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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Supreme Court No. 81704

District Court No.
A-17-763397-B

JOINT APPENDIX
Vol. 28 of 85
[JA006239-JA006486]

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

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

EXHIBIT 95

EXHIBIT 95

No. 18-1518

IN THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

THOMAS H. KRAKAUER,
Plaintiff-Appellee,

v.

DISH NETWORK, L.L.C.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
CATHERINE C. EAGLES, DISTRICT JUDGE • CASE NO. 1:14-CV-00333-CCE-JEP

AMICUS CURIAE BRIEF OF DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF DEFENDANT AND APPELLANT DISH NETWORK L.L.C.

[All parties have consented. FRAP 29(a).]

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 18-1518 Caption: Krakauer v. DISH Network L.L.C.

Pursuant to FRAP 26.1 and Local Rule 26.1,

DRI–The Voice of the Defense Bar
(name of ~~party/~~amicus)

DRI–The Voice of the Defense Bar

who is amicus curiae, makes the following disclosure:
(~~appellant/appellee/petitioner/respondent/~~amicus~~/intervenor~~)

1. Is ~~party/~~amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does ~~party/~~amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of ~~a party/~~amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☑ YES ☐ NO
If yes, identify entity and nature of interest:

We are unaware of any entities that must be identified other than those entities identified by defendant and appellant DISH Network L.L.C. in its disclosure of corporate affiliations and other interests.

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/ Felix Shafir Date: October 10, 2018

Counsel for: Amicus Curiae

CERTIFICATE OF SERVICE

****

I certify that on October 10, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

s/ Felix Shafir
(signature)

October 10, 2018
(date)

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INTEREST OF AMICUS CURIAE

Amicus curiae DRI–The Voice of the Defense Bar ("DRI") is an international organization that includes more than 22,000 members involved in the defense of civil litigation. DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation of the role of defense lawyers in the civil justice system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the fairness of the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair and efficient. To that end, DRI regularly participates as amicus curiae in cases that raise issues of vital concern to its members, their clients, and the judicial system.

The question presented by this case—whether or not class actions can include numerous uninjured class members—is of exceptional importance to DRI because its members routinely represent clients in class actions. By certifying a broad class of unnamed class members who suffered no injury and entering a judgment allowing these uninjured members to recover, the district court contravened the jurisdictional limits placed on federal courts by the United States Constitution.

DRI has an interest in ensuring that parties are subject to class litigation in federal court only when all unnamed class members have standing to sue under Article III of the Constitution. Indeed, DRI has repeatedly filed amicus briefs addressing significant class action issues. *See, e.g.,* Brief for DRI–The Voice of the Defense Bar as Amicus Curiae Supporting Petitioner, *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016) (No. 14-1146), 2015 WL 4967192; Brief of DRI–The Voice of the Defense Bar as Amicus Curiae in Support of Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317), 2014 WL 108362.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

DRI obtained consent of all the parties to file this brief. This brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

"Article III, § 2, of the Constitution restricts the federal 'judicial Power' to the resolution of 'Cases' and 'Controversies.'" *Sprint Commc'ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008). "No principle is more fundamental to the judiciary's proper role in our system of government than th[is] constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation omitted).

"That case-or-controversy requirement is satisfied only where a plaintiff has standing." *Sprint*, 554 U.S. at 273. To establish standing, a plaintiff must show that the defendant's conduct caused him or her to suffer a concrete "injury in fact" and that a favorable judgment will likely redress this alleged injury. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102-03 (1998) (citation omitted).

Class actions are not exempt from the standing requirement. *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 215-16 (1974). However, federal Courts of Appeals are divided over the interplay between Article III's standing requirements and unnamed class members.

Since the "constitutional requirement of standing is equally applicable to class actions," some Courts of Appeals hold that "each [class] member must have standing" and that "a class cannot be certified if it contains members who lack standing." *Halvorson v. Auto-Owners Ins.*, 718 F.3d 773, 778-79 (8th Cir. 2013); *accord, e.g.*, *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263-64 (2d Cir. 2006).

Other courts, however, indicate the named plaintiff need not show the unnamed members have standing, concluding "the 'cases or controversies' requirement is satisfied so long as a class representative has standing, whether in the context of a settlement or litigation class." *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015).

Still others authorize class certification where the class includes only a de minimis number of injured members as long as defendants ultimately are not required to pay those members. *E.g.*, *In re Nexium Antitrust Litig.*, 777 F.3d 9, 21-25 (1st Cir. 2015).

Finally, some courts inconsistently follow different approaches to the standing issue in different cases. *Compare, e.g.*, *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 594-95 (9th Cir. 2012), *and Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980), *with Torres v. Mercer Canyons*

Inc., 835 F.3d 1125, 1137-38 (9th Cir. 2016), *and Kleen Prods. LLC v. Int'l Paper Co.*, 831 F.3d 919, 927 (7th Cir. 2016).

This Court has not yet taken a position on this split of authority.[1] Consistent with Article III's limitations, this Court should hold that Article III precludes district courts from certifying class actions that include uninjured absent class members. At a minimum, this Court should hold that class action judgments cannot require defendants to provide relief to these uninjured members. And this Court should vacate the judgment here because the order granting class certification and the subsequent judgment contravene these principles.

[1] This Court has previously said that, "[i]n a class action, we analyze standing based on the allegations of personal injury made by the named plaintiffs." *Beck v. McDonald*, 848 F.3d 262, 269 (4th Cir. 2017). But such case law assessed whether the *named* plaintiffs had standing to sue, without considering whether the *unnamed* class members must also be shown to have standing. *See, e.g.*, *id.* at 266-78. Cases are not authorities for propositions never considered by them. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 n.5 (1992).

ARGUMENT

I. Article III precludes class certification where unnamed class members lack standing.

"The Constitution confers limited authority on each branch of the Federal Government." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1546 (2016). As to the Judiciary, Article III "endows the federal courts with '[t]he judicial Power of the United States,'" and "specif[ies] that this power extends only to 'Cases' and Controversies.'" *Id.* at 1547 (citations omitted).

Article III therefore "limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "'One element of the case-or-controversy requirement' is that plaintiffs 'must establish that they have standing to sue.'" *Id.* (citations omitted).

"[T]he 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc.,* 136 S. Ct. at 1547. "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and actual or imminent, not 'conjectural' or 'hypothetical.'" *Steel Co.*, 523 U.S. at 103 (citations omitted). "Second, there must be causation—a fairly traceable

connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.*

Because the "usual rule" in federal courts permits "litigation [to be] conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (citation omitted), the focus of the standing requirement is ordinarily easy to identify: the individual plaintiff must show "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines*, 521 U.S. at 818 (citation omitted). But Federal Rule of Civil Procedure 23 authorizes an exception to this usual rule, permitting a named plaintiff in certain narrowly defined circumstances to bring a class action to represent the interests of unnamed class members. *See Wal-Mart*, 564 U.S. at 348-49.

"That a suit may be a class action," however, "adds nothing to the question of standing" under Article III. *Spokeo, Inc.*, 136 S. Ct. at 1547 n.6 (citations omitted). Rule 23's procedural requirements for class certification "must be interpreted in keeping with Article III constraints." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997). "Art[icle]

III's [standing] requirement remains" in a class action and this constitutional requirement is satisfied only if the named class representative and the "class of other possible litigants" all share the same injury. *Warth*, 422 U.S. at 501; *accord Schlesinger*, 418 U.S. at 215-16. Where some class members have suffered an injury caused by the defendant but others have not, the constitutional standing requirement is not satisfied. *See Lewis v. Casey*, 518 U.S. 343, 358 & n.6 (1996).

Simply put, federal courts can "provide relief to claimants, in individual or class actions," only if the claimants "have suffered, or will imminently suffer, actual harm." *Id.* at 349. Affording a "class of individuals" relief where the defendant caused them no actual harm would eviscerate the separation of powers that is so vital to ensuring that federal courts do not exceed the narrow role assigned to them by the Constitution. *Id.* at 349-50, 357-58.

Accordingly, variations between the named plaintiff's and unnamed class members' injuries result in a lack of standing under Article III. *Gratz v. Bollinger*, 539 U.S. 244, 262-63 & n.15 (2003) (citing *Blum v. Yaretsky*, 457 U.S. 991 (1982)); *see also, e.g.*, *Lewis*, 518 U.S. at 358 & n.6 (holding that Article III standing requirement is not satisfied where some

class members suffer an injury but others do not); *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976) (same); *Warth*, 422 U.S. at 501-02 (same).

Consistent with this precedent, several federal appellate courts hold that class certification is inappropriate where the class representative demonstrates he has standing but the putative class includes unnamed members who lack standing. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 252 (D.C. Cir. 2013); *Halvorson*, 718 F.3d at 778-79; *Avritt v. Reliastar Life Ins.*, 615 F.3d 1023, 1034 (8th Cir. 2010); *Denney*, 443 F.3d at 264.

This Court should adopt the same rule. "In order for a class to be certified, each [class] member must have standing and show an injury in fact that is traceable to the defendant and likely to be redressed in a favorable decision," since the "constitutional requirement of standing is equally applicable to class actions." *Halvorson*, 718 F.3d at 778-79; *accord Rail Freight*, 725 F.3d at 252 (explaining that named plaintiffs must "show that they can prove, through common evidence, that all class members were in fact injured by the alleged" misconduct). Consequently, "a class cannot be certified if it contains members who lack standing."

Halvorson, 718 F.3d at 779 (citing *Denney*, 443 F.3d at 263-64); *accord Mazza*, 666 F.3d at 594 (same); *Avritt*, 615 F.3d at 1034 (same); *Adashunas*, 626 F.2d at 604 (affirming denial of class certification where it was unclear whether "proposed class members have all suffered a constitutional or statutory violation warranting some relief"); *see also Wal-Mart*, 564 U.S. at 364 (acknowledging "necessity" of excluding putative class members who "lack standing to seek injunctive or declaratory relief" from proposed class seeking such relief).

Other appellate decisions have reached a contrary conclusion. *See, e.g.*, *Torres*, 835 F.3d at 1137 & n.6; *Kleen Prods.*, 831 F.3d at 927; *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1197-98, 1201 (10th Cir. 2010); *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 307 (3d Cir. 1998).

But these latter decisions are predicated on flawed rationales. Some contend that Rule 23's prerequisites for class certification (such as the typicality or adequacy of representation or predominance requirements) will protect against the possibility that uninjured absent claimants will ultimately recover by the end of the case; others maintain that later developments (such as a trial on the merits following classwide

discovery) will perform the same sifting function. *See, e.g.*, *Torres*, 835 F.3d at 1137 (explaining that the presence of uninjured class members "does not necessarily defeat certification of the entire class" because a "district court is well situated to winnow out those non-injured members at the damages phase of the litigation, or to refine the class definition"); *Kleen Prods.*, 831 F.3d at 927 (explaining that, at class certification stage, named plaintiffs need not show every class member was injured as long as the class does not include "too many" uninjured members and each member must "ultimately" show injury "to recover"); *Stricklin*, 594 F.3d at 1197-98, 1201 (explaining that, at class certification stage, named plaintiffs need not show unnamed class members suffered an injury caused by the defendant in part because "classwide discovery and further litigation answer th[is] question after certification"); *Prudential*, 148 F.3d at 307 (explaining that, whether unnamed class members are properly in federal court is an issue of "compliance with the provisions of Rule 23, not one of Article III standing").

Neither of these misguided justifications should permit federal courts to ignore whether unnamed class members satisfy Article III's standing requirement at the class certification stage.

First, the theoretic possibility that the class may lose on the merits after class certification because of a failure to prove injury, or that uninjured class members might be winnowed out on the merits through post-certification proceedings, does not permit a court to ignore Article III's standing requirement for unnamed class members. Because "merits question[s] cannot be given priority over an Article III question," there is no basis for "allowing merits questions to be decided before Article III questions." *Steel Co.*, 523 U.S. at 97 n.2. "[T]he proposition that the court can reach a merits question when there is no Article III jurisdiction opens the door to all sorts of 'generalized grievances,' that the Constitution leaves for resolution through the political process." *Id.* (citation omitted).

Second, Rule 23's procedural requirements for class certification—such as the need to show typicality, adequacy of representation, or predominance—are not a sufficient substitute for scrutiny of unnamed members' Article III standing. Standing and Rule 23's requirements "spring from different sources and serve different functions." 1 William B. Rubenstein, Newberg on Class Actions § 2:6 (5th ed. 2012 & Supp. 2018). Thus, "[c]are must be taken, when dealing with apparently standing-related concepts in a class action context" because, although

"individual standing requirements" and "Rule 23 class prerequisites . . . appear related, in that they both seek to measure whether the proper party is before the court to tender the issues for litigation, they are in fact independent criteria. . . . Often satisfaction of one set of criteria can exist without the other." *In re Salomon Smith Barney Mut. Fund Fees Litig.*, 441 F. Supp. 2d 579, 605 (S.D.N.Y. 2006) (citation omitted).

Since "there is a fundamental analytical distinction between" Rule 23's prerequisites for class certification and "Article III standing," *In re Aggrenox Antitrust Litig.*, 94 F. Supp. 3d 224, 250 (D. Conn. 2015), it is improper for courts to replace an examination of standing with an analysis of whether class treatment is proper under Rule 23. The Supreme Court has "always insisted on strict compliance with" standing requirements because they serve the constitutional separation of powers by "keeping the Judiciary's power within its proper constitutional sphere." *Raines*, 521 U.S. at 819-20. In this era of frequent class actions, "courts must be more careful to insist on the formal rules of standing, not less so." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011).

In short, "Article III standing, as a fundamental constitutional requisite of federal judicial power, presents a 'threshold question in every federal case'"—including in class actions. *Aggrenox*, 94 F. Supp. 3d at 250 (citation omitted); *accord Denney*, 443 F.3d at 263 ("The filing of suit as a class action does not relax this jurisdictional [standing] requirement."). Thus, "a class cannot be certified if it contains members who lack standing" because "a named plaintiff cannot represent a class of persons who lack the ability to bring a suit themselves." *Halvorson*, 718 F.3d at 779; *see also, e.g., Rail Freight*, 725 F.3d at 252 (holding that "common evidence" must "show all class members suffered *some* injury").

II. At a minimum, Article III prevents federal courts from entering judgments that afford relief to uninjured class members.

Even assuming a lawsuit could be certified for class treatment where the class includes uninjured members, this Court should hold that, at a minimum, a class action judgment cannot allow uninjured members to recover. Any conclusion to the contrary would contravene Article III.

Article III standing is a constitutional prerequisite "in every federal case, determining the power of the court to entertain the suit." *Warth*, 422 U.S. at 498. Consequently, the "class representative" and "all

members of the class he represents" must "suffer the same injury" to satisfy Article III's standing requirement. *Schlesinger*, 418 U.S. at 215-16; *accord Warth*, 422 U.S. at 501. In other words, Article III permits a named plaintiff to sue as a representative only for those "who have been injured in fact, and *thus could have brought suit in their own right*." *Simon*, 426 U.S. at 40 (emphasis added). This requirement "for a personal, particularized injury serves vital interests going to the role of the Judiciary in our system of separated powers," and cannot be altered "by issuing to private parties who otherwise lack standing a ticket to the federal courthouse." *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

This essential constitutional limitation would be meaningless if a judgment could be entered in favor of uninjured class members merely because the named plaintiff brought a lawsuit as a class action, can show he or she suffered an injury caused by the defendant, and included uninjured members in the class. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1053 (2016) (Roberts, C.J., concurring). "Therefore, if there is no way to ensure that the jury's

damages award goes only to injured class members, the award cannot stand." *Id.*

Accordingly, even appellate decisions authorizing class certification notwithstanding the inclusion of uninjured members generally hold that defendants ultimately cannot be required to pay damages to uninjured members. *See, e.g.*, *Torres*, 835 F.3d at 1137 (holding that uninjured class members do "not necessarily defeat certification" where the district court can "winnow out those non-injured members at the damages phase of the litigation" or refine the class to exclude all such uninjured members); *Kleen Prods.*, 831 F.3d at 927 (holding that each class member must prove some injury from the alleged violation "in order ultimately to recover," even if they need not do so "at the class certification stage"); *Nexium*, 777 F.3d at 32 n.28 (holding that the law "preclude[s] *recovery* for uninjured class members"); *Stricklin*, 594 F.3d at 1198 (holding that although Rule 23 does not require named plaintiffs, at the class certification stage, to answer whether all class members were injured, "classwide discovery and further litigation answer the question after certification").

Some courts, however, appear to indicate that a class action judgment can afford relief to uninjured members without contravening Article III. *See, e.g.*, *Neale*, 794 F.3d at 369 (explaining that, "so long as a named class representative has standing, a class action presents a valid 'case or controversy'" under Article III). If such cases actually stand for this proposition, they are wrong.

According to such cases, "requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23." *Id.* at 367. These courts therefore maintain that "the requirements of Rule 23" should be the sole means for testing "the propriety of granting class-wide relief" to all class members. *Id.* at 368.

This rationale is flawed in several respects.

First, requiring unnamed class members to prove Article III standing is *not* inconsistent with the nature of a class action under Rule 23. The "constitutional requirement of standing is equally applicable to class actions," *Halvorson*, 718 F.3d at 779, and "standing is not dispensed in gross," *Lewis*, 518 U.S. at 358 n.6.

Indeed, Rule 23's class action requirements and Article III's standing requirement are wholly "independent criteria"—the "standing

doctrine is primarily concerned with ensuring that a real case or controversy exists" whereas Rule 23's distinct prerequisites "address concerns about the relationship between the class representative and the class." Rubenstein, *supra*, § 2:6. "Often satisfaction of one set of [these independent] criteria can exist without the other." *Salomon Smith Barney*, 441 F. Supp. 2d at 605 (citation omitted).

Second, even if the nature of a class action under Rule 23 were inconsistent with Article III, the latter's standing requirement would nonetheless mandate that each unnamed class member prove standing prior to the entry of a judgment. Article III trumps the Federal Rules of Civil Procedure. *See Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992) (holding that Federal Rules of Civil Procedure cannot "expand the judicial authority conferred by Article III"). Class actions are nothing more than a "procedural" mechanism for the "litigation of substantive claims," *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)—a device that does not itself furnish any substantive rights but instead provides "only the procedural means by which the remedy may be pursued," *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393, 402 (2010) (majority opinion). Such a procedural device "leaves the

parties' legal rights and duties intact and the rule of decision unchanged." *Id.* at 408 (plurality opinion). Moreover, the Rules Enabling Act "forbids interpreting Rule 23 to 'abridge, enlarge, or modify any substantive right.'" *Wal-Mart*, 564 U.S. at 367 (quoting 28 U.S.C. § 2072(b) (2012)).

Hence, "Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act." *Amchem Prods.*, 521 U.S. at 612-13. At a minimum, Article III and the Rules Enabling Act bar uninjured members from recovering in a class action. *See, e.g.*, *Bouaphakeo*, 136 S. Ct. at 1053 (Roberts, C.J., concurring); *Nexium*, 777 F.3d at 32 n.28.

III. The district court's judgment contravenes Article III and should therefore be vacated because the district court improperly certified a class containing uninjured class members and entered a judgment allowing them to recover.

A. The district court improperly certified a class that includes numerous uninjured members.

At the class certification stage, the district court acknowledged the proposed classes may include uninjured members but nonetheless authorized class treatment because, in the court's view, "the fact that it is impossible to exclude all uninjured class members at this [class certification] stage does not prevent certification." (*E.g.*, ECF No. 111 at

23-25, 29-30.) But, as explained above, *supra* pp. 6-14, "[i]n order for a class to be certified, each member must have standing and show an injury in fact that is traceable to the defendant"; "a class cannot be certified if it contains members who lack standing," *Halvorson*, 718 F.3d at 778-79. Consequently, the judgment should be vacated because the court erred in certifying a class with uninjured members.

Moreover, at the very least, a "class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 676-77 (7th Cir. 2009). The order granting class certification acknowledged this principle, (ECF No. 111 at 24), but improperly failed to prevent the class from including many uninjured members.

Plaintiff Thomas Krakauer sued under the Telephone Consumer Protection Act ("TCPA") for alleged violations of 47 U.S.C. § 227(c). (ECF No. 32 at 13.)[2] Section 227(c) "gives consumers 'who have received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of [certain] regulations' a private right of

[2] Plaintiff also alleged a second claim for violations of a regulation, (ECF No. 32 at 13-14), but the district court dismissed that claim based on the stipulation of the parties, (ECF No. 271 at 2-3).

action." *Jones v. Royal Admin. Servs., Inc.*, 887 F.3d 443, 448 (9th Cir. 2018) (quoting 47 U.S.C. § 227(c)).

The order granting class certification explained that Plaintiff's expert "obtained the names and addresses" of people "associated with" phone numbers on the Do-Not-Call Registry, and said "[t]hese persons make up the [Do-Not-Call Registry] class." (ECF No. 111 at 11.) When defendant DISH Network L.L.C. ("DISH") explained that only the subscribers for such phone numbers could sue under § 227(c), the court disagreed, concluding *any* person who received a call on such a number could sue under this provision. (ECF No. 111 at 14.) And the class definition did not even confine the class to members who actually answered a call or heard the phone ring. (*See, e.g.*, ECF No. 111 at 4; ECF No. 153 at 1.)

But the court was wrong: § 227(c) authorizes only subscribers to sue. (Appellant's Opening Brief ("AOB") 21-26.) By certifying a class of those who were merely associated with a number on the Do-Not-Call Registry, without limiting the class to telephone number subscribers (i.e., the only people who can sue under § 227(c)), the district court necessarily certified a class consisting of numerous people who were not injured

within the meaning of § 227(c). The court did not find that this uninjured component of the class was de minimis, and therefore failed to guard against an order certifying a class that includes many uninjured people.

B. The district court erroneously entered a judgment affording relief to uninjured class members.

Even if, at the class certification stage, a court could certify a class that includes uninjured members, the judgment should be reversed because it ultimately awarded damages to uninjured members.

The jury here did *not* find that every class member was injured. Instead, the jury was called on to decide whether DISH's alleged agent made two or more solicitation calls to each class number on the Do-Not-Call Registry in any 12-month period, (ECF No. 293 at 8-10; AOB 38-39), and the district court entered judgment for thousands of class members based on the jury's verdict, directing DISH to pay "each member of the class" $1,200 per call, (ECF No. 439 at 1, 3-4). In other words, at most, the jury was called on to decide only whether a technical violation of the statute at issue had occurred. *See* 47 U.S.C. § 227(c) (creating right of action for those who have "received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection"); 47 C.F.R. § 64.1200(c)(2)

(2018) (prohibiting telephone solicitations to "residential telephone subscriber[s]" who registered their numbers "on the national do-not-call registry").

However, "a statutory violation *alone* does not create" Article III standing. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 345 (4th Cir. 2017). A plaintiff cannot "automatically satisf[y] [Article III's] injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo, Inc.*, 136 S. Ct. at 1549. Rather, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* Thus, a statutory violation "divorced from any concrete harm" is insufficient to "satisfy the injury-in-fact requirement" since a violation without more "may result in no harm." *Dreher*, 856 F.3d at 344 (citation omitted).

Courts look to several considerations to assess whether a statutory violation constitutes an injury-in-fact under Article III. Because the standing requirement "is grounded in historical practice," courts consider whether a harm "has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Spokeo, Inc.*, 136 S. Ct. at 1549. Additionally, courts look to whether Congress identified a particular

statutory harm as satisfying Article III requirements. *Id.* Finally, even where Congress has done so, a claimant must show the violation in question is not "divorced from any concrete harm" before it can satisfy Article III. *Id.* The judgment here fails to satisfy *any* of these considerations.

First, the harm here has not traditionally been regarded as providing a basis for a lawsuit.

When Congress enacted the TCPA, it determined that "[u]nrestricted telemarketing . . . 'can be an intrusive invasion of privacy'" and the TCPA therefore "bans certain practices invasive of privacy." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371-72 (2012).

Under *certain* circumstances, American law allows suits for intrusive invasions of privacy: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (Am. Law Inst. 1977 & Supp. 2018). But the law places sharp limitations on when a person can bring such a lawsuit based on a telephone call. There is "no liability

unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man." *Id.* § 652B cmt. d. Thus, "there is no liability" for "calling [a person] to the telephone on one occasion *or even two or three*" occasions because "[i]t is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff, that becomes a substantial burden to his existence, that his privacy is invaded." *Id.* (emphasis added).

Here, the jury did not find that each class member received calls with such frequency that the calls amounted to an unlawful "course of hounding" under traditional legal principles. Instead, the jury was called on to decide whether DISH's alleged agent made two or more solicitation calls to each class number on the Do-Not-Call Registry in any 12-month period. (ECF No. 293 at 8-10; AOB 38-39.) Because two or three unsolicited telephone calls traditionally are not actionable, Restatement (Second) of Torts § 652B cmt. d, and since the jury never found that each class member received more than two or three unsolicited telephone calls from DISH's alleged agent, the judgment necessarily awarded damages

to class members who traditionally would not have been afforded a right to sue for these calls.

Second, the judgment awarded damages for a harm never identified by Congress in the statute at issue, 47 U.S.C. § 227(c)(5).

"Subsection (c)" of 47 U.S.C. § 227 creates private rights of action for certain calls "initiated for telemarketing purposes to residential telephone *subscribers*." *Chavrat v. NMP, LLC*, 656 F.3d 440, 449 (6th Cir. 2011) (emphasis added); *see also* 47 U.S.C. § 227(c)(1), (5) (directing the Federal Communications Commission to "initiate a rulemaking proceeding concerning the need to protect residential telephone *subscribers*' privacy rights to avoid receiving telephone solicitations to which they object" and creating a right of action for those who have "received more than one telephone call within any 12-month period by or on behalf of the same entity *in violation of the regulation prescribed under this subsection*" (emphasis added)); 47 C.F.R. § 64.1200(c)(2) (prohibiting entities from initiating telephone solicitations to a "residential telephone *subscriber* who has registered his or her telephone number on the national do-not-call registry" (emphasis added)). The statutory right of action "is accordingly limited to redress for violations of the regulations

that concern residential telephone *subscribers*." *Cunningham v. Spectrum Tax Relief, LLC*, No. 3:16-cv-02283, 2017 WL 3222559, at *3 (M.D. Tenn. July 7, 2017) (emphasis added), *adopted by* 2017 WL 3220411, at *1 (M.D. Tenn. July 28, 2017). But the district court did not limit the class to subscribers who received telemarketing calls on phone numbers listed on the Do-Not-Call Registry—the harm targeted by the statutory provision at issue.

Instead, the court certified a class consisting of members who were merely associated with a phone number on the Registry, without limiting the class to the subscribers of those numbers. *Supra* p. 21. As the court later stressed, "[a]t the time of class certification, all the telephone numbers had been identified" using records that "included names and addresses associated with many of the phone numbers." (ECF No. 351 at 2.) Plaintiff therefore provided class notice to thousands of persons "associated with these phone numbers." (ECF No. 351 at 3.) This vague, ambiguous "associated with" standard did not apply solely to subscribers, but also swept in those who merely lived or worked in subscribers' households or otherwise used subscribers' numbers during the class period. *See infra* p. 28.

Furthermore, the court subsequently refused to permit DISH to receive discovery or a trial on whether each "class member was the 'subscriber' to the phone number," reiterating its earlier ruling that class members need not prove "they are 'subscribers'" and concluding that Plaintiff proved his case when the jury found each class member received the calls in question. (ECF No. 351 at 5-11 & n.8.) The court then decided members could recover by affirming, via a claim form, that "the number was theirs *or their household's* during the class period" and showing "they, or *their household*, paid for *or used* the phone number at a time within the class period"—in other words, to recover damages without proving they were the numbers' subscribers. (ECF No. 351 at 18 (emphasis added); *see also* ECF No. 407 at 4-5, 11 (agreeing to enter judgment based on the data identifying "names associated with" phone numbers).)

The court later relieved many class members from complying with even this procedure, finding that, with narrow exceptions, thousands of members "were entitled to recover without going through [this] claims process" based on member lists likewise derived from names merely associated with phone numbers. (ECF No. 437 at 2-3, 6-8.) Ultimately

the court entered judgment in favor of thousands of class members based on such data, directing DISH to pay each member $1,200 per call. (ECF No. 439 at 1, 6.)

In short, the judgment permitted class members to recover without proving they were the subscribers of the phone numbers at issue—even though the harm identified by Congress in § 227(c)(5) is that sustained by certain telephone number *subscribers*. Consequently, in contravention of Article III, the judgment allowed class members to recover damages without proof that they suffered the harm singled out by the statute in question.

Finally, even assuming § 227(c) encompasses harm to nonsubscribers and the harm alleged here has traditionally provided a basis for a lawsuit (neither of which is the case), the judgment nonetheless violated Article III by awarding damages for a statutory violation without proof of any concrete injury.

Before trial, the district court determined that class members need not show they actually picked up or even heard the calls, concluding that each member "on a do-not-call list" who received a call here sustained a concrete injury from the "*risk* of an invasion of a class member's privacy"

since these "calls are a disruptive and annoying invasion of privacy." (ECF No. 218 at 3-4.) But the supposed risk of an invasion of privacy stemming from the receipt of the calls cannot suffice to show the injury necessary to satisfy Article III.

Standing requirements "ensure that the alleged injury is not too speculative for Article III purposes." *Clapper*, 568 U.S. at 409 (citation omitted). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc.*, 136 S. Ct. at 1548 (citation omitted). The injury must be "'real,' and not 'abstract.'" *Id.*

Although "'threatened rather than actual injury can satisfy Article III standing requirements,' not all threatened injuries constitute an injury-in-fact." *Beck*, 848 F.3d at 271 (citation omitted). The "threatened injury must be 'certainly impending'" and bare assertions of such an injury are insufficient to confer Article III standing. *Id.* at 272-73 (citation omitted). "[A] threatened event can be 'reasonabl[y] likel[y]' to occur but still be insufficiently 'imminent' to constitute an injury-in-fact." *Id.* at 276. The prospect of "'*possible* future injury' [is] not sufficient,"

Clapper, 568 U.S. at 409, so a plaintiff must show facts demonstrating the risk of the threatened harm is not too speculative, *Beck*, 848 F.3d at 274-75.

The district court decided, prior to trial, that the calls at issue could create a sufficiently concrete risk of harm because "unwanted telemarketing calls are a disruptive and annoying invasion of privacy." (ECF No. 218 at 3-4.) But "it would be an end-run around the qualifications for constitutional standing if any nebulous frustration resulting from a statutory violation would suffice" to show an Article III injury-in-fact. *Dreher*, 856 F.3d at 346; *see also Beck*, 848 F.3d at 273 (holding that bare assertions of emotional injury from a statutory violation are insufficient to confer Article III standing). In any event, during and after trial, the court ultimately did not require class members to demonstrate that any calls were actually disruptive or frustrating or threatened disruption or frustration. Rather, the jury was called on to decide whether DISH's alleged agent made two or more solicitation calls to each class number on the Do-Not-Call Registry in any 12-month period, and judgment awarding damages was entered based on the jury's verdict. *Supra* pp. 22, 25. The members were therefore allowed to

recover without proving any statutory violations had real world effects or that such threatened effects were certainly impending. Claimants cannot recover in federal court based on "a statutory violation divorced from any real world effect" because a "statutory violation absent a concrete and adverse effect does not confer standing." *Dreher*, 856 F.3d at 346.

In sum, since the judgment allowed class members to recover without showing any real harm, much less the harm Congress sought to prevent, it cannot stand. See *id.* at 347.[3]

---

[3] That the judgment permitted uninjured class members to recover confirms the importance of ensuring that *all* class members have Article III standing *at the class certification stage*. Some federal courts maintain that class certification is proper notwithstanding the inclusion of uninjured members because later proceedings will winnow out the uninjured members. *See, e.g., Torres*, 835 F.3d at 1137-38; *Kohen*, 571 F.3d at 676-79. But this view cannot be squared with this case, which proceeded to trial and final judgment yet still allowed uninjured members to recover. This case confirms that the Article III standing of all members should be resolved at the class certification stage because post-certification merits proceedings cannot sufficiently safeguard against the possibility that uninjured members will obtain relief by the end of the case.

CONCLUSION

For the foregoing reasons and for the reasons stated in DISH Network L.L.C.'s opening brief, this Court should vacate the judgment and remand for further proceedings consistent with this Court's opinion.

October 10, 2018

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Effective 12/01/2016

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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EXHIBIT 96

No. 18-1518

IN THE

United States Court of Appeals for the Fourth Circuit

THOMAS KRAKAUER,
Plaintiff-Appellee,
v.

DISH NETWORK L.L.C.,
Defendant-Appellant.

On Appeal from the United States District Court for the
Middle District of North Carolina
No. 1:14-cv-00333-CCE-JEP,
Hon. Catherine C. Eagles

AMICUS BRIEF OF

PRODUCT LIABILITY ADVISORY COUNCIL ("PLAC") IN SUPPORT OF DEFENDANT-APPELLANT DISH NETWORK'S APPEAL TO REVERSE THE JUDGMENT AGAINST DISH NETWORK

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers, in a diverse group of industries, who manufacture and/or sell products throughout the United States. https://plac.com/PLAC/AboutPLACAmicus. As a group, PLAC members have operations in almost all 50 states. In addition to corporate members, several hundred of the nation's leading product litigation defense attorneys are sustaining (non-voting) members of PLAC.[1]

PLAC's members seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and businesses in the supply chain. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this court, presenting the broad perspective of businesses seeking fairness and balance in the application and development of the law as it affects product manufacture and marketing.

In conducting their businesses, PLAC members engage in many different relationships with other businesses, both small and large. For these reasons, PLAC

[1] Under Fed. R. Civ. P. 29(a)(4)(E), PLAC affirms that no counsel for a party authored any part of this brief and affirms that no person other than PLAC and its counsel made a monetary contribution to its preparation or submission.

has a strong interest in the law of vicarious liability in the context of common law agency and as part of statutory jurisprudence.

SUMMARY OF ARGUMENT

The District Court departed sharply from normal agency principles to hold Defendant DISH NETWORK L.L.C. (DISH) vicariously liable for millions in penalties under the Telephone Consumer Protection Act (TCPA) for telemarketing violations of a third party independent marketing retailer, Satellite Systems Network ("SSN"). The services provided by such retailers, and DISH's relationship with them, exhibit the classic hallmarks of independent business enterprises and do not give rise to vicarious liability under agency principles. The retailer was free to determine the manner and means of marketing the products and services of its business clients, including DISH and DISH's competitors, for its own benefit.

DISH's lack of control is pivotal. In a contract with many provisions that are hallmarks of independence and expressly reject any agency relationship, the Court narrowed its focus to a term that required retailer consistency with rules applicable to promotional programs offered by DISH, a term to comply with governing law, and a term vesting DISH with ownership of records about DISH Network Subscribers. In doing so, the Court over amplified such unremarkable provisions into the type of ongoing control over the manner and means of business operations that supports vicarious liability for the conduct of an agent. The Court buttressed this overreach by misapplying a separate compliance agreement between DISH and states' attorney

generals, which the Court employed to morph the independent relationship between DISH and the retailer into agency.

Uncorrected, the Court's departure from agency principles threatens to bleed into business relationships and contexts which courts have found do not support vicarious liability, such as the quality control and verification needed in a trademark license to protect a mark from abandonment, and to protect business reputation, and goodwill. More broadly, the impact is likely to be substantial, as companies of all sizes scramble to reconfigure business to business relationships; sustaining the Court's amplified notion of agency could severely hurt businesses, their employees, and ultimately consumers of affected products and services.

ARGUMENT

I. The District Court Changed the Federal Common Law of Agency to Effectively Impose Strict Liability on DISH for Contracting for Services from Independent Business Enterprises.

A. Federal common law relies on the Restatements of Agency.

When applying federal statutes, the Fourth Circuit relies "on the Restatement[s] of Agency as a valuable source for general agency principles" in developing federal common law principles of agency: "we rely on 'the general common law of agency' and not the law of the particular state," in attempting to "establish a uniform nationwide application of" certain federal statutory terms "for [the] purpose of applying federal statutes," and to determine "the *general* common law of agency, the [Supreme] Court notes that it has traditionally looked to sources

such as the Restatement of Agency." *Cilecek v. Inova Health Sys. Servs*., 115 F.3d 256, 259-60 (4th Cir. 1997). Because vicarious liability imposed on DISH in this case hinges on application of the common law of agency, the implications of the Court's ruling extend beyond the telemarketing context.

B. Agency rests on the ongoing right to control actions.

The agency relationship has served as a way of doing business since the days of referring to persons as "masters" and "servants." But an agency relationship does not arise just because one person provides business services to another. Instead, the right to control the agent's acts throughout the relationship is crucial:

> "A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts."

Restatement (Third) of Agency § 1.01(c) (2006) ("Restatement").

Many agreements to provide services specify terms and conditions but do not create a right of control, and therefore do not create an agency relationship, as the Restatement § 1.01 cmt. f explains. Courts traditionally have held that no agency relationship exists for independent contractors or businesses when the principal does not control the activities of the alleged agent, who on a day to day basis acts independently. *Hofherr v. Dart Indus*., 853 F.2d 259, 262 (4th Cir. 1984)(no agency relationship in a retailer agreement)*; see also In re Monitronics Int'l, Inc.,* 223 F. Supp. 3d 514, 522 (W. Va. 2016) (no agency relationship between

manufacturer/service providers and authorized dealer because there was not control of day to day activities) (collecting cases).

"For an agency relationship to exist, an agent must have authority to act on behalf of the principal and '[t]he person represented [must have] a right to control the actions of the agent.'" Restatement (Third) Of Agency § 1.01 cmt. c (2006). The *sine qua non* of agency is whether the principal has the right to control the manner and method in which work is carried out by the agent. 223 F. Supp. 3d at 522; *see also Chemtool, Inc. v. Lubrication Techs., Inc.,* 148 F.3d 742, 745 (7th Cir. 1998) ("Principal among these considerations is the right to control the manner that the work is done").

C. Some measure of quality control and verification does not create an agency relationship.

Importantly, across types of businesses and business contexts, courts do not find the requisite control for vicarious liability — even where one party does exert *some* measure of control, such as quality control and verification, but not day-to-day control over the manner and means of performing the contracted service.

The classic case is where a business imposes some performance standards on the independent contractor, but those are not enough for an agency relationship. *See, Boyle v. RJW Transp., Inc.,* 2008 U.S. Dist. LEXIS 48724, *20 (N.D. Ill) (requiring compliance with laws, performance reports, quarterly assessments, and adherence to "somewhat detailed condition" did not create agency).

It is not unusual for a business to exert some controls, for one to verify quality control, or protect marks, goodwill or reputation, but such controls do not create an agency relationship. A business may impose constraints such as "setting standards in an agreement for acceptable service quality," which "does not of itself create a right of control." Restatement (Third) of Agency § 1.01 cmt. f(1) (2006). *See Thomas v. Freeway Foods, Inc.*, 406 F. Supp. 2d 610, 617 (M.D.N.C. 2005) ("It is well-established that inspections to determine compliance with customer service and trademarks do not establish an agency relationship."); *United States v. Bonds*, 608 F.3d 495 (9th Cir. 2009) (no agency where defendant imposed constraints but did not control all actions of alleged agent); *Singh v. 7-Eleven, Inc.,* 2007 U.S. Dist. LEXIS 16677, *7 (N.D.Cal. 2007) ("A franchisor must be permitted to retain such control as is necessary to protect and maintain its trademark, trade name and good will, without the risk of creating an agency relationship with its franchisees."); *Wilson-McCray v. Stokes*, 2003 U.S. Dist. LEXIS 22225 (N.D. Ill.) (no agency where driver's transportation agreement had written rules and a right to terminate).

In the telemarketing context, detailed levels of control across a broad swath of activities should exist before agency is found. *Jones v. Royal Admin. Servs*., 887 F.3d 443, 451-53 (9th Cir. 2018). In *Jones*, the Court found a plethora of requirements imposed on the telemarketer – record keeping, providing sales reports and cancellation requests, security measures, collecting payments on company's behalf,

getting approval for sales literature, using approved "scripts and materials" and complying with certain guidelines when selling products – did not support the requisite degree of control for finding an agency relationship and vicarious liability under the TCPA. *Id*.

D. The District's Court's expansion of agency principles greatly extends liability for the independent conduct of others.

The District Court eradicated the difference between a business' reasonable ability to have some measure of quality control and verification over an independent contractor, which does not rise to the level of controlling the manner and means of performing the services, and the broad and detailed level of control that does give rise to agency. This imposes vicarious liability on any business that hires an independent contractor to perform business activities, no matter what their contract provides. No prudent business would allow another business to provide marketing or distribution services without some type of performance or quality verification, which protects consumers, as well as the company's reputation or products, and is important to promote on public policy grounds.

The District Court missed the overall approach in DISH's contract with its Retailers — DISH's lack of control over any telemarketing activities. This is not to say that DISH had no control or should have to forego all control for a Retailer to be an independent contractor. For one, DISH sought to protect consumers on the do-not-call list by requiring retailers to comply with the law by scrubbing their call lists

– a request that protects consumers and recognizes that the independent contractor has that control. Similarly, DISH should be able to impose some control over promotional standards. But such control does not equate to control over the manner and means of performing work, as would take place in a true agency relationship. Restatement (3d) of Agency, § 1.01 cmt. f (2006) ("[S]etting standards in an agreement for acceptable service quality does not of itself create a right of control.").

The Retailer contract shows in many ways that the Retailer is a separate business not under DISH's control of DISH.[2] Most prominently, a Retailer has full authority to sell products of DISH's *competitors*. The Retailer, not DISH, determines how its marketing services are performed: how to market the product, and when and where to use telemarketing. This contract is a very far cry from the detailed level of control required for an agency relationship.

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[2] Multiple provisions show that the businesses that marketed DISH services and products ("Retailers") were independent contractors. Their contract expressly provides that the retailer is an "independent" contractor (not an agent). Introduction § B at Joint Exhibit 1 ("JTX1") p. 1; *see also id.,* § 11 at JTX1 p. 21 (stating that the relationship of the parties is of independent contractors and disavowing that the Retailer is an agent of DISH). Retailers warranted that they were independent businesses, did not depend on DISH for a major part of their businesses, and either did or could sell products or services that compete with DISH's products or services. *Id*. § 3.3 at JTX1 p. 8. DISH could offer other retailers the opportunity to market, promote and solicit orders in competition with existing retailers. *Id.* § 2.4 at JTX1 p. 5. DISH's promotional programs were discretionary for retailers to offer. *Id.,* Par. 1.32 at JTX1 p. 3. Retailers warranted that before participating they would carefully review the terms of any program and associated business rules or have them reviewed by counsel. *Id.*, Par. 3.8 at JTX1 p. 9.

The District Court's approach leaves no room for an independent relationship between two businesses because even imposing some performance standards would make the "hiring" company the principal of its service provider. Such a departure from the ordinary limitations that an absence of control means for the question of agency and vicarious liability subjects businesses to a Hobson's choice: do too little to protect their marks, brands, goodwill and reputation or have sufficient quality controls and face vicarious liability.

E. Statutes and regulations governing telemarketing were not enacted to expand agency principles or to impose strict liability for the independent conduct of others.

There is no reason to believe that telemarketing statutes were intended to expand the common law, absent any such language in the statutes. Yet, the District Court does just that, by imposing on DISH a strict liability standard.

In the context of civil law, strict liability is a theory that applies when a company puts an unreasonably dangerous product into the stream of commerce. Strict liability flows from the *product*. It is the nature of the product that leads to strict liability. See Restatement (Second) of Torts § 402(A) (1979) ("One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer."). While telemarketing may irritate recipients of calls, it is not dangerous.

Unlike strict liability, vicarious liability flows from a *relationship*. The TCPA did not envision that a buyer of telemarketing services, without control over the manner and means of providing the services, could be held strictly liable based on vicarious liability.[3] The contract here provides rights to a level of quality control consistent with an independent relationship. To hold a business liable because the independent service provider broke the telemarketing laws improperly imports a strict liability theory into violations of TCPA.

F. The Court misapplied an agreement between DISH and states' attorney generals to convert an independent contractor relationship to agency, nullifying the contract between DISH and SSN.

DISH and states' attorney generals entered into an Assurance of Voluntary Compliance ("AVC") regarding telemarketing. (see Plaintiff's Trial Exhibit 55 ("PX 55"[4]). Importantly, the AVC distinguished between DISH's "Authorized Telemarketers" (¶ 2.3) and "Covered Marketers" (¶ 2.9): "Covered Marketers" were "independent" "Third Party Retailer[s] authorized by DISH Network to offer, lease, sell, service, Advertise, and/or install DISH Network Services and/or DISH Network Goods" (¶ 2.15) (emphasis added). SSN was a Covered Marketer, not an Authorized Telemarketer. (Dist. Ct. Dkt. 383 at 15.)

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[3] The Congressional history shows some indication that the TCPA should not impose strict liability on any telemarketer that might violate its provisions. 147 Cong. Rec. S18784-85 (daily ed. Nov. 27, 1991).

[4] Citations are directly to district court record materials because the parties have chosen to use a deferred appendix.

The AVC provisions concerning Covered Marketers required DISH to provide them with the agreement, inform them that they must abide by it, investigate complaints, and monitor and "appropriately and reasonably" discipline retailers for not complying with telemarketing laws or the AVC's terms – which required *the retailer*s to establish written policies and procedures to comply with telemarketing laws and to comply with such laws. (¶¶ 4.73, 4.75, 4.77, 4.78.)

What is appropriate and reasonable necessarily must depend on DISH's contract with its retailers. At issue was whether DISH had the type of day-to-day control required to create an agency relationship and to impose vicarious liability on DISH, not whether DISH met obligations to the states' AG's under the AVC regarding Covered Marketers. But in analyzing whether SSN was DISH's agent, the Court focused on whether DISH had met its obligations to states' AGs, rather than the contract and relationship between DISH and SSN. The Court misapplied the AVC to nullify DISH's contract with SSN and to convert an independent contractor relationship to agency. Importantly, the AVC was "not intended to confer upon any person any rights or remedies" and provided it "shall not create any third-party beneficiary rights and may not be enforced by any person, entity or sovereign except the Attorneys General." (¶7.2.)

II. Imposing Strict Liability Based on Expanded Agency Principles Will Diminish the Efficiencies and Competitive Advantages of Contracting with Independent Businesses, and Decrease Innovation.

A. Contracting for services with independent businesses has become a business norm that is important to the economy and innovation.

Over the last 40 years, U.S. businesses increasingly have purchased a variety of services through independent contractors, which typically can supply services at lower cost and more efficiency. Steven Alan Cohen & William B. Eimicke, *Independent Contracting Policy and Management Analysis* 8 (2013).[5] Contracting allows a business the greater efficiency provided by specialists in the product, the market, or the desired service. Jeffrey A. Eisenach, *The Role of Independent Contractors in the U.S. Economy* 2 (Dec. 2010).[6] It increases workforce flexibility, avoids fixed costs, and permits as-needed payment for performance. *Id*.

Contracting for services majorly impacts small and medium size enterprises, which are key parts of the lifeblood of the U.S. economy. U.S. businesses employ millions. William J. Dennis, Jr., *Profile of American Small Businesses and Their Owners,* NIFB Research Foundation, "Number of Employing Businesses by Employment Size of Business," (Aug. 2014).[7] Some 28.8 million accounted for 99.7% of all U.S. business as of 2016. *See Small Business Profile*, The Small

[5] https://doi.org/10.7916/D8CR5SR9
[6] https://iccoalition.org/wp-content/uploads/2014/07/Role-of-Independent-Contractors-December-2010-Final.pdf
[7] https://www.nfib.com/assets/small-business-demographics-nfib-rsearch-2014.pdf

Business Advocate, Vol. 35. No. 3, Mar.-Apr. 2016, at 3[8]; Small businesses continue to add more net new jobs than large businesses, adding 1.4 million jobs through the first three quarters of 2014. *Small Business Market Update*, Small Business Bulletin, June 2015.[9] As "incubators for innovation and employment growth," they produce 46 percent of the private non-farm GDP in 2008. Kathryn Kobe, *Small Business GDP: Update 2002-2010*, U.S. Small Business Administration, Jan. 2012, at 1[10]. Dependence of large companies on services provided by independent contractors creates opportunities: U.S. parents of U.S. multinationals collectively purchase from U.S. small businesses an estimated $1.52 trillion in goods and services used as inputs in the production process – about 12.3% of their total sales. *Mutual Benefits, Shared Growth: Small and Large Companies Working Together,* Business Roundtable (Sept. 14, 2010)[11]. A large corporation as a customer opens business opportunities for small businesses. *See* Sangeeta Bharadwaj Badal, *How Large Corporations Can Spur Small-Business Growth*, Business Journal (Gallup), Jan. 29, 2013.[12] Major corporations spend billions annually for products and services; smaller companies

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[8] http://www.sba.gov/sites/default/files/March_April_2016_FINAL_508_compliant.pdf

[9] https://www.sba.gov/sites/default/files/Small_business_bulletin_June_2015.pdf; *see also* SBA Frequently Asked Questions, June 2016, (63% of net new jobs for 21 year span), https://www.sba.gov/content/small-business-gdp-update-2002-2010

[10] https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf

[11] https://www.businessroundtable.org/archive/resources/mutual-benefits-shared-growth-small-and-large-companies-working-togeth

[12] http://news.gallup.com/businessjournal/160109/large-corporations-spur-smallbusiness-growth.aspx

are more flexible in providing innovative products and services to meet corporate needs and quicker in delivering services locally, reducing costs. *Id.* Their knowledge of local markets can be extremely valuable for corporations trying to enter markets. *Id.*

Independent contractors enhance small business success. Specializations such as product design, advertising, accounting and information technology are being contracted out. Cohen & Eimicke, *supra*. Many of America's largest, most-successful companies started out quite small, for one, the legendary growth from tiny start-up to multibillion dollar businesses in the tech industry. Many innovative firms grow, often quite quickly. Business Roundtable, *supra*. Greater use of independent contracting is evident among companies that have carried out process or production innovations. *See* Cohen & Eimicke, *supra*, at 12. New organizational forms, including networks and strategic alliances are likely to increase opportunities for organizations to contract with other businesses. *Id.*

B. The District Court's approach to agency liability threatens to undermine the economic benefits of independent contracting.

In this context, using agency principles to impose vicarious liability on one business for actions of another independent business threatens great harm. The Court's approach to agency law risks drastically diminishing incentives to use third-party contractors or to outsource, reducing the opportunity for small businesses to provide services to a large business, and jobs available through small businesses.

Such expansion of agency law puts big business in greater control of smaller businesses. To manage risks from an overly expansive approach to vicarious liability, large companies will be pushed to exercise day-to-day control over the manner and means in which smaller business entities provide services, thereby reducing the innovation and nimbleness that small businesses contribute to the economy. Liability of small businesses who contract with larger independent service providers would be inflated without the real leverage to impose and enforce the type of monitoring and controls that the District Court decision would require.[13]

In short, contracting to another business for services has many economic benefits. Businesses that independently contract to other businesses create millions of jobs. Independent contracting allows small businesses to compete with larger ones, increasing competition and lowering prices. Altering the balance of agency liability, based on the case before the Court, means the law would create serious economic disruptions.

CONCLUSION

For these reasons, the District Court's judgment in favor of the Plaintiffs should be reversed.

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[13] Small businesses rely on independent contractors for services, outsourcing for content creation, marketing, IT, etc., including innovative platforms. Lidiya K, *5 Things to Outsource in Your Business*, Let's Reach Success (July 16, 2016). https://letsreachsuccess.com/2016/07/16/things-outsource-business/

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I hereby certify that this brief complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 3,550 words.

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/s/ Richard Kelley

CERTIFICATE OF SERVICE

In accordance with Fed. R. App. P. 25, I hereby certify that I have on this 10th day of October, 2018, filed the foregoing with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

/s/ Richard Kelley

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CERTIFICATE OF SERVICE

I certify that on October 11, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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DISTRICT COURT

CLARK COUNTY, 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, Plaintiffs, v. CHARLES W. ERGEN; JAMES DEFRANCO; CANTEY M. ERGEN; STEVEN R. GOODBARN; DAVID MOSKOWITZ; TOM A. ORTOLF; CARL E. VOGEL; GEORGE R. BROKAW; JOSEPH P. CLAYTON; and GARY S. HOWARD, Defendants, DISH NETWORK CORPORATION, a Nevada corporation, Nominal Defendant	CASE NO.: A-17-763397-B DEPT. NO.: XI **VOLUME 5 OF APPENDIX TO THE REPORT OF THE SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION**

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107	10/03/2003	DISH Network Retailer Contact Information Form and EchoStar Retailer Application	5254
108	10/07/2003	Letter from D. Hagen to A. Ahmed	5261
109	01/01/2004	Email from A. Ahmed to M. Mills, et al.	5265
110	02/12/2004	Email from D. Murphy to R. Bangert, et al.	5269
111	07/26/2004	Letter from R. Swanberg to Dish Network	5272
112	07/29/2004	Email from A. Ahmed to M. Mills, et al.	5330
113	09/14/2004	Letter from D. Steele to R. Swanberg	5334
114	09/15/2004	Email from J. Spreitzer to A. Ahmed, et al.	5342
115		Intentionally omitted	5345

DATED this 27th day of November 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of November 2018, a true and correct copy of the foregoing **VOLUME 5 OF APPENDIX TO THE REPORT OF THE SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

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EXHIBIT 97

EXHIBIT 97

RECEIVED
MAR 27 2001

ECHOSTAR SATELLITE CORPORATION
RETAILER AGREEMENT

This Agreement (the "Agreement") is effective as of the 7 day of March, 2001, by and between EchoStar Satellite Corporation ("EchoStar") having a principal place of business at 5701 South Santa Fe Drive, Littleton, Colorado 80120, and Satellite Systems Network, having a principal place of business at 33282 Golden Lantern #110 Dana Point CA 92629 ("Retailer").

INTRODUCTION

A. EchoStar is engaged, among other things, in the business of providing digital direct broadcast satellite (DBS) services through the DISH Network, a DBS service owned and operated by EchoStar and its Affiliates in the United States.

B. Retailer, acting as an independent contractor, desires to become authorized on a non-exclusive basis, to market, promote, and solicit orders for DISH Network™ video and audio programming packages ("Programming") provided by EchoStar (an "Authorized Retailer").

C. EchoStar desires to appoint Retailer as an Authorized Retailer in accordance with and subject to the terms and conditions of this Agreement.

AGREEMENT

1. **DEFINITIONS** In addition to the capitalized terms defined elsewhere in this Agreement, the following definitions shall apply to this Agreement:

1.1 "Affiliate" means any person or entity directly or indirectly controlling, controlled by or under common control with another person or entity.

1.2 "Commissionable Programming" means the Programming packages designated by EchoStar as commissionable under this Agreement, as set forth in Exhibit B hereto, which EchoStar may change at any time in its sole discretion upon notice to Retailer.

1.3 "Commissions" mean the Residual Commissions, together with any Additional Commissions, as such terms are defined in Section 5.2 and as set forth in Exhibit B hereto, which EchoStar may change at any time in its sole discretion upon notice to Retailer.

1.4 "DISH DBS System" means an MPEG-2 DVB compliant satellite receiver and related components packaged therewith, intended to be utilized for the reception of Programming delivered by satellite transponders owned and operated by EchoStar or its Affiliates, which is: (i) sold directly to Retailer by EchoStar or an EchoStar Affiliate under the "EchoStar" brand name or the brand name of an EchoStar Affiliate; or (ii) sold directly to Retailer by a Third Party Manufacturer pursuant to authorization granted by EchoStar under the brand name of such Third Party Manufacturer.

1.5 "EFT" means the electronic transfer of funds by a financial institution selected by EchoStar to the Retailer Account.

1.6 "Qualifying Residential Subscriber" means an individual at a Residential Location who orders Programming from EchoStar, who pays for the Programming in full, and who has never received any audio, video, or any other programming services from EchoStar or any Affiliate of EchoStar. A Qualifying Residential Subscriber shall not include any individual who would otherwise qualify, but whose equipment EchoStar, in its reasonable discretion, declines to activate.

1.7 "Residential Location" means a single family residential dwelling (i.e. single family houses, apartments, condominiums or other dwellings used primarily for residential purposes), located in the Territory; provided, however, in no case shall any satellite master antenna television system or private cable system in a residential multiple dwelling unit or any similar programming reception system (i.e. dormitories, etc.) be considered a Residential Location. EchoStar shall have the right to determine, in its sole discretion, whether a location constitutes a Residential Location, or is more appropriately considered a commercial or other non-residential location.

1.8 "Retailer Account" means the bank account, including account and ABA routing numbers, designated by Retailer in the manner prescribed by EchoStar, which Retailer may change from time to time by providing at least sixty (60) days prior written notice to EchoStar.

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0180

1.9 "Subscriber Account" means the account set up and maintained by EchoStar for a Qualifying Residential Subscriber who purchased a DISH DBS System from Retailer and for whom Commissionable Programming has been activated by EchoStar and which account remains active and in good standing.

1.10 "Territory" consists of the geographic boundaries of the United States, its territories and possessions.

1.11 "Third Party Manufacturer" means a third party manufacturer authorized by EchoStar or any Affiliate of EchoStar to market, distribute and sell DISH DBS Systems under its own brand name.

2. APPOINTMENT; TERRITORY

2.1 **Appointment**. EchoStar appoints Retailer as a non-exclusive authorized representative to promote and solicit orders for DISH Network video and audio Programming listed in Exhibit A, which is attached hereto and incorporated by reference herein, subject to all of the terms and conditions of this Agreement. The appointment set forth herein for the promotion of the DISH Network by Retailer shall apply to the same DBS service which may be operated by EchoStar or its Affiliates under a different name in the future. Retailer's authorization herein is limited to the solicitation of orders from, and the promotion of Programming to, Qualifying Residential Subscribers at Residential Locations unless EchoStar, in its sole discretion, specifically agrees in writing to permit Retailer to solicit orders from, or promote Programming to, others.

2.2 **Territory**. Retailer is only authorized, and shall limit its actions, to the promotion in the Territory of, and solicitation of orders in the Territory for, Programming in the packages (or a-la-carte for the Programming shown in Exhibit A as available on an a-la-carte basis), and at the prices, shown in Exhibit A.

2.3. **Acceptance**. Retailer accepts its appointment as an Authorized Retailer and agrees to use its reasonable commercial efforts to solicit orders for Programming in the Territory. Retailer understands that it may hold itself out to the public as an Authorized Retailer of EchoStar only after fulfilling, and for so long as it continues to fulfill, all of the requirements in this Agreement, and only during the Term of this Agreement.

2.4 **Non-Exclusivity**. Retailer acknowledges that: (i) nothing in this Agreement is intended to, nor shall it be construed as conferring any exclusive territory or any other exclusive rights to Retailer; (ii) EchoStar and its Affiliates make absolutely no promises, representations or warranties as to the potential amount of business or revenue that Retailer may expect to derive from participation in this Agreement; (iii) Retailer may not realize any business or revenue as result of its participation in this Agreement; (iv) nothing contained herein shall be construed as a guarantee of any minimum number of Commissions or other payments or forms of income or revenue; (v) EchoStar currently offers, and/or at any time in the future may offer, others the opportunity to solicit orders for Programming in the same geographic area in which Retailer is located and elsewhere; (vi) EchoStar currently solicits orders for Programming throughout the Territory and the entire United States, and may continue to do so in the future without any obligation or liability to Retailer whatsoever, and without providing Retailer with any notice thereof; and (vii) EchoStar shall be free to cease provision of the Programming services, and shall incur no liability to Retailer by virtue of any such cessation.

2.5 **Purchase of DISH DBS Systems by Retailer from EchoStar**. In the event that Retailer orders any DISH DBS Systems from Echosphere Corporation or any other Affiliate of EchoStar (collectively, "Echosphere" for purposes of this section) Retailer shall order such products by written purchase order ("Purchase Order") issued during the term of this Agreement. A Purchase Order shall be a binding commitment by Retailer. Any failure to confirm a Purchase Order shall not be deemed acceptance by Echosphere. Purchase Orders of Retailer shall state only the: (i) identity of goods; (ii) quantity of goods; (iii) purchase price of goods; and (iv) requested ship date of goods. Any additional terms stated in a Purchase Order shall not be binding upon Echosphere unless expressly agreed to in writing by Echosphere. In the event of any conflict between the terms of a Purchase Order and the terms of this Agreement, the terms of this Agreement shall prevail. Echosphere shall be considered a third party beneficiary of Retailer's obligations under this Agreement.

2.6 **Sale of DISH DBS Systems**. Retailer agrees that it will not directly or indirectly sell or otherwise transfer possession of a DISH DBS System to any person or entity who Retailer knows or has reason to know: (i) intends to resell it; (ii) intends to use it, or to allow others to use it, in any location other than a Residential Location; (iii) intends to use it, or to allow others to use it, in Canada or at any other location outside of the Territory; or (iv) intends to have Programming authorized for it under a single DISH Network account that has or will have Programming authorized for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line. In the event that Retailer directly or indirectly sells or otherwise transfers possession of a DISH DBS System to a person or entity who uses it, or allows others to use it, to permit the viewing of Programming in a non-Residential Location or any other area open to the public and Retailer knew or reasonably should have known that the person or entity intended to use it, or to allow others to use it, for such purposes, then Retailer agrees to pay to EchoStar upon demand: (a) the difference between the amount actually received by EchoStar for the Programming authorized for the DISH DBS System and the full commercial rate for such Programming (regardless of whether EchoStar has or had commercial distribution rights for such Programming); and (b)

the total amount of any admission charges or similar fees imposed for listening to or viewing such Programming (regardless of whether such charges and/or fees were imposed or collected by Retailer). In the event that Retailer directly or indirectly sells or otherwise transfers possession of a DISH DBS System to a person or entity who has Programming authorized for it under a single DISH Network account that at any time has Programming authorized for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line, and Retailer knew or reasonably should have known that the person or entity intended to have Programming authorized for the DISH DBS System under such an account, then Retailer agrees to pay to EchoStar upon demand, the difference between the amount actually received by EchoStar for the Programming authorized under the single account and the full retail price for such Programming had each DISH DBS System authorized under the single account been authorized under a separate DISH Network account. In the event that Retailer breaches any of its obligations under this Section 2.6, EchoStar shall be entitled to charge back the Commissions, if any, paid to Retailer by EchoStar. EchoStar's calculation of amounts owing to EchoStar from Retailer under this Section 2.6 shall be binding absent manifest error. The foregoing provisions of this Section 2.6 are without prejudice to any other rights and remedies that EchoStar and/or its Affiliates may have under this Agreement, at law, in equity or otherwise, and shall survive expiration or termination of this agreement indefinitely.

2.7 **Pre-Activations**. Retailer will not activate (a "Pre-activation") any DISH DBS System or DISH DBS receiver prior to installation of such DISH DBS System and/or receiver at a Residential Location.

2.8 **Prior Retailer Agreement**. In the event that Retailer previously entered into an agreement with EchoStar relating to the solicitation of orders for Programming by Retailer and the payment of commissions by EchoStar therefor (a "Prior Retailer Agreement"), which is in effect as of the effective date of this Agreement, then upon execution of this Agreement by Retailer and EchoStar: (i) the Prior Retailer Agreement shall be automatically terminated, except that the provisions (excluding the payment of commissions) in the Prior Retailer Agreement which expressly survive, and such other rights and obligations thereunder as would logically be expected to survive, its termination or expiration shall continue in full force and effect; and (ii) all commissions due to Retailer under the Prior Retailer Agreement shall be payable by EchoStar to Retailer in accordance with the terms and conditions of this Agreement; and (iii) except as set forth in Section 2.8(i) above, all rights and obligations between the parties shall be governed by the terms and conditions of this Agreement, and the Prior Retailer Agreement shall be of no force or effect. In the event that no Prior Retailer Agreement is in effect as of the effective date of this Agreement, Retailer shall only be eligible to receive Commissions for new Subscriber Accounts activated after the date of this Agreement, notwithstanding payment by EchoStar of any commissions to Retailer prior to the date of this Agreement. This Agreement shall not amend, modify, alter or change any terms or conditions of any Lease Plan Dealer Agreement, or any similar agreement relating to leasing, which is now existing or later made with EchoStar or any of its Affiliates.

3. **PROGRAMMING**

3.1 **Programming**. EchoStar, in its sole discretion, shall determine the Programming for which Retailer may solicit orders, as shown in Exhibit A. EchoStar may expand, reduce or otherwise modify Exhibit A and the content of any packages at any time and from time to time in its sole discretion. Any changes shall be effective (and Exhibit A shall be deemed modified) immediately upon notification by EchoStar, unless EchoStar notifies Retailer of a different effective date.

3.2 **Changes**. If at any time or for any reason EchoStar changes the content of any Programming package, Retailer's authority to solicit orders for the prior Programming package shall immediately cease.

4. **PRICES**. EchoStar, in its sole discretion, shall determine the retail prices for Programming. Retailer will only solicit orders for Programming at the retail prices set by EchoStar from time to time. The initial retail prices for the Programming are as set forth in Exhibit A. EchoStar may increase, decrease or otherwise modify those prices from time to time in its sole discretion. Any price changes shall be effective (and Exhibit A shall be deemed modified) immediately upon notification by EchoStar, unless EchoStar notifies Retailer of a different effective date.

5. **COMMISSIONS**.

5.1 **Residual Commissions**.

5.1.1 **Calculation**. Subject to the terms and conditions of this Agreement, for each DISH DBS System sold by a Retailer that results in the activation of Commissionable Programming for a new Subscriber Account, EchoStar shall pay Retailer a monthly commission (the "Residual Commission"), in accordance with the Commission Schedule attached hereto as Exhibit B (including the terms and conditions contained therein).

5.1.2 **Payment Terms**. Subject to the terms and conditions of this Agreement (including the exhibits attached hereto), commencing with the first full calendar month in which a Subscriber Account receives Commissionable Programming, and for every month thereafter in which the Subscriber Account receives Commissionable Programming during the entire month, Retailer shall be entitled to a Residual Commission. Each Residual Commission payment shall be made by EchoStar approximately forty-five (45) days following the last day of each calendar month for which a Residual Commission is owed to Retailer (on or about the fifteenth day of each month). Subject to the terms and conditions of this Agreement (including without limitation Sections 5.5, 5.6 and 5.7), Retailer shall continue to receive a Residual Commission on or about the fifteenth day of each month.

5.1.3 **Chargebacks**. In the event that Retailer is paid a Residual Commission but the Qualifying Residential Subscriber subsequently fails to pay in full for the Commissionable Programming, or a refund or credit is issued to the Qualifying Residential Subscriber for any reason (EchoStar shall have the discretion to issue a credit or refund in its sole discretion), Retailer shall be charged back the Residual Commission paid to Retailer.

5.1.4 **Annual New Subscriber Minimum.** If during the Term of this Agreement, Retailer fails in any full calendar year (or prorated portion of the calendar year in which this Agreement is executed) to activate the applicable annual minimum number of new Subscriber Accounts (the "Annual New Subscriber Minimum") as set forth in Exhibit B hereto, then as of January 1st of the following calendar year, Retailer shall no longer be entitled to receive Residual Commissions. Retailer shall thereafter be entitled to payment of Residual Commissions only upon attainment of the Annual New Subscriber Minimum during a subsequent calendar year and then only with respect to Qualifying Residential Subscribers whose Subscriber Account is first established during the year in which Retailer re-attains the Annual New Subscriber Minimum. Beginning the month following such attainment, Retailer shall be entitled to receive Residual Commissions (subject to the terms of this Agreement) for all Subscriber Accounts credited to Retailer in the then current calendar year and thereafter, unless and until Retailer fails to meet the Annual New Subscriber Minimum in any calendar year during the Term of this Agreement.

5.2 **Additional Commissions.** Retailer shall be eligible to participate in, and receive payments ("Additional Commissions") under, such promotions or incentive programs as EchoStar may institute in its sole discretion from time to time. Retailer acknowledges and agrees that: (i) under no circumstances shall EchoStar have at any time any obligation to offer Additional Commissions to Retailer, or if Additional Commissions are offered, to permit Retailer to be eligible to receive them; (ii) EchoStar may, in its sole discretion, add, discontinue, substitute, modify, or otherwise alter any or all of the terms of any promotion or incentive program involving the payment of Additional Commissions; and (iii) if EchoStar offers any Additional Commissions, Retailer shall only be eligible to receive the Additional Commissions if it meets all of the applicable qualification criteria and other terms and conditions as EchoStar may establish in its sole discretion.

5.3 **Payment.** Subject to the terms of this Section, all Commissions paid to Retailer hereunder shall be made by EFT.

5.3.1 **Electronic Funds Transfer**. Until Retailer provides EchoStar with the Retailer Account information in the manner prescribed by EchoStar ("EFT Instructions"), or in the event that Retailer elects to receive payments by check, EchoStar shall pay Commissions to Retailer by check and Retailer will be assessed EchoStar's standard processing fee, which may be changed by EchoStar in its sole discretion. For a period of approximately thirty (30) days after EchoStar receives initial EFT Instructions from Retailer, EchoStar will make all payments of Commissions to Retailer hereunder by check, and mail the same free of charge.

5.3.2 **Reliance on Retailer Account Information**. With respect to Retailer's EFT Instructions, and any purported changes or modifications thereof by Retailer, EchoStar may act in reliance upon any writing or instrument or signature which it, in good faith, believes to be genuine, and may assume the validity and accuracy of any statement or assertion contained in such writing or instrument and may assume that any person purporting to give any such writing, notice, advice, or instruction in connection with the provisions hereof has been duly authorized by Retailer to do so.

5.3.3 **EchoStar EFT Liability Limitation**. Retailer agrees that in no event shall EchoStar have any liability under this Agreement for any Commissions not received by Retailer as a result of an error in any way attributable to: (i) any bank or financial institution; (ii) Retailer; or (iii) any other person or entity outside of EchoStar's direct control.

5.4 **Commission Statements.** EchoStar shall provide Retailer, in an electronic format determined by EchoStar, periodic statements reflecting the Residual Commissions and Additional Commissions (if any) payable to Retailer. At Retailer's request, EchoStar will prepare and mail a paper copy of Retailer's periodic statements, subject to EchoStar's standard processing fee.

5.5 **Exceptions**.

5.5.1 Notwithstanding Section 5.1, above, Retailer shall not be entitled to any Commissions with respect to any Subscriber Account for which: (i) the Commissionable Programming has been canceled; (ii) payment in full for the Commissionable Programming has not been received by EchoStar; (iii) a credit or refund has been issued by EchoStar (to the extent of the credit or

refund issued); (iv) the subscriber would otherwise be a Qualifying Residential Subscriber, but is already receiving any of the Programming, or any other audio, video or other programming services from EchoStar or any of its Affiliates on the date of the order; or (v) the Subscriber Account is otherwise terminated, disconnected or deactivated for any reason.

5.5.2 In no event shall Retailer be entitled to Commissions with respect to the activation by EchoStar of DISH DBS Systems not confirmed by EchoStar as having been purchased by Retailer directly from either: (i) Echosphere Corporation or other Affiliate of EchoStar; or (ii) a Third Party Manufacturer. Retailer acknowledges and agrees that, with respect to DISH DBS Systems purchased by Retailer directly from a Third Party Manufacturer, EchoStar shall not be required to pay Retailer a Commission for the activation of Programming for a new Subscriber Account resulting from the sale by Retailer of any such DISH DBS System unless and until the Third Party Manufacturer provides EchoStar with accurate information required by EchoStar to be able to pay the Commission to Retailer including, at a minimum: (a) the serial number of the DISH DBS System sold by the Third Party Manufacturer to Retailer; and (b) the name and address, and other appropriate identifying information, of Retailer.

5.6 **Suspension and Termination of Commissions**.

5.6.1 **Suspension**. In addition to any other rights and remedies available, EchoStar shall not be required to pay any Commissions to Retailer which would otherwise be due to Retailer during any period in which Retailer is in breach or default of this Agreement, the Trademark License Agreement (Exhibit C) or any Other Agreement (as defined in Section 5.8 below), and EchoStar shall have no liability to Retailer as a result of such suspension of payment. Specifically, and without limitation of the foregoing, Retailer shall have no right at any time to recoup any Commissions not paid during a period of breach or default. For purposes of this Section 5.6.1, Retailer shall be deemed to be in "default" of this Agreement if Retailer fails to pay any amount owing to EchoStar and/or any of its Affiliates when due. The foregoing provisions of this Section 5.6.1 are without prejudice to any other rights and remedies that EchoStar and/or its Affiliates may have under this Agreement, at law, in equity or otherwise, and shall survive expiration or termination of this agreement indefinitely.

5.6.2 **Termination**. EchoStar shall have the right to terminate immediately all payments of Commissions due to Retailer under this Agreement, in addition to any other remedies available to EchoStar, upon the occurrence of any of the following events:

(a) this Agreement is terminated: (i) pursuant to Section 9.2 or 9.3 and, if applicable, after written notice of default has been delivered to Retailer and the applicable cure period has passed without remedy by Retailer of the default in question; or (ii) the Trademark License Agreement (Exhibit C) between the parties has been terminated by EchoStar for cause; or

(b) breach by Retailer of the confidentiality provisions contained in Section 13 below, during the Term or after expiration or termination of this Agreement. In no event shall the foregoing be the sole remedy available to EchoStar if Retailer breaches the confidentiality provisions of this Agreement;

(c) Retailer is purchasing DISH DBS Systems through a Third Party Manufacturer, and the agreement between EchoStar or its Affiliates and the Third Party Manufacturer terminates for any reason; or

(d) termination of any Other Agreement (as defined in Section 5.8 below) for any reason.

5.7 **Non-Commissioned Activations by EchoStar**. In the event that Retailer for any reason does not qualify for a Commission with respect to any Qualifying Residential Subscriber or any DISH DBS System, EchoStar shall be entitled to activate Programming for that Qualifying Residential Subscriber without payment of any Commission to Retailer, even if Retailer solicited the Qualifying Residential Subscriber to order Programming from EchoStar.

5.8 **Offsets**. In no event shall Retailer offset any Programming payment which may be collected by Retailer, or any other amounts due to EchoStar or any of its Affiliates from Retailer for any reason, against any Commissions owed to Retailer by EchoStar or any other sums owed to Retailer by EchoStar or any of its Affiliates. In the event that the Commissions paid by EchoStar to Retailer exceed the amount to which Retailer was entitled, or if Retailer is indebted to EchoStar or its Affiliates for any other reason, Retailer acknowledges and agrees that EchoStar and its Affiliates shall have the right, but not the obligation, to offset any such amounts due to EchoStar or its Affiliates from Retailer for any reason against any Commissions or other money otherwise due to Retailer from EchoStar or any of its Affiliates. Further, should one or more contracts now or hereafter exist between EchoStar and Retailer, or between Retailer and any Affiliate of EchoStar, or if EchoStar or any such Affiliate is holding funds or equipment to be paid or disbursed to Retailer pursuant to business dealings between the parties not reflected in any contract (all such other contracts and business dealings with EchoStar and/or any Affiliate are herein collectively referred to as the "Other Agreements"), EchoStar or such Affiliate may, but shall have no obligation to, deduct from any amounts due or to become due to Retailer under this Agreement any sums which Retailer owes to EchoStar or such Affiliate, whether or not then due arising out of this Agreement or the Other Agreements, as well as any and all amounts for which EchoStar or such Affiliate may become liable to third parties by reason of Retailer's acts in performing, or

failing to perform, Retailer's obligations under this Agreement or any of the Other Agreements. Further, EchoStar may, but shall have no obligation to, withhold such sums from any monies due or to become due to Retailer hereunder as EchoStar, in its sole discretion, deems necessary to protect EchoStar or any Affiliate from any loss, damage, or expense relating to or arising out of Retailer's performance hereunder, or in response to any claim or threatened claim of which EchoStar becomes aware concerning Retailer or the performance of Retailer's duties hereunder. EchoStar's right to money due and to become due hereunder shall not be subject to any defense (except payment), offset, counterclaim, or recoupment of Retailer whatsoever, including, but not limited to, any which might arise from a breach of this Agreement by EchoStar or any of its Affiliates.

5.9 **Recovery of Outstanding Amounts**. EchoStar's calculation of Commissions or other amounts due from EchoStar or its Affiliates to Retailer and/or offset amounts shall be binding absent manifest error. If, after the termination of this Agreement EchoStar has paid, or taken offsets against, all Commissions or other amounts due from EchoStar or its Affiliates to Retailer, then Retailer shall pay to EchoStar, within five (5) days after the day on which Retailer receives EchoStar's written notice thereof, all offset amounts which EchoStar or its Affiliates have not already recovered.

5.10 **Collection of Programming Fees**. Retailer acknowledges and agrees that, except for the installation of DISH DBS Systems which may be provided by Retailer, under no circumstances shall Retailer collect any payment for Programming or any other money due to EchoStar and/or any of EchoStar's Affiliates directly from any Qualifying Residential Subscriber, and all Programming fees will be billed directly to Qualifying Residential Subscribers by EchoStar. In the event that, notwithstanding Retailer's best efforts to comply with this requirement, any Qualifying Residential Subscriber forwards any payment to Retailer rather than to EchoStar directly, Retailer shall immediately forward the payment, together with any applicable sales or similar taxes, to EchoStar without deduction or offset of any kind, and shall instruct the Qualifying Residential Subscriber that all future payments for Programming must be made to EchoStar directly.

5.11 **Sole Compensation**. Retailer acknowledges and agrees that the Commissions payable pursuant to this Agreement constitute the sole commissions or fees payable by EchoStar to Retailer for Retailer's role in soliciting orders for Programming or for any other audio, video, or other programming provided by EchoStar or any of its Affiliates. Retailer further acknowledges and agrees that Commissions payable under this Agreement shall be in lieu of and not in addition to any other commissions, incentive programs or promotions under any Other Agreements (as defined in Section 5.8 above).

5.12 **No Admission**. No payment to Retailer under this Agreement, whether in full or in part, shall be deemed to operate as EchoStar's acceptance or admission that Retailer has complied with any provision of this Agreement.

6. **ORDERS**.

6.1 Retailer agrees to use its best commercial efforts to promote and enhance EchoStar's business, reputation and goodwill. Retailer shall allow only its employees (and not any independent contractors, sub-agents or other person or entity) to solicit, take or transmit any orders unless Retailer obtains EchoStar's specific prior written consent to use of such other person or entity, which consent may be withheld in EchoStar's sole discretion.

6.2 Retailer shall not sell Programming under any circumstances. All sales of Programming are transactions solely between EchoStar and Qualifying Residential Subscribers. Retailer also agrees that it shall not condition, tie or otherwise bundle any purchase of Programming with the purchase of other services or products other than as specifically agreed to in writing by EchoStar in advance.

6.3 Retailer shall promptly forward to EchoStar all orders for Programming in the manner prescribed by EchoStar from time to time. Retailer understands that EchoStar shall have the right, in its sole discretion, to accept or reject, in whole or in part, all orders for the Programming.

6.4 Retailer shall take all actions and refrain from taking any action, as reasonably requested by EchoStar in connection with the marketing, advertisement, promotion of, or taking of orders and Retailer shall cooperate by supplying EchoStar with information relating to those actions as EchoStar reasonable requests.

7. **TRADEMARK LICENSE AGREEMENT**. Retailer shall sign the Trademark License Agreement, in the form attached as Exhibit C hereto, which agreement is hereby incorporated by reference in its entirety.

8 **CONDUCT OF BUSINESS**.

8.1 **Business Ethics**. Retailer shall not engage in any activity or business transaction which could be considered unethical, as determined by EchoStar in accordance with prevailing business standards, or damaging to EchoStar's image or goodwill in any way. Retailer shall under no circumstances take action which could be considered disparaging to EchoStar. Retailer shall comply

with all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) ("Laws"), and Retailer is solely responsible for its compliance with all Laws which apply to its obligations under this Agreement.

8.2 **Signal Theft**. Retailer shall not directly or indirectly: (i) engage in any signal theft, piracy or similar activities; (ii) engage in any unauthorized reception, transmission, publication, use, display or similar activities with respect to Programming; (iii) use a single DISH Network account for the purpose of authorizing Programming for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line; (iv) alter any DISH DBS Systems or "Smart Cards", or any other equipment compatible with programming delivered by EchoStar or any of its Affiliates to be capable of signal theft (or for any other reason without the express written consent of EchoStar); (v) sell any equipment altered to permit signal theft or other piracy; or (vi) aid any others in engaging in, or attempting to engage in, any of the above described activities. Retailer shall immediately notify EchoStar if it becomes aware of any such activity.

8.3 **Hardware and Programming Export and Sale Restrictions**. In addition to, and not in limitation of, the Territory restrictions contained in this Agreement, Retailer hereby acknowledges that the U.S. Department of State and/or the U.S. Department of Commerce may in the future assert jurisdiction over DISH DBS Systems, and that DISH DBS Systems and Programming may not currently be sold outside of the U.S., Puerto Rico and the U.S. Virgin Islands. Retailer represents and warrants that it will not directly or indirectly arrange for or participate in the export or sale of DISH DBS Systems or Programming, in whole or in part, outside of the Territory, and agrees that Retailer will take all reasonable and adequate steps to prevent the export or sale of DISH DBS Systems and Programming outside of the Territory by others who purchase from Retailer and who might reasonably be expected to export or sell them outside the Territory.

Retailer acknowledges and understands that U.S. export laws relating to receivers may change from time to time in the future. Retailer acknowledges and agrees that it is Retailer's sole responsibility to be and remain informed of all U.S. laws relating to the export of receivers outside of the U.S. EchoStar and its Affiliates have absolutely no obligation to update Retailer regarding the status of U.S. export laws or any other U.S. laws relating to the export of receivers or any other products outside of the U.S. Retailer represents and agrees that prior to exporting any receivers outside of the U.S. it will investigate all applicable U.S. laws relating to the export of receivers outside of the U.S. Retailer is strictly prohibited from violating any U.S. law relating to the export of receivers outside of the U.S. Should Retailer export receivers outside of the U.S. in violation of this Agreement and/or U.S. law, this Agreement shall automatically terminate.

9. TERM AND TERMINATION.

9.1 **Term**. This Agreement shall commence on the date of execution by both parties and shall continue until December 31, 2001 (the "Term") unless and until terminated by either party in accordance with the terms and conditions of this Agreement. This Agreement is not automatically renewable.

9.2 **Termination By Either Party Upon Default**. This Agreement may be terminated by a party (the "Affected Party"), upon the occurrence of any of the following with respect to the other party (the "Other Party"): (i) the Other Party commits a payment default which is not cured within ten (10) days of receipt of written notice from the Affected Party (for purposes of this Section 9.2, Retailer shall be deemed to have committed a "payment default" if Retailer fails to pay any amount owing to EchoStar and/or any of its Affiliates when due); or (ii) the Other Party defaults on any obligation or breaches any representation, warranty or covenant in this Agreement, the Trademark License Agreement or any Other Agreement (regardless of whether breach or default of such obligation, representation, warranty or covenant is designated as giving rise to a termination right), and such default or breach, if curable, is not cured within thirty (30) days of receipt of written notice from the Affected Party. The parties agree that all obligations, representations, warranties and covenants contained in this Agreement, whether or not specifically designated as such, are material to the agreement of the parties to enter into and continue this Agreement.

9.3 **Termination by EchoStar**. This Agreement shall terminate automatically should any of the following occur, unless EchoStar notifies Retailer to the contrary in writing: (i) Retailer becomes insolvent, or voluntary or involuntary bankruptcy, insolvency or similar proceedings are instituted against Retailer; (ii) Retailer, for more than twenty (20) consecutive days, fails to maintain operations as a going business; (iii) Retailer, for more than twenty (20) consecutive days, ceases to actively market and promote DISH DBS Systems and/or Programming; (iv) Retailer, or any officer, director, substantial shareholder or principal of the Retailer is convicted in a court of competent jurisdiction of any offenses related to the business conducted by the Retailer in connection with this Agreement; (v) Retailer fails to comply with any applicable federal, state or local law or regulation, or engages in any practice, related to the business conducted by the Retailer in connection with this Agreement, which is determined to be an illegal or unfair trade practice in violation of any applicable federal, state or local law or regulation; (vi) Retailer falsifies any records or reports required hereunder; (vii) Retailer fails to renew, or loses, due to suspension, cancellation or revocation, for a period of fifteen (15) days or more, any license, permit or similar document or authority required by law or governmental authority having jurisdiction, that is necessary in carrying out the provisions of this Agreement and to maintain its corporate or other business status, as in effect as of the effective date of this Agreement; (viii) Retailer

directly or indirectly sells or otherwise transfers possession of a DISH DBS System to a person or entity who Retailer knew or had reason to know: (a) intended to resell it; (b) intended to use it, or to allow others to use it, in any location other than a Residential Location; (c) intended to use it, or to allow others to use it, in Canada or at any other location outside of the Territory; or (d) intended to authorize Programming for it using a single DISH Network programming account that had or would have Programming authorized for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line; (ix) Retailer makes any representation or promise on behalf of EchoStar inconsistent with the representations or promises that EchoStar has specifically authorized Retailer to make on behalf of EchoStar in this Agreement; (x) the Trademark License Agreement (Exhibit C) or any Other Agreement (as defined in Section 5.8 above) terminate for any reason; (xi) Retailer fraudulently receives, or attempts to receive, a commission, incentive or promotion under any Other Agreement (as defined in Section 5.8 above) in connection with Retailer's role in soliciting orders for Programming or for any other audio, video, or other programming provided by EchoStar or any of its Affiliates; (xii) Retailer directly or indirectly uses a single DISH Network account for the purpose of authorizing Programming for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line; (xiii) Retailer engages in Pre-activations; or (xiv) any actual or alleged fraud, misrepresentation, or illegal action of any sort by Retailer in connection with this Agreement, the Trademark License Agreement or any Other Agreement.

9.4 **Termination of Agreement**. Retailer agrees that if this Agreement terminates for any reason, then Retailer shall:

9.4.1 immediately discontinue the marketing, promotion, and solicitation of orders for Programming, and immediately cease to represent and/or imply to any person or entity that Retailer is an Authorized Retailer for EchoStar;

9.4.2 immediately discontinue all use of the trademarks associated or included in any way whatsoever with the Programming, including, without limitation, DISH. Moreover, the Trademark License Agreement shall also terminate;

9.4.3 deliver to EchoStar, or destroy, at EchoStar's option all tangible things of every kind (excluding DISH DBS Systems) in the possession or control of Retailer that bear any of the trademarks;

9.4.4 upon request by EchoStar, certify in writing to EchoStar that such delivery or destruction has taken place;

9.4.5 at the option of EchoStar's Echosphere Corporation Affiliate, cease to be authorized to purchase DISH DBS Systems from Echosphere or any other Affiliate of EchoStar; and

9.4.6 pay all sums due EchoStar.

10. **INDEPENDENT CONTRACTOR**. The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be Retailer's employees only, and not employees or agents of EchoStar. Retailer represents that it is not dependent on EchoStar for a major part of its business. It is further understood and agreed that Retailer has no right or authority to make any representation, promise or agreement on behalf of EchoStar except for such representations, promises, or agreements as EchoStar shall specifically, in writing, authorize Retailer to make. Any such inconsistent or additional warranty or representation made by Retailer shall constitute a breach of, and serve as grounds for termination of this Agreement pursuant to Section 9.3.

11. **LIMITATION OF LIABILITY**.

11.1 Upon termination of this Agreement by EchoStar for any reason set forth herein, EchoStar and its Affiliates shall have no liability or obligation to Retailer whatsoever. For example and not by limitation, in any such event Retailer shall have no right to require EchoStar to continue to allow Retailer to act as an Authorized Retailer to solicit orders on behalf of EchoStar. Retailer agrees that in the event of termination of this Agreement for any reason, no amounts spent in its fulfillment will be recoverable from EchoStar or any of its Affiliates by Retailer. The provisions of this Section 11.1 shall survive expiration or termination of this Agreement indefinitely.

11.2 IN NO EVENT SHALL ECHOSTAR OR ANY AFFILIATE OF ECHOSTAR BE LIABLE FOR ANY EXEMPLARY, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES TO RETAILER (INCLUDING WITHOUT LIMITATION, ANY PAYMENT FOR LOST BUSINESS, FUTURE PROFITS, LOSS OF GOODWILL, REIMBURSEMENT FOR EXPENDITURES OR INVESTMENTS MADE OR COMMITMENTS ENTERED INTO, CREATION OF CLIENTELE, ADVERTISING COSTS, TERMINATION OF EMPLOYEES OR EMPLOYEES SALARIES, OVERHEAD OR FACILITIES INCURRED OR ACQUIRED BASED UPON THE BUSINESS DERIVED OR ANTICIPATED UNDER THIS AGREEMENT), WHETHER FORESEEABLE OR NOT, CLAIMS UNDER DEALER TERMINATION, PROTECTION, NON-RENEWAL OR SIMILAR LAWS, FOR ANY CAUSE WHATSOEVER WHETHER OR NOT CAUSED BY ECHOSTAR'S NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT. IN NO EVENT SHALL ANY PROJECTIONS OR FORECASTS BY ECHOSTAR

BE BINDING AS COMMITMENTS OR PROMISES BY ECHOSTAR. THE PROVISIONS OF THIS SECTION 11.2 SHALL SURVIVE EXPIRATION OR TERMINATION OF THIS AGREEMENT INDEFINITELY.

12. **INDEMNIFICATION.** Retailer shall indemnify, defend and hold EchoStar and its Affiliates, and its and their respective officers, directors, employees, agents and shareholders, and its and their respective assigns, heirs, successors and legal representatives harmless from and against, any and all costs, losses, liabilities, damages, lawsuits, judgments, claims, actions, penalties, fines and expenses (including, without limitation, interest, penalties, reasonable attorneys' fees and all monies paid in the investigation, defense or settlement of any or all of the foregoing) ("Claims"), that arise out of, or are incurred in connection with: (i) Retailer's performance or failure of performance under this Agreement and any direct or indirect results thereof; (ii) Retailer's lawful or unlawful acts or omissions (or those of any of Retailer's employees or agents, whether or not such acts are within the scope of employment of such employees or agents) relating to the sale, marketing, advertisement, promotion or distribution of Programming and DISH DBS Systems and equipment; (iii) the breach of any of Retailer's representations or warranties herein; (iv) all purchases, contracts, debts and/or obligations made by Retailer; (v) Retailer directly or indirectly selling or otherwise transferring possession of a DISH DBS System to any person or entity who Retailer knew or reasonably should have known: (a) intended to resell it; (b) intended to use it, or to allow others to use it, in any location other than a Residential Location; (c) intended to use it, or to allow others to use it, in Canada or at any other location outside of the Territory; or (d) intended to authorize Programming for it using a single DISH Network programming account that had or would have Programming authorized for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line; (vi) the failure of Retailer to comply with, or any actual or alleged violation of, any applicable laws, statute, ordinance, governmental administrative order, rule or regulation; (vii) the failure of Retailer to comply with any provision of this Agreement; (viii) the failure of Retailer to collect adequate taxes and remit same to EchoStar as required herein; (ix) any claim brought by Retailer's employees or agents for compensation and/or damages arising out of the expiration or termination of this Agreement; (x) any claim of pirating, infringement or imitation of the logos, trademarks or service marks of programming providers (except with respect to any marketing materials supplied to Retailer by EchoStar); or (xi) Retailer directly or indirectly using a single DISH Network account for the purpose of authorizing Programming for multiple DISH DBS Systems that are not all located in the same residence and connected to the same phone line. The provisions of this Section 12 shall survive expiration or termination of this Agreement indefinitely.

13. **CONFIDENTIALITY.**

13.1 **General.** At all times during the term of this Agreement and for a period of three (3) years thereafter, Retailer and its employees will maintain, in confidence, the terms and provisions of this Agreement, as well as all data, summaries, reports or information of all kinds, whether oral or written, acquired, devised or developed in any manner from EchoStar's personnel or files, or as a direct or indirect result of Retailer's actions or performance under this Agreement, and Retailer represents that it has not and will not reveal the same to any persons not employed by Retailer, except: (i) at the written direction of EchoStar; (ii) to the extent necessary to comply with law, the valid order of a court of competent jurisdiction or the valid order or requirement of a governmental agency or any successor agency thereto, in which event Retailer shall notify EchoStar of the information in advance, prior to making any disclosure, and shall seek confidential treatment of such information; (iii) as part of its normal reporting or review procedure to its parent company, its auditors and its attorneys, provided such parent company, auditors and attorneys agree to be bound by the provisions of this paragraph; or (iv) to the extent necessary to permit the performance of obligations under this Agreement.

13.2 **Subscriber Information.** All subscribers who subscribe to Programming services shall be deemed customers of EchoStar for all purposes relating to programming services (including video, audio and data) and the hardware necessary to receive such services. Retailer acknowledges and agrees that the names, addresses and related information of such subscribers ("Subscriber Information") are as between Retailer and EchoStar, with respect to the delivery of programming services and the hardware necessary to receive such services, proprietary to EchoStar, and shall be treated with the highest degree of confidentiality by Retailer. Retailer shall not directly or indirectly use any Subscriber Information for the purpose of soliciting, or to permit any others to solicit, subscribers to subscribe to any other programming services or promote the sale of any hardware product used in connection with such services, and Retailer shall under no circumstance directly or indirectly reveal any Subscriber Information to any third party for any reason without the express prior written consent of EchoStar, which EchoStar may withhold in its sole and absolute discretion; provided however, that nothing shall prohibit Retailer from utilizing its own customer list for its general business operations unrelated to the delivery of programming services or the sale of any product used in conjunction with such services. The provisions of this Section 13.2 shall survive expiration or termination of this Agreement indefinitely (even if termination is due to a default or breach by EchoStar).

13.3 **Remedies.** Retailer agrees that a breach of these obligations of confidentiality will result in the substantial likelihood of irreparable harm and injury to EchoStar, for which monetary damages alone would be an inadequate remedy, and which damages are difficult to accurately measure. Accordingly, Retailer agrees that EchoStar shall have the right, in addition to any other remedies available, to obtain immediate injunctive relief as well as other equitable relief allowed by the federal and state courts. The foregoing remedy of injunctive relief is agreed to without prejudice to EchoStar to exercise any other rights and remedies it may have, including without limitation, the right to terminate this Agreement and seek damages or other legal or equitable relief. The provisions of this Section 13.3 shall survive expiration or termination of this Agreement indefinitely (even if termination is due to a default or breach by EchoStar).

13.4 **Economic Benefits Derived Held in Trust.** In the event that Retailer derives an economic benefit, in any form, from a violation of its obligations under Section 13.2, it is hereby agreed that such economic benefit is the property of EchoStar and that Retailer shall deliver the cash value of the economic benefit to EchoStar immediately upon receipt of the economic benefit. It is further agreed that Retailer shall hold such economic benefit in trust for the benefit of EchoStar until such time as its cash value is delivered to EchoStar. The foregoing is agreed to without prejudice to EchoStar to exercise any other rights and remedies it may have, including without limitation, the right to terminate this Agreement and seek damages or other legal or equitable relief. The provisions of this Section 13.4 shall survive expiration or termination of this Agreement indefinitely (even if termination is due to a default or breach by EchoStar).

14. MISCELLANEOUS.

14.1 **Waiver**. The failure of any party to insist upon strict performance of any provision of this Agreement shall not be construed as a waiver of any subsequent breach of the same or similar nature. All rights and remedies reserved to either party shall be cumulative and shall not be in limitation of any other right or remedy which such party may have at law or in equity.

14.2 **Attorney Fees**. In the event of any suit or action to enforce or interpret this Agreement or any provision thereof, the prevailing party shall be entitled to recover its costs, expenses and reasonable attorney fees, both at trial and on appeal, in addition to all other sums allowed by law.

14.3 **Successor Interests; No Assignment by Retailer**. This Agreement is binding upon the heirs, legal representatives, successors and assigns of EchoStar and Retailer. EchoStar may assign this Agreement to an Affiliate in whole or in part at any time without the consent of Retailer. This Agreement shall not be assigned by Retailer, except upon the prior written consent of EchoStar. Any merger, reorganization or consolidation of Retailer shall be deemed an assignment. If any person not a substantial stockholder of Retailer (less than a 25% interest) as of the date of this Agreement becomes a substantial stockholder of Retailer (equal to, or greater than a 25% interest), that shall be considered an assignment requiring EchoStar's consent hereunder.

14.4 **Choice of Law and Exclusive Jurisdiction.**

14.4.1 The relationship between the parties including all disputes and claims, whether arising in contract, tort, or under statute, shall be governed by and construed in accordance with the laws of the State of Colorado without giving any effect to its conflict of law provisions. Retailer and EchoStar acknowledge and agree that they and their counsel have reviewed, or have been given a reasonable opportunity to review, this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments of Exhibits hereto.

14.4.2 Any and all disputes arising out of, or in connection with, the interpretation, performance or the nonperformance of this Agreement or any and all disputes arising out of, or in connection with, transactions in any way related to this Agreement and/or the relationship between the parties (including but not limited to the termination of this Agreement or the relationship and Retailer's rights thereunder or disputes under rights granted pursuant to statutes or common law, including those in the state in which Retailer is located) shall be litigated solely and exclusively before the United States District Court for the District of Colorado. The parties consent to the *in personam* jurisdiction of said court for the purposes of any such litigation, and waive, fully and completely, any right to dismiss and/or transfer any action pursuant to 28 U.S.C.S. 1404 or 1406 (or any successor statute). In the event the United States District Court for the District of Colorado does not have subject matter jurisdiction of said matter, then such matter shall be litigated solely and exclusively before the appropriate state court of competent jurisdiction located in Arapahoe County, State of Colorado.

14.5 **Severability**. The parties agree that each provision of this Agreement shall be construed as separable and divisible from every other provision and that the enforceability of any one provision shall not limit the enforceability, in whole or in part, of any other provision hereof. In the event that a court of competent jurisdiction determines that any term or provision herein, or the application thereof to any person, entity, or circumstance, shall to any extent be invalid or unenforceable, the remaining terms and provisions of this Agreement shall not be affected thereby, and shall be interpreted as if the invalid term or provision were not a part hereof.

14.6 **Entire Agreement**. This Agreement sets forth the entire, final and complete understanding between the parties hereto relevant to the subject matter of this Agreement, and it supersedes and replaces all previous understandings or agreements, written, oral, or implied, relevant to the subject matter of this Agreement made or existing before the date of this Agreement. Except as expressly provided by this Agreement, no waiver or modification of any of the terms or conditions of this Agreement shall be effective unless in writing and signed by both parties. Any provision of this Agreement which logically would be expected to survive termination or expiration, shall survive for a reasonable time period under the circumstances, whether or not specifically provided in this Agreement.

14.7 **Compliance with Law.** The parties shall comply with, and agree that this Agreement is subject to, all applicable federal, state, and local laws, rules and regulations, and all amendments thereto, now enacted or hereafter promulgated in force during the term of this Agreement.

14.8 **Force Majeure.** Notwithstanding anything to the contrary in this Agreement, neither party shall be liable to the other for failure to fulfill its obligations hereunder if such failure is caused by or arises out of an act of force majeure including acts of God, war, riot, natural disaster, technical failure (including the failure of all or part of the communications satellite, or transponders on which the programming is delivered to Qualifying Residential Subscribers, or of the related uplinking or other equipment) or any other reason beyond the reasonable control of the party whose performance is prevented during the period of such occurrence.

14.9 **Remedies Cumulative.** It is agreed that the rights and remedies herein provided in case of default or breach by Retailer of this Agreement are cumulative and shall not affect in any manner any other remedies that EchoStar may have by reason of such default or breach by Retailer. The exercise of any right or remedy herein provided shall be without prejudice to the right to exercise any other right or remedy provided herein, at law, or in equity.

14.10 **Audit Rights.** In the event of any actual or suspected breach or default by Retailer (as determined in EchoStar's sole judgment), EchoStar shall have the right to review and audit, upon reasonable prior notice, Retailer's books and records for the purpose of determining Retailer's compliance with its duties and obligations under this Agreement (an "Audit"). Any audit conducted by EchoStar shall be conducted by EchoStar or its representative(s) at Retailer's offices during normal business hours. The provisions of this Section 14.10 shall survive expiration or termination of this Agreement indefinitely.

14.11 **General Provisions.** The terms and conditions attached as exhibits hereto are fully incorporated into this Agreement.

By signing below, Retailer hereby indicates its acceptance of the terms of, and agreement to, this Agreement.

Approved by :

ECHOSTAR SATELLITE CORPORATION	RETAILER
By:	By:
Title: VP Sales	Title: President
Date: 4-10-01	Date: 3-7-01

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Confidential-US v. DISH

DISH-Paper-014686
SLC_ DNC_Investigation_0012351
TX 102-005588

EXHIBIT A
DISH NETWORK
PROGRAMMING PACKAGES
ECHOSTAR I AND II

America's Top 40
$19.99 per month
$220.00 per year

A&E	History Channel (The)
America's Voice	Home & Garden TV
Angel One	Home Shopping Network
Cartoon Network (The)	Learning Channel (The)
CNBC	Lifetime
CNN	MTV
Comedy Central	Nashville Network (The)
Country Music Television	Nickelodeon (East)
Court TV	Nickelodeon (West)
C-SPAN	Nick at Nite (East)
C-SPAN2	Nick at Nite (West)
Discovery Channel	TV Land
Disney Channel (East)	QVC
Disney Channel (West)	Sci-Fi Channel
E! Entertainment	TBN
ESPN	TBS
ESPN2	TNT
ESPNEWS	Travel Channel (The)
EWTN	TV Games
Food Network	USA Network
FOX Family Channel	VH1
Headline News	Weather Channel (The)

America's Top 100 CD
$28.99 per month
$320.00 per year

America's Top 40

PLUS

AMC	Turner Classic Movies	Country Classics CD
Animal Planet	Univision	Country Currents CD
BBC America	WGN	Easy Instrumentals CD
Black Entertainment Television (BET)	ZDTV	Eurostyle CD
Bravo	(1) FOX/SportsChannel Regional Network	Fiesta Mexicana CD
CNNFN/CNNI		Hot Hits CD
Discovery People		Jazz Traditions CD
	CD Channels	
ESPN Classic	70s Songbook CD	Jukebox Gold CD
FX	Adult Alternative CD	Kidtunes CD
FOX News Channel	Adult Contemporary CD	Latin Styles CD
Galavision	Adult Favorites CD	LDS Radio Network CD
Game Show Network	Americana CD	Light Classical CD
Independent Film Channel	Big Band Era CD	Modern Rock Alternative CD
M2	Blues CD	New Age CD
MSNBC	Classic Rock CD	New Country CD
NOGGIN	Concert Classics CD	Non-Stop Hip Hop CD
PAX TV	Contemporary Christian CD	Power Rock CD
Romance Classics	Contemporary Instrumentals CD	Reggae CD
Toon Disney	Contemporary Jazz CD	Urban Beat CD

All prices, packages and programming subject to change without notice. Updated: 11/15/99

DISH NETWORK
PROGRAMMING PACKAGES
ECHOSTAR I AND II

DISH PIX Package

$15.00 per month
No Annual Available

A package of 10 channels – **No A la Carte Available**
Choose from services available in AT 40, AT 100 CD or Superstations (excluding Disney Channel, Toon Disney, Regional Sports Networks, MTV, M2, Nickelodeon, VH1, Nick At Nite's TV Land, FX, Romance Classics, IFC, Galavision, Univision, BBC America, ZDTV, FOX News Channel, and PAX TV, NOGGIN)

PPV

DISH on Demand — Prices beginning at $2.99
12 Channels

International Services
A la Carte

RAI: $9.99 per month or $119.88 per year

ANTENNA: $14.99 per month or $179.88 per year

DISH LATINO*

$19.99 per month
$239.88 per year

The following services are broadcast from satellites at the 119 Degree W.L. orbital position. Additional services are broadcast from the 110 Degree W.L. location.

- Univision
- Galavision
- Fox Sports World Espanol
- HTV
- Telemundo
- DISH CD Latin – 6 channels of CD-Quality Latin-Variety Music

Combination Superstation/Broadcast Networks

Choose Any One: $4.99 per month or $59.88 per year

Choose Any Two: $7.99 per month or $95.88 per year

Choose All Three: $9.99 per month or $119.88 per year

PACKAGES AVAILABLE

DISHNETS EAST Package
ABC, CBS, NBC, FOX
PBS – National Network

DISHNETS WEST Package
ABC, CBS, NBC, FOX*
PBS – National Network

*The West Coast FOX feed available September 1, 1998.

SuperStation Package
KTLA, KWGN, WPIX, WSBK, WWOR

Premium Services

Choose One Premium Pkg: $10.99 per month or $121.00 per year

Choose Two Premium Pkgs: $19.99 per month or $220.00 per year

Choose Three Premium Pkgs: $27.99 per month or $308.00 per year

Choose Four Premium Pkgs: $34.99 per month or $385.00 per year

PREMIUM PACKAGES AVAILABLE

- HBO Package (6 channels)
  includes 5 channels of HBO plus HBO Family
- Showtime Package (8 channels)
  includes 3 channels of Showtime plus Showtime Extreme, 2 channels of TMC, FLIX and Sundance Channel
- MultiChannel Cinemax (3 channels)
  Includes 3 channels of Cinemax
- Encore/STARZ! (4 channels)
  includes 1 channel of Encore, 2 channels of Starz! and 1 channel of Encore Westerns

DISH NETS Local Broadcast Networks Packages
$4.99 per month each

Los Angeles DMA	New York DMA
ABC – KABC	ABC – WABC
CBS – KCBS	CBS – WCBS
NBC – KNBC	NBC – WNBC
FOX – KTTV	FOX – WNYW
PBS – National	PBS – National

Adult Services
A la Carte

Playboy	$12.99 per month
	$6.99 per 4-hour block
TeN	$19.99 per month
	$219.89 per year
	$8.99 per 90-minute movie
Pleasure	$5.99 per 90 minute movie

Additional Services
A la Carte

Disney Channel: (Both East and West)	$9.99 per month
The Golf Channel:	$4.99 per month or $59.88 per year
Outdoor Channel	$1.99 month or $23.88 per year
DISH CD:	$4.99 per month or $59.88 per year
Single Broadcast Networks:	$1.50 each
MultiSport Package: (must subscribe to AT100 CD)	$4.99 per month or $59.88 per year

*The Spanish language package requires the DISH 500 antenna or two dishes, one pointed at the 119 Degree Orbital location and the other at the 110 Degree Orbital location. All prices, packages and programming subject to change without notice. Updated 11/15/99

DISH NETWORK
ECHOSTAR III
61.5 Degrees W.L.

International Services		International Radio	
TV5 (French)	$9.99 per month $119.88 per year	RFI	$1.00 per month $12.00 per year
RTPi (Portuguese) (must subscribe to AT40 or AT100)	$4.00 per month $48.00 per year	Al Zikr ART Music	Included in the ART Arabic Language Package at no additional charge. No a la carte is available.
TV Japan (Japanese)	$25.00 per month $300.00 per year		
TV Polonia (Polish) (must also subscribe to 2 Polskie Radio Services)	$14.99 per month* $179.88 per year*	Radio Maria Italy (Italian)	$5.00 per month $55.00 per year
ART (Arabic) ART Movies (Arabic) LBC (Arabic from Lebanon) Aljazeera (these four video services plus Al Zikr Radio service sold only as a package/no a la carte available)	$19.99 per month $239.88 per year	Radio Maria Poland (Polish)	$5.00 per month $55.00 per year
		Radio Maria Spanish	$5.00 per month $55.00 per year
ZEE TV (Hindi)	$14.99 per month $179.88 per year	Polskie Radio Program 1 Polskie Radio Program 3 (must subscribe to 2 Polskie Radio and 1 TV Polonia video services)	$4.99 per month* $59.88 per year*
TV Asia (Hindi/English/Gujarati)	$14.99 per month $179.88 per year		
ZEE TV and TV Asia Package	$24.99 per month $299.88 per year		
NTV and NTV PLUS	$24.99 per month $299.88 per year		
GLOBO	$19.99 per month $239.88 per year		

A la Carte		PPV	
NASA	Free Access	DISH on Demand 5 Channels	Prices beginning at $2.99
Bloomberg	$1.50 per month $18.00 per year		
TrackPower	$19.95 per month $150.00 per year		
The Racing Network	$24.99 per month $299.88 per year		

Local Network Packages
$4.99 per month each

Atlanta DMA	Boston DMA	Chicago DMA	Dallas DMA
ABC – WSB	ABC – WCVB	ABC – WLS	ABC – WFAA
CBS – WGMX	CBS – WBZ	CBS – WBBM	CBS – KTVT
FOX – WAGA	FOX – WFXT	FOX – WFLD	FOX – KDFW
NBC – WXIA	NBC – WHDH	NBC – WMAQ	NBC – KXAS
PBS - NATIONAL	PBS – NATIONAL	PBS – NATIONAL	PBS – NATIONAL

Miami DMA	New York DMA	Pittsburgh DMA	Washington, D.C. DMA
ABC – WPLG	ABC – WABC	ABC – WTAE	ABC – WJLA
CBS – WFOR	CBS – WCBS	CBS – KDKA	CBS – WUSA
FOX – WSVN	FOX – WNYW	NBC – WPXI	FOX – WTTG
NBC – WTVJ	NBC – WNBC	FOX – WPGH	NBC – WRC
PBS - NATIONAL	PBS – NATIONAL	PBS – NATIONAL	PBS – NATIONAL

*Must subscribe to 1 TV Polonia video and 2 Polskie Radio Services. All prices, packages and programming subject to change without notice.

Updated 11/15/99

DISH NETWORK
ECHOSTAR IV
TEMPORARILY MOVED TO SATELLITES LOCATED AT
119 DEGREES W.L.

International Services		International Radio Services	
TV Japan (Japanese)	$25.00 per month $300.00 per year	Al Zikr	Included in the ART Arabic Language Package at no additional charge. No a la carte is available.
ART (Arabic) ART Movies (Arabic) LBC (Arabic from Lebanon) Aljazeera (these four video services plus Al Zikr Radio service sold only as a package/no a la carte available)	$ 19.99 per month $239.88 per year		
ZEE TV (Hindi)	$ 14.99 per month $179.88 per year		
TV Asia (Hindi/English/Gujarati)	$ 14.99 per month $179.88 per year		
ZEE TV and TV Asia Package	$ 24.99 per month $299.88 per year		

All prices, packages and programming subject to change without notice.

Updated: 11/15/99

DISH NETWORK PROGRAMMING
LOCATED AT 110 DEGREES W.L.

*DISH LATINO**		International	
$19.99 per month **$239.88 per year**			
The package also includes HTV, FOX Sports World Espanol, Telemundo, Univision, Galavision and DISH CD Latin which are located at the 119 Degree Orbital position.		CHANNEL KOREA	$19.99 per month $239.88 per year
CBS Telenoticias Cine Latino Discovery en Espanol GEMS Gran Canal Latino	MTV-S Playboy en Espanol SUR TV Chile		

Local Network Packages **$4.99 each**			
Atlanta DMA	**Chicago DMA**	**Dallas DMA**	**Denver DMA**
ABC – WSB CBS – WGMX FOX – WAGA NBC – WXIA PBS - NATIONAL	ABC – WLS CBS – WBBM FOX – WFLD NBC – WMAQ PBS – NATIONAL	ABC – WFAA CBS – KTVT FOX – KDFW NBC – KXAS PBS – NATIONAL	ABC – KMGH CBS – KCNC NBC – KUSA FOX – KDVR PBS – NATIONAL
Phoenix DMA	**Salt Lake City DMA**	**San Francisco DMA**	
ABC – KNXV CBS – KPHO NBC – KPNX FOX – KSAZ PBS – NATIONAL	ABC – KTVX CBS – KUTV NBC – KSL FOX – KSTU UPN - KJZZ PBS – NATIONAL	ABC – KGO CBS – KPIX NBC – KRON FOX – KTVU PBS – NATIONAL	

PPV		***A La Carte***	
DISH on Demand 12 Channels	Prices beginning at $2.99	Bloomberg	**$1.50 per month** **$18.00 per year**

*The Spanish language package requires the DISH 500 antenna or two dishes, one pointed at the 119 Degree Orbital location and the other at the 110 Degree Orbital location.

EXHIBIT B
COMMISSION SCHEDULE

A. *Commissionable Programming Packages:* DishPix, America's Top 40, America's Top 100 CD, Dish Latino, and such other Programming packages as EchoStar, in its sole discretion, may add or substitute upon notice to Retailer.

B. *Annual New Subscriber Minimum:* 24 (to be prorated in the calendar year in which the Agreement is executed)

C. *Residual Commissions for Retailers.* Provided Retailer has reached the Annual New Subscriber Minimum, payment of Residual Commissions to Retailer will commence when and for such times as Residual Commissions payable to Retailer exceed twenty-five dollars ($25.00).

Number of New Subscriber Accounts Per Calendar Year	Monthly Residual Commission Per Subscriber
24 – 99	.50
100 – 249	.75
250 – 999	1.00
1000 – 2499	1.25
2500+	1.50

Terms and Conditions for Residual Commissions

a. The applicable Commission to which Retailer is entitled for each new calendar year during the Term of the Agreement shall be based upon the net number of new Subscriber Accounts activated by Retailer during the preceding calendar year, which is defined as the number of Retailer's current active Subscriber Accounts as of January 1 of the current calendar year, less the number of Subscriber Accounts on January 1 of the previous year.

b. During the calendar year in which the Agreement becomes effective, EchoStar may, in its sole discretion, pay Commissions due to Retailer based on a volume of new Subscriber Accounts which Retailer estimates in good faith that it will activate during such initial calendar year. In any event, the applicable Commission to which Retailer is entitled for the calendar year following the initial year shall be based upon the net number of new Subscriber Accounts (as defined above) activated by Retailer during the initial calendar year on a prorated basis.

c. With respect to multi-month Commissionable Programming purchased by Qualifying Residential Subscribers, Commissions shall be paid to Retailer, subject to the provisions of Section 5 of the Retailer Agreement to which this Exhibit is attached, on a pro rata basis in monthly installments for the period during which the multi-month Commissionable Programming is in effect.

Additional Commissions

Activation Commissions Program

1. For each primary receiver sold directly to Retailer after June 1, 1997 and before this Activation Commissions Program is terminated by EchoStar in its sole discretion, by: (i) Echosphere Corporation or an Affiliate under the "EchoStar" brand name; or (ii) a Third Party Manufacturer, and which results in the activation of a primary receiver for a new Subscriber Account, EchoStar shall pay Retailer a commission of $100.00 (an "Activation Commission"). The date of sale shall be deemed to be the date that the receiver is shipped to Retailer. For the purposes of this Exhibit B, a "Primary Receiver" shall be the first integrated receiver-decoder to be activated on a new Subscriber Account, all other receivers activated on that Subscriber Account (whether at the same time or later) shall be "Secondary Receivers".

2. For each Secondary Receiver sold to Retailer by: (i) Echosphere Corporation or an Affiliate; or (ii) a Third Party Manufacturer, and which is used in conjunction with a Primary Receiver of a Subscriber Account, EchoStar shall pay Retailer an Activation Commission of $40.00.

3. Subject to the terms and conditions of the Agreement to which this Exhibit is attached (including without limitation Sections 5.5, 5.6 and 5.7), each Activation Commission payment shall be made by EchoStar within ten (10) days of the later to occur of: (i) activation of the receiver; or (ii) if applicable, the date payment is due to Echosphere or its Affiliate for the receiver.

4. In the event that a receiver, for which an Activation Commission has been paid to Retailer by EchoStar, does not remain active and receiving Commissionable Programming for two hundred thirty (230) consecutive days commencing from the date of initial activation, Retailer shall be charged back the Activation Commission, and EchoStar may deduct charged back amounts from Commissions due to Retailer under this Agreement.

EXHIBIT C

TRADEMARK LICENSE AGREEMENT

THIS TRADEMARK LICENSE AGREEMENT (the "Agreement") is effective as of the 7 day of March, 2001, by and between EchoStar Satellite Corporation, with a place of business at 5701 South Santa Fe Drive, Littleton, Colorado 80120 ("ESC") and Satellite Systems Network, with its principal place of business at 33282 Golden Lantern #140 Dana Point, CA 92629 ("Licensee").

A. ESC conducts business in worldwide locations as, among other things, a provider of direct broadcast satellite-delivered, multi-channel, digital audio and video services ("Programming") to residential subscribers; and

B. Licensee conducts business as, among other things, a retailer of satellite television products and services to residential subscribers; and

C. Licensee desires to be permitted to use the EchoStar trademarks, service marks and trade names set forth in Exhibit A hereto, as amended from time to time in ESC's sole discretion (the "Trademarks") as ESC, in its sole discretion, may authorize, from time to time, under a non-exclusive license, to promote and solicit orders for DISH Network Programming.

NOW, THEREFORE, the parties hereto hereby agree as follows:

1. ESC hereby grants to Licensee a non-exclusive, non-transferable, revocable license (the "License") to use the Trademarks and such other trademarks as ESC may from time to time expressly in writing permit Licensee to use during the term of this Agreement, and no other term or license whatsoever, in its local advertising and promotional materials and at its business locations. Licensee shall have no right to use the logos, service marks or trademarks (whether in typewritten, stylized or any other form) of any programming providers, other than the logos, service marks and trademarks of programming providers that are contained in the advertising and promotional material provided to Licensee by ESC. No such materials shall indicate that any agreement of agency, partnership, joint venture, franchise or of exclusive or non-exclusive distributor exists between Licensee and ESC, unless ESC and Licensee enter into a separate written agreement permitting Licensee to do so. Notwithstanding the above, Licensee shall provide to ESC, at least thirty (30) days prior to first use, an example of any advertising or promotional materials in which Licensee intends to use any Trademarks or any such other trademarks (whether in typewritten, stylized or any other form), which use has not, within the past twelve months, been approved by ESC in exactly the manner intended for use. ESC may reject and prohibit Licensee from using such materials, for any reason or reasons in its sole discretion. If Licensee is required to, but fails to provide ESC with proposed advertising or promotional materials at least thirty (30) days prior to first use, ESC shall have just cause to immediately terminate the License by providing written notice to Licensee to that effect. This Agreement is not intended, nor shall it be construed, as creating any agreement of agency, partnership, joint venture, franchise or of exclusive or non-exclusive distributor, or as creating any obligation on the part of ESC to enter into any such agreement with Licensee. Further, this Agreement is not intended, nor shall it be construed, as providing any rights to Licensee to purchase or sell products or programming manufactured and/or distributed by ESC. Licensee expressly recognizes and agrees that any goodwill now existing or hereafter created through any sales by Licensee of products or programming manufactured and/or distributed by ESC, shall inure to ESC's sole benefit. This License shall be effective until terminated by either party in accordance with the terms of this Agreement, or until termination of the Retailer Agreement between ESC and Licensee.

2. The License granted by ESC is granted to Licensee only. Licensee has no authority to transfer or grant any sublicense to any other entity or individual for any reason, and if Licensee does so, such action shall terminate the License granted herein, at ESC's option, at any time thereafter. Licensee shall immediately cease using Trademarks in typewritten, stylized or any other form upon termination or expiration of this Agreement for any reason. Upon expiration or termination of this Agreement, at ESC's option Licensee shall immediately destroy or deliver to ESC any and all advertising and promotional materials in Licensee's possession with Trademarks (whether in typewritten, stylized or any other form) on them. If ESC requests destruction of advertising and promotional materials, Licensee shall promptly execute an affidavit representing at a minimum that such materials were destroyed, and the date and means of destruction.

3. Licensee expressly recognizes and acknowledges that the License, as well as any past use of the Trademarks in any manner whatsoever by Licensee (including but not limited to use on signs, business cards, or in advertisements) or in any form whatsoever by Licensee (including but not limited to typewritten or stylized form), shall not confer upon Licensee any proprietary rights or interest to any Trademarks including, but not limited to any existing or future goodwill in the Trademarks. All goodwill in the Trademarks shall inure to ESC's sole benefit. Further, Licensee waives any and all past, present, or future claims it has or might have to the Trademarks (whether in typewritten, stylized or any other form) and acknowledges that as between ESC and Licensee, ESC has the exclusive rights to own and use the Trademarks (whether in typewritten, stylized or any other form), and that ESC retains full ownership of the Trademarks (whether in typewritten, stylized or any other form) notwithstanding the License granted herein. While Licensee has no right or authority to do so, in the event that Licensee has previously, or in the future reserves, files, or registers any of the Trademarks of ESC (whether in typewritten, stylized or any other form), Licensee agrees to notify ESC immediately, and immediately upon request of ESC, to assign any and all interest to ESC that is obtained through the reservation, filing, or registration of the Trademarks in the U.S. or any foreign jurisdiction, and hereby acknowledges that any such reservation, filing, or registration of the Trademarks, whenever occurring, shall be on behalf of and for the sole benefit of ESC, and Licensee waives all claims or rights to any compensation whatsoever therefor. Licensee's obligations in this paragraph shall survive the expiration or termination of this Agreement indefinitely.

4. Nothing in this Agreement shall be construed to bar ESC from protecting its right to the exclusive use of its Trademarks (whether in typewritten, stylized or any other form) against infringement thereof by any party or parties, including Licensee, either during the

term of this Agreement or following any expiration or termination of Licensee's right to use the Trademarks pursuant to this Agreement. Licensee will promptly and fully advise ESC of any use of any mark that may appear to infringe the Trademarks (whether in typewritten, stylized or any other form). Licensee will also fully cooperate with ESC in defense and protection of the Trademarks (whether in typewritten, stylized or any other form), at ESC's expense. Similarly, nothing in this Agreement shall be construed to require that ESC take any action to protect the Trademarks in any instance, and ESC shall not be liable to Licensee in any manner whatsoever for failure to take any such action.

5. (a) This Agreement shall continue for a period of time equal to the term of the Retailer Agreement to which this Agreement is attached, unless terminated earlier for a reason provided herein. Any provision of this Agreement which logically would be expected to survive termination or expiration, shall survive for a reasonable time period under the circumstances, whether or not specifically provided in this Agreement.

(b) This Agreement may be terminated by a party (the "Affected Party") in the event that the other party (the "Other Party") defaults on any obligation or breaches any representation, warranty or covenant in this Agreement (regardless of whether breach or default of such obligation, representation, warranty or covenant is designated as giving rise to a termination right), and such default or breach, if curable, is not cured within thirty (30) days of receipt of written notice from the Affected Party. The parties agree that all obligations, representations, warranties and covenants contained in this Agreement, whether or not specifically designated as such, are material to the agreement of the parties to enter into and continue this Agreement.

(c) This Agreement shall terminate automatically upon termination of the Retailer Agreement to which this Agreement is attached any Other Agreement (as defined in Section 5.8 of the Retailer Agreement) for any reason, unless EchoStar notifies Licensee to the contrary in writing.

6. The relationship between the parties including all disputes and claims, whether arising in contract, tort, or under statute, shall be governed by and construed in accordance with the laws of the State of Colorado without giving any effect to its conflict of law provisions. Licensee and EchoStar acknowledge and agree that they and their counsel have reviewed, or have been given a reasonable opportunity to review, this Agreement and that the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party shall not be employed in the interpretation of this Agreement or any amendments of Exhibits hereto.

Any and all disputes arising out of, or in connection with, the interpretation, performance or the nonperformance of this Agreement or any and all disputes arising out of, or in connection with, transactions in any way related to this Agreement and/or the relationship between the parties (including but not limited to the termination of this Agreement or the relationship and Licensee's rights thereunder or disputes under rights granted pursuant to statutes or common law, including those in the state in which Licensee is located) shall be litigated solely and exclusively before the United States District Court for the District of Colorado. The parties consent to the *in personam* jurisdiction of said court for the purposes of any such litigation, and waive, fully and completely, any right to dismiss and/or transfer any action pursuant to 28 U.S.C.S. 1404 or 1406 (or any successor statute). In the event the United States District Court for the District of Colorado does not have subject matter jurisdiction of said matter, then such matter shall be litigated solely and exclusively before the appropriate state court of competent jurisdiction located in Arapahoe County, State of Colorado.

7. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized representatives as of the day and year first above written.

ECHOSTAR SATELLITE CORPORATION	LICENSEE
By:	By:
Title: VP Sales	Title: President

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PX0180-019

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Confidential-US v. DISH

DISH-Paper-014694
SLC_ DNC_Investigation_0012359
TX 102-005596

EXHIBIT A TO TRADEMARK LICENSE AGREEMENT

ECHOSTAR®

dish™ NETWORK

dish™

EXHIBIT 98

EXHIBIT 98

Wargo, Robert
From: Wargo, Robert
Sent: Monday, June 04, 2001 3:29 PM
To: Central File Request
Cc: Nestor, Jerrese
Subject: FW: DHP Activation bonus request

Please print two copies of this email and put it into the following files:

CommCentral #853445 and Satellite Systems Network #821970

Thanks,

Robert Wargo
EchoStar Communications Corp.
Central Setup Supervisor
Direct Ext 31266
(303) 723-1266-phone
(303) 723-3508-fax
E-mail: robert.wargo@echostar.com

-----Original Message-----
From: **Boehler, Keith**
Sent: Monday, June 04, 2001 1:39 PM
To: Wargo, Robert; Mills, Leisha
Subject: FW: DHP Activation bonus request

Robert

Please print copies of this e-mail and place it in the dealers file.

Thank you,
Keith Boehler
Commissions Supervisor
Echostar Communications
ph: 303-723-1739
fx: 303-723-1788

-----Original Message-----
From: Boehler, Keith
Sent: Monday, June 04, 2001 1:32 PM
To: Ahmed, Amir; Meyers, Nick; Oberbillig, Mike; Spreitzer, Jim; McCarthy, Cathy
Subject: FW: DHP Activation bonus request

All

ComCentral and Satellite Systems Network have been setup. Once the retailer number for Midwest Communication Group is received, I will set them up as well.

Thank you,
Keith Boehler
Commissions Supervisor
Echostar Communications
ph: 303-723-1739
fx: 303-723-1788

-----Original Message-----
From: McCarthy, Cathy
Sent: Monday, June 04, 2001 8:47 AM
To: Boehler, Keith

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0509

Subject: FW: DHP Activation bonus request

Keith,
Let see if we can get these set up before calcs start this week.

Thanks, Cathy

-----Original Message-----
From: Ahmed, Amir
Sent: Sunday, June 03, 2001 9:20 PM
To: Meyers, Nick; Oberbillig, Mike; Spreitzer, Jim; McCarthy, Cathy
Cc: Ahmed, Amir
Subject: FW: DHP Activation bonus request

Cathy,

Please change CommCentral #853445 and Satellite Systems Network #821970 DHP activation payments from $50.00 to $75.00. Nick will provide the retailer number for Midwest Communication Group.

Thanks,
Amir

-----Original Message-----
From: DeFranco, Jim
Sent: Sunday, June 03, 2001 10:13 PM
To: Ahmed, Amir
Subject: RE: DHP Activation bonus request

OK, THESE THREE ARE APPROVED FOR $75 ACTIVATION AND NO BONUS.

-----Original Message-----
From: Ahmed, Amir
Sent: Thursday, May 31, 2001 11:27 PM
To: DeFranco, Jim
Subject: DHP Activation bonus request

Jim

I am requesting $75.00 activation payment on DHP certs for six-months for the following retailers. Additional bonus will not be offered. I am expecting each of these three retailers to average minimum of 400-500 activation's per month. I will forward to Mary once approved. I have also attached the latest DHP exception list.

1. ComCentral #853445
Potential sales volume up to 1000 per month. ComCentral has been in business for over five years with 100 cellular retail outlets mainly in California. ComCentral also has a dedicated training staff that visits all of their locations, to provide updates and new product rollout training. They will market heavily to their existing cellular customers.

2. Satellite Systems Network #821970
Potential sales Volume up to 1500 per month. Satellite Systems Network uses several marketing companies to purchase new homeowner leads and use telemarketing and direct mail to close the deals.

3. Midwest Communications Group. Midwest Card Services (MCS), which Midwest Communications Group (MCG) operates under, has been providing

customized outsource solutions for over 15 years. MCS brings a base of experience in outbound sales including: Telecommunication products and services, Web page and Internet services, Satellite TV, and Credit Card and Merchant Bankcard products and services.

<< File: DHP CERT BONUS1.xls >>

EXHIBIT 99

EXHIBIT 99

From: Meyers, Nick
Sent: Monday, March 11, 2002 2:06:11 PM
To: Neylon, Brian; Ahmed, Amir
CC: Portela, Shawn
Subject: RE: Dish Network Answering Machine Message

Yes, this is our account.

This is being done by Vector marketing - on behalf of many retailers around the country.

Since they are not seeking co-op, many of the dealers are choosing to waive the activation fee (just like Direct Sales and Target Marketing have done).

While we are not lawyers, we know of no Colorado law which prohibits leaving solicitation voice mails - and Vector claims the same.

It has caused a few concerning calls, but seems to be greatly out weighed by the results.

Please let me know if you need us to do anything regarding this issue - or if it is still an issue at all.

Thanx

Nick

-----Original Message-----
From: Neylon, Brian
Sent: Monday, March 11, 2002 8:53 AM
To: Ahmed, Amir
Cc: Meyers, Nick
Subject: FW: Dish Network Answering Machine Message

Amir,

Retailer is from Ft. Collins CO.

Nick, any insight?

Brian

-----Original Message-----
From: Frey, Dennis
Sent: Monday, March 11, 2002 10:51 AM
To: Neylon, Brian
Subject: RE: Dish Network Answering Machine Message

Brian,

This is Satellite Systems Network out of Ft. Collins CO

The phone number takes you to a call center in CA who SSN contracts through for their sales...
Satellite Systems Network (Call Center)
33282 Golden Lantern #106
Dana Point, CA 92629
1-800-615-1621

The CSR for the call center wasn't sure of the exact mailing address for the DISH Network retailer contact of SSN, but let me know that they are out of Ft. Collins, CO.

Dennis

-----Original Message-----
From: Davidson, Mary
Sent: Sunday, March 10, 2002 10:12 PM

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0080

To: Ahmed, Amir; Neylon, Brian; 'wadewelch@twwlaw.com'
Subject: RE: Dish Network Answering Machine Message

Guys:

Our retailer agreement does have a clause that says that retailers must follow all laws - federal, state and local. So, if this is a violation of state law, then he needs to be advised of this. However, I have gotten several pre-recorded solicitation calls at home so we need to make sure this is prohibited before we bust him.

Wade:

Is calling with a pre-recorded message a specific violation of the federal telemarketing act?

Please advise.

Thanks,

Mary

-----Original Message-----
From: Novak, Scott
Sent: Sunday, March 10, 2002 7:26 PM
To: Ahmed, Amir; Neylon, Brian
Cc: Davidson, Mary
Subject: RE: Dish Network Answering Machine Message

Don't know New York law specifically, but in general state law frowns on pre-recorded telephone calls .... And retailer's contract, I'm sure, says they must follow laws, and indemnify us for problems they create.

If someone wants to make that clear to retailer I would be much obliged.

-----Original Message-----
From: Ahmed, Amir
Sent: Friday, March 08, 2002 10:44 PM
To: Neylon, Brian; Novak, Scott
Subject: FW: Dish Network Answering Machine Message

Brian,

Who is the retailer?

Scott, What are the laws? Anything you want me to do here?

Amir

-----Original Message-----
From: Pitts, Duke
Sent: Friday, March 08, 2002 8:34 AM
To: Ahmed, Amir
Cc: Novak, Scott
Subject: RE: Dish Network Answering Machine Message

Amir and Scott,
I was told that you should be informed of dealers using answering machine messaging. This is one calling in NY. He will answer his 800 number when you call. Let me know if you need me to go further with this.

Duke

-----Original Message-----
From: Jeff Grill [SMTP:jgrill@theromanngroup.com] <mailto:[SMTP:jgrill@theromanngroup.com]>
Sent: Thursday, March 07, 2002 5:39 PM
To: Pitts, Duke; Kral, Colleen
Cc: gad@theromanngroup.com <mailto:gad@theromanngroup.com>; ann@theromanngroup.com <mailto:ann@theromanngroup.com>
Subject: Dish Network Answering Machine Message

FYI,

I received this pre-recorded message on my answering machine yesterday (Long Island, New York):

Hi, this is uh Jim "Thomas with satellite systems network, sorry I missed ya.

Just calling to let you know that we are in your area installing free DISH Network Satellite television systems and ah we just came out with a great new promotion where you can get up to 4 TV's hooked up all with separate receivers and remote at no charge. That is a savings of over 1000 dollars and that is no cost for the equipment and no installation charge. And we are now also giving you the first 3 months of programming free as well.

And we are now giving you the first three months of programming as well what you get is over twice as many channels as cable. Commercial free music. And local channels in most areas as well.

And you get all this at a monthly cost which is usually lower than the cost of cable

All at a monthly cost, which is often, lower than cable

Give us a call when you get home.

You can reach us at 800-6151621

Made sure to mention promotion code SR241

We look forward to hearing from you.

EXHIBIT 100

EXHIBIT 100

From: Weyforth, PJ
Sent: Thursday, May 09, 2002 3:36 PM
To: Larson, Scott; Stingley, Tom; Bissell, Kent; Welch, Shana; Schnittgrund, Steve; Pitts, Duke; Binns, Todd; Firestone, Brian; Weaver, Nileen; Apala, Jay
Cc: Cartwright, Soraya
Subject: Telemarketing

Recently there have been quite a few complaints in states regarding the telemarketing efforts of Dish Network. As a result we are evaluating our practices to ensure we are in compliance with national and state guidelines. Together we need to review where we are and potential gaps that need to be closed. We realize that retailer may be causing the bulk of the issues but we need to ensure we are buttoned up in each area. There is to be a meeting scheduled with Legal shortly to review Telemarketing in general and this may assist us in the discussion.

Target Marketing Lists

All campaigns from Duke Pitts and Todd Binns are scrubbed by the vendor against the national and state no call lists. We are getting a letter from the vendor stipulating that this is their business practice and is applicable for all work they do for us.

LTS Leads

While there is opinion that we have a relationship with this customer because they called us we will begin scrubbing this list just as we do the Target Marketing List above. Duke Pitts and Todd Binns will identify a vendor to support this work. We just want to ensure there is a timely turn-around on these lists so we don't lose the effectiveness of this contact.

Winback

Those that we outbound call within 3 to 5 days of disconnect we are most likely alright to contact because of our recent business relationship. But this needs to be validated.

The lists that are more aged will need to be scrubbed against the no call list. Marty's team may need assistance from Duke & Todd to incorporate into the LTS lead scrub.

Premium Up-Sales

We have a business relationship with these customers and should not preclude us from contacting them. We may want to treat this like LTS leads and scrub against the national and state no call lists through a vendor. The legal department should be able to advise.

Non-Pay

No perceived impact if we continue the current process. Validation with legal may be appropriate.

Collections

This should not be an issue and today we don't view this as an issue but we may want to validate for any national or state rule changes that may change that perception.

No Call List

Today in the CSCs when an agent is told by a customer they do not want to be contacted through any telemarketing efforts they are identified in the system. However we do have individuals that contact us asking to be put on the Dish Network No Call List that are not customers. This is a bit more complex but there a process. I believe the gap is what we do with that list and how we ensure that any list we call is scrubbed against this list along with the national and state no call lists. We may be able to supply these to the vendor we select for LTS, Winback, Premium... to incorporate in their master list.

U.S., et al. v. Dish Network L.L.C. Plaintiff's Exhibit PX0477

Rules & Regulations

Today we are probably not as versed in all the regulations surrounding telemarketing as we should be. We need a point person other than legal within CSC or Marketing who is our resident expert. We also need to join an organization or web site that offers information in this area. This could go a long way.

So here is where we are and we need to meet on this quickly to get our plan of action together.

P.J. Weyforth

Confidential-US v. Dish

Dish-00008882

PX0477-002

JA006346
005211

SLC_ DNC_Investigation_0012964

TX 102-005608

EXHIBIT 101

EXHIBIT 101

ECHOSTAR SATELLITE CORPORATION

"DO-NOT-CALL" POLICY

IN COMPLIANCE WITH THE
TELEPHONE CONSUMER PROTECTION ACT OF 1991
(T.C.P.A.)

AND

THE TELEMARKETING AND CONSUMER FRAUD
AND ABUSE PREVENTION ACT OF 1994

AND

ACCOMPANYING REGULATIONS

(Revised June 1, 2002)

U.S., et al. v. Dish Network, L.L.C.
Joint Exhibit
JTX-0050

ECHOSTAR DO-NOT-CALL POLICY

I. INTRODUCTION

EchoStar has implemented this Do-Not-Call Policy in order to protect the privacy rights of consumers and to promote compliance with applicable laws and regulations. EchoStar intends to honor the request of any person who opts not to receive telephone solicitations.

II. DO-NOT-CALL POLICY

EchoStar maintains a list of phone numbers of persons who have indicated that they do not wish to receive solicitation calls. The phone number of any person who informs EchoStar that he or she does not wish to receive solicitation calls is placed on EchoStar's Do-Not-Call list. A request may be communicated by means of: 1) inclusion on an official state or federal Do-Not-Call list; 2) advising an EchoStar Customer Service Representative by phone; or 3) advising EchoStar in writing. Oral requests should be made by calling EchoStar's Customer Service Center at 1-800-333-DISH. Written requests should be sent to: EchoStar Satellite Corporation, Attention: Do Not Call, P.O. Box 9008, Littleton, Colorado 80120. All EchoStar employees who conduct outbound solicitation calls will be instructed on company policy and provided with guidance on how to add numbers to EchoStar's Do-Not-Call list.

A. STATE DO-NOT-CALL LISTS

It is Echostar's policy to obtain all state Do-Not-Call lists, and to not call the phone numbers on state Do-Not-Call lists. EchoStar's Do-Not-Call list will be updated within 30 days of receipt of the state Do Not Call list, or such shorter time if required by state law.

B. **COMMUNICATION**

WHAT TO SAY WHEN A PARTY REQUESTS TO BE ADDED TO OUR DO-NOT-CALL LIST:

"Mr.(s) _____, please excuse this call, I will have your phone number removed from our calling list immediately."

WHAT TO SAY IF A PERSON REQUESTS A COPY OF OUR "DO-NOT-CALL" POLICY:

"Mr.(s) _____, we will be happy to send a copy of our Do-Not-Call policy to you. Please let me confirm your address and we will mail you a copy. Thank you for your interest."

C. **UPDATING THE DO-NOT-CALL LIST**

1. DISH Network Customers

If a DISH Network customer calls in to request exclusion from solicitations, the inbound Customer Service Representative will input a "Do Not Call" code onto the customer's account. If an outbound Customer Service Representative receives a Do-Not-Call request from a DISH Network customer, the Customer Service Representative will mark the account in the dialer. Data is downloaded from each dialer and updates each customer's account with a "Do Not Call" code. Coded accounts, whether marked manually by an inbound Customer Service Representative or by download, are excluded from any future dialing list.

2. Non-Customers

A Customer Service Representative who receives a non-customer's request to be excluded from solicitations will mark that record as "Do Not Call" and provide his or her coach with the phone number(s) to be placed on the Do Not Call list. Each coach sends out a list of all such requests at the end of each shift, which are then added into the outbound dialers and EchoStar's Do Not Call database.

III. OTHER CALLING REQUIREMENTS

In addition to any specific training, instruction or other requirements, all EchoStar employees placing outbound solicitation calls must comply with the following:

1) Calls may only be placed between the hours of 8:00 a.m. and 9:00 p.m., local time of the called party.

2) Use of an artificial or prerecorded voice to deliver a message to any residential phone line is prohibited.

3) When making a call, provide the potential customer with your name and that you are calling on behalf of "DISH Network."

4) Advertisements may not be transmitted by any device to a telephone facsimile machine unless the person receiving the facsimile has given prior express invitation or permission to receive it.

IV. SAMPLE LETTER

Date

Name
Address

Dear_____:

Enclosed please find a copy of EchoStar's Do-Not-Call policy. We thank you for taking the time to examine this policy. If you have any questions or concerns, please feel free to contact us in writing at:

Echostar Satellite Corporation
P.O. Box 9008
Littleton, Colorado 80120

or by telephone at (800) 333-DISH.

We are sorry for any inconvenience we may have caused, and if we can be of service to you in the future, please do not hesitate to contact us.

Sincerely,

EchoStar Satellite Corporation

EXHIBIT 102

EXHIBIT 102

From: Binns, Todd
Sent: Thursday, June 06, 2002 1:37 PM
To: Hernandez, Julie
Cc: Gonzalez, Melissa; Weyforth, PJ; Stingley, Tom
Subject: RE: No solicit flags

Julie,

PJ and Tom have been working with legal to ensure we are buttoned up. I know we are in the process of procuring the necessary DNC lists but for the time being we are suppressing states that are deemed to be hot spots. Colorado is one of the states we are suppressing.

Todd Binns
Senior Database Marketing Analyst
303-723-2644
todd.binns@echostar.com

-----Original Message-----
From: **Hernandez, Julie**
Sent: Thursday, June 06, 2002 10:12 AM
To: Binns, Todd
Cc: Gonzalez, Melissa
Subject: FW: No solicit flags

Todd,

Are we taking this list into consideration when outbounding?

Julie Hernandez
Manager - IT Business Integration
phone: 303-723-3124
fax: 303-723-2199
email: julie.hernandez@echostar.com

-----Original Message-----
From: Schaefer, Germar
Sent: Thursday, June 06, 2002 9:54 AM
To: Litasi, Sherry; Gattone, Tim; Hawkins, Mike; Mason, Robert; McGuire, Ken; Vigil, George
Cc: Frosh, Julie; Hernandez, Julie; Langford, Linda
Subject: RE: No solicit flags

Julie(s):
Please make your clients aware of the solicitation restrictions below.

thanks

--- Germar ---
Dr.-Ing. Germar Schaefer
VP, IT Architecture & Development

EchoStar Communications Corp.
5701 S. Santa Fe Drive
Littleton, CO 80120

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0475

PX0475-001
JA006353
005218
Confidential-US v. Dish
Dish-00008873
SLC_ DNC_Investigation_0012955
TX 102-005615

Phone: +1 (303) 723-1140
Fax: +1 (303) 723-3607
Mobile: +1 (719) 460-6550
Pager: +1 (303) 201-7409
Alpha: 3032017409@archwireless.net
-----Original Message-----
From: Litasi, Sherry
Sent: Wednesday, June 05, 2002 4:12 PM
To: Gattone, Tim; Hawkins, Mike; Mason, Robert; McGuire, Ken; Vigil, George
Cc: Schaefer, Germar
Subject: No solicit flags

I am wondering if anyone in the business or IT is anticipating acquiring the no-call list data.

I've copied the following from the web site: http://www.coloradonocall.com/ (The bold text is from me.)

The law that created the No-Call List specifies that "persons or entities" that want to make residential telephone solicitations to Colorado residents must register and pay an annual fee to the Agent designated by the Public Utilities Commission to administer the program. Registration is required even if your company intends to use a list service (sometimes referred to as a "conforming list broker") that purports to comply with the Colorado No Call List.

By law, registration fees will range from $0 to $500 depending upon the size of the company. See the list of fees here. Nonprofit organizations and "conforming list brokers" may register and receive the No-Call List at no cost.

You can indicate your interest to register by filling out the following web form.

The first No-Call list will be available on June 10, 2002. You must update your list by no later than June 30, 2002 and use the Colorado No-Call List by no later than July 1, 2002.

Thanks,

Sherry Litasi
Sherry Litasi
Architect II
Manager, Data Architecture Team
EchoStar Communications
cell: 303-324-2305
office: 303-706-4573

PX0475-002
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Confidential-US v. Dish
Dish-00008874
SLC_ DNC_Investigation_0012956
TX 102-005616

EXHIBIT 103

EXHIBIT 103

June 12, 2002

Satellite Systems Network
Alex Tehranchi
33282 Golden Lantern, Suite 110
Dana Point, CA 92629

Re: Violation of the EchoSphere Retailer Agreement

Dear Mr. Tehranchi:

It has come to our attention that Satellite Systems Network is in violation of the EchoSphere Retailer Agreement (Agreement). The violation that occurred was in reference to paragraph 9.3, section v.

Paragraph 9.3 states that the Agreement shall terminate if "Retailer fails to comply with any applicable federal, state or local law or regulation, or engages in any practice, related to the business conducted by the retailer in connection with this Agreement which is determined to be an illegal or unfair trade practice in violation of any applicable federal, state or local law or regulation". Satellite Systems Network must comply with all applicable federal, state, and local laws, including but not limited to those specifically pertaining to telemarketing.

Please ensure that all practices pertaining to telemarketing are within the law. Thank you in advance for your co-operation in this matter.

Regards,

Mary Davidson
Director, Retail Services
DISH Network

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0187

EXHIBIT 104

EXHIBIT 104

From:	Davidson, Mary (Dir - Retail Svcs) </O=ECHOSTAR COMMUNICATIONS CORP/OU=ECHOSTAR/CN=RECIPIENTS/CN=MARY DAVIDSON>
Sent:	Friday, January 17, 2003 8:06 PM
To:	Meyers, Nick <Nick.Meyers@echostar.com>; Spreitzer, Jim <Jim.Spreitzer@echostar.com>; Grady, Ron <Ron.Grady@echostar.com>; Neylon, Brian <Brian.Neylon@echostar.com>; McElroy, Steve <Steve.McElroy@echostar.com>; Van Emst, Blake <Blake.VanEmst@echostar.com>
Cc:	Ahmed, Amir <Amir.Ahmed@echostar.com>; Carlson, Erik <Erik.Carlson@echostar.com>
Subject:	FW: Dialer: YOU WERE RIGHT!

Read this email string if you need a good laugh. You will also get a brief legal update on the legal aspects of using pre-recorded messages to telemarket prospective customers for satellite sales in the process...

What the hell does "chipper" mean anyway?

-----Original Message-----
From: Rick LeMAR [mailto:rocket@planet-earth.com]
Sent: Friday, January 17, 2003 1:38 AM
To: Davidson, Mary (Dir - Retail Svcs)
Subject: Re: Dialer: YOU WERE RIGHT!

Mary;

You are right, It is against Federal Law to use an ADAD to make unsolicited advertisements. If you would like to refer dealers to the Rules on the FCC site they are at: http://www.fcc.gov/cgb/consumerfacts/tcpa.html.

- emergency calls needed to ensure the consumer's health and safety;
- calls for which you have given prior consent;
- non-commercial calls;
- calls which don't include any unsolicited advertisements;
- calls by, or on behalf of, tax-exempt non-profit organizations; or
- calls from entities with which you have an established business relationship.

I know some major dealers included an SBCA board member that are using dialer companies. I will be sending them and an email today to let them know. I will also confront the 2 dialer companies (Sound Media and Smart Reply) and see what they have to say.

I can't thank you enough for your time.

Rick LeMar

> ----- Original Message -----
> **From:** Rick LeMAR
> **To:** Davidson, Mary (Dir - Retail Svcs)
> **Sent:** Thursday, January 16, 2003 7:37 AM
> **Subject:** Re: Dialer
>
> Very good idea, thanks Mary.

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0040

----- Original Message -----
From: Davidson, Mary (Dir - Retail Svcs)
To: 'Rick LeMAR'
Sent: Wednesday, January 15, 2003 7:16 PM
Subject: RE: Dialer

Ricky:

Before you get your wallet out and pay a lawyer, please feel free to call any and every reputable, publicly traded telemarketing company in the country and ask if they will leave pre-recorded cold calls to sell Satellite systems for your company and see what they say.

Mary

-----Original Message-----
From: Rick LeMAR [mailto:rocket@planet-earth.com]
Sent: Wednesday, January 15, 2003 5:01 PM
To: Davidson, Mary (Dir - Retail Svcs)
Subject: Re: Dialer

Mary;
Sorry about waisting your time, I will go out and get a federal legal opinion. By the way that PUC ANALYIST is an employee of the state of Texas and her only job is to regulate the ADAD.
r

----- Original Message -----
From: Davidson, Mary (Dir - Retail Svcs)
To: 'Rick LeMAR'
Sent: Wednesday, January 15, 2003 12:22 PM
Subject: RE: Dialer

Ricky:

Of course it isn't illegal, if you fit into one of the categories where leaving automated messages is allowed - like not for profit solicitations, or if you have a prior contact/relationship with the customer, etc. The PUC has an existing customer relationship with every customer in the state...so they can use pre-recorded messages.

Leaving pre recorded messages to cold call for commercial purposes is illegal under Federal Law. I read the law myself.

Ricky, please get a legal opinion from a lawyer that works in this field that says that leaving pre-recorded messages on a cold call basis for commercial purposes where there is no pre-existing customer relationship is not illegal under Federal Law.

A PUC analyst??? I am sure that I can find a commission analyst in my group that will tell me that this is not illegal too.

Sorry, this is not a good use of your time or mine.

Mary

-----Original Message-----
From: Rick LeMAR [mailto:rocket@planet-earth.com]
Sent: Wednesday, January 15, 2003 3:51 PM
To: Davidson, Mary (Dir - Retail Svcs)
Subject: Re: Dialer

Mary;
I just got off the phone with a Miss Betsy Tyson, an Analysis for the Public Utility Commission with the Great State of Texas. She handles review of all ADAD Permits and she said it is not against

Federal Law to use an ADAD!
her number is 512-936-7323 (direct line)
Can I get the federal statute that Echo is basing there decision on?
r

----- Original Message -----
From: Davidson, Mary (Dir - Retail Svcs)
To: 'Rick LeMAR'
Sent: Wednesday, January 15, 2003 10:56 AM
Subject: RE: Dialer

Federal law supercedes state law every time...

-----Original Message-----
From: Rick LeMAR [mailto:rocket@planet-earth.com]
Sent: Wednesday, January 15, 2003 8:02 AM
To: Davidson, Mary (Dir - Retail Svcs)
Subject: Re: Dialer

Mary;
It is my interpretation that the federal law applies only if the state adopts it or when calls are made over state lines in states were no rule of law has been adopted. In the state of Texas they not only approve it, you have to get a permit to use it. I have attached a copy of their law stating that and the application form. I also have been told from a legal source that once the federal government has their "national do not call list" in place the federal government will be re-writing their rules.
If you read the Texas Law doc enclosed, you will concluded that Texas does have strict rules in place. Their law will probably be used to set most of the federal guide lines. Especially when you consider who the Governor of the State of Texas was and what his current position is with the federal government.
Rick LeMar

----- Original Message -----
From: Davidson, Mary (Dir - Retail Svcs)
To: 'Rick LeMAR'
Sent: Tuesday, January 14, 2003 4:51 PM
Subject: RE: Dialer

Rick:

It is against the Federal Law, not the state law...

Sorry - no dialers.

Mary

-----Original Message-----
From: Rick LeMAR [mailto:rocket@planet-earth.com]
Sent: Tuesday, January 14, 2003 11:23 AM
To: Davidson, Mary (Dir - Retail Svcs)
Subject: Dialer

Mary;

It's was good seeing you at the show. You looked very chipper.

To follow up on the our conversation on the dialer. After researching about 10 states and federal telemarketing sales rules, I found out the following:
1-some states forbid the use of any type of recorded message in telemarketing
2-some states forbid the use of just autodialers with announcements (recording must be introduced by an attended person)
3-some states do not restrict

4-some states will allow it as long as you state your plan when you apply for your telemarketing plan and the state approves that plan by way of issuing a permit.
5-some states say it's OK as long as you have a permit for the ADAD (Automated Dialer Announcement Device) from the state to use the dialer.

A further note or two: The individual states not the federal government has jurisdiction in these matters. The proposed Nation "Do Not Call" list is getting some stiff opposition from individual state attorney's offices. Also, I find the state with more controls in place (like "Do Not Call" Lists) to be more apt to let a ADAD legal in their state, but under strict guide lines.

Therefore, I would assume that it would be:
1. OK, to use the dialer under approval of the individual states Attorney General's Office or governing body, where an actual permit is issued.
2. OK, to use the dialer under approval of the individual states Attorney General's Office or governing body, where permission is granted in writing by way of statement of usage of the dialer in filing for a permit to telemarket in that state.
3. (By our conversation) OK, to use the dialer in a state, when we have an legal opinion from an attorney stating that it is OK and that lawyer will stand behind his decision.
4. Avoid states that do not allow these devices.

Are these guide lines appropriate to follow as far as DISH NETWORK is concerned;
I further propose to let your office know or furnish a copy of legal justification(s) before working with a dealer in their state.

sincerely;
Rick LeMar

EXHIBIT 105

EXHIBIT 105

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION CIRCUIT COURT

CAUSE NO. 49C03-0304-PL-010011

IN RE: EchoStar Satellite Corporation,)
)
Respondent.)
)

FILED
46 APR 11 2003
CLERK OF THE MARION CIRCUIT COURT

PETITION FOR APPROVAL OF ASSURANCE OF VOLUNTARY COMPLIANCE

Petitioner, Stephen Carter, Attorney General of the State of Indiana, by counsel, Marguerite M. Sweeney, states the following in support of this Petition for Approval of Assurance of Voluntary Compliance:

1. Stephen Carter (hereinafter "the Attorney General") is the duly elected, qualified, and acting Attorney General of the State of Indiana.

2. The Attorney General is authorized to administer and enforce IC 24-4.7 et seq regulating the Telephone Solicitation of Consumers law (herinafter the "Act").

3. In administering the Act, the Attorney General alleges that EchoStar Satellite Corporation (hereinafter "RESPONDENT") has engaged in certain trade practices deemed to be in violation of IC 24-4.7-4.

4. On or about April 11, 2003, the Indiana Attorney General and the RESPONDENT entered into an Assurance of Voluntary Compliance ("AVC") designed to assure the Indiana Attorney General and the citizens of the State of Indiana that RESPONDENT will not engage in those practices alleged to be unlawful by the Attorney General. The AVC, marked as Exhibit 1, is attached hereto and incorporated herein by reference.

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0908

5. By entering into this AVC, RESPONDENT admits no wrong doing. Additionally, this AVC does not constitute that RESPONDENT has engaged in any methods, acts, uses, practices or solicitations declared to be unlawful under IC 24-4.7 or any rule or regulation promulgated thereto.

6. The AVC reflects that the Attorney General and the RESPONDENT recommend that this Court approve the AVC.

WHEREFORE, the Indiana Attorney General respectfully prays this Court to enter its Order approving the AVC attached hereto as Exhibit 1.

Respectfully submitted,

STEPHEN CARTER
Attorney General

Marguerite M. Sweeney

by: Marguerite M. Sweeney
Atty. # 2052-49
Deputy Attorney General
Office of the Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204-2770
Telephone: (317) 232-6201

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of April, 2003, the foregoing was mailed first-class, postage prepaid to:

Scott L. Novak
EchoStar Satellite Corporation
5710 S. Santa Fe Drive
Littleton, Colorado 80120

Marguerite M. Sweeney

Marguerite M. Sweeney
Atty. # 2052-49

PX0908-002
JA006364
005229
FTC306-029886
SLC_ DNC_Investigation_0004120
TX 102-005626

STATE OF INDIANA	)	IN THE MARION CIRCUIT COURT
	)	
COUNTY OF MARION	)	CAUSE NO.
IN RE: ECHOSTAR SATELLITE CORPORATION,	)	
	)	
Respondent.	)	

ASSURANCE OF VOLUNTARY COMPLIANCE

The State of Indiana, by Attorney General Stephen Carter and the Respondent, EchoStar Satellite Corporation (hereinafter "EchoStar," and collectively with the State of Indiana, the "Parties"), enter into an Assurance of Voluntary Compliance ("AVC") arising out of Ind. Code § 24-4.7.

I. DEFINITIONS

As used in this AVC and accompanying Agreed Order, the following words or terms shall have the following meanings:

1. The "Act" means Indiana's Telephone Solicitation of Consumers Act of 2001, Ind. Code § 24-4.7, and related statutes and rules adopted pursuant thereto, as said statutes and rules are amended from time to time.

2. The "Compliance Date" means April 1, 2003, which is the date by which EchoStar has assured the Division and the Office of the Attorney General that EchoStar and its Affiliates were in compliance with the AVC. For purposes of this AVC, an "Affiliate" shall mean a corporation or entity controlling, controlled by, or under common control with EchoStar; an entity "controls" another entity if it directly possesses the power to direct the management and policies of a person through ownership of voting securities. An independent retailer or independent contractor that sells EchoStar products or services does not constitute an Affiliate.

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EXHIBIT 1

PX0908-003

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005230
FTC306-029887
SLC_ DNC_Investigation_0004121
TX 102-005627

3. "Consumer" means a residential telephone subscriber who is an actual or a prospective:

(a) purchaser, lessee, or recipient of consumer goods or services; or

(b) donor to a charitable organization.

4. "Consumer Goods or Services" means any of the following:

(a) Tangible or intangible personal property or real property that is normally used for personal, family, or household purposes.

(b) Property intended to be attached to or installed on real property without regard to whether it is attached or installed.

(c) Services related to property described in (a) or (b) above.

(d) Credit cards or the extension of credit.

5. "Violation" means any individual instance of noncompliance with any provision of the Act.

6. "Division" means the Consumer Protection Division of the Office of the Attorney General of the State of Indiana.

7. For purposes of this AVC, "Doing Business in Indiana" means making Telephone Sales Calls to Consumers located in Indiana whether the Telephone Sales Calls are made from a location in Indiana or outside Indiana.

8. The "Effective Date" of this agreement shall be the date that it is executed by the Attorney General or his authorized deputy.

9. "Fund" refers to the Consumer Protection Division telephone solicitation fund established by Ind. Code § 24-4.7-3-6.

Initial SD

10. "Listing" refers to the no telephone sales solicitation listing that is published quarterly by the Division.

11. EchoStar's "locality" or "business location" means the geographic location or locations at which EchoStar may place telephone sales calls to Indiana consumers and the geographic location at which EchoStar maintains its corporate or business headquarters.

12. The phrase "Telephone Solicitor or Sub-entity Working for" shall mean EchoStar's or its Affiliates' employees, successors, assigns, principals, officers and directors.

13. "Telephone Number" means a residential telephone number in the State of Indiana.

14. "Telephone Sales Call" means a telephone call made to an Indiana Consumer for any of the following purposes:

(a) Solicitation of a sale of consumer goods or services.

(b) Solicitation of a charitable contribution.

(c) Obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

The term includes a call made for the above purposes by use of automated dialing or recorded message devices.

15. "Telephone Solicitor" means an individual, a firm, an organization, a partnership, an association, or a corporation expressly authorized by EchoStar or an Affiliate in writing for the specific purpose of initiating Telephone Sales Calls to Indiana Consumers.

III. WITNESSETH

20. This AVC, which is entered into without the adjudication of any issue of fact or law and upon consent of the parties, does not constitute an admission by EchoStar of any Violation. A violation of this AVC, however, does constitute *prima facie* evidence of a Violation.

21. EchoStar is organized under the laws of Colorado, with its principal place of business at 5701 S. Santa Fe Drive, Littleton, CO 80120. EchoStar transacts business with Indiana consumers.

22. The Division alleges that EchoStar committed one or more Violations prior to the Compliance Date, by making or causing to be made Telephone Sales Calls to one or more Telephone Numbers that appear on the Listing and offering, among other things, satellite television-related products or services. EchoStar expressly denies said allegations.

IV. ASSURANCES

23. To the extent that EchoStar has not already done so, EchoStar will immediately cease from making or causing to be made Telephone Sales Calls to Telephone Numbers on the Listing.

24. To the extent that EchoStar has not already done so, EchoStar shall establish, implement and maintain systems and procedures that are reasonably calculated to ensure compliance with the Act.

25. EchoStar shall subscribe to, continue to subscribe to, and remain current with, the Listing, so long as it makes Telephone Sales Calls to Indiana Consumers.

V. PENALTIES FOR FAILURE TO COMPLY

26. EchoStar understands and agrees that any violation of Ind. Code § 24-4.7-4 constitutes *prima facie* evidence of a Violation.

27. EchoStar also understands and agrees that each Telephone Sales Call in violation of the Act is considered a separate violation.

28. EchoStar further understands the remedies available to the Attorney General under the Act.

VI. CIVIL PENALTIES AND COSTS

29. EchoStar shall pay the sum of One thousand five hundred and 00/100 U.S. dollars ($1,500.00). EchoStar shall make full payment to the "Office of the Attorney General Consumer Protection Division Telephone Solicitation Fund" within fifteen (15) days after EchoStar receives a countersigned copy this AVC.

30. The payment referred to in the foregoing paragraph shall constitute a full settlement and release of any violations of the Act allegedly committed by EchoStar or any Telephone Solicitor or Sub-Entity Working for EchoStar prior to the Compliance Date.

VII. STIPULATED FUTURE CIVIL PENALTIES AND COSTS

31. In the event that EchoStar or any Telephone Solicitor or Sub-Entity Working for EchoStar violates the Act on or after the Compliance Date, EchoStar shall pay the sum of Nine hundred and 00/100 U.S. dollars ($900.00) per violation as an agreed-upon stipulated penalty (hereinafter "Stipulated Future Penalty").

32. This stipulation as to the Stipulated Future Penalty shall continue until September 15, 2004 (hereinafter "Stipulated-Penalty Expiration Date"), such that any violations committed by EchoStar or any Telephone Solicitor or Sub-Entity Working for EchoStar between the Compliance Date and Stipulated-Penalty Expiration Date shall be subject to the Stipulated Future Penalty as identified herein.

33. Any violations committed by EchoStar or any Telephone Solicitor or Sub-Entity Working for EchoStar on or after the Stipulated-Penalty Expiration Date shall be subject to any and all remedies available under the Act.

34. Upon notification from the Division of an alleged violation, EchoStar shall have thirty (30) days to investigate and report the results of said investigation to the Division. The Division shall review EchoStar's investigation in good faith, taking into consideration any mitigating facts and circumstances shown by EchoStar. If the Division, after a review of all available evidence in good faith, affirms that EchoStar or a Telephone Solicitor or Sub-Entity Working for EchoStar committed a violation, and EchoStar does not dispute the Division's determination, EchoStar shall make full payment to the Fund within thirty (30) days after being advised of such determination.

35. If EchoStar and the Division are unable to resolve a dispute as to whether an alleged violation call was made by EchoStar or a Telephone Solicitor or Sub-Entity Working for EchoStar, and EchoStar elects not to make payment as described above, then the Division may pursue any and all of the remedies available to it under the Act with respect to such call.

VIII. MONITORING AND COMPLIANCE

36. EchoStar acknowledges that upon the request of the Division, EchoStar may be required to provide a record of all Telephone Sales Calls made by EchoStar or by a Telephone

Initial SJ

Solicitor or Sub-Entity Working for EchoStar, in the time and manner prescribed by 11 IAC 1-2, as said rule may be amended from time to time.

37. EchoStar shall cooperate with the Office of the Attorney General and Division in the investigation and resolution of any and all complaints received by the Indiana Attorney General against EchoStar or DISH Network, including but not limited to, assisting the Indiana Attorney General in identifying and contacting any independent retailer which may have been responsible for the alleged violation.

38. When information provided to EchoStar by the Division indicates that an independent retailer of EchoStar products may have violated the Act, EchoStar will discuss the matter with the Division and will address the matter with said independent retailer to the extent EchoStar is able to do so under the law and its contractual relationships.

39. In the event that the Indiana Attorney General initiates litigation against a current or former independent dealer of EchoStar products for violations of the Act, EchoStar will act in a commercially reasonable manner to assist and cooperate in the prosecution of said independent dealer to the extent EchoStar is able to do so under the law and its contractual relationships.

IX. Forbearance On Execution And Default

40. No execution on the monetary portion of this AVC shall be issued so long as full payment is received pursuant to the terms as set forth above.

41. Failure by EchoStar to fully comply with payment, as set forth above, constitutes a violation of the terms of this AVC.

47. This AVC embodies the entire agreement and understanding of the parties hereto solely with respect to violations of the Act occurring prior to the Compliance Date. Acceptance of this AVC by the Division and the Office of the Attorney General, and its approval by the court, shall not be construed as a release or waiver of any claims or causes of action that may accrue to third parties having any private right of action, or of any claims or causes of action that may arise out of the violation or alleged violation of any statute or rule other than the Act, or of violations of the Act occurring after the Compliance Date.

48. All parties agree that this AVC constitutes a fair agreement, and presently agree to proceed in accordance therewith. EchoStar has had the opportunity to consult with legal counsel regarding this AVC, and agrees to be bound by all provisions contained herein.

49. EchoStar expressly waives any right to contest the validity or applicability of the Act or of this AVC, so long as and to the extent that said Act remains valid and enforceable.

50. The Office of the Attorney General, without further notice, shall make *ex parte* application to the Circuit Court of Marion County, State of Indiana, for entry and approval of this AVC.

51. The receipt of a fully executed original of this signed and filed AVC by EchoStar shall constitute notice and acceptance by EchoStar of all the terms of this AVC and EchoStar waives having the AVC served upon it.

Initial ___

THE RESPONDENT'S SIGNATURE AND ACKNOWLEDGMENT

The RESPONDENT, EchoStar Satellite Corporation, has read and understands this agreement and each of its terms and agrees to each and every term.

I, being first duly sworn on oath, depose and say that I am the SVP and General Counsel of EchoStar Satellite Corporation and am fully authorized and empowered to sign this Assurance of Voluntary Compliance on behalf of EchoStar Satellite Corporation, and have the ability to bind EchoStar Satellite Corporation to the terms of this Assurance of Voluntary Compliance.

David K. Moskowitz
Signature

David K. Moskowitz
Print name

Senior Vice President and General Counsel
Title

5701 S. Santa Fe Drive, Littleton, Colorado 80120
Address

State of Colorado)
) SS:
County of Arap.)

Subscribed and sworn to before me the undersigned, a Notary Public for the State of CO, this 4th day of April, 2003.

(SEAL) Sandi Bray, Notary Public

County of Residence: Arapahoe
My commission expires: 7/30/03

Initial SB

ACCEPTANCE OF STATE OF INDIANA
EX REL ATTORNEY GENERAL STEPHEN CARTER

STEPHEN CARTER
Attorney General

by: Marguerite Sweeney
Marguerite M. Sweeney
Deputy Attorney General
Attorney Number: 2052-49

DATE SIGNED: 4-8-2003

Office of the Attorney General
402 West Washington Street
Indiana Government Center South – 5th Floor
Indianapolis, Indiana 46204
Telephone: (317) 232-1011
Facsimile: (317) 232-7979

Initial SW

PX0908-012
JA006374
005239
FTC306-029896
SLC_ DNC_Investigation_0004130
Docket 81704 Document 2021-09000
TX 102-005636

STATE OF INDIANA)
)
COUNTY OF MARION)

IN THE MARION CIRCUIT COURT

CAUSE NO. 49C01-0304-MI-001011

IN RE: EchoStar Satellite Corporation,)
)
Respondent.)
)

95

FILED
APR 15 2003
CLERK OF THE MARION CIRCUIT COURT

ORDER APPROVING
ASSURANCE OF VOLUNTARY COMPLIANCE

Cause comes to be heard on the Petition for Approval of Assurance of Voluntary Compliance ("AVC") presented to the Court by Petitioner Attorney General Stephen Carter. The Court, having read the petition and the AVC, and being fully advised in the premises, finds as follows:

1. This Court has jurisdiction over the parties and the subject matter of this cause pursuant to IC § 24-4.7-5-5; and

2. The parties have read and understand the terms and conditions of this AVC and recommended that this Court approve the AVC; and

3. The AVC will adequately protect the public interest as expressed in IC 24-4.7.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the Assurance of Voluntary Compliance executed on or about April 11, 2003, is APPROVED.

SO ORDERED this _____ day of APR 15 2003, 2003.

JUDGE PRO TEMPORE

JUDGE, Marion Circuit Court

Distribution:

Marguerite M. Sweeney
Deputy Attorney General
Office of the Indiana Attorney General
Indiana Government Center South, 5th Floor
302 West Washington Street
Indianapolis, IN 46204

Scott L. Novak
EchoStar Satellite Corporation
5710 S. Santa Fe Drive
Littleton, Colorado 80120

EXHIBIT 106

EXHIBIT 106

IN THE CIRCUIT COURT OF ST. CHARLES COUNTY
STATE OF MISSOURI

FILED
MAY 0 4 2005
Circuit Clerk
ST. CHARLES COUNTY

STATE OF MISSOURI, ex rel. JEREMIAH W. (JAY) NIXON, Attorney General,	)	
Plaintiff,	)	**Cause No.: 03CV129088**
v.	)	**Division: 03**
ECHOSTAR COMMUNICATIONS CORPORATION, d/b/a DISH NETWORK™	)	
Defendant.	)	

PETITION FOR APPROVAL OF ASSURANCE OF VOLUNTARY COMPLIANCE

COMES NOW Jeremiah W. (Jay) Nixon, the duly elected, qualified and acting Attorney General of the State of Missouri, and states as follows:

1. Jeremiah W. (Jay) Nixon is the duly elected, qualified, and acting Attorney General of the State of Missouri.

2. Section 407.030.11[1] provides:

> In the administration of this Chapter, the attorney general may accept an assurance of voluntary compliance with respect to any method, act, use, practice or solicitation deemed to be violative of this chapter from any person who has engaged in or is engaging in such a method, act, use, practice or solicitation. The assurance of voluntary compliance shall be in writing and shall be filed with and subject to the approval of the circuit court of the county in which the alleged violator resides or has his principal place of business, or the circuit court of Cole County. Such assurance of voluntary compliance shall not be considered an admission of violation for any purpose.

3. In administering Chapter 407, the Attorney General alleges that Defendant Echostar Communications Corporation, has engaged in certain practices deemed to be in violation of Section 407.1098.1.

[1]All statute references are to Mo.Rev.Stat.(2000), as amended, unless otherwise indicated.

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0544

4. On or about the 2nd day of May, 2005, the Missouri Attorney General and the Defendant entered into an Assurance of Voluntary Compliance ("AVC") executed pursuant to Sections 407.030 and 407.1110. This AVC is designed to assure the Missouri Attorney General and the citizens of the State of Missouri that Defendant will not engage in those practices alleged to be unlawful by the Attorney General. The AVC, marked at Exhibit 1, is attached hereto and incorporated herein by reference.

5. By entering into this AVC, Defendant admits no wrong-doing. Additionally, this AVC does not constitute a finding by this Court that Defendant has engaged in any methods, acts, uses, practices or solicitations declared to be unlawful under Section 407.1098.1, et seq. or any rule or regulation promulgated thereto.

6. The AVC reflects that the Missouri Attorney General and the Defendant recommend that this Court approve the AVC.

WHEREFORE, the Missouri Attorney General respectfully prays this Court to enter its Order approving the AVC attached hereto as Exhibit 1.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Rex M. Burlison #29935
Chief Counsel, Eastern District
Wainwright State Office Building
111 North Seventh Street, Suite 934
St. Louis, Missouri 63101
(314) 340-7653
(314) 340-7891 facsimile

IN THE CIRCUIT COURT OF ST. LOUIS CITY
STATE OF MISSOURI

STATE OF MISSOURI, ex rel. JEREMIAH W. (JAY) NIXON, Attorney General,	)	
Petitioner,	)	Cause No.
vs.	)	Division
ECHOSTAR COMMUNICATIONS CORPORATION, D/B/A DISH NETWORK (TM),	)	
Respondent.	)	

ASSURANCE OF VOLUNTARY COMPLIANCE

Petitioner State of Missouri, at the relation of Attorney General Jeremiah W. (Jay) Nixon and Respondent Echostar Communications Corporation, d/b/a Dish Network (TM) ("Respondent"), by their authorized signatures, agree to the following:

I. GENERAL FINDINGS

1. Jurisdiction. This Court has jurisdiction over the parties and the subject matter of this Assurance of Voluntary Compliance ("AVC"). The Court is empowered to enter this AVC by agreement of the parties, pursuant to Sections 407.030 and 407.1107[1].

[1]All statutory references are to Mo. Rev. Stat. (2000), as amended, unless otherwise indicated.

2. Petitioner is the State of Missouri acting by and through Jeremiah W. (Jay) Nixon, the duly elected, qualified and acting Attorney General of the State of Missouri and who is duly responsible for the enforcement and administration of Missouri law.

3. Respondent is currently orgainized under the laws of the State of Colorado and has its primary place of business at 5701 S.Santa Fe Drive, Littleton, CO 80120. All references to Respondent herein include acts individually, in concert, or by or through employees, agents, representatives, affiliates, assignees and successors. Respondent, and the person who signs this AVC on behalf of the Respondent, hereby represents to the Court, and stipulates as part of this AVC, that Echostar Communications Corporation, d/b/a Dish Network (TM), as the named respondent to this AVC, is the appropriate entity to be party/respondent to this AVC and has or did have an interest in the Respondent which is the subject of this AVC. Furthermore, Respondent, and the person who has signed below on behalf of Respondent, represents to this Court and stipulates as a part of this AVC, that the person executing this AVC has the authority to execute this AVC on behalf of the Respondent.

4. The Respondent agrees and understands that this AVC applies to the Respondent, the Respondent's principles, officers, directors, agents, employees, representatives, successors and assigns, jointly and severally, while acting personally, or through any corporation or any other business entities, whose acts, practices, or policies are directed, formulated or controlled by the Respondent.

5. Respondent agrees and understands that, following acceptance of this AVC by the State of Missouri, at the relation of Attorney General Jeremiah W. (Jay) Nixon, the Office of the Missouri Attorney General may communicate directly with the Respondent for the purpose of executing and enforcing the terms of this document and resolving future matters that may arise.

6. Respondent is engaged in the business of marketing, for profit, satellite dishes and various direct broadcast satellite television services.

7. Respondent admits that it has engaged both in telemarketing, as defined in Section 407.1070(13), and in telephone solicitation as defined in Section 407.1095(3), with respect to the marketing of satellite television services. Further, Petitioner alleges and Respondent denies that, while engaged in telemarketing, it has violated Section 407.1098.1, and in doing so, has also employed a method, act, use, practice or solicitation violative of Sections 407.010 through 407.130.

8. Severability. The parties acknowledge that no other promises, representations, or agreements of any nature have been made or entered into by the parties, relating to the basis of this AVC. The Parties further acknowledge that this AVC constitutes a single and entire agreement that is not severable or divisible. If, however, any provision or provisions of this AVC is or are declared invalid by a court of competent jurisdiction, the rest of this AVC shall remain in full force and effect and shall not be affected by such declaration.

9. Non-Approval. Respondent, through its agents, representatives and/or employees shall not, directly or indirectly, represent to any person, natural or otherwise, that the Missouri Attorney General, or any of his employees, sanctions, endorses, or approves of any past or future methods, acts, uses, practices, or solicitations by or on behalf of Respondent.

10. Jurisdiction Retained. Jurisdiction is retained for the purpose of enabling any party to this AVC to apply to the Court at any time for the purpose of enforcement of the provisions herein or for the punishment of a violation of this AVC. The Parties agree that Respondent does not consent to jurisdiction under Chapter 407 for any purpose other than the limited purpose of entering into and enforcing this AVC.

11. Scope of AVC. This AVC embodies the entire agreement and understanding of the Parties hereto with respect to the subject matter contained herein relating solely to violations of Section 407.1070 through Section 407.1110.

12. Agreement to Proceed. Having read and understood the terms and conditions of this AVC, the Parties agree that this AVC constitutes a fair agreement, and presently agree to proceed in accordance therewith. The Missouri Attorney General believes an AVC, executed pursuant to Sections 407.030 and 407.1107, is presently adequate to protect the people of the State of Missouri. The Missouri Attorney General will, for the time being, forgo pursuing Respondent for violations of Section 407.1098.1 giving rise to this agreement, except as specifically described herein. Respondent has

had the opportunity to consult with legal counsel regarding this AVC, and agrees to be bound by all provisions contained herein, waiving its right to trial or appeal. The Missouri Attorney General in no way releases Respondent from any other liability, nor shall this AVC be construed to in any way affect any claims or causes of action that any Missouri citizen or business currently has or may have in the future.

13. Recommendation. The Petitioner and the Respondent recommend that the Court approve this AVC.

II. ASSURANCE

14. Respondent agrees to implement the following mitigation measures pursuant to this AVC:

A. To the extent that Respondent has not already done so, Respondent agrees to establish, implement and maintain systems and procedures that are reasonably calculated to insure compliance with Section 407.010 through Section 407.1132, including requiring third party telemarketing agencies with whom they do business to comply with such laws; and

B. Within thirty (30) days of the date of signing this AVC, Respondent will provide the office of Attorney General Jeremiah W. (Jay) Nixon with a detailed written description of the systems and procedures that it has implemented to insure compliance with the statutes identified and described in Section A immediately above.

This written description shall be mailed by Respondent to Missouri No Call, 720 Olive Street, Suite 2150, St. Louis, Missouri 63101; and

C. Respondent shall distribute a copy of the telephone solicitation procedures described in paragraphs A and B immediately above, to all current and future employees or other persons or entities conducting telemarketing in the State of Missouri on behalf of Respondent; and

D. Respondent shall subscribe to (or continue to subscribe to), and remain current with, the Missouri No Call database of residential subscribers' notices of objection to receiving telephone solicitations as described in Sections 407.1020 through 407.1110; and

E. Respondent shall institute a training program for all employees engaged in telemarketing in Missouri in which employees will receive instruction in customer relations, etiquette, and compliance with Missouri telecommunications merchandising practices, as set forth in Section 407.010 through 407.1132; and

F. Respondent agrees to implement these obligations in good faith. The Parties agree that as questions or concerns arise regarding these obligations, Respondent will work cooperatively with the Attorney General to resolve these questions or concerns to the satisfaction of the Attorney General.

15. Respondent agrees to obey Missouri's Merchandising Practices and No Call laws as set out in Section 407.010 through Section 407.1132.

16. Pursuant to Section 407.1107 and for the purpose of enforcement of Section 407.1098, Respondent shall make a contribution in the sum of Fifty–Thousand Dollars ($50,000) to the Merchandising Practices Revolving Fund. This contribution shall be payable upon execution of this AVC.

IV. MISCELLANEOUS PROVISIONS

IT IS FURTHER ORDERED, ADJUDGED AND DECREED THAT:

17. The Attorney General, without further notice, may make ex parte application to the Circuit Court for St. Louis City, State of Missouri, for entry and approval of this AVC.

18. The mailing of a copy of this signed and filed AVC to Respondent shall constitute notice and acceptance by the Respondent of all the terms of this AVC and Respondent waives having the AVC served upon it.

19. Respondent understands that, in addition to any other sanctions which may be imposed under this AVC or under Missouri Law, violation of any term of this AVC may result in contempt of court proceedings, civil penalties of up to Two Thousand Dollars ($2,000.00) for each knowing violation and such further relief as provided in Section 407.030.2.

20. Respondent agrees that it will pay a stipulated civil penalty of five thousand dollars ($5,000) per knowing violation for future violations of Sections 407.1070 through 407.1110

21. Respondent agrees and understands that nothing contained in this AVC affects the rights and causes of action of private parties.

RESPONDENT'S SIGNATURE AND ACKNOWLEDGMENT

Respondent has read and understands this agreement and each of its terms and agrees to each and every term.

I, being first duly sworn on oath, depose and say that I am the _____ of Echostar Communications Corporation, d/b/a Dish Network (TM) and am fully authorized and empowered to sign this Assurance of Voluntary Compliance on behalf of Echostar Communications Corporation, d/b/a Dish Network (TM) and have the ability to bind Echostar Communications Corporation, d/b/a Dish Network (TM) to the terms of this Assurance of Voluntary Compliance.

_____
Signature

_____
Print name

_____
Title

_____
Address

Subscribed and sworn to before me this ___ day of _____, 2003.

_____
Notary Public

My Commission Expires:

_____

ACCEPTANCE OF STATE OF MISSOURI AT THE RELATION OF ATTORNEY GENERAL JEREMIAH W. (JAY) NIXON

JEREMIAH W. (JAY) NIXON
Attorney General

_____

M. Steven Brown, #45977
Assistant Attorney General
Wainwright State Office Building
111 North Seventh Street, Suite 934
St. Louis, Missouri 63101
Telephone: (314) 340-7596
Facsimile: (314) 340-7029

EXHIBIT 107

EXHIBIT 107

DISH Network
Retailer Contact Information Form

Please print all information on form completely. If information is not available, please note on form.

DEALER NUMBER: _____ **(If known)**

DEALER NAME: DISH TV NOW Inc.

Mail to Address (Primary Bill To)

Street Address (Line 1): 1930 North Poplar St. Suite 21

Street Address (Line 2): _____

City, State, Zip: Southern Pines NC 28387

☐ *Marketing Kit for this Address*

Primary Ship to Address (Products & Hardware Systems)

Street Address (Line 1): _____

Street Address (Line 2): _____

City, State, Zip: _____

☐ *Marketing Kit for this Address*

Additional Ship to Address (Products & Hardware Systems)

Street Address (Line 1): _____

Street Address (Line 2): _____

City, State, Zip: _____

☐ *Marketing Kit for this Address*

Additional Ship to Address (Products & Hardware Systems)

Street Address (Line 1): _____

Street Address (Line 2): _____

City, State, Zip: _____

☐ *Marketing Kit for this Address*

Contact Person: David Hagen
Phone: 910 693 1555 x 1780
Fax: 910 693 1630
Dealer E-Mail Address: D.Hagen@dishtvnow.com
Dealer Website URL (if any): www.dishtvnow.com

DEFENDANT'S EXHIBIT DTX-959

EXHIBIT 2 HAGEN

Retailer Application

New Retailer Policy

The completion of this Retailer Application is necessary before any business can be transacted between your firm and EchoSphere Corporation ("EchoSphere") or EchoStar Satellite Corporation ("EchoStar"). Upon completion please send this application and a copy of your resale tax certificate (or business license) to the nearest EchoSphere Distribution Center. No business can be conducted until these requirements are met. An initial equipment order is also required.

You will receive a Retailer Agreement and complete pricing information once your application has been approved. Thank you for your cooperation during the application process. We look forward to doing business with you and your company.

(Please print clearly throughout the application)

Company Information

Company Name: DISH TV NOW Inc.
Proper Legal Name, including DBAs and/or Tradenames

Street Address: 1930 North Poplar St. Suite 21

City: Southern Pines State: NC ZIP Code: 28387

Telephone (_____) (910) 695-0000 Fax (_____) (910) 693-1630

Business Type (check one): ☐ Sole Proprietorship ☐ Partnership ☐ LLC ☑ Corporation

Federal Tax ID # : _____ - _____ Time in Business? _____ Years _____ Months
Number must be nine digits.

Company Website: www.dishtvnow.com Annual Sales Volume: ($)_____

Sales Tax Rules and Regulations – Resale Certificate Form

This tax may not be applicable to you, but it is required of us by the State. Your cooperation is appreciated.

Is the address on your resale certificate current? ☐ Yes ☐ No If no, list date of change: _____

I Hereby Certify, That I hold a valid State Seller's Permit #_____(Copy Must Be Attached) issued pursuant to the Sales and Use Tax Law; that I am engaged in the business of selling Direct-to-Home Satellite TV Reception Equipment and that the tangible personal property described herein which I shall purchase from EchoSphere Corporation will be resold by me in the form of tangible personal property provided, however, that in the event any of such property is used for purposes other than retention, demonstration or display while holding it for sale in the regular course of business, it is understood that I am required by the Sales and Use Tax Law to report and pay for the tax , measured by the purchase price of such property. Description of property to be purchased: Direct-To-Home Satellite Television Reception Equipment.

Such certificate is good until revoked in writing.

Signature: (X) _____ Date: 10/03/2003

Please Print Name: David Hagen Title: President

Salesperson: _____	Salesperson Initials: _____
Collector: _____	Regional Director Approval Initials: _____
Order Type: _____	Phone Number: _____
	Sales Channel: _____

Principals, Partners or Officers and Credit Authorization

Please list the principals of your company that will have signing authority on your EchoSphere Retailer account. You may list and attach any additional principals on a separate sheet of paper using the following format.
This section must be completed only by a principal, partner, member, or owner of your firm, as appropriate.

By signing this section of the application you are authorizing EchoStar or EchoSphere to conduct a background check and request a current credit report from the appropriate agencies. Misrepresentations may result in the immediate termination of your relationship with EchoSphere Corporation, in its sole and absolute discretion.

To whom it may concern:
I hereby give my permission and authorization for the release of credit and banking information to EchoStar Satellite Corporation and EchoSphere Corporation. This authorization is valid for both business and personal, credit and banking purposes.

The Federal Equal Opportunity Act prohibits creditors from discriminating against credit applicants on the basis of race, color, religion, nation origin, sex, marital status, age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant in good faith exercised any right under the Consumer Credit Protection Act. The federal agency that administers compliance with this law concerning this creditor is the Federal Trade Commission, Washington D.C.

(1) Name	David Hager	Title	President
Home Address	360 E. Illinois Ave	Social Security #	225-78-8844
City	Southern Pines	State / ZIP	NC / 28387
Telephone	(910) 693-1558 x 1780	E-mail address	d.hager@dishtvnow.com
Principal's Signature	(X)		

(2) Name		Title	
Home Address		Social Security #	
City		State / ZIP	
Telephone	( )	E-mail address	
Principal's Signature	(X)		

(3) Name		Title	
Home Address		Social Security #	
City		State / ZIP	
Telephone	( )	E-mail address	
Principal's Signature	(X)		

D&B # :
(Please provide if available)

_____

Please furnish a copy of your latest financial statement.

Has the Company or any Principal, Partner, or Officer of the Company ever filed for bankruptcy? ☐ Yes ☒ No
If yes, when did this occur:

Has the Company or any Principal, Partner, or Officer of the Company ever been convicted of a felony? ☐ Yes ☒ No
If yes, when did this occur:

Has the Company or any Principal, Partner, or Officer of the Company previously conducted business with EchoSphere under a different business name? ☒ Yes ☐ No
If yes, when did this relationship occur and what business name was used:
Gateline Corp. 2007

Has the Company or any Principal, Partner, or Officer of the Company previously purchased DISH Network equipment from an Authorized EchoSphere Distributor? ☐ Yes ☒ No
If yes, when did this relationship occur and what distributor was your company purchasing from:

Additional Information

By providing this required information, you are assisting EchoSphere to better understand your company's strategies and goals in relation to the DISH Network line of products. This allows us to tailor our business relationship with your company to better meet your needs.

Description of Current Business	(Check all areas that apply and list what percentage of your business each area entails)	
Please describe your business:	☐ Satellite (currently sold)	% of business: 0% 100%
	☐ Consumer Electronics	% of business: 0%
	☐ Cellular	% of business: 0%
	☐ Security	% of business: 0%
	☐ Other	% of business: 0%
	Projected DISH Network sales: 0%	Number of Locations:
		Please attach picture of primary location.

Current Advertising Mediums	Percent of Advertising Budget	Advertising Mediums to be used to promote DISH Network
☐ Newspapers	0%	
☐ Television	0%	
☐ Direct Mail	0%	
☐ Telemarketing	0%	
☐ Internet	0%	

What DISH Network Promotion(s) will your business focus on: _____

Please list your projected subscriber additions per month for the first six months: _____

Installation Capabilities: ☐ Owned & Operated ☐ Sub-Contractor ☒ DISH Network Service Corp ☐ Other _____

Daily Install Capacity # : _____ per day.

EchoSphere Retailer Application

ECHOSTAR

Bank Information

Checking Account #: 0060316397 97 Date Opened: 10-16-03

Savings Account #: Date Opened:

Bank Name: First Citizens Bank

Street Address: P.O. Drawer 1637

City: Southern Pines State: NC ZIP: 28388

Personal Banker: Peggy Davis Telephone (910) 692-6655

I authorize the bank to provide EchoSphere Corporation with any information requested. This information will be solely used for consideration of my company check application.

Signature: (X) Date: 10/03/2003

Please Print Name: David Hagen Title: President

Trade References

Company Name:

Street Address:

City: State: ZIP:

Industry Type: Length of Relationship?

Contact: Telephone ( )

Company Name:

Street Address:

City: State: ZIP:

Industry Type: Length of Relationship?

Contact: Telephone ( )

Company Name:

Street Address:

City: State: ZIP:

Industry Type: Length of Relationship?

Contact: Telephone ( )

Other Necessary Information

Additional paperwork is necessary in order to complete the application process.
Please attach the requested documents before sending in your form.

[redacted]

[redacted]

Signature and Acknowledgement

To my knowledge, all of the information I have provided in this Retail Application is true and accurate.

Signature: **(X)** _____ Date: **10/03/2003**

Please Print Name: **David Hagen** Title: **President**

EchoSphere Corporation, EchoStar Satellite Corporation, and their subsidiaries reserve the right to conduct a background check and request a current credit report from the appropriate agencies. Misrepresentations may result in the immediate termination of the Retailer Agreement by EchoStar Satellite Corporation, in its sole and absolute discretion.

Need Assistance?

[redacted]

EXHIBIT 108

EXHIBIT 108

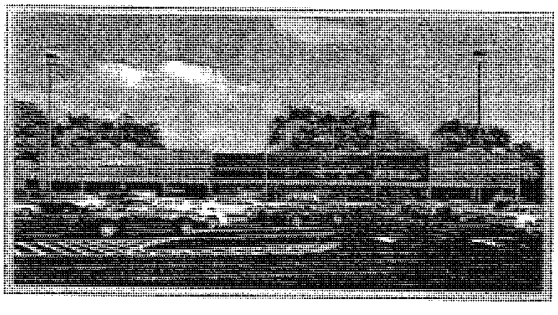
877-ORDER-TV
dishtvnow.com

October 7, 2003

Amir Ahmed
Echostar
5701 S. Santa Fe Drive
Littleton, CO 80120

Dear Mr. Ahmed:

Prime TV LLC was formed in early 1997 for the express purpose of marketing satellite systems to U.S. consumers. The company quickly became Primestar's number one dealer and then, later when DIRECTV purchased Primestar, has remained the top dealer and, perhaps, retailer of DIRECTV satellite systems. Prime TV's in-house marketing team develops and places a combination of direct response commercials, newspaper, co-op direct mail, yellow pages and Internet advertising to yield an average of 27,000 new DIRECTV subscribers per month. The company employs over 350 employees to service the over 500,000 satellite customers sold to date. Prime TV receives approximate 10,000 calls per month from customers seeking DISH Network service.



DISH TV NOW is a trade name of Gatelinx Corporation. Under the proposed DISH Network marketing program, DISH TV NOW will as soon as possible staff and train sufficient sales agents to receive the current volume of DISH Network calls. This alone will realize an estimated 2000 new DISH Network subscribers per month. Approximately 600,000 prospects per month in the U.S. search the Internet for satellite TV. The company's in-house web master will immediately be assigned the responsibility to employ established Internet marketing techniques to capture significant market share by directing prospect response both to the call center and website. Internet marketing is expected to incrementally realize several thousand new DISH Network subscribers per month. DISH TV NOW principal form of marketing will be through response television advertising. The company expects to launch the initial DISH TV NOW DRTV advertising campaign January 1, 2004. Approximately 90% of consumers are unwilling to respond to a DRTV ad by telephone. This is why for every one sale generated directly through phone response another 8 to 9 consumers will respond to the advertising by purchasing the product through brick and mortar retail. A recent phenomenon is at least one of those customers are now willing though to purchase the product through a website. Significant incremental sales will be realized by offering the consumer the

DISH TV NOW, 1930 N. Poplar Street, Southern Pines, NC 28387 USA phone: 910-695-0000 fax: 910-693-1630

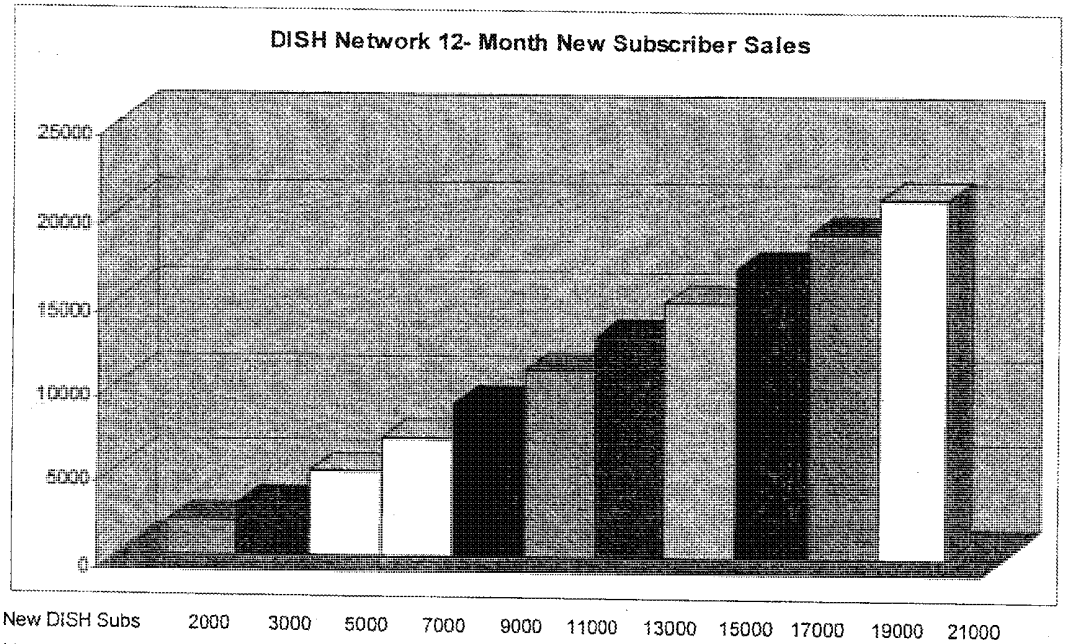
U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0148

dishtvnow.com website to subscribe to Dish Network. After a two-week ramp up, the company expects to generate several thousand-subscriber sales per week from DRTV advertising.

The following represents the projected top 50 producing DMAs:

NEW YORK CITY	HOUSTON	BALTIMORE
PHILADELPHIA	CINCINNATI	NASHVILLLE
MIAMI	JACKSON	BIRMINGHAM
GREENSBORO	LANCASTER	ELDORADO
COLUMBIA	RICHMOND	ROANOKE
CHICAGO	BOSTON	INDIANAPOLIS
CHARLOTTE	CLEVELAND	SYRACUSE
ATLANTA	ORLANDO	COLUMBUS
WASHINGTON	GREENVILLE	RENO
MEMPHIS	SEATTLE	DALLAS
ST LOUIS	NEW ORLEANS	WEST PALM BEACH
HARTFORD	SALT LAKE CITY	DENVER
SHREVEPORT	CHARLESTON	KANSAS CITY
LITTLE ROCK	TAMPA	DETROIT
RALEIGH	HATTIESBURG	NORFOLK
WILKES BARRE	PITTSBURGH	
LOS ANGELES	ALBANY	

The following represents the projected new DISH Network subscribers produced by the proposed marketing program over the next twelve months:



New DISH Subs	2000	3000	5000	7000	9000	11000	13000	15000	17000	19000	21000
Month-Year	Nov-03	Dec-03	Jan-04	Feb-04	Mar-04	Apr-04	May-04	Jun-04	Jul-04	Aug-04	Sep-04

DISH TV NOW, 1930 N. Poplar Street, Southern Pines, NC 28387 USA phone: 910-695-0000 fax: 910-693-1630

Please let me know if there is any clarification required or any questions I might answer. Thank-you for the opportunity.

Best regards.

David Hagen
President
Gatelinx Corporation

DISH TV NOW, 1930 N. Poplar Street, Southern Pines, NC 28387 USA phone: 910-695-0000 fax: 910-693-1630

EXHIBIT 109

EXHIBIT 109

Novotny, Dana

From: Ahmed, Amir
Sent: Thursday, January 01, 2004 7:56 PM
To: Mills, Mike; Novotny, Dana
Cc: Van Ernst, Blake
Subject: FW: Dish TV open issues

Guys,

We are in deep trouble with DISH TV Now. Only 62% of their sales are being activated. This is due to many reasons, some their fault and some ours. I need on Friday the most comprehensive grid and a summary. This means the overall grid must have all their sales along with a status on each of them.

I also need a summary page which identifies how many sales, how much activation, how many cancellations, how many pending, how many paid etc. We already have this grid. The reasons for the cancellations need to be provided so we can measure how many were DISH TV Now related issues.

Please come see me in the morning so we are all on the same page. I have emailed IT, I have emailed DNSC, I have emailed Retail Service. I am asking for help. I am not willing to lose this account. We have to get their confidence back ASAP.

Hagen has stopped all advertising and will not be selling DISH Network moving forward until we get all this fixed. This is exactly what I feared when the program started.

Amir

-----Original Message-----
From: Ahmed, Amir
Sent: Thursday, January 01, 2004 7:44 PM
To: Ahmed, Amir; Skalski, Steve; Rossetti, Nick
Subject: RE: Dish TV open issues

Guys,

I spent almost two hours on the phone with the Hagens today. Looks like the program is going to end. They have stopped all advertising, mentioned numerous times that the biggest issue is installation cancellations or re-schedules. Calendars are out 2-4 weeks and customers are not willing to wait or schedule installs and cancel after getting a quicker install date with a local retailer. I begged them to keep selling DISH Network and will be speaking to the Hagens on Monday. This account is high profile as Charlie continues to ask me everyday the sales and activations on this account.

What can we do? I am launching 4 more accounts on the OE Tool next week. Hagens are the largest and are already selling 300 a day. We can't afford to lose this business. They are averaging 1500 DTV per day and we have an opportunity to get their DTV business eventually.

Please help me. Majority of their sales are 301's, almost 90%. I have told them to stay away from 811 and 522's for right now.

Please help, we can't afford to lose this account.
Amir

-----Original Message-----
From: Ahmed, Amir
Sent: Wednesday, December 31, 2003 6:57 PM
To: Skalski, Steve; Rossetti, Nick
Subject: FW: Dish TV open issues

Please help me. Please continue sending out reminders to the field to treat OE sales partners as a priority. I am going to lose this account. Way to many cancellations.

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0154

PX0154-001

JA006401
005266
DISH-Paper-023168
SLC_ DNC_Investigation_0007287
TX 102-005663

Confidential- U.S. v. DISH

-----Original Message-----
From: David Hagen [mailto:d.hagen@gatelinx.com]
Sent: Wednesday, December 31, 2003 4:50 PM
To: Ahmed, Amir
Subject: FW: Dish TV open issues

As discussed.

> -----Original Message-----
> From: Kevin Kehoe
> Sent: Wednesday, December 31, 2003 6:39 PM
> To: David Hagen
> Cc: Nathan Cameron
> Subject: Dish TV open issues
>
> David,
>
> We are experiencing a number of problems related to entering orders in
> Dish's OE tool. In addition, we have had a number of incidents where
> Dish CSRs and installers are convincing our customers to cancel their
> orders with us only to have the orders replaced by the Dish or the
> installer/dealer.
>
> * Missing orders in real time web reporting:
> Under normal circumstances, the Dish OE is supposed to generate a new
> customer confirmation number at the conclusion of the order entry
> process. However, instead of order confirmations numbers, we receive
> a variety of error messages (account creation, CC# max. input, etc.)
> on approximately 15-20% of orders. From our perspective, it appears
> that the order entry has failed.
>
> Follow-up calls to the Dish CSRs by our sales reps reveal that new
> customer number are being created in their system even though we are
> receiving the error messages. More importantly, we are not seeing
> these confirmed orders reflected in the real-time reporting that we
> receive from Dish. It appears that neither Dish TV Now or the sales
> reps are being credited for the orders.
>
> For example, Curtis Garth (DTV043) entered 12 orders on Monday, Dec.
> 29. Of which, he received nine new customer numbers through the OE
> tool and confirmed three more from Dish customer service. The
> real-time report only credited him for nine orders.
>
> Below are the three orders confirmed through Dish CS that are missing
> from the real-time report:
>
> Jeffrey Miller
> 501-753-0549
> 8255909042649977
>
> Claude E. Jones
> 706-595-4118
> 8255909116890457
>
> Mark Ross
> 215-724-3311
> 8255909394145681
>
> Unfortunately, this appears to be happening every day. It is
> extremely time consuming to track down these new customer numbers from
> Dish CS and then verify with Dish whether Dish TV Now and the
> appropriate sales reps are being credited for these sales. I
>

>
> * Order cancellations by Installers
> We are receiving a number of complaints from customers regarding
> installer/dealers encouraging our customers to cancel their orders with us in order to replace the order through the installer/dealer.
>
> * Order cancellations by Dish CSRs
> We receive several calls a day from Dish CSRs requesting that we
> cancel our orders to accommodate the customer's desire to change their programming package, hardware configuration or installation date. The CSRs are telling us that they cannot make cha> nges to our orders and that they must enter a new order instead. The problem, of course, is that we are not getting paid for these "daughter" orders. I've instructed our sales reps to get the Dish CSR's rep. ID numbers when this occurs. Today, we had a couple of CSRs hang up on us when we made the request.
>
> Kevin
>

PX0154-003

JA006403
005268
Confidential- U.S. v. DISH
DISH-Paper-023170
SLC_ DNC_Investigation_0007289
TX 102-005665

EXHIBIT 110

EXHIBIT 110

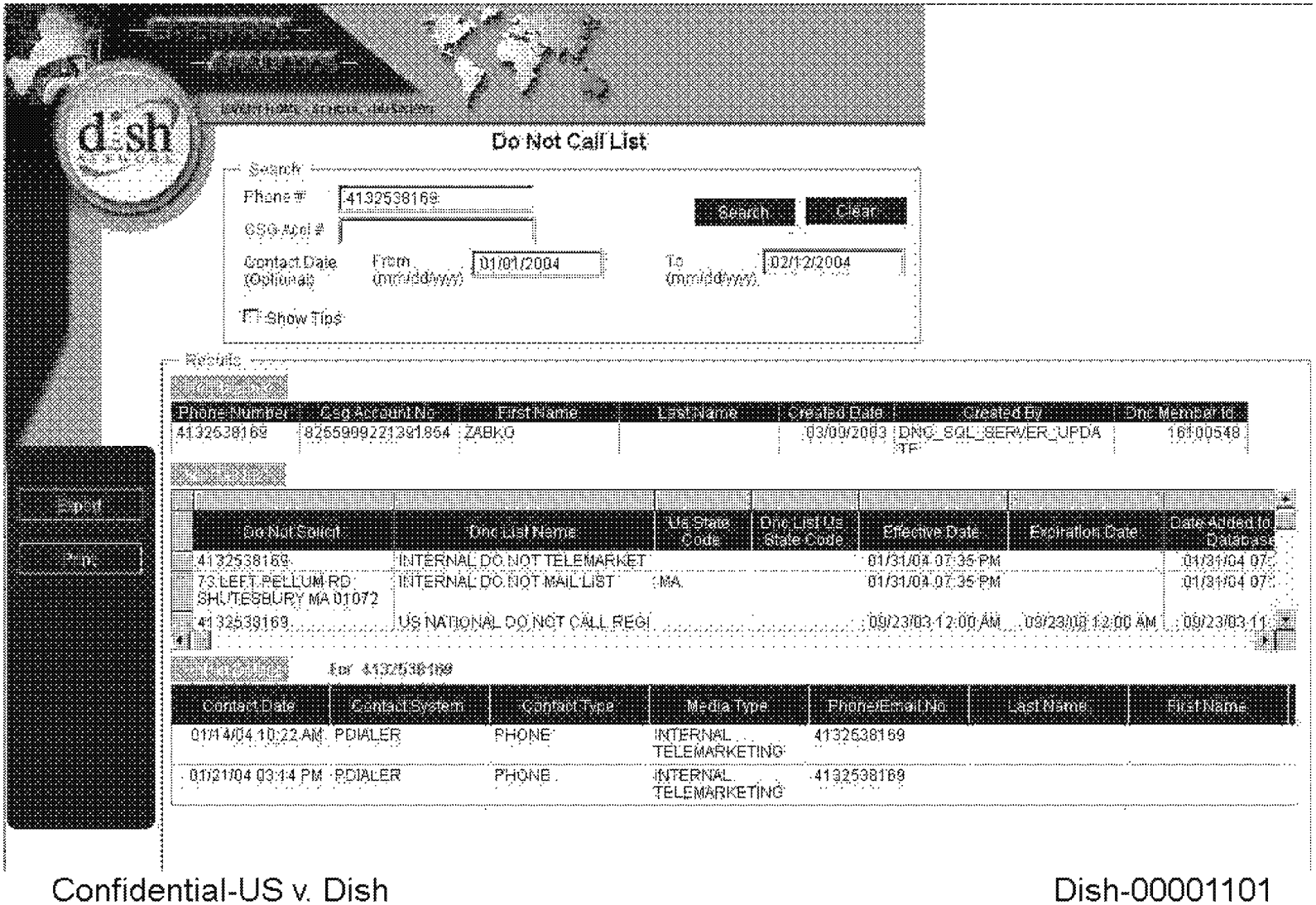
From: Murphy, David
Sent: Thursday, February 12, 2004 10:35 AM
To: Bangert, Russell; Parekh, Maulik
Cc: #CSC - Centenium BF
Subject: Customer Complaint
Attachments: DoNotCall_Request.jpg

Russell,

This customer's phone number was brought to me this morning with the customer stating that we had called her numerous times this year after she had requested to be added to our internal do not call list. I researched this number through Brio and found the attached results. We had contacted this customer on two different occasions in January and once today. She had registered with the Federal Do not call list back in September of 2003 and has also been entered into our internal no call database twice. I wanted to bring this to your attention so future incidents of this nature could be avoided going forward.

Dave

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0438



Do Not Call List

Search

Phone # 4132538169

CSG Acct #

Contact Date (Optional) From (mm/dd/yyyy) 01/01/2004 To (mm/dd/yyyy) 02/12/2004

Show Tips

Search | Clear

Results

Phone Number	Csg Account No	First Name	Last Name	Created Date	Created By	Dnc Member Id
4132538169	8265909221391864	ZABKO		03/09/2003	DNC_SQL_SERVER_UPDATE	16100548

Do Not Solicit	Dnc List Name	Us State Code	Dnc List Us State Code	Effective Date	Expiration Date	Date Added to Database
4132538169	INTERNAL DO NOT TELEMARKET			01/31/04 07:35 PM		01/31/04 07:
73 LEFT PELLUM RD SHUTESBURY MA 01072	INTERNAL DO NOT MAIL LIST	MA		01/31/04 07:35 PM		01/31/04 07:
4132538169	US NATIONAL DO NOT CALL REGI			09/23/03 12:00 AM	09/23/08 12:00 AM	09/23/03 11:

for 4132538169

Contact Date	Contact System	Contact Type	Media Type	Phone/Email No	Last Name	First Name
01/14/04 10:22 AM	PDIALER	PHONE	INTERNAL TELEMARKETING	4132538169		
01/21/04 03:14 PM	PDIALER	PHONE	INTERNAL TELEMARKETING	4132538169		

Confidential-US v. Dish

Dish-00001101

PX0438-002

JA006406
005271

SLC_ DNC_Investigation_0012862

TX 102-005668

EXHIBIT 111

EXHIBIT 111

Ryan Alan Swanberg
Consumer Rights Advocate
13050 Harriet Ave S #247
Burnsville, MN 55337
952-736-7998
952-890-7358

received
8/2/04

July 26th, 2004

Dish Network
Attn.: Legal Department
5701 S. Santa Fe Drive
Littleton, CO 80120

VIA U.S. MAIL

Re: Ryan Swanberg v. Dish Network

RULE 408 SETTLEMENT COMMUNICATION

To the Above:

Please be advised that I Ryan Swanberg have drafted a Complaint to sue Dish Network regarding violations of the 47 U.S.C.§ 227 (b)(1)(B), 47 C.F.R.§ 64.1200.(a)(2), 47 C.F.R.§ 64.1200.(d)(1), (d)(2), (d)(3), (d)(4) and 47 C.F.R.§ 64.1601.(e)(1) claims against your organization arising out of an illegal prerecorded telemarketing message on July 19th 2004. Such actions by one of your retailers (Dish TV Now, Inc.) were egregious, negligent, careless and I'm befuddled by the manner in which your telemarketing agents handle "Do Not Call" requests and other related "Do Not Call" procedures. I have never seen such non-compliance with the TCPA and FCC Regulations and the events that transpired on July 19th 2004 will be litigated with immense vigor in hopes to eliminate such practices. In addition, as detailed in the enclosed draft Complaint, Dish Network has vicarious liability with respect to any violations of the TCPA and FCC regulations committed by their retailers (Dish TV Now, Inc.). Furthermore, as detailed in the enclosed draft Complaint, the FCC ruled in a decision in one of its Orders clarifying its regulations: *"Decision. Our rules generally establish that the party on whose behalf a solicitation is made bears ultimate responsibility for any violations."* In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 13, Memorandum Opinion and Order, 10 FCC Rcd 12391 (1995). You are hereby notified that Dish Network is equally liable as a matter of factual occurrence and as a matter of law.

Please review the enclosed draft Complaint for the legal and factual basis for my claims. It is to be filed in the Untied States District Court District of Minnesota if this matter is not settled. Prior to filing suit, I'm offering a single attempt at settlement. Furthermore, please find the enclosed documentation of "Do Not Call" policy compliances from other entities that have complied with my request and most importantly, complied with the FCC and TCPA regulations. *(Please note, Plaintiff will produce over 200 examples of compliances at trial and the compliances attached herein*

U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0168

Confidential-US v. Dish
FTC/ECHOSTAR000789
JA006408
005273
Dish-00004688
SLC_ DNC_Investigation_0007290
TX 102-005670

only represent a diminutive portion of Plaintiff's work as a Consumer Rights Advocate thus far)

Contact me to discuss this matter. If I have not heard from your organization by **August 6th 2004,** I will assume that you are not interested in a settlement of this matter and will immediately file suit in Minnesota District Court. I will vigorously pursue all of my legal rights under 47 U.S.C.§ 227.(b)(1)(B), 47 C.F.R.§ 64.1200.(a)(2), (d)(1), (d)(2), (d)(3), (d)(4) and 47 C.F.R.§ 64.1601.(e)(1) as well as under other applicable federal and state law in the pursuit of my claims against your organization. Once again, I'm giving you one opportunity to resolve this matter prior to litigation. I look forward to hearing from you and or your litigation counsel in the very near future.

Very Truly Yours,

Ryan Swanberg

Ryan Swanberg, Consumer Rights Advocate

United States District Court
State of Minnesota
County of Dakota
Court File No.: CV-_____

Ryan Swanberg,	)	
Plaintiff,	)	
v.	)	**Complaint**
Dish Network,	)	
	)	**Pro Se**
Defendant.	)	

Jurisdiction

1. Jurisdiction of this Court arises under 28 U.S.C. § 1331, Minn. Stat. § 543.19 and pursuant to 47 U.S.C.§ 227 (3) et.seq.

Parties

2. Plaintiff Ryan Swanberg (hereinafter, "Plaintiff") person who resides in the City of Burnsville, County of Dakota, State of Minnesota.
3. Defendant Dish Network (hereinafter, "Defendant") operating from the address 5701 S. Santa Fe Drive, Littleton, CO 80120.

Factual Allegations

4. On or about July 19th 2004, Plaintiff received a phone call from Defendant's retailer (Dish TV Now) soliciting Defendant's services. (Dish Network products and or services) *(See Attached Exhibit 1)*
5. The FCC's regulations impose vicarious liability on telemarketers and or companies that do telemarketing on behalf of themselves for regulatory violations. This provision for vicarious liability includes telemarketing firms

PX0168-003
FTC/ECHOSTAR000791
JA006410
005275
Confidential-US v. Dish
Dish-00004690
SLC_ DNC_Investigation_0007292
TX 102-005672