

**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.

Electronically Filed  
Mar 30 2021 01:46 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Supreme Court No. 81704

District Court No.  
A-17-763397-B

**JOINT APPENDIX**

**Vol. 67 of 85**

**[JA015255-JA015502]**

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

<sup>2</sup> The Evidentiary Hearing Exhibits were filed with the District Court on July 6, 2020.

EXHIBIT 752

EXHIBIT 752

JA015255  
013977

TX 102-014517

1                   IN THE UNITED STATES DISTRICT COURT.  
2                   FOR THE CENTRAL DISTRICT OF ILLINOIS  
3                   SPRINGFIELD DIVISION

4   UNITED STATES OF AMERICA and   )  
5   The STATES OF CALIFORNIA,       )       MOTION HEARING  
6   ILLINOIS, NORTH CAROLINA, and   )  
7   OHIO,                               )       09-03073  
8                   PLAINTIFFS,       )  
9               VS.                     )       SPRINGFIELD, ILLINOIS  
10   DISH NETWORK, L.L.C.,            )  
11                   DEFENDANT.       )

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

15   NOVEMBER 2, 2016

16   A P P E A R A N C E S:

17   FOR THE PLAINTIFFS:

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20   STATE OF CALIFORNIA:	JINSOOK OHTA
21   (By telephone)	ADELINA ACUNA
22   STATE OF ILLINOIS:	ELIZABETH BLACKSTON
23   (By video)	PAUL ISAAC
	PHILIP HEIMLICH
24   STATE OF OHIO:	ERIN LEAHY
25   (By video)	JEFF LOESER
STATE OF NORTH CAROLINA:	DAVID KIRKMAN
(By video)	TERESA TOWNSEND
FEDERAL TRADE COMMISSION:	RUSSELL DEITCH
(By video)	GARY IVENS
Also present:	ANDREA GRABOW
(By video)	ERINN MARTIN

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NUMBER

## IDENTIFIED

## ADMITTED

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## IDENTIFIED

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

\* \* \* \* \*

THE COURT: This is 9-CV-3073, the United States versus DISH.

We have a witness, Ken Sponsler, appearing at Orrick in New York. His attorney is there as well, Michelle Schuster with MacMurray, Peterson, and Schuster.

We have the plaintiffs by video from New York, Lisa Hsiao, Patrick Runkle, Sang Lee.

We, unfortunately, have difficulty with our connections elsewhere.

We have State of California, Ms. Ohta and Ms. Acuna, by phone.

We have the State of Illinois by video, Paul Isaac, Elizabeth Blackston, Phil Heimlich.

State of North Carolina, David Kirkman, Teresa Townsend, by video.

Ohio, Erin Leahy, Jess Loeser by video.

United States Federal Trade Commission, Russell Deitch and Gary Ivens, by video.

We have Ms. Mazzuchetti with Kelley, Drye by video in New York at Orrick.

And Peter Bicks, Elyse Echtman, John Ewald, David Litterine-Kaufman, Louisa Irving, Allegra

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1 Noonan by video.

2 By telephone, we have DISH in-house counsel,  
3 Stanton Dodge, Lawrence Katzin, and Brett Kitei.

4 Have I neglected to recognize anyone who is  
5 present today for this video witness?

6 All right.

7 MS. ECHTMAN: Your Honor, I just need to  
8 correct something. It's Elyse speaking.  
9 Mr. Litterine-Kaufman is not here by video today,  
10 but Ms. Noonan and Ms. Irving are.

11 There are also representatives of the Federal  
12 Government here who I'll allow to introduce  
13 themselves.

14 THE COURT: All right. would you  
15 introduce --

16 MS. GRABOW: Andrea Grabow and Erinn  
17 Martin, Your Honor.

18 THE COURT: Okay. I apologize profusely  
19 for the delay in starting, as well as for the  
20 difficulty in establishing our video connections.

21 Have you determined, Diane, is it our fault?

22 THE CLERK: I do not believe so.

23 MR. BICKS: Yes. Judge, this is Peter  
24 Bicks. I think the fault is -- we had a network  
25 outage here at Orrick, so the blame lays on our

1 backs here. So I want to apologize for that. It  
2 happens from time to time. And our IT folks did  
3 everything possible to get this up and running.

4 And so I want to make it clear your staff has  
5 done an excellent job and the fault was on the  
6 Orrick end.

7 THE COURT: Thank you, Mr. Bicks. I wasn't  
8 trying to blame Diane by any means. She does a  
9 yeoman's job. And we do have additional staff  
10 present from Champaign-Urbana who are working to  
11 help cure the problems.

12 Do we have a witness, Mr. Sponsler? Could you  
13 raise your right hand and Diane will swear you in.

14 (The witness was sworn.)

15 THE COURT: Please proceed.

16 KEN SPONSLER

17 called as a witness herein, having been duly sworn,  
18 was examined and testified as follows:

19 DIRECT EXAMINATION

20 BY MS. ECHTMAN:

21 Q. Good morning, Mr. Sponsler.

22 A. Good morning.

23 Q. You were on vacation last week; is that  
24 right?

25 A. That's right, yes.

1 Q. And how was your fishing trip?

2 A. It was a wonderful trip. Great reunion with  
3 my brothers and Army versus Navy fishing trip we  
4 have every year.

5 Q. Did you win?

6 A. I won. Army won.

7 Q. That's great. How far in advance was that  
8 trip planned?

9 A. It's an annual trip. We go around the last  
10 week in October every year for the past ten years.  
11 Everybody flies into Atlanta and drives seven hours  
12 down there. So it's a big event for us. The house  
13 is, you know, about a thousand dollars a week, plus  
14 the travel. So very difficult to --

15 (Court reporter requested clarification.)

16 THE COURT: Mr. Sponsler, we're losing your  
17 voice. Where is your microphone located?

18 MS. ECHTMAN: I think the microphone is  
19 right here. I don't know that I can -- we'll try  
20 and see with our IT folks if we can move something  
21 closer to Mr. Sponsler so you can hear better.

22 THE COURT: Okay. Thank you.

23 BY MS. ECHTMAN:

24 Q. Mrs. Sponsler, if you could speak up.

25 I know you were on vacation last week. And

1 were you willing to travel to Apalachicola, if  
2 necessary, to testify by video?

3 A. Yes. I thought perhaps if we could find a  
4 location that had video conference capability, I  
5 would be willing to do that.

6 Q. Well, we appreciate your coming to New York  
7 to testify today by video.

8 Mr. Sponsler, do you still work at Compliance  
9 Point?

10 A. Yes. I'm still the senior vice-president  
11 and general manager.

12 Q. And can you tell me what the relationship is  
13 between PossibleNow and Compliance Point?

14 A. PossibleNow is our parent company.  
15 Compliance Point is a wholly-owned subsidiary of  
16 PossibleNow. So the officers--Rick Stauffer, Scott  
17 Frey, and Chris Hoover--are the senior officers at  
18 PossibleNow as well as Compliance Point.

19 Q. What business is Compliance Point engaged  
20 in?

21 A. Compliance Point, since 2005, has focused on  
22 providing consultative services to help companies  
23 comply with consumer contact regulations. Our focus  
24 is operationally. We don't have -- we're not a law  
25 firm, we don't have lawyers, but we have operational

1 experts. And we partner with law firms that provide  
2 legal services when needed.

3 So our focus is not only on operational  
4 compliance with e-mail, mail, fax, debt calling,  
5 debt collection, we also provide retainer services  
6 and --

7 (Court reporter requested clarification.)

8 THE COURT: I'm sorry, Mr. Sponsler. You  
9 said, "So our focus is not only on operational  
10 compliance with e-mail, mail, fax, debt calling,  
11 debt collection, we also provide retainer services  
12 and --" we missed what you said after that.

13 A. And assessment services. Assessment. In  
14 other words, gap analysis services.

15 Q. Patrick is asking if we want us to move  
16 Mr. Sponsler's seat, but I don't know if that will  
17 work, not having him on the center of the video.

18 UNKNOWN SPEAKER: I can move the camera  
19 anywhere.

20 THE COURT: So the cameraman is very clear.  
21 Could he have him sit next to the cameraman?

22 MR. RUNKLE: Your Honor, is this equally  
23 clear?

24 THE COURT: Off the record for this.

25 (A discussion was held off the record.)

1 THE COURT: Please proceed, Ms. Echtman.

2 MS. ECHTMAN: Okay. Can everyone hear me  
3 now?

4 THE COURT: Yes. Go ahead.

5 BY MS. ECHTMAN:

6 Q. What type of business, Mr. Sponsler, is  
7 PossibleNow engaged in?

8 A. PossibleNow, since 2001, has been the --  
9 what we consider the nation's premier provider of  
10 technology services to help companies that contact  
11 consumers to comply with not only do not call laws  
12 but to be able to comply with established business  
13 relationship exemptions, express consent exemptions,  
14 as well as e-mail laws. They're now one of the  
15 leading providers of privacy preference solutions to  
16 help companies at the enterprise level manage  
17 consumer preferences.

18 Q. And Mr. Sponsler, what type of work, if any,  
19 does PossibleNow perform for the Federal Government?

20 A. Well, they've done several things for the  
21 Federal Government over the years. They've done  
22 some data analysis I think in this case, of some of  
23 the call records. And they also perform hygiene on  
24 the National Do Not Call Registry.

25 Q. How long has PossibleNow performed that

1 hygiene work on the National Do Not Call Registry?

2 A. The Do Not Call Improvement Act was --  
3 became effective in late 2007, which made the  
4 Registry permanent. So now, when people put their  
5 number on the Do Not Call List, it never expires,  
6 where in 2003, there was a five-year expiration.

7 So when that change was made, there was a  
8 concern about numbers being stale, not belonging to  
9 the same people that put them on the Registry. So  
10 Lockheed Martin was selected by the government to be  
11 the subcontractor to manage the list, and they  
12 selected PossibleNow to perform the hygiene where  
13 they removed numbers that are disconnected from the  
14 original parties and have been reassigned to a  
15 different party at a different address.

16 So they've been doing that from the very  
17 beginning of --

18 Q. Is that in or about 2008 that it started?

19 A. Correct. That's correct; 2008.

20 Q. And they're continuing -- PossibleNow is  
21 continuing to do that work today?

22 A. That's correct.

23 Q. And, Mr. Sponsler, what type of work, if  
24 any, does PossibleNow perform for any state  
25 governments?

1           A. Well, variously over the years they've  
2 helped states to analyze post-call data. They've  
3 also tried to track down numbers. For example,  
4 today, spoofing is common, where a telemarketer  
5 might call and the telephone might have a local  
6 number that appears but actually it's not a local  
7 call. So sometimes it's difficult to track that  
8 down back to who the owner of the phone number is.  
9 So we have advanced data services that can help  
10 reverse engineer stuff like that and find the true  
11 source of some of the calls.

12           Q. And that work has been done for state  
13 governments?

14           A. Yes.

15           Q. And, Mr. Sponsler, have you ever been  
16 invited to speak as a telemarketing compliance  
17 expert by any governmental entities?

18           A. Yes. Marguerite Sweeney, I believe she's  
19 from the Indiana AG Office, invited me to come and  
20 speak at the Annual Do Not Call Regulator  
21 Conference. I was there to speak about data  
22 analysis services: How you can use post-call  
23 analysis such as we do now to really determine what,  
24 you know, upstream problems might have occurred in  
25 telemarketing or consumer contact.



1           And also, I did a very detailed analysis of all  
2           the state DNC lists to show them the breakdown of  
3           the number of wireless, how it's increasing on their  
4           list.

5           So it was, I thought, a good talk.

6           Q. Mr. Sponsler, have you had an opportunity to  
7           review the plaintiffs' proposed injunction in this  
8           case?

9           A. I have.

10          Q. Okay. I'd like for you to please open up --  
11          you've got a binder of exhibits in front of you. I  
12          believe the Court has a binder that we sent for  
13          delivery this morning.

14                 THE COURT: I believe that's what I have  
15          here. I have several.

16          Q. Thank you. The slim one is the one that  
17          came from DISH.

18                 THE COURT: I've got that.

19          Q. Thank you.

20          Mr. Sponsler, if you could turn to DTX1097. Do  
21          you recognize this as the Government's proposed  
22          injunction in this case?

23          A. I do.

24          Q. Okay. I'd like to turn your attention to  
25          page 7. Specifically the provision at Roman II A.

1 Have you seen this proposed provision before?

2 A. Yes.

3 Q. And if I could just read it to you, it says  
4 (as read:) As a pre-condition, prior to accepting  
5 sales from any new DISH OE retail, DISH must:

6 1. Hire a telemarketing-compliance expert that  
7 had no prior role with DISH or function in this  
8 case, who will prepare a plan to ensure that new OE  
9 retailers comply with telemarketing laws.

10 Do you see that?

11 A. I do.

12 Q. Is this the type of work that you do at  
13 Compliance Point, prepare operational plans to help  
14 ensure that companies comply with the telemarketing  
15 laws?

16 A. I mean absolutely. I mean this is our  
17 primary function. This is what we perfected, this  
18 very issue.

19 Q. And are you personally a telemarketing  
20 compliance expert?

21 A. I am.

22 Q. In terms of the work that you do in  
23 preparing plans to help ensure compliance with the  
24 telemarketing laws, can you tell us how you go about  
25 doing that?

1       A. Well, it all starts with an onsite  
2 assessment. We coordinate the visit so that we  
3 align one or two-day meetings with all the relevant  
4 participants at the organization.

5       So we'll want to talk to people such as IT,  
6 compliance and legal, marketing and sales, anybody  
7 that's over the contact center operation. I want to  
8 talk to IT staff about their telephony systems and  
9 their dialing platforms.

10       So we get these meetings set up that are about  
11 90 minutes in length. And we bring a team of two  
12 consultants; one is a primary note-taker and one  
13 leads the assessment.

14       And we start wanting to know overall, you know,  
15 what is your business? What do you market? What do  
16 you sell? What is your region? You know, where are  
17 you focused, are you in the northeast, are you  
18 nationwide? So we get the big picture.

19       And then we dive into deep details with each  
20 department. For example, in marketing and sales, we  
21 want to know where are the leads coming in from? Is  
22 it web? Is it inbound calls? Are you buying leads?  
23 Are you getting, you know, leads from other places?  
24 Are you gaining consent, and if you are, do you have  
25 records of consent? That sort of thing.

1           Next, we analyze the DNC suppression. Are you  
2           suppressing? Are you applying EBR rules correctly?  
3           Are you applying consent rules correctly?

4           Then we look at management of the campaign. So  
5           it's one thing to have a compliant list when you  
6           start out, but if you put it on the dialer and you  
7           leave it there too long, then you start running into  
8           issues. The earliest problem you're gonna have is  
9           honoring internal DNC lists, as well as wireless  
10          lists that report a number of problems that there's  
11          only a 15-day grace period when numbers are ported  
12          from wireline to landline.

13          So anyway, it's a very detailed one or two-day  
14          process of discovery. Once we have discovered  
15          everything they do in their operation, then we work  
16          with them to develop policies and procedures to  
17          comply, and we go from there.

18          Q. And do you prepare any written reports in  
19          connection with this type of work that you do?

20          A. Yes. The clients really -- there's three  
21          levels of that. One is a very robust report. When  
22          we're done with it, it's over 200 pages long.

23          There's kind of a middle report we do that's  
24          less expensive for the client because we don't have  
25          to put so much work into the minute detail. It's

1 more for clients that really want to -- us to help  
2 them implement things instead of having a road map  
3 where they're going to work more on it. So that's  
4 kind of a summary report.

5 And the last one is what we call knowledge  
6 transfer. Some clients don't want anything in  
7 writing, they want to have a discussion about what  
8 they need to work on. So we deliver that upon  
9 request.

10 Q. And in addition to yourself, are there other  
11 telemarketing compliance experts at Compliance Point  
12 who do this type of work?

13 A. I have ten great, young Americans that are  
14 extremely talented, knowledgeable, very  
15 well-trained, that are all experts in this. They  
16 manage about 60 clients right now; some very, very  
17 large, all the way down to contact center  
18 operations. Each member is personally assigned  
19 directly responsibility for those accounts.

20 So yes, we have about ten very, very  
21 well-trained experts as well.

22 Q. Well, you said they're very well-trained.  
23 How are they trained?

24 A. First thing I do -- from my Army days, I've  
25 learned that the best way to get people trained in

1 what you do, I don't like to try to break old  
2 habits, I like to instill the right methodologies  
3 and policies from the beginning.

4 So I look for superstars out of school. I look  
5 for people that have graduated with a very high GPA,  
6 they're involved in their communities, they have  
7 leadership experience in the academic atmosphere.  
8 And they also have some work experience. I like  
9 kids that paid their way and worked their way  
10 through. It normally takes me about ten interviews  
11 to find the one that I'm looking for. Kind of the  
12 criteria I look for is that they would be a good  
13 lieutenant in the Army, they're probably gonna work  
14 out for me.

15 So then we start a very strong training  
16 program. And it includes, the very first thing  
17 they're gonna do for three months is they're gonna  
18 study the Telephone Consumer Protection Act, the  
19 Telemarketing Sales Rule, every state statute, and  
20 we also focus on Canadian Castle Rules.

21 They're gonna do nothing but read. And while  
22 they're doing that, they're gonna give presentations  
23 to the team about what they have learned. They're  
24 gonna tell us the differences between the two,  
25 TSR/TCPA, in terms of EBR rules. You know, what are

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1 the definition differences? what are the call  
2 abandonment definition differences? what are the  
3 other differences between those rules, and how do  
4 they apply to our customers? what does the TCPA  
5 apply to verses the TSR?

6 So we go through this training during that  
7 three months that they have to give so that we can  
8 measure their progress.

9 After that, they're gonna begin answering  
10 client questions. We get about a dozen a day of  
11 e-mails asking every kind of compliance question in  
12 different scenarios. So they research, provide a  
13 written answer, and then we grade that answer and  
14 coach them.

15 We take them along on assignment. I'll pay for  
16 their travel to go to a client site and just  
17 observe. Or they may even take notes, that we don't  
18 use, but we'll compare that person's notes with the  
19 other official note-taker.

20 Finally, after about six months of that, they  
21 start working on their certifications. All of my  
22 consultants have to be certified in privacy for the  
23 CIPP, Certified Information Privacy Professional.  
24 Takes about six months at least of study on that.  
25 And they also have to be certified compliance --

1 Customer Engagement Compliance Professional  
2 Certification. That's administered by PACE. And  
3 that's a very robust certification focused directly  
4 on consumer contact compliance.

5 So once they get through all that and they pass  
6 certifications, the final thing they have to do to  
7 be certified as a consultant is they have to lead an  
8 assignment, a discovery assignment. They have to  
9 conduct it from A to Z, do all the questioning, and  
10 they have to develop a full report. And once they  
11 have done that successfully, we consider them to be  
12 a full member of the team. They're no longer an  
13 associate, they're a fully qualified consultant.

14 Q. Mr. Sponsler, do you have confidence in your  
15 team?

16 A. I have absolutely -- I'll put up my youngest  
17 person that is a qualified consultant against  
18 anybody out there that says they know this business,  
19 I'll put them against any of them.

20 Q. How many times have you and your team  
21 performed operational compliance reviews of the type  
22 that you've just described?

23 A. Well, we've been doing it close to 12 years.  
24 I'd say anywhere from 6 to 800 of these.

25 Q. Do you know of any other consulting firms to



1 do this type of operational compliance work the way  
2 you do it?

3 A. None. I don't know of any.

4 Q. And do you have an understanding of what  
5 Compliance Point's reputation is in the  
6 telemarketing compliance field?

7 A. I believe we have a very strong reputation.  
8 I know we're very well-known. A large portion of  
9 our business comes in from people that have heard  
10 about us or been told about us, that business comes  
11 into us. So I think we do have a very strong  
12 reputation.

13 Q. And is there anything proprietary about the  
14 operational compliance work that you do?

15 A. Absolutely. Everything we've done has been  
16 custom-developed from scratch. There is no, you  
17 know, other benchmarks out there that match what  
18 we've developed in order to have a very robust  
19 assessment model that makes sure we cover all the  
20 relevant areas for every company. Even within the  
21 areas, it's very detailed. So I think our whole  
22 model of developing these and retaining our clients  
23 with ongoing services is proprietary.

24 Q. And do you understand that this proposed  
25 injunction from the plaintiffs in this case would

1 prevent Compliance Point from doing this type of  
2 operational compliance work, assessment, and  
3 planning for a new DISH OE retailer?

4 A. I do understand that.

5 Q. And are you aware that the plaintiffs  
6 previously proposed conclusions of law with somewhat  
7 different injunction terms in them?

8 A. I'm familiar with that; yes.

9 Q. Okay. So I'd like you to please look at  
10 DTX1098. And specifically look at the conclusion of  
11 law at paragraph 107.

12 A. Okay.

13 Q. It's page 17, but we just took an excerpt  
14 from the conclusions of law, which are somewhat more  
15 lengthy.

16 So, Mr. Sponsler, these conclusions of law  
17 would require DISH -- DISH Network and DISH owned,  
18 operated, or contracted call centers to hire a  
19 third-party consulting organization not involved in  
20 this case to perform a top to bottom review of  
21 DISH's call center operation. Do you see that?

22 A. I do.

23 Q. Now, do you also understand this proposed  
24 term to prevent Compliance Point from performing an  
25 operational assessment of DISH's outbound

1 telemarketing operations?

2 A. That's what I understand; yes.

3 Q. And do you know of any other consulting  
4 organizations nearly as qualified as Compliance  
5 Point to do this type of operational compliance  
6 work?

7 A. I don't.

8 Q. Do you have any concerns about the impact of  
9 these proposed injunction terms on Compliance  
10 Point's business from a reputational standpoint?

11 A. Well, absolutely. You know, it might appear  
12 that, you know, we've done something wrong here and  
13 so we're being punished for doing something wrong.

14 It would also concern me with other clients  
15 that we're providing services for now, if they were  
16 to become involved in a civil investigative demand  
17 or some action and they asked for -- for me to  
18 provide expert witness work as part of that, I would  
19 fear that I would be put in the same position again  
20 of, you know, further, you know, reducing my  
21 footprint out there how I'm able to help clients.

22 So I'm very troubled about this being the start  
23 of something that is not recoverable.

24 Q. And you said you think it makes it appear  
25 that you did something wrong in your work in

1 connection with this case. Do you think that you  
2 did anything wrong?

3 A. I -- we didn't do anything wrong. We've  
4 always -- you know, we've worked with both sides of  
5 the -- in the past. I still work for both sides of  
6 the table right now. And we try to be -- do our  
7 work with integrity and honesty.

8 And you know, the data is the data. The data  
9 says what it says. Sometimes it's good for the  
10 plaintiff, sometimes it's good for the defendant,  
11 but it is what it is. And that's the way we've  
12 always looked at our business. And I just feel like  
13 this makes it appear that we've done something wrong  
14 here. And I don't -- I don't see why.

15 Q. Now, Mr. Sponsler, do you have any concerns  
16 about the plaintiffs' motivation for these proposed  
17 injunction terms?

18 A. I don't understand the motivation. I don't  
19 know if it's just punishment for us. I don't know.  
20 We've worked with the Government before, and I think  
21 we've always had a great relationship and great job.

22 I mean, for example, even today, my company,  
23 who is working with other companies that are under  
24 consent decrees with the Federal Government. I  
25 worked with them before the consent decree was

1 entered into, I work with them right today doing  
2 data audits of their post calls. Exactly what I  
3 would be doing here, I'm doing that on behalf of  
4 four other clients, and they're submitting those  
5 reports to the government, and apparently, there's  
6 no trust issue there. We haven't, in those cases,  
7 been eliminated from consideration. And we're doing  
8 a good job. I mean we're doing it well, we're doing  
9 it right, and so I really don't understand it in  
10 this case.

11 Q. And, Mr. Sponsler, do you think that these  
12 proposed injunction terms might have any impact on  
13 your willingness to take on future expert  
14 engagements that are adverse to the Federal  
15 Government or these plaintiff states?

16 MR. RUNKLE: Your Honor, I object to that  
17 question. This is -- I've let this go on for a long  
18 time, but this is pure speculation. He is here as a  
19 fact witness today, and I have no idea what that  
20 question has to do with anything, or whether the  
21 answer could actually elicit relevant evidence.

22 THE COURT: The objection is --

23 Q. Well, Your Honor, the issue --

24 THE COURT: Excuse me, Ms. Echtman. The  
25 objection is overruled. You may proceed. You may

1 answer.

2 A. Could you repeat the question?

3 Q. Yes. Do you have any concerns about -- I'm  
4 sorry. Do you think that these proposed injunction  
5 terms might have any impact on your willingness to  
6 take on future expert engagements adverse to the  
7 Federal Government or the plaintiff states?

8 A. Absolutely, yes. I do have concerns about  
9 it.

10 Q. And how might that -- this proposal impact  
11 your willingness to take on those future  
12 engagements?

13 A. Well, because if -- if I'm -- by doing so,  
14 by being an expert to talk about what we do or talk  
15 about what I have in this case, my opinions in this  
16 specific case, if there's gonna be a penalty  
17 associated with doing that, where I'm eliminated  
18 from consideration for future work, that's a huge  
19 consideration for us. And I think it's unfair  
20 hamstring.

21 Additionally, I'm concerned about this creating  
22 competition that doesn't exist right now. You know,  
23 nobody out there has tried to wrestle with all the  
24 technology and all the knowledge and all the  
25 resources you have to have to do this business. But

1 if the Government is going to go out and seek other  
2 places to do this, I mean I could see companies that  
3 would try to build this capability, try to create  
4 it, therefore, you know, having competition in the  
5 marketplace for us.

6 Q. Now, Mr. Sponsler, as part of your  
7 day-to-day work, do you follow the government  
8 enforcement actions in the telemarketing field?

9 A. Oh, absolutely. We -- part of our regular  
10 consultation that we provide to clients is based  
11 upon all the lessons learned. It's more than just  
12 knowing the statutes, it's knowing how Court's  
13 interpret these statutes. Some of these government  
14 actions, you can learn a lot when you read the --  
15 for example, the Federal Trade Commission's  
16 commentary on some of these settlement actions, you  
17 can learn about how they interpret the rules.

18 So yes, we study them. We typically send out a  
19 notice to our clients about it, and our  
20 interpretation of it, and kind of caution them on  
21 lessons learned.

22 Q. And are you aware of any other injunction in  
23 a government enforcement action that would -- with a  
24 term that would prohibit your company, Compliance  
25 Point, from playing a compliance role for the

1 company going forward?

2 A. None. That's never happened before, and  
3 I've never heard of it happening before.

4 Q. Okay. And you said, in fact, Compliance  
5 Point renders services for companies that are  
6 subject to consent decrees or governmental  
7 injunctions?

8 A. Absolutely, yes.

9 Q. And what type of service does Compliance  
10 Point do for those companies?

11 A. They're required to have post-call  
12 compliance analysis. So we take their data from the  
13 month before when they were placing outbound calls  
14 and we determine -- we compare the EBR date to the  
15 call date and the type of exemption it is, whether  
16 it's an inquiry or transaction. We also analyze  
17 cold calls. There should be no do not call issues  
18 on cold calls. So we run that against our data  
19 sources. We flag any potential issue calls and  
20 report those.

21 In one case, we've been retained to actually  
22 work with the contact center that had the issues to  
23 determine what happened. We document all that. And  
24 then we document ways to prevent that same issue  
25 from happening in the future. So we want to know,



1 do we need a redundant process? Do we need a  
2 supervisor to verify that something happened? Do we  
3 need sign-off?

4 So over the years, we've seen that having that  
5 kind of documentation and that kind of planning  
6 definitely changes behavior. So we submit all that  
7 back. And as far as I know, they turn those in to  
8 the government as required.

9 Q. So as far as you know, the Federal  
10 Government knows that Compliance Point is doing that  
11 work?

12 A. I'm assuming so; yes.

13 Q. And do any of those companies that you work  
14 with which are subject to injunctions or consent  
15 decrees, do any of them have perfect compliance  
16 records?

17 A. No. Something every month --

18 MR. RUNKLE: Your Honor, this is about  
19 compliance, and I thought that this hearing was not  
20 actually about compliance.

21 I mean Ms. Echtman is trying to say, "Oh,  
22 nobody's perfect; DISH wasn't perfect either." I  
23 thought that's exactly what we weren't supposed to  
24 be doing today.

25 THE COURT: Ms. Echtman?

1 MS. ECHTMAN: Your Honor, I'm not -- I'm  
2 not getting into specifically DISH's compliance, but  
3 I am getting into the provision of the injunction  
4 that provides one strike and you're out, you can  
5 never work with folks again. And just that it's an  
6 unreasonable standard.

7 MR. RUNKLE: Right. But he's a fact  
8 witness today, Your Honor, not an expert witness.  
9 So if Ms. Echtman asks that question, we're gonna  
10 have to go into the companies he worked for and how  
11 many violations they have, and all sorts of things  
12 on which no discovery has been taken. And I just  
13 don't think it's an appropriate line of inquiry.

14 MS. ECHTMAN: Well, Your Honor, I disagree  
15 that it opens up that entire line of inquiry, but in  
16 order to obviate any issue and move this along, I'll  
17 withdraw that question.

18 THE COURT: Thank you.

19 BY MS. ECHTMAN:

20 Q. Mr. Sponsler, in terms of the enforcement  
21 actions that you have followed, did any of them  
22 include an action against Caribbean Cruise Lines?

23 A. Yes. That was last year. It really caught  
24 our attention because one of our clients has a very  
25 similar name, and at first, we thought, "oh, my

1 goodness, our client has committed a terrible  
2 mistake," because it was about pre-recorded  
3 messages, and we knew our client did not use  
4 pre-recorded messages. So yes, that one caught our  
5 attention.

6 Q. Okay. Do you know what the allegations were  
7 against Caribbean Cruise Line in that case?

8 A. Yes. They had sent, I think, billions of  
9 pre-recorded messages without consent. There was  
10 some caller ID issues, they weren't displaying the  
11 correct caller ID on all those calls. So it was a  
12 pretty big -- I would say a huge flaw in what they  
13 were doing.

14 MR. RUNKLE: Your Honor, I -- I would just  
15 object based on lack of personal knowledge. I think  
16 the witness said he wasn't involved with this  
17 company.

18 MS. ECHTMAN: Right. Well, he's talking  
19 about what the allegations were. So we're just  
20 talking about allegations. He didn't say he knew  
21 them to be true for a fact.

22 MR. RUNKLE: Right, but he has no personal  
23 knowledge about that, does he?

24 MS. ECHTMAN: He does have personal  
25 knowledge as to what the allegations were against

1 Caribbean Cruise Lines.

2 MR. RUNKLE: But how is that relevant? He  
3 can just -- anybody can read the complaint.

4 MS. ECHTMAN: Mr. Runkle, I'll connect it.  
5 If you would just let me do the examination, I think  
6 this would --

7 MR. RUNKLE: I'm objecting that he is  
8 testifying about another lawsuit that he wasn't  
9 involved in.

10 THE COURT: Where are we --

11 MS. ECHTMAN: Your Honor, this is all set  
12 forth in -- this is all set forth in a document  
13 that's already been admitted into evidence. The  
14 complaint has come into evidence in this case.

15 THE COURT: The objection is overruled.

16 MR. RUNKLE: Your Honor --

17 THE COURT: Go ahead, Ms. Echtman.

18 BY MS. ECHTMAN:

19 Q. Okay. And are you aware that that  
20 particular case was settled with the Federal  
21 Government and certain states?

22 A. Yes.

23 Q. And is this one of the things that you  
24 followed in the course of your work?

25 A. Absolutely. That and every other bit of

1 information we can find about settlements or class  
2 actions or court decisions.

3 Q. Okay. And do you know that there was a  
4 consent injunction that was entered in that case?

5 A. Yes.

6 Q. And do you know whether, in that injunction,  
7 Caribbean Cruise Lines was banned from  
8 telemarketing?

9 A. They were not.

10 Q. And do you know whether Caribbean Cruise  
11 Lines was required to stop working with any of its  
12 lead generators?

13 A. They were not.

14 Q. Do you know what type of penalty Caribbean  
15 Cruise Lines was required to pay to the Federal  
16 Government?

17 MR. RUNKLE: Objection, Your Honor. This  
18 hearing is not about penalties.

19 THE COURT: The objection is overruled.  
20 You may answer.

21 A. The initial judgment or ruling was, I think,  
22 over \$7 million. And they -- because of financial  
23 whatever, problems or evaluation, they ended up  
24 paying \$500,000 split among the states and the  
25 Federal Government.

1 Q. And do you know how much of it went to the  
2 Federal Government?

3 A. It was about 200,000.

4 Q. Mr. Sponsler, do you know whether your COO,  
5 Rick Stauffer, has concerns about the injunction  
6 terms proposed by the Government in this case?

7 MR. RUNKLE: Objection, Your Honor.  
8 Hearsay.

9 MS. ECHTMAN: Your Honor, Mr. Sponsler  
10 would know this in the ordinary course of business  
11 in doing his work with Mr. Stauffer.

12 MR. RUNKLE: Your Honor, the Court already  
13 rejected Mr. Stauffer's attempt to testify. They  
14 have put in the proposed exhibits Mr. Stauffer's  
15 declaration from last week's motion to intervene. I  
16 had hoped we had put this issue to bed; apparently,  
17 we had not. They can't have him testify through the  
18 back door for when he was not allowed to testify  
19 through the front door.

20 THE COURT: The objection is sustained.

21 Q. Well --

22 Mr. Sponsler, are you familiar with an  
23 affidavit that Mr. Stauffer submitted in this case?

24 MR. RUNKLE: Same objection.

25 THE COURT: The objection is sustained.

1           Q. Mr. Sponsler, you talked a little bit about  
2 information that you provide to your clients about  
3 lessons learned from Government enforcement actions.  
4 Let me ask you this: If the plaintiffs' proposed  
5 injunction containing a five-year telemarketing ban  
6 were to be entered in this case, what would be your  
7 lesson learned to your clients?

8           A. It would be really, really, in the consumer  
9 contact world, really the biggest deal that I would  
10 have ever imagined ever. I mean it would be the  
11 biggest blow to the industry. There would be huge  
12 concerns about it.

13           And I guess my lesson learned would be really,  
14 you know, the power of the United States. That they  
15 have over companies to have a moratorium like that  
16 regardless of whether you're compliant or not, or  
17 you get into compliance and prove it, is a business  
18 changer.

19           It -- you know, something like that could  
20 easily put a company right out of business  
21 completely, and change the whole face of competition  
22 out there for consumers' choice that they might  
23 have. That would all be gone.

24           So it would be very serious lesson learned.

25           Q. And would that message lesson learned be any

1 different if it weren't a full five-year ban but it  
2 was an indefinite suspension of telemarketing  
3 activity while a compliance plan was implemented and  
4 developed?

5 A. No, because that could equate to the same  
6 thing. It could still stretch out into years before  
7 they could get back into normal operation.

8 Q. All right. Thank you very much for your  
9 time, Mr. Sponsler. Those are all of my questions  
10 right now.

11 A. Thank you.

12 THE COURT: Thank you, Ms. Echtman.

13 MR. RUNKLE: Your Honor, can we take a  
14 brief bathroom break?

15 THE COURT: Yes, we may. Five-minute  
16 recess.

17 (A break was taken.)

18 THE COURT: Please be seated.

19 I'm not sure I can see Mr. Sponsler. I think  
20 he's standing up.

21 Mr. Runkle, I cannot see you, so --

22 MR. RUNKLE: Okay. Can you hear me?

23 THE COURT: I can hear you and your voice  
24 carries very well.

25 MR. RUNKLE: All right. We'll try that



1 then.

2 THE COURT: Please proceed.

3 MR. RUNKLE: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MR. RUNKLE:

6 Q. Good afternoon, Mr. Sponsler.

7 A. Good afternoon, sir.

8 Q. Nice to see you here in New York.

9 A. Yes.

10 Q. So right before the break you testified  
11 about a settlement in the Caribbean Cruise Lines  
12 case; is that right?

13 A. Yes.

14 Q. And what you testified to was that they --  
15 there was no ban in that case; right?

16 A. Yes, sir.

17 Q. Do you have any idea what happened to  
18 Caribbean Cruise Lines?

19 A. What do you mean what happened to them?

20 Q. After that order?

21 A. No.

22 Q. No. So you don't know whether it was  
23 effective or not?

24 A. I do not.

25 Q. Okay. And did you know -- you talked about

1 the penalty in that case too?

2 A. Yes.

3 Q. Which was some small amount to the  
4 Government; right?

5 A. 7,500,000.

6 Q. Something like that. Did you hear about how  
7 that company entered into a \$76 million settlement  
8 with private plaintiffs?

9 A. I didn't.

10 Q. You didn't hear about that?

11 A. No, sir.

12 Q. Okay. So you also testified about your  
13 knowledge of other cases and whether there were bans  
14 in any of those other cases; is that right?

15 A. Yes.

16 Q. Okay. So I'd like to put a couple documents  
17 in front of you. One of them is -- well, let's give  
18 him these three documents right here.

19 Now, before we look at these documents, are you  
20 familiar with the difference between a litigated  
21 case and a settlement?

22 A. Yes.

23 Q. Right. So sometimes a party might be  
24 willing to accept something in a settlement that  
25 they wouldn't want if they had to litigate the case

1 the whole way through; right?

2 A. Correct.

3 Q. You understand that concept?

4 A. Absolutely; yes.

5 Q. Okay. So looking at that, let's look at  
6 what was marked as Defendant's Exhibit 727. It has  
7 the blue sticker on it. If you could just take a  
8 moment and look at this.

9 And to speed things up, if you could go to page  
10 16.

11 A. Okay.

12 Q. Okay. So have you ever seen this case  
13 before?

14 A. I think I have. I think I'm familiar with  
15 it.

16 Q. Hm-mm. And this is a case that the FTC  
17 brought against someone violating the do not call  
18 rules, among other rules; right?

19 A. Yes.

20 Q. And in this case there was a ban; right?  
21 Doesn't it look that way from page 16?

22 A. Well, there's a difference here, sir, to me.  
23 This company was defrauding the consumer. They were  
24 making promises that they didn't keep. They were  
25 selling services that they didn't deliver on.

1 That's not the case here with Dish Network.

2 So, of course, they were also violating the do  
3 not call laws here as well. But to me, committing  
4 fraud and cheating customers is not the same thing  
5 we're talking about in the DISH case.

6 Q. But in the DISH case, there has been  
7 evidence that DISH's retailers engaged in some of  
8 those practices, isn't there?

9 A. I'm not aware of that.

10 Q. Well, you sat through the whole trial;  
11 right?

12 A. Yes.

13 Q. Do you remember Richard Goodale?

14 A. Yes.

15 Q. Do you think he was just, you know, squeaky  
16 clean when it came to selling DISH Network services?

17 A. I don't think he was squeaky clean, but I  
18 don't remember anyone selling DISH Network services  
19 that weren't delivered. You know, that they paid  
20 for but never received the services. That's kind of  
21 what I'm talking about here in this case.

22 Q. So in the case where there was  
23 misrepresentation or fraud, you think an outright  
24 ban is appropriate?

25 A. It's case by case, sir. I don't know

1 exactly what you're referring to, but, you know, if  
2 I understood more about it, I would be able to  
3 comment better.

4 Q. Okay. Let's look at another one here.

5 Look at what's been marked as PX2018. If you  
6 could turn to page 8 of this document.

7 Are you familiar with this case?

8 A. I don't think so, sir.

9 Q. Okay. And in this case, which was filed in  
10 2014, or that this settlement was filed in 2014, on  
11 page 8 there you see, don't you, that the United  
12 States obtained a permanent ban on telemarketing  
13 against this individual for his violations of the  
14 Telemarketing Sales Rule?

15 A. I see that, sir. But again, I'd like to  
16 understand the nature of whether this was another  
17 fraud case or not. Could I have time to look at  
18 that?

19 Q. Surely.

20 MS. ECHTMAN: Mr. Runkle, does this  
21 stipulated judgment say what the claims were in the  
22 case?

23 A. Yes, I can't find it here.

24 Q. I don't believe it does, no.

25 A. I can't find what the nature of this was.

1 Q. But you weren't familiar with this?

2 A. No, sir.

3 Q. You weren't familiar with this case?

4 A. I don't recall it.

5 Q. All right.

6 MS. ECHTMAN: Mr. Runkle, do you know what  
7 the allegations were in that case?

8 Q. I'm -- excuse me?

9 MS. ECHTMAN: Well, could you put on the  
10 record -- Mr. Sponsler said it would be relevant to  
11 him to know what the claims were in the case. I  
12 assume that you know them. I think it would be  
13 helpful if we could put that on the record.

14 Q. I do know them. I don't know if the Court  
15 wants me to testify, but I can tell you what they  
16 are.

17 THE COURT: Go ahead.

18 Q. There's nothing about -- there's nothing  
19 about fraud in this case at all. This is a case of  
20 a person who enabled verbal calling to occur. It is  
21 what we'd call a CNAM dipping fee case. It's a  
22 person who enables verbal calls to occur. It was a  
23 company that provided services to robo callers. So  
24 there was no fraud in this case, I can make that  
25 representation to you.

1 A. Okay.

2 Q. Does that change your perception of whether  
3 a ban might be appropriate for telemarketing  
4 violations?

5 A. Well, given the limited information you've  
6 just given me, I'd like to study it further to be  
7 able to give you a complete answer.

8 Q. All right. Well, we'll move on.

9 But -- I'm sorry, these documents, they do  
10 change your testimony that in TSR violation cases,  
11 there have been bans; is that right?

12 A. There have been; yes.

13 Q. There have been bans, okay.

14 And in this case, the Government's proposal is  
15 a five-year ban, and that's more limited than a  
16 permanent ban, wouldn't you agree with me?

17 A. Yes.

18 Q. Okay. So now I understand that you're here  
19 to support your company getting DISH's business;  
20 right?

21 A. Yes.

22 Q. Right. And so you personally have been  
23 working for DISH since 2008; is that right?

24 A. Somewhere around there; yes, sir.

25 Q. Somewhere around there; right.

1 And you, in your capacity as Compliance Point  
2 or in your capacity as an employee of PossibleNow?

3 A. We became Compliance Point in '08, we were  
4 PossibleNow Consulting in '05, so maybe a little  
5 overlap.

6 Q. But you didn't -- you didn't work on the  
7 PossibleNow side of the equation for DISH; is that  
8 accurate?

9 A. I would have, in the beginning, been an  
10 employee of PossibleNow Consulting Services.

11 Q. Okay. And so -- but you're here talking  
12 about Compliance Point's work on this -- post this  
13 injunction, is that accurate to say?

14 If this injunction gets entered, you're talking  
15 about Compliance Point, not PossibleNow?

16 A. It could also involve PossibleNow; yes.

17 Q. But do you believe that this injunction  
18 would prohibit PossibleNow from providing its  
19 compliance services to DISH on a regular basis the  
20 way it does now?

21 A. I'm not sure what the impact of this could  
22 be. Because they are involved in the case. It says  
23 anyone who was involved in the case. They testified  
24 for the Government in this case and they did perform  
25 some data analysis. So yes, it's my understanding



1 they would also be eliminated from being able to  
2 provide services.

3 Q. But the part of the injunction you talked  
4 about was the part where DISH would be ordered to  
5 hire a compliance expert, is that correct?

6 A. Well, there's more than just hiring a  
7 compliance expert. There's -- there's the idea of  
8 setting up a compliance program, which would include  
9 scrubbing suppression services for do not call and  
10 wireless numbers. That's a service PossibleNow  
11 provides.

12 Q. Right. But if you could turn back to  
13 DTX1097. Ms. Echtman asked you about it. I think  
14 it's in the black binder right there.

15 And if you could go to page 7 of that.

16 A. Okay.

17 Q. Okay. So the concern that you and  
18 Ms. Echtman seem to share was this idea that -- that  
19 this language in Section A 1 here that says (as  
20 read:) Hire a telemarketing-compliance expert that  
21 had no prior role with DISH or function in this  
22 case, who will prepare a plan to ensure that new OE  
23 retailers comply with the telemarketing laws.

24 Is there any other language in this injunction  
25 that you think would prohibit you or PossibleNow

1 from doing anything?

2 A. I thought there was one other place here.

3 I thought there was one other place here that  
4 specified no one involved in the case could provide  
5 services, but I don't see it.

6 Q. Okay. So let's assume that that's the only  
7 provision in the current proposed order that relates  
8 to the concern that you and Ms. Echtman shared.  
9 Let's assume that's true. So this provision doesn't  
10 prohibit PossibleNow from provided the services that  
11 it already provides to DISH; would you agree with me  
12 on that?

13 A. Well, the third line here (as read:) fully  
14 implement the plan prepared by the expert. So the  
15 expert is gonna prepare a plan that includes  
16 suppression services of do not call application of  
17 EBR.

18 So I'm not sure how that language, that  
19 requirement, would fit into this prohibition of  
20 someone involved in the case.

21 Q. Okay. Let's say that DISH hires someone  
22 from a national consulting company, like McKinney or  
23 something like that. All right? And that person  
24 looks around to find a compliance company that would  
25 be able to -- to do those tasks; right?

1 A. Correct.

2 Q. Right. So would you want them to pick  
3 PossibleNow?

4 A. I would.

5 Q. Right. And this language wouldn't prevent  
6 them from doing that, would it?

7 A. I'm not sure. Legally, I don't know the  
8 downstream effects of this prohibition. Could it be  
9 third-party relationship with the primary vendor? I  
10 don't know.

11 Q. But all it says here is that the  
12 telemarketing compliance expert had no prior role  
13 with DISH or function in the case. Right? That's  
14 all it says?

15 A. Right. In that case, I would be the expert  
16 if I was hired, regardless of who the cover company  
17 was with no expertise.

18 Q. Well, you would be the expert hired under  
19 A1; right?

20 A. Right.

21 Q. But you wouldn't be the expert if they hired  
22 somebody else under A1 and the expert chose your  
23 company to implement parts of the plan?

24 A. Parts of A1?

25 Q. Right.

1 A. Oh, you're talking about the suppression?

2 Q. The plan; yes.

3 A. The plan.

4 Not sure how all that would work.

5 Q. Okay.

6 All right. So you talked at the end of your  
7 testimony about how you were concerned about the  
8 effect that this injunction could have on your  
9 business in the future; right?

10 A. Yes.

11 Q. And one of the concerns you had was that  
12 there might be competition?

13 A. Yes.

14 Q. Right. Isn't competition a good thing?

15 A. It can be; yes.

16 Q. Yeah. So maybe, you know, another company  
17 would be able to compete with you guys on -- and  
18 make you guys better? Don't you think?

19 A. Absolutely. Could be.

20 Q. Do you think you'd get better with  
21 competition?

22 A. I don't know. Depends on the competition.

23 Q. All right. So you also said that you were  
24 concerned that this injunction would have an affect  
25 on your ability to do expert work for defendants in

1 the future; right?

2 A. Yes.

3 Q. Okay. And -- because you were an expert in  
4 this case. That was your testimony; right?

5 A. Yes.

6 Q. But you're far more than an expert in this  
7 case; right?

8 A. I'm not sure I understand.

9 Q. Well, you've been working with DISH since  
10 2008; right?

11 A. Yes.

12 Q. So you weren't just brought on as an expert  
13 in this case; right?

14 A. Yes.

15 Q. You -- you've been working with DISH for the  
16 better part of a decade?

17 A. But that's the same with every other big  
18 company that we work with. It's been years and  
19 years of providing ongoing consulting services the  
20 same as we did for DISH. There's a lot of companies  
21 in a similar situation.

22 Q. But a lot of those companies, as you talked  
23 about already, entered into settlements with the  
24 Federal Government; right?

25 A. Some of them have; yes. And we've got other

1 companies that haven't had any issues at all. That  
2 haven't been concerned with the CIDs or  
3 investigative matters.

4 Q. But this case is a little bit unique, don't  
5 you think?

6 A. In what way, sir?

7 Q. It's a big case, different from some of the  
8 other stuff you've worked on; right?

9 A. Well, if you're a big client, a big  
10 footprint, you can get into a big case.

11 Q. Right.

12 So one of the ways this case is different is  
13 that it's a litigated case; right?

14 A. Yes, sir.

15 Q. And the other government cases that you are  
16 familiar with were mostly settlements; is that  
17 accurate to say?

18 A. That's correct.

19 Q. And in this case there was also a judicial  
20 finding that there were millions of unlawful calls  
21 made between 2004 and 2011. You're familiar with  
22 that?

23 A. That's correct; yes, sir.

24 Q. So that's something that takes it out of  
25 the -- takes it out of the realm of a lot of the

1 other cases you've worked on; right?

2 A. Well, it -- it takes it out of the realm in  
3 terms of the specifics that you're talking about in  
4 this case that have gotten us to this point today.  
5 But what I'm talking about is the end result of  
6 what's being proposed here is really my focus.

7 Q. But focusing on just that time period, and  
8 I'm not trying to insult you, but during that time  
9 period from 2008, when you started working for DISH,  
10 until 2011, where we still have violations going on,  
11 you didn't stop those from happening; right?

12 A. Well, you can't stop those things from  
13 happening. Those things that we found out at trial  
14 happened for various reasons. Some of it was pure  
15 deception and coverup and lies in that case.

16 There are ways that I think that could improve  
17 that situation. Doing some of this ongoing data --  
18 call data monitoring on a regular basis, with  
19 early -- identify things early on. But that didn't  
20 happen in this case because of the relationship  
21 between DISH and retailers.

22 Q. But the call -- the unlawful calls in this  
23 case were not just DISH's retailers' calls? They  
24 were DISH's own calls? There were some of those?

25 A. Some were DISH's own calls; yes.

1 Q. And your testimony is that just happens too?

2 A. Oh absolutely, mistakes happen.

3 Q. But if it's a mistake that the company  
4 should have known about, then it's not really a  
5 mistake; right?

6 MS. ECHTMAN: Objection.

7 A. Well --

8 MS. ECHTMAN: Beyond the scope. We're  
9 getting into compliance. This is not -- this isn't  
10 proper examination for this phase.

11 MR. RUNKLE: I'm pretty sure this responds  
12 to exactly what he was talking about with  
13 Ms. Echtman, Your Honor.

14 MS. ECHTMAN: Actually, when I started  
15 talking about mistakes and companies being under  
16 compliance orders making mistakes, Mr. Runkle, you  
17 objected. And that objection was sustained, and now  
18 you're going down that road.

19 MR. RUNKLE: I think that objection was  
20 overruled.

21 MS. ECHTMAN: No, it was --

22 Actually, I think I withdrew the question  
23 because it's not -- you said it's not part of this  
24 phase and I withdrew the question. And now you're  
25 going down the exact area --



1 MR. RUNKLE: I'm talking about --

2 MS. ECHTMAN: Mr. Runkle, can I finish?

3 I think you're going down the exact area that  
4 you objected to as inappropriate for this proceeding  
5 today. That you're getting into compliance and  
6 mistakes and whether mistakes inevitably happened.  
7 And when I asked a question like that, you objected,  
8 I withdrew the question. So I'm objecting here  
9 similarly.

10 MR. RUNKLE: Your Honor, the issue is that  
11 we're trying to have a hearing that's about -- you  
12 know, with a person from Compliance Point that isn't  
13 really about compliance.

14 But what I'm trying to get at here is the idea  
15 that one of the reasons the Government might not  
16 want this company to fill this role and might need a  
17 set of fresh eyes in that role, is that we proved  
18 all these violations and they seemed to happen on  
19 Compliance Point and PossibleNow's watch. I think  
20 that's very relevant to what is going on here today.

21 THE COURT: Certainly it's relevant. And  
22 certainly, we've gone over it repeatedly. Let's  
23 limit your inquiries.

24 MR. RUNKLE: I'll try to move on.

25 BY MR. RUNKLE:

1 Q. All right. Now, one of the other things we  
2 talked about during --

3 well, just one more thing. You do realize also  
4 that DISH's lawyers have taken the position in this  
5 case that John Taylor got a lot of stuff wrong in  
6 his expert report? Do you know that?

7 MS. ECHTMAN: Objection to the  
8 characterization.

9 THE COURT: The objection is overruled.

10 A. No, sir.

11 Q. You don't know that; okay.

12 Let's talk about something we discussed  
13 earlier.

14 All right. So we talked about, during your  
15 testimony in February, how you don't necessarily  
16 agree with the Court's ruling on vicarious liability  
17 in this case. Do you remember that?

18 A. Yes.

19 MS. ECHTMAN: Objection. Beyond the scope.

20 THE COURT: Mr. Runkle?

21 MR. RUNKLE: Your Honor, this line of  
22 questioning is designed to elicit whether  
23 PossibleNow -- well, whether Compliance Point is  
24 actually the appropriate company to be enforcing the  
25 TCPA in this case.

1 THE COURT: Ms. Echtman?

2 MR. RUNKLE: I'm sorry, Your Honor. If a  
3 company doesn't agree with the law and is trying to  
4 get the law changed, then it seems like it's an  
5 inappropriate company to enforce the law in this  
6 case.

7 THE COURT: The objection is --

8 MS. ECHTMAN: I don't think this has any  
9 relevance at all, Your Honor. That was an area of  
10 testimony on cross-examination by Mr. Runkle. There  
11 is no foundation to think that Mr. Sponsler doesn't  
12 use the law as written, as interpreted by the  
13 courts, in providing operational compliance services  
14 to his customers. And I think it's an unfair line  
15 of attack.

16 THE COURT: The objection is overruled.  
17 Mr. Sponsler, would you like the question read back?

18 A. Yes, please.

19 Q. Well, the question was, you disagree with  
20 the Court's vicarious liability ruling in this case;  
21 is that correct?

22 A. That was my testimony. I wish that I had  
23 clarified my testimony by saying that I wasn't aware  
24 of all of the facts in the -- in there -- in that  
25 proceeding. I wasn't present during it. Generally,

1 I made that statement because of -- of my belief  
2 that the relationship between DISH Corporate and  
3 retailers was different than what was interpreted.

4 Q. Okay. So if you don't agree with that  
5 ruling, it's not very promising that you'll be able  
6 to make DISH follow it, don't you think?

7 A. Has absolutely nothing to do. When we  
8 implement compliance procedures, it's in accordance  
9 with the law.

10 Q. Okay. So let's talk about the law.

11 You have been part of an effort to change  
12 vicarious liability under the TCPA, haven't you?

13 A. No. No, sir.

14 Q. Compliance Point has not been part of an  
15 effort to change vicarious liability rules under the  
16 TCPA?

17 MS. ECHTMAN: I'm going to object here  
18 because there's a privilege for the right to  
19 petition the government. And it's a completely  
20 inappropriate area of testimony to try to attack  
21 work that his company might be doing to petition the  
22 government. I don't think it's actually permitted  
23 in a court proceeding.

24 THE COURT: Well, I believe he already  
25 answered the question.

1 MS. ECHTMAN: There's a Constitutional  
2 right to petition the government.

3 MR. RUNKLE: Yes, there is. And there's a  
4 constitutional right to examine a witness. which  
5 I'm going to do.

6 Let's look at some documents.

7 PX --

8 (Court reporter requested clarification.)

9 Q. PX2002.

10 THE COURT: So while we're getting binders,  
11 I intend to break for lunch at about five to twelve.  
12 And those of you in larger cities, I assume, will  
13 need longer than an hour for lunch? Ms. Echtman?

14 MS. ECHTMAN: Your Honor, actually, we --  
15 because we're in a large city, there's actually food  
16 readily available, and we would actually need less  
17 than an hour.

18 I do believe that folks -- I don't want to  
19 inconvenience the court staff or anyone else, but I  
20 think that individuals in New York actually have  
21 travel plans for this afternoon. So if we could  
22 reasonably limit the lunch break, we would much  
23 appreciate that.

24 MR. RUNKLE: I can probably be done in 15  
25 minutes also, Your Honor.

1 THE COURT: Well, that's not an option. I  
2 have a business meeting I have to attend. I  
3 apologize.

4 So we'll break at five to twelve and reconvene  
5 at one. I will do my best to be back by then.

6 So please continue, Mr. Runkle.

7 BY MR. RUNKLE:

8 Q. Okay. So do you have 2002 in front of you?

9 A. I do, sir.

10 Q. Okay. This is a notice of an ex parte  
11 meeting that you attended with various officials at  
12 the FCC. Do you remember this meeting?

13 A. I do, sir.

14 Q. Okay. And why were you there?

15 A. Well, this is not -- we're not advocating  
16 getting rid of vicarious liability. We're -- this  
17 whole proposal was to have a bill that will allow  
18 for an affirmative defense for companies that exert  
19 specific due diligence in terms of work with their  
20 third parties in order to comply.

21 And it's fairly robust, what they have to do.  
22 You know, contracts, they have to have monitoring,  
23 they have to have data audits. They have to take  
24 action when they discover anomalies in compliance,  
25 including severing relationships. Our thinking was

1 that a lot of companies are already doing this, but  
2 there's no affirmative defense for them to go to.

3 So it's nothing to do with reducing a  
4 consumer's ability to file claims, to file class  
5 actions. It doesn't limit vicarious liability in  
6 any way. So I disagree with your characterization  
7 of what this effort is.

8 Q. Okay. But there is an effort to have  
9 Congress pass an amendment to the TCPA that changes,  
10 in a certain way, the vicarious liability under the  
11 law?

12 MS. ECHTMAN: And, Your Honor, I'm going to  
13 assert another objection. There's a Constitutional  
14 right to petition the government and there's a  
15 privilege against having that used against you in  
16 litigation.

17 MR. RUNKLE: I'm not familiar with that.

18 MS. ECHTMAN: It's the Noerr-Pennington  
19 Doctrine.

20 MR. RUNKLE: Okay.

21 MS. ECHTMAN: In California I think it's  
22 actually, I think it's called anti-slap. So I  
23 object to this line of question.

24 MR. RUNKLE: But he's not a party, Elyse,  
25 he's a witness. I'm talking about his activity.

1 His activities.

2 MS. ECHTMAN: Your Honor, that is the basis  
3 of the objection that I'm asserting.

4 THE COURT: The objection is overruled.

5 BY MR. RUNKLE:

6 Q. All right. So Compliance Point is part of  
7 an effort to pass an amendment to the TCPA? That  
8 you'll agree with me on?

9 A. Yes.

10 Q. Okay. And that amendment to the TCPA is  
11 proposed to change the vicarious liability rules  
12 under the TCPA?

13 A. It's not, sir. It does not have any impact  
14 on vicarious liability. What we're asking for will  
15 improve consumer protections, because right now  
16 companies fear implementing these kinds of  
17 additional due diligence measures because they fear  
18 they will overstep their bounds and be accused of  
19 being prescriptive and responsible.

20 This would open the door to more monitoring.  
21 More monitoring programs between companies and their  
22 third-parties to provide an affirmative defense if  
23 companies have done all the right things. And I  
24 think it's better for consumers.

25 Q. But the problem for that is -- well, you



1 testified earlier that you educate your staff on the  
2 TSR is; right?

3 A. Correct.

4 Q. Right. And the current state of the law  
5 under the TSR is that companies are responsible for  
6 all of the entities in their marketing chain; isn't  
7 that right?

8 A. Yes.

9 Q. Yes. So why does it make a difference?

10 A. It makes a great deal of difference  
11 because -- well, what would you rather have, sir, a  
12 situation where a company's engagement of a  
13 third-party and all they do is have a contract and  
14 they don't do anything? They don't monitor, they  
15 don't investigate Better Business Bureau complaints?  
16 They're hands-off, they say they're a separate  
17 company, we've got -- we just use them for a vendor?

18 I'd rather have an active monitoring program  
19 that identifies non-compliance and takes steps to  
20 correct it because consumers are protected better  
21 that way. All I'm saying is give an affirmative  
22 defense for proactive measures that make a  
23 difference. It's not a shadow program. You can't  
24 just check a box and say: "I'm doing this and  
25 that." There's got to be a real program. And

1 there's a lot of support for it on both sides of the  
2 aisle. We have briefed all the consumer protection  
3 groups around DC about this measure, and we've  
4 gotten very good commentary for them as well.

5 Q. Well, we're gonna get there in a little bit.  
6 Is now a good time to break, Your Honor?

7 THE COURT: Yes, it is.

8 Now, let me tell you, we're going to leave the  
9 lines open, but if anybody is on a laptop, your  
10 laptop may go to sleep, in which case you will have  
11 to reconnect when we reconvene. So be forewarned if  
12 that's the case.

13 MS. ACUNA: Your Honor, this Adelina in  
14 California. Should I hang up and connect again with  
15 Diane, or do you want me to leave the phone line  
16 open as well?

17 THE COURT: No, go ahead and hang up.  
18 Diane will reconvene at one. She will call you.

19 MS. ACUNA: Sounds good. Thank you, Your  
20 Honor.

21 THE COURT: Court's in recess.

22 (A lunch break was taken.)

23 THE COURT: All right. Court is reconvened  
24 with everyone but Ms. Ohta. And Ms. Ohta is trying  
25 to connect by video and has agreed to waive her

1 presence because -- who is it that's here?

2 THE CLERK: Ms. Acuna.

3 THE COURT: Ms. Acuna, are you there?

4 MS. ACUNA: Yes, I am, Your Honor.

5 THE COURT: All right. Is that correct,  
6 what I just said?

7 MS. ACUNA: Yes. Acuna, but you probably  
8 don't have a tilde on your paperwork.

9 THE COURT: I do not. Thank you for the  
10 correction.

11 And we have all the DISH attorneys in-house by  
12 phone too?

13 MR. DODGE: Yes, Your Honor.

14 THE COURT: All right. Please proceed.  
15 Everyone else is present by video.

16 Mr. Runkle.

17 MR. RUNKLE: Thank you, Your Honor.

18 BY MR. RUNKLE:

19 Q. All right. So before lunch we were talking  
20 about an attempt that your company is involved in to  
21 alter the TCPA; remember that?

22 MS. ECHTMAN: And, Your Honor, I have a  
23 standing objection to this line of questioning.

24 MR. RUNKLE: And I'd like to respond a  
25 little more to that objection I believe as being

1 from the Noerr-Pennington Doctrine, which I looked  
2 up over lunch. And it's actually about an immunity  
3 to suit -- immunity to anti-trust liability for a  
4 company that petitions the government to change the  
5 law. I don't think it has anything to do with  
6 witness privilege or testimonial privilege. So I'd  
7 just like to put that on the record.

8 MS. ECHTMAN: And I would disagree. That  
9 there are evidentiary rules that come out of the  
10 Noerr-Pennington Doctrine, and there's -- there's  
11 more progeny after that specific case itself  
12 expounding on that doctrine. And there's actually  
13 portions of it that have been codified under  
14 California law which specifically prohibits this  
15 type of questioning.

16 But I just want to lodge that continuing  
17 objection for the record, understanding that the  
18 Court has already overruled it.

19 MR. RUNKLE: But nothing under federal law?

20 MS. ECHTMAN: Noerr-Pennington is a federal  
21 doctrine.

22 MR. RUNKLE: Right. But you're not  
23 claiming that there's an evidentiary privilege under  
24 federal law for him not to testify about --

25 MS. ECHTMAN: Yes, I am claiming that.

1 MR. RUNKLE: what's the base for that?

2 MS. ECHTMAN: The Noerr-Pennington  
3 Doctrine.

4 MR. RUNKLE: Okay. But you can't cite a  
5 case?

6 MS. ECHTMAN: I didn't know you were going  
7 this way and I don't have a case ready with me  
8 today. I disagree with your interpretation and your  
9 position that it's narrowly tailored to that  
10 particular court opinion.

11 THE COURT: Well, I have to further say I'm  
12 not sure what you do in this situation where it may  
13 apply as to California but not as to everyone else  
14 involved here today. So I'm going to continue to  
15 overrule the objection.

16 BY MR. RUNKLE:

17 Q. Okay. So before lunch we were talking about  
18 this amendment to the TCPA that your company is  
19 somehow involved in; is that right?

20 A. Yes.

21 Q. Okay. And this is PX2004. Can you -- if  
22 you could go there. Does this look familiar to you?

23 A. Yes.

24 Q. This is the proposed amendment; right?

25 A. Yes.

1 Q. And if you -- turn to page 2.

2 Pages 2 through 4 are the -- is the operative  
3 language. And essentially, what it does, is create  
4 an affirmative defense under the TCPA for a company  
5 that hires third-parties to do marketing; is that  
6 right?

7 A. It's not only that, sir. It's any  
8 third-party relationships. It could be, you know, a  
9 dealer scenario, a retailer scenario. It could be a  
10 contact scenario. Any third-party relationships  
11 where each party depends on the other for  
12 compliance.

13 Q. Right. And that affirmative defense would  
14 apply in the circumstance where the company  
15 maintains compliance monitoring; right?

16 A. There's other things required as well, but  
17 compliance monitoring is one of those things.

18 Q. Okay. And so -- and that's on pages 3 and  
19 4, is that in order to fulfill part of -- part of  
20 this affirmative defense, a company needs to -- (as  
21 read:) The defendant shall be considered to be  
22 reasonably monitoring and maintaining records of  
23 compliance if the defendant, 1 --

24 THE COURT: We're getting feedback, Diane.

25 THE CLERK: I do not know where it's coming

1 from unless -- California is trying to connect, but  
2 maybe -- I'm sending a message to their IT person  
3 now.

4 Q. Solar flare.

5 Okay, we will just continue. So this part of  
6 the affirmative defense says that --

7 A. Which part are you looking at?

8 Q. I'm looking at page 3, talking about  
9 compliance monitoring?

10 A. Okay.

11 Q. It says (as read:) For purposes of Clause  
12 romanette -- romanette iii, and without limiting  
13 what may constitute reasonable monitoring and  
14 maintenance of records of compliance, the defendant  
15 shall be considered to be reasonably monitoring and  
16 maintaining records of compliance if the defendant:

17 1, requires the dealer or service provider to  
18 retain an objective, independent third-party  
19 monitoring service and to provide periodic  
20 compliance reports to the defendant.

21 So that's where you guys come in; right?

22 A. Well, I mean we could. There's other people  
23 that could. I mean the reason I was asked to be a  
24 part of this is to discuss the problems that the  
25 industry is facing in this area. And why there are

1 some companies not doing sufficient monitoring  
2 because of the fear of stepping beyond the line in  
3 terms of being responsible and prescriptive. And  
4 not having an affirmative defense to fall back on  
5 for doing more monitoring.

6 And we've said all along this whole thing is  
7 better for consumers. It means compliance. It  
8 means more checking. And that's our vision of it.

9 Q. Okay. But your testimony this morning was  
10 that your company is the only one who is -- is  
11 actually suited to do this kind of work; right?

12 A. There is no self-motivation here, sir. I  
13 was asked by the company who started this whole  
14 thing. I was asked if I would lend my industry  
15 expertise about what sufficient monitoring would be.  
16 I didn't craft this language here about -- I don't  
17 have any interest that you're alluding to here.

18 Q. But that was your testimony this morning;  
19 right?

20 A. What was?

21 Q. That your company was really the only  
22 company that could -- that could accomplish this  
23 kind of work?

24 A. I said my company was the only company that  
25 could put together a compliance program to the level



1 needed in this case. There are other ways to  
2 monitor. There are ways to listen to telephone  
3 calls, monitor what agents are saying. Yes, we are  
4 one of the few companies that can do data audits or  
5 monitoring through data audits. But there's other  
6 things. There's onsite visits. There's a lot of  
7 ways to monitor that would not just be something  
8 that I could do.

9 Q. Okay. But your company has a financial  
10 interest in this piece of litigation, don't you  
11 think?

12 A. I don't know. I don't know if we do or not.

13 Q. I mean you're part of the team that's  
14 pushing it; right?

15 A. Well, there's no financial reward for being  
16 part of a team to push it.

17 Q. But you're trying to get yourselves  
18 essentially written into the statute; right?

19 A. We are not trying to get ourselves written  
20 into the statute; no, sir. That's a very narrow  
21 view of this requirement. What we're saying is that  
22 you can't -- you need to have an independent,  
23 third-party to verify that you're complying. That's  
24 all we're saying. It's not -- we're not writing  
25 ourselves into that.

1 Q. Right. But it's an affirmative defense to  
2 what otherwise would be violations; right?

3 A. No. It's -- you could still have violations  
4 that have an affirmative defense. That's what the  
5 safe harbor is, the do not call safe harbor. That's  
6 what the call abandonment safe harbor is. There's  
7 violations, but there's a defense for it.

8 And this is the same thing, there might be  
9 violations, but we want to have affirmative defense  
10 to say, you know, I did -- I took all these  
11 measures, I did all these steps, and despite that,  
12 this still happened, so I should be able to have a  
13 defense against what happens.

14 Q. Right. And that squares with your trial  
15 testimony from February; right?

16 A. I'm not sure what part of the trial  
17 testimony you're referring to, sir.

18 Q. Well, that you thought every step DISH took  
19 in this case was reasonable--right--that you  
20 testified about? Remember that?

21 A. I talked about -- I don't know if I said  
22 every step DISH took was reasonable. What I talked  
23 about was the specific testimony that I was asked  
24 about. The measures that DISH took, the e-mail  
25 traffic that they ran down to try to identify

1 people/entities that were doing these things, the  
2 decisions they made, I thought they were reasonable;  
3 yes.

4 Q. So in a circumstance where your affirmative  
5 defense would have applied to DISH in this case, it  
6 would have let them off the hook for 50 million or  
7 so violations?

8 MS. ECHTMAN: I'd like to also object to  
9 the extent that this is a proposed amendment on --  
10 is it specific to the TSR or the TCPA, or does it  
11 apply to both? Because I think Mr. Runkle is  
12 muddying the record here.

13 Q. My attempt was not to muddy the record,  
14 because actually, that's an important point. Thank  
15 you.

16 So this applies only to TCPA; right?

17 A. I believe so.

18 Q. Right. To the private cause of action in  
19 the TCPA?

20 A. It has nothing whatsoever to do with the  
21 private cause of action. It would not affect any  
22 ability to file a private cause of action.

23 Q. But it would affect the ability of a private  
24 litigate to prove their cause of action; right?  
25 Because this is setting up an affirmative defense;

1 right?

2 A. Right. I mean but I want companies to do  
3 more in compliance. I want companies to monitor, to  
4 make sure that their partners are complying. I want  
5 that.

6 Q. Right. But the problem with what you're  
7 saying is what Ms. Echtman just raised, which is  
8 that the TSR already makes them do that, doesn't it?

9 A. Sir, they're not doing it. And there's no  
10 defense. There's no -- there's no credit for those  
11 that do do it. When you are doing it and there's  
12 still things that occur, you don't have a defense.  
13 All we're saying is we want to encourage more  
14 companies to do the right thing. Provide them a way  
15 to get credit for their efforts to comply, that's  
16 all. We're not taking away any right under private  
17 right of action. We're not changing -- trying to  
18 change the vicarious liability definition.

19 Q. But that brings me back to my original  
20 question that Ms. Echtman objected to, which was, if  
21 this had been in effect earlier, during the time  
22 period of this case, it would have gotten DISH off  
23 the hook, in your opinion, from its TCPA liability?

24 A. Absolutely not. It's a defense. That means  
25 there's two sides that are arguing about whether or

1 not the affirmative measures taken were sufficient.  
2 It's not a checkmark. It's not a checkmark that  
3 says, "I did these five things so I'm automatically  
4 off the hook." It's not that at all.

5 Q. But that was your testimony earlier in this  
6 case in February, that -- and you just said it, that  
7 you thought what DISH did was reasonable? It did  
8 reasonable monitoring and compliance?

9 A. Yes.

10 Q. Right. So it would have had this  
11 affirmative defense had this applied at the time?

12 MS. ECHTMAN: Objection. Not under the  
13 statute the federal government is suing under.

14 A. You know, each --

15 THE COURT: Hold your answer. Hold -- Mr.  
16 Runkle. Mr. Runkle, could you respond?

17 MR. RUNKLE: What's the objection?

18 MS. ECHTMAN: You're saying that there  
19 would have been a defense. You're questioning as  
20 the Federal Government and the Federal Government  
21 sued under the TSR. This is a proposed amendment to  
22 the TCPA. So I think your question -- I object to  
23 your question as misleading.

24 MR. RUNKLE: I asked him about the TCPA.  
25 We established already that this is a TCPA. I'm

1 asking him a question as a party to the case.

2 MS. ECHTMAN: Well, I object to your  
3 standing to ask a question about TCPA, which is not  
4 a claim that your client is pursuing.

5 MR. RUNKLE: My client is the United  
6 States. It's federal law; right? TCPA?

7 THE COURT: Is that a question for me or  
8 Ms. Echtman?

9 MR. RUNKLE: Well, I think Ms. Echtman  
10 knows that the TCPA is a federal law.

11 MS. ECHTMAN: The TCPA is a federal law,  
12 but it is not a law that Mr. Runkle is here  
13 pursuing. That is something for the states to ask  
14 if the states have that question. Mr. Runkle's  
15 client is the Federal Government suing under the  
16 TSR.

17 THE COURT: The objection is overruled.  
18 Your question again? would you read it back for  
19 Mr. Sponsler, Kathy.

20 (The requested material was read.)

21 BY MR. RUNKLE:

22 A. It would have been part of the analysis. It  
23 would have been part of the proceedings. If this  
24 was in place, DISH could have presented in court  
25 their beliefs that they met the requirements for the

1 affirmative defense. And they would have given  
2 testimony as to why they think they did, and you  
3 would have done your job and said why they didn't.  
4 But right now there is no argument for an  
5 affirmative defense because it doesn't exist in this  
6 case. I don't know if they would have prevailed or  
7 not. It would have been up to the Court.

8 Q. But under your opinion, they would have?  
9 That was the opinion you rendered during the trial;  
10 right?

11 A. You know, I'm not sure if they would have  
12 met all of these elements. I mean this is pretty  
13 prescriptive. Not only contracts but active  
14 monitoring, active escalation planning, all of these  
15 other recorded requirements here. It wasn't  
16 available, so maybe that's why they didn't undertake  
17 some of those things, I don't know. But --

18 Q. Okay. And while we're on that, let's go  
19 back to PX2002. And pages 4 and 5 of this document  
20 are, I believe, a presentation you made to the FCC?

21 Now, did you present this item to the FCC?

22 A. This was part of a packet of information  
23 that we put together and was a leave-behind document  
24 at all of the meetings that we had with regulators  
25 and Senators and Congressman and so on.

1 Q. Okay. And does this document accurately  
2 reflect some of the monitoring and enforcement you  
3 do for third-parties?

4 A. Yes. This is just an overarching concept of  
5 what monitoring enforcing can be. It wasn't meant  
6 to be prescriptive; that it had to be this. It was  
7 just an example of what kind of monitoring could  
8 happen.

9 Q. Okay. And I want to be very specific  
10 because I don't want you to be confused because  
11 there's been disputes in this case about the time  
12 period that we're talking about today. And I want  
13 you to confine your answer to this question very  
14 explicitly to the time period of 2013 and prior to  
15 that because that was the last time that I deposed  
16 you. Do you remember being deposed in 2013?

17 A. Yes, sir.

18 Q. Okay. And so in November 2013, which I  
19 believe is when that deposition was, and prior to  
20 that, DISH had not purchased this monitoring and  
21 enforcement system for its retailers; is that  
22 correct?

23 MS. ECHTMAN: Objection, Your Honor. There  
24 has been argument here about the fact that we're not  
25 going into compliance standards and what DISH's



1 compliance was for purposes of this proceeding.  
2 This is beyond the scope of the direct examination.  
3 And Mr. Runkle is specifically getting into areas  
4 that -- that are supposed to be off-limits for this  
5 hearing.

6 MR. RUNKLE: Your Honor, the problem is  
7 that this witness is here saying that his company is  
8 the best one best suited for the job and that they  
9 have this relationship with DISH. The problem is  
10 that they had all these services available and DISH  
11 didn't buy them. That's relevant evidence as to  
12 whether this witness can be the one who can actually  
13 make DISH do anything, which I submit that he can't  
14 because DISH already had this stuff available to it,  
15 it didn't do it. That's the line of questioning,  
16 Your Honor.

17 THE COURT: The objection --

18 MR. RUNKLE: That's explicitly relevant.

19 THE COURT: The objection is overruled.

20 BY MR. RUNKLE:

21 Q. So looking at the time period November 2013  
22 and into the past prior to that, DISH had not  
23 purchased any of this system for its retailers; is  
24 that correct?

25 A. Well, it's not a system. It's -- this is

1 describing monitoring enforcing methodologies.  
2 Different ways. You know, you've got an escalation  
3 plan here, you've got ongoing call data audit,  
4 you've got vendor and affiliate monitoring. These  
5 are concepts of monitoring and enforcing, not that  
6 somebody would do all of these things. It might not  
7 be relevant in all cases for every company. So it's  
8 not that this is a program.

9 And no, during the period 2013, DISH did not  
10 come to me to do some of these things.

11 Q. Okay. So let's talk a little bit more about  
12 the amendment --

13 A. But can I just add --

14 Q. Of course.

15 A. DISH was doing some of these things  
16 internally. They had their own policies and  
17 procedures for compliance, which we advocate. They  
18 had their own escalation plans internally. That's  
19 how they became aware of some of these complaints.  
20 And you know, they had contracts with both vendors  
21 and affiliates. And they also did some secret  
22 shopping, or mystery shopping, which is another way  
23 of monitoring and enforcing. So they did some of  
24 this, but they did it at home.

25 Q. Okay. So this amendment. There was a

1 hearing before a Senate committee; right? Are you  
2 familiar with that hearing?

3 A. Yes, sir.

4 Q. Were you there?

5 A. No, sir.

6 Q. Okay. And there was a consumer -- there was  
7 a woman from the National Consumer Law Center who  
8 spoke. And she spoke out against the amendment.  
9 Did you hear about that?

10 MS. ECHTMAN: Your Honor, he's asking  
11 about -- Mr. Sponsler about a hearing that he wasn't  
12 present at and doesn't have personal knowledge of.  
13 I object.

14 Q. There's a good-faith basis for my question,  
15 Your Honor, that will become apparent very shortly.

16 THE COURT: The objection is overruled.

17 Q. So you weren't familiar with the testimony  
18 of Margot Saunders at that hearing?

19 A. No, sir.

20 Q. Okay. In fact, at that hearing, she said  
21 that this case was a perfect example of why  
22 Compliance Point and ADT's proposed amendment to the  
23 TCPA should not be passed. You weren't familiar  
24 with that?

25 MS. ECHTMAN: Objection to Mr. Runkle's

1     repetition of hearsay and asking the witness if he  
2     knew about testimony he wasn't familiar with and  
3     wasn't present for.

4             MR. RUNKLE: Your Honor, it's not hearsay.  
5     It's not being offered for the truth of the matter,  
6     it's being offered for the -- to gauge the witness's  
7     reaction to a statement that was said, which I have  
8     a good-faith basis to understand was said because  
9     her testimony is actually a matter of Congressional  
10    record. If you want me to put it in front of the  
11    witness, I can.

12            THE COURT: Yes. Would you, please.

13            MR. RUNKLE: Okay. So let's turn to  
14    PX2007.

15            MS. ECHTMAN: Your Honor, I object to the  
16    use of this testimony similar to the objection that  
17    was sustained to the use of Mr. Stauffer's  
18    affidavit. This witness -- this person is not here  
19    and we do not have an opportunity to cross-examine  
20    her.

21            MR. RUNKLE: Your Honor, on direct -- or  
22    actually, in response to a question that I asked  
23    maybe, Mr. Sponser said that consumers supported  
24    this amendment. And I'm trying to probe his  
25    statement about consumers supporting this amendment

1 because I don't believe that it's accurate. And I  
2 think that's a fair subject for cross-examination.

3 THE COURT: The objection is overruled.

4 BY MR. RUNKLE:

5 Q. Okay. So if you can turn to page 21 of this  
6 document. Actually, first, I'm very sorry, let's  
7 start at page 1 of the document.

8 And on page 1 of the document you'll see, if  
9 you'll agree with me, that Margot Saunder's  
10 statement was made on behalf of the National  
11 Consumer Law Center, as well as Americans for  
12 Financial Reform, the Center For Responsible  
13 Lending, Consumer Action, Consumer Federation of  
14 America, Consumers Union, the National Association  
15 of Consumer Advocates, the National Center for Law  
16 and Economic Justice, Public Citizen, and MFY Legal  
17 Services. You see that there?

18 MS. ECHTMAN: Well, Mr. Runkle, you just  
19 said that Ms. Saunders was a consumer who testified.  
20 It appears that she's a lawyer, counsel at the  
21 National Consumer Law Center. I just want to make  
22 sure the record is accurate. Is this woman --

23 MR. RUNKLE: She is a consumer advocate who  
24 works at the National Center -- the Consumer Law  
25 Center.

1 MS. ECHTMAN: She's a lawyer?

2 MR. RUNKLE: She's a lawyer. Can you let  
3 me do this examination, Elyse, please.

4 MS. ECHTMAN: I'm making sure the record is  
5 clear.

6 BY MR. RUNKLE:

7 Q. Okay. So if you would turn to page 21.  
8 You'll see that Ms. Saunders, speaking on behalf of  
9 these organizations, cited this case as a reason for  
10 why the vicarious liability rules under the TCPA  
11 should not be changed. And does that surprise you?

12 A. It surprises me that she would refer to  
13 changing vicarious rules because it doesn't try to  
14 do that. I think she doesn't understand perhaps,  
15 what we're -- what this is about.

16 Q. Okay. So let's talk about another part of  
17 the TCPA that you don't agree with, which is the  
18 autodialer definition that the FCC has put out. Do  
19 you know what I'm talking about?

20 A. No, sir.

21 Q. Okay. So the FTC -- I mean the FCC, in a  
22 ruling in 2015, said that the definition of an  
23 automatic telephone dialing system includes dialers  
24 that can dial off of lists. Do you know what I'm  
25 talking about now?

1           A. Well, that actually changed or was added,  
2 much earlier, probably around 2005 or 2008.

3           Q. Right. And you had hoped, before that  
4 ruling came out last summer, that the FCC would  
5 provide relief to the industry by allowing the  
6 industry to contact people's cellphones using  
7 autodialers; right?

8           MS. ECHTMAN: Objection, Your Honor. We're  
9 going really far afield here. This case does not  
10 deal with autodialer laws, this is a do not call and  
11 pre-recorded call case, not about the definition and  
12 interpretation by the FTC of the ATDS.

13           MR. RUNKLE: Your Honor, this witness came  
14 here and said he's the one, he's the only one  
15 essentially, who can enforce this agreement. And I  
16 don't believe that -- I believe that he is part of  
17 the industry and wants the industry to be able to  
18 make more phone calls, not fewer phone calls. And  
19 that's the line of questioning that I'm pursuing  
20 right now. And I think it is very relevant to the  
21 testimony that he gave on direct.

22           THE COURT: Which agreement are you talking  
23 about? You said he's the only one who can enforce  
24 this agreement?

25           MR. RUNKLE: I'm sorry. The injunction. I

1 apologize.

2 THE COURT: I didn't think this was agreed  
3 to.

4 MS. ECHTMAN: It's not, Your Honor.

5 THE COURT: The objection is --

6 (Court reporter requested clarification.)

7 THE COURT: The objection is overruled.

8 BY MR. RUNKLE:

9 Q. All right. So let's try again.

10 So the TCPA has a provision preventing people  
11 from calling -- preventing any person from calling  
12 cellphones using an automatic telephone dialing  
13 system or an artificial pre-recorded voice; right?

14 MS. ECHTMAN: Objection of  
15 oversimplification of the law.

16 Q. Generally --

17 THE COURT: The objection is overruled.

18 A. Lacking the current -- the appropriate level  
19 of consent.

20 Q. Right. And so prior to that -- I'm sorry,  
21 prior to the FCC ruling from the summer of 2015,  
22 there were a number of petitions that the industry  
23 had made asking the FCC to clarify the definition of  
24 an ATDS; right?

25 A. Well, it needs clarification, sir. The



1 definition of an ATDS is very clear. It was  
2 approved by Congress and it is the statutory  
3 definition that it is a system that produces or  
4 stores numbers to be called using a sequential or --  
5 random or sequential number generator and to dial  
6 those numbers.

7 what you're talking about, this list concept,  
8 the American Collections Association asked for a  
9 petition saying that, "well, we don't randomly or  
10 sequentially generate numbers, we dial from a list.  
11 So we, therefore, think we do not meet the  
12 definition of an autodialer." That's where all that  
13 came about.

14 Q. Right. But PACE is an -- is an industry  
15 organization that you are part of; isn't that right?

16 A. That's correct.

17 Q. Are you on their Board of Directors?

18 A. Yes, sir.

19 Q. Okay. So PACE has sued the FCC to try to  
20 overturn that ruling; right?

21 A. To bring clarity to exactly what is an  
22 autodialer because right now we have ambiguity so  
23 bad that no one in the industry knows how to comply.

24 Q. But the ambiguity does not exist because of  
25 the FCC, the ambiguity exists because of the

1 industry; right?

2 A. Absolutely not. You know, we need  
3 guidelines that are -- tell us how to comply, what  
4 are the definitions. You know, when you have  
5 capacity words without definition of what capacity  
6 means, and we have this idea of future capacity and  
7 current capacity by adding software or hardware, I  
8 mean it's a very, very confusing -- it has caused  
9 the industry as a whole to revamp their dialing  
10 systems, still with uncertainty about whether their  
11 efforts to make sure they're only manually dialing  
12 cellphones, whether or not those efforts are going  
13 to be sufficient to meet this new definition because  
14 we just don't know.

15 Q. But the dialers that DISH uses would fall --  
16 or used during the time period you evaluated them,  
17 would fall under the ATDS definition; right?

18 MS. ECHTMAN: Objection. This is outside  
19 the scope of anything that Mr. Sponsler has been  
20 retained to opine on. This has not been an issue in  
21 this case.

22 MR. RUNKLE: He's a fact -- he's a fact  
23 witness, Your Honor.

24 MS. ECHTMAN: You just asked him for an  
25 expert opinion on an area of the law that he said is

1 very ambiguous. This is outside the scope and  
2 it's -- DISH has not hired Mr. Sponser to opine on  
3 this.

4 MR. RUNKLE: He is testifying as a fact  
5 witness today, Your Honor. He came here to offer  
6 testimony, and Ms. Echtman doesn't want him to  
7 testify, it's quite obvious. I don't know what --  
8 it's a frivolous objection. I asked him whether he  
9 thought DISH's dialers, that Mr. Bicks spent, you  
10 know, four hours asking him about the calls that  
11 DISH made and his certification that he offered to  
12 DISH about all their dialing systems in 2010, and  
13 now they won't let him testify about what he saw.  
14 It's outrageous, Your Honor.

15 THE COURT: The objection is overruled.

16 BY MR. RUNKLE:

17 Q. So DISH's dialers that you saw them using in  
18 2010 would have fit FCC's ATDS definition; is that  
19 right?

20 A. I did not analyze their dialing systems,  
21 sir.

22 Q. So a dialer that you feed a huge list of  
23 numbers into that dials people, that's not an ATDS?

24 A. Sir, it's very complex. Dialers have  
25 progressive power, predictive, they have preview

1 mode. You can use those different modes and some of  
2 them do not, absolutely do not dial automatically  
3 from a list, they're only dialed when an agent  
4 presses a button to dial it.

5 So no, you can't just look at a dialer from the  
6 outside and say it's an autodialer because that's  
7 not the case.

8 Q. But your organization wants businesses to be  
9 able to make more calls to cellphones; isn't that  
10 right?

11 A. I don't know where you get that from. I've  
12 never said that I -- I have no interest whatsoever  
13 in a business making more calls to cellphones.

14 Q. Well then, why does PACE want to, you know,  
15 expend all the effort to get the ATDS definition  
16 changed?

17 A. We don't want it changed, we want it  
18 clarified. We want everybody in the industry to be  
19 able to read -- as it was in the beginning, it was  
20 clear. In 1991, there was a clear definition of an  
21 ATDS. And so if you didn't have a system that  
22 randomly, sequentially-generated number, stored it,  
23 and then dialed it, you didn't have autodialer.  
24 That's clear. Right now it is -- it is muddy as it  
25 gets. And nobody knows where to -- where to turn,

1     what the definition is.  What am I using?  Will it  
2     be or not?  And it's far more complicated than the  
3     issue of loading a list.

4           Q.  Okay.  But would you agree with me,  
5     Mr. Sponsler, that consumers just don't want these  
6     calls?  I mean they don't like calls to their  
7     cellphones; would you agree with me on that?

8           A.  I think you're right.  I think a lot of  
9     consumers do not want these calls.  But the Federal  
10    Government and states have provided exemptions to  
11    those do not call protections that make these calls  
12    legal.  Including consent exemptions.  And including  
13    calls that are not solicitations.  So there are  
14    still a lot of calls that go on.  And I'm not an  
15    advocate for more calls, I'm not an advocate for  
16    unwanted calls at all.  It doesn't do consumers any  
17    good, it doesn't do companies any good.

18          Q.  So at that Senate hearing, would you be  
19    surprised to learn that Senator Markey from  
20    Massachusetts, he said that he wrote the TCPA, and  
21    he held up an old cellphone and he said that he --  
22    that the ATDS ban, as the FCC interpreted it, is  
23    exactly what he intended.  Would that surprise you?

24          A.  I'm sorry, sir, I --

25          Q.  Let's say that Senator Markey from

1 Massachusetts at that Senate hearing, that you  
2 didn't go to, held up a cellphone and said, "When I  
3 wrote the law, I envisioned that people wouldn't be  
4 allowed to call cellphones, and this is exactly what  
5 I intended." Would that surprise you?

6 A. When he wrote the 1991 --

7 Q. Yes.

8 A. He -- I would say he's a pretty good  
9 visionary because there wasn't very many cellphones  
10 in 1991.

11 Q. But the law does cover cellphones? It says  
12 that in the law; right?

13 A. Yes.

14 And I'm not an advocate for unwanted calls to  
15 cellphones at all.

16 Q. All right. We have one more -- so at --  
17 there was another meeting where you presented to  
18 the -- with the Better Business Bureau, you  
19 presented to some consumer groups. Do you remember  
20 that meeting?

21 A. Yes, sir.

22 Q. Okay. If you could turn to PX2005.

23 And so it looks like there were three  
24 presenters that day?

25 A. Yes, sir.

1 Q. Was Alex Hecht a presenter that day?

2 A. Yes, sir.

3 Q. He's part of a lobbying firm; is that  
4 correct?

5 A. ML Strategies; yes, sir.

6 Q. Is Compliance Point paying that lobbying  
7 firm?

8 A. No, sir.

9 Q. No. Okay.

10 And if you could turn to page 9 of this.

11 A. Okay.

12 Q. So it says that the chief supporters of the  
13 Daines amendment, as they call it, are PACE,  
14 Compliance Point, and ADT. So who's -- is ADT  
15 really the driving force behind it?

16 A. Yes, sir.

17 Q. Okay. So you're not the driving force,  
18 you're just the chief supporter? Your company?

19 A. I am supporting with my knowledge of how  
20 this kind of program can change the industry and  
21 change the customer experience for the better.  
22 That's why I'm -- I didn't call anybody and say,  
23 "let's do this." I was called to ask if I could  
24 lend expertise in the issue.

25 Q. Okay. So then if you could turn to page 16.

1 A. Okay.

2 Q. This was your presentation; right?

3 A. Yes, sir.

4 Q. Okay. And in your presentation, you said,  
5 if you could turn to -- you give an example. I want  
6 to turn to that.

7 I'm sorry, okay. So if you could turn to page  
8 32.

9 A. Yes, sir.

10 Q. All right. So you gave four case studies  
11 here during this -- during this presentation?

12 A. Yes, sir.

13 Q. Were any of these DISH?

14 A. I don't believe so.

15 Q. You don't believe any of those were DISH?

16 A. No, sir.

17 Q. All right. And then there was another  
18 presentation made here, and that was Alysa Hutnik of  
19 Kelley Drye and Warren; right?

20 A. No, sir, I don't --

21 Q. She wasn't there? If you could turn to page  
22 50?

23 A. Yeah. I didn't recall her being there,  
24 but --

25 Q. You don't recall her being there?



1 A. -- she must have been.

2 Q. Okay. So if you could turn to page 57 here.

3 A. Okay.

4 Q. So it appears that in her presentation,  
5 Ms. Hutnik said that -- that the federal common law  
6 of agency was murky as to what facts create an  
7 agency relationship in the context of the TCPA. Do  
8 you agree with that?

9 A. I think so; yes.

10 Q. You think so.

11 And so that's why, as Ms. Hutnik saw it -- and  
12 I guess you're not remembering any of her  
13 presentation there that day?

14 A. I mean this is all familiar to me. I didn't  
15 specifically remember her presenting that day.

16 Q. Okay. But it seems like, you know, she was  
17 there to argue that the vicarious liability rules  
18 are, you know, a little too strong now because these  
19 companies might get subject to liability; right?

20 A. I think that's a mischaracterization, sir.

21 Q. All right. So I'd like you to turn to 2006.  
22 So this was an ex parte presentation notice from  
23 this case. You know there was an FCC proceeding in  
24 this case; right?

25 A. There was a proceeding in this case?

1 Q. The vicarious liability rules; right?

2 A. Earlier.

3 Q. Yeah, in this case?

4 A. Yes.

5 Q. Right. You know about that; right?

6 A. Yes.

7 Q. Right. And if you read this, certainly  
8 seems to me like Ms. Hutnik was at a meeting where  
9 she said that the federal common law of agency is  
10 sufficient to provide the needed uniformity and  
11 predictability for telemarketers and consumers. Do  
12 you see that?

13 MS. ECHTMAN: I object. Is Mr. Runkle  
14 cross-examining Mr. Sponsler or Ms. Hutnik, who is  
15 not here?

16 MR. RUNKLE: I'm trying to get his reaction  
17 to this material, Your Honor. Because it certainly  
18 seems like there's being inconsistent positions  
19 taken here. And that it relates to Mr. Sponsler's  
20 ability to carry out his monitoring functions  
21 because he doesn't seem to really believe in the law  
22 and he doesn't believe in the vicarious liability  
23 principles that the Court has set forth.

24 MS. ECHTMAN: These are not statements by  
25 Mr. Sponsler, these are statements by a lawyer for

1 DISH in one capacity representing DISH, in another  
2 capacity making a Better Business Bureau  
3 presentation. I think this goes far beyond the  
4 scope. And it's not a fair cross-examination of  
5 Ms. Sponsler as to whether or not Ms. Hutnik's  
6 statement from -- between one document and another  
7 are consistent.

8 MR. RUNKLE: But those aren't the questions  
9 I asked --

10 MS. ECHTMAN: This has completely gone  
11 really far afield from the subject matter of the  
12 proposed injunction.

13 MR. RUNKLE: Those aren't really the  
14 questions I asked. The questions I asked is whether  
15 he agreed with Ms. Hutnik at the presentation that  
16 he was at. And then I'm going to ask him a  
17 different question about -- this is one I think DISH  
18 would agree this is admissible evidence because it's  
19 a statement made by DISH. So I think that it's  
20 permissible for me to question him on this topics.

21 THE COURT: The objection is overruled, but  
22 I'm sure glad I didn't let you go for 15 minutes  
23 40 minutes ago.

24 MR. RUNKLE: I'm almost done, Your Honor.  
25 I'm almost done, I promise.

1 THE COURT: Go ahead.

2 BY MR. RUNKLE:

3 Q. So you disagree with DISH here that the --  
4 that the federal common law of agency is sufficient  
5 to provide uniformity and predictability for  
6 telemarketers?

7 A. Sir, I have never seen this. I mean I would  
8 need to read it. I'm not sure what it's about  
9 really.

10 Q. So, Mr. Sponsler, don't you think that  
11 you're a little too close to the industry to really  
12 fulfill the pro-consumer role that may be needed in  
13 the injunction in this case?

14 A. Absolutely not. Compliance is pro-consumer.  
15 Monitoring and enforcing is pro-consumer. Having an  
16 affirmative defense for doing it right is  
17 pro-consumer. Having escalation plans is  
18 pro-consumer.

19 Everything that we advocate in being -- working  
20 towards compliance, educating companies about  
21 compliance, implementing policies and procedures in  
22 monitoring and recordkeeping is all for one purpose,  
23 comply with the laws. Protect the consumer, listen  
24 to the consumer rights and wishes. And we're better  
25 at that than anybody else, about getting those

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1 policies and programs in place. I've got a lot of  
2 clients that are successfully doing it.

3 And so no, I have no -- no idea that we want  
4 more calls and we want less consumer protection.  
5 Not at all.

6 Q. But during the time period, and focusing  
7 only on the time period of this case, you said that  
8 some of your clients are able to actually accomplish  
9 this; right?

10 A. Absolutely.

11 Q. Right. But during the time period that is  
12 at issue in this case, DISH was not able to  
13 accomplish it; right? And you worked for them?

14 A. I went in and did a one-time review of  
15 corporate DISH's compliance with their internal call  
16 centers. I have never analyzed their  
17 retailer-to-DISH relationships. It's only been  
18 limited to what they did at the corporate -- the  
19 corporation.

20 MR. RUNKLE: Okay. I don't have any  
21 further, Your Honor.

22 THE COURT: Do the states any --

23 MS. ECHTMAN: Your Honor, I have some  
24 redirect --

25 THE COURT: First of all, do the states --

1 MS. ECHTMAN: -- I don't know if the states  
2 have anything.

3 THE COURT: Ms. Ohta?

4 I'm sorry, I missed that?

5 MS. OHTA: I don't have any questions, Your  
6 Honor.

7 THE COURT: Okay. Thank you.

8 (The plaintiff states' attorneys had no  
9 questions.)

10 THE COURT: Ms. Echtman.

11 MS. ECHTMAN: Is it all right if I do it  
12 from here, will that work for the Court, or should I  
13 switch seats with Mr. Runkle?

14 THE COURT: No. Actually, we can see you  
15 better there.

16 MS. ECHTMAN: Okay.

17 THE COURT: Please proceed.

18 REDIRECT EXAMINATION

19 BY MS. ECHTMAN:

20 Q. Okay. Mr. Sponsler, you were asked a number  
21 of questions about this proposed amendment and -- to  
22 the TCPA specifically which would provide an  
23 affirmative defense. Mr. Runkle took issue with the  
24 statement that consumers supported the amendment by  
25 citing to testimony by a lawyer.

1 Mr. Sponsler, can you tell us who supported  
2 that amendment?

3 A. We met directly with six or seven consumer  
4 groups, many of which were listed in the paperwork  
5 that Mr. Runkle pointed out there that she was  
6 representing. We met directly with them.

7 And we did not get a positive, you know,  
8 supportive view, we got very productive feedback.  
9 We -- those groups recommended us to go see other  
10 groups, and they introduced us -- they made  
11 introductions to other groups for us to go meet,  
12 even giving us the contact information.

13 So it was a positive experience. I mean we did  
14 not have one group that was actually against what we  
15 were advocating.

16 Q. And when you're talking about those groups,  
17 the one that you met with is the woman who gave the  
18 Congressional testimony that Mr. Runkle referred to?

19 A. I did not meet with her. She -- I'm not  
20 sure which group she is directly affiliated with.  
21 And I apologize, I can't remember the names of all  
22 the various consumer advocacy groups that we did  
23 meet with, but there were quite a few that were also  
24 at the Better Business Bureau presentation.

25 Q. And you're saying you had good, productive

1 conversations with a member of Consumer Advocacy  
2 Group?

3 A. It was very productive. I mean nobody --  
4 you know, there was concern in the room that this  
5 was trying to be a back door to avoid, you know --  
6 reduce the protections under the TCPA or anything  
7 like that. So there was some, I'll say skepticism,  
8 but no outright objections or strong feelings were  
9 presented to us.

10 Q. And do you understand about Mr. Runkle's  
11 line of questioning that he's arguing that  
12 Compliance Point should be disqualified from  
13 providing operational compliance services under a  
14 court order because you've exercised your  
15 Constitutional right to lobby the government for  
16 improvements in the law?

17 A. Yes, I --

18 MR. RUNKLE: I think that -- objection,  
19 Your Honor. I don't think that's actually the  
20 argument. I think the argument was that it  
21 demonstrates bias and it's -- it's an appropriate  
22 cross-examination topic, not that he should be  
23 disqualified because he petitioned the government  
24 for something. That's absolutely not what the  
25 argument is.



1 THE COURT: Well, two things.

2 I'm going to overrule -- overrule your  
3 objection. But Mr. Sponsler, at one time, said that  
4 he met with six or seven consumer groups and did not  
5 get a supportive view, which seems contradictory to  
6 what he said after. Did Mr. Sponsler misspeak, or  
7 did the court reporter and I mishear?

8 A. What I meant, Your Honor, was that during  
9 the presentations to the consumer groups directly we  
10 didn't get anybody that said, "Oh, this is a great  
11 program, you know. We think, you know, it's a great  
12 amendment, we really support it." We didn't get  
13 that.

14 We did get a lot of constructive feedback. You  
15 know, who else we needed to see. We got some  
16 recommendations for tweaks in the language in the  
17 proposed bill that was very, I think, helpful for  
18 the bill. And so that sort of thing.

19 What I meant was, yeah, we didn't have anybody  
20 that was ready to sign up and say: "We fully  
21 support it." No, we didn't.

22 THE COURT: Thank you.

23 Go ahead, Ms. Echtman.

24 BY MS. ECHTMAN:

25 Q. Do you think that the argument that you're

1 somehow biased and can't work as a compliant expert  
2 because you've advocated for changes in the lawsuit  
3 is fair?

4 A. No. This is a very difficult business  
5 anyway with all the competing federal and state  
6 laws, and individual laws in states that are unique  
7 to the state. And you sometimes, like the two-party  
8 consent law, companies are forced to provide the  
9 recording notice in every state they call because of  
10 the states that are requiring it.

11 So it's difficult enough as it is without  
12 having this problem of having this national federal  
13 regulation that is -- has this ambiguity in it.  
14 This unclarity. It could be anything. And guess  
15 how we're gonna find out? We are gonna find out  
16 when we go to court which district interprets it  
17 which way. That's no way to comply.

18 I mean give the industry solid, clear rules  
19 that protect consumers, absolutely, but show a way  
20 to comply that's clear, that everybody knows what it  
21 is. That's all we're advocating.

22 The other thing, I think, that I've been a part  
23 of -- I mean this has not been my big focus, this is  
24 not something I do every day of the week. I mean  
25 I've been to DC a few times when they've asked me to

1 go. I haven't done any work on this in between.  
2 It's three or four occasions that they asked me to  
3 come speak about this proposed amendment. So it's  
4 not a big focus.

5 But I do think that it helps consumers to have  
6 companies that are willing to do more. To do more  
7 monitoring. And for them to have an affirmative  
8 defense if they do.

9 Q. And, Mr. Sponsler, do you think that you're  
10 biased?

11 A. I'm not biased at all.

12 Q. And did the Government ever take the  
13 position that your company, PossibleNow or  
14 Compliance Point, was somehow too biased to do the  
15 hygiene on the National Registry?

16 A. No.

17 Q. And did they ever take the position that  
18 your company's too biased to do call record  
19 monitoring in connection with the companies that are  
20 subject to injunctions?

21 A. No.

22 Q. And, Mr. Sponsler, when you provide advice  
23 to the companies that you work with on operational  
24 compliance plans, do you do that based on existing  
25 law?

1           A. Absolutely, yes. And also, you know,  
2       cautionary measures for those gray areas that aren't  
3       very clear.

4           Q. And that particular amendment, I think it  
5       was called the Baines -- the proposed Baines  
6       Amendment. Do you know whether that's been passed?

7           A. Oh, Daines.

8           Q. Daines Amendment. Has that been passed?

9           A. It has not; no.

10          Q. Okay. And, Mr. Sponsler, were you in court  
11       when Dr. Krakauer testified, a consumer from North  
12       Carolina?

13          A. Yes, ma'am.

14          Q. Are you aware that Dr. Krakauer also has a  
15       private TCPA case against DISH that's pending in  
16       North Carolina?

17          A. I believe that -- I believe it was disclosed  
18       during the trial I think; yes.

19          Q. And do you know that that case, that private  
20       TCPA case in North Carolina, addresses some of the  
21       same calls made by SSN that are at issue here?

22          A. No, I wasn't aware.

23          Q. We talked a bit about the proposed  
24       injunction and the provision for a telemarketing  
25       compliance expert to develop a compliance plan. Are

1 you aware of any other company that can perform the  
2 operational compliance role specified in that  
3 proposed injunction aside from Compliance Point?

4 A. I'm not aware of any other; no.

5 And the other point I want to make is, whatever  
6 plan is developed, however robust it is, it's my  
7 understanding that the Government would review that  
8 plan. That we would have to present that plan and  
9 why it's effective and what it would do to ensure  
10 compliance, and the Government would have to approve  
11 that plan. So I think that's an important aspect of  
12 that.

13 Q. Okay. And earlier in Mr. Runkle's  
14 cross-examination he mentioned a consulting company  
15 that he called McKinney. I think he may have also  
16 meant -- he might have actually meant McKinsey. Are  
17 you aware of the McKinsey Consulting Firm?

18 A. I am not.

19 Q. Do you -- and if they did, if they had any  
20 expertise in operational telemarketing compliance,  
21 would you be aware of them?

22 A. I would think so. I mean I've never had  
23 anybody say they were working with them or that they  
24 were competing with us or anything like that.

25 Q. And do you think it's important for someone

1 to have practical experience in telemarketing  
2 compliance in order to make a recommendation on a  
3 particular compliance plan?

4 A. Absolutely; yes.

5 Q. Okay. And how long did you say it takes to  
6 train members of your staff before they're qualified  
7 to do this work?

8 A. Fully trained is almost two years.

9 Q. And do you think it makes sense to require  
10 DISH to hire a consulting company like McKinsey that  
11 may have no prior telemarketing compliance expertise  
12 and pay that company to become educated, which could  
13 take them an inordinate amount of time?

14 A. No.

15 Q. And, Mr. Sponsler, I think you said earlier  
16 you're not a lawyer; correct?

17 A. No, ma'am.

18 Q. And what you do is centered around  
19 operational compliance and making sure that  
20 companies have processes in place to help them  
21 follow the law?

22 A. Correct.

23 Q. As it's written currently?

24 A. Yes.

25 Q. All right. Thank you, sir. I have no

1 further questions.

2 MR. RUNKLE: I have a very re-direct --  
3 re-cross questions, Your Honor.

4 THE COURT: Go ahead.

5 RECROSS EXAMINATION

6 BY MR. RUNKLE:

7 Q. Mr. Sponsler, you used to work for Booz  
8 Allen Hamilton; right?

9 A. Yes.

10 Q. All right. That's a consulting company;  
11 right?

12 A. Yes.

13 Q. Could Booz Allen Hamilton do the job if they  
14 were assigned it?

15 A. No, sir.

16 Q. They couldn't?

17 A. No, sir.

18 Q. They couldn't -- they couldn't take a job  
19 like this and learn how to do it and do it?

20 A. Oh, learn how -- maybe they could learn how  
21 to do it; yes, sir.

22 Q. They consult for the Department of Defense  
23 and all sorts of other government agencies; right?

24 A. Yeah, but they do not do any consulting in  
25 telemarketing compliance at all.

1 Q. Right. But if a consulting company like  
2 Booz Allen and Hamilton were assigned a priority  
3 project to do something like this, they could figure  
4 out how to do it and do it, don't you think?

5 A. Yeah. They would probably hire me.

6 Q. All right. So now you were talking with  
7 Ms. Echtman about the concern the companies have --  
8 well, I'm sorry.

9 You were talking about the concern that  
10 companies have that they're not clear about the  
11 vicarious liability rules; right?

12 And that's why the Daines Amendment should be  
13 passed; is that right?

14 A. No, sir, that's not -- that's a  
15 mischaracterization of what we talked about.

16 Q. Well, you said that they don't know whether  
17 they're liable or not, they don't know whether  
18 they'll create an agency relationship by doing  
19 prescriptive things with their third-parties; right?

20 A. Oh, yes, I did say that; yes, sir.

21 Q. You did say that?

22 A. That's true.

23 Q. But this case and other courts have ruled  
24 that under the TSR, they're already liable; right?

25 A. Sir, there are many complex relationships



1 where there is no automatic liability out there  
2 depending on what the relationship is. It is an  
3 analysis that has to be performed. And there are  
4 some examples that have been given, provided, as to  
5 what might constitute an agency principle, such as  
6 providing leads to be called, the company  
7 representing themselves as their partner company,  
8 things like that. But it's not -- it is not a cut  
9 in stone question.

10 Q. But vicarious liability under the TSR is a  
11 lot broader than vicarious liability under the TCPA;  
12 you'd agree with me on that, wouldn't you?

13 A. Not necessarily, sir.

14 Q. Okay. But let's say that your clients would  
15 be liable under the TSR when they may not be liable  
16 under the TCPA. Why wouldn't you just tell them  
17 that they might be liable and that they have to  
18 reform their practices? Why do we need to get them  
19 off the hook with an amendment to the TCPA?

20 A. This is nothing about getting anybody off  
21 the hook. That's not what this is about. It is  
22 simply providing a roadmap for companies to  
23 implement proper monitoring procedures that right  
24 now some of them are afraid to do because of this  
25 question. It's to say, don't be afraid, there is an

1 affirmative defense if you do A, B, C, D. It's not  
2 about getting anybody off the hook.

3 I don't understand why it's -- can't be clear  
4 that this whole initiative is to improve compliance.  
5 Stop the blind eye, stop not knowing what's going  
6 on. Know what's going on. Protect consumers.  
7 Comply.

8 Q. Well, Ms. Echtman just said -- just asked  
9 you whether you would -- whether you tell your  
10 clients to comply with current law now; right?

11 A. Of course.

12 Q. Right. And current law now is that they're  
13 liable under the TSR, is that --

14 A. Absolutely, they could be; yes.

15 Q. So they should just comply with the law  
16 instead of changing the law; right?

17 A. But the question about this -- the  
18 relationships of the agency principle is not a cut  
19 and dry question. You make it sound like everybody  
20 should automatically assume that I have this agency  
21 principle and I'm absolutely responsible, therefore  
22 X should occur. And that's not the case.

23 Q. All right. Now, Ms. Echtman asked you about  
24 PossibleNow and its work on the Registry, work on  
25 the National Do Not Call Registry?

1 A. Yes, sir.

2 Q. Compliance Point does not do work on the  
3 National Do Not Call Registry; is that right?

4 A. No, sir.

5 MR. RUNKLE: And that's all I have.

6 THE COURT: Do the states from any  
7 questions?

8 (The state plaintiffs' attorneys had no  
9 questions.)

10 THE COURT: All right. Ms. Echtman, any  
11 further questions?

12 MS. ECHTMAN: No further questions.

13 THE COURT: All right.

14 MS. ECHTMAN: No further questions, Your  
15 Honor.

16 MR. RUNKLE: Your Honor, I'd like to  
17 admit -- I'm sorry. I'd like to admit PX2018, which  
18 is the -- one of the settlements that I discussed  
19 with Mr. Sponsler.

20 THE COURT: Any objection?

21 MS. ECHTMAN: I'm just concerned with  
22 PX2018, that we don't know what the allegations  
23 were. I don't know if Mr. Runkle also has the  
24 complaint that preceded this.

25 MR. RUNKLE: Shall we put -- move to put

1 the complaint in? I will stipulate to put the  
2 complaint in.

3 MS. ECHTMAN: If you put the complaint in  
4 then we won't object to the stipulated injunction  
5 going in.

6 THE COURT: All right. So we'll show  
7 PX2018 is admitted. And you'll mark the complaint  
8 and we will admit it as well.

9 MR. RUNKLE: Thank you, Your Honor.

10 (Plaintiffs Exhibit 2018 admitted.)

11 MS. ECHTMAN: Your Honor, can we let  
12 Mr. Sponsler go because he has a flight to catch.

13 THE COURT: That's what I was just going to  
14 ask before Mr. Runkle spoke. May the witness be  
15 excused, please?

16 Yes?

17 Okay. Thank you, Mr. Sponsler.

18 MR. RUNKLE: Yes, Your Honor.

19 THE WITNESS: Thank you.

20 (The witness was excused.)

21 THE COURT: All right. So 2018 is  
22 admitted. What next?

23 The exhibits we've had referred to today are  
24 DTX1098, PX2018, PX2002, PX2004, PX2005, PX2006, and  
25 PX2007.

1           MR. RUNKLE: 2002 I'd like to move to  
2 admit.

3           THE COURT: Any objection?

4           MS. ECHTMAN: I'm sorry, Your Honor, let me  
5 just pull it up.

6           We object to 2002. It's a lobbying letter that  
7 we don't think should fairly come into evidence.

8           MR. RUNKLE: I think it's -- the witness  
9 confirmed some things about this -- the Attachment A  
10 to 2002. And also I think it's a public record that  
11 the Court could take judicial notice of also.

12          THE COURT: I'm going to show it as  
13 admitted over objection.

14          (Plaintiffs Exhibit 2002 admitted.)

15          THE COURT: Next, Mr. Runkle?

16          MR. RUNKLE: I'd like -- yes, next is 2004,  
17 which is the proposed amendment to the TCPA. I'd  
18 like to admit that.

19          THE COURT: Any objection?

20          MS. ECHTMAN: Objection. That -- on the  
21 grounds that this is again lobbying activity.

22          MR. RUNKLE: I don't think that's a proper  
23 objection. And I think the Court could take  
24 judicial notice of it.

25          THE COURT: Is this the Daines Amendment?

1 MR. RUNKLE: Yes.

2 THE COURT: I will show 2004 as admitted  
3 over objection.

4 (Plaintiffs Exhibit 2004 admitted.)

5 MR. RUNKLE: I'd also like to move to  
6 admit -- that's it.

7 THE COURT: Ms. Echtman, do you wish to  
8 have anything admitted at this time?

9 MS. ECHTMAN: Your Honor, 1098 are excerpts  
10 from the plaintiffs' conclusions of law from earlier  
11 in this case that contain the proposed injunction  
12 terms that they previously advocated. So we move to  
13 admit that.

14 THE COURT: Any objection?

15 MR. RUNKLE: I don't see why that needs to  
16 come into evidence, but I mean -- it's already filed  
17 on the docket, so --

18 THE COURT: Well, I'll show it as admitted.

19 MR. RUNKLE: -- I guess I don't object.

20 (Defendant's Exhibit 1098 was admitted.)

21 THE COURT: You also referred to DTX1097.  
22 Do you wish to have that admitted as well?

23 It's previously --

24 MS. ECHTMAN: I think 1097 was already  
25 admitted. That is the proposed injunction.

1 THE COURT: It was; yes.

2 MS. ECHTMAN: We also have some exhibits  
3 that we wanted to admit with respect to Infinity.

4 We have DTX1086, 1089, and 1094, which are  
5 responses by Infinity to DISH with respect to  
6 consumer complaints. And then 1094, I believe,  
7 is -- oh, DTX1094 is Infinity's do not call policy,  
8 which was produced in this case.

9 THE COURT: Any objection to admission of  
10 DTX1086, 1089, and 1094, Mr. Runkle?

11 MR. RUNKLE: I object to the admission of  
12 Infinity's statement as hearsay. That's just rank  
13 hearsay.

14 Are you going to use that for the proof of --  
15 that they actually took those actions?

16 MS. ECHTMAN: We're going to use this for  
17 evidence that Infinity responded to communications  
18 from Ms. Musso to defend themselves against consumer  
19 complaints.

20 MR. RUNKLE: So you're going to use their  
21 out-of-court statements, that you didn't ask them  
22 about when you had them on the stand last week, to  
23 prove the truth of a matter that you also didn't ask  
24 them about when you had them on the stand last week?

25 MS. ECHTMAN: It's not for the truth of the

1 matter asserted, it was for the fact that Infinity  
2 was responsive and provided information to DISH in  
3 response to DISH's investigations of consumer  
4 complaints.

5 MR. RUNKLE: If you can note on the record  
6 DISH's concession that those cannot be used for the  
7 proof of what Infinity asserted to DISH, then I  
8 don't object to their admission.

9 THE COURT: All right. So noted and they  
10 are admitted.

11 (Defendant's Exhibits 1086, 1089, and 1094 were  
12 admitted.)

13 THE COURT: Any other exhibits,  
14 Ms. Echtman?

15 MS. ECHTMAN: I don't have any other  
16 exhibits, but I do believe Mr. Bicks has some  
17 housekeeping issues that we would like to discuss.

18 THE COURT: Mr. Runkle, do you have any  
19 further exhibits, or do the states?

20 MR. RUNKLE: I do not.

21 MS. OHTA: No, Your Honor.

22 MR. RUNKLE: Oh, Andrea says just to put it  
23 on the record right now might help for housekeeping  
24 in the future, we're going to mark the complaint in  
25 the Turpel case, which -- yeah, which is that -- the



1 thing we just promised to go get, that's going to be  
2 2020. PX2020.

3 THE COURT: All right. We'll show PS2020  
4 has admitted.

5 (Plaintiffs' Exhibit 2020 admitted.)

6 THE COURT: All right. Diane, do you have  
7 any housekeeping matters before Mr. Bicks speaks?

8 THE CLERK: Not that I'm aware of. Just  
9 the 2005, 6 and 7, he was not going to admit; is  
10 that right?

11 THE COURT: 2005, 6, and 7 are not going to  
12 be admitted?

13 MR. RUNKLE: Those were used on  
14 cross-examination only; yes.

15 THE COURT: All right. Mr. Bicks.

16 MR. BICKS: Thank you, Your Honor.

17 The first matter I wanted to raise relates to  
18 the briefing on Ms. Kirk Fair. And in particular,  
19 the Court issued an order reflecting that  
20 simultaneous briefs were going to be filed by  
21 Monday, November 7th. And I was gonna suggest that  
22 DISH be allowed to file its brief on the 11th  
23 because we're gonna be responding to whatever  
24 Daubert assertions are made. And given that the  
25 arguments seem to move around a fair amount on the

1 record, I want to avoid the problem of ships passing  
2 in the night, where we're responding to something  
3 that we're not exactly sure what the details of it  
4 will be.

5 So if we had four days, I believe we'd be able  
6 to target our discussion to address specifically  
7 what the arguments are, and I think it will be more  
8 helpful to the Court, rather than two simultaneous  
9 briefs and us potentially then having to address an  
10 argument that we didn't anticipate in the  
11 simultaneous filing.

12 THE COURT: Mr. Runkle, any objection?

13 MR. RUNKLE: I believe California is taking  
14 the lead on that. Do we still have them on the  
15 phone?

16 MS. OHTA: Your Honor, can you hear me?  
17 California has no objections.

18 THE COURT: Okay, Ms. Ohta. Thank you.

19 So yes, you have until November 11th, DISH, to  
20 file your brief.

21 MR. BICKS: Thank you.

22 The other thing I wanted to alert the Court to  
23 is I think the Government had indicated that it was  
24 going to provide some form of evidentiary proffer on  
25 I think what is describes as consumer complaints,

1 and I think, you know, issues relating to the  
2 Sentinel database.

3 I wanted to alert the Court that DISH intends  
4 to do the same relating to what I would call current  
5 compliance. And I think -- I wanted the Court to  
6 know that. I think you heard me argue a couple  
7 times when we were last together I feel the  
8 government opened the door to that issue, and we  
9 intend to submit a proffer to the Court on  
10 compliance-related issues.

11 And I was going to suggest that we were going  
12 to provide that proffer -- we didn't have a time  
13 period from the Court for the Government's proffer,  
14 but I was going to propose that we would provide our  
15 proffer at the December 8th time period, at which  
16 point we're going to be filing the closing, the  
17 findings of fact, and the conclusions of law.

18 So I wanted the Court to know that we intended  
19 to do that.

20 MR. RUNKLE: Your Honor, I would object to  
21 that. I don't think DISH ever actually asked to put  
22 on its current compliance information. The only  
23 information it ever asked to put on was the  
24 documents that it gave us right before the trial  
25 last year that were two audits from its current

1 compliance regime, which the Court excluded.

2 I think that's a completely different scenario  
3 from us having an offer of proof for consumers that  
4 the Court -- that the Court ordered were --  
5 shouldn't testify.

6 THE COURT: So do you object to them  
7 submitting those two audits as a proffer?

8 MR. RUNKLE: Well, the two audits are  
9 already in the record. Those --

10 MR. BICKS: Your Honor, I will just tell  
11 the Court, because I think it's of importance to the  
12 Court to know that, and I believe it was alluded to  
13 and I believe we stated in papers, that those aren't  
14 the only two audits. And DISH has continued to do  
15 audits. And the ruling from the Court was that we  
16 couldn't use those audits until we got leave from  
17 the Court.

18 And there was also the option that the Court  
19 outlined for discovery, which DISH declined. But  
20 I'm completely mindful that, nonetheless, I believe  
21 as I've stated before, and I said at the hearing,  
22 the nature of the examination was such that I  
23 believe it opened the door.

24 THE COURT: I'll allow you to make the  
25 proffer.

1 MR. BICKS: And I argued --

2 Thank you, Your Honor.

3 And the final matter I wanted to address, and I  
4 think it falls under what I would call a request for  
5 clarification. And it's again something that I had  
6 alluded to when we were last together. But it  
7 really is how the Court is treating what I would  
8 call the option that the Court describe in, I  
9 believe it was order 624, which followed on order  
10 575.

11 In 624, the Court expressly said that it gave  
12 DISH the option to decline to conduct additional  
13 discovery with respect to the injunctive relief  
14 claim, with the understanding that we would not be  
15 able to use the documents disclosed, which includes  
16 some of the audit information. And this was at page  
17 3 of order 624.

18 And we read that as the Court had articulated  
19 it there, that that was an option that DISH had.  
20 And the Court will remember that over our objection,  
21 the Court had ordered five years of call record  
22 discovery which Your Honor stated, on the record at  
23 3546 of the February 17th transcript, would take a  
24 couple years for DISH to address. And because of  
25 that, DISH declined to accept that option because of

1 the -- the impracticability of providing that  
2 discovery in the time frame that was ultimately  
3 ordered, which I believe was in the one to two-month  
4 timeframe, or probably closer to two months.

5 But what is of concern to us is the statement  
6 that then was made by the Court in October 12th of  
7 2016, in order number 697, where the Government --  
8 and that's the order that deals with the  
9 Government's attempt to place into evidence the late  
10 produced information relating to the Sentinel  
11 database.

12 And in that order, and it's at page 9 of 9, the  
13 Court referred to DISH's refusal to provide  
14 supplement discovery as a fact that the Court was  
15 gonna take into account when determining whether  
16 permanent injunctive relief was necessary, and to  
17 what extent may be necessary.

18 As we are looking at that, it could be read to  
19 suggest some kind of a negative inference as to DISH  
20 which I do not believe is consistent with the prior  
21 orders of the Court where DISH was provided the  
22 option as the Court had outlined it. And never was  
23 it articulated that there was the possibility of  
24 some kind of a negative inference by DISH exercising  
25 that option.

1       So as we're piecing this together, we would --  
2       I started by saying a request for clarification.  
3       But the clarification requested is that the Court  
4       confirm that that was indeed an option that DISH had  
5       and that the Court did not intend that there be any  
6       kind of a negative evidentiary presumption by DISH  
7       declining to -- by exercising that option as the  
8       Court had indicated was an option in its prior  
9       rulings. And those rulings were -- really started  
10      with 575 at page 30 of 39. And then as I mentioned  
11      before, ruling 624 at page 3 of 10, where the Court  
12      indicated that DISH had that option.

13       So that is my request. If need be, we can  
14      formalize it, but I felt it important to put it on  
15      the record because it is obviously of very serious  
16      concern to us.

17           MR. RUNKLE: Well, Your Honor, if it was of  
18      serious concern to DISH, they should have produced  
19      discovery starting in 2010 and not waited until 2016  
20      to, you know, decline to produce the discovery that  
21      the Court found they should have produced, started  
22      producing six years ago, and then complain to the  
23      Court when the Court is going to take into account  
24      the fact that they won't provide discovery.

25       It's a sanctions motion. And it's entirely

1 appropriate for the Court, if fashioning equitable  
2 relief, to take into account all relevant  
3 circumstances, including the fact that DISH refused  
4 to produce this discovery. There's nothing that you  
5 can call it other than a refusal. It was very  
6 obvious that the discovery should have been produced  
7 and wasn't. That was the Court's finding.

8 And in addition to that, even though Mr. Bicks  
9 referred to it as a choice between those two  
10 options, the Court can totally take into account the  
11 fact that DISH made the choice not to engage in any  
12 substantive discovery, which led to this hearing,  
13 having witnesses who really had nothing very  
14 substantive to say at all because there was no  
15 additional discovery. And that was the reason that  
16 the case got bifurcated in the first place by  
17 opinion 575.

18 So this entire -- you know, this entire thing  
19 is of DISH's making. And for them to try to  
20 backtrack now and try to portray it as if it was  
21 some sort of choice between two equally appealing  
22 options, which obviously it wasn't, or two -- you  
23 know, two options that had the same effect or  
24 something like that, it obviously wasn't. When DISH  
25 chose not to do it, they chose not to do, and the



1 Court can take that into account.

2 THE COURT: Well, my clerk just handed me a  
3 note that says that is different supplemental  
4 discovery, not declining the option.

5 I will take a look at it. I will clarify my  
6 ruling. And we'll allow any clarification to be  
7 responded to, if there's an objection, Mr. Runkle.

8 MR. RUNKLE: Okay.

9 THE COURT: Anything further, Mr. Bicks?

10 MR. BICKS: No, Your Honor. And I  
11 appreciate the Court taking the time on this. I --  
12 I was not jumping up and down about raising it  
13 because, you know, I don't like to spring things in  
14 this kind of a setting. But I must say it is -- I  
15 did feel it was something important enough to bring  
16 to the Court's attention.

17 THE COURT: Okay. So has DISH rested at  
18 this time?

19 MR. BICKS: I believe we have, Your Honor.  
20 Subject to -- with the caveat that we'll provide  
21 that proffer. But I believe that we are -- yes,  
22 we're resting.

23 THE COURT: Okay. Can we take care of  
24 anything else today anybody?

25 I think Diane has a question.

1           (Sotto voce discussion when the Court and the  
2           Clerk.)

3           We have the daily admission sheets, as we did  
4           in our earlier springtime hearing, that need to be  
5           marked, which indicates which exhibits have been  
6           admitted. I will go ahead and mark those and  
7           include today's exhibits, and we'll send them out  
8           and make sure that your records agree with our  
9           records. All right?

10                 MR. BICKS: Thank you.

11                 THE COURT: All right. Court is adjourned.  
12           Thank you, counsel.

13                 (Court as adjourned in this case.)

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1 I, KATHY J. SULLIVAN, CSR, RPR, CRR, Official Court  
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4 above-entitled matter.

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KATHY J. SULLIVAN, CSR, RPR, CRR  
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EXHIBIT 753

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IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER, )  
)  
Plaintiff, )  
)  
v. )  
)  
DISH NETWORK, LLC, )  
)  
Defendant. )

1:14-CV-333

**MEMORANDUM OPINION AND ORDER**

Catherine C. Eagles, District Judge.

The defendant, Dish Network, LLC, willfully violated the Telephone Consumer Protection Act when its agent made 51,119 telephone solicitations to 18,066 residential phone numbers on the National Do Not Call Registry. Each class member is entitled to damages of \$1,200 for each violative solicitation call. Having considered proposals from the parties, the Court by this order outlines a process for entry of judgment in favor of those class members who are clearly identified and a general claims administration process for all other class members. The Court directs the parties to confer and submit motions, forms, and proposed additional procedures that follow the Court's outline and schedule.

**I. Background**

This lawsuit was filed in 2014. The plaintiff, Dr. Thomas Krakauer, asserted that Dish's agent, Satellite Systems Network, made repeated telephone solicitations to phone numbers, including his own, that were listed on the National Do Not Call Registry. Doc.

1. After discovery, the Court granted the plaintiffs' motion for class certification, and, as is relevant here, certified the following class:

All persons throughout the United States whose telephone numbers were listed on the federal Do Not Call registry for at least 30 days, but who received telemarketing calls from Satellite Systems Network, to promote the sale of Dish satellite television subscriptions from May 1, 2010 to August 1, 2011.

Doc. 47 at 1; *see* Doc. 111 at 4.<sup>1</sup>

At the time of class certification, all the telephone numbers had been identified using business records maintained by Five9, the software company that provided the agent's dialing software. *See* Doc. 137 at 19-136; Doc. 137-1; Doc. 137-2 at 1-34. The Five9 records included names and addresses associated with many of the phone numbers, but not all. When those records were incomplete, the plaintiffs' expert located names and addresses associated with the phone numbers using a LexisNexis commercial database. *See* Doc. 103 at 129:24-131:6. After incorporating this data, about 4,000 numbers still had incomplete name and address information. *See* Doc. 133-1 at ¶ 8.

The plaintiffs notified class members of the lawsuit by sending postcards to these names and addresses in February 2016. Doc. 206-1 at ¶ 4; *see* Doc. 153 at 2. The plaintiffs successfully delivered postcards to names and addresses associated with about 75 percent of the phone numbers in the class. Doc. 206-1 at ¶¶ 11-12.

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<sup>1</sup> The Court also certified a second class of people whose numbers were on Dish or its agent's internal do-not-call lists. *See* Doc. 111 at 4 (citing Doc. 47 at 1-2). The parties later stipulated to dismiss this class from the lawsuit. Doc. 271.

In the lead-up to trial, the parties stipulated to remove several categories of phone numbers from the class. *See* Docs. 264, 266, 271. This left 18,066 class phone numbers; the plaintiffs had delivered postcards to 13,268 persons associated with these phone numbers, leaving 4,798 not delivered. Doc. 331-1 at ¶¶ 6-7.

At trial, the plaintiffs presented class-wide evidence that (1) Dr. Krakauer and the 18,066 class members each received at least two telephone solicitations in any 12-month period, (2) the numbers called were residential numbers, (3) the calls were made on behalf of Dish, and (4) the calls were made when the telephone numbers were on the Registry for over thirty days. *See* Doc. 293 at 4. The jury answered all issues in favor of the plaintiffs, finding that Dish’s agent “[made] and class members receive[d] at least two telephone solicitations to a residential number in any 12-month period by or on behalf of Dish, when their telephone numbers were listed on the National Do Not Call Registry.” Doc. 292 at ¶ 2. The jury also determined that statutory damages of \$400 were appropriate for each violative call. *Id.* at ¶ 3. The Court thereafter trebled the damages because Dish’s violations were willful and knowing, increasing the award to \$1,200 per call. Doc. 338; 47 U.S.C. § 227(c)(5).

After the trial and at the Court’s request, each party proposed procedures for moving the case to final judgment and responded to each other’s proposals. *See* Docs. 329 to 331, 334 to 337. The Court heard oral argument on June 7, 2017.

## **II. Overview of issues**

The plaintiffs contend that liability and aggregate damages were established at trial, that no more proof is necessary, and that judgment can be entered now against Dish

in favor of the class. Plaintiffs seek to mail checks to the class members for whom they successfully delivered a class notice postcard and to have a claims administrator identify the remaining class members in a non-adversarial, practical process. Dish, on the other hand, asserts that more proof is required before any individual class members have established liability. Dish suggests mailing claim forms to the class notice addresses and then allowing the parties to litigate each recipient's membership in the class in an adversarial process with discovery, depositions, and jury trials.

These disputes break down into three basic issues. The first is whether the verdict established all issues of liability and whether the Court should enter judgment in an aggregate amount, at \$1,200 for each of the 51,119 violations. The second issue, which depends on the answer to the first issue, is what claims process is appropriate. The third issue is whether any unclaimed damages revert to Dish.

### **III. Liability and judgment**

The plaintiffs contend that the jury's verdict satisfied all elements of the TCPA claims and ask the Court to enter judgment against Dish and in favor of the class in the amount of \$61,342,800, based on a total liability of \$1,200 per call multiplied by 51,119 calls. *See* Doc. 331 at 9-11.<sup>2</sup> Dish contends that it is entitled to individual discovery and jury trials on the issue of the identity of the subscriber or recipient of each violative

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<sup>2</sup> The plaintiffs initially requested judgment in the amount of \$20,447,600 based on the \$400 damages amount per call set by the jury. Doc. 331 at 6. At that time, the Court had not yet trebled the damages. *See* Doc. 338. Over the course of the briefing and at oral argument, it is clear that plaintiffs now want judgment entered based on the \$1,200 damages amount, in view of the Court's finding on willfulness.



phone call. Doc. 330 at 14-15. Dish phrases this argument in several different ways, but it essentially claims that identity is an element of the cause of action and of statutory standing. The plaintiffs, on the other hand, contend that the jury by its verdict determined that each class member received the calls, that the plaintiffs' expert identified most of the class members as part of the class certification process, and that only a small number of phone numbers remain unlinked to a particular individual.

**A. Statutory standing**

To the extent Dish contends that statutory standing is an element that individual class members must prove to show liability, Dish is correct. However, the plaintiffs already proved the statutory standing of each class member at trial.

Statutory standing is “best understood as not even standing at all,” *CGM, LLC v. BellSouth Telecommc 'ns, Inc.*, 664 F.3d 46, 52 (4th Cir. 2011), but as an “element of proof” for a claim. *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 307 (3d Cir. 2011) (en banc) (statutory standing in antitrust context). In considering whether an individual has statutory standing, courts consider whether the individual “is a member of the class given authority by a statute to bring suit.” *CGM*, 664 F.3d at 52 (quotation omitted). “Normally, where the statutory language provides a clear answer, [the] analysis begins and ends with that language.” *Id.* at 53 (quotation omitted).

The class definition, the evidence, the jury instructions, and the jury verdict establish that this element was proven at trial. The standing provision at issue here, 47 U.S.C. § 227(c)(5), states that “[a] person who has received” calls in violation of the

§ 227(c) provisions may sue.<sup>3</sup> By its plain language, the determinative question for statutory standing is whether a call to a class member was *received*. The jury answered “Yes” to this question for all class members:

Did [Dish’s agent] make *and class members receive* at least two telephone solicitations to a residential number in any 12-month period by or on behalf of Dish, when their telephone numbers were listed on the National Do Not Call Registry?

[ X ]      YES as to Dr. Krakauer *and all class members*

Doc. 292 at ¶ 2 (emphasis added). The jury instructions also repeatedly referred to receiving calls and stated that “the plaintiff must prove . . . that he *and the class members each received* at least two telephone solicitations.” Doc. 293 at 4 (emphasis added); *see also id.* at 3, 8, 10-12.<sup>4</sup>

As the Court told the jury, “a person whose residential number is on the National Do Not Call Registry and who receives at least two telephone calls within any 12-month period by or on behalf of [Dish]” is entitled to damages. *Id.* at 3. The jury found that the plaintiffs proved all of these elements at trial. *See* Doc. 292. Dish is not entitled to undermine the jury’s verdict by second-chance challenges to the fact that the calls were received.

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<sup>3</sup> The Court previously addressed statutory standing in its order certifying the class. *See* Doc. 111 at 12-14. At that time, the Court rejected Dish’s contention that only subscribers had statutory standing.

<sup>4</sup> The evidence at trial established that all of the phone calls were connected and thus received. *See* Trial Tr. Jan. 12, Doc. 303 at 177:3-178:5 (testimony of Anya Verkhovskaya).

Statutory standing is an element of the claim, but the jury determined it in the plaintiffs' favor for every class member.<sup>5</sup> No additional procedures are required to satisfy that element.<sup>6</sup>

## **B. Identity of class members**

Dish similarly contends that due process entitles it to discovery and a trial on whether the class member was the "subscriber" to the phone number and whether the phone number was residential. *See* Doc. 330 at 4-5, 14. Dish is correct that the jury did not pair phone numbers with particular names or addresses, nor did the jury determine the identity of the persons who received the calls.<sup>7</sup> But that does not mean that Dish is entitled to discovery from thousands of individual class members and jury trials on the identities of thousands of class members when a verdict has already determined that Dish's agent made tens of thousands of violative calls, each received by a class member.<sup>8</sup>

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<sup>5</sup> The plaintiffs assert that, in class actions, only the class representative must prove standing. Doc. 337 at 6-7. Dish correctly points out that this assertion confuses constitutional standing, which is a jurisdictional requirement, with statutory standing, which functions as an element. Doc. 340-1 at 10-11.

<sup>6</sup> Dish also contends that it has the right to dispute this element under due process, the Rules Enabling Act, and the Seventh Amendment. Doc. 330 at 9. Dish had the opportunity to dispute the issue of receipt at trial, so these arguments are without merit.

<sup>7</sup> The Court repeatedly told the jurors and parties that the trial would not resolve those issues. Doc. 242 at 1; Doc. 260 at 79:7-80:2 ("We're not going to be trying those issues."); Doc. 293 at 9 ("There is no issue for you to decide in connection with names and addresses or the identities of class members. That is something that may be decided down the road in other proceedings."); Trial Tr. Jan. 17, Doc. 305 at 42:24-43:8 ("[T]here's no issue in this case about names and addresses. That's not something that you all have to decide.").

<sup>8</sup> In support of its due process claim, Dish cites cases from the class certification stage that appear to be based on ascertainability problems. *See Carrera v. Bayer Corp.*, 727 F.3d 300, 310 (3d Cir. 2013) (vacating class certification order because plaintiffs admitted that proposed claims

The Court has previously found that the class members were ascertainable, Doc. 111 at 9-14, and that the business records of Dish’s agent—supplemented by the LexisNexis database—identified most of them by name and address. *See id.* at 11; Doc. 153 at 2. Likewise, it has been established that Dish violated the TCPA when its agent made and class members received 51,119 telephone calls to residential numbers on the Registry, *see* Doc. 292 at ¶¶ 1-2, that each class member is entitled to \$400 in statutory damages per call, *id.* at ¶ 3, and that because Dish acted willfully, the damages should be trebled. Doc. 338.

Thus, Dish violated the TCPA and the class members—those persons whose telephone numbers were listed on the Registry—are entitled to up to \$1,200 for each violative call. There may be some questions about who is a class member, but that does not create a right to full-blown discovery and a jury trial on identity for each and every class member. Rule 23 contemplates that the court will make the decision about who the class members are. *See* Fed. R. Civ. P. 23(c)(3)(B) (in a Rule 23(b)(3) class action, the judgment must “specify or describe those to whom the Rule 23(c)(2) notice was directed,

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process would likely pay out some claims based on false affidavits, and defendant had an interest in ensuring that did not happen); *In re Processed Egg Prods. Antitrust Litig.*, 312 F.R.D. 124, 138-39 (E.D. Pa. 2015) (denying class certification and stating that “affidavits alone, without any objective records to identify class members . . . will not suffice” to identify class members and protect defendants’ interests). The Court already decided ascertainability in favor of the class, *see* Doc. 111 at 9-14, and these cases give little to no guidance on how class administration should occur after a jury verdict. Moreover, a third case cited by Dish criticizes the reasoning of *Carrera* as misguided. *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 239-40 (N.D. Cal. 2014) (granting class certification and stating that *Carrera*’s reasoning seems to be a “strange solution” to a problem that “seems, at best, premature”). The Court has already rejected Dish’s contention that class members must prove they are “subscribers.” Doc. 111 at 12-14.

who have not requested exclusion, and *whom the court finds* to be class members.”  
(emphasis added)).

In other class actions fully litigated through post-trial proceedings, courts have not found that due process or any other principle entitled defendants to a jury trial on individual class members’ identity. For example, in *Six Mexican Workers v. Arizona Citrus Growers*, 641 F. Supp. 259, 261 (D. Ariz. 1986), after trial, the court created a procedure using claim forms for the parties to identify the unnamed migrant farmworkers who made up the class. The court did not treat class members’ identities as an element. Instead, it indicated it would take “reasonable measures” to check that class members’ identities were correct, and it held that verifying class members’ identities “needs to be tailored to this particular situation.” *Id.* at 262-63.<sup>9</sup>

Similarly, in *Allapattah Services, Inc. v. Exxon Corp.*, 157 F. Supp. 2d 1291 (S.D. Fla. 2001), *aff’d*, 333 F.3d 1248 (11th Cir. 2003), *aff’d*, 545 U.S. 546 (2005), the court used a claims administration process that evaluated claims using a special master and a summary judgment process. “The goal of the Claims Administration Process [was] to determine whether a claimant is the proper owner of the interest in the damage award for the period of ownership asserted on the claimant's respective proof of claim form.”

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<sup>9</sup> In a similar case, the court held that the process of identifying migrant farmworker class members was “unlikely to engender dispute or controversy” because “the amount of statutory damages per class member has been determined, and all that remains is to contact the class members and have them demonstrate that they are indeed class members entitled to the pre-determined amount of damages.” *Rodriguez v. Berrybrook Farms, Inc.*, No. K86-161 CA8, 1990 WL 10520985, at \*3 (W.D. Mich. Oct. 29, 1990).

*Exxon*, No. 91-0986-CIV, 2006 WL 1132371, at \*3 (S.D. Fla. Apr. 7, 2006).<sup>10</sup> While the details of the process are not set forth in the decision, there is nothing to indicate that the Court authorized discovery pursuant to the Rules of Civil Procedure or contemplated jury trials, even though the issues to be determined in the claims process were significantly more complicated than the simple question of class membership left to resolve in this case. *See infra* pp. 12-13.

As the trial already established all of the elements necessary to prove a violation—indeed, 51,119 violations—Dish is not entitled to discovery and trials on the identities of class members. Whether a claimant is a class member is a question that can be more appropriately, fairly, and efficiently resolved through a claims administration process as authorized by Rule 23.

Like Dish, the Court is interested in insuring that only class members receive the damages awarded by the jury. The Court intends to establish a fair claims administration process that will weed out any unjustified claims by non-class members. As discussed *infra* p. 14, the Court agrees that Dish has some due process rights to a reasonable opportunity to participate in the claims administration process. In the circumstances of this case, the Court rejects the plaintiffs' contention that Dish has no right at all to participate in the process of identifying class members and accurately distributing class funds. *See* Doc. 334 at 10-11. So long as Dish's participation is helpful to confirm

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<sup>10</sup> At the time of the April 2006 order, the parties had reached a class settlement, but the order describes the incomplete, contested class administration process already underway.

identification of class members, does not delay the proceedings, and is not obstructive, the Court anticipates allowing Dish to have some input.

### **C. Aggregate damages**

The plaintiffs ask the Court to enter judgment in the amount of \$61,342,800, based on a total liability of \$1,200 per call multiplied by 51,119 calls. *See supra* note 2. The plaintiffs make a strong argument. Dish willfully violated the TCPA tens of thousands of times when its agent willfully made repeated solicitation calls to persons on the Registry; the jury set the amount of damages for each violative call; and a simple mathematical calculation leads to the appropriate judgment amount.<sup>11</sup> While such a judgment is no doubt appropriate, the Court concludes in its discretion that the better course in this case is to take a different approach that takes into account the uncertainties in some of the data about class membership.

Few contested class actions of this type have reached this stage, so there is little guidance for the Court. The two most helpful cases are *Barfield v. Sho-Me Power Electric Co-op.*, 309 F.R.D. 491 (W.D. Mo. 2015), *vacated on other grounds*, 852 F.3d 795 (8th Cir. 2017), and *Exxon*, 157 F. Supp. 2d 1291.

In *Barfield*, the jury awarded a verdict of \$79 million on behalf of a class because of Sho-Me Power's unauthorized use of property easements to lay commercial fiber optic cable. *See* 309 F.R.D. at 492. Like Dish, Sho-Me Power asserted a due process right to

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<sup>11</sup> *See Parks v. Pavkovic*, 753 F.2d 1397, 1402 (7th Cir. 1985) (Once there is a final judgment, "calculating the actual amount owed each class member . . . is not the resolution of a separate claim but merely the disbursement stage.").

participate in the claims process and to contest claims. The court rejected this assertion and held that, because the jury had created an “aggregate damage fund,” the defendant “has no interest in how the Plaintiffs apportion and distribute the damage fund among themselves.” *Id.* at 499; *see also In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 WL 3879264, at \*3 (D. Kan. July 26, 2013) (“[A]lthough Dow has an interest in making sure that the judgment against it is proper, the Court agrees with plaintiffs that Dow has no interest in the particular manner in which the total damages found by the jury are distributed among the class members.”), *aff’d*, 768 F.3d 1245, 1269 (10th Cir. 2014).<sup>12</sup>

In *Exxon*, a court chose not to use a per-violation jury verdict to calculate an aggregate damages figure. Classes of individual gas station dealers alleged that the way Exxon accounted for credit card processing fees had violated a good-faith clause in their gas supply contracts. *Exxon*, 61 F. Supp. 2d 1308, 1311-13 (S.D. Fla. 1999). The jury returned a special verdict in favor of the dealers and determined class damages on a cents-per-gallon basis. *Exxon*, 157 F. Supp. 2d at 1297. The plaintiffs asked for a final judgment setting out a total amount of class damages based on Exxon’s internal sales records, from which class members would be paid. *Id.* at 1295, 1297. The court found that calculating total compensatory damages was “straight-forward,” but the individual payments to class members were complicated by state law statutes-of-limitations issues, prejudgment interest, and by Exxon’s assertions of set-offs. *See id.* at 1308-09, 1313,

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<sup>12</sup> The court adopted a plan similar to the one in *Barfield*. *See In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 WL 3879264, at \*2-3 (D. Kan. July 26, 2013), *aff’d*, 768 F.3d 1245 (10th Cir. 2014).



1322. Because there were thousands of plaintiffs and because of these individual adjustments, the court declined to calculate a total, aggregate damages amount. *Id.* at 1299-301.

This case is not exactly like either *Barfield* or *Exxon*. The jury here issued a per-violation damages award, like the cents-per-gallon award in *Exxon* and unlike the total damages award in *Barfield*. Unlike in *Exxon*, however, there are no complicated individual issues, such as set-offs or state law questions, that affect application of the jury's damage award to individual class members, and the total damages amount is easy to calculate using simple multiplication.

In addition, neither of those cases dealt with the issue in this case about identifying who some of the class members are. On one hand, there are many class members fully identified by the various sources of name and address information used in these proceedings and for whom there can be no legitimate dispute about their membership in the class.<sup>13</sup> On the other hand, there are a few phone numbers that the plaintiffs have not yet linked to any particular name or address. In between these two extremes are situations where the name and address information is either incomplete or inconsistent.

The Court is not inclined to enter judgment against Dish now for damages to be awarded to persons who are yet unidentified, and this fact alone augurs against an aggregate damages award. Dish has presented evidence that close to 3,700 of the

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<sup>13</sup> For example, there are class phone numbers for whom the names and addresses in the Five9 data match the name and address information from LexisNexis, *and* for which the plaintiffs successfully delivered a class notice postcard.

telephone numbers did not have complete identifying name information or the information is inconsistent, *see* Doc. 340-2 at ¶ 5, and the parties appear to agree that the accuracy of the Five9 data about names and addresses is not guaranteed. *See* Docs. 335 at 18; *see* Doc. 337 at 14-15. Dish has had no opportunity to challenge the attribution of names and addresses to particular individual phone numbers,<sup>14</sup> and some persons may have been incorrectly identified as class members. Dish has repeatedly asserted its intention to challenge individual class membership, *e.g.*, Doc. 129 at 10-11; Doc. 231 at 43:9-44:5; Doc. 330 at 8, and the Court has indicated that Dish would have some opportunity to do so. *See, e.g.*, Doc. 204 at 112:21-113:13; Doc. 231 at 75:13-:25; Trial Tr. Jan. 17, Doc. 305 at 159:25-160:11.

As a matter of fairness and “basic due process,” in a class action not resolved by settlement, a defendant who will ultimately pay damages to class members has a right to participate in claims administration and “to object and oppose any unfounded or incorrect claim.” *Exxon*, 157 F. Supp. 2d at 1324. Apart from any element of liability, Dish has an interest in not paying damages to persons who are not proper class members, which aligns with the Court’s interest in insuring that only class members receive damages awards.

For these reasons, the Court will not enter an aggregate judgment against Dish in the amount of \$61 million and instead will require a claims administration process that

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<sup>14</sup> Dish has also contended that it lacked complete access to the details of how the plaintiffs’ expert identified names and addresses for the phone numbers where Five9 had no name and address information. *See* Doc. 335 at 19.

gives Dish the opportunity to reasonably challenge individual claims to class membership.

#### **IV. Class administration**

Class administration should be simple and straightforward. In class actions, “courts must use their discretion, and in many cases their ingenuity, to shape decrees or to develop procedures for ascertaining damages and distributing relief that will be fair to the parties but will not involve them in an unduly burdensome administration of the award.” 7AA Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1784 (3d ed. 2017). Courts should “shape the remedy to meet the exigencies of each case and difficulties in administration should not be allowed to destroy the usefulness of the class-action procedure.” *Id.* “The goal of any distribution method is to get as much of the available damages remedy to class members as possible and in as simple and expedient a manner as possible.” William B. Rubenstein, *Newberg on Class Actions* § 12.15 (5th ed. 2017).

If a claim form is necessary, “the claiming process should be as simple, straightforward, and nonburdensome as possible.” *Id.* at § 12.21. “Be careful to avoid claim forms that scare class members away with confusing questions and onerous proof requirements.” Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges* 30 (3d ed. 2010).

##### **A. Overview of process**

Upon motion of the parties, the Court will appoint a claims administrator who shall oversee and manage the claims process. The claims administrator shall mail claim

forms to all potential class members and shall otherwise publicize the claims process and make claim forms available. The claims administrator shall receive completed forms, make copies available to the parties, and undertake other responsibilities as directed by the Court.

When individual claim forms do not raise a dispute, the parties will submit such individual claims to the Court for judgment. The Court will establish a reasonable summary procedure for resolving disputed claims after hearing further from the parties.

Upon motion of the plaintiffs as to any group of class members who are identified fully and without contradiction in the existing data, the Court will consider entry of judgment in favor of such class members regardless of whether those individuals complete claim forms. To the extent the Court enters judgment for class members who do not submit claim forms, the administrator shall oversee and manage the process of updating addresses, obtaining any needed information from these class members, and mailing checks. As to class members not part of a group judgment, individual claim forms will be required from these class members before the Court will enter judgment.

**B. Claims administrator**

The parties shall confer about an appropriate claims administrator, and if they agree, they shall file a joint motion no later than September 6, 2017. If the parties do not agree, each side shall file a motion for appointment of a claims administrator on or before September 8, 2017, where each side shall suggest at least two entities or persons qualified, willing, and able to serve.

**C. Distributing claim forms and publicizing the claims process**

Once appointed and as soon as the claim form is approved by the Court, the claims administrator shall send a claim form to all potential class members. As a starting point, the claims administrator shall use the mailing list generated by the plaintiffs during the class notice process. *See* Doc. 153 at 2.<sup>15</sup> The claims administrator shall update addresses as needed and appropriate. For the remaining class members, the administrator may use additional databases to identify potential class member names and addresses, potentially including, but not limited to, the TransUnion, Experian, and MicroBilt resources. The claims administrator shall make information available to the parties concerning the source of information used to identify these names and addresses.

The administrator shall also make claims information, including blank claim forms, available using a case-dedicated website and press releases, in the same manner as in the class notice process. *See id.* at 2-3. The website shall provide public information about the lawsuit and its current status.

**D. Claim form and communications to class members**

The claim form or cover letter shall summarize the proceedings so far and provide the internet address for the case-dedicated website. The administrator will customize the mailed claim form for each claimant to include the phone number on the Registry, the number of violations, and the potential maximum damages amount associated with that phone number, subject to appeal, costs, and attorney's fees. Recipients who are not the

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<sup>15</sup> Both parties suggested beginning the claims process with this mailing list. Doc. 330 at 11; Doc. 331 at 4.

proper claimant shall be encouraged to forward the claim form to the proper class member, if known to the recipient, or to inform the class administrator of any other means to contact that class member. The deadline for claim submission shall be prominently stated.

The claim form shall include a place for the claimant's name and contact information, along with any other needed personal identification information. Claimants shall affirm that the phone number was theirs or their household's during the class period, and shall be asked to attach a document, such as a phone bill, showing that they, or their household, paid for or used the phone number at a time within the class period. If such documentation is unavailable, the claimant shall identify the provider of his or her phone service during the class period and will be encouraged to provide other documentation that supports his or her claim. Such documentation might include, for example, a phone bill dated outside the class period.

The Court directs the parties to confer about the exact format of the claim form and any cover letter or other communication giving instructions to class members, keeping in mind that the claim form should be both fair and as simple as possible.<sup>16</sup> The parties shall also confer about an appropriate deadline for submission of claims. The Court hopes for and expects a consent proposal, but if the parties cannot reach full

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<sup>16</sup> Dish's proposed claim form, Doc. 329-1 at 2-3, is inordinately complex and includes many demands for information as to issues which have already been decided. The Court cautions Dish that if it continues to attempt to re-litigate matters already decided, such as the issue of residential use, as part of the claims process, the Court will consider limiting Dish's role in the claims process.

agreement, the parties shall file a joint submission identifying areas of disagreement along with dueling proposed orders. The parties shall file the consent proposal or joint submission no later than August 28, 2017.

**E. Claims process**

**1. Entry of judgment without a claim form**

There are likely many persons whose membership in the class—and entitlement to a damages award—cannot reasonably be disputed. *See supra* note 13. The plaintiffs may move for judgment in favor of any such group<sup>17</sup> of class members who are identified fully and consistently in the existing data, for whom there is no contradictory information, and as to whom the evidence is the same.<sup>18</sup> Should the Court grant such a motion, receipt of a completed claim form will not be necessary for entry of judgment as to these class members.

If the plaintiffs decide not to file any such motion, they shall advise the Court and Dish of that decision no later than September 15, 2017. If the plaintiffs decide to file a group judgment motion, by that same date they shall provide Dish with a full list of any such class members' names, addresses, phone numbers, and the source(s) of that

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<sup>17</sup> The Court uses singular language here, but more than one group may be appropriate. To the extent the evidence is different, the plaintiffs should group the purported class members—similar to the “buckets” on the verdict sheet at trial, Doc. 292 at ¶ 2—and put each group in a separate motion.

<sup>18</sup> The plaintiffs suggested something like this approach as an alternative. *See* Doc. 334 at 11. The Court will not, at a minimum, entertain such a motion for any of the class members that have truly inconsistent name and address information, *see* Doc. 335-1 at ¶¶ 13-14, nor the numbers for which notice postcard delivery was unsuccessful. *See* Doc. 331-1 at ¶¶ 6-7.

information, along with a proposed draft judgment. No later than October 2, 2017, Dish shall communicate in writing any general objections it has about the list, along with any specific objections to the status of any individual on the list as a class member and any evidence Dish has indicating that the particular class member should not be included in the proposed judgment. No later than October 16, 2017, the parties shall meet and confer in an effort to identify and narrow any disputes so that individual issues are not included in the plaintiffs' motion and so that the briefing will be of optimal assistance to the Court. No later than November 1, 2017, the plaintiffs shall either file a motion for judgment for this group of class members or notify the Court and Dish that it has decided not to file the motion.

Dish has objected to any process that does not require some sort of individual claim by class members, contending that the Court had previously indicated that a claims process would be "required." *E.g.*, Doc. 335 at 10. In its previous statements, the Court made no decisions on post-trial procedures or identity of class members. Doc. 260 at 75:11-:12 ("I'm going to put that off.").<sup>19</sup> Among the statements cited by the defendant,

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<sup>19</sup> See Doc. 231 at 75:16-:20 ("[I]f there are individual challenges for particular people under particular circumstances, you know, we can identify those. If there is a couple of hundred of them, we'll figure out how to deal with them, should the plaintiffs win."), 78:20-:23 ("[T]here may be individuals or particular phone numbers where you have particular challenges and that we need to figure out a way for those to be resolved."). At the final pretrial hearing, the Court made clear that it was making no final decision about post-trial procedures. While the Court expressed skepticism about whether Dish should pay damages if no class member can be found for a particular phone number, the Court was explicit that that decision was "tentative." Doc. 260 at 75:12-:22.

Dish also mentions other statements by the Court that were tentative and provided no promises or a rulings about how post-trial proceedings would work. Some statements merely forecasted future decisions that the Court would need to make. *E.g.*, Doc. 204 at 113:2-:6; Doc.



only once did the Court state that post-trial proceedings were affirmatively necessary. Trial Tr. Jan. 17, Doc. 305 at 158:23-159:24 (“[W]e’ll have some posttrial proceedings of some sort so that Defendant can present any individual issues and so we can also figure out, you know, who gets the money.”). Even that statement indicated that such proceedings would be held only when Dish raised individual issues, and it made no specific guarantees about what the process would be.

In any event, the claims administration process outlined herein does not conflict with those or any other previous statements by the Court during this case. Indeed, the Court anticipates providing a mechanism for Dish to be heard when it has actual evidence to indicate that an individual claimant is not a class member.

## **2. Individual claims**

Beyond those persons identified fully and without contradiction in the existing data, the Court will follow generally the model set forth in *Exxon*, which allowed the defendant to participate in the process of identifying class members. *See* 2006 WL 1132371, at \*3. Given the uncertainties about the identification of some class members and their addresses and the passage of time, a simple claim form and claims

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242 at 1 (class membership “can be resolved post-trial using procedures to be determined later”). At other times, the Court excluded evidence at trial without determining whether those issues could arise after trial. *See* Doc. 231 at 79:25-80:3 (“I’m not interested in being surprised during the trial with individual—with requests for individual issues on the verdict sheet.”). Other statements were hypotheticals meant to elucidate a party’s argument. *E.g., id.* at 64:17-71:18 (discussion that ends with the Court’s statement that “[w]e have got to finalize these things at some point,” but not ruling on the issue). Dish also cites some of plaintiffs’ counsel’s statements during these discussions, Doc. 335 at 10, but these statements were an attempt to explore potential courses of action and did not concede anything or bind the parties to any particular post-trial procedure. *See, e.g.,* Doc. 231 at 64:3-:6.

administration process is appropriate for these claimants, to protect both Dish's rights and the integrity of the distribution of damages awards. Considering the amounts of the damage awards, which at a minimum will be \$2,400 per class member before costs and attorney's fees, it is not unduly burdensome for a claimant to fill out a short claim form that asks for basic information about their phone line.

As completed claim forms are received, the claims administrator shall make copies available to the parties. The parties shall confer about the claims. Some completed forms will clearly establish a claimant's status as a class member. When that is the case, the plaintiffs may move for judgment on that class member. Others will no doubt be facially insufficient, and when the parties so agree, the claims administrator shall deny the claim.

The Court anticipates that some claims will raise substantial questions about whether a claimant is a class member, that there may sometimes be two claimants for the same phone number, and that there may be other individual disputes or problems relevant to distribution of damages and entry of judgment. For those claims, a summary decision process will be needed, either by the claims administrator or a special master.<sup>20</sup>

The Court does not anticipate allowing either party any individual discovery of the kind contemplated by the Rules of Civil Procedure directed to any claimant. If the completed claim form is inadequate, it will be denied. If it is adequate, it will be granted.

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<sup>20</sup> It is possible that there will be some categories of claims involving similar evidence for large numbers of claimants as to which the Court may need to make the decision, and the parties should include this possibility in their discussions. Beyond entry of judgment, the Court does not expect to be involved in ordinary, individual claims resolution.

That said, the claims administrator should give an individual claimant a second chance to fill out an incomplete form. Where circumstances raise a question about whether the claimant is a class member, the claims administrator can seek additional specific information from a particular claimant by mail, email, phone, text, or other reasonable means in order to give the claimant a full opportunity to establish class membership. The Court does not absolutely rule out individual discovery should there be an unusual circumstance in an individual situation, but in the ordinary case it would be unduly burdensome and is unnecessary to a fair decision.

After hearing further from the parties, the Court will enter an order establishing specific procedures for entering judgment and resolving disputes. To that end, the parties shall confer about the specifics of a process for obtaining entry of judgment for undisputed claimants. They shall also confer about an appropriate schedule and mechanism for making and resolving objections to a claimant's status as a class member and for obtaining judgment for claimants whose class-member status is resolved. After conferring generally and no later than October 2, 2017, the parties shall exchange proposals. They shall meet and confer again in an effort to reduce and narrow areas of disagreement, continuing to exchange proposals as is productive. The parties shall file a joint submission no later than November 15, 2017. The joint submission shall identify the areas of agreement and disagreement.

#### **V. Unclaimed damage awards**

The plaintiffs contend that Dish should have to pay any and all unclaimed damage awards and that no unclaimed damages should revert to Dish. Doc. 337 at 16-18. To the

extent this simply restates the argument that the Court should enter judgment now for \$61 million, the Court rejects it for reasons previously explained. *See supra* pp. 13-15.

It is possible that there will be damages awards unclaimed by class members. As noted, the plaintiffs may file a motion to enter judgment in favor of some class members whose identities were consistently established by the call records and databases without contradiction, without requiring claim forms. The Court may grant such a motion. If that happens, it is likely that some of these folks will have moved or otherwise become “lost,” and a few may not cash the check. The plaintiffs contend that Dish should not get this money back through a reversion and that the money should be distributed otherwise by *cy pres* or some other means.

No doubt there is something unfair about Dish avoiding payment of damages for proven, willful violations of the law, a result that is certain to happen to some extent under the process established by this order. Moreover, Congress designed the TCPA’s damages provisions, in part, to deter violations. *Hannabury v. Hilton Grand Vacations Co.*, 174 F. Supp. 3d 768, 776 (W.D.N.Y. 2016). That deterrent effect weakens if Dish is off the hook for damages owed to injured class members who cannot be found.

However, the actual amount of unclaimed funds is unknown at this point. Given that the plaintiffs seek an equitable *cy pres* distribution of those funds determined in the Court’s discretion, *see* Doc. 337 at 16-18, the relative amount of those funds may be relevant to the Court’s decision on what to do with them. To the extent the decision is an equitable one, Dish’s conduct during the claims administration process may be appropriate for consideration.

If and when the plaintiffs move for judgment for certain class members in a subgroup, if and when the Court grants such a motion, and if and when it becomes clear that some damages awards cannot be delivered to the class members, the Court will be open to consideration of this issue.

## **VI. Interlocutory appeal**

The claims process is likely to take some months and to require resources by the parties and the Court. While it is going on, it would appear that there is no just reason to delay final judgment as to all issues the Court has finally decided, and pursuant to Rule 54(b), the Court intends to certify the case for interlocutory appeal. Subject to the Court's decision on Dish's recently filed motion for judgment as a matter of law and remittitur, Doc. 346, the Court expects to, at a minimum, certify the class certification issue, the *Spokeo* issue, the sufficiency of the evidence issue, and the Court's decision not to enter judgment against Dish in the amount of \$61 million. *See* Doc. 111; Doc. 218 at 1-4; Doc. 341; *supra* pp. 13-15. There may be other issues appropriate for certification. The parties shall confer and the Court will look for a motion, motions, or a joint motion for a Rule 54(b) judgment on specific issues no later than fourteen days after the Court rules on Dish's recent motion filed at Doc. 346, subject to further order of the Court. If no party files such a motion, the Court directs the parties to file a joint submission explaining why a Rule 54(b) judgment is not appropriate, limited to 6,000 words and with no individual briefs or responses allowed.

## **VII. Other matters**

The parties shall confer about other matters requiring resolution that may require a scheduling order, such as motions for attorney's fees and costs, and shall file a joint submission no later than August 31, 2017.

## **VIII. Conclusion**

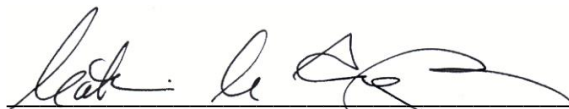
An aggregate judgment in the full amount is inappropriate in this case in light of the particular circumstances and inability to presently identify all class members. The plaintiffs may move for judgment for any group of class members who are identified fully and without contradiction in the existing data. Beyond that, claimants must submit a completed claim form, Dish will have a reasonable opportunity to raise concerns about whether a particular individual is a class member, and when appropriate, the Court will enter individual judgments.

It is **ORDERED** that:

1. The defendant's motion for post-trial procedures, Doc. 329, and the plaintiffs' requests for post-trial procedures, Doc. 331, are **GRANTED in part and DENIED in part** as stated herein.
2. The parties shall confer as directed and file such motions and submissions as are required by this order, as summarized in the Appendix.
3. Unless stated otherwise in this order, the time frame and word limits for briefing are those set forth in the Local Rules.
4. For all matters where joint submissions are required, the joint submission shall specifically state areas of agreement and disagreement and shall include

proposed orders, if applicable. If the parties do not reach full agreement, each party may file a brief at the time of the joint submission addressing areas of disagreement. In view of the degree of advance consultation required, the Court expects the parties to address all issues in the initial briefs, which are limited to 6,000 words. The parties may file short response briefs no longer than 2500 words within ten days, if necessary, and no reply briefs are allowed.

This the 27th day of July, 2017.



UNITED STATES DISTRICT JUDGE

## APPENDIX

<b><u>Date</u></b>	<b><u>Event to occur on or before that date</u></b>
Fourteen days after the Court rules on Doc. 346	Motions or joint submission on issues for interlocutory appeal
August 28, 2017	Parties confer and submit consent proposal or joint submission on claim form, claims deadline, and instructions to class members
August 31, 2017	Joint submission on all remaining matters requiring a scheduling order
September 6, 2017	Joint motion for appointment of claims administrator, if parties agree
September 8, 2017	Individual motions for appointment of claims administrator, if parties do not agree
September 15, 2017	Plaintiffs provide Dish with list of class members in any group for which the plaintiffs intend to file a group motion for judgment before claims process; if they will not file such a motion, plaintiffs advise Dish and the Court
October 2, 2017	Exchange proposals for procedures for adjudicating individual claims disputes; parties shall confer before and after this exchange
October 2, 2017	Dish provides plaintiffs with any objections to class members in proposed group judgment and any evidence for those objections
October 16, 2017	Parties meet and confer about class members in proposed group judgment
November 1, 2017	Plaintiffs file group motion(s) for judgment
November 15, 2017	After conferring as needed, joint submission on procedures for adjudicating individual claims disputes



EXHIBIT 754

EXHIBIT 754

JA015428  
014150

TX 102-014690

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

THOMAS H. KRAKAUER,	)	
on behalf of a class of persons,	)	
	)	
Plaintiff,	)	
	)	1:14-CV-333
v.	)	
	)	
DISH NETWORK, L.L.C.,	)	
	)	
Defendant.	)	

**ORDER ON CLAIMS PROCEDURES**

By orders entered on January 25, 2018, March 14, 2018, and April 5, 2018, Docs. 407, 428, and 438, the Court has determined that judgment for the entire class is appropriate in the amount of \$61,342,800; that as to approximately 11,000 class members there is no need for a claims process and all but a few issues have been resolved; and that a claims process is appropriate for the remaining class members. The Court is familiar with and has taken into account the entire history of this case and has specifically considered the parties' joint submissions. Docs. 380 and 417. Concomitantly with this Order, the Court has entered judgment in favor of the entire class.

The Court **ORDERS** and establishes the following claims procedures:

1. The Court previously extended the claims period to June 18, 2018. *See* Text Order 03/21/2018.
2. The Court previously appointed a Claims Administrator who shall continue to work under the terms of the appointment order, *see* Docs. 360 and 361, and who also shall undertake the tasks set forth in this Order.

3. The Administrator shall update counsel regularly as to claims submitted. This may be done in any reasonable and cost-effective manner, in the Administrator's discretion, including by maintenance of an online portal that can only be accessed by the parties and the Administrator, by weekly email summaries, or by any other reasonable means determined in the Administrator's discretion after consultation with the parties. The Administrator shall provide counsel with copies of all claims forms and any accompanying documentation.

4. The Court previously indicated its intent to appoint a Special Master and asked the parties for recommendations. Text Order 03/21/2018. The Court will enter a separate order later appointing a Special Master, whose duties shall include those set forth in this Order and in the Order entered today striking the plaintiff's February Lists. It is likely that the Court will require Dish to pay all or most of the Special Master's fees and expenses. The Court defers a decision on that issue until after the Special Master is appointed, at which time the Court anticipates establishing a briefing schedule.

5. No claims form is necessary for the persons described in the Court's January 25 Order granting the plaintiff's motion for judgment as to persons clearly identified in the existing data, Doc. 407, as supplemented by the Court's Order denying the defendant's motion for reconsideration and striking the plaintiff's February submissions. *See* Doc. 437. In order to finalize the list of persons covered by these Orders, the following procedure is established:

- a. Within ten (10) days of the date of this Order, the plaintiff shall revise the November Lists, filed on the docket at Doc. 385-1, in line with the representations it has made to the Court and the requirements of the Court's

orders, and the plaintiff shall provide the proposed Final List to Dish. The plaintiff's proposed Final List shall specifically identify any inclusions or changes made to correct transposition errors in the November Lists that affect the phone numbers, number of phone calls, or names on the November Lists. *See* Doc. 437 at 5-7.

- b. Within five (5) days thereafter, Dish, in writing, shall advise the plaintiff of any additional transposition errors and any other points of disagreement.
- c. The parties shall meet and confer to confirm that the proposed Final List complies with the terms of the Court's orders and the representations made by the plaintiff to the Court and to attempt to resolve any transposition errors.
- d. If the parties fail to agree on a Final List, the parties shall, within ten (10) days of the appointment of the Special Master, deliver a Joint Submission to the Special Master identifying areas of agreement and disagreement and containing the positions of both parties. Each side shall submit a proposed Final List. In the Joint Submission, the plaintiff may request that the Special Master correct in the Final List any transposition errors made in the November Lists that affect the phone numbers, number of phone calls, or names on the November Lists. The only issues for decision by the Special Master will be 1) whether the plaintiff's proposed Final List has deleted those persons required to be deleted from the November Lists by the Court's orders and the plaintiff's representations and does not include changes that this Court has not authorized or agreed to in its orders; 2) whether the plaintiff has identified

transposition errors in the November Lists that should be corrected in the Final List; and 3) approval of the plaintiff's proposed Final List or preparation of a recommended Final List.

- i. If Dish objects to the plaintiff's proposed Final List but fails or refuses to submit its own proposed Final List, Dish's objections are waived and the Special Master shall issue an order adopting the plaintiff's proposed Final List.
- ii. Dish need not and shall not repeat arguments that this Court previously rejected and shall not seek to expand the disputed issues before the Special Master beyond that approved by this Order. The Special Master shall not consider any such effort by Dish and Dish is advised that any such effort may result in an award of attorneys' fees to the plaintiff and in other appropriate sanctions.
- iii. The Special Master is authorized to hold a telephone conference with the lawyers should he or she have questions, to require the parties to provide copies of any pleadings, briefs, declarations, orders, or other relevant material, and to require either party to submit its proposed Final List in an appropriate electronic and paper format or to reorganize its proposed Final List.
- iv. The Special Master is authorized to consult with the Court if questions arise about application of the Court's orders and about housekeeping matters as needed. To the extent the Court provides substantive

direction, the Special Master will include that direction in his or her

Recommendation.

- e. As set forth in Federal Rule of Civil Procedure 53(d), the Special Master shall issue and file a Recommendation resolving any dispute over the Final List within forty-five (45) days of submission.
  - i. Objections are due as set forth in Rule 53(f)(2) and shall be accompanied by a proposed Final List; a party's failure to submit a list will result in the objections being stricken. Any brief in support is limited to 4000 words. If no objections are filed the plaintiff shall provide a proposed disbursement order.
  - ii. If objections are filed, the other party may respond within fourteen (14) days. The response brief is limited to 4000 words. Each party shall submit a proposed disbursement order consistent with its position. Failure to submit a proposed disbursement order will result in all objections being waived.
  - iii. No reply briefs are allowed.
  - iv. The Court may hold a hearing.
- f. Upon completion of its review, the Court will rule on any objections to the Special Master's report and will enter a disbursement order as to all Class Members on the approved Final List.

- g. If there is no dispute requiring resolution by the Special Master, the plaintiff shall file the Final List, with phone numbers sealed but names on the public record, along with a request for disbursement and a proposed order.
6. As to all persons and phone numbers not on the November Lists, or who are subsequently removed from the November Lists in the Final List, the following claims process will apply:
- a. The Administrator will review all claim forms and determine if they are complete. This review and determination will take place on a regular basis and will continue until the end of the claims period. The Administrator's determination of whether a claim is complete or incomplete shall be noted in the portal, if one is established, or otherwise communicated to counsel by email or other reasonable method.
  - b. A "complete" claim form is one that has been submitted with all relevant information, including a signed claim form. Supporting information is helpful, but not required, particularly where the data regarding the claimant is reasonably consistent and the claimant has attested that he or she had the number in question during the class period.
  - c. With leave of the Special Master when needed to decide between claimants or to assist in resolving conflicting evidence, class counsel or counsel for Dish may serve subpoenas on telephone carriers to obtain information regarding ownership of class telephone numbers during the class period. Any

information so obtained shall be shared with opposing counsel, the Administrator, and the Special Master.

- d. If the Administrator deems a claim form incomplete, the Administrator shall seek additional information from the claimant to give the claimant a full opportunity to establish class membership. The Administrator may seek such additional information even after the claims period has expired, but the absolute deadline for receipt of such additional information is August 1, 2018.
- e. Within thirty (30) days of receipt of a completed claim, the Administrator will decide whether a claim is valid or invalid.
  - i. A valid claim is one that the Administrator determines, using all available information, was submitted by the person who had the number during the class period or who resided in the household that had the number (or that person's representative).
  - ii. In making its determination, the Administrator may consider documentation provided by the consumer, any records from telephone companies, any evidence already in the record, whether there are other claimants to the same phone number, and, if the parties agree, any other information or data regarding the consumer's claim that he or she is a class member.
  - iii. If a claim is submitted after March 7, 2018, for a phone number included in the Final List established pursuant to Paragraph 5, the



Claims Administrator shall deny the claim if it is inconsistent with the Final List, absent agreement of the parties otherwise.

- iv. The Administrator will note its determination in the portal, if one is established, or shall otherwise communicate that determination to counsel for Dish and class counsel. The Administrator also shall notify the claimant, but this notice is not required where the claimant has submitted a claim but has not provided a class telephone number.
- f. Any party dissatisfied with the Administrator's determination shall give notice of an intent to object to the other party within fourteen (14) days. If the Administrator finds the claim invalid and plaintiff's counsel does not intend to object, plaintiff's counsel shall give timely notice to the claimant, but this notice is not required where the claimant has submitted a claim but has not provided a class telephone number.
- g. If notice of intent to object is given, the parties shall meet and confer as to validity during the next seven (7) days. If they agree, they shall advise the Claims Administrator of the agreement.
- h. The affected claimant or counsel for either party may object to the Administrator's determination within thirty (30) days by emailing or writing the Administrator. The objection shall state the complete basis for the objection, which shall be specific to the individual claim and which shall not address any issue other than whether the claimant is the appropriate person to receive the damages award. Dish is prohibited from filing objections based on

arguments that this Court previously rejected or that go beyond the scope of the issues to be decided by this claims process. The objection may not be longer than two pages.

- i. If no objection is timely made and in the absence of an agreement by all parties otherwise, the Administrator's determination will become a final decision. The Administrator shall notify the Special Master of such final decisions so that the decision can be included in the Special Master's final report.
- j. Rulings on objections to the Administrator's validity determinations will be made by the Special Master under procedures the Special Master deems appropriate and efficient. The Special Master will make his or her decision on the basis of the documentation supplied to the Claims Administrator and, if he or she determines it is appropriate, any additional information submitted by the parties. Individual hearings are not authorized. The Special Master will make recommended findings as to each disputed claim.
- k. No later than October 31, 2018, the Special Master will issue a report with his or her recommended findings as to all claimants and file it on the public docket.
- l. Any party intending to object to any aspect of the Special Master's recommendations shall provide its proposed objections to opposing counsel within ten (10) days. The parties shall then meet and confer in an effort to narrow the issues for resolution by the Court. Objections not included in the

proposed objections are waived. If neither party indicates an intent to object, the parties shall confer as to the form of a disbursement order and the plaintiff shall submit a proposed order to the Court upon expiration of the objection period.

- m. Objections to the Special Master's report must be filed with the Court within twenty-one (21) days of the filing of the Special Master's report. If objections are filed, the other party may respond within fourteen (14) days. Each party shall submit a proposed disbursement order consistent with its position.

Failure to submit a proposed disbursement order will result in all objections being waived. No reply briefs are allowed. Word limits applicable to summary judgment briefing apply.

- n. The Court may hold a hearing. Upon due consideration, the Court will rule on any objections to the Special Master's report.
- o. Upon completion of its review, the Court will enter a disbursement order as to all claimants whose claims are approved.

- 7. To the extent a report by the Special Master contains class member phone numbers or personal information other than names, the Special Master shall file a redacted report on the public docket and shall file the unredacted report under seal.

- 8. Within twenty-one (21) days of entry of the final disbursement order, the parties shall exchange proposed orders directed towards disposition of any undisbursed funds.

They shall then meet and confer within fourteen (14) days. If the parties agree, they

shall file a joint motion within fourteen (14) days of the meet-and-confer deadline. If the parties do not agree:

- a. Within fourteen (14) days of the meet-and-confer deadline, the plaintiff shall file a motion and proposed order along with a brief in support that does not exceed 5000 words.
- b. Within fourteen (14) days thereafter, the defendant shall file a motion and proposed order directed towards disposition of any remaining funds, along with one brief that both supports its motion and responds to the plaintiff's motion and that does not exceed 7000 words.
- c. If needed, within ten (10) days thereafter the plaintiff may file one brief that supports its motion and responds to the defendant's motion and that does not exceed 4000 words.
- d. If needed, within five (5) days thereafter the defendant may file one brief that supports its motion and does not exceed 2000 words.

**IT IS SO ORDERED**, this 5th day of April, 2018.



UNITED STATES DISTRICT JUDGE

EXHIBIT 755

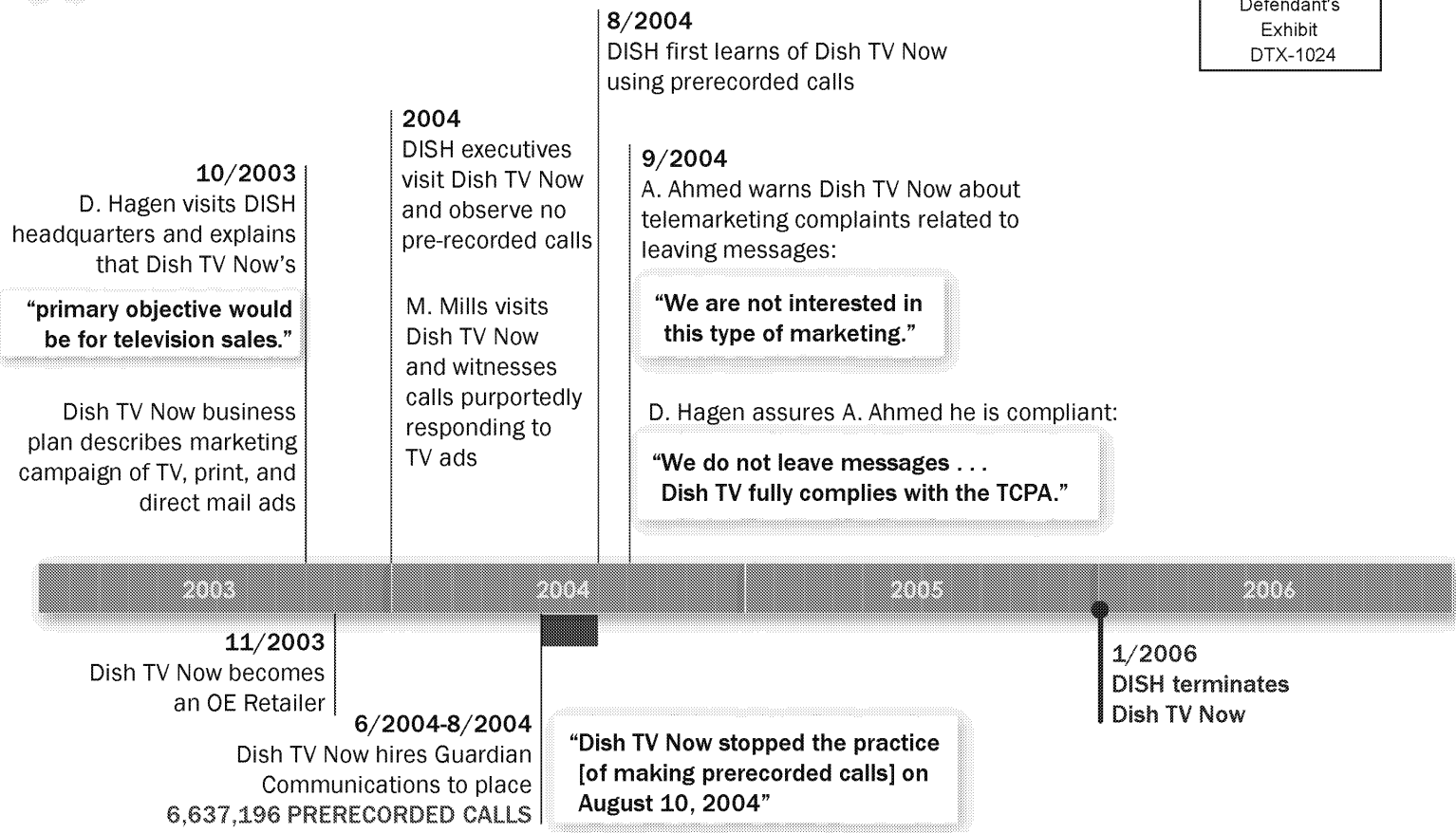
EXHIBIT 755

JA015440  
014162

TX 102-014702

# Retailer Dish TV Now: Timeline

Defendant's  
Exhibit  
DTX-1024



PX 148, Hagen Tr. at 37:25-38:1; Mills Testimony, Hagen Tr. at 19:2-20:3; DeFranco Testimony; Ahmed Testimony; PX 168; DTX 223, PX 173, S.J. Op. at 197

SLC\_ DNC\_Investigation 015441  
01463

EXHIBIT 756

EXHIBIT 756

JA015442  
014164

TX 102-014704



## Board of Directors

› **George R. Brokaw**

*Director*

› **James DeFranco**

*Director and Executive Vice President*

› **Charles W. Ergen**

*Chairman of the Board*

✓ **Candy Ergen**

*Senior Advisor and Director*

Candy Ergen has served on the Board since May 2001, is currently a Senior Advisor to us and has had a variety of operational responsibilities with us since our formation. Mrs. Ergen served as a member of the board of trustees of Children's Hospital Colorado from 2001 to 2012, and is now an honorary lifetime member. She has also served on the board of trustees of Wake Forest University since 2009. During 1980, Mrs. Ergen co-founded DISH Network with her future spouse, Charles W. Ergen, and James DeFranco. The Board concluded that Mrs. Ergen should serve on the Board due, among other things, to her knowledge of DISH Network since its inception and her service to us in a multitude of roles over the years.

*Director Since:*

January 22, 2018

› **Charles M. Lillis**

*Director*

› **Afshin Mohebbi**

*Director*

› **David K. Moskowitz**

*Senior Advisor and Director*

JA015443  
014165

TX 102-014705



▼ **Tom A. Ortolf**

*Director*

Tom Ortolf joined the Board in May 2005 and is a member of our Audit Committee, Compensation Committee, and Nominating Committee. Mr. Ortolf has been the President of CMC, a privately held investment management firm, for over twenty years. The Board has determined that Mr. Ortolf meets the independence requirements of NASDAQ and SEC rules and regulations. Mr. Ortolf has also served as a member of the board of directors of EchoStar since its formation in October 2007. The Board concluded that Mr. Ortolf should serve on the Board due, among other things, to his knowledge of DISH Network from his service as a director since 2005 and his expertise in finance, business and risk management, in particular in light of his experience as an executive with CMC.

*Director Since:*

January 22, 2018



Chair of the Audit Committee



Member of the Nominating and Governance Committee



Member of the Compensation Committee

► **Carl E. Vogel**

*Senior Advisor and Director*

EXHIBIT 757

EXHIBIT 757

JA015445  
014167

TX 102-014707



## LEWIS ROSE

*Partner*

lrose@kelleydrye.com

New York  
Tel: (202) 342-8821  
Fax: (212) 808-7897

I AM TOTALLY FOCUSED ON OUR CLIENTS—THEIR GOALS, VISION, BUSINESS PRACTICES, MARKETING, PROFITABILITY AND ULTIMATELY, THE RESULT THEY NEED TO WIN IN THE MARKETPLACE.

### ABOUT

Lew Rose serves as managing partner of Kelley Drye, and is a member of the firm's Executive Committee. Lew also served as managing partner of the Washington, D.C. office and past chair of the Advertising and Marketing practice group. Under Lew's leadership, the group received a Tier 1 ranking in the "Advertising Law-National" and "Advertising Law-D.C." categories in the 2010-2011 and 2011-2012 "Best Law Firms" studies published by *U.S. News* and *Best Lawyers*.

Named Washington D.C.'s Advertising "Lawyer of the Year" by *Best Lawyers®* in 2014 and 2018, Lew's practice is focused on consumer protection, advertising and consumer product safety law. Lew represents clients before federal and state law enforcement agencies and self-regulatory bodies, such as the National Advertising Division (NAD) of the Council of Better Business Bureaus.

Lew's extensive experience is marked by his representation of numerous clients in high-profile investigations by the Federal Trade Commission (FTC), including enforcement actions involving the substantiation of advertising claims, compliance with trade regulation rules, and a broad spectrum of marketing practices. He also represents clients across all product categories in many state attorney general proceedings.

Co-author of a treatise on advertising law, Lew advises on all phases of marketing products, including advertising, credit, direct response, telemarketing, franchising and warranty issues. Lew also counsels clients regarding advertising, marketing, electronic commerce and intellectual property issues with respect to interactive and online services and related technology. Ranked nationally as a leading practitioner in the Advertising Litigation area by *Chambers USA*, Lew is noted as having "outstanding technical industry knowledge" and is "practical, responsive, efficient and fun to work with."

Prior to entering private practice, Lew served as an attorney with the FTC, where he focused on the enforcement of FTC trade regulation rules and orders, civil penalty actions and consumer redress actions. Lew subsequently worked as an assistant to the director of the FTC Bureau of Consumer Protection on the development of law enforcement actions regarding advertising, marketing and credit practices. Lew also served as an attorney advisor to FTC Commissioner Terry Calvani, where he advised on all aspects of the FTC's jurisdiction, including proposed law enforcement actions, as well as legislative and regulatory proposals.

### PROFESSIONAL ACTIVITIES

## EXPERIENCE

Represent a manufacturer in a series of class actions alleging that the manufacturer assisted and facilitated independent retailers to violate the Telephone Consumer Protection Act by calling consumers on state "Do Not Call" lists.

Represent Gerber Products Co. in a lawsuit filed by the FTC alleging that certain claims for Gerber Good Start infant formula violated Section 5 of the Federal Trade Commission Act.

Represent Gerber Products Co. in a putative class action lawsuit piggybacking on the FTC lawsuit described above.

Represent UCI-FRAM Group in trade dress and patent litigation against ITW Corp., South/Win and SC Johnson.

Represent DISH Network in a lawsuit filed by the FTC and four state attorneys general alleging that DISH violated the Telemarketing Sales Rule and Telephone Consumer Protection Act.

Represented Purina Products in a NAD challenge alleging that Mars Pet Food made unsubstantiated claims for DentaStix pet treats.

Represent a technology company in a NAD challenge regarding comparative performance claims.

Represent a manufacturer in a class action alleging unlawful recording of a customer service telephone call in violation of California law.

Represent a money transfer company in an investigation by 44 state attorneys general regarding the effectiveness of the company's anti-fraud program.

Represented The Sherwin-Williams Company in resolving an FTC investigation into "no-VOC" environmental marketing claims.

Represented two internet start-ups in FTC investigations regarding whether their apps had clear and conspicuous disclosure of address book and other data sharing capabilities.

Represented the maker of an over-the-counter allergy drug in a NAD challenge regarding comparative onset-of-action claims. The NAD ruled in favor of our client on all material points.

Counsel to multinational consumer product companies, including Blyth, Citrix Online, Deluxe, Dick's Sporting Goods, Dish Network, Dun & Bradstreet, Home Depot, Honeywell Consumer Products, Jenny Craig, Nike, Sherwin-Williams and Trane regarding compliance with federal and state consumer protection and product safety laws, including the Video Privacy Protection Act.

Represented equity funds by providing due diligence consumer protection regulatory advice with respect to acquisition targets.

Represented an online retailer in an FTC investigation regarding compliance with the Mail and Telephone Order Rule.

Represented a wireless carrier in an investigation by the Florida and Tennessee Attorneys General into third-party mobile marketing advertising campaigns.

Represented a consumer electronics company in an FTC investigation of credit financing advertising practices.

Represented a consumer electronics company in an FTC investigation of rebate practices.

Represented Craftmatic in an FTC investigation alleging violation of "Do Not Call" rules.

Represented Trane in challenging advertising claims by Goodman Global, Inc. before the NAD, which found, as Trane had argued, that Goodman failed to disclose material limitations of its warranty terms.

Represented Goal Financial, LLC in an FTC investigation alleging failure to safeguard certain sensitive consumer information, and therefore misrepresenting its security practices.

*State of New York v. Gratis Internet, Inc.* (N.Y. Sup. Ct. 2007): Defended Gratis Internet in a lawsuit initiated by the Attorney General of

the State of New York alleging breach of privacy policy.

## HONORS

Named 2014 and 2018 D.C. Advertising "Lawyer of the Year" by *Best Lawyers*®.

*The Best Lawyers in America*® (Woodward/White, Inc.), Advertising Law, 2001-2019 and Information Technology, 2019.

Recognized as a leading attorney in First Amendment/Media/Advertising practice area by Washington D.C. *Super Lawyers*, 2013-2018.

Ranked nationally as a leading practitioner by *Chambers USA* in the Advertising: Litigation area, 2010-2017 and the Advertising: Transactional and Regulatory area, 2014-2018.

Recognized by *US Legal 500* as one of the leading lawyers in the areas of Marketing and Advertising, 2008-2018, and Data Protection and Privacy, 2013-2014.

## EDUCATION

University at Buffalo Law School, J.D., 1981

University at Buffalo, B.A., 1978, magna cum laude, New York Public Interest Research Group (NYPIRG), chair

## BAR ADMISSIONS

District of Columbia, 1988

New York, 1982

## COURTS

U.S. Supreme Court

U.S. Court of Appeals—Third, Fifth, Ninth and D.C. Circuits

U.S. District Court—District of Columbia

U.S. District Court—Northern and Southern Districts of New York

DC Court of Appeals

EXHIBIT 758

EXHIBIT 758

JA015449  
014171

TX 102-014711

**In the case of:**  
*THOMAS H. KRAKAUER v*  
*DISH NETWORK*

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*BRUCE WERNER*  
*March 17, 2015*

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Realtimereporters.net

JA015450  
014172

TX 102-014712

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE MIDDLE DISTRICT OF NORTH CAROLINA  
3 Civil Action No. 1:114-cv-00333-CCE-JEP

4                   RULE 30(b)(6) VIDEOTAPE DEPOSITION OF:  
5                   BRUCE WERNER - March 17, 2015  
6                   DISH Network L.L.C.

7 THOMAS H. KRAKAUER, on behalf of a class of persons,  
8 Plaintiff,  
9 v.  
10 DISH NETWORK, L.L.C.,  
11 Defendant.

12                   PURSUANT TO NOTICE, the Rule 30(b)(6)  
13 videotape deposition of BRUCE WERNER was taken on  
14 behalf of the Plaintiff at 1900 Grant Street,  
15 8th Floor, Denver, Colorado 80203, on March 17, 2015,  
16 at 9:46 a.m., before Marchelle Hartwig, Certified  
17 Shorthand Reporter and Notary Public within Colorado.  
18  
19  
20  
21  
22  
23  
24

Realtime Reporters, LLC  
schedulingrealtime@gmail.com 304-344-8463

JA015451  
014173

TX 102-014713



<p style="text-align: right;">Page 2</p> <p>1 A P P E A R A N C E S</p> <p>2 For the Plaintiff:</p> <p>3 JOHN W. BARRETT, ESQ.</p> <p>4 Bailey &amp; Glasser, LLP</p> <p>5 209 Capitol Street</p> <p>6 Charleston, West Virginia 25301</p> <p>7 For the Defendant:</p> <p>8 BENJAMIN E. KERN, ESQ.</p> <p>9 Benesch, Friedlander, Coplan &amp; Aronoff, LLP</p> <p>10 41 South High Street</p> <p>11 Suite 2600</p> <p>12 Columbus, Ohio 43215</p> <p>13 BRETT KITEL, ESQ.</p> <p>14 DISH Network L.L.C.</p> <p>15 9601 South Meridian Boulevard</p> <p>16 Englewood, Colorado 80112</p> <p>17 Also Present:</p> <p>18 Shaun van der Veen, Videographer</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p>	<p style="text-align: right;">Page 4</p> <p>1 Exhibit 18 Exhibit 194 - E-mail to Werner from Oberbillig, 1/30/07, Subject: 2 Fw: Dish Network Auto Dialer calls [Indiana AG], with 3 attached e-mails</p> <p>4 Exhibit 26 Letter to Steele from Tassi, 1/3/06, Re: EchoStar Satellite, 5 LLC CID Responses</p> <p>6 Exhibit 27 Letter to Tehranchi from Origer, 12/28/06, Re: Notice of Complaint 7 "Do Not Call" Violation</p> <p>8 Exhibit 28 Letter to Tehranchi from Origer, 1/17/07 Re: Notice of Complaint 9 "Do Not Call" Violation</p> <p>10 Exhibit 29 E-mail to Musso from Origer, 2/15/07, Subject: Re: Satellite 11 Systems Network, with attached e-mails</p> <p>12</p> <p>13 Exhibit 30 Letter to Tehranchi from Origer, 11/7/07, Re: Notice of Alleged 14 Complaint "Do Not Call" Violation</p> <p>15 Exhibit 31 E-mail to alex@yourdish.tv from Jaworski, 1/2/08, Subject: Fw: 16 Notice of Alleged Complaint "Do Not Call" Violation - Jeanette 17 Payne, with attached e-mails</p> <p>18 Exhibit 33 Letter to Tehranchi from Musso, 11/20/08, Re: Notice of Allegation - 19 Telephone Consumer Protection Act (TCPA)</p> <p>20 Exhibit 34 E-mail to Snyder from Patty, 5/28/09, Subject: Re: Satellite 21 Systems Network - Krakauer DNC National 09 07 03, with attached 22 e-mails</p> <p>23</p> <p>24</p>
<p style="text-align: right;">Page 3</p> <p>1 I N D E X</p> <p>2 EXAMINATION OF BRUCE WERNER: PAGE</p> <p>3 March 17, 2015</p> <p>4 By Mr. Barrett 8</p> <p>5</p> <p>6 DEPOSITION EXHIBITS: INITIAL REFERENCE</p> <p>7 Exhibit 2 Expert Report of Anya Verkhovskaya, 112</p> <p>8 A.B. Data, Ltd.</p> <p>9 Exhibit 4 Exhibit 193 - EchoStar Retailer 19</p> <p>10 Agreement between EchoStar</p> <p>11 Satellite L.L.C. and Satellite</p> <p>12 Systems Network, 12/31/04</p> <p>13 Exhibit 6 DISH Network Retailer Agreement 21</p> <p>14 between DISH Network L.L.C. and</p> <p>15 Satellite Systems Network,</p> <p>16 12/31/10</p> <p>17 Exhibit 9 Exhibit 187 - Letter to Tehranchi 51</p> <p>18 from Davidson, 6/12/02, Re:</p> <p>19 Violation of the EchoSphere</p> <p>20 Retailer Agreement</p> <p>21 Exhibit 10 Facts Blast to Dear DISH Network 40</p> <p>22 Retailer from Clark, 7/10/02</p> <p>23 Exhibit 12 Exhibit 185 - Complaint 52</p> <p>24 Exhibit 13 Exhibit 186 - Judgment by Consent 54</p> <p>and Stipulated Permanent</p> <p>25 Injunction</p> <p>26 Exhibit 16 Exhibit 191 - Florida Department 52</p> <p>27 of Agriculture and Consumer</p> <p>28 Services Department Press</p> <p>29 Release, 11/4/04</p> <p>30 Exhibit 17 E-mail to Werner from Oberbillig, 60</p> <p>31 1/30/07, Subject: Fw:</p> <p>32 Telemarketing, with attached</p> <p>33 e-mails</p> <p>34</p>	<p style="text-align: right;">Page 5</p> <p>1 Exhibit 35 E-mail to Laslo from Vendor 81</p> <p>2 Inquiries, 3/20/09, Subject: Fw:</p> <p>3 Telemarketing Issues, with</p> <p>4 attached e-mails</p> <p>5 Exhibit 36 Letter to Tehranchi from Musso, 81</p> <p>6 3/27/09, Re: Notice of Allegation -</p> <p>7 Telephone Consumer Protection Act</p> <p>8 (TCPA)</p> <p>9 Exhibit 37 E-mail to Vendor Inquiries from 75</p> <p>10 Sophie, 4/8/09, Subject: Fw:</p> <p>11 URGENT - Satellite Systems Network -</p> <p>12 Follow Up TCPA/DNC Issues 2 -</p> <p>13 11/20/08 and 03/27/09, with</p> <p>14 attached e-mails</p> <p>15 Exhibit 39 Letter to Tehranchi from Musso, 83</p> <p>16 5/27/09, Re: Notice of Alleged</p> <p>17 Complaint "Do Not Call" Violation</p> <p>18 Exhibit 42 E-mail to Chaykoski from Shaffer, 95</p> <p>19 5/4/10, Subject: Fw: TCPA -</p> <p>20 Campbell, Richard - Log ID: 26720,</p> <p>21 with attached e-mails</p> <p>22 Exhibit 43 E-mail to Shaffer, Vendor Inquiries, 95</p> <p>23 TCPA from Vendor Inquiries, 5/4/10,</p> <p>24 Subject: Re: TCPA - Campbell,</p> <p>Richard - Log ID: 26720, with</p> <p>25 attached e-mails</p> <p>26 Exhibit 44 Letter to Tehranchi from Musso, 95</p> <p>27 5/12/10, Re: Notice of Alleged</p> <p>28 Complaint "Do Not Call" Violation</p> <p>29 to the Pennsylvania Attorneys</p> <p>30 General</p> <p>31 Exhibit 45 E-mail to Rehan@yourdish.tv from 94</p> <p>32 Musso, 5/17/10, Subject: Re:</p> <p>33 Satellite Systems Network -</p> <p>34 Pennsylvania AG Complaint "Do Not</p> <p>Call" Violation - Campbell, with</p> <p>attached e-mails</p> <p>23</p> <p>24</p>

<p>Page 6</p> <p>1 Exhibit 47 Letter to To Whom It May Concern 99 2 from Mitchell, 8/16/11, Re: TCPA 3 Violations (again) 99 4 Exhibit 48 E-mail to Kitei from Berridge, 5 8/18/11, Subject: Re: Important! 6 New Document Uploaded to CSC 7 Matter Management, with attached 8 e-mails 73 9 Exhibit 66 E-mail to Vendor Inquiries from 10 Musso, 10/15/08, Subject: Re: 11 Record #6186 - Kimble - 12 8257310011384746 - Scholar, with 13 attached e-mails 83 14 Exhibit 67 E-mail to Dougherty from Vendor 15 Inquiries, 5/19/09, Subject: 16 Re: TCPA - TCPA - 9194719459 - 17 re thomas krakauer, with attached 18 e-mails 104 19 Exhibit 77 File Produced Natively - PowerPoint 20 Presentation 104 21 Exhibit 79 File Produced Natively - PowerPoint 22 Presentation 104 23 Exhibit 80 File Produced Natively - PowerPoint 24 Presentation 104 25 Exhibit 81 File Produced Natively - PowerPoint 26 Presentation 104 27 DEPOSITION EXHIBITS: (Previously Marked) 28 Exhibit 1 Plaintiff's Second Amended Notice 29 of Rule 30(b)(6) Deposition Duces 30 Tecum of DISH Network 8</p>	<p>Page 8</p> <p>1 reporter please swear in the witness. 2 BRUCE WERNER, 3 having been first duly sworn to state the whole truth, 4 testified as follows: 5 EXAMINATION 6 BY MR. BARRETT: 7 Q. Mr. Werner, good morning. 8 A. Good morning, sir. 9 Q. What is your full name? 10 A. My name is Bruce Marcel Werner. 11 Q. And what is your position at DISH 12 Network? 13 A. I'm a program manager. 14 Q. And you are here to testify as to several 15 topics that were set forth in the notice of 16 deposition, and you have that in front of you. It's 17 Exhibit 1. For our record, I want to make sure that I 18 understand that you are testifying on topic 1; is that 19 correct? 20 A. Yes, sir. 21 Q. A-a through d? 22 A. Yes, sir. 23 Q. 4-f and g? 24 A. Yes, sir.</p>
<p>Page 7</p> <p>1 WHEREUPON, the following proceedings were 2 taken pursuant to the Federal Rules of Civil 3 Procedure. 4 * * * * * 5 THE VIDEOGRAPHER: This is the videotaped 6 deposition of Bruce Werner, 30(b)(6) representative of 7 DISH Network, taken by the plaintiff in the matter of 8 Thomas H. Krakauer versus DISH Network L.L.C., being 9 Civil Action No. 1:14-cv-0333-CCE-JEP in the United 10 States District Court for the Middle District of North 11 Carolina, held at the offices of Hunter + Geist, Inc., 12 on this 17th day of March, 2015. 13 My name is Shaun van der Veen, and I am 14 the certified legal video specialist. The court 15 reporter is Marchelle Hartwig. We are now on the 16 record. The time is approximately 9:46 a.m. 17 Will counsel please introduce themselves 18 and who they represent. 19 MR. BARRETT: John Barrett for the 20 plaintiff. 21 MR. KERN: Ben Kern for DISH. 22 MR. KITEI: Brett Kitei, in-house counsel 23 for DISH. 24 THE VIDEOGRAPHER: Would the court</p>	<p>Page 9</p> <p>1 Q. 4-k and l? 2 MR. KERN: John, 4-i, also. 3 MR. BARRETT: 4-i, okay. 4 Q. (BY MR. BARRETT) 4-i, k and l? 5 A. Yes, sir. 6 MR. BARRETT: And I'm a little confused 7 here. Ben, your e-mail said Mr. Werner was 6 through 8 12, but also said Mr. Mills was 6. 9 MR. KERN: That's correct. 10 MR. BARRETT: Are they both testifying on 11 that topic? 12 MR. KERN: Yes. 13 Q. (BY MR. BARRETT) So 6 through 12? 14 A. Yes, sir. 15 MR. BARRETT: Did I leave anything out 16 there, Ben, do you know? 17 MR. KERN: You did not. Those are all 18 the categories that Mr. Werner is going to testify to. 19 MR. BARRETT: Okay. 20 Q. (BY MR. BARRETT) So program manager is 21 your job title; is that right? 22 A. Yes, sir. 23 Q. And you've had that job for how long? 24 A. A little over four years.</p>

<p style="text-align: right;">Page 10</p> <p>1 Q. Generally, what are your responsibilities 2 as program manager? 3 A. My job -- 4 Q. Yes. 5 A. -- description includes -- my job is to 6 facilitate a variety of conversations with the intent 7 of identifying and mitigating risks that are 8 associated with new customer activations, incentive 9 payments that we make for those activations, all based 10 on retailer agreements and business rules. And to say 11 "facilitate a conversation" is overlarge. 12 Q. Who -- do you share those 13 responsibilities with a peer? Do you divide them up, 14 for example, with you focusing on retailers and 15 another colleague focusing on other kinds of 16 retailers? 17 A. No. 18 Q. Okay. So you have the overall 19 responsibility for engaging in those conversations 20 that you described for all DISH retailers of any kind? 21 A. No. 22 Q. Okay. 23 A. Your -- the question before was do we 24 divide up? And the answer is no, we don't divide them</p>	<p style="text-align: right;">Page 12</p> <p>1 managed by Men Wang. 2 Q. Okay. 3 A. There is a group of people that do 4 reporting, and I'm not real close to the team so I 5 don't know what the reporting looks like in that 6 group, but they provide analytics functions for sales 7 operations. And I manage -- I don't manage. I'm a 8 program manager and I do different functions from 9 those three guys -- four guys -- four different -- 10 three different groups, rather. 11 Q. Okay. Thank you. 12 So in 2009, what was your position at 13 DISH Network? 14 A. In 2009, I was a general manager. 15 Q. And so I want to be fairly precise. 16 You've had this current position as program manager 17 for about four years. And I want to get an 18 understanding in 2009 through 2011 what your position 19 was and what your responsibilities were, so if you 20 could just describe that to me. 21 A. Prior to October 2010, I was general 22 manager of the audit, risk and compliance group. And 23 since roughly October, and I think that's the right 24 day, or approximate dates, rather, I've been a program</p>
<p style="text-align: right;">Page 11</p> <p>1 up, but it's more of the conversations that we have is 2 shared. We all -- through peers or through people 3 that work on the team, we work as a team. 4 Q. Who's on that team with you? 5 A. There is -- I think there is a total of 6 22 or 23 individuals on the team. 7 Q. Are you at the head of the team, so to 8 speak? 9 A. No, sir. 10 Q. Who is? 11 A. Our general manager manages the audit, 12 risk and compliance team. 13 Q. Who is that, the general manager? 14 A. Is Mark Weddle, W-e-d-d-l-e. 15 Q. And just give me a quick overview of the 16 structure of that team. You've got this gentleman, 17 Mr. Weddle, overseeing the team. You're a team 18 member. What are some of the other -- what's the 19 structure of it? 20 A. Mr. Weddle has, I guess, four different 21 groups that he's responsible for. An audit group is 22 supervised by Marques Mehlhorn. 23 Q. Okay. 24 A. There is a compliance team which is</p>	<p style="text-align: right;">Page 13</p> <p>1 manager. 2 Q. Why the change? 3 A. I think my -- as I evolved with the 4 company, I think they found better value in having me 5 focus on different elements of the team. 6 Q. Okay. So let's talk a little bit about 7 the -- well, I'm confused. I want to make sure I'm 8 covering the right topics here with you, but just give 9 me an overview of the development of the OE retailer 10 designation. When did an OE retailer designation come 11 into effect at DISH Network? 12 A. I don't know specifically. It was -- I 13 don't know the specific date -- early in the 2000s. I 14 don't know the specific date. 15 Q. Were you -- do you know why OE 16 retailers -- or do you know the history of how OE 17 retailers came into being? 18 A. As in the why? No. It clearly was -- I 19 would speculate. I don't know why. 20 Q. Okay. 21 MR. BARRETT: Mr. Mills is more of our OE 22 witness? 23 MR. KERN: He's closer to the OE program 24 as such, yes.</p>

<p style="text-align: right;">Page 14</p> <p>1 Q. (BY MR. BARRETT) All right. How does 2 DISH Network -- well, give me, if you can, just an 3 overview of any big-picture changes in the OE program 4 at DISH Network. And I realize that's a broad 5 question, but has DISH worked with OE retailers in 6 pretty much the same fashion since the OE retailer 7 program came into being? 8 A. I don't know what that means, "in the 9 same fashion." 10 Q. How does DISH Network work with OE 11 retailers today in terms of, you know, direct 12 involvement? 13 A. So it is a channel that allows a 14 retailer -- an OE retailer to use a tool, a specific 15 tool, to enter orders. They don't do installations 16 typically. But beyond that, we don't -- like, you 17 mean supervise what they do? 18 Q. Sales meetings, site visits, so on. 19 A. I don't know how we manage the 20 relationship with our OE partners. They have -- we 21 don't manage the OE retailers. We don't manage any of 22 our retailers, frankly. My understanding is we 23 provide a tool that allows them to do a sales-only 24 entry of an order.</p>	<p style="text-align: right;">Page 16</p> <p>1 providing the disclosures that need to be provided? 2 A. During -- well, when a new promotion 3 rolls out, we have a national quality assurance 4 program in place that one monitors some phone calls 5 that retailers -- with certain OE retailers that 6 submit calls, and we monitor those phone calls for 7 compliance. Some of those elements include ensuring 8 certain disclosures are made. 9 Beyond that, the OE retailer is 10 responsible for understanding -- any retailer is 11 responsible for disclosing the terms and conditions of 12 a sale, and we don't really manage that as a normal 13 course of business. 14 Q. What is your responsibility with respect 15 to monitoring these phone calls? Are you the guy who 16 makes sure that it happens? Do you have any 17 responsibility at all? 18 A. Today? 19 Q. Yes. 20 A. I have no responsibility for the 21 monitoring of our OE process. 22 Q. Sorry, I interrupted you. 23 A. Thank you. 24 No, I have no responsibility for</p>
<p style="text-align: right;">Page 15</p> <p>1 Q. Okay. We'll get to some documents. I'm 2 trying to kind of get an overview and then we'll dig 3 into the documents here. 4 Tell me your knowledge of how -- well, I 5 believe Mr. Mills would be the right guy to ask about 6 how new customers -- how OE retailers can access the 7 OE system. 8 MR. KERN: That's 2 or 3. 9 MR. BARRETT: Yeah, yeah. 10 Q. (BY MR. BARRETT) All right. Tell me, if 11 you will, about DISH's efforts to make sure that OE 12 retailers provide disclosures, any kind of 13 disclosures, to new customers that they sign up. 14 A. So you're asking about what mechanisms we 15 use? 16 Q. Sure. First of all, let's talk about 17 disclosures. DISH Network requires that OE retailers 18 make certain disclosures to new customers; is that 19 correct? 20 A. DISH, as a condition of our promotions, 21 requires all retailers to disclose the terms and 22 conditions of orders. 23 Q. And how -- with respect to OE retailers, 24 how does DISH Network make sure that they are</p>	<p style="text-align: right;">Page 17</p> <p>1 oversight of the OE sales process. 2 Q. In the period of 2009 through 2011, did 3 you have some responsibility for monitoring OE 4 retailer telephone calls? 5 A. Yes. 6 Q. And what was your responsibility? 7 A. As the general manager of the audit, risk 8 and compliance group, I had responsibility for 9 supervising folks that engaged or worked with our OE 10 partners to do a variety of functions. 11 Q. Okay. And, again, we have documents and 12 we'll go into that. 13 And you had mentioned "OE partners." Is 14 that a commonly used term at DISH Network, "OE 15 partners"? 16 A. I apologize for injecting a word. OE 17 retailers. I use those terms perhaps inappropriately, 18 but interchangeably. 19 Q. But OE partner is -- it's in the 20 documents and we'll get to that, but "OE partner" is a 21 term that is used to talk about OE retailers at DISH 22 Network. Is that fair? 23 A. Yes, I believe so. Yes. 24 Q. Okay. So you have some responsibility</p>

<p style="text-align: right;">Page 18</p> <p>1 for ensuring that retailers execute retailer 2 agreements with DISH Network; is that correct? 3 A. I'm sorry. Do that again. 4 Q. Yeah. Whose job is it to make sure that 5 OE retailers execute -- read, sign -- retailer 6 agreements with DISH Network? 7 A. You're asking who's responsible -- a 8 retailer is responsible for signing the agreement. 9 Q. Who's responsible for making sure that it 10 happens, that you have a signed agreement? 11 A. All of our retailers are independent 12 contractors. They're responsible for making sure they 13 sign it. 14 Q. I'm saying on the DISH Network side. 15 Somebody from DISH Network has to make sure that they 16 have a retailer agreement with the OE retailer, right? 17 A. I'm confused by the question. 18 Q. Sure. 19 A. There is some moving pieces there. 20 Q. Retailer agreement is between, on the one 21 hand, the retailer and DISH Network, right? 22 A. Okay. I mean, clarify. I mean, we have 23 agreements with retailers. 24 Q. Okay. So let's use Exhibit 4.</p>	<p style="text-align: right;">Page 20</p> <p>1 been the effective -- would the terms generally have 2 been the same? 3 A. Of -- 4 Q. The terms of this agreement generally be 5 the same as any agreement that was in effect in 2009? 6 A. Satellite Systems Network had an 7 agreement that was effective in 2009. I don't agree 8 that the terms would generally be the same. It's a 9 complex document. If there is -- I don't want to 10 characterize them as all the same. 11 Q. Who maintains files containing those 12 agreements at DISH Network? 13 A. There is no person that -- who's 14 responsible for maintaining retailer agreements. 15 Q. So if you were to say, Hey, I would like 16 to get the agreement from 2009 between DISH Network 17 and SSN, who would you ask? 18 A. There is a lot of people who could 19 answer -- who would be able to get that for you. 20 Q. So you could find that document, no 21 problem? 22 A. I would be able to find that document, 23 yes. 24 Q. Okay.</p>
<p style="text-align: right;">Page 19</p> <p>1 (Deposition Exhibit 4 was marked.) 2 Q. I'm going to hand you Exhibit 4. We're 3 jumping around a little bit. 4 A. Okay. 5 Q. Do you recognize Exhibit 4? 6 A. Yes, sir, I do. 7 Q. And this document has been provided and 8 identified in a U.S. v. DISH case. You see it's got 9 Exhibit 193, just for clarity. 10 MR. BARRETT: Ben, that is the exhibit 11 number that was assigned to this document in U.S. v. 12 DISH. 13 Q. (BY MR. BARRETT) This document was 14 identified as the operative retailer agreement between 15 DISH Network, or EchoStar at the time, and SSN. Is 16 that your understanding of what this document -- 17 A. During the period -- it became effective 18 December 31, 2004. 19 Q. And do you have any reason to believe 20 that this document was not effective in the period 21 2009 through 2011? 22 A. This particular document would not have 23 been in effect in 2009. 24 Q. Okay. What document -- what would have</p>	<p style="text-align: right;">Page 21</p> <p>1 (Deposition Exhibit 6 was marked.) 2 Q. I'm going to hand you Exhibit 6 and ask 3 you if you recognize that document. 4 A. Yes, sir, I do. 5 Q. And what is it? 6 A. This is the DISH Network retailer 7 agreement between EchoStar Satellite L.L.C., and 8 Satellite Systems Network effective December 31, 2010. 9 Q. And if you'll look under paragraph B on 10 the first page, can you -- would you agree with me 11 that that is the document that authorizes SSN to 12 market, promote and solicit orders for programming in 13 accordance with and subject to the terms and 14 conditions of this agreement? 15 A. Say that again. 16 Q. This is the document that authorizes 17 the -- SSN to "on a non-exclusive basis" -- do you see 18 that? 19 A. Yes, sir. 20 Q. -- "to market, promote and solicit orders 21 for Programming (as defined below) (an 'Authorized 22 Retailer'), in accordance with and subject to the 23 terms and conditions of this Agreement." 24 Did I read that correct?</p>

<p style="text-align: right;">Page 22</p> <p>1 A. You missed a few pieces at the beginning 2 of it. 3 Q. Okay. 4 A. This whole document -- this whole 5 document -- not just that phrase, but the whole 6 document covers the relationship. I think it's 7 important to recognize that the retailer is acting as 8 an independent contractor. 9 Q. I see. I did leave that out, you're 10 right. 11 A. Right. And he then -- the whole 12 description of this is that he desires to become -- 13 nobody is making him do it. He desires to become an 14 authorized, non-exclusive -- become an authorized -- 15 I'm sorry. Can I read that aloud -- 16 Q. Sure. 17 A. -- the whole thing, if you don't mind? 18 Q. Sure. 19 A. Subsection B, "Retailer, acting as an 20 independent contractor, desires to become authorized 21 on a non-exclusive basis to market, promote and 22 solicit orders for Programming (as defined below) (an 23 'Authorized Retailer'), in accordance with the 24 subject -- accordance with and subject to the terms</p>	<p style="text-align: right;">Page 24</p> <p>1 But he did ask "in your view," so if you 2 can answer, go ahead. 3 A. So do the question one more time. 4 Q. (BY MR. BARRETT) Yes. Does Exhibit 6, 5 this agreement, permit DISH Network to force -- 6 MR. BARRETT: Actually, let's read the 7 original question. I like the original question. 8 MR. KERN: Same objection once it's read. 9 (The last question was read back as 10 follows: "Does that authorize DISH Network to take 11 action to prohibit its dealers from engaging in 12 illegal telemarketing?") 13 A. No. I don't know -- the answer is no, 14 because I think the relationship -- retailers are 15 responsible for how they market their products. DISH 16 can take actions in response to, you know, if 17 something goes wrong or a telemarketing issue 18 occurs -- I'm sorry. If an illegal telemarketing 19 action occurs, DISH can take action with any 20 agreement, but I don't think -- DISH, I don't think, 21 takes -- doesn't demand retailers to do anything. 22 They do their own. We provide expectations in the 23 retailer agreement. 24 Q. (BY MR. BARRETT) What actions can DISH</p>
<p style="text-align: right;">Page 23</p> <p>1 and conditions of this Agreement." 2 Q. Okay. What is a Charlie Chat? Does that 3 name mean anything to you, that term? 4 A. Yes, it does. 5 Q. What is it? 6 A. Periodically, different functions or 7 different groups of our business sponsor broadcast 8 trainings, I guess, maybe updates for retailers and 9 other audiences. Charlie Chat is the title that's 10 been associated with those kind of somewhat informal 11 communications for years. 12 They are applicable to customers and 13 retailers and subsections of, you know, people that 14 sell Latino markets and that sort of thing, and I 15 think a lot of them have the title "Charlie Chat." 16 Q. In your view, does this retailer 17 agreement that we have just looked at, Exhibit 6 -- is 18 that Exhibit 6? 19 A. Yes, sir. 20 Q. Does that authorize DISH Network to take 21 action to prohibit its dealers from engaging in 22 illegal telemarketing? 23 MR. KERN: I'm going to object insofar as 24 it calls for a legal conclusion.</p>	<p style="text-align: right;">Page 25</p> <p>1 take? 2 A. For what? 3 Q. For when a retailer engages in illegal 4 telemarketing. 5 MR. KERN: Same objection. And to the 6 extent that we're asking what this document permits 7 DISH to do, if we can agree to a running objection, I 8 can allow -- if you're okay with that. 9 MR. BARRETT: Sure. 10 A. The retailer agreement allows this 11 agreement -- again, are we talking in general or are 12 we talking for Satellite Systems Network? 13 Q. (BY MR. BARRETT) Okay. Let's talk about 14 Satellite Systems Network. 15 A. Okay. This is the agreement I've got. 16 The agreement allows DISH, should violations of the 17 retailer agreement occur, to take action up to and 18 including termination. 19 Q. Can, under this agreement, DISH require 20 SSN to engage a third-party compliance outfit such as 21 PossibleNOW? 22 A. Does the agreement allow us to require 23 that? 24 Q. No. Does the agreement allow you to --</p>

<p style="text-align: right;">Page 26</p> <p>1 yes. Does the agreement allow DISH Network to require 2 that SSN engage a third-party compliance outfit such 3 as PossibleNOW? 4 A. In this agreement, it doesn't address the 5 PossibleNOW, but business rules are attached to or 6 referenced in the agreement, and those -- we have 7 business rules that require, not just SSN, but 8 retailers with certain thresholds of volume to engage 9 the services of PossibleNOW. 10 Q. In 2011, was SSN required to engage the 11 services of PossibleNOW? 12 A. I believe so. Again, it would have been 13 dependent on the volume, the sales volume. If they 14 did more than 50 a month, I think that qualified, so 15 they would have been required to participate with 16 PossibleNOW. 17 Q. How would DISH Network make sure that it 18 was participating with PossibleNOW? 19 A. I don't know. I think there is 20 probably -- whoever manages our relationship with 21 PossibleNOW would probably have been reporting. 22 Again, I wasn't responsible for the sales channel, so 23 to whether or not SSN, Satellite Systems Network, used 24 PossibleNOW or not, I don't know who would verify</p>	<p style="text-align: right;">Page 28</p> <p>1 7.3, you said? 2 Q. Yes, sir. 3 A. Thank you. And you said to myself or 4 aloud? 5 Q. Just to yourself. 6 MR. KERN: While he's reading, I'll 7 reiterate the objection to the extent that you're 8 going to ask him to interpret this document, that he's 9 not an attorney, to the extent that your questions 10 call for a legal conclusion. And then if we can keep 11 the running objection. 12 MR. BARRETT: Sure. 13 Q. (BY MR. BARRETT) Now, if you could just 14 read out loud, please, the sentence that begins with 15 the word "Furthermore." And I'm going to ask you a 16 couple of questions about that. 17 A. So fourth line down, "Furthermore, 18 Retailer shall take all actions and refrain from 19 taking any action, as requested by DISH in connection 20 with the marketing, advertisement, promotion, and/or 21 solicitation of orders for Programming and/or the 22 sale, lease or other transfer of DISH Systems, 23 Promotional Certificates and Prepaid Cards, and 24 Retailer shall cooperate by supplying DISH with any</p>
<p style="text-align: right;">Page 27</p> <p>1 that. I'm confident there was a process in place. I 2 don't know what that was. 3 Q. Okay. If you'll turn, please, to page 16 4 of Exhibit 6. 5 A. I'm sorry. 16? 6 Q. Yes, sir. Paragraph 7.3. 7 A. My page 16 -- 8 Q. I'm sorry. It's page 16 of 32. 9 A. I have an agreement that has page 16 of 10 39. 11 Q. Okay. 12 MR. KERN: Mine says 17 of 39 if you're 13 talking about 7.3. 14 MR. BARRETT: Okay. May I use this copy? 15 MR. KERN: Yes. 16 MR. BARRETT: Thanks. 17 THE VIDEOGRAPHER: Your microphone fell 18 off. 19 Q. (BY MR. BARRETT) Can you take just a 20 minute, please, to read paragraph 7.3 just to 21 yourself. 22 A. Page 17 now? 23 Q. Yes, sir. 24 A. Okay. I'm sorry. In subsection what?</p>	<p style="text-align: right;">Page 29</p> <p>1 information arising from or relating to those actions 2 within two days following a reasonable DISH request." 3 Q. And would you agree with me that that 4 gives DISH considerable power to ensure that its 5 authorized retailers do not engage in illegal 6 telemarketing? 7 A. I think that sentence speaks for itself. 8 I don't -- 9 Q. Would you agree with that statement, that 10 DISH does have considerable power to ensure that its 11 authorized retailers do not telemarket illegally? 12 MR. KERN: Objection as to form. 13 A. Are we talking about this sentence and 14 SSN? 15 Q. (BY MR. BARRETT) Well, just generally 16 speaking, I'm asking. And you've read the sentence 17 aloud. It says what it says. I'm not asking you to 18 read it again. I'm just saying, do you agree with the 19 statement that DISH had considerable power to ensure 20 that its authorized retailers did not engage in 21 illegal telemarketing? 22 MR. KERN: Same objection. 23 Answer to the extent that you understand 24 what that sentence means.</p>

<p style="text-align: right;">Page 30</p> <p>1 A. So this sentence, in my mind, has got 2 nothing to do with telemarketing, but it's got 3 everything to do with -- DISH is a big company like 4 Sears, like any big retailer in the world. And what 5 this sentence speaks to, for any -- to me, to any 6 retailer that chooses on an independent -- as an 7 independent contractor to sell DISH services, that 8 wants to do that, they desire to do it, as we read 9 earlier, these are rules that -- there are rules that 10 DISH puts in place to make sure that in the marketing 11 and advertising and promotion, that there is a 12 consistency as our sale processes are done across the 13 U.S. 14 It's a matter of -- this speaks to me -- 15 again, talking about this sentence, okay, if I've 16 got -- if we've got a promotion that goes out to the 17 street for 29.99, the independent retailer is obliged 18 to sell that product at 29.99. If a customer wants to 19 have ESPN, they have to buy it with the package that 20 ESPN comes with. They can't -- a retailer can't sell 21 that differently. 22 If a promotion requires a piece of 23 equipment to be installed for that promotion, a 24 retailer isn't allowed to install another receiver.</p>	<p style="text-align: right;">Page 32</p> <p>1 condition of doing business with us, SSN, you need to 2 show us that you are training your personnel in 3 telemarketing compliance? 4 A. Does this agreement -- I'm sorry. One 5 more time. 6 MR. BARRETT: Yeah. 7 (The last question was read back as 8 follows: "In your view, does this retailer agreement 9 give DISH the authority to say, As a condition of 10 doing business with us, SSN, you need to show us that 11 you are training your personnel in telemarketing 12 compliance?" ) 13 MR. KERN: Same objection. 14 A. And we're talking Satellite Systems 15 Network? 16 Q. (BY MR. BARRETT) Yes, sir. 17 A. Not all of our retailers? 18 Q. Yes, sir. 19 A. So our agreement requires that our 20 retailers need to be compliant with the law. We have 21 business rules that require, based on volume, 22 Satellite Systems Network needs to participate or work 23 with PossibleNOW. I don't know the business rules to 24 the detail that it requires Satellite Systems Network</p>
<p style="text-align: right;">Page 31</p> <p>1 It's managing the sales process. 2 This has got nothing to do with the color 3 of the van, the shirts they wear, the number of 4 employees, the process that they use to sell. It's 5 everything to do with the sales process, but I don't 6 think this sentence speaks to telemarketing in any 7 respect. 8 Q. (BY MR. BARRETT) Well, what it says is 9 it shall -- just reading it, "shall take all actions 10 and refrain from taking any action, as requested by 11 DISH in connection with the marketing, advertisement, 12 promotion and/or solicitation of orders for 13 Programming." I'll just stop there. 14 To me, when I read that, that invests or 15 vests considerable authority in DISH Network with 16 respect to its dealers to use telemarketing. Is that 17 an unfair understanding, in your review? 18 A. I don't know if that's unfair. I read it 19 this is focused on the sale of our equipment from 20 independent retailers that want to do the business, 21 and we have rules that say, If you're going to sell, 22 you're going to sell it our way. 23 Q. In your view, does this retailer 24 agreement give DISH the authority to say, As a</p>	<p style="text-align: right;">Page 33</p> <p>1 to do training or whatever. There are different 2 modules that I understand that Possible has -- 3 PossibleNOW has. 4 Our agreement doesn't require Satellite 5 Systems Network to do any training. They're 6 independent. They're an independent retailer. They 7 can do what they need to be able to -- they have an 8 opportunity to sell our product. It's up to them to 9 put the mechanisms in place that makes them compliant 10 with the law, and we have -- we provide an opportunity 11 to take advantage of our relationship that we have or 12 a retailer can have with PossibleNOW. I don't think 13 it requires anything except to be compliant with law. 14 Q. And I think you're answering a slightly 15 different question than the one I asked. I'm not 16 actually asking if the retailer agreement requires SSN 17 to show DISH that its personnel has engaged -- has 18 been trained in telemarketing compliance. I realize 19 this agreement does not say that. 20 I'm just asking you if this agreement 21 authorizes DISH to tell SSN, for example, Your 22 personnel must be trained in TCPA compliance. 23 MR. KERN: Same objection. 24 Q. (BY MR. BARRETT) As a condition of doing</p>



<p style="text-align: right;">Page 34</p> <p>1 business with us. In other words, the agreement 2 itself doesn't say that. I'm just saying, does it 3 give DISH the authority to tell SSN, Your personnel 4 must be trained in TCPA compliance? 5 MR. KERN: Same objection. 6 A. I don't believe it requires -- our 7 agreement doesn't require a retailer to do any 8 training. 9 Q. (BY MR. BARRETT) And I'm not saying that 10 it does. I'm saying, does it give DISH the authority 11 to tell SSN, You must undergo this training in TCPA 12 compliance in order to do business with us? 13 MR. KERN: Same objection. 14 A. I think in our agreement it's clear that 15 our retailer -- Satellite Systems Network is an 16 independent retailer. We don't tell -- we don't tell 17 them what to do. They need to be compliant with 18 whatever they do to sell the product. 19 Q. (BY MR. BARRETT) Well, you tell them 20 they need to use PossibleNOW, right? 21 A. Correct. 22 Q. So you can -- why can you not tell them, 23 You have to engage in telemarketing compliance 24 training?</p>	<p style="text-align: right;">Page 36</p> <p>1 Q. (BY MR. BARRETT) Why -- why -- why can 2 they tell them, You have to engage PossibleNOW, but 3 they can't tell them, You have to show us that your 4 personnel are trained in telemarketing compliance? 5 I'm having difficulty reconciling those two things and 6 understanding any difference between the two at all. 7 MR. KERN: Objection. Asked and 8 answered. Calls for a legal conclusion. 9 A. I can't answer the question. 10 Q. (BY MR. BARRETT) Do you know of any 11 retailers who -- OE retailers who use telemarketing 12 who were fined by DISH Network for engaging in illegal 13 telemarketing? 14 A. Since when? 15 Q. Let's say before December 31, 2011. 16 A. I know that at times, retailers have been 17 penalized for violations of TCPA. There is a bunch of 18 pieces, I think, attached to that. I don't remember 19 right now a specific retailer, but I know we have 20 penalized retailers for activity. 21 Q. Was SSN ever penalized for engaging in 22 illegal telemarketing by DISH Network? 23 A. I believe they were. I don't remember. 24 In the back of my head -- this is prior to 2011,</p>
<p style="text-align: right;">Page 35</p> <p>1 A. So I can create -- I'm sorry. What was 2 the question? 3 Q. Why can't DISH tell SSN, You need to show 4 us that you are training your personnel in 5 telemarketing compliance? 6 A. I'm going to go back to the same thing. 7 They're an independent business. They need to be 8 compliant with the laws. We don't tell retailers what 9 to do. 10 Q. But you just -- you told them that they 11 have to use PossibleNOW, right? Retailers have to 12 engage PossibleNOW if they're going to use 13 telemarketing at a certain volume. Is that correct? 14 A. That is correct, yes. 15 Q. So why can't -- can DISH Network also 16 tell this retailer, SSN, You have to show us that your 17 personnel are being trained in telemarketing 18 compliance as a condition of doing business? 19 MR. KERN: Objection. Asked and 20 answered. 21 A. I can't answer the question. You're -- 22 make sure -- what was -- the question was, why can't 23 DISH tell Satellite Systems Network? Because they're 24 an independent retailer.</p>	<p style="text-align: right;">Page 37</p> <p>1 though, I think. I believe there was a penalty that 2 was assessed. I don't know the details. 3 Q. Who would know that? 4 A. It would be in the compliance file that 5 was associated with Satellite Systems Network. 6 Q. SSN is not today a DISH Network retailer; 7 is that correct? 8 A. No, sir, they're not. 9 Q. And do you know why? 10 A. We placed the retailer on hold in 2003. 11 We essentially put them out of business in 2013 at the 12 direction of our counsel having to do with a Donaca 13 case that was out. 14 Q. Okay. I believe the first part of your 15 answer was you placed them on hold in 2003? 16 A. No. I'm sorry, 2013. I'm sorry. I 17 apologize. 2013. 18 Q. That's all right. 19 A. Good catch. Essentially that puts them 20 out of business. 21 Q. "Placed them on hold," is that the term 22 that you used? 23 A. Correct. We essentially limited access 24 to the tools. They couldn't do reconciliations based</p>

<p style="text-align: right;">Page 38</p> <p>1 off our documents. They were essentially out of 2 business. We put them out of business. Or I'm sorry, 3 we functionally terminated the agreement. 4 Q. Was -- that happened in 2013 on advice of 5 counsel, and I don't need to ask you about what that 6 advice was or any details about that. But I would 7 like to know if DISH Network had considered 8 terminating SSN prior to 2013. 9 A. I'm not aware of any conversation for 10 that. I don't know why it would do that. 11 Q. Okay. 12 MR. KERN: Need a break? 13 MR. BARRETT: Let's take a short break. 14 THE VIDEOGRAPHER: We are going off the 15 record. The time is 10:37. 16 (Recess taken, 10:37 a.m. to 10:44 a.m.) 17 THE VIDEOGRAPHER: We are back on the 18 record at 10:44. 19 Q. (BY MR. BARRETT) All right. Mr. Werner, 20 let's talk a little bit about monitoring of telephone 21 calls with respect to SSN back in 2009 through 2011, 22 that time frame. If DISH Network personnel wanted to 23 monitor any telephone call placed by SSN, how would 24 that happen?</p>	<p style="text-align: right;">Page 40</p> <p>1 Q. (BY MR. BARRETT) Was there a way to -- 2 or could a DISH Network employee visit SSN's call 3 center and listen in on any calls at the call center? 4 MR. KERN: Objection. Foundation. 5 But go ahead. 6 A. So could a DISH employee listen to a 7 phone call at SSN's call center? 8 Q. (BY MR. BARRETT) Yes, sir. 9 A. I think so, yeah. 10 Q. Did that regularly happen? 11 A. There was a time -- I don't know dates 12 and I'm peripherally aware that we had field folks in 13 many of our OE call centers or the centers that are 14 associated with our OE retailers. I don't know that 15 it happened with Satellite Systems Network. 16 Q. Okay. I'll talk to Mr. Mills more about 17 that. 18 This is Exhibit 10. 19 (Deposition Exhibit 10 was marked.) 20 Q. Do you recognize Exhibit 10? 21 A. Yes, sir. 22 Q. What is it? 23 A. It's the first time I have seen this 24 document. This is a Facts Blast and it's dated</p>
<p style="text-align: right;">Page 39</p> <p>1 MR. KERN: John, if I could -- I'm fine 2 with the line of questioning. It seems as if this 3 relates to 4-e, which is Mr. Mill's category. 4 MR. BARRETT: Okay. 5 MR. KERN: I mean, just so long as we 6 don't get too far into the weeds -- 7 MR. BARRETT: Sure. 8 MR. KERN: -- I'm fine with Bruce 9 answering what he can answer. 10 MR. BARRETT: Sure. 11 A. So there would be -- typically there 12 would be one of two different ways. We would not be 13 able to listen to all of their phone calls. We're not 14 set up to be able to log into their switch or 15 whatever, listen to live calls or all calls. 16 We require OE retailers to provide -- we 17 require retailers to provide recorded phone calls for 18 us to be evaluated by our national QA group. So one 19 way we would do it is a request from our national QA 20 folks to provide a -- make available to us a copy of a 21 call. 22 If we received a complaint might be 23 another way where we would request a copy of a 24 recording.</p>	<p style="text-align: right;">Page 41</p> <p>1 July 10 from Chris Clark, vice president of special 2 distribution, titled "Important Telemarketing and 3 Advertising Clarification." 4 Q. Have you seen any updates to this 5 document? You said you haven't seen this document 6 before. Have you seen a document like it, just at a 7 later period of time? 8 A. Periodically -- again, today or -- 9 Q. Okay. Let's talk about before the end of 10 2011. 11 A. Okay. There have been in my time -- and 12 I kind of took this function. I was responsible for 13 the compliance functions as a general manager in 14 approximately 2006. Time since then, we have 15 published, not this -- republished this document. We 16 have published documents that deal with telemarketing 17 in a variety of different ways. 18 Q. Is that before 2011? What I'm trying to 19 get a handle on -- just kind of cut to the chase 20 maybe. Sorry if I'm asking thick questions, but I 21 just want to get a handle on what the written policies 22 were at DISH Network regarding telemarketing prior to 23 the end of 2011. Of course this document -- we have 24 this document, Exhibit 10. Are there other documents</p>

<p style="text-align: right;">Page 42</p> <p>1 that you're aware of?</p> <p>2 A. I'm confident there were other documents</p> <p>3 that addressed telemarketing. I can't tell you which</p> <p>4 ones or how frequently they were published. I know</p> <p>5 they were there.</p> <p>6 Q. Okay. As a part of DISH's business rules</p> <p>7 up until the end of 2011, was an OE retailer required</p> <p>8 to get DISH's express written consent -- and, again,</p> <p>9 I'm reading from this document, which I understand you</p> <p>10 haven't seen before. Was an OE retailer required to</p> <p>11 get DISH's express written consent to hire or use</p> <p>12 third parties such as third-party telemarketers?</p> <p>13 A. Were they required to use them?</p> <p>14 Q. Were they required to get DISH's express</p> <p>15 written consent to use them.</p> <p>16 A. The answer is yes.</p> <p>17 Q. And was that a policy that was consistent</p> <p>18 throughout the end of 2011?</p> <p>19 A. The answer is yes.</p> <p>20 Q. Whose job was it to be sure that in 2009</p> <p>21 through 2011 that OE retailers were obtaining DISH's</p> <p>22 written consent to use third-party telemarketers?</p> <p>23 A. So it would be the retailer's</p> <p>24 responsibility to tell DISH any time they used a third</p>	<p style="text-align: right;">Page 44</p> <p>1 A. Yes.</p> <p>2 Q. Okay. Let me ask you if you agree with</p> <p>3 this statement. If SSN were to obtain a new customer</p> <p>4 through illegal telemarketing and that was a new DISH</p> <p>5 customer back in 2000- -- let's say in 2010, would</p> <p>6 DISH Network be benefiting from SSN's illegal</p> <p>7 telemarketing?</p> <p>8 MR. KERN: Objection as to foundation.</p> <p>9 Calls for a legal conclusion.</p> <p>10 A. I don't know the benefit part, and I</p> <p>11 don't think there has been any evidence that there</p> <p>12 have been any illegal telemarketing sales associated</p> <p>13 with illegal -- we haven't talked about any specifics</p> <p>14 to talk about what was illegal telemarketing, so</p> <p>15 it's -- I've got to speculate. I can't answer the</p> <p>16 question.</p> <p>17 Q. (BY MR. BARRETT) And let me try to lay</p> <p>18 the foundation. An OE retailer's job is to -- broadly</p> <p>19 speaking, is to obtain new customers for DISH Network.</p> <p>20 Is that accurate?</p> <p>21 A. That's pretty narrow.</p> <p>22 Q. But is that one of their functions?</p> <p>23 A. Is to sell our product, yes.</p> <p>24 Q. Yes. So when an OE retailer signs up a</p>
<p style="text-align: right;">Page 43</p> <p>1 party for any sales functions. Or what does it say?</p> <p>2 Advertising -- I mean, they were -- any time they used</p> <p>3 a third party -- a retailer was required to tell DISH</p> <p>4 when they're using a third party, yeah.</p> <p>5 Q. Whose job at DISH was it to make sure</p> <p>6 that that happened?</p> <p>7 A. Again, we didn't --</p> <p>8 Q. It's a DISH policy, You have to get our</p> <p>9 written permission to use third-party telemarketers,</p> <p>10 so whose job is it -- was it in 2009 through 2011 to</p> <p>11 make sure that that happened?</p> <p>12 A. I don't think there was anybody that was</p> <p>13 tasked with that. We don't know who does</p> <p>14 telemarketing. And by that, I think you're talking</p> <p>15 outbound telemarketing, but whatever. We don't -- we</p> <p>16 don't know.</p> <p>17 Again, I'm back to the thing about</p> <p>18 they're independent contractors. They do their</p> <p>19 business, OE or otherwise, and I don't know that I was</p> <p>20 aware who did outbound telemarketing. Who was</p> <p>21 required to fulfill or send in forms or let us know?</p> <p>22 Nobody was required at DISH to do that.</p> <p>23 Q. In 2009 through 2011, you knew that SSN</p> <p>24 was using outbound telemarketing, right?</p>	<p style="text-align: right;">Page 45</p> <p>1 new customer, the business transaction is between the</p> <p>2 customer and DISH Network, right?</p> <p>3 A. One of the relationships is that, yeah.</p> <p>4 Q. The customer signs up directly with DISH</p> <p>5 through the OE system, right?</p> <p>6 A. Well, that's not direct. That's through</p> <p>7 the retailer.</p> <p>8 Q. Of course. Yes. But the retailer makes</p> <p>9 basically -- when a retailer calls up a potential new</p> <p>10 customer, the customer says, Yes, I'm interested, the</p> <p>11 retailer accesses the OE system, right, and enters</p> <p>12 information into the OE system. Then there is an</p> <p>13 agreement going forward, a business transaction</p> <p>14 between the customer and DISH Network. Is that an</p> <p>15 accurate description of how the OE system generally</p> <p>16 works?</p> <p>17 MR. KERN: Objection to form.</p> <p>18 A. Any customer that sets up for DISH --</p> <p>19 sets up for DISH service is -- well, depending on the</p> <p>20 promotion, a customer may be bound in a contractual</p> <p>21 relationship with DISH, yes.</p> <p>22 Q. (BY MR. BARRETT) Yes. Okay. So the</p> <p>23 customer has a contractual relationship with DISH.</p> <p>24 The customer obtained through -- by an OE retailer's</p>

<p style="text-align: right;">Page 46</p> <p>1 telemarketing enters into a contractual relationship 2 with DISH Network. Is that accurate? 3 A. I think that summarizes what I said, 4 yeah. 5 Q. Okay. So assume for a minute that an OE 6 retailer makes an illegal telemarketing call. Signs 7 up or obtains -- the customer who receives the call 8 says, Yes, I would like a DISH subscription. And as a 9 result of the telemarketing call, the customer enters 10 into a contractual relationship with DISH, right? My 11 question is: Is DISH benefitting from illegal 12 telemarketing under that example? 13 MR. KERN: Objection as to form, 14 foundation and calls for a legal conclusion. 15 A. I think that DISH has a customer. I 16 don't know what "benefited" means. 17 Q. (BY MR. BARRETT) Financial, gets money 18 as a new customer. 19 A. So there is an income. There is costs 20 associated. There is a relationship with the 21 customer, so the customer is going to benefit. There 22 is multiple touch points, yes. 23 Q. But does DISH benefit from that call -- 24 MR. KERN: Same objection.</p>	<p style="text-align: right;">Page 48</p> <p>1 Q. (BY MR. BARRETT) Okay. Let's say 2 that -- just assume that it is illegal. Assume that a 3 call to someone who is on the Do Not Call Registry is 4 placed and that that call is illegal. It's a 5 violation of the TCPA. And I realize you're not a 6 lawyer and I'm not asking you to opine on whether, in 7 fact, that call was illegal. I'm saying assume that 8 it is. 9 MR. KERN: Same objection. 10 Q. (BY MR. BARRETT) Does DISH benefit from 11 that illegal call when John Smith is signed up to a 12 long-term DISH Network satellite TV subscription? 13 MR. KERN: Same objection. 14 A. So do we benefit at the time of the sale? 15 Q. (BY MR. BARRETT) Ever. 16 A. Ever. It's possible. It's possible. 17 Q. It's pretty likely, isn't it? I mean, 18 I'm talking about a five-year subscription for 19 Mr. Smith. 20 A. Depending on the promotion that the -- in 21 your illustration, Satellite Systems Network, 22 depending on the promotion that they sold this 23 customer, there may be or may not be a commitment. 24 There may not be long term. It may be, you know --</p>
<p style="text-align: right;">Page 47</p> <p>1 Q. (BY MR. BARRETT) -- financially? 2 A. I believe DISH has a relationship with 3 our customers, and there is a long-term expectation 4 that there will be a benefit to it, yeah. 5 MR. KERN: John, are you asking whether 6 there is a benefit right then or ever? 7 MR. BARRETT: Ever. 8 Q. (BY MR. BARRETT) Let's say -- we'll be 9 more granular with my hypothetical. So SSN places a 10 call to a customer, John Smith. It's an illegal call. 11 John Smith is on the national Do Not Call Registry and 12 is receiving a telemarketing call. John Smith says, 13 Yes, I would like a DISH Network subscription. 14 SSN accesses the OE system to sign the 15 customer up, John Smith up to receive DISH Network 16 services, satellite TV subscription. John Smith pays 17 the bill on a monthly basis, is a long-time customer 18 of DISH Network. Five years he keeps this DISH 19 Network plan. Does DISH benefit from that illegal 20 call to Mr. Smith? 21 MR. KERN: Objection as to form, 22 foundation and calls for a legal conclusion. 23 A. So where I get hooked up on this is I 24 don't know what "illegal" is.</p>	<p style="text-align: right;">Page 49</p> <p>1 depending on the promotion. There is a lot of moving 2 pieces to it. 3 Q. Just assume it's a standard promotion, 4 and I realize there are different promotions. But 5 when DISH Network rolls out a motion, it doesn't roll 6 it out to lose money. It rolls it out to make money 7 and to gain new customers, and that's what it's in 8 business to do. I'm not judging that at all. But 9 assume it's a fairly standard promotion. 10 MR. KERN: Same objection, and I believe 11 asked and answered. 12 MR. BARRETT: I don't think so, because 13 we're getting into the weeds about whether this 14 promotion or that promotion. 15 Q. (BY MR. BARRETT) I'm just asking you to 16 assume it's a standard promotion. 17 A. Again, would DISH benefit from it? 18 Q. Yes. 19 A. If we have a subscriber, the intent is to 20 make money off of it. I don't think there is any 21 evidence, though, that -- and forgive me for jumping, 22 I've never seen more than an allegation that something 23 in violation of TCPA laws or whatever occurred. I 24 don't believe I've ever seen this hypothetical that if</p>

<p style="text-align: right;">Page 50</p> <p>1 a do-not-call violation occurred -- of all the -- in 2 that -- whatever that six-or-so years where I was 3 responsible for, or close to that, I don't think I saw 4 evidence that there were do-not-call violations. So 5 to be hypothetical about would we make money, perhaps. 6 Q. Do you have an opinion about whether SSN 7 engaged in illegal telemarketing? 8 MR. KERN: Objection. Calls for a legal 9 conclusion. 10 A. I don't have an opinion about it. 11 Q. (BY MR. BARRETT) Okay. Let me take 12 those exhibits, if I may. 13 You're welcome to look at this, but topic 14 4-a on our notice is disciplinary action taken against 15 SSN for engaging in noncompliant telemarketing or any 16 other violation of its retailer agreement. Can you 17 tell me about all such disciplinary action? 18 A. In -- over what period again? 19 Q. At any time in DISH's relationship with 20 SSN. 21 A. So to my knowledge, with the one 22 exception of a penalty, perhaps -- I don't recall the 23 details on that one -- I don't recall there was any 24 disciplinary action that we exercised against</p>	<p style="text-align: right;">Page 52</p> <p>1 Q. Okay. So you have no knowledge about 2 what the nature of the infraction that's referenced in 3 that letter is? 4 A. No, sir. 5 Q. All right. 6 (Deposition Exhibit 16 was marked.) 7 Q. I'm handing you Exhibit 16. Have you 8 seen Exhibit 16 before? 9 A. No, sir, I have not. 10 Q. Do you know who Vitana, V-i-t-a-n-a, 11 Financial Group is? 12 A. No, sir. 13 Q. There has been a statement that Vitana 14 Financial Group is another name that SSN did business 15 under. Do you have any knowledge of that? 16 MR. KERN: Objection. Foundation. 17 A. I'm not aware of Vitana Financial Group 18 at all. 19 (Deposition Exhibit 12 was marked.) 20 Q. (BY MR. BARRETT) I'm handing you 21 Exhibit 12. Without reading the entire document, 22 because it's quite long, are you familiar with 23 Exhibit 12? 24 A. Your question is am I familiar with this</p>
<p style="text-align: right;">Page 51</p> <p>1 Satellite Systems Network. 2 Q. And the penalty that you just mentioned 3 is the penalty that you were talking about earlier in 4 your testimony? 5 A. You mentioned it. I recall -- I would 6 have to research to make sure. 7 Q. And to determine whether, in fact, there 8 was a penalty, you would look at the compliance file 9 for SSN; is that right? 10 A. Correct. And a penalty may have nothing 11 do with DNC violations. 12 Q. What do you think it may have to do with? 13 A. I don't. I'm sorry, I can't -- I have a 14 blank. Even if there was one, I don't -- 15 Q. Okay. The next topic is "All 16 investigations of SSN relate to noncompliant 17 telemarketing or violations of SSN's Retailer 18 Agreement," and I have some documents that we can 19 review that will help us here. 20 A. Okay. 21 (Deposition Exhibit 9 was marked.) 22 Q. I'll hand you Exhibit 9. Have you seen 23 Exhibit 9 before? 24 A. I have not.</p>	<p style="text-align: right;">Page 53</p> <p>1 document? 2 Q. Yes, sir. 3 A. No, sir, I'm not. 4 Q. Are you aware if any enforcement 5 proceedings brought against Satellite Systems Network 6 in the state of North Carolina? 7 A. I'm not aware of that, no, sir. 8 Q. I just -- if I look at the caption of 9 this document there, it says State of North Carolina 10 versus Vitana Financial Group, a California 11 Corporation doing business as Satellite Systems 12 Network, LLC. It also mentions Direct Satellite 13 Network Solutions and Alex Tehranchi, individually and 14 as an agent and principal officer of Vitana. 15 Does that refresh your recollection as to 16 any connection between SSN and Vitana Financial Group? 17 A. I'm not aware of Vitana at all, so this 18 can't refresh me, no, sir. Forgive me, but does this 19 have anything to do with DISH? 20 Q. I don't know. We'll read the document 21 later and find out. 22 A. I'm sorry. Yeah. I just turned to a 23 page that says DirecTV on it. I just didn't know -- 24 Q. Right.</p>

<p style="text-align: right;">Page 54</p> <p>1 A. -- if it had to do with DISH or whatever.</p> <p>2 Q. Right. I'm not sure.</p> <p>3 A. Because they sold -- over time they sold</p> <p>4 different products, too.</p> <p>5 Q. Yes.</p> <p>6 (Deposition Exhibit 13 was marked.)</p> <p>7 Q. I'm handing you Exhibit 13. Take a look</p> <p>8 at that, if you will, to -- again, without reading the</p> <p>9 entire legal document. I'll represent that --</p> <p>10 Mr. Werner, that this is a -- as it's styled, a</p> <p>11 "Judgment by Consent and Stipulated Permanent</p> <p>12 Injunction," directed to, among others, Satellite</p> <p>13 Systems Network, LLC, and Alex Tehranchi. Were you</p> <p>14 aware of this document?</p> <p>15 A. No, sir. I'm back to I don't know</p> <p>16 anything about Vitana Financial Group and this</p> <p>17 document is unknown to me.</p> <p>18 Q. Do you have any knowledge of SSN being</p> <p>19 fined in the state of North Carolina for engaging in</p> <p>20 illegal telemarketing?</p> <p>21 A. I'm not aware of that, no, sir.</p> <p>22 (Deposition Exhibit 18 was marked.)</p> <p>23 Q. I'm handing you Exhibit 18. Have you --</p> <p>24 MR. KERN: I'm going to object to this</p>	<p style="text-align: right;">Page 56</p> <p>1 account, a Pacer account, can access.</p> <p>2 MR. KERN: Is Mr. Werner's name -- I</p> <p>3 mean, these are privileged documents and he would be</p> <p>4 testifying about privileged issues.</p> <p>5 MR. BARRETT: I think we better call the</p> <p>6 Court.</p> <p>7 MR. KERN: I think that's okay. Do you</p> <p>8 want to call them right this moment for it or would</p> <p>9 you rather call it at the end?</p> <p>10 MR. BARRETT: I'm not coming back out</p> <p>11 here. I mean, the witness can come to me in Boston or</p> <p>12 West Virginia, but I'm not coming back out.</p> <p>13 MR. KERN: Do you want to finish with his</p> <p>14 testimony and come back?</p> <p>15 MR. BARRETT: No. I want to stop right</p> <p>16 now. I'm going to ask all kinds of questions about</p> <p>17 these documents -- we have to resolve this -- with</p> <p>18 Mr. Mills, with anybody. It's public documents.</p> <p>19 MR. KERN: Give me 15 minutes --</p> <p>20 MR. BARRETT: Okay.</p> <p>21 MR. KERN: -- to discuss and then we'll</p> <p>22 come back to it.</p> <p>23 MR. BARRETT: Sure.</p> <p>24 THE VIDEOGRAPHER: This is the end --</p>
<p style="text-align: right;">Page 55</p> <p>1 document. That document, although the ledger is cut</p> <p>2 off, is subject to attorney-client privilege.</p> <p>3 MR. BARRETT: This is an exhibit that was</p> <p>4 in the public court file at the Central District of</p> <p>5 Illinois.</p> <p>6 MR. KERN: I'm aware of that.</p> <p>7 MR. BARRETT: You have the objection. I</p> <p>8 understand.</p> <p>9 MR. KERN: And so I'll instruct the</p> <p>10 witness not to answer questions about this document.</p> <p>11 MR. BARRETT: Despite the fact that's</p> <p>12 it's in the public court file?</p> <p>13 MR. KERN: That's right. I don't believe</p> <p>14 that the -- that the district court's decision to make</p> <p>15 this document -- over the properly asserted privilege</p> <p>16 objection to make it public has the effect of waiving</p> <p>17 the privilege in this case.</p> <p>18 MR. BARRETT: I'm not saying you waive</p> <p>19 the privilege. I'm saying it's a public document now.</p> <p>20 It's on the public court file. It's accessible by</p> <p>21 anyone. I understand your objection and I'm not going</p> <p>22 to assert that you have waived. I'm just intending to</p> <p>23 ask this witness questions about documents that are in</p> <p>24 the public domain and that anybody with a computer</p>	<p style="text-align: right;">Page 57</p> <p>1 Sorry, are we off the record?</p> <p>2 MR. BARRETT: Yes.</p> <p>3 THE VIDEOGRAPHER: This is the end of</p> <p>4 media unit 1 in the deposition of Bruce Werner. We</p> <p>5 are off the record at 11:17.</p> <p>6 (Recess taken, 11:17 a.m. to 11:30 a.m.)</p> <p>7 THE VIDEOGRAPHER: This is the beginning</p> <p>8 of media unit 2 in the deposition of Bruce Werner,</p> <p>9 30(b)(6) representative of DISH Network. The time is</p> <p>10 11:30 a.m.</p> <p>11 MR. BARRETT: So we're back after a short</p> <p>12 break. Ben, did you have an opportunity to consider</p> <p>13 your objection?</p> <p>14 MR. KERN: Yes, and we will maintain the</p> <p>15 objection. We can talk to the Court at the</p> <p>16 appropriate time.</p> <p>17 MR. BARRETT: And the basis for that is</p> <p>18 what?</p> <p>19 MR. KERN: That the compulsion of those</p> <p>20 documents was over our -- over DISH's properly made</p> <p>21 objection for privilege; that the -- and that law, we</p> <p>22 believe, would support the position that the -- that a</p> <p>23 compulsory production of documents wherein a</p> <p>24 reasonable assertion of privilege was made does not</p>

<p style="text-align: right;">Page 58</p> <p>1 waive the objection with respect to attorney-client 2 privilege or work product for future litigations. 3 And the documents that you were preparing 4 to show are clearly asking -- requesting legal advice 5 and giving legal advice. Documents that would -- 6 other than through the district court's decision to 7 force the production of those documents would never -- 8 well, would squarely fall within the attorney-client 9 privilege, and that the district court's decision made 10 in that case doesn't have the effect of waiving the 11 privilege for DISH in this case, which is exactly what 12 would happen if those documents are permitted to be -- 13 if questions are permitted to be asked about those 14 documents in this deposition. 15 MR. BARRETT: And my view is I would 16 respect the non-waiver if you would maintain that 17 you're not waiving any rights to assert that this 18 document is privileged or not waiving any rights to 19 object to this document's admissibility. 20 We're here at a deposition that was 21 noticed. That's our basis. We want to go forward 22 with the questioning and don't understand why 23 documents that are in the public court file that were 24 the subject of an unsuccessful-for-DISH motion to</p>	<p style="text-align: right;">Page 60</p> <p>1 document that we were just discussing regarding the 2 privilege is Exhibit 18. I won't ask questions about 3 it based upon your objection, but I would like for it 4 to be a part of our exhibits and we can store it in 5 some separate fashion so that we have a clear record, 6 again, without any waiver. 7 MR. KERN: Under seal with an agreement 8 that we have not waived. 9 MR. BARRETT: Well, we'll address the 10 seal issue later. Let's just keep it in that pile for 11 now. 12 Let's come back to this. I don't want to 13 catch you off guard in any way, but I just want to 14 make sure that we don't -- we've got a lot of 15 documents here to look through. I want to make sure 16 that we keep them in order and we know what we're 17 arguing over. 18 MR. KERN: Okay. 19 (Deposition Exhibit 17 was marked.) 20 Q. (BY MR. BARRETT) This is Exhibit 17. 21 Take a minute, if you will, please, to look through 22 this document. Do you -- have you seen this document 23 before, Exhibit 17? 24 A. Let me just double-check. I've got one</p>
<p style="text-align: right;">Page 59</p> <p>1 compel discovery would be anything less than fair game 2 here, so . . . 3 MR. KERN: And, again, it's -- that 4 decision by the district court to make those -- to put 5 those documents -- not only to put those documents -- 6 to make those -- to compel those documents but to 7 compel them in an unsealed manner, we believe to be 8 incorrect and the decision is still appealable. 9 MR. BARRETT: Okay. 10 MR. KERN: But it's not instantly 11 appealable, which is part of the problem. 12 MR. BARRETT: I'm communicating with Matt 13 Norris here. Just one second. 14 MR. KERN: In fact, John, these documents 15 never would have been produced in this case so that 16 questions could be asked about them. 17 Q. (BY MR. BARRETT) Do you have any 18 knowledge, Mr. Werner, of a complaint by the Indiana 19 Attorney General Offices against SSN relating to 20 illegal telemarketing? 21 A. When? 22 Q. In 2005. 23 A. I'm not, no, sir. 24 MR. BARRETT: And for our record, the</p>	<p style="text-align: right;">Page 61</p> <p>1 more thing I'm reading, if I can. 2 Q. Sure. 3 MR. BARRETT: Before I jump into 4 questions on that, Ben, I've heard from my local 5 counsel, Matt Norris, and we understand that the 6 procedure -- correct procedure is to at the end of the 7 deposition -- no need to adjourn it now, but at the 8 end of the deposition, we'll adjourn and file a motion 9 to compel or you can file a motion for a protective 10 order. I'm not sure which, and then we'll address 11 that issue down the road. In other words, no phone 12 call today with the Court. 13 MR. KERN: Okay. That seems reasonable. 14 Q. (BY MR. BARRETT) So Exhibit 17, do you 15 recognize that? 16 A. Not specifically, no, sir, I don't. 17 Q. Do you have any knowledge of a complaint 18 by a consumer named Jeff Lichtenstein? 19 A. Jeff Lichtenstein is an employee -- 20 appears to be -- I'm sorry -- is an employee of 21 1-800-Technostores, one of our -- potentially one of 22 our retailers. I'm not familiar with him at all. 23 Q. If you'll look, the retailer on the 24 second page of that exhibit, Leslie Fiedler,</p>

<p style="text-align: right;">Page 62</p> <p>1 identified as the retailer behind the call as 2 Satellite Systems Network -- it's on the second page 3 of Exhibit 17. Do you see that? 4 A. Yes, sir. 5 Q. And there is an e-mail from Amir Ahmed to 6 Mike Oberbillig and Steve Keller saying, "This is 7 Alex's last chance. Fix it or he gets a letter and 8 will lead to termination. It's that simple." 9 My question is: Did you have any 10 discussion with anyone at DISH Network regarding this 11 last chance that's referenced -- 12 MR. KERN: Before you -- 13 Q. (BY MR. BARRETT) -- in the e-mail? 14 MR. KERN: I apologize, John. Which page 15 are we -- 16 MR. BARRETT: The very top of the second 17 page. 18 MR. KERN: Oh, I see it. I see it. I 19 apologize. 20 A. All right. 21 Q. (BY MR. BARRETT) Did you have any 22 conversation with anyone at DISH Network about Alex's 23 last chance back in 2005? 24 A. I don't believe I was part of this</p>	<p style="text-align: right;">Page 64</p> <p>1 A. Regarding DISH product or -- 2 Q. Yes, sir. 3 A. I'm not specifically aware of that, no. 4 Q. I need that document back. 5 A. Yeah. 6 (Deposition Exhibit 26 was marked.) 7 Q. I'm handing you Exhibit 26. It's a 8 document regarding an investigation by the State of 9 Washington that involved EchoStar and SSN. And you 10 testified just a minute ago that you have no knowledge 11 of that, so I don't think I have to ask you any 12 questions about that. 13 Do you have any knowledge about an 14 investigation by the State of Vermont regarding SSN 15 and DISH? 16 A. Again, for the same period? 17 Q. It would have been -- yes, approximately 18 2005, 2006. 19 A. I don't have specific knowledge of that 20 one, no, sir. 21 Q. Any general knowledge? Is that the first 22 you've heard of it? 23 A. About a specific complaint? 24 Q. About a complaint -- about an</p>
<p style="text-align: right;">Page 63</p> <p>1 conversation at all. 2 Q. Okay. Alex would be Alex Tehranchi, 3 correct? 4 A. I can't tell you. 5 Q. Okay. You don't know -- you know Alex 6 Tehranchi, right? 7 A. I've heard of him. He's a name to me. 8 Q. You haven't met him in person? 9 A. No, sir, I have not. 10 Q. Have you spoken with him on the phone? 11 A. I don't believe so. I may have. I don't 12 have a specific recollection. 13 Q. Okay. The first -- on the first page up 14 at the top, did you have any conversation with anyone 15 at DISH Network about whether Alex at SSN needed to 16 stop using message broadcasting and leaving messages? 17 A. Again, I have no recollection of that in 18 a conversation with anybody about this particular 19 e-mail. 20 Q. Okay. Do you have any knowledge about an 21 investigation of or relating to SSN telemarketing 22 brought by the State of Washington? 23 A. In what period? 24 Q. 2006.</p>	<p style="text-align: right;">Page 65</p> <p>1 investigation by the State of Vermont regarding DISH 2 and SSN. 3 A. I'm not specifically familiar with that. 4 If there was an investigation, I'm not aware of that. 5 (Deposition Exhibit 31 was marked.) 6 Q. Exhibit 31. Have you seen Exhibit 31 7 before? 8 A. I may have seen this. 9 Q. It's a complaint involving a consumer 10 named Jeanette Payne. 11 A. Correct. I apologize. I was looking for 12 the name. I saw some documents in preparation for 13 this -- for this deposition. Ms. Payne was one of a 14 few allegations that were made in the life cycle of 15 that 2006 to more recent for Satellite Systems 16 Network. I think I've seen this document. 17 Q. Who is Patrick Jaworski? 18 A. Patrick -- today or then? He's the same 19 person. 20 Q. Okay. Back in 2007, who -- 21 A. He's an analyst in the -- in our 22 compliance group today. 23 Q. And on the second page, I notice that he 24 is requesting certain information in the bullet</p>



<p style="text-align: right;">Page 66</p> <p>1 points. Do you see the bullet points?</p> <p>2 A. With Do Not Call Policy, Proof of Do Not</p> <p>3 Call Registrations, that sort of thing?</p> <p>4 Q. Yes.</p> <p>5 A. Yes, sir.</p> <p>6 Q. So the request for proof of do-not-call</p> <p>7 policy, what do you understand that to be? That would</p> <p>8 be SSN's internal do-not-call policy?</p> <p>9 A. It's the policy that has to do with do</p> <p>10 not call, yes.</p> <p>11 Q. And proof of do-not-call registrations,</p> <p>12 what is that asking for?</p> <p>13 A. I'm not clear. I don't know.</p> <p>14 Q. "List of Affiliate Companies with the</p> <p>15 contact information including any 3rd party call</p> <p>16 centers and anyone generating leads on your behalf," I</p> <p>17 think that's fairly clear what we're asking for there.</p> <p>18 A. Yes, sir.</p> <p>19 Q. "All Outbound Telemarketing Scripts for</p> <p>20 employees and affiliates." So that is the sort of --</p> <p>21 that's a fairly common request that DISH would make to</p> <p>22 a dealer who is accused of violating telemarketing</p> <p>23 laws?</p> <p>24 A. That would be a list of documents we</p>	<p style="text-align: right;">Page 68</p> <p>1 A. Yes, sir.</p> <p>2 Q. So regarding Exhibit 30, DISH is making</p> <p>3 this request as authorized by its retailer agreement</p> <p>4 and its business rules. Is that fair to say?</p> <p>5 A. We're writing this letter based on the</p> <p>6 agreement and the business rules. It's also because</p> <p>7 of the complaint or the allegation that was made, but</p> <p>8 yeah.</p> <p>9 Q. Do you have any specific recollection of</p> <p>10 Ms. Payne's complaint?</p> <p>11 A. Again, I reviewed a series of</p> <p>12 correspondence last night. Forgive me, I don't know</p> <p>13 what the outcome was, specific outcome on it. I</p> <p>14 recall that it was one of a few instances with</p> <p>15 Satellite Systems Network where there was a --</p> <p>16 complaints were made, but the bottom line on it was it</p> <p>17 wasn't a do-not-call issue on this one. It was</p> <p>18 persistent -- frequent and persistent or rude. I</p> <p>19 forget what the situation was on this one.</p> <p>20 Q. What does that mean, "frequent and</p> <p>21 persistent"?</p> <p>22 A. Again, I'm not an attorney. I don't know</p> <p>23 what all the rules are about telemarketing and all,</p> <p>24 but when we receive complaints, we -- at the time, we</p>
<p style="text-align: right;">Page 67</p> <p>1 would ask a retailer to provide if there was an</p> <p>2 alleged violation which was given to us, yeah.</p> <p>3 Q. What happens to the retailer if the</p> <p>4 retailer doesn't provide this sort of information?</p> <p>5 A. So the -- we would -- it would be our</p> <p>6 normal process to be persistent to understand what</p> <p>7 happened on the call that was associated with the</p> <p>8 allegation. It would be our -- we would do our best</p> <p>9 to get information back from the retailer, you know,</p> <p>10 from Satellite Systems Network, What happened on this</p> <p>11 call? The intent of this is to find out what happened</p> <p>12 on the call.</p> <p>13 Q. A retailer can't just say -- just ignore</p> <p>14 this, right, this kind of communication?</p> <p>15 A. I don't know that "no" is the answer. I</p> <p>16 know, especially early in our process, there were --</p> <p>17 we were persistent. We had a good process and we were</p> <p>18 persistent in trying to understand what happened on</p> <p>19 each of the calls. I'm not aware of a retailer that</p> <p>20 ever said no.</p> <p>21 Q. Okay. I'm done with that one.</p> <p>22 (Deposition Exhibit 30 was marked.)</p> <p>23 Q. I'm handing you Exhibit 30. Have you</p> <p>24 seen this document before?</p>	<p style="text-align: right;">Page 69</p> <p>1 would categorize those based on the type of a</p> <p>2 violation of the TCPA, and some of those would include</p> <p>3 frequent and persistent, rude, failure to put on a</p> <p>4 do-not-call list, maybe those sort of things. But</p> <p>5 this was not a -- it turned out the investigation led</p> <p>6 to this not being a do-not-call violation</p> <p>7 specifically.</p> <p>8 Q. Okay. Do you know what the do not</p> <p>9 call -- federal do-not-call laws provide?</p> <p>10 A. Specifically?</p> <p>11 Q. Yes, sir.</p> <p>12 MR. KERN: Objection to the extent it</p> <p>13 calls for a legal conclusion, but in your --</p> <p>14 Q. (BY MR. BARRETT) Generally, do you know?</p> <p>15 A. I know some pieces of it. I don't know</p> <p>16 the detail, I mean, how it's enforced or penalties or</p> <p>17 things like that, you know, whatever.</p> <p>18 Q. Do you know what the Do Not Call Registry</p> <p>19 is?</p> <p>20 A. Yes.</p> <p>21 Q. And what is it?</p> <p>22 A. It's a --</p> <p>23 MR. KERN: Objection and running</p> <p>24 objection to the extent we're talking about this.</p>

<p style="text-align: right;">Page 70</p> <p>1 A. I understand it to be a federal 2 registration where consumers can add their phone 3 numbers so that on that registry they would be 4 prohibited -- people using telemarketing strategies 5 would not be allowed to contact customers, consumers. 6 Q. (BY MR. BARRETT) Do you know about 7 any -- are there any provisions that would allow a 8 telemarketer to call someone who is listed on the Do 9 Not Call Registry? 10 A. I know there are some exemptions. I 11 don't know what those are specifically such as a -- 12 Q. Do you know generally what they are? 13 A. I can think of one. Existing business 14 relationships, perhaps. 15 Q. What is that again? 16 A. My understanding is it to be an existing 17 business relationship, which in some jurisdictions may 18 allow somebody to contact a customer by use of the 19 phone. 20 Q. And do you know what an existing business 21 relationship is? 22 MR. KERN: Continue running objection. 23 Calls for a legal conclusion. 24 A. Not specifically.</p>	<p style="text-align: right;">Page 72</p> <p>1 this deposition? 2 A. I reviewed a bunch of documents. 3 Especially over the time that I've been with DISH, 4 I've seen a lot of documents during the time that's 5 covered when this all occurred. Specifically, I 6 reviewed documents including agreements, some 7 correspondence, a variety of things. 8 Q. Did you review any databases, computer 9 files? 10 A. When? 11 Q. In preparing for the deposition, however 12 long you've been preparing for the deposition. 13 A. We have provided -- I've helped -- 14 MR. KERN: That's not what he's talking 15 about. He's asking about our preparation for this 16 deposition. 17 A. No, I did not. I did not, no. 18 Q. (BY MR. BARRETT) Okay. And we have some 19 native files and we'll look at those that I want to 20 ask you some questions about to get a handle on what 21 they are. 22 Do you know if the documents that you 23 reviewed have been produced in the case -- in this 24 case?</p>
<p style="text-align: right;">Page 71</p> <p>1 Q. (BY MR. BARRETT) Generally? 2 A. If a -- if someone using a telephone to 3 contact a customer or a consumer, if they have an 4 existing relationship, they may be able to contact 5 those people. 6 Q. Do you know if there are any limits on 7 the period of time that the existing relationship can 8 exist? 9 A. I don't know specifically. I'm 10 comfortable that it varies, too, between different 11 states and such, so I don't know, no. 12 Q. So, in your view, if a retailer were to 13 have a business relationship with someone in 2003, 14 would that permit that retailer to -- and this person 15 with whom they had a relationship is on the national 16 Do Not Call Registry, would this retailer be permitted 17 to call that consumer back in 2010 on the basis of an 18 existing business relationship? 19 MR. KERN: Same objection. 20 A. I don't know. Perhaps. 21 Q. (BY MR. BARRETT) Okay. You were talking 22 a little bit earlier about documents that you 23 reviewed. I want to cover that with you. Do you 24 recall what documents you did review in preparing for</p>	<p style="text-align: right;">Page 73</p> <p>1 A. All the documents that were associated 2 with this case, to my knowledge, they have all been 3 produced, yes. 4 Q. Okay. 5 A. If I saw something in our prep, you've 6 got a copy of it, yeah. 7 Q. Sure. 8 (Deposition Exhibit 66 was marked.) 9 Q. I'm handing you Exhibit 66. 10 A. Do you want this one on the pile here? 11 Q. Yes, please. 12 Do you recognize this document? 13 A. Yes, sir, I do. 14 Q. And what is it? 15 A. It is a -- it's an e-mail string 16 involving an alleged TCPA violation by a person by the 17 name of Angela Schoolar. 18 Q. And what do you know about Ms. Schoolar's 19 allegations? 20 A. I'm reviewing the document. It appears 21 that the nature of her complaint was frequent and 22 persistent call. It's on page 2 at the bottom. 23 Q. Yes, sir. Do you see where you just 24 were, there are several categories listed below</p>

<p style="text-align: right;">Page 74</p> <p>1 "Frequent/Persistent Calls"? You see rude behavior, 2 lewd/obscene conduct, harassment, a malicious call 3 pattern and then caller hung up when asked for 4 identity or to be added to DNC, and there is yeses and 5 noes there. 6 Are those all of the categories that DISH 7 was using at this time to categorize the nature of a 8 complaint by a consumer? 9 A. This was -- yes. 10 Q. So tell me what kinds of calls are 11 encompassed in this frequent/persistent category. I 12 know what frequent means. Frequent means often, 13 regularly. Persistent means more than once, not 14 giving up, that type of thing, right? 15 A. That's my understanding. 16 MR. KERN: I'll object to the extent that 17 it calls for a legal conclusion. I think what you're 18 asking about is his understanding of what those 19 categories is. 20 MR. BARRETT: Sure. 21 MR. KERN: And you're fine to testify 22 about that. And a running objection to the extent 23 that we go through each one of these. 24 Q. (BY MR. BARRETT) So what does the</p>	<p style="text-align: right;">Page 76</p> <p>1 of the documents that you would have looked at in the 2 last few days preparing for your deposition? 3 A. Yes, sir, I believe I've seen this one. 4 Q. And this is, again, an e-mail regarding 5 the Scholar -- S-c-h-o-o-l-a-r in one e-mail and e-r 6 in another -- complaint; is that correct? 7 A. She is one of -- I'm sorry -- one of two 8 people that are mentioned in this e-mail, yeah. 9 Q. Complaint Type: Frequent persistent, FP, 10 right, on page 2? 11 A. I'm sorry. Where are you pointing? 12 Right. Oh, in the chart itself, yes. 13 Q. Of course you see the response from 14 Sophie. Who is Sophie? 15 A. Sophie was an employee of Satellite 16 Systems Network. 17 Q. And it would be Sophie Tehranchi? 18 A. You know, I never knew her last name. I 19 don't know. 20 Q. Okay. There is a response here from 21 Sophie at the top, "The contact name for the leads was 22 Jeff Rogers." If you look down below that -- 23 A. I'm sorry. We're on page 1? 24 Q. Yes, sir.</p>
<p style="text-align: right;">Page 75</p> <p>1 frequent/persistent category encompass to you? 2 A. I take it as being unwanted phone calls 3 in general. Even more than that, that the calls made 4 to a specific individual, in this case Ms. Scholar, 5 she believed that they were frequent, they were 6 perhaps persistent. She complained about the number 7 of times a call came through. 8 Q. What would the category be for someone 9 who calls and says, I received one call from somebody 10 selling me DISH Network and I'm on the DNC Registry. 11 I want to complain about that? Which category would 12 that type of complaint fit? 13 A. It's not one of these, clearly. 14 Frequent/persistent, rude behavior, lewd and obscene 15 harassment, doesn't fall into any of those categories. 16 Do-not-call violations themselves were handled 17 separately. Not separately, but they were -- because 18 they were a special -- they're pretty significant. 19 Ms. Scholar's, as were the other four or five that I 20 looked at or studied in preparation for this -- this 21 was for frequent and persistent calls, an allegation. 22 Q. Okay. I'm done with that. 23 (Deposition Exhibit 37 was marked.) 24 Q. I'm handing you Exhibit 37. Is that one</p>	<p style="text-align: right;">Page 77</p> <p>1 A. Okay. I'm sorry. Yes. 2 Q. And if you look down below that, the 3 second e-mail on the page requests information 4 regarding the origination of the lead. Do you see 5 that, the bullet? 6 A. Yes, sir. 7 Q. And Sophie responds, "The contact name 8 for the leads was Jeff Rogers." 9 Do you have any knowledge of whether Jeff 10 Rogers was ever approved to provide sales leads to 11 SSN? 12 A. I can say definitely that he was never 13 submitted for approval as a third party to provide 14 phone services for -- or make calls for -- or 15 associated with Satellite Systems Network. 16 Q. Was anyone ever approved by DISH 17 Network -- back up. 18 Did SSN ever request written approval 19 from DISH Network to use any third-party telemarketer? 20 A. The answer is yes. 21 Q. And who? 22 A. There was -- I know there was a request. 23 I know there was a request. This goes back six years 24 in my own head for this. I can't pull the name.</p>

<p style="text-align: right;">Page 78</p> <p>1 There was a vendor that they submitted -- and I don't 2 recall what they were submitted for, but they 3 submitted one -- a retailer -- I'm sorry -- one vendor 4 for use for -- they used a third-party request form 5 for one entity to work for them. 6 Q. And you're not sure what that entity was? 7 A. I'm pulling on my memory. I can't do it 8 right now. I apologize. 9 Q. Do you recall generally what that vendor 10 was going to do? 11 A. I apologize. I don't know. 12 Q. That's fine. 13 A. Again, I suspect that document was 14 provided. The request form was provided to you all. 15 Q. Okay. Done with that. 16 (Deposition Exhibit 33 was marked.) 17 Q. 33. 33 has a stray page on it. If I 18 could have that exhibit back. Exhibit 33 that I've 19 handed you is two pages long and it's Bates'd DISH 20 11-23851 through 23852. 21 Do you recognize this to be a letter from 22 DISH Network to Alex Tehrani at SSN regarding the 23 Angela Schoolar complaint? 24 A. Yes, sir.</p>	<p style="text-align: right;">Page 80</p> <p>1 differently than frequent and persistent calls. I 2 believe that was your testimony. Do you recall that? 3 A. Yes. 4 Q. Okay. And now this letter says she 5 alleged that she received frequent, persistent calls 6 and then it further references her belief that these 7 calls were in violation of the TCPA regulations. 8 I guess what I'm getting at is I'm 9 confused by that. I don't understand why DISH would 10 categorize this complaint as a frequent and persistent 11 in one document, but reference TCPA violations in 12 another. I'm trying to understand how DISH used that 13 frequent and persistent category. 14 A. So to be real clear, the way the report 15 came to us -- that report came to us on a form that 16 had the categories on it. It's an allegation, and I 17 would offer that subsequent investigation revealed, 18 perhaps conversations with Ms. Schoolar, that there 19 may have been other things going on and that's what 20 was reflected in a letter that occurred later. 21 Again, as we asked for additional 22 information, we include that in our correspondence to 23 make sure we're complete in our investigation. 24 Q. Sure. Did SSN respond appropriately, in</p>
<p style="text-align: right;">Page 79</p> <p>1 Q. It's alleging that she received frequent, 2 persistent calls to her home number. And then in that 3 first paragraph it also says she believes these 4 attempts to contact her are in violation of the 5 Telephone Consumer Protection Act regulations. 6 Earlier we were talking about 7 Ms. Schoolar's complaints and we went over the 8 categories of her complaint and it was frequent and 9 persistent. That was the category into which her 10 complaint was placed. And here this letter references 11 possible or alleged violations of Telephone Consumer 12 Protection Act regulations. 13 A. Uh-huh. 14 Q. And so my question is: Was DISH using 15 this frequent/persistent category to refer to alleged 16 TCPA violations? 17 MR. KERN: Objection to form. 18 A. No. Do the question again. I don't know 19 if I understand it. 20 Q. (BY MR. BARRETT) Sure. In the earlier 21 correspondence that we looked at in the document that 22 we looked at, Ms. Schoolar's complaint was referred to 23 as "frequent and persistent," and you said that TCPA 24 was a different category because they were treated</p>	<p style="text-align: right;">Page 81</p> <p>1 DISH's estimation, to the Schoolar complaint? 2 A. I don't recall specifically how they 3 responded. I looked at some documents yesterday. I 4 don't recall that they did not respond. 5 Q. And -- 6 A. Sophie responded in that last thing we 7 looked at for Ms. Schoolar, I think, didn't she? 8 Q. Yes, sir. And it looks like from 9 Exhibit 37 there was a response explaining where the 10 lead came from and explaining -- providing some 11 additional explanation. 12 So I understand that DISH Network did not 13 discipline SSN for the Schoolar call in any way? 14 A. The result of our investigation, we found 15 this was not a do-not-call violation. It was one of 16 five or six over that six- or seven-year period, you 17 know, 2006 to 2012, whatever, yes. Or rather, we did 18 not discipline Satellite Systems Network for frequent 19 and persistent calls. Or this particular one, it was 20 alleged to be a frequent and persistent call. 21 (Deposition Exhibits 35 and 36 were 22 marked.) 23 Q. I'm handing you Exhibit 35 and also 24 Exhibit 36. Is this also a document -- this is a</p>

<p style="text-align: right;">Page 82</p> <p>1 complaint involving Kitty Fowler; is that correct?</p> <p>2 A. Which document?</p> <p>3 Q. It looks like both. 35 and 36 concern</p> <p>4 Ms. Fowler's complaint. Would you agree with that?</p> <p>5 A. Just a moment.</p> <p>6 Q. I don't really need to go into detail</p> <p>7 with questions about this, but I want to -- feel free</p> <p>8 to take your time to finish reading it, but I just</p> <p>9 want to ask you if DISH Network ever disciplined SSN</p> <p>10 relating to the Kitty Fowler complaint.</p> <p>11 A. DISH did not discipline Satellite Systems</p> <p>12 Network in this case. And this is another one, I</p> <p>13 think -- I would have to refer back, but I believe</p> <p>14 this one turned out to be -- again, this is</p> <p>15 persistent -- frequent and persistent, and I don't</p> <p>16 think there was an allegation that this was a do-not-</p> <p>17 call violation -- or I'm sorry. It was not</p> <p>18 specifically do not call.</p> <p>19 Q. Okay. I'm done with those. I'll take</p> <p>20 those back, if you don't mind.</p> <p>21 A. I put them in order for you.</p> <p>22 Q. I'm sorry, what was that? I missed that</p> <p>23 last comment.</p> <p>24 A. No. I just said I was going to -- I put</p>	<p style="text-align: right;">Page 84</p> <p>1 you three documents; 67, 39 and 34. These are</p> <p>2 documents pertaining to my client, Dr. Thomas</p> <p>3 Krakauer's complaints. I'm sure that you've read</p> <p>4 those in preparation for your deposition, but please</p> <p>5 take a minute just to confirm that for me.</p> <p>6 A. Yes, sir.</p> <p>7 Q. And my question for you is: Did DISH</p> <p>8 Network confirm that, with respect to Dr. Krakauer,</p> <p>9 SSN violated the TCPA?</p> <p>10 MR. KERN: Objection to the extent it</p> <p>11 calls for a legal conclusion.</p> <p>12 Answer if you can.</p> <p>13 A. My recollection of this one -- I don't</p> <p>14 recall how this was resolved. Okay? In fact, I don't</p> <p>15 think it's resolved at all. I don't think it was</p> <p>16 resolved as a do-not-call violation, but was, again,</p> <p>17 alleged -- what are they calling this one here? It</p> <p>18 was -- harassment, I think, was the issue on this one,</p> <p>19 which is a TCPA violation, but not a do-not-call</p> <p>20 violation.</p> <p>21 Q. (BY MR. BARRETT) So your position is</p> <p>22 that Dr. Krakauer did not allege a do-not-call</p> <p>23 violation. He alleged harassment?</p> <p>24 A. Without reviewing clearly all the</p>
<p style="text-align: right;">Page 83</p> <p>1 them in order for you, your forms.</p> <p>2 MR. BARRETT: If you want to take a</p> <p>3 break, we can take a break. It's 12:20. I'm fine to</p> <p>4 keep going, but it's up to you.</p> <p>5 MR. KERN: It's up to you. If you can</p> <p>6 go, I would rather keep going.</p> <p>7 THE DEPONENT: I'm good to go.</p> <p>8 MR. KITTEI: Ten more minutes. The other</p> <p>9 guys are waiting, so . . .</p> <p>10 MR. KERN: How much longer do you think</p> <p>11 you have, even ballpark?</p> <p>12 MR. BARRETT: Another hour or two. A</p> <p>13 couple hours.</p> <p>14 MR. KERN: Do you want to stop for lunch</p> <p>15 and come back?</p> <p>16 MR. BARRETT: Your call. Let's stop.</p> <p>17 THE VIDEOGRAPHER: We are going off the</p> <p>18 record. The time is 12:19.</p> <p>19 (Recess taken, 12:19 p.m. to 1:22 p.m.)</p> <p>20 THE VIDEOGRAPHER: We are back on the</p> <p>21 record at 1:22.</p> <p>22 (Deposition Exhibits 34, 39 and 67 were</p> <p>23 marked.)</p> <p>24 Q. (BY MR. BARRETT) Mr. Werner, I'm handing</p>	<p style="text-align: right;">Page 85</p> <p>1 documents here, because this is just three of them, I</p> <p>2 recall that this was messages on the first document,</p> <p>3 the one -- document 67, it came to us as a harassment</p> <p>4 call.</p> <p>5 Q. Okay. Let's look at No. 67, the second</p> <p>6 page of it. Do you see the e-mail from Rebecca</p> <p>7 Dougherty to David Laslo?</p> <p>8 A. Yes, sir.</p> <p>9 Q. Who's Ms. Dougherty?</p> <p>10 A. I don't know who that person is.</p> <p>11 Q. Do you know who Mr. Laslo is?</p> <p>12 A. I've heard his name. I can't say much</p> <p>13 more than that.</p> <p>14 Q. Okay. But is it fair to say that this</p> <p>15 e-mail communication is a communication from someone</p> <p>16 internally at DISH Network to another person</p> <p>17 internally at DISH Network documenting --</p> <p>18 A. Yes, it is.</p> <p>19 MR. KERN: The witness will be instructed</p> <p>20 to read the entire document before answering questions</p> <p>21 about it.</p> <p>22 A. Yes, sir.</p> <p>23 Q. (BY MR. BARRETT) Okay. Now that you've</p> <p>24 looked through the document again, what's your</p>

<p style="text-align: right;">Page 86</p> <p>1 understanding of Mr. Krakauer's -- Mr. Krakauer here 2 is -- Dr. Krakauer is what I refer to him as, but the 3 same person. What's your understanding of his 4 allegation regarding do-not-call violations? 5 A. He received a phone call from someone 6 that was purporting to be a DirectTV employee, and then 7 that person apparently had contacted DirectTV -- 8 contacted DirectTV to get some information from DirectTV 9 about Mr. Krakauer's account including, you know, 10 credit file information. It appears to be that a 11 qualification attempt was done for an account for 12 Mr. Krakauer, and we ran that down and we essentially 13 tracked that back to Satellite Systems Network. 14 Q. Sitting here today, do you know if 15 Mr. Krakauer had advised DISH Network that he was on 16 the national Do Not Call Registry? 17 A. I do not know that. 18 Q. Okay. Do you have any understanding 19 about whether in this lawsuit Dr. Krakauer has alleged 20 that he was on the Do Not Call Registry and received a 21 telemarketing call from SSN? 22 A. I am not clear. It's not clear to me. 23 Again, I reviewed a number of documents yesterday. 24 It's not clear to me whether or not those documents</p>	<p style="text-align: right;">Page 87</p> <p>1 included a statement from Mr. Krakauer that he was on 2 a do-not-call list, or the correspondence. I don't 3 recall that it said there was a clear do-not-call 4 violation. 5 Q. Let's look on the second page of 6 Exhibit 67 up toward the top. 7 A. I'm sorry, this is which one now? 8 Q. I'm sorry. Exhibit 67, the one you were 9 just looking at -- 10 A. Yes, sir. 11 Q. -- the second page, up toward the top, 12 the top third, I guess, do you see where it says, "DNC 13 List Consumer is on," and then it says "Internal" or 14 "National"? "Internal" and "National," rather? 15 A. I'm sorry. Show me again. I'm not clear 16 on what page you're talking about. Yes, sir. 17 Q. Does that not indicate to you that 18 Dr. Krakauer had advised DISH Network that he was on 19 the national Do Not Call Registry? 20 A. Yes, sir, it does. I missed that reading 21 that earlier. 22 Q. And up above that where you were just 23 reading, do you see where it says "Tracked by: TCPA"? 24 A. Yes, sir.</p>
<p style="text-align: right;">Page 88</p> <p>1 Q. What does that mean, "Tracked by: TCPA"? 2 A. I don't know. That was a -- 3 Ms. Dougherty made that note. I don't know what that 4 refers to specifically. 5 Q. Exhibit 39 is, of course, DISH's letter 6 to Tehranchis regarding the Krakauer complaint. Do 7 you see that? 8 A. Yes, sir. 9 Q. And then Exhibit 34 appears, to me, to be 10 the response from Patty with SSN regarding this 11 allegation; is that correct? 12 A. Let me scan it one more time, if I can, 13 to make sure. It appears to be that way. 14 MR. KERN: The witness will be instructed 15 to read it, read the document. 16 Q. (BY MR. BARRETT) My question for you -- 17 you've had a chance to read through that? 18 A. Yes, sir. 19 Q. My question for you is: When DISH 20 Network received this information, did it conclude 21 that SSN had violated the TCPA with respect to the 22 call to Dr. Krakauer that is referenced in these three 23 exhibits? 24 A. I don't know that we determined that it</p>	<p style="text-align: right;">Page 89</p> <p>1 was a violation. The information we received exposed 2 that there was a possible existing business 3 relationship, I think is what Sophie is saying, but I 4 don't know how that works. They responded to our 5 request and they shared this information. I don't 6 think we determined it was a violation or not. 7 Q. Okay. Let's talk about Exhibit 34. Do 8 you see that there, Exhibit 34? 9 A. Yes, sir. I've got it on top here. 10 Q. The first paragraph around the middle, 11 "Our lead from Mr. Krakauer was generated by us. We 12 sold him DirectTV back in April 2003 when we were a 13 DirectTV retailer." 14 So in DISH's opinion, does that fact as 15 stated here in this e-mail that SSN sold Dr. Krakauer 16 DirectTV back in 2003 -- does that constitute an 17 established business relationship that would allow SSN 18 to place the call to Dr. Krakauer? 19 MR. KERN: Objection. Calls for a legal 20 conclusion. 21 A. I don't know what decision or how the 22 decision was arrived at in this particular case, but 23 the allegation or the claim that there was an existing 24 relationship seems to be something that was evaluated</p>

<p style="text-align: right;">Page 90</p> <p>1 at the time.</p> <p>2 Q. (BY MR. BARRETT) So there was -- to your</p> <p>3 knowledge, was there any follow-up after -- by DISH</p> <p>4 Network after it received --</p> <p>5 A. Again, I saw a bunch of documents. I</p> <p>6 don't think there was any documents beyond this. You</p> <p>7 would have had those.</p> <p>8 Q. So from the standpoint of investigating</p> <p>9 this alleged violation, as far as DISH was concerned,</p> <p>10 the response that it received that is Exhibit 34 was</p> <p>11 satisfactory?</p> <p>12 MR. KERN: Objection as to form.</p> <p>13 A. I don't know if I like that it's</p> <p>14 sufficient or satisfactory, and I don't know -- this</p> <p>15 is where our investigation perhaps ended, yes.</p> <p>16 Q. (BY MR. BARRETT) DISH Network concluded</p> <p>17 that there was no reason to further investigate after</p> <p>18 receiving Exhibit 34, correct?</p> <p>19 A. I don't believe there are additional</p> <p>20 documents to that effect.</p> <p>21 Q. But you're here to testify with respect</p> <p>22 to DISH Network's investigations of alleged TCPA</p> <p>23 violations committed by SSN, so I'm not asking you</p> <p>24 about documents. I'm asking, do you have any</p>	<p style="text-align: right;">Page 92</p> <p>1 to where Sophie indicated that she had a -- their</p> <p>2 company had a relationship with PossibleNOW?</p> <p>3 A. I saw a bunch of e-mails yesterday. I</p> <p>4 can't specifically say there was one that specifically</p> <p>5 Sophie said. There was an acknowledgment that they</p> <p>6 had had PossibleNOW or subscribed to PossibleNOW as</p> <p>7 of -- I think it was October 2008.</p> <p>8 Q. Knowing what you know now from reading</p> <p>9 these three documents, did SSN violate the TCPA when</p> <p>10 it called Dr. Krakauer --</p> <p>11 MR. KERN: Objection. Calls for a legal</p> <p>12 conclusion.</p> <p>13 Q. (BY MR. BARRETT) -- in May of 2009?</p> <p>14 MR. KERN: Objection. Calls for a legal</p> <p>15 conclusion.</p> <p>16 A. The information that we evaluated, we</p> <p>17 looked at, is as it is on this e-mail. The call was</p> <p>18 made to Mr. Krakauer. I don't know if it was in</p> <p>19 violation or not. I'll leave it at that.</p> <p>20 Q. (BY MR. BARRETT) Why would it not be in</p> <p>21 violation? The statement on the e-mail that we</p> <p>22 reviewed indicates that Dr. Krakauer was on the</p> <p>23 national DNC list, and I'll represent to you that he</p> <p>24 was --</p>
<p style="text-align: right;">Page 91</p> <p>1 knowledge of whether DISH Network performed any</p> <p>2 further investigation after -- regarding the Krakauer</p> <p>3 allegations after it received the e-mail that is</p> <p>4 Exhibit 34?</p> <p>5 A. I don't believe we did.</p> <p>6 Q. Did DISH Network have any information as</p> <p>7 of May 28, 2009, that SSN was scrubbing its leads</p> <p>8 against the national Do Not Call Registry?</p> <p>9 A. As of that time, I believe we were aware</p> <p>10 that Satellite Systems Network had a relationship with</p> <p>11 PossibleNOW.</p> <p>12 Q. Okay. But you'll see here in this first</p> <p>13 paragraph of Exhibit 34, it says, "We do not have a</p> <p>14 date for scrubbing this lead through PossibleNow</p> <p>15 because at the time we were not a PossibleNow member."</p> <p>16 So does that change your answer?</p> <p>17 A. I reviewed documents yesterday where</p> <p>18 Sophie, in earlier correspondence, acknowledged that</p> <p>19 she had a relationship with PossibleNOW. At the</p> <p>20 time -- if she admits that she didn't have a</p> <p>21 relationship with PossibleNOW at that time, I can't</p> <p>22 speak to why. It was our expectation and our belief</p> <p>23 that she had a relationship with PossibleNOW.</p> <p>24 Q. What document is it that you're referring</p>	<p style="text-align: right;">Page 93</p> <p>1 A. Okay.</p> <p>2 Q. -- at that time. That he received a call</p> <p>3 from SSN, SSN reported that they did not scrub the DNC</p> <p>4 Registry because they didn't have a relationship with</p> <p>5 PossibleNOW, but that they had done business with</p> <p>6 Dr. Krakauer back in April of 2003. So those facts,</p> <p>7 does that indicate to you -- to DISH Network that this</p> <p>8 call was a violation of the TCPA?</p> <p>9 MR. KERN: Objection. Calls for a legal</p> <p>10 conclusion.</p> <p>11 A. In considering all that information and</p> <p>12 including the fact that there was a prior existing</p> <p>13 relationship at the time, we made the decision that it</p> <p>14 was something we were not going to pursue or do</p> <p>15 additional investigations, more accurately.</p> <p>16 Q. (BY MR. BARRETT) Was that the correct --</p> <p>17 I mean, that really doesn't answer my question. My</p> <p>18 question is: Did DISH Network conclude that the call</p> <p>19 was in violation of the TCPA?</p> <p>20 MR. KERN: Same objection.</p> <p>21 A. I don't think we determined it was a</p> <p>22 violation, but rather that -- I think we were</p> <p>23 satisfied that the call was made not as a violation.</p> <p>24 Q. (BY MR. BARRETT) Okay. DISH concluded</p>

<p style="text-align: right;">Page 94</p> <p>1 that because of the previous business transaction 2 between Dr. Krakauer and SSN; is that correct? 3 A. Looking at the documents that are here, 4 that's my conclusion, yes. 5 (Deposition Exhibit 45 was marked.) 6 Q. I'm handing you Exhibit 45. I don't need 7 to ask -- I don't intend to ask you detailed questions 8 about this document, but what I would like to know is 9 did the allegation that is contained in this document 10 lead to any disciplinary action by DISH Network 11 against SSN? 12 A. Let me read the document, if I can. 13 Q. Sure. 14 A. Yes, sir. 15 Q. Any disciplinary action by DISH Network 16 against SSN with respect to any allegation contained 17 in that document? 18 A. I don't see a customer name on this. A 19 couple of things on this. I don't notice a name 20 specifically, so how it would have been researched, I 21 would like to have a name. 22 Second, it's worth noting we're talking 23 about a long period of time where Satellite Systems 24 Network was a retailer. Ms. Musso is calling out that</p>	<p style="text-align: right;">Page 96</p> <p>1 Q. And if you'll look, please, at Exhibit 42 2 on the second page -- 3 A. Hang on just a second. 42. Yes, sir. 4 Q. Do you see the description of the 5 complaint? 6 A. The one below the line that starts with 7 "Nature of the complaint"? 8 Q. Yes. And on down a little bit further, 9 do you see the "As stated in the Attorney General's 10 complaint"? 11 A. Yes, sir. 12 Q. Can you read that aloud, please? 13 A. "As stated in the Attorney General's 14 complaint - Issue was rude behavior by an agent. The 15 agent appears to be a sales partner agent as he told 16 the customer he worked for Direct TV, then proceeded 17 to try to get the customer to switch from Direct TV to 18 DISH Network. The complaint came from" -- correct me 19 if I miss it. Part of the letters are cut off here. 20 "The Complaint came from a call back the agent made 21 after the customer declined the switch. That call 22 ended" -- the next word -- "then the agent called back 23 and when" -- I can't make out that last word there -- 24 customer answered, the agent yelled, 'I love it' and</p>
<p style="text-align: right;">Page 95</p> <p>1 it's been a long time since there was any issues with 2 Satellite Systems Network. To me, that's noting -- 3 worth noting. 4 Is there a customer name on this I can 5 look at? 6 Q. I don't see one. 7 MR. KERN: Customer name on Exhibit 45? 8 MR. BARRETT: Yeah. 9 MR. KERN: Campbell. 10 MR. BARRETT: Campbell, okay. Thank you. 11 A. Oh, okay. 12 Q. (BY MR. BARRETT) I've got four Campbell 13 documents that I can -- before I ask you any questions 14 about that, let me give you some more documents, to be 15 fair. 16 (Deposition Exhibits 42 through 44 were 17 marked.) 18 Q. I'm handing you 42, 43, 44. Just let me 19 know whenever you're ready. 20 A. Yes, sir. 21 Q. Okay. Do you see -- first of all, these 22 e-mails -- these are documents concerning a complaint 23 by Richard Campbell, correct? 24 A. Yes, sir.</p>	<p style="text-align: right;">Page 97</p> <p>1 hung. The customer filed the complaint with the AG 2 over this one harassing phone call." 3 Q. Okay. Do you see above where -- at the 4 top of that page, it says, "DNC List Consumer is on," 5 it says, National, State and Internal. Do you see 6 that? 7 A. Yes, sir, I do. 8 Q. And then down below that, below the 9 paragraphs that you just read, there is also an 10 indication that the telephone number that was dialed 11 is on the national Do Not Call Registry. Do you see 12 that? 13 A. Where just below it says, "Phone Number 14 Csg Account No."? 15 Q. Yes, sir. 16 A. I see an entry. It says, "Do Not Solicit 17 Dnc List Name, Us State, Dnc Us State," date added to 18 the DNC. 19 Q. You don't need to read that whole line. 20 A. Yes, I see that, though. Yeah. 21 Q. Yes. My question is: Do you have any 22 reason to believe that this number was not on the 23 national Do Not Call Registry? 24 A. No, sir, I don't.</p>



<p style="text-align: right;">Page 98</p> <p>1 Q. And are you aware of any response by SSN 2 to -- first of all, backing up, this complaint was 3 tied to SSN, correct? 4 A. The e-mail appears to indicate -- well, 5 yes, it was tied to Satellite Systems Network. Yes, 6 sir. 7 Q. And are you aware of any response from 8 Satellite Systems Network regarding these allegations? 9 A. So the answer is yes. 10 Q. What is the response? 11 A. This is for Campbell, right? This letter 12 was -- this e-mail was initiated on May 4 and reviewed 13 that e-mail, called Campbell, from Reji Musso to Rehan 14 at Satellite Systems Network on the 17th of May. 15 Q. I'm not sure what you were referring to. 16 If you could refer to the document numbers, exhibit 17 numbers. And also my question is whether SSN 18 responded to any communications from DISH Network 19 about these allegations. 20 A. So Exhibit 45 is an e-mail that 21 originated with Serena Snyder on or about the 13th of 22 May. Serena Snyder sent an e-mail to Sophie regarding 23 an AG complaint. Sophie did her search and reviewed 24 this earlier. I don't know if her response was in</p>	<p style="text-align: right;">Page 100</p> <p>1 defendant's privilege designation by consent of court 2 order. These are documents that fall within the same 3 discussion that we had earlier, and I'm going to 4 instruct Mr. Werner not to answer questions about 5 these two documents, 47 and 48. The rest of them are 6 fine. 7 MR. BARRETT: 47, I don't really 8 understand why that would be privileged. That's a 9 letter from a consumer to DISH Network. 10 MR. KERN: If you would give me a minute 11 to review it. 12 MR. BARRETT: Sure. 13 MR. KERN: Can we go off for one minute? 14 MR. BARRETT: Sure. 15 THE VIDEOGRAPHER: We are going off the 16 record. The time is 2:01. 17 (Recess taken, 2:01 p.m. to 2:05 p.m.) 18 THE VIDEOGRAPHER: This is the beginning 19 of media unit 3 in the deposition of Bruce Werner, 20 30(b)(6) representative of DISH Network. We are on 21 the record at 2:05. 22 MR. KERN: John, right before we went 23 off, you presented Exhibits 47 and 48, among other 24 exhibits. After my -- after you pointed out and my</p>
<p style="text-align: right;">Page 99</p> <p>1 response to our original correspondence or if it was 2 in response to the correspondence regarding the AG 3 complaint, but they did respond. 4 Q. I don't see any discussion between anyone 5 at DISH, at least in these e-mails, and anyone at SSN 6 regarding -- regarding the SSN caller stating that he 7 worked for DirectTV and then proceeded to try to get 8 the customer to switch from DirectTV to DISH Network. 9 I don't see any communication between DISH Network and 10 SSN regarding that being a problem. 11 A. In this set of correspondence, I don't 12 see it either. 13 Q. Are you aware of any other document that 14 would indicate that DISH Network called SSN out for 15 that kind of conduct? 16 A. I'm not aware, no, sir. 17 (Deposition Exhibits 27 through 29 and 47 18 and 48 were marked.) 19 Q. I'm handing you 47, 48, 29 -- 20 MR. KERN: 29, you said? 21 MR. BARRETT: Yes. 22 Q. (BY MR. BARRETT) -- 27 and 28. 23 MR. KERN: John, with respect to 48 and 24 47, both of these documents are produced over</p>	<p style="text-align: right;">Page 101</p> <p>1 independent review of Exhibit 47, we have made an 2 independent determination that this document is not 3 properly marked as privileged. I believe the reason 4 that it was originally marked was that it related to a 5 settlement offer. Obviously that's not 6 attorney-client privileged. 7 So this is -- Exhibit 47, you're free to 8 ask questions about and we withdraw the -- certainly 9 withdraw in this case any claim of privilege to that 10 document, so I apologize for the interruption. 11 MR. BARRETT: That's all right. 48? 12 MR. KERN: 48 remains. 13 MR. BARRETT: Okay. So no questions 14 permitted with respect to 48? 15 MR. KERN: At this very moment, that's 16 correct. 17 MR. BARRETT: Okay. 18 Q. (BY MR. BARRETT) So Jeffrey Mitchell in 19 Exhibit 47, are you aware of how Mr. Mitchell's 20 allegation was resolved? 21 A. I do not know, sir. 22 Q. Are you aware of how it was investigated 23 by DISH Network? 24 A. I would assume that we would follow our</p>

<p style="text-align: right;">Page 102</p> <p>1 normal procedure, which would include, you know, 2 reviewing the documents, contacting the retailer, 3 getting an explanation for the process, that sort of 4 thing. 5 Q. Exhibit 29, the date on that is -- this 6 is an e-mail -- February 15, 2007. Look, if you will, 7 at the third paragraph of Ms. Musso's e-mail to 8 Mr. Origer, O-r-i-g-e-r. 9 A. Yes, sir. 10 Q. There is a question from Mr. Origer about 11 SSN. "What is the detail on the allegations on this 12 account?" Then the response from Ms. Musso is there. 13 It says -- down in the third paragraph -- "Brian tells 14 me that they are doing well and going on the incentive 15 trip, so once again this is a business decision. I 16 guess we just need to let the attorney know that as 17 far as we know, they have righted the wrongs." 18 Do you have any understanding of what 19 Ms. Musso is talking about when she says "this is a 20 business decision"? 21 MR. KERN: Objection. Calls for 22 speculation. 23 Answer if you can. 24 Q. (BY MR. BARRETT) Do you know?</p>	<p style="text-align: right;">Page 104</p> <p>1 Whether or not we took action or not was a decision 2 based on the facts, not on the relationship we have or 3 the volume that was sold by that retailer. 4 Q. (BY MR. BARRETT) Okay. 5 (Deposition Exhibit 77 was marked.) 6 Q. 77. I don't need to go into detail on 7 this document other than to ask you if this is a 8 PowerPoint presentation that DISH Network provided at 9 Team Summit in the year 2013, which is what the first 10 page indicates. 11 A. Yes, sir, it is. 12 Q. Okay. 13 (Deposition Exhibit 79 was marked.) 14 Q. 79 looks like another similar report, but 15 I cannot find a date on there. I'm going to ask if 16 you know what year Exhibit 79 would have been 17 presented at Team Summit. Do you know what year? 18 A. Based on this document, I can't tell you 19 what year it is. I could do some research and find 20 out when this was created. Off the top of my head, I 21 can't tell you. It would be late 2000s, 2009, '10, 22 '11, something. I don't know. I would have to check. 23 (Deposition Exhibits 80 and 81 were 24 marked.)</p>
<p style="text-align: right;">Page 103</p> <p>1 A. No, sir, I don't know what she 2 specifically is talking about here. 3 Q. Was "business decision," that term, used 4 in the compliance context at DISH Network when talking 5 about alleged violations of telemarketing laws by 6 dealers? 7 MR. KERN: Objection as to form. 8 Answer the question if you understand it. 9 A. That's where I was going. I don't think 10 I understand the question. 11 Q. (BY MR. BARRETT) Well, I can ask it 12 better. Would DISH Network make business decisions 13 whether to discipline dealers who violate the TCPA 14 based upon the volume of business generated by those 15 dealers? 16 MR. KERN: Objection to foundation and 17 form. 18 Q. (BY MR. BARRETT) In other words, would 19 it treat dealers who sell a lot of subscriptions 20 differently than it would dealers who don't? 21 MR. KERN: Same objection. 22 A. No, sir. We applied a consistent set of 23 rules. Specifically when it came to "do not call," we 24 researched allegations as thoroughly as we did.</p>	<p style="text-align: right;">Page 105</p> <p>1 Q. Same question about 80. 2 MR. KERN: Are you just asking the date 3 on 81? 4 MR. BARRETT: Yes. 81 should be pretty 5 easy, but we're on 80. 6 Q. (BY MR. BARRETT) Do you know the date of 7 80? 8 A. No, sir, I don't. 9 Q. 81 appears to be 2009, according to the 10 document itself. And I just want to ask you, is this 11 a PowerPoint presentation that you provided at Team 12 Summit in 2009? 13 A. No. 81? 14 Q. Yes, sir. 15 A. Yes, sir, it is. 16 Q. Getting back to our notice. I think I'm 17 done with paper documents for now. 18 Total compensation paid annually to SSN 19 for generating DISH subscribers is one of the topics 20 that you were to testify about. What can you tell me 21 about that? 22 A. I can tell you that at the request of 23 counsel, I prepared a document -- or had a query done 24 and I summarized by year from 2007 to 2012, I think,</p>

<p style="text-align: right;">Page 106</p> <p>1 incentive payments that were made to Satellite Systems 2 Network. 3 Q. Okay. 4 MR. BARRETT: Do we have that with us or 5 how should we handle that? 6 MR. KERN: It's one of the produced 7 documents. 8 MR. BARRETT: It was? Okay. 9 MR. KERN: Yes. 10 MR. BARRETT: It has been produced? 11 MR. KERN: And I may have it. No, I 12 don't have it in this, but it has been produced. 13 MR. BARRETT: Okay. Got it. Yes. 14 Q. (BY MR. BARRETT) The number of new DISH 15 subscribers generated annually -- this is topic 4-g in 16 the notice -- do you have that information or was that 17 also provided separately? 18 A. That was on that same document, yes, sir. 19 Q. Here's the notice in case you need it. 20 Dates SSN operated as a retailer. Again, 21 that's been provided, I believe. 22 MR. KERN: That's right. 23 Q. (BY MR. BARRETT) We've talked about 24 requests by SSN for approval of any third-party vendor</p>	<p style="text-align: right;">Page 108</p> <p>1 specifically Satellite Systems Network did not 2 direct -- to my knowledge have ever directed a 3 retailer to a lead generator along the way. 4 Q. No. 7 is "The manner and means of 5 utilizing records or information to determine whether 6 a consumer has subscribed to DISH Network services, 7 and the dates of any subscriptions." 8 So how would -- what can you tell me 9 about that? 10 A. So if you were to ask -- so you have a 11 phone number, you want me to see if it's associated 12 with an account, there's a couple of different ways we 13 could do it. There is a couple of different systems 14 we could do it. It's a matter of just querying a 15 desktop. Well, a database, essentially. Put the 16 phone number in and it will tell me if it's associated 17 with a subscriber or subscriber accounts. A phone 18 number could be associated with more than one account 19 over time. 20 Q. Has DISH Network done that work in 21 connection with this case? 22 A. The Krakauer case? 23 Q. Yes. 24 A. I believe in our research specifically</p>
<p style="text-align: right;">Page 107</p> <p>1 or lead generator and any response by DISH to those 2 requests. You testified earlier that you believe that 3 there was one time that SSN had made such a request, 4 but you're not sure who it was or when it was made? 5 A. I can tell you who it is. 6 Q. Okay. 7 A. Just as you asked the second time, 8 Exclaim Marketing. 9 Q. What was Exclaim Marketing? 10 A. It's the name associated with the request 11 to use the third-party form -- again, one of the 12 documents I saw yesterday. I'm not clear what their 13 specific role was, but Exclaim Marketing was it. I 14 think that's been produced also. 15 Q. Do you know when it was, when they were 16 to provide services for SSN? 17 A. No, sir. I can look at the document. 18 That will refresh us both. But no, I don't know right 19 now. 20 Q. 4-1 is "All efforts by DISH to direct SSN 21 to, or suggest that SSN utilized any third-party 22 vendor or lead generator." 23 What can you tell me about that? 24 A. DISH does not direct any retailer --</p>	<p style="text-align: right;">Page 109</p> <p>1 regarding Mr. Krakauer's case or his -- the allegation 2 he did, I'm sure we did. 3 Q. With respect to any other potential class 4 member, should there be a class? 5 A. It would -- the answer -- if there 6 were -- the class -- now, we're talking about do not 7 call now, right. "Class"? I don't know what that 8 means. 9 Q. Okay. 10 A. Help me out. I don't understand the 11 question. I apologize. 12 Q. I'm just wondering if in connection with 13 this case, the Krakauer case, generally, this 14 litigation -- 15 A. Okay. 16 Q. -- if DISH Network has utilized its 17 internal records or information to determine whether 18 any person has subscribed to DISH Network services. 19 A. I would -- are there specifics? Again, I 20 don't know. 21 Q. Just generally. 22 A. If I was given a phone number, I could 23 determine if there was a credit account, it was their 24 business account associated with the phone number.</p>

<p style="text-align: right;">Page 110</p> <p>1 Q. Have you done that with respect -- or has 2 DISH Network done that with respect to anyone other 3 than Dr. Krakauer, to your knowledge? 4 A. I believe all of the claims, the 5 allegations that you recently -- the Cambell, the 6 other accounts -- or the allegations you've presented, 7 all of those, at least, have been -- we looked at 8 those. I don't know what else there would be. If 9 there are specifics, I could perhaps tell you. 10 Q. Okay. No. 8 -- we'll leave that where it 11 is, but No. 8 is "The manner and means of determining 12 whether any person or entity called by SSN consented 13 to receive a telemarketing call from SSN or any other 14 entity." 15 So what can you tell me about that? 16 A. I'm sorry. One more time. I'm still 17 back on the other one there. 18 Q. Sure. The topic is "The manner and means 19 of determining whether any person or entity called by 20 SSN consented to receive a telemarketing call from SSN 21 or any other entity." 22 A. So my understanding is that SSN had -- 23 what's the word -- not opt-ins, but they had -- they 24 were -- read that one more time. I'll grab the phrase</p>	<p style="text-align: right;">Page 112</p> <p>1 A. I don't believe so. I don't know. 2 Q. No. 10 is "All facts supporting DISH's 3 eleventh affirmative defense," which is the defense of 4 consent that's asserted in the answer. What can you 5 tell me there? 6 A. About what was in our statement? 7 Q. Yeah. About all of the facts that 8 support DISH's eleventh affirmative defense (consent). 9 A. Respectfully, I don't recall what was 10 alleged or what was printed in that. Can I refer to a 11 copy or -- do you have one? 12 Q. I can do that. I can also ask this, I 13 guess, a different way. Let's call this No. 2. 14 (Deposition Exhibit 2 was marked.) 15 MR. BARRETT: And I only have one copy. 16 It's 500 pages long. 17 Q. (BY MR. BARRETT) Mr. Werner, I'll just 18 represent to you and counsel that that is a copy of an 19 expert report that was provided in this case by Anya 20 Verkhovskaya, V-e-r-k-h-o-v-s-k-a-y-a, that lists 21 certain telephone calls that were placed by SSN. And 22 the reason it's so long is it literally lists all of 23 the telephone numbers that were dialed and the calls 24 that were placed.</p>
<p style="text-align: right;">Page 111</p> <p>1 that's in that sentence here. 2 Q. Sure. Why don't we put it in front of 3 you there, No. 8. Exhibit 1, No. 8. 4 A. And I apologize for being so sloppy 5 there. 6 Q. That's all right. Not at all. 7 A. It's my understanding that Satellite 8 Systems Network had consents for all of the calls that 9 they made. That was my understanding. So to the 10 extent that -- determining whether or not they had 11 any, they told us they did. 12 Q. What do you base your understanding on 13 that they had consent for all of the calls? 14 A. I don't think I ever had a conversation 15 with anybody at Satellite Systems Network, but I -- 16 and I can't tell you a single conversation where that 17 was noted, but I think it was -- we knew that they 18 had -- they had purported to us that they had consents 19 for the calls that they made. 20 Q. In writing or orally? 21 A. I don't recall. I don't recall. 22 Q. But as far as documentation goes, does 23 DISH have any documentation that SSN had consent to 24 place telemarketing calls?</p>	<p style="text-align: right;">Page 113</p> <p>1 And my question to you is: Does DISH 2 Network have any evidence that any person in those -- 3 in those records, in that Exhibit 2, consented to 4 receive telemarketing calls from DISH Network or SSN? 5 MR. KERN: I'm going to object to the 6 question insofar as it's nearly impossible to answer, 7 particularly for him. It's an unfair question. 8 If you can look through there and know 9 from those telephone numbers whether any particular 10 one has a consent, I'm okay with him trying. But I'm 11 not sure -- well, if that's the exercise you would 12 like him to go through. You can look through every 13 one of them and see if, in your recollection, there is 14 a consent. But beyond that, I think the papers to be 15 passed back and forth would probably be a better way 16 to have that question answered. 17 MR. BARRETT: I mean, we're here on a 18 topic that has been noticed as "All facts supporting 19 DISH's eleventh affirmative defense, consent, also the 20 ninth affirmative defense, EBR, so I want those facts. 21 Whatever those are -- I haven't seen any -- I want 22 them. 23 MR. KERN: What was the date of that 24 particular report?</p>

<p style="text-align: right;">Page 114</p> <p>1 MR. BARRETT: I don't know. 2 MR. KERN: Was it -- 3 MR. BARRETT: It would have been about 4 three weeks ago, maybe a month ago. It would be at 5 the end. I can take a look, if you would like. 6 MR. KERN: I'll also object to the 7 prematurity of having to give a definitive answer on 8 that particular point. 9 MR. BARRETT: It's January 30, 2015. So 10 I do want all of those facts. I'm entitled to all of 11 those facts and I don't have all of those facts. DISH 12 Network has had all of the information it needs from 13 us to answer that question. 14 So if the witness isn't prepared to tell 15 me who DISH Network has consent for or had an EBR with 16 at the time of these calls, that's fine. Just tell me 17 that. But I believe I am entitled to that information 18 and this has been a duly noticed deposition on that 19 topic. 20 MR. KERN: And to the extent that you 21 know it -- if you are not prepared to answer that all 22 facts question, then you're not, and we'll obviously 23 have to deal with it a different way, you know, 24 through -- and I suspect it will be through the papers</p>	<p style="text-align: right;">Page 116</p> <p>1 A. Okay. 2 Q. Probably -- I believe there is 80,000- 3 plus. 4 A. Okay. 5 Q. So we've reviewed the Facts Blast from 6 2002. I'll skip that. I want to talk to you about 7 some native files to try to get an understanding of 8 what some of these Excel files are. 9 A. Okay. 10 Q. So I'll get them up on the screen. I'm 11 showing you D-KRAK 667. That's an Excel file. Do you 12 see that on the screen? 13 A. I'm sorry. I was looking -- 14 Q. Do you see that on the screen? 15 A. What's that? I'm sorry. 16 Q. The document is 667 up at the top? 17 A. Yeah, I see the file name. Yes. 18 Q. Do you know what this document is? 19 A. It may be an extract of a portion of a 20 track of some type having to do with phone calls. I 21 don't specifically know what it is. 22 Q. Would this be DISH's internal DNC data? 23 A. How large is the file? How many lines 24 are there?</p>
<p style="text-align: right;">Page 115</p> <p>1 being passed back and forth. But, you know, I'm 2 comfortable enough saying that he is not going to be 3 able to answer that question, as we sit here today. 4 MR. BARRETT: Okay. 5 MR. KERN: But you're welcome to look 6 through every single one of these numbers and see if 7 you know the answer. 8 A. I apologize. I would prefer not to go 9 through the exercise. 10 Q. (BY MR. BARRETT) All right. 11 A. A list of phone numbers -- let me look at 12 the data first. 13 MR. KERN: I think this is one of those 14 things that if ultimately you're dissatisfied with the 15 content of the papers beings passed back and forth, 16 then I'll have to revisit the quality of the 17 preparation for him to be able to answer as to 18 those -- as to that tome of numbers, but we'll have to 19 see. 20 Q. (BY MR. BARRETT) Okay. No further 21 questions, then, on that. 22 A. Just a question, how many phone numbers 23 are there here, or entries are there? 24 Q. I don't know.</p>	<p style="text-align: right;">Page 117</p> <p>1 Q. There are 337. 2 A. I'm comfortable saying there are more 3 than 337 individuals that have requested not to be on 4 our -- not to be contacted by DISH. 5 MR. KERN: I'll object insofar as this 6 topic related to the internal do-not-call list was 7 dealt with by Mr. Montano, but to the extent that you 8 can answer these questions, I think it's okay. 9 Q. (BY MR. BARRETT) 695, it's an Excel 10 spreadsheet. Do you recognize this document? 11 A. On the sheets on the bottom, do they give 12 us any more, sheet 2 and sheet 3? This looks like a 13 pivot off of an original document. I don't know what 14 that is, sir. 15 Q. Okay. 721, do you recognize this? 16 A. Scroll to the right a little bit farther. 17 No, sir, I don't know what this is. 18 Q. 742. One of these tabs says "Blacklist." 19 Do you recognize it? 20 A. No, sir, I don't. 21 Q. Do you know of any blacklist that is 22 maintained at DISH respecting authorized retailers or 23 lead generators? 24 A. We don't -- we don't have -- we do not --</p>

<p style="text-align: right;">Page 118</p> <p>1 DISH does not keep a blacklist of anything, to my 2 knowledge. 3 Q. This is internal stings, consumer stings, 4 consumer ID'd retailer tabs on 744, which is another 5 Excel spreadsheet. Do you know what this document is? 6 A. Scroll to the right. It appears -- no, I 7 don't know what this is. It could be a tracker for -- 8 I don't know what it is for sure. 9 MR. KERN: The witness will be instructed 10 not to speculate. If you know what it is, you know 11 what it is. If you don't know what it is, you don't 12 know what it is. 13 A. I don't know what it is. 14 Q. (BY MR. BARRETT) Closed accounts as of 15 1/23/09, do you know what this document is? It's 763. 16 A. No, sir. 17 Q. 764, PossibleNOW Program for DISH Network 18 Retailers. What is this document? 19 A. I don't know. I haven't seen this 20 document. 21 Q. 829, do you recognize this document? 22 A. No, sir, I don't. 23 Q. Do you know what a pivot list is, 24 p-i-v-o-t, pivot?</p>	<p style="text-align: right;">Page 120</p> <p>1 Complaints. Red line, Retailers Identified. 2 A. Yes, sir, I see that. 3 Q. Have you seen this document before? 4 A. I don't believe so, sir. 5 Q. Or reports of this nature? 6 A. Over time, DISH has maintained different 7 documents and done manipulation and reporting off of 8 it for a variety of purposes. This looks like it's 9 about tracking something about TCPA. I don't know 10 what this document is specifically or how it was 11 generated or why, or much less when it was done. 12 Q. How about 1612? 13 A. I'm not familiar with this document. 14 Q. If you look under column B at the top on 15 line 2, "Process Type: Raw file scrub." It says 16 "Satellite Systems Network project paramount, campaign 17 paramount, call list paramount." Do you have any idea 18 what that is telling me there? 19 A. No, sir. I don't know what this is. 20 Q. Does DISH Network maintain any kind of 21 documentation indicating that a particular dealer has 22 scrubbed a list against the DNC Registry? 23 A. The -- if one of our retailers engaged 24 the services of PossibleNOW, the PossibleNOW and/or</p>
<p style="text-align: right;">Page 119</p> <p>1 A. I know in Excel a function can be done to 2 extract information by manipulating the data. Pivot 3 reports, I've heard that. I don't know what that term 4 is there. 5 Q. 841, do you know what this document is? 6 No? 7 A. I'm sorry, I didn't hear the question. 8 Q. Do you know what that document is? 9 A. No. I'm sorry. I don't know this 10 document, sir. 11 Q. 848, TCPA Tracking Chart. Do you see 12 that down at the bottom left? 13 A. I do, sir. 14 Q. Sheet 1, database dump. Do you know what 15 this document is? 16 A. Specifically I cannot tell you, sir. No, 17 sir. 18 Q. Generally, what is it? 19 A. Again, I don't want to speculate 20 generally. I don't know what the file is. It's got a 21 lot of data. It looks like phone numbers and stuff, 22 but I don't know what it is. 23 Q. How about this page here with the chart? 24 TCPA Tracking, do you see that? Black line, TCPA</p>	<p style="text-align: right;">Page 121</p> <p>1 the retailer would have those records, but DISH 2 doesn't get a record of their -- the work that they do 3 with PossibleNOW. Again, we don't manage that 4 relationship, so we don't expect reporting. 5 MR. BARRETT: Okay. That's all I've got. 6 Thank you very much. You are done. 7 THE DEPENDENT: My pleasure. 8 THE VIDEOGRAPHER: This concludes today's 9 deposition of Bruce Werner, 30(b)(6) representative of 10 DISH Network, and the end of media unit 3 of 3. We 11 are off the record at 2:45. 12 WHEREUPON, the within proceedings were 13 concluded at the approximate hour of 2:45 p.m. on the 14 17th day of March, 2015. 15 16 17 18 19 20 21 22 23 24</p>

<p>Page 122</p> <p>1 I, BRUCE WERNER, do hereby certify that I 2 have read the above and foregoing deposition and that 3 the same is a true and accurate transcription of my 4 testimony, except for attached amendments, if any. 5 Amendments attached ( ) Yes ( ) No 6 7 8 9 10 11 12 13 The signature above of BRUCE WERNER was 14 subscribed and sworn to before me in the county of 15 _____, state of Colorado, this _____ day of 16 _____, 2015. 17 18 19 20 21 Notary Public 22 My commission expires 23 24 Thomas H. Krakauer 3/17/15 (mh)</p>	<p>Page 123</p> <p>REPORTER'S CERTIFICATE</p> <p>STATE OF COLORADO )  ) ss. CITY AND COUNTY OF DENVER )</p> <p>I, MARCHELLE HARTWIG, Certified Shorthand Reporter and Notary Public, ID 20014012312, State of Colorado, do hereby certify that previous to the commencement of the examination, the said BRUCE WERNER was duly sworn by me to testify to the truth in relation to the matters in controversy between the parties hereto; that the said deposition was taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.</p> <p>I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.</p> <p>IN WITNESS WHEREOF, I have affixed my signature this 25th day of March, 2015.</p> <p>My commission expires April 19, 2017.</p> <p><input checked="" type="checkbox"/> Reading and Signing was requested. <input type="checkbox"/> Reading and Signing was waived. <input type="checkbox"/> Reading and Signing is not required.</p> <p><i>Marchelle Hartwig</i></p>
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30(b)(6)  
BRUCE WERNER - March 17, 2015

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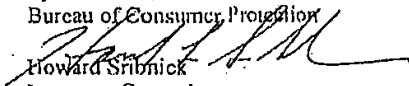


FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

September 30, 2005

MEMORANDUM

TO: Lydia Parnes, Director  
Bureau of Consumer Protection

FROM:   
Howard Stribnick  
Inspector General

SUBJECT: OIG Audit Survey of the Do Not Call Registry Scrubbing Process

DEFENDANT'S  
EXHIBIT  
DTX-352

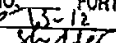
The Office of Inspector General (OIG) recently completed an audit survey of procedures used by the Federal Trade Commission (FTC) to remove invalid numbers from the Do Not Call (DNC) Registry.<sup>1</sup> The objectives of this survey were to determine whether registered phone numbers were being improperly removed (scrubbed) from the registry, and to document the reason for their removal. To complete this objective, the OIG (i) reviewed criteria used by AT&T to scrub the registry, (ii) defined the role played by local phone companies in the scrubbing process, and (iii) determined whether the removals were made for reasons consistent with contractual agreements and program objectives.

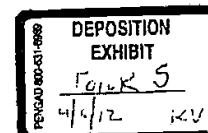
BACKGROUND

On September 18, 2002, the FTC issued final amendments to the Telemarketing Sales Rule, which established the National Do Not Call Registry (the Registry), permitting consumers to register their preference to block certain telemarketing calls. Consumers may register by phone or over the Internet. The number will stay on the Registry for five years unless it is disconnected or until the consumer requests that the number be removed. After five years, the consumer must renew his/her registration.

The law requires telemarketers to search the Registry at least every three months and avoid calling any phone numbers that are on the Registry. If a consumer continues to receive calls from

<sup>1</sup> A survey, as used in the auditing vernacular, refers to a process for gathering information about an organization, program, activity or function without detailed verification. Unlike audits, surveys are generally conducted within limited time frames. Survey outcomes often dictate whether, and to what extent, detailed audits will be performed.

EXH. NO. 6 FOR I.D.  
DATE: 9-13-12  
WITNESS:   
PATRICIA L. HUGGINS  
OSP NO. 3400



AT&T DEP. EX. NO. 25  
FOR I.D., AS OF 9-6-12 p.v.



telemarketers after s/he is on the Registry, then the consumer can file a complaint with the FTC. A telemarketer who disregards the Registry could be fined up to \$11,000 for each call.

In March 2003, the FTC awarded a contract to AT&T Government Solutions, Inc. (AT&T) to manage the Registry. Its responsibilities include providing a vehicle for consumers to place their name on the list, maintaining the Registry, and establishing a gateway for telemarketers to download telephone numbers. An important element of maintaining the Registry is to ensure that it contains only accurate and up-to-date telephone numbers. On a monthly basis, AT&T, through its subcontractor TARGUS, performs procedures to review the Registry and scrubs any numbers that, based upon pre-established criteria, are determined to no longer belong to the individual who placed the number onto the Registry.

As the Registry increased in size, the OIG began to receive a small number of complaints from consumers indicating that they had registered their phone number with the FTC but continued to receive prohibited calls and were unable to log their complaint when they attempted to do so. To their surprise, these consumers were informed that their phone number was not on the Registry. Based upon these complaints, the OIG performed an audit survey to determine if systemic weaknesses exist to warrant an audit of the Registry scrubbing process.

#### SCOPE AND METHODOLOGY

The OIG reviewed the control environment related to the Registry to document any weaknesses or potential weaknesses in the scrubbing process that would result in consumer phone numbers being scrubbed from the Registry without the consumer's knowledge or consent (e.g., an erroneous scrub).

Based on consumer complaints to the OIG, information collected from the FTC web page and discussions with program staff, the OIG developed a methodology to test whether the scrubbing process removed valid phone numbers along with valid scrubs. Consumers with whom we spoke explained that they did not request removal from the Registry, nor did they move or change phone numbers -- two conditions that would result in a legitimate scrub. Hence, we reasoned that an erroneous removal occurred.

During the course of our survey, we learned that AT&T was reporting to the FTC a relatively high incidence of "disconnects." This number represents consumers who never made it onto the Registry, but believed they had completed the process, e.g., the consumer entered the required information but failed to reply to the confirmation email sent shortly thereafter. A number cannot be added to the Registry without this confirmation reply. This could explain why consumers mistakenly thought they were on the Registry. Telemarketers, therefore, could continue to contact these individuals without violating any laws. The consumer, mistakenly believing that s/he was registered, would have the same potential for dissatisfaction with the Registry and the FTC as a consumer who had properly completed the registration process, but were later erroneously deleted from the Registry.

## PROCEDURES AND RESULTS

We performed a series of interviews with DNC managers, FTC IT personnel, AT&T and TARGUS representatives. Through these interviews we obtained an understanding of the control environment and how the overall process operates. In addition, we obtained monthly reports created by AT&T that reflected the activity of registrations, scrubs, and web incompletes both for the current period and cumulatively from the inception of the Registry. We also reviewed correspondence between FTC and AT&T regarding scrubbing issues since the inception of the Registry and how these issues were addressed. Based upon these procedures, we have determined the following:

- A formal and repetitive process exists to review the Registry each month to determine the phone numbers which should be scrubbed;
- This process appears to be functioning as described by all parties involved, although the formal process is not documented to a level that would be considered acceptable in the context of an audit;
- The total numbers "scrubbed" since the inception of the Registry is less than two percent of the total numbers registered. (Given that there are many reasons why a number would be scrubbed, we can conclude that a systematic problem with numbers being erroneously deleted does not exist.);
- Periodically, problems with unusually large numbers of web incompletes have occurred in the past. In each instance, both the FTC and contractor personnel have provided anecdotal evidence as to why the increase occurred; and
- The FTC and contractor staff actively monitored the performance and status of the Registry.

## CONCLUSION

The results of our survey do not indicate that large scale, systemic problems exist in the scrubbing process related to the Do Not Call Registry that would warrant a full scale audit at this time. As with any database, there are risks that errors may occur and go undetected. The lack of documentation surrounding the scrubbing process does increase the risk that the controls in place could deteriorate in the future and not be detected in a timely manner by FTC personnel and its contractors. However, the process as described to us during this survey does appear adequate based upon our understanding of the Registry. The lack of significant numbers of customer complaints supports this position on the performance of the Registry.

During the course of our work, the OIG discussed several suggestions as to additional tests or procedures to enhance controls over the scrubbing process. AT&T generally responded that the procedures could not be performed under the current process, or that significant additional cost would be incurred to perform the suggested procedures. Due to the lack of any evidence that large scale systemic problems exist, we would not recommend the incurrence of such a cost at this time.

We do recommend that the FTC continue to actively monitor the performance of the Registry. We specifically recommend that the web incompletes be monitored closely. Any future

occurrences of increased activity similar to what occurred in December 2004 should be investigated and the cause of the problem documented.

We also recommend that during the next renegotiation of the contract, the FTC include specific language giving it access to data, processes and controls with both the contractor and any subcontractors associated with Registry. Periodically, FTC staff should review these controls to ensure they are functioning properly.

I am available to discuss any aspects of this OIG audit survey.