

**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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Elizabeth A. Brown  
Clerk of Supreme Court  
Supreme Court No. 81704

District Court No.  
A-17-763397-B

**JOINT APPENDIX**  
**Vol. 26 of 85**  
**[JA005771-JA006015]**

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<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           **THE COURT:** Taber McRae. So I read the brief that the  
2 Defendant filed and I understand your position. I would -- I'm  
3 just going to let the Plaintiff speak first because I got your  
4 position.

5           **MR. EWALD:** Sure.

6           **THE COURT:** I would be inclined to let -- well, let me  
7 just say to both of you all I would be inclined to let the  
8 witness testify very specifically and narrowly about the  
9 specific questions asked of Ms. Tehranchi and her answers.  
10 Well, the witness wouldn't be asked about Ms. Tehranchi's  
11 testimony, but the witness could be asked her own testimony  
12 about those matters which came up in Ms. Tehranchi's testimony  
13 which you identified in your brief, but, you know, not to go  
14 beyond that like we would with an ordinary witness about the  
15 larger responsibilities of a witness, larger views, et cetera,  
16 about the case or facts or evidence. But in terms of six or  
17 seven questions, I'm not sure I really have a problem with  
18 that, but I'll be glad to hear from you all further from the  
19 Plaintiff as to whether that's agreeable. And then if the  
20 Defendant is seeking to do anything different than that,  
21 they'll have to let me know go ahead.

22           **MR. BARRETT:** Your Honor, we do not believe the  
23 witness should be permitted to testify for the following  
24 reasons.

25           One, she was excluded as a witness based on DISH's failure

1 to comply with Rule 26 by disclosing her in a timely fashion  
2 and you had stated in your order correctly that she may be  
3 called solely for impeachment purposes. Because it's very  
4 important to comply with Rule 26, as the Court's orders have  
5 stated, solely for impeachment is a very narrow exception to  
6 the Rule 26 obligation and what that means is -- solely for  
7 impeachment means just that. You cannot use a witness solely  
8 for impeachment to bolster your case substantively. There's  
9 abundant authority for that.

10 And the reason they want to use her is to bolster their  
11 case substantively on an issue on which they've already been  
12 heard by several witnesses, including Ahmed and Musso, and they  
13 both testified that DISH did not review the scripts. Okay.  
14 This is not solely for impeachment. Solely for impeachment  
15 would be putting someone on the stand to rebut Mr. DeFranco's  
16 testimony about DISH's -- you know, the seriousness with which  
17 DISH takes its own personal telemarketing obligations. Okay.  
18 That would be a solely for impeachment witness. This is  
19 bolstering the case substantively, not solely for impeachment.

20 And the case that I would cite that addresses this, one is  
21 from the District of Maryland. It's called *Newsome* and it's  
22 437 F.Supp.2d 431 from 2006.

23 **THE COURT:** 437 F.Supp.2d.

24 **MR. BARRETT:** 431.

25 **THE COURT:** 431. Who was the judge?

1           **MR. BARRETT:** I do not. District of Maryland.

2           **THE COURT:** Well, there is a judge up there who used  
3 to be a magistrate judge and now he is a district judge. His  
4 name is slipping my mind, but if you said it, I would remember,  
5 and he's really good at this kind of stuff, so I just was  
6 wondering if it was that judge.

7           **MR. BARRETT:** I hope it is, yes.

8           **THE COURT:** Okay.

9           **MR. BARRETT:** What that opinion holds is that  
10 impeachment evidence which also possesses a substantive quality  
11 cannot be said to fit the "solely for impeachment"  
12 classification.

13           This is substantive evidence. They've known for years that  
14 we have this evidence about script reviews. This is their  
15 employee. They never disclosed this person and Your Honor  
16 correctly excluded the witness because they never disclosed  
17 this person. This person is not being offered solely for  
18 impeachment, but it's instead a third witness that DISH wants  
19 to bring it in that it never properly disclosed to support  
20 Ahmed and Musso. Ms. Taber she should be excluded and should  
21 not be permitted to testify.

22           **THE COURT:** All right.

23           **MR. EWALD:** Your Honor, your order seemed to clear to  
24 me that Ms. Taber McRae can be brought solely for use of  
25 impeachment. I think this is a classic impeachment by

1 contradiction. Ms. Tehranchi says X; and as we laid out in our  
2 brief, Ms. Taber McRae will say, no, that isn't the case. And  
3 we are planning to bring her to testify on those limited issues  
4 and I would only add probably just to introduce who she is, why  
5 she is here to the point of the juror with the Five9 witness by  
6 depo designation who he didn't know who it was, so we would  
7 need to give some context. But there are some specific  
8 statements which Ms. Taber McRae will say are wrong, and  
9 they're about her and what she observed. So I think it is well  
10 within Your Honor's order and we are only attempting to provide  
11 it on a limited basis, 15-minute testimony or so.

12 And I would note too that Ms. Taber McRae is in Nevada and  
13 is, as far as we know, willing to come. Her husband was  
14 recently diagnosed with cancer and she was not able to come  
15 this week because she is in treatment with him. We are hopeful  
16 she'll be able to show up on Tuesday.

17 **MR. BARRETT:** Your Honor, one thing I neglected to  
18 mention is that they're claiming surprise based upon deposition  
19 testimony that was taken in 2013. Okay. This is  
20 Ms. Tehranchi's deposition testimony. Their lead counsel in  
21 this case, Eric Salad (phonetic), previous to this firm, took  
22 that deposition. So how can they claim to be surprised and in  
23 need of an impeachment witness for someone they deposed almost  
24 four years ago.

25 **MR. EWALD:** I did not claim surprise, Your Honor.

1 They put this evidence into trial by designating that  
2 deposition and therefore, under Your Honor's order, we believe  
3 we have the right to call Ms. Taber McRae to impeach those  
4 specific statements that we cite in our brief.

5           **THE COURT:** All right. Okay. Well, let me take a  
6 look at it tomorrow morning; and because I have some skills  
7 with our electronic docket, but not others, the best you're  
8 going to get from me is a text order because I don't actually  
9 know how to file a paper order, I'm happy to say, but I do know  
10 how to do a text order. So what I would anticipate is if  
11 I'm -- if I find it fairly simple, I'll let you know tomorrow;  
12 and if it takes me a little more time or thought, I'll let you  
13 know sometime Sunday; and that's what I will commit to you --

14           **MR. EWALD:** Thank you, Your Honor.

15           **THE COURT:** -- is that you will have a ruling by close  
16 of what would be the business day if Sunday were a business  
17 day. I'll try to do it tomorrow, though. Okay. But I feel  
18 like I need to read the case that the Plaintiffs have directed  
19 my attention to and shouldn't decide before I do that. All  
20 right.

21           **MR. EWALD:** Thank you.

22           **THE COURT:** Now, the only other thing I have on my  
23 radar as undecided is Defendant's Exhibit 25. That's the P --  
24 the PossibleNOW report. Is there anything else that I have  
25 tabled that I have forgotten about that the Plaintiff wants to



1 remind me of?

2 **MR. BARRETT:** I don't think so.

3 **MR. GLASSER:** No, Your Honor.

4 **THE COURT:** Okay. What about the Defendant? Have I  
5 forgotten anything else?

6 **MR. BICKS:** I'm not -- no.

7 **THE COURT:** Okay. So now I've heard a right fair  
8 amount about this, obviously, today and I'm going to think  
9 about it a little bit further, but I want to be sure I give --  
10 I don't want -- I'm not trying to get you to repeat what you've  
11 already told me, but if I have not given you a chance to say  
12 everything about it that you want to say, because you know,  
13 we've been at it kind of haphazard, I want to be sure I give  
14 you that -- you know, that I've given everybody a chance to say  
15 what they want to about that.

16 Does the Plaintiff have anything else they want to say  
17 about that?

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

19 **THE COURT:** No. Okay. The Defendant?

20 **MS. ECHTMAN:** I just want to add one more thing. I  
21 made all the arguments about why I think it should come in  
22 substantively on its own and I think it actually could help  
23 streamline our case because if Your Honor admits that we can  
24 drop one of our experts because I think that will make a point  
25 we want to be able to make in closings to the jury.

1           **THE COURT:** Okay.

2           **MS. ECHTMAN:** It will help streamline the case and  
3 otherwise it should come in.

4           **THE COURT:** Well -- all right. I'm going to do the  
5 same thing about this one and -- did you want to say anything  
6 in response?

7           **MR. GLASSER:** Yes, ma'am. Could we have time to file  
8 a quick brief on this one because I don't think it's going to  
9 hit any of the foundation requirements for the hole they're  
10 trying to put it through.

11          **THE COURT:** Okay. Since I have a lot of work to do  
12 this weekend on this and other matters, tomorrow at five  
13 o'clock?

14          **MR. GLASSER:** Yes, ma'am.

15          **THE COURT:** Okay. And any response Sunday at  
16 two o'clock?

17          **MR. EWALD:** Yes, Your Honor.

18          **MS. ECHTMAN:** Sure.

19          **THE COURT:** Okay. We'll all work all weekend. You  
20 all would have been working all weekend probably anyway, but  
21 I'm happy -- you can file it electronically. It will pop up by  
22 the miracles of technology on my computer screen and I will  
23 read it.

24          What is the Defendant's anticipation as to where we're  
25 going to be on Tuesday? I just -- you know, one of the things

1 I'm going to be doing this weekend is working on my jury  
2 instructions; and if you are going to rest your case Tuesday  
3 morning at eleven o'clock, I need to know that now.

4 **MR. BICKS:** Yeah. We're shooting, Your Honor, to be  
5 done by the close of business Tuesday.

6 **THE COURT:** Okay.

7 **MR. BICKS:** And if it leaked into Wednesday, it's a  
8 shot. As you know, lawyers are notoriously bad at time  
9 estimate. I put myself at the top of the list. But I think  
10 the goal is we're trying to get done at the end of the day  
11 Tuesday.

12 **THE COURT:** Okay. Often, it's my experience,  
13 lawyers -- maybe it's because I have a heavy thumb, but, you  
14 know, sometimes people take less time than they say they're  
15 going to. And who are you anticipating calling? I know  
16 there's this issue about an expert that you may or may not call  
17 depending on the ruling on Defendant's 25.

18 **MR. BICKS:** Right. So we've got Debra Aron, who is  
19 the rebuttal to their expert Ms. V, and then we've got Mike  
20 Mills, who was here. He went home for his daughter's birthday.  
21 He's going to come back Monday. Bruce Werner is a short  
22 witness. I'm trying to decide if we really need him. He's up  
23 in the air. I'll tell these folks when we figure it out. And  
24 then we've got Ms. Taber, you know, 15 minutes. So -- and then  
25 there's this fellow Dr. Fenili who talks about the PossibleNOW

1 report and that's prettily much the focus.

2           **THE COURT:** And Dr. Fenili is the one you might not  
3 need if the report comes in?

4           **MR. BICKS:** Yeah, we would probably drop him if we got  
5 that.

6           **THE COURT:** All right. Well, yeah, that ought to  
7 even -- that's going to take most of the day Tuesday it sounds  
8 like.

9 All right. Good. Well, I will try to have as much as I  
10 can, not having heard all of the evidence, jury instructions  
11 ready so that I will not be the cause of any delay in the  
12 charge conference. I did print out the last proposed  
13 instructions, which were filed in August -- at the end of  
14 August. That's what I'm looking at. Has there been anything  
15 since then? Did I miss something? It's entirely possible.  
16 That's what I have in my hand, but I don't have the whole file  
17 in front of me.

18           **MR. BICKS:** I'm looking to Mr. Ewald.

19           **THE COURT:** There's always somebody in charge of this  
20 kind of thing.

21           **MR. BICKS:** It's not me.

22           **MR. EWALD:** Your Honor, I believe that is the last one  
23 that was filed. We had -- well, two things I would add. One  
24 is we had made some comments in the pre-instruction back and  
25 forth --

1           **THE COURT:** Right.

2           **MR. EWALD:** -- where we told Your Honor if you're  
3 inclined to go with the North Carolina standard jury charge  
4 that we had a different proposal for you than what Plaintiffs  
5 had.

6           **THE COURT:** Yes. Okay. That -- thank you. I do  
7 remember that. So you're directing me to the -- I'm calling it  
8 briefing.

9           **MR. EWALD:** If you give me one second, Your Honor, I  
10 can tell you the ECF number.

11           **THE COURT:** This was when I sent out my rough draft  
12 preliminary instructions and you all gave me some comments back  
13 is what you're talking about.

14           **MR. EWALD:** Yes, Your Honor. We filed that on  
15 December 8th --

16           **THE COURT:** Okay.

17           **MR. EWALD:** -- and it's our response to the Court's  
18 proposed summary of applicable law.

19           **THE COURT:** And both sides filed something I remember,  
20 so I'll definitely take a look at that again.

21           **MR. EWALD:** Your Honor, one other thing. We had  
22 filed -- it all runs together now, but I believe it was after  
23 Friday's teleconference we filed a --

24           **THE COURT:** I saw that supplemental authority, some  
25 very long opinion from one of my colleagues in West Virginia --

1           **MR. EWALD:** Yes, Your Honor.

2           **THE COURT:** -- who talked about lots of stuff, but  
3 some of it was actual authority.

4           **MR. EWALD:** Yes.

5           **THE COURT:** Okay. So that's good.

6           Now, if anybody has anything else that they want to me to  
7 consider -- you know, I know the evidence isn't all in, but,  
8 you know, just, you know, go ahead. Don't wait if it's  
9 something you can do now. I know, you know, you may want to  
10 hand it up at the close of all the evidence, but I'm not  
11 promising to consider it if you wait that long, especially if  
12 it's something that has -- we already know about now. So if  
13 there's specific language that's not already in front of me  
14 about anything in terms of the jury instructions, I would  
15 greatly appreciate hearing about it this weekend so I can take  
16 it into account. I mean, I'll be up here every day so -- at  
17 least part of the time.

18           **MR. BICKS:** Sorry, Judge.

19           **THE COURT:** That's okay. I like trials. I'm happy to  
20 be figuring out some jury instructions.

21           Anything else we need to do before we stop for the day for  
22 the Plaintiff? No. For the Defendant?

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

24           **THE COURT:** Okay. If we do finish all the evidence on  
25 Tuesday, I would ask counsel to be available to stay late. You

1 know, one of the things we could do is have a -- like an  
2 informal charge conference off the record and work through some  
3 things; and then we could come in Tuesday morning, have the  
4 jury come a little bit late, do a formal charge conference on  
5 the record that might be less confusing for the appellate court  
6 after we work through some things. So I just would ask -- I  
7 mean, you all aren't local. You're not going to be doing  
8 anything Tuesday night anyway, but I just would ask you to, you  
9 know, keep that in mind. Or at least most of you, with two  
10 exceptions, aren't local. You know, at least some of you would  
11 be available Tuesday night in case that timing works out.

12 All right. I appreciate you all's efficiency. I'll see  
13 you Tuesday morning at 9:30.

14 (Proceedings concluded at 4:35 p.m.)  
15  
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**C E R T I F I C A T E**

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

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



Lori Russell, RMR, CRR  
Official Court Reporter

Date: 1/13/17

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# EXHIBIT 87

# EXHIBIT 87

JA005784  
004652

TX 102-005046

THOMAS H. KRAKAUER, \* Case No. 1:14CV333  
\*  
Plaintiff, \*  
\*  
vs. \* Greensboro, North Carolina  
\* January 18, 2017  
DISH NETWORK, L.L.C., \* 9:20 a.m.  
\*  
Defendant. \*

BEFORE THE HONORABLE CATHERINE C. EAGLES,  
UNITED STATES DISTRICT JUDGE, and a jury.

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JA005785  
004653

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

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

**THE COURT:** Good morning.

Okay. Over the evening recess, I did read the Defendant's motion for judgment as a matter of law, and I'm going to go ahead and submit the case to the jury. If the jury comes back in the Plaintiff's favor, we can discuss whether I should just reconsider that or whether the Defendant wants to file a motion for judgment notwithstanding the verdict. I'm not trying to make the Defendant file another brief if nothing has changed, but, you know, we can discuss the logistics of that, so I'm -- I guess I'll just defer ruling on it is probably the simplest way and we can talk about it later, if necessary.

So the clerk will reflect the ruling is deferred and that the case will be submitted to the jury.

All right. Anybody find any more typos on the verdict sheet?

**MR. BARRETT:** No, Your Honor. There is --

**THE COURT:** Wait, wait. Anything about the verdict sheet?

**MR. BARRETT:** Oh, the verdict sheet.

**THE COURT:** That's all I'm asking about right this second.

You're good for the Defendant, the verdict sheet?

**MR. BICKS:** Yes.

**THE COURT:** Madam clerk, here's copies. At the --

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1 when we recess, if you would put one in each juror's seat,  
2 okay.

3 **THE CLERK:** Yes.

4 **THE COURT:** So each juror will have a copy during your  
5 closing arguments.

6 Anything else that we need to take up before closing  
7 arguments at 9:30 for the Plaintiff?

8 **MR. BARRETT:** There's one issue with respect to the  
9 jury instructions.

10 **THE COURT:** Yes.

11 **MR. BARRETT:** On the top of page 6 of the revision  
12 from last night, there is the statement that "all telemarketers  
13 are required by law to maintain records of the phone numbers."

14 **THE COURT:** Yes.

15 **MR. BARRETT:** We propose that that be deleted.

16 **THE COURT:** Okay. I think the Defendants already  
17 asked for that to be deleted; is that right?

18 **MS. ECHTMAN:** That's right, we did ask.

19 **THE COURT:** So you agree?

20 **MS. ECHTMAN:** Yes.

21 **THE COURT:** All right. If everybody wants me to take  
22 it out, I'll take it out.

23 Anything else for the Plaintiff?

24 **MR. BARRETT:** No, Your Honor.

25 **THE COURT:** What about the Defendant? Anything we

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1 need to take up before closing arguments?

2 **MR. BICKS:** No.

3 **THE COURT:** No. All right. Good.

4 My plan, just logistically, is Plaintiff's argument. That  
5 will be about 30 -- I think you said about 45 minutes, no  
6 longer.

7 **MR. GLASSER:** I ran through it last night; and with  
8 the time it takes to go through the verdict sheet, it's more  
9 like an hour, hour and ten.

10 **THE COURT:** All right. We will take, depending on  
11 exactly how long, either a -- a short break -- short -- not  
12 complete recess, where I just excuse the jury to the jury room  
13 for comfort reasons, but I don't let everybody scatter for the  
14 full 15 minutes. And then we would probably do the same after  
15 Mr. Bicks' argument and then come back and have any rebuttal  
16 and my instructions. If we take full 15-minute recesses, you  
17 know, we -- it -- you know, it extends the time.

18 So I'm -- that's kind of my plan is to take shorter  
19 recesses. I don't think we've got any smokers on the jury who  
20 will -- who have been late getting back from break.  
21 Sometimes -- they have to leave the building to smoke and  
22 hopefully we won't have any problems about that. That's kind  
23 of my tentative plan is to take short breaks, 10 minutes, keep  
24 the jury in the jury room where they do have access to  
25 facilities, and then -- and take two short breaks during the

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1 morning. And hopefully I would get the instructions before  
2 lunch if we do it that way. That's my tentative plan.

3 **MR. GLASSER:** Your Honor, I'm going to want to use the  
4 butcher paper. Where do you want it situated?

5 **THE COURT:** You can put it --

6 **MR. GLASSER:** I'll be here. I think I can put it  
7 right here.

8 **THE COURT:** That's fine. If it blocks defense  
9 counsels' view of the jury, then defense counsel are free to  
10 move around probably -- you can sit over there where the  
11 security officer is if you want to sit in front of the bar or  
12 if you -- that first row behind the bar. Just feel free to  
13 move around as you need to to see.

14 **MR. BICKS:** Thank you.

15 **THE COURT:** I don't think there's a place to put it  
16 that doesn't block somebody's view so -- and I would prefer  
17 that you not put it there in front of the court reporter  
18 because then I can't see the jury and I need to keep my eye on  
19 them and I can't really move so -- okay.

20 Other logistical housekeeping questions? No? Okay. Yes.

21 **MR. BARRETT:** Just making sure we have this connected,  
22 Your Honor.

23 **THE COURT:** Oh, all right. We'll take -- we'll be at  
24 ease for five minutes and then we'll come back at 9:30 for the  
25 closing arguments. So court will be in recess for five

1 minutes.

2 (A recess was taken from 9:25 a.m. until 9:30 a.m.; all  
3 parties present.)

4 **THE COURT:** All right. Top of the ninth. I believe  
5 we're ready to proceed. Anything before we bring the jury in?

6 **MR. GLASSER:** No, ma'am.

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

8 **THE COURT:** All right. Bring the jury in.  
9 You put the verdict sheets in their chairs?

10 **THE CLERK:** Yes, ma'am.

11 (The jury entered the courtroom.)

12 **THE COURT:** Good morning. All right. You have heard  
13 all the evidence and it will soon be your duty to find the  
14 facts of this case and to apply the law that I will give you to  
15 those facts. Once I have instructed you on the law, you'll go  
16 to the jury room and begin your deliberations. You will have  
17 the duty to decide at least one, and perhaps as many as three,  
18 issues and there are some subissues on Question 2 that you may  
19 need to answer, all arising out of telemarketing phone calls  
20 allegedly made by SSN during the class period May 11th, 2010,  
21 through August 1st, 2011.

22 You have a copy of the verdict sheet in front of you. Each  
23 of you has one. It's clearly marked copy. I'll be sending the  
24 original verdict sheet back when you begin your deliberations  
25 that doesn't say "copy," but you can use that one as you wish,

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1 write on it, whatever.

2 Now, I will go over the law with you in some detail after  
3 the attorneys argue the case to you. In their arguments, the  
4 lawyers are allowed to review the evidence and to attempt to  
5 persuade you to answer the issues in favor of their client. If  
6 their memory of the evidence differs from yours, you should  
7 rely on your memory of the evidence because you are the finders  
8 of fact, not the lawyers and not me; and, of course, you should  
9 consider all of the evidence, not just the evidence mentioned  
10 by the lawyers in their closing arguments.

11 Now, I am going to go over the verdict sheet with you  
12 briefly before the arguments just to get you oriented. As you  
13 obviously know, the phone calls at issue here were not made  
14 directly by DISH and DISH is only responsible for phone calls  
15 that violate the Act if SSN was acting on DISH's behalf. We  
16 have been referring to this as the agency issue, which is the  
17 first question you will address. The Plaintiff must prove two  
18 things on that issue. First, that SSN was DISH's agent and,  
19 second, that SSN was acting in the course and scope of that  
20 agency when it made the telephone calls during the class  
21 period.

22 If the Plaintiff proves those things by the greater weight  
23 of the evidence, you will answer that first issue "yes" and  
24 then you'll turn to the second issue. If you answer the first  
25 issue "no," then you don't answer the remaining issues. But

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1 you have to answer Issue One. All right.

2 Now, the second issue, if you reach it, concerns whether  
3 the Plaintiff has proven that the calls violated the Telephone  
4 Consumer Protection Act or the TCPA. The Plaintiff must prove  
5 four things. First, that the telephone numbers of the class  
6 members were listed on the National Do Not Call Registry at the  
7 time of the call; second, that after the number had been listed  
8 for at least 30 days SSN called the number for -- called the  
9 number at least twice during any 12-month period with a  
10 telephone solicitation on behalf of DISH; third, that the calls  
11 were received; and fourth, that the numbers were residential at  
12 the time of the call.

13 The second issue gives you three options. One, to decide  
14 this issue in favor of all class members. That's yes. Two, to  
15 decide the issue in favor of some class members and against  
16 others. That's "yes except" on the verdict sheet, the one with  
17 the subcategory. Or, three, to decide the issue against all  
18 class members by answering "no," which is over on the third  
19 page at the end of the subissues.

20 If the Plaintiff has proven and you find that all the  
21 repeat calls SSN made to the class members violate the Act, you  
22 will answer "yes." If the Plaintiff has proven and you find  
23 that SSN made some calls that violate the Act, but the  
24 Plaintiff has failed to prove that all the numbers were  
25 residential, then you'll mark that second box "yes except"; and

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1 then you'll go through those various categories, marking each  
2 according to your findings; and if you find that the Plaintiff  
3 has not proven that the phone calls made by SSN violated the  
4 Act, you'll answer the second issue "no."

5 Now, if you answer "yes" either in whole or in part, "yes"  
6 or what I'm calling "yes except," then you'll turn to the third  
7 issue and address damages, the amount each class member would  
8 be entitled to recover; and if you answer "no," then you don't  
9 answer that third issue.

10 Now, I'm going to repeat what I just said to you when I go  
11 over the law with you after the arguments and also go over it  
12 with you in more detail, but I wanted to kind of give you a  
13 little focus to help you understand the lawyers' arguments.

14 Now, Mr. Glasser will be arguing first on behalf of the  
15 class. Then we'll probably take a short break. We may not  
16 take a full recess. I may just send you back to the jury room  
17 for a few minutes for comfort reasons. We'll come back.  
18 Mr. Bicks is going to argue on behalf of DISH. We'll probably  
19 take another little short comfort break after that. When we  
20 come back, Mr. Glasser has an opportunity to make a short  
21 rebuttal argument. The Plaintiff has the burden of proof, and  
22 therefore he gets to go first and last under the court rules.  
23 After that I'll give you your instructions on the law. It will  
24 probably be lunchtime around then, but we'll see what time it  
25 is exactly as to what we will do next, but that's roughly going

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1 to be our schedule and process this morning. The lawyers have  
2 promised me that they'll take no more than -- or an hour and  
3 15 minutes each total, maybe 20 minutes each. So around in  
4 there in that time.

5 I think we're ready to start and the jury is with the  
6 Plaintiff.

7 **MR. GLASSER:** Thank you, Your Honor.

8 Ladies and gentlemen of the jury, this is my favorite time  
9 of the trial because I finally get to talk right to you, right  
10 at you, you know, tell you what I think of the evidence, go  
11 through it. It's also the scary time of the trial because all  
12 the years of work that goes into it and you think, oh, man,  
13 what if I forget one thing. But I know there's strength in  
14 numbers in a jury and when you're back in the jury room, you'll  
15 remember the evidence and you'll point it out.

16 So Dr. Krakauer comes to you today on behalf of 18,000  
17 people asking you to enforce the Do Not Call law. If on the  
18 facts you heard in this courtroom DISH skates out of here, this  
19 Do Not Call law is worthless. You heard Sophie Tehranchi's  
20 deposition. She had a four-person boiler room that just called  
21 for DISH, four people. That's no AT&T. That's no Best Buy.  
22 That is a boiler room that is nothing but DISH. And let me go  
23 through the evidence.

24 Sophie Tehranchi made 231,000 connected calls in 15 months  
25 and 51,000 of them were to numbers on the Do Not Call List.

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1 Any effective system of monitoring or compliance could have  
2 caught that, whether you check weekly, monthly, yearly. I  
3 don't care. Any effective system could have caught that. And  
4 this DISH fishing boat that was fishing illegal waters  
5 generated a lot of -- a lot of customers for DISH. We'll go  
6 through some of the evidence on that. So don't let DISH cast  
7 all their sins on Sophie Tehranchi's head, just push that goat  
8 into the wilderness. Don't let them do that. That's the  
9 defense in this case. It's Sophie, Sophie, Sophie, SSN, SSN,  
10 SSN, push the goat into the wilderness. That's the evidence in  
11 this case.

12 The Court will instruct you on the law and she will tell  
13 you that an agent is simply a person or company empowered by  
14 another person or company to act on its behalf. That's what  
15 SSN did. It acted on behalf of DISH. There's no question  
16 after 2005 every call SSN made was on DISH's behalf to solicit  
17 customers for DISH.

18 Sophie Tehranchi's affidavit is also in evidence. It's  
19 Exhibit 198.

20 Can we look at that, Matt?

21 **THE COURT:** All right.

22 **MR. GLASSER:** This is Exhibit 198. This is paragraph  
23 9: From 2010 through 2011, all calls made through Five9  
24 platform were for the purpose of marketing DISH products and  
25 soliciting DISH orders by Satellite Systems. That's the

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1 evidence. These calls were on behalf of DISH.

2 Paragraph 12: Satellite Systems was an exclusive DISH  
3 dealer during 2010 and '11 and as such did not make any  
4 telemarketing calls soliciting any products other than DISH.

5 These are DISH calls. DISH knows that. So they want to  
6 blame SSN and say, oh, they acted outside the course of their  
7 agency. That's what they're telling you in this courtroom.  
8 That is not, that is not what they told 46 states Attorneys  
9 General in June of 2009 when they signed the assurance of  
10 compliance.

11 Let's look at Exhibit 55. And you will have this back in  
12 the jury room. This is Exhibit 55 at Section 4.7: DISH  
13 Network shall affirmatively investigate complaints regarding  
14 alleged violations of the Do Not Call laws and take appropriate  
15 action as soon as reasonably practicable. That's what they  
16 promised 46 states in June of 2009.

17 Let's look at paragraph 4.78, Matt.

18 4.78: DISH Network shall monitor, directly or through a  
19 third-party monitoring service, covered marketers -- the  
20 evidence is unequivocal SSN was a covered marketer -- and see  
21 whether they're complying with the Do Not Call law. That's  
22 what they -- that's what they said they had the power,  
23 authority, willingness to do in June of 2009. That alone  
24 annihilates the idea that the actions of SSN were outside the  
25 course and scope of this agency because SSN didn't sign this.

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1 DISH signed, DISH signed and said, "We have the power. We have  
2 the authority. We have the will. We're going to enforce this  
3 law. We're going to make our covered marketers abide by it."  
4 That is showing you know the scope of your authority over this  
5 marketer.

6 So DISH looked away and because they looked away right  
7 after this -- our -- our class period -- because that's the  
8 only time when we subpoenaed Five9. We got those records. We  
9 managed to get 15 months of records. SSN did not keep records,  
10 did not keep their records. We got lucky on that. And doesn't  
11 that help DISH? If you don't enforce your policy at DX2 --  
12 when you go back, you'll see DX2. That's the policy on keeping  
13 record. Isn't that convenient when you don't make them keep  
14 records of fishing in illegal waters? That's pretty  
15 convenient.

16 But anyway, because DISH looked away -- and the Court will  
17 also instruct you on acquiescence; that if you acquiesce, if  
18 you condone acts that you know are going on, if you look away,  
19 that's also justifying the agency. That's saying it's in the  
20 course. And because they looked away 51,000 times from  
21 May 2010 to August 2011 this law was violated. I mean, that is  
22 in the echo of that assurance of compliance. It's tight in  
23 time to that assurance of compliance.

24 And Reji Musso testified in the most plain terms. You guys  
25 remember her testimony. She said, "No, we do not investigate

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1 complaints to see if they're legitimate." In the entire seven  
2 years she ran the compliance department at DISH, she said she  
3 could not -- she did not run down the legitimacy of a single  
4 complaint, not one, not even Dr. Krakauer's, not even after he  
5 goes to the Attorney General of North Carolina and gives them a  
6 formal deposition under oath in September of 2011 telling them  
7 what was going on. Nothing happens to SSN. SSN -- nothing  
8 happens during the class period.

9 Sophie Tehranchi gave her deposition in August of 2013.  
10 She testified she was still working for DISH at that time.  
11 Sometime after that they now say they -- that they let her go,  
12 but Reji Musso said they just let the contract expire in 2014.

13 Now, Reji Musso also testified in the most plain, clear  
14 terms that they did not pay the approximately \$200,000 it would  
15 have taken to actually meet that statement that they will  
16 monitor. Let's look at Exhibit 70. When you're back in the  
17 jury room, please take Exhibit 70 in your hand and read it. It  
18 is one-page long. Right here at the bottom, Tier 3, compliance  
19 certification, it says at "Benefits" that this certification  
20 provides thorough review and certification of all federal,  
21 state telemarketing and Do Not Calling issues. DISH would be  
22 assured that certified call centers possess the processes and  
23 procedures -- can you make that big? Yeah. Processes and  
24 procedures to meet or exceed regulatory, as well as DISH  
25 corporate requirements. Price: \$4,500 per authorized

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1 retailer.

2 Recall that when we talked to Amir Ahmed he said -- let's  
3 take up Exhibit 89. Exhibit 89. You remember we went over  
4 this -- this is Exhibit 89, page 4 -- with Amir Ahmed. He  
5 said, "My budget for indirect activations in the year 2011 was  
6 two million. My OE retailers, my national sales partners," of  
7 which they are 45, of which OSN (sic) is one, "are going to get  
8 me \$1,099,000." That was the budget. One million activations,  
9 okay.

10 So Exhibit 70 shows us that for \$4,500 you could have  
11 assured yourself -- per marketer times 45 -- it's just a little  
12 bit over \$200,000 -- you could have assured yourself -- let's  
13 go back to 89 -- that these million activations were clean.

14 Well, DeFranco testified that a customer gives you \$80 a  
15 month. Amir Ahmed said 90. Let's say 80 times one million  
16 activations, \$80 million a month. Forty-five OE retailers, 45  
17 national sales partners, \$80 million of new revenue a month.  
18 Twelve months in a year. \$960 million of recurring revenue  
19 every single year.

20 What's it cost to keep that channel clean? \$200,000.  
21 \$200,000. And somebody well above Reji Musso's pay grade made  
22 that call. Who made that call? Fortune 200 companies intend  
23 what they're doing. These guys are way too smart for that to  
24 slip through the cracks. \$200,000 to clean up a billion  
25 dollars in revenue? That's an accident? That is the scope of

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1 agency. It's gone.

2 They don't want to put a governor on the fishing boat  
3 engine. They don't want to slow it down. They want a million  
4 activations a year from these telemarketing centers, these  
5 outbound centers that are calling only for DISH, selling only  
6 DISH, and they want that money. That's what this case is  
7 about. They didn't put a governor on the engine. That would  
8 have cost \$4,500. Exhibit 70. Compare Exhibit 70 to  
9 Exhibit 89 and you will come to the same conclusion I came to  
10 about what they were doing here.

11 And when they get busted, blame the -- blame SSN. Blame  
12 that little four-person boiler room that worked on your  
13 computers, didn't have any inventory, used your scripts.  
14 Actions speak way louder than words. You can say whatever you  
15 want, but when you don't agree to pay \$4,500 to clean up a  
16 billion dollars in revenue -- well, 45 times 45, so \$200,000 to  
17 clean up a billion dollars in revenue, you made an intentional  
18 decision that should matter in this courtroom here in  
19 North Carolina.

20 The Court will instruct you on the scope and course of  
21 authority, and she will tell you conduct matters, course of  
22 conduct matters. The contractual disclaimers that I'm sure  
23 they will flash on the screen do not conclude this case.  
24 Conduct matters. Actions speak louder than words. That's what  
25 the law is. And hiring a third-party monitor for a mere

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1 \$200,000 to police a billion dollars of revenue is crushing  
2 evidence of not intending to govern this system of getting  
3 clients.

4 The Court will instruct you on scope of authority; that if  
5 the principal does this, even if the conduct is illegal, even  
6 if it's illegal, they're responsible for it. It's not a  
7 defense to say, Oh, we didn't -- we didn't consent to illegal  
8 conduct. You knew what you were getting. We'll go over some  
9 of the evidence about the eyes wide open with SSN, but you  
10 remember an injunction from North Carolina, an injunction from  
11 Florida, assurance of compliance. I mean, these guys knew what  
12 they were getting. So unenforced written limits on agents'  
13 authority don't matter. Contracts rotting in a desk drawer do  
14 not matter. That's what the law is.

15 A third crushing piece of evidence in this case about how  
16 they looked the other way is actually Dr. Krakauer's complaint.

17 Let's look at Exhibit 282, please, Matt.

18 Remember this is the e-mail, you'll have it back there,  
19 where Dr. Krakauer first saw this e-mail at his deposition in  
20 September of '11 and it said, this is the DISH person: "I  
21 searched Dr. Krakauer's phone number in Echo Admin." Remember  
22 EchoStar is DISH. Echo Admin is DISH's billing system.  
23 "...and found there was a credit check ran on him last night.  
24 I did not inform Mr. Krakauer that his credit was run without  
25 his knowledge." Okay. And then they call him back and they

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1 never inform him.

2 I ask you, ladies and gentlemen of the jury, if you're  
3 covering up -- Reji Musso said that was improper. She said,  
4 this is a moment you must remember in the trial, DISH probably  
5 didn't want to, you know, upset Mr. Krakauer because -- I mean,  
6 he's a full-grown man. He is a full-grown man. They were  
7 covering up the improper act of their agent. When your agent  
8 does something wrong and you know it, if you're not standing  
9 behind it, why are you covering it up? Why are you covering it  
10 up? So that action of covering up speaks louder than words.  
11 Actions speak louder than words. They covered it up.

12 Let's go to Exhibit 656, please. Now, let's go back in  
13 time. This is Amir Ahmed's e-mail. Remember at the beginning  
14 in 2004, 2005 these guys were selling both DISH and DirecTV,  
15 and there was a period up till 2005 -- through 2005 when they  
16 were selling both and -- and DISH wanted these guys to sell  
17 more DISH. And I love this e-mail. Amir Ahmed. "Go get him.  
18 Need activations. Please tell Alex that I have worked my a-s-s  
19 off to get him additional economics. I have also had to deal  
20 with all his issues related to sales. Need incremental  
21 activations starting tomorrow." Whenever I read that e-mail,  
22 that a-s-s is like A, dollar sign, dollar sign. That's what  
23 they were thinking. They're like, "We've got to get these guys  
24 on our team. They can sell." So that shows you that DISH  
25 cares about activations, even if there's issues with sales.

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1 DISH wanted the customer.

2 Now, I told you in opening that there would be evidence of  
3 DISH approving SSN acting as DISH. Let's see Exhibit 22.  
4 Exhibit 22, 2009 outbound sales script. Sophie Tehranchi  
5 testified in the most clear terms that sales scripts were  
6 approved by DISH. "Hi, my name is, blank, with DISH Network."  
7 "My name is, blank. I'm with DISH Network." "My name is,  
8 blank. I'm an account manager with DISH Network, the satellite  
9 service provider." "Hello, my name is, blank. I'm an account  
10 manager with DISH Network." Who in the world on the other side  
11 of that phone call knows this isn't DISH? DISH is hold -- DISH  
12 is letting these guys act as DISH. That's scope of authority.

13 Now, let's look at Exhibit 1294, right in the class period.  
14 This is a back-breaking exhibit, Exhibit 1294.

15 Thank you, Matt. Can you pull up -- okay. There we go.

16 This is an e-mail dated June 3rd, 2010. Rehan@yourdish.tv  
17 at the top. That's the guy who works for SSN. He uses the  
18 dish.tv e-mail. Direct to DISH scripts, Q2 doc. January,  
19 February, March Q1. April, May, June Q2. Dr. Krakauer was  
20 called on the Direct to DISH campaign. You recall they were  
21 trying to switch him from DirecTV to DISH. Mr. Campbell, whose  
22 complaints you'll find at PX15, in May of 2010 got the same  
23 call trying to switch him from DirecTV to DISH.

24 Here it is. "Folks, here is the sales script for Q2.

25 Please let me know if any changes are warranted. Stop. Also,

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1 I have some questions before I submit an automated disclosure  
2 script." We're talking about two scripts. That's the sales  
3 script, just like Exhibit 22. These guys approved the scripts.  
4 These scripts were used with Dr. Krakauer and Mr. Campbell. It  
5 was trying to switch DirecTV residential customers to DISH.  
6 That's what the campaign was that we're here on.

7 There were DISH inspectors -- we've heard this testimony  
8 from witness after witness -- listening and grading the calls  
9 that use these scripts, live and by recording. Tehranchi  
10 clearly testified that DISH representatives came to her call  
11 center regularly and listened to the entirety of calls. All  
12 the work took place on DISH's own computer system, the OE tool.  
13 The website was yourfreedishtv.com. We've already seen the  
14 e-mail address. DISH let SSN use its trademarks. DISH gave  
15 SSN a list of vendors to call. They say, "We didn't tell them  
16 the exact number to call." They told them the vendor to buy  
17 the numbers to call from on the Charter campaign, for example.  
18 DISH provided the installation, customer service, IT support,  
19 all the inventory.

20 And the contract kept SSN on the shortest leash you can  
21 imagine. Let's look at section -- Exhibit 26, Section 7.3 of  
22 the contract. Here it is. When you're back in the jury room:  
23 Retailer shall take all action and refrain from taking any  
24 action as requested by EchoStar. First line: Retailer shall  
25 comply with all business rules, comma, including without

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1 limitation all business rules which govern or are otherwise  
2 applicable to promotional programs. Look at the definition of  
3 "business rule" in this contract. It's whatever we send you.  
4 If we send you a blast facts, we send you an e-mail, we send  
5 you a letter, whatever we say you must do or refrain from  
6 doing. Can you imagine a shorter leash?

7 And -- and SSN just got weekly activation payments. They  
8 were paid weekly. Is that a real business, got to get paid  
9 every week?

10 I told you in the opening statement that the evidence would  
11 be overwhelming that DISH had all kinds of direct knowledge of  
12 SSN's illegal telemarketing both before and after the assurance  
13 of compliance. After the assurance of compliance, we know that  
14 Dr. Krakauer gave a deposition. We know he complained. You'll  
15 look at PX15. You'll see a smattering of complaints going  
16 through after the assurance of compliance.

17 Let's go before. Let's go to Exhibit 503. This is Amir  
18 Ahmed's e-mail in 2004. This is three days after  
19 North Carolina sues them to stop their illegal marketing.  
20 Compare the dates on Exhibit 186 to this e-mail. "I'm hearing  
21 a lot of complaints on Satellite Systems on telemarketing calls  
22 to consumers," says Amir Ahmed. On the witness stand, do you  
23 know what he said? He said a lot. "I really meant a few. I  
24 just said a lot." What did he -- is it "a few" that he said in  
25 court or is it "a lot" he said when he didn't know he was going

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1 to be in court. Which is it?

2 Let's go to the next one, Exhibit 405 -- 504. I'm sorry.  
3 Looks like we have another retailer using telemarketing and not  
4 scrubbing their list. That's in October of '05.

5 Let's look at 194. "We know that SSN is using autodialers  
6 and automessages. Tehranchi has been warned time and again by  
7 me, by you, by the region, by phone, in writing, in person that  
8 the activities could violate the law. Last time Tehranchi  
9 blamed a rogue employee who he claimed was terminated, but the  
10 activities continue. Charter knows he's doing it and several  
11 state AGs know he's doing it as well."

12 This is after, after the North Carolina AG puts an  
13 injunction on him to tell him to stop doing autodialers and  
14 automessaging, after they're told to stop calling people on the  
15 Do Not Call List, after Florida gives the same sanction. And  
16 Reji Musso said she knew about the sanction. We'll get to her  
17 e-mail that gave her the knowledge. And -- so these guys --  
18 and then the AGs obviously did know because in 2009 these guys  
19 signed up with 46 of them to start policing this stuff.  
20 Obviously, the AGs found out about it.

21 In opening, Mr. Bicks implied that no one at DISH knew  
22 about the North Carolina injunction. Ms. Musso admitted they  
23 knew. In opening, Mr. Bicks implied no one at DISH knew about  
24 the Florida sanction. Ms. Musso said they knew.

25 And then I asked both Ms. Musso and Mr. Ahmed --

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1 "Ms. Musso, at any time from the time you were -- from '06  
2 until you left, was SSN ever disciplined in any way?" I didn't  
3 say "terminated." I went through -- remember I went through  
4 every level of discipline in that assurance of compliance.  
5 Were they required to retrain? Were they required to police  
6 themselves. Were they -- let's go to 419, the list of  
7 progressive discipline. I walked through every single one of  
8 these progressive disciplines that they testified existed both  
9 before and after the assurance of compliance. It's right here  
10 on the bottom. Were they suspended? Did you withhold any  
11 compensation? Did you impose any monetary fine? And there's  
12 some on the other page that are even lesser sanctions. And  
13 Ms. Musso said no, none, none of these sanctions ever before or  
14 after were ever applied.

15 I asked Mr. Amir, "I know in your e-mails, Mr. Amir, you  
16 sometimes say 'we should put them on probation' or 'we should  
17 do something.' Did you ever in fact do it?" Answer no, no.

18 So there was a -- there was noise about doing something  
19 about them, but they never did it. They had plenty of  
20 knowledge of what kind of telemarketer they were getting. They  
21 brought these guys in eyes wide open.

22 Now, what is the benefit to DISH of having a relationship  
23 set up this way as an allegedly independent contractor? Why  
24 not just have these extra four people in their own call center  
25 making the calls at DISH's headquarters? Because when you get

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1 busted, you can blame them and send them out to the wilderness.  
2 That's why. These people are smart. These people are smart.

3 Now, let's go -- let's -- I told you in opening that by  
4 stark contrast DirecTV -- I would show you that DirecTV dropped  
5 these guys. Let's go to Exhibit 190, Exhibit 190. So this is  
6 when Amir Ahmed is convincing Mr. DeFranco -- DeFranco and  
7 Charlie Ergen are on this e-mail, they're both on this email,  
8 Exhibit 190. Amir is saying: "Satellite Systems is DTV's,"  
9 that's DirecTV, "eighth largest independent retailer, six to  
10 eight thousand," that's sign-ups, "a month. They use message  
11 broadcasting with DTV as their primary source to generate  
12 sales."

13 By the way, that's in June '04 and the injunction that  
14 comes from a suit filed three days before this e-mail says  
15 that's illegal. These guys know that. They're in this  
16 business.

17 And you know what he says, it's their eighth largest. It's  
18 DirecTV's eighth largest source of revenue, these guys.

19 Okay. And now let's go to exhibit, let's see, PX15 at 7 --  
20 No. All right. On PX15, you will find that Sophie Tehranchi  
21 got -- yeah, here it is. Here it is. Reji Musso,  
22 September 21, '06, \$25,500 fine ordered against Vitana. And  
23 you'll see on the complaint that Vitana is SSN. Consumer  
24 complaint with rebuttal by DirecTV saying they termed the  
25 retailer. And she said on the witness stand that meant

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1 terminated and her understanding was that retailer was  
2 terminated. Sophie Tehranchi testified after '05 they only  
3 sold DISH.

4 So here you have actions are louder than words. DirecTV  
5 takes their eighth largest retailer and says no. DISH says,  
6 I'm going to embrace these guys. Actions speak louder than  
7 words. These guys get in all this trouble in 2004, in 2005;  
8 and all of a sudden DirecTV is like, "We're not touching these  
9 guys." Reji Musso understood it from this e-mail. DirecTV did  
10 the right thing.

11 What are you telling companies if you let DISH skate with  
12 all this eyes-open knowledge when their biggest competitor did  
13 the right thing and broke ties and got rid of their eighth  
14 largest source of revenue because they were doing it wrong?  
15 What message are you sending corporate America if you make that  
16 decision?

17 I told you in opening that DISH would say, We ordered SSN  
18 to sign up for this thing called PossibleNOW and scrub their  
19 lists. And I told you but the facts of the case are they  
20 didn't scrub their lists. I said I bet they use the words  
21 "PossibleNOW" a hundred times, maybe a thousand. I don't think  
22 we hit the thousand. I'm pretty sure we hit the hundred. I  
23 don't have a beef with PossibleNOW. If they had signed  
24 PossibleNOW up for the Exhibit 70, for the compliance, we  
25 wouldn't be here. They would be fine, but they didn't.

JA005810  
004678

1       So now let's look at PX15 at 7980. This is in the  
2 compliance file. This is after the Krakauer complaint. "We do  
3 not have a date for scrubbing this lead through PossibleNOW  
4 because at the time we are not a PossibleNOW member." So  
5 Dr. Krakauer's call. They tell -- they tell DISH, We did not  
6 scrub this lead. DISH doesn't ask any of the obvious  
7 questions: Who else are you calling? Scrub now. Stop calling  
8 people unscrubbed. They don't ask any of those questions.  
9 They just go on about their business.

10       And then let's go to PX899, one year later after the  
11 Campbell complaint. May 2010, no, this record was not  
12 rescrubbed. So we got a year later, still no rescrubbing.  
13 Again they don't ask the obvious questions: Are you still  
14 calling people who aren't scrubbed? Stop calling people who  
15 aren't scrubbed. Scrub now. It's not -- it's a  
16 going-through-the-motions complaint system.

17       I am not blaming Reji Musso for that. Her bosses set it  
18 up. She did the job. I mean, she probably could have done a  
19 different job if they had given her a different job. I have no  
20 doubt. For these retailers, you probably need Stevonne Smith,  
21 Sr., in there with these guys, but anyway -- but the Krakauer,  
22 Campbell excuse was the same, not rescrubbed.

23       Now, the Defendants say, "Well, wait a minute. We have a  
24 receipt they scrubbed." Let's look at it, DX26. This is the  
25 one scrubbing receipt in the entire case. Look at the date on

JA005811  
004679

1 it: July 14th, 2008. It covered 15,000 records. What does  
2 this have to do with this case? This document has nothing to  
3 do with this case. Why didn't a PossibleNOW witness come in  
4 here and spread scrubbing records all over the courtroom floor  
5 if these guys were using PossibleNOW? This is one record from  
6 2008. That's the best DISH can do on their scrubbing with  
7 PossibleNOW. Nothing to do with this case.

8 So Dr. Krakauer brought this lawsuit to put teeth in this  
9 law and just make it enforced. Let's just enforce it. Let's  
10 just enforce the law.

11 Let me walk through the verdict sheet with you, please.  
12 All right. The first question on the first sheet -- can you  
13 just blow it up -- is the agency question. I've talked about  
14 that for the last 30 minutes. I ask you respectfully to mark  
15 that question "yes." They had all the knowledge in the world.  
16 I have injunctions from two states. I've got the assurance of  
17 compliance. I mean, these guys knew. I have all those e-mails  
18 where they had eyes wide open. That's done. Yes. Conduct,  
19 actions speak louder than words.

20 Now let's go to the class members and I want to walk  
21 through this exhibit with you to talk about answering these  
22 questions. All right. At the top of -- remember this was the  
23 demonstrative used by Anya Verkhovskaya. At the top we have  
24 the 1.6 million calls. These are the records of Five9. We  
25 subpoenaed them. It's a giant phone bill. Okay. It's a giant

JA005812  
004680

1 phone bill. There are 1.6 million calls on it to telephone  
2 numbers. Nobody in this case has said it's not the bill and  
3 that the -- David Hill testified by video. I know that was  
4 boring. He said these were the numbers called; and if there's  
5 time on the number, it was connected. It was that short video  
6 testimony.

7 Okay. So we have 1.6 million calls. 1.4 of them were not  
8 connected. They were inbound or they were not connected.  
9 There was no time, so we cut them out. That is fair to DISH.  
10 How is that harming DISH? Fair to DISH. Cut them out.

11 That leaves 230,000 connected calls, okay. Not a single  
12 DISH witness disputed that. Ms. Aron came on here. She talked  
13 about names and addresses matching way down here at the bottom.  
14 Nobody, not a single witness of theirs, said those calls  
15 weren't connected. So this is undisputed, 230,000 connected  
16 calls in this case.

17 Now, then we reduced 65,000 single calls because the law is  
18 you have to be called twice. So if you're only called once, we  
19 took it out.

20 Now, if you're an SSN dialer guy and you get somebody on  
21 the call and it's a business, you're not going to call them  
22 again. You're going to hang up and you're not going to call  
23 them back. So this 65,000 calls scraped out right there is a  
24 material benefit to DISH. It's taking out every call that was  
25 actually connected that SSN figured out who was on the other

JA005813  
004681

1 end and for whatever reason didn't want to call them back. And  
2 one big reason would be SSN didn't sell business.

3 I asked Amir Ahmed, "In all the years you worked with SSN  
4 through the end of the class period, did they sell one  
5 business, one?" No, no. It -- DISH has all the records of  
6 every sale that SSN ever did. Why is this courtroom floor not  
7 full of business sales if they sold to businesses? They didn't  
8 get paid to sell to businesses. They got paid to sell to guys  
9 like Dr. Krakauer who own their own home and are going to keep  
10 this satellite dish for a long, long time. So this 65,000  
11 calls, that's scraping out businesses and anybody else who may  
12 not be a plausible buyer of this product, okay.

13 Now we're down to 58,000 numbers and 164,000 calls. Then  
14 we reduced 34,500 that were not on the Do Not Call list.  
15 Obviously, they're not protected because they're not on the  
16 list. DISH never complained, not a single DISH witness.  
17 Nobody disputes that we got the right list and that we took the  
18 right people off the list.

19 So now we're down to 23,000 numbers. At this point Anya  
20 did something else. She looked and she went to the LexisNexis  
21 database and said, "Okay. Businesses probably want to be  
22 known. It's more likely than not that if you're in a business  
23 you probably want to be called."

24 And the LexisNexis database looks at yellow pages. I know  
25 Dr. Fenili testified there's no database in America that can

JA005814  
004682

1 find businesses. When you look in the yellow pages and you  
2 call a plumber, does a plumber generally answer? Is the yellow  
3 pages a database in America that can generally identify  
4 businesses? I think it is and LexisNexis uses it and  
5 LexisNexis used the white pages and the business directories of  
6 the Secretary of States' offices where people register their  
7 business. Did LexisNexis catch every business in the world?  
8 No, probably not.

9 But we -- you remember there's no dispute in this case  
10 about government, so it's binary. It's either a business or  
11 it's a residence. So what Anya did was she worked to exclude  
12 businesses, and she went to obvious sources to try and find  
13 evidence of businesses and exclude those. And so we knocked  
14 out another 1,393 business numbers or numbers tagged by  
15 LexisNexis to business.

16 Now, why is that number small? Well, because we're only  
17 looking at these numbers. We've already carved out 1.4 million  
18 up here. We've already knocked out every single single call.  
19 We've already knocked out the non-DNC numbers. And businesses  
20 aren't entitled to the protection of the DNC, so why should  
21 they sign up? And we know that SSN only sold residential. The  
22 OE tool was a residential tool. They're looking at a list of  
23 DirecTV customers. These are residential customers. That's  
24 why there's not a massive number of businesses left in this  
25 database when you get to the bottom.

JA005815  
004683



1 And then we took out 1,700 DISH customers that were flagged  
2 in the Five9 records as DISH customers. Again fair to DISH.  
3 That got it down to 20,000 numbers and 57,000 calls.

4 Then we gave everything to DISH, that whole thick notebook.  
5 We gave it to DISH. And when they had a complaint that we  
6 thought was legitimate, we took it out. Everything that was  
7 close we took out. 6,000 numbers we removed and that got us  
8 down to 5,100 (sic) calls and 18,000 numbers.

9 Now, the question for you on Question 2 is is it the  
10 greater weight of the evidence -- let me talk about weight of  
11 the evidence. Criminal cases are beyond a reasonable doubt,  
12 moral certainty, okay. That's not this case. This is a civil  
13 case. In a civil case, the matter of proof is greater weight  
14 of the evidence, does the evidence tip -- the judge will  
15 instruct you on the law. She'll say does it tip however  
16 slightly in favor of the Plaintiff. And my question to you is  
17 once we've gone through all this work and we're down to these  
18 18,000 numbers, is it more likely than not that a number on  
19 there is residential? Answer yes.

20 And we don't have to only rely on LexisNexis. We relied on  
21 all the circumstantial evidence in the case about what it is  
22 that SSN was doing. They were calling residences to get them  
23 to switch from DirecTV to DISH. That's their job. That's what  
24 they got paid to do. Those are the people they called. Is it  
25 more likely than not? I mean, why would they waste money

JA005816  
004684

1 calling people they can't sell to? Why?

2 So they brought in a couple of witnesses to just throw  
3 smoke. Dr. Aron said the Five9 database is not valid. Well,  
4 it's the only call records we have. How is it not valid? How  
5 is a list of numbers not valid?

6 The judge will instruct you names and addresses have  
7 nothing to do with this case at this point. It is not -- we're  
8 trying to figure out if numbers were called. There's a whole  
9 other process once numbers are called to figure out names and  
10 addresses and who, if anyone, gets paid. All that is for the  
11 Court later.

12 So she said the Five9 list of numbers called. She didn't  
13 say the numbers weren't called. She never said the numbers  
14 weren't called. It was classic smoke and mirrors. She just  
15 started throwing smoke. 75 percent of the time LexisNexis'  
16 name and address matches Five9 name and address. Therefore,  
17 all Five9 is gone. It's more likely than not the name and  
18 address match. So please check "yes" on that first one.

19 Let's put the verdict form back up.

20 Just check "yes" here. Let's just stop the shenanigans.  
21 Check "yes."

22 Now, why are there these other boxes down here? These are  
23 challenges DISH raised through their experts, okay. First one,  
24 telephone numbers that LexisNexis always identifies as unknown.  
25 That doesn't mean the telephone number is unknown. It means

JA005817  
004685

1 they didn't mark the person as having evidence in the  
2 LexisNexis database they were residential. Dr. Krakauer is in  
3 that box. Dr. Krakauer is in that box. Did he suddenly get  
4 ejected from his home?

5 Let's go to the next page. I love this one. These are all  
6 kind of the same, but the next page really shows what I think  
7 is kind of -- look at this. Telephone numbers -- this one down  
8 here, the third one -- that LexisNexis always identifies as  
9 residential, including during the entire class period. Numbers  
10 that LexisNexis always identifies as residential, including  
11 during the entire class period.

12 And then the other one at the top. Okay. So they identify  
13 a guy in April of '10 that's living in a house. Is it more  
14 likely than not he moved out in May? I mean, all these are  
15 nitpicky quibbling. We gave them the list of numbers. Why  
16 aren't there a thousand business numbers on the floor in here  
17 going business, business, business, business? Because it's not  
18 true.

19 Let's get down to the -- to the enforcement phase of this.  
20 At the very bottom we're going to ask you to come up with a  
21 number between 0 and \$500 for this case per call, okay. And  
22 when Mr. Bicks stands up, if he does what he did in opening, he  
23 is going to try and focus on Dr. Krakauer and say, "Well,  
24 Dr. Krakauer got -- got only five calls." And he's going to  
25 say this has something to do with how long those calls lasted

JA005818  
004686

1 or -- or Dr. Krakauer, whether he suffered some grievous bodily  
2 harm. No, no, no. This is an enforcement action.

3 If you put \$50 in there, you have green-lighted call  
4 centers all over America, light up America's phones. If you  
5 put \$50 in there, you have said four-person boiler rooms are  
6 just fine, Corporate America, because you might make a billion  
7 dollars off of them. The most you can put in there is \$500.

8 It's not a criminal statute. No one goes to jail. That's  
9 the law. That's what Congress wrote. That's the most teeth it  
10 has and that's not even a lot of teeth, but it's the best we  
11 can do here today, ladies and gentlemen of the jury, and I ask  
12 you to do it. I ask you to do it. Let's make this good law  
13 have some teeth. Let's sit up and notice. Let's say for  
14 \$4,500 you could police this channel.

15 All right. Well, that's it. I have to sit down now and  
16 Mr. Bicks gets to talk. I really appreciate the time and  
17 attention you've given. You know, the jury system is what sets  
18 this country apart. It lets us have some justice on a really,  
19 you know, local level. It's awesome.

20 And I appreciate the Court, Ms. Russell, Ms. Sanders,  
21 everyone for giving us the time and attention.

22 And John Barrett, John and I have been friends since we  
23 were 14 years old, grew up together in West Virginia, so really  
24 enjoyed trying the case with John.

25 Appreciate the time you have given us. All right. See you

JA005819  
004687

1 guys.

2           **THE COURT:** Okay. Ladies and gentlemen, I'm going to  
3 give you a short break so that everybody is able to fully  
4 attend to the next closing argument. I'll excuse you to the  
5 jury room for five or ten minutes. Don't leave the jury room,  
6 okay, and don't talk about the case. Keep an open mind. The  
7 jurors are excused to the jury room.

8           (The jury left the courtroom.)

9           **THE COURT:** Okay. We'll shoot for five minutes. It  
10 might take us a minute or two longer than that so everybody  
11 here can have a comfort break.

12           **MR. BICKS:** Your Honor, can I just raise something?

13           **THE COURT:** Yes.

14           **MR. BICKS:** Can I ask -- an exhibit was shown that was  
15 Plaintiff's. It was Exhibit 198. I want to ask the clerk if  
16 that was admitted in evidence in this case, Plaintiff's  
17 Exhibit 198.

18           **THE COURT:** It might take her a minute to go through  
19 the list. Which one was that?

20           **MR. BICKS:** Exhibit 198.

21           **THE COURT:** No, I meant what was it.

22           **MR. BICKS:** It was a declaration from Sophie  
23 Tehranchi.

24           **THE CLERK:** No, I don't believe it was.

25           **MR. BICKS:** I don't believe it was admitted in

JA005820  
004688

1 evidence, Your Honor, and the document was displayed to the  
2 jury that was not admitted in evidence. I saw it. I had to  
3 then double-check while he was giving his opening, but  
4 displaying to a jury a document that's not admitted in evidence  
5 is a serious issue.

6 **THE COURT:** Okay. Let's see. Where -- was she -- was  
7 that after Ms. Musso? Was that where her testimony was? Yeah,  
8 here it is.

9 **MR. BARRETT:** Yes, Your Honor. That was -- after we  
10 played the deposition of Sophie Tehranchi, we moved to admit  
11 that is my recollection.

12 **MR. BICKS:** That was not moved into evidence.

13 **MR. BARRETT:** It was Deposition Exhibit 1. It was  
14 referred to in the deposition that was played for the jury. It  
15 was her affidavit. She was asked, Is it -- is it -- is that  
16 your affidavit? She said yes.

17 **THE COURT:** Right. I mean, I remember that reference.  
18 I'm not showing -- I'm just looking at my notes for her  
19 testimony. And it was marked, you say, as Plaintiff's 198?

20 **MR. BICKS:** Yep.

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

22 **THE COURT:** Okay. Well, we'll take a quick -- during  
23 the break, if you all can check. I'm not showing it and the  
24 clerk is not showing it, but we'll all double-check and then  
25 you all can -- we'll talk about what to -- if that is in fact

JA005821  
004689

1 correct, we can talk about what needs to be done about that.

2 **MR. BICKS:** Thank you.

3 **THE COURT:** So let's take a 5-minute recess.

4 (A brief recess was taken from 10:22 a.m. until 10:30 a.m.;

5 all parties present.)

6 **THE COURT:** Okay.

7 **MR. GLASSER:** Your Honor, I checked the transcript and

8 I agree with the Defendants. I made a mistake and I apologize

9 to the Court. Exhibit 198 was not admitted. It was my

10 mistake. I will say that the witness testified that everything

11 in her deposition -- in her affidavit was true and she did

12 testify to the things I told the jury, but I ought not have

13 shown the jury Exhibit 198. I think a limiting instruction

14 that that won't be going back to the jury room, it wasn't

15 admitted, they should disregard the evidence of -- in

16 Exhibit 198 is appropriate. I apologize to the Court for our

17 mistake.

18 **THE COURT:** Okay. What would the Defendant ask me to

19 do?

20 **MR. GLASSER:** Oh, I do, Your Honor --

21 **MR. BARRETT:** Your Honor, I went back and reviewed the

22 transcript. The affidavit was referred to during the

23 deposition designation. We played the deposition. We had the

24 situation with the juror. We came back in. We had moved to

25 admit one of the documents that was referenced in the

JA005822  
004690

1 deposition. We did not move to admit the one that was played  
2 to the jury. We would ask that we be permitted to do that now.  
3 It was referred to, you know, in the deposition designation.  
4 It was also a part of our pretrial disclosures. It is PX198  
5 and we ask that oversight be excused under the circumstances.

6 **THE COURT:** Okay. Mr. Bicks.

7 **MR. BICKS:** The affidavit is hearsay, Your Honor. It  
8 was not moved into evidence. It was all -- the only thing that  
9 happened at the deposition was somebody said, "Is that an  
10 affidavit?" She said, "Yes." She wasn't even questioned on  
11 it. It's clearly inadmissible. It was improperly shown to the  
12 jury.

13 A very stern instruction should be issued by the Court  
14 saying, "I've told you, ladies and gentlemen, numerous times  
15 that all you're to consider is the evidence in the case and a  
16 document was shown to you, Exhibit 198, a reference to  
17 Ms. Tehranchi. It should not have been shown to you. It was  
18 not admitted in the case and it's a serious thing."

19 I don't know what else to say. I -- I have not seen that  
20 before.

21 **THE COURT:** All right. I'm not going to allow it into  
22 evidence. Have -- I think it was Ms. Tehranchi's deposition  
23 when we had the issue with the juror becoming ill. I  
24 completely understand, but, you know, ordinarily I don't let  
25 affidavits in for the reasons that Mr. Bicks stated so -- and

JA005823  
004691



1 I'm not going to admit it late here.

2 So I'll just instruct the jury that it was not admitted  
3 into evidence and that on the -- I think it was two paragraphs,  
4 if I recall correctly, that Mr. Glasser referred to in that  
5 affidavit and I'm not going to repeat what those two paragraphs  
6 were about because I don't want to draw attention to that.

7 **MR. BICKS:** Right.

8 **THE COURT:** But I will tell them that that affidavit  
9 was not admitted into evidence and they should disregard  
10 those -- the parts of the affidavit that were shown to them and  
11 not -- and, as the Plaintiff has suggested, it won't be sent  
12 back with them. So I will tell them that and instruct them.

13 Okay. Anything else we need to take up before the jury  
14 comes in?

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

16 **THE COURT:** All right. You can bring the jury in.

17 And it was Plaintiff's --

18 **MR. GLASSER:** 198.

19 **THE COURT:** -- 198.

20 (The jury entered the courtroom.)

21 **THE COURT:** All right. Good morning again, ladies and  
22 gentlemen. During his closing argument to you, Mr. Glasser  
23 referred to Plaintiff's Exhibit 198 and showed you a couple of  
24 paragraphs. That was Sophie Tehranchi's affidavit. That  
25 affidavit was not admitted into evidence, so those paragraphs

1 should not have been shown to you and you should disregard the  
2 paragraphs or the parts of Ms. Tehranchi's affidavit which were  
3 shown to you during that closing argument. You can consider  
4 her testimony. Obviously, that was before you, but as to the  
5 parts of her affidavit which were shown to you, you should  
6 disregard that and that affidavit will not be going back to you  
7 as an exhibit. It was not admitted into evidence and  
8 Mr. Glasser was mistaken about that, which he agrees. All  
9 right. So please disregard that and I instruct you to  
10 disregard it.

11 We'll turn now to the Defendant's closing argument and the  
12 jury is with Mr. Bicks.

13 **MR. BICKS:** Thank you, Your Honor.

14 And good morning, ladies and gentlemen. I'm excited to  
15 talk to you all and I'm excited to make this closing argument.  
16 You may have heard a saying that if the facts are on your side,  
17 you argue the facts; and if the law is on your side, you argue  
18 the law; but if you don't have either, you pound on the table.  
19 and that's what you heard for 45 minutes, maybe close to an  
20 hour. I'm not going to do that. I'm going to talk to you  
21 about two things, the law and the evidence.

22 **THE COURT:** The law and --

23 **MR. BICKS:** And the evidence.

24 **THE COURT:** Okay. Pardon me.

25 **MR. BICKS:** Before I do that, I do want to say thank

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004693

1 you. You all have taken time away from your lives, your jobs  
2 to hear this case; and for myself, my team, and Mr. Dodge,  
3 Mr. Katzin from DISH, thank you for doing that. This is one of  
4 the greatest parts of our country in this system and I'm proud  
5 to be a part of it and I appreciate it.

6 So I want to start with some really simple things that we  
7 need to focus on and this is from the judge's instructions that  
8 you'll get and it says that in this courtroom we can only focus  
9 on testimony and evidence that was presented. And that's very  
10 important and it just relates to something the judge just said.  
11 Something was suggested to you, shown to you, but it's not even  
12 evidence in the case. And that's what we need to focus on,  
13 what the witnesses said and what the documents show, not what a  
14 lawyer suggested in a question, not what's up on a flip chart  
15 that shows big numbers. That's not evidence.

16 And this is a case, as you know -- and the Plaintiffs made  
17 a big deal about it. DISH is a successful company. They are  
18 and I'm proud of them and I'm proud to speak for them. They  
19 are successful and they've got good people. They employ a lot  
20 of people and they make a lot of good things. It's real  
21 important to remember that in this courtroom everybody is  
22 treated the same, even if it's an individual bringing a case  
23 against a company. Everyone is the same. And the reason is  
24 because a company, it's people. So everyone is treated the  
25 same and I thank you for that oath because that's very, very

JA005826  
004694

1 important.

2 Now, the burden of proof in this case is very, very  
3 important. We don't have to prove anything, but we did. And  
4 it's not just that Dr. Krakauer has the burden. He has it on  
5 each element and the elements are important. They're like  
6 steps of a stairwell. If you don't get over one step, you  
7 don't go to the next. And he's got several steps that he's got  
8 to climb and it can't be with pounding on the table. It's got  
9 to be with evidence. And what this says from the judge's  
10 instructions is that if he fails to establish any essential  
11 part of his claim then you must find in favor of DISH and  
12 that's what I will ask you to do when I am done speaking with  
13 you this morning.

14 This was a graphic that I showed in my opening statement  
15 because it puts things in context, that DISH has more than  
16 3,000 retailers around the country; and that's how it sets up  
17 its business, which, as you heard from the founder,  
18 Mr. DeFranco, it's a good and successful business.

19 And this is important because you just heard, on the  
20 butcher chart over there, all these huge numbers, but this  
21 isn't a case about any other retailer of those over 3,000.  
22 It's a case about one. It's a case about SSN and the evidence  
23 showed in this case that SSN accounted for a tiny part of  
24 DISH's business, less than a half of 1 percent, and  
25 Mr. DeFranco said that and Mr. Ahmed said that and that's the

JA005827  
004695

1 context.

2 And what Mr. DeFranco said -- and he came here because this  
3 case was important and I think that was an important moment,  
4 for the founder of this company from 1980 to come here and talk  
5 to you about his story and be subject to cross-examination so  
6 you could see was he telling the truth and what was the truth.  
7 These were the four points that he made.

8 One of the greatest things about this system is each and  
9 every one of you has so many different great traits, but one is  
10 common sense and that's always how I think about this case.  
11 Does this make sense that a company this successful, with the  
12 people you met, would idly sit by if somebody was doing  
13 something that would harm their business? Could they be where  
14 they are today if that's how they ran their business?

15 And what Mr. DeFranco said was that the reputation of DISH  
16 on a long-term basis is the key to its success; and that calls  
17 like the ones that are alleged, and I say alleged, to have  
18 taken place in this case harm DISH's reputation. And you can  
19 rest assured, when you saw Mr. DeFranco when he started out  
20 with Charlie Ergen and Cantey Ergen with \$60,000 on the table  
21 and put that at risk and to get where he is today with that  
22 company, that that reputation is their hallmark. It's what he  
23 spent his whole life putting together and he told you right on  
24 the stand that DISH does not risk its reputation with customers  
25 for short-term gain.

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004696

1 And the fourth point he made, which is so critical, is that  
2 DISH did not profit from SSN calls to numbers on the Do Not  
3 Call Registry.

4 And you probably remember Ms. Tehranchi. Plaintiff's  
5 counsel kind of attacked her. I didn't really think that was  
6 fair. You heard her say that they only had a few activations,  
7 exactly like what Mr. DeFranco said. They were small and they  
8 weren't doing a lot of sales and DISH didn't profit from any of  
9 those sales and they didn't put in any evidence to the  
10 contrary.

11 So when I see numbers written up on a butcher board that  
12 are not evidence, it brings me back to where I started, law and  
13 evidence. And there's no evidence of what's on that butcher  
14 board. This is the evidence when it relates to SSN and, of  
15 course, it's the truth.

16 There was a claim and a suggestion, an attack on Reji  
17 Musso, that compliance wasn't taken seriously. She came here,  
18 you all saw her, from Michigan to testify, not paid, not  
19 connected to DISH. She was proud of what she did and she was  
20 loyal and she told you that honestly and that's why she was  
21 here, because they're attacking her job. And she told you that  
22 compliance was a serious matter for DISH. And this is what the  
23 evidence was. This Retailer Chat -- what I did, ladies and  
24 gentlemen, so you know, I wrote exhibit numbers, typed them on  
25 my screen. So if there's something you want to see that says

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1 DX3, DX2, those are exhibit numbers; and I tried to put them on  
2 here so if you follow and you see something, you want to check  
3 what I say, and you should, this is what the exhibit is.

4 EchoStar script, a Retailer Chat, which is DISH  
5 communicating to its retailers about the importance of  
6 telemarketing compliance. And then the statement here that "we  
7 work with law enforcement officials." And it's not just in  
8 this script. It's in this Facts Blast at the bottom. You all  
9 learned about Facts Blasts. It's the way that DISH  
10 communicates with retailers.

11 And this is important because Ms. Tehranchi said she got  
12 these Facts Blasts in her deposition and they came into  
13 evidence. She got them from DISH. This was the message DISH  
14 was communicating.

15 Both Mr. DeFranco and Ms. Musso explained how DISH works  
16 with law enforcement if there are any issues relating to  
17 compliance. Why? Because it's the key to the success of the  
18 company.

19 So the argument and suggestion to you without evidence that  
20 compliance is toothless and Ms. Musso didn't do anything, this  
21 is what the evidence is. DISH was proactive on compliance.  
22 Why would it be working with law enforcement if it didn't care  
23 about what was going on with compliance? This is what the  
24 evidence was.

25 And this is what Ms. Musso said. These are three key

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1 points: That she and her compliance group -- and she told you  
2 about Serena Snyder and the rest of the folks, the six people  
3 who worked with her -- that they were proactive in reaching out  
4 and conveying the importance of compliance to retailers,  
5 including SSN; and that they dedicated significant resources to  
6 investigations. You saw the evidence about the investigations  
7 that were done and I'll talk about them. And they even went so  
8 far to do sting operations where it was sometimes tough for  
9 DISH to find where calls were coming from because numbers can  
10 be spoofed or disguised and they would have to sometimes do  
11 sting operations to identify retailers responsible for sales.

12       You were shown an exhibit by the Plaintiffs, a brochure of  
13 possible services that could be purchased; and the suggestion  
14 was and all those figures were worked out that DISH, you know,  
15 cut corners and didn't -- didn't do what it was supposed to do.  
16 But the evidence was that DISH brought on PossibleNOW in this  
17 case and PossibleNOW was working with retailers. What you saw  
18 there was a price sheet, a sales sheet for PossibleNOW, but you  
19 know the whole story because the evidence was that PossibleNOW  
20 was working with DISH and PossibleNOW was working with  
21 retailers and PossibleNOW trained SSN, as we'll talk about in a  
22 moment. So it's important to keep your eye on the ball and  
23 watch the evidence because that's what the evidence was, not  
24 something that was on a sales brochure where you can pay for  
25 this to do something. PossibleNOW was engaged. They were

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1 working with SSN. And you heard Ms. Musso. She was trained  
2 with PossibleNOW. PossibleNOW came to retailer summits. She  
3 told you about Team Summits and they were there to train  
4 retailers and that was on DISH's nickel and that is what the  
5 evidence showed.

6 Now, this is the question on the verdict sheet that you all  
7 are going to have to answer: Was SSN acting as DISH's agent?  
8 That's the first question. The evidence will show that they  
9 were not; and if you answer this question "no," you skip the  
10 other questions, you sign the verdict sheet, and you don't have  
11 to get into all the questions about the evidence about whether  
12 calls were made and so on and so forth. But this is the first  
13 question. When I come back to my stairs and am counting up the  
14 stairs, this is the first step.

15 And it's very important, you'll see from the instructions,  
16 that this question actually has two questions. One question,  
17 two steps and here are what the steps are. This is from the  
18 judge's jury instructions: In order for DISH to be liable for  
19 any TCPA violations committed by SSN -- and I say SSN. It was  
20 never explained to you all why Dr. Krakauer didn't sue SSN.  
21 They made the calls and I think common sense tells us why they  
22 didn't go after SSN, because they want to go after the deep  
23 pocket and that's really what this case is about. But to get  
24 to that, they've got to prove this, two things. Was SSN DISH's  
25 agent, that's the first step; and if they can show that, and

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1 they can't, the second step is was SSN acting in the course and  
2 scope of that agency. Two steps, one question on the first  
3 question you have to answer.

4 So what I'm going to do now, ladies and gentlemen, I'm  
5 going to walk through the evidence on these two questions and  
6 the judge's jury instructions have provided a guide as to what  
7 we look at.

8 Now, first question, has Dr. Krakauer met his burden of  
9 proof that SSN was DISH's agent? And the answer will be no.  
10 This is what I would call a show-stopper. It happened quickly  
11 in the trial when I was questioning Dr. Krakauer -- and that's  
12 the beauty of a closing. I get to hit things that maybe came  
13 out quick and I didn't maybe make it as clear when I questioned  
14 him. You all know now that he's here as the class  
15 representative for everybody. His case doesn't stand, no other  
16 case stands; and we know, as I told you in the opening, that  
17 he's here because he got five calls over about a year period  
18 that were 2 minutes and 32 seconds, 2 minutes and 32 seconds.

19 I asked him on the stand. No TV provider other than  
20 DirecTV was ever mentioned on any of those five calls to  
21 Dr. Krakauer. He said, "That's right." DISH was never even  
22 mentioned. Now, this is not the May 2009 call. These are the  
23 five calls that are in this case. And as the Court said and as  
24 I showed you in the beginning, this has to be based on evidence  
25 and there's no evidence that whoever it was -- and we don't

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1 even know -- who called Dr. Krakauer those five times, we don't  
2 even know if DISH came up on those calls. In fact, he said the  
3 only thing that came up was DirecTV.

4 That, ladies and gentlemen, is an issue and it's a problem  
5 and it's a hurdle and it's a serious one because why didn't  
6 they bring in evidence of the person who made the call. Where  
7 was that person? It's not our burden. We've got to present no  
8 evidence. We don't know what exactly was going on in that  
9 call, no tape recordings, no notes. Because what Mr. Krakauer  
10 said at the time of the calls is he didn't think there was  
11 going to be a case and it wasn't a big deal. "It wasn't  
12 important" were actually his words, but we have to have  
13 evidence in a case like this, particularly when you're here  
14 asking for \$25 million and this is what the evidence is.

15 Now, this is from the instructions about agency: The  
16 Plaintiff must prove that DISH and SSN agreed or reasonably  
17 understood that DISH had the power to control and direct SSN's  
18 telemarketing activities.

19 This is what it means to be an agent. It's not just that  
20 you're going to do something for me. You've got to look at  
21 what happened between the two people and the two companies,  
22 what the contracts say, what happened. And this is very  
23 important because it's like two sides to a coin. There's the  
24 DISH side and there's the SSN side.

25 And you saw what Ms. Tehranchi said. You heard her

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1 testimony and you didn't hear her say, "I was an agent." You  
2 didn't hear her say, "DISH controlled me." You needed to be  
3 shown evidence from SSN that they believed that DISH could tell  
4 them how to market. In fact, the evidence showed the exact  
5 opposite.

6 These are the four kind of categories of evidence and,  
7 again, I keep talking about evidence: Contracts, other  
8 writings, conduct, and statements. When you get the jury  
9 charge -- when I'm done and the Plaintiff's counsel gets to say  
10 a few words, you'll hear these four categories mentioned; and  
11 these are the categories of evidence to look at to answer that  
12 question did SSN believe and agree that DISH could control and  
13 dictate its telemarketing activities and did DISH believe, do,  
14 and agree to the same. We're going to look at these four  
15 categories of evidence in the case and every one of these  
16 categories will show that Plaintiff cannot meet its burden that  
17 SSN was an agent.

18 The first thing is the contract and contracts are  
19 important. I don't need to tell you folks that. This is how  
20 DISH runs its business. Words are the bond of the parties who  
21 sign this. And these are sophisticated companies. There was a  
22 comment about a boiler room. I don't know what evidence there  
23 is of a boiler room. Four people? If you actually look at the  
24 records in this case, the phone records, there were over 20  
25 people at SSN. It wasn't four and I don't know what this

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1 boiler room is all about.

2 I know that a contract was signed between two companies and  
3 that contract right up in the beginning, in the introduction,  
4 says that SSN is an independent contractor of DISH. That's  
5 what the parties agreed to, and that's how they acted, and a  
6 third party can't come in and try to upset what two businesses  
7 agreed to because that's the way the business world works.  
8 People put their deals in writing because they know that what  
9 they have to do and what they don't do and that's how  
10 businesses work. Contracts are important. This isn't just a  
11 piece of paper. Everybody signed it.

12 So we start with the contract and the contract is important  
13 and you heard it from all three witnesses -- Mr. Ahmed,  
14 Ms. Musso, Mr. DeFranco -- that this is a nonexclusive  
15 contract, which is very, very important because what it means  
16 is any retailer can work with whoever they want. They don't  
17 have to just sell DISH. Many of them don't. Most of them  
18 don't and you heard that from Mr. DeFranco. The retailer and  
19 SSN can work with whoever they want to work with.

20 And I come back to the contract because the contract,  
21 ladies and gentlemen, answers the question. The contract says  
22 that SSN was not an employee or agent of DISH. And this is in  
23 paragraph 10 of 2001. I told you there were three contracts.  
24 You'll have them all. In 2006 it's paragraph 11 and then the  
25 same in 2010. Every part of the contract, and it has a

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1 separate section, that the parties agreed to that they're an  
2 independent contractor and that SSN is not DISH's agent.  
3 That's what the parties agreed to and nobody came in the  
4 courtroom from SSN and said, "Oops, that's not what I agreed  
5 to. I didn't know." Or "Oops, we changed the contract. This  
6 is what the contract says."

7 And words are people's bonds when it comes to business and  
8 this is what it says. And you'll see that the Plaintiff really  
9 didn't talk about this provision much because it almost  
10 really -- I think it begins and ends the question right here.  
11 This is what they agreed to.

12 And it also is important in this section that it's not that  
13 they just say, "You're -- you're not our agent." They say,  
14 "Don't go out and tell people that you're DISH. You can't do  
15 that." And this is what's in the contract. This is what they  
16 agreed to. Paragraph 11 and it says: "Don't even imply to  
17 people out there that you are DISH. You are a retailer and you  
18 can sell DISH products, but you are not DISH." And this is  
19 what the contract says and nobody came in here from SSN, when  
20 it's their burden, and came in and said, "Oh, we changed the  
21 contract. That's not what it means." This is what the  
22 contract says, so we start with the contract.

23 So I put this up. It's a bull's eye because I listened to  
24 a lot of the questioning of our witnesses and I sat on the seat  
25 and I said to myself, "When is the Plaintiff going to ask one

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1 of our witnesses about the provision that says they're not an  
2 agent? Surely they will." Never. What happened? They threw  
3 darts at a board and started talking about all these  
4 provisions, except the one that says that they're an  
5 independent contractor and not an agent. Didn't even ask our  
6 witness about it. You throw a dart and you hit the middle of  
7 the board -- it's paragraph 11 -- and they acted as if that  
8 wasn't there.

9       There's something you all probably heard about a red  
10 herring, where somebody throws something out to kind of  
11 distract someone from really what's going on, and you never  
12 heard any mention of paragraph 11, which is where these parties  
13 said that SSN wasn't an agent.

14       And it's not just this contract. The Plaintiffs kept  
15 talking about this voluntary compliance agreement with 46  
16 Attorney Generals and you heard from DISH that the purpose of  
17 that agreement, the focus of that was for consumer protection  
18 to make -- to focus on terms and conditions of their programs;  
19 and the Court told you in an instruction that that's not an  
20 admission of any liability and it's actually a good thing if  
21 parties reach agreements like this.

22       But there are two very, very important definitions in here  
23 that I showed Mr. DeFranco and these definitions show that all  
24 of these state Attorney Generals recognize that DISH's  
25 relationship with a retailer like SSN is an independent

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1 relationship. So these are the two definitions. One is an  
2 authorized telemarketer and that is somebody that is hired by  
3 DISH to conduct telemarketing on DISH Network's behalf. That's  
4 one group of people. The second group is a third-party  
5 retailer and that's one or more independent persons and it goes  
6 on. SSN was a third-party retailer and Mr. DeFranco explained  
7 to you all that an authorized telemarketer -- that DISH  
8 actually works with authorized telemarketers, that DISH will  
9 give its calling lists to a telemarketer. But that's not what  
10 this case is about. This case is about third-party retailers  
11 and that's what SSN was.

12 So this is yet another contract which shows exactly what  
13 the contracts between the parties shows. Very important piece  
14 of evidence, these definitions, because it's not just that the  
15 contracts say that SSN was independent, it's this Attorney  
16 General agreement as well, these definitions.

17 And remember I said the four categories. You look at the  
18 contracts and the judge's instruction. It will say "other  
19 writings." So what were the other writings? You've got the  
20 Facts Blasts. Facts Blasts were in SSN's files and it says  
21 right here, right at the top, independent retailers. Second,  
22 no retailer is permitted to represent itself as DISH and then  
23 it says, "The retailer agreement clearly provides that your  
24 relationship with EchoStar is an independent contractor."

25 And you'll see when you get the instruction that one of the

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1 things kind of is does the evidence add up, is it consistent;  
2 and what I'm showing you now is evidence that always says the  
3 same thing, that the retailer is an independent contractor.  
4 And Mr. DeFranco, Mr. Ahmed explained why, because these are  
5 businesses who make their own decisions and invest their own  
6 money, and they're the ones who have the skin in the proverbial  
7 game. It's their money. If things go well, they lose their  
8 money. And that's why they set up business relationships where  
9 they're not going to let one company tell them what to do,  
10 because it's their money, and particularly if they have the  
11 ability to work with other companies. There's a business  
12 reason that this arrangement is set up this way.

13 And it wasn't just in the Facts Blasts that this is said.  
14 This was really something because this was a script from a  
15 Retailer Chat and Jim DeFranco, he's the cofounder and he's on  
16 these chats himself. This isn't a type of situation where  
17 some -- a company is saying, "Oh, we didn't know what was going  
18 on. Somebody, you know, in a mailroom did something and we  
19 weren't a part of it." He stepped up. He said, "I delivered  
20 this message. I'm the cofounder of the company." And he  
21 issues this message to retailers, retailers are not agents or  
22 employees of EchoStar.

23 Again, what the Court will say in the instruction is you  
24 look at contract, you look at writings, and you look at  
25 statements. Here's a statement right here: SSN is not an

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1 agent. It says it right here.

2 And so I prepared a little bit of a kind of a graphic to  
3 explain what this control is all about and how it works because  
4 it's what the evidence showed. The first point, and Mr. Ahmed  
5 said it and Mr. DeFranco said it, is a retailer decides what  
6 their marketing strategy is; and you probably saw in some of  
7 the evidence, one of the e-mails early, where it was said that  
8 SSN was doing 1 percent telemarketing and doing mailings,  
9 newspaper, and other stuff. That's their decision. That's the  
10 money they're spending. So all of these decisions of how to  
11 market, those are SSN's decisions. And remember the question  
12 is does DISH control all of this and does SSN let DISH control  
13 all of this. That's really what the question is and the  
14 evidence was the exact opposite, that DISH doesn't and SSN  
15 doesn't want DISH to. But those are all the things that SSN  
16 controls.

17 So let's say they telemarket. They decide what markets to  
18 target. Ms. Tehranchi said that. They decide how to get  
19 leads. She said that. They decide what type of dialer to use.  
20 The Five9 dialer and the people from Five9, DISH didn't have  
21 anything to do with Five9. SSN went out and made an  
22 arrangement with Five9 to do their dialing for them. That's  
23 all within their control. How to scrub, that's under their  
24 control working with third parties. DNC.com was a reputable  
25 company that they worked with and then they worked with

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1 PossibleNOW, but DISH doesn't control how the scrubbing is  
2 done. DISH is proud of the fact that they recommended and  
3 encouraged people to use PossibleNOW. That's a good thing.  
4 PossibleNOW is the market leader in telemarketing compliance  
5 and this is what was going on here and you saw that from the  
6 e-mails. Who makes the calls? That's all SSN. That's not  
7 DISH.

8 And then there's the sales pitch at the end where somebody  
9 decides I want to sign up; and it is true, ladies and  
10 gentlemen, that DISH does have some role in that sales pitch.  
11 DISH does want to make sure that whether you're in  
12 North Carolina, California, and Maine that if you're going to  
13 buy the Hopper or you're going to buy Sling or any of those  
14 products that you're told truthful information about the price  
15 and what those products can do, but that has nothing to do with  
16 telemarketing compliance. That's a responsible company making  
17 sure that its bread and butter is taken care of, and that's --  
18 when I put that box up, that's all SSN. And remember the  
19 question is did DISH direct and control this and did SSN want  
20 it. The answer is no. They haven't met their burden.

21 And that's what Reji Musso explained to you. What Reji  
22 said was the quality assurance program related to the accuracy  
23 of disclosures and that quality assurance happens after  
24 somebody is signing up for a sale. It's not during the whole  
25 process of let me figure out if I'm going to telemarket, let me

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1 decide who I'm going to call, let me hire Five9. SSN does all  
2 of that and that's their responsibility and that's how the  
3 parties set up their arrangement.

4 And you heard the practical aspect of it, ladies and  
5 gentlemen. DISH is based out of Colorado. Yes, it has a lot  
6 of people who work for it, but DISH isn't going to send its  
7 people into 3,500 businesses around the United States to be in  
8 there every day running dialers for them. They wouldn't be in  
9 business if they'd do that and they don't do it and they didn't  
10 do it here. And what Ms. Musso told you was that quality  
11 assurance thing to protect consumers, that's not control over  
12 SSN's telemarketing, all those other things that I was talking  
13 about, and that's what the evidence was.

14 All of these witnesses. It's not just the contract. It's  
15 not just the Facts Blasts. It's not the Retailer Chats. This  
16 is what these witnesses all said, all said the same thing:  
17 DISH did not control SSN's marketing activities and DISH did  
18 not consider SSN to be an agent. So those are the statements,  
19 that other category the Court has said in the instruction to  
20 look at. All the witnesses said the same thing.

21 And this is important because Ms. Tehranchi also said the  
22 same thing. You all will remember she used the word "we're  
23 separate businesses." And you would have thought, by the way,  
24 that she would have wanted to come in and say, "Ooh, DISH told  
25 me everything to do. I didn't do anything wrong. DISH told

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1 me." She said the opposite, that they were independent  
2 businesses.

3 The other thing to look at is conduct. What happened,  
4 right? What happened? Did -- what are examples of really the  
5 real world and control? This was one of my favorites and I  
6 mentioned it in the opening. Mr. Ahmed talked about it. DISH  
7 wanted a marketing script and SSN said no. Charlie Ergen, the  
8 chairman, wanted to see a script. Remember the evidence when  
9 he got called at home at his farm and he liked the pitch and he  
10 told Mr. Ahmed, "Go get me the script." You all saw Mr. Ahmed.  
11 He's a forceful guy. You know, you'd think he'd have a shot at  
12 getting it. He couldn't even get the script for the chairman  
13 of DISH from the folks at SSN. They said no.

14 What better example that the contract which says that  
15 they're independent and that they're not an agent and all of  
16 the other documents, what better example than this, that the  
17 chairman couldn't get a script. They didn't have control over  
18 their marketing. They certainly would have been able to get  
19 the script if they wanted it.

20 And remember this evidence from Ms. Musso that DISH wanted  
21 to get in to help do the quality control, right, the quality  
22 assurance to make sure when a sale was made that the terms and  
23 conditions were being disclosed. They were not even letting  
24 DISH in to their facility. Another practical example of  
25 separate businesses. They didn't want DISH in there for

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1 obvious reasons. They didn't want DISH seeing because, to some  
2 extent, as you all learned, they compete with each other  
3 because DISH also sells directly to folks like all of us, like  
4 consumers. DISH deals directly. They're competitors. But yet  
5 this is the conduct. This is what happened in the case.

6 So -- and then Dr. Krakauer told us that when he spoke to  
7 DISH about his call that Ms. Dougherty at DISH told him that  
8 SSN was independent. That's what was said and the reason I  
9 point that out is everybody is saying the same thing. It's in  
10 the contract. It's in every document. It's what all the  
11 witnesses said. The evidence all is consistent on this  
12 question where they have the burden of proof and that's what  
13 Dr. Krakauer told us. Dr. Krakauer told us that DISH said,  
14 "You got called by an independent contractor. We are not  
15 responsible for them." And he figured out it was SSN. He knew  
16 it was SSN and they didn't go after SSN. They went after DISH  
17 because they're a deep pocket.

18 Ms. Tehranchi. SSN is an independent business. She said  
19 that. She was shown that provision. Remember the independent  
20 contractor provision. And she said, "That's an independent.  
21 We're a separate business from them." That's what she said  
22 under oath. She also said the following: That DISH did not  
23 provide SSN with phone numbers to call, that DISH did not  
24 provide SSN with any contact information, that DISH did not  
25 provide SSN's telephone lines, own its buildings, equipment,

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1 employees, benefits, any of that. They're separate businesses  
2 and that's what an independent contractor is all about. That's  
3 the opposite of what an agent is all about and that's what the  
4 evidence was in the case.

5       So you look at all of these categories -- contracts, other  
6 writings, conduct, and statements -- and, ladies and gentlemen,  
7 each one of these shows no agency. That's all the evidence  
8 that I just went through. Every single bit of that evidence  
9 shows no agency and that's just the first step. They don't get  
10 beyond that and they can't get beyond the contract that the  
11 parties agreed to. A third party who doesn't know anything  
12 about the contract can't come in and say, "I know you  
13 businesses agreed that's how you're going to conduct  
14 yourselves, but I don't really think that's what the contract  
15 means."

16       What's the second question? First is that they're not the  
17 agent and the evidence shows no. And remember what I said,  
18 that there are two steps to that question. They don't get by  
19 the first step. The second step is the one about scope of  
20 authority, right? First is was DISH -- was SSN DISH's agent  
21 and the second is was SSN acting in the course and scope of  
22 that agency. That's the second question.

23       They don't meet their burden on the first for all the  
24 evidence that I showed you and now I want to talk to you about  
25 the evidence on this very, very important second question. And

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1 I don't think you get to it, but if you do, Plaintiff can't  
2 meet its burden and, ladies and gentlemen, he didn't come close  
3 on this.

4 This is very important because what the Court will tell you  
5 in the instructions is that a principal is not bound by the act  
6 of an agent unless it's within the scope of actual authority.  
7 In other words, what was the person supposed to do even if  
8 they're an agent and did they do it? What were the rules?  
9 What were the boundaries? What was the boundary line that they  
10 were supposed to stay within and not go over? And this was  
11 very important because what the Court says in its instructions  
12 is that, generally speaking, actions taken against the  
13 principal's interests are not within the scope. Because if  
14 you're my agent, you and I are going to be doing things that  
15 are in our common interest, but when you start doing things  
16 that are against my interests, you've gone outside of the  
17 scope.

18 And you heard the evidence from Mr. DeFranco, Ms. Musso,  
19 and Mr. Ahmed that the calls that are alleged to have taken  
20 place here are against DISH's financial interest and DISH  
21 didn't profit from the calls. You heard Mr. DeFranco. "This  
22 is against our interests. We don't want to get involved in  
23 lawsuits over things like this. We don't want to have people  
24 upset with how our business operates."

25 Word travels fast. And all three of these witnesses

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1 testified to this, all consistent; and there's no evidence to  
2 the contrary, no evidence to the contrary that DISH profited  
3 from this less than one-half of 1 retailer for these calls that  
4 were apparently made, according to the Plaintiffs -- and I'll  
5 show that their evidence really didn't meet much -- who didn't  
6 even want to be called. That's not in DISH's interests and the  
7 law says that when you act outside of the interests of the  
8 so-called principal that you have acted outside of the scope of  
9 authority.

10 This was an interesting part of the trial because -- I want  
11 to focus on the facts relating to Dr. Krakauer because remember  
12 I said in my opening, and I'll say it again, the case rises or  
13 falls with him. And this was the application that he signed  
14 for DirectTV and you all remember that on this application SSN  
15 was the dealer. And I don't fault Dr. Krakauer.

16 Remember he was on the stand and I said, "Remember you --  
17 SSN was the dealer, right?"

18 "No, I didn't have any documentary proof of that."

19 I said, "Are you sure? I think you signed a contract that  
20 said they were the dealer."

21 "I don't really know. I don't remember that."

22 I said, "Well, I can forgive that except if you're the  
23 plaintiff in a lawsuit where the request is \$25 million and you  
24 say to the jury that 'my job as the plaintiff is to know what's  
25 going on.'"

JA005848  
004716

1 And this was the contract that he signed. And, look, not  
2 all of us read contracts, but when you sign it and you're the  
3 plaintiff, you should know what's in it, particularly when you  
4 don't go after the company that made the calls and you're  
5 acting like in the courtroom "we don't really know who they  
6 are." "We're not sure who SSN was."

7 SSN was the dealer, and he gave SSN in his application his  
8 credit card information and other personal information. They  
9 had his phone number back in 2003 and he signed it. That was  
10 his signature. And he also got the equipment shipped to him  
11 from SSN. They knew all along that SSN was the dealer that  
12 sold him DirecTV and SSN had all of his information because  
13 they were the dealer that sold his DirecTV to him.

14 This timeline, ladies and gentlemen, is very, very  
15 important because what it shows is that SSN acted directly  
16 against what DISH said and what SSN told DISH they would do.  
17 It is outside of the scope even if you get to kind of what I  
18 call the second step. This evidence is very, very important.

19 The call was on May 9th of 2009. And remember that's not  
20 the call in the class period, which is May 2010 to August 2011.  
21 This is before, may of 2009. And we know that on May 10th,  
22 2009, that DISH compliance group starts an investigation. And  
23 when we again come back to the comment that DISH didn't really  
24 do anything, you know, they didn't really care, they're doing  
25 an investigation to try to figure out what happened.

JA005849  
004717

1       And you heard this piece of evidence, which was from  
2 Rebecca Dougherty's e-mail where she wanted to assist  
3 Mr. Krakauer to figure this out. DISH was as frustrated as he  
4 was and this is what was said in that e-mail: "Please help me  
5 to assist Mr. Krakauer." They're trying to figure out what  
6 happened with this call to them -- to him because DISH doesn't  
7 know who SSN is calling. DISH doesn't have their calling list.

8       And let me say something for a moment about the credit  
9 check. There is no claim in this case about a credit check.  
10 But what do we know? We know this, that Dr. Krakauer filled  
11 out an application on March of 2003 and on that application he  
12 had his credit card information, his phone number, and that he  
13 had a long-term relationship with DirecTV and presumably the  
14 dealer SSN that sold him his DirecTV.

15       And when he had that phone call May of 2009, Ken from SSN  
16 says to him, "I know you've got DirecTV, but I think I can save  
17 you some money. Are you interested?"

18       He says, "I am."

19       And Ken says, "I need some information from you. I need  
20 your credit card."

21       And he gives it to him. We don't know whether or not he  
22 gave him his social security number. He wasn't quite sure.  
23 But we know that SSN had his information. He puts him on hold.

24       He said, "Let me check and see if I can save you some  
25 money."

JA005850  
004718

1       Probably what happened was he put him on hold with the  
2 personal information that Dr. Krakauer gave him, some of which  
3 he probably already had because SSN had all of that  
4 information, and he ran a credit check. We don't know --  
5 although it's in DISH's rule that he was supposed to say and  
6 tell him that he was running a credit check, we don't know if  
7 that happened. Ken wasn't here. But Dr. Krakauer gave him the  
8 information to see if information -- if he could save him money  
9 because he was interested in it. I probably would have been  
10 interested in it. But that information was given to SSN to run  
11 a credit check.

12       And you heard Ms. Musso. If there was any question about  
13 whether or not he should have been told, he should have been  
14 told, no question about it, but -- and we don't know exactly  
15 what happened.

16       But this case is not about a credit check other than to try  
17 to make DISH look bad is really what that's all about, to try  
18 to distract you from what this case is really about. It's got  
19 nothing to do with a credit check. And you know what? These  
20 lawyers, who are good lawyers, if they had a claim for a credit  
21 check problem, we would be in this courtroom discussing it, but  
22 we're not.

23       So I ask you to keep focus on the law and the evidence and  
24 not by a little bit of a side detour to try to make you not  
25 like DISH.

JA005851  
004719

1 But you heard Ms. Musso. If he didn't know, then that  
2 wasn't right. But he gave them his personal information to try  
3 to save money and that's really what happened.

4 But the point of this is that DISH writes a letter to SSN  
5 and says: "Don't call Mr. Krakauer again." And this is on  
6 May 27th. "Please immediately insure that that phone number  
7 has been added to your internal Do Not Call Registry." And  
8 they're reminded, "You've got to comply with the law." DISH  
9 says directly, "Don't call him. Put him on your Do Not Call  
10 Registry." And remember the question is did they do something  
11 they weren't supposed to do. DISH told them, "Put him on your  
12 internal Do Not Call List."

13 And what do they say back? This is an important document.  
14 It's Defendant's Exhibit 8. Ms. Tehranchi writes back and she  
15 says, "That very same day we took Mr. Krakauer's phone number  
16 out of our entire master lead list and we put it on our DNC  
17 list. Our lead to Mr. Krakauer was generated by us when we  
18 sold him DirecTV back in April of 2003. Prior to this  
19 complaint, we did not know that Mr. Krakauer wanted off of our  
20 list."

21 This is such important evidence, ladies and gentlemen,  
22 because SSN is telling DISH -- and put yourself in Reji Musso's  
23 chair. You get this e-mail back. "We've taken him off our  
24 list. He's not on our master list. We had a business  
25 relationship with him and we're not going to call him again and

JA005852  
004720

1 we've deleted him from our database." And that's what DISH  
2 thought because that's what they were told and that's what  
3 common sense would say SSN would want to do. Why would SSN  
4 want to call somebody again when they said they're not  
5 interested, but that's what the evidence was.

6 And this is what Ms. Musso said about this. She wanted to  
7 make sure Dr. Krakauer didn't get any additional calls. They  
8 were investigating to try to solve a problem and that she  
9 believed that SSN had taken Dr. Krakauer out of their database  
10 and he wouldn't get another call because that's what the  
11 documents say.

12 And that's what the rules required them to do because it  
13 was SSN's job in three contracts to comply with the law and  
14 they were solely responsible. I said in my opening and I'll  
15 say it in my closing, "solely" means one and the one was SSN.  
16 They agreed in the contract to comply with the telemarketing  
17 laws and to be solely responsible, and that comes to the  
18 question of acting outside of the scope.

19 If the boundary down the floor is complying with the law  
20 and you step over, you've acted outside of the scope; and  
21 that's -- if what they're claiming actually happened -- and we  
22 can't be sure because of some of the problems with the calls --  
23 they went outside of the express scope defined in their  
24 contract where they were solely responsible for complying with  
25 the laws. And again this is very important because

JA005853  
004721

1 Ms. Tehranchi said that she agreed that the contract required  
2 her to comply with the laws.

3       So you've got what I said, the two-sided coin. You've got  
4 DISH saying that they're responsible and them saying, It's our  
5 job. And if that's what the evidence is -- and that's what it  
6 is -- and they didn't do their job, then they crossed the  
7 boundary. They were outside of the scope. And if they're  
8 outside of the scope, the law says that DISH is not  
9 responsible; and that makes common sense because if you're  
10 going to do something you agree to do and you don't do it, you  
11 did it, not DISH; and they should be responsible for that, not  
12 DISH.

13       And that's what the law is and Ms. Tehranchi recognized it.  
14 And she also said that they had an internal Do Not Call policy  
15 and that's in that e-mail where she writes back. "We have an  
16 internal Do Not Call policy. We've added him to our list. He  
17 won't get called again."

18       You heard a lot about this North Carolina injunction. Back  
19 in 2005 it's to DirecTV. It didn't even involve anything for  
20 DISH. And there are two interesting parts of this that I have  
21 on this screen. One is that SSN agrees that it is going to  
22 follow the law and it's actually under a court order here to do  
23 that going back to 2005. And then down in the second part,  
24 they agree that they're going to get to the North Carolina  
25 Attorney General in 30 days an entire written plan to make sure

JA005854  
004722

1 that they're following the law. They weren't said here, You  
2 can't telemarket. They said, You've got to get us a report in  
3 30 days to make sure you're good to go and you're under a court  
4 order no improper telemarketing stuff. And this is what this  
5 is. But it's back in 2005.

6 DISH didn't know about it in 2005. They did find out about  
7 it later, I think in late 2006, 2007. They didn't know about  
8 it at the time. They did find out about it. But it says right  
9 in it that SSN is to get a whole written plan to the  
10 North Carolina Attorney General and there was no evidence in  
11 this case -- and you can rest assured with these good lawyers,  
12 if they had it, they would have presented it. They would have  
13 come in and said, "Oh, SSN they never ever did that." There  
14 was no evidence of that. This is the evidence that you have  
15 that they had to get a plan to the North Carolina Attorney  
16 General, a written plan. No evidence that that didn't happen.

17 Facts Blasts again echoing to SSN about the importance of  
18 compliance, just like in that North Carolina injunction. This  
19 in 2007, you must follow the laws. And this is important  
20 again, because if they don't do it, it's outside of the scope.  
21 And it's not just that it's in the contract, but it's in all of  
22 these retailer chats, there as well.

23 PossibleNOW, a Retailer Chat -- remember I asked  
24 Mr. DeFranco about that, Jim. Jim is actually talking to the  
25 retailers about using PossibleNOW. The cofounder of the

JA005855  
004723



1 company is speaking to the retailers and saying, "Compliance  
2 with all laws is important. We want to introduce you to  
3 PossibleNOW so you can work with them. They're the best.  
4 They're the gold standard." That's what a responsible company  
5 does and that's what Jim did right here.

6 Now, this is important evidence. I've got three pieces of  
7 evidence. The first is this whole question of scrubbing.  
8 Ladies and gentlemen, that's SSN's job to do that scrubbing.  
9 DISH isn't running their dialers. DISH isn't overseeing what  
10 they're doing with Five9. Ms. Tehranchi testified that the  
11 lists loaded in the Five9 dialer were scrubbed by PossibleNOW.  
12 That's what she said. That was the evidence.

13 And they were suggesting to us that we had to bring in  
14 evidence for something, we had to bring in receipts to show  
15 that they didn't -- they scrubbed or they didn't. No, no, no,  
16 no, no. The burden of proof is on the Plaintiff.

17 We didn't have to present any evidence; but this is the  
18 evidence that was presented, testimony under oath from  
19 Ms. Tehranchi that the lists loaded were scrubbed and then an  
20 e-mail where SSN tells DISH that it's scrubbing and it gets  
21 something called a San number, which is a subscription number  
22 to get the Do Not Call list. You actually have to pay for it,  
23 buy it, and then you get the Do Not Call list you heard about  
24 from Mr. -- Dr. Fenili. And it's to scrub. They're buying the  
25 list to scrub with PossibleNOW and they say that they've done

JA005856  
004724

1 the training on October 2008. There's no evidence that they  
2 didn't do the training. They said they did it. They didn't  
3 bring in any evidence that didn't happen, but this is what DISH  
4 is told. And then a scrub receipt. "We scrubbed 15,000  
5 records." That's what the evidence is, an example of what they  
6 do. But this is three pieces of evidence of what they're  
7 saying. This is what the evidence was.

8 So back to my timeline, again very important, because I  
9 said this in my opening, that we had to look at this in three  
10 chapters; and you saw in the Plaintiff's opening that he  
11 referred to some 2004 and 2005 e-mails, but this case is about  
12 what happened in 2010 and 2011. And there's no question -- and  
13 I told you in the opening that SSN had some issues in 2003,  
14 2004, 2005, primarily with automated dialing calls, which is  
15 not what this case is about. It was after that that DISH had  
16 Reji on board. She got hired six people and they really  
17 improved their compliance situation. We're dealing with a time  
18 period after all that takes place. But this is really  
19 important when you're in a business and you're making  
20 decisions. It's not in a courtroom where people put -- string  
21 things together. It's kind of realtime.

22 And what was going on here is after this complaint with  
23 Mr. Krakauer an entire year goes by with not one problem, not  
24 even one complaint. And when you're making millions of calls,  
25 which is likely what happened, you all saw the evidence, and

JA005857  
004725

1 you don't get any complaint for a year, the indication to you,  
2 if you're Reji Musso sitting at her compliance desk with her  
3 team, is that things are looking pretty good and that's what  
4 the evidence was. A complaint came in one year later after the  
5 Dr. Krakauer complaint and there was this claim about dialer  
6 records and that there are these records missing.

7 The evidence actually was, whenever DISH would ask SSN what  
8 happened, they would give them information about the actual  
9 call that was made, which has happened with this Campbell  
10 complaint, a 6-second call. They respond and they say, "We had  
11 previously done business with this customer, according to our  
12 records, and," they say, "we never had a complaint like this  
13 before with an EBR."

14 And you heard that, established business relation. The  
15 judge will explain in her instructions that the defense in the  
16 case is not that an established business relationship exists  
17 with any of these people who are claiming things now. This is  
18 important evidence to show that this is what DISH was told and  
19 this is what DISH thought at this time.

20 And this individual, Mr. Campbell, I don't believe he's in  
21 this class, but this is the one complaint that DISH got and  
22 this is what they're told, an established business relationship  
23 with this individual and here is our records. One complaint.  
24 And if you have an established business relationship, you can  
25 call somebody.

JA005858  
004726

1        So this is real important. Mr. DeFranco and Ms. Musso said  
2        that any call by SSN to Dr. Krakauer after May of 2009 would be  
3        contrary to DISH's instructions. This is very important on  
4        scope of authority. DISH says, Don't do it. SSN says, We  
5        won't. If, in fact, it happened, these witnesses said it would  
6        be outside of authority and would be outside of what the  
7        contract says. Ladies and gentlemen, this is outside of the  
8        scope.

9        Here are the five calls that I talked about, the 2 minutes  
10       and 32 seconds: July 2010 -- July/August four of them, and  
11       then one in January 2011. And that's -- that's the 2 minutes  
12       and 32 seconds. And what do we know about those calls? Very  
13       important. One, DISH was never mentioned, I told you that  
14       before, only DirecTV; that Dr. Krakauer never complained to  
15       DISH or SSN that he received any calls after 2009 before filing  
16       this lawsuit. He had some story about in 2011 he was at a  
17       deposition. I'm not sure exactly what evidence that was, but  
18       he never wrote a letter, sent an e-mail, filed a complaint, did  
19       anything with DISH until this lawsuit got filed.

20       And he didn't keep any notes. And I'm not saying he should  
21       have kept any notes. God, we all throw stuff out. And who  
22       hits delete when you get a thing on your answering machine?  
23       Most people do. But he said he didn't think it was important  
24       and that's what the evidence was. It wasn't important until  
25       about three years later where I asked, "And you met with a

JA005859  
004727

1 group of lawyers and then you're the plaintiff in a \$25 million  
2 case, but it wasn't important at the time."

3 So this is really a summary of the evidence on outside of  
4 the scope of authority and I -- I know, folks, I've been  
5 talking for a while and I know it can be -- I'm trying to keep  
6 it interesting. I can see and I appreciate your staying with  
7 me, but this is real, real important. This is what SSN told  
8 DISH, that it would not call Dr. Krakauer; and what Plaintiff  
9 is saying now is that they called Dr. Krakauer after DISH asked  
10 them not to do it.

11 And we, again, are not really sure on the evidence because  
12 only DirectTV was mentioned. Was that a call for DISH? We  
13 don't know. We don't know. We don't know if those calls were  
14 calls because Dr. Krakauer had some problems with his  
15 equipment. We don't know if SSN was trying to sell a home  
16 theater or something. We can't be sure. But they've got to  
17 have evidence about what happened and DISH wasn't even  
18 mentioned.

19 But they say now that this happened, so let's say it did.  
20 If it did, it's outside of the scope. They told DISH they were  
21 scrubbing their lists, were signed up with PossibleNOW.  
22 They've got a scrub receipt and they're saying now they didn't  
23 properly scrub it and we don't even know that because  
24 Ms. Tehranchi actually said that they did do it. The Five9  
25 person wasn't even asked about it. But we don't even know

JA005860  
004728

1 that, but I think that's what they appear to be saying. They  
2 told DISH that they complied with the law; and if they did what  
3 happened and what's alleged here, if they could prove it, they  
4 didn't; and if all that happened, it would be outside of the  
5 scope. Again on my second step.

6 So what are the red herrings? I put this up hopefully to  
7 make things a little more interesting for us, but I kind of  
8 like the red herring thing. You all probably know what a red  
9 herring is. It's something that is intended to distract you  
10 from what the case is about.

11 So what are some of the red herrings that you heard? We  
12 know in this case that Dr. Krakauer said on any of these  
13 calls -- and I asked him pointblank, "Dr. Krakauer, nobody ever  
14 told you on any of these calls that they were authorized by  
15 DISH or that they were employed by DISH." And he said, "That  
16 is true."

17 So you heard this evidence about this script, remember the  
18 evidence, Plaintiff's counsel, this script. But that's not  
19 what this case is about. There's no evidence that somebody  
20 called and said, "I'm DISH." In fact, the evidence is the  
21 exact opposite. A draft script is sitting in SSN's file. We  
22 don't even know if anybody used it. She said it was a test or  
23 something. But it's got nothing to do with this case because  
24 in this case the evidence is that nobody ever said they were  
25 employed by DISH or authorized by DISH. So they're putting

JA005861  
004729

1 before you a script that has nothing to do with what the case  
2 is about. That is a red herring designed to take you away from  
3 what the evidence is.

4 Dialer records is something else that kind of was suggested  
5 again that they didn't have some records.

6 But this document right here was the response to  
7 Dr. Krakauer's complaint and it's a screenshot of the phone  
8 calls that were made to him that was given to DISH. And then  
9 in Mr. Campbell's complaint, the one that took place a year  
10 later, they're giving him all the call information. And that's  
11 what the evidence is. They're responding and giving  
12 information on the calls. That one on the top is a little hard  
13 to see. You'll see it in the jury room, but you'll see it's a  
14 screenshot of the actual call to Mr. Krakauer.

15 So that's a red herring about the call records, that  
16 somehow they don't have some documents. They've got all the  
17 call records that they're trying to prove their case for and  
18 that's what this case is about. But that, again, is a red  
19 herring.

20 This was a good example of a red herring when you saw  
21 Mr. Novak's memo, the lawyer; and Plaintiff's counsel made a  
22 big deal about it. But it wasn't until a long time that it was  
23 brought out that -- it was turned out to didn't involve SSN.  
24 It was a retailer called United Satellite. It was a little bit  
25 of a red herring, but it came out through Mr. Ahmed.

JA005862  
004730

1       And then you've got this of the order entry system and  
2 there was all this questioning that DISH has an order entry  
3 tool. It's a computer system. Ladies and gentlemen, if you  
4 all get stuff on Amazon or stuff like that, you know you type  
5 in your name, you give your information, and that's kind of how  
6 people -- a lot of people do business. It used to be you would  
7 have an order form, filled out your name, filled out your  
8 information, you faxed it, you mailed it. The OE system, this  
9 order entry system, is just like something that replaces that  
10 order form process that is the way businesses used to work and  
11 this is exactly what it says. It's an easy way to place  
12 customer orders for DISH equipment and services. It's a way  
13 that an order can be processed.

14       So the instruction is and the claim here was that DISH  
15 acquiesced, DISH consented and was fine with all this  
16 happening. You would have to find here that DISH knew of prior  
17 similar activities by SSN and consented or did not object.  
18 Ladies and gentlemen, you saw the evidence. DISH hears a  
19 complaint. They write back to them "don't do it." They send  
20 PossibleNOW. "You've got to work with PossibleNOW." There's  
21 no consent here.

22       And did not object? DISH did the opposite. To the handful  
23 of complaints over, like, five years, they write a letter  
24 saying, "You can't do that. Don't violate the law. It's your  
25 job. Clean it up. Get it right." There's no evidence of

JA005863  
004731



1 acquiescence and I made sure when all of our witnesses were  
2 here to ask them that, did DISH ever acquiesce or agree to SSN  
3 violating the law, and every one of these witnesses said no,  
4 every single one. And that was what the evidence was.

5 And it was up to them to bring Ms. Tehranchi into the  
6 courtroom and say to you whether it was on that video "DISH  
7 told me I could go ahead and violate the law," "DISH said it  
8 was okay." This isn't acquiescence. Acquiescence means you  
9 say, "Go ahead, yeah, do it. We don't care." But that's not  
10 what the evidence is and that's not what common sense is and  
11 you heard it from the founder to the lady who ran the  
12 compliance team.

13 So that's acting in the course and scope, and those are the  
14 two key questions. They don't get over those hurdles, ladies  
15 and gentlemen, and so you don't need to get to the question of  
16 counting up these calls and figuring out if they met their  
17 burden. But if you do, it's my responsibility to talk about  
18 it, but they don't get past those two steps. They're not even  
19 close to getting up those steps.

20 So let me talk for a moment -- and that's what the verdict  
21 is on number one. That's what we would ask you that you fill  
22 out. It will be up to you based on the evidence, but they  
23 don't get up under either of those steps and they have to get  
24 over both for Question 1 and they don't make it. They don't  
25 make it.

JA005864  
004732

1       So now we're into the question of did they show a  
2 telemarketing violation within the right period of time, did  
3 they meet their burden of proof -- and, again, it's theirs to  
4 show -- that all of these calls were made to residential  
5 numbers. And then there are other requirements. This is the  
6 first question and the answer is no, did they prove it.

7       And what was the evidence? I know it was kind of tedious.  
8 At least for me it's a tougher part of the case because it's  
9 technical and it involves pretty complicated data, but it is  
10 important here and they've got the burden of proof. And I come  
11 back to this because again, when you're asking for \$25 million,  
12 you'd better come in here with the proof. You can't be  
13 throwing stuff around and saying maybe it happened, it could  
14 have, it would have because it's \$500 a call that they're  
15 talking about. And it's pretty easy to figure out by reaching  
16 out to somebody if they actually got a call rather than trying  
17 to do all this data stuff, but they didn't do any of that and  
18 this is the way they choose to prove it.

19       And their expert, I've got to say this, she was an  
20 impressive person. That story was really incredible. I heard  
21 that and it was an incredible story what Ms. Verkhovskaya had  
22 gone through, but that's not what the case is about. The case  
23 is did she do her homework and did she do things in a careful  
24 way to come into a court and try to get \$25 million, and there  
25 were mistakes that were made.

JA005865  
004733

1       The first one is the Registry changes all the time.  
2 Numbers are coming on and off, so you've got to check it when  
3 the class starts and you've got to keep checking to see if the  
4 numbers change. They start only as April 1st. The class was  
5 May 11th and they look at the -- they don't even look at the  
6 right date. That was a problem and there was no reason for it.  
7 It could have been done more carefully. It would have taken  
8 more time.

9               **THE COURT:** You've got about five minutes left,  
10 Mr. Bicks.

11              **MR. BICKS:** Thank you, Your Honor.

12       And you learn that the telephone numbers were removed from  
13 the Registry. They're disconnected, reassigned, canceled. All  
14 of these things happen on the Registry.

15       There's all this issue about no reliable residential  
16 evidence. SSN's own dialer records show it called a lot of  
17 businesses and no one knows where SSN got the numbers to call.  
18 And the LexisNexis data, you heard all about that, how  
19 unreliable it was. And you heard Dr. Aron come in here and she  
20 was experienced in this space. This is her life, data, and she  
21 talked to you about the unreliability of the approach and  
22 that's their burden. So the answer to this second question is  
23 no.

24       And you remember Dr. Aron. I don't have to go too much  
25 through her stuff, but this was a summary of what she said.

JA005866  
004734

1 And you all heard her background. I don't need to repeat it.  
2 But she said that there were some unwarranted assumptions and  
3 some mistakes that were made, and a data scientist would have  
4 done her homework a little bit differently. She said, "Garbage  
5 in, garbage out. It was for me an easy way to get it. If you  
6 don't put in the right data, you don't get the right results."  
7 And there were problems with the call records and the  
8 LexisNexis data, and she missed -- as she pointed out,  
9 Dr. Verkhovskaya -- Ms. Verkhovskaya missed an important step  
10 because she didn't really validate the data. She didn't  
11 validate the input.

12 And then you heard from Mr. Fenili, who told us that  
13 70 percent of the numbers on the Registry -- you remember all  
14 the skirmishing about PossibleNOW -- that 70 percent of the  
15 numbers on that Registry were not identifiable as residential.  
16 It's a list that's got a lot of stuff on there that's not even  
17 residential.

18 And you heard from Ms. Verkhovskaya when Ms. Echtman  
19 examined her. And the Court will tell you if your testimony  
20 changes between when you have your deposition taken and your  
21 trial testimony that you all can consider that. So you heard  
22 what happened here. At her deposition she didn't consider that  
23 residential column in the records, and when she came here, she  
24 did. She didn't consider the government column at her  
25 deposition, and when she came here, she did. And she didn't

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1 consider the date ranges, and when she came here, she did. And  
2 you all can consider that and evaluate it. And there were  
3 others. She was unfamiliar with the LexisNexis data at her  
4 deposition and she was very knowledgeable on it when she was  
5 here. She didn't know what date fields mean when she had her  
6 deposition shown to her, and when she came here, she did. She  
7 was unsure about the residential column then and here she  
8 understood it. That's what the evidence was.

9 The LexisNexis did not check the residential box. And this  
10 goes through some of the categories on the verdict sheet and  
11 this is pretty important. LexisNexis had information when they  
12 would check the residential box and they didn't do it here  
13 because they didn't have the information. And when things are  
14 called "unknown," ladies and gentlemen, they're unknown. We  
15 don't know them. It can't be made up and it can't be guesswork  
16 when you've got a burden.

17 And to all of these questions on the verdict sheet, here is  
18 a situation where they were either looking at things before the  
19 class period or other wrong times here and they didn't have the  
20 right information on the residential box. That's what it said  
21 here. Numbers are disconnected and they were looking at the  
22 wrong time periods and they have to have the right information  
23 for the relevant time periods. And then they had inconsistent  
24 information when it came to unknowns and LexisNexis data. It  
25 was inconsistent and you all heard that evidence.

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1 And then not -- on the cell phones, not any evidence that  
2 they were in the class and they were used for residential  
3 purposes. Again problems with the data sources. You heard  
4 Dr. Aron talk about that, garbage in, garbage out. How could  
5 LexisNexis know if there was a mistake? They couldn't.

6 **THE COURT:** So you need to wrap things up.

7 **MR. BICKS:** I'm going to. Thank you.

8 This is an interesting thing about Dr. Krakauer's own  
9 application. He got his home and work numbers mixed up.  
10 They're the exact opposite when you look at it, exact opposite,  
11 which goes to show you how careful you have to be and how  
12 mistakes can be made. The number he indicated here for daytime  
13 would be his work, right? Typically you think your daytime is  
14 your work job. It was his home number.

15 And so at the end I don't believe you get to the question  
16 of the damages here. It's 0 to 500. I asked if this was a  
17 case about money and he said, "If I get a couple of bucks out  
18 of this case, that's fine for me. It's not about money." A  
19 couple bucks is 40 cents a call, 5 calls, \$2.40. We believe  
20 the answer should be zero and you can award zero. But that was  
21 his testimony. It shouldn't ever be more than 40 cents, but we  
22 believe it's zero.

23 So now it's my time to stop. I just want to say one or two  
24 things before I do. I sit down now. I don't have a chance to  
25 respond. Plaintiffs get to talk and I don't get to respond,

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1 but you know that I would want to. And if you get back in the  
2 jury room and you hear something, I hope you'll say, I bet DISH  
3 had a response to that, because I would.

4 And so I say to you not just thank you for your time -- and  
5 I said that in the beginning and I am thankful for that, as is  
6 our client -- but thank you for the oath that you took to  
7 follow the law and listen to the evidence and treat us just  
8 like Dr. Krakauer. Even though we're a company, we're a  
9 company of people. I've enjoyed presenting this case and you  
10 all have been so attentive and we all appreciate it. So thank  
11 you. The case for us is in your good hands and we appreciate  
12 it. Thank you very much.

13 **THE COURT:** All right. Thank you, Mr. Bicks.

14 We'll take a -- just a short break again before we come  
15 back and have the rebuttal argument and hopefully the  
16 instructions.

17 Keep an open mind. Don't talk about the case with each  
18 other. I'm going to send you back to the jury room. Don't  
19 leave the jury room. And we'll get back to you 5, 10 minutes,  
20 as quick as we can get back in the courtroom after a comfort  
21 break. The jury is excused.

22 If everyone will remain seated while they step out.

23 (The jury left the courtroom.)

24 **THE COURT:** Anything before we take a short break?

25 **MR. GLASSER:** No, ma'am.

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1           **THE COURT:** No. Let's -- we'll all shoot for 5  
2 minutes. That may not quite be possible, but we'll take a  
3 5-minute recess.

4           (A recess was taken from 11:54 a.m. until 12 p.m.; all  
5 parties present.)

6           **THE COURT:** Okay. Is there anything we need to take  
7 up before the jury comes back in?

8           **MR. GLASSER:** No, ma'am.

9           **THE COURT:** No?

10          **MR. BICKS:** No.

11          **THE COURT:** Officer, just be sure they're ready; and  
12 if they are, you can bring them back in. If they need another  
13 minute or two, we'll of course wait on the jury.

14          We'll see just how long Mr. Glasser's argument is.

15          **MR. GLASSER:** It won't be that long.

16          **THE COURT:** Okay. I'll make a final decision about  
17 whether to go ahead and instruct them at that point or whether  
18 to give them a short lunch break before I instruct them. My --  
19 you know, the heart is willing, but sometimes the stomach and  
20 the seating apparatus --

21          **MR. GLASSER:** How many pages are your instructions,  
22 Your Honor?

23          **THE COURT:** They're about 20.

24          **MR. GLASSER:** So about 20 minutes?

25          **THE COURT:** Yeah, maybe a hair longer.

JA005871  
004739



1           **MR. GLASSER:** If you do instruct them, do they come  
2 straight back to the jury room in your court or do you bring  
3 them back to court and then send them to the jury room?

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

5           **MR. GLASSER:** After you instruct the jury and they  
6 begin deliberation, do you typically just have them go straight  
7 to the jury room or do you bring them back every time?

8           **THE COURT:** Yeah, I usually just let them go straight  
9 to the jury room.

10          **MR. GLASSER:** So instructing them is great, right?

11          **THE COURT:** Yeah. I mean, I hope to instruct them  
12 before we go to lunch, but I'm going to look at them and -- I'm  
13 going to look at them and evaluate their attention spans.

14          (The jury entered the courtroom.)

15          **MR. GLASSER:** Ms. Sanders, I'm going to want to use  
16 the ELMO for this. Thanks.

17          **THE COURT:** Okay. We've hit the afternoon barely, so  
18 good afternoon. As I mentioned to you earlier, Mr. Glasser  
19 gets a rebuttal argument since the Plaintiff has the burden of  
20 proof. Everybody is seated.

21          Okay. The jury is with the Plaintiff.

22          **MR. GLASSER:** Okay. Ladies and gentlemen of the jury,  
23 I was sitting there listening to Mr. Bicks and a book popped  
24 into my head and I'm sure some of you have read it or seen the  
25 movie. It's 1984. It's written by George Orwell and it

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1 basically describes a world where some of the things you say  
2 are just not what they mean or they're just -- kind of the  
3 whole world is a little off-kilter.

4 That book popped into my head when Mr. Bicks said, quote,  
5 and I wrote it down, Dr. Krakauer had some story about a  
6 deposition he gave in 2011. Some story about a deposition he  
7 gave in 2011. When Dr. Krakauer was on the witness stand, they  
8 put the transcript of the deposition up. A DISH lawyer was  
9 there. It was September 2011. But in our courtroom today,  
10 it's "some story," we don't even know if Dr. Krakauer was even  
11 there at his deposition. That's -- I mean, it's like we're  
12 passing through this prism where the world just goes (noise)  
13 and just changes a little bit. Some story that Dr. Krakauer  
14 even attended his own deposition.

15 Here's the timeline he showed you in opening. He said he  
16 was going to prove that there were three years and three months  
17 where they never heard from Dr. Krakauer. This is from his  
18 opening argument. Now, the Court will instruct you in a minute  
19 on the law, and she will tell you Dr. Krakauer and nobody on  
20 the DNC, the Do Not Call List, had any duty whatsoever to call  
21 and complain to DISH. It was DISH's duty not to call them.  
22 There's no duty on the part of the person who's protected by  
23 the law. When a thief comes into your house and takes your  
24 jewelry, do you have a duty to call his mother? It's  
25 ridiculous.

JA005873  
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1 But here are the facts. This is what they showed you in  
2 opening and it wasn't true. They said first complaint by  
3 Dr. Krakauer. That I agree with.

4 Well, they left out the assurance of compliance right there  
5 in June 2009. That wasn't on any timeline they showed you in  
6 this case.

7 They left out Exhibit 70, which was October 12th, 2009.  
8 Why was DISH looking at Exhibit 70, that proposal by  
9 PossibleNOW to actually have compliance October 12th, 2009?  
10 Because in June 2009 they said they would monitor.

11 When he showed you the definitions from Exhibit 55, the  
12 assurance of compliance, he didn't show you the definition of  
13 "covered marketer." When you get back in the jury room, please  
14 read the definition of "covered marketer." It says OE  
15 retailers. We know OE retailers. There are 45 of them. There  
16 are not 3,500 of them. He didn't even show you that  
17 definition.

18 And then Dr. -- then Mr. Campbell gives his complaint about  
19 the same thing, the Direct to DISH switcharoo campaign; and  
20 then Dr. Krakauer gives testimony at a formal deposition  
21 attended by their lawyer, Victor Rou. None of that was on  
22 their timeline, none of it.

23 The second Orwellian moment, this was wild, they said  
24 basically we don't even know if there were Five9 calls.  
25 Remember that? Well, here's their opening from -- here's their

JA005874  
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1 slide in opening. They have the date of the call and the  
2 number of seconds at the call. Where did those records come  
3 from if not Five9? You can't have it both ways, DISH. What do  
4 you mean we don't know if there were phone calls? Not one of  
5 their expert witnesses said those numbers weren't connected,  
6 not one; and they used the connection and the connection times  
7 to argue about how small the damages ought to be in this case  
8 or how little the penalty should be for violating this law.  
9 You can't have it both ways.

10 They said, "We don't know if Dr. Krakauer was called."  
11 Anya Verkhovskaya testified there were ten calls to  
12 Dr. Krakauer in the call records and they put five of them that  
13 were actually -- and five were connected, and they put those  
14 five on their opening statement and talked about their length  
15 to you. How do we not know if those calls were made? The  
16 level of proof in this case is beyond a reasonable doubt. Just  
17 puffing up little, like, worries about this and that, that's  
18 not fair. We proved these calls. We have the records.  
19 Dr. Krakauer testified to them. They said Dr. Krakauer doesn't  
20 know if DISH called him. Well, why did he call DISH to  
21 complain?

22 Oh, this is important. They said I don't have any evidence  
23 for this \$960 million. Remember that? They said no evidence.  
24 Okay. The Court will tell you you do not have to check your  
25 common sense at the door. This exhibit, Exhibit 89, look at

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1 page 4 and page 14. Page 14 says that in 2010 the OE retailer  
2 signed up 1,000,052. So we'll just call that 1 million.  
3 That's at page 14. Times \$80, another \$960 million in 2010.

4 So let me talk about circumstantial -- let me talk about  
5 evidence. So we have from the mouths of their witnesses they  
6 get \$80 a week -- a month. Sorry. And we have from here  
7 exactly how many these OE covered marketers signed up. It is  
8 evidence -- you have the power as the jury to say, okay, common  
9 sense, \$80 times the number of sign-ups, that's the number.  
10 That is evidence.

11 You know, it's so funny. They say -- let me talk about  
12 circumstantial evidence. People want to denigrate  
13 circumstantial evidence. This is circumstantial evidence they  
14 got a billion dollars. What is circumstantial evidence? Let's  
15 say you're in your bed at night and you hear something outside  
16 your window and it's the last week when there was snow on the  
17 ground. In the morning you go out and there's fingerprints on  
18 your window and there's boots and there's some footprints  
19 leading up to your window. Okay. You did not see the guy  
20 peeking in your window. You're pretty sure somebody peeked in  
21 your window. That's circumstantial evidence and it's just as  
22 good -- the Court will tell you it's just as good as every  
23 other kind of evidence. It's commonsense evidence.

24 Mr. Bicks never ever explained to you why it was okay to  
25 keep these guys dialing for dollars after they were sanctioned

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004744

1 by North Carolina and Florida. He pointed to something in  
2 there about they were supposed to turn in a plan. Read  
3 Exhibit 186. The word "DirecTV" is not in there. These  
4 guys -- if you look at those e-mail that I talked about,  
5 there's a book of, like, five e-mail that were forwarded along  
6 to risk audit on January 30th, 2007. If you read those e-mail,  
7 you'll see at the time of these sanctions by these two states  
8 these guys were selling both DISH and DirecTV.

9 I showed you a couple of slides that I thought were un -- a  
10 little -- were interesting. Here's a slide they showed you in  
11 opening and I think they showed again in closing, but he  
12 highlighted the stuff above. That highlighting there is their  
13 highlighting from opening. He didn't say, "We have no records  
14 of the consumer phone numbers since we are no longer with  
15 Five9." That's what we were talking about when they said they  
16 didn't keep the records. It's right there. This is DX6.

17 He showed you this EchoStar Retailer Chat. Remember I  
18 asked Mr. DeFranco about this. It was in '07. I said, "Was  
19 SSN even there?"

20 He said, "I don't know."

21 They showed you this DX2, this plan that you're supposed to  
22 keep all your call records. Not enforced. You just saw the  
23 e-mail.

24 There's no evidence in this case that any single OE  
25 retailer was actually disciplined. Where are the discipline

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1 letters? Where is the choking back of any one of those 45  
2 national sales partners? Where is that evidence?

3 He asked you why did we not sue SSN. I'm going to tell  
4 you, because it wouldn't matter. It's a shell game. It's a  
5 defunct little four-person company. It's irrelevant. That's  
6 like chewing on Godzilla's toe. That's what that is. It's  
7 about as useful as those "Hey, be cautious out there" letters  
8 that you can just turn into a paper airplane and fly off the  
9 roof of DISH.

10 I was thinking about it when he was talking. An employee  
11 under the employment law would have more rights than SSN under  
12 that contract. Read that contract. They can change everything  
13 anytime for any reason no matter what they want. An employee  
14 at DISH has more rights than SSN under that contract.

15 They keep wanting to focus on this idea that they had 3,500  
16 retailers. They had 45 retailers bringing in a million  
17 sign-ups a year. Those were the telemarketers. Those were the  
18 only ones I care about in this trial.

19 Read Exhibit 22 and ask yourself is that holding out as  
20 DISH or not.

21 Here's another one. They did show this one just now in  
22 closing and they did the same cropping. They showed you this  
23 part, but they cropped out this part that said: "We do not  
24 have a date for scrubbing this through" -- and if you finish  
25 the sentence -- "PossibleNOW." When you're in the jury room,

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1 look at DX8. You'll see it says that. They're cropping out  
2 the stuff they don't like. It's a little bit of an Orwellian  
3 universe. We're going to pass through a prism of, like, an  
4 alternative reality here.

5 The Court will tell you that even if an act is illegal, if  
6 it's condoned, if it's not disciplined, if it's allowed, if it  
7 continues, they're responsible.

8 The Five9 contract is in evidence. You'll have it in the  
9 jury room. If you look at it, you'll see that Five9  
10 specifically says, "We do not scrub. We do not scrub. That's  
11 your responsibility."

12 Mr. Bicks said, "Oh, don't look at those e-mail from 2004,  
13 2005, those injunctions, those sanctions they got in 2005,  
14 because, okay, they used to have some issues, but now they  
15 don't." Well, they used to steal jewelry. Now they steal  
16 cars. They used to break the law by automessaging and  
17 autodialing. Now they break it by another means. You're on  
18 notice. Your eyes are wide open.

19 The judge will tell you, I may have mentioned this,  
20 Dr. Krakauer, no person had a duty to complain, period.

21 The bedrock fact here is in this case one out of five calls  
22 made by this shop were out of bounds. These guys were not  
23 running with chalk on their ankles down the sideline. They  
24 were out of bounds 20 percent of the time.

25 This is a Musso e-mail. This is after the -- this is from

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1 their opening again. This is after the Campbell complaint.  
2 It's DX16. She doesn't say, "Stop calling." She doesn't say,  
3 "Scrub your list." She doesn't say, "Go for retraining." She  
4 says, "We encourage you to be cautious." Is this *Hill Street*  
5 *Blues*? You guys remember that? "You boys be cautious out  
6 there."

7 Now, let's talk about Anya Verkhovskaya for a second. Anya  
8 said we have an obligation to say were they on the list 30  
9 days. The reason she looked at April 1st is the class starts  
10 May 11th. So if they're on April 1st, they're definitely on  
11 more than 30 days by the time you get to April -- May 11th.  
12 And then she said, "The report I asked for, if they had been  
13 removed, they would be kicked out of that report." So we  
14 covered that issue. That was a red herring.

15 DISH has not pointed to a single number not on the DNC. We  
16 gave them all the numbers. We gave them all the lists. Show  
17 me one number in this case not on the Do Not Call Registry.

18 You saw Anya's testimony. I think she was fair with them.  
19 I think she was fair with them. She pulled out everything  
20 there was an argument about and then we pulled out more. So  
21 the argument about whether or not these are residential is a  
22 footprints-in-the-snow discussion. The LexisNexis augments the  
23 other evidence we have in the case.

24 The evidence in the case is it was a Direct to DISH  
25 campaign. Guys like Krakauer, maybe even Campbell, that used

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1 to be signed up for DirecTV they were trying to switch to DISH.  
2 So who was the focus of the calls? That's the residential  
3 issue. Who did they get paid to call? Residences. They don't  
4 get paid to call businesses. And when I walked you through how  
5 the funnel worked, I showed you all the different places the  
6 businesses went out.

7 So, yes, Anya was not trying to include residences. She  
8 was trying to exclude businesses and government because that's  
9 the Venn diagram. If they're not business and government,  
10 they're residential. The question is is it more likely than  
11 not that these numbers are residential. The Court will tell  
12 you this is not a name-by-name, person-by-person determination.

13 Okay. That's it. Appreciate all your time and effort in  
14 the case. I know you'll do the right thing back there. Thanks  
15 a lot.

16 **THE COURT:** Okay. Ladies and gentlemen, I just want  
17 to check in with you about your energy levels here. My  
18 instructions to you will take somewhere between 20 and 30  
19 minutes, okay. I can send you to lunch now and we can come  
20 back and I can do that. If everybody is good, we'll proceed  
21 now. Everybody is good. Everybody -- you all are nodding at  
22 me. Okay. Anybody need to stand up where you are? Okay. If  
23 you do -- all right. We're good.

24 Now, you have heard the evidence and it will soon be your  
25 duty to find the facts of this case and to apply the law that I

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1 am about to give you to those facts. Once I have instructed  
2 you on the law, you will go to the jury room and select your  
3 foreperson. We'll probably go to lunch then, but when we come  
4 back, you will start your deliberations very soon thereafter.  
5 You will have the duty to decide at least one, and perhaps as  
6 many as three, issues with some subissues on Question 2 that  
7 you may need to answer, all arising out of telemarketing phone  
8 calls allegedly made by SSN.

9       You must make your decision only on the basis of the  
10 testimony and other evidence presented here in this courtroom  
11 during the trial; and you are not to be influenced in any way  
12 by bias, sympathy or prejudice for or against any of the  
13 parties, or by anything that you have heard or read outside the  
14 courtroom.

15       You must follow the law as I explain it to you, whether you  
16 agree with it or not, and you must follow all of my  
17 instructions as a whole. You should not single out or  
18 disregard any of the Court's instructions on the law. If I do  
19 not specifically define a word or a term, then you should apply  
20 the ordinary, everyday meanings of those words.

21       Now, in a civil lawsuit, the person who makes the claim  
22 bears the burden of proving those claims by a preponderance of  
23 the evidence. This means that the plaintiff who brings a  
24 lawsuit, here Dr. Krakauer on behalf of the class, has the  
25 burden of proving each essential element of his claim and the

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1 claims of the class by a preponderance of the evidence.

2 To prove something by a preponderance of the evidence means  
3 that you prove the facts supporting the claim are more likely  
4 than not. A preponderance of the evidence refers to the  
5 persuasiveness of the evidence, not to the number of witnesses  
6 who testified or the number of documents or other exhibits  
7 presented. In other words, a preponderance of the evidence  
8 means such evidence that, when compared to the evidence opposed  
9 to it, has more convincing force, and produces in your minds  
10 the belief that what is sought to be proved is more likely true  
11 than not. This standard does not require proof to an absolute  
12 certainty. That's seldom possible in any case. If you find  
13 the scales tip, however slightly, in favor of Dr. Krakauer and  
14 the class, then you should find in their favor. If, however,  
15 Dr. Krakauer fails to establish any essential part of his claim  
16 by a preponderance of the evidence, then you should find  
17 against him and against the class and in favor of DISH.

18 From time to time I may say "the greater weight of the  
19 evidence." That's the same thing as "the preponderance of the  
20 evidence."

21 You may remember some of my instructions from the beginning  
22 of the case. If anything you remember from those instructions  
23 is different from what I'm telling you now, go by my  
24 instructions that I'm giving you now after all the evidence. I  
25 think they're the same, but if you heard anything differently,

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1 go by what I'm telling you now. They're much more detailed and  
2 we've heard all the evidence now.

3 Now, as you will remember, the Do Not Call Registry was  
4 created by the federal government to give consumers a choice  
5 about whether to receive telemarketing calls at home. It  
6 allows a consumer to register a telephone number on the  
7 National Do Not Call Registry to avoid receiving telemarketing  
8 calls.

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

18 Now, under the law, a person whose residential number is on  
19 the National Do Not Call Registry and who receives at least two  
20 telephone calls within any 12-month period by or on behalf of  
21 the same entity may bring an action to recover and receive up  
22 to \$500 for each violation. Dr. Krakauer contends that he and  
23 each class member had their residential numbers on the National  
24 Do Not Call Registry, that he and the class members each  
25 received at least two calls within a 12-month period from SSN,

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1 and that SSN was acting on behalf of DISH when it made these  
2 calls. DISH contends that the Plaintiff's evidence is  
3 insufficient to prove that the class members were on the  
4 Registry at the relevant time and/or to prove that the numbers  
5 were residential. DISH also contends that SSN was not its  
6 agent and not acting in the course and scope of any agency.

7 Basically, the Plaintiff must prove by a preponderance of  
8 the evidence that he and the class members each received at  
9 least two telephone solicitations in any 12-month period, that  
10 the numbers called were residential numbers, that the calls  
11 were made by or on behalf of DISH Network, and that the calls  
12 were made when the telephone numbers had been on the Registry  
13 for over 30 days.

14 You will decide the issues in this case by answering the  
15 questions on the verdict sheet, which you have in front of you  
16 and which we will go over now. You must answer Issue One about  
17 agency and then, depending on your answer to that issue, there  
18 are other questions you may need to answer.

19 So let's start with Issue One. Was SSN acting as DISH's  
20 agent when it made the telephone calls at issue from May 11th,  
21 2010, through August 1st, 2011?

22 It is undisputed in this case that DISH itself did not make  
23 the telephone calls at issue. SSN did. In order for DISH to  
24 be liable for any TCPA violations committed by SSN, the  
25 Plaintiff must prove two things by the greater weight of the

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1 evidence: First, that SSN was DISH's agent; and second, that  
2 SSN was acting in the course and scope of that agency when it  
3 made the phone calls at issue, which were made from May 11,  
4 2010, to August 1st, 2011.

5 Now, when an agent acts on behalf of its principal and  
6 within the scope of its authority, then the principal is  
7 responsible for the act. If Dr. Krakauer proves to you by the  
8 greater weight of the evidence that SSN was acting on behalf of  
9 DISH in connection with its telemarketing, that is, that SSN  
10 was DISH's agent and was acting in the course and scope of that  
11 agency, then you would answer this issue "yes." If  
12 Dr. Krakauer fails to so prove both of those things, then you  
13 would answer this issue "no."

14 Now, an agent is a person or company empowered by another  
15 person or company to act on its behalf. The person granting  
16 the authority to the agent to act on its behalf is called the  
17 "principal." This should sound familiar from the beginning of  
18 the case. In deciding whether SSN was DISH's agent and acted  
19 within the scope of that agency in connection with the  
20 telemarketing at issue in this case, you may consider direct  
21 evidence and circumstantial evidence.

22 Now, actual authority exists where the principal has  
23 expressly or impliedly authorized the agent to act on the  
24 principal's behalf as to a particular matter. Authority may be  
25 expressly granted by the principal by word of mouth, or by

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1 writing, or it may be implied from the circumstances, such as  
2 when the principal's reasonably interpreted words or conduct  
3 would cause an agent to believe that the principal consents to  
4 having an act done on its behalf. This could arise from  
5 conduct of the principal amounting to consent or acquiescence.  
6 An agent acts with actual authority when, at the time of the  
7 action, the agent reasonably believes, based on the principal's  
8 words or conduct, that the principal wishes the agent to so  
9 act.

10 In order for agency to exist, the principal must have the  
11 power to direct and control the agent's actions. It is not  
12 necessary that the power actually be exercised.

13 In determining whether SSN was DISH's agent in connection  
14 with its telemarketing activities, you should consider all the  
15 evidence. This includes the contracts between SSN and DISH, as  
16 well as other writings between the parties and other conduct  
17 and statements by DISH and SSN. The parties' characterization  
18 of their relationship as one of independent contractor is not  
19 binding or controlling, though you may consider it, along with  
20 other evidence in the contract and elsewhere, as to whether  
21 DISH and SSN agreed or reasonably understood that DISH had the  
22 power to control and direct SSN's telemarketing activities.

23 Now, a principal is not bound by the act of an agent unless  
24 that act falls within the scope of actual authority granted by  
25 the principal to the agent. In order to determine the scope of

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1 the agent's authority, it is necessary to look again at the  
2 conduct and statements of the principal. An agent may not  
3 extend its authority by its own conduct standing alone.

4 Now, the act of the agent is treated in law as the act of  
5 the principal and for that reason an agent is expected to act  
6 for the benefit of the principal. Generally speaking, actions  
7 taken against the principal's interest are not within the scope  
8 of the agent's authority. The agent's determination that an  
9 action is in the principal's interest must be reasonable and  
10 based on its reasonable understanding of the principal's  
11 interests, as expressed by the principal. If the principal  
12 consents or acquiesces in the conduct, even if the conduct or  
13 act is illegal, then the agent may reasonably conclude that the  
14 conduct is in the principal's best interests. To decide that  
15 the principal acquiesced or consented, you must find that the  
16 principal knew of prior similar activities by the agent and  
17 consented to them or did not object to them.

18 So written limits on SSN's authority are relevant, but they  
19 are not necessarily conclusive or binding. You need to  
20 evaluate those written limits, as well as DISH's actions and  
21 inactions, its conduct, and its other writings and statements  
22 to decide whether DISH's conduct was consistent with written  
23 limits and whether SSN reasonably understood it was authorized  
24 to act differently than the written limits stated.

25 So in determining whether SSN acted within the course and

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1 scope of its authority, just as with the question of whether  
2 agency existed, you'll need to examine and consider the written  
3 documents and agreements between the parties, as well as other  
4 statements and actions by DISH and SSN and prior dealings  
5 between the parties. In other words, you should consider all  
6 of the evidence, direct and circumstantial, in evaluating  
7 whether SSN acted within the course and scope of any agency  
8 relationship it had with DISH.

9       So as to Issue One, if you find by the greater weight of  
10 the evidence that SSN was DISH's agent for purposes of  
11 telemarketing and that SSN acted within the course and scope of  
12 that agency when making the telephone calls to the class  
13 members, then you would answer this issue "yes," in favor of  
14 DISH. Excuse me. I said that backwards. Then you would  
15 answer the issue "yes," in favor of Dr. Krakauer and the class.  
16 If you do not so find or are unable to say as to either or both  
17 of these elements, then you would answer the issue "no," in  
18 favor of DISH. So since I misspoke there, let me just be sure  
19 I'm clear. If you answer it "yes," that's in favor of  
20 Dr. Krakauer. If you answer it "no," that's in favor of DISH.  
21 The Plaintiff, Dr. Krakauer, has the burden of proof to prove  
22 those two things and he has to prove those things before you  
23 can answer "yes." All right.

24       Now, if you answer "no," you do not need to answer Issues  
25 Two or Three. You would date and sign the verdict sheet, the

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1 foreperson would, on the next page and let us know you've  
2 reached a verdict. I'll talk about the logistics of that at  
3 the end. If, however, you do answer "yes," then you need to  
4 move on to Issue Two and answer it.

5       So Issue Two is: Did SSN make and class members receive at  
6 least two telephone solicitations to a residential number in  
7 any 12-month period by or on behalf of DISH, when their  
8 telephone numbers were listed on the National Do Not Call  
9 Registry? And, again, we're talking about the calls between  
10 May 11, 2010, and August 2011.

11       As I mentioned, this second issue concerns whether the  
12 Plaintiff has proven that the class members were on the  
13 registry, whether they were residential at the time of the  
14 calls, and that at least two calls were made during that  
15 12-month period.

16       On this issue, the burden of proof is on Dr. Krakauer to  
17 prove by a preponderance of the evidence four things: One,  
18 that the telephone numbers of the class members were listed on  
19 the National Do Not Call Registry at the time of the call; two,  
20 that after the number had been listed for at least 30 days, SSN  
21 called the number at least twice during any 12-month period  
22 with a telephone solicitation on behalf of DISH; three, that  
23 the calls were received; and four, that the numbers were  
24 residential at the time of the call.

25       So before I again go over these elements with you, let me

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1 mention two things that Dr. Krakauer does not have to prove.  
2 First, you have heard some evidence that SSN told DISH it  
3 thought it had an established business relationship with  
4 Dr. Krakauer and others who had bought DirecTV through SSN in  
5 the past. This evidence was admitted to show the course of  
6 conduct between DISH and SSN, and in connection with DISH's  
7 contention that it believed SSN was complying with the law and  
8 acting within the scope of the written agreement between SSN  
9 and DISH. However, this case does not concern the Established  
10 Business Relationship defense, and there has been no showing  
11 that in fact Dr. Krakauer or any class member had an  
12 established business relationship with SSN or DISH during the  
13 class period and no showing that any such relationship meant  
14 that the telephone solicitation calls at issue were allowed by  
15 law. In other words, there is no Established Business  
16 Relationship defense to the calls at issue in this case, and  
17 you should not consider the evidence about SSN's statements to  
18 DISH about established business relationship as a reason, by  
19 itself, to rule against Dr. Krakauer or the class. You should  
20 only consider that evidence as you evaluate the agency issue,  
21 the first issue that we already talked about. Dr. Krakauer  
22 does not have to prove that the class members did not have  
23 relationships with DISH.

24 Now, second, you've heard some evidence about whether names  
25 and addresses match up in the data used in this case. There is

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1 no issue for you to decide in connection with names and  
2 addresses or with the identities of class members. That is  
3 something that may be decided down the road in future  
4 proceedings not involving you. Your job is to decide whether  
5 the telephone numbers called were residential numbers on the  
6 DNC list at the time of the call and if so, whether SSN made at  
7 least two solicitation calls to those numbers. You may  
8 consider the evidence about names and addresses in evaluating  
9 the reliability of the data underlying the Plaintiff's  
10 evidence, but you should not consider it for any reason other  
11 than that. Dr. Krakauer does not have to prove here whether  
12 names or addresses match up with phone numbers.

13 Okay. Now, turning to the things that Dr. Krakauer does  
14 have to prove -- that the telephone numbers were on the Do Not  
15 Call Registry; that after they've been there 30 days, SSN  
16 called the number at least twice during the 12-month period  
17 with a telephone solicitation on behalf of DISH; that the calls  
18 were received; and the numbers were residential -- let me give  
19 you these instructions and definitions.

20 Once a person places a phone number on the Do Not Call  
21 Registry, it remains there indefinitely. It does not expire  
22 and it does not have to be removed. It remains until the  
23 registration is canceled by the customer or removed for some  
24 reason by the Registry database administrator. It is not  
25 necessary for anyone on the Do Not Call Registry to complain to

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1 the telemarketer or anyone else in order to be protected and  
2 covered by the TCPA. Registration is all that is required.  
3 Dr. Krakauer does not have to prove that he or anyone  
4 complained to DISH.

5 As to the timing, Dr. Krakauer must prove that after the  
6 number had been listed for at least 30 days SSN called the  
7 number at least twice during any 12-month period. And all of  
8 those words just have their ordinary meaning.

9 The calls must have been telephone solicitations, which  
10 means a telephone call or message for the purpose of  
11 encouraging the purchase of goods or services, such as  
12 satellite television products.

13 A call is received if the telephone call goes through and  
14 is connected so that the phone rings or the call is otherwise  
15 capable of being answered. A call can be received in any  
16 number of ways. Certainly if the call is answered by a person  
17 or picked up by an answering machine, the call is received. A  
18 call is also received if the ringing phone is heard by a person  
19 or if a person receives any other indication that there's a  
20 phone call available to be answered, such as a beep on call  
21 waiting or visual notification from a caller ID service, for  
22 example, even if the person does not actually answer the call.  
23 In other words, it is not necessary that the call be answered  
24 by a live human being or by an answering machine. And it is  
25 not necessary that the call be of any particular duration. It

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1 is not necessary that a conversation occur between the caller  
2 and the recipient.

3 Now, this section of the TCPA does not prohibit calls to  
4 business or government numbers, only to residential numbers on  
5 the Registry. In determining whether a number is a residential  
6 number, you should just consider the ordinary English meaning  
7 of that phrase. For example, if the number is for a landline  
8 associated with a home, whether that's an apartment, a  
9 condominium or any other kind of dwelling place, or if it is a  
10 cell phone primarily used for personal calls the way you'd use  
11 a residential landline, then it would be a residential number.  
12 The fact that a number may be used for some business calls, as  
13 well as personal purposes, does not necessarily mean it is not  
14 residential, so long as the phone associated with the number is  
15 primarily used as a residential number.

16 So if you find by the greater weight of the evidence that  
17 the telephone numbers of Dr. Krakauer and the class members  
18 were listed on the National Do Not Call Registry at the time of  
19 the call; that after the number had been listed for at least 30  
20 days, SSN called the number at least twice during any 12-month  
21 period with a telephone solicitation on behalf of DISH; third,  
22 that the calls were received; and that the numbers were  
23 residential at the time of the calls, then you would answer  
24 this second issue "yes," as to Dr. Krakauer and all the class  
25 members, and check the first box there under Issue Two. If you

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1 do not so find or are unable to say, then you'd check the third  
2 box on page 2, "no."

3 Now, if you find that some categories of phone numbers as  
4 to which -- let me start over. If you find that there are some  
5 categories of phone numbers as to which Dr. Krakauer has proven  
6 all of the elements but there are others where he has failed to  
7 prove that the numbers are residential, then you'll need to  
8 check that middle box, "Yes as to Dr. Krakauer and all the  
9 class members except." And then all the subissues, you would  
10 check that box if that is your finding. If he has proven the  
11 number is residential for a particular category, then do not  
12 check that subbox. Any class members in those subcategories  
13 that you check will not receive the award of any money damages.

14 Now, you will recall that the parties have entered into  
15 some stipulations about the number of calls that enter into  
16 those categories and you're to accept those stipulations as  
17 proven as they are stated. You have seen and heard these  
18 stipulations throughout the trial a few times, but let me read  
19 them to you now in full. You will have this in writing in  
20 front of you back in the jury room.

21 The telephone numbers included within the category  
22 described as "Telephone numbers that LexisNexis always  
23 identifies as unknown" are reflected on an attached  
24 Exhibit 31D, showing 5,258 telephone numbers and 14,815  
25 telephone calls.

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1       The telephone numbers included within the category  
2 described as "Telephone numbers that LexisNexis identifies as  
3 residential before May 1st, 2010, or after August 1st, 2011,"  
4 are reflected on the attached Exhibit 31A, showing 5,118  
5 telephone numbers and 14,519 telephone calls.

6       The telephone numbers included within the category  
7 described as "Telephone numbers that LexisNexis identifies as  
8 unknown in the May 2010 to August 2011 time period that the  
9 calls were made but identifies differently at other times" are  
10 reflected on Exhibit 31K, showing 276 telephone numbers and 792  
11 calls.

12       The telephone numbers included within the category  
13 described as "Telephone numbers that LexisNexis identifies as  
14 both residential and unknown" are reflected on Exhibit 31X,  
15 showing 1,770 telephone numbers and 5,031 calls.

16       The telephone numbers included within the category  
17 described as "Telephone numbers that LexisNexis always  
18 identifies as residential, including in the May 2010 to  
19 August 2011 time period that the calls were made" are reflected  
20 on Exhibit 31U, showing 5,801 telephone numbers and 16,491  
21 calls.

22       The telephone numbers included within the category  
23 described as "Telephone numbers that LexisNexis identifies as  
24 cellular and possibly cellular" are reflected on Exhibit 31L,  
25 showing 3,005 telephone numbers and 8,326 calls.

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1       So those are the stipulations.

2       I will point out to you that there is a good bit of overlap  
3 between these categories, so some of the telephone calls fall  
4 within more than one category. That's why if you add them up  
5 they are more than the totals here.

6       Now, if you find that Dr. Krakauer has proved his case as  
7 to some but not all class members, you would check that second  
8 box, and then check the boxes beside each category as to which  
9 Dr. Krakauer has not proven the number is residential. If he  
10 has proven the number is residential for a particular category,  
11 don't check that category box.

12       If you answer this second issue "yes," in whole or in  
13 part -- so if you check the first box "yes" or if you check  
14 "yes except" -- then you do need to answer the third issue,  
15 which is the damages issue. If you answer the second issue  
16 "no," then you skip the third issue.

17       The third issue: What amount, up to \$500, do you award for  
18 each call made in violation of the TCPA, Telephone Consumer  
19 Protection Act?

20       The Act provides that up to \$500 can be awarded for each  
21 call made in violation of the Act. You can award any amount  
22 from \$0 up to \$500 per call. The overall purpose of the Act is  
23 to prevent unwanted telephone calls to those on the Do Not Call  
24 Registry and to reduce the invasion of privacy these calls  
25 cause. In determining the appropriate amount, you can consider

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1 the severity or minimal nature of the violation, as you decide  
2 in light of the total number of unlawful calls made, the  
3 duration of those calls and in total -- individually and in  
4 total, and the nature of the privacy invasion that results from  
5 the unlawful calls generally. You can and should also consider  
6 the need to punish companies that violate the Act, and the need  
7 to deter future violations, as well as any other relevant  
8 circumstances. Dr. Krakauer is not required to prove that he  
9 or the class members suffered monetary loss as a result of the  
10 violations, though as I stated you can consider the nature of  
11 the injury suffered in determining an appropriate award, along  
12 with the other things I told you to consider.

13 There will be additional proceedings in the case which  
14 won't involve you, where the Court and parties will involve  
15 (sic) any individual issues, such as the names and addresses,  
16 as I mentioned, so -- and that's also why I'm not asking you to  
17 determine the total amount of damages. You're just deciding  
18 each call that violates, what's that amount.

19 If you reach this issue, you should write the amount you  
20 find, by the greater weight of the evidence, to be an  
21 appropriate sum for each class member to receive for each call  
22 that violates the Act. So those are the issues.

23 In reaching your verdict on these issues, you must consider  
24 only the evidence in the case. The term "evidence" includes  
25 the sworn testimony of the witnesses, the exhibits admitted,

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1 and the stipulations. Remember that anything the lawyers said  
2 is not evidence. A question to a witness is not evidence. It  
3 is the witness's answer that is the evidence in the case. Your  
4 own recollection and interpretation of the evidence is  
5 controlling and if I have excluded any evidence or instructed  
6 you to disregard any evidence, then you should follow that  
7 instruction and not consider it.

8       Also, nothing that I have said is evidence. You should  
9 take what I say about the law and follow it, but you are the  
10 sole judges of the facts. The law, as indeed it should,  
11 requires the presiding judge to be impartial. You should not  
12 draw any inference from any ruling I have made, expression on  
13 my face, inflection in my voice, or anything I have said or  
14 done that I have any opinion about what your verdict should be.  
15 It is your exclusive province to find the facts of this case  
16 and to render a verdict reflecting the truth as you find it.  
17 From time to time during the trial, I may have fussed at a  
18 lawyer or encouraged somebody to move along. That's just  
19 housekeeping, okay. All of that stuff, that doesn't reflect  
20 any opinion about what your verdict should be and you should  
21 not consider it for that.

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

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1 eyewitness. "Circumstantial evidence" is proof of a chain of  
2 facts and circumstances indicating that a fact has or has not  
3 been proved. The law makes no distinction between the weight  
4 you give to direct and circumstantial evidence. Both can be  
5 important and either can be sufficient as a basis for your  
6 decision.

7 Now, in saying that you must consider all of the evidence,  
8 this does not mean that you must accept all of the evidence as  
9 true or accurate. You have to decide whether you believe each  
10 witness's testimony and how much importance to give that  
11 testimony. In making those decisions, you may believe or  
12 disbelieve any witness in whole or in part. And as I mentioned  
13 earlier, the number of witnesses testifying concerning any  
14 particular matter is not controlling.

15 Now, in deciding whether to believe a witness, I suggest  
16 that you ask yourself a few questions: Did the witness impress  
17 you as someone who was telling the truth? Did the witness have  
18 any particular reason not to tell the truth? Did the witness  
19 have a personal interest in the outcome of the case? Did the  
20 witness seem to have a good memory? Did the witness have the  
21 opportunity and ability to observe accurately the things he  
22 testified about? Did the witness appear to understand the  
23 questions clearly and answer them directly? And did the  
24 witness's testimony differ from the testimony of other  
25 witnesses? You know, evaluate what the witness says, but you

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1 also look at his or her demeanor as they appeared in front of  
2 you.

3 In this case, you have heard from witnesses who testified  
4 as expert witnesses. The law permits expert testimony if it  
5 concerns scientific, technical, or other specialized knowledge  
6 that will help you understand or resolve a fact at issue.  
7 Experts are allowed to give opinions about these matters. You  
8 should evaluate their testimony just as you do the testimony of  
9 other witnesses, with additional consideration given to the  
10 expert's education and experience and the basis and reason for  
11 the expert's opinions.

12 You should consider the opinions of these expert witnesses,  
13 but you are not bound by them. It is up to you to decide  
14 whether to accept those opinions and how much weight to give  
15 those opinions, considering the witness's education and  
16 experience, the basis and reasons given for the opinions, and  
17 all the other evidence in the case, along with the usual  
18 demeanor, consistency, things that you would evaluate about any  
19 witness.

20 You heard some witnesses -- some testimony from witnesses  
21 who testified by deposition. These witnesses were questioned  
22 under oath and you should consider their testimony as if they  
23 had been present in the courtroom, to the extent that you can.

24 You also heard some of the witnesses who appeared in front  
25 of you live had their depositions taken before trial. If in

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1 that deposition you find that the witness gave testimony  
2 different from the witness's testimony in court and if you  
3 think those differences are material, you can consider those  
4 contradictions in evaluating the witness's credibility.

5 If you decide you believe a witness, it is still up to you  
6 to decide how important that testimony is. Some testimony may  
7 be credible, but not important. Other -- so you just have to  
8 evaluate that yourself. As I mentioned, you should not simply  
9 count up the number of witnesses. You must weigh the evidence.

10 In addition to the testimony, you have -- you will have  
11 before you the exhibits admitted into evidence. You may  
12 consider them as well. They are neither more important nor  
13 less important than the testimony just because they are in  
14 writing. Each piece of evidence should be evaluated, and if  
15 you find it is trustworthy and credible, it is up to you to  
16 decide how important it is. I will be sending the exhibits in  
17 to the jury room for your use during your deliberations, but as  
18 I say, that doesn't make them more important than the  
19 testimony. I encourage you not to get bogged down in the  
20 minutia of every single exhibit. Use them as you find helpful  
21 and relevant in your decision-making. Certainly read whatever  
22 you want. I'm not trying to discourage you from reading them,  
23 but you need to evaluate that.

24 Finally, there are stipulations. I read them to you and  
25 you should consider those as proven since the parties have

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1 agreed to those facts.

2       You've heard some evidence that complaints were made to  
3 DISH about SSN. Much of the evidence about complaints is  
4 admitted on the issue of agency, and you may consider that  
5 evidence in evaluating whether DISH's response to those  
6 complaints showed that SSN was or was not DISH's agent and, if  
7 it was, whether SSN acted or did not act within the scope of  
8 that agency. Otherwise, as I mentioned during the trial, an  
9 out-of-court statement is not admissible for the truth of that  
10 statement, so if someone complained outside of court and  
11 claimed that SSN made phone calls that violated the  
12 telemarketing laws, that out-of-court statement is not  
13 admissible to prove that SSN did in fact violate the  
14 telemarketing laws. If, however, DISH employees made  
15 statements in which they admitted the accuracy or truth of the  
16 complaint, then you may consider that admission as proof that  
17 SSN made telephone calls that were complained of and that they  
18 violated the Act.

19       In some of the exhibits and some of the testimony, folks  
20 have made statements about their understanding of the law.  
21 Some of these statements may be about the TCPA, some may be  
22 about agency. You know, you'll take your instructions on the  
23 law from me. You may, however, consider those statements as to  
24 what the person understood the law to be as providing context  
25 or explanations for other statements, acts, or admissions by

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1 the person.

2 Your deliberations are to be based only on the evidence.  
3 Do not look anything up online or in dictionaries. If you have  
4 questions about the meanings of any of the words I have used in  
5 my instructions, please ask me. As I say, words are used in  
6 their ordinary English meaning, unless I have given you a  
7 specific definition. If you aren't clear, let me know rather  
8 than conducting an independent investigation.

9 I remind you that not everything on the Internet and in the  
10 news media is true, and it is not fair to the parties to  
11 consider information which was not presented in the courtroom  
12 because the parties have not had a chance to test that  
13 information for truthfulness and accuracy and they've not had a  
14 chance to point out any problems with that information for your  
15 consideration.

16 While you are deliberating, should there be any breaks or  
17 recesses, don't talk about the case during those breaks and  
18 continue to avoid contact with the lawyers, parties or  
19 witnesses. Don't read anything about the case or communicate  
20 about the matter in any way with anyone other than the ten of  
21 you in the jury room while you are deliberating.

22 You should treat the parties the same without regard to  
23 whether they are individuals or businesses, and all parties are  
24 entitled to equal justice and fairness.

25 Any verdict you reach must be unanimous. In other words,

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1 to return a verdict, you must all ten agree.

2 During your deliberations, don't talk with anyone other  
3 than your fellow jurors and, I repeat, because it's really  
4 important, don't look anything up online. Don't talk or  
5 communicate about it with anyone else or conduct any  
6 independent investigation.

7 Now, it's 10 minutes till 1:00. I'm going to let you go in  
8 to the jury room and do two things: One, select a foreperson  
9 to lead you in your deliberations. That person presides over  
10 deliberations and will speak for you in court and will sign the  
11 verdict sheet. All right. Two, I want you to talk about how  
12 long you want your lunch recess to be. All right. This is  
13 going to be your first exercise in decision-making together.  
14 You know, normally I give an hour and fifteen minutes. That's  
15 in large part because we have work to do, but we're all done,  
16 okay. So if you all want a 30-minute break, an hour, whatever.  
17 I'm going -- you all go back there. Let me know. And then  
18 I'll bring you back into the courtroom. You all can tell me  
19 what you want to do about lunch and that's what we'll do.

20 When we come back from lunch, you'll go straight in to the  
21 jury room. The clerk will give you the original verdict sheet  
22 and all the exhibits. Take your notes with you when you go in  
23 a second. And then you start your deliberations.

24 When you reach a unanimous verdict, your foreperson fills  
25 in the appropriate places, checks the appropriate boxes as you

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1 unanimously agree, dates, and signs it. Today is the 18th of  
2 January. Then you will notify the security officer that you  
3 have a note. If you -- knock on the door, is that what they  
4 do?

5 **THE CLERK:** Yes.

6 **THE COURT:** Yes. And don't tell the security officer  
7 or Ms. Sanders or anybody what your verdict is. Just say,  
8 "We've reached a verdict." I'll get you back into the  
9 courtroom and you'll tell me what your verdict is.

10 If you have a question or you need to communicate with me  
11 about anything, you write your question down. You tell the  
12 security officer, "I've got a note for the judge." Don't tell  
13 them what the question is. Ms. Sanders will come get the note.  
14 She'll give it to me. I'll talk to the lawyers. I'll see if I  
15 can help you.

16 Don't tell me about any numerical division. You know, if  
17 you've voted on it and you're -- don't tell me that you're  
18 eight-two, six-six. Don't tell me that. Well, you wouldn't be  
19 six-six because there aren't twelve of you. Six-four,  
20 five-five. Don't tell me that.

21 You'll take your notes with you, but you will remember that  
22 the notes of one juror are not evidence and they are not more  
23 important than the memory of another juror.

24 Discuss it only in the jury room and only when all ten of  
25 you are present. So when you come back from lunch and you are

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1 gathering, don't talk about it until all ten of you are there.

2 At any time during your deliberations if you want to take a  
3 break, I'll be glad to let you do that, but don't just leave.

4 Send a note in: We want to take a 10-minute recess, 20-minute  
5 recess, whatever you want. We'll handle it that way.

6 We'll be glad to let you all stay late tonight if you need  
7 that or you just tell me whenever you're ready to go home for  
8 the day. If you want to come back tomorrow, if that's where we  
9 are, just let me know. I'll check in with you about five  
10 o'clock if I haven't heard from you.

11 All right. Thank you for your patience and service.  
12 Please retire to the jury room, select your foreperson, and  
13 talk about lunch; and I'll bring you back in in a minute.

14 Yes, sir.

15 **JUROR FOUR:** I'm sorry. Can I ask you again to go  
16 over the part about agency? Is that possible?

17 **THE COURT:** Yes, and I will be glad to do that. In  
18 view of attention spans, do you want me to do it now or do you  
19 want me to do it after lunch?

20 **JUROR TWO:** Can you just give us a copy of what you  
21 said or no, you have to articulate it?

22 **THE COURT:** If during your deliberations you need a  
23 copy of it, you ask me for it. Okay. How about this. You all  
24 go back and pick your foreperson and decide about lunch; and  
25 when you come back, before you go to lunch, I'll just run over

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1 the agency instructions again.

2 All right. You may retire and select your foreperson, talk  
3 about lunch. I'll bring you back in in just a moment.

4 (The jury left the courtroom.)

5 **THE COURT:** You need not repeat your objections from  
6 yesterday to the instructions if you objected yesterday.  
7 That's -- that's for the record.

8 But are there additional objections, corrections or  
9 additions to the charge as given for the Plaintiff?

10 **MR. GLASSER:** No, ma'am.

11 **THE COURT:** No. What about the Defendant?

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

13 **THE COURT:** No. Okay. I'm going to give them a  
14 moment; and since they have specifically asked and there was  
15 more than just Mr. Richter who appeared to be interested in  
16 hearing those agency instructions again, I'll just read those  
17 again on Issue One. It's not that long, though I did a very  
18 bad job of estimating how long it would take me to give those  
19 instructions. I'm sorry about that.

20 **MR. BICKS:** May I ask a question?

21 **THE COURT:** Yes.

22 **MR. BICKS:** Where would you prefer that we be once the  
23 deliberations start? In other words, should we be -- should  
24 one of us be here or how would -- what's the best way for us  
25 to communicate? We're all at the Marriott.

1           **THE COURT:** Oh, I don't want you to leave the  
2 courthouse.

3           **MR. BICKS:** Okay.

4           **THE COURT:** Yeah, you don't have to stay necessarily  
5 in the courtroom, but I would ask you to be -- somebody needs  
6 to be accessible. I think -- don't you all each have a room  
7 here in the courthouse?

8           **MR. BICKS:** Yeah.

9           **THE COURT:** Somebody -- I would assume that one on  
10 each side would be in the courtroom or in that space so that  
11 Ms. Sanders can find you promptly. But, yeah, please don't  
12 leave. I don't like to make the jury wait for 30 minutes while  
13 you all come back from offices or hotels.

14          **MR. BICKS:** Thank you.

15          **THE COURT:** Yeah.

16          **MR. GLASSER:** Your Honor, away from --

17          **THE COURT:** Here they are. They are ready. Bring  
18 them back in.

19          (The jury returned to the courtroom.)

20          **THE COURT:** That didn't take long. That's a good  
21 sign. All right. Who is your foreperson?

22          **FOREPERSON OF THE JURY:** I am, Your Honor.

23          **THE COURT:** Okay. That's Mr. Martin.

24          **FOREPERSON OF THE JURY:** No, Jackson.

25          **THE COURT:** Jackson. You're Ms. Martin. I'm so

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1   sorry. Mr. Jackson. You all moved a seat and I apologize.

2       Mr. Jackson, how long do you all want to take for lunch?

3               **FOREPERSON OF THE JURY:** One hour.

4               **THE COURT:** One hour. All right. Fine.

5       Now, I've been asked to go over the instructions on agency  
6 again. Let me do that for you here before you go to lunch.

7       When an agent acts on behalf of its principal and within  
8 the scope of its authority, then the principal is responsible  
9 for the act. If Dr. Krakauer proves to you by the greater  
10 weight of the evidence that SSN was acting on behalf of DISH in  
11 connection with its telemarketing, that is, that SSN was DISH's  
12 agent and was acting in the course and scope of that agency,  
13 then you would answer the issue "yes." And if Dr. Krakauer  
14 fails to so prove both of those things, you would answer "no."

15       An agent is a person or company empowered by another person  
16 or company to act on its behalf. The person granting the  
17 authority to the agent to act on its behalf is called the  
18 "principal." In deciding whether SSN was DISH's agent and  
19 acted within the scope of that agency in connection with the  
20 telemarketing at issue in this case, you may consider direct  
21 and circumstantial evidence.

22       Actual authority exists where the principal has expressly  
23 or impliedly authorized the agent to act on the principal's  
24 behalf as to a particular matter. Authority may be expressly  
25 granted by the principal by word of mouth, or by writing, or it

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1 may be implied from the circumstances, such as when the  
2 principal's reasonably interpreted words or conduct would cause  
3 an agent to believe that the principal consents to have an act  
4 done on its behalf. This could arise from conduct of the  
5 principal amounting to consent or acquiescence. An agent acts  
6 with actual authority when, at the time of the action, the  
7 agent reasonably believes, based on the principal's words or  
8 conduct, that the principal wishes the agent to so act.

9 In order for agency to exist, the principal must have the  
10 power to direct and control the agent's actions, but it is not  
11 necessary that that power be exercised.

12 In determining whether SSN was DISH's agent in connection  
13 with its telemarketing activities, you should consider all of  
14 the evidence. This includes the contracts between SSN and  
15 DISH, as well as other writings between the parties and other  
16 conduct and statements by DISH and SSN. The parties'  
17 characterization of their relationship as one of independent  
18 contractor is not binding or controlling, though you may  
19 consider it, along with other evidence in the contracts and  
20 elsewhere, as to whether DISH and SSN agreed or reasonably  
21 understood that DISH had the power to control and direct SSN's  
22 telemarketing activities.

23 A principal is not bound by the act of an agent unless that  
24 act falls within the scope of actual authority granted by the  
25 principal to the agent. In order to determine the scope of an

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1 agent's authority, you should look at the conduct and  
2 statements of the principal. An agent may not extend his  
3 authority by his own conduct standing alone.

4 The act of the agent is treated in law as the act of the  
5 principal and for that reason an agent is expected to act for  
6 the benefit of the principal. Generally speaking, actions  
7 taken against the principal's interest are not within the scope  
8 of the agent's authority. The agent's determination that an  
9 action is in the principal's interest must be reasonable and  
10 based on a reasonable understanding of the principal's  
11 interests, as expressed by the principal. If the principal  
12 consents or acquiesces in the conduct, even if the conduct or  
13 act is illegal, then the agent may reasonably conclude that the  
14 conduct is in the principal's interests. To decide that the  
15 principal acquiesced or consented, you must find that the  
16 principal knew of prior similar activities by the agent and  
17 consented or did not object.

18 Written limits on SSN's authority are relevant, but, again,  
19 not necessarily conclusive or binding. You will need to  
20 evaluate those written limits as well as DISH's actions and  
21 inactions, its conduct, and its other writings and statements  
22 to decide whether DISH's conduct was consistent with any  
23 written limits and whether SSN reasonably understood it was  
24 authorized to act differently than the written limits imposed.

25 So in determining whether SSN acted within the course and

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1 scope of its authority, just as with the question of whether  
2 agency existed, you'll need to examine and consider the written  
3 documents and agreements, as well as other statements and  
4 actions by the parties and their prior dealings. In other  
5 words, consider all of the evidence, direct and circumstantial,  
6 in evaluating whether SSN acted within the course and scope of  
7 any agency relationship it had with DISH.

8       So on Issue One, if you find by the greater weight of the  
9 evidence that SSN was DISH's agent for purposes of  
10 telemarketing and that SSN acted within the course and scope of  
11 that agency when making the telephone calls to the class  
12 members, you would answer "yes," in favor of Dr. Krakauer and  
13 the class. If you do not so find or are unable to say as to  
14 either or both of these elements, you would answer the issue  
15 "no," in favor of DISH.

16       All right. So my instructions are on here. I'm reading  
17 them off the computer. They're not necessarily all that  
18 pretty. I'll work on getting them pretty for you; and if you  
19 do need them in writing, you know, just ask. I'll be glad to  
20 accommodate you. You can ask on a particular topic or all of  
21 them. It might take me a little longer to get all of them  
22 prettied up for you, but I know it's a lot of information. If  
23 you don't need them -- or you can always come back in and ask  
24 me to just give them to you again here in court. Just send a  
25 note in, like I said.

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1        So I want you to take everything with you out of the  
2 courtroom, your notes and such, because you will not be coming  
3 in after lunch. All right. It's five after 1:00. So I want  
4 you to come back five after 2:00. You'll go into the jury  
5 room. When all of you are there, let Ms. Sanders know. She'll  
6 give you the original verdict sheet and the exhibits, and at  
7 that point you'll start your deliberations, okay. You're  
8 excused for a one hour lunch break. Thank you for your  
9 service.

10        (The jury left the courtroom at 1:05 p.m.)

11                **THE COURT:** Okay. Over the lunch break, Ms. Sanders  
12 will be getting the exhibits together, so I would ask you all  
13 to please be back about 10 minutes early so you can go over --  
14 look at those exhibits with her and be sure all of that is  
15 organized and arranged. We will resume in here at five after  
16 2:00 to send the original verdict sheet and the exhibits back,  
17 but I want you all back beforehand to go over the exhibits with  
18 her. All right.

19        I would ask also that you proofread the instructions that  
20 we sent you last night. I will delete that one sentence. If  
21 you saw any typos -- a couple places I said "his" when I was  
22 referring, I can't remember, to DISH or SSN. I'll try to  
23 change that to "its." I believe I changed it when I was  
24 instructing. That's the only thing that I saw. But if I  
25 missed a typo or anything, I'll be glad to hear from you all

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1 after lunch. I'm guessing from looking at them that they'll  
2 want the written instructions, okay.

3 Anything else we need to handle?

4 **MR. GLASSER:** Your Honor, just because I'm not sure if  
5 we'll be back together, can I be excused from court tomorrow?  
6 I have plenty of lawyers to leave.

7 **THE COURT:** As long as somebody is here to speak for  
8 the Plaintiff or the Defendant. You know, I would appreciate  
9 it if it was somebody who has been asking questions.

10 **MR. GLASSER:** Yeah, it will be John.

11 **THE COURT:** All right.

12 **MR. GLASSER:** Thank you.

13 **THE COURT:** And the same is true for any DISH lawyer  
14 who needs to leave or wants to wait elsewhere.

15 Anything else?

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

17 **THE COURT:** I just want to say to all the lawyers in  
18 the case I appreciate a well-tried case. I like trials. I  
19 like juries, and you all have done a really good job trying  
20 this case and giving the jury the evidence that they need, so I  
21 just want to thank you as well.

22 **MR. GLASSER:** Your Honor, I'd like to say too that our  
23 colleagues from DISH were great to work with in this case and I  
24 appreciate their professionalism. It's been really fun doing  
25 the case with them. It's rare these days.

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1           **THE COURT:** Yeah, you all have gotten along pretty  
2 well. It's been pretty impressive.

3           All right. We will be in recess until five minutes after  
4 2:00.

5           (A noon recess was taken from 1:07 p.m. until 2:05 p.m.;  
6 all parties present.)

7           **THE COURT:** It's 2:05. Ms. Sanders, were all the  
8 jurors back?

9           **THE CLERK:** He was going to check.

10          **THE COURT:** All right. And you have all the exhibits  
11 ready?

12          **THE CLERK:** Yes.

13          **THE COURT:** And the lawyers conversed with you about  
14 that?

15          **THE CLERK:** Yes, ma'am.

16          **THE COURT:** And here is the original verdict sheet.  
17 As soon as we confirm the jurors are back and ready, we will  
18 send that back in.

19          Over the lunch break I skimmed back through the  
20 instructions. I corrected "his" to "its." There was one  
21 place. Mr. McLean is going to proofread it one more time and  
22 then print out a copy for you. Did anybody see any typos that  
23 I needed to fix? I'm sort of anticipating they'll ask, so that  
24 way we'll have it and we can already have looked through it  
25 just to be sure it's the same as we've been working from all

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1 the way along.

2 **COURT SECURITY OFFICER:** One is still downstairs.

3 **THE COURT:** One is still downstairs. Okay. We'll  
4 just pause for a second.

5 **MR. GLASSER:** While we're on the record, can the  
6 record reflect we've returned the Court's adopter?

7 **THE COURT:** Somebody would have come after you. Yes.  
8 Off the record.

9 (Discussion off the record.)

10 **THE COURT:** Okay. The record will reflect then that  
11 all ten jurors are present, and I will instruct the clerk to  
12 hand in the original verdict sheet and all the exhibits, and we  
13 will be at ease. All right. Thank you.

14 (Ms. Sanders left the courtroom to handed the verdict sheet  
15 and exhibits to the jury and subsequently returned.)

16 **THE CLERK:** Judge, they are asking to use the flip  
17 chart.

18 **THE COURT:** Yeah, you can tear off the pages and take  
19 it to them.

20 Officer, would you just flip through and make sure there  
21 isn't something written on the other pages? I don't think  
22 there should be. Okay. It's good.

23 (Flip chart taken to the jurors.)

24 (Court was at ease awaiting the jury's verdict beginning at  
25 2:10 p.m.)

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1 (The Court returned to the bench at 2:45 p.m.; all parties  
2 present.)

3 **THE COURT:** All right. The jury sent in a note, which  
4 I believe the clerk has shown to counsel.

5 Can you hand it to me, Ms. Sanders, the note?

6 **THE CLERK:** Oh, I'm sorry. It's up here.

7 **THE COURT:** Oh, here it is. I'm sorry. It says:  
8 "Dear Judge Eagles, may we please have a hard copy of your  
9 instructions concerning agency? Thank you. Foreperson."

10 So I separated that out and printed it out. I would  
11 propose to give you all copies just for you to do a final  
12 proofread on it.

13 And in the meantime, if I can bring them back in and say,  
14 "Okay. I'm going to send that in to you. It will just take us  
15 a few minutes while we do a final proofread." Or if you -- if  
16 it's okay with you, Ms. Sanders can just go back there and tell  
17 them, "She's working on it. You'll have it shortly."

18 **MR. BICKS:** Yeah, I would tell them so they know.

19 **THE COURT:** Say again.

20 **MR. BICKS:** I would tell them.

21 **THE COURT:** Yes, that's -- is it --

22 **MR. GLASSER:** The Plaintiff is perfectly fine with  
23 Ms. Sanders going back and telling them. We do suggest, Your  
24 Honor, you just send the entire instructions back.

25 **THE COURT:** All right. Well, they just asked for

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1 agency.

2 Is it all right with the Defendant if Ms. Sanders tells  
3 them or do you want me to bring them in court?

4 **MR. BICKS:** No, that's fine if Ms. Sanders tells them.

5 **THE COURT:** Why don't you give them the agency  
6 instructions right now and we'll go -- we were working on  
7 getting the entire thing -- I was just having Mr. McLean do a  
8 final proofread.

9 You tell them.

10 So Ms. Sanders is going to tell them we're working on that  
11 and they'll get them in a little bit.

12 (Copies of agency instructions handed to counsel.)

13 (Ms. Sanders left the courtroom and subsequently returned  
14 courtroom.)

15 **THE COURT:** I'll let you all proofread that. When  
16 you're done, tell Ms. Sanders and I'll come back in here; and  
17 if there's anything that needs to be fixed, you can let me  
18 know. We're not talking about substance now. We're just  
19 making sure I don't have anything different from what we talked  
20 about earlier.

21 And in the meantime, I will have Mr. McLean continue to  
22 finish his proofreading of the entire document so that if they  
23 end up needing it they can ask for it. I'm not sure they'll  
24 need the rest of it. There was, relatively speaking, little  
25 time spent on the rest of the issues in closing so -- but, you

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1 know, they may want it. So if they do, certainly I'll give  
2 them to them.

3 All right. We'll be at ease. Just tell Marlene --  
4 Ms. Sanders when you're done proofreading.

5 (Court was at ease.)

6 (The Court returned to the bench at 2:54 p.m.; all parties  
7 present.)

8 **THE COURT:** Anything needed to be corrected on the  
9 draft I handed to you all?

10 **MR. BARRETT:** No, Your Honor.

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

12 **THE COURT:** All right. I'll hand one copy to the  
13 clerk marked Court Exhibit 3 just in case the jury writes on  
14 the one I hand in to them. So that will be Court Exhibit 3,  
15 which the clerk will keep for the record, and then I'll give  
16 her another copy which she can hand in to the jury.

17 Anything else we need to do?

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

19 **THE COURT:** No. All right. We'll be at ease.

20 (Document handed to the jury by Ms. Saunders.)

21 (Court was at ease at ease awaiting the jury's verdict at  
22 2:55 p.m.)

23 (The Court returned to the bench at 3:50 p.m.; all parties  
24 present.)

25 **THE COURT:** All right. The jury just says: May we

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1 have a break until 4 p.m.? So I'm just going to bring them in,  
2 remind them not to talk about the case during the break and  
3 give them the recess.

4 All right. Everybody ready?

5 **MR. BICKS:** Yes.

6 **THE COURT:** All right. Bring them in. Tell them, if  
7 you will, officer, leave everything in the jury room, all their  
8 papers.

9 **MR. GLASSER:** You ought to give them a little longer  
10 than eight minutes.

11 **THE COURT:** Yeah, I'll give them a couple more  
12 minutes, though they just sent the note in a minute ago. So  
13 they apparently don't want a very long break.

14 (The jury entered the courtroom.)

15 **THE COURT:** All right. Good afternoon. I have you  
16 all's note asking for a break. That's great. I'm glad to give  
17 you a recess.

18 I just brought you back into the courtroom to remind you  
19 that all of your discussions and deliberations are to take  
20 place in the jury room and only when all ten of you are  
21 present. So as you take your break, if you walk down the hall  
22 with one other juror, don't talk about the case; and, of  
23 course, you should continue to avoid any contact with the  
24 lawyers, parties or witnesses during the recess. Leave all of  
25 your material in the jury room.

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1       When you come back from your break, wait until all ten of  
2 you are present to resume your deliberations. I'm not going to  
3 bring you back in the courtroom before you resume.

4       And then I'll check -- if you all have not reached a  
5 verdict or told me otherwise about scheduling -- you know, at  
6 this point I'm kind of with you all on the schedule. I'll  
7 check back in with you a little bit after five o'clock to see  
8 what you want to do about scheduling.

9       All right. You all want a 10-minute recess?

10       **FOREPERSON OF THE JURY:** Yes.

11       **THE COURT:** Ten-minute recess. The jurors are  
12 excused.

13       If everyone else will remain seated.

14       (The jury left for a recess at 3:54 p.m.)

15       **THE COURT:** All right. If I could just ask you all --  
16 you know, here we are at the end. We don't want any problems  
17 during the recess. If you all just stay out of the hall.  
18 Either be in your space or stay in the courtroom so that we  
19 just don't run any risk of any problems.

20       Anything else we need to do?

21       **MR. GLASSER:** No, ma'am.

22       **THE COURT:** The -- the clerk will just check in with  
23 the jury in about 10 minutes and as soon as she -- she'll  
24 confirm they're all there. She'll just note on the record  
25 they've resumed deliberations without us coming back into

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1 session, if that's all right with everybody.

2 **MR. GLASSER:** That's fine with the Plaintiffs.

3 **MR. BICKS:** Yes.

4 **THE COURT:** All right. That's how we'll do it then.

5 And you all are at complete ease for 10 minutes and then I need  
6 you to be available should the jury need us.

7 We'll take a 10-minute recess.

8 (An afternoon recess was taken from 3:55 p.m. until  
9 4:05 p.m.)

10 (Court was at ease awaiting the jury's verdict.)

11 (The Court returned to the bench at 5:05 p.m.; all parties  
12 present.)

13 **THE COURT:** Okay. So it's 10 after 5:00. I can do --  
14 I can inquire of the jury a couple of different ways. I can  
15 bring them in and say, "Do you all want to keep going for a  
16 while or you want to stop or what do you want to do?" I can  
17 ask Ms. Sanders to stick her head in and say, you know, "You  
18 all want to keep going for a little while?"

19 Anybody have a preference?

20 **MR. BARRETT:** I think that's fine, Your Honor, for  
21 Ms. Sanders to check on them.

22 **THE COURT:** Is that all right?

23 **MR. BICKS:** Yes.

24 **THE COURT:** I mean, if they start to have a  
25 conversation with you, Ms. Sanders, we'll bring them in, but if

1 they just say -- if they just give you an answer, you know,  
2 that's fine. All right. We'll just sit here while you go  
3 inquire.

4 (Ms. Sanders left the courtroom.)

5 **THE COURT:** We should be able to hear them maybe if  
6 she leaves the door open, but she's shutting it so --

7 (Pause in the proceedings.)

8 (Ms. Sanders returned to the courtroom.)

9 (Discussion between the Court and Ms. Sanders.)

10 **THE COURT:** The jury apparently tells Ms. Sanders they  
11 would like 30 more minutes. So I'm -- well, I think we're all  
12 prepared to stay for 30 more minutes. So unless anybody has  
13 anything else, we'll be at ease until about 5:40. At which  
14 point I'll check in with you all, unless they've reached a  
15 verdict by then.

16 All right. We'll be at ease.

17 (Court was at ease awaiting the jury's verdict.)

18 (The Court returned to the bench at 5:28 p.m.; all parties  
19 present.)

20 **THE COURT:** All right. The jury has sent in this  
21 note: "Dear Judge, we would like a break for the evening. We  
22 would like your full directions to us. Can we start at 9 a.m.  
23 tomorrow?"

24 So I will take this to mean they want my instructions in  
25 writing, all of the written instructions. I'll confirm that

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1 with them when I bring them in. I have no problem starting at  
2 9:00.

3 Is that okay with everybody? Anybody have any problems?  
4 No.

5 All right. So I will propose to bring them in, confirm  
6 that I understand what they're saying, that they want the  
7 instructions in writing.

8 Did anybody have any corrections to the draft I gave you  
9 all earlier?

10 **MR. GLASSER:** No, ma'am.

11 **THE COURT:** No. No. So I'll just print out a copy  
12 for them to have in the morning and I'll let them go until nine  
13 o'clock.

14 Okay. You can bring the jury in. Tell them to leave  
15 everything in the jury room.

16 I'm just going to stand up for no -- no meaningful reason,  
17 other than I'm a little tired, as I'm sure you all are.

18 (The jury entered the courtroom at 5:30 p.m.)

19 **THE COURT:** Like I'm sure you all are, I'm a little  
20 tired of sitting, so I'm just standing.

21 I have your note asking to stop for the day and to come  
22 back tomorrow morning at 9:00. That's great. We'll be glad to  
23 start at nine o'clock. I'll ask you to leave all of your  
24 notes, all of the exhibits -- do you take the exhibits,  
25 Ms. Sanders, over the evening?

1           **THE CLERK:** No, I leave them.

2           **THE COURT:** Leave everything in there, leave the  
3 verdict sheet in there, leave all your copies of the verdict  
4 sheet, just leave everything in there over the evening recess;  
5 and we'll start back tomorrow morning at 9:00.

6           When you come back at 9:00, I won't bring you back into the  
7 courtroom. You'll just gather in the jury room. And when all  
8 ten of you are there, let Ms. Sanders know, "We're all here and  
9 we're starting," and you all can proceed.

10          Over the evening recess, do not talk about the case among  
11 yourselves in small groups as you walk to and from your cars.  
12 Don't have any contact with the lawyers, parties or witnesses,  
13 no independent investigation, no communicating about the case  
14 with anyone and no blogging, tweeting, et cetera.

15          I also see that you want -- you say you would like my full  
16 directions, so I take it you mean you want a complete set of  
17 all my instructions on the case, right? Everybody is nodding  
18 yes. I'll have that ready for you in the morning at nine  
19 o'clock; and when you tell Ms. Sanders that all ten of you are  
20 here, she'll give you a copy of it. I hope that will assist  
21 you in your deliberations.

22          Everybody good? All right. Thank you for your service.  
23 You're excused. We'll see you tomorrow morning.

24          (The jury left the courtroom.)

25           **THE COURT:** When I asked if everybody was good, they

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1 all nodded and smiled, which I took to mean I had responded to  
2 their inquiries and they didn't have anything else they needed  
3 from me at the moment.

4 How about you all? Nothing? Everybody is good? Okay.  
5 You are excused then and I'll just ask at least one lawyer for  
6 each side to be back at nine o'clock in the morning and we will  
7 await the jury's verdict so --

8 **MR. BICKS:** Your Honor, can I just -- can I see the  
9 note?

10 **THE COURT:** Sure. It actually looks like one of the  
11 other jurors wrote it, not the foreperson. Mr. Richter.

12 (Note handed to Mr. Bicks by Ms. Sanders.)

13 **THE COURT:** Okay. You all are welcome to see the  
14 note. I'd read it to you.

15 **MR. GLASSER:** That's fine, Judge. We're good on the  
16 note.

17 **MR. BICKS:** Great. Thank you.

18 **THE COURT:** Anything else before we break for the  
19 evening?

20 **MR. BICKS:** No.

21 **THE COURT:** I hope you all have a relaxing evening.

22 And, Mr. Glasser, you're leaving?

23 **MR. GLASSER:** Yes, ma'am. I really appreciate your  
24 hospitality.

25 **THE COURT:** Yes. Nice working with you.

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1 Court is adjourned until 9:30. Excuse me. Nine o'clock in  
2 the morning.

3 (Proceedings concluded at 5:33 p.m.)  
4  
5

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

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

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

15  
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14 Lori Russell, RMR, CRR  
15 Official Court Reporter

Date: 1/25/17

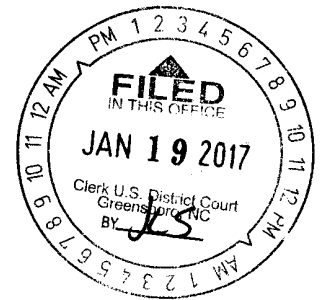
JA005928  
004796

# EXHIBIT 88

# EXHIBIT 88

JA005929  
004797

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



THOMAS H. KRAKAUER, )  
)  
Plaintiff, )  
)  
v. )  
)  
DISH NETWORK L.L.C., )  
)  
Defendant. )

1:14-CV-333

**VERDICT SHEET**

1. Was SSN acting as Dish's agent when it made the telephone calls at issue from May 11, 2010, through August 1, 2011?

☒ YES

☐ NO

*If Yes, continue to Question 2. If No, skip all other questions and sign the verdict sheet.*

2. Did SSN make and class members receive at least two telephone solicitations to a residential number in any 12-month period by or on behalf of Dish, when their telephone numbers were listed on the National Do Not Call Registry?

☒ YES as to Dr. Krakauer and all class members

*If Yes, continue to Question 3 and skip the following questions.*

☐ YES as to Dr. Krakauer and all class members except the following, whose numbers plaintiff has not proven were residential:

☐ Telephone numbers that LexisNexis always identifies as "unknown"

☐ Telephone numbers that LexisNexis identifies as residential before May 11, 2010 or after August 1, 2011

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- ☐ Telephone numbers that LexisNexis identifies as "unknown" in the May 2010 to August 2011 time period that the calls were made but identifies differently at other times
- ☐ Telephone numbers that LexisNexis identifies as both residential and "unknown"
- ☐ Telephone numbers that LexisNexis always identifies as residential, including in the May 2010 to August 2011 time period that the calls were made
- ☐ Telephone numbers that LexisNexis identifies as cellular and possibly cellular
- ☐ NO

*If you answer Yes in whole or in part, also answer Question 3. If you answer No to Question 2, skip Question 3 and sign the verdict sheet.*

3. What amount, up to \$500, do you award for each call made in violation of the TCPA?

\$ 400.00

Robert Jackson  
Foreperson

01/19/2017  
Date

# EXHIBIT 89

# EXHIBIT 89

JA005932  
004800

TX 102-005194

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

THOMAS KRAKAUER,

Plaintiff,

v.

DISH NETWORK LLC,

Defendant.

Case No. 1:14-CV-00333-CCE-JEP

**Oral Argument Requested**

**BRIEF IN SUPPORT OF DEFENDANT DISH NETWORK L.L.C.'S  
MOTION FOR A NEW TRIAL**

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004801

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DISH Network L.L.C. (“DISH”) submits this motion contemporaneously with its Rule 50(b) renewed motion for judgment in its favor as a matter of law and respectfully makes an alternative request for a new trial pursuant to Fed. R. Civ. P. 59.

**I. THE FOURTH CIRCUIT STANDARD FOR A NEW TRIAL**

Following a jury trial, the Court may, on motion, grant a new trial “on all or some of the issues . . . for any reason for which a new trial has heretofore been granted in an action at law in federal court.” Fed. R. Civ. P. 59(a)(1)(A). A new trial should be granted if the verdict (1) is against the clear weight of the evidence, (2) is based on evidence which is false, or (3) will result in a miscarriage of justice, even if there is substantial evidence that would prevent a directed verdict. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998). The first two prongs require the Court to make factual determinations, while the third prong is more “policy-related,” so the “judge’s unique vantage point and day-to-day experience with such matters lend expertise and consistency.” *Atlas Food Sys. & Servs., Inc. v. Crane Nat. Vendors, Inc.*, 99 F.3d 587, 594 (4th Cir. 1996). In assessing a motion for new trial, the Court should exercise its “own independent judgment after a weighing of all the evidence and any other pertinent factors in determining whether the verdict was against the clear weight of the evidence or would result in a miscarriage of justice.” *Williams v. Nichols*, 266 F.2d 389, 393 (4th Cir. 1959).

**II. A NEW TRIAL IS WARRANTED BECAUSE THE VERDICT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE**

The Rule 59 standard for a new trial is different from that of Rule 50, and affords



the Court “wider” discretion to evaluate the weight of the evidence. *McCracken v. Richmond, F. & P. R. Co.*, 240 F.2d 484, 488 (4th Cir. 1957) (setting aside a directed verdict and remanding for trial). Under the Rule 50 standard, for all of the reasons stated in DISH’s contemporaneously filed 50(b) motion, which DISH incorporates here by reference, no reasonable jury could have found a legally sufficient evidentiary basis for the verdict in this case. For those same reasons, under the less stringent Rule 59 standard, the verdict is against the clear weight of the evidence, warranting a new trial.

### **III. A NEW TRIAL SHOULD BE GRANTED BASED ON NUMEROUS PREJUDICIAL ERRORS AT TRIAL**

Substantial errors in the admission or rejection of evidence or instructions to the jury, and misconduct by counsel during closing arguments, are valid grounds for a new trial. *See, e.g., Ray v. Allergan, Inc.*, 863 F. Supp. 2d 552, 567 (E.D. Va. 2012) (new trial “only remedy” where prohibited arguments by counsel, and jury instructions on core issue, caused prejudice). Ultimately, a trial court “should exercise its discretion to grant a new trial ‘whenever, in its judgment, this action is required in order to prevent injustice.’” *Whalen v. Roanoke Cty. Bd. of Sup’rs*, 769 F.2d 221, 226 (4th Cir. 1985), *on reh’g*, 797 F.2d 170 (4th Cir. 1986) (quoting 11 Wright & Miller, Federal Practice and Procedure § 2805 at 38 (1973)). A new trial is necessary to prevent injustice in this case.

#### **A. DISH Respectfully Submits That the Court Made Erroneous and Prejudicial Evidentiary Rulings**

##### **1. Erroneous Admission of Prejudicial Prior Bad Act Evidence**

Before trial, the Court denied DISH’s motion to preclude evidence regarding SSN’s alleged prerecorded telemarketing violations from 2004 to 2005. The Court ruled

that the evidence was “relevant to the agency issue to the extent the violations were known or should have been known by Dish.” Doc. 222 at 4. First, DISH’s knowledge of alleged prerecorded calls in 2004 to 2005 is not relevant to whether SSN was DISH’s agent under an actual authority theory. Second, DISH’s knowledge of alleged violations in 2004 to 2005 is not relevant to whether SSN acted within the scope of any authority from DISH five to seven years later when SSN made the calls at issue. *See, e.g.*, Doc. 293 at 4 (asking whether SSN was “acting as Dish’s agent *when it made the telephone calls at issue from May 11, 2010 through August 1, 2011*”) (emphasis added). Plaintiff presented *zero* documents from the class period showing DISH’s knowledge of any illegal telemarketing behavior by SSN, and only *two* consumer do-not-call complaints in the years before the class period, both of which showed that DISH investigated and objected to any violation of the telemarketing laws. DX 8; PX 52.

Plaintiff made the 2004-2005 time period the centerpiece of his case. Plaintiff’s counsel read nearly every line contained within various 2004-2005 emails during his examination of Amir Ahmed, which spanned approximately 40 pages of transcript, prompting the Court to direct Plaintiff’s counsel to “get through this and get to a more relevant time frame.” Jan. 11, 2017 Tr. at 149:8-166:14; 170:18-191:9; 181:1-4. At the conclusion of Mr. Ahmed’s examination, the Court stated that “Defendant has some very good points here about Rule 403” and referred to the 2004-2005 time period as “not the crux of the case, not the most relevant time frame.” *Id.* at 194:4-14. Plaintiff nonetheless doubled down at closing, returning time and again to 2004-2005. He implored the jury to punish DISH for SSN’s conduct in 2004-2005, as opposed to the conduct at issue in the

case, telling the jury that “[a]ctions speak louder than words. These guys get in all this trouble in 2004, in 2005. . . . What are you telling companies if you let DISH skate with all this eyes-open knowledge . . . ?”<sup>1</sup> Jan. 18, 2017 Tr. at 26:4-16.

Plaintiff’s exploitation of the 2004-2005 evidence at trial makes clear that DISH’s motion *in limine* should have been granted. The 2004-2005 SSN conduct that Plaintiff harped on before the jury is improper character evidence, unduly prejudicial, and only marginally relevant, at best.<sup>2</sup> Under the applicable test for admissibility of prior acts, the prior act must be “similar” in “time, pattern, or state of mind,” and its probative value must not be substantially outweighed by confusion or unfair prejudice. *U.S. v. McBride*, 676 F.3d 385, 396-97 (4th Cir. 2012). The alleged 2004-2005 violations that Plaintiff emphasized are not sufficiently similar to the conduct at issue and, in any event, are too temporally remote to be relevant in this case. The few complaints that DISH received relating to SSN’s 2004-2005 conduct—which DISH raised with SSN and objected to—related to prerecorded messages, an act that differs in both motivation and methodology from failing to scrub dialing lists against the Registry. *See U.S. ex rel. Davis v. U.S.*

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<sup>1</sup> This statement is merely one example of many closing argument statements in which Plaintiff’s counsel implored the jury to hold DISH liable based on events from 2004-2005. *See also* Jan. 18, 2017 Tr. at 22:10-17; 24:19-21; 25:13-16; 26:6-10; 28:11-19.

<sup>2</sup> This conduct encompasses evidence relating to 2005 settlements obtained by North Carolina and Florida against Vitana Corporation, a d/b/a of SSN. DISH moved to exclude that evidence separately, which the Court also erroneously denied. DISH also timely objected to the introduction of each exhibit at trial. *See* PX 1160 (Jan. 11, 2017 Tr. at 150:7-16); PX 656, PX 194, PX 504 (Jan. 11, 2017 Tr. at 154:17-155:22; 156:3-13; 183:12-13); PX 120 (Jan. 11, 2017 Tr. at 181:10-16); PX 503 (Jan. 12, 2017 Tr. at 117:13-23); PX 186 (Jan. 11, 2017 Tr. at 164:4-6); PX 191 (Jan. 12, 2017 Tr. at 63:24-64:3).

*Training Ctr. Inc.*, 498 F. App'x 308, 318 (4th Cir. 2012) (prior act of paying alleged bribes to Afghani officials not relevant to claims of overbilling the government).

As the Court recognized, the more time devoted to marginally relevant prejudicial evidence, the greater the prejudice. Jan. 11, 2017 Tr. at 86:16-17 (“Defendant’s concerns are legitimate if you spend too much time on it.”). The extensiveness of Plaintiff’s presentation and argument magnified the prejudice, overwhelming any possible relevance. In similar circumstances, the Fourth Circuit vacated a judgment against the defendant where the plaintiffs “relied heavily on [prior bad acts evidence] in closing argument, in which they alleged that [defendant] had a pattern and practice of dishonesty that had to be stopped.”<sup>3</sup> *Fisher v. Am. Gen. Fin. Co.*, 52 F. App'x 601, 606–07 (4th Cir. 2002); *see also Sparks v. Gilley Trucking Co.*, 992 F.2d 50, 51–53 (4th Cir. 1993) (reversing for new trial because “jury heard detailed evidence about several prior [acts] . . . , and this evidence thus became an important aspect of [defendant’s] presentation to the jury.”). And as in *Fisher*, the size of the verdict here demonstrates that DISH was prejudiced by the evidence and that the error was not harmless. The \$400 per call awarded by the jury shows that the jury improperly did exactly what Plaintiff’s counsel asked it to do—assessing DISH with a hefty verdict based on the 2004-2005 events.

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<sup>3</sup> The Court’s decision to preclude DISH from quoting the trial transcript during its closing argument further compounded problems created by the erroneous evidentiary rulings. During his closing, Plaintiff’s counsel advanced prejudicial arguments unhinged from the evidence, and to its detriment, DISH was unable to correct and contextualize these arguments with specific references to the trial transcript. *See, e.g., U.S. v. Kuta*, 518 F.2d 947, 954 (7th Cir. 1975) (approving of counsel’s use of transcript quotes during closing argument because it promoted accuracy and did not place undue emphasis of particular evidence).

## 2. Plaintiff's Violation of Ground Rules on Other Retailers and Government Enforcement Actions

At trial, Plaintiff continually resorted to improper references to other retailers and government enforcement actions, which the Court recognized would unfairly prejudice DISH.<sup>4</sup>

Plaintiff's counsel painted an ominous picture of government enforcement actions against DISH because of alleged serious, widespread problems with retailers, the only purpose of which was to inflame the jury over conduct that had nothing to do with SSN's 2010-2011 phone calls. Plaintiff specifically asked Dr. Krakauer whether the North Carolina Attorney General's office was present at his 2011 deposition, Jan. 11, 2017 Tr. at 17:7-8, solely to improperly signal to the jury that the deposition was taken in a government enforcement action. Plaintiff also improperly used the AVC as purported

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<sup>4</sup> DISH moved *in limine* to exclude any reference to retailers other than SSN at trial, arguing that it was irrelevant and prejudicial. See Doc. 185. Plaintiff *agreed* not to offer evidence of other retailers' telemarketing violations during his case-in-chief, mooting DISH's motion. Doc. 204; June 3, 2016 Tr. at 103:23-104:8; Doc. 222 at 4. DISH also moved *in limine* to exclude references to *US v. DISH* and other legal proceedings or settlements. See Doc. 188. Both the Court and Plaintiff agreed that it would be unfairly prejudicial to say that DISH has been sued by the federal government in another matter, and accordingly, the Court limited the use of testimony in *US v. DISH* to cross examination. Doc. 222 at 5. The Court also limited references to that action as "a case involving Dish pending in Illinois," and precluded references to DISH being "sued by the federal government." *Id.* Finally, before trial, DISH moved to exclude the Assurance of Voluntary Compliance ("AVC") (PX 55) on the basis that it was prejudicial to allow Plaintiff to use a settlement document from an enforcement action by attorneys general. Jan. 6, 2017 Hearing Tr. at 10:2-15. The Court ruled that the AVC could only be offered on the issue of whether DISH had control over SSN's telemarketing, and instructed Plaintiff not to "go beyond that and say, you know, all these attorney generals said DISH did something wrong and in response DISH compromised." *Id.* at 22:10-20; *see also* Jan. 11, 2017 Tr. at 72:9-25.

evidence of widespread telemarketing problems and government enforcement actions. The Court allowed Plaintiff to state in questioning, over DISH's objection, that the "reason [DISH] must have had to have a settlement agreement with 46 states' attorneys general is because there were widespread problems with telemarketing, correct?" *Id.* at 80:10-16. After planting that seed, Plaintiff's counsel reinforced this prejudicial theme in closing, stating "after the North Carolina AG puts an injunction on him . . . after Florida gives the same sanction . . . then the AGs obviously did know because in 2009 these guys signed up with 46 of them to start policing this stuff. Obviously, the AGs found out about it." Jan. 18, 2017 Tr. at 23:12-20.

Later in his closing, Plaintiff's counsel tied the AVC and government enforcement actions to supposed "widespread issues." Counsel further argued that DISH should have presented evidence on disciplining retailers other than SSN, and that the absence of this evidence warranted a stiff verdict against DISH: "[t]here's no evidence in this case that any single OE retailer was actually disciplined. Where are the discipline letters? Where is the *choking back of any one of those 45 national sales partners?* Where is that evidence?" Jan. 18, 2017 Tr. at 93:24-94:2 (emphasis added). These repeated improper references to other retailers and government enforcement actions violated the ground rules for trial and significantly prejudiced DISH.

### **3. Erroneous Admission of Prejudicial Credit Check Evidence**

During trial, Plaintiff's counsel repeatedly referred to evidence that SSN had run a credit check on Dr. Krakauer without his knowledge. PX 282. The only purpose of this evidence was to unfairly impugn DISH and SSN. At a pretrial conference, DISH moved

to exclude any reference to the credit check under Rule 403, as it had no relevance to the claims asserted in this case and was highly prejudicial. Dec. 12, 2016 Hearing Tr. at 59:18-22. Plaintiff claimed that it was relevant because it showed that DISH “is covering up misdeeds.” *Id.* at 60:9-21. The Court agreed with DISH that this evidence could be prejudicial, but nonetheless allowed Plaintiff to use it only to show Dr. Krakauer’s motivation in bringing this case. *Id.* at 61:24-62:10 (“I have some 403 concerns about that one.”). Recognizing the potential for prejudice, however, the Court instructed Plaintiff to notify it *outside the jury’s presence prior* to asking any questions on the credit check. *Id.* at 61:9-13. Plaintiff’s counsel disregarded this instruction at trial and displayed PX 282 to the jury before it was in evidence and before approaching the bench to discuss his intended line of questioning. Jan. 11, 2017 Tr. at 18:8-20:14.

Then, instead of using the credit check as motivation evidence (*see* Jan. 11, 2017 Tr. at 22:9-27:8), Plaintiff’s counsel repeatedly and improperly used it for the precise purpose that the Court had precluded under Rule 403—to claim that DISH “covered up” SSN’s actions. Jan. 12, 2017 Tr. at 32:25-33:3 (“So then the decision . . . not to tell Dr. Krakauer about this in a way protected the national sales partner from being found out, right?”). During closing argument, Plaintiff’s counsel made improper use of the credit check again, asserting in mock outrage that “[DISH was] covering up the improper act of their agent. When your agent does something wrong and you know it, if you're not standing behind it, why are you covering it up? Why are you covering it up? So that action of covering up speaks louder than words. Actions speak louder than words. They covered it up.” Jan. 18, 2017 Tr. at 19:6-11. The Court’s erroneous admission of the

credit check evidence was compounded by Plaintiff counsel's blatant disregard of the Court's instructions regarding the proper procedure for addressing and use of the evidence, which substantially harmed DISH's rights at trial.

#### **4. Improper Preclusion of Fact Witnesses**

The Court's ruling precluding Kenneth Sponsler of PossibleNOW and former DISH employee Holly Taber McRae from testifying as fact witnesses improperly deprived DISH of critical evidence. The Court found DISH's pretrial disclosures inadequate for these witnesses, but Plaintiff had not even sought to preclude Mr. Sponsler from testifying as a fact witness and was well aware of Ms. McRae at the outset of the case. There was no risk of surprise or harm to Plaintiff from the testimony, and it should have been allowed. *See Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396–97 (4th Cir. 2014).

DISH disclosed that a PossibleNOW representative would have "information regarding DISH's and/or SSN's actions regarding, relating to, or arising out of their do-not-call compliance efforts." Doc. 205-2. The omission of Mr. Sponsler's name as that PossibleNOW representative was harmless. There was no surprise to Plaintiff. Plaintiff indisputably expected that DISH would call Mr. Sponsler at trial, as he specifically moved to exclude any *expert testimony* from him. Doc. 183 at 15-16. But Plaintiff never sought to preclude Mr. Sponsler from testifying as a fact witness. *Id.* In response to Plaintiff's motion, DISH agreed that it only would offer fact testimony from Mr. Sponsler. Doc. 194 at 30. The Court improperly acted *sua sponte* to grant greater relief than Plaintiff sought on his motion and wholly precluded Mr. Sponsler from testifying at



trial.

In addition, Mr. Sponsler's testimony was substantially justified, as it was very important to DISH's case. *See S. Mgmt. Corp. Ret. Trust v. Jewell*, 533 F. App'x 228, 230 (4th Cir. 2013). DISH was entitled to present evidence from a PossibleNOW representative concerning the specific scrubbing and other compliance services and training that SSN utilized. Plaintiff's counsel capitalized on this error at trial to exacerbate the prejudice. During closing arguments, he asked the jury: "Why didn't a PossibleNOW witness come in here and spread scrubbing records all over the courtroom floor if these guys were using PossibleNOW? This is one record from 2008. That's the best DISH can do on their scrubbing with PossibleNOW." Jan. 18, 2017 Tr. at 28:3-7.

Similarly, there was no surprise to Plaintiff with respect to Ms. McRae. Based on Ms. Tehranchi's deposition testimony, as well as DISH's document production, Plaintiff was well-aware of Ms. McRae's critical role in the relationship between DISH and SSN. Dep. Tr. at 43:15-47:25; 50:22-56:1; 60:15-61:24; 68:2-7; 106:5-107:2; Doc. 212 at 2. Plaintiff himself attempted to depose Ms. McRae around March 2015 but elected not to go forward with the deposition. Doc. 212 at 2 & Doc. 212-1. DISH offered to make Ms. McRae available for a deposition months before the start of trial, which cured any potential prejudice. With the preclusion of Ms. McRae, DISH was deprived of an opportunity to rebut Ms. Tehranchi's erroneous statements that DISH employees visited SSN's offices daily, had access to the SSN call center and reviewed marketing scripts (as opposed to disclosures). Tehranchi Dep. Tr. at 45:1-15, 47:21-25, 68:2-9.

**B. Refusal to Include a Scope of Authority Question on the Verdict Sheet**

The question of whether an agent exceeded the scope of its authority is not subsumed within the threshold question of whether an agency relationship exists; it is an entirely separate inquiry that becomes relevant only after a threshold agency determination is made. Doc. 253 at 7. At trial, DISH submitted extensive evidence establishing that SSN acted outside the scope of any authority from DISH, and the Court acknowledged in ruling on DISH's Rule 50(a) motion that the evidence on whether SSN acted within the scope of authority was close. Jan. 13, 2017 Trial Tr. at 149:22-24. Despite the abundant evidence that SSN acted outside the scope of any authority, the Court declined to include this question on the verdict sheet.

A verdict sheet must not "mislead or confuse" the jury. *Scott v. Isbrandtsen Co.*, 327 F.2d 113, 119 (4th Cir. 1964); *Fox v. Dynamark Sec. Ctrs., Inc.*, 885 F.2d 864 (Table), at \*6 (4th Cir. 1989) (ordering retrial where "the jury was both confused and misinformed to the prejudice of the defendants" based on jury instructions and verdict form used). Given the substantial trial evidence that SSN acted outside the scope of its authority, and for the reasons articulated in DISH's Rule 50(b) motion, the jury had to have been confused and misinformed to reach the verdict it did at trial. The "scope of authority" issue was buried within lengthy agency jury instructions, as well as within a generalized agency question on the verdict sheet. The omission of a separate question on the verdict sheet on this key issue misled and confused the jury on the scope of authority issue, to DISH's prejudice. The prejudice of this omission was further exacerbated by the other erroneous rulings that permitted Plaintiff to present improper and misleading

arguments that obscured the clear deficiency of proof that SSN acted within the scope of any purported agency.

**C. DISH Respectfully Submits That the Court Made Erroneous and Prejudicial Rulings on Admission of Expert Testimony**

**1. Erroneous and Prejudicial Rulings on Ms. Verkhovskaya and Dr. Aron's Testimony**

A motion for a new trial may be granted on the grounds that expert testimony was improperly admitted. *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1186 (4th Cir. 1990). Plaintiff's expert Anya Verkhovskaya should not have been permitted to (i) offer new opinions that were not disclosed in her expert report or deposition testimony, (ii) offer new bases for her opinions that had not previously been disclosed, and (iii) "correct" purportedly "mistaken" deposition testimony for the first time at trial.

Rule 26(a)(2)(B)(i) requires that expert reports contain "*a complete statement of all opinions the witness will express and the basis and reasons for them.*" (emphasis added). Rules 26(a)(2)(E) and 26(e)(2) further provide that a "duty to supplement extends both to information included in the report and to information given during the expert's deposition. *Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.*" (emphasis added). Rule 37(c)(1) provides for preclusion of expert testimony that is not properly disclosed. "If a party fails to provide information . . . as required by Rule 26(a) or (e), the party is not allowed to use that information . . . at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595–96 (4th Cir. 2003).

The test for whether undisclosed evidence is substantially justified or harmless is: (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the non-disclosing party's explanation for its failure to disclose the evidence. *S. States Rack & Fixture, Inc.*, 318 F.3d at 596–97. Because the non-disclosure was neither substantially justified nor harmless, the testimony should have been precluded and stricken from the record.

Ms. Verkhovskaya provided an expert report dated January 30, 2015, which was amended and corrected on March 5, 2015. In that report, Ms. Verkhovskaya expressed the ultimate opinion that her “analysis . . . reveals that 20,450 unique telephone numbers were on the NDNCR *as of April 1, 2010*, at least 30 days prior to any Connected Calls, received more than one Connected Call in any 12-month period, [and] were *not identified as business telephone numbers . . .*” Ex. A (Expert Report of Anya Verkhovskaya) at 10-11 (emphasis added). As the basis for her opinions, Ms. Verkhovskaya disclosed that she checked whether telephone numbers “were listed on the NDNCR as of April 1, 2010” with vendor Nexxa (Ex. A at 9); and after that removed telephone numbers assigned the disposition “Business” within the SSN call records or identified as business by vendor LexisNexis (Ex. A at 10). At deposition, Ms. Verkhovskaya testified that she only considered whether LexisNexis identified a telephone number as a business number, and did not consider other fields in the data that she received from LexisNexis, including (i) a residential column, (ii) a government column, and (iii) columns containing “begin” and

“end” date information. Ex. B (Verkhovskaya Deposition Excerpts) (Dep. Tr. at 110:7-11; 110:17-20; 116:20-117:16).

Ms. Verkhovskaya went far beyond those pretrial disclosures at trial. *First*, she improperly testified that she checked telephone numbers against the Registry *not only* “as of April 1, 2010” *but also through the end of class period*, because she claimed that Nexxa would have informed her by separate email if a telephone number had been removed from the Registry. Jan. 13, 2017 Tr. at 31:7-33:21. *Second*, she newly opined, *to a reasonable degree of certainty*, that all 20,450 telephone numbers were *affirmatively residential* at the time of the telephone calls (*id.* at 58:15-59:1), not simply “not identified as business numbers.”<sup>5</sup> *Third*, she newly opined that LexisNexis has a comprehensive database of business numbers, rendering residential any number that it does not identify as business. Jan. 12, 2017 Tr. at 182:2-10. *Fourth*, she opined that all telephone numbers in the various categories set forth in the parties’ trial stipulation are residential. Jan. 13, 2017 Tr. at 10:22-18:25.<sup>6</sup>

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<sup>5</sup> This ultimate opinion that Ms. Verkhovskaya offered at trial is not contained anywhere in Ms. Verkhovskaya’s report or deposition testimony. Ms. Verkhovskaya conceded that the residential opinion was not explicit but “assumed.” Jan. 13, 2017 Tr. at 59:10-16. Plaintiff’s counsel argued that the opinion appeared at page 1 of the report, in a description of the nature of Plaintiff’s Count I allegations. But, Ms. Verkhovskaya did not herself recognize that paragraph as containing such an opinion, after spending approximately one half hour reviewing her own report to look for it. *Id.* at 66:18-67:10.

<sup>6</sup> In reaching that residential opinion, she asserted that she understood and affirmatively considered columns in the LexisNexis data that she had testified at deposition she did not understand or consider. Jan. 13, 2017 Tr. at 49:1-16, 93:4-94:16, 96:22-98:20. Ms. Verkhovskaya conceded that this trial testimony contradicted her deposition testimony. Notwithstanding Rule 26(e)’s requirements regarding any changes to the expert’s disclosures, Ms. Verkhovskaya admitted that she changed her deposition testimony for

The jury relied on these new portions of Ms. Verkhovskaya's testimony to find that *all calls* at issue were made to residential telephone numbers on the Registry.

This previously undisclosed testimony surprised and prejudiced DISH, and DISH had no opportunity to cure the surprise. The "rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts." *S. States Rack & Fixture, Inc.*, 318 F.3d at 598; *see also BorgWarner, Inc. v. Honeywell Int'l, Inc.*, 750 F. Supp. 2d 596, 605-606 (W.D.N.C. 2010). Merely being able to cross-examine an expert on new opinions is not the ability to cure. *S. States Rack & Fixture, Inc.*, 318 F.3d at 598.

DISH sought to rebut Ms. Verkhovskaya's new testimony with testimony from its own expert, but the Court precluded it. In contrast to the broad latitude allowed to Ms. Verkhovskaya, the Court required DISH's counsel to provide page and paragraph cites from Dr. Debra Aron's report for every bit of testimony that Dr. Aron offered. *See, e.g.*, Jan. 17, 2017 Tr. at 8:8-19, 10:11-17, 14:3-17, 18:4-18, 37:5-16.

Plaintiff offered no justification for his failure to disclose, and there is none. His TCPA claim always required proof that calls were made to residential numbers on the Registry for at least 30 days at the time of the call. Yet, his expert's report neither opined that the telephone numbers were residential, nor that they were on the Registry, at the time they were called. Ex. A. And, the report did not disclose any basis to opine that telephone numbers not identified as businesses by SSN or LexisNexis could or should

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the first time at trial, without any prior steps to make or disclose corrections. *See* Jan. 13, 2017 Tr. at 98:13-20 ("I'm doing it now").

necessarily be considered residential. Ex. A. That foundation for her opinion—that she considered the LexisNexis business identifications to be dispositive—was material to the opinions she offered at trial and should have been explicitly set forth in the report under Rule 26(a). Jan. 12, 2017 Tr. at 182:2-10.

Plaintiff also knew, from DISH’s pretrial disclosures (Doc. 165-5) (which contained summary exhibits based on the LexisNexis data that the Court precluded DISH from using at trial) as well as from the parties’ stipulation on categories of telephone numbers in the LexisNexis data (Doc. 277), that DISH planned to cross-examine Ms. Verkhovskaya regarding LexisNexis information that she had said was not considered. Over DISH’s objection, the Court allowed Plaintiff to preemptively address DISH’s potential cross-examination, and provide direct examination opinion testimony that had not previously been disclosed. Jan. 13, 2017 Tr. at 10:22-18:25. In the course of that direct testimony, Ms. Verkhovskaya contradicted her deposition testimony, and claimed specifically to have used LexisNexis information previously “not used” to conclude that telephone numbers contained in each and every distinct stipulation category were more likely than not residential.<sup>7</sup> Jan. 13 2017 Tr. at 11:1-18:25.

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<sup>7</sup> At deposition, Ms. Verkhovskaya testified that she did not analyze the residential column. Ex. B (Dep. Tr. at 110:7-11) (“Yep, that’s not the column we analyzed for this case.”). At trial, she testified that she did in fact take that residential column into account. Jan. 13, 2017 Tr. at 93:4-94:16. At deposition, Ms. Verkhovskaya testified that she did not look at the government column. Ex. B (Dep. Tr. at 110:17-20) (“[W]as that a field you looked at for your work on this case?” “No.”). At trial, Ms. Verkhovskaya testified that she did use the government column. Jan. 13, 2017 Tr. at 49: 1-16. At deposition, Ms. Verkhovskaya testified that she did not use the date limitation columns. Ex. B (Dep. Tr. at 116:20-117:16) (“Those are the dates that LexisNexis utilizes for their

The Court conceded the problematic nature of this new testimony with respect to the stipulated call categories, despite having declined to preclude or strike it, later stating, “[m]aybe I shouldn’t have done that” (Jan. 17, 2017 Tr. at 17:4-17) and “[p]erhaps I shouldn’t have let it in unless and until you all actually put your evidence on challenging it. . . .” *Id.* at 21:4-8. Indeed, the testimony should not have come into evidence.

## **2. Erroneous and Prejudicial Limitation on Dr. Fenili’s Testimony**

Notwithstanding that it was an essential element of Plaintiff’s claims to prove that any cellphone numbers at issue were primarily used for residential purposes, the Court barred DISH’s expert witness, Dr. Robert Fenili, from opining with respect to cellphones and the inherent difficulties attendant to ascertaining whether a cellphone is used for residential or business purposes. The Court ruled that Dr. Fenili’s opinions on cellphones had “limited probative value and significant risk of confusion.” Doc. 222 at 2. DISH respectfully submits that that ruling was in error. Dr. Fenili would have testified that, unlike for landline numbers, he is not aware of any directory or publicly available information that determines whether a cellphone is used primarily for residential or business purposes. His testimony was necessary to rebut Ms. Verkhovskaya’s surprise assertion at trial that LexisNexis could identify all business cellphones, (Jan. 12, 2017 Tr. at 182: 2-10) and her assertion that whether or not a number is cellular has “no bearing” on whether that number is residential or business, Jan. 13, 2017 Tr. at 18:10-16. The exclusion of this testimony prevented DISH from demonstrating Plaintiff’s failure to

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internal use, but we did not use those dates...”). At trial, Ms. Verkhovskaya testified that she did take those dates into account. Jan. 13, 2017 Tr. at 96:22-98:20.



meet his burden of proof as to wireless numbers. Thus, Dr. Fenili's expert opinion was highly probative on the issues to be decided by the jury, as set forth in the jury instructions and on the verdict form, and carried no risk of confusion. The Court declined to reconsider its ruling following Ms. Verkhovskaya's testimony. Jan. 17, 2017 Tr. at 67:20-21 ("I ruled it was excluded on cell phones. I'm going to stick with that.").

**D. Plaintiff Counsel's Prejudicial References to Document not in Evidence During Closing Arguments**

DISH should be granted a new trial because, during his closing, Plaintiff's counsel quoted from, and improperly published to the jury, a hearsay declaration from Sophie Tehranchi that was not in evidence. Jan. 18, 2017 Tr. at 12:18-13:4. Plaintiff's counsel's misconduct "violated a fundamental rule . . . , that argument is limited to the facts in evidence," *U.S. v. Wilson*, 135 F.3d 291, 298, 302 (4th Cir. 1998), and improperly influenced the jury, warranting a new trial. *Ray v. Allergan, Inc.*, 863 F. Supp. 2d 552, 567 (E.D. Va. 2012) (granting new trial where counsel made improper and prejudicial comments during closing).

Counsel published the Tehranchi declaration to the jury and quoted her out-of-court statement that "[f]rom 2010 through 2011, all calls made through Five9 platform were for the purpose of marketing DISH products and soliciting DISH ordered by Satellite Systems. That's the evidence. These calls were on behalf of DISH." *Id.* at 12:22-13:1. Counsel also quoted Ms. Tehranchi's out-of-court statement that "Satellite Systems was an exclusive DISH dealer during 2010 and '11 and as such did not make any telemarketing calls soliciting any products other than DISH." *Id.* at 13:2-10.

The Court's curative instruction was vague and confusing and did not erase the prejudice to DISH. *See Wilson*, 135 F.3d at 302 (holding that curative instruction "was insufficient to cause the jury to disregard the specific argument" and reversing conviction). Although the Court instructed the jury to disregard the exhibit, which it identified as "Sophie Tehranchi's affidavit," it simultaneously encouraged the jury to "consider her testimony." Jan. 18, 2017 Tr. at 40:21-41:10. This instruction engendered more confusion than clarity.

**E. The Excessive Damages Award Violates DISH's Due Process Rights**

Substantive due process concerns have caused courts to express "profound disquiet" in a system that permits the "imposition of liability" in thousands of cases based upon the results of a non-representative sample of plaintiffs. *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020-21 (5th Cir. 1997) ("Our substantive due process concerns are based on the lack of fundamental fairness contained in a system that permits the . . . imposition of liability in nearly 3,000 cases based upon results of a trial of a non-representative sample of plaintiffs."); *In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (vacating trial order to extrapolate damages from sample of 41 claims to pool of 2,990 claims, where there are "disparities among 'class' members"). Where the underlying sample consists of only *one recipient*—the class representative—these due process concerns become even more pressing.

Here, DISH respectfully submits that the Court erred in permitting Plaintiff—over DISH's objections (*see, e.g.*, Doc. 228)—to aggregate the claims for 51,119 distinct telephone calls and apply a uniform per-call damages award to that number. As a result,

DISH was deprived of its right to present individual defenses to each claim, including the relative level of harm that might have been caused by each call and whether some of these class members presented cognizable legal claims at all. This error was not harmless, as the jury decided to award \$400 per call without hearing any of these defenses except as applied to Dr. Krakauer. Accordingly, DISH is entitled to a new trial on the issue of damages.

In addition, a new trial is an appropriate remedy when a verdict is excessive in light of the evidence. *Cline*, 144 F.3d at 304 (granting a new trial nisi remittitur because of an insufficiency of evidence supporting compensatory damages award and because evidence of plaintiff's harm and defendant's indifference did not support excessive punitive damages award). Because the evidence presented was insufficient to support a verdict of \$400 per violation, *supra* Part II, the damages award is excessive and the Court should, in accordance with its duty and the interests of justice, order a new trial.

### **CONCLUSION**

For the reasons set forth herein, DISH respectfully moves this Court to order a new trial.

Dated: March 7, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 2017, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notifications of such filing to all counsel of record.

/s/ Peter A. Bicks

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JA005956  
004824

# Exhibit A

JA005957  
004825

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

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

Plaintiff,

v.

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

DISH NETWORK, L.L.C.,

Defendant.

**EXPERT REPORT OF ANYA VERKHOVSKAYA, A.B. DATA, LTD.**

**SCOPE OF WORK**

Plaintiff's counsel asked me to analyze telemarketing call records produced by Five9, a telephone dialing system software company. A.B. Data, Ltd.'s Class Action Administration Company ("A.B. Data") was advised by Plaintiff's counsel that these records show telemarketing calls placed by Satellite Systems Network ("SSN") company to consumers in an effort to sell DISH Network ("DISH") satellite television subscriptions.

A.B. Data understands that Plaintiff alleges in Count One of the Complaint that he and putative class members whose residential telephone numbers were listed on the National Do Not Call Registry ("NDNCR") received two or more telemarketing calls from SSN promoting the sale of DISH services during a twelve-month period. I directed analysis of the call records to identify persons who received such calls, were on the NDNCR at least 30 days prior to the first call, and whose telephone numbers were not identified as business telephone numbers or numbers associated with Dish Customers, per the SSN data.

A.B. Data understands that Plaintiff alleges in Count Two of the Complaint that he and putative class members received two or more telemarketing calls from SSN promoting DISH

subscriptions after telling SSN and DISH they did not want to receive telemarketing calls. I directed analysis of the call records, in conjunction with a list of individuals who had previously informed DISH and/or SSN that they did not want to receive telemarketing calls, in order to identify persons who received such calls, had notified DISH and/or SSN at least 30 days prior, and whose telephone numbers were not identified as business telephone numbers or numbers associated with Dish Customers, per the SSN data.

## **EXPERIENCE AND QUALIFICATIONS**

I regularly oversee and direct the analysis of call records in my capacity as a Partner and Chief Operating Officer of A.B. Data, headquartered in Milwaukee, Wisconsin. A.B. Data provides a full range of class action and complex litigation support services, and specializes in multifaceted project management as well as notice, claims and settlement fund administration.

A.B. Data has been appointed as Notice, Claims, and/or Settlement Administrator in hundreds of high volume consumer, civil rights, insurance, antitrust, ERISA, securities, and wage and hour cases. I am familiar with and have been directly responsible for administering some of the largest and most complex class action settlements of all time, involving all aspects of direct, media and their party notice programs, data management, claims administration, and settlement fund distribution.

For example, A.B. Data was appointed by the U.S. District Court for the Eastern District of New York to administer the notice and claims process in *In re Holocaust Victim Assets Litigation*, No. CV-96-4849. For this \$1.2 billion settlement benefiting more than 100,000 potential claimants, A.B. Data designed, analyzed and implemented class member location, notice, document management systems and claims administration and processing in the matter.



Other cases include: *Wyatt v. El Paso Corporation* (\$285 million settlement); *In re Symbol Technologies, Inc. Securities Litigation* (\$139 million settlement); *In re Lernout & Hauspie Securities Litigation* (\$120.5 million settlement); *Perez v. Rent-A-Center, Inc.* (\$109 million settlement); *In re Reliant Securities Litigation* (\$75 million settlement); *In re Ready-Mixed Concrete Antitrust Litigation* (\$50 million settlement); *In re Marsh ERISA Litigation* (\$35 million settlement); *Carlson v. State of Alaska, Commercial Fisheries Entry Commission* (\$33.5 million settlement); and *In re Marine Hose Antitrust Litigation* (\$21.7 million settlement).

In virtually every case A.B. Data administers, its Court-appointed role is to use available class member records and data to identify class members in order to send them appropriate notice and, if applicable, claims information in a manner consistent with constitutional due process.

My hourly rate is \$425 an hour. I expect that A.B. Data will be paid approximately \$6,000 for the work to date.

In cases brought under the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, A.B. Data routinely analyzes call records to identify class members. In analyzing the call records, A.B. Data regularly partners with reputable data vendors such as LexisNexis, Experian, Nexxa Group, Inc. (“Nexxa”), and others (collectively, “Data Processors”). A.B. Data has longstanding relationships and prior experience with the Data Processors. The Data Processors are able to provide information via access to numerous records and data sources: Nexxa provides information from the National Do Not Call Registry, including date of registry; Experian provides skip-tracing services to identify the most recent address of an individual based upon a combination of name, address history, and/or telephone

number;<sup>1</sup> LexisNexis provides information from public and proprietary records, including information regarding whether a particular telephone number was associated with a business or residence and telephone number subscriber information.<sup>2</sup>

I regularly use these Data Processors in administering class action settlements, a context in which maximum accuracy and reliability is critical. In my experience, gained over the course of several years of working with these vendors, the vendors provide accurate and reliable information, and are regularly called upon to provide this type of information in Court-supervised class action settlements.

Cases brought under the TCPA in which A.B. Data has provided data analysis utilizing Data Processors' services as discussed above include:

- a. *Desai, et al. v. ADT Sec. Servs., Inc., et al.*, Case No. 1:11-cv-1925, United States District Court for the Northern District of Illinois, Eastern Division (as court-approved settlement administrator);
- b. *D. Michael Collins and Milford & Ford Assoc. Inc. v. ACS, Inc.*, Case No. 1:10-cv-11912, United States District Court, District of Massachusetts (as court-approved settlement administrator);
- c. *Brey Corp. t/a Hobby Works v. Life Time Improvements, Inc.*, Case No. 349410-v, Circuit Court for Montgomery County, Maryland (as court-approved settlement administrator);
- d. *Evan Fray-Witzer v. Olde Stone Land Survey Co., Inc.*, Case. No.

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<sup>1</sup> According to Experian at [www.experian.com/consumer-information/sikp-tracing-services.com](http://www.experian.com/consumer-information/sikp-tracing-services.com), MetroNet provides access to comprehensive contact data on more than 140 million households and 19 million businesses with multiple data sources updated regularly to ensure the most accurate, up-to-date information available.

<sup>2</sup> It is common knowledge within the class action administration industry that LexisNexis is one of the largest aggregators of public record and proprietary information. Their information comes from governmental sources, leading credit bureaus, national address databases, national phone databases, utility information, warranty and subscription information and thousands of other sources.

2008-04175, Suffolk Superior Court of Massachusetts (as court-approved settlement administrator);

e. *Milford & Ford Assoc., Inc., and D. Michael Collins v. Cell-Tek, LLC*, Case No. 1:09-cv-11261-DPW, United States District Court, District of Massachusetts (as court-approved settlement administrator);

f. *Mann & Co., PC v. C-Tech Indus. Inc.*, Case No. 1:08CV11312-RGS, United States District Court, District of Massachusetts (as court-approved settlement administrator);

g. *Diana Mey et al. v. Herbalife Int'l, Inc., et al.*, Case No. 01-C-263, Circuit Court of Ohio County, West Virginia (as court-approved settlement administrator);

h. *Evan Fray-Witzer and Beardsley Ruml v. Metro. Antiques, LLC*, Case No. 02-5827, Suffolk Superior Court of Massachusetts (as court-approved settlement administrator);

i. *Martin v. Dun & Bradstreet, Inc., et al.*, Case No. 1:12CV215, United States District Court for the Northern District of Illinois, Eastern Division (as court-approved settlement administrator);

j. *Donaca v. Dish Network, L.L.C.*, Case No. 11-cv-2910-RBJ-KLM, United States District Court for the District of Colorado;

k. *Warnick, et al. v. DISH Network, L.L.C.*, Case No. 1:12-cv-01952-WYD-MEH, United States District Court for the District of Colorado;

l. *Lopera v. The Receivable Mgmt. Servs. Corp.*, Case No. 12-CV-9649, United States District Court the Northern District of Illinois Eastern Division;

m. *Kubacki v. Peapod, LLC*, Case No. 13 C 729, United States District Court for the Northern District of Illinois, Eastern Division;

n. *Benzion v. Vivint, Inc.*, Case No. 12-CV-61826-WJZ, United States District Court, Southern District of Florida, Fort Lauderdale Division (as court-approved settlement administrator);

o. *Mey v. Honeywell Int'l., Inc., et al.*, Case No. 2:12-cv-1721, United States District Court for the Southern District of West Virginia;

p. *Southwell, et al. v. Mortgage Investors Corporation of Ohio, Inc., et al.*, Case No. 2:13-cv-01289-MJP, United States District Court, Western District of Washington;

q. *Horton v. Cavalry Portfolio Services, LLC*, Case No. 13 CV0307 JAH WVG, United States District Court, Southern District of California; and

r. *Shamblin v. Obama For America, et al.*, Case No. 8:13-cv-02428-VMC-TMB, United States District Court, Middle District of Florida, Tampa Division.

I have also testified in the following matters as an expert witness at deposition or trial in the last four years in the following cases:

a. In the matter of *Donaca v. Dish Network, L.L.C.*, Case No. 11-cv-2910-RBJ-KLM, United States District Court for the District of Colorado, I provided an expert report regarding analysis of call records as compared to the National Do Not Call Registry and deposition testimony regarding that analysis and other capabilities of A.B. Data;

b. In the matter of *Warnick v. Dish Network, L.L.C.*, Case No. 1:12-cv-01952-WYD-MEH, United States District Court for the District of Colorado, I provided an expert report regarding A.B. Data's abilities to analyze call records to identify calls made to cellular/mobile telephone numbers and to identify subscribers of telephone numbers and deposition testimony regarding same;

c. In the matter of *Benzion v. Vivint, Inc.*, Case No. 12-CV-61826-WJZ, United States District Court, Southern District of Florida, Fort Lauderdale Division, I provided an expert report regarding data analysis of call logs, including comparison of call records to the National Do Not Call Registry and analysis of call records to identify calls made to cellular/mobile telephone numbers and deposition testimony regarding same;

d. In the matter of *Southwell, et al. v. Mortgage Investors Corporation of Ohio, Inc., et al.*, Case No. 2:13-cv-01289-MJP, United States District Court, Western District of Washington, I provided an expert report regarding analysis of call records to identify telephone numbers associated with business or residence and deposition testimony regarding same and capabilities of A.B. Data;

e. In the matter of *Horton v. Cavalry Portfolio Services, LLC*, Case No. 13 CV0307 JAH WVG, United States District Court, Southern District of California, I provided an expert report regarding analysis of call records to identify calls made to cellular/mobile telephone numbers and ability to identify subscribers and testimony regarding same.

## ANALYSIS

### *Source Data*

I was provided with the following data files representing 1,661,318 calls placed by SSN to promote DISH satellite-television subscriptions (“Source Data” or “Five9 Records”):

- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110801-20110831.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110701-20110731.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110601-20110630.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110501-20110531.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110801-20110831.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110401-20110430.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110301-20110331.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20110101-20110131.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20101201-20101231.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20101101-20101130.csv

- CONFIDENTIAL – SatelliteSystemsNetwork2010-20101001-20101031.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20100901-20100930.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20100801-20100831.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20100701-20100731.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20100601-20100630.csv
- CONFIDENTIAL – SatelliteSystemsNetwork2010-20100501-20100531.csv

These file names and the calls included in them indicate that the files include calls dated May 11, 2010 to August 1, 2011. At the outset, A.B. Data aggregated all call records, including all relevant data points, from the Source Data into a SQL database (the “Analysis Database”), from which further data analysis could occur, queries could be run, and additional data-points tracked.

### ***Connected Calls Analysis***

A.B. Data identified calls that were not connected to an outbound recipient based upon the call type, campaign, disposition code or duration from the Source Data and flagged them as such in the Analysis Database. Through this step, A.B. Data flagged the following inbound and “unconnected” calls, which were identified for the following reasons:

Disposition Code: appeared as blank	5
Disposition Code: “[Deleted]”	174,718
Disposition Code: “Abandon”	53,115
Disposition Code: “Busy”	39,766
Disposition Code: “Fax”	2,795
Disposition Code: “Fax machine”	4,520
Disposition Code: “Internal Call”	1
Disposition Code: “No Answer”	1,000,002
Disposition Code: “No Disposition”	8,584
Disposition Code: “Operator Intercept”	85,029
Duration: 00:00:00 (for calls with Disposition Codes not listed as eliminated above)	61,068
Call Type and/or Campaign: Inbound	1,594
<b>TOTAL</b>	<b>1,431,197</b>

This step left 230,121 remaining calls (the “Connected Calls”) to analyze.

***Count One/NDNCR -- Analysis of Connected Calls***

As stated above, I was asked to identify persons who received more than one SSN/DISH call within any 12-month period, at a time when that telephone number had been listed on the National Do Not Call Registry (“NDNCR”) for at least 30 days.<sup>3</sup>

The first step in this analysis was to determine which of the Connected Calls were called more than once in any 12-month period. This was determined through programmatic queries of the Analysis Database, a commonly-used data analysis procedure, as conducted by our Information Systems team and reviewed by our Quality Assurance team in cooperation with our Project Management team. This analysis identified 164,494 records representing all Connected Calls made to 58,151 unique telephone numbers that had received more than one call.

Second, A.B. Data coordinated with Nexxa to determine which of these numbers were listed on the NDNCR as of April 1, 2010. April 1, 2010 represents the date 30 days prior to May 1, 2010, the first date covered by the call records. A.B. Data submitted a data file of the 58,151 unique telephone numbers represented by the 164,494 calls referenced above. Based upon the output data received from Nexxa and compared to the Analysis Database, it was found that 23,625 unique telephone numbers were listed on the NDNCR as of April 1, 2010 (the “NDNCR Numbers”). The number of calls made to those telephone numbers more than 30 days after the NDNCR date of April 1, 2010, was 66,448. This information was tracked in the Analysis Database.

Third, A.B. Data reviewed the 23,625 NDNCR Numbers identified in the second step to identify any of those telephone numbers for which at least one of the Connected Calls had been

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<sup>3</sup> This and any subsequent references to 30-day timeframes designate inclusive timeframes, meaning, for example, that a telephone number was on a list or registry for at least 30 full days prior to a subsequent action/call.

assigned the disposition “Business” according to the Source Data. This analysis resulted in identification of 1,275 unique telephone numbers as being business-identified telephone records.

A.B. Data also coordinated with LexisNexis, with which it has established a specialized query based upon LexisNexis’ proprietary aggregated data sources, to determine which additional telephone numbers were identified as business numbers during the relevant timeframe. This analysis resulted in the identification of 118 additional records as business-identified telephone numbers in the Analysis Database. The analysis in this step resulted in identification of (i) a total 1,393 unique telephone numbers that were identified, via the Source Data and A.B. Data’s additional research, as business telephone numbers during the relevant timeframe and (ii) a total of 22,258 unique NDNCR Numbers that were not identified as business numbers during the relevant timeframe (the “Non-business NDNCR Numbers”).

Fourth, A.B. Data reviewed the Non-business NDNCR Numbers to identify any telephone numbers for which at least one of the Connected Calls had been assigned the disposition of “Dish Customer” according to the Source Data. This analysis resulted in identification of 1,782 unique telephone numbers identified per the Source Data as being, at the time of at least one Connected Call, a “Dish Customer.” This analysis resulted in identification of 20,450 unique telephone numbers that were on the NDNCR as of April 1, 2010, at least 30 days prior to any Connected Calls, received more than one Connected Call were not identified as business telephone numbers according to the call dispositions in the Source Data or A.B. Data’s additional research via LexisNexis, and had not received a Connected Call dispositioned as “Dish Customer.” The total number of Connected Calls made to these telephone numbers is 57,900.

In summary, my analysis of the Source Data reveals that 20,450 unique telephone



numbers were on the NDNCR as of April 1, 2010, at least 30 days prior to any Connected Calls, received more than one Connected Call in any 12-month period, were not identified as business telephone numbers, and did not receive a Connected Call dispositioned as “Dish Customer,” based upon the information from the Source Data. Below is a chart that provides an overview of the quantities associated with the data processing/identification steps completed in this analysis:

Total number of telephone numbers in the Source Data that were on the NDNCR as of April 1, 2010 (the “NDNCR Numbers”)	23,625
Business-identified telephone numbers in NDNCR Numbers	1,393
“Dish Customer”-dispositioned numbers in NDNCR Numbers (after flagging of Business-identified telephone numbers)	1,782
<b>TOTAL UNIQUE TELEPHONE NUMBERS</b>	<b>20,450</b>
<b>TOTAL ASSOCIATED CONNECTED CALLS</b>	<b>57,900</b>

Attached to this Expert Report as Exhibit A is a listing of the 20,450 unique telephone numbers along with relevant information regarding associated name and address, as available from the Source Data and supplemented through additional data research to be discussed further, subsequently in this Expert Report.

***Count Two/DISH's Internal Do Not Call Database -- Analysis of Connected Calls***

**A. Persons called after requesting placement on DISH's internal do not call database**

A.B. Data next determined which of the Connected Calls were placed, at a time when the telephone number had been listed on DISH's internal do not call database, for at least 30 days prior. A.B. Data obtained the following DISH internal do not call lists from the Plaintiff's counsel:

- DISH Retailer DNC List 2010 and Older.txt
- Echostar\_Internal\_Upto\_20101231.txt
- Echostar\_Retailer\_Upto\_20101231.txt

A.B. Data combined the three lists (combined, the “Internal DNC”) for purposes of comparing them to the Analysis Database.

Next, the Analysis Database was queried to compare the dates and telephone numbers of the Internal DNC against the dates and telephone numbers of the Connected Calls. This query looked for calls that were made to telephone numbers that received more than one Connected Call where the telephone number had been listed on the Internal DNC for at least 30 days prior to the date of the first Connected Call. As a result of this query, it was determined that there were 26,368 Connected Calls (the “IDNC Connected Calls”) made to 8,590 unique telephone numbers (the “IDNC Numbers”).

Following the same methodology, performed and described earlier in this Expert report related to the analysis completed relating to Count 1 of the Complaint, A.B. Data reviewed the IDNC Numbers to identify any telephone numbers that were dispositioned as “Business” in the Source Data or identified via LexisNexis as business telephone numbers during the relevant timeframe. This resulted in identification of 350 unique telephone numbers identified as business telephone numbers. A.B. Data also reviewed the IDNC Numbers to identify any telephone numbers for which any Connected Call was dispositioned as “Dish Customer” in the Source Data. This analysis resulted in identification of 1,123 unique telephone numbers that were dispositioned as “Dish Customer”.

In summary, my analysis of the Source Data reveals 7,117 unique telephone numbers that received more than one Connected Call and were on the Internal DNC at least 30 days prior to the first Connected Call; these unique telephone numbers received 20,549 Connected Calls. Attached to this Expert Report as Exhibit B is a listing of the 7,117 unique telephone numbers along with relevant information regarding associated names and addresses, as available from the

Source Data and supplemented through additional data research to be discussed further, subsequently in this Expert Report. Below is a chart that provides an overview of the quantities associated with the data processing/identification steps completed in this analysis:

Total number of IDNC Numbers	8,590
Business-identified telephone numbers in IDNC Numbers	350
“Dish Customer”-dispositioned numbers in IDNC Numbers (after flagging of Business-identified telephone numbers)	1,123
TOTAL UNIQUE TELEPHONE NUMBERS	7,117
TOTAL ASSOCIATED CONNECTED CALLS	20,549

**B. Persons called after requesting placement on SSN’s internal do not call database**

It was next determined which of the Connected Calls were placed at a time when the Five9’s Source Data records indicated that the recipient had previously requested that they no longer wanted to receive telephone calls, which were dispositioned on the records as “DNC” or “Do Not Call,” and that request had been made at least 30 days prior to the subsequent calls.

There were 2,297 total Connected Calls made to 905 unique telephone numbers identified as “DNC” or “Do Not Call” in the Five9 records for which there were at least two subsequent Connected Calls made after the initial “DNC” or “Do Not Call” designation and that request had been made at least 30 days prior (“SSN’s DNC Numbers”).<sup>4</sup> To make this determination, the Analysis Database and data therein was queried to find instances of Connected Calls made to telephone numbers which occurred more than 30 days following the instance of a “DNC”- or “Do Not Call”- dispositioned call made to the same telephone number.

Completing the same analysis described previously herein to identify business-identified

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<sup>4</sup> This figure does not include the call initially dispositioned “DNC” or “Do Not Call” – the triggering call.

and “Dish Customer”-dispositioned Connected Calls, A.B. Data did not identify any business-identified telephone numbers in SSN's DNC Numbers and identified 43 telephone numbers that had been dispositioned as “Dish Customer”. This analysis resulted in identification of 862 unique telephone numbers that received 2,206 Connected Calls.

In summary, my analysis of the Source Data reveals 862 unique telephone numbers for which at least two Connected Calls were made subsequent to a “DNC” or “Do Not Call” disposition in the Five9 records. Attached to this Expert Report as Exhibit C is a listing of the 862 unique telephone numbers along with relevant information regarding associated names and addresses, as available from the Source Data and supplemented through additional data research to be discussed further, subsequently in this Expert Report. Below is a chart that provides an overview of the quantities associated with the data processing/identification steps completed in this analysis:

Total number of SSN's DNC Numbers	905
Business-identified telephone numbers in SSN's DNC Numbers	0
“Dish Customer”-dispositioned numbers in SSN's DNC Numbers (after flagging of Business-identified telephone numbers)	43
<b>TOTAL UNIQUE TELEPHONE NUMBERS</b>	<b>862</b>
<b>TOTAL ASSOCIATED CONNECTED CALLS</b>	<b>2,206</b>

To supplement the incomplete name and address information available in the Five9 records, A.B. Data completed a standard reverse-append process via an established report with LexisNexis. For this data process, A.B. Data provides the relevant telephone number in an input file and LexisNexis provides an output file that includes, among other information, information regarding the name(s) and address(es) relevant to the subscribers of the telephone number for a given timeframe. A.B. Data uses this output file to append the name and address information

into the Analysis Database.

In addition to the address research completed and described herein, A.B. Data would coordinate to update the addresses researched and obtained from the Five9 records prior to any mailing of notification materials via the use of the United States Postal Service ("USPS") National Change of Address ("NCOA<sup>Link</sup>") database, which contains approximately 160 million records or 48 months of permanent addresses. NCOA<sup>Link</sup> is updated daily and USPS regularly provides change-of-address information to NCOA<sup>Link</sup> licensees. NCOA<sup>Link</sup> helps reduce undeliverable-as-addressed ("UAA") mail by correcting input addresses prior to mailing. Additional address updating via Experian's MetroNet® service would be coordinated for any addresses determined to be undeliverable. Further, in addition to the address and name research completed herein, A.B. Data would coordinate with additional Data Processors, such as Experian, to identify addresses based upon name and telephone number information and/or to identify additional name information based upon telephone number, if needed, for further supplementation of information that has not yet been identified.

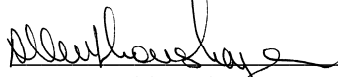
It is common in my profession to rely on Data Processors to identify the names and addresses of subscribers of telephone numbers. I and many A.B. Data employees have used Data Processors to perform similar court-accepted and/or approved services for a number of cases in numerous courts across the country. Additionally, it is common practice in the industry of class action administration to utilize the date services described herein as provided by Data Processors.

To ensure the accuracy of the analysis and process outlined in this Expert Report, quality procedures were performed. First, members of the Information Systems team, Quality Assurance team, and Project Management team met to determine data analysis and processing steps. Second, at my direction, my Quality Assurance team reviewed and signed off on the

analysis process, including scripting and data loads. Third, input versus output counts, cross/counts, and field inventory were verified. Fourth, the results of the relevant queries were independently verified.

I have reached the opinions expressed herein based on a reasonable degree of certainty in the field of data management, data analysis, class member identification, and claims administration.

Executed at Milwaukee, Wisconsin this 30<sup>th</sup> day of January, 2015.

  
\_\_\_\_\_  
Anya Verkhovskaya

# Exhibit B

JA005974  
004842

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

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

Plaintiff,

CIVIL ACTION NO.  
14-CV-333

-vs-

JUDGE CATHERINE C.  
EAGLES

DISH NETWORK, L.L.C.,

MAGISTRATE JUDGE  
JOI E. PEAKE

Defendant.

Examination of ANYA VERKHOVSKAYA, taken at  
the instance of the Defendant, under and pursuant to the  
Federal Rules of Civil Procedure, before DANNIELLE K.  
COPELAND, Registered Merit Reporter, Certified Realtime  
Reporter and Notary Public in and for the State of  
Wisconsin, at A.B. Data, 600 A.B. Data Drive, Glendale,  
Wisconsin, on March 6, 2015, commencing at 9:29 a.m. and  
concluding at 2:00 p.m.

Job No. 90298



1 ANYA VERKHOVSKAYA  
 2 A P P E A R A N C E S  
 3 BAILEY GLASSER  
 4 MR. PATRICK MUENCH  
 5 One North Old State  
 6 Capitol Plaza  
 7 Springfield, Illinois 62701  
 8 appeared on behalf of the Plaintiff  
 9  
 10 BENESCH FRIEDLANDER COPLAN & ARONOFF  
 11 MR. ERIC ZALUD  
 12 MR. DAVID KRUEGER  
 13 200 Public Square  
 14 Cleveland, Ohio 44114  
 15 appeared on behalf of the Defendant

16 A L S O P R E S E N T

17 Mr. Rodney Hudson, Videographer.

18 \* \* \* \* \*

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11 \* \* \* \* \*

12 Disposition Of Original Exhibits:

13 Attached To Original Transcript.

14 \* \* \* \* \*

1 ANYA VERKHOVSKAYA  
 2 TRANSCRIPT OF PROCEEDINGS  
 3 ANYA VERKHOVSKAYA, called as a witness  
 4 herein, having been first duly sworn on oath, was  
 5 examined and testified as follows:  
 6 VIDEOGRAPHER: This is the start of Disk  
 7 1 of the video deposition of Anya Verkhovskaya in  
 8 the matter of Thomas H. Krakauer on behalf of a  
 9 class of persons versus DISH Network, LLC. In the  
 10 United States District Court for the Middle  
 11 District of North Carolina, Case No. 14-CV-333.  
 12 This deposition is being held at A.B. Data located  
 13 at 600 A.B. Data Drive in Milwaukee, Wisconsin, on  
 14 March 6th, 2015, at approximately 9:29 a.m. My  
 15 name is Rodney Hudson. I am the legal video  
 16 specialist from TSG Reporting, Incorporated,  
 17 headquartered at 747 Third Avenue New York, New  
 18 York. The court reporter is Dannielle Copeland in  
 19 association with TSG Reporting. Will counsel  
 20 please introduce yourselves.  
 21 MR. MUENCH: Patrick Muench, Bailey and  
 22 Glasser on behalf of the plaintiff.  
 23 MR. ZALUD: Eric Zalud, Benesch  
 24 Friedlander on behalf of the defendant.  
 25 MR. KRUEGER: David Krueger, Benesch

1 ANYA VERKHOVSKAYA  
 2 Friedlander on behalf of the defendant.  
 3 VIDEOGRAPHER: Okay. Will the court  
 4 reporter please swear in the witness?  
 5 ANYA VERKHOVSKAYA, called as a witness  
 6 herein, having been first duly sworn on oath, was  
 7 examined and testified as follows:  
 8 EXAMINATION  
 9 BY MR. ZALUD:  
 10 Q This is the deposition of Anya Verkhovskaya. Am I  
 11 pronouncing that correctly?  
 12 A Verkhovskaya.  
 13 Q Verkhovskaya, very close. Taken in the case,  
 14 caption: Thomas Krakauer versus DISH Network as  
 15 referenced by the videographer, pending in the  
 16 federal court in North Carolina. Ms. Verk- --  
 17 Verkhovskaya?  
 18 A Correct.  
 19 Q I'm Eric Zalud. We've met before and we've met  
 20 off the record, but I'll introduce myself to you  
 21 on the record. I'm counsel for the defendant,  
 22 DISH Network, in this case. You've just taken the  
 23 oath. Do you understand that carries with it all  
 24 the obligations of telling the truth as if we were  
 25 at trial?

1 ANYA VERKHOVSKAYA  
2 A Correct.  
3 Q All right. I just have a couple questions about  
4 some of the data fields, not all of them, but  
5 about the one, two, three, four, five, sixth  
6 column over, "current\_cell, Capital Y, Capital N."  
7 Do you see that one?  
8 A Um-hum.  
9 Q Could you give me a "yes," please?  
10 A Yes. I'm sorry.  
11 Q Thank you. That's okay. Do you know what that  
12 column means?  
13 A For this particular case, we did not analyze that  
14 column.  
15 Q I see. Okay. Do you know what it means anyway,  
16 or no?  
17 A Yeah, on this particular output, no. On the  
18 number -- it is my assumption that it means  
19 whether a cell -- whether a particular number was  
20 a cell phone or not, but I did not analyze that  
21 field at all.  
22 Q In your work on this case, whether a number was a  
23 residential landline or a wireless cell phone?  
24 A Correct.  
25 Q That was not part of your project?

1 ANYA VERKHOVSKAYA  
2 A "Phone One" and "Carrier Name" are not fields that  
3 we analyzed for this particular case.  
4 Q All right. Do you know what they mean from other  
5 cases you've worked on?  
6 A The carrier name could represent a number of  
7 carriers, either current or within a specific  
8 timeframe. I don't know what type of a carrier  
9 name they appended here because I did not analyze  
10 that field, and "Phone One" I don't exactly know  
11 what they included in this particular field for  
12 their default query because I didn't analyze that  
13 field either for this report.  
14 Q So we can't tell if this -- let's just look at the  
15 first one, Thomas Valvano. Do you see it up top  
16 there?  
17 A Second one -- oh, the first phone number?  
18 Q Yes.  
19 A Or the second -- okay, got it.  
20 Q Where there's a name, Thomas Valvano?  
21 A Yes.  
22 Q Valvano. We can't tell if that was -- if that  
23 means that was his phone number and it was a  
24 Verizon number in 2010, in 2011, in -- in 2015,  
25 there's -- there's no way to tell that from this?

1 ANYA VERKHOVSKAYA  
2 A That's correct.  
3 Q All right. How about the next one? I'm not going  
4 to ask you about every single one, but the next  
5 one --  
6 A Sure.  
7 Q -- "phone type code." Do you know what that  
8 means?  
9 A It's another field that is an automatic append  
10 through LexisNexis, and we did not analyze it for  
11 this particular case.  
12 Q All right. So I -- I think I understand that, so  
13 this is in -- this is kind of a standard format --  
14 A Standard form.  
15 Q -- that they send out, and some of these columns  
16 you look at depending on what your assignment is?  
17 A That's correct.  
18 Q All right. And then there's a column "Listed  
19 Name" right, the very next column?  
20 A That's correct.  
21 Q And -- and then right next to "Listed Name"  
22 there's "Phone One" and "Carrier Name," right?  
23 A That's correct.  
24 Q So how do those three columns relate to each  
25 other?

1 ANYA VERKHOVSKAYA  
2 A Possibly there is, but this is not something I  
3 analyzed for this case.  
4 Q All right. Understood. Then moving on -- like I  
5 said, I'm not going to ask about each one of  
6 these, all the way over -- the one, two, three,  
7 four, five -- about the seventh or eighth column  
8 from the right side, "Listing Type BUS." One,  
9 two, three, four, five, six, seven, eight, nine.  
10 Nine in.  
11 A Yes.  
12 Q Do you know what that column means?  
13 A Yes.  
14 Q What is that?  
15 A It is an indicator whether the list -- the phone  
16 number is a business phone number.  
17 Q At what point in time?  
18 A Within the timeframe that we indicated to  
19 LexisNexis.  
20 Q So the -- the 2010/2011 time period we've been  
21 talking about?  
22 A That's correct.  
23 Q And if a number on this sheet is identified as a  
24 business number, you would have excluded it?  
25 A That's correct.

1 ANYA VERKHOVSKAYA  
2 Q From the connected call universe?  
3 A That's correct.  
4 Q So they're able to go back to a particular  
5 timeframe?  
6 A Yes.  
7 Q How about the next column over,  
8 "listing\_type\_res," next column to the right from  
9 the one we just looked at?  
10 A Yep, that's not the column we analyzed for this  
11 case.  
12 Q All right. Do you know what that is from work on  
13 prior matters, or no?  
14 A It refers to confirmation whether it is a  
15 residential or non, but I'm not sure whether this  
16 is the case in this matter.  
17 Q All right. How about the next one,  
18 "listing\_type\_gov," do you know -- was that a  
19 field you looked at for your work on this case?  
20 A No.  
21 Q How about "tel-" -- "telcordia\_only"?  
22 A That's not the field we looked at.  
23 Q Do you know what that means from -- from prior  
24 experience?  
25 A I can't recall.

1 ANYA VERKHOVSKAYA  
2 Q -- as to what that means?  
3 A They just -- they always asked us to disregard  
4 this field.  
5 Q I mean, it's possible that LexisNexis isn't sure  
6 whether a number is a cell phone or not, right?  
7 A We don't -- I don't know.  
8 Q They would only know what they mean by possible --  
9 A That's correct.  
10 Q -- possible cell phone?  
11 One other question about that column on  
12 Page 2, same column, at the bottom -- near the  
13 bottom, there's several entries, "Possible  
14 Ported," P-O-R-T-E-D, "Cell Phone." Do you see  
15 those?  
16 A Yes, I do.  
17 Q I understand that's LexisNexis' internal data  
18 field, but what does that mean, "Ported Cell  
19 Phone"?  
20 MR. MUENCH: Object to form.  
21 THE WITNESS: It's a cell phone --  
22 ported cell phone, regardless of how this report  
23 shows --  
24 BY MR. ZALUD:  
25 Q Right.

1 ANYA VERKHOVSKAYA  
2 Q Okay. And the next one, "cell, C-E-L-L, hyphen,  
3 type." Is that one you looked at for this --  
4 A No.  
5 Q -- project? No? And do you know what that is  
6 from -- what that means from prior experience,  
7 that particular field?  
8 A I can't recall.  
9 Q Okay. And the next one, "new\_type," is that  
10 something you looked at in this case?  
11 A No.  
12 Q How about this reference -- there's a few  
13 references in that column, the "Possible non-DA."  
14 Do you see that?  
15 A Actually, this column and the last one, I believe  
16 they're internal LexisNexis notes.  
17 Q I see. So you wouldn't know what -- do you --  
18 like -- let's just -- in case you might know from  
19 prior work, "Possible non-DA," do you know what  
20 that means?  
21 A No.  
22 Q And "Possible Cell Phone," I mean, I'm -- I'm  
23 guessing, but you would be guessing too, I guess,  
24 right --  
25 A Correct.

1 ANYA VERKHOVSKAYA  
2 A -- means that the phone number was ported, but  
3 it's completely irrelevant in this case.  
4 Q And what do you mean by "ported"?  
5 A Transferred from one user to another or ported  
6 from a cell phone to a landline or the other way  
7 around.  
8 Q So if a cell phone could have switched users, it  
9 could be a different person whose cell phone it  
10 is, right?  
11 A That's correct.  
12 Q Or a cell phone could have -- the same number  
13 could now be a landline?  
14 A That's correct.  
15 Q Or a landline could now be a cell phone?  
16 A That's correct.  
17 Q But that is not relevant, you said, to the work  
18 you did in this case?  
19 A That's correct.  
20 Q And why is that?  
21 A We were not asked to do that work.  
22 Q Do you know if LexisNexis can identify businesses  
23 at home that use a cell phone, like a gallery or  
24 like a -- like an artist studio or like a -- an  
25 accountant who works at home; can they identify

1 ANYA VERKHOVSKAYA  
2 home-based businesses that use a cell phone?  
3 A Yes.  
4 Q Okay. And how do they go about doing that?  
5 A I don't know.  
6 Q Okay. Can they identify -- I'm sorry, I've got to  
7 ask, then: How do you know they can if you don't  
8 know how?  
9 A Because part of our tests we encountered that they  
10 can.  
11 Q But no tests were run in this case, right?  
12 A There was no need to identify cell phone  
13 portability or usage for this case.  
14 Q How about a landline that starts out as someone's  
15 residential landline but then they start a  
16 business and start using that for their business.  
17 Can LexisNexis identify that?  
18 A LexisNexis represents that they can.  
19 Q Do you know how they go about doing that?  
20 A They represent that they have proprietary linking  
21 methodology that links various data sources  
22 together. So just to give you an example that  
23 LexisNexis gave me, if you advertise your business  
24 on White Pages as a business and you live at the  
25 same phone number, they will have that information

1 ANYA VERKHOVSKAYA  
2 website?  
3 A Probably, yes, they --  
4 Q You think --  
5 A Yes.  
6 Q What do they do, they look all over the Internet  
7 for every phone number --  
8 MR. MUENCH: Object to form.  
9 BY MR. ZALUD:  
10 Q -- is that what they do?  
11 A I don't know.  
12 Q Have they told you that's what they do?  
13 A They represented to me that they have proprietary  
14 linking methodology that links billions of records  
15 from hundreds of different sources.  
16 Q Have they told you that they can take any number  
17 in the world that has a website that's associated  
18 with it and identify it as a business?  
19 A They did not say those words to me.  
20 Q How about the next column? It looks like it's --  
21 the next two columns: "dt\_first\_seen" and  
22 "dt\_last\_seen." Were those used in your analysis  
23 here?  
24 A Those are the dates that LexisNexis utilizes for  
25 their internal use, but we did not use those

1 ANYA VERKHOVSKAYA  
2 that you have a home-based business, and they will  
3 know the phone number that this business utilizes.  
4 Based on LexisNexis' representation, they will be  
5 able to link that and provide us with information  
6 that that phone number is listed for business  
7 uses.  
8 Q If it's listed in the White Pages?  
9 A For example, or any other source.  
10 Q Really, like, what -- like, how about if my  
11 brother has a catering business he runs out of his  
12 home and he advertises by putting flyers in  
13 people's mailboxes, would they be able to find  
14 that?  
15 A Probably not.  
16 Q How about if he's got this catering business and  
17 he advertises in the classified section of the  
18 local newspaper, would they be able to find that,  
19 do you think?  
20 MR. MUENCH: Object to form.  
21 THE WITNESS: If there is an online  
22 version, possibly. I don't know.  
23 BY MR. ZALUD:  
24 Q So yeah, so how about if he's got this catering  
25 business he runs out of his home and he has a

1 ANYA VERKHOVSKAYA  
2 dates.  
3 Q Well, you know, Mr. Valvano is turning into a  
4 pretty good example, because if you look at his  
5 column, it looks to me like it says  
6 "date\_first\_seen, June 5th, 2012, 2012/06/05." Do  
7 you see that?  
8 A But he doesn't have a business identifier, so we  
9 didn't look at his record at all.  
10 Q Right, but they -- they have no information for  
11 him for 2011 --  
12 MR. MUENCH: Object to the form.  
13 BY MR. ZALUD:  
14 Q -- right? I mean, the date they first --  
15 A I will have to follow up with LexisNexis and ask  
16 them exactly what those dates mean.  
17 Q Who is going to do that?  
18 A I can follow up with them --  
19 Q All right.  
20 A -- directly and ask what those dates mean.  
21 Q Because let's -- what if Mr. Valvano had a  
22 business in 2011? His record's not even on here  
23 for 2011 so we wouldn't know from this database,  
24 right?  
25 A That's not what my understanding is of this

1 ANYA VERKHOVSKAYA  
2 output.  
3 Q I mean, there's a couple others down here, the  
4 date first seen, 2014, so --  
5 A Well, as I said, I don't know what those dates  
6 represent. I'm not sure that your interpretation  
7 is correct. It was represented to me that these  
8 records fall within the 2010/2011 timeframe that  
9 we provided to LexisNexis.  
10 Q Via what means was it represented to you?  
11 A By phone.  
12 Q Okay. Because I don't see any of those dates  
13 anywhere in any of these fields, right? I see  
14 nothing about timeframe other than date first seen  
15 and date last seen, right? That's the only thing.  
16 A That's correct, and I'm more than happy to follow  
17 up with LexisNexis to verify that their  
18 representation was accurate.  
19 Q Let's take a hypothetical, though, just in case.  
20 So let's say -- let's presume -- let's take  
21 Mr. Valvano here. Let's presume that date first  
22 seen means the date his information first shows up  
23 on their system, and that date is June 5th, 2012,  
24 all right? I understand we don't know, but let's  
25 presume that, okay? Will you presume that with

1 ANYA VERKHOVSKAYA  
2 Q We just -- we just don't know at this point?  
3 A That's correct.  
4 Q And how about this last -- I think this is my last  
5 column here, "vendor\_dt\_last\_seen\_used." Do  
6 you -- did you use that for this case?  
7 A No, and as I indicated earlier, that's a column  
8 that LexisNexis indicates is their internal data  
9 field.  
10 Q Is there a name -- do they have a name for the  
11 service you used them for in this case? Does  
12 LexisNexis have a name, is it a product name or a  
13 database name?  
14 A Yes.  
15 Q And what is that?  
16 A It's the LexisNexis database.  
17 Q And did they ever explain to you how they're able  
18 to go back in time to a particular timeframe and  
19 determine whether a number is a business number or  
20 a residential number?  
21 A They represent that they've been collecting data  
22 from hundreds of different sources over the past  
23 number of decades, and they maintain and  
24 accumulate that data that allows them to provide  
25 us with these types of reports.

1 ANYA VERKHOVSKAYA  
2 me?  
3 A I will presume, but I'm not sure how it is  
4 relevant to the work that we did.  
5 Q Well, it would be relevant if he -- his number was  
6 a business number in 2011, wouldn't it?  
7 A Based on this output, it wasn't.  
8 Q Depending on what this date means?  
9 A Correct. So I'm happy to clarify what that date  
10 means.  
11 Q But if it means what I'm supposing, and I  
12 understand it's just me, but you're -- you know,  
13 you're being qualified an expert witness so I can  
14 ask you hypotheticals. If it means he's first on  
15 their system for this search in June of 2012, then  
16 this search wouldn't reveal if his number was a  
17 business number in 2011, would it? It couldn't?  
18 A Well, if his -- hypothetically, if he's first seen  
19 on this search after our timeframe, then somebody  
20 else would have appeared in the database for this  
21 phone number for an earlier timeframe,  
22 hypothetically.  
23 Q And that could have been a business number?  
24 A Could have been somebody else's number or a  
25 business number.

1 ANYA VERKHOVSKAYA  
2 Q Did they ever say something like, the further back  
3 we go, the less likely we are to be completely  
4 accurate?  
5 A They did not represent it to us.  
6 Q Do you know how often they update their databases?  
7 A I can't recall exactly, but it's my belief that  
8 they talked about a few times a week.  
9 Q Do you -- I'm sorry, were you -- were you  
10 finished?  
11 A I am. I was.  
12 Q Do you know if LexisNexis takes into account VOIP  
13 lines in their analysis?  
14 A It is my understanding that they do.  
15 Q Do they take into consideration employers who  
16 provide cell phones to their employees?  
17 A In some cases they do.  
18 Q And some -- which cases?  
19 A Sometimes they tell us they're able to provide  
20 this information; sometimes not.  
21 Q All right.  
22 A And I don't know how the systems work.  
23 Q You don't know how they're able to in some cases  
24 but not able to in other cases?  
25 A That's correct.

1 ANYA VERKHOVSKAYA  
 2 not me. Have you ever looked at any of the data  
 3 they submitted to you and said there were -- a  
 4 mistake was made?  
 5 A Yes. At times they send us wrong files or data --  
 6 as I mentioned to you earlier -- for wrong dates,  
 7 but they correct that if and when we find that  
 8 mistake.  
 9 Q But in this case, no one double-checked their  
 10 work, as you told us earlier, right?  
 11 A Well, we double-checked what we could, which  
 12 included quantities and fields and other types of  
 13 data qualifiers.  
 14 Q But no one double-checked that a particular number  
 15 they said wasn't a business number really wasn't a  
 16 business number, right?  
 17 A Correct.  
 18 Q And have you ever, in your hundreds of cases with  
 19 them, ever checked something like that with them?  
 20 A Well, as I mentioned earlier, we run a number of  
 21 tests on a regular basis, and the accuracy rate is  
 22 anywhere from --  
 23 Q 86 --  
 24 A 86 to 97 --  
 25 Q -- percent to 97 percent?

1 ANYA VERKHOVSKAYA  
 2 STATE OF WISCONSIN )  
 ) SS:  
 3 COUNTY OF MILWAUKEE )  
 4  
 5 I, DANNIELLE K. COPELAND, Registered  
 6 Merit Reporter, Certified Realtime Reporter and Notary  
 7 Public in and for the State of Wisconsin, do hereby  
 8 certify that the above deposition of ANYA VERKHOVSKAYA  
 9 was recorded by me on March 6, 2015, and reduced to  
 10 writing under my personal direction.  
 11 I further certify that I am not a  
 12 relative or employee or attorney or counsel of any of  
 13 the parties, or a relative or employee of such attorney  
 14 or counsel, or financially interested directly or  
 15 indirectly in this action.  
 16 In witness whereof I have hereunder set  
 17 my hand and affixed my seal of office at Milwaukee,  
 18 Wisconsin, this 6th day of March, 2015.  
 19  
 20  
 21 \_\_\_\_\_  
 Notary Public  
 22 In and for the State of Wisconsin  
 23  
 24 My Commission Expires: October 18th, 2015.  
 25

1 ANYA VERKHOVSKAYA  
 2 A Yes.  
 3 Q So 14 percent of the time, they get it wrong?  
 4 MR. MUENCH: Object to form.  
 5 THE WITNESS: I stated earlier that 14  
 6 percent, we call it the data is not accurate.  
 7 MR. ZALUD: Okay. I don't have any  
 8 further questions. Thank you.  
 9 MR. MUENCH: I'm done.  
 10 VIDEOGRAPHER: Okay. This is the end of  
 11 Disk 3 of the deposition of Anya Verkhovskaya. We  
 12 are off the record at 1:59 p.m.  
 13 (Proceedings concluded at 2:00 p.m.)  
 14  
 15  
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 25

1 NAME OF CASE: Thomas Krakauer v. DISH Network  
 2 DATE OF DEPOSITION: 3/6/2015  
 3 NAME OF WITNESS: Anya Verkhovskaya  
 4 Reason Codes:  
 5 1. To clarify the record.  
 6 2. To conform to the facts.  
 7 3. To correct transcription errors.  
 8 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_  
 9 From \_\_\_\_\_ to \_\_\_\_\_  
 10 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_  
 11 From \_\_\_\_\_ to \_\_\_\_\_  
 12 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_  
 13 From \_\_\_\_\_ to \_\_\_\_\_  
 14 Page \_\_\_\_\_ Line \_\_\_\_\_ Reason \_\_\_\_\_  
 15 From \_\_\_\_\_ to \_\_\_\_\_  
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 25 \_\_\_\_\_

# EXHIBIT 90

# EXHIBIT 90

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004850

TX 102-005244

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

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

**MEMORANDUM OPINION AND ORDER**

Catherine C. Eagles, District Judge.

In January 2017, after a six-day trial, a jury returned a verdict finding that the defendant Dish Network violated the Telephone Consumer Protection Act. Through its agent, Satellite Systems Network, Dish made over 51,000 telephone solicitations to a class of plaintiffs on the National Do Not Call Registry, in violation of the Act. Dish moves for judgment as a matter of law, contending that there was insufficient evidence SSN acted as Dish's agent, that the plaintiffs' expert was unreliable, and that the plaintiffs lacked standing. In the alternative, Dish moves for a new trial, contending that the jury's verdict is against the weight of the evidence and is a miscarriage of justice. Because the evidence fully supports the jury's verdict and Dish received a fair trial, the Court will deny the motions.

**I. PROCEDURAL BACKGROUND**

The plaintiff, Dr. Thomas Krakauer, filed suit in 2014 alleging that Dish violated the Telephone Consumer Protection Act, 47 U.S.C. § 227(c)(5), when its agent called

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thousands of numbers on the National Do Not Call Registry between 2009 and 2011. *See* Doc. 32 at ¶¶ 25, 47, 54.<sup>1</sup> The Court certified the class, covering the period from May 2010 to August 2011, Doc. 111 at 4, 34, and largely denied summary judgment. *See* Docs. 113, 118, 169.

Trial on class issues began on January 10, 2017. Minute Entry 01/10/2017.<sup>2</sup> On January 19, the jury returned a verdict in favor of the plaintiffs. Doc. 292. The jury found that SSN was Dish's agent and that, for every class member, SSN made "at least two telephone solicitations to a residential number" on the Registry. *See id.* at ¶¶ 1-2. The jury awarded \$400 per call. *Id.* at ¶ 3.<sup>3</sup> Dish filed motions for judgment as a matter of law under Rule 50(b) and for a new trial under Rule 59(a)(1)(A). Docs. 318, 320.<sup>4</sup> Briefing is now complete.

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<sup>1</sup> All references to the record cite the document number appended by the CM-ECF system. Pin citations are to the page numbers appended by CM-ECF, or, where indicated, to numbered paragraphs in a document. For transcripts, line numbers are also indicated. Trial transcripts are available on the docket at Docs. 301 to 307.

<sup>2</sup> At the close of the plaintiffs' case-in-chief, Dish orally moved for judgment as a matter of law under Rule 50(a). Minute Entry 01/13/2017; Fed. R. Civ. P. 50(a). The Court denied the motion. *Id.* Dish again moved for judgment as a matter of law at the close of all the evidence. Minute Entry 01/17/2017; Doc. 290. The Court deferred ruling on the motion. Minute Entry 01/18/2017.

<sup>3</sup> After the verdict, the Court denied Dish's Rule 50(a) motion, without prejudice to a Rule 50(b) motion. Text Order 02/08/2017.

<sup>4</sup> Dish requested oral argument on both motions. Docs. 318, 320. Given the Court's familiarity with this case and the issues it raises, oral argument would not be helpful and the request is denied.

## II. FACTS

In deciding a motion for judgment as a matter of law, the Court “view[s] the evidence in a light most favorable to the non-moving party and draw[s] every legitimate inference in that party's favor.” *Saunders v. Branch Banking & Trust Co. of Va.*, 526 F.3d 142, 147 (4th Cir. 2008) (citation omitted). In deciding a motion for a new trial, the Court is permitted to weigh the evidence and consider the credibility of witnesses. *Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 301 (4th Cir. 1998).

The evidence at trial showed that Dish had broad contractual rights to control SSN’s telemarketing practices; that it promised forty-six state attorneys general that it would monitor and control the telemarketing practices of its marketers, including SSN; that it was aware SSN had a long history of non-compliance with the TCPA; that it learned just before the class period began that SSN was soliciting people on the Do Not Call Registry and yet it took no action to prevent SSN from making those calls on Dish’s behalf; and that during the class period SSN made thousands of phone calls to residential numbers on the Registry attempting to sell Dish products.

The Court further incorporates facts in its May 22, 2017, opinion, which found that Dish’s violations of the TCPA were willful and knowing. Doc. 338 at 3-20. The Court will discuss additional facts as necessary.

## III. JUDGMENT AS A MATTER OF LAW

“A court may award judgment as a matter of law only if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party.” *Saunders*, 526 F.3d at 147 (citing Fed. R. Civ. P. 50(a)). Judgment as a matter of law is

appropriate only when “the court determines that the only conclusion a reasonable jury could have reached is one in favor of the moving party.” *Id.* at 147 (citation omitted).

**a. Agency**

To prevail at trial on agency, the plaintiffs had to prove two things by the greater weight of the evidence: first, that SSN was Dish’s agent; and second, that SSN acted in the course and scope of that agency when it made the calls at issue. Doc. 293 at 4-5. The Court instructed the jury on actual authority, including implied actual authority by consent or acquiescence. *Id.* at 5, 6-7.<sup>5</sup> Dish contends that the evidence was insufficient to support the jury’s finding that SSN was Dish’s agent and insufficient to support the jury’s finding that SSN acted within the scope of that agency.

**i. Actual authority**

For agency to exist, the principal must have the power to direct and control the agent’s actions. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013); Restatement (Third) of Agency § 1.01 & cmt. c (2006). An agent acts with actual authority when, at the time of the action, the agent reasonably believes, based on the principal’s words or conduct, that the principal wishes the agent to so act. *See Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 990 (4th Cir. 2012). In most cases, “the existence and scope of agency relationships are factual matters.” *Metco Prods., Inc. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989).

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<sup>5</sup> The Court earlier granted summary judgment in Dish’s favor on the two alternate agency theories of apparent authority and ratification. Doc. 118.

The plaintiffs offered substantial evidence that SSN had actual authority to act as Dish's agent when it made telemarketing calls. As set forth in more detail in the Court's opinion on the willful and knowing issue, the SSN-Dish contract gave Dish substantial control over SSN's marketing and gave Dish unilateral power to impose additional requirements about telemarketing on SSN. Doc. 338 at 8-9. Dish periodically imposed requirements on SSN and other OE retailers—i.e., marketers—about telemarketing. These included a requirement that the marketers use PossibleNow, a service that scrubbed phone lists against the Registry, and a requirement that marketers keep records of calls made. DX 2; DX 5.<sup>6</sup> Less than a year before the class period began, Dish represented to forty-six state attorneys general in an Assurance of Voluntary Compliance (the Compliance Agreement) that it had the authority to and would monitor compliance of all its marketers, including SSN, with telemarketing laws. Doc. 338 at 14-15. Dish sent SSN a copy of that Compliance Agreement. *See* Trial Tr. Jan. 11, 2017, Doc. 302 at 73:25-74:10 (testimony by Amir Ahmed). Dish had the power to control and direct SSN's telemarketing activities, it had manifested that intent to and did exercise that power over SSN, and it had given SSN reasonable grounds to believe that Dish wished SSN to act as its agent in its telemarketing activities. *See* Doc. 293 at 6.

Dish points to the SSN-Dish contracts, written communications with SSN, and the testimony of Dish employees, all of which stated that SSN was an independent contractor. Doc. 319 at 7-8. Dish also contends that it lacked control over SSN's

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<sup>6</sup> PX refers to "Plaintiffs' Exhibit," DX to "Defendant's Exhibit," and JX to "Joint Exhibit."

telemarketing. *Id.* at 9-10. That the contract between Dish and SSN explicitly characterized the relationship as one of independent contractor, JX 1 at ¶ 11, is not binding on third parties. *See, e.g., City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1097-98 (7th Cir. 1992). As discussed *supra*, there was substantial evidence to the contrary that, if accepted by the jury, showed that SSN acted as Dish's agent. The jury was not required to accept Dish's evidence, and it resolved conflicts in the evidence in favor of the plaintiffs, as was its privilege. *See, e.g., Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) (stating that the jury has the power to determine the facts).

**b. Scope of authority**

A principal is not bound by the act of an agent unless that act falls within the scope of actual authority granted by the principal to the agent. Restatement (Third) of Agency § 7.04 (2006). Actions taken against the principal's interest are generally not within the scope of the agent's authority. *United States v. Hilton*, 701 F.3d 959, 970 (4th Cir. 2012); *cf. Tobacco Tech., Inc. v. Taiga Int'l N.V.*, 388 F. App'x 362, 373 (4th Cir. 2010) (unpublished) (agent's knowledge not imputed to principal if agent is acting adversely to principal's interests). If the principal consents or acquiesces in a course of conduct, the agent may reasonably conclude that the conduct is in the principal's best interests. *See Commodity Futures Trading Comm'n v. Gibraltar Monetary Corp., Inc.*, 575 F.3d 1180, 1189 (11th Cir. 2009) (per curiam); Restatement (Third) of Agency § 2.02 cmt. d (2006) ("questions of interpretation that determine whether an agent acted with actual authority have a temporal focus that moves through time as the agent decides how to act"); *id.* at cmt. e ("[a]n agent's understanding of the principal's interests and objectives is an element

of the agent's reasonable interpretation of the principal's conduct."'). To decide that the principal acquiesced or consented, there must be evidence that the principal knew of earlier similar activities by the agent and consented or did not object to them. *See id.* ("[i]n determining whether an agent's action reflected a reasonable understanding of the principal's manifestations of consent, it is relevant whether the principal knew of prior similar actions by the agent and acquiesced in them."')

The plaintiffs presented substantial evidence that SSN acted within the scope of its authority when it made the telemarketing calls at issue. Obviously Dish benefitted, and SSN knew that Dish benefitted, when SSN made sales on Dish's behalf. Dish knew that government lawsuits and consumer complaints, including a complaint from Dr. Krakauer just a year before the class period began, had demonstrated problems with SSN's compliance with the do-not-call laws. PX 15 at 8060-62; Doc. 338 at 10-17. Dish knew that DirecTV, its primary competitor, had terminated SSN as a marketer. *See* PX 15 at 8002; Trial Tr. Jan. 12, Doc. 303 at 52:13-:21, 55:6-:8 (testimony of Reji Musso). SSN had told Dish that SSN was using a telemarketing list that contained people on the Registry. *See* PX 15 at 7980-81. Dish knew that SSN was not following Dish's instruction to maintain call records or its instruction to use a third-party vendor, Possible Now, to scrub call lists against the Registry. *See* Doc. 338 at 12-14, 16-17.

Despite these red flags, Dish never took disciplinary action against SSN and never threatened to terminate SSN. *See* Trial Tr. Jan. 12, Doc. 303 at 20:11-21:12, 22:4-:21 (Musso testimony). It never investigated whether SSN's conduct violated telemarketing laws. *See id.* at 41:12-42:7, 73:12-74:9, 78:4-:23 (Musso testimony). SSN was aware of

the complaints and Dish's lack of monitoring and enforcement; by inference, SSN knew Dish was not going to terminate or discipline SSN for these violations, knew that Dish's compliance requirements were empty words, and knew that Dish placed the financial gains from making sales ahead of TCPA compliance.

Under these circumstances, and based on Dish's words, conduct, and inaction, SSN could reasonably believe that Dish acquiesced or consented to SSN's telemarketing violations, and SSN could reasonably conclude that its telemarketing conduct was in Dish's best interests, because it could result in sales to Dish. *See* Doc. 293 at 6-7. The evidence was well sufficient to support the jury's finding that SSN's actions were within its scope of authority.

Dish maintains that SSN's telemarketing calls to persons on the Registry were beyond its scope of authority. Dish presented evidence that it told SSN not to contact any person on the Registry and to scrub its lists with PossibleNow, and Dish contends that it is not responsible for calls SSN made thereafter to persons on the Registry. Doc. 319 at 13-14.<sup>7</sup> Dish asserts that it never acquiesced to SSN's conduct because it objected to every violation of which it was aware. *Id.* at 14-20. Dish also contends that calls to people on the Registry were outside any scope of authority because those calls were adverse to Dish's interests. *Id.* at 20.

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<sup>7</sup> In support, Dish cites *Bridgeview Health Care Center, Ltd. v. Clark*, 816 F.3d 935, 939 (7th Cir.), *cert denied*, 137 S. Ct. 200 (2016), a TCPA case where a fax marketer ignored the principal's instructions. Doc. 319 at 10-11. *Bridgeview* is entirely different from the facts here, because it involved a one-time transaction where the principal had no opportunity to acquiesce. *See* 816 F.3d at 937.

The evidence to the contrary, however, was significant, and while a jury could have accepted Dish's evidence and contentions, it was not required to do so. *See, e.g., Dimick*, 293 U.S. at 486. Communications between Dish and SSN in response to numerous complaints show that Dish acquiesced to SSN's marketing practices. When SSN twice told Dish that it was, in fact, not scrubbing all its lists with PossibleNow, Dish's only response was to ask SSN to stop calling the specific person who had complained. *See* PX 15 at 7980-81, 8005; PX 52; PX 899 at 1. Dish did nothing to monitor SSN's compliance with these requests or with the telemarketing laws generally. *See* Trial Tr. Jan. 12, Doc. 303 at 41:12-42:7 (Musso testimony). The evidence of Dish's silence about scrubbing *other* numbers on the Registry from SSN's call lists and its failure to monitor in the face of its promises to the state attorneys general, about which SSN knew, were sufficient to support an inference that Dish acquiesced to SSN's practices. For the same reasons, SSN could reasonably assume from Dish's knowledge and failure to object that calls to numbers on the Registry were in Dish's best interests—at least as long as the recipients did not complain, as most did not. *See id.* at 150:16-152:15 (Musso testimony); Restatement (Third) of Agency § 2.02 cmt. e (2006) (in determining consent, "it is relevant whether the principal knew of prior similar actions by the agent and acquiesced in them").

Dish also contends that it instructed SSN not to call Dr. Krakauer again and that SSN disobeyed this instruction. Doc. 319 at 11-13. Contrary to Dish's suggestion, a reasonable jury could find that SSN's later calls to Dr. Krakauer in 2010 and 2011 were within the scope of the agency relationship. The instructions to stop calling Dr. Krakauer



came in communications from Dish's compliance department. PX 15 at 7980-81, 8005. SSN knew from experience that instructions from the compliance department were window dressing that SSN could safely ignore. *See* Doc. 338 at 17-18, 24-26. Furthermore, SSN had, in response to the 2009 complaint from Dr. Krakauer, indicated to Dish that it was using a call list that was last scrubbed in 2003. *See* Trial Tr. Jan. 12, Doc. 303 at 35:3-36:7, 38:16-39:17 (Musso testimony). This suggests that anyone Dish had told SSN not to call in the intervening *six years* was still on SSN's call lists in 2009, and that Dish acquiesced to this practice by not objecting to it. Dish did nothing to monitor or check on whether SSN complied with its instructions about scrubbing, even though it knew SSN had ignored such instructions in the past. SSN could reasonably assume that Dish was just going through the motions and that its words meant nothing, so that calling Dr. Krakauer again was still within the scope of SSN's actual authority.

**c. Plaintiffs' expert**

Dish maintains that there was insufficient evidence that the calls at issue violated the TCPA, because the plaintiffs' expert, Anya Verkhovskaya, gave unreliable testimony that was "wildly speculative." Doc. 319 at 20-22. Specifically, Dish challenges Ms. Verkhovskaya's testimony that the class members' phone numbers were on the Registry at the time of the calls and that they were residential numbers.

Ms. Verkhovskaya testified that she had worked for eighteen years at a data analysis organization that manages data for class action lawsuits. Trial Tr. Jan. 12, Doc. 303 at 166:21-167:9, 172:4-:25. She has worked on more than a thousand class actions, Trial Tr. Jan. 13, Doc. 304 at 21:13-:15, including several large international cases. Trial

Tr. Jan. 12, Doc. 303 at 171:2-:25. She testified that her analysis of the call data was based on her experience in the data industry and her understanding of the practices of several data vendors on whose data she regularly relies. *See, e.g., id.* at 179:18-180:18, 182:2-:22.

Ms. Verkhovskaya began her analysis with an examination of call records for the class period from Five9, a software service used by SSN to make calls and connect them with SSN's call center. *See id.* at 167:15-168:4; Dep. Tr. of David Hill, Doc. 332 at 15:25-16:5.<sup>8</sup> These call records, which Ms. Verkhovskaya received in electronic form, showed the number called, date, time, length of the call, and other information. Trial Tr. Jan. 12, Doc. 303 at 174:3-:13, 176:13-:21. After downloading the records into a database, she determined that SSN made 1.6 million calls during the class period. *Id.* at 175:11-:14.

Ms. Verkhovskaya testified that she first removed inbound calls and calls that were not connected. *Id.* at 177:3-178:5. This left approximately 230,000 connected, outbound calls. *Id.* at 178:6-:8. She then removed calls to numbers that SSN called only once, since a TCPA violation requires more than one call. *Id.* at 178:11-:17; 47 U.S.C.

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<sup>8</sup> The Five9 records were admitted into evidence at trial with no objection after they were authenticated by Five9 employees David Hill and Tanya Maslennikov, who testified by video deposition. *See* Hill Dep., Doc. 332 at 8:10-:13, 11:22-:25, 12:4-:14; Dep. Tr. of Tanya Maslennikov, Doc. 333 at 17:17-:20, 20:25-21:3; PX 2007 (Hill affidavit); PX 197 (Maslennikov affidavit). For these two depositions and the deposition of Bahar "Sophie" Tehranchi, Doc. 327, pin citations refer to the page numbers in the original transcript, not the page numbers appended by CM-ECF.

§ 227(c)(5). This left approximately 164,500 calls to 58,150 numbers. Trial Tr. Jan. 12, Doc. 303 at 178:21-179:3.

Next, she removed calls to numbers that were not on the Registry as of 30 days before the class period began, or April 1, 2010. Trial Tr. Jan. 13, Doc. 304 at 30:15-:21. She obtained information about what numbers were on the Registry from Nexxa, which she testified was an “industry standard.” Trial Tr. Jan. 12, Doc. 303 at 179:18-180:6.<sup>9</sup> She also testified that the data from Nexxa would indicate if a number had later come off the Registry. Trial Tr. Jan. 13, Doc. 304 at 32:1-33:21. After comparing the numbers, she removed 34,526 numbers that were not on the Registry, Trial Tr. Jan. 12, Doc. 303 at 179:14-:17, leaving 66,468 calls to 23,625 numbers. *See* PX 2008; Trial Tr. Jan. 13, Doc. 304 at 31:7-:11.

Ms. Verkhovskaya then took several steps to remove any numbers from the list that were not residential. She testified that she used data from LexisNexis and from the call records to determine whether the numbers called were residential.<sup>10</sup> She removed all numbers that the Five9 call records themselves marked as “business.” Trial Tr. Jan. 12,

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<sup>9</sup> Ms. Verkhovskaya testified that the Registry has agreements with some companies, including Nexxa and PossibleNow, to provide bulk information about who is on the Registry, but that it will not provide such bulk information without special agreements in place. Trial Tr. Jan. 12, Doc. 303 at 180:7-:18.

<sup>10</sup> Ms. Verkhovskaya testified about the reliability of the LexisNexis database at several different points in her examination and cross-examination. For example, early on she explained that LexisNexis is a large public company that the legal industry has used for many years and that LexisNexis maintains a database of business and government phone numbers that identifies “the majority of business numbers.” Trial Tr. Jan. 12, Doc. 303 at 182:2-183:7; Trial Tr. Jan. 13, Doc. 304 at 54:15-56:8; *see also* Trial Tr. Jan. 13, Doc. 304 at 15:5-16:11, 69:4-72:17, 75:8-:19.

Doc. 303 at 181:10-182:1. She also used the LexisNexis database to remove additional business and government numbers from the class. *See id.* at 191:2-:9.

Ms. Verkhovskaya testified that based on her experience, once business and government numbers were eliminated, the remaining numbers must be residential. *See, e.g., id.* at 190:25-191:6.<sup>11</sup> She also considered that SSN was focused on selling Dish to residences, which suggested that most of their calls would be to residential numbers. *E.g.,* Trial Tr. Jan. 13, Doc. 304 at 13:22-14:5. As a result of this review, she removed 1,393 business numbers, leaving calls to 22,232 numbers that she concluded were residential numbers. Trial Tr. Jan. 12, Doc. 303 at 181:10-:17, 183:8-:10. Finally, she removed numbers that the Five9 data identified as existing Dish customers, leaving 57,900 calls to 20,450 numbers.<sup>12</sup> *Id.* at 183:11-:23.

Ms. Verkhovskaya provided clear, cogent testimony explaining her methodology and the bases for her opinions. To the extent there was conflicting evidence that

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<sup>11</sup> Ms. Verkhovskaya testified that LexisNexis affirmatively identifies numbers as residential in its database only if it has “affirmative evidence” they are residential. *See, e.g.,* Trial Tr. Jan. 13, Doc. 304 at 15:5-16:11. She considered phone numbers with no business, residential, or government designation to be residential. *Id.* at 11:1-13:2. These were the “unknown” designations referenced in Issue 2 of the verdict sheet. *See* Doc. 292 at ¶ 2.

<sup>12</sup> In the lead-up to trial, the parties stipulated to remove some of these numbers from the class for various reasons. *See* Doc. 264. The parties also stipulated as to which phone numbers fell into certain buckets of proof to facilitate jury decision-making about whether these phone numbers were residential. *See* Doc. 277; *see infra* at p. 22 & note 18. These buckets included, for example, numbers that LexisNexis identified as residential, but only outside the class period, Doc. 277 at ¶ 2, and numbers that LexisNexis identified as cellular or possibly cellular. *Id.* at ¶ 6.

questioned the validity, credibility, and weight of Ms. Verkhovskaya's opinions, the jury weighed that evidence and rejected Dish's evidence.<sup>13</sup>

Dish contends that Ms. Verkhovskaya's analysis was flawed because she did not check to see if class members' numbers were on the Registry on the actual date that SSN called. Doc. 319 at 21. Dish suggests that some of the numbers could have come off the Registry between April 1, 2010, and the date of the call. However, Dish points to no evidence that any identified phone number actually did come off the Registry after April 1, and Ms. Verkhovskaya testified that Nexxa would have removed those numbers from the list it provided her. Trial Tr. Jan. 13, Doc. 304 at 32:1-33:21. This evidence was sufficient to support the jury's finding that the numbers of the class members were on the Registry at the time the calls were made.

Dish asserts that Ms. Verkhovskaya was speculating when she testified that the class numbers were residential. Doc. 319 at 21-22. As Dish points out, Ms. Verkhovskaya could not identify all of the sources of data LexisNexis uses to classify numbers as residential or business. Trial Tr. Jan. 13, Doc. 304 at 71:10-:23; *see* Trial Tr. Jan. 17, Doc. 305 at 39:9-:22 (testimony of Dr. Debra Aron that LexisNexis uses many sources in a proprietary process). That, however, is not the test. *See* Fed. R. Evid. 702.

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<sup>13</sup> Dish's expert witness, Dr. Debra Aron, testified at some length that Ms. Verkhovskaya "failed to apply the proper standards, the accepted standards of data analysis." Trial Tr. Jan. 17, Doc. 305 at 29:19-50:15. Even if the Court agreed that Ms. Verkhovskaya's evidence was shaky, which it does not, Dish had a full opportunity to contest it and took advantage of that opportunity. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 596 (1993) (noting that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence").

Moreover, Ms. Verkhovskaya considered the Five9 records and SSN's telemarketing goals along with the LexisNexis data to conclude that the numbers were residential, as discussed *supra* p. 13. She also used the LexisNexis data in a neutral way by *removing* numbers that LexisNexis said were business numbers from the class list, an action that benefited Dish. *Supra* p. 13.

The jury evaluated Dish's challenges to Ms. Verkhovskaya's testimony and was not persuaded. Viewing the evidence in the light most favorable to the plaintiffs, there was a sufficient evidentiary basis to show that the calls were made to numbers on the Registry and that those numbers were residential.

#### **d. Standing**

Finally, Dish contends that Dr. Krakauer lacked standing to bring these claims because there was no evidence that he, or any other class member, heard or answered any of the calls at issue. Doc. 319 at 22. In support, Dish cites *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-49 (2016) and *Romero v. Dep't Stores Nat'l Bank*, 199 F. Supp. 3d 1256, 1262 (S.D. Cal. 2016).

To the extent Dish asserts that the plaintiffs lack standing because of *Spokeo*, this contention has no merit for the reasons stated in the Court's previous order. *See* Doc. 218 at 1-4.

The recent *Romero* decision is neither applicable nor persuasive. In *Romero*, the court held that there was no standing under § 227(b)(3) of the TCPA for calls that were auto-dialed but never heard or answered. 199 F. Supp. 3d at 1262 ("Plaintiff does not offer any evidence of a concrete injury caused by the use of an ATDS [or automated

telephone dialing system], as opposed to a manually dialed call.”). The injury here, under § 227(c)(5), is to the privacy of the persons called, and it is not based on the method by which calls were dialed. *See, e.g., Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376-77 (4th Cir. 2013) (recognizing that the TCPA “protects residential privacy”). Furthermore, the evidence is that the calls here were actually connected, because the plaintiffs’ data expert excluded calls with a zero or negligible duration. Trial Tr. Jan. 12, Doc. 303 at 177:3-178:5 (Verkhovskaya testimony).

**e. Conclusion**

The evidence at trial easily supports the jury’s findings. Dish’s motion for judgment as a matter of law will be denied.

**IV. NEW TRIAL**

A district court should grant a new trial under Rule 59(a)(1)(A) when: “(1) the verdict is against the clear weight of the evidence, or (2) is based upon evidence which is false, or (3) will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict.” *Gentry v. E. W. Partners Club Mgmt. Co.*, 816 F.3d 228, 240-41 (4th Cir. 2016) (quoting *Cline*, 144 F.3d at 301). None of these circumstances exist here.

**a. Clear weight of the evidence**

Dish contends that the verdict is against the clear weight of the evidence for the reasons stated in its motion for judgment as a matter of law. Doc. 321 at 4. For the reasons stated *supra* pp. 3-15 and stated in the Court’s decision on willfulness, Doc. 338,

the evidence fully supports the jury's verdict. The verdict is not against the clear weight of the evidence.

**b. Evidentiary rulings**

Dish contends that some of the Court's evidentiary rulings were incorrect and resulted in a miscarriage of justice. In particular, Dish asserts that the Court allowed plaintiffs' counsel to overemphasize SSN's 2004 and 2005 TCPA violations related to prerecorded calls, Doc. 321 at 4-7, and the enforcement actions against Dish and other marketers. *Id.* at 8-9. Dish contends the evidence of SSN's credit check on Dr. Krakauer was erroneously admitted and improperly used by the plaintiffs. *Id.* at 9-11. Dish also disputes the exclusion of two fact witnesses, Kenneth Sponsler and Holly Taber McRae. *Id.* at 11-12.

As explained in the Court's order on the willfulness issue, evidence about SSN's 2004 and 2005 violations and the enforcement actions against SSN was relevant to the agency question and therefore was properly before the jury. Doc. 338 at 10-13, 19. It would be strange if the Court did not allow plaintiffs' counsel to draw the jury's attention to admissible evidence that supports their theory of the case. In any event, plaintiffs' counsel spent relatively little time on this evidence in his closing argument and focused more on Dish's absence of meaningful compliance procedures. *See generally* Trial Tr. Jan. 18, Doc. 306 at 11:8-36:1.<sup>14</sup>

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<sup>14</sup> Dish contends that the Court's decision not to allow counsel to quote from the trial transcript during closing argument "compounded" these purported errors. Doc. 321 at 7 n.3. Dish cites *United States v. Kuta*, 518 F.2d 947, 954 (7th Cir. 1975) in support, but that case



Dish contends that the plaintiffs violated evidentiary rulings by referring to other marketers' TCPA issues and to the enforcement actions against Dish. Doc. 321 at 8-9. None of Dish's cited references violated the Court's pretrial ground rules, which, in relevant part, (1) prohibited any mention that the United States had sued Dish, and (2) limited any description of the settlement aspects of the Compliance Agreement in opening statements. *See* Doc. 222 at 5; Doc. 316 at 22:10-:24. The other relevant ground rule established by the Court was that "Dish may object at trial and the Court will deal with the objections as they arise," *e.g.*, Doc. 222 at 4-5, which is exactly what happened as to all the other statements or lines of questioning Dish identifies in its brief. The plaintiffs did not violate the Court's evidentiary rulings.

To the extent Dish contends that the use of the evidence of the unauthorized credit check conducted by SSN violated a pretrial ruling, Doc. 321 at 9-11, that is not correct. At a pretrial conference, the Court expressed some Rule 403 concerns and directed the plaintiffs not to mention the credit check in front of the jury without approval by the Court. Doc. 260 at 61:9-:13 (stating that "[i]f and when the plaintiff gets ready to ask questions about [the credit check], you just let me know . . . and I'll hear from you"). The Court also noted that if Dish questioned Dr. Krakauer's motives for bringing suit, then his knowledge of the credit check might become relevant. *See id.* at 62:3-:10. Dish did exactly that in its opening statement. *See* Trial Tr. Jan. 10, Doc. 301 at 102:22-

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unambiguously says that "it is also within the discretion of the trial court whether to permit counsel to read from the trial transcript during closing argument." *Kuta* provides no support for Dish's motion.

103:13 (“Mr. Krakauer will tell you that he’s bringing this case to make things right, it’s not about the money; but the evidence will be that he didn’t sue the company that did things wrong . . . . [T]he Plaintiff is trying to seek a windfall for a phone call.”).

When the matter came up during testimony, the credit check evidence in PX 282 was originally shown to the jury on an electronic screen before it had been admitted. *See* Trial Tr. Jan. 11, Doc. 302 at 18:8-19:8. This was obviously an administrative mistake—plaintiffs’ counsel had asked to show PX 282 to the *witness*—and the clerk quickly turned off the screen visible to the jury. *See id.* At the bench conference that followed, plaintiffs’ counsel then asserted that the credit check evidence was relevant to show that Dish “protected SSN.” *Id.* at 20:25-21:8. Over Dish’s objection, the Court allowed plaintiffs’ counsel to question Dr. Krakauer about the credit check because it was relevant to Dr. Krakauer’s motivation.<sup>15</sup> *Id.* at 21:9-:21.

Dish also challenges the plaintiffs’ later use of the credit check evidence to show that Dish ignored and covered up SSN’s misdeeds. *E.g.*, Trial Tr. Jan. 18, Doc. 306 at 18:15-19:11 (closing argument). Dish contends that the Court had precluded any use of the credit check evidence other than to show Dr. Krakauer’s motivations. Doc. 321 at 9-11. However, the Court never affirmatively adopted any such limitation, and Dish did

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<sup>15</sup> Dr. Krakauer testified that Dish never informed him about the unauthorized credit check. Trial Tr. Jan. 11, Doc. 302 at 25:12-:21, 27:4-:8. His testimony indicated that he first learned of the credit check when his deposition was taken by the North Carolina Attorney General’s office in 2011 in another case, when he was shown internal Dish documents discussing the credit check. *See id.* at 16:23-17:9, 18:18-:20, 26:25-27:3. The unauthorized credit check evidence suggested a motive for why Dr. Krakauer filed suit and rebutted Dish’s contention that he was only interested in money.

not ask at trial for a limiting instruction about the use of this evidence.<sup>16</sup> In any event, while initially admitted by the Court as relevant to Dr. Krakauer's motivation for filing suit, it became clear during the trial that the credit check evidence ultimately had wider relevance. The credit check incident corroborated Dish's broader pattern of ignoring misconduct by SSN, which was relevant to agency.<sup>17</sup> *See* Doc. 338 at 10-14, 16-17; Doc. 293 at 6-7 (final jury instructions stating that the lack of enforcement of written limits on behavior is relevant to consent and acquiescence). The plaintiffs' use of the credit check evidence did not violate any evidentiary rulings.

Finally, the Court made the decisions to exclude Ms. McRae and Mr. Sponsler as fact witnesses after briefing and a full opportunity to be heard. *See* Doc. 222 at 3-4. Dish did not disclose these persons as potential fact witnesses during the discovery process, *id.*, and nothing happened at trial to raise grounds for changing that decision.

### **c. Verdict sheet**

Dish maintains that the verdict was a miscarriage of justice because the verdict sheet did not have a separate question asking whether SSN acted within the scope of any

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<sup>16</sup> PX 15, which contained the same credit check evidence as PX 282, *see* PX 15 at 8060-62, was generally subject to a limiting instruction that the jury should use it as evidence of what Dish knew, not necessarily as the truth of what the documents asserted. Trial Tr. Jan. 21, Doc. 303 at 26:22-27:4. The plaintiffs' use of the credit check evidence was consistent with this instruction.

<sup>17</sup> The evidence indicated that Dish knew SSN's employee had violated Dish's rules governing the running of credit reports in connection with a telemarketing complaint made by Dr. Krakauer a year before the class period began. *See* PX 15 at 8061; Trial Tr. Jan. 12, Doc. 303 at 31:18-32:24 (Musso testimony). Other evidence indicated that Dish did nothing to stop SSN from misusing Dish's access to credit reports, *see* PX 15 at 7980-82, 8005 (not mentioning credit reports), or to discipline SSN. *See* Trial Tr. Jan. 12, Doc. 303 at 20:11-21:12 (Musso testimony).

authority it had been given by Dish. Doc. 321 at 13-14. A separate question was unnecessary. The Court clearly and repeatedly instructed the jury that scope of authority was part of the agency question on the verdict sheet. When the court's instructions fully inform the jury of the applicable law, special interrogatories on every element of a claim or defense are not needed. *E.g.*, *Talkington v. Atria Reclamelucifers Fabrieken BV*, 152 F.3d 254, 266-67 (4th Cir. 1998); *see Gentry*, 816 F.3d at 238-39; *Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 190 (4th Cir. 1994) (holding that "[t]he use of special verdicts rests with the discretion of the district court, and the exercise of this discretion extends to the language used in the form" (citations omitted)).

The Court's initial jury instructions, before the evidence, mentioned scope of authority three times. *See* Trial Tr. Jan. 10, Doc. 301 at 70:9-71:21. The final instructions explained scope of authority in detail and mentioned scope of authority more than a dozen times. *E.g.*, Doc. 293 at 5-7. When reviewing the verdict sheet at the end of the instructions, the Court instructed the jury that a "Yes" answer on the agency question required finding (1) that there was an agency relationship and (2) "that SSN was acting in the course and scope of that agency when it made the telephone calls during the class period." Trial Tr. Jan. 18, Doc. 306 at 8:17-:24. These instructions adequately addressed the scope of authority issue by incorporating it into the agency question.

#### **d. Expert testimony**

Dish contends that the Court should have excluded parts of Ms. Verkhovskaya's testimony and should have allowed Dish's experts to testify more fully. Doc. 321 at 14-19. The testimony at issue concerned whether or not the phone numbers at issue were

residential and whether they were on the Registry on the relevant date. Dish's assertions must be evaluated in context.

As noted *supra* p. 12, Ms. Verkhovskaya used, *inter alia*, data from LexisNexis to remove business numbers and to conclude that the remaining numbers were residential. Dish pointed out that the data from LexisNexis came in several different forms, some of which was stronger than others. For example, some phone numbers were affirmatively identified in the LexisNexis data as residential, while others were not affirmatively identified as falling into any category. *See supra* note 11. Among those affirmatively identified as residential by LexisNexis, some were given that designation during the class period, while others were designated as residential only before or after the class period. Dish also contended that many of the numbers were cellular numbers, and LexisNexis identified some as cellular or possibly cellular. *See* Trial Tr. Jan. 13, Doc. 304 at 18:10-:19 (Verkhovskaya testimony). Dish asserted that these numbers were less likely to be residential.

In order to fairly and efficiently allow Dish to contest whether certain phone numbers were residential, the parties reviewed the data, divided the numbers into categories, or "buckets," based on the information from LexisNexis, and stipulated as to which phone numbers were in which buckets.<sup>18</sup> Doc. 277; *see also supra* note 12. The

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<sup>18</sup> In proceedings before the originally-scheduled trial date, the Court was concerned about managing the presentation of the residential issue on the all-or-nothing basis advocated by the plaintiffs and felt it would be fairer to Dish to give the jury the opportunity to make different findings based on differences in the evidence. *See generally* Doc. 204. Thereafter, the Court and the parties spent substantial time figuring out the most manageable way for this defense to be

verdict sheet broke out all of these buckets so the jury could decide, bucket by bucket, whether the plaintiffs' proof that the numbers were residential was sufficient. Doc. 292 at ¶ 2. These buckets would allow the jury to decide that the evidence was sufficient as to all of the numbers, some of them, or none of them.<sup>19</sup>

While Dish has contended since the class certification stage that the evidence that the numbers were residential was not reliable, it never identified its own expert to testify that any numbers were or were not residential. *See* Doc. 233 at 7 & n.5. As the case moved towards trial, well after discovery had closed, Dish repeatedly tried to fill in this and other gaps in its pretrial preparations by attempting to call witnesses at trial who it had not disclosed or designated to testify.<sup>20</sup> *See id.* at 7-8, 19-20 (numerous exhibits and witnesses); Doc. 222 at 3-4 (Ms. McRae, Mr. Sponsler); Doc. 183 at ¶ 10 (unnamed Microbilt representative).

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decided by the jury, and the stipulations were part of the solution. The word "buckets" was adopted by the parties and the Court as a colloquial way to refer to these categories.

<sup>19</sup> As it happens, the jury accepted the plaintiffs' evidence as to every bucket and rejected all of Dish's challenges. *See* Doc. 292 at ¶ 2.

<sup>20</sup> Rule 26 requires expert witnesses to submit a written report containing, among other information, "a complete statement of all opinions the witness will express and the basis and reasons for them." Fed. R. Civ. P. 26(a)(2)(B)(i). "The purpose of the rule is to avoid unfair surprise to the opposing party." *Heller v. Dist. of Columbia*, 801 F.3d 264, 270 (D.C. Cir. 2015) (quotation omitted), *reh'g en banc denied*, 814 F.3d 480 (2016). "The purpose of [expert] reports is not to replicate every word that the expert might say on the stand. It is instead to convey the substance of the expert's opinion . . . so that the opponent will be ready to rebut, to cross-examine, and to offer a competing expert if necessary." *Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009); *see also Gay v. Stonebridge Life Ins. Co.*, 711 F. Supp. 2d 165, 167 (D. Mass. 2010) (denying motion for new trial and stating that an expert report "need not include the precise language that the expert will employ at trial"), *aff'd*, 660 F.3d 58 (1st Cir. 2011).

**i. Ms. Verkhovskaya**

At trial, Ms. Verkhovskaya testified that all of the phone numbers remaining in the class were residential. Trial Tr. Jan. 12, Doc. 303 at 191:13-:17. She also explained why she had not removed from the class the numbers in the various buckets during her analysis and why she still believed the numbers were residential. *E.g.*, Trial Tr. Jan. 13, Doc. 304 at 10:2-14:17, 90:3-91:4.

Dish contends that Ms. Verkhovskaya did not disclose in her report or at her deposition that she would testify that all the phone numbers were residential and that it was error to allow her to so testify.<sup>21</sup> Dish's objections are based on an unduly narrow reading of her report. In her report, Ms. Verkhovskaya explained how she removed business numbers from the data set and stated that the remaining numbers "were not identified as business numbers," *see* Doc. 48-2 at 10-12, which in the context of this case is based on the obvious need to prove the remaining numbers are residential. *See* § 227(c)(5). Her testimony was simply another way of saying the same thing. *See Walsh v. Chez*, 583 F.3d 990, 994 (7th Cir. 2009). Dish should not have been surprised.<sup>22</sup>

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<sup>21</sup> Dish also made this argument in an oral motion to strike at trial. *See* Trial Tr. Jan. 13, Doc. 304 at 120:7-124:16.

<sup>22</sup> The Court allowed Dish to fully explore this asserted inconsistency before the jury. On cross-examination, Dish pushed Ms. Verkhovskaya to acknowledge that her expert report did not actually say that the numbers were residential. In response, she testified that her opinion was based on an assumption that all non-businesses numbers are residential. Trial Tr. Jan. 13, Doc. 304 at 58:15-59:16 ("Well, to me, it is clear that if they're not businesses, that they're residential.").

To the extent Dish challenges the decision to allow Ms. Verkhovskaya to testify about the buckets on direct examination, that decision was within the Court's discretion to manage the order of evidence. *See* Fed. R. Evid. 611(a) (allowing courts to "exercise reasonable control over the mode and order of examining witnesses and presenting evidence" to make the trial "effective for determining the truth" and to "avoid wasting time"). Dish stated that it would cross-examine Ms. Verkhovskaya on the same topics, Trial Tr. Jan. 12, Doc. 303 at 198:16-:20, and it was clear that Dish intended to call experts who would testify about some of these buckets. *See id.* at 199:21-:23. The Court allowed Ms. Verkhovskaya to testify about the buckets on direct in order to reduce confusion, *see id.* at 199:1-:20; 202:18-:25, and to prevent the need for Ms. Verkhovskaya to testify again during the plaintiffs' rebuttal evidence. *See* Trial Tr. Jan. 17, Doc. 305 at 22:11-:15.<sup>23</sup> An expert who testifies at trial is allowed to explain why criticisms of her work are mistaken or unwarranted, even if those explanations are not in her original report.<sup>24</sup> *See Thompson v. Doane Pet Care Co.*, 470 F.3d 1201, 1203 (6th

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<sup>23</sup> Dish points to a couple of places in the record where the Court expresses some doubt about whether it had made the right decision to let Ms. Verkhovskaya testify about the stipulated buckets on direct. *See* Trial Tr. Jan. 17, Doc. 305 at 17:14-:17, 21:4-:8. These comments were made in the course of evaluating the plaintiffs' evidentiary challenges to Dish's expert, Dr. Aron, and were not findings that the Court had done it wrong; they were reflections on some of the problems caused by Dish's efforts to offer evidence through experts that it had failed to disclose before trial. The Court allowed Dish's experts to testify fully when they had been properly disclosed and overruled objections by the plaintiffs on this point. *Id.* at 37:5-38:16, 60:9-:15. The Court is satisfied that the way it handled the matter did not result in any unfairness to Dish.

<sup>24</sup> Ms. Verkhovskaya's testimony may have actually been helpful for Dish because she explained the contents of the buckets to the jury. Ms. Verkhovskaya's testimony, Trial Tr. Jan. 13, Doc. 304 at 10:2-18:19, 90:6-103:19, was the only testimony by any witness about most of those buckets.



Cir. 2006) (holding that Rule 26(a)(2)(B) “contemplates that the expert will supplement, elaborate upon, explain and subject himself to cross-examination upon his report”).

Dish also objects to Ms. Verkhovskaya’s testimony that all of the class members’ numbers had remained on the Registry during the time that SSN called them. Doc. 321 at 15-16; *see* Trial Tr. Jan. 12, Doc. 303 at 183:24-184:5; Trial Tr. Jan. 13, Doc. 304 at 31:18-33:21. This testimony was based on her understanding of the Nexxa data, which Ms. Verkhovskaya discussed in her pretrial report and at her deposition. Doc. 48-2 at 10; Doc. 103 at 40, 154:9-156:21. She was not required to forecast her testimony word-for-word, *see Walsh*, 583 F.3d at 994, nor was she required to anticipate every challenge to her opinions and include her responses to such challenges in her report. There was no unfair surprise to Dish. *See Heller v. Dist. of Columbia*, 801 F.3d 264, 270 (D.C. Cir. 2015), *reh’g en banc denied*, 814 F.3d 480 (2016).

Finally, Dish contends that Ms. Verkhovskaya gave new testimony that contradicted her deposition and formed new opinions. Doc. 321 at 18 & n.7. At a few points, Ms. Verkhovskaya gave different answers from her deposition testimony about whether she had used certain columns of information from LexisNexis in her analysis. *See* Trial Tr. Jan. 13, Doc. 304 at 48:8-49:16, 92:24-94:16, 95:20-97:22. She also admitted at trial that she was, at times, confused at her deposition. *See id.* at 49:8-12, 94:20-23, 95:2-7, 97:20-22.

A few minor misstatements or errors, corrected at trial, do not constitute new opinions. *See Walsh*, 583 F.3d at 994. Even if they did, the admission of a few statements does not constitute a miscarriage of justice requiring a new trial. *See Perrin v.*

*O’Leary*, 36 F. Supp. 2d 265, 267 (D.S.C.) (holding that the new trial requires more than “minor evidentiary errors” (quotation omitted)), *aff’d*, 165 F.3d 911 (4th Cir. 1998). Dish cross-examined Ms. Verkhovskaya at length about these discrepancies, *see* Trial Tr. Jan. 13, Doc. 304 at 49:1-50:6, 91:5-98:20, and the jury found them of no consequence. *Cf. Daubert*, 509 U.S. at 596 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”).

**ii. Dr. Aron**

Dish contends that the Court improperly prevented Dr. Aron from offering testimony to rebut the “new opinions” in Ms. Verkhovskaya’s testimony. Doc. 321 at 17. As noted *supra* p. 24, Ms. Verkhovskaya did not offer new opinions and no one should have been surprised that Ms. Verkhovskaya testified that the class members’ numbers were residential and were on the Registry at the relevant time.

Dish also contends that “the Court required DISH’s counsel to provide page and paragraph cites from Dr. Debra Aron’s report for every bit of testimony [she] offered” before her testimony could be admitted. Doc. 321 at 17. That is not an accurate statement of the record.

Before trial, the Court granted a motion to exclude all testimony about a supplemental report Dr. Aron prepared addressing the plaintiffs’ proposed method of class notice, both because she had not been properly disclosed and for Rule 403 reasons.

Doc. 233 at 19-21 (excluding Doc. 129-1 (supplemental report)).<sup>25</sup> At trial, it became clear that Dish intended to ask Dr. Aron some questions about topics that did not appear in her original report. *E.g.*, Trial Tr. Jan. 17, Doc. 305 at 16:22-:23 (“[S]he didn’t offer any opinions about that, anything close to that in her original report.”), 19:10-:22 (“Well, where is anything close to that in the report?”).<sup>26</sup> By asking Dish questions, the Court was giving Dish an opportunity to help the Court understand why Dr. Aron’s testimony might fall outside the confines of the ruling on the motion in limine. Consistent with its pretrial ruling, the Court ruled that Dr. Aron’s testimony should be limited to the matters in her original report, as Dish had not disclosed Dr. Aron as an expert on any other topic. *Id.* at 21:14-23:5. The limitations placed on Dr. Aron’s testimony were appropriate and did not result in a miscarriage of justice.

To the extent Dish asserts that the Court imposed different standards on Dish than it did on the plaintiffs when evaluating whether expert opinions were outside the scope of those disclosed pretrial, Dish is comparing apples to oranges. As stated in the Court’s pretrial evidentiary order, “Dish did not disclose that Dr. Aron or any other expert witness would offer opinions at trial about specific categories of class members and phone numbers that purportedly do not meet the elements for liability.” Doc. 233 at 12-13. The ultimate reason the Court did not allow Dr. Aron to testify about these buckets

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<sup>25</sup> The plaintiffs did not seek to exclude Dr. Aron’s testimony about issues raised in her original report. That report opposed class certification and challenged Ms. Verkhovskaya’s analysis. Doc. 56-12.

<sup>26</sup> The issue of Dish attempting to use undisclosed expert testimony was a recurring problem. *See supra* p. 23.

was that Dish did not disclose her as an expert—and she reached no affirmative opinions—about whether class members’ numbers met the standards for liability. *See* Trial Tr. Jan. 17, Doc. 305 at 19:1-:4, 21:14-22:3; Fed. R. Civ. P. 26(a)(2)(A), (B)(i). In contrast, the plaintiffs properly identified Ms. Verkhovskaya as an expert before trial. Ms. Verkhovskaya affirmatively analyzed the elements of liability, both in her report and in her testimony. *See generally* Doc. 321-1. Dish repeatedly attempted to avoid the consequences of its pretrial failure to identify witnesses, *see supra* p. 23, and it was appropriate for the Court to keep tabs on this throughout the trial.

Moreover, the Court allowed Dish to present extensive testimony from Dr. Aron about the methods Ms. Verkhovskaya used to reach her conclusions and about the purported unreliability of the underlying data. *See* Trial Tr. Jan. 17, Doc. 305 at 29:19-50:15. The Court overruled objections by the plaintiffs to much of this testimony. *Id.* at 37:5-38:16, 60:9-:15. Dish had a fair opportunity to rebut Ms. Verkhovskaya’s opinions.

### **iii. Dr. Fenili**

Finally, Dish contends that the Court should have allowed Dr. Robert Fenili to testify about cellular numbers on the Registry. Doc. 321 at 19-20. The Court granted a motion in limine and excluded Dr. Fenili’s testimony about cellular numbers. Doc. 222 at 2. As previously stated, that evidence was of limited probative value and had a significant risk of confusion. *Id.* Nothing happened at trial to change the Court’s Rule 403 evaluation of that evidence. The exclusion of that testimony was appropriate and not a miscarriage of justice.

**e. Closing argument**

Dish asserts that the verdict was a miscarriage of justice because Dr. Krakauer's counsel referred in closing argument to PX 198, an affidavit of Bahar "Sophie" Tehranchi, which was not in evidence. Doc. 321 at 20-21.

The mistaken reference by plaintiffs' counsel to an exhibit not in evidence was a harmless error. The plaintiffs' closing argument only briefly discussed the affidavit, using it to show that all of SSN's calls through the Five9 platform in 2010 and 2011 were to market Dish products. *See* Trial Tr. Jan. 18, Doc. 306 at 12:18-13:10. These were background facts not legitimately in dispute, because the Ms. Tehranchi testified to these same facts in her video deposition, which was in evidence. *See* Dep. Tr. of Bahar "Sophie" Tehranchi,<sup>27</sup> Doc. 327 at 18:21-:23, 23:3-:15, 26:15-27:7, 72:16-:22, 121:17-:20.

When Dish brought the error to the Court's attention, it asked only for a limiting instruction, not a mistrial. Trial Tr. Jan. 18, Doc. 306 at 38:18-40:15. The Court immediately gave the requested instruction, telling the jury to disregard the paragraph of the affidavit shown to them and to rely only on Ms. Tehranchi's testimony. *Id.* at 40:21-41:10. That instruction cured any error. *See Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 501 (4th Cir. 2001) ("[T]here is an 'almost invariable assumption of the law that jurors follow their instructions.'" (quoting *Richardson v. Marsh*, 481 U.S. 200, 206-07

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<sup>27</sup> Selections of Ms. Tehranchi's video deposition testimony were shown to the jury at trial and offered into evidence.

(1987)); *cf. United States v. Mason*, 344 F. App'x 851, 853-54 (4th Cir. 2009) (per curiam) (unpublished) (finding that an instruction to the jury to rely on its own recollection of the evidence was adequate to cure misconduct in a closing argument). There was no miscarriage of justice resulting from plaintiffs' counsel's reference to the unadmitted exhibit.

**f. Calculation of damages**

Dish maintains that the format of the damages calculation violated Dish's substantive due process rights and was a miscarriage of justice. Doc. 321 at 21-22. In particular, Dish contends that it was a miscarriage of justice that the Court did not permit the jury to award different damage amounts for different phone calls. Doc. 326 at 11.

Courts have routinely found that the statutory damages set by the TCPA are constitutional, including in class actions with representative plaintiffs. *Pasco v. Protus IP Sols., Inc.*, 826 F. Supp. 2d 825, 835 (D. Md. 2011) (citing a "complete non-existence of cases" finding TCPA damages unconstitutional); *see, e.g., City Select Auto Sales, Inc. v. David/Randall Assocs., Inc.*, 96 F. Supp. 3d 403, 427-28 (D.N.J. 2015) (awarding TCPA damages on summary judgment in class action); *Centerline Equip. Corp. v. Banner Pers. Serv., Inc.*, 545 F. Supp. 2d 768, 777-78 (N.D. Ill. 2008) (rejecting due process challenge to TCPA damages at the motion to dismiss stage); *Accounting Outsourcing, LLC v. Verizon Wireless Pers. Commc'ns, L.P.*, 329 F. Supp. 2d 789, 808-10 (M.D. La. 2004) (same).

Dish makes only a passing argument on this point.<sup>28</sup> It cites no TCPA cases in support of its position. The two Fifth Circuit cases Dish cites are distinguishable: The class members in those cases suffered varied personal injuries based on exposure to toxic substances over varying time periods. *See In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1017 (5th Cir. 1997) (crude oil waste contaminated drinking water in a residential neighborhood); *In re Fibreboard Corp.*, 893 F.2d 706, 710 (5th Cir. 1990) (asbestos-related cases). The plaintiffs here did not seek individualized damages, and the harm each class member experienced was essentially the same as other class members. *See generally* Doc. 111 (order granting class certification).

**g. Damages amount**

Dish asserts that the damages award of \$400 per call was excessive in light of the evidence, Doc. 321 at 22, but makes only a cursory argument in support of this claim. The damages award is within the \$500 range permitted by statute, *see* § 227(c)(5), and the plaintiffs were not required to prove any economic loss or out-of-pocket expenses in order to recover damages. Doc. 293 at 13-14. TCPA violations result in invasions of privacy, unwanted interruptions of and disruptions to time at home, tied-up phone lines, and wasted time spent answering unwanted solicitation calls or listening to unwanted

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<sup>28</sup> When Dish raised this argument in pretrial filings, *e.g.*, Doc. 228 at 21-22, it clarified that its “main point is [that] the jury needs to know how much it is awarding in the aggregate,” Doc. 231 at 101:24-102:24, indicating that Dish was primarily concerned about the format of the damages question on the verdict sheet.

voice messages. *See, e.g., Universal Elections*, 729 F.3d at 376-77. It was within the jury's discretion to award damages of \$400 for each such violation.

## V. CONCLUSION

The plaintiffs offered credible evidence that SSN made thousands of telemarketing phone calls on Dish's behalf and as Dish's agent to residential numbers on the Do Not Call Registry in violation of federal law. Dish had a full opportunity to dispute the plaintiff's evidence and there was no miscarriage of justice.

It is **ORDERED** that Dish Network's motion for judgment as a matter of law, Doc. 318, and motion for a new trial, Doc. 320, are **DENIED**.

This the 21st day of July, 2017.

  
UNITED STATES DISTRICT JUDGE