

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

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A-17-763397-B

JOINT APPENDIX
Vol. 34 of 85
[JA007691-JA007940]

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Document	Vol.	Page No.	Date
Report of the Special Litigation Committee of DISH Network Corporation and Appendices of Exhibits Thereto (Exs. 1-792; Appx. Vols. 1-50) Evidentiary Hearing SLC Exhibit 102²	4-73	JA000739- JA016874	11/27/18

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.

Response: The exhibit cited by Plaintiffs in this paragraph (Ex. 219) does not support the contention made by Plaintiffs in this paragraph; the cited testimony does not establish that DISH had knowledge that American Satellite allegedly used prerecorded messages; in addition, the cited testimony constitutes inadmissible hearsay with respect to anything allegedly said by the declarant regarding this topic; 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 Sections V and VII.B..

316. In April 2006, Dish entered into a contract with JSR Enterprises by which: (a) Dish appointed JSR as an "Authorized Retailer"; (b) Dish authorized JSR to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized JSR to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all JSR records in connection with its Dish retailership; (e) Dish required that JSR "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 JSR "fail[ed] to comply with any applicable federal, state or local law or regulation." EchoStar Retailer Agreement with JSR Enterprises at 1, 6, 16, *Charvat v. Echostar Satellite, LLC*, No 07-cv-01000 (S.D. Ohio Dec. 19, 2008) ECF No. 33-6 (Ex. 238).

Response: DISH does not dispute that it entered into a Retailer Agreement with JSR, which agreement speaks for itself; such Retailer Agreement, however, did not provide DISH with access to "all JSR records in connection with its Dish retailership;" rather, under paragraph 17.9 of the Retailer Agreement, JSR 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.

317. On or around June 28, 2006, Dish knew that JSR "generat[ed] sales through auto-dialing" and that JSR had a "list of one million plus clients ranges from about \$2K to \$9K per

list depending on the quality. JSR is spending about \$2K/mo. and makes about 750K+ dials per week generating around 40 sales a week.” Olsen Decl. at ¶¶ 29-30; LA South OE.xls (Ex. 239).

Response: The exhibit referenced does not support the statement proffered, nor does it demonstrate that anyone at DISH other than a low level sales representative wrote down the statements at issue on the date indicated; the evidence cited also lacks foundation and constitutes inadmissible hearsay; 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.

318. As used in the telemarketing context, the term “burning” means sending as many prerecorded messages to as many phones as possible using computer equipment. Portela Dep. 39:2-15, 147:11-21, Apr. 19, 2012 (Ex. 240).

Response: The testimony referenced does not support the statement proffered; the testimony is also irrelevant, non-responsive, lacks foundation, lacks personal knowledge, and constitutes inadmissible hearsay. *Phillips*, 855 F.Supp.2d at 771-772.

320. Dish also learned that JSR had hired a manager from another OE retailer that Dish had just terminated for telemarketing violations. Ex. 239; Press Release, Dish, *EchoStar Takes Action Upon Do-Not-Call Violators* (Dec. 7, 2006) (Ex. 242).

Response: The exhibit cited by Plaintiffs (Ex. 239) does not support the contentions contained in this paragraph and is otherwise objectionable as lacking foundation and on hearsay grounds; 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.

325. On October 19, 2006, consumer ██████████ sent a letter to JSR Enterprises—copying Dish attorney Dana Steele—regarding JSR Enterprises’ prerecorded telemarketing calls that she received. Letter from ██████████ to Grider (Oct. 19, 2006) (Ex. 247).

Response: DISH does not dispute that consumer Ms. [REDACTED] sent a letter dated October 19, 2006 by way of facsimile to JSR Enterprises complaining of unwanted prerecorded telemarketing calls allegedly received from JSR Enterprises; however, DISH disputes that any of the alleged calls were made by DISH or anyone acting on behalf of DISH; in addition, Ms. [REDACTED]'s letter contains inadmissible hearsay, and therefore, does not support the alleged facts; 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 Sections V and VII.B.

327. When she received a call from JSR, Ms. [REDACTED] asked for a supervisor on the JSR call, the call center agent told her that it was actually a "porn shop" and that the supervisor was "f---ing someone on the floor." [REDACTED], Do Not Call Investigation Form (Nov. 1, 2006) (Ex. 249).

Response: DISH does not dispute that consumer Ms. [REDACTED] filed a complaint dated November 1, 2006; however, DISH disputes that any of the alleged calls were made by DISH or anyone acting on behalf of DISH; in addition, Ms. [REDACTED]'s complaint contains inadmissible hearsay, and therefore, does not support the alleged facts. *Phillips*, 855 F.Supp.2d at 771-772.

335. Dish knew that JSR was using the same offshore call center that had been linked to multiple other Dish OE retailers. Ex. 254; Ex. 253.

Response: The exhibits cited by Plaintiffs (Exs. 254, 253) do not support the contentions contained in this paragraph and are otherwise objectionable as lacking foundation and on hearsay grounds; DISH further objects to the use of Exhibit 254 on the grounds of attorney-client privilege and the attorney work product doctrine; 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.

336. When sued about JSR's calls in a private TCPA lawsuit, Dish stated in 2008 that it had no idea how JSR generated sales. Ex. 171 at 2.

Response: Exhibit 171 does not state that DISH "had no way of knowing" how JSR generated sales; rather, it states that:

Echostar does not supply, approve, or review the names, addresses, or other contact information of persons or entities to whom the Retailers (or their third-party marketing vendors) make telephone calls. Echostar has no way of knowing who the Retailers are calling or the referring source of new orders.

(Exhibit 171); 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.

337. In January 2007, Ms. Musso stated that continuing to ignore retailers like JSR committing telemarketing violations "impacts our credibility." Ex 254.

Response: The exhibit cited by Plaintiffs (Ex. 254) does not support the contention contained in this paragraph and is otherwise objectionable as lacking foundation and on hearsay grounds; DISH further objects to the use of Exhibit 254 on the grounds of attorney-client privilege and the attorney work product doctrine; 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.

338. On January 22, 2007, JSR Enterprises admitted to Dish that it or its call center affiliates had contacted at least two additional consumers whose numbers were registered on the Registry. Letter from Goodale to Musso (Jan. 22, 2007) (Ex. 256).

Response 338-A: DISH does not dispute that it identified complaints from 14 different consumers between September 2006 and February 2007 regarding telemarketing calls received from JSR Enterprises; the cited exhibit (Ex. 256) does not support the contention

that the complaints consisted of prerecorded message telemarketing calls; In correspondence dated January 22, 2007 (Exhibit 256), JSR stated that:

JSR enterprise is always concerned when a complaint arrives regarding an alleged violation of a DNC. JSR has taken additional steps to ensure ethical marketing for our sales team, with the employ of a Call Center Compliance Corporation, which enables us to fully comply with all the current 16 states that maintain their own DNC rules. With this enhancement, we anticipate a reduction in any claim state violations. . .

That correspondence further stated that two phone numbers were registered on the DNC, and were mistakenly in JSR's database. JSR indicated that it had removed such numbers and that they would not be contacted again; JSR did not indicate whether such numbers were dialed in response to an inquiry or whether JSR had an established business relationship with such consumers at the time of the call; Plaintiffs have no evidence that the persons called were the persons who had placed their numbers on the NDNCR and, thus, the purported fact is irrelevant and immaterial; 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 and VII.B.

339. Dish identified complaints from at least 14 different consumers (some with multiple complaints) between September 2006 and February 2007 regarding prerecorded message telemarketing and telemarketing to numbers on Registry by JSR Enterprises. Ex. 244.

Response: The cited exhibit (Ex. 244) that refers generally to complaints filed with the FTC does not support the contention that DISH or any entity acting on behalf of DISH placed any telemarketing calls to the various complainants because the complaints are based on inadmissible hearsay, and therefore, do not support the alleged facts; 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 Sections V and VII.B.

340. More than 1,000 people complained to FTC within one day of having received an illegal call reflected in the JSR call records, with many of them reporting JSR or Direct Dish by name. Letter from Runkle to Kelly (Aug. 27, 2013) (Ex. 257); Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28(b), App. B.

Response: The cited exhibit (Ex. 257) that refers generally to complaints filed with the FTC does not support the contention that DISH or any entity acting on behalf of DISH placed any telemarketing calls to the various complainants because the complaints are based on inadmissible hearsay, and therefore, do not support the alleged facts; 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.

344. JSR employed Philippine call centers to engage in "press one" telemarketing to American consumers, including consumers on the Registry. Goodale Decl. at 1, July 30, 2013 (Ex. 261).

Response: DISH objects to the Plaintiffs' reliance on Mr. Goodale's declaration; this declaration is inadmissible and should not be considered by the court; the FTC did not disclose Mr. Goodale on the Plaintiffs' Rule 26 Disclosures as a person with information, and was never identified by Plaintiffs as a potential witness (AMF 461; DX 243, Plaintiffs' April 30, 2013 FRCP Rule 26 Disclosures); the exhibit cited by Plaintiffs (Ex. 261) does not support the contention contained in this paragraph, at least insofar as the purported fact is that JSR called persons who registered their telephone numbers on the NDNCR; 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.

345. JSR attempted to sell Dish service on every outbound call it made. Ex. 261 at 2.

Response: DISH objects to the Plaintiffs' reliance on Mr. Goodale's declaration; this declaration is inadmissible and should not be considered by the court; the FTC did not disclose Mr. Goodale on the Plaintiffs' Rule 26 Disclosures as a person with information, and was never identified by Plaintiffs as a potential witness (AMF 461; DX 342, Plaintiffs' April 30, 2013 FRCP Rule 26 Disclosures); the statement upon which this purported fact is based lacks foundation and personal knowledge; 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; the purported fact is also irrelevant and immaterial since there is no evidence that the calls at issue were violative of the NDNCR and/or DISH's Internal List. *Mullin, 732 F.3d at 776; see* Opposition at Section V.

346. JSR only called residential consumers to sell residential Dish satellite television service. Ex. 261 at 2.

Response: DISH objects to the Plaintiffs' reliance on Mr. Goodale's declaration; this declaration is inadmissible and should not be considered by the court; the FTC did not disclose Mr. Goodale on the Plaintiffs' Rule 26 Disclosures as a person with information, and was never identified by Plaintiffs as a potential witness (AMF 461; DX 243, Plaintiffs' April 30, 2013 FRCP Rule 26 Disclosures); the statement upon which this purported fact is based lacks foundation and personal knowledge; 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; the purported fact is also irrelevant and immaterial since there is no evidence that the calls at issue were violative of the NDNCR and/or DISH's Internal List, nor can it be assumed that calls to

“residential customers” necessarily reached residential landline telephones. *Phillips*, 855 F.Supp.2d at 771-772; *Mullin*, 732 F.3d at 776.

347. Dish kept approximately \$1 million in commissions that it owed JSR at the time of its termination. Ex. 261 at 1.

Response: DISH objects to the Plaintiffs’ reliance on Mr. Goodale’s declaration; this declaration is inadmissible and should not be considered by the court; the FTC did not disclose Mr. Goodale on the Plaintiffs’ Rule 26 Disclosures as a person with information, and was never identified by Plaintiffs as a potential witness (AMF 461; DX 243, Plaintiffs’ April 30, 2013 FRCP Rule 26 Disclosures); the statement upon which this purported fact is based lacks foundation and personal knowledge; 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.

348. After termination, JSR Enterprises continued selling Dish, pushing its sales through other Dish OE retailers. Ex. 261 at 3.

Response: DISH objects to the Plaintiffs’ reliance on Mr. Goodale’s declaration; this declaration is inadmissible and should not be considered by the court; the FTC did not disclose Mr. Goodale on the Plaintiffs’ Rule 26 Disclosures as a person with information, and was never identified by Plaintiffs as a potential witness (AMF 461; DX 243, Plaintiffs’ April 30, 2013 FRCP Rule 26 Disclosures); the statement upon which this purported fact is based lacks foundation and personal knowledge, and is otherwise irrelevant and immaterial to any fact that is pertinent to 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. *Phillips*, 855 F.Supp.2d at 771-772; see Opposition at Section V.

355. 473,102 of those 2,349,031 calls were to California phone numbers. Ex. 28 at 14 (Table 6a).

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); 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; see Opposition at Section V.

356. 369,384 of those 2,349,031 calls were to Illinois phone numbers. Ex. 28 at 14 (Table 6a).

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); 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; see Opposition at Section V.

357. 18,250 of those 2,349,031 calls were to North Carolina phone numbers. Ex. 28 at 14 (Table 6a).

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); 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; *see* Opposition at Section V.

358. 129,004 of those 2,349,031 calls were to Ohio phone numbers. Ex. 28 at 14 (Table 6a).

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); 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.

360. Dish’s expert has also confirmed that in 2006, JSR made 685,667 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 14 (Tables 6b, 6c).

Response: The exhibit cited by Plaintiffs (Ex. 28) does not support the contentions contained in this paragraph, particularly insofar as the purported facts suggest the existence of any actual violations of the TCPA and/or the TSR (Taylor Decl. ¶¶ 2-10); 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 Sections II and V.

362. A telecommunications company named Airespring served as JSR’s phone company during JSR’s stint as a OE retailer, provided certain JSR phone records, and verified the authenticity and accuracy of those records. Rummelsburg Decl., June 15, 2012 (Ex. 267).

Response: The exhibit cited by Plaintiffs (Ex. 267) does not support the contentions contained in this paragraph and is otherwise objectionable on hearsay grounds and lack of foundation; 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.

381. Ms. [REDACTED] never responded to any type of free offer from Dish Network. Ex. 278 at 28:15-17.

Response: The facts alleged in this paragraph are immaterial. Whether Ms. [REDACTED] called DISH on her own volition without prompting or for some reason other than responding to any other offer from DISH, free or otherwise, does not change the fact that DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED] between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030", which is a campaign name indicating that DISH was responding to an inquiry made by Ms. [REDACTED] from her ([REDACTED]) [REDACTED] wireless telephone number (Taylor Decl. at ¶17); and therefore, these calls these calls would not have been potential TCPA or TSR violations; the fact that Ms. [REDACTED] is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH.

382. She did not conduct internet research on Dish products, services, or offers. Ex. 278 at 27:25-28:3.

Response: The facts alleged in this paragraph are immaterial. Whether Ms. [REDACTED] conducted any internet research on DISH products, services or offers does not change the fact that DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED] between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030", which is a campaign name

indicating that DISH was responding to an inquiry made by Ms. [REDACTED] from her ([REDACTED]) [REDACTED] wireless telephone number (Taylor Decl. at ¶15-17), and therefore, these calls these calls would not have been potential TCPA or TSR violations; the fact that Ms. Doucette is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH.

383. She never provided her phone number to Dish or contacted Dish on her mobile phone in or around October 2008. Ex. 278 at 28:4-10.

Response: The facts alleged in this paragraph are immaterial. Whether she provided her phone number to DISH or contacted DISH on her mobile phone in or around October 2008 does not change the fact that DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED] between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030, which is a campaign name indicating that DISH was responding to an inquiry made by Ms. [REDACTED] from her ([REDACTED]) [REDACTED] wireless telephone number (Taylor Decl. at ¶17), and therefore, these calls these calls would not have been potential TCPA or TSR violations; the fact that Ms. [REDACTED] is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH.

386. Ms. [REDACTED] would listen to these prerecorded calls and messages in her voicemail for 10 to 15 seconds before realizing with irritation that it was a telemarketing call. Ex. 278 at 34:11-18, 35:9-20.

Response: With regard to the content of the calls referenced in this paragraph, the alleged statements in Exhibit 278 constitute inadmissible hearsay and therefore do not support the alleged facts; the facts alleged in this paragraph are misleading; DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED]'s wireless telephone number between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030" (Taylor Decl. at ¶17), which is a campaign name for inquiry-based EBR calls (*Id.*), and therefore, these calls would not have been potential TCPA or TSR violations; the fact that Ms. [REDACTED] is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH. *See* Opposition at Section III.

387. Ms. [REDACTED] was annoyed that she received calls from Dish despite being on the Registry, Ex. 278 at 30:8-21, and she described her frustration saying,

"I'd received more than one call I recall seeing the number more than once pop up, and then I recall one voicemail, there probably could have been two, and I just remember being annoyed that I had been on the Do Not Call Registry, yet I was still receiving telemarketing calls from one or any entity so, therefore, I made the complaint."

Ex. 278 at 30:8-14.

Response: The alleged statements made in Exhibit 278 constitute inadmissible hearsay and therefore do not support the alleged facts; the facts alleged in this paragraph are misleading; DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED]'s wireless telephone number between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030" (Taylor Decl. at ¶17), which is a campaign name is for inquiry-based EBR calls (*Id.*), and

therefore, these calls would not have been potential TCPA or TSR violations; the fact that Ms. [REDACTED] is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH.

391. After the [REDACTED] subscribed to Dish, Dish began calling the family's landline, (618) 532-2584, with calls about changing their service plan and special events. Ex. 279 at 10:23-11:3, 17:24-18:12.

Response: 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 by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶18-20); Ms. [REDACTED]'s testimony in Exhibit 279 constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers and therefore does not support the alleged facts. *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772

392. Ms. [REDACTED] testified: "They would call us quite frequently. They were a real pain in the butt." Ex. 279 at 18:11-12.

Response: 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 by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶18-20); Ms. [REDACTED]'s testimony in Exhibit 279 constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers and therefore does not

support the alleged facts. *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

393. The phone would ring multiple times in a single day when they didn't answer it. Ex. 279 at 36:8-37:6.

Response: 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-21013, and therefore, any calls made to this consumer by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶18-20). *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

394. The calls came at inconvenient times, in the afternoon when her children were napping. Ex. 279 at 38:15-41:9.

Response: 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 by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶18-20). *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

395. Ms. [REDACTED] estimated that she received a "few hundred" calls marketing Dish during the two year period 2005-2007. Ex. 279 at 42:9-13.

Response: 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 by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶18-20); Ms. [REDACTED]'s testimony in Exhibit 279 constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers and therefore does not

support the alleged facts; the facts alleged in this paragraph call for speculation. *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

396. She believed the calls were from Dish because the person calling or message would say it was Dish. Ex. 279 at 23:20-24:2.

Response: The alleged statements made in Exhibit 279 in support of this paragraph constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers and therefore do not support the alleged facts; 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-21013, and therefore, any calls made to this consumer by DISH would not have been potential TCPA or TSR violations (Taylor Decl. at ¶18-20). *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

398. At least one such call, believed by Ms. [REDACTED] to have occurred in April or May 2006, upset Ms. [REDACTED] greatly because it woke her three children, including a colicky newborn, from their naps. Ex. 279 at 19:2-22; 40:22-41:4.

399. Ms. [REDACTED] recalled that she "screamed" at the caller, id. 38:3-14, and she also recalled telling Dish to stop calling. Ex. 279 at 22:17-23:9.

Response to 398 & 399: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she was upset with certain unidentified callers and screamed at one caller in April or May 2006; however, Ms. [REDACTED]'s testimony constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers. *Phillips*, 855 F.Supp.2d at 771-772.

400. The [REDACTED] registered their landline number on the Registry on November 7, 2007. Ex. 1 at ¶ 9.

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, because DISH's calls to Ms. [REDACTED] preceded the date on which Ms. [REDACTED]'s placed her landline telephone number on the Registry, and also Ms. [REDACTED] had an EBR during the timeframe in which DISH placed calls to her.

402. Ms. [REDACTED] described her feelings about the Dish telemarketing calls she received during her deposition, noting how she would not pick up the phone but the system would continue dialing and making the phone ring until someone answered—an unpleasant experience for someone with three children under age three. Ex. 279 at 56:3-17.

Response: The statements made in Exhibit 270 call for speculation; the alleged statements made in Exhibit 279 constitute inadmissible hearsay with respect to anything allegedly said by any unidentified callers, and therefore does not support the alleged facts; the facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. See Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772.

403. When she did answer the phone, she noted that she almost always told the caller not to call again. Ex. 279 at 57:23-58:3.

Response: The statements made in Exhibit 270 in support of this paragraph call for speculation; the alleged statements made in Exhibit 279 constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers, and therefore does not support the alleged facts. *Phillips*, 855 F.Supp.2d at 771-772.

404. Ms. [REDACTED] explained that telemarketing calls “are a pain and they wake up children . . . They interrupt stuff. They a lot of times would call at dinnertime.” Ex. 279 at 58:4-11.

Response: The statements made in Exhibit 270 in support of this paragraph call for speculation; the alleged statements made in Exhibit 279 constitutes inadmissible hearsay with respect to anything allegedly said by any unidentified callers, and therefore does not

support the alleged facts; the facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. *Phillips*, 855 F.Supp.2d at 771-772.

405. The [REDACTED] canceled their Dish service in mid-2013, and Ms. [REDACTED] testified that Dish started calling her home phone again, once or twice weekly, after they ceased their Dish service. Ex. 279 at 18:17-19, 21:8-22:16. *Phillips*, 855 F.Supp.2d at 771-772.

Response: The cited testimony regarding alleged calls made to Ms. [REDACTED] by DISH after she cancelled her service in or about mid-2013 is inadmissible hearsay and therefore, does not support the alleged facts.

409. Mr. [REDACTED] remembers receiving a call sometime in 2009 in which the caller offered him savings on his monthly bill if he would switch from DirecTV to Dish. Ex. 280 at 12:17-13:16, 35:5-6.

Response: DISH does not dispute that Mr. [REDACTED] testified that he received a telephone call from an unidentified individual who asked him to switch from DirecTV to DISH, however, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; in addition, Mr. [REDACTED]'s testimony constitutes inadmissible hearsay with respect to anything allegedly said by the unidentified caller. *Phillips*, 855 F.Supp.2d at 771-772.

410. Dish OE retailer Satellite Systems Network made the May 2009 call. [REDACTED] Dep. Ex. 2, Sept. 28, 2011 (Ex. 281).

Response: DISH does not dispute that it conducted an investigation that led it to conclude that Satellite Systems Network ("SSN") called Mr. [REDACTED], however, DISH disputes that this call was made by DISH or that SSN was acting on behalf of DISH when SSN made the call.

411. The caller knew Mr. [REDACTED] was a longtime DirecTV customer and, after placing him on hold, indicated that certain premiums would soon be expiring and that if he switched to Dish Network, the caller could save him money. Ex. 280 at 12:17-13:16.

Response: Mr. [REDACTED] did not testify that the unidentified individual with whom he spoke with stated that Mr. [REDACTED] was a “longtime” customer of DirecTV; furthermore, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; in addition, the testimony lacks foundation. *Phillips*, 855 F.Supp.2d at 771-772.

412. Concerned about a possible privacy breach, Mr. [REDACTED] contacted both DirecTV and Dish to complain about the call, added a password to his DirecTV account, and went to his bank to change his credit card number. Ex. 280 at 11:18-13:25, 25:17-24.

Response: DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; in addition, the testimony lacks foundation. *Phillips*, 855 F.Supp.2d at 771-772.

414. Dish conducted an internal investigation which confirmed that Mr. [REDACTED] was called by Dish retailer SSN in May 2009, and found that the employee had “proceeded to call Directv and pretended to be Mr. [REDACTED] to get info from his account” and even completed a credit check without Mr. [REDACTED]’s knowledge. E-mail from Snyder to Dougherty (May 19, 2009) (Ex. 282).

Response: DISH does not dispute that it conducted an investigation into Mr. [REDACTED] complaint; however, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH, as evidenced by the very documents that Plaintiffs cite, *i.e.*, Exs. 282 & 283.

416. SSN, using a call center company named Five9, called Mr. [REDACTED] an additional 10 times during 2010 and 2011 trying to sell Dish service, including two additional calls SSN labeled as “DNC” for “Do Not Call.” Ex. 197 at ¶8; Ex. 38 at ¶ 14, App. A.

Response: DISH does not dispute that Five9, Inc. provided services to SNN, however, DISH disputes that the exhibits cited by Plaintiffs constitute evidence of telemarketing

calls made on behalf of DISH; indeed, DISH disputes that the calls were made by DISH or anyone acting on behalf of DISH. *Mullin*, 732 F.3d at 776.

419. In or around December 2009, Mr. ■ specifically remembers receiving two telemarketing calls on the same day from a man selling Dish Network services:

And when I spoke to him, he indicated that he checks the Do Not Call list, and our exchange got a little testy. He called me some names; I called him a name. I hung up. He blocked his number and called me back and started to yell at me again, at which point I reversed searched his number, found that he had a number of failed businesses or, you know some shenanigans, and then I called Dish Network.

Ex. 284 at 12:12-13:21.

Response: DISH does not dispute that Mr. ■ testified during his deposition that he received telephone calls from an unidentified individual purporting to sell DISH services, however, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; in addition, Mr. ■'s testimony constitutes inadmissible hearsay; the testimony lacks foundation. *Phillips*, 855 F.Supp.2d at 771-772.

420. Mr. ■ called Dish directly after hanging up with the original caller to report the improper conversation. Ex. 284 at 12:17-19.

Response: DISH does not dispute that Mr. ■ testified during his deposition that he called DISH directly after hanging up after receiving a call from an identified individual, however, the cited testimony does not provide evidence of any fact material to Plaintiffs' motion. *Phillips*, 855 F.Supp.2d at 771-772.

421. Dish Network responded by assuring Mr. ■ it would do its best to terminate this dealer's franchise. Ex. 284 at 19:11-13.

Response: DISH does not dispute that Mr. [REDACTED] testified during his deposition that DISH responded by assuring Mr. [REDACTED] that it would terminate the unidentified caller's franchise that allegedly placed the call to Mr. [REDACTED], however, the cited testimony does not provide evidence of any fact material to Plaintiffs' motion. *Phillips*, 855 F.Supp.2d at 771-772.

422. Dish's own records reveal that Mr. [REDACTED] was called by A1 Vi Satellites, which was a Dish retailer. Letter from Musso to Ajmera (Dec. 22, 2009) (Ex. 285); E-mail from Colmenares to Snyder (Feb. 12, 2010) at DISH2-0000033633 (Ex. 286).

Response: DISH does not dispute that it identified A1 Vi Satellites as the unidentified caller to Mr. [REDACTED], however, DISH disputes that this call was made by DISH or that A1 Vi Satellites was acting on behalf of DISH when A1 Vi Satellites made the call, as evidenced by the very document cited by Plaintiffs, *i.e.* Ex. 285.

423. A1 Vi Satellites admitted that it got leads from a website and had no meaningful do-not-call compliance procedures, but Dish's response was not to terminate A1 Vi Satellites, but rather to ask the company to create more "transparency" as to its operations. Ex. 286 at DISH2-0000033633.

Response: Misstates document; the exhibit cited by Plaintiffs does not support the statements that A1 Vi Satellites had no meaningful do-not-call compliance procedures or that DISH's response was not to terminate A1 Vi Satellites rather to ask the company to create more "transparency" as to its operations; the cited exhibit cited by Plaintiffs *does* show that DISH diligently investigated the complaint, that the call was made in error and that once it was determined that Mr. [REDACTED] was on the Registry, A1 Vi Satellites did not place any further calls to him.

425. Ms. [REDACTED] disconnected her Dish service in 2006, and Dish then called her five times between January 2007 and April 2008. Ex. 287 at 19:7-18; Ex. 38 at ¶ 15.

Response: The alleged statements are disputed because Ms. [REDACTED] testified that she likely had DISH services until in or about the beginning of 2008 (DX-235 at 53:13-54:20); the alleged statements in Exhibit 287 are also misleading and misstate the record, because DISH's call records indicate that it placed only two calls to Ms. [REDACTED] on March 2, 2007 and April 18, 2008; the facts alleged in this paragraph are immaterial because there is no evidence to show that DISH's March 2, 2007 and April 18, 2008 calls to Ms. [REDACTED] were anything more than an inadvertent error, which supports DISH's safe harbor defense; 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).

428. Ms. [REDACTED] recalls always asking callers to "remove my number from their calling list" and hearing her husband do the same. Ex. 287 at 28: 6-14, 30:25- 31:14.

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' Motion; the alleged statements made in Exhibit 287 in support of this paragraph are inadmissible hearsay, and therefore, do not support the alleged facts. *Phillips*, 855 F.Supp.2d at 771-772.

430. On April 18, 2008, Dish called Ms. [REDACTED]'s telephone number as part of the Hindi-language winback campaign, "PB HIN DROP." Ex. 38 at ¶ 15.

Response: Response: The facts alleged in this paragraph are immaterial because there is no evidence to show that DISH's April 18, 2008 call to Ms. [REDACTED] was anything more than an inadvertent error, which supports DISH's safe harbor defense; 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).

435. Beginning in May 2007, Ms. [REDACTED] began to receive daily automated collection calls from Dish directed to another individual. Ex. 289 at 44:11-19; 45:21-46: 24.

Response: The alleged statements made in Exhibit 289 are disputed because there is no evidence to support the assertion that Ms. [REDACTED] received daily automated collection calls; furthermore, the facts alleged in this paragraph are immaterial because this paragraph does not refer to telemarketing calls.

437. Dish's records confirm that Ms. [REDACTED]'s home telephone number was placed on the entity-specific do-not-call list on or about September 19, 2007. Ex. 38 at ¶ 16.

Response: The facts alleged in this paragraph are disputed, because DISH's records indicate that Ms. [REDACTED]'s telephone number was placed on DISH's internal do-not-call list on August 2, 2008. (Taylor Decl., ¶27).

441. Ms. [REDACTED] found it "offensive" that Dish called as late as 8:00pm, Ex. 289 at 67:12-22, and was very annoyed by the solicitation calls, testifying:

I find phone calls annoying, but I'm outside, I can just ignore them, but most of the time, you know, I find myself running in the house, catching a call and that is what's most annoying is when you think it's something important. I have a mother in a nursing home now. Prior to that she was in a home with Alzheimers by herself, you know. It's very upsetting to run in and try—just like you answered a phone call because you think your son is having a problem. I have had more problems and running for phones.

Ex. 289 at 79:4-15.

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, particularly because DISH call records show a total of seven calls made by DISH to Ms. [REDACTED]. The campaign codes associated with the five calls between October 25, 2007 and December 7, 2007 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 and there is no cited evidence to support the assertion that Ms. [REDACTED]'s cited testimony

relates to any of these calls; the campaign codes associated with the remaining 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. (Taylor Decl., ¶28-29).

444. Mr. ■ began receiving calls from telemarketers purporting to sell Dish Network services in early 2005. Ex. 163 at 46:13-49:7; Ex. 38 at ¶ 19.

Response: DISH does not dispute that Mr. ■ testified during his deposition that he began receiving calls from telemarketers purporting to sell DISH's services in early 2005, however, DISH disputes that these calls were made by DISH or anyone acting on behalf of DISH; in addition, Mr. ■'s testimony constitutes inadmissible hearsay; the testimony lacks foundation. *Phillips*, 855 F.Supp.2d at 771-772.

445. After listening to one automated message play during a call he received on February 4, 2005, Mr. ■ spoke with a live person and told them he wanted to be added to their no-call list. Ex. 163 at 47:3-48:23; Ex. 164.

Response: DISH does not dispute that Mr. ■ testified during his deposition that during one call Mr. ■ spoke to a caller and stated that he wanted to be added to the caller's DNC list, however, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; in addition, Mr. ■'s testimony constitutes inadmissible hearsay; the testimony and document cited by Plaintiffs lack foundation that DISH or anyone acting on behalf of DISH made the call. *Phillips*, 855 F.Supp.2d at 771-772.

446. The caller told Mr. ■ he had to provide his phone number to be added to that list. Ex. 163 at 49:20-50:6.

Response: Plaintiffs allege that the call originated from Tenaya/Star Satellite. While DISH disputes this (*see* Response to statement 447), even if true, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH.

447. The call records for Dish retailer Tenaya/Star Satellite show it called Mr. ■■■'s number on September 26, 2005. Ex. 38 at ¶ 19.

Response: DISH's call records do not support the contention that DISH or anyone acting on behalf of DISH placed any calls to Mr. ■■■ (see Taylor Decl., ¶31-33); even if it did, which it did not, DISH disputes that this call was made by DISH or anyone acting on behalf of DISH; furthermore all of the allegations related to Mr. ■■■ are immaterial because the calls allegedly received by Mr. ■■■ from Star Satellite on September 26, 2005 are outside the applicable statute of limitations, which is three years under the TSR.

448. Mr. ■■■ filed complaints about the calls with both the State of Illinois and with Dish, naming Dish TV Now as the entity that placed the prerecorded calls he received. Ex. 164; Sill Dep. Ex. 5, June 19, 2012 (Ex. 290); Sill Dep. Ex. 6, June 19, 2012 (Ex. 291).

Response: Hearsay; lacks foundation; misstates documents; the cited documents do not support the contention that Mr. ■■■ filed a complaint with DISH; DISH's call records do not support the contention that DISH TV Now placed any calls to Mr. ■■■ (Taylor Decl., ¶32); DISH disputes that this call was made by DISH or anyone acting on behalf of DISH. *Phillips*, 855 F.Supp.2d at 771-772.

449. Dish's response to Mr. ■■■—misidentified in Dish's letter as "■■■■■■■■■■"—recognized that its "independent retailer" Dish TV Now, *see* UF 184-227 *supra*, had called Mr. ■■■ to solicit Dish, but disavowed any responsibility for the calls and suggested Mr. ■■■ contact Dish TV Now directly. Ex. 290; Ex. 291.

Response: Misstates documents; the cited documents do not support the contention that DISH recognized that DISH TV Now called Mr. ■■■ to solicit DISH products or services,

rather, DISH's April 12, 2005 letter to Ms. Sarah Schackmann of the Illinois Attorney General's Office reveals that DISH's representative was only reciting the business entity named by Mr. [REDACTED] in his complaint (see Pls. Ex. 291); DISH's call records do not support the contention that DISH TV Now placed any calls to Mr. [REDACTED] (see Taylor Decl., ¶33). DISH disputes that this call was made by DISH or anyone acting on behalf of DISH. *Phillips*, 855 F.Supp.2d at 771-772.

458. The telemarketing calls from Dish Network were a nuisance to Mrs. [REDACTED] because they interrupted dinner, lunch, and nap time with her four children. Ex. 292 at 64:3-8; 68:22-72:10.

Response: The cited testimony does not support the alleged facts set forth in this paragraph: DISH, however, does note that to the extent that Ms. [REDACTED] described the alleged calls as a nuisance undercuts the notion that TCPA or TSR violations can give rise to over a billion dollars in penalties.

462. Mrs. [REDACTED] lives with her husband and adult grandson. Ex. 293 at 11:18-12:1.

Response: At the time of the deposition, Ms. [REDACTED] was living with her stepson, not her grandson; regardless, the cited testimony does not provide evidence of any fact material or relevant to Plaintiffs' motion.

463. Telemarketing calls from Dish led Mrs. [REDACTED] to list her number on the Registry. Ex. 293 at 17:3-5, 22:2-13, 37:2-13.

Response: Lacks foundation; the cited testimony does not support the contention that DISH placed calls to Ms. [REDACTED]; additionally, Ms. [REDACTED] testified that most of the complaints she filed through the Sentinel database reference telemarketing calls where "DISH" was not mentioned (*see* Pls. Ex. 293 at 99:1-101:17); any testimony by Ms. [REDACTED] with respect to unidentified callers claiming they were selling DISH's products or

services constitutes inadmissible hearsay; DISH's call records do not support the contention that DISH placed any calls to Ms. [REDACTED] (DX-238); DISH disputes that the calls placed to Ms. [REDACTED] were made by DISH or anyone acting on behalf of DISH. *Phillips*, 855 F.Supp.2d at 771-772.

466. Mrs. [REDACTED] described how she would get calls selling Dish that were "just constant: three, four, five times a day... [I]t went on all day and most of the evening up to as late as eleven o'clock at night" and prevented her from getting any sleep. Ex. 293 at 18:4-16, 37:24-38:7.

Response: Lacks foundation; DISH does not dispute that Ms. [REDACTED] testified during her deposition that she would frequently receive calls from unidentified callers allegedly selling DISH; however, the cited testimony constitutes inadmissible hearsay; DISH's call records do not support the contention that DISH placed any calls to Ms. [REDACTED] (DX-238); DISH disputes that the calls placed to Ms. [REDACTED] were made by DISH or anyone acting on behalf of DISH. *Phillips*, 855 F.Supp.2d at 771-772.

469. The calls started with prerecorded messages and Mrs. [REDACTED] would try to navigate to a live person, but she was seldom successful. Ex. 293 at 20:19-23, 22:2-23:3, 25:10-17.

Response: Lacks foundation; DISH does not dispute that Ms. [REDACTED] testified during her deposition that the calls began with prerecorded messages and that Ms. [REDACTED] would try to speak with a live individual; DISH's call records do not support the contention that DISH placed any calls to Ms. [REDACTED] (DX-238); DISH disputes that the calls placed to Ms. [REDACTED] were made by DISH or anyone acting on behalf of DISH. *Phillips*, 855 F.Supp.2d at 771-772.

470. When she did reach a live person, Mrs. [REDACTED] asked to be put on the callers' do not call lists and told them she was not interested, but the telemarketers were rude, "[h]anging up on me, not answering my questions, trying to overtalk me . . . continuing with their sales pitch." Ex. 293 at 23:12-24:6.

Response: Lacks foundation; DISH does not dispute that Ms. [REDACTED] testified during her deposition that she asked callers to be placed on the caller's DNC lists and that she told them she was not interested; DISH's call records do not support the contention that DISH placed any calls to Ms. [REDACTED] (DX-238); DISH disputes that the calls placed to Ms. [REDACTED] were made by DISH or anyone acting on behalf of DISH, and therefore, Ms. [REDACTED] was not speaking with Dish. *Phillips*, 855 F.Supp.2d at 771-772.

471. At times, they would fail to hang up and tie up her line. Ex. 293 at 31:1-8.

Response: Lacks foundation; DISH does not dispute that Ms. [REDACTED] testified during her deposition that the callers would fail to hang up and tie up her line; however, DISH's call records do not support the contention that DISH placed any calls to Ms. [REDACTED] (DX-238); accordingly, DISH disputes that the calls placed to Ms. [REDACTED] were made by DISH or anyone acting on behalf of DISH. *Phillips*, 855 F.Supp.2d at 771-772.

472. The call records for Dish retailer Star Satellite show at least five prerecorded sales calls to Mrs. [REDACTED]' home number between August 30, 2005 through October 3, 2005. Ex. 38 at ¶ 23.

Response: DISH's call records do not support the contention that DISH or anyone acting on behalf of DISH placed any calls to Ms. [REDACTED] (DX-238, ¶37); furthermore, all of the allegations related to Ms. [REDACTED] are immaterial because the calls allegedly received by Ms. [REDACTED] from Star Satellite are outside the applicable statute of limitations, which is three years under the TSR.

473. Mrs. [REDACTED] complained about the calls to the Office of the North Carolina Attorney General, which forwarded the complaints to Dish; Dish responded through letters dated June 13, 2006 and June 30, 2006. Ex. 293 at 44:10-46:2; [REDACTED] Dep. Ex. 7, Sept. 20, 2011 (Ex. 294).

Response: DISH does not dispute that Mrs. [REDACTED] complained about calls that do not appear in any of the call records produced by DISH and that were complained about to the Office of the North Carolina Attorney General; furthermore, DISH does not dispute the fact that it responded to the Office of the North Carolina Attorney General by way of letters dated June 13, 2006 and June 30, 2006; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion because Plaintiffs cannot attribute the complained about calls to DISH for purposes of liability or otherwise.

UNDISPUTED IMMATERIAL FACTS

The following facts alleged by Plaintiffs are not material given the governing law of Plaintiffs' claims.

5. In November 2013, Dish had more than \$4 billion in cash reserves, and an additional \$5.5 billion of liquid assets such as marketable investment securities. Dish Network Corp., Form 10-Q Quarterly Report at 9 (Nov. 12, 2013) (Ex. 4).

Response: The amount of cash in reserves and liquid assets on any given date does not provide evidence of any fact material to Plaintiffs' motion; to the extent there is any question as to the amount of any claimed civil penalty or fine and DISH's ability to pay that fine, this statement does not provide material or relevant evidence as to that issue.

6. In April 2013, Dish submitted a bid of \$25.5 billion, including more than \$17 billion in cash, to purchase the wireless carrier Sprint. Press Release, Dish, *DISH Network Proposes Merger with Sprint Nextel Corporation for \$25.5 Billion* (Apr. 15, 2013) (Ex. 5).

Response: The amount of DISH's bid does not provide evidence of any fact material to Plaintiffs' motion; to the extent there is any question as to the amount of any claimed civil penalty or fine and DISH's ability to pay, this statement does not provide material or relevant evidence as to that issue.

7. In October 2012, Dish settled a long-running dispute about its breach of a contract with a single content provider by paying \$700 million in cash. Press Release, Dish, *DISH Network and Voom Reach Settlement* (Oct. 21, 2012) (Ex. 6).

Response: The amount that DISH paid to resolve the litigation does not provide evidence of any fact material to Plaintiffs' motion; to the extent there is any question as to the amount of any claimed civil penalty or fine and DISH's ability to pay, this statement does not provide material or relevant evidence as to that issue. *Phillips*, 855 F.Supp.2d at 771-772.

8. Dish's stock price has climbed substantially since October 2012. Dish, Stock Information, Dish Network - Investor Relations, available at <http://dish.client.shareholder.com/stockquote.cfm> (last visited December 19, 2013) (Ex. 7).

Response: DISH's stock price, which by its nature is in constant flux, does not provide evidence of any fact material to Plaintiffs' motion; to the extent there is any question as to the amount of any claimed civil penalty or fine and DISH's ability to pay, this statement does not provide material or relevant evidence as to that issue.

9. Between 2003 and 2010, Dish's top retailers activated 102,822,244 subscribers for Dish. Supplemental Resp. of Def. Dish Network LLC to Pls.' First Set of Interrogs. Pursuant Ct.'s Disc. Order at 9, Feb. 15, 2011 (Ex. 8); Dish, Top 100, Feb. 15, 2011 (Ex. 9).

10. Between 2003 and 2010, Dish paid its top 100 retailers a total of \$3.06 billion in incentive payments as shown by year: 2003—\$298,905,686; 2004—\$296,514,820; 2005—\$334,530,314; 2006—\$394,219,659; 2007—\$483,053,766; 2008—\$466,761,417; 2009—\$361,945,888; and 2010—\$427,493,941. Ex. 9.

Response to 9 & 10: Plaintiffs have made claims in their motion regarding six Independent Retailers; paragraphs 9 and 10 are not limited to those six retailers and, moreover, the amount paid to any given retailer does not bear on any issue that is material or relevant to Plaintiffs' motion. *Phillips*, 855 F.Supp.2d at 771-772.

11. Between 2003 and 2010, Dish paid its OE retailers American Satellite, Dish TV Now, JSR Enterprises, National Satellite Systems, Satellite Systems Network, and Star Satellite a total of \$93,978,594 in incentive payments. Ex. 8 at 9; Ex. 9; Dish, All O/Es, Feb. 15, 2011 (Ex. 102).

Response: The amount paid to the specific Independent Retailers does not bear on any issue material or relevant to Plaintiffs' motion.

12. Dish was held in contempt of court for violating a permanent injunction and ordered to pay nearly \$90 million in sanctions in the case of *TiVo Inc. v. Dish Network, Corp.*, 655 F.Supp.2d 661, 666 (E.D. Tex. 2009), *aff'd*, 646 F.3d 869, 876 (Fed. Cir. 2011) (en banc) (Ex. 10).

Response: Any alleged prior bad acts are not material or relevant in this civil action or to Plaintiff's Motion. Fed.R.Evid. 404.

13. Dish settled *TiVo Inc. v. Dish Network, Corp.* with a payment to TiVo of \$500 million. Press Release, TiVo Inc., DISH Network and EchoStar Announce Half-Billion Dollar Settlement of Patent Litigation, available at <http://pr.tivo.com/press-releases/tivo-dish-network-and-echo-star-announce-half-billion-dollar-settlement-of-patent-litigation> (May 2, 2011) (Ex. 11).

Response: The amount paid to resolve the referenced litigation does not provide evidence of any fact material or relevant to Plaintiffs' motion; to the extent there is any question as to the amount of any claimed civil penalty or fine and DISH's ability to pay, this statement does not provide material or relevant evidence as to that issue.

15. Dish's automatic dialers ("autodialers") are computer-controlled devices capable of making hundreds of thousands of phone calls in a single day and are located in Colorado, Texas, and West Virginia. Montano Dep. 39:21-42:7, Mar. 15, 2011 (Ex. 14); Steele Decl. ¶ 36, Ex. A. (Ex. 15).

Response: The numbers of calls a specific autodialer is capable of making is not material or relevant to Plaintiffs' motion, which concerns outbound telemarketing calls that were (allegedly) actually made.

25. In Dish's 2007-2010 call records, Dish's expert found 501,650 "issue calls" to numbers on the Registry for more than 31 days—443,753 prior to or on February 9, 2009 and 57,897 after that date. Ex. 16 at 7-8.

Response: DISH's expert arrived at this conclusion, but it is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. (Taylor Decl. ¶¶ 2-10.)

40. Dish did not share its entity-specific do-not-call list with any retailers until April 2008, and it did not collect entity-specific requests from Dish retailer National Satellite Systems (“NSS”) until summer 2010. Ex. 28 at 1, 13.

Response: DISH was not required under the law to share its entity-specific DNC list with any Independent Retailers; accordingly, this statement is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion. *Phillips*, 855 F.Supp.2d at 771-772.

57. Some Dish calls were labeled “DPV,” which means “positive voice.” Disposition Guidelines 1.12.09.xls (Jan. 12, 2012) (Ex. 43).

Response: The fact alleged in this paragraph is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

58. “Positive voice” indicates that a call recipient has picked up the phone and is listening. E-mail from Montano to Gonzalez (Mar. 24, 2011) (Ex. 44).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

66. The “AM 100507ZEE” Zee Sports automessage was a telemarketing call. Ex. 46; Dish Mem. in Support of Mot. for Reconsideration at 18 (“DISH does not dispute that the Zee Sports Campaign contained a direct or indirect sales message and was conducted for a commercial purpose.”) (d/e 291) (Ex. 48).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

67. During the outbound calls made as part of the AM 090507 GREEK campaign, Dish played a prerecorded message that contained the following language: “Call us today to have the unique opportunity to watch the attempt of the Greek team, which always makes us proud. For more information, call 1-888-483-3902.” Ex. 42 at ¶ 7(a).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Please listen to an important

announcement from Dish Network, your satellite television provider. Exclusively, on the net and on Dish Network, European [speaker mumbles word]. Our national basketball team defends itself this week until next Sunday in Spain for the 2007 Euro Basket. Call us today to have the unique opportunity to watch the attempt of the Greek team, which always makes us proud. For more information, call 1-888-483-3902.”

68. During the outbound calls made as part of the AM 090607 CHIN campaign, Dish played a prerecorded message that contained the following language: “[M]ore exciting Chinese TV shows, including the most welcomed, ‘I Guess, I Guess, I Guess Guess Guess,’ ‘Variety Big Brother,’ ‘Super Starry Walk,’ ‘Flying Pigeon Nightly Wave,’ ‘May Barbaric Princess,’ ‘Taiwan Dongsen News,’ etc. Your enjoyment and satisfaction guaranteed. Please call today, 1-877-446-2742. Watch the additional shows at Dish Network Chinese TV channels which have the most entertainment shows.” Ex. 42 at ¶ 7(b).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Dear Dish Network Customers, add you favorite Chinese TV channels now! Dish Network is now providing, your satellite television provider. Exclusively, on the net and on Dish Network, European [speaker mumbles word]. Our national basketball team defends itsemay more exciting Chinese TV shows, including the most welcomed, ‘I Guess, I Guess, I Guess Guess Guess,’ ‘Variety Big Brother,’ ‘Super Starry Walk,’ ‘Flying Pigeon Nightly Wave,’ ‘May Barbaric Princess,’ ‘Taiwan Dongsen News,’ etc. Your enjoyment and satisfaction guaranteed. Please call today, 1-877-446-2742. Watch the additional shows at Dish Network Chinese TV channels which have the most entertainment shows.”

69. During the outbound calls made as part of the AM 090607 FILI campaign, Dish played a prerecorded message that contained the following language: “Now is the best time to come back to your Filipino shows Call 1-877-456-2609 . . . to have Dish Network Filipino TV added now.” Ex. 42 at ¶ 7(c).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: "Our dear Dish Network viewers! Now is the best time to come back to your Filipino shows. Dish Network will offer finer Filipino shows and movies. Watch your favorite shows, like Kikay Machine, Shall We Dance?, the Jojo Anhar Show, award-winning films, and much more. The Dish Network Filipino packages start at just \$9.99 per month. Call 1-877-456-2609 — that's 1-877-456-2609 — to have Dish Network Filipino TV added now!"

70. During the outbound calls made as part of the AM 090607 KORE campaign, Dish played a prerecorded message that contained the following language: "If you add the Korean Variety Pack to your registration now, you can view Korean language programming for \$24.99 a month. Call 1-888-644-2117 today and add the Korean Variety Pack to your subscription. Please call 1-888-644-2117 right now." Ex. 42 at ¶ 7(d).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: "Hello Dish Network customer. This is your opportunity to add the Korean Variety Pack to your subscription to enjoy the most entertaining and varied Korean language programming ever. You can enjoy the popular Hello Aegi-ssi featuring talent Lee Da-Hae and Lee Jee-Hoon and the red-hot drama Ma-Wang featuring Uhm 3 Tae-Woong, conveniently at home. Also, on Star Real Story: I Am, which gives you a glimpse into stars' real lives, you can meet the biggest stars like Boa, Bi, Shinhwa, and others. If you add the Korean Variety Pack to your registration now, you can view Korean language programming for \$24.99 a month. Call 1-888-644-2117 today and add the Korean Variety Pack to your subscription. Please call 1-888-644-2117 right now."

71. During the outbound calls made as part of the AM 091107 ARAB campaign, Dish played a prerecorded message that contained the following language: “Ramadan is better on the channels of ART America: MBC, Dubai Satellite Channel, Nile Drama and Abu Dhabi Satellite Channel. For subscription and more information, please call the following number: 1 888 262 2604.” Ex. 42 at ¶ 7(e).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Dear customer, Thanks for being a loyal customer to Dish Network Company, the leading company in providing the best Arab bouquets that fit all family members. Now it is the suitable time to subscribe to one of the Dish Network Arab bouquets during the Holy Month of Ramadan. Don't miss it and subscribe today to watch the most recent programs and new Ramadan series, little: Bab El Harah", "Tash Ma Tash", King Farouk, "Awlad Al Layel", "Khawatir", the cornerstone and Nimr bin Adwan. Ramadan is better on the channels of ART America: MBC, Dubai Satellite Channel, Nile Drama and Abu Dhabi Satellite Channel. For subscription and more information, please call the following number: 1 888 262 2604...1 888 262 2604.”

72. During the outbound calls made as part of the AM 091107 GREEK campaign, Dish played a prerecorded message that contained the following language: “Now is the ideal time to watch the Greek package which includes the best Greek channels To learn more information about the Greek channels on Dish Network, contact us at 1-888-483-3902.” Ex. 42 at ¶ 7(f).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Please listen to an important announcement from Dish Network, your satellite television provider. We thank you for

your trust and for choosing us. Dish Network brings you closer to Greece and fills with life (liveliness) your television programming. Now is the ideal time to watch the Greek package which includes the best Greek channels like Antenna Satellite, Antenna Gold, Blue and [another channel]. Also, don't lose the best comedies, dramas, news, documentaries, as well as well as, exclusively, the Greek football championships live, which starts this year on August 26th. To learn more information about the Greek channels on Dish Network, contact us at 1-888-483-3902.”

73. During the outbound calls made as part of the AM 091207 CHIN campaign, Dish played a prerecorded message that contained the following language: “After expiration of the free trial period, you only need \$34.99 to continue with your enjoyment of the 13 exciting channels in the Taiwan Sky Net Package. Call today the Chinese subscription hotline at 1-888-229-8215!” Ex. 42 at ¶ 7(g).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: “good news! From September 12 to 25, Dish Network will provide you with free trial watching experience with Taiwan Sky Net Package, which includes the 13 top Taiwanese TV channels including Taiwan TV, Central TV, China TV, Tianxia Satellite TV, Satellite TV II, and Dongsheng TV. The free trial period starts at 3 o'clock on September 12 (Pacific Time). During the free trial period, Dish Network broadcasts the satellite premier "My Just Boyfriend", "Baoqingtian—Bai Yutang Legend", "Flying 4 Pigeon Nightly Wave", and other exciting TV shows which you cannot miss. After expiration of the free trial period, you only need \$34.99 to continue with your enjoyment of the 13 exciting channels in the Taiwan Sky Net Package. Call today the Chinese subscription hotline at 1-888-229-8215!”

74. During the outbound calls made as part of the AM 091307 KINO campaign, Dish played a prerecorded message that contained the following language: “Tune to channel 724 and enjoy German Kino+ free of charge from September 12th to the 26th, 2007. If you would like to receive the program permanently, please call us at 1-888-276-2995!” Ex. 42 at ¶ 7(h).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Dish Network would like to inform you about its offer to receive German Kino+ on channel 724 free of charge. German Kino+ offers German-speaking TV programs 24 hours a day. The best of German films, classics and high-quality documentaries. Unabridged and commercial free - German Kino+ will bring you entertainment at its finest; the best Germany has to offer. Tune to channel 724 and enjoy German Kino+ free of charge from September 12th to the 26th, 2007. If you would like to receive the program permanently, please call us at 1-888-276-2995!”

75. During the outbound calls made as part of the AM 091407 FRENCH campaign, Dish played a prerecorded message that contained the following language: “Call us today at 1-888-793-8490 to add Tres TV and 3A Telesud to your French lineup. Price will vary based on your current subscription.” Ex. 42 at ¶ 7(i).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Please listen to this important message from Dish Network, your satellite TV provider. Dish Network is offering a free preview of Tres TV on channel 575 and a free preview of 3A Telesud on channel 574 until September 19 th. Tres TV has a brand new face. The biggest stars such as Gwen Stefanie, Kanye West and Shaggy are on Tres TV in September. Until December, 3A Telesud broadcasts an exclusive TV series, Yama Africa. The first time on Telesud, a fictional drama show highlights the lives of four African women living in Brooklyn, New

York. Watch the first episode on Friday, September 14 th. Call us today at 1-888-793-8490 to add Tres TV and 3A Telesud to your French lineup. Price will vary based on your current subscription. You must have a DISH 510 to see this free preview. Thank you for being a valued Dish Network customer.”

76. During the outbound calls made as part of the AM 091407 GERMAN campaign, Dish played a prerecorded message that contained the following language: “Subscribe today by calling us at 1-888-276-2995.” Ex. 42 at ¶ 7(j).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: “Dear Dish Network customer, thank you for your ongoing subscription and for being a loyal Dish Network customer. Dish Network is dedicated to bringing you the best in German television that suits all your enjoyment needs in one comprehensive package. Now is the best time to subscribe to our German language plus package, which includes the best German channels like DW TV, Proseben, German KINO Plus, EuroNews. Don't miss the prime time AID and ZDF television shows on DW TV which features well known talk shows, new documentaries, quality entertainment, and children's programs. Enjoy the new bonus league soccer season live at home from Proseben every Friday, Saturday and Sunday. And don't forget the quality German classic movies on German KINO Plus and the latest news from a European perspective on EuroNews. Subscribe today by calling us at 1-888-276-2995.”

77. During the outbound calls made as part of the AM 092107 FREEHD campaign, Dish played a prerecorded message that contained the following language: “As a valued customer, Dish Network wants to give you six months of free Dish HD programming today. Call us at 1-888-222-3147 to take advantage of Dish HD programming today.” Ex. 42 at ¶ 7(k).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: "Please listen to this important message from Dish Network, your satellite TV provider. Now is the time to experience your TV in stunning clarity with Dish HD TV, your favorite shows will look so life like that you'll think you're actually there. If you love watching TV, you'll love it even more in Dish HD quality. As a valued customer, Dish Network wants to give you six months of free Dish HD programming today. Call us at 1-888-222-3147 to take advantage of Dish HD programming today."

78. During the outbound calls made as part of the AM 100407 INDUSM campaign, Dish played a prerecorded message that contained the following language: "Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming." Ex. 42 at ¶ 7(n).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: "Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming."

79. During the outbound calls made as part of the AM 100407 INDUSV campaign, Dish played a prerecorded message that contained the following language: "Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming." Ex. 42 at ¶ 7(o).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: "Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming."

80. During the outbound calls made as part of the AM 100807 INDUS campaign, Dish played a prerecorded message that contained the following language: "Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming." Ex. 42 at ¶ 7(p).

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; furthermore, Plaintiffs only restate a portion of this campaign message, which in its entirety states: "Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming."

81. The prerecorded telemarketing messages in the 15 AM campaigns listed above all lasted longer than two seconds. Ex. 42 at ¶ 7.

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

86. In 2003, the State of Missouri sued Dish for violating the Missouri Do-Not-Call Registry. Pet. For TRO Prelim. & Permanent Injs., Civil Penalties & Other Relief, *Missouri ex rel. Nixon v. EchoStar Satellite*, No. 03-cv-129088 (Cir. Ct. St. Charles Cnty. Aug. 27, 2003) (Ex. 52).

Response: 2003 is well outside the statute of limitations and there is otherwise no basis to conclude that the State of Missouri established any basis for DISH's liability. 15 U.S.C. § 57b(d).

87. Dish eventually settled the Missouri case because of "[Dish's] own actions at the very early stages of implementing DNC processes and procedures." E-mail from Steele to Dodge et al. (Apr. 19, 2006) (Ex. 53).

Response: The settlement with Missouri Attorney General is not relevant to this action as Missouri is not a party; furthermore, that settlement took place in 2006, which is outside the statute of limitations. 15 U.S.C. § 57b(d).

89. Dish signed a 2009 assurance of voluntary compliance with 46 states related to its telemarketing practices. Assurance of Voluntary Compliance, *In re Dish Network LLC* (July 1, 2009) (Ex. 55).

Response: The Assurance of Voluntary Compliance (the "Assurance") is evidence of nothing and contains DISH's position with respect to the claims by the Attorneys' General referenced therein ("DISH Network asserts that by entering into this Assurance, it does so denying wrongdoing of any kind and affirmatively states that it believes the requirements it has agreed to by signing this Assurance are policies, procedures and actions that exceeded applicable legal and common law standards and that it met all legal standards prior to the Attorneys General bringing their investigation." Ex. 55 at 3-4); further, none of the Attorneys General who were involved in the Assurance has joined this action against DISH.

99. In 2011, dozens of Dish QA personnel used more than 50 different metrics to evaluate more than 70 sales calls made by Dish OE retailer Defender during one week, creating more than

3,000 individual data points that Dish reported back to Defender to improve its sales. Defender WE 08.9.11.xls (Sept. 2, 2011) (Ex. 66).

Response: 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*, 855 F.Supp.2d at 771-772.

100. Each Defender sales call averaged more than 30 minutes in length, requiring Dish employees to spend more than 40 hours listening to and scoring these calls. Ex. 66.

Response: 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*, 855 F.Supp.2d at 771-772.

109. Dish's proffered expert admitted that Dish's complaint script incorrectly stated that if a consumer does not pick up the phone, there is no violation of the TCPA. Sponsler Dep. 202:21-203:7, Dec. 5, 2012 (Ex. 76).

Response: The statement contained in this paragraph constitutes a legal conclusion and as such is not a fact; the statement is otherwise inadmissible as exceeding the scope of the expert's retention; finally, this statement is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. *Phillips*, 855 F.Supp.2d at 771-772

138. Dish TV Now, the first such OE retailer Dish contracted with in November 2003, was headed by a husband-and-wife team of federal felons. Ex. 62 at 19:14-20; Ex. 88 at 80:16-23; *United States v. Defusco*, No. 89-cr-00349 (E.D. Va. Oct. 20, 1989) (Ex. 93).

Response: The criminal record of the principal of a former DISH retailer is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; moreover, there is no

evidence that DISH knew of this criminal record. (Plaintiffs' Ex. 88, Ahmed Tr. 80:16 – 81:11; DX-227, Mills 5-3-12 Tr. 22:3 – 18).

151. Currently, there are less than 40 OE retailers, and there have never been more than 100. Ex. 77 at 38:3-15.

152. The OE system at certain times has produced more sales than the entirety of Dish's direct sales organization. Dish, Gross Sales Update (Aug. 6, 2007) (Ex. 99); Ex. 90; Ex. 89; E-mail from Mills to Neylon (Feb. 2, 2012) (Ex. 100); Dashboard_Week8.xls (Feb. 28, 2007) (Ex. 101).

153. During the relevant time period, Dish's OE retailers averaged more than 20,000 sales per year. Ex. 90; Ex. 99; Ex. 8 at 9; Ex. 102; Ex. 9.

157. Dish maintained a no-affiliate policy for its TVRO retailers. Ex. 106; Ex. 105.

167. Dish does not require its retailers to report to Dish when they are investigated by a government agency or sued by a private party related to violations of consumer-protection statutes or criminal conduct. Resps. of Def. Dish to Pls.' First Set of Interrogs. at 15, July 19, 2010 (Ex. 127).

169. Dish has received thousands of complaints about telemarketing calls selling Dish. Ex. 78 at 223:11-229:3; Metzger Dep. Ex. 342, Mar. 17, 2011 (Ex. 128).

Response to 151-53, 157, 167 & 169: The statements contained in these paragraphs constitute inadmissible hearsay and therefore do not support the alleged facts). *Phillips*, 855 F.Supp.2d at 771-772

Response to 167: The Interrogatory that Plaintiffs cite asked DISH to describe whether and under what circumstances DISH has required Retailers "to report to [DISH] when they received telemarketing complaints . . ." See Resps. of Def. Dish to Pls.' First Set of Interrogs. at 15, July 19, 2010 (Ex. 127). It did not ask DISH to provide the same information related to government agency investigations or lawsuits initiated against the Retailers. DISH's response was only that the Independent Retailers did not have to report consumer complaints to DISH.

174. Ms. Musso testified that she does not actually ensure compliance, but rather offers suggestions to retailers about how they might better adhere to the retailer agreement. Ex. 77 at 58:17-59:13, 61:12-21, 133:12-134:10.

184. In or around October 1989, David Hagen, along with his wife Annette Hagen, pleaded guilty to one count of conspiracy (to commit bankruptcy fraud) and one count of money laundering in the Eastern District of Virginia, and Mr. Hagen was sentenced to 60 months in prison. *United States v. DeFusco*, 949 F.2d 114, 115 (4th Cir. 1991) (Ex. 144); Ex. 93 at FTC350-003432, FTC350-03440.

185. On November 3, 1989, David Hagen and Annette Hagen were enjoined from a number of deceptive marketing practices in a permanent injunction entered by the United States District Court for the Eastern District of Virginia on November 3, 1989. Permanent Inj., *FTC v. Defusco*, No. 89-1046 (E.D. Va. Nov. 3, 1989) (Ex. 145).

186. In February 1990, David Hagen pleaded guilty to “conspiracy and one substantive count” of mail fraud in the Eastern District of Texas, and was sentenced to 60-months of incarceration. *United States v. DeFusco*, 930 F.2d 413, 414 (5th Cir. 1991) (Ex. 146); Ex. 144.

Response to 174 & 184-86: Any facts related to the background of DISH’s retailers of which DISH had no knowledge are not material to any fact that is pertinent to Plaintiffs’ motion.

187. After David Hagen was released from federal prison, he started a satellite sales business called Prime TV in Southern Pines, North Carolina. Hagen Dep. 12:20-13:11, Jan. 12, 2012 (Ex. 147); Letter from Hagen to Ahmed (Oct. 7, 2003) (Ex. 148).

Response: The fact that David Hagen was in prison and then started Prime TV, a company that sold DirectTV products and services (and not DISH), is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

188. By 2004, Mr. Hagen’s businesses had two adjacent call centers located in a Southern Pines, North Carolina strip mall: the larger call center had seats for 600 telemarketers; the smaller call center had seats for 100 telemarketers. Ex. 147 at 21:12-22:23, 27:25-30:4.

Response: The size of David Hagen’s call centers and where they were located is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

189. In August 2003, the State of North Carolina opened an investigation into Prime TV’s marketing practices, which culminated in a June 2004 consent decree requiring Prime TV to,

among other things, honor rebates that it had promised to consumers but never paid. Letter from Green to Yelverton (Aug. 29, 2003) (Ex. 149); Consent J., *North Carolina v. Prime TV LLC*, No. 04-cvs-008148 (Super. Ct. Div. June 14, 2004) (Ex. 150).

Response: The alleged prior bad acts of PrimeTV are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion and are not material or relevant in this civil action; furthermore, the consent decree referenced by Plaintiffs in this paragraph did not state that PrimeTV was required to honor rebates that it had promised consumers but never paid and it did not involve alleged telemarketing violations similar to those involved in this case. There is no evidence that DISH was aware of the proceedings conducted by the State of North Carolina, or the resulting consent judgment.

191. On or around October 21, 2003, David Hagen formed a new company, Dish TV Now, that filed its Articles of Incorporation with the North Carolina Secretary of State. Dish TV Now Inc., Articles of Inc. of Dish TV Now, Inc. (Oct. 21, 2001) (Ex. 151).

Response: When and where Dish TV Now was formed is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

198. In 2004, Dish co-founder James DeFranco and VP Ahmed visited Dish TV Now's call centers to observe the company's marketing activities. Ex. 147 at 19:25-22:1, 25:10-26:18.

Response: Plaintiffs do not claim that either Mr. DeFranco or Mr. Ahmed witnessed any illegal telemarketing conduct while visiting Dish TV Now's call center, or that they observed any outbound telemarketing or the use of prerecorded messages; as such, this statement is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

199. Dish employees provided regular trainings to Dish TV Now call-center agents. Olsen Decl. ¶¶ 27-28, Nov. 21, 2013 (Ex. 155); Ex. 62 at 32:13-32:18.

Response: Plaintiffs do not claim that DISH provided to Dish TV Now training on telemarketing; rather the cited document shows that DISH provided training regarding DISH's products.

200. On June 14, 2004, David Hagen, Annette Hagen, and Prime TV entered into a consent judgment with the State of North Carolina Attorney General to resolve allegations regarding Prime TV's marketing practices. Ex. 150.

Response: Any alleged prior bad acts of PrimeTV, David Hagen or Annette Hagen are irrelevant and immaterial to any fact that is pertinent or to this civil action; furthermore, the consent decree referenced in this paragraph did not deal with alleged telemarketing violations similar to those involved in this case and there is no evidence that DISH was aware of the proceedings conducted by the State of North Carolina, or the resulting consent judgment.

207. Guardian Communications stopped dialing Dish solicitation messages on Dish TV Now's behalf when David Hagen stopped payment on \$200,000 worth of checks to Guardian. Ex. 161 at 123:5-124:23.

Response: There is no evidence that DISH had knowledge that Dish TV Now was using Guardian Communications; rather, the facts show that Dish TV Now told DISH that it was placing calls using live agents (Exhibit 119); accordingly, the reason why Dish TV Now stopped using Guardian Communications is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

212. In 2005, Dish TV Now agreed to indemnify Dish and to retain counsel on Dish's behalf in regards to an Ohio TCPA lawsuit about Dish TV Now's telemarketing activities. E- mail from Mills to Ahmed (Dec. 22, 2005) (Ex. 165).

Response: Dish TV Now's agreement to indemnify DISH with respect to a single lawsuit alleging a TCPA violation in 2005, unrelated to this action, is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

214. In 2004 or 2005, Dish paid for Hagen to go on a luxury cruise. Ex. 147 at 168:25-170:16.

Response: There is no evidence that the cruise referenced in this paragraph occurred after Dish TV Now committed any alleged telemarketing violations; even if so, this fact would remain irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

217. A predictive dialer is a dialing system that automatically dials consumers' telephone numbers in a manner that "predicts" the time when a consumer will answer the phone and a telemarketer will be available to take the call. *In the Matter of Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991*, 27 FCC Rcd. 1830, 1835 (Feb. 15, 2013) (Ex 170).

Response: It is not a violation of telemarketing laws to use a predictive dialer and the definition of predictive dialer is therefore irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

224. In 2007, Dish told FTC in a Powerpoint presentation that it had terminated Dish TV Now due to telemarketing violations. Ex. 56 at FTC006-000736.

Response: DISH's settlement discussions with the FTC covered a wide range of topics. Further, the material contained in Exhibit 56 is inadmissible under Federal Rule of Evidence 408 and therefore should not be admitted for any purpose in this action, including Plaintiffs' motion.

225. On May 15, 2009, David Hagen was convicted of a number of additional federal felonies, including conspiracy to commit securities fraud, conspiracy to commit mail and wire fraud, and conspiracy to commit money laundering. David Hagen is currently serving a 45-year federal prison term. Verdict, *United States v. Hagen*, 08-cr-93 (W.D.N.C. May 15, 2009) (Ex. 175); Second Superseding Bill of Indictment, *United States v. Hagen*, No. 08-cr-93 (W.D.N.C. Feb.

19, 2009) (Ex. 176); J. in a Crim. Case, *United States v. Hagen*, No. 08-cr-93 (W.D. of N.C. Nov. 17, 2009) (Ex. 177); Special Verdict, *United States v. Hagen*, No. 08-cr-93 (W.D. of N.C. May 15, 2009) (Ex. 178).

Response: David Hagen’s conviction in May 2009 – years after the Dish TV Now relationship terminated – is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

227. Between 2004 and 2005, Dish TV Now activated 91,210 subscribers for Dish, and Dish paid Dish TV Now \$20.61 million for these new activations. Ex. 8 at 9; Ex. 9.

Response: The total number of activations by Dish TV Now and the amount that DISH paid Dish TV Now for any activations is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion. Plaintiffs’ Exhibit 8 does not support the facts alleged in Paragraph 227; furthermore, DISH paid Dish TV Now \$17.51 million for the activations listed in Plaintiffs’ Exhibit 9.

228. On or around March 20, 2001, Satellite Systems Network (“SSN”) became a Dish retailer. EchoStar Satellite LLC’s Resp. to Vt. Civ. Investigative Subpoena (Ex. 179).

Response: The date that Satellite Systems Network (“SSN”) became an Independent Retailer predates the applicable statute of limitations period and is irrelevant and immaterial to any facts pertinent to Plaintiffs’ motion.

230. The President of SSN is Alex “Ali” Tehranchi and its Vice President is his sister, Bahar “Sophie” Tehranchi. EchoStar Retailer Application of SSN (Mar. 7, 2001) (Ex. 181); Ex. 179 at 4; Tehranchi Dep. 14:17, 15:22-17:19, 21:4-11, *Donaca v. Dish Network, LLC*, No. 11-cv-02910 (C.D. Cal. Aug. 26, 2013) (Ex. 182).

Response: The fact that Alex Tehranchi is President of SSN and his sister, Sophie Tehranchi, is the Vice President of SSN is irrelevant and immaterial to any facts pertinent to Plaintiffs’ motion.

233. In June 2004, the State of North Carolina sued SSN for calling North Carolinians on the Registry and placing prerecorded telemarketing calls to North Carolina consumers, all in violation of North Carolina law. Compl., *North Carolina v. Vitana Fin. Grp. Inc.*, No. 4-cv-008799 (Wake Cnty. Ct. June 25, 2004) (Ex. 185).

Response: The alleged prior bad acts of SSN are irrelevant and immaterial to any facts pertinent to Plaintiffs' motion; also, the conduct alleged in the referenced exhibit occurred outside the applicable limitations period.

234. The case ended in 2005 with a consent judgment where SSN paid a penalty of \$15,000 and was enjoined from, among other things, calling North Carolinians on the Registry. Ex. 185; J. by Consent & Stipulated Permanent Inj., *North Carolina v. Vitana Fin. Grp., Inc.*, No. 04-cv-008799 (N.C. Sup Ct. Mar. 21, 2005) (Ex. 186).

Response: The alleged prior bad acts of SSN are irrelevant and immaterial to any facts pertinent to Plaintiffs' motion; also, the conduct alleged in the referenced exhibit occurred outside the applicable limitations period; further, there is no evidence that DISH was aware of the proceedings by the State of North Carolina, or the resulting consent judgment.

235. On or around June 12, 2002, Dish informed SSN that its telemarketing practices were in potential violation of the Retailer Agreement and requested that SSN ensure compliance with telemarketing laws. Letter from Davidson to Tehranchi (June 12, 2002) (Ex. 187).

Response: The referenced exhibit cites conduct that predates the effective date of the amended TSR, and predates the applicable limitations period; this fact is, therefore, irrelevant and immaterial to any facts pertinent to Plaintiffs' motion.

236. On or around November 6, 2002, Dish visited SSN and reminded Mr. Tehranchi to follow the rules and that the "entire executive group is watching close." SSN Retailer File at DISH-Paper-010020 (Ex. 188).

Response: The referenced exhibit shows that DISH was communicating with and reminding Independent Retailers that they are required to comply with telemarketing

laws; this exhibit is, therefore, irrelevant and immaterial to any facts pertinent to Plaintiffs' motion.

239. On or around November 4, 2004, the State of Florida obtained a \$25,000 civil penalty against Tehranchi and his company for telemarketing violations between January 2003 and February 2004, including prerecorded message telemarketing and calls to numbers on the state's do-not-call registry, and Tehranchi and his company were permanently enjoined from further violations of Florida's telemarketing laws. Press Release, Fla. Dep't of Agric. and Consumer Servs., *Bronson Takes Action in Telemarketing Case* (Nov. 4, 2004) (Ex. 191).

Response: This fact is irrelevant and immaterial to any facts pertinent to Plaintiffs' motion because conduct was alleged to be violation of Florida law; Florida is not a party and this action; further, 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); *see also* Opposition at Sections V and VII.B..

240. By or before December 31, 2004, SSN became an OE retailer. E-mail from Vallejos to Hargan et al. (Sept. 22, 2006) (Ex. 192); EchoStar Retailer Agreement with Satellite Sys. Network (Dec. 31, 2004) (Ex. 193).

Response: The date on which SSN became an OE retailer is irrelevant and immaterial to any facts pertinent to Plaintiffs' motion.

241. On September 26, 2005, Dish acknowledged that it knew SSN and Tehranchi were using prerecorded message telemarketing to sell Dish Network, saying: (a) that "Terachi [sic] been [sic] warned time and time again (by [Dish counsel], by [Dish Sales], by the region, by phone, in writing, in person, that these activities could violate the law"; (b) that Dish had "stressed that [Tehranchi] must follow the line if he wants continued support etc."; and (c) that Dish had "successfully resisted the argument that we are responsible for the conduct of independent retailers, however, SSN is a problem because we know what he is doing and have cautioned him to stop.... Eventually someone will try to use that against [Dish]." E-mail from Novak to Ahmed et al. (Sept. 26, 2005) (Ex. 194).

Response: DISH objects to the use of Exhibit 194 on attorney-client privilege and work product grounds; regardless, the referenced exhibit demonstrates that DISH was taking

steps to make sure that SSN was complying with its Independent Retailer Agreement, including the obligation to abide telemarketing law; this exhibit also shows that DISH imposed a probation on SSN due to the allegations against it.

244. On August 16, 2006, Dish in-house lawyer Dana Steele acknowledged in an internal email to Dish general counsel David Moskowitz that she knew the following facts about SSN's telemarketing activities:

SSN has used the same scripts as [Dish Retailer] United, is out of Aliso Viejo, CA (as is United), and it is the other retailer that the VT AG is investigating us for. We believe United and SSN either used the same affiliate marketer or hired [customer service representatives] back and forth from each other in their call centers in Aliso Viejo as there were so many similar patterns in allegations against them.

E-mail from Steele to Werner & Origer (Aug. 28, 2006) (Ex. 195).

Response DISH objects to the use of Exhibit 195 on attorney-client privilege and work product grounds; in addition, Plaintiffs have not produced call records for the 2006 time period that could show that SSN made calls in violation of any telemarketing law. *Mullin*, 732 F.3d at 776; furthermore, Exhibit 195 demonstrates that "SSN" refers to Satellite Systems Now, a retailer that is completely separate and apart from Satellite Systems Network. (See Exhibit 195, DISH9-0001320).

246. On or around September 22, 2006, Dish stated to the State of Vermont while responding to a civil investigative subpoena that:

EchoStar has received complaints alleging 'Do Not Call' violations by Satellite Systems Network. EchoStar investigated this complaint and ultimately determined that based upon representations by Satellite Systems Network after performing an internal investigation, the allegation brought to EchoStar's attention was not traced to Satellite Systems Network.

Letter from Steele to Burg at DISH5-0000033882 (Sept. 22, 2006) (Ex. 196).

Response: DISH's response to the Vermont inquiry does not prove any material fact in this case, and Plaintiffs have not produced call records for the 2006 time period that could show that SSN made calls in violation of any telemarketing law. *Mullin*, 732 F.3d at 776.

247. Dish employees often visited SSN's call center, listened to phone calls, provided marketing support, and gave sales training to both managers and sales agents. Ex. 188; Ex. 155 at ¶¶ 31-32.

Response: DISH provided general sales support to educate SSN on DISH products and services, and neither Exhibit 155 nor 188 show that DISH trained SSN on outbound telemarketing or that SSN had committed any violations of telemarketing laws; this fact is thus irrelevant and immaterial to any facts pertinent to Plaintiff's motion

248. The following entries appear as notes in Dish's system recorded by Dish employees observing activities at SSN's office: "Met with Alex. Covered details on the Satellite Market and the Spanish Market. Went over details on what works with marketing compared to the competitors," (Apr. 5, 2005); "Sales Training with Alex Tehranchi and sales managers . . . Covered ways to drive the sales reps on increasing Dish Network sales." (Apr. 18, 2005); "[N]ew call center looks incredible . . . [SSN manager Steve Rad] knows that if he needs anything at all (i.e. support, training, issues, questions, etc.) to contact me directly." (May 27, 2005); "[H]is new call center is up and running with internet access so they should be ready to rock & roll . . . he requested that [I] attempt to get him some updated training materials for his new hires . . . [I]ve instructed [S]teve to send me an e-mail with the content that the 'long' brochures had on them and [I]d just create it for him in photoshop." (June 2, 2005). Ex. 155 at ¶¶ 31-32.

Response: DISH provided general sales support to educate SSN on DISH products and services, and Exhibit 155 does not show that DISH trained SSN on outbound telemarketing or that SSN had committed any violations of telemarketing laws; this fact is thus irrelevant and immaterial to any facts pertinent to Plaintiff's motion

257. Between 2004 and 2010, SSN activated 46,168 subscribers for Dish service. During that time period, Dish paid SSN approximately \$12.3 million for these subscribers. Ex. 9; Ex. 8 at 9.

Response: The number of subscribers that SSN activated, and the amount DISH paid SSN for these activations, is irrelevant and immaterial to any facts pertinent to Plaintiff's motion.

260. Star Satellite, also known as Tenaya Marketing, was a Dish retailer based in Provo, Utah founded on or around February 2003 by Daniel Myers and controlled by Walter Eric Myers. Ex. 92 at 38:10-39:12, 50:18-51:21; Dish, EchoStar Incentivized Retailer Agreement with Star

Satellite LLC (May 19, 2003) (Ex. 200); Star Satellite Board Meeting Minutes (Feb. 11, 2003) (Ex. 201).

Response: The fact that Star Satellite was based in Provo, Utah and founded in February 2003 is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

264. Star Satellite used Guardian to make phone calls selling Dish that played a prerecorded telemarketing message instructing the call recipient to "push 1" if he or she wanted to purchase Dish services—after a consumer pressed "1," the call would be connected to Star Satellite's call centers. Ex. 92 at 77:04-18, 109:21-110:09; 144:18-20.

Response: The fact that Star Satellite hired Guardian for pre-recorded dialer service is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

265. Star Satellite attempted to sell Dish service on every call Guardian placed. Ex. 92 at 144:18-145:11.

Response: The fact that Star Satellite attempted to sell DISH on every call placed by Guardian is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

266. On January 25, 2005, a consumer—[REDACTED]—sent a letter to Star Satellite and Echostar complaining of a prerecorded telephone solicitation selling Dish services. Letter from [REDACTED] to Myers & Moskowitz (Jan. 25, 2005) (Ex. 203).

Response: The fact that consumer [REDACTED] sent a letter to Star Satellite complaining of prerecorded telephone calls is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

267. On February 18, 2005, a Dish customer—[REDACTED]—contacted Dish regarding prerecorded message telemarketing from Star Satellite selling Dish service. E-mail from [REDACTED] to Ergen et al. (Feb. 18, 2005, 10:13am) (Ex. 204).

Response: The fact that consumer [REDACTED] sent a letter to Star Satellite complaining of prerecorded telephone calls is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

268. In April 2005, Star Satellite became an OE retailer. Ex. 202 at ¶ 15.

Response: The fact that Star Satellite became an OE retailer in April 2005 is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

269. In May 2005, a Dish employee forwarded a complaint about Star Satellite robocalls to another Dish employee and appended the message "are these your boys again?" Email from Medina to Williams (May 25, 2005 4:21pm) (Ex. 205).

Response: This email is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

270. Star Satellite's national robocalling more than doubled Star Satellite's annual Dish sales—from around 6,000 in 2004 to around 12,000 to 15,000 in 2005. Ex. 92 at 86:8- 86:18, 97:16-98:13.

Response: The number of sales that Star Satellite made using prerecorded messages is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

272. On August 12, 2005, Dish contacted Star Satellite regarding a July 21, 2005 lawsuit by a consumer—Jay Connor—against Star Satellite and Dish in South Carolina Small Claims Court, which alleged that Connor received a prerecorded message telemarketing call on July 5, 2005 selling Dish Network service. Letter from Steele to Myers (Aug. 12, 2005) (Ex. 208); Compl., *Connor v. Star Satellite LLC*, No. 2005-SC-86-1748 (Charleston Cnty. Ct. July 20, 2005) (Ex. 209).

Response: The fact that DISH contacted Star Satellite regarding a lawsuit filed by a consumer against Star Satellite is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

274. In October 2005, Dish sent the company a warning letter about its telemarketing practices after a member of the U.S. House of Representatives contacted Dish about Star Satellite's robocalls. E-mail from Ahmed to Myers (Oct. 25, 2005) (Ex. 211); Letter from Ahmed to Myers (Oct. 26, 2005) (Ex. 212).

Response: The fact that a warning letter was sent to Star Satellite by DISH regarding telemarketing compliance is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

281. The Star Satellite calls were dialed to, at the very least, 40 percent confirmed residential land-line phone numbers. Stauffer Decl. ¶ 10(e), Oct. 10, 2012 (Ex. 214); Ex. 38 at ¶ 26(a).

Response: The percentage of calls to residential landlines Star Satellite made is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

283. On July 21, 2008, a consent decree was filed in the United States District Court for the District of Nevada between Star Satellite and the United States regarding Star Satellite's illegal telemarketing practices. Consent Decree, *United States v. Star Satellite, LLC*, No. 08-cv-00797 (D. Nev. July 21 2008) ECF No. 6 (Ex. 215); E-mail from Dufault to Werner (July 16, 2008) (Ex. 216).

Response: The fact that Star Satellite entered into a consent decree with the government is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

286. In 2005—while it was a Dish OE retailer and using Guardian to conduct prerecorded message telemarketing—Star Satellite activated 18,679 subscribers for Dish, for which Dish paid Star Satellite \$3.67 million. Ex. 9; Ex. 8 at 9.

Response: The number of subscribers that Star Satellite activated in 2005, and the payments made to Star Satellite by DISH, is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

287. In March 2000, Todd DiRoberto was convicted in the District of Massachusetts for participating in a drug distribution conspiracy and was sentenced to 60 months in federal prison. J., *United States v. DiRoberto*, No. 97-cr-40052 (D. Mass. Mar. 16, 2000) ECF No. 288 (Ex. 217).

288. On October 2, 2003, the Securities and Exchange Commission filed a lawsuit against Todd DiRoberto in connection with his involvement with a fraudulent stock offering scheme that used telemarketing sales tactics. Compl., *SEC v. Lee*, No. 03-cv-1957 (S.D. Cal. Oct 2, 2003) ECF No. 1 (Ex. 218).

290. In 2005, American Satellite, Inc. was incorporated in the State of Nevada. DiRoberto Decl. ¶ 4, *Donaca v. Dish Network LLC*, No. 11-cv-2910 (D. Colo. Dec. 28, 2012) (Ex. 221).

291. Todd DiRoberto was the President of American Satellite, Inc. Retailer Profile & Notification for American Satellite Inc. (Apr. 9, 2010) (Ex. 220); Ex. 221 at ¶ 3.

Response to 287-288, 290-291: Facts related to the background of Todd DiRobertro are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

292. On or around September 2005, American Satellite became a Dish retailer. Ex. 220; Ex. 121.

Response: The date that American Satellite, Inc. (“American Satellite”) became an Independent Retailer is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

294. In 2006, American Satellite became an OE retailer. Ex. 221 at ¶ 7.

Response: The date on which American Satellite gained access to the OE tool is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

296. Former American Satellite manager and Dish employee Manuel Castillo testified that one of his daily responsibilities at American Satellite was to start the prerecorded dialer. Ex. 219 at 74:6-15, 76:13-79:22.

Response: The fact that Manuel Castillo testified that one of his activities while he was an employee of American Satellite was to “start the prerecorded dialer” is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

297. If a consumer indicated interest as a result of the American Satellite prerecorded sales calls, the consumer would be transferred to a Filipino call center—then, if the consumer actually wished to purchase Dish, the call was transferred from the Filipino call center to the American Satellite call center in San Diego to complete the sale. Ex. 219 at 74:6-15, 76:13-79:22.

Response: American Satellite’s procedures regarding prerecorded messages are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; in addition, the cited testimony constitutes inadmissible hearsay. *Phillips*, 855 F.Supp.2d at 771-772.

298. A former Dish and American Satellite employee informed Dish in 2007 that American Satellite used prerecorded messages to sell Dish service. Ex. 219 at 175:19-177:24, Castillo Dep. Ex. 20, June 14, 2012 (Ex. 222).

Response: The fact that American Satellite may have used prerecorded messages is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion; in addition, the cited testimony constitutes inadmissible hearsay. *Phillips*, 855 F.Supp.2d at 771-772.

299. In December 2005, a consumer—[REDACTED]—participated in Dish's sting program, and the results of Mr. [REDACTED]'s stings identified American Satellite as the source of at least five separate illegal telemarketing calls between December 2005 and June 2006. Letter from Origer to DiRoberto & Pyle (Dec. 28, 2006) (Ex. 223); Ex. 137; American Satellite 020907_Tracker info.xls (Feb. 9, 2007) (Ex. 224).

300. In January 2006, a consumer—[REDACTED]—participated in Dish's sting program, and the results of Mr. [REDACTED]'s stings identified American Satellite as the source of at least three separate illegal telemarketing calls between January 2006 and December 2006. Letter from Origer to DiRoberto & Pyle (Jan. 17, 2007) (Ex. 225); E-mail from Musso to Hargan & Steele (Jan. 1, 2007, 6:10pm) (Ex. 226); Ex. 137; Ex. 224.

Response to 299-300: The fact that DISH conducted "sting" operations regarding American Satellite and investigated it for certain sales practices is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, except, the exhibits cited by Plaintiffs in these paragraphs establish that DISH took seriously and investigated consumer complaints and informed American Satellite of the results of the investigations and required that American Satellite take action to cease certain sales practices. Even when confronted with an alleged TCPA consumer complaint, American Satellite went to great lengths to confirm and explain to DISH its standard procedure for handling and processing leads that it generated via Internet inquiries. (Exh. 213; DISH2-0000035815) and Exh. 223 (DISH2-0000035898).)

301. On or around September 19, 2006, [REDACTED] complained to Dish about receiving prerecorded calls during the prior two months from a company selling Dish Network services. E-mail from Hargan to Metzger et al. (Sept. 20, 2006, 4:32pm) (Ex. 227).

302. Mr. ██████ began participating in Dish's sting program, and the results of Mr. ██████'s sting identified American Satellite as the source of at least one illegal prerecorded message telemarketing call. E-mail from Steele to Moskowitz et al. (Sept. 27, 2006, 2:53pm) (Ex. 228); Ex. 137; Ex. 224.

303. American Satellite admitted to Dish that it had placed the illegal call. Ex. 228; Ex. 137; Ex. 224.

304. Mr. ██████ told Dish's general counsel that if the calls did not stop, he was going to begin calling Dish executives at 3 a.m., which is when he needed to wake up for his dairy business. E-mail from Steele to Metzger & Hargan (Sept. 19, 2006) (Ex. 229).

305. By January 1, 2007, Dish was aware of at least seven separate cases—confirmed by its own sting program—of illegal telemarketing by American Satellite. Ex. 226.

306. Following a February 13, 2007 meeting with Dish representatives, American Satellite informed Dish that it had terminated all of its relationships with outside marketing companies. Letter from Pyle to Blum (Feb. 22, 2007) (Ex. 230).

Response to 301-306: The record evidence clearly shows a collaborated effort by DISH and American Satellite to determine the root of Mr. ██████'s complaint. (Pl. Exh. 228.) Importantly, the fruits of that investigation determined that Mr. ██████ only placed his number on the NDNCR on September 15, 2006, which would not make it effective until October 15, 2006. (Id.) DISH's follow up investigation confirmed that "Mr. ██████'s number was contacted [by American Satellite] within the 30 day window for the FTC DNC registration to be downloaded," mooted any allegation of a TSR or TCPA violation in the first instance. (Id.) Based on this alone, it is inconceivable how Plaintiffs can assert that DISH violated the TSR due to American Satellite's marketing practices. The fact that DISH conducted "sting" operations regarding American Satellite and investigated it for certain sales practices is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, except, the exhibits cited by Plaintiffs in these paragraphs establish that DISH took seriously and investigated consumer complaints and informed American Satellite of the results of the investigations and required that American Satellite

take action to cease certain sales practices. Even when confronted with an alleged TCPA consumer complaint, American Satellite went to great lengths to confirm and explain to DISH its standard procedure for handling and processing leads that it generated via Internet inquiries. (Exh. 213; DISH2-0000035815) and Exh. 223 (DISH2-0000035898).)

307. In May 2007, the results of another consumer string identified American Satellite as having placed an illegal telemarketing call. E-mail from Hargan to Musso (May 2, 2007, 11:20am) (Ex. 231); Ex. 137.

308. On or around September 16, 2008, Dish identified American Satellite as having placed an illegal prerecorded telemarketing call. E-mail from Berridge to Musso (Sept. 16, 2008) (Ex. 232).

Response to 307 & 308: The fact that DISH conducted “sting” operations regarding American Satellite and investigated it for certain sales practices is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion, except, the exhibits cited by Plaintiffs in these paragraphs establish that DISH took seriously and investigated consumer complaints and informed American Satellite of the results of the investigations and required that American Satellite take action to cease certain sales practices.

309. In April 2009, Dish considered terminating American Satellite in connection with a consumer’s complaint regarding illegal telemarketing. E-mail from Musso to Calbert (Apr. 3, 2009) (Ex. 233).

310. On May 7, 2010, Dish terminated its relationship with American Satellite. Letter from Van Emst to DiRoberto (May 7, 2010) (Ex. 234).

Response to 309 & 310: The fact that DISH ultimately terminated American Satellite is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; if anything, this fact establishes that DISH took seriously and investigated consumer complaints and ultimately terminated American Satellite.

311. Between 2005 and 2010, American Satellite activated 140,550 subscribers for Dish service. During that time period, Dish paid American Satellite approximately \$30.32 million. Ex. 9; Ex. 8 at 9.

Response: The number of subscribers that American Satellite activated is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

312. On or around February 9, 2006, Jerry Dean Grider submitted an application to Dish for his company, JSR Enterprises, to become a Dish retailer. JSR Enterprises, EchoStar Business Plan Form (Feb. 9, 2006) (Ex. 235).

Response: The date on which JSR submitted an application to become an Independent Retailer, and that JSR indicated that it would use telemarketing (without specifying inbound or outbound), are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

314. Prior to being a Dish retailer, JSR—headed by Jerry Dean Grider and Richard Goodale—was an affiliate of a different OE retailer, Dish Nation, and JSR used autodialing on Dish Nation's behalf in early 2006. Ex. 155 at ¶¶ 29-30; Pending OE Retailers 08_14_06.xls (Aug. 14, 2006) (Ex. 237).

Response: The exhibits referenced do not state that JSR ever used autodialing on Dish Nation's behalf; the exhibits cited do not establish that JSR used equipment that meets the legal definition of automated dialer or automatic telephone dialing system; the exhibits referenced do not state that Richard Goodale was the head of JSR, or that JSR was an affiliate of Dish Nation; the evidence cited also lacks foundation and constitutes inadmissible hearsay; 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 Sections V and VII.B.

315. In February 2006, JSR Enterprises submitted a retailer application to Dish in which Grider stated that JSR Enterprises would use telemarketing to market Dish services. Ex. 235.

Response: The date on which JSR submitted an application to become an Independent Retailer, and that JSR indicated that it would use telemarketing (without specifying inbound or outbound), are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

319. Dish gave JSR a typical per-customer activation commission of \$175. Retailer Order Entry Promotional Program Effective: July 1, 2006 through Sept. 30, 2006 at DISH5-0000111666 (Aug. 14, 2006) (Ex. 241).

Response: The amounts paid to JSR are immaterial to Plaintiffs' motion because Plaintiffs have not and cannot show an agency relationship between DISH and JSR, or that JSR acted as DISH's agent when engaging in allegedly illegal telemarketing. See Opposition at Section V.

321. On or about August 10, 2006, Dish accepted JSR Enterprises as an OE retailer based on "the information [Jerry Grider] have provided to EchoStar Satellite LLC. in regards to [JSR Enterprises'] ability to sell Dish Network products and services." Letter from Oberbillig to Grider (Aug. 10, 2006) (Ex. 243).

Response: The fact that DISH gave JSR access to the OE tool in August 2006 does not establish that JSR committed any telemarketing violation, or that DISH should be held liable for any conduct by JSR. See Opposition at Section V.

322. Dish trained sales people in JSR's telemarketing office on how to sell Dish to consumers, with the Dish employee assigned to the account reporting the following meetings: "Met and trained JSR Enterprises sales staff. 5 reps and Amy (partner) were present at the sales training. Don Chamberlain, Janet Weaver, Bill Sombardy, Mark Daben and Rick Fox." "JSR Contact - Entire Management Grp and Afflitate [sic] Representative from West Coast, David Garcia, and Data Manger Steve Hicks What I did: Atteneded [sic] meeting and sales training for JSR, David Garcia and explained what is need ed for JSR to grow and functions of dattabase [sic] management." Ex. 155 at ¶¶ 29-30.

323. In or around September 2006, consumer [REDACTED] complained to Dish that she had received a prerecorded telemarketing call selling Dish services and that her number was registered on the Registry, and Ms. [REDACTED] agreed to participate in Dish's sting program. JSR 020907_allegations.xls (Feb. 9, 2007) (Ex. 244); Letter from Origer to Grider (Oct. 6, 2006) (Ex. 245); E-mail from Steele to Klein (Sept. 28, 2006) (Ex. 246).

324. On September 28, 2006, Dish informed Ms. [REDACTED] that it identified JSR Enterprises as the Dish retailer responsible for the telemarketing, and Dish informed Ms. [REDACTED] that it was initiating a formal investigation into JSR Enterprises' practices. Ex. 246.

326. On or around November 15, 2006, consumer [REDACTED] participated in Dish's sting program. E-mail from Corrigan to TCPA@echostar.com (Nov. 15, 2006) (Ex. 248); Ex. 244.

328. Dish wrote JSR a letter saying that Dish knew JSR was responsible for the calls to Ms. [REDACTED] because JSR had tried to run her credit information five times on the same day. E-mail from Musso to voice@jrsatellite.com (Dec. 20, 2006) (Ex. 250); Ex. 248; Ex. 244.

Response to 322-324, 326 & 328: To the extent that these facts are relevant at all (they are not) they demonstrate that that DISH took customer complaints seriously, and conducted due diligence on its Retailers.

329. In late November 2006, JSR Enterprises informed Dish that JSR Enterprises "expanded their outbound telemarketing efforts by adding a dialer and increasing the [number] of employees." E-mail from Fielding to Oberbillig et al. (Dec. 5, 2006) (Ex. 251).

Response: The fact that JSR advised DISH that it had expanded its outbound telemarketing efforts does not establish that JSR committed any telemarketing violation, or that DISH can be held liable for any conduct by JSR. See Opposition at Section V.

330. On December 7, 2006, the State of Missouri obtained a temporary restraining order against JSR Enterprises to cease telemarketing calls to Missouri citizens, based in part on many complaints the state received regarding JSR Enterprises' telemarketing practices. E-mail from Musso to Origer et al. (Feb. 8, 2007) (Ex. 252).

331. On December 21, 2006, Reji Musso informed Mike Mills that JSR was linked to a sting call. E-mail from Musso to Mills (Dec. 20, 2006, 12:35pm) (Ex. 253).

332. On December 21, 2006, Musso informed Dish managers Brian Neylon, Robb Origer, and Bruce Werner, who dealt with compliance and compensation issues relating to Dish retailers, that the latest allegation "is probably a violation," but Dish chose not to terminate JSR Enterprises, instead deciding to "consider a formal penalty" and with Ms. Musso believing that JSR was the "least of [Dish's] worries." E-mail from Musso to Hargan (Jan. 10, 2007) (Ex. 254).

333. Dish's compliance manger, Reji Musso, stated about JSR: "[T]hey were very responsive, and I don't think guilty." E-mail from Musso to Neylon (Dec. 21, 2006) (Ex. 255).

334. In December 2006, Dish Retail Services manager Robb Origer was inclined to terminate JSR but then decided to continue Dish's business relationship with the firm. Ex. 254.

341. In February 2007, Dish learned that a Missouri court had enjoined JSR from telemarketing into that state in December 2006 when Dish employees found a two-month-old press release on the Internet and forwarded it around the company internally. Ex. 252; E-mail from Origer to Neylon (Feb. 8 2007) (Ex. 258).

342. Dish stated in its press release upon JSR's termination: "EchoStar terminated its relationship with this retailer as a result of EchoStar's internal investigation of consumer complaints alleging violations of telemarketing laws." Ex. 258; Press Release, Dish, *EchoStar Takes Action Upon Do-Not-Call Violators* (Feb. 14, 2007) (Ex. 259).

343. On or around February 13, 2007, Dish terminated JSR. Letter from Origer to Grider (Feb. 13, 2007) (Ex. 260); Ex. 258.

Response to 330-334 & 341-343: This supports that DISH was doing diligence on its Retailers).

349. Dish knew that Grider was involved in Dish marketing at OE retailer USA Cable in 2008, but continued to accept sales from USA Cable despite telemarketing complaints about the company. E-mail from Musso to Walker & Slater (Feb. 25, 2009) (Ex. 262); Cumulative Report (Ex. 263).

350. USA Cable was still an OE retailer in December 2011. E-mail from CET.Analytics@dishnetwork.com to Han et al. (Dec. 3, 2011) (Ex. 264).

Response to 349 & 350: There is no evidence that USA Cable placed any improper calls to consumers and this allegation is irrelevant and immaterial to any fact pertinent to Plaintiffs' Motion.³⁵¹ Dish, through its representative Mike Mills, testified at its deposition that JSR used online and print advertisements to sell Dish service, and that it did not remember JSR's other marketing methods. Ex. 62 at 92:15-21.

352. Mills stated in an earlier email that JSR's only marketing method was outbound telemarketing. E-mail from Mills to Neylon & Musso (Dec. 21, 2006) (Ex. 265).

Response: Mr. Mills' testimony and his recollection at his deposition is not inconsistent with Ex. 265.

353. During the 7-month period between August 2006 and February 2007 as a Dish OE retailer, JSR Enterprises activated 10,050 Dish customers and Dish paid JSR \$1.5 million during this period. Ex. 9; Ex. 8 at 9.

Response: The number of subscribers that JSR activated is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

354. Dish's expert found that a set of JSR call records show 2,349,031 calls to consumers on the Registry from August 2006 through December 31, 2006. Ex. 28 at 14 (Table 6a).

Response: Raw hits to numbers on the Registry are not proof of a violation; Plaintiffs did not produce sufficient evidence that would allow an analysis of whether the calls were made to customers with an existing business relationship. *Mullin*, 732 F.3d at 776.

359. JSR called an additional 4 million consumers on the Registry after Dish terminated the firm. Ex. 38 at ¶ 26(b).

Response: The number of calls JSR made after DISH terminated the firm is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

361. At the time of JSR's calls, Dish had a policy of not sharing its entity-specific do-not-call list with its retailers. Letter from Shaw to McFadden (Jan. 5, 2007).

Response: The calls JSR made after DISH terminated the firm is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

363. New Edge Satellite ("New Edge") was a Dish TVRO retailer operating in Saginaw, Michigan during the 2000s. LaVictor Dep. 7:23-8:8, 16:14-17:20, 21:16-22:10, 26:16- 28:16, Feb. 28, 2012 (Ex. 268).

Response: The date that New Edge Satellite (“New Edge”) became an Independent TVRO Retailer is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

364. New Edge performed outbound telemarketing, marketing Dish Network service to consumers, from approximately sometime in 2003 until 2007. Ex. 268 at 21:16-24:23, 26:16-32:1, 60:13-21, 90:3-6.

Response: The time period when New Edge allegedly marketed DISH’s products or services is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion, and also in part, outside of the applicable statutes of limitation

365. Dish’s distributor CVS—a company that acted as the intermediary between Dish’s TVRO retailers and distributed Dish equipment to the retailers who had physical inventory—knew that New Edge used outbound telemarketing to sell Dish service. Ex. 268 at 17:12-21:15, 43:2-44:12, 94:24-95:16

Response: The fact that a third party “knew” that New Edge allegedly used outbound telemarketing to sell DISH’s products or services 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 any such third party regarding this topic.

366. New Edge’s entity-specific do-not-call list, which it kept on handwritten and printed sheets and transmitted to the FTC in late 2005, was recorded by New Edge’s telemarketing agents while they made calls selling Dish. Civil Investigative Demand to New Edge Satellite (Aug. 4, 2005) (Ex. 269); Ex. 268 at 108:1-109:7, 121:13-123:16; LaVictor Dep. Ex. 1, Feb. 28, 2012 (Ex. 270); LaVictor Dep. Ex. 2, Feb. 28, 2012 (Ex. 271).

Response: The fact that New Edge kept “handwritten and printed sheets” containing consumer numbers is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; in addition, the contents of any such writings constitute inadmissible hearsay.

367. Dish never shared its entity-specific do-not-call list with New Edge, nor did Dish ever ask New Edge to share its list with Dish. Ex. 268 at 108:1-109:7, 121:13-123:16.

Response: The fact that New Edge and DISH did not share their “entity-specific do not call lists” with each other is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

368. Dish made 4,968 telemarketing calls to consumers who had already told New Edge to put them on its do-not-call list. Ex. 38 at ¶ 26(c).

Response: The fact that DISH allegedly made calls to numbers on any list maintained by New Edge is irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion; in addition, the contents of any such writings and/or statements made by declarants who have not testified in this action constitute inadmissible hearsay; furthermore, the exhibit cited by Plaintiffs as support of this assertion (Ex. 38 at ¶ 28(c)) does not support that assertion. To the extent that Plaintiffs meant to cite to Ex. 38 at ¶ 28(b), that statement by Plaintiffs’ expert alone does not support the assertion because it does not identify any specific consumer nor does it identify for what purpose New Edge made any such call.

369. Southern California-based National Satellite Systems (“NSS”) has been a Dish retailer since 2005, and an OE retailer since 2006. NSS Dep. 14:6-12, 32:12-25, 36:1-40:24, 43:19-25, Jan. 11, 2012 (Levi); NSS Dep. Ex. NSS-2, Jan. 11, 2012 (Ex. 273); NSS Dep. Ex. NSS-3, Jan. 11, 2012 (Ex. 274).

Response: The fact that NSS was based in Southern California and a Dish retailer since 2005 and an OE retailer is irrelevant and material to any fact is pertinent to Plaintiffs’ motion. 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.

370. Dish entered into a contract with NSS by which: (a) Dish appointed NSS as an “Authorized Retailer”; (b) Dish authorized NSS to “market, promote, and solicit” orders for Dish service nationally; (c) Dish authorized NSS to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all NSS records in connection with its Dish retailership; (e) Dish required that NSS “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 NSS “fail[ed] to comply with any applicable federal, state or local law or regulation.” Ex. 274 at DISH-Paper-007769, DISH-Paper-007772, DISH-Paper-007776, DISH-Paper-007788, DISH-Paper-007803-DISH-Paper-007808.

Response to 370(a)-(e): These specific provisions in DISH’s retailer agreement are irrelevant and immaterial to any fact that is pertinent to Plaintiffs’ motion.

Response to 370(f): DISH does not dispute that it entered into a Retailer Agreement with NSS, which agreement speaks for itself; however, DISH disputes that the agreement would be automatically terminated if NSS 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 under Section 10.4. Also, 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.

371. Dish’s telemarketing compliance manager, Reji Musso, wrote in an August 2008 email in that NSS “has broken more TCPA laws than I care to enumerate,” and Dish has received numerous complaints about NSS’s telemarketing since 2007. E-mail from Musso to Taber & Mills (May 29, 2008, 9:25am) (Ex. 275); TCPA Spread Sheet 07 19 10.xls (Ex. 276).

Response: The referenced exhibits demonstrate that DISH was taking steps to make sure that NSS was complying with its Independent Retailer Agreement, including the obligation to abide by telemarketing laws. 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.

372. Dish's telemarketing compliance department has affirmatively approved of NSS using outbound telemarketing, and specifically approved of NSS using an offshore outbound telemarketing call center located in India. Ex. 77 at 208:21-209:9.

Response: The fact that NSS used a call center located in India is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion. 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.

373. Although Dish bans all other retailers from using overseas marketing agents, Dish claimed it allowed NSS to do so because NSS owns and operates the call center, although NSS's corporate designee testified that NSS does not, in fact, own it. Ex. 77 at 208:21-209:9; Ex. 272 at 8:6-15, 47:1-49:5, 51:1-18.

Response: There is no evidence that DISH had knowledge that NSS was not the owner-operator of the Indian call center. The testimony by Kobi Levi further confirms that NSS "took an initial investment in the company" and "assumed we would own it." (Pl. Ex. 272 at 47:12-15). Mr. Levi further testified that him and his business partners "wanted to have the ability to sell out of India so we ... invested money ... to build [the Indian call center]." (Id. 48:1-5); furthermore, as a rule, DISH does not outright prohibit the use of international entities from accessing its OE tool. (DX-241, Musso Tr. 29:6 – 17).

374. Pursuant to a subpoena, NSS produced some of its 2008-2009 call records, including two large files with the filenames "Cold Calling." Ex. 272 at 133:19-24, 230:18-231:2.

Response: The fact that NSS produced a portion of its call records bearing "Cold Calling" in two file names is irrelevant and immaterial to any facts pertinent to Plaintiffs' motion; furthermore, the testimony offered by Plaintiffs does not support the contention that any call record files produced by NSS bore "Cold Calling" in its file name. The record evidence, therefore, does not support this fact.

375. The company testified that those business records accurately reflect incidents of outbound telemarketing from an Indian call center attempting to sell Dish service to consumers. Levi Decl., Nov. 20, 2013 (Ex. 277).

Response: The use of the term, “the company” is vague and ambiguous as it does not identify exactly which company Plaintiffs are referring to (and as such immaterial). The exhibit cited by Plaintiffs in this paragraph (Ex. 277) constitutes inadmissible hearsay with respect to any of the contents of this document, and therefore does not support the alleged facts. The references to business records reflecting incidents of outbound telemarketing are irrelevant and immaterial to any facts pertinent to Plaintiffs’ motion. Also, 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.

376. When compared against the numbers on Dish’s entity-specific do-not-call lists, Dish’s expert found that during December 2008 and August 2009, NSS placed 222,700 calls to 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 15 (Tables 7a, 7b).

Response: DISH’s expert did not arrive at the conclusion that Plaintiffs attribute to him in this paragraph. The references to business records reflecting incidents of outbound telemarketing are irrelevant and immaterial to any facts pertinent to Plaintiffs’ motion. Also, 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.

377. [REDACTED], of [REDACTED], CA, is a logistics manager for [REDACTED] in Costa Mesa, CA. [REDACTED] Dep. 13:5-6, 11:13-20, June 15, 2012 (Ex. 278).

Response: DISH does not dispute that Ms. [REDACTED] testified in her deposition as to her place of residence and occupational status; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

379. Mrs. [REDACTED] placed her landline and mobile numbers on the Registry on July 26, 2003, soon after the registry was announced. Ex. 278 at 14:5-10; 20:7-13; Ex. 1 at ¶ 8.

Response: DISH does not dispute that Ms. [REDACTED]'s telephone numbers were on the Registry as of the date that the Registry became effective, *i.e.*, October 17, 2003. (Taylor Decl. at ¶ 16); however, the fact that Ms. [REDACTED] testified that she placed her [REDACTED] [REDACTED] cellular telephone number on the Registry is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers.

380. Ms. [REDACTED] testified that she registered her numbers on the Registry because if the intent of a caller "is to try to sell me something, and if I'm not buying it, I don't want to be bothered." Ex. 278 at 48:10-15.

Response: Ms. [REDACTED]'s alleged reasons for registering her telephone numbers on the Registry is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

384. After placing her number on the Registry, Mrs. [REDACTED] recalls receiving telemarketing calls from Dish Network to her mobile number. Ex. 278 at 26:1-17.

Response: DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED]'s wireless telephone number between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030", which is a campaign name indicating that DISH was responding to an inquiry made by Ms. [REDACTED] from her ([REDACTED]) [REDACTED] wireless telephone number (Taylor Decl. at ¶15), and therefore, these calls would not have been potential TCPA or TSR violations; the fact that

Ms. [REDACTED] is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH.

385. Dish's 2007-2010 call records show that between November 7, 2008 and November 13, 2008, Dish placed seven outbound telemarketing calls for the "5639_08w44_LTS_OTM_English_20081030" campaign to Ms. [REDACTED]'s number ([REDACTED]). Ex. 38 at ¶ 12.

Response: The facts alleged in this paragraph are immaterial. DISH's call records indicate that DISH placed seven calls to Ms. [REDACTED]'s wireless telephone number between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030"; which is a campaign name indicating that DISH was responding to an inquiry made by Ms. [REDACTED] from her ([REDACTED]) [REDACTED] wireless telephone number (Taylor Decl. at ¶17), and therefore, these calls would not have been potential TCPA or TSR violations; furthermore, the fact that Ms. [REDACTED] is complaining about calls made to her wireless telephone number is also irrelevant and immaterial to Plaintiff's motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers, and these facts cannot form the basis for any liability as to DISH.

388. This frustration led Mrs. [REDACTED] to confirm the registration of her numbers in December 2011. Ex. 278 at 22:25-23:1; Ex. 1 at ¶ 10.

Response: DISH does not dispute that Ms. [REDACTED] testified that her frustration led her to confirm the registration of her numbers at some point in time; however, this fact is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

389. [REDACTED] is a stay-at-home mother who, with her husband and four children ages four to ten, lives in Centralia, Illinois. [REDACTED] Dep. 10:4-11:19, Aug. 28, 2013 (Ex. 279).

Response: DISH does not dispute that Ms. [REDACTED] testified in her deposition as to her place of residence and family; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

406. [REDACTED] has lived in [REDACTED], North Carolina, since May 1985, is retired from working at the [REDACTED], and now volunteers at the [REDACTED]. [REDACTED] Dep. 8:1-5, 40:20-24, Sept. 28, 2011 (Ex. 280).

Response: DISH does not dispute that Mr. [REDACTED] testified in his deposition as to her place of residence and occupational status; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

407. Mr. [REDACTED]'s land line number, ([REDACTED]) [REDACTED], has been on the Registry since July 3, 2003. Ex. 280 at 7:21; 9:11-12; Ex. 1 at ¶ 10.

Response: DISH does not dispute that Mr. [REDACTED] testified during his deposition that his landline telephone number is [REDACTED], nor that the [REDACTED] landline telephone number was on the Registry as of the date that the Registry became effective, *i.e.*, October 17, 2003); however, these facts alone are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion (Taylor Decl. ¶23.)

408. Mr. [REDACTED]'s number has been on Dish's entity-specific do-not-call list since at least May 9, 2009. Ex. 38 at ¶ 14.

Response: DISH's call records indicate that this consumer's landline telephone number has been on DISH's internal do-not-call list since May 10, 2009 (Taylor Decl., DX-238).

413. Mr. [REDACTED] has never inquired about Dish services or engaged in a transaction with Dish prior to the call he complained about. Ex. 280 at 19:3-12.

Response: DISH confirmed that the call was placed by an independent retailer.

415. When notified of the violation by Dish, SSN admitted that it had called Mr. [REDACTED] and claimed that it had generated the lead because it sold Mr. [REDACTED] DirecTV in April 2003. E-mail from patty@yourdish.tv to [REDACTED] (May 28, 2009) (Ex. 283).

Response: DISH confirmed that the call was placed by an independent retailer.

417. [REDACTED] is a [REDACTED], Ohio resident who has never purchased or inquired about Dish Network services. [REDACTED] Dep. 5:5, 20:16-25, Dec. 13, 2011 (Ex. 284).

Response: DISH does not dispute that Mr. [REDACTED] testified during his deposition that he never purchased or inquired about DISH's services, however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

418. Mr. [REDACTED] placed his mobile number, ([REDACTED]) [REDACTED], and land line number ([REDACTED]) [REDACTED], on the Registry on July 2, 2003, and he occasionally checked the FTC website to be sure his number was registered on the Registry. Ex. 284 at 8:10-9:11; 37:5-18; 38:19-39:12; Ex. 1 at ¶11.

Response: DISH does not dispute that Mr. [REDACTED]'s [REDACTED] landline telephone number [REDACTED] was on the Registry as of the date that the Registry became effective, *i.e.*, October 17, 2003; however, this fact alone is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion (Taylor Decl., DX-238); moreover, the fact that Mr. [REDACTED] testified that he placed his [REDACTED] wireless telephone number on the Registry is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion as the FTC has no jurisdiction with respect to calls made to wireless telephone numbers.

424. [REDACTED], New Jersey resident [REDACTED] placed her home landline number, ([REDACTED]) [REDACTED], on the Registry on October 26, 2005. Ex. 1 at ¶ 12; [REDACTED] Dep. 14:14-16, Sept. 16, 2013 (Ex. 287).

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition that the landline number [REDACTED] was placed on the Registry on or about October 26, 2005; however, this fact alone is irrelevant and immaterial to any fact that is pertinent to

Plaintiffs' motion; moreover, the cited testimony regarding Ms. [REDACTED]'s place of residence does not provide evidence of any fact material to Plaintiffs' motion.

429. The calls were inconvenient and annoying because "you say don't call, and they call." Ex. 287 at 32:23-33:4.

Response: DISH does not dispute that Ms. [REDACTED] testified that certain calls she received were annoying, however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

431. Since ending their Dish Network service, the [REDACTED] have not made any inquiries regarding Dish Network products or services. Ex. 287 at 43:15-44:11.

Response: DISH does not dispute that Ms. [REDACTED] testified that neither she nor her family have made any inquiries regarding DISH's products or services; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

432. [REDACTED], a retiree who now breeds horses at her home in [REDACTED], North Carolina, has had her landline telephone number, ([REDACTED]) [REDACTED], since moving into her home in May 2007. [REDACTED] Dep. 19:13-20:2, 29:5-13, June 20, 2012 (Ex. 289).

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she has used the [REDACTED] landline telephone number since moving into her home in May 2007; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion

442. [REDACTED], of [REDACTED], Illinois, has landline number ([REDACTED]) [REDACTED]. Ex. 163 at 5:14-17, 22:16-22.

Response: DISH does not dispute that Mr. [REDACTED] testified during his deposition that he has a [REDACTED] landline telephone; however, the remaining cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

450. [REDACTED] is a stay-at-home mother who lives in [REDACTED], Illinois. [REDACTED] Dep. 10:4-17, Oct. 4, 2011 (Ex. 292).

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she is a stay-at-home mother who lives in [REDACTED], Illinois; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

453. On July 14, 2009, Mrs. [REDACTED] received a telemarketing call from Dish's EC_VWIN_TRL_05M_ENG campaign while she was marking the one-year anniversary of her mother's death, and she requested not to be called again; Dish's records show that the call was labeled with a contact result code of "DNC." Ex. 37; Ex. 38 at ¶ 20; Ex. 292 at 20:4-23.

Response: The facts alleged in this paragraph are irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion, particularly because, the July 14, 2009 call was within the proper EBR period. *See* Opposition at Section IV; *Phillips*, 855 F.Supp.2d at 771-772. Dish's records show that the call was labeled with a contact result code of "DNC."

459. [REDACTED], of [REDACTED], North Carolina has had her home telephone number ([REDACTED]) [REDACTED], since 2001. [REDACTED] Dep. 15:5-9, Sept. 30, 2011 (Ex. 293).

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she has used the [REDACTED] telephone in her home since 2001; however, the remaining cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

460. Mrs. [REDACTED]'s number has been on the Registry since May 5, 2006. Ex. 1 at ¶ 24.

461. Mrs. [REDACTED] is a part-time front desk clerk at the [REDACTED]; during 2006, she was a night auditor there. Ex. 293 at 7:9-20.

Response to 460 & 461: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she is a part-time front desk clerk at the Comfort Inn and that during

2006, she was a night auditor at the same business establishment; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

464. Mrs. [REDACTED] slept during the day, because she worked the night shift at the [REDACTED] from 11 p.m. until 7 a.m. and would not return home until 8 or 9 a.m. the next morning. Ex. 293 at 18:11-13.

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she worked the night shift at the [REDACTED] and would get home from work at approximately 8 or 9 a.m.; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

465. Mrs. [REDACTED]'s elderly husband, [REDACTED], has a heart condition and needs to be able to contact her, especially when he is away from home, so Mrs. [REDACTED] could not turn off her home telephone. Ex. 293 at 18:21-19:2.

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition that she could not turn her phone off because of her husband's medical issues; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

467. Mrs. [REDACTED] was at her "wit's end" and began documenting the calls. Ex. 293 at 22:2-13.

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition as to her state of mind and that she began documenting telemarketing calls; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

468. Mrs. [REDACTED] testified: "I would be sleeping on the couch with a pen and paper trying to documents some of this, and waking up . . . from a sound sleep with this thing, what I did get, I wrote down." Ex. 293 at 35:14-18.

Response: DISH does not dispute that Ms. [REDACTED] testified during her deposition as to the nature of her recording information pertaining to telemarketing calls; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion.

474. Dish's letters responded that though the [REDACTED]'s number "likely was previously included on our internal No Call list, in an abundance of caution, DISH Network has submitted it again." Ex. 293 at 44:10-46:2; Ex. 294.

Response: DISH does not dispute that it responded in its letters that Ms. [REDACTED]'s number "likely was previously included on our internal No Call list, in an abundance of caution, DISH Network has submitted it again"; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion because the DISH call records do not show that DISH placed any calls to Ms. [REDACTED].

475. The [REDACTED] telephone number does not appear on any of the entity-specific do-not-call lists produced by Dish. Ex. 38 at ¶ 23.

Response: Ms. [REDACTED]'s telephone number does not appear on the versions of DISH's internal call lists that were produced in discovery; however, the cited testimony is irrelevant and immaterial to any fact that is pertinent to Plaintiffs' motion because the DISH call records in this case do not reflect any calls placed to Ms. [REDACTED]'s telephone number.

476. Exhibits submitted in support of Plaintiffs' Motion for Summary Judgment bearing the Bates Labels prefix "DISH" or "DISH-Paper" are true and correct copies of documents received from Dish or from Dish's lawyers in connection with this litigation. Chien Decl. ¶ 5, Dec. 20, 2013 (Ex. 295).

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; DISH does not dispute that such documents were received from DISH in response to Plaintiffs' discovery requests, however, many of the documents produced by DISH were authored or created by a third-party, or contained hearsay statements, and DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to

support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents “are true and correct.”

477. Exhibits 8, 9, 102, and 127 are true and correct copies of Dish’s Responses to Plaintiff’s First Set of Interrogatories. Ex. 295 at ¶¶ 6, 7, 37, 43.

Response: DISH does not dispute that these are true and correct copies of DISH’s Responses to Plaintiffs’ First Set of Interrogatories, however, DISH objects to this statement of fact to the extent it is being used to verify or validate Plaintiffs’ characterizations of DISH’s responses.

478. Exhibits 12-14, 17-19, 21, 27, 32, 33, 36, 62, 65, 70, 76-78, 88, 92, 98, 116, 126, 128, 147, 161, 163, 164, 169, 174, 182, 219, 222, 240, 268, 270-274, 278-281, 284, 287, and 289-294 are true and correct excerpts of deposition transcripts and associated exhibits. Ex. 295 at ¶¶ 8-10, 12-14, 17, 19, 20, 25, 27, 29-31, 33-35, 40, 42, 47, 53, 55-58, 68, 73, 76, 78, 80-87.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the referenced documents, however, DISH does not dispute that such documents were received from DISH in response to Plaintiffs’ discovery requests or that such documents are accurate excerpts of depositions; many of the documents produced by DISH were authored or created by a third-party, or contained hearsay statements, and DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs’ to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct.

480. Exhibits 22 through 25, 31, and 257 are true and correct copies of letters exchanged by the parties’ counsel in connection with this litigation. Ex. 295 at ¶ 15.

Response: DISH does not dispute that these are true and correct copies of letters exchange between counsel, however, DISH objects to this statement of fact to the extent it is being used to verify or validate Plaintiffs' characterizations of DISH's representations in those communications.

481. Exhibit 39, 43, 54, 66, 79, 101, 107, 137, 140, 162, 224, 237, 239, 244, and 276 are or include true and correct printouts of Excel spreadsheets produced by Dish. Ex. 295 at ¶¶ 21, 22, 23, 28, 32, 36, 37, 39, 45, 52, 65, 67, 68, 70.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents, however, DISH does not dispute that such documents were received from DISH in response to Plaintiffs' discovery requests; many of the documents produced by DISH were authored or created by a third-party, or contained hearsay statements, and DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct.

482. Exhibit 56, 105, 120, 259 are a true and correct copy of a document produced by Dish to the FTC. Ex. 295 at ¶¶ 24, 38, 75.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents, however, DISH does not dispute that such documents were received from DISH in response to Plaintiffs' discovery requests; many of the documents produced by DISH were authored or created by a third-party, or contained hearsay statements, and DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH

objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct.

483. Exhibit 63 is a true and correct copy of a document received in response to a subpoena directed to Dish retailer SSN. Ex. 295 at ¶¶ 26, 97; Ex. 297.

Response: DISH objects to this statement of fact to the extent is it being used to verify or validate statements made in the documents, further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

484. Exhibit 69 is a true and correct copy of a business record received from PossibleNow and reflects statements written by PossibleNow employees acting in the scope of their retention by Dish. Stauffer Decl., Dec. 5, 2013 (Ex. 296).

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents, further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

485. Exhibits 94 and 96 are true and correct copies of documents received in response to a subpoena directed to Dish retailer iDish. Ex. 95 at ¶ 5.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents, further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

486. Exhibit 120 is a true and correct copy of an audio file produced by Dish. Ex. 295 at ¶ 41.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; further DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

487. Exhibit 131 is a true and correct copy of a video file produced by Dish. Ex. 295 at ¶ 44.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

488. Exhibit 149 is a true and correct copy of a Civil Investigate Demand issued by the State of North Carolina to Prime TV. Ex. 295 at ¶ 47.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the document; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

489. Exhibit 51 is a true and correct copy of documents received by the FTC from Dish TV Now. Ex. 295 at ¶ 49.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

490. Exhibits 157, 159, and 160 are true and correct copies of documents received by the government from Guardian Communications. Ex. 295 at ¶¶ 50-52; Ex. 161 at 83:17-85:8; Ex. 158.

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the document; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to

support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

491. Exhibits 201-202, 206-208, and 210-213 are true and correct copies of documents received by the FTC from Tenaya/Star Satellite and reflect documents in Star Satellite's possession. Ex. 295 at ¶¶ 59-67; Ex. 202. .

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

492. Exhibit 234 is a true and correct copy of documents received in response to a subpoena directed to Dish retailer American Satellite. Inc. Ex. 295 at ¶ 66. .

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact.

493. Exhibit 271 is a true and correct copy of documents received by the FTC from New Edge Satellite. Ex. 295 at ¶76, Ex. 268 at 108:1-109:25. .

Response: DISH objects to this statement of fact to the extent it is being used to verify or validate statements made in the documents; further, DISH does not and cannot verify the authenticity or accuracy of the statements made therein; therefore, without more specificity from the Plaintiffs on the specific facts that are alleged by Plaintiffs' to support their claims, DISH objects to any effort by Plaintiffs to rely on this statement of fact as an admission by DISH that statement made in these documents are true and correct; and for these reasons, DISH disputes this fact

ADDITIONAL MATERIAL FACTS

DISH'S BUSINESS, GENERALLY

1. DISH is the nation's third largest pay-TV provider, with roughly 14 million customers in the United States as of December 30, 2012. (DX-1,¹³ Excerpts of DISH Network Corp. Form 10-K, filed 02/20/13, at 1.)
2. DISH employs more than 25,000 people in the United States. (*Id.* at 19.)
3. DISH provides programming that includes more than: (a) 270 basic video channels; (b) 70 Sirius Satellite Radio music channels; (c) 30 premium movie channels; (d) 35 regional and specialty sports channels; (e) 3,300 standard definition and HD local channels, (f) 300 Latino and international channels; and (g) 70 channels of pay-per-view content. (*Id.* at 2.)
4. DISH subscribers receive programming via DISH-branded equipment, including satellite dishes, digital set-top receivers, and remote controls. (*Id.*)
5. DISH-branded receiver systems and DISH programming are sold by direct sales channels as well by independent third parties, such as small satellite retailers, direct marketing

¹³ "DX" refers to DISH's summary judgment exhibits.

groups, local and regional consumer electronics stores, nationwide retailers, and telecommunications companies. (*Id.* at 4.)

6. In addition, DISH partners with certain telecommunications companies to bundle DISH-branded programming with broadband and/or voice services on a single bill. (*Id.*)

7. One of the ways that DISH itself makes contact with potential customers and its existing and former customers is by making certain types of outbound telephone calls that are conducted pursuant to the company's compliance policies and procedures. (DX-2, Declaration of Joey Montano dated January 6, 2014 (the "Montano Decl.") ¶3.)

8. These calls include both sales-related calls, such as campaigns directed to solicit new customers and to win back former customers, as well as sales calls to current customers to upgrade to certain programming packages. (*Id.* at ¶4.)

9. These calls also include non-sales related calls, such as calls to schedule appointment reminders for installation, technical support, payment reminders, among other non-sales related purposes. (*Id.* at ¶4.)

10. The volume of these DISH sales and non-sales-related outbound calls from 2003 to 2010 numbered in the hundreds of millions calls. (*Id.* at ¶5; *see also* DX-3 Plaintiff's Supplemental Responses to DISH's Interrogatories dated December 14, 2012, Ex. A.)

11. Between 2007 and 2010, DISH also contracted with two third party call centers to help place outbound telemarketing and non-telemarketing related phone calls for DISH: eCreek Services Group ("eCreek") and EPLDT-Ventus ("EPLDT"). (eCreek and EPLDT are collectively referred to herein as the "Telemarketing Vendors.") (Montano Decl., ¶6.)

12. The eCreek call center was based in Cherry Creek, Colorado and used its own dialer to place outbound phone calls. (*Id.* ¶6.)

13. EPLDT was based in the Philippines and placed calls through DISH's dialer. (*Id.* ¶6.)

14. DISH looked at a variety of factors when hiring an outbound vendor, including the Telemarketing Vendors, to perform telemarketing for DISH. (DX-158, Deposition Transcript of Russell Bangert, December 15, 2010 ("Bangert 12/15/10 Dep.") 201:22-202:11.) These factors included compliance, which was a high priority for DISH, and included DISH's assessment of the vendor's ability to fully comply with relevant laws and how competently it would be able to meet such compliance requirements. (*Id.*)

15. For example, before DISH retained EPLDT to make telemarketing calls, DISH met with EPLDT's legal department to determine how well they understood telemarketing laws, and met with EPLDT's personnel who were responsible for administrating its policies to confirm they could meet its compliance obligations. (*Id.* at 203:9-21.)

DISH HAS ESTABLISHED AND IMPLEMENTED WRITTEN PROCEDURES NOT TO CALL ANYONE WHO HAS STATED THAT HE OR SHE DOES NOT WISH TO BE CALLED BY OR ON BEHALF OF DISH OR WHO REGISTERED HIS OR HER NUMBER ON THE NDNCR

16. From at least as early as 2003 to the present, DISH implemented written practices and procedures designed to comply with 16 C.F.R. § 310.4(b)(1)(ii)-(iii) and 47 CFR 64.1200(c)(2) as part of its routine business practice "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-3, DX-4, DX-5 and DX-6 (Echostar "Do-Not-Call" Policies, 2002, 2004, 2006, and 2008.))

17. 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-3 – DX-6.)

18. 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-3 – DX-6.)

19. In following its written Do Not Call Policy, DISH maintains a list of phone numbers (“DISH’s Internal DNC List”) of persons who have indicated that they do not wish to receive solicitation telephone calls from DISH, and DISH’s routine business practice is and was to not contact such persons for solicitation purposes. (DX-170, Deposition Transcript of Bob Davis, December 16, 2010 (“Davis Dep.”) 338:22-339:16; 339:17-341:14; DX-21, Pl. Dep. Ex. 136 Davis.)

20. DISH also maintained written policies regarding the Do Not Call scrubbing process that was applied to DISH’s outbound telemarketing calls. (DX-157, Deposition Transcript of Russell Bangert, April 18, 2012 (“Bangert 4/18/12 Dep.”) 124:19-125:15.) DISH communicated these policies to all personnel who used DISH’s dialer. (*Id.* 125:6-20; 126:12-127:16.)

21. In addition, DISH maintained a current version of the FTC’s NDNCR, which it updated monthly. (DX-170, Davis Dep. 257:5-15.)

22. DISH typically sends telemarketing guidelines to new vendors at the start of the business relationship between DISH and the vendor. (DX-170, Davis Dep. 62:18-63:3.) DISH's Telemarketing Vendor, eCreek, also maintained its own written "Do Not Call" Policy. (DX-7, Pl. Dep. Ex. 258 (Dexter).)

23. During the relevant time period (2003-2010), as well as through (Davis) the present, DISH maintained a telemarketing guidelines policy (DX-29, Pl. Dep. Ex. (Davis) 118) that governs outbound telemarketing calls placed by the Telemarketing Vendors, and required the following steps to be taken whenever a DNC request is received as part of an inbound or outbound campaign: "[a] immediately tag that number so that it will not be called again[;] [b] add that telephone number to the vendor-company specific DNC list within 24 hours as part of the overnight cycle[;] [c] forward that telephone number to EchoStar for inclusion in its company-specific DNC list." (DX-170, Davis Dep. 41:15-43:14; 44:16-46:2; DX-29.)

24. These guidelines also required vendors to: "prepare a list of all customer telephone numbers tagged with do not call status in the previous day. A daily report will be sent to DISH each day with a list of newly tagged DNC numbers for that day's calling activity. The list will be clearly identified as a do-not-call file." (DX-170, Davis Dep. 50:1-20; DX-29.)

25. The Telemarketing Vendors forwarded DNC requests to DISH through a feedback file process that happens each night where all the dialing results from that day's dialing get sent to DISH in a file that is uploaded to DISH's computer system. (DX-170, Davis Dep. 46:16-47:20.) DISH diligently monitored compliance with that policy, and if a Telemarketing Vendor did not upload its list each night, DISH would follow-up with the Telemarketing Vendor to determine why. (*Id.* 99:5-20.)

26. Once a number was added to the DISH Internal DNC List, that meant the Telemarketing Vendor would remove the number from the then-campaign as well as any other campaigns that existed. (DX-170, Davis Dep. 48:8-49:25.)

DISH HAS TRAINED ITS PERSONNEL AND THOSE OF ANY ASSISTING IN DISH'S COMPLIANCE IN THE WRITTEN PROCEDURES REGARDING DO NOT CALL

27. DISH has also 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. (DX-8.)

28. 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.)

29. 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, ("CSC Do Not Call Requests"); DX-12, ("Do Not Call Regulatory Compliance"); DX-11, (email regarding DNC training schedule); DX-9, DX-10, and DX-13 (e-mail re: DNC training with attached presentations re: Inbound DNC Process and Investigator Process for DNC); DX-17, (PowerPoint presentation delivered by PossibleNOW); DX15, (same); DX-16, (same); DX-18, (same).)

30. 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.*)

31. 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.) All of DISH's outbound call agents also receive training on the applicable telemarketing laws and specific do not call regulations. (DX-217, Deposition Transcript of Amy Dexter, March 9, 2011 ("Dexter Dep.") 43:8-17.)

32. 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.)

33. 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.)

34. 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, Dexter Dep. 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.)

35. On or about December 14, 2007, DISH contracted with PossibleNOW, a compliance vendor, to assist DISH with scrubbing against the NDNCR, maintaining and scrubbing against DISH's Internal DNC List, as well as to provide additional support as to telemarketing compliance. (DX-191, Pl. Dep. Ex. (Stauffer 4/27/10) 2 (Master Services Agreement); (DX-166, Deposition Transcript of Richard Stauffer, April 27, 2010 ("Stauffer 4/27/10 Dep.") 17:5-13; 20:11-31:3; 47:23-54:15; 61:23-63:1.)

DISH MAINTAINS AND RECORDS DISH'S INTERNAL DNC LIST

36. There were a variety of methods by which someone could be added to the DISH Internal DNC List, including (a) a request made to an individual performing telemarketing for DISH; (b) files transmitted from the Telemarketing Vendors on DISH's dialing system that compiled the records of those consumers who had asked to be placed on DISH's Internal DNC List; and (c) a web page as to which everyone in the company had access and could add to DISH's Internal DNC List. (DX-157, Bangert 4/18/12 Dep. 141:5-142:3.)

37. DISH's written policy reflected these methods. (DX-157, Bangert 4/18/12 Dep. 142:4-10.)

38. As reflected in the above processes, DISH has recorded, maintained, and updated its Internal DNC List. (DX-2, Montano Decl. ¶¶17-20.)

39. Initially, if an individual requested to be placed on DISH's Internal DNC List, DISH would forward those phone numbers to the personnel at DISH in charge of maintaining the updates to DISH's Internal DNC List. (DX-154, Deposition Transcript of Dana Steele, April 12, 2012 ("D. Steele Dep.") 57:20-58:19.)

40. DISH then created a system, called the "CSC Web," so that the DISH personnel who received the do not call request from an individual could immediately enter that number in the system, which, in turn, immediately added that number to DISH's Internal DNC List. (DX-2, Montano Decl. ¶18; DX-152, Deposition Transcript of Serena Snyder, March 8, 2011 ("Snyder Dep.") 74:10-75:5.)

41. DISH produced to Plaintiffs a copy of the then-current version of DISH's Internal DNC List. (d/e 155 at p. 7.)

42. As set forth above, DISH required its Telemarketing Vendors to record, maintain, and provide a list to DISH of phone numbers of persons who requested not to receive further outbound telephone calls, and DISH included those numbers on DISH's Internal DNC List. (DX-2, Montano Decl. ¶19.)

43. As set forth above, on or about December 14, 2007, DISH contracted with PossibleNOW to assist DISH with, among other things, the maintenance of DISH's Internal DNC List. (DX-191, Pl. Dep. Ex. (Stauffer 4/27/10) 2, (Master Services Agreement); (DX-166, Stauffer 4/27/10 Dep. 17:5-13; 20:11-31:3; 47:23-54:15; 61:23-63:1); DX-2, Montano Decl. ¶22.)

44. Prior to 2008, DISH's Internal DNC List was comprised of requests made by consumers to DISH directly, and requests made by consumers to Telemarketing Vendor centers. (DX-2, Montano Decl. ¶24.)

45. Although DISH was not required by law to do so, through PossibleNOW, DISH set up functionality that would permit Independent Retailers to upload and update regularly their own, respective internal Do Not Call lists to a platform that would allow DISH to scrub against such lists. This platform also enabled Independent Retailers to scrub against DISH's Internal DNC List and the Do-Not-Call Lists of other Retailers. (DX-2, Montano Decl. ¶25.)

46. This functionality did not exist until April 8, 2008, and even then, there was a "ramp up" time of Retailers uploading numbers. (DX-214, Declaration of John Taylor and Exhibit A, ("Taylor Decl.") Taylor Rebuttal Report dated November 6, 2013; DX-166, Stauffer 4/27/10 Dep. 71:8-72:8; 115:6-116:10; DX-30, Pl. Dep. Ex. (Stauffer 4/24/12) 24.)

47. As of at least September 30, 2008, DISH required Independent Retailers that made 600 or more calls during the prior calendar year, and that engaged in any telemarketing, to engage with PossibleNOW so that PossibleNOW could provide any do not call requests to DISH. (DX-2, Montano Decl. ¶2.) If an Independent Retailer placed a call and the call recipient requested not to receive further outbound telephone calls made by the Retailer, the Retailer was (and is today) required by agreement with DISH to record and maintain the person's telephone number (among other information) and send that information to DISH through PossibleNOW. (DX-146, Deposition Transcript of Joey Montano, March 15, 2011 ("Montano Dep.") 53:13-54:11; DX-2, Montano Decl. ¶24.)

48. Once the functionality was established by PossibleNOW, it maintained three separate lists for use by DISH and Independent Retailers: (a) internal list requests made to DISH

itself; (b) internal list requests made to a Telemarketing Vendor; and (c) internal list requests made to an Independent Retailer. PossibleNOW and DISH considered the combination of these lists as a “Consolidated DNC List.” (DX-166, Stauffer 4/27/10 Dep. 101:9-19; DX-170, Davis Dep. 308:18-309:4; 318:12-20; 325:6-14.)

49. Because Independent Retailers maintained their own internal Do Not Call Lists prior to April 8, 2008 or the dates on which the Independent Retailers began engaging with PossibleNOW, the date that a consumer’s number was added to a Retailer’s internal Do Not Call List often predated the date that the number became part of the Consolidated DNC List.¹⁴

DISH AND ITS TELEMARKETING VENDORS USE A PROCESS TO PREVENT TELEMARKETING TO PERSONS WHO PLACED THEIR NUMBERS ON THE DNCR OR TO DISH’S INTERNAL DNC LIST

50. From 2003 to the present, DISH has used a process to prevent telemarketing to any telephone number on any list established pursuant to 16 C.F.R. § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B). (DX-157, Bangert 4/18/12 Dep. 91:1-4.) This process uses a version of the FTC’s NDNCR that is no older than thirty-one (31) days prior to the date any call is made. DISH maintains records documenting this process. (DX-2, Montano Decl. ¶21.) DISH produced call records containing numbers of persons who stated that they did not wish to be contacted to Plaintiffs. This list contains wireless and business numbers, invalid numbers and landline numbers. (DX-238, Taylor Decl. ¶8.)

51. DISH tested its methods to ensure that it complied with the applicable TSR/TCPA rules. (DX-218, Pl. Dep. Ex. (Dexter) 244. Specifically, DISH ran tests on its NDNCR scrubbing process to ensure that the process was working properly, including running queries to

¹⁴ Plaintiffs’ expert has identified violations from DISH’s call records and Independent Retailer call records pertaining to the Retailer portion of the Consolidated DNC List before that portion of the list existed or even became available through PossibleNOW.

ensure that a list generated by the scrubbing process did not include numbers on the NDNCR. (DX-157, Bangert 4/18/12 Dep. 101:17-103:7.) Mr. Bangert ran these kinds of tests “more times than [he] can remember.” (*Id.*)

52. The physical creation of outbound calling campaigns is conducted in collaboration with DISH’s marketing department, the sales or customer-retention department, and the compliance department. (DX-158, Deposition Transcript of Russell Bangert, December 15, 2010 (“Bangert Dep. 12/15/10”) 109:4-10.) The compliance department is responsible for “ensuring that before any calling takes place on the list, the leads 100 percent meet all legal obligations.” (*Id.* 110:2-6.)

53. DISH has employed at least two “fail-safe” mechanisms over time to ensure that calling campaign lists were not used by outbound call centers after the interval during which new customers would have been added to DISH’s Internal DNC List. (DX-158, Bangert 12/15/10 Dep. 163:19-24.) First, DISH’s outbound call department was responsible for maintaining a list of all of the campaign call lists that were created, when they were generated, and when they needed to be expired. (*Id.* 163:25-164:6.) Subsequently, DISH employed a mechanism where each list was encoded with the date that it was created, and the dialer has a fail-safe in it where the dialer does not permit the calling to take place if the call does not otherwise satisfy a legal exemption to place the call. (*Id.* 164:7-164:12.)

54. DISH scrubbed its calling lists against the NDNCR, the state do not call registries, and DISH’s Internal DNC List. (DX-157, Bangert 4/18/12 Dep. 73:5-16; 74:5-15.) During the relevant time period, DISH assigned personnel to download the NDNCR as required within the relevant time requirements. (*Id.* 74:20-75:7.)

55. Initially the NDNCR was downloaded by DISH employee Russell Bangert, and later that responsibility was transitioned to Monte Faucet. (DX-157, Bangert 4/18/12 Dep. 74:20-75:7.) Mr. Bangert met with Mr. Faucet many times to provide him with relevant materials (including the TCPA, written summaries provided by the FTC on the matter, records of applications that DISH made for state do not call lists, etc.), and to educate him as to the process and the personnel with whom he would be working. (*Id.* 76:20-77:23.) Thereafter, the NDNCR was downloaded 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. ¶16.) In early 2008, DISH, in partnership with PossibleNOW automated regular downloads of the NDNCR including daily adds and deletes as well as a full monthly refresh of the entire Federal DNC list. (*Id.* ¶22.)

56. Mr. Bangert downloaded the lists at least every 30 days, and often more frequently, including daily on many occasions. (DX-157, Bangert 4/18/12 Dep. 81:10-16.) Mr. Bangert then made the list available for uploading into DISH's "do-not-contact" database. (*Id.* 82:5-9; 84:22-85:3.)

57. DISH typically scrubs against the NDNCR and DISH's Internal DNC List on the same day that DISH initiates a calling campaign. (DX-2, Montano Decl. ¶23.)

58. DISH's outbound department is divided into an operations division and a dialer division. (DX-217, Dexter Dep. 20:19-21:3.) Before a calling campaign is approved for use, all scripts for outbound campaigns are reviewed by the operations division for compliance with the TCPA and other telemarketing regulations. (*Id.* 15:6-11; 16:2-4; DX-146, Montano Dep. 28:6-14; 30:3-11; 49:15-20.) Every campaign, regardless of size, goes through this process. (DX-217 Dexter Dep. 71:21-72:2.)

59. The outbound dialer division processed the lists and scrubbed against the various Do Not Call lists. (DX-217, Dexter Dep. 21:4-9.) DISH erred on the side of over scrubbing lists. (*Id.* 49:14-15.)

60. DISH also had a process to audit whether its Do Not Call database was functional, including regular auditing by DISH's IT department, and by users of the database. Mr. Bangert, for example, checked at least one list a day on days when he was otherwise pulling calling lists to ensure that no one on the dial lists appeared on any applicable do not call lists. (DX-157, Bangert 4/18/12 Dep. 147:22-149:15.) Anyone who pulled a list was required to audit the process to see if the scrubs were conducted correctly. (*Id.* 149:25-151:6.)

61. DISH sent daily Do Not Call suppression lists to its Telemarketing Vendor eCreek. (DX-170, Davis Dep. 332:11-333:7; 335:7-25.) Before DISH allowed eCreek to place calls, DISH scrubbed the list of numbers to be called, and then eCreek scrubbed that list again to ensure compliance with DISH's Internal DNC List. (*Id.* 71:22-72:23; DX-31, Pl. Dep., Ex. (Davis) 120.) The call lists were typically generated by DISH's marketing analytics team, who passed the list on to an audit team, and then to technical operations, to ensure that the customers who were supposed to be getting called were on the list based on the criteria generated by the marketing team. (DX-170, Davis Dep. 129:21-130:15.) Each of these call lists would be scrubbed against DISH's Internal DNC list. (*See Id.* 160:19-161:7, 163:25-164:3; 187:22-188:5, 189:3-17.)

62. In addition to the daily uploads to DISH, eCreek was required to upload its Do-Not-Call lists to DISH's compliance vendor, PossibleNOW, on a weekly basis. (DX-170, Davis Dep. 100:22-25.)

63. The dialer operations manager manages the campaigns and would load the campaign into the dialer, ensuring the reporting worked, and the dialer was operational. (DX-170, Davis Dep. 18:19-19:9.) If it was a prerecorded campaign, the dialer operations manager would ensure the campaign systematically “report[ed] on the back end.” (*Id.* 18:22-19:9.)

64. Business operations specialists primarily processed and distributed lists. (DX-170, Davis Dep. 21:2-16.)

65. Outbound operations managers coordinated outbound projects with designated campaign dialing sites (*i.e.*, DISH’s installations group, collections, and marketing), and they coordinated the reporting of the campaign performance with those sites. (DX-170, Davis Dep. 21:17-22:25.) These sites include both internal call centers that place outbound calls, as well as DISH’s Telemarketing Vendors. (*Id.* 27:10-15.) The outbound operations manager is responsible for compliance with the DNC lists and telemarketing compliance obligations. (*Id.* 33:3-12.)

66. As set forth above, since 2008, DISH has worked with its compliance vendor, PossibleNOW, to compile a Consolidated DNC List. (DX-170, Davis Dep. 237:7-239:20; DX-144, DISH/PossibleNOW Master Services Agreement.)

67. As further set forth above, through its use of PossibleNOW’s services, DISH also scrubs its outbound telemarketing campaigns and the do not call lists of Independent Retailers as a courtesy to individuals who do not wish to receive telephone calls regarding DISH products or services, even though the individual’s request was made to an Independent Retailer, rather than to DISH. (DX-2, Montano Decl. ¶26.) The same courtesy is extended to individuals who have made do not call requests to DISH, because DISH requires the Independent Retailers to scrub

any outbound telemarketing calls against DISH's Internal DNC List, as well as the Retailer's own list. (*Id.*)

68. PossibleNOW's services provide DISH with tools for scrubbing campaign lists, updating the various national and state do not call lists with additions and deletions, providing these lists to DISH on a monthly basis, and maintaining DISH's Internal DNC List. (DX-166, Stauffer 4/27/10 Dep. 20:4-30:11.)

69. DISH has a business operations specialist that interfaces with PossibleNOW to accomplish the scrubbing of telemarketing campaign lists. (DX-146, Montano Dep. 59:12-19.)

70. DISH took the appropriate steps to ensure that it understood and adhered to the scrubbing process designed by PossibleNOW. (DX-22, Pl. Dep., Ex. (Montano) 286; DX-23, Pl. Dep., Ex. (Montano) 287; DX-24, Pl. Dep., Ex. (Montano) 291; DX-25, Pl. Dep., Ex. (Fletcher) 108; DX-26, Pl. Dep. Ex. (Davis) 130; DX-28, Pl. Dep., Ex. (Bangert 12/15/10) 107.) This process required that numbers were "scrubbed" prior to being included in a call campaign. (DX-27, Pl. Dep. Ex. (Bangert 12/15/10) 104.)

71. In addition to using PossibleNOW, DISH internally maintained its policies to scrub its call lists for numbers that were placed by consumers on internal, state, federal, or wireless lists. (DX-170, Davis Dep. 255:2-257:4.) In other words, DISH scrubbed its call lists twice – first internally, and second through PossibleNOW. (*Id.* 260:7-265:1.)

72. To generate lists of telephone numbers that will be called, DISH uses a software application called PDialer. PDialer takes input data from various DISH databases to create lists of telephone numbers to be called. (Decl. of Anitha Gogineni, d/e 224 ¶7.) PDialer compiles the list of telephone numbers, then scrubs them against its purchased NDNCR and internal Do Not Call list to eliminate telephone numbers on those lists. (DX-170, Davis Dep. 233:7-21.) The P-

Dialer application (in addition to PossibleNOW's services) ensures that DISH's calls are placed to a number with which DISH maintained an Established Business Relationship ("EBR"), as defined by federal and state telemarketing compliance laws. (*Id.* 260:7-264:25.)

73. DISH purchases access to the NDNCR for all area codes for which it places outbound calls. DISH does not share the cost of accessing the NDNCR with any other entity, including any Independent Retailer. (DX-2, Montano Decl. ¶27.)

74. DISH does not use the NDNCR for any purpose except compliance with the TSR and TCPA and with any such state or federal law designed to prevent telephone solicitations to telephone numbers registered on the national database. (DX-2, Montano Decl. ¶28.)

DISH AND ITS TELEMARKETING VENDORS MONITOR AND ENFORCE COMPLIANCE WITH DISH'S DO NOT CALL PROCEDURES

75. Throughout the relevant time period, DISH has monitored and enforced compliance with its Do Not Call policies and procedures. (DX-2, Montano Decl. ¶29.) Such monitoring and enforcement was accomplished through the implementation, training, and testing of its telemarketing compliance, as well as call campaign and script review and scrubbing policies and procedures as described supra. (*Id.* ¶¶14-74.)

76. DISH also monitored and enforced its telemarketing compliance requirements as applied to its Telemarketing Vendors. For example, DISH measured Telemarketing Vendor EPLDT for compliance, including the rate at which calls were abandoned, and otherwise "measured all campaigns by day to ensure that they were exceeding expectations of the federal and state, where applicable, governments." (DX-158, Bangert 12/15/10 Dep. 203:21-204:14.) DISH also monitored a variety of EPLDT's phone calls, including through a group within DISH that listens to them. (*Id.* 204:15-23.) Finally, DISH also "analyzed all phone calls made to ensure that they were [not] on do-not-call lists. The list goes on and on." (*Id.* 204:24-205:3.)

77. In the event that DISH was monitoring EPLDT calls and heard a customer indicate that he or she had requested that DISH not call, DISH ensured that the agent apologized, that the individual was immediately put on DISH's Internal DNC List, and the call was terminated. (DX-158, Bangert 12/15/10 Dep. 210:13-21.) If a call was considered to be a violation of the business terms between DISH and EPLDT, a DISH employee was responsible for bringing it to the attention of DISH's management team and ensuring "that they followed the appropriate accountability procedure," which could include requesting that the particular person no longer make calls on DISH's behalf. (*Id.* 211:9-212:3.)

78. Similar oversight and monitoring was applied to DISH's other Telemarketing Vendor, eCreek.

79. DISH management and/or its internal legal department would also discipline any DISH telemarketer for perceived TCPA or do not call violations. (DX-170, Davis Dep. 40:5-12.)

80. An in camera review by this Court also showed

that DISH's attorneys actively participated in monitoring compliance with the [TSR]. DISH attorneys investigated consumer complaints. DISH attorneys arranged for consumers to participate in sting operations designed to establish that DISH Independent Retailers and distributors were violating DISH procedures for compliance with the [TSR]. DISH attorneys reviewed and approved scripts for compliance with the [TSR]. DISH attorneys reviewed and approved calling programs for compliance with the [TSR]. All of these types of activities are direct evidence of DISH's Safe Harbor affirmative defense.

(d/e 151 at p. 7.)

81. This Court also noted that "DISH attorneys did more than just provide advice that is relevant to monitoring a compliance functions, they (along with others) performed these functions." (d/e 151 at p. 8.)

82. As an additional means to ensure an effective compliance program, DISH created a DNC investigation team (the "DNC Investigation Team") in 2006 to investigate and resolve

consumer complaints regarding TSR/TCPA-related issues. (DX-159, Deposition of Marciedes Metzger, March 17, 2011 (“Metzger Dep.”) 73:21-74:11; 74:15-75:6.)

83. To assist the DNC Investigation Team and other DISH personnel in investigating the potential cause of consumer complaints concerning telemarketing, DISH created an extensive written manual. (DX-159, Metzger Dep. 73:1-6; DX-32, Pl. Dep. Ex. (Metzger) 328; DX-20, Pl. Dep., Ex. (Laslo) 170.)

84. This manual was used by DISH’s DNC Investigation Team, a group comprised of selected DISH customer service representatives (“CSRs”) to “identify the nature and source of telemarketing related (referred to as TCPA) violations, accurately report findings and resolve customer concerns. (DX-32, Pl. Dep Ex. (Metzger) 328.)

85. In furtherance of this mission, the manual provided detailed information regarding the TCPA, the NDNCR, taking customer calls regarding potential TSR/TCPA issues, tracking customer complaints, suppressing calls, and using PossibleNOW’s “DNC Solutions™” (“DNC Solutions”) with regard to Do Not Call compliance. (DX-32, Pl. Dep. Ex. (Metzger) 328.)

86. DISH also employed an “Executive Resolution Team” or “ERT” to handle customer concerns that are escalated from DISH’s regular customer call centers. (DX-159, Metzger Dep. 25:25-27:1.) The ERT includes customer resolution specialists (“CRSs”), coaches (who oversee the CRSs), and team managers (who oversee the coaches.) (*Id.*, Metzger Dep. 29:12-30:8.) Every one of these individuals is available to take customer calls. (*Id.*) DISH’s ERT management team reviewed this manual with its customer service resolution employees during one-on-one training sessions. (DX-153, Deposition Transcript of David Laslo, March 4, 2011 (“Laslo Dep.”) 28:19-30:19; 34:4-35:3.) These training sessions lasted approximately two (2) hours for each employee. (DX-153, Laslo Dep. 26:25-27:10.)

87. By 2005, the ERT was comprised of approximately one hundred and fifty CRSs, not including coaches and managers, and thereafter expanded to employ approximately two hundred and fifty CRSs, twenty coaches, and five managers. (DX-159, Metzger Dep. 37:9-39:23; 40:6-12.) Every CRS was trained on and responsible for taking calls regarding Do Not Call issues. (*Id.* 51:12-53:8.)

88. In addition to their other responsibilities, DISH added the handling of Do Not Call issues as a particular responsibility of the ERT in 2006 or 2007. (DX-159, Metzger Dep. 51:17-23.) In recognition of its priority of the issue, DISH maintained a “service level goal” for the resolution of pending do not call issues among its CRS agents. (*Id.* 132:3-133:8.) The relevant team coach received a weekly quality assurance score, and then feedback was given to the agent at issue. (*Id.*)

89. In a typical scenario, a frontline CRS might receive a call from a customer indicating that he or she is receiving unwanted calls that he or she believes is DISH Network calling. (DX-159, Metzger Dep. 49:5-17; 39:13-17.) The CSR would offer to place the customer on DISH’s Internal DNC List, but if the consumer stated that they wished to speak to someone else, or was otherwise upset or aggravated, the call would then be handled by the ERT. (*Id.* 49:5-17; 75:17-76:4.) As part of their responsibilities in resolving the call, DISH CSRs would determine whether a customer was on a Do Not Call list, and add the individual’s phone number to DISH’s Internal DNC list. (*Id.* 157:9-158:13; 123:2-124:15.)

90. DISH also had a team that handled, researched, and responded to written customer complaints, which it referred to as the DRT. (DX-159, Metzger Dep. 62:20-64:4.)

91. So that DISH could track and evaluate the effectiveness of its Do Not Call investigation and resolution procedures, DISH would aggregate these complaints with those received by ERT in a database called the “TCPA Tracker.” (DX-159, Metzger Dep. 64:5-66:2.)

92. One of the products of this TSR/TCPA tracker program was a flow chart that walks through the various stages of handling TSR/TCPA-related issues. (DX-40, Pl. Dep. Ex. (Bangert), 113); DX-49, Pl. Dep. Ex. (Origer) 159; *see also* DX-50, Pl. Dep. Ex. (Laslo) 186, DX-51, Pl. Dep. Ex. (Snyder) 228; and DX-52, Pl. Dep. Ex. (Origer) 148.)

93. In researching these complaints, DISH noted that many of the complaints originated from phone numbers that were not associated with DISH or its Vendor Telemarketers. (DX-159, Metzger Dep. 81:1-82:5.) DISH discovered that, among other things, non-DISH callers were spoofing DISH’s telephone number and caller I.D., and/or otherwise identifying themselves as DISH and directing consumers back to DISH’s main telephone number. (*Id.* 81:1-83:21.)

94. From time to time, however, mistakes were made and DISH received complaints relating to telemarketing from either its own customers or consumers. DISH carefully considered how best to address those complaints. (DX-53, Pl. Dep. Ex. (Metzger) 337; DX-90, Pl. Dep. Ex. (Werner) 265.)

95. The evidence developed in this action shows that DISH took seriously and investigated TSR/TCPA-related complaints made by DISH customers or consumers whether directly or through a state attorney general. Indeed, the record evidence demonstrates the steps and process utilized by DISH to address the following complaints:

Consumer ██████████. (DX-33, Pl. Dep. Ex. (Metzger) 331.)

Consumer ██████████. (DX-34, Pl. Dep. Ex. (Metzger) 332.)

Consumer [REDACTED]. (DX-35, Pl. Dep. Ex. (Metzger) 333.)

Consumer [REDACTED] of [REDACTED]. (DX-36, Pl. Dep. Ex. (Metzger) 334.)

Consumer [REDACTED]. (DX-37, Pl. Dep. Ex. (Metzger) 335.)

Consumer [REDACTED]. (DX-38, Pl. Dep. Ex. (Metzger) 338.)

Consumer Not Identified. (DX-39, Pl. Dep. Ex. (Metzger) 345.)

Consumer [REDACTED]. (DX-41 Pl. Dep. Ex. (Werner) 448.)

Consumer [REDACTED]. (DX-42, Pl. Dep. Ex. (Werner) 423.)

Consumer [REDACTED]. (DX-43, Pl. Dep. Ex. (Laslo) 176.)

Various Indiana Consumers. (DX-44, Pl. Dep. Ex. (Laslo) 177.); DX-45 Pl. Dep. Ex. (Laslo) 181.)

Consumer [REDACTED]. (DX-46, Pl. Dep. Ex. (Laslo) 189.)

Consumer [REDACTED]. (DX-47, Pl. Dep. Ex. (Laslo) 190.)

Unidentified Consumer. (DX-48, Pl. Dep. Ex. (Laslo) 192.)

Consumer [REDACTED]. (DX-54, Pl. Dep. Ex. (Laslo) 193.)

Consumer [REDACTED]. (DX-55, Pl. Dep. Ex. (D. Steele) 405.)

Consumer [REDACTED]. (DX-56, Pl. Dep. Ex. (D. Steele) 409.)

Consumer [REDACTED]. (DX-57, Pl. Dep. Ex. (D. Steele) 416.)

Consumer [REDACTED]. (DX-58, Pl. Dep. Ex. (D. Steele) 417.)

Consumer [REDACTED]. (DX-59, Pl. Dep. Ex. (Snyder) 195.)

Consumer [REDACTED]. (DX-60, Pl. Dep. Ex. (Snyder) 197.)

Consumer [REDACTED]. (DX-61, Pl. Dep. Ex. (Snyder) 198.)

Consumer [REDACTED]. (DX-62, Pl. Dep. Ex. (Snyder) 199.)

Consumer [REDACTED]. (DX-63, Pl. Dep. Ex. (Snyder) 200.)

Consumer [REDACTED]. (DX-64, Pl. Dep. Ex. (Snyder) 202.)

- Consumer [REDACTED]. (DX-65, Pl. Dep. Ex. (Snyder) 203.)
- Consumer [REDACTED]. (DX-66, Pl. Dep. Ex. (Snyder) 207.)
- Consumer [REDACTED]. (DX-67, Pl. Dep. Ex. (Snyder) 209.)
- Consumer [REDACTED]. (DX-68, Pl. Dep. Ex. (Snyder) 218.)
- Consumer [REDACTED]. (DX-69, Pl. Dep. Ex. (Snyder) 219.)
- Consumer [REDACTED]. (DX-73, Pl. Dep. Ex. (Snyder) 233.)
- Consumer [REDACTED]. (DX-74, Pl. Dep. Ex. (Origer) 150.)
- Consumer [REDACTED]. (DX-75, Pl. Dep. Ex. (Origer) 161.)
- Consumer [REDACTED]. (DX-79, Pl. Dep. Ex. (Origer) 164.)
- Consumer [REDACTED]. (DX-76, Pl. Dep. Ex. (Musso) 297.)
- Consumer [REDACTED]. (DX-77, Pl. Dep. Ex. (Musso) 298.)
- Consumer [REDACTED]. (DX-78 Pl. Dep. Ex. (Musso) 310.)
- Consumer [REDACTED]. (DX-81, Pl. Dep. Ex. (Montano) 138; DX-80, Pl. Dep. Ex. (Montano) 288.)
- Various Consumers. (DX-82, Pl. Dep. Ex. (Montano) 285.)
- Consumer [REDACTED]. (DX-83, Pl. Dep. Ex. (Mills) 477; DX-84, Pl. Dep. Ex. (Mills) 478.)
- Consumer [REDACTED]. (DX-85, Pl. Dep. Ex. (Dexter) 247.)
- Consumer [REDACTED]. (DX-86, Pl. Dep. Ex. (Davis) 136.)
- Consumer Anil Agarwal. (DX-87, Pl. Dep. Ex. (Bangert 12/15/10) 106.)
- Consumer [REDACTED]. (DX-88, Pl. Dep. Ex. (Bangert 12/15/10) 111.)
- Consumer [REDACTED]. (DX-89, Pl. Dep. Ex. (Bangert 12/15/10) 117.)

96. DISH maintains a list of complaints that are registered with DISH customer service representatives.

97. This list includes both complaints about telemarketing calls, as well as complaints concerning other, non-telemarketing issues.

98. “I understand that the number of telemarketing related complaints that DISH receives has decreased overtime, and greatly decreased since 2009.” (DX-2, Montano Decl. ¶2.)

**THE CONSUMER COMPLAINTS PRODUCED BY PLAINTIFFS
DO NOT MATCH DISH’S CALL RECORDS**

99. The majority of the consumer complaints produced by Plaintiffs in this case do not match call records produced by DISH.

100. For example, of the approximate 400 consumer complaints produced by State Plaintiffs, only one can be traced to DISH call records at issue in this case, and that call was made to a number to which DISH did not have access at the time of the call since it appeared solely on the do-not-call list of a DISH retailer. (DX-214, Taylor Decl. ¶7.)

101. Of the 41¹⁵ depositions of consumers across the country who had made complaints about receiving calls referencing DISH (DX-219), Plaintiffs could only find six consumers whose telephone numbers matched calls made by DISH: [REDACTED] [REDACTED] (who received the same calls at the same telephone number), and [REDACTED].

102. For the other 34 consumers, there is no evidence that these calls originated from DISH. (DX-214, Taylor Decl. ¶5.) With respect to the six, any calls that DISH made to [REDACTED] [REDACTED] were not for telemarketing purposes. (DX-212, Deposition Transcript of [REDACTED] [REDACTED], September 4, 2013 (“[REDACTED] Dep.”) 111:20-114:8; 126:23-134:4.) The

¹⁵ Consumer [REDACTED], who was deposed by Plaintiffs on June 4, 2014 in [REDACTED] Ohio, could not recall the last four digits of her landline telephone number during her deposition. Accordingly, DISH’s expert could not perform any analysis about her telephone number.

calls to ██████ must also be excluded as potentially violative calls because she had an existing business relationship with DISH during the times that DISH attempted to contact her. (DX-214, Taylor Decl., ¶4.) Accordingly, out of the 41, only four could even possibly be used to link a violation to DISH.

103. Ms. ██████'s complaint is based on one of mistaken identity – albeit unfortunate. DISH was provided with her number erroneously by a customer residing in ██████, New York that was apparently attempting to avoid paying DISH for an outstanding balance. (DX-212, ██████ Dep. 123:10-125:13.) In her deposition, Ms. ██████ expressly acknowledged that it was a case of mistaken identity and that all of DISH's telephone inquiries were related to the ██████ customer's unpaid debt – she unequivocally testified that no calls involved any attempts by DISH to market or sell its services. (*Id.* 111:20-114:8; 126:23-134:4.) Accordingly, DISH's attempts to contact Ms. ██████ were not telemarketing calls and were clearly the result of error.

104. With regard to Ms. ██████, DISH's expert was able to eliminate any DISH calls based on the campaign names, since they indicate that they were made solely to Ms. ██████ within the proper "EBR" (established business relationship) period.¹⁶ (DX-214, Taylor Decl. ¶4.) In addition, DISH did not otherwise have access to Ms. ██████'s do-not-call request at the time of the calls, since it appeared solely on the do-not-call list of a DISH retailer. (DX-214, Taylor Decl. ¶4.) Ms. ██████ stated during her deposition that she became a DISH customer in or about 2005 or 2006. (DX-210, Deposition Transcript of ██████, August 28, 2013 ("██████ Dep.") 16:4-9.) Ms. ██████ also testified that she terminated her relationship with

¹⁶ All of the calls to Ms. ██████ by DISH were made between August 15, 2007, and September 5, 2008.

DISH in or about May 2013. (*Id.* 18:13-15.) DISH’s analysis of DISH’s call records show that Ms. [REDACTED] had an existing business relationship with DISH. (DX-214, Taylor Decl. ¶4.)

**ANY VIOLATIONS OF THE TSR OR TCPA
BY DISH WERE THE RESULT OF ERROR**

105. As summarized above, DISH has numerous policies and processes in place to ensure that all outbound telemarketing calls are conducted in compliance with the TSR, TCPA, and applicable state laws. *See supra* ¶¶14-49. DISH tests those policies and procedures, and investigates complaints that it receives concerning telemarketing. *See supra* ¶¶50-98.

106. There is no evidence of any claimed TSR/TCPA violation in which a DISH employee acted in any way other than simply consistent with a mistake – a human error. For all of the thousands of calling campaigns, DISH personnel, while obviously not an eyewitness to the placing of hundreds of millions of calls, were trained and required to use a dialer with a Do Not Call filter and scrubbing system. *See supra* ¶¶14-74. Testing also was performed to ensure proper scrubbing. *See supra* ¶¶50-81. Where a call was made that did not comply with the TSR or TCPA Do Not Call provisions, the only possible conclusion as to the reason for such a call was that a subscribing filter was not properly applied, applied in error, or failed -- *i.e.*, a mistake.

107. Further, as has been conclusively proven, the FTC itself made numerous mistakes in the process of maintaining and downloading the NDNCR and providing it to telemarketers. This too obviously constitutes error.

THE NATIONAL DO NOT CALL REGISTRY

108. The FTC contracted with AT&T Government Solutions, Inc. (“AT&T”) to “develop, implement, and operate” the NDNCR. (FTC, The National Do Not Call Registry: Annual Report to Congress for FY 2003 and 2004 Pursuant to the Do Not Call Implementation Act On Implementation of the National Do Not Call Registry (2005).) The NDNCR began

registering consumer phone numbers on June 27, 2003, although full operation of the NDNCR, including the consumer complaint mechanism, did not commence until October 1, 2003. (*Id.* at 3, n.6; Press Release, FTC, National Do Not Call Registry Opens (June 27, 2003), <http://www.ftc.gov/news-events/press-releases/2003/06/national-do-not-call-registry-opens>.)

The NDNCR has a consumer registration process component. Consumers may, through the Internet or a toll free number, register up to three telephone numbers at a time with the FTC. (FTC, Consumer Information: National Do Not Call Registry, available at <http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry>.) These numbers are then processed by the FTC or its contractor and placed on the NDNCR. The NDNCR also has a subscription process whereby those entities wishing to engage in telemarketing to consumer landlines must subscribe to the FTC’s NDNCR, download the NDNCR, and scrub their calling lists against the NDNCR. (FTC, Q&A for Sellers and Telemarketers about DNC Provisions of TSR, available at <http://www.business.ftc.gov/documents/alt129-q-telemarketers-sellers-about-dnc-provisions-tsr>.) “The [NDNC] now has more than 221 million telephone numbers on it....” (FTC, Media Resources, The Do Not Call Registry, available at <http://www.ftc.gov/news-events/media-resources/do-not-call-registry>).

109. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (DX-155, Deposition Transcript of Ami Dziekan, February 15, 2012

(“Dziekan Dep.”) 229:7-230:2.)

110. During the FTC’s initial planning for the NDNCR, stakeholders raised issues concerning the FTC’s ability to accurately maintain the NDNCR. (DX-175, TSR, 68 Fed. Reg. 4580 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310).)

111. Among those concerns was using the NDNCR itself to provide proof of a violation of the Do Not Call rules. The following exchange took place at an FTC workshop held in 2002 to discuss the implementation of the NDNCR:

Question from Eileen Harrington, Deputy Director of FTC Bureau of Consumer Protection: Have you had any complaints in Missouri from businesses who have found, or would there be a way for them to discover that numbers on your list were inadvertently placed on the list, or from consumers?

Response from Rex Burlison with the Missouri Office of the Attorney General, on behalf of the National Association of Attorneys General: We have got a list with 970,000 numbers [in Missouri]. There’s going to be inaccuracies. I don’t care how many people that you put on preserving the accuracy of the list, there’s going to be problems with the list, and you have to accept that, especially when you go to a national list with millions of numbers, you are going to have a list that is imperfect, and it just doesn’t matter until it comes to when someone is trying to enforce a violation. That’s when it matters. Is that person or is that number that you’re enforcing against accurately on the list and was it accurately given to the industry to protect the consumer.

(DX-176 at 149-50 (FTC Transcript, FTC Rulemaking Workshop, Session 1 (June 5, 2002) <http://web.archive.org/web/20130501140905/http://www.ftc.gov/bcp/rulemaking/tsr/020605xscrip.pdf>.) (emphasis added).)

112. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]:

Email from Linda Miller (in relevant part):

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(d/e 152, Ex. 1, Declaration of Joseph A. Boyle dated June 15, 2012 (“Boyle 6/15 Decl.”) ¶6, Ex. E at 5.)

113. [REDACTED] (DX-163, Deposition Transcript of David Torok, April 5, 2012 (“Torok Dep.”) 133:5-8.) Rather, the FTC [REDACTED]. (*Id.* 133:8-14.)

114. In a separate instance, the FTC notified AT&T in April 2004 that inactive registrations were not being properly removed from the NDNCR in accordance with the terms of the contract between the FTC and AT&T. (d/e 152, Ex. 1, Boyle 6/15 Decl., ¶3, Ex. B at 1.)

115. [REDACTED]

[REDACTED]

[REDACTED]. DX-165 Deposition Transcript of Linda Miller Lavenda, September 6, 2012 (“Lavenda Dep.”) (47:23-48:2-10.)

116. [REDACTED]

[REDACTED]. (DX-165, Lavenda Dep. 76:17-20.)

117. [REDACTED]

[REDACTED]. (DX-148, Deposition Transcript of James Shaffer, June 13, 2012 (“Shaffer Dep.”) 51:10-53:10; DX-178, Pl. Dep. Ex. 4, (Shaffer) Ex. 4, § C. ¶1.1.)

118. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (DX-148, Shaffer Dep. 297:13-17; 298:2-300:21; 399:19-21.)

119. [REDACTED]

[REDACTED]. (DX-165, Lavenda Dep. 193:10-20.)

120. [REDACTED]

[REDACTED]. (DX-145, Deposition Transcript of Murali Thirukkonda, June 5, 2012 (“Thirukkonda Dep.”) 17:18-22.)

121. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 137:24-140:5.)

122. [REDACTED]. (DX-

145, Thirukkonda Dep. 31:19-23.)

123. [REDACTED]

[REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep.

287:7-292:20; DX-180, Ex. LM-10.)

124. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda

Dep. 103:18-106:2; 117:19-119:22; DX-180, Pl. Dep. Ex. (Thirukkonda) LM-10.)

125. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 106:6-107:10; DX-180, Pl. Dep. Ex. (Thirukkonda) LM-

10.)

126. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 106:24-107:23; DX-180, Pl.

Dep. Ex. (Thirukkonda) LM-10 at 2.)

127. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (DX-145, Thirukkonda Dep. 33:15-24.)

128. [REDACTED]

[REDACTED]

[REDACTED] (“Stauffer 4/26/12 Dep.”) 32:6-35:6, 59:12-24.)

129. [REDACTED]

[REDACTED]. (DX-167, Stauffer 4/26/12 Dep. 35:20-40:6.)

130. [REDACTED]

[REDACTED]. (DX-167, Stauffer 4/26/12 Dep. 101:4-102:7.)

131. [REDACTED]

[REDACTED]. (DX-167, Stauffer 4/26/12 Dep. 102:8-12.)

132. [REDACTED]

[REDACTED]

[REDACTED]. (d/e 152, Ex. 1, Boyle 6/15 Decl. ¶4, Ex. C.)

133. [REDACTED]

[REDACTED]

[REDACTED] (d/e, Ex. 1, Boyle 6/15 Decl. ¶4, Ex. C.)

134. [REDACTED]

[REDACTED]. (DX-167, Stauffer 4/26/12 Deposition, 61-62; 72; 73-95). [REDACTED]

[REDACTED]. (*Id.*) [REDACTED]

[REDACTED]. (*Id.*) [REDACTED]

[REDACTED]. (Id.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (Id.) [REDACTED]

[REDACTED]. (Id. 79-80, 95.) [REDACTED]

[REDACTED] (Id. 100:6-18.)

135. [REDACTED]

[REDACTED]

[REDACTED] (DX-167, Stauffer 4/26/12 Dep. 80:3-10.)

136. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (DX-167, Stauffer 4/26/12 Dep.

152:6-154:23.) [REDACTED]

[REDACTED]

[REDACTED] (Id. 153:2-154:23.)

137. PossibleNOW summed up these latent incurrences in the following testimony:

[REDACTED]

[REDACTED]

(DX-167, Stauffer 4/26/12 Dep. 189:20-191:17.)

138. [REDACTED]

[REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 86:1-87:3.)

139. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 86:1-87:6.)

140. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 90:5-91:9; 225:2-20.)

141. [REDACTED]

[REDACTED]. (d/e 152-11, Ex. J.)

142. [REDACTED] (DX-155, Dziekan Dep. 99:5-11.)

143. The NDNCr includes many wireless numbers, numbers disconnected but not reassigned, business numbers, VOIP numbers and others (March 2009 report prepared by PossibleNOW). (d/e 152, Ex. 1, Boyle 6/15 Decl. ¶11, Ex. J.)

144. [REDACTED]
[REDACTED]
[REDACTED]. (DX-145, Thirukkonda Dep. 225:21-226:17; DX-181, Pl. Dep. Ex. (Thirukkonda), LM-33.)

145. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] (DX-145, Thirukkonda Dep. 227:16-228:21.)

146. [REDACTED]
[REDACTED]
[REDACTED] (DX-145, Thirukkonda Dep. 228:14-15.)

147. The NDNCr website maintained by the FTC states that the NDNCr “is only for personal phone numbers” and that business-to-business calls or faxes are not covered by the NDNCr. ([http://www.consumer.ftc.gov/articles/0108-national do not call registry](http://www.consumer.ftc.gov/articles/0108-national-do-not-call-registry) (last accessed January 6, 2014.) The 2009 PossibleNOW report, however, found that 13% of the phone numbers listed on the NDNCr were business landline numbers. (d/e 152, Ex. 1, Boyle 6/15 Decl. ¶11, Ex. J, at 7.)

[REDACTED]

[REDACTED]

[REDACTED]: <http://www.ftc.gov/bcp/menus/business/mareting.shtm>.

(DX-145, Thirukkonda Dep. 268:9-270:8; DX-182.)

149. [REDACTED]

[REDACTED]

[REDACTED]. (DX-155, Dziekan Dep. 100:6-25.)

150. As of March 2009, 13% of the phone numbers listed on the NDNCR were business numbers. (d/e 152, Ex. 1, Boyle 6/15 Decl. ¶11, Ex. J, at 7.)

151. As of 2009, 5.3% of numbers on the NDNCR were inactive. (d/e 152, Ex. 1, Boyle 6/15 Decl. ¶11, Ex. J, at 7.)

152. [REDACTED]

[REDACTED]. (DX-155;

DX-183 Dziekan Dep. Ex. 5.)

153. [REDACTED]

[REDACTED]. (DX-143, Deposition Transcript of Richard Stauffer, November 28, 2012 (“Stauffer 11/28/12 Dep.”) 396:23-397: 7.)

154. [REDACTED]

[REDACTED]

[REDACTED]

(DX-163, Torok Dep. 75:8-84:11; 85:2-86:5.) [REDACTED]

[REDACTED]. (*Id.* 99:9-13; 135:22-136:16.)

155. [REDACTED]

[REDACTED]. (DX-167, Stauffer 4/26/12 Dep. 96:6-20.) The FTC estimates that 25% of the telephone numbers associated with VoIP services are not included in the directory assistance data that is used to perform hygiene on the NDNCR. (Biennial Report Congress Under the Do Not Call Registry Free Extension Act of 2007, 2011 WL 6935660 *4 (Dec. 1, 2011).) Thus, the FTC does not have the data to remove from the NDNCR VoIP numbers that are disconnected from service.

156. Dr. Robert Fenili, DISH's expert witness, developed a model to estimate the composition of the NDNCR as of September 2011. (DX-189, Expert Report of Robert Fenili 7/26/12.) Based on this model, as of September 2011, over 50% of all numbers on the NDNCR were wireless numbers. This is consistent with PossibleNOW's FTC analysis in 2009. (*Id.* at 13, Table 4.) Dr. Fenili further estimated that as of September 2011, 12.2% of numbers on the NDNCR were business landlines, roughly the same as in 2009, and 7.1% of numbers on the NDNCR were inactive landlines – an increase from 2009. (*Compare id.* with d/e 152, Ex. 1, Boyle 6/15 Decl. ¶11, Ex. J, at 7.) Dr. Fenili estimates that only 28.2% of numbers registered on the NDNCR are active residential landlines. (DX-209, Declaration of Robert Fenili, January 6, 2014, Ex. A at 13, Table 4.)

157. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 149:3-150:24; 192:13-199:12; 274:1-280:9, LM-12; DX-185, Pl. Dep. Ex. (Thirukkonda), LM-41.)

158. [REDACTED]

[REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 303:2-305:20; DX-186, Pl. Dep. Ex. LM-49.)

159. [REDACTED]

[REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 305:21-310:4.)

160. [REDACTED]

[REDACTED]

(DX-145, Thirukkonda Dep. 307:18-308:11.)

161. [REDACTED]

[REDACTED]

[REDACTED]. (DX-143, Stauffer 11/28/12 Dep. 329:17-332:16.)

162. [REDACTED]

[REDACTED]. (DX-145, Thirukkonda Dep. 42:9-45:19.)

PLAINTIFFS’ FLAWED “MASSIVE COMPUTER PROCESSING”

163. In the FTC’s Responses to DISH’s First Set of Interrogatories Directed to the United States, the FTC stated:

i. Entity-specific DNC violations

[REDACTED]

ii. National DNC violations

[REDACTED]

[REDACTED]

(DX-187, United States' Responses to DISH's First Set of Interrogatories Directed to the United States at pp. 5 and 6.)

164. [REDACTED]

[REDACTED]

[REDACTED] (DX-187, p.

4.)

165. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (DX-155, Dziekan Dep. 229:16-24.)

166. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (DX-155, Dziekan Dep. 237:22-238:17;

241:18-242:10.) [REDACTED]

[REDACTED]

[REDACTED] (“Mastrocinque Dep.”) 129:15-17.)

167. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (DX-155,

Dziekán Dep. 235:21-236:1.)

168. [REDACTED]

[REDACTED]. (DX-155, Dziekán Dep. 237:8-238:20; *see also id.* 253:10-16.)

169. [REDACTED] (DX-155, Dziekán Dep. 237:22-

238:17, 241:18-242:10; DX-174, Deposition Transcript of Leslie Steele, October 4, 2012 (“L.

Steele Dep.”) 85:3-5); (2) [REDACTED] (DX-174, L. Steele Dep. 85:6-8); (3) [REDACTED]

[REDACTED] (*id.* 85:9-11); (4) [REDACTED]

[REDACTED] (*id.* 85:21-86:2); (5) [REDACTED] (*id.* 86:3-6); (6)

[REDACTED] (*id.* 86:7-10); or (7) [REDACTED]

[REDACTED] (*id.* 86:11-14).

170. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. (DX-194, Plaintiff’s Supplemental

Responses to DISH’s Interrogatories dated December 14, 2012.)

171. Both the 2003-2007 Call Records and the 2007-2010 Call Records contained a mix of both telemarketing and non-telemarketing call records, (Opinion, d/e 165, Opinion re: Plaintiff's Third Motion to Compel Discovery Responses, 7/20/2012; DX-197, Report of Dr. Erez Yoeli, July 19, 2012, and calls to non-residential, and wireless and business numbers, and numbers that could not be classified as fitting within any of these specific categories. (DX-137, Rebuttal Report of Dr. Erez Yoeli, October 15, 2012.)

172. This Court already decided that the 2003-2007 Call Records contain both telemarketing and non-telemarketing call records:

In 2008, DISH provided the FTC with the 2008 Analysis that notified the FTC that the 2003-2007 calls included non-telemarketing calls such as collection calls and business calls. The 2008 Analysis further notified the FTC that calls could be associated with calling campaigns and with EBR status of DISH customers. The Plaintiffs, thus, knew these limitations on the 2003-2007 calls before they filed this action. The Plaintiffs elected to focus their discovery efforts on the 2007-2010 calls rather than the earlier data.

(d/e 165, at 13).

173. FTC economist Dr. Erez Yoeli, Ph.D. and a team of analysts conducted an analysis of the DISH 2007-2010 call records. (d/e 155, Opinion of Court re: Plaintiff's Motion to File SAC, at 7.)

174. Plaintiffs could not and did not conduct an analysis to determine which, or how many, of the 2003-2007 call records related to telemarketing calls.

175. [REDACTED]

[REDACTED]

[REDACTED]. (DX-162, Mastrocinque Dep. 160:21-161:14; 180:24-181:1; 203:2-5.)

176. [REDACTED]

[REDACTED]

(DX-162, Mastrocinque Dep. 181:5-10), [REDACTED]

[REDACTED]. (*Id.* 181:12-15.)

177. [REDACTED]

[REDACTED]. (DX-162, Mastrocinque Dep. 143:2-145:4.)

178. [REDACTED]

[REDACTED]. (DX-194, Plaintiff's Supplemental Responses to DISH's Interrogatories dated December 14, 2012.) Of these more than 20 million alleged calls, 80.5% were to numbers as to which DISH would have had no access or knowledge. (DX-214, Taylor Decl., Ex. A at 9-12.)

179. Plaintiffs took 41 consumer depositions of consumers across the country who made complaints about receiving calls referencing DISH. (DX-219.)

**DISH'S RELATIONSHIP WITH INDEPENDENT RETAILERS AND
OVERSIGHT AND MONITORING OF INDEPENDENT RETAILERS'
COMPLIANCE WITH AGREEMENT TERMS**

180. As referenced above, between 2003 and 2010, there were more than 7,500 Independent Retailers. (DX-208, Declaration of Mike Mills dated January 6, 2014 (the "Mills Decl.") ¶4.)

181. During the relevant time period, the relationships between DISH and the Independent Retailers were governed by DISH's Retailer Agreements (the "Retailer Agreement"). (DX-208, Mills Decl. ¶6.)

182. Independent Retailers were required to sign a Retailer Agreement to market and sell DISH products and services. (DX-208, Mills Decl. ¶7.)

183. Section 11 of the standard Retailer Agreement, entitled “Independent Contractor,” confirms the independent contractor relationship between DISH and the Retailers, and provides in pertinent part:

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 . . . 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. . . . 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.

(DX-208, Mills Decl. ¶8.)

184. Section 9.1 of the standard Retailer Agreement, entitled “Compliance with Laws,” provides in pertinent part that:

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.”

(DX-208, Mills Decl. ¶9.)

185. DISH’s standard Retailer Agreement also contains a Trademark License Agreement, which confirms that Retailers are not related or affiliated with DISH, and cannot hold themselves out as DISH, or any related or affiliated DISH entity. (DX-208, Mills Decl. ¶10.)

186. During the relevant time period, the “Independent Contractor,” “Compliance with Laws,” and Trademark License Agreement were contained in each and every Retailer Agreement between DISH and the Retailers, with only slight, non-substantive variations in the precise language of each provision. (DX-208, Mills Decl. ¶11.)

187. Aside from the limitations set forth in the Retailer Agreement, DISH does not control the manner and means in which Independent Retailers market and sell DISH Network® brand systems and packages, either under the Retailer Agreements or otherwise. (DX-208, Mills Decl. ¶12.)

188. The details of when, how, and by whom the actual marketing and sales are to be performed are left to the Retailers, who are permitted to use any lawful form of advertising, including, but not limited to, telemarketing, email solicitation, direct mail, and newspaper advertising. (DX-208, Mills Decl. ¶13.)

189. DISH does not give Retailers any specific instructions as to the timing or manner of marketing calls. Generally, the only verbatim scripting language that DISH provides to Independent Retailers are legal disclosures and disclaimers that relate to the product offering that must be utilized when consummating a sale. (DX-208, Mills Decl. ¶14.)

190. With certain exceptions, the Retailers are free to market the goods and services of any other entity, including competitors of DISH. (DX-208, Mills Decl. ¶15.)

191. DISH requires that Retailers operate under their own company name or a d/b/a name registered to the Retailer. (DX-208, Mills Decl. ¶15.)

192. DISH requires that Retailers comply with all applicable telemarketing laws, including by purchasing their own version of the NDNCR as well as registering as a telemarketer and accessing state Do Not Call lists, and post bonds in states that require it. (DX-164,

Deposition Transcript of Reji Musso, March 16, 2011 (“Musso Dep.”) 134:15-135:12; DX-91, Pl. Dep. Ex. (Musso) 295 at 1.) From time to time, DISH would ask the Retailers to provide it with “proof of [Retailer’s] compliance with all outbound telemarketing laws, including, but not limited to [Retailer’s] Do Not Call policy, Proof of Do Not Call Registrations and Outbound Telemarketing Scripts.” (DX-147, Deposition Transcript of Robb Origer, March 3, 2011 (“Origer Dep.”) 204:1-11; DX-99 Pl. Dep. Ex. (Origer) 144.)

193. DISH encouraged and, as set forth below in many instances, required Retailers to utilize the DNC Solutions tool offered through PossibleNOW. (DX-71, Pl. Dep. Ex. (Van Emst) 350; DX-49, Pl. Dep. Ex. (Origer) 159.)

194. DISH frequently reminds Independent Retailers of their obligations under the terms of the Retailer Agreement and under state and federal telemarketing laws, of the consequences that would result should a Retailer violate the telemarketing laws. (DX-208, Mills Decl. ¶17.)

195. DISH communicated to Independent Retailers DISH’s requirement that they comply with the TSR/TCPA policies through written communications referred to as “Facts Blasts” and “Retailer Chats” (DX-72, Pl. Dep. Ex. (Werner) 421; DX-90, Pl. Dep. Ex. (Werner) 265; DX-91, Pl. Dep. Ex. (Musso) 295; DX-92, Pl. Dep. Ex. (Origer) 142.

196. DISH disseminates reminders of the Retailer’s obligations under the terms of the Retailer Agreement in various forms, including written “Facts Blasts,” such as the Facts Blast that was sent by DISH to Retailers on or about November 11, 2006, which states in pertinent part:

**IMPORTANT REMINDER TO INDEPENDENT
RETAILERS WHO ENGAGE IN TELEPHONE
MARKETING AND SALES OF DISH NETWORK®
PRODUCTS AND SERVICES**

Your [DISH] Retailer Agreement prohibits Retailers from violating any applicable laws, including federal and state marketing and telemarketing laws.

The Retailer Agreement clearly provides that your relationship with [DISH] is that of an independent contractor. Your outbound and inbound call agents MUST identify the company that they work for. AGENTS MAY NOT SAY THAT THEY WORK FOR DISH NETWORK.

Failure to comply with the obligations in your [DISH] Retailer Agreement, applicable state and federal laws, and the cautionary statements in this document could lead to disciplinary action against you by [DISH], up to and including termination.

(DX-208, Mills Decl. ¶18 (emphasis in original).)

197. DISH also maintained a Retail Services department internally, which consisted of a variety of teams, including a risk and audit team that contained a compliance unit. (DX-150, Deposition Transcript of Blake Van Emst, March 18, 2011 (“Van Emst Dep.”) 28:21-29:8; 37:6-13; 39:8-15; 42:19-43:3.) The risk and audit team is responsible for ensuring that Independent Retailers are compliant with the current DISH Retailer Agreement and all DISH business rules. (*Id.* 91:15-92:3.)

198. The Retailer compliance team was overseen by Reji Musso, a Retail Services Compliance manager who was trained by members of DISH’s legal department on telemarketing compliance. (DX-164, Musso Dep. 19:10-13; 78:13-15.) Since at least 2006, DISH also dedicated two employees to compliance issues as they related to Retailers who used an order entry tool, including compliance with federal, state and local laws. (*Id.* 10:5-11; 14:9-16:7; 19:14-22.) DISH added a third employee with these responsibilities in 2011. (*Id.* 10:5-11; 14:9-16:7; 19:14-22.)

199. Representatives from this compliance team provided clear communication and education about key terms of the Retailer Agreement in retailer development forums that took

place throughout the United States several times a year. (DX-160, Deposition Transcript of Bruce Werner, March 10, 2011 (“Werner Dep.”) 38:25-39:10.) These events were sponsored by DISH’s direct sales channel to discuss with groups of Retailers a variety of topics, including audit and compliance issues. The Retailer compliance team attended six to eight of these types of events a year, providing training on compliance with the Retailer Agreement, including (depending upon what issues were current) “everything from TCPA, trademark license agreement issues, use of third parties, approval for use of third parties, those sort of things.” (*Id.* 14:13-16:7; 39:22-40:13.)

200. Also through the Retailer compliance unit, one of the ways that DISH oversaw and monitored Independent Retailer compliance with the Retailer Agreement, including the provision that the Retailers complied with all applicable laws, was through an established procedure in place since at least 2006 to deal with telemarketing complaints against Retailers. (DX-164, Musso Dep. 79:5-15; 79:23-82:11.) This procedure included performing research to attempt to identify the recipient of the call at issue by telephone number. (*Id.* 79:5-15; 79:23-82:11.) If DISH was able to do so, and if the call was made by an Independent Retailer, DISH notified the Independent Retailer of the allegation by letter, prepared in coordination with DISH’s legal department and signed by DISH’s compliance manager, and requested information relative to that interaction with the consumer. (*Id.* 79:5-15; 79:23-82:11; 83:3-14.)

201. In particular, DISH formally requested the Retailer’s internal do not call policy, the origination of the lead (if applicable), how the telephone interaction resolved, and the dialer records if there were any. DISH gave the Independent Retailer seven days to respond. (DX-164, Musso Dep. 81:7-20.) In DISH’s experience, Retailers responded to these letters and took them very seriously. (*Id.* 84:2-6.) DISH also monitored the e-mails that Retailers sent in response to

these inquiries (to an e-mail box to which each member of the compliance team has access) on a constant basis, five days a week. (*Id.* 86:11-88:4.)

202. DISH reviewed each response and, if anything was missing, either asked the Retailer for the information and/or asked for an explanation as to why it was not received. (DX-164, Musso Dep. 84:7-85:8.) DISH also added the response to its vendor inquiries tracker, so that it could continue to monitor the information and take further action as necessary. (*Id.* 84:7-85:8.)

203. DISH's Retail Services department also maintained a list (called a POE list) of any escalated customer complaints that warranted immediate sharing with its order entry Retailers. (DX-164, Musso Dep. 127:1-128:11.) Those complaints might include instances where the customer was particularly agitated, went through an executive contact at DISH, was referred by DISH's TCPA team, or had received multiple unwanted calls from a Retailer. (*Id.* 146:10-16.)

204. DISH notified Independent Retailers of escalated complaints to ensure that Retailers promptly removed the relevant number from their contact lists, and added the number to the Retailer's internal do not call lists. (DX-164, Musso Dep. 127:1-128:11; 141:5-11; DX-76, Pl. Dep. Ex. (Musso) 297.)

205. As of September 30, 2008, DISH required Independent Retailers that made 600 or more calls during the prior calendar year, and which engaged in any telemarketing, to engage with PossibleNOW so that PossibleNOW could provide any do not call requests to DISH. (DX-2, Montano Decl. ¶¶22 & 24; DX-213.) If such an Independent Retailer placed a call and the call recipient requested not to receive further outbound telephone calls made by the Retailer to sell DISH products or services, the Retailer was required to record and maintain the person's

telephone number (among other information) and send that information to DISH through PossibleNOW. (DX-2, Montano Decl. ¶¶25-26.)

206. If DISH became aware of a breach of the Retailer Agreement or a consumer complaint – *e.g.*, if a Retailer said it was calling “on behalf of” DISH – then DISH would investigate. (DX-147, Origer Dep. 54:6-55:5.) In instances when DISH was able to associate a consumer complaint with a particular Independent Retailer, then DISH’s Retail Services team would discuss the issue with the particular Retailer and the sales organization. (*Id.* 54:23-56:13; 58:6-59:18; 90:19-91:3.)

207. Furthermore, when DISH believed that an Independent Retailer engaged in activity that potentially violated telemarketing laws or regulations, it investigated the potential violation and if necessary took steps to address those potential violations, including termination of the applicable Retailer Agreement:

I-Satellite. (DISH investigated I-Sat and terminated this retailer because the retailer had engaged in TSR/TCPA violations.). (DX-156, Deposition Transcript of Mike Mills, May 3, 2012 (“Mills Dep.”) 352:21-355:4; DX-93, Pl. Dep. Ex. (Werner) 269; DX-94, Pl. Dep. Ex. (Snyder) 204; DX-95; Pl. Dep. Ex. (Van Emst) 355; DX-96 Pl. Dep. Ex. (Van Emst) 358; DX-97, Pl. Dep. Ex. (Musso) 318; DX-98, Pl. Dep. Ex. (Mills) 495;

Apex Satellite, Inc. (DISH investigated a consumer complaint and terminated this retailer for, among other things, TSR/TCPA violations and failure to comply with the terms of its Retailer Agreement.). (DX-100, Pl. Dep. Ex. (Werner) 274; DX-102, Pl. Dep. Ex. (Van Emst) 352; DX-103, Pl. Dep. Ex. (Snyder) 215; DX-104, Pl. Dep. Ex. (Musso) 301; DX-105, Pl. Dep. Ex. (Musso) 302; DX-106, Pl. Dep. Ex. (Musso) 304; DX-107, Pl. Dep. Ex. (Musso) 305;

JSR Enterprises. (DISH investigated JSR Enterprises after receiving complaints from consumers regarding JSR Enterprises’s telemarketing practices. DISH terminated JSR Enterprises because this retailer was found to have engaged in unlawful telemarketing practices and was ordered by a court to cease its telemarketing activities in the state of Missouri.). (*See* DX-111, Pl. Dep. Ex. (Werner) 431);

United Satellite. (DISH terminated this retailer after its investigation uncovered the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

Atlas Assets. (DISH terminated this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

Blu Kiwi (I Dish). (DISH assessed a \$10,000 penalty to this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

Sterling Communications Group. (DISH assessed a \$53,000 penalty to this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

Dish Factory Direct, Inc. (after investigating a consumer complaint, DISH sent a formal demand letter to this retailer to request information regarding the retailer's alleged improper telemarketing call to a consumer and proof by the retailer of its "compliance with all outbound telemarketing laws."). (DX-112, Pl. Dep. Ex. (Werner) 433);

Altitude Marketing, LLC. (DISH required Attitude Marketing, among others, to comply with its new program initiative whereby retailers were required to identify the root cause of consumer complaints.). (DX-115, Pl. Dep. Ex. (Werner) 277);

Satellite Systems Now. (DISH sent two formal demand notices to Satellite Systems Now requesting information regarding the retailer's alleged improper telemarketing call to a consumer, proof by the retailer of its compliance with all outbound telemarketing laws, and to cease and desist from any unlawful telemarketing activities.). (DX-116, Pl. Dep. Ex. (Werner) 260);

I-Dish. (after investigating a consumer complaint, DISH required this retailer to take corrective measures regarding its telemarketing practices.) (DX-117, Pl. Dep. Ex. (Werner) 264);

National Satellite Systems. (after investigating consumer complaints, this retailer was penalized for a TSR/TCPA violation and was required to take corrective measures to avoid any future infractions.). (DX-119, Pl. Dep. Ex. (Werner) 266); DX-118, Pl. Dep. Ex. (Snyder) 210; DX-120, Pl. Dep. Ex. (Van Emst) 363; DX-121, Pl. Dep. Ex. (Snyder) 221; DX-122, Pl. Dep. Ex. (Snyder) 224; DX-123, Pl. Dep. Ex. (Snyder) 231; DX-193, Pl. Dep. Ex. (Snyder) 224; DX-124, Pl. Dep. Ex. (Snyder) 235; DX-125, Pl. Dep. Ex. (Musso) 315; DX-126, Pl. Dep. Ex. (Musso) 321;

LA Activations Inc., d/b/a Direct Satellite Sales. (DISH terminated this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-127, Pl. Dep. Ex. (Werner) 279); (DX-129, Pl. Dep. Ex. (Van Emst) 359);

Cyberworks Software. (after investigating a consumer complaint, DISH sent a formal demand letter to this retailer to request information regarding the retailer's alleged improper telemarketing call to a consumer and proof by the retailer of its "compliance with all outbound telemarketing laws."). (DX-128, Pl. Dep. Ex. (Steele) 410); and

Defender Security. (DISH assessed a \$5,000 penalty to this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-133, Pl. Dep. Ex. (Mills) 506.)

208. As set forth above, DISH sent letters to Independent Retailers who were alleged or thought to have violated telemarketing laws. (DX-147, Origer Dep. 86:3-11; DX-99, Pl. Dep. Ex. (Origer) 144.) DISH would also send cease-and-desist letter to Independent Retailers who did not appear to be in compliance with telemarketing laws. (*Id.* 116:3-24; DX-108, Pl. Dep. Ex. (Origer) 151.)

209. DISH made business decisions based on the results of the investigation – many times requiring education, levying fines, or terminating the Retailer. (DX-147, Origer Dep. 91:4-92:11; *see also* DX-109, Pl. Dep. Ex. (Origer) 147.) DISH's Retail Services department informed the Retailer of the disciplinary action to be taken. (DX-147, Origer Dep. 92:21-93:11.) DISH's Retailer Services department sent letters to the Retailer to inform the Retailer how the situation was resolved. (*Id.* 95:2-22; *see also* DX-109, Pl. Dep. Ex. (Origer) 147.)

210. If DISH was unable to identify the caller about whom a consumer complained, in many instances, DISH attempted a "sting" operation to determine whether the caller was an Independent Retailer so that DISH could take appropriate action. (DX-147, Origer Dep. 111:14-113:13; *see also* DX-110, Pl. Dep. Ex. (Werner) 424; *see also* DX-136, Pl. Dep. Ex. (Laslo) 172.)

SPECIFIC RETAILERS IDENTIFIED BY PLAINTIFFS

211. As of January 2011, approximately 7,500 Independent Retailers sold DISH's products or services. (d/e 85, Opinion of Court Ordering Parties to Jointly File an Administrative Complaint with the FCC, 2/4/2011, at 9.)

212. Throughout this action, Plaintiffs have identified only a handful of Independent Retailers, which Plaintiffs referred to as "authorized dealers" and "Marketing Dealers" in the SAC. (d/e 257, SAC, at ¶¶38, 40, 41-48).

213. DISH filed a Motion for Judgment on the Pleadings Dismissing Claims of Liability Based Upon the Conduct of Third Parties Not Identified in the Complaint as to Plaintiffs' then operative Complaint. (d/e 70, DISH Motion for Judgment on the Pleadings, 1/10/2011.) DISH filed that motion based on Plaintiffs' failure to specifically identify the third parties for whom Plaintiffs were attempting to hold DISH liable.

214. In an Opinion entered on January 28, 2011, Judge McCuskey held that Plaintiffs were not required at that particular stage in the action (January 2011) to identify each of those Retailers and permitted Plaintiffs to develop discoverable information about all current and former Independent Retailers. (d/e 85, Opinion of Court re: d/e 70, DISH Motion for Judgment on the Pleadings, 1/10/2011, at 6, 9-10.)

215. From January 28, 2011 through the close of fact discovery in 2013, Plaintiffs had nearly two-and-half years to produce discovery regarding these 7,500 Independent Retailers.

216. While Judge McCuskey decided that Plaintiffs were not required to allege additional facts in their Complaint regarding any unidentified Retailers (d/e 85, Opinion of Court re: d/e 70, DISH Motion for Judgment on the Pleadings, 1/10/2011 at 6), they were required to come forward with that evidence by the close of discovery.

217. The time for that discovery has now closed and at the end of almost four years of discovery, Plaintiffs identified only eleven Independent Retailers who they claim committed violations: (1) DISH TV Now; (2) Tenaya/Star Satellite; (3) Planet Earth Satellite (“Planet Earth”); (4) Vision Quest; (5) New Edge Satellite (“New Edge”); (6) JSR Enterprises (“JSR”); (7) Defender Direct (“Defender”); (8) National Satellite Systems (“NSS”); (9) Satellite Systems Network (“SSN”); (10) DISH Direct and (11) E-Management. (DX-195, Supplemental Expert Report of Dr. Erez Yoeli revised October 21, 2013, Appendix A; DX-196, Revised Report by Dr. Erez Yoeli dated December 14, 2012; DX-199, Revised Rebuttal Report by Dr. Erez Yoeli dated December 14, 2012; DX-198, Rebuttal Report by Dr. Erez Yoeli dated October 16, 2012; DX-197, Report of Dr. Erez Yoeli dated July 19, 2012; DX-194, Plaintiff’s Supplemental Responses to DISH’s Interrogatories dated December 14, 2012; DX-140, Plaintiff’s Supplemental Responses to DISH’s Third Set of Interrogatories dated April 6, 2012; DX-142, Plaintiff’s Responses to DISH’s Third Set of Interrogatories dated March 16, 2011.)

218. Plaintiffs attempt to prove that certain Independent Retailers placed illegal telemarketing calls by relying on the same flawed “massive computer programming” that Plaintiffs rely on with respect to DISH call records. (DX-194, DX-195, DX-196, DX-197, DX-198 and DX-199.)

219. There is no proof that the call records relating to Planet Earth, Vision Quest, New Edge, JSR, Defender, NSS, SSN, DISH Direct and E-Management contain: (i) exclusively interstate calls to residential consumers, as opposed to businesses or the government; (ii) calls to residential landlines, as opposed to wireless numbers; (iii) calls related to DISH’s products or services, as opposed to some other entity’s products or services; (iv) calls relating to telemarketing; (v) calls without an EBR or, not in response to an inquiry; (vi) calls to the person

(or household) that put their number on the NDNCR on the Independent Retailers' respective internal do not call lists.

220. There is no proof that the call records relating to Dish TV Now and Tenaya/Star Satellite contain: (i) exclusively interstate calls to residential consumers, as opposed to businesses or the government; (ii) calls to residential landlines, as opposed to wireless numbers; or (iii) calls without an EBR or not in response to an inquiry.

221. Nicholas Mastrocinque, who was an Investigator at FTC working on the FTC's investigation of DISH and the Independent Retailers, testified that he and his colleagues placed calls to consumers whose phone number appeared in the call records produced by Independent Retailers. (DX-162, Mastrocinque Dep. 150:24 – 161:14.) According to Mr. Mastrocinque, he and his FTC colleagues randomly selected from multiple sets of Independent Retailer call records a small sample of consumers to call to conduct an interview. (*Id.* 151:21- 153:2.) Mr. Mastrocinque testified that in response to his and his colleagues' questions, some consumers indicated that they had an EBR with the calling party, (*Id.* 152:22-153:13), some consumers may have indicated that the calls that they received were not telemarketing calls (*Id.* 156:17-157:8), and some consumers would indicate that a product other than a DISH product or service was offered (*Id.* 158:17-159:6.) Mr. Mastrocinque testified that although consumers stated, with respect to specific calls that they received, that they had an EBR or that a product other than a DISH product was offered, the FTC did nothing to remove such calls from the violations claimed in this lawsuit. (*Id.* 160:21-161:14.)

DISH TV NOW

222. In this lawsuit, the FTC claims TSR violations arising from calls allegedly placed on behalf of DISH TV Now, a former Independent Retailer, from June 1, 2004 to August 10,

2004. (DX-198; DX-195.) The FTC claims that all of the violation calls allegedly related to DISH TV Now were placed by Guardian Communications, a third party company that facilitated the provision of pre-recorded telephone messages to consumers. (DX-198; DX-195.)

223. State Plaintiffs do not seek any relief based on calls allegedly made by or on behalf of DISH TV Now. (DX-195, Supplemental Expert Report of Dr. Erez Yoeli revised October 21, 2013, Appendix A.)

224. Guardian Communications was not a telemarketer. (DX-173, Baker Dep. 13:21-23.)

225. Guardian was never an Independent Retailer, and never had any relationship whatsoever with DISH. (DX-173, Deposition Transcript of Kevin Baker, May 14, 2012 (“Baker Dep.”) 13:21-23; 55:15-17.)

226. DISH never contracted with Guardian Communications to place telemarketing calls on behalf of DISH. (DX-173, Baker Dep. 13:22-23; 55:8-17.)

227. DISH TV Now became an Independent Retailer in November 2003. (DX-156, Mills Dep. 19:18-20.)

228. The principal of DISH TV Now was an individual named David Hagen. (DX-208, Mills Decl. ¶27.)

229. Mr. Hagen was also the principal of a company named “Prime TV,” which sold DirecTV products and services. (DX-156, Mills Dep. 19:18-21:16; 29:20-30:4; DX-149, Deposition Transcript of David Hagen, January 12, 2012, (“Hagen Dep.”) 92:16–94:9.)

230. Prime TV had a long term relationship with DirecTV at the time DISH TV Now became an Independent Retailer. (DX-169, Deposition Transcript of Amir Ahmed, April 11, 2012 (“Ahmed Dep.”) 47:14-48:3; DX-149, Hagen Dep. 11:18-21.)

231. DISH TV Now signed a Retailer Agreement.

232. That Retailer Agreement confirmed the fact that DISH TV Now was an independent contractor of DISH. It also required DISH TV Now to agree that it would comply with all “applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto,” including the TSR and TCPA.

233. DISH had no knowledge that DISH TV Now made outbound telemarketing calls or used pre-recorded messages to promote DISH’s products and services. (DX-208, Mills Dep. 35:7-37:21; DX-149, Hagen Dep. 34:15-36:5; DX-169, Ahmed Dep. 47:18-52:9.)

234. DISH did not know that DISH TV Now used Guardian to place pre-recorded messages. (DX-169, Ahmed Dep. 47:18-52:9.)

235. DISH TV Now was an independent business. (DX-149, Hagen Dep. 131:10-135:2; 135:22-136:22.)

236. Mr. Hagen testified on behalf of DISH TV Now as follows:

Q. Okay, Did DISH ever supply to you lists of consumers to contact?

A. No.

Q. Did you ever advise DISH of the consumers that you were going to contact to attempt to sell DISH’s products and services?

A. No.

Q. Would DISH know the origin of each referral that – or strike that. Would DISH know the referral source of new orders placed by DISH TV Now?

A. I assume you mean, would they know the advertising source, the – the – where it came from?

Q. Yes.

A. And the answer is, they wanted to, but, no, they didn’t.

Q. So that was something – so that was the information that they asked for you to provide?

A. Yeah. But I was disinclined because I considered that proprietary.

Q. And in some respect was DISH a competitor of yours with respect to –

A. Absolutely. Absolutely. In fact, they were our largest – maybe they were our – in my mind, they were our only competitor. Because they were outselling customers four or five times larger in resources than we were.

(DX-149, Hagen Dep. 134:1 – 135:2.)

237. DISH terminated DISH TV Now as a retailer more than six years ago on January 20, 2006. (DX-207, Notice of Termination letter.)

238. Plaintiffs performed a small sample analysis of DISH TV Now's call records to determine whether those call records indicate calls made to individual consumer landlines, and not to business numbers, wireless numbers, or numbers that were unable to be classified as a consumer landline, business number or wireless number. (DX-137, Declaration of Rick Stauffer dated October 10, 2012.) Plaintiffs could only conclude that a portion of the calls were made to individual consumer landlines, while a significant percentage were not.

239. There is no evidence that the calls allegedly made by DISH TV Now were limited solely to calls to a consumer, rather than a business or a government phone number.

240. There is no evidence that DISH controlled the manner or means in which DISH TV Now marketed or sold DISH products or services.

TENAYA/STAR SATELLITE

241. In this lawsuit, Plaintiffs also claim violations arising from calls allegedly placed on behalf of former Independent Retailer Tenaya/Star Satellite from July 30, 2005 to November 26, 2005. (DX-198; DX-195.) The FTC claims that all of the violation calls related to Tenaya/Star Satellite were placed by Guardian. (DX-198; DX-195.)

242. Tenaya was founded in 2002 by Walter Myers. (DX-168, Deposition Transcript of Walter Eric Myers, February 24, 2012 (“Myers Dep.”) 17:13-18:13.)

243. After Mr. Myers formed Tenaya, he contacted DISH and advised that he wanted to sell DISH services door-to-door. (DX-168, Myers Dep. 20:15-21:16; 33:24-34:8.) Mr. Myers did not tell DISH anything about the possibility of using telemarketing. (*Id.* 21:17-19.)

244. Tenaya entered into a Retailer Agreement with DISH, and in 2002 and 2003, sold DISH services primarily through door-to-door marketing. In 2003 and 2004, Star Satellite, like Tenaya, primarily used door-to-door marketing to sell DISH services. (DX-135, Tenaya Account Summary; DX-168, Myers Dep. 18:19-20; 20:15-21; 30:9-25.)

245. In February 2003, Walter Myers’s brother, Dan Myers, formed a new company called Star Satellite. Several months later, in May 2003, Star Satellite entered into a “Retailer Agreement” with DISH. (Plaintiffs’ Undisputed Material Facts (“Pl. UF.”) Exhibit 200.)

246. Walter Myers thereafter became a principal of Star Satellite, and conducted all sales activities of DISH services through Star Satellite, and not through Tenaya. (DX-168, Myers Dep. 38:10-21.)

247. The Tenaya and Star Satellite Retailer Agreements provide, among other things, that Tenaya/Star Satellite would “promote and solicit orders for” DISH programming services, subject to the terms of the Agreement. (Pl. UF., Exhibit 200, § 3.1.)

248. Pursuant to the terms of the Retailer Agreements, “[t]he relationship of the parties [*i.e.*, Tenaya/Star Satellite and DISH] is that of independent contractors. [Tenaya/Star Satellite] shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be [Tenaya/Star Satellite’s] employees only, and not employees or agents of [DISH] or its Affiliates.” (Pl. UF., Exhibit 200, § 11.)

249. The Retailer Agreements required Tenaya/Star Satellite to “prominently state its business name, address and phone number in all communications with the public,” and was prohibited from “hold[ing] itself out to the public or represent that it is an agent, employee or Affiliate” of DISH.” (Pl. UF., Exhibit 200, § 11.)

250. The Retailer Agreements also required that Tenaya/Star Satellite “shall comply with all applicable governmental, statutes, laws, rules, regulations, ... now enacted or hereafter promulgated, in force during the Term ...” (Pl. UF., Exhibit 200, § 9.1; *see also* DX-168, Myers Dep. 175:23-176:20.)

251. Star Satellite/Tenaya was an independent business. (DX-168, Myers Dep. 176:21-181:17.)

252. As an Independent Retailer, Tenaya/Star Satellite had extensive autonomy. (DX-168, Myers Dep. 177:17-21.) It was free to market the goods and services of any other company, including DISH’s competitors. (*Id.* 174:9-13.) It was also up to Tenaya/Star Satellite, and not DISH, to decide the details of when and how Tenaya/Star Satellite marketed DISH’s products and services, regardless of whether such marketing involved door-to-door sales, or newspaper, radio or television advertisements. (*Id.* 174:14-175:22.)

253. Tenaya/Star Satellite had the sole discretion to decide which mode of advertising to use, so long as it was legal; DISH did not permit Tenaya Star Satellite to engage in any illegal marketing activities. (DX-168, Myers Dep. 175:23-176:20.)

254. DISH also had no involvement in how Tenaya/Star Satellite operated its day-to-day affairs, and did not direct or control Tenaya/Star Satellite’s business. (DX-168, Myers Dep. 178:4-179:16.)

255. When Tenaya/Star Satellite's salespeople marketed DISH's products and services, they would always identify themselves as individuals who worked for Star Satellite, and not for DISH. (DX-168, Myers Dep. 179:17-180:17.)

256. Tenaya/Star Satellite also sold DirecTV's products and services. (DX-168, Myers Dep. 53:11-14.)

257. In the middle of 2004, however, and unbeknownst to DISH, Tenaya/Star Satellite began working with Guardian. (DX-168, Myers Dep. 76:3-7.)

258. Although Star Satellite advised DISH that it was conducting "some phone sales" (not specifying whether they were inbound or outbound), Tenaya/Star Satellite never disclosed to DISH "any of the details" of its telemarketing efforts, or that it had engaged "Guardian to do ... pre-recorded messages" or even that it was working with Guardian. (DX-168, Myers Dep. 102:8-104:17; 117:22-118:5; 182:12-183:18.)

259. DISH advised Tenaya/Star Satellite to ensure that it was complying with all laws, and specifically to make sure that Tenaya/Star Satellite conveyed certain disclaimers to consumers, and to scrub against the Do Not Call List, which Tenaya/Star Satellite confirmed to DISH that it was doing. (DX-168, Myers Dep. 121:12-123:15.)

260. Tenaya/Star Satellite failed to disclose to DISH that it was working with Guardian and affirmatively concealed from DISH that it utilized pre-recorded message calling and auto-dialing. It was "a well-known fact" that DISH could terminate a Retailer relationship if it learned that a Retailer used auto dialing. (DX-173, Baker Dep. 177:7-15.)

261. On at least two occasions when DISH representatives were scheduled to visit Tenaya/Star Satellite's offices, Walter Myers contacted Guardian to advise that it was temporarily ceasing its telemarketing activities because "DISH Network is coming into our

office and we can't let them know we're auto dialing." (DX-173, Baker Dep. 71:23-72:5; 177:23-178:4.)

262. Plaintiffs performed a small sample analysis of Tenaya/Star Satellite's call records to determine whether those call records indicate calls made to individual consumer landlines, as opposed to calls to business numbers, wireless numbers, or numbers that were unable to be classified as a consumer landline, business number or wireless number. (DX-137, Declaration of Rick Stauffer dated October 10, 2012.) Plaintiffs concluded that only a minority of the call records reflected calls made to individual consumer landlines.

263. There is no evidence that the call records related to Tenaya/Star Satellite are comprised of only calls to residential consumers.

264. There is no evidence that DISH controlled the manner or means in which Tenaya/Star Satellite marketed or sold DISH products or services.

265. DISH terminated Tenaya/Star Satellite's access to DISH's order entry tool on January 20, 2006.

VISION QUEST

266. Plaintiffs alleged in the SAC that Vision Quest, a Michigan-based company, is a "Marketing Dealer" that committed TSR, TCPA and/or other state law violations for which DISH should be held responsible. (d/e 257 ¶40.)

267. In February 2006, the FTC served a CID on McLeod Telecom ("McLeod"), a telecommunications provider, seeking account information and "local and long distance telephone connection records" "relating to the customer/subscriber Vision Quest any other telephone number(s) or account(s) held by the same customer/subscriber." (DX-203.)

268. In response to the CID, McLeod produced 1,419,998 call records for calls related to accounts held by Vision Quest during the time period from July 1, 2005 to March 31, 2006. (DX-194, Plaintiff's Supplemental Responses to DISH's Interrogatories dated December 14, 2012, Exhibit A; DX-171, Deposition Transcript of Brian Cavett, February 29, 2012 ("Cavett Dep.") 100:7-8; 110:16-20; 111:21-23; 177:3-6.)

269. McLeod was not deposed in this action.

270. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of Vision Quest telecommunications records. (DX-194.)

271. The calls allegedly placed by Vision Quest, however, are not addressed in Plaintiffs' expert report and Plaintiffs, therefore, have abandoned their claims that DISH should be held liable for such calls. (DX-195.)

272. Vision Quest began selling DISH's products and services in 2001, and had a Retailer Agreement with a company known as CVS Systems, which was a distributor of DISH's products. (DX-171, Cavett Dep. 12:21 - 13:20.)

273. Vision Quest's principal was Bryan Cavett. (DX-171, Cavett Dep. 9:4-6.)

274. Mr. Cavett testified that he had limited contact with DISH, but had regular contact with CVS. (DX-171, Cavett Dep. 72:5-6 ("Like I said we really didn't have contact with DISH Network."); *Id.* 80:17-21 (Q. "Did DISH Network offer any training for your sales reps?" A. "Well, again, everything was through CVS. They didn't really have anything you know for us, we didn't have much contact with them.").)

275. Vision Quest was an independent business. (DX-171, Cavett Dep. 175:13-176:19.)

276. DISH had no involvement in Vision Quest's business, how it operated its day-to-day affairs, and did not direct or control Vision Quest's business. (DX-171, Cavett Dep. 175:13-176:8.)

277. Mr. Cavett further testified that DISH exercised no control over Vision Quest's business, advertising or sales efforts:

I mean when I, when I did telemarketing I did telemarketing. [DISH is] not in control of me telemarketing. They don't have control over any advertising that I do whether it's mail, whether it's door-to-door, whether it's telemarketing, whether it's radio, whether it's TV. . . . [T]hey don't have no control over what I do for marketing at all, they have none. It's, I'm a retailer I'm a separate person from them what I choose to do is what I choose to do.

(DX-171, Cavett Dep. 129:1-13.)

278. DISH did not tell Vision Quest how to market, whether by telemarketing, mail, door-to-door, radio or television, the products and services it sold. (DX-171, Cavett Dep. 129:3-6; 150:4-10; 173:21-22; 175:13-176:8; 187:13-188:4.)

279. When the FTC raised to Mr. Cavett that it believed DISH should be held responsible for Vision Quest's alleged actions, Mr. Cavett responded that:

I let them know that I don't really understand you know how they can feel that. I'm a complete independent retailer I make my own decisions. I'm no different than like Sears who buys a product from some other place and how they choose to advertise it is up to them. I'm literally the same kind of guy. I'm buying a product that I want to sell and they you know in no manner told that I got to go in and do this.

(DX-171, Cavett Dep. 187:19-188:3.)

280. Mr. Cavett testified that Vision Quest did commercial (non-residential) sales in addition to residential sales. (DX-171, Cavett Dep. 41:7-17.) Commercial sales included sales to "mom and pops . . . to large manufacturing to . . . chains like Burger King, bars, doctors,

lawyers, hospitals.” (*Id.* 143:13-17). Mr. Cavett testified that Vision Quest did a great number of commercial sales between 2004 and 2008, including through the use of telemarketing. (*Id.* 143:18-144:8.)

281. Vision Quest made calls to consumers and businesses. (DX-171, Cavett Dep. 144:11-17; 168:25-169:11; 177:25-178:3)

282. Mr. Cavett testified that he believed that 90 percent of the telemarketing calls made by Vision Quest were in Michigan to Michigan recipients. (DX-171, Cavett Dep. 147:4-7.)

283. Mr. Cavett further testified at his deposition that Vision Quest made both telemarketing and non-telemarketing calls, and that it is not possible from Vision Quest’s phone records to distinguish between calls made for telemarketing calls as opposed to calls made for other purposes. (DX-171, Cavett Dep. 177:17-178:2.)

284. He also testified that Vision Quest’s phone records reflected outbound calls to Vision Quest’s own customers to confirm an installation appointment, as well as follow-up calls with Vision Quest’s customers to “see how the installation went, kind of a survey basically to ask how [its] technician was.” (DX-171, Cavett Dep. 178:11-179:9.)

285. Mr. Cavett also testified that Vision Quest received service calls from its own customers, and placed outbound calls to discuss service issues and in response to customer’s messages to set up a service appointment. (DX-171, Cavett Dep. 179:9-13 (“You know other times the call could be from if they need service and they, you know we pick it up on the voice mail or whatever. It comes in late at night then we return calls there because we didn’t have a 24 hour service either.”).)

286. Many outbound calls made by Vision Quest were in response to a customer's inquiry. (DX-171, Cavett Dep. 179:19-180:6.)

NEW EDGE SATELLITE

287. Plaintiffs alleged in the SAC that New Edge Satellite ("New Edge"), another Michigan-based company, is a "Marketing Dealer" that committed TSR, TCPA and/or other state law violations for which DISH should be held responsible. (d/e 257 ¶40.)

288. In February 2006, the FTC served a CID on LDMI/Tak America ("LDMI"), a telecommunications provider, seeking account information and "local and long distance telephone connection records" "relating to the customer/subscriber New Edge Satellite any other telephone number(s) or account(s) held by the same customer/subscriber." (DX-204.)

289. In response to the CID, LDMI produced approximately 1 million call records for calls related to accounts held by New Edge Satellite during the time period from February 2005 to September 2006. (DX-194.)

290. LDMI was not deposed in this action.

291. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of New Edge's telecommunications records. (DX-194.)

292. The calls allegedly placed by New Edge are not addressed in Plaintiffs' expert report and, therefore Plaintiffs have abandoned their claims that DISH could be held liable for such calls. (DX-195.)

293. New Edge Satellite began selling DISH products and services sometime in 2003 after setting up an account with CVS, a distributor that sold DISH products. (DX-172,

Deposition Transcript of Derek LaVictor, February 28, 2012 (“ LaVictor Dep.”) 17:16-18 (“No I did not have any contract with DISH Network. And when I set up the account I contracted CVS not DISH Network.”); *Id.* 24:20-23.)

294. New Edge was an independent business. (DX-172, LaVictor Dep. 151:5-157:12.)

295. There is no evidence that DISH controlled the manner or means in which New Edge marketed or sold DISH products or services. (DX-172, LaVictor Dep. 151:8-152:10; 154:8-15.)

296. New Edge Satellite also sold products and services of companies other than DISH. (DX-172, LaVictor Dep. 151:1-7.)

297. DISH had no involvement in how New Edge operated its day-to-day affairs, and did not direct or control New Edge’s business. (DX-172, LaVictor Dep. 154:16-157:8.)

298. Derek LaVictor, a principal of New Edge, testified that before his deposition, he had several conversations with a Department of Justice (“DOJ”) lawyer who told him that Plaintiffs were trying to prove that a link existed between New Edge and DISH. Mr. LaVictor told the DOJ lawyer that there was no link between New Edge and DISH and that New Edge “was more linked to CVS than anything.” (DX-172, LaVictor Dep. 143:3-144:6.)

299. New Edge made all of its own decisions regarding whether and how to market the products it sold, including DISH’s products and services. (DX-172, LaVictor Dep. 153:8-157:12.)

300. When New Edge’s employees called customers in an attempt to sell DISH services, they identified themselves as “New Edge Satellite.” (DX-172, LaVictor Dep. 156:18-23.)

301. New Edge had frequent interactions with its own customers. Mr. LaVictor testified that:

[p]eople are always calling. We had you know one person a lot of times dedicated half the day just taking care of service issues and people generally not understanding the system and trying to rectify problems.

(DX-172, LaVictor Dep. 161:25-162:6.) Mr. LaVictor testified that when customers would call in with service issues, New Edge would “[c]all them back and . . . schedule with the service tech, schedule a service call and we’d go back out and fix it.” (DX-172, LaVictor Dep. 162:19-163:13.)

302. New Edge’s phone records included calls that were made to respond to customer service inquiries. (DX-172, LaVictor Dep. 159:12-24.)

303. Mr. LaVictor testified that New Edge’s telephone records also included other types of non-telemarketing calls, such as calls to confirm installation or to determine whether installation was successful, as well as personal calls made by New Edge employees. (DX-172, LaVictor Dep. 158:22 -159:24.)

304. The majority of outbound calls made by New Edge were made from Michigan to Michigan residents. (DX-172, LaVictor Dep. 149:4-9.)

305. Mr. LaVictor testified that DISH never provided New Edge with a list of customers to whom it should attempt to sell DISH products:

Q. Did DISH ever supply to New Edge Satellite the names, telephone numbers or addresses of people that New Edge Satellite should attempt to make sales to?

A. Attempt to make sales to, no.

Q. Did CVS ever provide dial lists or lead lists to New Edge Satellite?

A. No.

* * *

Q. Did DISH Network know who CVS was calling or I’m sorry did DISH Network know who New Edge Satellite was calling for marketing purposes?

A. No.

(DX-172, LaVictor Dep. 153:17-23; 154:4-7.)

PLANET EARTH SATELLITE

306. Plaintiffs alleged in the SAC that Planet Earth Satellite (also known as Teichert Marketing) (“Planet Earth”), an Arizona company, is a “Marketing Dealer” that committed TSR, TCPA and/or other state law violations for which DISH should be held responsible. (d/e 257 ¶40.)

307. In February 2006, the FTC served a CID on Electric Lightwave and Integra Telecom, Inc, two telecommunications providers purportedly used by Planet Earth, seeking “local and long distance telephone connection records” for Planet Earth. (DX-202.)

308. In response to the CID, those providers collectively produced over 1.5 million call records for the time period spanning from November 30, 2004 to December 29, 2005, and from January 1, 2005 to January 31, 2007. (DX-194.)

309. Neither Electric Lightwave nor Integra Telecom was deposed in this action.

310. In response to DISH’s interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the “raw hits” analysis performed by Interimage, which chart included call records and the “raw hits” analysis results of Planet Earth’s telecommunications records.

311. The calls allegedly placed by Planet Earth, however, are not addressed in Plaintiffs’ expert report and thus there is no evidence that DISH can or should be held liable for such calls. (DX-195.)

312. Planet Earth was an independent business. (DX-161, Deposition Transcript of Thomas Teichert, February 23, 2012 (“Teichert Dep.”) 173:1-178:13.)

313. Planet Earth’s principal is Tom Teichert. (DX-206.)

314. Planet Earth also sold DirecTV's, Cox Cable's and Qwest's products and services. (DX-161, Teichert Dep. 45:18-20.)

315. DISH did not control the manner or means in which Planet Earth marketed or sold DISH products or services. (DX-161, Teichert Dep. 173:1-175:10.)

316. DISH had no involvement in how Planet Earth operated its day-to-day affairs, and did not direct or control Planet Earth's business. (DX-161, Teichert Dep. 175:12-178:13.)

317. DISH never approved or reviewed the list of leads that Planet Earth intended to call, nor did DISH have any knowledge of who Plaintiff Earth called. (DX-161, Teichert Dep. 177:14- 20.)

318. Mr. Teichert testified that the records produced by Planet Earth's telecommunications providers would include calls made for non-telemarketing purposes, as well as calls to consumers who consented to be called. (DX-161, Teichert Dep. 187:9-12.)

319. In particular, Mr. Teichert testified that Planet Earth's telephone records would include telephone calls to follow up with customers that sales representatives met during door-to-door sale activities, where such customers consented to be called. (DX-161, Teichert Dep. 184:10-185:18.)

320. Mr. Teichert also testified that Planet Earth would make "2-2-2 calls" for both Planet Earth's DirecTV and DISH customers. (DX-161, Teichert Dep. 185:19-186:16.) Mr. Teichert explained that "2-2-2 calls" are customer service calls to existing customers, and are common in the industry and "that's what you do to keep your customers." (*Id.* 185:19-186:16.)

321. Mr. Teichert testified that Planet Earth would regularly return the calls of customers who had service questions, such as "question[s] on how their remote works." (DX-

161, Teichert Dep. 186:20-187:4.) These types of calls were also included in Planet Earth's telecommunications records. (*Id.*)

322. Mr. Teichert testified that about half of the calls made by Planet Earth were made from Arizona to Arizona consumers. (DX-161, Teichert Dep. 188:10-189:1.)

323. Mr. Teichert testified that he did commercial sales for both DISH and DirecTV, and that Planet Earth made calls to business customers and prospects. (DX-161, Teichert Dep. 189:2-190:1.) Mr. Teichert testified that records of such calls were also included within Planet Earth's telecommunications call records. (*Id.*)

324. Mr. Teichert also testified that Planet Earth made calls to DirecTV customers who had disconnected service in an attempt to get those customers to reconnect service, and that records of those calls would be included in the phone records produced to the FTC by Planet Earth's telecommunications' providers. (DX-161, Teichert Dep. 190:2-191:11.)

325. Mr. Teichert testified that multiple persons who are not associated with any Independent Retailer have contacted him in an attempt to sell him sales to be put through Planet Earth. (DX-161, Teichert Dep. 195:10-198:25.) Mr. Teichert believes that these third parties do outbound dialing to United States consumers from overseas in an effort to sell DISH products and services, even though they are not authorized to do so, and then attempt to sell those "sales" or leads to Independent Retailers. (*See id.*)

326. Mr. Teichert does not believe that DISH should be held responsible for any allegedly illegal telemarketing calls made by Planet Earth because Planet Earth is its own company that operated separately from DISH. (DX-161, Teichert Dep. 222:11-223:5.)

JSR ENTERPRISES

327. In this action, Plaintiffs claim violations arising from calls allegedly placed by JSR from August 4, 2006 to March 31, 2007. (DX-194.)

328. In March 2007, the FTC served a Civil Investigative Demand on Airespring, Inc., a telecommunications provider, seeking account information and “local and long distance telephone connection records” associated with Toll-Free-Number 866-895-5420, and “any other telephone number(s) or account(s) held by the same customer(s) or subscriber(s).” (DX-200.)

329. According to Plaintiffs’ discovery responses, Airespring, Inc. served more than 30 million records for calls related to accounts held by JSR during the time period from August 4, 2006 to March 31, 2007. (DX-194.)

330. Neither Airespring, Inc. nor JSR was deposed in this action.

331. There is no evidence that each of the JSR’s accounts with Airespring, Inc. was used for a telemarketing purpose, or for the purpose of selling DISH products and/or services.

332. There is no evidence that all of the 30 million call records produced by Airespring, Inc. relate to telemarketing calls placed by JSR in an attempt to sell a DISH product or service.

333. There is no evidence that the 30 million call records produced by Airespring, Inc. included interstate calls, or calls made to residential consumers rather than to businesses or the government.

334. The FTC claims that DISH should be held liable for more than 7 million calls allegedly made by JSR that the FTC claims are violations of the TSR provisions governing calls to persons who place their phone numbers on the NDNCR.

335. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]. (DX-211, Deposition Transcript of Dr. Erez Yoeli, December 16, 2013 (“Yoeli Dep.”) 204:19-205:7; DX-195.)

336. [REDACTED]
[REDACTED]

[REDACTED]. (DX-211, Yoeli Dep. 215:5-216:17.) State Plaintiffs, however, have no evidence of which calls (if any) were placed to residents of their respective states.

337. [REDACTED]. (*See e.g.*, DX-138, Pl. Dep. Ex. (Myers) 14.)

338. JSR signed a Retailer Agreement when it became an Independent Retailer. (*See e.g.*, DX-138.)

339. That Retailer Agreement confirmed the fact that JSR was an independent contractor of DISH. It also required JSR to agree that it would comply with all “applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto,” including the TSR/TCPA.

340. DISH terminated JSR as a retailer almost seven years ago on or about February 13, 2007. The termination was a result of an investigation conducted by DISH, which revealed that JSR violated telemarketing laws. (DX-141, Notice of Termination letter.)

341. Notably, of the approximately 7 million allegedly illegal calls that Plaintiffs identify, 4,000,200 of those calls occurred during the 45 day period *after* DISH terminated JSR as an Independent Retailer on February 13, 2007. (DX-195, Appendix A.)

342. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]. (DX-137, Declaration of Rick Stauffer dated October 10, 2012 ¶10(f).) [REDACTED]

343. In addition, there is no evidence that JSR's calls were made to individual consumer landlines that properly belong on the NDNCR, as opposed to individual consumer landlines that were disconnected after a consumer placed the number on the NDNCR, but which number was later reassigned.

344. There is no evidence that DISH controlled the manner or means in which JSR marketed or sold DISH products or services.

National Satellite Systems

345. In this lawsuit, the FTC's claim that DISH is liable for internal list TSR violations arising from calls allegedly placed by NSS from December 2, 2008 and June 21, 2010. (DX-195.)

346. [REDACTED]

[REDACTED]. (DX-211, Yoeli Dep. 212:25-213:19.)

347. State Plaintiffs do not seek to recover for any call placed by NSS. (DX-195.)

348. NSS became an Independent Retailer in or about 2001 or 2002. (DX-151, Levi Dep. 21:5-12.)

349. The principal of NSS was an individual named Kobi Levi. (DX 208, Mills Declaration ¶ 39, January 6, 2014).

350. NSS was a party to a Retailer Agreement. (Pl. UF., ¶370, Ex. 274 at DISH-Paper-007772-007811.)

351. That Retailer Agreement confirmed the fact that NSS was an independent contractor of DISH. (Pl. UF., ¶370, Ex. 274 at DISH-Paper-007772.) It also required NSS to agree that it would comply with all “applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto,” including the TSR/TCPA. (Pl. UF., ¶370, Ex. 274 at DISH-Paper-007789.)

352. NSS is an independent business. (DX-151, Deposition Transcript of Kobi Levi, January 11, 2012 (“Levi Dep.”) 223:9-227:21.)

353. DISH did not provide any lead lists to NSS, or otherwise supply to NSS the names and contact information of persons who NSS should contact to sell DISH’s products and services. Nathaniel William Jones, a former employee of DISH who later became employed by NSS, testified as follows:

Q Did you ever provide dial lists or lead lists to retailers for them to contact to attempt to sell DISH products or services?

A No.

Q Are you aware of anyone at DISH that provided retailers with those types of lists for the purpose of contacting consumers to purchase DISH products or services?

A No.

(DX-107, Deposition Transcript of Nathaniel William Jones, January 10, 2012 (“Jones Dep.”) 208:25-209:8.)

354. Mr. Levi testified on behalf of NSS, as follows:

Q: Did DISH supply to NSS the names, addresses, or other contact information of persons who NSS should contact to sell DISH products and services?

A: Not that I remember.

(DX-151, Levi Dep. 225:4-11.)

355. There is no evidence that any of NSS’s call records demonstrate that they consist of calls made solely to individual consumer landlines, and not to wireless telephone numbers, business or government numbers, pagers, maritime radios, and other devices.

356. There is no evidence that any calls allegedly made by NSS were limited solely to telemarketing calls to a residential consumer.

357. There is no evidence that any calls allegedly made by NSS were limited solely to telemarketing calls to a consumer for the purpose of selling a DISH product or service.

358. There is no evidence that DISH controlled the manner or means in which NSS marketed or sold DISH products or services.

SATELLITE SYSTEMS NETWORK

359. In this lawsuit, Plaintiffs claim that DISH should be liable for calls placed by SSN. (DX-195, Ex. A.)

360. SSN became an Independent Retailer on or around March 20, 2001. (Pl. UF., ¶228, Ex. 179.)

361. SSN signed a Retailer Agreement when it became a DISH retailer. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676-014695.)

362. That Retailer Agreement confirmed the fact that SSN was an independent contractor of DISH. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676.) It also required SSN to agree that it would comply with all “applicable federal, state, and local laws, rules and regulations, and all amendments thereto,” including the TSR/TCPA. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014686.)

363. SSN was not deposed in this action.

364. There is no evidence that any of SSN’s call records reflect were calls made solely to individual consumer landlines, and not to wireless telephone numbers, business or government numbers, pagers, maritime radios, and other devices.

365. There is no evidence that any of SSN’s call records were calls made solely to individual consumer landlines that properly belong on the NDNCR as opposed to individual consumer landlines that were disconnected after a consumer placed the number on the NDNCR, but which number was later reassigned.

366. There is no evidence that any calls allegedly made by SSN on behalf of DISH were limited solely to telemarketing calls to a consumer.

367. None of SSN’s call records establish any of those calls were placed by a SSN for the purpose of selling DISH’s products or services, rather than some other product.

368. There is no evidence that DISH controlled the manner or means in which SSN marketed or sold DISH products or services.

DISH DIRECT

369. In 2006, the FTC served a CID on Qwest Communications Int’l, Inc. (“Qwest”), a telecommunications provider, seeking account information and “local and long distance telephone connection records” relating to Dish Direct. (DX-205.)

370. In response to the CID, Qwest produced approximately 33,187 call records for calls related to accounts held by Dish Direct during the time period from March 12, 2004 to February 11, 2006. (DX-194, Exhibit A.)

371. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of Dish Direct's telecommunications records. (DX-194, Exhibit A.)

372. Neither Qwest nor Dish Direct was deposed in this action.

373. The calls allegedly placed by Dish Direct are not addressed in Plaintiffs' expert report and, therefore Plaintiffs have abandoned their claims that DISH should be held liable for such calls. (DX-195, Appendix A.)

374. There is no evidence whatsoever about what the telecommunications records produced by Qwest contain.

E-MANAGEMENT

375. In or about late 2007, the FTC served a CID on ITC Deltacom, a telecommunications provider, seeking account information and "local and long distance telephone connection records" relating to "the customer(s) or subscriber(s) associated with telephone number(s) 561-314-2596." (DX-201.)

376. In response to the CID, ITC Deltacom produced over 4 million call records for calls related to accounts held by E-Management during the time period from January 2007 to November 2007. (DX-194, Exhibit A.)

377. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage,

which chart included call records and the “raw hits” analysis results of E-Management’s telecommunications records. (DX-194, Exhibit A.)

378. Neither ITC Deltacom nor E-Management was deposed in this action.

379. The calls allegedly placed by E-Management are not addressed in Plaintiffs’ expert report and, therefore Plaintiffs have abandoned their claims that DISH should be held liable for such calls. (DX195, Appendix A.)

380. There is no evidence whatsoever about what the telecommunications records produced by ITC Deltacom contain.

DEFENDER

381. In this action, Plaintiffs claim that DISH should be liable for calls placed by Defender. (DX-195, Ex. A.)

382. Defender signed a Retailer Agreement when it became a DISH retailer. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676-014695.)

383. That Retailer Agreement confirmed the fact that Defender was an independent contractor of DISH. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676.) It also required Defender to agree that it would comply with all “applicable federal, state, and local laws, rules and regulations, and all amendments thereto,” including the TSR/TCPA. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014686.)

384. In addition to selling DISH products and services, Defender sold multiple other product lines. Defender was the largest promoter of ADT home security products. (DX-169, Ahmed Dep. 116:22-25.)

385. There is no evidence that any of Defender’s call records were calls made solely to individual consumer landlines that properly belong on the NDNCR as opposed to individual

consumer landlines that were disconnected after a consumer placed the number on the NDNCR, but which number was later reassigned.

386. None of Defender's call records establish any of those calls were placed by a Defender for the purpose of selling DISH's products or services.

387. There is no evidence that DISH controlled the manner or means in which Defender marketed or sold DISH products or services.

AREA CODES DO NOT PROVIDE ANY PROOF OF GEOGRAPHIC LOCATION

388. The FCC has itself acknowledged that “[t]he relationship between numbers and geography—taken for granted when numbers were first assigned to fixed wireline telephones—is evolving as consumers turn increasingly to mobile and nomadic services.” *In re: Numbering Policies for Modern Communications, Notice of Proposed Rulemaking, Order and Notice of Inquiry*, 28 FCC Rcd 5842, 5844 (2013) (“Numbering Policies for Modern Communications”).

389. For example, Plaintiff North Carolina produced a “Do Not Call Complaint” dated August 8, 2008 for [REDACTED]. (DX-215). [REDACTED], who identified himself as a resident of [REDACTED], North Carolina, alleged that he received calls to his phone number with a California area code. While none of the call records at issue in this case actually reflect any of the calls complained about by Mr. [REDACTED], if they had, the purported calls would have been mistakenly counted as violations recoverable by Plaintiff California, rather than Plaintiff North Carolina, when Plaintiff California has no standing to pursue relief on behalf of another state resident. Similarly, Plaintiff Ohio produced a consumer complaint dated January 8, 2009 for [REDACTED]. (DX-216.) Mr. [REDACTED], who identified himself as a resident of [REDACTED], Ohio, indicated that he is the subscriber of two phone numbers that bear a Pennsylvania area code.

Again, if calls to Mr. [REDACTED]'s phone numbers appeared in the call records in this case, State Plaintiffs would have counted such call as one to a Pennsylvania resident. (DX-216)

390. Three primary technological developments have broken the connection between numbers and geography. *See, e.g., Teltech Sys., Inc. v. Barbour*, 866 F.Supp.2d 571, 575-576 (S.D. Miss. 2011).

391. First, since 1997, the FCC has required telecommunications carriers to permit consumers to “port” their telephone numbers, *i.e.*, keep their previous telephone number even when they switch to another carrier. 47 C.F.R. § 52.23; *see, e.g., In re: Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996) (establishing an implementation schedule for telephone number portability). In 2003, the FCC allowed consumers to transfer (or “port”) their wireline numbers to a wireless carrier. *In re: Telephone Number Portability, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23697 (2003).

392. In 2007, the FCC allowed consumers to port their telephone numbers to Voice over Internet-Protocol (“VoIP”) services as well, allowing consumers to transition from traditional wireline services to advanced IP-based services. *In re: Telephone Number Requirements for IP-Enabled Services, Report and Order, Declaratory Ruling, Order on Remand and Notice of Proposed Rulemaking*, 22 FCC Rcd 19531 (2007).

393. Second, over the time period relevant to Plaintiffs’ claims, consumers increasingly obtained wireless service¹⁷ and maintained “mobile numbers that [were] associated

¹⁷ To put wireless registrations in perspective, in December 2003, landline numbers accounted for only 54 percent of all telephone numbers in the United States. According to the FCC, there were approximately 183 million landline numbers in 2003 (137.4 million residential landline numbers and 45.6 million business landline numbers). FCC, (footnote continued)

with an area code other than the one where they live.” *Teltech Sys.*, 866 F.Supp.2d at 575. As one commentator noted in a May 2009 article, “the area code . . . is becoming increasingly irrelevant,” because “[t]he whole idea of having to have a number correspond to where you actually are seems to have gone away,” and wireless customers can use any area code, “regardless of whether it carries geographic significance.”¹⁸ Amy Saunders, *Cellphone Age Turns the 614 Into Just Numbers*, THE COLUMBUS DISPATCH, May 16, 2009, <http://www.dispatch.com/content/stories/local/2009/05/16/areacodes.html>. (DX-192.) Further, unlike historical practices of wireline carriers, wireless carriers have been able to assign telephone numbers without regard to the consumer’s place of residence. As the FCC has acknowledged, “wireless carriers have considerable discretion in assigning telephone numbers, and often do so to minimize their own costs rather than based on the consumer’s location. *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd 11407, 11517, n. 520 (2010) (“14th Annual Wireless Competition Report”, 100 n. 520 (May 20, 2010, available at

(footnote continued)

Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Table 8.2 “End-User Switched Access Lines and VoIP Subscriptions by Customer Type”, at pp.8-6 (September 2010) (sum of reporting incumbent local exchange carriers (“ILEC”) and reporting non-ILEC figures). The FCC report suggests that some (approximately 10%) of the reported residential landlines are actually business landlines. *Id.* The Cellular Telecommunications and Internet Association (“CTIA”) estimates there were 158.7 million wireless numbers in the United States in December 2003. CTIA, “CTIA’s Semi-Annual Wireless Industry Wireless Industry Survey Results.” <http://www.ctia.org/advocacy/research/index.efm/aid/10316>.

¹⁸ FCC Commissioner Jessica Rosenworcel recently stated that “[p]eople now move and take their numbers with them. Case in point: in my office here at the Commission, half of those who work with me have phone numbers with area codes that do not reflect where they live.” *Numbering Policies for Modern Communications*, 28 F.C.C.R. at 5920.

<http://www.fcc.gov/reports/mobile-wireless-competition-report-14th-annual> (last accessed Jan. 6, 2014).

394. Third, during the time period relevant to Plaintiffs' claims, consumers have increasingly selected Internet-protocol-based services, such as VoIP services. VoIP service subscriptions, like mobile service subscriptions, have increased greatly between 2003 and 2010, with nearly 32 million VoIP lines in service as of December 2010. Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Local Telephone Competition: Status As of December 31, 2010, at p. 2 & Fig. 1 (October 2011).¹⁹ VoIP numbers can be assigned without regard to the consumer's physical location. For example, a VoIP customer located in Atlanta may choose to have a number traditionally associated with Chicago. In an Order issued in 2004, the FCC readily acknowledged that, in the context of VoIP service, "the NANP number [which is relied upon by Dr. Yoeli here] is not necessarily tied to the user's physical location for either assignment or use, in contrast to most wireline circuit-switched [but not wireless] calls." *Vonage Order*, 19 F.C.C.R. 22404 (2004).

395. The FCC further provided examples to explain why a subscriber's or call recipient's NPA/NXX could not be used as a proxy for a subscriber's or call recipient's state of residence or geographic location:

If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having

¹⁹ The FTC has acknowledged, in its Biennial Report, that "[s]ince . . . 2003, two forms of technology have developed considerably: mobile phones and [VoIP]." FTC, Biennial Report to Congress: Pursuant to the Do Not Call Fee Registry Extension Act of 2007 (Dec. 2009), available at <http://www.ftc.gov/sites/default/files/documents/reports/biennial-report-congress-pursuant-do-not-call-registry-fee-extension-act-2007/100104dnabiennialreport.pdf> (last accessed Jan. 6, 2014.)

a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.

(*Vonage Order*, 19 FCC Rcd at 22421.)

396. Notably, recognizing the considerable decoupling of phone numbers and geography, an FCC advisory committee has recently recommended that the FCC “fully decouple” geography from the telephone number. *Numbering Policies for Modern Communications* (¶118).

397. According to the FTC, 99.97% of landlines in the U.S. are included in the national directory assistance database. Unlike land-line service providers, wireless and VoIP service providers were not, during the relevant time period, required to share their directory assistance data. (*Id.*) FTC approximated, however, that 75% of VOIP numbers are included in the national directory assistance data.

398. Thus, the numbers that PossibleNOW identified as “residential” could include a significant percentage of VoIP numbers and the majority of numbers identified by PossibleNOW as “unknown” include wireless, VoIP, business or government numbers, and are unlikely to include residential landlines.

399. Not all of the numbers contained in DISH’s call records were residential landlines, as opposed to business, wireless or VoIP numbers.

400. In his December 16, 2013 deposition, Plaintiffs’ expert, Dr. Yoeli, testified as follows:

Q. With respect to the analysis of the state law claims, the file names that indicate state –

A. Yes.

Q. -- [REDACTED]



(DX-211, Yoeli Dep. 215:5-216:17.)

THERE IS NO EVIDENCE OF A WILLFUL VIOLATION BY DISH OF THE TSR WITH RESPECT TO ANY CLAIMED TSR VIOLATION BY DISH, ECREEK OR EPLDT, OR AN INDEPENDENT RETAILER

401. Plaintiffs have no evidence that, with respect to any calls placed by DISH or any of its Telemarketing Vendors, DISH, in connection with any such calls, acted with actual knowledge or knowledge fairly implied on the basis of objective circumstances that any such call was unfair or deceptive and was prohibited by the TSR.

402. Plaintiffs have no evidence that, with respect to any calls placed by a Retailer, DISH, in connection with any such calls, acted with actual knowledge or knowledge fairly implied on the basis of objective circumstances that any such call was unfair or deceptive and was prohibited by the TSR.

DISCOVERY PROVIDED IN THE CID PHASE AND DISCOVERY IN THIS CASE

403. In July 2005, the FTC sent DISH a Civil Investigative Demand (“CID”).

According to the CID, the scope of the investigation was as follows:

To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaged in (1) unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act . . . and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commissions’ Telemarketing Sales Rule, 16 C.F.R., part 310, including but not limited to the provision of substantial assistance or support—such as mailing lists, scripts, merchant accounts and other information, products or services – to telemarketers engaged in unlawful practices. Pls.’ Ex. 1 (d/e 201-1).

(d/e 279, Opinion re: Plaintiff’s Motion for Discovery Sanctions, at 5.)

404. In response to the CID, DISH provided records on calls made from October 2003-September 2005, December 2005-December 2006, and January 2007-August 2007 (2003-2007 calls). (d/e 165, Opinion at 9.)

405. In 2008, DISH sent the FTC analyses of portions of these records (the “2008 Analysis”). (d/e 165, Opinion at 9-10. (citing Motion, Exhibit 30, Letter dated August 11, 2011, from Patrick Runkle to Joseph Boyle and Lauri Mazzuchetti, enclosing a copy of the 2008 analysis from PossibleNOW (“2008 Analysis”).)

406. The 2008 Analysis covered the four month period from June through September 2005, and the two months of April and October for the years 2004, 2005, 2006 and 2007. (d/e 165, Opinion at 10.)

407. The 2008 Analysis also notified the FTC that the 2003-2007 calls included non-telemarketing calls such as collection calls and business calls. (d/e 165, Opinion at 13.)

408. The 2008 Analysis further notified the FTC that calls could be associated with calling campaigns and with EBR status of DISH customers. (d/e 165, Opinion at 13.)

409. DISH provided some detailed information (i.e., EBR status of call recipient) for the calls covered by the 2008 Analysis, but not for the rest of the 2003-2007 calls. (d/e 165, Opinion at 10 (citing Motion, at 11).)

410. Plaintiffs, thus, knew these limitations on the 2003-2007 calls before they filed this action. (d/e 165, Opinion at 13.)

411. Plaintiffs elected to focus their discovery efforts on the 2007-2010 calls rather than the earlier data. (d/e 165, Opinion at 13.)

412. After Plaintiffs filed this case, DISH produced telephone records for the period from September 1, 2007, to March 12, 2010 (2007-2010 Call Records). Plaintiffs state that these records described nearly 435 million calls. (d/e 165, Opinion at 10-11 (citing Motion, at 10.) This data includes all calls covering such matters as telemarketing, payment reminders, service, installation and surveys. (d/e 155, Opinion re: Plaintiff's Motion to File SAC, at 7.)

413. The parties engaged in a "lengthy collaborative discovery process" to analyze the 2007-2010 calls to, among other things, identify telemarketing calls, and to associate calls with specific marketing campaigns and to determine whether the recipients of calls had EBRs with DISH. (*Id.* at 11.)

414. The parties began the process on November 17, 2010, and the Plaintiffs' analysis of the data extended through expert discovery. (d/e 134, Plaintiffs' Motion for Leave to File SAC, Exhibit 10, Decl. of Erez Yoeli.) The Plaintiffs describe the process as "painstaking." (d/e 165, Opinion at 9.)

415. Plaintiffs received discovery in this case related to "all authorized dealers and telemarketers" of DISH. (d/e 80, Amended Opinion re: Plaintiffs First Motion to Compel Production of Documents and Answers to Interrogatories, at 9.) Some discovery included call

records produced by a telecommunications provider, and not by the Retailer. *See, e.g., supra* ¶266 (McLeod Telecom), ¶288 (LDMI), ¶307 (Electric Lightwave and Integra Telecom), ¶328 (Airespring, Inc.).

416. DISH has produced in electronic form more than 220,000 pages of documents, in addition to producing, among other things, approximately 400 million call records and voluminous paper documents. (DX-221, Declaration of Henry T. Kelly, executed on January 6, 2014 (“Kelly Dec.”) at ¶2.)

417. DISH produced documents designated as follows on about the following dates:

Production Date	Beginning Bates	Ending Bates
May 27, 2010	DISH-00000001	DISH-00000001
June 29, 2010	DISH-00000002	DISH-00000002
August 9, 2010	DISH-00000003	DISH-00009606
August 13, 2010	Undesignated - list of written complaints January 13, 2005 to May 17, 2010 (native).	
August 16, 2010	DISH2-0000000001	DISH2-0000005876
August 16, 2010	DISH2-0000005877	DISH2-0000024789
September 30, 2010	DISH2-0000024790	DISH2-0000039846
November 12, 2010	DISH3-00000001	DISH3-0000620
January 6, 2011	DISH4-000001	DISH4-000028
February 14, 2011	DISH5-0000000001	DISH5-0000066437
February 15, 2011	DISH6-0000000001	DISH6-0000000468
March 11, 2011	Undesignated – campaign ID designations (native).	
March 11, 2011	DISH8-0000000001	DISH8-0000000006
March 17, 2011	Undesignated – DISH’s internal Do Not Call list produced in response to Plaintiffs’ RFP 1 (native).	
June 2, 2011	DISH-Paper-000001	DISH-Paper-013823
June 17, 2011	DISH-Paper-013824	DISH-Paper-019476
February 1, 2012	DISH-Paper-019477	DISH-Paper-025964
March 14, 2012	DISH5-0000066438	DISH5-0000068475

April 2, 2012	DISH7-000000001	DISH7-000007897
April 10, 2012	DISH5-0000068476	DISH5-0000103504
April 10, 2012	DISH5-0000103505	DISH5-0000106990
April 10, 2012	DISH5-0000106991	DISH5-0000107145
April 24, 2012	DISH5-0000107146	DISH5-0000113912
June 28, 2012	DISH5-0000113913	DISH5-0000126552
June 28, 2012*	DISH - 00006210	DISH - 00009238
June 28, 2012*	DISH-Paper-023749	DISH-Paper-025948
June 28, 2012*	DISH2-0000000500	DISH5-0000000500
June 28, 2012*	DISH5-0000000125	DISH5-0000107129
June 28, 2012	DISH8-0000007	DISH8-0004672
June 28, 2012	DISH8-0034826	DISH8-0034830
June 30, 2012	DISH9-0000001	DISH9-0012768
July 20, 2012	DISH8-00034673	DISH8-00034821
July 30, 2012	DISH5-0000107133	DISH5-0000107136
August 3, 2012	DISH8-0034822	DISH8-0035176
August 3, 2012	DISH9-0012769	DISH9-0012796
August 3, 2012	DISH3 - Various	DISH3 - Various
August 24, 2012	DISH9-0012797	DISH9-0013145
August 30, 2012	DISH9-0013146	DISH9-0013730
September 9, 2012	DISH11-000001	DISH11-000015
September 19, 2012	Undesignated – campaign ID designations (correspondence from J. Boyle to L. Hsiao.)	
October 1, 2012	DISH11-000016	DISH11-016183
November 20, 2012	DISH8-00035177	DISH8-00035280
November 28, 2012	Undesignated – campaign ID designations (correspondence from L. Mazzuchetti to L. Hsiao).	
December 3, 2012	DISH11-016184	DISH11-039266
September 10, 2013	DISH12-000001	DISH12-000021
September 20, 2013	DISH12-000022	DISH12-000025
September 27, 2013	DISH12-000026	DISH12-000028

*These documents produced on June 28, 2012 were produced pursuant to the Court's June 12, 2012 Order granting in part and denying in part Plaintiffs' Motion to Compel. The bates ranges reflect the documents required by the Court's Order.

September 27, 2013	DISH12-000029	DISH12-000029
October 16, 2013	DISH12-000031	DISH12-000079
October 17, 2013	DISH12-000080	DISH12-000088
November 13, 2013	DISH12-000090	DISH12-001129
November 15, 2013	DISH12-001130	DISH12-001145

These documents were produced either through CD-rom, DVD or through File Transfer Protocol (“FTP”). (DX-221 at ¶3.)

418. DISH also provided Plaintiffs with unfettered access to review, inspect, and copy all of DISH’s hard-copy consumer complaint and independent retailer files (including audit and compliance files) on April 11, 12 and 13, 2011. Attorneys for the Plaintiffs reviewed such documents at DISH’s facilities on or about April 11 and 12, 2011. (DX-221 at ¶4.)

419. With respect to the independent retailer files, the State Plaintiff lawyers provided DISH with a list of approximately 65 retailers for which they sought copies of the paper files. DISH copied and produced the requested documents. (DX-221 at ¶5.)

420. DISH also provided Plaintiffs’ counsel with access to DISH’s Salescomm and SEIBEL PRM databases, two live enterprise databases. The Salescomm data environment contains information on the date and amount of payments made to each independent retailer. SEIBEL PRM is a live relationship management application which is used by DISH to track information related to independent retailers. (DX-221 at ¶6.)

421. On September 27, 2012, DISH provided a hard-drive, containing information stored in the Salescomm and SEIBEL PRM databases that was responsive to Plaintiffs’ discovery requests. (DX-221 at ¶7.)

422. On April 6, 2012, Plaintiffs served DISH with their Sixth Request for Production of Documents (“Sixth Set of RFPDs”). RPF 2 of the Sixth Set of RFPDs sought, in part, audio

recordings related to 61 automessage campaigns. (d/e 229, Declaration of Nainesh Ramjee, executed January 4, 2012, ¶2.)

423. In response to RFP 2 of the Sixth Set of RFPDs, DISH searched for the audio recordings related to the call campaigns itemized in Plaintiffs' request. As a result of this reasonable and diligent search, DISH located 37 digital audio recordings responsive to RFP 2 of the Sixth Set of RFPDs. These 37 digital audio recordings represent 52 of the 61 call campaigns enumerated in RFP 2 of the Sixth Set of RFPDs. (d/e 229 ¶3.)

424. A number of the digital audio recordings were in languages other than English. (d/e 229 ¶4.)

425. On June 29, 2012, DISH produced to Plaintiffs a compact disc bearing bates label DISH5-0000126553, which contained all 37 digital audio files representing 52 of the 61 call campaigns enumerated in RFP 2. (d/e 229 ¶5.)

426. From those digital audio files, Plaintiffs' expert identified 15 campaigns as being related to telemarketing and are roughly translated as follows:

AM 090507 GREEK ["AM – 090507Greek@1297@1.vox."]:

Please listen to an important announcement from Dish Network, your satellite television provider. Exclusively, on the net and on Dish Network, European _____ [speaker mumbles word]. Our national basketball team defends itself this week until next Sunday in Spain for the 2007 Euro Basket. Call us today to have the unique opportunity to watch the attempt of the Greek team, which always makes us proud. For more information, call 1-888-483-3902;

AM 090607 CHIN ["AM – 090607Chinese@1298@1.vox."]:

Dear Dish Network Customers, add you favorite Chinese TV channels now! Dish Network is now providing, your satellite television provider. Exclusively, on the net and

on Dish Network, European _____ [speaker mumbles word]. Our national basketball team defends itsemany more exciting Chinese TV shows, including the most welcomed, “I Guess, I Guess, I Guess Guess Guess,” “Variety Big Brother,” “Super Starry Walk,” “Flying Pigeon Nightly Wave,” “May Barbaric Princess,” “Taiwan Dongsen News,” etc. Your enjoyment and satisfaction guaranteed. Please call today, 1-877-446-2742. Watch the additional shows at Dish Network Chinese TV channels which have the most entertainment shows.

AM 090607 FILI [“AM – 090607Filipino@1299@1.vox.”]:

Our dear Dish Network viewers! Now is the best time to come back to your Filipino shows. Dish Network will offer finer Filipino shows and movies. Watch your favorite shows, like *Kikay Machine*, *Shall We Dance?*, *the Jojo Anhar Show*, award-winning films, and much more. The Dish Network Filipino packages start at just \$9.99 per month. Call 1-877-456-2609 – that’s 1-877-456-2609 – to have Dish Network Filipino TV added now!

AM 090607 KORE [“AM – 090607Korean@1300@1.vox.”]:

Hello Dish Network customer. This is your opportunity to add the Korean Variety Pack to your subscription to enjoy the most entertaining and varied Korean language programming ever. You can enjoy the popular *Hello Aegi-ssi* featuring talent *Lee Da-Hae* and *Lee Jee-Hoon* and the red-hot drama *Ma-Wang* featuring Uhm Tae-Woong, conveniently at home. Also, on *Star Real Story: I Am*, which gives you a glimpse into stars’ real lives, you can meet the biggest stars like *Boa*, *Bi*, *Shinhwa*, and others. If you add the Korean Variety Pack to your registration now, you can view Korean language programming for \$24.99 a month. Call 1-888-644-2117 today and add the Korean Variety Pack to your subscription. Please call 1-888-644-2117 right now

AM 091107 ARAB [“AM – 091107Arabic@1302@1.vox.”]:

Dear customer, Thanks for being a loyal customer to Dish Network Company, the leading company in providing the best Arab bouquets that fit all family members. Now it is the suitable time to subscribe to one of the Dish Network Arab bouquets during the Holy Month of Ramadan. Don't miss it and subscribe today to watch the most recent programs and new Ramadan series, little: Bab El Harah”, “Tash Ma Tash”, King Farouk, “Awlad Al Layel”, “Khawatir”, the cornerstone and Nimr bin Adwan. Ramadan is better on the channels of ART America: MBC, Dubai Satellite Channel, Nile Drama and Abu Dhabi Satellite Channel. For subscription and more information, please call the following number: 1 888 262 2604...1 888 262 2604

AM 091107 GREEK [“AM – 091107Greek@1303@1.vox.”]:

Please listen to an important announcement from Dish Network, your satellite television provider. We thank you for your trust and for choosing us. Dish Network brings you closer to Greece and fills with life (liveliness) your television programming. Now is the ideal time to watch the Greek package which includes the best Greek channels like Antenna Satellite, Antenna Gold, Blue and [another channel]. Also, don't lose the best comedies, dramas, news, documentaries, as well as well as, exclusively, the Greek football championships live, which starts this year on August 26th. To learn more information about the Greek channels on Dish Network, contact us at 1-888-483-3902.

AM 091207 CHIN [“AM – 091207Chinese@1304@1.vox.”]:

Good news! From September 12 to 25, Dish Network will provide you with free trial watching experience with Taiwan Sky Net Package, which includes the 13 top Taiwanese TV channels including Taiwan TV, Central TV, China TV, Tianxia Satellite TV, Satellite TV II, and Dongsheng TV. The free trial period starts at 3 o'clock on September

12 (Pacific Time). During the free trial period, Dish Network broadcasts the satellite premier “My Just Boyfriend”, “Baoqingtian—Bai Yutang Legend”, “Flying Pigeon Nightly Wave”, and other exciting TV shows which you cannot miss. After expiration of the free trial period, you only need \$34.99 to continue with your enjoyment of the 13 exciting channels in the Taiwan Sky Net Package. Call today the Chinese subscription hotline at 1-888-229-8215!

AM 091407 FRENCH [“AM – 091407French@1306@1.vox.”] This recording is in English:

Please listen to this important message from Dish Network, your satellite TV provider. Dish Network is offering a free preview of Tres TV on channel 575 and a free preview of 3A Telesud on channel 574 until September 19th. Tres TV has a brand new face. The biggest stars such as Gwen Stefanie, Kanye West and Shaggy are on Tres TV in September. Until December, 3A Telesud broadcasts an exclusive TV series, Yama Africa. The first time on Telesud, a fictional drama show highlights the lives of four African women living in Brooklyn, New York. Watch the first episode on Friday, September 14th. Call us today at 1-888-793-8490 to add Tres TV and 3A Telesud to your French lineup. Price will vary based on your current subscription. You must have a DISH 510 to see this free preview. Thank you for being a valued Dish Network customer.

AM 091407 GERMAN [“AM – 091407German_Drops@1307@1.vox.”] This recording is in English:

Dear Dish Network customer, thank you for your ongoing subscription and for being a loyal Dish Network customer. Dish Network is dedicated to bringing you the best in German television that suits all your enjoyment needs in one comprehensive package. Now is the best time to subscribe to our German language plus package, which includes

the best German channels like DW TV, Proseben, German KINO Plus, EuroNews. Don't miss the prime time AID and ZDF television shows on DW TV which features well known talk shows, new documentaries, quality entertainment, and children's programs. Enjoy the new bonus league soccer season live at home from Proseben every Friday, Saturday and Sunday. And don't forget the quality German classic movies on German KINO Plus and the latest news from a European perspective on EuroNews. Subscribe today by calling us at 1-888-276-2995.

AM 100407 INDUSM ["AM – 100407IndusM@1325@1.vox."]:

Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming.

AM 100407 INDUSV ["AM – 100407IndusM@1325@1.vox."]:

Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming.

AM 100807 INDUS ["AM – 100407IndusM@1325@1.vox."]:

Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style

entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming

AM 092107 FREEHD [“AM – 092107FreeHD@1317@1.vox.”] This recording is in English:

Please listen to this important message from Dish Network, your satellite TV provider. Now is the time to experience your TV in stunning clarity with Dish HD TV, your favorite shows will look so life like that you’ll think you’re actually there. If you love watching TV, you’ll love it even more in Dish HD quality. As a valued customer, Dish Network wants to give you six months of free Dish HD programming today. Call us at 1-888-222-3147 to take advantage of Dish HD programming today.

427. The Zee Sports pre-recorded message campaign was likewise directed to then-existing DISH customers. (DX-2, Montano Decl. ¶33.)

PROCEDURAL HISTORY

428. Plaintiffs filed this action (“*DISH I*”) on March 25, 2009, asserting claims for violations of the TSR (Counts I-III), the TCPA, and various individual state law claims (Counts IV-XII). (d/e 1, Complaint.) Plaintiffs filed a First Amended Complaint (“FAC”) on April 30, 2009, removing an Ohio state law claim under Ohio Revised Code Section 3719.02 (Count XII). (d/e 5, First Amended Complaint.) DISH answered the FAC on December 7, 2009. (d/e 26, Answer to First Amended Complaint.)

429. On May 18, 2012, Plaintiffs moved for leave to file the SAC, seeking to add a claim under the TSR’s Entity-Specific Do Not Call Rule, *i.e.*, the alleged violations of DISH’s Internal List. (d/e 135, Plaintiff’s Motion for Leave to File SAC.) Magistrate Judge Cudmore

denied this motion on June 20, 2012, finding “that the Plaintiffs unduly delayed proposing amendment to the prejudice of [DISH].” (d/e 155, Opinion of Court re: Plaintiff’s Motion to File SAC, at 1.) The FTC responded to this adverse ruling by filing a second lawsuit, on August 22, 2012, asserting the new claim in a case styled *Federal Trade Commission v. DISH Network L.L.C.*, No. 3:12-cv-03221 (C.D. Ill.) (“*DISH II*”).

430. On September 25, 2012, DISH moved to dismiss *DISH II* on grounds of res judicata and statute of limitations. (*DISH II*, d/e 6, DISH Motion to Dismiss for Failure to State a Claim.)

431. Fact discovery in *DISH I* closed in July 2012 (with a limited exception), and expert discovery closed on December 14, 2012. (Text Order, May 23, 2012, granting Docket 139 Consent Motion for Extension of Time to Complete Discovery.) Dispositive motions, including anticipated summary judgment motions by both sides, were due on January 22, 2013. (Text Order, January 11, 2013, granting Docket 236 Joint Motion for Extension of Time to File Dispositive Motions.) On January 17, 2013, the Court stayed the deadline for filing dispositive motions pending the Court’s ruling on the motion to dismiss in *DISH II*. (Text Order, Jan. 17, 2013.)

432. After holding a status conference on March 5, 2013, the Court issued an Order denying DISH’s motion to dismiss in *DISH II*, vacating Magistrate Judge Cudmore’s denial of Plaintiffs’ motion for leave to file a SAC in *DISH I*, and dismissing *DISH II* without prejudice to Plaintiffs’ re-filing the dismissed claim in *DISH I*, and without prejudice to DISH raising a res judicata defense to the new Internal List claim in *DISH I*. (d/e 258, Opinion of Court re: Motion to Dismiss in Case No. 12-3221.)

433. Plaintiffs filed the SAC on March 12, 2013. (d/e 257, SAC.) The SAC asserts the following twelve claims:

	Plaintiff	Summary of Claim As Alleged	Statute
Count I	FTC	DISH engaged in or caused a telemarketer to engage in initiating an outbound telephone call to a person's telephone number on the NDNCR.	TSR, 16 C.F.R. § 310(b)(4)(1)(iii)(B)
Count II	FTC	In connection with telemarketing, DISH has engaged in or caused other telemarketers to engage in initiating an outbound telephone call to a person who has previously stated he does not wish to receive such a call made by or on behalf of DISH.	TSR, 16 C.F.R. § 310(b)(4)(1)(iii)(A)
Count III	FTC	DISH has abandoned or caused telemarketers to abandon an outbound telephone call by failing to connect the call to a sales representative within two seconds of the completed greeting of the person answering the call.	TSR, 16 C.F.R. § 310(b)(1)(iv)
Count IV	FTC	DISH has provided substantial assistance or support to Star Satellite and/or DISH TV Now even though DISH knew or consciously avoided knowing that Star Satellite and/or DISH TV Now abandoned outbound telephone calls.	TSR, 16 C.F.R. § 310.3(b)
Count V	California, Illinois, North Carolina, Ohio	DISH, either directly or indirectly as a result of a third party acting on its behalf, has engaged in a pattern or practice of initiating telephone solicitations to residential telephone subscribers whose telephone numbers were listed on the NDNCR.	TCPA, 47 C.F.R. § 64.1200(c)(2), 47 U.S.C. § 227(c)
Count VI	California, Illinois, North Carolina, Ohio	DISH, either directly or indirectly as a result of a third party acting on its behalf, has engaged in a pattern or practice of initiating telephone solicitations to residential telephone subscribers using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and where the call was not initiated for emergency purposes or otherwise exempted by rule or order of the Federal Communications Commission.	TCPA, 47 C.F.R. § 64.1200(a)(2), 47 U.S.C. § 227(b)(1)
Count VII	California	DISH made or caused to be made telephone calls to California telephone numbers listed on the NDNCR and sought to rent, sell, promote, or lease goods or services during those calls.	Cal. Bus. & Prof. Code § 1759(c)(2)

	Plaintiff	Summary of Claim As Alleged	Statute
Count VIII	California	DISH has engaged in unfair competition under California law through (1) engaging in a pattern or practice of initiating telephone solicitations to residential telephone subscribers whose telephone numbers were listed on the NDNCR; (2) placing telephone solicitations to residential telephone lines using artificial or prerecorded voices; (3) making or causing to be made telephone calls to California telephone numbers listed on the NDNCR and seeking to rent, sell, promote, or lease goods or services during those calls; and (4) disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.	Cal. Bus & Prof. Code § 17200
Count IX	North Carolina	DISH, and/or third parties acting on its behalf, made telephone solicitations to the telephone numbers of North Carolina telephone subscribers when those numbers were in the pertinent edition of the NDNCR; DISH failed to monitor and enforce compliance by its employees, agents, and independent contractors, and those persons made telephone solicitations to North Carolina telephone subscribers when those numbers were in the pertinent edition of the NDNCR.	N.C. Gen. Stat. §§ 75-102(a), (d)
Count X	North Carolina	DISH, and/or third parties acting on its behalf, used automatic dialing and recorded message players to make unsolicited telephone calls to North Carolina telephone subscribers without first having live operators inform the telephone subscribers of the nature and length of the recorded message and asking for and obtaining permission to play the message from the person receiving the call.	N.C. Gen. Stat. § 75-104
Count XI	Illinois	DISH, and/or third parties acting on its behalf, knowingly played or caused to be played prerecorded messages placed by an autodialer without the consent of the called party.	815 ILCS 305/30(b), 815 ILCS 505/2Z
Count XII	Ohio	DISH, either directly or as a result of a third party acting on its behalf, engaged in a pattern or practice of (1) initiating telephone solicitations to residential	Ohio Rev. Code § 1345.02(A), 1345.03(A)

	Plaintiff	Summary of Claim As Alleged	Statute
		telephone subscribers in the State of Ohio, whose numbers were listed on the NDNCR; and (2) initiating telephone calls to residential telephone lines using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and without falling within a specified exemption.	

434. The Court issued a new case schedule on March 21, 2013, extending fact discovery on the new claims to September 16, 2013, and expert discovery to November 22, 2013. (Text Order, March 21, 2013, granting d/e 259 Consent Motion to New Case Schedule.) DISH answered the SAC on March 29, 2013. (d/e 263, Answer to SAC.)

435. The Court further modified the Scheduling Order on November 7, 2013, extending the expert discovery deadline to December 19, 2013, and the deadline for dispositive motions to January 6, 2014. (Text Order, Nov. 7, 2013, granting d/e 337 Agreed Motion for Extension of Time to Complete Expert Discovery and File Dispositive Motions.) In doing so, the Court vacated the date set for the final pretrial conference and trial, indicating that those dates would be reset after dispositive motions were filed. (*Id.*)

AMERICAN SATELLITE

436. No call records relevant to American Satellite were produced in this action.

437. No representative of American Satellite was deposed in this action.

438. Plaintiff's expert did not analyze any call records relating to American Satellite in this action.

YOELI'S REPORTS

439. Plaintiff's expert issued six reports in this action, on July 19, 2012; October 16, 2012; December 14, 2012 (two) ; October 14, 2013; and October 21, 2013, respectively.

INDEPENDENT RETAILERS

440. There is no evidence that calls allegedly placed by JSR, SSN or NSS as reflected in the call records in this case were exclusively telemarketing calls made to offer a DISH product or service.

441. There is no evidence that JSR, SSN, NSS, DISH TV Now, New Edge Satellite or American Satellite were acting as DISH's telemarketers. Rather, each was acting as a seller in its own right.

442. DISH has current business relationships with independent third-party retailers ("Independent Retailers" or "Retailers"), including the sales-only retailers that use DISH's order/entry tool ("National Sales Partners"). (DX-234, Declaration of Bruce Werner, February 5, 2014, Decl. ¶ 3 "Werner Decl.", DX-349.)

443. DISH Currently has 35 National Sales Partners (also known as OE Retailers), which are listed below:

- 1) INFINITY SALES GROUP LLC
- 2) GO DISH COM LTD
- 3) ALTITUDE MARKETING LLC
- 4) I DISH COM LLC
- 5) ALLCONNECT
- 6) DISH DIRECT(AZ)
- 7) STERLING COMMERCE GROUP INC
- 8) NATIONAL PROGRAMMING SERVICE LLC
- 9) DISH INSTALLATION INC
- 10) NATIONAL SATELLITE SYSTEMS
- 11) MARKETING GURU INC
- 12) SATELLITE COUNTRY
- 13) CONNECT YOUR HOME
- 14) ACN OPPORTUNITY LLC
- 15) VMC SATELLITE
- 16) UNI SAT COMMUNICATIONS
- 17) CANNON
- 18) DISH SATELLITE TV INC
- 19) MOOREHEAD COMMUNICATIONS
- 20) DIRECT SATELLITE TV LLC

- 21) MICROCOM
- 22) DISH NORTH AMERICA INC
- 23) SINGLE SOURCE SATELLITE
- 24) ACCELLER
- 25) HD SATELLITE SALES
- 26) CHANNEL CHOICE
- 27) ORBIT SALES
- 28) AEROWAVE GROUP
- 29) DIGITAL TV INC
- 30) ESE MARKETING
- 31) DRESHERY INCORPORATED
- 32) BLUE LIGHT INTEGRATED SERVICES
- 33) VWAY TECHNOLOGIES LLC
- 34) CUSTOM COMM
- 35) TELESERVICES

(DX-234, Werner Declaration ¶4.)

444. National Satellite Systems (“NSS”) is the only active National Sales Partner which Plaintiffs mention or address in their motion for summary judgment, yet Plaintiffs seek to enjoin them all with the relief requested by Plaintiffs.

MIKE MILLS

445. The “OE” tool, as described in Plaintiffs’ Motion for Summary Judgment, is no longer either operational or used by Independent Retailers. Rather, over the past eighteen months to approximately two years, all Retailers (including TVRO Retailers, national sales partners and telecom partners) were transitioned to an order entry tool known as “Axiom.” Unlike predecessor systems, the Axiom tool is a universal tool used by all Independent Retailers. (Declaration of Mike Mills, filed January 27, 2014 “Mills Decl.”)

446. As of January 24, 2014, there were 4,110 active TVRO Retailers. (Mills Decl., DX-224.).

447. In 2013, there were 4,501 TVRO Retailers that activated at least one account. This populations of Independent Retailers completed, on average, approximately thirteen sales per month. (DX-224, Mills Decl. ¶ 5.)

448. A small percentage of TVRO Retailer sales are installed by DISH, and not the TVRO Retailer who made the sale. (DX – 224, Mills Decl. ¶ 6.)

449. Satellite Systems Network (“SSN”) ceased being an active Independent Retailer in 2013. (DX-224.)

450. David Hagen of DISH TV Now informed DISH that Dish TV Now was dialing lists of its own current and former customers and 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. (DX-149; Hagen Dep. 134:8-135:2.)

451. 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. 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. (DX-223 DISH8-000098.)

452. DISH conducted secret shops and learned that Dish TV Now was only selling Direct TV; 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. (DX-225, Dish-Paper-023286).

453. Mr. Sponsler testified, the recommendations he made to DISH 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.

(DX-226; Sponslder Dep. 54:9-24).

SATELLITE SYSTEMS NETWORK

454. “[W]hen [DISH] brought on Satellite Systems Network [as an OE retailer], they said they did print [and] online” marketing. (DX-224; Mills 5-3-12 Tr. 51:16-20.)

455. In at least one instance, DISH garnished SSN's earnings in the amount of \$15,000 (see DX-228, DISH-PAPER-007994)

456. In February 2007, DISH implemented a call monitoring system for SSN to gather quality assurance information, which included bi-weekly on-site monitoring by DISH. (*See* DX-229; DISH-PAPER-008055.)

AMERICAN SATELLITE

457. DISH was unaware of these activities, and in fact understood American Satellite's predominant marketing methods to be through email and Internet advertising. (DX-227; Mills Dep. 5-4-12 Tr. 386:23-387:17.)

458. American Satellite went to great lengths to confirm and explain to DISH its standard procedure for handling and processing leads that it generated via Internet inquiries. (DX-230; Snyder Dep. Exh. 213 (DISH2-0000035815) and Plaintiffs' Exh. 223 (DISH2-0000035898).)

LTS SYSTEMS

459. DISH's LTS collects and identifies leads of "people that inquired about subscribing to DISH Network but for whatever reasons did not do so on their phone call." (DX-231, Bangert 12-15-10 Tr. 187:8-14; *see also* DX-232, Montano 11-29-12 Tr. 66:3-7.)

460. Upon inquiry "the customer's information from those that do not purchase [DISH services] is generated in a daily calling file and delivered to the outbound team to process and load into the dialer to be called so the customer can be called back." (DX-232, Montano 11-29-12 Tr. 66:10-13.)

JSR

461. The FTC obtained an affidavit from Jerry Grider's purported business partner – Richard Goodale. This declaration, however, is inadmissible and is not properly considered by this Court at summary judgment (or at trial). The FTC did not disclose to DISH that it had talked to Mr. Goodale, he was never deposed in this action, and he was never identified in the FTC's Rule 26 disclosures as a potential witness – for these reasons, he cannot be called to testify at trial. (DX-243, Plaintiffs' April 30, 2013 FRCP Rule 26 Disclosures)

462. Mr. Taylor has explained that the NDNCR was inaccurate, over-inclusive, and that "issue calls" are not the same as violations. Rather, "issue calls" are precisely that – "calls that require further investigation" to determine if they are actually violative of the TCPA or TSR, are protected by the relevant safe harbor provisions, or fall within some other exception or legal argument as to why the calls do not constitute violations of the TCPA or TSR." (DX-238, Taylor Decl. ¶ 3.); (Taylor Dep. 5:18-6:1; 25:23-26:1, Nov. 20, 2013; (Taylor Dep. 67:7-137:1-10, Dec. 16, 2012).

463. Mr. Taylor did not equate “issue calls” with violations. Thus, Plaintiffs not only ignore Mr. Taylor’s actual conclusions, they also misrepresent them to be the *exact opposite* of what they are. Mr. Taylor testified:

Q: Mr. Taylor, in your reports you refer to something called a potential issue call. Do you know what I’m talking about?

A: I do.

Q: What is a potential issue call to you?

A: A potential issue call is something that someone needs to look at to confirm whether it is or is not a potential violation to the national Do Not Call list or to an entity specific list.

(DX-238, Taylor Decl. ¶ 3; Taylor Dep. 11/20/13 5:18-6:1.)

464. Dr. Yoeli ignored the FTC’s own subcontractor’s findings with respect to proliferation of non-residential landlines on the NDNCR and the flaws in the disconnect/reassign process. (DX-195.) Dr. Yoeli did not provide a scientifically supportable method to exclude raw hits that were based on numbers that did not belong on the NDNCR. (*Id.*)

465. John Taylor’s September 2012 Revised Expert Report was simply an amended version of his July 2012 report, intended to correct a few numerical discrepancies in the earlier report. (DX-246 ; Sept. 19, 2012 Letter from J. Boyle to L. Hsiao.)

466. After filing the SAC, Plaintiffs served no new discovery on DISH related to its newly asserted “Internal List” claim.

467. Plaintiffs, however, did seek third party discovery from PossibleNow and received from it in response historical data about the combined entity specific list maintained by PossibleNow. This historical information was not in DISH’s possession. (DX-244, Taylor Dep. 45:16-48:2, Nov. 20, 2013.)

468. There were no matches identified between DISH's call records and the phone number () , which is associated with . DISH's call records, therefore, show that DISH did not place any calls to Mr. . (DX-238, Taylor Decl. ¶13).

469. There were no matches identified between DISH's call records and the phone number () , which is associated with . DISH's call records, therefore, show that DISH did not place any calls to Mr. . (DX-238, Taylor Decl. ¶14).

470. Ms. 's telephone numbers were on the Registry as of the date that the Registry became effective, *i.e.*, October 17, 2003. DISH's call records indicate that DISH placed seven calls to Ms. 's wireless telephone number between November 7, 2008 and November 13, 2008 under the following call campaign name: "5639_08w44-LTS_OTM_English_20081030", which is a campaign name indicating that DISH was responding to an inquiry made by Ms. from her () wireless telephone number. (DX-238, Taylor Decl. ¶¶15-17).

471. According to DISH's call records, DISH placed calls to Ms. between August 15, 2007 and September 5, 2008. DISH placed Ms. 's telephone number on its internal do-not-call list on October 23, 2008. The following call campaign codes (*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 (7MTH), 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 consumers have terminated services with DISH. Accordingly, these particular campaign codes show that the calls were made to Ms. within the proper EBR period. (DX-238, Taylor Decl. ¶¶18-20).

472. Mr. [REDACTED]'s ([REDACTED]) [REDACTED] landline telephone number was on the Registry as of the date that the Registry became effective, *i.e.*, October 17, 2003. DISH's call records indicate that Mr. [REDACTED]'s landline telephone number has been on DISH's internal do-not-call list since May 10, 2009. There were no matches identified between DISH's call records and the phone number ([REDACTED]) [REDACTED], which is associated with Mr. [REDACTED]. DISH's call records, therefore, show that DISH did not place any calls to Mr. [REDACTED]. (DX-238, Taylor Decl. ¶¶21-23).

473. Mr. [REDACTED]'s ([REDACTED]) [REDACTED] landline telephone number was on the Registry as of the date that the Registry became effective, *i.e.*, October 17, 2003. There were no matches identified between DISH's call records and the phone number ([REDACTED]) [REDACTED], which is associated with [REDACTED]. DISH's call records, therefore, show that DISH did not place any calls to Mr. [REDACTED]. (DX-238, Taylor Decl. ¶¶24-25).

474. Ms. [REDACTED]'s ([REDACTED]) [REDACTED] telephone number was placed on the Registry on June 4, 2007. DISH's records indicate that Ms. [REDACTED]'s telephone number was placed on DISH's internal do-not-call list on August 2, 2008. (DX-238, Taylor Decl. ¶¶26-27).

475. DISH's call records indicate that DISH placed the following five calls to Ms. [REDACTED] in 2007: 1) October 25, 2007 under the "HG STZ LATINO" campaign; 2) November 26, 2007 under the "EC PLAYINTV NEW (ESP)" campaign; 3) November 30, 2007 under the "EC PLAYINTV NEW (ESP)" campaign; 4) December 6, 2007 under the "EC PLAYINTV NEW (ESP)" campaign; and 5) December 7, 2007 under the "EC STZ LATINO 2P" campaign. The campaign codes associated with the foregoing five 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. (DX-238, Taylor Decl. ¶¶28-29).

476. 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. 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. (DX-238, Taylor Decl. ¶30).

477. DISH's records indicate that Mr. [REDACTED]'s ([REDACTED]) [REDACTED] telephone number was placed on the Registry on or about December 25, 2005. There were no matches identified between DISH's call records and the phone number ([REDACTED]) [REDACTED], which is associated with [REDACTED]. DISH's call records, therefore, show that DISH did not place any calls to Mr. [REDACTED]. DISH's call records and the call records at issue in this case show that DISH TV Now did not place calls to Mr. [REDACTED]. (DX-238, Taylor Decl. ¶¶31-33).

478. DISH's records indicate that Ms. [REDACTED]'s ([REDACTED]) [REDACTED] landline telephone number was placed on the Registry on or about August 22, 2007. DISH's records indicate that it placed a call to Ms. [REDACTED] on July 14, 2009 under the "EC_VWIN-TRL-05M-ENG" campaign and that DISH entered "DNC" as a result code. The July 14, 2009 call was within the proper EBR period. (DX-238, Taylor Decl. ¶¶34-35).

479. DISH's records indicate that Ms. [REDACTED]'s ([REDACTED]) [REDACTED] landline telephone number was placed on the Registry on or about May 5, 2006. There were no matches identified between DISH's call records and the phone number ([REDACTED]) [REDACTED], which is associated with

██████████. DISH's call records, therefore, show that DISH did not place any calls to Ms. ██████████. (DX-238, Taylor Decl. ¶¶36-27).

480. The FTC instructed its expert to assume that all of the calls reflected in the Independent Retailer call records were telemarketing calls. (DX-0195.)

481. Prior to becoming an Independent Retailer, DISH TV Now represented to DISH that the only methods of marketing in which DISH TV Now would engage in were direct response commercials, newspaper advertisements, co-op direct mailers, yellow page advertisements, and Internet advertising. (Ahmed Dep. 47:18-48:3, Exh. 365.)

482. Amir Ahmed, a Senior Vice President at DISH, who personally corresponded with DISH TV Now representatives and visited the Retailer understood that “[t]elevision ads and a lot of Internet advertising, a lot of print is what [DISH TV Now] showed [him], and that was the three big things for them.” (*Id.* 51:17-19.)

483. On July 25, 2005, DISH initiated an audit of Star Satellite's business practices. (DX-239, DISH5-0000021300.)

484. In October 2005, Mr. Ahmed contacted Mr. Myers (Star Satellite's owner) to discuss Star Satellite's business practices. As Mr. Myers testified, Mr. Ahmed used that discussion as a disciplinary meeting. (DX-240; Myers Tr. 136:22-137:8, 138:7-13.)

485. Mr. Myers explained that Mr. Ahmed and DISH were furious that Star Satellite had surreptitiously used telemarketing to sell DISH products. (*Id.* 138:22-25: “It was basically just [Ahmed] yelling at me about this complaint and how it was unacceptable”)

486. DISH followed that disciplinary call with a written letter to confirm that Star Satellite had “halted all telemarketing activities involving persons named on the National Do-

Not-Call Registry as necessary to comply with applicable telemarketing/do-not-call and other laws.” (DX-240; Myers Dep. Ex. 7.)

487. Star Satellite did not use this, or any alleged sales script provided by DISH, for any of the prerecorded calls at issue. (DX-240, Myers Dep. 134:3-9.)

488. Star Satellite confirmed that it did not use the required legal disclosures in any of the abandoned calls at issue (and in violation of its Retailer Agreement). (DX-240 Myers Dep. 134:23 – 135:4) (“Q....Did that message include the disclosures, disclaimers that DISH required? A. No, only because I know it was too short for that. The disclaimers are like pages. I mean, this message would last probably like ten or fifteen seconds; and the disclaimers were pages and pages and pages.”)

489. Counsel for the FTC asked PossibleNOW the following questions about the seven million numbers that were purged from the NDNCR.

Q. So when did you first start using what you called the first algorithm?

A. Sometime in late 2006.

Q. And when did you start using the second algorithm?

A. March of 2008.

Q. Going back to Exhibit Number 2, there’s a 7 million figure. Do you see that?

A. Yes.

Q. Did you contact those 7 million consumers?

A. No.

Q. Did you interview those 7 million consumers?

A. No.

Q. Would that have been more accurate than the algorithm you developed?

A. Yes.

(DX-242, Stauffer 4/26/12 Dep. 274-75.)

490. DISH has produced in discovery PDialer screenshots that document its scrubbing process. Plaintiffs even acknowledge this. (d/e 79 at 14: “On August 24, 2012, Defendant produced 116 pages of documents which consisted of “screen shots” from the Predictive Dialer (PDialer), a list processing and scrubbing application. See Pls.’ Ex. 16A, 16B (d/e 201-16, 201-

17). Defendant produced three screenshots for each campaign. See Pls.’ Motion for Sanctions, p. 6 (d/e 201.): “[o]n August 24, 2012, Defendant produced 116 pages of documents which consisted of “screen shots” from the Predictive Dialer (PDialer), a list processing and scrubbing application. (See Plaintiffs’ Exh. 16A, 16B (d/e 201-16, 201-17). Defendant produced three screenshots for each campaign. See Pls.’ Motion for Sanctions, p. 6 (d/e 201).)

ARGUMENT

I. PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT MUST BE DENIED BECAUSE THERE ARE NUMEROUS GENUINE ISSUES OF MATERIAL FACT

At summary judgment, a court’s function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). “The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor.” *Id.* at 255; *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995).

Even if a material fact is not disputed, summary judgment is still inappropriate if “countervailing inferences” or “different ultimate inferences” are supportable from the same facts. *Nat’l Football Scouting, Inc. v. Cont’l Assur. Co.*, 931 F.2d 646, 649 (10th Cir. 1991); *Sarkes Tarzian, Inc. v. United States*, 240 F.2d 467, 470 (7th Cir. 1957). *Dunn v. United States*, 278 F.Supp. 885 (S.D. Ill. 1968) (citing *Sarkes Tarzian*, 240 F.2d at 470).

The Supreme Court has emphasized summary judgment should be denied “in a case where there is a reason to believe that the better course would be to proceed to a full trial.” *Anderson*, 477 U.S. at 255. As set forth herein, there are countless contested facts pivotal to the issues raised in Plaintiffs’ Motion. Moreover, Plaintiffs repeatedly, and in error, attempt to draw numerous inferences in their favor to lead this Court to improper conclusions as to liability. Plaintiffs’ Motion must be denied.

II. THE UNDISPUTED FACTS OF DISH'S COMPLIANCE WITH THE SAFE HARBOR PROVISIONS OF THE TSR AND TCPA REQUIRE DENIAL OF PLAINTIFFS' MOTION

The evidence shows that DISH has satisfied the required elements for this safe harbor defense. (AMF ¶¶16-107.) Thus, DISH asked this Court to rule in its favor in DISH's motion for summary judgment. If this Court is disinclined to enter summary judgment in DISH's favor, at a minimum these arguments create genuine and material disputes regarding DISH's satisfaction of the safe harbor defense.²¹ Indeed, the FTC's staff has underscored that application of the safe harbor is a fact-intensive inquiry that must be resolved on a case-by-case basis. FTC, *Complying with the Telemarketing Sales Rule* (*available at www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#safeharbor*). Also, because the safe harbor turns on the issue of DISH's good faith compliance efforts, summary judgment is not appropriate. *See Askew v. Bloemker*, 548 F.2d 673, 679 (7th Cir. 1976) (“[T]he question of whether the defendants acted . . . in good faith is itself a question of fact. . . . Cases in which motive and intent play a leading role are particularly inappropriate for disposition on a motion for summary judgment.”); *Mobile Weather Team, Inc. v. Quinn*, No. 05-1020, 2006 WL 2598318, at *1 (C.D. Ill. Sept. 8, 2006).

A. DISH Is Entitled To The Safe Harbor Defense In This Case

The TSR's “safe harbor” provision provides a *complete* defense to any alleged violations of Section 310.4(b)(1)(iii), *i.e.*, calls to persons who either have (a) requested that they

²¹ Both DISH and Plaintiffs have moved for summary judgment. When considering competing motions, the court must take care to resolve all factual disputes and any competing rational inferences in the light most favorable to the party opposing each motion. *See Wightman v. Springfield Terminal Ry.*, 100 F.3d 228, 230 (1st Cir. 1996); *Schwabenbauer v. Bd. of Educ.*, 667 F.2d 305, 314 (2d Cir. 1981). Denial of one motion does not necessarily imply that the other party's motion should be granted. *See, e.g.*, 11 James Wm. Moore, et al. Federal Practice ¶ 56.10[6].

not receive telemarketing calls from the caller; or (b) registered their telephone number on the NDNCR. 16 C.F.R. § 310.4(b)(3). Likewise, the TCPA safe harbor provides a complete defense to any alleged violations claimed in Counts V, VII, VIII, IX, and XII for phone calls to persons who have registered their telephone number on the NDNCR. 47 C.F.R. § 64.1200(c)(2).

This Court described the TSR's safe harbor as follows: "[I]f a seller or telemarketer uses a current version of the List, has written procedures for compliance with TSR, and monitors and enforces compliance with the TSR and the written procedures, then a telemarketer's call that violates the TSR made in error will not result in liability." (d/e 20, Opinion, 11/02/2009, at 13.)

DISH has put forth uncontested evidence that it has satisfied each of the safe harbor requirements. Specifically, DISH created robust and comprehensive written Do Not Call policies and procedures (*see* AMF ¶¶16-26), trained its personnel and its Telemarketing Vendor call centers on these policies and procedures (*id.* at ¶¶27-35), maintained and recorded the applicable Do Not Call lists (*id.* at ¶¶36-49), used a process to prevent telemarketing to telephone numbers on these Do Not Call lists employing a version of the NDNCR no more than 31 days prior to the call date (*id.* at ¶¶55-81), and monitored and enforced its telemarketing policies and procedures (*id.* at ¶¶75-98), including by using multiple levels of proposed campaign reviews, tracking consumer telemarketing complaints, and investigating and addressing such complaints, and enhancing processes as a result of such efforts. (*Id.* at ¶¶14-98, 105-107.) DISH even uses PossibleNOW, the FTC's own subcontractor, to aid in its compliance process. (PUF ¶38; AMF ¶¶29; 34; 43-49; 55-72.) DISH has demonstrated that any calls made to persons who requested not to be called were the result of inadvertent errors. (AMF ¶¶105-107.)

Rather than relying on facts, Plaintiffs' response to the safe harbor defense is to change the law and the rules. Plaintiffs invoke a strict liability policy and then describe good faith mistakes as malicious. Far from supporting their position with either law and evidence, Plaintiffs devote scant attention of their 180 page motion to the safe harbor defense. (Plaintiffs' Motion at 132-134.) Plaintiffs attempt to position the TSR and TCPA as strict liability rules so as to preclude honest mistakes by employees in a legitimate business (whose jobs exist to perform compliance activities). Plaintiffs then re-characterize such efforts as premeditated, illegal activities. However, the law expressly adopts the safe harbor and rejects Plaintiffs' concept of strict liability. DISH's compliance efforts are not the fake storefront portrayed by Plaintiffs. Instead, Plaintiffs' own call record analysis of DISH's outbound calls demonstrates that DISH's robust compliance efforts and programs were successful.

B. DISH Has Complied in Good Faith With The Safe Harbor Provision

As noted, Congress rejected the strict liability approach in favor of the safe harbor. The safe harbor does not require a perfect score, but rather requires that the seller or telemarketer make good faith efforts. *See* 60 Fed. Reg. at 30,417 n.114 (“[t]he Commission believes that any error should be excused . . . as long as the seller or telemarketer is complying in good faith with the . . . requirements of the [Rule’s] safe harbor.”) Contrary to Plaintiffs' position, the TSR's safe harbor “is intended to protect telemarketers who make a good faith effort to comply with these [NDNCR and internal DNC] provisions, but who inadvertently place an outbound call in violation of either of them.” FTC, Report to Congress Pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws, at 10 (Sept. 2003), (*available at* <http://web.archive.org/web/20130916203647/http://ftc.gov/os/2003/09/dnciareport.pdf>) (hereafter, “Do Not Call Implementation Act Report”).

The evidence shows DISH and its employees, motivated solely by performing their compliance functions, meet and exceed the good faith standard. (AMF ¶¶14-98, 105-107.) These employees are reviewed, paid, and promoted or demoted not based on avoiding compliance, but by enhancing it. (*Id.*) There is no evidence of willful evasion of these safeguards. The only conclusion is that DISH has acted in good faith and that any calls in violation of DISH’s compliance program and the TSR/TCPA are inadvertent. (AMF ¶¶16-107.) Plaintiffs generated thousands of deposition pages and reviewed hundreds of thousands of documents, but could not find a single instance where DISH’s compliance efforts were not pursued in good faith. Plaintiffs have made no showing whatsoever that DISH ever acted in bad faith. Finally, the evidence in this case shows real success in compliance. Even relying on Plaintiffs’ own allegations on the instant Motion, out of this universe of 1 billion calls analyzed by Plaintiffs, only 1% are cited by Plaintiffs as evidence of an alleged violation by DISH. (AMF ¶170; Plaintiffs’ Motion at 113, 120, 131.)

The safe harbor provisions of the TSR and TCPA provide DISH with a complete defense.

C. Plaintiffs’ Arguments that DISH Cannot Avail Itself of The Safe Harbor Should Be Rejected

Plaintiffs’ arguments that DISH cannot avail itself of the safe harbor defense all fail.

1. Plaintiffs Are Wrong About the Effect of The Allegedly High Incidence of Errors

Plaintiffs rely on an FTC staff paper that states that a “high incidence of ‘errors’” may establish that the compliance measures are not adequate. (Plaintiff’s Motion at 86; 132-33.) A staff paper is, at best, simply the staff’s view – not the Commission’s and certainly not a court’s. The same source further noted that “if there is a low incidence of ‘errors,’ there may not

be a Rule violation,” and implicitly conceded that a determination of whether the safe harbor applies is not an appropriate issue to be decided on summary judgment, stating that its application depends “on the facts of each case.” *Id.* FTC, Complying with the Telemarketing Sales Rule (available at <http://www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#safeharbor>).

In contrast, the FTC itself specifically found that the gross number of alleged TSR violations is irrelevant to the safe harbor. The safe harbor recognizes that errors will be made; otherwise, there would be no need for the safe harbor. 47 CFR § 64.1200(C)(2)(A); TSR, 60 Fed. Reg. 30,406, 30,417 (June 8, 1995). The FTC’s Revised Notice of Proposed Rulemaking for the TSR also states that the safe harbor is not limited by “a certain number of violations.” TSR, 60 Fed. Reg. at 30,417. This makes perfect sense. By relying on percentages, the safe harbor takes into account both the total number of calls (the denominator) and the total number of alleged violations (the numerator). If just the total number of violations were the standard, larger companies would be prejudiced just because they place a greater gross number of calls. Clearly, the total gross incidence of alleged “errors” that DISH allegedly committed, cannot be a factor in DISH’s safe harbor defense.

Further, even if the gross total amount of alleged errors on its own were a basis to vitiate the safe harbor defense, the known and indisputable problems with the accuracy of the NDNCR and Plaintiffs’ failure to attempt to account for these inaccuracies creates, at a minimum, a material question of fact and would require this Court to improperly draw an inference against DISH – inferring that a 1% error rate equates to a non-working compliance program. DISH, rather, is entitled to the favorable inference here – that its 99% success rate is indicative of its effective compliance effort.

During discovery, Plaintiffs analyzed approximately one billion call records pertaining to outbound calls that DISH placed between 2003 to 2010. In their Motion, as purported proof that DISH's compliance program was a failure, Plaintiffs claim that: (i) DISH allegedly committed 4,064,099 Registry violations, which is 0.4% of "errors" of the total call records analyzed and 1% of "error" calls in the 2007-2010 call records; and (ii) DISH allegedly committed 8,329,726 Internal List Violations, which is 0.8% of "errors" of the total call records analyzed and 2% of "errors" in the 2007-2010 call records. (Plaintiffs' Motion at 113, 120.) Put differently, even Plaintiffs' own evidence and Motion show a low incidence of alleged errors.

Notably, the FTC's own accuracy expectations for its contractor that maintains the NDNCR, Lockheed Martin, are materially lower than what Plaintiffs are now demanding of DISH. Indeed, the FTC set an accuracy rate of 95% for Lockheed Martin (AMF ¶124), and from time-to-time, Lockheed Martin's accuracy rate has dipped down to as low as 43.9%. (*Id.* at ¶125.) Yet, the FTC did not terminate Lockheed Martin when it failed to meet the FTC's standard.²²

In any event, DISH disputes the violations claimed by Plaintiffs as wildly inflated, and those disputed facts cannot be used to negate the safe harbor defense.

2. Plaintiffs Are Wrong About the Effect of Do-Not-Call Requests Made To Independent Retailers

Plaintiffs claim that, as a matter of law, DISH should lose its safe harbor defense because, until 2008, DISH did not include with its own Internal DNC List requests that may have been made to Independent Retailers. Plaintiffs, however, have not cited to (nor could they) any

²² Setting their contractor's accuracy rate at 95%, and not terminating that contractor when it missed that mark by over half, demonstrates the hypocrisy of Plaintiffs' efforts to impugn DISH for not having a zero tolerance policy for the Independent Retailers' telemarketing failures.

legal authority that would require DISH to collect and include within its Internal DNC List requests that may be made to any of the 7,500 Independent Retailers who sold DISH products and services (and, in many instances, the product and services of companies other than DISH) over the pertinent time period. Plaintiffs' novel argument would mean that this Court would have to resolve whether each Independent Retailer is or was its own seller, or is or was a vendor telemarketer of DISH. This factual dispute cannot be resolved on summary judgment, particularly when many Independent Retailers sell other branded products and services, including product and service offerings. (AMF ¶¶222-387.) DISH disputes that any of the Independent Retailers were or are DISH's telemarketers (instead the Independent Retailers are their own respective sellers). Further, the substance of any alleged request to an Independent Retailer (including whether the request was DISH-related is at best, a factual question that cannot be resolved on summary judgment.

In addition, the FTC appears to have rejected this freshly minted argument that DISH must honor Do Not Call requests made to a separate legal entity. The FTC has acknowledged that there are instances where even a division of the same corporate entity can be a different seller from another division, and need not honor an internal DNC request made to that very same corporate entity. Specifically, in a "Q&A" prepared for businesses, the FTC has stated:

What if a consumer asks a specific division of a corporation not to call? Does a call from a different division violate the Rule?

Distinct corporate divisions generally are considered separate sellers under this Rule.

FTC, Complying with the Telemarketing Sales Rule, *available at* www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#safeharbor)

(emphasis added). Surely, DISH and the Independent Retailers, which are entirely separate corporate entities with different company names, who have entirely separate corporate operations and structures, cannot be required to honor an internal DNC request made by a called party to one but not the other. This manufactured “violation” of the safe harbor provision is both non-existent and meritless, and cannot possibly negate DISH’s safe harbor defense as a matter of law.

3. Plaintiffs’ Claim That DISH Maintained No Records Documenting its Scrubbing or List Creation Processes Is Mistaken

Finally, Plaintiffs erroneously state that DISH maintained no records documenting its scrubbing or list creation process. False. To generate calling lists, DISH uses a software application called PDialer. PDialer takes input data from various DISH databases to create lists of telephone numbers to be called. (AMF ¶72.) PDialer compiles the list of numbers, then scrubs them against DISH’s purchased NDNCR and internal Do Not Call list to eliminate telephone numbers on those lists. (*Id.*) The P-Dialer application (in addition to PossibleNOW’s services) also ensures (where appropriate) that DISH’s calls are placed to a number with which DISH maintained an Established Business Relationship (“EBR”), as defined by telemarketing laws. (*Id.*) As demonstrated by documents DISH produced in discovery, DISH maintained the PDialer screen shots that documented its scrubbing and list creation process. (d/e 79 at 14: “On August 24, 2012, Defendant produced 116 pages of documents which consisted of “screen shots” from the Predictive Dialer (PDialer), a list processing and scrubbing application. (*See* Plaintiffs’ Motion, Exh. 16A, 16B (d/e 201-16, 201-17).) Defendant produced three screenshots for each campaign. (*See* Pls.’ Motion for Sanctions, p. 6 (d/e 201).)

III. THE FTC CANNOT OBTAIN SUMMARY JUDGMENT AS TO COUNTS I-IV OF THE SECOND AMENDED COMPLAINT BECAUSE THE COMMISSION’S “MASSIVE COMPUTER PROGRAMMING APPROACH” INCLUDES NUMBERS OVER WHICH THE FTC LACKS JURISDICTION OR THAT ARE EXPRESSLY NOT SUBJECT TO THE TSR

Only telephone numbers within the FTC’s jurisdiction can provide a basis for a violation or, at the very least, a basis for a civil penalty or an injunction. To enforce the TSR, the FTC must show, at a minimum, that the seller or telemarketer placed the calls at issue to a number over which the FTC has jurisdiction. 16 C.F.R. § 310.4(b)(1)(iii)(B); *see also* 15 U.S.C. § 6105(a) (“no activity which is outside the jurisdiction of [the FTC] Act shall be affected by [TSR]”). It is a threshold element of any TSR claim that the defendant made a telemarketing call to a residential consumer (rather than a business), *i.e.*, a call by a telemarketer to “induce the purchase of goods or services.” 16 C.F.R. § 310.4(b)(1)(iii)(B) (a violation requires an “outbound telephone call”); 16 C.F.R. § 310 (“outbound telephone call” is one “initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution”).

The FTC has conceded, for example, that it has no jurisdiction over calls made to wireless telephone numbers, which number in the millions on the NDNCR. (AMF ¶142.) The TSR also provides that the FTC’s enforcement jurisdiction is limited to interstate calls: “Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one *interstate* telephone call.” 16 C.F.R. § 310.2(dd) (emphasis added). The FTC also has conceded this point. Do Not Call Implementation Act Report, *supra*, at 8 (“the Telemarketing Act . . . limits the reach of the Rule to only interstate telemarketing . . .”).²³

²³ The FCC and courts have also rejected reliance upon area codes as indicative of the interstate and intrastate nature of a call. *Vonage Holdings Corp. v. Nebraska Pub. Serv.* (footnote continued)

The FTC has produced no evidence that a particular call made by any Independent Retailer was for telemarketing to offer a DISH product or service. Nor has the FTC produced any evidence that each claimed violation (whether made by DISH or an Independent Retailer) was during a call that is subject to the FTC's jurisdiction or implicates the TSR. The FTC's Motion, therefore, must be denied as to Counts I-IV.

A. Raw Hits Do Not Prove Violations of the TSR

Plaintiffs' case rests on a "massive computer processing" approach that is based on the faulty assumption that a call to a number on the NDNCR or an Internal DNC List always can be the basis for a violation of the TSR or the TCPA, or a state statute. (AMF ¶¶163-176.) Plaintiffs already have conceded that a raw hit is not dispositive of whether an unlawful telemarketing call was made. (AMF ¶¶165-168.) A raw hit, however, does not consider: (1) who dialed a call; (2) if the call was dialed at all; (3) the purpose of any given call; (4) whether the call was made at the request of the called party; (5) whether an auto-dialer was used to make the call; (6) whether the number called was to a business, government, or residence; (7) whether the dial was made to an active in-service number, thereby resulting in a call; or (8) whether an EBR existed or the call was in response to a consumer inquiry. (AMF ¶¶109; 165-169.)

Plaintiffs here have the burden of demonstrating not just that DISH or an Independent Retailer placed a call to a number registered on a DNC list, but also that a call actually occurred, was a telemarketing call to sell a DISH product or service, that the recipient had not consented to receive such call or did not have an EBR, and that the call was made to a

(footnote continued)

Comm'n, 564 F.3d 900, 902 (8th Cir. 2009) ("determining the interstate and intrastate nature of VoIP service cannot be accomplished by reference to the VoIP user's telephone number, because a customer living in one area code may be assigned a telephone number from a different area code.")

consumer and not a business or government number. Indeed, in *FTC v. Vacation Property Services*, No. 8:11-cv-00595, 2012 WL 1854251 (M.D. Fla. May. 21, 2012), the court explicitly rejected the FTC’s attempt to do what it tries here with its “raw hits” evidence – “[t]he FTC’s evidence of the total number of calls [defendant] made to persons on the Do Not Call Registry is unpersuasive because this evidence fails to exclude persons who had a prior business relationship with [defendant] [*i.e.*, an EBR].” *Id.* at *3 n.15. Without evidence that, among other things, calls to telephone numbers registered on the NDNCR or DISH’s internal DNC List were solicitations and/or made without the consumers’ consent, the total number of “hits” shows absolutely nothing and fails to satisfy the FTC’s burden of proof.

The FTC itself has made statements conceding that individualized inquiries are necessary to investigate DNC complaints properly. FTC, *Additional Report to Congress Pursuant to the Do Not Call Registry Fee Extension Act of 2007*, at 11 (Dec. 2009) (“the agency must scrutinize business records of individual sales and inquiries, and determine whether calls were made within the time periods prescribed in the TSR of FCC rules”) ([available at www.ftc.gov/sites/default/files/documents/reports/additional-report-congress-do-not-call-registry-fee-extension-act-2007/100104dncadditionalreport.pdf](http://www.ftc.gov/sites/default/files/documents/reports/additional-report-congress-do-not-call-registry-fee-extension-act-2007/100104dncadditionalreport.pdf)).

Plaintiffs cite *Ira Holtzman, C.P.A. v. Turza*, 728 F.3d 682 (7th Cir. 2013), to suggest that it has met its burden. *Turza*, a TCPA facsimile case, does not support the FTC’s position here. The Seventh Circuit was principally addressing the form of judgment as it related to unclaimed funds from a class action award. In addressing the question of consent or EBR, the Seventh Circuit noted that the facts in the *Turza* case did not cause these matters to present individualized issues. *Id.* at 684. Here, individualized issues abound.

Plaintiffs cannot identify those consumers whose numbers properly appeared on the NDNCR. Without the ability to establish that the number on the NDNCR was properly there in the first instance, Plaintiffs have failed to present evidence of *actual* violations. Similarly, with respect to Independent Retailer call records (mainly produced by telecommunications providers), Plaintiffs cannot establish which calls were made to those consumers with whom there was an EBR or who received a call in response to their inquiry. Plaintiffs also cannot identify which calls were telemarketing calls versus non-telemarketing calls; nor can they identify which calls were made to offer a DISH product versus the product of some other brand. Plaintiffs' Motion must be denied.

B. Plaintiffs Cannot Meet Their Burden of Proof By Attempting to Rely on What DISH's Expert, Mr. Taylor, Identified as "Issue Calls"

Plaintiffs attempt to avoid their burden of proof regarding the foundation for claiming an NDNCR violation by mischaracterizing the findings of DISH's expert, John Taylor of PossibleNOW. Plaintiffs claim that while they:

undertook a lengthy process to analyze those records between late 2010 and late 2013, the Court need not resolve *any disputes about that process* on summary judgment because Plaintiffs base their motion on the subset of violations that *Dish's expert* identified in his reports. For the purposes of this brief, Plaintiffs treat the raw facts of the call counts Dish's expert generated as true, thereby removing from the summary judgment phase most, if not all, of the factual disputes about the call record analyses.

(Plaintiffs' Motion at 89 (non-bolded emphasis in original) (emphasis added).) Plaintiffs simply ignore a key aspect of Mr. Taylor's findings. *Mr. Taylor explained that the NDNCR was inaccurate, over-inclusive, and that "issue calls" are not the same as violations.* (AMF ¶¶463-464.) Rather, "issue calls" are precisely that – "calls that require further investigation" to determine if they are actually violative of the TCPA or TSR, are protected by the relevant safe

harbor provisions, or fall within some other exception or legal argument as to why the calls do not constitute violations of the TCPA or TSR.” (AMF ¶463.)

Plaintiffs’ maneuvering reveals that their expert Dr. Yoeli’s processing and analysis is compromised. Dr. Yoeli ignored the FTC’s own subcontractor’s findings with respect to proliferation of non-residential landlines on the NDNCR and the flaws in the disconnect/reassign process. (AMF ¶465.) Dr. Yoeli did not provide a scientifically supportable method to exclude raw hits that were based on numbers that did not belong on the NDNCR. (*Id.*) Plaintiffs cannot avoid this fatal evidentiary defect by relying on a mischaracterization of DISH’s expert. Plaintiffs’ inability to provide a reliable basis for using “raw hits” is fatal to all of Plaintiffs’ Do Not Call claims.

IV. PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED AS TO COUNTS I, V, VII AND IX (NDNCR-BASED CLAIMS) OF THE SECOND AMENDED COMPLAINT DUE TO PLAINTIFFS’ RELIANCE ON RAW HITS OF AN OVER INCLUSIVE NDNCR

Plaintiffs have moved for summary judgment on Counts I, V, VII, and IX, each of which asserts claims against DISH under the TSR, TCPA, or state statutes for calls allegedly made to numbers on the NDNCR based on call records pertaining to calls made by DISH, a Vendor Telemarketer retained by DISH, or Independent Retailers SSN and JSR. For each of these claims, Plaintiffs must prove that, among other things, a call was made to the consumer who had registered his or her number on the NDNCR. Plaintiffs have not met this burden and their Motion must be denied as to Counts I, V, VII, and IX.

Because Plaintiffs have relied upon “raw hits” to the NDNCR, it is Plaintiffs’ burden to prove that, among other things, the NDNCR is valid, *i.e.*, that it contains only numbers that belong on it. Plaintiffs made no attempt to prove the validity of the NDNCR but simply ignored the Registry problems that they know exist. From the earliest days of the NDNCR’s

development, the FTC has been aware of the fundamental need to ensure “the accuracy and validity of consumer telephone numbers added to the registry.” (AMF ¶¶108-124.) During the FTC’s initial planning for the NDNCR, significant concerns were raised about whether the federal government could ensure the accuracy of such a massive national database. (*Id.* ¶¶110-111.) These concerns proved to be legitimate.

In fact, soon after the NDNCR was put into operation, several events occurred that compromised the accuracy of the NDNCR, including problems with the data provided to telemarketers as part of the NDNCR download process. (AMF ¶¶112.) These errors led directly to Congressional intervention and attempt to improve the accuracy of the NDNCR through the enactment of the Do Not Call Improvement Act.

Despite the Improvement Act, and the FTC’s retention of multiple contractors and subcontractors in an effort to cure the NDNCR’s inaccuracy problems, errors continued to bedevil the NDNCR. (AMF ¶¶120-162.) To this day, the NDNCR contains millions of numbers that do not fit the original purpose of the NDNCR. (AMF ¶¶120-156.) As a result of these well-documented errors and the FTC’s and FCC’s decision not to restrict the types of numbers that can be added to the NDNCR, the NDNCR is comprised of significant percentages of numbers that, even if called, cannot trigger liability. These numbers include:

1. Invalid and unknown numbers – numbers typed in incorrectly, with, for example, inaccurate area codes, an insufficient number of digits, etc. (AMF ¶¶110, 115, 136, 151);
2. Disconnected numbers that have not been reassigned to new persons (AMF ¶¶127, 130, 132-134);
3. Wireless telephone numbers (AMF ¶¶130, 131, 141); and
4. Business and government lines (AMF ¶¶147-151.)

Having failed to establish the reliability of the NDNCR, Plaintiffs' Motion with respect to the NDNCR claims must be denied.

A. Only Numbers Registered on the NDNCR by the Person Associated With That Number Can Form the Basis For a Violation

The TSR provides that the NDNCR is a database of telephone numbers “of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services” of a seller.²⁴ 16 C.F.R. § 310.4(b)(1)(iii)(B). A number on the NDNCR must continue to be associated with the person who registered that number (the “Registrant Consumer”). Thus, an NDNCR claim only can be based upon calls made to a residential landline of the Registrant Consumer. Plaintiffs must prove, therefore, that the alleged violations were calls to these numbers. If a registered number is no longer associated with the Registrant Consumer (because the consumer moved, changed his or her phone number, canceled phone service for that number, etc.), a call to that number cannot be a violation. *Id.*; *First Nat'l Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 477 (7th Cir. 1999) (courts construe statutes according to literal, express terms unless doing so would lead to an absurd result or thwart the purpose of the overall statutory scheme).

The FTC essentially has conceded this point. It has unsuccessfully attempted to remove from the NDNCR landline phone numbers that are no longer associated with the persons who originally registered them. (AMF ¶¶113-135.) The FTC first attempted to do so by tracking and attempting to purge numbers that either were disconnected altogether or reassigned to a new landline subscriber. (*Id.* ¶¶114-119.) In October 2008, the FTC changed this process such that it only purged those landline phone numbers that had been disconnected *and* reassigned

²⁴ Plaintiffs admit that the NDNCR is for “consumers who *do not wish* [present tense] to receive certain types of telemarketing calls.” (d/e 57, SAC ¶11.)

to a different person and household than the one originally associated with the number. (*Id.* at ¶¶128-135.)

The FTC knew from the outset that the NDNCR, while a potential consumer protection tool, could not be used as an enforcement tool. Rex Burlison, the Missouri Attorney General at that time, on behalf of the National Association of Attorneys General (“NAAG”), stated:

I don't care how many people that you put on preserving the accuracy of the list, there's going to be problems with the list, and you have to accept that, especially when you go to a national list with millions of numbers, you are going to have a list that is imperfect, and it just doesn't matter until it comes to when someone is trying to enforce a violation. That's when it matters. Is that person or is that number that you're enforcing against accurately on the list and was it accurately given to the industry to protect the consumer.

(AMF ¶111.) (FTC Transcript, FTC Rulemaking Workshop, Session 1 (June 5, 2002) at 149-150 (*available at <http://web.archive.org/web/20130501140905/http://www.ftc.gov/bcp/rulemaking/tsr/020605xscript.pdf>*). Thus, even prior to the inception of the NDNCR, Plaintiffs knew that the mere existence of a number on the NDNCR was not sufficient to establish that a call to that number was a violation of the TSR/TCPA, and that more needed to be done to establish a violation.

Further evidence of the fact that the NDNCR cannot provide accurate law enforcement information comes from the FTC's own subcontractor, PossibleNOW, which is responsible for NDNCR's hygiene. (AMF ¶¶128-137.) Part of its task is removing landline numbers from the NDNCR that are no longer associated with the people who registered them. (*Id.* at ¶134.) PossibleNOW attempts to accomplish this by looking at numbers that become “disconnected” from the subscribers to those numbers. (*Id.*) It then uses an algorithm that relies on several assumptions to determine if the numbers should be removed from the NDNCR. (*Id.*)

First, PossibleNOW waits 30 days to see if a number remains disconnected. (*Id.*) It then waits 90 days after disconnection to see if the number is re-assigned to another person. (*Id.*) If it is re-assigned to a person with the same last name or a person with a different last name but at the same address as the previous holder of the number, PossibleNOW simply assumes the number should stay on the NDNCR. (*Id.*) This process creates false negatives (numbers remaining on the NDNCR that should not be there). (*Id.*) All of these assumptions cause the NDNCR to be “over inclusive.”²⁵ (*Id.*; Stauffer 4/26/12 Dep. at 95.) Over inclusive simply means inaccurate.

Indeed, PossibleNOW testified as follows:

[REDACTED]

²⁵ The FTC has not instituted any process to remove wireless numbers from the NDNCR that are no longer associated with the persons who registered them. (AMF ¶130.) This is particularly problematic because wireless numbers account for more than half of the numbers on the NDNCR.



(AMF ¶135; *Id.* at 79-80 (emphasis added).) As PossibleNOW concluded, the only way to get to the truth is to “track the person down.” *Id.* This is another way of saying “massive computer processing,” which Plaintiffs rely exclusively upon in their Motion, does not prove a violation, and at the very least creates a material question of fact as to whether a call to such number should be treated as a violation of the TSR or TCPA.

The problems do not end there, however. In October 2007, Lockheed Martin took over the management of the NDNCR. (AMF ¶120.) It also has confirmed that there have been problems with: (a) “removing numbers from the [NDNCR];” (b) loading customer registrations on the NDNCR “in a timely manner”; and (c) NDNCR “telemarketer downloads.” (*Id.*) Each of these three areas affects the reliability of the NDNCR. PossibleNOW confirmed the problems with removing numbers from the NDNCR, as noted above. Its process creates false negatives – meaning there are numbers on the NDNCR that should not be there. (*Id.* ¶¶134, 137.) Here, therefore, Plaintiffs are improperly claiming a raw hit if there was a call to any number on the NDNCR, even though it is beyond doubt that there are numbers on the NDNCR that do not belong there and cannot give rise to liability.

This was reaffirmed by PossibleNOW. In or around 2009, PossibleNOW was hired to do a one-time massive purge of numbers from the NDNCR that should not have been on the NDNCR in the first instance. (AMF ¶¶136; *Id.* at 152-54.) That purge removed millions of improper numbers from the NDNCR as of the day of the purge. Notably, PossibleNOW did not

go back and purge these numbers off the historical NDNCR records used by Plaintiffs to develop its “raw hits.” (*Id.*; AMF ¶137.)²⁶

Counsel for the FTC asked PossibleNOW the following questions about the seven million numbers that were purged from the NDNCR.

[REDACTED]

(Stauffer 4/26/12 Dep. 274-75.) Thus, the FTC’s own counsel developed testimony from its own subcontractor, PossibleNOW, that evidence from the consumer is the only guarantee of accuracy regarding NDNCR registration.

²⁶ These are the same “raw hits” Plaintiffs rely on as a starting point for an NDNCR violation. (AMF ¶¶164-169.) Thus, Plaintiffs are using indisputably incorrect (and therefore unreliable) information as a basis for their “massive computer processing” evidence to support their NDNCR claims.

AT&T, Lockheed Martin, and PossibleNOW also identified mistakes related to the lists that telemarketers download for scrubbing. (AMF ¶¶ 112, 127, 161, 162.) These all create accuracy issues – and material issues of fact – when it comes to prosecuting an NDNCR claim against sellers and telemarketers. Any company that engages in telemarketing must download the list for scrubbing purposes and would have no way of knowing of these mistakes in the Registry. Plaintiffs’ use of its “massive computer processing” to generate “raw hits,” however, ignores all of these problems. In reality, an alleged raw hit (and thus, a claimed violation) could be generated for a call by such a telemarketer solely because of the inaccuracies in the download process of NDNCR numbers overseen by the FTC. Nevertheless, this admitted problem has not kept the FTC from using “raw hits” as the sole basis for a violation. (AMF ¶¶165-170.) This is not only inexplicable, it necessarily (and deceptively) results in a higher incidence of alleged violative calls caused by no fault of the seller or telemarketer. Indeed, this improperly high incidence of raw hits underpins the FTC’s assertion that the safe harbor defense is not available to DISH. A legitimate business such as DISH corrects its errors, provides refunds and credits, and is otherwise accountable to its customers. Here, the FTC, who is supposed to maintain an accurate NDNCR, actually blames the sellers and telemarketers for its own NDNCR errors.²⁷

Because the FTC does not maintain an accurate record of telephone numbers that are associated with the persons who registered them, there is no way that Plaintiffs can

²⁷ Also, if a consumer’s registration of his or her number is not properly processed, which discovery has shown happens on occasion, the consumer will believe that she registered on one date but the NDNCR will show a different registration date. This could mean that a consumer would believe a call on a certain date was improper, but the NDNCR records would not show the timely registration. This affects the validity of consumer complaints such as those relied upon by Plaintiffs here. (*See, e.g.*, Response to PUF ¶115.)

demonstrate that a raw hit is a call by DISH or an Independent Retailer to a person who objected to receiving the call. This defect in proof alone also justifies denial of Plaintiffs' Motion as to all of the Registry-based claims.

B. The Only Way to Prove that a Number on the Registry is Still Associated With the Person who Registered the Number is by The Consumer's Testimony

As shown, Plaintiffs' "massive computer processing" is insufficient to prove a claim based upon a match between a called number and a number on the historical NDNCR. As confirmed by PossibleNOW, the only way to answer that open question, and prove the violation, is through the consumer's testimony. Plaintiffs must come forward with evidence from the consumer who actually made the NDNCR request to meet their burden to prove a violation.²⁸ That is true as to all of the NDNCR and the DISH Internal DNC List claims asserted by Plaintiffs. A complaint by a consumer does not provide such admissible proof. A consumer complaint is hearsay. *See FTC v. E.M.A. Nationwide, Inc.*, No. 1:12-cv-2394, 2013 WL 4545143, at *2-3 (N.D. Ohio Aug. 27, 2013).

Plaintiffs cite Paragraph 115 of their Statement of Undisputed Facts claiming that, 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.) This proves nothing. First, the call records they rely on include call records from

²⁸ Similarly, for the Internal List claims, the TSR defines the violation as calling the "person" on the internal list, not the "number." 16 C.F.R. § 310.4(b)(1)(iii)(A). Again, Plaintiffs have not met their burden of proof on the essential element that a call was made to a "person" who asked not to be contacted, without evidence from that person that he or she was, in fact, called at a number that he or she had registered on the NDNCR at the time of the call.

Independent Retailers allegedly from JSR and those are not admissible evidence. As to the DISH call records, from what can be discerned from Appendix B, only 555 calls even fall within this illusory statistic. Thus, even if these DISH calls did count as potential violations, the percentage would be 1% of the 50,000-plus complaints cited by Plaintiffs (555 divided by 50,000). Not surprisingly, this is consistent with the other low percentage rate of errors in this case. (*See* footnote 3 *infra*). Finally, the Court would have to infer that these coincidental matches mean the complaint relates to the call it is “matched” with. That is impermissible on summary judgment.

The unreliability of Plaintiffs’ consumer complaint analysis is further supported by the FTC’s own investigator, Nicholas Mastrocinque, who admitted that many consumer complaints he investigated, on an individualized basis, could not support a claim against DISH. He worked on the agency’s investigation of DISH and the Independent Retailers. He testified that he and his colleagues placed calls to consumers whose phone numbers allegedly appeared in the call records produced by Independent Retailers. (AMF ¶221.) According to Mr. Mastrocinque

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Obviously, the

reason Plaintiffs moved away from the needed individualized proof of NDNCR violations by DISH is because they could not generate a case against DISH by relying upon individualized proof. Such proof is vital to Plaintiffs' claims but is tellingly absent from their proof of "millions" of violations. Plaintiffs' Motion, therefore, should be denied.

C. Calls to Business Numbers Do Not Violate the Registry

Plaintiffs also have not proven that the claimed violative calls were made to consumer phone numbers as opposed to business numbers. This is critical because neither the TCPA, nor the TSR, restricts calls to businesses. *See FCC, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 70 Fed. Reg. 19,330, 19,331 (Apr. 13, 2005); 16 C.F.R. § 310.6(b)(7); (d/e 20, Opinion, 11/02/2009, at 3("[c]onsumers were permitted to register their personal telephone numbers on the Do Not Call List.")) Thus, there can be no TSR violations arising from calls made to business (or government) lines. In sum, the FTC's enforcement jurisdiction under the TSR is limited to consumer residential landlines.

The FCC also recognized that "home based business" numbers on the NDNCR deserved special attention. 70 Fed. Reg. at 19, 331.²⁹ And, as to home-based businesses, the FCC admitted it would have to "review such calls as they are brought to [the FCC's attention] to determine whether or not the call was made to a residential subscriber." *Id.* Thus, individualized

²⁹ The FTC noted the same concerns when it amended the TSR in 2003:

A number of commenters asked the Commission to clarify coverage of its "do-not-call" provisions. Some queried whether calls to home businesses would be subject to the "do not-call" requirements. The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's "do-not-call" requirements.

TSR, 68 Fed. Reg. 4,580, 4,632 (Jan. 29, 2003).

consumer inquiry – as discussed above – is necessary to establish whether the call on the NDNCR was a violation because it was made to a residential subscriber, and not to a business (whether home-based or otherwise).

The reason for such individualized inquiry is obvious. A consumer may register her number on the NDNCR but admit that she runs a home-based business from 9 a.m. to 5 p.m. using that number. If this person testifies that she received a telemarketing call at 2 p.m., presumably the results of the Government’s “analysis” of that call would be that it was to a business, and thus not a Do Not Call violation. If, however, the complaining consumer testified that the call came in after 5 p.m., the Government would claim a violation. Thus, a mere “match” of the called number and the historical NDNCR does not answer the salient open question of whether that call violates the TSR or the TCPA. Indeed, the FTC’s general manager of the NDNCR, and its Rule 30(b)(6) witness on the NDNCR in this case, conceded that a simple match between a phone number and the NDNCR is *not* evidence of a TSR violation. (AMF ¶166.)

Plaintiffs have not proven that each of the calls that they claim were violations were made to consumer phone numbers, as opposed to business or government numbers. For this additional reason, Plaintiffs’ Motion should be denied.

V. THE FTC CANNOT PREVAIL ON COUNT I FOR ADDITIONAL REASONS

A. The FTC Cannot Prevail On Count I As To DISH’s Call Records For Additional Reasons

The FTC cannot prevail on Count I of the SAC as to DISH’s call records for the following additional reasons.

2,386,386 Alleged Internal List & NDNCR Violations. First, with respect to the FTC’s claims that there are 2,386,386 violations that are raw hits to the NDNCR and to

DISH's internal list, Plaintiffs rely on purported hits to the internal Do Not Call lists maintained by various Independent Retailers not even identified by Plaintiffs, rather than the Do Not Call requests made to DISH itself. (Plaintiffs' Motion at 90.) As set forth herein, the FTC cannot prove that these unidentified Independent Retailers were "telemarketers" of DISH, rather than their own sellers, so as to require DISH to collect and honor Do Not Call requests made to a separate legal entity.³⁰

873,551 inquiry-based alleged telemarketing calls. Plaintiffs next claim that DISH should not be able to rely upon an inquiry exception for 873,551 telemarketing calls to consumers where DISH responded to leads. (Plaintiffs' Motion at 92.) As a threshold matter, Plaintiffs are relying on an expert report that was superseded by a later report due to Plaintiffs' own changed analysis. Plaintiffs' reliance on the prior, non-operative report requires Plaintiffs' argument as to these calls to be rejected outright. (Response to UF 33.) Further, Plaintiff's contention that DISH did not provide any "leads" from consumers, and that DISH has no evidence to create defenses as to the 873,551 inquiry-based alleged telemarketing calls is simply false.³¹ DISH has in fact produced these materials to Plaintiffs in the form of call records. The 873,551 calls were derived from DISH's lead-tracking system ("LTS"). (Pl. Ex. 26, p. 7.) As borne out in discovery, DISH's LTS collects and identifies leads of "people that inquired about subscribing to DISH Network but for whatever reasons did not do so on their phone call." (AMF

³⁰ Notably, Plaintiffs ask this Court to double count these alleged violation calls, and get double civil penalties for the same calls, as violations of both Counts I and II of the SAC.

³¹ With respect to the amount of inquiry-based calls, Plaintiffs mischaracterize DISH's expert's analysis of these calls as "issue calls." (PUF ¶33.) Mr. Taylor's expert report specifically notes that his team was "able to identify 873,551 *valid inquiry EBR calls* based on campaign name, date and EBR period analysis." (Pl. Ex. 26, p. 7) (emphasis added). Nowhere in Mr. Taylor's expert report does he characterize these calls as "issue calls." (Pl. Ex. 26; Response to PUF ¶33; AMF ¶59 and 460.)

¶457.) Upon inquiry “the customer’s information from those that do not purchase [DISH services] is generated in a daily calling file and delivered to the outbound team to process and load into the dialer to be called so the customer can be called back.” (AMF ¶460.) The outbound team uses PDialer to call these inquiring customers back and “[o]nce dialed, the PDialer output file becomes the call record.” (Pl. Ex. 30, Montano Decl. ¶13.) The call record byproduct of PDialer is represented by the “nearly 1 billion call records that were produced by DISH either in response to the CID, or in response to Plaintiffs’ discovery requests in this case.” (*Id.*)

Plaintiffs’ reliance on this Court’s April 23, 2013 Order (d/e 279) (“Order 279”) to preclude DISH from offering evidence regarding inquiry-based leads is equally unavailing. At the inception of discovery (or previously in the CID phase), DISH produced close to 1 billion call records, which is inclusive of DISH’s LTS inquiry leads. Further, the call records created by the LTS is for consumers who made an active inquiry to DISH and have an inherent EBR. Scrubbing of any lists created by the LTS, therefore, would be unnecessary and the LTS data created in the form of call records has nothing to do with any scrubbing mechanism used by DISH.

Under the TSR, there is no basis to conclude that DISH bears the burden of proof as to EBR including the existence of an inquiry. The TSR defines the elements of a violation as initiating an outbound call to a person on the NDNCR unless the seller has an EBR (which includes an inquiry). 16 C.F.R. 310.4(b)(1)(iii)(B)(ii). Based on this text, it is the FTC’s burden to prove the absence of an EBR in order to establish elements of a claimed violation of this section of the TSR.

DISH has more than met any burden of proof as to the existence of an EBR or inquiry with respect to many calls that it made to consumers, and Plaintiffs' motion must be denied.

332,512 calls. Plaintiffs next seek summary judgment as to calls that Plaintiffs argue should not have been excluded from DISH's expert's analysis. (Plaintiffs' Motion 92.) But again, Plaintiffs are relying on an expert report that was superseded by a later report necessitated due to Plaintiffs' own changed analysis. Plaintiffs' reliance on the prior, non-operative report requires Plaintiffs' argument as to these calls to be rejected outright on that basis. (*See* Response to UF 33.) In the operative version of John Taylor's expert report, Mr. Taylor relied on codes that excluded records that showed a dialer error or a failure of the telephone to ring – totaling 532,261 records. (Plaintiffs' Motion, Ex. 16.) These codes, which include “** System Code Invalid,” “Busy,” “Invalid Number,” “No Dial Tone,” “No Ring Back,” “Reorder,” “Special Information Tone,” and “General Error,” are predominantly indicative that no call even occurred, or was initiated, because of a dialer error or invalid number. (*Id.*) Accordingly, Plaintiffs cannot obtain summary judgment as to these calls.

B. The FTC Cannot Prevail On Count I Based On Calls Allegedly Made By Independent Retailers

Under Count I, the FTC also seeks to hold DISH liable for NDNCR calls allegedly made by Independent Retailers JSR and SSN. (AMF ¶¶ 330 and 360.) Although Plaintiffs deposed representatives of nearly a dozen Independent Retailers during discovery in this case, Plaintiffs did not depose any representative of JSR or SSN. The depositions of the dozen Independent Retailers in virtually every instance demonstrated that the call records produced as to those Retailers were comprised of a mix of telemarketing and non-telemarketing calls, and some were a mix of calls made to market products other than DISH's products. In

addition, those depositions showed that DISH did not cause the Independent Retailers to make any calls whatsoever, let alone violation call; nor were facts developed that could show that the Independent Retailers were telemarketers of DISH. Because they had to abandon any attempt at summary judgment for calls placed by Independent Retailers that were actually deposed, Plaintiffs instead rely upon hearsay affidavits, improper inferences, and assumptions, to prove that JSR and SSN committed violation calls and that DISH should be held liable for such calls. That neither of these Retailers was deposed creates numerous hotly-contested issues of material fact which preclude summary judgment.

C. The FTC Cannot Prove That The Calls Allegedly Placed By SSN Or JSR Were Telemarketing Calls Made To Offer A DISH Product

Plaintiffs' Motion also must be denied on Count I because genuine issues of fact exist as to whether: (a) the calls allegedly placed by JSR or SSN were telemarketing calls to offer a DISH product or service; and (b) JSR or SSN were acting as DISH's telemarketer, rather than as their own respective sellers. The alleged JSR and SSN call records were produced by telecommunications providers and do not establish the content or purpose of a call. They certainly cannot prove that the calls were telemarketing. Neither can these records establish that these calls were placed by JSR or SSN to sell DISH products or services. Indeed, while the record evidence shows that Independent Retailers sold products and services for other companies (AMF ¶¶221, 256, 296, 320, 384), Plaintiffs ask this Court to assume that from August 4, 2006 to March 31, 2007, every call that JSR made was to sell DISH products and services.

Further, while the evidence shows that Independent Retailers made numerous types of non-telemarketing calls, Plaintiffs apparently also ask this Court to assume that every call is a triggering telemarketing call notwithstanding that these call records have not been parsed to exclude customer service follow-up calls, return calls to customers who inquired about

satellite TV service, return calls to customers who inquired about other non-DISH/non-satellite TV services, and personal calls made by retailer employees.³² (AMF ¶¶219-221, 238-40, 262, 263 268-271, 280-286, 292, 301-303, 307-311, 320-321. 323-325, 328-336, 341, 342, 355-358, 363-368, 369-374, 376-380, 384-386.)

Finally, the FTC has failed to produce admissible evidence that the call records relating to JSR and SSN contain: (i) exclusively interstate calls to residential consumers, as opposed to calls to businesses or the government; (ii) calls to residential landlines, as opposed to wireless numbers; (iii) calls related to DISH's products or services, as opposed to some other entity's products or services; (iv) calls relating to telemarketing; (v) calls without an EBR or, not in response to an inquiry; (vi) calls to the person (or household) that put their number on the NDNCR on the Independent Retailers' respective internal Do Not Call lists.

Thus, Plaintiffs improperly rely both on assumptions and inferences, and fall short of the undisputed facts necessary to meet their burden on summary judgment.

D. The FTC Cannot Establish That DISH "Caused" JSR or SSN To Place Violation Calls

Even if the FTC had admissible evidence of violations by Independent Retailers (it does not), it cannot prove that DISH is a "seller" that "caused" a TSR violation by any Independent Retailer acting as a "telemarketer." To establish liability against DISH for an Independent Retailer's alleged violation of the NDNCR, Plaintiffs must prove that DISH as a "seller [has] cause[d]" an Independent Retailer as its "telemarketer" to initiate outbound calls to a Registrant Consumer. 16 C.F.R. § 310.4(b)(1)(iii)(B). Additionally, Plaintiffs also bear the

³² The fact that calls by Independent Retailers covered a wide variety of topics, including non-DISH products and services and non-telemarketing subject matter, was confirmed by multiple Independent Retailers who were deposed by Plaintiffs. (AMF ¶221.) It was also confirmed by the FTC's own investigation of these calls. (*Id.*)

burden of proving that DISH “caused” an Independent Retailer to place a telephone call in violation of the NDNCR. *See Pugliese v. Prof'l Recovery Serv., Inc.*, No. 09-12262, 2010 WL 2632562, at *8 (E.D. Mich. June 29, 2010) (plaintiffs cannot carry their burden if the call records do not contain the necessary evidence to establish their claims). Plaintiffs cannot satisfy any of these elements, much less all of them.

1. DISH Is Not A “Seller,” And Neither SSN Nor JSR Were DISH’s Telemarketers, In Connection with The Activities of the Independent Retailers

The reality is that where a company contracts with independent retailers who, in turn, sell products or services to develop their *own* customers, Section 310.4(b)(1)(iii)(B) simply does not apply, by its terms. *Id.* The TSR defines a “seller” as “any person who, *in connection with a telemarketing transaction*, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration.” 16 C.F.R. § 310.2(aa) (emphasis added). DISH is not a “seller” in its DISH/Independent Retailer relationship because it was not involved in any “telemarketing transactions” with the Independent Retailers. *Id.* DISH does not hire Independent Retailers to conduct telemarketing for DISH. Instead, DISH has contractual arrangements with Independent Retailers under which the Independent Retailers market and sell DISH’s products, among others. These Independent Retailers decide the manner and means by which they market and sell DISH’s (and/or other companies’) services. (*See, e.g.*, AMF ¶¶ 222-387.)³³ Thus, DISH does not enter into any “telemarketing transaction” with any Independent Retailer to place telemarketing calls to anyone. Accordingly, DISH is not a “seller”

³³ If it learns of compliance concerns associated with an Independent Retailer, DISH advises the Independent Retailer that it must develop its own plan to cure such problems. (AMF ¶¶192-209.)

for purposes of establishing liability arising from the Independent Retailers' own alleged violations of the NDNCR.

The FTC even advises that “*Distinct corporate divisions generally are considered separate sellers under this Rule.*”³⁴ FTC, Complying with the Telemarketing Sales Rule, *supra* at 25 (emphasis added). If different corporate divisions are separate “sellers” under the TSR, then completely separate and independent companies with whom DISH contracts must be as well.

2. DISH Is Not Involved in “Telemarketing Transactions” With The Independent Retailers

Even if DISH were a “seller” vis-à-vis an Independent Retailer, it was not involved in “telemarketing transactions” with these Independent Retailers. Under the TSR, a “telemarketing transaction” is a “plan, program, or campaign which is conducted to induce the purchase of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call.” 16 C.F.R. § 310.2(dd). For example, DISH, as a seller, hires eCreek to act as a “telemarketer” (*i.e.*, “any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.”) 16 C.F.R. § 310.2(cc)).

³⁴ Notably, the same FTC guidance also provides separate guidelines for charitable organizations, in which the FTC states that telefundors for such organizations are required to share Do Not Call requests with the charity and/or separate telefundors. This guidance for telefundors makes sense because the charitable telefunder is, by definition, making the donation request on behalf of a single charity. Thus, consumers’ Do Not Call requests made to the telefunder are necessarily related to the charity itself. In contrast, here, the Independent Retailers sell a variety of branded products and services, and a consumer’s Do Not Call request cannot be linked directly to a particular branded product or service products being sold. (AMF ¶¶222-387.) Rather, the consumer’s Do Not Call request is being made to the Independent Retailer who is selling and telemarketing in its own right. (Notably, in the charitable context, the FTC advises that it is the telefunder that is subject to liability for a violation, and not the charity. *Id.* (“Calling someone who has asked not to be called on behalf of a charitable organization potentially exposes the telefunder who places the call to a civil penalty of \$16,000 per violation.”)).

Thus, DISH designs the telemarketing plan for eCreek, and eCreek serves as DISH's Telemarketing Vendor. In contrast, however, DISH does not design telemarketing plans for the Independent Retailers. This is because they are not "telemarketers" in the conduct of the DISH/Independent Retailer relationship. There is no "telemarketing transaction" between DISH and the Independent Retailers such that the Independent Retailers constitute "telemarketers" under the TSR.³⁵ (*See, e.g.*, AMF ¶¶227-387.)

DISH's standard Retailer Agreement also prohibits the Independent Retailers from holding themselves out as DISH or any related or affiliated DISH entity. (AMF ¶¶185, 191.) In this regard, the Independent Retailers are free to offer or market non-DISH satellite provider services, or products unrelated to satellite services. In addition, the Retailer Agreement requires Independent Retailers to comply with all applicable laws. On this basis alone, Plaintiffs cannot obtain summary judgment.

3. There Is No Evidence That DISH Caused Any Retailers To Place Telemarketing Calls, As Required To Support A Claim Under 16 C.F.R. § 310.4(b)(1)(iii)(B)

Even if there were a basis to find a seller/telemarketer relationship between DISH and the Independent Retailers, Plaintiffs must prove that DISH "caused" a telemarketer to call a number on the NDNCR. 16 C.F.R. § 310.4(b)(1)(iii)(B).³⁶

³⁵ If the Independent Retailers were acting as telemarketers for DISH, they would be required to register as telemarketers for DISH, rather than telemarketers themselves, with the FTC. There is no evidence that any such registration occurred.

³⁶ Plaintiffs rely on this Court's decision on DISH's motion to dismiss the First Amended Complaint for their definition of "cause." However, there the Court focused simply on the verb "cause." (d/e 20 at 9-18.) The Court found that the dictionary definition of the verb cause should be applied in interpreting the TSR, equating "cause" in the TSR with gravity "causing" an object to fall to earth. That decision was made on the pleadings, before any discovery, and did not focus on what conduct Plaintiffs now claim DISH as a seller was "causing" to occur. So, even if the bare bones dictionary definition of cause

(footnote continued)

In other words, to prove that DISH caused a violation, Plaintiffs must show that DISH took specific action that resulted in JSR or SSN violating the NDNCR. No such evidence exists. Rather, the evidence shows that DISH's standard Retailer Agreement required JSR and SSN to comply with "all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders," and makes clear that each Independent Retailer is "solely responsible for compliance with all Laws that apply to its obligations under" the Retailer Agreement. (AMF ¶¶184, 192.)

To reinforce the importance of complying with these terms of the Retailer Agreement, DISH required the Independent Retailers to provide DISH with "proof of [an Independent Retailer's] compliance with all outbound telemarketing laws, including, but not limited to [the Independent Retailer's] Do Not Call policy, Proof of Do Not Call Registrations and Outbound Telemarketing Scripts." (Origer Dep. 204:1-11 & Ex. 144; *see also* AMF ¶¶192.) DISH also frequently emphasized to the Independent Retailers that their agreements with DISH required them to be in compliance with all state and federal telemarketing laws, and that the Independent Retailer could be terminated for violating telemarketing laws. (*Id.* at ¶194.)

DISH researched and investigated any telemarketing complaints and took multiple steps to try to determine whether caller IDs provided by consumers were associated with an Independent Retailer, including JSR and SSN. DISH also demanded that Independent Retailers promptly remove the relevant number from their contact lists (if it was in such contact

(footnote continued)

relied on by the Court at that point in time is still applicable, it does not resolve the question of whether DISH caused any "telemarketing" activity by any one of the six Independent Retailers. As set forth herein, and in DISH's Motion for Summary Judgment, DISH did not cause any of the six Independent Retailers to engage in telemarketing activity.

lists), and add the number to their internal do not call lists. (AMF ¶¶192, 203-204.) DISH also tracked the Independent Retailers' responses to DISH's investigations/inquiries, and the Retailers' subsequent activities, so that DISH could monitor the Retailer and take further appropriate action as necessary. (AMF ¶202.) The record, even as relied upon by Plaintiffs, demonstrates that DISH took these steps with respect to both JSR and SSN. (AMF ¶¶340, 452-454.) Accordingly, Plaintiffs cannot establish that DISH caused JSR or SSN to initiate outbound telephone calls to persons who registered their telephone numbers on the NDNCR.

E. The FTC Improperly Relies On Misrepresentations of The Record, And Assumptions And Inferences In Its Own Favor

It is important to reiterate that after nine years of investigation and litigation focused on 7,500 Independent Retailers, Plaintiffs only attempt to obtain summary judgment on their "causing" claims with respect to only two Retailers – SSN and JSR. (AMF ¶215.) It is not surprising that Plaintiffs' investigation revealed that the overwhelming majority of Retailers were acting in a completely legitimate and lawful manner. This is true with respect to their conduct in general and their conduct with respect to the offering of DISH's products and services. The absence of any evidence of wrongdoing as to virtually the entire universe of Independent Retailers is complemented by a complete absence of any basis for summary judgment as to SSN and JSR.

1. SSN

To prove that DISH was "causing" SSN to commit violations, Plaintiffs create an illusion that, as long as DISH was profiting off of its partnership with SSN, it did not matter to DISH how SSN went about acquiring customers and new activations, even if those tactics were against the law. The evidence shows otherwise. What Plaintiffs rely upon are multiple inferences impermissibly drawn in their own favor and snippets of evidence presented out of

context. As shown below, the exhibits and “facts” upon which Plaintiffs purport to rely are conveyed to this Court in a grossly distorted and twisted fashion, and do not support the contentions for which they are proffered. Courts have refused to award summary judgment in other TSR cases brought by the FTC on grounds that the Commission repeatedly misrepresented the record facts. *See, e.g., FTC v. Internet Mktg. Group, Inc.*, No. 3:04-0568, 2006 WL 273540, at *1-8 (M.D. Tenn. Feb. 2, 2006).

For example, Plaintiffs would have this Court believe that DISH was training SSN on how to perform outbound telemarketing calls. (Plaintiffs’ Exhibit 155, ¶¶31-32.) Nonsense. These exhibits relate to DISH providing support to educate SSN on DISH products and services, and are completely devoid of any reference to DISH training SSN on any outbound telemarketing methods.

Plaintiffs also cite to a letter and an SSN retailer file dating back 12 years ago to 2002. Putting aside the fact that both of these documents cite to conduct predating the effective date of the amended TSR and applicable limitations period, Exhibits 187 and 188 only further support what has already been confirmed -- DISH actively reminded Independent Retailers (such as SSN) of their obligations to comply with telemarketing laws. (*See* Exhibit 187, “Satellite Systems Network must comply with all applicable federal, state, and local laws, including but not limited to those specifically pertaining to telemarketing. Please ensure that all practices pertaining to telemarketing are within the law.” (Response to PUF ¶235).)

Plaintiffs, without citing to any hard facts, make the unsubstantiated assertion that, despite DISH’s knowledge of SSN’s illegal telemarketing activity and its “many lawsuits and complaints,” DISH continued its relationship with SSN. (Plaintiffs’ Motion at 101-102.) Rather, Plaintiffs only cite two SSN retailer agreements, the hearsay testimony of Sophie

Tehranchi (allegedly an SSN principal) from another case, and that SSN was a DISH retailer at the time of her deposition (in another case) in August 2013. (UF ¶237, Exhibits 180, 182, and 189.) None of these exhibits support that DISH had knowledge of SSN's supposed illegal telemarketing operation.

In yet another attempt mislead this Court, Plaintiffs argue that when SSN became a so-called "OE retailer" in 2004 (UF ¶240), DISH knew of SSN's alleged "questionable marketing practices" as related to SSN's lawsuit with the State of North Carolina and the civil penalty assessment in Florida. (Plaintiffs' Motion at 102, Exhibits 185, 186, and 191.) Without providing more than the mere existence of a lawsuit involving SSN (in which DISH was not a named party), and completely ignoring the fact that SSN was one of over 7,500 Independent Retailers, Plaintiffs expect the Court to assume that DISH knew about SSN's troubles. There is no evidence to establish that DISH was aware of the proceedings in North Carolina or the resulting consent judgment. (Response to PUF ¶¶233-234.) To the contrary, "when [DISH] brought on Satellite Systems Network [as an OE retailer], they said they did print [and] online" marketing. (AMF ¶455.) Moreover, the leap of faith and knowledge suggested by Plaintiffs vastly underestimates and ignores the thousands of vendor contracts that DISH enters into on a monthly basis for matters unrelated to the business of SSN, and unrelated to telemarketing. In all events, the imposition of "notice" or "knowledge" into the equation of summary judgment means the claim fails unless there is no dispute about the notice and knowledge. To be clear, DISH disputes the assumptions relied upon by Plaintiffs.

Plaintiffs' reliance on Exhibit 194 mischaracterizes the nature of the attorney-client privileged communication between DISH's in-house counsel and employees. While Plaintiff would like this email chain to evidence DISH's alleged knowledge of SSN's purported

illegal telemarketing activities, Exhibit 194 is yet another example of DISH's proactive approach to ensure SSN was complying with the retailer agreement. It also evidences that DISH imposed a probationary period on SSN. (Response to PUF ¶¶241, 243.) Nothing in Exhibit 194 demonstrates that DISH is responsible for SSN's actions. SSN's Retailer Agreement specifically outlines this fact. (Plaintiffs' Motion Exhibit 193, §§ 9.1, 11-13.) Further to this point is the fact that the evidence demonstrates that in at least one instance, DISH garnished SSN's earnings in the amount of \$15,000 (AMF ¶453) and that in February 2007, DISH implemented a call monitoring system for SSN to gather quality assurance information, which included bi-weekly on-site monitoring by DISH. (AMF ¶454.)³⁷

Likewise, Plaintiffs' attempt to connect Exhibits 195 and 196 to demonstrate a purported willingness on DISH's part to conceal alleged DNC violations committed by SSN fails, but Plaintiffs fail to note that upon further investigation (and in step with Exhibit 196), DISH determined that the offending retailer in Exhibit 195 "is NOT Satellite Systems Network . . . but is Satellite Systems Now." (emphasis in original). In that regard, DISH investigated the complaint in Exhibit 196 and correctly determined that SSN was not the culprit. (Response to PUF ¶¶245, 246.)

2. JSR

As to JSR, Plaintiffs again improperly rely on mischaracterizations of the record and improperly attempt to draw inferences in their own favor. While DISH was taking steps to investigate consumer complaints with JSR and with the input of various businesspersons at DISH, Plaintiffs attempt to paint a picture that DISH knew and did nothing about JSR's conduct.

³⁷ The FTC uses a similar approach in dealing with Lockheed Martin's failures in maintaining the NDNCR. Yet, it did not terminate Lockheed Martin for a high failure rate but, instead, imposed a fine. (AMF ¶¶ 124-125.)

Notably, in each instance that DISH sought an explanation from JSR as to whether it could justify a call made that resulted in a consumer complaint, JSR offered a legitimate explanation or stated that an inadvertent error had occurred and would be immediately rectified. While DISH initially gave JSR the benefit of the doubt, it ultimately terminated JSR's Retailer Agreement just a short time after JSR became a Retailer in the first place, six months after JSR was provided access to the OE tool, and a short time after DISH investigated JSR.³⁸ Plaintiffs have the luxury of playing Monday morning quarterback to second-guess and criticize DISH's decision and the timing of those decisions, without giving DISH the favorable inferences that this Court is required to give on this Motion.

Further, there is no evidence that DISH controlled the manner or means in which JSR marketed or sold DISH products or services. (AMF ¶344.) While both DISH and Plaintiffs desired to depose JSR's principal Jerry Grider, he could not be found. Realizing that it has no facts to hold DISH liable for NDNCR calls made by JSR, the FTC obtained an affidavit from Jerry Grider's purported business partner – Richard Goodale. (AMF ¶461.) This declaration, however, is inadmissible and is not properly considered by this Court at summary judgment (or at trial). The FTC did not disclose to DISH that it had talked to Mr. Goodale, he was never deposed in this action, and he was never identified in the FTC's Rule 26 disclosures as a potential witness – for these reasons, he cannot be called to testify at trial. Fed. R. Civ. P. 37(c)(1) (“If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion,

³⁸ Plaintiffs claim that Jerry Grider went to work for a different retailer after JSR was terminated. (Plaintiffs' Motion at 112.) Even if this were true, Plaintiffs do not present any evidence or claim that this second retailer committed any outbound telemarketing, let alone telemarketing violations.

at a hearing, or at trial . . . ”); *see also David v. Caterpillar, Inc.*, 324 F.3d 851, 857 (7th Cir. 2003) (quoting *Salgado v. Gen. Motors Corp.*, 150 F.3d 735, 742 (7th Cir. 1998) (“[T]he sanction of exclusion is automatic and mandatory unless the sanctioned party can show its violation of Rule 26(a) was either justified or harmless.”)); *Mitchell v. Iowa Interstate R.R. Ltd.*, No. 07-1351, 2010 WL 2089305, at *2 (C.D. Ill. May 25, 2010) (excluding testimony of witnesses not disclosed under Rule 26(a) or (e). Neither can the FTC’s proffered consumer complaints support its claims as they are inadmissible hearsay and, therefore, cannot sustain summary judgment. *See E.M.A. Nationwide*, 2013 WL 4545143, at *2-3. Mr. Goodale’s and the various consumer declarations cannot and do not support the FTC’s claims as a matter of law.

VI. THE FTC CANNOT PREVAIL ON COUNT II OF THE SECOND AMENDED COMPLAINT BASED ON DISH’S INTERNAL DO NOT CALL LIST

The FTC alleges that DISH is liable for its own acts, and the acts of Independent Retailers JSR, SSN, and NSS for calls allegedly made to telephone numbers on the DISH Internal DNC List. (Plaintiffs’ Motion at 114-120.) The FTC has not met its burden with respect to Count II and its Motion should be denied.

A. There is No Proof that Each or Any of the Internal Call List Claims Involve a Call to a Person Who Asked Not to be Called by DISH, SSN, NSS or JSR, Respectively

The internal list provision of the TSR focuses on the seller itself and is “company-specific.” 60 Fed. Reg. 43,842, 43,855 (Dec. 31, 1995). The request only applies to the company to which the consumer has made the do-not-call request. 67 Fed. Reg. 4,492, 4,516 (Jan. 30, 2002); *accord* 67 Fed. Reg. at 4,516 (“After a consumer requests not to receive calls *from a particular company*, that company may not call the consumer. Other companies, however, may lawfully call that same consumer until he or she requests *each of them* not to call.”) (emphasis added).

Moreover, the prohibition of calls on a company’s internal list applies to “calls made to a person,” not to a person’s *residence*, because there may be more than one person at a given residence who is a customer of the seller. (60 Fed. Reg. at 30,417; *see also* d/e 272, Opinion re: DISH Motion to Strike SAC, at 6.) This Court’s previous rulings are not to the contrary: “DISH cannot assert an established business relationship for [telemarketing] calls to numbers where the *owner of the number* requested to be placed on DISH’s internal do not call list.” (d/e 258, Opinion of Court re: Motion to Dismiss in Case No. 12-3221, at 19 (emphasis added).)

Here, the FTC seeks to hold DISH liable for calls that DISH allegedly made to customers on its own Internal List *and* to customers on the Do Not Call lists maintained by multiple Independent Retailers.³⁹ (AMF ¶¶44-49; 66-67; PUF ¶39.) The FTC cannot prove that any of the claimed millions of calls were to a “person,” as opposed to a number, who stated that he or she did not wish to be called by the seller or its telemarketer. This defect is fatal.

In addition, the FTC’s contention – that DISH is liable for calls made to consumers who purportedly indicated to *Independent Retailers* that they did not wish to receive calls from DISH – is meritless. The Independent Retailers are sellers in their own right. (AMF ¶¶327-368.) DISH is not required to aggregate Do Not Call requests from every possible source, particularly from Independent Retailers (who are not identified by Plaintiffs in their motion) who sell DISH products or services alongside those of any other number of companies. Similarly, Independent Retailers are not required to aggregate and report to DISH every Do Not Call

³⁹ Notably, New Edge was a TVRO Retailer, and not a so-called “OE Retailer.” (PUF ¶363.) With respect to New Edge, Plaintiffs claim that DISH is liable for calling numbers on New Edge’s internal DNC list, which New Edge maintained only in a handwritten form and never provided to DISH. (Response to PUF ¶363.)

request that the Independent Retailer receives from a prospective customer. On the contrary, the Independent Retailers are required to keep track of Do Not Call requests *made to them*, not to DISH. Likewise, DISH is required to keep track of requests made to DISH, not to the Independent Retailers. 67 Fed. Reg. at 4516; 60 Fed. Reg. at 43,855.

Plaintiffs overreach by trying to hold DISH liable for calling numbers that were on the Do Not Call lists of Independent Retailers who may have been selling non-DISH products and who may have received a request from a consumer not to be called regarding those non-DISH products. Plaintiffs made this allegation regardless of whether DISH had access to the lists that the Independent Retailers maintained. Similarly, the FTC seeks to hold DISH liable for calls placed by SSN, NSS and JSR to numbers that were either on DISH's Internal DNC List or the internal lists of other Independent Retailers, as opposed to internal do not call lists maintained by SSN, NSS and JSR. During the time frame that JSR is alleged to have made certain calls, JSR did not have any way to access DISH's Internal DNC List, and there is no evidence that it had any way to access the internal do not call list of any other Independent Retailer nor did it have such an obligation.

B. The FTC Cannot Demonstrate That Every Alleged Internal List Violation Was a Telemarketing Call to a Person Who Asked Not to be Called by DISH, Or SSN, NSS or JSR, Respectively

Furthermore, just as only telemarketing calls to numbers on the Registry are covered by the TSR, only telemarketing calls can be a basis for alleged internal list violations. The TSR prohibits a telemarketer from (or a seller from causing a telemarketer to engage in) initiating outbound telemarketing telephone calls to persons who have previously stated that they do not wish to receive calls made by or on behalf of the seller whose goods or services are being offered. 16 C.F.R. § 310.4(b)(1)(iii)(A). Thus, a plaintiff must prove that the call at issue was for telemarketing. 16 C.F.R. § 310.2(cc) (defining "telemarketer" as a person who initiates calls

“in connection with telemarketing”). As set forth above, the FTC cannot prove that the alleged violation calls purportedly made by JSR, NSS and SSN were telemarketing calls made to sell DISH products. (AMF ¶¶331-332, 356-357, 366-367; Response to PUF 345-346; PUF 374-375.) Rather, the FTC instructed its expert to *assume* that those calls were telemarketing calls. (AMF ¶480.) In the absence of actual *proof* on this issue, however, the FTC’s Internal List claim fails under the plain language of the rule. 16 C.F.R. § 310.4(b)(1)(iii)(A).

This particular defect dooms *all* of the FTC’s alleged Internal List claim violations, other than those claimed for the DISH 2007-2010 call records.

C. The FTC Cannot Establish That the Telephone Numbers In the Call Records Represent Violative Calls

The Internal List claim (Count II) also is flawed in the same manner as the NDNCR claims. (*See* Section IV above). The FTC cannot demonstrate that DISH violated the DISH Internal DNC List (or those of the Independent Retailers) without first weeding out intrastate calls and calls to invalid and unknown numbers; pagers, maritime radios, and other devices not covered by the TSR; disconnected numbers that have not been reassigned to new persons; business and government lines; wireless telephone numbers; and telephone numbers that are no longer associated with the persons who made the Do Not Call request in the first instance.

D. The FTC Cannot Establish That DISH “Caused” JSR, NSS or SSN To Place Violation Calls

As set forth above in Section V, even if the FTC had admissible evidence of violations by an Independent Retailer (it does not), the FTC cannot prove that DISH is a “seller” that “caused” a TSR violation by any Independent Retailer (including JSR, NSS and SSN) acting

as DISH’s “telemarketer.”⁴⁰ Indeed, for calls made by Independent Retailers, DISH is not a “seller,” and no Independent Retailer (including JSR, NSS and SSN) was a DISH telemarketer; DISH is not involved in “telemarketing transactions” with the Independent Retailers; and there is no evidence that DISH caused any Retailers to place telemarketing calls.

The fact that NSS used a call center located in India is irrelevant and immaterial. (Response to PUF ¶372.) Moreover, there is no evidence that DISH had knowledge that NSS was not the owner-operator of the Indian call center. The testimony by Kobi Levi confirms that NSS “took an initial investment in the company” and “assumed we would own it.” (Response to PUF ¶373.) Mr. Levi further testified that he and his business partners “wanted to have the ability to sell out of India so we . . . invested money . . . to build [the Indian call center].” (*Id.* 48:1-5.) Furthermore, as a rule, DISH does not outright prohibit the use of international entities from accessing the OE tool. (Response to PUF ¶373.)

Plaintiffs, therefore, fail to provide this Court with any relevant evidence demonstrating any actual notice to DISH of NSS’s alleged illegal telemarketing activities, let alone any conduct that would indicate that DISH caused NSS to place illegal telemarketing calls. Payment of sales commissions to NSS, without more, remains an irrelevant and immaterial fact. Summary judgment should be denied as to claims based on NSS’s, JSR’s or SSN’s conduct.

E. Count II Is Barred By The Applicable Statute Of Limitations and Res Judicata

For the reasons stated in Section V(E) of DISH’s moving brief, the applicable statute of limitations prevents the FTC from seeking civil penalties on Count II as a result of any

⁴⁰ Here, the FTC alleges that “in numerous instances,” DISH caused a telemarketer to make an outbound call to a person who has placed her telephone number on the NDNCR in violation of 16 C.F.R. § 310.4(b)(1)(iii)(B). (d/e No. 257, SAC, Count I, ¶ 66.)

call that predates May 12, 2009, three years before the Court deemed Claim II filed in DISH I. This limitation applies to an unidentified number of calls alleged to have been made by DISH between 2007 and 2010 (Plaintiffs' Motion at C(1)-(3)), all calls alleged to have been made by JSR (Plaintiffs' Motion at C(4)), and an unidentified number of calls alleged to have been made by NSS between 2008 and 2009 (Plaintiffs' Motion at C(5).)

In addition, for the reasons set forth in DISH's Motion for Summary Judgment, Count II is barred by the doctrine of res judicata.

VII. THE FTC IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS ABANDONED CALLS CLAIM ASSERTED IN COUNT III OF THE SECOND AMENDED COMPLAINT

A. The Facts Demonstrate That DISH Made No Abandoned Calls In Violation Of The TSR

In Count III of the SAC, the FTC alleges that DISH violated the TSR by abandoning calls (or causing telemarketers to abandon calls) in violation of 16 C.F.R. § 310.4(b)(1)(iv). (Plaintiffs' Motion at 120-131.) Essentially, this claim against DISH, for "abandoning" calls, applies only to DISH's use of prerecorded calls. When DISH made these pre-recorded calls, however, DISH was allowed to place calls to consumers with whom it had an existing relationship.

As stated by the FTC, "In August 2008 the Commission adopted additional amendments to the TSR that directly address the use of prerecorded messages in telemarketing calls." Complying with the Telemarketing Sales Rule, *supra* at 25. Specifically, the FTC guided businesses regarded the TSR amendment:

In August of 2008, the Commission adopted amendments to the TSR that directly address the use of prerecorded messages in telemarketing. Under those amendments, as of September 1, 2009, the Rule expressly prohibits outbound telemarketing calls that deliver a prerecorded message unless the seller has obtained the call recipient's prior signed, written agreement to receive such calls from that seller. The prohibition applies to prerecorded message calls regardless

of whether they are answered by a person or by an answering machine or voice mail service. With certain exceptions (explained on pages 61 and 62), the prohibition applies to all calls that deliver a prerecorded message, regardless of whether the number called is listed on the National Do Not Call Registry.

(*Id.*)

Importantly, while the FTC has considered prerecorded calls abandoned calls, since 2003, it had agreed that prerecorded calls could be made to existing customers. *See FTC v. Asia Pacific Telecomm, Inc.*, 802 F.Supp.2d 925, 931 (N.D. Ill. 2011). As the record establishes, each of the prerecorded message campaigns that Plaintiffs claim are violations were directed to a DISH existing customer, and each of those campaigns was completed prior to August 2008. (Response to PUF ¶¶55-60; AMF ¶¶426-427.) Accordingly, these “abandoned calls” cannot be a basis for a violation, and the FTC cannot meet its burden to show otherwise.

B. The FTC Is Not Entitled To Summary Judgment On Its Claim That DISH Caused Independent Retailers To Abandon Calls

The FTC could never prevail on its motion with respect to alleged abandoned calls by DISH TV Now, Tenaya/Star Satellite, and American Satellite. All claims related to these allegedly abandoned calls are barred by the statute of limitations. Even if these claims were not stale, there are numerous genuine issues of material fact as to whether any of these Retailers acted as DISH’s telemarketer, and if so, whether DISH caused any of these Retailers to make violative calls.

1. The Three-Year Statute Of Limitations Bars Plaintiffs’ Claims As To Dish TV Now and Star Satellite

Statutes of limitations are strictly applied. *See Bowen v. City of New York*, 476 U.S. 467, 479 (1986) (statute of limitations “must be strictly construed”); *Fier v. Astrue*, No. 11 CV 8705, 2012 WL 2368323, at *3 (N.D. Ill. June 21, 2012). Further, “when a suit is based on conduct that continues over a lengthy period of time, a plaintiff can ordinarily recover only those

damages resulting from wrongful acts that occurred within the time period of the applicable statute of limitations.” *Forster Music Publisher, Inc. v. Price Stern Sloan, Inc.*, No. 93 C 4487, 1995 WL 239093, at *1 (N.D. Ill. Apr. 21, 1995); *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 754 F.2d 216, 219 (7th Cir. 1985). Once a defendant has established that a claim is barred, the burden shifts to the plaintiff to show that the claim is timely. *Zapp v. Utd. Transp. Union*, 879 F.2d 1439, 1441 (7th Cir. 1989).

The statute of limitations applicable to TSR claims is three years and bars claims for alleged violations occurring prior to March 25, 2006. 15 U.S.C. § 57b(d) (“[n]o action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates”); accord *FTC v. Magazine Solutions, LLC*, No. 7-692, 2010 WL 1009442, at *13 (W.D. Pa. Mar. 15, 2010) (“Actions for violations of the TSR are subject to a three-year statute of limitations.”) (citing 15 U.S.C. § 57b(d)).⁴¹ All of the abandoned call violations that the FTC claims were made by Dish TV Now and Star Satellite occurred between June 1, 2004 and November 26, 2005. (AMF ¶¶222, 241.) Accordingly, the FTC’s claim that DISH “caused” Independent Retailers to place abandoned calls is wholly barred by the statute of limitations. *See, e.g., Vector-Springfield Props., Ltd. v. Cent. Ill. Light Co., Inc.*, 108 F.3d 806, 810 (7th Cir. 1997).

⁴¹ The FTC commenced this action on March 25, 2009, seeking relief for violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the TSR. (d/e 257, SAC, ¶4.) In doing so, the FTC alleges four claims seeking civil penalties, injunctive relief, and other equitable relief for alleged violations of the TSR. (*Id.*, Counts I-IV, ¶¶66-69.) The statute of limitations unquestionably bars these claims to the extent that the FTC seeks to impose liability for any alleged violations occurring on or before March 25, 2006. *Magazine Solutions*, 2010 WL 1009442, at *13 (“Because the FTC filed this action on May 23, 2007, the Defendants are only liable for any TSR violations commencing after May 23, 2004.”).

Statutes of limitations govern the type of claim asserted rather than the specific relief requested. *Lyons P'Ship, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4th Cir. 2001) (“when Congress creates a cause of action and provides both legal and equitable remedies, its statute of limitations for that cause of action should govern, regardless of the remedy sought”). Thus, any argument that the general federal five-year limitations period under 28 U.S.C. § 2462 applies merely because Plaintiffs are seeking civil penalties in addition to other types of relief under the TSR, would be misplaced.

Further, Section 2462 provides a general limitations period for suits seeking enforcement of a civil penalty. The statute, however, is preceded by the following clause: “Except as otherwise provided by Act of Congress . . .” 28 U.S.C. § 2462. As part of the FTC Act, 15 U.S.C. § 57b(d), Congress provided a specific three-year statute of limitations for rule violations. Thus, the general five-year limitations period is inapplicable here because Congress “otherwise provided” a shorter period for actions alleging violations of an FTC rule, such as the TSR.

It is a basic canon of statutory construction that, when they conflict, “a specific statute takes precedence over a more general statute.” *Bhd. of Maint. of Way Employees v. CSX Transp., Inc.*, 478 F.3d 814, 817 (7th Cir. 2007). This rule applies even where the statutes provide for different remedies, otherwise “there would be two separate civil action provisions that applied to the [statute allegedly violated].” *Sterk v. Redbox Automated Retail, LLC*, No. 11 C 1729, 2012 WL 3006674, at *3 (N.D. Ill. July 23, 2012). In this case, the TSR employs a

specific three-year limitations period without qualification or regard to the type of remedies sought. That limitations period prevails over the general five-year statute of limitations.⁴²

2. The FTC Cannot Prevail On Any Claim That DISH Caused An Independent Retailer to Abandon a Call

Even if the FTC had admissible evidence of violations by an Independent Retailers (it does not), the Commission cannot prove that DISH is a “seller” that “caused” a TSR violation by Dish TV Now or Star Satellite acting as DISH’s “telemarketer.” Indeed, DISH is not a “seller,” and neither Dish TV Now nor Star Satellite was a DISH telemarketer. Because DISH is not involved in “telemarketing transactions” with the Independent Retailers, there can be no claim that DISH has “caused” liability.

a. DISH TV Now

The FTC cannot meet its burden with respect to Count III for abandoned calls allegedly made by DISH TV Now. Prior to becoming an Independent Retailer, DISH TV Now represented to DISH that the only methods of marketing in which DISH TV Now would engage in were direct response commercials, newspaper advertisements, co-op direct mailers, yellow page advertisements, and Internet advertising. (AMF ¶¶233-234; 481.) Moreover, DISH TV Now represented unequivocally that it would be driving inbound calls only “from customers seeking DISH Network service” and that, “[u]nder the proposed DISH Network marketing program, DISH TV NOW will as soon as possible staff and train sufficient sales agents to receive the current volume of DISH Network calls.” (*Id.*) This is further confirmed in the testimony of DISH employees who dealt with DISH TV Now. Amir Ahmed, a Senior Vice

⁴² For Count II, the limitation period runs from March 12, 2013 because that is the date the Count II claims were filed. (d/e 272.) The FTC may claim the period runs from the date the motion to amend the First Amended Complaint was filed. That would be May 18, 2012.

President at DISH, who personally corresponded with DISH TV Now representatives and visited the Retailer understood that “[t]elevision ads and a lot of Internet advertising, a lot of print is what [DISH TV Now] showed [him], and that was the three big things for them.” (AMF ¶482.) As far as DISH knew, outbound telemarketing using prerecorded auto-messages was not a practice in which DISH TV Now engaged. (AMF ¶233.)

Plaintiffs attempt to vilify DISH for entering into a Retailer Agreement with DISH TV Now because its principal, David Hagen, unbeknownst to DISH, had a criminal background. There is no 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. In fact, the U.S. Equal Employment Opportunity Commission has warned employers about asking about criminal histories in the context of employment applications, noting that several states limit an employers’ use of arrest and conviction records to make employment decisions. http://www.eeoc.gov/laws/practices/inquiries_arrest_conviction.cfm. As such, DISH could not be faulted for entering into an independent contractor agreement with a rehabilitated person who had a past conviction, particularly where that conviction had nothing to do with telemarketing, even if it had known about that person’s past.

In fact, the evidence illustrates that 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 ¶¶236, 450.) 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 ¶451; Response to PUF ¶201.) 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 pre-recorded message. (*Id.*) It is also undisputed that DISH advised DISH TV Now, and contractually required it, to adhere to all laws. (AMF ¶¶231-232.) DISH TV Now confirmed that its practice was to scrub faithfully against the NDNCR, maintain an internal Do Not Call list, and immediately add any customer to this list upon request to fully comply with the TCPA. (AMF ¶451; Response to PUF ¶201.)

Accordingly, the FTC has not met its burden to be granted summary judgment on Count III of the SAC as it pertains to alleged abandoned calls placed by DISH TV Now.

b. Tenaya/Star Satellite

Likewise, the FTC cannot meet its burden as to Count III with respect to abandoned calls allegedly made by Tenaya/Star Satellite. The record demonstrates that Tenaya/Star Satellite – like DISH TV Now – affirmatively concealed its use of an autodialer and prerecorded messages from DISH. DISH not only did not know, but could not have known, about Tenaya/Star Satellite’s use of an autodialer to make allegedly abandoned prerecorded message calls. As such, Plaintiffs cannot prove that DISH caused Tenaya/Star Satellite to place the alleged abandoned calls using an autodialer.

Indeed, Tenaya/Star Satellite never disclosed to DISH “any of the details” of its telemarketing efforts, that it had engaged “Guardian to do . . . pre-recorded messages,” or even that it was working with Guardian at all. (AMF ¶¶258-264.) Tenaya/Star Satellite not only failed to disclose that it was working with Guardian or using prerecorded messages, but it is undisputed that Tenaya/Star Satellite affirmatively concealed from DISH its pre-recorded

message calling and auto-dialing activities. (AMF ¶¶258; 260.) It was “a well-known fact” that DISH could terminate a retailer relationship “if you got caught auto dialing.” (AMF ¶260.) Thus, on at least two occasions when DISH representatives were scheduled to visit Star Satellite’s offices, Walter Myers contacted Guardian to advise that it was temporarily ceasing its telemarketing activities because “DISH Networks is coming into our office and we can’t let them know we’re auto dialing.” (AMF ¶261.) It is also undisputed that DISH advised Tenaya/Star Satellite to, and contractually required that it, ensure that it was complying with all laws, and also specifically to make sure that Tenaya/Star Satellite conveyed certain disclaimers to consumers, and scrubbed against the Do Not Call List, which Tenaya/Star Satellite confirmed to DISH that it was doing. (AMF ¶¶244; 247-248; 259.)

Accordingly, the FTC has not met its burden to be granted summary judgment on Count III of the SAC as it pertains to alleged abandoned calls placed by Tenaya/Star Satellite.

3. American Satellite

The FTC also fails to meet its burden with respect to American Satellite on the basis that the Commission has not produced a single call record showing any call made by American Satellite. (AMF ¶436-438.) The “evidence” Plaintiffs offer instead is either completely irrelevant and used for the sake of sensationalizing Plaintiffs’ allegations, or provides further support confirming that DISH took proactive measures to investigate and resolve any consumer complaints it received. (Response to PUF ¶¶299-309.) In a poor attempt to prove the complacency of DISH with respect to American Satellite’s alleged illegal telemarketing activity, Plaintiffs highlight the various “sting” investigations in which DISH uncovered American Satellite as the culprit of alleged illicit telemarketing practices. (Response to PUF ¶¶299-301.) Yet, these various sting investigations establish that DISH investigated consumer complaints and

followed through by informing American Satellite of the results of its investigations and requiring that it take action.

To Plaintiffs' point that DISH knew about American Satellite's alleged illegal outbound telemarketing activity and did nothing about it, the record evidence establishes that DISH was unaware of these activities, and in fact understood American Satellite's predominant marketing methods to be through email and Internet advertising. (AMF ¶457.) Even when confronted with an alleged TCPA consumer complaint, American Satellite went to great lengths to confirm and explain to DISH its standard procedure for handling and processing leads that it generated via Internet inquiries. (AMF ¶458.) Moreover, with respect to consumer Robert Parker's TCPA complaint, the record evidence clearly shows a collaborated effort by DISH and American Satellite to determine the root of Mr. Parker's complaint. (Plaintiffs' Motion, Exh. 228.) Importantly, the fruits of that investigation determined that Mr. Parker only placed his number on the NDNCR on September 15, 2006, which would not make it effective until October 15, 2006. (*Id.*) DISH's follow up investigation confirmed that "Mr. Parker's number was contacted [by American Satellite] within the 30 day window for the FTC DNC registration to be downloaded," mooted any allegation of a TSR or TCPA violation in the first instance. (*Id.*) Based on this alone, it is inconceivable how Plaintiffs can assert that DISH violated the TSR due to American Satellite's marketing practices (which, in the one instance Plaintiff has highlighted, proved to be a non-violation after all).

Accordingly, Plaintiffs have failed to meet their burden to be granted summary judgment on Count III of the SAC.

VIII. THE FTC DOES NOT MEET ITS BURDEN WITH RESPECT TO COUNT IV OF THE SECOND AMENDED COMPLAINT (ASSISTING AND FACILITATING)

Plaintiffs limit their Motion to assert “assisting and facilitating” claims only on the basis of conduct by Tenaya/Star Satellite “when DISH knew that it was engaged in practices that violated the TSR.” (Plaintiffs’ Motion at 131.) As set forth more fully below, the FTC cannot obtain summary judgment on this TSR claim because: (a) it is barred by the statute of limitations; and (b) the FTC cannot meet its burden of proof, or, at a minimum, genuine issues of material fact exist.

A. The FTC Cannot Prevail On Its Assisting And Facilitating Claim Because It Is Barred By the TSR’s Three-Year Statute of Limitations

As set forth above, all of the abandoned call violations that the FTC claims were made by Tenaya/Star Satellite (and DISH TV Now), which DISH is alleged to have assisted and facilitated, occurred before March 25, 2006, and are barred by the three-year statute of limitations for TSR claims. Accordingly, the FTC cannot be awarded summary judgment on Count IV of the Second Amended Complaint.

B. The FTC Cannot Meet Its Burden Of Proof, Or, At A Minimum, Genuine Issues Of Material Fact Exist

Nor can the FTC meet its burden of proof on this claim. To violate the TSR’s “assisting and facilitating” provision, a person must provide “substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates” specified provisions of the TSR (here, abandoned calls). 16 C.F.R. § 310.3(b). The FTC fails to identify *any* facts that reflect that DISH knew or consciously avoided knowledge that Star Satellite was engaging in abandoned call violations. On this basis alone, the FTC fails to meet its burden of proof.

Even if knowledge of telemarketing violations generally were sufficient (it is not), the FTC's alleged proof of "knowledge" is sorely deficient. The type of knowledge required is a demanding and more exacting standard than a "knew or should have known" standard,⁴³ which the FTC has underscored in the past "is appropriate 'in a situation where a person's liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person.'" 68 Fed. Reg. at 4,612 (citation omitted). For example, such knowledge does *not* include a failure to investigate a third party's conduct. *See* 60 Fed. Reg. at 30,414 (referencing a duty to investigate as part of a less demanding "knew or should have known" standard, and rejecting such standard because it "may have swept too broadly and exposed those only casually associated with deceptive telemarketing to liability").

Here, the FTC asserts that DISH acquired actual knowledge that Star Satellite was "violating the telemarketing laws" (Plaintiffs' Motion at 132) on the basis of (a) two consumer complaints from early 2005 (PUF ¶¶266, 267), and (b) an internal May 2005 DISH email reflecting that DISH was investigating one or more complaints associated with Star Satellite (PUF ¶269). In no way do these three documents support a showing that DISH knew Star Satellite was engaging in abandoned call violations, or engaging in practices that generally violated the TSR. At most, they amount to Plaintiffs' assertion that DISH had a duty to investigate the complaints, which the FTC has rejected in the past as the type of knowledge necessary to meet this standard, *see supra*. In any event, DISH *did* initiate an investigation following these complaints. If anything, the alleged "knowledge" that the FTC asserts here is a

⁴³ The New York State Consumer Protection Board, for example, requested that sellers and telemarketers be held jointly liable for the actions of each other. 60 Fed. Reg. at 43,844-45. That position was rejected by the FTC.

prime example of Plaintiffs' constant attempts to re-characterize (and tar) DISH's good faith investigation and compliance efforts.

To be sure, receipt of a consumer complaint (or as is the case here, two consumer complaints), and investigation as to the source or cause for such complaint(s) associated with an Independent Retailer, is not evidence of knowledge of unlawful conduct. If that were the case, any company that has a customer care dispute or Better Business Bureau inquiry could potentially be charged with such knowledge.

Moreover, the FTC entirely ignores how DISH responded to this information, and falsely asserts that DISH did not discipline Star Satellite in any way. (Plaintiffs' Motion at 128.)

In 2005, Star Satellite historically had limited its sales efforts to door-to-door sales, and had no history of telemarketing. (AMF ¶¶242-244.) In response to DISH's oversight and monitoring efforts after receiving complaints about Star Satellite's practices, Star Satellite advised DISH that it was conducting "some phone sales" (not specifying whether they were inbound or outbound), but Star Satellite never disclosed to DISH "any of the details" of its telemarketing efforts, or that it had engaged "Guardian to do . . . pre-recorded messages" or even that it was working with Guardian. (AMF ¶258.) DISH thereafter advised Star Satellite to ensure that it was complying with all laws as was required under the Retailer Agreement, and specifically to make sure that it conveyed certain disclaimers to consumers, and to scrub against the Do Not Call List, which Star Satellite confirmed to DISH that it was doing. (AMF ¶259.) Star Satellite, however, failed to disclose to DISH that it was working with a third party company, and indeed affirmatively concealed from DISH that it utilized pre-recorded message calling and autodialing because, it was "a well-known fact" that DISH could terminate a Retailer relationship if it learned that a Retailer used auto dialing. (AMF ¶260.)

DISH, however, did not rely on such representations and did not cease its monitoring efforts. On July 25, 2005, DISH initiated an audit of Star Satellite's business practices. (AMF ¶483.) And in October 2005, Mr. Ahmed contacted Mr. Myers (Star Satellite's owner) to discuss Star Satellite's business practices. As Mr. Myers testified, Mr. Ahmed used that discussion as a disciplinary meeting. (AMF ¶484.) Mr. Myers explained that Mr. Ahmed and DISH were furious that Star Satellite had surreptitiously used telemarketing to sell DISH products. (AMF ¶485: "It was basically just [Ahmed] yelling at me about this complaint and how it was unacceptable") DISH followed that disciplinary call with a written letter to confirm that Star Satellite had "halted all telemarketing activities involving persons named on the National Do-Not-Call Registry as necessary to comply with applicable telemarketing/do-not-call and other laws." (AMF ¶486.)

The full factual context makes clear that DISH did not have the alleged knowledge that Star Satellite was engaging in unlawful abandoned call violations, and the absence of such knowledge dooms Plaintiffs' "assisting and facilitating" claim. At a minimum, there is a genuine question of fact as to whether receipt of two complaints about alleged unlawful telemarketing, and an email reflecting a continuing internal investigation into a retailer's practices, constitutes the type of actual knowledge of specific abandoned call violations that is necessary to trigger an "assisting and facilitating" claim when, at most, such documents merely reflect facts that might warrant further inquiry.

Regardless, not only was there an absence of knowledge of such violations, but the facts also do not support that DISH provided substantial assistance to Star Satellite following such alleged knowledge. To prove "substantial assistance," the FTC must demonstrate something "more than mere casual or incidental dealing with a seller or telemarketer that is