

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

vs.

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

Respondents.

Electronically Filed  
Mar 30 2021 02:03 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court  
Supreme Court No. 81704

District Court No.  
A-17-763397-B

**JOINT APPENDIX**

**Vol. 71 of 85**

**[JA016189-JA016436]**

Eric D. Hone (NV Bar No. 8499)  
Joel Z. Schwarz (NV Bar No. 9181)  
H1 LAW GROUP  
701 N. Green Valley Pkwy., Suite 200  
Henderson, Nevada 89074  
Tel: (702) 608-3720

*Liaison Counsel for Appellants*

J. Stephen Peek  
Robert J. Cassity  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134  
Tel: (702) 669-4600

*Attorneys for the Special Litigation  
Committee of Nominal Defendant  
DISH Network Corporation*

[Additional counsel appear on next page.]

<p>Randall J. Baron (<i>Pro Hac Vice</i>)  Benny C. Goodman III (<i>Pro Hac Vice</i>)  Erik W. Luedeke (<i>Pro Hac Vice</i>)  ROBBINS GELLER RUDMAN &amp;  DOWD LLP  655 West Broadway, Suite 1900  San Diego, CA 92101-8498  Tel: (619) 231-1058</p> <p><i>Lead Counsel for Appellants</i></p>	<p>C. Barr Flinn  Emily V. Burton  YOUNG CONAWAY STARGATT  &amp; TAYLOR, LLP  Rodney Square  1000 North King Street  Wilmington, DE 19801  Tel: (302) 571-6600</p> <p><i>Attorneys for the Special Litigation  Committee of Nominal Defendant  DISH Network Corporation</i></p>
---	---

## TABLE OF CONTENTS FOR VOLUME 71<sup>1</sup>

<b>Document</b>	<b>Vol.</b>	<b>Page No.</b>	<b>Date</b>
Report of the Special Litigation Committee of DISH Network Corporation and Appendices of Exhibits Thereto (Exs. 1-792; Appx. Vols. 1-50)	4-73	JA000739- JA016874	11/27/18
<b>Evidentiary Hearing SLC Exhibit 102<sup>2</sup></b>			

---

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

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

EXHIBIT 784

EXHIBIT 784

JA016189  
014910

TX 102-015451

UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF ILLINOIS  
SPRINGFIELD DIVISION

UNITED STATES OF AMERICA and the  
STATES OF CALIFORNIA, ILLINOIS,  
NORTH CAROLINA, and OHIO,  
Plaintiffs,

v.

DISH NETWORK L.L.C.,  
Defendant.

Case No. 3:09-cv-03073-SEM-BGC

---

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

---

JA016190  
014911

TX 102-015452

**TABLE OF CONTENTS**

Introduction..... 1

Statement of Undisputed Material Facts..... 4

    Dish Network And Telemarketing.....4

    Dish’s Robocall Telemarketing .....12

    Dish’s Compliance Activities .....17

    Dish’s OE Call Centers .....24

    Dish’s First OE Call Center, Dish TV Now .....32

    Dish’s OE Call Center Satellite Systems Network .....39

    Dish’s OE Call Center Star Satellite .....45

    Dish’s OE Call Center American Satellite.....48

    Dish’s OE Call Center JSR Enterprises .....52

    Dish Retailer New Edge Satellite and its Entity-Specific Do-Not-Call List .....59

    Dish’s OE Call Center National Satellite Systems .....60

    Consumer Related Facts .....62

    Custodial Facts.....74

Argument ..... 77

    Counts I – IV: The United States.....78

        A. The TSR Statutory and Regulatory Framework .....78

        B. The Undisputed Facts Show That Dish Violated the TSR by  
            Calling Numbers on the Registry and by Causing Its Retailers to  
            Call Numbers on the Registry .....88

        C. There Is No Dispute That Dish Engaged in or Caused Other  
            Telemarketers to Engage in Initiating Outbound Telephone Calls to  
            Persons Who Had Stated That They Did Not Want to Receive  
            Calls in Violation of the TSR.....114

D.	There Is No Genuine Material Factual Dispute That Dish Abandoned or Caused Telemarketers to Abandon Outbound Calls in Violation of the TSR.....	120
E.	Dish Violated the TSR by Providing Substantial Assistance and Support to Star Satellite, Knowing Or Consciously Avoiding Knowing That It Was Violating the TSR .....	131
F.	Dish Cannot Be Shielded by the TSR Safe Harbor .....	132
	Civil Penalties on Counts I-IV .....	134
A.	There Is No Genuine Material Factual Dispute That Dish Violated the TSR With “Actual Knowledge Or Knowledge Fairly Implied on the Basis of Objective Circumstances” That Its Conduct Was Prohibited.....	134
B.	Several Factors Counsel Strongly in Favor of a Sizable Penalty.....	138
	Injunctive Relief on Counts I-IV .....	151
	Counts V and VI: The States of California, Illinois, North Carolina, and Ohio.....	155
A.	The Telephone Consumer Protection Act.....	155
B.	There Is No Genuine Material Factual Dispute That Dish, Both Directly and Indirectly as a Result of Third Parties Acting on Its Behalf, Violated the TCPA by Engaging in a Pattern or Practice of Initiating Telephone Solicitations to Residential Telephone Subscribers on the Registry .....	160
C.	There Is No Genuine Material Factual Dispute That Dish, Both Directly and Indirectly as a Result of Third Parties Acting on Its Behalf, Violated the TCPA by Engaging in a Pattern or Practice of Initiating Prerecorded Telephone Solicitations.....	163
	Damages on Counts V And VI .....	166
	Injunctive Relief on Counts V And VI .....	168
	Counts VII and VIII: The State of California .....	169
A.	There Is No Genuine Material Factual Dispute That Dish Violated California’s Do-Not-Call Registry Statute .....	169

B.	There Is No Genuine Material Factual Dispute That Dish Violated California’s Unfair Competition Statute and Prohibition on Prerecorded Messages.....	170
C.	Relief on Counts VII and VIII .....	172
	Counts IX and X: The State of North Carolina.....	174
A.	There Is No Genuine Material Factual Dispute That Dish Violated North Carolina’s Do-Not-Call Registry Statute.....	174
B.	There Is No Genuine Material Factual Dispute That Dish Violated North Carolina’s Robocall Statute .....	176
C.	Relief on Counts IX and X.....	177
	Count XI: The State of Illinois.....	177
A.	There Is No Genuine Material Factual Dispute That Dish Violated the Illinois Autodialer Act .....	177
B.	Relief on Count XI.....	179
	Conclusion .....	179



# **TABLE OF AUTHORITIES**

## **CASES**

<i>Ameritech Benefit Plan Comm. v. Commc’n Workers of Am.,</i> 220 F.3d 814 (7th Cir. 2000) .....	77
<i>Anderson v. Liberty Lobby, Inc.,</i> 477 U.S. 242 (1986).....	77
<i>Ashland Facility Operations, LLC v. NLRB.,</i> 701 F.3d 983 (4th Cir. 2012) .....	159
<i>Barquis v. Merchants Collection Ass’n,</i> 7 Cal. 3d 94 (1972) .....	171
<i>BCS Servs., Inc. v. Heartwood 88, LLC,</i> 637 F.3d 750 (7th Cir. 2011) .....	82
<i>Bonime v. DIRECTV, Inc.,</i> B163051, 2003 WL 22931345 (Cal. Ct. App. Dec. 12, 2003) .....	123
<i>CE Design, Ltd. v. Prism Bus. Media, Inc.,</i> 606 F.3d 443 (7th Cir. 2010) .....	87
<i>Celotex Corp. v. Catrett,</i> 477 U.S. 317 (1986).....	77
<i>Clare v. Bell,</i> 37 N.E.2d 812 (Ill. 1941).....	178
<i>Cnty. Assisting Recovery, Inc. v. Aegis Ins. Co.,</i> 92 Cal. App. 4th 886 (2001) .....	171
<i>Cnty. for Creative Non-Violence v. Reid,</i> 490 U.S. 730 (1989).....	157
<i>Costello v. Oppenheimer &amp; Co.,</i> 711 F.2d 1361 (7th Cir. 1983) .....	167
<i>Dugan v. Smerwick Sewerage Co.,</i> 142 F.3d 398 (7th Cir. 1998) .....	77
<i>EEOC v. Wilson Metal Casket Co.,</i> 24 F.3d 836 (6th Cir. 1994) .....	85
<i>Farmers Ins. Exch. v. Superior Court,</i> 826 P.2d 730 (Cal. 1992); .....	171

<i>FTC v. Affiliate Strategies, Inc.</i> , 849 F. Supp. 2d 1085 (D. Kan. 2011) .....	81
<i>FTC v. Amy Travel Serv., Inc.</i> , 875 F.2d 564 (7th Cir. 1989) .....	85
<i>FTC v. Asia Pac. Telecom, Inc.</i> , 802 F. Supp. 2d 925 (N.D. Ill. 2011) .....	81
<i>FTC v. Colgate-Palmolive Co.</i> , 380 U.S. 374 (1965) .....	151
<i>FTC v. Evans Prods. Co.</i> , 775 F.2d 1084 (9th Cir. 1985) .....	84
<i>FTC v. Febre</i> , 128 F.3d 530 (7th Cir. 1997) .....	84
<i>FTC v. Global Mktg. Group</i> , 594 F. Supp. 2d 1281 (M.D. Fl. 2008) .....	132
<i>FTC v. IFC Credit Corp.</i> , 543 F. Supp. 2d 925 (N.D. Ill. 2008) .....	78
<i>FTC v. Mainstream Mktg. Servs., Inc.</i> , 345 F.3d 850 (10th Cir. 2003) .....	79
<i>FTC v. Med. Billers Network, Inc.</i> , 543 F. Supp. 2d 283 (S.D.N.Y. 2008) .....	84
<i>FTC v. Minuteman Press</i> , 53 F. Supp. 2d 248 (E.D.N.Y. 1998) .....	84
<i>FTC v. Morton Salt Co.</i> , 334 U.S. 37 (1948) .....	85
<i>FTC v. Publ'rs. Bus. Servs.</i> , 821 F. Supp. 2d 1205 (D. Nev. 2010) .....	87
<i>FTC v. Think Achievement Corp.</i> , 144 F. Supp. 2d 1013 (N.D. Ind. 2000) .....	152
<i>FTC v. U.S. Sales Corp.</i> , 785 F. Supp. 737 (N.D. Ill. 1992) .....	85, 152
<i>FTC v. World Travel Vacation Brokers, Inc.</i> , 861 F.2d 1020 (7th Cir. 1988) .....	84

<i>Gabelli v. SEC</i> , 133 S.Ct. 1216 (2013).....	139
<i>Gager v. Dell Fin. Servs.</i> , 727 F.3d 265 (3d Cir. 2013).....	93
<i>Good Shepherd Manor Found., Inc. v. City of Momence</i> , 323 F.3d 557 (7th Cir. 2003) .....	90
<i>Goodman v. Nat’l Sec. Agency, Inc.</i> , 621 F.3d 651 (7th Cir. 2010) .....	77
<i>HK Sys., Inc. v. Eaton Corp.</i> , 553 F.3d 1086 (7th Cir. 2009) .....	82
<i>In re S. African Apartheid Litig.</i> , 633 F. Supp. 2d 117 (S.D.N.Y. 2009).....	160
<i>In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991</i> , 27 FCC Rcd. 1830, 1835 (Feb. 15, 2013).....	37
<i>In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991</i> , 7 FCC Rcd. 8,752 (Sept. 17, 1992).....	156
<i>In the Matter of the Joint Petition Filed by DISH Network, LLC, et al. Concerning the Telephone Consumer Protection Act (TCPA) Rules</i> , 28 FCC Rcd. 6574 (May 9, 2013).....	157, 158
<i>Ira Holtzman, CPA v. Turza</i> , 728 F.3d 682 (7th Cir. 2013) .....	88, 89
<i>Jerman v. Carlisle, McNellie, Rini, Kramer &amp; Ulrich LPA</i> , 559 U.S. 573 (2010).....	83
<i>Kaylor-Trent v. John C. Bonewicz, PC</i> , 910 F. Supp. 2d 1112 (C.D. Ill. 2012) (Myerscough, J.) .....	102, 145
<i>Kludt v. Majestic Star Casino, LLC</i> , 200 F. Supp. 2d 973 (N.D. Ind. 2001) .....	78
<i>Kraft, Inc. v. FTC</i> , 970 F.2d 311 (7th Cir. 1992) .....	85
<i>Kreuger Int’l, Inc. v. Fed. Ins. Co.</i> , 647 F. Supp. 2d 1024 (E.D. Wis. 2008).....	78

<i>Mainstream Mktg. Servs. v. FTC</i> , 358 F.3d 1228 (10th Cir. 2004) .....	78
<i>Maxwell v. KPMG LLP</i> , 520 F.3d 713 (7th Cir. 2008) .....	82
<i>McGrew v. Countrywide Home Loans, Inc.</i> , 628 F. Supp. 2d 1237 (S.D. Cal. 2009).....	87
<i>Meacham v. Knolls Atomic Power Lab.</i> , 554 U.S. 84 (2008).....	85
<i>NLRB v. Express Publ'g Co.</i> , 312 U.S. 426 (1941).....	85
<i>People v. Custom Craft Carpets, Inc.</i> , 159 Cal. App. 3d 676 (1984) .....	173
<i>People v. Toomey</i> , 157 Cal. App. 3d 1 (1984) .....	173
<i>Podolsky v. First Healthcare Corp.</i> , 50 Cal. App. 4th 632 (1996) .....	171
<i>Ross v. Commercial Fin. Servs., Inc.</i> , 31 F. Supp. 2d 1077 (N.D. Ill. 1999) .....	82
<i>Sadowski v. Med1 Online, LLC</i> , 07 C 2973, 2008 WL 489360 (N.D. Ill. Feb. 20, 2008).....	87, 92
<i>Saunders v. Superior Court of Los Angeles County</i> , 27 Cal. App. 4th 832 (1994) .....	170
<i>Sawyer v. Atlas Heating &amp; Sheet Metal Works, Inc.</i> , 642 F.3d 560 (7th Cir. 2011) .....	157
<i>Schaffer v. Weast</i> , 546 U.S. 49 (2005).....	85, 86
<i>Scottsdale Indem. Co. v. Vill. of Crestwood</i> , 673 F.3d 715 (7th Cir. 2012) .....	passim
<i>SEC v. Lyttle</i> , 538 F.3d 601 (7th Cir. 2008) .....	83
<i>Smith v. Accenture U.S. Group Long-Term Disability Ins. Plan</i> , No. 05-cv-5941, 2006 WL 2644957 (N.D. Ill. Sept. 13, 2006).....	159

<i>Soppet v. Enhanced Recovery Co.</i> , 679 F.3d 637 (7th Cir. 2012) .....	93
<i>State v. Altus Fin.</i> , 36 Cal. 4th 1284 (2005) .....	173
<i>Telebrands Corp. v. FTC</i> , 457 F.3d 354 (4th Cir. 2006) .....	85
<i>Texas v. Am. Blastfax, Inc.</i> , 164 F. Supp. 2d 892 (W.D. Tex. 2001).....	168
<i>The Broad. Team, Inc. v. FTC</i> , 429 F. Supp. 2d 1292 (M.D. Fla. 2006).....	81
<i>Thrasher-Lyon v. Ill. Farmers Ins. Co.</i> , 861 F. Supp. 2d 898 (N.D. Ill. 2012) .....	87
<i>Trentadue v. Redmon</i> , 619 F.3d 648 (7th Cir. 2010) .....	77
<i>United States v. ACB Sales &amp; Serv., Inc.</i> , 590 F. Supp. 561 (D. Ariz. 1984) .....	134
<i>United States v. Brown</i> , 688 F.2d 1112 (7th Cir. 1982) .....	89
<i>United States v. Cornerstone Wealth Corp.</i> , 549 F. Supp. 2d 811 (N.D. Tex. 2008) .....	135
<i>United States v. David Allen DeFusco</i> , 930 F.2d 413 (5th Cir. 1991) .....	122
<i>United States v. David Allen Hagen DeFusco</i> , 949 F.2d 114 (4th Cir. 1991) .....	122
<i>United States v. Dish Network</i> , 754 F. Supp. 2d 1002 (C.D. Ill. 2010). .....	134
<i>United States v. Dish Network, LLC</i> , 667 F. Supp. 2d 952 (C.D. Ill. 2009) .....	138
<i>United States v. Hagen</i> , 468 F. App'x 373 (4th Cir. 2012) .....	127
<i>United States v. Hatfield</i> , 591 F.3d 945 (7th Cir. 2010) .....	82

<i>United States v. Loew's, Inc.</i> , 371 U.S. 38 (1962) .....	85
<i>United States v. Louisiana-Pacific Corp.</i> , 967 F.2d 1372 (9th Cir. 1992) .....	140
<i>United States v. Nat'l Fin. Servs., Inc.</i> , 98 F.3d 131 (4th Cir. 1996) .....	83, 137, 140, 146
<i>United States v. One 1992 Lexus SC400</i> , 167 F. Supp. 2d 977 (N.D. Ill. 2001) .....	83
<i>United States v. Reader's Digest Ass'n, Inc.</i> , 494 F. Supp. 770 (D. Del. 1980) .....	150
<i>United States v. Tex-Tow, Inc.</i> , 589 F.2d 1310 (7th Cir. 1978) .....	82
<i>Wellington Homes, Inc. v. W. Dundee China Palace Rest., Inc.</i> , 984 N.E.2d 554 (Ill. Ct. App. 2013) .....	157
<i>Zenith Radio Corp. v. Hazeltine Research, Inc.</i> , 395 U.S. 100 (1969) .....	84

## STATUTES

15 U.S.C. § 45 (2013) .....	passim
15 U.S.C. § 53 (2013) .....	78, 84
15 U.S.C. § 56 (2013) .....	78
15 U.S.C. § 57a (2013) .....	78
15 U.S.C. § 57b (2013) .....	78
15 U.S.C. § 6102 (2013) .....	78
15 U.S.C. § 6106 (2013) .....	79, 90, 93
28 U.S.C. § 1658 (2013) .....	157, 165
47 U.S.C. § 227 (2013) .....	passim
815 Ill. Comp. Stat. 305/30 (2013) .....	177, 178
815 Ill. Comp. Stat. 505/7 (2013) .....	179
Cal. Bus. & Prof. Code § 17205 (2013) .....	173

Cal. Bus. & Prof. Code § 17206 (2013).....	173
Cal. Bus. & Prof. Code § 17208 (2013).....	173
Cal. Bus. & Prof. Code § 17536 (2013).....	173
Cal. Bus. & Prof. Code § 17592 (2013).....	169, 170
CAL. BUS. & PROF. CODE § 17593 (2013) .....	87, 173
Cal. Code Civ. Proc. §338 (2013).....	173
H.R. Rep. No. 110-485 (2007).....	79
N.C. Gen. Stat. § 75-101 (2013) .....	174, 175
N.C. Gen. Stat. § 75-102 (2013) .....	174
N.C. Gen. Stat. § 75-103 (2013) .....	175
N.C. Gen. Stat. § 75-104 (2013) .....	176
N.C. Gen. Stat. § 75-105 (2013) .....	87, 177
N.C. Gen. Stat. § 75-16.2 (2013) .....	175, 176
Telephone Consumer Protection Act of 1991, PL 102–243, 105 STAT. 2394 (1991).	102, 155, 156

#### OTHER AUTHORITIES

FTC, Complying with the Telemarketing Sales Rule, available at <a href="http://www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#safeharbor">http://www.business.ftc.gov/documents/ bus27-complying- telemarketing-sales-rule#safeharbor</a> .....	86
---	----

#### RULES

FED. R. CIV. P. 26.....	91
FED. R. CIV. P. 37.....	91
Fed. R. Civ. P. 56.....	77

#### REGULATIONS

16 C.F.R. § 310.2 (2013) .....	passim
16 C.F.R. § 310.3 (2013) .....	81, 131, 132
16 C.F.R. § 310.4 (2013) .....	passim

47 C.F.R. § 64.1200 (2013) .....	passim
Federal Civil Penalties Inflation Adjustment Act, 74 Fed. Reg. 857-01 (Jan. 9, 2009).....	83
FTC Amended Telemarketing Sales Rule Statement of Basis and Purpose, 68 Fed. Reg. 4580 (Jan. 29, 2003) .....	78
Rules and Regulations Implementing the Telephone Consumer Protection Act (TCPA) of 1991, 68 Fed. Reg. 44,144 (July 25, 2003).....	92
Telemarketing Sales Rule (“TSR”), 71 Fed. Reg. 58,716 (Oct. 4, 2006).....	79
Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995).....	80, 91
Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. 51,173 (2008) .....	79
Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4579 (2003) .....	79, 80



NOW COME Plaintiffs, the United States of America and the States of California, Illinois, North Carolina, and Ohio, by and through their attorneys, and pursuant to Rule 56(a) of the Federal Rules of Civil Procedure and CDIL-LR 7.1(D), and as and for their Motion for Summary Judgment state as follows:

### **INTRODUCTION**

In November 2003, just days after the new National Do-Not-Call Registry (“Registry”) and related laws became effective, Dish Network (“Dish”) successfully persuaded David and Annette Hagen, a husband-and-wife team of felons with a long history of consumer fraud, to head the first call center that Dish authorized to market nationally through its new “Order Entry” (“OE”) program. The Hagens called their company “Dish TV Now,” and Dish worked closely with the company to make the OE program a success. In a few months’ time, Dish TV Now’s North Carolina call center signed up many thousands of new Dish subscribers—sales that were generated, at least in part, by over six million illegal robocalls sent to consumers around the country by a Moline, Illinois-based dialer hired by Dish TV Now. Although Dish knew about the illegal robocalls, it pressed Mr. Hagen to increase sales and paid Dish TV Now more than \$20 million in commissions for the subscribers it brought Dish.

Dish’s dalliance with Dish TV Now and illegal telemarketing was not an isolated indiscretion, but part of an unmistakable pattern. In 2005, Dish knew that Utah-based call center Star Satellite had used prerecorded message telemarketing to sell Dish. Dish allowed Star Satellite to market nationally in the OE program anyway, and it then made more than 43 million illegal robocalls to sell Dish. Similarly, San Diego-based call center American Satellite was run by a felon who had been sued by the United States Securities and Exchange Commission for

fraud involving telemarketing, but Dish nevertheless hired the company to market nationally in the OE program, with predictable results.

The undisputed facts reveal that—over and over again—Dish affirmatively chose to take sales from call-center operations it knew were violating the telemarketing laws. But Dish did not just take sales from these firms; it provided them with extraordinary support—training sales agents, providing sales scripts, installing satellite television equipment, and offering instant web-based access to Dish’s internal systems to make sure that the OE call centers generated as many sales as possible. And in spite of its knowledge of these retailers’ illegal activities, Dish handsomely rewarded them with many millions of dollars in incentives for the subscribers they brought Dish.

Similarly misplaced priorities also marked the telemarketing calls made directly by Dish’s in-house telemarketing operation, which used call centers in the United States and the Philippines. Since 2003, Dish itself has made more than 10 million illegal telemarketing calls. Despite numerous private lawsuits and investigations by nearly every state attorney general, and its own knowledge that it has broken the law, the irrefutable evidence shows that Dish has never ensured that its own telemarketing actually complies with state and federal telemarketing laws. Dish illegally called millions of people on the Registry, millions of people who had told Dish or one of its retailers that they did not want to receive sales calls, and harassed hundreds of thousands of people with illegal abandoned and prerecorded messages.

Despite this illegal conduct, Dish remains one of America’s largest corporations—worth upwards of \$20 billion—its call centers dial thousands of people every day, and its OE program remains one of its most successful sales initiatives. Indeed, the only real losers in the Dish telemarketing equation have been American consumers: North Carolina senior citizen Laurie

Sykes, who worked the night shift at the Comfort Inn—and kept her phone on during the day in case her husband, who had heart problems, needed to reach her—was repeatedly awakened by illegal prerecorded robocalls selling Dish while she tried to sleep at home during the day.

Illinois resident Lisa Skala was bothered by numerous Dish telemarketing calls, even after she asked Dish several times to stop calling. Florida dairy farmer R [REDACTED] P [REDACTED] was awakened by illegal Dish robocalls in the evening while trying to sleep so that he could wake up at 3 a.m. to run his business.

These consumers are far from alone, and Dish repeatedly put profit over not only people's privacy, but also the truth. When the time came to admit what it knew—that its own call centers and its OE call centers were responsible for extraordinary levels of telemarketing violations—Dish instead chose to engage in a lengthy campaign of misinformation in which it misled courts, regulatory agencies, news outlets, and consumers. But the truth will out: Dish knows that it is responsible for these illegal calls, and has feared for nearly a decade that someone would use its knowledge and acquiescence of illegal telemarketing against it. That time is now.

Upon a finding of liability, and following any hearing or further briefing the Court may hereafter order, the United States will seek a substantial penalty appropriate to the severity of Dish's conduct. To encourage Dish's future compliance with the law, it will be essential for the Court to impose a penalty significant enough to make it more profitable for Dish to comply with the telemarketing laws than to tolerate its and its retailers' continued violations of those laws.

**UNDISPUTED MATERIAL FACTS**

1. The National Do-Not-Call Registry (“Registry”) was established in 2003 and now contains more than 200 million phone numbers. Dziekan Decl. ¶ 3 (Ex. 1).

2. Consumers register their phone numbers on the Registry via the Internet or through an automated telephone system, and telemarketers register with the FTC and download the Registry in order to comply with the law. Answer to Second Am. Compl. ¶¶ 11, 15, Mar. 19, 2013 (d/e 263) (Ex. 2).

**Dish Network And Telemarketing**

3. Dish is a business entity formed under the laws of Colorado with a principal place of business in Englewood, Colorado. Ex. 2 at ¶ 9.

4. Dish was known as Echostar until January 1, 2008, when it changed its name. Press Release, EchoStar, *EchoStar Communications Corporation Announces Distribution Date for the Separation of Its Businesses* (Dec. 28, 2007), available at <http://about.dish.com/press-release/corporate/echostar-communications-corporation-announces-distribution-date-separation-i> (Ex. 3).

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

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

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

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

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

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

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

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

13. Dish settled *TiVo Inc. v. Dish Network, Corp.* with a payment to TiVo of \$500 million. Press Release, TiVo Inc., *DISH Network and EchoStar Announce Half-Billion Dollar Settlement of Patent Litigation*, *available at* <http://pr.tivo.com/press-releases/tivo-dish-network-and-echo-star-announce-half-bill-nasdaq-tivo-0750426> (May 2, 2011) (Ex. 11).

14. Since October 18, 2003, Dish has placed interstate telemarketing calls to American consumers through a network of call centers located in, among other places, Colorado, Texas, New Jersey, West Virginia, and the Philippines. Dish Dep. 21:23-22:14, 24:10-25:24, 30:24-31:24, 33:11-34:21, 109:15-25, 115:12-22, 118:7-122:23, Dec. 15, 2010 (Bangert) (Ex. 12); Dish Dep. 61:5-20, Apr. 18, 2012 (Bangert) (Ex. 13).

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

16. Since October 18, 2003, Dish has placed live interstate telemarketing calls to American consumers through several vendors to whom it sends telemarketing lists. Ex. 12 at 32:5-33:2, 34:22-35:23, 37:10-46:6, 104:2-109:25, 140:14-141:6.

17. Dish made more than one interstate telemarketing call as part of its telemarketing activities. John Taylor, Expert Report of John Taylor at 9 (Oct. 14, 2013) (removing only 174,474 calls out of millions as “intrastate” calls) (Ex. 16).

18. From 2006 through 2011, Dish had a contract with a Colorado-based vendor—eCreek, headed by a former Dish executive—that used its own dialer to place Dish telemarketing calls using dialing lists provided by Dish. Ex. 12 at 43:24-46:17, 264:7-265:4; Dish Dep. 66:24-68:18, Dec. 16, 2010 (Davis) (Ex. 17), Dish Dep. Ex. 119, Dec. 16, 2010 (Davis) (Ex. 18).

19. Dish recorded data about the calls in its September 2007 to March 2010 call records in a computer system, which accurately stored the phone number dialed, the date and time of the call, a name indicating the campaign during which the call was made, and the “disposition code” entered by the Dish employee or agent who handled the call. Ex. 14 at 68:5-

24, 158:18-159:9, 161:5-16; Ex. 12 at 14:17-15:13; Montano Dep. 56:8-56:18, Nov. 29, 2012 (Ex. 19).

20. Dish is responsible for telemarketing calls placed by eCreek that Dish produced as its internal call records because it provided the dialing lists to eCreek. Letter from Augustino to Dortch (Dec. 9, 2011) (“[I]f the principal directs the retailer’s telemarketing activity by providing call lists for telemarketing, the principal can be held liable for the reseller’s telemarketing based on those lists.”) (Ex. 20); Ex. 14 at 114:13-117:7.

21. Dish maintained an entity-specific do-not-call list, which recorded, among other things, the phone numbers of persons who stated they did not wish to receive telemarketing calls by or on behalf of Dish Network and the dates those requests were received. Ex. 12 at 210:13-21, 235:2-18, 240:3-241:23; Dish Dep. 237:1-241:15, Dec. 17, 2010 (Davis) (Ex. 21).

22. In May and June 2010, Dish produced its September 2007 to March 2010 internal call records (the “2007-2010 call records”) in two sets: (1) a hard drive Bates numbered DISH-00000001, containing calls handled by Dish’s domestic and Filipino call centers; and (2) two CDs Bates numbered DISH-00000002, containing calls placed by eCreek’s dialer. Letter from Korzha to Crane-Hirsch et al., May 27, 2010 (Ex. 22); Letter from Korzha to Crane-Hirsch et al., June 29, 2010 (Ex. 23); Letter from Boyle to Crane-Hirsch & Runkle, Apr. 27, 2010 (Ex. 24); Letter from Boyle to Crane-Hirsch & Runkle, June 28, 2010 (Ex. 25).

23. The analysis by Dish’s proffered expert, John Taylor of PossibleNow, confirmed as accurate Plaintiffs’ findings that certain Dish calls in DISH-00000001 were “issue calls” or Registry “hits”—*i.e.*, calls were to telephone numbers that had had been on the Registry for at least 31 days. John Taylor, Revised Expert Report at 1-2, Sept. 20, 2012 (Ex. 26).

24. As used by Dish's expert, the term "issue calls" means that Dish could not exclude on the basis of any defense identified by its expert. Taylor Dep. 5:18-6:11, Nov. 20, 2013 (Ex. 27).

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

26. Dish's expert excluded the following from the "issue calls" in UF25: non-telemarketing calls, calls where Dish asserts that the "telephone never rang" on the recipient's phone, and calls where Dish reached a business. Ex. 27 at 69:11-18; Ex. 16 at 6-7; John Taylor, Expert Rebuttal Report at 10, Nov. 6, 2013 (Ex. 28).

27. 53,167 of those 501,650 calls were to California phone numbers. Ex. 16 at 8.

28. 42,019 of those 501,650 calls were to California phone numbers using a 90-day Registry grace period as opposed to a 31-day grace period. Ex. 28 at 10.

29. 24,096 of those 501,650 calls were to Illinois phone numbers. Ex. 28 at 10.

30. 16,005 of those 501,650 calls were to North Carolina phone numbers. John Taylor, Supplemental Rebuttal Report of John Taylor at 3, Nov. 18, 2013 (Ex. 298).

31. 23,853 of those 501,650 calls were to Ohio phone numbers. Ex. 28 at 10.

32. Dish does not preserve any information about the creation of its calling campaigns—which are telesales efforts calling prospective, former, or current customers—and how it scrubs its calling lists. Gogineni Decl. ¶ 8, Jan. 2, 2013 (d/e 224) (Ex. 29); Montano Decl. ¶ 14, Jan. 4, 2013 (d/e 227) (Ex. 30).

33. In addition to the 501,650 Registry hits referenced in UF25 above, Dish Expert Taylor also found that Dish's 2007-2010 call records contained 873,551 "issue calls" to numbers



on the Registry for more than 31 days that Dish claimed were part of “lead” campaigns—*i.e.*, sales initiatives that called groups of consumers who had supposedly inquired about Dish. Ex. 26 at 7.

34. Dish’s expert excluded a number of potential issue calls on the basis of several asserted defenses: that the “telephone never rang” despite the fact that Dish initiated the call (309,931); that Dish reached someone who did not speak English or told Dish it had the wrong number (12,552); or that Dish’s dialer happened to be located in the same state as the recipient of the call (10,029). Ex. 26 at 5, 8.

35. Dish’s expert excluded from his call counts all calls in Dish’s 2007-2010 call records that reached businesses. Ex. 16 at 7; Ex. 27 at 69:11-18, 71:1-4; Ex. 28 at 10.

36. In March 2011, Dish produced a copy of its entity-specific do-not-call list to Plaintiffs on a disc labeled “Dish Network LLC Internal Do-Not-Call Lists,” with the cover letter from Dish’s counsel reading: “. . . we enclose a CD-Rom containing DISH’s Internal Do Not Call lists, which are responsive to Request No.1 of Plaintiffs’ Third RFPDs.” Letter from Boyle to Hsiao, Mar. 11, 2011 (Ex. 31).

37. According to Dish, the telephone numbers on this list are those of consumers who told Dish and its retailers that that they did not wish to receive future telemarketing calls. Ex. 21 at 237:1-241:15.

38. Since approximately December 2007, Dish has used an outside telemarketing-compliance vendor, PossibleNow, to maintain the entity-specific do-not-call lists compiled by Dish and its retailers, and has hired PossibleNow employees—including persons designated by Dish as expert witnesses in this case—to consult on other compliance issues. Sponsler Dep.

64:7-69:5, Nov. 13, 2013 (Ex. 32), Sponsler Dep. Ex. 16, Nov. 13, 2013 (Ex. 33); Ex. 27 at 28:12-21; E-mail from Sponsler to Hutnik (July 25, 2007) (Ex. 34).

39. According to Mr. Taylor, Dish did not have access to many of the entity-specific do-not-call requests its retailers collected until long after those requests had been made by consumers, because its retailers did not upload those requests to PossibleNow. Ex. 27 at 47:21-49:8.

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

41. Dish did not take a role in the process of sharing its entity-specific do-not-call list, and Dish does not know if retailers actually upload do-not-call requests to PossibleNow. E-mail from Musso to Pastorius et al. (June 17, 2008) (Ex. 35); Dish Dep. 37:11-38:10, Apr. 16, 2012 (Werner) (Ex. 36).

42. eCreek’s call-center agents labeled the calls where consumers asked not to be called as “DNC,” meaning “do not call.” eCreek DNC Procedure (Ex. 37).

43. From November 2008 through March 2010, Dish and/or eCreek made 140,349 telemarketing calls to more than 23,000 distinct consumer telephone numbers that had been recorded as “DNC” by eCreek and Dish more than 30 days prior to the 140,349 illegal calls. Yoeli Decl. ¶ 27 (Ex. 38); Third Party Vendor List-Calls.xls (Apr. 26, 2010) (Ex. 39); Ex. 21 at 289:14-290:18.

44. In November 2013, Dish’s expert found 8,224,409 “issue calls” to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 11 (Tables 3b-3d).

45. 3,114,488 of the 8.2 million calls in UF44 were placed to numbers that were actually on Dish's entity-specific do-not-call list and accessible to Dish at the time of the call. Ex. 28 at 11 (Tables 3b, 3d).

46. 2,397,390 of the 8.2 million calls in UF44 were also calls that had been on the Registry for more than 31 days. Ex. 38 at ¶ 29(b)(i). 11,004 of these 2,397,390 calls were included within the 501,650 "issue" identified by Dish's Expert John Taylor in UF25 (*i.e.*, calls to numbers on the Registry for more than 31 days). Ex. 38 at ¶ 29(b)(i). Excluding these 11,004 calls yields a total of 2,386,386 calls to phone numbers that had been on the Registry for more than 31 days and that are numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the call.

47. 302,983 of the 2,386,386 calls in UF46 were to California phone numbers. Ex. 38 at ¶ 29(b)(i).

48. 296,640 of the 2,386,386 calls in UF46 were to California phone numbers using a 93-day Registry grace period. Ex. 38 at ¶ 29(b)(ii).

49. 118,289 of the 2,386,386 calls in UF46 were to Illinois phone numbers. Ex. 38 at ¶ 29(b)(i).

50. 97,785 of the 2,386,386 calls in UF46 were to North Carolina phone numbers. Ex. 38 at ¶ 29(b)(i).

51. 95,275 of the 2,386,386 calls in UF46 were to Ohio phone numbers. Ex. 38 at ¶ 29(b)(i).

52. S [REDACTED] D [REDACTED] of Virginia, who has the phone number ([REDACTED]) [REDACTED], received an illegal call from Dish on September 10, 2008, and wrote to FTC the same day, "I have asked them repeatedly to remove me from their call list and not call anymore as there is an 8 month old

baby in the house who they are constantly waking up, even talking to a supervisor, but so far, we have not gotten any relief from their numerous phone calls every day! PLEASE HELP.” Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28, App. B.

53. S ■■■ M ■■■ of California, who has the phone number (■■■) ■■■■, received an illegal call from Dish on June 18, 2009, and wrote to FTC the same day, “This company will not stop calling me no matter how many times I have asked them to stop!” Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28, App. B.

54. B ■■■ C ■■■ of Texas, who has the phone number (■■■) ■■■■ and received an illegal call from Dish on January 20, 2009, stated simply, “Make them stop calling me, Please.” Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28, App. B.

#### **Dish’s Robocall Telemarketing**

55. Dish has known since at least January 2003 that prerecorded telemarketing messages, also known as “robocalls,” are generally unlawful. E-mail from Davidson to Meyers et al. (Jan. 17, 2003) (Ex. 40); *see* Kyle Gaffaney, *Federal Ban on Automated Prerecorded Messages, So-Called “Robocalls,” Goes into Effect*, 22 Loy. Consumer L. Rev. 130 (2009) (Ex. 41).

56. Since October 18, 2003, Dish has placed prerecorded telemarketing calls to American consumers using a Dish-owned system to deliver prerecorded messages. Ramjee Decl. ¶¶ 7-8, Jan. 4, 2013 (d/e 229) (Ex. 42).

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

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

59. From 2002 until the end of 2007, at the earliest, Dish used prerecorded messages to sell international programming. Dish, 2003 Mktg Plan Int'l Programming Chinese Servs. at DISH5-0000088604 (Oct. 15, 2002) (Ex. 45); E-mail from Davis to Munger (Nov. 9, 2007) (Ex. 46).

60. Between October 18, 2003 and March 2010, Dish initiated 98,054 prerecorded calls with the disposition code DPV to American consumers in 15 specific Dish automessage campaigns: AM 100507ZEE, AM 090507 GREEK, AM 090607 CHIN, AM 090607 FILI, AM 090607 KORE, AM 091107 ARAB, AM 091107 GREEK, AM 091207 CHIN, AM 091307 KINO, AM 091407 FRENCH, AM 091407 GERMAN, AM 092107 FREEHD, AM 100407 INDUSM, AM 100407 INDUSV, and AM 100807 INDUS. Ex. 38 at ¶ 29(a)(ii).

61. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 46,523 calls to California phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

62. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 14,196 calls to Illinois phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

63. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 4,983 calls to North Carolina phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

64. As part of the 15 Dish automessage campaigns listed in UF60, Dish initiated 3,640 calls to Ohio phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 12 (Tables 4a, 4b).

65. Dish's internal database reflects that it dialed these 15 campaigns only to "residential" customers. Screenshots of Dish Predictive Dialer (Ex. 47).

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

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

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

69. During the outbound calls made as part of the AM 090607 FILI campaign, Dish played a prerecorded message that contained the following language: "Now is the best time to

come back to your Filipino shows . . . Call 1-877-456-2609 . . . to have Dish Network Filipino TV added now.” Ex. 42 at ¶ 7(c).

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

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

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

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

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

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

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

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

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

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



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

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

**Dish’s Compliance Activities**

82. Dish acknowledged internally in 2002 that it had not obeyed Oregon’s do-not-call list. E-mail from Kuelling to Moskowitz (May 21, 2002, 7:06PM) (Ex. 49).

83. Dish stopped dialing into Oregon when it realized it had been breaking the law, and then fabricated an excuse why it had not complied. E-mail from Kuelling to Moskowitz (May 24, 2002, 12:43AM) (Ex. 50).

84. At that point, Dish employees did not even know what types of calls were being made to what states and from where. Ex. 50.

85. A few days later, Dish compiled a list of states that did not have do-not-call lists, and proceeded to dial into those states without analyzing whether other rules might apply. E-mail from Kuelling to Dodge (May 23, 2002) (Ex. 51).

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

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

88. Dish and its retailers’ telemarketing practices were the subject of dozens of state investigations. 10 04 07 Legal and RS Project Report.xls (Oct. 4, 2007) (Ex. 54).

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

90. In 2007, Dish learned that it called a consumer on its entity-specific do-not-call list, while responding to a Colorado Attorney General inquiry. Ex. 46.

91. In 2007, Dish presented its compliance program to FTC as evidence that it complied with the TSR. Dish, Echostar Satellite LLC Presentation to Div. of Mktg. Practices, Federal Trade Commission at FTC006-000731 (Jan. 19, 2007) (Ex. 56) .

92. Dish’s lawyers and compliance personnel have known specifically since before the Registry went into effect that Dish would have to pay up to \$11,000 per violation for violating the TSR. E-mail from Maciejewski to Tran (Sept. 9, 2003, 4:50PM) (Ex. 57).

93. Dish’s lawyers acknowledge that the marketing department does not tell them about sales initiatives that may raise telemarketing concerns. E-mail from Davis to Pastorius (June 6, 2008) (Ex. 58).

94. In early 2010, Dish realized that its internal dialing systems did not actually scrub telephone numbers on its entity-specific do-not-call list from its telemarketing campaigns. E-mail from Montano to Davis (Jan. 28, 2010) (Ex. 59); E-mail from Bagwell to Montano (Jan. 28, 2010) (Ex. 60).

95. In late 2003, Dish created a new marketing initiative called the “Order Entry (OE) Tool.” OE retailers (*i.e.*, those that were a part of this initiative) would only have to make a sale, and collect payment and customer information “on Dish Network’s behalf.” “DISH Network takes care of everything after the sale.” The OE tool did everything except find the consumer. Letter from Ahmed to Hagen (Oct. 7, 2003) (Ex. 61); Dish Dep. 21:21-22:2, May 3, 2012 (Mills) (Ex. 62).

96. Sometime in 2009, Dish created and implemented a Quality Assurance (“QA”) call-monitoring system that required OE retailers to upload dozens of recordings of sales calls every week to Dish for qualitative evaluation by a team of Dish sales personnel. Dish, Important Notice – Quality Assurance Program (2009) (Ex. 63); SSN Production Cover E-mails at SSN-000179, SSN-000434 (Dec. 1, 2011) (producing document titled “Important Notice – Quality Assurance Program”) (Ex. 297).

97. The Dish QA program does not monitor for telemarketing compliance. Letter from Origer to Bamira (Feb. 20, 2007) (Ex. 64); Ex. 36 at 147:5-149:13; Snyder Dep. 20:20-21:18, 24:6-16, 25:12-19, Mar. 8, 2011 (Ex. 65).

98. The QA program “monitor[s] and evaluate[s]” the OE retailers to ensure they were offering “a high quality representation of DISH Network,” and so that Dish could “provide feedback to assist [the OE retailers] on how to constantly improve from a sales perspective.” Ex. 63; Ex. 64.

99. In 2011, dozens of Dish QA personnel used more than 50 different metrics to evaluate more than 70 sales calls made by Dish OE retailer Defender during one week, creating more than 3,000 individual data points that Dish reported back to Defender to improve its sales. Defender WE 08.9.11.xls (Sept. 2, 2011) (Ex. 66).

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

101. In 2006, when Dish created an entity-specific do-not-call process for its retailers, it devised a “three strikes” system wherein a retailer would be terminated if Dish caught it breaking the telemarketing laws three times. Dish, Do Not Call List Escalation Process (May 16, 2006) (Ex. 67).

102. Dish changed the “three strikes” policy in 2007 to a policy calling for a “business decision” as to whether to continue the relationship with the retailer in spite of the telemarketing violations. Dish, Do Not Call Process Flow (Aug. 20, 2007) (Ex. 68).

103. Between 2003 and December 3, 2013, consumers have filed tens of thousands of complaints with the FTC identifying Dish telemarketing calls—including complaints about Registry violations, entity-specific violations, and prerecorded messages. Ex. 1 at ¶¶ 20, 26, 28, 29, 30, Ex. A.

104. PossibleNow discovered at some point in 2007 or 2008 that Dish’s system for scrubbing its calling lists was “flawed and not operating in a compliant manner.” PossibleNow, Dish Network Client Profile (Ex. 69).

105. PossibleNow told Dish in 2009 that it needed to improve its compliance systems in order to comply with “regulator mandates,” but Dish did not buy the product PossibleNow recommended. Ex. 32 at 34:22-40:25, Sponsler Dep. Ex. 15, Nov. 13, 2013 (Ex. 70).

106. For years, Dish told consumers who complained about telemarketing that they should contact each of their thousands of “independent” retailers if they wish to stop receiving Dish telemarketing calls. Letter from Romero to Fink (Feb. 21, 2007) (ex. 71); Letter from

Bappe to Fox (July 14, 2006) (Ex. 72); dnc tracker template -Direct3.doc (July 1, 2012) (Ex. 73); Musso Decl. at 2, Aug. 16, 2010 (d/e 48-3) (Ex. 74).

107. When a do-not-call complaint came in, the Dish customer service agent was required to ask the consumer if he or she answered the phone when the telemarketer called. Dish, ERT Tracker-TCPA at DISH5-0000078125 (Ex. 75).

108. If the consumer said “no,” the Dish employee was required to read the following statement: “Calls to a consumer by a telemarketer do not actually constitute a violation of the Telephone Consumer Protection Act if the consumer does not answer the call.” Ex. 75 at DISH5-0000078125.

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

110. Dish created an email distribution list called the “POE Notice,” which told the OE retailers to stop calling approximately 100 specific phone numbers. Musso Dep. 127:1-22, 140:15-19, 141:6-11, 147:24 -150:8, Mar. 16, 2011 (Ex. 77); Metzger Dep. 160:20 – 161:11, Mar. 17, 2011 (Ex. 78).

111. Those phone numbers were of people who had sued Dish or its retailers about telemarketing violations, or of people who presented an extremely escalated telemarketing complaint to a Dish executive. Ex. 77 at 127:15-22, 146:7-16; Ex. 78 at 160:20-161:5, 169:6-23, 173:2-12.

112. Ms. Musso, Dish’s telemarketing compliance manager for its retailers, agreed that the retailers were on “the honor system” and stated that retailers committing telemarketing

violations were judged on a “case by case basis.” Ex. 77 at 63:15-64:23, 133:12 134:10, 222:9-223:5, 244:16- 245:9.

113. Dish’s compliance manager and experts did not provide a single, measurable metric by which Dish could evaluate its retailers’ compliance with telemarketing laws. Ex. 77 at 174:12-24; 256:18-257:13; Ex. 32 at 35:3-38:21.

114. Dish received many thousands of consumer complaints about telemarketing. Active Tracker .xls (Ex. 79).

115. Of the 50,000-plus Dish-related telemarketing complaints FTC received, Plaintiffs have identified 1,505 complaints submitted by consumers within one calendar day of receiving an actual violative call as contained in the call records in this case. Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28(b), App. B.

116. Ms. Musso testified that she did not look at complaints that did not contain a caller ID number reported by the complainant because “you can’t get blood from a turnip.” Ex. 77 at 221:15 – 222:23.

117. Dish admitted before the FCC that it would be liable under the TCPA: (a) “if [Dish] directs the [third party’s] telemarketing activity by providing call lists for telemarketing”; and (b) “if [Dish] knows that a retailer is repeatedly engaging in violative telemarketing when selling [Dish]’s products or services, and [Dish] fails to take reasonable measures to address the unlawful conduct.” Ex. 19.

118. In 2002, Dish knew that many of its retailers were using robocalls to sell Dish service, as top Dish sales executives engaged in an email discussion stating: “[robodialing] has caused a few concerning calls, but seems to be greatly outweighed by the results.” E-mail from Meyers to Neylon & Ahmed (Mar. 11, 2002) (Ex. 80).

119. In 2002, Dish lawyers knew that “state law frowns on pre-recorded telemarketing calls.” Ex. 80.

120. One of Dish’s marketing strategies is placing outbound telemarketing calls to its current and former customers. Ex. 12 at 104:2-106:7, 215:3-216:9; E-mail from Senderovitz to Altahwi (Sept. 13, 2007) (Ex. 81); E-mail from Pastorius to Blum et al. (June 19, 2009) (Ex. 82).

121. Dish’s system for scrubbing—*i.e.*, eliminating from its calling lists numbers that should not be called—depended on Dish employees inputting criteria into a number of proprietary data systems. Ex. 13 at 19:22-20:22, 84:8-21; 114:13-115:22, 152:18-153:10; Ex. 17 at 129:14-130:15, 160:19-161:07.

122. Dish did not scrub its current and former customer telemarketing calling lists against the Registry. E-mail from Davis to Gregg (Oct. 13, 2008) (Ex. 83); E-mail from Dexter to Kuehn (Oct. 25, 2011) (Ex. 84).

123. Dish did not scrub many of its telemarketing calling lists against its entity specific do-not-call list. Ex. 28 at 10-11.

124. Dish did not establish written policies for scrubbing of its lists. Ex. 13 at 149:8-151:11.

125. Dish did not educate the employees that created marketing lists on how to ensure that those lists were appropriately scrubbed for do-not-call compliance with federal or state telemarketing laws. Ex. 13 at 119:17-120:9, 129:25-131:10.

126. Dish does not have a practice of requiring all outbound calling campaigns to be vetted for compliance. E-mail from Fletcher to KBSCorpPB@echostar.com (Mar. 14, 2008) (Ex. 85); E-mail from Dexter to Walden (Aug. 16, 2011) (Ex. 86).

**Dish's OE Call Centers**

127. Dish sells nearly 60 percent of its new subscribers through the “indirect sales channel”—the term it uses for sales that come from sources other than Dish’s marketing department. Bangert Decl. ¶ 4, *Padberg v. Dish Network*, No. 2:11-ev-04035-NKL (W.D. Mo. May 16, 2012) EFC No. 90-10 (Ex. 87); Ahmed Dep. 13:19-25, Apr. 11, 2012 (Ex. 88).

128. Included in the indirect sales channel are two types of entities that account for more than 80 percent of the sales in the indirect sales channel—“TVRO” retailers and “OE” retailers. Dish, Indirect Sales (June 6, 2011) (Ex. 89); Ex. 88 at 13:19-25; Dish, Dish Network Activations Dashboard at DISH5-0000090412 (Sept. 6, 2011) (Ex. 90).

129. Since Dish’s debut in 1996, it has contracted with thousands of TVRO (an acronym meaning “TV Receive Only”) retailers. Ex. 62 at 16:2-7; Ex. 88 at 18:7-15.

130. Dish currently has active contracts with about 7,436 TVRO retailers. Ex. 74 at ¶ 4.

131. TVRO retailers are local or regional entities that typically employ an installation staff. Ex. 62 at 15:14-23.

132. Once a TVRO retailer makes a sale, the retailer’s employee or agent travels to the customer’s home to install Dish service, and TVRO retailers do not receive payments from Dish until they verify that they have installed or activated the customer. Ex. 62 at 15:14-23; Amendment No. 1 to EchoStar TVRO Dealer Agreement with Teichart Mktg. ¶ 10 (June 10, 1997) (Ex. 91); Ex. 88 at 15:10-16:13.

133. Each TVRO retailer delivers, on average, fewer than ten activations per month to Dish, and the 7,500 or so active TVRO retailers account for about 30 percent of Dish’s indirect



sales and around 18 percent of Dish's overall sales. Ex. 90 at DISH5-0000090412; Ex. 89 at DISH5-0000090754.

134. In late 2003, Dish sales executive Amir Ahmed began contracting with nationwide direct-marketing organizations on a new initiative, called "order entry" or "OE." Ex. 61.

135. Dish's plan was that these OE direct marketing organizations would use "aggressive" nationwide marketing methods, and enter their sales directly into Dish's computer systems, using Dish's credit-qualification system, and without having to handle physical inventory. Ex. 88 at 19:20-22:4; Ex. 61.

136. Dish created an online tool, the "order entry tool," for this purpose, and called entities with access to this tool "OE retailers." Ex. 88 at 19:20-22:4.

137. The OE retailer initiative was a selective program that, at the beginning, was limited to a small number of national marketing entities that high-level Dish employees personally selected for participation in the program. Ex. 61; Ex. 88 at 22:8-24; Myers Dep. 96:13-97:2, Feb. 24, 2012 (Ex. 92).

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

139. Dish's OE tool walked the telemarketing agents at OE retailers' call centers through every step of the sales process, with Dish generating and performing all the tasks necessary to make the retailers' sales activities as efficient as possible. Ex. 61; E-mail from POESupport@echostar.com at IDISH-006521 (Jan. 27, 2006) (Ex. 94); Lowe Decl. ¶ 5, Nov. 5, 2013 (Ex. 95).

140. The OE tool allowed individual telemarketing agents at the OE retailer call center to sign in using Dish-provided usernames and passwords. Ex. 62 at 33:14-33:22.

141. Dish provided multiple passwords to the OE retailers because it knew that the OE retailers had many telesales agents selling Dish to consumers. Ex. 62 at 33:14-35:6.

142. Dish and the OE retailers then used the individual Dish-provided logins to track the OE retailers' telemarketing activities—for example, Dish tracked the IP addresses that the OE retailers were using to log in to Dish's system. Ex. 62 at 221:23-224:20; Ex. 36 at 155:14-157:20;.

143. Dish also gave OE retailers the option of using "Sales Rep ID" numbers in order to track sales metrics of individual call center agents, and Dish generated reports of agent sales for OE retailers. Ex. 62 at 223:12-224:20; E-mail from POESupport@echostar.com (Mar. 15, 2007) (Ex. 96).

144. Dish gave OE retailers detailed "17734" reports that tracked the OE retailers' sales activities by more than 60 metrics, including internal Dish data that was designed to increase the OE retailers' sales numbers. Ex. 96.

145. Unlike the TVRO retailers, OE retailers are not required to perform installations. Ex. 88 at 15:10-16:13; Ex. 92 at 82:18-83:3; 95:20-96:12.

146. Once an OE retailer call center agent enters a sale into Dish's system, Dish displays to that agent an installation calendar, which allows the agent to bind Dish to a date and time where Dish or a Dish agent will install Dish service at the customer's home. Ex. 88 at 15:10-16:13; Ex. 92 at 82:18-83:3.

147. Dish required the OE call-center agent to obtain a Social Security number and credit card from the prospective customer, in order to perform a credit check for Dish service

that was arranged for and provided by Dish, using Dish credit-qualification guidelines. Ex. 94 at IDISH-006527; E-mail from Metzger to Benigo (Nov. 18, 2008) (Ex. 97).

148. The OE tool required that the OE call-center agent take a credit-card payment from the consumer, and also required that the agent solicit the prospective customer to give Dish authorization to auto-charge the consumer's credit card every month. Ex. 94 at IDISH-006534.

149. The OE tool also instructed the OE retailer's telemarketing agent to read a number of specific sentences to the consumer after a sale was made, so that Dish could fulfill its disclosure obligations under state and federal law. Ex. 94 at IDISH-006535; Simplexity Dep. 66:6-23 (Sept. 10, 2013) (Zaruba) (Ex. 98).

150. The Dish executive who created the OE program said at its inception that the retailers were acting "on DISH Network's behalf" when they made sales and took payments from consumers. Ex. 61.

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

152. The OE system at certain times has produced more sales than the entirety of Dish's direct sales organization. Dish, Gross Sales Update (Aug. 6, 2007) (Ex. 99); Ex. 90; Ex. 89; E-mail from Mills to Neylon (Feb. 2, 2012) (Ex. 100); Dashboard\_Week8.xls (Feb. 28, 2007) (Ex. 101).

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

154. Existing Dish retailers often inquired about the opportunity to be "get on [the] OE tool" so that they could market nationally, and Dish established unofficial quotas so that an OE

retailer had to bring Dish a certain number of customers every month in order to stay on the OE tool. E-mail from Ballard to Mills (July 18, 2007) (Ex. 103); Ex. 92 at 95:20-97:7.

155. Dish knows that retailers generating more than 150 sales per month use outbound telemarketing to achieve that sales level. E-mail from Origer to Musso et al. (Aug. 17, 2007) (Ex. 104).

156. In 2002, Dish believed that allowing retailers to use affiliates, which Dish identified as “third-parties, independent contractors, agents, sub-agents, companies, or any other person or entity—including Telemarketers—[that] solicit[s], take[s], or transmit[s] any orders for DISH Network products or services,” would lead to telemarketing violations. Dish, Facts Blast (July 10, 2002) (Ex. 105); Dish, Facts Blast (July 16, 2002) (Ex. 106).

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

158. Dish allowed OE retailers to use, in some case, hundreds of thousands of affiliates, including overseas entities. Affiliate List\_Masters.xls (Ex. 107); E-mail from Mills to Neylon ( Feb. 7, 2007) (Ex. 108); E-mail from Origer to Neylon et al. (July 12, 2006) (Ex. 109); E-mail from Musso to tmdiroberto@aol.com (Sept. 28, 2006) (Ex. 110); E-mail from Brandvein to Musso (Oct. 3, 2006) (Ex. 111); Letter from Ahmed to Trimarco (Sept. 2, 2009) (Ex. 112); E-mail from Musso to Ahmed (Apr. 19, 2011) (Ex. 113); Dish, Facts Blast (Sept. 9, 2008) (Ex. 114); Dish, Facts Blast: Important Notice Unauthorized Use of Third Party Lead Generation & Telemarketing Servs. (June 19, 2007) (Ex. 115); Rahim Dep. 130:16-130:22, Mar. 14, 2012 (Ex. 116).

159. If an OE retailer contacted a consumer and entered that consumer’s information into the OE tool but did not complete the sale, Dish used that information to telemarket to those

customers 48-72 hours after the OE retailer made the initial contact. E-mail from Binns to Parekh et al. (Aug. 11, 2004) (Ex. 117); E-mail from Pacini to Binns (Jan. 13, 2005) (Ex. 118).

160. Dish took no action to limit international computer access to its OE tool until 2008 or 2009. Ex. 77 at 240:3-13.

161. By September 2004, the highest levels of Dish management, including Dish co-founder Jim DeFranco, were aware that the first OE retailer, Dish TV Now, was probably using illegal telemarketing to sell Dish Network service. E-mail from Kuelling to Dodge (Sept. 16, 2004) (Ex. 119).

162. By September 2005, Dish lawyers believed that, when it knew pertinent facts about a retailer's illegal telemarketing activities and failed to take action to stop accepting sales from that retailer, it would be liable for that entities' conduct. E-mail from Oberbillig to Oberbillig et al. (Sept. 30, 2005 5:26pm) (Ex. 120).

163. Dish has a policy that its retailers are liable for their independent affiliates' conduct. Dish, EchoStar Retailer Agreement with American Satellite Inc. ¶ 7.1 (Oct. 19, 2005) (Ex. 121); E-mail from Donelly to Creelsdishtv@anythingdish.com at DISH5-0000086614 (July 18, 2011, 4:41pm) (Ex. 122); E-mail from Musso to Pyle (Feb. 4, 2007) (Ex. 123).

164. Dish knows that its retailers are "smart business people" who know where their sales and leads come from. E-mail from Origer to Musso et al. (Dec. 22, 2006) (Ex. 124).

165. As Dish internally recognizes, its retailers have become extremely adept at hiding their identities from consumers and regulators when they commit telemarketing violations. E-mail from Metzger to Laslo (July 21, 2008) (Ex. 125).

166. Dish has no regular practice of performing background checks or public records searches on its retailers prior to allowing them to market on Dish's behalf. Dish Dep. at 19:2-16, 26:17-25, 32:8-23, 43:9-11, 47:11-24, May 4, 2012 (Van Vorst) (Ex. 126).

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

168. Dish told this Court that it was not aware of retailers performing outbound telemarketing and said that it has so many retailers that it cannot even go through all of its documents to figure out whether they are breaking the telemarketing laws. Ex. 74.

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

170. In 2007, Dish believed that its retailers' outbound telemarketing was responsible for about 20,000 new Dish customer acquisitions every month. E-mail from Mills to Werner (May 17, 2007) (Ex. 129).

171. Dish created a "compliance" department in its "Retail Services" division in order to "bring[] structure to [Dish's] efforts in complying with Federal, State and internal requirements surrounding marketing." E-mail from Werner to Metzger (Aug. 21, 2006) (Ex. 130); Ex. 77 at 10:10-11, 16:8-25, 17:12-18:7.

172. Dish's Executive Vice President of sales did not want to create the compliance department. The Retailer Chat at 1:06:00 (Jan. 16, 2007) (Ex. 131).

173. In 2006, Dish brought on Reji Musso to head Dish's new compliance efforts for OE retailers. Ex. 77 at 15:22-16:25, 17:18-18:7, 18:21-19:13.

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

175. Internally, Ms. Musso told in-house counsel that she understood she should “deflect responsibility away from [Dish]” for retailer telemarketing complaints. E-mail from Musso to Berridge & Pastorius (Nov. 6, 2007, 10:42pm) (Ex. 132).

176. Dish retailers committed more telemarketing violations than the ones identified specifically by the Plaintiffs’ call records in this case. E-mail from Rukas to Slater et al. (March 5, 2009) (Ex. 133).

177. Dish’s lawyers created what it called the “sting” or “merchant identification” process in 2005 or 2006, which involved giving fake ID information to consumers complaining about telemarketing calls, who were told to sign up with the offending caller in order to allow Dish to determine which of its retailers made the sale. Ex. 78 at 149:19-152:9; Dish, Sting Flow (Sept. 13, 2006) (Ex. 134); Dish, Acknowledgement Form: Do Not Call (DNC) Sting Procedures (2007) (Ex. 135); Dish, Vendor is not Found. What Next? (Ex. 136).

178. Dish’s sting program found that many OE retailers were using illegal telemarketing to sell Dish Network service. DatabaseDump All.xls (Sept. 19, 2007) (Ex. 137).

179. Dish did not terminate the retailers identified in its sting program, despite having told consumers and regulators that it would do so. Letter from Musso to Cain (Aug. 6, 2008) (Ex. 138); Letter from Origer to Brandvein (Aug. 16, 2007) (Ex. 139); E-mail from Musso to Alex@yourdish.tv (Jan. 17, 2007) (Ex. 140); E-mail from Mills to Musso (Dec. 20, 2006) (Ex. 141); E-mail from Werner to Origer et al. (Feb. 13, 2007) (Ex. 142); E-mail from Musso to Werner (July 22, 2008, 5:21pm) (Ex. 143); Ex. 56 at FTC006-000731.

180. A Dish employee testified that its sting program was unsuccessful. Ex. 78 at 149:19-154:14.

181. Dish did not share its entity-specific do-not-call list with its retailers until 2008. Ex. 77 at 53:2-5, 55:7-56:3.

182. Dish had a policy until 2008 that it did not collect from its retailers the phone numbers of those persons who had requested not to receive Dish telemarketing calls. Ex. 77 at 53:13-55:15; Ex. 36 at 37:11-43:09.

183. Dish does not know whether any retailer has actually complied with its post-2008 policy requiring retailers to upload do-not-call lists. Ex. 36 at 37:11-43:09.

**Dish's First OE Call Center, Dish TV Now**

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

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

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



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

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

189. In August 2003, the State of North Carolina opened an investigation into Prime TV's marketing practices, which culminated in a June 2004 consent decree requiring Prime TV to, among other things, honor rebates that it had promised to consumers but never paid. Letter from Green to Yelverton (Aug. 29, 2003) (Ex. 149); Consent J., *North Carolina v. Prime TV LLC*, No. 04-cvs-008148 (Super. Ct. Div. June 14, 2004) (Ex. 150).

190. In or around October 2003, Dish began pursuing Hagen to market Dish using Dish's new OE Tool. Ex. 61.

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

192. In November 2003, Dish TV Now became Dish's first OE retailer. Ex. 62 at 19:14-20.

193. Dish entered into a contract with Dish TV Now by which: (a) Dish appointed Dish TV Now as an "Authorized Retailer"; (b) Dish authorized Dish TV Now to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized Dish TV Now to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all Dish TV Now records in connection with its Dish retailership; (e) Dish required that Dish TV Now "shall take all

actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders”; and (f) Dish provided that the agreement would be terminated if Dish TV Now “fail[ed] to comply with any applicable federal, state or local law or regulation.” EchoStar Retailer Agreement with Dish TV Now at 1, 6, 16, 25-26, 29-32, *Charvat v. EchoStar Satellite, LLC*, No 07-cv-01000 (S.D. Ohio Dec. 19, 2008) ECF No. 33-3 (Ex. 152).

194. Dish did not perform a public records check on David Hagen before contracting him to pilot the OE program. Ex. 88 at 80:16-81:18.

195. David and Annette Hagen worked with Dish to improve the OE tool. E-mail from Yonker to Ahmed (Mar. 10, 2004) (Ex. 153); E-mail from Ahmed to Mills & Novotny (Jan. 1, 2004) (Ex. 154).

196. Dish provided logins and IDs to Dish TV Now so that Dish was able to track specific sales made by individual agents in Dish TV Now’s call center. Ex. 147 at 97:13-99:18.

197. The sales volume generated by Dish TV Now was important to the most senior of Dish’s executives, including Dish co-founder and then-CEO Charles Ergen, and Dish offered Mr. Hagen any support it could give him. Ex. 154.

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

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

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

201. On June 15, 2004, Dish TV Now contracted with an Illinois-based voice broadcasting company, Guardian Communications (“Guardian”), to call consumers on lead lists purchased from telemarketing lead list vendors and play prerecorded sales messages to sell Dish service. Tr. of Baker Test. at 122:6-125:5, 233:19-238:22, *In Re: Guardian Commc'ns Inc. Investigative Hr'g*, FTC No. 052-3166 (June 28, 2006) (Ex. 156); Guardian Commc'ns, Voice Messaging Agreement with Dish TV Now (June 15, 2004) (Ex. 157).

202. Guardian Communications marked all of its Dish TV Now sales calls with the code “WOW TV.” Baker Decl. ¶ 12, Mar. 28, 2012 (Ex. 158).

203. Dish TV Now only sold Dish services and did not sell DirecTV service. Ex. 147 at 9:16-11:11, 144:10-147:11.

204. Between May 2004 and August 2004, pursuant to its contract with Dish TV Now, Guardian placed 6,673,196 prerecorded telemarketing calls to American consumers who answered the phone and were not connected to a live operator within two seconds, and Guardian produced records of those calls to the FTC. Ex. 157; Ex. 156 at 122:6-125:5; WOW\_TV\_P 20040521.txt (May 21, 2004) (Ex. 159); WOW-TV\_P05212004213321013.txt (May 21, 2004) (Ex. 160); Baker Dep. at 68:15-19, May 14, 2012 (Ex. 161); DishTVNow spreadsheet.xls (2006) (Ex. 162); Ex. 38 at ¶ 26(d); Ex. 158 at ¶¶ 10, 18.

205. Guardian’s system detected whether a person or a voicemail system answered the phone call, and would either play the prerecorded message or hang up the call, depending on the dialer setting. Ex. 156 at 122:6-125:5.

206. By June 2004, Dish was aware that Dish TV Now was using prerecorded messages to sell Dish service. Ex. 119.

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

208. On August 7, 2004, David Hagen complained to Dish Vice President Amir Ahmed that Dish Network was soliciting prospective customers that had first been contacted by Dish TV Now after Dish TV Now's sales attempt failed based on the customer's credit score or the OE Tool erred. Ex. 117 at DISH5-0000066940.

209. Dish took the consumer information entered by the Dish TV Now sales agent, which had not resulted in a sale, and placed outbound sales calls itself to that consumer within 48-72 hours. Ex. 117; Ex. 118.

210. Dish vice president Amir Ahmed testified in 2012 that he did not know whether David Hagen was using prerecorded messages to sell Dish, despite emails he sent to David Hagen on the topic. Ex. 88 at 51:8-52:9; Ex. 119.

211. Illinois consumer Morton Sill received prerecorded calls from Dish TV Now in February 2005. Sill Dep. 47:3-52:23, 56:9-60:9, June 19, 2012 (Ex. 163); Sill Dep. Ex. 3, June 19, 2012 (Ex. 164).

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

213. Dish told consumers that it could not help them when they complained about Dish TV Now's calls and had no way of finding out if Dish TV Now was making calls. Letter from Gutierrez to Schackmann (Apr. 12, 2005) (Ex. 166); Letter from Steele to S [REDACTED] (Sept. 14, 2004) (Ex. 167).

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

215. On or around July 26, 2004, Dish received a complaint from R [REDACTED] S [REDACTED] stating that he had received a telemarketing call from Dish TV Now. Letter from S [REDACTED] to Dish (July 26, 2004) (Ex. 168).

216. Nearly two months later, on September 14, Dish sent S [REDACTED] a letter stating it had researched the complaint and would forward the information to Dish TV Now, although no one can recall what research Dish actually performed. Ex. 167; Ex. 168; Steele Dep. 194:20-197:4, Apr. 12, 2012 (Ex. 169).

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

218. Dish employees providing training and sales support inside Mr. Hagen's call center saw firsthand in August 2004 Dish TV Now's sales agents marketing with predictive dialing to sell Dish service. Ex. 155 at ¶¶ 27, 28.

219. In September 2004, Dish Vice President Amir Ahmed sent Mr. Hagen an email asking the following either-or question: Was Dish TV Now "telemarketing consumers over the phone" or was it using "predictive dialing and leaving messages"? Ex. 119.

220. Hagen responded to Mr. Ahmed's email stating that Dish TV Now was "us[ing] a predictive dialer" to place outbound calls to a large database of former customers, that his dialer

could determine if a human being answered the phone, and that his company “fully complies with the TCPA.” Ex. 119.

221. Dish stated in an affidavit filed in the Southern District of Ohio that Dish “had no way of knowing” how Dish TV Now was marketing Dish service. Aff. of Blake Van Emst at 2, *Charvat v. EchoStar Satellite, LLC*, No. 07-cv-01000 (S.D. Oh. Dec 19, 2008) ECF No. 33-1 (Ex. 171).

222. On January 3, 2006, Dish wrote a letter to David Hagen complaining about his lack of sales and asking him to ramp up his marketing plans. Letter from Mills to Hagen (Jan. 3, 2006) (Ex. 172).

223. On January 20, 2006, Dish terminated Dish TV Now because too many customers whom Dish TV Now acquired had cancelled and because Dish TV Now had ceased actively marketing Dish. Ex. 165; Letter from Origer to Dish TV Now Inc. (Jan. 20, 2006) (Ex. 173); Werner Dep. Ex. 259, Mar. 10, 2011 (Ex. 174).

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

225. On May 15, 2009, David Hagen was convicted of a number of additional federal felonies, including conspiracy to commit securities fraud, conspiracy to commit mail and wire fraud, and conspiracy to commit money laundering. David Hagen is currently serving a 45-year federal prison term. Verdict, *United States v. Hagen*, 08-cr-93 (W.D.N.C. May 15, 2009) (Ex. 175); Second Superseding Bill of Indictment, *United States v. Hagen*, No. 08-cr-93 (W.D.N.C. Feb. 19, 2009) (Ex. 176); J. in a Crim. Case, *United States v. Hagen*, No. 08-cr-93 (W.D. of N.C. Nov. 17, 2009) (Ex. 177); Special Verdict, *United States v. Hagen*, No. 08-cr-93 (W.D. of N.C. May 15, 2009) (Ex. 178).

226. Dish cannot say, knowing what it knows now, that it would not have contracted with David Hagen to sell Dish service. Ex. 62 at 30:14-24.

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

**Dish's OE Call Center Satellite Systems Network**

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

229. Dish entered into contract with SSN by which: (a) Dish appointed SSN as an "Authorized Retailer"; (b) Dish authorized SSN to "market, promote, and solicit" orders for Dish service nationally; (c) Dish authorized SSN to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all SSN records in connection with its Dish retailership; (e) Dish required that SSN "shall take all actions and refrain from taking any action, as reasonably requested by [Dish] in connection with the marketing, advertisement, promotion of, or taking of orders"; and (f) Dish provided that the agreement would be terminated if SSN "fail[ed] to comply with any applicable federal, state or local law or regulation." Dish, EchoStar Retailer Agreement with SSN at 1, 2, 6, 7 (Mar. 27, 2001) (Ex. 180).

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

231. By May 2001, Dish expected SSN to make up to 1,500 new activations per month, and Dish knew that SSN would use telemarketing to generate these expected activations. E-mail from Ahmed to DeFranco (May 31, 2001, 11:27pm) (Ex. 183).

232. By January 2002, Dish expected SSN to make up to 3,000 to 5,000 new activations per month, and invited SSN to join the Retailer Bonus Program based on its performance. Letter from Origer to Tehranchi (Dec. 28, 2006) (Ex. 184).

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

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

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

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

237. SSN has been selling Dish since the early 2000s and remains a Dish retailer as of 2013. Ex. 180; Dish Network Retailer Agreement with Satellite Sys. Network (Dec. 31, 2010) (Ex. 189); Ex. 182 at 17:16-22, 26:12-26:14.

238. On June 28, 2004, Dish founder and CEO Charles Ergen received a telemarketing sales call from SSN at one of his residences, after which Mr. Ahmed told Ergen that SSN used “message broadcasting” (i.e., prerecorded message telemarketing) as “their primary source” of



generating satellite TV service activations. E-mail from Ahmed to Ergen et al. (June 28, 2004) (Ex. 190).

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

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

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

242. In September 2005, Dish decided not to terminate its relationship with SSN; instead, Dish contemplated placing SSN on probation, and there is no evidence that further remedial or punitive action was taken against SSN. Ex. 194.

243. Dish recognized it was responsible for SSN's violations because it knew what SSN was doing. Ex. 194.

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

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

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

245. In, November, and December 2006, stings conducted by two separate consumers—J [REDACTED] M [REDACTED] and G [REDACTED] F [REDACTED]—identified SSN as the source of illegal prerecorded message telemarketing. Ex. 137.

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

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

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

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

248. The following entries appear as notes in Dish's system recorded by Dish employees observing activities at SSN's office: "Met with Alex. Covered details on the Satellite

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

249. SSN contracted with Five9, an online call-center software provider, to provide outbound dialing services, and Five9’s business records accurately depict SSN’s calling activity. Maslennikov Decl. ¶¶ 8, 16, *Donaca v. Dish Network LLC*, No.11-cv-2910 (D. Colo. Dec. 21, 2012) (Ex. 197).

250. The Five9 records accurately represent outbound telemarketing calls selling Dish service, and that SSN did not sell any other product during that time. Ex. 182 at 18:21-23, 26:15-27:7, 34:13-19; Tehranchi Decl. ¶¶ 8-12, *Donaca v. Dish Network LLC*, No.11-cv-2910 (D. Colo. Aug. 19, 2013) (Ex. 198)

251. Dish’s expert concluded in his November 2013 rebuttal report that, during 2010 and 2011, SSN made at least 381,811 calls to phone numbers on the Registry in the records obtained from Five9. Ex. 28 at 13 (Table 5a).

252. 37,688 of those 381,811 calls were to California phone numbers. Ex. 28 at 13 (Table 5a).

253. 17,357 of those 381,811 calls were to Illinois phone numbers. Ex. 28 at 13 (Table 5a).

254. 13,088 of those 381,811 calls were to North Carolina phone numbers. Ex. 28 at 13 (Table 5a).

255. 22,878 of those 381,811 calls were to Ohio phone numbers. Ex. 28 at 13 (Table 5a).

256. Dish's expert concluded in his November 2013 report that, during 2010 and 2011, SSN made at least 65,936 calls to phone numbers of consumers who stated to Dish or a Dish retailer that they did not wish to receive phone calls. Ex. 28 at 13-14 (Tables 5b, 5c).

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

258. By August 18, 2011, Dish had developed a "standard go after SSN letter" for sending to SSN regarding its illegal telemarketing. E-mail from Berridge to Kitei (Aug. 18, 2011) (Ex. 199).

259. Two consumers complained to FTC within one calendar day of having received a violative call as contained in the Five9 call records, reporting SSN's caller ID and stating: "Please make them stop calling; PLEASE!!!!" and "They have called two to three times a day for the last two weeks. When I finally answered they contacted me about satellite dishes. I let them know . . . [I] would like to be taken off their list. They told me to hold while they transferred my call and then hung up on me. I have since received several more calls, twice a day. " Ex. 1 at ¶ 29, Ex. A; Ex. 38 at ¶ 28(b), App. B; Ex. 182 at 34:13-37:1.

**Dish's OE Call Center Star Satellite**

260. Star Satellite, also known as Tenaya Marketing, was a Dish retailer based in Provo, Utah founded on or around February 2003 by Daniel Myers and controlled by Walter Eric Myers. Ex. 92 at 38:10-39:12, 50:18-51:21; Dish, EchoStar Incentivized Retailer Agreement with Star Satellite LLC (May 19, 2003) (Ex. 200); Star Satellite Board Meeting Minutes (Feb. 11, 2003) (Ex. 201).

261. Dish entered into a contract with Star Satellite by which: (a) Dish appointed Star Satellite as an “Authorized Retailer”; (b) Dish authorized Star Satellite to “market, promote, and solicit” orders for Dish service nationally; (c) Dish authorized Star Satellite to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all Star Satellite records in connection with its Dish retailership; (e) Dish required that Star Satellite “shall take all actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders”; and (f) Dish provided that the agreement would be terminated if Star Satellite “fail[ed] to comply with any applicable federal, state or local law or regulation.” Ex. 200 at 16, 22, 24, 28.

262. Star Satellite began as a TVRO retailer, and had several regional sales and installation operations, including an operation in Los Angeles. Ex. 92 at 17:11-18:20; 23:16-24:7; 66:1-67:2, 85:24-86:7.

263. Beginning in May 2004, Star Satellite began a business relationship with the same voice broadcasting company used by Dish TV Now, Guardian (aka U.S. Voice Broadcasting, Inc.), *see* UF201 *supra*. Ex. 92 at 76:3-77:3, 106:1-107:24; Walter Eric Myers, Statement ¶ 5, 6 (Mar. 22, 2006) (Ex. 202).

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

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

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

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

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

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

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

271. In July and November 2005, Dish provided outbound telemarketing sales scripts to Star Satellite. E-mail from Anderson to Myers & bcs@starsatllc.com (July 28, 2005) (Ex. 206); E-mail from Mills to Myers (Nov. 3, 2005) (Ex. 207).

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

273. Dish's lawyers edited a settlement agreement by which Dish and Star Satellite settled the claim and kept the terms of the settlement secret. Facsimile from Conley to Myers (Sept. 29, 2005) (Ex. 210).

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

275. As late as November 3, 2005, Dish provided Star Satellite with telemarketing support. E-mail from Mills to Myers (Nov. 3, 2005) (Ex. 213).

276. In the four months between July 30, 2005 and November 26, 2005, Dish placed at least 43,100,876 illegal prerecorded calls marketing Dish for Star Satellite, and Guardian produced accurate records of those calls to the FTC. Ex. 38 at ¶ 26(e); Ex. 158 at ¶¶ 15-20.

277. 5,727,417 of those 43,100,885 calls were to California phone numbers. Ex. 38 at ¶ 26(e).

278. 2,659,984 of those 43,100,885 calls were to Illinois phone numbers. Ex. 38 at ¶ 26(e)

279. 1,716,225 of those 43,100,885 calls were to North Carolina phone numbers. Ex. 38 at ¶ 26(e).

280. 3,419,175 of those 43,100,885 calls were to Ohio phone numbers. Ex. 38 at ¶ 26(e).

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

282. On November 22, 2005, Star Satellite ended its relationship with Guardian. Ex. 92 at 148:13-149:4.

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

284. Star Satellite remains a Dish retailer. Ex. 92 at 55:17-56:16.

285. Dish paid for Myers' employees to go on several incentive trips to luxury destinations. Ex. 92 at 167:19-169:2.

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

**Dish's OE Call Center American Satellite**

287. In March 2000, Todd DiRoberto was convicted in the District of Massachusetts for participating in a drug distribution conspiracy and was sentenced to 60 months in federal



prison. J., *United States v. DiRoberto*, No. 97-cr-40052 (D. Mass. Mar. 16, 2000) ECF No. 288 (Ex. 217).

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

289. Dish was aware that Mr. DiRoberto had “trouble in the past” and that “he had basically made his money in illegal things.” Castillo Dep. 37:1-38:4, June 14, 2012 (Ex. 219).

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

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

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

293. Dish entered into a contract with American Satellite by which: (a) Dish appointed American Satellite as an “Authorized Retailer”; (b) Dish authorized American Satellite to “market, promote, and solicit” orders for Dish service nationally; (c) Dish authorized American Satellite to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all American Satellite records in connection with its Dish retailership; (e) Dish required that American Satellite “shall take all actions and refrain from taking any action, as requested by [Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders”; and (f) Dish provided that the agreement would be terminated if American Satellite “fail[ed] to

comply with any applicable federal, state or local law or regulation.” Ex. 121 at 1, 5, 6, 15, 17, 22.

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

295. American Satellite used prerecorded messages to sell Dish service. Ex. 219 at 26:9-27:23, 44:19-46:13, 76:13-79:22.

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

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

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

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

300. In January 2006, a consumer—G ■■■■■ F ■■■■■—participated in Dish’s sting program, and the results of Mr. F ■■■■■’s stings identified American Satellite as the source of at

least three separate illegal telemarketing calls between January 2006 and December 2006. Letter from Origer to DiRoberto & Pyle (Jan. 17, 2007) (Ex. 225); E-mail from Musso to Hargan & Steele (Jan. 1, 2007, 6:10pm) (Ex. 226); Ex. 137; Ex. 224.

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

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

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

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

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

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

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

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

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

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

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

**Dish's OE Call Center JSR Enterprises**

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

313. An automated dialer or automatic telephone dialing system is defined as "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator; and to dial such numbers." 47 U.S.C. § 227(a)(1) (Ex. 236).

314. Prior to being a Dish retailer, JSR—headed by Jerry Dean Grider and Richard Goodale—was an affiliate of a different OE retailer, Dish Nation, and JSR used autodialing on Dish Nation's behalf in early 2006. Ex. 155 at ¶¶ 29-30; Pending OE Retailers 08\_14\_06.xls (Aug. 14, 2006) (Ex. 237).

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

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

317. On or around June 28, 2006, Dish knew that JSR “generat[ed] sales through auto-dialing” and that JSR had a “list of one million plus clients ranges from about \$2K to \$9K per list depending on the quality. JSR is spending about \$2K/mo. and makes about 750K+ dials per week generating around 40 sales a week.” Olsen Decl. at ¶¶ 29-30; LA South OE.xls (Ex. 239).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

351. Dish, through its representative Mike Mills, testified at its deposition that JSR used online and print advertisements to sell Dish service, and that it did not remember JSR's other marketing methods. Ex. 62 at 92:15-21.

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

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

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

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

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

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

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

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

360. Dish's expert has also confirmed that in 2006, JSR made 685,667 calls to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 14 (Tables 6b, 6c).

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

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

**Dish Retailer New Edge Satellite and its Entity-Specific Do-Not-Call List**

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

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

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

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

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

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

#### **Dish’s OE Call Center National Satellite Systems**

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

370. Dish entered into a contract with NSS by which: (a) Dish appointed NSS as an “Authorized Retailer”; (b) Dish authorized NSS to “market, promote, and solicit” orders for Dish service nationally; (c) Dish authorized NSS to use Dish trademarks in marketing; (d) Dish gave itself a right of access to all NSS records in connection with its Dish retailership; (e) Dish required that NSS “shall take all actions and refrain from taking any action, as requested by

[Dish] in connection with the marketing, advertisement, promotion and/or solicitation of orders”; and (f) Dish provided that the agreement would be terminated if NSS “fail[ed] to comply with any applicable federal, state or local law or regulation.” Ex. 274 at DISH-Paper-007769, DISH-Paper-007772, DISH-Paper-007776, DISH-Paper-007788, DISH-Paper-007803-DISH-Paper-007808.

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

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

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

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

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

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

phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. Ex. 28 at 15 (Tables 7a, 7b).

**Consumer Related Facts**

**Linda Doucette**

377. Linda Doucette, of Torrence, CA, is a logistics manager for Brinderson Construction in Costa Mesa, CA. Doucette Dep. 13:5-6, 11:13-20, June 15, 2012 (Ex. 278).

378. Mrs. Doucette has had her landline number, (████) █████, since 1994 and her mobile number, █████-████, since 1992. Ex. 278 at 14:11-16.

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

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

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

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

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

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

385. Dish's 2007-2010 call records show that between November 7, 2008 to November 13, 2008, Dish placed seven outbound telemarketing calls for the "5639\_08w44\_LTS\_OTM\_English\_20081030" campaign to Ms. Doucette's number [REDACTED]. Ex. 38 at ¶ 12.

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

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

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

Ex. 278 at 30:8-14.

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

**Amy Johnson**

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

390. The Johnsons signed up for Dish service in 2005 or 2006. Ex. 279 at 16:1-25.

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

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

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

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

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

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

397. Dish's 2003-2007 call records reflect that Dish made 115 calls to the Johnson's telephone number between February 2006 and August 2007, including at least three calls more than 30 days after July 12, 2007, when Dish placed the Johnsons' number on its entity-specific do-not-call list. Ex. 38 at ¶ 13.

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

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

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

401. Dish's 2007-2010 call records show that during the year between September 2007 and September 2008, Dish made 52 separate telemarketing calls to the Johnsons' landline number as part of the following telemarketing campaigns: TH VOL TRAIL (1MTH), BF VOL TRAIL (2MTH), BF VOL TRAIL (4MTH), TH VOL TRAIL (5MTH), EP VOL TRAIL



(6MTH), TH VOL TRAIL (7MTH), EP VOL TRAIL (8MTH), OR VOL TRAIL (9MTH). Ex. 38 at ¶ 13.

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

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

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

405. The Johnsons canceled their Dish service in mid-2013, and Ms. Johnson testified that Dish started calling her home phone again, once or twice weekly, after they ceased their Dish service. Ex. 279 at 18:17-19, 21:8-22:16.

**Thomas Krakauer**

406. Thomas Krakauer has lived in Bahama, North Carolina, since May 1985, is retired from working at the Museum of Life and Science, and now volunteers at the Museum of Durham History. Krakauer Dep. 8:1-5, 40:20-24, Sept. 28, 2011 (Ex. 280).

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

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

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

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

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

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

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

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

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

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

**Patrick Lea**

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

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

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

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

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

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

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

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

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

**Parimala Nagendra**

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

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

426. During one of two Dish calls on January 5, 2007, Ms. Nagendra told Dish she did not want any more telemarketing calls, the disposition code "SP" was entered into Dish's system, and her landline number was added to Dish's entity-specific do-not-call list. Ex. 38 at ¶ 15.

427. "SP," which stands for "suppression," is used by Dish's internal systems to suppress a particular telephone number and prevent it from being dialed in future telemarketing campaigns or, if entered directly into the dialer, immediately.

System A Dispostions 1\_12\_09.doc (Ex. 288); Ex. 14 at 158:11-159:9, 162:10-16.

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

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

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

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

**Elizabeth Phillips**

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

433. Ms. Phillips' telephone number was first placed on the Registry on June 3, 2007, and re-registered in 2010 and 2012. Ex. 1 at ¶ 13.

434. Ms. Phillips has never been a Dish customer and she has not contacted Dish to inquire about services by phone or through completing a lead form on the Internet. Ex. 289 at 36:15-16; 37:3-38:1.

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

436. The calls were so incessant she tried to contact Dish twice to address the error and stop the calls. Ex. 289 at 46:1-6, 50:20-52:20, 62:6-12.

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

438. Between October 25, 2007 and December 6, 2007, Dish called Ms. Phillips' home telephone number six times as part of its HG STZ LATINO, EC PLYINTV NEW(ESP), and EC STZ LATINO 2P telemarketing campaigns. Ex. 38 at ¶ 16.

439. Between 2008 and 2010, Ms. Phillips continued to receive calls marketing Dish on her █████-█████ number, sometimes up to two a day, usually around lunchtime and dinner

time, encouraging her to subscribe for Dish; if she did not answer a message would be left urging her to subscribe to Dish. Ex. 289 at 67:6-68:5, 72:5-23.

440. Ms. Phillips knew it was Dish calling from the phone number displayed and from the message itself, which mentioned Dish Network and “was like listening to a commercial on your telephone.” Ex. 289 at 67:11-69:8, 70:8-16.

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

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

Ex. 289 at 79:4-15.

**Morton Sill**

442. Morton Sill, of Chillicothe, Illinois, has landline number ( ) . Ex. 163 at 5:14-17, 22:16-22.

443. Mr. Sill placed his landline number on the Registry on December 20, 2005. Ex. 1 at ¶ 18.

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

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

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

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

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

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

**Lisa Skala**

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

451. Mrs. Skala placed her land line number, ( ) , on the Registry in August 2007. Ex. 1 at ¶ 19.

452. Mrs. Skala was a Dish Network customer from approximately 2004 to October or November 2008. Ex. 292 at 17:24-19:3; 50:15-19.

453. On July 14, 2009, Mrs. Skala received a telemarketing call from Dish's EC\_VWIN\_TRL\_05M\_ENG campaign while she was marking the one-year anniversary of her mother's death, and she requested not to be called again; Dish's records show that the call was labeled with a contact result code of "DNC." Ex. 37; Ex. 38 at ¶ 20; Ex. 292 at 20:4-23.

454. After her July 2009 do-not-call request, Dish called Ms. Skala at least nine more times. Ex. 38 at ¶ 20; Ex. 292 at 20:8-23.

455. In early 2010, Mrs. Skala received several sales calls from Dish Network to her land line number—each time she told the caller she was not interested and to please not call again. Ex. 292 at 20:4-22:20, 23:11-24:3, 39:20-23, 64:3-8; Ex. 38 at ¶ 20.

456. These calls led Mrs. Skala to file two complaints in January and February 2010. Ex. 1 at ¶ 20.

457. Dish continued to call Mrs. Skala and labeled telemarketing calls to her number as “DNC” two more times, on February 3 and March 2, 2010, yet apparently never placed her number on Dish’s entity specific do-not-call list. Ex. 38 at ¶ 20.

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

#### **Laurie Sykes**

459. Laurie Sykes, of New Bern, North Carolina has had her home telephone number ( ) , since 2001. Sykes Dep. 15:5-9, Sept. 30, 2011 (Ex. 293).

460. Mrs. Sykes’s number has been on the Registry since May 5, 2006. Ex. 1 at ¶ 24.

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

### **Custodial Facts**

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

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

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

479. Exhibits 16, 26, 28, and 298 are true and correct copies of reports of John Taylor produced by Dish in connection with this litigation. Ex. 295 at ¶¶ 11, 16, 18, 89.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### Argument

Summary judgment is proper “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (a). A genuine issue of material fact exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While the court must view the record and make inferences in a light most favorable to the nonmoving party, *Ameritech Benefit Plan Comm. v. Commc’n Workers of Am.*, 220 F.3d 814, 821 (7th Cir. 2000), those inferences must be drawn from specific facts in the record, *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 922-23 (7th Cir. 1994).

Once Plaintiffs show that the facts mandate judgment in their favor, the nonmovant has the burden of identifying record evidence that establishes a triable factual issue. *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 402 (7th Cir. 1998). To satisfy this burden, the nonmovant must show more than “some metaphysical doubt as to the material facts, and neither speculation nor generic challenges to a witness’s credibility are sufficient to satisfy this burden.” *Trentadue v. Redmon*, 619 F.3d 648, 653 (7th Cir. 2010).<sup>1</sup> “We often call summary judgment the ‘put up or shut up’ moment in litigation, by which we mean that the non-moving party is required to marshal and present the court with the evidence she contends will prove her case. And by evidence, we mean evidence on which a reasonable jury could rely.” *Goodman v. Nat’l Sec. Agency, Inc.*, 621 F.3d 651, 654 (7th Cir. 2010).

When the nonmoving party has the burden of proof on a defense, the moving party need not negate the opponent’s defense through affidavits or other materials. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). That is, if the defendant bears the burden of proof on a defense, the

---

<sup>1</sup> Internal citations and quotation marks omitted throughout.

plaintiff is not required to prove a negative in order to obtain summary judgment. *Kreuger Int'l, Inc. v. Fed. Ins. Co.*, 647 F. Supp. 2d 1024, 1030 (E.D. Wis. 2008). However, the moving party may, if it chooses, put on evidence negating an anticipated defense. *Kludt v. Majestic Star Casino, LLC*, 200 F. Supp. 2d 973, 976 (N.D. Ind. 2001).

### **COUNTS I – IV: THE UNITED STATES**

#### **A. The TSR Statutory and Regulatory Framework**

Over the past three decades, prolific telemarketing by companies like Dish and its affiliates, aided by inexpensive and rapidly advancing telephony technology, has led federal and state legislatures to enact laws to protect consumers from unwanted sales calls. *See* FTC Amended Telemarketing Sales Rule Statement of Basis and Purpose, 68 Fed. Reg. 4580, 4581 (Jan. 29, 2003). The FTC's do-not-call rules are intended to: (1) protect the privacy of individuals in their homes; and (2) protect consumers from the risk of fraudulent and abusive solicitation. *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228, 1237 (10th Cir. 2004).

#### **1. The Final Amended TSR**

The final amended Telemarketing Sales Rule ("TSR"), which created and adopted the Registry, was promulgated in January 2003 pursuant to Section 3(c) of the Telemarketing Act, 15 U.S.C. § 6102(c), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3). A violation of the TSR constitutes an unfair or deceptive act or practice in or affecting commerce in violation of Section 5(a) of the FTCA. 15 U.S.C. § 45(a); *see FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925 (N.D. Ill. 2008). The United States is empowered to bring actions on behalf of the FTC to enforce the FTC Act, seeking, *inter alia*, injunctive relief and civil penalties. 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a) and 57b.

The Registry, which quickly become “one of the most popular Federal programs in history,” H.R. Rep. No. 110-485, at 4 (2007), opened for registrations in June 2003 and took effect in October 2003, *FTC v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 861 (10th Cir. 2003). The Registry now contains more than 200 million phone numbers. UF1. Consumers register their phone numbers via the Internet or through an automated telephone system, and telemarketers can register and download the list in order to comply with the law. UF2.

Under the TSR, “telemarketing” means “a plan, program, or campaign which is conducted to induce purchases of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call.” 15 U.S.C. § 6106(4); *see also* 16 C.F.R. § 310.2(cc). Telemarketing is not limited to activities in which a sale or offer for sale is communicated during a telephone call: “The definition [of telemarketing] simply states that the call be ‘conducted to induce the purchase of goods or services.’” Telemarketing Sales Rule, Final Rule, 68 Fed. Reg. 4579, 4655-56 (2003). The TSR thus also applies to sales calls that combine an informational message with direct or indirect solicitation. *See* Telemarketing Sales Rule, Final Rule Amendments, 73 Fed. Reg. at 51,173 (2008); Telemarketing Sales Rule (“TSR”), 71 Fed. Reg. 58,716, 58,725 n.107 (Oct. 4, 2006).

The TSR covers the telemarketing activities of both “telemarketers” and “sellers.” A seller is “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), while a telemarketer is “any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor,” *id.* § 310.2(cc). Furthermore, the FTC announced when it established the Registry that the TSR’s

prohibitions “apply to any call placed to a consumer, whether to a residential telephone number or to the consumer’s cellular telephone or pager.” 68 Fed. Reg. 4,580, 4,632-33.

Under this framework, the TSR makes it illegal “for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in,” a number of acts, including, as relevant here:

- “Initiating any outbound telephone call to a person whose telephone number is listed on the Registry (“Registry”),” unless the seller either “has obtained the express agreement, in writing, of such person to place calls to that person” or “has an established business relationship [(“EBR”)] with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls.” 16 C.F.R. § 310.4(b)(1)(iii). An EBR is “a relationship between a seller and a consumer” based on a financial transaction between the seller and consumer within the 18 months preceding the date of the call, or a consumer’s inquiry or application regarding the seller’s product within the three months preceding the date of the call. 16 C.F.R. § 310.2(o).
- “Initiating any outbound telephone call to a person when that person previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered.” 16 C.F.R. § 310.4(b)(1)(iii); *see* Telemarketing Sales Rule, 60 Fed. Reg. 43,842 (Aug. 23, 1995) (adopting the entity-specific do-not-call rule as part of the original TSR and explaining its requirements);
- Abandoning any outbound telephone call. An outbound telephone call is “abandoned” if a person answers it and the telemarketer does not connect the call to a live sales representative within two (2) seconds of the person’s completed



greeting. 16 C.F.R. § 310.4(b)(1)(iv). A prerecorded telemarketing call counts as an abandoned call if a consumer picks up the phone and is not connected to a live operator within two seconds, and such a call is therefore prohibited by the TSR.

*FTC v. Asia Pac. Telecom, Inc.*, 802 F. Supp. 2d 925, 930-32 (N.D. Ill. 2011); *The Broad. Team, Inc. v. FTC*, 429 F. Supp. 2d 1292, 1300 (M.D. Fla. 2006).

The TSR also prohibits any person from “provid[ing] 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 [the TSR].” 16 C.F.R. § 310.3(b). Substantial assistance requires “a connection between the assistance provided and the resulting violations of the core provisions of the TSR.” *FTC v. Affiliate Strategies, Inc.*, 849 F. Supp. 2d 1085, 1114 (D. Kan. 2011) (quoting Opinion 20 at 9). Substantial assistance under the TSR includes, among many other things, “providing any script, advertising, brochure, promotional material, or direct marketing piece used in telemarketing.” *Id.* at 1114-15.

## **2. “Cause” Under the TSR**

As noted above, the TSR states that it is illegal for any person to “cause” a telemarketer to violate the Registry, entity-specific, and call-abandonment provisions of the TSR. 16 C.F.R. § 310.4(b)(1)(iii). Holding that the verb “cause” means “to bring about a consequence,” this Court found that “a seller ‘causes’ the telemarketing activity of a telemarketer by retaining the telemarketer and authorizing the telemarketer to market the seller’s products and services.” Opinion 20 at 10-15. The Court also noted that as used in the TSR, the term does not connote directness, immediacy, proximity, intent, or motive, and the Court also noted that “the seller is liable for the telemarketer’s violations of the TSR unless the safe harbor provisions apply.” *Id.*

This is the law of the case, and the Court has no reason to modify it here. *See HK Sys., Inc. v. Eaton Corp.*, 553 F.3d 1086, 1088 (7th Cir. 2009).

Because the TSR is designed to protect consumers, the Court's interpretation also reflects the principle that the law should be construed in favor of consumers in order to effect its purpose. *Ross v. Commercial Fin. Servs., Inc.*, 31 F. Supp. 2d 1077, 1079 (N.D. Ill. 1999). Indeed, this Court's straightforward and correct interpretation of the TSR is consistent with the plain meaning of the verb "cause" and comports with the Seventh Circuit's understanding of the term. *United States v. Hatfield*, 591 F.3d 945, 948 (7th Cir. 2010) (legal concept of "cause" is attached to conduct society wants to eliminate through legal processes); *Maxwell v. KPMG LLP*, 520 F.3d 713, 716 (7th Cir. 2008) (same); *see also BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 756 (7th Cir. 2011). An entity also "causes" a violative act under federal or state law when it has actual or constructive notice of the act and possesses the ability to stop it, but fails to do so. *Scottsdale Indem. Co. v. Vill. of Crestwood*, 673 F.3d 715, 720-21 (7th Cir. 2012).

Under this Court's controlling interpretation of the verb "cause," therefore, Dish caused a telemarketer's actions if Dish retained the telemarketer and authorized the telemarketer to market its goods and services. An agency relationship between a seller and telemarketer is not necessary to "cause" violations under the TSR, because federal law contemplates imposing liability on third parties that bear responsibility or are in a position to prevent conduct that the law forbids. *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1316 (7th Cir. 1978) (holding that the "cause" of an oil spill under federal law was the owner of a barge operation, "even where it exercised all due care and a third party's act or omission was the immediate cause of the spill").

### 3. Civil Penalties Under the FTC Act

A defendant who violates the FTC Act or a regulation promulgated thereunder with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” that its actions are prohibited is subject to civil penalties under the FTCA. 15 U.S.C. § 45 (m)(1)(A), (C); *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573 (2010).

The civil penalties provision does not require evaluation of a defendant’s subjective mental state or proof that the defendant acted with willfulness or the specific intent of violating the Act. *United States v. Nat’l Fin. Servs., Inc.*, 98 F.3d 131, 139 (4th Cir. 1996). Rather, all that is required is that the defendant knew or should have known about the law and knew or should have known that its actions were unlawful. *Id.* (“A defendant is responsible where a reasonable person under the circumstances would have known of the existence of the provision and that the action charged violated that provision.”). Dish’s objective knowledge—what it actually knew or objectively should have known—is entirely appropriate for the Court to resolve on summary judgment. *See, e.g., United States v. One 1992 Lexus SC400*, 167 F. Supp. 2d 977, 987 (N.D. Ill. 2001) (resolving issues of knowledge and willful blindness on summary judgment); *see also SEC v. Lyttle*, 538 F.3d 601, 603 (7th Cir. 2008) (holding that even subjective state of mind is appropriate to resolve on summary judgment in government enforcement action).

The Court may award civil penalties of \$11,000 for each violation before February 9, 2009, and \$16,000 per violation on or after February 9, 2009. Federal Civil Penalties Inflation Adjustment Act, 74 Fed. Reg. 857-01 (Jan. 9, 2009). In setting the civil penalty amount, the FTC Act directs the Court to consider the following factors: “the degree of culpability, any

history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.” 15 U.S.C. § 45 (m)(1)(c).

#### **4. Injunctive Relief Under the FTC Act**

Section 13(b) of the FTC Act provides that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). Courts have held that a “proper case” includes any matter involving a violation of a law enforced by the FTC. *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985); *FTC v. Med. Billers Network, Inc.*, 543 F. Supp. 2d 283, 323 (S.D.N.Y. 2008).

The Court enjoys broad discretion to award relief and to define the terms of the permanent injunction. In FTC cases, courts regularly impose orders with broad injunctive provisions to guard against future consumer injury. Such injunctive provisions can include, among other things, bans, bonds, monitoring provisions, and reporting requirements. This Court has broad discretion “to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant’s conduct in the past.” *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1027-28 (7th Cir. 1988); *Commodity Futures Trading Comm’n v. Hunt*, 591 F.2d 1211, 1220 (7th Cir. 1979) (past unlawful conduct is “highly suggestive of future violations”). There is no statute of limitations for injunctive relief under Section 13(b) of the FTC Act. *E.g.*, *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 263 (E.D.N.Y. 1998) (“[W]ith respect to Section 13(b), the statute contains no statute of limitations.”).

The Court also has authority to impose any ancillary equitable relief necessary to effectuate the ordered injunction. *FTC v. Febre*, 128 F.3d 530, 534 (7th Cir. 1997); *FTC v. Amy*

*Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989). This may include enjoining otherwise legal conduct. *United States v. Loew's, Inc.*, 371 U.S. 38, 53 (1962); *EEOC v. Wilson Metal Casket Co.*, 24 F.3d 836, 842 (6th Cir. 1994). Recordkeeping and monitoring provisions may also be appropriate. *FTC v. U.S. Sales Corp.*, 785 F. Supp. 737, 753-54 (N.D. Ill. 1992).

The framing of the scope of injunction should depend on “the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts . . . found to have been committed . . . in the past.” *NLRB v. Express Publ'g Co.*, 312 U.S. 426, 436-437 (1941). To assess whether the relief sought is reasonably related to the violations committed, the courts look to “(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations.” *Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006); *Kraft, Inc. v. FTC*, 970 F.2d 311, 326 (7th Cir. 1992).

##### **5. The TSR Safe Harbor**

Plaintiffs anticipate some legal dispute about who bears the burden of proof with respect to the affirmative defenses available to Dish under the foregoing statutory schemes. “When a proviso . . . carves an exception out of the body of a statute . . . those who set up such exception must prove it.” *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84 (2008); *Schaffer v. Weast*, 546 U.S. 49, 56 (2005) (“[C]ertain elements of a plaintiff’s claim may be shifted to defendants, when such elements can fairly be characterized as affirmative defenses or exemptions.”); *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) (“[T]he general rule of statutory construction that the burden of proving justification or exemption under a special exception to the prohibitions of a

statute generally rests on one who claims its benefits, requires that respondent undertake this proof.”).

The TSR safe harbor states that an entity will not be liable under the Registry and entity-specific provisions if it meets the following conjunctive six-part test:

- (i) It has established and implemented written procedures to comply with [the entity-specific do-not-call and Registry do-not-call portion of the TSR];
- (ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to [the immediately preceding section];
- (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 [the entity-specific do-not-call portion of the TSR];
- (iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to [the entity-specific do-not-call and Registry do-not-call portion of the TSR], 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 [the first prong of the safe harbor]; and
- (vi) Any subsequent call otherwise violating [the entity-specific do-not-call or the Registry do-not-call portion of the TSR] is the result of error.

16 C.F.R. § 310.4(b)(3). The FTC has stated with regard to the “error” prong that: “If there is a high incidence of ‘errors,’ it may be determined that the procedures are inadequate to comply with the Rule’s Do Not Call requirements, the safe harbor is not fulfilled, and the calls violate the Rule.” *See* FTC, *Complying with the Telemarketing Sales Rule*, *available at* <http://www.business.ftc.gov/documents/bus27-complying-telemarketing-sales-rule#safeharbor>.

Because the safe harbor is an exception carved out of the general body of the regulation, Dish bears the burden of proof to establish this defense. *See Schaffer*, 546 U.S. at 56. Even

though it is therefore not necessary for Plaintiffs to negate the applicability of the safe harbor defense in this brief, Plaintiffs will note undisputed facts establishing that Dish has failed to satisfy the safe harbor requirements.<sup>2</sup>

#### **6. Other Defenses to Liability**

The TSR—as well as the other federal and state laws described herein—contain general prohibitions and carve out other exceptions from those prohibitions. The defendant bears the burden of proving it had an Established Business Relationship (“EBR”) and consent-to-call defenses under the telemarketing laws. *Sadowski v. Med1 Online, LLC*, 07 C 2973, 2008 WL 489360, at \*4 (N.D. Ill. Feb. 20, 2008) (“We agree with Plaintiff’s argument that defendants have the burden of proving an established business relationship under the TCPA.”); *Thrasher-Lyon v. Ill. Farmers Ins. Co.*, 861 F. Supp. 2d 898, 905 (N.D. Ill. 2012) (“[E]xpress consent is not an element of a TCPA plaintiff’s prima facie case, but rather is an affirmative defense for which the defendant bears the burden of proof.”); see *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 448 (7th Cir. 2010); *McGrew v. Countrywide Home Loans, Inc.*, 628 F. Supp. 2d 1237, 1242 (S.D. Cal. 2009). If Dish ever asserts that a call falls within the business-to-business exemption of the TSR—to date, it has not—Dish also bears the burden of proof for that defense. 16 C.F.R. § 310.4(b)(7); see *FTC v. Publ’rs. Bus. Servs.*, 821 F. Supp. 2d 1205 (D. Nev. 2010).

To streamline the summary judgment process, even though Plaintiffs do not bear the burden of proof on Dish’s defenses, Plaintiffs will note in many instances where there is an asserted defense and will deal with it to show the absence of material factual disputes.

---

<sup>2</sup> The TCPA has a similar but not identical safe harbor, 47 C.F.R. § 64.1200(c)(2), and the state do-not-call statutes have yet other similar safe harbors, N.C. Gen. Stat. § 75-105(a)(2); Cal. Bus. & Prof. Code § 17593(d). This brief discusses only the TSR safe harbor, but the discussion is relevant to the other safe harbor as well.

**B. COUNT I: The Undisputed Facts Show That Dish Violated the TSR by Calling Numbers on the Registry and by Causing Its Retailers to Call Numbers on the Registry**

The Seventh Circuit recently found that summary judgment is appropriate in a telemarketing case where electronic records establish the facts of the transmissions, because a defendant cannot create an issue of material fact by questioning whether the transmissions in those records actually happened. *Ira Holtzman, CPA v. Turza*, 728 F.3d 682, 684-85 (7th Cir. 2013). As in *Turza*, no reasonable juror could reject the electronic call logs that have been collected and meticulously evaluated here. And those call records show that since 2003, Dish and its retailers' call centers have made or caused to be made many illegal phone calls.

**1. Dish's Call Centers Initiated Nearly Five Million Outbound Telephone Calls to Numbers on the Registry in Violation of the TSR**

**i. Dish's Dialers**

At times relevant to this case, Dish maintained predictive automatic dialers—sophisticated computer-controlled devices capable of calling hundreds of thousands of telephones in a single day—to make telephone calls and routing the calls to various domestic and foreign call centers. Undisputed Fact (“UF”) Nos. 14, 15, 16. For all of the telemarketing calls these dialers made, Dish is both a seller and a telemarketer under the TSR. 16 C.F.R. § 310.2(aa). Dish's records for the calls, which are maintained as part of its business, reflect the dates and times each call was placed, the phone number dialed, the campaign name, and a “contact result code” that shows the outcome of the call—*e.g.*, whether the call reached an answering machine, whether the agent made a sale on the call, etc. UF19.

**ii. Dish's Call Centers**

Dish used its own autodialers to route calls to its web of call centers in Colorado, Texas, New Jersey, West Virginia, and the Philippines, among other places. UF14, 15. Dish has also



hired specific telemarketing vendors—as most relevant for this motion, Colorado-based telemarketing organization eCreek, headed by a former Dish executive—to make millions of telemarketing calls using Dish’s internally-generated dialing lists. UF16, 18. Although eCreek made the calls using its own dialer, it input telemarketing call data—sales and call result codes—into Dish’s computer systems. UF18, 19. There is no dispute that Dish is liable for telemarketing calls placed by eCreek that Dish produced as its internal call records. UF20.

The primary Dish-generated call records at issue are several large sets of data files containing calls made between September 2007 and March 2010 by Dish’s call centers and eCreek. UF22. Dish’s act of producing these call records to Plaintiffs authenticated those business records; there is no dispute that these records are what they say they are and that they accurately depict Dish’s internal telemarketing efforts. *United States v. Brown*, 688 F.2d 1112, 1116 (7th Cir. 1982); *Turza*, 728 F.3d at 684-85.

While Plaintiffs undertook a lengthy process to analyze those records between late 2010 and late 2013, the Court need not resolve any disputes about that process on summary judgment because Plaintiffs base their motion on the subset of violations that *Dish’s expert* identified in his reports. For the purposes of this brief, Plaintiffs treat the raw facts of the call counts Dish’s expert generated as true, thereby removing from the summary judgment phase most, if not all, of the factual disputes about the call record analyses.

Plaintiffs do not, however, take Dish’s expert’s opinions and conclusions as true because Dish’s lawyers erroneously instructed him to conclude that certain calls did not violate the laws at issue thereby eliminating those calls from his call counts. Whether a call that Dish’s expert has admitted occurred is a “violation” of the laws at issue is for the Court, and not the parties’ experts, to decide. “[E]xpert testimony as to legal conclusions that will determine the outcome

of the case is inadmissible.” *Good Shepherd Manor Found., Inc. v. City of Mومence*, 323 F.3d 557, 564 (7th Cir. 2003). Furthermore, Dish’s expert in certain instances simply failed to perform relevant call record analyses, leaving Plaintiffs’ analyses as the only evidence in the record.

As described below, in Dish’s 2007-2010 call records, Dish’s expert identified almost five million telemarketing calls to phone numbers on the Registry that violated the TSR. These Registry violations also reflect that Dish’s telemarketing campaigns called consumers in virtually every state, more than satisfying the TSR’s application to calls that are part of “a plan, program, or campaign which is conducted to induce purchases of goods or services . . . by use of one or more telephones and which involves more than one interstate telephone call.” 15 U.S.C. § 6106(4); UF17.

Dish’s violations<sup>3</sup> may be broken into the groups set forth below, none of which is genuinely or materially in dispute:

- 501,650 telemarketing calls that Dish’s expert analyzed and identified as violations of the Registry rule for which Dish has no defense. UF24, 25.

There is no dispute—legal or factual—about these calls because Dish’s expert admitted that there were no more steps that he could take to find defenses for these calls. UF24, 25.

- 2,386,386 telemarketing calls to phone numbers on the Registry for more than 31 days that were also calls to phone numbers of people who had stated more than 30

---

<sup>3</sup> Plaintiffs note that all of the violation counts in this brief take the record in the light most favorable to Dish, and Plaintiffs do not concede in any way that the record reflects only these call counts. In other words, the call counts in this motion are a floor, not a ceiling. If a trial is necessary in this case, Plaintiffs will seek to hold Dish liable for a much larger set of violations.

days prior to the call to Dish or a Dish retailer or business partner that they did not wish to receive calls.<sup>4</sup> UF44, 46; *see* 16 C.F.R. § 310.4(b)(1)(iii).

There is no genuine factual dispute about these calls. Dish has asserted that it did not have access to all of its entity-specific do-not-call requests at all times, but that was because—Dish now admits—it did not have a consolidated database of all entity-specific requests related to Dish and did not collect do-not-call requests from its retailers for many years. UF39. To illustrate, the following scenario could have occurred: (a) a Dish retailer may have received and recorded an entity-specific do-not-call request from a consumer in 2005; (b) Dish did not receive that request because it did not have a system for obtaining those requests in 2005; (c) Dish called that consumer in 2008 on a telemarketing call; and (d) Dish then, in 2009 or 2010, obtained the 2005 do-not-call request from the retailer. Through its expert, Dish contends incorrectly that it would not be liable for the 2008 call and others like it because it did not have access to the do-not-call request.

Even taking all of Dish’s assertions about its entity-specific do-not-call list as true for the purposes of this motion, this does not provide a defense.<sup>5</sup> Since 1995—before Dish even existed—sellers and telemarketers have been required not to telemarket to a consumer who “previously has stated that he or she does not wish to receive an outbound telephone call made by or on behalf of the seller whose goods or services are being offered.” TSR, 60 Fed. Reg. at 43,866; *see* Rules and Regulations Implementing the Telephone Consumer Protection Act

---

<sup>4</sup> This 2,386,386 excludes 11,004 calls that overlap with the 501,650 issue calls identified by Dish’s expert that are discussed in the prior bullet point. UF25, 46.

<sup>5</sup> Although unnecessary to decide as part of this motion, Plaintiffs dispute whether much if any of the historical data about Dish’s entity-specific list are admissible, as Dish did not provide this information in discovery. *See* FED. RS. CIV. P. 26 (a)(1)(A)(ii), 37(b), 37(c).

(TCPA) of 1991, 68 Fed. Reg. 44,144, 44,156 (July 25, 2003) (“[S]uch request applies to all telemarketing campaigns of the seller and any affiliated entities that the consumer reasonably would expect to be included given the identification of the caller and the product being advertised.”). If a Dish retailer collected a do-not-call request while telemarketing Dish service in 2005, the Court can and should decide as a matter of law that Dish had an obligation to honor that request regardless of when Dish actually got around to collecting that request. If the Court so rules, Dish’s quixotic inquiry into which entity-specific requests it received at various times is unnecessary and irrelevant.

- 873,551 telemarketing calls to consumers on the Registry that Dish asserted were during campaigns where Dish responded to leads it purports to have received from consumers. UF33.

There is no genuine dispute about these calls that could create a triable factual issue on this record. Dish has the burden of proof on EBR, *Sadowski*, 2008 WL 489360, at \*4, but it did not produce any leads from consumers, it admitted to the Court it does not possess such information, and the Court precluded Dish from offering it in any event. UF33, 32; Opinion 279 at 43-44. Dish therefore cannot point to anything in the record that could create defenses as to these calls.

- 332,512 violations that Dish has attempted to exclude only on the basis of a triad of nonexistent defenses: that the “telephone never rang” despite the fact that Dish initiated the call (309,931); that Dish reached someone who did not speak English or told Dish it had the wrong number (12,552); or that Dish’s dialer happened to be located in the same state as the recipient of the call (10,029). UF34.

On these calls, Dish's three would-be defenses create purely legal, not factual, disputes. As to the "telephone never rang" calls, the rules prohibit calls from being "initiated," not from being completed. 16 C.F.R. § 310.4(b)(1)(iii)(B) (prohibiting the "initiat[ion]" of phone calls to phone numbers on the Registry); 47 C.F.R. § 64.1200(c) (same). This makes sense because the government wants to prevent telemarketers from calling these numbers in the first place. Similarly, reaching a person who does not speak the language the telemarketer expects or is not the individual the telemarketer expects to reach does not constitute a defense. *Id.*; *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012); *see Gager v. Dell Fin. Servs.*, 727 F.3d 265, 273 n.6 (3d Cir. 2013) ("Callers have a continuing responsibility to check the accuracy of their records . . ."). Finally, if a firm has made more than one interstate call as part of its telemarketing activities, it is irrelevant that a firm's dialer happens to be located in the same state as the consumer it illegally called. 15 U.S.C. § 6106(4). There is no dispute that Dish made more than one interstate telemarketing call as part of its telemarketing activities. UF17.

Dish broke the do-not-call rules nearly five million times from September 2007 through March 2010 by calling consumers on the Registry. By September 2007, Dish had been on notice for many years that its telemarketing compliance practices were inadequate, but it did not fix the problems. UF82, 83, 84, 86, 87. And the human cost of Dish's illegal calls was very real: Among many other examples, a California resident who is on the Registry and received illegal calls described in this section stated, "This company will not stop calling me no matter how many times I have asked them to stop!" UF53. A Virginia resident who was on the Registry and received illegal Dish calls stated, "I have asked them repeatedly to remove me from their call list and not call anymore as there is an 8 month old baby in the house who they are constantly waking up, even talking to a supervisor, but so far, we have not gotten any relief from their

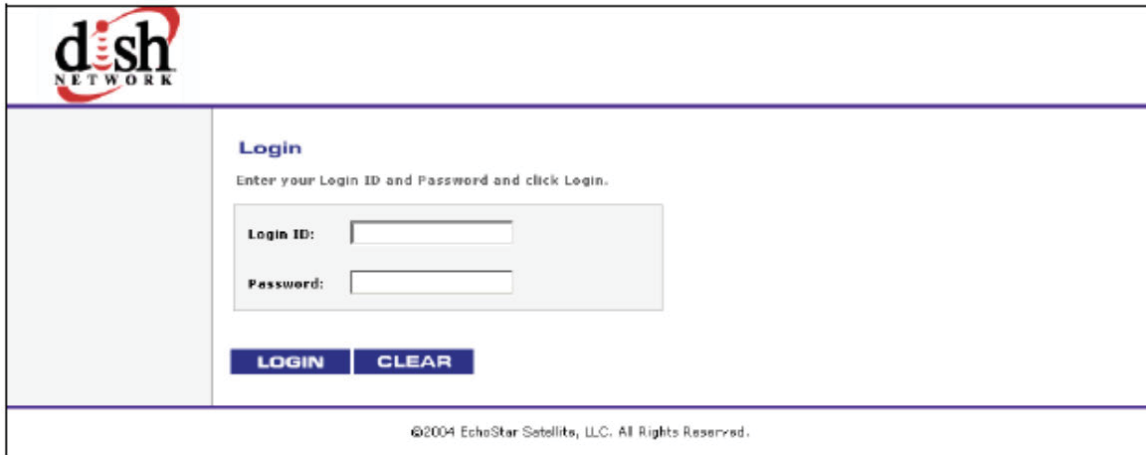
numerous phone calls every day! PLEASE HELP.” UF52. A Texas resident who received illegal Dish calls stated simply, “Make them stop calling me, Please.” UF54.

Dish’s call records and its expert confirmed that Dish initiated these millions of illegal telemarketing calls, which means there is no factual dispute about them. Furthermore, Dish was unable to identify any valid factual or legal defenses for these calls, which means that the United States is entitled to summary judgment on Count I as to these 4,094,099 calls.

**2. In 2003, Dish Created the OE Call Center System, Which Led to an Extreme Proliferation in Illegal Telemarketing**

Dish’s call centers were not the only entities making telemarketing calls selling Dish service. UF127, 128, 170. Dish created the OE call center system in 2003 in order to allow large, direct-marketing “retailers” with existing call-center operations to sell Dish on a national level, using methods like telemarketing. UF134, 135, 136, 155. The OE call center system was successful in large part because it allowed these direct marketers to use aggressive tactics to sell Dish directly to consumers throughout the United States, without concerning themselves with physical inventories or installations. UF135. That is, Dish’s OE call center retailers did not need to dispatch technicians or install satellite dishes on customers’ roofs. UF145. All they had to do was find consumers to input into Dish’s computer systems. UF135, 136, 139, 145, 146.

And for that purpose, Dish created a web-based “OE tool,” which walked the telemarketing agents at Dish’s OE call centers through every step of the sales process, with Dish generating and performing all the tasks necessary to make the retailers’ sales activities as efficient as possible. UF136, 139.



**dish**  
NETWORK

**Login**

Enter your Login ID and Password and click Login.


Login ID:

Password:

**LOGIN** **CLEAR**


©2004 EchoStar Satellite, LLC. All Rights Reserved.

First, the OE tool allowed the individual telemarketing agents at the OE retailer call center to sign in using Dish-provided usernames and passwords, as shown in the screenshot above. UF140. Dish provided multiple passwords to the OE retailers—sometimes numbering in the hundreds to a single retailer—because it knew that the OE retailers had many telesales agents selling Dish to consumers. UF141, 143, 188. Dish and the OE retailers then used the individual Dish-provided logins to track the OE retailers' activities. UF142, 143, 144. For example, Dish generated frequent reports with more than 60 different metrics telling the retailers how many sales had been made using each login. UF144. Dish eventually tracked and filtered the IP addresses that the OE retailers were using to log in to Dish's system. UF142, UF144.

		<a href="#">CANCEL</a> <a href="#">LOGOUT</a>	
<b>PACKAGE SUMMARY</b> <b>Getting Started</b> <b>One Time Fees</b> † One Time Cost: \$0.00 <b>Monthly Equipment Fees:</b> <b>Monthly Programming:</b> <b>Monthly Credits:</b> ** Monthly Total \$0.00 <small>† Taxes are not included</small>		Sales Rep ID: <input type="text"/> Please enter customer information: <input type="radio"/> Mr. <input type="radio"/> Ms. *First Name: <input type="text"/> *Last Name: <input type="text"/> *Billing Telephone Number: <input type="text"/> ( ) - <input type="text"/> *Can Be Reached: <input type="text"/> ( ) - <input type="text"/> Email: <input type="text"/> *Address Line 1: <input type="text"/> Unit #: <input type="text"/> *City: <input type="text"/> *State: <input type="text"/> *Zip Code: <input type="text"/> <input checked="" type="checkbox"/> Billing Address same as Service Address *Does your customer own the residence? <input type="radio"/> Yes <input type="radio"/> No <small>If no, the customer must have the written approval by the owner of the installation.</small> * required field <a href="#">PREVIOUS</a> <a href="#">CLEAR</a> <a href="#">CONTINUE</a>	
<small>©2004 EchoStar Satellite, LLC. All Rights Reserved.</small>			

The OE tool also collected the prospective customer's personal information on Dish's behalf via the OE retailers' telesales agents. UF139, 147, 148, 150. In the early days of the OE tool, if the OE call-center agent input consumer information into the tool but did not complete the sale, Dish seized the consumer's telephone number for itself as a telemarketing lead and began telemarketing to that consumer almost immediately. UF159. Dish also gave OE retailers the option of using "Sales Rep ID" numbers in order to track sales metrics of individual call center agents, and Dish generated reports of agent sales for OE retailers. UF143. Dish, not the OE retailer, also collected Social Security numbers and performed instant credit checks in order to qualify the prospective customers to whom the OE retailers' telesales agents were speaking. UF147.





[CANCEL](#)
[LOGOUT](#)

---

**PACKAGE SUMMARY**

**Getting Started**

**One Time Fees**

- Digital Home Advantage Activation Fee **\$49.99**

**† One Time Cost: \$49.99**

**Monthly Equipment Fees:**

- DISH Network DVR Service Fee **\$4.98**

**Monthly Programming:**

- America's Top 120 with HBO and Cinemax with Local Channels **\$59.99**
- Showtime Unlimited **\$11.99**
- DISH HOME PROTECTION **\$5.99**

**Monthly Credits:**

- DISH HOME PROTECTION **\$5.99**
- HBO/SHOW/MAX 3 MO FREE **\$28.99**
- First Month Free **\$37.99**
- First Month Free **\$5.00**

**†† Monthly Total \$4.98**

\*Taxes are not included

**Schedule Information**

Please select an installation date from the selections provided below, then click 'Continue'. If your customer would like more dates to choose from, please click on 'More Dates'.

DATE	DAY	8AM - 12PM	12PM - 5PM*
Aug 19	Fri	<input type="radio"/>	<input type="radio"/>
Aug 20	Sat	<input type="radio"/>	<input type="radio"/>
Aug 21	Sun	<input type="radio"/>	<input type="radio"/>
Aug 22	Mon	<input type="radio"/>	<input type="radio"/>
Aug 23	Tue	<input type="radio"/>	<input type="radio"/>
Aug 24	Wed	<input type="radio"/>	<input type="radio"/>
Aug 25	Thu	<input type="radio"/>	<input type="radio"/>
Aug 26	Fri	<input type="radio"/>	<input type="radio"/>
Aug 27	Sat	<input type="radio"/>	<input type="radio"/>

**Additional Installation Dates**

Selecting 'More Dates' allows your customer to choose their own installation date using our online calendar. If the date that has been selected is unavailable, please ask your customer to choose another date.

\*In California, 1 pm - 5 pm (4 hour window required)


Time window represents technician arrival time, not completed installation time.

[MORE DATES](#)  

[PREVIOUS](#)
[CLEAR](#)
[CONTINUE](#)

©2004 EchoStar Satellite, LLC. All Rights Reserved.

After selecting specific Dish programming on a different screen, the OE tool then required the retailer's telemarketing agent to schedule Dish's delivery and installation of services. UF145, 146. The OE retailer was not responsible for doing anything on the date the OE call center agent selected. UF145, 146. Rather, the OE call center agent bound Dish itself to a specific date and time that Dish would dispatch a Dish employee or contractor to install a satellite on the consumer's roof and activate the receiver. UF146.

		<a href="#">CANCEL</a> <a href="#">LOGOUT</a>	
<b>PACKAGE SUMMARY</b>		<b>Credit Card Payment</b>	
<b>Getting Started</b> <b>One Time Fees</b> • Digital Home Advantage Activation Fee <b>\$49.99</b> <b>† One Time Cost: \$49.99</b>		Payment is required to purchase equipment. Payment of \$49.99 covers the activation of your customer's DISH Network receiver system which contains the following: DHA 18:PARTNER:2 Rooms:625 . PLEASE ENTER CREDIT CARD PAYMENT INFORMATION	
<b>Monthly Equipment Fees:</b> • DISH Network DVR Service Fee <b>\$4.98</b> <b>Monthly Programming:</b> • America's Top 120 with HBO and Cinemax with Local Channels <b>\$59.99</b> • Showtime Unlimited <b>\$11.99</b> • DISH HOME PROTECTION <b>\$5.99</b> <b>Monthly Credits:</b> • DISH HOME PROTECTION <b>\$5.99</b> • HBO/SHOW/MAK 3 MO FREE <b>\$28.99</b> • First Month Free <b>\$37.99</b> • First Month Free <b>\$5.00</b> <b>†+ Monthly Total \$4.98</b>		Credit Card : <input type="text" value="Visa"/> Expiration Date: <input type="text" value="08"/> <input type="text" value="2005"/> Credit Card Number: <input type="text" value="4387755555555550"/> Amount to Charge: <b>49.99</b> Please ask the customer if they would like to set their credit or debit card to pay their DISH Network bill automatically each month. YES, Sign the customer up for Credit Card Autopay <input type="checkbox"/> The above amount does not include tax. If your customer lives in a state that requires tax on equipment, it will be reflected on your customer's first bill. <a href="#">PREVIOUS</a> <a href="#">CLEAR</a> <a href="#">CONTINUE</a>	
*Taxes are not included			
©2004 EchoStar Satellite, LLC. All Rights Reserved.			

Next, the OE tool required that the OE call-center agent take a credit-card payment from the consumer, and also required that the agent solicit the consumer to give Dish authorization to auto-charge the consumer's credit card every month. UF148. The payments that resulted from this screen were not payments from the consumers to the OE retailers; they were payments directly from the consumer to Dish. UF148, 150.

		<a href="#">CANCEL</a> <a href="#">LOGOUT</a>	
<b>PACKAGE SUMMARY</b>		<b>Promotion Terms &amp; Conditions</b>	
<b>Getting Started</b>		<b>Digital Home Advantage - Please read to the customer</b>	
<b>One Time Fees</b>		<ul style="list-style-type: none"> <li>Your first bill will be pre-rated for the current month as well as one month in advance.</li> <li>You will see a \$49.99 promotional charge on your first bill.</li> <li>Your monthly rate will be \$_____. This does not include any applicable sales tax.</li> <li>All payments for programming are non-refundable.</li> <li>You must maintain the minimum of America's Top 60, DISH Latino, or Greet Well TV Package.</li> </ul>	
* Digital Home Advantage Activation Fee \$49.99		<ul style="list-style-type: none"> <li>When available, your local channels will be included in your programming package as part of your Digital Home Advantage programming package.</li> <li>The first receiver's rental fee is included in your basic programming package price. There is an additional \$5.00 per month rental fee per receiver beyond the first.</li> <li>Each of your receivers must be continuously connected to your same land-based phone line. A monthly \$4.99 additional Outlet Programming Access Fee applies to the second tuner of each DISH 322, DISH Player-DVR 625 or DISH Player-DVR 942 receiver. This fee will be waived on a monthly basis for each such receiver that DISH Network confirms has been continuously connected to customer's same land-based phone line.</li> <li>All equipment remains the property of DISH Network and must be returned within fifteen days of account deactivation to DISH Network or you must pay an unreturned equipment fee which at a minimum is \$100 per receiver.</li> <li>We have placed a \$1.00 credit card hold on your credit card which will be removed within 3 to 7 business days.</li> <li>Social Security Numbers are used to obtain credit scores and will not be released to third parties except for verification and collection purposes or if required by governmental authorities.</li> <li>The Digital Home Advantage equipment and promotion comes with a standard warranty, which includes 24/7 tech support, Advance Exchange Repair (\$14.95 shipping), and In-Home service trip charge (available if a problem can not be solved over the phone) for \$99.</li> <li>Account holder must be present at the time of installation.</li> <li>If you do not own the property, you will need to present written permission from your landlord to the installer.</li> <li>DISH Network provides a 90-Day installation warranty.</li> <li>DISH Network needs 24-hour advance notice if you need to cancel or reschedule your installation.</li> <li>You will receive your first month of qualifying service FREE.</li> <li>If applicable - The DISH 611 HD and DISH Player-DVR 942 HD/DVR receivers require a subscription to the DISH Network "HD Pak" which is \$9.99 per month.</li> <li>If applicable - If you have added the \$9.99 DISH Network "HD Pak", you will receive it "free" for 6 months. You will receive a \$9.99 adjustment on your bill for 6 months. After this time, you will be billed for the current rate of \$9.99/mo, unless you call DISH Network to cancel the DISH Network HD Pak.</li> <li>If applicable - The VOOM original HD Pak requires a second dish antenna at an additional cost at the time of initial installation.</li> <li>If applicable - There is a monthly \$4.98 DISH Network DVR Service fee for each DISH Player - DVR 510, DISH Player DVR 625 and DISH Player-DVR 942. There is no charge for the DISH Network DVR Service if subscribing to America's "Everything" Pak or Latino "Everything" Pak.</li> <li>If applicable - If you have added the \$5.99 DISH Home Protection (DHPP) you will receive 24/7 tech support, Advance Exchange Repair (with FREE shipping) and In-Home service trip charge (available if a problem can not be solved over the phone) for \$29. Also included in your DHPP is one Free DISHMevo per year.</li> <li>If applicable - If you have ordered the DISH Player-DVR 942 HD/DVR receiver, you have paid a non-refundable \$250 lease upgrade fee. There is a limit of one DISH Player-DVR 942 receiver per account.</li> <li>If applicable - If you have signed up for HBO, Showtime &amp; Cinemax, you will receive an adjustment for the value of HBO, Showtime &amp; Cinemax for three months (3 months free). After the 3-month promotional period, the then-current programming price will apply. Adjustments are non-refundable.</li> <li>If applicable (DHA10) - You have signed up for the Digital Home Advantage agreement plan. You will receive DISH Home Protection Plan (over \$105 value) for length of agreement at no charge. If service is terminated there is a cancellation fee equal to \$13.33 multiplied by the number of months remaining in your agreement. At the end of agreement, you must call DISH Network to cancel DHPP or \$5.99 monthly charge will be applied for service.</li> <li>If applicable (DHA18) - You will receive a \$49.99 promotional credit on your first bill.</li> </ul>	
<b>† One Time Cost: \$49.99</b>			
<b>Monthly Equipment Fees:</b>			
* DISH Network DVR Service Fee \$4.98			
<b>Monthly Programming:</b>			
* America's Top 120 with HBO and Cinemax with Local Channels \$59.99			
* Showtime Unlimited \$11.99			
* DISH HOME PROTECTION \$5.99			
<b>Monthly Credits:</b>			
* DISH HOME PROTECTION \$5.99			
* HBO/SHOW/MAX 3 NO FREE \$20.99			
* First Month Free \$37.99			
* First Month Free \$5.00			
<b>** Monthly Total \$4.98</b>			
†Taxes are not included			

Finally, Dish, via the OE tool, instructed the OE retailer's telemarketing agent to "[p]lease read to the consumer" a number of specific sentences after a sale was made, so that Dish could fulfill its disclosure obligations under state and federal law. UF149.

Dish said when it created the OE program that the retailers were acting "on DISH Network's behalf" when they made sales and took payments from consumers. UF150. The

evidence is overwhelming that the OE tool was designed and optimized for telesales agents in the OE retailers' call centers, and that it created a close, symbiotic relationship between the OE call centers' telemarketing activities and Dish.

Indeed, during the mid-2000s, the OE system was a boon for direct-marketing firms all over the country, who quickly recognized the opportunity to deliver customers to Dish at nearly \$200 per head—no questions asked and with very few strings attached. UF 152, 153, 154, 227, 257, 311, 319, 353. Existing Dish retailers inquired about the opportunity to be put “on the OE tool” so that they could market nationally—and Dish established unofficial quotas so that an OE retailer had to bring Dish a certain number of customers every month in order for the OE money to keep flowing. UF154.

As lucrative as the OE tool was for many of the OE retailers, it was even more lucrative for Dish. The OE program was so successful that, within several years, it had become the largest individual source of Dish's annual new-customer activations—surpassing even Dish's own vast marketing operation. UF152, 153. Dish's traditional “brick and mortar” retailers, who maintain equipment inventories and perform installations, average fewer than 100 customer activations a year per retailer. UF133. Dish's OE call centers, who do marketing only average more than 20,000 customer activations a year. UF153. That's right—Dish's OE call centers do not average two times, or three times, or ten times the number of sales as Dish's other “retailers.” Rather, they activate *200 times* the average number of customers that the traditional retailers do.

Although Dish told this Court that it is not aware of much Dish retailer telemarketing and that it has so many retailers that it cannot even be bothered to go through its internal files to figure out which ones are breaking the telemarketing laws, UF168, the actual evidence Dish produced reveals this story to be a canard. In fact, Dish has known for years that its OE retailers'

outbound telemarketing is responsible for tens of thousands of new Dish customers every month, and also that retailers achieving over a certain sales threshold use outbound telemarketing to make sales. UF155, 170. And just as the OE tool has led to some great rewards for Dish, the system has also led to great risk because it created such a direct relationship between the OE call center and Dish itself. When Dish wanted to “bring structure” to its efforts to comply with the TCPA, it did not go looking for all 7,000 of its traditional retailers and did not even look internally at its own call centers. UF171. Rather, it created a “compliance” division in its “Retail Services” department, and hired a compliance manager to supervise the few dozen OE retailers. UF173. Dish’s executive VP of sales acknowledged in a video presentation to retailers that he did not want to create the compliance department to control their behavior—reflecting Dish’s knowledge that controlling the telemarketing behavior of the OE retailers would impact Dish financially. UF172.

As Dish internally recognizes, its retailers have become extremely adept at hiding their identities from consumers and regulators when they commit telemarketing violations. UF165. As such, it is more difficult to obtain retailer call records, and the evidence reflects that the calls described herein are only drops in the bucket of Dish retailer telemarketing violations. However, Plaintiffs do not move for summary judgment on all Dish retailer calls known or unknown. Rather, as detailed very specifically below, Plaintiffs move for summary judgment on calls by six specific representative OE retailers that cover the time period from 2002 to the present.

**3. There Is No Genuine Material Factual Dispute That Dish Caused Its OE Call Center Satellite Systems Network to Violate the TSR**

In 2002, Dish knew that its retailer Satellite Systems Network (“SSN”), a Southern California-based call center owned by Ali “Alex” Tehrani, was using illegal telemarketing to sell Dish service. UF228, 230, 231, 235, 236, 241, 248. Despite this knowledge, and in the face

of many lawsuits and complaints, Dish fostered a business relationship with SSN that has lasted more than a decade and continues today. UF237.

Dish first learned SSN was using putatively illegal robocalls<sup>6</sup> selling Dish around November 2002, before even the existence of the Registry or the OE program. UF235, 236. In response to this discovery, Dish tried to ensure SSN was following the telemarketing laws and “explain[ed]” to it “that [the] entire [Dish] executive group is watching close.” UF235, 236.

Notwithstanding its knowledge of SSN’s questionable marketing practices—in a pattern that repeats itself again and again—Dish allowed SSN to become part of the burgeoning OE system in 2004. UF240. Trouble quickly ensued. In June 2004, the State of North Carolina sued SSN for calling North Carolinians on the Registry and for placing prerecorded telemarketing calls to North Carolina telephones, all in violation of North Carolina law. UF233. The case settled in 2005 with a consent judgment where SSN paid a penalty and was enjoined from, among other things, calling North Carolinians on the Registry. UF234; *see Kaylor-Trent v. John C. Bonewicz, PC*, 910 F. Supp. 2d 1112, 1115-16 (C.D. Ill. 2012) (Myerscough, J.) (“[T]he Court finds relevant that other individuals claimed Defendant committed the same violations against them around the same general time period of the violations herein.”).

None of SSN’s illegal behavior was lost on Dish, which, all along, knew that SSN continued violating the law in marketing Dish service. UF231, 235, 236, 238, 239, 241, 245. In September 2005, Dish corporate counsel Scott Novak recognized in an extraordinarily frank

---

<sup>6</sup> As described more fully *infra*, prerecorded message telemarketing, or “robocalling,” was generally outlawed by the Telephone Consumer Protection Act (“TCPA”) in the early 1990s. Telephone Consumer Protection Act of 1991, PL 102–243, 105 STAT. 2394 (1991) (“It shall be unlawful for any person in the United States . . . to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party[.]”).



email to company executives and others in the legal department that SSN continued its illegal telemarketing and warned that by tolerating the behavior, Dish could be held liable for it:

From: Novak, Scott  
Sent: Monday, September 26, 2005 1:24 PM  
To: Ahmed, Amir; Oberbillig, Mike; Mills, Mike  
Cc: Keller, Steven; Miller, Kerry; Steele, Dana; Gowland, Jim  
Subject: RE: Dish Network Auto Dialer calls [Indiana AG]

We know that SSN is using autodialers and automessages. Terachi been warned time and again (by me, by you, by the region, by phone, in writing, in person) that these activities could violate the law. Last time, Teranchi blamed a "rogue employee," who he claimed was terminated, but the activities continue. Charter knows he's doing it, and several state AG's know he's doing it as well.

In the past, we have successfully resisted the argument that we are responsible for the conduct of independent retailers, however, SSN is a problem because we know what he is doing and have cautioned him to stop. There is risk in continuing to give warnings without a follow-through action. Eventually, someone will try to use that against us.

UF 241, 243. These internal acknowledgements reveal the company's true attitude toward the issue of telemarketing compliance and Dish's retailers—while Dish says that its retailers should not break the telemarketing laws, it knows that they do, recognizes that its compliance activities are ineffectual, and acknowledges that its sham denials of responsibility will only take it so far.

Dish did not terminate SSN, but apparently spent about another year receiving information on SSN's illegal telemarketing. UF242, 245. In August 2006, in-house lawyer Dana Steele—who was also copied on the September 2005 email reproduced above—wrote in an email to Dish management that she knew very specific details about SSN's telemarketing: "SSN has used the same scripts as [Dish OE retailer] United, is out of Aliso Viejo, CA (as is United) . . . We believe United and SSN either used the same affiliate marketer or hired [customer service representatives] back and forth from each other in their call centers in Aliso Viejo as there were so many similar patterns in allegations against them." UF244.

But when it came time to tell authorities all of what it knew about SSN, Dish fell woefully short. In a September 2006 submission that stands in stark tension with internal emails she wrote and received, Dish lawyer Dana Steele told the State of Vermont in response to an

investigative demand about SSN: “EchoStar has received complaints alleging ‘Do Not Call’ violations by Satellite Systems Network. EchoStar investigated this complaint and ultimately determined that based upon representations by Satellite Systems Network after performing an internal investigation, the allegation brought to EchoStar’s attention was not traced to Satellite Systems Network.” UF246.

It is unfortunate that not only did Dish fail to share what it knew with the State of Vermont, it affirmatively decided to tell regulators that it investigated and discovered that SSN did *not* violate the law—despite its knowledge that SSN had been violating the telemarketing laws for, at that point, four years. And there is no indication that anything has changed—by 2011, Dish’s knowledge of SSN’s illegal telemarketing was apparently even a source of humor in Dish’s legal department; when Dish was sued for illegal calls placed by SSN, a Dish paralegal joked that she would “draft our standard go after SSN letter.” UF258.

In fact, Dish’s employees have been intimately familiar with SSN’s operations for the better part of a decade and have frequently visited SSN’s call center: listening to phone calls, providing marketing support, and giving sales training to call-center managers and agents—the same call center employees Dish knew were handling illegal phone calls selling Dish. UF247. Following are just a small sample of hundreds of notes Dish employees took reflecting their support activities with SSN:

- “Met with Alex. Covered details on the Satellite Market and the Spanish Market. Went over details on what works with marketing compared to the competitors,” (Apr. 5, 2005);
- “Sales Training with Alex Tehranchi and sales managers . . . Covered ways to drive the sales reps on increasing Dish Network sales.” (Apr. 18, 2005);
- “[N]ew call center looks incredible . . . [SSN manager Steve Rad] knows that if he needs anything at all (i.e. support, training, issues, questions, etc.) to contact me directly.” (May 27, 2005);



- “[H]is new call center is up and running with internet access so they should be ready to rock & roll . . . he requested that [I] attempt to get him some updated training materials for his new hires . . . [I]’ve instructed [S]teve to send me an e-mail with the content that the ‘long’ brochures had on them and [I]’d just create it for him in photoshop.” (June 2, 2005).

UF248.

Even though the evidence is indisputable that SSN has been making illegal phone calls selling Dish for over a decade, the United States does not move for summary judgment on calls SSN made in 2003, 2004, or even 2008 or 2009. Rather, it is an undisputed fact that SSN continues to commit telemarketing violations selling Dish service years after this lawsuit was filed, and it is on SSN’s more recent violations that the United States seeks summary judgment. During 2010 and 2011, SSN placed at least 381,811 illegal telemarketing calls selling Dish to phone numbers on the Registry. UF249, 250, 251. The 381,811 figure is taken directly from Dish’s expert’s November 2013 report, which means there is no material factual dispute about these calls. UF251.

Dish is the seller on these 381,811 calls because it is the entity “who, in connection with [SSN’s telemarketing transactions], provide[d], offer[ed] to provide, or arrange[d] for others to provide goods or services to the customer in exchange for consideration.” 16 C.F.R. § 310.2(aa); UF139, 250. And Dish violated the TSR because, as the seller, it caused its telemarketer SSN to place these Dish sales calls by retaining SSN as a retailer and allowing it to market Dish to American consumers. UF229; *see* 16 C.F.R. § 310.2(cc); 16 C.F.R. § 310.4(b)(1)(iii); Opinion 20 at 14-15. Likewise, there is no genuine material factual dispute that Dish caused these violations by having nearly a decade’s worth of actual notice of SSN’s illegal telemarketing and doing nothing to stop it despite having the ability to do so. UF229, 235, 236, 239, 241; *see Scottsdale*, 673 F.3d at 720-21. Like the defendant in *Scottsdale*, Dish “‘caused’ the [violations]

in a perfectly good sense of the word” even though it did not “originate” the phone calls. *Id.* The United States is entitled to summary judgment on Count I against Dish on these calls.

Consumers complained to the FTC within one calendar day of having received a violative call from SSN as contained in the Five9 call records, reporting SSN’s caller ID and stating: “Please make them stop calling; PLEASE!!!!” and “They have called two to three times a day for the last two weeks. When I finally answered they contacted me about satellite dishes. I let them know . . . [I] would like to be taken off their list. They told me to hold while they transferred my call and then hung up on me. I have since received several more calls, twice a day.” UF259.

But there is even more direct testimony about the impact of SSN’s illegal calling practices. Around May 9, 2009, a month and a half after this lawsuit was filed, SSN placed an illegal telemarketing call to North Carolina retiree Thomas Krakauer. UF406, 407, 409. Mr. Krakauer had never engaged in a transaction with Dish, nor had he inquired about Dish service. UF411, 413. Mr. Krakauer complained to Dish, which investigated and concluded that SSN made the call. UF414. SSN admitted to Dish that it made the call, and told Dish that it had generated the lead because it supposedly sold Mr. Krakauer DirecTV in April 2003—six years before the illegal call. UF415. SSN did not explain how either Dish or SSN could possibly have an EBR with a consumer who had bought a competitor’s product six years earlier. Dish, having confirmed that Mr. Krakauer received an illegal call, did nothing.

Remarkably, SSN then called Mr. Krakauer ten more times over the next two years. UF416. In addition to harassing and annoying Mr. Krakauer, the calls violated at least four different legal obligations of Dish and SSN: (a) the TSR; (b) the TCPA; (c) the North Carolina Unwanted Telephone Solicitations Act; and (d) the consent decree SSN signed in 2005 that

enjoined it from calling North Carolinians on the Registry. The United States is entitled to summary judgment against Dish on Count I based on SSN's 381,811 illegal calls.

**4. There Is No Material Factual Dispute That Dish Caused Its OE Call Center JSR Enterprises to Violate the TSR**

In early 2006, Dish knew that a Southern California-based company named JSR Enterprises ("JSR"), the principals of which were Jerry Dean Grider and Richard Goodale, was using an autodialer to call lead lists selling Dish on behalf of existing Dish OE call center Dish Nation. UF314, 317. Dish knew that JSR was autodialing 750,000 people every week and bringing in 40 new Dish customers for Dish. UF317.

This eye-popping level of phone calls and the extremely low number of sales strongly suggest that JSR was "burn[ing] up the countryside" with illegal "press one" robocalls. UF318. In this context, "burning" means using an autodialer to send as many robocalls as possible to any many phone numbers as possible, and hoping some people press "one" to buy the product offered. UF318. "Burning" had an extraordinarily low success rate for JSR, but Dish's OE system essentially encouraged this behavior because the large per-customer payments Dish gave JSR and its other retailers made up for the fact that less than one one-hundredth of one percent of JSR's phone calls yielded a sale. UF317, 319. That is, JSR told Dish it cost \$2,000 to dial 750,000 people, but its 40 Dish sales per week brought in roughly \$7,000 of Dish commissions. UF317, 319. In this way, JSR could still make money even though it had to dial tens of thousands of people illegally before Dish made even one sale.

Dish also knew that JSR lacked EBRs with the consumers it was calling because it knew JSR generated its telemarketing leads by buying lead lists. UF317. Dish similarly learned that JSR had hired a manager from another OE retailer that Dish had just terminated for telemarketing violations. UF320.

But despite this considerable knowledge about JSR's questionable telemarketing activities, in August 2006 Dish granted JSR's application to become an OE retailer. UF321. The Dish retailer agreement gave JSR access to Dish's OE systems, facilitating JSR's nationwide autodialing campaigns that brought customers directly to Dish. UF95, 139, 321. Dish further encouraged JSR's OE operations by training JSR's telemarketing salespeople—the same salespeople who had already been using illegal telephone calls to sell Dish—on how to sell Dish to consumers. UF322.

The results were predictable. Only a month after Dish authorized JSR to market nationally, Dish's "sting" program<sup>7</sup> caught JSR illegally telemarketing to H■■■■ K■■■■, a consumer on the Registry who had no EBR with Dish. UF323, 324. The sting gave Dish actual knowledge that JSR had called Ms. K■■■■ in violation of the TSR's abandoned call provisions. But Dish's lawyers and compliance staff did nothing, despite having told consumers and regulators that it would discipline retailers revealed by the sting program to be breaking the law. UF179, 324. A month later in October 2006, Dish caught JSR sending prerecorded telemarketing messages to consumer M■■■■ W■■■■. UF325. Again Dish failed to act.

In November 2006, Dish caught JSR in yet another sting, when JSR made multiple prerecorded message calls to New Hampshire resident L■■■■ C■■■■ and then harassed her after she asked not to be called. UF326. When Ms. C■■■■ asked for a supervisor, the call center agent told her that it was actually a "porn shop" and that the supervisor was "f----ing someone on

---

<sup>7</sup> Dish's sting program identified Dish retailers who were using illegal telemarketing by giving consumers who received illegal calls fictitious credit-card information so that, when they received another call, they could accept the offer made on the illegal call and subscribe to Dish. Dish's systems then traced which retailer made the sale. UF177.

the floor.” UF327. Dish’s response to this incident amounted to writing JSR a letter. UF328. Dish did nothing else to stop JSR from harassing American consumers.

In December 2006, Dish caught JSR Enterprises making illegal telemarketing calls again, concluding internally that “this latest allegation is probably a violation.” UF332. At that time, Dish also confirmed its suspicions that JSR Enterprises had been using the same offshore call centers in the Philippines that many other Dish OE call centers had also used to conduct illegal telemarketing activities. UF335.

Between late December 2006 and January 2007, a remarkably ineffectual Dish internal email discussion ensued. UF331, 332, 333. Dish’s telemarketing compliance manager, Reji Musso, assumed that JSR was not engaging in illegal conduct, despite the raft of contrary evidence generated by Ms. Musso herself: “[T]hey were very responsive and I don’t think guilty.” UF333, UF339. Later in the discussion, Dish sales managers—who knew that while JSR was conducting illegal telemarketing, it was at that point bringing in 1,500 to 2,000 new Dish customers a month—affirmatively decided to continue Dish’s business relationship with JSR. UF334. Ms. Musso agreed with this decision, stating that “JSR is the least of our worries” and that no action was warranted—other than maybe a “fine” to be paid from JSR *to Dish*, allowing it to profit further JSR’s from illegal retailer telemarketing. UF332. At the same time, Ms. Musso acknowledged that failing to take action against OE retailers breaking the law “impacts [Dish’s] credibility.” UF337.

There is no evidence that Dish ever actually imposed a fine. Dish kept receiving consumer complaints about JSR, and JSR’s illegal telemarketing continued with Dish’s approval for about another month. UF338, 339. At that point, in February 2007, Dish realized that two months earlier, in early December 2006, the State of Missouri had obtained a temporary

restraining order enjoining JSR from telemarketing into that state because of its extraordinary volume of telemarketing violations. *See State of Missouri v. E. Direct Dish, Inc., et al.*, No. 0622-CC06865 (Mo. Cir. Ct. filed Dec. 6, 2006); UF341. Dish did not learn about the injunction for two months because it did not have—and still lacks—a policy requiring its OE call centers to inform Dish when they are the subject of enforcement actions. UF167.

Embarrassed by the press about the Missouri enforcement action, Dish terminated JSR on February 13, 2007. UF341, 343. Despite the fact that Dish did not terminate JSR because of the telemarketing violations it had meticulously tracked and then affirmatively decided to ignore for months, Dish used the occasion to congratulate itself for its telemarketing compliance in a press release, falsely asserting: “Following up on consumer complaints alleging violations of telemarketing laws, EchoStar’s investigation resulted in the termination of its relationship with this retailer.” UF342.

In reality, while Dish fiddled, JSR burned. A set of outbound dialing records obtained via civil investigative demand from JSR’s telecommunications provider reveals that Dish caused JSR to place at least 2,349,031 calls to phone numbers on the Registry between August 2006 and December 31, 2006—an average of about 15,000 violations every single day. UF354. There is no factual dispute over this figure because it comes from Dish’s expert’s report. UF354. One of JSR’s principals, Mr. Goodale, has affirmed that JSR was involved in massive amounts of “press 1” telemarketing from Philippine call centers that did not scrub their calling lists against the Registry. UF344.

Dish is the seller on these 2,349,031 calls because it is the entity “who, in connection with [JSR’s telemarketing transactions], provide[d], offer[ed] to provide, or arrange[d] for others to provide goods or services to the customer in exchange for consideration.” 16 C.F.R. §

310.2(aa); UF139, 319, 345, 353. And Dish violated the TSR because, as the seller, it caused its telemarketer JSR to place these Dish sales calls by retaining JSR as a retailer and allowing it to market Dish to American consumers. UF316; *see* 16 C.F.R. § 310.2(cc); 16 C.F.R. § 310.4(b)(1)(iii); Opinion 20 at 14-15. Likewise, there is no genuine material factual dispute that Dish caused these violations by: (a) having actual notice of JSR's illegal telemarketing and doing nothing to stop it despite having the ability to do so; and (b) paying large sales commissions to JSR despite its knowledge of JSR's illegal conduct. UF316, 317, 319, 321, 353; *see Scottsdale*, 673 F.3d at 720-21. The United States is entitled to summary judgment on Count I against Dish on these calls.

A set of more than 1,000 consumer complaints shows how Americans reacted to JSR's telemarketing calls for Dish. These complaints are from people who complained to FTC within one day of having received an illegal call *as reflected in the JSR call records*, with many of them reporting JSR by name. UF340. American consumers objected, but Dish unquestionably benefited from JSR's illegal calls. By accepting the fruits of JSR's illegal telemarketing for six months, Dish gained 10,050 customers. UF353. When a private TCPA plaintiff sued Dish over JSR's calls, Dish misled the United States District Court for the Southern District of Ohio about its relationship with JSR, falsely stating that it had no idea how JSR generated sales, despite extensive evidence that Dish knew JSR used only outbound telemarketing. UF336.

Remarkably, neither the JSR Enterprises story nor its illegal telemarketing ended with JSR's termination. UF348. Illustrating the game of Whack-a-Mole that Dish's lax oversight of its OE call centers perpetuated, after Dish terminated JSR, the remnants of the firm kept calling,

generating new Dish customers by accessing the OE tool using other OE retailers' logins.<sup>8</sup>

UF348. In 2008, Dish's internal audit team realized that Mr. Grider was working for another Dish OE retailer called USA Cable—a subject of numerous telemarketing complaints to Dish.

UF348, 349. Again, this realization appears to have prompted no meaningful action by Dish;

USA Cable was still an OE retailer as of December 2011. UF350.

///

---

<sup>8</sup> The JSR call records captured an additional four million violations after Dish terminated JSR, but Plaintiffs do not move for summary judgment on those calls. UF359.



Table I Count I (TSR): Calls to Numbers on the National DNC Registry Plaintiff: United States				
List “Hit”	Dish Contention for Why Call is Not a Violation	Violations Identified by Dish	Undisputed Violations Established by Plaintiffs	Cite
Dish 2007-2010 Calls				
Registry	None	501,650		Ex. 16 at p.8
Registry	Dish received an inquiry	873,551		Ex. 26 at p.8 (Table Row 8)
	Call Not Completed	309,931		Ex. 26 at pp. 5, 8 (Tables Row 1)
	Non-English Speaker or Wrong Number	12,552		Ex. 26 at pp.5, 8 (Tables Row 5, 7)
	Intrastate	10,029		Ex. 26 at pp.5, 8 (Table2 Row 6)
Registry + Dish entity- specific (Dish + BP + Retailer Inaccessible)	Did not get some entity- specific requests from retailers		2,386,386	Ex. 28 at p. 10  + Ex. 38 at ¶ 29(b)(i)
Dish 2007-2010 Total		4,094,099		
Retailer JSR Enterprises (2006 calls only)				
Registry	None	2,349,031		Ex. 28 at p. 14 (Table 6a)
Retailer SSN/Five9				
Registry	None	381,811		Ex. 28 at p. 13 (Table 5a)
Retailer Total (JSR + SSN)		2,730,842		

C. **COUNT II: There Is No Dispute That Dish Engaged in or Caused Other Telemarketers to Engage in Initiating Outbound Telephone Calls to Persons Who Had Stated That They Did Not Want to Receive Calls in Violation of the TSR**

The United States is entitled to summary judgment on the entity-specific do-not-call claim under the TSR, which prohibits telemarketing calls made to persons who have stated that they do not wish to receive an outbound telephone call 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). Dish maintains an entity-specific—sometimes called “internal”—do-not-call list for this purpose. UF21. Dish’s expert concluded in November 2013 that Dish placed about 8.2 million telemarketing calls to phone numbers on that list, including calls to consumers whose do-not-call requests Dish either never received due to its deficient processes or that it ignored in various ways.

1. **Dish Made More Than Eight Million Telemarketing Calls to Persons Who Had Stated They Did Not Wish to Receive Dish Telemarketing Calls**

Dish’s expert found that, from September 1, 2007 through March 31, 2010, Dish made 8,224,409 telemarketing calls to phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. UF44. Dish’s admissions through its expert mean that there is no genuine factual dispute that Dish made these millions of telemarketing calls.

Dish’s only apparent defense to liability on some of these 8.2 million illegal calls is that it did not start collecting entity-specific do-not-call requests from its retailers until 2008, and so it did not have access to some of the do-not-call requests its retailers collected. UF39, 40. As discussed *supra* at 85-87, this is not a defense. Moreover, Dish has further admitted that it made 3,114,488 calls to numbers that *were* actually on its list and accessible to it at the times of the calls, rendering Dish’s inquiry into which requests it received at which times nearly meaningless. UF45.

New Jersey resident Parimala Nagendra illustrates the challenges millions of consumers faced in getting Dish to honor its entity-specific do-not-call list. After disconnecting her Dish service, Dish began calling in 2007 to win her back. UF425. Dish called Ms. Nagendra even though she had asked Dish specifically not to call her, and Dish's records reflect that Dish's computer system "suppressed" Ms. Nagendra's phone number—supposedly rendering Dish's system incapable of dialing the number. UF426, 428, 427. Nevertheless, Dish's Pinebrook, New Jersey call center called her in April 2008 as part of a Hindi-language telemarketing campaign. UF430.

**2. Dish Made 140,349 Illegal Calls to Consumers Who Asked Not to Be Called But Whose Numbers Were Not Recorded on Dish's Entity-specific Do-Not-Call List**

Just as bad as Dish's millions of calls to numbers on its entity-specific do-not-call list was Dish's failure to record tens of thousands of direct consumer requests to be placed on that list in the first place. Midlothian, Illinois resident Lisa Skala testified that, during a Dish telemarketing call in 2009 while she was marking the one-year anniversary of her mother's death, she asked Dish not to call her again. UF453. Dish's call records corroborate this testimony. UF453. Dish's call center eCreek labeled the call—which was made to Ms. Skala during a telemarketing campaign to persons who had disconnected their Dish service five months prior—as "DNC," meaning "do not call." UF42. Nevertheless, Dish's call records reflect at least nine more telemarketing calls to Ms. Skala's number, including two more calls labeled as "DNC." UF454, 457. Ms. Skala testified that the unwanted calls disrupted her life and were a nuisance, interrupting her children's nap times and her mourning of her mother. UF458.

Ms. Skala was not alone. From November 2008 through March 2010 (the most recent call records Dish produced), Dish made 140,349 telemarketing calls to more than 23,000 distinct

telephone numbers Dish's call center eCreek recorded as "DNC"—an average of nearly seven illegal calls per phone number. UF43. Despite these do-not-call requests, Dish not only failed to place those persons on its entity-specific do-not-call list, but it kept calling them. UF43. The United States is entitled to summary judgment on these 140,349 calls.

**3. Dish Cold-Called Thousands of Consumers Who Had Told Dish Retailer New Edge Satellite That They Did Not Want to Receive Dish Telemarketing Calls**

Dish also failed to honor the entity-specific do-not-call lists compiled by its retailers. New Edge Satellite ("New Edge") was a "traditional"—*i.e.*, non-OE program—Dish retailer operating in Saginaw, Michigan. UF363. New Edge performed outbound telemarketing, marketing Dish Network service to consumers, from approximately 2003 until early 2007. UF364. Dish's agent CVS Systems—which brought New Edge on as a Dish retailer and provided Dish equipment to New Edge—knew that New Edge used outbound telemarketing to sell Dish service. UF365.

New Edge's entity-specific do-not-call list, which it kept on handwritten and printed sheets, was meticulously recorded by New Edge's telemarketing agents while they made calls selling Dish. UF366. Although it or its agent knew that New Edge was conducting outbound telemarketing selling Dish service, Dish never asked New Edge to share its entity-specific do-not-call list with Dish. UF367. Dish, in its 2007-2010 call records, then made 4,968 telemarketing calls to consumers who had already told New Edge more than 30 days prior to put them on its do-not-call list. UF368. The United States is entitled to summary judgment on those 4,968 telemarketing calls under the entity-specific rule, 16 C.F.R. § 310.4(b)(iii)(A).

**4. Dish Caused Its OE Call Center JSR to Call Persons Who Had Stated That They Did Not Want to Receive Calls**

Dish OE call center JSR Enterprises, discussed above, did not just call people on the Registry. Dish's expert has also confirmed that during 2006, JSR made 685,667 calls to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue, in violation of the entity-specific do-not-call rule. UF360. Dish is the seller on these calls, and caused its telemarketer JSR to violate the TSR in the same way that it caused JSR's Registry violations. *See supra* at 107-12. Dish also caused the violations of the entity-specific rule by its policy at the time of not sharing its entity-specific do-not-call list with its retailers, including JSR. UF361.

**5. Dish Caused Its OE Call Center National Satellite Systems to Call Persons Who Had Stated That They Did Not Want to Receive Calls**

Even after Dish started sharing its entity-specific do-not-call list with its retailers in 2008, retailers kept calling hundreds of thousands of consumers on that list. National Satellite Systems ("NSS") is a longtime Southern California-based Dish OE retailer.<sup>9</sup> UF369. Dish's telemarketing compliance manager, Reji Musso, wrote in an August 2008 email that NSS "has broken more TCPA laws than I care to enumerate," and Dish has received numerous complaints about NSS's telemarketing since 2007. UF371. Yet Dish's telemarketing compliance department has affirmatively approved of NSS using outbound telemarketing, and specifically approved of NSS using offshore outbound telemarketing call centers located in India. UF372. Although Dish bans all other retailers from using overseas marketing agents, Dish claimed it allowed NSS to do so because NSS owns and operates an Indian call center, although NSS's

---

<sup>9</sup> NSS is not to be confused with SSN, described earlier. Both are southern California-based Dish OE retailers, but are otherwise unrelated.

corporate designee testified that NSS does not, in fact, own the call center. UF373. NSS did not receive access to Dish's entity-specific call list until summer 2010. UF40.

Pursuant to a subpoena, NSS produced some of its 2008-2009 call records, including two large files with the filenames "Cold Calling." UF374. When compared against the numbers on Dish's entity-specific do-not-call list, the numbers in NSS's two cold calling files show that during December 2008 and August 2009, NSS placed 222,700 calls to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue—a number about which there is no factual dispute because it comes from Dish's expert's November 2013 report. UF376.

Dish is the seller on these 222,700 calls because it is the entity "who, in connection with [NSS's telemarketing transactions], provide[d], offer[ed] to provide, or arrange[d] for others to provide goods or services to the customer in exchange for consideration." 16 C.F.R. § 310.2(aa); UF139, 375. And Dish violated the TSR because, as the seller, it caused its telemarketer NSS to place these Dish sales calls by retaining NSS as a retailer and allowing it to market Dish to American consumers. UF370; *see* 16 C.F.R. § 310.2(cc); 16 C.F.R. § 310.4(b)(1)(iii); Opinion 20 at 14-15. Likewise, there is no genuine material factual dispute that Dish caused these violations by: (a) having actual notice of NSS's illegal telemarketing and doing nothing to stop it despite having the ability to do so; (b) failing to share its entity-specific do-not-call list with NSS and other retailers; and (c) paying large sales commissions to NSS despite its knowledge of NSS's illegal conduct. UF11, 39, 40, 41, 371, 372; *see Scottsdale*, 673 F.3d at 720-21. The United States is entitled to summary judgment on Count II against Dish on these 222,700 calls.

**6. Dish Caused Its OE Call Center Satellite Systems Network to Call Persons Who Had Stated to That They Did Not Want to Receive Calls**

Dish's expert concluded in his November 2013 report that, during 2010 and 2011, Dish OE retailer SSN—discussed in detail *supra* at 101-07—made at least 65,936 Dish telemarketing calls to the phone numbers of persons who had stated to Dish or a Dish retailer that they did not wish to receive outbound telephone calls 30 days or more prior to the calls at issue. UF256. There is no material factual dispute that Dish caused those violations, as discussed *supra*, by retaining SSN for marketing services and allowing it to telemarket Dish service. UF229. The undisputed facts further show that Dish knew about SSN's illegal telemarketing since 2002, but did not take meaningful action to stop SSN from making illegal telemarketing calls. UF235, 236, 237, 241, 245. The United States is therefore entitled to summary judgment on these 65,936 illegal calls.

///



Table II Count II (TSR): Calls to Numbers on Dish’s Entity-Specific DNC List Plaintiff: United States				
List “Hit”	Dish Contention For Why Call Is Not A Violation	Violations Identified by Dish	Undisputed Violations Established by Plaintiffs	Cite
Dish 2007-2010 Calls				
Dish entity-specific (DISH + BP + Retailer- List Inaccessible)	Did not get some entity- specific requests from retailers	8,224,409		Ex. 28 at p.11 (Tables 3b, 3c)
Dish 2007-2010 Calls to Numbers Not Placed on Dish Entity-Specific Do-Not-Call List				
“DNC” code calls	None		140,349	Ex. 38 at ¶ 27
Dish 2007-2010 Calls to New Edge Entity-Specific Do-Not-Call List				
New Edge entity- specific	None		4,968	Ex. 38 at ¶ 26(c)
Dish 2007-2010 Total		8,369,726		
JSR Enterprises (2006 calls only)				
Dish entity-specific (DISH + BP + Retailer- List Inaccessible)	Did not get some entity- specific requests from retailers	685,667		Ex. 28 at p. 14 (Table 6b, 6c–2006 calls)
Retailer Satellite Systems Network (“SSN”) / Five9				
Dish entity-specific (DISH + BP + Retailer- List Accessible)	None	65,936		Ex. 28 at pp.13-14 (Table 5b, 5c)
National Satellite Systems (“NSS”)				
Dish entity-specific (DISH + BP + Retailer- List Accessible)	None	222,700		Ex. 28 at p. 15 (Table 7a, 7b)
Retailer (JSR + SSN + NSS)		974,303		

**D. COUNT III: There Is No Genuine Material Factual Dispute That Dish Abandoned or Caused Telemarketers to Abandon Outbound Calls in Violation of the TSR**

**1. Dish Itself Abandoned Outbound Telephone Calls in Violation of the TSR**

Since September 2007, Dish's own dialers placed at least 98,054 abandoned sales calls—telemarketing calls that were not connected to a live operator within two seconds of a person



answering the phone—to consumers throughout the United States. 16 C.F.R. § 310.4(b)(1)(iv); UF57, 60, 81.

There is no material factual dispute that these campaigns did not involve a live operator and that Dish conducted at least 15 such robocall campaigns to induce consumers to purchase Dish products or services. UF56. In addition to the AM 100507ZEE robocall campaign, which Dish has already admitted to the Court was a telemarketing campaign, Dish produced English translations of the scripts of the robocall messages used in each of the 15 campaigns at issue. UF66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80. Each campaign contained a solicitation encouraging the recipients of the calls to buy Dish programming. For example:

- AM 090507 GREEK (“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.”); UF67.
- AM 090607 CHIN (“[M]ore exciting Chinese TV shows, including the most welcomed, ‘I Guess, I Guess, I Guess Guess Guess,’ ‘Variety Big Brother,’ ‘Super Starry Walk,’ ‘Flying Pigeon Nightly Wave,’ ‘May Barbaric Princess,’ ‘Taiwan Dongsan 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.”); UF68.

The 15 Dish automessage campaigns identified above all played similar solicitations. UF69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80.

The Dish robocalls that were answered by a live person, and therefore abandoned, were labeled by Dish’s computer system with the result code “DPV.” UF57. Each of the 98,054 calls discussed above were labeled with the DPV result code—proof that a live consumer answered

each call and was not connected to a live operator within two seconds. UF57, 60. These calls were therefore abandoned calls that violated the TSR, and the United States is entitled to summary judgment on Count III of the Second Amended Complaint for Dish's placement of 98,054 abandoned calls.

**2. Dish Caused Its OE Call Center Dish TV Now to Abandon Outbound Telephone Calls in Violation of the TSR**

In addition to the numerous OE retailer violations of the Registry and entity-specific rules discussed above, Dish also caused its OE call center retailers to make illegal prerecorded, abandoned telemarketing calls by retaining those retailers and authorizing them to conduct telemarketing activities. Dish further caused those retailers to place abandoned calls by acquiring actual or constructive knowledge of their illegal telemarketing activities, failing to act to stop them, and rewarding them for the new Dish customers generated by their illegal conduct.

In November 2003, Dish contracted with Dish TV Now to become Dish's first OE call center. UF138. When they started marketing Dish service, Dish TV Now's principals, David Hagen (a.k.a. David DeFusco) and Annette Hagen, were husband-and-wife federal felons with an extraordinary history of consumer fraud dating back to the 1980s. UF138, 184, 186. Their criminal ventures included mail fraud—for example, running fraudulent sweepstakes falsely telling consumers that they had won prizes, *United States v. David Allen DeFusco a/k/a David Allen Hagen*, 930 F.2d 413, 414 (5th Cir. 1991) (“[Hagen] conceded that the U.S. Express ‘contest’ was fraudulent.”)—as well as bankruptcy fraud and money laundering, *United States v. David Allen Hagen DeFusco*, 949 F.2d 114, 116 (4th Cir. 1991). In 1989, the FTC secured an injunction in the United States District Court for the Eastern District of Virginia against the Hagens' former company and the Hagens personally to prevent them from committing unfair and deceptive acts and practices in violation of the FTC Act. UF184.

In the late 1990s, after he was released from federal prison, Mr. Hagen created PrimeTV, a Southern Pines, North Carolina company that became a highly successful DirectTV retailer by, among other things, apparently violating the TCPA's prohibition on junk faxes and promising consumers large refunds that never materialized. UF187, 189; *Bonime v. DIRECTV, Inc.*, B163051, 2003 WL 22931345 (Cal. Ct. App. Dec. 12, 2003).

Impressed by the Hagens' DirecTV sales and indifferent to or uninterested in their public record of fraud and deceptive acts and practices, in a letter from October 7, 2003—days before the amended TSR and Registry took effect—Dish executives solicited Mr. Hagen to become a Dish retailer to participate in a special sales program called the “Order Entry (OE) Tool.” UF95, 190, 192. Dish touted its new OE system as allowing Mr. Hagen's company to focus solely on marketing and collecting money and customer information “on DISH Network's behalf.” UF95, 135, 150, 193. Dish further promised that the OE system meant that “DISH Network takes care of everything after the sale,” including installation, equipment, and customer service. UF95, 193.

Mr. Hagen agreed to become a Dish retailer, and he quickly formed a company called Dish TV Now. UF191. In November 2003, Dish brought Dish TV Now on as a sales partner without any background checks that would have revealed Mr. Hagen's history of fraud convictions or the FTC injunction—nor did it ask him about any pending investigations into his marketing practices, such as one that was then being conducted by the State of North Carolina. UF166, 167, 189, 192, 194.

Working together closely, Dish and Dish TV Now rapidly turned the OE tool into one of Dish's most successful marketing initiatives. UF137, 152, 153, 195. The Hagens helped Dish modify the OE tool so that the system would be more efficient and allow Dish TV Now's OE

call centers to push more business through Dish's systems. UF195. The highest levels of Dish management, including its CEO Charles Ergen, helped ensure that the OE program was a success for the Hagens. UF197. Dish also provided on-the-ground sales trainings and marketing support for Dish TV Now's customer service agents—the people handling the illegal phone calls.

UF199. Dish executives and employees regularly visited Dish TV Now's North Carolina call centers and communicated with the Hagens and their employees not only to identify and fix problems with the OE tool, but to address how both Dish and Dish TV Now could increase new customer activations. UF198, 199. During 2004 and 2005, Dish TV Now activated 91,210 new Dish subscribers and received more than \$20 million in Dish commissions. UF227. Dish sent David Hagen on at least one luxury cruise to recognize his high sales volumes. UF214.

Although Dish knew or should have known that Dish TV Now likely would use illegal marketing methods, just months after the Hagens came onboard, Dish obtained actual knowledge that one of Dish TV Now's forms of Dish marketing was using predictive dialing to place prerecorded, abandoned calls. UF206, 211. In July 2004, a consumer sent Dish a detailed draft complaint that included recordings and transcripts of illegal Dish TV Now calls. UF215. Around the same time, Dish employees providing training and sales support inside Mr. Hagen's call center saw firsthand his sales agents using autodialing to sell Dish service. UF218.

Dish Vice President Amir Ahmed then sent Mr. Hagen an email, asking an either-or question revealing Mr. Ahmed's knowledge that Dish TV Now used telemarketing to sell Dish service: Was Dish TV Now "telemarketing consumers over the phone" or was it using "predictive dialing and leaving messages"? UF210, 219. Hagen responded that he was "us[ing] a predictive dialer" to place outbound calls to a large database of former customers, that his

dialer could determine if a human being answered the phone, and that his company “fully complies with the TCPA.” UF220.

In light of Mr. Hagen’s history of criminal and civil fraud, the detailed draft complaint it received, Mr. Hagen’s obtuse response to Dish’s questions about telemarketing, and the Dish TV Now telemarketing that Dish employees saw firsthand, Dish knew or should have known that Mr. Hagen would violate the telemarketing laws while marketing Dish. And Dish TV Now *was* violating the telemarketing laws. Putting aside Mr. Hagen’s and Dish’s general protestations, the only specific evidence in the record shows that Dish TV Now entered into a contract with Guardian Communications (“Guardian”)—a voice broadcasting company located in Moline, Illinois—to place millions of illegal abandoned solicitation calls selling Dish, using lists obtained from a telemarketing lead-list broker. UF201. Specific call records from Guardian show that from June 2004 until September 2004, Dish TV Now placed millions of prerecorded calls marketing Dish. UF204. In 6,673,196 of those calls, a live consumer answered the phone and was not connected to an operator within two seconds—either hearing Dish TV Now’s prerecorded solicitation message or dead air. UF204, 205.

Dish is the seller on these 6,673,196 calls because it is the entity “who, in connection with [Dish TV Now’s telemarketing transactions], provide[d], offer[ed] to provide, or arrange[d] for others to provide goods or services to the customer in exchange for consideration.” 16 C.F.R. § 310.2(aa); UF139, 201, 202, 203, 227. And Dish violated the TSR because, as the seller, it caused its telemarketer Dish TV Now to place these Dish sales calls by retaining Dish TV Now as a retailer and allowing it to market Dish to American consumers. UF193; *see* 16 C.F.R. § 310.2(cc); 16 C.F.R. § 310.4(b)(1)(iii); Opinion 20 at 14-15. Likewise, there is no genuine material factual dispute that Dish caused these violations by: (a) hiring veteran fraudsters with a

long history of anti-consumer conduct to market Dish service to American consumers; (b) having notice of Dish TV Now's illegal telemarketing and doing nothing to stop it despite having the ability to do so; and (c) paying large sales commissions to Dish TV Now despite its knowledge of NSS's illegal conduct. UF184, 185, 186, 189, 206, 227; *see Scottsdale*, 673 F.3d at 720-21. The United States is entitled to summary judgment on Count III against Dish on these calls.

The Dish sales calls from Guardian did not stop because Dish found out about them, but rather because Mr. Hagen failed to pay Guardian's bill. UF207. The record reveals that Mr. Hagen appears to have found other voice broadcasters to fulfill his needs, as Illinois resident Morton Sill received a prerecorded call from Dish TV Now in February 2005. UF211, 442-449. In fact, the record is devoid of evidence that Dish—despite its actual knowledge of Dish TV Now's illegal calls—took any action against Dish TV Now whatsoever to stop it from breaking the law.

Dish's failure to act did not stop it, however, from attempting to mislead regulators and courts about its business relationship with Dish TV Now. For example, Dish told the FTC in 2007 that Dish terminated Dish TV Now due to its telemarketing violations. UF224. Dish's internal documents reflect that Dish did not terminate Dish TV Now for telemarketing violations, but rather because Dish TV Now had stopped selling Dish service and because Dish TV Now had brought lower-quality customers to Dish than it preferred. UF223. In fact, just a few weeks before the termination, Dish had made a personal appeal to Mr. Hagen to ramp up his marketing efforts. UF222.

Moreover, when it was sued for Dish TV Now's illegal telemarketing in a private TCPA case, Dish filed an affidavit falsely claiming that it had no idea how Dish TV Now generated sales. UF221. And Dish's preference to remain willfully blind to the risks of doing business

with a con artist persists: Dish today cannot say for sure that it would not have hired Mr. Hagen even if it had known of his criminal history from the beginning. UF226. Fortunately, despite its unwillingness to repudiate its dealings with Mr. Hagen, Dish is incapable of hiring him to telemarket today, as Mr. Hagen is currently serving a 45-year federal prison sentence for a \$27 million securities fraud scheme committed during the time he was marketing Dish in 2004 and 2005. *United States v. Hagen*, 468 F. App'x 373, 375 (4th Cir. 2012) (“At the time of the proceedings in this case, Hagen was an experienced financial fraud schemer.”).

**3. Dish Caused Its OE Call Center Star Satellite to Abandon Outbound Telephone Calls in Violation of the TSR**

Star Satellite, an OE call center located in Provo, Utah, began its relationship with Dish in 2002 as Tenaya Marketing, one of Dish's thousands of traditional retailers. UF260, 262. As such, in addition to marketing Dish, Star Satellite installed equipment for its Dish sales, effectively limiting its geographic scope because it needed to be physically present in areas where it marketed in order to perform installations. UF262. Even so, Star Satellite tried to grow its sales area by sending young Utahans to Los Angeles to sell Dish door-to-door. UF262. Like Dish TV Now, Star Satellite also engaged Guardian in 2004 to dial illegal robocalls selling Dish service. UF263, 264.

Dish learned that Star Satellite was using illegal telemarketing from consumer complaints Dish received in January and February 2005—complaints that identified Star Satellite by name and described in detail its illegal sales calls. UF266, 267. Despite this knowledge, Dish accepted Star Satellite as an OE retailer a few months later, in April 2005, giving it access to the OE tool and allowing Star Satellite to expand its illegal robocalling. UF268. Trouble quickly ensued, with so many complaints about Star Satellite that Dish internally made jokes—“are these your boys again?”—when forwarding the telemarketing complaints around the company.

UF269. Notwithstanding the complaints, Star Satellite’s robocalling was wildly successful both for Star Satellite and Dish, more than doubling Star Satellite’s Dish sales—from around 6,000 in 2004 to around 12,000 to 15,000 in 2005. UF270.

In July 2005, despite having ample notice that Star Satellite was using illegal, prerecorded telemarketing messages, Dish gave Star Satellite outbound telemarketing scripts to facilitate the company’s telemarketing of Dish service to consumers. UF271. A few weeks later, a South Carolina resident sued Dish and Star Satellite for Star Satellite’s prerecorded calls selling Dish. UF272. Dish and Star Satellite settled the case under a confidential settlement edited by Dish’s lawyers, yet Dish did not discipline Star Satellite in any way. UF273.

Eventually, in October 2005, Dish sent the company a warning letter about its telemarketing practices—but only after a member of the U.S. House of Representatives contacted Dish about Star Satellite’s illegal robocalls. UF274. But by then, most of the damage had been done—in the four months between July 30, 2005 and November 26, 2005, Star Satellite placed at least 43,100,885 Dish sales calls that were answered by a live person, who heard either a Dish solicitation message or dead air. UF276.

Dish is the seller on these 43,100,885 calls because it is the entity “who, in connection with [Star Satellite’s telemarketing transactions], provide[d], offer[ed] to provide, or arrange[d] for others to provide goods or services to the customer in exchange for consideration.” 16 C.F.R. § 310.2(aa); UF139, 265, 285, 286. And Dish violated the TSR because, as the seller, it caused its telemarketer Star Satellite to place these Dish sales calls by retaining Star Satellite as a retailer and allowing it to market Dish to American consumers. UF261; *see* 16 C.F.R. § 310.2(cc); 16 C.F.R. § 310.4(b)(1)(iii); Opinion 20 at 14-15. Likewise, there is no genuine material factual dispute that Dish further caused these violations by: (a) having notice of Star Satellite’s illegal



telemarketing and doing nothing to stop it despite having the ability to do so; and (b) providing sales scripts, paying sales commissions, and providing other incentives to Star Satellite despite its knowledge of Star Satellite's illegal conduct. UF266, 267, 269, 285, 286; *see Scottsdale*, 673 F.3d at 720-21. The United States is entitled to summary judgment on Count III against Dish on these calls.

**4. Dish Caused Its OE Call Center American Satellite to Abandon Outbound Telephone Calls in Violation of the TSR**

American Satellite, based in San Diego, California, became a Dish OE call center in early 2006. UF290, 294. American Satellite's principal was Todd DiRoberto, a convicted felon who received a 60-month federal prison sentence in 2000 for participating in a drug distribution conspiracy. UF287, 291. After serving his prison term, Mr. DiRoberto apparently commenced other illegal activities, and was sued in 2003 by the Securities and Exchange Commission for defrauding investors in a worthless business venture and by selling fraudulent securities using telemarketing. UF288.

Dish knew about Mr. DiRoberto's prior troubles with the law. UF289. Dish also knew from a very early date that American Satellite primarily marketed using illegal telemarketing; multiple Dish "stings" had identified American Satellite as a telemarketing violator. UF299, 300, 301. The evidence proves American Satellite's violative activities: Among many other things, an former American Satellite manager, Manuel Castillo, testified that he was responsible for ensuring that American Satellite's secret robocall autodialer was started each day so that the fruits of the illegal calling could be laundered through a Philippine call center, with consumers who expressed a willingness to purchase transferred to American Satellite's San Diego call center to complete the sale on the OE tool. UF296.

The United States seeks summary judgment against Dish for one of American Satellite's illegal calls about which Dish generated internal business records. In September 2006, Florida resident R [REDACTED] P [REDACTED] complained to Dish about persistent prerecorded Dish marketing calls to his phone number, even though Dish had no valid EBR with him. UF301, 302. Mr. P [REDACTED] told Dish's general counsel that if the calls did not stop, he was going to begin calling Dish executives at 3 a.m., which is when he needed to wake up for work. UF304.

Dish's legal team ran a sting to identify which retailer was contacting Mr. P [REDACTED]. UF302. The next time he was called, Mr. P [REDACTED] signed up for Dish using the fake credit card number Dish gave him, and Dish determined that American Satellite had made the sale that resulted from the illegal call. UF302. Dish's business records demonstrate that there is no genuine material factual dispute that American Satellite used illegal, abandoned calls to telemarketing Dish to Mr. P [REDACTED]. UF302.

Dish is the seller on these P [REDACTED] call because it is the entity "who, in connection with [American Satellite's telemarketing transactions], provide[d], offer[ed] to provide, or arrange[d] for others to provide goods or services to the customer in exchange for consideration." 16 C.F.R. § 310.2(aa); UF139, 298, 302, 303, 311. And Dish violated the TSR because, as the seller, it caused its telemarketer American Satellite to place these Dish sales calls by retaining American Satellite as a retailer and allowing it to market Dish to American consumers. UF293; *see* 16 C.F.R. § 310.2(cc); 16 C.F.R. § 310.4(b)(1)(iii); Opinion 20 at 14-15. Likewise, there is no genuine material factual dispute that Dish caused this violation by hiring Mr. DiRoberto, a drug-dealing felon who had recently been sued by the SEC for securities fraud via telemarketing, to sell Dish to American consumers. UF287, 288, 289, 294. Dish further caused this violation by: (a) having actual knowledge since at least January 2006 that Mr. DiRoberto and American

Satellite were breaking the telemarketing laws, and doing nothing about it; and (b) paying large commissions to American Satellite despite its knowledge of Star Satellite's illegal telemarketing. UF305, 306, 307, 308, 309, 310, 311; *see Scottsdale*, 673 F.3d at 720-21. The United States is entitled to summary judgment on Count III against Dish on this call.

<b>Table III</b> <b>Count III (TSR): Abandoned Calls</b> <b>Plaintiff: United States</b>				
Prerecorded Call Code	Dish Contention For Why Call Is Not A Violation	Violations Identified by Dish	Undisputed Violations Established by Plaintiffs	Dish Document Cite
<b>Dish 2007-2010 15 AM Campaigns</b>				
DPV (Live Voice)	None		98,054	Ex. 38 at ¶ 29(a)(ii)
<b>Dish TV Now/ WOW TV Calls</b>				
Code C	None		6,673,196	UF204
<b>Star Satellite/ Tenaya Calls</b>				
Code C	None		43,100,885	UF276
<b>American Satellite</b>				
n/a	None		1	UF302
Retailer Total		49,774,082		

**E. COUNT IV: Dish Violated the TSR by Providing Substantial Assistance and Support to Star Satellite, Knowing Or Consciously Avoiding Knowing That It Was Violating the TSR**

As discussed *supra* at 127-29, Dish gave its Utah-based retailer Star Satellite significant help and support to sell Dish. The provision of substantial assistance or support to Star Satellite, when Dish knew that it was engaged in practices that violated the TSR, is itself a practice that violates the TSR. Under 16 C.F.R. § 310.3(b), “[i]t is a deceptive telemarketing act or practice and a violation of this Rule for a person to 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 § 310.3(a), (c) or (d), or § 310.4 of this Rule.”

The substantial assistance provision of the TSR ascribes liability when a person provides assistance to a telemarketer he knew or consciously avoided knowing was violating the Rule. The evidence more than meets this burden. Indeed, it shows that Dish continued providing substantial assistance and support to Star Satellite when it had actual knowledge that the company was violating the TSR.

After Dish acquired actual knowledge that Star Satellite was violating the telemarketing laws, Dish gave Star Satellite the most direct, paradigmatic example of substantial assistance and support of telemarketing possible—it gave Star Satellite an outbound sales script in order to facilitate Star Satellite telemarketing Dish service to consumers. UF271; *see FTC v. Global Mktg. Group*, 594 F. Supp. 2d 1281, 1288 (M.D. Fl. 2008). Dish also provided Star Satellite with access to the OE tool, other marketing materials, and millions of dollars in continued commissions and incentives. UF268, 271, 275, 286. Based on Star Satellite’s high sales volumes, Dish awarded Star Satellite employees with incentive trips to luxury destinations. UF285. Any reasonable fact finder would find that Dish gave substantial assistance and support to Star Satellite while it knew that Star Satellite was violating the TSR, entitling the United States to summary judgment on Count IV.

**F. Dish Cannot Be Shielded by the TSR Safe Harbor**

Although Dish has never articulated how or why it believes it is entitled to the protection of any relevant safe harbor, Dish’s expert’s admissions about the extraordinary numbers of illegal dials he found in Dish’s call records makes the safe harbor the only potential avenue for

Dish to escape liability. But the undisputed facts show that Dish is not entitled to the safe harbor.

Among many other things, Dish has failed to maintain and record a list of telephone numbers that Dish may not contact in compliance with the entity-specific rule at 16 C.F.R. § 310.4(b)(1)(iii)(A). Dish admitted in November 2013 that many entity-specific do-not-call requests its retailers received over the last decade did not make it onto its entity-specific list for years. UF39. In fact, Dish never even attempted to share its entity-specific do-not-call list with its telemarketers until April 2008—and, it now admits, it did not collect entity-specific requests from at least one of its largest telemarketers until summer 2010. UF40. No reasonable fact finder could conclude that Dish maintained a list of persons who requested not to receive calls.

Another reason Dish cannot avail itself of the safe harbor is its abject and undisputed failure to “use[] a process to prevent telemarketing to any telephone number on any list established pursuant to [the entity-specific and Registry portion of the TSR], 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 maintain[] records documenting this process.” 16 C.F.R. § 310.4(b)(3). Dish made millions of illegal calls to numbers on the Registry. Dish’s expert found that Dish made more than eight million telemarketing calls to people recorded by Dish or a Dish retailer as having asked Dish not to call. UF44. Dish made an additional 140,349 illegal calls to consumers whom Dish recorded in its computer as having asked not to be called, but whose numbers Dish did not place on its entity-specific do-not-call list. UF43. Dish called thousands of consumers who had told Dish retailer New Edge Satellite that they did not want to receive Dish telemarketing calls. UF368. Furthermore, Dish admitted to this Court that it does not maintain any records whatsoever documenting how it created and scrubbed its calling lists

against the Registry and its entity-specific do-not-call list. UF32. No reasonable factfinder could conclude on this record that Dish used a process to prevent calling numbers on the Registry or on Dish's entity-specific do-not-call list, nor could a reasonable factfinder conclude that Dish maintained records documenting that process.

#### **CIVIL PENALTIES ON COUNTS I-IV**

**A. There Is No Genuine Material Factual Dispute That Dish Violated the TSR With “Actual Knowledge Or Knowledge Fairly Implied on the Basis of Objective Circumstances” That Its Conduct Was Prohibited**

Faced with the overwhelming evidence that Dish knew or should have known what the federal telemarketing laws required and that it committed violations anyway, any reasonable juror must find that Dish violated the TSR with “actual knowledge or knowledge fairly implied on the basis of objective circumstances” that its conduct was prohibited.<sup>10</sup> 15 U.S.C. § 45(m). Given Dish's admissions about its millions of illegal calls and the uncontradicted, extraordinarily damaging documents revealing Dish's willful lack of telemarketing compliance, Dish's knowledge of its illegal conduct is beyond dispute. Hence, the Court should grant summary judgment to the United States as to Dish's liability for civil penalties.

In order to prevail under 15 U.S.C. § 45(m), the Government need not prove that the defendant had actual knowledge that its conduct was prohibited by the FTC Act. In *United States v. ACB Sales & Serv., Inc.*, 590 F. Supp. 561, 575 n.11 (D. Ariz. 1984), for example, the court held that the civil penalties provision “require[s] only that the defendant or its agent have some knowledge, actual or constructive, of the requirements of the [FTC-administered law] such

---

<sup>10</sup> Dish's liability for civil penalties under the FTC Act is to be considered by a jury if necessary, while the amount of the civil penalty, the scope of equitable relief under the FTC Act, and all disputes on the remaining counts are questions for the Court. *United States v. Dish Network*, 754 F. Supp. 2d 1002, 1003 (C.D. Ill. 2010).

that it can be concluded that the defendant or its agent knew or should have known that his conduct was unlawful.” Other courts have awarded summary judgment under this provision when the defendant knew or should have known that the FTC had found the act in question to be unlawful. *United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811 (N.D. Tex. 2008).

There is no need to plumb the depths of what Dish should have known, however, because at all relevant times it is indisputable that Dish actually knew about the federal and state telemarketing laws—including every requirement at issue here. The evidence shows not only that Dish demonstrated actual knowledge of the TSR and other telemarketing laws, but also that Dish repeatedly discovered itself, its telemarketers, and its retailers to be *violating* those same laws over the past decade. Because Dish had objective knowledge of the laws and violated them after it acquired that knowledge, the United States is entitled to summary judgment and civil penalties.

In 2002, Dish discovered that the State of Oregon had a state do-not-call registry that it had simply ignored. UF82. Internal documents reveal Dish’s utter disregard for the telemarketing laws; for a time, its managers and lawyers had no idea what its vast telemarketing operation was doing, and instead of complying with the intricacies of the state laws, Dish simply ceased dialing into states with do-not-call registries. UF83, 84, 85.

In 2002, Dish itself had been using prerecorded messages to advertise international programming for several years, a practice that Dish continued until at least the end of 2007. UF59. Around the same time, Dish also knew that “many” Dish retailers—including SSN and others—were using illegal robocalls to sell its service. UF118. Instead of taking effective action to stop these practices, Dish salespeople approved of them, noting that “[robodialing] has caused a few concerning calls, but seems to be greatly outweighed by the results.” UF118. The same



email chain reflects Dish's in-house legal department's long-standing knowledge that prerecorded sales messages are illegal. UF119.

Dish's intimate familiarity with the telemarketing laws continued to grow. In 2003, the State of Missouri sued Dish for, among other things, violating that state's do-not-call registry. UF86. Although Dish litigated the case for several years, its internal documents acknowledged that despite its haphazard attempts at compliance, it had broken the telemarketing laws. UF87. Numerous state attorneys general subsequently investigated Dish and its retailers' telemarketing practices, which signed a 2009 assurance of voluntary compliance ("AVC") with 46 states related to its telemarketing practices. UF88, 89.

Similarly, Dish has long known that it and its retailers illegally call phone numbers on Dish's entity-specific, or "internal," do-not-call list. UF90. For example, in early 2010, Dish realized that its internal dialing systems did not actually eliminate, or "scrub," telephone numbers on its entity-specific list from its telemarketing campaigns—a situation confirmed by Dish's expert and call records. UF94. Dish had previously learned of this problem in 2007, while responding to a Colorado Attorney General inquiry, but it failed to fix the situation and went on to call millions of consumers on its entity-specific do-not-call list. UF90. Dish's efforts to comply with the law by imposing a "requirement" that its retailers respect entity-specific do-not-call requests fares even worse: After specifically refusing to do so for years, in 2008 Dish created a system for sharing its entity-specific do-not-call list with its retailers—a system that the undisputed record reveals was deficient. UF181, 182, 183, 256, 376.

The ineffectual "compliance" program Dish created serves as additional evidence that Dish knew about the telemarketing laws. This program was created in 2005 and 2006 to deal with the thousands of complaints Dish was receiving from consumers and regulators and to bring



“structure” to Dish’s efforts to comply with the law. UF169, 171. But the system was an after-the-fact failure that tolerated millions of violations before any responsive action. As just one example, Dish’s compliance manager, in an unguarded email with a Dish lawyer, recognized that her true role was to “deflect responsibility away from Echostar” for telemarketing complaints about retailers. UF175. To the public and to FTC, Dish touted this same compliance program as evidence that it obeyed the law. UF91.

The record is replete with evidence that, even today, despite its intimate familiarity with the telemarketing laws, Dish still chooses to operate on the edges of those laws. For example, Dish continues not to scrub many of its telemarketing campaigns against the Registry because those campaigns target its current and former customers, even if their phone numbers are on the Registry. UF122, 126, 424, 425, 430, 431. But when Dish needed to provide evidence that it possessed valid EBRs for those calls, it came up millions short. UF25, 33. That Dish even initiated those telemarketing calls without scrubbing proves the United States’ civil penalties case, revealing: (a) Dish’s complete knowledge of exactly what the TSR does and does not allow; and (b) Dish’s failure to take effective steps to prevent violations of the law.

To find that Dish knew it could be liable for its retailers’ illegal telemarketing, the Court need look no further than Dish’s in-house lawyer Scott Novak’s September 2005 acknowledgement that Dish is responsible for retailer telemarketing violations when it knows about them and does not take effective action to stop them. UF162. Because Dish had actual knowledge that it could be legally responsible for its retailers’ calls, Dish cannot plausibly assert that it did not know it could “cause” violations by its OE retailers. *Nat’l Fin. Servs. Inc.*, 98 F.3d at 139. If Dish questioned whether acquiescing to and accepting the benefits of millions of illegal calls dialed by its retailers violated the TSR, Dish could have looked to FTC’s long-

standing position that a company is liable for calls dialed to sell its service, *see, e.g.*, FTC, “DirecTV to Pay \$5.3 Million Penalty For Do Not Call Violations” (Dec. 13, 2005) (“The Do Not Call Rule applies to all players in the marketing chain, including retailers and their telemarketers.”), *available at* <http://www.ftc.gov/opa/2005/12/directv.shtm>, or even the Court’s earlier orders in this case, *United States v. Dish Network, LLC*, 667 F. Supp. 2d 952, 957-58 (C.D. Ill. 2009).

Finally, Dish’s willingness to misrepresent and withhold information from courts and regulators about what it and its retailers are doing also proves Dish’s knowledge. UF221. For example, if Dish actually believed that SSN was its arms-length independent contractor for which Dish had no liability, Dish would have shared what it knew about SSN’s telemarketing violations with the State of Vermont. UF246, 246. Instead, it hid the truth.

The FTC Act does not award an “A” for effort that is an “F” in practice. The United States has proven, and Dish admits to, millions of telemarketing violations. Telemarketing calls do not place themselves; Dish is a Fortune 200 company that understands its duty to comply with the telemarketing laws and what those laws mean. There is no material dispute that Dish’s violations of the TSR were committed “with actual knowledge or knowledge fairly implied on the basis of objective circumstances” that the acts were prohibited.

**B. Several Factors Counsel Strongly in Favor of a Sizable Penalty**

At this time, the United States moves for summary judgment only as to Dish’s liability for civil penalties under the TSR, not on the amount of those penalties. The United States recognizes that setting the amount of penalty may depend on the Court’s factual and legal findings as to liability. That said, at any further proceeding to set a penalty, the United States

intends to seek a sizable penalty. This brief highlights the factors that justify such a penalty in this case.

The FTC Act imposes significant civil penalties for each violative call, and Plaintiffs have proven that Dish is liable for almost 66 million calls that violated the TSR.<sup>11</sup> If the United States sought the full civil penalties of \$11,000 (or \$16,000 for calls on or after February 9, 2009) on all these calls, the resulting penalty would be more than \$725 billion.

Count I (Dish Registry violations)	Count I (Retailer Registry violations)	Count II (Dish Entity- Specific Violations)	Count II (Retailer Entity- Specific)	Count III (Dish Abandoned Calls)	Count III (Retailer Abandoned Calls)	Total
4,094,099	2,730,842	8,369,726	288,636 <sup>12</sup>	98,054	49,774,082	65,355,439

Although this figure reflects the broad scope of Dish's misconduct, the United States recognizes that a smaller penalty is appropriate. To determine the appropriate civil penalty under the FTC Act, the statute directs the Court to consider: "the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other

<sup>11</sup> While Dish has the burden of asserting any affirmative defenses based on any statute of limitations, the United States has used the five-year statute of limitations for civil penalties actions in counting violations for civil penalty purposes. *Gabelli v. SEC*, 568 U.S. \_\_\_, 133 S.Ct. 1216, 1220 (2013). For summary judgment on Counts I, III, and IV, as alleged in the complaint filed March 25, 2009, the United States seeks civil penalties for calls made on or after March 25, 2004. For summary judgment on Count II of the Second Amended Complaint, filed March 12, 2013, the United States seeks civil penalties for calls made on or after August 22, 2007—five years before the FTC filed the *Dish II* litigation in this Court, which asserted that claim. Complaint, ECF No. 1, *FTC v. Dish Network*, 12-cv-3221 (C.D. Ill filed Aug. 22, 2012). The United States does not concede that the statute of limitations for the entity-specific claim actually began running on August 22, 2007, but moves for summary judgment on calls within this period to obviate unnecessary disputes.

<sup>12</sup> Plaintiffs do not request civil penalties in connection with calls made by JSR to numbers on Dish's entity-specific list. 288,636 represents the sum total of SSN and NSS's violative calls.

matters as justice may require.” 15 U.S.C. § 45(m)(1)(c); *see, e.g., Nat’l Fin. Servs., Inc.*, 98 F.3d 131 at (4th Cir. 1996); *United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1379-81 (9th Cir. 1992). All of these factors would justify the United States seeking a substantial award, in light of Dish’s extraordinary culpability, its poor compliance history, and the impact of its and its OE retailers’ illegal calling on consumers, among other factors. In that regard, the United States notes that a penalty of \$1 billion, surely a substantial amount, represents a mere 0.15% of the maximum penalty.

**1. Dish Is Highly Culpable for Its Telemarketing Misconduct and Has a Long History of Violating Telemarketing Laws**

As the United States has demonstrated, Dish has known for years that it and its retailers were making vast numbers of illegal telemarketing calls, but instead of acting to stop this, Dish intentionally avoided taking concrete steps to solve these problems and instead implemented various ineffective measures while misleading the public and regulators about what it knew and did. UF242, 246, 246, 258.

From the beginning of the OE program, Dish hired call-center proprietors like David and Annette Hagen and Todd DiRoberto—felons with histories of defrauding consumers—without regard to whether they could be trusted to deal with consumers and without even requiring them to tell Dish if they had been accused of violating consumer-protection laws. UF166, 185, 186, 190, 288, 289. Even after Dish acquired knowledge that Dish TV Now, Star Satellite, American Satellite, SSN, JSR, and NSS were using illegal telemarketing, it continued allowing those companies to telemarket on its behalf. *See supra* at 101-129. A strong civil penalty is necessary both to punish Dish for, and to deter other companies from, tolerating similar large-scale violations of consumer-protection statutes in order to grow their businesses.

Even today, Dish will not acknowledge to the public, to regulators, or to courts that its retailers have been making many illegal outbound telemarketing calls that violate the law. UF210, 213, 221. In addition, Dish misled the State of Vermont about what it knew about SSN's telemarketing, misled the Southern District of Ohio about whether it shared telemarketing leads with its retailers, misled the FTC about why it terminated Dish TV Now, and misled the public about why it terminated JSR Enterprises. UF221, 246, 342; Opinion 279 at 39-40.

Dish's compliance manager, Reji Musso, sent many letters to OE retailers accusing them of telemarketing violations and seeking information, but she was either unable or unwilling to take effective measures to stop the calls that she knew were harassing millions of American consumers, and Dish compliance personnel often chose to believe the retailers over the flood of consumer complaints—a stance that the evidence reveals even a Dish VP thought was unreasonable. UF331, 332, 333, 334.

And even though Dish's agreement with its OE retailers gives Dish complete access to their marketing data and documents, Dish continues to feign ignorance about its retailers' telemarketing activities. UF193, 229, 261, 293, 316, 370. The retailer agreement also allows Dish to terminate the retailers for violating any law, but Dish did not terminate the retailers named in this brief when it found out they were violating the law—in fact, Dish encouraged them to keep selling. UF193, 229, 261, 293, 316, 370.

Instead of ensuring that its retailers would not telemarket illegally on its behalf, Dish used its power over its retailers to enhance their sales of Dish. While Dish was disclaiming knowledge or control about whether its OE call centers were making illegal calls, Dish created and implemented a complex Quality Assurance (“QA”) call-monitoring system that required OE retailers to upload dozens of recordings of sales calls every week to Dish for qualitative

evaluation by Dish. UF96. Although such a program has potential application to monitoring Dish's OE retailers' do-not-call compliance, the QA program did not do so. UF97. Instead, the QA program's goal is to "monitor and evaluate" the OE retailers to ensure they are offering "a high quality representation of DISH Network," and so that Dish could "provide feedback to assist [the OE retailers] on how to constantly improve from a sales perspective." UF98. For example, in 2011, dozens of Dish QA personnel used more than 50 different metrics to evaluate more than 70 sales calls made during one week by Dish retailer Defender, creating more than 3,000 individual data points reported back to Defender to improve its sales. UF99. Each Defender sales call averaged more than 30 minutes in length, requiring Dish employees to spend more than 40 hours listening to and scoring these calls. UF100. Dish's QA system demonstrates that, when Dish has the corporate will to solve a problem—even one relates to retailers and telemarketing—it can be addressed. Dish has never shown similar resolve to fix its retailers' compliance with telemarketing laws, and it will not do so unless ordered by this Court.

Dish's failure to act on the results of its own "sting" program also shows its bad faith as to its retailers' telemarketing violations. UF179. As described *supra*, in 2005 Dish's legal department created a sting program to catch "rogue retailers" violating the law. UF177. Dish told consumers and regulators that the sting program was intended to identify and terminate telemarketing violators. UF179. But the sting program—far from being the failure that Dish's deponents described—was actually a victim of its own success. With a short period, Dish caught many of its top OE retailers committing telemarketing violations and created detailed business records detailing the illegal calls. UF178. But Dish failed to terminate most of the retailers it caught in its sting program. UF179.

The sting program was just one example of Dish's widening tolerance of retailer violations. In 2006, when Dish created an entity-specific do-not-call process for its retailers, it devised a "three strikes" system wherein a retailer would be terminated if Dish caught it breaking the telemarketing laws three times. UF101. But there is no evidence that Dish ever enforced the policy. In fact, after Dish caught many of its largest OE retailers engaged in illegal telemarketing in late 2006 and early 2007, it changed the policy to call for an amorphous "business decision" on whether to continue the retailer relationship despite the telemarketing violations. UF102.

Since then, Dish has further watered down its policy: during their 2011 and 2012 depositions, Dish's compliance manager and experts could not provide one metric by which Dish could evaluate its retailers' compliance with telemarketing laws. UF113. According to Dish's compliance manager, Reji Musso, her job is not to ensure that retailers comply with the law, but rather to suggest how they could adhere to the Dish retailer agreement—even though when Ms. Musso was first hired, her supervisor said her role was to help Dish comply with federal and state marketing laws, including the TCPA. UF171, 174. Ms. Musso agreed that Dish's retailers are on "the honor system" and that retailers who violate the law are judged on a "case by case basis." UF112. In sum, the evidence shows not just that Dish should have known about the violations and done something about it—it shows that Dish *did* know about the violations and continues to find ways to feign ignorance of and excuse its retailers' conduct to justify tolerating their behavior.

As to its own telemarketing, a tide of lawsuits, investigations, and enforcement actions made Dish acutely aware of its responsibilities. UF86, 88. Internal documents reflect that Dish's lawyers and compliance people have known since before the Registry took effect that

Dish could be liable for \$11,000 (later \$16,000) per violation of the TSR, but it proceeded to make millions of illegal calls anyway. UF92.

In many instances, the outbound telemarketing department designed processes that violate the telemarketing laws—for instance, Dish did not evaluate whether its prerecorded sales campaigns contained sales messages, and consistently failed to scrub its campaigns calling former customers against the Registry. UF122, 126. Worse, Dish collected entity-specific do-not-call requests for many consumers and then inexplicably ignored them. UF42, 43. Dish’s in-house lawyers have candidly acknowledged that the marketing department does not tell them about telemarketing sales initiatives that may violate the law. UF93.

In 2002, Dish knew it had violated Oregon’s do-not-call statute, and in 2005, it settled the Missouri enforcement action because it broke the law; ten years later, Dish has not reformed its practices. UF87. Achieving a robust compliance program was attainable and Dish had ample opportunities and resources to attain this goal. UF160, 171. For example, since about 2007, Dish has hired employees of the telemarketing-compliance vendor PossibleNow—including persons now retained as expert witnesses in this case—to consult on telemarketing compliance issues, and since 2008, PossibleNow has maintained Dish’s and its retailers entity-specific do-not-call lists. UF38. In 2007, PossibleNow discovered that Dish’s system for scrubbing its calling lists was “flawed and not operating in a compliant manner,” UF104, and told Dish it should improve its compliance systems to comply with “regulator mandates”; Dish failed to do so. UF105. These red flags did not stop Dish from proceeding with the years of illegal calling confirmed by its expert.

Dish also received thousands of consumer complaints about telemarketing. UF114. Plaintiffs do not offer those complaints as evidence of violations; rather, the flood of complaints



represents evidence of Dish's knowledge and state of mind when it received those complaints but failed to take sufficient action to reform its marketing practices. Using Dish's and its retailers' call records, Plaintiffs have already proven millions of violations, which makes the evidence of other complaints and lawsuits relevant to determining Dish's state of mind when it and its retailers violated the law. *Kaylor-Trent*, 910 F. Supp. 2d at 1115-16. Also relevant to Dish's state of mind are the settlements Dish entered into regarding its own and its retailers' telemarketing practices. UF87, 272, 273.

Dish also engaged in other bad-faith, anti-consumer conduct toward consumers who complained about telemarketing violations, *e.g.*:

- For years, Dish told consumers who complained about telemarketing that they should contact the “independent” retailers if they wish to stop receiving Dish telemarketing calls—but, by Dish's count, it has over 7,000 retailers, meaning that, to stop its telemarketing calls, Dish was telling consumers either to identify the one entity that called or to contact each of the 7,000. UF106, 130.
- Dish failed to add people who asked not to be called to its entity-specific do-not-call list, and made telemarketing calls to them. UF42, 43, 473, 474, 475.
- Dish added people who asked not to be called to its entity-specific do-not-call list, but kept making telemarketing calls to them anyway. UF21, 123.
- Dish created an email distribution for its OE call centers called a “POE notice,” in which Dish's compliance people advised OE retailers not to call a limited set of about 100 phone numbers. UF110. Many of those numbers were for consumers who sued Dish for violating the TCPA or complained to senior Dish executives about telemarketing. UF111. The POE notices show that Dish knew its OE

retailers were calling consumers around the country indiscriminately and that it could do something to make them stop—if it really wanted to. Meanwhile, the millions of consumers on the Registry and Dish’s entity-specific do-not-call list had to fend for themselves.

- Dish created a script for its customer service agents that misrepresented the TCPA to consumers. When a do-not-call complaint came in, the Dish customer service agent asked the consumer if he or she answered the phone when the telemarketer called. UF107. If the consumer said “no,” the Dish employee had to read the following: “Calls to a consumer by a telemarketer do not actually constitute a violation of the Telephone Consumer Protection Act if the consumer does not answer the call.” UF108. This misstates the law to the consumer’s detriment, Dish’s expert admitted this statement was inaccurate, and no responsible person could interpret the TCPA in the way Dish informed consumers. UF109. Spreading misinformation about consumers’ rights under a federal consumer-protection statute should not be countenanced by the Court.

Dish knows it and its retailers have violated the telemarketing laws, it has a poor compliance history, and it appears not to have learned from its mistakes. Court should impose a substantial civil penalty to punish such behavior.

## **2. Dish Is Highly Culpable Because Its Conduct Injured Consumers**

While the government need not prove actual harm to obtain civil penalties under the FTC Act, *Nat’l Fin. Servs.*, 98 F.3d at 140, here the overwhelming evidence shows that thousands of American consumers were harmed by Dish’s illegal telemarketing. Between 2003 and today, the FTC has identified more than 60,000 complaints that may be related to Dish telemarketing—

including complaints about Registry violations, entity-specific violations, and prerecorded messages. UF103. Most of those complaints, as Dish's own compliance manager has admitted, are untraceable to specific entities because, among other reasons, Dish retailers hide their identities and "you can't get blood from a turnip." UF116. But of these 60,000-plus complaints, Plaintiffs have identified 1,505 complaints submitted by consumers within one calendar day of receiving an actual violative call shown by the call records. UF115.

The complaints Plaintiffs received reflect the large-scale consumer harm that Dish has inflicted, and the consumers who testified offer a more intimate take on the emotional injury, harassment, inconvenience, and annoyance Dish's and its retailers' illegal and incessant telemarketing caused:

Laurie Sykes of New Bern, North Carolina, worked the night shift at the Comfort Inn from 11 p.m. until 7 a.m. the next day. UF459, 461, 464. She kept the phone on while she tried to sleep during the day, because her elderly husband had a heart condition and might need reach her when he was out. UF462, 465. Frequent Dish robocalls all day, up until 8 p.m., prevented her from getting any sleep, UF463, 466, and records of Star Satellite's robocalls show that Star Satellite called Mrs. Sykes at least five times, UF472. Mrs. Sykes was at her "wit's end" on how to stop the calls, and she began sleeping on the couch with pen and paper ready to document the calls when they woke her. UF467, 468. She listened to the full prerecorded message in hopes of reaching a live person at the end, and when she did reach a person, though they were often rude to her, she told them to put her on their do-not-call list. UF469, 470. Sometimes, the caller would not hang up and she could not use her telephone. UF471. Mrs. Sykes filed two complaints with the North Carolina Attorney General, and Dish responded to both that, although her number was probably on its entity-specific list already, they would submit it again "in an

abundance of caution.” UF473, 474. Dish never put Ms. Sykes’ number onto its entity-specific do-not-call list. UF475.

Linda Doucette of Torrence, California registered her home and cell phone numbers on the Registry in 2003 because she did want to be bothered by telemarketers. UF377, 378, 379. She was annoyed to find this did not stop Dish, which placed numerous unsolicited telemarketing calls to her residence. UF384, 385. She also received irritating Dish prerecorded sales messages in her voicemail that she would check and delete, even though, as she correctly believed, she shouldn’t have been “receiving telemarketing calls from one or any entity.” UF386, 387.

Elizabeth Phillips of Westfield, North Carolina has never been a Dish customer, but around May 2007 she began receiving daily automated collection calls from Dish directed to another individual. UF432. She contacted Dish to stop the calls and she added her number to the Registry; Dish then started making telemarketing calls to her. UF433, 434, 435, 436, 437. Dish would call during the day, or sometimes as late as 8 p.m., and Ms. Phillips would run into the house, worried it was a call about her mother with Alzheimer’s disease—only to be annoyed by a Dish telemarketing call. UF438, 439, 440, 441.

Patrick Lea’s home phone number in Cincinnati, Ohio, has been on the Registry since July 2003. UF417, 418. Around December 2009, he received a rude telemarketing call from a Dish retailer. UF419. The telemarketer called Mr. Lea “some names,” Mr. Lea disconnected the call, and the telemarketer called Mr. Lea back to yell at him again. UF419. Mr. Lea complained to Dish, which promised to terminate the retailer’s franchise. UF420, 421. Dish conducted an investigation and identified its retailer Al Vi Satellites as being responsible for the call. UF422.

Al Vi Satellites admitted that it got leads from a website and had no meaningful do-not-call compliance procedures, but Dish's did not terminate it. UF423.

Between 2006 and 2008, Dish made many telemarketing calls to Centralia, Illinois, stay-at-home mom Amy Johnson, some of which woke her young children during naps, interrupted the family at dinnertime, or caused the phone to ring multiple times in a single day. UF389, 391, 392, 393, 394, 395. One call prompted her to scream at the telemarketer, by waking her three young children after she had finally gotten her colicky newborn asleep. UF398, 399. Ms. Johnson repeatedly asked the telemarketers not to call, and she was added to Dish's entity-specific do-not-call list. UF397, 399, 403. Even after that, Dish called her 52 more times with telemarketing calls. UF401.

The consumers profiled above represent a tiny handful of the millions of Americans who received illegal calls from Dish and its retailers. Tens of thousands of those consumers were bothered enough by these calls to file complaints with regulators against Dish. UF103. The irritation, inconvenience, emotional distress, sleep loss, and even fear suffered by consumers who received these unwanted calls over the past decade establishes widespread consumer harm that justifies imposing a significant penalty on Dish.

### **3. Dish Can Pay a Large Civil Penalty**

One of the nation's largest corporations, Dish has substantial assets and can afford substantial penalties. In November 2013, Dish had more than \$4 billion in cash reserves, and an additional \$6 billion of liquid assets such as marketable investment securities. UF5. In April 2013, Dish offered \$25.5 billion, including more than \$17 billion in cash, to purchase the wireless carrier Sprint. UF6. If Dish has money to expand into a new business, it can pay for its illegal conduct in its existing business.

Dish also has substantial assets available in order to pay legal obligations. In 2011, Dish paid a \$500 million to settle a patent dispute in which Dish had previously paid a \$90 million contempt sanction for violating a court order. UF12-13. In October 2012, Dish settled a long-running dispute about its willful breach of a contract with a single content provider by paying \$700 million in cash. UF7. Dish's market value has climbed substantially since then. UF8.

**4. Any Civil Penalty Must Deter Future Misconduct and Would Be Proper Under the Circumstances**

A civil penalty must not be a mere “license fee” or “an acceptable cost of violation,” but should provide “meaningful deterrence.” *United States v. Reader's Digest Ass'n, Inc.*, 494 F. Supp. 770, 779 (D. Del. 1980). Dish is so large, and has been violating the telemarketing laws for so long, that the civil penalties imposed must be substantial to accomplish this goal. The disincentives for telemarketing violations—*i.e.*, the penalties sought here—must outweigh the benefits reaped by Dish via those violations. Dish has literally filled its coffers through its and its retailers' unlawful telemarketing, and even a seven- or eight-figure penalty would be a rounding error on Dish's billion-dollar balance sheet.

For these reasons, although the United States will seek far less than it could under the statutory limits, the penalty must nonetheless reflect Congress' view that violations of the FTC Act are serious and should be punished severely. Such a severe penalty is especially appropriate to deter the type of conduct that Dish engaged in, as well as to discourage other companies from purposefully misinterpreting the telemarketing laws as relieving them of responsibility for telemarketing calls made by third-party telemarketers they support and encourage.

Dish's conduct in this and other litigations reveals that, in pursuit of profits and its corporate goals, Dish will disregard its legal obligations, whether they involve a court order, a contract, or the telemarketing laws, and mislead the public, regulators, and the courts about its

activities. UF7, 82-126. The undisputed evidence also shows Dish will risk significant amounts of money to achieve its goals. Since 2003, in return for activations of more than a million subscribers (each paying sizable monthly fees), Dish spent a total of \$3.06 billion—almost \$500 million a year—to incentivize its retailers to generate new Dish subscribers, even though Dish knew or should have known that many of its most successful retailers were using illegal telemarketing. UF9, 10, 11, 127, 128, 152, 153. Dish paid almost \$100 million in commissions to just the six OE retailers addressed in this motion. UF11.

To encourage Dish’s future compliance with the law, the Court should impose a penalty significant enough to make it more profitable for Dish to comply with the telemarketing laws than to tolerate its and its retailers’ continued violations of those laws.

Dish has not only refused to acknowledge how the telemarketing laws apply to its conduct, but it continues to violate those laws and to deny responsibility for its own and its retailers’ behavior, even after being sued by five sovereigns. Only a substantial penalty would send a message to Dish and others that, when they violate the law and avoid taking the steps necessary to prevent such violations, they do so at their peril.

#### **INJUNCTIVE RELIEF ON COUNTS I-IV**

To stop Dish’s decade-long pattern of TSR violations—including causing or substantially assisting and supporting its retailers in calling people on the Registry and on Dish’s entity-specific do-not-call list, and placing abandoned calls—the United States seeks permanent injunctive relief. The proposed relief would “fence in” Dish by curtailing certain practices and by implementing stringent reporting requirements to reduce future violations. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d

1013, 1017 (N.D. Ind. 2000) (reasonable fencing-in provisions are appropriate to prevent illegal practices); *U.S. Sales Corp.*, 785 F. Supp. at 753-54.

The undisputed facts show that Dish's violations of the TSR were serious and deliberate and lasted nearly a decade—including years after the complaint was filed in this case. If it acted at all, Dish applied only ineffectual stop-gap solutions and ignored its obligation to comply with the TSR, unchastened by federal and state investigations of its telemarketing practices, thousands of consumer complaints, and lawsuits initiated by consumers and government. Serious injunctive relief is required to combat such a mindset.

Indeed, Dish concealed and materially misrepresented its own activities and its knowledge of what its retailers were doing, as described *supra* and as found by the Court's April 2013 sanctions order. Based on Dish's lengthy record of dissembling about what it and its retailers are doing, any injunctive relief must include measures to prevent Dish from merely stating that it has taken all steps to comply with the law and then doing just the opposite, or turning a blind eye to retailers' violative conduct. The most appropriate relief to stop Dish's harassment of American consumers would be an injunction barring Dish from telemarketing at all, thus eliminating any potential for abusive telemarketing practices—practices revealed by nearly four years of discovery and 70 depositions.

Strict injunctive relief is also necessary because the record, both with respect to Dish and its retailers, is littered with failed prior settlements and injunctions: the 1989 order against David Hagen enjoining him from violating the FTC Act, the 2005 North Carolina consent decree against SSN, the 2006 Missouri injunction against JSR, and the 2009 AVC between Dish and 46 state attorneys general. UF89, 184, 233, 330. The injunction here must have measurable, demonstrable enforcement mechanisms to ensure that this conduct ends now.



Finally, “fencing in” relief is necessary because of the likelihood that Dish will use its illegal telemarketing methods to promote products in addition to its satellite television services. Dish has made a high-profile bid expand into offering wireless services for consumers, such as cellphones. UF6. When and if Dish enters these new markets, it and its retailers will undoubtedly seek to market these offerings. Without appropriate injunctive relief over Dish’s telemarketing conduct, Dish and its retailers will almost certainly use telemarketing to market any new products and services.

Based on the foregoing, the Court should award the United States the following permanent injunctive relief, summarized below and described in detail in the proposed order:

- Enjoin Dish, any Dish successor entity, and any other entity (such as eCreek) with which Dish has entered into or will enter into any type of agreement to conduct outbound dialing from placing any outbound telemarketing call for five years;
- Enjoin Dish from accepting any new customer orders from any current OE retailer or successor (or from any similar successor system), or any new OE retailer, unless and until Dish: (a) hires a telemarketing-compliance expert that had no prior role with Dish or function in this case, who will prepare a plan to bring the OE retailers into compliance with the telemarketing laws; (b) transmits the expert’s plan to the Court, the Department of Justice, the Federal Trade Commission, and the State Plaintiffs; and (c) fully implements the plan prepared by the expert. Six months after fully implementing the expert’s plan and resuming taking orders from the OE system, Dish and the expert shall prepare and transmit to Plaintiffs a comprehensive written status report regarding

telemarketing compliance of OE retailers. Upon receipt of the six-month report, Plaintiffs have the right to respond to the report and then petition the Court to continue the OE-retailer ban indefinitely. The Court will decide such a petition without allowing additional discovery beyond the status report and the Plaintiffs' response;

- At the end of the five-year ban on telemarketing, if Dish resumes telemarketing either on its own or via a vendor such as eCreek, the Court should require Dish to retain and transmit all telemarketing compliance materials to the Plaintiffs on a semi-annual basis for ten years, including: (a) all outbound telemarketing call records; (b) all records of leads, EBRs, and consents-to-call associated with those call records; (c) all telemarketing complaints it received during the prior quarter; (d) all internal emails, internal instant messages, and internal Siebel database entries discussing telemarketing compliance over the prior quarter; and (e) any other relevant telemarketing-compliance related information. Upon receipt and analysis of these records, Plaintiffs have the option of petitioning the Court for further injunctive relief, up to and including a complete telemarketing ban. The Court will decide such a petition on the record only and without allowing additional discovery beyond the records Dish transmitted to Plaintiffs and the parties' analyses of those records;
- At the end of the five-year telemarketing ban, permanently enjoin Dish from violating the TSR and state statutes at issue here;

- Permit representatives from Plaintiffs unannounced inspectional authority to examine any Dish office, Retailer office, Retailer call center, or other similar facility to inspect for compliance with the Court’s order;
- Declare that Dish will be liable for its retailers’ violations going forward as if Dish itself had placed the calls.

**COUNTS V AND VI: THE STATES OF CALIFORNIA, ILLINOIS,  
NORTH CAROLINA, AND OHIO**

**A. The Telephone Consumer Protection Act**

In 1991, Congress passed the TCPA to stem telemarketing abuses, recognizing that unrestricted telemarketing “can be an intrusive invasion of privacy and, when an emergency or medical assistance telephone line is seized, a risk to public safety.” Telephone Consumer Protection Act of 1991 § 2(5) . The TCPA, in addition to containing a number of affirmative prohibitions, directed the Federal Communications Commission (“FCC”) to promulgate regulations further restricting telemarketing, which are codified at 47 C.F.R. § 64.1200.

**1. Direct Liability Under the TCPA**

The TCPA defines “seller” and “telemarketer” similarly to the TSR. 47 C.F.R. § 64.1200(f)(9), (11). The TCPA regulations define “telephone solicitation” as “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” *Id.* § 64.1200(f)(14).

One of the TCPA’s most long-standing prohibitions, effective since 1992, prohibited any person from initiating phone calls to deliver prerecorded messages to residential phone lines without the express prior consent of the recipient. 47 U.S.C. § 227(b)(1)(B). Unlike the TSR’s abandoned-call provision, which applies only when a consumer picks up the phone, the TCPA prohibits *initiating* any call to deliver a prerecorded message to a residential line. *Id.* Congress’s

intent in banning such activity was not only to address the annoyance of such calls to consumers, but also to prevent the “seiz[ing]” of phone lines by robocalling activity. Telephone Consumer Protection Act of 1991 § 2(5).

The TCPA exempts noncommercial robocalls from this prohibition, 47 C.F.R. § 64.1200(a)(2),<sup>13</sup> and the FCC also created an exception that prerecorded sales messages could be placed to consumers with whom the caller has an EBR, *In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991*, 7 FCC Rcd. 8,752, 8,769-71 (Sept. 17, 1992). In July 2003, the FCC revised the TCPA’s EBR definition to harmonize with the TSR’s 18-month and 3-month grace periods. 68 Fed. Reg. at 44,148; 47 C.F.R. § 64.1200(a)(2)(iv).

In July 2003, the FCC also concluded a rulemaking that, among other things, incorporated the forthcoming Registry into the TCPA’s prohibitions. 68 Fed. Reg. at 44,148. The regulations specified that:

No person or entity shall initiate any telephone solicitation to . . . A residential telephone subscriber who has registered his or her telephone number on the Registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator.

47 C.F.R. § 64.1200(c). In its order adopting the Registry under the TCPA, the FCC clarified that this prohibition includes wireless numbers, and also established a presumption that a wireless number on the Registry is a “residential” phone number under the TCPA. 68 Fed. Reg. at 44,146-47.

---

<sup>13</sup> 47 C.F.R. § 64.1200(a) was reorganized in October 2013, with a new subsection added and the EBR exception eliminated, among other changes. Because all the robocalls in this case occurred before then, the cites to 47 C.F.R. § 64.1200 in this motion refer to the version in effect at the time of the calls.

The states' attorneys general enforce the TCPA provisions at issue here. Whenever a State "has reason to believe that any person has engaged or is engaging in a pattern or practice of [violative] 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." 47 U.S.C. § 227(g)(1). The statute provides treble damages for willful or knowing violations. *Id.* The TCPA's statute of limitations is four years, and the limitations period does not implicate state law. 28 U.S.C. § 1658; *Sawyer v. Atlas Heating & Sheet Metal Works, Inc.*, 642 F.3d 560, 561 (7th Cir. 2011); see *Wellington Homes, Inc. v. W. Dundee China Palace Rest., Inc.*, 984 N.E.2d 554, 569 (Ill. Ct. App. 2013).

## **2. Vicarious Liability Under the TCPA**

In a May 2013 declaratory order that arose partially from this Court's primary jurisdiction referral, the FCC clarified that a seller is not directly liable under the TCPA for illegal calls made by telemarketers selling its services. *In the Matter of the Joint Petition Filed by DISH Network, LLC, et al. Concerning the Telephone Consumer Protection Act (TCPA) Rules*, 28 FCC Rcd. 6574, 6582-84 (May 9, 2013).<sup>14</sup> Rather, the FCC declared, the federal common law of agency controls whether a seller like Dish is liable for calls made by other entities selling its products. *Id.* at 6585-86. The FCC recognized that a formal agency relationship, such as a "right to control the manner and means" by which the agent works, see *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989), is unnecessary for vicarious liability to attach. *Id.* Rather, apparent authority and ratification are well-recognized common-

---

<sup>14</sup> To the extent that Opinion 20 required something less than agency in order to ascribe liability under the TCPA, those portions of Opinion 20 are superseded by the FCC's ruling.

law agency concepts that have already been applied in the TCPA context. *Id.* at 6586-88. The FCC gave the following nonexclusive, illustrative examples where liability would attach:

- If “the seller allows the outside sales entity access to information and systems that normally would be within the seller’s exclusive control, including: access to detailed information regarding the nature and pricing of the seller’s products and services or to the seller’s customer information.”
- If the seller give the outside sales entity “[t]he ability . . . to enter consumer information into the seller’s sales or customer systems, as well as the authority to use the seller’s trade name, trademark and service mark.”
- If “the seller approved, wrote or reviewed the outside entity’s telemarketing scripts.”
- “[I]f the seller knew (or reasonably should have known) that the telemarketer was violating the TCPA on the seller’s behalf and the seller failed to take effective steps within its power to force the telemarketer to cease that conduct.”
- The FCC also noted that if a seller has the ability to “oversee the conduct of its telemarketers,” that it should be subjected to liability, “even if that power to supervise is unexercised.”

*Id.* at 6,592-93. Dish also admitted before the FCC that it would be liable “if [Dish] knows that a retailer is repeatedly engaging in violative telemarketing when selling [Dish]’s products or services, and [Dish] fails to take reasonable measures to address the unlawful conduct.” UF117.

The parties have already briefed, to some extent, the effect of the FCC declaratory order on this case. When it lifted the stay of the TCPA claims, the Court accepted Plaintiffs’ position that, even though Dish petitioned for review of the FCC order in the United States Court of

Appeals for the District of Columbia Circuit, the Court could craft its rulings to avoid the danger of inconsistent adjudications. *See* June 10, 2013 Text Order.

For this motion and, if necessary, for future jury instructions, this Court's role is to define and apply the federal common law of agency here, subject to any Seventh Circuit and U.S. Supreme Court case law on point. *See Smith v. Accenture U.S. Group Long-Term Disability Ins. Plan*, No. 05-cv-5941, 2006 WL 2644957, at \*2-3 (N.D. Ill. Sept. 13, 2006) (describing circuit split on issue of federal common law). Although neither higher court has directly addressed apparent agency and ratification in the marketing affiliate context, the federal common law of apparent agency and ratification is well recognized, with the basic building blocks largely undisputed. Thus if the Court applies these basic principles to the telemarketing context, using the FCC decision as guidance, the Court's decision will be faithful to the law and will not conflict with the D.C. Circuit.

Apparent agency, also known as apparent authority, is a common-law agency concept in which a principal creates an agency relationship by enrobing a putative agent with the power to bind it, such that a reasonable third party would believe the putative agent was the principal's agent. *Ashland Facility Operations, LLC v. NLRB.*, 701 F.3d 983, 990 (4th Cir. 2012). A putative agent has apparent authority "when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." *Id.* (quoting Restatement (Third) of Agency § 2.03 (2006)). Apparent agency does not require that "a principal's manifestation must be directed to a specific third party in a communication made directly to that person." *Id.* Rather, "a principal may create apparent authority by appointing a person to a particular position" and "[r]estrictions on an agent's

authority that are known only to the principal and the agent do not defeat or supersede the consequences of apparent authority for the principal's legal relations" with others. *Id.*

Ratification is a common-law agency concept in which a principal creates an agency relationship by acquiescing to and accepting the benefits of the acts of another when it knew or should have known that the putative agent was committing the acts in question. "Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him." *In re S. African Apartheid Litig.*, 633 F. Supp. 2d 117, 121-22 (S.D.N.Y. 2009) (collecting cases applying the federal common law of ratification). The acts of an agent are imputed to the principal "if the principal adopts the unauthorized act of his agent in order to retain a benefit for himself . . . [e]ven mere acquiescence is sufficient to infer adoption of wrongdoing." *Id.*

**B. COUNT V: There Is No Genuine Material Factual Dispute That Dish, Both Directly and Indirectly as a Result of Third Parties Acting on Its Behalf, Violated the TCPA by Engaging in a Pattern or Practice of Initiating Telephone Solicitations to Residential Telephone Subscribers on the Registry**

**1. Dish's Call Centers Directly Placed Illegal Calls to Residential Telephone Subscribers on the Registry**

For Dish's own calls, the TCPA's imposition of liability mostly mirrors the TSR's. *Compare* 47 C.F.R. § 64.1200(c)(2) *with* 16 C.F.R. § 310.4(b)(1)(iii)(B). Thus, to demonstrate the undisputed Registry TCPA violations committed by Dish itself, Plaintiffs incorporate the discussion of Dish's TSR Registry violations *supra* at 88-94, which establishes that Dish's TSR violations are also "telephone solicitations" under the TCPA. 47 C.F.R. § 64.1200(f)(14). For all of the calls in Dish's own call records, Dish either initiated the calls itself and is the "person or entity" that initiated the violative call, 47 C.F.R. § 64.1200(c)(2), or it gave eCreek a



calling list containing that phone number, which Dish admits subjects it to TCPA liability, UF117.

One difference between the TSR and TCPA does affect the State Plaintiffs' TCPA claims. Unlike the TSR, which exempts genuine business-to-business calls with the burden of proof on the defendant, the TCPA prohibits calls to "residential" phone numbers on the Registry. *Compare* 16 C.F.R. § 310.4(b)(7) *with* 47 C.F.R. § 64.1200(c)(2). This has no practical effect on the call counts in Dish's expert reports, however, because Dish's call records reflect when its calls reached businesses and Dish's expert did not count those calls in his reports. UF35.

Dish's expert identified a first group of calls to phone numbers on the Registry for which Dish has identified no defense: 53,167 to California numbers, 24,096 to Illinois, 16,005 to North Carolina, and 23,853 to Ohio. UF25, 27, 28, 29, 30, 31. Dish's expert identified hundreds of thousands more telemarketing calls into each state that were also to persons who, more than 30 days before the call, had requested to Dish or a Dish retailer not to receive telemarketing calls. These entity-specific do-not-call requests cut off any EBR that Dish could assert, rendering these calls violations. Separated by state, Dish made 302,983 such calls to California phone numbers, 118,289 to Illinois, 97,785 to North Carolina, and 95,275 to Ohio. UF44, 46, 47, 49, 50, 51. Dish cannot dispute that it is liable for both groups of Registry violations under the TCPA.

**2. Dish Is Vicariously Liable for the Illegal Telemarketing Calls That Its OE Call Center JSR Enterprises Made to Consumers in the Plaintiff States in Violation of the TCPA**

Under the federal common law of agency, Dish is liable for Dish OE retailer JSR Enterprises' illegal telemarketing activities, discussed in detail *supra* at 107-12, 117. A deep dive into the federal common law of agency is unnecessary here, however, because Dish admitted to the FCC during the primary jurisdiction referral that it would be vicariously liable "if

[Dish] knows that a retailer is repeatedly engaging in violative telemarketing when selling [Dish]’s products or services, and [Dish] fails to take reasonable measures to address the unlawful conduct.” UF117. Dish’s statement describes its relationship with JSR exactly, and no reasonable factfinder could otherwise find. Dish knew that JSR was repeatedly engaging in violative telemarketing when selling Dish’s products and services, and it failed to take reasonable measures to address the unlawful conduct—as described in detail *supra* at 107-12.

But even if the Court conducts an agency analysis of Dish’s conduct, it is undisputed that Dish: (a) authorized JSR to market Dish service to consumers; (b) contractually gave itself control over how JSR would market Dish to consumers; (c) gave JSR access to its exclusive sales systems; (d) allowed JSR to place orders into those sales systems using Dish-generated usernames and passwords; (e) allowed JSR agents to bind Dish to deliver service to the consumer when JSR contacted prospective customers; and (f) allowed JSR to use its trademarks to sell Dish service to consumers. UF135, 139, 140, 146, 316, 321. Because Dish authorized JSR to act on its behalf with the consumer in all meaningful respects, a reasonable juror would be compelled to find that Dish’s actions created a manifestation to an objective observer that JSR’s marketing efforts were being taken on behalf of Dish.

Dish is also vicariously liable for JSR’s conduct because it ratified JSR’s illegal telemarketing practices. Ratification requires that a principal know, or have constructive knowledge of, relevant facts surrounding the conduct that the putative agent is taking on its behalf, coupled with a failure to act effectively to repudiate that conduct. Dish knew about JSR’s illegal telemarketing calls but kept accepting the benefits of JSR’s illegal activities. UF328, 332, 334.

Dish is vicariously liable for the Registry violations that JSR committed, which Dish's expert found numbered as follows: 473,102 to California phone numbers, 369,384 to Illinois, 18,250 to North Carolina, and 129,004 to Ohio. UF354, 355, 356, 357, 358.

Table V Count V (TCPA): Calls to Residential Numbers on the National DNC Registry Plaintiffs: California, Illinois, North Carolina, Ohio					
Lists “Hit”		CA	IL	NC	OH
Dish 2007-2010					
Registry  (30 day grace period)	Violations	53,167	24,096	16,005	23,853
	EBR Asserted	None			
	Cite	Ex. 16 at p.8	Ex. 28 at p. 10 (Table 3a)	Ex. 298 at p.3 (Table 3b)	Ex. 28 at p.10 (Table 3a)
Registry + Dish entity-specific  (30 day grace period)	Violations	302,983	118,289	97,785	95,275
	EBR Asserted	Not applicable because calls were to Dish’s entity-specific DNC list			
	Cite	Ex. 28 at pp. 10, 11 (Tables 3a-3d) + Ex. 38 at ¶ 29(b)(i)			
JSR Enterprises (2006 Calls Only)					
Registry	Violations	473,102	369,384	18,250	129,004
	EBR Asserted	None			
	Cite	Ex. 28 at p. 14 (Table 6a)			

**C. COUNT VI: There Is No Genuine Material Factual Dispute That Dish, Both Directly and Indirectly as a Result of Third Parties Acting on Its Behalf, Violated the TCPA by Engaging in a Pattern or Practice of Initiating Prerecorded Telephone Solicitations**

The TCPA and its regulations prohibit initiating a telephone call to a residential phone line to deliver a prerecorded message. 47 U.S.C. § 227(b)(1)(B). Dish's expert analyzed the 15 Dish prerecorded campaigns described *supra* at 120-22 to identify consumers called by Dish whose telephone numbers appeared or should have appeared on Dish's entity-specific do-not-call

list.<sup>15</sup> Dish's internal database reflects that it dialed these 15 campaigns to "residential" customers only. UF65. Furthermore, the record reflects that these campaigns were all sales calls not subject to the TCPA's "noncommercial" exemption. 47 C.F.R. § 64.1200(a)(2)(ii). Dish's expert found that Dish placed 46,523 such calls into California, 14,196 into Illinois, 4,983 into North Carolina, and 3,640 into Ohio. UF61, 62, 63, 64.

Plaintiffs are entitled to summary judgment on these calls because they were undisputedly calls initiated to deliver a prerecorded message to phone numbers of consumers with whom Dish has no valid EBR, because, at least 30 days before the call, they asked Dish or a Dish retailer not to call again.

**1. Dish Is Vicariously Liable Under the TCPA for the Illegal Robocalls Its OE Call Center Star Satellite Initiated**

Under the federal common law of agency, Dish is liable for Star Satellite's illegal robocalls. The Court need not conduct a full agency law analysis because Dish admitted to the FCC during the primary jurisdiction referral that it would be vicariously liable "if [Dish] knows that a retailer is repeatedly engaging in violative telemarketing when selling [Dish]'s products or services, and [Dish] fails to take reasonable measures to address the unlawful conduct." UF117. Dish's statement describes its relationship with Star Satellite exactly, and no reasonable factfinder could otherwise find. Dish knew that Star Satellite was committing repeated telemarketing violations while selling Dish's products and services, and it failed to take reasonable measures to address the unlawful conduct. *See supra* at 127-29.

---

<sup>15</sup> While the TCPA, at the relevant time, allowed prerecorded calling campaigns to consumers with whom Dish had an EBR, 47 C.F.R. § 64.1200(a)(2)(iv), a consumer's request that Dish not call invalidates and terminates that EBR, 47 C.F.R. § 64.1200(f)(5)(i). To simplify this claim for this motion, Plaintiffs seek summary judgment only on those Dish telemarketing robocalls to phone numbers on Dish's entity-specific do-not-call list.

But even if the Court conducts an agency analysis of Dish's conduct, Dish cannot dispute that it: (a) authorized Star Satellite to market Dish service to consumers; (b) contractually gave itself control over how Star Satellite would market Dish to consumers; (c) gave Star Satellite access to its exclusive sales systems; (d) allowed Star Satellite to place orders into those sales systems using Dish-generated usernames and passwords; (e) allowed Star Satellite agents to bind Dish to deliver service to the consumer when Star Satellite contacted prospective customers; (f) accepted a customer that Star Satellite delivered regardless of whether that customer had been solicited using illegal telemarketing; and (g) allowed Star Satellite to use its trademarks to sell Dish service to consumers. UF135, 139, 140, 145, 146, 147, 148, 261, 271, 275. Because Dish gave Star Satellite the authority to act on its behalf, a reasonable juror would be compelled to find that, to an objective observer, Dish's actions manifested an endorsement of Star Satellite's marketing efforts.

Dish is also vicariously liable for Star Satellite's conduct because it ratified Star Satellite's illegal telemarketing practices. Ratification requires that a principal know, or have constructive knowledge of, relevant facts surrounding the conduct that the putative agent is taking on its behalf, coupled with a failure to act effectively to repudiate that conduct. As described in detail above, Dish knew about Star Satellite's illegal telemarketing calls, but continued reaping the benefits of the company's illegal activities. UF266, 267, 268, 284, 286.

Plaintiffs seek summary judgment under the TCPA only for calls initiated to residential phone numbers during the four years before the First Amended Complaint was filed. *See* 28 U.S.C. § 1658. Using PossibleNow, the company that employs Dish's experts, Plaintiffs used a statistically significant sample to determine that at least 40 percent of Star Satellite's calls were dialed to confirmed residential land-line phone numbers. UF281. Plaintiffs therefore reduce by

60 percent the total number of Star Satellite prerecorded calls sent into each state, yielding the following counts: 2,290,966 in California, 1,063,993 in Illinois, 686,489 in North Carolina, and 1,367,670 million in Ohio. UF277, 278, 279, 280.

Table VI Count VI (TCPA): Prerecorded Sales Calls Plaintiffs: California, Illinois, North Carolina				
	CA	IL	NC	OH
Dish 2007-2010 15 AM Campaigns				
List “Hit”	Dish’s entity-specific DNC list (DISH + BP + Retailer + List Inaccessible)			
EBR Asserted	None because calls were to Dish entity-specific DNC list			
Violations Admitted	46,523	14,196	4,983	3,640
Cite	Ex. 28 at p. 12 (Tables 4a, 4b)			
Star Satellite/ Tenaya				
EBR Asserted	None			
Undisputed Violations Established by Plaintiffs	2,290,966	1,063,993	686,489	1,367,670
Cite	Ex. 38 at ¶ 26(e)			

#### **Damages on Counts V And VI**

The TCPA awards each Plaintiff State \$500 in damages for each violative call made to a consumer in that state, and treble damages if the violations were knowing or willful. 47 U.S.C. § 227(g)(1). Under the statutory damages scheme, Plaintiffs do not need to prove Dish’s state of



mind to be entitled to \$500 per violation. Because Plaintiffs have proven the facts of the violations, therefore, the statute awards \$500 per violation.<sup>16</sup>

For the two TCPA counts above, Plaintiffs proved the following numbers of violations per state:

	Count V.I (Dish Registry violations)	Count V.II (Retailer Registry violations)	Count VI.I (Dish Prerecorded Calls)	Count VI.II (Retailer Prerecorded Calls)	Totals
CA	438,079	473,102	46,523	2,290,966	3,248,670
IL	171,959	369,384	14,196	1,063,993	1,619,532
NC	140,409	18,250	4,983	686,489	850,131
OH	150,249	129,004	3,640	1,367,670	1,650,563

Multiplying the totals by \$500 per violation yields the following amounts per state: more than \$1.6 billion for CA, nearly \$810 million for IL, more than \$425 million for NC, and more than \$825 million for OH. But Plaintiff States do not request those amounts. Instead, when a compensatory award appears to be excessive, as a matter of law, the Court may reduce the award using its common-law powers of remittitur. *Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1374 (7th Cir. 1983). The State Plaintiffs ask that the Court be guided by the civil penalties discussion offered by the United States *supra* at 134-151 in determining the following damages to be appropriate: California requests \$50 million or about \$15 per illegal call, Illinois requests \$25 million, North Carolina requests \$15 million, and Ohio requests \$25 million in damages.

---

<sup>16</sup> Although Plaintiffs believe summary judgment is merited on the question of whether Dish's TCPA violations were knowing and willful, the Court need not reach the question because the State Plaintiffs seek less than \$500 per violation.

**Injunctive Relief on Counts V And VI**

The TCPA provides that, in lawsuits brought by a state attorney general, “[u]pon a proper showing, a permanent or temporary injunction . . . shall be granted without bond.” 47 U.S.C. § 227(g)(2). The statute authorizes broad injunctive relief, allowing this Court to “command[] the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation.” *Id.*; see also *Texas v. Am. Blastfax, Inc.*, 164 F. Supp. 2d 892, 902 (W.D. Tex. 2001) (granting injunction in state TCPA action upon showing of violations).

The Plaintiff States join the United States’ request for the permanent injunctive relief described *supra* at 151-55 and incorporate that discussion here. The request for injunctive relief under the TCPA is appropriate because it not only enjoins Dish from violating the law, but the ancillary provisions—such as reporting and recordkeeping—achieve Congress’ goal of preventing additional violations. 47 U.S.C. § 227(g)(2). Furthermore, to effectuate the monetary TCPA damages remedy, Plaintiff States respectfully ask the court as part of the injunctive award to require Dish to identify and fully fund a claims administrator approved by the Plaintiff States, in order to identify and distribute damage awards to consumers in the Plaintiff States who received calls that violated the TCPA.

///



**COUNTS VII AND VIII: THE STATE OF CALIFORNIA**<sup>17</sup>**A. There Is No Genuine Material Factual Dispute That Dish Violated California's Do-Not-Call Registry Statute (Count VII)**

The State of California seeks summary judgment on Count VI of the Amended Complaint, based on Dish's sales calls to California consumers on the Registry found by Dish's expert. California Business and Professions Code Section 17592(c) provides that "no telephone solicitor shall call any telephone number on the . . . 'do not call' list" to "offer a prize or to rent, sell, exchange, promote, gift, or lease goods or services." The statute defines California's do-not-call list as "the California telephone numbers" on the Registry. Cal. Bus. & Prof. Code § 17592(a)(2). The term "telephone solicitor" is defined as "any person or entity who, on his or her own behalf or through salespersons or agents, announcing devices, or otherwise, makes or causes a telephone call to be made to a California telephone number that . . . seeks to . . . rent, sell, exchange, promote, gift or lease goods or services . . . ." *Id.* § 17592(a)(1).

Thus, California's do-not-call statute works almost identically to the TCPA Registry provision, but applies only to the California phone numbers on the Registry. There are several slight differences between California's statute and the federal laws. As relevant here: (a) California gives telemarketers a three-month grace period to stop calling newly registered phone numbers, whereas the TSR and TCPA safe harbors give only 31 days; and (b) California's inquiry EBR period is 30 days, whereas the federal period is 90 days. Cal. Bus. & Prof. Code § 17592.

---

<sup>17</sup> Plaintiffs do not, and do not plan to, move for summary judgment on Count XII, which asserts Ohio's state law claim. For the following reason, however, this motion is not a request for partial summary judgment: If the Court grants summary judgment on the TCPA claims and grants injunctive and monetary relief to Ohio on the TCPA claims, Ohio will voluntarily dismiss Count XII. If the Court denies summary judgment to Ohio on the TCPA claims, however, Claim XII will simply remain on the same footing as the rest of the claims to be tried.

Dish's call records reflect that it made tens of thousands of telemarketing calls to Registry telephone numbers with California area codes. Between 2007-2010, Dish's expert found that Dish made 42,019 calls to California consumers on the Registry for which Dish has no evidence of a valid EBR or other defense, and another 296,640 calls to consumers on the Registry who had asked Dish or its retailers not to call. UF28, 48. The State of California is therefore entitled to summary judgment on its Section 17592(c) claim, Cal. Bus. & Prof. Code § 17592(e)(4), and on Count VI of the complaint.

<b>Table VII</b> <b>Count VIII (Cal. Bus. &amp; Prof. Code § 17592): Calls to CA Numbers on Registry</b> <b>Plaintiff: California</b>			
<b>List "Hit"</b> <b>(90-day grace</b> <b>period)</b>	<b>Dish assertion for</b> <b>why calls are not</b> <b>violations</b>	<b>Violations</b>	<b>Cite</b>
<b>Dish 2007-2010</b>			
Registry	None	42,019	Ex. 28 at p. 10 (Table 3a)
Registry + Dish entity-specific	Dish failed to get entity-specific requests from its retailers	296,640	Ex. 38 at ¶ 29(b)(ii)

**B. There Is No Genuine Material Factual Dispute That Dish Violated California's Unfair Competition Statute and Prohibition on Prerecorded Messages (Count VIII)**

The State of California further seeks summary judgment on Count VIII, which alleges violations of the state's unfair competition statute. Section 17200 prohibits unfair competition defined as "any unlawful, unfair, or fraudulent business act or practice." An unlawful business act or practice includes any activity that is forbidden by law "be it civil or criminal, federal, state, or municipal, statutory or regulatory, or court-made [law]." *Saunders v. Superior Court of Los Angeles County*, 27 Cal. App. 4th 832, 838-839 (1994). The "unlawful" prong of California UCL uses "sweeping language" to borrow violations of other laws and makes them actionable as

unlawful business practices. *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 111 (1972); *see also Farmers Ins. Exch. v. Superior Court*, 826 P.2d 730, 742 (Cal. 1992). Also, the statute is written in the disjunctive, establishing “three varieties of unfair competition—acts or practices which are unlawful or unfair or fraudulent. Thus, a practice is prohibited as ‘unfair’ or ‘deceptive’ even if not ‘unlawful’ or vice versa.” *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996). Thus, if a company engages in business activities prohibited by other laws, it also violates the California UCL. The UCL imposes “strict liability” and requires no showing that the defendant intended to violate the law, or to injure anyone. *E.g., Cmty. Assisting Recovery, Inc. v. Aegis Ins. Co.*, 92 Cal. App. 4th 886, 891 (2001).

Dish violated the UCL by violating the TCPA, and California moves for summary judgment under the UCL on Dish’s TCPA violations. As Plaintiffs have proven these TCPA violations above, liability under the California UCL follows without additional proof. Dish’s violations of the TCPA as to California phone numbers consisted of three separate groups: a set of 53,167 Registry violations, a set of 302,983 Registry violations that were calls to numbers of people who had asked not to receive Dish sales calls, and a set of 46,523 prerecorded telemarketing calls it initiated to phone numbers of people who had asked not to receive Dish sales calls. UF27, 47, 61. California also moves for summary judgment on Dish’s retailers’ violations of the TCPA, based on the 473,102 JSR Registry violations and the 2,290,966 Star Satellite robocall violations. UF355.

///

<b>Table VIII</b> <b>Count VIII (Cal. Bus. Prof. Code § 17200):</b> <b>Violation of TCPA and Prerecorded Message Ban</b> <b>Plaintiff: California</b>				
List “Hit”	Dish assertion for why calls are not violations	Violations Identified by Dish	Undisputed Violations Established by Plaintiffs	Cite
<b>Dish 2007-2010</b>				
Registry	None	53,167		Ex. 16 at p.8
Registry + Dish entity-specific	Dish failed to get entity-specific requests from its retailers	302,983		Ex. 38 at ¶ 29(b)(i)
<b>Dish 2007-2010 15 AM Campaigns (Prerecorded Messages)</b>				
07-10 Dish Prerecorded Message Telemarketing	None because calls to entity-specific list	46,523		Ex. 28 at p. 12 (Tables 4a, 4b)
<b>JSR Enterprises</b>				
Registry	None	473,102		Ex. 16 at p.8
<b>Star Satellite</b>				
Prerecorded Message Telemarketing	None	2,290,966		Ex. 38 at ¶ 26(e)
Total		3,166,741		

**C. Relief on Counts VII and VIII**

The State of California seeks the injunctive relief requested by the United States, as outlined above, and civil penalties. For violations of its state do-not-call law, California seeks penalties under Business and Professions Code Section 17593 and Section 17536. Section 17593 provides that for state do-not-call violations, the Attorney General may seek a civil penalty up to what the Federal Trade Commission may seek under federal do-not-call statutes—*i.e.*, \$11,000 for each violation before February 9, 2009 and \$16,000 for each violation after February 9, 2009.

Cal. Bus. & Prof. Code § 17593. Section 17536 further provides that the California Attorney General may seek a penalty up to \$2,500 for each violation of the provisions governing advertising within the state of California. Cal. Bus. & Prof. Code § 17536. For violations of its unfair competition law found at Business and Professions Code Section 17200 *et. seq.*, Section 17205 allows California to seek civil penalties up to \$2,500 per violation.

The three types of penalties requested above are “cumulative.” *See* Cal. Bus. & Prof. Code § 17205; *People v. Toomey*, 157 Cal. App. 3d 1, 22 (1984) (finding a legislative intent to allow double penalties). For each violation of sections 17200 and 17500, the court “shall” award a civil penalty up to \$2,500 each. Cal. Bus. & Prof. Code § 17206, subds. (a)-(b); Cal. Bus. & Prof. Code § 17536; *People v. Custom Craft Carpets, Inc.*, 159 Cal. App. 3d 676, 686 (1984). Thus, for each violation, the Court may impose a penalty of up to \$16,000 or \$21,000 depending on the date of the violation (\$2,500 + \$2,500 + 11,000 or 16,000). *See Toomey*, 36 Cal. App. 3d at 22-23.

Civil penalties aim both to punish the defendant and to deter the defendant and others from future violations of the law. *See State v. Altus Fin.*, 36 Cal. 4th 1284, 1291 (2005). To calculate the penalty, the court must consider the “relevant circumstances” presented by the parties. Cal. Bus. & Prof. Code § 17206, subd. (b) and 17535 subd. (b). These may include “the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s misconduct, and the defendant’s assets, liabilities, and net worth.” *Id.*

The statute of limitations for civil penalties is four years for Section 17200 violations (Cal. Bus. & Prof. Code § 17208) and three years for Section 17500 violations (Cal. Code Civ. Proc. § 338(h)). Dish is liable for 416,419 Registry violations on Count VII and 3,248,670



violations on Count VIII, all of which occurred within the statute of limitations. Given the civil penalties factors discussed above, the fact that California has the largest number of consumers who were affected by Dish's illegal telemarketing practices, and the need to calculate a penalty that will deter future violations, California seeks civil penalties of about \$15 for each of the approximately 3.2 million illegal calls Dish made to California consumers, for a total of an additional \$50 million on its state-law claims.<sup>18</sup>

### **COUNTS IX AND X: THE STATE OF NORTH CAROLINA**

**A. There Is No Genuine Material Factual Dispute That Dish Violated North Carolina's Do-Not-Call Registry Statute (Count IX)**

In Count IX, the State of North Carolina alleges that Dish violated the North Carolina Unwanted Telephone Solicitations Act, N.C. Gen. Stat. §§ 75-102(a), 75-102(d). The Act provides that no telephone solicitor shall make a telephone solicitation to a North Carolina residential telephone subscriber's telephone number if the subscriber's telephone number appears in the Registry. The statute prohibits calls to North Carolina phone numbers on the Registry, regardless of where the calls originate. N.C. Gen. Stat. § 75-101(4). Another part of the statute requires telephone solicitors to implement systems and procedures to prevent telephone solicitations to telephone subscribers whose numbers appear in the Registry and to monitor and enforce compliance by its employees and independent contractors in those systems and procedures. N.C. Gen. Stat. § 75-102(d).

North Carolina's do-not-call statute contains prohibitions nearly identical to the TCPA Registry provisions, but applies only to the North Carolina phone numbers on the Registry.

---

<sup>18</sup> If the Court finds that it cannot award a penalty amount at this stage of the processing, plaintiff California requests that, in the alternative, the Court summarily adjudicate the number of Sections 17200 and 17592 violations and find that Dish is liable for 416,419 violations as to Count VII and 3,248,670 violations as to Count VIII.

Thus, North Carolina recognizes the TCPA's EBR exceptions, N.C. Gen. Stat. §§ 75-101(5), 75-103(a)(2), and allows calls made with express permission from the recipient, with the telephone solicitor bearing the burden to demonstrate permission, N.C. Gen. Stat. §§ 75-101(6); 75-103(a)(1). The statute of limitations is four years. N.C. Gen. Stat. § 75-16.2.

Dish called North Carolina consumers on the Registry, failed to implement systems and procedures to prevent those calls, and failed to monitor and enforce compliance by its employees, retailers, and independent contractors with regard to those systems and procedures. UF124, 125, 126. Between 2007 and 2010, Dish itself placed at least 16,005 telephone calls to North Carolinian residential telephone subscribers on the Registry for which Dish had neither a valid EBR nor express permission to call the recipient. UF30. North Carolina is entitled to summary judgment on these violations.

The State is also entitled to summary judgment that Dish violated Section 75-102(d). The undisputed evidence shows that the system Dish uses to scrub its calling lists against the Registry does not create or preserve any records of its activities. UF32. The sheer number of violative calls Dish placed to the Registry and its entity-specific do-not-call list indicates that, whatever systems and procedures Dish actually used did not prevent violative calls. UF30, 50. Moreover, Dish's corporate testimony established that it did not have written systems and procedures for preventing telephone solicitations to North Carolina consumers on the Registry. UF122, 124, 125, 126. Based on the number of Registry violations committed by Dish retailers such as JSR and NSS, the undisputed evidence also establishes that Dish failed to monitor and enforce compliance by its independent contractors to prevent Registry violations. *See supra* at 94-112. Plaintiffs are therefore entitled to summary judgment on Count IX regarding Dish's lack of the required systems, procedures, and monitoring and compliance enforcement.

<b>Table IX</b> <b>Count IX (NC Gen. Stat. § 75-102): Calls to Numbers on Registry</b> <b>Plaintiff: North Carolina</b>			
<b>List “Hit”</b>	<b>Dish assertion for why calls are not violations</b>	<b>Violations Identified</b>	<b>Cite</b>
<b>Dish 2007-2010</b>			
Registry	None	16,005	Ex. 298 at p. 3 (Table 3b)

**B. There Is No Genuine Material Factual Dispute That Dish Violated North Carolina’s Robocall Statute (Count X)**

Dish also made illegal robocalls to North Carolina phone numbers in violation of North Carolina’s robocall statute, N.C. Gen. Stat. § 75-104, which prohibits the placement of prerecorded unsolicited telephone calls using an automated dialer. UF63. The statute of limitations is, generally, four years.<sup>19</sup> N.C. Gen. Stat. § 75-16.2.

Dish cannot dispute that it made at least 4,983 prerecorded sales calls to North Carolinians, which violated General Statute § 75-104. UF63, 66-80. Dish’s transcripts and recordings of these calls indicate that a Dish live operator did not introduce the playing of the prerecorded message and did not obtain express consent from each recipient of a call to play the message. N.C. Gen. Stat. § 75-104; *see supra* at 120-122. North Carolina is therefore entitled to summary judgment on Count IX of the Amended Complaint.

///

---

<sup>19</sup> The statute of limitations can be much longer when the North Carolina Attorney General files an enforcement action. For purposes of calculating damages and penalties in this action, however, plaintiff North Carolina uses the four-year period.



<b>Table X</b> <b>Count X (NC Gen. Stat. § 75-104): Prerecorded Sales Calls</b> <b>Plaintiff: North Carolina</b>				
<b>List “Hit”</b>	<b>Dish assertion for why calls are not violations</b>	<b>Violations Identified by Dish</b>	<b>Undisputed Violations Established by Plaintiffs</b>	<b>Cite</b>
<b>Dish 2007-2010 15 AM Campaigns (Prerecorded Calls)</b>				
Dish 07-10 Prerecorded Telemarketing Campaigns	None	4,983		Ex. 38 at p. 12 (Tables 4a, 4b)

**C. Relief on Counts IX and X**

For Dish’s violations of its telemarketing laws, N.C. Gen. Stat. §75-105(a)(1) awards North Carolina equitable relief, plus statutorily prescribed civil penalties of \$500 for the first violation, \$1,000 for the second, and \$5,000 for each violation after that. North Carolina joins the United States’ request for the injunctive relief sought. *See supra* at 151-55. For civil penalties, based on Dish’s 20,988 calls made in violation of its statutes, North Carolina is entitled to \$104,928,500. North Carolina is also entitled to attorneys’ fees because Dish’s conduct was willful, N.C. Gen. Stat. § 75-105(d), but has not yet finalized its fee calculations.

**COUNT XI: THE STATE OF ILLINOIS**

**A. There Is No Genuine Material Factual Dispute That Dish Violated the Illinois Autodialer Act**

The State of Illinois alleges that Dish violated its autodialer statute. The Automatic Telephone Dialers Act (“ATDA”) makes it a violation “to play a prerecorded message placed by an autodialer without the consent of the called party.” 815 Ill. Comp. Stat. 305/30(b). A knowing violation of the ATDA is an unlawful practice under Section 2Z of the Consumer Fraud and Deceptive Business Practices Act. 815 Ill. Comp. Stat 305/30(d). The ATDA has no EBR exemption nor is it limited solely to “residential” phone numbers, so any robocall dialed into

Illinois without consent violates the statute. The Illinois consumer-protection statutes have no statutes of limitations for attorney general enforcement actions. *See Clare v. Bell*, 37 N.E.2d 812, 814 (Ill. 1941).

Dish's call records establish that, without the consent of the party called, Dish knowingly placed at least 14,196 prerecorded telemarketing calls that played a prerecorded sales message, violating Illinois' autodialer statute and constituting an unlawful practice that violates Section 22 of the Illinois Consumer Fraud and Deceptive Business Practices Act. UF62. As detailed in the civil penalties section above, Dish has known since at least 2002 that automessages are illegal under state law, but never ensured that its own dialers were not sending illegal robocalls to Illinois consumers. UF82, 124-126. Furthermore, since 2002 Dish has known that its telemarketing operations were subject to various state laws that it had ignored—and yet, Dish never took steps to comply with the Illinois robocall statute. UF82. It is undisputed that the AM campaigns described above were sales campaigns, and whether Dish had an EBR with the recipients of these calls is irrelevant under state law. UF66-80; *see* 815 Ill. Comp. Stat. 305/30(b). The State of Illinois is entitled to summary judgment on Count XI.

<b>Table XI</b> <b>Count XI (815 Ill. Comp. Stat 305/30(b), 505/2): Prerecorded Sales Calls</b> <b>Plaintiff: Illinois</b>				
<b>List "Hit"</b>	<b>Dish assertion for why calls are not violations</b>	<b>Violations Identified by Dish</b>	<b>Undisputed Violations Established by Plaintiffs</b>	<b>Cite</b>
<b>Dish 2007-2010 15 AM Campaigns (Prerecorded Calls)</b>				
Dish 07-10 Prerecorded Telemarketing Campaigns	None	14,196		Ex. 28 at. p. 12 (Tables 4a, 4b )

**B. Relief on Count XI**

Pursuant to 815 Ill. Comp. Stat. 505/7 of the Act, Illinois joins the other State Plaintiffs in seeking the injunctive relief outlined in Plaintiffs' proposed order, *see supra* at 151-55. As authorized by Section 2Z of the Illinois Consumer Fraud and Deceptive Business Practices Act, Illinois also seeks \$50,000 in civil penalties.

**CONCLUSION**

Plaintiffs respectfully request that the Court enter summary judgment in favor of the Plaintiffs and against Dish on Counts I through XI of the Second Amended Complaint, and enter judgment against Dish in the following amounts: \$115 million (\$50 million to CA, \$25 million to IL, \$15 million to NC, and \$25 million to OH) on Counts V and VI; \$50 million for the State of California on Counts VII and VIII; \$104,931,500 for the State of North Carolina on Counts IX and X; \$50,000 for the State of Illinois on Count XI; and an amount consistent with the civil penalties factors discussed above for the United States of America on Counts I – IV. Plaintiffs also respectfully request injunctive relief as discussed *supra* at 151-55, 168.

Dated: December 23, 2013

OF COUNSEL:

LOIS C. GREISMAN  
Associate Director for Marketing Practices

ROBERTO ANGUIZOLA  
Assistant Director, Marketing Practices

RUSSELL DEITCH  
GARY IVENS  
Attorneys  
Federal Trade Commission  
600 Pennsylvania Ave. NW, Room 288  
Washington, DC 20580  
Telephone: 202-326-2585 (Deitch),  
202-326-2330 (Ivens)  
Fax: 202-326-3395

Respectfully,

FOR THE UNITED STATES:

STUART F. DELERY  
Assistant Attorney General  
MAAME EWUSI-MENSAH FRIMPONG  
Deputy Assistant Attorney General

MICHAEL S. BLUME, Director

/s/ Patrick R. Runkle

LISA K. HSIAO  
PATRICK R. RUNKLE  
SANG H. LEE  
Trial Attorneys  
Consumer Protection Branch  
U.S. Department of Justice  
PO Box 386  
Washington, DC 20044-0386  
Telephone: 202-532-4892 (Hsiao)  
202-532-4723 (Runkle)  
202-532-4793 (Lee)  
Fax: 202-514-8742  
[Lisa.K.Hsiao@usdoj.gov](mailto:Lisa.K.Hsiao@usdoj.gov)  
[Patrick.R.Runkle@usdoj.gov](mailto:Patrick.R.Runkle@usdoj.gov)  
[Sang.H.Lee@usdoj.gov](mailto:Sang.H.Lee@usdoj.gov)

GREG GILMORE  
Assistant U.S. Attorney  
U.S. Attorney's Office for the Central District  
of Illinois  
318 S. 6th St.  
Springfield, IL 62701-1806  
Telephone: 217-492-4450  
Fax: 217-492-4512  
[Greg.Gilmore@usdoj.gov](mailto:Greg.Gilmore@usdoj.gov)

FOR THE PEOPLE OF THE STATE OF  
CALIFORNIA

KAMALA D. HARRIS  
Attorney General of the State of California  
JINSOOK OHTA  
Deputy Attorney General  
Consumer Law Section  
Office of the Attorney General  
110 W. "A" Street, Suite 1100  
San Diego, CA 92101-3702  
Telephone: 619-645-3182  
Fax: 619-645-2062  
[jinsook.ohata@doj.ca.gov](mailto:jinsook.ohata@doj.ca.gov)

FOR THE PEOPLE OF THE STATE OF  
ILLINOIS

LISA MADIGAN  
Attorney General of Illinois  
ELIZABETH BLACKSTON  
Assistant Attorney General; Chief, Consumer  
Fraud Bureau

PAUL ISAAC  
Assistant Attorney General  
Consumer Fraud Bureau  
601 South University Ave., Suite 102  
Carbondale, IL 62901  
Telephone: 618-529-6418  
Fax: 618-529-6403  
[pisaac@atg.state.il.us](mailto:pisaac@atg.state.il.us)

FOR THE STATE OF OHIO

MIKE DEWINE  
Attorney General of Ohio  
MICHAEL ZIEGLER  
ERIN B. LEAHY  
Assistant Attorneys General  
Consumer Protection Section  
Ohio Attorney General's Office  
30 E. Broad St., 14th Floor  
Columbus, OH 43215-3414  
Telephone: 614-466-3980 (Ziegler)  
614-752-4730 (Leahy)  
Fax: 866-768-2648  
[Michael.Ziegler@ohioattorneygeneral.gov](mailto:Michael.Ziegler@ohioattorneygeneral.gov)  
[Erin.Leahy@ohioattorneygeneral.gov](mailto:Erin.Leahy@ohioattorneygeneral.gov)

FOR THE STATE OF NORTH CAROLINA

ROY COOPER  
Attorney General of North Carolina  
DAVID N. KIRKMAN  
Special Deputy Attorney General  
Consumer Protection Division  
North Carolina Department of Justice  
114 West Edenton Street  
9001 Mail Processing Center  
Raleigh, NC 27699-9001  
Tel. 919-716-6033  
Fax 919-716-6050  
[dkirkman@ncdoj.gov](mailto:dkirkman@ncdoj.gov)

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Plaintiffs' Motion for Summary Judgment was served via ECF this 23rd day of December 2013, upon each of the persons listed below:

Joseph A. Boyle  
Lauri A. Mazzuchetti  
[jboyle@kelleydrye.com](mailto:jboyle@kelleydrye.com)  
[lmazzuchetti@kelleydrye.com](mailto:lmazzuchetti@kelleydrye.com)

Counsel for Dish Network, LLC

s/ Patrick R. Runkle  
PATRICK R. RUNKLE

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

Pursuant to CDIL-LR 7.1(B)(4)(c), I hereby certify that the above memorandum complies with the type-volume limitation of the Court's October 24, 2013 order. The memorandum has 30,916 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/ Patrick R. Runkle  
PATRICK R. RUNKLE

EXHIBIT 785

EXHIBIT 785

JA016385  
015106

TX 102-015647



**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 MOTION FOR SUMMARY JUDGMENT**

Defendant DISH Network L.L.C. ("DISH"), by and through its undersigned counsel, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 7.1(D) of the United States District Court, Central District of Illinois, hereby moves this Court for an order granting summary judgment in its favor on Counts I through XII of 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, and the States of California, Illinois, North Carolina and Ohio.

DISH has filed contemporaneously with this Motion its Memorandum of Law in Support of its Motion for Summary Judgment and the exhibits and evidence in support thereof.

JA016386  
015107

TX 102-015648

DATED: January 6, 2014

Respectfully Submitted,

By: /s/ Henry T. Kelly  
Henry T. Kelly  
KELLEY DRYE & WARREN LLP  
333 W. Wacker Dr.  
Chicago, Illinois 60606  
Phone (312) 857-2350

Joseph A. Boyle  
Lauri A. Mazzuchetti  
KELLEY DRYE & WARREN LLP  
200 Kimball Drive  
Parsippany, New Jersey 07054  
Phone (973) 503-5900

*Attorneys for Defendant Dish Network LLC*

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF ILLINOIS  
SPRINGFIELD DIVISION**

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

DISH NETWORK L.L.C.,

Defendant.

Case No.: 3:12-3221-SEM-BGC

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, hereby deposes and states that he caused the foregoing, **MOTION FOR SUMMARY JUDGMENT** to be electronically filed with the Clerk of the Court on January 6, 2014, using the ECF system, and served on all parties of record via the ECF system, pursuant to LR 5.3.

/s/ Henry T. Kelly

Henry T. Kelly

JA016388  
015109

TX 102-015650

EXHIBIT 786

EXHIBIT 786

JA016389  
015110

TX 102-015651

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

3   UNITED STATES OF AMERICA and   )  
4   The STATES OF CALIFORNIA,       )       BENCH TRIAL  
5   ILLINOIS, NORTH CAROLINA, and   )  
6   OHIO,                               )       09-03073  
7                   PLAINTIFFS,       )  
8                   VS.                 )       SPRINGFIELD, ILLINOIS  
9   DISH NETWORK, L.L.C.,            )  
10                   DEFENDANT.       )       VOL. 1

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

14   FEBRUARY 17, 2016

15   A P P E A R A N C E S:  
16   FOR THE PLAINTIFFS:  
17   STATE OF ILLINOIS:

ELIZABETH BLACKSTON  
PAUL ISAAC  
PHILIP HEIMLICH

18   (Present by video)

19   USA DEPT. OF JUSTICE:

LISA HSIAO  
PATRICK RUNKLE  
SANG LEE

20   STATE OF CALIFORNIA:

JINSOOK OHTA  
JON WORM

21   STATE OF ILLINOIS:

ELIZABETH BLACKSTON  
PAUL ISAAC  
PHILIP HEIMLICH

22   STATE OF OHIO:

ERIN LEAHY  
JEFF LOESER

23   STATE OF NORTH CAROLINA:

DAVID KIRKMAN  
KEVIN ANDERSON

24   FOR THE DEFENDANT:

PETER BICKS  
ELYSE ECHTMAN  
JOHN EWALD  
JAMIE SHOOKMAN  
JOSEPH BOYLE  
LAURI MAZZUCHETTI  
SHASHA ZOU

25   COURT REPORTER:

KATHY J. SULLIVAN, CSR, RPR, CRR  
600 E. MONROE, ROOM 312  
SPRINGFIELD, ILLINOIS  
(217)492-4810

KATHY J. SULLIVAN, CSR, RPR, CRR  
OFFICIAL COURT REPORTER

JA016390  
015111

## I N D E X

WITNESS

PAGE

## E X H I B I T S

(Refer to Docket Entries 599 thru 607 for dates of  
exhibit admissions.)

KATHY J. SULLIVAN, CSR, RPR, CRR  
OFFICIAL COURT REPORTER

JA016391  
015112

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

2 \* \* \* \* \*

3 THE COURT: On the record. This is 09-3073  
4 the United States versus DISH Network.5 The cause is called for trial. By video we  
6 have most. We have Ms. Hsiao. We have Mr. -- Mr.  
7 Runkle is in Paris; is that right?

8 MR. RUNKLE: I'm not in Paris.

9 THE COURT: Oh, Mr. Runkle is here.  
10 what happened?11 MR. RUNKLE: There was an ice storm here.  
12 And as I explained, I think, my wife is a flight  
13 attendant, so we only fly when seats are available.  
14 Seats were not available. So we're going to try  
15 next week.16 THE COURT: Did you make it to the  
17 Valentine's party?18 MR. RUNKLE: I did make it to the party.  
19 And my daughter and wife were very appreciative.  
20 Thank you, Your Honor.21 THE COURT: All right. We have Mr. Sang  
22 Lee. Jinsook Ohta. Jon Worm.23 Paul Isaac is here in person. Elizabeth  
24 Blackston and Philip Heimlich are here.

25 We have Mr. David Kirkman.

KATHY J. SULLIVAN, CSR, RPR, CRR  
OFFICIAL COURT REPORTERJA016392  
015113

1 We have Erin Leahy and Jeff Loeser.

2 We have Russell Deitch and Gary Ivans.

3 We have Mr. Joe Boyle. Lauri Mazzuchetti is  
4 not here.

5 We have Peter Bicks. Elyse Echtman. John  
6 Ewald. Jacob Albertson. Naomi Mower. Jamie  
7 Shookman. Shasha Zou. Allegra Noonan.

8 And Stanton Dodge is on the phone. Lawrence  
9 Katzin and Brett Kitei are also on the phone.

10 Are we missing the paralegal from the  
11 government?

12 THE CLERK: She is present also.

13 THE COURT: There you are.

14 MS. HSIAO: Andrea Grabow, Erinn Martin,  
15 and Grace Garner are all here for DOJ.

16 THE COURT: Then do we have Trudy for the  
17 defendants?

18 MR. BICKS: No, Your Honor. Trudy is not  
19 here.

20 THE COURT: I'm not sure we can do this  
21 without Trudy.

22 I'm not laughing, I'm serious. I know you've  
23 all done a lot of preparation for purpose of getting  
24 all of these exhibits admitted. And I especially  
25 want to thank you, Diane, who I told her boss today



1 deserved a raise after this month in trial and  
2 keeping these exhibits so well organized. And once  
3 thanks again to the paralegals again for all that.  
4 As well as the lawyers.

5 I think he told me I have to go to the  
6 President to get you the raise though. which I  
7 would do if it would do any good.

8 All right.

9 THE CLERK: We have all these DC attorneys.

10 THE COURT: Yeah, we have the FTC lawyers,  
11 maybe they could help you.

12 Okay. So everybody has the exhibit and witness  
13 lists that I have in my hand today, all the  
14 attorneys; correct, Diane?

15 THE CLERK: I'm assuming that defendant  
16 exchanged all of those, Your Honor. Yes. That we  
17 entered on a daily basis with the paralegal and the  
18 law clerk. They should have a copy of all those.

19 THE COURT: Okay. Now, the ones I have  
20 here are the trial dates which we neglected to enter  
21 those on the record; correct?

22 THE CLERK: That's correct.

23 THE COURT: Okay. We will go through those  
24 first. And then we have defendant's exhibits. And  
25 you all have -- the plaintiffs all have that list of

1 exhibits as well?

2 MR. LEE: Yes, Your Honor.

3 THE COURT: Okay. Then first of all, I'm  
4 going to deny the Rule 52. And I will follow that  
5 up with a written order as well.

6 The exhibit and witness list that is in my  
7 hand, page 1 of 2, is for trial date January 29th of  
8 2016.

9 And I'm going to initial. DTX977 is admitted.  
10 And I'm going to go through plaintiffs as admitted.  
11 233, 457, 535, 1379, 1031, 1380.

12 Plaintiffs' 131, 1220, 621, 165.

13 Defendant's 959, 223, 836.

14 Plaintiffs' 168, 501, 742, 1306, 1392, 1390,  
15 and 188.

16 That completes January 29th.

17 Then we have February 2nd. Defendant's 970.  
18 And for the record, all of your previous objections,  
19 if there were objections, are preserved.

20 So that was 970, 335, 237.

21 Then Plaintiffs' 235. Plaintiffs' 1083.

22 Defendant's 139.

23 Plaintiffs' 1422, 1425, and 1103.

24 And then February 3rd of 2016. Defendant's  
25 752, 309. And Plaintiffs' 1361.

1 February 4th, Plaintiffs' 80 and 199.

2 February 5th, Plaintiffs' 1427, 1428, 109, 657,  
3 560.

4 Defendant's 14, 964, 663, 671, 662, 785.

5 Plaintiffs' 59, 1079, and 84. And 60.

6 Defendant's 189 and 650.

7 February 9th, Plaintiffs' 117, 1430, 477, 50,  
8 1429, 1431, 545, 53, 483, 482, 478, 538, 404, 696.

9 Defendant's 459, 16, 17, 972.

10 Plaintiffs' 1426, 1433, 514, 736, and 1270.

11 I'm sorry, 1404. Sorry, I couldn't see the one  
12 there. That was Plaintiffs'.

13 All right. Then on February 10th of 2016,  
14 Defendant's 670 is admitted, 19, 1015, 643, 1016.

15 February 11th, Defendant's 1017, 626C, 626D,  
16 626B, 666. And then Plaintiffs' 1435, 1436, 1434,  
17 and 155 pages 7 through 21.

18 Now to the defendant's list.

19 Defendants are moving to admit all of the  
20 documents on the list that has been tendered; is  
21 that correct?

22 MR. BICKS: Yes, Your Honor. This is Peter  
23 Bicks. That's correct.

24 THE COURT: We have this voice activated,  
25 so you have to speak up more, because this is the

1 first time I've seen you today. And I can't believe  
2 I'm asking you to speak more.

3 Anyway. All right. Defendants have moved for  
4 the admission of the following:

5 Do we have objections to the admission of any  
6 of these defendant's exhibits? The plaintiffs, I  
7 assume not, but as to the Defendant's?

8 MR. LEE: Yes, Your Honor, We -- there are  
9 a handful we do not have an objection to. Could I  
10 read those off to you?

11 THE COURT: You may.

12 MR. LEE: These are the ones that  
13 plaintiffs have withdrawn their objection.

14 They are PX0115.

15 THE COURT: Hold on. Did you say PX?

16 MR. LEE: Yes. There are a number of PXs  
17 that the defendant identified. I thought I would  
18 identify those first for you.

19 THE COURT: And they're on this list?

20 MR. LEE: I believe so.

21 THE COURT: Repeat the number?

22 MR. RUNKLE: They're at the very end of the  
23 list.

24 MR. LEE: They are at the very end of the  
25 list.

1           Maybe -- there are three DTXs, I'll list those  
2 off first, Your Honor.

3           THE COURT:   Okay.

4           MR. LEE:    There's DTX111.

5           THE COURT:   No objection?

6           MR. LEE:    No objection, Your Honor.

7           THE COURT:   111 is admitted.

8           MR. LEE:    DTX589.

9           THE COURT:   I'll show no objection, 589 is  
10 admitted.

11          MR. LEE:    And DTX1000.

12          THE COURT:   DTX1000 is admitted.   No  
13 objection.

14          MR. LEE:    Then I believe maybe at the end  
15 of the list there are some PXs that they identified  
16 to which we have no objection to their admission.

17          Maybe I'm mistaken that they're on the list,  
18 but I can still read them off to you.

19          MR. BICKS:   Yes, Your Honor, this is Peter  
20 Bicks.   They're on the last page of the list, I  
21 think.   We have it on 31 and 32.

22          THE COURT:   Are they these ones that were  
23 formerly CX?

24          MR. BICKS:   No, they're PX.

25          THE COURT:   Okay.   The numbers, Mr. Lee?

1           MR. LEE: Yes. The numbers in order are  
2       PX105 -- I'm going in order. PX105. PX114. PX115.  
3       PX570. And PX1112.

4           THE COURT: No objection. I will show 105,  
5       114, 115, 570, and 1112 as admitted.

6           So there are objections to all of the other  
7       defendant's exhibits?

8           MR. LEE: There are, Your Honor.

9           MR. RUNKLE: Yes. We think they can be  
10      handled in categories, similar to the way we did our  
11      exhibits.

12          THE COURT: Okay. Do you have them  
13      categorized?

14          MR. RUNKLE: We do.

15          MR. LEE: We do. Would you like us to read  
16      off the categories to you?

17          THE COURT: I thought those were supposed  
18      to be given to Diane ahead of the hearing today. So  
19      that we had them in our hands; the objections?

20          MR. LEE: We provided the objections to  
21      DISH. I'm sorry we didn't send them to you in time,  
22      Your Honor. We can send that to you now.

23          THE COURT: Can you e-mail it right now?

24          MR. LEE: Yes, Your Honor.

25          THE COURT: Then I'll wait until we get it.

1 I assume, Ms. Blackston, you don't have it?

2 MS. BLACKSTON: I have a printed out  
3 version that I've written on that you're welcome to  
4 have.

5 THE COURT: well, depending on what you  
6 have written on it, you may not want to share.

7 MS. BLACKSTON: Just taking notes from  
8 today.

9 THE COURT: we'll hang on for a second.  
10 Let's go on and talk about something else.

11 I have the proposals for the additional  
12 discovery. In essence, there's -- there are two  
13 categories of disputes--to use your terminology--the  
14 time period and the scope of discovery.

15 I and my clerks have been discussing both of  
16 these issues at length.

17 The defendants want the time period to be --  
18 excuse me, plaintiffs want the time period to be  
19 April, 2010 through January, 2016.

20 My inclination is to go with that time period.  
21 However, it would become obvious, if I go with that  
22 time period, that we will have another couple years,  
23 at least, of discovery.

24 And I will tell you in terms of the scope of  
25 the materials I'm also inclined to go with the

1 plaintiffs' scope of materials. which again, would  
2 further delay the case.

3 Obviously I've denied the Rule 52. And I will  
4 tell you that thus far, given what the evidence is,  
5 I'm inclined to rule with the plaintiffs. However,  
6 I -- given what the evidence has been thus far I'm  
7 not inclined to impose \$23 billion in penalties.

8 So I'm going to ask you--and I know you've  
9 tried settling this case before--whether knowing  
10 that, there's any inclination to want to sit down at  
11 the table and negotiate a settlement of this matter?

12 MR. RUNKLE: Your Honor, I think that there  
13 has been ongoing discussion in Washington between  
14 DISH settlement counsel, which is from Wilmer  
15 Cutler, and -- yes, there's a couple other firms  
16 involved, and senior DOJ and FTC officials.

17 We would expect that, after trial, those  
18 discussions would continue. I think both sides have  
19 participated in those discussions and have, you  
20 know, have participated in those discussions in good  
21 faith.

22 My -- hoping not to speak out of turn here, our  
23 hope is that there be some ability, because we were  
24 so close on injunctive relief, that there may be  
25 some way to have discussions about injunctive



1 relief. But as to the amount of the penalty, the  
2 parties were still very far apart on that at the  
3 last report.

4 So we can definitely have more discussions now  
5 that the trial is over. But we believe that the  
6 civil penalties claim has now been tried and is ripe  
7 for decision. And if the parties can come to some  
8 other kind of agreement on the injunctive relief,  
9 that might be a domino that would fall that would  
10 allow the case to proceed in a more orderly fashion,  
11 without numerous more years of delay.

12 So I -- I don't know whether that's what you  
13 wanted to hear, but I think there will be more  
14 discussions.

15 THE COURT: How many firms are involved in  
16 the settlement discussions?

17 MR. RUNKLE: There's Wilmer Cutler.  
18 There's Coplantz, Hatch, Duffy. And is that it? I  
19 don't know -- there's DISH inside --

20 MS. HSIAO: And Kelley Drye --

21 MR. RUNKLE: Kelley Drye was at the last  
22 one. Then there's us, the FTC. And I believe  
23 Mr. Dodge was at the last meeting. So -- there's a  
24 separate sort of realm of settlement discussions  
25 going on. I don't know what the status of that is,

1 or how that's going to be picked up now after the  
2 trial, but I -- I think what I just said, is that a  
3 reasonable way to move forward if there's interest  
4 on both sides in having a resumed discussion. But  
5 perhaps Mr. Dodge can speak to that.

6 MS. HSIAO: To add to what Mr. Runkle said.  
7 The states, who -- DOJ's knowledge, the states  
8 haven't been involved in settlement discussions to  
9 date. The last couple of meetings have been just  
10 federal government and DISH counsel.

11 So I don't know what the status is of whether  
12 there are any settlement discussions going on with  
13 the state. To my knowledge there are not, but they  
14 may know better.

15 THE COURT: Ms. Ohta?

16 MS. OHTA: Your Honor, with regard to the  
17 states, the last interaction between the states and  
18 DISH with regard to settlement was we sent them a  
19 counteroffer to their proposal. And we haven't  
20 heard anything back. And this is including the time  
21 period about --

22 MR. WORM: It was mid-December.

23 MS. OHTA: Yeah, mid-December.

24 THE COURT: Well, common courtesy,  
25 Mr. Boyle, Mr. Bicks, would dictate that you at

1 least respond. To say nothing of the rules.

2 Mr. Bicks, what is your understanding of the  
3 possibility of settlement?

4 MR. BICKS: Obviously, Your Honor, I'm, you  
5 know, guarded in my obligations here. I mean the  
6 settlement discussions are obviously privileged.

7 And I think that what I can say to the Court  
8 is, from the prospective of our client, the range of  
9 proposals that were on the table essentially made  
10 it, for the client, no choice but to come in and try  
11 this case. And which we did.

12 And -- but I also can say in good faith that I  
13 know our client has always taken settlement  
14 seriously in the case. But, you know, when -- as  
15 Your Honor saw the case, when amounts that are  
16 sought that are at the entire market cap value of  
17 the company, you know, it -- companies have really  
18 no choice but to -- to come try the case.

19 So -- and I can say that Mr. Dodge and others,  
20 who have been, you know, involved in the government  
21 and the -- some of the firms that were mentioned,  
22 wilmerHale in particular, you know, have in good  
23 faith had discussions. And I wouldn't be surprised  
24 if there are further discussions.

25 But that would really be something that I would

1 have to talk with Mr. Dodge, who is on the phone,  
2 you know, and discuss that in detail. And it's hard  
3 to have that conversation in this kind of a forum.

4 THE COURT: Well, certainly.

5 MR. DODGE: Your Honor, this is Stanton  
6 Dodge. I can shed a bit of light on this, if you  
7 would like?

8 THE COURT: Well, just don't violate any  
9 confidences you're not supposed to.

10 MR. DODGE: No, of course not. But with  
11 respect to the number of firms involved on our side.

12 The firm Coblenz Patch is a firm from San  
13 Francisco. The named partner, Richard Patch, has  
14 been a very close, trusted advisor of mine for  
15 probably 14 years. And he and I have settled  
16 numerous cases together. So I always like to bring  
17 him to something like this to help, you know, give  
18 it a real try to settle.

19 So, one, that's, you know, a sign that we're  
20 really serious about settling this. He's a guy --  
21 he and I have been unsuccessful maybe one time in 20  
22 cases not settling. That's why they're involved.

23 And Ken Salazar, WilmerHale, a former Attorney  
24 General of Colorado, a U.S. Senator, and Secretary  
25 of the Interior, has long been an advisor to our

1 company. He's at WilmerHale. I wanted him involved  
2 for his advice and guidance as a former Attorney  
3 General.

4 And there's also a bulk of experience related  
5 to Department of Justice at that firm. And  
6 Ms. Mazzuchetti was there the last time to help from  
7 a factual basis. We wanted to make sure if I missed  
8 something in those discussions, that she was there,  
9 you know, to help me correct any misconceptions I  
10 might have.

11 And I'd say beyond that, you know, we had sent  
12 something to the federal government and the states,  
13 and they had said they wanted to proceed separately  
14 in settlement discussions. Which, of course, we  
15 respect.

16 We met with folks in Washington on January 8th  
17 at the Department of Justice and FTC. And then as  
18 Your Honor, knows the trial started on the 19th. So  
19 sadly, we have not had a chance to get back to the  
20 states on their counter. But we are more than happy  
21 to do. I'm also more than happy to continue talking  
22 with the DOJ and FTC, which quite frankly, when we  
23 finished the last meeting we had we all agreed we  
24 were open to further discussions.

25 So I'd be very happy to do that.

1           THE COURT: Mr. Dodge, thank you. I wasn't  
2 being critical of the number of firms involved, I  
3 was just not sure I understood the number of firms  
4 involved. And certainly you're such a youngster you  
5 would need to have advice of your elders.

6           I do mean you are a youngster, not  
7 inexperienced.

8           So the bottom line is nobody has really  
9 answered the question--and I gather you can't--about  
10 settlement. And I know the cost of opening this up  
11 from 2010 to 2016 is going to be ungodly. And will  
12 require quite a bit of your time potentially here in  
13 Springfield once again.

14          I feel if I do not open it up for that time  
15 period, and for the scope that the plaintiffs want,  
16 it's kind of like how the jury must feel when they  
17 try a case where a lot of the evidence has been  
18 precluded by evidentiary rulings of the Court.

19          I feel it's evidence that I need to have. So I  
20 am going to open it up from April, 2010 through  
21 January, 2016 as to the time period.

22          And I know there's not been a motion to compel  
23 filed as to this whole issue with addresses, but I  
24 do find that the request, that the various document  
25 requests do cover the list processing application,

1 lead lists, lead tracking system, name and address,  
2 LTS individual records, Equifax, the metrics that  
3 you use to measure market penetration.

4 So then in terms of scheduling, obviously you  
5 have experts already, but I'm concerned, since I'm  
6 opening it up, that the following dates will be too  
7 short-sighted.

8 As I understand it DISH reserved the right to  
9 decline to engage in supplemental discovery. Have  
10 you made a decision on that, Mr. Bicks?

11 MR. BICKS: I think -- the answer is we  
12 haven't, Your Honor, because we wanted to get some  
13 guidance from you as to what you were thinking in  
14 terms of the scope of discovery.

15 As our papers articulated, the discovery was  
16 focused on the question of an injunction. And our  
17 position, as the Court knows, was that that would be  
18 focusing on the present day.

19 And I think what we would want to do is hear  
20 from the Court in terms of what you were thinking.  
21 And then if we would have an opportunity to confer  
22 with our client, you know, we would be in a position  
23 to tell the Court whether or not, in essence, we are  
24 going to decline any further discovery and  
25 essentially tee the question up for an injunctive

1 relief based on the present record.

2 But I would like an opportunity to discuss that  
3 with our client now that we hear the direction of  
4 the Court.

5 THE COURT: Okay. That's fine.

6 I will indicate that the request for fees and  
7 expenses that DISH incurs in connection with the  
8 supplement discovery relating to the Stauffer  
9 analysis, and preparation and taking of the  
10 January 25 deposition of Mr. Stauffer, will be  
11 granted.

12 Then DISH asked that the plaintiffs not be  
13 permitted to conduct another new residential  
14 analysis. You've asked that I bar Mr. Stauffer and  
15 any of the plaintiffs from conducting further  
16 residential analysis. I will not do so. In the  
17 event it's needed after the additional discovery is  
18 completed. But I want you to seek to supplement  
19 before doing so.

20 All right? Plaintiffs understand that?

21 MS. BLACKSTON: Yes, Your Honor.

22 THE COURT: So feel free to disagree with  
23 me at this point. Here are the proposed dates:

24 March 4th, 2016, DISH is to propound fact  
25 discovery, including third-party subpoenas regarding



1 the Stauffer 2016 analysis.

2 And then the plaintiffs, on the same date, are  
3 to propound fact discovery regarding the address  
4 information related to the Stauffer 2016 analysis.

5 March 28, 2016, DISH is to produced, by secure  
6 FTP, all telemarketing call records, with all  
7 available data fields, for the time period. And  
8 this includes DISH's established business  
9 relationship data, including any information from  
10 which DISH determines whether it has an EBR, like  
11 inquiries and leads and dates, current customers,  
12 former customers, customer termination dates, last  
13 payment dates, activation dates, et cetera.

14 April 4th of 2016, DISH is to produce, by  
15 secure FTP, all other records relating to  
16 telemarketing compliance for the time period for  
17 both DISH and its retailers. And that will include,  
18 again, lead lists, documents related to creation of  
19 calling lists, scrubbing requests, scrubbing  
20 receipts, audits, and any audit related documents.

21 April 11, 2016, DISH is to produce documents  
22 concerning consumer complaints, investigations into  
23 and response to those complaints for the time  
24 period.

25 April 25th of 2016, plaintiffs are to produce

1 an expert report on the audit call records. And  
2 shall respond to DISH discovery requests regarding  
3 the Stauffer January, 2016 analysis. And DISH shall  
4 respond to plaintiffs' discovery requests concerning  
5 the addresses.

6 May 23rd of 2016, DISH is to produce a  
7 responsive expert report on the audit call records,  
8 and complete depositions, if any, regarding Stauffer  
9 January, 2016 analysis.

10 June 20, 2016, plaintiffs are to produce a  
11 rebuttal expert report on the audit call records.

12 June 27, 2016, DISH is to produce expert report  
13 regarding Stauffer January, 2016 analysis.

14 August 8th of 2016, close of supplemental  
15 discovery, including expert depositions.

16 Tuesday, October 25, 2016, we've set this at  
17 9:30 in the morning for the permanent injunction  
18 hearing. And hearing for DISH to present any  
19 additional evidence regarding the Stauffer analysis.

20 November 21, 2016, plaintiffs to submit  
21 reasonable expenses and attorneys fee for audit call  
22 records from discovery.

23 And then same date for DISH to submit the  
24 attorney's fees for the additional deposition and  
25 the original deposition of Mr. Stauffer.

1 December 5, 2016, is the deadline to object to  
2 requests for attorneys' fees and expenses.

3 I will give you a written order with all of  
4 those dates in place. And if you do have a problem  
5 with them, I will allow you to object, and we'll  
6 have another phone conference.

7 Did you get the document that Mr. Lee was  
8 referring to, Diane?

9 THE CLERK: That's what I gave to you,  
10 Judge.

11 THE COURT: Did we lose someone? We lost  
12 the government. Well, that's one way to deal with  
13 the exhibits.

14 Mr. Isaac, you didn't get to do much during the  
15 trial, would you like to make the objections?

16 MR. ISAAC: I'm not prepared, Your Honor.

17 THE COURT: You don't want to hold up the  
18 demonstrative exhibit?

19 MR. ISAAC: I can do that.

20 THE COURT: I will tell you that some of  
21 the categories were objections to demonstrative  
22 exhibits. And because this was a bench trial and  
23 these were shown in record, I want them admitted on  
24 the record. They were demonstrative exhibits and  
25 they are being admitted for that purpose.

1           And quite frankly, because they were very  
2 helpful. Both sides' exhibits. And, you know, if  
3 we are going to have an appeal in this case, I think  
4 the Appellate Court--having been on an appellate  
5 court--it's good to have whatever the trial court  
6 saw in front of it.

7           So we will go through them as soon as we get  
8 the government back on.

9           (A discussion was held off the record.)

10           THE COURT: Is there any objection to us  
11 having the government by phone, at least from the  
12 people here?

13           MR. BICKS: No, Your Honor.

14           THE COURT: And not from the states?

15           MS. BLACKSTON: No, Your Honor.

16           MS. OHTA: No objection, Your Honor.

17           THE CLERK: They're still trying to get it  
18 back. They think the time difference, that it timed  
19 out on their end. So they need someone to lengthen  
20 it there.

21           THE COURT: What time is it there?

22           THE CLERK: It would be 3:15.

23           (A discussion was held off the record.)

24           THE COURT: Well, we do have at least the  
25 basis of the objection. Why don't we have -- do we

1 have Mr. Runkle's direct line? His cellphone?

2 MR. ISAAC: I think we can try to get them.

3 MS. BLACKSTON: We've got a conference call  
4 line that we can use if that would help, Your Honor.  
5 It sounds like you're trying to do the video.

6 THE CLERK: No, I'm trying to do a  
7 telephone line. But I'm asking them for a telephone  
8 number to call in the room. I don't know if a  
9 cellphone would pick up everyone or not. But any  
10 phone is going to do right now, even if it is just  
11 him putting his cellphone on speaker.

12 As long as I have a number I can dial through  
13 the annex and it will go through the system.

14 They do think -- they set the cut off time for  
15 an hour and it cut off at an hour, which was 3:15  
16 their time. So I think it cut off too soon.

17 MS. BLACKSTON: Would it work if they call  
18 here?

19 THE CLERK: I can give them the second line  
20 and then I would answer. Either way. I can dial  
21 them or they can dial in to us.

22 THE COURT: Mr. Isaac, do you know, are  
23 plaintiffs' objections new objections that have  
24 never been stated on the record?

25 MS. BLACKSTON: I really -- we didn't

1 really coordinate very much on this.

2 THE COURT: Okay.

3 MS. BLACKSTON: I really wouldn't want to  
4 make a representation about it, Your Honor.

5 MR. EWALD: Your Honor, this is John Ewald.  
6 I can't say that every single objection that's  
7 contained in what plaintiffs' just sent you had  
8 previously been communicated to us, but during the  
9 pre-trial process they did assert a number of  
10 objections to these documents. And my assumption is  
11 it is the same, or something less, than what they  
12 previously asserted. I just can't say for sure.

13 MS. ECHTMAN: So it should be embodied in  
14 the final pre-trial order. But they may have  
15 expanded their objections.

16 THE COURT: That's what my question was  
17 aimed at. That's what I was afraid of. Thank you,  
18 Mr. Ewald.

19 Let me address one question I have on your  
20 list. DTX323. Diane has made a notation that this  
21 was not on the exhibit list that was tendered to the  
22 Court.

23 MR. EWALD: Your Honor, I believe now that  
24 we did provide a copy to Diane. The story on that  
25 one: On an earlier draft version of the exhibit

1 list that we gave to plaintiffs on November 2nd, it  
2 was on there. And then inadvertently admitted.

3 It is one of the consent-related complaints  
4 that we actually did append to the appendix in  
5 opposition to the motion in limine that you denied  
6 that plaintiffs had filed.

7 So plaintiffs have been aware of it, but it did  
8 not end up inadvertently on the final list that was  
9 filed with the Court.

10 THE COURT: So it's not a surprise?

11 MR. RUNKLE: Can you hear us?

12 THE CLERK: Can you hear us just fine.

13 THE COURT: All right. So the plaintiffs  
14 are now either present by video or by telephone.

15 We were just discussing Defendant's 323. We  
16 have been -- not discussing the exhibits, we've just  
17 been chitchatting trying to get you back on the  
18 phone. But I asked why 323 was not on the exhibit  
19 list that was tendered to the Court. And it has  
20 just been explained that it was actually on the  
21 November disclosure to the plaintiffs, so that this  
22 wasn't a surprise to the plaintiffs. Is that  
23 correct, Mr. Runkle?

24 MR. LEE: This is Mr. Lee, Your Honor. I  
25 believe that's correct. So we do have -- and they

1 provided the document to us earlier in -- this  
2 afternoon, so we've had a chance to look at it. And  
3 it's one of the -- it's a complaint, I believe,  
4 filed by the United States against a particular  
5 company. And so there's a category -- there's a set  
6 of those documents in the one actually that the  
7 court has already ruled on that I believe it belongs  
8 to. So we don't think -- there's not an issue there  
9 in terms of the disclosure.

10 THE COURT: Okay. Why don't you give me  
11 then the category of -- I'm not sure if it's  
12 category of documents or category of objections that  
13 you're going to catalogue for me?

14 MR. LEE: Well, there's just a couple of  
15 things that I wanted to highlight for the Court.

16 And one is there are a set of documents --  
17 excuse me, of exhibits that DISH identified that are  
18 printouts of websites. I can give you the DX  
19 numbers. And we believe there's no basis in  
20 evidence for those documents to come in. There's no  
21 hearsay exception that would allow website printouts  
22 to come in. So we would like to highlight that for  
23 the Court.

24 They are DTX192. DTX791. DTX834. DTX--

25 THE COURT: Hold, hold on, hold on.



1 MR. LEE: Sorry.

2 THE COURT: Okay. 834, and then what?

3 MR. LEE: DTX912. DTX913. DTX914. And  
4 DTX979.

5 THE COURT: Mr. Bicks, who's going to  
6 handle your response to the objections?

7 MR. BICKS: Mr. Ewald is going to handle  
8 that.

9 MR. EWALD: At least some of them.

10 Your Honor, I think they fall into a couple  
11 different categories, but in general, they are  
12 similar to other documents that have been admitted  
13 in trial to make the record full.

14 One of those I believe is --

15 MR. RUNKLE: We're back.

16 THE COURT: You are?

17 That didn't last long.

18 MR. EWALD: Your Honor, they cover a wide  
19 range. One, I believe, is actually from the FTC  
20 website relating to --

21 THE CLERK: Hold on, I'm not sure -- are  
22 they back by video? Because the phone hung up. So  
23 I don't have them if they're not by video.

24 Mr. Runkle, Mr. Lee?

25 MR. LEE: Yes.

1 THE CLERK: If you would speak so the video  
2 will go to you so we can see that you're there.

3 MR. RUNKLE: Can you hear us?

4 THE COURT: We can hear you, we cannot see  
5 you. Can you hear them, Mr. Bicks?

6 MR. BICKS: I can hear them, but not see  
7 them.

8 MR. RUNKLE: We can see you.

9 THE COURT: You're back.

10 Now, we're going to go through this quickly  
11 because I don't want to be cut off again.

12 Mr. Ewald, please continue with your objection.  
13 Actually, with your response to their objection.

14 MR. EWALD: Your Honor, they cover a couple  
15 different things.

16 One, 791 is Fitch ratings for DISH Network.  
17 It's something we wanted to offer to the Court with  
18 ability to pay argument.

19 We also included a number of articles related  
20 to recent settlements; GM settlement 834; that we  
21 thought would be helpful to the Court in deciding  
22 the penalty question.

23 And then some articles about DISH's background,  
24 and that goes on for the testimony of -- of  
25 Mr. DeFranco, that we thought would be helpful to

1 the Court.

2 THE COURT: Helpful to the Court. An  
3 evidentiary ruling?

4 MR. RUNKLE: Your Honor, there's no basis  
5 in evidence to admit printouts from websites. None  
6 of these are from the FTC website. A lot of these  
7 are just fluff from websites about how great DISH  
8 Network is. I just don't see how any conceivable  
9 interpretation of the Rules of Evidence could let in  
10 an article about a proposed settlement from the  
11 Forbes website about some settlement the government  
12 might or might not be entering into. But this --  
13 there's no basis in evidence for this.

14 THE COURT: I'm in a bit of quandary.  
15 Judge Posner has, as we've discussed, used the  
16 internet and websites in deciding case. In the  
17 attorney fee case I just read, however, he  
18 criticized the trial court for using the Consumer  
19 Price Index and another matrix that are regularly  
20 used. Because both sides didn't have the  
21 opportunity to see them. The Court did the research  
22 on its own in that case.

23 But I'm going to admit them over objection.

24 So 192 defendant is admitted. 791, 834, 912,  
25 913, 914, 979, are all admitted.

1           Next category?

2           MR. LEE: Next category, Your Honor, are  
3 the demonstratives that DISH's lawyers prepared and  
4 used during the trial presentation. While we  
5 understand the Court would not be confused as to  
6 whether these are substantive evidence, we don't  
7 believe the Federal Rules of Evidence permit these  
8 to actually be admitted as substantive evidence in  
9 this case.

10           MR. RUNKLE: And, Your Honor, there's a 7th  
11 Circuit case from 2013 that Judge Hamilton wrote  
12 that actually discusses this exact issue. And says  
13 that demonstratives, while they might be helpful to  
14 the jury or the Court, are not to be admitted into  
15 evidence.

16           So we don't have any problem with the Court  
17 considering the demonstratives, obviously, but they  
18 should not be admitted as substantive pieces of  
19 evidence. And I can give Your Honor the cite for  
20 that. I don't believe that the plaintiffs have  
21 actually admitted into evidence, or marked with a PX  
22 number, any of the demonstratives.

23           I can give Your Honor a cite for that case, but  
24 it's just black letter law. They can't be admitted  
25 into evidence.

1 THE COURT: They're admitted as  
2 demonstrative exhibits, not as substantive evidence.

3 I know there was a problem with one of my  
4 favorite timelines, that Mr. Runkle, you put Post-It  
5 notes on, and it did not get preserved. Can you  
6 possibly recreate the Post-It notes that you had on  
7 that timeline and submit those to the Court?

8 MR. RUNKLE: I can. I don't know if I can  
9 put that magic back into a bottle, but I can try.

10 THE COURT: Do your best. I know without  
11 you walking over to the board to put the Post-It on  
12 it it won't have quite the flare.

13 So that's DTX 23, 24, 24A, 25, 26, 27, 28, 29,  
14 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42,  
15 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55,  
16 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68,  
17 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 1080,  
18 1081 and 1082.

19 As long as we're on this last page, there are  
20 no objections to those last five, which I've already  
21 marked as admitted on the defendant's sheet. They  
22 were plaintiffs.

23 Okay. Next category?

24 MR. LEE: The other -- next category are  
25 the settlements and complaints that United States

1 has filed against various companies, including those  
2 that were related to DISH Network.

3 I know the Court has already ruled on them. We  
4 just, again, want to highlight the fact that these  
5 are not very probative on this issue because those  
6 cases were all settled prior to litigation, while  
7 this case, obviously, has gone through serious  
8 discovery, as well as at trial and -- on the merits.  
9 So we just wanted to highlight that for the Court.

10 I don't know if you would like us to go through  
11 the DTX numbers or --

12 MR. RUNKLE: She has them.

13 MR. EWALD: Your Honor, I'm not clear from  
14 the sheet which ones that falls into. I can go  
15 through each of them if you would like.

16 THE COURT: Go ahead.

17 MR. EWALD: DTX293. DTX294. DTX295.  
18 DTX296. DTX297. DTX298. DTX299. DTX300. DTX301.  
19 DTX302. DTX303. DTX304. DTX305. DTX306. DTX307.  
20 DTX308. DTX310. DTX311. DTX312. DTX313. DTX317.  
21 DTX318. DTX323. DTX324. DTX325. DTX326. DTX327.

22 Hold on, there's a jump. DTX619. DTX620.  
23 DTX621. DTX622. DTX623. DTX624. DTX625. DTX684.  
24 DTX685. DTX686. DTX687. DTX712. ZDTX713.  
25 DTX714. DTX715. DTX716. DTX717. DTX718. DTX719.

1 DTX720. DTX721. DTX722. DTX723. DTX724. DTX725.  
2 DTX726. DTX727. DTX728. DTX729. DTX730. DTX731.  
3 DTX732. DTX733. DTX734. DTX735. DTX736. DTX834,  
4 which I believe has already been admitted. DTX863.  
5 And DTX864.

6 THE COURT: Diane, was 834 previously  
7 admitted?

8 THE CLERK: They just -- that was on that  
9 website exhibits, Your Honor, he just admitted.

10 THE COURT: All right. Did you mean to  
11 skip 651?

12 MR. EWALD: I'm sorry. Your Honor, that  
13 would fall in a different category.

14 THE COURT: A different category, is that  
15 what you said?

16 MR. EWALD: Yes.

17 THE COURT: Okay. We seem to have a  
18 defective podium up here. It throws my paper on the  
19 floor.

20 All right. Next category?

21 Those are admitted over objection.

22 MR. LEE: Your Honor, for the remaining  
23 exhibits that are identified in this spreadsheet, we  
24 just wanted to stand on the objections identified  
25 there. I don't think we need to go through the

1 arguments about them at this point.

2 THE COURT: All right. So going back to  
3 the first page of defendant's, I'm going to show the  
4 following admitted.

5 This is defendant's. 10, 13, 49, 71, 97, 99,  
6 109, 179, 180, 182, 183, 185, 192, 215, 216, 228,  
7 229, 246.

8 Then on the top of the page, 337, 338, 340,  
9 348, 351, 352, 361, 394, 399, 403, 437, 463, 466,  
10 475, 477, 498, 525, 572, 651.

11 741, on the next page, 745, 749, 754, 755, 757,  
12 791, 815, 817, 819, 822, 823, 828, 830, 831, 832,  
13 833, 852, 864, 912, 913, 914, 916, 917, 918, 919,  
14 921, 922, 923, 924, 925, 926, 931, 936, 937, 939.

15 On the last page, 941, 943, 945, 952, 958, 961,  
16 965, 966, 979, 1001, 1002, 1003, 1004, 1005.

17 1001A -- I'm sorry. 1002A, 1002B, 1003A,  
18 1004A, 1004B, and 1005A.

19 Does that take care of the admission of all of  
20 the exhibits, Mr. Ewald?

21 MR. EWALD: Yes, I think it does, Your  
22 Honor. We're just double checking, but it looks  
23 good from our end.

24 THE COURT: Mr. Runkle. Mr. Lee.

25 MR. LEE: Your Honor, this is --



1           Yes, I just wanted to highlight a couple of  
2 things. For the 1001A, 1002A, 1002B, 1003A, 1004A  
3 and 1004B, and 1005A, those are demonstratives.  
4 Those were sort of highlighted parts of the  
5 underlying exhibit that was used during Dr.  
6 Abernethy's testimony. I just wanted to highlight  
7 that for the Court.

8           THE COURT: So those are the ones that we  
9 actually captured pictures of and they are admitted  
10 only as demonstrative exhibits, 1001A through 1005A.

11           MR. LEE: Thank you, Your Honor.

12           THE COURT: Thank you for noting that,  
13 Mr. Lee.

14           I will send you a written order with the  
15 scheduling, as I said before. If you have  
16 objections, be sure and state them.

17           Closing arguments need to be scheduled. How do  
18 you wish to proceed with closing arguments?

19           Mr. Runkle, do you wish to do simultaneous  
20 briefs?

21           MR. RUNKLE: I think simultaneous briefs  
22 would be appropriate. We would ask for two weeks  
23 for -- two weeks from today, or thereabouts.

24           THE COURT: Today is the 17?

25           MR. RUNKLE: One thing we wanted to address

1 before that. In response to Your Honor's rulings  
2 today, we actually have two additional documents we  
3 wanted the Court to consider. I think it would be  
4 easier to go through those now. I think we just  
5 sent them to DISH and the Court.

6 One is PX1437, is a complaint the FTC filed.  
7 It's the first do not call enforcement action that  
8 the FTC filed. It was in April of 2004.

9 The second is a website article in response to  
10 DISH's website articles about itself. We have our  
11 own website article we found about DISH that we  
12 would like the Court to consider. That is going to  
13 be PX1438. We just sent those to the Court and to  
14 DISH.

15 MS. OHTA: Your Honor, California would  
16 like to request one additional week for the closing  
17 arguments.

18 THE COURT: So you're asking for three  
19 weeks? Is that what you mean, Ms. Ohta?

20 MS. OHTA: If that's okay with you, Your  
21 Honor.

22 THE COURT: You're always so polite.  
23 I'll give all parties three weeks. Which would  
24 make it March 9th. Simultaneous briefs.

25 And is there any objection, Mr. Ewald, to

1 PX1437 and 38?

2 MS. ECHTMAN: We haven't gotten them yet.

3 MR. EWALD: We haven't received the e-mail  
4 yet.

5 I think Mr. Bicks has one comment he wants to  
6 make. We will review the documents.

7 MS. ECHTMAN: We also want to move in which  
8 designated depositions we will be using. So we have  
9 a list of those, to make sure we get to the  
10 housekeeping. But I will let Mr. Bicks respond to  
11 the time.

12 MR. BICKS: Your Honor, my only observation  
13 was since it was the plaintiffs who have the burden  
14 and are going first, I thought it would be fair for  
15 us to have an opportunity to respond to their  
16 argument, rather than have it simultaneous.

17 THE COURT: Well, we were all here  
18 together, so I want simultaneous briefing. I'm  
19 going to allow you to respond to each other's  
20 arguments also.

21 Two weeks from that. Which would make it what?

22 THE CLERK: The 23rd.

23 THE COURT: Just because I haven't had  
24 enough to read in this case.

25 So next, Mr. Ewald?

1 MS. ECHTMAN: Your Honor, the website  
2 article is DISH Network, the Meanest Company in  
3 America. I don't think that's necessary or relevant  
4 to this case. It seems more like tit for tat to try  
5 and put that in.

6 And then the other one Mr. Ewald tells me is  
7 fine.

8 THE COURT: May I see it?

9 MS. ECHTMAN: 1438 we object to.

10 MR. RUNKLE: Your Honor, if you let them  
11 put in an article about how they are the most  
12 innovative company in America, we certainly are  
13 entitled to put in a Business Week article about how  
14 DISH is the meanest company in America.

15 THE COURT: The objection is overruled. I  
16 will admit both 1437 and 1438.

17 And I'm going to hand write them on this last  
18 list that was submitted by defendants. It's  
19 obviously Plaintiffs' exhibits and plaintiffs'  
20 motion.

21 Ms. Echtman.

22 MS. ECHTMAN: John Ewald has another  
23 exhibit.

24 MR. EWALD: These are additional DTX  
25 numbers that were treated as demonstratives. They

1 were cross exhibits previously with DX numbers, and  
2 we want to move them into evidence.

3 THE COURT: They're not on your list?

4 MR. EWALD: DX -- they are on the list?

5 MS. ECHTMAN: I believe they were treated  
6 all as demonstrative, but they're actually  
7 substantive articles.

8 MR. EWALD: Yes, from Mr. Abernethy.

9 MR. BOYLE: Yeah, so --

10 MR. EWALD: These are actually substantive  
11 evidence that were on cross. They were CX numbers  
12 that we would move in. They're on our list, but  
13 they didn't fall under the number of the  
14 demonstrative exhibits.

15 So those are DTX1018. DTX1019. DTX1020.  
16 DTX1021. And DTX1022.

17 THE COURT: Okay. So for clarity, these  
18 are being admitted as substantive evidence?

19 MR. EWALD: Yes, Your Honor.

20 THE COURT: All right. Those are admitted.

21 MR. LEE: Over objection, Your Honor.

22 THE COURT: Over your objection.

23 Okay. Then, Your Honor, we --

24 MS. ECHTMAN: Then DISH is going to be  
25 proffering the following designated depositions,

1 which have already been submitted to the Court.

2 Kevin Baker taken May --

3 THE COURT: Hold on. There's too much  
4 rattling of paper. We can't hear you. You said  
5 Kevin Baker?

6 MS. ECHTMAN: Kevin Baker, who was the  
7 principal of Guardian Communications, from May 14,  
8 2012.

9 David Hagan of Dish TV Now from January 12,  
10 2012.

11 Bahar Tehranchi, August 26th, 2013. That was  
12 taken in the Donaca case. And it's addressed in the  
13 briefing, the trial briefing before the Court.

14 Marciedes Metzger, March 17, 2011.

15 John Krebs, May 9, 2012.

16 David Laslo, March 4, 2011.

17 Nicholas Mastrocinque. That's two transcripts  
18 from December 6th and 7th, 2011.

19 David Torok, April 5, 2012.

20 Kelly Horne, May 8, 2012.

21 Kathy French, August 22, 2012.

22 Linda Miller Lavenda, September 6, 2012.

23 And Amy Dziekan, February 15, 2012.

24 THE COURT: I missed Linda Miller's last  
25 name.

1 MS. ECHTMAN: Lavenda, L-a-v-e-n-d-a.

2 MR. RUNKLE: Her name is Linda Miller. Her  
3 middle name is Lavenda.

4 MS. ECHTMAN: Thank you for that  
5 correction.

6 THE COURT: All right. So those will be  
7 admitted and I will rule on those objections as we  
8 get to those.

9 MR. RUNKLE: Your Honor, there were two  
10 issues with those that were covered in the pre-trial  
11 brief.

12 Bahar Tehranchi. The plaintiffs were not  
13 present at that deposition. So under Rule 32 it  
14 can't be used. DISH argued there is some exception  
15 to that rule, but the rule is pretty categorical  
16 that a deposition at which a party is not present  
17 can't be used against that party. So I would object  
18 to that. I understand you can, you know, consider  
19 that.

20 The other one is Linda Lavenda Miller. Dish  
21 didn't prove that Ms. Miller was not present in the  
22 Central District of Illinois. I don't know if she  
23 is amenable to service of process or not. Her  
24 deposition was take in Chicago, and it was a  
25 30(b)(6) of ATT Government Solutions, which I also

1 believe is a company present in Illinois.

2 So I think we objected in the trial brief to  
3 DISH using that deposition without making a  
4 determination of whether Ms. Miller would actually  
5 be able to come to the trial, whether she was  
6 present in the Central District of Illinois, whether  
7 AT&T Government Solutions was amenable to service  
8 and process in Springfield, which I believe it was.

9 So those are the two depositions I would object  
10 to DISH attempting to use.

11 MS. ECHTMAN: So, Your Honor, on the first  
12 issue, we briefed it. And the rule is if you have  
13 someone that is prefaced with the same interest as  
14 the plaintiffs here, that they cannot claim that  
15 it's -- it can't be used, and that's addressed in  
16 our brief.

17 On the second issue. I don't recall that  
18 particular issue being raised as to the location of  
19 Ms. Miller. We can certainly investigate her  
20 location. But I do know that Chicago, Illinois, is  
21 beyond 100 miles from the courthouse. So the fact  
22 that she appeared in Chicago does not mean that she  
23 was within the subpoena power.

24 And we also addressed all the issues about  
25 whether a non-party's 30(b)(6) can be used in the



1 context of the briefing that was done prior to  
2 trial.

3 THE COURT: All right. I'm glad you  
4 re-raised those objections. I will rule on those  
5 objections before I read the depositions. And  
6 before I rule on the objections in the depositions.

7 All right.

8 MR. EWALD: Your Honor, there's one other  
9 housekeeping matter I want to make sure of.  
10 Plaintiffs were responsible for providing the  
11 transcripts of the deposition designations to the  
12 Court. And at last look we had, the transcript of  
13 Walter Eric Myers had been inadvertently admitted.  
14 I'm not sure if the plaintiffs have since provided  
15 that. I just want to make sure you have it.

16 MS. HSIAO: Your Honor, we did provide it.  
17 It should be on the Court's hard drive.

18 THE COURT: So do you wish me to --

19 MR. RUNKLE: I believe the very final issue  
20 would have been the Fenili designations. Did we go  
21 over that?

22 MR. BOYLE: I just got the e-mail. I  
23 haven't even looked at the designations. I think  
24 you indicated you would be amenable to  
25 counter-designations sometime next week, as read the

1 e-mail briefly before I walked in this conference  
2 room.

3 MR. RUNKLE: I just wanted to raise that as  
4 one outstanding minor item.

5 THE COURT: I will put that on my list.

6 So is there any problem with the Eric Myer  
7 deposition being considered?

8 MR. RUNKLE: No.

9 THE COURT: All right. Anything else we  
10 can take care of today?

11 No? Nothing from the plaintiffs?

12 What about from the defense?

13 MR. BICKS: No, Your Honor. Obviously  
14 we'll -- we will review the order and get back to  
15 the Court on our thoughts about, you know, the  
16 additional discovery and -- as we've discussed.

17 MS. OHTA: And, Your Honor, as we  
18 forecasted for the Court during the last day of  
19 trial that was conducted in Springfield, the states  
20 will be filing a motion with the Court for sanctions  
21 regarding some of the address and -- the address and  
22 residential information that was not produced  
23 pursuant to discovery requests and Court orders.

24 THE COURT: Yes, I understand that.  
25 Anything else?

1 All right. Court is adjourned.

2 (Court was adjourned in this matter.)

3  
4 I, KATHY J. SULLIVAN, CSR, RPR, Official Court  
5 Reporter, certify that the foregoing is a correct  
6 transcript from the record of proceedings in the  
7 above-entitled matter.

8  
9  
10  
11  
12 This transcript contains the  
13 digital signature of:

14  
15 Kathy J. Sullivan, CSR, RPR  
16 License #084-002768  
17  
18  
19  
20  
21  
22  
23  
24  
25

KATHY J. SULLIVAN, CSR, RPR, CRR  
OFFICIAL COURT REPORTER

JA016436  
015157