IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

Supreme Court No. 81704

District Court No.
A-17-763397-B

JOINT APPENDIX
Vol. 70 of 85
[JA015983-JA016188]

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

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

EXHIBIT 783

EXHIBIT 783

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA and the STATES OF CALIFORNIA, ILLINOIS, NORTH CAROLINA, and OHIO, Plaintiffs, v. DISH NETWORK L.L.C., Defendant.	Case No.: 3:09-cv-03073 (SEM) (BGC)

DEFENDANT DISH NETWORK L.L.C.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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Defendant DISH Network L.L.C. ("DISH") moves for an order granting summary judgment in its favor as to each claim in the Second Amended Complaint ("SAC") filed by Plaintiffs the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission (the "FTC"), and the States of California ("Plaintiff California"), Illinois ("Plaintiff Illinois"), North Carolina ("Plaintiff North Carolina") and Ohio ("Plaintiff Ohio") (collectively, the "State Plaintiffs," and together with the FTC, "Plaintiffs"). This Motion is made pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.1(D) of the United States District Court, Central District of Illinois.

This Motion is based upon this Memorandum of Law, the Declarations of Joey Montano, John Taylor, and Mike Mills, filed herewith; the pleadings and papers on file in this action; and upon such oral argument and/or documentary matters as may be presented to the Court at or before the hearing on this Motion.

INTRODUCTION

DISH provides essential satellite video and audio programming, and internet communications to over 14 million individuals and businesses. Some of these subscribers are located in rural areas that are primarily served by satellite providers such as DISH.[1] DISH provides its subscribers with award winning levels of quality service, http://about.dish.com/company-info/awards, and has made significant investments to benefit consumers by constantly innovating its product and service offering. http://about.dish.com/company-info.

DISH accomplishes this wide-ranging and economically dynamic activity through its over 25,000 employees. DISH also adds to the economic vitality of the country by using

[1] In fact, in the Central District of Illinois, DISH has approximately 126,000 active subscribers.

thousands of independent third parties' businesses nationwide (who also employ thousands of people) who offer DISH products and services. These include small satellite retailers, local and regional consumer electronics stores, and nationwide retailers (collectively, "Independent Retailers" or "Retailers").

In addition, DISH and its employees engage in significant and serious community relations endeavors. DISH supports the Minority Media and Telecommunications Counsel ("MMTC"). MMTC is a national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecommunications and broadband industries, and closing the digital divide. DISH also supports Public Knowledge, which preserves the openness of the Internet and the public's access to knowledge; promotes creativity through balanced copyright; and upholds and protects the rights of consumers to use innovative technology lawfully. In addition, DISH supports The New America Foundation, which is a nonprofit, nonpartisan public policy institute that invests in new thinkers and new ideas to address the next generation of challenges facing the United States.

DISH is also a member of such organizations and associations as: the Satellite Broadcasting and Communications Association, the Computer & Communications Industry Association, Consumer Electronics Association, The Wireless Infrastructure Association, the Competitive Carriers Association and CTIA – The Wireless Association® to name a few.

In contrast to the reality of the significant economic activities of DISH (which has been in business for over 30 years), Plaintiffs demonize DISH by treating its legitimate business efforts as a sham and impugn DISH's compliance efforts as imperfect or lax. Plaintiffs then, perversely, use DISH's good faith compliance efforts as support for their liability claims by contending that DISH controls the Independent Retailers.

While Plaintiffs have engaged in this misplaced effort to castigate DISH, the evidence shows that the National Do Not Call Registry ("NDNCR") (which forms the basis of Plaintiffs' SAC) is polluted with numbers that never belonged on the NDNCR (business, government, and invalid numbers), are outside of Plaintiffs' jurisdiction, or are not subject to any registry hygiene (essentially the only numbers subject to hygiene are residential landline numbers; all others are outside the scope of the FTC's hygiene process). Because it is infested with numbers that either never belonged there or have since lost their status as NDNCR numbers, the NDNCR cannot be a sufficient basis for an enforcement action.[2]

Plaintiffs talk a good game about the reliability of their NDNCR data environments. However, discovery has proven that all of Plaintiffs' talk is just that – talk. Plaintiffs took for granted that no one would question the accuracy of the NDNCR. Well DISH did, and did so in a comprehensive fashion. The evidence revealed that the NDNCR is a deficient enforcement database. Both the front and the back end of the NDNCR are so rife with errors and processing failures, that it is virtually worthless as a vehicle of proof. Yet, Plaintiffs excoriate DISH at the same time that their evidential and enforcement house is an irredeemable mess.

In addition, the undisputed facts show that from the outset, DISH has taken the Telemarketing Sales Rule ("TSR") and Telephone Consumer Protection Act ("TCPA") seriously, and has implemented telemarketing policies and procedures thoughtfully throughout its business. These efforts far exceed Plaintiffs' efforts to maintain their enforcement mechanisms. Because DISH has actively and properly sought to meet the requirements of the

[2] There is no telling what the result would be if Plaintiffs were held to the compliance standard for their own hygiene of the NDNCR that they seek to impose on DISH under the TSR and TCPA.

TSR and the TCPA, it is entitled to the safe harbor defense against Plaintiffs' "Do Not Call" claims as provided in both the TSR and TCPA, as well as the state statutes.

In compliance with both the TSR and the TCPA, DISH created robust and comprehensive Do Not Call policies and procedures, and continues to update and refine them as the law and practices evolve. DISH has trained its personnel, and the personnel of its vendor call centers ("Telemarketing Vendors") on these policies and procedures, and monitors compliance by these groups. DISH maintains an internal Do Not Call list ("DISH Internal DNC List"), purchases versions of the NDNCR from the FTC, and uses a sophisticated process (using the FTC's own subcontractor) to prevent telemarketing calls to consumers who placed their telephone numbers on the Do Not Call lists. DISH vigorously monitored and enforced all of these telemarketing policies and procedures, including by using multiple levels of telemarketing campaign reviews, tracking consumer telemarketing complaints, investigating and addressing such complaints, and enhancing its processes as a result of such efforts. In contrast, the NDNCR is massively over-populated with numbers over which the FTC has no jurisdiction, with numbers remaining on it after consumers abandon their numbers, and numbers coming off the NDNCR that should have remained on it.

Plaintiffs' eyes also proved to be bigger than their stomachs. Plaintiffs investigated all of DISH's 7,500 Independent Retailers and obtained an order directing DISH to "provide responses and documents that relate to ***all*** authorized dealers. . . ." (d/e 65, Opinion of Court re: Plaintiffs' First Motion to Compel Production of Documents and Answers to Interrogatories, at 9.) After a nine-plus-year investigation, Plaintiffs assert call record evidence limited to just 11 of the approximately 7,500 Independent Retailers – a tacit admission that they found no issue with 99.9% of the Independent Retailers. Even after their Independent Retailer claims shrunk from

7,500 to 11, Plaintiffs still failed to recognize the gaps in their resized case. Their Independent Retailer claims fail because there is no evidence that DISH caused such third parties to engage in prohibited telemarketing. Nor is there evidence to support a claim that DISH should be liable for calls allegedly made by Independent Retailers (assuming that such calls are violations) under an agency theory.[3]

The FTC falsely alleges that DISH violated the FTC's TSR by: (i) making or causing Independent Retailers to make telemarketing calls to residential consumers who the FTC claims registered their numbers on the NDNCR; (ii) initiating telephone solicitations to residential consumers who made a request to DISH and/or an Independent Retailer not to be called; and/or (iii) abandoning sales calls or assisting and facilitating an Independent Retailer to abandon sales calls. State Plaintiffs jump on the bandwagon by piggybacking claims that DISH called consumers who placed their numbers on the NDNCR and made telephone solicitations using a prerecorded message, and by virtue of Independent Retailers allegedly placing such calls, in violation of the TCPA and various state statutes.

Plaintiffs' claims in the SAC, however, suffer from a multitude of failures of proof that are fatal. Despite not even attempting to keep their house in order, Plaintiffs seek billions of dollars in fines and penalties and injunctive relief that will arrest much of the undoubtedly economically beneficial activity of DISH and the Independent Retailers. This unprecedented attack fails due to Plaintiffs' attempt to prove millions of anonymous violations through their self-described "massive computer processing," which relies upon the NDNCR rather than

[3] Plaintiffs' recently filed Motion for Summary Judgment (d/e 344, Plaintiffs' Motion for Summary Judgment, 1/02/2014) is based solely upon the conduct of six Independent Retailers. Plaintiffs' actual proofs regarding any actionable conduct of these six Retailers is woefully insufficient. Plaintiffs also rely upon instances of conduct not even related to these six Retailers (meaning less than 0.1% of DISH's total retailer relationships), to infer that the entire universe of conduct engaged in by Retailers, during an eight-year time period, was an ongoing TSR and TCPA violation. That is simply false.

individual proof. However, Plaintiffs' database – the NDNCR – proves nothing because of the FTC's neglect in maintaining it.[4] Plaintiffs' failures can be summarized as follows:

- Plaintiffs cannot prove that each alleged NDNCR violation call was made to a residential, rather than business or government, telephone subscriber who placed his or her number on the NDNCR.[5] By relying solely on "hits" to the NDNCR generated by "massive computer processing," rather than consumer testimony, Plaintiffs essentially assume that every number on the NDNCR is a residential number that belonged to the consumer who registered it (the "Registrant Consumer") at the time the call was made. The opposite is true. Consumer landlines constitute the vast *minority* of numbers on the NDNCR. The NDNCR is comprised mostly of wireless numbers, business and government numbers, VoIP numbers, and invalid numbers. This is problematic for Plaintiffs in meeting their respective burdens of proof because they either do not have jurisdiction as to such numbers under their respective enforcement laws, or there can be no credibility as to any numbers they seek to enforce based on a raw hit because the FTC did not apply proper hygiene to such numbers in the NDNCR and has not removed many

[4] The reason Plaintiffs decided to rely on this massive consumer analysis instead of individualized proof is because, while Plaintiffs claim to have received numerous consumer complaints regarding telemarketing of DISH's services, they could not produce any evidence to attribute the vast majority of those complaint calls to DISH or any Independent Retailer.

[5] As the FCC noted, "in the 2003 TCPA Order, the Commission adopted a national do-not-call registry, in conjunction with the FTC, to provide residential consumers with a one-step option to prohibit unwanted telephone solicitations." Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fe. Reg. 19,330 (Apr. 13, 2005). *See also id.* at 19331 (addressing "a call from a telemarketer to an unwilling listener in their home . . . ."; "consumer privacy in the home"; "[w]e also decline to exempt from the do-not-call rules those calls made to 'home-based businesses'; rather, we will review such calls as they are brought to our attention to determine whether or not the call was made to a residential subscriber.")

business, government, abandoned, and invalid numbers from the NDNCR, leading to a highly inflated and knowingly flawed registry of numbers. Simply put, there are millions of residential landline numbers on the NDNCR that Plaintiffs know were not still associated with the person who originally registered the number on the NDNCR at the time of the alleged violation call. The FTC concedes as much as they have halfheartedly attempted, quite unsuccessfully, to purge some of these numbers from the NDNCR. Plaintiffs make no attempt to account for the massive over-inclusiveness of numbers on the NDNCR. It is shameful for a government law enforcement team to assert claims for billions of dollars of fines based on an NDNCR that, by their own admission, contains bogus information that is incapable of producing a baseline for such a hidden and brutal tax. This is not to mention that their proposed injunction claims effectively seeks to shut down entire aspects of DISH's business.

- Other proof problems abound. For example, the TSR itself makes clear that the FTC has jurisdiction only over interstate, and not intrastate calls. 16 C.F.R. § 310.2(dd). The FTC has no evidence that each of the claimed violation calls for which it seeks relief were interstate, rather than intrastate, calls.
- As to whole sets of claimed violations occurring between 2003 and 2007, Plaintiffs cannot prove that these alleged calls were even telemarketing calls.
- As to the Independent Retailer call records, they not only cannot be identified as telemarketing calls, but Plaintiffs also cannot prove that any telemarketing calls were made to offer or sell a DISH product or service, as opposed to some other company's product or service. In fact, the FTC's own investigator admitted that

some of these Independent Retailer calls were made to sell something other than a DISH product.

- State Plaintiffs' claims all must fail because under the TCPA and each of the state laws, State Plaintiffs can only seek relief for telemarketing calls that are placed to their respective state's residents. State Plaintiffs also did nothing to develop any facts that could show that the claimed offending telemarketing calls were placed to consumers within the boundaries of California, Illinois, North Carolina, and/or Ohio. State Plaintiffs seek hundreds of millions of dollars of fines without proving that their residents were harmed. The reason is clear; it is not the consumer harm that Plaintiffs care about, it is money. Plaintiffs are not able to marshal the thousands of consumers who they claim are outraged, but instead try the NSA-like trick of "massive computer processing" of phone records. Plaintiffs are thereby not representing actual residents, but area codes. By relying upon simply the area codes of the numbers dialed alone, however, Plaintiffs run afoul of the dose of reality provided by another bureaucracy – the FCC. The FCC and courts have repeatedly made clear that, due to advances in technology, area codes and telephone numbers cannot be relied upon to prove that a call recipient resided or was located in a particular state at the time of the call.
- State Plaintiffs' claims that DISH made telephone calls using prerecorded messages in violation of the TCPA fail because each and every one of those calls were made to a then-existing DISH customer (which was a permissible basis to make such calls under the TCPA at the time period). Indeed, DISH produced the recordings of the prerecorded messages played during the calls claimed to be

violations, the phrasing of which confirms that these calls were made to existing customers (*i.e.*, stating that "Please listen to an important announcement from DISH Network, your satellite television provider," or "Dear DISH Network Customers, add your favorite Chinese TV channels now!") Plaintiffs inexplicably continue their pursuit of legitimate business by continuing to press these TCPA and state law claims based on prerecorded messages that were clearly used only for existing customers.

- Finally, the FTC's claim that DISH is liable for alleged abandoned calls (of prerecorded message calls) by Independent Retailers Dish TV NOW and Tenaya/Star Satellite are barred by the applicable statute of limitations.

Summary judgment should be granted in DISH's favor on claims in the SAC.

PROCEDURAL HISTORY

Plaintiffs filed this action ("*DISH I*") on March 25, 2009, asserting claims for violations of the TSR (Counts I-III), the TCPA, and various individual state law claims (Counts IV-XII). (d/e 1, Complaint.)[6] Plaintiffs filed a First Amended Complaint ("FAC") on April 30, 2009, removing an Ohio state law claim under Ohio Revised Code Section 3719.02 (Count XII). (d/e 5, First Amended Complaint.) DISH answered the FAC on December 7, 2009. (d/e 26, Answer to First Amended Complaint.)

On May 18, 2012, Plaintiffs moved for leave to file the SAC, seeking to add a claim under the TSR's Entity-Specific Do Not Call Rule, *i.e.*, the alleged violations of DISH's Internal List. (d/e 135, Plaintiff's Motion for Leave to File SAC.) Magistrate Judge Cudmore denied this motion on June 20, 2012, finding "that the Plaintiffs unduly delayed proposing amendment to the

[6] All citations to docket entries are to the docket in *DISH I*, unless otherwise noted.

prejudice of [DISH]." (d/e 155, Opinion of Court re: Plaintiff's Motion to File SAC, at 1.) The FTC responded to this adverse ruling by filing a second lawsuit, on August 22, 2012, asserting the new claim in a case styled *Federal Trade Commission v. DISH Network L.L.C.*, No. 3:12-cv-03221 (C.D. Ill.) ("*DISH II*"). On September 25, 2012, DISH moved to dismiss *DISH II* on grounds of res judicata and statute of limitations. (*DISH II*, d/e 6, DISH Motion to Dismiss for Failure to State a Claim.)

Fact discovery in *DISH I* closed in July 2012 (with a limited exception), and expert discovery closed on December 14, 2012. (Text Order, May 23, 2012, granting d/e 139 Consent Motion for Extension of Time to Complete Discovery.) Dispositive motions, including anticipated summary judgment motions by both sides, were due on January 22, 2013. (Text Order, January 11, 2013, granting Docket 236 Joint Motion for Extension of Time to File Dispositive Motions.) On January 17, 2013, the Court stayed the deadline for filing dispositive motions pending the Court's ruling on the motion to dismiss in *DISH II*. (Text Order, Jan. 17, 2013.)

After holding a status conference on March 5, 2013, the Court issued an Order denying DISH's motion to dismiss in *DISH II*, vacating Magistrate Judge Cudmore's denial of Plaintiffs' motion for leave to file a SAC in *DISH I*, and dismissing *DISH II* without prejudice to Plaintiffs' re-filing the dismissed claim in *DISH I*, and without prejudice to DISH raising a res judicata defense in *DISH I*. (d/e 258, Opinion of Court re: Motion to Dismiss in Case No. 12-3221.)

Plaintiffs filed the SAC on March 12, 2013. (d/e 257, SAC.) The SAC asserts the following twelve claims:

	Plaintiff	Summary of Claim As Alleged	Statute
Count I	FTC	DISH engaged in or caused a telemarketer to engage in initiating an outbound telephone call to a person's	TSR, 16 C.F.R. § 310(b)(4)(1)(iii)(B)

	Plaintiff	Summary of Claim As Alleged	Statute
		telephone number on the NDNCR.	
Count II	FTC	In connection with telemarketing, DISH has engaged in or caused other telemarketers to engage in initiating an outbound telephone call to a person who has previously stated he does not wish to receive such a call made by or on behalf of DISH.	TSR, 16 C.F.R. § 310(b)(4)(1)(iii)(A)
Count III	FTC	DISH has abandoned or caused telemarketers to abandon an outbound telephone call by failing to connect the call to a sales representative within two seconds of the completed greeting of the person answering the call.	TSR, 16 C.F.R. § 310(b)(1)(iv)
Count IV	FTC	DISH has provided substantial assistance or support to Star Satellite and/or DISH TV Now even though DISH knew or consciously avoided knowing that Star Satellite and/or DISH TV Now abandoned outbound telephone calls.	TSR, 16 C.F.R. § 310.3(b)
Count V	California, Illinois, North Carolina, Ohio	DISH, either directly or indirectly as a result of a third party acting on its behalf, has engaged in a pattern or practice of initiating telephone solicitations to residential telephone subscribers whose telephone numbers were listed on the NDNCR.	TCPA, 47 C.F.R. § 64.1200(c)(2), 47 U.S.C. § 227(c)
Count VI	California, Illinois, North Carolina, Ohio	DISH, either directly or indirectly as a result of a third party acting on its behalf, has engaged in a pattern or practice of initiating telephone solicitations to residential telephone subscribers using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and where the call was not initiated for emergency purposes or otherwise exempted by rule or order of the Federal Communications Commission.	TCPA, 47 C.F.R. § 64.1200(a)(2), 47 U.S.C. § 227(b)(1)
Count VII	California	DISH made or caused to be made telephone calls to California telephone numbers listed on the NDNCR and sought to rent, sell, promote, or lease goods or services during those calls.	Cal. Bus. & Prof. Code § 1759(c)(2)
Count VIII	California	DISH has engaged in unfair competition under California law through (1) engaging in a pattern or practice of initiating telephone solicitations to residential telephone subscribers whose telephone numbers were listed on the NDNCR; (2) placing telephone solicitations to residential telephone lines	Cal. Bus & Prof. Code § 17200

	Plaintiff	Summary of Claim As Alleged	Statute
		using artificial or prerecorded voices; (3) making or causing to be made telephone calls to California telephone numbers listed on the NDNCR and seeking to rent, sell, promote, or lease goods or services during those calls; and (4) disseminating an unsolicited prerecorded message by telephone without an unrecorded, natural voice first informing the person answering the telephone of the name of the caller or the organization being represented, and either the address or telephone number of the caller, and without obtaining the consent of that person to listen to the prerecorded message.	
Count IX	North Carolina	DISH, and/or third parties acting on its behalf, made telephone solicitations to the telephone numbers of North Carolina telephone subscribers when those numbers were in the pertinent edition of the NDNCR; DISH failed to monitor and enforce compliance by its employees, agents, and independent contractors, and those persons made telephone solicitations to North Carolina telephone subscribers when those numbers were in the pertinent edition of the NDNCR.	N.C. Gen. Stat. §§ 75-102(a), (d)
Count X	North Carolina	DISH, and/or third parties acting on its behalf, used automatic dialing and recorded message players to make unsolicited telephone calls to North Carolina telephone subscribers without first having live operators inform the telephone subscribers of the nature and length of the recorded message and asking for and obtaining permission to play the message from the person receiving the call.	N.C. Gen. Stat. § 75-104
Count XI	Illinois	DISH, and/or third parties acting on its behalf, knowingly played or caused to be played prerecorded messages placed by an autodialer without the consent of the called party.	815 ILCS 305/30(b), 815 ILCS 505/2Z
Count XII	Ohio	DISH, either directly or as a result of a third party acting on its behalf, engaged in a pattern or practice of (1) initiating telephone solicitations to residential telephone subscribers in the State of Ohio, whose numbers were listed on the NDNCR; and (2) initiating telephone calls to residential telephone lines using artificial or prerecorded voices to deliver a message without the prior express consent of the called party and without falling within a specified	Ohio Rev. Code § 1345.02(A), 1345.03(A)

	Plaintiff	Summary of Claim As Alleged	Statute
		exemption.	

The Court issued a new case schedule on March 21, 2013, extending the fact discovery on the new claims to September 16, 2013, and new expert discovery to November 22, 2013. (Text Order, March 21, 2013, granting d/e 259 Consent Motion to New Case Schedule.) DISH answered the SAC on March 29, 2013. (d/e 263, Answer to SAC.)

The Court further modified the Scheduling Order on November 7, 2013, extending the expert discovery deadline to December 19, 2013, and the deadline for dispositive motions to January 6, 2014. (Text Order, Nov. 7, 2013, granting d/e 337 Agreed Motion for Extension of Time to Complete Expert Discovery and File Dispositive Motions.) The Court vacated the date set for the final pretrial conference and trial, indicating that those dates would be reset after dispositive motions were filed. (*Id.*)

STATEMENT OF UNDISPUTED FACTS[7]

DISH'S BUSINESS, GENERALLY

1. DISH is the nation's third largest pay-TV provider, with roughly 14 million customers in the United States as of December 30, 2012. (DX-1,[8] Excerpts of DISH Network Corp. Form 10-K, filed 02/20/13, at 1.)

2. DISH employs more than 25,000 people in the United States. (*Id.* at 19.)

3. DISH provides programming that includes more than: (a) 270 basic video channels; (b) 70 Sirius Satellite Radio music channels; (c) 30 premium movie channels; (d) 35

[7] References to DISH's Statement of Undisputed Facts are designated herein as "DUF".

[8] "DX" refers to DISH's summary judgment exhibits.

regional and specialty sports channels; (e) 3,300 standard definition and HD local channels, (f) 300 Latino and international channels; and (g) 70 channels of pay-per-view content. (*Id.* at 2.)

4. DISH subscribers receive programming via DISH-branded equipment, including satellite dishes, digital set-top receivers, and remote controls. (*Id.*)

5. DISH-branded receiver systems and DISH programming are sold by direct sales channels as well by independent third parties, such as small satellite retailers, direct marketing groups, local and regional consumer electronics stores, nationwide retailers, and telecommunications companies. (*Id.* at 4.)

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

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

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

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

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

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

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

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

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

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

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

16. From at least as early as 2003 to the present, DISH implemented written practices and procedures designed to comply with 16 C.F.R. § 310.4(b)(1)(ii)-(iii) and 47 CFR 64.1200(c)(2) as part of its routine business practice "to protect the privacy rights of consumers

and to promote compliance with applicable laws and regulations," and "to honor the request of any person who opts not to receive telephone solicitations" from DISH. (DX-2, Montano Decl. ¶16; *see also* DX-3, DX-4, DX-5 and DX-6 (Echostar "Do-Not-Call" Policies, 2002, 2004, 2006, and 2008.))

17. DISH periodically updated its "'Do Not Call' Policy" and related supporting procedure documents and distributed them internally to all DISH employees with responsibility for outbound calls in the ordinary course of DISH's business. (DX-3 – DX-6.)

18. DISH's "Do Not Call" Policy and related supporting procedures set forth, among other things: (a) the procedures by which any persons who inform DISH that they do not wish to receive solicitation calls from DISH are placed on DISH's Internal DNC List (as defined below); (b) the procedures by which DISH complies with the NDNCR; (c) the precise language DISH personnel are to use when responding to requests to be added to DISH's Internal DNC list and/or requests for a copy of DISH's "Do Not Call" Policy; and (d) the procedures for updating DISH's Internal DNC List. (DX-3 – DX-6.)

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

20. DISH also maintained written policies regarding the Do Not Call scrubbing process that was applied to DISH's outbound telemarketing calls. (DX-157, Deposition Transcript of Russell Bangert, April 18, 2012 ("Bangert 4/18/12 Dep.") 124:19-125:15.) DISH

communicated these policies to all personnel who used DISH's dialer. (*Id.* 125:6-20; 126:12-127:16.)

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

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

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

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

25. The Telemarketing Vendors forwarded DNC requests to DISH through a feedback file process that happens each night where all the dialing results from that day's dialing get sent to DISH in a file that is uploaded to DISH's computer system. (DX-170, Davis Dep.

46:16-47:20.) DISH diligently monitored compliance with that policy, and if a Telemarketing Vendor did not upload its list each night, DISH would follow-up with the Telemarketing Vendor to determine why. (*Id*. 99:5-20.)

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

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

27. DISH has also trained its personnel, and the Telemarketing Vendors, on DISH's Do Not Call compliance policies and procedures. (DX-2, Montano Decl. ¶12.) This training is (and has been) provided to any DISH employee or vendor responsible for managing and/or implementing outbound calling campaigns. (*Id.*) DISH took this training seriously. (DX-8.)

28. DISH's project manager of technical operations, Bob Davis, managed the outbound call operations area, including new outbound requests, Do Not Call compliance, TCPA compliance, and dialer operations. (DX-170, Davis Dep. 17:9-18; 38:2-23.) The project manager of technical operations supervised a dialer operations manager, who supervised two to three business operations specialists, and an outbound operations manager, who supervised two to three employees. (*Id*. 18:10-18.)

29. Training is provided in person by a departmental coach, by a member of DISH's legal or compliance teams, or by an employee of PossibleNOW, a third party that provides TCPA training and compliance services for DISH. (DX-2, Montano Decl. ¶13; DX-14, ("CSC Do Not Call Requests"); DX-12, ("Do Not Call Regulatory Compliance"); DX-11, (email regarding DNC training schedule); DX-9, DX-10, and DX-13 (e-mail re: DNC training with attached presentations re: Inbound DNC Process and Investigator Process for DNC); DX-17,

(PowerPoint presentation delivered by PossibleNOW); DX15, (same); DX-16, (same); DX-18, (same).)

30. A trainee may also be assigned to review a PowerPoint presentation on DISH's Do Not Call compliance procedures, available on DISH's intranet, with his or her department managers. (DX-2, Montano Decl. ¶14.) The managers will discuss the presentation with the trainee and, later, the trainee may address any questions about Do Not Call compliance to the trainee's managers and/or DISH's Do Not Call compliance team. (*Id.*)

31. DISH also provides its inbound and outbound calling employees with specific training on: (1) how to access and provide consumers with DISH's Do Not Call Policy; (2) how to add consumers to DISH's Internal DNC List; and (3) how to distinguish between the types of calls that may or may not be placed to consumers, regardless of whether they are on a Do Not Call list. (DX-2, Montano Decl. ¶15; DX-14.) All of DISH's outbound call agents also receive training on the applicable telemarketing laws and specific do not call regulations. (DX-217, Deposition Transcript of Amy Dexter, March 9, 2011 ("Dexter Dep.") 43:8-17.)

32. DISH provided the department responsible for placing outbound telephone calls with telemarketing compliance training through a PowerPoint presentation that was followed up with a group discussion. (DX-217, Dexter Dep. 16:20-17:15.)

33. DISH also provides its Telemarketing Vendors' agents with the same training that DISH agents receive. (DX-217, Dexter Dep. 45:2-5.) DISH's Do Not Call policy is available on a DISH website to which all DISH agents (and Telemarketing Vendor agents) have access. The policy is part of the training that is provided to any agents who are engaged in outbound calling. (*Id*. 179:25-180:4; 181:20-23.)

34. Initially, with respect to do-not call scrubbing against DISH's Internal DNC List and the NDNCR list, Russell Bangert, a DISH employee trained in telemarketing compliance, trained all personnel responsible for using DISH's dialer and scrubbing system (P-Dialer) as to which scrubs to perform on outbound calling lists (including scrubs against all do not call lists), and then trained the individual who took over this responsibility at DISH for Mr. Bangert. (DX-217, Dexter Dep. 111:20-112:5; 119:7-121:12.) Thereafter, training for DISH's dialer and scrubbing systems, as well as procedures for all outbound calls, was performed by DISH's Dialer Operations Team in its Bluefield call center prior to processes being centralized and updated at DISH's corporate campus and integrated with PossibleNOW in early 2008. (DX-2, Montano Decl. at ¶16.)

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

DISH MAINTAINS AND RECORDS DISH'S INTERNAL DNC LIST

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

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

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

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

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

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

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

43. As set forth above, on or about December 14, 2007, DISH contracted with PossibleNOW to assist DISH with, among other things, the maintenance of DISH's Internal DNC List. (DX-191, Pl. Dep. Ex. (Stauffer 4/27/10) 2, (Master Services Agreement); (DX-166,

Stauffer 4/27/10 Dep. 17:5-13; 20:11-31:3; 47:23-54:15; 61:23-63:1); DX-2, Montano Decl. ¶22.)

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

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

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

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

48. Once the functionality was established by PossibleNOW, it maintained three separate lists for use by DISH and Independent Retailers: (a) internal list requests made to DISH itself; (b) internal list requests made to a Telemarketing Vendor; and (c) internal list requests made to an Independent Retailer. PossibleNOW and DISH considered the combination of these lists as a "Consolidated DNC List." (DX-166, Stauffer 4/27/10 Dep. 101:9-19; DX-170, Davis Dep. 308:18-309:4; 318:12-20; 325:6-14.)

49. Because Independent Retailers maintained their own internal Do Not Call Lists prior to April 8, 2008 or the dates on which the Independent Retailers began engaging with PossibleNOW, the date that a consumer's number was added to a Retailer's internal Do Not Call List often predated the date that the number became part of the Consolidated DNC List.[9]

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

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

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

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

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

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

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

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

55. Initially the NDNCR was downloaded by DISH employee Russell Bangert, and later that responsibility was transitioned to Monte Faucet. (DX-157, Bangert 4/18/12 Dep. 74:20-75:7.) Mr. Bangert met with Mr. Faucet many times to provide him with relevant materials (including the TCPA, written summaries provided by the FTC on the matter, records of applications that DISH made for state do not call lists, etc.), and to educate him as to the process and the personnel with whom he would be working. (*Id.* 76:20-77:23.) Thereafter, the NDNCR was downloaded by DISH's Dialer Operations Team in its Bluefield call center prior to processes being centralized and updated at DISH's corporate campus and integrated with PossibleNOW in early 2008. (DX-2, Montano Decl. ¶16.) In early 2008, DISH, in partnership with PossibleNOW automated regular downloads of the NDNCR including daily adds and deletes as well as a full monthly refresh of the entire Federal DNC list. (*Id.* ¶22.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

80. An in camera review by this Court also showed

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

(d/e 151 at p. 7.)

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

82. As an additional means to ensure an effective compliance program, DISH created a DNC investigation team (the "DNC Investigation Team") in 2006 to investigate and resolve consumer complaints regarding TSR/TCPA-related issues. (DX-159, Deposition of Marciedes Metzger, March 17, 2011 ("Metzger Dep.") 73:21-74:11; 74:15-75:6.)

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

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

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

86. DISH also employed an "Executive Resolution Team" or "ERT" to handle customer concerns that are escalated from DISH's regular customer call centers. (DX-159, Metzger Dep. 25:25-27:1.) The ERT includes customer resolution specialists ("CRSs"), coaches (who oversee the CRSs), and team managers (who oversee the coaches.) (*Id*, Metzger Dep. 29:12-30:8.) Every one of these individuals is available to take customer calls. (*Id.*) DISH's ERT management team reviewed this manual with its customer service resolution employees during one-on-one training sessions. (DX-153, Deposition Transcript of David Laslo, March 4,

2011 ("Laslo Dep.") 28:19-30:19; 34:4-35:3.) These training sessions lasted approximately two (2) hours for each employee. (DX-153, Laslo Dep. 26:25-27:10.)

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

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

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

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

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

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

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

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

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

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

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

c. Consumer . (DX-35, Pl. Dep. Ex. (Metzger) 333.)

d. Consumer . (DX-36, Pl. Dep. Ex. (Metzger) 334.)

e. Consumer (DX-37, Pl. Dep. Ex. (Metzger) 335.)

f. Consumer . (DX-38, Pl. Dep. Ex. (Metzger) 338.)

g. Consumer . (DX-39, Pl. Dep. Ex. (Metzger) 345.)

h. Consumer . (DX-41 Pl. Dep. Ex. (Werner) 448.)

i. Consumer (DX-42, Pl. Dep. Ex. (Werner) 423.)

j. Consumer . (DX-43, Pl. Dep. Ex. (Laslo) 176.)

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

l. Consumer . (DX-46, Pl. Dep. Ex. (Laslo) 189.)

m. Consumer . (DX-47, Pl. Dep. Ex. (Laslo) 190.)

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

o. Consumer . (DX-54, Pl. Dep. Ex. (Laslo) 193.)

p. Consumer . (DX-55, Pl. Dep. Ex. (D. Steele) 405.)

q. Consumer (DX-56, Pl. Dep. Ex. (D. Steele) 409.)

r. Consumer . (DX-57, Pl. Dep. Ex. (D. Steele) 416.)

s. Consumer . (DX-58, Pl. Dep. Ex. (D. Steele) 417.)

t. Consumer . (DX-59, Pl. Dep. Ex. (Snyder) 195.)

u. Consumer . (DX-60, Pl. Dep. Ex. (Snyder) 197.)

v. Consumer . (DX-61, Pl. Dep. Ex. (Snyder) 198.)

w. Consumer . (DX-62, Pl. Dep. Ex. (Snyder) 199.)

x. Consumer . (DX-63, Pl. Dep. Ex. (Snyder) 200.)

y. Consumer (DX-64, Pl. Dep. Ex. (Snyder) 202.)

z. Consumer . (DX-65, Pl. Dep. Ex. (Snyder) 203.)

aa. Consumer . (DX-66, Pl. Dep. Ex. (Snyder) 207.)

bb. Consumer . (DX-67, Pl. Dep. Ex. (Snyder) 209.)

cc. Consumer . (DX-68, Pl. Dep. Ex. (Snyder) 218.)

dd. Consumer . (DX-69, Pl. Dep. Ex. (Snyder) 219.)

ee. Consumer . (DX-73, Pl. Dep. Ex. (Snyder) 233.)

ff. Consumer (DX-74, Pl. Dep. Ex. (Origer) 150.)

gg. Consumer (DX-75, Pl. Dep. Ex. (Origer) 161.)

hh. Consumer . (DX-79, Pl. Dep. Ex. (Origer) 164.)

ii. Consumer . (DX-76, Pl. Dep. Ex. (Musso) 297.)

jj. Consumer . (DX-77, Pl. Dep. Ex. (Musso) 298.)

kk. Consumer (DX-78 Pl. Dep. Ex. (Musso) 310.)

ll. Consumer . (DX-81, Pl. Dep. Ex. (Montano) 138; DX-80, Pl. Dep. Ex. (Montano) 288.)

mm. Various Consumers. (DX-82, Pl. Dep. Ex. (Montano) 285.)

nn. Consumer . (DX-83, Pl. Dep. Ex. (Mills) 477; DX-84, Pl. Dep. Ex. (Mills) 478.)

oo. Consumer . (DX-85, Pl. Dep. Ex. (Dexter) 247.)

pp. Consumer . (DX-86, Pl. Dep. Ex. (Davis) 136.)

qq. Consumer . (DX-87, Pl. Dep. Ex. (Bangert 12/15/10) 106.)

rr. Consumer . (DX-88, Pl. Dep. Ex. (Bangert 12/15/10) 111.)

ss. Consumer . (DX-89, Pl. Dep. Ex. (Bangert 12/15/10) 117.)

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

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

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

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

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

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

101. Of the 41[10] depositions of consumers across the country who had made complaints about receiving calls referencing DISH (DX-219), Plaintiffs could only find six consumers whose telephone numbers matched calls made by DISH:

(who received the same calls at the same telephone number), and

102. For the other 34 consumers, there is no evidence that these calls originated from DISH. (DX-214, Taylor Decl. ¶5.) With respect to the six, any calls that DISH made to were not for telemarketing purposes. (DX-212, Deposition Transcript of

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

, September 4, 2013 (" Dep.") 111:20-114:8; 126:23-134:4.) The calls to must also be excluded as potentially violative calls because she had an existing business relationship with DISH during the times that DISH attempted to contact her. (DX-214, Taylor Decl., ¶4.) Accordingly, out of the 41, only four could even possibly be used to link a violation to DISH.

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

104. With regard to Ms. , DISH's expert was able to eliminate any DISH calls based on the campaign names, since they indicate that they were made solely to Ms. within the proper "EBR" (established business relationship) period.[11] (DX-214, Taylor Decl. ¶4.) In addition, DISH did not otherwise have access to Ms. do-not-call request at the time of the calls, since it appeared solely on the do-not-call list of a DISH retailer. (DX-214, Taylor Decl. ¶4.) Ms. stated during her deposition that she became a DISH customer in or about 2005 or 2006. (DX-210, Deposition Transcript of August 28, 2013 (" Dep.") 16:4-9.) Ms. also testified that she terminated her relationship with

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

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

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

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

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

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

THE NATIONAL DO NOT CALL REGISTRY

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

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

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

109.

(DX-155, Deposition Transcript of Ami Dziekan, February 15, 2012 ("Dziekan Dep.") 229:7-230:2.)

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

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

> Question from Eileen Harrington, Deputy Director of FTC Bureau of Consumer Protection: Have you had any complaints in Missouri from businesses who have found, or would there be a way for them to discover that numbers on your list were inadvertently placed on the list, or from consumers?
>
> Response from Rex Burlison with the Missouri Office of the Attorney General, on behalf of the National Association of Attorneys General: We have got a list with 970,000 numbers [in Missouri]. There's going to be inaccuracies. I don't care how many people that you put on preserving the accuracy of the list, there's going to be problems with the list, and you have to accept that, especially when you go to a national list with millions of numbers, you are going to have a list that is imperfect, and it just doesn't matter until it comes to when someone is trying to enforce a violation. That's when it matters. Is that person or is that number that you're enforcing against accurately on the list and was it accurately given to the industry to protect the consumer.

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

112.

:

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

113.

(DX-163, Deposition Transcript of David Torok, April 5, 2012 ("Torok Dep.") 133:5-8.) Rather, the FTC

. (*Id.* 133:8-14.)

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

115.

DX-165 Deposition Transcript of Linda Miller Lavenda, September 6, 2012 ("Lavenda Dep.") (47:23-48:2-10.)

116.

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

117.

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

118.

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

119.

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

120.

(DX-145, Deposition Transcript of Murali Thirukkonda, June 5, 2012 ("Thirukkonda Dep.") 17:18-22.)

121.

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

122. . (DX-145, Thirukkonda Dep. 31:19-23.)

123.

. (DX-145, Thirukkonda Dep. 287:7-292:20; DX-180, Ex. LM-10.)

124.

. (DX-145, Thirukkonda Dep. 103:18-106:2; 117:19-119:22; DX-180, Pl. Dep. Ex. (Thirukkonda) LM-10.)

125.

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

126.

. (DX-145, Thirukkonda Dep. 106:24-107:23; DX-180, Pl. Dep. Ex. (Thirukkonda) LM-10 at 2.)

127.

." (DX-145, Thirukkonda Dep. 33:15-24.)

128.

(DX-167, Deposition Transcript of Richard Stauffer, April 26, 2012 ("Stauffer 4/26/12 Dep.") 32:6-35:6, 59:12-24.)

129.

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

130.

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

131.

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

132.

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

133.

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

134.

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

(*Id.*)

(*Id.*)

(*Id.*)

(*Id.*)

(*Id.* 79-80, 95.)

(*Id.* 100:6-18.)

135.

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

136.

. (DX-167, Stauffer 4/26/12 Dep. 152:6-154:23.)

(*Id.* 153:2-154:23.)

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

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

138.

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

139.

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

140.

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

141. As of March 2009, 49.45% of the numbers on the NDNCR were wireless numbers. (d/e 152-11, Ex. J.)

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

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

144.

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

145.

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

146.

(DX-145, Thirukkonda Dep. 228:14-15.)

147. The NDNCR website maintained by the FTC states that the NDNCR "is only for personal phone numbers" and that business-to-business calls or faxes are not covered by the NDNCR. (http://www.consumer.ftc.gov/articles/0108-national do not call registry (last accessed January 6, 2014.) The 2009 PossibleNOW report, however, found that 13% of the phone

numbers listed on the NDNCR were business landline numbers. (d/e 152, Ex. 1, Boyle 6/15 Decl. ¶11, Ex. J, at 7.)

148.

to: http://www.ftc.gov/bcp/menus/business/mareting.shtm.

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

149.

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

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

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

152.

. (DX-155; DX-183 Dziekan Dep. Ex. 5.)

153.

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

154.

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

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

155.

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

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

157.

. (DX-145,

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

158.

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

159.

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

160.

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

161.

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

162.

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

PLAINTIFFS' FLAWED "MASSIVE COMPUTER PROCESSING"

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

i. Entity-specific DNC violations

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

164.

(DX-187, p. 4.)

165.

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

166.

(DX-155, Dziekan Dep. 237:22-238:17; 241:18-242:10.)

(DX-162, Deposition , December 6, 2011 ("Mastrocinque Dep.") 129:15-17.)

167. . DX-155, Dziekan Dep. 229:7-24.

(DX-155, Dziekan Dep. 235:21-236:1.)

168.

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

169. (DX-155, Dziekan Dep. 237:22-238:17, 241:18-242:10; DX-174, Deposition Transcript of Leslie Steele, October 4, 2012 ("L. Steele Dep.") 85:3-5); (2) (DX-174, L. Steele Dep. 85:6-8); (3) (*id.* 85:9-11); (*id.* 86:3-6); (6) (*id.* 86:7-10); or (7) (*id.* 86:11-14).

170.

(DX-194, Plaintiff's Supplemental Responses to DISH's Interrogatories dated December 14, 2012.)

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

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

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

(d/e 165, at 13).

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

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

175.

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

176.

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

(*Id.* 181:12-15.)

177.

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

178.

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

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

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

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

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

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

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

> The relationship of the parties hereto is that of independent contractors. Retailer shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be Retailer's employees only, and not employees or agents of DISH . . . Retailer (including without limitation its officers; directors, employees and Permitted Subcontractors) shall not, under any circumstances; hold itself out to the public or represent that it is DISH or an employee, subcontractor, Affiliate, agent or sub-agent of DISH or any DISH Affiliate. . . . This Agreement does not constitute any joint venture or partnership. It is further understood and agreed that Retailer has no right or authority to make any representation, warranty, promise, covenant, guarantee or agreement or take any action for or on behalf of DISH or any Affiliate of DISH.

(DX-208, Mills Decl. ¶8.)

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

> Retailer shall comply with all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto, now enacted or 'hereafter promulgated (hereinafter "Laws"), and retailer is solely responsible for its compliance with all Laws that apply to its obligations under this Agreement."

(DX-208, Mills Decl. ¶9.)

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

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

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

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

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

190. With certain exceptions, the Retailers are free to market the goods and services of any other entity, including competitors of DISH. (DX-208, Mills Decl. ¶5.)

191. DISH requires that Retailers operate under their own company name or a d/b/a name registered to the Retailer. (DX-208, Mills Decl. ¶15.)

192. DISH requires that Retailers comply with all applicable telemarketing laws, including by purchasing their own version of the NDNCR as well as registering as a telemarketer and accessing state Do Not Call lists, and post bonds in states that require it. (DX-164,

Deposition Transcript of Reji Musso, March 16, 2011 ("Musso Dep.") 134:15-135:12; DX-91, Pl. Dep. Ex. (Musso) 295 at 1.) From time to time, DISH would ask the Retailers to provide it with "proof of [Retailer's] compliance with all outbound telemarketing laws, including, but not limited to [Retailer's] Do Not Call policy, Proof of Do Not Call Registrations and Outbound Telemarketing Scripts." (DX-147, Deposition Transcript of Robb Origer, March 3, 2011 ("Origer Dep.") 204:1-11; DX-99 Pl. Dep. Ex. (Origer) 144.)

193. DISH encouraged and, as set forth below in many instances, required Retailers to utilize the DNC Solutions tool offered through PossibleNOW. (DX-71, Pl. Dep. Ex. (Van Emst) 350; DX-49, Pl. Dep. Ex. (Origer) 159.)

194. DISH frequently reminds Independent Retailers of their obligations under the terms of the Retailer Agreement and under state and federal telemarketing laws, of the consequences that would result should a Retailer violate the telemarketing laws. (DX-208, Mills Decl. ¶17.)

195. DISH communicated to Independent Retailers DISH's requirement that they comply with the TSR/TCPA policies through written communications referred to as "Facts Blasts" and "Retailer Chats" (DX-72, Pl. Dep. Ex. (Werner) 421; DX-90, Pl. Dep. Ex. (Werner) 265; DX-91, Pl. Dep. Ex. (Musso) 295; DX-92, Pl. Dep. Ex. (Origer) 142.

196. DISH disseminates reminders of the Retailer's obligations under the terms of the Retailer Agreement in various forms, including written "Facts Blasts," such as the Facts Blast that was sent by DISH to Retailers on or about November 11, 2006, which states in pertinent part:

> **IMPORTANT REMINDER TO INDEPENDENT RETAILERS WHO ENGAGE IN TELEPHONE MARKETING AND SALES OF DISH NETWORK® PRODUCTS AND SERVICES**

> **Your [DISH] Retailer Agreement prohibits Retailers from violating any applicable laws, including federal and state marketing and telemarketing laws.**
>
> The Retailer Agreement clearly provides that your relationship with [DISH] is that of an independent contractor. Your outbound and inbound call agents MUST identify the company that they work for. AGENTS MAY NOT SAY THAT THEY WORK FOR DISH NETWORK.
>
> Failure to comply with the obligations in your [DISH] Retailer Agreement, applicable state and federal laws, and the cautionary statements in this document could lead to disciplinary action against you by [DISH], up to and including termination.

(DX-208, Mills Decl. ¶18 (emphasis in original).)

197. DISH also maintained a Retail Services department internally, which consisted of a variety of teams, including a risk and audit team that contained a compliance unit. (DX-150, Deposition Transcript of Blake Van Emst, March 18, 2011 ("Van Emst Dep.") 28:21-29:8; 37:6-13; 39:8-15; 42:19-43:3.) The risk and audit team is responsible for ensuring that Independent Retailers are compliant with the current DISH Retailer Agreement and all DISH business rules. (*Id.* 91:15-92:3.)

198. The Retailer compliance team was overseen by Reji Musso, a Retail Services Compliance manager who was trained by members of DISH's legal department on telemarketing compliance. (DX-164, Musso Dep. 19:10-13; 78:13-15.) Since at least 2006, DISH also dedicated two employees to compliance issues as they related to Retailers who used an order entry tool, including compliance with federal, state and local laws. (*Id.* 10:5-11; 14:9-16:7; 19:14-22.) DISH added a third employee with these responsibilities in 2011. (*Id.* 10:5-11; 14:9-16:7; 19:14-22.)

199. Representatives from this compliance team provided clear communication and education about key terms of the Retailer Agreement in retailer development forums that took

place throughout the United States several times a year. (DX-160, Deposition Transcript of Bruce Werner, March 10, 2011 ("Werner Dep.") 38:25-39:10.) These events were sponsored by DISH's direct sales channel to discuss with groups of Retailers a variety of topics, including audit and compliance issues. The Retailer compliance team attended six to eight of these types of events a year, providing training on compliance with the Retailer Agreement, including (depending upon what issues were current) "everything from TCPA, trademark license agreement issues, use of third parties, approval for use of third parties, those sort of things." (*Id.* 14:13-16:7; 39:22-40:13.)

200. Also through the Retailer compliance unit, one of the ways that DISH oversaw and monitored Independent Retailer compliance with the Retailer Agreement, including the provision that the Retailers complied with all applicable laws, was through an established procedure in place since at least 2006 to deal with telemarketing complaints against Retailers. (DX-164, Musso Dep. 79:5-15; 79:23-82:11.) This procedure included performing research to attempt to identify the recipient of the call at issue by telephone number. (*Id.* 79:5-15; 79:23-82:11.) If DISH was able to do so, and if the call was made by an Independent Retailer, DISH notified the Independent Retailer of the allegation by letter, prepared in coordination with DISH's legal department and signed by DISH's compliance manager, and requested information relative to that interaction with the consumer. (*Id.* 79:5-15; 79:23-82:11; 83:3-14.)

201. In particular, DISH formally requested the Retailer's internal do not call policy, the origination of the lead (if applicable), how the telephone interaction resolved, and the dialer records if there were any. DISH gave the Independent Retailer seven days to respond. (DX-164, Musso Dep. 81:7-20.) In DISH's experience, Retailers responded to these letters and took them very seriously. (*Id.* 84:2-6.) DISH also monitored the e-mails that Retailers sent in response to

these inquiries (to an e-mail box to which each member of the compliance team has access) on a constant basis, five days a week. (*Id.* 86:11-88:4.)

202. DISH reviewed each response and, if anything was missing, either asked the Retailer for the information and/or asked for an explanation as to why it was not received. (DX-164, Musso Dep. 84:7-85:8.) DISH also added the response to its vendor inquiries tracker, so that it could continue to monitor the information and take further action as necessary. (*Id.* 84:7-85:8.)

203. DISH's Retail Services department also maintained a list (called a POE list) of any escalated customer complaints that warranted immediate sharing with its order entry Retailers. (DX-164, Musso Dep. 127:1-128:11.) Those complaints might include instances where the customer was particularly agitated, went through an executive contact at DISH, was referred by DISH's TCPA team, or had received multiple unwanted calls from a Retailer. (*Id.* 146:10-16.)

204. DISH notified Independent Retailers of escalated complaints to ensure that Retailers promptly removed the relevant number from their contact lists, and added the number to the Retailer's internal do not call lists. (DX-164, Musso Dep. 127:1-128:11; 141:5-11; DX-76, Pl. Dep. Ex. (Musso) 297.)

205. As of September 30, 2008, DISH required Independent Retailers that made 600 or more calls during the prior calendar year, and which engaged in any telemarketing, to engage with PossibleNOW so that PossibleNOW could provide any do not call requests to DISH. (DX-2, Montano Decl. ¶¶22 & 24; DX-213.) If such an Independent Retailer placed a call and the call recipient requested not to receive further outbound telephone calls made by the Retailer to sell DISH products or services, the Retailer was required to record and maintain the person's

telephone number (among other information) and send that information to DISH through PossibleNOW. (DX-2, Montano Decl. ¶¶25-26.)

206. If DISH became aware of a breach of the Retailer Agreement or a consumer complaint – *e.g.*, if a Retailer said it was calling "on behalf of" DISH – then DISH would investigate. (DX-147, Origer Dep. 54:6-55:5.) In instances when DISH was able to associate a consumer complaint with a particular Independent Retailer, then DISH's Retail Services team would discuss the issue with the particular Retailer and the sales organization. (*Id.* 54:23-56:13; 58:6-59:18; 90:19-91:3.)

207. Furthermore, when DISH believed that an Independent Retailer engaged in activity that potentially violated telemarketing laws or regulations, it investigated the potential violation and if necessary took steps to address those potential violations, including termination of the applicable Retailer Agreement:

a. I-Satellite. (DISH investigated I-Sat and terminated this retailer because the retailer had engaged in TSR/TCPA violations.). (DX-156, Deposition Transcript of Mike Mills, May 3, 2012 ("Mills Dep.") 352:21-355:4; DX-93, Pl. Dep. Ex. (Werner) 269; DX-94, Pl. Dep. Ex. (Snyder) 204; DX-95; Pl. Dep. Ex. (Van Emst) 355; DX-96 Pl. Dep. Ex. (Van Emst) 358; DX-97, Pl. Dep. Ex. (Musso) 318; DX-98, Pl. Dep. Ex. (Mills) 495;

b. Apex Satellite, Inc. (DISH investigated a consumer complaint and terminated this retailer for, among other things, TSR/TCPA violations and failure to comply with the terms of its Retailer Agreement.). (DX-100, Pl. Dep. Ex. (Werner) 274; DX-102, Pl. Dep. Ex. (Van Emst) 352; DX-103, Pl. Dep. Ex. (Snyder) 215; DX-104, Pl. Dep. Ex. (Musso) 301; DX-105, Pl. Dep. Ex. (Musso) 302; DX-106, Pl. Dep. Ex. (Musso) 304; DX-107, Pl. Dep. Ex. (Musso) 305;

c. JSR Enterprises. (DISH investigated JSR Enterprises after receiving complaints from consumers regarding JSR Enterprises's telemarketing practices. DISH terminated JSR Enterprises because this retailer was found to have engaged in unlawful telemarketing practices and was ordered by a court to cease its telemarketing activities in the state of Missouri.). (*See* DX-111, Pl. Dep. Ex. (Werner) 431);

d. United Satellite. (DISH terminated this retailer after its investigation uncovered the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

e. Atlas Assets. (DISH terminated this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

f. Blu Kiwi (I Dish). (DISH assessed a $10,000 penalty to this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

g. Sterling Communications Group. (DISH assessed a $53,000 penalty to this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-112, Pl. Dep. Ex. (Werner) 432);

h. Dish Factory Direct, Inc. (after investigating a consumer complaint, DISH sent a formal demand letter to this retailer to request information regarding the retailer's alleged improper telemarketing call to a consumer and proof by the retailer of its "compliance with all outbound telemarketing laws."). (DX-112, Pl. Dep. Ex. (Werner) 433);

i. Altitude Marketing, LLC. (DISH required Attitude Marketing, among others, to comply with its new program initiative whereby retailers were required to identify the root cause of consumer complaints.). (DX-115, Pl. Dep. Ex. (Werner) 277);

j. Satellite Systems Now. (DISH sent two formal demand notices to Satellite Systems Now requesting information regarding the retailer's alleged improper telemarketing call to a consumer, proof by the retailer of its compliance with all outbound telemarketing laws, and to cease and desist from any unlawful telemarketing activities.). (DX-116, Pl. Dep. Ex. (Werner) 260);

k. I-Dish. (after investigating a consumer complaint, DISH required this retailer to take corrective measures regarding its telemarketing practices.) (DX-117, Pl. Dep. Ex. (Werner) 264);

l. National Satellite Systems. (after investigating consumer complaints, this retailer was penalized for a TSR/TCPA violation and was required to take corrective measures to avoid any future infractions.). (DX-119, Pl. Dep. Ex. (Werner) 266); DX-118, Pl. Dep. Ex. (Snyder) 210; DX-120, Pl. Dep. Ex. (Van Emst) 363; DX-121, Pl. Dep. Ex. (Snyder) 221; DX-122, Pl. Dep. Ex. (Snyder) 224; DX-123, Pl. Dep. Ex. (Snyder) 231; DX-193, Pl. Dep. Ex. (Snyder) 224; DX-124. Pl. Dep. Ex. (Snyder) 235; DX-125, Pl. Dep. Ex. (Musso) 315; DX-126, Pl. Dep. Ex. (Musso) 321;

m. LA Activations Inc., d/b/a Direct Satellite Sales. (DISH terminated this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-127, Pl. Dep. Ex. (Werner) 279); (DX-129, Pl. Dep. Ex. (Van Emst) 359);

n. Cyberworks Software. (after investigating a consumer complaint, DISH sent a formal demand letter to this retailer to request information regarding the retailer's alleged improper telemarketing call to a consumer and proof by the retailer of its "compliance with all outbound telemarketing laws."). (DX-128, Pl. Dep. Ex. (Steele) 410); and

o. Defender Security. (DISH assessed a $5,000 penalty to this retailer after its investigation revealed the retailer had engaged in TSR/TCPA violations.). (DX-133, Pl. Dep. Ex. (Mills) 506.)

208. As set forth above, DISH sent letters to Independent Retailers who were alleged or thought to have violated telemarketing laws. (DX-147, Origer Dep. 86:3-11; DX-99, Pl. Dep. Ex. (Origer) 144.) DISH would also send cease-and-desist letter to Independent Retailers who did not appear to be in compliance with telemarketing laws. (*Id.* 116:3-24; DX-108, Pl. Dep. Ex. (Origer) 151.)

209. DISH made business decisions based on the results of the investigation – many times requiring education, levying fines, or terminating the Retailer. (DX-147, Origer Dep. 91:4-92:11; *see also* DX-109, Pl. Dep. Ex. (Origer) 147.) DISH's Retail Services department informed the Retailer of the disciplinary action to be taken. (DX-147, Origer Dep. 92:21-93:11.) DISH's Retailer Services department sent letters to the Retailer to inform the Retailer how the situation was resolved. (*Id.* 95:2-22; *see also* DX-109, Pl. Dep. Ex. (Origer) 147.)

210. If DISH was unable to identify the caller about whom a consumer complained, in many instances, DISH attempted a "sting" operation to determine whether the caller was an Independent Retailer so that DISH could take appropriate action. (DX-147, Origer Dep. 111:14-113:13; *see also* DX-110, Pl. Dep. Ex. (Werner) 424; *see also* DX-136, Pl. Dep. Ex. (Laslo) 172.)

SPECIFIC RETAILERS IDENTIFIED BY PLAINTIFFS

211. As of January 2011, approximately 7,500 Independent Retailers sold DISH's products or services. (d/e 85, Opinion of Court Ordering Parties to Jointly File an Administrative Complaint with the FCC, 2/4/2011, at 9.)

212. Throughout this action, Plaintiffs have identified only a handful of Independent Retailers, which Plaintiffs referred to as "authorized dealers" and "Marketing Dealers" in the SAC. (d/e 257, SAC, at ¶¶38, 40, 41-48).

213. DISH filed a Motion for Judgment on the Pleadings Dismissing Claims of Liability Based Upon the Conduct of Third Parties Not Identified in the Complaint as to Plaintiffs' then operative Complaint. (d/e 70, DISH Motion for Judgment on the Pleadings, 1/10/2011.) DISH filed that motion based on Plaintiffs' failure to specifically identify the third parties for whom Plaintiffs were attempting to hold DISH liable.

214. In an Opinion entered on January 28, 2011, Judge McCuskey held that Plaintiffs were not required at that particular stage in the action (January 2011) to identify each of those Retailers and permitted Plaintiffs to develop discoverable information about all current and former Independent Retailers. (d/e 85, Opinion of Court re: d/e 70, DISH Motion for Judgment on the Pleadings, 1/10/2011, at 6, 9-10.)

215. From January 28, 2011 through the close of fact discovery in 2013, Plaintiffs had nearly two-and-half years to produce discovery regarding these 7,500 Independent Retailers.

216. While Judge McCuskey decided that Plaintiffs were not required to allege additional facts in their Complaint regarding any unidentified Retailers (d/e 85, Opinion of Court re: d/e 70, DISH Motion for Judgment on the Pleadings, 1/10/2011 at 6), they were required to come forward with that evidence by the close of discovery.

217. The time for that discovery has now closed and at the end of almost four years of discovery, Plaintiffs identified only eleven Independent Retailers who they claim committed violations: (1) DISH TV Now; (2) Tenaya/Star Satellite; (3) Planet Earth Satellite ("Planet Earth"); (4) Vision Quest; (5) New Edge Satellite ("New Edge"); (6) JSR Enterprises ("JSR"); (7) Defender Direct ("Defender"); (8) National Satellite Systems ("NSS"); (9) Satellite Systems Network ("SSN"); (10) DISH Direct and (11) E-Management. (DX-195, Supplemental Expert Report of Dr. Erez Yoeli revised October 21, 2013, Appendix A; DX-196, Revised Report by Dr. Erez Yoeli dated December 14, 2012; DX-199, Revised Rebuttal Report by Dr. Erez Yoeli dated December 14, 2012; DX-198, Rebuttal Report by Dr. Erez Yoeli dated October 16, 2012; DX-197, Report of Dr. Erez Yoeli dated July 19, 2012; DX-194, Plaintiff's Supplemental Responses to DISH's Interrogatories dated December 14, 2012; DX-140, Plaintiff's Supplemental Responses to DISH's Third Set of Interrogatories dated April 6, 2012; DX-142, Plaintiff's Responses to DISH's Third Set of Interrogatories dated March 16, 2011.)

218. Plaintiffs attempt to prove that certain Independent Retailers placed illegal telemarketing calls by relying on the same flawed "massive computer programming" that Plaintiffs rely on with respect to DISH call records. (DX-194, DX-195, DX-196, DX-197, DX-198 and DX-199.)

219. There is no proof that the call records relating to Planet Earth, Vision Quest, New Edge, JSR, Defender, NSS, SSN, DISH Direct and E-Management contain: (i) exclusively interstate calls to residential consumers, as opposed to businesses or the government; (ii) calls to residential landlines, as opposed to wireless numbers; (iii) calls related to DISH's products or services, as opposed to some other entity's products or services; (iv) calls relating to telemarketing; (v) calls without an EBR or, not in response to an inquiry; (vi) calls to the person

(or household) that put their number on the NDNCR on the Independent Retailers' respective internal do not call lists.

220. There is no proof that the call records relating to Dish TV Now and Tenaya/Star Satellite contain: (i) exclusively interstate calls to residential consumers, as opposed to businesses or the government; (ii) calls to residential landlines, as opposed to wireless numbers; or (iii) calls without an EBR or not in response to an inquiry.

221. Nicholas Mastrocinque, who was an Investigator at FTC working on the FTC's investigation of DISH and the Independent Retailers, testified that he and his colleagues placed calls to consumers whose phone number appeared in the call records produced by Independent Retailers. (DX-162, Mastrocinque Dep. 150:24 – 161:14.) According to Mr. Mastrocinque, he and his FTC colleagues randomly selected from multiple sets of Independent Retailer call records a small sample of consumers to call to conduct an interview. (*Id.* 151:21- 153:2.) Mr. Matrocinque testified that in response to his and his colleagues' questions, some consumers indicated that they had an EBR with the calling party, (*Id.* 152:22-153:13), some consumers may have indicated that the calls that they received were not telemarketing calls (*Id.* 156:17-157:8), and some consumers would indicate that a product other than a DISH product or service was offered (*Id.* 158:17-159:6.) Mr. Mastrocinque testified that although consumers stated, with respect to specific calls that they received, that they had an EBR or that a product other than a DISH product was offered, the FTC did nothing to remove such calls from the violations claimed in this lawsuit. (*Id.* 160:21-161:14.)

DISH TV NOW

222. In this lawsuit, the FTC claims TSR violations arising from calls allegedly placed on behalf of DISH TV Now, a former Independent Retailer, from June 1, 2004 to August 10, 2004. (DX-198; DX-195.) The FTC claims that all of the violation calls allegedly related to

DISH TV Now were placed by Guardian Communications, a third party company that facilitated the provision of pre-recorded telephone messages to consumers. (DX-198; DX-195.)

223. State Plaintiffs do not seek any relief based on calls allegedly made by or on behalf of DISH TV Now. (DX-195, Supplemental Expert Report of Dr. Erez Yoeli revised October 21, 2013, Appendix A.)

224. Guardian Communications was not a telemarketer. (DX-173, Baker Dep. 13:21-23.)

225. Guardian was never an Independent Retailer, and never had any relationship whatsoever with DISH. (DX-173, Deposition Transcript of Kevin Baker, May 14, 2012 ("Baker Dep.") 13:21-23; 55:15-17.)

226. DISH never contracted with Guardian Communications to place telemarketing calls on behalf of DISH. (DX-173, Baker Dep. 13:22-23; 55:8-17.)

227. DISH TV Now became an Independent Retailer in November 2003. (DX-156, Mills Dep. 19:18-20.)

228. The principal of DISH TV Now was an individual named David Hagen. (DX-208, Mills Decl. ¶27.)

229. Mr. Hagen was also the principal of a company named "Prime TV," which sold DirecTV products and services. (DX-156, Mills Dep. 19:18-21:16; 29:20-30:4; DX-149, Deposition Transcript of David Hagen, January 12, 2012, ("Hagen Dep.") 92:16–94:9.)

230. Prime TV had a long term relationship with DirecTV at the time DISH TV Now became an Independent Retailer. (DX-169, Deposition Transcript of Amir Ahmed, April 11, 2012 ("Ahmed Dep.") 47:14-48:3; DX-149, Hagen Dep. 11:18-21.)

231. DISH TV Now signed a Retailer Agreement.

232. That Retailer Agreement confirmed the fact that DISH TV Now was an independent contractor of DISH. It also required DISH TV Now to agree that it would comply with all "applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto," including the TSR and TCPA.

233. DISH had no knowledge that DISH TV Now made outbound telemarketing calls or used pre-recorded messages to promote DISH's products and services. (DX-208, Mills Dep. 35:7-37:21; DX-149, Hagen Dep. 34:15-36:5; DX-169, Ahmed Dep. 47:18-52:9.)

234. DISH did not know that DISH TV Now used Guardian to place pre-recorded messages. (DX-169, Ahmed Dep. 47:18-52:9.)

235. DISH TV Now was an independent business. (DX-149, Hagen Dep. 131:10-135:2; 135:22-136:22.)

236. Mr. Hagen testified on behalf of DISH TV Now as follows:

> Q. Okay, Did DISH ever supply to you lists of consumers to contact?
>
> A. No.
>
> Q. Did you ever advise DISH of the consumers that you were going to contact to attempt to sell DISH's products and services?
>
> A. No.
>
> Q. Would DISH know the origin of each referral that – or strike that. Would DISH know the referral source of new orders placed by DISH TV Now?
>
> A. I assume you mean, would they know the advertising source, the – the – where it came from?
>
> Q. Yes.
>
> A. And the answer is, they wanted to, but, no, they didn't.

> Q. So that was something – so that was the information that they asked for you to provide?
>
> A. Yeah. But I was disinclined because I considered that proprietary.
>
> Q. And in some respect was DISH a competitor of yours with respect to –
>
> A. Absolutely. Absolutely. In fact, they were our largest – maybe they were our – in my mind, they were our only competitor. Because they were outselling customers four or five times larger in resources than we were.

(DX-149, Hagen Dep. 134:1 – 135:2.)

237. DISH terminated DISH TV Now as a retailer more than six years ago on January 20, 2006. (DX-207, Notice of Termination letter.)

238. Plaintiffs performed a small sample analysis of DISH TV Now's call records to determine whether those call records indicate calls made to individual consumer landlines, and not to business numbers, wireless numbers, or numbers that were unable to be classified as a consumer landline, business number or wireless number. (DX-137, Declaration of Rick Stauffer dated October 10, 2012.) Plaintiffs could only conclude that a portion of the calls were made to individual consumer landlines, while a significant percentage were not.

239. There is no evidence that the calls allegedly made by DISH TV Now were limited solely to calls to a consumer, rather than a business or a government phone number.

240. There is no evidence that DISH controlled the manner or means in which DISH TV Now marketed or sold DISH products or services.

TENAYA/STAR SATELLITE

241. In this lawsuit, Plaintiffs also claim violations arising from calls allegedly placed on behalf of former Independent Retailer Tenaya/Star Satellite from July 30, 2005 to November

26, 2005. (DX-198; DX-195.) The FTC claims that all of the violation calls related to Tenaya/Star Satellite were placed by Guardian. (DX-198; DX-195.)

242. Tenaya was founded in 2002 by Walter Myers. (DX-168, Deposition Transcript of Walter Eric Myers, February 24, 2012 ("Myers Dep.") 17:13-18:13.)

243. After Mr. Myers formed Tenaya, he contacted DISH and advised that he wanted to sell DISH services door-to-door. (DX-168, Myers Dep. 20:15-21:16; 33:24-34:8.) Mr. Myers did not tell DISH anything about the possibility of using telemarketing. (*Id.* 21:17-19.)

244. Tenaya entered into a Retailer Agreement with DISH, and in 2002 and 2003, sold DISH services primarily through door-to-door marketing. In 2003 and 2004, Star Satellite, like Tenaya, primarily used door-to-door marketing to sell DISH services. (DX-135, Tenaya Account Summary; DX-168, Myers Dep. 18:19-20; 20:15-21; 30:9-25.)

245. In February 2003, Walter Myers's brother, Dan Myers, formed a new company called Star Satellite. Several months later, in May 2003, Star Satellite entered into a "Retailer Agreement" with DISH. (Plaintiffs' Undisputed Material Facts ("Pl. UF.") Exhibit 200.)

246. Walter Myers thereafter became a principal of Star Satellite, and conducted all sales activities of DISH services through Star Satellite, and not through Tenaya. (DX-168, Myers Dep. 38:10-21.)

247. The Tenaya and Star Satellite Retailer Agreements provide, among other things, that Tenaya/Star Satellite would "promote and solicit orders for" DISH programming services, subject to the terms of the Agreement. (Pl. UF., Exhibit 200, § 3.1.)

248. Pursuant to the terms of the Retailer Agreements, "[t]he relationship of the parties [*i.e.*, Tenaya/Star Satellite and DISH] is that of independent contractors. [Tenaya/Star Satellite] shall conduct its business as an independent contractor, and all persons employed in the conduct

of such business shall be [Tenaya/Star Satellite's] employees only, and not employees or agents of [DISH] or its Affiliates." (Pl. UF., Exhibit 200, § 11.)

249. The Retailer Agreements required Tenaya/Star Satellite to "prominently state its business name, address and phone number in all communications with the public," and was prohibited from "hold[ing] itself out to the public or represent that it is an agent, employee or Affiliate" of DISH." (Pl. UF., Exhibit 200, § 11.)

250. The Retailer Agreements also required that Tenaya/Star Satellite "shall comply with all applicable governmental, statutes, laws, rules, regulations, … now enacted or hereafter promulgated, in force during the Term …" (Pl. UF., Exhibit 200, § 9.1; *see also* DX-168, Myers Dep. 175:23-176:20.)

251. Star Satellite/Tenaya was an independent business. (DX-168, Myers Dep. 176:21-181:17.)

252. As an Independent Retailer, Tenaya/Star Satellite had extensive autonomy. (DX-168, Myers Dep. 177:17-21.) It was free to market the goods and services of any other company, including DISH's competitors. (*Id.* 174:9-13.) It was also up to Tenaya/Star Satellite, and not DISH, to decide the details of when and how Tenaya/Star Satellite marketed DISH's products and services, regardless of whether such marketing involved door-to-door sales, or newspaper, radio or television advertisements. (*Id.* 174:14-175:22.)

253. Tenaya/Star Satellite had the sole discretion to decide which mode of advertising to use, so long as it was legal; DISH did not permit Tenaya Star Satellite to engage in any illegal marketing activities. (DX-168, Myers Dep. 175:23-176:20.)

254. DISH also had no involvement in how Tenaya/Star Satellite operated its day-to-day affairs, and did not direct or control Tenaya/Star Satellite's business. (DX-168, Myers Dep. 178:4-179:16.)

255. When Tenaya/Star Satellite's salespeople marketed DISH's products and services, they would always identify themselves as individuals who worked for Star Satellite, and not for DISH. (DX-168, Myers Dep. 179:17-180:17.)

256. Tenaya/Star Satellite also sold DirecTV's products and services. (DX-168, Myers Dep. 53:11-14.)

257. In the middle of 2004, however, and unbeknownst to DISH, Tenaya/Star Satellite began working with Guardian. (DX-168, Myers Dep. 76:3-7.)

258. Although Star Satellite advised DISH that it was conducting "some phone sales" (not specifying whether they were inbound or outbound), Tenaya/Star Satellite never disclosed to DISH "any of the details" of its telemarketing efforts, or that it had engaged "Guardian to do … pre-recorded messages" or even that it was working with Guardian. (DX-168, Myers Dep. 102:8-104:17; 117:22-118:5; 182:12-183:18.)

259. DISH advised Tenaya/Star Satellite to ensure that it was complying with all laws, and specifically to make sure that Tenaya/Star Satellite conveyed certain disclaimers to consumers, and to scrub against the Do Not Call List, which Tenaya/Star Satellite confirmed to DISH that it was doing. (DX-168, Myers Dep. 121:12-123:15.)

260. Tenaya/Star Satellite failed to disclose to DISH that it was working with Guardian and affirmatively concealed from DISH that it utilized pre-recorded message calling and auto-dialing. It was "a well-known fact" that DISH could terminate a Retailer relationship if it learned that a Retailer used auto dialing. (DX-173, Baker Dep. 177:7-15.)

261. On at least two occasions when DISH representatives were scheduled to visit Tenaya/Star Satellite's offices, Walter Myers contacted Guardian to advise that it was temporarily ceasing its telemarketing activities because "DISH Network is coming into our office and we can't let them know we're auto dialing." (DX-173, Baker Dep. 71:23-72:5; 177:23-178:4.)

262. Plaintiffs performed a small sample analysis of Tenaya/Star Satellite's call records to determine whether those call records indicate calls made to individual consumer landlines, as opposed to calls to business numbers, wireless numbers, or numbers that were unable to be classified as a consumer landline, business number or wireless number. (DX-137, Declaration of Rick Stauffer dated October 10, 2012.) Plaintiffs concluded that only a minority of the call records reflected calls made to individual consumer landlines.

263. There is no evidence that the call records related to Tenaya/Star Satellite are comprised of only calls to residential consumers.

264. There is no evidence that DISH controlled the manner or means in which Tenaya/Star Satellite marketed or sold DISH products or services.

265. DISH terminated Tenaya/Star Satellite's access to DISH's order entry tool on January 20, 2006.

VISION QUEST

266. Plaintiffs alleged in the SAC that Vision Quest, a Michigan-based company, is a "Marketing Dealer" that committed TSR, TCPA and/or other state law violations for which DISH should be held responsible. (d/e 257 ¶40.)

267. In February 2006, the FTC served a CID on McLeod Telecom ("McLeod"), a telecommunications provider, seeking account information and "local and long distance

telephone connection records" "relating to the customer/subscriber Vision Quest any other telephone number(s) or account(s) held by the same customer/subscriber." (DX-203.)

268. In response to the CID, McLeod produced 1,419,998 call records for calls related to accounts held by Vision Quest during the time period from July 1, 2005 to March 31, 2006. (DX-194, Plaintiff's Supplemental Responses to DISH's Interrogatories dated December 14, 2012, Exhibit A; DX-171, Deposition Transcript of Brian Cavett, February 29, 2012 ("Cavett Dep.") 100:7-8; 110:16-20; 111:21-23; 177:3-6.)

269. McLeod was not deposed in this action.

270. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of Vision Quest telecommunications records. (DX-194.)

271. The calls allegedly placed by Vision Quest, however, are not addressed in Plaintiffs' expert report and Plaintiffs, therefore, have abandoned their claims that DISH should be held liable for such calls. (DX-195.)

272. Vision Quest began selling DISH's products and services in 2001, and had a Retailer Agreement with a company known as CVS Systems, which was a distributor of DISH's products. (DX-171, Cavett Dep. 12:21 - 13:20.)

273. Vision Quest's principal was Bryan Cavett. (DX-171, Cavett Dep. 9:4-6.)

274. Mr. Cavett testified that he had limited contact with DISH, but had regular contact with CVS. (DX-171, Cavett Dep. 72:5-6 ("Like I said we really didn't have contact with DISH Network."); *Id.* 80:17-21 (Q. "Did DISH Network offer any training for your sales reps?" A.

"Well, again, everything was through CVS. They didn't really have anything you know for us, we didn't have much contact with them.").)

275. Vision Quest was an independent business. (DX-171, Cavett Dep. 175:13-176:19.)

276. DISH had no involvement in Vision Quest's business, how it operated its day-to-day affairs, and did not direct or control Vision Quest's business. (DX-171, Cavett Dep. 175:13-176:8.).

277. Mr. Cavett further testified that DISH exercised no control over Vision Quest's business, advertising or sales efforts:

> I mean when I, when I did telemarketing I did telemarketing. [DISH is] not in control of me telemarketing. They don't have control over any advertising that I do whether it's mail, whether it's door-to-door, whether it's telemarketing, whether it's radio, whether it's TV. . . . [T]hey don't have no control over what I do for marketing at all, they have none. It's, I'm a retailer I'm a separate person from them what I choose to do is what I choose to do.

(DX-171, Cavett Dep. 129:1-13.)

278. DISH did not tell Vision Quest how to market, whether by telemarketing, mail, door-to-door, radio or television, the products and services it sold. (DX-171, Cavett Dep. 129:3-6; 150:4-10; 173:21-22; 175:13-176:8; 187:13-188:4.)

279. When the FTC raised to Mr. Cavett that it believed DISH should be held responsible for Vision Quest's alleged actions, Mr. Cavett responded that:

> I let them know that I don't really understand you know how they can feel that. I'm a complete independent retailer I make my own decisions. I'm no different than like Sears who buys a product from some other place and how they choose to advertise it is up to them. I'm literally the same kind of guy. I'm buying a product that I want to sell and they you know in no manner told that I got to go in and do this.

(DX-171, Cavett Dep. 187:19-188:3.)

280. Mr. Cavett testified that Vision Quest did commercial (non-residential) sales in addition to residential sales. (DX-171, Cavett Dep. 41:7-17.) Commercial sales included sales to "mom and pops . . . to large manufacturing to . . . chains like Burger King, bars, doctors, lawyers, hospitals." (*Id.* 143:13-17). Mr. Cavett testified that Vision Quest did a great number of commercial sales between 2004 and 2008, including through the use of telemarketing. (*Id.* 143:18-144:8.)

281. Vision Quest made calls to consumers and businesses. (DX-171, Cavett Dep. 144:11-17; 168:25-169:11; 177:25-178:3)

282. Mr. Cavett testified that he believed that 90 percent of the telemarketing calls made by Vision Quest were in Michigan to Michigan recipients. (DX-171, Cavett Dep. 147:4-7.)

283. Mr. Cavett further testified at his deposition that Vision Quest made both telemarketing and non-telemarketing calls, and that it is not possible from Vision Quest's phone records to distinguish between calls made for telemarketing calls as opposed to calls made for other purposes. (DX-171, Cavett Dep. 177:17-178:2.)

284. He also testified that Vision Quest's phone records reflected outbound calls to Vision Quest's own customers to confirm an installation appointment, as well as follow-up calls with Vision Quest's customers to "see how the installation went, kind of a survey basically to ask how [its] technician was." (DX-171, Cavett Dep. 178:11-179:9.)

285. Mr. Cavett also testified that Vision Quest received service calls from its own customers, and placed outbound calls to discuss service issues and in response to customer's messages to set up a service appointment. (DX-171, Cavett Dep. 179:9-13 ("You know other times the call could be from if they need service and they, you know we pick it up on the voice

mail or whatever. It comes in late at night then we return calls there because we didn't have a 24 hour service either.").)

286. Many outbound calls made by Vision Quest were in response to a customer's inquiry. (DX-171, Cavett Dep. 179:19-180:6.)

NEW EDGE SATELLITE

287. Plaintiffs alleged in the SAC that New Edge Satellite ("New Edge"), another Michigan-based company, is a "Marketing Dealer" that committed TSR, TCPA and/or other state law violations for which DISH should be held responsible. (d/e 257 ¶40.)

288. In February 2006, the FTC served a CID on LDMI/Tak America ("LDMI"), a telecommunications provider, seeking account information and "local and long distance telephone connection records" "relating to the customer/subscriber New Edge Satellite any other telephone number(s) or account(s) held by the same customer/subscriber." (DX-204.)

289. In response to the CID, LDMI produced approximately 1 million call records for calls related to accounts held by New Edge Satellite during the time period from February 2005 to September 2006. (DX-194.)

290. LDMI was not deposed in this action.

291. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of New Edge's telecommunications records. (DX-194.)

292. The calls allegedly placed by New Edge are not addressed in Plaintiffs' expert report and, therefore Plaintiffs have abandoned their claims that DISH could be held liable for such calls. (DX-195.)

293. New Edge Satellite began selling DISH products and services sometime in 2003 after setting up an account with CVS, a distributor that sold DISH products. (DX-172, Deposition Transcript of Derek LaVictor, February 28, 2012 (" LaVictor Dep.") 17:16-18 ("No I did not have any contract with DISH Network. And when I set up the account I contracted CVS not DISH Network."); *Id.* 24:20-23.)

294. New Edge was an independent business. (DX-172, LaVictor Dep. 151:5-157:12.)

295. There is no evidence that DISH controlled the manner or means in which New Edge marketed or sold DISH products or services. (DX-172, LaVictor Dep. 151:8-152:10; 154:8-15.)

296. New Edge Satellite also sold products and services of companies other than DISH. (DX-172, LaVictor Dep. 151:1-7.)

297. DISH had no involvement in how New Edge operated its day-to-day affairs, and did not direct or control New Edge's business. (DX-172, LaVictor Dep. 154:16-157:8.)

298. Derek LaVictor, a principal of New Edge, testified that before his deposition, he had several conversations with a Department of Justice ("DOJ") lawyer who told him that Plaintiffs were trying to prove that a link existed between New Edge and DISH. Mr. LaVictor told the DOJ lawyer that there was no link between New Edge and DISH and that New Edge "was more linked to CVS than anything." (DX-172, LaVictor Dep. 143:3-144:6.)

299. New Edge made all of its own decisions regarding whether and how to market the products it sold, including DISH's products and services. (DX-172, LaVictor Dep. 153:8-157:12.)

300. When New Edge's employees called customers in an attempt to sell DISH services, they identified themselves as "New Edge Satellite." (DX-172, LaVictor Dep. 156:18-23.)

301. New Edge had frequent interactions with its own customers. Mr. LaVictor testified that:

> [p]eople are always calling. We had you know one person a lot of times dedicated half the day just taking care of service issues and people generally not understanding the system and trying to rectify problems.

(DX-172, LaVictor Dep. 161:25-162:6.) Mr. LaVictor testified that when customers would call in with service issues, New Edge would "[c]all them back and . . . schedule with the service tech, schedule a service call and we'd go back out and fix it." (DX-172, LaVictor Dep. 162:19-163:13.)

302. New Edge's phone records included calls that were made to respond to customer service inquiries. (DX-172, LaVictor Dep. 159:12-24.)

303. Mr. LaVictor testified that New Edge's telephone records also included other types of non-telemarketing calls, such as calls to confirm installation or to determine whether installation was successful, as well as personal calls made by New Edge employees. (DX-172, LaVictor Dep. 158:22 -159:24.)

304. The majority of outbound calls made by New Edge were made from Michigan to Michigan residents. (DX-172, LaVictor Dep. 149:4-9.)

305. Mr. LaVictor testified that DISH never provided New Edge with a list of customers to whom it should attempt to sell DISH products:

> Q. Did DISH ever supply to New Edge Satellite the names, telephone numbers or addresses of people that New Edge Satellite should attempt to make sales to?

A. Attempt to make sales to, no.

Q. Did CVS ever provide dial lists or lead lists to New Edge Satellite?

A. No.

* * *

Q. Did DISH Network know who CVS was calling or I'm sorry did DISH Network know who New Edge Satellite was calling for marketing purposes?

A. No.

(DX-172, LaVictor Dep. 153:17-23; 154:4-7.)

PLANET EARTH SATELLITE

306. Plaintiffs alleged in the SAC that Planet Earth Satellite (also known as Teichert Marketing) ("Planet Earth"), an Arizona company, is a "Marketing Dealer" that committed TSR, TCPA and/or other state law violations for which DISH should be held responsible. (d/e 257 ¶40.)

307. In February 2006, the FTC served a CID on Electric Lightwave and Integra Telecom, Inc, two telecommunications providers purportedly used by Planet Earth, seeking "local and long distance telephone connection records" for Planet Earth. (DX-202.)

308. In response to the CID, those providers collectively produced over 1.5 million call records for the time period spanning from November 30, 2004 to December 29, 2005, and from January 1, 2005 to January 31, 2007. (DX-194.)

309. Neither Electric Lightwave nor Integra Telecom was deposed in this action.

310. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of Planet Earth's telecommunications records.

311. The calls allegedly placed by Planet Earth, however, are not addressed in Plaintiffs' expert report and thus there is no evidence that DISH can or should be held liable for such calls. (DX-195.)

312. Planet Earth was an independent business. (DX-161, Deposition Transcript of Thomas Teichert, February 23, 2012 ("Teichert Dep.") 173:1-178:13.)

313. Planet Earth's principal is Tom Teichert. (DX-206.)

314. Planet Earth also sold DirecTV's, Cox Cable's and Qwest's products and services. (DX-161, Teichert Dep. 45:18-20.)

315. DISH did not control the manner or means in which Planet Earth marketed or sold DISH products or services. (DX-161, Teichert Dep. 173:1-175:10.)

316. DISH had no involvement in how Planet Earth operated its day-to-day affairs, and did not direct or control Planet Earth's business. (DX-161, Teichert Dep. 175:12-178:13.)

317. DISH never approved or reviewed the list of leads that Planet Earth intended to call, nor did DISH have any knowledge of who Plaintiff Earth called. (DX-161, Teichert Dep. 177:14- 20.)

318. Mr. Teichert testified that the records produced by Planet Earth's telecommunications providers would include calls made for non-telemarketing purposes, as well as calls to consumers who consented to be called. (DX-161, Teichert Dep. 187:9-12.)

319. In particular, Mr. Teichert testified that Planet Earth's telephone records would include telephone calls to follow up with customers that sales representatives met during door-to-door sale activities, where such customers consented to be called. (DX-161, Teichert Dep. 184:10-185:18.)

320. Mr. Teichert also testified that Planet Earth would make "2-2-2 calls" for both Planet Earth's DirecTV and DISH customers. (DX-161, Teichert Dep. 185:19-186:16.) Mr. Teichert explained that "2-2-2 calls" are customer service calls to existing customers, and are common in the industry and "that's what you do to keep your customers." (*Id*. 185:19-186:16.)

321. Mr. Teichert testified that Planet Earth would regularly return the calls of customers who had service questions, such as "question[s] on how their remote works." (DX-161, Teichert Dep. 186:20-187:4.) These types of calls were also included in Planet Earth's telecommunications records. (*Id.*)

322. Mr. Teichert testified that about half of the calls made by Planet Earth were made from Arizona to Arizona consumers. (DX-161, Teichert Dep. 188:10-189:1.)

323. Mr. Teichert testified that he did commercial sales for both DISH and DirecTV, and that Planet Earth made calls to business customers and prospects. (DX-161, Teichert Dep. 189:2-190:1.) Mr. Teichert testified that records of such calls were also included within Planet Earth's telecommunications call records. (*Id.*)

324. Mr. Teichert also testified that Planet Earth made calls to DirecTV customers who had disconnected service in an attempt to get those customers to reconnect service, and that records of those calls would be included in the phone records produced to the FTC by Planet Earth's telecommunications' providers. (DX-161, Teichert Dep. 190:2-191:11.)

325. Mr. Teichert testified that multiple persons who are not associated with any Independent Retailer have contacted him in an attempt to sell him sales to be put through Planet Earth. (DX-161, Teichert Dep. 195:10-198:25.) Mr. Teichert believes that these third parties do outbound dialing to United States consumers from overseas in an effort to sell DISH products

and services, even though they are not authorized to do so, and then attempt to sell those "sales" or leads to Independent Retailers. (*See id*.)

326. Mr. Teichert does not believe that DISH should be held responsible for any allegedly illegal telemarketing calls made by Planet Earth because Planet Earth is its own company that operated separately from DISH. (DX-161, Teichert Dep. 222:11-223:5.)

JSR ENTERPRISES

327. In this action, Plaintiffs claim violations arising from calls allegedly placed by JSR from August 4, 2006 to March 31, 2007. (DX-194.)

328. In March 2007, the FTC served a Civil Investigative Demand on Airespring, Inc., a telecommunications provider, seeking account information and "local and long distance telephone connection records" associated with Toll-Free-Number 866-895-5420, and "any other telephone number(s) or account(s) held by the same customer(s) or subscriber(s)." (DX-200.)

329. According to Plaintiffs' discovery responses, Airespring, Inc. served more than 30 million records for calls related to accounts held by JSR during the time period from August 4, 2006 to March 31, 2007. (DX-194.)

330. Neither Airespring, Inc. nor JSR was deposed in this action.

331. There is no evidence that each of the JSR's accounts with Airespring, Inc. was used for a telemarketing purpose, or for the purpose of selling DISH products and/or services.

332. There is no evidence that all of the 30 million call records produced by Airespring, Inc. relate to telemarketing calls placed by JSR in an attempt to sell a DISH product or service.

333. There is no evidence that the 30 million call records produced by Airespring, Inc. included interstate calls, or calls made to residential consumers rather than to businesses or the government.

334. The FTC claims that DISH should be held liable for more than 7 million calls allegedly made by JSR that the FTC claims are violations of the TSR provisions governing calls to persons who place their phone numbers on the NDNCR.

335.

(DX-211, Deposition Transcript of Dr. Erez Yoeli, December 16, 2013 ("Yoeli Dep.") 204:19-205:7; DX-195.)

336.

. (DX-211, Yoeli Dep. 215:5-216:17.) State Plaintiffs, however, have no evidence of which calls (if any) were placed to residents of their respective states.

337. (*See e.g.*, DX-138, Pl. Dep. Ex. (Myers) 14.)

338. JSR signed a Retailer Agreement when it became an Independent Retailer. (*See e.g.*, DX-138.)

339. That Retailer Agreement confirmed the fact that JSR was an independent contractor of DISH. It also required JSR to agree that it would comply with all "applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders

(whether federal, state, municipal, or otherwise) and all amendments thereto," including the TSR/TCPA.

340. DISH terminated JSR as a retailer almost seven years ago on or about February 13, 2007. The termination was a result of an investigation conducted by DISH, which revealed that JSR violated telemarketing laws. (DX-141, Notice of Termination letter.)

341. Notably, of the approximately 7 million allegedly illegal calls that Plaintiffs identify, 4,000,200 of those calls occurred during the 45 day period ***after*** DISH terminated JSR as an Independent Retailer on February 13, 2007. (DX-195, Appendix A.)

342.

. (DX-137, Declaration of Rick Stauffer dated October 10, 2012 ¶10(f).)

343. In addition, there is no evidence that JSR's calls were made to individual consumer landlines that properly belong on the NDNCR, as opposed to individual consumer landlines that were disconnected after a consumer placed the number on the NDNCR, but which number was later reassigned.

344. There is no evidence that DISH controlled the manner or means in which JSR marketed or sold DISH products or services.

NATIONAL SATELLITE SYSTEMS

345. In this lawsuit, the FTC's claim that DISH is liable for internal list TSR violations arising from calls allegedly placed by NSS from December 2, 2008 to June 21, 2010. (DX-195.)

346.

. (DX-211, Yoeli Dep. 212:25-213:19.)

347. State Plaintiffs do not seek to recover for any call placed by NSS. (DX-195.)

348. NSS became an Independent Retailer in or about 2001 or 2002. (DX-151, Levi Dep. 21:5-12.)

349. The principal of NSS was an individual named Kobi Levi. (Mills Decl. ¶39.)

350. NSS was a party to a Retailer Agreement. (Pl. UF., ¶370, Ex. 274 at DISH-Paper-007772-007811.)

351. That Retailer Agreement confirmed the fact that NSS was an independent contractor of DISH. (Pl. UF., ¶370, Ex. 274 at DISH-Paper-007772.) It also required NSS to agree that it would comply with all "applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders (whether federal, state, municipal, or otherwise) and all amendments thereto," including the TSR/TCPA. (Pl. UF., ¶370, Ex. 274 at DISH-Paper-007789.)

352. NSS is an independent business. (DX-151, Deposition Transcript of Kobi Levi, January 11, 2012 ("Levi Dep.") 223:9-227:21.)

353. DISH did not provide any lead lists to NSS, or otherwise supply to NSS the names and contact information of persons who NSS should contact to sell DISH's products and services. Nathaniel William Jones, a former employee of DISH who later became employed by NSS, testified as follows:

> Q Did you ever provide dial lists or lead lists to retailers for them to contact to attempt to sell DISH products or services?

A No.

Q Are you aware of anyone at DISH that provided retailers with those types of lists for the purpose of contacting consumers to purchase DISH products or services?

A No.

(DX-107, Deposition Transcript of Nathaniel William Jones, January 10, 2012 ("Jones Dep.") 208:25-209:8.)

354. Mr. Levi testified on behalf of NSS, as follows:

Q: Did DISH supply to NSS the names, addresses, or other contact information of persons who NSS should contact to sell DISH products and services?

A: Not that I remember.

(DX-151, Levi Dep. 225:4-11.)

355. There is no evidence that any of NSS's call records demonstrate that they consist of calls made solely to individual consumer landlines, and not to wireless telephone numbers, business or government numbers, pagers, maritime radios, and other devices.

356. There is no evidence that any calls allegedly made by NSS were limited solely to telemarketing calls to a residential consumer.

357. There is no evidence that any calls allegedly made by NSS were limited solely to telemarketing calls to a consumer for the purpose of selling a DISH product or service.

358. There is no evidence that DISH controlled the manner or means in which NSS marketed or sold DISH products or services.

SATELLITE SYSTEMS NETWORK

359. In this lawsuit, Plaintiffs claim that DISH should be liable for calls placed by SSN. (DX-195, Ex. A.)

360. SSN became an Independent Retailer on or around March 20, 2001. (Pl. UF., ¶228, Ex. 179.)

361. SSN signed a Retailer Agreement when it became a DISH retailer. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676-014695.)

362. That Retailer Agreement confirmed the fact that SSN was an independent contractor of DISH. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676.) It also required SSN to agree that it would comply with all "applicable federal, state, and local laws, rules and regulations, and all amendments thereto," including the TSR/TCPA. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014686.)

363. SSN was not deposed in this action.

364. There is no evidence that any of SSN's call records reflect were calls made solely to individual consumer landlines, and not to wireless telephone numbers, business or government numbers, pagers, maritime radios, and other devices.

365. There is no evidence that any of SSN's call records were calls made solely to individual consumer landlines that properly belong on the NDNCR as opposed to individual consumer landlines that were disconnected after a consumer placed the number on the NDNCR, but which number was later reassigned.

366. There is no evidence that any calls allegedly made by SSN on behalf of DISH were limited solely to telemarketing calls to a consumer.

367. None of SSN's call records establish any of those calls were placed by a SSN for the purpose of selling DISH's products or services, rather than some other product.

368. There is no evidence that DISH controlled the manner or means in which SSN marketed or sold DISH products or services.

DISH DIRECT

369. In 2006, the FTC served a CID on Qwest Communications Int'l, Inc. ("Qwest"), a telecommunications provider, seeking account information and "local and long distance telephone connection records" relating to Dish Direct. (DX-205.)

370. In response to the CID, Qwest produced approximately 33,187 call records for calls related to accounts held by Dish Direct during the time period from March 12, 2004 to February 11, 2006. (DX-194, Exhibit A.)

371. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of Dish Direct's telecommunications records. (DX-194, Exhibit A.)

372. Neither Qwest nor Dish Direct was deposed in this action.

373. The calls allegedly placed by Dish Direct are not addressed in Plaintiffs' expert report and, therefore Plaintiffs have abandoned their claims that DISH should be held liable for such calls. (DX-195, Appendix A.)

374. There is no evidence whatsoever about what the telecommunications records produced by Qwest contain.

E-MANAGEMENT

375. In or about late 2007, the FTC served a CID on ITC Deltacom, a telecommunications provider, seeking account information and "local and long distance telephone connection records" relating to "the customer(s) or subscriber(s) associated with telephone number(s) 561-314-2596." (DX-201.)

376. In response to the CID, ITC Deltacom produced over 4 million call records for calls related to accounts held by E-Management during the time period from January 2007 to November 2007. (DX-194, Exhibit A.)

377. In response to DISH's interrogatory request that Plaintiffs identify all violations claimed, Plaintiffs produced a chart reflecting the "raw hits" analysis performed by Interimage, which chart included call records and the "raw hits" analysis results of E-Management's telecommunications records. (DX-194, Exhibit A.)

378. Neither ITC Deltacom nor E-Management was deposed in this action.

379. The calls allegedly placed by E-Management are not addressed in Plaintiffs' expert report and, therefore Plaintiffs have abandoned their claims that DISH should be held liable for such calls. (DX195, Appendix A.)

380. There is no evidence whatsoever about what the telecommunications records produced by ITC Deltacom contain.

DEFENDER

381. In this action, Plaintiffs claim that DISH should be liable for calls placed by Defender. (DX-195, Ex. A.)

382. Defender signed a Retailer Agreement when it became a DISH retailer. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676-014695.)

383. That Retailer Agreement confirmed the fact that Defender was an independent contractor of DISH. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014676.) It also required Defender to agree that it would comply with all "applicable federal, state, and local laws, rules and regulations, and all amendments thereto," including the TSR/TCPA. (Pl. UF., ¶229, Ex. 180 at DISH-Paper-014686.)

384. In addition to selling DISH products and services, Defender sold multiple other product lines. Defender was the largest promoter of ADT home security products. (DX-169, Ahmed Dep. 116:22-25.)

385. There is no evidence that any of Defender's call records were calls made solely to individual consumer landlines that properly belong on the NDNCR as opposed to individual consumer landlines that were disconnected after a consumer placed the number on the NDNCR, but which number was later reassigned.

386. None of Defender's call records establish any of those calls were placed by a Defender for the purpose of selling DISH's products or services.

387. There is no evidence that DISH controlled the manner or means in which Defender marketed or sold DISH products or services.

AREA CODES DO NOT PROVIDE ANY PROOF OF GEOGRAPHIC LOCATION

388. The FCC has itself acknowledged that "[t]he relationship between numbers and geography—taken for granted when numbers were first assigned to fixed wireline telephones—is evolving as consumers turn increasingly to mobile and nomadic services." *In re: Numbering Policies for Modern Communications, Notice of Proposed Rulemaking, Order and Notice of Inquiry*, 28 FCC Rcd 5842, 5844 (2013) ("Numbering Policies for Modern Communications").

389. For example, Plaintiff North Carolina produced a "Do Not Call Complaint" dated August 8, 2008 for . (DX-215). Mr. , who identified himself as a resident of Winston Salem, North Carolina, alleged that he received calls to his phone number with a California area code. While none of the call records at issue in this case actually reflect any of the calls complained about by Mr. , if they had, the purported calls would have been mistakenly counted as violations recoverable by Plaintiff California, rather than Plaintiff North Carolina, when Plaintiff California has no standing to pursue relief on behalf of another state

resident. Similarly, Plaintiff Ohio produced a consumer complaint dated January 8, 2009 for Richard Smith. (DX-216.) Mr. , who identified himself as a resident of Columbus, Ohio, indicated that he is the subscriber of two phone numbers that bear a Pennsylvania area code. Again, if calls to Mr. phone numbers appeared in the call records in this case, State Plaintiffs would have counted such call as one to a Pennsylvania resident. (DX-216)

390. Three primary technological developments have broken the connection between numbers and geography. *See, e.g., Teltech Sys., Inc. v. Barbour*, 866 F. Supp. 2d 571, 575-576 (S.D. Miss. 2011).

391. First, since 1997, the FCC has required telecommunications carriers to permit consumers to "port" their telephone numbers, *i.e.*, keep their previous telephone number even when they switch to another carrier. 47 C.F.R. § 52.23; *see, e.g., In re: Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 8352 (1996) (establishing an implementation schedule for telephone number portability). In 2003, the FCC allowed consumers to transfer (or "port") their wireline numbers to a wireless carrier. *In re: Telephone Number Portability, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 23697 (2003).

392. In 2007, the FCC allowed consumers to port their telephone numbers to Voice over Internet-Protocol ("VoIP") services as well, allowing consumers to transition from traditional wireline services to advanced IP-based services. *In re: Telephone Number Requirements for IP-Enabled Services, Report and Order, Declaratory Ruling, Order on Remand and Notice of Proposed Rulemaking*, 22 FCC Rcd 19531 (2007).

393. Second, over the time period relevant to Plaintiffs' claims, consumers increasingly obtained wireless service[12] and maintained "mobile numbers that [were] associated with an area code other than the one where they live." *Teltech Sys.*, 866 F. Supp. 2d at 575. As one commentator noted in a May 2009 article, "the area code . . . is becoming increasingly irrelevant," because "[t]he whole idea of having to have a number correspond to where you actually are seems to have gone away," and wireless customers can use any area code, "regardless of whether it carries geographic significance."[13] Amy Saunders, Cellphone Age Turns the 614 Into Just Numbers, THE COLUMBUS DISPATCH, May 16, 2009, http://www.dispatch.com/content/stories/local/2009/05/16/areacodes.html. (DX-192.) Further, unlike historical practices of wireline carriers, wireless carriers have been able to assign telephone numbers without regard to the consumer's place of residence. As the FCC has acknowledged, "wireless carriers have considerable discretion in assigning telephone numbers, and often do so to minimize their own costs rather than based on the consumer's location. *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, 25 FCC Rcd 11407, 11517, n. 520 (2010) ("*14th Annual*

12 To put wireless registrations in perspective, in December 2003, landline numbers accounted for only 54 percent of all telephone numbers in the United States. According to the FCC, there were approximately 183 million landline numbers in 2003 (137.4 million residential landline numbers and 45.6 million business landline numbers). FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, Trends in Telephone Service, Table 8.2 "End-User Switched Access Lines and VoIP Subscriptions by Customer Type", at pp.8-6 (September 2010) (sum of reporting incumbent local exchange carriers ("ILEC") and reporting non-ILEC figures). The FCC report suggests that some (approximately 10%) of the reported residential landlines are actually business landlines. *Id.* The Cellular Telecommunications and Internet Association ("CTIA") estimates there were 158.7 million wireless numbers in the United States in December 2003. CTIA, "CTIA's Semi-Annual Wireless Industry Wireless Industry Survey Results."http://www.ctia.org/advocacy/research/index.efm/aid/10316.

13 FCC Commissioner Jessica Rosenworcel recently stated that "[p]eople now move and take their numbers with them. Case in point: in my office here at the Commission, half of those who work with me have phone numbers with area codes that do not reflect where they live." *Numbering Policies for Modern Communications*, 28 F.C.C.R. at 5920.

Wireless Competition Report, 100 n. 520 (May 20, 2010, available at http://www.fcc.gov/reports/mobile-wireless-competition-report-14th-anuual (last accessed Jan. 6. 2014).

394. Third, during the time period relevant to Plaintiffs' claims, consumers have increasingly selected Internet-protocol-based services, such as VoIP services. VoIP service subscriptions, like mobile service subscriptions, have increased greatly between 2003 and 2010, with nearly 32 million VoIP lines in service as of December 2010. Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, Local Telephone Competition: Status As of December 31, 2010, at p. 2 & Fig. 1 (October 2011).[14] VoIP numbers can be assigned without regard to the consumer's physical location. For example, a VoIP customer located in Atlanta may choose to have a number traditionally associated with Chicago. In an Order issued in 2004, the FCC readily acknowledged that, in the context of VoIP service, "the NANP number [which is relied upon by Dr. Yoeli here] is not necessarily tied to the user's physical location for either assignment or use, in contrast to most wireline circuit-switched [but not wireless] calls." *Vonage Order*, 19 F.C.C.R. 22404 (2004).

395. The FCC further provided examples to explain why a subscriber's or call recipient's NPA/NXX could not be used as a proxy for a subscriber's or call recipient's state of residence or geographic location:

> If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between

[14] The FTC has acknowledged, in its Biennial Report, that "[s]ince . . . 2003, two forms of technology have developed considerably: mobile phones and [VoIP]." FTC, Biennial Report to Congress: Pursuant to the Do Not Call Fee Registry Extension Act of 2007 (Dec. 2009), available at http://www.ftc.gov/sites/default/files/documents/reports/biennial-report-congress-pursuant-do-not-call-registry-fee-extension-act-2007/100104dncbiennialreport.pdf (last accessed Jan. 6, 2014.)

> that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.

(*Vonage Order*, 19 FCC Rcd at 22421.)

396. Notably, recognizing the considerable decoupling of phone numbers and geography, an FCC advisory committee has recently recommended that the FCC "fully decouple" geography from the telephone number. *Numbering Policies for Modern Communications* (¶118).

397. According to the FTC, 99.97% of landlines in the U.S. are included in the national directory assistance database. Unlike land-line service providers, wireless and VoIP service providers were not, during the relevant time period, required to share their directory assistance data. (*Id.*) FTC approximated, however, that 75% of VOIP numbers are included in the national directory assistance data.

398. Thus, the numbers that PossibleNOW identified as "residential" could include a significant percentage of VoIP numbers and the majority of numbers identified by PossibleNOW as "unknown" include wireless, VoIP, business or government numbers, and are unlikely to include residential landlines.

399. Not all of the numbers contained in DISH's call records were residential landlines, as opposed to business, wireless or VoIP numbers.

400. In his December 16, 2013 deposition, Plaintiffs' expert, Dr. Yoeli, testified as follows:

> Q. With respect to the analysis of the state law claims, the file names that indicate state –
> A. Yes.

(DX-211, Yoeli Dep. 215:5-216:17.)

THERE IS NO EVIDENCE OF A WILLFUL VIOLATION BY DISH OF THE TSR WITH RESPECT TO ANY CLAIMED TSR VIOLATION BY DISH, ECREEK OR EPLDT, OR AN INDEPENDENT RETAILER

401. Plaintiffs have no evidence that, with respect to any calls placed by DISH or any of its Telemarketing Vendors, DISH, in connection with any such calls, acted with actual knowledge or knowledge fairly implied on the basis of objective circumstances that any such call was unfair or deceptive and was prohibited by the TSR.

402. Plaintiffs have no evidence that, with respect to any calls placed by a Retailer, DISH, in connection with any such calls, acted with actual knowledge or knowledge fairly implied on the basis of objective circumstances that any such call was unfair or deceptive and was prohibited by the TSR.

DISCOVERY PROVIDED IN THE CID PHASE AND DISCOVERY IN THIS CASE

403. In July 2005, the FTC sent DISH a Civil Investigative Demand ("CID"). According to the CID, the scope of the investigation was as follows:

> To determine whether unnamed telemarketers, sellers, or others assisting them have engaged or are engaged in (1) unfair or deceptive acts of practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act . . . and/or (2) deceptive or abusive telemarketing acts or practices in violation of the Commissions' Telemarketing Sales Rule, 16 C.F.R., part 310, including but not limited to the provision of substantial assistance or support—such as mailing lists, scripts, merchant accounts and other information, products or services – to telemarketers engaged in unlawful practices. Pls.' Ex. 1 (d/e 201-1).

(d/e 279, Opinion re: Plaintiff's Motion for Discovery Sanctions, at 5.)

404. In response to the CID, DISH provided records on calls made from October 2003-September 2005, December 2005-December 2006, and January 2007-August 2007 (2003-2007 calls). (d/e 165, Opinion at 9.)

405. In 2008, DISH sent the FTC analyses of portions of these records (the "2008 Analysis"). (d/e 165, Opinion at 9-10. (citing Motion, Exhibit 30, Letter dated August 11, 2011, from Patrick Runkle to Joseph Boyle and Lauri Mazzuchetti, enclosing a copy of the 2008 analysis from PossibleNOW ("2008 Analysis").)

406. The 2008 Analysis covered the four month period from June through September 2005, and the two months of April and October for the years 2004, 2005, 2006 and 2007. (d/e 165, Opinion at 10.)

407. The 2008 Analysis also notified the FTC that the 2003-2007 calls included non-telemarketing calls such as collection calls and business calls. (d/e 165, Opinion at 13.)

408. The 2008 Analysis further notified the FTC that calls could be associated with calling campaigns and with EBR status of DISH customers. (d/e 165, Opinion at 13.)

409. DISH provided some detailed information (i.e., EBR status of call recipient) for the calls covered by the 2008 Analysis, but not for the rest of the 2003-2007 calls. (d/e 165, Opinion at 10 (citing Motion, at 11).)

410. Plaintiffs, thus, knew these limitations on the 2003-2007 calls before they filed this action. (d/e 165, Opinion at 13.)

411. Plaintiffs elected to focus their discovery efforts on the 2007-2010 calls rather than the earlier data. (d/e 165, Opinion at 13.)

412. After Plaintiffs filed this case, DISH produced telephone records for the period from September 1, 2007, to March 12, 2010 (2007-2010 Call Records). Plaintiffs state that these records described nearly 435 million calls. (d/e 165, Opinion at 10-11 (citing Motion, at 10.) This data includes all calls covering such matters as telemarketing, payment reminders, service, installation and surveys. (d/e 155, Opinion re: Plaintiff's Motion to File SAC, at 7.)

413. The parties engaged in a "lengthy collaborative discovery process" to analyze the 2007-2010 calls to, among other things, identify telemarketing calls, and to associate calls with specific marketing campaigns and to determine whether the recipients of calls had EBRs with DISH. (*Id*. at 11.)

414. The parties began the process on November 17, 2010, and the Plaintiffs' analysis of the data extended through expert discovery. (d/e 134, Plaintiffs' Motion for Leave to File SAC, Exhibit 10, Decl. of Erez Yoeli.) The Plaintiffs describe the process as "painstaking." (d/e 165, Opinion at 9.)

415. Plaintiffs received discovery in this case related to "all authorized dealers and telemarketers" of DISH. (d/e 80, Amended Opinion re: Plaintiffs First Motion to Compel Production of Documents and Answers to Interrogatories, at 9.) Some discovery included call

records produced by a telecommunications provider, and not by the Retailer. *See, e.g., supra* ¶266 (McLeod Telecom), ¶288 (LDMI), ¶307 (Electric Lightwave and Integra Telecom), ¶328 (Airespring, Inc.).

416. DISH has produced in electronic form more than 220,000 pages of documents, in addition to producing, among other things, approximately 400 million call records and voluminous paper documents. (DX-221, Declaration of Henry T. Kelly, executed on January 6, 2014 ("Kelly Dec.") at ¶2.)

417. DISH produced documents designated as follows on about the following dates:

Production Date	**Beginning Bates**	**Ending Bates**
May 27, 2010	DISH-00000001	DISH-00000001
June 29, 2010	DISH-00000002	DISH-00000002
August 9, 2010	DISH-00000003	DISH-00009606
August 13, 2010	Undesignated - list of written complaints January 13, 2005 to May 17, 2010 (native).	
August 16, 2010	DISH2-0000000001	DISH2-0000005876
August 16, 2010	DISH2-0000005877	DISH2-0000024789
September 30, 2010	DISH2-0000024790	DISH2-0000039846
November 12, 2010	DISH3-0000001	DISH3-0000620
January 6, 2011	DISH4-000001	DISH4-000028
February 14, 2011	DISH5-0000000001	DISH5-0000066437
February 15, 2011	DISH6-000000001	DISH6-0000000468
March 11, 2011	Undesignated – campaign ID designations (native).	
March 11, 2011	DISH8-000000001	DISH8-0000000006
March 17, 2011	Undesignated – DISH's internal Do Not Call list produced in response to Plaintiffs' RFP 1 (native).	
June 2, 2011	DISH-Paper-000001	DISH-Paper-013823
June 17, 2011	DISH-Paper-013824	DISH-Paper-019476
February 1, 2012	DISH-Paper-019477	DISH-Paper-025964
March 14, 2012	DISH5-0000066438	DISH5-0000068475

April 2, 2012	DISH7-000000001	DISH7-000007897
April 10, 2012	DISH5-0000068476	DISH5-0000103504
April 10, 2012	DISH5-0000103505	DISH5-0000106990
April 10, 2012	DISH5-0000106991	DISH5-0000107145
April 24, 2012	DISH5-0000107146	DISH5-0000113912
June 28, 2012	DISH5-0000113913	DISH5-0000126552
June 28, 2012*	DISH - 00006210	DISH - 00009238
June 28, 2012*	DISH-Paper-023749	DISH-Paper-025948
June 28, 2012*	DISH2-0000000500	DISH5-0000000500
June 28, 2012*	DISH5-0000000125	DISH5-0000107129
June 28, 2012	DISH8-0000007	DISH8-0004672
June 28, 2012	DISH8-0034826	DISH8-0034830
June 30, 2012	DISH9-0000001	DISH9-0012768
July 20, 2012	DISH8-00034673	DISH8-00034821
July 30, 2012	DISH5-0000107133	DISH5-0000107136
August 3, 2012	DISH8-0034822	DISH8-0035176
August 3, 2012	DISH9-0012769	DISH9-0012796
August 3, 2012	DISH3 - Various	DISH3 - Various
August 24, 2012	DISH9-0012797	DISH9-0013145
August 30, 2012	DISH9-0013146	DISH9-0013730
September 9, 2012	DISH11-000001	DISH11-000015
September 19, 2012	Undesignated – campaign ID designations (correspondence from J. Boyle to L. Hsiao.)	
October 1, 2012	DISH11-000016	DISH11-016183
November 20, 2012	DISH8-00035177	DISH8-00035280
November 28, 2012	Undesignated – campaign ID designations (correspondence from L. Mazzuchetti to L. Hsiao).	
December 3, 2012	DISH11-016184	DISH11-039266
September 10, 2013	DISH12-000001	DISH12-000021
September 20, 2013	DISH12-000022	DISH12-000025
September 27, 2013	DISH12-000026	DISH12-000028
September 27, 2013	DISH12-000029	DISH12-000029
October 16, 2013	DISH12-000031	DISH12-000079

*These documents produced on June 28, 2012 were produced pursuant to the Court's June 12, 2012 Order granting in part and denying in part Plaintiffs' Motion to Compel. The bates ranges reflect the documents required by the Court's Order.

October 17, 2013	DISH12-000080	DISH12-000088
November 13, 2013	DISH12-000090	DISH12-001129
November 15, 2013	DISH12-001130	DISH12-001145

These documents were produced either through CD-rom, DVD or through File Transfer Protocol ("FTP"). (DX-221 at ¶3.)

418. DISH also provided Plaintiffs with unfettered access to review, inspect, and copy all of DISH's hard-copy consumer complaint and independent retailer files (including audit and compliance files) on April 11, 12 and 13, 2011. Attorneys for the Plaintiffs reviewed such documents at DISH's facilities on or about April 11 and 12, 2011. (DX-221 at ¶4.)

419. With respect to the independent retailer files, the State Plaintiff lawyers provided DISH with a list of approximately 65 retailers for which they sought copies of the paper files. DISH copied and produced the requested documents. (DX-221 at ¶5.)

420. DISH also provided Plaintiffs' counsel with access to DISH's Salescomm and SEIBEL PRM databases, two live enterprise databases. The Salescomm data environment contains information on the date and amount of payments made to each independent retailer. SEIBEL PRM is a live relationship management application which is used by DISH to track information related to independent retailers. (DX-221 at ¶6.)

421. On September 27, 2012, DISH provided a hard-drive, containing information stored in the Salescomm and SEIBEL PRM databases that was responsive to Plaintiffs' discovery requests. (DX-221 at ¶7.)

422. On April 6, 2012, Plaintiffs served DISH with their Sixth Request for Production of Documents ("Sixth Set of RFPDs"). RPF 2 of the Sixth Set of RFPDs sought, in part, audio recordings related to 61 automessage campaigns. (d/e 229, Declaration of Nainesh Ramjee, executed January 4, 2012, ¶2.)

423. In response to RFP 2 of the Sixth Set of RFPDs, DISH searched for the audio recordings related to the call campaigns itemized in Plaintiffs' request. As a result of this reasonable and diligent search, DISH located 37 digital audio recordings responsive to RFP 2 of the Sixth Set of RFPDs. These 37 digital audio recordings represent 52 of the 61 call campaigns enumerated in RFP 2 of the Sixth Set of RFPDs. (d/e 229 ¶3.)

424. A number of the digital audio recordings were in languages other than English. (d/e 229 ¶4.)

425. On June 29, 2012, DISH produced to Plaintiffs a compact disc bearing bates label DISH5-0000126553, which contained all 37 digital audio files representing 52 of the 61 call campaigns enumerated in RFP 2. (d/e 229 ¶5.)

426. From those digital audio files, Plaintiffs' expert identified 15 campaigns as being related to telemarketing and are roughly translated as follows:

(a) AM 090507 GREEK ["AM – 090507Greek@1297@1.vox."]:

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

(b) AM 090607 CHIN ["AM – 090607Chinese@1298@1.vox."]:

Dear Dish Network Customers, add you favorite Chinese TV channels now! Dish Network is now providing, your satellite television provider. Exclusively, on the net and on Dish Network, European _____ [speaker mumbles word]. Our national basketball team defends itsemany more exciting Chinese TV shows, including the most welcomed,

"I Guess, I Guess, I Guess Guess Guess," "Variety Big Brother," "Super Starry Walk," "Flying Pigeon Nightly Wave," "May Barbaric Princess," "Taiwan Dongsen News," etc. Your enjoyment and satisfaction guaranteed. Please call today, 1-877-446-2742. Watch the additional shows at Dish Network Chinese TV channels which have the most entertainment shows.

(c) AM 090607 FILI ["AM – 090607Filipino@1299@1.vox."]:

Our dear Dish Network viewers! Now is the best time to come back to your Filipino shows. Dish Network will offer finer Filipino shows and movies. Watch your favorite shows, like *Kikay Machine*, *Shall We Dance?*, *the Jojo Anhar Show*, award-winning films, and much more. The Dish Network Filipino packages start at just $9.99 per month. Call 1-877-456-2609 – that's 1-877-456-2609 – to have Dish Network Filipino TV added now!

(d) AM 090607 KORE ["AM – 090607Korean@1300@1.vox."]:

Hello Dish Network customer. This is your opportunity to add the Korean Variety Pack to your subscription to enjoy the most entertaining and varied Korean language programming ever. You can enjoy the popular *Hello Aegi-ssi* featuring talent *Lee Da-Hae* and *Lee Jee-Hoon* and the red-hot drama *Ma-Wang* featuring Uhm Tae-Woong, conveniently at home. Also, on *Star Real Story: I Am*, which gives you a glimpse into stars' real lives, you can meet the biggest stars like *Boa*, *Bi*, *Shinhwa*, and others. If you add the Korean Variety Pack to your registration now, you can view Korean language programming for $24.99 a month. Call 1-888-644-2117 today and add the Korean Variety Pack to your subscription. Please call 1-888-644-2117 right now

(e) AM 091107 ARAB ["AM – 091107Arabic@1302@1.vox."]:

Dear customer, Thanks for being a loyal customer to Dish Network Company, the leading company in providing the best Arab bouquets that fit all family members. Now it is the suitable time to subscribe to one of the Dish Network Arab bouquets during the Holy Month of Ramadan. Don't miss it and subscribe today to watch the most recent programs and new Ramadan series, little: Bab El Harah", "Tash Ma Tash", King Farouk, "Awlad Al Layel", "Khawatir", the cornerstone and Nimr bin Adwan. Ramadan is better on the channels of ART America: MBC, Dubai Satellite Channel, Nile Drama and Abu Dhabi Satellite Channel. For subscription and more information, please call the following number: 1 888 262 2604…1 888 262 2604

(f) AM 091107 GREEK ["AM – 091107Greek@1303@1.vox."]:

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

(g) AM 091207 CHIN ["AM – 091207Chinese@1304@1.vox."]:

Good news! From September 12 to 25, Dish Network will provide you with free trial watching experience with Taiwan Sky Net Package, which includes the 13 top Taiwanese TV channels including Taiwan TV, Central TV, China TV, Tianxia Satellite TV, Satellite TV II, and Dongsheng TV. The free trial period starts at 3 o'clock on September 12 (Pacific Time). During the free trial period, Dish Network broadcasts the satellite

premier "My Just Boyfriend", "Baoqingtian—Bai Yutang Legend", "Flying Pigeon Nightly Wave", and other exciting TV shows which you cannot miss. After expiration of the free trial period, you only need $34.99 to continue with your enjoyment of the 13 exciting channels in the Taiwan Sky Net Package. Call today the Chinese subscription hotline at 1-888-229-8215!

(h) AM 091407 FRENCH ["AM – 091407French@1306@1.vox."] This recording is in English:

Please listen to this important message from Dish Network, your satellite TV provider. Dish Network is offering a free preview of Tres TV on channel 575 and a free preview of 3A Telesud on channel 574 until September 19th. Tres TV has a brand new face. The biggest stars such as Gwen Stefanie, Kanye West and Shaggy are on Tres TV in September. Until December, 3A Telesud broadcasts an exclusive TV series, Yama Africa. The first time on Telesud, a fictional drama show highlights the lives of four African women living in Brooklyn, New York. Watch the first episode on Friday, September 14th. Call us today at 1-888-793-8490 to add Tres TV and 3A Telesud to your French lineup. Price will vary based on your current subscription. You must have a DISH 510 to see this free preview. Thank you for being a valued Dish Network customer.

(i) AM 091407 GERMAN ["AM – 091407German_Drops@1307@1.vox."] This recording is in English:

Dear Dish Network customer, thank you for your ongoing subscription and for being a loyal Dish Network customer. Dish Network is dedicated to bringing you the best in German television that suits all your enjoyment needs in one comprehensive package. Now is the best time to subscribe to our German language plus package, which includes the best German channels like DW TV, Proseben, German KINO Plus, EuroNews. Don't

miss the prime time AID and ZDF television shows on DW TV which features well known talk shows, new documentaries, quality entertainment, and children's programs. Enjoy the new bonus league soccer season live at home from Proseben every Friday, Saturday and Sunday. And don't forget the quality German classic movies on German KINO Plus and the latest news from a European perspective on EuroNews. Subscribe today by calling us at 1-888-276-2995.

(j) AM 100407 INDUSM ["AM – 100407IndusM@1325@1.vox."]:

Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming.

(k) AM 100407 INDUSV ["AM – 100407IndusM@1325@1.vox."]:

Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming.

(l) AM 100807 INDUS ["AM – 100407IndusM@1325@1.vox."]:

Assalam Alaikum (peace be unto you), please try a free preview of the finest music channel in Urdu, Indus Music. Indus Music brings great Urdu music and life-style entertainment programs from Pakistan. Please go today to channel 574, and from

October 3 to October 17 try out free Urdu entertainment. Only Dish TV provides superior Urdu channels. Call today at 1-888-269-0195 to upgrade to Pak Megapak and make Indus Music channel part of your Urdu programming

(m) AM 092107 FREEHD ["AM – 092107FreeHD@1317@1.vox."] This recording is in English:

Please listen to this important message from Dish Network, your satellite TV provider. Now is the time to experience your TV in stunning clarity with Dish HD TV, your favorite shows will look so life like that you'll think you're actually there. If you love watching TV, you'll love it even more in Dish HD quality. As a valued customer, Dish Network wants to give you six months of free Dish HD programming today. Call us at 1-888-222-3147 to take advantage of Dish HD programming today.

427. The Zee Sports pre-recorded message campaign was likewise directed to then-existing DISH customers. (DX-2, Montano Decl. ¶33.)

ARGUMENT

I.
LEGAL STANDARD ON SUMMARY JUDGMENT

"Summary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005) (internal quotations and citations omitted). "If [the non-movants do] not [meet their burden], summary judgment, if appropriate, shall be entered against [them]." *Leister v. Dovetail, Inc.*, No.: 05-2115, 2007 WL 128862, at *2 (C.D. Ill. Jan. 12, 2007) (citing Fed. R. Civ. P. 56(e)), *aff'd*, 546 F.3d 875 (7th Cir. 2008). Here, that "put up or shut up" moment requires that Plaintiffs answer for the dearth of essential, admissible evidence. Plaintiffs simply

cannot meet their burden of proof. They must now, but cannot, come forward with evidence that shows at least a dispute as to material facts that create a genuine issue for trial.

DISH is not required "to produce evidence showing the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 217, 325 (1980) (emphasis added); *see also Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 n.3 (7th Cir. 1994) (expressly rejecting argument that, where nonmoving party has burden of proof at trial, movant must produce affirmative evidence negating an element of nonmoving party's case). When a party is shown to have no admissible evidence as to a necessary element of their claim, there can be "'no genuine issue as to any material fact.'" *Celotex*, 477 U.S. at 323. "A complete failure of proof concerning an essential element of the [plaintiff's claim] necessarily renders all other facts immaterial." *Id.*

As will be set forth in exhaustive detail below, Plaintiffs have relied upon the false assumption that the NDNCR is accurate and reliable. This is indisputably incorrect. Thus, all of Plaintiffs' NDNCR claims are built on a foundation of sand. Moreover, even if the historical numbers on the NDNCR were properly placed there by consumers, Plaintiffs' jurisdiction indisputably does not extend to the vast majority of numbers on the NDNCR. As to the FTC, its jurisdiction is limited to residential landlines. The NDNCR is not confined solely to residential landlines. In fact, residential landlines are a minority of the numbers registered on the NDNCR. As to State Plaintiffs, they must prove that calls were placed to residents of their respective states. Their evidence on this point rests on the demonstrably false assumption that area codes are proof of the residency of the called party. Plaintiffs' case is rife with many other evidentiary failures (including that the few call records they have with respect to a few Independent Retailers are both inadmissible and prove nothing). As set forth more fully below, evidential failures

pervade Plaintiffs' case. There is no issue of genuine material fact precluding the entry of summary judgment for DISH.

To avoid summary judgment, Plaintiffs must, but cannot, "do more than simply show that there is some metaphysical doubt as to the material facts," but must "come forward with 'specific facts showing that there is a *genuine issue for trial*.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted and emphasis in original). Plaintiffs must make an affirmative showing on all matters placed in issue by this motion on which they bear the burden of proof at trial. *Celotex*, 477 U.S. at 323. For the reasons set forth more fully below, DISH is entitled to summary judgment on all of the claims asserted in the SAC.

II.
DISH IS ENTITLED TO SUMMARY JUDGMENT DISMISSING COUNTS I, II, V, VII, VIII, IX, AND XII BASED ON THE SAFE HARBOR DEFENSE

A. DISH's Compliance Procedures Satisfy The Requirements Of The Safe Harbor Provisions Of The TSR and TCPA

The TSR contains a "safe harbor" provision, relevant to Counts I and II, which provides for a *complete* defense to any alleged violations of section 310.4(b)(1)(iii), *i.e.*, calls to persons who either have (a) requested that they not receive telemarketing calls from the caller; or (b) registered their telephone number on the NDNCR. 16 C.F.R. § 310.4(b)(3). The safe harbor provision provides, in full:

> (3) A seller or telemarketer will not be liable for violating § 310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:
>
> (i) It has established and implemented written procedures to comply with § 310.4(b)(1)(ii) and (iii);
>
> (ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to § 310.4(b)(3)(i);

> (iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with § 310.4(b)(1)(iii)(A);
>
> (iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to § 310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;
>
> (v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to § 310.4(b)(3)(i); and
>
> (vi) Any subsequent call otherwise violating § 310.4(b)(1)(ii) or (iii) is the result of error.

16 C.F.R. § 310.4(b)(3).

The FCC has prescribed a similar safe harbor provision under the TCPA, relevant to Counts V, VII, VIII, IX, and XII, that provides for a complete defense against allegedly violative calls to persons who have registered their telephone number on the NDNCR. The TCPA safe harbor provides, in pertinent part:

> Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:
>
> (i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:
>
> (A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;
>
> (B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;
>
> (C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

> (D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.
>
> . . . .
>
> (E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers[.]

47 C.F.R. § 64.1200(c)(2). The only substantive differences between the TSR and TCPA safe harbor provisions are: (1) the TSR safe harbor provides a defense against alleged violations of a company's internal do not call list, as well as alleged violations of the NDNCR; and (2) the TCPA safe harbor contains additional requirements regarding the telemarketer's purchase and use of the NDNCR database. *Compare* 16 C.F.R. § 310.4(b)(3); 47 C.F.R. § 64.1200(c)(2)(i)(E).

Finally, the gross number of alleged TSR violations is irrelevant to the application of the safe harbor. Telemarketing Sales Rule, 60 Fed. Reg. 30,406, 30,417 (June 8, 1995). The FTC made this clear in its Revised Notice of Proposed Rulemaking for the TSR:

> [S]ome commenters suggested that the safe harbor should not be limited to a certain number of violations per consumer or per year. These commenters maintained that if the other enumerated steps are taken by a telemarketer in a reasonable manner, and a call is made erroneously, a Rule violation should not be found. The Commission agrees, and has deleted this limitation to the safe harbor.

Id. In fact, this Court noted that:

> [t]he FTC recognized the possibility of strict liability and included a safe harbor provision in the original TSR to avoid this problem. The Notice of Proposed Rulemaking for the 2003 amendments explained that: 'Commenters generally supported the safe harbor, stating that strict liability is inappropriate where a company has made a good faith effort to comply with the Rule's requirements and has implemented reasonable procedures to do so.'" Plaintiffs' Response to DISH Network's Motion to Dismiss (d/e 14) (Plaintiffs' Response), Exhibit 5, Notice or Proposed Rulemaking (selected excerpts), 67 Fed. Reg. 4492, 4520 (January 30, 2002).

(d/e 20, Opinion re: DISH Motion to Dismiss, 11/02/2009, at 11-12.) This Court further noted as follows: "[t]hus, if a seller or telemarketer uses a current version of the List, has written procedures for compliance with TSR, and monitors and enforces compliance with the TSR and the written procedures, then a telemarketer's call that violates the TSR made in error will not result in liability." (*Id.* at 13.) The proof here establishes that DISH indisputably has met all of these standards and is entitled to summary judgment.

Importantly, Plaintiffs spent thousands of deposition pages and reviewed hundreds of thousands of documents but could not find a single instance where DISH's compliance efforts were not pursued in good faith. Simply put, their effort to paint DISH as a bad actor was a total failure. Plaintiffs' response to this failure is to change the safe harbor rules. They improperly invoke a zero tolerance policy or describe mistakes made in good faith as malicious and part of a ruse by DISH. Plaintiffs' characterization of DISH's efforts prove that they live in a bureaucratic bubble where honest mistakes by employees in a legitimate business (whose jobs exist to perform compliance activities) are premeditated, illegal activities. Plaintiffs' misguided approach is consistent with zealotry but does not provide evidence to rebut DISH's proven good faith compliance.

DISH has indisputably made good faith efforts to satisfy, and has satisfied, each element of the safe harbor requirements prescribed in the TSR and TCPA. DISH created robust and

comprehensive Do Not Call policies and procedures, (*see* DUF ¶¶16-26) trained its personnel and the personnel of its Telemarketing Vendor call centers on these policies and procedures (*see* supra ¶¶27-35), maintained and recorded the applicable Do Not Call lists (*see* DUF ¶¶36-49), used a process to prevent telemarketing to telephone numbers on these Do Not Call lists employing a version of the NDNCR no more than 31 days prior to the call date (*see* DUF ¶¶550-81), and monitored and enforced its telemarketing policies and procedures (*see* DUF ¶¶75-98), including by using multiple levels of proposed campaign reviews, tracking consumer telemarketing complaints and investigating and addressing such complaints, and enhancing processes as a result of such efforts. *See* DUF ¶¶14-98, 105-107.

Further, the results of Plaintiffs' own call record analysis of DISH's outbound calls demonstrate that DISH's compliance efforts and program were successful overall. During discovery in this case, Plaintiffs have analyzed approximately one billion call records pertaining to outbound calls placed by DISH between 2003 to 2010. Under a best case scenario, using the wildly inflated number of purported violation calls identified by Plaintiffs' expert, Plaintiffs could establish that only 2.5% of those calls allegedly violate the TSR or TCPA. (*See* DUF ¶178.) Using a more realistic view of what Plaintiffs likely will try to establish (relying on the alleged violations claimed in their own summary judgment motion), Plaintiffs only could establish (at best) that 1% of those calls are purported violations.[16] *See* DX-214, Ex. A, Taylor Expert Report.

Notably, during discovery it was revealed that the FTC's accuracy expectations for its own contractor that maintains the NDNCR, Lockheed Martin, are significantly lower than what Plaintiffs are now demanding of DISH.

[16] DISH's view of the number of potential "issue calls" drives its percentage of error down far below 1%.

. (*See* DUF ¶124.) Moreover, the FTC did not terminate Lockheed Martin when it failed to meet the FTC's own standard. Instead, it is indisputable that

(*see, e.g.* DUF ¶¶124-126)

(*See* DUF ¶¶112-119, 121, 123-134, 136-14, 143, 145-162.) The FTC continued, however, to use

(*See* DUF ¶125.)

Against this back drop is the case against DISH – a company whose main purpose is to expand economic opportunity for its employees and shareholders, bring needed services to underserved areas and, in doing so, spins off significant revenue to local, state, and the federal government. DISH has bettered its compliance program year after year and bettered the FTC's own acceptable error rate for tasks where the FTC is attempting to fulfill a core consumer protection function.

For these reasons and for those set forth in greater detail below, DISH has a complete defense to any alleged violations of the NDNCR or DISH's Internal DNC List, and the FTC is in no position to claim a zero tolerance standard for DISH.

B. <u>The Safe Harbor Provision Only Requires Good Faith Compliance</u>

The TSR clearly does not require a perfect score in order to gain the safe harbor defense. There is no "zero tolerance" policy; the TSR and TCPA pragmatically require only that the seller or telemarketer make good faith efforts. *See* 60 Fed. Reg. at 30,417 n. 114 ("[t]he Commission believes that any error should be excused . . . as long as the seller or telemarketer is complying in good faith with the . . . requirements of the [Rule's] safe harbor.") Thus, the FTC has emphasized that the TSR's safe harbor "is intended to protect telemarketers who make a good faith effort to comply with these [NDNCR and internal DNC] provisions, but who inadvertently place an outbound call in violation of either of them." FTC, Report to Congress Pursuant to the

Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws, at 10 (Sept. 2003), (*available at* http://web.archive.org/web/20130916203647/http://ftc.gov/os/2003/09/dnciareport.pdf). The Court need only examine the undisputed efforts of DISH employees, motivated solely by performing their compliance functions, to see the good faith standard has been met and surpassed. (*See* DUF ¶¶14-98, 105-107.) These employees are reviewed, paid, and promoted or demoted not based on avoiding compliance but by enhancing compliance. There is no evidence to the contrary.

The evidence in this case shows real success in compliance. The NDNCR is downloaded, and lists are scrubbed. DISH uses PossibleNOW, the FTC's own subcontractor, to aid in this process. No evidence shows willful evasion of these well identified and proven safeguards. The only conclusion is that any calls in violation of the TSR/TCPA were the result of inadvertent error.

In sum, the safe harbor provisions of the TSR and TCPA provide DISH with a complete defense. Accordingly, DISH is entitled to judgment as a matter of law on Counts I, V, VII, IX, as well as those elements of Counts VIII and XII which depend upon violations of 47 C.F.R. § 64.1200(c)(2). (*See* SAC, Count VIII ¶¶82(a), 82(c); Count XII.)

III.

SUMMARY JUDGMENT MUST BE GRANTED DISMISSING ALL NDNCR AND DISH INTERNAL DNC LIST VIOLATIONS THAT ARE NOT BASED ON ADMISSIBLE TESTIMONY BY AN ACTUAL RECIPIENT OF A CALL

A. Rather Than Supplying Admissible Evidence From Consumers, Plaintiffs Improperly Base Their Case On "Massive Computer Processing" of Call Records

As noted herein, the FTC's and State Plaintiffs' NDNCR and DISH Internal DNC List claims rely exclusively on "massive computer processing" as proof of violations. (DUF ¶¶163-

170.) The results of this "massive computer processing," however, do not provide proof that any call was made to a residential line of a person who had his or her number registered on the NDNCR (or the DISH Internal DNC List) at the time of the call. Further, in the case of the 2003-2007 Call Records and the Independent Retailer records, this "massive computer processing" does not provide evidence that these calls were telemarketing calls. (DUF ¶172.) Finally, as to claims regarding calls by Independent Retailers, the records relied on by Plaintiffs provide no evidence that these calls were made to sell a DISH product or service. (DUF ¶¶219-221, 238-40, 262, 263 268-271, 280-286, 292, 301-303, 307-311, 320-321. 323-325, 328-336, 341, 342, 355-358, 363-368, 369-374, 376-380, 384-386.) These missing essential facts only could have been developed through consumer testimony on a case-by-case, or call-by-call, basis. Simply relying on "massive computer processing" of hundreds of millions of call records cannot meet Plaintiffs' burden of proof. Plaintiffs' own representatives consistently confirmed that the mere fact that a number is on the NDNCR (and by extension, the internal list) is simply not proof that a call to that number is a violation.

B. The FCC, The FTC, The National Association of State Attorneys General and The FTC's Subcontractor Responsible for Maintaining the Accuracy of the NDNCR All Concede the Necessity of Individualized Proof To Establish an NDNCR Claim

The FCC was confronted with the issue of how to treat the registration of "home based business" numbers on the NDNCR. FCC, Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 70 Fed. Reg. 19,330, 19,331 (Apr. 13, 2005). The FCC admitted that the NDNCR "does not preclude calls to businesses." *Id.* Thus, as to home-based businesses, the FCC admitted it would have to "review such calls as they are brought to [the FCC's attention] to determine whether or not the call was made to a residential subscriber." *Id.* The FTC expressly noted the same concerns when it amended the TSR in 2003: "A number of

commenters asked the Commission to clarify coverage of its 'do-not-call' provisions. Some queried whether calls to home businesses would be subject to the 'do not-call' requirements. The Rule exempts telemarketing calls to businesses (except for sellers or telemarketers of nondurable office or cleaning supplies). Therefore, calls to home businesses would not be subject to the amended Rule's 'do-not-call' requirements. Telemarketing Sales Rule, 68 Fed. Reg. 4,580, 4,632 (Jan. 29, 2003). Thus, individualized inquiry is necessary to establish whether the call on the NDNCR was a violation because it was made to a residential subscriber, and not to a business (whether home-based or otherwise).

The reason for such a determination is obvious. A consumer may register her number on the NDNCR but admit that she runs a home-based business from 9 a.m. to 5 p.m. using that number. If this person testifies that she received a telemarketing call at 2 p.m., presumably the results of the FCC's "analysis" of that call would be that it was to a business, and thus not a Do Not Call violation. If, however, the complaining consumer testified that the call came in after 5 p.m., the FCC would claim a violation.

(*See* Dzieken Dep. 237:22-238:17; 241:18-242:10, Mastrocinque Dep. 129:15-17.)

The only way to answer that open question, and prove the violation, is through the consumer's testimony. That is true as to all of the NDNCR and the DISH Internal DNC List claims asserted by Plaintiffs. Customer testimony is essential to meet Plaintiffs' burden to prove a violation. Not even a complaint by a consumer provides such admissible proof. A consumer

complaint is hearsay. *See FTC v. E.M.A. Nationwide, Inc.*, No.: 1:12-cv-2394, 2013 WL 4545143, at *2-3 (N.D. Ohio Aug. 27, 2013).

Other direct and explicit evidence confirms the need for the consumer/registrant's testimony. At an FTC workshop held in 2002, Rex Burlison of the Missouri Office of Attorney General, on behalf of the National Association of Attorneys General, stated:

> I don't care how many people that you put on preserving the accuracy of the list, there's going to be problems with the list, and you have to accept that, especially when you go to a national list with millions of numbers, you are going to have a list that is imperfect, and ***it just doesn't matter until it comes to when someone is trying to enforce a violation. That's when it matters. Is that person or is that number that you're enforcing against accurately on the list and was it accurately given to the industry to protect the consumer.***

(DUF ¶111.) (FTC Transcript, FTC Rulemaking Workshop, Session 1 (June 5, 2002) at 149-150 (*available at* http://web.archive.org/web/20130501140905/http://www.ftc.gov/bcp/rulemaking/tsr/020605xscript.pdf.) (emphasis added). Thus, prior to the inception of the NDNCR, law enforcement agencies, including the FTC and the National Association of Attorneys General, knew that the mere existence of a number on the NDNCR was not proof that a call to that number was a violation of the TSR/TCPA.

(DUF ¶¶128-137.)

(DUF ¶134.)

(*Id.*).

(*Id.*)

(*Id.*)

(*Id.*)

. (*Id.*)

(*Id.*)

(*Id.*)

Q.

(DX-167, Stauffer 4/26/12 Dep. 95:2-23.)

Q.

(DUF ¶135; DX-167, Stauffer 4/26/12 Dep. 79:8-80:10 (emphasis added).)

This is another way of saying "massive computer processing" does not prove a violation.

. (DUF ¶¶136; DX-167, Stauffer 4/26/12 Dep. 152:6-154:23.)

17

. (DUF ¶¶164-169.) Thus, Plaintiffs are using indisputably incorrect (and therefore unreliable) information as a basis for their "massive computer processing" evidence to support their NDNCR claims.

(DUF ¶137; DX-167, Staufer 4/26/12 Dep. 189:20-191:7.) In that same deposition, counsel for the FTC asked PossibleNOW the following questions about the seven million numbers that were purged from the NDNCR.

(DX-167, Stauffer 4/26/12 Dep. 274:18-275:12.) Thus, the FTC's own counsel developed testimony from its own subcontractor, PossibleNOW,

Because registrations are the foundation for the NDNCR claims in this case, these admitted inaccuracies are fatal.

." (*Id.*) Each of these three areas affects the reliability of the NDNCR. PossibleNOW confirmed the problems with removing numbers from the NDNCR, as noted above. Its process creates false negatives – meaning there are numbers on the NDNCR that should not be there. Here, Plaintiffs are improperly claiming a raw hit if there was a call to any number on the NDNCR.

. (DUF ¶¶112, 127, 161, 162.) These also create accuracy issues when it comes to prosecuting an NDNCR claim against telemarketers. A company such as DISH or eCreek must download the list for scrubbing purposes and would have no way of knowing of these admitted mistakes. However, Plaintiffs ignore this problem and insist on using Plaintiffs' "massive computer processing" to generate "raw hits." Thus, a mistaken raw hit could be generated for a call by such a telemarketer solely because of the undisputed inaccuracies in the NDNCR. This admitted problem caused by the FTC has not dissuaded the agency from using a "raw hit" generated solely by its own mistake as the basis for a violation. This is simply inexplicable. Indeed, a legitimate business such as DISH corrects its errors, provides refunds and credits, and is otherwise accountable to its customers. Here, the FTC, who is supposed to be providing protections to telemarketers by maintaining an accurate NDNCR, not only disregards telemarketers' legitimate concerns but actually blames the

telemarketers for the FTC's errors. Finally, if a consumer's registration of his or her number is not properly processed, the consumer will believe that she registered on one date but the NDNCR will show a different registration date. This could mean that a consumer would believe a call on a certain date was improper, but the NDNCR records would not show the timely registration. This obviously affects the validity of consumer complaints

The indisputable facts show that Plaintiffs' "massive computer processing" is insufficient to prove a claim based upon a match between a called number and a number on the historical NDNCR. Plaintiffs must come forward with evidence from the consumer who actually made the NDNCR request. Similarly, for the Internal List claims, the TSR defines the violation as calling the "person," on the internal list, not the "number." 16 C.F.R. § 310.4(b)(1)(iii)(A). Again, Plaintiffs cannot meet their burden of proof on the essential element that a call was made to a "person" who asked not to be contacted, without evidence from that person that he or she was, in fact, called.

C. Plaintiffs Have Non-Hearsay Testimony From Only Four Consumers

Plaintiffs did try to obtain consumer testimony for this case. Plaintiffs took 41 consumer depositions. Of those, only four of the consumer's phone numbers appeared in DISH's call records. For the other 37 consumers, their allegedly called numbers do not appear in any of DISH's calling records. Thus, for 37 of the 41 consumer depositions, these consumers' testimony about what was said by the caller are hearsay. *E.M.A. Nationwide*, 2013 WL 4545143, at *2. There is no evidence that these calls were made by DISH or an Independent Retailer. What was said on the phone by the caller cannot provide such proof because it would be hearsay. Inadmissible hearsay cannot prove a violation attributable to DISH. *Id.*

Additionally, Nicholas Mastrocinque, who was an investigator at the FTC working on the agency's investigation of DISH and the Independent Retailers, testified that

. (DUF ¶221.) According to Mr. Mastrocinque,

(*Id.*) Mr. Matrocinque testified that,

, (*Id.*),

(*Id.*),

. (DX-162, Mastrocinque Dep. 158:22-159:6.) Mr. Mastrocinque testified that,

. (*Id.*) Obviously, the reason Plaintiffs moved away from the needed individualized proof of NDNCR violations by DISH is because they could not generate a case against DISH by relying upon individualized proof. Summary judgment should be granted.

IV.
DISH IS ENTITLED TO SUMMARY JUDGMENT DISMISSING COUNT I OF THE SECOND AMENDED COMPLAINT

The FTC cannot otherwise meet its burden of proof on Count I of the SAC, which claims that DISH violated the TSR because:

> In numerous instances, in connection with telemarketing, Defendant DISH Network engaged in or caused a telemarketer to engage in initiating an outbound telephone call to a person's telephone number on the National Do Not Call Registry in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

(d/e 257, SAC, at ¶66.)

. (DUF ¶¶163-178.)

Section 310.4(b)(1)(iii)(B) of the TSR prohibits a "seller" from making (or causing a "telemarketer" to make) an outbound telemarketing call to a consumer who has registered his or her telephone number on the NDNCR, but only if the person called did not have an established business relationship ("EBR") with the seller. 16 C.F.R. § 310.4(b)(1)(iii)(B)(ii). The provision is equally inapplicable to calls that a seller makes in response to consumer inquiries. *Id.*; 16 C.F.R. § 310.2(c)(2) (defining "established business relationship" based on a consumer inquiry).

To prevail on a claim for violations of the NDNCR, the FTC must show *at a minimum* that the calls at issue were placed by a seller or its telemarketer to a number on the NDNCR over which the FTC has jurisdiction. 16 C.F.R. § 310.4(b)(1)(iii)(B); *see also* 15 U.S.C. § 6105(a) ("no activity which is outside the jurisdiction of [the FTC] Act shall be affected by [TSR]"). Moreover, it is a necessary element of any claim for violation of the TSR that the defendant made a *telemarketing* call to a consumer, *i.e.*, a call by a telemarketer to "induce the purchase of goods or services." 16 C.F.R. § 310.4(b)(1)(iii)(B) (a violation requires an "outbound telephone call"); 16 C.F.R. § 310. ("outbound telephone call" is one "initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.")

As set forth below, the FTC cannot meet its burden of proof with respect to several required elements of Count I.[18]

[18] The State Plaintiffs' Counts V, VII, VIII, IX and XII (collectively with Count I, the "NDNCR Claims") will fail for similar reasons. Under Count V (TCPA), State Plaintiffs must prove that DISH, or Independent Retailers acting on DISH's behalf, initiated telephone solicitations to "[a] residential telephone subscriber who has registered his or her telephone number on the" NDNCR. 47 C.F.R. § 64.1200(c)(2). Count VII (California Do-Not-Call) requires California to prove that DISH, or Independent Retailers acting on DISH's behalf, made or caused to be made telephone numbers listed on the NDNCR, seeking to rent, sell, promote, or lease goods or services during those calls. Cal. Bus. & Prof. Code § 17592(c). Count IX (North Carolina Do-Not-Call) requires North Carolina to prove that DISH, or Independent Retailers acting on DISH's behalf, made a "telephone solicitation to a telephone subscriber's telephone number" appearing on the NDNCR. N.C. Gen. Stat. § 75-102(a). Count VIII (California Unfair Competition Law ("UCL")) and Count XII (Ohio Consumer Sales Practices Act)

A. The FTC Cannot Prove That The Claimed Violative Calls Were Interstate Calls Made To Residential Landlines Belonging To The Consumers Who Registered Them

Plaintiffs' rely on "massive computer processing" of DISH or third-party calling records to assert that a match of numbers on such calling records with numbers on the NDNCR is proof of a violative call. But, to have any viability, the NDNCR must be populated exclusively with numbers that could be the basis for a TSR violation. As noted, this is undisputedly not the case. From the earliest days of the NDNCR's development, the FTC has been actively aware of the fundamental need to ensure "the accuracy and validity of consumer telephone numbers added to the registry. (DUF ¶¶108-124.) During the FTC's initial planning for the NDNCR, various stakeholders raised significant concerns with whether the federal government was up to the task of ensuring the accuracy of such a massive national database. (*Id.* ¶¶110-111.) These concerns, not surprisingly, provided to be legitimate.

Soon after the NDNCR was put into operation, several events occurred that compromised the accuracy of the NDNCR, including problems with the data provided to telemarketers as part of the NDNCR download process. (DUF ¶112.) These errors led directly to Congressional intervention and attempts to improve the accuracy of the NDNCR through the enactment of the Do Not Call Improvement Act in 2008 ("DNCIA").

Despite the enactment of the DNCIA, and the FTC's retention of multiple contractors and subcontractors in an effort to sort out the NDNCR's accuracy issues, errors continued to bedevil the NDNCR. (DUF ¶¶120-162.) To this day, the NDNCR contains millions of numbers that do not fit the original well-tailored purpose of the NDNCR. (DUF ¶¶120-156.) As a result of these well-documented errors and the FTC's and FCC's decision not to restrict the types of numbers

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"borrow" violations from the TSR and TCPA, and as such, do not rest on additional elements. (SAC ¶¶82, 94-95.)

that can be added to the NDNCR, the NDNCR is comprised of significant percentages of numbers that, even if called, cannot trigger any TSR liability. These numbers include:

- Invalid and unknown numbers – numbers typed in incorrectly, with, for example, inaccurate area codes, an insufficient number of digits, etc. (DUF ¶¶110, 115, 136, 151);
- Disconnected numbers that have not been reassigned to new persons (DUF ¶¶127, 130, 132-134);
- Wireless telephone numbers (DUF ¶¶130, 131, 141); and
- Business and government lines (DUF ¶¶147-151.)

As set forth more fully below, as a result of this widespread proliferation of numbers on the NDNCR over which the FTC has no jurisdiction, its "massive computer processing" cannot meet the FTC's burden of proof on Count I because it relies on a false premise that all of the numbers on the NDNCR are within its TSR jurisdiction.

1. The FTC Seeks To Impose Liability For Calls Made To Numbers Over Which It Has No Jurisdiction And Are Not Within The Scope of the TSR

The FTC has made it clear that the NDNCR was intended solely to address calls made to ***individual consumer landlines***, stating that the NDNCR "is designed to advance the privacy rights of consumers by providing them with an effective, enforceable means to make known to sellers their wishes not to receive solicitation calls." 68 Fed. Reg. at 4635. Thus, the NDNCR protects the right of individuals against "unwanted speech ***into their own homes***." *Mainstream Marketing Services, Inc. v. FTC*, 358 F.3d 1228 (10th Cir. 2004) (emphasis added).)[19]

[19] The FTC also concluded that its National Do Not Call List "[t]his Order establishes a national do-not-call list for those residential telephone subscribers who wish to avoid most unwanted telephone solicitations." FCC, Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144, 44,175 (July 25, 2003).

In *Mainstream Marketing*, a consolidated appeal challenging the constitutionality of the TSR under the First Amendment, the FTC reiterated that the TSR and NDNCR are premised on the government's interests in "protecting the privacy of individuals ***in their homes***." *Id.* at 1237 (emphasis added). The FTC emphasized that "[p]erhaps the most striking feature of the do-not-call registry is that it . . . merely allows ***individual households*** to exercise the right 'to be left alone,' by barring ***from their own homes*** speech by others they do not wish to hear." (DX-220) (emphasis added.) The FTC further confirmed that "the do-not-call registry is aimed at an especially important element of ***residential privacy***, the protection from direct interruption *of* ***home and family life***." (*Id.* at 31 (emphasis added).) Finally, the FTC argued (and the Tenth Circuit agreed) that:

> [T]he do-not-call ***registry is extraordinarily well-tailored*** to impose only minimal restrictions on speech, because – unlike most provisions that regulate commercial speech – the FTC and FCC rules do not themselves ban any speech, but simply allow consumers to "opt in" to a list that shields them from telemarketing calls placed by commercial telemarketers. 10th Cir. Order, 10/7/03, at 22.

(*Id.* at 40 (emphasis added).)[20] Thus, to support the constitutionality of the NDNCR, the FTC has made clear that, since the NDNCR's inception, the FTC's enforcement jurisdiction only reaches landline, consumer telephone numbers that are properly registered on the NDNCR.[21]

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[20] The FCC also acknowledged this important Constitutional issue stating: "[i]ndividual privacy rights, public safety issues and commercial freedoms of speech must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices." *In re Telephone Consumer Protection Act of 1991*, 7 F.C.C.R. 2736, 2741 (Apr. 17, 1992).

[21] This Court should not accept Plaintiffs' construction of the TSR and the TCPA, as well as the state statutes. To do so would create constitutional questions. Even the FTC recognized that "[t]he Supreme Court has made it clear that '[i]f commercial speech is to be distinguished,' it must be distinguished by its content." (DX-220 at 50-51 [FTC br.], citing *Bates v. State Bar of Ariz.*, 433 U.S. 350, 363 (1977).) The "massive computer processing" does not distinguish the content of any claimed call but treats all calls to numbers on the NDNCR as a potential basis for liability. While, in some instances Plaintiffs have attempted to cull the call records down to alleged telemarketing calls, in

In keeping with the foregoing, the FTC has conceded that it has no jurisdiction with respect to calls made to wireless telephone numbers.[22] (DUF ¶142.) In addition, the TSR specifically does not cover "[t]elephone calls between a telemarketer and any business . . . ." 16 C.F.R. § 310.6(b)(7). Likewise, government phone numbers also do not fit within the TSR's scope. Indeed, this Court specifically noted that under the TSR "[c]onsumers were permitted to register their personal telephone numbers on the Do Not Call List." (d/e 20, Opinion re: DISH Motion to Dismiss, at 3.) As such, there can be no TSR violations arising from calls made to business or government lines. In sum, the FTC's enforcement jurisdiction under the TSR is limited to consumer residential landlines.

Only 28.2% of numbers registered on the NDNCR are properly-registered active residential landlines. (DUF ¶156.) The NDNCR is comprised mostly of wireless numbers, business and government numbers and VoIP numbers. As of September 2011, over 50% of all numbers on the NDNCR are wireless numbers, an estimate consistent with PossibleNOW's analysis in 2009. (*Id*.) Thus, the FTC's "massive computer processing" is based upon a fundamental, but fatally wrong, assumption – that all numbers on the NDNCR are both properly

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other instances (*i.e.*, the 2003-2007 call records and many of the Independent Retailer records), Plaintiffs have not attempted to limit their claims based upon the purported content of these calls.

22 It is also questionable whether FTC has jurisdiction over calls made to or voice over Internet Protocol ("VoIP"). By 2010, the FCC had repeatedly asserted its jurisdiction over interconnected Voice over Internet Protocol ("interconnected VoIP") services and imposed regulatory obligations similar to those that apply to traditional telecommunications carriers. *See, e.g., Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Comm', Memorandum Opinion and Order*, 19 FCC Rcd 22404, *aff'd, Minn. Pub. Util. Comm. v. FCC*, 483 F.3d 570 (8th Cir. 2007) (preempting state authority over interconnected VoIP); IP-Enabled Services, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245 (2005) (applying E911 obligations); *Communications Assistance for Law Enforcement Act and Broadband Access and Services, Second Report and Order*, 21 FCC Rcd 5360 (2006) (applying wiretapping obligations); Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) (applying federal universal service contribution obligations).

on the NDNCR and are subject to the FTC's jurisdiction. Plaintiffs erroneously rely on "massive computer processing" that generates "hits" to the NDNCR, but this alone does not prove that a telemarketing call was placed to the residential subscriber's landline.[23] The FTC has not and cannot remove, from its claimed violations, calls to numbers over which it has no enforcement jurisdiction. It concededly lacks jurisdiction over wireless numbers, business, government and invalid numbers that are on the NDNCR. The FTC cannot prove here that the calls it relies on as violative calls to the NDNCR are TSR violations. Summary judgment is appropriate on Count I.

2. The FTC Cannot Prove That The Claimed Violations Arise From Calls Made To Consumers Who Registered Their Numbers On The NDNCR

Under the TSR, the NDNCR is a database of telephone numbers "of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services" of a seller.[24] 16 C.F.R. § 310.4(b)(1)(iii)(B). Thus, a number on the NDNCR must continue to be associated with the person who registered that number. Obviously, if a registered number is no longer associated with the Registrant Consumer (because the customer moved, changed his or her phone number, canceled service, etc.), a call to that number cannot be a violation of the TSR. *Id.*; *First Nat'l Bank Of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 477 (7th Cir. 1999) (courts construe statutes according to literal, express terms unless doing so would lead to an absurd result or thwart the purpose of the overall statutory scheme).

The FTC has conceded this point. It has unsuccessfully attempted to remove from the NDNCR landline phone numbers that are no longer associated with the persons who originally

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[23] Even if the FTC had jurisdiction over calls made to, or, using wireless or VoIP service, the FTC has conceded that it has no effective means of removing wireless or VoIP numbers from the NDNCR when the person assigned to the number changes because neither wireless carriers nor VoIP providers are required to report to the databases that FTC relies upon in an attempt to determine when a telephone number ceases to be used by the Registrant Consumer.

[24] Plaintiffs admit that the NDNCR is for "consumers who *do not wish* to receive certain types of telemarketing calls." (d/e 257, SAC ¶11) (emphasis added.)

registered them. (DUF ¶¶113-135.) The FTC first attempted to do so by tracking and attempting to purge numbers that either were disconnected altogether or reassigned to a new landline subscriber. (*Id.* ¶¶114-119.) As of October 2008, however, the FTC changed this process such that it only purged those landline phone numbers that had been disconnected *and* reassigned to a different person and household than the one originally associated with the number. (*Id.* at ¶¶128-135.)

These unsuccessful attempts to purge numbers from the NDNCR contribute significantly to the NDNCR's inaccuracy. The continuing and existing processes do not ensure that the numbers on the NDNCR actually remain associated with the persons who respectively registered them. (*Id.*) As a result, in addition to containing millions of invalid or improperly-registered numbers (*e.g.*, wireless, business and governemnt numbers), Plaintiffs' raw hits *also* include telephone numbers that Plaintiffs cannot demonstrate to be associated with the persons who registered them in the first place. (*Id.* at ¶¶133-135.) This is fatal to Plaintiffs' claim.

In short, because the FTC does not maintain an accurate record of telephone numbers that are associated with the persons who registered them, there is no way that Plaintiffs can demonstrate that a raw hit is a call by DISH or an Independent Retailer to a person who objected to receiving the call. This defect in proof alone also justifies the dismissal of Count I on summary judgment.

B. <u>The FTC's Jurisdiction Is Limited To Interstate Calls</u>

It is also clear that the FTC's enforcement jurisdiction is limited to interstate calls. The TSR itself notes this jurisdictional limitation: "Telemarketing means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(dd). Notably, the FCC, having adopted a regulatory scheme

under the TCPA that is similar, but not identical, to the TSR, also has confirmed the reach of its jurisdiction versus the FTC's jurisdiction. In the TCPA, Congress directed the FCC also to create a "national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations . . . ." 47 U.S.C. 227(c)(3)). Ultimately, the FCC decided not to create its own separate national do-not-call registry, but instead established "with the [FTC] a national do not call registry for consumers who wish to avoid unwanted telemarketing calls." 68 Fed. Reg. at 44,144. Of particular relevance here, the administration of the NDNCR was left to the FTC, but both FTC and FCC retained their own exclusive areas of enforcement jurisdiction. For its part, the FCC has stated specifically that "the FTC's jurisdiction does not extend to intrastate activities."[25] The FTC has also conceded this point. FTC Report to Congress pursuant to the Do Not Call Implementation Act on Regulatory Coordination in Federal Telemarketing Laws, 2003 WL 22120161, at * 7 (Sept. 2003) ("the Telemarketing Act . . . limits the reach of the Rule to only intrastate telemarketing . . .").

Here, Count I of the SAC must be dismissed because the FTC has no evidence establishing that the calls on its raw hits list are interstate versus intrastate calls.[26]

C. There Is No Proof That The Violations Claimed From The 2003-2007 DISH Call Records Are Telemarketing Calls

Plaintiffs have no evidence that the 2003-2007 calls on the raw hits list were, in fact, telemarketing calls. Plaintiffs are attempting to rely upon 2003-2007 call records produced in

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25 The FTC, and not the FCC, is a party here and only the FTC's enforcement jurisdiction is in play.

26 The FCC and courts have rejected reliance upon area codes as indicative of the interstate and intrastate nature of a call. *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900, 902 (8th Cir. 2009) ("determining the interstate and intrastate nature of VoIP service cannot be accomplished by reference to the VoIP user's telephone number, because a customer living in one area code may be assigned a telephone number from a different area code.")

response to the CID, which this Court has already found were not limited to telemarketing calls. As this Court noted:

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

(d/e 165, Opinion at 13.) The Court's statement arose out of Plaintiffs' belated 2012 request for information from DISH, including campaign IDs that are indicative of the purpose of the calls made, in aid of Plaintiffs' attempt to cull from these call records the non-telemarketing calls. Without this information, all Plaintiffs could do is produce what amounts to nothing more than a "raw hit" of records that match numbers listed on the NDNCR. Plaintiffs have no way of identifying which calls are telemarketing calls and which calls are not, as they tried to do with respect to the 2007-2010 DISH call record set.[27] DISH objected to this request on the grounds that it was unduly burdensome and would impose undue delay. (d/e 165, Opinion at 12-13.) The Court agreed and denied Plaintiffs' Motion to Compel. (*Id.* at 15; DUF ¶172.)[28]

This Court summarized the process that Plaintiffs obviously intended to utilize for the 2003-2007 call records (if they could obtain the information belatedly requested) by describing the analysis of 2007-2010 call records:

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[27] To the extent that Plaintiffs intend to do so through evidence of consumer complaints, this evidence has repeatedly been rejected as inadmissible hearsay. *E.M.A. Nationwide*, 2013 WL 4545143, at *2; *FTC v. U.S. Mortg. Funding, Inc.*, No. 11-cv-80155, 2011 WL 2784466, at *2 (S.D. Fla. July 12, 2011).

[28] Undoubtedly, that is why the FTC coined the term "raw hits." The hits are raw and must be refined to determine the content of the call and the status of the call recipient. (DUF ¶169.)

> After Plaintiffs filed this case, DISH produced telephone records for the period from September 1, 2007, to March 12, 2010 (2007-2010 calls). Plaintiffs state that these records described nearly 435 million calls. The parties engaged in a "lengthy collaborative discovery process" to analyze these 2007-2010 calls to associate calls with specific marketing campaigns and to determine whether the recipients of calls had EBRs with DISH. *Id.* at 11. The parties began the process on November 17, 2011 [sic, should be November 17, 2010], and the Plaintiffs analysis of the data extended into at least October 2011.

(d/e 165, Opinion at 10-11) (footnote and internal citations omitted.)[29]

Because this Court also acknowledged that the 2003-2007 call records would need to be analyzed in a manner similar to the 2007-2010 call records, (*id.*), this Court explicitly found that the 2003-2007 call records were *not* all telemarketing calls and that there was no way to determine without this further analysis whether particular calls *were* telemarketing calls. By denying Plaintiffs' request for this information, based upon the Court's own reasoning, Plaintiffs lack the ability to establish which of the calls in the 2003-2007 time frame are telemarketing calls. (*Id.*)

Thus, Plaintiffs have no evidence for any of their TSR claims related to the 2003-2007 call records. Plaintiffs have not, and cannot, establish a TSR violation (or any related TCPA violation) with respect to the 2003-2007 call records. Accordingly, DISH is entitled to summary judgment on all claims arising out of the 2003-2007 call records as a matter of law.

D. The FTC Cannot Prevail On Count I Based On Calls Allegedly Made By Independent Retailers

In addition to attempting to establish direct liability against DISH under Count I, the FTC seeks to hold DISH liable for NDNCR calls allegedly made by Independent Retailers.

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[29] The Yoeli Affidavit to Plaintiff's Motion to File a Second Amended Complaint confirms that the date Dr. Yoeli began the process was November 17, 2010, not November 17, 2011. (*See* d/e 135, Ex. 10.)

As with its evidence against DISH, however, the only evidence that the FTC can marshal is that the Independent Retailers placed calls to numbers on the NDNCR. These are the same "raw hits" that form the basis of the FTC's flawed 2003-2007 claim against DISH.[30]

1. The FTC Cannot Prove That The Calls Placed By Independent Retailers Were Telemarketing Calls Placed To Offer A DISH Product

As with the 2003-2007 DISH call record set, Plaintiffs have no evidence whatsoever as to what portion (or how many) of the Independent Retailer call records are for telemarketing calls. These call records are likely to include customer service follow-up calls, return calls to customers who inquired about satellite TV service, return calls to customers who inquired about other non-DISH/non-satellite TV services, and personal calls made by retailer employees.[31] (DUF ¶¶219-221, 238-40, 262, 263 268-271, 280-286, 292, 301-303, 307-311, 320-321, 323-325, 328-336, 341, 342, 355-358, 363-368, 369-374, 376-380, 384-386.) Thus, Plaintiffs cannot demonstrate whether these call records analyzed by Dr. Yoeli contain telemarketing or non-telemarketing calls (or a combination of both), outbound or inbound calls, or calls to consumers, businesses, or to the government. And, none of these records establishes that these calls were placed by an Independent Retailer for the purpose of selling DISH's services. It is indisputable that numerous Independent Retailers sold products and services for companies such as DirecTV, ADT and others (DUF ¶¶221, 256, 296, 320, 384) (in fact, the name of one retailer focused on heavily by Plaintiffs – Dish TV Now and Dish Direct – incorporates in its name portions of both the DISH Network and Direct TV monikers). Accordingly, each of Plaintiffs' claims based on

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30 Plaintiffs' reliance on raw NDNCR hits from the Independent Retailer records is fatally flawed for all the reasons set forth above.

31 This reality was confirmed by multiple Independent Retailers who were deposed by Plaintiffs and by the FTC's own investigation of these calls.

the Independent Retailer call records must be dismissed because there is zero evidence to support an underlying telemarketing call by these third parties that can be attributed to DISH.

2. The FTC Cannot Establish That DISH Is Responsible For Any Given Retailer's Alleged Conduct

Even if the FTC had admissible evidence of violations by an Independent Retailer (it does not), they cannot prove that DISH is a "seller" that "caused" a TSR violation by an Independent Retailer acting as a "telemarketer."[32] Indeed, to establish liability against DISH for an Independent Retailer's alleged violation of the NDNCR, Plaintiffs must prove that DISH as a "seller [has] cause[d]" an Independent Retailer as its "telemarketer" to initiate outbound calls to a person whose telephone number is on the NDNCR. 16 C.F.R. § 310.4(b)(1)(iii)(B). Plaintiffs also bear the burden of proving that DISH "caused" its Independent Retailers to place a telephone call in violation of the NDNCR. *See Pugliese v. Prof'l Recovery Serv., Inc.*, No. 09-12262, 2010 WL 2632562, at *8 (E.D. Mich. June 29, 2010) (plaintiffs cannot carry their burden if the call records do not contain the necessary evidence to establish their claims). Plaintiffs cannot satisfy any of these elements of their burden of proof.

It is important to reiterate what Plaintiffs are attempting to accomplish in this case. They want to transmogrify DISH's arms-length transaction with separate, legally distinct entities that have their own employees, file their own taxes, and support their own local communities, into subsidiaries or agents of DISH. To foist this fictional relationship on the parties will only harm the national and local economies. If DISH is forced to sever these relationships because Plaintiffs' fictional world of creating liability for the conduct of the acts of the other party in an arms-length transaction, It could end that business model, and jobs will be lost based on

[32] Here, the FTC alleges that "in numerous instances," DISH caused a telemarketer to make an outbound call to a person who has placed their telephone number on the NDNCR in violation of 16 C.F.R. § 310.4(b)(1)(iii)(B). (d/e 257, SAC, Count I, ¶66.)

Plaintiffs' invention of a legal fiction. Such a legal precedent, further, would cause a tidal wave through many other industries, such as the home security industry, which utilize similar business models, forcing scores of businesses to leave the market such anti-consumer and anti-competitive results should be avoided.

The reality is that where a company contracts with independent retailers who, in turn, sell products or services to develop their *own* customers, Section 310.4(b)(1)(iii)(B) simply does not apply, by its terms. *Id*. The TSR defines a "seller" as "any person who, *in connection with a telemarketing transaction*, provides, offers to provide, or arranges for others to provide goods or services to the customer in exchange for consideration." 16 C.F.R. § 310.2(aa) (emphasis added). DISH is not a "seller" in its DISH/Independent Retailer relationship because it was not involved in any "telemarketing transactions" with the Independent Retailers. *Id.* DISH does not hire Independent Retailers to conduct telemarketing for DISH. Instead, DISH has contractual arrangements with Independent Retailers under which the Independent Retailers market and sell DISH products. These Independent Retailers decided the manner and means by which they market and sell DISH services. (*See e.g.*, DUF ¶¶222-387.)[33] Thus, DISH does not enter into any "telemarketing transaction" with any Independent Retailer to place telemarketing calls to anyone. Accordingly, DISH is not a "seller" for purposes of establishing liability arising from the Independent Retailers' own alleged violations of the NDNCR.

Further, even if DISH was a "seller," it was not involved in "telemarketing transactions" with respect to Independent Retailers. A "telemarketing transaction," under the TSR's definition of "telemarketing," is a "plan, program, or campaign which is conducted to induce the purchase

[33] If it learns of compliance problems by an Independent Retailer, DISH advises the Independent Retailer that it must develop its own plan to cure such problems. (DUF ¶¶192-209.) Presumably, Plaintiffs would laud such efforts.

of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call." 16 C.F.R. § 310.2(dd). What that is the situation, DISH, as a seller hires a company (such as eCreek) to act as a "telemarketer." (which is defined by the TSR as "any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor." 16 C.F.R. § 310.2(cc)). In that context, DISH designs the telemarketing plan for eCreek, and it serves as DISH's Telemarketing Vendor. However, in contrast, there is no evidence that DISH designs telemarketing plans for Independent Retailers. This is because they are not "telemarketers" in the DISH/Independent Retailer relationship. There is no "telemarketing transaction" between DISH and the Independent Retailers such that the Independent Retailers constitute "telemarketers" under the TSR.[34] (*See, e.g.*, DUF ¶¶227-387.)

DISH's standard Retailer Agreement also prohibits the Retailers from holding themselves out as DISH or any related or affiliated DISH entity. (DUF ¶¶185, 191.) In this regard, the Independent Retailers are free to offer or market non-DISH satellite provider services, or products unrelated to satellite services, in any manner they please, so long as the DISH Retailers comply with all applicable laws.

3. There Is No Evidence That DISH Caused Any Retailers To Place Telemarketing Calls, As Required To Support A Claim Under 16 C.F.R. § 310.4(b)(1)(iii)(B)

Even if there were a basis to find a seller/telemarketer relationship between DISH and the Independent Retailers, Plaintiffs must prove that DISH caused a telemarketer to call a number on the NDNCR. 16 C.F.R. § 310.4(b)(1)(iii)(B) provides:

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[34] If the Independent Retailers were acting as telemarketers for DISH, they would be required to register as telemarketers for DISH, rather than telemarketer for themselves with the FTC. There is no evidence that any such registration occurred.

> It is an abusive telemarketing act or practice . . . for a seller *to cause* a telemarketer to engage in the following conduct: . . . [i]nitiating any outbound telephone call to a person when . . . [t]hat person's telephone number is on the "do-not-call" registry, maintained by the [FTC], of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services . . . .

Id. (emphasis added).

DISH took no specific action that resulted in any of the Independent Retailers violating the NDNCR. DISH did not develop a plan, program or campaign to initiate outbound telephone calls to a person who registered her telephone number on the NDNCR. Moreover, DISH's standard Retailer Agreement requires each Independent Retailer to comply with "all applicable governmental statutes, laws, rules, regulations, ordinances, codes, directives, and orders," and makes clear that each Independent Retailer is "solely responsible for compliance with all Laws that apply to its obligations under" the Retailer Agreement. (DUF ¶¶184, 192.)

To reinforce the importance of complying with these terms of the Retailer Agreement, DISH periodically would ask the Independent Retailers to provide DISH with "proof of [an Independent Retailer's] compliance with all outbound telemarketing laws, including, but not limited to [the Independent Retailer's] Do Not Call policy, Proof of Do Not Call Registrations and Outbound Telemarketing Scripts." (DX-147, Origer Dep. 204:1-11; DX-99, Pl. Dep. Ex. (Origer) 144.) (DUF ¶¶192.) DISH also frequently reminded the Independent Retailers of their obligations under the terms of the Retailer Agreement, and state and federal telemarketing laws, and of the consequences that would result if an Independent Retailer was to violate telemarketing laws. (*Id.* ¶194.) DISH also researched and investigated any telemarketing complaints that might be associated with a phone number belonging to an Independent Retailer, and demanded that Independent Retailers promptly remove the relevant number from their contact lists (if it was in such contact lists), and add the number to their internal do not call lists. (DUF ¶¶192, 203-

204.) Accordingly, Plaintiffs cannot establish that DISH "caused" the Independent Retailers to initiate outbound telephone calls to persons who registered their telephone numbers on the NDNCR.

E. The Three-Year Statute Of Limitations Bars Any Claim Under Count I For Alleged TSR Violations Occurring Before March 25, 2006

The Seventh Circuit has made it clear that summary judgment is appropriate when a plaintiff files its claims after the relevant statute of limitations has expired. *See, e.g., Vector-Springfield Props., Ltd. v. Cent. Ill. Light Co., Inc.*, 108 F.3d 806, 810 (7th Cir. 1997). In particular, the court may grant summary judgment where "(1) the statute of limitations has run, thereby barring plaintiff's claim as a matter of law, and (2) there exist no genuine issues of material fact regarding the time at which plaintiff's claim has accrued and the application of the statute to plaintiff's claim which may be resolved in plaintiff's favor." *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1219 (7th Cir. 1984) (Cummings, C.J.) (citing *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982)). In the event that a suit is based on conduct that continues over time, "a plaintiff can ordinarily recover only those damages resulting from wrongful acts that occurred within the time period of the applicable statute of limitations." *Forster Music Publisher, Inc. v. Price Stern Sloan, Inc.*, No. 93 C 4487, 1995 WL 239093, at *1 (N.D. Ill. Apr. 21, 1995) (citations omitted).

Of relevance here, the statute of limitations on a claim for violations of the TSR is three years. 15 U.S.C. § 57b(d) ("[n]o action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates"); *accord FTC v. Magazine Solutions, LLC*, No. 7-692, 2010 WL 1009442, at *13 (W.D. Pa. Mar. 15, 2010) ("Actions for violations of the TSR are subject to a three-year statute of limitations.") (citing 15 U.S.C. § 57b(d)).

Here, the FTC commenced this action on March 25, 2009, seeking relief for violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the TSR. (d/e 257, SAC, ¶4.) In doing so, the FTC alleges four claims seeking civil penalties, injunctive relief, and other equitable relief for alleged violations of the TSR. (*Id.*, Counts I-IV, ¶¶66-69.) The statute of limitations unquestionably bars these claims to the extent that the FTC seeks to impose liability for any alleged violations occurring on or before March 25, 2006.[35] *Magazine Solutions*, 2010 WL 1009442, at *13 ("Because the FTC filed this action on May 23, 2007, the Defendants are only liable for any TSR violations commencing after May 23, 2004.").

Nonetheless, according to the Supplemental Expert Report of Dr. Erez Yoeli,

(DX-195.)

Indeed, of the 35 million alleged NDNCR violations at issue in this case, an unspecified number purportedly occurred on or before March 25, 2006. (*Id.*) The statute of limitations unquestionably (and absolutely) bars the imposition of liability on DISH for these violations. 15 U.S.C. § 57b(d); *Yorger*, 733 F.2d at 1219; *Magazine Solutions*, 2010 WL 1009442, at *13.

Based on the foregoing, DISH is entitled to summary judgment with regard to any alleged violations of the TSR occurring prior to March 25, 2006, *Vector-Springfield*, 108 F.3d at 810, including but not limited to those that appear in Appendix A of the Supplemental Yoeli Report.

V.
THE FTC CANNOT PREVAIL ON CLAIMS PREDICATED ON ALLEGED CALLS TO NUMBERS ON DISH'S INTERNAL DO NOT CALL LIST (COUNT II)

In Count II of the SAC, the FTC alleges that DISH violated the TSR because:

[35] For Count II, the limitation period runs from March 12, 2013 because that is the date the Count II claims were filed. (d/e 272.) The FTC may claim the period runs from the date the motion to amend the First Amended Complaint was filed. That would be May 18, 2012.

> In numerous instances, in connection with telemarketing, DISH Network has engaged in or caused other telemarketers to engage in initiating an outbound telephone call to a person who has previously stated that he or she does not wish to receive such a call made by or on behalf of DISH Network, in violation of the TSR, 16 C.F.R. § 310.4(b)(1)(iii)(B).

(d/e 257, SAC, Count II, ¶67.) The FTC bears the burden of proof on this claim.

As with its claims regarding the NDNCR, the FTC alleges that DISH is liable for its own acts, and the acts of Independent Retailers, with respect to calls that DISH allegedly made to telephone numbers on the DISH Internal DNC List. (*Id.*) As set forth below, the FTC's claims in Count II fail and should be dismissed on summary judgment.

A. The FTC Improperly Seeks Relief As To Calls Made To Numbers Over Which It Has No Jurisdiction And Are Outside The Scope Of The TSR

As set forth above, TSR applies only to calls made to residential landlines and the FTC's jurisdiction is limited to calls made to such numbers. As a result, the same defects that entitle DISH to summary judgment on Count I apply equally to Count II. With respect to its claim that DISH called numbers on an entity-specific DNC list, the FTC has no way of proving, using its "massive computer processing" approach, that the violations it claims arise from calls within its jurisdiction and/or the scope of the TSR. For this reason alone, DISH is entitled to summary judgment dismissing Count II of the SAC.

B. The FTC Cannot Establish That DISH Is Directly Liable For Any Calls To The Internal List

1. There is No Proof that Each or Any of the Internal Call List Claims Involve a Call to a Person Who Asked Not to be Called by DISH

The TSR prohibits a telemarketer from (or a seller from causing a telemarketer to engage in) initiating outbound telephone calls to persons who have previously stated that they do not wish to receive calls made by or on behalf of the seller whose goods or services are being offered. 16 C.F.R. § 310.4(b)(1)(iii)(A). To demonstrate a violation of this rule, a plaintiff must

prove that the call at issue was for telemarketing. 16 C.F.R. § 310.2(cc) (defining "telemarketer" as a person who initiates calls "in connection with telemarketing"). In addition, the FTC has made clear that the prohibition applies to "calls made to a person," not to a person's *residence*, because there may be more than one person at a given residence who is a customer of the seller. 60 Fed. Reg. at 30,417. *See also* (d/e 272, Opinion re: DISH Motion to Strike SAC, at 6 ("The new Count II alleges Defendant violated the [TSR] by engaging or causing other telemarketers to engage in initiating outbound telephone calls to a person who has previously stated that he or she does not wish to receive such calls made by or on behalf of a Defendant.")).

The prohibition on calls to a seller or telemarketer's internal do not call list focuses on the seller itself, not on the good or service that is being offered. 60 Fed. Reg. 43,842, 43,855 (Dec. 31, 1995). In this regard, the internal list provision of the TSR is "company-specific," and bars only Do Not Call requests that a consumer makes directly to the company at issue. 67 Fed. Reg. 4,492, 4,516 (Jan. 30, 2002). This is clear from both the language of the TSR and the FTC's comments on that language, including that it is the seller or telemarketer *to whom the do-not-call request is made* that is required to compile the list of such requests, and that may not call the consumer thereafter. 60 Fed. Reg. at 43,855; *accord* 67 Fed. Reg. at 4,516 ("After a consumer requests not to receive calls *from a particular company*, that company may not call the consumer. Other companies, however, may lawfully call that same consumer until he or she requests *each of them* not to call.") (emphasis added). This Court also noted: "DISH cannot assert an established business relationship for calls to numbers where the ***owner of the number*** requested to be placed on DISH's internal do not call list." (d/e 258, Opinion, Case No. 12-3221, at 19 (emphasis added).)

In this case, the FTC seeks to hold DISH liable for what appears to be in excess of 20 million calls that DISH allegedly made to customers on its own internal list *and* to customers on the Do Not Call lists maintained by multiple Independent Retailers. The FTC cannot prove to whom each of these over 20 million calls were made. Thus, it simply cannot prove that any of the 20 million calls were to a "person," as opposed to a number, who stated that he or she did not wish to be called by DISH (as opposed to an Independent Retailer). This defect is fatal.

Plaintiffs also overreach by seeking to hold DISH liable for Do Not Call requests allegedly made not to DISH, but to an Independent Retailer who may have been selling non-DISH products and who may have received a request from a consumer not to be called regarding those non-DISH products. This is true regardless of whether DISH had access to the lists that the Independent Retailers maintained. Indeed, of the calls at issue, *80.5%* were to numbers as to which DISH would have had no access to, or knowledge that the number was associated with a person who asked not to be called.[36] (DUF ¶178.) Another *13.4%* were to numbers to which DISH had access, but had no obligation not to call because the consumer's request was made to a Retailer, not DISH. (*Id*.) In other words, almost 94% of the Internal List claim calls at issue were *not* on the DISH Internal DNC List, and cannot form a basis of liability in this action.

The FTC's contention that DISH is liable for calls made to consumers who purportedly indicated to *Independent Retailers* that they did not wish to receive calls from DISH is entirely meritless. The Independent Retailers are sellers in their own right. DISH is not required to aggregate Do Not Call requests from every possible source, particularly from Independent Retailers who sell DISH products or services alongside those of any other number of companies.

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[36] Not surprisingly, the parties' respective experts do not agree on the total number of Internal List claim calls at issue and, thus, the percentages above are those of DISH's expert, John Taylor, of PossibleNOW.

Similarly, *Independent Retailers* are not required to aggregate and report to DISH every Do Not Call request that the Independent Retailer receives from a prospective customer. On the contrary, the Independent Retailers are required to keep track of Do Not Call requests *made to them*, not DISH, and vice versa. 67 Fed. Reg. at 4516; 60 Fed. Reg. at 43,855.

C. The FTC Cannot Demonstrate That Every Alleged Internal List Violation Was a Telemarketing Call to a Person Who Asked Not to be Called by DISH

The FTC cannot prove that all of the alleged violations were telemarketing calls. Rather, the FTC instructed its expert, Dr. Yoeli, to *assume* that all calls, other than those appearing in DISH's 2007-2010 call records, were telemarketing calls. In the absence of actual *proof* on this issue, however, the FTC's Internal List claim fails under the plain language of the rule. 16 C.F.R. § 310.4(b)(1)(iii)(A). This particular defect is fatal to *all* of the FTC's alleged Internal List claim violations, other than those claimed from the DISH 2007-2010 call vendors.

D. The FTC Cannot Establish That the Telephone Numbers In the Call Records Represent Violative Calls

The Internal List claim (Count II) also is flawed in the same manner as the NDNCR claims. The FTC cannot demonstrate that DISH violated the DISH Internal DNC List (or those of the Independent Retailers) without first weeding out intrastate calls and calls to invalid and unknown numbers; pagers, maritime radios, and other devices not covered by the TSR; disconnected numbers that have not been reassigned to new persons; business and government lines; wireless telephone numbers; and telephone numbers that are no longer associated with the persons who made the Do Not Call request in the first instance.

E. Count II is Barred by the Statute of Limitations

Count II also fails as a matter of law to the extent that the FTC seeks damages beyond the applicable statute of limitations. The three-year limitations period clearly prevents the FTC from pursuing civil penalties as the result of any call that predates May 12, 2009, three years before

the date the Court deemed Claim II filed in *DISH I*. (*See* d/e 258, Opinion, Case No. 12-3221, at 24); *see also Magazine Solutions*, 2010 WL 1009442, at *13.

F. Count II Is Barred by Res Judicata

Count II of the SAC also must be dismissed because it is barred by the doctrine of res judicata. Res judicata bars a subsequent action in federal court when three requirements are satisfied: (1) an identity of claims in the two actions; (2) an identity of the parties or their privies; and (3) a final judgment on the merits of the original action. *Johnson v. Cypress Hill*, 641 F.3d 867, 874 (7th Cir. 2011); *Golden v. Barenborg*, 53 F.3d 866, 869 (7th Cir 1985). "If these three elements are met, then res judicata 'bars not only those issues which were actually decided in a prior suit, but also all issues which could have been raised in that action.'" *Serv. Employees Int'l Union Local 1 v. Digby's Detective and Sec. Agency, Inc.*, No. 08 C 5544, 2009 WL 721003, at *2 (N.D. Ill. Mar. 18, 2009) (citation omitted). It is well settled that "if res judicata applies, then granting [a] motion for summary judgment is appropriate." *Prochotsky v. Baker & McKenzie*, 966 F.2d 333, 334 (7th Cir. 1992) (Bauer, C.J.) (citations omitted).

1. The Court Granted DISH Leave To Assert Its Res Judicata Defense In This Case

As a threshold matter, the Court *expressly granted* DISH leave to pursue its res judicata defense in this case. (*See* d/e 258, Opinion, Case No. 12-3221, at 24.) In fact, the FTC itself advocated for this at this Court's March 5, 2013 hearing. In arguing against either consolidation of the *DISH I* and *DISH II* proceedings or allowing the *DISH II* claim to be inserted via amendment to the *DISH I* complaint (the result that later occurred), counsel for DISH noted that DISH's *res judicata* defense in *DISH II* could arguably be lost if such relief were granted. (d/e 255, Official Transcript of Proceedings held on 3/5/2013, at 5-6.) In response, counsel for the FTC told the Court: "[T]he first problem with [DISH counsel] Mr. Boyle's position is that a res

judicata defense could be asserted in the renewed answer to . . . the second amended complaint." (*Id.*, at 21-22.) After the hearing, the Court granted leave to amend in *DISH I* and dismissed *DISH II* (d/e 258, Opinion, Case No. 12-3221, at 24.) In so doing, the Court expressly noted that the dismissal of *DISH II* was "without prejudice to DISH raising a res judicata defense in DISH I." (*Id.*)

2. There is an Identity of Claims in The First Action and This Action

The first element of res judicata requires an identity of claims. Courts will consider claims to be identical where the two actions share a "single core of operative facts" even though the legal theories may be different. *Cypress Hill*, 641 F.3d at 874; *Brown v. Chrysler Fin. Servs.*, 218 Fed. Appx. 536, 539 (7th Cir. 2007).

Here, there cannot be any serious debate that Count II is identical in all respects to the claim that Magistrate Judge Cudmore denied Plaintiffs leave to assert in June 2012. (*Compare, e.g.*, d/e 257, SAC, ¶67, *with* d/e 135, Ex. 1, Proposed SAC, ¶67.)

3. The Parties Remain The Same

The second element of res judicata is an "identity of parties or privies in the two suits." *Tartt v. Nw. Cmty. Hosp.*, 453 F.3d 817, 822 (7th Cir. 2006) (citations omitted). Claim II involves the exact same parties (the FTC and DISH) that it did at the time of Magistrate Judge Cudmore's ruling. (*Compare generally* d/e 257, SAC, *with* Proposed SAC d/e 135, Ex. 1, Proposed SAC.)

4. The Order Denying Leave to File the SAC in *DISH I* Was a Final Judgment on the Merits

The last requirement to establish res judicata is a final judgment on the merits. *Cypress Hill*, 641 F.3d at 874. In *DISH I*, Magistrate Judge Cudmore denied Plaintiffs' motion for leave

to file the SAC, which would have asserted Count II. That order was a final judgment on the merits for res judicata purposes.

In the Seventh Circuit, a denial of a request for leave to file an amended complaint is a final order constituting res judicata on the merits of the claims which were the subject of the proposed amended pleading. *See, e.g., Cypress Hill*, 641 F.3d at 874; *Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 121 F.3d 1027, 1034 (7th Cir. 1997) (finding that "the district court entered a final judgment in the first" case for res judicata purposes where the court denied plaintiff's Rule 15 motion to amend its complaint); *Fries v. Larson Mfg. Co.*, Nos. 95-3830, 96-1287, 1996 U.S. App. LEXIS 33647, at *10-11 (7th Cir. Oct. 3, 1996); *see also Anderson v. Guaranteed Rate, Inc.*, No. 13 C 431, 2013 WL 2319138, at *4 (N.D. Ill. May 28, 2013) ("the Court agrees with the reasoning of [other] courts and finds that the decision to deny Plaintiffs' motion to amend the complaint [as being untimely and unduly prejudicial] constitutes a final judgment for res judicata purposes"); *Wsol v. Carr*, No. 99 C 6834, 2001 WL 1104641, at *10 (N.D. Ill. Sept. 18, 2001) ("'it is well settled that denial of leave to amend constitutes res judicata on the merits of the claims which were subject of the proposed pleading'") (citation omitted).[37]

Other courts are in accord. *See, e.g., Christman v. Saint Lucie Cty., Fla.*, 509 Fed. Appx. 878, 879 (11th Cir. 2013) ("The denial of leave to amend the [plaintiff's] prior complaint was an adjudication on the merits as to the proposed claims"); *McMillan v. Fulton Cty., Georgia*, 352 Fed. Appx. 329, 331 (11th Cir. 2009) (affirming the district court's holding that "the decision to deny leave to amend a complaint was a final judgment on the merits"); *McKenna v. City of*

[37] *See also Smith v. Woodstock*, 521 F. Supp. 1263, 1265-66 (N.D. Ill. 1981) (finding that claims were barred by res judicata because there was a final judgment where earlier court denied plaintiff's motion to amend, and explaining that "[f]or the purposes of res judicata, the definition of a judgment on the merits" under "[a] more modern view includes not only those judgments based on legal rights, but extends to dismissal on other than traditionally substantive grounds") (quoting *Harper Plastics, Inc. v. Amoco Chems. Corp.*, 657 F.2d 939, 943 (7th Cir. 1981)).

Philadelphia, 304 Fed. Appx. 89, 93 (3d Cir. 2008) ("For res judicata purposes, 'denial of a motion to amend a complaint in one action is a final judgment on the merits barring the same complaint in a later action.'") (citations omitted); *Witthohn v. Fed. Ins.* Co., 164 Fed. Appx. 395, 397-98 (4th Cir. 2006) (citation omitted) (same); *Prof'l Mgmt. Assocs., Inc. v. KPMG LLP*, 345 F.3d 1030, 1031 (8th Cir. 2003) (same).[38]

Indeed, "courts have barred actions on the basis of claim preclusion where a litigant attempt[s] to assert claims that were contained in a proposed amended complaint in [a] prior lawsuit." *Johnson v. Cypress Hill*, No. 08 C 7264, 2010 WL 744278, at *3 (N.D. Ill. Feb. 26, 2010), *aff'd*, 641 F.3d 867 (7th Cir. 2011); *Roboserve*, 121 F.3d 1027, 1034-35 (7th Cir. 1997);[39] *Fries*, 1996 U.S. App. LEXIS 33647, at *10-11 (barring claims asserted in second case on res judicata grounds, where court in first case denied plaintiffs' motion for leave to amend their complaint to assert same claims); *Wsol*, 2001 WL 1104641, at *10 (same); *see also Sanders v. Walker*, No. 95-3743, 1996 U.S. App. LEXIS 9540, at *7 (7th Cir. Apr. 8, 1996) ("Indeed, if we

[38] *See also Olson v. Brott*, No. 09-790, 2009 WL 4912135, at *2 (D. Minn. Dec. 11, 2009) (rejecting plaintiff's argument that no final judgment on merits existed because judgment had not yet been entered in first action, and holding that denial of leave to amend was, itself, final judgment on the merits for res judicata purposes); *Crystal Import Corp. v. Avid Identification Sys., Inc*., 582 F. Supp. 2d 1166, 1170 n.4 (D. Minn. 2008) (fact that earlier lawsuit had not reached judgment "is irrelevant" for finding that denial of leave to amend is final judgment on the merits).

[39] In *Roboserve*, the district court denied the plaintiff's motion for leave to amend its complaint as untimely, but stated that the proposed claims "'should be the subject of a different lawsuit, . . . another place, another time.'" *Id*. at 1035 (quoting district court). On appeal, the plaintiff argued that the district court in the first action had already ruled on the defendant's res judicata defense. The Seventh Circuit disagreed, responding, "[w]e do not consider the judge's remarks . . a substantive ruling on [defendant's] res judicata defense. He correctly denied the motion to amend the complaint . . . as untimely.. . . At most these statements constitute dicta not binding on the district court resolving the second case . . . [I]f [plaintiff] disagreed with the district court's denial of leave to amend to include these claims, it should have appealed that issue; it did not." *Id*. Like the district court in the first *Roboserve* case, Magistrate Judge Cudmore suggested that "[i]f the FTC elects to authorize a new suit, then both the United States and DISH will have a full opportunity to litigate that claim." (d/e 155, Order, at 16.) Magistrate Judge Cudmore's comment was dicta, under the circumstances. *Roboserve*, 121 F.3d at 1035. Moreover, that statement has no bearing on the conclusion that Count II is now barred.

were to allow this suit to go forward, it would render our earlier decision finding that the district court was correct to deny the amendment to the first complaint a practical nullity."); *Prof'l Mgmt. Assocs*., 345 F.3d at 1032 ("Denial of leave to amend constitutes res judicata on the merits of the claims which were subject of the proposed amended pleading. *This is so even when denial of leave to amend is based on reasons other than the merits, such as timeliness.*") (emphasis added and citations omitted).

In this case, Count II remains unchanged from the proposed claim that Plaintiffs sought leave to file in 2012. (*Compare*, *e.g.,* d/e 257, SAC, ¶67, *with* d/e 135, Ex. 1, Proposed SAC, ¶67.) Magistrate Judge Cudmore denied Plaintiffs' motion for leave to file the proposed SAC on the grounds of undue delay because, Plaintiffs had ample time to move to amend at an earlier date (at least eight months earlier) but failed to do so. (d/e 155, Opinion, at 10-12.) The court also found that permitting the FTC the opportunity to amend the complaint just one week before the close of discovery would cause DISH undue prejudice. (*Id*. at 12-16.) This decision was a judgment on the merits of the claim that was the subject of the proposed pleading.

Based on the foregoing, the FTC should not have been permitted to resurrect Count II in either *DISH II or* this action, as the claim is barred by res judicata in its entirety. DISH is entitled to summary judgment on Count II for the same reason.

VI.
THE FTC CANNOT PREVAIL ON COUNT III OF THE SECOND AMENDED COMPLAINT AS A MATTER OF LAW

In Count III of the SAC, the FTC alleges that DISH violated the TSR by abandoning calls (or causing telemarketers to abandon calls) in violation of 16 C.F.R. § 310.4(b)(1)(iv). (d/e 257, SAC, ¶68). Section 310.4(b)(1)(iv) of the TSR provides:

> (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

> . . . .
>
> (iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

An "outbound telephone call" is defined as "a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution." 16 C.F.R. § 310.2(v). Thus, under 16 C.F.R. § 310.4(b)(1)(iv), a seller can be liable for causing a "telemarketer" to place an "outbound telephone call."

A. The FTC Cannot Prove That It Seeks Relief Only As To Calls Made To Numbers Over Which It Has Jurisdiction Under The TSR

The FTC's jurisdiction is limited to calls made to residential landlines. Again, the same defects that plague Counts I and II in this regard also apply to Count III. Specifically, the TSR does not apply to, and the FTC does not have jurisdiction over, intrastate calls, calls made to wireless numbers, and calls made to and business and government numbers, among other types of calls. The FTC is no more able to demonstrate that the violations that it claims in Count III arise from calls within its jurisdiction than it can with regard to Counts I and II. For this reason alone, DISH is entitled to summary judgment on Count III of the SAC.

B. The FTC Cannot Prevail On Any Claim That DISH Caused an Independent Retailer to Abandon a Call

The FTC has claimed that only two Independent Retailers placed abandoned calls; DISH TV Now and Tenaya/Star Satellite. As set forth more fully below, the FTC's claim fails because: (a) it is barred by the statute of limitations; and (b) the FTC cannot prove that DISH caused either of these two Independent Retailers to make such calls.

1. The Three-Year Statute Of Limitations Bars Any Claim Under Count I For Alleged TSR Violations Occurring Before March 25, 2006

As set forth above in, statute of limitations applicable to TSR claims is three years, and bars claims for alleged violations occurring prior to March 25, 2006. All of the abandoned call violations that the FTC claims were made by an Independent Retailer occurred between June 1, 2004 and November 26, 2005. Accordingly, the FTC's claim that DISH caused Independent Retailers to place abandoned calls is wholly barred by the statute of limitations.

2. The FTC Cannot Establish That DISH Caused Any Retailer To Abandon An Outbound Telemarketing Call

The FTC cannot establish that DISH caused either Tenaya/Star Satellite or DISH TV Now to abandon an outbound telemarketing call in violation of this section.

a. Tenaya/Star Satellite

The record evidence demonstrates that Tenaya/Star Satellite affirmatively concealed its use of an autodialer and prerecorded messages from DISH. Thus, DISH not only did not know, but could not have known, about Tenaya/Star Satellite's use of an autodialer to make allegedly abandoned prerecorded message calls. As such, Plaintiffs cannot prove that DISH caused Tenaya/Star Satellite to place the alleged abandoned calls using an autodialer.

Indeed, and as set forth above, Tenaya/Star Satellite never disclosed to DISH "any of the details" of its telemarketing efforts, that it had engaged "Guardian to do … pre-recorded messages," or even that it was working with Guardian at all. (DX-168, Myers Dep. 102:8-104:17; 117:22-118:5; 182:12-187:18.) Tenaya/Star Satellite not only failed to disclose that it was working with Guardian or using prerecorded messages, but it is undisputed that Tenaya/Star Satellite affirmatively concealed from DISH its pre-recorded message calling and auto-dialing activities. It was "a well-known fact" that DISH could terminate a retailer relationship "if you got caught auto dialing." (DX-173, Baker Dep. 177:7-10.) Thus, on at least two occasions when

DISH representatives were scheduled to visit Star Satellite's offices, Walter Myers contacted Guardian to advise that it was temporarily ceasing its telemarketing activities because "DISH Networks is coming into our office and we can't let them know we're auto dialing." (Barker Dep. 71:23-72:5; 177:23-178:4.) It is also undisputed that DISH advised Tenaya/Star Satellite to, and contractually required that it, ensure that it was complying with all laws, and also specifically to make sure that Tenaya/Star Satellite conveyed certain disclaimers to consumers, and to scrub against the Do Not Call List, which Tenaya/Star Satellite confirmed to DISH that it was doing. (Myers Dep. 121-123.)

Accordingly, Plaintiffs cannot prevail on Count III of the SAC as it pertains to alleged abandoned calls placed by Tenaya/Star Satellite.

b. DISH TV Now

Likewise, summary judgment must be entered in favor of DISH as to Count III with respect to abandoned calls allegedly made by DISH TV Now. Prior to becoming an Independent Retailer, DISH TV Now represented to DISH that the only methods of marketing DISH TV Now would engage in were direct response commercials, newspaper advertisements, co-op direct mailers, yellow page advertisements, and internet advertising. (DX-169, Ahmed Dep. 47:18-48:3; DX-__, Pl. Dep. Ex. (Ahmed) 365.) Moreover, DISH TV Now represented in no uncertain terms that it would only be driving inbound calls only "from customers seeking DISH Network service" and that, "[u]nder the proposed DISH Network marketing program, DISH TV NOW will as soon as possible staff and train sufficient sales agents to receive the current volume of DISH Network calls." (DX-___.) This is further confirmed in the testimony of DISH employees who dealt with DISH TV Now. Amir Ahmed, a Senior Vice President at DISH, who personally corresponded with DISH TV Now representatives, and visited DISH TV Now understood that "[t]elevision ads and a lot of Internet advertising, a lot of print is what [DISH TV Now] showed

[him], and that was the three big things for them." (DX-169, Ahmed Dep. 51:17-19.) As far as DISH knew, outbound telemarketing using prerecorded automessages was not a practice in which DISH TV Now engaged. (*Id.* 51:15-52:9; DX-156, Mills Dep. 35:7-37:21.)

In fact, the record evidence illustrates that DISH TV Now actively withheld information from DISH regarding the advertising source of the new orders placed by DISH TV Now as it was regarded as "proprietary" information and a competitive advantage over DISH. (DX-149, Hagen Dep. 134:8-135:2.) Even when directly confronted by DISH about whether DISH TV Now is "using predictive dialers and leaving messages trying to sell the customers DISH Network," DISH TV Now unequivocally denied using such practices. (DX-___.) In response to such inquiries, DISH TV Now assured DISH that its use of predictive dialers was limited to "consumers who have previously inquired with [DISH TV Now] about satellite TV service or are current DISH TV Now DISH Network customers," and that its predictive dialer "only connects live customers to a live DISH TV Now agent" and never uses an automated or prerecorded message. (Id.) It is also undisputed that DISH advised DISH TV Now, and contractually required it to adhere to all laws. DISH TV Now confirmed that its practice was to faithfully scrub against the NDNCR, maintain an internal Do Not Call list, and immediately add any customer to this list upon request in order to fully comply with the TCPA. (Id.)

Accordingly, the FTC cannot prevail on Count III of the SAC as it pertains to alleged abandoned calls placed by DISH TV Now.

VII.
DISH IS ENTITLED TO SUMMARY JUDGMENT DISMISSING COUNT IV OF THE SECOND AMENDED COMPLAINT

In Count IV of the SAC, Plaintiffs claim that DISH violated the TSR by allegedly providing:

> substantial assistance or support to Star Satellite and/or DISH TV Now even though Defendant DISH Network knew or consciously avoided knowing Defendant Star Satellite and/or DISH TV Now abandoned outbound telephone calls in violation of § 310.4(b)(1)(iv) of the TSR. Defendant DISH Network, therefore, has violated 16 C.F.R. § 310.3(b).

(d/e 257, SAC, ¶69.) This claim cannot withstand summary judgment.

A. The FTC Cannot Prove That It Seeks Relief Only As To Calls Made To Numbers Over Which It Has Jurisdiction Under The TSR

The same problems that exist with respect to the FTC's jurisdiction as to Counts I, II and III apply equally to Count IV. The FTC has no way of proving, using its "massive computer processing" approach, that the violations that it claims in Count IV arise from calls that are subject to its jurisdiction (*i.e.*, calls made to residential landlines). For this reason alone, DISH is entitled to summary judgment dismissing Count IV of the SAC.

B. The Three-Year Statute of Limitation Bars All Claims Under Count IV

In addition, and for the same reasons asserted with respect to Count III of the SAC, the applicable statute of limitations bars all claims asserted in Count IV. All of the abandoned call violations that the FTC claims were made by Tenaya/Star Satellite and DISH TV Now, which DISH is alleged to have assisted and facilitated, occurred before March 25, 2006, and are barred by the three-year statute of limitations for TSR claims.

C. There Is No Evidence of Assisting and Facilitating

Plaintiffs cannot proveand there is no evidence that DISH substantially assisted or supported Tenaya/Star Satellite or DISH TV Now to place abandoned calls. In order to violate the TSR's "assisting and facilitating" provision, a person must provide "substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates" specified provisions of

the TSR (here, abandoned calls). 16 C.F.R. § 310.3(b). The FTC cannot satisfy any of the required elements of an "assisting and facilitating" claim under the TSR.

To prove the first element, "substantial assistance," the FTC must demonstrate something "more than mere casual or incidental dealing with a seller or telemarketer that is unrelated to a violation of the Rule." 60 Fed. Reg. at 43,852. Examples of substantial assistance include:

> Providing lists of contacts to a seller or telemarketer that identify persons over the age of 55, persons who have bad credit histories, or persons who have been victimized previously by deceptive telemarketing or direct sales; providing any certificate or coupon which may later be exchanged for travel related services; providing any script, advertising, brochure, promotional material, or direct marketing piece used in telemarketing; or providing an appraisal or valuation of a good or service sold through telemarketing when such an appraisal or valuation has no reasonable basis in fact or cannot be substantiated at the time it is rendered.

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

Even if it could establish that Star Satellite and DISH TV Now abandoned calls subject to 16 C.F.R. § 310.4(b)(1)(iv) and *also* could establish the "substantial assistance" element, the FTC has no evidence that DISH was substantially assisting DISH TV Now or Star Satellite at a time when DISH knew or consciously avoided knowing that either Retailer was violating Section 310.4(b)(1)(iv). 16 C.F.R. § 310.3(b). As the Court already has found, a simple reliance upon

evidence that DISH paid an Independent Retailer is insufficient. (*See* d/e 32, Opinion re: DISH Motion for Interlocutory Appeal, 2/4/2010, at 9, n.1.) Specifically, the Court held that "DISH Network will not be held liable on Count [IV] simply because it paid Dealers to provide telemarketing services. The plaintiffs must also prove that: (1) the Dealers were violating the TSR, and (2) DISH Network knew or consciously avoided knowing that the Dealers were violating the TSR, but still kept paying the Dealers to continue the violations." (*Id.*)

Indeed, the FTC itself intended for the "conscious avoidance" standard to be demanding and more exacting than a "knew or should have known" standard. As the FTC explained in rejecting consumer groups' and law enforcement's requests to use a "knew or should have known" standard in the TSR for third-party liability in this context,[40] the FTC underscored that the conscious avoidance standard "is appropriate 'in a situation where a person's liability to pay redress or civil penalties for a violation of this Rule depends on the wrongdoing of another person.'" 68 Fed. Reg. at 4,612 (citation omitted). "Conscious avoidance," however, does *not* include a failure to investigate a third party's conduct. *See* 60 Fed. Reg. at 30,414 (referencing a duty to investigate as part of a less demanding "knew or should have known" standard, and rejecting such standard because it "may have swept too broadly and exposed those only casually associated with deceptive telemarketing to liability").

Here, the FTC has no evidence that DISH knew that DISH TV Now or Star Satellite was committing abandoned call violations. Nor is there any evidence that DISH consciously was avoiding such knowledge. Indeed, this conduct – to the extent it occurred, if at all - was hidden from DISH deliberately. In short, the FTC has no evidence whatsoever that DISH was providing

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[40] The New York State Consumer Protection Board, for example, requested that sellers and telemarketers be held jointly liable for the actions of each other. 60 Fed. Reg. at 43,844-45. That position was rejected by the FTC.

substantial assistance to DISH TV Now and Star Satellite while consciously avoiding knowledge (by deliberately ignoring glaring details or by purposefully and deliberately ignoring clear signs) that DISH TV Now or Star Satellite was committing abandoned call violations. If anything, the evidence in the record affirmatively rebuts this assertion. Accordingly, for any one of the reasons identified above, the FTC cannot establish this claim and DISH is entitled to summary judgment. *Celotex Corp.*, 477 U.S. at 323.

VIII.
THE FTC'S CLAIMS FOR INJUNCTIVE RELIEF SHOULD BE DISMISSED AS IT HAS NO EVIDENCE THAT IT IS REASONABLY FORESEEABLE THAT DISH WILL ENGAGE IN ANY FUTURE TSR VIOLATIONS

Pursuant to 15 U.S.C. § 53(b), the FTC may only seek a permanent injunction in cases where a corporation "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b)(1). The statute makes it clear that such injunctive relief should only be ordered in "proper cases" and "after proper proof." *Id.* at § 53(b)(2).

To meet its burden of proof to show entitlement to a statutory injunction, the moving party must demonstrate (a) that the defendant violated the statutory scheme at issue; and (b) "that there is some reasonable likelihood of future violations." *Wisc. v. Stockbridge-Munsee Cmty.*, 67 F. Supp. 2d 990, 994 (E.D. Wisc. 1999) (citing *Commodity Futures Trading Comm'n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979)); *see also Kashwere, LLC v. Kashwere USAJPN*, No. 12-5018, 2013 WL 5966990, at *4 (N.D. Ill. Nov. 8, 2013) (granting defendant's motion for summary judgment on two claims for injunctive relief as to which plaintiff presented insufficient evidence of any conduct so as to justify an injunction); *SEC v. Fischer*, No. 07 C 4483, 2012 WL 3757375, at *15 (N.D. Ill. Aug. 28, 2012 (granting summary judgment as to requested remedy of

injunctive relief where "[n]o reasonable court could conclude that there is a reasonable likelihood of future violations in this case.").

The FTC cannot meet this burden of proof. First, as detailed above, on Counts I-IV, the FTC cannot prove that DISH violated the TSR. Thus, as a threshold matter, the FTC cannot show its entitlement to any injunctive relief. Second, for the same reasons that DISH is entitled to a complete defense under the TSR safe harbor, the FTC cannot prove the reasonable likelihood of future violations. As described more fully above in Section II, DISH (1) has numerous written practices and procedures in place to ensure compliance with the TSR; (2) trains its personnel and any entity which assists DISH in its compliance in DISH's practices and procedures; (3) maintains a list of telephone numbers of persons who have stated that they do not wish to receive an outbound telephone call made by or on behalf of DISH; (4) uses processes to prevent telemarketing to any telephone numbers on the NDNCR; and (5) monitors and enforces compliance with such processes. In addition, even assuming that the FTC could prove that DISH made any violative calls, such calls were the result of error. Moreover, the consistent drop of the numbers of complaints to DISH about telemarketing establishes that DISH's current compliance practices are already preventing future complaints consistent with the safe harbor.

In light of this undisputed evidence, the FTC cannot possibly show, as it must, that there is *any* reasonable possibility whatsoever of future TSR violations. As such, there is no basis upon which to grant the FTC's request for injunctive relief and DISH is entitled to summary judgment on this issue, as a matter of law. *Kashwere*, 2013 WL 5966990, at *4; *Fischer*, 2012 WL 3757375, at *15; *Stockbridge-Munsee*, 67 F. Supp. 2d at 994.

IX.
THERE IS NO BASIS TO AWARD ANY CIVIL PENALTIES UNDER THE TSR

The particular remedies a plaintiff seeks are part of a claim on which summary judgment may be granted. *Fischer*, 2012 WL 3757375, at *9. Thus, DISH can seek dismissal of the FTC's civil penalties claims. Pertinent here, violations of the TSR can subject the "seller" and "telemarketer" to a civil penalty of up to $16,000.00 per violation. 15 U.S.C. § 45(m)(1)(A); 16 C.F.R. § 1.98(d) (adjusting maximum civil penalty for inflation). Penalties, however, are only appropriate for violations that were committed "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by [the TSR]." 15 U.S.C. § 45(m)(1)(A).

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

Even assuming *arguendo* that the FTC could establish a TSR violation, it cannot meet its burden of proof to show how, under the circumstances, that any claimed TSR violation occurred, or that it was the result of actual knowledge by DISH that such act would violate the TSR. 45 U.S.C. § 45(m)(1)(A). The FTC simply has ignored this statutory requirement, assuming incorrectly that the knowledge required to establish a civil penalty is somehow an empty formality.

Similarly, to the extent Counts I through IV of the SAC attempt to impose liability on DISH for the alleged conduct of Independent Retailers, the FTC must show that the Independent Retailers' conduct violated the TSR (and, as discussed above, it cannot). Even if it could prove such a violation, the FTC would have to show that DISH committed an act in connection with a

call by an Independent Retailer that DISH knew was unfair or deceptive and that act violated the TSR. There is no such evidence. If the Court is persuaded by the FTC's attempt to impose the FTC's new "strict liability" standard for a causing violation under the TSR, civil penalties are still improper, because such a strict liability standard would mean DISH was liable regardless of its knowledge of the Independent Retailers' violative conduct. That would violate the standard for civil penalties.

Further, the FTC cannot impose a novel standard for civil penalties (*i.e.*, liability where DISH had no knowledge of the actionable conduct.) As a matter of well-established law, "[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *see Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1333-34 (D.C. Cir. 1995) (rejecting a fine due to EPA's failure to give fair notice of its interpretation of the applicable regulation); *Montgomery Ward & Co., Inc. v. FTC*, 691 F.2d 1322, 1332 (9th Cir. 1982) (noting rule that "[i]f a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.") (internal quotations and citations omitted). The FTC has never given notice of an intent to impose strict vicarious civil penalty liability for violations of the TSR, and certainly cannot attempt to do so here.

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

X.
SUMMARY JUDGMENT MUST BE GRANTED DISMISSING ALL STATE PLAINTIFFS' CLAIMS AS THEY CANNOT PROVE WHICH CALLS, IF ANY, WERE MADE TO THEIR RESPECTIVE STATE'S RESIDENTS

Pursuant to the express text of the TCPA, the State Plaintiffs may only pursue a TCPA claim that allegedly arises from telemarketing calls made to their respective State's residents. 47 U.S.C. § 227(g)(1) ("Whenever the attorney general of a State . . . has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions ***to residents of that State*** . . . the State may bring a civil action ***on behalf of its residents*** to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions.") (emphasis added). This Court also noted that "[t]he TCPA further authorized state Attorneys General to bring actions on behalf of the citizens of such states for violations of the TCPA" and that "[t]he Attorney General Plaintiffs (Attorneys General) brought these claims on behalf of the citizens of their states." (d/e 20, Opinion at 5, 23.)

Each of the other claims asserted by State Plaintiffs require, as an essential element, that the calls at issue be placed to their respective State residents. State Plaintiffs did nothing to develop any reliable means to establish that any particular allegedly offending telemarketing call was placed to a resident or person within the boundaries of California, Illinois, North Carolina and/or Ohio. Instead, in the initial Rebuttal Report of Plaintiffs' expert, Dr. Erez Yoeli, he states

(DX-195.) As set forth more fully below, the FCC and courts have made clear that, due to advances in technology, area codes and telephone numbers cannot be relied upon to prove that a call recipient resided or was

located in a particular state at the time of the call. Even the small number of complaints produced by State Plaintiffs in discovery show that this is a real, not theoretical, flaw that plagues all of State Plaintiffs' claims including their TCPA claims. Accordingly, Counts V through XI of the SAC, which like Plaintiffs' other claims relies on "massive computer processing," must be dismissed.[41]

A. Technological Developments Have Broken The Connection Between Phone Numbers And Geography

The FCC, itself, has acknowledged that "[t]he relationship between numbers and geography – taken for granted when numbers were first assigned to fixed wireline telephones – is evolving as consumers turn increasingly to mobile and nomadic services." *In re: Numbering Policies for Modern Communications, Notice of Proposed Rulemaking, Order and Notice of Inquiry*, 28 F.C.C.R. 5842, 5844 (2013) ("*Numbering Policies for Modern Communications*"). Three primary technological developments have broken the connection between numbers and geography. *See, e.g.*, *TelTech Sys., Inc. v. Barbour*, 866 F. Supp. 2d 571, 575-76 (S.D. Miss. 2011). (DUF ¶390.)

First, since 1997, the FCC has required telecommunications carriers to permit consumers to "port" their telephone numbers, *i.e.*, keep their previous telephone numbers even when they switch to another carrier or move to another geographic area that traditionally was associated with a different area code and interchange number. 47 C.F.R. § 52.23; *see also, e.g.*, *In re Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 8352 (1996) (establishing an implementation schedule for telephone number portability). In 2003, the FCC allowed consumers to transfer (or "port") their wireline

[41] This argument applies with equal force to **all** claims, and necessarily requires dismissal of the SAC in its entirety.

numbers to a wireless carrier. *In re: Telephone Number Portability, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 18 F.C.C.R. 23697 (2003). In 2007, the FCC allowed consumers to port their telephone numbers to VoIP services as well, allowing consumers to transition from traditional wireline services to advanced IP-based services. *In re Telephone Number Requirements for IP-Enabled Services, Report and Order, Declaratory Ruling, Order on Remand and Notice of Proposed Rulemaking*, 22 F.C.C.R. 19531 (2007). (DUF ¶¶391-392.)

Second, over the time period relevant to Plaintiffs' claims here, consumers increasingly obtained wireless service and maintained "mobile numbers that [were] associated with an area code other than the one where they live[d]." *TelTech Sys.*, 866 F. Supp. 2d at 575. As one commentator noted in a May 2009 article, "the area code . . . is becoming increasingly irrelevant," because "[t]he whole idea of having a number correspond to where you actually are seems to have gone away," and wireless customers can use any area code, "regardless of whether it carries geographic significance." (DUF ¶393.) Further, wireless carriers have been able to assign telephone numbers without regard to the consumer's place of residence. As the FCC has acknowledged, "wireless carriers have considerable discretion in assigning telephone numbers, and often do so to minimize their own costs rather than based on the consumer's location. FCC, *In re Implementation of Section 60029)(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services*, WT Dkt. No. 09-66, at 100 n. 520 (14th Report May 20, 2010).

Third, during the time period relevant to Plaintiffs' claims, consumers have increasingly selected Internet-protocol-based services, such as VoIP services. VoIP service subscriptions,

like mobile service subscriptions, have increased greatly between 2003 and 2010, with nearly 32 million VoIP lines in service as of December 2010. FCC, *Local Telephone Competition: Status As of December 31, 2010*, at p. 2 & Fig. 1 (October 2011) (available at hraumfoss.fcc.gov/edocs_public/attachmatch/Doc-31026411.pdf).[42] VoIP numbers can be assigned without regard to the consumer's physical location. For example, a VoIP customer located in Atlanta may choose to have a number traditionally associated with Chicago. In an Order issued in 2004, the FCC readily acknowledged that "the NANP [North American Numbering Plan] number [which is relied upon by Dr. Yoeli here] is not necessarily tied to the user's physical location for either assignment or use, in contrast to most wireline circuit-switched [but not wireless] calls." *In re: Vonage Holdings Corporation* ("Vonage Order"), 19 FCC Rcd. 22404 (2004). The FCC further provided examples to explain why a subscriber's or call recipient's NPA/NXX could not be used as a proxy for a subscriber's or call recipient's state of residence or geographic location:

> If a subscriber's NPA/NXX were associated with Minnesota under the NANP, Minnesota's telephone company regulations would attach to every DigitalVoice communication that occurred between that subscriber and any other party having a Minnesota NPA/NXX. But because subscribers residing anywhere could obtain a Minnesota NPA/NXX, a subscriber may never be present in Minnesota when communicating with another party that is, yet Minnesota would treat those calls as subject to its jurisdiction.

Id. at 22421; *see also Nuvio Corp. v. FCC*, 473 F.3d 302, 303 (D.C. Cir. 2007) (recognizing that "VoIP service allows callers to choose what are called 'non-native' area codes. For example, a customer living in the District of Columbia can use an area code from anywhere in the country.")

[42] The FTC has acknowledged, in its Biennial Report, that "[s]ince . . . 2003, two forms of technology have developed considerably: mobile phones and [VoIP]." FTC, Biennial Report to Congress Under the Do Not Call Registry Fee Extension Act of 2007, FY 2010 & 2011, at 4 (December 2011) (available at http://www.ftc.gov/reports/biennial-report-congress-under-do-not-call-registry-fee-extension-act-2007-fy-2010-2011)

(DUF ¶394.) Notably, recognizing the decoupling of phone numbers and geography, an FCC advisory committee recently has recommended that the FCC "fully decouple" geography from the telephone number. *Numbering Policies for Modern Communications*, at ¶118. For these reasons, State Plaintiffs' assumption that all calls made to an area code traditionally associated with a geographic area within their respective States is fatally flawed, and renders State Plaintiffs unable to prove their TCPA claims, and state specific claims, through "massive computer processing."

B. State Plaintiffs' Own Productions Have Confirmed That Area Codes Cannot Be Used To Prove That a Call Was Placed To a Resident of a Certain State

State Plaintiffs' own productions in discovery of purported consumer complaints confirm that area codes cannot be used to prove that a call was placed to a resident of a particular state. (DUF ¶389.) As such, the State Plaintiffs' claims must be dismissed. For example, Plaintiff North Carolina produced a "Do Not Call Complaint" dated August 8, 2008 for . (*Id.*) Mr. , who identified himself as a resident of , North Carolina, alleged that he received calls to his phone number with a California area code. (*Id.*) While none of the call records at issue in this case actually reflect any of the calls about what Mr. complained, if they had, Plaintiff California would have mistakenly counted as California violations, rather than North Carolina vilations, when Plaintiff California has no standing to pursue relief on behalf of another state resident. (*Id.*)

Similarly, Plaintiff Ohio produced a consumer complaint dated January 8, 2009 for . (*Id.*) Mr. , who identified himself as a resident of , Ohio, indicated that he is the subscriber of two phone numbers that bear a Pennsylvania area code. (*Id.*) Again, if calls to Mr. phone numbers appeared in the call records in this case, State Plaintiffs would have counted such call as one to a Pennsylvania resident. (*Id.*)

State Plaintiffs' own records, therefore, demonstrate that area codes are not a reliable means to prove the state residence of call recipients. Accordingly, all of State Plaintiffs' claims must be dismissed.

XI.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT V OF THE SECOND AMENDED COMPLAINT

In Count V of the SAC, State Plaintiffs allege that DISH violated the TCPA, specifically 47 C.F.R. § 64.1200(c)(2) and 47 U.S.C. § 227(c), which govern "telephone solicitation[s]" to "[a] residential subscriber who has registered his or her number on the [NDNCR]." 47 C.F.R. § 64.1200(c)(2). These provisions expressly do not apply to calls to non-residential wireless or business or government numbers. *See id.* As set forth at Sections III and IV(C) above, State Plaintiffs cannot prove that any of the violations its claims were telemarketing calls made to residential landlines, rather than to non-residential wireless, business, or government numbers. Likewise, and as set forth in Section IV(D)(1) above, State Plaintiffs cannot prove that the violations that it claims from the 2003-2007 DISH call records or the Independent Retailer call records arise from telemarketing calls, as opposed to calls made for a non-telemarketing purpose. Finally, and as set forth in Section IV(A), State Plaintiffs cannot prove that the violations that it claims from any call record set are based on calls placed to the residential subscriber who had registered his or her number on the NDNCR. For these reasons, State Plaintiffs' claims asserted in Count V suffer from a failure of proof on required elements, and should be dismissed on summary judgment.

XII.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT VI OF THE SECOND AMENDED COMPLAINT

In Count VI of the SAC, State Plaintiffs allege that DISH violated 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. § 227(b)(1)(B), which are the provisions of the TCPA governing

the initiation of "any telephone call to a residential line using an artificial or prerecorded voice to deliver a message." State Plaintiffs' "prerecorded message" TCPA claims are based on two categories of recorded calls: (a) calls made by DISH; and (b) calls purportedly made by Guardian Communications for Tenaya/Star Satellite between July 30, 2005 and November 26, 2005 (these call records were produced in response to a subpoena served on Guardian Communications, a third party who allegedly provided service to Tenaya/Star Satellite.)[43]

A. State Plaintiffs Have No Means Of Proving That The Claimed Violation Calls Were Placed To Residential Landlines

Both 47 C.F.R. § 64.1200(a)(2) and 47 U.S.C. §227(b)(1)(B) apply only to residential telephone lines, and not to wireless, business, or government numbers. As set forth above, State Plaintiffs have no proof that the violations that they claim result from calls to residential numbers, as opposed to non-residential wireless, business, or government numbers. (DUF ¶¶171, 262.)

(*Id*.) This basis alone also is grounds to grant summary judgment dismissing Count VI of the SAC.

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

With respect to calls made by DISH, State Plaintiffs claim that calls made as part of fifteen prerecorded message campaigns violated the TCPA. Yet, at the time of such calls, the then-operative version of the TCPA specifically provided that prerecorded message calls made "to any person with whom the caller has an established business relationship at the time the call is made" are not violations. 47 C.F.R. § 64.1200(a)(2)(iv). There is no dispute that each of the fifteen prerecorded message campaigns at issue, which were dialed between September 2007 and

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

November 2008, were directed to DISH customers who were, at the time of the calls, existing subscribers of DISH service. (DUF¶¶421-422.) Thus, Count VI must be dismissed as it pertains to the prerecorded messages calls placed by DISH.

XIII.
SUMMARY JUDGMENT MUST BE GRANTED DISMISSING ALL OF THE STATE PLAINTIFFS' CLAIMS PREDICATED ON VICARIOUS LIABILITY

State Plaintiffs cannot establish that DISH violated the TCPA or the applicable state laws "as a result of a third party acting on its behalf." (d/e 257, SAC, Count V, ¶72; Count VI, ¶76; Count VII, ¶80; Count VIII, ¶82(a)-(d); Count IX, ¶85; Count X; Count XI, ¶93; and Count XII, ¶¶95, 96.)

In a 2013 declaratory ruling, the FCC "clarif[ied] that while a seller does not generally 'initiate' calls made through a third-party telemarketer within the meaning of the TCPA, it nonetheless may be held vicariously liable under federal common law principles of agency for violations of either section 227(b) or section 227(c) that are committed by third-party telemarketers." *In re Joint Petition Filed by DISH NETWORK, LLC*, CG No. 11-50, 2013 WL 193449, *1 (F.C.C. May 9, 2013.) State Plaintiffs, however, have failed to adduce sufficient evidence to support an agency theory of liability under federal common law principles of agency. Nor do State Plaintiffs fare any better under applicable state laws.

Put simply, there are no facts to suggest any agency relationship, whether actual or implied, between the Independent Retailers and DISH. (DUF ¶¶180-400.) To the contrary, the facts establish that DISH took active measures to avoid such a relationship, both contractually and in public. Indeed, two courts already have held that Independent Retailers are not agents of DISH. *See Zhu v. DISH Network, L.L.C.*, 808 F. Supp. 2d 815, 819 (E.D. Va. 2011); *Charvat v. EchoStar Satellite, LLC*, 676 F. Supp. 2d 668, 676 (S.D. Ohio 2009), *vacated on other grounds*, -- Fed Appx. --, No. 09-4525 2013 WL 5664664 (6th Cir. Oct. 17, 2013). In *Charvat*, for

example, the plaintiff alleged that DISH's predecessor, EchoStar Satellite, was liable for alleged TCPA violations by retailers, claiming that the retailers were acting on EchoStar's "behalf." The court granted summary judgment in EchoStar's favor, finding that EchoStar could not be vicariously liable for the conduct of its retailers because EchoStar did not maintain "control over the method of advertising or the means by which the Retailers carry out their marketing activities." 676 F.Supp. 2d at 675; *see also Zhu*, 808 F. Supp. 2d at 818-19.

The same result is warranted here, as it is undisputed that DISH did not control the Independent Retailers' marketing activities, and thus, the Independent Retailers cannot be considered DISH's agents.

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

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

Under Federal Common law, an agency relationship is created "when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1113 (C.D. Cal. 2010), *vacated on other grounds*, --- F.3d. ---, 2013 WL 6670945 (9th Cir. 2013). For an agency relationship to exist, the agent must be subject to the principal's control with respect to the acts undertaken by the agent. *Id.*; *Boss v. International Broth. Of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers*, 567 F. Supp. 845, 847, n. 1 (N.D.N.Y. 1983) ("The element

most essential to the demonstration of any agency relationship is that of control"); *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1009 (7th Cir. 1982) ("at common law a principal is not liable for the torts of his independent contractors[.]"); *Kittlaus v. United States*, 41 F.3d 327, 330 (7th Cir. 1994) ("hornbook agency law clearly distinguishes between agents who are employees of the principal and agents who act as independent contractors."); Restatement (Second) of Agency § 2 (1958) ("An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."); Restatement (Third) of Agency § 1.01, cmt f. (2006) (an agency relationship cannot exit absent the right to control the actor."). The requirements are materially the same under the laws of North Carolina, Illinois, Ohio, and California.[44]

[44] *See SunTrust Bank v. C & D Custom Homes, LLC*, 734 S.E.2d 588, 590 (N.C. Ct. App. 2012) ("There are two essential ingredients in the principal-agent relationship: (1) Authority, either express or implied, of the agent to act for the principal, and (2) the principal's control over the agent."); *Daniels v. Corrigan*, 382 Ill.App.3d 66, 75, 886 N.E.2d 1193, 1204 (Ill. Ct. App. 2008) (finding no agency relationship when contract identified the parties as independent contractors, and, notwithstanding such language, the elements required of an agency relationship, namely "[(i)] the right to control the manner in which the work is done, [(ii)] the method of payment, [(iii)] the right to discharge, [(iv)] the skill required in the work to be done, and [(v)] who provides the tools, material, or equipment", were not present.); *Knapp v. Hill*, 276 Ill.App.3d 376, 380, 657 N.E.2d 1068, 1071 (Ill. Ct. App. 1995) ("The test of agency is whether the purported principal has the right to control the manner and method in which the work is carried out by the agent and whether the agent is capable of subjecting the principal to personal liability."); *Hanson v. Kynast*, 494 N.E.2d 1091 (Ohio 1986) ("This court has held that the relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks."; *Forbes v. Par Ten Group, Inc.*, 99 N.C.App. 587, 394 S.E.2d 643 (N.C. Ct. App. 1990) ("Whether a principal-agent relationship exists is a question of fact for the jury when there is evidence tending to prove it; it is a question of law for the court if only one inference can be drawn from the facts."); Cal. Civ. Code § 2295 (an agent is "one who represents another, called the principal, in dealings with third persons."); Cal. Civ. Code § 2299 (An agent has actual authority to act on the principal's behalf when the agent is "really employed by the principal."); *Paramount Farms, Inc. v. Ventilex B.V.*, 735 F. Supp. 2d 1189, 1213 (E.D. Cal. 2010) (Such authority arises as a consequence of the principal's conduct "which causes an agent reasonably to believe that the principal consents to the agent's execution

The authority granted by the principal to the agent can be actual or apparent. "Apparent authority" exists "where the principal engages in conduct that, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 545 (D.C. Cir. 2006). According to the Restatement (Third) of Agency, "[a]pparent authority … is created by a [principal's] manifestation that another has authority to act with legal consequences for the [principal] who makes the manifestation, when a third party reasonably believes the actor to be authorized and the belief is traceable to the manifestation." Restatement (Third) of Agency § 3.03. A manifestation by the principal to the third party is an "essential requirement" of apparent authority. *Id.*, cmt b; *see also* Restatement (Second) of Agency § 265 ("Apparent authority exists only as to those whom the principal has manifested that an agent is authorized."); *Moriarity v. Glueckert Funeral Home, Ltd*., 155 F.3d 859, 865-866 (7th Cir. 1998). Thus, "[a]pparent authority cannot be established merely by showing that the agent claimed authority or purported to exercise it, but must be established by proof of something said or done by the principal on which a third person reasonably relied." *Moreau v. James River-Otis, Inc*., 767 F.2d 6, 9-10 (1st Cir. 1985). And "[t]he fact that one party performs a service that facilitates the other's business does not constitute [the required] manifestation." Restatement (Third of Agency §3.03, cmt b. These same elements are required under the laws of North Carolina, Illinois, Ohio and California.[45]

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of an act on behalf of the principal.") (*citing Tomerlin v. Canadian Indem. Co*., 61 Cal. 2d 638, 643-644 (Cal. 1964)).

45 *Environmental Builders, Inc. v. Blankenbaker,*, No. 2001-P-0064, 2002 WL 31862675 (Ohio Ct. App. 2002) ("To establish a principal/agent relationship under the theory of apparent agency, the evidence must show that (1) the principal held the agent out to the public as possessing sufficient authority to act on the principal's behalf, and (2) the person dealing with the agent had a good faith reason to believe and did believe that the agent possessed the necessary authority."); *Cove Management v. AFLAC, Inc.*, 986

B. There is no Evidence to Support State Plaintiffs' General Allegations that the Independent Retailers Acted as Agents of DISH

Here, there is no evidence to support State Plaintiffs' allegation that the Independent Retailers acted as agents of DISH, or that DISH otherwise "initiated" any calls placed by the Independent Retailers. (d/e 257, SAC, Count V, ¶72; Count VII, ¶80; Count VIII, ¶80 (a), (c); Count IX, ¶85; Count XII, ¶95.) DISH's standard Retailer Agreement precludes Independent Retailers from having any authority (actual or apparent) to act on DISH's behalf. For example, Section 11 of the Retailer Agreement expressly precludes an Independent Retailer from holding itself out to the public or representing that it is DISH or an employee, subcontractor, affiliate, agent, or sub-agent of DISH or any DISH affiliate. (DUF ¶¶183, 185.) DISH also requires each Independent Retailer to operate under its own company name or a d/b/a registered to the Retailer. (DUF ¶¶185, 191.) The Retailer Agreement's Trademark License Agreement further confirms that the Retailers are not related or affiliated with DISH, and it prohibits the Independent Retailers from using "DISH Network" (or any other name affiliated with DISH Network) in its name. (DUF ¶¶185.) In sum, there is no evidence that the Independent Retailers had actual authority to act on DISH's behalf.

Even if a third party were to believe that an Independent Retailer was an agent of DISH, this belief cannot be traced to anything that DISH did or did not do. Both Section 11 of the Retailer Agreement and the Retailer Agreement's Trademark Licensing Agreement expressly

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N.E.2d 1206 (Ill. Ct. App. 2013) ("Apparent authority in an agent to do an act for his principal must be based on the words and acts of his principal and cannot be based on anything the agent himself has said or done"); *Phillips v. Restaurant Management of Carolina, L.P.*, 146 N.C.App. 203, 552 S.E.2d 686 (N.C. Ct. App. 2001) ("[a]n apparent agency is created where 'a person by words or conduct represents or permits it to be represented that another person is his agent' when no actual agency exists.")'; Cal. Civ. Code § 2300 (An agent has ostensible authority when the principal "intentionally, or by want of ordinary care, causes a third person to believe another to be his agent."); *Paramount Farms*, 735 F. Supp. 2d at 1213 (The principal's representations may be to the public at large).

prohibit a Retailer from holding itself out as DISH Network or representing that it is affiliated with DISH Network in any way. (DUF ¶¶183, 185, 191.) Thus, DISH cannot be responsible for an Independent Retailer's conduct.

Finally, DISH did not ratify or knowingly accept any benefits of calls placed by Independent Retailers that violated the TCPA. In fact, DISH took steps to ensure that Independent Retailers complied with all applicable laws, including by requiring that the Independent Retailers purchase their own version of the NDNCR, access state Do Not Call lists, and comply with all applicable telemarketing laws. (DUF ¶¶184, 192.) DISH also reminded Independent Retailers of these obligations by periodically sending Facts Blasts to the Independent Retailers. (DUF ¶¶194, 196.) Finally, DISH has terminated Retailer Agreements with Independent Retailers who violated telemarketing laws. (DUF ¶207.)

For these reasons, DISH is entitled to summary judgment on Counts V, VII, VIII, IX, and XII insofar as the State Plaintiffs allege that DISH is liable for the calls allegedly placed by the Independent Retailers.

C. There is no Evidence to Support State Plaintiffs' Specific Allegations that Tenaya/Star Satellite Acted as an Agent of DISH

State Plaintiffs also cannot establish that DISH should be held vicariously liable for prerecorded calls allegedly made by Tenaya/Star Satellite. (d/e 257, SAC, Count VI, ¶76, Count VIII, ¶¶82 (b) and (d), Count X, ¶89, Count XI, ¶93, Count XII, ¶96).[46] State Plaintiffs cannot prove that Tenaya/Star Satellite was DISH's agent at the time that it placed the calls in question.

Tenaya Marketing was founded in 2002 by Walter Myers in Provo, Utah. (DUF ¶242.) After Mr. Myers formed Tenaya, he contacted DISH, through a 1-800 number and advised that

[46] The record evidence is devoid of any facts or allegations that any Independent Retailer, other than Tenaya/Star Satellite, made prerecorded telemarketing calls.

he wanted to sell DISH services door-to-door. (DUF ¶243.) He did not tell DISH anything about the possibility of using telemarketing. (*Id.*) Tenaya thereafter entered into a Retailer Agreement with DISH, and in 2002 and 2003, sold DISH services primarily through door-to-door marketing. (DUF ¶244.) In February 2003, Walter Myers' brother, Dan Myers, formed a new company called Star Satellite. Several months later, in May 2003, Star Satellite entered into a "Retailer Agreement" with DISH's predecessor, EchoStar. (DUF ¶245.) Walter Myers thereafter became a principal of Star Satellite, and conducted all sales activities of DISH services through Star Satellite, and not through Tenaya. (DUF ¶246.)

The Star Satellite Retailer Agreement provides, among other things, that Star Satellite would "promote and solicit orders for" DISH programming services, subject to the terms of the Agreement. (DUF ¶247.) Pursuant to the terms of the Retailer Agreement, "[t]he relationship of the parties [*i.e.*, Star Satellite and DISH] is that of independent contractors. [Star Satellite] shall conduct its business as an independent contractor, and all persons employed in the conduct of such business shall be [Star Satellite's] employees only, and not employees or agents of [DISH] or its Affiliates." (DUF ¶248.) The Retailer Agreement also required Star Satellite to "prominently state its business name, address and phone number in all communications with the public," and was prohibited from "hold[ing] itself out to the public or represent that it is an agent, employee or Affiliate" of DISH." (DUF ¶¶248-249.) The Retailer Agreement also required that Star Satellite "shall comply with all applicable governmental, statutes, laws, rules, regulations, … now enacted or hereafter promulgated, in force during the Term …" (DUF ¶250.)

Plaintiffs cannot establish that Star Satellite had actual authority to place pre-recorded message calls to consumers. As an Independent Retailer for DISH, Star Satellite had extensive

autonomy. (DUF ¶252.) It was free to market the goods and services of any other company, including DISH's competitors. (*Id.*) It was also up to Star Satellite, and not DISH, to decide the details of when and how Star Satellite marketed DISH's products and services, regardless of whether such marketing involved door-to-door sales, or newspaper, radio or television advertisements. (*Id.*) In essence, it was entirely within Star Satellite's discretion which mode of advertising to use, so long as it was legal – DISH did not permit Star Satellite to engage in any illegal marketing activities. (DUF ¶253.) DISH also had no involvement in how Star Satellite operated its day-to-day affairs, and did not direct or control Star Satellite's business. (DUF ¶254.) And when Star Satellite salespeople would market DISH services, they would always identify themselves as working for Star Satellite, and not for DISH. (DUF ¶25.)

In 2003 and 2004, Star Satellite, like Tenaya, primarily used door-to-door marketing to sell DISH services. (DUF ¶244.) In the middle of 2004, however, Star Satellite began working with Guardian Communications, a company that facilitated auto-dialing services and the provision of pre-recorded telephone messages to consumers. (DUF ¶257.) Although Star Satellite advised DISH that it was conducting "some phone sales," Star Satellite never disclosed to DISH "any of the details" of its telemarketing efforts, or that it had engaged "Guardian to do … pre-recorded messages" or even that it was working with Guardian at all. (DUF ¶258.) DISH advised Star Satellite to ensure that it was complying with all laws, and specifically to make sure that Star Satellite conveyed certain disclaimers to consumers, and to scrub against the Do Not Call List, which Star Satellite confirmed to DISH that it was doing. (DUF ¶259.)

Star Satellite not only failed to disclose that it was working with Guardian, it is undisputed that Star Satellite affirmatively concealed from DISH its pre-recorded message calling and auto-dialing activities. (DUF ¶260.) It was "a well-known fact" that DISH could

terminate a retailer relationship "if you got caught auto dialing." (*Id*.) Thus, on at least two occasions when DISH representatives were scheduled to visit Star Satellite's offices, Walter Myers contacted Guardian to advise that it was temporarily ceasing its telemarketing activities because "DISH Networks is coming into our office and we can't let them know we're auto dialing." (DX-173, Baker Dep. 177:7-10.)

Nor can Plaintiffs establish that Star Satellite had apparent authority to place pre-recorded message calls to consumers because there is no evidence that DISH manifested to those consumers that Star Satellite was authorized to do so. In fact, it is undisputed that DISH had no direct dealings whatsoever with the consumers that Star Satellite allegedly contacted. Courts have consistently rejected claims of apparent authority where, as here, a principal's manifestation is absent. *See Overnite Transportation Co. v. NLRB*, 140 F.3d 259 (D.C. Cir. 1998); *NLRB v. Downtown Bid Services Corp*., 682 F.3d 109 (D.C. Cir. 2012). Thus, DISH cannot be vicariously liable for Star Satellite's alleged TCPA violations, and is entitled to summary judgment on Counts VI, VIII, X, XI, and XII insofar as they allege that DISH is liable for the alleged dissemination of prerecorded messages by Tenaya/Star Satelite.

D. Neither North Carolina Law, Nor Illinois Law Provide For Third Party Liability

DISH cannot be held liable for Tenaya/Star Satellites' alleged violations of N.C. Gen. Stat. § 75-104 and the Illinois Automatic Telephone Dialers Act ("IATDA"), 815 ILCS 305/30(b) because neither statute provides for third party liability.

Plaintiff North Carolina claims that DISH is liable for alleged violations of the N.C. Gen. Stat. § 75-104 committed by Tenaya/Star Satellite. Section 75-104, however, does not provide for any third party liability. Rather, liability is limited to only the "person" who "use[s] an automatic dialing and recorded message player to make an unsolicited telephone call." N.C. Gen. Stat. § 75-104(a). In comparison, N.C. Gen. Stat. § 75-102 (which is not at issue here)

imposes liability for telephone solicitations made by a "telephone solicitor," which is defined by the statute as "[a]ny individual, business establishment, or other legal entity doing business in this State that, directly or through salespersons or agents, makes or attempts to make telephone solicitations or causes telephone solicitations to be made." N.C. Gen. Stat. §§ 75-101(9), 75-102(a). The distinction in the express language used in these two sections of the same statutory demonstrates that N.C. Gen. Stat. § 75-104 simply does not create liability for anyone other than the person making the autodialed call playing a prerecorded message. Even if this Court were to find that there can be third party liability under N.C. Gen. Stat. § 75-104, Plaintiff North Carolina cannot demonstrate any basis upon which DISH can be held liable for alleged prerecorded message calls made by Tenaya/Star Satellite, and for this additional reason, DISH is entitled to summary judgment as to Count X.

Plaintiff Illinois claims that DISH is liable for alleged violations of the IATDA committed by Tenaya/Star Satellite. The IATDA, however, limits liability to persons who "make or cause to be made" telephone calls using an autodialer. As set forth above in Section VI(B)(2)(a), DISH did not cause Tenaya/Star Satellite to place any of its alleged prerecorded message calls. For this additional reason, DISH is entitled to summary judgment as to Count XI.

XIV.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT VII OF THE SAC (CALIFORNIA DO NOT CALL LAW)

In Count VII of the SAC, Plaintiff California claims that DISH violated California Business & Professions Code Section 17592(a)(1) (the "California DNC Law") by "making or causing to be made telephone calls to California telephone numbers listed on the [NDNCR] and seeking to rent, sell, promote, or lease goods or services during those calls." (d/e 257, SAC, Count VII.) California Plaintiff bases these claims on outbound dialing by DISH covering the

time period from March 25, 2006 through March 2010, as well as outbound dialing by Independent Retailers JSR, SSN and Defender Direct.

A. Plaintiff California Cannot Prove Which Calls, If Any, Were Made To its State's Residents Or "California Numbers"

The California DNC Law expressly states that it applies only to "California telephone numbers listed on the [NDNCR]." Cal. Bus. Prof. Code § 17592(a)(2). Because Plaintiff California is only authorized to pursue claims on behalf of California residents, the phrase "California telephone numbers," which is not defined by the statute, must be interpreted to mean telephone numbers associated with California residents. *See DaFonte v. Up-Right, Inc.*, 2 Cal. 4th 593, 601 (1992) (citations omitted) (in interpreting a statute, courts "must first consult the words themselves, giving them their usual and ordinary meaning.") Here, Plaintiff California seeks to rely upon area code alone to prove that violation calls purportedly set forth in various sets of call records are based on calls made to California residents. As set forth above, however, both courts and the FCC have rejected the notion that area codes can be used to prove a call recipient's state of residence.

To the extent that Plaintiff California argues that "California telephone numbers" should be interpreted to mean any phone number with an area code that is typically associated with California, then this Court must find that the California DNC Law violates the Commerce Clause. It is well-settled that state regulations that have the practical effect of controlling extraterritorial conduct are per se invalid under the Commerce Clause. *See Midwest Title Loans, Inc. v. Mills*, 593 F.3d 660, 665 (7th Cir. 2010) ("[A]nother class of nondiscriminatory local regulations is invalidated without a balancing of local benefit against out-of-state burden, and that is where states actually attempt to regulate activities in other states."); *Pac. Merch. Shipping Ass'n v. Goldstene*, 639 F.3d 1154, 1178 (9th Cir. 2011) (observing that even where statutes are

non-discriminatory, "the Commerce Clause prohibits state legislation regulating commerce that takes place wholly outside of the state's borders, regardless of whether the commerce has effects within the state," and that "the court must consider the practical effects of the regulatory scheme, taking into account the possibility that other states may adopt similar extraterritorial schemes and thereby impose inconsistent obligations").

Courts addressing claims based on telephone calls have held similar state laws to be invalid under the Commerce Clause. In *TelTech Systems, Inc. v. Barbour*, 866 F. Supp. 2d 571 (S.D. Miss. 2011), the Court held that a Mississippi law governing caller-ID spoofing was invalid under the Commerce Clause because a caller ID spoofing service would have no way of knowing whether the recipient of its call was in Mississippi. The Court stated that:

> Due to the tremendous growth of mobile phone usage and the fact that many cell customers have mobile numbers that are associated with an area code other than the one where they live, to the Federal Communication Commission's imposition of mobile number portability (which permits a mobile customer which switches carriers to keep his existing phone number), to the introduction of IP-based services, including voice over internet protocol (VoIP) (which enables the delivery of voice communications over the Internet), and to the growth of call forwarding, it is impossible for a user or provider of caller ID spoofing service to know whether the recipient of their caller ID spoofing is in Mississippi.

(*Id*. 575-76.) The Court, therefore, opined that the statute was "indisputably and inevitably ha[d] a significant wholly extraterritorial effect" in violation of the Commerce Clause. (*Id.* 577.)

The FCC itself has also recognized the impact of the Commerce Clause on state regulations pertaining to telephone calls and telecommunications. In 2004, the FCC issued an order preempting the State of Minnesota's attempt to regulate VoIP services. *Vonage*, 19 FCC Rcd. 22404 (Nov. 12, 2004). The Eighth Circuit affirmed. *Minn. Pub. Utils. Com'n v. FCC*, 483 F.3d 570 (8th Cir. 2007). In its *Vonage* order, the FCC decided that the state's regulatory reach violated the Commerce Clause because Minnesota's requirements would have the "'practical

effect' of regulating commerce occurring wholly outside that state's borders." *Vonage*, 19 FCC Rcd. at 22428 (citing *Healy v. Beer Inst*., 491 U.S. 324, 332 (1989)). The FCC reached this conclusion because there was no method to identify calls that were made from or to a person in Minnesota (aside from each consumer self-identifying his or her location or state of residence). *Id.*

The practical effect of applying the California DNC Law to all calls placed to a number with a California area code, as urged by State Plaintiffs here, would be controlling conduct occurring wholly outside California's boundaries. Consider the example of consumer Mr. referenced in Section X(B) above. Mr. a resident of North Carolina, complained about receiving a call on his telephone, which happened to have a California area code and telephone number. (DUF ¶389). Mr. thus presents the exact concern that the FCC expressed in the *Vonage Order* – he has a NPA/NXX associated with California number, but is not a California resident and may not have been present in California at any time, much less than when he received the allegedly offending calls. (*Id.*) Yet, this California statute would treat the alleged calls to Mr. as subject to its jurisdiction.

For these reasons alone, Count VII of the SAC should be dismissed.[47]

B. California Cannot Prove Which Calls, If Any, Were Telemarketing Calls To A Residential Subscriber Made To Sell A DISH Product

For the reasons set forth in Sections III, IV(C) and IV(D) California claim must fail because it cannot prove which calls, if any, were telemarketing calls to a residential subscriber made to sell a DISH product.

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

C. California Cannot Prove That The Calls Claimed To Be Violations Were Made To The Person (Or Household of the Person) Who Placed The Number On the NDNCR

For the reasons set forth in Sections III and IV(A), the California DNC claim must be dismissed because California cannot prove that the calls claimed to be violations were made to the person (or household of the person) who placed the number on the NDNCR.

Even if Plaintiff California could establish that DISH violated the California DNC Law, which it cannot, DISH is entitled to avail itself of the statute's safe harbor defense. Indeed, Section 17593(d) of the California DNC Law provides that "[i]t shall be an affirmative defense to any action brought under this article that the violation was accidental and in violation of the telephone solicitor's policies and procedures and telemarketer instruction and training." As set forth above in (DUF ¶¶105-107), any violations committed by DISH were the result of inadvertence and were in violation of DISH's policies and procedures and its instruction and training (*see* DUF ¶¶14-98.) On this basis alone, DISH is entitled to summary judgment.

D. The One-Year Statute of Limitations for Claims Under Cal. Bus. & Prof. Code § 17592 Bars Any Claim For Alleged Violations Arising Before March 25, 2008

Finally, the California DNC Law provides for a one-year statute of limitations. Pursuant to Cal. Civ. Proc. Code § 340(a), the statute of limitations is one year for "[a]n action upon a statute for a penalty or forfeiture, if the action is given to an individual, or to an individual and the state, except if the statute imposing it prescribes a different limitation." Section 17593(a), entitled "Civil actions," grants the Attorney General the authority to bring a civil action. Section 17593(b) provides for a private right of action. As such, both individuals and the State may recover under the statute, and the one-year statute of limitations applies.

Therefore, the statute of limitations bars any claim by Plaintiff California for alleged violations of Section 17592 arising prior to March 25, 2008.

XV.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT VIII OF THE SAC (CALIFORNIA UNFAIR COMPETITION)

A. Plaintiff California's Section 17200 Claim Fails Because It Cannot Show That DISH Violated A "Borrowed Statute"

In Count VIII of the SAC, Plaintiff California asserts that DISH's alleged violations of the TCPA, Section 17592, and California Civil Code Section 1170(a)(22)(a) are also "unlawful" business practices under California Business & Professions Code § 17200, *et seq.* ("UCL 17200"). To sustain a claim under Section 17200, however, there must be a violation of the so-called "borrowed" statutes, here the TCPA, Section 17592, and Section 1770(a)(22)(a). *See Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1168 (9th Cir. 2012). As set forth in Sections X, XI, XII, XIII and XIV, *supra*, DISH neither violated the TCPA nor Section 17592. In addition, for the same reasons that DISH did not violate the TCPA's proscription against prerecorded messages as set forth in Section XII, DISH did not violate Section 1770(a)(22)(a), which is the California state law analogue prohibiting the same conduct. As such, California Plaintiff's UCL claim must fail because DISH did not violate these "borrowed" statutes, and without an actual statutory violation "there is no unlawful conduct to serve as the basis of plaintiff's UCL claim." *Rice v. Sunbeam Prods., Inc.*, No. CV 12–7923, 2013 WL 146270, at *8 (C.D. Cal. Jan. 7, 2013); *In re Sony Grand Wega KDF-E A10/A20 Series Rear Projection HDTV Television Litig.*, 758 F. Supp. 2d 1077, 1091 (S.D. Cal. 2010).

B. The One-Year Statute of Limitations Bars Any Claim For Alleged Violations of Section 17200 Arising Before March 25, 2008

In addition, Plaintiff California cannot use Section 17200 to artificially extend the one-year statute of limitation applicable to claims under Section 17592 to four years. While claims brought pursuant to Section 17200 have a four-year statute of limitations, under California law, where there are competing statutes of limitations, the more specific statute prevails over the more

general statute. *Strother v. Cal. Coastal Comm'n*, 173 Cal.App.4th 873, 879 (2009). For the reasons stated *supra*, a one-year statute of limitations specifically applies to Section 17592 claims and, therefore, overcomes the general four-year limit placed on Section 17200 claims. Accordingly, any claim that DISH violated the "unlawful" prong of Section 17200 through its alleged violation of Section 17592 prior to March 25, 2008, is barred by the one-year statute of limitations.

XVI.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT IX OF THE SAC (NORTH CAROLINA)

In Count IX of the SAC, Plaintiff North Carolina claims that DISH, or third parties acting on its behalf, violated N.C. Gen. Stat. § 75-103 by "making telephone solicitations to the telephone numbers of North Carolina telephone subscribers when those numbers were in the pertinent decision of the [NDNCR]." (SAC ¶85.) Plaintiff North Carolina also claims that DISH failed "to monitor and enforce compliance by its employees, agents and independent contractors," as per N.C. Gen. Stat. § 75-102(d).

As set forth in Section XIII, IV(C) and IV(D), Plaintiff North Carolina's claim must be dismissed because it cannot prove which calls, if any, were telemarketing calls to a residential subscriber made to sell a DISH product. As set forth in Sections III and IV(A), Count IX must be dismissed because Plaintiff North Carolina cannot prove that the calls claimed to be violations were made to the person (or household of the person) who placed the number on the NDNCR.

XVII.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT X OF THE SAC (NORTH CAROLINA)

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

As set forth in Section X, Plaintiff North Carolina's claim must fail because it cannot prove which calls, if any, were made to its state's residents or "North Carolina Telephone Subscribers." Similarly, and as set forth in Section XVI above, Plaintiff North Carolina's cannot prove which calls, if any, were telemarketing calls to a residential subscriber made to sell a DISH product. Count X of the SAC fails on these bases and should be dismissed.

XVIII.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT XI OF THE SAC (ILLINOIS)

As set forth above, in Count XI of the SAC, Plaintiff Illinois alleges that DISH, and/or third parties acting on its behalf, violated the IATDA, 815 ILCS 305/30(b), by placing autodialed calls that played a prerecorded message. Plaintiff Illinois' claim that DISH itself violated the IATDA is predicated on the same 15 prerecorded message campaigns that underlie the State Plaintiffs' TCPA claim. As set forth above, each of the DISH prerecorded message campaigns relied on by the State Plaintiffs, including Plaintiff Illinois, was made to then-existing DISH customers. (DUF ¶¶421-422.) Section 20 of the IATDA provides that the Act shall not apply to telephone calls "made to any person with whom the telephone solicitor has a prior or existing business relationship." 815 ILCS 305/20(a)(2). Thus, Plaintiff Illinois's IATDA claim with respect to DISH's prerecorded message campaigns must be dismissed.

XIX.
DISH IS ENTITLED TO SUMMARY JUDGMENT ON COUNT XII OF THE SAC (OHIO)

In Count XI of the Complaint, Plaintiff Ohio asserts a claim under the Ohio Consumer Sales Protection Act ("OCSPA"). (SAC, Count XIX.) To support its purported OCSPA claim, Plaintiff Ohio alleges that the exact same telephone calls and conduct that it claims violated the TCPA also violated the OCSPA. Specifically, Plaintiff Ohio claims that DISH, or a third party allegedly acting on its behalf, violated the OCSPA by: (a) initiating telephone calls to numbers

on the NDNCR in violation of the TCPA; and (b) delivering a prerecorded message or using an artificial voice in violation to the TCPA.

Plaintiff Ohio's OCSPA claim for direct liability against DISH fails on its face for three reasons. First, a violation of the TCPA is not, by itself, a violation of the OCSPA. *See Charvat v. NMP*, LLC, 656 F.3d 440, 450 (6th Cir. 2011) (citing *Culbreadth v. Golding Enterp.*, L.L.C., 872 N.E. 2d 284 (Ohio 2007)). In this regard, courts applying Ohio law, including the Sixth Circuit and Ohio Supreme Court, have specifically rejected the supposition that "delivering a prerecorded message without prior express consent, in violation of [the TCPA]" is by itself a violation of the OCSPA. *See id.*; *Culbreadth*, 872 N.E.2d at 291. Rather, violations of the TCPA can only constitute independent violations of the OCSPA if the circumstances of those calls violate specific provisions of the OCSPA. *Id.*; *see also Lucas v. Telemarketer Calling From (407) 476-5670*, No. 1:12-cv-630, 2013 WL 2456320, *5 (S.D. Ohio June 6, 2013); *Charvat v. DFS Services LLC*, 781 F. Supp. 2d 588, 594 (S.D. Ohio 2011) (dismissing claims under the OCSPA and holding that a telemarketing call that violates the TCPA does not "also violate the OCSPA absent some allegation of deception").

Second, even if Plaintiff Ohio could prove an OCSPA violation simply by proving a TCPA violation, which it cannot, for the reasons set forth in Sections X-XIII above, Plaintiff Ohio cannot prove that DISH committed any TCPA violation.

Third, even if the conduct alleged by Plaintiff Ohio could support a claim under the OCSPA, which it cannot, it is Plaintiff Ohio's burden to show that DISH committed an unfair, deceptive, or unconscionable act or practice in connection with a "*consumer* transaction." Ohio Rev. Code §§ 1345.02(A)–.03(A) (emphasis added). The Ohio Supreme Court has rejected the argument that transactions involving businesses or entities fall within the definition of "consumer

transaction" under the OCSPA. *Culbreath*, 872 N.E.2d at 286. As set forth above, Plaintiff Ohio cannot meet any of these necessary components of its state claim by simply pointing to massive call record analysis.[48]

XX.
CONCLUSION

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

Dated: January 10, 2014

Respectfully submitted,

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[48] Plaintiff Ohio's claim also fails for the reasons set forth in Sections in Sections X and XI.

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

Pursuant to Local Rule 7.1(B)(4)(c) of the Rules of the Central District of Illinois, I hereby certify that the foregoing memorandum complies with the type-volume limitation of the Court's December 2, 21013 order. The memorandum has an argument section of 26,967 words, exclusive of front matter, statement of undisputed facts, inline images, and signature block, as counted by the word processing system used to prepare the document, Microsoft Word 2010.

/s/ Henry Kelly
Henry Kelly