

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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JOINT APPENDIX
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[JA007941-JA008190]

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Evidentiary Hearing SLC Exhibit 102²			

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.

unrelated to a violation of the Rule” at issue (here, abandoned calls). 60 Fed. Reg. at 43,852. There also must be a direct temporal and substantive link between the “substantial assistance” and the violation. In other words, there must “be some *connection* between the substantial assistance provided to a deceptive telemarketer and the *resulting violations of core provisions* of the revised proposed Rule.” 60 Fed. Reg. at 30,414 (June 8, 1995) (emphasis added). This Court has confirmed that “the Assisting and Facilitating provision of the TSR contains language that defines both a degree of connection between the action and the rule violation and the actor’s intent.” (d/e 20, Opinion re: DISH Motion to Dismiss, 11/02/2009, at 10.)

None of the purported evidence that the FTC cites for this claim establishes the direct temporal and substantive link between Star Satellite’s abandoned call violations (which are alleged to have occurred between July 30 and November 26, 2005), and the “substantial assistance” that DISH allegedly provided to Star Satellite in connection with those calls. For its proof of “substantial assistance,” the FTC first refers to a July 2005 email from DISH to Star Satellite as evidence that DISH provided an alleged sales script to Star Satellite prior to the time when Star Satellite engaged in the alleged abandoned call violations. (Plaintiffs’ Motion, Ex. 206.) Star Satellite did not use this, or any alleged sales script provided by DISH, for any of the prerecorded calls at issue. (AMF ¶487.) Thus, there is no substantive link between this script and the alleged abandoned call violations.

The FTC then refers to an email from DISH to Star Satellite that purports to provide “marketing support” (Plaintiffs’ Motion, Exhs. 207 and 213, which are the same email), however the FTC failed to enclose the referenced attachment to the email. In fact, the email contained in Exhibits 207 and 213 references required verbatim legal disclosures, which are hardly anything that amounts to “marketing support.” Regardless, 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). (AMF ¶488: “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.”) Thus, there is no substantive link between the alleged “marketing support” and alleged abandoned call violations.

The only other evidence that the FTC references is DISH providing Star Satellite with access to the OE tool and compensation in the form of commissions and incentives. (Plaintiffs’ Motion at 132.) But the FTC fails to tie or convey how these facts – which amount to allowing access to a software system and engaging in business generally – amount to substantially assisting the abandoned call violations at issue. As the Court already has found, a simple reliance upon evidence that DISH paid an Independent Retailer is insufficient. (*See* d/e 32, Opinion re: DISH Motion for Interlocutory Appeal, 2/4/2010, at 9, n.1.) Specifically, the Court held that “DISH Network will not be held liable on Count [IV] simply because it paid Dealers to provide telemarketing services.” (*Id.*) Indeed, there is not even evidence of that type of payment.

In short, the FTC has failed to establish that DISH substantially assisted Star Satellite in making unlawful abandoned calls, while knowing or consciously avoiding knowledge that Star Satellite was making unlawful abandoned calls.

IX. THE COURT SHOULD DENY PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT WITH RESPECT TO THE TCPA AND STATE LAW CLAIMS

State Plaintiffs' motion for summary judgment on their TCPA and state law claims set forth in Counts V through XI of the SAC (the "State Claims"),⁴⁴ should be denied for the same reasons that summary judgment should be denied to the FTC on its TSR-related claims. (See Sections III-VIII *supra*.) Set forth below are additional reasons why summary judgment cannot be granted to the State Plaintiffs.⁴⁵

X. THERE ARE, AT BEST, QUESTIONS OF FACT AS TO WHICH CALLS, IF ANY, WERE TELEMARKETING CALLS MADE TO STATE PLAINTIFFS' RESIDENTS

The State Plaintiffs only may pursue a claim that arises from telemarketing calls made to their respective state residents. 47 U.S.C. § 227(g)(1); *see also Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 742 (2012) (TCPA "authorizes States to bring civil actions . . . on their residents' behalf"); *St. Louis Heart Center, Inc. v. Vein Centers For Excellence, Inc.*, No. 4:12 CV 174, 2013 WL 6498245, at *1 (E.D. Mo. Dec. 11, 2013) (same). This Court also noted that "[t]he TCPA further authorized state Attorneys General to bring actions on behalf of the citizens of such states for violations of the TCPA" and that "[t]he Attorney General Plaintiffs (Attorneys General) brought these claims on behalf of the citizens of their states." (d/e 20, Opinion, 11/02/2009, at 5, 23.) Similarly, each of the other State claims requires, as an essential element, that the calls at issue be placed to the respective State's residents. *See, e.g., Cal. Bus. & Prof. Code* § 17592(c); *N.C. Gen. Stat.* § 75-102(a).

⁴⁴ Plaintiffs are not moving for summary judgment on Count XII regarding Ohio state law. (Plaintiffs' Motion at 169 n.17.)

⁴⁵ Indeed, as set forth in DISH's own motion for summary judgment, the undisputed facts support entry of judgment in DISH's favor on all of the State Claims.

State Plaintiffs, however, have offered no undisputed facts that establish that the calls set forth in the call records at issue were telemarketing calls made to residents of their respective states. Instead, they merely refer to the initial Rebuttal Report of Dr. Yoeli, who simply concludes that certain calls were “made to telephone numbers *with area codes* for California, Illinois, North Carolina, and Ohio.” (DX-195) (emphasis added). This raises more factual questions than it answers.

The FCC and courts agree that, due to advances in technology, area codes and telephone numbers are not proof that a call recipient resided or was located in a particular state at the time of the call. *In re Numbering Policies for Modern Communications, Notice of Proposed Rulemaking, Order and Notice of Inquiry*, 28 F.C.C.R. 5842, 5844 (2013) (“*Numbering Policies for Modern Communications*”); *see also TelTech Sys., Inc. v. Barbour*, 866 F.Supp.2d 571, 575-76 (S.D. Miss. 2011) (AMF ¶390); *see also Hartman v. United Bank Card Inc.*, No. C11-1753, 2012 WL 4792926, at *2-3 (W.D. Wash. Oct. 9, 2012) (“Just because a mobile telephone number was called does not mean that it was located within Washington at the time it was called. That is the point of the court’s order [denying certification]: we simply cannot tell where a mobile number was located at the time of the call in question without an evidentiary hearing.”), *subsequent proceeding at* 291 F.R.D. 591, 598 (W.D. Wash. 2013) (rejecting proposed revised class definition because “irrespective of whether the number dialed had a Washington State area code, the evidence in the record indicates that Defendants did not know where the person receiving the call was located. Thus, the new class definition would not eliminate the need for individualized hearings with respect to fact issues.”) (internal citations omitted).

In an Order issued in 2004, the FCC readily acknowledged that “the NANP [North American Numbering Plan] 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." *In re Vonage Holdings Corporation* ("Vonage Order"), 19 F.C.C.R. 22404, 22408 (2004). The FCC further provided examples to explain why a subscriber's or call recipient's area code and exchange ("NPA/NXX") could not be used as a proxy for a subscriber's or call recipient's state of residence or geographic location. *Id.* at 22421; *see also Nuvio Corp. v. FCC*, 473 F.3d 302, 303 (D.C. Cir. 2007) (recognizing that "VoIP service allows callers to choose what are called 'non-native' area codes. For example, a customer living in the District of Columbia can use an area code from anywhere in the country.") (AMF ¶394.) Notably, recognizing the decoupling of phone numbers and geography, an FCC advisory committee recently has recommended that the FCC "fully decouple" geography from the telephone number. *Numbering Policies for Modern Communications*, at ¶118.

For these reasons, State Plaintiffs' factual assumption that all calls made to an area code traditionally associated with a geographic area are necessarily to consumers residing within their respective states is untenable. This flaw renders State Plaintiffs unable to prove their TCPA claims or any of their state-specific claims. At a minimum, Plaintiffs' "evidence" regarding area codes presents factual issues relating to the location of where calls were actually received, which cannot be resolved in Plaintiffs' favor on summary judgment.⁴⁶ Even the small number of complaints produced by State Plaintiffs in discovery show that this lack of proof plagues all of State Plaintiffs' claims, including their TCPA claims. Consider the example of consumer Mr. Farm. (AMF ¶389.) State Plaintiffs cannot show that calls to certain area codes meet their burden on summary judgment. Their motion should be denied.

⁴⁶ State Plaintiffs' purported consumer complaints confirm that area codes do not prove that a call was placed to a resident of a particular state. (AMF ¶389.)

In addition, as to claims regarding calls by Independent Retailers, the records relied on by Plaintiffs provide no evidence that these calls were made to sell a DISH product or service. (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.) These missing essential facts only could have been developed through consumer testimony on a case-by-case, or call-by-call, basis rather than a “massive computer processing” of hundreds of millions of call records. Plaintiffs’ own representatives consistently have admitted that the mere fact that a number is on the NDNCR is simply not proof that a call to that number is a violation. Plaintiffs are, therefore, not entitled to summary judgment.

XI. STATE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT TO THE EXTENT THEIR CLAIMS ARE PREDICATED ON THE CONDUCT OF THE INDEPENDENT RETAILER

Much of State Plaintiffs’ claims are premised not on DISH’s conduct, but, rather, on conduct by third parties JSR and Star Satellite, which State Plaintiffs contend acted on DISH’s behalf. (Plaintiffs’ Motion at 155-178.) Plaintiffs cannot show the absence of material questions of fact on the heavily fact-intensive inquiry to prove agency. Indeed, this Court has noted that the issue of agency is a question of fact. (d/e 20 at 24-25; d/e 32 at 11.) *See also Rush Presbyterian St. Luke’s Medical Center v. Safeco Ins. Co. of Am.*, No. 85 C 8998, 1987 WL 8629, at *2 (N.D. Ill. Mar. 23, 1987) (“questions of agency are rarely appropriate for resolution by way of summary judgment.”) *Roger Kennedy Constr., Inc. v. Amerisure Ins. Co.*, 506 F.Supp.2d 1185, 1195 (M.D. Fla. 2007) (“Because the issue of agency is factual in nature, it generally should not be resolved on summary judgment.”); *Allen v. Greenville Hotel Partners, Inc.*, 409 F.Supp.2d 672, 679 (D.S.C. 2006) (“Generally, questions of agency ordinarily should not be resolved by summary judgment where there are *any* facts giving rise to an inference of an agency relationship.”) (emphasis in original; citation omitted); *Savanna Group, Inc. v. Trynex*,

Inc., No. 10 C 7995, 2013 WL 4734004, at *6 (N.D. Ill. Sept. 3, 2013) (analyzing 2013 FCC Order and its application in TCPA case, and holding that “[t]he existence and scope of an agency relationship between [defendant] and [sender of facsimiles advertising defendant’s service] turns on numerous disputed issues of fact inappropriate for resolution at summary judgment”).⁴⁷

In a 2013 declaratory ruling, the FCC “clarif[ied] that while a seller does not generally ‘initiate’ calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers.” *In re Joint Petition Filed by DISH NETWORK, LLC*, CG No. 11-50, 2013 WL 193449, at *1 (FCC May 9, 2013). As Plaintiffs note, in its 2013 Order, the FCC listed several examples of instances where vicarious liability might attach. (Plaintiffs’ Motion at 158.) However, just two weeks ago, the D.C. Circuit, in its review of the FCC’s “guidance,” found that “[t]he FCC agrees that the ‘guidance’ in question *has no binding effect on courts [and] that it is not entitled to deference . . .*” *Dish Network, LLC v. FCC*, -- Fed. Appx. --, No. 13-1182, 2014

⁴⁷

Other courts in TCPA actions have refused to award summary judgment to plaintiffs on the issue of whether a defendant could be held vicariously liable for violations by third parties because of the fact-intensive nature of agency determinations, regardless of whether such relationships were alleged to be actual, apparent, or ratified agency. *See, e.g., Bridgeview Health Care Center Ltd. v. Clark*, No. 09 C 5601, 2013 WL 4495221, at *1, *3 (N.D. Ill. Aug. 21, 2013) (analyzing 2013 FCC Order and denying reconsideration of denial of summary judgment to plaintiff on agency theory of liability). Where genuine issues of material fact regarding the existence of an agency relationship were found to be absent, those cases generally involved awards of summary judgment *to the defendants* – *i.e.*, there was no issue of fact as to the *non-existence* of an agency relationship. *See, e.g., Palm Beach Golf Center-Boca, Inc. v. Sarris*, -- F.Supp. 2d --, No. 12-80178, 2013 WL 5972173, at *8-10 (S.D. Fla. Oct. 22, 2013) (awarding summary judgment to defendant in TCPA action and finding that plaintiff’s evidence was insufficient to support third-party liability under actual, apparent, or ratified agency theories).

WL 323660, at *1 (D.C. Cir. Jan. 22, 2014) (emphasis added). Thus, the illustrations set forth in the FCC's 2013 Order, to which Plaintiffs citing, do not support their agency arguments.

The state of the TCPA, as of January, 2014 is such that if State Plaintiffs wish to impose vicarious liability, they must adduce sufficient evidence to support an agency theory of liability under federal common law principles of agency. They cannot do so. Nor do they fare any better under applicable state laws, and summary judgment imposing vicarious liability should be denied.

A. Federal Common Law and Applicable State Law Principles of Agency Require Both (i) A Grant of Authority to the Agent and (ii) Control by the Principal over the Agent

Under both federal common law and the laws of North Carolina, Illinois, Ohio, and California, a party asserting an agency relationship must establish: (1) authority of the agent to act for the principal, and (2) the principal's control over the agent. These elements consistently are required across the applicable jurisdictions and, in their absence, a party cannot bind, nor impute liability to, another.

Under federal common law, an agency relationship is created "when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1113 (C.D. Cal. 2010), *vacated on other grounds*, 788 F.3d 1048 (9th Cir. 2013). For an agency relationship to exist, the agent must be subject to the principal's control with respect to the acts undertaken by the agent. *Id.*; *Kittlaus v. United States*, 41 F.3d 327, 330 (7th Cir. 1994) ("hornbook agency law clearly distinguishes between agents who are employees of the principal and agents who act as independent contractors."); *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1009 (7th Cir. 1982) ("at common law a principal is not liable for the torts of his independent contractors");

Restatement (Third) of Agency § 1.01, cmt f. (2006) (an agency relationship cannot exist absent the right to control the actor); Restatement (Second) of Agency § 2 (1958) (“An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.”). The requirements are materially the same under the laws of North Carolina, Illinois, Ohio, and California.⁴⁸

There is no evidence of DISH “controlling” its Independent Retailers. In fact, to the contrary, the facts establish that DISH took active measures to eschew such a relationship, both contractually and in public. (AMF ¶¶180-400.) DISH’s standard Retailer Agreement precludes Independent Retailers from having any authority (actual or apparent) to act on DISH’s behalf. Section 11 of the Retailer Agreement expressly precludes an Independent Retailer from holding itself out to the public or representing in any way that it is DISH or an employee, subcontractor, affiliate, agent, or sub-agent of DISH or any DISH affiliate. (AMF ¶¶183, 185.) DISH also requires each Independent Retailer to operate under its own company name or a d/b/a registered to the Retailer. (AMF ¶¶185, 191.) In sum, there is no evidence that the Independent Retailers had actual authority to act on DISH’s behalf.⁴⁹ Indeed, two federal courts already have

⁴⁸ See *SunTrust Bank v. C & D Custom Homes, LLC*, 734 S.E.2d 588, 590 (N.C. Ct. App. 2012); *Daniels v. Corrigan*, 886 N.E.2d 1193, 1204 (Ill. Ct. App. 2008); *Knapp v. Hill*, 657 N.E.2d 1068, 1071 (Ill. Ct. App. 1995); *Hanson v. Kynast*, 494 N.E.2d 1091, 1094 (Ohio 1986); *Forbes v. Par Ten Group, Inc.*, 394 S.E.2d 643 (N.C. Ct. App. 1990); Cal. Civ. Code § 2295; Cal. Civ. Code § 2299; *Paramount Farms, Inc. v. Ventilex B.V.*, 735 F.Supp. 2d 1189, 1213 (E.D. Cal. 2010).

⁴⁹ Despite the fact that Plaintiffs cannot establish that Independent Retailers are DISH agents under federal common law and applicable state law principles of agency, deference to the FCC’s interpretation that independent contractors may be held vicariously liable for TCPA violations is further inappropriate with respect to retailer conduct that occurred prior to the issuance of the declaratory ruling in May 2013. Retroactive application of this interpretation would be unfair to DISH, who cannot be

(footnote continued)

held that Independent Retailers are not agents of DISH. *See Zhu v. DISH Network, L.L.C.*, 808 F.Supp.2d 815, 819 (E.D. Va. 2011); *Charvat v. EchoStar Satellite, LLC*, 676 F.Supp.2d 668, 676 (S.D. Ohio 2009), *vacated on other grounds*, -- Fed Appx. --, No. 09-4525, 2013 WL 5664664 (6th Cir. Oct. 17, 2013). In *Charvat*, for example, the plaintiff alleged that DISH's predecessor, EchoStar Satellite, was liable for alleged TCPA violations by retailers, claiming that the Independent Retailers were acting on EchoStar's "behalf." The court granted summary judgment in EchoStar's favor, finding that it could not be held vicariously liable for the conduct of its Independent Retailers because EchoStar did not maintain "control over the method of advertising or the means by which the Retailers carry out their marketing activities." *Charvat*, 676 F.Supp.2d at 675; *see also Zhu*, 808 F.Supp.2d at 818-19.

As there is no evidence of actual authority granted by DISH to the Independent Retailers, State Plaintiffs can rely only on an apparent authority theory (if at all). "Apparent authority" exists "where the principal engages in conduct that, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545 (D.C. Cir. 2006). According to the Restatement (Third) of Agency, "[a]pparent authority . . . is created by a [principal's] manifestation that another has authority to act with legal consequences for the

(footnote continued)

expected to deduce an agency's interpretation of its rules in advance – much less an interpretation contrary to the established principle that an agency relationship does not exist between an employer and an independent contractor. *Christopher*, 132 S. Ct. at 2168 ("It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference."). *See also Acosta v. Target Corp.*, No. 05 C 7068, 2013 WL 3456767, at *14 (N.D. Ill. July 3, 2013) (declining retroactive application of Truth in Lending Act and Regulation Z interpretations).

[principal] who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation.” Restatement (Third) of Agency § 3.03. A manifestation by the principal to the third party is an “essential requirement” of apparent authority. *Id.*, cmt b; *see also Moriarity v. Glueckert Funeral Home, Ltd.*, 155 F.3d 859, 865-66 (7th Cir. 1998); Restatement (Second) of Agency § 265 (“Apparent authority exists only as to those whom the principal has manifested that an agent is authorized”). Thus, “[a]pparent authority cannot be established merely by showing that the agent claimed authority or purported to exercise it, but must be established by proof of something said or done by the principal on which a third person reasonably relied.” *Moreau v. James River-Otis, Inc.*, 767 F.2d 6, 9-10 (1st Cir. 1985). And “[t]he fact that one party performs a service that facilitates the other’s business does not constitute [the required] manifestation.” Restatement (Third) of Agency §3.03, cmt b. These same elements are required under the laws of North Carolina, Illinois, Ohio, and California.⁵⁰ What a third party may have understood or relied upon is a question of fact inappropriate for resolution at summary judgment.

Even if a third party were to believe that any of the six Independent Retailers was an agent of DISH, this belief cannot be traced to anything that DISH did or did not do. State Plaintiffs have no evidence of any such conduct. Moreover, both Section 11 of the Retailer Agreement and the Retailer Agreement’s Trademark Licensing Agreement expressly forbid a Retailer from holding itself out as DISH Network or representing that it is affiliated with DISH

⁵⁰ *Env’t Builders, Inc. v. Blankenbaker*, No. 2001–P–0064, 2002 WL 31862675, at *3 (Ohio Ct. App 2002); *Cove Management v. AFLAC, Inc.*, 986 N.E.2d 1206, 1212-13 (Ill. Ct. App. 2013) (quotations and citation omitted); *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 552 S.E.2d 686, 695 (N.C. Ct. App. 2001) (quotations and citation omitted); *Paramount Farms*, 735 F.Supp. 2d at 1213; Cal. Civ. Code § 2300.

Network in any way. (AMF ¶¶183, 185, 191.) Thus, DISH cannot be responsible for an Independent Retailer's conduct.

Finally, to the extent that the "ratification" concept of common law agency even could apply here,⁵¹ DISH did not ratify or knowingly accept any benefits of calls placed by Independent Retailers that may have violated the TCPA. In fact, DISH took steps to ensure that Independent Retailers complied with all applicable laws, including by requiring that the Independent Retailers purchase their own versions of the NDNCR, access state Do Not Call lists, and comply with all applicable telemarketing laws. (AMF ¶¶184, 192.) DISH also reminded Independent Retailers of these obligations by periodically sending "Facts Blasts" to the Independent Retailers. (AMF ¶¶194, 196.) Finally, DISH has terminated Retailer Agreements with Independent Retailers who violated telemarketing laws. (AMF ¶207.)

For these reasons, summary judgment should not be awarded to State Plaintiffs on these State claims.

**B. State Plaintiffs Can Offer No Evidence that
Tenaya/Star Satellite or JSR Acted as an Agent of DISH**

State Plaintiffs also have failed to establish that DISH should be held vicariously liable for prerecorded calls allegedly made by Tenaya/Star Satellite or JSR. (d/e 257, SAC,

⁵¹ The only case Plaintiffs cite in support of the ratification concept is *In re S. African Apartheid Litigation*, 633 F.Supp. 2d 117 (S.D.N.Y. 2009). Plaintiffs' Motion at 160. That case involved allegations of international law violations (with federal court jurisdiction based upon the Alien Torts Act) and the court's discussion regarding agency revolved around a parent/subsidiary relationship. Ratification represents one of the "unusual circumstances" where a court will hold a parent corporation liable for the acts of its subsidiary. *Bangkok Broadcasting & TV Co., Ltd. v. IPTV Corp.*, 742 F.Supp. 2d 1101, 1120 (C.D. Cal. 2010). Indeed, Plaintiffs acknowledge that there is no binding authority "address[ing] . . . ratification in the marketing affiliate context" (Plaintiffs' Motion at 159 (also noting same with respect to "apparent authority").) The Court should decline to apply the narrow concept of ratification in this case.

Count VI, ¶ 76, Count VIII, ¶¶ 82(b) and (d), Count X, ¶ 89, Count XI, ¶ 93, Count XII, ¶ 96.) State Plaintiffs have not proven, and cannot prove, that Tenaya/Star Satellite or JSR were DISH's agents at the time that they allegedly placed the calls in question.

State Plaintiffs have offered no evidence to establish that Star Satellite had actual authority from DISH to place pre-recorded message calls to consumers. Nor could they. As an Independent Retailer for DISH, Star Satellite had extensive autonomy. (AMF ¶252.) It was free to market the goods and services of any other company, including DISH's competitors. (*Id.*) It was also up to Star Satellite, and not DISH, to decide the details of when and how it marketed DISH's products and services, regardless of whether such marketing involved door-to-door sales, or newspaper, radio, or television advertisements. (*Id.*) In essence, it was entirely within Star Satellite's discretion which mode of advertising to use, so long as it was legal – DISH did not permit Star Satellite to engage in any illegal marketing activities. (AMF ¶253.) DISH also had no involvement with how Star Satellite operated its day-to-day affairs, and did not direct or control Star Satellite's business. (AMF ¶254.) And when Star Satellite salespeople would market DISH services, they always would identify themselves as working for Star Satellite, and not for DISH. (AMF ¶255.) Moreover, as discussed in Section VIII, Star Satellite hid from DISH that Star Satellite was working with Guardian Communications to send pre-recorded telephone messages.

Nor can State Plaintiffs establish that Star Satellite had apparent authority to place pre-recorded message calls to consumers because there is no evidence that DISH manifested to those consumers that Star Satellite was authorized to do so. In fact, it is undisputed that DISH had no direct dealings whatsoever with the consumers that Star Satellite allegedly contacted. Courts consistently have rejected claims of apparent authority where, as here, a principal's

manifestation is absent. *See, e.g., NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 114-15 (D.C. Cir. 2012); *Overnite Transportation Co. v. NLRB*, 140 F.3d 259, 304 (D.C. Cir. 1998).

Similarly, there is no evidence whatsoever that DISH controlled the manner or means in which JSR marketed or sold DISH products or services because JSR was never deposed in this action. (AMF ¶344.) Thus, Plaintiffs' purported agency claim as to JSR suffers from a complete absence of proof.

Thus, DISH cannot be held vicariously liable for Star Satellite's or JSR's alleged TCPA and state law violations and Counts VI, VIII, X, XI, and XII. At a minimum, summary judgment cannot be awarded in State Plaintiffs' favor on these claims.

XII. STATE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT V OF THE SAC AS TO CONDUCT ENGAGED IN BY DISH

In Count V of the SAC, State Plaintiffs allege that DISH violated the TCPA, specifically 47 C.F.R. § 64.1200(c)(2) and 47 U.S.C. § 227(c), which governs "telephone solicitation[s]" to "[a] residential subscriber who has registered his or her number on the [NDNCR]." 47 C.F.R. § 64.1200(c)(2). These provisions expressly do not apply to calls to non-residential wireless or business or government numbers. *See id.* As set forth at Sections III-IV above, there are a myriad of factual issues that cannot be resolved in Plaintiffs' favor as to whether any of the alleged calls at issue were telemarketing calls made to residential landlines, rather than to non-residential, wireless, business, or government numbers. Likewise, and as set forth in Sections V and X above, State Plaintiffs cannot prove that the violations that they claim from the 2003-2007 DISH call records or the Independent Retailer call records arise from telemarketing calls, as opposed to calls made for a non-telemarketing purposes. Finally, and as set forth in Section IV, State Plaintiffs cannot prove that the violations that they claim from any call record set are based on calls placed to the residential subscriber who had registered his or her

number on the NDNCR. For these reasons, State Plaintiffs are not entitled to summary judgment on Count V.

**XIII. STATE PLAINTIFFS ARE NOT ENTITLED TO SUMMARY JUDGMENT
ON COUNT VI OF THE SECOND AMENDED COMPLAINT**

In Count VI of the SAC, State Plaintiffs allege that DISH violated 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. §227(b)(1)(B), which are the provisions of the TCPA governing the initiation of “any telephone call to a residential line using an artificial or prerecorded voice to deliver a message.” State Plaintiffs’ “prerecorded message” TCPA claims are based on two categories of recorded calls: (a) calls made by DISH; and (b) calls purportedly made by Tenaya/Star Satellite.⁵² As set forth below, State Plaintiffs are not entitled to summary judgment because there are factual disputes regarding (i) whether the calls at issue were placed to residential landlines; and (b) whether DISH made pre-recorded calls to non-DISH customers.

**A. State Plaintiffs Have Not Established That The Claimed
Violation Calls In Fact Were Placed To Residential Landlines**

Both 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. §227(b)(1)(B) apply only to residential telephone lines, and not to wireless, business, or government numbers. State Plaintiffs have offered no proof that the violations that they claim result from actual calls to residential numbers, as opposed to non-residential wireless, business, or government numbers. (AMF ¶¶171, 262.) Plaintiffs’ own witness and expert have admitted that not all of the calls placed by DISH or Tenaya/Star Satellite were to residential landlines. (AMF ¶¶171, 262.) The best (and only) evidence Plaintiffs muster is a sampling of 5001 call records, which purportedly revealed that 40% of the Independent Retailer’s calls were to residential land-line phone

⁵² For the reasons set forth above in Section XI, the State Plaintiffs have failed to meet their burden to establish third-party liability with respect to Count VI.

numbers. (Plaintiffs’ Motion at 165 (referring to Plaintiffs’ Exh. 214 10/10/2012 Stauffer Decl. at ¶ 10(e).) Yet, as Plaintiffs’ expert acknowledged in the same document that contained his sample analysis, what may appear to be a residential number actually could be a wireless or business number. (Plaintiffs’ Exh. 214, Stauffer Decl. at ¶ 7 (identifying “case in which a small business person, such as person who has a hair salon in his/her home, uses a wireless number for the residential and business listed number”).)⁵³ Plaintiffs must point to specific calls that violate the TCPA to meet their burden of proof; they may not extrapolate the results from a small subset of sampled calls placed by an Independent Retailer to all of that Retailer’s calls, and treat that as the basis for DISH’s liability. Indeed, Plaintiffs cite no authority that would allow them to relinquish their proof obligations in the manner that they propose.

B. State Plaintiffs Cannot Prevail On Their Prerecorded Message TCPA Claims Based On Calls Made By DISH

With respect to calls made by DISH, State Plaintiffs claim that calls made as part of 15 prerecorded message campaigns violated the TCPA. (Plaintiffs’ Motion at 163-164.) Yet, at the time of such calls, the then-operative version of the TCPA specifically provided that prerecorded message calls made “to any person with whom the caller has an established business relationship at the time the call is made” are not violations. 47 C.F.R. § 64.1200(a)(2)(iv). Plaintiffs admit as much. (Plaintiffs’ Motion at 164 n.14.) There is no dispute that each of the 15 prerecorded message campaigns at issue, which were dialed between September 2007 and November 2008, were directed to DISH customers who were, at the time of the calls, existing subscribers of DISH service (AMF ¶¶421-422) and, while Plaintiffs note that “a consumer’s

⁵³ Moreover, as noted above, Plaintiffs cannot demonstrate that a telephone number that Tenaya/Star Satellite may have called, at that time, still belonged to the person who registered it on a Do Not Call list.

request that Dish not call invalidates and terminates that EBR [between the consumer and DISH],” (Plaintiffs’ Motion at 164 n.14), they do not actually argue or present evidence that any consumers, in fact, made such request. Thus, Plaintiffs are not entitled to summary judgment on Count VI. Rather, the claim must be dismissed as it pertains to the prerecorded messages calls placed by DISH.

**XIV. PLAINTIFF CALIFORNIA IS NOT ENTITLED
TO SUMMARY JUDGMENT ON COUNT VII OF THE SAC**

In Count VII of the SAC, Plaintiff California claims that DISH violated California Business & Professions Code § 17592(a)(1) (the “California DNC Law”) by “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.” (d/e 257, SAC, Count VII.) Plaintiff California bases these claims on outbound dialing by DISH between 2007 and 2010, as well as outbound dialing by several unnamed Independent Retailers. (Plaintiffs’ Motion at 169-70.)⁵⁴ Plaintiff California is not entitled to summary judgment because it has offered no evidence, nor could it, that the calls at issue were made to California residents.

**A. Plaintiff California Cannot Prove Which Calls, If Any,
Were Made To Its State’s Residents Or “California Numbers”**

The California DNC Law expressly states that it applies only to “California telephone numbers listed on the [NDNCR].” Cal. Bus. Prof. Code § 17592(a)(2). Because Plaintiff California is only authorized to pursue claims on behalf of California residents, the

⁵⁴ The Plaintiff California, ignoring binding authority, advocates that a three-year statute of limitation applies to Section 17592 claims. (Plaintiffs’ Motion at 173.) This is incorrect. For the reasons stated in Section XIV(D) of DISH’s moving brief, a one-year statute of limitations applies.

phrase “California telephone numbers,” which is not defined by the statute, must be interpreted to mean telephone numbers associated with California residents. *See DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 601 (1992) (citations omitted) (in interpreting a statute, courts “must first consult the words themselves, giving them their usual and ordinary meaning”). Here, Plaintiff California seeks to rely upon area codes alone to prove that violation calls purportedly set forth in various sets of call records are based on calls made to California residents. As set forth above, however, both courts and the FCC have rejected the notion that area codes can be used to prove a call recipient’s state of residence.

Plaintiff California’s argument that “California telephone numbers” should be interpreted to mean any phone number with an area code that is typically associated with California is meritless. Indeed, any such interpretation would violate the Commerce Clause. State regulations that have the practical effect of controlling extraterritorial conduct are per se invalid under the Commerce Clause. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010) (“[A]nother class of nondiscriminatory local regulations is invalidated without a balancing of local benefit against out-of-state burden, and that is where states actually attempt to regulate activities in other states.”); *TelTech Systems, Inc.*, 866 F.Supp.2d at 575-77 (holding that a Mississippi law governing caller-ID spoofing was invalid under the Commerce Clause because a caller ID spoofing service would have no way of knowing whether the recipient of its call was in Mississippi).

The FCC, itself, has recognized the impact of the Commerce Clause on state regulations pertaining to telephone calls and telecommunications. In 2004, the FCC issued an order preempting the State of Minnesota’s attempt to regulate VoIP services. *Vonage*, 19 F.C.C.R. 22404 (Nov. 12, 2004). The Eighth Circuit affirmed. *Minn. Pub. Utils. Comm’n v.*

FCC, 483 F.3d 570 (8th Cir. 2007). In its *Vonage Order*, the FCC decided that the state's regulatory reach violated the Commerce Clause because Minnesota's requirements would have the "practical effect" of regulating commerce occurring wholly outside that state's borders." *Vonage*, 19 F.C.C.R. at 22428. The FCC reached this conclusion because there was no method to identify calls that were made from or to a person in Minnesota (aside from each consumer self-identifying his or her location or state of residence). *Id.*

The practical effect of applying the California DNC Law to all calls placed to a number with a California area code, as urged by Plaintiff California here, would be to control conduct occurring wholly outside of California's boundaries. For these reasons, Plaintiff California should not be awarded summary judgment on Count VII of the SAC.⁵⁵

B. California Has Offered No Evidence To Prove Which Calls, If Any, Were Telemarketing Calls To A Residential Subscriber Made To Sell A DISH Product

For the calls allegedly made by JSR, Plaintiff California's claim also must fail because it cannot prove which calls, if any, were telemarketing calls to a residential subscriber made to sell a DISH product, as opposed to a call of a different nature.⁵⁶ (*See* Sections III and X.)

⁵⁵ Each of the claims asserted by the other State Plaintiffs (Illinois, North Carolina, and Ohio) suffer from this same fatal flaw, namely that area codes cannot be used to prove a call recipient's state of residence.

⁵⁶ Indeed, Plaintiff California simply argues that "liability under the California UCL follows without additional proof" because the same evidence that supports its TCPA claim supports the California DNC Law claim. (Plaintiffs' Motion at 171.) However, as detailed above, *see supra* at Sections IX-XIII, Plaintiffs' TCPA claim falls. So too, then, does Plaintiff California's DNC Law violation.

C. California Has Offered No Evidence To Prove That The Calls Claimed To Be Violations Were Made To The Person (Or Household of the Person) Who Placed The Number On the NDNCR

The California DNC claim also must be dismissed because Plaintiff California cannot prove that the calls claimed to be violations were made to the person (or household of the person) who placed the number on the NDNCR. (*See* Section IV.)

Even if Plaintiff California could establish that DISH violated the California DNC Law, DISH is entitled to avail itself of the statute's safe harbor defense. Section 17593(d) of the California DNC Law provides that "[i]t shall be an affirmative defense to any action brought under this article that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketer instruction and training." Cal. Bus. & Prof. Code § 17593(d). As set forth above (AMF ¶¶105-107), any violations committed by DISH were the result of inadvertence, and were in violation of DISH's policies and procedures and its instruction and training. (AMF ¶¶14-98.) Plaintiff California, therefore, cannot be granted summary judgment on this claim.

XV. PLAINTIFF CALIFORNIA IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT VIII OF THE SAC BASED ON UNFAIR COMPETITION BECAUSE IT CANNOT SHOW THAT DISH VIOLATED A "BORROWED STATUTE"

In Count VIII of the SAC, Plaintiff California asserts that DISH's alleged violations of the TCPA, Section 17592, and California Civil Code Section 1170(a)(22)(a) are also "unlawful" business practices under California Business & Professions Code § 17200, *et seq.* (the "UCL"). (Plaintiffs' Motion at 170-171.)⁵⁷ To sustain a claim under Section 17200,

⁵⁷ The Plaintiff California, ignoring binding authority, advocates that a four-year statute of limitation applies to Section 17200 claims. (Plaintiffs' Motion at 173.) This is incorrect. For the reasons stated in Section XV (B) of DISH's moving brief, a one year statute of limitations applies.

however, there must be a violation of the so-called “borrowed” statutes, here the TCPA, Section 17592, and Section 1770(a)(22)(a). *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). As set forth in Sections X, XI, XII, XIII, and XIV, *supra*, DISH violated neither the TCPA nor Section 17592. In addition, for the same reasons that DISH did not violate the TCPA’s proscription against prerecorded messages as set forth in Section XIII, DISH did not violate Section 1770(a)(22)(a), which is the California state law analogue prohibiting the same conduct.

As such, Plaintiff California’s UCL claim must fail because DISH did not violate these “borrowed” statutes, and without an actual statutory violation “there is no unlawful conduct to serve as the basis of plaintiff’s UCL claim.” *Rice v. Sunbeam Prods., Inc.*, No. CV 12–7923, 2013 WL 146270, at *8 (C.D. Cal. Jan. 7, 2013); *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F.Supp.2d 1077, 1091 (S.D. Cal. 2010). Thus, summary judgment cannot be granted to Plaintiff California.

XVI. PLAINTIFF NORTH CAROLINA IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT IX OF THE SAC

In Count IX of the SAC, Plaintiff North Carolina claims that DISH violated N.C. Gen. Stat. § 75-103 by “making telephone solicitations to the telephone numbers of North Carolina telephone subscribers when those numbers were in the pertinent version of the [NDNCR].” (SAC ¶ 85.) Plaintiff North Carolina also claims that DISH failed “to monitor and enforce compliance by its employees, agents and independent contractors,” pursuant to N.C. Gen. Stat. § 75-102(d). Plaintiff North Carolina does little more than restate those allegations and sprinkle in a specific number of allegedly violative calls in its argument in support of summary judgment. (Plaintiffs’ Motion at 174-175.) It is evidence, not allegations, that is

required at summary judgment, and Plaintiff North Carolina's offering in its motion is inadequate to obtain judgment in its favor.

As set forth in Sections III and IV(A), Count IX also must be dismissed because Plaintiff North Carolina cannot prove that the calls claimed to be violations were made to the person (or household of the person) who placed the number on the NDNCR. Nor can Plaintiff North Carolina show which calls were made to consumers versus businesses. At the very least, there are numerous factual issues, which preclude entry of summary judgment in its favor.

XVII. PLAINTIFF NORTH CAROLINA IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT X OF THE SAC

In Count X of the SAC, Plaintiff North Carolina claims that DISH, or third parties acting on its behalf, violated N.C. Gen. Stat. § 75-104 by using "an automatic dialing and recorded message player to make unsolicited telephone call[s]."

As set forth in Section X, Plaintiff North Carolina's claim must fail because it cannot prove which calls, if any, were made to its State's residents or "North Carolina Telephone Subscribers." Similarly, and as set forth in Section XVI above, Plaintiff North Carolina cannot prove which calls, if any, were telemarketing calls to a residential subscriber made to sell a DISH product, as opposed to calls of some other nature. Thus, Plaintiff North Carolina should not be granted summary judgment. In fact, Count X of the SAC should be dismissed.

XVIII. PLAINTIFF ILLINOIS IS NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT XI OF THE SAC

As set forth above, in Count XI of the SAC, Plaintiff Illinois alleges that DISH violated the IATDA, 815 ILCS 305/30(b), by placing autodialed calls that played a prerecorded message. Plaintiff Illinois' claim that DISH itself violated the IATDA is predicated on the same 15 prerecorded message campaigns that underlie the State Plaintiffs' TCPA claim. As set forth above, each of the DISH prerecorded message campaigns relied on by Plaintiff Illinois, was

made to then-existing DISH customers. (AMF ¶¶421-422.) Plaintiff Illinois wrongfully argues (without citation) that the IATDA “has no EBR exemption.” (Plaintiffs’ Motion at 177.) Section 20 of the IATDA provides, however, that the Act shall not apply to telephone calls “made to any person with whom the telephone solicitor has a prior or existing business relationship.” 815 ILCS 305/20(a)(2). Thus, Plaintiff Illinois is not entitled to summary judgment on this claim.

XIX. THE INJUNCTIVE RELIEF SOUGHT BY PLAINTIFFS IS UNWARRANTED AND IMPROPER, AND CANNOT BE GRANTED ON SUMMARY JUDGMENT

Plaintiffs seek the following permanent injunction and declaratory order:

G. Enjoin Dish....from placing any outbound telemarketing call for five years;

H. Enjoin Dish from accepting any new customer orders from any current OE retailer or successor (or from any similar successor system), or any new OE retailer, unless and until Dish: (a) hires a telemarketing-compliance expert that had no prior role with Dish or function in this case, who will prepare a plan to bring the OE retailers into compliance with the telemarketing laws; (b) transmits the expert’s plan to the Court, the Department of Justice, the Federal Trade Commission, and the State Plaintiffs; and (c) fully implements the plan prepared by the expert. Six months after fully implementing the expert’s plan and resuming taking orders from the OE system, Dish and the expert shall prepare and transmit to Plaintiffs a comprehensive written status report regarding telemarketing compliance of OE retailers. Upon receipt of the six-month report, Plaintiffs have the right to respond to the report and then petition the Court to continue the OE-retailer ban indefinitely. The Court will decide such a petition without allowing additional discovery beyond the status report and the Plaintiffs’ response;

I. At the end of the five-year ban on telemarketing, if Dish resumes telemarketing either on its own or via a vendor such as eCreek, the Court should require Dish to retain and transmit all telemarketing compliance materials to the Plaintiffs on a semi-annual basis for ten years, including: (a) all outbound telemarketing call records; (b) all records of leads, EBRs, and consents-to-call associated with those call records; (c) all telemarketing complaints it received during the prior quarter; (d) all internal emails, internal instant messages, and internal Siebel database entries discussing telemarketing compliance over the prior quarter; and (e) any other relevant telemarketing-compliance related information. Upon receipt and analysis of these records, Plaintiffs have the option of petitioning the Court for further injunctive relief, up to and including a complete telemarketing ban. The Court will decide such a petition on the record

only and without allowing additional discovery beyond the records Dish transmitted to Plaintiffs and the parties' analyses of those records.

J. At the end of the five-year telemarketing ban, permanently enjoin Dish from violating the TSR and state statutes at issue here;

K. Permit representatives from Plaintiffs unannounced inspectional authority to examine any Dish office, Retailer office, Retailer call center, or other similar facility to inspect for compliance with the Court's order;

L. Declare that Dish will be liable for its retailers' violations going forward as if Dish itself had placed the calls.

(Plaintiffs' Motion at 153-55) (collectively referred to as "Plaintiffs' Injunctive Relief.")⁵⁸ These extreme remedies are neither supported by law nor the facts. Summary judgment cannot be granted on any of Plaintiffs' claims.

A. Plaintiffs Have Not Established That The Extreme Injunctive and Declaratory Relief They Seek Is Appropriately Tailored to This Case

Injunctive relief is a "drastic and extraordinary remedy," (*Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S. Ct. 2743, 2748 (2010)), and thus a court may "enjoin only as much as is necessary" to protect the party seeking the injunction. *Igram v. Page*, No. 98 C 8337, 1999 WL 705895, at *3 (N.D. Ill. Aug. 27, 1999). Accordingly, courts must "tailor injunctive relief to the scope of the violation found." *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604-05 (7th Cir. 2007); *Nat'l Org. for Women, Inc. v. Scheidler*, 396 F.3d 807, 817 (7th Cir. 2005); *Weidner v. Carroll*, No. 06-782, 2010 WL 310310, at *3 (S.D. Ill. Jan. 21, 2010). Moreover, "a plaintiff is [not] entitled to an unreasonably broad [] injunction merely

⁵⁸ State Plaintiffs, pursuant to the TCPA, join in this request for injunctive relief.

because a reasonable injunction is more difficult to enforce.” *Mantek Div. of NCH Corp. v. Share Corp.*, 780 F.2d 702, 711 (7th Cir. 1986).⁵⁹

Plaintiffs make no attempt to propose relief that is appropriately tailored. Rather, they summarily assert that the unprecedented fencing-in relief they seek is necessary because DISH is already a party to a 2009 settlement between DISH and State Attorneys General (even though there has been no claim by the parties to that settlement that DISH did not comply with it), and because of the existence of dated settlements against two former and one non-active retailer (and not with DISH). They also profess concern that DISH may promote products other than satellite television services. (Plaintiffs’ Motion at 152-53.) They cite no law to support that these alleged reasons are sufficient to satisfy the extreme fencing-in relief they seek, which is not surprising because there is no applicable precedent.⁶⁰

⁵⁹ The FTC is seeking a permanent injunction for alleged violations of the TSR through Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Section 13(b) requires this Court first to make a determination that DISH violated the TSR, and then, that there is a “cognizable danger of recurrent violation” to justify the issuance of an injunction. *FTC v. Kitco of Nev., Inc.*, 612 F.Supp. 1282, 1296 (D. Nev. 1985) (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). Even if the Plaintiffs established liability (they have not), for the reasons stated herein, the “concerns” that they cite are a poor substitute for proof of cognizable danger of recurrent violations.

⁶⁰ And while Plaintiffs summarily cite *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965), this case counsels against granting such extreme “fencing in” relief here. In *Colgate-Palmolive*, the Supreme Court closely tracked the restrictions of the law (there, Section 5 of the FTC Act) and permitted an injunction aimed at ensuring that deceptive commercials were not used to advertise different. Here, the injunctive relief Plaintiffs seek would be akin to preventing Colgate-Palmolive from airing any commercials at all – a remedy that would clearly have “no reasonable relation to the unlawful practices found to exist.” *Id.* The other case cited by the United States is *FTC v. U.S. Sales Corp.*, 785 F.Supp. 737, 753-54 (N.D. Ill. 1992). This case, which was premised on the deceptive conduct by the defendants, simply reiterates a court’s general power to enter equitable relief after finding deception and misrepresentation under the FTC Act, and also notes that monitoring requirements are permissible to ensure compliance. Again, however, such equitable relief should be tailored to the facts of the case. Indeed, there is no

(footnote continued)

Moreover, even if this Court were to accept Plaintiffs' view of the world, the facts do not support such extensive restrictions on DISH's business. DISH acted in good faith to comply with the telemarketing laws, and the evidence showed that Plaintiffs can identify only a small percentage of DISH calls that they could even assert as violations and only a handful of Independent Retailers who Plaintiffs assert purportedly did anything wrong.⁶¹ These are not facts that support Plaintiffs' Injunctive Relief, which go well beyond the restrictions of the TSR, TCPA, and state law.

Rather, Plaintiffs' Injunctive Relief is plainly not reasonably related and narrowed to the practices they claim are violations. Rather, such an injunction overreaches and would damage a marketplace (that the FTC itself regulates) where only two competitors exist in the satellite TV spectrum. By placing extreme restrictions on DISH's business, but not the other satellite TV provider, would cause significant financial loss to DISH and result in conditions that negatively impact competition and thus consumers. Courts have not hesitated to curtail such over-reaching requests by the FTC. *See FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 45 (D.C. Cir. 1985) (instructing the district court to modify the injunction to remove the provision requiring FTC approval of advertising); *FTC v. J.K. Publ'ns, Inc.*, 99 F.Supp.2d 1176, 1209-10 (C.D. Cal. 2000) (limiting the scope of the injunction so as not to prohibit the individual from employment as a non-managerial employee in any business that handles consumer credit or

(footnote continued)

evidence in this case that DISH's current telemarketing efforts are anything but exemplary.

⁶¹ Despite this meager evidence and the fact that only one of the sales-only Independent Retailers mentioned in Plaintiffs' motion (NSS) is an active Retailer, Plaintiffs' Injunctive Relief would impact all 35 active sales-only Independent Retailers. (AMF ¶¶443-444).

debit card accounts and “effectively prohibit him from working in the overwhelming majority of businesses”).⁶²

In any event, whether to grant an injunction based on past misconduct is a fact-intensive inquiry. *FTC v. Think Achievement Corp.*, 144 F.Supp.2d 1013, 1017 (N.D. Ind. 2000)(holding Court explained that whether to grant an injunction based on past misconduct was a fact-intensive inquiry, and is not appropriate for summary judgment).

B. Any Permanent Injunction Entered By The Court Must Comply With The Constitution

In *Goans Acquisition, Inc. v. Merch. Solutions, LLC*, No. 12-00539, 2013 WL 5408460 (W.D. Mo. Sept. 26, 2013), the court aptly noted that a broad injunction seeking to prevent the defendant from engaging in lawful facsimile marketing (in this case, under the TCPA) “would be of dubious constitutionality.” *Id.*, at *4. Indeed, an injunction unmoored from the requirements of the TSR or TCPA – such as that proposed by the Plaintiffs against DISH – would run afoul of the First Amendment.

Telemarketing, *i.e.*, targeted speech for the purpose of soliciting listeners to purchase goods or services, “fits soundly within the definition of commercial speech” and regulations restricting such speech implicate the First Amendment. *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1233 (10th Cir. 1999). It is axiomatic that truthful commercial speech is protected by the First Amendment and that restrictions on such speech are subject to intermediate scrutiny. *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001); *U.S. West*, 182 F.3d at 1233 (10th

⁶² See also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 924 n.67 (1982) (injunctions must “restrain only unlawful conduct.”); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 184 (1968) (“[O]rder[s] must be tailored as precisely as possible to the exact needs of the case.”); *CPC Int’l, Inc. v. Skippy Inc.*, 214 F.3d 456, 461 (4th Cir. 2000) (“Injunctions must be narrowly tailored and should prohibit only unlawful conduct.”).

Cir. 1999); *Kole v. Village of Norridge*, 941 F.Supp.2d 933, 951 (N.D. Ill. 2013); *Entm't Software Ass'n v. Chicago Transit Auth.*, 696 F.Supp.2d 934, 949 (N.D. Ill. 2010).

The Supreme Court has established a four-part test for analyzing restrictions on commercial speech, of which the fourth prong “requires a reasonable fit between the government restriction and the means chosen to accomplish those ends, which must be “narrowly tailored to achieve the desired objective.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 528 (2001). As the party seeking to impose a restriction on commercial speech by DISH and its Retailers, it is Plaintiffs’ burden to justify such restrictions. *See Edenfield v. Fane*, 507 U.S. 761, 770 (1993). “This burden is not satisfied by mere speculation or conjecture; rather, [the government] . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” *Id.* at 770-71.

Under this standard, total bans on a specified means of commercial speech have repeatedly have been struck down as unconstitutional and violative of the First Amendment. *See Edenfield*, (striking a Florida rule prohibiting CPAs from engaging in direct, in-person, uninvited solicitation unless the person to be solicited was already a client of the CPA). 507 U.S. at 763-64, 767. *See also Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002) (finding unconstitutional certain provisions of the Food and Drug Administration Modernization Act that prohibited advertising and promotion of particular compounded drugs); *Entm't Software Ass'n*, 696 F.Supp.2d at 947-49 (finding that industry group of video game makers were likely to prevail on their constitutional challenge to a blanket ban on commercial advertisements for mature-content video games on Chicago’s trains, buses, and transit facilities).

Similarly, here, Plaintiffs’ Injunctive Relief would unduly and unreasonably infringe on DISH’s and the Independent Retailers’ protected speech. This is especially true in

this case because Plaintiffs have come forward with only the most meager evidence that any of DISH's and the Independent Retailers' telemarketing was in violation of the TSR or TCPA.

C. State Plaintiffs' Request For A Permanent Injunction Under the TCPA Should Be Denied Because It Is Not Narrowly Tailored To Comply With The TCPA

State Plaintiffs' request for an injunction is governed by the TCPA. The TCPA requires any injunctive relief to be narrowly tailored to the terms of that statute so that DISH is not precluded from engaging in otherwise permissible telemarketing. In *Goans Acquisition*, for example, plaintiff sued under the TCPA seeking monetary relief and "a preliminary and permanent injunction prohibiting [defendant] from transmitting unsolicited facsimile transmissions." The court held that plaintiff's broad demand for injunctive relief was not permitted by the TCPA, and that "the injunctive relief available under the statute is limited to actions to enjoin violations of the TCPA." 2013 WL 5408460, at *4. Because the plaintiff sought an injunction to prevent defendant "from sending any unsolicited facsimile transmissions," the court held that "[s]uch an injunction would be of dubious constitutionality" and, "[m]ore importantly, such an injunction is not within the scope of the TCPA" because the statute permits unsolicited faxes in various situations. *Id.* "While the TCPA limits the ability of entities to send unsolicited advertisements by facsimile, it does not prohibit all such transmissions. As such, the statute does not authorize injunctive relief seeking an unlimited prophylactic prohibition such as that sought by [plaintiff]." *Id.* See also *Manfred v. Bennett Law, PLLC*, No. 12-cv-61548, 2012 WL 6102071, at *3 (S.D. Fla. Dec. 7, 2012)(dismissing plaintiff's request for injunctive relief under the TCPA because it sought to prohibit calls to "any person" rather than only to the plaintiff); *J2 Global Communications, Inc. v. Blue Jay Inc.*, No. C 08-4254, 2009 WL 4572726, at *9 (N.D. Cal. Dec. 1, 2009)(even as to a repeat offender who admitted to violating the TCPA, the court narrowed an already extremely tailored proposed

injunction that sought only to restrict future unsolicited faxes to the plaintiff without its prior consent).⁶³ Thus, it is clear that courts awarding injunctive relief under the TCPA are careful to issue an appropriately narrow injunction that does not prohibit otherwise lawful conduct. The Court, here, cannot issue an injunction that has the impact of noticeably favoring one competitor in the marketplace where the competition is limited to only two satellite television providers.

XX. PLAINTIFFS CANNOT BE GRANTED THE UNPRECEDENTED CIVIL PENALTIES THAT THEY SEEK ON SUMMARY JUDGMENT

**A. The FTC Has Failed To Provide Evidence Of
Liability Based On A Per Plan, Program Or Campaign**

Under the TSR, the FTC's jurisdiction is limited to enforcement actions regarding "plan[s], program[s] or campaign[s] which [a]re conducted to induce purchase of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call." 15 U.S.C. 6104(4); 16 CFR 310.2(cc). Pursuant to the TSR, "[i]t is an abusive telemarketing act or practice and a violation of this Rule" for a telemarketer to initiate a call to a person who has properly placed their number on the Registry, absent an EBR, or for a telemarketer to initiate a call to a person who previously stated that he or she does not wish to receive an outbound telemarketing call by or on behalf of a seller. 16 CFR 310.4(b)(1)(iii). Thus, under the TSR, improperly calling someone on the Registry or an internal do not call list subjects the telemarketer to a potential penalty for that "plan, program, or campaign" – not for the individual call itself, and absent protection from the safe harbor provisions, civil penalties must

⁶³ State Plaintiffs cite *Texas v. Am. Blastfax, Inc.*, 164 F.Supp. 2d 892, 902 (W.D. Tex. 2001), to support their requested relief. Blastfax is not on point. The injunction there was largely on consent of the defendant and did no more than prohibit conduct already prohibited by the TCPA. Thus, Blastfax is consistent with the other TCPA cases in which any injunction is narrowly tailored to track the language of the statute and ensure that legal conduct is not otherwise infringed.

be assessed on such a basis (*i.e.* per campaign in which there were abusive telemarketing practices).

Intentionally or not, the FTC concedes this point. The FTC relies on the TSR's definition of "Telemarketing" in arguing that DISH can be held liable for purely intrastate calls, stating that "if a firm has made more than one interstate call as part of its telemarketing activities, it is irrelevant that a firm's dialer happens to be located in the same state as the consumer it illegally called." (Plaintiffs' Motion at 93 (citing the definition of "Telemarketing" in 15 USC 6104(4)). Thus, according to the FTC, once there is more than one interstate telephone call, it is the *campaign* that becomes at issue, and whether there were additional intrastate calls is irrelevant.

Based on this reasoning, the violations claimed and damages sought by the FTC are grossly disproportionate to the number of campaigns alleged to have violated the TSR. Indeed, this approach is consistent with the broader language of the TSR, which distinguishes between a "calling campaign" and "each telemarketing call placed" when necessary. *Compare, e.g.,* 16 CFR 310.4(b)(4)(i) *with* 16 CFR 310.4(b)(4)(ii). Nor does the FTC offer any rationale for analyzing violations on a "calling campaign" basis when alleging liability, but looking at "each telemarketing call placed" when it comes to damages.

Accordingly, the FTC cannot obtain summary judgment because it failed to present any proof on a per plan, program or campaign basis.

B. There Is No Basis To Award Any Civil Penalties Under The TSR

The FTC appears to have admitted that any question as to the amount of civil penalties should be resolved separately from those issues raised in Plaintiffs' Motion. While DISH certainly concurs that the question as to any amount of any civil penalty has not even been addressed, let alone resolved, in Plaintiffs' Motion, it is also clear that the fact-intensive nature of

whether or not civil penalties are appropriate in the first instance cannot and has not been resolved through Plaintiffs' Motion. In fact, the FTC's claims for civil penalties must be dismissed. Pertinent here, violations of the TSR after February 9, 2009 can subject the "seller" and "telemarketer" to a civil penalty of up to \$16,000 per violation. 15 U.S.C. § 45(m)(1)(A); 16 C.F.R. § 1.98(d). On or before February 9, 2009, the maximum civil penalty amount for a rule violation was \$11,000. *Id.* Penalties are only appropriate for violations that were committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by [the TSR]." 15 U.S.C. § 45(m)(1)(A).

In this case, the FTC seeks "monetary civil penalties from [DISH] for every violation of the TSR" alleged in Counts I-IV. (d/e 257, SAC, Prayer ¶2.) As discussed above, the FTC cannot prove that DISH is liable for *any* alleged violations of the TSR in Counts I-IV. As such, the FTC is not entitled to any civil penalties under 15 U.S.C. § 45(m)(1)(A).

Even assuming *arguendo* that the FTC could establish a TSR violation, it cannot meet its burden of proof to show, under the circumstances, that each and every claimed TSR violation occurred, or that it was the result of actual knowledge by DISH that such act would violate the TSR. Indeed, as addressed above, Plaintiffs cannot even establish that each alleged call was to a phone number properly on the NDNCR, within Plaintiffs' jurisdiction, or that such phone call ever reached a consumer's active phone number, which remained associated with the consumer who placed such phone number on the NDNCR or DISH's internal DNC list. Monetary penalties per each alleged violation require proof that each such violation actually occurred. In this case, because of the FTC's failure to properly maintain the NDNCR, and otherwise meet its burden as to each alleged call, there is no degree of confidence (let alone high confidence) that each and every alleged call is, in fact, a violation that merits a civil penalty.

This is all the more pronounced within the context of DISH's implementation and enforcement of numerous policies, processes, and practices to prevent placing telemarketing calls to phone numbers on the NDNCR or DISH's internal DNC list (AMF ¶¶14-107.) The facts also demonstrate that DISH acted in good faith to comply with applicable telemarketing laws, including learning the telemarketing laws, and designing policies and processes to comply with the varying (and sometimes contradicting) TSR, TCPA, and state laws that continued to change over the course of this case, and DISH's adjustment of its compliance program to such changes. (*Id.*) The FTC simply has ignored this statutory requirement to prove each and every violation for which it seeks civil penalties, assuming incorrectly that the knowledge required to establish a civil penalty can be satisfied by the FTC's own assertion. Particularly given the shocking figures they are seeking, this knowledge element cannot be dismissed as an empty formality.

Similarly, to the extent Counts I through IV of the SAC attempt to impose liability on DISH for the alleged conduct of Independent Retailers, the FTC must show that the Independent Retailers' conduct violated the TSR (and, as discussed above, it cannot). Even if it could prove such a violation, the FTC would have to show that DISH committed an act in connection with a call by an Independent Retailer that DISH knew was unfair or deceptive, and that the act violated the TSR. There is no such evidence. If the Court is persuaded by the FTC's attempt to impose the FTC's new "strict liability" standard for a causing violation under the TSR, civil penalties are still improper, because such a strict liability standard would mean DISH was liable regardless of its knowledge of the Independent Retailers' violative conduct or knowledge of this novel standard.

As a matter of well-established law, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for

violating a rule without first providing adequate notice of the substance of the rule.” *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995) (rejecting a fine due to EPA’s failure to give fair notice of its interpretation of the applicable regulation); *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1332 (9th Cir. 1982) (noting rule that “[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.”) (internal quotations and citations omitted). *See also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166–67 (2012). Numerous other cases are in accord and underscore this point.⁶⁴

Yet, this is exactly what DISH is facing here where the FTC is now demanding, based on no prior guidance or enforcement, for example: (i) that DISH should have obtained the internal DNC lists from Independent Retailers and scrubbed its calls against them (and vice versa) for the entire calling period at issue; (ii) that DISH should essentially have terminated Independent Retailers upon the first instance of receiving a consumer complaint concerning the retailer; (iii) that DISH would be strictly liable for a retailer’s unlawful telemarketing simply on the basis of providing access to DISH’s tool for entering orders or by providing legal verbatim disclosures; and (iv) that DISH should be liable for prerecorded message calls even during the

⁶⁴ “Where civil penalties may be imposed, therefore, individuals and organizations must be specifically put on notice of possible government sanctions before they are levied.” *Id.*; *United States v. Rust Commc’ns Group, Inc.*, 425 F.Supp. 1029, 1033 (E.D.Va. 1976). The statutes or regulations that permit monetary penalties against persons who violate them must provide fair warning of the conduct that is prohibited or that is required, and must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents. *In re Metro-East Mfg. Co.*, 655 Fed. 2d 805, 810 (7th Cir. 1981); *Montgomery Ward & Company v. FTC*, 691 F.2d 1322, 1332 (9th Cir. 1982); *Diamond Roofing Company v. Occupational Safety and Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976). This is a requirement of constitutional due process. *Id.*

period where the TSR did not restrict them and even where, during the entire period relevant to this case, the TCPA allowed such calls if the caller had an EBR with the call recipient. Indeed, the first time these acts were conveyed to DISH as violating the TSR was during this enforcement proceeding. That surely is not the type of fair warning that is entitled to any deference, and cannot form a basis for levying civil penalties against DISH for each and every alleged call at issue.

For the foregoing reasons, the FTC is not entitled to civil penalties under any theory for any purported TSR violations pursuant to Counts I-IV, and summary judgment, thus, must be denied to Plaintiffs on this issue. *Fisher*, 2012 WL 3757375, at *14 (granting summary judgment to defendants as to all claims for civil penalties).

C. Claims For Civil Penalties Are Not Properly Resolved At Summary Judgment

Courts routinely hold that the imposition of civil penalties is a fact-intensive inquiry that is not appropriate for summary judgment, and, thus, is more properly reserved for the trier of fact and at the very least warrants a hearing to address the parties' positions in further detail. For this reason alone, Plaintiffs' motion for summary judgment should be denied to the extent that it seeks to impose civil penalties on DISH.

In assessing the need for a civil penalty, courts routinely consider: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the benefits derived from the violations; and (5) the necessity of vindicating the authority of the FTC. *U.S. v. Prochnow*, No. 07-10273, 2007 WL 3082139, at *3 (11th Cir. Oct. 22, 2007) (per curiam); *FTC v. Hushes*, 710 F.Supp. 1524, 1529 (N.D. Tex. 1989). Plaintiffs' Motion is full of conjecture and hyperbolic accusations about DISH that purport to satisfy these factors, but these accusations are neither reflective of reality nor undisputed.

As to good or bad faith, while Plaintiffs may take issue with how DISH maintained and enhanced its telemarketing compliance program, the facts clearly demonstrate that DISH and its personnel acted in good faith. Plaintiffs' repeated efforts to re-characterize as pernicious DISH's compliance investigations and responses, and identification of isolated human errors over the span of a decade with prompt remedial responsive action, does not equate to proof of bad faith. If that were the case, the FTC's own problematic maintenance of the NDNCR, and its faulty oversight and monitoring of its contractors charged with maintaining the registry, should be characterized the same way.

The assertions regarding consumer injury are based on Plaintiffs' assertions that any consumer complaint referencing the word "DISH" is attributable to DISH Network, and is evidence of a law violation and injury. As an initial matter, unverified consumer complaints are not evidence of consumer injury. *See FTC v. E.M.A. Nationwide*, 2013 WL 4545143, at *2-3. Moreover, Plaintiffs' efforts to show consumer injury from other means was a failure and based entirely on hearsay, as noted above. *See E.M.A. Nationwide*, 2013 WL 4545143, at *2. There is no evidence that these calls were made by DISH or an Independent Retailer.

Nor have Plaintiffs satisfied the "ability to pay" prong by mere reference to DISH's corporate statements. The "ability to pay" prong must be taken into account, in context with each of the other required proofs; it is not intended to financially devastate a corporate entity that has a valid legal dispute with the FTC on the scope of the law, or materially prevent DISH from continuing its business. Plaintiffs fail to identify any benefits derived from the violations other than through summary accusations (and, in any event, assuming there was any illegal telemarketing, it is unlikely that such conduct resulted in many new subscribers and

profits for DISH). Even if there were any profits, any such benefits derived from such violations pale in comparison to the large penalty the FTC is seeking.

Further, while Plaintiffs assert that a severe penalty is necessary to vindicate the FTC's authority, whether in a seven or eight figure (or \$1 billion figure), it is telling that the FTC's enforcement of the TSR to date has shown much more prudence. The sum total of civil penalties that the FTC has obtained via *all* of its 30 TSR enforcement actions is approximately \$83 million. Most of these cases involve civil penalties well under \$1 million, a few in the low millions, and only two cases at or above \$7.5 million. The cases at the high mark involved aggravating factors, such as fraudulent and deceptive conduct in addition to telemarketing violations. It is telling that the FTC has considered these types of figures a vindication of their authority in enforcing the TSR, rather than the absurdly high numbers Plaintiffs assert are necessary to this Court.

**D. State Plaintiffs Are Not Entitled To Summary Judgment
On Damages For Alleged Violations Of The TCPA (Counts V and VI)**

State Plaintiffs, like the FTC, impermissibly ask this Court to award damages at summary judgment that also are subject to intensive factual analysis that is to be reserved for the trier of fact – and not this Court on summary judgment. Indeed, State Plaintiffs ask this Court to apply the same civil penalties analysis on Counts V and VI that the FTC sought to be applied on Counts I through IV. The State Plaintiffs, without citation to any authority, arbitrarily ascribe a \$15 penalty per alleged violation. As such, the State Plaintiffs, by breaking from the statutory frame-work for damages calculations, have affirmatively (and improperly) asked this Court to sit as a trier of fact to levy an absurdly high and arbitrary amount of civil penalties at an improper stage.

For the reasons stated in Section XX(B), such an analysis precludes summary judgment, and Plaintiffs' Motion must be denied.

E. The Civil Penalties Sought by Plaintiffs Violate the Eighth Amendment

Finally, the civil penalties sought by Plaintiffs which are more than a number of countries' gross domestic products, and far exceed (by many multiples) any civil penalty amount by the FTC in a TSR or any other type of case, violate the Eighth Amendment's prohibition on excessive fines. The Eighth Amendment to the Constitution, applicable to the States through the Due Process Clause of the Fourteenth Amendment, *see Robinson v. California*, 370 U.S. 660, 666 (1962), provides that "excessive fines [shall not] be imposed." U.S. Const. amend. VIII. A fine means "a payment to a sovereign as punishment for some offense." *United States v. Bajakajian*, 524 U.S. 321, 327 (1988). A civil fine or penalty that cannot fairly be said to solely serve a remedial purpose, but rather only can be explained as also serving either a retributive or deterrent purpose, is punishment. *United States v. Mackby*, 261 F.3d 821, 829 (9th Cir. 2000).

A fine is unconstitutionally excessive if (1) the payment to the government constitutes punishment for an offense and (2) the payment is grossly disproportionate to the gravity of the defendant's offense. *Id.* at 830. Thus, an excessive fines analysis involves two steps: (1) whether the Excessive Fines Clause applies, and (2) if, so, whether the fine is "excessive." *Bajakajian*, 524 U.S. at 334 (cited in *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985, 1006 (9th Cir. 2007)).

Here, it undisputed, and Plaintiffs admit, that civil penalties sought by each of the Plaintiffs constitutes punishment for an offense. (Plaintiffs' Motion at 140 ("A strong civil

penalty is necessary . . . to punish DISH.”)⁶⁵ As such, the only issue before the Court is whether these fines are excessive. They are. A fine violates the excessive fine clause where, as here, it is “grossly disproportional to the gravity of a defendant’s offense.” *Id.* To apply the standard, the court compares the amount of the fine to the gravity of the offense.

In this case, the fines Plaintiffs seek are shockingly disproportional to the gravity of allegedly violative telephone calls, which is made clear when compared with all of the FTC’s past civil penalty TSR cases, as discussed in Section XX(C) (*compare* approximately \$83 million based on 30 cases, with the potential over \$1 billion that Plaintiffs insinuate they will seek in this single case). Indeed, in *Blastfax*, the court found “inequitable and unreasonable” a civil penalty of \$500 for each of 937,500 violations of the TCPA read into the statute its authority to award “up to” \$500 per violation, and reduced the penalty to seven-cents per violation. 164 F.Supp.2d at 900. The same type of prudential approach is necessary here to avoid running afoul of the Constitution.

Because the penalties sought by Plaintiffs are grossly disproportionate to the alleged harms, the penalties run afoul of the Eighth Amendment.

⁶⁵ Despite every Plaintiff acknowledging that their statutory penalties are so high as to be in violation of the Constitution, the North Carolina Plaintiff offers no limitation to its \$104,931,500 damage claim based on the Eighth Amendment. The North Carolina Attorney General makes no effort to explain why this damage calculation comports with, or can avoid, the Eighth Amendment’s limitations (because he cannot). This omission is glaring when placed in juxtaposition with the penalties sought by every other Plaintiff. While all Plaintiffs, in a thinly veiled and ill-conceived attempt to avoid the Eighth Amendment’s prohibition on excessive fines, affirmatively seek smaller fines than they contend are available under the plethora of statutes upon which they rely, the North Carolina Plaintiff claims it cannot reduce its outrageous \$104,931,500 damage claim.

F. The Damages Sought By The North Carolina Plaintiff (Counts IX And X) Are Disproportionate To The Harm

Even assuming the Eighth Amendment did not apply in North Carolina,⁶⁶ the North Carolina Plaintiff's \$104,931,500 claim is grossly overinflated. North Carolina law provides for a private right of action for a telephone subscriber, as well as an enforcement action brought by the Attorney General on behalf of a telephone subscriber. Under either form of action (private or public enforcement), the focus is on calls to a specific resident. Thus, a resident may "recover five hundred dollars (\$500) for the first violation, one thousand dollars (\$1,000) for the second violation, and five thousand dollars (\$5,000) for the third and any other violation that occurs within two years of the first violation." N.C. Gen. Stat. § 75-105(a)(1) and (b)(2). The statutory language regarding fines is identical for both private and public enforcement action.

Thus, were a North Carolina telephone subscriber to bring a cause of action based on the call records in this case, then he or she would be entitled to recover for those calls placed to his or her number (*i.e.*, \$500 for the first, \$1,000 for the second, etc.). Here, however, the Attorney General has brought an action "on behalf of" certain North Carolina telephone subscribers and has stepped into their shoes. However, there is no basis for the North Carolina Plaintiff to treat all of the recipients of the calls identified as one person and thereby treat the first alleged call to any alleged North Carolina resident as the initial predicate "violation," and the second call to a different alleged North Carolina resident as the second predicate violation, and all calls thereafter, as a third or more predicate. Assigning a \$1,000 or \$5,000 penalty to any raw hit in this case, whether or not it was the only call placed to that number, improperly applies a

⁶⁶ Of course, under the Fourteenth Amendment, the Eighth Amendment does, in fact, apply to the states.

\$1,000 or \$5,000 fine. This, in at least numerous instances, thereby increases the penalty from \$500 for a single call, to either \$1,000 or \$5,000.

The North Carolina legislature has clearly ascribed a \$500 penalty to the first call made to each North Carolina telephone subscriber in violation of the statute. Here, its unitary treatment of the call record results causes the Attorney General to act outside his statutory ambit. The North Carolina Attorney General should have presented evidence establishing the number of calls placed to each individual North Carolina telephone subscriber. Having failed to make that evidentiary showing, the Court should deny North Carolina's motion for summary judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be denied in its entirety, and DISH's Motion for Summary Judgment should be granted in its entirety.

Dated: February 5, 2014

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION**

Pursuant to Local Rule 7.1(B)(4)(c) of the Rules of the Central District of Illinois, I hereby certify that the foregoing memorandum complies with the type-volume limitation of the Court's January 9, 2014 order. The memorandum has an argument section of 31,478 words, exclusive of front matter, statement of undisputed facts, inline images, and signature block, as counted by the word processing system used to prepare the document, Microsoft Word 2010.

/s/ Henry Kelly

Henry Kelly

EXHIBIT 247

EXHIBIT 247

JA007983
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IN THE UNITED STATES DISTRICT COURT.
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA and)	
The STATES OF CALIFORNIA,)	BENCH TRIAL
ILLINOIS, NORTH CAROLINA, and)	
OHIO,)	09-03073
PLAINTIFFS,)	
VS.)	SPRINGFIELD, ILLINOIS
DISH NETWORK, L.L.C.,)	
DEFENDANT.)	VOL. 8

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE SUE MYERSCOUGH
UNITED STATES DISTRICT JUDGE

JANUARY 29, 2016

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

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	SANG LEE
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	JON WORM
STATE OF ILLINOIS:	ELIZABETH BLACKSTON
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	PHILIP HEIMLICH
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MIKE MILLS	
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P R O C E E D I N G S

* * * * *

THE COURT: Good morning.

I understand we have a couple of issues. We have some additional exhibits which had not been moved into evidence yesterday. Is there such a motion today?

MR. RUNKLE: Yes. Plaintiffs would like to move to admit 233, 457 -- I'm sorry, these are Plaintiffs' --

THE COURT: Hold on just one second. I'd like to make a note.

MR. RUNKLE: Plaintiffs would like to move to admit 233, 457, 532 --

(Court reporter requested clarification.)

MR. RUNKLE: 535. And 736. And 1270.

THE COURT: Any objection?

MR. BICKS: Can you tell me what they are? I don't have the numbers.

MR. RUNKLE: They were documents mentioned yesterday that we --

MR. BICKS: Your Honor, can I just check them at a break? I don't know the numbers off the top of my head.

THE COURT: I can't imagine why.

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1 MR. BICKS: I was also on my side reminded
2 DTX977, which was Mr. Castillo's draft declaration
3 that was used that I would move in.

4 MR. RUNKLE: No objection to that, Your
5 Honor.

6 THE COURT: All right. 977 is admitted.
7 (Defendant's Exhibit 977 was admitted.)

8 MR. BICKS: And we will check on the others
9 on a break, Your Honor.

10 THE COURT: And you will remind me, Diane,
11 not to let that slip.

12 All right. Our next witness is?

13 MR. BICKS: Mr. DeFranco. I'll get him,
14 Your Honor.

15 (The witness was sworn.)

16 THE COURT: Sir, if you will step over
17 here. That pulls out. Good morning.

18 THE WITNESS: Good morning.

19 THE COURT: Would you like a glass of
20 water?

21 THE WITNESS: Yes, please.

22 THE COURT: Please proceed.

23 JAMES DeFRANCO
24 called as a witness herein, having been duly sworn,
25 was examined and testified as follows:

1 CROSS EXAMINATION

2 BY MS. HSIAO:

3 Q. Good morning, Mr. DeFranco.

4 A. Good morning.

5 Q. I'm Lisa Hsiao. I'm a lawyer for the
6 Justice Department and I'm representing the
7 plaintiffs today. I will be asking you some
8 questions. I want to thank you for coming. I know
9 you changed your schedule and we appreciate that.
10 We will try to get you out of here soon.

11 Could you please state your full name and spell
12 it for the record.

13 A. James DeFranco.

14 Q. And spell it, please?

15 A. Last name is D-e-F-r-a-n-c-o.

16 Q. And you are one of the founders of DISH
17 Network?

18 A. That's correct.

19 Q. You've been there since 1980, I guess, the
20 company was founded?

21 A. That's correct.

22 Q. And you're now a director and executive
23 vice-president?

24 A. Correct.

25 Q. And a special adviser to Charlie Ergen?

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1 A. Correct.

2 Q. And Charlie Ergen's position is?

3 A. Chairman and CEO.

4 Q. Since you founded the company, I don't even
5 know what it is, 35 years ago, the company has been
6 very successful, isn't that right?

7 A. Yes.

8 Q. You started with 100,000 customers in July,
9 1996?

10 A. Sounds about right.

11 Q. And you have today roughly 14 million
12 customers, maybe a little less?

13 A. A little less than 14.

14 Q. You have multiple satellites that DISH owns
15 that are orbiting the earth?

16 A. Yes.

17 Q. And the company has expanded beyond
18 satellite TV; isn't that right?

19 A. That's correct.

20 Q. So you now have Sling TV, I guess, which
21 allows you to watch a basketball game here, for
22 example, that's being broadcast in California;
23 right?

24 A. Yes.

25 Q. And DISH has also been expanding into the

1 wireless spectrum field; correct?

2 A. Correct.

3 Q. So let's walk through a little bit some of
4 the successes that your company has had. And
5 hopefully I'll cover some of what Mr. Bicks might
6 cover with you.

7 THE COURT: Ms. Hsiao, I didn't understand.
8 A basketball game here that is being broadcast in
9 California. I don't understand how that's any
10 different from TV.

11 Q. I will let Mr. DeFranco explain it since he
12 probably understands it better than I. Can you
13 explain Sling TV?

14 A. Sling TV is -- actually allows you to
15 receive television over the open airwaves. So you
16 don't need a DISH or any wires. Anywhere you have a
17 broadcast wireless connection. And it's -- it's
18 been in place about a year, Sling TV has. And maybe
19 you've seen ads for Apple TV, or Sony is getting
20 into that business as well. And it's a much less
21 expensive, generally speaking, service. So our
22 Sling TV service gives you a little over 20
23 channels, so you don't have to buy a larger package,
24 for about \$20 a month.

25 THE COURT: Is it all sports?

1 A. No, no. Disney is on -- no, it's a
2 combination of programming.

3 THE COURT: So I might tell my husband
4 about it.

5 Q. But I know it is used for sports because my
6 husband would love to have it.

7 A. Yes. We have ESPN and Disney. There are
8 several other generally programming networks that
9 are on there as well.

10 Q. Does that answer your question, Your Honor?

11 THE COURT: Yes, thank you very much.

12 Q. So let's go through some of the history. In
13 1999, you launched a 500 channel satellite TV
14 system? Sound about right?

15 A. Yes. I mean that sounds right.

16 Q. And by September 2003 DISH had a million
17 DVRs in subscriber homes?

18 A. Sounds right.

19 Q. And a DVR is just -- can you explain it?

20 A. A digital video recorder.

21 Q. And that allows you basically to record TV
22 shows without a VCR, for example?

23 A. Without a tape. It just puts it on a hard
24 drive, kind of like a computer hard drive.

25 Q. And by May 2004 DISH was offering local

1 channels to markets in all 50 states and the
2 District of Columbia, right?

3 A. Sounds correct.

4 Q. You had nationwide coverage by that point?

5 A. When you talk about local -- I mean when you
6 talk about local channels, we had nationwide
7 coverage with our core services, but it was a major
8 undertaking to offer the network channels, NBC, CBS,
9 ABC, Fox, WB, those services, throughout America.
10 That was actually a greater challenge than launching
11 the service. But that does sounds right that we
12 were in all 50 states at that time.

13 Q. And in 2012 -- well, I'm sorry, May 2010,
14 you were able to offer local broadcast channels in
15 all 210 local markets in the United States?

16 A. That's kind of what I was referring to, yes.

17 Q. 2012 you introduced the Hopper, right? And
18 Joey. I don't know if the Court has seen the
19 commercials, but it allows you to skip ads when
20 you're watching TV, right?

21 A. The Hopper is the most advanced DVR on the
22 market. And yes, if you make selections within it
23 then there are certain -- certain shows that you're
24 able to -- you know, once you make the original
25 selection, that it will, after a period of time,

1 meaning the show is not broadcast today, if it's --
2 if you watch it later, than yes it will -- if you
3 select it, it will automatically skip commercials on
4 some channels.

5 THE COURT: I have a question. Totally
6 irrelevant to everything. Every time I see that ad
7 I wonder if you were behind the Rabbit back in the
8 day. But you don't look old enough to have been the
9 inventor of the Rabbit. Do you remember it?

10 A. What did it do?

11 THE COURT: It was antenna that went on
12 your TV that allowed you not to be hooked up to a
13 cable. It transmitted to the TV.

14 A. We didn't have anything to do with the
15 Rabbit, Your Honor.

16 THE COURT: All right.

17 A. We did have a lot to do with, you know, over
18 the air antennas. So things that would substitute
19 for the Rabbit --

20 THE COURT: Okay.

21 A. -- but not the Rabbit itself.

22 THE COURT: So I have to ask, how old are
23 you?

24 A. Let's see. 62, I guess.

25 THE COURT: You may not be old enough to

1 know --

2 BY MS. HSIAO:

3 Q. So DISH had its initial public offering in
4 1995; is that right?

5 A. That sounds correct.

6 Q. And in 1999 you were added to the NASDAQ 100
7 Index?

8 A. Sounds correct.

9 Q. So let's talk a little bit about the
10 financial history the last few years of the company.
11 And I want to offer as a group some of the financial
12 statements since -- really since 2011, because they
13 allow us, you know, the last three years, each of
14 those. And I have -- the parties have agreed on the
15 admission of PX1093, which is the 2011 10K filing
16 with the SEC. PX1379, which is DISH's 2012 10K.
17 PX1031, which is DISH's 2014 10K. And PX1380, which
18 is DISH's 2015 third quarter 10Q.

19 And you guys are okay with that, right?

20 MR. BICKS: Yes.

21 THE COURT: Yes. SO 1093, 1379, 1031, and
22 1380 are admitted.

23 (Plaintiffs Exhibits PX1093, 1379, 1031 and 1380
24 admitted.)

25 Q. So I'm gonna bring you this binder. well, I

1 won't --

2 THE COURT: You should have invested in the
3 binder companies.

4 Q. There have been a lot of binders used in
5 this case.

6 THE COURT: Look behind you, there are a
7 few.

8 A. That's just for this?

9 THE COURT: Yes, ma'am. For me.

10 Q. And I'm not gonna ask you to look through
11 the annual, the 10ks. I'm gonna ask you some
12 questions about the financial history. So if you
13 need to refer to them, feel free. I can direct you
14 to pages and so forth.

15 A. Okay.

16 Q. This is not meant to be a memory test on
17 your part.

18 So I'm looking first at what was marked -- what
19 has been admitted as PX1379, which is the 2012 10K.
20 And I just want to ask you some questions about
21 that. And again, feel free, if you don't know where
22 something is, to ask. Because it is a hundred page
23 document.

24 So in 2010 DISH's net income was 984 -- well,
25 \$984.7 million, does that sound right? I'm looking

1 at page 109 of PX1379.

2 A. Could you repeat the question, please?

3 Q. That in 2010 DISH's net income was
4 \$984.7 million? It's under the consolidated
5 statement of cash flows.

6 A. For 2010?

7 Q. Yes.

8 A. 984.732, that's correct.

9 Q. And then if you turn to the next page, the
10 very bottom where it says net increase in cash and
11 cash equivalents. DISH's cash in 2010 increased
12 \$534,828,000; is that correct?

13 A. That's correct.

14 Q. And at the end of 2010 DISH had \$640 million
15 in cash?

16 A. That's correct.

17 Q. And do you remember that in 2010 DISH's
18 share price was about \$17 a share?

19 A. I don't remember.

20 Q. You don't remember. Does that sound about
21 right?

22 A. 2010.

23 Q. Yes?

24 A. I mean it could be, yeah. I don't remember.

25 Q. Okay. I mean it's not important, we can --

1 we're gonna talk about the trajectory. And I have
2 some stuff I can show you if you want more specific
3 information. In fact, why don't we just do that now
4 so you don't have to guess.

5 I'm not gonna offer this. This is just to
6 refresh his memory about share prices. And I'll
7 represent this was -- this was just downloaded from
8 Yahoo's financial page, just to give us a little
9 context.

10 So does this refresh your memory that at the
11 end of 2010 DISH's share price was about \$17 a
12 share.

13 A. This reflects December 1st, 2010, that the
14 range for that day was between 17.95 and 19.66.

15 Q. Okay. So let's move to 2011, which is also
16 reflected in PX1379. And again I'm looking at the
17 same page, 109, we were just looking at.

18 A. Same document?

19 Q. Yeah. Exhibit 1379, page 109.

20 A. Thank you. Yes.

21 Q. Okay. So in 2011 DISH's net income was
22 \$1.5 billion; right?

23 A. That's correct.

24 Q. And if you turn the page to page 110, about
25 three quarters of the way down the page it shows

1 that DISH paid a cash dividend to its shareholders
2 of \$893 million in 2011; is that right?

3 A. I'm sorry, where is it?

4 Q. It's under cash flows from financing
5 activities.

6 THE COURT: Mr. DeFranco, on your right is
7 a screen and it's highlighted there. And it's also
8 on this big screen here.

9 A. Oh, perfect.

10 Q. So I'm looking at the 893,278. That was the
11 dividend that was paid?

12 A. Yes.

13 Q. So DISH shareholders received -- the company
14 paid out to its shareholders \$893,278,000 in
15 dividends; right?

16 A. I believe that was \$2 a share.

17 Q. \$2 a share.

18 A. Yeah.

19 Q. So if you were a shareholder, which I take
20 you probably are, you received a dividend?

21 A. Correct.

22 Q. And I wanted to touch a little on DISH's
23 litigation. I take it you're aware that DISH is
24 involved in multiple litigations that are reported
25 in its financial statements; right?

1 A. Over the years, you mean?

2 Q. Over the years.

3 A. Yes.

4 Q. And in 2011 DISH was actually fighting a
5 lawsuit, a patent infringement suit from Tivo; isn't
6 that right?

7 A. Yes.

8 Q. And there was an judgement in that case and
9 an injunction against DISH in that case; correct?

10 A. Correct.

11 Q. And DISH was actually sanctioned for
12 violating that injunction and a \$90 million contempt
13 sanction was imposed; isn't that right?

14 A. I don't believe that we had to pay any
15 sanctions in the case.

16 Q. Well, let's look at page 176 of that same
17 document.

18 A. Okay, I'm there.

19 Q. Okay. Well, I'm looking at this, and you're
20 right, it doesn't say in here that you actually paid
21 the sanction. But you don't remember that the U.S.
22 Court of Appeals for the Federal Circuit upheld the
23 \$90 million sanction against DISH?

24 A. I don't remember -- I just remember that I
25 don't believe that we had to pay the sanction. I'm

1 not sure what exactly the legalese were around that.

2 Q. And you ultimately settled the Tivo case;
3 correct?

4 A. That's correct.

5 Q. For \$500 million?

6 A. That's correct.

7 Q. I believe you paid 300 million upfront. And
8 then you have to pay the remaining 200 million
9 later; correct?

10 A. Correct. We're still making payments, yes.

11 Q. Now, despite that outlay in the Tivo case,
12 you were still able to make significant investments
13 in the company in 2011; is that right?

14 A. Yes.

15 Q. You bought Blockbuster, for example, for
16 \$234 million?

17 A. Correct.

18 Q. And you bought TerreStar Spectrum; is that
19 correct?

20 A. I'm familiar with TerreStar. I don't
21 remember the timing, but if you have it there,
22 then --

23 Q. So I believe it's on page 135 of the
24 document we're looking at.

25 THE COURT: How do you spell TerreStar?

1 Q. T-e-r-r-e-S-t-a-r, the S is capitalized.
2 So I'm looking at 135. It actually starts on
3 134. The title of the section I'm looking at is
4 DBSD North America and TerreStar Transactions?

5 A. Correct.

6 Q. So -- I guess this is in 2012, not 2011.
7 So the price for TerreStar was \$1.7 billion?

8 A. Is it on here?

9 Q. Let me see --

10 THE COURT: What is TerreStar?

11 A. TerreStar and DBSD were entities that held
12 the rights to wireless spectrum. And this was
13 really a key decision point for us, Your Honor,
14 in -- almost like making the transition to go from
15 big dishes to DBRs. So it was a major investment.
16 We have made additional investments in wireless
17 since. And it's really to transform the company
18 from just a satellite video company to a --
19 hopefully, you know, this gives us the opportunity
20 to potentially compete with AT&T and Verizon.

21 THE COURT: Okay.

22 Q. Okay. So to make this a little easier, I
23 want to look at the top of page 135. The very first
24 paragraph.

25 A. Yes.

1 Q. And this refers to both the DBSD and
2 TerreStar transactions. Do you see what I'm looking
3 at?

4 A. I do.

5 Q. Because DISH basically acquired both DBSD
6 and TerreStar Spectrum?

7 A. Correct.

8 Q. So it says that the total consideration to
9 acquire these assets was approximately 2.8 --
10 \$2.86 billion; is that right?

11 A. Correct.

12 Q. The 1.36 billion for DBSD and 1.382 billion
13 for TerreStar. Right?

14 A. Correct.

15 Q. And then it says here you also made a net
16 payment of \$114 million to Sprint pursuant to a
17 Sprint settlement agreement?

18 A. That's correct.

19 Q. So you paid all of those amounts over the
20 2011-2012 time frame? or 2012-2013?

21 A. In that time frame, yes.

22 Q. All right. So going back to page 109, the
23 cash flows page. I'm moving on to 2012.

24 Oh, before I do that I just want to look back
25 at the share prices. So 2011, the end of 2011,

1 DISH's share price is up from roughly 17 that we
2 discussed before to about 27; is that right?

3 A. December 1st, 2011, it closed at 28.48.

4 Q. 28, okay. So 2012, looking back at 1379, in
5 the net income, DISH's net income that year was --

6 (A discussion was held off the record.)

7 Q. I didn't mean to read so fast. 625,740.000?

8 A. Correct.

9 (A discussion was held off the record.)

10 Q. All right. So I'm looking at page 110 now,
11 the net increase in cash for 2012. And it looks
12 like DISH's net increase in cash for 2012 was
13 \$2,997,032,000; is that correct.

14 A. That's correct.

15 Q. And at the end of 2012 DISH had \$3.6 billion
16 in cash and cash equivalents. Am I reading it
17 right?

18 A. Yes.

19 Q. Now, it looks like also from this same page,
20 and I'm looking at the purchases of property and
21 equipment in the middle section of the statement
22 under cash flows from investing activities. Do you
23 see that?

24 A. Page 110?

25 Q. Yes. It's the third entry under cash flows

1 from investment activities?

2 A. I see that.

3 Q. So it looks like DISH was able to spend
4 \$957,566,000 continuing to invest in its business?
5 Right?

6 A. Correct.

7 Q. And in fact, if you look at the figures for
8 2011 and 2012, DISH made significant investments in
9 those years as well, right? You continued to invest
10 and try to grow the business?

11 A. Yes.

12 Q. Now, let's talk about litigation in 2012.
13 Do you remember the Voom case against DISH?

14 A. Yes.

15 Q. It was a breach of contract case?

16 A. Yes.

17 Q. And that case went to trial; is that right?

18 A. Correct.

19 Q. Ultimately DISH paid \$700 million to settle
20 that case; correct?

21 A. That's correct.

22 Q. And there were additional \$30 million in
23 litigation expenses; is that right?

24 A. I don't remember that number.

25 Q. Now we just talked about DISH's investments

1 during that year, that you paid \$700 million to
2 settle a case. And we also just looked at the
3 amounts that DISH was able to invest that year.

4 I also want to turn your attention to line 110
5 on -- under that same section, cash flows from
6 investing activities?

7 A. Yes.

8 Q. So DISH it looks like also bought FCC
9 licenses for \$24 million that year; is that right?

10 A. Correct.

11 Q. And then it also paid off the DBSD and
12 TerreStar transactions for \$40 and \$36 million
13 respectively?

14 A. Correct.

15 Q. And then looking back at the share prices,
16 DISH's share price is up to 36 in 2012? The end of
17 2012; is that right?

18 A. On December 3rd, 2012, it was 36.40.

19 Q. Now, I wanted to -- remember we were just
20 talking about the Tivo transaction. And you said
21 you didn't remember the \$90 million sanction? or
22 that you paid it, right?

23 A. Right, I said I didn't think we had to pay
24 the sanction.

25 Q. All right.

1 MS. HSIAO: Your Honor, for the record I
2 just want to -- the plaintiffs filed a motion in
3 limine, as you know, to preclude evidence of
4 post-2012 activity. And obviously the Court denied
5 it, and ordered the permanent injunction hearing.
6 And I just want to preserve for the record that even
7 though I'm asking questions about 2012 now, that
8 we -- we still believe that our objection had merit
9 and our motion had merit. So I just wanted to make
10 that statement.

11 THE COURT: So will Mr. DeFranco have to be
12 called back again?

13 MS. HSIAO: No. In fact, my plan is to ask
14 all those questions now because as a prophylactic
15 measure, basically.

16 THE COURT: Any objection, Mr. Bicks?

17 MR. BICKS: No. And just so we're clear, I
18 think we have been operating under the assumption
19 that the "ability to pay" is based on the current
20 financial condition and that's --

21 MS. HSIAO: We're prepared to --

22 MR. BICKS: Right. I don't think that has
23 anything to do with the completely different issue
24 of our entitlement and our request to present the
25 current compliance situation, which is what is the

1 subject of the matter that's before the court. So
2 we would like to get Mr. DeFranco done and not --

3 THE COURT: I thought we might.

4 MR. BICKS: Yes.

5 MR. RUNKLE: I just want to point out that
6 we don't agree that the ability to pay in the
7 statute necessarily means current day ability to
8 pay. And that the Court could actually look at
9 different time periods ability to pay to calculate
10 the civil penalties figure. But for the purposes of
11 today I don't think that matters.

12 THE COURT: All right.

13 BY MS. HSIAO:

14 Q. So now we can turn away from that document
15 and turn to PX1031, please, which is the 2014 10K.

16 A. Okay.

17 Q. So I'm looking at page 109 of PX1031. Okay,
18 we're gonna run through the same exercise.

19 A. Go ahead.

20 Q. So in 2013, as I read this, it says that
21 DISH's net income was \$789,746,000; is that right?

22 A. Correct.

23 Q. And at the end of the year DISH had --
24 DISH's net increase in cash was \$1,000,126,280, is
25 that right? It's on page 110.

1 A. 1,000,126,280.

2 Q. And at the end of the year DISH had in cash
3 and cash equivalents 4,700,022,000?

4 A. Correct.

5 (A discussion was held off the record.)

6 Q. So in 2013 DISH spent \$328 million to buy
7 FCC authorizations for spectrum licenses; is that
8 right?

9 I'm looking -- it's at the top of page 110. It
10 says purchases of FCC authorizations-H block
11 wireless spectrum lists. Do you see that?

12 A. I see that?

13 Q. So you see in the second column the
14 328,134,000?

15 A. That's correct.

16 Q. And also in April 2013, is it right that
17 DISH actually bid \$25.5 billion to buy Sprint?

18 A. I don't remember the exact timing, but we --
19 we did make an attempt to acquire Sprint.

20 Q. And the offer included more than \$17 billion
21 in cash; is that right?

22 A. That sounds right.

23 THE COURT: Were you successful?

24 A. No, ma'am.

25 THE COURT: Okay.

1 Q. And looking back at the stock price, your
2 stock continued to rise. So at the end of 2013 the
3 stock price was up to \$57 a share?

4 A. Correct.

5 Q. So let's go to 2014. And I'm staying on
6 that same document. On page 109 at the beginning --
7 or the net income for 2014 was \$928,902,000; right?

8 A. Correct.

9 Q. And DISH's cash increased \$2.4 billion in
10 2014; correct?

11 A. Correct.

12 Q. And at the end of 2014 DISH had more than
13 \$7 billion in cash and cash equivalents?

14 A. That's correct.

15 Q. And that was even after DISH spent
16 \$1.3 billion on purchases of FCC authorization for
17 H block wireless spectrum licenses; isn't that
18 right?

19 A. That's correct.

20 Q. And DISH also made a deposit for the AWS3
21 auction of \$1.3 billion on top of the licensing; is
22 that correct?

23 A. That's correct.

24 Q. So at the end of 2014 your investment, your
25 shares continued to increase in value. And the

1 share price was \$72 a share at the end of 2014; is
2 that right?

3 A. December 1st of 2014 it was 72.89.

4 Q. So doing very well?

5 A. It increased.

6 Q. Well, we talked about how it was only \$17 a
7 few years before, right? That's a great increase;
8 isn't that correct?

9 A. Yes.

10 Q. Good investment?

11 A. Yes.

12 Q. All right. So let's look at the 2015 10Q,
13 which is PX1380.

14 So if you could look at page 16 of PX1380, and
15 again, I'm looking at the consolidated statements of
16 cash flows page.

17 A. Yes.

18 Q. At the end of September 2015 it looks like
19 DISH's net income was \$888,188,000. Am I reading
20 that right?

21 A. Correct.

22 Q. And DISH also had \$368 million in marketable
23 securities at that point; is that correct?

24 A. I'm sorry, I don't see it here.

25 Q. I may actually be looking at the wrong page.

1 Hold on.

2 Okay. I'm looking at PX -- page 12, I'm sorry.
3 I had you on the wrong page. So under the
4 consolidated balance sheets, under assets, it says
5 1.24 -- 1.24 billion in cash and cash equivalents.
6 Do you see that?

7 A. Yes, I do.

8 Q. And under that 368,651,000 marketable
9 investment securities?

10 A. That's correct.

11 Q. And so -- now, during 2015 DISH spent
12 \$9.9 billion buying FCC spectrum; that's right,
13 isn't it?

14 A. Correct.

15 Q. And DISH did that through two companies that
16 DISH owns 85 percent of, North Star and SNR; is that
17 correct?

18 A. We have non-controlling interest. I'm not
19 sure what our ownership percentage is. But that is
20 correct.

21 Q. And so despite spending all of that money,
22 that \$9.9 billion, at the end of September 2015 DISH
23 still had \$1.2 billion in cash and cash equivalents
24 left? We just looked at that number, is that right?
25 On page 12, that 1,100,244,381 number?

1 A. Correct.

2 Q. And DISH won, through those two companies,
3 very valuable spectrum; right?

4 A. Correct.

5 Q. And the spectrum, in fact some market
6 analysts have valued it as much as \$37 billion in
7 value. Do you know that?

8 A. I hadn't seen those reports.

9 Q. Forbes Magazine suggested it would be worth
10 about \$37 billion if it were sold?

11 A. I'm not familiar with the article, but I do
12 believe it was a good investment.

13 Q. Okay. And in fact, DISH ultimately ended up
14 deciding not to buy all of it, isn't that right?
15 And it paid another \$516 million in fines because
16 the FCC required it to pay that amount to give up
17 that spectrum; correct?

18 A. Through the designated entities spectrum was
19 returned that was originally bid on and won, and
20 that was the rules around the auction to do that.

21 Q. And it's true, isn't it, that DISH is
22 actually contemplating bidding in another FCC
23 spectrum auction that's suppose to take place in
24 March 2016?

25 A. We're considering that.

1 Q. So you would spend more money to buy
2 additional spectrum if you successfully bid on
3 spectrum in that auction?

4 A. Yes, if we -- yes, if we successfully bid in
5 the auction we would spend more money.

6 THE COURT: I'm sorry, Ms. Hsiao, I'm not
7 sure I understand correctly. So you said you would
8 spend more to buy additional spectrum?

9 Q. Yes. If you won the auction you would spend
10 more money to buy spectrum?

11 A. Correct.

12 Q. And DISH is also prepared to loan more money
13 to SNR and North Star if they need additional
14 investment to use that spectrum; that's right, isn't
15 it?

16 A. If -- if the spectrum was purchased through
17 those designated entities, that's correct.

18 Q. And I don't know what the stock price is
19 today, but from the document I have it looks like
20 the last entry is -- well, at the end of 2015 the
21 shares were \$57 a share. And January 4th, they were
22 \$47 a share; is that right?

23 A. Yes. And today they're in the low 40s.

24 Q. Okay. We're here because of a telemarketing
25 case. I take it you know that?

1 A. Yes.

2 Q. So I wanted to ask you a little bit about
3 telemarketing.

4 A. Are we through with this book?

5 Q. Yes, I'm through with that book. You can
6 lay it down.

7 A. Thank you.

8 Q. So the last two days we've had Bruce Werner
9 and Reji Musso on the stand, and those are both
10 employees, managers at DISH Network?

11 A. I don't believe Reji Musso works for DISH at
12 the time, but Bruce Werner is a current employee,
13 yes.

14 Q. And would you say that DISH is a pretty
15 close-knit company. That you can talk to anybody
16 and you know who they are, correct? Even though
17 you're the founder of the company?

18 A. Well, I don't know all 18,000, but I mean
19 we -- generally, we do have an open-door policy if
20 someone wants to talk to us, yes.

21 Q. People feel free to send you e-mails when
22 they have questions?

23 A. Yes.

24 Q. And you respond to them?

25 A. Yes.

1 Q. Consumers e-mail you when they have
2 questions or complaints?

3 A. Sometimes, yes.

4 Q. And same thing with Charlie Ergen? People
5 reach out to Charlie and he reaches out to other
6 people in the company freely; correct?

7 A. Yes.

8 Q. And you generally knew what was going on,
9 certainly, with the company's retailer -- the OE
10 retailer program, for example, when it started?

11 A. Yes, yes.

12 Q. And it's been a very successful program,
13 hasn't it?

14 A. I mean it's had it's ups and downs, but yes,
15 I'm glad we instituted that program.

16 Q. And the OE retailers you know have generated
17 30 to 60 percent of DISH's new subscribers at some
18 points in time; isn't that right?

19 A. What were the numbers you said?

20 Q. Well, between 30 and 60 percent at any given
21 time?

22 A. I don't think so, but -- I mean maybe in the
23 30 percent range. I don't believe it ever was as
24 high as 60 percent, but --

25 Q. And you knew generally what -- you know Amir

1 Ahmed, correct?

2 A. Oh, definitely.

3 Q. And you know what he's doing to work with
4 those OE retailers; correct?

5 A. Generally, yes.

6 Q. And you knew Mike Mills; correct --

7 A. Yes.

8 Q. -- you know Mike Mills?

9 A. Yes, I do.

10 Q. And you know what he's doing to work with
11 those OE retailers?

12 A. Yes.

13 Q. And you do things, you know, maybe at some
14 companies somebody at your high position wouldn't
15 do. Like you approve activation bonuses for
16 example; right?

17 A. Not anymore, but during the introduction of
18 the OE program, because it was a new program, I did
19 oversee it more closely.

20 Q. And you visited retailers even sometimes?

21 A. Still do.

22 Q. And you -- you know, when retailers
23 complained they might even complain to you; isn't
24 that right?

25 A. Absolutely.

1 Q. You also oversaw things that Bruce Werner
2 and Reji were doing, for example, to try to police
3 third-party affiliate use by retailers; that's
4 right, isn't it?

5 A. I had some visibility to that, yes.

6 Q. And you -- you knew about how retailers were
7 terminated? You knew -- you approved terminations
8 from time to time; isn't that right?

9 A. From time to time. Certainly not all. Yes.

10 Q. Now, I take it you know that we're here
11 because of illegal telemarketing calls?

12 A. Correct.

13 Q. And I take it that DISH did not want to make
14 illegal telemarketing calls?

15 A. Correct.

16 Q. It wasn't in your interest for consumers to
17 get those calls?

18 A. Correct.

19 Q. And similarly, it's not in DISH's interest
20 for its retailers to be calling people illegally?

21 A. Correct.

22 Q. Now, I take it you know by now that there
23 was summary judgement in this case, and that DISH
24 has been held liable for its own calls to people on
25 the do not call registry?

1 A. Correct.

2 Q. And you know that DISH has been held liable
3 for calling people that told DISH not to call them
4 anymore?

5 A. Correct.

6 Q. And that DISH made tens of thousands of
7 automated sales calls that were illegal? And now
8 DISH has been held liable for those?

9 A. I don't know the numbers off the top of my
10 head.

11 Q. But you know that liability was found on
12 prerecorded sales calls by DISH; right?

13 A. This is a very serious issue and that's why
14 I am here.

15 Q. And in fact, DISH had an Outbound Department
16 that was suppose to prevent those things from
17 happening; isn't that right?

18 A. That's correct.

19 Q. And the system didn't work very well, did
20 it?

21 A. Well, it didn't work perfectly.

22 Q. A lot of things fell through the cracks,
23 right?

24 A. I mean I don't -- any call is not -- any
25 incorrect call is not acceptable. But I think based

1 on the volume of calls that DISH made -- you know,
2 it certainly did not meet our standards of
3 perfection by any means. Was it -- was it a
4 disaster? Meaning, you know, high percentage of
5 calls that were made in a mistaken fashion? I think
6 it was a lower percentage. I don't remember the
7 percentage, but I think it was, you know, in the --

8 Q. Well, would you say making 3 million calls
9 to people on the do not call registry, that's not a
10 disaster?

11 A. That's a problem. It's a big problem. But
12 if there were hundreds of millions of calls made,
13 you know, it would be less of a problem than if
14 there were only 4 million calls made.

15 Q. So the problem could have been a lot bigger,
16 right, but it wasn't?

17 A. Certainly.

18 Q. And we've heard from Bob Davis, who use to
19 run the Outbound Department? He worked hard to try
20 and stop it; right?

21 A. I didn't know Bob, but I assume that he did.

22 Q. So the system could have worked better? You
23 would agree with me on that, wouldn't you?

24 A. Yes. And it works better today.

25 Q. Now -- and we're not gonna talk about that

1 today, but maybe at another time. Similarly, you
2 probably know now that DISH has been held liable for
3 millions of calls by its retailers?

4 A. Yes.

5 Q. Prerecorded sales calls and the 43 million
6 prerecorded sales calls, did you hear that number?

7 A. I know it's a big number.

8 Q. And safe to say you didn't know at the time
9 that that enormous volume of calls was taking place?

10 A. That's correct.

11 Q. You weren't close enough to the retailers to
12 know exactly what they were doing; right?

13 A. Well, actually hid it from us. I mean we
14 did visit the retailers. And we did try and
15 understand how their marketing was done, and so on
16 and so forth. Just to -- as -- in the course of
17 business, to see if we could help them and also to
18 see what, you know, what ideas they had about how
19 their marketing efforts were. So -- but no, we did
20 not know that they were making illegal telemarketing
21 calls.

22 Q. Well, who hid it from you?

23 A. The retailers.

24 Q. All of them?

25 A. I think the big -- the ones that are

1 outlined in this case for the most part, yes. I
2 mean -- I certainly, and I don't believe our people
3 knew that they were making illegal telemarketing
4 calls or we would have taken action.

5 Q. well, I believe you're talking about Star
6 Satellite. Does that sound familiar?

7 A. I know Star Satellite. I mean I don't know
8 them, but I'm familiar with the name, yes.

9 Q. Did you have a conversation with Star
10 Satellite where you believe you were lied to?

11 A. I don't recall having a conversation with
12 them where I was lied to.

13 Q. Do you know who the principal of Star
14 Satellite is?

15 A. Is it Myers? Is that his name, or --

16 Q. Walter Eric Myers?

17 A. Myers, yes.

18 Q. But you don't have any first-hand knowledge
19 that he lied to anybody at DISH, isn't that right?

20 A. I saw his testimony.

21 Q. well, you saw his testimony, but you didn't
22 talk to him; correct?

23 A. No, that's correct.

24 Q. And in fact, you didn't even talk to anybody
25 that talked to him; is that right?

1 A. That's correct.

2 Q. And the testimony was his account, but you
3 haven't talked to anybody at DISH that said, "oh, he
4 lied to me," have you?

5 A. That's correct.

6 Q. And you may not know this, but there has
7 been evidence introduced during this trial that
8 showed that DISH got complaints about Walter Eric
9 Myers and Star Satellite calls in January, February,
10 May. They were sued in August. All before those 43
11 million calls took place.

12 Are you familiar with that? Has anybody showed
13 you that?

14 A. I don't recall.

15 Q. So DISH certainly had reason to know about
16 it, don't you?

17 A. I don't know.

18 Q. Well, if somebody sent them letters and
19 somebody sued them, don't you think the company may
20 have figured out that maybe something was going
21 wrong?

22 A. Somebody sued DISH or somebody --

23 Q. Somebody sued DISH. In August -- actually
24 for calls that took place in July. And the lawsuit
25 was sent to DISH around August 2005.

1 A. well, we certainly -- they sued DISH we'd
2 have been aware of the lawsuit. I don't know that
3 we knew -- I don't know. I don't remember.

4 Q. So you don't actually have any first-hand
5 knowledge that anybody lied to DISH about this?

6 A. Only what I said, in his testimony at the --
7 that he hid information from us regarding that.

8 Q. Okay. So getting back to the retailers.
9 Now, DISH had an Audit and Risk Department that was
10 suppose to stop these types of illegal telemarketing
11 calls by the retailers; isn't that right?

12 A. We have a group within the retail services
13 area that do monitor retailers' performance. And
14 one of the things that they would do is, you know,
15 is monitor the retailers' performance in all areas.

16 Q. Including telemarketing compliance?

17 A. well, I mean if we get -- if complaints
18 would come in to us, to DISH, that related to
19 telemarketing issues, then that group would
20 investigate those complaints. And there were, you
21 know, varying periods in type -- there certainly
22 were complaints, you know, so -- but it was hard to
23 identify how and who those calls came from. Because
24 a lot of people identified themselves as DISH and it
25 could have been a DISH retailer, it could have not

1 been a DISH retailer.

2 And so if we believed it was a DISH retailer,
3 or if the retailers themselves -- other retailers
4 who were not doing anything inappropriately sent us
5 information, because we went out and actually
6 solicited our retailers to share with us if they
7 personally got inappropriate calls, illegal calls,
8 so that -- because they kind of had a better feel
9 for how to ask the questions than a typical
10 consumer. And so they would usually do a better job
11 of at least attempting to find out where the call
12 came from, and not just caller ID, because caller ID
13 could be spoofed and may not be correct. But it
14 would help -- and if that happened, then the --
15 those retailers would give that information to folks
16 within this department. And they could then do a
17 better job of investigating and attempting to find
18 out where the calls came from.

19 Q. So, I mean, you just described it. The Risk
20 and Audit, they found out that there were retailers
21 representing that they were DISH Network; isn't that
22 right? They caught them?

23 A. Yes.

24 Q. Retailers weren't suppose to do that?

25 A. Correct.

1 Q. They caught retailers making abusive and
2 harassing phone calls, right?

3 A. I don't know what you mean by abusive and
4 harassing. But illegal phone calls; correct.

5 Q. And they -- they recommended discipline in
6 fact for retailers who were breaking the rules --

7 A. Correct.

8 Q. -- isn't that right?

9 A. Correct.

10 Q. But we just talked about that 43 million
11 calls, and there were more, as I'm sure you know.
12 So Reji and Bruce's department, they didn't stop
13 those calls, did they? They didn't stop them from
14 happening?

15 A. No, they -- they didn't -- no, they didn't
16 stop them from happening.

17 Q. And that department, I mean those people
18 worked hard. We heard their testimony. And they
19 couldn't -- they couldn't prevent it; isn't that
20 right?

21 A. They couldn't prevent it entirely; correct.

22 Q. Now, the company could have prevented it if
23 it had put the retailers on hold, isn't that right?

24 A. Well, we didn't know who -- you know, I
25 don't know what you mean by that.

1 Q. well, when you know somebody like walter
2 Eric Myers is making prerecorded complaints --
3 making prerecorded calls from January to August
4 2005, you have reasons maybe to suspect there was a
5 problem. You could put them on hold; right?

6 A. That wouldn't prevent them from making phone
7 calls.

8 Q. well, if they weren't getting paid, or if
9 they couldn't put in sales, would they have any
10 incentive to make phone calls? They wouldn't,
11 right?

12 A. I don't know. They might sell other
13 products or -- DirectTV, I don't know.

14 Q. But they wouldn't be selling DISH?

15 A. If we put them on hold then they would not
16 be able to process a new order with DISH.

17 Q. So DISH could have done more to stop these
18 illegal calls; isn't that correct?

19 A. I don't know. I think we did -- I think we
20 did a good job investigating. I don't know if we
21 could have done more.

22 Q. You would agree with me, I think, that the
23 illegal telemarketing calls that DISH made, that its
24 retailers made, they weren't good, were they?

25 A. No, they weren't good.

1 Q. Thanks. I have nothing more for you right
2 now.

3 A. Thank you.

4 THE COURT: Do the states have any
5 questions?

6 All right. Mr. Bicks.

7 REDIRECT EXAMINATION

8 BY MR. BICKS:

9 Q. Good morning, Mr. DeFranco. We're gonna
10 cover several topics with the question of ability to
11 pay at the end.

12 Let me just ask you to share and tell us about
13 how you started DISH?

14 A. It was 1980. It actually wasn't DISH at
15 that point, it was Ecosphere, was the name of the
16 first company that ultimately became DISH. Lived in
17 Dallas, Texas. I was a friend of Charlie Ergen's.
18 We knew each other about three years. And we were
19 looking for some new idea that we thought would be
20 an opportunity in the communications industry.

21 I saw one of those big 12-foot dishes on the
22 side of the road one day. And the -- this was in
23 Garland, Texas. And the person who owned it--it was
24 on a trailer--was there. And I stopped the car and
25 pulled over. And I had seen them before, but not up

1 close.

2 And this individual, I asked him what it was
3 about. He was thrilled to share the information
4 with me. He had just bought the rights to sell this
5 particular system in the State of Texas. And so I
6 spent about 45 minutes with him or so. He kind of
7 explained to me how it worked. I asked him if the
8 company was a public company. He believed that --
9 his parent company, he said no, but he thought they
10 were gonna do an IPO. They were located in
11 Sarasota, Florida.

12 And that was on a Sunday. Tuesday I called
13 Charlie and told him what I saw, and that I thought
14 we should go check it out. Thursday we flew to
15 Florida. And two weeks later I had quit my current
16 job and we decided to move to Colorado to sell large
17 satellite systems to consumers.

18 Q. And why Colorado?

19 A. We picked Colorado because of the poor TV
20 reception in the mountains, large rural communities.
21 We actually had Colorado, Utah, and Wyoming where we
22 had the rights to sell this product. And we felt
23 this product would be more of a need in rural
24 America rather than obviously in the cities. And
25 then the growth rate of Colorado was a

1 consideration, as well as per capita income.

2 Q. And explain to us --

3 THE COURT: Mr. Bicks, this isn't really
4 relevant, I'm curious. What did you do before?
5 What job did you quit.

6 A. I worked for a wholesale wine and liquor
7 company. I called on restaurants, helped them do
8 their wine lists.

9 THE COURT: Okay.

10 Q. Share with us the focus on rural America?
11 Why rural America?

12 A. Well, because in many parts of the -- the
13 systems we put in, I mean we did put some in within
14 the Denver metropolitan area for people who, you
15 know, wanted to have the greatest technology and so
16 on and so forth. But generally speaking the people
17 that really needed it were people that couldn't get
18 good TV reception and that was generally in rural
19 America.

20 Q. And have you been involved in managing
21 various aspects of the company?

22 A. Yes.

23 Q. And explain that to us?

24 A. Over the years I've done not everything, but
25 you know, I've been over most of our disciplines

1 from, you know, sales, marketing, engineering,
2 manufacturing. I'd say the things that I haven't
3 done is probably run the Legal Department, finance,
4 accounting, human resources. But other than that,
5 I've had responsibility for most of the rest of the
6 areas of discipline.

7 Q. And I think you mentioned this, but how many
8 people does DISH employ today.

9 A. About 18,000.

10 Q. And can you describe within the market where
11 you fit in. Number one, number two, number three,
12 four? Give us a sense of where you rank?

13 A. Today we're the third largest subscription
14 video provider behind NBC/Comcast and behind
15 AT&T/DirectTV. And if the Time Warner/Charter merger
16 is approved, then we would be number four.

17 Q. And you told us, I think in response to
18 Ms. Hsiao's question, you have about 13 -- a little
19 under 14 million subscribers today?

20 A. Just under 14 million, that's correct.

21 Q. All right. And tell us about --

22 THE COURT: Excuse me just a second. The
23 18,000 doesn't include any retailers that you would
24 use?

25 A. That's correct. These are direct employees

1 of just -- I don't mean just, but of DISH Network.

2 Q. That's a good question from Court. Tell us,
3 Mr. DeFranco, how many -- besides DISH employees,
4 who else relies on DISH?

5 A. Folks at EchoStar. We use to be one company
6 and we have been separated as two companies for
7 about seven or eight years, something like that.
8 They have over 4,000 employees. Our independent
9 retailers, we have several thousand of those. And
10 there's probably about 6 or 7,000 folks that work in
11 our -- that are not employees, that work in our
12 Field Service Group.

13 So when we talk about doing installations in
14 every corner of the country, more than -- more than
15 half of them are done by employees; part of that
16 18,000. But the rest are done by either independent
17 contractors or entities that are outside the
18 company. So we call them regional service providers
19 or subcontractors. And there's probably 6 or 7,000
20 folks that work in those groups.

21 Q. And describe for us DISH's philosophy when
22 it comes to hiring and promoting employees?

23 A. Well, in the interview process I think you
24 could ask almost any manager what we look for and we
25 basically look for three things. We look for

1 energy, need for achievement, and intelligence.

2 So while it's important certainly for people to
3 have background in many areas of the company. You
4 know, of course if you have somebody that is going
5 to work in accounting they should probably have, you
6 know, accounting discipline. Legal same type of
7 thing. But generally speaking we're looking for
8 good people who want to be a part of something and
9 want opportunity in their careers.

10 So when we hire somebody and they perform well
11 within the organization, they're not -- they clearly
12 should know and it's open knowledge that we are very
13 pro having folks move in different disciplines of
14 the company. So somebody may start and work six
15 months or a year in a department. They will perform
16 well. They will see a job posting for a different
17 department and that may help them in their career
18 advancement where they could apply and get
19 transferred to another department.

20 Q. And does DISH have a policy of paying for
21 employees college education?

22 A. We do have a program where we'll assist in
23 their -- they can apply for tuition assistance.

24 Q. And there were questions asked by plaintiffs
25 here, you know, suggesting that, you know, there

1 were some issues in retailer compliance. I'd like
2 you to tell us about the pride you have in the
3 company and the reactions and experiences you have
4 as somebody who's out and dealing with retailers,
5 dealing with people from your company?

6 A. Well, I mean, we're -- we're very proud of
7 what we've built. We're proud of the -- of the
8 relationships that we've built with retailers and
9 distributors and other business partners over the
10 years. They're all an important part of our
11 success.

12 We -- obviously without consumers, without
13 customers and retailers to support our product, and
14 all across the country and in small communities
15 around the country, and in -- and in the cities as
16 well. Customer service is key. I mean because if
17 you don't take care of the customer you won't have
18 any. And they'll -- you know, they spread bad news,
19 you know, a lot faster than they share their good
20 experiences.

21 So it's very important to us, number one, that
22 we take care of our customers. And number two, that
23 our retailers have an open communication to us and
24 that we communicate well with them.

25 Q. And does DISH make substantial investments

1 in acquiring and maintaining customers?

2 A. Yes.

3 Q. And can you explain that to us? What
4 would -- what would a typical investment be made if
5 I were a consumer and signed up for DISH?

6 A. Well, today the business is very -- very
7 competitive. So there's us and DirectTV certainly,
8 which are the two satellite providers. But in
9 addition to that. So even in the most rural areas
10 of America where there's no cable and telephone
11 competition, there's still DISH and DirectTV. And
12 then as you get into more suburban and urban areas
13 you may have three or four or five competitors.

14 So obviously it's us, DirectTV anywhere. We
15 have got certainly the cable operators, and then the
16 phone companies that offer video as well.

17 So -- I'm sorry, what was your --

18 Q. The actual, the economics --

19 A. Oh, sure. So -- so today the consumer
20 offers for, you know, all of the video services are
21 almost free upfront, right. It does vary some, but
22 as a consumer if you called up DISH or DirectTV and
23 said "I'd like to become a customer," you know, we
24 go through obviously what we have to offer and so on
25 and so forth. And we come to your home, we do an

1 installation, we supply hardware and so on. And
2 obviously the hardware costs money, the installation
3 costs money, and the sales process costs money.

4 So somewhere between 7 and \$800 we would have
5 invested in -- in the equipment and installation.
6 And in addition to that we would have given you
7 discounts on your programming for some period of
8 time. We've just launched a program where we will
9 hold your price constant for three years. In the
10 past we've had programs for one year, two years,
11 where you get discounted programming. So we might
12 have another, you know, few hundred dollars that we
13 have given you in discounted programming as well.
14 So it could -- anyway.

15 Q. So how long would it take for a DISH
16 subscriber to become profitable for DISH?

17 A. Three to four years. So you would have to
18 obviously become a customer, and for us to recover
19 our investment would take three to 4 years.

20 Q. So what happens, for example, if a retailer,
21 unknown to DISH, makes some calls, improper calls
22 and signs people up, and they decide -- they
23 terminate their service within a year or two years,
24 is that good for DISH?

25 A. No. We would lose money on those customers.

1 Q. How many -- at DISH you're one of the
2 founders, but you are one of the folks who was
3 really actively involved in the retailer operation?

4 A. Yes.

5 Q. And does DISH work with thousands of
6 retailers?

7 A. Yes.

8 Q. And have retailers always been a big part of
9 the company?

10 A. After the first six months. So from -- you
11 know, when we started, the first six months we
12 were -- we were a retailer only, so we didn't sell
13 to other retailers. I'm talking about the end of
14 '80 and beginning of 1981. And at that point we
15 started, you know, understanding -- you know,
16 understanding the business and recruiting other
17 retailers in a different way. Back then it was just
18 that we were a hardware provider.

19 But we had relationships with retailers all
20 over the country, you know, through the 90s and into
21 the 2000s. And -- I should say through the 80s and
22 into the 90s. And then we launched DISH Network in
23 1996, is when we got our first customer. We were
24 about two years behind DirecTV. So many of the
25 retailers when the transition took place of big

1 dishes to small dishes, and we didn't have a small
2 dish to offer, many retailers had switched their
3 focus to DirecTV to sell the small antenna, small
4 dishes. But yes, we still had retailers.

5 And then as we launched DISH Network in 1996,
6 obviously we tried to recruit these retailers back.
7 And they have been a very important part of our
8 business throughout our growth.

9 Q. And why do you need to work with some
10 retailers?

11 A. There's a lot of square miles in 50 states.
12 And you know, we certainly didn't have the
13 wherewithal, and don't today, to be able to do
14 installations -- I mean we do -- today we actually
15 can administer an installation and service anywhere
16 in the U.S. But number one, it hasn't always been
17 that way. And even so, we don't have sales offices
18 throughout every community in the U.S.

19 And the product today is -- ultimately the
20 consumer is buying programming. And they know what
21 ESPN is, they know what Disney is, and so on, for
22 the most part. But the ease of use and the
23 technology and the quality of the picture, and all
24 those types of factors, are things you need to
25 actually see face to face. And certainly the

1 retailers have established themselves in the
2 community. And obviously it's -- you're more
3 comfortable if you're buying something from a local
4 person that you know versus, you know, through the
5 internet or over the phone.

6 Q. Now, is DirectTV your main competitor in the
7 satellite TV business?

8 A. For -- as it relates to the most rural areas
9 of America, it basically would be us and DirectTV.
10 And then you also have the cable operators and phone
11 companies once you get into suburban America and
12 urban America.

13 Q. And is DirectTV connected to GM?

14 A. DirectTV, when they launched, was owned by
15 General Motors. So when we launched DISH Network we
16 were competing with DirectTV, who was owned by
17 Hughes, who was owned by General Motors; that's
18 correct.

19 Q. So it was essentially you, Charlie Ergen.
20 And with -- how much money did you start with to
21 compete against DirectTV and General Motors.

22 A. Well, when we started in 1980 we started
23 with \$60,000.

24 Q. And were you proud of what you've done to
25 get to where you are today?

1 A. Very much so.

2 Q. And does DirectTV, do they use retailers?

3 A. They do.

4 Q. And in your experience was it ever
5 contemplated that DISH could control the day-to-day
6 operation of thousands of retailers?

7 A. No.

8 Q. And to your knowledge did DISH ever want to
9 control the day-to-day operation of its retailers?

10 A. We did not.

11 Q. And you dealt with retailers, right?
12 Yourself?

13 A. Yes.

14 Q. Did retailers want DISH to control their
15 day-to-day operations?

16 A. No. I mean these were entrepreneurs who,
17 you know, in some cases were starting a new business
18 that -- to get into the satellite business, similar
19 to what we did. And in many cases already had a
20 business. So you know, may have been a local
21 appliance store, TV store, or -- or may have sold
22 other products, you know, whether it be home
23 security or -- you know, various different products.

24 So no, they -- they weren't -- they did not
25 want us to control their day-to-day business.

1 Q. And did you require that any of your
2 retailers be exclusive to DISH?

3 A. No.

4 Q. And in the course of your doing business
5 with retailers do you consider your retailers to be
6 honest business people?

7 A. As a whole, yes.

8 Q. And tell us about the importance of the
9 retailers to their local communities, and what you
10 have seen as one of the two people who founded the
11 company?

12 A. Well again, I think that it -- you know, how
13 they -- I mean again, because there are thousands of
14 them, it's a wide range of what they're -- you know,
15 what their size of their business and whether their
16 business is exclusively satellite or whether they do
17 other things in the electronics business or in the
18 appliance area or other categories as well. So
19 there's a significant range there.

20 But typically they would be folks from the
21 local community that, you know, they're -- attended
22 the local schools and children go to the schools.
23 And you know, whether they -- how they work in the
24 business community, whether they know people at the
25 Rotary Club, and so forth and so on. It's up to

1 them on the decisions they make and who they know in
2 their community.

3 Q. And you understand about this case that
4 there are three or four retailers that are being
5 focused on, Star Satellite, JSR, SSN, retailer Dish
6 TV Now which I'm gonna ask you about. What type of
7 percentage is that, those four that I talked about,
8 to your overall retailer population?

9 A. Well, you know, when you talk about four or
10 five or ten retailers versus thousands, it's a very
11 small percentage.

12 Q. And do retailers, are they bound by
13 contracts with DISH?

14 A. Yes.

15 Q. And you've got a Retail Services Department?

16 A. Yes.

17 Q. And is -- is that the group that's
18 responsible for vetting and monitoring retailers?

19 A. Certainly they're the group that works with
20 the retailers. When you talk about vetting, we
21 actually have -- I believe it's in accounting now.
22 We have what we call central setup group that, you
23 know, checks the applications, checks the
24 principals, Dunn and Bradstreet, does some other
25 checks on them to do the approval of the retailer

1 prior to it going to Retail Services and to the
2 Sales Department.

3 Q. The Court has heard about OE retailers. Was
4 the concept of the OE tool invested by DISH or were
5 other companies doing similar things?

6 A. DirectTV had a similar program prior to us.

7 Q. And was the OE tool conceived as something
8 to foster telemarketing?

9 A. No.

10 Q. And did you have in your mind that the OE
11 tool would create possible telemarketing problems
12 for DISH?

13 A. No.

14 Q. One of the retailers that is being discussed
15 in this case is a company called Dish TV Now. Do
16 you know that company?

17 A. I did. They're no longer in existence.

18 Q. And were they -- were they a DISH OE
19 retailer?

20 A. Yes.

21 Q. And did they have an established
22 relationship with DirectTV when they became a DISH TV
23 retailer?

24 A. Yes. well, the -- I believe it was under a
25 different company name, but the management was

1 the -- the ownership was the same, yes.

2 Q. And do you remember any of the folks who
3 were involved with Dish TV Now?

4 A. Yes.

5 Q. And who -- tell us your memory of those, who
6 that was?

7 A. David Hagan was the owner. And his wife
8 worked in the business, don't remember her first
9 name. And I don't remember the names of other
10 folks, but I did visit them and take a tour of their
11 facility.

12 Q. And let me show you Plaintiffs' 148. And
13 Mr. Albertson will have a small binder there.
14 I'll -- 148 is in evidence.

15 Have you seen this before, Mr. DeFranco?

16 A. Yes.

17 Q. And this is a letter from David Hagan, who's
18 the principal of Dish TV Now, to Mr. Amir Ahmed?

19 A. Correct.

20 Q. And tell us who Amir is?

21 A. Amir is a senior vice-president with DISH.
22 And at that time -- I'm not sure if he was a
23 vice-president or senior vice-president, but he
24 would have overseen a portion of our retailer and
25 perhaps all of our, I don't remember exactly, but

1 our retail sales group.

2 Q. And does Mr. Hagan describe in this letter
3 how he expected that Dish TV Now would market DISH?

4 A. Yes.

5 Q. And it's a little bit tricky just because
6 the name of the company is Dish TV Now. Is that a
7 company with an affiliation in a legal sense with
8 DISH?

9 A. No.

10 Q. All right. And there's reference in this
11 document to the form of marketing that Dish TV Now
12 was going to undertake. Do you see that?

13 A. Yes.

14 Q. And could you explain what kind of marketing
15 you had anticipated and what they told you?

16 A. Well, he said he was gonna start with
17 internet marketing and direct response television,
18 but then he also did direct mail -- is his current
19 DirectTV business, direct mail and newspaper ads and
20 so on. But initially he was gonna start with
21 internet and direct response television.

22 THE COURT: What is direct response
23 television?

24 A. That would be like -- I mean I don't want to
25 say an infomercial, normally an infomercial might

1 be half hour. It could be a 30 second or one minute
2 television ad where the -- you know, ultimately they
3 put a phone number and their website and people call
4 it.

5 THE COURT: Okay. I thought maybe there
6 was something new and they just pressed a button on
7 the TV set to respond.

8 A. No.

9 THE COURT: That's something.

10 A. They do have something like that now.

11 Q. Mr. DeFranco, does this document make any
12 reference to outbound telemarketing?

13 A. No.

14 Q. And did you meet, you mentioned Mr. Hagan,
15 what was your impression of him?

16 A. I mean, I guess I'll say that him
17 personally, I thought he was a little flashy, kind
18 of boisterous. He had a big office and he had, you
19 know, kind of antiques and things that he had
20 collected from his travels in his office. That part
21 wasn't our style. But when I toured his facility,
22 it was a very clean, upbeat, high energy facility.
23 They seemed to be very well established in -- in the
24 business. And I was happy that he was interested in
25 carrying DISH as well as DirectTV.

1 Q. And was it encouraging to you to see that he
2 was already doing business for DirectTV?

3 A. Definitely. In fact, he was turning away
4 customers who were requesting DISH. So you know,
5 when he was doing DirectTV I think that's what
6 inspired him to -- I don't know this, but inspired
7 him to call us, was -- but he actually was turning
8 away customers who were requesting DISH products.
9 So he thought if he could carry both products he
10 could take care of those customers as well.

11 Q. At this time did you have any indication
12 that Mr. Hagan had any prior criminal issues and
13 things of that nature?

14 A. No.

15 Q. Let me show you DTX959, which is in the
16 binder. It's tab 2. This is a retailer contact
17 information form. And I'd like to go to page 4.
18 And you know what this document is, by the way?

19 A. The first page is just a contract form. The
20 second page is the actual application to become a
21 retailer.

22 Q. And you recognize this as the standard
23 retailer application that DISH had at the time?

24 A. Yes.

25 Q. And you see the questions there, has the

1 company or any principal partner or officer ever
2 been convicted. And the answer is what in this
3 document?

4 A. The answer is no.

5 Q. Your Honor, we would move into evidence
6 Defendant's 959.

7 MS. HSIAO: No objection.

8 THE COURT: Don't take that down, I'm
9 trying to read it.

10 Q. I'm sorry.

11 THE COURT: Okay. I was trying to read it.

12 Q. And I say actually you, Mr. DeFranco, you
13 had visited Dish TV Now.

14 A. That's correct.

15 Q. And when you visited, any indication that
16 there -- that they were conducting outbound
17 telemarketing?

18 A. Not at all.

19 Q. And did anyone at Dish TV Now tell you that
20 they were gonna be doing outbound telemarketing?

21 A. No.

22 Q. Did anyone at Dish TV Now tell you that they
23 were gonna engage a third party called Guardian
24 Communications?

25 A. No.

1 Q. And did you make any efforts to control the
2 day-to-day operations of Dish TV Now?

3 A. No.

4 Q. And given actually your interactions and
5 what you know about the kind of business that we
6 show that was on that photograph, would that have
7 been even possible?

8 A. No.

9 Q. And were you aware of any telemarketing
10 violations by Dish TV Now going back to 2004?

11 A. No. Well, not -- I mean I see that the
12 application was at the end of 2003. I don't recall
13 when we became aware of what -- you know, of the
14 problems.

15 Q. And let me show you Defendant's 223. And
16 this is a document that you saw in the year of 2004?

17 A. Correct.

18 Q. And this is, as I say, 223. This is a
19 document that obviously you received, Mr. DeFranco?

20 A. Correct.

21 Q. All right. So we would move 223 into
22 evidence.

23 THE COURT: Any objection?

24 MS. HSIAO: No objection.

25 THE COURT: DTX223 is admitted.

1 (Defendant's Exhibit DTX223 was admitted.)

2 THE COURT: We need to take our break.

3 (Whereupon a break was taken.)

4 THE COURT: Please continue, Mr. Bicks.

5 by Mr. BICKS:

6 Q. Mr. DeFranco, I have Defendant's 223 up.
7 And I've highlighted a portion of the e-mail that
8 Mr. Hagan had sent on to Mr. Ahmed that you in turn
9 received.

10 what does this convey to you in terms of Dish
11 TV Now's compliance with telemarketing laws?

12 A. When I saw this message I -- I felt that
13 Mr. Hagan was very familiar with and was following
14 the TCPA laws.

15 Q. And when it says in here that DISH TV fully
16 complies with the TCPA, and he has an explanation of
17 precisely what is going on, did you have any reason
18 to doubt the information that was being provided to
19 you?

20 A. No.

21 Q. And was your impression that Mr. Ahmed,
22 knowing him -- for how many years have you known
23 Amir Ahmed?

24 A. More than 15 and probably approaching 20.

25 Q. And was it your impression that, knowing

1 what you do about him, that he was on top of this
2 situation?

3 A. Yes.

4 Q. And in your experience is it a prudent thing
5 to do to terminate a retailer if you get an
6 allegation of a telemarketing issue?

7 A. Not an allegation, no.

8 Q. And why not?

9 A. Allegations aren't always true.

10 Q. And does that mean that you don't take a
11 complaint seriously at DISH?

12 A. We definitely take complaints seriously. So
13 an allegation would certainly warrant an
14 investigation.

15 Q. And what was the practice at DISH, and has
16 been the practice since you've been there, when it
17 comes to allegations about legal issues and
18 telemarketing issues? What would be the practice of
19 the company in terms of dealing with that?

20 A. To investigate it and get the facts.

21 Q. And when you learned about the finding in
22 this case about Dish TV Now's use of Guardian to
23 engage in improper telemarketing practices, how did
24 you react when you found about that?

25 A. I was very upset about it. Felt like I'd

1 been scammed.

2 Q. Are these kind of things good for your
3 business?

4 A. No.

5 Q. And why not?

6 A. Well, I mean let's put aside the legality
7 issues. I mean obviously if someone is breaking the
8 law it's -- in any way, and even if it's obviously
9 not us, it's a poor reflection on us if they're
10 associated with us. So we'll start there. That's
11 most important.

12 But secondly is that it's poor for our business
13 regardless. Obviously it's poor for the retailer's
14 business long term. And certainly as we think about
15 our business, we think about it for the long term.
16 We don't -- we don't think about what -- you know,
17 what the effect might be.

18 So even if it was a positive, short-term thing
19 in some way that some type of marketing effort was
20 taken that was legal, if it wasn't good for us long
21 term then that's something we wouldn't be interested
22 in. And I think it -- in this case, in this case
23 meaning as it relates to calling customers, I mean I
24 think it reflects poorly on DISH if they're
25 representing themselves as DISH.

1 And even if they attain customers, our
2 experience is that these customers never, or rarely,
3 get to a point where we would break even as a whole
4 on customers that are attained in this manner.

5 Q. Let me just quickly ask you the -- there
6 have been some evidence here involving offshore call
7 centers. In the 2005-2006 time frame did you become
8 aware of offshore call centers posing as DISH to try
9 to push for leads?

10 A. Yes.

11 Q. And tell me what you recall about that?

12 A. It was a big problem. It was a problem for
13 us and a problem for DirecTV, in that as the -- as
14 the customer base grew for satellite television
15 subscribers, so we've been in the range of 14
16 million for many years. And DirecTV, you know, did
17 continue to grow, today they're at 20 million, I
18 don't recall at this point in time what their number
19 was, but they were always larger than us.

20 So when you had that percentage, so just call
21 it for round numbers, call it 25 percent of U.S.
22 households having one of those services, either DISH
23 or DirecTV. Someone, I would like to strangle
24 whoever it was, but someone got the idea to just
25 randomly call people's homes and find out if they

1 were a DirectTV or DISH subscriber. And if they were
2 a DISH subscriber, they'd make a note of that and
3 they would sell that lead to a DirectTV retailer. If
4 they were a DirectTV subscriber they would make a
5 note and they would sell that customer's name to a
6 DISH retailer. Or attempt to.

7 So it was a big problem. I mean -- and it
8 ramped up very quickly. It wasn't easy to identify
9 because these folks may have called themselves DISH or
10 may have called themselves DirectTV, but weren't
11 affiliated with the company in any way. And -- and
12 the caller ID's didn't match so there was no way to
13 track them down.

14 Ultimately, when I say ultimately, I mean we
15 did, after a lot of work, determine that they were
16 offshore centers, call centers, making the calls.
17 And basically we couldn't -- we couldn't stop the
18 calls.

19 So what we did was talked to our retailers.
20 Because we did hear about retailers that were buying
21 leads. And in some cases, by the way, they would
22 even buy -- they would sell an existing DISH
23 customer -- I mean, they would sell the lead for an
24 existing DISH customer to a retailer. And they
25 would tell the customer that they could get new

1 equipment and re-subscribe to DISH. So we were able
2 to discover this through retailers who were trying
3 to activate new DISH customer who were already DISH
4 customers.

5 And when we discovered this we started
6 communicating with retailers through our retailer
7 chat and other methods that -- that they needed to
8 be very careful of who they purchased leads from
9 because there was this scam going on. And -- and
10 ultimately, I mean I think that we had somewhat of
11 an impact, because, you know, when they wouldn't buy
12 any more leads, of course, the business for this --
13 these groups diminished and ultimately stopped.

14 But it wasn't because we were able to take any
15 action against the actual parties who were making
16 the calls. It was that the value of their -- of
17 their work became worthless because the retailers
18 didn't -- weren't willing to purchase them anymore
19 because they knew they were in some way bogus and
20 weren't of value.

21 Q. And you mention offshore. Where
22 specifically offshore was this problem coming from?

23 A. My recollection is that it was like Pakistan
24 or something like that.

25 Q. You mentioned retailer chats. What are

1 those?

2 A. They're broadcasts that we do to our
3 retailer base so they have -- there's a way for us
4 to give them a special subscription through their
5 satellite receiver for their show -- for the unit
6 that's in their business so that when we do these
7 broadcasts. Because there's, you know, potentially
8 some information that consumers wouldn't necessarily
9 be interested in and so on.

10 So we can activate just the units in the
11 retailers' business, that we can do a broadcast over
12 the air and actually talk to them about how their --
13 whatever is happening in the current business,
14 whether it is promotions or other factors in the
15 business. And then we take their questions through
16 either the internet or faxes, or they can call in --
17 you know, take live calls.

18 We do those about every three to five weeks
19 just to update them on what's happening.

20 Q. And do you yourself even, as the founder of
21 the company, did you actually appear on these
22 retailer chats?

23 A. For quite a long time, yes. I haven't been
24 on one recently. I get requests once in a while,
25 how come you're not on there, but -- but yes, that's

1 correct.

2 Q. And I want to actually show Plaintiffs
3 Exhibit 131, which is a video, a short video of a
4 retailer chat. And I want to ask some questions
5 about it. Maybe easier if the lights are a little
6 bit dimmed. And let's play, if we can, Plaintiffs'
7 131.

8 (Video recording played in open court.)

9 Q. So first of all, that was you on the video;
10 correct?

11 A. Correct.

12 Q. And who was the other fellow?

13 A. Eric Carlson.

14 Q. And he is now the president of DISH?

15 A. That's correct.

16 Q. Your Honor, I would move into evidence
17 Exhibit 131.

18 THE COURT: When was it made?

19 Q. Do you remember, sir?

20 A. I don't -- I mean we did them every three
21 weeks. I don't remember -- I would guess, you know,
22 nine -- eight, nine, ten years ago. I don't recall
23 the date.

24 Q. Your Honor, it's January 2007. I can
25 represent that. I think the parties know that is

1 the date.

2 THE COURT: Thank you.

3 MR. RUNKLE: I don't have an objection,
4 Your Honor, except there is a very entertaining
5 intro that has Mr. DeFranco in some action poses.
6 Do you have that one? Do you know what I'm talking
7 about?

8 I'm sorry.

9 Q. Mr. DeFranco, in --

10 THE COURT: I'm sorry, I can't let this go.
11 You have to ask him what his action poses are.

12 A. I don't know.

13 MR. RUNKLE: It shows him going around
14 looking at satellite dishes, talking to retailers.
15 There's some peppy music.

16 A. Oh, the introduction to the -- oh, you mean
17 for each of the Charlie Chats. I got you.

18 Q. What were you doing?

19 A. It's just an introduction while they're
20 waiting to bring the cameras up. So this part is
21 not live, it's just a pre-Charlie chat. So if you
22 turned in early they had some introductory video on
23 there about maybe our Team Summit conferences, or
24 what I'm not sure, I don't remember exactly. But
25 now I understand.

1 Q. You said on there, "if you don't follow all
2 of the telemarketing laws you're gonna get in
3 trouble." why did you say that?

4 A. well, because they would be breaking the
5 law.

6 Q. And you also said in there, "we're not
7 flexible at all." why did you say that?

8 A. Because if you break the law we're gonna
9 terminate your agreement.

10 Q. And did -- and you said in there that DISH
11 had terminated some retailers and others were under
12 investigation. what was the purpose of
13 communicating that?

14 A. well, we felt -- we -- I mean there we
15 didn't -- obviously, at least in that segment that
16 you showed, we didn't put the names of the retailers
17 up. But we felt that we did publish the names of
18 the retailers both through press releases as well
19 as, I suspect that we did it through our blast facts
20 communications to retailers.

21 But so that it was clear. Number one, that we
22 were serious. And that would hit home quicker with
23 the retailers so that they would know that, you
24 know, whether they knew these other retailers that
25 were terminated, obviously that would be more

1 impactful perhaps, because they knew who they were,
2 and we weren't fooling around with this.

3 But, you know, the list, as it got processed
4 and publicized, I think did deter other retailers
5 who may have considered doing improper telemarketing
6 from either, number one, making sure they understood
7 the rules and what they could do and couldn't do, or
8 number two, didn't do telemarketing, outbound
9 telemarketing at all.

10 Q. And I want to show you Plaintiffs' proposed
11 finding of fact regarding this video. And I want to
12 ask you to comment on it.

13 It's 363. It says (as read:) In a televised
14 presentation to its OE retailers in January 2007
15 DISH's executive vice-president Jim DeFranco
16 confessed that he did not want to create a
17 compliance section with the Retail Services
18 Department.

19 Is that an accurate statement about the video
20 that we just looked at?

21 A. No. I mean number one, I think it was Eric
22 that was sarcastic, a bit sarcastic. And this is
23 taken out of context, but that he -- you know, I
24 mean, I can tell you for sure that what he meant was
25 that he had hoped that there wasn't a problem to

1 begin with that would have required, you know, the
2 additional disciplinary activity both investigation
3 and terminations of retailers.

4 So not that he -- not that he didn't want to
5 put it in place. I mean we certainly have always
6 been very operationally oriented and followed the
7 laws. And this obviously is a very serious problem
8 with outbound telemarketing. But there were other
9 problems that we had -- had with retailers over the
10 years where they have tried to take advantage of us
11 either by -- you know, many different ways.

12 And so the Compliance Department wasn't
13 created -- our overall compliance wasn't created
14 just for this issue. You know, very common that
15 other scams--in this case illegal activity in
16 outbound telemarketing--but other ways that
17 retailers would --

18 Again, not all. I mean, you know, the lion's
19 share of retailers were good, honest business
20 people. But you did have the small minority that
21 could hurt your business, basically trying to steal
22 from you, you know, whether it be sending in
23 fraudulent activations or various different things.

24 Q. You remember a retailer called Apex?

25 A. I do.

1 Q. And did you terminate Apex?

2 A. We did.

3 Q. And were you actually personally involved in
4 communicating with people at Apex on this point?

5 A. I think post termination in this case.

6 Q. And when you terminate a retailer is that --
7 could that be a serious thing for the retailer and
8 the people that were relying on DISH?

9 A. Well, I mean, I think it varied depending on
10 how -- how much of their activity was DISH related.
11 I mean, if -- if a retailer had other business
12 activity that they were, you know, running their
13 business on, it might be less of a factor. If
14 they -- you know, if they were doing less
15 activations with us.

16 If most of their business was DISH Network
17 business, then yeah, terminating them could
18 certainly have a negative impact, significant
19 negative impact on their ability -- you know, their
20 ability -- they wouldn't be able to sell DISH
21 Network directly through us. So it could have a
22 definite impact, negative impact on them.

23 Q. So let me show you Defendant's 836. And
24 this is a communication that you're on in March of
25 2009.

1 A. Yes.

2 Q. And Your Honor, I would move into evidence
3 Defendant's 836.

4 MS. HSIAO: No objection.

5 THE COURT: It's admitted.

6 (Defendant's Exhibit 836 was admitted.)

7 Q. I want to ask you about this because this is
8 a communication, it involves Apex. And I'd like to
9 highlight the bottom of it, Trudy. From a name that
10 I don't want to try to pronounce, because I think I
11 would get it wrong.

12 You see this gentleman from Apex who's writing
13 to you, Mr. DeFranco. And what is the message
14 that's being communicated to you in terms of the
15 possible impact of this kind of a termination?

16 A. Well, he goes into some detail about the
17 impact on his business and his employees' families.
18 And him not being able to administer his commission
19 system. And I don't -- he talks about his, you
20 know, employees being able to pay their bills and so
21 on. And he also, in my opinion when I read it, you
22 know, implies that, you know, he may take legal
23 action against us for terminating.

24 Q. Let's go up to your reaction when you get
25 this. What do you say?

1 A. I said that he should have considered the
2 consequences and followed the proper procedures and
3 that would have avoided the problem.

4 Q. And why was that your response? It seems,
5 you know, a little bit cold reading the e-mail
6 out -- without the context of it?

7 A. He was a bad person. I mean he was
8 intentionally, you know, doing these things. This
9 wasn't an issue of a couple mistakes here and there.
10 So before I responded I knew -- you know, I did ask
11 the question about what happened with this
12 particular account. And it was explained to me and
13 it was clear to me that he, you know, was well aware
14 of what was happening in the company, and that he
15 condoned it.

16 Q. Let me ask you about eCreek. A question had
17 come up earlier in the case about eCreek. Are you
18 familiar with DISH's -- with eCreek?

19 A. Yes.

20 Q. And are you aware that the principals of
21 eCreek at one point had a company called Dish
22 Factory Direct that was a DISH OE retailer?

23 A. Yes.

24 Q. All right. Let me show you Plaintiffs
25 Exhibit 647, it's been admitted, and it's tab 7. Do

1 you recognize this document?

2 A. Yes.

3 Q. And you see that your name is on it in
4 several places? Obviously it's a document that you
5 got; right?

6 A. Yes.

7 Q. All right. And I want to ask you about it,
8 that there's a comment on the back page here about a
9 duplicate -- about duplicate accounts. And there's
10 a comment in there that an internal audit showed
11 fraudulent behavior as they had 5 percent duplicate
12 accounts. Do you see that?

13 A. I do see that.

14 Q. Does this -- can you explain this -- in your
15 view is this -- is this actually fraudulent conduct?
16 I mean, can you put some context and explain what's
17 going on here?

18 A. Well, as you -- what this was about, a
19 duplicate account would be a situation where there
20 was an existing DISH Network account and there was a
21 new activation for the same household, okay. So
22 this was, and continues to be a problem. The --
23 which is -- anyway, one of the many reasons that
24 we're changing some of the way we promote DISH
25 Network today and the offers that we provided to new

1 customer.

2 So the offers were so lucrative to a consumer,
3 and they still are, and many of the other -- and
4 they still are for us, too, don't get us wrong.
5 Obviously we have to be competitive. But the
6 upfront offers were so lucrative, and the discounts
7 that customer would get for their first year or two
8 of programming that consumers, I think, over the
9 years, have been somewhat indirectly trained to see
10 how long they have been a customer, and I'm not just
11 talking about video, I think this started years ago
12 when Sprint and MCI were trading long distance
13 customers, I think it was a similar phenomenon. So
14 customers, in this case consumers, may have an
15 account for DISH in the husband's name and then
16 maybe have that account for over -- over the
17 promotional period, so say they got promotional
18 programming for 12 months. Maybe after 12 months,
19 15 months, 18 months, whatever, they would -- the
20 wife would call and act like she wanted to be a new
21 customer and put the account in her name.

22 And obviously that puts us out of business if
23 that becomes rampant, because as I said earlier, we
24 spend somewhere between 7 and \$800 just in the
25 installation and hardware. So we have to keep a

1 customer for three to four years to break even. So
2 if this kind of thing happens in any volume, and
3 even one obviously costs the company money.

4 But as this reads here you can see at the end
5 of that paragraph it says in parenthesis (as read:)
6 We target those that are over two percent. And
7 basically what that means is that consumers in and
8 of themselves dupe the retailers. You know, meaning
9 pull the wool over the retailers eyes, where even
10 the retailer, it's hard for them to know that this
11 is happening. So -- so some of that can be
12 unintentional by the retailer. So at 2 percent we
13 don't even look at it.

14 I would say that at 5 percent it would be that
15 there was some poor management within the -- within
16 their group. They should have had a sense for it at
17 some level, meaning maybe a couple of sales people
18 were doing something inappropriately or maybe one of
19 their managers. But personally I would -- and while
20 we did terminate them for 5 percent, you know, we
21 terminated a lot of folks that were more in the 20
22 to 30 percent range of their activations.

23 So I would call this poor management, I
24 wouldn't have said it was fraudulent.

25 Q. And in terms of eCreek, how did they do as

1 a -- I guess what would be called kind of a contract
2 customer service center?

3 A. They were very good at it. Actually the
4 person that owned the company use to work for DISH
5 in our customer service center previously.

6 Q. All right. Let me just ask you a couple of
7 quick questions. There's been some discussion here
8 about lead lists to retailers. Are you familiar
9 with a company called Defender?

10 A. Yes.

11 Q. And as a general policy does DISH provide
12 lead lists to retailers?

13 A. No.

14 Q. Why not?

15 A. Well, I mean the reason we have retailers is
16 for them to generate leads and sales based on their
17 own activity. And we don't need to -- I mean,
18 there's no reason we would need to do that in any
19 general manner because we have folks at our centers
20 who can followup on leads.

21 Q. But was there a situation which DISH
22 contemplated providing a lead list to Defender?

23 A. Yes.

24 Q. And let me show you, it's Plaintiffs' 1220.
25 And this is an e-mail that you're on from June of

1 2007.

2 A. Yes.

3 Q. And I think, Your Honor, my notes it's
4 Plaintiffs' Exhibit. I don't know that it's
5 admitted. I have here that it's not. If it wasn't,
6 then we would tender it.

7 MS. HSIAO: We have no objection.

8 THE COURT: 1220 is admitted. Plaintiffs'.
9 (Plaintiffs Exhibit 1220 admitted.)

10 Q. Does this e-mail refer to a situation
11 involving a lead list and Defender?

12 A. Yes. Defender was an OE, good OE retailer
13 for DISH, as well as one of ADTs -- ADT Security
14 Company's largest, I guess, distributors or
15 customers, you know, that got ADT accounts. And
16 they had had some success working on their own list,
17 both for ADT product and for DISH product.

18 And so they were asking to have their customer
19 service folks, separate from their retailer
20 agreement, on whether they could help us and be kind
21 of a third-party center for us specific to follow-up
22 on people who had called DISH but didn't purchase on
23 their -- you know, at the time that they called.

24 So they, you know, thought that this would be
25 something that would be helpful to both companies.

1 And that they could perform well with this -- with
2 these customers and get a high -- you know, a higher
3 close rate than we would otherwise get on our own.

4 Q. And there's reference here to signing an
5 agency agreement. Would that -- would that
6 arrangement be more akin to kind of eCreek, who
7 would be kind of a vendor and make calls for DISH as
8 opposed to an OE retailer situation?

9 A. Correct. Yeah, they were asking for a
10 separate -- you know, different agreement that
11 allowed them to have a different set of folks who
12 they already had actually that did these calls for
13 ADT and for -- not -- for their activity in ADT and
14 DISH. And so they felt they could use that resource
15 to obviously make money for themselves. I mean they
16 wanted to get paid for this and get additional DISH
17 customers as a result.

18 Q. And did you try it out?

19 A. We did. It was clunky. We did and it
20 proved that -- at least the results we had were that
21 they -- they weren't any better than us. So their
22 closing rate wasn't better than us, so we didn't
23 move forward with the program.

24 Q. And are you aware of any evidence in any way
25 to suggest that a lead list was provided to Star

1 Satellite?

2 A. No.

3 Q. Dish TV Now?

4 A. No.

5 Q. JSR?

6 A. No.

7 Q. SSN?

8 A. No.

9 Q. American Satellite?

10 A. No.

11 Q. All right. Let's talk about the question of
12 DISH's financial situation.

13 Can you tell the Court generally about some of
14 the competition and economic risks that affect the
15 company that you founded?

16 A. Well, we talked about our four competitors
17 in the subscription video business, whether it be
18 the phone companies: Verizon, AT&T, Century Link,
19 so on and so forth. And then obviously DirectTV.
20 And then cable companies. And many of these
21 overlap, of course. So you know, that's that
22 portion of competition from the standpoint of
23 historical and current.

24 And then on a going forward basis certainly we
25 talked about Sling Television, which is a DISH

1 company or a DISH product that has been in existence
2 for about a year. And certainly this is -- this
3 technology and this approach to viewing subscription
4 television has been on a growth path. And we expect
5 it to continue to be on a growth path.

6 Now, this is kind of good news/bad news, in
7 that when you -- you know, we're -- the launch of
8 Sling TV is -- is definitely causing cannibalization
9 to DISH Network subscription customers. But also,
10 obviously, we're getting customers from other folks
11 who may have had subscription services from our
12 competition as well. Or people who didn't subscribe
13 to subscription television at all previously, but
14 now feel that this kind of a value and flexibility
15 in how they use it is worthwhile.

16 So on one hand, it hurts a little bit, but we
17 know it's the future. So we -- I guess I would -- I
18 would say it's, you know, kind of a step in
19 understanding what happened in -- when big dishes
20 went to little dishes. You know, we knew that -- we
21 knew that as -- even in the large dish business,
22 when we started there were 12-foot dishes. And then
23 as the satellites got more powerful and the
24 technology got a little better, they came down to
25 10-foot dishes and 8-foot dishes, and in some cases

1 even 6-foot dishes. And each time the dish size
2 came down, the market grew.

3 So at this point we knew when this pizza pan
4 size dish comes out it's going to have a huge impact
5 on the market. So you can either put your head in
6 the sand and hope everything is going to be okay, or
7 in our case what we did was invest all the money we
8 had and borrowed as much money as we could to build
9 and launch our own satellite.

10 So this is a similar type thing where we see
11 the future is that while people will still, we hope,
12 continue to subscribe to traditional subscription
13 television through their dishes, that there's gonna
14 be a large demand for people to get television
15 through other methods. You know, one that we have
16 recently launched, again, this would be like well, I
17 didn't want to, but I had to. In that we know that
18 if we -- if we just depended on our core business as
19 we knew it, that that would deteriorate over time.
20 And so while Sling TV does have a deterioration
21 affect on us, we know that it's the future. And we
22 have to understand the business and we've got to get
23 into the business.

24 So Apple TV, as an example, is going to be
25 launching soon. Sony will have a package they

1 offer. The programmers themselves will be offering,
2 and do offer, programming over the internet or over
3 wireless so that you could subscribe to HBO
4 directly, or you could subscribe to other services
5 on a direct basis, which even though we're large
6 providers of these services, they're competing with
7 us directly as well.

8 So it's hard to know exactly how this is all
9 going to shake out, but we know certainly the
10 competition is getting more difficult, not less.

11 Q. In terms of number of subscribers, I think
12 you mentioned 13.9 million. How is that number --
13 what is the pattern of that if we happen to look
14 over the last couple of years? Is it going up, kind
15 of even, are you fighting to stay where you are,
16 dropping off. Where in there?

17 A. In the several years we have been in the 14
18 million range. Sometimes slightly higher, sometimes
19 lower. The, I guess, difference today I can say is
20 that a year ago we launched Sling TV. Sling TV is
21 part of our numbers that are reported, so -- so
22 that -- I can tell you that our traditional
23 satellite video subscribers is definitely in
24 decline. And the Sling TV customers are customers
25 that, as I mentioned earlier, are -- our package

1 with them is a little over 20 channels for \$20 a
2 month. So the margin on those customers is much
3 lower than it is on our core business.

4 Q. All right. Let's get into some of the
5 actual nitty gritty numbers. You were shown the
6 2014 net income number of about \$928 million. Does
7 net income kind of tell the whole story of DISH's
8 financial picture?

9 A. No.

10 Q. And can you explain why not?

11 A. Well, net income doesn't consider principal
12 debt payments that may be required and it doesn't
13 consider capital expenses for the company.

14 Q. And are those -- you mentioned debt
15 principal payments and capital expenditures. Are
16 those significant expenditures that are actually not
17 deducted in arriving at net income?

18 A. Correct.

19 Q. All right. And let me show you Plaintiffs
20 Exhibit 1380, which is the third quarter 10Q for
21 2015. And would this be the most recent public
22 information about DISH's financial disclosures?

23 A. Yes.

24 Q. Okay. And we have on this chart
25 \$13.7 billion highlighted at the bottom and

1 1.5 billion highlighted at the top. Can you explain
2 to the Court what those two figures are all about?

3 A. Well, I guess I'm -- it's simpler to
4 describe. So 13.631 billion is the total
5 outstanding notes that we have where we owe people
6 money as a result of bond -- you know, bond
7 issuances and so on and so forth.

8 Q. A lot of money?

9 A. Yes, it is.

10 Q. And there's an indication at the top of
11 \$1.5 billion. And then there's a footnote that says
12 7 and 1/8 percent senior notes due 2016. And it
13 matures on February 1st, 2016. That's coming up
14 pretty soon, right?

15 A. That's correct. So February 1st. Those
16 were ten year notes and that's the rate we paid, 7
17 and 1/8 interest rate.

18 Q. And that interest rate, what is that for
19 people who have basic kind of market understanding?
20 What does that interest rate tell you?

21 A. Well, you can get a mortgage today for, you
22 know, between 3 and 4 percent. So at that rate, I
23 mean that tells you that the borrower -- you know,
24 the lenders felt that that was the level of interest
25 that they were willing to pay. Or at least our

1 investment bankers told us that was the level it
2 needed to be at to raise money ten years ago at, you
3 know, that billion and a half dollars. So that's
4 the interest rate we pay on that money that we
5 borrowed.

6 Q. And that -- so in terms of what is due on
7 Monday, how much money is due on Monday?

8 A. I think -- I think it's a billion five fifty
9 or somewhere in that range. It's -- the billion and
10 a half is the principle and then there is some
11 interest. I don't know if it shows it on here.

12 Q. And if we just compare that -- I think it's
13 pretty simple math, but that 1.5 billion and change
14 that's due on Monday, that exceeds the entire
15 \$928 million net income for 2014; right?

16 A. By quite a bit, yes.

17 Q. And do you have, as a company, continuing
18 principal payment obligations beyond the date of
19 February 1st, 2016?

20 A. Yes. On average our notes that -- the loans
21 that would be due average about a billion and a half
22 a year for the next eight or nine years.

23 Q. And you said early -- earlier that net
24 income does not reflect capital expenditures. Do
25 capital expenditures also play a big role in DISH's

1 business?

2 A. Yes.

3 Q. And can you explain how so?

4 A. Well, the equipment, a portion of the
5 equipment that we put in customers' homes is
6 considered a capital expenditure. So in some
7 respects the -- I mean the better we do in acquiring
8 new customers the more we have to spend, as I
9 mentioned earlier. Now, it's not the full amount of
10 the 7 or \$800, I think it's more in the \$200 range
11 per new customer that goes towards capital
12 expenditures.

13 Q. Give us a ballpark. How much does it cost
14 to build and launch a satellite? Or rocket ship, I
15 guess, that takes the satellite up?

16 A. When you consider the construction, the
17 launch and insurance, it's between \$250 and
18 \$300 million.

19 Q. And how often does DISH launch a satellite?

20 A. Historically, in the first, you know, eight
21 to ten years, we launched one a year. And the
22 expected life is about a 15-year lifespan for a
23 satellite.

24 Q. And is being able to launch the satellite
25 something that is fundamental to your business?

1 A. You'd be in trouble if you weren't able to
2 broadcast to your subscribers, yes.

3 Q. And let me show you, just on the capital
4 expenditures, I think you've explained that each
5 time there's a new subscriber there's a capital
6 expenditure. I'd like to look at actually how much
7 in total those are. If we could pull up -- it's out
8 of the 2014 10K, 2007. It's DeFranco 7.

9 You see here that indication of \$543 million.
10 Can you tell us what that represents?

11 A. Yes, that's the equipment that was
12 capitalized during 2014.

13 Q. And if we look at -- in other words, that's
14 what DISH has to lay out; right?

15 A. Yes, that's -- that would be the -- that
16 would be -- I mean because unfortunately, because we
17 actually maintain ownership of the equipment when we
18 put it in someone's home so that we can recover a
19 portion of it should they disconnect. That number,
20 anyway, use to be a lot different, lot higher.
21 Because today, as we re-use the equipment, even
22 though the equipment may cost us more to make,
23 because we get to re-use it we get some benefit from
24 that. So that's why it's in I believe the \$200
25 range per customer what we capitalize when we put it

1 in their home.

2 Q. Let me show you DeFranco 8. And this is
3 from the 2014 10K. This says (as read:) Paid TV
4 subscriber additions 2.6 million. Right?

5 A. That's correct.

6 Q. Does that mean your numbers increased by
7 2.6 million that year?

8 A. No, that's the number of new -- new
9 customers that we got. But we lost, you know, I
10 think a few more actually. But so we -- we lost
11 about as many customers as we gained.

12 Q. And from your prospective is net income a
13 reliable gauge of how much actual cash DISH has
14 available?

15 A. No.

16 Q. All right. And does net income take into
17 account principle debt repayment like the 1.5
18 billion that's due on Monday?

19 A. No.

20 Q. Does it take into account capital
21 expenditures, the amount of money that's required to
22 invest and run the business?

23 A. No.

24 Q. Now let me look at -- I think this was shown
25 to you in the plaintiffs' questioning. Let me show

1 you defendant's -- DeFranco 10, which is again from
2 the 2014 10K. And this indicates cash, cash
3 equivalents, and marketable security of 9 -- what is
4 that about \$9.2 billion?

5 A. Billion dollars. That's correct.

6 Q. But that's for 2014, right?

7 A. That's correct.

8 Q. And the situation is different today, right?

9 A. Correct.

10 Q. And by the way, while we're on it, remember
11 you were asked questions about the -- the deal, that
12 large possible acquisition? I think it was the
13 Sprint deal?

14 A. Yes.

15 Q. And I think the number was thrown out was
16 several billions of dollars. Did DISH actually --
17 would DISH have had to borrow money if it was going
18 to -- actually to do that deal?

19 A. Yes.

20 THE COURT: And for the record, DeFranco 10
21 is Defendant's 1031 at 61.

22 Q. Exactly, Your Honor.

23 Let me show you the third quarter, which is
24 Plaintiffs' 1380 at page 12. It's DeFranco 11. I
25 want to focus on this question cash, cash

1 equivalents, and certain marketable securities.

2 Remember we had looked at 9.2 billion for 2014.
3 As we are now in the third quarter, what is this
4 telling you in terms of cash, cash equivalents, and
5 marketable securities?

6 A. We had about 1.6 billion as of
7 September 30th, 2015.

8 Q. So -- and 1.24 billion is cash and cash
9 equivalents. And then the 368 million would change,
10 that's marketable investment securities?

11 A. Correct.

12 Q. And why did the cash, cash equivalents, and
13 marketable security decrease?

14 A. Well, we made large, very large investments
15 through our partners in wireless band widths, you
16 know, through the FCC auction.

17 Q. And basically -- are those investments and
18 those kind of business risks you take, is that what
19 keeps the company -- what keeps the lights on?

20 A. Well, it's more than that. I think it's --
21 you know, our belief is that obviously that's a lot
22 of money. And our belief is that we're at a turning
23 point in our company where we -- if we don't make an
24 investment in the future, which we believe to be
25 wireless, and put ourself in a position to compete

1 with AT&Ts and Verizons out there, then we would die
2 a slow death only having video subscription
3 business.

4 Q. And if we look at, it's in the 10Q, which is
5 Plaintiffs' 1380 at page 23, if we look at DeFranco
6 13. This indicates the -- how much was invested in
7 the spectrum proposition that you told us about?

8 A. That's the most recent one, yes.

9 Q. And that -- how much is that investment?

10 A. 10.19 billion.

11 Q. And is there additional investments beyond
12 that in wireless spectrum?

13 A. Yes.

14 Q. And making that investment, that 10 billion
15 and change there, is that one of the reasons the
16 current cash, marketable securities has gone down?

17 A. Well, it's the biggest reason.

18 Q. And if we look also at the 10Q, there was an
19 additional \$5.0 billion, DeFranco 12, that has been
20 invested in the whole wireless spectrum potential
21 transaction?

22 A. Correct. That's in addition to the 10
23 billion that's noted.

24 Q. And I think you told us this, but why is
25 this investment so essential to the business?

1 A. well, again, the -- I would, you know, say
2 that this is a repeat of what we went through when
3 the industry changed about big dishes to small
4 dishes. So had we not made the hundreds of millions
5 of dollars of investment in the, you know, early
6 90s, we wouldn't be here today to talk about it
7 because the big dish business is gone. And so we
8 had to borrow money, hundreds of millions of
9 dollars, back then to build, construct, and launch
10 our first satellites.

11 And I -- obviously this is a lot of money, so
12 we feel very strongly that the future of the company
13 to be able to exist, you know, down the road five,
14 ten years from now, is -- requires us to make this
15 investment to put together -- I mean today we have
16 this -- this -- this frequency. We aren't actually
17 gaining anything from it today. We've got to build
18 a business around this to be able to compete with
19 AT&T, Verizon, and others. But we need the
20 foundation, which is the spectrum, to build that
21 business on.

22 Q. And how would you describe this time period
23 in DISH's history and whether or not it would be
24 possible to buy this spectrum at another time?

25 A. Spectrum, we don't determine the schedules,

1 you know. The auctions -- FCC determines when the
2 auctions are scheduled. And if we aren't there to
3 participate and purchase it at the time then it
4 would get bought by AT&T, Verizon, and others. And
5 would likely not be available again in the future.

6 Q. And so let me get specifically to what's
7 being asked or potentially asked for in this case.
8 Does DISH have the ability to pay a \$23 billion
9 penalty --

10 A. No.

11 Q. -- as requested by the state plaintiffs?

12 A. No.

13 Q. What is the entire market capitalization of
14 DISH?

15 A. It's somewhere in that range actually. So
16 that's -- that's the total worth of the company, and
17 we would -- if that -- I mean certainly we would be
18 out of business.

19 Q. And how many people would lose their jobs if
20 that were to happen?

21 A. Well, 18,000 direct employees. You've got
22 4400 at EchoStar that heavily rely on DISH Network
23 to stay in business. And then thousands of
24 retailers and several thousand subcontractors that
25 do service and installation for us. I didn't add

1 that up, but I guess it's in the 30 to 40,000 range
2 or 50,000 range.

3 Q. Focusing on current liquid assets, could
4 DISH pay a \$900 million penalty as requested by the
5 Federal government?

6 A. Well, it would be possible. I mean we don't
7 have the cash today, or I should say on February 1st
8 we wouldn't have the cash. It would be possible,
9 but very difficult.

10 Q. So does DISH, as -- in terms of the current
11 liquid assets, does DISH have \$900 million that as
12 requested by the federal government?

13 A. Today we do.

14 Q. And you mentioned this debt payment. And
15 how is DISH gonna make that debt payment?

16 A. Out of cash and marketable securities.

17 Q. And did DISH consider refinancing this debt
18 payment?

19 A. We did. And that would be a normal course
20 of business for companies like us, would be to, you
21 know, anticipate when these are due. And assuming
22 that you, you know, don't have a comfortable level
23 of available cash in the company, that you would
24 make an attempt to go out and raise additional
25 capital to make that call and kind of, you know,

1 give you some breathing room.

2 We did consider it. The markets are very
3 difficult right now. I mean, even if you're not in
4 the financial markets directly, you know, with the
5 price of oil and what's happening in China and the
6 general economy, now would not be a good time. And
7 you would pay a significantly higher rate to raise
8 money today than we would have in, you know, a year
9 ago, let's say.

10 Q. And on this question, so we're clear on the
11 900 million. If, for example, you paid \$900 million
12 today, could you make the debt repayment due on
13 Monday?

14 A. No.

15 Q. And I think you touched on this, but walk us
16 through whether or not you could pay \$900 million
17 out of cash, cash equivalents, and marketable
18 securities at a future date?

19 A. If you don't mind, let me continue on the
20 prior answer.

21 Q. Yeah.

22 A. So if -- if we didn't pay the debt payment
23 that was due on February 1st.

24 Q. Yes.

25 A. The impact of that would, through a little

1 bit of a process, but not a very long process, would
2 cause the rest of the debt that you saw to become
3 due, which obviously we wouldn't have the money to
4 pay, and would basically put us in a serious
5 situation.

6 Q. And so in terms of how much cash and cash
7 equivalents DISH will have after Monday, if we do
8 the simple math, you got about 1.6 billion in cash,
9 cash equivalents as of September 30th. And then we
10 talked about a \$1.5 billion principal debt repayment
11 on Monday. How much cash would you have left?

12 A. About a hundred billion -- I mean a hundred
13 million dollars.

14 Q. And is that -- in terms of money needed to
15 run a business, do you need money at DISH to run the
16 business?

17 A. Yes. I would say that in -- you know, on
18 balance that that would be certainly the lowest that
19 I could remember our cash position to be.
20 Generally, to put it into perspective, our payables
21 each month would be in the billion dollar range;
22 right. So that means that to pay for our
23 programming, to pay salaries, to pay, you know,
24 other expenses, our leases, and basically to keep
25 the business open, again, in general terms, let's

1 just call it about a billion dollars a month.

2 So you know, if the business continued on a
3 good trajectory and we continued to have cash flows
4 that we have had historically in recent history,
5 then that wouldn't be a problem. But if there were
6 any type of an impact to the business that had a
7 negative short-term effect--I mean I'm not even
8 talking long-term--I mean basically that reduces our
9 buffer of cash to, you know, a couple of days.

10 Q. And if the -- just hypothetically, a penalty
11 in the amount of \$900 million. What would DISH have
12 to do to be able to satisfy that, looking out into
13 the future?

14 A. Well, there's three ways to -- I mean to
15 raise -- that I can think of to raise money. We
16 could try and borrow the money. I mean obviously if
17 we don't have the money we could try and borrow the
18 money. Sell assets. Or I guess you could, you
19 know, issue additional stock to try and raise money.

20 Q. And for example, if you tried to do it by
21 way of debt, you think you would get a good interest
22 rate if you tried to do that?

23 A. I'm sure we would not. In fact, I'm sure it
24 would not be in the range -- in -- it would be much
25 more difficult to raise than the money we've raised

1 historically. And the reason I say that is not only
2 because of the situation with the current markets
3 and their lack of appetite for -- for debt today,
4 but when investors make an investment in buying
5 bonds, I mean, they -- part of that process is
6 what's your business plan? What are you gonna do
7 with the money?

8 And the reason we were able to raise money to,
9 you know, over the years, but in many cases is
10 because they see that we're investing in spectrum
11 for our future. And they have belief that based on
12 our historical ability to execute on a business
13 plan, that we will be successful in that. Doesn't
14 mean we will, but they have some level of confidence
15 that they will get paid back. And that they will
16 get paid this interest.

17 It's a whole different thought process, if we
18 said, "Oh, we'd like to borrow some money because we
19 have a penalty." Because there's no future
20 opportunity as a result of paying a penalty for them
21 to, you know, get a return on their investment. So
22 for sure if we could raise the money at all with
23 that type of an approach for that purpose, the
24 interest rates would definitely be punitive.

25 Q. And what about credit markets for -- I think

1 you talked about that, but in terms of kind of
2 what's going on in the marketplace, what are you
3 seeing?

4 A. well, it's very -- it's a very difficult
5 situation today to be in a situation -- I mentioned
6 that earlier, you know, if -- again, even with the
7 business plan we have and the fact that we have the
8 debt repayment on -- next week, the markets today
9 would take advantage of us from a rate prospective
10 if we try to refinance that right away.

11 Q. And are credit markets actually specifically
12 open for DISH?

13 A. Don't know. I mean, you know, how it works
14 is you say "I'd like to raise money." And your
15 investment banker goes out and talks to their
16 clientele and asks, "Are you interested in
17 investing?"

18 We know it's a very difficult situation today
19 and that the rates today would be higher than you
20 would prefer.

21 Q. And if DISH tried to sell strategic assets
22 is it certain that you could find willing buyers?

23 A. No. But I don't -- you know, I mean it's --
24 it's not certain, but you're likely not to get
25 certainly the value of those assets. It would be a

1 fire sale type situation if they knew that it was to
2 pay a penalty. And basically you'd have two
3 choices, you could sell your assets that are the
4 core of your current business. You know, as an
5 example, attempt to sell a satellite or something
6 like that, which would have an immediate impact on
7 your current business. Or you could sell your -- as
8 an example, spectrum, but the spectrum is your
9 future. And without the proper spectrum allocation
10 you could get to a point where --

11 I mean first of all, any -- obviously we
12 purchased it to start with so we thought it was
13 something we needed. And to sell even a portion of
14 it would put you in more of a deterrent situation as
15 you try and build your future to compete with the
16 AT&Ts and Verizons of the world.

17 Q. And what kind of impact would selling off
18 wireless spectrum licenses, for example, have on
19 DISH's future ability to do business?

20 A. Well, I mean, it could. Again, depending
21 on -- I mean -- you know, it certainly wouldn't be a
22 good thing. Not having the critical mass of
23 spectrum required to launch the business then might
24 prohibit you from being in business in the future.

25 Q. And what about could DISH issue stock,

1 you've alluded to that, but to pay a penalty?

2 A. Technically, yes. However, the -- you know,
3 the shareholders would be very upset because they
4 would get diluted. Not only the folks that -- that
5 own our stock throughout, you know, the marketplace,
6 but our employees' retirement plans where there's
7 DISH stock in there would all be affected as well.
8 So it would have a significant affect. It's not
9 something that we would entertain.

10 Q. And on stock price, you saw some charts, and
11 I think you indicated what the stock price is today.
12 Is that -- is it down about 40 percent since the
13 high on February 23rd, 2015, of about \$80?

14 A. Yeah. I think it's more that 40 percent,
15 but yes. So yes, it's -- wouldn't be a good time.

16 Q. You -- but you were asked questions about
17 the Tivo settlement of years ago. That was May of
18 2011?

19 A. Yes.

20 Q. And can you tell us what that case was
21 about?

22 A. It was a patent infringement case about
23 DVRs. You may have heard the Tivo name. It
24 irritates me when I hear it, because we actually had
25 the first DVR on the marketplace, but their name is

1 a brand tied to the DVR. Very important piece of
2 technology. We, unfortunately, while we didn't
3 think it should be the case, we did lose a patent
4 infringement case to them.

5 And actually there was an injunction that would
6 have caused us to remove in excess of 3 million DVRs
7 from current customers' homes. A huge impact. We
8 would have had to replace those DVRs at about \$300
9 apiece. So -- that would have cost us about a
10 billion dollars. Not counting the inconvenience to
11 our customers.

12 And in addition to that, the DVRs we would have
13 had to replace them with were products that required
14 a DISH modification. So customer couldn't -- we
15 couldn't just mail the unit to them. We'd have to
16 actually go out and do a service call on their
17 antenna. And that would have cost us about another
18 \$400 million.

19 So in total, would have been in the vicinity of
20 \$1.4 billion of expense to the company to facility
21 the -- the injunction requirements.

22 And even then, had we done that, and continued
23 to fight the case, there was the potential that our
24 other DVRs could have been found in violation and
25 would have cost the company additional money.

1 That's unknown, because we did settle the case.

2 Q. And are payments still being made under that
3 settlement?

4 A. Yes.

5 Q. And I think you hit this, but DISH -- did
6 DISH get something in return for this?

7 A. Well, we -- we got the rights to use the
8 technology that was said to have infringed. So we
9 don't have issues with our current DVRs as it
10 relates to TiVo from a patent infringement
11 situation. So that's obviously critical. But in
12 addition to that, as I mentioned, if we hadn't
13 settled we would have had those other expenses we
14 were able to avoid.

15 Q. And the Boom case, that was a case where I
16 think DISH paid \$700 million as part of a
17 comprehensive business arrangement?

18 A. Correct.

19 Q. And can you explain how that worked?

20 A. Well, Boom was an affiliate company to AMC,
21 which is one of our key programming providers. And
22 they had already acquired some -- some spectrum, 500
23 megahertz spectrum. So as part of the settlement we
24 got a long-term agreement, very important agreement,
25 to continue to distribute their programming. And in

1 addition to that, as part of the settlement, we also
2 got the spectrum to add to our treasury of spectrum
3 availability.

4 Q. Now, in this case the plaintiffs say the
5 penalty should be in an amount, if there's going to
6 be a penalty, material to DISH and sufficient to
7 deter future misconduct. What is material to DISH
8 when you think about counting concepts?

9 A. Well, from -- from an accounting
10 perspective, as you do your public financial
11 statements and so on and so forth, a number of
12 that -- that ranges between 5 and 10 percent would
13 have to be disclosed as a material fact. And this
14 is not me or accountants making this up, this is an
15 SEC requirement.

16 So as an example, certainly something material.
17 If we had, as an example, \$200 million of net
18 income, \$10 to \$20 million, I don't know what the
19 number would ultimately be, that would be up to the
20 accountants to determine, but that would have to be
21 disclosed as a material event in our -- in our 10K
22 or 10Q.

23 Q. And in terms of financial reporting, net
24 income is reported on a quarterly basis; right?

25 A. That's correct.

1 Q. And earning per share and things of those
2 metrics, those are calculated quarterly?

3 A. That's correct.

4 Q. And when you're talking about materiality
5 and the 5 to 10 percent rule of thumb, that applies
6 to quarterly --

7 A. Correct.

8 Q. -- financial statements?

9 A. Correct.

10 Q. And would --

11 THE COURT: Mr. Bicks, it's noon.

12 MR. BICKS: Your Honor, I have two
13 questions and I'm done.

14 THE COURT: I have a business meeting at
15 noon. What kind of redirect do you have?

16 MS. HSIAO: I probably have half an hour.

17 THE COURT: We're going to have to break.

18 MR. BICKS: Understood.

19 THE COURT: I apologize, but they're from
20 out of town also. Not quite as far as you have.

21 (A break was taken.)

22 THE COURT: Please continue.

23 MR. BICKS: Thank you, Your Honor.

24 REDIRECT EXAMINATION

25 BY MR. BICKS: (Cont'd)

1 Q. Mr. DeFranco, when we broke I was asking you
2 questions about materiality. And we had discussed
3 that \$20 to \$25 million, if we were looking at
4 quarterly income of say \$200 to \$250 million, would
5 be material to DISH. I would like to continue with
6 that topic.

7 As an example, Mr. DeFranco, would a --
8 hypothetically, a penalty of say 20 to \$25 million
9 imposed on DISH, would you view that as a slap on
10 the wrist?

11 A. No.

12 Q. And can you explain why not?

13 A. It's a lot of money. I mean, we view that
14 as a lot of money. I mean, I know as we talked
15 about things here, you know, we have certainly made
16 a lot of significant investments in our future and
17 they had more zeros than \$20 million. But our
18 philosophy in how we run the business is spend money
19 like it's our own, to think long term.

20 As an example, our current corporate
21 headquarters several years ago, we have 2,000 people
22 working out of that facility. We purchased 40,000
23 square feet, be paid \$40 million for that facility.
24 So I mean \$20 million is a lot of money.

25 Q. And just as a concrete example, are there

1 parts of DISH's business practices where people end
2 up being on business trips and things of that nature
3 where people double up in rooms and things of that
4 nature?

5 A. Yes. We definitely do share rooms when we
6 go to trade show and things like that.

7 Q. And I could just thank you on behalf of my
8 litigation team, I'm glad you didn't force us to do
9 that. I'm grateful.

10 The question was asked to you of -- in terms of
11 dealing with retailers, you were asked, you know,
12 when you get a complaint why don't you just shut
13 somebody off of the OE tool?

14 Can you give us the prospective from a
15 practical standpoint of running a business and
16 whether or not that makes sense, and explain your
17 views on that?

18 A. Well, I think we had an example that we
19 talked about that actually we obviously did do that
20 and terminated Apex. We talked about them earlier.
21 I mean if we got -- if every time we got a complaint
22 of -- not just a telemarketing complaint, but other
23 types of complaints that, you know, are serious and
24 could ultimately lead to the termination of the
25 retailer, if we turned off the tool while we did the

1 investigation we would put a lot of good retailers
2 out of business for the reason that the gentleman
3 from Apex talked about.

4 In other words, you -- depending on their
5 dependence on what other business they do in
6 addition to DISH. But if they're reliant on the OE
7 tool to place their orders and we shut that system
8 down, then basically, until we either terminate or
9 turn it back on, I mean they're -- you know, it puts
10 a significant financial hardship on whoever it is.

11 So if the complaint that we got, regardless,
12 telemarketing or otherwise, and this is a regular
13 course of business for us, not the telemarketing
14 ones, but other things that we have to look at. We
15 talked about duplicate accounts. I mentioned that
16 there are, you know, some retailers that are less
17 than ethical. Most are very honest and ethical.
18 But in other ways, so other reasons we would
19 terminate, potentially terminate retailers, or
20 actually do terminate retailers, if every time we
21 did an investigation we turned off the tool we would
22 end up putting a lot of good retailers who didn't
23 violate policies or the law out of business.

24 Q. And when Mr. Werner and Ms. Musso was here
25 there were suggestions that honestly were pretty

1 much directed at you. And the suggestion that was
2 made in this courtroom was that people like Reji
3 Musso, Bruce Werner, were people who got pressured
4 by sales, even at the top, to overlook compliance.
5 Can you address that for us?

6 A. Absolutely not true. I mean I was very
7 involved in -- you know, oversaw sales for many
8 years. And not just at a high level. I mean
9 especially as it related to the time frame of the --
10 not because necessarily of the specifically to the
11 telemarketing issues, but the OE tool was something
12 new to us, you know, during that period of time.

13 And so I was very active when we talked about
14 some of the cases where I -- cases meaning
15 documentation, where I was involved with a
16 particular customer and Amir might be asking for an
17 increase in the amount that we pay that customer for
18 activations. I mean it was a new program. And so,
19 you know, naturally, something new we don't have
20 experience with, I'd be more hands on. Today I
21 don't do that. They -- I have confidence in them.
22 Our programs are stable. They know what our
23 programs are, and they -- the other executives of
24 the company that now run sales who then worked for
25 me now make those decisions.

1 Q. And I put up the example of you on the
2 retailer chat with Mr. Carlson. Was that a one-off
3 event where you were emphasizing the importance of
4 compliance?

5 A. No. I mean it -- obviously that was -- that
6 was a serious period -- I mean it's always a serious
7 issue, but during that period of time there was a
8 lot of confusion as it related specifically to
9 telemarketing issues. You know, the laws were --
10 weren't clear state by state, and so on and so
11 forth. And so it was not -- you know, it was
12 something that we reinforced and we tried to make
13 sure that people, you know, in their particular
14 areas, knew and investigated before they used that
15 method of contacting customers.

16 Q. And that retailer chat, the video, was that
17 something that all retailers, every retailer was
18 invited to participate in and could hear about and
19 learn about?

20 A. Absolutely. And then we follow-up that
21 video with a communication to the retailer that kind
22 of summarizes what took place on the -- on the
23 video. So all -- all retailers' showroom receivers
24 or -- for their business office would be activated
25 to that, and they certainly are made well aware and

1 invited to participate and call and ask questions
2 and so on.

3 Q. And from the prospective of one of the
4 founders of the company, did you look the other way
5 when it came to issues of compliance?

6 A. Absolutely not, I mean we --

7 Q. Did you ever suggest to anybody at DISH that
8 when it came to compliance with any legal issue that
9 they -- that they in any way look the other way?

10 A. No. Again, I mean our -- obviously been in
11 business 35 years. We've had a lot of hills and
12 valleys along the way in -- in how the business is
13 operated and, you know, the economies and our
14 position as a competitor in the business, and so on
15 and so forth. But everything we do is thinking
16 about how do we do things for the long haul. What
17 about -- what's the impact five years, ten years
18 from now.

19 Q. And just focusing on the future, we talked
20 about the financial situation, the upcoming -- the
21 debt obligations and as those things go forward.
22 What is your plan when you leave here and get back
23 to work, what's your plan to have enough cash on
24 hand to operate the business?

25 A. Well, I mean we have to continue to operate

1 efficiently and effectively. And you know, attract
2 more customers, have good promotions, make sure we
3 provide good customer service. And make sure our
4 cash flow is what it needs to be.

5 You know, is there the potential that we might
6 try and raise money, additional money, to either
7 replenish the -- the 1.5 million that we've spent,
8 or for -- that and/or for future other business
9 opportunities? There is. Certainly there is.

10 We hope that the markets and the folks who want
11 to invest see that the purpose of those funds will
12 show a return. And that we can get a decent rate if
13 we need to borrow money.

14 Q. So my final question to you, you know, you
15 talked a little bit about your pride in the company
16 that you founded. I'd like you to just share with
17 us any experience you think would be helpful in
18 really giving some detail to that. I know you meet
19 with -- unlike many executives, who some people
20 think of executives as people who sit up in fancy
21 offices, you know, huge storied buildings. But what
22 do you do kind of -- and when it comes to dealing
23 with people who are actually involved in the
24 business, and share with us, you know, your pride in
25 what you have done.

1 THE COURT: You can object to his question.

2 A. I think the -- I guess I would say at this
3 point in time one of the most rewarding things for
4 me, two areas I will mention.

5 One is to see people like Eric Carlson, who
6 started with us, you know, 20 years ago, started as
7 his first job out of college, to be able to grow and
8 become president of the company is very rewarding.

9 And the second thing is, you know, we do -- we
10 do about once a year, we call it Team Summit. We
11 have about 3,000 people, you know, we do it for the
12 retailers. And you know, to have retailers come up,
13 shake my hand, you know, "I put my kids through
14 college because of DISH Network, thank you very
15 much." I mean those are two things that really mean
16 a lot to me.

17 Q. Thank you.

18 THE COURT: Redirect.

19 MS. HSIAO: Yes, Your Honor.

20 RECROSS EXAMINATION

21 BY MS. HSIAO:

22 Q. Mr. DeFranco, thank you for staying around.
23 I'm going to try to be as brief as I can, get you
24 out of here.

25 Now, you talked at length with Mr. Bicks about

1 how DISH has moved beyond the satellite television
2 market which has matured into new areas; isn't that
3 right?

4 A. Correct.

5 Q. And DirectTV until now really has been -- and
6 continues to be your biggest competitor. But now
7 you find yourself competing with AT&T and Verizon
8 and telecom companies?

9 A. Yes. All of them are competitors, yes.

10 Q. All of them compete in the TV space now?

11 A. Correct.

12 Q. And it's safe to say that retailers will
13 continue to be an important part of how DISH sells
14 those products?

15 A. Correct.

16 Q. Now, you talked about how DISH loses money
17 on short-term customers. And also, I guess, on
18 things like duplicate accounts and fake accounts;
19 correct?

20 A. Yes.

21 Q. And in addition, we talked about
22 competition, and the proliferation of options for
23 consumers in terms of programming; right?

24 A. Yes.

25 Q. It's a very competitive market?

1 A. Yes.

2 Q. And DISH is doing everything it can to keep
3 the subscribers it has?

4 A. On a profitable basis, yes.

5 Q. Well, to keep them so you can continue to
6 collect monthly fees from them, right, for their
7 service?

8 A. Well, we have some customer we actually,
9 even when they are customers we lose money on them.
10 So -- but yes, we --

11 Q. Fair enough. That's how you make your
12 money, from your customers?

13 A. Yes.

14 Q. And it's important to constantly sign up new
15 subscribers so that you can keep your number of
16 subscribers around that 14 million mark that we were
17 talking about?

18 A. As long as the new customers that we sign up
19 would -- that we would expect them to be profitable
20 as well.

21 Q. Now, you talked to Mr. Bicks about the
22 thousands of retailers DISH has. And those include
23 the TVRO brick and mortar retailers, right?

24 A. Correct.

25 Q. And the national accounts?

1 A. Correct.

2 Q. And the order entry retailers?

3 A. Correct.

4 Q. But there aren't thousands of order entry
5 retailers; isn't that right?

6 A. That's correct.

7 Q. There's -- at one time there were maybe 70
8 or 80, is that about right? Maybe a hundred?

9 A. I don't know that we ever got to a hundred,
10 but 60, 70, 80 sounds --

11 Q. What's the number now, do you know?

12 A. I think it's between 10 and 20.

13 Q. So much smaller than it use to be?

14 A. Yes.

15 Q. But those few OE retailers, they generate an
16 enormous number of subscribers for a group their
17 size; isn't that right?

18 A. Well, they do -- yes, they do national
19 marketing as opposed to the other retailers that are
20 in their own -- the selling, installing retailers do
21 the installation themselves, all right. So they
22 have to be able to manage the installations and
23 service in their area. And the OE retailers do
24 national marketing or large regional marketing and
25 we do the service and installation so that allows

1 them to -- to sell more, yes.

2 Q. So does it sound right to you that, for
3 example in 2007, the order entry retailers, however
4 many there were, 80 or 60 or 100, they generated
5 31 percent of the new activations?

6 A. That could be, yes.

7 Q. Compared with even DISH, which only
8 generated about -- its direct sales only generated
9 about 27 percent?

10 A. That sounds about right.

11 Q. And the national accounts, much smaller.
12 Maybe 1 percent?

13 A. I don't remember those numbers, but yes.

14 Q. And did you know that at one point DISH's
15 top 22 OE retailers constituted 93 percent of the
16 sales in that channel? In the OE channel?

17 A. That doesn't surprise me.

18 Q. Now, you talked to Mr. Bicks about that it
19 was not DISH's general policy to give leads to
20 retailers. But you saw the documents that DISH did
21 give leads to retailers, did they not? It happened?

22 A. Yeah, we did a test with Defender. And
23 there may have been one or two other cases where --
24 where we provided some leads to retailers.

25 Q. All right. So do you remember that DISH

1 gave leads to Marketing Guru?

2 A. I know who Marketing Guru is. And I do have
3 a recollection that we did a test with them.

4 Q. In fact, you believed that Amir Ahmed
5 sometimes gave cold lists to call to Marketing Guru;
6 isn't that right?

7 A. I don't remember the specifics of what --
8 but that was the idea of the list with Defender, was
9 that type of a list, meaning that the customers
10 had -- obviously didn't activate with DISH. So I
11 don't know what -- I don't know what they would
12 refer to as a cold list.

13 Q. So if you could turn to PX621 in the book
14 that there, please. You see this is an e-mail from
15 Eric Carlson to you on March 20, 2006?

16 A. Yes.

17 Q. And it's in response to an e-mail that you
18 sent to Mr. Carlson and others where you say, (as
19 read:) Eric and Tom will coordinate and respond.
20 It is possible that Amir made arrangements for some
21 cold lists to be worked by a couple of retailers.
22 If still wish review to determine if it makes sense
23 to continue.

24 Did you write that?

25 A. Yes.

1 Q. Your Honor, I'd like to offer PX621 into
2 evidence, please.

3 THE COURT: Any objection?

4 MR. BICKS: No objection.

5 THE COURT: It's admitted.

6 (Plaintiffs' Exhibit PX621 admitted.)

7 Q. You talked about Defender, and I believe
8 that was PX1220 that Mr. Bicks asked you about.

9 A. Okay.

10 Q. Do you remember that there were other
11 occasions where DISH sent retailers lists of -- sent
12 retailers lists of customers to call?

13 A. I mean I -- I know that it was done on a
14 very limited basis. I can't say that I remember
15 every situation.

16 Q. Look at the next tab. It may not be the
17 next tab. Look at PX 1223 in your binder, please.

18 A. Okay.

19 Q. You'll see this is an e-mail from Steve
20 McElroy to you on March 7, 2009. Are you there?

21 A. Yes.

22 Q. And you see that second e-mail from Jim
23 DeFranco to Steve McElroy and others, and it says,
24 (as read:) Are we making the calls and e-mailing
25 lists to retailers today? Every day could be

1 costing us sales for the customers who move on to
2 another video service since we think they turned
3 them down.

4 Did you write that?

5 A. Yes. And what this referred to, this was --
6 this was a situation where the credit approval
7 agency that we used, so in other words, the
8 retailers submit applications. And they provided
9 the consumer's information so that we can do a
10 credit check on that customer. I say we. We
11 actually put it into a system and we send it to
12 Experion or one of the other credit agencies. And
13 they give us a score. It doesn't show the score,
14 but it pops up they're either approved or declined.
15 Then the retailer sees they are either approved or
16 declined.

17 And there was a problem with the credit
18 reporting agency in this particular case where
19 retailers were submitting customers who should have
20 been approved but were declined. So what this means
21 is that we wanted to be sure that the retailers who
22 submitted customers who were declined but should
23 have been approved actually got sent back to those
24 specific retailers who sent the names in to begin
25 with.

1 Q. Right. So you had to send them back the
2 names of the people who had been declined?

3 A. The names that they initially sent us who
4 should have been approved but ultimately were
5 declined. So it's their own customers that they
6 were receiving names for.

7 Q. Okay.

8 A. And that -- in this -- I mean just to be
9 clear, in this situation there were a lot of
10 retailers that got back the names of their own
11 customers that -- I didn't realize that that was
12 what we were asking about previously. I thought you
13 were talking about the Defender example, where we
14 actually had names of customers who had called DISH
15 that were not Defender names.

16 So this was a completely different situation.
17 And yes, lots of retailers would have received back
18 the names of their own customers who inadvertently
19 were declined but should have been approved.

20 Q. Okay. Well, thanks for that explanation.
21 Now, you can put that down for right now.

22 You were talking with Mr. Bicks about visiting
23 retailers. And you said that you had gone to visit
24 David Hagan and his call center in North Carolina;
25 is that right?

1 A. Yes.

2 Q. And David Hagan was the principal of Dish TV
3 Now. And you met him and his wife Annette?

4 A. Correct.

5 Q. Is that her name?

6 A. Correct.

7 Q. Now, Mr. Bicks showed you a background -- a
8 document showing that Mr. Hagan had filled out an
9 application; right? And you said you didn't know he
10 had any criminal history?

11 A. Correct.

12 Q. So you didn't know he had spent time in
13 prison for mail fraud?

14 A. Correct.

15 Q. Or that he had been enjoined by the Federal
16 Court in Virginia for deceptive marketing?

17 A. Correct.

18 Q. And DISH didn't perform any kind of
19 background checks on these retailers? I mean this
20 was the very first OE retailer; right?

21 A. I believe it was certainly one of the early
22 OE retailers. It was at the inception of the
23 program. And whatever our policy was and procedure
24 for taking retailers applications at that time for
25 other retailers we did for Mr. Hagan and other OE

1 retailers.

2 Q. So obviously you didn't do a criminal
3 background check because you would have known these
4 things; right?

5 A. That's correct.

6 Q. And when David Hagan -- when Dish TV Now
7 sold people DISH, they got people's credit card
8 numbers; right?

9 A. Correct.

10 Q. Sometimes their social security numbers?

11 A. Correct.

12 Q. Their addresses?

13 A. Correct.

14 Q. Did DISH run background checks on the people
15 that go into people's homes to install DISH's
16 equipment?

17 A. I don't believe we did then. I think we do
18 now.

19 Q. So at that time you didn't run a check to
20 see if they had a history, a criminal history either
21 then?

22 A. That's correct.

23 Q. Now, talking about Dish TV Now. I believe
24 Mr. Bicks showed you some documents and you said you
25 believed he was doing things the right way. Are you

1 aware that in 2005 DISH was actually sued for DISH
2 TV Now's telemarketing violations?

3 A. I don't recall.

4 Q. If you look at Tab 165. PX165 in your
5 binder.

6 A. I'm there.

7 Q. So in the section -- this is from
8 December 22, 2005. It says, (as read:) The account
9 is on AR/AP hold for the following. And then under
10 that it says, litigation overview. We were sued
11 along with Dish TV Now at the beginning of this year
12 for allegations of multiple Ohio TCPA violations.
13 And that Dish TV Now agreed to indemnify 100 percent
14 to the tune of \$30,000.

15 So you weren't aware of that, were you?

16 Your Honor, while Mr. DeFranco is looking at
17 the exhibit, I would move it into evidence.

18 THE COURT: Any objection?

19 MR. BICKS: No objection.

20 THE COURT: It's admitted.

21 (Plaintiffs' Exhibit PX165 admitted.)

22 A. I mean as I sit here today I -- I mean I
23 don't remember seeing this actual document, but
24 I'm -- based on the -- on what I'm reading here I
25 suspect that I would have been aware of it.

1 Q. So you think you might have been aware of it
2 at the time, but you don't remember now; right?

3 A. Correct.

4 Q. Okay. If you look at the next tab, PX168.

5 A. Okay.

6 Q. Were you aware that consumer Ryan Swanberg
7 wrote to DISH in July of 2004, and threatened to sue
8 DISH for illegal prerecorded calls made by Dish TV
9 Now?

10 A. I don't recall.

11 Q. Does this letter look like that's what was
12 threatened? And there's a complaint attached to it?

13 A. Oh, yeah, yes. I thought you asked if I
14 was -- if I knew about it at the time.

15 Q. Your Honor, I'd like to offer PX168 into
16 evidence, please.

17 THE COURT: Any objection?

18 MR. BICKS: No objection.

19 THE COURT: 168 is admitted.

20 (Plaintiffs' Exhibit PX168 admitted.)

21 Q. Now, Mr. Bicks also asked you, Mr. DeFranco,
22 about the fact that Mr. Hagan, when he wrote that
23 letter talking about his capabilities, he said that
24 he had leads for all these people he was gonna call.
25 Do you remember that?

1 That's not in that binder, but I can show you
2 if you want?

3 A. No, I mean -- I understand the letter, and
4 that he -- he said -- I mean he said he was -- I
5 mean he may have said that as well, but he said he
6 was -- the explanation was that he was ultimately
7 complying with all the TCPA requirements.

8 Q. And did you know -- do you know now that
9 Dish TV Now between May and August 2004, they made
10 six and a half million calls to the do not call
11 registry that there were no EBRs for?

12 A. I do know now. And had I known then what I
13 know now, we would have, you know, on something that
14 obvious, we would -- I'm sure we would have taken
15 action against Mr. Hagan sooner.

16 Q. So you shouldn't have trusted him; isn't
17 that right?

18 A. Well, you mean based on what I know now?

19 Q. Yes.

20 A. Yes, that's correct.

21 Q. Now, you were -- you were talking about how
22 you wouldn't terminate a retailer based on
23 complaints only. Just seems unfair, I think you
24 said; right?

25 A. That's correct.

1 Q. And --

2 A. Without investigation.

3 Q. Well, one complaint may be not enough;
4 right?

5 A. One complaint would be enough to
6 investigate.

7 Q. What about a complaint where you verified
8 that it was a violation?

9 A. I think that depends on the rest of the
10 circumstances around the situation.

11 Q. What about two complaints where you verified
12 there was a situation?

13 A. I think that would also depend on the
14 situation.

15 Q. I mean --

16 A. Let me -- I guess would you like me to
17 elaborate?

18 Q. Well, I'll ask you, for example, have you
19 heard of JSR Enterprises?

20 A. I have.

21 Q. You know JSR Enterprises, DISH had four or
22 five stings in the fall of 2006, and they determined
23 who was making the illegal calls. And it wasn't for
24 seven months or six months that DISH terminated. I
25 mean was that too long in your view?

1 MR. BICKS: I don't mind questioning like
2 this, but we know from the record that -- and the
3 examination that there were two stings. So if
4 there's gonna be cross-examination it should be
5 consistent with what the evidence is.

6 Q. I think there were four stings. But
7 whatever, two stings?

8 MR. BICKS: It's on the board.

9 A. Okay. I mean -- whether it was -- just to
10 be clear, I would call a sting an investigation, a
11 form of investigation. So that means we -- we -- we
12 have a complaint, we're trying to figure out, you
13 know, what -- you know, what's happening. And -- at
14 least this is my interpretation of what a sting
15 would be. And we -- we worked to try to get to the
16 bottom of what was -- whether somebody -- you know,
17 what was happening.

18 And then to your -- how you started, you know,
19 this discussion about whether one is a problem or
20 two a problem. I would say that, you know, it's --
21 it's -- one of the key relative things is if it was
22 errors that were made or whether it was an
23 intentional direction by the owners of the company
24 or the management of the company to intentionally do
25 illegal telemarketing or other things that would

1 be -- hurt DISH Network, regardless of whether they
2 were telemarketing issues or not.

3 Q. How --

4 A. I mean to me that's a big factor. And then
5 you have the volume of what's the -- what's the --
6 what's the -- so what's the intent by -- you know,
7 the organization. Did they make a couple mistakes.
8 And were those -- you know, if -- if a company did
9 ten activations a month and made five mistakes, you
10 know, and had five bad -- I mean it kind of goes
11 back to that one document I looked at earlier where
12 there was 5 percent duplicate accounts. If -- if --
13 if they did ten activations and they have five
14 duplicate accounts, that would be 50 percent, yes, I
15 mean that -- I understand this doesn't have to do
16 with telemarketing, but I'm applying the same type
17 of approach. Yeah, that would be a problem and we
18 would take action, that can't be an accident.

19 Q. So if they had 20,000 activations a month
20 and nine stings catching them, that would not be a
21 problem?

22 A. No. Nine stings catching them. If that
23 means that the stings identified nine calls and we
24 talked to the owner and the owner said, "I make, you
25 know, 30,000 calls a month and there are some errors

1 in our system so nine people got, you know, got
2 called that shouldn't have gotten called." I'd say
3 that's something that needs to be fixed, and not --
4 nine is too many and one is too many.

5 But it's more about can -- you know, fix the
6 problem, whatever the problem was in the system. Or
7 if you had a bad sales person that wasn't following
8 the rules, or something like that, would that
9 warrant -- would I terminate a retailer who did
10 50,000 calls in a month and had, you know, 10 bad
11 calls? I wouldn't take immediate action to
12 terminate that retailer. I'd tell him to fix the
13 problem.

14 I mean -- I mean we had problems ourself. I
15 mean so -- you know, obviously our goal is to have
16 zero. But there was -- you know, I mean sometimes
17 there's problems.

18 Q. Now, you knew, Mr. DeFranco, that DISH faced
19 some liability for the illegal calls its retailers
20 were making; right?

21 A. Yes.

22 Q. And we just talked about a lawsuit that you
23 said you must have known about at the time. And
24 isn't it true -- I mean, for example, we're looking
25 at Apex. I believe, Mr. Bicks showed you a -- a

1 letter, an e-mail from Apex; you remember that?

2 A. Yes.

3 Q. Isn't it true that one of the reasons Apex
4 was terminated was because DISH feared that no
5 action would make DISH complicit in Apex's illegal
6 activity?

7 A. Can you repeat the question?

8 Q. Let's look at the document, maybe that will
9 make it clearer. If you look at PX501 in your
10 binder.

11 A. I'm there.

12 Q. You see there's an e-mail from Robert
13 Calbert to you?

14 A. Yes.

15 Q. And the second paragraph of that, this is
16 about urgent matter from Apex satellite. (As read:)
17 Once hearing this, I contacted Steve and Blake to
18 determine course of action, fearing that no action
19 would make us complicit in his illegal activity.

20 And this was with reference to Apex's 126 TCPA
21 violations that DISH was aware of. So DISH knew
22 there was some liability for these TCPA violations;
23 right?

24 A. You mean liability to DISH?

25 Q. Well, that DISH would be complicit in

1 Apex's --

2 A. I mean I would say that my interpretation of
3 this is that -- that we have determined that this
4 is, you know, a significant issue and that we need
5 to take action. And not because of what the
6 implications might be otherwise. Just because I
7 think it was determined that it was -- when I say
8 that, what I mean by that is whether or not DISH
9 would have some -- be complicit, as you said, but
10 more so that it's the right thing to do under the
11 circumstances because it was concluded at that point
12 that the -- that he was a bad -- bad apple. And he
13 was -- you know, he was doing it intentionally and,
14 you know, was the owner of the company.

15 Q. Your Honor, I'd like to offer PX501 into
16 evidence.

17 MR. BICKS: No objection.

18 THE COURT: 501 is admitted.

19 (Plaintiffs' Exhibit PX501 admitted.)

20 Q. And while we're on the subject of Apex.
21 DISH knew for quite a while before this e-mail we're
22 looking at March 2009 that Apex had been doing
23 prerecorded messages; is that right?

24 A. I'd have to go back and look if you have the
25 document.

1 Q. PX742 in your binder.

2 A. 742?

3 Q. Yes, sir.

4 A. Go ahead.

5 Q. This is an e-mail from Reji Musso to Josh
6 Slater with Apex. She says (as read:) They are
7 doing prerecorded messages. Called Stewart
8 Abramson, harvester, and a new customer. We do not
9 permit this type of telemarketing. The law is very
10 complex and in SC an absolutely no-no.

11 So DISH knew what Apex was doing in July 2008;
12 correct?

13 A. Well, yes.

14 Q. Your Honor, I would like to offer PX742 into
15 evidence.

16 THE COURT: Any objection?

17 MR. BICKS: No.

18 THE COURT: 742 is admitted.

19 (Plaintiffs' Exhibit PX742 admitted.)

20 Q. Now, you said to Mr. Bicks that DISH did not
21 want to control the retailers. Do you remember
22 that?

23 A. Yes.

24 Q. But the retailer agreement gives DISH the
25 right to control them; isn't that true?

1 A. No.

2 Q. Well, look at PX738 in your binder, please.

3 I'm sorry, 238. And if you could turn to
4 page -- I'm looking for Paragraph 7.3, which is on
5 page 16. You see the third sentence of paragraph
6 73.3. (As read:) Retailers shall take all actions
7 and refrain from taking any action as requested by
8 EchoStar in connection with the marketing,
9 advertisement, promotion, and/or solicitation of
10 orders for programming and sales of DISH DCS
11 systems. And retailers shall cooperate by supplying
12 EchoStar with information relating to those actions
13 as EchoStar reasonably requests.

14 And it says that EchoStar can subject them to
15 disciplinary action. Is that a fair reading?

16 A. Yes. What this means is that they -- the
17 retailers -- I'm sorry, when I answered the question
18 I didn't realize you were referring to this. But
19 you know, I don't believe this is us running the
20 retailer's business. This is making sure that the
21 retailer sells only the products that we have
22 available to sell.

23 In other words, they can't make up their own
24 programming package. And they can't offer, you
25 know, promotions that DISH doesn't offer. They --

1 you know, they are -- they are, you know,
2 independent retailers that are marketing our
3 products that we have available for sale. Obviously
4 there has to be some consistency there in what the
5 offer is. We couldn't have 2,000 retailers
6 offering -- it would be -- any way, it would be
7 impossible. So that's the purpose around this
8 language.

9 Q. And I'm not gonna argue with you about the
10 language of the contract. That's just what the
11 contract says, right?

12 A. Yes.

13 Q. But the contract also says that DISH can
14 automatically terminate retailers? And DISH did
15 that from time to time, right?

16 A. I mean I guess I'd like to -- where does it
17 say that?

18 Q. Let's take a look. We were talking about
19 JSR Enterprises, but what I want you to refer to is
20 PX1306 in your binder, please. It's an e-mail about
21 Cactus Concepts. Shawn Portela was the principal.

22 A. I'm sorry, 1306?

23 Q. Yes. Do you see the middle is an e-mail to
24 you from Steve McElroy about Cactus follow-up?

25 A. I mean I haven't read it all, but I have a

1 recollection -- I mean -- yes, I recognize this.

2 Q. So if you look at page 2 of that, if you
3 flip the page. The second paragraph on that page
4 says, it says (as read:) After the meeting with
5 Shawn I held a second meeting with the internal
6 participants.

7 Do you see that paragraph?

8 A. Yes.

9 Q. You say -- I mean Mr. McElroy says, (as
10 read:) I asked the retail services to execute
11 termination paperwork for Cactus Concepts. And I
12 will call Shawn tomorrow morning and tell him
13 verbally that we are recognizing automatic
14 termination provision under Section 10.4 of the
15 retailer agreement. And that we are proceeding to
16 collect monies received by Cactus Concepts due to
17 account fraud.

18 That's an example of the automatic termination
19 provision; correct?

20 A. I'd still like to see 10.4.

21 Q. Okay. Let's look back at PX 1038 then.

22 A. Was that what it was, 10.4? Yes.

23 Q. And 10.4 is on page 19 of PX238. It has a
24 long list of things that automatic termination will
25 take place.

1 A. Okay. I haven't read it yet, but I see
2 that.

3 Q. So my question was just do you recognize
4 that, for example, you used automatic termination in
5 the case of Cactus Concepts? Or you were
6 contemplating it?

7 A. Yes.

8 Q. All right. Now, I want to move on quickly,
9 because I know you need to get out of here, to the
10 money. And Mr. Bicks asked you about the
11 \$1.5 billion ten-year note that comes due tomorrow.

12 A. February 1st.

13 Q. February 1st. DISH is not gonna go broke on
14 February 2nd after it pays that, right?

15 A. Correct.

16 Q. You've had notes due in the past that you've
17 paid off with no problem; correct?

18 A. Correct.

19 Q. And how much cash does DISH have on hand
20 today?

21 A. Well, as of the end of September it was
22 about one point.

23 MR. BICKS: Your Honor, can I -- the issue
24 that at least I'm concerned about at this point is,
25 you know, public disclosure of present day

1 information in light of the fact that DISH has not
2 released its public financial statements.

3 So I just -- can I just confer with Mr. Dodge
4 for a moment?

5 THE COURT: Yes.

6 MS. HSIAO: We could close the court.

7 THE COURT: Ms. Hsiao just suggested
8 closing the courtroom, which I'm loathe to do.

9 MS. HSIAO: We can close the courtroom if
10 you like.

11 THE COURT: It's possible the witness
12 doesn't know.

13 A. I could give you an answer. I don't know
14 the exact number, but I could give you an answer
15 that would give you an indication.

16 MR. BICKS: So what I think the concern is,
17 as I indicated--because the 10K will not be filed
18 until the beginning of March--the concern is that
19 this could be confidential information.

20 So I don't mind him answering it, but -- I hate
21 to have the imposition of requesting that we, you
22 know, have this sealed. But I don't know of any
23 other alternative.

24 MS. HSIAO: We have no objection to that,
25 Your Honor. Not sealing, but to clearing the

1 courtroom for now.

2 MR. RUNKLE: We could do some research into
3 the issue. I don't know. Obviously, very sensitive
4 to DISH's responsibilities about disclosing
5 financial information. I frankly just don't know.

6 MR. DODGE: Your Honor, may I --

7 THE COURT: Mr. Dodge. How is your back,
8 Mr. Dodge?

9 MR. DODGE: It feels much better.

10 We file our 10K in late March. I would suggest
11 we clear the courtroom and seal it for just that
12 particular portion of the record. It is material,
13 non-public information, and will be until we file
14 the 10K. But the good news is we will be filing it
15 very soon, so it will be likely to be a short period
16 of time.

17 THE COURT: As I said, I don't like to seal
18 information in a civil trial, but I will do so.

19 If I could get you to empty the courtroom.

20 (Proceedings were reported and transcribed in a
21 sealed transcript.)

22 THE COURT: Yes. The court is unsealed.
23 Please continue.

24 BY MS. HSIAO:

25 Q. We were talking about putting aside money to

1 buy spectrum. And DISH put aside that money and it
2 was able to spend nine and a half billion dollars in
3 2015?

4 A. Correct.

5 Q. Even though you knew you had this debt
6 obligation coming up in 2016?

7 A. Correct.

8 Q. And DISH was able to pay a significant fine
9 to the Federal Communications Commission because it
10 decided not to use -- to take all the spectrum that
11 it bought; isn't that right?

12 A. Through the designated entities.

13 Q. Through it's designated entities, and those
14 you're referring to are North Star and SNR?

15 A. Yes.

16 Q. And they had bought the spectrum as
17 designated entities. And they were entitled to a
18 significant discount because they were effectively
19 small businesses basically; right?

20 A. Yes.

21 Q. And then FCC ruled that they were not
22 entitled to that designated entity designation
23 because DISH had controlling interest in both
24 entities; right?

25 A. I don't believe that that was -- I don't

1 want to get technical about it because I don't --
2 but no, I won't agree to what you just said. I
3 don't know the answer to that. I do know that we
4 didn't do anything improper. The FCC didn't find us
5 to have done anything that was, you know, outside
6 the guidelines of the auction. And that this was a
7 determination that -- that was arrived at in
8 conjunction with the designated entities and the
9 FCC.

10 Q. Well, suffice to say the FCC --

11 A. But money was paid to the FCC.

12 Q. \$513 million -- \$516 million, I think;
13 correct?

14 A. That sounds about right.

15 Q. And the FCC found that North Star and SNR
16 are not designated entities, they're not small
17 businesses. Safe to say?

18 A. I believe -- they did say that, but I
19 believe that's still under appeal.

20 Q. And in fact, the Senate is starting an
21 investigation of that issue; isn't that right?
22 DISH's role in those two entities?

23 A. I'm not familiar with that.

24 Q. And DISH would have had to pay \$3.3 billion
25 more for those -- the spectrum for North Star and

1 SNR because -- if it had decided to go ahead with
2 acquiring all the spectrum that they had bid for;
3 isn't that correct?

4 A. That sounds like the right number, yes.

5 Q. So DISH decided not to take all that
6 spectrum and instead to pay the \$516 million fine.

7 THE COURT: I'm sorry, how much more would
8 they have paid? 3.3 --

9 Q. Billion.

10 THE COURT: Billion, as a B.

11 Q. Yes.

12 Now, Mr. DeFranco, we talked about this case
13 being in litigation for several years. DISH didn't
14 set aside any money to possibly pay off penalties in
15 this case, did it?

16 A. Yes.

17 Q. Oh, it did? So how much?

18 A. Is that a question I can answer?

19 Q. That's another --

20 MR. BICKS: That's confidential
21 information, I believe.

22 THE COURT: Why is it confidential?

23 MR. BICKS: Because it hasn't been
24 publically disclosed.

25 THE COURT: So it would be disclosed

1 similarly either the last week in February or first
2 of March?

3 MR. BICKS: I believe that -- the answer
4 is, Your Honor, I don't know. That is an accounting
5 disclosure issue that, you know, has to be
6 evaluated.

7 THE COURT: Is it an attorney-client
8 privilege matter?

9 MR. BICKS: I believe so. And it's also --
10 you know, it's not -- it's non-public information.

11 THE COURT: Mr. Runkle?

12 MR. RUNKLE: Your Honor, they plainly
13 opened the door to this line of questioning by their
14 questioning of Mr. DeFranco. I mean their
15 questioning of Mr. DeFranco gave the impression that
16 the company is tittering on the edge of collapse and
17 it's going to be left with pennies next week. If
18 they set aside money to pay this litigation, that's
19 the most probative question that's been asked. They
20 plainly opened the door to that. There's no rule of
21 evidence that could exclude that. And it's not
22 attorney-client privilege.

23 THE COURT: I'm not sure they opened the
24 door. And I'm not sure it's not privileged under a
25 number of other bases.

1 So I'm not going to order the witness to
2 answer, but we can address the legal issues and
3 perhaps get that answer at a later time.

4 MS. HSIAO: Thank you, Your Honor.

5 BY MS. HSIAO:

6 Q. So you said -- well, so in any event, you
7 set aside money for this litigation. And the
8 lawyers at DISH knew, or know certainly, that even
9 under the Telemarketing Sales Rule, which is the
10 United States claims here, that DISH could be liable
11 for 11,000 to \$16,000 per call. Are you aware of
12 that?

13 A. I know that the maximum penalty adds up to a
14 big number.

15 Q. And the TCPA claims are at least \$500 a
16 call. That's what Congress set the statute minimum
17 at. Are you aware of that?

18 A. I wasn't sure of the number, but I knew it
19 was a significant amount.

20 Q. And the state plaintiffs, they have
21 statutory claims. Some of them are \$5,000 a call,
22 some of them are \$2,500 a call--are you aware of
23 those--minimum?

24 A. Not specifically.

25 Q. So there's significant liability that DISH

1 is facing. And it sounds like DISH is planning for
2 that. Is that safe to say?

3 A. I think that -- I don't think, I mean I
4 can -- and this I think I can say without a problem,
5 that DISH has looked at the other settlements that
6 have taken place in the case. Both the retailers
7 who implicitly, intentionally made the calls, hid
8 the information from us. And looked at what they
9 settled their cases for. And other similar actions
10 that were settled by DirectTV and other companies for
11 violations.

12 And based on that, understanding that every
13 situation is different, but based on that, and our
14 knowledge knowing that we didn't intentionally do
15 the -- the things that these other companies did,
16 that the court would find that it would be something
17 that's reasonable under all of those circumstances.

18 Q. Well, you were talking about the
19 settlements. This isn't a settlement, right?

20 A. No, that's correct.

21 Q. We're at trial.

22 A. Correct.

23 Q. So those cases that you were talking about,
24 those weren't proven in a trial like this; right?

25 A. Well, I -- I don't know the background of

1 all those cases.

2 Q. Now, you said that 20 to 25 million dollars
3 is a lot of money. And I agree with you, it is a
4 lot of money. Certainly for me. DISH has spent --
5 as of July 14th, DISH told its insurance company it
6 had spent \$16 million litigating this case. Are you
7 aware of that?

8 A. I was not aware of that.

9 Q. And I'm sure that since July 2014, which was
10 before the summary judgement was granted in this
11 case and before the case went to trial, that many
12 more millions have been spent for all these people
13 here today. That's safe to say, isn't it?

14 A. I don't know the number, but that is a lot
15 of money.

16 Q. Now, I understand you don't want to pay a
17 penalty in this case. And I understand \$20 million
18 is a lot of money, and \$500 million is a lot of
19 money, and \$700 million is lot of money, and a
20 billion dollars is a lot of money. And if DISH were
21 to have to pay 500 million or a billion, it would be
22 a punishment for DISH, isn't that right?

23 A. It would be a huge punishment.

24 Q. It be a significant penalty?

25 A. Huge.

1 Q. Do you think that would send a message to
2 DISH that it could not continue to violate the
3 telemarketing laws?

4 A. I don't think it would take that kind of --
5 I think we already understand we never wanted to
6 violate the telemarketing laws, whatever the
7 penalty.

8 Q. Well, whether you did. Do you think it
9 would provide an incentive for other companies to
10 not violate the telemarketing laws, whether by
11 mistake or on purpose, to not violate them at all?
12 Would provide an incentive, wouldn't it?

13 A. I can't speak for other companies. I can
14 only speak for myself.

15 Q. And a slap on the wrist is not enough when
16 somebody breaks the law repeatedly, you said that
17 yourself; right? That's why you terminated Apex and
18 all those other retailers that defrauded DISH?

19 A. I agree.

20 Q. I don't have anything further, thank you.

21 THE COURT: Any of the states?

22 Mr. Bicks, may your client be excused?

23 MR. BICKS: I just wanted to ask him one
24 question.

25 THE COURT: Okay.

REDIRECT EXAMINATION

BY MR. BICKS:

Q. Can we pull up PLAINTIFFS' 204 and go to paragraph -- 238, I'm sorry. Paragraph 238 and go to 9.1. Paragraph 9.1, page 17, and blow that up.

Do you see this provision, Mr. DeFranco?

A. I do.

Q. And you were asked questions, hypothetical questions, about who's responsible under the law for certain telemarketing issues as between DISH and an OE retailer. Is this contract, at least from your perspective as one of the senior people at DISH, does this govern the -- this contract govern the relationship between you and your OE retailers?

A. Yes.

Q. And do the parties here agree that the retailer is solely responsible for compliance with all laws?

A. Yes.

Q. And is that -- in your understanding, having been involved with retailers basically your entire career at DISH, was there any -- ever in your mind any ambiguity or confusion about this?

A. No.

Q. Thank you.

1 MS. HSIAO: Nothing further, Your Honor.

2 THE COURT: All right. Thank you,
3 Mr. DeFranco, it was nice to meet you.

4 THE WITNESS: Thank you, Your Honor.

5 THE COURT: You may leave that. We'll get
6 it.

7 (The witness was excused.)

8 THE COURT: This brings to mind,
9 Mr. DeFranco is going back to St. Louis. I
10 understand there are a number of other individuals
11 who are going to be flying out of St. Louis fairly
12 early this evening?

13 MR. BICKS: Yes, Your Honor. I was just
14 alerting the Court. I didn't want to inconvenience
15 you or have an interruption if there were people at
16 DISH or if anyone had to leave a little bit early to
17 get to a flight. I think folks have flights that
18 are sevenish, a little before. 7, 7:30 in that time
19 frame. I'm not involved in the logistics of people
20 trying to get to the airport. I just wanted to
21 alert Diane that we didn't want to be rude to the
22 Court if somebody needed to leave a little early.

23 THE COURT: No. But I do caution you the
24 traffic around St. Louis is bad between, on a
25 Friday, four and six. And you could be in bumper to

1 bumper on this side of the river before you even get
2 across the river. So you should keep your eye on
3 the traffic before you leave. There are a couple of
4 alternate routes you can take. I assume you have
5 people who can advise you on that.

6 MR. DODGE: Would it be okay to leave a
7 little early, Your Honor, to avoid that traffic?

8 THE COURT: Yes. The other question is
9 it's 2:38. And I want to see how many witnesses we
10 have. We're not going to be going late under the
11 circumstances.

12 Mr. Runkle.

13 MR. RUNKLE: We have a consumer witness who
14 we expect to take a half an hour to 45 minutes,
15 depending on DISH's questions, of course.

16 Then Mike Mills is going to testify. Ms. Ohta
17 is actually leaving this evening also. And she was
18 going to question him first and then I was going to
19 question him. So I don't know if we will get to me
20 today --

21 THE COURT: Get to who?

22 MR. RUNKLE: To my questions for Mr. Mills.
23 I'm not testifying.

24 THE COURT: I was gonna say.

25 MR. RUNKLE: So that's the rest of the day.

1 And then I guess Mr. Mills will have to continue on
2 Tuesday.

3 THE COURT: Can Mr. Mills be here?

4 MR. BICKS: He has been -- the answer is
5 yes, Your Honor. I tell you he's been here all week
6 and he has a one-year-old daughter. He's been
7 waiting here all week to testify, or at least for
8 three or four days. But I believe we made
9 arrangements for him to get back.

10 THE COURT: I would have no problem if he
11 wanted to bring his one-year-old with him.

12 MR. BICKS: We could use that back at the
13 hotel.

14 MS. HSIAO: Also, Your Honor, just to let
15 you know, Dr. Das, who is our next witness, his wife
16 Susan and his 14-year-old daughter Sara are also
17 here in the courtroom today. So they came to
18 support their dad and husband.

19 THE COURT: Okay. Thank you. I think we
20 will take a break. Dr. Das, if you will step up and
21 take the stand. You don't have to step up right
22 this minute. And Ms. Das, the daughter, what is
23 your daughter's name?

24 DR. DAS: Sara.

25 THE COURT: Sara, I should know that. You

1 just said that and that's my daughter's name. would
2 you like to step back in chambers and see where we
3 do our serious work.

4 MS. HSIAO: She wants to be a lawyer too.

5 THE COURT: I'm not indicating this is not
6 serious work.

7 (A break was taken.)

8 THE COURT: If you will please swear
9 Dr. Das.

10 MS. HSIAO: Your Honor, I forgot to move to
11 admit 1306, Plaintiffs' 1306.

12 THE COURT: 1306 is admitted.

13 (Plaintiffs' Exhibit 1306 admitted.)

14 THE COURT: Has defense had enough time to
15 decide about those five documents you had not --

16 MS. ECHTMAN: So Your Honor, I'll handle
17 that.

18 THE COURT: Ms. Echtman.

19 MS. ECHTMAN: Yes, so these are Plaintiffs'
20 exhibits. No objection on 233, 457, or 535.

21 On Plaintiffs' Exhibit 532, 736, and 1270 --

22 THE COURT: Wait, wait. I'm sorry, these
23 are new ones that I was not planning on.

24 No objection to 233, 457, 535. But there is an
25 objection to --

1 MS. ECHTMAN: Plaintiffs' Exhibit 532, 736
2 and 1270. I don't believe they were actually used
3 in Ms. Musso's examination. And they do contain
4 hearsay.

5 THE COURT: Ms. Hsiao, Mr. Runkle?
6 Do you have 532 down on your sheet? I don't --

7 MR. RUNKLE: Let's do that first. I don't
8 think 532 was one of the ones we talked about. I
9 think the real time may have been 532, and then I
10 corrected it. But there may be --

11 Mr. Boyle: I have 535.

12 MS. ECHTMAN: Then it's just 736 and 1270.

13 THE COURT: I will reserve on those so we
14 can get on with the testimony. The others are
15 admitted. 233, 457, 353.

16 (Plaintiffs' Exhibit 233, 456, 353 admitted.)

17 (The witness was sworn.)

18 THE COURT: If you would step over here.
19 The doctor did not come back while I talked to his
20 wife and child. You have a lovely family, doctor.

21 Please, proceed.

22 ANDREW DAS
23 called as a witness herein, having been duly sworn,
24 was examined and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. HEIMLICH:

2 Q. Good afternoon. Could you please state your
3 name for the record.

4 A. My name is A. Andrew Das, D-a-s, as in Sam.

5 Q. And what is your profession?

6 A. I'm a professor.

7 Q. What do you teach?

8 A. I teach religious studies.

9 Q. Where at?

10 A. Elmhurst College in Elmhurst, Illinois.

11 Q. What city and state do you live in?

12 A. I live in Villa Park, Illinois.

13 Q. Villa Park, that's a suburb of Chicago?

14 A. It's three miles west of Elmhurst.

15 Q. Thank you for being here. I know that is
16 not a particularly short drive, or a scenic one. So
17 thank you for spending your afternoon with us.

18 Who lives at this address you with?

19 A. My wife lives at this address with me and my
20 three children: Peter, Paul, and Sara.

21 Q. And how long have you lived at this current
22 address?

23 A. I've lived at this address since January
24 2003.

25 Q. Do you have a landline telephone at this

1 address?

2 A. I do.

3 Q. What is the telephone number?

4 A. 630-279-4705.

5 Q. And how long have you had this number for?

6 A. I've had this number since I moved into the
7 home in 2003 in January.

8 Q. And is this the only landline phone number
9 you have had?

10 A. It's the only landline I have.

11 Q. Are you familiar with the do not call
12 registry?

13 A. Yes, sir, I am.

14 Q. What's your understanding of it?

15 A. My understanding of it is once a number is
16 placed on the do not call registry that it's
17 maintained there, and that telemarketing calls
18 should not come to your house. Unless you have a
19 direct relationship with the business.

20 Q. Did you register your -- this 4705 number on
21 the do not call registry?

22 A. Yes, I did, in January -- excuse me, in July
23 2003.

24 Q. After registering your home phone number on
25 the do not call registry did you ever receive calls

1 from someone trying to sell you DISH Network
2 services?

3 A. Yes. I've had a large volume of calls from
4 people with accents trying to market to me quote
5 DISH Network services.

6 Q. When did these calls begin?

7 A. These calls began, at the latest, in the
8 later part of 2004.

9 Q. Can you describe these calls? What did they
10 say to you?

11 A. Well, the calls typically began, the
12 solicitor will ask, "We'd like to know if you'd like
13 to have satellite TV services provided." Or "we're
14 calling on behalf of DISH Network." I would say
15 that I am -- I would also say "I've asked not to be
16 called by DISH Network." They would continue to
17 call.

18 Or I'd ask for a supervisor in order to ask --
19 to verify a potential call back number. But I
20 didn't want to give any indication I was interested
21 in services, just that were I interested in this
22 service what would be the number to contact you to
23 call you back.

24 Most -- the vast majority of these calls the
25 solicitor would not provide a call back number and I

1 would ask to speak to a supervisor. I would usually
2 get hung up on at that point. I did get through to
3 a supervisor in a handful of instances. And I would
4 ask for a call back number and usually not receive
5 it in those handful of incidents. I did get a call
6 back number in one instance with a supervisor.

7 Q. When you got these calls did you ask to be
8 taken off their calling lists?

9 A. I always asked to be taken off the calling
10 list. And I also mentioned I'm on the do not call
11 registry and they're not suppose to be calling me.

12 Q. At any time have you been a DISH Network
13 customer?

14 A. No.

15 Q. Have you ever inquired about their services
16 or asked them to contact you?

17 A. No. I've not inquired about the services or
18 asked them to contact me.

19 Q. So since you registered your number on the
20 do not call registry approximately how many
21 telemarketing calls like this have you received?

22 A. Well, from the period of late 2004 when the
23 calling began until early July 2013 when I quit
24 taking calls that came in as private caller or an
25 unidentified caller, over those years I would

1 receive, especially -- I did not have a caller ID
2 function until November of 2009, when I changed my
3 telephone service. Prior to that point I had to
4 answer the phone, I wouldn't know who was calling
5 me. I would have roughly 40 to 50 of these calls
6 per year.

7 Q. All right. You said you stopped answering
8 unavailable calls?

9 A. My calling habits have changed dramatically
10 over the years in direct relation to the
11 telemarketing from "DISH Network solicitors." I
12 had -- I had a very basic landline with no frills
13 prior to late 2009. I had to answer the phone to
14 find out who was calling. And so during that time
15 period when these volumes of calls would be coming
16 to our home, sometimes five to six per week. Other
17 times we could even have on occasion one to three
18 calls in a single day. In fact, I've -- I have
19 filed donotcall.gov complaints with DISH Network
20 calls on the same day, actually within 15 minutes of
21 each other. I did that in 2012, I believe. 2012,
22 2013, I believe. No, it was 2013, at the end of
23 June, I did two calls, one at 5:25 and one at 5:40
24 on the same day. I was kind of shocked. And
25 actually it was the same caller and he said that I

1 really need to subscribe to DISH Network not to be
2 called.

3 So these are high volumes of calls. Prior to
4 obtaining new phone service in 2009 I had to answer
5 the phone. When I would lodge a complaint over the
6 call I would have to do so on the internet, but
7 didn't have internet access at home. So I could
8 dial in and get my e-mails through my college
9 server, but I had no internet access from home. So
10 I would the next day go in the office and I would
11 have notes from the call and then I would file the
12 do not call complaint from the office at that point.

13 Now, if, on the rare occasion that the
14 telemarketer had volunteered a call back number, I
15 would say there were a handful of occasions where I
16 would try to call that number from the office to try
17 to verify the number. With few exceptions these
18 were bogus numbers, not valid numbers. But I made
19 that then part of the complaint.

20 Now, you asked about my calling habits. They
21 did -- or my practices, is that right, counsel?
22 I've been -- my answer was lengthy so I'm not sure
23 of the initial question. I must have been
24 wondering, wasn't the question --

25 Q. I think the last question I asked you was

1 how many calls you received?

2 A. Yeah, quite a few I mean. 40 to 50 I think
3 a year is quite a few.

4 Q. Fair to say you didn't not want to receive
5 these calls?

6 A. I did not want to receive these calls. And
7 the 40 to 50 per year were only a fraction of the
8 total number of calls. That's only when I answered
9 the phones.

10 Q. Did you ever file a complaint with the
11 Illinois Attorney General's Office regarding these
12 calls?

13 A. Yes, I did. I went to the Villa Park Police
14 Department. We had had a high volume of calls from
15 solicitors representing themselves this way from
16 2005 to 2007. In late 2006 I went to the local
17 police department to see what could be done to get
18 these solicitation calls to stop. And they
19 recommended I contact the Illinois Attorney
20 General's Office. So I filed a complaint over the
21 phone calls with them at that point.

22 Q. Okay. Do you know was this complaint
23 forwarded to DISH Network?

24 A. I do know from correspondence I received
25 subsequently that this complaint had been forwarded.

1 Q. Okay. And did you ever reach out directly
2 to DISH Network to complain about this?

3 A. Yes, I did. There was one point over
4 those -- that almost decade long experience, that I
5 did go to the website for DISH Network and located
6 their customer service number and called them. And
7 I explained I had been receiving these calls in such
8 great volume incessantly and I asked to please be
9 taken off their calling list. But for a good five
10 years after that call, I mean, they still came in.

11 Q. When you were talking to a DISH Network
12 customer service representative what did they say to
13 you after you told them about your complaints?

14 A. They said they maintain a do not call
15 registry, a number, a list, and that my number would
16 be put on that list. That's what I learned on the
17 phone.

18 Q. Okay. And you said the calls didn't cease
19 after that?

20 A. There was no -- there was no diminishment in
21 the activity of the calls.

22 Q. Okay. You said a lot of times you tried to
23 make an effort to find out who was calling you, get
24 a call back number?

25 A. Well, yes. Prior to 2009 and when we

1 upgraded our telephone service, I believe that the
2 function on the old phones--this dates me--is star
3 76. And you would be charged a dollar from AT&T to
4 star 76 to find out the phone number of the person
5 you called. So I could -- most of the time I
6 couldn't get a number, but sometimes I did.

7 Q. And did you ever reach a person on the other
8 end?

9 A. There was one point I did reach a person. I
10 was given -- and actually, in this instance it
11 was -- I received a number not through call 76. A
12 call 76 were usually bogus numbers, or just not
13 available. But I received information from the
14 telemarketing caller at one point when I, in my
15 usual spiel, would ask, you know, "what is the
16 number associated with your business if someone were
17 trying to contact your company?"

18 And then I was -- actually had been -- I always
19 would ask for a supervisor too. I would rarely get
20 one. But I got a number. And I called that number
21 at one point and -- that was given to me. And on
22 one occasion it was apparently a legitimate number.
23 The person who answered the phone said his name was
24 Mike. And I asked him is this DISH Network. And
25 the man said yes. And I said thank you and I hung

1 up.

2 Q. why did you hang up?

3 A. I didn't want to give any impression that I
4 was interested in DISH Network services. I was very
5 worried about that, giving any impression I was
6 interested in the service. But I did report that in
7 my do not call complaint registry.

8 Q. So you tell these telemarketers to stop
9 calling. You tell them you're on the do not call
10 list. You complain to the Illinois Attorney
11 General, which was forwarded to DISH Network. You
12 talked to DISH Network directly. Did any of these
13 efforts stop these telemarketing phone calls?

14 A. These efforts did nothing.

15 Q. How did this make you feel?

16 A. Frustrated, helpless, despairing. Not
17 wanting to answer the phone. My habits have changed
18 over that ten year period. The frustration we had
19 prior to November 2009 was why, when a sales person
20 from AT&T showed up at our door and mentioned AT&T
21 Uverse, we were actually interested in the offer.
22 Normally we would never -- you know I had a very
23 cheap plan. I spent only 40 some dollars a month on
24 my telephone. So I changed for telephone and for --
25 I did also have internet access, so it would be \$90

1 a month. I didn't really need that, I could do that
2 at the office. I had no need for it, but I wanted
3 this plan because this plan would allow me to screen
4 phone calls with the Uverse feature. I would see
5 who was calling when they called in. So for that
6 reason alone the increase in cost was worthwhile.
7 Just something to try to stop getting harassed.
8 Because I had no way of knowing who was calling
9 prior to that. It was very frustrating. My wife
10 didn't want to answer the phone. I didn't want to
11 answer the phone. DISH Network become a name known
12 around our family's dinner table. It has remained
13 so.

14 We have changed our pattern since then. When
15 we got the new service in 2009 I asked them, I
16 can -- they said, well, you have to pay to have your
17 name unlisted in the telephone directory. I said
18 well, can we put it down as something like A. So
19 they changed my name from A Das in the phone direct
20 to just A, because people seemed -- telemarketers
21 knew my name as Das somehow. And they would always
22 ask, is this Mr. Das, we are calling from DISH
23 Network. So I thought maybe I could have this
24 volume of telemarketing calls reduced if I just have
25 my name at A in the telephone book, maybe -- however

1 they're getting the name.

2 Since then we're -- in the last few years since
3 2013, when I thought there was nothing to be done
4 about this and it was quite despairing. It had
5 gotten to the point where my wife and I don't answer
6 phone calls that come in as unavailable and private
7 caller. And then we still get telemarketing calls.
8 If it's the number one -- the DISH marketing calls
9 were coming in under the number one. There was one
10 that came quite consistently over 2012, 2013, and it
11 was 1-800-334-3474. I actually called AT&T and had
12 them do an investigation of the phone number. AT&T
13 reported back to me that they were not able to
14 find -- to match up that number with any legitimate
15 phone account. They were not able to determine who
16 was calling from that supposed number. But that was
17 the number that was coming up on caller ID.

18 So this was very frustrating to the point that
19 I had a function on a phone I bought where you could
20 block numbers. So it's sort of like the Star Trek
21 episode. When you are fighting the Borg you begin
22 to rotate your shield frequencies. So I will block
23 numbers, I will block the number 1 always. I will
24 block 800-344-3474, the DISH phone number. Any
25 numbers associated with DISH, I make sure I track

1 and put them on the block feature so then I see call
2 blocked. And I see the number one is call blocked.
3 I have a suspicion if I didn't have one blocked then
4 I would have a good idea who was calling because one
5 had always been DISH Network during that period from
6 my experience.

7 So yes, this has been a real nightmare for our
8 family and our -- our habits have completely changed
9 with respect to how we use a telephone.

10 Q. Those are all the questions I have at this
11 time.

12 THE COURT: Thank you, Mr. Heimlich.

13 States have any questions?

14 Mr. Ewald.

15 CROSS EXAMINATION

16 BY MR. EWALD:

17 Q. Good afternoon, Dr. Das. Do you remember
18 taking your deposition in this case?

19 A. Yes. It would have been October of 2011.

20 Q. You recall testifying that 100 percent of
21 the calls that you received relating to DISH came
22 from callers with Indian accents?

23 A. Yes, that is correct.

24 Q. And it's your belief the calls were coming
25 from an Indian call center; right?

1 A. Indian or Pakistani.

2 Q. And --

3 THE COURT: I'm sorry, why did you think
4 that?

5 A. I'm half Indian, so I recognize Indian
6 accents.

7 THE COURT: Okay.

8 Q. Isn't it true that you based any belief that
9 the calls originated from DISH entirely on the
10 content of the calls and on the callers identifying
11 themselves as DISH Network?

12 A. Yes.

13 Q. And in fact, when we started this testimony
14 on a couple of occasions you said "DISH Network"?

15 A. Yes, I said "DISH Network".

16 Q. Because you're not sure if in fact it was
17 DISH Network?

18 A. I can only testify to my own experience.

19 Q. I appreciate that. So you have no way of
20 knowing whether the calls were truly from DISH?

21 A. With the one exception when I got a call
22 back number and I called the call back number. And
23 Mike -- I asked him is this DISH Network, and he
24 said yes.

25 Q. Well, that was not a call from DISH, that

1 was a number you dialed; right?

2 A. No, that was a number provided by the DISH
3 Network telemarketers that I then called back.

4 Q. And we'll get back to that one, okay?

5 A. Sure.

6 Q. Actually, the DISH telemarketers, or "DISH
7 telemarketers" that you've encountered, you have no
8 way of knowing whether those people were truly
9 calling from DISH; right?

10 A. As a consumer I don't know how I would.

11 Q. And you don't know whether they're actually
12 calling on behalf of DISH; right?

13 A. Well, they're marketing DISH services.

14 Q. Again, apart from what they were
15 representing, you don't know whether they were
16 actually calling on behalf of DISH?

17 A. I assume when they go into spiels about
18 satellite service and two year subscriptions and
19 \$500 off on your satellite DISH Network
20 subscription, or 50 percent reduction in cost over
21 the two years of your initial run with DISH Network,
22 I could only assume that those were all legitimate
23 offers. I can't verify that.

24 Q. And you can't say for sure whether or not
25 those individuals were calling with DISH's approval;

1 right?

2 A. I do not know the relationship of the
3 callers to the company.

4 Q. And in fact, on the one occasion that you
5 spoke with a DISH representative on the phone, and
6 when you received a letter from DISH, both times
7 they said they didn't call you; right?

8 A. In the letter that EchoStar sent me, I'm
9 assuming they represent DISH Network, yeah --

10 Q. Formally known as --

11 A. Right. They said I was on their do not call
12 list, and -- I don't know, I can't recall if they
13 said they were not calling me, but they certainly
14 said they would keep me on their do not call list.

15 Q. Let's look at that one. PX1392.

16 A. Yes, I recognize the letter.

17 Q. And do you see the third paragraph down, (as
18 read:) DISH Network subscribes to a database that
19 allows us to track all of our outbound phone calls.
20 This database also contains national, state, and
21 individual company do not call list information.
22 After researching this database, we have determined
23 that DISH Network has not placed a solicitation call
24 to Mr. Das' home.

25 Do you see that?

1 A. Yes.

2 Q. And did you receive this letter?

3 A. Yes, I did.

4 Q. I would move PX1392 into evidence.

5 THE COURT: Any observation?

6 MR. HEIMLICH: No objection.

7 THE COURT: It's admitted.

8 (Plaintiffs' Exhibit 1392 admitted.)

9 Q. And blow that up, Trudy. The paragraph that
10 starts with (as read:) I have added Mr. Das' phone
11 number to our DISH Network do not call list. This
12 will take effect no later than February 21st, 2011.
13 After this he will not receive any solicitation
14 calls from DISH Network.

15 Do you see that?

16 A. Yes.

17 Q. Do you recall receiving that at the time?

18 A. Yes, I do.

19 Q. You're not aware of any written
20 documentation evidencing that DISH Network called
21 you, right?

22 A. Evidence that DISH Network directly called
23 me? I do not have evidence of that sort.

24 Q. You're not aware of any written
25 documentation evidencing that you were contacted by

1 an authorized DISH retailer, do you?

2 A. I do not know if the "DISH Network
3 solicitors" were authentic or not.

4 Q. And you never actually tried to purchase the
5 DISH services that were purportedly being offered by
6 these calls; right?

7 A. No, I never did.

8 Q. So as you sit here today you don't know
9 whether the callers could have sold you DISH
10 services if you had indicated you wanted them?

11 A. I only know that they represented themselves
12 as being able to make those sales.

13 Q. And in fact, at least some point in the past
14 you suspected that individuals identifying
15 themselves as DISH Network might actually be
16 associated with a fraudulent company; is that right?

17 A. I don't know that one way or the other.

18 Q. Let's look at PX1390. Dr. Das, do you
19 recognize this?

20 A. Yes.

21 Q. What is it?

22 A. It is one of the complaint forms that I
23 filled out to the Illinois Attorney General's Office
24 for one of the solicitation calls I received.

25 Q. If you can turn to page 2, Trudy. In what

1 is paragraph 17 it asks: How would you like the
2 complaint resolved? You see there it says Identify
3 if "DISH Network" is DISH Network or a fraudulent
4 company?

5 A. Yes, that's correct. As I said, I don't
6 know whether they are or they are not.

7 Q. You testified that callers would sometimes
8 give you call back phone numbers at your request;
9 right?

10 A. That's correct.

11 Q. And the numbers would be identified to you
12 as a DISH business number?

13 A. Yes.

14 Q. In a handful of instances you tried to call
15 those customers back; right?

16 A. That's correct.

17 Q. Try to verify that the numbers were
18 legitimate?

19 A. Yes.

20 Q. You would expect a large corporation like
21 DISH to give you a number that connected to someone
22 who answered professionally, wouldn't you?

23 A. I don't know.

24 Q. Well, if in fact DISH Network was trying to
25 sell you services they would want to give you an

1 active number, wouldn't they?

2 A. Presumably.

3 Q. But as you testified, most of the numbers
4 here typically, as you said, bogus?

5 A. Well, these people wanted to make the deal
6 over the phone directly and were hesitant to provide
7 call back numbers. I had to -- to request that
8 repeatedly on many of these phone calls. Assuming
9 that they stayed on the line.

10 Q. Of course. Let's just talk briefly about
11 the conversation you talked about --

12 A. Oh, one thing. This, of course, is prior to
13 November 2009, when we had a call back -- or a
14 number identification on our telephone service.

15 Q. All right. So let's talk about the call you
16 had -- brief call you had with a person who
17 identified himself as Mike. Okay?

18 A. Sure.

19 Q. So that was the only time --

20 THE COURT: Mr. Ewald, before you go away
21 from PX1390. There is a question, 14: What was the
22 product or service offered during the call? And
23 you've written in here, I believe, phone service to
24 Indian?

25 A. Yes, that's correct. DISH Network -- the

1 DISH Network calls, the vast majority of them were
2 soliciting satellite TV service. But there were --
3 there were a small number of these--I would say also
4 on a handful, and so you're receiving 40 to 50 calls
5 a year and a portion of that is logged as
6 complaints. But there were, I would say, a handful
7 of these calls over the years where the -- the
8 Indian-accented solicitor would also -- or -- would
9 either would also try to market phone service to
10 India, or that -- in this case I think that may have
11 been a DISH Network person marketing phone service
12 to India. This was an unusual call in that regard.

13 THE COURT: Thank you.

14 Q. Of course.

15 Let's talk about the phone call with Mike. And
16 you called this number after receiving it from one
17 of the telemarketing calls that you received; right?

18 A. Correct.

19 Q. They said that this was a phone number for
20 DISH?

21 A. I asked him is this DISH Network and he said
22 yes, it is.

23 Q. Would you -- you would expect a toll free
24 number like the one that you called to lead you back
25 to a customer service agent at DISH; right?

1 A. Possibly. If you called Elmhurst College to
2 my line I would answer it Andrew.

3 Q. But you're not trying to sell services,
4 right?

5 A. This was a call back number to the company.
6 Whether it's to their customer service division or
7 whether it's to an individual, I don't know.

8 Q. And when you called it was answered with
9 "Hello, this is Mike," is that right?

10 A. This is Mike.

11 Q. And I believe you testified at your
12 deposition that the fellow answered it as if it was
13 something like his personal line?

14 A. Yeah, much like my line in the office
15 presumably.

16 Q. Okay. And in the call you asked Mike if
17 you'd reached DISH, and he said yes?

18 A. DISH Network, and he said yes.

19 Q. And you immediately terminated the call?

20 A. That's correct.

21 Q. Now, you had no way to verify the person on
22 the other end actually worked at DISH?

23 A. I can only go by how he represented himself.

24 Q. And even if he was at DISH, you can't say
25 whether or not DISH authorized the original caller

1 to direct people to this number; right?

2 A. I just -- that's the call back number they
3 provided me.

4 Q. Your Honor, I would -- I have no further
5 questions.

6 THE COURT: Anything further.

7 MR. LEE: I just have a couple, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. LEE:

10 Q. Mr. Das, you testified about some of the
11 specifics of the offers that you were being
12 solicited over these phones calls.

13 A. Yes.

14 Q. I know you testified that you were never
15 interested. But what did you think would have
16 happened if you had gone through this sales process
17 that was being offered to you?

18 A. I think I would be asked to provide my
19 credit card number and payment information and I
20 would receive satellite service.

21 Q. Satellite service from who?

22 A. From DISH Network.

23 Q. Now, you've also testified about providing
24 complaints to the donotcall.gov website, about going
25 down to the police station, filing written

1 complaints with the State Attorney General's Office,
2 keeping track of all of the calls and complaints you
3 got, specific notes. Am I recalling that correctly?

4 A. In 2012 and 2013, I was filing my complaints
5 with the do not call registry with three to five
6 minutes of the calls themselves, and e-mailing those
7 complaints to donotcall.gov to one of the lawyers at
8 the Illinois Attorney General's Office, as well as a
9 representative of, I believe, the FTC.

10 Q. Now, lots of people also do sort of what you
11 testified to have done, which is just ignore the
12 calls. But instead, you've gone and taken all these
13 steps?

14 A. Yes.

15 Q. Could you tell us why you've gone to such
16 efforts?

17 A. Absolutely. It's -- it was so distressing
18 prior to receiving upgraded phone service when you
19 don't know who's calling. It could be your parents,
20 your in-laws, your family, or people who are
21 trying -- legitimately trying to get in contact with
22 you, and then to have these telemarketing calls.

23 And the majority of our telemarketing calls at
24 that point prior to 2009 were DISH Network calls.
25 They were repeated callers. They came in clusters.

1 The clusters were sometimes quite intense. There
2 would be a month or two during the year when we
3 would get five to six calls a week, sometimes --
4 usually one call a day, but sometimes two or three
5 calls in a day.

6 Those are very distressing periods for our
7 family. That's the reason I made contact in 2006
8 with the Illinois Attorney General's Office, because
9 it was quite an intrusion on our family, on our
10 dinner hour. These calls came late in the afternoon
11 or early in the evening. Quite an intrusion on our
12 family. The only way we could figure to get it
13 stopped was to try to make complaints and be
14 diligent with this.

15 Q. Do you think that people, consumers, should
16 have to go to the lengths you did to stop these
17 types of calls?

18 A. No one should have to go through this as a
19 consumer.

20 MR. LEE: Thank you. That's all I have.

21 MR. HEIMLICH: I have one more.

22 THE COURT: Mr. Heimlich.

23 REDIRECT EXAMINATION

24 BY MR. HEIMLICH:

25 Q. Dr. Das, when you talked to DISH did they

1 seem particularly concerned that someone was calling
2 you? I know they said they didn't call you, but did
3 they seem concerned that someone was calling saying
4 they were DISH Network?

5 A. I got the impression it was a call center
6 for customer services and it was just someone saying
7 we will write your name down for the do not call
8 list for our company.

9 Q. Did they ever call you to do further
10 investigation?

11 A. They did not call to do further
12 investigation. I did receive a letter from EchoStar
13 claiming they had tried to make contact with me to
14 investigate the one complaint we had. We have an
15 answering machine. And we have no messages from
16 EchoStar or DISH Network, LLC, from that time
17 period. We had no messages from them. We had no
18 attempts to call from them. And we answer our
19 phone.

20 MR. HEIMLICH: That's all I have.

21 THE COURT: Anything further, Mr. Ewald?

22 MR. EWALD: Nothing further.

23 THE COURT: Thank you. You're excused.

24 (The witness was excused.)

25 MR. HEIMLICH: Your Honor, can I move to

1 admit PX1390.

2 THE COURT: PX1390. Any objection?

3 Mr. Ewald, any objection to 1390?

4 MR. EWALD: I'm sorry, Your Honor, what?

5 THE COURT: Any objection to PX 1390?

6 MR. EWALD: No, Your Honor. My apologies.

7 THE COURT: All right. It's admitted.

8 (Plaintiffs' Exhibit 1390 admitted.)

9 THE COURT: And while we are talking about
10 exhibits, I have marked as admitted all of our
11 exhibits from yesterday.

12 If you will go ahead and get Mr. Mills.

13 So the following exhibits have been admitted --
14 we will make a record later, let's get the witness
15 on the stand.

16 (A discussion was held off the record.)

17 THE COURT: Mr. Mills. If you will step
18 over here and be sworn.

19 (The witness was sworn.)

20 THE COURT: Please proceed.

21 MIKE MILLS

22 called as a witness herein, having been duly sworn,
23 was examined and testified as follows:

24 CROSS EXAMINATION

25 BY MS. OHTA:

1 Q. Good afternoon, Mr. Mills. My name is Jin
2 Ohta and I'll be asking you some questions this
3 afternoon.

4 A. Okay.

5 Q. Would you please state and spell your name?

6 A. Michael James Mills, M-i-c-h-a-e-l,
7 J-a-m-e-s, M-i-l-l-s.

8 Q. Are you currently employed at DISH Network?

9 A. I am.

10 Q. And what is your current title?

11 A. Director of Sales.

12 Q. What are your job responsibilities as
13 director of sales?

14 A. I'm director of sales for our OE retailers.

15 Q. As director of sales do you work with DISH
16 employees called national account managers?

17 A. I do.

18 Q. Do they also work with OE retailers?

19 A. They do.

20 Q. Do you also work with a group of DISH
21 employees called FSDRs?

22 A. I do not.

23 Q. Did you in the past when you had different
24 titles with DISH?

25 A. Yes.

1 Q. And I'll come back to that.

2 what was the first job you had with DISH that
3 involved working with its OE retailers?

4 A. I was a business development manager.

5 Q. And when did you begin in that position?

6 A. June 29, 2001.

7 Q. Okay. And did you -- after that position
8 did you become a regional sales manager at some
9 point?

10 A. I did.

11 Q. And when was that?

12 A. I forget the months, but I think it's
13 somewhere in the 2004 time frame.

14 Q. And you were still working with OE retailers
15 in your capacity as regional sales manager?

16 A. There were OE retailers in my region, but I
17 wasn't, you know, solely responsible for OE
18 retailers at the time.

19 Q. But you did work with the OE retailers in
20 your region in your role as regional sales manager?

21 A. If there was, yes.

22 Q. So as regional sales manager did you at that
23 point work with DISH employees called FSDRs?

24 A. No.

25 Q. Did you work with national account managers

1 as a regional sales manager?

2 A. I did not.

3 Q. So after you were regional sales manager
4 what's the next position that you held with the
5 company?

6 A. National sales manager.

7 Q. And what were your responsibilities with
8 regard to OE retailers as a national sales manager?

9 A. I was responsible for OE retailers.

10 Q. And in that position did you work with
11 national account managers?

12 A. No.

13 Q. Did you work with FSDRs?

14 A. I take that back. With the national account
15 managers, in that role I believe that role morphed
16 at some point in time that I did.

17 And to your next question with FSDRs, yes as
18 national sales manager, yes, I did.

19 Q. And did you oversee FDSRs or work with
20 them -- are they in your chain of hierarchy?

21 A. They did not report directly to me, no.

22 Q. But you worked together with them in your
23 work with OE retailers; correct?

24 A. At points in time, yes.

25 Q. And after your position as national sales

1 manager did you become director of sales after that,
2 or was there a position in between?

3 A. I became director of sales after that.

4 Q. And when was that?

5 A. I believe sometime in the 2008 time frame.
6 Maybe February.

7 Q. So we already mentioned OE retailers several
8 times. Would you just give us a short description
9 of what are OE retailers?

10 A. So OE retailers, the OE stands for order
11 entry. They were retailers that could sell on a
12 national basis through the OE tool, in which they
13 would take orders for DISH and DISH would fulfill on
14 the installation.

15 Q. And when did DISH as a company start working
16 with OE retailers?

17 A. Later part of 2003.

18 Q. So is the OE tool that you just mentioned,
19 is that an online sales portal used to enter orders
20 for DISH?

21 A. Yeah, that would be accurate.

22 Q. And did DISH create the OE tool?

23 A. It was an inhouse application, yes.

24 Q. And did DISH maintain the OE tool? From an
25 IT prospective, keeping it up and running?

1 A. Yes.

2 Q. Does DISH distribute log-ins to retailers to
3 allow them access to a OE tool?

4 A. We did.

5 Q. And could DISH take away a retailer's access
6 to the OE tool?

7 A. We could.

8 Q. Could you turn to Plaintiffs; Exhibit 1208.

9 THE COURT: He doesn't have a book. Nor do
10 I.

11 Q. That was Plaintiffs' Exhibit 1208.

12 THE COURT: I would like to thank my court
13 reporter for real time. Have you found it helpful?

14 MR. BICKS: Yes.

15 THE COURT: Have you used it before?

16 MR. BICKS: Yes.

17 THE COURT: Where?

18 MR. BICKS: Eastern District, Southern
19 District of New York, and in Arizona. Many
20 different jurisdiction actually.

21 THE COURT: State or federal court?

22 MR. BICKS: Mostly federal.

23 THE COURT: I ask because I think I told
24 you before I kept being denied real time for the
25 attorneys.

1 MR. BICKS: I don't want to be a witness.

2 THE COURT: You're going to be a witness,
3 because you've had it.

4 Please continue.

5 BY MS. OHTA:

6 Q. Have you had a chance to flip through that
7 exhibit?

8 A. Give me a moment here. Yes.

9 Q. Does that document look familiar to you?

10 A. It does.

11 Q. What is it?

12 A. It's the order entry tool screen shots.

13 Q. Okay. Is it a training guide to each OE
14 retailers how to place an order through the tool?

15 A. It looks like it would have been used some
16 time ago.

17 Q. And were you involved in creating some
18 original version of this document?

19 A. I'm sure I was.

20 Q. And I'm sure minor changes have been made to
21 this process along the way since this document was
22 created. But just in broad strokes, does this
23 document appear to accurately convey steps for a
24 sales rep to enter an order through the OE tool?

25 A. It does.

1 Q. And these are steps that a sales rep for an
2 OE retailer would take while having a customer on
3 the phone with them; is that correct?

4 A. Yes.

5 Q. And so the process of entering an order
6 through the OE tool, did that include entering in
7 customer address information?

8 A. Yes.

9 Q. Does it also include entering in a customer
10 Social Security number for a credit check?

11 A. Yes.

12 Q. Does it also include entering in credit card
13 number information for card validation?

14 A. Yes.

15 Q. And selecting a promotion and an
16 installation date?

17 A. Yes.

18 Q. Does it also include a step for entering
19 payment information and having the option to sign up
20 for auto pay?

21 A. Yes.

22 Q. If you'll turn to page 13 of that exhibit.
23 Does the OE tool prompt the sales rep working for an
24 OE retailer to read to the customer these terms and
25 conditions of sale?

1 A. There were terms and conditions included in
2 the OE tool, yes.

3 Q. And DISH would provide the language for
4 these terms and conditions that are read to the
5 customer; correct?

6 A. That is correct.

7 Q. And finally, once an order is placed, DISH
8 fulfills the installation; correct?

9 A. That's correct.

10 Q. Would you turn to Plaintiffs' Exhibit 334.
11 And flip to page 4 of that exhibit.

12 So is it correct that one of the benefits to an
13 OE retailer of using the OE tool is that all money
14 transactions placed through the tool are directly
15 between DISH and the customer? Is that right?

16 A. That's what it says, yes.

17 Q. And so the OE retailer actually has no role
18 in that transaction. It's a direct transaction
19 between DISH and the customer?

20 A. The monies collected in the OE tool are
21 between DISH and the customer.

22 Q. And the customer will see DISH -- if the
23 customer uses a credit card, the customer will see
24 DISH on his or her credit card statements; is that
25 right?

1 A. If there was a transaction, right.

2 Q. Would you please turn to the -- turn to page
3 5 of the same exhibit. It's the very next page.
4 And this page describes limitations of the OE tool.
5 And it says that -- it appears to say that the OE
6 tool does not accommodate commercial accounts. Does
7 that mean that the OE tool can't be used to enter
8 orders from hotels?

9 A. Yes.

10 Q. Does it also mean that the OE tool can't be
11 used to enter orders for bars and restaurants?

12 A. At this time, yes.

13 Q. And for apartment buildings with multiple
14 residences?

15 A. Somewhat. We can put DISH into apartment
16 buildings. There are certain apartment buildings
17 designated as MDU properties that we were unable to
18 install.

19 Q. Okay. So the limitations of the OE tool was
20 that the OE tool could not be used to enter orders
21 for the specific MDU full apartment buildings; is
22 that right?

23 A. Yeah. There was a certain subset we could
24 not.

25 Q. Were OE retailers paid an amount per order

1 placed with DISH through the OE system?

2 A. They were paid an incentive upon account
3 activation.

4 Q. And that would be the result of an order
5 placed through the OE tool?

6 A. That's correct.

7 Q. So for retailers who only placed orders
8 through the OE tool, they wouldn't have had any
9 reason to try to market DISH to businesses or
10 hotels; correct?

11 A. At this time, no.

12 Q. And only to private residences?

13 A. Residences, correct. Residential
14 properties.

15 Q. If you'll turn to page 6 of the same
16 exhibit. Under field sales development. This
17 document says that DISH's field sales development
18 representatives provided weekly sales trainings to
19 OE retailers. Do you know what those sales
20 trainings consisted of?

21 A. Promotions is what it states. Promotions,
22 pricing, packages, information on a DISH product.

23 Q. And what would this consistent localized
24 support referenced in this document consistent of?

25 A. So we had field development or field sales

1 development folks scattered throughout the --
2 scattered throughout the country. So I think that's
3 probably what that's referring to.

4 Q. And what would be the actual support
5 services that were being provided?

6 A. Training.

7 Q. In the course of your work did you visit OE
8 retailers at their call centers?

9 A. I did.

10 Q. And did you go to call centers to train OE
11 retailers yourselves? Yourself, sorry?

12 A. I did early in the process, yes.

13 Q. And is that when you were a regional sales
14 manager?

15 A. It was probably more when I was a business
16 development manager, and as needed early on in my --
17 when I was a national sales manager.

18 Q. And did you, in that same early time period
19 that you just referenced, did you train OE retailers
20 on how to use the OE tool?

21 A. I did.

22 Q. And when your job duties progressed such
23 that you weren't doing this personally yourself
24 anymore, do you know if account managers or FSDRs
25 also trained OE retailers on how to use the tool?

1 A. I would say more account managers within my
2 group would train on the OE tool.

3 Q. And FSDRs, did they have any role -- any
4 role in training on the OE tool? I know we just
5 talked about the training and the consistent
6 localized support that they provided.

7 A. I think they were familiar with the OE tool,
8 but that wasn't their primary role. They were there
9 really specifically on training on the promotions,
10 pricing, products.

11 Q. And did DISH send -- send somebody to train
12 OE retailers when they had new sales
13 representatives, to train them on the OE tool?

14 A. It just really probably depends on the
15 timing.

16 Q. But it would do so depending on the timing?
17 Do you have a sense of how often that would happen?

18 A. If -- if FSDRs or account managers were
19 onsite for training and they had new employees, then
20 those new employees would have been part of that
21 training.

22 Q. All right. So if they were already onsite
23 to train on the promotions or the products; is that
24 what you're saying?

25 A. Correct.

1 Q. So this training on things like pricing,
2 products, and promotions, is that something that
3 national account managers did as well?

4 A. Yes, when needed.

5 Q. And how often was that needed?

6 A. Really depends on the account.

7 Q. Excuse me?

8 A. Really depends on the OE retailer.

9 Q. Okay. Under what circumstances would there
10 be more training needed?

11 A. Probably the more agents.

12 Q. When you visited OE retailers did you listen
13 to live sales calls at the retailer call center?

14 A. I have.

15 Q. And was this more when you were a business
16 development manager, regional sales manager?

17 A. I'm not sure on specifics. I would probably
18 say more so on the national account manager.

19 Q. Okay. But when you moved on to other
20 positions, national account managers -- sorry,
21 strike that. So national account managers also
22 monitored calls at OE retailer call centers;
23 correct?

24 A. Yes.

25 Q. And did you review sales scripts for OE

1 retailers and suggest changes?

2 A. I have over time.

3 Q. And did you review scripts for disclaimers
4 to be read to customer and suggest changes to those?

5 A. I have, and our compliance group has as
6 well.

7 Q. All right. Would you turn to Plaintiffs'
8 Exhibit 207. Do you recognize this document?

9 A. I do.

10 Q. And was this an instance of when you
11 provided comments on changes -- comments and changes
12 on disclaimers in scripts for an OE retailer named
13 Star Satellite?

14 A. This looks like I did, yes.

15 Q. And was providing these kinds of comments on
16 scripts and disclaimers something you did regularly?

17 A. I wouldn't say I did this regularly.

18 Q. Okay. Do you recall being deposed in this
19 case?

20 A. Yes.

21 Q. Under your very first tab you'll see some
22 pages from one of your depositions in the case.
23 Will you turn to page 71 of that deposition
24 transcript.

25 This will be -- sorry, the tab will say -- this

1 will be for your May 3rd, 2012, deposition.

2 A. Okay. I'm sorry, where am I to look?

3 Q. Page 71 of your May 3rd, 2012, deposition.

4 And I'm starting at line 7 where the question says
5 (as read:) Do you remember providing comments on
6 sales scripts that retailer sales agents would use
7 in selling DISH Network services.

8 You answered yes.

9 How often did you provide those kind of
10 comments?

11 Answer: Regularly.

12 Did I read that correctly?

13 A. You did.

14 Q. And DISH has always provided comments on
15 retailer scripts for disclaimers for OE retailers;
16 correct?

17 A. I'm sure if we were asked we would.

18 Q. And have you provided those comments since
19 the inception of the OE program?

20 A. I would assume we have.

21 Q. would you like to see something that would
22 make you more sure or refresh your recollection?

23 A. Sure.

24 Q. would you turn to page 73 of that same
25 deposition transcript that you had open. You can

1 take a look at lines 9 to 16.

2 A. Okay.

3 Q. So was providing comments on retailer
4 scripts for disclaimers something that DISH has been
5 doing since the inception of the OE tool?

6 A. Yes. I thought you were referring to me in
7 a personal capacity. Sorry.

8 Q. No problem. We all understand that was a
9 long time ago.

10 Switching gears a little bit. Did DISH
11 institute a quality assurance program for its OE
12 retailers?

13 A. We did.

14 Q. And the quality assurance program, or the QA
15 program, what was it?

16 A. The QA program was a list of questions,
17 mostly around disclaimers, to the consumer to ensure
18 those had been properly read.

19 Q. So was DISH's purpose in implementing this
20 program to improve the quality of sales calls made
21 by the OE retailers?

22 A. Yes.

23 Q. Would you turn to Plaintiffs' Exhibit 1048.
24 Do you recognize this document?

25 A. Yes.

1 Q. So these look like various QA action plans
2 written by national account managers Clay Suter. If
3 you flip to page 4, will walker. There's Terrence
4 Rukas, Richard Brilli. Are these national account
5 managers that you worked with?

6 A. They were at the time, yes.

7 Q. So did the QA program include DISH
8 communicating its expectations of OE retailer sales
9 calls with customers?

10 A. I'm sorry, can you say that again.

11 Q. Sorry, that wasn't a very good question. So
12 did someone at DISH communicate to OE retailers
13 these QA expectations for phone calls that would
14 happen with customer?

15 A. Yes, we communicated QA expectations.

16 Q. And did the QA program require OE retailers
17 to record and upload calls to an FTP site?

18 A. At this time it did.

19 Q. And did the QA program also involve DISH
20 evaluating the OE retailer sales calls to see how
21 well they had executed on the expectations that were
22 communicated to them?

23 A. There were -- there are some questions in
24 the QA to right sizing. So did they ask questions
25 and did they provide a solution based on the answers

1 to the questions based on what the consumer said.

2 Q. Thank you. So did the QA program involve
3 DISH evaluating the OE retailer sales calls
4 according to the expectations?

5 A. Yes.

6 Q. And were there results of those evaluations
7 in the form of QA scores?

8 A. There was.

9 Q. And did your sales group receive the scores
10 from the calls?

11 A. We did.

12 Q. Was that on a weekly basis?

13 A. Yes.

14 Q. And did your sales group discuss those
15 scores with OE retailers?

16 A. Yes.

17 Q. And did your sales group counsel OE
18 retailers on how to improve those scores?

19 A. Yes. They would work with the retailers to
20 improve those scores; yes.

21 Q. Okay. So in order to improve those scores
22 did you or your account managers further listen to
23 calls onsite?

24 A. Account managers would listen to calls
25 onsite from time to time, yes.

1 Q. And in order to improve scores did you or
2 your account managers review scripts, further review
3 scripts?

4 A. They could have.

5 Q. But you don't remember if they actually did
6 or not?

7 A. I'm sure they did.

8 Q. So if you will turn to page 3 of the same
9 exhibit. And there is -- I know the text is small.
10 There's a bolded italicized section toward the
11 bottom of the page. Starting, "If all else fails."

12 A. Okay.

13 Q. So in an attempt to improve QA scores could
14 DISH withhold DISH promotions from OE retailers to
15 stop them from selling?

16 A. No.

17 Q. Excuse me?

18 A. No.

19 Q. Does this national account manager appear to
20 think that they could do so?

21 A. I'm reading this as a flippant comment from
22 a national sales manager. Or national account
23 manager.

24 Q. So these OE partner QA action plans. Let's
25 go back to what kinds of documents these are. So