IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court No. 81704

District Court No. A-17-763397-B

JOINT APPENDIX
Vol. 33 of 85
[JA007441-JA007690]

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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 244

EXHIBIT 244

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

MATTHEW DONACA, an individual and on behalf of all others similarly situated,

Plaintiff,

v. Civil Action No.: 11-cv-2910-RBJ-KLM

DISH NETWORK, L.L.C.,

Defendant.

DECLARATION OF TODD DIROBERTO

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1. I, Todd DiRoberto, declare as follows:

2. I am over the age of 18 years and not a party to this action. I have personal knowledge of the matters contained in this declaration and, if called as a witness to testify, I could and would competently testify to them.

3. I am the former president of American Satellite, Inc. ("American Satellite"), a former DISH Network, L.L.C. ("DISH") authorized dealer, which is also known as an "OE Retailer".

4. American Satellite, Inc. was formed in 2005 as a Nevada corporation, and was registered to do business in California.

5. While American Satellite was a DISH dealer, it was headquartered in California with multiple offices in San Diego.

6. At one time, American Satellite had as many as 80 employees, but is no longer in business.

7. American Satellite became a DISH OE retailer in 2006, after becoming a conditional license in 2006.

8. Attached as Exhibit 1 is the DISH Network Retailer Agreement entered into between American Satellite and DISH on December 31, 2008. American Satellite and DISH entered into similar Dish Network Retailer Agreements every year on December 31.

9. While American Satellite was a DISH OE retailer, it was tasked with the goal of acquiring new customers for DISH's satellite television business.

10. In order to acquire new customers for DISH American Satellite used a number of tools, including both inbound and outbound telemarketing.

11. With respect to outbound telemarketing, shortly after it formed, American Satellite hired third parties that would use various forms of telemarketing to pre-qualify prospective customers and transfer them over to American Satellite to be sold DISH satellite television services.

12. With respect to its own internal telemarketing, in an attempt to generate new leads, American Satellite would purchase "real time leads" from third party lead generation companies and web-sites that that run promotional offers on the internet.

13. An example of one of these companies is Marketing Giants.

14. It is my understanding that Marketing Giants sold American Satellite real time leads using an aggregation service, which obtained the leads that were sold to American Satellite from yet more lead generation web sites with which they were affiliated.

15. When a potential customer expressed interest in the satellite television product, the customer's information would appear on the computer screen in front of one of American Satellite's telemarketers, who would hand dial that lead.

16. An individual participating in a promotion on the lead generation website, which eventually became a "real time lead", agreed to be contacted by accepting the terms in the "Use of Personal Information" section of the various websites.

17. As a result, American Satellite did not scrub any of the real time leads that it purchased against the Federal Do Not Call list prior to calling potential customers in order to sell them DISH services.

18. When making these outbound telemarketing calls, American Satellite used two telecommunications providers, Telepacific and Cbeyond.

19. In accordance with our understanding of its contractual obligations, American Satellite disclosed to DISH any and all third parties it did business with.

20. While a DISH OE dealer, American Satellite occasionally received complaints from DISH with respect to telemarketing activity.

21. With respect to telemarketing compliance issues, including these complaints, American Satellite was typically contacted by Reji Musso and/or Serena Snyder.

22. American Satellite regularly responded to these complaints after gathering the requested information.

23. Throughout various times it was a DISH OE Dealer, American Satellite was fined by DISH.

24. From time to time, American Satellite would receive a demand letter from an individual or a law firm regarding an alleged violation of the Telephone Consumer Protection Act ("TCPA") in connection with an alleged pre-recorded message or for contacting an individual on a federal or state do not call list. An example of one such demand letter is attached at Exhibit 2.

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25. American Satellite was also named, along with DISH, as a defendant in a number of lawsuits brought by individuals alleging a violation of the TCPA in connection with an alleged pre-recorded message or for contacting an individual on a federal or state do not call list. An example of several of those lawsuits is attached as Exhibit 3.

26. American Satellite maintained that because these individuals providing their information to various websites, it was allowed to contact them.

27. At DISH's request, American Satellite regularly indemnified DISH from such demand letters, lawsuits and claims.

28. DISH advised American Satellite that the state by state laws with respect to pre-recorded messages were something to be wary of, and to ensure that American Satellite maintained "opt-in" information for any individual it was contacting on any state or federal do not call list.

29. DISH also suggested several vendors for American Satellite to contact regarding telemarketing compliance.

30. With respect to the content of the telemarketing calls American Satellite made, DISH regularly monitored and reviewed calls as well as suggested edits and approved all scripts used by our representatives.

31. American Satellite was terminated as a DISH dealer on May 7, 2010. Attached at Exhibit 4 is a copy of the termination notice American Satellite received.

32. DISH claimed that the termination was as a result of a proposed e-mail marketing campaign involving a reference to the movie Avatar, and did not inform American Satellite that the termination occurred because of any telemarketing activity.

33. Sworn as true to the best of my knowledge and belief, subject to the penalties of perjury.

TODD DIROBERTO

DATE 12/28/12

EXHIBIT 1

DISH NETWORK RETAILER AGREEMENT

This DISH Network Retailer Agreement (the "Agreement") is made and effective as of December 31, 2008 (the "Effective Date"), by and between DISH Network L.L.C., formerly known as EchoStar Satellite L.L.C. ("DISH"), having a place of business at 9601 S. Meridian Blvd., Englewood, Colorado 80112; and **AMERICAN SATELLITE INC** , having a place of business at **1660 HOTEL CIR N, SAN DIEGO, CA, 92108** ("Retailer").

INTRODUCTION

A. DISH is engaged, among other things, in the business of providing digital direct broadcast satellite ("DBS") services under the name DISH Network®.

B. Retailer, acting as an independent contractor, desires to become authorized on a non-exclusive basis to market, promote and solicit orders for Programming (as defined below) (an "Authorized Retailer"), in accordance with and subject to the terms and conditions of this Agreement.

C. DISH 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 terms defined elsewhere in this Agreement, the following definitions shall apply to this Agreement:

1.1 "Additional Incentives" means Additional Residential Incentives, Additional Residential MDU Incentives, Additional Commercial Incentives and Additional Bulk Incentives, as such terms are defined in Sections 6.2.1, 6.2.2, 6.2.3 and 6.2.4, respectively.

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

1.3 "Any Time" means any time and from time to time.

1.4 "Bulk Incentives" means Monthly Bulk Incentives and Additional Bulk Incentives, as such terms are defined in Sections 6.1.4 and 6.2.4, respectively.

1.5 "Bulk Programming" means the Programming that DISH makes generally available for viewing in Guest Properties and bulk-billed MDU Properties, in each case assuming 100% penetration, subject to any restrictions (geographic, blackout, or otherwise) as DISH may impose on some or all of such programming services at Any Time in its Sole Discretion. DISH reserves the right to change the Bulk Programming offered and/or any restrictions applicable to such Bulk Programming at Any Time in its Sole Discretion.

1.6 "Bulk Subscriber Account" means the customer account set up and maintained by DISH for a Qualifying Bulk Subscriber who purchased a DISH DBS System directly from Retailer and for whom Eligible Bulk Programming has been activated by DISH and which customer account remains active and in good standing.

1.7 "Business Rule(s)" means any term, requirement, condition, condition precedent, process or procedure associated with a Promotional Program or otherwise identified as a Business Rule by DISH which is communicated to Retailer by DISH or an Affiliate of DISH either directly (including without limitation via e-mail) or through any method of mass communication reasonably directed to DISH's retailer base, including, without limitation, a "Retailer Chat", e-mail, facts blast, or posting on DISH's retailer web site. Retailer agrees that DISH has the right to modify, replace or withdraw any Business Rule at Any Time in its Sole Discretion, upon notice to Retailer.

1.8 "Chargeback" means DISH's right to reclaim Incentives pursuant to the terms and conditions of this Agreement, any Promotional Program or applicable Business Rules.

1.9 "Commercial Incentives" means Monthly Commercial Incentives and Additional Commercial Incentives, as such terms are defined in Sections 6.1.3 and 6.2.3, respectively.

1.10 "Commercial Location" means a Public Commercial Location and/or a Private Commercial Location, as those terms are defined below in Sections 1.33 and 1.29, respectively.

1.11 "Commercial Programming" means the Programming that DISH makes generally available for viewing in Commercial Locations subject to any restrictions (geographic, blackout, or otherwise) as DISH may impose on some or all of such programming services at Any Time in its Sole Discretion. DISH reserves the right to change the Commercial Programming offered and/or any restrictions applicable to such Commercial Programming at Any Time in its Sole Discretion.

1.12 "Commercial Subscriber Account" means the customer account set up and maintained by DISH for a Qualifying Commercial Subscriber who purchased a DISH DBS System directly from Retailer and for whom Eligible Commercial Programming has been activated by DISH and which customer account remains active and in good standing.

1.13 "DISH DBS System" means a satellite receiver, which for purposes of this Agreement shall mean a single standalone consumer electronics device, and related components packaged therewith (if any), intended to be utilized solely for the reception of Programming delivered by satellite transponders owned, leased and/or otherwise operated or utilized by DISH and/or any of its Affiliates, which is: (i) sold directly to Retailer by DISH or a DISH Affiliate under the "DISH Network" brand name or the brand name of a DISH Affiliate; or (ii) sold directly to Retailer by a Third Party Manufacturer pursuant to authorization granted by DISH under the brand name of such Third Party Manufacturer.

1.14 "DISH Network Subscriber" shall have the meaning set forth in Section 9.5.

1.15 "EFT" means the electronic transfer of funds from one financial institution to another.

1.16 "Eligible Bulk Programming" means the Bulk Programming packages designated by DISH as qualifying for the payment of Bulk Incentives under this Agreement, as set forth in applicable Business Rules, as such Business Rules may be modified in whole or in part at Any Time in DISH's Sole Discretion, upon notice to Retailer.

1.17 "Eligible Commercial Programming" means the Commercial Programming packages designated by DISH as qualifying for the payment of Commercial Incentives under this Agreement, as set forth in applicable Business Rules, as such Business Rules may be modified in whole or in part at Any Time in DISH's Sole Discretion, upon notice to Retailer.

1.18 "Eligible Residential MDU Programming" means the Residential MDU Programming packages designated by DISH as qualifying for the payment of Residential MDU Incentives under this Agreement, as set forth in applicable Business Rules, as such Business Rules may be modified in whole or in part at Any Time in DISH's Sole Discretion, upon notice to Retailer.

1.19 "Eligible Residential Programming" means the Residential Programming packages designated by DISH as qualifying for the payment of Residential Incentives under this Agreement, as set forth in applicable Business Rules, as such Business Rules may be modified in whole or in part at Any Time in DISH's Sole Discretion, upon notice to Retailer.

1.20 "Guest Property" means a hotel, motel, timeshare, hospital, other healthcare facility or any other similar type of facility located in the Territory that regularly permits overnight or otherwise short-term stays by individuals. Notwithstanding the foregoing, DISH reserves the right to determine at Any Time, in its Sole Discretion, whether a location constitutes a Guest Property or is more appropriately considered another type of location.

1.21 "Incentives" mean Monthly Incentives together with any Additional Incentives, as such terms are defined in Sections 1.25 and 1.1, respectively.

1.22 "Institutional/Residential Location" means a property located in the Territory that displays Programming in a non-public, common viewing area within a property that is owned or operated by a government or commercial entity, in which employees are being provided residential living accommodations to facilitate the requirements of their job responsibilities. For example (and without limitation of the foregoing), non-public, common viewing areas within fire stations, oil rigs and coast guard stations are typically Institutional/Residential Locations. Notwithstanding the foregoing, DISH reserves the right to determine at Any Time, in its Sole Discretion, whether a location constitutes an Institutional/Residential Location or is more appropriately considered another type of location.

1.23 "Laws" shall have the meaning set forth in Section 9.1.

1.24 "MDU Property" means a dormitory, apartment building, condominium complex, retirement community or other type of multifamily living establishment located in the Territory that affords residents living quarters. Notwithstanding the foregoing, DISH reserves the right to determine at Any Time, in its Sole Discretion, whether a location constitutes an MDU Property (and, if so, what type of MDU Property, e.g., bulk-billed, non-bulk-billed or other) or is more appropriately considered another type of location.

1.25 "Monthly Incentives" means Monthly Residential Incentives, Monthly Residential MDU Incentives, Monthly Commercial Incentives and Monthly Bulk Incentives, as such terms are defined in Sections 6.1.1, 6.1.2, 6.1.3 and 6.1.4, respectively.

1.26 "Other Agreement(s)" means any agreement(s) between Retailer and/or any of its Affiliates, on the one hand, and DISH and/or any of its Affiliates, on the other hand.

1.27 "Permitted Subcontractors" shall have the meaning set forth in Section 7.1.

1.28 "Prepaid Card" means a card, serialized certificate, approval code sequence and/or other identifier issued in connection with a Promotional Program offered by DISH which is sold directly to Retailer by DISH or an Affiliate of DISH for resale by Retailer directly to a consumer and which, among other things, provides such consumer with certain rights to receive Programming for a fixed duration or in a certain amount.

1.29 "Private Commercial Location" means a place of business located in the Territory that: (i) may be accessible to the public; and (ii) does not typically serve food and/or liquor for immediate consumption. For example (and without limitation of the foregoing), office reception areas or waiting rooms and the private offices of attorneys, doctors/dentists, and other business professionals are typically Private Commercial Locations. Notwithstanding the foregoing, DISH reserves the right to determine at Any Time, in its Sole Discretion, whether a location constitutes a Private Commercial Location, or is more appropriately considered another type of location.

1.30 "Programming" means DISH Network video, audio, data and interactive programming services. DISH reserves the right to change the Programming offered and/or any restrictions applicable to such Programming at Any Time in its Sole Discretion.

1.31 "Promotional Certificate" means a serialized certificate issued in connection with a Promotional Program offered by DISH which is sold directly to Retailer by DISH or an Affiliate of DISH for resale by Retailer directly to a consumer which, among other things, entitles such consumer to a DISH DBS System (or the use of such system, if the applicable Promotional Program involves leasing equipment to consumers) and may include installation of such DISH DBS System.

1.32 "Promotional Program" means: (i) a promotional offer, as determined by DISH, which Retailer may present to consumers in connection with Retailer's marketing, promotion and solicitation of orders for Programming; (ii) the Incentives, if applicable and as determined by DISH at Any Time in its Sole Discretion, which Retailer may receive in connection with such promotional offer; and (iii) the Business Rules, as determined by DISH, setting forth the terms and conditions governing each such promotional offer and any corresponding Incentives. DISH reserves the right to discontinue any Promotional Program or change the Business Rules associated therewith at Any Time in its Sole Discretion, upon notice to Retailer.

1.33 "Public Commercial Location" means a place of business located in the Territory that: (i) is generally accessible to the public; (ii) is typically classified within the hospitality industry; (iii) typically serves food and/or liquor for immediate consumption; and (iv) is typically registered with a fire occupancy certificate. No Unit in an MDU Property or a Guest Property that is installed with or otherwise connected to a satellite master antenna television, private cable or similar programming reception system as may be specified by DISH at Any Time in its Sole Discretion shall be considered a Public Commercial Location; provided, however, that a place of business located within such an MDU Property or Guest Property that otherwise meets the definition of a Public Commercial Location (e.g., a restaurant within a hotel or hospital) may be considered a Public Commercial Location. For example (and without limitation of the foregoing), bars, restaurants, clubs, casinos, lounges, and shopping malls are typically Public Commercial Locations. Notwithstanding the foregoing, DISH reserves the right to determine at Any Time, in its Sole Discretion, whether a location constitutes a Public Commercial Location, or is more appropriately considered another type of location.

1.34 "Qualifying Bulk Subscriber" means a commercial enterprise providing Bulk Programming on a bulk basis, assuming 100% penetration, to a Guest Property and/or a bulk-billed MDU Property that orders Eligible Bulk Programming, that timely pays for all Bulk Programming ordered in full, that has not violated any of the terms and conditions set forth in a DISH Commercial Customer Agreement, and that has not previously received any audio, video, data, interactive or any other programming services from DISH or any Affiliate of DISH: (i) within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period); or (ii) at any time (in all other cases). A Qualifying Bulk Subscriber shall not include any commercial enterprise that would otherwise qualify, but whose equipment DISH, in its Sole Discretion, declines to activate.

1.35 "Qualifying Commercial Subscriber" means a commercial enterprise operating a business at a Commercial Location that orders Eligible Commercial Programming, that timely pays for all Commercial Programming ordered in full, that has not violated any of the terms and conditions set forth in a DISH Commercial Customer Agreement, and that has not previously received any audio, video, data, interactive or any other programming services from DISH or any Affiliate of DISH: (i) within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period); or (ii) at any time (in all other cases). A Qualifying Commercial Subscriber shall not include any commercial enterprise that would otherwise qualify, but whose equipment DISH, in its Sole Discretion, declines to activate.

1.36 "Qualifying Residential MDU Subscriber" means an individual at a non-bulk-billed MDU Property who orders Eligible Residential MDU Programming, who timely pays for all Residential MDU Programming ordered in full, who has not violated any of the terms and conditions set forth in a DISH Residential Customer Agreement, and who has not previously received any audio, video, data, interactive or any other programming services from DISH or any Affiliate of DISH: (i) within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period); or (ii) at any time (in all other cases). A Qualifying Residential MDU Subscriber shall not include any individual who would otherwise qualify, but whose equipment DISH, in its Sole Discretion, declines to activate.

1.37 "Qualifying Residential Subscriber" means an individual at a Residential Location or an Institutional/Residential Location who orders Eligible Residential Programming, who timely pays for all Residential Programming ordered in full, who has not violated any of the terms and conditions set forth in a DISH Residential Customer Agreement, and who has not previously received any audio, video, data, interactive or any other programming services from DISH or any Affiliate of DISH: (i) within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period); or (ii) at any time (in all other cases). A Qualifying Residential Subscriber shall not include any individual who would otherwise qualify, but whose equipment DISH, in its Sole Discretion, declines to activate.

1.38 "Residential Incentives" means Monthly Residential Incentives and Additional Residential Incentives, as such terms are defined in Sections 6.1.1 and 6.2.1, respectively.

1.39 "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, that in no case shall any location (including, without limitation a Commercial Location, an MDU Property or a Guest Property) that is installed with or otherwise connected to a satellite master antenna television, private cable or similar programming reception system as may be specified by DISH at Any Time in its Sole Discretion be considered a Residential Location. Notwithstanding the foregoing, DISH reserves the right to determine at Any Time, in its Sole Discretion, whether a location constitutes a Residential Location or is more appropriately considered another type of location.

1.40 "Residential MDU Incentives" means Monthly Residential MDU Incentives and Additional Residential MDU Incentives, as such terms are defined in Sections 6.1.2 and 6.2.2, respectively.

1.41 "Residential MDU Programming" means the Programming that DISH makes generally available for viewing in non-bulk-billed MDU Properties subject to any restrictions (geographic, blackout, or otherwise) as DISH may impose on some or all of such programming services at Any Time in its Sole Discretion. DISH reserves the right to change the Residential MDU Programming offered and/or any restrictions applicable to such Residential MDU Programming at Any Time in its Sole Discretion.

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

1.43 "Residential Programming" means the Programming that DISH makes generally available for viewing in Residential Locations and Institutional/Residential Locations subject to any restrictions (geographic, blackout, or otherwise) as DISH may impose on some or all of such programming services at Any Time in its Sole Discretion. DISH reserves the right to change the Residential Programming offered and/or any restrictions applicable to such Residential Programming at Any Time in its Sole Discretion.

1.44 "Residential Subscriber Account" means the customer account set up and maintained by DISH for a Qualifying Residential Subscriber who purchased a DISH DBS System, Promotional Certificate or Prepaid Card directly from Retailer and for whom Eligible Residential Programming has been activated by DISH and which customer account remains active and in good standing.

1.45 "Retailer Account" means the bank account, including without limitation account and ABA routing numbers, designated by Retailer in the manner prescribed by DISH at Any Time in its Sole Discretion, which Retailer may change from time to time by providing at least sixty (60) days' prior written notice to DISH.

1.46 "Sole Discretion" means a person's or entity's sole and absolute discretion for any reason or no reason.

1.47 "Subscriber Accounts" means Residential Subscriber Accounts, Residential MDU Subscriber Accounts, Commercial Subscriber Accounts and Bulk Subscriber Accounts, as such terms are defined in Sections 1.44, 1.42, 1.12 and 1.6, respectively.

1.48 "Term" shall have the meaning set forth in Section 10.1 below.

1.49 "Territory" shall have the meaning set forth in Section 2.2 below.

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

1.51 "Unit" means: (i) solely in the case of hospitals and other healthcare facilities, each television on the premises; (ii) solely in the case of all Guest Properties other than hospitals and other healthcare facilities, each room in the Guest Property; and (iii) solely in the case of bulk-billed or non-bulk-billed MDU Properties, each separate living quarters in the bulk-billed or non-bulk-billed MDU Property. For clarity, no Commercial Location shall constitute a Unit.

2. **APPOINTMENT; TERRITORY.**

2.1 **Appointment.** DISH hereby appoints Retailer as a non-exclusive Authorized Retailer to market, promote and solicit orders for Programming, subject to all of the terms and conditions of this Agreement and all Business Rules (which are hereby incorporated into this Agreement by reference in their entirety). 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 DISH and/or any of its Affiliates under a different name in the future. Retailer's authorization hereunder is limited to: (i) the solicitation of orders for Residential Programming from, and the marketing, advertising and promotion of Residential Programming to, consumers at Residential Locations and Institutional/Residential Locations; (ii) the solicitation of orders for Residential MDU Programming from, and the marketing, advertising and promotion of Residential MDU Programming to, consumers at non-bulk-billed MDU Properties; (iii) the solicitation of orders for Commercial Programming from, and the marketing, advertising and promotion of Commercial Programming to, commercial enterprises operating businesses at Commercial Locations; and (iv) the solicitation of orders for Bulk Programming from, and the marketing, advertising and promotion of Bulk Programming to, commercial enterprises providing Bulk Programming on a bulk-basis, assuming 100% penetration, to Guest Properties and bulk-billed MDU Properties.

2.2 **Territory.** Retailer's authorization hereunder, and any actions it undertakes in connection with, or in furtherance of, this Agreement, shall be limited solely to the area within the geographic boundaries of the United States and its territories and possessions (the "Territory").

2.3. **Acceptance.** Retailer hereby accepts its appointment as an Authorized Retailer and agrees to use its best efforts to continuously and actively advertise, promote and market Programming and to solicit orders therefor, subject to and in accordance with all of the terms and conditions of this Agreement. Retailer understands that it may hold itself out to the public as an Authorized Retailer of DISH only after fulfilling, and for so long as it continues to fulfill, all of the duties, obligations, requirements and other terms and conditions contained in this Agreement and all Business Rules, and only during the Term of this Agreement.

2.4 **Non-Exclusivity.** Retailer acknowledges that: (i) nothing in this Agreement is intended to confer, nor shall it be construed as conferring, any exclusive territory or any other exclusive rights upon Retailer; (ii) DISH and its Affiliates make absolutely no statements, promises, representations, warranties, covenants or guarantees as to the amount of business or revenue that Retailer may expect to derive from participation in this Agreement or any Promotional Program; (iii) Retailer may not realize any business, revenue or other economic benefit whatsoever as a result of its participation in this Agreement or any Promotional Program; (iv) nothing contained herein shall be construed as a guarantee of any minimum amount of Incentives or any minimum amount of other payments, income, revenue or other economic benefit in any form whatsoever; (v) DISH currently offers, and at Any Time, in the future may offer in its Sole Discretion, others the opportunity to act as an Authorized Retailer or to solicit orders for Programming in the same geographic area in which Retailer is located and elsewhere; (vi) DISH and its Affiliates shall be entitled, among other things, to: (a) market, promote and solicit orders for programming, (b) distribute, sell, lease and otherwise transfer possession of satellite receivers, related accessories and other equipment, promotional certificates and prepaid cards, and (c) perform installation and maintenance services (directly and indirectly through subcontractors or otherwise) for satellite receivers, related accessories and/or other equipment, in each case throughout the Territory and in direct or indirect competition with Retailer, without any obligation or liability to Retailer whatsoever, and without providing Retailer with any notice thereof; and (vii) DISH shall be free to cease or suspend provision of the Programming offered in whole or in part at Any Time in its Sole Discretion, and shall incur no liability to Retailer by virtue of any such cessation or suspension.

2.5 **Certain Purchases by Retailer.** In the event that Retailer orders any DISH DBS Systems, related accessories, other equipment, Promotional Certificates and/or Prepaid Cards from Echosphere L.L.C. or any of its Affiliates (collectively, "Echosphere" for purposes of this Section 2.5), Retailer shall order such products by phone order, via Echosphere online ordering or by written purchase order (each, a "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 and conditions stated in a Purchase Order shall not he binding upon Echosphere unless expressly agreed to in writing by Echosphere. In no event shall Echosphere be liable for any delay, or failure to fulfill, any Purchase Order (or any portion thereof), regardless of the cause of such delay or failure. In the event of any conflict between the terms and conditions of a Purchase Order and the terms and conditions of this Agreement, the terms and conditions of this Agreement shall control. In the event of any ambiguity between or among the terms and conditions of this Agreement and the terms and conditions of any Purchase Order, DISH shall have the sole and exclusive authority to interpret and/or make a final determination in its Sole Discretion concerning any issue arising from such ambiguity. Echosphere shall he considered a third party beneficiary of Retailer's obligations under this Agreement. Retailer hereby

acknowledges and agrees that Echosphere has no obligation to re-purchase any satellite receivers, related accessories, other equipment, promotional certificates or prepaid cards sold or otherwise transferred to Retailer by Echosphere or any other DISH Affiliate or third party (including without limitation, a Third Party Manufacturer) at any time and for any reason or no reason.

2.6 **Certain Prohibited Transactions.** Retailer agrees that as a condition precedent to its eligibility to receive Incentives from DISH, it will not directly or indirectly sell, lease or otherwise transfer possession of a DISH DBS System, Promotional Certificate or Prepaid Card to any person or entity whom Retailer knows or reasonably should know: (i) is not an end-user and/or intends to resell, lease or otherwise transfer it for use by another individual or entity; (ii) intends to use it, or to allow others to use it, to view Residential Programming at a location other than a Residential Location or Institutional/Residential Location; (iii) intends to use it, or to allow others to use it, to view Residential MDU Programming at a location other than a non-bulk-billed MDU Property; (iv) intends to use it, or to allow others to use it in Canada, Mexico or at any other location outside of the Territory; or (v) intends to have, or to allow others to have, Programming authorized for a DISH DBS System under a single DISH Network account or Prepaid Card that has or will have Programming authorized for multiple satellite receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account or Prepaid Card, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant satellite receiver as set forth in applicable Business Rules. It shall be Retailer's sole and exclusive responsibility to investigate and determine whether any direct or indirect sale, lease or other transfer by Retailer would be in violation of this Section 2.6. In the event that Retailer directly or indirectly sells, leases or otherwise transfers possession of a DISH DBS System, Promotional Certificate or Prepaid Card to a person or entity who uses it or allows others to use it to: (a) view Residential Programming at a location other than a Residential Location or Institutional/Residential Location, or (b) view Residential MDU Programming at a location other than a non-bulk-billed MDU Property, then Retailer agrees to pay to DISH upon demand: (1) the difference between the amount actually received by DISH for the Prepaid Card or the Programming authorized for the corresponding DISH DBS System, as applicable, and the full commercial rate for such Programming (regardless of whether DISH has or had commercial distribution rights for such Programming); and (2) the total amount of any admission charges or similar fees imposed and/or collected 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, leases or otherwise transfers possession of a DISH DBS System, Promotional Certificate or Prepaid Card to a person or entity who has, or allows others to have, Programming authorized for a DISH DBS System under a single DISH Network account or Prepaid Card that at any time has Programming activated for multiple satellite receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account or Prepaid Card, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant satellite receiver as set forth in the applicable Business Rules, and Retailer knew or reasonably should have known that the person or entity intended to have, or allow others to have, Programming authorized for the DISH DBS System under such an account or Prepaid Card, then Retailer agrees to pay to DISH upon demand, the difference between the amount actually received by DISH for the Prepaid Card or the Programming authorized under the single account, as applicable, and the full retail price for such Programming or the full amount that DISH would have received for multiple Prepaid Cards in each case had each DISH DBS System authorized under the single account or Prepaid Card been authorized under a separate account or Prepaid Card, as applicable. IN THE EVENT THAT RETAILER BREACHES ANY OF ITS OBLIGATIONS UNDER THIS SECTION 2.6, DISH SHALL BE ENTITLED TO CHARGE BACK AT ANY TIME (EVEN AFTER THE TERMINATION OR EXPIRATION OF THIS AGREEMENT) THE INCENTIVES, IF ANY, PAID TO RETAILER BY DISH WITH RESPECT TO ANY SUBSCRIBER ACCOUNT AFFECTED BY SUCH BREACH OR DEFAULT. IN THE EVENT THAT RETAILER WISHES TO DISPUTE ANY SUCH CHARGEBACK, RETAILER SHALL FOLLOW THE DISPUTE RESOLUTION PROCEDURES SET FORTH IN SECTION 15 BELOW. DISH'S CALCULATION OF AMOUNTS OWING TO DISH FROM RETAILER UNDER THIS SECTION 2.6 SHALL BE BINDING ABSENT FRAUD, MALICE OR WILLFUL AND WANTON MISCONDUCT ON THE PART OF DISH. The foregoing provisions of this Section 2.6 are without prejudice to any other rights and remedies that DISH and/or any of its Affiliates may have under contract (including without limitation this Agreement), at law, in equity or otherwise (all of which are hereby expressly reserved), and shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

2.7 **Pre-Activations.** Retailer shall not, prior to installation, directly or indirectly activate ("Pre-Activate") any DISH DBS System, nor shall Retailer directly or indirectly sell, lease or otherwise transfer possession of a DISH DBS System, Promotional Certificate or Prepaid Card to any person or entity who Retailer knows or reasonably should have known intends to Pre-Activate a DISH DBS System.

2.8 **Financing; Making Payments on Behalf of End-Users.** Retailer shall not directly or indirectly provide financing for the purchase of any Programming or make any payment to DISH for Programming or otherwise on behalf of any end-user of a DISH DBS System, nor shall Retailer directly or indirectly sell, lease or otherwise transfer possession of a DISH DBS System, Promotional Certificate or Prepaid Card to any person or entity who Retailer knows or reasonably should have known intends to provide financing for the purchase of any Programming or make any payment to DISH for Programming or otherwise on behalf of any end-user of a DISH DBS System.

2.9 **Installation Services.** Retailer represents, warrants, covenants and agrees that all installation and after-sales services performed by Retailer and its employees and Permitted Subcontractors in connection with the sale, lease or other transfer of DISH DBS Systems, Promotional Certificates and/or Prepaid Cards will be performed by Retailer and its employees and Permitted Subcontractors, in full compliance with all applicable Laws, and subject to all of the terms, conditions, standards and guidelines established by DISH or any of its Affiliates (including, without limitation, those set forth in the DISH Network Installation Manual located on DISH's retailer web site), as such terms, conditions, standards and guidelines may be changed at Any Time by DISH and/or any of its Affiliates (including, without limitation, Dish Network Service L.L.C. and Dish Network California Service Corporation (collectively, "DNSLLC")) in their Sole Discretion, upon notice to Retailer. In addition to (and without limitation of) the foregoing, Retailer represents, warrants, covenants and agrees that any and all related accessories and/or other equipment installed for, or otherwise provided to, a consumer in fulfillment of, or otherwise in connection with, such installation and after-sales services shall strictly comply with any and all specifications and other terms and conditions, including without limitation any approved part number and/or vendor lists, as set forth by DISH and/or any of its Affiliates (including without limitation DNSLLC) in applicable Business Rules at Any Time in their Sole Discretion.

2.10 **Prior Retailer Agreements.**

2.10.1 IN THE EVENT THAT RETAILER PREVIOUSLY ENTERED INTO ANY DISH NETWORK RETAILER AGREEMENT, ECHOSTAR RETAILER AGREEMENT, INCENTIVIZED RETAILER AGREEMENT, COMMISSIONED RETAILER AGREEMENT, COMMISSIONED DEALER AGREEMENT OR ANY OTHER AGREEMENT WITH DISH, ANY OF ITS PREDECESSORS OR ANY AFFILIATE OF ANY OF THE FOREGOING RELATING TO THE MARKETING, PROMOTION, ADVERTISING AND/OR SOLICITATION OF ORDERS FOR DISH NETWORK PROGRAMMING (EACH A "PRIOR RETAILER AGREEMENT"), WHICH IS IN EFFECT (IN WHOLE OR IN PART) AS OF THE EFFECTIVE DATE, THEN UPON EXECUTION OF THIS AGREEMENT BY RETAILER (WHETHER VIA SIGNATURE OR ELECTRONIC ACCEPTANCE): (I) ALL PRIOR RETAILER AGREEMENTS SHALL BE AUTOMATICALLY TERMINATED, EXCEPT THAT THE PROVISIONS (EXCLUDING ANY PROVISIONS RELATED TO THE PAYMENT OF COMMISSIONS OR INCENTIVES) IN SUCH PRIOR RETAILER AGREEMENTS THAT EXPRESSLY SURVIVE AND SUCH OTHER RIGHTS AND OBLIGATIONS THEREUNDER AS WOULD LOGICALLY BE EXPECTED TO SURVIVE TERMINATION OR EXPIRATION SHALL CONTINUE IN FULL FORCE AND EFFECT FOR THE PERIOD SPECIFIED OR FOR A REASONABLE PERIOD OF TIME UNDER THE CIRCUMSTANCES IF NO PERIOD IS SPECIFIED; (II) ALL INCENTIVES, COMMISSIONS OR OTHER PAYMENTS OF ANY TYPE DUE TO RETAILER UNDER SUCH PRIOR RETAILER AGREEMENTS SHALL BE PAYABLE BY DISH TO RETAILER AS INCENTIVES SOLELY IN ACCORDANCE WITH AND SUBJECT TO THE TERMS AND CONDITIONS OF THIS AGREEMENT; AND (III) EXCEPT AS SET FORTH IN SECTION 2.10.1(I), ALL RIGHTS AND OBLIGATIONS BETWEEN THE PARTIES SHALL BE GOVERNED BY THE TERMS AND CONDITIONS OF THIS AGREEMENT, AND ALL PRIOR RETAILER AGREEMENTS SHALL BE OF NO FURTHER FORCE OR EFFECT.

2.10.2 RETAILER AND ITS AFFILIATES HEREBY ACKNOWLEDGE AND AGREE THAT THEY DO NOT, AS OF THE EFFECTIVE DATE, HAVE ANY CLAIMS OR CAUSES OF ACTION AGAINST DISH, ECHOSTAR CORPORATION, ANY OF THEIR PREDECESSORS OR ANY AFFILIATE OF ANY OF THE FOREGOING FOR ANY ACTS OR OMISSIONS THAT MAY HAVE OCCURRED PRIOR TO THE EFFECTIVE DATE AND, IN CONSIDERATION OF RETAILER BEING APPOINTED AS AN AUTHORIZED RETAILER HEREUNDER BY DISH, RETAILER AND ITS AFFILIATES HEREBY WAIVE ANY AND ALL SUCH CLAIMS AND CAUSES OF ACTION, WITH THE SOLE EXCEPTION OF ANY CLAIMS OR CAUSES OF ACTION FOR WHICH RETAILER PROVIDES WRITTEN NOTICE TO DISH IN THE SAME FORM REQUIRED FOR A NOTICE OF CLAIM UNDER SECTION 15 BELOW WITHIN NINETY (90) DAYS (OR THE SHORTEST PERIOD OF TIME ALLOWED BY APPLICABLE LAW IF SUCH PERIOD IS MORE THAN 90 DAYS) AFTER THE DATE THAT RETAILER EXECUTES THIS AGREEMENT (WHETHER VIA SIGNATURE OR ELECTRONIC ACCEPTANCE). DISH SHALL HAVE THE SAME RIGHTS WITH RESPECT TO REQUESTS FOR ADDITIONAL INFORMATION AND ACCESS TO RETAILER'S BOOKS AND RECORDS IN CONNECTION WITH ANY SUCH CLAIMS AND CAUSES OF ACTION AS DISH HAS UNDER SECTION 17.9 BELOW. FAILURE TO STRICTLY COMPLY WITH THE PROVISIONS OF THIS SECTION 2.10.2 WITH RESPECT TO A PARTICULAR CLAIM AND/OR CAUSE OF ACTION SHALL CONSTITUTE A WAIVER BY RETAILER AND ITS AFFILIATES WITH RESPECT TO THE RELEVANT CLAIM AND/OR CAUSE OF ACTION. HOWEVER, NOTWITHSTANDING ANY OF THE TERMS AND CONDITIONS OF THIS AGREEMENT, NOTHING CONTAINED IN THIS AGREEMENT WILL WAIVE ANY RIGHT RETAILER MAY HAVE IN THE CLAIMS BROUGHT IN THE FOLLOWING CLASS ACTION LAWSUITS IN THE EVENT THE FOLLOWING LAWSUITS ARE CERTIFIED: CASE NO. 00-CV-1989, STYLED *JOHN DEJONG, D/B/A ANEXWAVE,@ AND JOE KELLY, D/B/A AKEL-TRONICS,@ AND JAGUAR TECHNOLOGIES, INC. V. ECHOSTAR SATELLITE CORPORATION*, UNITED STATES DISTRICT COURT, DISTRICT OF COLORADO; AND/OR CASE NO. 00-CV-3130, STYLED *AIR COMMUNICATION & SATELLITE, INC. ET AL. V. ECHOSTAR SATELLITE CORPORATION*, DISTRICT COURT, ARAPAHOE COUNTY, COLORADO. IN THE EVENT THAT NO PRIOR RETAILER AGREEMENT IS IN EFFECT AS OF THE EFFECTIVE DATE, RETAILER SHALL ONLY BE ELIGIBLE TO RECEIVE INCENTIVES FOR NEW SUBSCRIBER ACCOUNTS ACTIVATED FROM AND AFTER THE EFFECTIVE DATE, NOTWITHSTANDING PAYMENT BY DISH OR ANY OF ITS PREDECESSORS OR ANY AFFILIATE OF ANY OF THE FOREGOING OF ANY INCENTIVES, COMMISSIONS OR OTHER PAYMENTS OF ANY TYPE TO RETAILER PRIOR TO THE EFFECTIVE DATE. 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 DISH OR ANY OF ITS AFFILIATES.

2.11 **Promotional Programs.** Retailer shall be eligible to participate in such Promotional Programs as DISH and/or any of its Affiliates may make available to Retailer at Any Time in their Sole Discretion. Retailer agrees to be bound by, and to use its best efforts to support, all of the terms and conditions of (and all of such terms and conditions are hereby incorporated into this Agreement by reference in their entirety) the Promotional Programs in which Retailer elects to participate. Retailer acknowledges and agrees that: (i) under no circumstances shall DISH or any of its Affiliates have at any time any obligation to offer any Promotional Programs to Retailer, or if Promotional Programs are offered to others, to permit Retailer to be eligible to participate in them; (ii) DISH and its Affiliates may, at Any Time in their Sole Discretion, add, discontinue, substitute, modify, amend or otherwise alter any or all of the terms and conditions of any Promotional Programs; and (iii) if DISH and/or any of its Affiliates offer any Promotional Programs to Retailer, then Retailer shall only be eligible to participate in each such Promotional Program if and to the extent that it meets all of the qualification criteria and other terms and conditions as DISH and/or its Affiliates may establish at Any Time in their Sole Discretion. In the event of any conflict or inconsistency between the terms and conditions of a Promotional Program and/or applicable Business Rules and the terms or conditions of this Agreement, the terms and conditions of this Agreement shall control. In the event of any ambiguity between or among the terms and conditions of a Promotional Program, Business Rule and/or this Agreement, DISH shall have the sole and exclusive authority to interpret and/or make a final determination in its Sole Discretion concerning any issue arising from such ambiguity.

2.12 **MDU Property / Guest Properties.** Retailer shall ensure that no Guest Property or bulk-billed MDU Property directly or indirectly engages in: (i) the reselling of Bulk Programming (i.e., the property cannot charge more for Bulk Programming than they pay to DISH for such Bulk Programming); (ii) the retransmission or rebroadcast of any Programming, except with the express written consent of DISH, which consent DISH may withhold in its Sole Discretion; or (iii) modifying, adding to, or deleting any of the Bulk Programming offered. In addition to (and without limitation of) the foregoing, Retailer shall not directly or indirectly engage, and shall ensure that no Guest Property or bulk-billed MDU Property directly or indirectly engages, in any act or omission through which DISH and/or any of its Affiliates could be deemed a "cable operator" or any other similar term, including without limitation any act or omission arising from or relating to the crossing of a public right of way by a provider of video programming services, in each case as defined under any applicable Laws ("Cable Operator"). Retailer shall promptly notify DISH if it is aware of or suspects: (a) a change in the number of Units at any Guest Property or bulk-billed MDU Property to which Bulk Programming is provided, or (b) any act or omission as set forth in the immediately preceding sentence through which DISH and/or any of its Affiliates could be deemed a Cable Operator. Retailer further understands and agrees that bulk-billed MDU Properties, non-bulk-billed MDU Properties and Guest Properties may require the purchase of commercially-invoiced DISH DBS Systems, if required and in such case, as further described in applicable Business Rules and adjustable at Any Time in DISH's Sole Discretion.

3. **REPRESENTATIONS AND WARRANTIES.** The parties hereto make the following representations and warranties with the specific intent to induce the other party into entering into this Agreement and recognize that the other party would not enter into this Agreement but for the following representations and warranties:

3.1 Each party hereto represents and warrants that the execution (whether via signature or electronic acceptance), delivery and performance of this Agreement have been duly authorized and that it has the full right, power and authority to execute, deliver and perform this Agreement.

3.2 Each party hereto represents and warrants that the signature of its duly authorized representative below or its electronic acceptance of this Agreement, as applicable, is genuine and that the person signing or electronically accepting this Agreement on behalf of such party is authorized by such party to sign and/or electronically accept this Agreement on its behalf.

3.3 Retailer represents and warrants that: (i) it is a valid and existing entity in compliance with all Laws related to the maintenance of its corporate or other business status; (ii) it is not currently insolvent; (iii) it is not currently violating and has never violated any Laws; (iv) neither it nor any of its Affiliates has ever engaged in any of the acts prohibited under Section 2.6, 2.7, 2.8, 2.9, 2.12, 6.10, 6.14, 7, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7 or 14 below; (v) neither it nor any of its Affiliates has ever engaged in any acts that would have resulted in automatic termination or be considered a default or breach under any current or former DISH Network Retailer Agreement, EchoStar Retailer Agreement, Incentivized Retailer Agreement, Commissioned Retailer Agreement, Commissioned Dealer Agreement, Distributor Retailer Agreement, Non-Incentivized Retailer Agreement, Non-Commissioned Retailer Agreement, or Non-Commissioned Dealer Agreement with DISH and/or any of its Affiliates or under any current or former Other Agreement; (vi) it is not dependent upon DISH and/or any Affiliates of DISH for a major part of Retailer's business; and (vii) it either sells or could sell other products or services in addition to DISH products or services that compete with DISH products or services.

3.4 EACH PARTY HERETO REPRESENTS AND WARRANTS THAT IT HAS READ THIS AGREEMENT IN ITS ENTIRETY AND THAT IT UNDERSTANDS FULLY EACH AND EVERY ONE OF THE TERMS AND CONDITIONS SET FORTH HEREIN.

3.5 EACH PARTY HERETO REPRESENTS AND WARRANTS THAT IT HAS BEEN GIVEN THE OPPORTUNITY TO HAVE ITS INDEPENDENT COUNSEL REVIEW THIS AGREEMENT PRIOR TO EXECUTION (WHETHER VIA

SIGNATURE OR ELECTRONIC ACCEPTANCE). EACH PARTY HERETO FURTHER REPRESENTS AND WARRANTS THAT EITHER THIS AGREEMENT HAS BEEN ACTUALLY REVIEWED BY ITS INDEPENDENT COUNSEL OR THAT SUCH PARTY HAS DECLINED TO HAVE ITS INDEPENDENT COUNSEL DO SO.

3.6 EACH PARTY HERETO REPRESENTS AND WARRANTS THAT IT IS NOT RELYING UPON, AND IT HAS NOT BEEN INDUCED INTO ENTERING INTO THIS AGREEMENT BY, ANY STATEMENTS, PROMISES, REPRESENTATIONS, WARRANTIES, COVENANTS, AGREEMENTS, GUARANTEES, ACTS OR OMISSIONS NOT EXPRESSLY SET FORTH HEREIN.

3.7 EACH PARTY HERETO REPRESENTS AND WARRANTS THAT IT HAS NOT BEEN COERCED INTO ENTERING INTO THIS AGREEMENT AND THAT IT HAS ENTERED INTO THIS AGREEMENT OF ITS OWN FREE WILL AND FREE OF INFLUENCE OR DURESS.

3.8 RETAILER REPRESENTS AND WARRANTS THAT BEFORE IT PARTICIPATES IN ANY PROMOTIONAL PROGRAM IT WILL CAREFULLY REVIEW THE TERMS AND CONDITIONS OF SUCH PROMOTIONAL PROGRAM AND ASSOCIATED BUSINESS RULES OR HAVE THEM REVIEWED BY ITS INDEPENDENT COUNSEL.

3.9 EACH PARTY HERETO REPRESENTS, WARRANTS, ACKNOWLEDGES AND AGREES THAT: (I) THE TERMS AND CONDITIONS OF THIS AGREEMENT, AND EACH AND EVERY PARAGRAPH AND EVERY PART HEREOF, HAVE BEEN COMPLETELY AND CAREFULLY READ BY, AND EXPLAINED TO, SUCH PARTY; AND (II) THE TERMS AND CONDITIONS OF THIS AGREEMENT ARE FULLY AND COMPLETELY UNDERSTOOD BY SUCH PARTY AND SUCH PARTY IS COGNIZANT OF ALL OF SUCH TERMS AND CONDITIONS AND THE EFFECT OF EACH AND ALL OF SUCH TERMS AND CONDITIONS.

4. **PROGRAMMING.**

4.1 **Programming.** DISH shall determine at Any Time, in its Sole Discretion, the Programming for which Retailer may solicit orders. DISH may expand, reduce or otherwise modify the content of any Programming packages or add or delete any Programming (either in a package or a-la-carte) at Any Time in its Sole Discretion. All such changes shall be effective immediately upon notification by DISH, unless DISH notifies Retailer of a different effective date.

4.2 **Changes.** If at any time or for any reason or no reason DISH changes the content of any Programming package, Retailer's authorization to market, promote and solicit orders for the prior Programming package shall immediately cease.

5. **PRICES.** DISH shall determine the retail prices for Programming at Any Time in its Sole Discretion. Retailer will only solicit orders for Programming at the retail prices set by DISH from time to time. DISH may increase, decrease or otherwise modify those prices at Any Time in its Sole Discretion. Any price changes shall be effective immediately upon notification by DISH, unless DISH notifies Retailer of a different effective date. Retailer shall not represent that Programming may be purchased or otherwise obtained on any other terms and conditions except as authorized in writing by DISH.

6. **INCENTIVES.** In consideration of Retailer's continuing efforts to market, promote and solicit orders for Programming and Retailer's continuing efforts to service DISH Network Subscribers after initial activation, Retailer may be eligible to receive the Incentives set forth below.

6.1 **Monthly Incentives.**

6.1.1 **Monthly Residential Incentives.** Subject to the terms and conditions of this Agreement (including without limitation the exhibits attached hereto) and any applicable Business Rules, for each DISH DBS System or Promotional Certificate that during the Term of this Agreement: (i) is sold to Retailer directly by DISH or any of its Affiliates (in the case of DISH DBS Systems and Promotional Certificates), or a Third Party Manufacturer (solely with respect to DISH DBS Systems); (ii) is re-sold by Retailer directly to a Qualifying Residential Subscriber; and (iii) results in the activation of Eligible Residential Programming for a new Residential Subscriber Account, Retailer may be eligible to receive a monthly incentive (the "Monthly Residential Incentive"), in accordance with applicable Business Rules. Solely for the purposes of this Section 6.1.1 and solely with respect to DISH DBS Systems activated under a Promotional Program involving the leasing of equipment by DISH to end users, a DISH DBS System: (a) for which title is automatically transferred from Retailer to DISH pursuant to the Business Rules applicable to such Promotional Program, and (b) which is leased by DISH directly to a Qualifying Residential Subscriber pursuant to such Business Rules, in each case during the Term of this Agreement, shall be deemed to be re-sold by Retailer directly to such Qualifying Residential Subscriber for purposes of clause (ii) above. The amount of such Monthly Residential Incentive together with payment terms and other applicable terms and conditions shall be set forth in Business Rules which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER. DISH SHALL DETERMINE FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR

ANY REASON OR NO REASON WHETHER A PARTICULAR DISH NETWORK SUBSCRIBER IS A NEW RESIDENTIAL SUBSCRIBER ACCOUNT ELIGIBLE FOR THE PAYMENT OF MONTHLY RESIDENTIAL INCENTIVES HEREUNDER. DISH'S CALCULATION AND PAYMENT OF MONTHLY RESIDENTIAL INCENTIVES SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15.

6.1.2 **Monthly Residential MDU Incentives.** Subject to the terms and conditions of this Agreement (including without limitation the exhibits attached hereto) and any applicable Business Rules, for each DISH DBS System that during the Term of this Agreement: (i) is sold to Retailer directly by DISH or any of its Affiliates, or a Third Party Manufacturer; (ii) is re-sold by Retailer directly to a Qualifying Residential MDU Subscriber; and (iii) results in the activation of Eligible Residential MDU Programming for a new Residential MDU Subscriber Account, Retailer may be eligible to receive a monthly incentive (the "Monthly Residential MDU Incentive"), in accordance with applicable Business Rules. Solely for the purposes of this Section 6.1.2 and solely with respect to DISH DBS Systems activated under a Promotional Program involving the leasing of equipment by DISH to end users, a DISH DBS System: (a) for which title is automatically transferred from Retailer to DISH pursuant to the Business Rules applicable to such Promotional Program, and (b) which is leased by DISH directly to a Qualifying Residential MDU Subscriber pursuant to such Business Rules, in each case during the Term of this Agreement, shall be deemed to be re-sold by Retailer directly to such Qualifying Residential MDU Subscriber for purposes of clause (ii) above. The amount of such Monthly Residential MDU Incentive together with payment terms and other applicable terms and conditions shall be set forth in Business Rules which shall he distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER. DISH SHALL DETERMINE FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON WHETHER A PARTICULAR DISH NETWORK SUBSCRIBER IS A NEW RESIDENTIAL MDU SUBSCRIBER ACCOUNT ELIGIBLE FOR THE PAYMENT OF MONTHLY RESIDENTIAL MDU INCENTIVES HEREUNDER. DISH'S CALCULATION AND PAYMENT OF MONTHLY RESIDENTIAL MDU INCENTIVES SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15.

6.1.3 **Monthly Commercial Incentives.** Subject to the terms and conditions of this Agreement (including without limitation the exhibits attached hereto) and any applicable Business Rules, for each DISH DBS System that during the Term of this Agreement: (i) is sold to Retailer directly by DISH or any of its Affiliates, or a Third Party Manufacturer; (ii) is re-sold by Retailer directly to a Qualifying Commercial Subscriber; and (iii) results in the activation of Eligible Commercial Programming for a new Commercial Subscriber Account, Retailer may be eligible to receive a monthly incentive (the "Monthly Commercial Incentive"), in accordance with applicable Business Rules. The amount of such Monthly Commercial Incentive together with payment terms and other applicable terms and conditions shall be set forth in Business Rules which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER. DISH SHALL DETERMINE FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON WHETHER A PARTICULAR DISH NETWORK SUBSCRIBER IS A NEW COMMERCIAL SUBSCRIBER ACCOUNT ELIGIBLE FOR THE PAYMENT OF MONTHLY COMMERCIAL INCENTIVES HEREUNDER. DISH'S CALCULATION AND PAYMENT OF MONTHLY COMMERCIAL INCENTIVES SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15.

6.1.4 **Monthly Bulk Incentives.** Subject to the terms and conditions of this Agreement (including without limitation the exhibits attached hereto) and any applicable Business Rules, for each DISH DBS System that during the Term of this Agreement: (i) is sold to Retailer directly by DISH or any of its Affiliates, or a Third Party Manufacturer; (ii) is re-sold by Retailer directly to a Qualifying Bulk Subscriber; and (iii) results in the activation of Eligible Bulk Programming for a new Bulk Subscriber Account, Retailer may be eligible to receive a monthly incentive (the "Monthly Bulk Incentive"), in accordance with applicable Business Rules. The amount of such Monthly Bulk Incentive together with payment terms and other applicable terms and conditions shall be set forth in Business Rules which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER. DISH SHALL DETERMINE FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON WHETHER A PARTICULAR DISH NETWORK SUBSCRIBER IS A NEW BULK SUBSCRIBER ACCOUNT ELIGIBLE FOR THE PAYMENT OF MONTHLY BULK INCENTIVES HEREUNDER. DISH'S CALCULATION AND PAYMENT OF MONTHLY BULK INCENTIVES SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15.

6.2 **Additional Incentives.**

6.2.1 **Additional Residential Incentives.** During the Term of this Agreement, Retailer may be eligible to participate in and receive incentives other than Monthly Residential Incentives with respect to new Residential Subscriber Accounts, such

as co-op accrual, activation fee payments, flex payments, equipment discounts and professional installation payments ("Additional Residential Incentives") under such Promotional Programs as DISH may make available to Retailer at Any Time in DISH's Sole Discretion. The terms and conditions, including without limitation, eligibility requirements, governing each Additional Residential Incentive shall be set forth in applicahle Business Rules, which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER.

6.2.2 **Additional Residential MDU Incentives**. During the Term of this Agreement, Retailer may be eligible to participate in and receive incentives other than Monthly Residential MDU Incentives with respect to new Residential MDU Subscriber Accounts, such as activation fee payments, flex payments, equipment discounts and professional installation payments ("Additional Residential MDU Incentives") under such Promotional Programs as DISH may make available to Retailer at Any Time in DISH's Sole Discretion. The terms and conditions, including without limitation, eligibility requirements, governing each Additional Residential MDU Incentive shall be set forth in applicable Business Rules, which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER.

6.2.3 **Additional Commercial Incentives**. During the Term of this Agreement, Retailer may be eligible to participate in and receive incentives other than Monthly Commercial Incentives with respect to new Commercial Subscriber Accounts, such as activation fee payments, flex payments, equipment discounts and professional installation payments ("Additional Commercial Incentives") under such Promotional Programs as DISH may make available to Retailer at Any Time in DISH's Sole Discretion. The terms and conditions, including without limitation, eligibility requirements, governing each Additional Commercial Incentive shall be set forth in applicable Business Rules, which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER.

6.2.4 **Additional Bulk Incentives**. During the Term of this Agreement, Retailer may be eligible to participate in and receive incentives other than Monthly Bulk Incentives with respect to new Bulk Subscriber Accounts, such as activation fee payments, flex payments, equipment discounts and professional installation payments ("Additional Bulk Incentives") under such Promotional Programs as DISH may make available to Retailer at Any Time in DISH's Sole Discretion. The terms and conditions, including without limitation, eligibility requirements, governing each Additional Bulk Incentive shall be set forth in applicable Business Rules, which shall be distributed or otherwise made available by DISH from time to time in accordance with Section 1.7 above. DISH EXPRESSLY RESERVES THE RIGHT TO CHANGE APPLICABLE BUSINESS RULES AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, UPON NOTICE TO RETAILER.

6.2.5 RETAILER ACKNOWLEDGES AND AGREES THAT:

(I) UNDER NO CIRCUMSTANCES SHALL DISH HAVE AT ANY TIME ANY OBLIGATION TO OFFER ANY ADDITIONAL INCENTIVES TO RETAILER, OR IF ADDITIONAL INCENTIVES ARE OFFERED TO OTHERS, TO ALTER OR AMEND APPLICABLE BUSINESS RULES TO PERMIT RETAILER TO BE ELIGIBLE TO RECEIVE THEM;

(II) DISH MAY AT ANY TIME AND FROM TIME TO TIME, IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, ADD, DISCONTINUE, SUBSTITUTE, MODIFY OR OTHERWISE ALTER ANY OR ALL OF THE TERMS AND CONDITIONS OF ANY PROMOTIONAL PROGRAM INVOLVING THE PAYMENT OF ADDITIONAL INCENTIVES;

(III) IF DISH OFFERS ANY ADDITIONAL INCENTIVES TO RETAILER THROUGH ANY PROMOTIONAL PROGRAM, RETAILER SHALL ONLY BE ELIGIBLE TO RECEIVE THE ADDITIONAL INCENTIVES IF AND TO THE EXTENT THAT RETAILER MEETS ALL OF THE QUALIFICATION CRITERIA AND OTHER TERMS AND CONDITIONS SET FORTH IN THE APPLICABLE BUSINESS RULES (IF ANY) AND THIS AGREEMENT;

(IV) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES AND EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (V) BELOW, ADDITIONAL RESIDENTIAL INCENTIVES SHALL ONLY BE PAID TO RETAILER WITH RESPECT TO DISH DBS SYSTEMS OR PROMOTIONAL CERTIFICATES THAT: (A) ARE SOLD TO RETAILER BY DISH OR AN AFFILIATE OF DISH (IN THE CASE OF DISH DBS SYSTEMS AND PROMOTIONAL CERTIFICATES) OR A THIRD PARTY MANUFACTURER (AS DEFINED IN SECTION 1.50) (SOLELY WITH RESPECT TO DISH DBS SYSTEMS); (B) ARE RE-SOLD BY RETAILER DIRECTLY TO A QUALIFYING RESIDENTIAL SUBSCRIBER; AND (C) RESULT IN THE ACTIVATION OF ELIGIBLE RESIDENTIAL PROGRAMMING FOR A NEW RESIDENTIAL SUBSCRIBER ACCOUNT;

(V) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES, SOLELY WITH RESPECT TO PROMOTIONAL PROGRAMS INVOLVING THE LEASING OF EQUIPMENT BY DISH, ADDITIONAL RESIDENTIAL INCENTIVES SHALL ONLY BE PAID TO RETAILER WITH RESPECT TO DISH DBS SYSTEMS (A) THAT ARE SOLD TO RETAILER BY DISH, AN AFFILIATE OF DISH, OR A THIRD PARTY MANUFACTURER (AS DEFINED IN SECTION 1.50); (B) FOR WHICH TITLE IS AUTOMATICALLY TRANSFERRED DIRECTLY FROM RETAILER TO DISH PURSUANT TO THE BUSINESS RULES APPLICABLE TO SUCH PROMOTIONAL PROGRAM; (C) THAT ARE LEASED BY DISH DIRECTLY TO A QUALIFYING RESIDENTIAL SUBSCRIBER; AND (D) THAT RESULT IN THE ACTIVATION OF ELIGIBLE RESIDENTIAL PROGRAMMING FOR A NEW RESIDENTIAL SUBSCRIBER ACCOUNT;

(VI) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES AND EXCEPT AS OTHERWISE PROVIDED IN SUBSECTION (VII) BELOW, ADDITIONAL RESIDENTIAL MDU INCENTIVES SHALL ONLY BE PAID TO RETAILER WITH RESPECT TO DISH DBS SYSTEMS THAT: (A) ARE SOLD TO RETAILER BY DISH OR ANY OF ITS AFFILIATES OR A THIRD PARTY MANUFACTURER (AS DEFINED IN SECTION 1.50); (B) ARE RE-SOLD BY RETAILER DIRECTLY TO A QUALIFYING RESIDENTIAL MDU SUBSCRIBER; AND (C) RESULT IN THE ACTIVATION OF ELIGIBLE RESIDENTIAL MDU PROGRAMMING FOR A NEW RESIDENTIAL MDU SUBSCRIBER ACCOUNT;

(VII) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES, SOLELY WITH RESPECT TO PROMOTIONAL PROGRAMS INVOLVING THE LEASING OF EQUIPMENT BY DISH, ADDITIONAL RESIDENTIAL MDU INCENTIVES SHALL ONLY BE PAID TO RETAILER WITH RESPECT TO DISH DBS SYSTEMS (A) THAT ARE SOLD TO RETAILER BY DISH, AN AFFILIATE OF DISH, OR A THIRD PARTY MANUFACTURER (AS DEFINED IN SECTION 1.50); (B) FOR WHICH TITLE IS AUTOMATICALLY TRANSFERRED DIRECTLY FROM RETAILER TO DISH PURSUANT TO THE BUSINESS RULES APPLICABLE TO SUCH PROMOTIONAL PROGRAM; (C) THAT ARE LEASED BY DISH DIRECTLY TO A QUALIFYING RESIDENTIAL MDU SUBSCRIBER; AND (D) THAT RESULT IN THE ACTIVATION OF ELIGIBLE RESIDENTIAL MDU PROGRAMMING FOR A NEW RESIDENTIAL MDU SUBSCRIBER ACCOUNT;

(VIII) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES, ADDITIONAL COMMERCIAL INCENTIVES SHALL ONLY BE PAID TO RETAILER WITH RESPECT TO DISH DBS SYSTEMS THAT: (A) ARE SOLD TO RETAILER BY DISH OR ANY OF ITS AFFILIATES OR A THIRD PARTY MANUFACTURER (AS DEFINED IN SECTION 1.50); (B) ARE RE-SOLD BY RETAILER DIRECTLY TO A QUALIFYING COMMERCIAL SUBSCRIBER; AND (C) RESULT IN THE ACTIVATION OF ELIGIBLE COMMERCIAL PROGRAMMING FOR A NEW COMMERCIAL SUBSCRIBER ACCOUNT;

(IX) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES, ADDITIONAL BULK INCENTIVES SHALL ONLY BE PAID TO RETAILER WITH RESPECT TO DISH DBS SYSTEMS THAT: (A) ARE SOLD TO RETAILER BY DISH OR ANY OF ITS AFFILIATES OR A THIRD PARTY MANUFACTURER (AS DEFINED IN SECTION 1.50); (B) ARE RE-SOLD BY RETAILER DIRECTLY TO A QUALIFYING BULK SUBSCRIBER; AND (C) RESULT IN THE ACTIVATION OF ELIGIBLE BULK PROGRAMMING FOR A NEW BULK SUBSCRIBER ACCOUNT; AND

(X) UNLESS EXPRESSLY SET FORTH TO THE CONTRARY UNDER APPLICABLE BUSINESS RULES, IN NO EVENT SHALL RETAILER BE ELIGIBLE TO RECEIVE ANY MONTHLY INCENTIVES OR ADDITIONAL INCENTIVES HEREUNDER IN CONNECTION WITH THE MARKETING, PROMOTION, SALE, TRANSFER, HANDLING OR ANY OTHER ACTIVITY RELATING TO OR IN CONNECTION WITH PREPAID CARDS AND/OR THE INSTALLATION, SALE OR OTHER TRANSFER OF DISH DBS SYSTEMS, RELATED EQUIPMENT OR OTHER ACCESSORIES IN CONNECTION THEREWITH.

6.2.6 DISH SHALL DETERMINE FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON WHETHER A PARTICULAR DISH SUBSCRIBER IS A NEW RESIDENTIAL SUBSCRIBER ACCOUNT, NEW RESIDENTIAL MDU SUBSCRIBER ACCOUNT, NEW COMMERCIAL SUBSCRIBER ACCOUNT OR NEW BULK SUBSCRIBER ACCOUNT THAT IS ELIGIBLE FOR THE PAYMENT OF ADDITIONAL INCENTIVES HEREUNDER. RETAILER ACKNOWLEDGES AND AGREES THAT IF IT CHOOSES TO PARTICIPATE IN ANY PROMOTIONAL PROGRAM IT WILL CAREFULLY REVIEW AND ADHERE TO ALL THE TERMS AND CONDITIONS SET FORTH IN THE BUSINESS RULES RELATED THERETO. FURTHERMORE, RETAILER'S PARTICIPATION IN ANY PROMOTIONAL PROGRAM OR RECEIPT OF ADDITIONAL INCENTIVES THEREUNDER SHALL SERVE AS RETAILER'S ACKNOWLEDGEMENT OF THE TERMS AND CONDITIONS SET FORTH IN APPLICABLE BUSINESS RULES AND RETAILER'S AGREEMENT TO BE BOUND THERETO. DISH'S CALCULATION AND PAYMENT OF ADDITIONAL INCENTIVES SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15.

6.3 Chargeback of Incentives.

6.3.1 IN THE EVENT THAT RETAILER IS PAID AN INCENTIVE TO WHICH IT IS NOT ENTITLED PURSUANT TO THE TERMS AND CONDITIONS OF THIS AGREEMENT OR ANY PROMOTIONAL PROGRAM OR APPLICABLE BUSINESS RULES, DISH SHALL HAVE THE RIGHT TO CHARGE BACK SUCH INCENTIVE PAID TO RETAILER. IN ADDITION TO (AND WITHOUT LIMITATION OF) THE FOREGOING, DISH SHALL HAVE THE RIGHT TO CHARGE BACK ALL OR ANY PORTION OF THE MONTHLY INCENTIVES (AT ANYTIME) OR ADDITIONAL INCENTIVES (TO THE EXTENT THAT THE APPLICABLE CHARGEBACK PERIOD SET FORTH IN THIS AGREEMENT OR APPLICABLE BUSINESS RULES HAS NOT EXPIRED) PAID:

(I) WITH RESPECT TO A PARTICULAR QUALIFYING RESIDENTIAL SUBSCRIBER WHO SUBSEQUENTLY FAILS TO PAY IN FULL FOR THE UNDERLYING ELIGIBLE RESIDENTIAL PROGRAMMING, OR WITH RESPECT TO WHOM A REFUND OR CREDIT IS ISSUED FOR ANY REASON (DISH SHALL HAVE THE OPTION TO ISSUE SUCH CREDITS OR REFUNDS AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON);

(II) WITH RESPECT TO A PARTICULAR QUALIFYING RESIDENTIAL MDU SUBSCRIBER WHO SUBSEQUENTLY FAILS TO PAY IN FULL FOR THE UNDERLYING ELIGIBLE RESIDENTIAL MDU PROGRAMMING, OR WITH RESPECT TO WHOM A REFUND OR CREDIT IS ISSUED FOR ANY REASON (DISH SHALL HAVE THE OPTION TO ISSUE SUCH CREDITS OR REFUNDS AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON);

(III) WITH RESPECT TO A PARTICULAR QUALIFYING COMMERCIAL SUBSCRIBER WHO SUBSEQUENTLY FAILS TO PAY IN FULL FOR THE UNDERLYING ELIGIBLE COMMERCIAL PROGRAMMING, OR WITH RESPECT TO WHOM A REFUND OR CREDIT IS ISSUED FOR ANY REASON (DISH SHALL HAVE THE OPTION TO ISSUE SUCH CREDITS OR REFUNDS AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON); AND

(IV) WITH RESPECT TO A PARTICULAR QUALIFYING BULK SUBSCRIBER WHO SUBSEQUENTLY FAILS TO PAY IN FULL FOR THE UNDERLYING ELIGIBLE BULK PROGRAMMING, OR WITH RESPECT TO WHOM A REFUND OR CREDIT IS ISSUED FOR ANY REASON (DISH SHALL HAVE THE OPTION TO ISSUE SUCH CREDITS OR REFUNDS AT ANY TIME AND FROM TIME TO TIME IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON).

IN ADDITION TO (AND WITHOUT LIMITATION OF ANY OF) THE FOREGOING, DISH SHALL HAVE THE RIGHT TO CHARGE BACK ALL OR ANY PORTION OF THE INCENTIVES PAID IN CONNECTION WITH RETAILER FRAUDULENTLY OR WRONGFULLY RECEIVING AN INCENTIVE OR OTHER PAYMENT BY: (A) MISREPRESENTING ANY INFORMATION CONCERNING A PRIOR OR CURRENT DISH SUBSCRIBER TO MAKE THAT PERSON APPEAR TO BE A NEW DISH SUBSCRIBER, OR (B) CREATING A FICTITIOUS OR FRAUDULENT CUSTOMER ACCOUNT. FOR THE AVOIDANCE OF DOUBT, IN THE EVENT DISH DETERMINES AT ANY TIME IN GOOD FAITH IN ITS SOLE AND ABSOLUTE DISCRETION FOR ANY REASON OR NO REASON, THAT RETAILER COMMITTED FRAUD OR OTHER MISCONDUCT, DISH SHALL HAVE THE RIGHT TO CHARGE BACK ALL OR ANY PORTION OF THE INCENTIVES PAID TO RETAILER, AND OUT-OF-POCKET EXPENSES (INCLUDING WITHOUT LIMITATION PROGRAMMING COSTS PAID AND ANY EQUIPMENT SUBSIDIES PROVIDED) INCURRED BY DISH AND/OR ANY OF ITS AFFILIATES, IN CONNECTION WITH SUCH FRAUD OR MISCONDUCT. DISH'S CALCULATION AND ASSESSMENT OF ANY CHARGEBACK SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15. DISH'S DETERMINATION THAT A CHARGEBACK IS PROPER SHALL BE CONTROLLING ABSENT FRAUD, MALICE OR WANTON AND WILLFUL MISCONDUCT ON THE PART OF DISH. THE PROVISIONS OF THIS SECTION 6.3 SHALL SURVIVE EXPIRATION OR TERMINATION OF THIS AGREEMENT (FOR ANY REASON OR NO REASON WHATSOEVER) INDEFINITELY.

6.4 Payment. Subject to the terms of this Section 6.4, all Incentives paid to Retailer hereunder shall be made by EFT.

6.4.1 **Electronic Funds Transfer.** Retailer shall provide DISH with the Retailer Account information and any changes thereto ("EFT Instructions"), in the manner prescribed by DISH. Until Retailer provides DISH with EFT Instructions, or in the event that Retailer elects to receive payments by check, DISH shall pay Incentives to Retailer by check and Retailer will be assessed DISH's standard processing fee, which may be changed by DISH at Any Time in its Sole Discretion.

6.4.2 **Reliance on Retailer Account Information.** With respect to Retailer's EFT Instructions, and any purported changes or modifications thereof by Retailer, DISH 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. The provisions of this Section 6.4.2 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

6.4.3 **DISH EFT Liability Limitation.** Retailer agrees that in no event shall DISH have any liability under this Agreement for any Incentives 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, entity or circumstance outside of DISH's direct control. The provisions of this Section 6.4.3 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

6.4.4 **Incentive Statements.** DISH shall make available to Retailer, in an electronic format determined by DISH at Any Time in its Sole Discretion, periodic statements reflecting the Incentives (if any) payable to Retailer as well as any Chargebacks assessed against Retailer. For the avoidance of doubt, such statements will only be made available during periods when Incentives are payable to Retailer. Retailer acknowledges that DISH is not required to provide Retailer with any additional information, including but not limited to communications between DISH and any DISH Network Subscriber or any customer account information regarding any DISH Network Subscriber.

6.5 **Exceptions.** Notwithstanding anything to the contrary set forth herein:

6.5.1 Retailer shall not be entitled to Monthly Residential Incentives (at anytime) or Additional Residential Incentives (to the extent that the applicable Chargeback period set forth in this Agreement or applicable Business Rules has not expired) with respect to any Residential Subscriber Account for which: (i) Eligible Residential Programming has been cancelled by anyone; (ii) payment in full for Eligible Residential Programming has not been timely received by DISH in accordance with the terms and conditions of the then current DISH Residential Customer Agreement; (iii) a credit or refund has been issued by DISH for any reason (DISH shall have the right to issue credits or refunds at Any Time in its Sole Discretion); (iv) the subscriber would otherwise be a Qualifying Residential Subscriber, but is already receiving—or previously received within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period) or at any time (in all other cases)—any of the Programming, or any other audio, video, data, interactive or other programming services from DISH or any of its Affiliates on the date of the order; (v) the Residential Subscriber Account is otherwise terminated, disconnected or deactivated for any reason or no reason whatsoever; or (vi) the Qualifying Residential Subscriber alleges that Retailer committed fraud or any other deceptive act or practice.

6.5.2 Retailer shall not be entitled to Monthly Residential MDU Incentives (at anytime) or Additional Residential MDU Incentives (to the extent that the applicable Chargeback period set forth in this Agreement or applicable Business Rules has not expired) with respect to any Residential MDU Subscriber Account for which: (i) Eligible Residential MDU Programming has been cancelled by anyone; (ii) payment in full for Eligible Residential MDU Programming has not been timely received by DISH in accordance with the terms and conditions of the then current DISH Residential Customer Agreement; (iii) a credit or refund has been issued by DISH for any reason (DISH shall have the right to issue credits or refunds at Any Time in its Sole Discretion); (iv) the subscriber would otherwise be a Qualifying Residential MDU Subscriber, but is already receiving— or previously received within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period) or at any time (in all other cases)—any of the Programming, or any other audio, video, data, interactive or other programming services from DISH or any of its Affiliates on the date of the order; (v) the Residential MDU Subscriber Account is otherwise terminated, disconnected or deactivated for any reason or no reason whatsoever; or (vi) the Qualifying Residential MDU Subscriber alleges that Retailer committed fraud or any other deceptive act or practice.

6.5.3 Retailer shall not be entitled to Monthly Commercial Incentives (at anytime) or Additional Commercial Incentives (to the extent that the applicable Chargeback period set forth in this Agreement or applicable Business Rules has not expired) with respect to any Commercial Subscriber Account for which: (i) Eligible Commercial Programming has been cancelled by anyone; (ii) payment in full for Eligible Commercial Programming has not been timely received by DISH in accordance with the terms and conditions of the then current DISH Commercial Customer Agreement; (iii) a credit or refund has been issued by DISH for any reason (DISH shall have the right to issue credits or refunds at Any Time in its Sole Discretion); (iv) the subscriber would otherwise be a Qualifying Commercial Subscriber, but is already receiving— or previously received within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period) or at any time (in all other cases)—any of the Programming, or any other audio, video, data, interactive or other programming services from DISH or any of its Affiliates on the date of the order; (v) the Commercial Subscriber Account is otherwise terminated, disconnected or deactivated for any reason or no reason whatsoever; or (vi) the Qualifying Commercial Subscriber alleges that Retailer committed fraud or any other deceptive act or practice.

6.5.4 Retailer shall not be entitled to Monthly Bulk Incentives (at anytime) or Additional Bulk Incentives (to the extent that the applicable Chargeback period set forth in this Agreement or applicable Business Rules has not expired) with respect to any Bulk Subscriber Account for which: (i) Eligible Bulk Programming has been cancelled by anyone; (ii) payment in full for Eligible Bulk Programming has not been timely received by DISH in accordance with the terms and conditions of the then current DISH Commercial Customer Agreement; (iii) a credit or refund has been issued by DISH for any reason (DISH shall have the right to issue credits or refunds at Any Time in its Sole Discretion); (iv) the subscriber would otherwise be a Qualifying Bulk Subscriber, but is already

receiving— or previously received within the time period set forth in applicable Business Rules (solely with respect to Promotional Programs (if any) that provide for such a time period) or at any time (in all other cases)—any of the Programming, or any other audio, video, data, interactive or other programming services from DISH or any of its Affiliates on the date of the order; (v) the Bulk Subscriber Account is otherwise terminated, disconnected or deactivated for any reason or no reason whatsoever; or (vi) the Qualifying Bulk Subscriber alleges that Retailer committed fraud or any other deceptive act or practice.

6.5.5 Retailer shall not be entitled to any Incentives with respect to the activation by DISH of a DISH DBS System unless: (i) all of the individual components comprising the applicable DISH DBS System (e.g., receivers, dishes and LNBFs) are confirmed by DISH as having been purchased by Retailer directly from either: (a) DISH or an Affiliate of DISH, or (b) a Third Party Manufacturer; or (ii) the DISH DBS System is delivered pursuant to a Promotional Certificate that is confirmed by DISH as having been purchased by Retailer directly from DISH or an Affiliate of DISH. Retailer acknowledges and agrees that DISH shall not be required to pay Incentives to Retailer in connection with a DISH DBS System purchased by Retailer directly from a Third Party Manufacturer unless and until the Third Party Manufacturer provides DISH with accurate information required by DISH to be able to pay such Incentives to Retailer including, at a minimum: (1) serial numbers for DISH DBS Systems sold by the Third Party Manufacturer to Retailer; and (2) the name and address, and other appropriate identifying information of Retailer.

6.5.6 Notwithstanding anything to the contrary set forth herein and unless expressly set forth to the contrary under the terms and conditions of a specific Promotional Program or applicable Business Rules, Retailer shall only be entitled to receive Monthly Residential Incentives and Additional Residential Incentives with respect to the first new Residential Subscriber Account activated per household. Notwithstanding anything to the contrary set forth herein and unless expressly set forth to the contrary under the terms and conditions of a specific Promotional Program or applicable Business Rules, Retailer shall only be entitled to receive Monthly Residential MDU Incentives and Additional Residential MDU Incentives with respect to the first new Residential MDU Subscriber Account activated per household. Notwithstanding anything to the contrary set forth herein and unless expressly set forth to the contrary under the terms and conditions of a specific Promotional Program or applicable Business Rules, Retailer shall only be entitled to receive Monthly Commercial Incentives and Additional Commercial Incentives with respect to the first new Commercial Subscriber Account activated per business operated at a Commercial Location.

6.6 **Suspension and Termination of Incentives.**

6.6.1 **Suspension.** In addition to (and without limitation of) any other rights and remedies available, DISH shall not he required to pay any Incentives 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 or any Other Agreement, and DISH 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 Incentives not paid during a period of breach or default. The foregoing provisions of this Section 6.6.1 may be exercised without terminating this Agreement and are without prejudice to any other rights and remedies that DISH and/or its Affiliates may have under this Agreement, at law, in equity or otherwise. The provisions of this Section 6.6.1 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

6.6.2 **Termination.** In the event this Agreement expires or is terminated for any reason or no reason whatsoever, DISH shall have the right, in addition to any other rights and remedies it may have, to terminate immediately all payments of Incentives then presently due and owing, or thereafter due, to Retailer under this Agreement.

6.7 **Non-Incentivized Activations by DISH.** In the event that Retailer for any reason does not qualify for an Incentive with respect to any Qualifying Residential Subscriber and/or any DISH DBS System at a Residential Location or Institutional/Residential Location, DISH shall be entitled to activate Residential Programming for that Qualifying Residential Subscriber and/or DISH DBS System without payment of any Incentive or compensation to Retailer, even if Retailer solicited the Qualifying Residential Subscriber to order Residential Programming from DISH. In the event that Retailer for any reason does not qualify for an Incentive with respect to any Qualifying Residential MDU Subscriber and/or any DISH DBS System at a non-bulk-billed MDU Property, DISH shall be entitled to activate Residential MDU Programming for that Qualifying Residential MDU Subscriber and/or DISH DBS System without payment of any Incentive to Retailer, even if Retailer solicited the Qualifying Residential MDU Subscriber to order Residential MDU Programming from DISH. In the event that Retailer for any reason does not qualify for an Incentive with respect to any Qualifying Commercial Subscriber and/or any DISH DBS System at a Commercial Location, DISH shall be entitled to activate Commercial Programming for that Qualifying Commercial Subscriber and/or DISH DBS System without payment of any Incentive to Retailer, even if Retailer solicited the Qualifying Commercial Subscriber to order Commercial Programming from DISH. In the event that Retailer for any reason does not qualify for an Incentive with respect to any Qualifying Bulk Subscriber and/or any DISH DBS System at a Guest Property or a bulk-billed MDU Property, DISH shall be entitled to activate Bulk Programming for that Qualifying Bulk Subscriber and/or DISH DBS System without payment of any Incentive to Retailer, even if Retailer solicited the Qualifying Bulk Subscriber to order Bulk Programming from DISH.

6.8 **Offsets.** In no event shall Retailer or any of its Affiliates have the right to offset, set-off, or otherwise deduct any Incentives or other amounts due or owing to Retailer or any of its Affiliates from DISH or any of its Affiliates from or against any amounts due or owing from Retailer or any of its Affiliates to DISH or any of its Affiliates. In the event that the Incentives paid by DISH

to Retailer exceed the amount to wbich Retailer was entitled, or if Retailer and/or any of its Affiliates are indebted to DISH and/or any of its Affiliates under Section 13 below or for any other reason (including without limitation for any Chargebacks permitted hereunder), Retailer and its Affiliates hereby acknowledge and agree that DISH and its Affiliates shall have the right, but not the obligation, to offset any such amounts against any Incentives or other amounts otherwise due to Retailer or any of its Affiliates from DISH or any of its Affiliates, as well as any and all amounts for which DISH and/or any of its Affiliates may become liable to third parties by reason of Retailer's and/or any of its Affiliate's acts in performing, or failing to perform, Retailer's and/or any of its Affiliate's obligations under this Agreement or any Other Agreement. Further, DISH may, but shall have no obligation to, withhold such sums from any monies due or to become due to Retailer hereunder as DISH, at Any Time in its Sole Discretion, deems necessary to protect DISH and/or any of its Affiliates from any loss, damage, or expense relating to or arising out of Retailer's actions, inaction or performance hereunder, or in response to any claim or threatened claim of which DISH becomes aware concerning Retailer or the performance of Retailer's duties hereunder. DISH'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 DISH or any of its Affiliates. The provisions of this Section 6.8 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

6.9 **Recovery of Outstanding Amounts**. DISH'S CALCULATION OF INCENTIVES AND OFFSET AMOUNTS SHALL BE PRESUMED CONCLUSIVELY AND IRREBUTABLY CORRECT ABSENT A TIMELY NOTICE OF CLAIM BY RETAILER PURSUANT TO SECTION 15. Within thirty (30) days after expiration or termination of tbis Agreement for any reason or no reason whatsoever, Retailer shall pay to DISH all amounts owing from Retailer and/or any of its Affiliates to DISH and/or any of its Affiliates.

6.10 **Collection of Programming and Other Fees.**

6.10.1 Retailer acknowledges and agrees that: (i) with the sole exception of payments for installation and after-sales services performed by Retailer and as otherwise expressly permitted by DISH in writing, under no circumstances shall Retailer or any of its Affiliates collect any payment for Programming or any other payment due or owing to DISH and/or any of its Affiliates from any DISH Network Subscriber or any other person or entity; (ii) all subscription, demand purchase and other Programming fees shall be billed directly to DISH Network Subscribers by DISH; (iii) in the event that, notwithstanding Retailer's best efforts to comply with clause (i) above, a DISH Network Subscriber or other person or entity forwards any such payment to Retailer or any of its Affiliates, Retailer shall immediately forward the payment, together with any applicable sales or similar taxes, to DISH without deduction or offset of any kind, and shall instruct the DISH Network Subscriber or other person or entity that all future payments must be made to DISH directly; and (iv) until such time as the payment is delivered to DISH, such payment shall be deemed to be the sole and exclusive property of DISH, and Retailer shall hold such payment in trust for the benefit of DISH.

6.10.2 Retailer further acknowledges and agrees that: (i) under no circumstance sball Retailer or any of its Affiliates directly or indirectly collect any payment or derive any economic benefit in any form from a programming service provider (a "Programmer") in comection with and/or arising out of or relating to the marketing, promotion and/or solicitation of orders for the programming service(s) of such Programmer by Retailer and/or any of its Affiliates; (ii) in the event that, notwithstanding Retailer's best efforts to comply with clause (i) above, Retailer or any of its Affiliates receives any such payment or derives any such economic benefit, Retailer shall immediately forward the payment or deliver the cash value of the economic benefit, as the case may be, to DISH without deduction or offset of any kind; and (iii) until such time as the payment or cash value of the economic benefit is delivered to DISH, such payment or economic benefit sball be deemed to be the sole and exclusive property of DISH, and Retailer shall hold such payment or economic benefit in trust for the benefit of DISH.

6.10.3 The foregoing is agreed to without prejudice to DISH exercising any other rights and remedies it may have at law, in equity, under contract or otherwise (all of wbich are hereby expressly reserved), including without limitation, the right to terminate this Agreement and/or seek damages or other legal or equitable relief. The provisions of this Section 6.10 shall survive expiration or termination of this Agreement (for any reason or no reason) indefinitely.

6.11 **Sole Incentives.** Retailer hereby acknowledges and agrees that the Incentives payable pursuant to this Agreement and any applicable Business Rules constitute the sole amounts payable by DISH to Retailer in connection with this Agreement.

6.12 **No Admission.** No payment to Retailer under this Agreement, whether in full or in part, shall be deemed to operate as DISH's acceptance, waiver or admission that Retailer has complied with any provision of this Agreement or the requirements of any Promotional Program including, without limitation, any Business Rules related thereto. The parties acknowledge and agree that at all times (including without limitation in connection with any arbitration or court proceeding) it shall remain Retailer's burden to prove eligibility for receipt of any Incentive (including, without limitation, performance of any conditions precedent thereto) or that any Chargeback was incorrect.

6.13 **Acknowledgement.** Retailer hereby acknowledges and agrees that the Incentives paid to Retailer under this Agreement do not represent deferred compensation in any form whatsoever and are not being paid to Retailer with respect to the

procurement of, or the activation of Programming for, DISH Network Subscribers, but rather are being paid to Retailer as an incentive to continue marketing, promoting and soliciting orders for Programming from prospective DISH Network Subscribers and to provide continuing service to DISH Network Subscribers after initial activation.

6.14 **Assignment of Right to Payment.** Retailer does not have the power or the right to assign any payments, or its right to receive any payments, that may be due to Retailer under this Agreement. Any such assignment (whether express or by operation of law) shall be void and unenforceable. Any such attempted assignment shall immediately discontinue Retailer's right to future payments under this Agreement.

6.15 **Claims.** NOTWITHSTANDING ANYTHING TO THE CONTRARY SET FORTH HEREIN, IN NO EVENT SHALL ANY NOTICE OF CLAIM ARISING OUT OF OR RELATING TO ANY ALLEGED FAILURE TO PAY ANY AMOUNTS DUE AND OWING FROM DISH AND/OR ANY OF ITS AFFILIATES, ON THE ONE HAND, TO RETAILER AND/OR ANY OF ITS AFFILIATES, ON THE OTHER HAND, OR ARISING OUT OF OR RELATING TO ANY CHARGEBACK BE PROVIDED LATER THAN THIRTY (30) DAYS AFTER THE DATE THAT THE RELEVANT PAYMENT SHOULD HAVE BEEN MADE OR THE DATE THAT THE RELEVANT CHARGEBACK OCCURRED, AS APPLICABLE, OR LATER THAN THIRTY (30) DAYS AFTER EXPIRATION OR TERMINATION OF THIS AGREEMENT FOR ANY REASON OR NO REASON WHATSOEVER, WHICHEVER IS EARLIER, OR THE SHORTEST PERIOD PERMITTED UNDER APPLICABLE LAW (IN THE EVENT THAT SUCH PERIOD IS IN EXCESS OF THE APPLICABLE PERIOD SET FORTH ABOVE).

7. **ORDERS.**

7.1 Retailer agrees to use its best efforts to promote and enhance DISH's business, reputation and goodwill. Retailer shall allow only its employees, and shall not use any independent contractors, subcontractors, Affiliates, agents, sub-agents or any other persons not employed by Retailer to fulfill any of its obligations hereunder without DISH's specific prior written consent, which consent may be withheld in DISH's Sole Discretion. In the event that DISH does grant consent to Retailer to use persons not employed by Retailer to perform any activities contemplated hereunder ("Permitted Subcontractors"), Retailer shall be responsible for the acts and omissions of such Permitted Subcontractors to the same extent it is responsible for the acts and omissions of its own employees.

7.2 Retailer shall not sell Programming under any circumstances. All sales of Programming are transactions solely between DISH and DISH Network Subscribers. Retailer shall promptly forward to DISH all orders for Programming in the manner(s) prescribed by DISH at Any Time in its Sole Discretion. Retailer understands that DISH shall have the right, in its Sole Discretion, to accept or reject, in whole or in part, all orders for Programming. Retailer also agrees that it shall not condition, tie or otherwise bundle any purchase of Programming with the purchase of any other services or products other than as specifically consented to in writing by DISH in advance, which consent may be withheld in DISH's Sole Discretion.

7.3 Retailer shall comply with all Business Rules, including without limitation all Business Rules which govern or are otherwise applicable to any Promotional Program in which Retailer participates. Retailer shall disclose to each prospective DISH Network Subscriber the relevant terms and conditions of each Promotional Program in which such prospective DISH Network Subscriber is interested, as well as any other terms and conditions as set forth in any applicable Business Rules. Furthermore, Retailer shall take all actions and refrain from taking any action, as requested by DISH in connection with the marketing, advertisement, promotion and/or solicitation of orders for Programming and/or the sale, lease or other transfer of DISH DBS Systems, Promotional Certificates and Prepaid Cards and Retailer shall cooperate by immediately supplying DISH with any information arising from or relating to those actions as DISH reasonably requests. The failure of Retailer to adhere to any Business Rules may result in disciplinary action by DISH in its Sole Discretion up to and including termination of this Agreement and/or any Other Agreement, and/or the exercise by DISH of any other right or remedy available to it under contract (including without limitation this Agreement), at law, in equity or otherwise (all of which are hereby expressly reserved).

7.4 Retailer hereby acknowledges and agrees that the relationship, contractual or otherwise, between DISH (and/or any of its Affiliates) and each DISH Network Subscriber is, as between DISH and Retailer, for the sole and exclusive benefit of DISH and that DISH may conduct such relationship in any manner that it sees fit at Any Time, in its Sole Discretion, without incurring any liability whatsoever to Retailer and/or any of its Affiliates. In furtherance (and without limitation) of the foregoing, Retailer acknowledges and agrees that Retailer is not a third-party beneficiary of any agreement that DISH or any of its Affiliates may have with any DISH Network Subscriber, and that, under no circumstances, shall Retailer and/or any of its Affiliates have any claim or cause of action against DISH or any Affiliate of DISH for any action taken (or not taken) by DISH and/or any of its Affiliates with regard to any DISH Network Subscriber. Retailer further acknowledges and agrees that all records created or maintained by, or on behalf of, DISH relating to any DISH Network Subscriber are the sole and exclusive property of DISH and DISH shall not have any obligation whatsoever to give or allow Retailer access to such information, even if authorized or requested by such DISH Network Subscriber. The provisions of this Section 7.4 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

8. **TRADEMARK LICENSE AGREEMENT.** Retailer shall sign or electronically accept the Trademark License Agreement, in the form attached as Exhibit A hereto (the "Trademark License Agreement"), which agreement is hereby incorporated into this Agreement by reference in its entirety.

9. CONDUCT OF BUSINESS.

9.1 **Compliance with Laws.** Retailer shall not engage in any activity or business transaction which could be considered unethical, as determined by DISH in accordance with prevailing business standards, or damaging to DISH's and/or any of its Affiliates' image or goodwill in any way. Retailer shall under no circumstances take any action which could be considered disparaging to DISH and/or any of its Affiliates. Retailer shall comply with all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto, now enacted or hereafter promulgated (hereinafter "Laws"), and Retailer is solely responsible for its compliance with all Laws that apply to its obligations under this Agreement.

9.2 **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 or Prepaid Card for the purpose of authorizing Programming for multiple DISH DBS Systems that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account or Prepaid Card, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant receiver as set forth in applicable Business Rules; (iv) alter any DISH DBS Systems or smart cards or any other equipment compatible with programming delivered by DISH or any of its Affiliates to be capable of signal theft (or for any other reason without the express written consent of DISH); (v) manufacture, import, offer to the public, sell, provide or otherwise traffic in any technology, product, service or device which is primarily designed or produced for the purpose of, or is marketed for use in, or has a limited commercially significant purpose other than, assisting in or facilitating 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 DISH if it becomes aware of any such activity by any person or entity. The provisions of this Section 9.2 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

9.3 **Hardware and Programming Export and Sale Restrictions.**

9.3.1 In addition to (and without 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, Promotional Certificates, Prepaid Cards and Programming may not currently be sold outside of the Territory. Retailer represents, warrants and agrees that it will not directly or indirectly arrange for or participate in the export or sale of DISH DBS Systems, Promotional Certificates, Prepaid Cards or Programming, in whole or in part, outside of the Territory, and agrees that it will take all reasonable and adequate steps to prevent the export or sale of DISH DBS Systems, Promotional Certificates, Prepaid Cards and Programming outside of the Territory by others who purchase from Retailer and who might reasonably be expected to export or sell them outside of the Territory.

9.3.2 Retailer acknowledges and understands that U.S. export laws relating to satellite receivers may change at Any 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 satellite receivers outside of the United States. DISH 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 satellite receivers or any other products outside of the United States. Retailer represents, warrants and agrees that prior to exporting any satellite receivers outside of the United States, Retailer will investigate all applicable U.S. laws relating to the export of satellite receivers outside of the United States. Retailer is strictly prohibited from violating any U.S. law relating to the export of satellite receivers outside of the United States. Should Retailer export satellite receivers outside of the United States in violation of this Agreement and/or U.S. law, this Agreement shall automatically terminate.

9.4 **Bounty Programs.** Retailer acknowledges that it is in the best interest of both DISH and Retailer for DISH Network Subscribers to be long-term customers of DISH and/or its Affiliates. Retailer acknowledges that churning of DISH Network Subscribers is detrimental to DISH and negatively affects DISH's ability to offer Monthly Incentives and/or Additional Incentives. Retailer acknowledges that for any Promotional Program to be viable, DISH Network Subscribers must be long-term subscribers to DISH Network. Therefore, Retailer agrees that during the Term of this Agreement and for a period of five (5) years following the expiration or termination of this Agreement for any reason or no reason, Retailer and its Affiliates will not directly or indirectly in any manner whatsoever operate, offer to any other person or entity, participate in, or assist any other person or entity to participate in, any promotion or program offered by any person or entity (including without limitation Retailer and/or any of its Affiliates) other than DISH or an Affiliate of DISH which directly or indirectly provides for the delivery of an economic incentive or other benefit to Retailer, DISH Network Subscribers or any other person or entity in any form directly or indirectly in connection with the direct or indirect solicitation of customers of DISH or any other DBS provider or customers of any DTH satellite programming service provider, for any purpose whatsoever (including, without limitation, in connection with such person or entity directly or indirectly assisting in the process of attempting to cause a customer of DISH or any other DBS provider or a customer of any DTH programming service provider to become a subscriber to any other programming service provider). In addition to (and without limitation of) the foregoing, Retailer agrees that

during the Term of this Agreement and for a period of five (5) years following the expiration or termination of this Agreement for any reason or no reason, Retailer and its Affiliates will not directly or indirectly produce, place, display or use any advertising or marketing material that explicitly references DISH Network, DISH, an Affiliate of DISH or DISH Network Subscribers and attempts to persuade DISH Network Subscribers to cancel their DISH service and/or switch to a service offered by any other DBS provider, DTH programming service provider or multi-channel video programming distributor ("MPVD"). Further (and without limitation of the foregoing), during the Term of this Agreement and for a period of five (5) years following the expiration or termination of this Agreement for any reason or no reason, Retailer shall not convert, or directly or indirectly assist any other person or entity who Retailer actually knew or reasonably should have known intended to convert, any DISH Network Subscriber to the services of any otber DBS provider, DTH programming service provider or MVPD. The provisions of this Section 9.4 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) for five (5) years.

9.5 **Subscriber Information.** All consumers who directly or indirectly subscribe to, purchase, lease or otherwise receive and/or acquire: (i) Programming (whether in connection with a Prepaid Card or otherwise); (ii) any other services provided by DISH or any of its Affiliates; and/or (iii) receive any other services incidental, connected or related to any of the foregoing services, and/or who directly or indirectly purchase, lease or otherwise obtain the hardware necessary to receive any such Programming and/or any such other services ("DISH Network Subscribers") shall be deemed customers of DISH for all purposes relating to programming services, including without limitation video, audio, data and interactive programming services, the other services provided by DISH or any of its Affiliates and any other services incidental, connected or related to any of the foregoing services ("Services"), and the hardware necessary to receive any of such services ("Hardware"). Retailer acknowledges and agrees that the names, addresses and other identifying information of DISH Network Subscribers ("Subscriber Information") constitute DISH trade secrets. As such, Retailer further acknowledges and agrees that such Subscriber Information is, as between Retailer and DISH, with respect to the delivery of Services and the provision of Hardware, proprietary to DISH, and shall be treated with the highest degree of confidentiality by Retailer. Retailer shall not directly or indirectly: (a) make use of any list of past or current DISH Network Subscribers (whether developed by Retailer or obtained from DISH or another source), (b) use any Subscriber Information for the direct or indirect benefit of any individual or entity other than DISH, (c) use any Subscriber Information for the purpose of soliciting, or permit any others to solicit, any person or entity to subscribe to any Services offered by any person or entity other than DISH or an Affiliate of DISH, or promote the sale, lease or other acquisition of any Hardware used in connection with services offered by any person or entity other than DISH and its Affiliates, or (d) reveal any Subscriber Information to any third party for any reason without the express prior written consent of DISH, wbich consent may be withheld by DISH in its Sole Discretion; provided, however, that nothing shall prohibit Retailer from utilizing its own customer list (but not a discrete portion thereof identifying any DISH Network Subscribers) for its general business operations unrelated to the delivery of Services or the provision of Hardware. The provisions of this Section 9.5 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

9.6 **Sales and Use Tax.** Any transactions between Retailer and consumers for the purchase of DISH DBS Systems, Promotional Certificates, Prepaid Cards, related accessories and/or other equipment are transactions entered into solely and exclusively between Retailer and the consumer. Although DISH may from time to time incentivize Retailer to offer consumers free or discounted DISH DBS Systems, related accessories and/or other equipment, DISH does not acquire or retain title (except in connection with certain lease-based Promotional Programs) in such DISH DBS Systems, related accessories and/or other equipment. Retailer, and not DISH, is solely responsible for Retailer's investigation of and compliance with all Laws concerning sales and use taxes applicable to any equipment and/or other transactions between Retailer and any consumers.

9.7 **Restricted DISH Employees.** Retailer acknowledges that DISH and its Affiliates have invested substantial economic and other resources and goodwill in the training and professional development of Restricted DISH Employees (as defined below) and that Restricted DISH Employees have acquired certain trade secrets and/or other confidential and proprietary information of DISH and/or its Affiliates in which DISH and its Affiliates have a valuable interest in protecting and for which disclosure to Retailer and/or any of its Affiliates or any other DBS provider, DTH programming service provider or MVPD would be detrimental to DISH and its Affiliates (solely for the purposes of this Section 9.7, "Confidential Company Information"). Therefore, Retailer agrees that during the Term of this Agreement and for a period of twelve (12) months following the expiration or termination of this Agreement for any reason or no reason, Retailer and its Affiliates will not directly or indirectly in any manner whatsoever: (i) solicit, recruit, cause, entice, induce or otherwise attempt to persuade (or assist any other person or entity to solicit, recruit, cause, entice, induce or otherwise attempt to persuade) any Restricted DISH Employee to: (a) terminate or otherwise discontinue his or her employment witb DISH and/or any of its Affiliates, or (b) be employed by, or provide services to, any individual or entity on behalf of himself or herself, or as a partner, shareholder, director, trustee, principal, agent, employee or consultant of, or similar relationship with, any individual or entity whatsoever; or (ii) employ, hire, contract for, or otherwise engage the services of (or assist any other person or entity to employ, bire, contract for or otherwise engage the services of), any Restricted DISH Employee on behalf of himself or herself, or as a partner, shareholder, director, trustee, principal, agent, employee, or consultant of, or similar relationship with, any individual or entity whatsoever. For the purposes of this Section 9.7, "Restricted DISH Employee" shall mean any person then employed by DISH and/or any of its Affiliates or previously employed by DISH and/or any of its Affiliates at any time within the immediately preceding twelve (12) months: (1) as a regional sales manager, national sales manager, senior manager, director, vice president, senior vice president or executive vice president, (2) in any other position: (A) involving the management, supervision and/or control of other persons employed by DISH and/or any of its Affiliates, and (B) through which such person enjoys and exercises a degree of unsupervised independence and control over the business area, unit, team, division, group, region, territory, subject matter, and/or other similar segment or distinction

(collectively, "Business Segment") for which he or she is responsible that would logically be considered reasonably similar to or greater than the degree of unsupervised independence and control generally enjoyed and exercised by any persons who satisfy the description set forth in clause (1) above with respect to their applicable Business Segment, (3) in any position involving the performance of any professional services (including without limitation legal, financial or accounting services) for any person who satisfies the description set forth in clause (1) or (2) above, or (4) who obtains or otherwise acquires any Confidential Company Information in any manner whatsoever and for any reason or no reason (regardless of whether such acquisition is within the scope of employment or authority of such employee). The provisions of this Section 9.7 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) for twelve (12) months.

9.8 **Remedies.** Retailer agrees that any breach of its obligations set forth in this Section 9 will cause substantial and irreparable harm and injury to DISH for which monetary damages alone would be an inadequate remedy, and which damages are difficult to accurately measure. Accordingly, Retailer agrees that DISH shall have the right, in addition to (and without limitation of) any other rights and remedies available to DISH at law, in equity, under contract or otherwise (all of which are hereby expressly reserved), to obtain immediate injunctive relief (without the necessity of posting or filing a bond or other security) to restrain the threatened or actual violation hereof by Retailer, its Affiliates, employees, independent contractors, subcontractors, agents or sub-agents, as well as other equitable relief allowed by the federal and state courts. The provisions of this Section 9.8 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

9.9 **Economic Benefits Derived Held in Trust.** In the event that Retailer derives an economic benefit, in any form, from a violation of any of its obligations under this Section 9, it is hereby agreed that such economic benefit is the property of DISH and that Retailer shall deliver the cash value of the economic benefit to DISH immediately upon receipt of the economic benefit. It is further agreed that Retailer shall hold such economic benefit in trust for the benefit of DISH until such time as its cash value is delivered to DISH. The foregoing is agreed to without prejudice to DISH to exercise any other rights and remedies it may have at law, in equity, under contract or otherwise (all of which are hereby expressly reserved), including without limitation, the right to terminate this Agreement and seek damages or other legal or equitable relief. The provisions of this Section 9.9 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

10. TERM AND TERMINATION.

10.1 **Term.** This Agreement shall commence on the Effective Date and shall continue through December 31, 2010 (the "Term"), unless earlier terminated by either party hereto or otherwise in accordance with the terms and conditions of this Agreement. This Agreement is not automatically renewable, and neither party hereto shall be under any obligation whatsoever to offer or to accept an agreement to renew or replace this Agreement upon its expiration. RETAILER RECOGNIZES THAT THIS AGREEMENT MAY BE TERMINATED PRIOR TO THE EXPIRATION OF THE TERM AND THAT NO REPRESENTATIONS, WARRANTIES, COVENANTS OR GUARANTEES HAVE BEEN MADE TO RETAILER THAT RETAILER WILL REMAIN AN AUTHORIZED RETAILER DURING THE ENTIRE TERM OR THAT THE AGREEMENT WILL NOT BE TERMINATED PRIOR TO EXPIRATION OF THE TERM PURSUANT TO SECTION 10.2, 10.3, 10.4 OR 10.5 BELOW.

10.2 **Termination by Either Party for Convenience.** Either party hereto may, in its Sole Discretion, terminate this Agreement for its convenience (without cause) by giving the other party no less than sixty (60) days prior written notice.

10.3 **Termination By Either Party Upon Default.** This Agreement may be terminated by a party hereto (the "Affected Party"), if the other party (the "Other Party") has failed to cure (if curable) any Default (as defined below) within twenty (20) days of receipt of a written notice of such Default from the Affected Party. For the purposes of this Agreement a "Default" shall occur when: (i) the Other Party fails to pay any amount to the Affected Party or its Affiliates when due under this Agreement or any Other Agreement; or (ii) the Other Party fails to perform any obligation or breaches any representation, warranty or covenant in this Agreement, any Other Agreement, or the Trademark License Agreement (regardless of whether breach or default of such obligation, representation, warranty or covenant is designated as giving rise to a termination right).

10.4 **Automatic Termination.** This Agreement shall terminate automatically should any of the following occur, unless DISH notifies Retailer to the contrary in writing at any time thereafter: (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 continuously and actively market and promote DISH DBS Systems, Promotional Certificates, Prepaid Cards 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 criminal offenses greater than a Class C (or comparable) Misdemeanor; (v) Retailer fails to comply with any applicable Laws, or engages in any practice, substantially related to the business conducted by Retailer in connection with this Agreement, which is determined to be an unfair trade practice or other violation of any applicable Laws, including without limitation any telemarketing/do-not-call laws, spam laws, privacy laws, fair credit reporting laws or warranty laws; (vi) Retailer falsifies any records or reports required hereunder or under any Business Rule; (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 any Laws or by any governmental authority having jurisdiction, that is necessary in carrying out the provisions of this Agreement or to maintain its corporate or other business status in effect as of the

Effective Date; (viii) Retailer directly or indirectly sells, leases or otherwise transfers possession of a DISH DBS System, Promotional Certificate or Prepaid Card to a person or entity whom Retailer knew or reasonably should have known: (a) was not an end-user and/or intended to resell it, lease it or otherwise transfer possession of it for use by another individual or entity, (b) intended to use it, or to allow others to use it, to view Residential Programming at a location other than a Residential Location or Institutional/Residential Location, (c) intended to use it, or to allow others to use it, to view Residential MDU Programming at a location other than a non-bulk-billed MDU Property, (d) intended to use it, or to allow others to use it, in Canada, Mexico or at any other location outside of the Territory, or (e) intended to authorize, or to allow others to authorize, Programming for a DISH DBS System using a single DISH Network account or Prepaid Card that had or would have Programming authorized for multiple satellite receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account or Prepaid Card, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant satellite receiver as set forth in applicable Business Rules; (ix) Retailer makes, or attempts to make, any representation, promise or agreement for or on behalf of DISH; (x) the Trademark License Agreement or any Other Agreement expires or terminates for any reason or no reason; (xi) Retailer directly or indirectly uses a single DISH Network account or Prepaid Card for the purpose of authorizing Programming for multiple satellite receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account or Prepaid Card, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant satellite receiver as set forth in applicable Business Rules; (xii) any actual or alleged fraud, misrepresentation, or illegal action of any sort by Retailer in connection with this Agreement, the Trademark License Agreement, and/or any Other Agreement; (xiii) Retailer Pre-Activates any DISH DBS System or directly or indirectly sells, leases or otherwise transfers possession of a DISH DBS System, Promotional Certificate or Prepaid Card to a person or entity who Retailer knew or reasonably should have known intended to Pre-Activate a DISH DBS System; (xiv) Retailer directly or indirectly makes any payment to DISH for Programming services or otherwise on behalf of any retail end-user of any DISH DBS System; (xv) the churn rate experienced by DISH for DISH Network Subscribers activated through Retailer is equal to or greater than 125% of the churn rate experienced by DISH with respect to DISH Network subscribers generally during any consecutive three-month period; (xvi) Retailer is in breach or default of any of its obligations under Section 2.6, 2.7, 2.8, 2.9, 2.12, 6.10, 6.14, 7, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7 or 14; (xvii) Retailer indefinitely ceases to actively market and promote DISH DBS Systems, Promotional Certificates, Prepaid Cards and/or Programming, as determined by DISH in its Sole Discretion; (xviii) Retailer fraudulently receives, or attempts to receive, an Incentive or any other payment of any type to which it is not entitled under the terms and conditions of this Agreement or any Other Agreement, including without limitation by misrepresenting any information concerning a prior DISH Network Subscriber to make that person or entity appear to be a new DISH Network Subscriber, creating a fictitious or fraudulent customer account, or improperly modifying or canceling a pending work order; or (xix) Retailer fails to activate the applicable minimum number of new subscribers set forth in any applicable Business Rules.

10.5 **Expiration or Termination of Agreement.** The parties hereto agree that if this Agreement expires or terminates for any reason or no reason: (i) Retailer shall 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 of DISH; (ii) Retailer shall immediately discontinue all use of the trademarks associated or included in any way whatsoever with Programming, including, without limitation, DISH; (iii) Retailer shall, at its sole cost and expense, deliver to DISH at the address specified in Section 17.10.1 of this Agreement (or such other address(es) as may be designated in accordance with Section 17.10.2 of this Agreement), or destroy, at DISH's option, all tangible things of every kind (excluding DISH DBS Systems) in Retailer's possession or control that bear any of the trademarks; (iv) Retailer shall upon request by DISH, certify in writing to DISH that such delivery or destruction has taken place; and (v) Retailer shall pay all sums due DISH under this Agreement and any Other Agreement within thirty (30) days of the date of such expiration or termination. In addition to (and without limitation of) any of the foregoing, in the event Retailer does not receive written notice of DISH's option election under clause (iii) of this Section 10.5 within twenty (20) days of the date of expiration or termination of this Agreement, Retailer shall, at its sole cost and expense, deliver all tangible things described in such clause (iii) to DISH at the notice address specified in Section 17.10.1 of this Agreement (or such other address(es) as may be designated in accordance with Section 17.10.2 of this Agreement). DISH acknowledges and agrees that, following the expiration or termination of this Agreement for any reason or no reason, Retailer may choose to sell products, programming and other services that compete with DISH products, programming and other services and that DISH cannot require Retailer to continue as an Authorized Retailer. Retailer acknowledges and agrees that it cannot require DISH to allow Retailer to remain an Authorized Retailer regardless of whether or not any other retailer is allowed to remain an Authorized Retailer.

11. **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 DISH or any of its Affiliates. Retailer shall prominently state its business name, address and phone number and that Retailer is an "authorized DISH Network retailer" in all communications with the public, including, without limitation, marketing materials, flyers, print ads, television or radio spots, web sites, e-mails, invoices, sales slips, and the like. Notwithstanding anything set forth in this Agreement to the contrary, Retailer (including without limitation its officers, directors, employees and Permitted Subcontractors) shall not, under any circumstances, hold itself out to the public or represent that it is DISH or an employee,

subcontractor, Affiliate, agent, or sub-agent of DISH or any DISH Affiliate. In furtherance (and without limitation) of the foregoing, in no event shall Retailer use DISH's name or the name of any DISH Affiliate and/or any trade name used by DISH or any DISH Affiliate in any manner which would tend to imply that Retailer is an Affiliate of DISH or that Retailer is an employee, subcontractor, Affiliate, agent, or sub-agent of DISH or any of its Affiliates or that Retailer is acting or is authorized to act on behalf of DISH or any of its Affiliates. This Agreement does not constitute any joint venture or partnership. It is further understood and agreed that Retailer has no right or authority to make any representation, warranty, promise, covenant, guarantee or agreement or take any action for or on behalf of DISH or any Affiliate of DISH.

12. **LIMITATION OF LIABILITY.** The provisions of this Section 12 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

12.1 UPON THE EXPIRATION OR TERMINATION OF THIS AGREEMENT FOR ANY REASON OR NO REASON WHATSOEVER, DISH AND ITS AFFILIATES SHALL HAVE NO LIABILITY OR OBLIGATION TO RETAILER WHATSOEVER AND RETAILER SHALL HAVE NO RIGHT TO REQUIRE DISH TO CONTINUE TO ALLOW RETAILER TO ACT AS AN AUTHORIZED RETAILER TO SOLICIT ORDERS FOR PROGRAMMING ON BEHALF OF DISH. RETAILER AGREES THAT IN THE EVENT OF EXPIRATION OR TERMINATION OF THIS AGREEMENT FOR ANY REASON OR NO REASON, NO AMOUNTS SPENT IN FULFILLMENT OF THIS AGREEMENT WILL BE RECOVERABLE BY RETAILER FROM DISH OR ANY OF ITS AFFILIATES.

12.2 IN NO EVENT SHALL ANY PROJECTIONS OR FORECASTS MADE BY OR ON BEHALF OF DISH OR ANY OF ITS AFFILIATES BE BINDING AS COMMITMENTS OR PROMISES. IN NO EVENT SHALL DISH OR ANY AFFILIATE OF DISH BE LIABLE FOR ANY EXEMPLARY, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES TO RETAILER (WHETHER FORESEEABLE OR NOT), 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, OR CLAIMS UNDER DEALER TERMINATION, PROTECTION, NON-RENEWAL OR SIMILAR LAWS, FOR ANY CAUSE WHATSOEVER WHETHER OR NOT CAUSED BY NEGLIGENCE, GROSS NEGLIGENCE OR WILLFUL MISCONDUCT.

13. **INDEMNIFICATION.** Retailer shall indemnify, defend and hold DISH 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 (collectively the "DISH Group") 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 attorney 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, the Trademark License Agreement and/or any Other Agreement, and any direct or indirect results thereof, including but not limited to Retailer's sale and/or installation of DISH DBS Systems, Promotional Certificates or Prepaid Cards; (ii) Retailer's lawful or unlawful acts or omissions (or those of any of Retailer's employees, independent contractors, subcontractors, Affiliates, agents and sub-agents, whether or not such acts are within the scope of employment or authority of such employees, independent contractors, subcontractors, Affiliates, agents and sub-agents) relating to the sale, leasing, transfer of possession, marketing, advertisement, promotion and/or solicitation of orders for Programming, Promotional Certificates, Prepaid Cards and/or DISH DBS Systems and/or any other products or services of DISH or any of its Affiliates; (iii) the failure of Retailer to comply with any provision of this Agreement or any Business Rule; (iv) the breach of any of Retailer's representations or warranties contained herein; (v) all purchases, contracts, debts and/or obligations made by Retailer; (vi) the failure of Retailer to comply with, or any actual or alleged violation of, any applicable Laws; (vii) any claim brought by Retailer's employees, independent contractors, subcontractors, Affiliates, agents, sub-agents and/or any other person or entity for compensation and/or damages arising out of or relating to the expiration or termination of this Agreement; (viii) any claim of pirating, infringement or imitation of the logos, trademarks or service marks of programming providers or any other person or entity (except with respect to any marketing materials supplied to Retailer by DISH); (ix) any installation and/or after-sale services performed by Retailer, or any of its employees, independent contractors, subcontractors, Affiliates, agents or sub-agents; (x) Retailer's, or any of its employees', independent contractors', subcontractors', Affiliates', agents' or sub-agents' failure to comply with any performance standard; (xi) a DISH Network Subscriber's dissatisfaction with any aspect of the installation and/or after-sale services performed by Retailer, or any of its employees, independent contractors, subcontractors, Affiliates, agents or sub-agents; (xii) the termination, disturbance, interruption or other interference with the service provided by any public utility or damage to the equipment of any public utility caused directly or indirectly by Retailer, or any of its employees, independent contractors, subcontractors, Affiliates, agents or sub-agents; (xiii) Retailer directly or indirectly selling, leasing or otherwise transferring possession of a DISH DBS System, Promotional Certificate or Prepaid Card to any person or entity whom Retailer knew or reasonably should have known: (a) was not an end-user and/or intended to resell it, lease it or otherwise transfer possession of it for use by another individual or entity, (b) intended to use it, or to allow others to use it, to (1) view Residential Programming at a location other than a Residential Location or Institutional/Residential Location, or (2) view Residential MDU Programming at a location other than a non-bulk-billed MDU Property, (c) intended to use it, or to allow others to use it, in Canada, Mexico or at any other location outside of the Territory, or (d) intended to authorize, or to allow others to authorize, Programming for a DISH DBS System using a single DISH Network account or Prepaid Card that has or would have Programming authorized for multiple

satellite receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant satellite receiver as set forth in applicable Business Rules; and/or (xiv) Retailer directly or indirectly using a single DISH Network account or Prepaid Card for the purpose of authorizing Programming for multiple satellite receivers that are not all located in the same Residential Location, Institutional/Residential Location, bulk-billed MDU Property, Unit of a non-bulk-billed MDU Property, Guest Property or Commercial Location, as applicable based upon the type of Programming authorized for the relevant DISH Network account or Prepaid Card, and except in the case of a bulk-billed MDU Property or Guest Property, connected to the same land-based phone line and/or broadband home network, in each case consistent with the method and manner of connectivity authorized in respect of the relevant satellite receiver as set forth in applicable Business Rules. In the event of any claim for indemnification by the DISH Group under this Section 13, the DISH Group shall be entitled to representation by counsel of its own choosing, at Retailer's sole cost and expense. The DISH Group shall have the right to the exclusive conduct of all negotiations, litigation, settlements and other proceedings arising from any such Claims and Retailer shall, at its own cost and expense, render all assistance requested by DISH in connection with any such negotiation, litigation, settlement or other proceeding. Each indemnity obligation set forth in this Section 13 shall be in addition to (and without limitation of) any other indemnity obligations set forth in this Agreement. The provisions of this Section 13 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

14. **CONFIDENTIALITY.** Retailer and its employees will maintain, in confidence, the terms, conditions and provisions of this Agreement, the terms, conditions and provisions of any and all Business Rules and Promotional Programs, as well as all data, summaries, reports, communications or information of all kinds, whether oral or written, acquired, devised or developed in any manner from DISH's and/or any of its Affiliate's personnel or files, or as a direct or indirect result of Retailer's actions or performance under this Agreement, including without limitation nonpublic personal information of DISH Network Subscribers ("Confidential Information") and Retailer represents, warrants and covenants to DISH and its Affiliates that it has not and will not reveal the same to any persons not employed by Retailer, except: (i) at the written direction of DISH; (ii) to the extent necessary to comply with any applicable Laws, 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 DISH in writing of the information prior to making any disclosure, and shall seek confidential treatment of such information; or (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. Retailer shall not issue an independent press release with respect to this Agreement or the transactions contemplated hereby without the prior written consent of DISH, which consent may be withheld in DISH's Sole Discretion. Upon expiration or termination of this Agreement for any reason or no reason whatsoever, Retailer shall return all Confidential Information (including, without limitation, all copies thereof) or at DISH's request in DISH's Sole Discretion destroy all such Confidential Information, and immediately certify in writing to DISH that such delivery or destruction has taken place. For the avoidance of doubt (and without limitation of the provisions of the immediately preceding sentence), in the event Retailer does not receive a request from DISH to destroy all Confidential Information (including, without limitation, all copies thereof) upon expiration or termination of this Agreement, Retailer shall return all such Confidential Information and copies thereof (if any) to DISH at the notice address specified in Section 17.10.1 of this Agreement (or such other address(es) as may be designated in accordance with Section 17.10.2 of this Agreement). Retailer agrees that any breach or default of any of its obligations set forth in this Section 14 will cause substantial and irreparable harm and injury to DISH for which monetary damages alone would be an inadequate remedy, and which damages are difficult to accurately measure. Accordingly, Retailer agrees that DISH shall have the right, in addition to (and without limitation of) any other rights and remedies available to DISH at law, in equity, under contract or otherwise (all of which are hereby expressly reserved), to obtain immediate injunctive relief (without the necessity of posting or filing a bond or other security) to restrain the threatened or actual violation hereof by Retailer, its employees, independent contractors, subcontractors, Affiliates, agents or sub-agents, as well as any other equitable relief allowed by the federal or state courts. The provisions of this Section 14 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

15. **DISPUTE RESOLUTION.**

Retailer acknowledges that DISH deals with thousands of retailers and that hundreds of thousands of incentive payments are made annually. Retailer acknowledges that any delay in notifying DISH of any alleged shortage or non-payment, allegedly incorrect chargeback, or any other alleged claim that may result in DISH's liability to Retailer for damages or injunctive relief may impede DISH's ability to fully and timely investigate any such claim by Retailer. Retailer agrees that it is in each party's best interest to give DISH control over claims that have to be investigated and to allow DISH to investigate any such claim at the earliest possible moment as well as maintain an orderly method for handling retailer claims. Accordingly, Retailer agrees to immediately inspect and review the statements described in Section 6.4.4 to determine any claims or disputes that Retailer believes exist and, in the event of any claim or dispute, to follow the procedures set forth below. Retailer also agrees to follow the below claims procedures for all claims that may result in DISH's liability to Retailer for damages or injunctive relief.

15.1 **Claims for Breach or Default.** IN THE EVENT OF AN OCCURRENCE THAT RENDERS, OR MIGHT RENDER, DISH LIABLE TO RETAILER FOR ANY DAMAGES OR INJUNCTIVE RELIEF AS A RESULT OF ANY ALLEGED BREACH OR DEFAULT OF THIS AGREEMENT OR ANY OTHER AGREEMENT, RETAILER SHALL GIVE WRITTEN NOTICE

OF SUCH OCCURRENCE AS SOON AS PRACTICABLE TO DISH (A "NOTICE OF CLAIM"). IN NO EVENT SHALL ANY NOTICE OF CLAIM BE PROVIDED LATER THAN NINETY (90) DAYS AFTER THE DATE OF THE RELEVANT OCCURRENCE, OR THE SHORTEST PERIOD PERMITTED UNDER APPLICABLE LAW (IN THE EVENT THAT SUCH PERIOD IS IN EXCESS OF THE APPLICABLE PERIOD SET FORTH ABOVE). EACH NOTICE OF CLAIM SHALL STATE: (I) THE DATE, TIME AND NATURE OF THE OCCURRENCE; (II) THE TOTAL AMOUNT CLAIMED BY RETAILER, IF ANY, IN CONNECTION WITH SUCH OCCURRENCE AND THE BASIS FOR ANY AMOUNT CLAIMED, AND (III) IDENTIFICATION OF ALL DOCUMENTS AND OTHER INFORMATION IN RETAILER'S CONTROL OR POSSESSION ARISING FROM OR RELATING TO SUCH OCCURRENCE. RETAILER MAY SUBMIT A NOTICE OF CLAIM CONCERNING INCENTIVE PAYMENTS THROUGH DISH'S RETAILER WEBSITE (http://retailer.echostar.com, or through such other website(s) as DISH may direct from time to time in applicable Business Rules) IN ACCORDANCE WITH APPLICABLE BUSINESS RULES. RETAILER MAY SUBMIT A NOTICE OF CLAIM CONCERNING ALL OTHER CLAIMS VIA ELECTRONIC MAIL TO executiveresolution@echostar.com (or to such other e-mail address(es) as DISH may direct from time to time in applicable Business Rules) WITH THE SUBJECT LINE "NOTICE OF CLAIM." AFTER SUBMITTING A NOTICE OF CLAIM, RETAILER SHALL PROVIDE DISH WITH ANY AND ALL ADDITIONAL INFORMATION REQUESTED BY DISH WITHIN THIRTY (30) DAYS AFTER RECEIPT OF DISH'S REQUEST. DISH SHALL BE ENTITLED TO HAVE ACCESS TO RETAILER'S BOOKS AND RECORDS DURING ITS INVESTIGATION OF RETAILER'S CLAIM. FAILURE TO STRICTLY COMPLY WITH THE PROVISIONS OF THIS SECTION 15.1 WITH RESPECT TO A PARTICULAR OCCURRENCE THAT RENDERS, OR MIGHT RENDER, DISH IN BREACH OR DEFAULT OF THIS AGREEMENT AND LIABLE TO RETAILER FOR DAMAGES OR INJUNCTIVE RELIEF, SHALL CONSTITUTE A WAIVER BY RETAILER WITH RESPECT TO THE RELEVANT OCCURRENCE, INCLUDING WITHOUT LIMITATION ANY DAMAGES RELATED THERETO.

15.2 **Mediation.** Except as expressly set forth to the contrary in the last sentence of this Section 15.2, the parties agree to submit any and all disputes, controversies or claims not otherwise barred or resolved under Section 15.1 or exempted under Section 15.4, which may arise hetween Retailer and/or any of its Affiliates, on the one hand, and DISH and/or any of its Affiliates, on the other hand, including but not limited to any and all disputes, controversies, and claims arising out of or relating to this Agreement including, without limitation, any and all disputes, controversies or claims related to: (i) the execution and delivery of this Agreement (whether via signature or electronic acceptance); (ii) the interpretation of this Agreement; (iii) a party's performance or failure to perform hereunder; (iv) the termination of this Agreement; and (v) any rights Retailer may have under dealer termination or non-renewal laws (collectively "Disputes"), to mandatory non-binding mediation (a "Mediation") in front of a single mediator. Either party may initiate a Mediation by giving written notice to the other party pursuant to Section 17.10 describing the Dispute (a "Notice of Mediation"). The Notice of Mediation shall include: (a) a statement of the initiating party's position and a summary of arguments supporting that position, and (b) the name and title of the executive who will represent that party and of any other persons who will accompany the executive. The Mediation shall take place in the City and County of Denver, Colorado at a mutually agreeable time and location before a mediator chosen by mutual agreement of the parties. In the event that either party fails to negotiate the selection of a mediator in good faith or unreasonably withholds its approval of a mediator, such party shall be deemed to have waived its right to select the mediator by mutual agreement of the parties and shall be required to participate in the Mediation with the mediator chosen by the other party. Each party shall participate through a representative with full settlement authority and shall bear its own costs and expenses and one-half of the costs and expenses of the mediator. Any such Mediation must be concluded within sixty (60) days of the Notice of Mediation. Nothing contained herein (excluding the provisions of Section 2.10, which shall apply in full force and effect) shall limit or restrict the rights of either party and/or any of its Affiliates to file a Notice of Arbitration (as defined below) and/or bring a request for injunctive relief against the other party and/or any of its Affiliates for any violations of Section 2.2, 2.6, 2.7, 2.8, 2.12, 5, 6.10, 7.2, 7.3, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 11 or 14 or any provision of the Trademark License Agreement or any Other Agreement. In the event that a party (the "Non-Mediating Party") fails to: (1) pay one-half of the costs and expenses of the mediator to the mediator when due; or (2) otherwise refuses or fails to participate in or attend a Mediation that has been properly initiated pursuant to this Section 15, then the Non-Mediating Party agrees that: (A) the Non-Mediating Party shall be deemed to have waived its right to initiate an Arbitration (as defined below) pursuant to Section 15.3, as fully participating in a Mediation pursuant to this Section 15.2 is a condition precedent to a party's right to initiate an Arbitration; (B) the other party (the "Mediating Party") shall have the right (but not the obligation) to initiate an Arbitration pursuant to Section 15.3 without any further obligation under this Section 15.2; and (C) the Mediating Party shall have the option, exercisable upon written notice to the Non-Mediating Party, to have the underlying dispute, controversy or claim resolved solely and exclusively before a court of competent jurisdiction located in the State of Colorado, as delineated in Section 15.5 below. In the event that the Mediating Party elects to initiate an Arbitration pursuant to clause (B) above or to resolve the underlying dispute, controversy or claim in court pursuant to clause (C) above, the parties agree that the Non-Mediating Party shall be deemed to have waived its right to pursue any affirmative claims or counterclaims in such Arbitration or court proceeding as fully participating in a Mediation pursuant to this Section 15.2 is a condition precedent to recovery. Notwithstanding the foregoing, with respect solely to a dispute, controversy or claim not otherwise barred or resolved under Section 15.1 or exempted under Section 15.4 that directly arises from or in connection with the automatic termination of this Agreement under Section 10.4, the parties acknowledge and agree that either of them shall have the right (but not the obligation) to initiate an Arbitration pursuant to Section 15.3 without first initiating a Mediation under this Section 15.2.

15.3 **Arbitration.** Except as set forth to the contrary in this Section 15.3 or Section 15.4 below, any and all disputes, controversies or claims between Retailer and/or any of its Affiliates, on the one hand, and DISH and/or any of its Affiliates, on the other hand, including without limitation any and all disputes, controversies or claims arising out of or in connection with this Agreement, including but not limited to the validity of this Section 15, the circumstances concerning the execution and delivery of this Agreement

(whether via signature or electronic acceptance), and any allegations of fraud in the inducement, or which relate to the parties' relationship with each other or either party's compliance with any Laws, which are not settled through negotiation, the claim process set forth above in Section 15.1, or the mediation process set forth above in Section 15.2, shall be resolved solely and exclusively by binding arbitration (an "Arbitration") in accordance with both the substantive and procedural laws of Title 9 of the U.S. Code ("Federal Arbitration Act") and the Commercial Arbitration Rules of the American Arbitration Association (the "Commercial Arbitration Rules"). In the event of any conflict or inconsistency between or among the Federal Arbitration Act, the Commercial Arbitration Rules, and/or the terms and conditions of this Agreement, such conflict or inconsistency shall be resolved by giving precedence in the following order: (i) this Agreement; (ii) the Federal Arbitration Act; and (iii) the Commercial Arbitration Rules. In consideration of DISH entering into this Agreement with Retailer, Retailer agrees that it will not serve as a class representative in any class action lawsuit brought by any person or legal entity concerning this Agreement in any respect. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN THE LAST SENTENCE OF SECTION 15.2 WITH RESPECT TO MEDIATION, NEITHER PARTY NOR ANY OF ITS AFFILIATES MAY BRING ANY DEMAND FOR ARBITRATION AGAINST THE OTHER PARTY AND/OR ANY OF ITS AFFILIATES IF IT AND/OR ANY OF ITS AFFILIATES HAS FAILED TO FULLY COMPLY WITH THE PROCEDURES SET FORTH IN SECTIONS 15.1 AND 15.2; provided, however, that nothing contained herein (excluding the provisions of Section 2.10, which shall apply in full force and effect) shall limit or restrict the rights of either party and/or any of its Affiliates to file a Notice of Arbitration and/or bring a request for injunctive relief against the other party and/or any of its Affiliates for any violations of Section 2.2, 2.6, 2.7, 2.8, 2.12, 5, 6.10, 7.2, 7.3, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 11 or 14 or any provision of the Trademark License Agreement or any Other Agreement.

15.3.1 **Initiation of Arbitration; Selection of Arbitrators.** The Arbitration must be initiated within ninety (90) days from the final day of the Mediation, or one hundred fifty (150) days from the Notice of Mediation in the event that the Mediation is not concluded within sixty (60) days of the Notice of Mediation, and shall be initiated by written notice from the initiating party to the other party pursuant to Section 17.10 stating the initiating party's intent to initiate arbitration ("Notice of Arbitration"). The Arbitration shall be conducted in the City and County of Denver, Colorado by a panel of three arbitrators who shall be selected as follows: (i) one arbitrator shall be selected by the claimant(s) within thirty (30) days of sending the Notice of Arbitration; (ii) one arbitrator shall be selected by the respondent(s) within thirty (30) days of the claimant(s) notifying respondent of the identity of claimant's arbitrator; and (iii) the third arbitrator shall be selected by the arbitrators chosen by the claimant(s) and the respondent(s) within thirty (30) days of the appointment of the respondent(s)' arbitrator. The parties acknowledge and agree that each party shall have the option, exercisable upon written notice to the other party, to designate the arbitrator selected by such party as a non-neutral arbitrator in which event such arbitrator shall not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence. Notwithstanding the foregoing, in the event that either party fails to timely select an arbitrator pursuant to this Section 15.3: (a) such party shall be deemed to have waived its right to a three-member arbitration panel and shall be required to participate in the arbitral proceedings with the one arbitrator selected by the other party without any objection, and (b) the one arbitrator selected by the other party shall thereafter be deemed a neutral arbitrator with whom neither party shall communicate *ex parte* concerning the Arbitration.

15.3.2 **Authority of the Arbitrator(s); Awards.** The parties hereby agree that the arbitrator(s) selected pursuant to Section 15.3.1 (the "Arbitrator(s)") are not authorized to: (i) conduct "class arbitration" in any form; and/or (ii) arbitrate any dispute on a representative basis in any form. The parties hereby agree that the Arbitrator(s) have the authority to entertain and rule upon dispositive motions, including but not limited to, default judgments as governed by Rule 55 of the Federal Rules of Civil Procedure, motions for summary judgment as governed by Rule 56 of the Federal Rules of Civil Procedure and motions to dismiss as governed by Rule 12 of the Federal Rules of Civil Procedure. The decision of the Arbitrator(s) shall be final and binding on the parties and, notwithstanding the last sentence of this Section 15.3.2, any award of the Arbitrator(s) may be entered and enforced as a final judgment in any state or federal court of competent jurisdiction in the United States. The parties agree that, in no event, shall the Arbitrator(s)' decision include a recovery under any theory of liability, or award in any amount, not expressly allowed under this Agreement, any Promotional Program or applicable Business Rules, including without limitation, punitive or treble damages. In furtherance (and without limitation) of the foregoing, any award made by the Arbitrator(s) shall be within the limitations set forth in Section 12. The parties further agree that the Arbitrator(s) may not award damages, injunctive relief or any other remedy to any person or legal entity who is not present at the Arbitration or who does not submit proof of any alleged damages at the Arbitration. Unless otherwise agreed by the parties in writing, all pleadings, discovery (oral and written), decisions, orders, awards and judgments resulting from the Arbitration shall be kept confidential.

15.3.3 **Arbitration Costs.** The following shall be borne equally by the parties during any Arbitration hereunder: (i) all administrative costs, fees and expenses assessed or imposed by the person(s) and/or entity administering the arbitration arising from or in connection with such Arbitration; and (ii) all costs, fees and expenses of the Arbitrator(s) arising from or in connection with such Arbitration. Notwithstanding the immediately preceding sentence, the party(ies) determined by the Arbitrator(s) to be the prevailing party(ies) shall be entitled to recover from the non-prevailing party(ies) any and all costs, fees and expenses arising from any Arbitration hereunder, including without limitation all costs of the record or transcripts thereof, if any, administrative fees, and all other fees involved (including but not limited to reasonable attorney fees of the prevailing party(ies)); provided, however, that such costs and expenses may otherwise be allocated in an equitable manner as determined by the Arbitrator(s).

15.3.4 **Remedies for Non-Participation.** The parties acknowledge and agree that: (i) in addition to (and without limitation of) the other provisions of this Section 15, each party is relying upon the provisions of this Section 15.3 to efficiently address and resolve any and all disputes, controversies and claims arising out of or relating to this Agreement and (ii) any failure or

refusal by a party (the "Non-Participating Party") to: (a) pay any amount to the American Arbitration Association ("AAA") when due ("Arbitration Payment Default"), or (b) otherwise participate in or attend an Arbitration that has been properly initiated pursuant to this Section 15 ("Other Arbitration Default") will cause substantial and irreparable harm and injury to the other party (the "Participating Party"), for which monetary damages alone would be an inadequate remedy, including without limitation the termination of arbitral proceedings by the AAA. Accordingly, each party agrees that, in the event of an Arbitration Payment Default or Other Arbitration Default (each a "Non-Participation Event"), the Participating Party shall have the right (but not the obligation), in addition to (and without limitation of) any other rights and remedies available to such party at law, in equity, under contract (including without limitation this Agreement) or otherwise (all of which are hereby expressly reserved), to obtain immediate relief from the Arbitrator(s) or a court of competent jurisdiction located in the State of Colorado, as delineated in Section 15.5 below, in each case in the form of specific performance and/or a preliminary or permanent injunction, whether prohibitive or mandatory, against any violation or threatened violation of this Section 15.3, and without the necessity of posting or filing a bond or other security to restrain the threatened or actual violation of this Section 15.3 by the Non-Participating Party. In addition to (and without limitation of) the foregoing, in the event of a Non-Participation Event, the Participating Party shall have the option, exercisable upon written notice to the Non-Participating Party, to have the underlying dispute, controversy or claim resolved solely and exclusively before a court of competent jurisdiction located in the State of Colorado, as delineated in Section 15.5 below. In the event that the Participating Party elects to resolve the underlying dispute, controversy or claim in court pursuant to this Section 15.3.4, the parties agree that the Non-Participating Party shall be deemed to have waived its right to pursue any affirmative claims or counterclaims in such court proceeding as fully participating in an Arbitration pursuant to this Section 15.3 is a condition precedent to recovery.

15.4 **Exceptions.** Notwithstanding the foregoing, any request by either party for preliminary or permanent injunctive relief, whether prohibitive or mandatory, shall not be subject to mediation or arbitration and may be adjudicated solely and exclusively in the United States District Court for the District of Colorado or in the appropriate state court of competent jurisdiction located in the City and County of Denver, Colorado pursuant to Section 15.5 below; provided, however, that nothing contained herein (excluding the provisions of Section 2.10, which shall apply in full force and effect) shall limit or restrict the rights of either party and/or any of its Affiliates to file a Notice of Arbitration and/or bring a request for injunctive relief against the other party and/or any of its Affiliates for any violations of Section 2.2, 2.6, 2.7, 2.8, 2.12, 5, 6.10, 7.2, 7.3, 9.1, 9.2, 9.3, 9.4, 9.5, 9.6, 9.7, 11 or 14 or any provision of the Trademark License Agreement or any Other Agreement.

15.5 **Choice of Law; Exclusive Jurisdiction.** The relationship between the parties and their present and future Affiliates, including without limitation all disputes, controversies or claims, whether arising in contract, tort, under statute or otherwise, shall be governed by and construed in accordance with the laws of the State of Colorado, applicable to contracts to be made and performed entirely within the State of Colorado by residents of the State of Colorado, without giving any effect to its conflict of law provisions. In the event that a lawsuit is brought for injunctive relief pursuant to Section 15.2, 15.3, or 15.4 above or as otherwise permitted in clause (C) of Section 15.2 or the penultimate sentence of Section 15.3.4, such lawsuit shall be litigated solely and exclusively before the United States District Court for the District of Colorado. The parties and their present and future Affiliates consent to the *in personam* jurisdiction of the United States District Court for the District of Colorado and the appropriate state court located in the City and County of Denver, State of Colorado for the purposes set forth in this Section 15 and waive, fully and completely, any right to dismiss and/or transfer any action pursuant to Title 28 U.S.C. Section 1404 or 1406 (or any successor statute). For purposes of this Section 15, in the event that the United States District Court for the District of Colorado does not have subject matter jurisdiction over any matter for which it is specified herein as the proper venue, then such matter shall be litigated solely and exclusively before the appropriate state court of competent jurisdiction located in the City and County of Denver, State of Colorado.

15.6 **Survival.** The provisions of this Section 15 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

16. **INSURANCE.**

16.1 Retailer shall, at its sole cost and expense, procure and maintain throughout the Term of this Agreement the following insurance coverages:

16.1.1 Workers' Compensation or similar employee benefit act coverage with statutory limits as prescribed by the laws of all states in which Retailer conducts business operations in connection with this Agreement and Employers' Liability coverage with limits and a deductible that are reasonable and adequate for businesses involved in the sale, installation, service and repair of consumer electronics.

16.1.2 Commercial General Liability coverage including, without limitation, coverage for Premises/Operations, Product/Completed Operations, Blanket Contractual Liability, Independent Contractors, Broad Form Property Damage, and Personal/Advertising Injury with limits and a deductible that are reasonable and adequate for businesses involved in the sale, installation, service and repair of consumer electronics.

16.1.3 Commercial Automobile Liability coverage which includes coverage for all owned, hired, and non-owned vehicles with limits and a deductible that are reasonable and adequate for businesses involved in the sale, installation, service and repair

of consumer electronics.

16.2 All such policies and coverages shall: (i) be primary and non-contributory, and issued by insurers licensed to do business in all states in which Retailer conducts business operations in connection with this Agreement; (ii) be endorsed to provide DISH at least thirty (30) days prior notification of cancellation or material change in coverage; (iii) name DISH as an additional insured; and (iv) be endorsed to provide DISH with written notice of Retailer's failure to renew any coverage not later than the anniversary date for each coverage. All such insurance shall be evidenced by a certificate of insurance acceptable to DISH, which shall be provided to DISH upon request.

16.3 All insurance policies required by this Section 16 (except Workers' Compensation) shall designate DISH, DNSLLC, their Affiliates, and their respective directors, officers, and employees (all hereinafter referred to in this clause as "Company") as additional insureds. All such insurance policies shall be required to respond to any claim and pay any such claim prior to any other insurance or self-insurance which may be available. Any other coverage available to Company shall apply on an excess basis. Retailer understands and agrees that DISH, DNSLLC and their Affiliates and their respective directors, officers and employees are third party beneficiaries of Retailer's obligations under this Section 16. No deductible amount on any insurance policy required by this Section 16 shall exceed ten percent (10%) of the coverage amount of the policy.

17. MISCELLANEOUS.

17.1 **Waiver.** Except as otherwise expressly set forth to the contrary herein, 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. In addition to (and without limitation of) the foregoing, the failure of DISH or any of its Affiliates to insist upon strict performance of any provision of any agreement between DISH and/or any of its Affiliates on the one hand and another retailer on the other hand, shall not be construed as a waiver of DISH's right to insist upon strict performance of each and every representation, warranty, covenant, duty and obligation of Retailer hereunder. In addition to (and without limitation of) the foregoing, the election of certain remedies by DISH or any of its Affiliates with respect to the breach or default by another retailer of any agreement between DISH and/or any of its Affiliates on the one hand and such other retailer on the other hand shall not be deemed to prejudice any rights or remedies that DISH may have at law, in equity, under contract (including without limitation this Agreement) or otherwise with respect to a similar or different breach or default hereunder by Retailer (all of which are hereby expressly reserved).

17.2 **Successor Interests; No Assignment by Retailer; Third Party Beneficiaries.** This Agreement is binding upon the heirs, legal representatives, successors and permitted assigns of DISH and Retailer. In addition to (and without limitation of) the prohibition against assignment of payments set forth in Section 6.14 above, neither party shall assign this Agreement without the prior written consent of the other party, except that DISH may assign this Agreement to any of its Affiliates in whole or in part and at Any Time in DISH's Sole Discretion without the consent of Retailer. Because this Agreement is made and entered into by DISH in reliance on the financial, business and personal reputation of Retailer and its ownership and management, any merger, reorganization (including without limitation any change of form of entity, for example changing from a corporation to an LLC) or consolidation of Retailer shall be deemed an assignment requiring DISH's consent hereunder and if any person not a substantial stockholder of Retailer (someone with less than a 25% interest) as of the Effective Date subsequently becomes a substantial stockholder of Retailer (equal to, or greater than a 25% interest), that shall be considered an assignment requiring DISH's consent hereunder. The provisions of this Agreement are for the exclusive benefit of the parties hereto, DISH's Affiliates and their heirs, legal representatives, successors and permitted assigns, and nothing in this Agreement, express or implied, is intended, or shall be deemed or construed, to confer upon any third party (other than as expressly set forth for Affiliates of DISH) any rights, benefits, duties, obligations, remedies or interests of any nature or kind whatsoever under or by reason of this Agreement.

17.3 **Construction and Interpretation.** Retailer and DISH hereby represent, warrant, acknowledge and agree 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 the Business Rules, including without limitation any amendments hereto or thereto. This Agreement may be executed by facsimile or electronic acceptance and in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

17.4 **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. If any one or more of the provisions contained herein, or the application thereof to any person, entity, or circumstance, for any reason are held to be invalid, illegal, or unenforceable in any respect, then such provision(s) shall be enforced to the maximum extent permissible, and the remaining provisions of this Agreement shall be unaffected thereby and will remain in full force and effect.

17.5 **Entire Agreement.** This Agreement and the Business Rules constitute the entire agreement between the parties with respect to the subject matter of this Agreement. Except as otherwise expressly provided herein, no party shall be bound by any communications between them on the subject matter of this Agreement, unless such communication is: (i) in writing; (ii) bears a date contemporaneous with or subsequent to the Effective Date; and (iii) is signed by both parties to this Agreement. On the Effective Date,

all prior agreements (except as set forth to the contrary in Section 2.10 and with further exception of the Business Rules and Other Agreements (including without limitation any previous "Exclusive Bounty Hunter Agreements")) or understandings between the parties shall be null and void. The parties specifically acknowledge there are no unwritten side agreements or oral agreements between the parties which alter, amend, modify or supplement this Agreement. In addition to (and without limitation of) any provisions of this Agreement that expressly survive termination or expiration, any provision of this Agreement that logically would be expected to survive termination or expiration, shall survive for a reasonable time period under the circumstances.

17.6 **Compliance with Laws.** Retailer hereby agrees to comply with, and hereby agrees that this Agreement is subject to, all applicable Laws in force or effect at any time during the Term of this Agreement.

17.7 **Force Majeure.** Notwithstanding anything set forth to the contrary in this Agreement, neither party shall be liable to the other party for its failure to fulfill any of its obligations hereunder if such failure is caused by or arises out of an act of force majeure including without limitation acts of God, war, riot, natural disaster, technical failure (including without limitation the failure of all or part of any communications satellite or transponders on which the Programming is delivered to DISH Network Subscribers, or of 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.

17.8 **Remedies Cumulative.** It is agreed that the rights and remedies herein provided to DISH in case of default or breach by Retailer of this Agreement are cumulative and without prejudice to any other rights and remedies that DISH may have by reason of such default or breach by Retailer at law, in equity, under contract or otherwise (all of which are hereby expressly reserved).

17.9 **Records and Audit Rights.** During the Term of this Agreement and for a period of five (5) years thereafter, Retailer shall keep and maintain at its principal place of business complete and accurate records and books of account, as well as all documentation of all material processes and procedures, in connection with: (i) its performance under this Agreement, the Trademark License Agreement and any Other Agreement; (ii) the payment of Incentives and any other payments to Retailer and/or any of its Affiliates by DISH and/or any of its Affiliates; and (iii) all payments made by Retailer or any of its Affiliates to DISH and/or any of its Affiliates. Such books, records and documentation shall be in sufficient detail to show all information necessary to support any Retailer claim, request or entitlement of any nature from DISH and/or any of its Affiliates. DISH shall have the right, upon two (2) days prior written notice, to review, audit and make copies of Retailer's books, records and documentation for the purposes of: (a) determining Retailer's compliance with its duties and obligations under this Agreement, the Trademark License Agreement or any Other Agreement; (b) determining Retailer's compliance with applicable Laws, including without limitation any telemarketing/do-not-call laws, spam laws, privacy laws, fair credit reporting laws or warranty laws; (c) investigating any claims against DISH and/or any of its Affiliates made by Retailer and/or any of its Affiliates; (d) investigating any Claims for which Retailer is obligated to indemnify the DISH Group pursuant to Section 13 hereof; and/or (e) verifying that Incentive payments and any and all other payments of any type made to Retailer and/or any of its Affiliates by DISH and/or any of its Affiliates are being properly calculated (an "Audit"). DISH shall be entitled to conduct an Audit regardless of the existence of any claim, dispute, controversy, mediation, arbitration or litigation between the parties. In the event that Retailer refuses to allow DISH to conduct an Audit, Retailer acknowledges that DISH shall be entitled to obtain immediate relief in the form of specific performance from either the panel of arbitrators (if arbitration has been commenced pursuant to Section 15 above) or a court located within the State of Colorado, as delineated in Section 15.5 of this Agreement. Any audit conducted by DISH shall be conducted by DISH or its representative(s) at Retailer's offices during normal business hours. If, during the course of an Audit, DISH uncovers that: (1) Retailer has failed to comply with any of its obligations under this Agreement, and/or (2) Retailer and/or any of its Affiliates has made a frivolous claim against DISH and/or any of its Affiliates, Retailer shall pay to DISH the costs and expenses incurred by DISH in connection with such Audit. If an Audit reveals that: (A) Retailer and/or any of its Affiliates have underpaid DISH and/or any of its Affiliates, or (B) Retailer has miscalculated any item bearing upon the Incentives paid to Retailer resulting in an overpayment of Incentives by DISH and/or any of its Affiliates, Retailer agrees to repay to DISH the amount of any such underpayment or overpayment, as applicable, made together with interest thereon at the highest rate allowed by law, computed from the date of such underpayment or overpayment, as applicable; and pay all reasonable costs and expenses, including without limitation reasonable attorney fees and accountant fees incurred by DISH and/or any of its Affiliates in connection with an Audit and with enforcing the collection of such amounts. The provisions of this Section 17.9 are without prejudice to any other rights and remedies that DISH and/or any of its Affiliates may have under contract (including without limitation this Agreement), at law, in equity or otherwise (all of which are hereby expressly reserved), and shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

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17.10 **Notices.**

17.10.1 **Notice to DISH.** Except as otherwise provided in Sections 15 and 17.19, all notices to be given to DISH pursuant to this Agreement shall be in writing, signed by Retailer, and sent by: (i) first class certified mail, postage prepaid; or (ii) overnight courier service, charges prepaid, to the following address(es) or such other address(es) as DISH may designate to Retailer at Any Time in accordance with Section 17.10.2:

If by first class certified mail:

To DISH:	DISH Network L.L.C. Attn: Retail Services P.O. Box 6627 Englewood, CO 80155
With a copy to:	R. Stanton Dodge Executive Vice President, General Counsel and Secretary DISH Network L.L.C. P.O. Box 6655 Englewood, CO 80155

If by overnight courier service:

To DISH:	DISH Network L.L.C. Attn: Retail Services 9601 South Meridian Blvd. Englewood, CO 80112
With a copy to:	R. Stanton Dodge Executive Vice President, General Counsel and Secretary DISH Network L.L.C. 9601 South Meridian Blvd. Englewood, CO 80112

The receipt of such notice shall constitute the giving thereof.

17.10.2 **Notice to Retailer.** All notices to be given to Retailer pursuant to this Agreement shall be in writing and sent by: (i) first class certified mail, postage prepaid; (ii) overnight courier service, charges prepaid; (iii) facsimile transmission, to Retailer at the address listed on the first page of this Agreement or the fax number listed on the signature page of this Agreement, or such other address or other fax number as Retailer may designate in writing delivered to DISH in accordance with Section 17.10.1; or (iv) with the exception of notices given pursuant to Sections 10, 13 or 15, any method of mass communication reasonably directed to DISH's retailer base, including, without limitation, facts blast, e-mail, posting on DISH's retailer web site or broadcast on a "Retailer Chat". The sending of such notice with confirmation of successful receipt of the entire transmission (in the case of facsimile transmission), receipt of such notice (in the case of first class certified mail or overnight courier service), sending of such notice (in the case of e-mail), posting (in the case of DISH's retailer web site) or broadcast (in the case of Retailer Chats) shall constitute the giving thereof. It shall be Retailer's sole responsibility to keep itself informed of all notices, changes and other information set forth in any facts blast, e-mail, "Retailer Chat" or posting on DISH's retailer web site.

17.10.3 The provisions of this Section 17.10 shall survive expiration or termination of this Agreement (for any reason or no reason) indefinitely.

17.11 **Attorney Fees.** In the event of any suit, action or arbitration between Retailer and/or any of its Affiliates, on the one hand, and DISH and/or any of its Affiliates, on the other hand, including but not limited to any and all suits, actions or arbitrations to enforce this Agreement, any Business Rules, any Promotional Program or any provisions hereof or thereof, subject to Section 15.3.3, the prevailing party shall be entitled to recover its costs, expenses and reasonable attorney fees, at arbitration, at trial and on appeal, in addition to (and without limitation of) all other sums allowed by law. The provisions of this Section 17.11 shall survive expiration or termination of this Agreement (for any reason or no reason) indefinitely.

17.12 **Modifications.** Retailer acknowledges that DISH competes in the multi-channel video distribution market, which is highly competitive, fluid and volatile and that DISH must make changes to its marketing, promotion and sales of products and services from time to time to stay competitive. Therefore, Retailer agrees that DISH may, at Any Time in its Sole Discretion, change, alter, delete, add or otherwise modify Incentives, Incentive schedules, Incentive structures, Promotional Programs and/or Business Rules,

payment terms, or the Chargeback rules associated therewith, upon notice to Retailer, without the need for any further consent, written or otherwise, from Retailer. IF ANY SUCH CHANGE, ALTERATION, DELETION, ADDITION OR OTHER MODIFICATION IS MATERIAL AND UNACCEPTABLE TO RETAILER, RETAILER'S ONLY RECOURSE IS TO TERMINATE THIS AGREEMENT. RETAILER'S CONTINUED PERFORMANCE UNDER THIS AGREEMENT FOLLOWING RECEIPT OF NOTICE OF A CHANGE, ALTERATION, DELETION, ADDITION OR OTHER MODIFICATION WILL CONSTITUTE RETAILER'S BINDING ACCEPTANCE OF THE CHANGE, ALTERATION, DELETION, ADDITION OR OTHER MODIFICATION.

17.13 **Interstate Commerce.** The parties acknowledge that the transactions contemplated by this Agreement involve interstate commerce.

17.14 **General Provisions.** The exhibit(s) hereto are hereby incorporated into this Agreement by reference in their entirety.

17.15 **Power and Authority.** Retailer represents and warrants to DISH that it has full power and authority to enter into this Agreement and perform its obligations hereunder and that its execution and delivery of this Agreement (whether via signature or electronic acceptance) and performance of its obligations hereunder does not and will not violate any Laws or result in a breach of, or default under, the terms and conditions of any contract or agreement by which it is bound.

17.16 **Consent to Receive Faxes.** Retailer hereby acknowledges that this Agreement serves as Retailer's express written consent to receive facsimile transmittals from DISH and its Affiliates, including without limitation facsimile transmittals which contain unsolicited advertisements. For the avoidance of doubt, such permitted facsimile transmittals from DISH or any of its Affiliates shall include, but not be limited to, information about the commercial availability or quality of products, goods or services; notices of conferences and seminars; and new product, programming or promotion announcements. This written consent shall include (without limitation) all facsimile transmittals regulated by future Federal Communications Commission action.

17.17 **Waiver of Evidence.** No course of dealing, course of performance, or usage of trade shall be considered in the interpretation or enforcement of this Agreement. Both parties waive any right they may have to introduce evidence of any such course of dealing, course of performance, or usage of trade.

17.18 **Correction of Spelling, Typographical or Clerical Errors.** Retailer hereby grants to DISH a limited power of attorney to correct and/or execute or initial all spelling, typographical and clerical errors discovered in this Agreement, the Trademark License Agreement, any Other Agreement, and any amendments to any of the foregoing, including without limitation, errors or inconsistencies in the spelling of Retailer's name, address, phone number or fax number or the spelling of the name or title of the duly authorized representative signing or electronically accepting each such agreement on Retailer's behalf.

17.19 **Alteration of Terms and Conditions.** Retailer acknowledges and agrees that, because among other things DISH has thousands of authorized retailers, it is in each party's best interest to establish an orderly process for Retailer to propose additions, deletions, changes, alterations and/or other modifications to the terms and conditions set forth in this Agreement and for DISH to receive such proposals prior to the parties entering into an agreement. Therefore, Retailer further acknowledges and agrees that any additions, deletions, changes, alterations and/or other modifications to the terms and conditions of this Agreement proposed by Retailer must be sent to DISH solely and exclusively via an e-mail message addressed to proposedchanges@echostar.com (or to such other e-mail address(es) as may be expressly specified by DISH at Any Time in its Sole Discretion in applicable Business Rules) with the subject line "Proposed Changes to DISH Network Retailer Agreement" (a "Proposal") and that such Proposals must be received by DISH prior to Retailer executing this Agreement (whether via signature or electronic acceptance). RETAILER ACKNOWLEDGES AND AGREES THAT: (I) ANY AND ALL PROPOSALS RECEIVED BY DISH AFTER RETAILER HAS EXECUTED THIS AGREEMENT SHALL BE OF NO FORCE OR EFFECT; AND (II) IN THE EVENT THAT RETAILER EXECUTES THIS AGREEMENT AFTER DISH HAS RECEIVED ONE OR MORE PROPOSALS, ALL SUCH PROPOSALS SHALL BE DEEMED TO HAVE BEEN WITHDRAWN BY SUCH EXECUTION AND SHALL BE OF NO FURTHER FORCE OR EFFECT. Consequently, in the event that the following events occur in the following order: (a) DISH receives a Proposal from Retailer, (b) Retailer executes this Agreement (whether via signature or electronic acceptance), and (c) DISH executes this Agreement, then Retailer acknowledges and agrees that the execution of this Agreement by Retailer withdrew the Proposal and Retailer and DISH will therefore have a binding agreement on the terms and conditions set forth herein, without any additions, deletions, changes, alterations or other modifications thereto. Further, in the event that the following events occur in the following order: (1) Retailer executes this Agreement (whether via signature or electronic acceptance), (2) DISH receives a Proposal from Retailer, and (3) DISH executes this Agreement, then Retailer acknowledges and agrees that the Proposal shall be of no force or effect because it was submitted after Retailer executed this Agreement and Retailer and DISH will therefore have a binding agreement on the terms and conditions set forth herein, without any additions, deletions, changes, alterations or other modifications thereto. Further, in the event that the following events occur in the following order: (A) DISH receives a Proposal from Retailer, (B) Retailer executes this Agreement (whether via signature or electronic acceptance), (C) DISH receives a second Proposal from Retailer, and (D) DISH executes this Agreement, then Retailer acknowledges and agrees that the execution of this Agreement by Retailer withdrew the first Proposal and the second Proposal shall be of no force or effect because it was submitted after Retailer executed this Agreement, and Retailer and DISH will therefore have a binding agreement on the terms and conditions set forth herein, without any additions, deletions, changes, alterations or other modifications thereto. Retailer further acknowledges and agrees that a Proposal may only be accepted by DISH in a writing signed by an Executive Vice President of DISH (or his or her designee),

which specifically acknowledges receipt of the applicable Proposal, includes the portion(s) of the Proposal that DISH is willing to accept, and expressly states that DISH has agreed to accept such portion(s) of the Proposal. Notwithstanding anything to the contrary set forth herein, DISH is under no obligation to receive, consider or accept any Proposals, and in the event that a Proposal received by DISH is not accepted in the manner provided in the immediately preceding sentence, then such Proposal shall automatically be deemed to have been rejected by DISH. For the avoidance of doubt, DISH has the right to not receive, consider or accept any Proposal and to reject any Proposal in its Sole Discretion.

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IN WITNESS WHEREOF, the parties have caused this Agreement to be signed and/or accepted electronically by their duly authorized representatives as of the date first written above.

DISH NETWORK L.L.C.

By: _____
Name:
Title:

RETAILER

Retailer Number: **13375148**

Retailer Company Name: **AMERICAN SATELLITE INC**
(please print)

Street Address: **1660 HOTEL CIR N**
(please print)

City, State, Zip Code: **SAN DIEGO, CA, 92108**
(please print)

Fax Number: **N/A**
(for notice to Retailer pursuant to Section 17.10.2)

(please print)

By: _____
(signature)

Name (please print): **TODD DIROBERTO**

Title (please print): **PRESIDENT**

[SIGNATURE PAGE OF DISH NETWORK RETAILER AGREEMENT]

EXHIBIT A

TRADEMARK LICENSE AGREEMENT

This Trademark License Agreement (the "Agreement") is made and effective as of the Effective Date, by and between DISH Network L.L.C., formerly known as EchoStar Satellite L.L.C. ("DISH"), having a place of business at 9601 S. Meridian Blvd., Englewood, Colorado 80112; and **AMERICAN SATELLITE INC**, having a place of business at **1660 HOTEL CIR N, SAN DIEGO, CA**
92108 ("Licensee").

INTRODUCTION

WHEREAS, DISH conducts business in worldwide locations as, among other things, a provider of direct broadcast satellite-delivered, multi-channel, digital video, audio, data, interactive and other programming services;

WHEREAS, Licensee conducts business as, among other things, a retailer of satellite television products and services; and

WHEREAS, Licensee desires to be permitted to use the Listed Trademarks (as defined below) in accordance with and subject to the terms and conditions of this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

AGREEMENT

1. DISH and its Affiliates hereby grant to Licensee a non-exclusive, non-transferable, revocable license (the "License") to use the Listed Trademarks during the term of this Agreement, and no other term or license whatsoever, solely to market, promote and solicit orders for Programming and the hardware necessary to receive such Programming ("Hardware") in its advertising and promotional materials and at its business locations.

(a) Licensee expressly recognizes and agrees that Licensee shall not, in whole or in part, modify, alter, supplement, delete or otherwise change any of the Trademarks (whether in typewritten, stylized or any other form) as provided to Licensee by DISH and/or any of its Affiliates, including without limitation through dissecting in any manner the form of stylized "I" in "DISH". Licensee shall have no right to use any logos, service marks or trademarks (whether in typewritten, stylized or any other form) of any programming providers (collectively, "Programmer Trademarks"), other than the Programmer Trademarks that are contained in the advertising and promotional material provided to Licensee by DISH and/or its Affiliates. No such materials shall indicate that any agreement of agency, partnership, joint venture, franchise or exclusive or non-exclusive distributorship exists between Licensee on the one hand, and DISH and/or its Affiliates on the other hand, unless DISH and/or its Affiliates on the one hand, and Licensee on the other hand, enter into a separate written agreement permitting Licensee to do so.

(b) Notwithstanding the above, in the event Licensee's exact intended manner of use of one or more of the following has not been approved in writing by DISH in the immediately preceding twelve (12) months, Licensee shall provide to DISH, at least thirty (30) days prior to first use, and in each case in typewritten, stylized and/or any other form acceptable to DISH: (i) an example of any advertising or promotional materials in which Licensee intends to use any Trademarks or Programmer Trademarks; (ii) a written, dispositive listing of all Trademark Paid Search Terms that Licensee intends to bid upon and/or purchase in connection with Licensee's marketing, promotion or solicitation of orders for Programming, Hardware, Services or any other goods or services offered by DISH or any Affiliate of DISH; and (iii) any and all URL's (as defined below) that Licensee intends to use, whether in whole or in part. DISH may reject and prohibit Licensee from using such materials, URLs or Trademark Paid Search Terms in its Sole Discretion. If Licensee is required to, but fails to provide DISH with proposed advertising or promotional materials, Trademark Paid Search Terms and/or URLs at least thirty (30) days prior to first use in compliance with the foregoing, DISH shall have just cause to immediately terminate this Agreement upon written notice to Licensee.

(c) For the purposes of this Agreement:

(i) "DISH Trademarks" shall mean any trademark, service mark and/or trade name of DISH and/or any of its Affiliates that is not a Listed Trademark;

(ii) "Listed Trademarks" shall mean the trademarks, service marks and trade names of DISH and/or its Affiliates that are: (x) set forth in Exhibit 1 attached hereto and incorporated herein by reference in its entirety, as such exhibit may be modified at Any Time in DISH's Sole Discretion upon notice to Licensee; (y) posted (and only while posted) on the DishNetworkSolutions website (www.dishmarketingsolutions.com) or on such other website(s) as may be expressly specified by DISH in

applicable Business Rules at Any Time in its Sole Discretion (each, a "DISH Marketing Site"); and (z) set forth in applicable Business Rules which expressly permit their use by Licensee;

(iii) "Trademarks" shall mean Listed Trademarks and DISH Trademarks;

(iv) "Trademark Paid Search Terms" shall mean any Internet search term that: (x) includes any of the DISH Trademarks and/or the Listed Trademarks; and (y) for which Licensee has directly or indirectly made any payment or provided any other economic benefit of any type whatsoever to any person or entity other than DISH or any of its Affiliates in connection with the placement of any advertising or promotional materials or links thereto on an Internet website; and

(v) "URL" shall mean any domain name, telephone number (toll-free or otherwise), IP address, text messaging address, or any other letter, number, character or combination thereof that includes or refers to any Trademark, whether in whole or in part, whether separately, formatively or otherwise, and whether properly spelled or in any typographical derivation or misspelling thereof.

(d) Licensee acknowledges and agrees that DISH may at Any Time, in its Sole Discretion, change, alter, delete, add or otherwise modify the Listed Trademarks set forth in Exhibit 1 hereto, on any DISH Marketing Site and/or in any Business Rules otherwise applicable to any of the Trademarks, upon notice to Licensee, without the need for any consent, written or otherwise, from Licensee.

2. 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 DISH and/or any of its Affiliates 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 DISH and/or any of its Affiliates. Licensee expressly recognizes and agrees that any goodwill now existing or hereafter created through any sales or solicitation of orders by Licensee of Programming, Hardware and/or any other products, programming and/or other services manufactured and/or distributed by DISH and/or any of its Affiliates in association with the Trademarks shall inure to DISH's sole and exclusive benefit. This License shall be effective until terminated by either party in accordance with the terms and conditions of this Agreement, or until expiration or termination of the DISH Network Retailer Agreement to which this Agreement is attached (the "DISH Network Retailer Agreement") for any reason or no reason whatsoever.

3. Licensee agrees that all products and services promoted and/or rendered by Licensee in connection with any of the Trademarks, and all promotional and other uses of any of the Trademarks by Licensee in association with any Programming, Hardware and/or any other products and services offered by Licensee in connection with this Agreement and/or the DISH Network Retailer Agreement, shall be of a nature and quality that conforms to such standards as may be required by DISH from time to time in its Sole Discretion. Licensee acknowledges and agrees that DISH shall have the right (but not the obligation) to take any and all actions as may be determined by DISH at Any Time in its Sole Discretion to be necessary to ensure that the nature and quality of the services and/or products offered by Licensee in connection with any of the Trademarks, this Agreement and/or the DISH Network Retailer Agreement conform to, and are otherwise maintained at a level which reflects, the high standards of DISH and its Affiliates, including without limitation by directly or indirectly through its authorized representatives inspecting Licensee's use of the Trademarks in accordance with the audit provisions of the DISH Network Retailer Agreement.

4. The License granted by DISH and its Affiliates 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, this Agreement shall automatically terminate, unless DISH notifies Licensee to the contrary in writing at any time thereafter. Licensee shall immediately cease using Trademarks in typewritten, stylized or any other form upon expiration or termination of this Agreement for any reason or no reason whatsoever. Upon expiration or termination of this Agreement for any reason or no reason whatsoever, at DISH's option Licensee shall, at its sole cost and expense, immediately destroy or deliver to DISH any and all advertising and promotional materials in Licensee's possession with Trademarks (whether in typewritten, stylized or any other form) on them and immediately cease using any Trademark Paid Search Terms. In addition to (and without limitation of) any of the foregoing, in the event Licensee does not receive written notice of DISH's option election pursuant to the immediately preceding sentence, Licensee shall, at its sole cost and expense, deliver all materials described in such sentence to DISH at the notice address specified in Section 17.10.1 of the DISH Network Retailer Agreement (or such other address(es) as may be designated in accordance with Section 17.10.2 of the DISH Network Retailer Agreement). If DISH requests destruction of advertising and promotional materials and/or that Licensee cease using any Trademark Paid Search Terms and/or URLs, Licensee shall promptly execute an affidavit representing at a minimum that such materials were destroyed and/or that the use of such Trademark Paid Search Terms and/or URLs has ceased, as applicable, and the date and means of such destruction or last use.

5. Licensee expressly recognizes and acknowledges that this License, as well as any past use by Licensee of the Trademarks in any manner whatsoever (including but not limited to use on signs, on business cards, in advertisements, in Trademark Paid Search Terms and/or as URLs) or in any form whatsoever (including but not limited to typewritten or stylized form), shall not confer upon Licensee any proprietary or other rights, title or interest in, to or under any of the Trademarks including, but not limited to, any

existing or future goodwill in any of the Trademarks. Further, Licensee waives any and all past, present, or future claims it has or might have in the future in, to, or under any of the Trademarks (whether in typewritten, stylized or any other form) and acknowledges that as between DISH and its Affiliates on the one hand, and Licensee and its Affiliates on the other hand, DISH and its Affiliates have the exclusive rights to own and use the Trademarks (whether in typewritten, stylized or any other form), and that DISH and its Affiliates retain full ownership of the Trademarks (whether in typewritten, stylized or any other form) notwithstanding the License granted herein.

6. Licensee represents and warrants that Licensee has not previously reserved, filed or registered, and hereby agrees that Licensee shall not in the future, reserve, file, or register, any formative mark that contains or incorporates in whole or in part any of the Trademarks (whether in typewritten, stylized or any other form). In addition to (and without limitation of the foregoing), Licensee represents and warrants that Licensee has not previously registered, and hereby agrees that Licensee shall not in the future register, any domain name: (i) which includes all or any portion of the Trademarks; (ii) which may otherwise be confusingly similar to all or any portion of the Trademarks; or (iii) for which such registration would not be in accordance with the Usage Standards (as defined below). In the event that Licensee: (a) has previously reserved, filed or registered, or in the future reserves, files or registers, any such trademark; or (b) has previously registered, or in the future registers, any domain name in each case in contravention of any of the foregoing, Licensee agrees to notify DISH immediately, and shall immediately upon the request of DISH, assign to DISH or its designated Affiliate any and all rights, title, and interests that are obtained through the reservation, filing, or registration of any such trademarks (whether in the U.S. or any foreign jurisdiction) or the registration of any such domain name, as applicable, and hereby acknowledges and agrees that any such reservation, filing, or registration, whenever occurring, shall be on behalf of and for the sole and exclusive benefit of DISH, and Licensee waives any and all claims or rights to any compensation whatsoever therefor. Licensee's obligations in this Section 6 shall survive the expiration or termination (for any reason or no reason whatsoever) of this Agreement indefinitely.

7. Licensee agrees not to hold itself out as DISH Network, DISH, EchoStar Technologies L.L.C. ("EchoStar"), any DISH or EchoStar Affiliate, or any other related or affiliated entity. To avoid any confusion in this respect, unless otherwise expressly agreed to in writing by DISH, Licensee agrees not to use, register, submit an application for, obtain, acquire or otherwise seek as part of its business name, trade name or otherwise any Trademark or URL that DISH at Any Time in its Sole Discretion deems to be confusingly similar to any Trademark or URL registered or pursued for registration by DISH and/or any of its Affiliates (whether within the Territory or otherwise), including without limitation: (a) "DISH"; (b) "NET": (c) "ECHO"; (d) "Star"; (e) "Turbo"; (f) "NeverMiss"; or (g) any other word or combination of words identified or included in any Trademark. In addition to (and without limitation of any of) the foregoing, Licensee shall conform any and all use of "DISH" and any Trademark to such usage standards as may be set forth by DISH at Any Time in its Sole Discretion in applicable Business Rules, on www.dishmarketingsolutions.com, or on any DISH Marketing Site ("Usage Standards"). Licensee further agrees to immediately transfer to DISH or its designated Affiliate(s), upon DISH's request, all right, title and interest in, to and under any trademark or URL that Licensee has registered in contravention of any of the provisions of this Agreement, any applicable Business Rules and/or the Usage Standards. Licensee's failure to comply with the provisions of this Section 7 shall constitute a material breach of this Agreement. Upon request, Licensee shall provide DISH with a list of all domain names Licensee uses to market, promote or solicit orders for Programming, Hardware and/or any other services or products offered by DISH and/or its Affiliates.

8. Nothing in this Agreement shall be construed to bar DISH and its Affiliates from protecting their right to the exclusive use of the Trademarks (whether in typewritten, stylized or any other form) and/or URLs against infringement thereof by any party or parties, including without limitation Licensee, either during the term of this Agreement or following any expiration or termination of Licensee's right to use the Listed Trademarks and/or URLs pursuant to this Agreement for any reason or no reason whatsoever. Licensee will promptly and fully advise DISH of any use of any mark that may appear to infringe the Trademarks (whether in typewritten, stylized or any other form) and/or URLs. Licensee will also fully cooperate with DISH and its Affiliates in the defense and protection of the Trademarks (whether in typewritten, stylized or any other form) and/or URLs, at DISH's and/or its Affiliates' expense. Similarly, nothing in this Agreement shall be construed to require that DISH and/or its Affiliates take any action to protect any of the Trademarks and/or URLs in any instance, and DISH and its Affiliates shall not be liable to Licensee in any manner whatsoever for failure to take any such action.

9. (a) This Agreement shall continue for a period of time equal to the term of the DISH Network Retailer Agreement, unless terminated earlier for any reason provided herein. The provisions of this Agreement that expressly survive and such other rights and obligations hereunder as would logically be expected to survive expiration or termination of this Agreement shall continue in full force and effect for the period specified or for a reasonable period under the circumstances if no period is specified.

(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 twenty (20) 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 the expiration or termination of the DISH Network

Retailer Agreement for any reason or no reason whatsoever and upon termination of any Other Agreement for any reason or no reason whatsoever, unless DISH notifies Licensee to the contrary in writing.

10. The relationship between the parties including without limitation all disputes, controversies and claims, whether arising under contract, in tort, under statute or otherwise, 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 DISH 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 or exhibits hereto.

11. Any and all disputes, controversies or claims arising out of, or in connection with, the interpretation, performance or nonperformance of this Agreement and any and all disputes, controversies or claims arising out of, or in connection with, transactions in any way related to this Agreement and/or the relationship for any reason whatsoever 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 without limitation 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 the City and County of Denver, State of Colorado.

12. Licensee agrees that any breach of its obligations under this Agreement will cause substantial and irreparable harm and injury to DISH for which monetary damages alone would be an inadequate remedy, and which damages are difficult to accurately measure. Accordingly, Licensee agrees that DISH shall have the right, in addition to (and without limitation of) any other rights and remedies available to DISH at law, in equity, under contract or otherwise (all of which are hereby expressly reserved), to obtain immediate injunctive relief (without the necessity of posting or filing a bond or other security) to restrain the threatened or actual violation hereof by Licensee, its Affiliates, employees, independent contractors, subcontractors, agents or sub-agents, as well as other equitable relief allowed by the federal and state courts. The provisions of this Section 12 shall survive expiration or termination of this Agreement (for any reason or no reason whatsoever) indefinitely.

13. This Agreement may be executed by facsimile or electronic acceptance in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

14. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the DISH Network Retailer Agreement.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the parties hereto have signed and/or electronically accepted, this Agreement by their duly authorized representatives as of the date first written above.

DISH NETWORK L.L.C.

By: _____
Name:
Title:

LICENSEE

Retailer Number: **13375148**

Retailer Company Name: **AMERICAN SATELLITE INC**(please print)

Street Address: **1660 HOTEL CIR N**
(please print)

City, State, Zip Code: **SAN DIEGO , CA, 92108**
(please print)

By: _____
(signature)

Name (please print): **TODD DIROBERTO**

Title (please print): **PRESIDENT**

[SIGNATURE PAGE OF TRADEMARK LICENSE AGREEMENT]

EXHIBIT 1 TO TRADEMARK LICENSE AGREEMENT

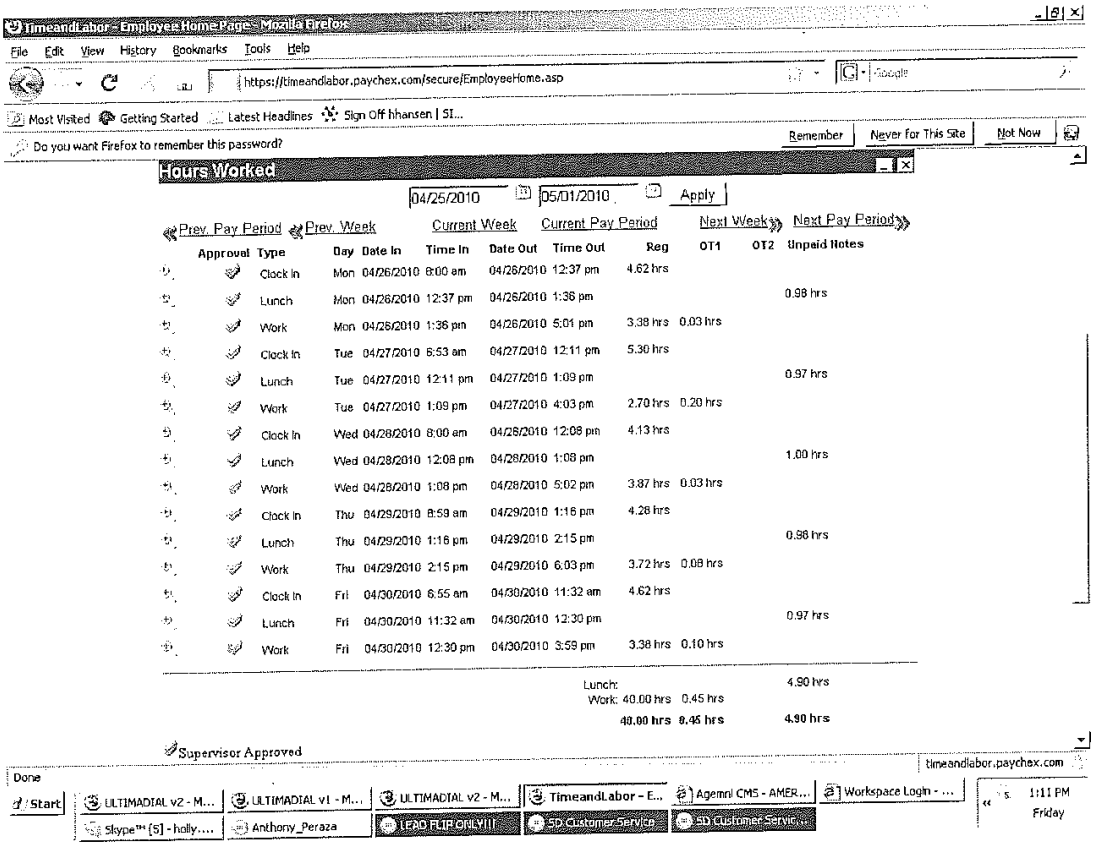

TimeandLabor - Employee HomePage - Mozilla Firefox
File Edit View History Bookmarks Tools Help
https://timeandlabor.paychex.com/secure/EmployeeHome.asp
Most Visited Getting Started Latest Headlines Sign Off hhansen | SI...
Do you want Firefox to remember this password?
Remember Never for This Site Not Now
Hours Worked
04/25/2010 05/01/2010 Apply
Prev. Pay Period Prev. Week Current Week Current Pay Period Next Week Next Pay Period
Approval Type Day Date In Time In Date Out Time Out Reg OT1 OT2 Unpaid Notes
Clock In Mon 04/26/2010 8:00 am 04/26/2010 12:37 pm 4.62 hrs
Lunch Mon 04/26/2010 12:37 pm 04/26/2010 1:36 pm 0.98 hrs
Work Mon 04/26/2010 1:36 pm 04/26/2010 5:01 pm 3.38 hrs 0.03 hrs
Clock In Tue 04/27/2010 8:53 am 04/27/2010 12:11 pm 5.30 hrs
Lunch Tue 04/27/2010 12:11 pm 04/27/2010 1:09 pm 0.97 hrs
Work Tue 04/27/2010 1:09 pm 04/27/2010 4:03 pm 2.70 hrs 0.20 hrs
Clock In Wed 04/28/2010 8:00 am 04/28/2010 12:08 pm 4.13 hrs
Lunch Wed 04/28/2010 12:08 pm 04/28/2010 1:08 pm 1.00 hrs
Work Wed 04/28/2010 1:08 pm 04/28/2010 5:02 pm 3.87 hrs 0.03 hrs
Clock In Thu 04/29/2010 8:59 am 04/29/2010 1:16 pm 4.28 hrs
Lunch Thu 04/29/2010 1:16 pm 04/29/2010 2:15 pm 0.98 hrs
Work Thu 04/29/2010 2:15 pm 04/29/2010 6:03 pm 3.72 hrs 0.08 hrs
Clock In Fri 04/30/2010 6:55 am 04/30/2010 11:32 am 4.62 hrs
Lunch Fri 04/30/2010 11:32 am 04/30/2010 12:30 pm 0.97 hrs
Work Fri 04/30/2010 12:30 pm 04/30/2010 3:59 pm 3.38 hrs 0.10 hrs
Lunch: 4.90 hrs
Work: 40.00 hrs 0.45 hrs
40.00 hrs 0.45 hrs 4.90 hrs
Supervisor Approved
timeandlabor.paychex.com
Done
Start
ULTIMADIAL v2 - M...
ULTIMADIAL v1 - M...
ULTIMADIAL v2 - M...
TimeandLabor - E...
Agemni CMS - AMER...
Workspace Login - ...
Skype™ [5] - holly....
Anthony_Peraza
LEAD FLIR ONLY!!!
SD Customer Service
SD Customer Servic...
1:11 PM
Friday

EXHIBIT 2

VISSER AND ASSOCIATES, PLLC

LEGAL AND MEDIATION SERVICES
2480 - 44TH STREET, S.E. – SUITE 150
KENTWOOD, MICHIGAN 49512
Telephone: (616) 531-9860
Facsimile: (616) 531-9870

Brook J. Bisonet — brook@visserlegal.com
John M. Guinan — john@visserlegal.com
Tyler N. Hayes — tyler@visserlegal.com
Donald R. Visser — donv@visserlegal.com
Donovan J. Visser – Of Counsel — donovan@visserlegal.com

September 17, 2008

Mr. Todd M. DiRoberto
AMERICAN SATELLITE, INC.
375 N. Stephanie Street – Suite 1411
Henderson, Nevada 89014

Re: Campbell v. American Satellite, Inc
Our File No.: 08-411

Dear Mr. DiRoberto:

Our firm represents Ms. Karen Campbell. Your company called Mr. Campbell at 616-696-7493 on at least five occasions. These telephone solicitations consisted in whole or in part of a pre-recorded message. These telephone calls contained multiple violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227 (TCPA), and the Michigan Home Sales Solicitation Act, M.C.L. § 445.111 (MHSSA).

After listening to the pre-recorded message, the calls were transferred to a live solicitor. The solicitor attempted to sell Dish Network services and provided the name of your company as "American Satellite" and provided its website as amsatporoviders.com. Through subsequent research, it was confirmed that American Satellite, Inc. made the telephone calls to Ms. Campbell.

I will be candid with you. In the past, I have dealt with automated calls delivered by authorized retailers of Dish Network services. I attempt to resolve the problem through direct contact with companies in your position. Typically, I am able to resolve the matter without resorting to litigation. However, if I must advise my client to file suit in Michigan, the process will involve EchoStar. This has created problems for authorized retailers in the past.

The TCPA provides for statutory damages of up to $1,500 per violation, as well as injunctive relief. The MHSSA provides for statutory damages in the amount of $250 per violation and an award of reasonable costs and attorney fees.

Your company, which called my client on at least five occasions, transmitted telephone calls compromising multiple violations of both acts. Under federal law, the calls violated 47

U.S. § 227(b)(1)(B) and 47 U.S.C. § 227(d)(3)(A). Under Michigan law, the calls violated M.C.L. § 445.111a(1), M.C.L. § 445.111b(1), M.C.L. § 445.111b(2), and M.C.L. § 445.111c(1)(h). Pursuant to the federal statute, your company is liable to my client for $15,000. Pursuant to the Michigan statute, your company is liable to my client for $5,000 plus reasonable costs and attorney fees. Often, once we begin litigation, we discover additional phone calls giving rise to additional liability and statutory damages.

One of the ironies of TCPA/MHSSA litigation is that the award of attorney fees often far exceeds the value of the initial claim. With that in mind, we make a genuine offer to settle these claims at the outset, as well as be frank and candid as to the factors involved.

My client is willing to settle her claim stemming from the TCPA and MHSSA violations upon payment of $21,000 within 7 days of the date of this letter. If no agreement has been reached by that date, this offer to settle will terminate, and I will advise my client to file suit in Michigan.

Often, parties protest because they have contracted with others to provide these phone services. While you may have some right to contribution or indemnification, this is a matter you would need to resolve outside of this settlement offer. The low amount of the offer is predicated upon keeping our client's attorney fees low. If we have to delay settlement or participate in any way while allocation of this liability is pursued, then the amount due to my client will necessarily increase.

Also, at this time, I would request that you place my client's number, referenced above, on your do-not-call list, as well as send me a copy of your company's do-not-call policy.

Thank you for your attention to this matter.

Very truly yours,

Brook J. Bisonet

BJB/rkl

cc: Ms. Karen Campbell

EXHIBIT 3

David C. Blum #7814
CRIPPEN & CLINE L.C.
Attorneys for Plaintiff
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone: (801) 238-6500
Facsimile: (801) 238-6505

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JEFFREY J. MITCHELL, an individual, Plaintiff, vs. Echostar Satellite, LLC, Aloha Communications, LLC, American Satellite, Inc., Arial Wireless, Inc., DishPronto, Inc., Discount Communications, EBN Financial, Marketing Guru, On Site Satellite East, LLC, Satellite Country, Inc., Satellite Systems Network, LLC., Sterling Commerce Group, Inc., Sterling Satellite, LLC, Techstar Satellite, United Satellite, Inc., Genutec Business Solutions, Inc. corporations, and JOHN DOES 1-30, individuals and unidentified entities, Defendants.	**SUMMONS** Civil No. 060910277 Judge Robin W. Reese

TO American Satellite, Inc.:

You are hereby summoned and required to file an Answer in writing to the attached First

Amended Complaint with the Clerk of the 3rd District Court, 450 South State Street, Salt Lake City, UT 84111, and to serve upon, or mail to the Plaintiff's attorney, at the address above, a copy of said Answer, within 20 days if you are served in the State of Utah, or within 30 day if you are served outside the State of Utah, after service of this Summons upon you. If you fail to do so, judgment by Default will be taken against you for the relief demanded in said First Amended Complaint which has been filed with the Clerk of the above-entitled Court and a copy of which is hereto attached and herewith served upon you.

DATED THIS 25 day of September, 2006.

CRIPPEN & CLINE, L.C.

David C. Blum
Attorney for Plaintiff

David C. Blum #7814
CRIPPEN & CLINE L.C.
Attorneys for Plaintiff
10 West 100 South, Suite 425
Salt Lake City, Utah 84101
Telephone: (801) 238-6500
Facsimile: (801) 238-6505

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR

SALT LAKE COUNTY, STATE OF UTAH

JEFFREY J. MITCHELL, an individual, Plaintiff, vs. Echostar Satellite, LLC, Aloha Communications, LLC, American Satellite, Inc., Arial Wireless, Inc., DishPronto, Inc., Discount Communications, Marketing Guru, On Site Satellite East, LLC, Satellite Country, Inc., Satellite Systems Network, LLC., Sterling Commerce Group, Inc., Sterling Satellite, LLC, United Satellite, Inc. and JOHN DOES 1-30, individuals and unidentified entities, Defendants.	**FIRST AMENDED COMPLAINT** Civil No. 060910277 Judge Robin W. Reese

Plaintiff Jeffrey J. Mitchell complains of Defendants and John Does 1 - 30, (hereinafter Defendant) and for claims for relief alleges and avers as follows:

PARTIES, JURISDICTION AND VENUE

1. Jeffrey J. Mitchell is an individual located in Salt Lake County, State of Utah.

2. Echostar Satellite, LLC (hereinafter Dish) is a limited liability company located in Colorado.

3. Aloha Communications, LLC. is a limited liability company located in Utah.

4. American Satellite, Inc. is a corporation located in California.

5. Arial Wireless, Inc is a corporation located in Utah.

6. DishPronto, Inc. is a corporation located in Florida.

7. EBN Financial is corporation located in California.

8. Marketing Guru is a DBA, located in California.

9. On Site Satellite East, LLC. is a limited liability company located in Arizona.

10. Satellite Country, Inc. is a corporation located in Texas.

11. Satellite Systems Network, LLC. is a limited liability company located in California.

12. Sterling Satellite, LLC is a de facto limited liability company located in Wisconsin.

13. Sterling Commerce Group, Inc. is a successor in interest to Sterling Satellite LLC and is a limited liability company located in Wisconsin.

14 Techstar Satellite is a DBA located in Utah.

15. United Satellite is an entity whose type and location are currently unknown.

16. The John Does are the unidentified entities and the individuals who are directors and/or managers of all identified and unidentified entities.

17. Defendant's agents and/or contractors are hereinafter referred to as Agents.

18. The Defendants have submitted themselves to the jurisdiction of this court pursuant to UTAH CODE ANN. §78-27-24.

19. Venue is proper in this Court pursuant to UTAH CODE ANN. §78-13-7.

GENERAL ALLEGATIONS

20. The Defendant and/or Agents thereof made seventy-one unsolicited telephone calls to the Plaintiff's residential subscriber lines at 801-224-3754 and 801-224-3764 for the purposes of a telephone solicitation. These calls were made on or about the dates listed as follows:

September 25, 2003 to 801-224-3764 (hereinafter 1st Call),

October 23, 2003 to 801-224-3764 (hereinafter 2nd Call),

October 30, 2003 to 801-224-3764 (hereinafter 3rd Call),

December 15, 2003 to 801-224-3764 (hereinafter 4th Call),

January 20, 2004 to 801-224-3764 (hereinafter 5th Call),

February 11, 2004 to 801-224-3764 (hereinafter 6th Call),

May 5, 2004 to 801-224-3764 (hereinafter 7th Call),

February 10, 2005 to 801-224-3754 (hereinafter 8th Call),

March 4, 2005 to 801-224-3754 (hereinafter 9th Call),

June 3, 2005 to 801-224-3764 (hereinafter 10th Call),

June 3, 2005 to 801-224-3754 (hereinafter 11th Call),

June 13, 2005 to 801-224-3754 (hereinafter 12th Call),

July 27, 2005 to 801-224-3754 (hereinafter 13th Call),

August 18, 2005 to 801-224-3764 (hereinafter 14th Call),

August 19, 2005 to 801-224-3754 (hereinafter 15th Call),

August 30, 2005 to 801-224-3764 (hereinafter 16th Call),

August 30, 2005 to 801-224-3754 (hereinafter 17th Call),

September 1, 2005 to 801-224-3764 (hereinafter 18th Call),

September 1, 2005 to 801-224-3764 (hereinafter 19th Call),

September 9, 2005 to 801-224-3764 (hereinafter 20th Call),

September 14, 2005, to 801-224-3754 (hereinafter 21st Call),

September 26, 2005, to 801-224-3754 (hereinafter 22nd Call),

October 12, 2005, to 801-224-3754 (hereinafter 23rd Call),

October 26, 2005, to 801-224-3754 (hereinafter 24th Call),

November 7, 2005, to 801-224-3754 (hereinafter 25th Call),

December 7, 2005, at 10:18 AM to 801-224-3754 (hereinafter 26th Call),

December 7, 2005, at 11:28 AM to 801-224-3754 (hereinafter 27th Call),

December 20, 2005, to 801-224-3754 (hereinafter 28th Call),

December 21, 2005, to 801-224-3754 (hereinafter 29th Call),

January 6, 2006, to 801-224-3754 (hereinafter 30th Call),

January 18, 2006, at 9:23 AM to 801-224-3754 (hereinafter 31st Call),

January 18, 2006, at 9:29 AM to 801-224-3764 (hereinafter 32nd Call),

January 18, 2006 at 6:02 PM to 801-224-3764 (hereinafter 33rd Call),

January 26, 2006 to 801-224-3754 (hereinafter 34th Call),

January 27, 2006 to 801-224-3754 (hereinafter 35th Call),

February 6, 2006, to 801-224-3754 (hereinafter 36th Call),

February 7, 2006, to 801-224-3754 (hereinafter 37th Call),

February 10, 2006, at 8:07 AM to 801-224-3764 (hereinafter 38th Call),

February 10, 2006, at 8:07 AM to 801-224-3754 (hereinafter 39th Call),

February 13, 2006, to 801-224-3754 (hereinafter 40th Call),

February 15, 2006, to 801-224-3754 (hereinafter 41st Call),

February 16, 2006, at 4:55 PM to 801-224-3764 (hereinafter 42nd Call),

February 16, 2006, at 5:01 PM to 801-224-3764 (hereinafter 43rd Call),

February 16, 2006, at 5:07 PM to 801-224-3764 (hereinafter 44th Call),

February 22, 2006 at 8:03 AM to 801-224-3754 (hereinafter 45th Call),

February 22, 2006 at 11:41 AM to 801-224-3754 (hereinafter 46th Call),

March 7, 2006 to 801-224-3764 (hereinafter 47th Call),

March 14, 2006 to 801-224-3764 (hereinafter 48th Call),

March 21, 2006 to 801-224-3764 (hereinafter 49th Call),

March 31, 2006 at 6:00 PM to 801-224-3764 (hereinafter 50th Call),

March 31, 2006 at 7:01 PM to 801-224-3754 (hereinafter 51st Call),

April 12, 2006 at 1:54 PM to 801-224-3754 (hereinafter 52nd Call),

April 18, 2006 at 7:45 PM to 801-224-3754 (hereinafter 53rd Call),

April 28, 2006 at 4:20 PM to 801-224-3764 (hereinafter 54th Call),

May 4, 2006 at 5:55 PM to 801-224-3754 (hereinafter 55th Call),

May 11, 2006 at 6:41 PM to 801-224-3754 (hereinafter 56th Call),

May 15, 2006 at 3:24 PM to 801-224-3764 (hereinafter 57th Call),

June 1, 2006 at 12:11 PM to 801-224-3754 (hereinafter 58th Call),

June 2, 2006 at 1:39 PM to 801-224-3764 (hereinafter 59th Call),

June 12, 2006 at 6:27 PM to 801-224-3764 (hereinafter 60th Call),

June 22, 2006 at 5:16 PM to 801-224-3764 (hereinafter 61st Call),

June 28, 2006 at 4:35 PM to 801-224-3754 (hereinafter 62nd Call),

July 13, 2006 at 7:41 PM to 801-224-3754 (hereinafter 63rd Call),

July 13, 2006 at 8:17 PM to 801-224-3754 (hereinafter 64th Call),

July 14, 2006 at 11:58 AM to 801-224-3754 (hereinafter 65th Call),

July 26, 2006 at 10:47 AM to 801-224-3754 (hereinafter 66th Call),

August 9, 2006 at 4:51 PM to 801-224-3754 (hereinafter 67th Call),

August 11, 2006 at 12:17 PM to 801-224-3754 (hereinafter 68th Call),

August 11, 2006 at 1:40 PM to 801-224-3764 (hereinafter 69th Call),

August 15, 2006 at 11:59 AM to 801-224-3754 (hereinafter 70th Call) and

August 17, 2006 at 1:21 PM to 801-224-3764 (hereinafter 71st Call).

21. Plaintiff has settled the 6th, 8th and 53rd Calls.

22. References to settled calls have been removed from the causes of action.

23. Upon information and belief:

Echostar Satellite, LLC made calls 1, 38, 39, 41, 45, 46, 48, 49, 52, 58 and 62;

Aloha Communications made calls 18 and 20;

American Satellite made calls 28, 29, 30, 31, 32, 35, 40, 50, 54, 55, 57, 59, 60 and 61;

Arial Wireless made calls 2, 3, 4, 5;

EBN Financial made call 6;

DishPronto, Inc. made call 47;

Discount Communications made calls 21 and 56;

Marketing Guru made call 51;

On-Site Satellite East, LLC made calls 63 and 64;

Planet Earth Satellite, Inc made calls 8 and 53;

Satellite Country made calls 10 and 11 ;

Satellite Systems Network made calls 24 and 25;

Sterling Satellite, LLC or Sterling Commerce Group, Inc made calls 36, 65, 66 and 67;

Techstar Satellite made call 7;

United Satellite made calls 27, 34, 37, 68, 69 and 71;

Vision Satellite made call 26.

24. Entities not positively identified but which represented themselves under various names (duplicates exist because caller used more than one name during a conversation) are:

Direct Satellite made calls 9 and 14;

Direct Satellite Network made call 19;

Direct Promotions made call 9;

Dish Satellite Network made calls 16 and 17;

Dish Satellite made calls 42, 43 and 44;

Satellite Promotions made calls 9 and 22;

Satellite Center made call 12;

Satellite Solutions Network made call 15.

25. Entities not yet identified made calls 13, 23, 33 and 70.

26. Plaintiff received other calls from Defendant and/or it's Agents which were not documented following Plaintiff's do not call requests.

27. Plaintiff has received other calls from Echostar and/or it distributors which were documented but which are not included in the complaint.

28. There was no established business relationship for the purposes of telemarketing between the Plaintiff and any Defendant at the time of the calls.

29. Defendants initiated each call without meeting the minimum requirements for placing telemarketing calls.

30. During the 14th, 15th, 19th, 22nd, 23rd, 24th, 25th and 27th calls, the Defendant and/or their Agents failed to properly identify the solicitor by not providing any name.

31. During the 1st, 2nd, 4th, 5th, 7th, 8th, 9th, 12th, 26th, 28th, 29th, 30th, 34th, 35th, 36th, 37th, 38th, 40th, 41st, 46th, 47th, 48th, 49th, 50th, 51st, 54th, 55th, 56th, 61st, 62nd, 65th, 68th, and 71st Calls, the Defendant and/or their Agents provided only a first name.

32. During the 6th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 19th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 47th, 50th, 51st, 54th, 55th, 57th, 59th, and 60th Calls, the Defendant and/or their Agents failed to properly identify the entity on whose behalf the solicitation was made.

33. During the 1st, 2nd, 4th, 5th, 7th, 8th, 9th, 10th, 12th, 14th, 15th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 41st, 42nd, 43rd, 47th, 48th, 49th, 50th, 54th, 55th, 57th, 58th, 59th, 60th, 61st, 62nd, 65th, 66th, 67th, 68th,

69th, 70th, 71st Calls, the Defendant and/or their Agents failed to provide a telephone number or address of the business on whose behalf the calls were made.

34. The 6th, 9th, 10th, 11th, 14th, 15th, 16th, 19th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 47th, 50th, 54th, 55th, 57th,59th, 60th, 61st, 65th, 66th, 67th, 68th, 69th, and 71st Calls were placed by the Defendant and/or their Agents using an automated or prerecorded voice system.

35. During each call the Defendant and/or their Agents used an automated dialing system.

36. The calls were commercial in nature and constituted a solicitation and/or contained an unsolicited advertisement.

37 During the 1st, 2nd, 4th, 5th, 7th, 8th, 12th, 18th, 20th, 21st, 24th, 26th, 29th, 41st, 42nd, 43rd, 48th, 49th, 57th, 58th, 59th, 60th, 61st, 62nd, 64th, 71st Calls, Plaintiff requested that he not be called again and/or be added to the Defendant's do not call list and that no further solicitations take place.

38. Plaintiff made do not call requests of Dish customer service for line 801-224-3754 on November 9, 2005, December 23, 2005, January 30, 2006, February 8, 2006, February 17, 2006, February 22, 2006, April 3, 2006, May 13, 2006, July 14, 2006 and a do not call request for line 801-224-3764 on February 10, 2006, March 9, 2006, March 16, 2006, June 6, 2006, June 19, 2006 and August 19, 2006.

39. During each of these requests the Defendant and/or their Agents failed to properly record a do-not-call request and/or failed to place the number on the company specific do not call list at the time the request was made.

40. The Defendant and/or their Agents failed to honor a previous do-not-call request for five years by making the 2nd, 3rd, 4th, 5th, 6th, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 53rd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 71st Calls.

41. Plaintiff requested a written do-not-call policy during the 1st, 2nd, 4th, 5th, 7th, 8th, 12th, 18th, 20th, 21st, 24th, 26th, 29th, 41st, 48th, 49th, 58th, and 71st Calls, and during Plaintiff's calls to customer service on November 9, 2005, December 23, 2005, January 30, 2006, February 17, 2006, March 9, 2006, June 6, 2006, and June 19, 2006.

42. Plaintiff never received a valid written do not call policy as a result of any of these requests.

43. Plaintiff received two apology letters from Dish but no do not call policy.

44. The Defendants' and/or their Agents employees involved in telemarketing were not properly trained in the existence of and proper use of a do-not-call list for each call.

45. The Defendant and/or their Agents failed to display a phone number, at which a do not call request can be placed, on caller ID during the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 44th, 47th, 50th, 51st, 54th, 55th, 56th, 57th, 59th, 62nd, 65th, 66th, 67th, 68th, 69th, 70th, 71st Calls.

46. The Defendant and/or their Agents failed to display the name of the entity on caller

ID during the 6th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls.

47. The Defendants and/or their Agents blocked their caller ID information from being displayed during the 43rd and 44th Calls.

48. The Defendant and/or their Agents abandoned four calls to the Plaintiff which were in excess of the 3% of all calls made by the Defendant over the previous 30 days during the 31st, 32nd, 44th, 53rd and 63rd Calls.

49. The Defendant and/or their Agents failed to identify the entity after abandoning the call during the 31st, 32nd, 44th, 53rd and 63rd Calls.

50. The Defendant and/or their Agents failed to provide a phone number at which a do not call request could be placed after abandoning the call during the 31st, 32nd, 44th, 53rd and 63rd Calls.

51. The Defendant and/or their Agents failed to notify the consumer that the call was a telemarketing call after abandoning the call during the 31st, 32nd, 44th, 53rd and 63rd Calls.

52. The Defendant and/or their Agents withheld caller ID information during the 1st Call.

53. The Defendant and/or their Agents failed to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase during the 25th, 28th, 34th, 35th, 36th, 37th, 38th, 40th, 46th, 47th, 48th, 51st, 56th, 59th, 64th, 65th and 71st Calls.

54. Upon information and belief, Defendant's Agents were not registered with the Utah

Division of Consumer Protection as required by UTAH CODE ANN. §13-26-3 at the time of the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 44th, 47th, 50th, 51st, 53rd 54th, 55th, 56th, 57th, 59th, 60th, 61st, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls.

55 The Defendants and/or their Agents caused or permitted their solicitor to solicit on behalf of a company that was not registered with the Division of Consumer Protection as required by UTAH CODE ANN. §13-26-3 during the 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 44th, 47th, 50th, 51st, 53rd, 54th, 55th, 56th, 57th, 59th, 60th, 61st, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls.

56. The Defendant and/or their Agents caused or permitted their solicitor to make or cause to be made a false material statement during the 6th, 9th, 12th, 14th, 15th, 16th, 17th, 19th, 21st, 22nd, 24th, 27th, 34th, 37th, 42nd, 43rd, 44th, 51st, 60th, 65th, 68th and 71st Calls by providing a false business name.

57. Defendant and/or their Agents committed all alleged violations willfully or knowingly.

FIRST CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Initiating Call Without Proper Procedures)

58. The foregoing paragraphs are incorporated herein by reference.

59. The actions of Defendant and/or their Agents, by initiating each call without first

having minimum proper procedures in place, violated 47 CFR 64.1200(d).

60. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $34,000 ($500 per violation) for 68 violations or actual monetary loss, whichever is greater.

61. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $102,000.

SECOND CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Initiating Call Without Proper Procedures)

62. The foregoing paragraphs are incorporated herein by reference.

63. The actions of Defendant and/or their Agents, by initiating each call without first having minimum proper procedures in place, violated UTAH CODE ANN. §13-25a-103(4).

64. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $34,000 ($500 per violation) for 68 violations and to recover court costs and reasonable attorney fees.

THIRD CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Identify Solicitor)

65. The foregoing paragraphs are incorporated herein by reference.

66. The actions of Defendant and/or their Agents, by failing to identify themselves during the 14th, 15th, 19th, 22nd, 23rd, 24th, 25th and 27th calls, violated 47 CFR 64.1200(d)(4)

67. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $4,000 ($500 per violation) for eight violations or actual monetary loss, whichever is greater.

68. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $12,000.

FOURTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Identify Solicitor)

69. The foregoing paragraphs are incorporated herein by reference.

70. The actions of Defendant and/or their Agents, by failing to properly identify themselves during the 14th, 15th, 19th, 22nd, 23rd, 24th, 25th and 27th calls, violated UTAH CODE ANN. §13-25a-103(5)(a).

71. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $4,000 ($500 per violation) for eight violations and to recover court costs and reasonable attorney fees.

FIFTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Identify Entity)

72. The foregoing paragraphs are incorporated herein by reference.

73. The actions of Defendant and/or their Agents, by failing to identify the entity on whose behalf the 9th, 10th, 11th, 12th, 14th, 15th, 19th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 47th, 50th, 54th, 55th, 57th, 59th, and 60th Calls were made, violated 47 CFR 64.1200(d)(4).

74. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $15,000 ($500 per violation) for thirty violations or actual monetary loss, whichever is greater.

75. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $45,000.

SIXTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Identify Entity)

76. The foregoing paragraphs are incorporated herein by reference.

77 The actions of Defendant and/or their Agents, by failing to properly identify the entity on whose behalf the 9th, 10th, 11th, 12th, 14th, 15th, 19th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 47th, 50th, 54th, 55th, 57th, 59th, and 60th Calls were made, violated UTAH CODE ANN. §13-25a-103(5)(b).

78. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $15,000 ($500 per violation) for thirty violations and to recover court costs and reasonable attorney fees.

SEVENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Provide Phone Number or Address)

79. The foregoing paragraphs are incorporated herein by reference.

80. The actions of Defendant and/or their Agents, by failing to provide the telephone number or address of the entity on whose behalf the 1st, 2nd, 4th, 5th, 7th, 9th, 10th, 12th, 14th, 15th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 41st, 42nd, 43rd, 47th, 48th, 49th, 50th, 54th, 55th, 57th, 58th, 59th, 60th, xx61st, 62nd, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls were made, violated 47 CFR 64.1200(d)(4).

81. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $25,000 ($500 per violation) for fifty violations or actual monetary loss, whichever is greater.

82. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $75,000.

EIGHTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Provide Phone Number or Address)

83 The foregoing paragraphs are incorporated herein by reference.

84. The actions of Defendant and/or their Agents, by failing to provide the telephone number or address of the entity on whose behalf the 1st, 2nd, 4th, 5th, 7th, 9th, 10th, 12th, 14th, 15th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 41st, 42nd, 43rd, 47th, 48th, 49th, 50th, 54th, 55th, 57th, 58th, 59th, 60th, 61st, 62nd, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls were made, violated UTAH CODE ANN. §13-25a-103(4).

85. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $25,000 ($500 per violation) for fifty violations and to recover court costs and reasonable attorney fees

NINTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Prerecorded or Artificial Voice)

86. The foregoing paragraphs are incorporated herein by reference.

87. The actions of Defendant and/or their Agents, by making the 9th, 10th, 11th, 14th, 15th, 16th, 19th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 47th, 50th, 54th, 55th, 57th, 59th, 60th, 61st, 65th, 66th, 67th, 68th, 69th, and 71st Calls to a residential telephone line using a prerecorded or artificial voice, violated 47 U.S.C. §227(b)(1)(B).

88. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $17,500 ($500 per violation) for thirty-six violations or actual monetary loss, whichever is greater.

89. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations

willful or knowing, it should award treble damages in the amount of $52,500.

TENTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Prerecorded or Artificial Voice)

90. The foregoing paragraphs are incorporated herein by reference.

91. The actions of Defendant and/or their Agents, by making the 9th, 10th, 11th, 14th, 15th, 16th, 19th, 22nd, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 33rd, 34th, 35th, 36th, 37th, 40th, 47th, 50th, 54th, 55th, 57th,59th, 60th, 61st, 65th, 66th, 67th, 68th, 69th, and 71st Calls with an automated dialing system using a prerecorded or artificial voice, violated UTAH CODE ANN. §13-25a-103(1).

92. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $17,500 ($500 per violation) for thirty-six violations and to recover court costs and reasonable attorney fees.

ELEVENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Record Do Not Call Request)

93 The foregoing paragraphs are incorporated herein by reference.

94. The actions of Defendant and/or their Agents, by failing to record a do not call request during the 1st, 2nd, 4th, 5th, 7th, 12th, 18th, 20th, 21st, 24th, 26th, 29th, 41st, 42nd, 43rd, 48th, 49th, 57th, 58th, 59th, 60th, 61st, 62nd, 64th and 71st Calls, and during fifteen calls to Defendant Dish's customer service, violated 47 CFR 64.1200(d)(3).

95. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $20,000 ($500 per violation) for forty violations or actual monetary loss, whichever is greater.

96. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations

willful or knowing, it should award treble damages in the amount of $60,000

TWELFTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Record Do Not Call Request)

97. The foregoing paragraphs are incorporated herein by reference.

98. The actions of Defendant and/or their Agents, by failing to record a do not call request during the 1st, 2nd, 4th, 5th, 7th, 8th, 12th, 18th, 20th, 21st, 24th, 26th, 29th, 41st, 42nd, 43rd, 48th, 49th, 57th, 58th, 59th, 60th, 61st, 62nd, 64th, 71st Calls, and during fifteen calls to Defendant Dish's customer service, violated UTAH CODE ANN. §13-25a-103(4).

99. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $20,000 ($500 per violation) for forty violations and to recover court costs and reasonable attorney fees.

THIRTEENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Honor a Do Not Call Request)

100. The foregoing paragraphs are incorporated herein by reference.

101. The actions of Defendant and/or their Agents, by making all calls except the 1st, and 8th Calls, after having received a do not call request, violated 47 CFR 64.1200(d)(6).

102. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $33,500 ($500 per violation) for sixty-seven violations or actual monetary loss, whichever is greater.

103. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $100,500.

FOURTEENTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Honor a Do Not Call Request)

104. The foregoing paragraphs are incorporated herein by reference.

105. The actions of Defendant and/or their Agents, by failing to honor a do not call request by making all calls except for the 1st and 8th, violated UTAH CODE ANN. §13-25a-103(4).

106. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $33,500 ($500 per violation) for sixty-seven violations and to recover court costs and reasonable attorney fees.

FIFTEENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Send A Requested Do Not Call Policy)

107. The foregoing paragraphs are incorporated herein by reference.

108. The actions of Defendant and/or their Agents, by failing to send a do not call policy when requested during the 1st, 2nd, 4th, 5th, 7th, 12th, 18th, 20th, 21st, 24th, 26th, 29th, 41st, 48th, 49th, 58th, and 71st Calls, and during Plaintiff's calls to customer service on November 9, 2005, December 23, 2005, January 30, 2006, February 17, 2006, March 9, 2006, June 6, 2006, June 19, 2006 and August 19, 2006 violated 47 CFR 64.1200(d)(1).

109. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $12,500 ($500 per violation) for twenty-five violations or actual monetary loss, whichever is greater.

110. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $37,5000.

SIXTEENTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Send A Requested Do Not Call Policy)

111. The foregoing paragraphs are incorporated herein by reference.

112. The actions of Defendant and/or their Agents, by failing to send a do not call policy when requested during the 1st, 2nd, 4th, 5th, 7th, 12th, 18th, 20th, 21st, 24th, 26th, 29th, 41st, 48th, 49th, 58th, and 71st Calls, and during Plaintiff's calls to customer service on November 9, 2005, December 23, 2005, January 30, 2006, February 17, 2006, March 9, 2006, June 6, 2006, and June 19, 2006, violated UTAH CODE ANN. §13-25a-103(4).

113. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $12,500 ($500 per violation) for twenty-five violations and to recover court costs and reasonable attorney fees.

SEVENTEENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure to Train Telemarketing Personnel)

114. The foregoing paragraphs are incorporated herein by reference.

115. The actions of Defendant and/or their Agents, by failing to train all telemarketing personnel involved with each of the calls whether directly or indirectly, in the existence and use of a do not call list, violated 47 CFR 64.1200(d)(2).

116. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $33,500 ($500 per violation) for sixty-seven violations or actual monetary loss, whichever is greater.

117. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $100,500.

EIGHTEENTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Train Telemarketing Personnel)

118. The foregoing paragraphs are incorporated herein by reference.

119. The actions of Defendant and/or their Agents, by failing to train telemarketing personnel involved with each of the calls whether directly or indirectly, in the existence and use of a do not call list, violated UTAH CODE ANN. §13-25a-103(4).

120. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $33,500 ($500 per violation) for sixty-nine violations and to recover court costs and reasonable attorney fees.

NINETEENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure To Provide A Telephone Number On Caller ID)

121. The foregoing paragraphs are incorporated herein by reference.

122. The actions of Defendant and/or their Agents, by failing to provide on caller ID a telephone number at which a do not call request could be made during the 7th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 44th, 47th, 50th, 51st, 54th, 55th, 56th, 57th, 59th, 62nd, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls, violated 47 CFR 64.1601(e)(i).

123. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $23,000 ($500 per violation) for forty-six violations or actual monetary loss, whichever is greater.

124. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $69,000.

TWENTIETH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure To Provide A Telephone Number On Caller ID)

125. The foregoing paragraphs are incorporated herein by reference.

126. The actions of Defendant and/or their Agents, by failing to provide on caller ID a telephone number at which a do not call request could be made during the 7th, 9th, 10th, 11th, 12th, 14th, 15th, 16th, 17th, 19th, 20th, 21st, 23rd, 24th, 25th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 44th, 47th, 50th, 51st, 54th, 55th, 56th, 57th, 59th, 62nd, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls, violated UTAH CODE ANN. §13-25a-103(4).

127. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $23,000 ($500 per violation) for forty-six violations and to recover court costs and reasonable attorney fees.

TWENTY-FIRST CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Failure To Provide A Company Name On Caller ID)

128 The foregoing paragraphs are incorporated herein by reference.

129. The actions of Defendant and/or their Agents, by failing to provide on caller ID the company name of the calling entity during the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls, violated 47 CFR 64.1200(e)(i).

130 Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $30,000 ($500 per violation) for sixty violations or actual monetary loss, whichever is greater.

131. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $90,000.

TWENTY-SECOND CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure To Provide A Company Name On Caller ID)

132. The foregoing paragraphs are incorporated herein by reference.

133. The actions of Defendant and/or their Agents, by failing to provide on caller ID the company name of the calling entity during the 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 19th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th, 41st, 42nd, 43rd, 44th, 45th, 46th, 47th, 48th, 49th, 50th, 51st, 52nd, 54th, 55th, 56th, 57th, 58th, 59th, 60th, 61st, 62nd, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls, violated UTAH CODE ANN. §13-25a-103(4) and UTAH CODE ANN. 13-25a-103(6).

134. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $30,000 ($500 per violation) for sixty violations and to recover court costs and reasonable attorney fees.

TWENTY-THIRD CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Blocking Caller ID)

135. The foregoing paragraphs are incorporated herein by reference.

136. The actions of Defendant and/or their Agents, by blocking caller ID during the 43rd and 44th Calls, violated 47 CFR 64.1601(e)(ii).

137. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $1,000 ($500 per violation) for two violations or actual monetary loss, whichever is greater.

138. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations

willful or knowing, it should award treble damages in the amount of $3,000.

TWENTY-FOURTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Blocking Caller ID)

139. The foregoing paragraphs are incorporated herein by reference.

140. The actions of Defendant and/or their Agents, by blocking caller ID information during the 43rd and 44th Calls, violated UTAH CODE ANN. §13-25a-103(4).

141. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $1,000 ($500 per violation) for two violations and to recover court costs and reasonable attorney fees.

TWENTY-FIFTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Abandoned Call In Excess Of 3%)

142. The foregoing paragraphs are incorporated herein by reference.

143. The actions of Defendant and/or their Agents, by abandoning calls in excess of 3% during the 31st, 32nd, 44th and 63rd Calls, violated 47 CFR 64.1200(a)(6).

144. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations or actual monetary loss, whichever is greater.

145. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $6,000.

TWENTY-SIXTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Abandoned Call In Excess Of 3%)

146. The foregoing paragraphs are incorporated herein by reference.

147. The actions of Defendant and/or their Agents, by abandoning calls in excess of 3%

during the 31st, 32nd, 44th and 63rd Calls, violated UTAH CODE ANN. §13-25a-103(4).

148. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations and to recover court costs and reasonable attorney fees.

TWENTY-SEVENTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Abandoned Call Failure To Provide Company Name In Message)

149. The foregoing paragraphs are incorporated herein by reference.

150. The actions of Defendant and/or their Agents, by failing to provide an entity name in an abandoned call message during the 31st, 32nd, 44th and 63rd Calls, violated 47 CFR 64.1200(a)(6).

151. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations or actual monetary loss, whichever is greater.

152. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $6,000.

TWENTY-EIGHTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Abandoned Call Failure To Provide Company Name In Message)

153 The foregoing paragraphs are incorporated herein by reference.

154. The actions of Defendant and/or their Agents, by failing to provide an entity name in an abandoned call message during the 31st, 32nd, 44th and 63rd Calls, violated UTAH CODE ANN. §13-25a-103(4).

155. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations and to recover court costs and reasonable attorney fees.

TWENTY-NINTH CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Abandoned Call Failure To Provide Telephone Number In Message)

156. The foregoing paragraphs are incorporated herein by reference.

157. The actions of Defendant and/or their Agents, by failing to provide a telephone number at which a do not call request could be placed in an abandoned call message during the 31st, 32nd, 44th and 63rd Calls, violated 47 CFR 64.1200(a)(6).

158. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations or actual monetary loss, whichever is greater.

159. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $6,000.

THIRTIETH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Abandoned Call Failure To Provide Telephone Number In Message)

160. The foregoing paragraphs are incorporated herein by reference.

161. The actions of Defendant and/or their Agents, by failing to provide a telephone number at which a do not call request could be placed in an abandoned call message during the 31st, 32nd and 44th Calls, violated UTAH CODE ANN. §13-25a-103(4).

162. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations and to recover court costs and reasonable attorney fees.

THIRTY-FIRST CAUSE OF ACTION
VIOLATION OF 47 U.S.C. §227
(Abandoned Call Failure To Identify Call As A Telemarketing Call)

163. The foregoing paragraphs are incorporated herein by reference.

164. The actions of Defendant and/or their Agents, by failing to notify consumer that the call was a telemarketing call in an abandoned call message during the 31st, 32nd and 44th Calls, violated 47 CFR 64.1200(a)(6).

165. Pursuant to 47 U.S.C. §227(b)(3)(B), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations or actual monetary loss, whichever is greater.

166. Pursuant to 47 U.S.C. §227(b)(3), if the Court should find Defendants violations willful or knowing, it should award treble damages in the amount of $6,000.

THIRTY-SECOND CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Abandoned Call Failure To Identify Call As A Telemarketing Call)

167. The foregoing paragraphs are incorporated herein by reference.

168. The actions of Defendant and/or their Agents, by failing to notify consumer that the call was a telemarketing call in an abandoned call message during the 31st, 32nd and 44th Calls, violated UTAH CODE ANN. §13-25a-103(4).

169. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $2,000 ($500 per violation) for four violations and to recover court costs and reasonable attorney fees.

THIRTY-THIRD CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Withholding Caller ID Information)

170. The foregoing paragraphs are incorporated herein by reference.

171. The actions of Defendant and/or their Agents, by withholding caller identification during the 1st Call, violated UTAH CODE ANN. §13-25a-103(6).

172. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $500

for one violation and to recover court costs and reasonable attorney fees.

THIRTY-FOURTH CAUSE OF ACTION
VIOLATION OF THE UTAH TELEPHONE SOLICITATION AND FACSIMILE ACT
(Failure to Discontinue Solicitation When Asked)

173. The foregoing paragraphs are incorporated herein by reference.

174. The actions of Defendant and/or their Agents, by failing to discontinue the solicitation when requested during the 41st and 42nd calls, violated UTAH CODE ANN. §13-25a-103(5)(d).

175. Pursuant to UTAH CODE ANN. §13-25a-107(2), Plaintiff is entitled to recover $1,000 for two violations and to recover court costs and reasonable attorney fees.

THIRTY-FIFTH CAUSE OF ACTION
VIOLATION OF THE UTAH CONSUMER SALES PRACTICES ACT
(Failure To Notify Consumer Of Rescission Rights)

176. The foregoing paragraphs are incorporated herein by reference.

177. The actions of Defendant and/or their Agents, by failing to notify consumer of their rescission rights during the 25th, 28th, 34th, 35th, 36th, 37th, 38th, 40th, 46th, 47th, 48th, 51st, 56th, 59th, 64th, 65th and 71st Calls, violated UTAH CODE ANN. §13-11-4(2)(m).

178. Pursuant to UTAH CODE ANN. §13-11-19(2), Plaintiff is entitled to recover $34,000 ($2000 per violation) for seventeen violations and to recover court costs.

179. Pursuant to UTAH CODE ANN. §13-11-19(5)(a) Plaintiff is entitled to recover reasonable attorney fees.

THIRTY-SIXTH CAUSE OF ACTION
VIOLATIONS OF THE UTAH TELEPHONE FRAUD PROTECTION ACT

180. The foregoing paragraphs are incorporated herein by reference.

181. The actions of Defendant and/or their Agents, by failing to be registered with the Utah

Division of Consumer Protection, using a fictitious name, making an untrue material statement, or having caused or permitted a solicitor to violate any provision of UTAH CODE ANN. §13-26-11 at the time of the 2nd, 3rd, 4th, 5th, 7th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 40th, 42nd, 43rd, 44th, 47th, 50th, 51st, 54th, 55th, 56th, 57th, 59th, 60th, 61st, 63rd, 64th, 65th, 66th, 67th, 68th, 69th, 70th and 71st Calls, violated UTAH CODE ANN. §13-26-11.

182. Pursuant to UTAH CODE ANN. §13-26-8(2), Plaintiff is entitled to recover $12,000 ($2,000 per transaction prior to May 2005) for calls 2, 3, 4, 5, 7, 9, and $127,500 ($2,500 per transaction) for fifty-one transactions in violation of the Utah Telephone Fraud Protection Act. Total amount requested for this cause of action is $143,500.

THIRTY-SEVENTH CAUSE OF ACTION
PUNITIVE DAMAGES

183. Inasmuch as the Calls were willful, wanton and made without regard to the rights of the Plaintiff, pursuant to UTAH CODE ANN. §78-18-1(1)(a) Plaintiff is entitled to punitive damages.

WHEREFORE, Plaintiff requests as follows:

1. On Plaintiff's First Cause of Action, judgment in the amount of $102,000.

2. On Plaintiff's Second Cause of Action, judgment in the amount of $34,000 plus Plaintiff's reasonably incurred attorney's fees and Court costs.

3. On Plaintiff's Third Cause of Action, judgment in the amount of $12,000.

4. On Plaintiff's Fourth Cause of Action, judgment in the amount of $4,000 plus Plaintiff's reasonably incurred attorney fees and Court costs

5. On Plaintiff's Fifth Cause of Action, judgment in the amount of $45,000.

6. On Plaintiff's Sixth Cause of Action, judgment in the amount of $15,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

7. On Plaintiff's Seventh Cause of Action, judgment in the amount of $75,000

8. On Plaintiff's Eighth Cause of Action, judgment in the amount of $25,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

9. On Plaintiff's Ninth Cause of Action, judgment in the amount of $52,500.

10. On Plaintiff's Tenth Cause of Action, judgment in the amount of $17,500 plus Plaintiff's reasonably incurred attorney fees and Court costs.

11. On Plaintiff's Eleventh Cause of Action, judgment in the amount of $60,000.

12. On Plaintiff's Twelfth Cause of Action, judgment in the amount of $20,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

13. On Plaintiff's Thirteenth Cause of Action, judgment in the amount of $100,500.

14. On Plaintiff's Fourteenth Cause of Action, judgment in the amount of $33,500 plus Plaintiff's reasonably incurred attorney fees and Court costs.

15. On Plaintiff's Fifteenth Cause of Action, judgment in the amount of $37,500.

16. On Plaintiff's Sixteenth Cause of Action, judgment in the amount of $12,500 plus Plaintiff's reasonably incurred attorney fees and Court costs

17. On Plaintiff's Seventeenth Cause of Action, judgment in the amount of $100,500.

18. On Plaintiff's Eighteenth Cause of Action, judgment in the amount of $33,500 plus Plaintiff's reasonably incurred attorney fees and Court costs.

19. On Plaintiff's Nineteenth Cause of Action, judgment in the amount of $69,000.

20. On Plaintiff's Twentieth Cause of Action, judgment in the amount of $23,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

21. On Plaintiff's Twenty-first Cause of Action, judgment in the amount of $90,000.

22. On Plaintiff's Twenty-second Cause of Action, judgment in the amount of $30,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

23. On Plaintiff's Twenty-third Cause of Action, judgment in the amount of $3,000.

24. On Plaintiff's Twenty-fourth Cause of Action, judgment in the amount of $1,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

25. On Plaintiff's Twenty-fifth Cause of Action, judgment in the amount of $6,000.

26. On Plaintiff's Twenty-sixth Cause of Action, judgment in the amount of $2,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

27. On Plaintiff's Twenty-seventh Cause of Action, judgment in the amount of $6,000.

28. On Plaintiff's Twenty-eighth Cause of Action, judgment in the amount of $2,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

29. On Plaintiff's Twenty-ninth Cause of Action, judgment in the amount of $6,000.

30. On Plaintiff's Thirtieth Cause of Action, judgment in the amount of $2,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

31. On Plaintiff's Thirty-first Cause of Action, judgment in the amount of $6,000.

32. On Plaintiff's Thirty-second Cause of Action, judgment in the amount of $2,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

33. On Plaintiff's Thirty-third Cause of Action, judgment in the amount of $500 plus

Plaintiff's reasonably incurred attorney fees and Court costs.

34. On Plaintiff's Thirty-fourth Cause of Action, judgment in the amount of $1,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

35. On Plaintiff's Thirty-fifth Cause of Action, judgment in the amount of $34,000 plus Plaintiff's reasonably incurred attorney fees and Court costs.

36. On Plaintiff's Thirty-sixth Cause of Action, judgment in the amount of $139,500.

37. The total amount of statutory damages requested is $1,203,000

38. On Plaintiff's Thirty-seventh Cause of Action, judgment of punitive damages for particularly egregious misconduct, sufficient to cause Defendants to comply with 47 U.S.C §227, UTAH CODE ANN. §13-25a-1 *et seq.*, UTAH CODE ANN. §13-26-1 *et seq.* and UTAH CODE ANN. §13-11-1 *et seq.*.

39. Pursuant to 47 U.S.C§ §227(b)(3)(A), UTAH CODE ANN. §13-25a-107(2)(c) and UTAH CODE ANN. §13-11-19(1)(b), Plaintiff asks the court to enjoin Defendant from committing further violations of 47 U.S.C §227, UTAH CODE ANN. §13-25a-1 *et seq.*, AND UTAH CODE ANN. §13-11-1 *et seq* .

40 Plaintiff asks the court for mandatory attorney's fees for each federal cause of action filed under 47 U.S.C. §227 pursuant to 47 U.S.C. §206.

41. For such other and further relief as the Court deems just and equitable.

42. Total amount of statutory damages requested is $1,203,000 plus attorneys fees and court costs.

IN THE EVENT OF DEFAULT:

43. Defendant Echostar Satellite, LLC to pay $505,000 in statutory damages for violations committed during calls 1, 7, 9, 12, 13, 14, 15, 16, 17, 19, 22, 23, 26, 33, 38, 39, 41, 42, 43, 44,45, 46, 48, 49, 51, 52, 58, 62 and 70 plus $6,550,000 in punitive damages for extremely egregious conduct;

44. Defendant Aloha Communications, LLC to pay $29,000 in statutory damages for violations committed during calls 18 and 20;

45. Defendant American Satellite, Inc. $279,000 in statutory damages for violations committed during calls 28, 29, 30, 31, 32, 35, 40, 50, 54, 55, 57, 59, 60 and 61 plus $558,000 in punitive damages for very egregious conduct;

46. Defendant Arial Wireless, Inc to pay $50,000 in statutory damages for violations committed during calls 2, 3, 4, 5 plus $50,000 in punitive damages for somewhat egregious conduct;

47. Defendant DishPronto, Inc. to pay $18,500 in statutory damages for violations committed during call 47;

48. Defendant Discount Communications to pay $33,000 in statutory damages for violations committed during calls 21 and 56;

49. Defendant Marketing Guru to pay $4,500 in statutory damages for violations committed during call 51;

50. Defendant On Site Satellite East, LLC to pay $33,000 damages for violations committed during calls 63 and 64;

51. Defendant Satellite Country, Inc. to pay $35,000 in statutory damages for violations

committed during calls 10 and 11;

52. Defendant Satellite Systems Network, LLC to pay $22,500 in statutory damages for violations committed during calls 24 and 25;

53. Defendant Sterling Commerce Group, Inc., Sterling Satellite, LLC to pay $72,000 in statutory damages for violations committed during calls 36, 65, 66 and 67 plus $144,000 in punitive damages for very egregious conduct;

54. Defendant United Satellite, Inc to pay $117,000 in statutory damages for violations committed during calls 27, 34, 37, 68, 69 and 71 plus $234,000 in punitive damages for very egregious conduct.

DATED THIS 25 day of September, 2006.

CRIPPEN & CLINE, L.C.

David C. Blum
Attorney for Plaintiff

Filters Used:

Billing Report

Form Format

Date Printed: **11/05/2006**
Time Printed: **12:06PM**
Printed By: **LMW**

Date	**11/01/2006**	Time	**1:52PM**	**1:52PM**	Duration	**0.00**	(hours)	Code	**Billable Wor**						
Description	Calendaring & Scheduling Response date.							Staff	**Andree Robinson**						
Client	,				MatterRef	**Denysiak, Barbara**				MatterNo					
Reminders		Follow	**N**	Done	**N**	Notify	**N**	Hide	**N**	Trigger	**N**	Private	**N**	Status	
Time/Exp	T	Dur/Qty	**0.1**		Bill Qty	**0**				Rate/Price	**85**				
Dur/Qty	**0.1**							Bill Status	**B**						
Bill Qty	**0**							Hold	**N**						

Date	**11/01/2006**	Time	**1:52PM**	**1:52PM**	Duration	**0.00**	(hours)	Code	**Billable Wor**						
Description	Administration, set up/review of documents							Staff	**Andree Robinson**						
Client	,				MatterRef	**Denysiak, Barbara**				MatterNo					
Reminders		Follow	**N**	Done	**N**	Notify	**N**	Hide	**N**	Trigger	**N**	Private	**N**	Status	
Time/Exp	T	Dur/Qty	**0.2**		Bill Qty	**0**				Rate/Price	**85**				
Dur/Qty	**0.2**							Bill Status	**B**						
Bill Qty	**0**							Hold	**N**						

PX0221-086

DISTRICT OF MINNESOTA
COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
DISTRICT COURT

TYPE OF CASE: OTHER CIVIL

Mikhail Sheynker, Plaintiff vs. Dish Network Service L.L.C., Defendant	File No. **AMENDED COMPLAINT** JURY TRIAL DEMANDED

JURISDICTION

1. Venue is proper pursuant to Minn. Stat. § 542.09, because the cause of action or some part thereof arose in the County of Hennepin.

2. The court has subject matter jurisdiction pursuant to 47 U.S.C. § 227(b)(3), Minn. Stat. § 325E.31, and Minn. Stat. § 8.31, Subd. 3a.

FACTUAL ASSERTIONS

3. Defendant Dish Network Service L.L.C. is a corporation that is in the business of providing satellite dish television services.

4. Plaintiff is a resident of Hennepin County, who resides at 90 South Ninth Street # 1203, Minneapolis, MN 55402. Plaintiff has never had any business relationship with Defendant, has never received services from Defendant in general or at Plaintiff's address in particular.

5. On October 12, 2006, at about 7:31 p.m., Plaintiff received a phone call at 612-332-9699, which is Plaintiff's residential home phone number. The call was a pre-recorded advertising message. The message stated that it was "dish" calling about "satellite TV."

6. The pre-recorded message solicited Plaintiff to press "1" to obtain more information.

7. Plaintiff pressed "1" and was referred to a live representative.

8. Once Plaintiff mentioned to the live representative that he was prompted to contact the representative by the recorded message, the representative hung up.

9. The number from which the pre-recorded message was sent to Plaintiff is 702-818-2447, which is probably an autodialer's phone number, as it cannot be reached when dialed.

10. On October 17, 2006, at about 2:54 p.m., Plaintiff received the same pre-recorded message at his home phone number. The number from which the pre-recorded message of October 17,2006 was sent to Plaintiff is 800-232-3232, which is

probably an autodialer's phone number, as it cannot be reached when dialed.

11. Plaintiff pressed "1" and was referred to a live representative.

12. This time Plaintiff did not mention the pre-recorded message.

13. Plaintiff asked the live representative and was told that the name of the company offering the satellite television services was Dish Network.

14. On November 4, 2006, at about 10:40 a.m., Plaintiff received the same pre-recorded message discussed above at his home phone number. This time, Plaintiff recorded the message.

15. The artificial pre-recorded message said the following:

> "Hi, this is Jerry with Dish, the satellite TV company. I'll get right to the point. High installation, high receivers and remotes for up to four rooms, and the free DVR, and if you don't know what a DVR is, press "1", and our reps [sic] will tell you about it. It's awesome technology and it will change the way you watch TV. Basically, if you still have a cable provider for TV, we want your business and we'll go to great lengths to get it, by giving you all the equipment free that used to cost $ 2,000 and save you

money on a monthly basis going forward. It's a no brainer [sic]. We'll even give you an additional hundred bucks back if you sign up today. So with no obligation, press "1" to be connected to a customer service representative. It does not hurt to at least talk to us and learn more. Because I'm confident we can save you money and improve the way you watch TV. Give us a chance, press "1" now."

16. The number from which the pre-recorded message of November 4,2006 was sent to Plaintiff is 416-777-9181, which is probably an autodialer's phone number, as it cannot be reached when dialed.

17. On either November 23 or November 24, 2006, Plaintiff called Defendant at 800-333-3474 and talked to a live representative of Defendant. Plaintiff gave his full name and informed Defendant's representative that Plaintiff received pre-recorded messages advertising Defendant's services and that Plaintiff never authorized Defendant to send such messages to Plaintiff's residential address.

18. Defendant's representative asked Plaintiff for his phone number. Plaintiff said that his phone number was 612-332-9699. The representative said he wanted to check whether Plaintiff had a current account with Defendant. For some

reason, the representative did not enter the right number into the system and said that Defendant did not have in the system Plaintiff as a current customer. Plaintiff then asked Defendant's representative whether Plaintiff would have to put his number on Defendant's do-not-call list for the messages to stop coming, and Defendant's representative said "yes." Defendant's representative said that if Plaintiff did not put his phone number on the list, Plaintiff would still get message calls.

19. Plaintiff said that he wanted his number to be placed on the do-not-call list and reiterated his home phone number 612-332-9699. This time Defendant's representative got the number right, checked it again, and said that Defendant has a current customer with the phone number that is the same as Plaintiff's phone number. Plaintiff said that there was some mistake and that Plaintiff never signed up for any service with Defendant, and that 612-332-9699 is Plaintiff's phone number. The representative said that he would have to talk to his manager.

20. After talking to the manager, the representative told Plaintiff that Defendant would take care of everything and Plaintiff would not get any messages again. When asked to verify that Plaintiff would never get any messages from Defendant in the future, the representative said "never".

The representative then wished Plaintiff "Happy Thanksgiving", and the call ended.

21. On November 28, 2006 at 1:46 p.m., Plaintiff received another message advertising Defendant's services with the only apparent difference being that this message stated that it was "Brian with Dish." The number from which the message was sent was 202-552-6893, which is probably an autodialer, as it cannot be reached when dialed.

22. On December 4, 2006 at 7:50 p.m., Plaintiff received the same pre-recorded message that Plaintiff received on November 28. The number from which the message was sent was 202-552-6893, which is probably an autodialer, as it cannot be reached when dialed.

23. On December 5, 2006 at 3:20 p.m., Plaintiff received another pre-recorded message on behalf of Defendant. The number from which the message was sent was 416-477-9552, which is probably an autodialer, as it cannot be reached when dialed.

24. Prior to the six pre-recorded messages of October 12, October 17, November 4, November 28, December 4, and December 5 of which Plaintiff made a note, Plaintiff received several similar artificial messages advertising services provided by Defendant.

25. Plaintiff has reason to believe that Defendant is responsible for having sent Plaintiff said pre-recorded

artificial messages.

COUNT 1

26. Paragraphs 3 through 25 are incorporated herein.

27. Each call of October 12, October 17, November 4, November 28, December 4, and December 5 used an artificial or prerecorded voice.

28. Each call of October 12, October 17, November 4, November 28, December 4, and December 5 was made to Plaintiff's residential line.

29. Each call of October 12, October 17, November 4, November 28, December 4, and December 5 was made for a commercial purpose.

30. Each call of October 12, October 17, November 4, November 28, December 4, and December 5 constituted either an unsolicited advertisement or a telephone solicitation as it advertised Defendant's services and invited Plaintiff to contact Defendant for business services or purpose.

31. Defendant, who was the caller, did not have an established business relationship with Plaintiff at the time of each call, and Plaintiff never expressly allowed Defendant to call Plaintiff.

32. The calls of October 12, October 17, November 4, November 28, December 4, and December 5 were not made for emergency

purposes.

33. Therefore, each of Defendant's pre-recorded calls of October 12, October 17, November 4, November 28, December 4, and December 5 violated 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200 (a)(2), with the result that six violations of 47 U.S.C. § 227(b)(1)(B) and six violations of 47 C.F.R. § 64.1200 (a)(2) were effected by said message calls.

COUNT 2

34. Paragraphs 3 through 33 are herein incorporated.

35. None of the pre-recorded messages of October 12, October 17, November 4, November 28, December 4, and December 5 clearly stated the identity of the business that was responsible for initiating the phone call and the name under which the entity was registered to conduct business with the State Corporation Commission.

36. The statement that the call was from "Jerry [or Brian] with dish," "the satellite TV company," does not disclose the actual corporate identity of the business responsible for the call.

37. Therefore, each of Defendant's pre-recorded calls of October 12, October 17, November 4, November 28, December 4, and December 5 violated 47 C.F.R. § 64.1200 (b)(1), with the result that six violations of 47 C.F.R. § 64.1200 (b)(1) were effected by said message calls.

COUNT 3

38. Paragraphs 3 through 37 are herein incorporated.

39. None of the pre-recorded messages of October 12, October 17, November 4, November 28, December 4, and December 5 stated the phone number of the business initiating the phone call.

40. Therefore, each of Defendant's pre-recorded calls of October 12, October 17, November 4, November 28, December 4, and December 5 violated 47 C.F.R. § 64.1200 (b)(2), with the result that six violations of 47 C.F.R. § 64.1200 (b)(2) were effected by said message calls.

COUNT 4

41. Paragraphs 3 through 40 are herein incorporated.

42. None of the pre-recorded messages of October 12, October 17, November 4, November 28, December 4, and December 5 permitted Plaintiff to make a do-not-call request, because none of them included the phone number that could be used by the recipient of the message to make a do-not-call request as required under 47 C.F.R. § 64.1200 (b)(2).

43. Therefore, each of Defendant's pre-recorded calls of October 12, October 17, November 4, November 28, December 4, and December 5 violated 47 C.F.R. § 64.1200 (b)(2), with the result that six violations of 47 C.F.R. § 64.1200 (b)(2)

were effected by said message calls.

COUNT 5

44. Paragraphs 3 through 43 are herein incorporated.

45. Defendant failed to stop sending Plaintiff messages after Plaintiff asked Defendant to stop and after Defendant's representative said that Plaintiff would never receive the pre-recorded messages on behalf of Defendant again, thereby giving Plaintiff reason to believe that the messages were to stop immediately.

46. Therefore, each of the pre-recorded calls of November 28, December 4 and December 5, 2006 violated 47 C.F.R. § 64.1200(d)(3), with the result that three violations of 47 C.F.R. § 64.1200(d)(3) were effected by said messages.

COUNT 6

47. Paragraphs 3 through 46 are incorporated herein.

48. None of the pre-recorded messages of October 12, October 17, November 4, November 28, December 4, and December 5 was immediately preceded by a live operator who was required to obtain Plaintiff's consent before the pre-recorded message was to be delivered.

49. Plaintiff has not otherwise authorized the receipt of the messages.

50. The unauthorized artificial messages invaded Plaintiff's privacy and caused Plaintiff's irritation.

51. Therefore, Defendant's pre-recorded calls of October 12, October 17, November 4, November 28, December 4, and December 5 violated Minn. Stat. § 325E.27.

52. As a result, Plaintiff is entitled to be awarded damages that the Court finds appropriate pursuant to Minn. Stat. § 8.31, subd.3a, because Plaintiff suffered actual injury in the form of Defendant's infringement on Plaintiff's residential privacy, which it is the purpose of Minn. Stat. § 325E.27 to protect.

COUNT 7

53. Paragraphs 3 through 52 are herein incorporated.

54. Plaintiff asserts, and it is reasonable for Plaintiff to assert, that the violations enumerated in Counts 1-6 were either knowing or willful violations of 47 U.S.C.§ 227(b)(1)(B), 47 C.F.R. § 64.1200 (a)(2), 47 C.F.R. § 64.1200 (b)(1), 47 C.F.R. § 64.1200 (b)(2), 47 C.F.R. § 64.1200(d)(3) and Minn. Stat. § 325E.27.

55. Defendant is a sophisticated business entity catering to massive markets, and therefore has sophisticated marketing acumen and possesses extensive legal knowledge related to its activities, and should be aware of the prohibitions

enumerated in 47 U.S.C. § 227, 47 C.F.R. § 64.1200, and Minn. Stat. § 325E.27.

56. Plaintiff's receipt of at least six said messages from different autodialers is probably not an isolated event or a mistake, and Defendant causes the sending of numerous unsolicited pre-recorded messages to numerous residential numbers.

57. The mere fact that Defendant mistakenly believed it had Plaintiff's phone number on file as belonging to a customer is a simple fortuity that is not related to Defendant's recorded-message advertising method or campaign.

58. The message itself indicates it was addressed to people with whom Defendant does not have an existing business relationship: "...if you still have a cable provider...," "...we want your business...," "at least talk to us...," "...sign up today," and "give us a chance..." in the message all indicate that the purpose of the message is to attract new potential customers, and not to contact existing ones.

59. Defendant unlawfully omitted from the messages Defendant's phone number and its corporate name, which are required to be included even in the messages that can be lawfully sent.

60. Defendant ignored Plaintiff's do-not-call request, and Plaintiff has received so far three more pre-recorded messages, even after Defendant's representative assured

Plaintiff he would never receive such messages again.

61. Defendant is also known to have violated the state no-call law at least in one other State, Missouri, and under the agreement with Missouri Attorney General Jay Nixon, Defendant was to pay a civil penalty for the violations.

RELIEF REQUESTED

62. Therefore, Plaintiff prays that the Court grant:

DECLARATORY RELIEF

i. Declaratory Judgment that Defendant's pre-recorded phone calls of October 12, October 17, November 4, November 28, December 4, and December 5, 2006 were in violation of 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200 (a)(2) and 47 C.F.R. § 64.1200 (b)(1), (b)(2), (d)(3) and Minn. Stat. § 325E. 27.

DAMAGES

ii. Order that Defendant pay Plaintiff $ 500 in damages pursuant to 47 U.S.C. § 227(b)(3)(B)under each of counts 1-5 for each and every violation of 47 U.S.C. § 227 (b)(1)(B) and 47 C.F.R. § 64.1200 (a)(2), (b)(1), (b)(2), (d)(3);

iii. If the Court finds said violations to be knowing or willful, that, pursuant to 47 U.S.C. § 227 (b)(3), Court

increase the damages for each and every said violation threefold, to $ 1,500 under each such count, for each and every violation of 47 U.S.C. § 227 (b)(1)(B), 47 C.F.R. § 64.1200(a)(2), (b)(1), (b)(2), (d)(3);

iv. Order the Defendant to pay Plaintiff damages that the Court finds appropriate pursuant to Minn. Stat. § 325E. 31 and Minn. Stat. § 8.31, subd.3a under count 6, for each violation of Minn. Stat. § 325E.27;

v. Order the Defendant to reimburse Plaintiff for costs and attorney's fees, if any incurred, pursuant to Minn. Stat. § 8.31 Subd.3a.

PERMANENT INJUNCTION

vi. Permanently enjoin Defendant from further unlawful use of pre-recorded phone messages pursuant to 47 U.S.C. § 227 (b)(3)(A) and Minn. Stat. § 8.31 Subd. 3a in the State of Minnesota and throughout the several states and the United States of America.

Date

12/06/06

Signature,

M. Sheynker

Mikhail Sheynker
Plaintiff pro se
90 South Ninth Street # 1203
Minneapolis, MN 55402
Tel: (612) 332-9699
(917) 715-7309

DISTRICT OF MINNESOTA
COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT
DISTRICT COURT

TYPE OF CASE: OTHER CIVIL

Mikhail Sheynker, Plaintiff vs. Dish Network Service L.L.C., Defendant	File No. 27-CV-07-357 **PROPOSED SUPPLEMENTAL PLEADING** JURY TRIAL DEMANDED

JURISDICTION

1. Venue is proper pursuant to Minn. Stat. § 542.09, because the cause of action or some part thereof arose in the County of Hennepin.

2. The court has subject matter jurisdiction pursuant to 47 U.S.C. § 227(b)(3), Minn. Stat. § 325E.31, and Minn. Stat. § 8.31, Subd. 3a.

FACTUAL ASSERTIONS

3. Defendant Dish Network Service L.L.C. is a corporation that is in the business of providing satellite dish television

services.

4. Plaintiff is a resident of Hennepin County, who resides at 90 South Ninth Street # 1203, Minneapolis, MN 55402. Plaintiff has never had any business relationship with Defendant, has never received services from Defendant in general or at Plaintiff's address in particular.

5. On December 27, 2006, at about 7 p.m., Plaintiff received a pre-recorded, autodialed message advertising satellite TV services at 612-332-9699, which is Plaintiff's residential home phone number.

6. The message prompted Plaintiff to press "1" to talk to a live representative. When Plaintiff pressed "1", the automatic voice stated that it was "Satellite TV Services". Plaintiff was referred to a live representative.

7. Plaintiff talked to a woman who gave only her first name Rhonda. Right away Rhonda said, "Satellite TV Activations, are you calling to activate service?" Plaintiff asked Rhonda whether it was Dish Network or Direct TV, and she said Dish Network. Plaintiff asked her why he was called, as Plaintiff had cable and not Dish Network. Rhonda told Plaintiff that the purpose of the call was to inform Plaintiff of the promotion and Rhonda went to ask Plaintiff whether he had a contract with cable and when it expired. Plaintiff responded by asking Rhonda whether it was Dish Network per se, and

Rhonda said that it was actually Dish Network. Then Plaintiff asked whether it was Dish Network that sent Plaintiff the pre-recorded message, to which Rhonda said yes, because Dish Network noticed Plaintiff did not have service with them. Plaintiff then asked Rhonda for her phone number, and she said it was 1-800-893-9516.

8. Plaintiff got the exact same pre-recorded advertising message as he did on December 27 on the following dates: December 29, 2006, at 10:46 a.m. from 712-429-0435, which is an autodialer as it cannot be reached when dialed; January 2, 2007 at 7:16 p.m. from 406-764-4453, which is an autodialer as it cannot be reached when dialed; January 4, 2007 at 3:45 p.m. from 307-964-8758, which is an autodialer as it cannot be reached when dialed; January 10, 2007 at 5:08 p.m. from 800-855-2723, which is an autodialer as it cannot be reached when dialed; February 2, 2007 at 4:17 p.m. from 202-552-6893, which is an autodialer as it cannot be reached when dialed.

COUNT 1

9. Paragraphs 3 through 8 are incorporated herein.

10. Each call of December 27, December 29, January 2, January 4, January 10, and February 2 used an artificial or prerecorded voice.

11. Each call of December 27, December 29, January 2, January 4, January 10, and February 2 was made to Plaintiff's residential line.

12. Each call of December 27, December 29, January 2, January 4, January 10, and February 2 was made for a commercial purpose.

13. Each call of December 27, December 29, January 2, January 4, January 10, and February 2 constituted either an unsolicited advertisement or a telephone solicitation as it advertised Defendant's services and invited Plaintiff to contact Defendant for business services or purpose.

14. Defendant, who was the caller, did not have an established business relationship with Plaintiff at the time of each call, and Plaintiff never expressly allowed Defendant to call Plaintiff.

15. The calls of December 27, December 29, January 2, January 4, January 10, and February 2 were not made for emergency purposes.

16. Therefore, each of Defendant's pre-recorded calls of December 27, December 29, January 2, January 4, January 10, and February 2 violated 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200 (a)(2), with the result that six violations of 47 U.S.C. § 227(b)(1)(B) and six violations of 47 C.F.R. § 64.1200 (a)(2) were effected by said message calls.

COUNT 2

17. Paragraphs 3 through 16 are herein incorporated.

18. None of the pre-recorded messages of December 27, December 29, January 2, January 4,January 10, and February 2 clearly stated the identity of the business that was responsible for initiating the phone call and the name under which the entity was registered to conduct business with the State Corporation Commission.

19. The statement that the call was from "the satellite TV Services" does not disclose the actual corporate identity of the business responsible for the call.

20. Therefore, each of Defendant's pre-recorded calls of December 27, December 29, January 2, January 4, January 10, and February 2 violated 47 C.F.R. § 64.1200 (b)(1), with the result that six violations of 47 C.F.R. § 64.1200 (b)(1) were effected by said message calls.

COUNT 3

21. Paragraphs 3 through 20 are herein incorporated.

22. None of the pre-recorded messages of December 27, December 29, January 2, January 4, January 10, and February 2 stated the phone number of the business initiating the phone call.

23. Therefore, each of Defendant's pre-recorded calls of December 27, December 29, January 2, January 4, January 10, and February 2 violated 47 C.F.R. § 64.1200 (b)(2), with the result that six violations of 47 C.F.R. § 64.1200 (b)(2) were effected by said message calls.

COUNT 4

24. Paragraphs 3 through 23 are herein incorporated.

25. None of the pre-recorded messages of December 27, December 29, January 2, January 4, January 10, and February 2 permitted Plaintiff to make a do-not-call request, because none of them included the phone number that could be used by the recipient of the message to make a do-not-call request as required under 47 C.F.R. § 64.1200 (b)(2).

26. Therefore, each of Defendant's pre-recorded calls of December 27, December 29, January 2, January 4, January 10, and February 2 violated 47 C.F.R. § 64.1200 (b)(2), with the result that six violations of 47 C.F.R. § 64.1200 (b)(2) were effected by said message calls.

COUNT 5

27. Paragraphs 3 through 26 are herein incorporated.

28. On either November 23 or 24, Plaintiff placed his phone number on the do-not-call list with Defendant and December 1 served Defendant with a complaint alleging violation of the Telephone Consumer Protection Act.

29. Defendant failed to stop sending Plaintiff messages after Plaintiff asked Defendant to stop.

30. Therefore, each of the pre-recorded calls of December 27, December 29, January 2, January 4, January 10, and February 2 violated 47 C.F.R. § 64.1200(d)(3), with the result that six violations of 47 C.F.R. § 64.1200(d)(3) were effected by said messages.

COUNT 6

31. Paragraphs 3 through 30 are incorporated herein.

32. None of the pre-recorded messages of December 27, December 29, January 2, January 4, January 10, and February 2 was immediately preceded by a live operator who was required to obtain Plaintiff's consent before the pre-recorded message was to be delivered.

33. Plaintiff has not otherwise authorized the receipt of the messages.

34. The unauthorized artificial messages invaded Plaintiff's privacy and caused Plaintiff's irritation.

35. Therefore, Defendant's pre-recorded calls of December 27, December 29, January 2, January 4, January 10, and February 2 violated Minn. Stat. § 325E.27.

36. As a result, Plaintiff is entitled to be awarded damages that the Court finds appropriate pursuant to Minn. Stat. § 8.31, subd.3a, because Plaintiff suffered actual injury in the form of Defendant's infringement on Plaintiff's residential privacy, which it is the purpose of Minn. Stat. § 325E.27 to protect.

COUNT 7

37. Paragraphs 3 through 36 are herein incorporated.

38. Plaintiff asserts, and it is reasonable for Plaintiff to assert, that the violations enumerated in Counts 1-6 were either knowing or willful violations of 47 U.S.C.§ 227(b)(1)(B), 47 C.F.R. § 64.1200 (a)(2), 47 C.F.R. § 64.1200 (b)(1), 47 C.F.R. § 64.1200 (b)(2), 47 C.F.R. § 64.1200(d)(3) and Minn. Stat. § 325E.27.

39. Defendant is a sophisticated business entity catering to massive markets, and therefore has sophisticated marketing acumen and possesses extensive legal knowledge related to its activities, and should be aware of the prohibitions

enumerated in 47 U.S.C. § 227, 47 C.F.R. § 64.1200, and Minn. Stat. § 325E.27.

40. Plaintiff's receipt of at least six said messages from different autodialers is probably not an isolated event or a mistake, and Defendant causes the sending of numerous unsolicited pre-recorded messages to numerous residential numbers.

41. The conversation with Rhonda, Defendant's live representative, shows that, with its messages, Defendant intentionally targeted non-customers in hope of gaining new ones.

42. Defendant ignored Plaintiff's do-not-call request, and Plaintiff has received so far nine more pre-recorded messages.

43. Defendant kept sending the pre-recorded messages even after Plaintiff served Defendant with a complaint of December 26, 2006 and after Plaintiff filed suit against Defendant on January 3, 2007 for the violation of the Telephone Consumer Protection Act.

44. Defendant is also known to have violated the state no-call law at least in one other State, Missouri, and under the agreement with Missouri Attorney General Jay Nixon, Defendant was to pay a civil penalty for the violations

RELIEF REQUESTED

45. Therefore, Plaintiff prays that the Court grant:

DECLARATORY RELIEF

i. Declaratory Judgment that Defendant's pre-recorded phone calls of December 27, December 29, January 2, January 4, January 10, and February 2 were in violation of 47 U.S.C. § 227(b)(1)(B) and 47 C.F.R. § 64.1200 (a)(2) and 47 C.F.R. § 64.1200 (b)(1), (b)(2), (d)(3) and Minn. Stat. § 325E. 27.

DAMAGES

ii. Order that Defendant pay Plaintiff $ 500 in damages pursuant to 47 U.S.C. § 227(b)(3)(B)under each of counts 1-5 for each and every violation of 47 U.S.C. § 227 (b)(1)(B) and 47 C.F.R. § 64.1200 (a)(2), (b)(1), (b)(2), (d)(3);

iii. If the Court finds said violations to be knowing or willful, that, pursuant to 47 U.S.C. § 227 (b)(3), Court increase the damages for each and every said violation threefold, to $ 1,500 under each such count, for each and every violation of 47 U.S.C. § 227 (b)(1)(B), 47 C.F.R. § 64.1200(a)(2), (b)(1), (b)(2), (d)(3);

iv. Order the Defendant to pay Plaintiff damages that the Court finds appropriate pursuant to Minn. Stat. §

325E. 31 and Minn. Stat. § 8.31, subd.3a under count 6, for each violation of Minn. Stat. § 325E.27;

v. Order the Defendant to reimburse Plaintiff for costs and attorney's fees, if any incurred, pursuant to Minn. Stat. § 8.31 Subd.3a.

PERMANENT INJUNCTION

vi. Permanently enjoin Defendant from further unlawful use of pre-recorded phone messages pursuant to 47 U.S.C. § 227 (b)(3)(A) and Minn. Stat. § 8.31 Subd. 3a in the State of Minnesota and throughout the several states and the United States of America.

Date

02/07/07

Signature,

Mikhail Sheynker
Plaintiff pro se
90 South Ninth Street # 1203
Minneapolis, MN 55402
Tel: (612) 332-9699
(917) 715-7309

2008 - SC - 86 - 2243

Case No: 2008-SC-86-2243
Filed: 12-18-08
Served:
Default:
Hearing:

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MARK FITZHENRY
Plaintiff

POST OFFICE BOX 181
Street Address

ISLE OF PALMS, S.C. 29451
City State Zip

(843) 743-8428
Phone

995 MORRISON DRIVE
CHARLESTON, SC 29403

vs. AMERICAN SATELLITE, INC. and DISH NETWORK, LLC
Defendant

555 W. BEECH, SUITE 215
Street Address

SAN DIEGO, CA. 92101
City State Zip

Phone

R/A: MR. L. MICHAEL WILSON
MR. R. STANTON DODGE
9601 S. MERIDIAN BLVD.
ENGLEWOOD, CO. 80155

SMALL CLAIMS COURT SUMMONS

DATE: DECEMBER 18, 2008

TO: AMERICAN SATELLITE, INC and DISH NETWORK, LLC, Defendant

You are hereby notified that the Plaintiff has filed a claim and is asking for judgment against you as stated in the complaint.

You must present an answer to this complaint within thirty (30) days after service of this complaint upon you. If you do not answer, judgment by default may be entered against you. Your answer must be filed in writing to the Small Claims Court prior to the expiration of the 30 days. A clerk is available to assist you at the Small Claims Court from 8:30 a.m. to 4:30 p.m., Monday through Friday.

The Court will schedule a hearing on this claim at the time your answer is filed. If you have witnesses, books, receipts or other writings bearing on this claim, you must bring them with you at the time of the hearing or they will not be considered. If you wish to have witnesses called to court, see the Clerk of the Small Claims Court for assistance.

If you have a claim against the Plaintiff arising out of the same matter, you must file it with the Court at the time you file your answer.

MAGISTRATE, SMALL CLAIMS COURT

2474L

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

CASE NO.:08-SC- 86 -2243

MARK FITZHENRY
Plaintiff,

vs.

AMERICAN SATELLITE, INC., and
DISH NETWORK, LLC,

Defendants.

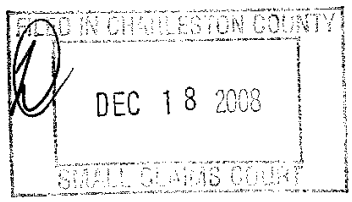
VERIFIED COMPLAINT

ADDRESS FOR REGISTERED AGENT FOR AMERICAN SATELLITE, INC.:

Mr. L. Michael Wilson
555 W. Beech
Suite 215
San Diego, CA 92101

ADDRESS FOR DEFENDANT DISH NETWORK, LLC:

Mr. R. Stanton Dodge
9601 S. Meridian Blvd.
Englewood, CO 80155



Plaintiff complaining of the Defendants alleges as follows:

TYPE OF ACTION

1. This is an action to recover statutory damages imposed by 47 U.S.C § 227 (b) (3), and trebled damages constituting a forfeiture or other penalty.

PARTIES

2. Plaintiff is a resident of Charleston County, South Carolina, and the statutory violations and injury to Plaintiff occurred in Charleston County.

3. Defendants AMERICAN SATELLITE, INC., and DISH NETWORK, LLC, make, cause to be made, contract to be made, or allow to be made on their behalf, unsolicited, prerecorded/artificial telemarketing advertisement calls to residential telephone subscribers.

VENUE AND JURISDICTION

4. The Telephone Consumer Protection Act ("the TCPA or "the Act") consists of 47 U.S.C. 227 as amended and the FCC's implementing rules (see generally 47 C.F.R. Part 64 Subpart 1200 and 1601, and Part 318). The TCPA places conduct, identification, record keeping, and disclosure requirements on entities engaged in telephone solicitations and facsimile transmissions, and it provides a private right of action by a consumer in State court in response to violations of the TCPA's regulations. 47 U.S.C. § 227 (b) (3) imposes strict liability on individuals and/or entities that are in violation of section (b) of the Act.

5. This cause of action arises out of conduct of Defendants in initiating a telephone call to Plaintiff in Charleston County.

6. Venue and jurisdiction are proper in this Court pursuant to 47 U.S.C. § 227 and the laws of the United States and Constitution as they may apply.

ACTS OF AGENTS

7. Whenever it is alleged in this complaint that Defendants did any act, it is meant that the Defendants performed, caused to be performed, and/or participated in the act and/or that Defendants' officers, employees, contractors, assigns, successors, predecessors, affiliates, or other agent performed or participated in the act on behalf of, for the benefit of, and/or under the authority of the Defendant.

DEFENDANT'S USE OF PRERECORDED TELEPHONE MESSAGE

8. Defendants use, directly and/or by their agents, one or more devices that call telephone subscribers and deliver messages using a prerecorded or artificial voice.

9. Defendants directly and/or by their agents, did initiate the telephone call (FIRST CALL) alleged herein with a device that delivered a message using a prerecorded or artificial voice.

10. Defendants directly and/or by their agents, are aware of this device's designed operation and/or have knowledge that and that calls were being made using an artificial or prerecorded voice to deliver a message

11. Defendants directly and/or by his agents, can exercise control over the agents initiating the calls and the content of the message delivered by the artificial or prerecorded voice.

12. Defendants have violated the TCPA's rules and regulations by making or causing to be made, prerecorded calls "on behalf of" the Defendant so as to generate sales leads from the unsolicited pre-recorded advertisements to residential telephone subscribers.

TELEPHONE SOLICITATIONS MADE TO PLAINTIFF'S HOME

First Call

13. On or about October 29, 2008 at approximately 12:32 PM, a telephone call, ("First CALL") was initiated on behalf of the Defendants to one of the residential telephone numbers subscribed to by the Plaintiff.

14. The purpose of the FIRST CALL was, among other things, to initiate a telephone message advertising the availability or quality of property, goods, and/or services – to wit, satellite TV service - on behalf of the Defendants.

15. The FIRST CALL supporting information is preserved as evidence of the same along with the account information from the resultant sale of satellite service.

16. The FIRST CALL delivered an unsolicited advertisement without the prior express consent of the called party.

17. The prerecorded was broadcast from a telephone number controlled or operated by or on behalf of the Defendants.

18. Defendants did not obtain prior consent, in any form, inviting them to deliver a prerecorded message of any form to Plaintiff's residential telephone line.

FIRST CAUSE OF ACTION - 47 U.S.C. 227
Delivering an unsolicited advertisement to a service using an artificial or prerecorded voice violating 47 U.S.C. 227 (b) (1) (B).

19. Paragraphs 1 through 18 are restated as if set forth herein.

20. Defendants did initiate a telephone call ("FIRST CALL") to plaintiff's residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party.

SECOND CAUSE OF ACTION – 47 U.S.C. 227
Violation of artificial or prerecorded message standards, identification requirements – C.F.R. 64.1200 (b)(1)

21. Paragraphs 1 through 20 are restated as if set forth herein.

22. The Defendants failed at the beginning of the message, to state clearly the true, legal identity of the business, individual, or other entity initiating the call, including the name under which the entity is registered to conduct business with the State Corporation Commission or comparable regulatory authority.

THIRD CAUSE OF ACTION – 47 U.S.C. 227
Violation of delivery requirements and privacy restrictions – C.F.R. 64.1601 (e)(i)

23. Paragraphs 1 through 22 are restated as if set forth herein.

24. Defendants deliberately failed to disclose the true, legal name of the individual caller, the true, legal name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted.

Willful or Knowing Violations

25. Defendants' actions, as described in paragraphs 21, 23, and 25 manifest THREE knowing and/or willful actions in violation of 47 U.S.C. 227 within the meaning of the 1934 Communications Act and the Federal Communications Commission.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for the following relief, temporarily and permanently:

26. For the statutory damages of $500 per violation, to be awarded to the Plaintiff in accordance with the TCPA, for each of the Defendants' violations of the TCPA and;

27. For trebled damages to be awarded to the Plaintiff in accordance with the TCPA, for each of Defendants' willful and/or knowing violations of that TCPA listed in paragraph 25 above, and;

29. For such other and further relief as the Court may deem just and proper.

30. Plaintiff waives the excess of any award above the jurisdiction of the Court in effect at the time judgment is rendered.

Respectfully submitted,
This 17 day of December, 2008.

Mark Fitzhenry, Plaintiff, *Pro Se*
PO Box 181
Isle of Palms, SC 29451
(843) 743-8428

VERIFICATION

The undersigned states and swears that all the foregoing allegations are true and correct to the best of his knowledge and belief.

Mark Fitzhenry

Subscribed and sworn to before me by Mark Fitzhenry this 17 day of December, 2008.

Notary Public for South Carolina

My commission expires on Jan 3, 2015

CHARLESTON COUNTY SMALL CLAIMS COURT
INSTRUCTION SHEET

ADDRESS: POST OFFICE BOX 941, 29402 995 MORRISON DRIVE, CHARLESTON, SC 29403

PHONE: SMALL CLAIMS COURT DOWNTOWN CALL (843) 724-6720

HOURS: 8:30 AM - 5:00 PM Monday through Thursday 8:30 AM - 1:00 PM Friday

FILING: The filing and service of process fee is $80.00. There is an additional $10.00 charge for each additional defendant with a different address. The complaint and any attachments must be filed in DUPLICATE. The defendant must be a resident of Charleston County. Please provide the court with a clear and accurate legal name and street address for the defendant, so that the summons and complaint can be served without delay. Route and box numbers are not acceptable. If filing against a business, determine whether or not the business is incorporated or privately owned. If privately owned, list owner's full legal name. If incorporated, list agent's name and address for service of process. If filing to collect an account or note, include duplicate copies of the statement of account, invoices, or note to verify the amount due and have your signature notarized. The jurisdictional limit in this court is $7,500.00.

SUMMONS: The Small Claims Court issues a summons when the complaint is filed and the summons requires the defendant to answer the complaint within thirty (30) days after the date of service. The defendant must answer in writing and a clerk is available at the Small Claims Office to assist a party if needed.

If the defendant has a claim against the plaintiff arising from the same facts, the defendant may file a counterclaim in writing with the court at the same time the answer is filed.

DEFAULT: If the defendant does not answer within thirty (30) days after service of the summons and complaint, a judgment by default may be entered against the defendant.

HEARING: The Court will schedule a hearing at the time the defendant files an answer. The parties must appear with any witnesses and evidence that are necessary to prove their cases. A WRITTEN, NOTARIZED, OUT OF COURT STATEMENT FROM A WITNESS CANNOT BE USED AS EVIDENCE. A WITNESS MUST APPEAR IN PERSON IN COURT TO TESTIFY. There is a charge of $8.00 per subpoena if issued by the court

JURY TRIAL: Either party has the right to request a jury trial and it must be submitted in writing at least five (5) working days prior to the date of the hearing.

JUDGMENTS: A Transcript of Judgment will be issued with specific instructions about the enforcement of the Judgment. It may be recorded immediately at the Clerk of Court's Office. The Execution Against Property Order may be filed with the Charleston County Sheriffs Office thirty (30) days after notice of judgment. The recorded judgment will remain valid and enforceable for a period of ten (10) years and accrues interest at the rate of 12% from the date of judgment. When the judgment is satisfied, the plaintiff must notify the Clerk of Court's Office so that the judgment will be recorded as satisfied.

POST TRIAL: A Motion for a New Trial must be received by this court in writing within five (5) days after notice of the judgment.

APPEALS: An appeal must be filed in writing within thirty (30) days from the notification of the judgment date. There is a $150.00 filing fee and it must be filed with the Court of Common Pleas. The notice of appeal must be personally served on this court and on the opposing party within the same thirty (30) days.

R-02/04

EXHIBIT 4

VIA FACSIMILE ONLY TO (619) 704-1570

May 7, 2010

American Satellite Inc.
Todd M Diroberto
1660 Hotel Cir N
San Diego, CA 92108

Re: Notice of Automatic Termination of Dish Network Retailer Agreement

Dear Todd M Diroberto:

Pursuant to the provisions set forth in Section 10.4 of the DISH Network Retailer Agreement, by and between DISH Network L.L.C., formerly known as EchoStar Satellite L.L.C. ("DISH"), and American Satellite Inc., effective as of December 31, 2008, as amended (the "Retailer Agreement"), the Retailer Agreement has automatically terminated.

Notwithstanding such termination, you continue to have certain duties and obligations under the Retailer Agreement, including without limitation, those set forth in Sections 9.4, 9.5, and 10.5 thereof. In addition to (and without limitation of) the foregoing, the Retailer Agreement requires you to immediately destroy all Subscriber Information within your possession or control, and to certify in writing to DISH that such destruction has taken place. If we do not receive such written certification within five days of the date of this letter, we will assume that you are refusing to comply with your obligation and reserve the right to seek immediate injunctive relief in Colorado District Court.

This letter is without prejudice to any rights and remedies that may otherwise be available to DISH and/or any of its Affiliates, whether arising at law, in equity, under contract (including without limitation, the right to chargeback any and all amounts owing to DISH in accordance with the terms and conditions of the Retailer Agreement), or otherwise. All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Retailer Agreement.

Sincerely,

DISH NETWORK L.L.C.

By: _____
Blake Van Emst
Vice President, Retail Services

EXHIBIT 245

EXHIBIT 245

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA and the STATES OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, and OHIO, Plaintiffs, v. DISH NETWORK, L.L.C., Defendant	Case No. 3:09-CV-03073-SEM-BGC

DECLARATION OF RICHARD GOODALE

I am a citizen of the State of California, am over 18 years of age, have personal knowledge of the matters asserted herein and am otherwise qualified to testify.

I owned a stake in, was a principal of, and worked at a company known as JSR Enterprises ("JSR") located in Santa Ana, California from 2006 until early 2007.

JSR was owned by a man named Jerry Grider. I have not seen Mr. Grider since 2009.

As an affiliate of Dish retailer Dish Nation, Rainbow Entertainment Systems Inc was able to use Dish Nation's login information that allowed it to access and directly enter sales into Dish's OE system.

In August 2006, Dish brought our organization—under the name JSR Enterprises—onboard as a full OE retailer. As a Dish retailer in its own right, JSR was authorized to enter sales directly into Dish's system with our own logins and no longer had to use the Dish Nation logins.

At that time, JSR's business model was "press 1" telemarketing robocalls and live outbound telemarketing calls. That is, JSR paid a dialing company in the Philippines to make millions of robocalls to consumers containing a prerecorded message that pitched satellite service. If any of those consumers pressed 1 on their phones, the call was transferred to a sales agent either at JSR's California call center/an offshore calling center. JSR also made live calls from its call center.

DEFENDANT'S EXHIBIT
DTX-739

Dish sales employees were aware that JSR's primary method of selling Dish service to consumers was through robocall telemarketing. Dish's sales employees made frequent visits to JSR's call center and gave us geographic areas to focus on selling Dish service around the country.

For the live calls placed from our call center, the lead lists were scrubbed against the National Do-Not-Call Registry. I do not believe that the call lists for "press 1" robocalls of the offshore call centers' activities were scrubbed against the National Do-Not-Call Registry.

JSR contracted with a telecom company called Airespring for telecom services.

At all times, JSR sold Dish Network service exclusively through outbound telemarketing.

Although JSR sold several other products, such as HughesNet satellite internet, every outbound call JSR made first attempted to sell Dish to the consumer.

JSR exclusively sold residential service to residential customers. We did not sell commercial packages to businesses.

Dish's corporate officers, including Mike Mills, Mike Overbilling, Bobby Fielding, and Eric Carlson met with us on multiple occasions. They all knew that our call center conducted outbound telemarketing.

I attended meetings with these individuals.

In at least one such meeting, a Dish employee named Mike Mills pushed us to do more calls and stated he wanted us to tap into the Hispanic market in California and Texas. We eventually decided against this because Hispanic customers had more churn.

Dish sent an email stating specifically that Dish did not want its name used in the prerecorded press 1 telemarketing message a consumer would hear when receiving a call.

Dish communicated a number of telemarketing complaints to us, but it was generally impossible for us to address those complaints because—other than the live dialing from our office—the autodialing was being performed by foreign call centers.

On Valentine's Day 2007, Dish terminated our retailership. Dish said that the termination was because of our telemarketing activities, but as I stated above, Dish knew about those activities long before our termination.

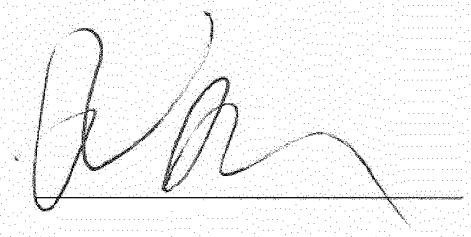
Our termination was profitable for Dish. They structure their contract so that if they accuse a retailer of misconduct, they get to keep whatever funds are outstanding at the time. In our case, Dish owed us about $1 million in sales incentives at the time the termination occurred. They kept all of the customers that we had brought in for them during our last weeks as a retailer, but did not pay us the incentives.

After our termination, JSR signed on as an affiliate of other Dish OE retailers and continued trying to sell Dish. That activity continued for at least a month after our termination, at which point I left.

I know all of this information because I witnessed the activities with my own eyes. In the case of the offshore call centers, I was aware of those centers' activities because of the business relationships between the centers and JSR. I also witnessed calls being transferred from those centers as a result of JSR's "press 1" robocalls.

I declare under penalty of perjury to the best of my knowledge the foregoing is true and correct.

Executed on July 30, 2013.



APEN

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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 10 OF APPENDIX TO THE REPORT OF THE SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION

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246	03/06/2014	Defendant Dish Network LLC's Opposition to Plaintiffs' Motion for Summary Judgment	6416
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248	02/02/2016	Trial Transcript, *United States v. DISH Network, LLC*, Case No.09-3073 (C.D. Ill.) (D.I. 622) (M. Mills Testimony)	7056
249	02/03/2016	Trial Transcript, *United States v. DISH Network, LLC*, Case No.09-3073 (C.D. Ill.) (D.I. 625) (B. Neylon Testimony)	7334
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251	Undated	DNC Investigation Team Manual	7592
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254	Undated	Sting Flow	7652
255	Undated	Retailer JSR: Timeline	7654
256	Undated	Retailer Star Satellite: Timeline	7656
257	Undated	Retailer SSN: Timeline	7658

DATED this 27th day of November 2018.

By __/s/ Robert J. Cassity_____
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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 10 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 246

EXHIBIT 246

E-FILED
Thursday, 06 March, 2014 10:00:08 AM
Clerk, U.S. District Court, ILCD

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA and the STATE OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, and OHIO,

Plaintiffs,

v.

DISH NETWORK L.L.C.,

Defendant.

Case No.: 3:09-cv-03073-SEM-BGC

DEFENDANT DISH NETWORK L.L.C.'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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Attorneys for Defendant DISH Network L.L.C.

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DEFENDANT DISH NETWORK, L.L.C.'S

OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant DISH Network L.L.C. ("DISH") opposes Plaintiffs' Motion (d/e 342 "Plaintiffs' Motion") seeking summary judgment on the Second Amended Complaint ("SAC") filed by Plaintiffs the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC"), and the States of California, Illinois, North Carolina, and Ohio (the "State Plaintiffs," and together with the FTC, "Plaintiffs").

This Opposition is based upon the Declarations of Joey Montano, John Taylor, and Mike Mills, the pleadings and papers on file in this action, and upon such oral argument and/or documentary matters as may be presented to the Court at or before the hearing on Plaintiffs' Motion. DISH also moved for summary judgment on January 6, 2014 ("DISH's Motion"). (d/e 346.) DISH's Motion and the declarations, exhibits, and memorandum of law on which it is based also are incorporated herein.

INTRODUCTION

Plaintiffs come to this Court and proclaim that all facts are "clear" and there is "no material fact" at issue in their massive case. If that were so, the plentiful references to EchoStar and DISH in contexts outside of this case would be entirely unnecessary. Likewise, references to the deplorable conduct and criminal/civil histories of certain independent businesses with which DISH had, at one point or another, a contractual relationship would be unnecessary. If the facts are clean and clear, and the violations obvious, then Plaintiffs would not have resorted to shrill rhetoric and inflammatory argument that diminishes, rather than enhances, their case. Yet, Plaintiffs' Motion is loaded with innuendo and citations to various incidents that are – without question – unrelated to this case.

A corollary to Plaintiffs' proliferation of smear and guilt-by-association arguments is their heavy reliance on events that are not only outside the statute of limitations but also, in many instances, before the 2003 promulgation of the Amended Telemarketing Sales Rule ("TSR"). This is not only improper but it also highlights the weakness in Plaintiffs' case in general and specifically in Plaintiffs' Motion. The reason Plaintiffs employ this tactic is that the relevant facts do not support their Motion or their case. In 2003, the TSR ushered in a new regime of compliance requirements, most specifically, the creation of the National Do Not Call Registry (the "NDNCR" or "Registry"). Thus, in 2003, a new regulatory regime arose that created challenges for businesses as well as the FTC. Importantly, as set forth herein, the FTC has had more than its fair share of problems meeting these challenges. The FTC has encountered well-documented, undeniable, and significant implementation problems, including accuracy problems for the NDNCR. In fact, the initial roll out of the Amended TSR was so problematic that, in 2007, Congress had to step in and pass the Do Not Call Improvement Act (the "Improvement Act"). No one would begrudge the FTC's difficulties after the initial enactment of the TSR, or even the need for an "Improvement Act." The FTC certainly has needed such leniency. In fact, it continues to struggle with hygiene issues, recording consumer complaints properly, and problems ensuring that sellers and telemarketers can accurately download the NDNCR. The FTC, however, accords no such similar grace to DISH. Instead, the FTC smears DISH and relies on pre-TSR conduct, as well as conduct well outside the statute of limitations, to do so. This Court should see through this tactic, apply the law to the facts, and deny Plaintiffs' Motion.

The staleness of much of Plaintiffs' evidence also eviscerates any support for the draconian injunctive relief they seek. DISH has been proactive in refining and upgrading its

compliance process in light of technological advancements and in response to ever increasing government regulations at both the state and federal level, coupled with DISH's own interest in avoiding compliance problems while assuring it maintains its excellent customer service. Most important, DISH has been responsive to consumer complaints. The evidence shows that DISH's conduct is causing a positive trend in reducing the number of complaints and ensuring even better compliance with the telemarketing laws. Plaintiffs' injunctive relief request completely side steps this critical set of facts. There is no mention by Plaintiffs of the current state of affairs at DISH vis-à-vis the alleged need for injunctive relief. Thus, Plaintiffs' Motion does not carry their burden of proof to obtain prospective injunctive relief. Plaintiffs also fail to address the continued improvement of DISH's compliance efforts and instead rely mainly upon events which occurred many years ago.

A. DISH Properly Conducts Legally Protected Telemarketing

As an initial matter, DISH's telemarketing is a legal activity designed to inform the public about its products and services. DISH currently provides its services to over 14 million people in the United States – including TV subscribers and broadband users – especially in rural areas where network television, cable television, and cable broadband may not otherwise be available. DISH's products allow homes to receive a panoply of digital, news, cultural, political, weather, education, sports, and entertainment programming critical to keeping people informed in all of these areas of life in the twenty-first century United States. Thus, DISH's business has brought needed services to underserved areas.

DISH's growth has been achieved in an extremely competitive environment. Its continued success depends in part on its timely investment in, and introduction and implementation of new competitive products and services. To be successful, DISH must be

innovative and active in making sure its customers have access to the newest and best technology.

One way that DISH promotes its products is through legal and constitutionally-protected telemarketing, *i.e.*, phone calls to potential subscribers and to current and former subscribers to offer new packages and special one-time events. These telemarketing calls, however, are not the only calls that DISH makes. DISH also calls its subscribers, for example, to give them information about service matters, outages, and DISH's periodic need to reposition the subscribers' DISH receivers. DISH also returns phone calls to subscribers and others who have asked it for information, and calls subscribers whose payments are in arrears.

It is beyond dispute that truthful advertising benefits consumers by significantly lowering prices, improving consumer choices, bringing consumers information that would otherwise be unavailable and providing consumers with market alternatives. In fact, Robert Pitofsky, FTC Chairman in 1995, stated that a core principle of advertising regulation is "an understanding that unnecessary restraints on truthful advertising can be as harmful to consumers as deceptive or unfair advertising." The benefits of telemarketing are similar to any other form of truthful advertising. Consumers benefit by being made aware of products and services that can be of value to them. Telemarketers can lower prices for entire product categories and alert consumers to specific lower prices or better service packages. This improves the individual consumer's welfare.[1] This ample support for the benefits of legal telemarketing should not be surprising, after all, it is a primary method of fundraising by politicians and some of the greatest charitable institutions in this country.

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[1] Expert Report of Avery M. Abernethy dated July 25, 2012 ("Abernethy Report") at p. 3-4.

B. **Plaintiffs' Nine-Year Investigation Has Proven That DISH Meets Any Reasonable Compliance Standard**

Despite this legal premise as to DISH's calling practices, Plaintiffs have spent nine years of relentless prosecution, including the review of hundreds of thousands of pages of documents, countless depositions of DISH personnel, Independent Retailers, and experts, and massive computer processing of DISH's call records, and yet for all their efforts, their evidence establishes that DISH is 99% compliant (or better) with the telemarketing laws and rules at issue in this case.[2] With respect to calls made by DISH or DISH Telemarketing Vendors, Plaintiffs examined approximately 1 billion call records dating back from as long ago as 2003. In Plaintiffs' Motion, out of this universe of 1 billion calls, Plaintiffs cite approximately 1% as evidence of DISH's violations.[3] Thus, in no instance can Plaintiffs claim that DISH's error rate was ever higher than approximately 1% of the total records produced in this case.[4] That means that DISH had a 99% compliance rate with the TSR and Telephone Consumer Protection Act ("TCPA"), which is exemplary and far better than the accuracy rate that the FTC or its contractors meet in maintaining the accuracy of the NDNCR.

Even for this 1% alleged error rate, Plaintiffs merely rely upon so-called "issue calls," which are not violations. Rather, they are simply calls to numbers that appear on the

---

2 Error rates are a fact of life in our computer driven society.

3 Plaintiffs' Motion claims that DISH (excluding calls placed by Retailers) made 1,707,713 Registry violation calls (to avoid double counting, this does not count the Registry EBR calls that Plaintiffs claim are overridden by a Do Not Call request). The FTC also claims 8,369,726 Do Not Call request violations. That yields a total of 10,077,439 claimed Do Not Call violation calls placed by DISH – just 1% of the approximately one billion that DISH placed during this period.

4 If, as Plaintiffs insinuate, DISH has a corporate mentality of nonchalance, or a culture of non-compliance, regarding the telemarketing laws, then surely Plaintiffs' massive investigation would have yielded a greater percentage of alleged "issue calls."

NDNCR. It is indisputable that the NDNCR contains a very high percentage of numbers that cannot form the basis for an "issue" because they either do not belong on the NDNCR, they are numbers over which Plaintiffs have no jurisdiction, or they are numbers that are not subject to the laws at issue in this case. Thus, as this case hinges on alleged violations arising out of numbers on the NDNCR, the Government's burden begins with proof that the NDNCR is viable, scrubbed, maintained, and reliable. The Court cannot be asked to readily conclude that DISH violated the TSR and TCPA by calling numbers on the Registry if the Court cannot also find the predicate facts to establish the maintenance of the Registry, and that the credibility of the Registry (as it has existed over time) is beyond question. This Court should conclude that the NDNCR is not reliable, and has been maintained haphazardly by the FTC and its contractors. Thus, Plaintiffs' contentions regarding DISH's alleged NDNCR violations (and the claim that they vitiate DISH's safe harbor defense) must be rejected, as these alleged violations are based on an over-inclusive and inaccurate NDNCR.

Plaintiffs also sought to expand the reach of the TSR and TCPA through broad based and far reaching claims and vicarious liability. Plaintiffs claim that DISH is responsible for the conduct of wholly separate and independent businesses. These independent businesses maintain their own separate existence, employees, and operating procedures. DISH contracts with these companies and they are referred to herein as either "Independent Retailers" or "Retailers." As set forth herein, not only has this case proved the lack of merit regarding Plaintiffs' claim of widespread abuse by these Independent Retailers but also Plaintiffs have no basis to attribute liability for any conduct by these Independent Retailers to DISH.

Moreover, after an over nine-year investigation related to Independent Retailers, during which Plaintiffs sought and obtained access to information regarding all 7,500 of these

Independent Retailers, Plaintiffs' Motion only claims violations by six of them. That means that Plaintiffs found no actionable conduct as to over 99% of the Independent Retailers.[5] Simply put, Plaintiffs' far reaching investigations have borne no fruit.

Plaintiffs' Motion fails on many other levels. First, Plaintiffs rely on 488 "facts," and a mountain of allegedly supporting evidence, to claim that there are no disputed questions of material fact. However, even assuming these facts are uncontroverted (they are not), this mountain of information does not support Plaintiffs' Motion. Rather, it underscores the need for a trial. Plaintiffs' Motion raises numerous factual issues that cannot be resolved through a summary process. Second, dozens of the alleged undisputed facts are in dispute and/or are not supported by the cited evidence. Many are not facts at all, but inappropriate opinion or argument. Plaintiffs inappropriately generalize, and impute the isolated experiences of six Independent Retailers to DISH and other Independent Retailers who are not mentioned in Plaintiffs' Motion. At the same time, Plaintiffs ask this Court to ignore that DISH has made vast efforts to comply with the telemarketing laws, including employing a team of people devoted to such efforts. DISH has compliance teams dedicated to ensuring adherence to the telemarketing laws for the calls that DISH and its Telemarketing Vendors place. DISH also has a retail services department that has the function to, in part, investigate telemarketing complaints and determine (where possible) the source of the call. If a Retailer made the call at issue, DISH takes appropriate action based on the results of the investigation. Plaintiffs unfairly and inappropriately failed to set forth these and numerous other relevant and material facts that

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[5] This investigation of Independent Retailers did not result in naming any of them as parties to this case. Rather, Plaintiffs improperly ask the Court to take the legal leap of faith that would find DISH responsible for all wrong conduct, wherever found and for whatever action, for businesses and people who do not work directly for DISH.

clearly indicate that there are triable issues. Finally, the inferences upon which Plaintiffs rely are all drawn against DISH when the law requires that these inferences be drawn in DISH's favor. This simple legal truism requires denial of Plaintiffs' Motion.

C. Plaintiffs' Motion Fails to Establish Any Basis for Liability For Calls That DISH or DISH's Telemarketing Vendors Placed

Plaintiffs offer no evidence of knowing conduct by DISH, or its Telemarketing Vendors ePLDT and eCreek, that any of the calls placed violated the TSR and/or TCPA. Plaintiffs rely primarily upon the alleged total number of DISH calls identified as "issue calls" by DISH's expert. First, as noted above, DISH's accuracy percentage far exceeds any reasonable standard for compliance. Further, DISH's expert was responding to Plaintiffs' expert analysis of the DISH, ePLDT, and eCreek call records. Plaintiffs' expert analysis is flawed because, among other reasons, Dr. Yoeli incorrectly assumed each number on the NDNCR properly. DISH's expert never conceded, and indeed, expressly disavowed the contention that these issue calls are violations. Thus, there is no evidentiary basis for Plaintiffs' claims regarding the calls placed by DISH or its Telemarketing Vendors.

Even assuming, however, that each "issue call" was a violation, the amount claimed in Plaintiffs' Motion is a minute percentage of the approximately one billion calls placed from 2003-2010. Less than a 1% error rate is surely within the acceptable range of errors under the safe harbor. In fact, the FTC allows its own contractor, Lockheed Martin, a 5% error rate when managing the NDNCR (and, in practice, it has a much higher error rate).

Other than pointing to the tiny percentage of "issue calls," Plaintiffs offer no evidence that DISH is not entitled to the safe harbor defense under the TSR and TCPA for calls placed by DISH, ePLDT, and/or eCreek. The safe harbor defense only requires good faith compliance. There is no evidence that DISH acted in bad faith. (Because of that absence of

contrary evidence, DISH also has moved for summary judgment on its safe harbor defense). (d/e 346.) Further, particularly pertinent to Plaintiffs' Motion, questions of good faith are factual and not typically resolved on summary judgment.

Plaintiffs also do not attempt to show that even a single "issue call" occurred through the conduct of an individual at DISH, ePLDT, or eCreek acting with "actual knowledge or knowledge fairly imputed on the basis of objective circumstances" that any such call was "unfair or deceptive," or was prohibited by the TSR. (d/e 80 at p. 8.) This is a critical omission as it bears upon the burden of proof to recover civil penalties. (*Id*.) At a bare minimum, and as this Court has acknowledged, civil penalties "raise issues of knowledge or intent." (*Id.* at 7.)

Thus, even if this Court finds that Plaintiffs have produced any evidence pointing to any such alleged knowledge or intent (they have not), such issues could not be resolved on summary judgment, at least not in favor of Plaintiffs. Moreover, to the extent Plaintiffs' Motion relies upon inference with respect to the conduct of DISH or its Telemarketing Vendors, these inferences must be drawn in DISH's favor and preclude the entry of summary judgment. In sum, Plaintiffs have no basis to obtain summary judgment on any aspect of civil penalties. Indeed, due to the wholesale lack of evidentiary support to support Plaintiffs' claim, DISH has moved for summary judgment to dismiss the FTC's claim for civil penalties. (d/e 346.)

D. Plaintiffs' Vicarious Liability Claims Regarding the Independent Retailers Also Fail

As to Plaintiffs' various liability claims based on Independent Retailers' conduct, after an exhaustive search, Plaintiffs failed to obtain any evidence of TSR or TCPA violations by the vast majority of these Retailers (that is, they found no evidence of alleged violations with respect to over 99.9% of the Independent Retailers). Indeed, Plaintiffs' Motion alleges actionable misconduct by only six, out of 7,500, Independent Retailers, and they proffer no evidence as to any actionable conduct by these Retailers that can be attributed to DISH.

Plaintiffs' Motion does not establish an agency relationship between DISH and these Independent Retailers and the FTC can neither legally nor factually show that these Independent Retailers were telemarketers for DISH or that DISH assisted and facilitated any actionable conduct. Plaintiffs then ask this Court to take the inferential leap based on such inadequate evidence to infer that DISH's entire compliance program regarding the Independent Retailers, during an eight-year time period, was simply a ruse to avoid TSR and TCPA compliance. In doing so, they ignore the evidence of DISH's robust monitoring and compliance, and that DISH regularly disciplined and terminated Retailers for telemarketing violations. Instead, Plaintiffs spin DISH's compliance activities in an attempt to create an inference of willful non-compliance.

Plaintiffs also make up legal arguments out of thin air that, if adopted, would create strict liability for both sellers and anyone engaged with a seller when it comes to telemarketing violations. For example, Plaintiffs blame DISH for not immediately terminating a retailer upon the discovery of a single instance of an alleged telemarketing violation or receipt of consumer complaint. No law requires such zero tolerance and indeed DISH should be afforded a reasonable opportunity to investigate the veracity of any such instances of alleged telemarketing violations and take appropriate steps.

Even more distorted is Plaintiffs' attempt to use the results of DISH's efforts to investigate, and, where appropriate, discipline and/or terminate Retailers as proof that DISH was not serious about its compliance program. Thus, Plaintiffs turn the law on its head by using DISH's good faith conduct to comply with the TSR and TCPA requirements, as evidence against it. If DISH did nothing and investigated nothing, it would have learned nothing and known nothing. Of course, Plaintiffs then would claim, as a result, that DISH has no safe harbor

defense. In short, Plaintiffs have adopted the "damned if you do and damned if you don't" approach.

DISH actively investigated complaints, including those received from Plaintiffs and the Better Business Bureau, and worked with offending Independent Retailers to cure identifiable problems. Plaintiffs twist this laudable activity into an accusation that DISH is an enabler of the Retailers' telemarketing and, therefore, liable under the TSR's "cause" and "assisting and facilitating" provisions and/or the TCPA "on behalf of" provisions with respect to these Independent Retailers' conduct. From this stretch, Plaintiffs claim massive and unprecedented monetary penalties.

Plaintiffs' Motion creates a compliance nightmare for any company that contracts with retailers, franchisees, or other third parties as a method to increase distribution of its products or services. Independent Retailers separately have promoted and sold DISH's products and services, while many at the same time promote numerous other branded products and services. DISH had Retailer Agreements with approximately 7,500 Independent Retailers during the time period relevant to this case who used any number of methods to promote products, such as direct mail, radio/TV advertising, flyers, the Internet, and, of course, telemarketing.

DISH enters into specific Retailer Agreements with the Independent Retailers, which agreements set forth the obligations of each party, including the requirement that the Retailer obey all federal and state laws, including the TSR and the TCPA. (*See* Response to PUF ¶¶124 and 156.) Further, DISH has comprehensive compliance procedures to confirm that Independent Retailers perform in accordance with the Retailer Agreements.[6]

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[6] Plaintiffs attempt to vilify DISH for entering into a Retailer Agreement with a third-party entity whose principal, unbeknownst to DISH, had a criminal background. There is no

(footnote continued)

As to Plaintiffs' focus on the conduct of six Independent Retailers – out of some 7,500 – with whom DISH has done business, Plaintiffs argue that DISH is liable for all of the alleged violations committed by each of these six entities. DISH, however, did not know and could not have known much of what Plaintiffs claim about these Independent Retailers when it entered into the Retailer Agreements with them. Because DISH has an effective compliance program, however, it was able to ascertain wrongdoing, investigate that wrongdoing, and if it determined that the Independent Retailer would not cease its wrongdoing, terminate the Independent Retailer. Plaintiffs try to impugn DISH's very effective compliance program by arguing that at the first sign of non-compliance or receipt of a consumer complaint, DISH immediately should have terminated the Independent Retailers. That is not the real world or the law. Nor is it a standard that the FTC applies in its own use of third parties, such as Lockheed Martin, its contractor, for the NDNCR.

E. Plaintiffs' Motion Is Not Supported by Undisputed Facts

Plaintiffs' Motion is both legally and factually unsupported and contrary to the established rules regarding the drawing of inferences on summary judgment. It is well-settled that inferences must be drawn in DISH's favor. Plaintiffs, however, engage in exactly the opposite exercise by relying heavily on inferences drawn against DISH. For example, Plaintiffs mischaracterize internal correspondence from DISH's in-house counsel regarding retailer conduct and/or the TSR/TCPA. This privileged material was made available to Plaintiffs by

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(footnote continued)

> requirement, as Plaintiffs suggest, that DISH or any company using independent third-party businesses perform a criminal background check on such business before entering into an agreement with them.

Order of the Court. (d/e 151.) Plaintiffs rely on much of this correspondence as evidence of alleged bad faith. In lifting the privilege for this documentation, this Court stated:

> The in camera review shows that Dish's attorneys actively participated in monitoring compliance with the Rule. Dish attorneys investigated consumer complaints. Dish attorneys arranged for consumers to participate in sting operations designed to establish that Dish retailers and distributors were violating Dish procedures for compliance with the Rule.

Thus, this Court's description of the role of in-house counsel clearly supports an inference that that role was one that supported compliance. Plaintiffs now seek to have the Court infer the precise opposite from the very same conduct. Obviously, such an inference cannot be drawn against DISH on Plaintiffs' Motion. Rather, this Court should draw the inference that such conduct was in furtherance of DISH's good faith compliance efforts.

In addition to its impermissible attempt to rely upon inferences it seeks to draw against DISH, Plaintiffs also have failed to factually and legally support their claims with admissible evidence. Plaintiffs' failures can be summarized as follows:

- By relying solely on "hits" to the NDNCR generated by "massive computer processing," rather than consumer testimony, Plaintiffs essentially assume that every number on the NDNCR is a residential number that belonged to the consumer who registered it at the time the call was made. Plaintiffs cannot prove that each alleged NDNCR violation call was made to a residential, rather than business or government, telephone subscriber who placed his or her number on the NDNCR. The undisputed facts show that the opposite is true. Consumer landlines are a *minority* of numbers on the NDNCR. The NDNCR is comprised mostly of wireless numbers, business and government numbers, VoIP numbers, and invalid numbers. Plaintiffs, therefore, cannot meet their burdens of proof

because the FTC has not removed millions of business, government, abandoned, and invalid numbers from the NDNCR, leading to a highly inflated and knowingly flawed registry of numbers. In addition, Plaintiffs lack enforcement jurisdiction as to many of these phone numbers.

- Even as to residential landline numbers on the NDNCR, there are millions that Plaintiffs know are not still associated with the Registrant Consumer. The FTC concedes as much as it has unsuccessfully attempted to purge these numbers from the NDNCR.
- Plaintiffs make no attempt to account for this massive over-inclusiveness of numbers on the NDNCR. Thus, Plaintiffs' claims for over a billion dollars of fines are based on an NDNCR that, by their own admission, is incapable of producing a baseline for any violation, much less civil penalties of over a billion dollars. Plaintiffs' proposed injunction effectively would shut down entirely lawful aspects of DISH's business.
- Under the TSR, the FTC has jurisdiction only over interstate calls, not intrastate calls. 16 C.F.R. § 310.2(dd). The FTC has no evidence that each of the claimed violation calls for which it seeks relief was interstate.
- As to the alleged violations between 2003 and 2007, Plaintiffs cannot prove that these alleged calls were even telemarketing calls, as opposed to calls for some other purpose.
- As to the Independent Retailer call records, Plaintiffs cannot prove which of the calls were telemarketing calls, or that any telemarketing calls were made for a DISH product or service, rather than some other company's product or service. In

fact, the FTC's own investigator admitted that some of these Independent Retailer calls were made to sell something other than a DISH product.

- Under the TCPA and each of the state laws, State Plaintiffs can only seek relief for telemarketing calls that are placed to residents in their states. State Plaintiffs have no proof that telemarketing calls for which they claim a violation were placed to consumers within the boundaries of California, Illinois, North Carolina, and/or Ohio. Thus, State Plaintiffs seek hundreds of millions of dollars of fines without proving that their residents were harmed. State Plaintiffs try to show calls into their states based only on area codes. The FCC and courts repeatedly have made clear that, due to advances in technology, area codes and telephone numbers cannot be relied upon to prove that a call recipient resided or was located in a particular state at the time of the call.
- State Plaintiffs also claim that DISH made telephone calls using prerecorded messages in violation of the TCPA. When all of these calls were made, the TCPA did not bar such calls to a company's customers. All of those pre-recorded calls were made to then-existing DISH customers. Thus, there is no violation. The prerecorded messages played during the allegedly violative calls confirm that the calls were made to DISH customers: "Please listen to an important announcement from DISH Network, your satellite television provider," or "Dear DISH Network Customers, add your favorite Chinese TV channels now!"
- Finally, the FTC's claim that DISH is liable for alleged abandoned calls (or prerecorded message calls) by Independent Retailers Dish TV NOW and Tenaya/Star Satellite, which DISH did not even know (and could not have

known) were occurring because these Retailers were actually actively concealing such information from DISH, are barred by the applicable statute of limitations.

F. Plaintiffs' Motion Must Be Denied

In sum, the undisputed facts show that DISH acted in compliance with both the TSR and TCPA, it has implemented robust and comprehensive written Do Not Call policies and procedures, and continues to update and refine them as the law evolves. DISH has trained its personnel, and the personnel of its Telemarketing Vendors on these policies and procedures, and monitors compliance by these groups. DISH maintains an internal Do Not Call list ("DISH Internal DNC List"), purchases versions of the NDNCR from the FTC, and relies on a sophisticated process (using the FTC's own subcontractor) to prevent telemarketing calls to consumers who placed their telephone numbers on the Do Not Call lists. DISH vigorously monitored and enforced all of these telemarketing policies and procedures, including by using multiple levels of telemarketing campaign reviews, tracking consumer telemarketing complaints, investigating and addressing such complaints, and enhancing its processes as a result of such efforts. In fact, DISH has bettered its compliance program year-after-year, and bettered by far the FTC's own contractor's compliance with respect to the NDNCR.

As to the Independent Retailers, first Plaintiffs' Motion fails to supply the legal basis to hold DISH liable for the conduct of any Independent Retailer cited therein. Also, the isolated conduct of less than 1% of the Independent Retailers does not support Plaintiffs' Motion asserting over a billion dollars in penalties. Plaintiffs have not proven any retailer violations that could be attributed to DISH. Further, there is simply no legal basis under the TSR, TCPA, or state law to find DISH vicariously liable for such few Independent Retailers' conduct.

In the face of these facts, Plaintiffs' proposed form of order is both ominous and odious. First, Plaintiffs reveal their true mindset (all telemarketing should be illegal) by seeking

to ban DISH's telemarketing activities for five years and potentially indefinitely. (Plaintiffs' Motion at 152.) This is clearly an unconstitutional impingement on DISH's free speech rights and is unsupportable. Next, based on guilt by association, Plaintiffs seek to ban all Independent Retailers from access to DISH's sales process based on the alleged conduct of less than 1% of Independent Retailers. Even if Plaintiffs had proven telemarketing violations by six Independent Retailers, they cannot justify punishing every Independent Retailer. Finally, the fines they suggest, nearly $1.3 billion, are outrageously excessive, do not correspond to any of the evidence in this case, and are multiples of more than what the FTC has obtained in civil penalties of all of its TSR enforcement actions combined.[7] This outrageous request is plainly, and ominously, oppressive, unreasonable, and unconstitutional. Plaintiffs' Motion should be denied in its entirety.

DISH'S RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

DISH states as follows for its Response to the Plaintiffs' Statement of Material Facts. Consistent with Local Rule 7.1, DISH has segregated its response into Undisputed Material Facts, Disputed Material Facts, Disputed Immaterial Facts, and Undisputed Immaterial Facts. In addition, DISH provides Additional Material Facts.

UNDISPUTED MATERIAL FACTS

1. The National Do-Not-Call Registry ("Registry") was established in 2003 and now contains more than 200 million phone numbers. Dziekan Decl. ¶ 3 (Ex. 1).

2. Consumers register their phone numbers on the Registry via the Internet or through an automated telephone system, and telemarketers register with the FTC and download the Registry

[7] It should be apparent to the Court that the use of such inflated numbers and claims for billions of dollars in damages occur for two entirely inappropriate reasons: (1) to obtain favorable political headway for the FTC and the state Attorneys General in characterizing their "fight;" and (2) to develop leverage for unreasonable settlement demands.

in order to comply with the law. Answer to Second Am. Compl. ¶¶ 11, 15, Mar. 19, 2013 (d/e 263) (Ex. 2).

3. Dish is a business entity formed under the laws of Colorado with a principal place of business in Englewood, Colorado. Ex. 2 at ¶ 9.

4. Dish was known as Echostar until January 1, 2008, when it changed its name. Press Release, EchoStar, EchoStar Communications Corporation Announces Distribution Date for the Separation of Its Businesses (Dec. 28, 2007), available at http://about.dish.com/press-release/corporate/echostar-communications-corporation-announces-distribution-date-separation-i (Ex. 3).

14. Since October 18, 2003, Dish has placed interstate telemarketing calls to American consumers through a network of call centers located in, among other places, Colorado, Texas, New Jersey, West Virginia, and the Philippines. Dish Dep. 21:23-22:14, 24:10-25:24, 30:24-31:24, 33:11-34:21, 109:15-25, 115:12-22, 118:7-122:23, Dec. 15, 2010 (Bangert) (Ex. 12); Dish Dep. 61:5-20, Apr. 18, 2012 (Bangert) (Ex. 13).

19. Dish recorded data about the calls in its September 2007 to March 2010 call records in a computer system, which accurately stored the phone number dialed, the date and time of the call, a name indicating the campaign during which the call was made, and the "disposition code" entered by the Dish employee or agent who handled the call. Ex. 14 at 68:5- 24, 158:18-159:9, 161:5-16; Ex. 12 at 14:17-15:13; Montano Dep. 56:8-56:18, Nov. 29, 2012 (Ex. 19).

26. Dish's expert excluded the following from the "issue calls" in UF25: non- telemarketing calls, calls where Dish asserts that the "telephone never rang" on the recipient's phone, and calls where Dish reached a business. Ex. 27 at 69:11-18; Ex. 16 at 6-7; John Taylor, Expert Rebuttal Report at 10, Nov. 6, 2013 (Ex. 28).

36. In March 2011, Dish produced a copy of its entity-specific do-not-call list to Plaintiffs on a disc labeled "Dish Network LLC Internal Do-Not-Call Lists," with the cover letter from Dish's counsel reading: ". . . we enclose a CD-Rom containing DISH's Internal Do Not Call lists, which are responsive to Request No.1 of Plaintiffs' Third RFPDs." Letter from Boyle to Hsiao, Mar. 11, 2011 (Ex. 31).

38. Since approximately December 2007, Dish has used an outside telemarketing-compliance vendor, PossibleNow, to maintain the entity-specific do-not-call lists compiled by Dish and its retailers, and has hired PossibleNow employees—including persons designated by Dish as expert witnesses in this case—to consult on other compliance issues. Sponsler Dep. 64:7-69:5, Nov. 13, 2013 (Ex. 32), Sponsler Dep. Ex. 16, Nov. 13, 2013 (Ex. 33); Ex. 27 at 28:12-21; E-mail from Sponsler to Hutnik (July 25, 2007) (Ex. 34).

39. According to Mr. Taylor, Dish did not have access to many of the entity-specific do-not-call requests its retailers collected until long after those requests had been made by consumers, because its retailers did not upload those requests to PossibleNow. Ex. 27 at 47:21-49:8.

42. eCreek's call-center agents labeled the calls where consumers asked not to be called as "DNC," meaning "do not call." eCreek DNC Procedure (Ex. 37).

120. One of Dish's marketing strategies is placing outbound telemarketing calls to its current and former customers. Ex. 12 at 104:2-106:7, 215:3-216:9; E-mail from Senderovitz to Altahwi (Sept. 13, 2007) (Ex. 81); E-mail from Pastorius to Blum et al. (June 19, 2009) (Ex. 82).

129. Since Dish's debut in 1996, it has contracted with thousands of TVRO (an acronym meaning "TV Receive Only") retailers. Ex. 62 at 16:2-7; Ex. 88 at 18:7-15.

131. TVRO retailers are local or regional entities that typically employ an installation staff. Ex. 62 at 15:14-23.

132. Once a TVRO retailer makes a sale, the retailer's employee or agent travels to the customer's home to install Dish service, and TVRO retailers do not receive payments from Dish until they verify that they have installed or activated the customer. Ex. 62 at 15:14-23; Amendment No. 1 to EchoStar TVRO Dealer Agreement with Teichart Mktg. ¶ 10 (June 10, 1997) (Ex. 91); Ex. 88 at 15:10-16:13.

313. An automated dialer or automatic telephone dialing system is defined as "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1) (Ex. 236).

378. Mrs. [redacted] has had her landline number, ([redacted]) [redacted], since 1994 and her mobile number, [redacted], since 1992. Ex. 278 at 14:11-16.

390. The [redacted] signed up for Dish service in 2005 or 2006. Ex. 279 at 16:1-25.

479. Exhibits 16, 26, 28, and 298 are true and correct copies of reports of John Taylor produced by Dish in connection with this litigation. Ex. 295 at ¶¶ 11, 16, 18, 89.

452. Mrs. [redacted] was a Dish Network customer from approximately 2004 to October or November 2008. Ex. 292 at 17:24-19:3; 50:15-19.

DISPUTED MATERIAL FACTS

DISH disputes the accuracy and competence of these facts for the reasons stated.

21. Dish maintained an entity-specific do-not-call list, which recorded, among other things, the phone numbers of persons who stated they did not wish to receive telemarketing calls by or on behalf of Dish Network and the dates those requests were received. Ex. 12 at 210:13-21, 235:2-18, 240:3-241:23; Dish Dep. 237:1-241:15, Dec. 17, 2010 (Davis) (Ex. 21).

Response: While it is not disputed that DISH maintained an entity specific do not call list, the list itself did not record things; rather it was a record of telephone numbers, many of which FTC has no jurisdiction over, that purportedly belonged to persons who requested to not be called at the time that they made such request (Defendant DISH

Network's Statement of Additional Material Facts ("AMF"), are set forth below[8] (AMF ¶ 19); the exhibits cited by Plaintiffs (Exs. 12 and 21) do not support the contentions contained in this paragraph, that persons making such a request used the phrase "by or on behalf of" DISH.

22. In May and June 2010, Dish produced its September 2007 to March 2010 internal call records (the "2007-2010 call records") in two sets: (1) a hard drive Bates numbered DISH-00000001, containing calls handled by Dish's domestic and Filipino call centers; and (2) two CDs Bates numbered DISH-00000002, containing calls placed by eCreek's dialer. Letter from Korzha to Crane-Hirsch et al., May 27, 2010 (Ex. 22); Letter from Korzha to Crane-Hirsch et al., June 29, 2010 (Ex. 23); Letter from Boyle to Crane-Hirsch & Runkle, Apr. 27, 2010 (Ex. 24); Letter from Boyle to Crane-Hirsch & Runkle, June 28, 2010 (Ex. 25).

Response: DISH disputes any implication that the call records contain telemarketing telephone calls. As stated in DISH's Second Supplemental Responses to Plaintiffs' First Request for Production of Documents for ESI (Plaintiffs' Ex. 23), the records produced had not been analyzed to determine whether the telephone numbers called were, *inter alia,* on the applicable do not call registry, satisfied applicable grace periods, were based on an existing business relationship, or whether the records ever left the dialer, were made for collection purposes, or were made to business telephone numbers.

23. The analysis by Dish's proffered expert, John Taylor of PossibleNow, confirmed as accurate Plaintiffs' findings that certain Dish calls in DISH-00000001 were "issue calls" or Registry "hits"—i.e., calls were to telephone numbers that had been on the Registry for at least 31 days. John Taylor, Revised Expert Report at 1-2, Sept. 20, 2012 (Ex. 26).

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[8] DISH's Additional Material Facts Numbers 1 through 427 are from DISH Network, L.L.C.'s Memorandum of Law In Support of Its Motion for Summary Judgment, Statement of Undisputed Facts, d/e 353. DISH acknowledges the Court's suggestion to not incorporate by reference these facts, and to restate the facts relied on to support DISH's Opposition to Plaintiffs' Motion. With the exception of Additional Mateial Facts 1-6, each of these Additional Material Facts are relied on to support DISH's Opposition.

Response: The exhibit cited by Plaintiffs (Ex. 26) does not support the contentions contained in this paragraph (*see* DX-238 Declaration of John Taylor dated February 5, 2014 ("Taylor Decl.").

24. As used by Dish's expert, the term "issue calls" means that Dish could not exclude on the basis of any defense identified by its expert. Taylor Dep. 5:18-6:11, Nov. 20, 2013 (Ex. 27).

Response: The exhibit cited by Plaintiffs (Ex. 27) does not support the contentions contained in this paragraph.

27. 53,167 of those 501,650 calls were to California phone numbers. Ex. 16 at 8.

Response: Plaintiffs have no evidence that any calls were made to "California phone numbers"[9] and the document cited does not provide any such evidence (see AMF 388-400; see also Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

28. 42,019 of those 501,650 calls were to California phone numbers using a 90-day Registry grace period as opposed to a 31-day grace period. Ex. 28 at 10.

Response: Plaintiffs have no evidence that any calls were made to "California phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; see also Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

29. 24,096 of those 501,650 calls were to Illinois phone numbers. Ex. 28 at 10.

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[9] A dispute about a fact is "genuine" for purposes of summary judgment if the evidence of the fact is such that a reasonable jury could return a verdict for the nonmoving party. *Borcky v. Maytag Corp.*, 248 F.3d 691, 695 (7th Cir. 2001). The Court should further construe all facts in a light most favorable to the nonmoving party, and resolve all ambiguities in favor of DISH. *Mullin v. Temco Mach., Inc.*, 732 F.3d 772, 776 (7th Cir. 2013).

Response: Plaintiffs have no evidence that any calls were made to "Illinois phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

30. 16,005 of those 501,650 calls were to North Carolina phone numbers. John Taylor, Supplemental Rebuttal Report of John Taylor at 3, Nov. 18, 2013 (Ex. 298).

Response: Plaintiffs have no evidence that any calls were made to "North Carolina phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

31. 23,853 of those 501,650 calls were to Ohio phone numbers. Ex. 28 at 10.

Response: Plaintiffs have no evidence that any calls were made to "Ohio phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

32. Dish does not preserve any information about the creation of its calling campaigns—which are telesales efforts calling prospective, former, or current customers—and how it scrubs its calling lists. Gogineni Decl. ¶ 8, Jan. 2, 2013 (d/e 224) (Ex. 29); Montano Decl. ¶ 14, Jan. 4, 2013 (d/e 227) (Ex. 30).

Response: The exhibits cited by Plaintiffs (Exs. 29 and 30) do not support Plaintiffs' statement contained in this paragraph (*see* AMF ¶¶ 20, 34-35, 50-74).

35. Dish's expert excluded from his call counts all calls in Dish's 2007-2010 call records that reached businesses. Ex. 16 at 7; Ex. 27 at 69:11-18, 71:1-4; Ex. 28 at 10.

Response: DISH's expert did not arrive at the conclusions that Plaintiffs attribute to him in this paragraph (*see* Taylor Decl. ¶¶ 2-10).

37. According to Dish, the telephone numbers on this list are those of consumers who told Dish and its retailers that that they did not wish to receive future telemarketing calls. Ex. 21 at 237:1-241:15.

Response: The exhibit cited by Plaintiffs (Ex. 21) does not support Plaintiffs' statement contained in this paragraph (*see* AMF ¶¶ 19).

43. From November 2008 through March 2010, Dish and/or eCreek made 140,349 telemarketing calls to more than 23,000 distinct consumer telephone numbers that had been recorded as "DNC" by eCreek and Dish more than 30 days prior to the 140,349 illegal calls. Yoeli Decl. ¶ 27 (Ex. 38); Third Party Vendor List-Calls.xls (Apr. 26, 2010) (Ex. 39); Ex. 21 at 289:14-290:18.

Response: Plaintiffs' characterization of "illegal calls" is misleading and lacks foundation; DISH disputes the veracity of the information relied upon by Plaintiffs' expert (s*ee* AMF ¶¶ 112-178).[10]

44. In November 2013, Dish's expert found 8,224,409 "issue calls" to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 11 (Tables 3b-3d).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; Plaintiffs' characterization of "issue calls" as calls "to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls" is misleading and confusing; the exhibit cited by Plaintiffs in this paragraph (Ex. 28) does not support Plaintiffs' statement contained in this paragraph (*see* Taylor Decl. ¶¶ 2-10.)

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[10] Courts will disregard alleged facts that contain legal conclusions, are hearsay, not based on personal knowledge, irrelevant, or not supported by evidence in the record. *Phillips v. Quality Terminal Servs., LLC*, 855 F.Supp.2d 764, 771-772 (N. D. Ill. 2012.) Moreover, a party may not rely on vague, conclusory terms. *Bumba v. Pavilion Foundation*, No. 09 CV 2314, 2012 WL 7660209 at *6 (C.D. Ill. March 7, 2012), *citing Gabrielle M. v. Park Forest-Chicago Heights, Il. Sch. Dist. 163*, 315 F.3d 817, 822 (7th Cir. 2003.)

45. 3,114,488 of the 8.2 million calls in UF44 were placed to numbers that were actually on Dish's entity-specific do-not-call list and accessible to Dish at the time of the call. Ex. 28 at 11 (Tables 3b, 3d).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; the issue is not "calls . . . placed to numbers," as claimed by Plaintiffs, because placing calls alone is not a basis for liability under the TSR or TCPA, and instead, the content of the calls to actual persons are material questions of fact. *Phillips*, 855 F.Supp.2d at 771-772.

46. 2,397,390 of the 8.2 million calls in UF44 were also calls that had been on the Registry for more than 31 days. Ex. 38 at ¶ 29(b)(i). 11,004 of these 2,397,390 calls were included within the 501,650 "issue" identified by Dish's Expert John Taylor in UF25 (i.e., calls to numbers on the Registry for more than 31 days). Ex. 38 at ¶ 29(b)(i). Excluding these 11,004 calls yields a total of 2,386,386 calls to phone numbers that had been on the Registry for more than 31 days and that are numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the call.

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. *Phillips*, F.Supp.2d at 771-772.

47. 302,983 of the 2,386,386 calls in UF46 were to California phone numbers. Ex. 38 at ¶ 29(b)(i).

Response: Plaintiffs have no evidence that any calls were made to "California phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

48. 296,640 of the 2,386,386 calls in UF46 were to California phone numbers using a 93-day Registry grace period. Ex. 38 at ¶ 29(b)(ii).

Response: Plaintiffs have no evidence that any calls were made to "California phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

49. 118,289 of the 2,386,386 calls in UF46 were to Illinois phone numbers. Ex. 38 at ¶ 29(b)(i).

Response: Plaintiffs have no evidence that any calls were made to "Illinois phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

50. 97,785 of the 2,386,386 calls in UF46 were to North Carolina phone numbers. Ex. 38 at ¶ 29(b)(i).

Response: Plaintiffs have no evidence that any calls were made to "North Carolina phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10)

51. 95,275 of the 2,386,386 calls in UF46 were to Ohio phone numbers. Ex. 38 at ¶ 29(b)(i).

Response: Plaintiffs have no evidence that any calls were made to "Ohio phone numbers" (*Mullin*, 732 F.3d at 776), and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10).

53. [redacted] of California, who has the phone number ([redacted]) [redacted], received an illegal call from Dish on June 18, 2009, and wrote to FTC the same day, "This company will not stop calling me no matter how many times I have asked them to stop!" Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28, App. B.

Response: The alleged statements made in Exhibit 1 in support of this paragraph constitute inadmissible hearsay with respect to anything allegedly said by the declarant and therefore do not support the alleged facts; the telephone number referenced in this paragraph does not appear in DISH's call records or any of the call records produced in this case (Taylor Decl. ¶14); Plaintiffs' characterization of the alleged call as "illegal" is misleading and lacks foundation. *Phillips*, F.Supp.2d at 771-772; *Bumba*, 2012 WL 7660209 at *6.

55. Dish has known since at least January 2003 that prerecorded telemarketing messages, also known as "robocalls," are generally unlawful. E-mail from Davidson to Meyers et al. (Jan. 17, 2003) (Ex. 40); see Kyle Gaffaney, Federal Ban on Automated Prerecorded Messages, So-Called "Robocalls," Goes into Effect, 22 Loy. Consumer L. Rev. 130 (2009) (Ex. 41).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any facts that are pertinent to Plaintiffs' motion; the exhibits cited by Plaintiffs (Exs. 40 and 41) do not support Plaintiffs' statement contained in this paragraph; the term "generally unlawful" is misleading, and as such constitutes an irrelevant immaterial statement; to the extent this paragraph addresses conduct outside the applicable statute of limitations, these facts are not material because they cannot form the basis for any liability as to DISH. *Phillips*, 855 F.Supp.2d at 771-772; *Bumba*, 2012 WL 7660209 at *6; 15 U.S.C. § 57b(d), *accord F*TC v. Magazine Solutions, LLC, No. 7-692, 2010 WL 1009442, at *13 (W.D. Pa. Mar. 15, 2010) (federal three year statute of limitations applies to these claims.)

56. Since October 18, 2003, Dish has placed prerecorded telemarketing calls to American consumers using a Dish-owned system to deliver prerecorded messages. Ramjee Decl. ¶¶ 7-8, Jan. 4, 2013 (d/e 229) (Ex. 42).

Response: Disputed with respect to Plaintiffs' characterization that DISH's pre-recorded message campaigns were regular, ongoing, or continuous as Plaintiffs' use of "since" implies. Merriam-Webster Online Dictionary, available at http://www.merriam-webster.com/dictionary/since (defining "since" as "from a definite past time until now") (last accessed Jan. 28, 2014). In fact, DISH's use of prerecorded messages was sporadic at best, with the overwhelming majority of campaigns confined to a six-month period between September 2007 and March 2008. *See* Ramjee Decl. ¶ 7(a)-(tt), Jan. 4, 2013 (d/e

229) (Ex. 42).[11] Moreover, discovery revealed that DISH had only 61 calling campaigns over the more than ten-year period identified by Plaintiffs which utilized pre-recorded messages. *Id*. at ¶ 5. Further, as the recording transcripts set forth at Paragraphs 7(a) through (uu) of the Ramjee Declaration demonstrate, most of these calls were made to existing customers.

In addition, to the extent this paragraph addresses conduct outside the applicable statute of limitations, these facts are not material because they cannot form the basis for any liability as to DISH. 15 U.S.C. § 57b(d).

Finally, there is no evidence to support the assertion that the recipients of such calls were "consumers" who are protected by the TSR (*i.e.*, the numbers called were residential landlines still associated with the individuals who registered them in the first instance).

92. Dish's lawyers and compliance personnel have known specifically since before the Registry went into effect that Dish would have to pay up to $11,000 per violation for violating the TSR. E-mail from Maciejewski to Tran (Sept. 9, 2003, 4:50PM) (Ex. 57).

Response: DISH does not deny that its attorneys and compliance personnel have been aware of the TSR since before the DNC Registry went into effect, and affirms that it has sought to comply with those requirements. However, the exhibit referenced in this paragraph (Ex. 57), and the reference to a penalty per violation, is not attributable to DISH's attorneys or compliance personnel. The referenced exhibit is from DISH's Information Technology Dept.

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[11] The campaign names include the date when the campaigns were used. For example, "AM 090507 GREEK," Ramjee Decl. at ¶ 7(a), occurred on September 5, 2007.

93. Dish's lawyers acknowledge that the marketing department does not tell them about sales initiatives that may raise telemarketing concerns. E-mail from Davis to Pastorius (June 6, 2008) (Ex. 58).

Response: The exhibit cited by Plaintiffs in this paragraph (Ex. 58) does not support the contentions contained in this paragraph; it does, however, support the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense; DISH further objects to the use of Exhibit 58 on the grounds of attorney-client privilege and the attorney work product doctrine.

94. In early 2010, Dish realized that its internal dialing systems did not actually scrub telephone numbers on its entity-specific do-not-call list from its telemarketing campaigns. E-mail from Montano to Davis (Jan. 28, 2010) (Ex. 59); E-mail from Bagwell to Montano (Jan. 28, 2010) (Ex. 60).

Response: Plaintiffs state that DISH's internal dialing systems did not scrub telephone numbers on its Internal DNC list out of its telemarketing campaigns and that DISH knew of such fact. That is an incorrect assertion and heavily disputed in any event. Any dialing issues were the results of one-off human errors – in occasional instances, DISH employees simply failed to select the correct filtering/scrubbing option before the relevant calling campaigns took place. The two emails that Plaintiffs cite show that dialing errors were not the result of DISH's scrubbing technology not working as it should but, rather, a single instance where a DISH manager failed to add a number to DISH's IDNC list and suppress that number from DISH's dialer. *See* E-mail from Montano to Davis (Jan. 28, 2010) (Ex. 59) ("[redacted]"); E-mail from Bagwell to Montano (Jan. 28, 2010) (Ex. 60) (same). Thus, at most, DISH realized that,

in occasional instances, as the result of human error, certain numbers that should not have been called were not suppressed; but, there is no evidence of a uniform, consistent, and ongoing failure of DISH's internal dialing system to scrub, as Plaintiffs have asserted. Contrary to the contention in this paragraph, DISH's automated dialing machines do scrub for telephone numbers on its entity specific DNC list for DISH's telemarketing campaigns (AMF ¶¶ 50-57).

104. PossibleNow discovered at some point in 2007 or 2008 that Dish's system for scrubbing its calling lists was "flawed and not operating in a compliant manner." PossibleNow, Dish Network Client Profile (Ex. 69).

Response: The exhibit cited by Plaintiffs (Ex. 69) does not support the contentions contained in this paragraph; however, the exhibit does support the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense; the contentions in this paragraph misstate the evidence, because Exhibit 69 consists of a memo from PossibleNOW indicating potential upgrades and/or current processes or procedures, and the reference in the paragraph appears to be related solely to the scrubbing process using lists provided by Retailers to DISH; to the extent this contention references Retailers, it is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Sections II and V.

105. PossibleNow told Dish in 2009 that it needed to improve its compliance systems in order to comply with "regulator mandates," but Dish did not buy the product PossibleNow recommended. Ex. 32 at 34:22-40:25, Sponsler Dep. Ex. 15, Nov. 13, 2013 (Ex. 70).

Response: The exhibits cited (Exs. 32 and 70) do not support the contentions contained in this paragraph. As Mr. Sponsler testified, the recommendations he made were for the

purposes of selling services without any specific knowledge regarding DISH's retailer compliance program:

> [I]n 2009 my relationship with Dish was fairly new. I didn't know very much about what they did or how they did it. And so, I had recommended to them the most – one of the most comprehensive programs that we do without having an analysis of, you know, how did Dish, what was their relationship with their retailers, specifically, and how did they handle that through contracts. I didn't even look at that stuff. This was just, you know, kind of the Cadillac program that I put out there. And what I am saying is that today, in 2013, knowing what I know now about Dish's relationships, I would design a different program recommendation.

(AMF 431, DX-226 (Sponsler Dep.54:9-24.). The interaction described in Exs. 32 and 70 regarding PossibleNOW/Compliance Point, however, does support the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense.

106. For years, Dish told consumers who complained about telemarketing that they should contact each of their thousands of "independent" retailers if they wish to stop receiving Dish telemarketing calls. Letter from Romero to [redacted] (Feb. 21, 2007) (ex. 71); Letter from Bappe to [redacted] (July 14, 2006) (Ex. 72); dnc tracker template -Direct3.doc (July 1, 2012) (Ex. 73); Musso Decl. at 2, Aug. 16, 2010 (d/e 48-3) (Ex. 74).

Response: Plaintiffs misstate the exhibits in support of this paragraph; the exhibits cited by Plaintiffs (Exs. 71, 72, 73, and 74) do not support the contentions made by Plaintiffs in this paragraph; however, they do support the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense.

107. When a do-not-call complaint came in, the Dish customer service agent was required to ask the consumer if he or she answered the phone when the telemarketer called. Dish, ERT Tracker-TCPA at DISH5-0000078125 (Ex. 75).

Response: The exhibit cited by Plaintiffs (Ex. 75) does not support the contentions made by Plaintiffs in this paragraph; however, it do support the fact that DISH took seriously

its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense.

108. If the consumer said "no," the Dish employee was required to read the following statement: "Calls to a consumer by a telemarketer do not actually constitute a violation of the Telephone Consumer Protection Act if the consumer does not answer the call." Ex. 75 at DISH5-0000078125.

Response: The exhibit cited by Plaintiffs (75) does not support the contentions made by Plaintiffs in this paragraph; however, it does support the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense.

112. Ms. Musso, Dish's telemarketing compliance manager for its retailers, agreed that the retailers were on "the honor system" and stated that retailers committing telemarketing violations were judged on a "case by case basis." Ex. 77 at 63:15-64:23, 133:12 134:10, 222:9- 223:5, 244:16- 245:9.

Response: The exhibit cited by Plaintiffs (Ex. 77) does not support the contentions made by Plaintiffs in this paragraph; Plaintiffs ignore the fact that DISH's interactions with the Retailers are governed by contract (*see* AMF ¶¶ 180-196); DISH has robust procedures in place concerning alleged telemarketing violations, which supports the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense (*see* AMF ¶¶ 197-210).

114. Dish received many thousands of consumer complaints about telemarketing. Active Tracker .xls (Ex. 79).

Response: The exhibit cited by Plaintiffs in this paragraph (Ex. 79) constitutes inadmissible hearsay with respect to any of the contents of this document and therefore does not support the alleged facts regarding the content of any given complaint; however, Exhibit 79 does support the fact that DISH took seriously its compliance efforts and, as

such, constitutes a fact that supports DISH's safe harbor defense. *Phillips*, 855 F.Supp.2d at 771-772.

116. Ms. Musso testified that she did not look at complaints that did not contain a caller ID number reported by the complainant because "you can't get blood from a turnip." Ex. 77 at 221:15 – 222:23.

Response: Plaintiffs misstate the exhibits in support of this paragraph; the exhibit cited by Plaintiffs (Ex. 77) does not support the contentions made by Plaintiffs in this paragraph; the information contained in that exhibit, however, does support the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense.

121. Dish's system for scrubbing—i.e., eliminating from its calling lists numbers that should not be called—depended on Dish employees inputting criteria into a number of proprietary data systems. Ex. 13 at 19:22-20:22, 84:8-21; 114:13-115:22, 152:18-153:10; Ex. 17 at 129:14-130:15, 160:19-161:07.

Response: DISH employees are responsible for setting up the determined scrub criteria for a campaign by selecting (i.e. inputting) the criteria into the Pdialer application that will then process the list based on the criteria selected. However, that is only one step in the process, a secondary scrub takes place at PossibleNow in instances where the lists are telemarketing calls.

122. Dish did not scrub its current and former customer telemarketing calling lists against the Registry. E-mail from Davis to Gregg (Oct. 13, 2008) (Ex. 83); E-mail from Dexter to Kuehn (Oct. 25, 2011) (Ex 84).

Response: The exhibits cited by Plaintiffs (Exs. 83 and 84) do not support the contentions contained in this paragraph; Exhibits 83 and 84 do, however, provide facts that support DISH's safe harbor defense; DISH further objects to the use of Exhibits 83 and 84 on the grounds of attorney-client privilege and the attorney work product doctrine.

123. Dish did not scrub many of its telemarketing calling lists against its entity specific do-not-call list. Ex. 28 at 10-11.

Response: The exhibit cited by Plaintiffs (Ex. 28) does not support the contentions made by Plaintiffs in this paragraph; the word "many" as used in this paragraph is vague and misleading. *Bumba*, 2012 WL 7660209 at *6.

124. Dish did not establish written policies for scrubbing of its lists. Ex. 13 at 149:8-151:11.

Response: The deposition testimony cited by Plaintiffs does not support this statement of fact. Indeed, the deponent on whose testimony Plaintiffs exclusively rely qualified his responses with respect to whether there was a written policy – "I don't think it was in a written policy [regarding the "auditing" of DNC lists]," "I can't speak to ever," and "not to my knowledge." Exh. 13 at 149:18, and 149:23-24. Thus, rather than stating definitively that DISH had no written policy – as Plaintiffs suggest – Mr. Bangert testified that he simply did not know one way or another.

In fact, the record reveals that, since at least 2003, DISH has had written policies and practices designed to comply with the TSR and TCPA in order "to protect the privacy rights of consumers and to promote compliance with applicable laws and regulations," and "to honor the request of any person who opts not to receive telephone solicitations" from DISH. (DX-2, Montano Decl. ¶ 16; *see also* DX-5, DISH-00000449-52 at 450; DX-6, DISH-00001939-41 at 1940; DX-3, DISH-00006052 at 6053; and DX-4, DISH-00006850 at 6851.) Further, DISH periodically updated its "'Do Not Call' Policy" and related supporting procedure documents and distributed them internally to all DISH employees with responsibility for outbound calls in the ordinary course of DISH's business. (DX-5. DISH-00000449-52 at 450; DX-6, DISH-00001939-41 at 1940; DX-3, DISH-00006052 at 6053; and DX-4, DISH-00006850 at 6851.) DISH's "Do Not Call"

Policy and related supporting procedures set forth, among other things: (a) the procedures by which any persons who inform DISH that they do not wish to receive solicitation calls from DISH are placed on DISH's Internal DNC List (as defined below); (b) the procedures by which DISH complies with the NDNCR; (c) the precise language DISH personnel are to use when responding to requests to be added to DISH's Internal DNC list and/or requests for a copy of DISH's "Do Not Call" Policy; and (d) the procedures for updating DISH's Internal DNC List. (DX-5, DISH-00000449-52 at 450; DX-6, DISH-00001939-41 at 1940; DX-3, DISH-00006052 at 6053; and DX-4, DISH-00006850 at 6851.)

125. Dish did not educate the employees that created marketing lists on how to ensure that those lists were appropriately scrubbed for do-not-call compliance with federal or state telemarketing laws. Ex. 13 at 119:17-120:9, 129:25-131:10.

Response: Plaintiffs grossly misrepresent the record. In fact, they flatly contradict it. The deposition testimony cited by Plaintiffs in support of this fact supports the opposite conclusion – that DISH did educate and train its employees on how to ensure calling lists were appropriately scrubbed for compliance with federal and state telemarketing laws. For example, the following exchanges took place between Plaintiffs' counsel and the deponent:

> Q. . . . Did DISH Network have a training program for users of P-Dialer? . . . Go ahead. Answer the question.
> A. I guess the answer to the question is: We decided. How it worked is that we worked with legal. Legal told us which types of scrubs would be applicable, and then those would be the scrubs that would be used.
> Q. ***I'm asking about a training program. If the answer is no, that's fine.***
> A. ***I'm not saying the answer is no.***
> Q. Okay.
> A. What I'm saying is: That's how it works. I learned how to use the system in instruction with IT, reviewing the documents, and learning it. ***So yes. I would say to that regard, there is a training program.***

> Q. Okay. Did other users undergo this – of P-Dialer undergo this training program?
> A. ***I personally trained everyone on P-Dialer***, and, as I said, when I transitioned it to Monte, this was one of the things I trained him on.

Ex. 13 at 119:17-120:14 (emphasis added and counsel's objections omitted). Plaintiffs, again, seriously misrepresent the record and their Motion for Summary Judgment should be denied for that reason alone. *See Internet Mktg. Group, Inc*., 2006 WL 273540.

It is clear that DISH trained its personnel, and the Telemarketing Vendors, on DISH's Do Not Call compliance policies and procedures. (DX-2, Montano Decl. ¶ 12.) This training is (and has been) provided to any DISH employee or vendor responsible for managing and/or implementing outbound calling campaigns. (*Id.*) DISH took this training seriously. (Pl. Dep. Ex. 268 (Werner) DISH-00006629.) DISH's project manager of technical operations, Bob Davis, managed the outbound call operations area, including new outbound requests, Do Not Call compliance, TCPA compliance, and dialer operations. (DX-170, Davis Dep. 17:9-18; 38:2-23.) The project manager of technical operations supervised a dialer operations manager, who supervised two to three business operations specialists, and an outbound operations manager, who supervised two to three employees. (*Id*. 18:10-18.)

Training is provided in person by a departmental coach, by a member of DISH's legal or compliance teams, or by an employee of PossibleNOW, a third party that provides TCPA training and compliance services for DISH. (DX-2, Montano Decl. ¶ 13; DX-14, DISH-00000126-77 ("CSC Do Not Call Requests"); DX-12, DISH-00000438-44 ("Do Not Call Regulatory Compliance"); DX-11, DISH2-0000037715 (email regarding DNC training schedule); DX-9, 38646, 38647-49 and 38650-52 (e-mail re: DNC training w/ attached presentations re: Inbound DNC Process and Investigator Process for DNC);

DX-17, DISH5-0000021632-53 (PowerPoint presentation delivered by PossibleNOW); DX15, 21674-78 (same); DX-16, 21689-703 (same); DX-18, 21738-60 (same).) A trainee may also be assigned to review a PowerPoint presentation on DISH's Do Not Call compliance procedures, available on DISH's intranet, with his or her department managers. (DX-2, Montano Decl. ¶ 14.) The managers will discuss the presentation with the trainee and, later, the trainee may address any questions about Do Not Call compliance to the trainee's managers and/or DISH's Do Not Call compliance team. (*Id.*)

DISH also provides its inbound and outbound calling employees with specific training on: (1) how to access and provide consumers with DISH's Do Not Call Policy; (2) how to add consumers to DISH's Internal DNC List; and (3) how to distinguish between the types of calls that may or may not be placed to consumers, regardless of whether they are on a Do Not Call list. (DX-2, Montano Decl. ¶ 15; DX-14, DISH-00000137-38, 140-55, 161-65.) All of DISH's outbound call agents also receive training on the applicable telemarketing laws and specific do not call regulations. (DX-217, Dexter Dep. 43:8-17.) DISH provided the department responsible for placing outbound telephone calls with telemarketing compliance training through a PowerPoint presentation that was followed up with a group discussion. (DX-217, Dexter Dep. 16:20-17:15.)

DISH also provides its Telemarketing Vendors' agents with the same training that DISH agents receive. (DX-217, Dexter Dep. 45:2-5.) DISH's Do Not Call policy is available on a DISH website to which all DISH agents (and Telemarketing Vendor agents) have access. The policy is part of the training that is provided to any agents who are engaged in outbound calling. (*Id*. 179:25-180:4; 181:20-23.) Initially, with respect to

do-not call scrubbing against DISH's Internal DNC List and the NDNCR list, Russell Bangert, a DISH employee trained in telemarketing compliance, trained all personnel responsible for using DISH's dialer and scrubbing system (P-Dialer) as to which scrubs to perform on outbound calling lists (including scrubs against all do not call lists), and then trained the individual who took over this responsibility at DISH for Mr. Bangert. (DX-217, *Id.* 111:20-112:5; 119:7-121:12.) Thereafter, training for DISH's dialer and scrubbing systems, as well as procedures for all outbound calls, was performed by DISH's Dialer Operations Team in its Bluefield call center prior to processes being centralized and updated at DISH's corporate campus and integrated with PossibleNOW in early 2008. (DX-2, Montano Decl. at ¶ 16.)

126. Dish does not have a practice of requiring all outbound calling campaigns to be vetted for compliance. E-mail from Fletcher to KBSCorpPB@echostar.com (Mar. 14, 2008) (Ex. 85); E-mail from Dexter to Walden (Aug. 16, 2011) (Ex. 86).

Response: The exhibits cited by Plaintiffs (Exs. 85 and 86) do not support the contentions contained in this paragraph – the vast majority of the contents of Exhibit 85 relate to physical mail and e-mail, not telemarketing, and Exhibit 86 appears to relate to survey campaigns and not telemarketing campaigns; however, these exhibits do support the fact that DISH took seriously its compliance efforts and, as such constitute facts that supports DISH's safe harbor defense; DISH further objects to the use of Exhibit 86 on the grounds of attorney-client privilege and the attorney work product doctrine.

397. Dish's 2003-2007 call records reflect that Dish made 115 calls to the [redacted]'s telephone number between February 2006 and August 2007, including at least three calls more than 30 days after July 12, 2007, when Dish placed the [redacted]' number on its entity-specific do-not-call list. Ex. 38 at ¶ 13.

Response: The exhibit cited by Plaintiffs (Ex. 38) does not support the contentions in this paragraph, because Ms. [redacted]'s telephone number was placed on the Registry on November 7, 2007, and therefore, any alleged calls received prior to this date cannot constitute TSR or TCPA violations. Moreover, DISH placed this consumer's telephone number on its accessible internal do-not-call list on October 23, 2008, and the July 12, 2007 date to which Plaintiffs refer is the date on which this consumer's telephone number was placed on a Retailer's internal do-not-call list (to which DISH did not have access at that time) (Taylor Decl. at ¶ 4). The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, because Ms. [redacted] had an EBR with DISH since in or about 2005 or 2006 until mid-2013, and therefore, any calls made to this consumer during the time alleged by Plaintiffs would not have been potential TCPA or TSR violations (Taylor Decl. at ¶ 4). See Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

401. Dish's 2007-2010 call records show that during the year between September 2007 and September 2008, Dish made 52 separate telemarketing calls to the [redacted]' landline number as part of the following telemarketing campaigns: TH VOL TRAIL (1MTH), BF VOL TRAIL (2MTH), BF VOL TRAIL (4MTH), TH VOL TRAIL (5MTH), EP VOL TRAIL (6MTH), TH VOL TRAIL (7MTH), EP VOL TRAIL (8MTH), OR VOL TRAIL (9MTH). Ex. 38 at ¶ 13.

Response: This is disputed because Ms. [redacted]'s telephone number was placed on the Registry on November 7, 2007, and therefore, any alleged calls received prior to this date cannot constitute TSR or TCPA violations. Moreover, DISH placed this consumer's telephone number on its accessible internal do-not-call list on October 23, 2008, and the July 12, 2007 date to which Plaintiffs previously referred is the date on which this consumer's telephone number was placed on a Retailer's internal do-not-call list (to which DISH did not have access at that time) (Taylor Decl. at ¶19). The facts alleged in

this paragraph are therefore irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, because Ms. [redacted] had an EBR with DISH since in or about 2005 or 2006 until mid-2013, and therefore, the alleged calls made to this consumer by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶ 4); The exhibit cited by Plaintiffs in this paragraph does not support the contentions contained in this paragraph, because the call campaign codes referenced in this paragraph (i.e., "TH VOL TRAIL (1MTH), BF VOL TRAIL (2MTH), BF VOL TRAIL (4MTH), TH VOL TRAIL (5MTH), EP VOL TRAIL (6MTH), TH VOL TRAIL (7MTH0, EP VOL TRAIL (8MTH), OR VOL TRAIL (9MTH)") are campaigns that DISH uses to call current customers or to call customers within an 18-month period after such consumer has terminated services with DISH, and accordingly, these particular campaign codes indisputably show that the calls were made within the proper EBR period (Taylor Decl., ¶20).

426. During one of two Dish calls on January 5, 2007, Ms. [redacted] told Dish she did not want any more telemarketing calls, the disposition code "SP" was entered into Dish's system, and her landline number was added to Dish's entity-specific do-not-call list. Ex. 38 at ¶ 15.

Response: The alleged exhibit cited by Plaintiffs in this paragraph (Ex. 38) does not support the contentions contained in this paragraph regarding whether Ms. [redacted] told DISH she did not want any more telemarketing calls or whether the disposition code "SP" was entered into DISH's system; the telephone number 973-895-0071 was entered into DISH's internal DNC list on January 5, 2007, which supports the fact that DISH took seriously its compliance efforts and, as such, constitutes a fact that supports DISH's safe harbor defense.

427. "SP," which stands for "suppression," is used by Dish's internal systems to suppress a particular telephone number and prevent it from being dialed in future telemarketing campaigns or, if entered directly into the dialer, immediately. System A Dispositions 1_12_09.doc (Ex. 288); Ex. 14 at 158:11-159:9, 162:10-16.

Response: "SP" is the dialer disposition used when an outbound call is placed and the consumer receiving the call indicates that they would like to stop receiving telemarketing calls (Ex. 14 at 158:21-23); the system registers the consumers phone number on the DISH internal DNC list during nightly updating processes (*Id.* at 161:1-4); this process and the disposition "SP" should not be confused with the process for suppressing a telephone number directly in the dialer which will stop all calls (*Id.* at 162:10-12); the SP dialer disposition only adds the number to the internal DNC list (*Id.*).

433. Ms. [redacted]' telephone number was first placed on the Registry on June 3, 2007, and re-registered in 2010 and 2012. Ex. 1 at ¶ 13.

Response: The facts alleged in this paragraph are disputed, because DISH's records indicate that Ms. [redacted]' [redacted] telephone number was placed on the Registry on June 4, 2007) (Taylor Decl., ¶26).

434. Ms. [redacted] has never been a Dish customer and she has not contacted Dish to inquire about services by phone or through completing a lead form on the Internet. Ex. 289 at 36:15-16; 37:3-38:1.

Response: The exhibit cited by Plaintiffs (Ex. 289) does not support the contention contained in this paragraph, that Ms. [redacted] never contacted DISH to inquire about services, because Ms. [redacted] testified that she conducted internet research about DISH's and DirectTV's services prior to signing up for DirecTV (Ex. 289, 36:23-38:4), and Ms. [redacted] could not recall one way or the other whether she provided her phone number to DISH while looking into its products and services (*id*., at 38:2-4).

436. The calls were so incessant she tried to contact Dish twice to address the error and stop the calls. Ex. 289 at 46:1-6, 50:20-52:20, 62:6-12.

Response: The facts alleged in this paragraph are argumentative; the exhibit cited by Plaintiffs in this paragraph (Ex. 289) does not support the contention in this paragraph that the calls that Ms. [redacted] received were "incessant." *Bumba*, 2012 WL 7660209 *6.

438. Between October 25, 2007 and December 6, 2007, Dish called Ms. [redacted]' home telephone number six times as part of its HG STZ LATINO, EC PLYINTV NEW(ESP), and EC STZ LATINO 2P telemarketing campaigns. Ex. 38 at ¶ 16.

Response: Ms. [redacted] conceded that the calls made to her were a case of mistaken identity because the campaign codes associated with the referenced calls indicate that these were telemarketing calls offering service-related upgrades to an existing DISH customer or to a consumer who DISH believed to be a customer based on the associated telephone number. (Taylor Decl., ¶28-29; Pls. Ex. 289 at 43:1-45:1). DISH's telemarketing calls were directed at an individual of Hispanic descent that it believed to be a customer of DISH. Ms. [redacted]'s conceded as much in her deposition as she testified that her ([redacted]) [redacted] telephone number was newly assigned to her and that she was receiving DISH calls attempting to locate an individual of Hispanic descent. (DX-236 at 31:12-32:25; Pls. Ex. 289 at 43:1-45:1).

439. Between 2008 and 2010, Ms. [redacted] continued to receive calls marketing Dish on her [redacted] number, sometimes up to two a day, usually around lunchtime and dinner time, encouraging her to subscribe for Dish; if she did not answer a message would be left urging her to subscribe to Dish. Ex. 289 at 67:6-68:5, 72:5-23.

Response: The alleged statements in Exhibit 289 constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers; the facts alleged in this paragraph lack foundation, and they are disputed, because DISH's call records indicate that DISH placed only the following two calls to Ms. [redacted] after December 31, 2007:

1) March 5, 2009 under the "AM RA 0305" campaign; and 2) March 6, 2009 under the "AM ADHOC AUTOPAY" campaign (Taylor Decl., ¶30); the facts alleged in this paragraph are disputed because the campaign codes associated with the foregoing two calls indicate that these were not telemarketing calls, and therefore, these calls were placed by DISH to an existing DISH customer or to a consumer who DISH believed to be a customer based on the associated telephone number. (Id.).

440. Ms. [redacted] knew it was Dish calling from the phone number displayed and from the message itself, which mentioned Dish Network and "was like listening to a commercial on your telephone." Ex. 289 at 67:11-69:8, 70:8-16.

Response: The exhibit cited by Plaintiffs (Ex. 289) does not support the contention contained in this paragraph, that Ms. [redacted] knew that the calls she was receiving were from DISH; the alleged statements made in Exhibit 289 in support of this paragraph constitute inadmissible hearsay with respect to the calls she allegedly received; the facts alleged in this paragraph are disputed because Ms. [redacted] never chose to speak to a live individual to obtain the origin of the calls (Pls. Ex. 289 at 69:12-16); the facts alleged in this paragraph are speculative, because Ms. [redacted] could not recall any of the products or services that were allegedly being offered because she did not wait on the phone long enough (all that she recalls is that "DISH Network" was mentioned), (*id*. at 70:5-71:8), nor did she ever confirm that the numbers on her caller I.D. were telephone numbers used by DISH, and instead, she only recalls seeing different numbers on her caller I.D. when the calls rang to her home (DX-236 at 73:9-74:12); the facts alleged in this paragraph lack foundation; the facts alleged in this paragraph misstate the testimony, which does not mention any "number displayed." *Phillips*, 855 F.Supp.2d at 771-772.

443. Mr. [redacted] placed his landline number on the Registry on December 20, 2005. Ex. 1 at ¶ 18.

Response: DISH's records indicate that Mr. [redacted]'s [redacted] telephone number was placed on the Registry on or about December 25, 2005. (Taylor Decl., at ¶ 31.)

451. Mrs. [redacted] placed her land line number, ([redacted]) [redacted], on the Registry in August 2007. Ex. 1 at ¶ 19.

Response: Ms. [redacted] [redacted] landline telephone number was placed on the Registry on or about August 22, 2007. (Taylor Decl., ¶34).

454. After her July 2009 do-not-call request, Dish called Ms. [redacted] at least nine more times. Ex. 38 at ¶ 20; Ex. 292 at 20:8-23.

Response: The facts alleged in this paragraph do not support the contention that the alleged nine calls were telemarketing calls. Moreover, DISH's safe harbor defense is a complete defense to any alleged violations of the TSR or TCPA. *See* 16 C.F.R. § 310.4(b)(3) (TSR safe harbor); 47 C.F.R. § 64.1200(c)(2) (TCPA safe harbor).

455. In early 2010, Mrs. [redacted] received several sales calls from Dish Network to her land line number—each time she told the caller she was not interested and to please not call again. Ex. 292 at 20:4-22:20, 23:11-24:3, 39:20-23, 64:3-8; Ex. 38 at ¶ 20.

Response: The cited testimony does not support the contention.

456. These calls led Mrs. [redacted] to file two complaints in January and February 2010. Ex. 1 at ¶ 20.

Response: DISH does not dispute that Mrs. [redacted] filed two complaints in January and March, 2010; however, Plaintiffs have not provided any evidence that calls from DISH "led Mrs. [redacted] to file" the referenced complaints.

457. Dish continued to call Mrs. [redacted] and labeled telemarketing calls to her number as "DNC" two more times, on February 3 and March 2, 2010, yet apparently never placed her number on Dish's entity specific do-not-call list. Ex. 38 at ¶ 20.

Response: Ms. [redacted]'s deposition testimony does not confirm that she received the number of calls referenced in the cited exhibit. Moreover, DISH's safe harbor defense is a complete defense to any alleged violations of the TSR or TCPA. *See* 16 C.F.R. § 310.4(b)(3) (TSR safe harbor); 47 C.F.R. § 64.1200(c)(2) (TCPA safe harbor).

DISPUTED IMMATERIAL FACTS

The following facts alleged by Plaintiffs are not material given the governing law of Plaintiffs' claims.[12] In addition, DISH disputes the accuracy and competence of these facts for the reasons stated.

16. Since October 18, 2003, Dish has placed live interstate telemarketing calls to American consumers through several vendors to whom it sends telemarketing lists. Ex. 12 at 32:5-33:2, 34:22-35:23, 37:10-46:6, 104:2-109:25, 140:14-141:6.

Response: The phrase "telemarketing lists" is vague and therefore fails to provide relevant evidence of any material fact in support of Plaintiffs' motion. *Bumba*, 2012 WL 7660209 at *6.

17. Dish made more than one interstate telemarketing call as part of its telemarketing activities. John Taylor, Expert Report of John Taylor at 9 (Oct. 14, 2013) (removing only 174,474 calls out of millions as "intrastate" calls) (Ex. 16).

Response: The use of the phrase "telemarketing activities" is vague and therefore fails to provide relevant evidence of any material fact in support of Plaintiffs' motion; in addition, the identification of alleged "interstate" calls by area code cannot be the basis of any claim of liability by Plaintiffs in their motion, *see* AMF ¶¶ 388-400. *Bumba*, 2012 WL 7660209 at *6.

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[12] Material facts" are defined by the substantive law at issue in the case, and are those facts that are necessary to apply the law. *Golden v. Barenborg*, 850 F.Supp. 716, 720 (N.D. Ill. 1994) aff'd, 53 F.3d 866 (7th Cir. 1995). A fact is immaterial if it does not affect the outcome of the claim given the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

18. From 2006 through 2011, Dish had a contract with a Colorado-based vendor— eCreek, headed by a former Dish executive—that used its own dialer to place Dish telemarketing calls using dialing lists provided by Dish. Ex. 12 at 43:24-46:17, 264:7-265:4; Dish Dep. 66:24-68:18, Dec. 16, 2010 (Davis) (Ex. 17), Dish Dep. Ex. 119, Dec. 16, 2010 (Davis) (Ex. 18).

Response: The phrase "headed by a former DISH executive" is vague and therefore fails to provide relevant evidence of any material fact in support of Plaintiffs' motion; in addition, the employment background of the "head" of eCreek is irrelevant and immaterial. *Bumba*, 2012 WL 7660209 at *6.

20. Dish is responsible for telemarketing calls placed by eCreek that Dish produced as its internal call records because it provided the dialing lists to eCreek. Letter from Augustino to Dortch (Dec. 9, 2011) ("[I]f the principal directs the retailer's telemarketing activity by providing call lists for telemarketing, the principal can be held liable for the reseller's telemarketing based on those lists.") (Ex. 20); Ex. 14 at 114:13-117:7.

Response: The use of the term "responsible" is an impermissible legal conclusion; moreover, the source for this legal conclusion is a letter (Ex. 20) from counsel regarding "resellers" and uses the phrase "can be held liable," not "is liable." *Phillips,* 855 F.Supp.2d at 771-772.

33. In addition to the 501,650 Registry hits referenced in UF25 above, Dish Expert Taylor also found that Dish's 2007-2010 call records contained 873,551 "issue calls" to numbers on the Registry for more than 31 days that Dish claimed were part of "lead" campaigns—i.e., sales initiatives that called groups of consumers who had supposedly inquired about Dish. Ex. 26 at 7.

Response: Response: DISH's expert, John Taylor, presented the conclusion relied upon by Plaintiffs in his expert report dated September 20, 2012. Plaintiffs' Ex. 26 at 7, 10. However, that report and the conclusions stated therein were expressly superceded by Mr. Taylor's more recent report, dated October 14, 2013. Compare Plaintiffs' Ex. 26 at 7, 10 with Plaintiffs' Exhibit 16 at 1. Mr. Taylor made it clear in the latter report, as follows:

> In my previous Expert Report, prepared in July 2012, my analysis was narrowly focused on the conclusions presented by the government in December 2011. At the time, Plaintiffs' conclusions did not include any analysis of the Retailer files for either entity-specific or National Do Not

> Call Registry ("NDCNR") raw hits. In this report, I disregard the government's analysis of and conclusions produced in December 2011, and begin conduct an empirical analysis of the entire set of records presented. This analysis consists of (435MM Dish/Ecreek 2007-2010)(25MM Retailer records).

Plaintiffs' Ex. 16 at 1 (emphasis added); see also Additional Material Fact No. 465 (Taylor's September 2012 report was simply an amended version of his July 2012 report, intended to correct a few numerical discrepancies in the earlier report).

In his October 14, 2013 report, Mr. Taylor excluded duplicate calls, bad records, non-telemarketing calls, calls to customers with whom DISH had an established business relationship, responses to inquiries, and bad result codes, among other things, from his conclusions regarding the 2007-2010 call records Plaintiffs' Ex. 16 at 4-8. His new conclusion regarding the inquriy calls addressed above appears in the October report, and demonstrates why Plaintiffs' attempt to rely on his prior conclusion on this issue is misleading, and why any attempt to rely on his new conclusion would be equally invalid. *Id.* at 6-7. In particular, Mr. Taylor removed the inquiry calls at issue from the analysis long before the end, and did not, thus, subject them to the other grounds for eliminating potential issue calls which appear later in the analysis. *Id.* at 6-8. In light of the fact the his new analysis supercedes that which appears in his September 2012 report, and given that the 873,551 would have to be subjected to the new analysis in order for it to have any validity, Mr. Taylor's discrete conclusions in this regard (from either report) are wholly unreliable as evidence of actual or potential TSR/TCPA violations. *Id.* at 1, 4-8. The conclusion in his September report is therefore irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, and Plaintiffs' attempt to rely on that conclusion is (again) misleading.

Moreover, even if Mr. Taylor's conclusion had not been superceded (it was), the conclusion remains irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. (Taylor Decl. ¶¶ 2-10.)

34. Dish's expert excluded a number of potential issue calls on the basis of several asserted defenses: that the "telephone never rang" despite the fact that Dish initiated the call (309,931); that Dish reached someone who did not speak English or told Dish it had the wrong number (12,552); or that Dish's dialer happened to be located in the same state as the recipient of the call (10,029). Ex. 26 at 5, 8.

Response: DISH's expert, John Taylor, presented the conclusions relied upon by Plaintiffs in his expert report dated September 20, 2012. Plaintiffs' Ex. 26 at 5, 8. However, that report and the conclusions stated therein were expressly superceded by Mr. Taylor's more recent report, dated October 14, 2013. Compare Plaintiffs' Ex. 26 at 7, 10 with Plaintiffs' Exhibit 16 at 1. Mr. Taylor made it clear in the latter report, as follows:

> In my previous Expert Report, prepared in July 2012, my analysis was narrowly focused on the conclusions presented by the government in December 2011. At the time, Plaintiffs' conclusions did not include any analysis of the Retailer files for either entity-specific or National Do Not Call Registry ("NDCNR") raw hits. In this report, I disregard the government's analysis of and conclusions produced in December 2011, and begin conduct an empirical analysis of the entire set of records presented. This analysis consists of (435MM Dish/Ecreek 2007-2010)(25MM Retailer records).

Plaintiffs' Ex. 16 at 1 (emphasis added); see also Additional Material Fact No. 465 (Taylor's September 2012 report was simply an amended version of his July 2012 report, intended to correct a few numerical discrepancies in the earlier report).

In his October 14, 2013 report, Mr. Taylor excluded duplicate calls, bad records, non-telemarketing calls, calls to customers with whom DISH had an established business relationship, responses to inquiries, and bad result codes, among other things, from his conclusions. Plaintiffs' Ex. 16 at 7, 9. As demonstrated by Mr. Taylor's new report, the potential issue calls that Plaintiffs identify above were removed from the analysis long

before the end, and were thus not subjected to the other grounds for eliminating potential issue calls which appear later in the analysis. *Id.* at 7-10. In light of the fact the Mr. Taylor's new analysis supercedes that which appears in his September 2012 report, and given that the calls at issue would have to be subjected to the new analysis in order for the counts to have any validity, Mr. Taylor's discrete conclusions in this regard (from either report) are wholly unreliable as evidence of actual or potential TSR/TCPA violations. Plaintiffs' Ex. 16 at 1, 7-10. The conclusions in his September report are therefore irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, and Plaintiffs' attempt to rely on that conclusion is (again) misleading.

Moreover, even if Mr. Taylor's conclusions had not been superceded (they were), the conclusions remain irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. (Taylor Decl. ¶¶ 2-10.)

41. Dish did not take a role in the process of sharing its entity-specific do-not-call list, and Dish does not know if retailers actually upload do-not-call requests to PossibleNow. E-mail from Musso to Pastorius et al. (June 17, 2008) (Ex. 35); Dish Dep. 37:11-38:10, Apr. 16, 2012 (Werner) (Ex. 36).

Response: The exhibit cited by Plaintiffs (Ex. 35) does not support the contention made by Plaintiffs in this paragraph; indeed, that exhibit supports the opposite contention, that DISH was to be made aware of any issues with independent retailers uploading their lists; in addition, Exhibit 35 is an isolated email and cannot support the broad sweeping statement contained in this paragraph; the fact is immaterial because DISH was not required under the law to share its entity specific DNC list with any Independent Retailers; Ex. 36 consists of testimony regarding simply one department; PossibleNOW specifically performs the task for DISH and therefore DISH does "take a role" (AMF ¶¶ 24; 35; 45-48); as Ms. Musso testified, the Retailer Agreements require OE retailers to

sign up with PossibleNOW, and to share their internal lists with PossibleNOW – a process in which DISH is uninvolved (DX-241, Musso Dep., p. 55:13-22); Ms. Musso's compliance group merely receives monthly reports from PossibleNOW which state which retailers have signed up with PossibleNOW (*id.* at 58:21-60:1); the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by those retailers does not establish liability as to DISH. *See* Opposition at Section V; *Phillips*, 855 F.Supp.2d at 771-772.

52. [redacted] of Virginia, who has the phone number ([redacted]) [redacted], received an illegal call from Dish on September 10, 2008, and wrote to FTC the same day, "I have asked them repeatedly to remove me from their call list and not call anymore as there is an 8 month old baby in the house who they are constantly waking up, even talking to a supervisor, but so far, we have not gotten any relief from their numerous phone calls every day! PLEASE HELP." Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28, App. B.

Response: The alleged statements made in Exhibit 1 in support of this paragraph constitute inadmissible hearsay with respect to anything allegedly said by the declarant and therefore do not support the alleged facts; Plaintiffs' characterization of the alleged call as "illegal" is misleading and lacks foundation. *Phillips*, 855 F.Supp.2d at 771-772; *Bumba*, 2012 WL 7660209 *6.

54. [redacted] of Texas, who has the phone number ([redacted]) [redacted] and received an illegal call from Dish on January 20, 2009, stated simply, "Make them stop calling me, Please." Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28, App. B.

Response: The alleged statements made in Exhibit 1 in support of this paragraph constitute inadmissible hearsay with respect to anything allegedly said by the declarant and therefore do not support the alleged facts; Plaintiffs' characterization of the alleged call as "illegal" is misleading and lacks foundation. Phillips, 855 F.Supp.2d at 771-772; Bumba, 2012 WL 7660209 *6.

59. From 2002 until the end of 2007, at the earliest, Dish used prerecorded messages to sell international programming. Dish, 2003 Mktg Plan Int'l Programming Chinese Servs. at DISH5-0000088604 (Oct. 15, 2002) (Ex. 45); E-mail from Davis to Munger (Nov. 9, 2007) (Ex. 46).

Response: DISH disputes Plaintiffs' characterization that DISH used pre-recorded messages to sell international programming on regular, ongoing, or continuous basis between 2002 and the end of 2007, as Plaintiffs' use of the word "from" suggests. DISH's use of prerecorded messages was sporadic at best, with the overwhelming majority of campaigns confined to a six-month period between September 2007 and March 2008. *See* Ramjee Decl. ¶ 7(a)-(tt), Jan. 4, 2013 (d/e 229) (Ex. 42). Moreover, discovery revealed that DISH had only 61 calling campaigns over the more than ten-year period identified by Plaintiffs, which utilized pre-recorded messages. *Id*. at ¶ 5. Further, as the recording transcripts set forth at Paragraphs 7(a) through (uu) of the Ramjee Declaration demonstrate, many of these calls were calls to existing customers during the period from September 2007 to October 2007. To the extent this paragraph addresses conduct outside the applicable statute of limitations of the TSR and TCPA, these facts are not material because they cannot form the basis for any liability as to DISH; to the extent that any of the prerecorded messages identified by Plaintiffs in this paragraph were sent to customers with whom DISH had an existing business relationship ("EBR"), there can be no liability under the TSR/TCPA for calls to numbers on the the NDNCR for these messages, and the facts alleged in this paragraph are therefore irrelevant and immaterial to any fact that is pertinent to Plaintiff's motion; the exhibits cited by Plaintiffs (Exs. 45 and 46) do not support Plaintiffs' statement contained in this paragraph. *Phillips*, F.Supp.2d at 771-772; *Bumba*, 2012 WL 7660209 at *6; 15 U.S.C. § 57b(d).

Further, the evidence that Plaintiffs cite do not support the broad asserted fact. For example, the purported "2003 Mktg. Plan Int'l Programming Chinese Servs." document references only a contemplated marketing plan that would utilize an "auto dialer program." DISH5-0000088604. There is no mention of a prerecorded message campaign that Plaintiffs lead the Court to believe is discussed therein. The other document that Plaintiffs cite is an email chain amongst DISH employees regarding DISH's investigation into a DNC complaint resulting from a "sales pitch" for Hindi Programming. E-mail from Davis to Munger (Nov. 9, 2007) (Ex. 46). It is inappropriate for Plaintiffs to make such sweeping generalization about DISH's international programming telemarketing practices based on a single email about a single campaign to sell Hindi programming. In fact, in another TSR Do Not Call case brought by the FTC – *FTC v. Internet Mktg. Group, Inc*., No. 3:04-0568, 2006 WL 273540 (M.D. Tenn. Feb. 2, 2006) – the Middle District of Tennessee denied the Commission's motion for summary judgment exclusively on grounds that the FTC misrepresented and over-generalized the record throughout its statement of undisputed material facts, thereby failing to comply with the local rule requiring that statements of fact accurately reflect or summarize the record evidence. *Id*. at *3-4 (FTC's broad, generalized assertion that a "substantial number" of calls violated the TSR based upon evidence of two specific calls justified denial of agency's motion for summary judgment). The liberties that Plaintiffs take with the record evidence in this case similarly justify denial of their motion for summary judgment here.

60. Between October 18, 2003 and March 2010, Dish initiated 98,054 prerecorded calls with the disposition code DPV to American consumers in 15 specific Dish automessage campaigns: AM 100507ZEE, AM 090507 GREEK, AM 090607 CHIN, AM 090607 FILI, AM 090607 KORE, AM 091107 ARAB, AM 091107 GREEK, AM 091207 CHIN, AM 091307 KINO, AM

091407 FRENCH, AM 091407 GERMAN, AM 092107 FREEHD, AM 100407 INDUSM, AM 100407 INDUSV, and AM 100807 INDUS. Ex. 38 at ¶ 29(a)(ii).

Response: DISH disputes that any such calls referenced occurred at any time other than during the period from September 2007 to October 2007. To the extent this paragraph addresses conduct outside the applicable statute of limitations of the TSR and TCPA, these facts are not material because they cannot form the basis for any liability as to DISH; to the extent that any of the prerecorded messages identified by Plaintiffs in this paragraph were sent to customers with whom DISH had an EBR, there can be no liability under the TSR/TCPA for calls to numbers on the the NDNCR for these messages, and the facts alleged in this paragraph are therefore irrelevant and immaterial to any fact that is pertinent to Plaintiff's motion; the exhibits cited by Plaintiffs (Exs. 45 and 46) do not support Plaintiffs' statement contained in this paragraph. *Phillips*, 855 F.Supp.2d at 771-772; *Bumba*, 2012 WL 7660209 at *6; 15 U.S.C. § 57b(d).

61. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 46,523 calls to California phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

Response: Plaintiffs have no evidence that any calls were made to "California phone numbers," and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10); Plaintiffs have no evidence that the calls were initiated to the persons who had stated to DISH or a Retailer that they did not wish to receive outbound telephone calls; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *Mullin*, 732 F.3d at 776; s*ee* Opposition at Section V.

62. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 14,196 calls to Illinois phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

Response: Plaintiffs have no evidence that any calls were made to "Illinois phone numbers," and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10); Plaintiffs have no evidence that the calls were initiated to the persons who had stated to DISH or a Retailer that they did not wish to receive outbound telephone calls; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *Mullin*, 732 F.3d at 776; s*ee* Opposition at Section V.

63. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 4,983 calls to North Carolina phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

Response: Plaintiffs have no evidence that any calls were made to "North Carolina phone numbers," and the document cited does not provide any such evidence, (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10); Plaintiffs have no evidence that the calls were initiated to the persons who had stated to DISH or a Retailer that they did not wish to receive outbound telephone calls; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *Mullin*, 732 F.3d at 776; s*ee* Opposition at Section V.

64. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 3,640 calls to Ohio phone numbers of persons who had stated to Dish or a Dish retailer that they did not

wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

Response: Plaintiffs have no evidence that any calls were made to "Ohio phone numbers," and the document cited does not provide any such evidence (*see* AMF 388-400; *see also* Response to ¶ 354; Taylor Decl. ¶¶ 2-10); Plaintiffs have no evidence that the calls were initiated to the persons who had stated to DISH or a Retailer that they did not wish to receive outbound telephone calls; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *Mullin*, 732 F.3d at 776; s*ee* Opposition at Section V.

65. Dish's internal database reflects that it dialed these 15 campaigns only to "residential" customers. Screenshots of Dish Predictive Dialer (Ex. 47).

Response: Plaintiffs proffer no evidence that the 15 campaigns were dialed only to residential customers. *Bumba*, 2012 WL 7660209 at *6; *Mullin*, 732 F.3d at 776

82. Dish acknowledged internally in 2002 that it had not obeyed Oregon's do-not-call list. E-mail from Kuelling to Moskowitz (May 21, 2002, 7:06PM) (Ex. 49).

Response: This fact is immaterial because it is outside the applicable statute of limitations period and prior to the enactment of the amended TSR (15 U.S.C. § 57b(d)); in addition, Oregon is not a state plaintiff in this matter; finally, the exhibit cited in this paragraph (Ex. 49) reflects an investigation conducted by counsel and contains the inconclusive statement that "*apparently* we do not subscriber to Oregon's no call list . . ."; Plaintiffs' contention that DISH did not "obey Oregon's do not call list" is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; such a statement does

not even support the contention that Oregon law was violated. *Phillips*, 855 F.Supp.2d at 771-772.

83. Dish stopped dialing into Oregon when it realized it had been breaking the law, and then fabricated an excuse why it had not complied. E-mail from Kuelling to Moskowitz (May 24, 2002, 12:43AM) (Ex. 50).

84. At that point, Dish employees did not even know what types of calls were being made to what states and from where. Ex. 50.

Response to 83 & 84: the conduct alleged in these paragraphs is outside the statute of limitations (15 U.S.C. § 57b(d)); the exhibit cited by Plaintiffs in this paragraph (Ex. 50) does not in any way show a "fabricat[ion]" of an excuse, but rather simply consists of a statement that one of the "main list supplier[s] . . ." did in fact scrub against Oregon's do not call list; the author of the email only notes that other list suppliers "may not" scrub their lists; the period at issue is well outside the statute of limitations and does not support the contention; exhibit 50 does not support the contention that "DISH employees did not even know what types of calls were being made from what states and from where"

85. A few days later, Dish compiled a list of states that did not have do-not-call lists, and proceeded to dial into those states without analyzing whether other rules might apply. E-mail from Kuelling to Dodge (May 23, 2002) (Ex. 51).

Response: The exhibit cited in support of this paragraph (Ex. 51) is immaterial because it is outside the three year statute of limitations period and prior to the enactment of the amended TSR (15 U.S.C. § 57b(d)); the statements in the exhibit constitute inadmissible hearsay and therefore do not support the alleged facts, nor do these alleged facts provide any relevant information to Plaintiffs' motion. *Phillips*, 855 F.Supp.2d at 771-772.

88. Dish and its retailers' telemarketing practices were the subject of dozens of state investigations. 10 04 07 Legal and RS Project Report.xls (Oct. 4, 2007) (Ex. 54).

Response: The statements made in this paragraph are simply claims of violations of the TSR and/or TCPA are therefore inadmissible hearsay that cannot support any fact material to the Plaintiffs' motion. *Phillips*, 855 F F.Supp.2d at 771-772.

90. In 2007, Dish learned that it called a consumer on its entity-specific do-not-call list, while responding to a Colorado Attorney General inquiry. Ex. 46.

Response: The exhibit cited by Plaintiffs (Ex. 46) does not support Plaintiffs' statement contained in this paragraph, and instead, that exhibit describes the subject call as a "possible violation of our business rules and TCPA"; the email reflects that the failure, if any, was due to an error, and therefore the facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

91. In 2007, Dish presented its compliance program to FTC as evidence that it complied with the TSR. Dish, Echostar Satellite LLC Presentation to Div. of Mktg. Practices, Federal Trade Commission at FTC006-000731 (Jan. 19, 2007) (Ex. 56).

Response: DISH's settlement discussions with the FTC covered a wide range of topics; the material contained in Exhibit 56 relates to settlement discussions and is therefore inadmissible under Federal Rule of Evidence 408 and should not be admitted for any purpose in this action, including Plaintiffs' motion.

95. In late 2003, Dish created a new marketing initiative called the "Order Entry (OE) Tool." OE retailers (i.e., those that were a part of this initiative) would only have to make a sale, and collect payment and customer information "on Dish Network's behalf." "DISH Network takes care of everything after the sale." The OE tool did everything except find the consumer. Letter from Ahmed to Hagen (Oct. 7, 2003) (Ex. 61); Dish Dep. 21:21-22:2, May 3, 2012 (Mills) (Ex. 62).

Response: DISH admits that it utilizes an order entry tool ("OE Tool"); the statement that the "OE Tool did everything except find the consumer" constitutes hyperbole and

therefore is misleading, immaterial and irrelevant; the exhibits cited by Plaintiffs (Exs. 61 and 62) do not support the contentions contain in this paragraph.

96. Sometime in 2009, Dish created and implemented a Quality Assurance ("QA") call-monitoring system that required OE retailers to upload dozens of recordings of sales calls every week to Dish for qualitative evaluation by a team of Dish sales personnel. Dish, Important Notice – Quality Assurance Program (2009) (Ex. 63); SSN Production Cover E-mails at SSN-000179, SSN-000434 (Dec. 1, 2011) (producing document titled "Important Notice – Quality Assurance Program") (Ex. 297).

97. The Dish QA program does not monitor for telemarketing compliance. Letter from Origer to Bamira (Feb. 20, 2007) (Ex. 64); Ex. 36 at 147:5-149:13; Snyder Dep. 20:20-21:18, 24:6-16, 25:12-19, Mar. 8, 2011 (Ex. 65).

98. The QA program "monitor[s] and evaluate[s]" the OE retailers to ensure they were offering "a high quality representation of DISH Network," and so that Dish could "provide feedback to assist [the OE retailers] on how to constantly improve from a sales perspective." Ex. 63; Ex. 64.

Response to 96, 97 & 98: The facts alleged in these paragraphs are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; the quality assurance program referenced in these paragraphs relates only to post-sales disclosures and as such has no bearing on the TSR and TCPA claims. *Phillips*, F.Supp.2d at 771-772.

101. In 2006, when Dish created an entity-specific do-not-call process for its retailers, it devised a "three strikes" system wherein a retailer would be terminated if Dish caught it breaking the telemarketing laws three times. Dish, Do Not Call List Escalation Process (May 16, 2006) (Ex. 67).

102. Dish changed the "three strikes" policy in 2007 to a policy calling for a "business decision" as to whether to continue the relationship with the retailer in spite of the telemarketing violations. Dish, Do Not Call Process Flow (Aug. 20, 2007) (Ex. 68).

Response to 101 & 102: The exhibits cited by Plaintiffs (Exs. 67, 68) do not support the contentions made by Plaintiffs in these paragraphs; these facts are also immaterial because there is no zero tolerance policy under the TSR and/or TCPA whereby DISH is required to terminate an Independent Retailer based upon a single alleged TSR or TCPA

violation or even any specific number of TSR and/or TCPA violations; *see, e.g.*, TSR, 60 Fed. Reg. 30,406, 30,417 (June 8, 1995).

103. Between 2003 and December 3, 2013, consumers have filed tens of thousands of complaints with the FTC identifying Dish telemarketing calls—including complaints about Registry violations, entity-specific violations, and prerecorded messages. Ex. 1 at ¶¶ 20, 26, 28, 29, 30, Ex. A.

Response: The facts in paragraph 103 are disputed because the process of "identifying dish telemarketing calls" is in the vast majority of instances a hearsay statement as are attempts to tie DISH to claims of registry violations, entity-specific violations, and prerecorded messages. Other than legally admissible statements contained in the cited exhibit, this alleged fact is immaterial because it does not prove a fact relevant to Plaintiffs' motion.

110. Dish created an email distribution list called the "POE Notice," which told the OE retailers to stop calling approximately 100 specific phone numbers. Musso Dep. 127:1-22, 140:15-19, 141:6-11, 147:24 -150:8, Mar. 16, 2011 (Ex. 77); Metzger Dep. 160:20 – 161:11, Mar. 17, 2011 (Ex. 78).

111. Those phone numbers were of people who had sued Dish or its retailers about telemarketing violations, or of people who presented an extremely escalated telemarketing complaint to a Dish executive. Ex. 77 at 127:15-22, 146:7-16; Ex. 78 at 160:20-161:5, 169:6-23, 173:2-12.

113. Dish's compliance manager and experts did not provide a single, measurable metric by which Dish could evaluate its retailers' compliance with telemarketing laws. Ex. 77 at 174:12-24; 256:18-257:13; Ex. 32 at 35:3-38:21.

Response to 110, 111 & 113: The exhibits cited by Plaintiffs (Exs. 77 & 78) do not support the contentions made by Plaintiffs in these paragraphs; these paragraphs are also immaterial because there is no zero tolerance policy under the TSR and/or TCPA whereby DISH is required to terminate an Independent Retailer based upon a single

alleged TSR or TCPA violation or even any specific number of TSR and/or TCPA violations; *see, e.g.*, TSR, 60 Fed. Reg. 30,406, 30,417 (June 8, 1995).

The exhibits cited by Plaintiffs do not contain any testimony by DISH's compliance manager or its expert that DISH, in fact, did not have a "single, measurable metric" to evaluate its Retailer's telemarketing compliance. Rather, Ms. Musso testified that (1) a Retailer may have a good sales process but still commit some TCPA violations (Exh. 77 at 174:12-24), and (2) when DISH's quality assurance process was implemented in August 2009, which was designed to ensure that proper disclosures were being made to consumers, DISH did not require its OE Retailers to provide DISH with the telephone numbers they called. (Id. at 256:18-257:13). There was no questioning from Plaintiffs' counsel about whether DISH measured Retailers' compliance with telemarketing laws.

115. Of the 50,000-plus Dish-related telemarketing complaints FTC received, Plaintiffs have identified 1,505 complaints submitted by consumers within one calendar day of receiving an actual violative call as contained in the call records in this case. Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28(b), App. B.

Response: This fact is disputed because "the 50,000-plus Dish-related telemarketing complaints FTC received," cannot be authenticated and/or admitted into evidence as actual DISH related telemarketing complaints. Further, this fact asserts numbers that cannot be correlated to the cited report (Plaintiffs' Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28(b), App. B.). This fact is also immaterial because it is offered to support an inference to be drawn against DISH that the mere matching of the call records and complaints occurring within a "calendar day" means that the complaint was related to the call contained in the call record. This is not an inference that can be drawn against DISH on summary judgment. *Mullin*, 732 F.3d at 776; *Phillips*, 855 F.Supp.2d at 771-772.

117. Dish admitted before the FCC that it would be liable under the TCPA: (a) "if [Dish] directs the [third party's] telemarketing activity by providing call lists for telemarketing"; and (b) "if [Dish] knows that a retailer is repeatedly engaging in violative telemarketing when selling [Dish]'s products or services, and [Dish] fails to take reasonable measures to address the unlawful conduct." Ex. 19.

Response: The exhibit cited by Plaintiffs (Ex. 19) does not contain the language quoted in the paragraph, and is therefore irrelevant; the exhibit does not provide support for any portion of the contention; the alleged "admission" is not an admission by DISH with respect to liability in this case; this statement is simply a statement of Plaintiffs' legal position and therefore, it does not constitute an admissible fact.

118. In 2002, Dish knew that many of its retailers were using robocalls to sell Dish service, as top Dish sales executives engaged in an email discussion stating: "[robodialing] has caused a few concerning calls, but seems to be greatly outweighed by the results." E-mail from Meyers to Neylon & Ahmed (Mar. 11, 2002) (Ex. 80).

119. In 2002, Dish lawyers knew that "state law frowns on pre-recorded telemarketing calls." Ex. 80.

Response to 118 & 119: Regardless of whether or not DISH knew that some of its Retailers placed telephone calls via an autodialer, such practice was not unlawful in 2002. Moreover, even now, as Plaintiffs acknowledge (see Plaintiffs' Motion at 164 n.15) the mere placement of a call by means of an autodialer is not per se unlawful, as there are exceptions allowing such calls to be placed, such as if there is an existing business relationship between the caller and recipient. See 47 C.F.R. § 64.1200(a)(2)(iv). the reference to a retailer is irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

127. Dish sells nearly 60 percent of its new subscribers through the "indirect sales channel"—the term it uses for sales that come from sources other than Dish's marketing department.

Bangert Decl. ¶ 4, *Padberg v. Dish Network*, No. 2:11-ev-04035-NKL (W.D. Mo. May 16, 2012) EFC No. 90-10 (Ex. 87); Ahmed Dep. 13:19-25, Apr. 11, 2012 (Ex. 88).

Response: DISH does not dispute the contents of the exhibit cited by Plaintiffs in this paragraph (Ex. 87), however, the documents relied on do not support Plaintiffs' position. Mr. Bangert's declaration indicates that 60 percent of sales, not necessarily new subscribers, are through indirect sales changes. *Bumba*, 2012 WL 7660209 at *6.

128. Included in the indirect sales channel are two types of entities that account for more than 80 percent of the sales in the indirect sales channel—"TVRO" retailers and "OE" retailers. Dish, Indirect Sales (June 6, 2011) (Ex. 89); Ex, 88 at 13:19-25; Dish, Dish Network Activations Dashboard at DISH5-0000090412 (Sept. 6, 2011) (Ex. 90).

Response: DISH does not dispute that certain retailers used an OE tool in the past, and that certain retailers were referred to as "TVRO" retailers; DISH also does not dispute that these retailers historically accounted for 80 percent of the sales in the indirect sales channel; however, the OE tool is no longer operational and therefore is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; the reference to retailers is irrelevant and immaterial because any such retailers are not DISH's agents, and any conduct alleged by those retailers does not establish liability as to DISH. See Opposition at Section V.

130. Dish currently has active contracts with about 7,436 TVRO retailers. Ex. 74 at ¶ 4.

Response: As of January 24, 2013, DISH had agreements with 4,110 active TVRO retailers, (*see* DX-224, Mills January 26, 2014 Declaration ¶ 4); furthermore, the number of agreements that DISH currently has with its TVRO retailers is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. See Opposition at Section V; *Phillips*, 855 F.Supp.2d at 771-772.

133. Each TVRO retailer delivers, on average, fewer than ten activations per month to Dish, and the 7,500 or so active TVRO retailers account for about 30 percent of Dish's indirect sales and around 18 percent of Dish's overall sales. Ex. 90 at DISH5-0000090412; Ex. 89 at DISH5-0000090754.

Response: In 2013, there were 4,501 distinct TVRO retailers that activated an account, but not all activated each month; the average number of activations for this population of 4,501 TVRO Retailers was 13 per month during 2013; in 2013, active TVRO retailers accounted for about 30 percent of DISH's indirect sales and around 18 percent of DISH's overall sales (DX 224, Mills Decl. ¶5.); furthermore, the number of distinct TVRO retailers that activated an account is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. See Opposition at Section V; *Phillips*, 855 F.Supp.2d at 771-772.

134. In late 2003, Dish sales executive Amir Ahmed began contracting with nationwide direct-marketing organizations on a new initiative, called "order entry" or "OE." Ex. 61.

Response: Mr. Ahmed did not contract with anyone and the OE Tool was not offered exclusively to "nationwide direct-marketing organizations" Ex. 88 at 22:12-21:10. The OE Tool was previously used by AT&T and Radio Shack in 2001, 2002 and 2004.

135. Dish's plan was that these OE direct marketing organizations would use "aggressive" nationwide marketing methods, and enter their sales directly into Dish's computer systems, using Dish's credit-qualification system, and without having to handle physical inventory. Ex. 88 at 19:20-22:4; Ex. 61.

Response: Misstates exhibits; the exhibit cited by Plaintiffs (Ex. 88) does not support the contention made by Plaintiffs in this paragraph; the other exhibit cited by Plaintiffs (Ex. 61) is cited for Plaintiffs' statement that "DISH's plan that OE directing marketing organizations would use aggressive nationwide marketing methods"; exhibit 61 does not say that, but rather addresses "consumer promotions" meaning, as is clearly from seen

from the exhibit, that the offers to the consumer on price were to be aggressive and to the consumer's advantage.

136. Dish created an online tool, the "order entry tool," for this purpose, and called entities with access to this tool "OE retailers." Ex. 88 at 19:20-22:4.

Response: The testimony cited by Plaintiffs (Ex. 88) does not support the contentions made by Plaintiffs in this paragraph; the testimony referenced in Exhibit 88 establishes that the OE Tool was previously used by AT&T and Radio Shack before it was in use with other Independent Retailers.

137. The OE retailer initiative was a selective program that, at the beginning, was limited to a small number of national marketing entities that high-level Dish employees personally selected for participation in the program. Ex. 61; Ex. 88 at 22:8-24; Myers Dep. 96:13-97:2, Feb. 24, 2012 (Ex. 92).

Response: The exhibits cited by Plaintiffs in this paragraph (Exs. 61, 88, 92) do not support Plaintiffs' contentions regarding "high level DISH employees" and the alleged selection for participation use of the OE Tool.

139. Dish's OE tool walked the telemarketing agents at OE retailers' call centers through every step of the sales process, with Dish generating and performing all the tasks necessary to make the retailers' sales activities as efficient as possible. Ex. 61; E-mail from POESupport@echostar.com at IDISH-006521 (Jan. 27, 2006) (Ex. 94); Lowe Decl. ¶ 5, Nov. 5, 2013 (Ex. 95).

Response: Misstates exhibits, and the documents cited therein speak for themselves; the exhibits cited by Plaintiffs (Exs. 61, 94 and 95) do not support the contention made by Plaintiffs in this paragraph; furthermore, Plaintiffs' contention about DISH's OE Tool is not relevant to any material fact in Plaintiffs' motion. *Phillips,* 855 F.Supp.2d at 771-772.

140. The OE tool allowed individual telemarketing agents at the OE retailer call center to sign in using Dish-provided usernames and passwords. Ex. 62 at 33:14-33:22.

Response: The exhibit cited by Plaintiffs in this paragraph (i.e., Ex. 62) does not support Plaintiffs' reference to "telemarketing agents," which is not defined; Plaintiffs alleged that this case involves outbound telemarketing, and vague reference to "telemarketing agents" in "call center[s]" provides no evidence regarding a fact that is material to Plaintiff's motion; individuals may handle inbound calls, as well as calls which are not sales related – i.e., non-outbound and non-telemarketing calls. *Bumba*, 2012 WL 7660209 at *6.

141. Dish provided multiple passwords to the OE retailers because it knew that the OE retailers had many telesales agents selling Dish to consumers. Ex. 62 at 33:14-35:6.

Response: Sales Rep ID may or may not have been used by certain retailers, as evidenced by Ex. 62.

142. Dish and the OE retailers then used the individual Dish-provided logins to track the OE retailers' telemarketing activities—for example, Dish tracked the IP addresses that the OE retailers were using to log in to Dish's system. Ex. 62 at 221:23-224:20; Ex. 36 at 155:14-157:20.

Response: The exhibits cited by Plaintiffs in this paragraph (i.e., Exs. 62 and 36) do not support Plaintiffs' contention.

143. Dish also gave OE retailers the option of using "Sales Rep ID" numbers in order to track sales metrics of individual call center agents, and Dish generated reports of agent sales for OE retailers. Ex. 62 at 223:12-224:20; E-mail from POESupport@echostar.com (Mar. 15, 2007) (Ex. 96).

Response: The exhibits cited by Plaintiffs in this paragraph (i.e., Exs. 62 and 96) do not support Plaintiffs' contention. Rather, the Sales Rep ID may or may not have been used by certain retailers, as evidenced by Ex. 62.

144. Dish gave OE retailers detailed "17734" reports that tracked the OE retailers' sales activities by more than 60 metrics, including internal Dish data that was designed to increase the OE retailers' sales numbers. Ex. 96.

Response: The Sales Rep ID may or may not have been used by certain retailers, as evidenced by Ex. 62.

145. Unlike the TVRO retailers, OE retailers are not required to perform installations. Ex. 88 at 15:10-16:13; Ex. 92 at 82:18-83:3; 95:20-96:12.

Response: Plaintiffs' statement is incorrect; TVRO retailers are not "required to perform installations"; in addition, there is no evidence of a one size fits all "OE retailer" designation

146. Once an OE retailer call center agent enters a sale into Dish's system, Dish displays to that agent an installation calendar, which allows the agent to bind Dish to a date and time where Dish or a Dish agent will install Dish service at the customer's home. Ex. 88 at 15:10-16:13; Ex. 92 at 82:18-83:3.

Response: Misstates testimony; Plaintiffs' contention that an "agent" can "bind" DISH is incorrect; there is no evidence to support such contention.in addition, there is no evidence of a one size fits all "OE retailer" designation. *Phillips*, 855 F.Supp.2d at 771-772.

147. Dish required the OE call-center agent to obtain a Social Security number and credit card from the prospective customer, in order to perform a credit check for Dish service that was arranged for and provided by Dish, using Dish credit-qualification guidelines. Ex. 94 at IDISH-006527; E-mail from Metzger to Benigo (Nov. 18, 2008) (Ex. 97).

Response: The exhibits cited by Plaintiffs (Exs. 94, 97) do not support the contentions made by Plaintiffs in this paragraph; there is no one size fits all process whereby "DISH required the OE call center agent to obtain the Social Security number and credit card from the prospective customer . . ."

148. The OE tool required that the OE call-center agent take a credit-card payment from the consumer, and also required that the agent solicit the prospective customer to give Dish authorization to auto-charge the consumer's credit card every month. Ex. 94 at IDISH-006534.

Response: The exhibit cited by Plaintiffs (Ex. 94) does not support the contention made by Plaintiffs in this paragraph; there is no evidence that the "OE Tool" "required" the undefined "OE call center agent" to do anything; furthermore, this alleged "fact" attempts to convey improperly that every Independent Retailer utilizing the OE Tool was operating a call center and that that call center made outbound telemarketing calls.

149. The OE tool also instructed the OE retailer's telemarketing agent to read a number of specific sentences to the consumer after a sale was made, so that Dish could fulfill its disclosure obligations under state and federal law. Ex. 94 at IDISH-006535; Simplexity Dep. 66:6-23 (Sept. 10, 2013) (Zaruba) (Ex. 98).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiff's motion; the disclosure obligations referred to in this paragraph were required after a sale was made, and as such have no relevance to alleged telemarketing, which by definition occurs pre-sale. *Phillips*, 855 F.Supp.2d at 771-772.

150. The Dish executive who created the OE program said at its inception that the retailers were acting "on DISH Network's behalf" when they made sales and took payments from consumers. Ex. 61.

Response: The exhibit cited by Plaintiffs (Ex. 61) does not support the contention made by Plaintiffs in this paragraph; in fact, this is a complete mischaracterization of Exhibit 61, which does not state that the retailers were acting "on DISH Network's behalf" in marketing DISH's services or products; furthermore, to the extent this statement is offered as a legal conclusion, such a statement is inadmissible for that purpose; the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V; *Phillips*, 855 F.Supp.2d at 771-772.

154. Existing Dish retailers often inquired about the opportunity to "get on [the] OE tool" so that they could market nationally, and Dish established unofficial quotas so that an OE retailer had to bring Dish a certain number of customers every month in order to stay on the OE tool. E-mail from Ballard to Mills (July 18, 2007) (Ex. 103); Ex. 92 at 95:20-97:7.

Response: The exhibits cited by Plaintiffs in this paragraph (Exs. 92 and 103) do not support the contention made by Plaintiffs in this paragraph; there is no evidence regarding all "existing DISH retailers" "often" inquiring about the opportunity to use the OE Tool; the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

155. Dish knows that retailers generating more than 150 sales per month use outbound telemarketing to achieve that sales level. E-mail from Origer to Musso et al. (Aug. 17, 2007) (Ex. 104).

Response: The exhibit cited by Plaintiffs (Ex. 104) does not support the contention made by Plaintiffs in this paragraph; misstates the document, which does not state that all Independent Retailers that consummate 150 sales per month use outbound telemarketing to achieve that sales level; the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

156. In 2002, Dish believed that allowing retailers to use affiliates, which Dish identified as "third-parties, independent contractors, agents, sub-agents, companies, or any other person or entity—including Telemarketers—[that] solicit[s], take[s], or transmit[s] any orders for DISH Network products or services," would lead to telemarketing violations. Dish, Facts Blast (July 10, 2002) (Ex. 105); Dish, Facts Blast (July 16, 2002) (Ex. 106).

Response: Neither of the exhibits cited by Plaintiffs (Exs. 105 and 106) support the contentions made by Plaintiffs in this paragraph; the exhibits do, however, show that

DISH proactively informed Independent Retailers of their requirement to comply with the telemarketing laws.

158. Dish allowed OE retailers to use, in some case, hundreds of thousands of affiliates, including overseas entities. Affiliate List_Masters.xls (Ex. 107); E-mail from Mills to Neylon (Feb. 7, 2007) (Ex. 108); E-mail from Origer to Neylon et al. (July 12, 2006) (Ex. 109); E-mail from Musso to tmdiroberto@aol.com (Sept. 28, 2006) (Ex. 110); E-mail from Brandvein to Musso (Oct. 3, 2006) (Ex. 111); Letter from Ahmed to Trimarco (Sept. 2, 2009) (Ex. 112); E-mail from Musso to Ahmed (Apr. 19, 2011) (Ex. 113); Dish, Facts Blast (Sept. 9, 2008) (Ex. 114); Dish, Facts Blast: Important Notice Unauthorized Use of Third Party Lead Generation & Telemarketing Servs. (June 19, 2007) (Ex. 115); Rahim Dep. 130:16-130:22, Mar. 14, 2012 (Ex. 116).

Response: The exhibits cited by Plaintiffs (Exs. 107-116) do not support the contention made by Plaintiffs in this paragraph, but do provide information that supports DISH's safe harbor defense. DISH did not "allow" OE retailers to use overseas affiliates to telemarket. In fact, as several of the documents cited by Plaintiff confirm that pursuant to DISH policy and its Retailer Agreements, DISH "prohibit[ed retailers] from using foreign-based (outside of the United states) affiliates, call centers, agents, subcontractors, or any other partners either directly or indirectly or via another party in order to generate leads or sales for DISH Network in any way." Dish, Facts Blast (Sept. 9, 2008), at 1 (Ex. 114) (emphasis added); Dish, Facts Blast: Important Notice Unauthorized Use of Third Party Lead Generation & Telemarketing Servs. (June 19, 2007) (Ex. 115).

Further, Plaintiffs would have this Court believe that a single OE retailer may have used hundreds of thousands of affiliates, itself. That assertion is belied by the very testimony of Rick Rahim, an independent retailer that they cite. Mr. Rahim testified that, at one point, there were "a quarter of a million affiliates" total but that, even then, "we were the only ones interacting with the customer." Rahim Dep. 130:19-130:22, Mar. 14, 2012 (Ex. 116).

159. If an OE retailer contacted a consumer and entered that consumer's information into the OE tool but did not complete the sale, Dish used that information to telemarket to those customers 48-72 hours after the OE retailer made the initial contact. E-mail from Binns to Parekh et al. (Aug. 11, 2004) (Ex. 117); E-mail from Pacini to Binns (Jan. 13, 2005) (Ex. 118).

Response: The exhibits cited by Plaintiffs (Ex. 117 and 118) do not support the contention made by Plaintiffs in this paragraph; the exhibits contradict this contention for at least one specific user of the OE Tool, Radio Shack, which did not have that experience; furthermore, the context of Exhibits 117 and 118 demonstrate that there was an issue with the OE code filters, which caused DISH to mistakenly contact customers where retailers had not consummated a sale. Once this was brought to DISH's attention, DISH immediately worked on the coding of the OE filters to ensure that it does "not include any retailer leads in [DISH's] outbound telemarketing." (Ex. 118, DISH5-000006969). Russell Bangert's testimony regarding this issue and Exhibit 117 confirm that this practice was a mistake, which DISH sought to resolve expeditiously. (DX-233, Bangert 4-18-12 Tr. 202:10 – 203:4). The reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

160. Dish took no action to limit international computer access to its OE tool until 2008 or 2009. Ex. 77 at 240:3-13.

Response: The exhibit cited by Plaintiffs (Ex. 77) does not support the contention made by Plaintiffs in this paragraph, and makes no reference to "international computer access."

161. By September 2004, the highest levels of Dish management, including Dish co- founder Jim DeFranco, were aware that the first OE retailer, Dish TV Now, was probably using illegal telemarketing to sell Dish Network service. E-mail from Kuelling to Dodge (Sept. 16, 2004) (Ex. 119).

Response: The exhibit cited by Plaintiffs (Ex. 119) does not support the contention made by Plaintiffs in this paragraph; the claim that somebody was "probably using illegal telemarketing" is hyperbole and argument, and provides no facts material to Plaintiffs motion; exhibit 119 does reflect, however, DISH's mandate that Independent Retailers comply with the TCPA and establishes that Dish TV Now misrepresented to DISH that it complied with the TCPA; the reference to Dish TV Now is irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

162. By September 2005, Dish lawyers believed that, when it knew pertinent facts about a retailer's illegal telemarketing activities and failed to take action to stop accepting sales from that retailer, it would be liable for that entities' conduct. E-mail from Oberbillig to Oberbillig et al. (Sept. 30, 2005 5:26pm) (Ex. 120).

Response: The exhibit cited by Plaintiffs (Ex. 120) does not support the contention made by Plaintiffs in this paragraph; this contention is nothing more than an opinion regarding Plaintiffs' views about liability in this action and therefore fails to provide relevant evidence of any fact material to Plaintiffs' motion; furthermore, Exhibit 120 confirms that DISH took affirmative steps to remind its Independent Retailers of their obligations to comply with telemarketing laws.

163. Dish has a policy that its retailers are liable for their independent affiliates' conduct. Dish, EchoStar Retailer Agreement with American Satellite Inc. ¶ 7.1 (Oct. 19, 2005) (Ex. 121); E-mail from Donelly to Creelsdishtv@anythingdish.com at DISH5-0000086614 (July 18, 2011, 4:41pm) (Ex. 122); E-mail from Musso to Pyle (Feb. 4, 2007) (Ex. 123).

Response: The broad statement contained in this paragraph regarding DISH's alleged policies is not supported by Exhibits 121, 122 and 123; Independent Retailers' liability for the acts of yet other third parties constitutes a legal conclusion and does not provide evidence of a fact material to Plaintiffs' motion; the reference to retailers is also

irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V; *Phillips*, 855 F.Supp.2d at 771-772.

164. Dish knows that its retailers are "smart business people" who know where their sales and leads come from. E-mail from Origer to Musso et al. (Dec. 22, 2006) (Ex. 124).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; the exhibit cited by Plaintiffs (Ex. 124) does not support the contention made by Plaintiffs in this paragraph; Exhibit 124 does, however, provide further information regarding the fact that DISH reminded its Independent Retailers of their obligations to comply with telemarketing laws.

165. As Dish internally recognizes, its retailers have become extremely adept at hiding their identities from consumers and regulators when they commit telemarketing violations. E-mail from Metzger to Laslo (July 21, 2008) (Ex. 125).

Response: Misstates the exhibit; the email exchange referenced in Exhibit 125 confirms that the practice of "spoofing" causes recipients of calls and others (such as DISH) to be misled as to the identity of the calling party; the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

166. Dish has no regular practice of performing background checks or public records searches on its retailers prior to allowing them to market on Dish's behalf. Dish Dep. at 19:2-16, 26:17-25, 32:8-23, 43:9-11, 47:11-24, May 4, 2012 (Van Vorst) (Ex. 126).

Response: The characterization of a "regular practice" is vague and as such is immaterial; DISH does, in fact, check certain information with respect to potential Independent Retailers; in addition, Bruce Werner testified that the DISH finance team does credit worthy checks, and his audit team performs due diligence to confirm whether

the applying retailer was a retailer that previously was terminated under a different name, or to determine whether there are reasons not to establish a relationship with that retailer (Werner Dep., 57:16-59:7); the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

168. Dish told this Court that it was not aware of retailers performing outbound telemarketing and said that it has so many retailers that it cannot even go through all of its documents to figure out whether they are breaking the telemarketing laws. Ex. 74.

Response: Misstates the testimony; the exhibit cited by Plaintiffs (Ex. 74) does not support the contention made by Plaintiffs in this paragraph; Exhibit 74 is a declaration that was given in connection with Plaintiffs' requests during the discovery process in this action, and related to a request for information regarding DISH's approximately 7,500 Independent Retailers; in response, DISH confirmed to the Court that it did not have any simple method to check which of the approximately 7,500 Independent Retailers might from time to time pick up the phone or otherwise use outbound telemarketing calls as a means to market or sell DISH services; the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

170. In 2007, Dish believed that its retailers' outbound telemarketing was responsible for about 20,000 new Dish customer acquisitions every month. E-mail from Mills to Werner (May 17, 2007) (Ex. 129).

Response: Misstates the document; the exhibit cited in this paragraph (Ex. 129) constitutes a "guess" by a DISH employee and therefore does not support Plaintiffs contention; the reference to retailers is also irrelevant and immaterial because such

retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

171. Dish created a "compliance" department in its "Retail Services" division in order to "bring[] structure to [Dish's] efforts in complying with Federal, State and internal requirements surrounding marketing." E-mail from Werner to Metzger (Aug. 21, 2006) (Ex. 130); Ex. 77 at 10:10-11, 16:8-25, 17:12-18:7.

Response: Misstates the exhibit; DISH had compliance efforts in place with respect to telemarketing prior to 2006; the e-mail contained in Exhibit 130 does not say that any department was "created," but rather that Ms. Musso joined an existing department.

172. Dish's Executive Vice President of sales did not want to create the compliance department. The Retailer Chat at 1:06:00 (Jan. 16, 2007) (Ex. 131).

Response: The exhibit cited by Plaintiffs (Ex. 131) does not support the contention made by Plaintiffs in this paragraph; far from indicating any desire not to employ robust compliance, the retailer chat makes very clear, beginning at approximately 1:05:00, that DISH takes Independent Retailer compliance with telemarketing laws very seriously.

173. In 2006, Dish brought on Reji Musso to head Dish's new compliance efforts for OE retailers. Ex. 77 at 15:22-16:25, 17:18-18:7, 18:21-19:13.

Response: The exhibit cited by Plaintiffs in this paragraph (Ex. 77) does not support the contention that Ms. Musso's compliance efforts were solely related to "OE retailers."

175. Internally, Ms. Musso told in-house counsel that she understood she should "deflect responsibility away from [Dish]" for retailer telemarketing complaints. E-mail from Musso to Berridge & Pastorius (Nov. 6, 2007, 10:42pm) (Ex. 132).

Response: The exhibit cited by Plaintiffs (Ex. 132) does not support the contention made by Plaintiffs in this paragraph; rather, this e-mail exchange between Ms. Musso discusses how other DISH employees are responsible for compliance efforts, and acknowledges

that when an Independent Retailer commits a violation, Ms. Musso attempts to allocate responsibility for that violation where it belongs – the Independent Retailer.

176. Dish retailers committed more telemarketing violations than the ones identified specifically by the Plaintiffs' call records in this case. E-mail from Rukas to Slater et al. (March 5, 2009) (Ex. 133).

Response: Plaintiffs' motion addresses only six Independent Retailers for which they have no admissible evidence to claim a violation attributable to DISH; accordingly, the information in paragraph 176 contains no information or evidence relevant to a fact that is material to Plaintiffs' motion; furthermore, the exhibit cited by Plaintiffs (Ex. 133) does not support the contention made by Plaintiffs in this paragraph; "Plaintiffs' call records" in this case fail to identify any telemarketing violations; the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Section V.

177. Dish's lawyers created what it called the "sting" or "merchant identification" process in 2005 or 2006, which involved giving fake ID information to consumers complaining about telemarketing calls, who were told to sign up with the offending caller in order to allow Dish to determine which of its retailers made the sale. Ex. 78 at 149:19-152:9; Dish, Sting Flow (Sept. 13, 2006) (Ex. 134); Dish, Acknowledgement Form: Do Not Call (DNC) Sting Procedures (2007) (Ex. 135); Dish, Vendor is not Found. What Next? (Ex. 136).

Response: DISH conducted the sting to determine ***if*** one if its independent retailers may have made the sale, and did not assume that one of its independent retailers had made the sale.

178. Dish's sting program found that many OE retailers were using illegal telemarketing to sell Dish Network service. DatabaseDump All.xls (Sept. 19, 2007) (Ex. 137).

Response: The voluminous exhibit cited by Plaintiffs (Ex. 137) does not contain any evidence that supports the contention made by Plaintiffs in this paragraph. *Mullin*, 732 F.3d at 776.

179. Dish did not terminate the retailers identified in its sting program, despite having told consumers and regulators that it would do so. Letter from Musso to Cain (Aug. 6, 2008) (Ex. 138); Letter from Origer to Brandvein (Aug. 16, 2007) (Ex. 139); E-mail from Musso to Alex@yourdish.tv (Jan. 17, 2007) (Ex. 140); E-mail from Mills to Musso (Dec. 20, 2006) (Ex. 141); E-mail from Werner to Origer et al. (Feb. 13, 2007) (Ex. 142); E-mail from Musso to Werner (July 22, 2008, 5:21pm) (Ex. 143); Ex. 56 at FTC006-000731.

Response: The exhibits cited by Plaintiffs (Exs. 138-43) do not support the contention made by Plaintiffs in this paragraph; they do, however, demonstrate that area codes and other aspect of calling numbers can be manipulated in a practice known as "spoofing," and that DISH has informed Independent Retailers that they must comply with the telemarketing laws.

180. A Dish employee testified that its sting program was unsuccessful. Ex. 78 at 149:19-154:14.

Response: The testimony cited by Plaintiffs (Ex. 78) does not support the contention made by Plaintiffs in this paragraph, but it does show that DISH made extraordinary efforts to resolve complaints about alleged violations of the telemarketing laws.

181. Dish did not share its entity-specific do-not-call list with its retailers until 2008. Ex. 77 at 53:2-5, 55:7-56:3.

182. Dish had a policy until 2008 that it did not collect from its retailers the phone numbers of those persons who had requested not to receive Dish telemarketing calls. Ex. 77 at 53:13-55:15; Ex. 36 at 37:11-43:09.

183. Dish does not know whether any retailer has actually complied with its post-2008 policy requiring retailers to upload do-not-call lists. Ex. 36 at 37:11-43:09.

Response to 181, 182 & 183: The exhibits cited by Plaintiffs (Exs. 36 & 77) do not support the contention made by Plaintiffs in these paragraphs; Plaintiffs mischaracterize

the cited testimony in Exhibit 77 as to the difference between "shar[ing]" an entity specific do not call list and allowing entities to scrub against that list; as for Paragraph 183, Ms. Musso testified that she receives monthly reports from PossibleNOW indicating which retailers signed up with them (DX-241, Musso Dep. 59:18-60:10); the reference to retailers is also irrelevant and immaterial because such retailers are not DISH's agents, and any conduct alleged by the retailers does not establish liability as to DISH. *See* Opposition at Sections V.

190. In or around October 2003, Dish began pursuing Hagen to market Dish using Dish's new OE Tool. Ex. 61.

Response: Misstates the document; Exhibit 21 shows that David Hagen pursued DISH to become an independent retailer, and not the other way around.

192. In November 2003, Dish TV Now became Dish's first OE retailer. Ex. 62 at 19:14-20.

Response: The fact that Dish TV Now was the first Independent Retailer to use the OE tool is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. Ex. 88 at 22:12-21:10. The OE Tool was previously used by AT&T and Radio Shack in 2001, 2002 and 2003.

193. Dish entered into a contract with Dish TV Now by which: (a) Dish appointed Dish TV Now as an "Authorized Retailer"; (b) Dish authorized Dish TV Now to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized Dish TV Now to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all Dish TV Now records in connection with its Dish retailership; (e) Dish required that Dish TV Now "shall take all actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders"; and (f) Dish provided that the agreement would be terminated if Dish TV Now "fail[ed] to comply with any applicable federal, state or local law or regulation." EchoStar Retailer Agreement with Dish TV Now at 1, 6, 16, 25-26, 29-32, *Charvat v. EchoStar Satellite, LLC*, No 07-cv-01000 (S.D. Ohio Dec. 19, 2008) ECF No. 33-3 (Ex. 152).

Response: DISH does not dispute that it entered into a Retailer Agreement with Dish TV Now, which agreement speaks for itself; however, DISH disputes that the agreement would be automatically terminated if Dish TV Now failed to comply with any applicable federal, state, or local law or regulation, because the agreement allows DISH the option of providing written notice if it did not want to terminate the agreement; such Retailer Agreement also did not provide DISH with access to "all Dish TV Now records in connection with its Dish retailership;" rather, under paragraph 17.9 of the Retailer Agreement, Dish TV Now was obligated to maintain certain records, and DISH had the right, on notice, to audit such records; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

194. Dish did not perform a public records check on David Hagen before contracting him to pilot the OE program. Ex. 88 at 80:16-81:18.

Response: Misstates the testimony; irrelevant and immaterial; DISH had no legal obligation to perform a public records search on David Hagen before entering into a retailer agreement with Dish TV Now; DISH did not contract with David Hagen to "pilot the OE program."

195. David and Annette Hagen worked with Dish to improve the OE tool. E-mail from Yonker to Ahmed (Mar. 10, 2004) (Ex. 153); E-mail from Ahmed to Mills & Novotny (Jan. 1, 2004) (Ex. 154).

Response: Misstates the documents; Exhibits 153 and 154 show that David Hagen and Annette Hagen were complaining to DISH about, amongst other things, the operation of the OE tool and were threatening to cease being an Independent Retailer; the Exhibits

further show that DISH was working with Dish TV Now to resolve the issues raised by David Hagen and Annette Hagen.

196. Dish provided logins and IDs to Dish TV Now so that Dish was able to track specific sales made by individual agents in Dish TV Now's call center. Ex. 147 at 97:13-99:18.

Response: Misstates the testimony; David Hagen testified at his deposition that DISH provided logins and IDs to Dish TV Now so that Dish TV Now could track the commissions earned by its individual agents; Mr. Hagen did not testify that DISH was tracking the individual activity by Dish TV Now's agents.

197. The sales volume generated by Dish TV Now was important to the most senior of Dish's executives, including Dish co-founder and then-CEO Charles Ergen, and Dish offered Mr. Hagen any support it could give him. Ex. 154.

Response: Misstates the document; Exhibit 154 states that DISH's co-founder and then-CEO, Charles Ergen, was paying attention to Dish TV Now's sales activity; the referenced exhibit does not state that DISH offered Mr. Hagen "any support it could give him."

201. On June 15, 2004, Dish TV Now contracted with an Illinois-based voice broadcasting company, Guardian Communications ("Guardian"), to call consumers on lead lists purchased from telemarketing lead list vendors and play prerecorded sales messages to sell Dish service. Tr. of Baker Test. at 122:6-125:5, 233:19-238:22, *In Re: Guardian Commc'ns Inc. Investigative Hr'g*, FTC No. 052-3166 (June 28, 2006) (Ex. 156); Guardian Commc'ns, Voice Messaging Agreement with Dish TV Now (June 15, 2004) (Ex. 157).

Response: Misstates the testimony; the exhibits cited by Plaintiffs (Exs. 156 & 157) do not support the contention made by Plaintiffs in this paragraph; David Hagen informed DISH that Dish TV Now was dialing lists of its own current and former customers. In fact, DISH TV Now actively withheld information from DISH regarding the advertising source of the new orders placed by DISH TV Now as it was regarded as "proprietary"

information and a competitive advantage over DISH. (AMF ¶¶,428, Hagen Dep. 134:8-135:2, DX-149.) Even when directly confronted by DISH about whether DISH TV Now was "using predictive dialers and leaving messages trying to sell the customers DISH Network," DISH TV Now unequivocally denied using such practices. (AMF ¶ 429; DX 223 (DISH8-000098.) In response to such inquiries, DISH TV Now assured DISH that its use of predictive dialers was limited to "consumers who have previously inquired with [DISH TV Now] about satellite TV service or are current DISH TV Now DISH Network customers," and that its predictive dialer "only connects live customers to a live DISH TV Now agent" and never uses an automated or prerecorded message. (Id.)

202. Guardian Communications marked all of its Dish TV Now sales calls with the code "WOW TV." Baker Decl. ¶ 12, Mar. 28, 2012 (Ex. 158).

Response: DISH objects to the Plaintffs' reliance on a Declaration from Mr. Baker. Mr. Baker was deposed in this case on May 14, 2002; Mr. Baker was therefore not unavailable to testify under Fed.R.Evid. 804(a), and Mr. Baker's declaration is inadmissible hearsay. Fed.R.Evid. 840(b)(5); *FTC v. Communidyne*, 1994 WL 323327 (N.D.Ill. June 27, 1994.)

203. Dish TV Now only sold Dish services and did not sell DirecTV service. (Ex. 147 at 9:16-11:11, 144:10-147:11.)

Response: Misstates the testimony; the exhibit cited by Plaintiffs in this paragraph (Ex. 165) shows that DISH conducted secret shops and learned that Dish TV Now was only selling Direct TV; Exhibit 172, relied upon elsewhere by Plaintiffs, states that DISH had contacted Dish TV Now's call center and the sales people indicated that Dish TV Now no longer sold DISH products or services. See also December 16, 2005 email from Mike Mills to David Hagen (AMF ¶ 430, DX-225 (Dish-Paper-023286).

204. Between May 2004 and August 2004, pursuant to its contract with Dish TV Now, Guardian placed 6,673,196 prerecorded telemarketing calls to American consumers who answered the phone and were not connected to a live operator within two seconds, and Guardian produced records of those calls to the FTC. Ex. 157; Ex. 156 at 122:6-125:5; WOW_TV_P 20040521.txt (May 21, 2004) (Ex. 159); WOW-TV_P05212004213321013.txt (May 21, 2004) (Ex. 160); Baker Dep. at 68:15-19, May 14, 2012 (Ex. 161); DishTVNow spreadsheet.xls (2006) (Ex. 162); Ex. 38 at ¶ 26(d); Ex. 158 at ¶¶ 10, 18.

Response: Plaintiffs proffered no evidence to support the contention that "American consumers," rather than businesses or other non-consumers, were called; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH.

206. By June 2004, Dish was aware that Dish TV Now was using prerecorded messages to sell Dish service. Ex. 119.

Response: Exhibit 119 demonstrates only that DISH received a complaint regarding "using predictive dialers and leaving messages," and that Amir Ahmed (a DISH Vice President) made clear to Dish TV Now that DISH was not interested in this type of marketing; Mr. Hagen of Dish TV Now responded as follows:

> Dish TV Now uses a predictive dialer to make outbound calls to consumers who have previously inquired with us about satellite TV service or are current Dish TV Now DISH Network customers. The intelligent dialer knows the difference between a No Answer, Busy, Answering Machine or Live Connect. The dialer only connects live customers to a live Dish TV Now agent. We do not leave messages. We have a list of over five million past and current customers that we scrub against the Do Not Call List. In addition, we maintain a Dish TV Now Do Not Call List. Any customer who wishes to opt out on future solicitations is immediately added to the list. Dish TV fully complies with the TCPA.

(Exhibit 119); the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH.

208. On August 7, 2004, David Hagen complained to Dish Vice President Amir Ahmed that Dish Network was soliciting prospective customers that had first been contacted by Dish TV Now after Dish TV Now's sales attempt failed based on the customer's credit score or the OE Tool erred. Ex. 117 at DISH5-0000066940.

209. Dish took the consumer information entered by the Dish TV Now sales agent, which had not resulted in a sale, and placed outbound sales calls itself to that consumer within 48-72 hours. Ex. 117; Ex. 118.

Response to 208 & 209: The record evidence demonstrates that DISH was not deliberately soliciting prospective customers that Dish TV Now initially contacted. This is confirmed in an email wherein Brian Pacini explains that "[i]f a failed created score shows up in the lead tracking database then it should be taken out." (Ex. 117, August 10, 2004 Email Pacini to Bangert); furthermore, to ensure that this practice stopped, Todd Binns recommends that DISH "will need development to change the OE code so that [DISH] can filter this from [DISH's] extracts. Until this is done we will continue to contact retailer leads and have no way to identify them." (Ex. 117, August 11, 2004 Email from Binns to all). Finally, Russell Bangert testified to the inadvertent mistake committed by DISH as to Exhibit 117, stating that "it's a mistake, and that the retail entity [Dish TV Now] is clearly upset with it and escalates that to us, which then prompts a discussion as to how we can resolve instances like this from occurring in the future." (DX-233, Bangert 4-18-12 Tr. 202:10 – 203:4).

210. Dish vice president Amir Ahmed testified in 2012 that he did not know whether David Hagen was using prerecorded messages to sell Dish, despite emails he sent to David Hagen on the topic. Ex. 88 at 51:8-52:9; Ex. 119.

Response: Misstates the exhibit; the exhibit cited by Plaintiffs (Ex. 119) does not show that Mr. Ahmed had knowledge of Dish TV Now's use of prerecorded messages; see response to ¶ 206 above.

211. Illinois consumer [redacted] received prerecorded calls from Dish TV Now in February 2005. [redacted] Dep. 47:3-52:23, 56:9-60:9, June 19, 2012 (Ex. 163); Sill Dep. Ex. 3, June 19, 2012 (Ex. 164).

Response: DISH does not dispute that Mr. [redacted] testified during his deposition that he received a telephone call from DISH TV Now; however, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH. (Taylor Decl. ¶32). Mr. [redacted]'s testimony constitutes inadmissible hearsay with respect to anything allegedly said by the alleged caller. DISH's call records and the call records at issue in this action do not support the contention that DISH TV Now placed any calls to Mr. [redacted]).

213. Dish told consumers that it could not help them when they complained about Dish TV Now's calls and had no way of finding out if Dish TV Now was making calls. Letter from Gutierrez to Schackmann (Apr. 12, 2005) (Ex. 166); Letter from Steele to Swanberg (Sept. 14, 2004) (Ex. 167).

Response: Misstates the exhibits; Exhibit 166 is a letter to the Illinois Attorney General's office encouraging it to contact Dish TV Now regarding a consumer complaint made by Mr. [redacted] regarding calls allegedly made by Dish TV Now; Exhibit 167 is a September 14, 2004 letter from DISH's corporate counsel stating that DISH researched the consumer's claims, put the consumer's phone number on DISH's internal "Do Not Call List," provided the consumer with a copy of DISH's Do Not Call policy, and indicated that DISH would forward a copy of the consumer's letter to Dish TV Now for resolution; there is no evidence in either exhibit that DISH told consumers that it could not help them or had no way of finding out who made the calls in question; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

215. On or around July 26, 2004, Dish received a complaint from [redacted] stating that he had received a telemarketing call from Dish TV Now. Letter from [redacted] to Dish (July 26, 2004) (Ex. 168).

Response: DISH does not dispute that Mr. [redacted] sent a letter dated July 26, 2004 to DISH complaining that he received a prerecorded telemarketing call from DISH TV Now; however, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; Mr. [redacted]'s testimony constitutes inadmissible hearsay with respect to anything allegedly said by the unidentified caller; the material contained in Exhibit 168 is inadmissible under Federal Rule of Evidence 408 and therefore should not be admitted for any purpose in this action, including Plaintiffs' motion.

216. Nearly two months later, on September 14, Dish sent [redacted] a letter stating it had researched the complaint and would forward the information to Dish TV Now, although no one can recall what research Dish actually performed. Ex. 167; Ex. 168; Steele Dep. 194:20-197:4, Apr. 12, 2012 (Ex. 169).

Response: Misstates the exhibits; Exhibits 167 and 168 show that DISH received a complaint from [redacted] and responded to it on September 14, 2004; Exhibit 169 establishes that former in house counsel, Dana Steele, could not recall at her deposition, eight years after the fact, how DISH researched Mr. [redacted]'s Complaint; notably, Exhibit 119 shows that at the same time, Vice President Amir Ahmed questioned Dish TV Now regarding a complaint that had been received about it.

219. In September 2004, Dish Vice President Amir Ahmed sent Mr. Hagen an email asking the following either-or question: Was Dish TV Now "telemarketing consumers over the phone" or was it using "predictive dialing and leaving messages"? Ex. 119.

Response: The exhibit cited by Plaintiffs in this paragraph (Ex. 119) does not support the contention made by Plaintiffs in this paragraph. Instead, it clearly shows that DISH

did not have knowledge of any pattern or practice of illegal telemarketing using prerecorded messages by Dish TV Now).

218. Dish employees providing training and sales support inside Mr. Hagen's call center saw firsthand in August 2004 Dish TV Now's sales agents marketing with predictive dialing to sell Dish service. Ex. 155 at ¶¶ 27, 28.

Response: The exhibit cited by Plaintiffs does not support this statement. The exhibit references a notation in a database that "insurance is a big push with them" and then references predictive dialing. Its not clear whether the predictive dialing was used for DISH service or for insurance. Moreover, the use of predictive dialing was not a *per se* violation of the TSR.

220. Hagen responded to Mr. Ahmed's email stating that Dish TV Now was "us[ing] a predictive dialer" to place outbound calls to a large database of former customers, that his dialer could determine if a human being answered the phone, and that his company "fully complies with the TCPA." Ex. 119.

Response: Misstates the exhibit; see response to ¶206 above for Mr. Hagen's full response, which indicated that Dish TV Now was calling both its own current and former customers; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH.

221. Dish stated in an affidavit filed in the Southern District of Ohio that Dish "had no way of knowing" how Dish TV Now was marketing Dish service. Aff. of Blake Van Emst at 2, Charvat v. EchoStar Satellite, LLC, No. 07-cv-01000 (S.D. Oh. Dec 19, 2008) ECF No. 33-1 (Ex. 171).

Response: Misstates the exhibit; Exhibit 171 does not state that DISH "had no way of knowing" how Dish TV Now was marketing DISH service; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH.

222. On January 3, 2006, Dish wrote a letter to David Hagen complaining about his lack of sales and asking him to ramp up his marketing plans. Letter from Mills to Hagen (Jan. 3, 2006) (Ex. 172).

Response: Misstates the exhibit; Exhibit 172 is a letter asking Mr. Hagen to share with DISH the plans that Dish TV Now had to market DISH products and services; it does not request that Mr. Hagen "ramp up his marketing plans."

223. On January 20, 2006, Dish terminated Dish TV Now because too many customers whom Dish TV Now acquired had cancelled and because Dish TV Now had ceased actively marketing Dish. Ex. 165; Letter from Origer to Dish TV Now Inc. (Jan. 20, 2006) (Ex. 173); Werner Dep. Ex. 259, Mar. 10, 2011 (Ex. 174).

Response: The exhibit cited by Plaintiffs (Ex. 165) does not support the contention made by Plaintiffs in this paragraph; the exhibit, which consists of an email from Mike Mills to Amir Ahmed dated December 22, 2005, sets forth the multiple reasons to discontinue a relationship with Dish TV Now, including, among other things, that DISH had become aware of telemarketing complaints and a litigation against Dish TV Now and that Dish TV Now was marketing DirecTV and not DISH products and services; as set forth in the exhibit, DISH elected to rely on provisions of the Retailer Agreement regarding churn and DishTV Now's failure to market DISH's services; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

226. Dish cannot say, knowing what it knows now, that it would not have contracted with David Hagen to sell Dish service. Ex. 62 at 30:14-24.

Response: Misstates the testimony; the exhibit cited by Plaintiffs in this paragraph (Ex. 62) does not support the contention made by Plaintiffs in this paragraph; the deposition testimony cited in this paragraph was elicited from a single witness about what DISH

might have done in a hypothetical circumstance; it does not constitute any evidence about DISH actually did; accordingly, it is irrelevant and immaterial to any aspect of Plaintiffs' motion; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

229. Dish entered into contract with SSN by which: (a) Dish appointed SSN as an "Authorized Retailer"; (b) Dish authorized SSN to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized SSN to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all SSN records in connection with its Dish retailership; (e) Dish required that SSN "shall take all actions and refrain from taking any action, as reasonably requested by [Dish] in connection with the marketing, advertisement, promotion of, or taking of orders"; and (f) Dish provided that the agreement would be terminated if SSN "fail[ed] to comply with any applicable federal, state or local law or regulation." Dish, EchoStar Retailer Agreement with SSN at 1, 2, 6, 7 (Mar. 27, 2001) (Ex. 180).

Response: DISH does not dispute that it entered into a Retailer Agreement with Satellite Systems Network ("SSN"), which agreement speaks for itself; however, DISH disputes that the agreement would be automatically terminated if SSN failed to comply with any applicable federal, state, or local law or regulation, because the agreement allows DISH the option of providing written notice if it did not want to terminate the agreement; such Retailer Agreement also did not provide DISH with access to "SSN records in connection with its Dish retailership;" rather, under paragraph 6.4 of the Retailer Agreement, SSN "shall cooperate by supplying EchoStar with information relating to those actions as EchoStar reasonable [sic] requests."; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

Response 229(f): DISH does not dispute that it entered into a Retailer Agreement with SSN, which agreement speaks for itself; however, DISH disputes that the agreement

would be automatically terminated if SSN failed to comply with any applicable federal, state, or local law or regulation, because the agreement allows DISH the option of providing written notice if it did not want to terminate the agreement; such Retailer Agreement also did not provide DISH with access to "all SSN records in connection with its Dish retailership;" rather, under paragraph 17.9 of the Retailer Agreement, SSN was obligated to maintain certain records, and DISH had the right, on notice, to audit such records; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH). *See* Opposition at Section V.

231. By May 2001, Dish expected SSN to make up to 1,500 new activations per month, and Dish knew that SSN would use telemarketing to generate these expected activations. E-mail from Ahmed to DeFranco (May 31, 2001, 11:27pm) (Ex. 183).

Response: Misstates the exhibit; the referenced exhibit (Ex. 183) only states that SSN has a "[p]otential sales Volume up to 1500 per month," and that SSN would be using both "telemarketing and direct mail to close the deals"; the email does not state, however, whether SSN would be using outbound or inbound telemarketing; Mike Mills testified at his deposition that SSN mostly used print and online marketing to drive inbound calls, and DISH only became aware of SSN's outbound telemarketing efforts when SSN was named in a DirecTV lawsuit (Mills Dep. 5-3-12 Tr. 51:13 – 52:6).

232. By January 2002, Dish expected SSN to make up to 3,000 to 5,000 new activations per month, and invited SSN to join the Retailer Bonus Program based on its performance. Letter from Origer to Tehranchi (Dec. 28, 2006) (Ex. 184).

Response: Exhibit 184 does not remotely support this fact; this is an unrelated "Notice of Complaint" letter from DISH to SSN regarding consumer complaint.

237. SSN has been selling Dish since the early 2000s and remains a Dish retailer as of 2013. Ex. 180; Dish Network Retailer Agreement with Satellite Sys. Network (Dec. 31, 2010) (Ex. 189); Ex. 182 at 17:16-22, 26:12-26:14.

Response: SSN ceased being an active Independent Retailer in 2013 (Mills Decl., ¶7); the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

238. On June 28, 2004, Dish founder and CEO Charles Ergen received a telemarketing sales call from SSN at one of his residences, after which Mr. Ahmed told Ergen that SSN used "message broadcasting" (i.e., prerecorded message telemarketing) as "their primary source" of generating satellite TV service activations. E-mail from Ahmed to Ergen et al. (June 28, 2004) (Ex. 190).

Response: Mistates the exhibit; Exhibit 190 shows that Mr. Ahmed told Mr. Ergen that SSN uses message broadcasting to sell DirecTV; when Mr. Ahmed followed up with SSN, SSN indicated that it only used live persons for calls, and did not use message broadcasting; notably, SSN refused to share its telemarketing script with DISH; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

242. In September 2005, Dish decided not to terminate its relationship with SSN; instead, Dish contemplated placing SSN on probation, and there is no evidence that further remedial or punitive action was taken against SSN. Ex. 194.

Response: Exhibit 194 is privileged and should not be relied on for any reason. Moreover, DISH did take action against SSN. There is at least one instance where SSN's earnings were garnished (*see* DISH-PAPER-007994 – 5/10/07 Email from Oberbillig to Mills, Musso and Neylon: "I was aware of a garnishment issues, ($15K) that was taken from [Satellite System Network's] funds this week for [redacted], which Bruce

Werner had spoken to Alex about."); also, in February 2007, DISH implemented a call monitoring system for SSN to gather quality assurance information, which included biweekly on-site monitoring by DISH (*see* DISH-PAPER-008055: "Effective August 1, 2006 Echostar will begin monitoring inbound and outbound phone calls from your call center(s). By monitoring calls we will provide feedback to you and your business regarding undiscovered customer issues as well as compliance with your Echostar retailer agreement."; DISH-Paper-007991).

243. Dish recognized it was responsible for SSN's violations because it knew what SSN was doing. Ex. 194.

Response 243: DISH objects to the use of Exhibit 194 on the grounds of attorney-client privilege and the attorney work product doctrine; in addition, Plaintiffs' statement is a mischaracterization of Exhibit 194; Novak only states that "SSN is a problem because we know what he is doing and have cautioned him to stop. There is risk in continuing to give warnings without follow-through action"; nothing in Exhibit 194 demonstrates that DISH is responsible for SSN's actions; also, SSN's retailer agreement with DISH indicates that SSN is responsible for its own compliance and is an independent contractor, *see* Ex. 193 (Retailer agreement Section 9.1, Compliance with Laws: "[SSN] shall comply with all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives and orders (whether federal, state, municipal, or otherwise) and all amendments thereto … and Retailer is solely responsible for its compliance with all Laws that apply to its obligations under this Agreement."; *see also* Sections 11 through 13: "Independent Contractor", "Limitation of Liability" and "Indemnification.").

245. In, November, and December 2006, stings conducted by two separate consumers—[redacted]and [redacted]—identified SSN as the source of illegal prerecorded message telemarketing. Ex. 137.

Response: Exhibit 137 is voluminous and Plaintiffs have not directed the Court or the parties to the relevant sections, if any; otherwise, the exhibit does not appear to support the contentions in this paragraph).

249. SSN contracted with Five9, an online call-center software provider, to provide outbound dialing services, and Five9's business records accurately depict SSN's calling activity. Maslennikov Decl. ¶¶ 8, 16, *Donaca v. Dish Network LLC*, No.11-cv-2910 (D. Colo. Dec. 21, 2012) (Ex. 197).

Response: DISH does not dispute that SSN contracted with Five9 to provide for outbound dialing services; DISH, however, disputes that Five9's business records accurately depict SSN's calling activity; Exhibit 197, Maslennikov Decl. ¶12(iii), states that Five9 provided "All Call Detail Records for SSN that had been retained by Five9 at the time the subpoena was issues"; the document only shows SSN's calling activity through Five9 up to the date of the subpoena.

250. The Five9 records accurately represent outbound telemarketing calls selling Dish service, and that SSN did not sell any other product during that time. Ex. 182 at 18:21-23, 26:15-27:7, 34:13-19; Tehranchi Decl. ¶¶ 8-12, *Donaca v. Dish Network LLC*, No.11-cv-2910 (D. Colo. Aug. 19, 2013) (Ex. 198)

Response 250: DISH does not dispute that SSN contracted with Five9 to provide for outbound dialing services; DISH, however, disputes that Five9's business records accurately depict SSN's calling activity; Exhibit 197, Maslennikov Decl. ¶12(iii), states that Five9 provided "All Call Detail Records for SSN that had been retained by Five9 at the time the subpoena was issues"; the document only shows SSN's calling activity through Five9 up to the date of the subpoena; Ms. Tehranchi also testified that Five9 was not the exclusive dialer company hired by SSN, *see* Tehranchi Dep. Tr. 27:8-11: "Q

Okay. Has Satellite Systems Network used companies similar to Five9 in the past, other dialing companies? A Yes."); Plaintiff's evidence therefore contradicts the contention that Five9's records are an accurate representation of SSN's outbound telemarketing records. *Mullin*, 732 F.3d at 776.

251. Dish's expert concluded in his November 2013 rebuttal report that, during 2010 and 2011, SSN made at least 381,811 calls to phone numbers on the Registry in the records obtained from Five9. Ex. 28 at 13 (Table 5a).

Response: Plaintiffs have no evidence that any calls were made to phone numbers in Illinois, Ohio, North Carolina, or California, and the document cited does not provide any such evidence; see AMF 388-400. *Mullin*, 732 F.3d at 776; furthermore, Table 5a represents "potential issue calls" occurring after February 9, 2009. To the extent this contention references Retailers, it is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. See Opposition at Sections II and V.

252. 37,688 of those 381,811 calls were to California phone numbers. Ex. 28 at 13 (Table 5a).

Response: Plaintiffs have no evidence that any calls were made to "California phone numbers," and the document cited does not provide any such evidence; *see* AMF 388-400; *see also* response to ¶ 251. *Mullin*, 732 F.3d at 776. To the extent this contention references Retailers, it is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. See Opposition at Sections II and V.

253. 17,357 of those 381,811 calls were to Illinois phone numbers. Ex. 28 at 13 (Table 5a).

Response: Plaintiffs have no evidence that any calls were made to "Illinois phone numbers," and the document cited does not provide any such evidence; *see* AMF 388-400; *see also* response to ¶ 251. *Mullin*, 732 F.3d at 776. To the extent this contention references Retailers, it is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. See Opposition at Sections II and V.

254. 13,088 of those 381,811 calls were to North Carolina phone numbers. Ex. 28 at 13 (Table 5a).

Response The exhibit cited does not support Plaintiffs' contention in this paragraph, as the data in Table 5a is for "Five9/NSS" not SSN. Plaintiffs have no evidence that any calls were made to "North Carolina phone numbers," and the document cited does not provide any such evidence. *See* AMF 388-400; see also response to ¶ 251. *Mullin*, 732 F.3d at 776.

255. 22,878 of those 381,811 calls were to Ohio phone numbers. Ex. 28 at 13 (Table 5a).

Response: Plaintiffs have no evidence that any calls were made to "Ohio phone numbers," and the document cited does not provide any such evidence; see AMF 388-400; *see also* response to ¶ 251. *Mullin*, 732 F.3d at 776. To the extent this contention references Retailers, it is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Sections II and V.

256. Dish's expert concluded in his November 2013 report that, during 2010 and 2011, SSN made at least 65,936 calls to phone numbers of consumers who stated to Dish or a Dish retailer that they did not wish to receive phone calls. Ex. 28 at 13-14 (Tables 5b, 5c).

Response: Plaintiffs have no evidence that any calls were made to phone numbers in Illinois, Ohio, North Carolina, or California, and the document cited does not provide any such evidence; see AMF 388-400. *Mullin*, 732 F.3d at 776; furthermore, Table 5b and 5c represent "potential issue calls" occurring after February 9, 2009. To the extent this contention references Retailers, it is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Sections II and V.

258. By August 18, 2011, Dish had developed a "standard go after SSN letter" for sending to SSN regarding its illegal telemarketing. E-mail from Berridge to Kitei (Aug. 18, 2011) (Ex. 199).

Response: The alleged statements made in Exhibit 199 in support of this paragraph constitute inadmissible hearsay and therefore do not support the alleged fact; DISH further objects to the use of Exhibit 199 on the grounds of attorney-client privilege and the attorney work product doctrine. *Phillips*, 855 F.Supp.2d at 771-772.

259. Two consumers complained to FTC within one calendar day of having received a violative call as contained in the Five9 call records, reporting SSN's caller ID and stating: "Please make them stop calling; PLEASE!!!!" and "They have called two to three times a day for the last two weeks. When I finally answered they contacted me about satellite dishes. I let them know . . . [I] would like to be taken off their list. They told me to hold while they transferred my call and then hung up on me. I have since received several more calls, twice a day. " Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28(b), App. B; Ex. 182 at 34:13-37:1.

Response: The exhibits referenced in this paragraph neither relate to nor remotely support any of the contentions made in this paragraph.

261. Dish entered into a contract with Star Satellite by which: (a) Dish appointed Star Satellite as an "Authorized Retailer"; (b) Dish authorized Star Satellite to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized Star Satellite to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all Star Satellite records in connection with its Dish retailership; (e) Dish required Star Satellite "shall take all actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion

and/or solicitation of orders"; and (f) Dish provided that the agreement would be terminated Star Satellite "fail[ed] to comply with any applicable federal, state or local law or regulation." Ex. 200 at 16, 22, 24, 28.

Response: DISH does not dispute that it entered into a Retailer Agreement with Star Satellite, which agreement speaks for itself; however, DISH disputes that the agreement would be automatically terminated if Star Satellite failed to comply with any applicable federal, state, or local law or regulation, because the agreement allows DISH the option of providing written notice if it did not want to terminate the agreement; such Retailer Agreement also did not provide DISH with access to "Star Satellite records in connection with its Dish retailership;" rather, under paragraph 17.9 of the Retailer Agreement, Star Satellite was obligated to maintain certain records, and DISH had the right, on notice, to audit such records; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

262. Star Satellite began as a TVRO retailer, and had several regional sales and installation operations, including an operation in Los Angeles. Ex. 92 at 17:11-18:20; 23:16-24:7; 66:1-67:2, 85:24-86:7.

Response: The cited testimony does not support the contention that Star Satellite was a TVRO retailer; Myers only testifies that when he started Tenaya he "didn't really know what it would become … [and that he] wanted to see if [he] could … start a business and run a business"; Myers also states that Tenaya "ended up being door-to-door." (Ex. 92 at 18:5-10); the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *See* Opposition at Section V.

263. Beginning in May 2004, Star Satellite began a business relationship with the same voice broadcasting company used by Dish TV Now, Guardian (aka U.S. Voice Broadcasting, Inc.), *see* UF 201 *supra*. Ex. 92 at 76:3-77:3, 106:1-107:24; Walter Eric Myers, Statement ¶ 5, 6 (Mar. 22, 2006) (Ex. 202).

Response: The fact that Star Satellite entered into a business relationship with Guardian is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; also, neither the testimony at 106:1-107:24 nor Exhibit 202 ¶ 5 stand for this proposition.

271. In July and November 2005, Dish provided outbound telemarketing sales scripts to Star Satellite. E-mail from Anderson to Myers & bcs@starsatllc.com (July 28, 2005) (Ex. 206); E-mail from Mills to Myers (Nov. 3, 2005) (Ex. 207).

Response: Exhibit 206 does not support the contention contained in this paragraph; Exhibit 206 demonstrates that DISH helped provide training materials that were to guide its retailers, but that DISH did not mandate the use of any particular sales script; the exhibit only shows that DISH provided a sample script for Star Satellite to work off of: "I'm still working on getting the QA form for you, but I did find some scripts for outbound calling that you may be able to adapt and work with, ***if you want.*"** (emphasis added); Ex. 207 only shows that DISH provided comments back to retailers regarding the sales script; Mike Mills emailed to Myers in response to Myers' request: "Let me know if you need me to make any changes to these scripts"; also, Mike Mills' deposition clarifies that he has never commented on or seen sales scripts for outbound sales scripts, but that he did provide comments and feedback on inbound sales scripts; Mills also testified that DISH never provided outbound sales scripts to the OE retailers (Mills Vol I Tr. 77:22 – 78:24.); Myers also testified that when phone sales were being made, he was not given scripts by DISH, but that DISH was involved with making sure Star Satellite was providing the disclaimers appropriately (*See* Myers Tr. 93:23 -94:22.)

273. Dish's lawyers edited a settlement agreement by which Dish and Star Satellite settled the claim and kept the terms of the settlement secret. Facsimile from Conley to Myers (Sept. 29, 2005) (Ex. 210).

Response: DISH does not dispute that a draft settlement agreement was sent to Myers; Exhibit 210, however, only shows that DISH sent Myers a revised version of the settlement agreement that still needed to be approved by Myers and his attorney; this is an unexecuted draft settlement agreement.

275. As late as November 3, 2005, Dish provided Star Satellite with telemarketing support. E-mail from Mills to Myers (Nov. 3, 2005) (Ex. 213).

Response: Exhibit 213 does not support the contentions contained in this paragraph; rather, it is demonstrative of DISH's involvement with approving scripts and has nothing to do with calling or dialing customers; Mike Mills' deposition clarifies that he has never commented on or seen sales scripts for outbound sales scripts, but that he did provide comments and feedback on inbound sales scripts; Mills also testified that DISH never provided outbound sales scripts to the OE retailers (Mills Vol I Tr. 77:22 – 78:24.); Myers testified that when phone sales were being made, he was not given scripts by DISH, but that DISH was involved with making sure Star Satellite was providing the disclaimers appropriately (Myers Tr. 93:23-94:22).

276. In the four months between July 30, 2005 and November 26, 2005, Dish placed at least 43,100,876 illegal prerecorded calls marketing Dish for Star Satellite, and Guardian produced accurate records of those calls to the FTC. Ex. 38 at ¶ 26(e); Ex. 158 at ¶¶ 15-20.

Response: The exhibit cited by Plaintiffs (Ex. 38 at ¶ 26(e)) does not support the contentions made by Plaintiffs in this paragraph. *Mullin*, 732 F.3d at 776.

277. 5,727,417 of those 43,100,885 calls were to California phone numbers. Ex. 38 at ¶ 26(e).

Response: The exhibit cited by Plaintiffs (Ex. 38 at ¶ 26(e)) does not support the contentions made by Plaintiffs in this paragraph. *Mullin*, 732 F.3d at 776.

278. 2,659,984 of those 43,100,885 calls were to Illinois phone numbers. Ex. 38 at ¶ 26(e).

Response: The exhibit cited by Plaintiffs (Ex. 38 at ¶ 26(e)) does not support the contentions made by Plaintiffs in this paragraph. *Mullin*, 732 F.3d at 776.

279. 1,716,225 of those 43,100,885 calls were to North Carolina phone numbers. Ex. 38 at ¶ 26(e).

Response: The exhibit cited by Plaintiffs (Ex. 38 at ¶ 26(e)) does not support the contentions made by Plaintiffs in this paragraph. *Mullin*, 732 F.3d at 776.

280. 3,419,175 of those 43,100,885 calls were to Ohio phone numbers. Ex. 38 at ¶ 26(e).

Response: The exhibit cited by Plaintiffs (Ex. 38 at ¶ 26(e)) does not support the contentions made by Plaintiffs in this paragraph. *Mullin*, 732 F.3d at 776.

282. On November 22, 2005, Star Satellite ended its relationship with Guardian. Ex. 92 at 148:13-149:4.

Response: DISH does not dispute that Star Satellite stopped using Guardian as of November 22, 2005; DISH, however, disputes the characterization of this testimony as it is taken out of context; Myers specifically testified that Star Satellite used Guardian up until November 22, 2005 which " was the time when [he] completely shut down the call center"; he further stated that he shut down due to Guardian's CID, which scared him: "It really scared me; and I essentially just right away went and shut down every bit of telemarketing we did and sold the call center, closed it down, fired all the employees and just shut it all down" (DX-240, 148:13 – 149:4).

284. Star Satellite remains a Dish retailer. Ex. 92 at 55:17-56:16.

Response: The reference to a retailer is irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH (*see* Opposition at Section V); DISH does not dispute that Star Satellite remains a DISH retailer; DISH, however, disputes the characterization of Myers' testimony as it is taken out of context; the testimony reflects that "Star Satellite still has a small door-to-door contingent" that sells DISH service (Ex. 92, Myers Tr. 55:22 – 56:1); Myers testified that he shut down the telemarketing component of Star Satellite nine years ago in 2005 (Ex. 92, Myers Tr. 148:13-149:4).

285. Dish paid for Myers' employees to go on several incentive trips to luxury destinations. Ex. 92 at 167:19-169:2.

Response: DISH does not dispute that Myers' sent his employees on incentive trips organized and paid for by DISH; DISH, however, does dispute the characterization of Myers' testimony as it is taken out of context; Myers testified that an annual trip was provided by DISH for its top 100 retailers as an award to Star Satellite; this was not an automatic trip awarded to retailers: rather, they had to earn it; Myers only sent his employees because he does not like traveling.

289. Dish was aware that Mr. DiRoberto had "trouble in the past" and that "he had basically made his money in illegal things." Castillo Dep. 37:1-38:4, June 14, 2012 (Ex. 219).

Response: The exhibit cited by Plaintiffs in this paragraph (Ex. 219) does not support the contention made by Plaintiffs in this paragraph; the deposition testimony cited by Plaintiffs (Ex. 219, 37:1-38:4) fails to establish at what point "DISH was aware that Mr. DiRoberto had 'trouble in the past' and that 'he had basically made his money in illegal things'"; any such testimony, however, is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; in addition, the cited testimony constitutes inadmissible

hearsay with respect to anything allegedly said by the declarant regarding this topic; accordingly, Plaintiffs have no evidence that DISH knew that DiRoberto "had 'trouble in the past'" or at the time that American Satellite became a DISH retailer.

293. Dish entered into a contract with American Satellite by which: (a) Dish appointed American Satellite as an "Authorized Retailer"; (b) Dish authorized American Satellite to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized American Satellite to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all American Satellite records in connection with its Dish retailership; (e) Dish required that American Satellite "shall take all actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders"; and (f) Dish provided that the agreement would be terminated if American Satellite "fail[ed] to comply with any applicable federal, state or local law or regulation." Ex. 121 at 1, 5, 6, 15, 17, 22.

Response: DISH does not dispute that it entered into a Retailer Agreement with American Satellite, which agreement speaks for itself; however, DISH disputes that the agreement would be automatically terminated if American Satellite failed to comply with any applicable federal, state, or local law or regulation, because the agreement allows DISH the option of providing written notice if it did not want to terminate the agreement; such Retailer Agreement also did not provide DISH with access to "all American Satellite records in connection with its Dish retailership;" rather, under paragraph 17.9 of the Retailer Agreement, American Satellite was obligated to maintain certain records, and DISH had the right, on notice, to audit such records; the reference to a retailer is also irrelevant and immaterial because such retailer is not DISH's agent, and any conduct alleged by that retailer does not establish liability as to DISH. *Phillips*, 855 F.Supp.2d at 771-772; *see* Opposition at Section V.

295. American Satellite used prerecorded messages to sell Dish service. Ex. 219 at 26:9-27:23, 44:19-46:13, 76:13-79:22.