladies and gentlemen, is not about those  
4 prerecorded calls that happened in 2004. You'll hear about  
5 that. There were a handful, not a huge amount, but there were  
6 some issues. And SSN had some issues with DirecTV, too. But  
7 not one person who got a prerecorded call is bringing a claim  
8 in this lawsuit. That's not what this case is about.

9 DISH took some steps to improve its compliance to deal with  
10 a bunch of issues but -- including some of these prerecorded  
11 calls, and it centralized its compliance -- and you'll hear  
12 from Bruce and Reji about that -- within the retail services  
13 department and it made some changes. Reji actually wasn't even  
14 hired at this point in time. So if you hear evidence of 2003,  
15 2004, it's not really what this case is about. And DISH took  
16 steps to deal with that. That's kind of 2003 to 2004, '5, in  
17 that time period.

18 2006 to 2009, that's the time period leading up to the  
19 calls that are important in this case. DISH hires Reji Musso  
20 to step in and help with compliance. She builds out a staff of  
21 about six people to deal with compliance issues all coming off  
22 of the 2004 change in the law and to improve procedures at  
23 DISH.

24 DISH has a way to investigate complaints, a formal process.  
25 And you can imagine with this amount of telemarketing and other

1 marketing activities a company does get complaints, and they  
2 have to have a way to investigate them, and DISH set up a whole  
3 system and took proactive measures to deal with that. They  
4 sent out Fact Blasts, the things I talked about, to tell  
5 retailers about telemarketing issues, the TCPA. That's what  
6 the statute is called. And DISH sent out that kind of  
7 information.

8       They had the Retailer Chats on telemarketing compliance  
9 where very senior people, including the cofounder, Jim  
10 DeFranco, were talking to retailers about the importance of  
11 following the telemarketing laws. And you'll hear evidence of  
12 this and I think it's going to be important evidence because it  
13 shows you that DISH was paying attention to this from the top  
14 of the company all the way down. The cofounder was on Retailer  
15 Chats with telemarketers and also with other retailers and  
16 saying, "You've got to follow the laws."

17       Compliance training. You'll see something here, Team  
18 Summits. That's when DISH would get together with its  
19 retailers. It had compliance training at those summits and it  
20 invited PossibleNOW to come in. You heard Plaintiff's counsel  
21 talk about PossibleNOW. He said I was going to mention it, I  
22 don't know, thousands of times. I'm not going to mention it  
23 thousands of times, but I'm going to say a little bit about it  
24 because it's important.

25       PossibleNOW is a company that is probably the leader in the

1 market at making sure Do Not Call lists are scrubbed.  
2 "Scrubbed" means you take a Do Not Call list and you compare it  
3 to the National Registry list and you mesh them together and  
4 you do computer stuff on them and you make sure that the  
5 numbers that are not supposed to be called are scrubbed out.  
6 So when you hear the phrase "scrubbing," that's what that's all  
7 about.

8 DISH started working with PossibleNOW in about 2006 and  
9 strongly encouraged its retailers to use PossibleNOW to make  
10 sure that there weren't telemarketing issues, and PossibleNOW  
11 came to Team Summit retailer meetings to help retailers see how  
12 important it was to follow compliance and to work with them.

13 You'll hear from Reji and Bruce, and this is what they will  
14 testify: That they educated and assisted SSN with compliance,  
15 including explaining PossibleNOW's role as a resource.  
16 PossibleNOW is the market leader. They're the ones who keep  
17 track of the National Do Not Call Registry for the government.  
18 They're hired to do that. They're the best in the business.

19 They will say that DISH investigated complaints to identify  
20 retailers responsible for those complaints. And the evidence  
21 will be that it is hard a lot of times -- you can imagine, if  
22 you get a call that you don't want, it's hard a lot of times to  
23 figure out where that call comes from; and DISH had set up a  
24 way to investigate; and it's not as easy as it may seem. If  
25 somebody says, "I got a call from an 800 number," it's not

1 easy. It takes a lot of work, and you'll hear from Reji and  
2 Bruce about the kind of work that they put in on these  
3 investigations.

4 And then when there were complaints relating to SSN -- and  
5 there were a handful over a several-year period -- you will  
6 hear the information DISH got and how they reacted to that; and  
7 the evidence will show that they acted both professionally,  
8 quickly, responsibly, and reasonably.

9 I mentioned these Fact Blasts and where DISH would tell  
10 retailers how important it was to follow the telemarketing  
11 laws. Here is an example and the statement down at the bottom  
12 that EchoStar takes telemarketing violations very seriously.  
13 For obvious reasons, it's bad for their business when customers  
14 get ticked off and they reinforce that message because it's  
15 important to the company.

16 Important reminders. "Here are the telemarketing laws.  
17 Make sure you follow them." Because remember the evidence is  
18 that the contract said that SSN has to comply with the  
19 telemarketing laws and here is DISH reinforcing how important  
20 that is.

21 PossibleNOW they brought on and it's very important timing,  
22 ladies and gentlemen, because the calls, again, here took place  
23 in 2010, 2011. DISH brings on PossibleNOW 2008. SSN signs up  
24 with PossibleNOW in October of 2008. Here's an important  
25 message coming out from DISH to its retailers: Enroll with



1 PossibleNOW. And you'll see this highlighted sentence. It  
2 says: To facilitate retailer scrubbing of customer leads  
3 against lists. And that's what PossibleNOW does. That's what  
4 their business is. So DISH is getting the word out to use  
5 PossibleNOW.

6 This is a communication with SSN and DISH, and SSN is  
7 saying to DISH that they are working with PossibleNOW October  
8 of 2008. This is before the calls that are even at issue in  
9 this case. DISH is being told, "We're using PossibleNOW." And  
10 this is evidence of that that you'll see.

11 This is April of 2009. DISH -- somebody says to DISH  
12 somebody shouldn't have called me. DISH reached out to SSN.  
13 "What's going on here?"

14 And they're saying, "We're using PossibleNOW. We're  
15 scrubbing our lists."

16 And here's evidence of actually a receipt out of the files  
17 of SSN that you'll be able to see in this case. They scrubbed  
18 1,500, it looks like, 62 records. And then you'll see there at  
19 the bottom 108 were Do Not Call. They had actually receipts  
20 that they were scrubbing these phone numbers and here is an  
21 example. They were in fact scrubbing. But one of the things  
22 you'll learn in this case is mistakes happen when there are  
23 very, very large groups of data that are being scrubbed against  
24 each other, but this is evidence that DISH had that SSN was in  
25 fact scrubbing. So that's what was kind of going on in 2006 to

1 2009. I will call that Chapter 2 in the case.

2 So now let's talk about Chapter 3, which are the calls that  
3 we're talking about here. DISH receives two consumer  
4 complaints about SSN and investigates them, because one of the  
5 questions that probably will come through your mind in the case  
6 is why didn't DISH terminate SSN earlier than it did. DISH did  
7 end up terminating SSN. And the people who were responsible  
8 for making the calls at the time had this kind of information.  
9 There were two consumer complaints during this time period  
10 about SSN and they were investigated by DISH. SSN was put on  
11 hold in August of 2013. And you'll hear evidence about what  
12 DISH found out when it did that investigation, and there were  
13 good explanations for how that -- for how that could happen  
14 when it comes to scrubbing and other things, but it's important  
15 to put that in perspective.

16 Let me talk about the timeline of Mr. Krakauer's complaint  
17 to DISH. This is what the evidence will show because, again,  
18 the timing is very important. I told you when I first stood up  
19 that this shows that DISH acted responsibly and professionally.  
20 So what exactly will the evidence show on the timeline? 2003,  
21 that's when Mr. Krakauer signs up for DirecTV. May of 2009,  
22 it's May 9th, he got a telemarketing call from SSN.

23 And remember SSN was the company that sold him his DirecTV.  
24 They had his information and they thought that they had a  
25 business relationship with him, which you'll hear about, an

1 established business relationship, which in telemarketing can  
2 allow a telemarketer call you if they have this business  
3 relationship.

4 **MR. GLASSER:** Objection.

5 **MR. BICKS:** This is what they say they thought.

6 **THE COURT:** As to what the law is, you'll take that  
7 from me.

8 **MR. BICKS:** Absolutely.

9 **THE COURT:** Go ahead.

10 **MR. BICKS:** So on May 9th, Mr. Krakauer gets a call  
11 and he reaches out and he says something to DISH. DISH  
12 investigates. The compliance group looks at that. They're  
13 undertaking an investigation. They confirm and they determine  
14 that SSN called Mr. Krakauer.

15 They reach out to SSN the day after they conclude that that  
16 call came from SSN. They reach out and they say, "We found out  
17 about this. We investigated it. We concluded it came from  
18 you. Don't do it." Day after.

19 They send a letter following up saying that -- telling them  
20 about Mr. Krakauer's complaint and asking for specific details:  
21 Scrubbing the list, where did it come from, so on and so forth.  
22 And this is important because this is what the letter said:  
23 "Immediately ensure that this phone number has been added to  
24 your internal Do Not Call list." This is what DISH says to  
25 SSN.

1       And remember the question did SSN act outside of what it  
2 was supposed to do. DISH says, "Add this list to your internal  
3 list." And it says, talking about the contract, you're  
4 required to comply with the applicable laws. That was the part  
5 of the contract I spoke about. And it also said there could be  
6 disciplinary action if this isn't done. And this is what DISH  
7 communicated.

8       SSN responds immediately. This is important because SSN,  
9 when there were a couple of these complaints, would immediately  
10 respond to DISH, wouldn't be sitting there waiting for months.  
11 They would get back. And they responded to this and they said,  
12 "We think it was a mistake and we've put Mr. Krakauer on our Do  
13 Not Call list. We didn't know that he didn't want to be called  
14 by us. We had dealt with him before," going back to 2003. And  
15 they said that they would not call him again.

16       And this is the letter, you'll see it, where they  
17 responded. They put him on their list the same day that DISH  
18 asked them not to do it and they say here -- right here in the  
19 second paragraph, "Prior to this complaint, we did not know  
20 that Mr. Krakauer wanted off of our calling list." And they  
21 say they always comply with the laws and they say that they  
22 take this seriously. They respond the same day saying, "We've  
23 put him on our list. We thought we could call him because we  
24 had dealt with him before and we've put him on the list." And  
25 then they had deleted his name from their database. That's the

1 information that DISH had.

2       So this is then what the evidence will show on this set of  
3 facts because it's so important to the case on one of the key  
4 questions, outside of the scope. One, SSN did call  
5 Mr. Krakauer. DISH investigated and determined that SSN made  
6 the call.

7       Step two, DISH says to SSN, "Add Mr. Krakauer's number to  
8 your Do Not Call Registry and do not call him again."

9       SSN says to DISH, "We have already deleted his number and  
10 will not call him again."

11       That's what the evidence will show on this important  
12 question did SSN do what DISH said and did they do what they  
13 said they would do.

14       And then what it turns out in this case, 14 months later --  
15 go by, and SSN called Mr. Krakauer five times for the 2 minutes  
16 and 32 seconds, and DISH did not know about that. That's what  
17 the evidence will be. But this, ladies and gentlemen, evidence  
18 will show that SSN went directly outside what DISH said.  
19 That's what these facts are, outside of the scope. That's what  
20 the evidence will be, not following specific instructions that  
21 DISH gave.

22       After these calls -- it's important because a year goes by,  
23 right, and DISH -- after this May 2009 call, the letters I just  
24 showed and not one thing happened. DISH had no information  
25 that there were any issues from SSN.

1       Here's an e-mail you'll see from Reji Musso to the folks at  
2 SSN where they say: "A long time ago -- Sophie will remember,  
3 when I first came on to retail services" -- that's 2006 --  
4 "there were some issues, but not again until now." And they  
5 see a call.

6       And there's a discussion here, you'll see the evidence,  
7 about did this call -- did it have an established business  
8 relationship and Reji says: "Make sure you check with your  
9 legal counsel about whether or not you had an established  
10 business relationship," and reminds them, "You should use  
11 PossibleNOW."

12       And she makes the comment that a complaint is not always --  
13 is an allegation and it's very important -- you'll hear in this  
14 case that a lot of times DISH will get a complaint on a  
15 telemarketing issue like that and it turns out that the person  
16 did -- what -- did deal with DISH or did reach out to DISH and  
17 that happens here and that will be the evidence on this point.

18       The evidence will be that SSN's overall compliance to DISH  
19 looked in pretty good shape at this time. That was the  
20 information that they had.

21       And this is important because Plaintiff's counsel said that  
22 there were millions of calls made in 2010 and 2011, millions.  
23 I think the evidence, ladies and gentlemen, will be in this  
24 case 1.7 million calls were made by SSN, okay, but DISH had two  
25 indications of a complaint during this time period, two out of

1 1.7 million.

2 And you'll see those two little red dots. They're probably  
3 hard to see. But when you're in telemarketing compliance and  
4 you know that somebody makes millions of calls and you only  
5 hear two complaints to people whose job this is, that shows  
6 things are in pretty good shape and that's what they -- the  
7 information that they had at the time.

8 So this lawsuit is filed in April 2014. DISH learns about  
9 these five calls to Dr. Krakauer, the 2 minutes 32 seconds, and  
10 they find out about those calls. And ultimately SSN -- SSN is  
11 actually put on hold in August 2013 before this case is filed;  
12 and when you're put on hold, you're shut off, okay. So DISH  
13 shut them off. They're ultimately formally terminated after  
14 that, but during that time period between August 2013 and their  
15 retailer agreement being terminated, they weren't allowed to do  
16 any sales with DISH.

17 And this is the sequence of those calls, the 2 minutes and  
18 32 seconds, and the evidence will show that Mr. Krakauer never  
19 reached out to DISH about those calls and that DISH actually  
20 wasn't even mentioned during any of those calls. There were a  
21 couple calls to his answering machine that I think the evidence  
22 will be that he deleted. And that's -- that's what the  
23 evidence was at this time, and the evidence will be that DISH  
24 didn't know this until much later, and that's the 2 minutes and  
25 32 seconds.

1       So the evidence on this will be important that SSN told  
2 DISH then that it would not call Mr. Krakauer. It told DISH it  
3 was scrubbing the lists -- and you saw some of the -- a  
4 receipt, I showed you one -- and that it complied with the law.  
5 We do know now that they called Mr. Krakauer after that 2  
6 minutes and 32 seconds, and it must be that they failed to  
7 scrub properly all lists. We don't know that for sure, but  
8 clearly it wasn't 100 percent scrubbed right, but there can be  
9 mistakes in scrubbing.

10       But the evidence is that SSN didn't properly scrub and that  
11 SSN didn't comply with the law, and the evidence will be that  
12 they acted outside of the scope because the clear instruction  
13 was that they were supposed to do that.

14       So are the damages warranted? I told you, ladies and  
15 gentlemen, that this is a case where the Plaintiffs, when you  
16 add up those numbers, are -- it's over \$25 million based on  
17 those 2 minutes and 32 seconds.

18               **THE COURT:** Well, I think that's a bit misleading  
19 so --

20               **MR. BICKS:** I don't want to be misleading, Your Honor.

21               **THE COURT:** If you're talking about 51,000 calls, it  
22 can't -- this is 5 calls you're talking about 2 1/2 minutes.

23               **MR. BICKS:** Yeah. And based on these five calls and  
24 the allegations of the class, the witness who will be there  
25 talking about the five calls to him, and the statistics that



1 will be put on these other calls, which are -- we will show  
2 have some questions with them, and you won't hear any other  
3 witness come in this courtroom and talk about any call, that  
4 the amount of recovery here is over \$25 million.

5 And at the end of the case, we will say that that's not  
6 going to be fair and that the evidence is going to show here  
7 that SSN was not DISH's agent in the case, that SSN acted  
8 outside the scope of any authority, and that the damages that  
9 are sought in this case are not warranted.

10 So I thank you for your time. I know I went on, but that's  
11 kind of a road map of what the evidence is going to be. So  
12 thank you very much.

13 **THE COURT:** Okay. Thank you, Mr. Bicks.

14 All right. Ladies and gentlemen, we'll start in the  
15 morning at 9:30 with the first witness in the case. Even  
16 though you've heard the opening statements, of course, as I  
17 told you, that's not evidence and you'll need to hear the  
18 evidence from the witnesses and the exhibits themselves. So  
19 we'll start at 9:30.

20 Over the evening recess, please do not discuss the case  
21 among yourselves or with anyone else. Don't have any contact  
22 with the lawyers, parties or witnesses. Do not conduct any  
23 independent investigation. No tweeting, no Instagramming, no  
24 blogging. And don't talk to any of your family members or  
25 coworkers or neighbors about the case beyond, you know, the

1 logistics of saying that you're here and what your schedule is.  
2 No comment or discussion about the substance.

3 Also, this is an old building. Sometimes it's cold,  
4 sometimes it's hot. There are ways in which I have a lot of  
5 power, but I cannot seem to have any power over the heat, so I  
6 do suggest to you you bring a coat and a sweater and be  
7 prepared for some fluctuations in the temperature over the  
8 course of the trial.

9 And if any of you have a cold or you need water in the  
10 courtroom while the trial is going on, please bring one of the  
11 bottles with a lid because stuff gets spilled. Please don't  
12 bring anything in an open top and don't bring anything other  
13 than water because they don't replace the carpet very often,  
14 okay.

15 All right. Thank you all for your time. Leave your notes  
16 in your chair. You're excused to your jury room and you can  
17 leave from the hallway there. We'll see you in the morning at  
18 9:30.

19 (The jury left the courtroom.)

20 **THE COURT:** Okay. What do we need to take up before  
21 we stop for the day other than these two telephone requests,  
22 smartphone requests? Anything for the Plaintiff?

23 **MR. BARRETT:** Your Honor, there are a couple matters.  
24 We felt that the opening statement really intruded  
25 significantly into statements about the law and we would ask

1 the Court consider an appropriate limiting instruction  
2 regarding the law. Scope of actual authority is a matter that  
3 came up in the opening, as well as EBR, so we believe that  
4 there needs to be some clarification that the law will come  
5 from Your Honor and not from counsel.

6           **THE COURT:** All right. Well, certainly there was a  
7 little more about the law than would have been preferable, but  
8 I do think I interrupted a couple of times and told them that  
9 thing, just that. I don't think I need to do anything else.  
10 If there's particular aspects of the law that need to be  
11 addressed, I can do that during the course of a witness's  
12 testimony if it would be helpful. You all can -- either side  
13 can draft something up. You know, I would prefer to do it at  
14 the end of the case, but I did not cover EBR in my initial  
15 instructions, so I don't know if there's -- I'll just leave  
16 that for another day.

17           So anything else for the Plaintiff?

18           **MR. BARRETT:** Yes, Your Honor, there is another  
19 matter. You recall the motions in limine. We moved to exclude  
20 a couple of letters that were written to Dr. Krakauer back in  
21 2014 advising him that he had certain rights and inviting him  
22 to contact counsel, and Your Honor had excluded that in the  
23 motion in limine ruling, those two letters.

24           The statements in opening about three years going by, 2014  
25 until Dr. Krakauer filed his lawsuit, treads pretty close to

1 issues that are presented in that letter and will require some  
2 clarifying testimony from Dr. Krakauer about why he filed the  
3 lawsuit and what he learned, which, of course, intrudes closely  
4 again to the letter that he received back in 2014 that Your  
5 Honor has excluded.

6 It's kind of a perilous path for us to direct questioning  
7 on that point. We want to ensure that we do not open any doors  
8 with respect to that issue, but we do need to clarify what  
9 Dr. Krakauer learned about his rights and when, and we do not  
10 want to intrude upon Your Honor's ruling. We also don't want  
11 to intrude upon any advice or information that Dr. Krakauer  
12 received from us at that time.

13 So I'm raising that kind of as a precautionary issue. We  
14 do not want to open the door. We do intend to elicit that  
15 testimony in response to opening statement and we simply wanted  
16 to bring that matter before the Court.

17 **THE COURT:** All right. Thank you for letting me know.

18 **MR. GLASSER:** So I guess the question is if we ask him  
19 why did -- why did you not sue prior to when you sued and he  
20 says, "Because I didn't know about class actions until 2014 and  
21 that this had happened to lots of people," does the Court  
22 believe that would open the door and undermine the motion in  
23 limine and bring in all this other stuff? I feel like we've  
24 been baited to do that and we should be able to respond to the  
25 idea that he just sat around.

1           **THE COURT:** Well, I mean, I don't know exactly what  
2 he's going to say so I can't really rule in advance, but, you  
3 know, I don't have any problem with him explaining his  
4 motivation. You know, that -- that seems like a fair thing  
5 so --

6           **MR. BICKS:** Well, first of all, Your Honor, your in  
7 limine ruling said we could not introduce into evidence written  
8 communications with his counsel. I didn't show any of those  
9 letters.

10          **THE COURT:** Right.

11          **MR. BICKS:** All I said was a meeting took place and a  
12 lawsuit got filed. That's all that I said. And so, first of  
13 all, I was mindful of your in limine rulings and that's why I  
14 didn't publish or even refer to letters or communications. I  
15 just said a meeting took place so people can see on a timeline  
16 when the case got filed compared to the calls.

17          So I -- I have told -- Your Honor, I don't know what, you  
18 know, Mr. Krakauer is going to say about his motivations, but I  
19 had mentioned to Your Honor, you know, that if he starts  
20 getting into why, you know, he brought the lawsuit and he  
21 starts opening things up, you know, I will deal with what would  
22 be permissible on cross at that point.

23          **THE COURT:** Right. I mean, I'm not sure I can really  
24 rule on it. I mean, certainly an inference one could draw from  
25 the opening statement would be that he was motivated to sue

1 because he met with some lawyers. Now, there are other ways to  
2 interpret that argument as well -- that opening statement as  
3 well. So, you know, I don't know how to rule on it until I  
4 hear what he says.

5 **MR. GLASSER:** Okay.

6 **THE COURT:** You know, just general questions about his  
7 motivation that don't lead to long speeches, you know, we  
8 shouldn't have any problems.

9 **MR. GLASSER:** Thank you, Your Honor. That's it for  
10 the Plaintiff.

11 **THE COURT:** Anything the Defendant wants to address  
12 before we stop for the day?

13 **MS. ECHTMAN:** Your Honor, when we spoke on Friday, I  
14 mentioned that we had an issue about some expert exhibits and  
15 this relates directly to motions in limine as well. Your Honor  
16 will recall that Plaintiff moved in limine to exclude all of  
17 the defense Exhibit 31 data summaries and Your Honor ruled that  
18 we could not use those exhibits in our affirmative case, in  
19 cross-examination for any purpose.

20 Since that time we have had some back and forth about those  
21 defense categories and there's a stipulation that's now been  
22 entered into and that the Court, I believe, will be reading to  
23 the jury.

24 Recently, within the last two weeks, Plaintiff's counsel  
25 gave us some new exhibits that they want to use with their

1 expert and they are portions of our old Exhibit 31 summaries  
2 that were precluded for all purposes. And so we said, "If  
3 you're going to use them, then we want to use the rest of  
4 them." And the response we got was no.

5 So, you know, this gets back to the goose-gander. They  
6 can't add new exhibits and use them with their expert when they  
7 were not produced as part of expert discovery. They were  
8 actually precluded based on their own motion; and if you're  
9 going to let them use it, then we've got to be able to use our  
10 summaries for all purposes with our witnesses as well. We  
11 think it's got to be a level playing field here. They can't  
12 come out with new expert exhibits to elicit new expert  
13 testimony that we've never heard before based on our exhibits  
14 that Your Honor precluded based on their motion.

15 **THE COURT:** Okay. Is this the --

16 **MS. ECHTMAN:** So it's not what's attached to the  
17 stipulation actually. They made their own new versions and  
18 they want to use them affirmatively with their expert. We have  
19 no idea what their expert is going to say about that.

20 **THE COURT:** In connection with Ms. Verkhovskaya.

21 **MS. ECHTMAN:** Verkhovskaya's affirmative testimony.  
22 There are several exhibits. One is called -- I believe it's  
23 PX2000 and what that is -- it's got a cover sheet that says  
24 there are approximately -- you know, it's got the number of  
25 telephone numbers, and it's got the number of phone numbers,

1 and then there's an attachment that lists every phone number  
2 and how many calls to each of those phone numbers. I think  
3 that's fair because that lets everyone know what the scope of  
4 the class is. Right, those are the phone numbers that they're  
5 suing on that are left in the class and we whittled them down.

6 But on top of that, they have an exhibit that they want to  
7 use with their expert that relates to every one of the call  
8 buckets that are in the stipulation and they want to have their  
9 expert affirmatively testify about those when they were never  
10 part of that expert's opinions. They're actually exhibits that  
11 we developed in rebuttal, and now they want to make them part  
12 of the case in chief and won't let us use other portions that  
13 we think are relevant that have the supporting data for those  
14 exhibits.

15 **THE COURT:** All right. What's the Plaintiff say?

16 **MR. BARRETT:** Your Honor, that's not correct.  
17 Exhibits 2001 through 2007 consist of nothing more than the  
18 telephone numbers that are within the call categories that the  
19 jury is going to have to resolve, the call categories that Your  
20 Honor developed for the verdict form. So they are particular  
21 challenges. For example, did the LexisNexis data show that  
22 this telephone number is unknown at a certain point in the  
23 class period and should that preclude the jury from finding  
24 that that was a residential number.

25 It's not new analysis. It's the telephone numbers that are



1 in the stipulations that we reached with DISH several months  
2 ago and that -- actually several weeks ago and that Your Honor  
3 has adopted and approved. So it's telephone numbers and it's  
4 call counts.

5 So, first of all, I don't think there was an accurate  
6 description of what these are. It's the telephone numbers that  
7 we've all agreed to filed with the Court regarding the  
8 categories, the categorical challenges that would be on the  
9 verdict form. It's a summary document that shows nothing more  
10 than the numbers, as I said, the call counts, but also it  
11 totals up the calls and the numbers precisely as the  
12 stipulation did. So it's the stipulation. It's not something  
13 new.

14 But beyond that, Your Honor, this is premature. This  
15 issue -- we have not presented this evidence. They do not  
16 know -- you know, we don't have to disclose exactly how we are  
17 going to present this evidence. We have to disclose the  
18 exhibit, which we did last week or sooner than that, to allow  
19 them to check it for accuracy. They checked it for accuracy.  
20 They actually alerted us to some inaccuracies, and we revised  
21 the exhibit and sent it back to them, so there's nothing  
22 inaccurate. It's a summary of voluminous information that our  
23 expert might use on the witness stand.

24 **MS. ECHTMAN:** Your Honor, if I just might respond to  
25 the assertion that what I informed you of was inaccurate. It's

1 not. It's actually the Plaintiff taking our work, our data  
2 summaries that they said were expert work and weren't merely  
3 summaries, because each of them are a portion of what was  
4 originally in our Exhibit 31s before we started working  
5 collaboratively to narrow them and refine them and make sure we  
6 agreed on what was fairly in them. Now --

7 **THE COURT:** So what -- what would you want to do  
8 beyond what's --

9 **MS. ECHTMAN:** So all they have are the phone numbers  
10 and the call counts in each one, and what I was ready to try to  
11 talk to Mr. Barrett about is if you want to use these that just  
12 have the phone numbers and the call counts, then we also want  
13 to use all of the LexisNexis data that supports it.

14 And we provided them with excerpts from the LexisNexis  
15 data, just exactly pulled from those files that relate to all  
16 of those phone numbers, and similarly all of the Five9  
17 telephone records that relate to those phone numbers and said,  
18 "If you're going to use that with your expert, we want to use  
19 the rest of it with our expert."

20 And the answer was, "No, you can't."

21 **THE COURT:** What would it -- I guess I'm not really  
22 understanding exactly what -- for what purpose the Plaintiff  
23 would use it, nor am I understanding for what purpose the  
24 Defendant would use it. I mean, you're describing it to me,  
25 but you're not telling me why it's relevant or why it's going

1 to be helpful to the jury. I mean, I don't really --

2 **MS. ECHTMAN:** And we don't know for what purpose the  
3 Plaintiff is going to use it because the Plaintiff's expert  
4 never gave any opinions on these particular defensive challenge  
5 buckets; and if they want their expert to give new opinions on  
6 them, we need to know what that's going to be. We've had no  
7 information from their expert about what she might possibly say  
8 about these things because it's not part of the work that she  
9 did with respect to their case in chief. And they currently  
10 have a ruling that our expert, Debra Aron, can't testify about  
11 any of this. So it's very lopsided here where now they want to  
12 use these --

13 **THE COURT:** I am not following. I mean, I -- you  
14 know, I am -- I mean, I hear what you're saying, but I can't --  
15 I'm not really following why -- what -- I mean, I'm not  
16 disagreeing with you. I just am not understanding because --  
17 and you're obviously not going to be able to explain to me why  
18 the Plaintiff wants to use this evidence. So I'm just going to  
19 wait because I don't understand and I -- I'm going to wait and  
20 see what they want to use it for; and, you know, if they open  
21 some door, we'll -- you know, we'll talk.

22 **MS. ECHTMAN:** All right. So our position is they  
23 haven't disclosed what their expert's opinions might possibly  
24 be about these summaries that were originally precluded -- that  
25 we were precluded from using and if they're going -- we object

1 to their expert using them and giving any new opinions about  
2 them that haven't been disclosed; and just for the record, if  
3 the Court is inclined to let them do it, which we don't think  
4 the Court should --

5 **THE COURT:** I'm not saying that one way or the other.  
6 I'm pretty sure what I just said was I don't know enough about  
7 it to rule, so you're going to have to repeat your objections  
8 when I do know enough about it to rule in light of what I then  
9 do know.

10 I mean, you can keep talking if you want to right now, but  
11 it's really -- it's not being that helpful to me because I  
12 don't understand and I don't think I can understand until this  
13 is presented to me in some different kind of way. So I'm just  
14 not really getting what the Plaintiff might use it for and how  
15 this might come up. So when we get there, just object and  
16 we'll take it up at that point.

17 **MS. ECHTMAN:** Thank you, Your Honor.

18 **THE COURT:** Okay. Glad to deal with it then.

19 What else do we need to deal with today?

20 **MR. GLASSER:** Nothing from the Plaintiff, Your Honor.

21 **THE COURT:** Anything else from the Defendant?

22 **MR. BICKS:** No, Your Honor.

23 **THE COURT:** All right. So let's see. We have a  
24 couple of folks who wanted to bring their smartphones in. Are  
25 these Mr. Dodge and -- I don't know if it's Mr. or Ms. Kitei.

1           **MR. BICKS:** Kitei.

2           **THE COURT:** They're both lawyers?

3           **MR. BICKS:** Yes, Mr. Dodge is DISH's general counsel.  
4 He's right here. This is Mr. Dodge.

5           And Mr. Kitei is one of the DISH lawyers who has been  
6 working on the case.

7           **THE COURT:** All right. Well, that's -- as long as  
8 they fill out the form, that's fine. I don't, you know --  
9 don't use your phone in the courtroom while court is in  
10 session. That's my main rule for everybody and even if you're  
11 sitting, you know, in the back because it's obvious when that  
12 happens, and it's distracting to me and the jurors. So I just  
13 repeat that for everybody. They can do that. I don't know if  
14 our IT people are still here.

15          But, Ms. Sanders, you can communicate with them about that.

16          All right. Anything else? No? All right. Good.

17          I have not reduced the time, but obviously we aren't going  
18 to finish by next Friday if you all use all of the time. The  
19 time was calculated when I thought we had an internal Do Not  
20 Call issue, which is gone. So, you know, I'm assuming you all  
21 are -- we're going to finish and you all told me last week on  
22 the phone that we would, so I'm not really going to make any  
23 adjustments. I'm just going to rely on you to do it within --  
24 you know, within that schedule, unless I start having some  
25 concerns about it. But it sounded like you all have been

1 communicating about that and nobody had any real worries.

2 Okay. Anything else?

3 She is going to keep -- continue to keep time.

4 All right. We'll be in recess until 9:30 tomorrow morning.

5 (Proceedings concluded at 5 p.m.)

6

7

**C E R T I F I C A T E**

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

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

16

17



18

19 Lori Russell, RMR, CRR  
20 Official Court Reporter

21 Date: 1/25/17

22

23

24

25

# EXHIBIT 84

# EXHIBIT 84

JA005104  
003972

TX 102-004366

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 11, 2017  
DISH NETWORK, L.L.C., \* 9:30 a.m.  
\*  
Defendant. \*  
\*\*\*\*\*

**DAILY TRANSCRIPT OF TRIAL TESTIMONY**  
BEFORE THE HONORABLE CATHERINE C. EAGLES,  
UNITED STATES DISTRICT JUDGE, and a jury.

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TX 102-004367



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

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TX 102-004368

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## PLAINTIFF'S EXHIBITS

9	NO.:	DESCRIPTION:	ADMIT
10	PX26		107
11	PX28		138
12	PX55		55
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1	<b>DEFENSE EXHIBITS</b>		
2	NO.:	DESCRIPTION:	ADMIT
3	DX63		36
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6			
7	<b>JOINT EXHIBITS</b>		
8	NO.:	DESCRIPTION	ADMIT
9	1		107
10	2		140
11	3		209
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TX 102-004370

**P R O C E E D I N G S**

1  
2           **THE COURT:** Good morning. Is there anything we need  
3 to take up before the jury comes in?

4           **MR. BARRETT:** Your Honor, one housekeeping matter. We  
5 have a replacement exhibit, PX24, for Your Honor's and the  
6 Court's trial exhibit notebooks. We've provided a copy of this  
7 to -- to DISH. And if I may, perhaps, hand this to  
8 Ms. Sanders?

9           **THE COURT:** All right.

10          **MR. BARRETT:** I would do whatever you would like.

11          **THE COURT:** You can.

12          **MR. BARRETT:** Thank you.

13          **THE COURT:** Anything else?

14          **MR. BARRETT:** The only other housekeeping matter, Your  
15 Honor, is when I question the witness, I have this portable --  
16 may I stand here behind the table and use the ELMO while I  
17 question the witness?

18          **THE COURT:** Yes, you may.

19          **MR. BARRETT:** Thank you.

20          **THE COURT:** Anything for the Defendants before the  
21 jury comes in?

22          **MR. BICKS:** Nothing, Your Honor.

23          **THE COURT:** All right. You may bring the jury in.

24 All right. There are some wires, you know, associated with  
25 the ELMO. So anybody walking around the well, please don't

1 fall.

2 Is it hot in here?

3 **MR. BARRETT:** I suppose that brings up another matter.  
4 I may need to spray my throat with this from time to time. I'm  
5 hanging in there.

6 **THE COURT:** Go ahead. I'm at the tail end of a cold.  
7 The clerk has called to see if they can make it less hot.

8 (The jury entered the courtroom.)

9 **THE COURT:** All right. Good morning, ladies and  
10 gentlemen. I'm glad you all made it here safely and that all  
11 of the snow is melting, and we're ready to get started. We  
12 have called about the heat. It's quite warm in here.  
13 Hopefully, it will cool off a little bit to a better  
14 temperature shortly.

15 I think we're ready to get going, and the Plaintiff can  
16 call its first witness.

17 **MR. BARRETT:** Thank you, Your Honor. The Plaintiff  
18 calls Thomas Krakauer.

19 **THOMAS KRAKAUER, PLAINTIFF'S WITNESS, SWORN**

20 **DIRECT EXAMINATION**

21 **BY MR. BARRETT:**

22 Q. Good morning, sir.

23 A. Good morning.

24 Q. Could you please tell the jury your name.

25 A. My name is Thomas Krakauer.

1 Q. All right. Dr. Krakauer, where do you live?

2 A. I live in Durham County -- northern Durham County in the  
3 township of Bahama.

4 Q. And how long have you lived there?

5 A. Since 1985.

6 Q. Do you work?

7 A. I'm retired.

8 Q. And retired from what?

9 A. I'm retired from the North Carolina Museum of Life and  
10 Science.

11 Q. What was your job there?

12 A. I was a chief executive officer.

13 Q. And when did you become chief executive officer at the  
14 museum?

15 A. In 1985, when I moved to North Carolina.

16 Q. Now, are you a medical doctor?

17 A. No, I'm a Ph.D.

18 Q. And what is your Ph.D. field?

19 A. It's in zoology.

20 Q. I would like to ask you some questions about this lawsuit.  
21 Did you bring this lawsuit on your own behalf?

22 A. I brought it as an enforcement effort. The federal Do Not  
23 Call List, the TCPA, says that if somebody receives more than  
24 two phone calls in a year, they're authorized to bring suit  
25 against the company that filed those call -- placed those

1 calls.

2 Q. So on whose behalf did you bring the lawsuit?

3 A. I brought the lawsuit on behalf of a class of 18,000  
4 citizens.

5 Q. What is your role in this lawsuit?

6 A. I'm the class representative.

7 Q. And what does that mean to you, sir?

8 A. That means three things: I have to be generally familiar  
9 with the progress of the case, I have to participate in events  
10 like this trial, and I also -- I think it very important, I  
11 have to be loyal and faithful to the rest of the class so that  
12 I represent their interests, not my own.

13 Q. Have you ever been a class representative in a lawsuit  
14 before?

15 A. No, sir, I have not.

16 Q. Have you -- have you ever brought a lawsuit before?

17 A. No, sir, I have not.

18 Q. I'd like to ask you some questions about the Do Not Call  
19 law and the Do Not Call Registry. Are you familiar with the  
20 National Do Not Call Registry?

21 A. Yes, sir, I am.

22 Q. And what is the Registry?

23 A. It was established by the federal government because of the  
24 outrage of citizens at the uncontrolled proliferation of  
25 telemarketing practices.

1           **MR. BICKS:** Your Honor, I would just object to the  
2 witness reciting the history. He's not here to do that.

3           **THE COURT:** All right. Well, sustained as to the  
4 accuracy of that. He wasn't there, I assume, and doesn't have  
5 firsthand knowledge of that. The jury can disregard that.

6           **MR. BARRETT:** Yes, Your Honor.

7 **BY MR. BARRETT:**

8 Q. What does the National Do Not Call Registry allow a person  
9 to do?

10           **MR. BICKS:** Your Honor, again, I object. He's not an  
11 expert.

12           **THE COURT:** Okay. What are you --

13           **MR. BARRETT:** Just leading to the questions about what  
14 he did to join the Registry, put his number on the Registry.

15           **THE COURT:** Okay. Well, you can ask those questions.

16 **BY MR. BARRETT:**

17 Q. Did you place your telephone number on the Do Not Call  
18 Registry?

19 A. Yes, sir, I did.

20 Q. And what telephone number is that?

21 A. That was my landline phone number, (919) 471-9459.

22 Q. And when did you first put your telephone number on the  
23 Registry?

24 A. It was in July of 2 -- excuse me --

25           **THE COURT:** July when? I missed the year.



1                   **THE WITNESS:** I coughed through the year. I  
2 apologize. It was in July of 2003.

3 **BY MR. BARRETT:**

4 Q. Would you like a glass of water?

5 A. No, thank you. That will urge me to shorten my testimony.

6 Q. Sure. So July of 2003. How did you place your call on the  
7 Registry?

8 A. I went online and placed it.

9 Q. Now, about the telephone number that you registered, when  
10 did you first get that telephone number?

11 A. That number was the number I had when I first came to  
12 North Carolina in 1985.

13 Q. And was it a landline telephone number?

14 A. Yes, sir, it was a landline.

15 Q. And whose number was it?

16 A. It was my personal number.

17 Q. And who paid the bills?

18 A. I paid the bills.

19 Q. How long did you have that telephone number?

20 A. I had that number from 1985 until 2002 -- late 2002 when I  
21 decided I just wanted to have a cell phone, and as the  
22 expression is, I cut the cord.

23 Q. Was it 2002 or --

24 A. I'm sorry. 2012.

25 Q. When you say "cut the cord," what do you mean?

1 A. It means I -- I no longer had landline services, but I only  
2 paid for a cell phone.

3 Q. Had your phone number ever been removed from the National  
4 Do Not Call Registry until 2012?

5 A. No, sir, it's not.

6 Q. I'd like to talk with you about some of the calls that you  
7 received in this case.

8 Do you have a -- backing up, do you have a subscription  
9 television service in your home?

10 A. Yes, sir, I do.

11 Q. Who provides your service?

12 A. It's DirecTV.

13 Q. And how long have you had DirecTV?

14 A. Since early 2003.

15 Q. And how did you decide on DirecTV?

16 A. I went to a couple of big-box stores, looked at the  
17 promotional material, and thought that the benefits of DirecTV  
18 at that time were superior to those of DISH Network.

19 Q. And how did you sign up for DirecTV?

20 A. Well, I took the advertising material from the big-box  
21 store and called the number that was on it for DirecTV.

22 Q. Who do you pay for your DirecTV service each month?

23 A. Yes, sir, I do.

24 Q. Who do you pay?

25 A. I pay DirecTV.

1 Q. And has that remained the same since 2003?

2 A. Yes, sir, it has.

3 Q. Have you ever received calls asking you to switch from  
4 DirecTV to DISH Network?

5 A. Yes, sir, I have.

6 Q. When is the first call that you can remember?

7 A. It was on a Saturday evening of May the 9th, 2009.

8 Q. And was that on -- what telephone number was that on?

9 A. That was on my landline, so (919) 471-9459.

10 Q. All right. How did that telephone call begin?

11 **MR. BICKS:** Your Honor, I think this could be hearsay  
12 if he's asking what somebody said to him. I'm not sure what --

13 **THE COURT:** Is it -- it's not offered for the truth.  
14 I assume it's offered to show what was said to him.

15 **MR. BARRETT:** Yes, it was offered to show what he did,  
16 what was told to him, and what he did in response.

17 **THE COURT:** Overruled. Go ahead.

18 **THE WITNESS:** The call started with the person -- a  
19 gentleman said, "I see you've been a longtime customer of  
20 DirecTV, and I think I can save you some money."

21 **BY MR. BARRETT:**

22 Q. Okay. What happened next on that call?

23 A. We talked about the various services I was getting from  
24 DirecTV, and at some point, he asked me for the last four  
25 digits of my credit card.

1 Q. Okay. And what happened next?

2 A. Well, I gave him those -- those numbers and he put me on --  
3 put me on hold.

4 Q. Did he come back to the call?

5 A. Yeah, he came back to the call; and at that time he told me  
6 that I had some premiums that I was currently getting from  
7 DirecTV, and when those premiums expired, he could save me some  
8 money.

9 Q. Save you some money how?

10 A. As the call progressed, he indicated that he could save me  
11 some money by switching to DISH Network.

12 Q. During the call, did this gentleman tell you that he  
13 represented DISH Network?

14 A. No, sir, he didn't, but I assumed that he represented DISH  
15 Network because he wanted me to switch from DirecTV to DISH.

16 Q. And during the call, did this gentleman give you a name and  
17 telephone number?

18 A. He gave me his name, Ken, and he --

19 **THE COURT:** His name Ken?

20 **THE WITNESS:** Ken, K-E-N. And he gave me the phone  
21 number, which I recorded.

22 **BY MR. BARRETT:**

23 Q. Recorded by -- how?

24 A. Handwritten on the back of an envelope.

25 Q. Now, up until that call, May of 2009, had you ever

1 contacted DISH to inquire about DISH subscriptions?

2 A. No, I had not.

3 Q. Have you since?

4 A. No, I have not since.

5 Q. All right. So you hung up the phone with this gentleman.

6 You said his name was Ken. What did you do the next day?

7 A. The next morning, I first called DirecTV and told them that

8 it appeared as if someone had impersonated me to get

9 information about my DirecTV account. And they told me to put

10 a password protection on my account, which I did. And then I

11 talked to a second person, asked if there is a way that I could

12 stop the calls, and I was told that I should call DISH Network,

13 and they gave me a phone number.

14 Q. And did you call DISH Network?

15 A. Yes, sir, I did. I called DISH Network.

16 Q. And what happened during the call?

17 A. I escalated the call through several levels until I finally

18 talked with somebody who seemed aware of the situation.

19 Q. What did you tell this person?

20 A. I more or less told her what had happened the night before

21 and what could be done about it.

22 Q. Okay. Did you, at some point, hear back from the person

23 you spoke with?

24 A. I called on the 10th, and I got a call -- of May, and I got

25 a call back on the 21st of May, a very brief call. So, yes, I

1 did hear back.

2 Q. And what did the representative tell you?

3 A. She told me that they'd identified the caller and that he  
4 was a contractor, and as such, DISH Network was -- I'm sorry.  
5 DirecTV was not responsible for his behavior.

6 Q. Okay. You said DirecTV wasn't responsible, but --

7 A. I'm sorry, yes. I'm getting confused. I apologize. I  
8 know this is complex and I don't want to confuse you. But,  
9 yes, I was talking with the representative of DISH Network, and  
10 she told me that since the -- the caller was a contractor, DISH  
11 Network was not responsible for his actions.

12 Q. After you received the May 9th, 2009 call that you had  
13 described, the initial call from Ken, did you take any steps to  
14 protect your -- protect yourself?

15 A. Yeah. Yes, sir, I did. That Monday morning, I called the  
16 Attorney General's office to protest the fact that somebody was  
17 able to call and apparently impersonate me. Since I had given  
18 this gentleman my -- the last four digits of my credit card  
19 number, I changed my credit card. And I also subscribed to  
20 Equifax to protect myself from identity theft.

21 Q. All right. Now, after you contacted the North Carolina  
22 Attorney General's office, did the calls stop?

23 A. No, sir, they did not.

24 Q. Did you receive any calls that were similar to the one that  
25 you received from Ken?

1 A. I received a number of calls, so many that I felt it was  
2 appropriate for me to reregister my number on the federal Do  
3 Not Call Registry.

4 Q. How would these calls begin?

5 A. They all began with, I see you've been a long-term --  
6 sorry -- a long-term customer of DirecTV and I can save you  
7 some money.

8 Q. Did you receive more than one call in a 12-month period  
9 with this similar message?

10 A. Yes, sir, I did.

11 Q. And you said that you reregistered your telephone number on  
12 the Do Not Call Registry?

13 A. Yes, sir, I did.

14 Q. The question is, do you understand if you needed to  
15 register your phone again on the Do Not Call Registry?

16 A. I now know it was not necessary. Once one registers the  
17 number, the -- that registry remains in force.

18 Q. And approximately when was it that you reregistered your  
19 number?

20 A. I reregistered my number in approximately June of 2011.

21 Q. Two thousand --

22 A. 2010.

23 Q. 2010. Now, you said that you contacted the State Attorney  
24 General. I want to ask you about that. Did you hear back from  
25 the Attorney General's office of North Carolina sometime after

1 you had lodged your complaint?

2 A. Yes, I did. I got a call asking me if I would be -- attend  
3 a deposition with regard to DISH Network's telemarketing  
4 practices.

5 Q. Okay. And when was the deposition?

6 A. It was in September of 2011.

7 Q. And was the North Carolina Attorney General's office  
8 present?

9 A. Yes, sir, they were.

10 Q. Was DISH Network present?

11 A. Yes, sir, they were.

12 Q. And who was there for DISH Network?

13 A. This is from my memory, but I believe his name was Victor  
14 Rao.

15 Q. And who did Mr. Rao represent?

16 A. He represented DISH Network.

17 Q. Did you testify at your deposition September of 2011 about  
18 the May 2009 call?

19 A. Yes, sir, I did.

20 Q. Did you testify about other calls that you received?

21 A. Yes, sir, I did.

22 Q. When you gave your deposition in September of 2011, when is  
23 the last time that you received a similar call?

24 A. I was really struck by the fact that I received a call in  
25 September 2011, just shortly before the deposition. And it



1 started exactly the same way, and the call went to my voice  
2 mail. And I listened to the whole thing, because it -- I found  
3 it intriguing that just before I was called to this deposition,  
4 I got another call, but I didn't return the call. Once I  
5 listened to it, I deleted it.

6 Q. At your deposition, were you provided with documents?

7 A. Yes, sir, I was.

8 **MR. BARRETT:** Your Honor, it's tab -- I'm sorry,  
9 Volume 2, Plaintiff's Exhibit 282 that I would like to show the  
10 witness.

11 **THE COURT:** All right. Go ahead.

12 **MR. BARRETT:** I do not have that on my screen.

13 **THE CLERK:** Oh, sorry.

14 **THE WITNESS:** I now have it on mine.

15 **BY MR. BARRETT:**

16 Q. You do.

17 A. Yes, sir.

18 Q. All right. Dr. Krakauer, have you seen Plaintiff's  
19 Exhibit 282 before?

20 A. I saw it during the Attorney General's deposition.

21 **MR. BICKS:** Your Honor, I don't believe 282 is in  
22 evidence, and is it displayed?

23 **MR. BARRETT:** It --

24 **MR. GLASSER:** Yes.

25 **THE COURT:** Was there going to be an objection to it

1 or --

2 **MR. BICKS:** This -- I think if this is the exhibit --

3 **THE CLERK:** I took it down.

4 **MR. BICKS:** Right. This is an exhibit, Your Honor,  
5 that we had an in limine discussion about, and it wasn't to be  
6 raised until we discussed it with you first.

7 **MR. BARRETT:** May we approach to do so?

8 **THE COURT:** All right.

9 (The following bench conference was recorded.)

10 **MR. BARRETT:** This is an e-mail that Dr. Krakauer  
11 received at his deposition --

12 **THE COURT:** Yes.

13 **MR. BARRETT:** -- at which DISH was present. And he  
14 reviewed this. And it contains a recitation of a DISH  
15 representative the day after he received the May 9 call  
16 regarding what Dr. Krakauer reported to the DISH  
17 representative.

18 **THE COURT:** Uh-huh.

19 **MR. BARRETT:** And what I would like to review is the  
20 highlighted portions on mine saying who it was from, TCPA, it's  
21 got his number, his name.

22 **THE COURT:** Yes. For what purpose?

23 **MR. BARRETT:** For the purpose of establishing what she  
24 reported -- what he reported to DISH Network, what he told her.

25 **THE COURT:** He who? Dr. Krakauer?

1           **MR. BARRETT:** Yes.

2           **THE COURT:** Okay. And your objection?

3           **MR. BICKS:** The objection is, Your Honor, first of  
4 all, the fact that he saw a document at a deposition doesn't --  
5 is not relevant. It doesn't make this in any way admissible.  
6 That's number one.

7           Number two, remember the credit issue that we talked about  
8 where -- where I told Your Honor they were going to make this  
9 argument and he's going to presumably try to say this now, that  
10 I found out through this that somebody ran a credit report on  
11 me, right?

12           And Your Honor said, I don't see how that's coming into the  
13 case, and before that comes up, you need to come over and talk  
14 to me.

15           The part of this thing that's highlighted is that you can  
16 see here --

17           **THE COURT:** Okay. So the only thing you object to is  
18 that one reference to get personal credit info?

19           **MR. BICKS:** Well, if we take that out of this  
20 document, then I'm okay with them using this document. But for  
21 him -- a document -- they can ask him what happened on the  
22 call. But for him to be looking at a document from a DISH  
23 person, reciting what the DISH person was told by him,  
24 that's -- that's not admissible.

25           **MR. BARRETT:** Your Honor, this establishes what he was

1 told regarding the credit check. And when Rebecca Dougherty  
2 called him back -- Rebecca Dougherty, first of all, says in  
3 parentheses: I did not inform Dr. Krakauer that his credit was  
4 run without his knowledge. So he is still unaware this  
5 happened.

6 We're not raising this to say this is a violation of the  
7 law. We're raising this to say that DISH Network protected  
8 SSN.

9 **THE COURT:** Okay. All right. You can ask him  
10 questions about this e-mail from the DISH person because that's  
11 an admission, you know. In terms of just reading it, I mean,  
12 Mr. Bicks is right, it's not relevant just because it came up  
13 during a deposition. But this is -- if this is a DISH person,  
14 that's an admission, so it's not hearsay, and it seems to  
15 clearly be relevant, so, at least as to that one e-mail, you  
16 can go ahead.

17 **MR. BICKS:** But, Your Honor, you have said the credit  
18 reporting issue --

19 **THE COURT:** Well, I know, but I'm overruling it now in  
20 light of the -- his statements, where you questioned his  
21 motivation. And so, there we are.

22 **MR. BICKS:** Okay. Just so we're clear, now I'm  
23 allowed, right, to go into the meetings and the financial --

24 **THE COURT:** No, you're not.

25 **MR. BICKS:** -- arrangements he has in the case?

1           **THE COURT:** No, you're not. We'll take this up at the  
2 break.

3           **COURT REPORTER:** Judge, I'm having a hard time hearing  
4 Mr. Bicks.

5           (Conclusion of bench conference.)

6           **MR. BARRETT:** Your Honor, is that also visible on the  
7 jury's -- thank you.

8 **BY MR. BARRETT:**

9 Q. Dr. Krakauer, at your deposition, we were before -- before  
10 the discussion with the Court, we were reviewing this, and you  
11 were provided with this document at your deposition. Is that  
12 true?

13 A. Yes, sir, I was.

14 Q. And what does this document generally represent?

15 A. This document represents an e-mail chain within DISH that  
16 was as a result of my call on May 10th.

17           **MR. BICKS:** Again, Your Honor, I would object to the  
18 witness describing the document, what it represents.

19           **THE COURT:** All right. Well, do you dispute that  
20 these are e-mails between DISH people?

21           **MR. BICKS:** No, I do not.

22           **THE COURT:** Okay. Overruled.

23 **BY MR. BARRETT:**

24 Q. Dr. Krakauer, I've highlighted certain portions of the  
25 second page of PX 282.

1 A. Yes, sir.

2 Q. Do you see at the top it says from Rebecca Dougherty?

3 A. Yes, sir, I do.

4 Q. And do you see the date of that, Sunday, May 10, 2009,  
5 10:26 a.m.?

6 A. Yes, sir, I do.

7 Q. And what was the date of the call you received that caused  
8 you to contact DISH?

9 **THE COURT:** I'm sorry. Say again.

10 **BY MR. BARRETT:**

11 Q. Sure. What was the date of the call that you received that  
12 caused you to contact DISH?

13 A. May the 9th.

14 Q. So the day before?

15 A. Yes, sir.

16 Q. Okay. Do you see in the subject line: Subject: TCPA,  
17 TCPA, and that telephone number (919) 471-9459? Is that your  
18 telephone number?

19 A. Yes, sir, I see that, and that is my telephone number.

20 Q. Do you see: Customer information: And the name Thomas  
21 Krakauer? Do you see that?

22 A. Yeah, I see that.

23 Q. And then, the phone number where the call was received.  
24 And again, that's your telephone number, correct?

25 A. Yes, sir, it is --

1 Q. All right.

2 A. -- or was.

3 Q. And it says: DNC list consumer is on: And national?

4 **THE COURT:** I'm sorry. If you can -- when you look  
5 down, it is hard for me to hear.

6 **MR. BARRETT:** Okay. Thank you. Fighting through this  
7 cold so --

8 **BY MR. BARRETT:**

9 Q. The portion stating: DNC list consumer is on: National.  
10 Do you see that?

11 A. Yes. It says I'm on the national Do Not Call List.

12 Q. On down the page, I'm going to read this to you and ask you  
13 some questions about it.

14 A. Yes, sir.

15 Q. Thomas Krakauer received a call last night, Saturday May 9,  
16 from a retailer sales partner, question mark, who was claiming  
17 to be a DirecTV employee. The phone number the call was  
18 received from is 1-800-375-8211, extension 105, caller's name  
19 was Ken. Okay?

20 A. I see that, yes, sir.

21 Q. And you said that you had written down Ken's telephone  
22 number and name. Do you believe this to be the name and  
23 telephone number that you wrote down?

24 A. I have no evidence to dispute this.

25 Q. Okay. It says, the employee, Ken, right here. The

1 employee Ken then proceeded to call DirecTV and pretended to be  
2 Mr. Krakauer to get information from his account so he could  
3 call Mr. Krakauer back and get personal credit info from him,  
4 including his SSN and his credit card number. When further  
5 into the call, Mr. Krakauer became suspicious. He questioned  
6 the agent, who then told him they were from DISH Network and  
7 wanted to sell him DISH Network service.

8 And my question to you, does that generally reflect the  
9 conversation that you had with the DISH representative that  
10 morning?

11 A. Yes, sir, that generally reflects the conversation.

12 Q. The next paragraph. I searched Mr. Krakauer's phone number  
13 in Echo Admin and found there was a credit check run on him  
14 last night. In parentheses: I did not inform Mr. Krakauer  
15 that his credit was run without his knowledge, so he is still  
16 unaware this happened. The credit score ID is 8172493.

17 And my question to you is, when the DISH representative  
18 called you back a few weeks later, a few weeks after the  
19 May 9th, 2009 call, did she tell you that DISH had run a credit  
20 check on you?

21 A. No, she did not.

22 Q. Continuing with this document. Do you see at the top  
23 there's an e-mail from Vendor Inquiries sent on May 18th, 2009,  
24 3:21 p.m., to Rebecca Dougherty. First of all, do you believe  
25 that Rebecca Dougherty is the name of the DISH representative



1 who called you back in May of 2009?

2 A. The date is May 19th, not the 18th. But, yes, I do believe  
3 Rebecca Dougherty was the person that I communicated with.

4 Q. Okay. And it says, Rebecca, based upon the information  
5 provided, we are able to identify the retailer. It has an OE  
6 number, 821970. Contact name: Alex Tehranchi, Sophie  
7 Tehranchi. Company: Satellite Systems Network. Has the  
8 address information, and the e-mail address is alex@yourdishtv  
9 and sophie@yourdishtv.

10 My question to you, sir, is, when the DISH representative  
11 we now know is Ms. Dougherty called you back, did she tell you  
12 that SSN was the entity that placed the call?

13 A. She did not.

14 **MR. BARRETT:** Your Honor, I would move the admission  
15 of PX 282.

16 **THE COURT:** Did you want to be heard further on your  
17 objection?

18 **MR. BICKS:** No, Your Honor.

19 **THE COURT:** All right. Overruled. And it'll be  
20 admitted.

21 **MR. BARRETT:** I have a clerk copy of that. Well, I  
22 will provide that.

23 **THE COURT:** Okay. Go ahead.

24 **BY MR. BARRETT:**

25 Q. The first time you learned that SSN placed this call on

1   behalf of DISH was when?

2   A.   The first time I learned that DISH had placed this call was  
3   upon seeing this material at the Attorney General's deposition.

4   Q.   And at the deposition -- just one second. Did you receive  
5   a letter from Ms. Dougherty back in 2009 telling you about SSN  
6   or a credit check or other information pertaining to your  
7   complaint?

8   A.   I've had no direct communication from Rebecca Dougherty.

9   Q.   After you provided your deposition, moving ahead, in 2011  
10   in the Attorney General matter where DISH was represented by  
11   counsel, did you receive any communication from DISH,  
12   acknowledging that SSN was responsible?

13   A.   I have not.

14   Q.   Did you receive any letter from DISH stating that it was  
15   taking some kind of action against SSN in response to your  
16   testimony September of 2011?

17   A.   I've received no letter from DISH.

18   Q.   When did you first learn that you had the right to file a  
19   lawsuit against DISH Network under the Do Not Call law?

20   A.   This was in 2014.

21   Q.   And what did you learn about your right to do so?

22   A.   I learned that there was enforcement opportunities under  
23   the Do Not Call List and that it wasn't just about me. It was  
24   a class of 18,000 people who had -- who were on the Do Not Call  
25   List who had received 51,000 calls on behalf of DISH.

1 Q. And the year that you filed this lawsuit, this case that  
2 we're here on today, is what?

3 A. Say that again, please.

4 Q. What year did you file this lawsuit?

5 A. I believe it was filed in 2017.

6 Q. But this is 2017 now, so --

7 A. Okay. I'm sorry. It was 2014.

8 Q. Okay. Were you here in the courtroom yesterday for opening  
9 statements to the jury?

10 A. Yes, sir, I was.

11 Q. And were you here in the courtroom when DISH's counsel said  
12 that the Plaintiff, and that's you, is looking for over  
13 \$25 million based on five calls lasting 2 minutes and 32  
14 seconds? Were you here for that?

15 A. I was here for that.

16 Q. And what do you think of that, sir?

17 **MR. BICKS:** Again, objection, Your Honor.

18 **THE COURT:** Well, you need to rephrase that question.

19 **BY MR. BARRETT:**

20 Q. What do you have to say in response to that?

21 **THE COURT:** No, no. What -- I don't know what you're  
22 asking him. That's --

23 **MR. BARRETT:** I would like for him to be able to  
24 respond to a statement that --

25 **THE COURT:** Are you asking him if that's true?

1                   **MR. BARRETT:** Yes.

2                   **BY MR. BARRETT:**

3                   Q. Is that true?

4                   A. That is not true.

5                   Q. And why is it not true?

6                   A. I would receive only the same amount as every member of the  
7 class, which is set by federal statutes at \$500.

8                   **MR. BICKS:** Your Honor, I object.

9                   **THE COURT:** Overruled. Go ahead.

10                  **BY MR. BARRETT:**

11                  Q. I'm sorry. Were you finished with your response?

12                  A. Yeah, I think what I said was that I would receive only the  
13 same amount as all of the other members of the class.

14                  Q. And is this lawsuit based on five calls lasting 2 minutes  
15 and 32 seconds?

16                  A. No, sir, this lawsuit is not based upon that. It's based  
17 upon enforcing a federal statute based on the Do Not Call List,  
18 and, you know, if no efforts are taken to enforce this, wealthy  
19 telemarketers are free to continue to make calls forever.

20                  **MR. BICKS:** Your Honor, I don't think that's proper  
21 testimony. I would object.

22                  **THE COURT:** Well, overruled. Go ahead. You can move  
23 on.

24                  **MR. BARRETT:** Thank you, Dr. Krakauer. I have no  
25 further questions.

1                   **THE COURT:** Questions for DISH?

2                   **MR. BICKS:** Yes, Your Honor.

3                                   **CROSS-EXAMINATION**

4 **BY MR. BICKS:**

5 Q. First of all, good morning, Dr. Krakauer.

6 A. Good morning, sir.

7 Q. Do you prefer I call you doctor or mister?

8 A. Yes, sir, I do. If members of Congress feel comfortable  
9 about calling me doctor, I would appreciate if you would do the  
10 same.

11 Q. All right. Happy to do that. Thank you.

12 And you've been retired since when?

13 A. 2004.

14 Q. And you're here -- you're a class representative in this  
15 lawsuit, right?

16 A. Yes, sir, I am.

17 Q. I want to ask you some questions about Satelllite Systems  
18 Network. You've heard of Satelllite Systems Network?

19 A. I've -- I've heard about it through the e-mail chain in the  
20 deposition.

21 Q. Do you remember that Satelllite Systems Network was the  
22 dealer involved in your original purchase of your DirecTV  
23 account?

24 A. What I remember is that I placed DirecTV -- placed a call  
25 to DirecTV, and they forwarded that -- that call to SSN, and I

1 had no direct connection with SSN.

2 Q. You don't remember filling out an application that  
3 indicated that SSN was the dealer when you got your DirecTV  
4 account?

5 A. I did not know what the -- you know, the eight-point type  
6 on the agreement to take DirecTV service. So to answer your  
7 question briefly, no, I do not remember having any dealings  
8 with SSN.

9 Q. And in connection -- I think you said, as part of your role  
10 as a class representative, you're supposed to be generally  
11 familiar with what the case -- is on going in the case?

12 A. Yes, sir, I remember that.

13 Q. And did you -- before you came here to testify, did you  
14 look at documents that you signed in connection with getting  
15 your DirecTV account?

16 A. Yes, I did.

17 Q. And do you remember the DirecTV Annual Programming  
18 Commitment Agreement that you signed on March 6th, 2003?

19 A. Vaguely.

20 Q. And -- and do you remember whether or not that indicated on  
21 it that the dealer involved was Satellite Systems Network?

22 A. I believe that when I called DirecTV, they forwarded my  
23 call to SSN, and I'm not sure that what took place in 2003 has  
24 any relevance to --

25 **THE COURT:** Okay. Well, you don't need to argue with

1 him. He's just asking you what you remember.

2 **THE WITNESS:** Okay.

3 **BY MR. BICKS:**

4 Q. Yeah. And, sir, let me just ask again. Do you remember  
5 signing a DirecTV Annual Programming Commitment Agreement on  
6 March 6th, 2003, that indicates that the dealer involved in  
7 your account was Satellite Systems Network?

8 A. I remember signing a contract for the installation of  
9 DirecTV. I do not remember any mention of SSN.

10 **MR. BICKS:** So, Your Honor, may I approach the witness  
11 and show him DX81?

12 **THE COURT:** You may.

13 **BY MR. BICKS:**

14 Q. And, Dr. Krakauer, tell me when you've had a moment to look  
15 at that.

16 A. I have a document called Direct Annual Programming  
17 Commitment Agreement, and it's -- I check off whether I am a  
18 new DirecTV customer.

19 Q. And do you see your signature in the middle of that  
20 document?

21 A. Yes, sir, I do.

22 **MR. BICKS:** All right. Your Honor, I'd move to admit  
23 DX81 and publish for the jury.

24 **THE COURT:** It will be admitted.

25

1 **BY MR. BICKS:**

2 Q. Do you have -- you can see this document on the screen,

3 Dr. Krakauer?

4 A. Yes, I can.

5 Q. And is that your signature in the middle?

6 A. Yes, sir, it is.

7 Q. And tell our jury what date you signed this.

8 A. The 6th of March, 2003.

9 Q. And what's the agreement say at the top? What kind of

10 agreement is it?

11 A. It's a DirecTV Annual Programming Commitment.

12 Q. And do you see the phone numbers that are on there?

13 A. The phone number that I -- that I see -- one is my home

14 phone, and the other is my office phone.

15 Q. And which one is your home phone?

16 A. The (919) 471-9459.

17 Q. And is that the same phone number that Ken called you on

18 May 9th, 2009?

19 A. That is the same phone number.

20 Q. And do you see that credit card information on here?

21 A. Yes, sir, I do.

22 Q. And what name do you see above the credit card information?

23 A. I see Satellite Systems Network.

24 Q. And that's under dealer name, right?

25 A. Yes.



1 Q. And that credit card, is that your credit card?

2 A. Yes, sir, it is.

3 Q. And where do you believe that credit card information came

4 from?

5 A. I'm sure I gave it when I placed the call to DirecTV to

6 subscribe to DirecTV's service.

7 Q. And you see here that the dealer involved was Satellite

8 Systems Network? Did you see that?

9 A. I did not see that then. I see that now.

10 Q. All right. And do you also remember the -- the company --

11 you got equipment shipped to you, right? Do you remember that?

12 A. Yes, I did.

13 Q. And do you also remember the name of the company that

14 shipped that equipment to you?

15 A. It didn't seem important to me. I was getting -- I was

16 getting TV, and, you know, some guys were coming in to install

17 it. So I do not remember what that document said. Well, I've

18 seen that document. I now can say, yes, I've seen this

19 document, but I certainly did not place any importance to it

20 when I purchased my DirecTV in 2003.

21 Q. Right. And in connection with your role as being a class

22 representative, you've told our jury that you were to kind of

23 be familiar with what's going on in the case and what it's

24 about, right?

25 A. Yes, sir.

1 Q. And did you look through your files to determine the role  
2 of Satellite Systems Network before this case was filed?

3 A. Last year when I was -- the brief answer is yes. Last  
4 year, when I was filling out my federal income taxes, I came  
5 across a folder that was titled "DirecTV," and it had the  
6 documents in question.

7 Q. And that was after this lawsuit was filed?

8 A. Yes, sir, it was.

9 Q. Let me show you DX63.

10 **THE COURT:** That's Defendant's Exhibit 63?

11 **MR. BICKS:** Yes.

12 **THE COURT:** So, ladies and gentlemen, the parties may  
13 say "PX," Plaintiff's exhibit, "DX," Defendant's exhibit.  
14 You'll get used to the shorthand.

15 Go ahead.

16 **BY MR. BICKS:**

17 Q. And you've seen this before, Dr. Krakauer?

18 A. This is a document that I uncovered in the files and  
19 forwarded to my attorneys, and they made it available to you,  
20 but between --

21 **THE COURT:** Okay. So what's the question about the  
22 document?

23 **MR. BICKS:** I'd like to move its admission, Your  
24 Honor.

25 **THE COURT:** What is it? I mean, I know it was the

1 document you found, but what is it?

2           **THE WITNESS:** It's a document I received that  
3 documented the fact that I was getting a satellite receiver and  
4 that I was getting, you know, DirecTV equipment.

5           **THE COURT:** Okay. So a document related to equipment  
6 you got back in 2003?

7           **THE WITNESS:** Yes, sir -- I mean, yes, ma'am.

8           **THE COURT:** That's okay. That happens to me all the  
9 time.

10          It's admitted.

11           **MR. BARRETT:** We have no objection to the admission.

12           **MR. BICKS:** And may I please -- thank you, Trudy, for  
13 displaying that.

14 **BY MR. BICKS:**

15 Q. And do you see at the top there who sent you the equipment?  
16 Where did it come from?

17 A. It came from a company called Satellite Systems Network.

18 Q. And is that your handwriting on this document?

19 A. Yes, sir, it is.

20 Q. All right.

21           **MR. BICKS:** And can we go back, Trudy, and can you  
22 pull up Defendant's Exhibit 81?

23 **BY MR. BICKS:**

24 Q. And the credit card information -- do you see that credit  
25 card information on here, Dr. Krakauer?

1 A. Yes.

2 Q. And I think -- remember you told us about that May 2009  
3 call where Ken asked you for credit card information?

4 A. Yes, sir.

5 Q. And did you give him that credit card information?

6 A. He asked me for the last four digits of my current credit  
7 card, which I gave him, yes, sir.

8 Q. And on this application from 2003, this contract you  
9 signed, you also provided credit card information?

10 A. I was required by DirecTV to provide credit card  
11 information to purchase the satellite service, so the answer is  
12 yes, sir.

13 Q. And you don't dispute, do you, sir, that the dealer  
14 involved in your original purchase of DirecTV was Satellite  
15 Systems Network, as reflected on the contract you signed?

16 A. Based upon the contract, that is correct, but I never  
17 called SSN. I called DirecTV to purchase the satellite, and  
18 they assigned it to SSN. So I -- technically, your question --  
19 the answer to your question is yes, but I never called SSN. I  
20 called DirecTV to get satellite service, and they assigned my  
21 call to one of their at that time dealers.

22 **THE COURT:** Okay. I think you've said all that. So  
23 let's move on.

24 **BY MR. BICKS:**

25 Q. Yeah. And have you previously testified that there was no

1 printed evidence that SSN was in any way in the loop with your  
2 original DirecTV account?

3 A. I did not find these documents --

4 **MR. BARRETT:** Objection as to the mischaracterization  
5 of the testimony, Your Honor.

6 **THE COURT:** Well, he can answer.

7 Go ahead. You can answer.

8 **THE WITNESS:** I testified at the Attorney General's  
9 deposition in 2011, at which time, I was not aware of these  
10 documents. So when I said in 2011 that I was not aware of any  
11 documentation linking my DirecTV account to SSN, that was  
12 correct.

13 **BY MR. BICKS:**

14 Q. Uh-huh. And do you recall that you also said that under  
15 oath in the year of 2016?

16 A. I do not recall that.

17 Q. Do you recall testifying in 2016 that you have no direct  
18 evidence, no printed evidence, that SSN was in the loop when it  
19 came to your DirecTV account?

20 A. Again, my answer is the same. I had not found these  
21 documents until I was working on my federal income tax and  
22 found a file in my files titled "DirecTV." So based upon  
23 everything I knew when I gave that testimony, I had no direct  
24 evidence that SSN was in any way involved.

25 Q. All right. And so -- so then I'm clear and our jury is

1 clear, before the lawsuit was filed that has us in this  
2 courtroom, did you go look at your DirecTV file to determine  
3 who the dealer was when you bought your original DirecTV  
4 subscription?

5 A. I did not.

6 Q. All right. Now, let's talk a little bit about the 2009  
7 call. Are you with me, Dr. Krakauer?

8 A. Yes, sir.

9 Q. And you told us that an individual named Ken called you and  
10 gave you a phone number, right?

11 A. I gave him a phone number.

12 Q. And he also gave you his phone number, right?

13 A. He gave me -- I asked -- yes, he gave me his phone number.

14 Q. All right. And he was polite and forthright on the call?

15 A. Certainly.

16 Q. Yeah. And did you ever on that call tell him not to call  
17 you back?

18 A. I told him I was not interested in DISH Network, and that  
19 ended the call.

20 Q. And did you have any notes of that phone call?

21 A. The only notes that I took on that call was his name and  
22 his phone number on the back of an envelope, which I no longer  
23 have.

24 Q. And what happened to those notes?

25 A. I threw them out. I often throw out notes from telephone

1 messages after they no longer seemed important.

2 Q. And do you recall whether he said that he personally  
3 represented DISH Network?

4 A. He never said that he personally represented DISH Network,  
5 but when he told me to switch from DirecTV to DISH, I assumed  
6 he had a connection to DISH Network.

7 Q. Do you recall whether he stated whether he was an employee  
8 of DISH Network?

9 A. He never did.

10 Q. Do you recall whether he told you he was authorized by DISH  
11 Network to call you?

12 A. He did not tell me.

13 Q. All right. And you gave him your credit card information  
14 after he asked for it, right?

15 A. When he started the call and said he could see that I was a  
16 longtime supporter of DirecTV, I assumed he represented  
17 DirecTV, and so, yes, I did give him the last four digits of  
18 the -- of my credit card.

19 Q. And then -- and he said he could save you money, right?

20 A. Yes, he did.

21 Q. And then you spoke to people at DISH, right?

22 A. Yes, sir.

23 Q. And someone named Rebecca Dougherty, right?

24 A. Yes.

25 Q. When you spoke to Rebecca Dougherty, did you tell her that

1 you had signed your DirecTV Annual Programming Commitment  
2 Agreement that showed that Satellite Systems Network was the  
3 dealer?

4 A. I was not aware of that when I talked to Rebecca Dougherty.  
5 So the answer to your question is no.

6 Q. And I think you told us DISH, to your knowledge, did an  
7 investigation of what happened, right?

8 A. Yes, they did.

9 Q. And you spoke with Ms. Dougherty, and she told you that the  
10 party that called you was a contractor and that DISH was not  
11 responsible for the actions of that contractor, right?

12 A. More or less, that's what she said.

13 Q. Did you ask Ms. Dougherty what was the name of the  
14 contractor?

15 A. After she told me that DISH was not responsible for the  
16 contractor's name, we terminated the call because I didn't  
17 think that it was going to go farther.

18 Q. So you did not ask for the name of the contractor?

19 A. I did not.

20 Q. All right. And you did eventually find out that it was  
21 SSN, right?

22 A. I found that out -- SSN in 2003 was working for DirecTV,  
23 and in 2009, subsequently, they were working on behalf of DISH.

24 Q. Did you reach out to SSN and tell them that you didn't want  
25 to be called?



1 A. I did not.

2 Q. Did you send a letter, a fax, make a phone call, anything  
3 even like that?

4 A. I did not.

5 Q. Now, let me ask you some questions about the calls that are  
6 at issue in this case. You understand there's a class period  
7 in this case, right?

8 A. Yes, sir.

9 Q. And do you know what the class period is?

10 A. Are you asking what's the start date and what's the end  
11 date?

12 Q. Yes.

13 A. I believe it is from May of 2010 until the same time in  
14 2011.

15 Q. And do you know how many calls that relate to your phone  
16 number that are in play in this case in that class period? Do  
17 you know how many?

18 A. You know, that's an interesting question and -- because the  
19 class period is a calendar year, but there's only a certain  
20 shorter period that Satellite Systems Network saved the -- the  
21 call records. So I remember, you know, at least 10, but there  
22 are only a smaller number that are in the -- the Five9 records,  
23 which is the company that placed the call --

24 Q. All right.

25 A. -- the computer system that generated the call.

1 Q. Do you remember -- you said "10." You remember you talked  
2 about your 2011 deposition?

3 A. You know, roughly 10.

4 Q. Yeah, and do you remember what you said at that deposition  
5 about how many calls there were?

6 A. I think I said at least five.

7 Q. Do you remember you said three to five? Does that help  
8 your memory?

9 A. I think my -- what I'm saying today is more correct.

10 Q. Well, let me just show you -- well, let me show you your  
11 2011 transcript at 39 to 22, 40 to 5, and I can pull it on the  
12 screen so you can see it. Maybe it will refresh your memory.

13 The question at the bottom was: "Let me first ask you,  
14 would you say that the number of calls was approximately three,  
15 more than three, less than three?"

16 **THE COURT:** Is there something that refers to a time  
17 frame?

18 **MR. BICKS:** I can show the whole thing, Your Honor.  
19 I'm telling you, having known the deposition, it was how many  
20 calls took place after 2009, and I can --

21 **THE COURT:** All right. Go ahead.

22 **MR. BICKS:** And can you go to the next page, Trudy?

23 **BY MR. BICKS:**

24 Q. Do you remember being asked those questions?

25 A. I do.

1 Q. All right. And this was in 2011, presumably when things  
2 were a lot fresher in your mind than coming here in 2017,  
3 right?

4 A. I -- I think your characterization of what I remember  
5 during the deposition in 2011 is somewhat presumptuous. I said  
6 three to five, but if I'd only received three to five calls,  
7 there would have been no reason for me to refile my phone  
8 number on the Do Not Call Registry. So the three to five is  
9 probably not complete. I can't recall exactly how many calls  
10 there were, but, you know, that's really not the issue.

11 **THE COURT:** Okay. That's good. Do you have another  
12 question?

13 **BY MR. BICKS:**

14 Q. That was the testimony that you gave, right, three to five?

15 A. That was the testimony I gave.

16 Q. All right. And on these phone calls, was anybody in any  
17 way rude or -- in any way to you in these what you said there  
18 was three to five?

19 A. They were not.

20 Q. And a couple of those calls went into your answering  
21 machine?

22 A. Yes, sir, they were.

23 Q. And you deleted that, right?

24 A. I did.

25 Q. And is it safe to say that in each of those phone calls

1 from 2010 to 2011 that the only satellite service provider that  
2 was mentioned was DirecTV?

3 A. I think that's correct.

4 Q. So no other cable provider or satellite service provider  
5 was mentioned on any of those calls aside from DirecTV? That's  
6 true, is it not?

7 A. That is true.

8 Q. And you don't know the name of the individual who called  
9 you during those what you said here was three to five calls?

10 A. I do not.

11 Q. Before this complaint was filed in April 2014, did you ever  
12 tell anyone at DISH that you received those three to five  
13 calls?

14 A. I did not.

15 Q. Did you ever send an e-mail, write a letter, or pick up the  
16 phone and call anybody at SSN to say that you received these  
17 calls?

18 A. I did not.

19 Q. Did you write a letter to the Better Business Bureau about  
20 these calls?

21 A. No, sir, I did not.

22 Q. You know that those calls came from a number associated  
23 with Satellite Systems Network, correct?

24 A. I think my attorneys will present that information.

25 Q. Do you know that yourself as the class representative with

1 us today?

2           **THE COURT:** Are you asking him if he has learned that  
3 during the course of this litigation?

4           **MR. BICKS:** Yes.

5           **THE COURT:** Okay. You may answer.

6           **THE WITNESS:** I have learned that through the course  
7 of this litigation.

8 **BY MR. BICKS:**

9 Q. But you didn't sue SSN in this case, did you?

10 A. I did not.

11 Q. And you called this an enforcement action; is that right?

12 A. That is correct.

13 Q. Do you know -- you're familiar with the complaint, the  
14 formal written document that was filed in this case?

15 A. Which document are you referring to?

16 Q. The document that started this lawsuit that says what your  
17 claims are.

18 A. Yes, sir, I do.

19 Q. And do you know how much money in that complaint that  
20 you're asking for for yourself?

21 A. I'm not expecting to get more than \$500.

22 Q. Do --

23 A. And, you know, this is a class action lawsuit and --

24           **THE COURT:** Okay. Just a second. I think he asked  
25 you if -- how much you asked for in the complaint for yourself.

1 So if you can just answer that question.

2 **BY MR. BICKS:**

3 Q. Do you know what you asked for in the complaint?

4 **THE COURT:** For himself?

5 **MR. BICKS:** Yes.

6 **THE WITNESS:** I do not.

7 **MR. BICKS:** Can I approach to refresh his memory?

8 **THE COURT:** All right.

9 **MR. BARRETT:** Your Honor, may I -- may we approach at  
10 the sidebar?

11 **THE COURT:** Okay.

12 (The following bench conference was recorded.)

13 **THE COURT:** Now, I know you don't want to be really  
14 close because we're all sick, but we have to be close or they  
15 can't hear. So you have to speak right into the mike or the  
16 court reporter cannot take it down. Okay. So come in closer.

17 **MR. BICKS:** Okay. Sorry.

18 **THE COURT:** Go ahead. Your objection?

19 **MR. BARRETT:** Your Honor, this is misleading. I have  
20 no idea what he intends to --

21 **THE COURT:** Can you show me?

22 **MR. BICKS:** Yeah, I'm going to show him the formal  
23 complaint where he said he wants \$1,500.

24 **MR. BARRETT:** Your Honor, that's the issue of  
25 willfulness, which the Court has --

1           **THE COURT:** That says willful or knowing. He's  
2 entitled to that, and if you want me to explain to the jury  
3 that he's entitled to 1,500 if it's willful or knowing, then, I  
4 mean, I guess I can do that. What's the point?

5           **MR. BICKS:** Because, Your Honor, when the witness gets  
6 up there and says he's asking for \$500 and the complaint says  
7 1,500, that's not true.

8           **MR. BARRETT:** That's what he is asking the jury for at  
9 this trial.

10          **THE COURT:** You know, it just seems like it gets us  
11 into a bunch of confusing stuff. I mean, I guess if you want  
12 to ask him and you want me to explain to the jury about willful  
13 and knowing and that that's a question for the Court, but that  
14 seems -- that seems not like a good idea to me.

15          **MR. BARRETT:** Your Honor, he also said in opening that  
16 there's 25 million, I think, at stake here. That is \$500 times  
17 the number of class calls.

18          **THE COURT:** Okay. I just think under Rule 403 I'm not  
19 going to let you do this.

20          (Conclusion of the bench conference.)

21          **THE COURT:** Go ahead.

22 **BY MR. BICKS:**

23 Q. Dr. Krakauer, you're asking for money for you in this case,  
24 right?

25 A. I'm asking for the jury to tell DISH that they should not

1 be permitted to make uncontrolled telemarketing calls, and if I  
2 get a couple of bucks out of it, that is fine; but my  
3 motivation is if DISH Network is -- is not liable for  
4 something, there will be no reason for them to stop making  
5 calls, and in this case, 18,000 people received 51,000 phone  
6 calls on behalf of DISH Network. That's -- that's why --  
7 that's why I'm doing it. It's -- I didn't enter this for the  
8 money. It just seemed that somebody had to step forward and  
9 say that -- stop it, you know, or pay a penalty.

10 Q. Am I right that then this case for you has nothing to do  
11 with money?

12 A. It has nothing to do with it, but -- but --

13 **THE COURT:** Okay. That's good. Just a second. Stop.  
14 Just let him ask you another question.

15 Go ahead.

16 **BY MR. BICKS:**

17 Q. And you talked about, I think, some discussions -- a  
18 meeting you had with lawyers, do you remember that, before this  
19 case got filed?

20 A. It was in the --

21 **MR. BARRETT:** Your Honor, may we approach?

22 **THE COURT:** Okay. Just let him answer the question  
23 yes or no, and I'll let him ask just one or two questions in  
24 view of the testimony. So your question is did you meet with  
25 lawyers?



1           **MR. BICKS:** Right, right before this case was filed.

2           **THE COURT:** Okay.

3           **THE WITNESS:** Yes, I met with lawyers in 2014 about  
4 this trial.

5 **BY MR. BICKS:**

6 Q. All right. And just so we're clear, this class period is  
7 between, say, 2011, right, and that's when it ends, right? You  
8 know that?

9 A. I do know that.

10 Q. And so this case gets filed a little bit over three years  
11 after, right, 2011, right? You know that?

12 A. Yes, sir.

13           **THE WITNESS:** Your Honor, may I answer that question a  
14 little bit more completely?

15           **THE COURT:** Your attorneys can ask more questions on  
16 redirect, if they wish.

17 Do you have further questions?

18           **MR. BICKS:** Yes.

19 **BY MR. BICKS:**

20 Q. And my question is during that time period, say, 2011 to  
21 when you filed this case in 2014, did you ever reach out to  
22 anybody at DISH Network?

23 A. I did not.

24 Q. And you never reached out to anybody at SSN, right?

25 A. I did not.

1 Q. And you didn't even think that this would ever be a federal  
2 lawsuit until that meeting in 2014, right?

3 A. I think that's correct. I -- I didn't realize that a class  
4 action suit could come out of this, and I didn't realize the  
5 size of the class, the number of people who had received calls  
6 and the number of calls they had received; and, you know, if  
7 there can't be some enforcement on a federal statute,  
8 there's -- there's nothing to keep wealthy companies from  
9 continuing to violate the TCPA.

10 **MR. BICKS:** And, Your Honor, I would move to strike  
11 that testimony as not responsive to my question.

12 **THE COURT:** Well, I think -- it looks like maybe he  
13 was explaining his answer, so overruled. You may ask another  
14 question.

15 **BY MR. BICKS:**

16 Q. And that was information that you heard from lawyers?

17 **MR. BARRETT:** Objection, Your Honor.

18 **THE COURT:** Okay. Well, you know, it's not surprising  
19 that people go to lawyers to be informed about what the law is,  
20 so move on.

21 **MR. BICKS:** I've got no further questions, Your Honor.

22 **THE COURT:** Any redirect?

23 **MR. BARRETT:** No, Your Honor.

24 **THE COURT:** All right. Thank you. You can step down.

25 (The witness left the stand.)

1           **THE COURT:** You may call your next witness.

2           **MR. GLASSER:** The Plaintiff calls Amir Ahmed.

3           **THE COURT:** Is somebody getting him?

4           **MS. ECHTMAN:** Yes, Your Honor, we are getting him.

5           **THE COURT:** All right. Thank you.

6           So, generally speaking, ladies and gentlemen, the witnesses  
7 are out of -- except for the parties, are out of the courtroom  
8 during the trial. So between each witness, there will usually  
9 be a short delay while -- they're just right down the hall, but  
10 unlike on TV, when these things happen in five -- you know,  
11 less than a fifth of a second, we have to wait on the witness  
12 to get into the courtroom.

13          And as I mentioned to you yesterday, we will take a short  
14 break probably about eleven o'clock. If at any time my  
15 decision about when to take a break is not matching up with how  
16 much coffee you drank this morning, just let me know. It's not  
17 an endurance contest. So if you do need to take a break before  
18 I say we're going to take a break, just raise your hand and  
19 I'll be glad to accommodate you on that.

20          (Pause in the proceedings.)

21          (The witness entered the courtroom.)

22                   **AMIR AHMED, PLAINTIFF'S WITNESS, SWORN**

23                   **DIRECT EXAMINATION**

24           **THE COURT:** All right. Go ahead.

25 **BY MR. GLASSER:**

1 Q. Tell the jury your name, sir.

2 A. My name is Amir Ahmed.

3 Q. Mr. Ahmed, I understand you're currently senior vice  
4 president at DISH?

5 A. That is correct.

6 Q. From 2000 -- June of 2009 until August of 2013, I  
7 understand you were the senior vice president at DISH, whose  
8 responsibility was indirect sales; is that correct?

9 A. That is correct.

10 Q. Indirect sales are the sales that include the sales of a  
11 company called SSN, an order entry retailer; is that correct?

12 A. Yes.

13 **THE COURT:** And if you could maybe -- Ms. Sanders, can  
14 you get the mike a little closer? The witness is soft-spoken.  
15 If you can adjust it.

16 **THE WITNESS:** Yes.

17 **THE COURT:** Yes, sir. That's much better. Thank you.  
18 Go ahead.

19 **MR. GLASSER:** Sorry, Your Honor, I dropped the --

20 **BY MR. GLASSER:**

21 Q. In that capacity, you had principal responsibility for the  
22 retailers of DISH services that were not DISH itself; isn't  
23 that correct?

24 A. That's correct.

25 Q. You reported to a gentleman by the name of Charlie Ergen,

1 the owner of the company, or the founder of the company; is  
2 that correct?

3 A. Yes, he was my -- the boss, but I reported to Mr. Jim  
4 DeFranco.

5 Q. Okay. DeFranco. And we heard about him. He's a gentleman  
6 on the board of directors of the company and one of the  
7 cofounders; right?

8 A. Yes, sir.

9 Q. So you are at the apex power group in this company; isn't  
10 that fair to say? You're reporting right to the boss?

11 A. I'm reporting to, yes, Jim DeFranco, yes.

12 Q. And everybody who sold -- who was not DISH itself, you were  
13 the boss of; isn't that right?

14 A. Yes, my responsibility was indirect sales, correct.

15 Q. So we learned in opening arguments from your counsel that  
16 there were about 3,500 indirect sales retailers out there in  
17 the world. Is that consistent with your memory about 2011?

18 A. That's correct. That's about right.

19 **THE COURT:** And if I can just -- you're saying  
20 "indirect," one word, not "in direct" two words, right? So  
21 we're talking about "indirect," one word, sales, right?

22 **MR. GLASSER:** Yes, ma'am. I'll -- I'll say not DISH  
23 itself.

24 **THE COURT:** Okay. Go ahead.

25 **BY MR. GLASSER:**

1 Q. Right?

2 A. Yes, those are -- we had about 3500 independent satellite  
3 dealers. We also had other accounts. Are you including that  
4 we had accounts -- national accounts, or Telco Partners, a lot  
5 of public, private companies, commercial companies, yes.

6 Q. You were responsible for all that, too?

7 A. That was under me, yes, until 2013.

8 **MR. GLASSER:** I want to approach the witness with  
9 Exhibit 55, Your Honor.

10 **THE COURT:** Plaintiff's Exhibit 55?

11 **MR. GLASSER:** Yes, ma'am.

12 (Document handed to the witness by Mr. Glasser.)

13 **BY MR. GLASSER:**

14 Q. Handing you, Mr. Amir [sic], a document called an Assurance  
15 of Voluntary Compliance. You recognize that document; don't  
16 you?

17 A. Yes, sir.

18 **MR. GLASSER:** I move the admission of Exhibit 55, Your  
19 Honor, and ask to be able to publish it to the jury.

20 **THE COURT:** It will be admitted.

21 **MS. ECHTMAN:** Your Honor, we stand on our prior  
22 objections.

23 **THE COURT:** All right. Noted and overruled. This is  
24 the redacted one?

25 **MR. GLASSER:** Yes, ma'am.

1           **THE COURT:** Okay. It will be admitted.

2           **MR. GLASSER:** All right. I want to start at the top.

3           **MS. ECHTMAN:** And, Your Honor, I believe we have  
4 agreement on a limiting instruction for the Court to read about  
5 this particular exhibit.

6           **MR. GLASSER:** Do you want to do it at the end or the  
7 beginning?

8           **THE COURT:** We'll proceed with the testimony. I'll  
9 talk to you all about that at the morning break. I will just  
10 note, ladies and gentlemen, this is a very long document, and  
11 the parts that don't matter to this lawsuit we -- have been  
12 blacked out, so there's no confusion on you all's part, and you  
13 don't have to read a 40-page document -- 70-page document.  
14 It's just they've -- we've cut out the parts that don't matter  
15 to this case. So go ahead.

16 **BY MR. GLASSER:**

17 Q. All right. So, Mr. Amir [sic], you see at the top there  
18 the title of this document is Assurance of Voluntary  
19 Compliance; is that correct?

20 A. Yes, sir.

21 Q. What does the word "assurance" mean to you?

22           **THE COURT:** In the context of this document?

23 **BY MR. GLASSER:**

24 Q. Just in plain English. When you assure somebody something,  
25 what do you tell them?

1 A. Agreeing.

2 Q. And then, here at the bottom, it's kind of the negative,  
3 it's a Footnote 1: This Assurance of Voluntary Compliance  
4 shall, for all necessary purposes, also be considered an  
5 assurance of discontinuance. Right? Do you see that?

6 A. Yes, sir.

7 Q. And does the word "discontinue" mean to you, to stop  
8 something?

9 A. It could mean that, yes.

10 Q. The parties to this Assurance of Voluntary Compliance are  
11 Attorneys General; is that correct?

12 A. Yes, sir.

13 Q. And DISH Network, LLC; is that correct?

14 A. Yes, sir.

15 Q. DISH Network, LLC, is the company for which you are the  
16 head of sales at the relevant time period, June of 2009;  
17 correct?

18 A. Yes, sir.

19 Q. And I think if we count them up, you'll see there are 46  
20 separate states that DISH entered this Assurance of Compliance  
21 with; isn't that true?

22 A. I believe so, yes.

23 Q. Now, the OE retailers that we're going to talk about here,  
24 they had a nationwide territorial sales area; isn't that  
25 correct?



1 A. Yes, they could sell around the country.

2 Q. So they would be selling into these 46 states; right?

3 A. Yes.

4 Q. And it's -- and the assurance --

5 **THE COURT:** I'm sorry. You said OE retailers?

6 **MR. GLASSER:** Yes, ma'am.

7 **THE COURT:** What's that OE?

8 **THE WITNESS:** Order entry.

9 **THE COURT:** Order entry?

10 **THE WITNESS:** Yes, ma'am.

11 **THE COURT:** Okay. Go ahead.

12 **BY MR. GLASSER:**

13 Q. And here, DISH Network sells and leases to its subscribers  
14 such receiving equipment both directly and through authorized  
15 retailers; right?

16 A. Yes.

17 Q. I don't think this is in dispute in the case, but just to  
18 get it in the record, DISH Network does this through a fleet of  
19 satellites that orbit the earth that beam the services down to  
20 the receivers; right?

21 A. Yes, sir.

22 Q. I think I heard in opening there are about 18 of those  
23 satellites; is that correct?

24 A. That's correct.

25 Q. And I understand from some things I've read that the total

1 amount of channels you all are sending is up to 3,500 channels  
2 to somebody's receiver; is that right?

3 A. That could be, but --

4 Q. A lot?

5 A. Yeah, that's not realistic. I'm saying that's not what the  
6 customer is getting.

7 Q. Okay. Not what?

8 A. I don't know exactly what amount.

9 Q. What's it cost a month to get this DISH now?

10 A. You're talking about the --

11 Q. Like just an average?

12 A. Average. The customer average pays about \$90 a month.

13 Q. Okay. And has that been the case from 2009 to the present,  
14 basically, something like \$90 a month?

15 A. In that 80 to 90 range, yes.

16 Q. Okay. Now, there's some definitions that I just want to go  
17 through because when we get to the later parts of the  
18 assurance, the defined terms are used. So let's just go to the  
19 first defined term that I want to talk about, which is "covered  
20 marketer."

21 **THE COURT:** Paragraph 2.9?

22 **MR. GLASSER:** Yes, ma'am.

23 **THE WITNESS:** Yes.

24 **BY MR. GLASSER:**

25 Q. Are you with me, Mr. Ahmed?

1 A. Yes.

2 Q. So a covered marketer means a third-party retailer;  
3 right --

4 A. Yes.

5 Q. -- capital T, and we'll get to the meaning of that -- who  
6 can directly enter into DISH's Network's order entry  
7 application system, OE retailer. That's the definition of a  
8 covered marketer; right?

9 A. Yes.

10 Q. And we agree that SSN was a covered marketer; right?

11 A. Yes.

12 Q. Okay.

13 A. They're -- "covered marketer" is defined here as a  
14 third-party retailer, yes, as an OE retailer, independent  
15 contractor.

16 Q. Who has the power to enter sales directly into the order  
17 entry system of DISH; correct?

18 A. Yes, that is the system they can enter an order.

19 Q. Okay. And so this part of the deal having to do with  
20 covered marketers has nothing to do with the 3500 marketers.  
21 It has to do with the subset of marketers who have nationwide  
22 sales ability and responsibility who are called OE retailers;  
23 isn't that true?

24 A. Yes. This is referring to third-party retailers and OE  
25 retailer, but they're all third-party retailers. All 3500 are

1 third-party retailers.

2 Q. I get that. But the definition here is, covered marketer

3 is a third-party retailer. You know what a Venn diagram is?

4 A. Yes.

5 Q. All right. So we've got a Venn diagram of all the

6 retailers. There's 3500 in the Venn; right?

7 A. Yes.

8 Q. And then there's about -- in 2011, there's about 45 who

9 have that power to enter right into the DISH system; right?

10 A. That's correct.

11 Q. All right.

12 A. Yes.

13 Q. And those 45 are called the order entry retailers; correct?

14 A. Yes.

15 Q. And those 45 have nationwide sales ability; right?

16 A. Yes.

17 Q. And those 45 are less than 2 percent of all retailers;

18 correct?

19 A. That would -- yes, very small percentage out of the 3500,

20 yes.

21 Q. So there's no point in this case talking about 3500

22 retailers because what we're talking about is one retailer,

23 SSN, which is in the 45; right?

24 A. Yes.

25 **MS. ECHTMAN:** Objection, argumentative.

1           **THE COURT:** Okay. Well, don't argue with the witness.  
2 You can ask him a question.

3 **BY MR. GLASSER:**

4 Q. And then the definition of "third-party retailer" is one or  
5 more independent persons, corporation, partnership, or any  
6 other type of entity, as the case may be, that is authorized by  
7 DISH Network to offer, lease, sell, advertise and/or install  
8 DISH Network services and/or DISH Network goods; right?

9 A. Yes.

10 Q. So that's the 3500?

11 A. Yes.

12 Q. Okay. Now, the next section of this assurance discusses  
13 the application to -- of the assurance to DISH itself and its  
14 successors. Are you with me?

15           **THE COURT:** You're in paragraph 3.1?

16           **MR. GLASSER:** Yes, ma'am.

17 **BY MR. GLASSER:**

18 Q. Are you with me?

19 A. Yes, I am.

20 Q. All right. I want to go to this. DISH Network shall  
21 provide a copy --

22           **THE COURT:** And excuse me. When you read --

23           **MR. GLASSER:** Stand up.

24           **THE COURT:** -- talk slower.

25           **MR. GLASSER:** Okay.

1           **THE COURT:** I'm not trying to make it last longer, but  
2 I do want to be able to understand you. And when you're  
3 reading out loud, it's harder.

4           **MR. GLASSER:** All right.

5 **BY MR. GLASSER:**

6 Q. So just to summarize, DISH Network is supposed to provide a  
7 copy of this assurance to all of its companies and all of its  
8 related companies; right?

9 A. Yes.

10 Q. Okay. And all of the officers, directors, employees,  
11 shareholders, agents, servants, and assigns who have  
12 managerial-level responsibilities in performing the obligations  
13 outlined in the assurance; right?

14 A. Yes.

15 Q. So DISH was obligated under this deal to disseminate this  
16 assurance to all its managers so they would follow it; isn't  
17 that right?

18 A. Yes.

19 Q. It says here: DISH Network shall require its third-party  
20 realtors -- I'm going to have trouble with that.

21 A. Retailers.

22 Q. Retailers to comply with the terms and conditions of this  
23 assurance. Right?

24 A. Yes.

25 Q. Everybody's supposed to abide by it; right? Yes?

1 A. Yes.

2 Q. And then, the term of the assurance says: Upon execution  
3 of this assurance, DISH Network shall be bound from directly or  
4 indirectly engaging in practices set forth herein and shall be  
5 required to directly or indirectly satisfy the affirmative  
6 requirements set forth herein. Do you see that?

7 A. Yes, I do.

8 Q. So there's going to be affirmative requirements, things you  
9 need to do; right? That's what "affirmative requirements"  
10 means?

11 A. Okay.

12 Q. Do you agree?

13 A. That's what it says, yes.

14 Q. Do you agree that an affirmative requirement is a thing  
15 you're supposed to do?

16 A. Yes.

17 **THE COURT:** Okay. Is that a good stopping point for  
18 our morning break?

19 **MR. GLASSER:** Yes, ma'am.

20 **THE COURT:** All right. Ladies and gentlemen, I'm  
21 going to excuse you for a 15-minute recess. Please leave your  
22 notes in your chair. You'll remember during this break, as all  
23 breaks, that you won't talk about the case among yourselves or  
24 with anyone else. Don't have any contact with the lawyers,  
25 parties, or witnesses. Don't conduct any independent

1 investigation, or read or listen to anything about the case.  
2 And if I forgot to tell you anything else you're not supposed  
3 to do, you'll remember from yesterday.

4 Go back through the jury room and please be back in the  
5 jury room in about 15 minutes, shortly before 11:15.

6 The jurors are excused. If everyone else will remain  
7 seated while they step out.

8 (The jury left the courtroom at 11:00 a.m.)

9 **THE COURT:** All right. And the witness may step down.  
10 Thank you.

11 (The witness left the stand.)

12 **THE COURT:** If I could just ask, Mr. Glasser, if you  
13 would refer to the paragraph number.

14 **MR. GLASSER:** Yes, ma'am.

15 **THE COURT:** It's not so much for me or the jurors, but  
16 the Court of Appeals might appreciate it one day --

17 **MR. GLASSER:** Yes, ma'am. No problem.

18 **THE COURT:** -- for ease of reference to the part that  
19 you're referring to.

20 **MR. GLASSER:** Okay. No problem.

21 **THE COURT:** And is there anything the Plaintiff wants  
22 to take up before we take our recess?

23 **MR. GLASSER:** No, ma'am.

24 **THE COURT:** What about the Defendant?

25 **MR. EWALD:** Your Honor, there was reference to the



1 proposed limiting instruction --

2 **THE COURT:** Yes.

3 **MR. EWALD:** -- related to this document. And the  
4 parties, I believe, are in agreement, except for one phrase in  
5 one sentence. And I can show the Court what DISH's proposal  
6 is, if I may approach.

7 **MR. GLASSER:** Can I just come to the corner? I don't  
8 have my copy.

9 **THE COURT:** Is it the same one you handed up  
10 yesterday?

11 **MR. EWALD:** No, Your Honor. The parties conferred and  
12 we tried to reach agreement, and we did, except for one little  
13 phrase. I have both parties --

14 **THE COURT:** All right. Yeah.

15 **MR. GLASSER:** Let's just walk up there and talk.

16 **THE COURT:** Well, it's awfully hard to talk at that  
17 corner. But why don't you all look at it together for a  
18 second. You can put it up on the screen. I can see it on the  
19 screen.

20 **MR. EWALD:** So I would --

21 **THE COURT:** Just a second. Just let me look at it.

22 (Pause in the proceedings.)

23 **MR. EWALD:** This is Plaintiff's, Your Honor.

24 **THE COURT:** Okay. Hold on.

25 (Pause in the proceedings.)

1           **THE COURT:** Okay. Now, let me see the Defendant's.

2           **MR. EWALD:** Your Honor, I bracketed the only differing  
3 language. It's really that first part of that sentence.

4           (Pause in the proceedings.)

5           **THE COURT:** Okay. So the Defendants want me to say:  
6 The Plaintiffs are offering the assurance as evidence on the  
7 question of whether DISH had control over SSN. And you are to  
8 consider it only for that purpose and not for any other  
9 purpose.

10          And now, can I see the Plaintiff's language again?

11           **MR. GLASSER:** Your Honor, the Plaintiff says: The  
12 Plaintiffs are offering the assurance as evidence that DISH has  
13 power or control over SSN. And you are to consider it only for  
14 that purpose.

15          And the reason we are saying that is the assurance itself  
16 obligates DISH to issue business rules causing compliance with  
17 the assurance. That's an element of power, Your Honor.

18           **MR. EWALD:** But, Your Honor, I don't think power comes  
19 up in any of the agency context. We talked about control. And  
20 it's not -- I think it's more proper to say "the question of  
21 control" rather than "is evidence that." The Court's  
22 stipulation is saying what it's evidence of.

23           **THE COURT:** You spoke awfully quickly.

24           **MR. EWALD:** I did.

25           **THE COURT:** And can you hand them up now and let me

1 look at them together?

2 **MR. EWALD:** Sure.

3 (Documents handed to the Court.)

4 **MR. GLASSER:** That's the only difference among the  
5 two.

6 (Pause in the proceedings.)

7 **THE COURT:** Okay. Well, just looking back at what I  
8 told them at the beginning of the case, and I believe this  
9 actually was at DISH's request, I said: The principal must  
10 have the power to direct and control the agent's actions.

11 So that is, in fact, what this evidence is being offered  
12 towards. I don't really see a huge amount of difference in  
13 this, so --

14 **MR. EWALD:** Your Honor, the point I was making earlier  
15 is that it is one thing to say that there is a question the  
16 jury must answer, and that this is being offered by Plaintiffs  
17 for that, as opposed to saying this is, in fact, evidence of  
18 that.

19 **THE COURT:** Well, if it wasn't evidence of that, why  
20 would I let it in? I mean, I don't understand what you're  
21 saying.

22 **MR. EWALD:** I was trying to track Your Honor's -- when  
23 we discussed this yesterday, that was the manner in which you  
24 posed the instruction, and we tried to track that. I think it  
25 just is more appropriate for this context.

1           **THE COURT:** Okay. Well, I don't see a huge amount of  
2 difference between these two instructions. So, I'll give the  
3 one that DISH has handed up just out of an abundance of  
4 caution. Okay. So you want me to give that when we come back  
5 from the break?

6           **MR. GLASSER:** Sure.

7           **THE COURT:** Seems like a good time?

8           **MR. EWALD:** Yes.

9           **MS. ECHTMAN:** Thank you, Your Honor.

10          **MR. GLASSER:** What time is break over?

11          **THE COURT:** 11:15. So you all need to be real quick.  
12 We'll take a 10-minute recess.

13          **MS. ECHTMAN:** Thank you.

14          (A morning break was taken from 11:05 a.m. until  
15 11:15 p.m.)

16          **THE COURT:** Anything we need to take up before the  
17 jury comes in?

18          **MR. GLASSER:** Just on housekeeping, Your Honor, I  
19 wanted to point out, we do have our expert, Anya Verkhovskaya,  
20 here. I understand the sequestration is to fact witnesses.

21          **THE COURT:** Did you have any objection to her being  
22 present?

23          **MS. ECHTMAN:** No problem.

24          **THE COURT:** Okay. Thank you.

25          **MS. ECHTMAN:** And I assume there's no objection if we

1 bring any of our experts.

2 **MR. GLASSER:** Correct.

3 **THE COURT:** Correct?

4 **MR. GLASSER:** Correct.

5 **THE COURT:** Okay. Then the sequestration order only  
6 applies to fact witnesses going forward.

7 All right. We can bring the jury in.

8 (The jury entered the courtroom.)

9 **THE COURT:** All right. Good morning again. Ladies  
10 and gentlemen, your -- this document that we're -- the witness  
11 is discussing right now, Plaintiff's Exhibit 55, you are  
12 hearing testimony about an Assurance of Voluntary Compliance  
13 between certain State Attorneys General and DISH Network, LLC,  
14 entered in June of 2009.

15 And this assurance was entered by all parties to the  
16 assurance to resolve a dispute without trial or adjudication of  
17 any issue of fact or any finding of liability against DISH of  
18 any kind. So the assurance does not constitute an admission by  
19 DISH for any purpose of any fact or of any violation of any  
20 rule, law, or regulation. So it's not an admission of  
21 wrongdoing, and you should not consider it for that.

22 The Plaintiffs are offering the assurance as evidence on  
23 the question of whether DISH had control over SSN. And you are  
24 to consider it only for that purpose and not for any other  
25 purpose.

1       Of course, you're the judges of the facts, and subject to  
2 that limiting instruction, you should consider this assurance  
3 just like any other piece of evidence, giving it the weight or  
4 importance you think it deserves in light of all the other  
5 evidence. And as I already mentioned, we've redacted the parts  
6 that don't have anything to do with this case. Okay. Go  
7 ahead.

8               **MR. GLASSER:** Thank you, Your Honor.

9 **BY MR. GLASSER:**

10 Q. So, Mr. Ahmed, I want to apologize. I accidentally called  
11 you Mr. Amir once, my colleague told me. I'm sorry.

12 A. That's all right.

13 Q. Anyway, so I want to go to the next section of the  
14 assurance, which concerns telemarketing and Do Not Call. Are  
15 you with me?

16 A. Yes, sir.

17 Q. All right. DISH Network, it says, in section 4.76 --

18               **THE COURT:** 67?

19 **BY MR. GLASSER:**

20 Q. 67, sorry. Yeah, 4.67: DISH Network shall comply with all  
21 federal, state, and local laws regarding telemarketing,  
22 including but not limited to those which prohibit calling  
23 consumers who are on any federal, state, or local Do Not Call  
24 List, unless otherwise exempted by such laws. Do you see that?

25 A. Yes, sir.

1 Q. Okay. So that was the undertaking that you guys took;  
2 right?

3 A. Yes.

4 Q. Now, the next page, and we'll get to some of this, it  
5 says -- this is at 4.73, says: DISH Network shall issue  
6 business rules to its authorized telemarketers and covered  
7 marketers requiring them to comply with the terms of this  
8 assurance. Do you see that?

9 A. Yes, sir.

10 Q. Okay. So we'll talk about, when we get to the contract,  
11 what a business rule is. But just to preview it, because we  
12 don't have the contract in front of us, I can only examine you  
13 on one document.

14 **THE COURT:** If you could slow down.

15 **BY MR. GLASSER:**

16 Q. To preview it, the contract has a section that provides  
17 that DISH has the power to issue business rules; correct?

18 A. Yes.

19 Q. And the section says that the retailer must do or refrain  
20 from doing whatever it is that DISH tells them in the business  
21 rule; right? Paraphrasing. Yes?

22 A. I'd like to -- yes -- I mean, I would like to read exactly  
23 what it says.

24 Q. We'll get to it --

25 A. Thank you.

1 Q. -- I just can only kind of show one document at a time.  
2 A. Sure. Understood.  
3 Q. Okay. We'll get there. Now, the next section,  
4 Section 4.74, says: DISH shall affirmatively investigate  
5 complaints regarding violations of federal, state, and local  
6 laws regarding the telemarketing, including but not limited to  
7 those which prohibit calling consumers who are on any federal,  
8 state, or local Do Not Call Lists unless otherwise exempted by  
9 such laws, and shall take appropriate action as soon as  
10 reasonably practicable against any authorized telemarketers and  
11 covered marketers it has determined to be in violation of the  
12 requirements of this assurance. Do you see that?  
13 A. Yes, sir.  
14 Q. All right. Let's talk about some of the clauses in here.  
15 First, DISH took on a duty to affirmatively investigate; is  
16 that right?  
17 A. Yes.  
18 Q. And -- and then, DISH also agreed that it shall take  
19 appropriate action as soon as reasonably practicable when its  
20 investigation determined a violation; right?  
21 A. Yes.  
22 Q. And this covers covered marketers, right here, which you  
23 agree SSN is one?  
24 A. Yes.  
25 Q. So moving onto Section 4.75, says: Within 30 days of the



1 date of the execution of this assurance, DISH Network shall  
2 provide each authorized telemarketer and each covered marketer  
3 with a copy of this assurance and inform them that in order to  
4 continue acting as a DISH Network authorized telemarketer or  
5 covered marketer, they must abide by the terms and conditions  
6 of this assurance; right?

7 A. Yes.

8 Q. So the idea was we're going to get this out to the 45  
9 covered marketers, and we're going to do what it says?

10 A. Yes, it was sent out to all the retailers.

11 Q. 4.77 requires DISH Network to require the covered marketer  
12 to establish written policies and procedures to comply with the  
13 telemarketing laws, including the Do Not Call List; right?

14 A. Yes.

15 Q. And then I want to talk about the second duty here at 4.78,  
16 okay? Are you with me at 4.78?

17 A. Yes, sir.

18 Q. It says: DISH Network shall monitor, directly or through a  
19 third-party monitoring service approved by DISH, its covered  
20 marketers to determine whether they are telemarketing consumers  
21 and, if so, to determine whether the covered marketer is  
22 complying with all federal state, state, and local Do Not Call  
23 laws. Do you see that?

24 A. Yes, sir.

25 Q. All right. Let's talk about this sentence. First, it

1 says, "DISH shall monitor," right?

2 A. Correct.

3 Q. Second, it says, directly or indirectly, they shall  
4 monitor, right? That's what it's talking about it. They shall  
5 monitor directly or indirectly through a third party, but  
6 somebody --

7 **THE COURT:** I'm sorry? Where are you saying  
8 indirectly?

9 **BY MR. GLASSER:**

10 Q. So they shall monitor directly through a third party -- oh,  
11 they shall monitor directly through a third-party monitoring  
12 service approved -- they shall monitor directly or through a  
13 third-party monitoring service. Do you see that?

14 A. Yes, that I see.

15 Q. So DISH can do it itself, or it can hire a monitor?

16 A. Yes.

17 Q. Okay. To determine, right, whether they are telemarketing  
18 consumers, right? Are they telemarketing? Are they calling  
19 consumers?

20 A. Yes.

21 Q. Okay. And whether they -- it -- the covered marketer is  
22 complying? Do you see that?

23 A. Yes, I do.

24 Q. All right. So all those verbs, you agree with me, are  
25 active verbs? Shall monitor, that's an active thing, right?

1 A. Yes.

2 Q. To determine, that's an active, affirmative act,  
3 determining, right?

4 A. Yes.

5 Q. Is complying is a continuing thing, is complying, right?

6 A. Yes.

7 Q. It does not say in here monitor only after a consumer  
8 writes you ten letters, does it?

9 A. No, it does not say that.

10 **MS. ECHTMAN:** Objection.

11 **THE COURT:** Overruled.

12 **BY MR. GLASSER:**

13 Q. And you agree with me that 4.78 is a separate obligation  
14 from the obligation at 4.74 to investigate complaints?

15 A. Yes, this is to investigate complaints. Can I see the  
16 other one, sir?

17 Q. Yes. And this is to monitor and make sure there's  
18 compliance?

19 A. And this is to monitor, yes.

20 Q. And then at 4.79, it goes into a discipline section, right?

21 A. Yes, sir.

22 Q. At 4.79, it says: DISH Network shall appropriately and  
23 reasonably discipline a covered marketer if DISH Network  
24 reasonably determines that, in connection with telemarketing --

25 **THE COURT:** Slow down.

1 **BY MR. GLASSER:**

2 Q. -- DISH Network goods and/or DISH Network services, the  
3 covered marketer has failed to fulfill contract requirements  
4 with respect to compliance with federal, state, and local  
5 telemarketing laws, right?

6 A. Yes.

7 Q. All right. So that's saying we all know that your contract  
8 says they should comply with the law, but if you find out  
9 through your investigation, which is that 4.74 duty, that  
10 they're not, we're going to do something, right?

11 A. Yes, that's what it says.

12 Q. Or, B, violated federal, state, or local telemarketing  
13 laws, right?

14 A. Yes.

15 Q. Independent of the contract you just -- right? Agree?  
16 It's a separate sentence.

17 A. Yes.

18 Q. Okay. Or failed to comply with the terms of this assurance  
19 as they relate to telemarketing and the Do Not Call Section,  
20 right? The third thing, if they don't comply with this deal --  
21 if a covered marketer doesn't comply with this deal, we're  
22 going to discipline them?

23 A. That's an option, yes.

24 **THE COURT:** And just be sure you're asking a question,  
25 Mr. Glasser.

1 **BY MR. GLASSER:**

2 Q. Okay. You think "shall appropriately and reasonably  
3 discipline" is an option?

4 A. Yes, we have to look at the facts. Those are one of the  
5 options that we could do, yes.

6 Q. And then there's a set of kind of remedies that are -- I  
7 guess some are worse and some are less. Termination, right?

8 A. Yes.

9 Q. Imposing a monetary fine, right?

10 A. Yes, sir.

11 Q. Withholding of compensation, right?

12 A. Yes, sir.

13 Q. Suspending the right to telemarket for a period of time,  
14 right?

15 A. Yes, sir.

16 Q. Prohibiting telemarketing, right?

17 A. Yes.

18 Q. Requiring the covered marketer to improve its process or  
19 procedures for compliance with the TCPA and other federal,  
20 state, and local laws regarding telemarketing?

21 A. Yes, sir.

22 Q. Requiring the covered telemarketer to terminate certain  
23 employees involved in TCPA violations or other violations of  
24 state or local laws, right?

25 A. Yes.

1 Q. Requiring the covered marketer to terminate telemarketing  
2 affiliates?

3 A. Yes.

4 Q. That didn't come up in this case. Requiring the covered  
5 marketer to retrain employees in the TCPA, right?

6 A. Yes.

7 Q. Or other appropriate and reasonable discipline under the  
8 circumstances, right?

9 A. That's correct.

10 Q. And then it says: In determining what disciplinary action  
11 shall be taken, DISH Network shall take into consideration the  
12 egregiousness of the covered marketer's conduct, the number of  
13 violations, the covered marketer's willingness to cure the  
14 problem, and whether DISH Network has previously disciplined  
15 the covered marketer. Do you see that?

16 A. Yes, sir.

17 Q. So it's fair to say that history matters in how you're to  
18 discipline, right?

19 A. Yes, you take -- you have to take a look at each  
20 circumstance, yes.

21 Q. So what you know about the covered marketer that arose  
22 prior to this deal matters to how you're supposed to treat them  
23 going forward, right?

24 A. Yes, we take every complaint, sir, very seriously, yes.

25 Q. And then here's a section. It's kind of similar to what

1 the Court just read: 7.2, this assurance does not constitute  
2 an admission by DISH for any purpose of any fact or of a  
3 violation of law, rule, or regulation, nor does this assurance  
4 constitute evidence of any liability, fault, or wrongdoing.  
5 The assurance is entered into without a trial or adjudication,  
6 right?

7 A. Yes, sir.

8 Q. So it's a settlement agreement?

9 A. Yes.

10 Q. So the reason you must have had to have a settlement  
11 agreement with 46 states' attorneys general is because there  
12 were widespread problems with telemarketing, correct?

13 **MS. ECHTMAN:** Objection, Your Honor --

14 **THE COURT:** Well --

15 **MS. ECHTMAN:** -- 403.

16 **THE COURT:** Overruled. You can answer the question.

17 **BY MR. GLASSER:**

18 Q. In general.

19 A. This is a customer protection piece. It is. It is  
20 about -- it is about making sure we do agree with the -- with  
21 the states on telemarketing laws, on terms and conditions,  
22 on -- there was specific other markets, to make sure we're  
23 doing everything accurately ourselves and our retailers to  
24 explain consumer promotions on the terms and conditions and  
25 exactly what the laws are in telemarketing, yes.

1 Q. Okay. And it says here on page -- on Section 7.3: DISH  
2 Network shall comply with the terms of this assurance within 90  
3 days following execution, right?

4 A. Yes.

5 Q. It says here on 8.1 that DISH Network understands --  
6 represents -- well, represents and warrants that it's a  
7 voluntary and free act to enter into this deal, right?

8 A. Yes, that's what it says.

9 Q. And is the result of good faith negotiations, right?

10 A. Yes, sir.

11 Q. And DISH represents and warrants that the signatories to  
12 the assurance have the authority to act for and bind DISH,  
13 right?

14 A. Yes.

15 Q. Okay. And nothing in this assurance relieves DISH of the  
16 obligations to comply with all state and federal law. Do you  
17 see that?

18 A. Yes, sir.

19 Q. And then it says: Within 30 days of this assurance, DISH  
20 Network shall submit a copy of this to each of its officers,  
21 directors, and any employee necessary to ensure compliance. Do  
22 you see that?

23 A. Yes, sir.

24 Q. And right here it says: Nothing in the assurance shall be  
25 construed to affect, restrict, limit, waive, or alter any



1 private right of action that a consumer may have against DISH  
2 Network. Do you see that?

3 A. Yes, I do.

4 Q. And that's a case like the one we have here today, right,  
5 private right of action?

6 A. Yes.

7 Q. So I understand, Mr. Ahmed, that you were the person who  
8 kind of invented in DISH the concept of having OE retailers,  
9 right? You were kind of the founder of that program; is that  
10 correct?

11 A. The founder meaning --

12 Q. The person who kind of dreamed it up and thought it would  
13 be a good idea?

14 A. No, the program existed for other accounts, yes, and then  
15 we included certain retailers into the OE program, yes.

16 Q. Got it. Okay. But weren't you one of the originators of  
17 the starting of it and getting it started and getting it fired  
18 up and then for -- in the early years?

19 A. As it relates to the OE retailers?

20 Q. Yes.

21 A. Yes.

22 Q. Okay. And because you were the president of sale -- or  
23 vice president of sales -- senior vice president of sales, you  
24 had ongoing responsibility for it. I think we should probably  
25 point out you worked --

1 A. Vice president of sales.

2 Q. When did you start working for DISH?

3 A. I started 1993 of June, sir.

4 Q. '93. Okay. And then you worked up until sometime in 2006.

5 Can you give me the month?

6 A. Yes, January 31, 2006.

7 Q. All right. So in the beginning of 2006, January 31st,  
8 2006, you left, went to work somewhere else, and then you came  
9 back right at the time this assurance of compliance was  
10 entered, right?

11 A. Yes. I came back on May 31st, 2009.

12 Q. Okay. So you have personal knowledge of what happened up  
13 'til January 31st, 2006, inside DISH and then from May 31,  
14 2009, up to the present?

15 A. Yes, I'm aware of some of those, yes.

16 Q. So I'm going to approach you with Exhibit 89.

17 **THE COURT:** Plaintiff's?

18 **MR. GLASSER:** Yes, yes, ma'am, Plaintiff's Exhibit 89.

19 **MS. ECHTMAN:** Your Honor, we have objections to this  
20 exhibit under Rules 802, 401, 403, and 404.

21 **MR. GLASSER:** Can I lay some foundation?

22 **THE COURT:** Hold on just a second. Let me get it in  
23 front of me. You can ask some preliminary questions.

24 **BY MR. GLASSER:**

25 Q. All right. So just -- let's look -- look through it to

1 yourself. In particular, I want to draw your attention to  
2 page 3.

3 A. Yes.

4 Q. The information contained on page 3 in this presentation is  
5 generally accurate about your position in the company; isn't  
6 that true?

7 A. Yes, in --

8 Q. As of June --

9 A. -- 2011, June 6th.

10 Q. Which is the date, right?

11 A. Yes.

12 Q. I'd like you to turn to page 4. Page 4 has data about the  
13 budget for sales for OE retailers for 2011, the class period in  
14 this case; isn't that right?

15 A. Yes.

16 Q. This budget would have been in place as of June 2011 for  
17 you to be -- it to be discussed inside the sales force team at  
18 DISH; isn't that right?

19 A. Yes.

20 Q. Turning to page --

21 **THE COURT:** Okay. Excuse me just one second.

22 Ladies and gentlemen, let me excuse you to the jury room  
23 for a moment while I talk to the lawyers about this exhibit.  
24 Just leave your notes in your chair.

25 (The jury left the courtroom.)

1           **THE COURT:** Okay. If I can first just ask DISH,  
2 Ms. Echtman, I don't understand the hearsay objection. This  
3 appears to be a DISH document.

4           **MS. ECHTMAN:** It is a DISH document. The question is  
5 relevance, and it's got a lot of information --

6           **THE COURT:** Okay. Stop. You said Rule 802, and  
7 that's a hearsay rule. So is that -- do you not have a hearsay  
8 objection?

9           **MS. ECHTMAN:** I believe that there is hearsay embedded  
10 in the document, Your Honor, and that's why we made a hearsay  
11 objection.

12           **THE COURT:** Okay. All right. And what is the  
13 Plaintiff offering it to prove in terms of relevance?

14           **MR. GLASSER:** It's relevant because it shows the  
15 importance of the OE retailers on a relative basis. They were  
16 more than 60 percent or more than 50 percent of sales -- it's  
17 relevant to show where Mr. Ahmed is in the organization, which  
18 he's testified to, but this shows a graph. It's relevant to  
19 show the sales expectations internally for OE retailers in  
20 2011, the class period. It's relevant to show the sales that  
21 were accomplished by OE retailers in 2010. It's relevant to  
22 show the relevant amount of OE retailers compared to general  
23 retailers, and it's relevant to show that internally they used  
24 the moniker "National Sales Partners."

25           **THE COURT:** All right. And for the Defendant on your

1 objection?

2           **MS. ECHTMAN:** Your Honor, generally, what they're  
3 trying to do with this is trying to show that DISH is a wealthy  
4 company, which is not an appropriate item here. They want to  
5 show total sales of other retailers. We've objected to  
6 evidence about other retailers. This is about SSN. This is  
7 not about DISH's entire retailer channel. If they want to show  
8 information about SSN's activations and sales, that's one  
9 thing; but to go into the whole channel just to show that DISH,  
10 you know, has a big retailer budget that makes a lot of money,  
11 I think that's prejudicial.

12           **THE COURT:** All right. Well, assuming you can do this  
13 in not very much time --

14           **MR. GLASSER:** Yeah, it's fast.

15           **THE COURT:** -- I will overrule the objection.  
16 Obviously, the Defendant's concerns are legitimate if you spend  
17 too much time on it.

18           **MR. GLASSER:** Yes, ma'am.

19           **THE COURT:** So that would hit the Rule 403 level, or  
20 if you attempt to use it for any sort of improper purpose like  
21 you got to hold DISH liable because they're a big company, you  
22 can't make that argument. Go ahead.

23           **MS. ECHTMAN:** Right, and this case is not about  
24 penalties. It's about damages. It's not about punishing. The  
25 penalty phase is for Your Honor. So emphasis on wealth is

1 inappropriate.

2 **MR. GLASSER:** I'm going to use it for --

3 **THE COURT:** I think -- just a second. I'm ruling in  
4 your favor, so you don't have to argue further. The points  
5 that the Plaintiff said they are offering it for, those are, in  
6 fact, relevant, and so long as the questions are appropriate  
7 and we don't spend too much time on it, I'll let you do it. If  
8 I have Rule 403 concerns, I'll start objecting for the  
9 Defendant myself.

10 **MS. ECHTMAN:** Thank you, Your Honor.

11 **THE COURT:** Go ahead. Or the Defendant can object  
12 again at any point. Go ahead. Oh, wait, the jury.

13 **MR. GLASSER:** The jury.

14 **THE COURT:** Sorry. I'm forgetting the most important  
15 people.

16 You can bring the jury in.

17 Don't tell anybody I did that. That would be embarrassing.

18 (The jury entered the courtroom.)

19 **THE COURT:** All right. Go ahead.

20 **MR. GLASSER:** I move the admission of Plaintiff's  
21 Exhibit 89, Your Honor.

22 **THE COURT:** It will be admitted.

23 **BY MR. GLASSER:**

24 Q. Okay. Mr. Ahmed, this is a presentation about indirect  
25 sales in June of 2011. Do you agree with me?

1 A. Yes, sir.

2 Q. Turning to page 3, this shows at a high level your position  
3 in respect of the sales operations at DISH at the top; is that  
4 right?

5 A. Yes.

6 Q. Turning to the next page, page 4, this shows the 2011  
7 indirect activation's budget; isn't that right?

8 A. Yes, sir.

9 Q. All right. And for the OE retailers, the expectation was a  
10 little bit over 1 million activations in 2011; is that right?

11 A. Yes, sir.

12 Q. All right. And as you can tell from the relative size of  
13 the pie, the OE retailer portion was more than half of the  
14 2 million new activations that your sales force was trying to  
15 get in that year, 2011; is that right?

16 A. Yes, that was the OE budget.

17 Q. All right. And the OE retailers are also called National  
18 Sales Partners; isn't that true?

19 A. Yes.

20 Q. So when it says here on the right side of Exhibit 89  
21 "National Sales Partner, OE tool," that's the slice of the  
22 retailers that SSN is in, right?

23 A. Yes.

24 Q. And just quickly, these full-service retailers are the  
25 other 3,500 retailers we've discussed in this case, right?

1 A. That is correct.

2 Q. Which are expected to bring in about, it looks like,  
3 670,000 activations, right?

4 A. Yes, that's the budget.

5 Q. And then I don't actually know what Alliance Partner is?

6 A. Those are Telco Partners, telephone companies, like  
7 Windstream, TDS, and Frontier at that time.

8 Q. And national accounts, I take it, are probably like deals  
9 with Marriott or whatever?

10 A. No, that would be -- national accounts would be Costco,  
11 would be Sears, would be RadioShack?

12 Q. Okay. Great. Turning to page 14, this has the data for  
13 what happened in 2010, isn't that right, 2010 summary?

14 A. Yes.

15 Q. And the OE tool retailers, the National Sales Partners,  
16 brought in about 1,052,000 new activations, right?

17 A. Yes, sir.

18 Q. And the other 3,500 retailers brought in, it looks like,  
19 something like 630,000?

20 A. Yes, sir.

21 Q. So it's pretty clear -- we've talked about, you know, the  
22 company. It came up in opening. It's come up with you. It  
23 has satellites in space. It has all these other things, but at  
24 the end of the day, it's depends on customers; isn't that  
25 right?



1 A. It's all about the customers, yes, sir.

2 Q. It depends on new activations every year, right?

3 A. Yes, that's important to us.

4 Q. And your compensation, in part, depends on new activations

5 every year because you need to hit your sales budgets, right?

6 A. Sir, I'm a sales guy. I'm responsible for sales. Yes, I

7 want new activations, but it's very important for you to know

8 that it's about quality activations, long-term customers. It's

9 just not about any activations.

10 Q. And the OE tool is designed to get quality long-term

11 customers like Dr. Krakauer, who happens to be DirecTV, but own

12 their own home. That's good, right?

13 A. Yes, it is.

14 Q. Are likely to be on for a long time because they're in a

15 residence, right?

16 A. We want happy customers for a long time. That's exactly --

17 that's what we need to do.

18 Q. But the OE tool was not designed to sell to commercial

19 customers. It was for individual customers, right?

20 A. Right, not commercial, right.

21 Q. Noncommercial?

22 A. Yes.

23 Q. And so the typical person you're looking for -- you prefer

24 people who own their own home, for example, to people who live

25 in apartments who are more migratory, right?

1 A. Yes.

2 Q. And there was a separate sales organization away from the  
3 OE tool retailers to sell to businesses, wasn't there?

4 A. Yes, it's a commercial division.

5 Q. As a person who worked with and managed the OE retailers  
6 for a long time, you'll be able to tell the jury how the OE  
7 tool worked, right, generally?

8 A. I think there's others that can do it better, but, yes, I  
9 can generally talk about it.

10 Q. All right. I'm showing you an OE, order entry, tool  
11 training agenda. Would that help you -- that would probably  
12 help you explain it to the jury; isn't that right?

13 A. Sure. When was this -- when is this from, sir?

14 Q. I don't know the answer to that.

15 **MS. ECHTMAN:** Mr. Glasser, if you could just do me a  
16 favor and let us know what exhibit number this is.

17 **MR. GLASSER:** 334. I move the admission of  
18 Exhibit 334, Your Honor.

19 **THE COURT:** Well, I'm --

20 **MS. ECHTMAN:** I don't believe we have any objections  
21 to this exhibit.

22 **THE COURT:** All right. It will be admitted.

23 And if the witness needs to see the entire document --

24 **MR. GLASSER:** Oh, I'll take it to him.

25 **THE COURT:** -- you know, since he indicated he wasn't

1 completely sure of the time frame.

2 (Copy of exhibit handed to the witness.)

3 **BY MR. GLASSER:**

4 Q. So, Mr. Ahmed, I just want to generally talk the jury  
5 through how the OE tool works in general, okay?

6 A. Sure.

7 Q. All right. I want to turn to page 3. How does the OE tool  
8 work? It says here that the OE tool interfaces with CSG  
9 EchoStar's billing system for account creation and gives the  
10 user a realtime DISH Network Service's calendar for the  
11 earliest available installation date. Do you see that?

12 A. Yes, sir.

13 Q. All right. CSG -- so at all relevant times, which is the  
14 end of the class period, 2011, the OE tool interfaced with -- I  
15 know, EchoStar, DISH, same thing, right?

16 A. Yes.

17 Q. -- the DISH billing system, correct?

18 A. Yes, all the platforms interface with CSG.

19 Q. All right.

20 A. You have to know where to bill the customer.

21 Q. Got it. And DISH Network Service -- it also calendared and  
22 sent out installers. It automated the process, right?

23 A. Yes. The customer can choose when they would like it  
24 installed, and, yes, they would get installed at that point.

25 Q. Turning to page 4, this is a discussion of the relevant

1 benefits of using the OE tool to the OE retailer, correct?

2 A. Yes.

3 Q. Okay. So you tell -- the idea is that an OE retailer  
4 doesn't have to buy equipment or purchase inventory, DISH's  
5 equipment, DISH's hoppers, DISH's whatever; DISH has all that,  
6 pays for all that inventory, and then ships it right to the  
7 place where it's installed, right?

8 A. Yes, we deliver it to the customer with the installer.

9 Q. Right. So this is not a retailer -- the OE retailer is not  
10 a retailer like, say, a General Motors dealer who has actual  
11 cars on the lot that are sitting there that the dealer bought.  
12 The cars are at DISH -- the DISH equipment is at DISH, and it's  
13 delivered straight to the customer?

14 A. Yes.

15 Q. Inventory is with DISH all the time?

16 A. Yes.

17 Q. DISH balance sheet, DISH money pays for all the inventory,  
18 right?

19 A. That's correct.

20 Q. Okay. The OE retailer has no need to have its own  
21 installation guys, right, because DISH provides the  
22 installation guys, correct?

23 A. Yes.

24 Q. The OE retailer doesn't actually have to handle any money  
25 from the customer, right, because when the deal goes through,

1 the customer's billing is straight on the DISH billing system,  
2 and DISH gets the credit card payment and DISH gets the  
3 subsequent payments, right?

4 A. Yes, we have to bill the customer for the services we're  
5 providing.

6 Q. Okay. And on customer returns, DISH handles all returned  
7 equipment and refunds with the customer directly, right?

8 A. Yes.

9 Q. So you don't have to have a staff that deals with returns  
10 if you're an OE retailer, right?

11 A. There are hopefully not a lot of returns, but, yes.

12 Q. Okay. And all these things were true at all relevant times  
13 to this case up through the end of 2011 about OE retailers,  
14 right?

15 A. Yes, that's the program.

16 Q. And the customer will see DISH on their credit card  
17 statement, right?

18 A. Yes, it's our billing. We bill the customer. They're  
19 getting our service.

20 Q. There are some limitations to the OE tool I think we  
21 discussed. No commercial, right? It doesn't sell  
22 commercially? It's not for commercial sales?

23 A. Yes. That's why I asked. This is an old document. At  
24 that time, no.

25 Q. And when did it become available for commercial sales?

1 A. For public-private commercial establishments, I believe  
2 they can do that today.

3 Q. Today. But when did that happen?

4 A. I don't have the exact date.

5 Q. You do not believe it happened through the end of the class  
6 period, 2011, do you?

7 A. I'm not certain of that, sir. We did include  
8 public-private into the tool. A lot of retailers wanted to  
9 sell to businesses.

10 Q. So as the head of sales, you don't know what day?

11 A. I don't know.

12 Q. You don't know what year?

13 A. I'm not certain. It could -- I'm not certain when it  
14 happened, no.

15 Q. And you don't know if SSN ever sold more than one  
16 commercial deal to a business ever?

17 A. I don't know that.

18 Q. There is support provided to the OE retailers, right?

19 A. Yes, sir.

20 Q. I'm sorry. Wrong page. Let's see. I need to be on  
21 page 6. Here we go, page 6. So let's walk through the  
22 elements of support. There's field sales development, which  
23 provides weekly sales training on promotions, et cetera, and  
24 consistent localized support, right?

25 A. Yes, that's what it says.

1 Q. So these are field sales training representatives across  
2 the country that go into the OE retailers stores and train  
3 them, right?

4 A. On our consumer promotions. It says weekly. I don't know  
5 how often we did that. It's a document, and this actually  
6 looks like because of the -- because of the logo, this is  
7 probably about 10, 11, 12 years old. So I don't know exactly  
8 how often they went, but, yes, on the consumer promotions, yes,  
9 we provided training.

10 Q. But whether it was weekly or monthly, at all relevant times  
11 to this case, DISH field service development -- or field sales  
12 development personnel were made available, put into the OE  
13 retailers' offices, and trained them on DISH products and  
14 sales?

15 A. The training on the consumer offer, yes, it's our  
16 responsibility to do that.

17 Q. Okay.

18 A. Make sure they're doing things correctly as it relates to  
19 the consumer offer and understanding our technology and our  
20 promotions.

21 Q. Okay. DNS means DISH Network Service, right?

22 A. That's correct.

23 Q. All right. And -- and this is just kind of repeating the  
24 idea that they'll handle installations and customer complaints  
25 or adjustments arising out of installations through the DISH

1 Network Services, right?

2 A. Yes.

3 Q. CSC I think is the billing section of DISH, right?

4 A. The Customer Service Center.

5 Q. Customer Service Center. Okay. So is this saying that,

6 hey, our customer service center will deal with customer

7 complaints or customer service needs?

8 A. No, this is if the platform would go down, that the retail

9 had an opportunity to contact using exceptions line so we can

10 bill the account and not have the customer waiting or losing

11 the customer.

12 Q. Okay. If the system went down?

13 A. Yes, and it frequently went down.

14 Q. And then IT is Information Technology, right?

15 A. Yes.

16 Q. And DISH provides 24/7 maintenance of the OE tool

17 performance and operations, right?

18 A. Yes.

19 Q. And DISH is responsible for the creation, development, and

20 implementation of enhancements to the OE tool, right?

21 A. Yes, there's always enhancements.

22 Q. And was that IT support function for DISH Corporate true

23 the whole -- all the relevant time of this case through the end

24 of the class period?

25 A. For all platforms, it's a system. You have to have IT



1 support to make sure it's functioning.

2 Q. Okay. So now let's go to page 9. We'll just walk through

3 kind of what it is. So it's basically a computer like the one

4 you have in front of you where the screens pop up and the

5 telemarketer walks through the screens with the customer on the

6 phone, right?

7 A. The retailer.

8 Q. Okay. The person on the phone -- okay. The retailer is --

9 A. Sales agent, yes.

10 Q. Sales agent, great. Okay. The sales agent walks through

11 the screens as they pop up on the computer, right?

12 A. That's correct.

13 Q. A lot of drop-down menus and checking of boxes, right?

14 A. Yes, that's very important.

15 Q. All right. And so to get to it, you just type in

16 salespartners.dishnetwork.com/partners/logon.do. Do you see

17 that?

18 A. Yes.

19 Q. And then this is kind of hard to see. I have another

20 version that's a little easier to see, but there's a login ID

21 and a password, right?

22 A. Yes.

23 Q. So the National Sales Partner, in this case SSN, will have

24 its own passwords to get in?

25 A. That's correct.

1 Q. Then there's some buttons you click to create new  
2 customers, right?

3 A. Yes.

4 Q. Okay. Reschedule customer installation, right?

5 A. Yes.

6 Q. Okay. And that's true at all relevant times of this case,  
7 right?

8 A. Yes, you have to put the customer information into the  
9 platform.

10 Q. Turning to page 12, there are -- and I'll try -- I've got  
11 another one we can quickly go through that's a little easier to  
12 see on the drop-down menus, but, basically, there's  
13 fill-in-the-blanks, right, where you get the customer phone  
14 number, the address, the city, state, residence, those things,  
15 right?

16 A. Yes, that's relevant. That's very important.

17 Q. And then the price is calculated by the machine, right?

18 A. Yes, based on what the customer is purchasing, yes.

19 Q. So DISH sets the price for DISH products, not the sales  
20 agent?

21 A. Right, it's our promotion, it's our offer and, yes, we set  
22 the price.

23 Q. All right. And the machine -- and that's true at all  
24 relevant times in this case?

25 A. Yes, it's our product.

1 Q. Then the next page of the computer, which is hard to see,  
2 but it basically figures out what the customer is qualified for  
3 and what the customer can get, right?

4 A. That's correct.

5 Q. And that was true at all relevant times of this case?

6 A. Right, there are certain promotions for certain customers  
7 based on their qualification.

8 Q. Page 16, again, it has to do with the drop-down screen and  
9 some clicking and filling in of -- of fields, but, basically,  
10 what happens is the machine sets up and runs a credit check on  
11 the customer for their -- if they want to buy DHA or FFA?

12 A. Yes, every customer for DISH, every customer.

13 Q. Okay. So every customer, the sales agent has them on the  
14 phone, they take their data, DISH runs a credit check on them?

15 A. That's correct.

16 Q. And DISH keeps the results of the credit check? Well, DISH  
17 owns the credit check. DISH paid for it?

18 A. We ran the credit check, yes.

19 Q. And you paid for it? The sales agent's company didn't pay  
20 for it, correct?

21 A. We ran the credit check. Yes, I believe that could be  
22 right.

23 Q. And then I'll go through the next pages pretty fast because  
24 there's a lot of them, but it's basically the idea of figuring  
25 out how many receivers you have, and there's a bunch of

1 clicking and picking, right?

2 A. That's very important because we need to know what the

3 customer is requesting.

4 Q. Okay. Basic program packages that can be available,

5 clicking and picking, right?

6 A. Exactly. We need to know what the customer wants in terms

7 of programming, what their needs are.

8 Q. Picking the local and network channels they want, clicking

9 and picking, right?

10 A. Same thing. We ask them if they want locals.

11 Q. Deciding on their premium programming, clicking and

12 picking, right?

13 A. Sure.

14 Q. And then it recalculates the price. It's not up to the

15 sales agent?

16 A. No. We need to be accurate with what the customer is

17 purchasing so we can give them the correct price.

18 Q. So these sales agents aren't independent in the sense of

19 negotiating anything, right?

20 A. It's our promotion, and we can't have 35 -- you just

21 mentioned 3,500 retailers. Can you imagine 3,500 retailers --

22 if we didn't do this, they would all come up with the wrong

23 pricing. You can't do that.

24 Q. But, of course, we know that there are only 45?

25 A. Or 45.

1 Q. Okay. So the next five pages are basically the same type  
2 of stuff, you agree? Just look through. It's different types  
3 of programming, different clicking and picking, right? I'm up  
4 to page 26 now.

5 A. Yes, sir.

6 Q. Do you agree with me?

7 A. I'm at 26, yes.

8 Q. Okay. But do you agree with me that the next five screens  
9 are virtually the same as what we were talking about before?

10 A. Yes, broadband installation date, yes.

11 Q. Then DISH takes the credit card payment, right? And then  
12 additional disclosures will display what you must read to the  
13 customer before moving forward, correct?

14 A. Yes.

15 Q. And so to make sure that they were reading them correctly,  
16 DISH had a field representatives who would listen in on calls,  
17 right?

18 A. Yes, we could do that.

19 Q. Upload recordings of calls to the DISH system every week  
20 for quality review -- quality assurance review; right?

21 A. When we'd be requested, we could do that, yes.

22 Q. Okay. And this was true at all relevant times of this  
23 case, DISH physically could listen in to calls, and did; right?

24 A. Yes, yes.

25 Q. And DISH took recordings of the calls regularly and did

1 review those; right?

2 A. Yes. And you just showed me the terms and conditions,  
3 which is so critical because it is about the customer. I need  
4 to say that. You need to make sure what the customer is  
5 requesting, that it is explained to them accurately. You can't  
6 tell them your price is \$29 when it's 49. It's -- so you have  
7 to take care of the customer --

8 Q. I got it.

9 A. -- okay? I just wanted to --

10 Q. So what's going to happen here is I'm going to ask you my  
11 questions --

12 A. I'm sorry. Okay.

13 Q. -- and then your lawyer gets to stand up and ask you  
14 anything you want, and you get to say whatever --

15 **THE COURT:** Okay. Well, he can explain his answers.  
16 Go ahead.

17 **THE WITNESS:** Okay. I'm sorry.

18 **THE COURT:** No, that's all right.

19 **BY MR. GLASSER:**

20 Q. So -- and then, like you said, the terms and conditions are  
21 read, and they all pop up automatically; right?

22 A. Yes, sir.

23 Q. Okay. Let's just quickly go through a similar order entry  
24 tool manual that just had some screens that are easier to read.

25 **THE COURT:** Which --

1           **MR. GLASSER:** Plaintiff's Exhibit 1208. I'll approach  
2 the witness with it.

3           (Document handed to the witness.)

4           **THE COURT:** Any objection to this one?

5           **MS. ECHTMAN:** Let me just check. I don't believe so.  
6 No. No objection.

7           **THE COURT:** All right.

8           **MR. GLASSER:** Okay. I move the admission of  
9 Plaintiff's Exhibit 1208.

10          **THE COURT:** It will be admitted.

11 **BY MR. GLASSER:**

12 Q. So what we have here, Mr. Ahmed, is just another kind of  
13 manual on the order entry tool that has a few different pieces  
14 of info, so I want to quickly go over that.

15 All right. On the first page, the order entry tool is the  
16 essential application you will be using to place customer  
17 orders for DISH Network equipment and services. That's pretty  
18 true for OE retailers; right?

19 A. Yes.

20 Q. Okay. You just access the tool from your web browser by  
21 clicking on the DISH Network logo on your screen. Do you see  
22 that?

23 A. Yes.

24 Q. So did you guys install software that connected directly to  
25 this network on the OE retailer's computer systems?

1 A. I don't know exactly how it worked. We didn't -- I don't  
2 believe we put any software into the retailers' organization.  
3 We had a platform and they had the ability to access it based  
4 on the fact that we attached a log-in so it could be tied to  
5 the retailer.

6 **THE COURT:** And platform, you just mean some --

7 **THE WITNESS:** The OE platform.

8 **THE COURT:** -- internet out there?

9 **THE WITNESS:** Our order entry platform at DISH.

10 **BY MR. GLASSER:**

11 Q. Okay. And then, on page 3, it says here at the top: Enter  
12 customer information. Define if your customer owns their  
13 residence or not. And down at the bottom, it's: Does your  
14 customer own the residence? If no, the customer must have  
15 written approval by the owner of the installation. Do you see  
16 that?

17 A. Yes.

18 Q. That's because the order entry tool was focused on  
19 residential sales; isn't that true?

20 A. No. We wanted to make sure that there's provisions out  
21 there. There are certain condominium units or apartment units  
22 that the owners would not allow a satellite DISH, so we wanted  
23 to make sure that we had the right information.

24 Q. And then, again, they get the credit card payment and it  
25 goes straight to DISH; right? Is that right?



1 A. Yes, we bill the customer.

2 Q. And then, at the end here, page 15.

3 **MS. ECHTMAN:** Mr. Glasser, I'm sorry to interrupt you,  
4 but could you just -- I need you to just say the page number,  
5 because it's very hard for me to follow you.

6 **MR. GLASSER:** Yeah, sorry.

7 **MS. ECHTMAN:** Thank you.

8 **BY MR. GLASSER:**

9 Q. At page 15, the order summary, congratulations and welcome  
10 to DISH Network; right?

11 A. Yes.

12 Q. I'm approaching you with Plaintiff's Exhibit 26.

13 (Document handed to the witness by Mr. Glasser.)

14 **BY MR. GLASSER:**

15 Q. Do you recognize Plaintiff's Exhibit 26 as an EchoStar  
16 Retailer Agreement in this case for Satellite Systems Network;  
17 right?

18 A. Yes, sir.

19 **MR. GLASSER:** Move the admission of Plaintiff's  
20 Exhibit 26, Your Honor.

21 **MS. ECHTMAN:** Your Honor, I believe we've replaced  
22 this with a joint exhibit, so this is one of the JXs. It's JTX  
23 1. And there's, of course, no objection.

24 **THE COURT:** Okay.

25 **MR. GLASSER:** So I'd move the admission of Plaintiff's

1 26 and JTX1, Your Honor.

2 **THE COURT:** It will be admitted.

3 **BY MR. GLASSER:**

4 Q. All right. So I want to go over the -- you asked about the  
5 contract with SSN, so I want to go over it with you, sir; okay?

6 A. Yes, sir.

7 Q. All right. This is the EchoStar Retailer Agreement  
8 effective as of December 31, 2006. Do you see that?

9 A. Yes, I do.

10 Q. All right. So, we know in this case that Dr. Krakauer was  
11 called in 2009 for the first time, so this is the agreement  
12 that was in effect at the time he was called; right? I've got  
13 another one for 2010 I'm going to show you in a minute.

14 A. Okay.

15 Q. Do you agree?

16 A. Sure.

17 Q. Okay. And you saw -- your lawyer went through the  
18 different agreements in opening; right? And this is the part  
19 that your lawyer pointed out in opening, that they're acting as  
20 an independent contractor and desire to become authorized to  
21 market and promote DISH; right?

22 A. Yes.

23 Q. Now, I want to focus on some terms and conditions. I'm at  
24 Section 1.7. Do you see it down there, "Business Rules"?

25 A. Yes, I do.

1 Q. All right. So business rule, you'll recall, in the  
2 Assurance of Compliance, there was that paragraph that said  
3 DISH shall issue business rules. Do you recall that?

4 A. Yes.

5 Q. All right. So now, we're looking at the definition of  
6 "business rule," right?

7 A. Yes.

8 Q. It means a term, requirement, condition, condition  
9 precedent, process, or procedure associated with a promotional  
10 program or otherwise identified as a business rule by EchoStar,  
11 which is communicated to retailer by EchoStar or an affiliate  
12 of EchoStar either directly, including without limitation via  
13 e-mail, or through any method of mass communication reasonably  
14 desired -- sorry -- directed to EchoStar's retailer base,  
15 including, without limitation, retailer chat, e-mail, facts  
16 blast, or posting to EchoStar's retailer website; right?

17 A. Yes.

18 Q. All right. So that's a mouthful, but basically, DISH has  
19 the power to issue SSN a business rule by sending them an  
20 e-mail?

21 A. Business rules were sent via e-mails and also posted on the  
22 retailer care site, yes.

23 Q. All right. And retailer agrees that EchoStar has the right  
24 to modify any business rule at any time, defined term, in its  
25 sole discretion, a defined term; right?

1 A. Yes.

2 Q. Turning to page 5, it says here: EchoStar hereby appoints  
3 retailer as a nonexclusive authorized retailer to market,  
4 promote, and solicit orders for programming, subject to all the  
5 terms and conditions of this agreement and all business rules.  
6 This is at Section 2.1. Do you see it up here at the top?

7 A. Yes, I do.

8 Q. Which are hereby incorporated into this agreement by  
9 reference in their entirety. So the business rules issued by  
10 DISH are part of the contract; right?

11 A. Yes.

12 Q. Okay. Territory, in this case, is the United States;  
13 right?

14 A. Yes.

15 Q. So SSN had the power to sell across the United States;  
16 right?

17 A. Yes.

18 Q. And one of the meanings of it being nonexclusive is your  
19 other 44 national sales partners in 2011 likewise had the power  
20 to sell across the United States; right?

21 A. Can you repeat that? Did you say nonexclusive?

22 Q. Yes. So, SSN did not have the exclusive right to sell in  
23 the United States to the exclusion of your other 44 national  
24 sales partners. They also had the right to sell in the United  
25 States; correct?

1 A. Yes. And they could sell any other product, also, not just  
2 DISH.

3 Q. I'll get to that.

4 A. Okay.

5 Q. But you agree that that is a meaning of this contract, that  
6 SSN cannot say, hey, wait a minute, DISH, I have the right  
7 exclusively to the United States of America?

8 A. That's correct.

9 Q. Okay. And then, "Acceptance," here in 2.3 basically says  
10 that: The retailer accepts its appointment as an authorized  
11 retailer and agrees to use its best efforts to continuously and  
12 actively advertise, promote, and market programming and to  
13 solicit orders therefore, subject to and in accordance with all  
14 the terms and conditions of this agreement; right?

15 A. Yes.

16 Q. Retailer understands that it may hold itself out to the  
17 public as an authorized retailer of EchoStar only after  
18 fulfilling and for so long as it continues to fulfill all the  
19 duties, obligations, requirements, and other terms and  
20 conditions in this agreement; right?

21 A. Yes.

22 Q. I forgot to go to the definition of, "sole discretion," so  
23 let's go back to 1.64 -- I'm sorry 1.46, on page -- on page 4.  
24 Do you see that?

25 A. Yes, sir.

1 Q. "Sole discretion" means a person's sole and absolute  
2 discretion for any reason or no reason; right?

3 A. Yes.

4 Q. So when the part about business rules said DISH could  
5 change its business rules anytime in its sole discretion, that  
6 was saying, in plain English, that DISH can change any aspect  
7 of this contract it wants at any time for any reason or no  
8 reason; right?

9 A. Business rules pertaining to our consumer promotions, yes.

10 Q. Okay. Turning to Section 5 of the contract on page 9, this  
11 just says that EchoStar shall determine the retail prices for  
12 programming at any time in its sole discretion; right?

13 A. Yes.

14 Q. Retailer will only solicit orders for programming at the  
15 retail prices set by EchoStar from time to time; right?

16 A. Yes.

17 Q. EchoStar may increase, decrease, or otherwise modify those  
18 prices at any time in its sole discretion; right?

19 A. Yes.

20 Q. Any price charges shall be effective immediately upon  
21 notification by EchoStar. Okay. Then we go down to  
22 "incentives," which is what you call the pay for the OE  
23 retailer; right?

24 A. Yes.

25 Q. Okay. There are -- it says here: In consideration of

1 retailer's continuing efforts to market, promote, solicit  
2 orders for programming and retailer's continuing efforts to  
3 provide DISH Network subscribers after an initial activation,  
4 retailer may be eligible to receive the following, and, you  
5 know, the pay; right?

6 A. (Nodding head.)

7 Q. So there are monthly residential incentives; right?

8 A. Uh-huh.

9 **THE COURT:** And if the witness could just answer out  
10 loud.

11 **THE WITNESS:** I'm sorry. Yes. I'm sorry, Your Honor.

12 **THE COURT:** That makes me a little dizzy.

13 **BY MR. GLASSER:**

14 Q. I'm at Section 6.1. EchoStar expressly reserves the right  
15 to change applicable business rules at any time and from time  
16 to time in its sole and absolute discretion for any reason or  
17 no reason, upon notice to the retailer; right?

18 A. Yes, sir.

19 Q. All right. EchoStar shall determine from time to time in  
20 its sole and absolute discretion for any reason or no reason  
21 whether a particular DISH Network subscriber is a new  
22 residential subscriber account eligible for payment of monthly  
23 residential incentives hereunder. EchoStar's calculation and  
24 payment of monthly residential incentives shall be presumed  
25 conclusively and irrebuttably correct absent a timely notice of

1 claim by the retailer pursuant to Section 15, which we'll get  
2 to. You see that?

3 A. Yes.

4 Q. All right. So, because in their sole discretion, for any  
5 reason or no reason -- well, DISH can change the price that --  
6 the pay they're going to pay for any reason or no reason in  
7 their sole discretion anytime; right?

8 A. We can adjust the pay, yes, just like we can adjust the  
9 programming packages, yes.

10 Q. And that statement about DISH being able to change the pay  
11 at any time for any reason or no reason appears in the monthly  
12 residential MDU incentives, right, right here at Section 6.12?

13 A. Yes.

14 Q. In the monthly commercial incentives in 6.13; right?

15 A. Can you just tell me -- I just want to make sure. I'm sure  
16 you're telling it accurately, but --

17 Q. No.

18 A. -- I just want to make sure I can see it.

19 Q. Well, I'll tell you what.

20 A. I apologize.

21 Q. No, it's fine. Totally fine.

22 A. I just want to see that -- exactly that right language is  
23 in there.

24 Q. Right here.

25 **MS. ECHTMAN:** Does Mr Ahmed have a copy of the whole



1 document?

2 **MR. GLASSER:** Yes.

3 **THE WITNESS:** What page are we on, sir?

4 **BY MR. GLASSER:**

5 Q. All right. So, basically, my question is -- let's just do  
6 this a little faster. There are a series of incentives that  
7 can be paid. There are monthly incentives; right?

8 A. Correct.

9 Q. There are additional residential incentives; correct?

10 A. Correct.

11 Q. There are -- and in each of those incentives, for  
12 everything DISH pays, DISH can change what it wants to pay at  
13 any time in its sole discretion for any reason or no reason;  
14 right?

15 A. Yes, we can change that based on the competitive nature of  
16 the business, yes.

17 Q. I got it. So not only is the price set by DISH, but all  
18 the pay is set by DISH and can be changed every day if DISH  
19 wants?

20 A. That's not realistic, we would change it every day. I  
21 think some of it probably didn't change for a couple of years,  
22 but --

23 Q. No, I get it. I understand. But I'm saying --

24 A. But that's not realistic.

25 Q. But the contract --

1 A. Yes.

2 Q. I agree -- so it's a pretty one-sided contract; right?

3 A. We can change the pricing on the programming and the  
4 incentives.

5 Q. So these retailers -- this OE retailer has signed up for a  
6 pretty one-sided deal in your view, since a completely  
7 unrealistic price changes could happen every day under this  
8 contract; right?

9 **MS. ECHTMAN:** Objection, argumentative.

10 **THE COURT:** Well, the witness can answer, but he can  
11 explain. He's not limited to "yes" or "no."

12 **THE WITNESS:** I mean, how it's written. But, again,  
13 you know, you have to look at the context of everything.  
14 That's not how a business is run.

15 **BY MR. GLASSER:**

16 Q. So, there are things about this contract that are written  
17 in here that boots on the ground level never really are true;  
18 right?

19 A. Well, you can't change pricing every day on programming  
20 packages, right? Customers sign two-year agreements. You just  
21 can't change the package pricing. That's what I'm saying, it's  
22 not realistic.

23 Q. But you have the legal power to do so; right?

24 A. The agreement says that, yes.

25 Q. In your view, that holds the retailer on a fairly tight

1 leash; doesn't it?

2 A. Meaning?

3 Q. If I can change your pay -- let's say you work for me, and  
4 I can change your pay every day, anytime I want for any reason  
5 or no reason even though you have a written contract. Isn't  
6 that contract a pretty short leash for you?

7 A. Not if the retailer -- no. I mean, that's what they're  
8 agreeing with and that's what we pay them, based on, you know,  
9 whatever our payment is to all the retailers.

10 Q. Okay. Now, there's some other things that the retailer  
11 acknowledges and agrees. I'm on page 11, if you want to look  
12 at the one in your hand or on the screen. Page 11.

13       Retailer -- and it's Section 6.25. Retailer acknowledges  
14 and agrees that page -- Section II, EchoStar may at any time  
15 and from time to time, in its sole and absolute discretion --  
16 see those words again -- for any reason or no reason, add,  
17 discontinue, substitute, modify, or otherwise alter any or all  
18 of the terms and conditions of any promotional program  
19 involving the payment of additional incentives. Do you see  
20 that?

21 A. Yes, sir.

22 Q. That's what we were just talking about; right?

23 A. Yes.

24 Q. Let's go to Section 6.4, "Payment." It says: Subject to  
25 the terms of this Section 6.4, all incentives paid to retailers

1 shall be made by EFT. I think that's electronic funds  
2 transfer.

3 A. That's correct.

4 Q. And that's generally how these retailers were paid; right?

5 A. Right.

6 Q. And Sophie Tehranchi -- well, it's your understanding this  
7 was a weekly pay?

8 A. That's correct.

9 Q. But it was paid on activations?

10 A. On activations, correct.

11 Q. Okay. Now, I'm turning to Section 7.3, which is on  
12 page 17. And this is under a section called, "Orders." Do you  
13 see that?

14 A. Yes, sir.

15 Q. These are orders from DISH; right?

16 A. Yes.

17 Q. Section 7.3: Retailer shall comply with all business  
18 rules, including without limitation all business rules which  
19 govern or are otherwise applicable to any promotional program  
20 in which retailer participates --

21 **THE COURT:** Okay. Just --

22 **MR. GLASSER:** Too fast.

23 **THE COURT:** Slow, and it -- you know, if you can ask  
24 questions rather than just read.

25 **MR. GLASSER:** Okay. All right.

1 **BY MR. GLASSER:**

2 Q. All right. Here's the part I really want to see. All  
3 right. See this section here, where it says: Retailer shall  
4 take all action and refrain from taking any action as requested  
5 by EchoStar in connection with the marketing, advertisement,  
6 promotion, and/or solicitation of orders for programming, or  
7 the sale, lease, or other transfer of DISH systems. And  
8 retailer shall cooperate by supplying EchoStar with any  
9 information arising from or relating to those actions as  
10 EchoStar reasonably requests. Okay?

11 A. Yes, sir.

12 Q. All right. So this clause covers two possible things,  
13 things you ask them to do, they must do; right?

14 A. As it relates to orders, the consumer promotion terms and  
15 conditions, yes.

16 Q. All right. Let's read it. I know you're trying to limit  
17 -- let's read it. Retailer shall take all action -- refrain  
18 from taking any action as requested by EchoStar in connection  
19 with the marketing, advertising, promotion, and/or solicitation  
20 of orders. We've just gone through the OE tool; right?

21 A. Yes.

22 Q. That's all we're doing. We're marketing, soliciting  
23 orders. Isn't that true?

24 A. This section, 7.3, it's clear, it's about orders, correct;  
25 and, no, it's about the orders, sir, and it is about exactly

1 explaining what the customer is getting, the importance of the  
2 terms and conditions, and they must follow that so we know the  
3 customers are happy, and they know exactly what they're  
4 getting, and they're honestly being informed of what they're  
5 getting. That's what this is about.

6 Q. All right. So we looked at the Assurance of Compliance;  
7 right?

8 A. Yes.

9 **THE COURT:** Okay.

10 **BY MR. GLASSER:**

11 Q. And the Assurance of Compliance said that DISH would issue  
12 business rules causing adherence to that Assurance of  
13 Compliance; right?

14 A. Yes.

15 Q. And that Assurance of Compliance required ongoing  
16 monitoring. We already discussed that; right?

17 A. These business rules about the consumer promotion.

18 Q. So, this is the section of the contract that DISH was  
19 relying on to tell 46 States Attorneys General that it could  
20 cause compliance; isn't that true?

21 A. Sir, I think you're taking that out of context. This is --  
22 you have to look at the entire agreement as a whole. The  
23 entire agreement references independent contractors and the  
24 sole responsibility to be compliant and follow the law. This  
25 is specifically about orders and the consumer order which is so

1 relevant to us because we need to make sure we're processing  
2 what the customer wants. That's what this is about, orders.

3 Q. Find the part in the contract, then, that gives DISH the  
4 power to impose the Assurance of Compliance if it's not  
5 Section 7, and point it out to me.

6 A. Sir, it's never, ever that I know ever been used more  
7 broadly than what it says, which is the orders and compliance  
8 on the orders. That's what this is about.

9 Q. So you think that DISH was faking out the 46 Attorneys  
10 General and didn't, in fact, have the power to impose a  
11 business rule causing compliance?

12 A. No. I'm just saying, this is about specific orders, about  
13 the consumer order. When they purchase something, we need to  
14 let them know exactly what they're purchasing. And we want to  
15 make sure the retailer is explaining the terms and conditions  
16 and the disclosures to the customer. That's what this is  
17 about.

18 Q. And you want to say that a section of a contract that says,  
19 we can order you to take any objection or refrain from taking  
20 any action does not give the power to make them comply with the  
21 Assurance of Compliance?

22 A. You have to look at the whole agreement as a whole. I see  
23 where you're taking that, but that's not what it's ever used --  
24 I've never used it that way. I don't think anyone's ever used  
25 it that way.

1 Q. Okay. 7.4 says: Retailer hereby acknowledges and agrees  
2 that the relationship, contractual or otherwise, between  
3 EchoStar and each DISH Network subscriber is as between  
4 EchoStar and its retailer for the sole and exclusive benefit of  
5 EchoStar. Do you see that?

6 A. Yes.

7 Q. All right. So that's a section saying when the sales agent  
8 signs up a customer, that customer is signed up for the sole  
9 and exclusive benefit of DISH; right?

10 A. Yes, that customer is in a relationship with DISH. They're  
11 getting our services, our equipment, and, yes, they're paying  
12 for the programming to DISH.

13 Q. Okay. And then, the next sentence: EchoStar may  
14 conduct -- I'm at 7.4 still -- EchoStar may conduct such  
15 relationship in any manner that it sees fit at any time in its  
16 sole discretion without incurring any liability whatsoever to  
17 the retailer or any of its affiliates; right?

18 A. Yes.

19 Q. So that's basically saying once -- once the sales agent  
20 presses click and congratulations, welcome to DISH, that's  
21 solely a DISH customer, not an SSN customer?

22 A. This -- it's a DISH subscriber. Yes, they're purchasing  
23 our services.

24 Q. All right. It says here: Retailer acknowledges and agrees  
25 that all records created or maintained by or on behalf of



1 EchoStar relating to any DISH Network subscriber are the sole  
2 and exclusive property of EchoStar, and EchoStar shall not have  
3 any obligation whatsoever to give or allow retailer access to  
4 such information, even if authorized or requested by such DISH  
5 Network subscriber; right?

6 A. Yes.

7 Q. So, had Dr. Krakauer been signed up for DISH and known it  
8 was SSN, and then later, SSN calls in and says, we'd like to  
9 see Dr. Krakauer's records, DISH could say no?

10 **MS. ECHTMAN:** Objection. This is a hypothetical  
11 question for a fact witness.

12 **THE COURT:** Well, he can explain what the contract  
13 means. Overruled.

14 **THE WITNESS:** I think if there was any complaint that  
15 came in --

16 **BY MR. GLASSER:**

17 Q. That's not what I asked.

18 A. If there was a complaint that came in, I know what it says.  
19 If a complaint that came in, we would take care of the customer  
20 because it's all about the customer. We would identify what  
21 the issue is and work with the retailer to identify the issue.

22 Q. I didn't ask you about a complaint. I'm saying -- I'm  
23 saying the books, records, the records, the -- the fact of the  
24 customer's personal information, where the customer lives, what  
25 the customer watches on TV, all that stuff is the complete,

1 total, exclusive property of DISH and has nothing to do with  
2 the retailer --

3 A. The retailer --

4 Q. -- right?

5 A. The retailer sold the customer, they have that information,  
6 but that is our subscriber. And, yes, we have all that  
7 information. We're billing them. They're getting our service.  
8 We need to know where they live.

9 Q. And even if the subscriber knew the identity, was best  
10 friends with the OE retailer that signed him up, and the OE  
11 retailer wanted the information, you could say no because  
12 that's not the OE retailer's stuff. It's your stuff?

13 A. The OE retailer would have that information, also, right.  
14 They sold to the customer. They would have that information.  
15 But, yes, that's our customer as we're billing them.

16 Q. Well, you say that, but they click on the machine and it  
17 goes away, and then they go to the next one; don't they?

18 A. They could -- any business retailer, they could keep that  
19 information; right.

20 Q. What, they would --

21 A. We have to have a platform to process the order so we know  
22 what we're installing, where we're sending the signal for the  
23 service, where we're billing the customer, right? We have to  
24 do that, or how are you going to get a subscriber to watch TV?

25 Q. So is your theory that the OE retailer -- you know, sales

1 agent, telemarketer keeps some butcher paper on the side?

2 A. Not butcher paper. If they're organized, they would have  
3 that information, yes. They have a system, they know who they  
4 sold to.

5 Q. But, in any event, under the contract, the records are  
6 DISH's, and SSN doesn't even have the legal right to look at  
7 them; right?

8 A. That's what the contract says.

9 Q. Page -- page 18, Section 9.1, I think we saw this in  
10 opening argument. The retailer promises to abide by the law;  
11 right?

12 A. Yes, sir.

13 Q. Okay. Let's go to page 9 point -- page 19, Section 9.5, to  
14 save reading at least, can you just familiarize yourself with  
15 Section 9.5, and then I'll ask you some questions about it?

16 A. I'm going to look at it up here, sir. Some of it's not  
17 coming through. Yeah, that's a little bit better. Thank you.

18 Q. Just look up when you're comfortable, you remember what  
19 this covers.

20 (Pause in the proceedings.)

21 A. Okay, sir.

22 Q. All right. So you agree that under Section 9.5 of the  
23 contract, SSN had no right to make use of any list of past or  
24 current DISH Network subscribers, whether delivered by the  
25 retailer or obtained by EchoStar for any reason? I'm at

1 Subsection A, 9.5, Subsection A. Right here.

2 A. Yeah, that's what I'm trying to -- it says -- yes, make use  
3 of any lists of past or current DISH Network subscribers. Yes.

4 Q. All right. So, if the retailer had the butcher paper and  
5 wrote down the names and addresses and then wanted to go sell  
6 some other product, they had no legal right to use that  
7 information; isn't that correct?

8 A. Yes. We're protecting the customer there. We don't want  
9 them using that list for whatever reason.

10 Q. So there's no --

11 **MS. ECHTMAN:** Objection, relevance on this whole line.

12 **THE COURT:** Okay. Well, let's move along. You can  
13 proceed, but let's --

14 **BY MR. GLASSER:**

15 Q. You can't use any information for the direct or indirect  
16 benefit of any other entity; right? Right?

17 A. Yes. That's protecting the customer for sure.

18 Q. Got it. You can't solicit these customers for any other  
19 services offered by any other person or entity; right?

20 A. Right. We don't want -- no, we don't want a retailer to  
21 bring us a subscriber and then take that customer and sell them  
22 a competing product.

23 Q. Okay. I got it. So, in this case, from May of 2010 to  
24 August of 2011, the evidence will be that there are 231  
25 connected calls -- 231,000 connected calls. The information

1 that SSN gleaned from those calls if they signed up a customer,  
2 was solely for DISH's use; right?

3 **MS. ECHTMAN:** Objection, lacks foundation.

4 **THE COURT:** Well, the jury will take the evidence  
5 about the numbers from witnesses, not from counsel, but you can  
6 answer the question.

7 **BY MR. GLASSER:**

8 Q. Are you following me?

9 A. No.

10 Q. All right. I guess what I'm trying to say is, you have  
11 said on the witness stand and your lawyer said in opening that  
12 this -- that this -- this independent retailer had this power  
13 to market to all these other people. And I'm saying if all the  
14 marketing you're doing for more than a year is only DISH and  
15 only DISH products, and you're under this contract, you can't  
16 legally use that information for anything. So how are you  
17 going to practically go do something else?

18 **THE COURT:** You're talking about -- when you say  
19 "you," you mean SSN?

20 **MR. GLASSER:** SSN.

21 **THE WITNESS:** You're telling me they're not selling  
22 any other product or --

23 **BY MR. GLASSER:**

24 Q. I'm just saying practically speaking, all the work you've  
25 done.

1 A. Uh-huh.

2 Q. All the customers, all the contact info, all the data,  
3 everything is DISH's, on a very concrete, practical level,  
4 that's another really short leash, isn't it, Mr. Ahmed?

5 A. Ahmed, yes. Yes, our customers, we have information, and  
6 the retailer can have the information, also.

7 Q. They can have it, but they can't use it. It's illegal  
8 under the contract. It's not contractually allowed; right?

9 A. If they have the information of the customer, yes, we want  
10 to protect the customer. We don't want the customer to be  
11 harassed or sold a DISH -- a competing product.

12 Q. Right. You don't want them going and selling, switching  
13 that guy back to DirecTV next month; right?

14 A. Financially, it does not make sense, no.

15 Q. I agree. It's for DISH's benefit, right?

16 **THE COURT:** Okay. So don't argue or agree.

17 **BY MR. GLASSER:**

18 Q. Okay. It's for DISH's benefit, then; correct?

19 A. Yes. They're our subscribers. We want to protect our  
20 subscribers.

21 Q. You said -- the part where you said this is DISH's data,  
22 DISH's people, it's for DISH's benefit, this secrecy and this  
23 locking down of the retailer's ability to, in fact, market to  
24 somebody else is for DISH's benefit; right?

25 **MS. ECHTMAN:** Objection, argumentative, especially for

1 the characterizations, and repetitive.

2           **THE COURT:** Okay. If you can ask shorter questions  
3 that are less argumentative.

4 **BY MR. GLASSER:**

5 Q. What you were talking about when you said --

6           **THE COURT:** Okay. So ask -- ask it as a question.

7 **BY MR. GLASSER:**

8 Q. Okay. What thing were you saying benefited DISH?

9 A. Sir, we're spending close to \$1,000 to acquire a customer.  
10 We're investing a tremendous amount. Our break-even is close  
11 to 3-1/2, 4 years. They're our subscribers, and we want to  
12 make sure they're going to last with us a long time and they're  
13 happy. It's very important to us. We're not making -- that's  
14 what I was saying earlier. It's not about any acquisition.  
15 It's about a long-term customer.

16 Q. All right. So you said a lot of things there, so let's  
17 break it down.

18 A. Yes, sir.

19 Q. You told me a minute ago or at the beginning of your exam  
20 that it was about \$90 a month for a customer; right?

21 A. That's correct.

22 Q. All right. And \$90 a month is something over \$1,000 a  
23 year; right?

24 A. Yes, sir.

25 Q. Okay. And you just told me it costs \$1,000 to get a

1 customer; right?

2 A. Yes, sir.

3 Q. So your payback is not three or four years, it's one year  
4 on the math you gave me?

5 A. Sir, may I correct you on that? Not -- nothing in business  
6 is 100 percent profit. Let's look at this. You just  
7 challenged me. Yes, average customer pays us \$90. That's the  
8 facts, right, when you look at our earnings call.

9 You have to pay the programmers, ESPN, CNN, HBO. They  
10 don't give us programming free. Networks, ABC, NBC, CBS, FOX,  
11 you have to pay them. That's 50 percent of your cost. You're  
12 paying commissions, like you mentioned. You sent -- rolling a  
13 truck to do installation. Okay. You've got operational costs,  
14 satellite that you mentioned. You've got billing costs.  
15 You've got service calls. There -- and I can go on and on.

16 So it's not -- you're saying they're paying \$90 in 12  
17 months, you made your money. No.

18 What I'm saying is when you break that down, you might be  
19 making a very small -- and then that is why the break-even is  
20 3-1/2, 4 years.

21 Q. That's why it's important to DISH and beneficial to DISH to  
22 lock those customers down by not letting SSN go sell them  
23 something else; right?

24 A. I just explained that we want to take care of our  
25 customers. They want our service. Of course we want to take



1 care of our customers. We want happy customers.

2 Q. Okay. Let's go to --

3 A. We're in the customer service business.

4 Q. Let's go to Section 9.7. 9.7 says that: In the event the  
5 retailer derives an economic benefit, in any form, from a  
6 violation of its obligations under Section 9 -- and that  
7 ownership of the customer is in Section 9, you agree; right?

8 A. Yes.

9 Q. All right. Then that economic benefit is actually the  
10 property of EchoStar; right? Do you see that in Section 9.7?

11 A. Yes, I do.

12 Q. All right. So if they had the gumption to go out and sell  
13 some DirecTV, you could just seize the money; right?

14 A. No. It's not exclusive. They can sell DirecTV.

15 Q. I know you keep saying it's not exclusive, but if they use  
16 any of the business they've -- they've done for the last five  
17 or six years to sell this other product, it's for your benefit?

18 **THE COURT:** That's not a question.

19 **BY MR. GLASSER:**

20 Q. So how is it -- how is it practically, practically  
21 possible?

22 **MS. ECHTMAN:** Objection.

23 **THE COURT:** That's not a question.

24 **THE WITNESS:** I don't understand the question, sir.

25 **MR. GLASSER:** I'll move on.

1           **THE COURT:** You're not asking a clear question. What  
2 are you asking?

3           **MR. GLASSER:** I'll move on to the next. All right.

4           **THE COURT:** Okay. So, maybe that's a good time,  
5 actually, to stop and go to lunch. All right.

6           Ladies and gentlemen, I'm going to excuse you until 2:00.  
7 That will give you about an hour and 15 minutes to get  
8 something to eat, stretch your legs. I suggest to you that you  
9 not eat too much so you'll be all right this afternoon. Lay  
10 your notes in your chair. Don't talk about the case or have  
11 any contact with anyone or form any opinion, and come back at  
12 2:00. Jurors are excused. If everyone will remain seated  
13 while they step out.

14           (The jury left the courtroom at 12:45 p.m.)

15           **THE COURT:** Okay. So, Mr. Glasser, you're going to  
16 have to stop arguing with the witness. The witness --

17           **MR. GLASSER:** I'll move on.

18           **THE COURT:** -- is not even disagreeing with you. I'm  
19 having a little trouble understanding exactly why you're  
20 arguing with him, because about the relevant points, he's not  
21 even disagreeing with you that I heard.

22           **MR. GLASSER:** I'll go quicker through the rest of  
23 this.

24           **THE COURT:** So we just need to move a little  
25 differently through that. And just, if I can remind you, ask a

1 question, don't make a statement. And, you know, I tolerate a  
2 little bit of making statements and then saying, right, or,  
3 correct, but at some point, you know, that's really not  
4 helpful.

5 **MR. GLASSER:** Okay.

6 **THE COURT:** And then, if I can also just ask all  
7 counsel, if there's something happening and you need to say  
8 something about it, please direct your comments to the Court,  
9 not to opposing counsel. So, you know, if you're having  
10 trouble, you don't have an exhibit, just direct your comments  
11 to me so that lawyers are not talking to each other in the  
12 courtroom in front of a jury, because that's -- that has the  
13 potential to kind of get out of control, so -- all right?  
14 Anything else we need to do before we take our recess?

15 **MR. GLASSER:** Not from us, Your Honor.

16 **MS. ECHTMAN:** No, I just want to know for planning  
17 purposes so we know when to have our next witness ready.

18 **MR. GLASSER:** I mean, I'm getting to the end of the  
19 exam. I mean, it's not going to be -- what time do we come  
20 back?

21 **THE COURT:** 2:00.

22 **MR. GLASSER:** I mean, I think your next -- you'll be  
23 able to take --

24 **THE COURT:** Say again. I can't hear you. Talk to me.

25 **MR. GLASSER:** I think she'll be able to take the

1 witness by three.

2           **THE COURT:** All right. So you anticipate another hour  
3 on direct?

4           **MR. GLASSER:** Maybe less.

5           **THE COURT:** Maybe less. All right.

6           **MS. ECHTMAN:** Your Honor, I just want to also bring up  
7 the point that we made our Rule 403 and 404 objection to  
8 certain evidence about other retailers, and we were told that  
9 they would not bring it up about telemarketing complaints,  
10 violations by other retailers. We were assured that wasn't  
11 going to happen, and that it would only be potentially if DISH  
12 opened the door.

13           Now, we did not open any door because we haven't done  
14 anything yet, and they put on the Assurance of Voluntary  
15 Compliance and said, this must have been because there were  
16 widespread problems.

17           **THE COURT:** Exactly. I heard the question. The  
18 witness, however, denied that. So there is no evidence in  
19 front of the jury of widespread problems, and the Plaintiff  
20 will not make any argument to that effect, because the  
21 statement by counsel is not evidence. So, the witness denied  
22 it.

23           You know, if you want to ask a few more questions about  
24 that when it comes your time, you can, but there -- as far as  
25 I'm concerned, there is no evidence of that, and the Plaintiff

1 should not argue about that. And having asked that one  
2 question, I wouldn't anticipate any other questions about that  
3 from Plaintiff's counsel.

4 **MR. GLASSER:** Okay.

5 **THE COURT:** Right?

6 **MR. GLASSER:** Yes, ma'am.

7 **THE COURT:** Unless there's something I'm missing.  
8 Okay.

9 **MS. ECHTMAN:** Thank you. And, Your Honor, going  
10 forward, I will direct the Court -- I just have to say it's  
11 been very hard to follow because Mr. Glasser is shuffling  
12 through papers, and I know he's not doing it intentionally.  
13 But, he's quickly mentioning an exhibit, I've got to find it in  
14 the binders I have. And when he's shuffling through, I don't  
15 know what page he's on.

16 **THE COURT:** Right. And he's doing better, I will say.  
17 So, it is very helpful both -- for everybody's purposes to cite  
18 the page and paragraph number, and I think he is doing better  
19 about that. So, just continue for all of our sakes.

20 **MS. ECHTMAN:** Thank you.

21 **THE COURT:** Anything else?

22 **MR. GLASSER:** No, ma'am.

23 **THE COURT:** All right. We'll be in recess until 2:00.

24 (A noon recess was taken from 12:50 p.m. until 2 p.m.; all  
25 parties present.)

1           **THE COURT:** I think we were short a juror or two the  
2 last time the clerk checked. Is there anything the Plaintiff  
3 wants to take up?

4           **MR. GLASSER:** No, ma'am.

5           **THE COURT:** Defendant?

6           **MS. ECHTMAN:** No, thank you, Your Honor.

7           **THE COURT:** The clerk tells me that -- they're all  
8 back? Okay. The clerk tells me that one of the jurors has a  
9 family member who's bringing them back and forth to court who  
10 has been in the courtroom some, and so I just want to -- let's  
11 see. Is that --

12          **THE CLERK:** Yes, that's Mr. Burgess.

13          **THE COURT:** Mr. Burgess, is that you back there?

14          **MAN IN AUDIENCE:** Pardon.

15          **THE COURT:** Are you Mr. Burgess? Are you Mr. Burgess?

16          **MAN IN AUDIENCE:** No, ma'am.

17          **THE CLERK:** Oh, no, he went back downstairs.

18          **THE COURT:** Pardon me. I apologize.

19           In any event, apparently, Ms. Burgess' husband had been in  
20 here a little bit. So I'm just going to give them an extra  
21 caution about that. You know, it's not unusual to have the  
22 person driving the juror to and from to be here. So I have had  
23 to deal with that before. I'll mention it explicitly.

24           All right. You can bring the jury in. And let's see. The  
25 witness -- yes, you can come on back up. You may have to wait

1 if the jurors start coming in before you get up there. No, it  
2 looks like you can come on.

3 (The witness returned to the witness stand.)

4 **THE COURT:** It's a tight squeeze there.

5 (The jury entered the courtroom.)

6 **THE COURT:** All right. Before we get started, let me  
7 just ask all the jurors -- and tell you that you should not  
8 come into the courtroom during any of the breaks or before  
9 court starts in the morning. The lawyers are talking to each  
10 other about the case. Things could be going on in here. So,  
11 you know, if you need something that's in the courtroom and  
12 it's during a break, please ask one of the security officers or  
13 Ms. Sanders to help you so that you're not coming in and out of  
14 the courtroom except with the jurors as a whole.

15 And I know from time to time jurors ride to court with, you  
16 know, a family member and that person is around the courthouse,  
17 and that's -- there's no problem with that. I just want to,  
18 you know, make sure that there's no conversation about the case  
19 going on even with a spouse who might be here. I will say  
20 there's a trial going on downstairs. So anybody looking for  
21 something to do could go down there and watch the other case  
22 rather than being in here. We just don't want to have any  
23 conversation about that with anyone between a juror and anyone  
24 else.

25 And I believe we're ready to continue with direct

1 examination. So you may proceed.

2 **MR. GLASSER:** Thank you, Your Honor.

3 **BY MR. GLASSER:**

4 Q. I think we're still on the ELMO. Thanks. So I'm at  
5 Section 10.2. I'm on page 20, and this is how either party can  
6 terminate the contract.

7 **THE COURT:** And just to get me back on, this is the  
8 2006 contract between SSN and DISH?

9 **MR. GLASSER:** Yes, ma'am, Exhibit 26.

10 **THE COURT:** All right. Go ahead.

11 **MR. GLASSER:** Plaintiff's Exhibit 26. I may need to  
12 turn that down a little.

13 **BY MR. GLASSER:**

14 Q. So, Mr. Ahmed, do you agree that either party could, for  
15 its own convenience, terminate this arrangement on 60 days'  
16 notice?

17 A. Yes.

18 Q. Turning to the next page at Section 11, this is the section  
19 that you were present for opening that Mr. Bicks went over  
20 about the relationship to the parties hereto is that of an  
21 independent contractor. Do you see that?

22 A. Yes, sir.

23 Q. So that is in the contract as well, right?

24 A. Yes, sir.

25 Q. Okay. We're going to turn next to Plaintiff's Exhibit 28.



1           **MR. GLASSER:** Any objection to putting this right on  
2 the ELMO? It's the OE.

3           **THE COURT:** Okay.

4           **MR. GLASSER:** Your Honor, I wonder -- I move the  
5 admission of Exhibit 28.

6           **MS. ECHTMAN:** No objection.

7           **THE COURT:** All right. It will be admitted.

8 **BY MR. GLASSER:**

9 Q. Okay. This is only a couple pages long, so I'm not going  
10 to bother to come up there and give you one. This is the OE  
11 retailer amendment to the EchoStar retailer agreement, also  
12 dated in 2006. Do you see that?

13 A. Yes, sir.

14           **THE COURT:** With SSN?

15           **MR. GLASSER:** Yes, ma'am, with Satellite Systems  
16 Network here in the top.

17 **BY MR. GLASSER:**

18 Q. So this, together with the document that we just looked at,  
19 forms the contract with SSN, right?

20 A. Yes, yes.

21 Q. Okay. Now, right here in the middle at Section 1.44,  
22 there's a whole section on residential subscriber accounts. Do  
23 you see that section?

24 A. Yes, I do.

25 Q. And that's because the main purpose of the OE retailer was

1 to sign up residential subscribers, right?

2 A. Yes, that's one of our goals to residential subscribers,  
3 yes.

4 Q. And then this is the agreement that actually lets them, at  
5 Section 1.56, have access and use the OE tool, the order entry  
6 tool, that we went over at length with the jury on how it  
7 works, right?

8 A. Yes.

9 Q. And then, just like the monthly incentives that we talked  
10 about before with the main part of the contract, these  
11 residential incentives are paid under applicable business  
12 rules, right?

13 A. That's correct, for qualifying activations, correct.

14 Q. Okay. So it's clear from this contract that the business  
15 rules also cover pay, isn't it?

16 A. Yes, it says, "Additional residential incentives shall be  
17 paid to retailer," yes.

18 Q. I'm approaching you with Plaintiff's Exhibit 29, which is  
19 the 2010 version of the contract. Do you recognize it?

20 **MR. GLASSER:** I move its admission.

21 **THE WITNESS:** Yes, sir.

22 **MR. GLASSER:** It's Plaintiff's Exhibit 29.

23 **MS. ECHTMAN:** This has actually become JTX2?

24 **THE COURT:** The Joint Exhibit No. 2.

25 **MS. ECHTMAN:** It's Joint Exhibit No. 2, and there's no

1 objection.

2           **THE COURT:** It will be admitted.

3 **BY MR. GLASSER:**

4 Q. Okay. So this, Mr. Ahmed, is the December 10 -- I mean,  
5 December 2010 version of the contract with SSN, right?

6 A. Yes, sir.

7 Q. Okay. Business rules -- I'm not going to go through this  
8 whole thing, but business rules are still defined as "any term,  
9 requirement, condition, precedent, process, or procedure  
10 associated with a promotional program or otherwise identified  
11 as a business rule by DISH which is communicated to the  
12 retailer by DISH or an affiliate of DISH," right?

13 A. Yes, sir.

14 Q. All right.

15           **THE COURT:** And that's paragraph 1.7?

16           **MR. GLASSER:** Yes, ma'am.

17 **BY MR. GLASSER:**

18 Q. So at paragraph 1.7, it says, "associated with a  
19 promotional program or otherwise identified as a business  
20 rule." Do you see that?

21 A. Yes, I do.

22 Q. So would you agree that in plain English it's both those  
23 rules associated with promotional programs or those rules  
24 otherwise identified as a business rule?

25 A. Yes, business rule for promotional programs. It's what it

1 says.

2 Q. Okay. So your answer to me was, yes, business rules for  
3 promotional programs, which creates an endless loop, and I'm  
4 asking you, do you see there are two things there: One, rules  
5 with respect to promotional programs, and, two, or rules  
6 otherwise identified as a business rule?

7 A. Yes, that's what it says.

8 Q. So it is not an endless loop. It is both, correct?

9 **MS. ECHTMAN:** Objection, argumentative.

10 **THE COURT:** Sustained.

11 **BY MR. GLASSER:**

12 Q. Now I'm at Section 1.46. The definition of sole discretion  
13 is the same as before, right?

14 A. Yes.

15 Q. Okay. And, you know, I don't want to grind through a whole  
16 other contract for an hour. So is there any part of this  
17 second contract that you believe changed from the first  
18 contract that we ought, in fairness, to look at?

19 A. No.

20 Q. I don't know of any.

21 A. I don't know of any either. The retailer is still an  
22 independent contractor.

23 Q. Okay. I'm going to show you Exhibit 241.

24 **MR. GLASSER:** And I move its admission.

25 **THE COURT:** Plaintiff's Exhibit 241?

1           **MS. ECHTMAN:** Yes, we have an objection to this. This  
2 does not pertain to SSN. We have a relevance objection.

3           **MR. GLASSER:** Then I'll lay a foundation, Your Honor.

4           **MS. ECHTMAN:** And this applies overall to that general  
5 objection about information with respect to other retailers, if  
6 you look at the last page.

7           **THE COURT:** Okay. You can ask a few questions  
8 directed to showing its relevance.

9 **BY MR. GLASSER:**

10 Q. So the document I've handed you is an example of a fairly  
11 typical promotional program as rolled out to OE retailers, in  
12 this instance, an OE retailer other than SSN, right?

13 A. Yes, this went out to all the OE retailers.

14           **THE COURT:** I'm sorry? It went out to who?

15           **THE WITNESS:** To the OE retailers.

16 **BY MR. GLASSER:**

17 Q. So just because it happens to have the attachment for the  
18 exact pricing for one OE retailer, the pricing might be unique  
19 to an OE retailer, but the content of the promotional program  
20 is common to the OE retailers, correct?

21 A. That's correct. We're providing the economics that we pay  
22 on specific products.

23 Q. And the qualifying procedure and just how the promotion is  
24 going to run, right, under Exhibit 241, Plaintiff's  
25 Exhibit 241?

1 A. And the, yes, qualifying promotion.

2 **MR. GLASSER:** I move the admission of Plaintiff's  
3 Exhibit 241, Your Honor, just as an example of a typical  
4 promotional program.

5 **THE COURT:** Can counsel step up to the bench briefly?  
6 (The following bench conference was recorded.)

7 **THE COURT:** Speak directly into the microphone for the  
8 court reporter. Why is this relevant?

9 **MR. GLASSER:** It just shows how they roll out each  
10 promotional program. They do millions over six months --

11 **THE COURT:** Yeah, but why do we care?

12 **MR. GLASSER:** Because it shows sole and complete  
13 discretion on every item ten times in two pages of DISH, just  
14 every single thing about sole and complete discretion ten times  
15 in two pages, and so I'm saying every time they roll out a  
16 program, they roll it out under their sole and complete  
17 discretion. It just goes to power and control, and I would use  
18 the one with SSN if they had produced one with SSN, but they  
19 just didn't.

20 **THE COURT:** Okay.

21 **MS. ECHTMAN:** Well, Your Honor, can we just remove the  
22 last page if it's going to go to the jury because it's got  
23 rights for a different retailer?

24 **THE COURT:** All right. We'll remove the last page.  
25 That makes sense.

1           **MS. ECHTMAN:** That's fine with me.

2           **THE COURT:** Good idea.

3           (End of bench conference.)

4           **THE COURT:** All right. We're going to remove the last  
5 page, which has to do with another retailer, not this retailer,  
6 not SSN, and with that deletion, Plaintiff's Exhibit 241 will  
7 be admitted.

8           **BY MR. GLASSER:**

9           Q. All right. So let's go quickly through this. Would you  
10 agree with me that Exhibit 241 is just kind of generally how  
11 different -- example of how a promotional program is rolled  
12 out?

13           **THE COURT:** Is what?

14           **BY MR. GLASSER:**

15           Q. Rolled out to the OE retailer?

16           A. Any promotional program, consumer program, or changes in  
17 programming, anything, we do send out a business rule  
18 explaining exactly what the program is.

19           Q. All right.

20           A. So every retailer knows.

21           Q. Okay. And I just want to go through it quickly and say  
22 that on the first -- second paragraph, do you see that sole and  
23 absolute discretion, EchoStar's sole and absolute discretion?

24           A. Yes.

25           Q. And then it gives a program overview, right, at the next

1 statement?

2 A. Yes.

3 Q. Right above that, it says that EchoStar determines whether  
4 you can participate in their sole and complete discretion,  
5 right?

6 A. Yes.

7 Q. On the program overview, again, EchoStar's sole and  
8 complete discretion comes up, right?

9 A. Where is that, sir?

10 Q. Right where my finger is.

11 A. Yes.

12 Q. Okay. On the qualifying promotions, they reserve the right  
13 in their sole and complete discretion to change it for any  
14 reason or no reason. Do you see that?

15 A. Yes.

16 Q. On the residential incentives, what you're going to get  
17 paid here at the bottom, they reserve the right to change it in  
18 their sole and complete discretion at any time, right?

19 A. Yes.

20 Q. On the next page, on chargebacks or how chargebacks are  
21 going to be handled for returns, EchoStar retains the right in  
22 its sole and complete discretion to figure that out however  
23 they want, right?

24 A. That's correct.

25 **THE COURT:** Doesn't it say absolute? I don't know



1 that that's different.

2 **THE WITNESS:** Absolute discretion.

3 **MR. GLASSER:** You're right, sole and absolute  
4 discretion.

5 **BY MR. GLASSER:**

6 Q. And then call monitoring here at the bottom: The retailer  
7 acknowledges that EchoStar shall have the right, but not the  
8 obligation, at any time and from time to time in its sole and  
9 complete discretion to monitor, record, or otherwise access,  
10 whether electronically or otherwise and in all cases, at  
11 EchoStar's election any and all telephone or other similar  
12 communications made between the retailer, and a long list of  
13 people, including their own employees. And I'm sure the  
14 customer. Is that correct?

15 A. I don't know about the customer, but, yes, that's what it  
16 says there.

17 Q. Well --

18 A. This is -- this is a business rule, and if I can comment on  
19 it --

20 Q. I haven't asked you a question yet.

21 A. I'm sorry. I'm sorry.

22 Q. Okay. So -- yeah, it says -- it says, they can call  
23 monitor between the employees, agents, subagents of the  
24 retailer and any prospective or actual customer. Do you see  
25 that?

1           **THE COURT:** Consumer?

2           **THE WITNESS:** Yes, sir, I do.

3           **BY MR. GLASSER:**

4           Q. All right. And so that's what we discussed earlier when we  
5           said that DISH field service representatives could go in and  
6           listen to whatever they wanted to listen to, right? Correct?

7           A. Yes, we could require the calls.

8           Q. You also had an audit service run by Bruce Werner that  
9           could come in and audit their books and records, right?

10          A. We have a compliance group, that Bruce Werner works there,  
11          yes. Bruce Werner is employed in the compliance group,  
12          correct.

13          Q. And we already talked about the taping that goes on, the  
14          taping of the calls that were uploaded on a regular basis for  
15          review. Remember that?

16          A. Sure, yes.

17          Q. Okay. This is the business rule that allows that access by  
18          DISH, right?

19          A. Yes.

20          Q. Okay.

21          A. Now can I comment, sir? I'm just saying it's -- this is  
22          important. No, it's very important because, again, we do want  
23          to listen to calls to make sure that our promotions are  
24          accurately explained to the customer because there's so many  
25          facets on the promotion. That's important. It's competitive.

1 Business rules have to change. Promotions have to change based  
2 on what the competition is doing, whether it's DirecTV, whether  
3 it's the cable companies. So they have to change, and we have  
4 to control that because it's our promotions. That's what this  
5 is. Competition changes based on what they pay out, the  
6 economics. Market conditions change so we have to control the  
7 economics. That's what this is.

8 Q. Okay. And so under this call monitoring business rule,  
9 after the assurance of compliance, couldn't you have said we'd  
10 like you to upload to us everyone you called last week so we  
11 can see if they're on the Do Not Call List?

12 A. I cannot answer that. We required certain calls to be  
13 uploaded, and we're making sure that all the terms and  
14 conditions are accurately represented. That's very important  
15 for us.

16 Q. Okay. Then there's a couple more instances of sole and  
17 complete discretion. So I've got a two-page document here, and  
18 I counted ten instances of sole and absolute discretion on the  
19 part of DISH.

20 A. Yes.

21 Q. That's fairly common in the communications with the  
22 retailers, right?

23 A. It's our consumer offer. We have to protect the customer  
24 to make sure that what we're offering as a service is  
25 accurately represented to that customer. That's what's

1 important.

2 Q. Okay. All right. So now we've covered the assurance of  
3 compliance, how the OE tool works --

4 A. Yes, sir.

5 Q. -- and the contract. I want to turn to Satellite Systems  
6 itself, okay?

7 A. Yes, sir.

8 Q. I want to turn to the time period before you left in 2006,  
9 so roughly 2004 to 2006. Are you with me?

10 A. Yes.

11 Q. At that time you were still vice president in charge of  
12 indirect sales, as we established right when you took the  
13 stand, right?

14 A. Yes, sir.

15 **MR. GLASSER:** I have Exhibit 1160. I move the  
16 admission of it.

17 **MS. ECHTMAN:** Your Honor, if I might have a moment to  
18 see what it is?

19 **THE COURT:** All right.

20 (Pause in the proceedings.)

21 **MS. ECHTMAN:** We've got multiple objections to this  
22 one.

23 **MR. GLASSER:** So maybe I could lay a foundation?

24 **MS. ECHTMAN:** May I state my objections?

25 **THE COURT:** Okay. Just a second. Hold on.

1 (Pause in the proceedings.)

2 **THE COURT:** All right. Ladies and gentlemen, let me  
3 just excuse you to the jury room for a moment. Leave your  
4 notes in your chair.

5 (The jury left the courtroom.)

6 **THE COURT:** What's your objection?

7 **MS. ECHTMAN:** Your Honor, there's -- there's hearsay  
8 in here. They're saying there's a lot of complaints about SSN.

9 As we've talked about earlier, and it's covered by one of  
10 our motions in limine, this is about an earlier time period.  
11 It's about different types of issues. This is not about Do Not  
12 Call issues. This is a time period where we said this is prior  
13 to -- 2005 and prior, and it's improper attempt to use  
14 character evidence from a completely different time period,  
15 from 2005, which is years before Dr. Krakauer got his call, and  
16 we have relevance, unfair prejudice, improper character.

17 **THE COURT:** I don't understand your hearsay objection.

18 **MS. ECHTMAN:** I've got the other objections. I'll  
19 withdraw the hearsay objection.

20 **THE COURT:** All right.

21 **MS. ECHTMAN:** Other than it has a conversation -- it  
22 repeats a conversation with Alex Tehranchi.

23 **THE COURT:** Okay. For the Plaintiff?

24 **MR. GLASSER:** Well, Your Honor, in the opening and  
25 again in the cross-examination of Dr. Krakauer, they covered

1 this period of time. The witness has already testified that  
2 under the assurance of compliance the history of SSN is  
3 relevant. This 2000 --

4 **THE COURT:** I'm sorry. Say again.

5 **MR. GLASSER:** The history, what they know about SSN  
6 historically is relevant to the progressive discipline set  
7 forth in the compliance. This shows the story of how they were  
8 working with both DISH and Direct for a while and then weaned  
9 from Direct to only DISH. So it makes that point. It shows  
10 how you pay them. It's completely relevant to this case, and  
11 then was forwarded again by Mike Oberbillig to Bruce Werner in  
12 the risk audit department in 2007. So I just -- I mean, this  
13 is the heart of the case.

14 **THE COURT:** All right. Overruled.

15 **MR. GLASSER:** Now, there are a few more -- this is  
16 kind of the -- one of the farthest back in time, but we kind of  
17 march forward on a few of these. In each instance, it's  
18 Mr. Amir's own e-mail.

19 Should we -- I mean, I'm happy to lay the foundation every  
20 time, I mean, if we're going to object to all of them. How do  
21 you want to handle it? Can I give it to the witness, lay the  
22 foundation without showing it, they can object, or do you want  
23 to do a side --

24 **THE COURT:** Well, I'd prefer to keep the jury -- not  
25 have the jury go in and out, in and out. It's just I'm having

1 some difficulty with the system -- the sidebar sound system,  
2 and the court reporter is having trouble hearing us during  
3 those sidebars, so I'm trying to minimize them.

4 What are your next exhibits?

5 **MR. GLASSER:** Well, they're the same. They're e-mails  
6 between Mr. --

7 **THE COURT:** Well, which -- what are your next  
8 exhibits?

9 **MR. GLASSER:** Oh, okay, yeah. The 656, which is an  
10 e-mail in -- later in 2004, in September, where they're  
11 giving --

12 **THE COURT:** Okay. Just tell me what the numbers are.

13 **MR. GLASSER:** 656 --

14 **THE COURT:** Uh-huh.

15 **MR. GLASSER:** -- where additional economics are being  
16 given to SSN and Mr. DeFranco.

17 **THE COURT:** Okay. I'm -- I believe I asked you to  
18 just give me the numbers.

19 **MR. GLASSER:** 656.

20 **THE COURT:** Yes.

21 **MR. GLASSER:** 1160.

22 **MS. ECHTMAN:** 1160 is what we're on right now, isn't  
23 it?

24 **THE COURT:** Yes.

25 **MR. GLASSER:** Oh, yeah. 194, which is the --

1           **THE COURT:** Okay. I see.

2           **MS. ECHTMAN:** 194 -- do you want me to wait?

3           **THE COURT:** Yes, I'm trying to get a list.

4           **MR. GLASSER:** 504. Oh, no, not --

5           **THE COURT:** All right. 504.

6           **MR. GLASSER:** Yeah, 504. I think that's it for his  
7 e-mail, Your Honor.

8           **THE COURT:** Okay.

9           **MR. GLASSER:** They're all Amir Ahmed e-mail.

10          **THE COURT:** And is your objection the same on all of  
11 those?

12          **MS. ECHTMAN:** Well, we have different objections. The  
13 one specifically with 194, that is actually an incomplete  
14 document. 504 is a longer version of the same one. Both of  
15 those documents start out with someone forwarding an e-mail  
16 that was not written by anyone at DISH. It is a specific  
17 complaint that's been forwarded to people at DISH, and that  
18 particular complaint we have a hearsay objection on.

19          This is also the Scott Novak --

20          **THE COURT:** I'm totally confused by what you just  
21 said. You are complaining that they have excluded a hearsay  
22 complaint.

23          **MS. ECHTMAN:** No, we're objecting -- okay. I wasn't  
24 clear. I'm sorry. Let me back up.

25          **THE COURT:** Okay.



1           **MS. ECHTMAN:** Okay. So 194 and 504 are different  
2 versions of the same e-mail. The version at 194 is incomplete.  
3 504 is a longer version -- a more complete version of that  
4 e-mail. So that's -- that's one issue is that 194 is  
5 incomplete.

6           **THE COURT:** Okay. Is there some reason not to use  
7 504?

8           **MR. GLASSER:** I am using 504. I called it out.

9           **MS. ECHTMAN:** They're both actually -- I'm sorry.  
10 They're both incomplete. There's another e-mail that they have  
11 that has more on that chain. This is the famous Scott Novak  
12 e-mail that Your Honor has a limine instruction about. So I'm  
13 sorry, Your Honor. Both 194 and 504 -- oh, gosh. I'm confused  
14 now. I'm sorry. Okay. 194 is an incomplete version of  
15 another e-mail. 504 is a completely different e-mail.

16           **THE COURT:** Okay.

17           **MS. ECHTMAN:** I apologize for my confusion on that.  
18 Five -- so let's start with 194. That one starts with a  
19 complaint from the Indiana Attorney General, and that complaint  
20 is hearsay.

21           **THE COURT:** It -- where is that?

22           **MS. ECHTMAN:** That's at 194-003. That original e-mail  
23 is from Margaret Sweeney, msweeney@atg.state.in.us. So that  
24 complaint is hearsay.

25           And then later on, it -- there's a description of another

1 complaint at the top of that page, again is hearsay, and the  
2 document itself --

3 **THE COURT:** Okay.

4 **MS. ECHTMAN:** -- is incomplete.

5 **THE COURT:** And it's incomplete?

6 **MS. ECHTMAN:** It's incomplete because there's a longer  
7 version of this with more back-and-forth that's highly  
8 relevant.

9 **THE COURT:** Okay. Well, you can ask him whatever you  
10 want about other e-mails; but, you know, to the extent there  
11 are complaints in there, I'll be glad to tell the jury that  
12 they're offered to show that the complaint was received, not  
13 that the complaint was true and accurate, since the complainer  
14 isn't here under oath.

15 **MS. ECHTMAN:** Okay.

16 **THE COURT:** I have no problem with doing that.  
17 Subject to that, you can go ahead.

18 These are obviously fairly old, so I would hope we could  
19 move through them quickly. To some extent, that depends on the  
20 witness. So -- and, you know -- but we can go ahead with this,  
21 and I'll overrule the objections, as I -- subject to the  
22 limiting instruction that I just mentioned. So --

23 **MR. GLASSER:** Just to be clear on how we're going to  
24 handle it, I'll go ahead and use them and give them a moment to  
25 state an objection and then move on?

1           **THE COURT:** Right. They can repeat their objection,  
2 as we -- as has been stated here and -- in summary form.

3           **MS. ECHTMAN:** Your Honor, if I might clarify? PX120  
4 is the complete version of PX194. Just so I know what the  
5 ruling was on 194 on the completeness issue.

6           **THE COURT:** Okay. Well, completeness in an e-mail  
7 chain, you know, I -- you're just going to have to ask the  
8 witness about that. I don't know of any requirement that every  
9 single e-mail in an e-mail chain be in front of a jury. If you  
10 think there's an e-mail that's left out, I'm glad for you to  
11 ask questions about that and put in your -- you know, refer to  
12 Plaintiff's Exhibit 120. That's totally fine. I just think  
13 it's easier to deal with it that way.

14 All right. Bring the jury in.

15           **MS. ECHTMAN:** And, Your Honor, again, also the 194,  
16 we've got the Novak limiting instruction.

17           **THE COURT:** Beyond --

18           **MS. ECHTMAN:** The fact that --

19           **THE COURT:** Just a second, Officer. I'm sorry.

20           **MS. ECHTMAN:** So the issue in 194 -- and I'm sorry.  
21 Let me just remind the Court, please, before he brings the jury  
22 in, there's a statement by one of DISH's lawyers, and it's  
23 actually on page 1 of 194, that says: "In the past, we've  
24 successfully resisted the argument that we're responsible for  
25 the conduct of independent retailers. However, SSN is a

1 problem because we've cautioned them to stop." And Your Honor  
2 had agreed to give an instruction that the jury is not to  
3 consider the legal analysis contained in the e-mail as an  
4 accurate and appropriate explanation of the law in this case.

5 **THE COURT:** Okay. Thank you for reminding me. All  
6 right. I'll do that, too --

7 **MR. GLASSER:** All right.

8 **THE COURT:** -- when we get to it?

9 **MS. ECHTMAN:** Thank you very much, Your Honor.

10 **THE COURT:** Thank you. Okay. Now we can bring the  
11 jury in.

12 **MS. ECHTMAN:** I've forgotten what exhibit we're on.

13 **MR. GLASSER:** 1160.

14 **MS. ECHTMAN:** Thank you.

15 (The jury entered the courtroom.)

16 **THE COURT:** All right. Go ahead for the Plaintiff.

17 **MR. GLASSER:** Your Honor, I move the admission of  
18 Plaintiff's Exhibit 1160.

19 **THE COURT:** It will be admitted.

20 **BY MR. GLASSER:**

21 Q. So, Mr. Ahmed, you recognize your name here on Plaintiff's  
22 Exhibit 160 (sic), which is an e-mail chain from July 19, 2004,  
23 at 7:51 in the evening; is that right?

24 A. Yes, sir.

25 Q. Some of the other people on this -- we've heard about Mike

1 Mills. What does he do in the company at this time?

2 A. Mike Mills would have been the account manager.

3 Q. Okay. And what is Jim -- how do you even say that?

4 A. Jim Spreitzer.

5 Q. Who is he?

6 A. He was the director of the Sacramento office for the West

7 Coast Region.

8 Q. And that's -- the West Coast is where SSN was, in

9 California, right?

10 A. Yes, sir.

11 Q. And Mike Oberbillig -- how do you say that?

12 A. Mike Oberbillig.

13 Q. And what --

14 A. He reports to Jim, and he would be the regional sales

15 manager for that office.

16 Q. Regional sales manager. Great.

17 It says, "Please call Alex in the morning and give them

18 some good news. We are increasing Satellite Systems OE

19 activation payment from \$150 to \$175 effective immediately."

20 Do you see that?

21 A. Yes, sir.

22 Q. And then a 25-dollar bonus for other type of activations,

23 right?

24 A. Yes, sir.

25 Q. And then a 15-dollar bonus for another type of commitment,

JA005262  
004130

1 right?

2 A. Yes, sir.

3 Q. All right. And -- and then some other pay increases

4 basically down here at the bottom of the e-mail, right?

5 A. No, that's -- that's the same -- I'm just sending that to

6 retail services because they need to change the amount in the

7 system.

8 Q. Okay. So Eric Miller is to put it in the system about what

9 they're going to get paid?

10 A. Yes.

11 Q. "And the idea is to get Alex excited. I want a minimum of

12 2,500 activations in August." That's you, right?

13 A. Yes.

14 Q. The Alex being discussed in this e-mail is Alex Tehranchi,

15 the owner of Satellite Systems Network, right?

16 A. That's correct. And if I could mention that -- you

17 mentioned the 25 and 15.

18 Q. Yes.

19 A. That was across the board for every retailer, not just

20 Mr. Tehranchi.

21 Q. Okay. And then later in the e-mail chain, Mr. Amir -- I

22 mean, Mr. Ahmed, you and Mike Mills and Oberbillig talk some

23 more about Satellite Systems, right?

24 A. Yes.

25 Q. And you say, "You guys need to spend time with Alex on the

1 whole program," right?

2 A. Yes.

3 Q. "Make sure he understands the exception process," right?

4 A. Yes.

5 Q. "Make sure he does not give us just -- just give us

6 apartment sales," right?

7 A. Correct, yes, sir.

8 Q. Because you prefer residential sales, right?

9 A. Apartment sales, yes, they -- again, we talked about the

10 break even.

11 Q. And you say, "I'm hearing a lot of complaints on Satellite

12 Systems on telemarketing calls to customers." Do you see that?

13 A. Yes, sir.

14 Q. Okay. This is July 29th, 2004, right?

15 A. That's correct.

16 Q. And then Mr. Oberbillig on Tuesday, January 30th, 2007,

17 forwards this e-mail to Bruce Werner, right?

18 A. In 2007?

19 Q. Yes, do you see that at the top?

20 A. Yes, sir.

21 Q. Bruce Werner is the head of risk audit function at DISH

22 retail sales services, right?

23 A. Yes, he's in our risk and audit department.

24 Q. There's no comment on the e-mail, though, and you were not

25 in the company in January of 2007, so I take it you don't know

1 the reason why in 2007 Mr. Oberbillig thought Mr. Werner, the  
2 head of risk audit, ought to see this e-mail?

3 A. Yes, I don't have any knowledge of that.

4 Q. Turning to Exhibit 656, Plaintiff's Exhibit 656.

5 **MR. GLASSER:** I move its admission, Your Honor.

6 **THE COURT:** It will be admitted.

7 **BY MR. GLASSER:**

8 Q. So let's start at the back. This is an e-mail between you  
9 and Mr. Jim DeFranco -- let's see. The last one was in July.  
10 So this is September.

11 A. Correct.

12 Q. So two months later. And Mr. DeFranco is the man -- he's  
13 on the board of directors of DISH, right?

14 A. Yes, he is. He's also my boss.

15 Q. He was -- and, actually, we talked about him earlier when  
16 you took the stand?

17 A. Yes, sir.

18 Q. All right. And so you e-mailed Jim, and you say,  
19 "Satellite Systems Network is averaging 350 activations per  
20 month on the OE tool." That's for you guys, right?

21 A. That's what it says, yes.

22 Q. That's DISH's tool, right?

23 A. That's correct.

24 Q. "However, they are averaging 9,000 activations per month  
25 for DTV"?



1 A. That's -- yes.

2 Q. That's DirecTV, your competitor, right?

3 A. That would be DirecTV.

4 Q. So at this point in time in 2004 is the point in time we've  
5 talked about in this case where Satellite Systems Network sold  
6 for DirecTV and they sold for DISH, right?

7 A. Correct.

8 Q. Okay. "After speaking to" -- say that name.

9 A. Spreitzer.

10 Q. -- "Spreitzer, increasing their activation payment from 175  
11 to" --

12 **THE COURT:** Slow down, please.

13 **BY MR. GLASSER:**

14 Q. -- "from 175 to \$200 until January 31st, 2015, will get us  
15 incremental 2,500 to 3,500 activations per month starting  
16 October." Do you see that?

17 A. Yes, sir.

18 Q. "I'm requesting the same economics as we provide," and you  
19 list some more OE retailers, right?

20 A. Correct.

21 Q. And Mr. DeFranco approves that, right, "proceed"?

22 A. Correct. So can I comment?

23 Q. When I ask you a question.

24 A. Okay.

25 Q. So -- and then you have a private e-mail a little later in

1 the night, a little -- I think Mr. DeFranco's e-mail was at  
2 7:23 p.m., and at 9:24, you email privately to Jim, right?

3 A. To Jim Spreitzer, correct.

4 Q. "Go get him." You want to recruit Alex to sell more DISH,  
5 right?

6 A. Yes, I want more DISH activations.

7 Q. "Need activations. Please tell Alex that I worked my A-S-S  
8 off to get him additional economics." Do you see that?

9 A. Yes, sir.

10 Q. "I have also had to deal with all his issues related to  
11 sales." Do you see that?

12 A. Yes, I do.

13 Q. And then he says he's out hiring -- Jim replies he's out --

14 **THE COURT:** I'm sorry? What?

15 **BY MR. GLASSER:**

16 Q. Jim replies that he, being Alex, is out hiring people for  
17 DISH this week, expanding the program. Do you see that?

18 A. Yes, sir.

19 Q. And, again, in January of 2007, Mr. Oberbillig forwards  
20 this e-mail to risk audit for reasons you don't know, right?

21 A. That's correct.

22 Q. Again, with no comment, right, no comment from  
23 Mr. Oberbillig?

24 A. That's all I see there, what you're showing me, sir. I  
25 don't know -- I don't have knowledge of that.

1 Q. I'm approaching you with Plaintiff's Exhibit 186.

2 **MR. GLASSER:** Your Honor, I have a certified copy of  
3 Exhibit 186, and I move its admission.

4 **MS. ECHTMAN:** Your Honor, we stand on our prior  
5 objections on rule -- on PX186, and subject to a motion in  
6 limine, 802, 401, 403, and 404.

7 **THE COURT:** All right. Overruled. Go ahead.

8 **BY MR. GLASSER:**

9 Q. Plaintiff's Exhibit 186 is a judgment by consent and  
10 stipulated permanent injunction; is that correct?

11 A. Correct.

12 Q. It was entered in the state of North Carolina in the County  
13 of Wake, right?

14 A. Yes, sir.

15 Q. And it -- it governs a thing called Vitana Financial Group,  
16 a California corporation doing business as Satellite Systems  
17 Network, right?

18 A. Yes.

19 Q. And this gentleman we've just been discussing, Mr. Alex  
20 Tehranchi, right?

21 A. Yes.

22 Q. And the date is March 21st, 2005, right?

23 A. Yes, sir.

24 Q. And the date that the case started and the attorney -- I'm  
25 sorry -- the State of North Carolina's Attorney General sued

1 Satellite Systems was June 25th, 2004, right?

2 A. That's what it says, yes.

3 Q. Let's turn to page 5 of this document, and it puts a  
4 permanent injunction in place. It says, "The Defendants" --  
5 and we already remember that we looked at that, Satellite  
6 Systems Network and Mr. Tehranchi, right?

7 A. Yes, sir.

8 Q. -- "are hereby permanently restrained and enjoined" -- that  
9 means they need to stop, right?

10 A. Yes.

11 Q. -- "under North Carolina law from engaging in,  
12 participating, making, causing to be made, or assisting in any  
13 manner or any capacity whatsoever, whether directly or  
14 indirectly, in concert with others, or through intermediary,  
15 third party, business entity, or device, telephone solicitation  
16 to telephone subscribers in the state of North Carolina who are  
17 signed up on the National Do Not Call Registry or who  
18 previously communicated a desire to receive no further  
19 telephone solicitations from the Defendants," right?

20 A. Yes, that's what it says.

21 Q. So your OE retailer is after March 25th, 2005, legally  
22 ordered by the State of North Carolina to stop calling people  
23 on the Do Not Call Registry, right?

24 A. Yes, based on this document. Obviously, I'm not aware of  
25 it at that time, but, yes, what you're showing me.

1 Q. And then it says, "Moreover, Defendants are hereby  
2 permanently restrained and enjoined from engaging in,  
3 participating in, making or causing to be made, whether  
4 directly or indirectly, in concert with others, telephone  
5 solicitations via automatic dialing and recorded message  
6 players without the express consent of the residential  
7 telephone subscriber."

8 That's what you're -- in opening, you were present and  
9 Mr. Bicks talked about automessaging and autodialing problems.  
10 That covers that, right?

11 A. Yes.

12 Q. Okay. And it's signed by a Superior Court judge, right, in  
13 Wake County, North Carolina?

14 A. Yes.

15 Q. And I think you said you didn't know about it. I heard  
16 that.

17 Dr. Krakauer gave a deposition on September 28th, 2011,  
18 that we talked about this morning with the North Carolina  
19 Attorney General and a DISH lawyer named Victor Rao. Are you  
20 saying that no one told you about that?

21 **THE COURT:** Told him about the deposition?

22 **MR. GLASSER:** Yes.

23 **MS. ECHTMAN:** Objection, Your Honor.

24 **THE COURT:** Well, what --

25 **MR. GLASSER:** I'm laying a foundation.