IN THE SUPREME COURT OF THE STATE OF NEVADA

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

Appellants,

vs.

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

Respondents.

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Elizabeth A. Brown
Clerk of Supreme Court

Supreme Court No. 81704

District Court No.
A-17-763397-B

JOINT APPENDIX
Vol. 73 of 85
[JA016687-JA016874]

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

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

EXHIBIT 788

EXHIBIT 788

From: Mills, Mike
Sent: Thursday, May 17, 2007 10:51:01 AM
To: Werner, Bruce
Subject: RE: Subscriber Growth

OE – about 12k. Can't speak the retailer base as a whole but if I had to guess I'd say about 20k.

Mike Mills
National Sales Manager
303.723.2865
mike.mills@echostar.com

From: Werner, Bruce
Sent: Thursday, May 17, 2007 8:46 AM
To: Mills, Mike
Subject: Subscriber Growth

Mike I'm trying to answer to answer the following question:

Echostar Retailers that use outbound telemarketing as a primary strategy for acquiring new subscribers add **how many** gross additions per month.

Bruce M. Werner
General Manager of Risk in Retail Services
720.514.5745

CONFIDENTIAL - SUBJECT TO ATTORNEY / CLIENT AND WORK PRODUCT PRIVILEGES

PENGAD 800-631-6989
U.S., et al. v. Dish Network L.L.C.
Plaintiff's Exhibit
PX0129

EXHIBIT 789

EXHIBIT 789

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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. PLANET EARTH SATELLITE, INC., also doing business as TEICHERT MARKETING, and THOMAS TEICHERT, individually and as an officer of PLANET EARTH SATELLITE, INC., Defendants.	Case No.: 2-08-CV-1274 STIPULATED JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

Plaintiff, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or the "Commission"), has commenced this action by filing the complaint herein, and defendants Planet Earth Satellite, Inc., and Thomas Teichert, have waived service of the summons and complaint. Plaintiff, and the above-named Defendants, have agreed to settlement of this action.

THEREFORE, on the joint motion of the parties, it is hereby **ORDERED, ADJUDGED AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and 15 U.S.C. §§

45(m)(1)(A), 53(b), 56(a), and 57b.

2. Plaintiff, and Defendants consent to jurisdiction and venue in this District.

3. The activities of Defendants are in or affecting commerce, as defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. The complaint states a claim upon which relief may be granted against Defendants under Sections 5(a), 5(m)(1)(A), 13(b), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b.

6. Defendants have entered into this Stipulated Judgment and Order for Permanent Injunction ("Order") freely and without coercion. Defendants further acknowledge that they have read the provisions of this Order and are prepared to abide by them.

7. Defendants hereby waive all rights to appeal or otherwise challenge or contest the validity of this Order.

8. Defendants have agreed that this Order does not entitle Defendants to obtain attorneys' fees as a prevailing party under the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, and Defendants further waive any rights to attorneys' fees that may arise under said provision of law.

9. Entry of this Order is in the public interest.

DEFINITIONS

For the purpose of this Order, the following definitions shall apply:

1. "Asset" means any legal or equitable interest in, or right or claim to, any real or personal property, including without limitation, chattels, goods, instruments, equipment, fixtures, general intangibles, leaseholds, mail or other deliveries, inventory, checks, notes, accounts, credits, contracts, receivables, shares of stock, and all cash, wherever located.

2. "Customer" means any person who is or may be required to pay for goods or services offered through telemarketing.

3. "Defendants" means Planet Earth Satellite, Inc., and Thomas Teichert.

4. "Established business relationship" means a relationship between the seller and a person based on: (a) the person's purchase, rental, or lease of the seller's goods or services or a financial transaction between the person and seller, within the eighteen (18) months immediately preceding the date of the telemarketing call; or (b) the person's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

5. "National Do Not Call Registry" means the National Do Not Call Registry maintained by the Federal Trade Commission pursuant to 16 C.F.R. § 310.4(b)(1)(iii)(B).

6. "Outbound telephone call" means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

7. "Person" means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

8. "Representatives" means Defendants' successors, assigns, officers, agents, servants, employees, and those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise.

9. "Seller" means 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, whether or not such person is under the jurisdiction of the Federal Trade Commission.

10. "Telemarketer" means any person who, in connection with

telemarketing, initiates or receives telephone calls to or from a customer or donor.

11. "Telemarketing" means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

12. The "Telemarketing Sales Rule" or "Rule" means the FTC Rule entitled "Telemarketing Sales Rule," 16 C.F.R. § 310, attached hereto as Appendix A, or as it may be amended.

ORDER

I. PROHIBITION AGAINST ABUSIVE TELEMARKETING PRACTICES

IT IS ORDERED that, in connection with telemarketing, Defendants and their Representatives are hereby permanently restrained and enjoined from engaging in, causing other persons to engage in, or assisting other persons to engage in, violations of the Telemarketing Sales Rule, including but not limited to:

A. Initiating any outbound telephone call to any person at a telephone number on the National Do Not Call Registry unless the seller proves that:

1. the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or

2. the seller has an established business relationship with such person and that person has not previously stated that he or she does not wish to receive outbound telephone calls made by or on behalf of the seller; or

B. Initiating any outbound telephone call to a person when that person has previously 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 or made by or on behalf of the charitable organization for which a charitable contribution is being solicited; or

C. Initiating any outbound telephone call to a telephone number within a given area code without first paying the required annual fee for access to the telephone numbers within that area code that are on the National Do Not Call Registry; and

D. Abandoning any outbound telephone call to a person by failing to connect the call to a live operator within two seconds of the person's completed greeting, unless the following four conditions are met:

1. Defendants or their Representatives employ technology that ensures abandonment of no more than three percent of all calls answered by a person, measured per day per calling campaign;

2. Defendants or their Representatives, for each telemarketing call placed, allow the telephone to ring for at least fifteen seconds or four rings

before disconnecting an unanswered call;

3. Whenever a live operator is not available to speak with the person answering the call within two seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed; and

4. Defendants retain records, in accordance with 16 C.F.R. § 310.5 (b)-(d), establishing compliance with the preceding three conditions.

Provided, however, that if the Commission promulgates any rule that modifies or supersedes the Telemarketing Sales Rule, in whole or part, Defendants shall comply fully and completely with all applicable requirements thereof, on and after the effective date of any such rule.

II. CIVIL PENALTY

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Seven Million, Ninety Four Thousand, Three Hundred Fifty Four Dollars ($7,094,354) is hereby entered against Defendants Planet Earth Satellite, Inc., and Thomas Teichert as a civil penalty, pursuant to Section 5(m)(1)(A) of the Federal Trade Commission Act, 15 U.S.C. § 45(m)(1)(A). Based upon Defendants' sworn representations in financial statements provided to the Commission, full payment for the foregoing is suspended except for Twenty Thousand Dollars ($20,000), contingent upon the accuracy and completeness of the financial statements as set forth in subparagraph E and F of this Paragraph.

B. Within five (5) days of receipt of notice of the entry of this Order, Defendants Planet Earth Satellite, Inc., and Thomas Teichert, shall transfer a total of Twenty Thousand Dollars ($20,000) in the form of a wire transfer or certified or cashier's check made payable to the Treasurer of the United States. The check or written confirmation of the wire transfer shall be delivered to: Director, Office of

Consumer Litigation, U.S. Department of Justice Civil Division, P.O. Box 386, Washington, DC 20044. The cover letter accompanying the check shall include the title of this litigation and a reference to DJ# 102-3466. Such transfer by Defendants shall constitute partial satisfaction of the judgment against the Defendants.

C. Defendants shall cooperate fully with Plaintiff and the Commission and its agents in all attempts to collect the amount due pursuant to this Paragraph if Defendants fail to pay fully the amount due at the time specified herein. In such an event, Defendants agree to provide Plaintiff and the Commission with their federal and state tax returns for the preceding two years, and to complete new standard-form financial disclosure forms fully and accurately within ten (10) business days of receiving a request from Plaintiff or the Commission to do so. Defendants further authorize Plaintiff and the Commission to verify all information provided on the financial disclosure forms provided by Defendants with all appropriate third parties, including but not limited to financial institutions.

D. Upon payment by Defendants as provided in subparagraph B of this Paragraph, the remainder of the judgment against the Defendants shall be suspended subject to the conditions set forth in subparagraph E and F of this Paragraph.

E. Plaintiff's agreement to this Order is expressly premised upon the truthfulness, accuracy, and completeness of Defendants' sworn financial statements and supporting documents submitted to the Commission and dated February 20, 2007, and August 15, 2007, all of which include material information upon which Plaintiff relied in negotiating and agreeing to this Order.

F. If, upon motion by Plaintiff, this Court finds that Defendants failed to disclose any material asset, materially misrepresented the value of any asset, made any other material misrepresentation or omission in the sworn financial statements described above, then this Order shall be reopened and ans suspension of the judgment shall be lifted for the purpose of requiring payment of a civil penalty in the full amount of the judgment ($7,094,354) by any Defendant who made such material misstatement or omission, less the sum of all amounts paid to the Treasurer of the United States pursuant to subparagraph B of this Paragraph. Provided, however, that in all other respects this Order shall remain in full force and effect, unless otherwise ordered by the Court.

G. In accordance with 31 U.S.C. § 7701, Defendants are hereby required, unless they have done so already, to furnish to Plaintiff and the FTC their taxpayer identifying number(s) (social security numbers or employer identification numbers) which shall be used for purposes of collecting and reporting on any delinquent amount arising out of Defendants' relationship with the government.

H. Defendants agree that the facts as alleged in the complaint filed in this action shall be taken as true in any subsequent litigation filed by Plaintiff or the Commission to enforce their rights pursuant to this Order, including but not limited to a nondischargeability complaint in any subsequent bankruptcy proceeding.

I. Proceedings instituted under this Paragraph are in addition to, and not in lieu of, any other civil or criminal remedies as may be provided by law, including any other proceedings that the Plaintiff may initiate to enforce this Order.

III. RECORD KEEPING PROVISIONS

IT IS FURTHER ORDERED that for a period of five (5) years from the date of entry of this Order, Defendants, and their successors and assigns, shall maintain and make available to the Plaintiff or Commission, within seven (7) days of the receipt of a written request, business records demonstrating compliance with the terms and provisions of this Order.

IV. DISTRIBUTION OF ORDER BY DEFENDANTS AND ACKNOWLEDGMENTS OF RECEIPT

IT IS FURTHER ORDERED that Defendants, and their successors and assigns, shall within thirty (30) days of the entry of this Order, provide a copy of this Order with Appendix A to all of their owners, principals, members, officers, and directors, as well as managers, agents, servants, employees, and attorneys having decision-making authority with respect to the subject matter of this Order; secure from each such person a signed statement acknowledging receipt of a copy of this Order; and shall, within ten (10) days of complying with this Paragraph, file an affidavit with the Court and serve the Commission, by mailing a copy thereof, to the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, setting forth the fact and manner of its compliance, including the name and title of each person to whom a copy of the Order has been provided.

V. NOTIFICATION OF BUSINESS CHANGES

IT IS FURTHER ORDERED that each Defendant, and its successors and assigns, shall notify the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, at least thirty (30) days prior to any change in such Defendant's business, including, but not limited to, merger, incorporation, dissolution, assignment, and sale, which results in the emergence of a successor corporation, the creation or dissolution of a subsidiary or parent, or any other change, which may affect such Defendant's obligations under this Order.

VI. NOTIFICATION OF INDIVIDUAL'S AFFILIATION

IT IS FURTHER ORDERED that Defendant Thomas Teichert shall, for a period of five (5) years from the date of entry of this Order, notify Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade

Commission, 600 Pennsylvania Ave., N.W., Washington, D.C. 20580, within thirty (30) days of his affiliation with a new business or employment whose activities include telemarketing or his affiliation with a new business or employment in which his duties involve the sale or offering for sale of satellite programming.

VII. COMMUNICATION WITH DEFENDANTS

IT IS FURTHER ORDERED that for the purposes of compliance reporting, Plaintiff and the Commission are authorized to communicate directly with Defendants.

VIII. FEES AND COSTS

IT IS FURTHER ORDERED that each party to this Order hereby agrees to bear its own costs and attorneys' fees incurred in connection with this action.

IX. SEVERABILITY

IT IS FURTHER ORDERED that the provisions of this Order are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall remain in full force and effect.

X. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for purposes of construction, modification and enforcement of this Order.

XI. COMPLETE SETTLEMENT

The parties hereby consent to entry of the foregoing Order which shall constitute a final judgment and order in this matter. The parties further stipulate and agree that the entry of the foregoing Order shall constitute a full, complete and final settlement of this action.

/ / / /

/ / / /

JUDGMENT IS THEREFORE ENTERED in favor of Plaintiff and against Defendants, pursuant to all the terms and conditions recited above.

IT IS SO ORDERED.

DATED: ________________ ________________________________

UNITED STATES DISTRICT JUDGE

FOR THE DEFENDANTS:

THOMAS TEICHERT, Individually

PLANET EARTH SATELLITE, INC.
by Thomas Teichert, President

OF COUNSEL:

LOIS C. GREISMAN
Associate Director for Marketing Practices

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GARY IVENS
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600 Pennsylvania Ave, N.W.
Washington, DC 20580

Respectfully submitted,
FOR THE UNITED STATES OF AMERICA:

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Appendix A

PART 310—TELEMARKETING SALES RULE

AUTHORITY: 15 U.S.C. 6101–6108.

SOURCE: 68 FR 4669, Jan. 29, 2003, unless otherwise noted.

§310.1 Scope of regulations in this part.

This part implements the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. 6101-6108, as amended.

§310.2 Definitions.

(a) *Acquirer* means a business organization, financial institution, or an agent of a business organization or financial institution that has authority from an organization that operates or licenses a credit card system to authorize merchants to accept, transmit, or process payment by credit card through the credit card system for money, goods or services, or anything else of value.

(b) *Attorney General* means the chief legal officer of a state.

(c) *Billing information* means any data that enables any person to access a customer's or donor's account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

(d) *Caller identification service* means a service that allows a telephone subscriber to have the telephone number, and, where available, name of the calling party transmitted contemporaneously with the telephone call, and displayed on a device in or connected to the subscriber's telephone.

(e) *Cardholder* means a person to whom a credit card is issued or who is authorized to use a credit card on behalf of or in addition to the person to whom the credit card is issued.

(f) *Charitable contribution* means any donation or gift of money or any other thing of value.

(g) *Commission* means the Federal Trade Commission.

(h) *Credit* means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(i) *Credit card* means any card, plate, coupon book, or other credit device existing for the purpose of obtaining money, property, labor, or services on credit.

(j) *Credit card sales draft* means any record or evidence of a credit card transaction.

(k) *Credit card system* means any method or procedure used to process credit card transactions involving credit cards issued or licensed by the operator of that system.

(l) *Customer* means any person who is or may be required to pay for goods or services offered through telemarketing.

(m) *Donor* means any person solicited to make a charitable contribution.

(n) *Established business relationship* means a relationship between a seller and a consumer based on:

(1) the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or

(2) the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

(o) *Free-to-pay conversion* means, in an offer or agreement to sell or provide any goods or services, a provision under which a customer receives a product or service for free for an initial period and will incur an obligation to pay for the product or service if he or she does not take affirmative action to cancel before the end of that period.

(p) *Investment opportunity* means anything, tangible or intangible, that is offered, offered for sale, sold, or traded based wholly or in part on representations, either express or implied, about past, present, or future income, profit, or appreciation.

(q) *Material* means likely to affect a person's choice of, or conduct regarding, goods or services or a charitable contribution.

(r) *Merchant* means a person who is authorized under a written contract with an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(s) *Merchant agreement* means a written contract between a merchant and an acquirer to honor or accept credit cards, or to transmit or process for payment credit card payments, for the purchase of goods or services or a charitable contribution.

(t) *Negative option feature* means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.

(u) *Outbound telephone call* means a telephone call initiated by a telemarketer to induce the purchase of goods or services or to solicit a charitable contribution.

(v) *Person* means any individual, group, unincorporated association, limited or general partnership, corporation, or other business entity.

(w) *Preacquired account information* means any information that enables a seller or telemarketer to cause a charge to be placed against a customer's or donor's account without obtaining the account number directly from the customer or donor during the telemarketing transaction pursuant to which the account will be charged.

(x) *Prize* means anything offered, or purportedly offered, and given, or purportedly given, to a person by chance. For purposes of this definition, chance exists if a person is guaranteed to receive an item and, at the time of the offer or purported offer, the telemarketer does not identify the specific item that the person will receive.

(y) *Prize promotion* means:

(1) A sweepstakes or other game of chance; or

(2) An oral or written express or implied representation that a person has won, has been selected to receive, or may be eligible to receive a prize or purported prize.

(z) *Seller* means 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.

(aa) *State* means any state of the United States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, and any territory or possession of the United States.

(bb) *Telemarketer* means any person who, in connection with telemarketing, initiates or receives telephone calls to or from a customer or donor.

(cc) *Telemarketing* means a plan, program, or campaign which is conducted to induce the purchase of goods or services or a charitable contribution, by use of one or more telephones and which involves more than one interstate telephone call. The term does not include the solicitation of sales through the mailing of a catalog which: contains a written description or illustration of the goods or services offered for sale; includes the business address of the seller; includes multiple pages of written material or illustrations; and has been issued not less frequently than once a year, when the person making the solicitation does not solicit customers by telephone but only receives calls initiated by customers in response to the catalog and during those calls takes orders only without further solicitation. For purposes of the previous sentence, the term "further solicitation" does not include providing the customer with information about, or attempting to sell, any other item included in the same catalog which prompted the customer's call or in a substantially similar catalog.

(dd) *Upselling* means soliciting the purchase of goods or services following an initial transaction during a single telephone call. The upsell is a separate telemarketing transaction, not a continuation of the initial transaction. An "external upsell" is a solicitation made by or on behalf of a seller different from the seller in the initial transaction, regardless of whether the initial transaction and the subsequent solicitation are made by the same telemarketer. An "internal upsell" is a solicitation made by or on behalf of the same seller as in the initial transaction, regardless of whether the initial transaction and subsequent solicitation are made by the same telemarketer.

§310.3 Deceptive telemarketing acts or practices.

(a) *Prohibited deceptive telemarketing acts or practices*. It is a deceptive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Before a customer pays[1] for goods or services offered, failing to disclose

[1] When a seller or telemarketer uses, or directs a customer to use, a courier to transport payment, the seller or telemarketer must make the disclosures required by §310.3(a)(1) before sending a courier to pick up payment or authorization for payment, or *Continued*

truthfully, in a clear and conspicuous manner, the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of the sales offer;[2]

(ii) All material restrictions, limitations, or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer;

(iii) If the seller has a policy of not making refunds, cancellations, exchanges, or repurchases, a statement informing the customer that this is the seller's policy; or, if the seller or telemarketer makes a representation about a refund, cancellation, exchange, or repurchase policy, a statement of all material terms and conditions of such policy;

(iv) In any prize promotion, the odds of being able to receive the prize, and, if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion and that any purchase or payment will not increase the person's chances of winning; and the no-purchase/no-payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate;

(v) All material costs or conditions to receive or redeem a prize that is the subject of the prize promotion;

(vi) In the sale of any goods or services represented to protect, insure, or otherwise limit a customer's liability in the event of unauthorized use of the customer's credit card, the limits on a cardholder's liability for unauthorized use of a credit card pursuant to 15 U.S.C. 1643; and

(vii) If the offer includes a negative option feature, all material terms and conditions of the negative option feature, including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

(2) Misrepresenting, directly or by implication, in the sale of goods or services any of the following material information:

(i) The total costs to purchase, receive, or use, and the quantity of, any goods or services that are the subject of a sales offer;

(ii) Any material restriction, limitation, or condition to purchase, receive, or use goods or services that are the subject of a sales offer;

(iii) Any material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer;

(iv) Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies;

(v) Any material aspect of a prize promotion including, but not limited to, the odds of being able to receive a prize, the nature or value of a prize, or that a purchase or payment is required to win a prize or to participate in a prize promotion;

(vi) Any material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability;

(vii) A seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity;

(viii) That any customer needs offered goods or services to provide protections a customer already has pursuant to 15 U.S.C. 1643; or

(ix) Any material aspect of a negative option feature including, but not limited to, the fact that the customer's account will be charged unless the customer takes an affirmative action to avoid the charge(s), the date(s) the charge(s) will be submitted for payment, and the specific steps the customer must take to avoid the charge(s).

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directing a customer to have a courier pick up payment or authorization for payment.

[2] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the disclosure requirements under the Truth in Lending Act and Regulation Z shall constitute compliance with § 310.3(a)(1)(i) of this Rule.

(3) Causing billing information to be submitted for payment, or collecting or attempting to collect payment for goods or services or a charitable contribution, directly or indirectly, without the customer's or donor's express verifiable authorization, except when the method of payment used is a credit card subject to protections of the Truth in Lending Act and Regulation Z,[3] or a debit card subject to the protections of the Electronic Fund Transfer Act and Regulation E.[4] Such authorization shall be deemed verifiable if any of the following means is employed:

(i) Express written authorization by the customer or donor, which includes the customer's or donor's signature;[5]

(ii) Express oral authorization which is audio-recorded and made available upon request to the customer or donor, and the customer's or donor's bank or other billing entity, and which evidences clearly both the customer's or donor's authorization of payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction and the customer's or donor's receipt of all of the following information:

(A) The number of debits, charges, or payments (if more than one);

(B) The date(s) the debit(s), charge(s), or payment(s) will be submitted for payment;

(C) The amount(s) of the debit(s), charge(s), or payment(s);

(D) The customer's or donor's name;

(E) The customer's or donor's billing information, identified with sufficient specificity such that the customer or donor understands what account will be used to collect payment for the goods or services or charitable contribution that are the subject of the telemarketing transaction;

(F) A telephone number for customer or donor inquiry that is answered during normal business hours; and

(G) The date of the customer's or donor's oral authorization; or

(iii) Written confirmation of the transaction, identified in a clear and conspicuous manner as such on the outside of the envelope, sent to the customer or donor via first class mail prior to the submission for payment of the customer's or donor's billing information, and that includes all of the information contained in §§310.3(a)(3)(ii)(A)-(G) and a clear and conspicuous statement of the procedures by which the customer or donor can obtain a refund from the seller or telemarketer or charitable organization in the event the confirmation is inaccurate; *provided*, however, that this means of authorization shall not be deemed verifiable in instances in which goods or services are offered in a transaction involving a free-to-pay conversion and preacquired account information.

(4) Making a false or misleading statement to induce any person to pay for goods or services or to induce a charitable contribution.

(b) *Assisting and facilitating*. It 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.

(c) *Credit card laundering*. Except as expressly permitted by the applicable credit card system, it is a deceptive telemarketing act or practice and a violation of this Rule for:

(1) A merchant to present to or deposit into, or cause another to present to or deposit into, the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant;

(2) Any person to employ, solicit, or otherwise cause a merchant, or an employee, representative, or agent of the merchant, to present to or deposit into

[3] Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR part 226.

[4] Electronic Fund Transfer Act, 15 U.S.C. 1693 *et seq.*, and Regulation E, 12 CFR part 205.

[5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

the credit card system for payment, a credit card sales draft generated by a telemarketing transaction that is not the result of a telemarketing credit card transaction between the cardholder and the merchant; or

(3) Any person to obtain access to the credit card system through the use of a business relationship or an affiliation with a merchant, when such access is not authorized by the merchant agreement or the applicable credit card system.

(d) *Prohibited deceptive acts or practices in the solicitation of charitable contributions.* It is a fraudulent charitable solicitation, a deceptive telemarketing act or practice, and a violation of this Rule for any telemarketer soliciting charitable contributions to misrepresent, directly or by implication, any of the following material information:

(1) The nature, purpose, or mission of any entity on behalf of which a charitable contribution is being requested;

(2) That any charitable contribution is tax deductible in whole or in part;

(3) The purpose for which any charitable contribution will be used;

(4) The percentage or amount of any charitable contribution that will go to a charitable organization or to any particular charitable program;

(5) Any material aspect of a prize promotion including, but not limited to: the odds of being able to receive a prize; the nature or value of a prize; or that a charitable contribution is required to win a prize or to participate in a prize promotion; or

(6) A charitable organization's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity.

§ 310.4 Abusive telemarketing acts or practices.

(a) *Abusive conduct generally.* It is an abusive telemarketing act or practice and a violation of this Rule for any seller or telemarketer to engage in the following conduct:

(1) Threats, intimidation, or the use of profane or obscene language;

(2) *Requesting or receiving payment* of any fee or consideration for goods or services represented to remove derogatory information from, or improve, a person's credit history, credit record, or credit rating until:

(i) The time frame in which the seller has represented all of the goods or services will be provided to that person has expired; and

(ii) The seller has provided the person with documentation in the form of a consumer report from a consumer reporting agency demonstrating that the promised results have been achieved, such report having been issued more than six months after the results were achieved. Nothing in this Rule should be construed to affect the requirement in the Fair Credit Reporting Act, 15 U.S.C. 1681, that a consumer report may only be obtained for a specified permissible purpose;

(3) Requesting or receiving payment of any fee or consideration from a person for goods or services represented to recover or otherwise assist in the return of money or any other item of value paid for by, or promised to, that person in a previous telemarketing transaction, until seven (7) business days after such money or other item is delivered to that person. This provision shall not apply to goods or services provided to a person by a licensed attorney;

(4) Requesting or receiving payment of any fee or consideration in advance of obtaining a loan or other extension of credit when the seller or telemarketer has guaranteed or represented a high likelihood of success in obtaining or arranging a loan or other extension of credit for a person;

(5) Disclosing or receiving, for consideration, unencrypted consumer account numbers for use in telemarketing; *provided*, however, that this paragraph shall not apply to the disclosure or receipt of a customer's or donor's billing information to process a payment for goods or services or a charitable contribution pursuant to a transaction;

(6) Causing billing information to be submitted for payment, directly or indirectly, without the express informed consent of the customer or donor. In any telemarketing transaction, the seller or telemarketer must obtain the express informed consent of the customer or donor to be charged for the

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goods or services or charitable contribution and to be charged using the identified account. In any telemarketing transaction involving preacquired account information, the requirements in paragraphs (a)(6)(i) through (ii) of this section must be met to evidence express informed consent.

(i) In any telemarketing transaction involving preacquired account information and a free-to-pay conversion feature, the seller or telemarketer must:

(A) obtain from the customer, at a minimum, the last four (4) digits of the account number to be charged;

(B) obtain from the customer his or her express agreement to be charged for the goods or services and to be charged using the account number pursuant to paragraph (a)(6)(i)(A) of this section; and,

(C) make and maintain an audio recording of the entire telemarketing transaction.

(ii) In any other telemarketing transaction involving preacquired account information not described in paragraph (a)(6)(i) of this section, the seller or telemarketer must:

(A) at a minimum, identify the account to be charged with sufficient specificity for the customer or donor to understand what account will be charged; and

(B) obtain from the customer or donor his or her express agreement to be charged for the goods or services and to be charged using the account number identified pursuant to paragraph (a)(6)(ii)(A) of this section; or

(7) Failing to transmit or cause to be transmitted the telephone number, and, when made available by the telemarketer's carrier, the name of the telemarketer, to any caller identification service in use by a recipient of a telemarketing call; *provided* that it shall not be a violation to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller or charitable organization on behalf of which a telemarketing call is placed, and the seller's or charitable organization's customer or donor service telephone number, which is answered during regular business hours.

(b) *Pattern of calls.* (1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

(i) Causing any telephone to ring, or engaging any person in telephone conversation, repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number;

(ii) Denying or interfering in any way, directly or indirectly, with a person's right to be placed on any registry of names and/or telephone numbers of persons who do not wish to receive outbound telephone calls established to comply with §310.4(b)(1)(iii);

(iii) Initiating any outbound telephone call to a person when:

(A) 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 or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) that person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller

(*i*) has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature[5] of that person; or

(*ii*) has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer

[5] For purposes of this Rule, the term "signature" shall include an electronic or digital form of signature, to the extent that such form of signature is recognized as a valid signature under applicable federal law or state contract law.

does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

(2) It is an abusive telemarketing act or practice and a violation of this Rule for any person to sell, rent, lease, purchase, or use any list established to comply with §310.4(b)(1)(iii)(A), or maintained by the Commission pursuant to §310.4(b)(1)(iii)(B), for any purpose except compliance with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on such lists.

(3) A seller or telemarketer will not be liable for violating §310.4(b)(1)(ii) and (iii) if it can demonstrate that, as part of the seller's or telemarketer's routine business practice:

(i) It has established and implemented written procedures to comply with §310.4(b)(1)(ii) and (iii);

(ii) It has trained its personnel, and any entity assisting in its compliance, in the procedures established pursuant to §310.4(b)(3)(i);

(iii) The seller, or a telemarketer or another person acting on behalf of the seller or charitable organization, has maintained and recorded a list of telephone numbers the seller or charitable organization may not contact, in compliance with §310.4(b)(1)(iii)(A);

(iv) The seller or a telemarketer uses a process to prevent telemarketing to any telephone number on any list established pursuant to §310.4(b)(3)(iii) or 310.4(b)(1)(iii)(B), employing a version of the "do-not-call" registry obtained from the Commission no more than thirty-one (31) days prior to the date any call is made, and maintains records documenting this process;

(v) The seller or a telemarketer or another person acting on behalf of the seller or charitable organization, monitors and enforces compliance with the procedures established pursuant to §310.4(b)(3)(i); and

(vi) Any subsequent call otherwise violating §310.4(b)(1)(ii) or (iii) is the result of error.

(4) A seller or telemarketer will not be liable for violating 310.4(b)(1)(iv) if:

(i) the seller or telemarketer employs technology that ensures abandonment of no more than three (3) percent of all calls answered by a person, measured per day per calling campaign;

(ii) the seller or telemarketer, for each telemarketing call placed, allows the telephone to ring for at least fifteen (15) seconds or four (4) rings before disconnecting an unanswered call;

(iii) whenever a sales representative is not available to speak with the person answering the call within two (2) seconds after the person's completed greeting, the seller or telemarketer promptly plays a recorded message that states the name and telephone number of the seller on whose behalf the call was placed[7]; and

(iv) the seller or telemarketer, in accordance with §310.5(b)-(d), retains records establishing compliance with §310.4(b)(4)(i)-(iii).

(c) *Calling time restrictions*. Without the prior consent of a person, it is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in outbound telephone calls to a person's residence at any time other than between 8:00 a.m. and 9:00 p.m. local time at the called person's location.

(d) *Required oral disclosures in the sale of goods or services*. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer in an outbound telephone call or internal or external upsell to induce the purchase of goods or services to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the seller;

(2) That the purpose of the call is to sell goods or services;

(3) The nature of the goods or services; and

(4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered and that any purchase or payment will not increase the person's chances of winning. This disclosure must be made before or in conjunction with the description of the prize to the person called. If requested by that person, the telemarketer must disclose the no-purchase/no-payment

[7] This provision does not affect any seller's or telemarketer's obligation to comply with relevant state and federal laws, including but not limited to the TCPA, 47 U.S.C. 227, and 47 CFR part 64.1200.

entry method for the prize promotion; *provided*, however, that, in any internal upsell for the sale of goods or services, the seller or telemarketer must provide the disclosures listed in this section only to the extent that the information in the upsell differs from the disclosures provided in the initial telemarketing transaction.

(e) *Required oral disclosures in charitable solicitations*. It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer, in an outbound telephone call to induce a charitable contribution, to fail to disclose truthfully, promptly, and in a clear and conspicuous manner to the person receiving the call, the following information:

(1) The identity of the charitable organization on behalf of which the request is being made; and

(2) That the purpose of the call is to solicit a charitable contribution.

[68 FR 4669, Jan. 29, 2003, as amended at 69 FR 16373, Mar. 29, 2004]

§310.5 Recordkeeping requirements.

(a) Any seller or telemarketer shall keep, for a period of 24 months from the date the record is produced, the following records relating to its telemarketing activities:

(1) All substantially different advertising, brochures, telemarketing scripts, and promotional materials;

(2) The name and last known address of each prize recipient and the prize awarded for prizes that are represented, directly or by implication, to have a value of $25.00 or more;

(3) The name and last known address of each customer, the goods or services purchased, the date such goods or services were shipped or provided, and the amount paid by the customer for the goods or services;[8]

(4) The name, any fictitious name used, the last known home address and telephone number, and the job title(s) for all current and former employees directly involved in telephone sales or solicitations; *provided*, however, that if the seller or telemarketer permits fictitious names to be used by employees, each fictitious name must be traceable to only one specific employee; and

(5) All verifiable authorizations or records of express informed consent or express agreement required to be provided or received under this Rule.

(b) A seller or telemarketer may keep the records required by §310.5(a) in any form, and in the same manner, format, or place as they keep such records in the ordinary course of business. Failure to keep all records required by §310.5(a) shall be a violation of this Rule.

(c) The seller and the telemarketer calling on behalf of the seller may, by written agreement, allocate responsibility between themselves for the recordkeeping required by this Section. When a seller and telemarketer have entered into such an agreement, the terms of that agreement shall govern, and the seller or telemarketer, as the case may be, need not keep records that duplicate those of the other. If the agreement is unclear as to who must maintain any required record(s), or if no such agreement exists, the seller shall be responsible for complying with §§310.5(a)(1)-(3) and (5); the telemarketer shall be responsible for complying with §310.5(a)(4).

(d) In the event of any dissolution or termination of the seller's or telemarketer's business, the principal of that seller or telemarketer shall maintain all records as required under this Section. In the event of any sale, assignment, or other change in ownership of the seller's or telemarketer's business, the successor business shall maintain all records required under this Section.

§310.6 Exemptions.

(a) Solicitations to induce charitable contributions via outbound telephone calls are not covered by §310.4(b)(1)(iii)(B) of this Rule.

(b) The following acts or practices are exempt from this Rule:

(1) The sale of pay-per-call services subject to the Commission's Rule entitled "Trade Regulation Rule Pursuant

[8] For offers of consumer credit products subject to the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, and Regulation Z, 12 CFR 226, compliance with the recordkeeping requirements under the Truth in Lending Act, and Regulation Z, shall constitute compliance with §310.5(a)(3) of this Rule.

to the Telephone Disclosure and Dispute Resolution Act of 1992," 16 CFR Part 308, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(2) The sale of franchises subject to the Commission's Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures," ("Franchise Rule") 16 CFR Part 436, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(3) Telephone calls in which the sale of goods or services or charitable solicitation is not completed, and payment or authorization of payment is not required, until after a face-to-face sales or donation presentation by the seller or charitable organization, *provided*, however, that this exemption does not apply to the requirements of §§ 310.4(a)(1), (a)(7), (b), and (c);

(4) Telephone calls initiated by a customer or donor that are not the result of any solicitation by a seller, charitable organization, or telemarketer, *provided*, however, that this exemption does not apply to any instances of upselling included in such telephone calls;

(5) Telephone calls initiated by a customer or donor in response to an advertisement through any medium, other than direct mail solicitation, *provided*, however, that this exemption does not apply to calls initiated by a customer or donor in response to an advertisement relating to investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or advertisements involving goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls;

(6) Telephone calls initiated by a customer or donor in response to a direct mail solicitation, including solicitations via the U.S. Postal Service, facsimile transmission, electronic mail, and other similar methods of delivery in which a solicitation is directed to specific address(es) or person(s), that clearly, conspicuously, and truthfully discloses all material information listed in § 310.3(a)(1) of this Rule, for any goods or services offered in the direct mail solicitation, and that contains no material misrepresentation regarding any item contained in § 310.3(d) of this Rule for any requested charitable contribution; *provided*, however, that this exemption does not apply to calls initiated by a customer in response to a direct mail solicitation relating to prize promotions, investment opportunities, business opportunities other than business arrangements covered by the Franchise Rule, or goods or services described in §§ 310.3(a)(1)(vi) or 310.4(a)(2)-(4); or to any instances of upselling included in such telephone calls; and

(7) Telephone calls between a telemarketer and any business, except calls to induce the retail sale of nondurable office or cleaning supplies; *provided*, however, that § 310.4(b)(1)(iii)(B) and § 310.5 of this Rule shall not apply to sellers or telemarketers of nondurable office or cleaning supplies.

§ 310.7 Actions by states and private persons.

(a) Any attorney general or other officer of a state authorized by the state to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the state's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the state or private person shall serve the Commission with the required notice immediately upon instituting its action.

(b) Nothing contained in this Section shall prohibit any attorney general or other authorized state official from proceeding in state court on the basis of an alleged violation of any civil or criminal statute of such state.

§ 310.8 Fee for access to the National Do Not Call Registry.

(a) It is a violation of this Rule for any seller to initiate, or cause any telemarketer to initiate, an outbound telephone call to any person whose telephone number is within a given area code unless such seller, either directly or through another person, first has paid the annual fee, required by §310.8(c), for access to telephone numbers within that area code that are included in the National Do Not Call Registry maintained by the Commission under §310.4(b)(1)(iii)(B); *provided*, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose.

(b) It is a violation of this Rule for any telemarketer, on behalf of any seller, to initiate an outbound telephone call to any person whose telephone number is within a given area code unless that seller, either directly or through another person, first has paid the annual fee, required by §310.8(c), for access to the telephone numbers within that area code that are included in the National Do Not Call Registry; *provided*, however, that such payment is not necessary if the seller initiates, or causes a telemarketer to initiate, calls solely to persons pursuant to §§310.4(b)(1)(iii)(B)(*i*) or (*ii*), and the seller does not access the National Do Not Call Registry for any other purpose.

(c) The annual fee, which must be paid by any person prior to obtaining access to the National Do Not Call Registry, is $62 per area code of data accessed, up to a maximum of $17,050; *provided*, however, that there shall be no charge for the first five area codes of data accessed by any person, and *provided further*, that there shall be no charge to any person engaging in or causing others to engage in outbound telephone calls to consumers and who is accessing the National Do Not Call Registry without being required under this Rule, 47 CFR 64.1200, or any other Federal law. Any person accessing the National Do Not Call Registry may not participate in any arrangement to share the cost of accessing the registry, including any arrangement with any telemarketer or service provider to divide the costs to access the registry among various clients of that telemarketer or service provider.

(d) After a person, either directly or through another person, pays the fees set forth in §310.8(c), the person will be provided a unique account number which will allow that person to access the registry data for the selected area codes at any time for twelve months following the first day of the month in which the person paid the fee ("the annual period"). To obtain access to additional area codes of data during the first six months of the annual period, the person must first pay $62 for each additional area code of data not initially selected. To obtain access to additional area codes of data during the second six months of the annual period, the person must first pay $31 for each additional area code of data not initially selected. The payment of the additional fee will permit the person to access the additional area codes of data for the remainder of the annual period.

(e) Access to the National Do Not Call Registry is limited to telemarketers, sellers, others engaged in or causing others to engage in telephone calls to consumers, service providers acting on behalf of such persons, and any government agency that has law enforcement authority. Prior to accessing the National Do Not Call Registry, a person must provide the identifying information required by the operator of the registry to collect the fee, and must certify, under penalty of law, that the person is accessing the registry solely to comply with the provisions of this Rule or to otherwise prevent telephone calls to telephone numbers on the registry. If the person is accessing the registry on behalf of sellers, that person also must identify each of the sellers on whose behalf it is accessing the registry, must provide each seller's unique account number for access to the national registry, and must certify, under penalty of law, that the sellers will be using the information gathered from the registry solely to comply with the provisions of this Rule or otherwise to prevent telephone calls to telephone numbers on the registry.

[68 FR 45144, July 31, 2003, as amended at 69 FR 45585, July 30, 2004; 70 FR 43280, July 27, 2005; 71 FR 43054, July 31, 2006]

§310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

REASONS FOR SETTLEMENT

This statement accompanies the final order executed by defendants Planet Earth Satellite and Thomas Teichert. The final order enjoins defendants from violating the Telemarketing Sales Rule ("Rule"), 16 C.F.R. Part 310, including the prohibition on calling telephone numbers on the National Do Not Call Registry. It also requires the payment of civil penalties.

Pursuant to Section 5(m)(3) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(m)(3), the Commission hereby sets forth its reasons for settlement by entry of Stipulated Judgment and Order for Permanent Injunction ("final order"):

On the basis of the allegations contained in the complaint, the Commission believes that a civil penalty of $7,094,354 constitutes the appropriate amount on which to base the settlement against the defendants. However, due to defendants' inability to pay, the total payment by defendants is $20,000 unless the defendants made misrepresentations to the Commission about their finances. In addition, the injunctive provisions of the final order should assure defendants' future compliance with the law. Finally, with the entry of the final order, the time and expense of litigation will be avoided.

For the foregoing reasons, the Commission believes that the settlement by entry of the attached final order is justified and well within the public interest.

EXHIBIT 790

EXHIBIT 790

No. 17-3111

IN THE

United States Court of Appeals for the Seventh Circuit

UNITED STATES OF AMERICA ET AL.,
Plaintiffs-Appellees.

v.

DISH NETWORK L.L.C.,
Defendant-Appellant,

On Appeal from the United States District Court
for the Central District of Illinois
No. 3:09-cv-03073-SEM-TSH
Hon. Sue E. Myerscough

BRIEF FOR DEFENDANT-APPELLANT
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ORAL ARGUMENT REQUESTED

February 22, 2018

Easha Anand
ORRICK, HERRINGTON &
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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 17-3111

Short Caption: USA, et al v. DISH Network L.L.C.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

DISH Network L.L.C.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Orrick, Herrington & Sutcliffe LLP; Kelley Drye & Warren LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

See Attachment A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

See Attachment A

Attorney's Signature: s/ E. Joshua Rosenkranz Date: 2/22/2018

Attorney's Printed Name: E. Joshua Rosenkranz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ______

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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See Attachment A

Attorney's Signature: s/ Easha Anand Date: 2/22/2018

Attorney's Printed Name: Easha Anand

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Short Caption: USA, et al v. DISH Network L.L.C.

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Attorney's Signature: s/ Kelsi Brown Corkran Date: 2/22/2018

Attorney's Printed Name: Kelsi Brown Corkran

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Attorney's Signature: s/ Elyse Echtman Date: 2/22/2018

Attorney's Printed Name: Elyse Echtman

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Attorney's Signature: s/ Derek Fischer Date: 2/22/2018

Attorney's Printed Name: Derek Fischer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** X

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Attorney's Signature: s/ Samuel Harbourt Date: 2/22/2018

Attorney's Printed Name: Samuel Harbourt

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Attorney's Signature: s/ Naomi J. Mower　　Date: 2/22/2018

Attorney's Printed Name: Naomi J. Mower

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** X

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Attorney's Signature: s/ Eric Shumsky Date: 2/22/2018

Attorney's Printed Name: Eric Shumsky

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Attorney's Signature: s/ Shasha Zou Date: 2/13/2018

Attorney's Printed Name: Shasha Zou

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ______ **No** X

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ATTACHMENT A

(3) If the party or amicus is a corporation:

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DISH Network L.L.C. is a wholly owned subsidiary of DISH DBS Corporation, which is a wholly owned subsidiary of DISH Network Corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

DISH Network Corporation has publicly traded equity (NASDAQ: DISH) and DISH DBS Corporation has publicly traded debt. Based solely on a review of Form 13D and Form 13G filings with the Securities and Exchange Commission, no entity owns more than 10% of DISH Network Corporation's stock other than Putnam Investments, LLC, JPMorgan Chase & Co., and Centennial Fiduciary Management LLC.

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INTRODUCTION

Unprecedented.

That is what this case is, through and through—from the novel theories of vicarious liability the district court invented to the $280 million in penalties and damages it imposed on DISH Network largely for the telemarketing violations of a few rogue independent contractors.

It all began with the most routine—and innocent—of business decisions. DISH was a small regional satellite television business that blossomed into a national success in part by contracting with independent businesses to solicit orders for its services. Businesses in every sector make that decision, because it is costly and inefficient to hire the employees and purchase the property necessary to scale up for nationwide direct sales.

DISH developed a network of about 8000 independent businesses—called "retailers"—that secured their own space, hired their own employees, and devised and executed their own marketing strategies, often tailored to the idiosyncrasies of their own local markets. They were paid based upon the number of customers they recruited for DISH. Many simultaneously marketed for DISH's competitors. DISH did not supervise retailers' day-to-day activities. No company could have supervised that many. But DISH did impose quality-control measures to shield consumers from fraud and extracted a contractual commitment from every retailer to obey the law—including all telemarketing laws.

Despite these efforts, four of the independent retailers committed widespread telemarketing violations. Those four repeatedly lied to DISH about their noncompliance, and three undertook elaborate measures to conceal their misconduct.

Things played out exactly as they should have—at first. DISH put an end to the unlawful calling by ousting these rogue retailers from its national sales program. And the Government secured judgments against the worst perpetrators.

Then things took a bizarre turn. The FTC and four states sued DISH, seeking billions of dollars almost entirely for those same illegal calls that DISH neither made nor directed. The court found DISH liable based on legal theories that are unprecedented. Literally. There is no precedent supporting them.

Under one set of statutes, the court found that the retailers committed their violations as DISH's agents. Agency can arise only by mutual consent. Yet, the district court overrode the contract provisions disclaiming an agency relationship at least eight times. It also ignored the provisions prohibiting the retailers from violating the law. *And* DISH's repeated warnings. *And* that the retailers affirmatively hid their misconduct from DISH.

These facts defeat agency as a matter of law. But the court found DISH liable largely because the retailers' contract authorized mundane quality-control measures—measures typical of any non-agency contractual service arrangement.

Under another statute, the court found that DISH "caused" the retailers' violations. It held a business "causes" an independent contractor's telemarketing violations simply by authorizing it to be a retailer. That is strict liability. No party urged that position on the court here. And no court has ever imposed strict liability under a statute like this.

The result of this extra-statutory vicarious liability was an eye-popping $280 million award. That, too, is unprecedented. It is 36 times the size of the closest runner-up, a telemarketing judgment leveled against a business that was directly (not vicariously) responsible for placing *billions* of calls—calls that, unlike here, were substantively deceptive. As read by the court, the telemarketing statutes authorized it to impose any award it chose, up to a maximum of $1.3 *trillion*. That is not a typo. To be precise: $1,320,177,977,000. Discretion that unbridled cannot be sustained. It deprives businesses of any reasonable notice of the liability they face, inviting discriminatory enforcement and arbitrary results.

The opinion below strikes fear in businesses across the country. Independent contractors perform all sorts of consumer marketing for all sorts of products and services. If this opinion is sustained, just about every consumer-facing business lives under threat of crushing liability for signing retailer agreements with independent contractors and, incongruously, increases its exposure by taking steps to protect consumers from fraud. Worse, if these statutes are the blank checks the district court believed them to be, one bad apple can sink an entire company.

This Court should reverse the judgment.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 15 U.S.C. §§ 45(m), 53(b), 56(a), 57b, 6105(b); 28 U.S.C. §§ 1331, 1337(a), 1367(a), 1345, 1355; and 47 U.S.C. § 227(g), based upon claims under federal telemarketing laws, as well as factually related claims under state statutes. The court entered judgment on June 5, 2017. A779-80. On July 3, 2017, DISH timely moved under Rules 52(b) and 59 of the Federal Rules of Civil Procedure, A1060-104, which tolled the time to appeal, Fed. R. App. P. 4(a)(4)(A). The motions were granted in part and denied in part on August 10, 2017. A1105-34. DISH timely appealed on October 6, 2017. A1135-37. This Court has jurisdiction. 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. DISH's contract with retailers repeatedly disclaimed an agency relationship and barred its retailers from violating telemarketing laws. Did the district court err in holding that rogue retailers were DISH's agents and that their unlawful calls fell within the scope of an agency relationship?

2. The Telemarketing Sales Rule prohibits certain telemarketing calls, as well as "substantially assisting" placement of

those calls or "causing" a telemarketer to place them. Did the district court err in holding that DISH "caused" all of a retailer's illegal calls merely by enlisting it as a retailer? Relatedly, did the court err in holding DISH liable for "substantially assisting" those same violations where an essential element of "substantial assistance"—proximate causation—was not satisfied?

3. The district court read the relevant statutes to authorize a $1.3 trillion penalty, which empowered it to select any amount it wished. Did this award violate due process, given that DISH lacked any notice of possible exposure, the statutes invited arbitrariness, and the court's actual award of $280 million was in fact arbitrary and excessive?

4. In cases of "continuing" violations of the Telemarketing Sales Rule, civil penalties must be calculated per day, rather than per call. And a penalty cannot be imposed for any violation unless DISH had knowledge of "each" violation and the legal standard on which it was based. Did the district court err in (a) finding the continuing-violations provision inapplicable, even though the court faulted DISH for an ongoing failure to prevent retailers' violations; (b) imposing

penalties for all the retailers' violations without ever finding that DISH knew of "each"; and (c) failing to explain how DISH could have reasonably anticipated the court's novel legal interpretations?

STATEMENT OF THE CASE

DISH Grows Into One Of The Nation's Largest Satellite Television Providers

In 1980, two friends founded DISH (formerly "EchoStar") with the mission to expand access to television using satellite dishes. A10. They started selling satellite antennas in Colorado, where rural communities lacked access to cable television. A1389-91. Later, they transformed DISH into the nation's second-largest satellite television provider, with 18,000 employees and 14 million customers spread throughout the country. A1392.

No business builds a customer base that large and geographically dispersed without an expansive marketing program. So while DISH has a marketing department, it also relies on a network of outside retailers operating around the country. A10. By the mid-2000s, DISH had contracts with some 8000 retailers, all independent businesses. A67-68. DISH made incentive payments to the retailers based on the number of customers they brought in. A1365-66. Retailers applied their local expertise to craft tailored marketing strategies, including phone, in-person, television, radio, and online campaigns. A12-13, 66-67. Their contracts with DISH—called "Retailer Agreements"—specified in multiple ways that the retailers were "independent contractors" and not "agent[s]." A71-73. Consistent with this status, many of the retailers also sold the services of DISH competitors like DIRECTV. *Id.*

Some retailers, called "Order Entry" ("OE") retailers, recruited new customers and entered their orders online, leaving it to DISH to install the equipment. That arrangement enabled retailers to market nationally without maintaining huge inventories of satellite hardware. RadioShack, for example, was an OE retailer for DISH. A63-66.

DISH Confronts An Evolving Legal Landscape

Businesses that use telemarketing to attract customers have confronted a bewildering and ever-changing regulatory landscape. When DISH started telemarketing in 1998, two federal laws administered by different agencies generally prohibited two activities (with many caveats and exceptions): prerecorded calls and "internal-list" calls. *First*, prerecorded marketing calls to noncustomers were prohibited by the Telephone Consumer Protection Act ("TCPA") and accompanying regulations promulgated by the Federal Communications Commission. 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. § 64.1200. *Second*, companies were required to maintain an internal list of consumers who asked the company not to call them. A523-25. The Telemarketing and Consumer Fraud and Abuse Prevention Act prohibited marketing calls to these "internal-list" consumers, delegating implementation to a different federal agency, the Federal Trade Commission. *Id.*; 15 U.S.C. § 6102(a). The FTC's implementation is codified in the Telemarketing Sales Rule ("TSR"), 16 C.F.R. pt. 310.

Over the next decade, regulators imposed increasingly stringent telemarketing restrictions. Most significantly, in 2003, the FTC created the National Do-Not-Call Registry. A29. The Registry is a database of phone numbers registered by consumers who do not want to receive telemarketing calls. FTC regulations generally prohibit telemarketers from calling numbers on the Registry. *Id.* There is, however, a huge, but ill-defined, exception where the company has an "established business relationship" with the customer. 16 C.F.R. § 310.4(b)(1)(iii)(B)(2). Shortly after the FTC issued its rules, the FCC promulgated similar Do-Not-Call regulations under the TCPA. A539-40.

Next, the FTC amended its regulations to prohibit "abandoned calls." 68 Fed. Reg. 4580, 4641-44 (Jan. 29, 2003). The term is something of a misnomer: The FTC deems a call "abandoned" if "the telemarketer does not connect the call to a sales representative within two seconds" after the customer answers the phone. *Id.* The district court interpreted this provision to effectively prohibit all prerecorded calls—because when "the telemarketer only play[s] a prerecorded message[,] no human telemarketer c[o]me[s] on the line within two seconds." A534. While the TCPA allowed prerecorded calls to an existing customer, the TSR's abandoned-call provision did not. A534, 538.

Layered over the overlapping federal regimes is a patchwork of 48 state telemarketing laws. Cong. Research Serv., R43684, *Telemarketing Regulation* 7-9 (2016). As relevant in this appeal, California and North Carolina prohibit prerecorded and Registry calls. A378-83, 392-96.

Most important here, each of these laws (the TSR, TCPA, and California and North Carolina statutes) was interpreted by the district court to impose liability not just on the telemarketer that actually places the calls, but also on the "seller" that contracts with the telemarketer, under differing circumstances. The relevant liability provisions and interpretations are summarized in Table 1 (at 24), along with the penalties and damages under each scheme.

DISH Invests In Compliance

Internal compliance. In 2002, after the FTC announced its plan to create the Registry, DISH devised a multifaceted compliance program. A35-37. It developed a sophisticated software program to "scrub" prohibited numbers from its calling lists. A45-47. It adopted telemarketing-compliance policies and updated them frequently. A1138-50. DISH also created a centralized compliance department, which trained DISH employees on handling Do-Not-Call requests and vetted each new calling campaign to ensure that it was professional and legal. A1424-36. Starting in 2007, DISH enhanced its compliance efforts by retaining PossibleNOW, the nation's leading telemarketing-compliance vendor, to provide further training, help DISH scrub its call lists, and perform audits. A53-56. DISH required its employees to attend PossibleNow's online "webinars" every three months. A1440-42.

No matter how robust the compliance program, telemarketing compliance is challenging. First are the technological challenges. A few stray keystrokes can yield large-scale violations. In late 2008, for example, a technical glitch while scrubbing DISH's calling lists caused a onetime spike of about 300,000 telemarketing infractions. A1446-47.

DISH was not alone. The companies that the *federal government* trusts to maintain the master Registry make similar mistakes. In one incident, its Registry caretaker "mistakenly dropped 225,000 numbers from the [government's version of the] Registry." A191-98 (cataloging similar mistakes). To address such hitches, DISH audited and regularly checked its calling records and improved its compliance protocols. A47, 60-62.

Then there are maddening interpretive quandaries. For example, it is far from clear which internal do-not-call lists are relevant. With regard to DISH's own marketing calls, 64% of the violations the district court found (10.9 out of 17 million) rested on the court's determination (which we challenge on appeal, § I.A) that the retailers were DISH's agents. *Infra* Table 1 (at 24) & 50, n.3. That led the court to conclude that DISH was forbidden to call any consumer who was on any *retailer's* internal list, not just those who were on *DISH's own* internal lists. A289. So if a consumer directed Radio Shack, or any other DISH retailer, not to call her, she was out of bounds to DISH too. The catch is that the telemarketing regulations say nothing about this basis for liability. The district court here relied on an FCC ruling that was not issued until 2013, after the calls at issue. A289-92 (citing 28 F.C.C. Rcd. 6574, 6582). Similarly, an important question below was what qualifies as an "established business relationship" that would allow DISH to call its own current and former customers even if listed on the Registry. A170-73. The TSR bars calls made more than 18 months after the relationship ends, but does not elucidate that standard. DISH measured from when a customer's service was disconnected, but the court held the ban ran exclusively from the customer's last payment, accounting for some 1.2 million additional violations (another ruling we challenge on appeal, § II.B.3). A170-73.

Retailer compliance. These challenges grow infinitely harder when it comes to DISH's retailers—the focus of this appeal. After an extensive investigation, Plaintiffs seek to hold DISH liable for the widespread violations of only four of those independent contractors. Those retailers committed violations despite the steps DISH took, within the confines of the independent-contractor relationship, to ensure retailer compliance. DISH's Retailer Agreement provides that the retailer "shall comply with" all applicable laws, including telemarketing regulations. A1297. The Agreement also reminds each retailer that, as an independent contractor, it is "solely responsible for its compliance." *Id.* DISH frequently reinforced compliance imperatives by bombarding retailers with "facts blast[s]" and video messages. A1372-74, 1393-98. DISH also conducted inspections at retailer call centers, looking out for signs of compliance issues. *E.g.*, A1407-08. On one retailer visit, a DISH representative overheard an employee mention prerecorded calls; DISH immediately terminated the retailer. *Id.* In addition, DISH provided compliance training at its annual retailer retreats and urged retailers to attend additional trainings with PossibleNOW. A1449-50, 1452.

But with limited visibility into each retailer's exact activities, a seller in DISH's position ordinarily could not uncover telemarketing violations until it received consumer complaints.

DISH Responds To Telemarketing Complaints

With thousands of retailers engaging millions of customers in various ways, complaints are inevitable. Of course, complaints are not the same as confirmed violations. A1371, 1419-20. Some complaints raised genuine questions about a retailer's legal compliance. But others came from customers whom DISH and the retailers were permitted to call under the established-relationship exemption, or had other innocent explanations. A1375. So DISH had to develop a system to investigate complaints and distinguish the bona fide problems from the false positives.

Step one was to try to identify the responsible retailer. A94. That, alone, could be a challenge. Behind DISH's back, a few retailers impermissibly hired subcontractors to place calls from offshore call centers. *E.g.*, *infra* at 17-20. And several of those played cat-and-mouse games, using fake caller IDs to make illegal calls. A85-86. DISH responded with a "sting" program: DISH would direct the complaining customer to open a dummy account with the caller so DISH could catch the culprit retailer who input the order. A94-95.

Once DISH figured out the responsible retailer, a DISH executive would contact it and remind it to comply with all telemarketing laws. A88-89, 1411-12. Then DISH would ask about the complaint. Here, too, because DISH had limited visibility, retailers could at times explain away infractions as aberrations. A134-35. Depending on the retailer's response and past compliance record, DISH would consider disciplinary actions. A99. Among them were financial penalties and contract termination. A74.

In 2006, DISH formed a new Compliance Department to consolidate and expand its retailer compliance efforts. A91. The Department "established a systematic way to notify … [r]etailers about consumer complaints"; "issued weekly [reports]" on retailer telemarketing compliance; compiled a list of "complaints [that] had been unresolved"; and sent that list to the retailers with instructions not to call the numbers "for any reason." A95-96.

A Few Retailers Commit Telemarketing Violations While Hiding Their Unlawful Conduct

This appeal is largely about four bad apples out of DISH's retailer barrel: three flagrant offenders, Dish TV Now ("DTVN"), Star Satellite, and JSR Enterprises, plus Satellite Systems Network ("SSN"), whose violations were on a smaller scale.

DTVN. Originally a major DIRECTV retailer, DTVN began working with DISH in 2003. A111, 1261. It lied to DISH throughout. DTVN principal David Hagen concealed a felony conviction on his retailer application. A111. He also assured DISH he would market primarily through television and online advertisements. *Id.* But within months, DTVN secretly subcontracted with Guardian Communications to place calls, A112, which was a violation of the Retailer Agreement, A86. DTVN paid Guardian by the call. A1314. Guardian placed 6.6 million prerecorded calls in one three-month period (May to August 10, 2004). A112.

DTVN knew DISH prohibited this type of calling: The Agreement required compliance with the law, A1297, and DISH executives reiterated the prohibition on illegal calling to DTVN, A1354-55. Hagen testified, "it was obvious that if we" engaged in "illegal telemarketing," DISH "would cut off our heads." *Id.* So DTVN concealed its illegal activities from DISH. When a DISH executive visited, DTVN employees pretended to generate business through TV commercials directing viewers to call in. "[T]hey would yell on the floor, 'Hey, we have a commercial coming up in five minutes, everybody on the phone.'" A1406. In fact, Guardian's robocalls were generating those incoming calls.

DISH did not know about DTVN's prerecorded calling. DISH did not learn of Guardian's existence until this litigation. A1405-06. DISH received just a single complaint, which was lodged only eight days before DTVN stopped its illegal calls. A112-13. DISH immediately confronted Hagen, asking whether DTVN was using prerecorded calls. A113. "This is simple," the DISH executive said, "We're not interested in this type of marketing." *Id.* Hagen responded with another lie: that DTVN called only "consumers who have previously inquired with us," and did not play prerecorded messages. A113-14.

In January 2006, DISH terminated DTVN. A1261.

Star. Star's story is similar. It became a retailer in 2003. A1262. In 2004, without DISH's knowledge, Star too breached the Retailer

Agreement and enlisted Guardian to place calls to sell DISH products. A121-22. In a four-month period (July 30 to November 22, 2005), Guardian placed over 43 million prerecorded calls for Star. A126.

DISH made clear to Star that it prohibited unlawful telemarketing. Toward the end of that period, in October 2005, DISH received a complaint that Star was making Registry calls. A DISH executive immediately warned Star's principal "that [DISH] would shut [Star] down" if it made any illegal calls. A127. DISH later warned Star again, in writing, that it must "comply with all applicable laws." A1328.

Like DTVN, Star concealed its prerecorded calling from DISH. By having Guardian make the calls offsite, Star ensured that DISH employees would not discover the calling when they inspected Star's call center. A1359, 1361. Call recipients would be asked to "press one," and if they did, would be patched in to Star's call center, making it appear to visitors that the calls were inbound from interested customers. A1359. Thus, DISH did not know of Star's relationship with Guardian or its tens of millions of prerecorded calls. DISH received only four complaints about Star's prerecorded calling from the time Star retained Guardian in 2004 to the end of its prerecorded calling in November

2005. None were confirmed as actual violations. A124-26. Nonetheless, due to suspicions of misconduct, DISH terminated Star's access to the web-based order platform in January 2006. A1262, 1330-31.

JSR. JSR was a DISH retailer for less than a year, from April 2006 to February 2007. A1263. As with DTVN and Star, DISH made clear to JSR that it did not tolerate telemarketing violations. "Each time" DISH received a consumer complaint, it "notified JSR" of the complaint and DISH's policy. A133-34; *see* A1333-34. Nonetheless, JSR made millions of illegal calls. *Infra* Table 2 (at 25). These violations were obscured from DISH because, like DTVN and Star, JSR concealed its misconduct. As JSR's principal testified, when confronted by DISH about complaints, he provided "fibs" and excuses. A1415. JSR also used fake caller IDs and offshore call centers to avoid detection. A133-34, 1329, 1381-83. But as the number of complaints grew, DISH grew fed up and terminated the retailer. A137-38, 1211.

SSN. The final retailer, SSN, generated few additional complaints. DISH investigated them through the protocol discussed above (at 15-16). When confronted, SSN too provided excuses that obscured its violations. A119-20, 1257-59.

In 2007 and 2008, the FTC brought enforcement actions against the worst offenders, Guardian and Star. It sued them for the 40 million-plus calls they placed—the *identical* calls at issue in this case. A439. The FTC entered into consent judgments with Guardian for $7.9 million, and with Star for $4.4 million, separately reducing these amounts to $150,000 and $75,000 respectively to account for inability to pay. A1167, 1198.

Plaintiffs Sue And The District Court Issues A $280 Million Judgment

Unsatisfied with the pound of flesh the FTC extracted from the primary offenders, in March 2009, the United States, along with California, Illinois, North Carolina, and Ohio, sued DISH. A783-811. The Federal Government sued under the TSR. Each state sued under its own laws and the TCPA. Collectively they sought $2.1 billion, 183 times the Star and Guardian settlement amounts. A449.

The court found DISH liable for about 147 million violations, summarized in the Tables below. These violations were based on about 72 million unique calls (millions of them counted multiple times under the various regimes). The four bad-apple retailers were responsible for the vast majority—about 129 million violations, or 88%—as compared to about 17 million committed by DISH. (For perspective, the latter figure was less than 2% of the billion-plus outbound calls DISH made between 2003 and 2010. A633, 1270.) Over three-quarters of the total violations—about 113 of 147 million—were based on the 43 million calls Guardian placed for Star, each counted again and again under the various federal and state regimes. A385, 396, 419-20, 423-24.

With 147 million violations multiplied by the maximum authorized recovery, the court had discretion to impose any judgment up to $1.3 trillion. A355-56, 421-28.[1] It chose $280 million. The court did not base that sum on the number of violations. Instead, the court concluded the violations were so numerous that it could impose a penalty of "approximately 20 percent of DISH's 2016 after-tax profits." A449. The lion's share was punishment for the retailer violations—i.e., to punish DISH for not sufficiently monitoring the retailers. A429, 435.

[1] As a matter of "equitable" discretion, the court did not count all 147 million violations when calculating the award. *E.g.*, A316. Instead, it used 98 million and calculated the authorized award as $783 billion. A421-27.

Similar thinking led the court to issue a permanent injunction requiring DISH to take extensive measures to prevent further violations and holding it liable for a lapse by any of DISH's thousands of current independent retailers. A459-62, 487-88, 493-501.[2]

[2] The rulings presented for review are the Findings of Fact and Conclusions of Law, A1-475, the Permanent Injunction, A476-513, the Opinion on Summary Judgment, A514-751, and the Opinion Denying the Motion to Dismiss, A752-778.

Table 1. Summary of Laws and Violations

	TSR	TCPA	State laws
Prohibited Calls	Prerecorded Registry Internal-list	Prerecorded Registry	Prerecorded Registry Internal-list
Liability Standard Applied by District Court for Retailer Calls	If a seller "causes" or "substantially assists" a retailer's violations. 16 C.F.R. §§ 310.3(b), 310.4(b)(1).	If the telemarketer is the seller's common-law agent. A544.	If the telemarketer is the seller's common-law agent. A378-400, 403-14.
Max Penalties or Damages Per Violation	$11,000 (pre-2009) $16,000 (after 2009) A318.	$500 47 U.S.C. § 227(g).	NC: $500-5000 CA: $2500-18,500 OH: $25,000 A391, 396, 416.
Approximate Number of Violations Found	114.9 million *Retailers*: 100.9 million *DISH*: 14 million A419-21.	16.2 million *Retailers*: 14.6 million *DISH*: 1.6 million A422-24.	15.6 million *Retailers*: 13.7 million *DISH*: 1.9 million A424-427.

<u>Table 2. Tally of Unlawful Calls & Violations by Retailer or DISH</u>

	Prerecorded	Registry	Internal-List	% of Total Violations
DTVN	*Calls:* 6.6 million *Violations:* 6.6 million	0	0	4.4%
Star	*Calls:* 43.1 million *Violations:* 112.9 million	0	0	77%
JSR	*Calls:* 1.3 million *Violations:* 1.3 million	*Calls:* 5.7 million *Violations:* 7.2 million	*Calls:* 686,000 *Violations:* 686,000	6.2%
SSN	0	*Calls:* 382,000 *Violations:* 467,000	*Calls:* 66,000 *Violations:* 66,000	0.4%
DISH	*Calls:* 98,000 *Violations:* 158,000	*Calls:* 6.1 million *Violations:* 9.0 million	*Calls:* 8.4 million *Violations:* 8.41 million	11.9%

A287, 307, 312-16, 364-66, 370-72, 380-88, 392-400, 414, 419-28.

SUMMARY OF THE ARGUMENT

I. DISH cannot be held liable for the retailers' unlawful calls, where DISH instructed the retailers to comply with the law, they contractually promised they would, and then they broke the law anyway, lying and concealing their misconduct throughout.

A. Common-law agency was the only basis on which the district court held DISH liable for the retailers' violations under the TCPA and two state statutes. That liability must be vacated for two independent reasons: (1) The retailers were not DISH's agents; and (2) the retailers' misconduct was not within the scope of authority DISH conferred.

The distinguishing feature of agency is that the parties *mutually consent* to one party's control of the day-to-day details of the other's work. The contract between DISH and the retailers made clear their intention was the opposite: It disclaims an agency relationship at least eight times.

The district court ignored these disclaimers in favor of a lone sentence buried in a part of the contract unrelated to agency, which it construed to give DISH "absolute power" over the retailers' day-to-day operations. But that stray sentence said no such thing and was not nearly explicit enough to overcome the numerous disclaimers of agency.

All extrinsic evidence—testimony from the contracting parties, DISH and the retailers—showed that the agency disclaimers reflected the parties' intent. Moreover, the reality of their relationship looked nothing like agency. The retailers devised and implemented their own marketing strategies without DISH's supervision or input.

Even if the retailers were DISH's agents, DISH cannot be held liable for their millions of violations because the retailers could not reasonably have believed DISH authorized them to break the law. DISH ordered the retailers to comply with the law, then repeatedly reminded them of that obligation.

B. Under the second federal regime at issue—the TSR—the court did not even purport to apply common-law principles of vicarious liability. Instead, it held DISH strictly liable for the retailers' millions of violations simply because DISH signed retailer contracts with them. The court manufactured this novel form of vicarious liability from a provision making a seller like DISH liable for "causing" a telemarketer's unlawful calls. 16 C.F.R. § 310.4(b). But in the law, "cause" means "proximate cause" absent clear indication otherwise, and there is no such indication here. The district court leaned heavily on its understanding that the FTC had endorsed the court's unprecedented "causation" standard and that deference was therefore required under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The premise, however, was wrong: From the start of this case, the FTC advocated a proximate-causation standard.

Applying that standard, DISH cannot be held liable. There is no proximate cause unless the retailers' violations were the natural and probable consequence of DISH's conduct. Nothing DISH did (or did not do) made it "natural and probable" that retailers would violate the law—as is evident from the fact that the vast majority of retailers obeyed the law.

C. For the same reason, DISH did not violate the TSR's "substantial assistance" provision. 16 C.F.R. § 310.3(b). DISH cannot be liable unless its assistance *proximately causes* a telemarketer's violations. Because DISH did not proximately cause any retailer's violations, it necessarily did not trigger "substantial assistance" liability.

II. Even if this Court upholds liability, the $280 million penalty must be vacated on both constitutional and statutory grounds.

A. The district court read the telemarketing statutes to authorize an outer limit in excess of $1.3 *trillion*. That gave the court unbounded discretion to pick any number it desired and denied DISH any meaningful sense of its actual exposure.

Prior judgments and settlements provided no warning of a penalty this high. The FTC pursued Guardian and Star—the actual perpetrators—for the *same calls* at issue here but considered their wrongdoing worth only $7.9 and $4.4 million respectively. And the highest telemarketing judgment ever before secured—in a case involving 3 to 4 *billion* robocalls—was for just $7.7 million, 36 times *lower* than the penalty here for a violation that was 50 times *greater*. These grossly inconsistent results lay bare why the laws here violate due process: They fail to cabin arbitrariness and do not provide "fair notice … of the severity of the penalty that [the] State may impose." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (internal quotation marks omitted).

Apart from these flaws, the actual $280 million award is unconstitutionally arbitrary and excessive on its own terms. The court did not even attempt to justify it under the established criteria for assessing such a large penalty—most importantly, "reprehensibility of the defendant's conduct." *Id.* at 418-19.

B. Constitutional defects aside, the award must be vacated because the district court miscalculated the statutory maximum for the TSR violations. The provision authorizing civil penalties has three limitations that dramatically reduce the maximum here.

First, the statute mandates that "continuing" violations be counted per day, not per call. 15 U.S.C. § 45(m)(1)(C). A violation is "continuing" either where the defendant breaks the law through a continuing course of conduct, or where a limited number of the defendant's decisions produce "detrimental effect[s] … [that] continue and increase over a period of time." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 231, 242-43 (1975). However you look at it, the violations based on retailer calls were continuing. DISH did not place any of the calls. Its involvement was limited to a continuing course of conduct: as the district court understood it, an ongoing failure to prevent the rogue retailers from violating the law. Properly calculated, the maximum for the retailer violations was, at most, about $8.35 *million*.

Second, even if each of the retailers' calls counted as a separate violation by DISH, the court failed to apply the penalty statute's knowledge requirement. The statute authorizes a penalty only where the defendant violates a rule "with actual knowledge or knowledge fairly implied" of "each violation." 15 U.S.C. § 45(m)(1)(A). Thus, the district court could not impose penalties on DISH for the 101 million retailer TSR violations without finding that DISH knew or should have known about "each." The court did not even attempt to satisfy this requirement.

Third, the penalty statute provides a mistake-of-law defense, meaning DISH was not subject to penalties if its view of the TSR was reasonable. The court never explained, nor could it have, why DISH's readings of the TSR "causation" and "established business relationship" standards were unreasonable.

ARGUMENT

I. The District Court Erred In Holding DISH Liable For The Retailer Violations.

"[C]ommon-sense is opposed to making one man pay for another man's wrong." Oliver Wendell Holmes, Jr., *Agency*, 5 Harv. L. Rev. 1, 14 (1891). Justice Holmes' age-old wisdom has never been more apt. Nearly 90% of the violations that the district court found were committed not by DISH, but by four independent retailers. Worse, there is no dispute that all four contractually promised DISH not to violate the law and three actively hid their wrongdoing from DISH. Common sense is not just "opposed" to this $280 million payment for the retailers' wrongs—it is downright scandalized.

The district court read the TCPA and the California and North Carolina statutes to embrace traditional common-law agency principles. But the court committed legal error when it "went well beyond traditional principles," *Meyer v. Holley*, 537 U.S. 280, 286, 290-91 (2003), to find an agency relationship that the contract explicitly disclaimed and the parties never otherwise assumed in word or deed. § I.A. For the TSR, the court impermissibly applied markedly *un*traditional principles of liability in connection with two different TSR provisions, finding DISH "caused" each retailer's violations based on a novel strict-liability theory, § I.B., and ignoring an element necessary to show DISH "substantially assisted" a retailer's violation, § I.C.

On de novo review of the court's erroneous construction and application of these standards, *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004), the liability rulings must be vacated. The penalties and damages, as well as the permanent injunction, must also be vacated, since they were predicated almost entirely on the retailer violations for which DISH was held liable. A435, 459; *e360 Insight v. The Spamhaus Project*, 500 F.3d 594, 604 (7th Cir. 2007) (courts must "tailor injunctive relief to the scope of the violation[s]").

A. The independent retailers were not DISH's agents when the parties disclaimed an agency relationship and the retailers disregarded DISH's instructions to follow the law.

The only basis on which the district court held DISH vicariously liable under the TCPA and two state statutes was common-law agency. A292. In keeping with Justice Holmes' edict, the law sets a "specific and demanding" standard for establishing agency. *Steele v. Armour & Co.*, 583 F.2d 393, 395 (8th Cir. 1978). That axiom informs the two elements Plaintiffs had to satisfy to prove agency: (1) that DISH and the retailers mutually agreed that the retailers would be DISH's agents; and (2) that the retailers' misconduct was within the scope of authority conferred. The district court erred as a matter of law as to both.

1. The retailers were not DISH's agents.

The court recognized that Plaintiffs could not prove agency unless "the principal and agent agree[d] that the agent acts for the principal." A292. As is evident from this definition, the agent and principal must "both" agree to assume the significant obligations and liabilities of an agency relationship. Restatement (Third) of Agency § 1.01 & reporter's note d (2006); *see Meyer*, 537 U.S. at 286. To discern the nature of the retailer-DISH relationship, the place to start is with the "contract actually executed between the parties." *Logue v. United States*, 412 U.S. 521, 527-30 (1973). That contract explicitly disclaims any agency relationship and nothing in the parties' conduct overrode that agreement.

Contract. The preamble of the Retailer Agreement declares that the retailer shall "act[] as an independent contractor." A1281. Beyond that, the only section of the Agreement that addresses the question is § 11, entitled "INDEPENDENT CONTRACTOR." It declares in no uncertain terms that: "The relationship of the parties hereto is that of independent contractors" and not "agent[s]." A1300. Section 11 repeats the point at least six times, including:

- "Retailer has no right or authority to … take any action on behalf of [DISH]." *Id.*
- "[I]n no event shall Retailer use [DISH's] name … in any manner … imply[ing] that … Retailer is an agent." *Id.*
- "Retailer has no right or authority to make any representation, promise or agreement … on behalf of [DISH]." *Id.*

A disavowal of agency does not get more definitive. That DISH "expended such considerable efforts to avoid an agency designation is palpable evidence that [it] did not intend to consent … to an agency relationship with" the retailers. *CFTC v. Gibraltar Monetary Corp.*, 575 F.3d 1180, 1189 (11th Cir. 2009). Since consent to agency is essential, that should be the end of the analysis.

The district court scarcely acknowledged § 11. In an afterthought, it opined that the provision established only that the retailers were "separate, independent companies," noting that "[a]n independent company, however, can be an agent." A298. True enough, but the court's premise was wrong: Section 11 is explicit that the companies are *not* agents.

Instead of addressing the provisions that actually discuss agency, the court treated a lone inapplicable sentence—elsewhere in the Agreement—as if it were the only evidence of the parties' intent about the nature of their relationship. A294. The very notion that one sentence in a distant provision could overcome such explicit disavowals is implausible. That would have to be one very powerful sentence—one even more explicit, specific, and emphatic than the disavowals of agency.

The sentence the court found superseding—in § 7.3—does not come close. It says nothing about agency. It is buried in the middle of a section governing the intricacies of DISH promotional offers in a portion of the Agreement entitled "Orders." A1296. The point of that section is to require retailers to follow DISH's "Promotional Program[s]," which set out the prices and terms for DISH programming. A1283. Retailers must "comply with all" rules "applicable to any Promotional Program" and "disclose to each prospective DISH [customer] the relevant terms of the Promotional Program." A1296. In connection with that obligation comes the next sentence—the one on which the court based its agency finding: "Retailer 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." *Id.*; *see* A294-97. That means the retailers cannot go rogue on "Promotional Programs" and promise programming packages, prices, or terms that DISH does not offer (e.g., HBO for $1!). A1399-400. If DISH directs the retailer to stop making a particular offer, or to correct how it is mis-advertising an offer, the retailer must comply. *Id.*

That is plainly not enough control to convert a retailer into DISH's agent. Agency requires "control over the purported agent's day-to-day operations." *Carlisle v. Deere & Co.*, 576 F.3d 649, 656 (7th Cir. 2009); Restatement (Third) of Agency § 1.01 cmt. f. That DISH merely "specif[ied] standards," *Logue*, 412 U.S. at 529-30, and could "demand compliance with" those standards, *Williams v. United States*, 50 F.3d 299, 306 (4th Cir. 1995), did not convert the independent-contractor retailers into its agents—any more than supplying blueprints turns a builder into the homeowner's agent, or a franchisor's "quality control" measures turn the franchisee into an agent, *Slates v. Int'l House of Pancakes, Inc.*, 413 N.E.2d 457, 465-66 (Ill. App. Ct. 4th Dist. 1980).

Wrenching the lone sentence from § 7.3 out of context, the district court over-read it to grant DISH "absolute power" over the retailers. A109. As the opinion progressed, the court took to calling this sentence the "absolute power clause." A295-96. To be clear, there is no "absolute power clause." Just that one sentence in § 7.3, which the court read to mean that "DISH … had the authority to tell … [r]etailers what to do simply, 'because I said so.'" *Id.*

That expansive reading is wrong, and must be rejected on de novo review, *Digitech Computer, Inc. v. Trans-Care, Inc.*, 646 F.3d 413, 417 (7th Cir. 2011), (contract interpretation reviewed de novo), for several reasons. *First*, the contract explicitly states this sentence *cannot* supersede § 11's agency disavowal: Section 11 applies "[n]otwithstanding anything in this Agreement to the contrary." A1300. *Second*, even without that direction, the parties would not have hidden such an important provision—one granting DISH "absolute power" to direct retailer marketing—in the middle of a paragraph about DISH's "Promotional Programs." Contracting parties do not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). *Third*, under Colorado law (which governs interpretation of the

Agreement, A1303), the court was required to read the Agreement "to harmonize … all provisions so that none"—including the disclaimers of agency—are "rendered meaningless." *FDIC v. Fisher*, 292 P.3d 934, 937 (Colo. 2013). *Fourth*, DISH and its retailers uniformly testified that DISH had nothing close to absolute control. *E.g.*, A1353, 1360, 1399-400. Thus, even if the contract were ambiguous, such "extrinsic evidence" of the parties' intent resolves any ambiguity. *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911-12 (Colo. 1996).

This last point bears emphasis. Where the only evidence of the parties' intent confirms they did not mean to create an agency relationship, it is improper to allow nonparties motivated by the prospect of a litigation jackpot to seek a reinterpretation that is fundamentally at odds with what the parties themselves intended. *See Neves v. Potter*, 769 P.2d 1047, 1054 (Colo. 1989) ("Colorado[] [takes an] unsympathetic position toward parties who seek to take gratuitous advantage of an agreement when they are not parties to the agreement.").

Course of dealing. Beyond the stray sentence in the contract, the court observed that "the actual practices of the parties are [also] relevant to determining whether an agency exists." A293. To be sure, in the face of a contractual provision disavowing agency, parties theoretically could behave in ways that exhibit the requisite mutual assent to establish agency. Restatement (Third) of Agency § 1.02. But not here. Where "language in [a contract] … expressly disavows an agency relationship," evidence of the parties' conduct "falls short" unless it provides especially powerful indication of a contrary intent. *Leon v. Caterpillar Indus., Inc.*, 69 F.3d 1326, 1336 (7th Cir. 1995). That is particularly true when—again, as here—the parties go "to great pains" to include in their contract "multiple provisions specifically disclaiming any agency relationship." *Gibraltar*, 575 F.3d at 1189.

Here, the parties' behavior uniformly demonstrated that DISH did *not* have the requisite authority to exercise "control over the purported agent's day-to-day operations." *Carlisle*, 576 F.3d at 656. DISH had "nothing … to do with" how the thousands of retailers marketed DISH products. A1353; *see* A73, 122. The retailers did not consult with DISH about day-to-day matters, such as what numbers to call or what marketing scripts to use, A73, and they developed and bore the financial risk of their own particular marketing strategies and business models, A66-67, 73, 122. In short, DISH did not dictate, and could not have dictated, the day-to-day marketing activities of 8000 retailers.

Also telling, many of DISH's retailers simultaneously worked for DISH's competitors, such as DIRECTV. A73. As a fiduciary, an agent could never work for a competitor without the principal's permission. Restatement (Third) of Agency § 1.01 cmt. d. Consistent with their non-agent status, the retailers sought no permission, and DISH gave no indication that it believed it held a veto.

None of this is disputed.

The meager evidence the district court pointed to, A293-99, was certainly not enough to override the explicit contractual terms. For one thing, the court's purported evidence of DISH control was from "2008 and 2009." A294. But 99% of the retailers' unlawful calls—all except SSN's—were placed before then, between 2004 and 2007. *Infra* at 72, n.10. So even if this evidence overcame the explicit contractual language, it could not have supported DISH liability for the retailers' pre-2008 violations.

In any event, the evidence that the court cited was entirely consistent with an ordinary contractual agreement "to receive services provided by persons who are not agents," Restatement (Third) of Agency § 1.01 cmt. f, and therefore cannot overcome the contract's plain terms. *First*, the court observed that DISH "fired 40 [r]etailers"—"for fraud and making misrepresentations." A294. But terminating an independent contractor for fraud (which the Agreement contemplated, A1298-99), is evidence of good business sense, not agency. When your builder defrauds you or lies to the housing inspector, you are allowed to terminate the relationship. That does not make him (or the contractors you don't fire) your agent.

Second, the court mentioned that DISH took steps to protect consumers from telemarketing violations. A294. DISH, for example, asked retailers to engage PossibleNow to scrub their call lists of numbers on the Registry. *Id.* But "restrictions upon … manner and means of performance that spring from" efforts to comply with "government regulation" do not support agency because the "company is not controlling the [contractor], the law is." *FedEx Home Delivery v. NLRB*, 563 F.3d 492, 501 (D.C. Cir. 2009) (internal quotation marks omitted). So when FedEx requires its drivers to "complete a driving course" and "audit[s] [their] performance" twice a year to ensure they comply with "DOT [safety] regulations," *id.* at 500-01, that does not make them agents. This makes sense: A company cannot be saddled with the weighty duties and liabilities of an agency relationship, Restatement (Third) of Agency §§ 7.03, 8.09-8.15, merely because it takes steps to prevent contractors from violating the law. Otherwise, companies would feel a need to scrap their compliance measures altogether.

Third, the court heavily emphasized DISH's expanded efforts "[b]y 2009" to ensure that retailers "accurately describ[ed] DISH products and promotions." A104, 294. But this was merely a feature of the limited authority DISH reserved in the aforementioned § 7.3. Again, providing an independent contractor with quality-control specifications, and verifying that they are satisfied, does not turn the contractor into an agent. *Supra* at 37. When you exercise a contractual right to conduct a weekly walk-through with your architect to verify your builder's workmanship, that does not convert the builder into your agent. That was all that happened here. For example, when retailers inaccurately described DISH promotional offers, DISH was contractually authorized to "revise[] sales scripts," but only to correct misstatements of sales terms. A295-96; *see* A1409-10.

Finding an agency relationship from these facts would mark a revolutionary change in the law of agency. Businesses in every sector rely heavily on independent contractors and expect to be able to make suggestions and exercise quality control. Those ubiquitous practices cannot convert independent contractors into agents—and they did not here.

2. The retailers did not act as DISH's agents when they violated DISH's instructions and broke the law.

Even if the retailers somehow became DISH's agents, the agency ruling must be reversed for a second reason. As a matter of law, the court failed to establish that the retailers acted within the scope of their authority when they broke telemarketing laws in violation of DISH's express instructions.

An agent's act falls outside the scope of conferred authority if the agent could not "reasonably believe[] … the principal wishes the agent so to act." Restatement (Third) of Agency §§ 2.01, 7.04; *e.g.*, *Opp v. Wheaton Van Lines, Inc.*, 231 F.3d 1060, 1062-64 (7th Cir. 2000) (agent who was instructed to "let the movers in" on principal's behalf did not have additional authority to sign a limitation of the movers' liability); *Orix Credit All., Inc. v. Taylor Mach. Works, Inc.*, 125 F.3d 468, 474-75 (7th Cir. 1997) (agent with power to sign marketing agreements did not have authority to enter repurchase agreements). Particularly relevant here, "crimes and torts" are almost never within the scope of an agent's authority "because … a reasonable agent … believe[s] that the principal does not intend to authorize the agent to do th[ose] act[s]." Restatement (Third) of Agency § 2.02 cmt. h. So vicarious liability for crimes or torts cannot stand unless the principal issued clear instructions to break the law.

DISH instructed the opposite. *Supra* at 14. Such "formal written" instructions are "often dispositive," Restatement (Third) of Agency § 2.02 cmts. c, f, g, because an "agent has no authority to act contrary to the known wishes and instructions of his principal," *Old Sec. Life Ins. Co. v. Cont'l Ill. Nat'l Bank and Tr. Co. of Chicago*, 740 F.2d 1384, 1391 (7th Cir. 1984). Here, they most certainly were because DISH reiterated its instructions, including in verbal warnings when it got wind of possible violations. *Supra* at 14, 18-19. There is no other way to understand the warning "that [DISH] would shut [the retailer] down" if it "violate[d] the Do-Not-Call Laws," A127, or "[t]his is simple, … We're not interested in this type of marketing," A113. In light of these explicit and repeated instructions, no retailer could reasonably believe DISH intended it to break the law.

The retailers obviously did not believe that was DISH's direction. Otherwise, they would not have lied about and disguised their illegal calling. *Supra* at 17-20. No one thinks to themselves, "I'm doing my job exactly how I've been asked to do it—so now I'll lie about what I'm doing." Star's principal underscored the point when he testified that he "did not want scrutiny from DISH about whether [he] was complying with Do-Not-Call Laws." A122.

The district court never found that Plaintiffs satisfied the controlling legal standard. Instead, it simply declared that a "principal is liable for the acts of the agent … unless the agent acts entirely for the agent's benefit only." A299. That is the wrong standard as a matter of law.

The court purported to find this standard in *Hartmann v. Prudential Insurance Co. of America*, 9 F.3d 1207, 1210 (7th Cir. 1993).

But *Hartmann*'s brief discussion—which was but a preface to its holding that the parties had "forfeit[ed]" and "disclaim[ed] … any theory of vicarious liability," *id.* at 1212, 1214-15—was not even about the scope of an agent's conferred authority. It recited the standard for "respondeat superior," a distinct—and much broader—form of vicarious liability for torts committed by an *inside* employee (or "servant") within the scope of his *employment* (or "master-servant" relationship). *Id.* at 1210-11; *compare* Restatement (Third) of Agency § 7.04 (on "actual authority"), with *id.* § 7.07 (on "respondeat superior"); *see Boudwin v. Hastings Bay Marina, Inc.*, 614 F.3d 780, 783-84 (8th Cir. 2010) (addressing these "different legal theories").

More on point is this Court's opinion in *Bridgeview Health Care Ctr., Ltd., v. Clark*, 816 F.3d 935 (7th Cir. 2016). There, the defendant retained a firm to conduct a limited fax-advertising campaign, within a particular locality. *Id.* at 939. Instead, the firm sent out 5,000 TCPA-violative ads across three states. *Id.* This Court held that the defendant had not expressly or impliedly conferred authority: It had not "directly spoken or written to [the fax-advertising firm], telling it to send [the] nearly 5,000 fax ads," and "[n]othing about fax marketing inherently calls for sending thousands of advertisements" or "sending these ads to states where the advertiser does not do business." *Id.* Exactly the same is true here.

The court distinguished *Bridgeview* on the theory that "DISH authorized the … Retailers to market DISH Network programming nationally," unlike the *Bridgeview* defendant who authorized advertising only "within a 20 mile radius of Terre Haute." A300. But the legal rule in *Bridgeview* was not limited to geography; violating a geographic limitation was just one way in which the agent there exceeded the scope of its authority. The legal rule, however, was the familiar one: An agent cannot reasonably infer broader authority than a principal expressly conveyed, except when the express instructions "inherently" require doing something more. And here, nothing about "marketing nationally" "inherently" requires massive violations of the telemarketing laws.

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The court's approach to agency yielded one of the grand ironies of this case. DISH could not possibly have exercised day-to-day operational control over thousands of retailers. So, like any business in its shoes, DISH did not attempt that quixotic task. Both common sense and well-settled law make clear that this decision is legitimate: Because a business cannot keep an eye on all of its independent contractors day in and day out, it does not bear responsibility when they go rogue and break the law. The district court nonetheless wiped out this legal protection on the theory that DISH exercised just a tad *too much* control in its efforts to protect consumers from fraud, misleading sales pitches, and telemarketing violations. *Supra* at 42-43. Having done that—and declared the retailers to be DISH's agents—the court then proceeded to impose huge penalties and damages on DISH because it *did not exercise enough control*. *Supra* at 22-23. That Catch-22 cannot be the law. Businesses cannot effectively operate in such a damned-if-you-do-damned-if-you-don't regime, with such enormous consequences and such a razor-thin margin for error.

All the violations based on DISH's supposed principal-agent relationship with the retailers must be reversed. That includes:

- All of the 28.3 million TCPA and state-law retailer violations, A364-66, 371-72, 382-88, 393-96; *and*
- 11.2 million violations under the TSR, TCPA, and state law—some by retailers, some by DISH directly—for which DISH was

held liable because the call recipients appeared on the retailers' internal lists.[3]

B. DISH did not "cause" the retailers' TSR violations simply by contracting with them.

Unlike its TCPA analysis, the district court did not even purport to apply common-law principles of vicarious liability to the TSR. It held that every business is liable for every TSR violation of any independent contractor that it contracts with. That strict-liability notion is foreign to the common law and to any rational view of vicarious liability—and it is not what the TSR means when it imposes liability for "causing" a violation. § I.B.1. Under the proper standard—"proximate cause"—DISH cannot be held liable for the 57.8 million retailer calls the court held to violate the TSR under Counts I-III. § I.B.2.

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[3] These violations included internal-list calls that DISH placed to numbers on the retailers' internal lists, A289, 307, internal-list calls that retailers placed to numbers on *other* retailers' internal lists, A305-07, and Registry calls DISH placed to customers with whom DISH had an "established business relationship," but were nevertheless treated as violations because the numbers appeared on the retailers' internal lists, overriding the established-relationship exemption, A178-82, 283, 360-61, 380, 385, 393.

1. The district court erred in abandoning the common-law rule that "cause" means proximate cause.

The court found this unprecedented strict liability hidden in the provision of the TSR that makes it unlawful for a seller to "cause a telemarketer to engage in" violations of the rule. 16 C.F.R. § 310.4(b). The court reasoned that DISH "caused" every one of the retailers' violations simply because "DISH retained the[m] … to market DISH products and services." A284-85, 765. The court did not suggest this was the most natural meaning of "cause"—which it most certainly is not. Rather, it believed itself bound to interpret the word in that unnatural way in deference, under *Auer v. Robbins*, 519 U.S. 452 (1997), to what the court found to be the FTC's interpretation of its own regulation. A764-66. The court committed legal error in both its interpretation of "cause" and its deference ruling.

a. The court devised the definition of "cause" on its own initiative. The FTC did not advance a definition remotely close to the court's; it argued that "cause" means "proximate cause." A845-46. As the FTC acknowledged, *id.*, for "centuries, it has been a well established principle of the common law, that in all cases of loss, we are to attribute it to the proximate cause, and not to any remote cause," *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390-91 (2014) (internal quotation marks and brackets omitted). Thus, laws using the word "cause" must be interpreted to incorporate proximate-cause principles, absent clear indications to the contrary.[4] *E.g., Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 344-46 (2005) (securities fraud, 15 U.S.C. § 78u-4(b)(4)); *Martinez v. Carson*, 697 F.3d 1252, 1255 (10th Cir. 2012) (42 U.S.C. § 1983); *U.S. ex rel. Sikkenga v. Regence BlueCross BlueShield*, 472 F.3d 702, 714 (10th Cir. 2006) (False Claims Act, 31 U.S.C. § 3729(a)(1)).

The TSR's regulatory history confirms the FTC intended to adopt this traditional understanding. The FTC "decline[d] to" hold "sellers and telemarketers … jointly liable … for the actions of the other." 60 Fed. Reg. 43,842, 43,844-45 (Aug. 23, 1995). It found "nothing in the statute or legislative history to support the view that it [was] the intent of Congress" to make "sellers and telemarketers … [strictly] liable … for

[4] DISH argued below for a variant on proximate cause ("active conduct" such as "directing [a] telemarketer" to violate the TSR," A820). On the record eventually presented, the distinction probably makes no difference, but for present purposes, DISH is satisfied to embrace the proximate-cause standard.

the actions of the other." 60 Fed. Reg. 30,406, 30,411 (June 8, 1995). In short, vicarious liability—in any form, especially the extreme type the district court found—was nowhere in the picture.[5]

The court rejected the age-old rule about the meaning of "cause" based on two inferences it drew from other language in the regulation. But this language does not "'speak directly' to the question addressed by the common law," and thus cannot "abrogate a common-law principle." *United States v. Texas*, 507 U.S. 529, 534 (1993). That rule is especially "strict[]" because the TSR "imposes a penalty." *C.I.R. v. Acker*, 361 U.S. 87, 91 (1959) (internal quotation marks omitted).

The court began by comparing the TSR's provision prohibiting sellers from "caus[ing]" telemarketing violations with the TSR's "substantial assistance" provision, 16 C.F.R. § 310.3(b), the other possible basis for a seller's TSR liability. The court found it significant that the "causing" provision lacks two elements found in the

[5] At times, the court appeared to suggest that it was invoking agency principles as an alternative basis to hold DISH vicariously liable under the TSR. *E.g.*, A327-28. This too would be inconsistent with the TSR's plain language rejecting vicarious liability of any sort. But even if the TSR silently incorporates agency principles, there could be no agency liability for the reasons described in § I.A.

"substantial assistance" provision: a *mens rea* element ("knows or consciously avoids knowing") and a level-of-involvement element ("substantial assistance"). A762. These distinctions reveal nothing, however, about the meaning of the element the "causing" provision *does* contain—that a seller is not liable unless it "causes" a telemarketer to commit a violation. Indeed, causation is also a separate element of the "substantial assistance" provision, *infra* § I.C—an element totally different than the inquiry into either a defendant's state of mind, *e.g.*, Restatement (Second) of Torts § 8A (1979), or whether "assistance" qualifies as "substantial," *id.* § 876 cmt. d.

Next, the court drew an inference from the TSR's "safe harbor" provision, under which a seller can insulate itself from liability by adopting certain safeguards. The court seems to have reasoned that the safe harbor would be superfluous if the word "causes" requires something more than simply contracting with a telemarketer who then makes unlawful calls. A762-64. This is wrong. To take one example, a seller may proximately cause a telemarketer's TSR violation if it "provid[es] the telemarketer with a customer contact list that includes customers that should not be called." 60 Fed. Reg. 8313, 8318 n.27

(Feb. 14, 1995). The safe harbor would still apply in that situation if the seller provided the Registry numbers as a "result of error" (for instance, a scrubbing mistake), 16 C.F.R. § 310.4(b)(3)(vi), and the safe harbor's other requirements were satisfied, *id.* § 310.4(b)(3)(i)-(v).

b. The district court also erred in believing that *Auer* deference required it to adopt its implausible definition. A686-88, 766. Throughout this litigation, the FTC took the position that proximate cause is the appropriate standard because "tort law (and other areas of law) generally look to proximate as well as factual causation." A879. The court never explained how it could ever be proper to defer to a position that an agency itself disavows.

In any event, there never was any such agency interpretation. The court cited an FTC publication, but that publication did not so much as hint at the court's interpretation. A764-65. All it said was that there could be certain (unspecified) circumstances under which a "seller … *might* be liable" for a telemarketer's violations. *Id* (emphasis added) (internal quotation marks omitted). That bears no relation to the strict-liability standard the court adopted. "Without the agency's own considered [endorsement]" of the district court's standard, deference is unwarranted. *Exelon Generation Co. v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 576 (7th Cir. 2012).

Even if that one FTC document could be construed to suggest the court's standard, *Auer* deference still would be inappropriate. The document was an informal guide. A764-65. The FTC's proposed and final TSR rulemakings did not even mention the court's "causation" standard. DISH therefore had "little reason to suspect" the FTC would adopt any interpretation other than the long-settled principle that "cause" means proximate cause. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155-157 (2012).[6]

2. DISH did not proximately cause the retailers' TSR violations.

Under the correct standard—proximate cause—DISH is not liable for the retailer TSR violations. The rule for over a century has been there is no proximate cause unless the violations were "the *natural* and *probable* consequence" of DISH's conduct. *Milwaukee & St. Paul Ry. Co. v. Kellogg,* 94 U.S. 469, 475 (1876) (emphasis added). Nothing DISH did (or did not do) made it "natural and probable" that retailers

[6] While this Court is bound by *Auer*, we preserve our position that it should be overruled. A908-20.

would violate the law. The clearest proof is that DISH maintained thousands of relationships with retailers that did not break the law. In any event, two factors break any possible causal chain as a matter of law.

First, when another party's "intentional tort or crime" directly causes the injury, it is a "superseding cause of harm." Restatement (Second) of Torts § 448 & cmt. b. *Second*, because the retailers acted contrary to DISH's express instructions, this case falls squarely within *Suzik v. Sea-Land Corp.*, 89 F.3d 345, 347, 350 (7th Cir. 1996). There, a trucking company instructed its drivers to contact a dispatcher if a truck's propane tank came loose, so the dispatcher could send a repair person to assist with a mechanical lift. Disregarding this policy, a driver moved the tank himself and was injured. *Id.* at 347. This Court held that no reasonable factfinder could find the company proximately caused the injury, because the "driver's departure from … procedures" was a superseding cause of his injuries. *Id.* at 350.

That is just what happened here. DISH required its retailers to comply with the TSR. *Supra* at 14. The retailers clearly understood that instruction, as evidenced by the fact that they hid their illicit telemarketing from DISH. *Supra* at 17-20. Moreover, when DISH received complaints about unlawful retailer calls, it demanded an explanation from the retailer and reiterated DISH's policy against illegal calling. *Supra* at 16. As a matter of law, Plaintiffs did not show proximate cause.

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The district court's novel interpretation of "cause" is potentially ruinous. It is also irreconcilable with the intent of both Congress and the FTC to "encourag[e] the growth of the legitimate telemarketing industry." 68 Fed. Reg. at 4583. American businesses widely rely on lawful telemarketing. In fact, in the past several years, they spent about as much on telemarketing as they did on television advertising (roughly $60 billion). Advertising Age, *Marketing Fact Pack* 14 (2017), http://tinyurl.com/yd57oqhr. If this Court affirms, businesses will be held strictly liable for any of their contractors' telemarketing violations. Because "cause" means at least proximate cause, and Plaintiffs did not show proximate cause as a matter of law, the judgment must be reversed as to the 57.8 million retailer calls in violation of the TSR under Counts I-III. A287, 307, 312-13.

C. DISH cannot be held liable for "substantially assisting" Star's calls.

After holding DISH liable for all of the retailers' violations under the TSR causation provision, the district court held DISH liable a second time for a huge portion of the same calls—the 43.1 million placed by Star—under the TSR provision that makes a seller liable for "substantially assisting" a telemarketer's calls. A313-16.[7]

The "substantial assistance" provision is modeled on near-identical language in Restatement (Second) of Torts § 876 ("persons acting in concert"). 60 Fed. Reg. at 43,851-52. "[O]rdinary principles of tort causation apply" under § 876. *Montgomery v. Aetna Plywood, Inc.*, 231 F.3d 399, 413 n.6 (7th Cir. 2000). That means that DISH cannot be held liable for substantially assisting a violation without proof that its conduct proximately caused the violation. Thus, the "substantial assistance" violations cannot stand because, as demonstrated above, DISH did not proximately cause Star's calls.

[7] These violations were among those not counted when calculating the penalty. *Supra* at 22, n.1.

II. The $280 Million Penalty Violates Due Process And Misapplies The FTC Act.

Even if this Court upholds liability, the award must be vacated for two reasons. *First*, the telemarketing statutes, as applied here, violate due process. § II.A. *Second*, at a minimum, the case must be remanded for reconsideration, because the district court made three legal errors in calculating the maximum range. § II.B. These questions are reviewed de novo. *United States v. Wicks*, 132 F.3d 383, 386 (7th Cir. 1997).

A. The telemarketing statutes did not provide fair notice, yielding an unconstitutionally excessive award.

a. The district court read the telemarketing statutes to authorize the corporate death penalty—more than a hundred times over. The $1.3 trillion outer limit for the TSR violations is the GDP of Spain. A419-21 & n.76. The TCPA authorized another $8 billion—enough to shutter most any company. A421-24. Plus another $48 billion under state law. A424-28. In 2016, the FTC increased its penalty, this time to $40,000 per call, 81 Fed. Reg. 42,476 (June 30, 2016), so the potential TSR liability today would be over $4 trillion.

Even for short-term violations, the potential liability is crushing. Consider, for example, Guardian's four-month spree of prerecorded calls marketing DISH services for Star. A126. At Guardian's rate of 375,000 prerecorded calls *per day*, that would generate over $4 billion of exposure *daily* for these calls alone. *Id.*

With potential penalties ranging anywhere from something more than $0 to instant corporate death, the court had unbridled discretion to pick any penalty it desired.[8] DISH thus had no way to assess its actual exposure. A company in DISH's position might ask what the same agencies have demanded before. That would have set a drastically lower expectation. The FTC pursued Guardian and Star—the actual perpetrators—for the *same calls* at issue here. Despite their greater culpability, the FTC considered their wrongdoing worth only $7.9 and $4.4 million respectively. A439. The settlement agreements separately reduced the penalties to $150,000 and $75,000 respectively to adjust for the perpetrators' financial condition. *Id.*

Or, in a rational world, one might look at judgments that courts impose—at least to discern an outer boundary. That too would have

[8] The TCPA authorizes statutory "damages"; all other statutes at issue provide for civil "penalties." *Supra* Table 1 (at 24). The distinction can make a difference in other contexts, but not to any arguments in this appeal.

failed to put DISH on notice. The largest telemarketing judgment before this one was in a recent case where the FTC and several states alleged that Caribbean Cruise Lines itself (not a third-party contractor) had placed about 3 to 4 billion "robocalls." A1215-16. That was about 50 times the number of impermissible calls found here; and, unlike here, the FTC also alleged that the calls were substantively deceptive. *Id.* Yet the court entered a stipulated judgment of only $7.7 million. A439. That was almost 40 times lower than what the court awarded here—about 1500 times less per call. Or consider one of the most flagrant, massive telemarketing violations of all time—where a defendant "blasted consumers with billions of … robocalls": The FTC obtained a judgment of only $2.7 million, less than 1% of the amount awarded here (and about 2000 times less per call). FTC, *Press Release* (June 2, 2017), https://tinyurl.com/y7xae2pt; *see also* A973-74 (collecting similar examples of vastly smaller judgments).

b. Any application of a statute that provides so little notice, affords so much prosecutorial discretion, and yields such disparate results violates due process. The Supreme Court has condemned each of these evils. As to notice, "[e]lementary notions of fairness … dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that [the] State may impose." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (internal quotation marks omitted). The Court has expressed concerns about boundless discretion yielding exactly the sort of constitutionally impermissible "arbitrary" results on display here. *Id.* And "uniform general treatment of [the] similarly situated … is the essence of law itself." *BMW of N. Am. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J., concurring).

These principles articulated in the context of punitive damages apply with equal force to statutory penalties. *U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 387-90 (4th Cir. 2015). A penalty provision would be unconstitutional if it said: "Large-scale violations are punishable by a fine between $5000 and $1.3 trillion, in the district court's discretion," or "the district court has the discretion to impose a whopping penalty of unspecified size." But that's all we have here. "[U]nlimited judicial discretion" in the assessment of penalties "may invite extreme results that jar one's constitutional sensibilities." *P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991).

The result would be different if the statute had some realistic maximum to "anchor the court's … select[ion] [of] an appropriate" punishment. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346, 1349 (2016) (considering the Sentencing Guidelines). As this case illustrates, the absence of such constraints invites prosecutors and plaintiffs' lawyers to seek—and courts to impose—radically different punishments for identical conduct.

c. Even apart from the foregoing flaws, the $280 million penalty is unconstitutionally arbitrary on its own terms, violating both due process and the Eighth Amendment's prohibition on excessive fines. The court plucked the award—20% of DISH's profits—out of thin air. It bore no relation to DISH's "reprehensibility," the most important factor for identifying "grossly excessive or arbitrary punishments" that violate due process, *Campbell*, 538 U.S. at 416-19, or the Excessive Fines Clause, *United States v. Rogan*, 517 F.3d 449, 454 (7th Cir. 2008); *Tuomey*, 792 F.3d at 388. DISH did nothing "reprehensible."

In fact, this case does not meet even one of *Campbell*'s indicia of reprehensibility. The harm caused was not "physical," 538 U.S. at 419; the call recipients were at most "annoyed and bothered," A446. Nor did

DISH evince "intentional malice, trickery, or deceit." *Campbell*, 538 U.S. at 419. Rather, as discussed, the vast majority of the violations required no culpability on DISH's part: They were imposed vicariously. But punitive awards have traditionally been "strict[ly] limit[ed]" in cases of "vicarious liability." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 541-42 (1999); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("traditional practice provides a touchstone for [due-process] analysis").

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Legislatures can easily avoid these constitutional problems. They can cap penalties arising out of one course of conduct, so that per-violation penalties do not aggregate to excessive sums. *E.g.,* 12 U.S.C. § 4010 (setting per-violation penalty up to $1000, but limiting "total recovery" to "the lesser of $500,000 or 1 percent of the net worth of the [defendant]"); 15 U.S.C. § 1692k (similar); 49 U.S.C. § 60122(a) (setting the "maximum civil penalty … for a related series of violations" at $2 million). Here, the FTC and FCC, which have broad rulemaking authority on telemarketing, could supply similar limits. *See* 47 U.S.C. § 227(b)(2); 15 U.S.C. § 6102(a).

Alternatively, legislatures (or agencies) can link maximum penalties to actual harm. That is what Congress did when it tied the antitrust trebling penalties and patent willfulness damages to a "multiple of the injury actually proved." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485-86 (1977). That achieves what the Supreme Court prescribed in the context of punitive damages when it held that defendants receive adequate notice of potential punitive damages so long as "the disparity between the actual or potential harm … and the punitive damages award" is small. *Campbell*, 538 U.S. at 418, 424-25.

What Congress and agencies may not do, however, is authorize boundless liability that leaves prosecutors and class-action lawyers free to threaten ruin, and courts free to impose any penalty they want, shorn from any numerical limits and objective criteria or any semblance of actual harm suffered.

B. The district court erred in calculating the FTC Act's outer limit with respect to TSR violations.

Constitutional defects aside, the award must be vacated because the district court started from a legally flawed premise: that penalties are authorized for every call found to violate the TSR. This is wrong.

The FTC Act has three limitations that dramatically reduce the number of violations subject to penalties.[9] *First*, it mandates that "continuing" violations be counted per day, meaning the district court should not have counted each of the retailers' calls as a separate violation by DISH. This limitation reduces the maximum penalty for the vast majority of the TSR violations—the retailers' violations—down to, at most, $8.35 million. § II.B.1. *Second*, even if each of the retailers' calls counted as a separate violation by DISH, the FTC Act does not authorize a penalty for any violation without a showing that DISH knew about *that very violation*. The district court ignored this requirement entirely. § II.B.2. *Third*, the FTC Act provides a mistake-of-law defense, meaning DISH cannot be penalized if it could have reasonably believed its conduct was compliant. The court failed to apply this requirement as well. § II.B.3.

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[9] The TSR does not prescribe penalties specific to telemarketing. 15 U.S.C. § 6102(c). Rather, TSR violations are punishable under a generic provision of the FTC Act, 15 U.S.C. § 45(m), covering a vast array of conduct, anything from ripping off a bereaved widow with misleading funeral prices, 16 C.F.R. § 453.2, to using deceptive labels like "Lite Diet" for non-diet foods, *Bakers Franchise Corp. v. FTC*, 302 F.2d 258, 259 (3d Cir. 1962).

1. The continuing-violations provision applies to the TSR retailer violations, dramatically reducing the maximum penalty.

The rule for continuing violations is simple: "In the case of a violation through *continuing failure to comply* with a rule …, *each day* of continuance of such failure *shall* be treated as a separate violation." 15 U.S.C. § 45(m)(1)(C) (emphasis added). The Supreme Court, applying the nearly identical provision one paragraph earlier, § 45(l), has explained that there is a continuing violation in two circumstances: *either* where a defendant violates the law through a "continuing act" or course of conduct, *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 242-43 (1975), *or* where a limited number of the defendant's decisions or policies produce "detrimental effect[s] … [that] continue and increase over a period of time," *id.* at 231-33. In the first scenario, the focus is on the defendant's conduct, which by its very nature is continuing. In the second, the focus is on both the defendant's conduct and the harm: Where there is a mismatch between the number of culpable acts the defendant has taken and the amount of continuing harm they cause, daily penalties are mandatory.

Either way, the retailer TSR violations were continuing here. DISH's involvement in those violations was limited to a continuing course of conduct: the "manner in which DISH operated the Order Entry Program," i.e., DISH's management of its retailers and, in the district court's view, its ongoing failure to do enough to prevent their telemarketing violations. A435. There was also a gross mismatch between the amount of continuing harm—millions of virtually identical unlawful retailer calls—and DISH's few related acts. Indeed, the court held that DISH "caused" each retailer's violations with just one innocuous act: signing a contract with the retailer. *Supra* § I.B. The "substantial assistance" violations similarly turned on very few culpable acts by DISH (such as contracting with Star) that resulted in liability for 43.1 million calls. A314-15.

In similar circumstances, the Sixth Circuit applied the continuing-violations provision at issue in *ITT* to limit liability. In *United States v. Alpine Industries, Inc.*, the defendant violated an FTC consent order when it misrepresented the health benefits of air-cleaning products. 352 F.3d 1017 (6th Cir. 2003). The defendant then made those misrepresentations in promotional materials, which, "if … parsed for individual misrepresentations," would reveal "thousands upon thousands of violations." *Id.* at 1030 (internal quotation marks omitted). Because that approach to violation-counting did not reflect culpability for the serious but limited number of acts taken by the defendant, the court calculated violations on a per-day basis.

In a similar case, the defendant committed "totally unconstrained" TSR violations, numbering in the hundreds of thousands. *United States v. Prochnow*, No. 1:02-cv-00917, 2005 WL 8154273, at *4, 8-9 (N.D. Ga. Dec. 2, 2005). On appeal, the Government acknowledged that the "violations can correctly be analyzed as continuing," Brief of United States at 21-22, *United States v. Prochnow,* No. 07-10273-G, 2007 WL 1231876 (11th Cir. Apr. 6, 2007), and the Eleventh Circuit agreed. 2007 WL 3082139, at *4 (Oct. 22, 2007); *accord United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811, 822 (N.D. Tex. 2008) (adopting the same approach).

In a few cursory sentences, the district court incorrectly held that the only way to satisfy the continuing-violations provision was where "a party continues to violate [a rule] but the number of violations is unclear." A355. It then observed that "[t]he United States has proven millions of calls" and "[e]ach call proven is a separate violation." A356. But the text of the provision is not limited to continuing violations that pose counting difficulties. That is why *ITT* treated the violation as "continuing" even though there were exactly "two," easily countable unlawful transactions. 420 U.S. at 229-30, 232-33.

Applied here, the continuing-violation provision reduces the maximum penalty for the retailer TSR violations to no more than $8.35 million. "[E]ach day" of a continuing violation "shall be treated as a separate violation, for purposes of subparagraph[] (A)." § 45(m)(1)(C). Subparagraph (A) imposes a knowledge requirement: It authorizes a penalty for "each violation" only where the defendant has "actual knowledge or knowledge fairly implied on the basis of objective circumstances that [its] act is … prohibited." § 45(m)(1)(A).

Thus, daily penalties may be imposed only from the time that DISH had "knowledge fairly implied" that a continuing violation had begun. Assuming (however implausibly) that DISH had reason to know of each retailer's violations from the day of that retailer's first violation to the last, the maximum possible TSR penalty for retailer violations would be about $8.35 million.[10] The Court should therefore remand for calculation of an appropriate penalty under this reduced maximum.

2. The district court applied the wrong legal standard in concluding DISH knew of the retailers' TSR violations.

Even if this Court decides that DISH's penalty for the retailers' violations may be calculated on a per-call basis, it still must remand because the district court misapplied the knowledge requirement. As discussed, the FTC Act authorizes a penalty for "each violation" only where the defendant "violates [a] rule" with "actual knowledge or knowledge fairly implied … that [its] act is … prohibited." § 45(m)(1)(A). Thus, the district court could not impose civil penalties on DISH for the 101 million retailer TSR violations without making two findings: (1) that DISH knew or should have known the retailers were

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[10] Even though some retailers violated multiple provisions, DISH's involvement was limited to one course of conduct. *See Alpine*, 352 F.3d at 1021-22, 1030 (treating a continuing violation of multiple provisions as one violation). At most, DISH's course of conduct contributed to:

- **Star:** unlawful calls over 116 days; $1,276,000 maximum. A126.
- **JSR:** 229 days; $2,519,000 maximum. A138, 1277.
- **SSN:** 215 days; $3,440,000 maximum. A120, 1260.
- **DTVN:** 102 days; $1,122,000 maximum. A112.

engaging in "prohibited" acts under the TSR; and (2) that DISH knew or should have known about "each violation."

As to the first requirement, the court took two different approaches. For some retailers' violations—including all of DTVN's calls and JSR's Registry and internal-list violations—the court made no findings at all that DISH knew or should have known of the violations. In an echo of the improper causation ruling, *supra* § I.B, the court seemed to think the knowledge requirement could be satisfied based simply on DISH's knowledge that it "retained" each retailer. *E.g.*, A335-37, 344, 349. But the statute requires much more: that DISH acted with awareness that its conduct is "prohibited." What the TSR "prohibits" are unlawful telemarketing calls, not entering into retailer contracts.

That is how penalty statutes are presumed to work: Absent some other indication in the text, a statute's mental-state requirement must be applied to the illegal conduct itself. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127, 129 (1985) ("willful" requirement applied to all "of the Act's requirements," so violation was not willful where defendant "simply knew of the potential applicability" of the statute);

United States v. X-Citement Video, Inc., 513 U.S. 64, 72 (1994) (in criminal statutes, mental-state requirement applies to the extent necessary to separate wrongful conduct from "otherwise innocent conduct"). Nothing about the FTC Act's knowledge requirement suggests it should be applied any other way.

For other retailers' violations, the court made limited knowledge findings. But it did not provide evidentiary support. Most notably, the court stated that DISH knew of Star's prerecorded calling, but it pointed to only a few unverified consumer complaints and one DISH employee's unconfirmed belief. A350. This was legally insufficient to prove knowledge, actual or implied.

The court did not even try to satisfy the second requirement—proof of knowledge as to "each violation." § 45(m)(1)(A). That means that if DISH should have known of, say, four violations, the FTC Act authorizes civil penalties specifically for those four violations. The court identified no basis for imposing civil penalties on DISH for every one of the retailers' 101 million TSR violations. Remand is therefore required so that the court can calculate the scope of retailer violations that satisfy the FTC Act knowledge standard.

3. The district court failed to explain how DISH reasonably could have known its conduct violated the TSR.

There is another reason the FTC Act knowledge requirement is not satisfied here: Section 45(m)(1)(A) "provide[s] a mistake-of-law defense," meaning DISH cannot be penalized based on a reasonable "misunderstanding about what the [TSR] requires." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 581, 583 (2010). In two instances, the district court rejected DISH's TSR interpretations but failed to explain why DISH's views were unreasonable. *First*, DISH could not reasonably have anticipated that "cause" means simply "do business with." *Supra* § I.B.

Second, DISH could not have known that, for purposes of the "established business relationship" exemption to Registry calling, *supra* at 9, 13, the relationship ends on the "date of last payment," rather than the date when DISH disconnects a customer's service, A170-73. In fact, DISH was right. A payment date is just one way to determine the relationship's duration: The relationship is "based on … the consumer's purchase … of the seller's goods or services *or a financial transaction*." 16 C.F.R. § 310.2(q)(1) (emphasis added). "In instances where consumers pay in advance for future services," as DISH customers do, "the seller may claim the exemption for 18 months from the last … shipment [or delivery] of the product" or service—meaning here, 18 months from the disconnect date. 68 Fed. Reg. at 4593.[11] Accordingly, the Court should remand for recalculation of the penalty award because penalties should not have been assessed for conduct DISH reasonably viewed as compliant.

CONCLUSION

For the foregoing reasons, the judgment should be reversed in part, vacated in part, and remanded.

Dated: February 22, 2018

Respectfully submitted,

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[11] If this Court affirms on liability grounds, leaving the injunction in place, this question could affect how DISH demonstrates injunction compliance.

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ADDENDUM OF STATUTES AND REGULATIONS

15 U.S.C. § 45(m).

(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

***

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account 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.

16 C.F.R. § 310.2(q).

(q) ***Established business relationship*** means a relationship between a seller and a consumer based on:

> **(1)** the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the eighteen (18) months immediately preceding the date of a telemarketing call; or
>
> **(2)** the consumer's inquiry or application regarding a product or service offered by the seller, within the three (3) months immediately preceding the date of a telemarketing call.

16 C.F.R. § 310.3(b).

(b) *Assisting and facilitating.* It 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.

16 C.F.R. § 310.4(b)(1).

(b) Pattern of calls.

(1) It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to engage in, or for a seller to cause a telemarketer to engage in, the following conduct:

***

(iii) Initiating any outbound telephone call to a person when:

(A) 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 or made on behalf of the charitable organization for which a charitable contribution is being solicited; or

(B) That person's telephone number is on the "do-not-call" registry, maintained by the Commission, of persons who do not wish to receive outbound telephone calls to induce the purchase of goods or services unless the seller or telemarketer:

(1) Can demonstrate that the seller has obtained the express agreement, in writing, of such person to place calls to that person. Such written agreement shall clearly evidence such person's authorization that calls made by or on behalf of a specific party may be placed to that person, and shall include the telephone number to which the calls may be placed and the signature of that person; or

(2) Can demonstrate that the seller has an established business relationship with such person, and that person has not stated that he or she does not wish to receive outbound telephone calls under paragraph (b)(1)(iii)(A) of this section; or

(iv) Abandoning any outbound telephone call. An outbound telephone call is "abandoned" under this section if a person answers it and the telemarketer does not connect the call to a sales representative within two (2) seconds of the person's completed greeting.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Cir. R. 32(c) because this brief contains 13,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system on February 22, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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EXHIBIT 791

EXHIBIT 791

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**IN THE 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 SUPPLEMENTAL MEMORANDUM OF LAW REGARDING AGENCY DEFERENCE

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OTHER AUTHORITIES

Defendant DISH Network L.L.C. ("DISH") respectfully submits this supplemental memorandum of law regarding "the continued validity of the doctrine of deference to an agency's interpretations of its regulations," and the doctrine's implications with respect to the pending motions for summary judgment in accordance with this Court's July 8, 2014 Order. (d/e 422.)

PRELIMINARY STATEMENT

From the outset of this case, DISH has maintained that the facts surrounding DISH's relationship with the Independent Retailers, as alleged by the Federal Trade Commission ("FTC"), could not meet the standard for "causing" liability under the Telemarketing Sales Rule ("TSR"). DISH argued that the FTC's reliance on mere arms-length, general business transactions between DISH and the Independent Retailers was not enough to satisfy the "cause" standard under the TSR. Thus, DISH moved, in 2009, on this basis, to dismiss the Complaint.[1] The previous Judge (Hon. Jeanne Scott, U.S.D.J., ret.) denied DISH's motion to dismiss and adopted a broad interpretation of "cause." Judge Scott likened it to "gravity causing an object to fall to earth." (d/e 20 at 10.) Judge Scott granted "*Auer* deference" to the FTC's interpretation of the word "cause" in the TSR. DISH sought interlocutory appeal of this decision, which Judge Scott denied. (d/e 32.)

Since the denial of DISH's motion to dismiss in 2009, the Supreme Court has called into doubt the validity of *Auer* deference as a matter of law. Moreover, the Supreme Court and other courts have applied much greater scrutiny to agencies' interpretations of their

[1] As noted by this Court in its recent Order, DISH has argued on summary judgment that the facts adduced during discovery have further confirmed the lack of a nexus between DISH and the Independent Retailers with respect to the Independent Retailers' alleged violations of the TSR.

own regulations and refused to grant *Auer* deference to those interpretations where there was an insufficient basis articulated by the agency.

Whether this Court accepts that *Auer* deference is no longer valid as a matter of law or simply follows the recent trend of the law when scrutinizing the FTC's articulated basis for such deference, it is clear that the FTC's interpretation of "cause" cannot stand. The FTC, in response to DISH's motion to dismiss, argued that "cause" liability does not require that "the sellers directly participated in the violations." (d/e 14 at 8-9.) However, it then leapt from that mundane conclusion – that "cause" is not limited to instances of direct participation in a violation – to claiming, for the first time, that "cause" can be established simply if "the seller did not monitor and enforce the telemarketer's compliance." (d/e 14 at 10.) There is no support for "cause" liability arising from a seller's alleged failure to maintain and enforce telemarketing compliance by an independent retailer. In fact, and as noted below, the FTC, prior to asserting its position on "cause" against DISH here, had interpreted "cause" to require some active conduct by the seller directly related to the telemarketing activity of a third party (such as an Independent Retailer). The FTC had previously defined "cause" as a seller providing calling lists to a telemarketer or interfering with a do-not-call request by a consumer made to a telemarketer. The FTC's post-hoc and material expansion of its interpretation of "cause" to support its ligation position against DISH is improper. The FTC's new interpretation of "cause" simply cannot support a liability finding against DISH, as DISH had no notice of this new interpretation.

Further, allowing the FTC to interpret its own regulation would simply permit it to unfairly enhance its litigation position against DISH. This would arrogate to the FTC the power to create, enforce, and interpret the TSR. DISH and other regulated entities would have no protection from this unconstitutional concentration of power and the consequences of unfair surprise and prejudice that result from post-hoc, litigation-inspired interpretations that naturally flow from this improper concentration of power.

The FTC seeks to support its right to deference through vague statements in agency publications, such as business guidance stating that a "seller also *might* be liable, unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures." (d/e 14 at 7) (emphasis added). A phrase such as "might be liable," however, is so vague as to be meaningless. Obviously, this vague phrase is a far cry from the strict liability standard ("will be liable") the FTC now presses against DISH to claim "cause" liability. Similarly devoid of notice or meaning is the FTC's citation to its own proceedings and settlements involving other entities. How could DISH, or anyone besides the actual litigants in those cases, know what conduct the FTC believed constituted a seller's "causing" a telemarketer to violate the TSR? Litigation involving other parties who engaged in different conduct is far too abstract to put DISH on notice that the TSR "cause" section creates strict liability.[2] Moreover, these purported examples of the FTC giving notice of its interpretation of the word "cause" all

[2] In fact, in opposing DISH's motion to dismiss, the FTC relied on the following quotation from then FTC Chairman Deborah Platt Majoras as support for its argument that the public was on notice of its broad cause interpretation: "[t]his multimillion dollar penalty drives home a simple point: Sellers are on the hook for calls placed on their behalf." (d/e 14 at 8, n.2). This quote provides no such notice as it merely states that both sellers and telemarketers can be liable under the TSR, without defining the nature and extent of "cause" liability. Further, the Chairman used the notable phrase "on their behalf," which is strikingly close to the phrase "on behalf of." The phrase "on behalf of" is also used in a parallel TCPA regulation and requires a far closer relationship between a seller, such as DISH, and an Independent Retailer, than the FTC relies upon here to claim "cause" liability. As this Court knows, "on behalf of" requires a plaintiff to prove an agency relationship between the seller and the independent retailer. *See* Point III, *infra* (discussing *In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of Am., & the States of California, Illinois. N. Carolina, & Ohio for Declaratory Ruling Concerning the Tel. Consumer Prot. Act (Tcpa) Rules*, 28 F.C.C. Rcd. 6574 (2013), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (D.C. Cir. 2014) (hereinafter "*DISH Network FCC Declaratory Ruling*"). Obviously, agency is a far higher standard for "cause" liability than that asserted by the FTC here.

occurred *after* the conduct at issue in this case began, and after the FTC attempted to enforce its TSR theory as to DISH.

It is simply impermissible under the Constitution, and the Administrative Procedures Act, to allow the FTC to use vague (and post-hoc) pronouncements as a basis to assert massive liability. Indeed, this case is a prime example of why the doctrine of *Auer* deference, in just the last five years, has devolved to the point that its author, Justice Scalia, no longer supports it and both the Chief Justice and Justice Alito are ready to reconsider it. Simply put, *Auer* deference stands on dubious constitutional grounds. So much so that the Supreme Court as a whole has not hesitated to deny *Auer* deference in multiple instances, and scores of lower courts no longer give such deference to self-serving agency interpretations. Thus, this Court should reject *Auer*. If this Court does not reject *Auer* outright, it should refuse to give deference to the FTC's overly broad and unfair interpretation of the word "cause" because: (i) the FTC's support for its interpretation is non-existent; and (ii) it is nothing more than a post-hoc litigation position that seeks, without prior notice, to hold DISH liable for massive statutory penalties based on the actions of the Independent Retailers.

Whether this Court rejects the concept of *Auer* deference in total, or simply refuses to apply such deference based on the facts of this case, the result should be the same – DISH cannot be liable for the telemarketing acts of Independent Retailers under any reasonable interpretation of the word "cause." DISH cannot be said to have "caused" Independent Retailers' telemarketing violations merely by entering into contracts, and engaging in arms-length, general business conduct, with these Independent Retailers.

Alternatively, if this Court is not inclined to revisit the interpretation of "cause" previously found in this case, DISH respectfully requests that this Court certify the question for an immediate interlocutory appeal as there can be no dispute that the issue is now ripe for review.

PROCEDURAL BACKGROUND

The TSR, promulgated by the FTC, provides that it is a violation "for a seller to cause a telemarketer to engage in" prohibited conduct. 16 C.F.R. § 310.4(b)(1). The TSR does not define the word "cause." In its November 4, 2009 Opinion, Judge Scott denied DISH's motion to dismiss the FTC's "causing" claims that were based on alleged telemarketing violations by Independent Retailers. Judge Scott stated that the Court was deferring to the FTC's construction of the TSR because it was not "plainly erroneous or inconsistent with the regulation," citing Seventh Circuit authority from 2008 and 2009. (d/e 20 at 9 &15.) DISH moved to certify the question for interlocutory appeal. Judge Scott denied the motion, finding no substantial grounds for difference of opinion regarding the Court's obligation to defer to the FTC's interpretation of its own regulations. (d/e 32 at 7.)

Currently pending before the Court is DISH's motion for summary judgment, which is based, in part, on the FTC's failure to factually establish that DISH "caused" Independent Retailers to violate the TSR. (d/e 341 at 101-07; d/e 349 at 136-38.) As this Court noted, and as explained herein, the law regarding the deference owed to an agency's interpretation of its own regulations has dramatically changed in the last five years. (d/e 422.) Based on the current state of the law, such deference is no longer required as a general matter and, in any event, is not appropriate in this case.

ARGUMENT

I. THE DOCTRINE OF *AUER* DEFERENCE SHOULD BE DISREGARDED BECAUSE IT IS OF QUESTIONABLE VALIDITY

A. The Supreme Court Has Called Into Question The Continued Validity of *Auer*

The FTC argued that its claim based on "cause" is founded upon the doctrine of *Auer* deference (d/e 14 at 7-11). Thus, the validity of *Auer* is a paramount issue. In *Auer v. Robbins*, 519 U.S. 452 (1997), the Supreme Court held that an agency interpretation of its own regulation was "controlling unless plainly erroneous or inconsistent with the regulation." *Id.* at 461 (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)). Although *Auer* deference came to be thought of as a strict command, the Court foreshadowed that such deference would not be absolute: "The Secretary's position is in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462 (citing *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988)).[3]

Within the last few years, however, Justice Scalia, the author of *Auer*, has second-guessed the basic concept of providing deference to an agency interpreting its own regulation. In *Talk America v. Michigan Bell Telephone*, 131 S. Ct. 2254 (2011), Justice Scalia announced that "while I have in the past uncritically accepted [the *Auer*] rule, I have become increasingly

[3] Thus, even under *Auer*, the Supreme Court – and other courts – has consistently held that an agency should receive no deference where its interpretation of a regulation is not a "fair and considered judgment" of the agency and can be characterized as a "post hoc rationalization" advanced for litigation purposes. As set forth herein, it is clear that the FTC's interpretation of "cause" is not the result of fair and considered judgment and is, in fact, a post hoc rationalization to support the FTC's litigation position against DISH. *See* Section III.

doubtful of its validity." *Id.* at 2266 (Scalia, J., concurring). Justice Scalia cogently explained the serious defect with granting deference to an agency's interpretation of its own regulations:

> When Congress enacts an imprecise statute that it commits to the implementation of an executive agency, it has no control over that implementation (except, of course, through further, more precise, legislation). The legislative and executive functions are not combined. But when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning. And though the adoption of a rule is an exercise of the executive rather than the legislative power, a properly adopted rule has fully the effect of law. It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well. "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, Spirit of the Laws bk. XI, ch. 6, pp. 151-152 (O. Piest ed., T. Nugent transl. 1949).
>
> Deferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes; the vagueness effectively cedes power to the Executive. By contrast, deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases. This frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government.

Id. (citing John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996)).

Indeed, just one year later in *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156 (2012), all nine Justices of the Supreme Court declined to give deference to the Department of Labor's interpretation of its own regulation. The Court cited approvingly to Justice Scalia's concurrence in *Talk America*, noting that deference "creates a risk that agencies will promulgate vague and open-ended regulations that they can later interpret as they see fit." *Id.* at 2168 (citing *Talk America*, 131 S. Ct. at 2266 (Scalia, J. concurring)). And in 2013, in his well-reasoned dissent in *Decker v. Northwest Environ. Defense Ctr.*, 133 S. Ct. 1326 (2013), Justice Scalia wrote that "enough is enough" – it was time to dispense with the *Auer* doctrine as an unconstitutional violation of the separation of powers:

> For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of "defer[ring] to an agency's interpretation of its own regulations."
>
> * * *
>
> But when an agency interprets its own rules — that is something else. Then the power to prescribe is augmented by the power to interpret; and the incentive is to speak vaguely and broadly, so as to retain a "flexibility" that will enable "clarification" with retroactive effect. "It is perfectly understandable" for an agency to "issue vague regulations" if doing so will "maximiz[e] agency power." Combining the power to prescribe with the power to interpret is not a new evil: Blackstone condemned the practice of resolving doubts about "the construction of the Roman laws" by "stat[ing] the case to the emperor in writing, and tak[ing] his opinion upon it." 1 W. Blackstone, Commentaries on the Laws of England 58 (1765). And our Constitution did not mirror the British practice of using the House of Lords as a court of last resort, due in part to the fear that he who has "agency in passing bad laws" might operate in the "same spirit" in their interpretation. The Federalist No. 81, pp. 543-544 (J. Cooke ed. 1961). *Auer* deference encourages agencies to be "vague in framing regulations, with the plan of issuing 'interpretations' to create the intended new law without observance of notice and comment procedures." Anthony, The Supreme Court and the APA: Sometimes They Just Don't Get It, 10 Admin. L.J. Am. U. 1, 11-12 (1996). *Auer* is not a logical corollary to *Chevron* but a dangerous permission slip for the arrogation of power.

133 S. Ct. 1339-41 (Scalia, J., concurring in part, dissenting in part) (citations omitted). Chief Justice Roberts, in an opinion joined by Justice Alito, also forecast his willingness to consider the issue anew in a proper case. *Id.* at 1338-39 (Roberts, C.J., concurring).

The Seventh Circuit also has repeatedly questioned the continued validity of *Auer* deference. Indeed, in 2012, only months before the Supreme Court decided *Christopher*, the

Seventh Circuit declined to grant *Auer* deference to the Nuclear Regulatory Commission's interpretation of its regulations because, among other reasons, the interpretation did not reflect the Commission's "fair and considered" judgment on the issue. *Exelon Generation Company, LLC v. Local 15, Int'l Bhd. of Elec. Workers, AFL-CIO*, 676 F.3d 566, 576 (7th Cir. 2012) (Hamilton, J.). The Court further noted that "[t]he Supreme Court's application of *Auer-Seminole Rock* deference has been 'sporadic.'" *Id.* at 576 n.5. Citing Justice Scalia's concurrence in *Talk America*, the Court further noted that, while the doctrine had, until that point, "survived various attempts to inter it," the doctrine had "serious" problems and was likely to be addressed again by the Supreme Court:

> This court previously commented that "[p]robably there is little left of *Auer*." *Keys v. Barnhart*, 347 F.3d 990, 993 (7th Cir. 2003). While the doctrine raises serious separation-of-powers and administrative law concerns, that pronouncement was either an exaggeration or premature. Justice Scalia is willing to "reconsider" *Auer-Seminole Rock* deference, *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring), and the Court may soon have an opportunity to do so. *See Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011) (rejecting *Auer-Seminole Rock* deference to agency interpretation), *cert. granted*, 132 S. Ct. 760 (Nov. 28, 2011).

Id. Similarly, in *U.S. v. Raupp*, 677 F.3d 756 (7th Cir. 2012), also decided pre-*Christopher*, the Seventh Circuit predicted that "there are signs on the horizon that the Supreme Court may be about to revisit *Auer* and endorse a more skeptical review of agency interpretations of their own regulations." *Id.* at 765. Indeed, as explained above, the Seventh Circuit's forecast was correct as all nine Justices of the Supreme Court in *Christopher* rejected *Auer* deference. *Christopher*, 132 S. Ct. at 2168 ("Accordingly, *whatever the general merits of Auer deference*, it is unwarranted here.") (emphasis added).

Thus, there is ample basis for this Court to conclude that *Auer* deference is no longer viable and to reject the FTC's interpretation of the word "cause."

B. <u>Commentators Have Urged Abandonment of *Auer* Deference</u>

The academic community also has recognized the defects with *Auer* deference and there is now a chorus of commentators calling for its abandonment. Professor John F. Manning, the Bruce Bromley Professor of Law at Harvard Law School, is the leading critic and has been cited approvingly by Justice Scalia in both *Talk America*, 131 S. Ct. at 2266 (noting that the "defects of *Auer* deference, and the alternatives to it, are fully explored" by Professor Manning), and *Decker*, 133 S. Ct. at 1341. Well before the current erosion of the *Auer-Seminole Rock* deference doctrine, Professor Manning wrote that "*Seminole Rock* leaves an agency free both to write a law and then to 'say what the law is' through its authoritative interpretation of its own regulations." John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules,* 96 Colum. L. Rev. 612, 618 (1996). Because "administrative agencies exercise[] delegated lawmaking authority, as well as perform[] executive and adjudicative functions," Professor Manning has argued – and Justice Scalia has echoed – that "it is crucial to have some meaningful external check upon the power of the agency to determine the meaning of the laws that it writes." *Id.* at 682. He has therefore urged the Court to "replace *Seminole Rock* with a standard that imposes an independent judicial check on the agency's determination of regulatory meaning." *Id.* at 617.

Similarly, former George Mason University Law Professor Robert Anthony, also cited by Justice Scalia, *Decker*, 133 S. Ct. at 1341, has argued that *Seminole Rock* (and, by extension *Auer*) deference should be abandoned:

> Agencies will realize that they can issue such documents - creating tangible meaning where the regulations did not - with a high degree of confidence that their interpretations, issued without notice and comment, will be upheld because they are not inconsistent with the regulation. This prospect generates incentives to be vague in framing regulations, with the plan of issuing

> "interpretations" to create the intended new law without observance of notice and comment procedures.

Robert A. Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin L.J. Am. U. 1, 11-12 (1996).

Since the decision in *Christopher* and Justice Scalia's dissent and Chief Justice Roberts's concurrence in *Decker*, several commentators have recognized that the *Auer* doctrine is now of doubtful validity. *See* Quin M. Sorenson, *Decker v. NEDC: A New Dispute over Judicial Deference to an Agency's Interpretation of its Own Regulation*, 44 No. 6 ABA TRENDS 9, 10, 12 (July/Aug. 2013) ("The decision in *Decker*, and most specifically Justice Scalia's dissent, now calls [the *Auer*] doctrine into doubt. . . . Whether the Chief Justice's invitation in *Decker* will lead to more than mere academic commentary may, in the end, depend on the facts of the case in which the question is ultimately presented, including how directly those facts illustrate and highlight the concerns highlighted by Justice Scalia."); Kevin O. Leske, *Between Seminole Rock and a Hard Place: A New Approach to Agency Deference*, 46 Conn. L. Rev. 227, 270 (Nov. 2013) ("*Decker*, in combination with *Talk America* and *SmithKline Beecham*, provides the strongest evidence that the Court will agree to hear a case involving *Seminole Rock* in order to re-evaluate the doctrine. Consequently, it is possible that the Court could soon resolve many of the questions emanating from its opinions over the past sixty-eight years."); *Clean Water Act – Auer Deference – Decker v. Northwest Environmental Defense Center*, 127 Harv. L. Rev. 328, 333, 337 (Nov. 2013) ("It seems that *Auer's* days may be numbered. One Justice has launched a direct assault on the doctrine, and two others have signaled that they would welcome the opportunity to reconsider it. After the Court arguably restricted the doctrine in [*Christopher*], the trend seems clear. . . . Following the Chief Justice's unmistakable call for litigation challenging *Auer*, the Court will likely have an opportunity to address this doctrine in the near future."); Daniel Mensher, *With Friends Like These: The Trouble with Auer Deference*, 43 Envt. L. 849, 850 (Fall 2013) ("*Decker* should be a call for courts to revisit and revise their approach to deferring to agency interpretations of regulations.")

Other articles have criticized the *Auer* deference framework, finding that it creates the separation of power concerns that Justice Scalia highlighted in his dissent in *Decker*. *See* Michael P. Healy, *The Past, Present, and Future of Auer Deference: Mead, Form and Function in Judicial Review of Agency Interpretations of Regulations*, 62 U. Kan. L. Rev. 633, 680 (Mar. 2014) ("The constitutional separation of powers strongly supports a standard of review that requires the court itself to interpret the regulations promulgated by the agency. . . . [T]he making of law must be separated from the application of law. The lawmaker and the law applier must not be one and the same. . . . An independent actor, here a court, must have authority to review the application of agency-made law independently."); Stephen M. DeGenaro, *Why Should We Care About an Agency's Special Insight?*, 89 Notre Dame L. Rev. 909, 912-13 (Dec. 2013) ("Deference under *Seminole Rock* creates a problem that has no analog in the *Chevron* context: if an agency knows it will receive deference for its own interpretation of a regulation, it can 'delegate' to itself the power to clarify a regulation at a later time. . . . Unbridled *Seminole Rock* deference, which empowers an agency to self-delegate, contravenes separation of powers norms, exploits a loophole within the Administrative Procedure Act, and incentivizes behavior that is detrimental to good governance."); Iveory Perkins, *The Aftermath of Christopher v. SmithKline Beechman Corp.: The Battle Between Deference and Notice and the Guidance of Michigan Jurisprudence*, 91 U. Det. Mercy L. Rev. 53, 70 (Winter 2014) ("Judicial review is a necessity for correcting errors made by agencies . . . . Courts cannot sit idly by and grant deference to agencies on an absolute basis. *Christopher* was an example of the importance of judicial review because 'if courts truly did not substitute their judgment for that of an administrative agency, then judicial review would become an expensive and meaningless process.'"); Devin Johnson, *Decker v. Northwest Environmental Defense Center*: *Auer* Deference; "Enough is Enough," 27 Tul. Envtl. L.J. 121, 130 (Winter 2013) ("[S]trong deference to agency interpretations of regulations can not only lead to confusing and unnatural readings of regulations[,] . . . but also blur the lines between the roles of the branches of government and lead to hasty rule interpretation. . . . The power and duty of regulatory bodies is to clarify the law written by Congress. If given the power to interpret its own regulations, a regulatory body is afforded the right to upend that duty and clarify only when challenged in court. This discourages considered forethought in regulating and favors reactionary, circumstantial afterthought.").

The groundswell of support for dispensing with *Auer* deference from both courts and commentators did not exist five years ago when DISH filed its motion to dismiss, and was, therefore, not considered by this Court in connection with DISH's motion. These leading academics should be considered now as the Court determines whether the FTC is still entitled to the deference it apparently was given in its interpretation of the word "cause" in the TSR – the weight of authority and persuasive argument counsels against affording any deference in this case.

II. THE LEGAL FRAILTY OF *AUER* IS CLEAR NOT JUST IN THE SUPREME COURT QUESTIONING OF ITS CONTINUING VALIDITY BUT ALSO BY THE SUPREME COURT AND THE LOWER COURTS DECLINING IN MANY INSTANCES TO GRANT *AUER* DEFERENCE

While the Supreme Court has not yet expressly invalidated *Auer*, it has encouraged a vigorous questioning of its continued validity. Indeed, this Court requested supplemental briefing on these important issues precisely because of the Chief Justice's invitation in *Decker*. Importantly, going hand-in-glove with questioning the outright constitutionality of *Auer* are the numerous refusals to grant deference by both the Supreme Court and the lower courts based upon the facts of a given situation.

In *Christopher v. SmithKline Beecham Corp.*, for example, all nine Justices of the Supreme Court declined to afford *Auer* deference to the Department of Labor's interpretation of its own regulation and compiled the growing list of exceptions to the supposed doctrine of *Auer* deference – exceptions which, in *Christopher*, swallowed the rule:

> Deference is undoubtedly inappropriate, for example, when the agency's interpretation is "'plainly erroneous or inconsistent with the regulation.'" And deference is likewise unwarranted when there is reason to suspect that the agency's interpretation "does not reflect the agency's fair and considered judgment on the matter in question." This might occur when the agency's interpretation conflicts with a prior interpretation, or when it appears that the interpretation is nothing more than a "convenient litigating position," or a "'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack."

132 S. Ct. 2156, 2166 (2012)(citations omitted). Ultimately, the Court declined to give deference to the DOL's interpretation of its own regulation because, among other reasons, the DOL's position was first announced in amicus briefs filed in pending litigation:

> Petitioners invoke the DOL's interpretation of ambiguous regulations *to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced.* To defer to the agency's interpretation in this circumstance would seriously undermine the principle that agencies should provide regulated parties "fair warning of the conduct [a regulation] prohibits or requires."

Id. at 2167 (emphasis added) (citations omitted). Similarly here, despite the FTC's claim to the contrary, the FTC's overly broad interpretation of "cause" was asserted in opposition to DISH's motion to dismiss where it claimed that "cause" can be found simply if "the seller did not monitor and enforce the telemarketer's compliance." (d/e 14 at 10.) This raises exactly the same concerns about liability without notice that arose in *Christopher* and resulted in a denial of deference.

Following *Christopher*, Courts of Appeals and District Courts that have considered the issue have, unsurprisingly, refused to give *Auer* deference to an agency's interpretation of its own regulations on a variety of grounds. For example, in *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013), the Equal Employment Opportunity Commission ("EEOC"), on behalf of a Muslim job applicant, brought a Title VII action against the defendant, Abercrombie & Fitch Stores ("Abercrombie"), for religious discrimination. *Id.* at 1114. An EEOC regulation, 29 C.F.R. § 1605.2(c)(1), stated that "[a]fter an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation, the employer . . . has an obligation to reasonably accommodate the individual's religious practices." The EEOC argued that Abercrombie had to provide an accommodation even though the job applicant did not explicitly communicate the need for one because Abercrombie had notice from another source. *Id.* at 1136. The Tenth Circuit rejected the EEOC's interpretation of its regulation finding it to be unpersuasive and not entitled to deference. *Id.* at 1138. The court held that the EEOC's interpretation did "not reflect its fair and considered judgment on the matter in question" and stated:

> [T]he EEOC does not identify any prior instance where it has taken the stance regarding notice that it does here, and its position does not appear to be anything other than a creature of this proceeding – where it is "a party to this case." . . . At least coupled with its prior inconsistent conduct, this circumstance gives us some reason to suspect that the EEOC's view regarding notice is "nothing more than an agency's convenient litigating position"; as such, giving it *Auer* deference "would be entirely inappropriate." Moreover, we have difficulty concluding that the EEOC has provided "adequate notice" . . . or "fair warning" . . . to employers that their obligation

> to provide a reasonable religious accommodation may be triggered by something other than an explicit communication from applicants or employees regarding their conflicting religious practice and need for an accommodation. Nothing in the text of the EEOC's regulation, 29 C.F.R. § 1605.2(c)(1), would "provide clear notice of this."

Id. at 1139-40 (internal citations and emphasis omitted). Here too, the FTC's position was first articulated where it is a "party to the proceeding" against DISH. Also, there is no basis to conclude that the FTC had notified DISH, or other sellers dealing with telemarketing by others, that the word "cause" would essentially amount to strict liability for a seller for any telemarketing violation by an entity offering that seller's goods or services.

Similarly, in *Cameron v. United States*, 550 F. App'x 867 (Fed. Cir. 2013), the core issue was whether the Army acted contrary to the language of regulation AR 135-18 when the plaintiff, Col. Cameron, retired without consideration by a retention board. *Id.* at 872. Col. Cameron argued that the regulation mandated that he should have received automatic consideration by a retention board. *Id.* The government, on the other hand, argued that the word "eligible" in the regulation is ambiguous and that the court should defer to the National Guard Bureau's interpretation of "eligible" and its conclusion that Col. Cameron was not "eligible" for review because he was on one-time orders when he reached the twenty-year mark. *Id.* The court noted that, although the Supreme Court has accorded deference to agencies' interpretations of their own regulations, it has recently clarified that judicial deference to an agency's interpretation is "not without limits." *Id.* The government's proposed interpretation was an after-the-fact rationalization prompted by Col. Cameron's efforts to seek relief rather than a consistent policy addressing one-time tour officers. *Id.* at 874. The two advisory opinions relied on by the government were only drafted after Col. Cameron was discharged and had subsequently filed for reinstatement. *Id.* Moreover, each newly posited rationale differed from earlier rationales. *Id.*

These "inconsistencies and series of different rationales provide[d] a further reason why the interpretation of AR 135-18 advanced by the government in th[e] appeal did not merit the traditional level of deference." *Id.*

And in *Independent Training and Apprenticeship Program v. California Department of Industrial Relations*, 730 F.3d 1024 (9th Cir. 2013) (Tashima, J.), the Ninth Circuit declined to give *Auer* deference to the Department of Labor's interpretation of its regulations because the interpretation was inconsistent with its prior interpretation and the new interpretation provided a significant potential for unfair surprise. *Id.* at 1035 (noting that conflicts between an agency's current and previous interpretations and "undermin[ing] the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires" are two of the reasons to decline to afford *Auer* deference). The court found that the plaintiffs had relied on the prior interpretation in guiding their conduct at the time the instant controversy arose, so having the Department of Labor change its interpretation effectively "pull[ed] the rug out from under litigants that had relied on [the] long-established, prior interpretation of [the] regulation . . . ." *Id. See also Sun Capital Partners III, LP v. New Eng. Teamsters & Trucking Indus. Pension Fund*, 724 F.3d 129, 140 (1st Cir. 2013) (Lynch, J.) (finding *Auer* deference inappropriate because "significant monetary liability would be imposed on a party for conduct that took place at a time when that party lacked fair notice of the interpretation at issue"). Considering the FTC's massive, and totally improper, claim to a billion dollars in civil penalties, the FTC's failure to provide notice to DISH of its capacious view of the nature and extent of "cause" liability mandates denial of *Auer* deference to the FTC's interpretation of "cause."

District Courts have also recognized that *Auer* deference is no longer controlling in light of the Supreme Court's recent decisions on the issue. *See Vietnam Veterans of Am. v. Cent. Intelligence Agency*, No. C 09-0037 CW, 2013 WL 6092031, at *15-16 (N.D. Cal. Nov. 19, 2013) (Wilken, J.) (deference not warranted because defendants' current interpretation of regulation did not reflect a "fair and considered judgment on the matter" and was a post-hoc rationalization and a litigation argument); *Cardiosom, L.L.C. v. United States*, 115 Fed. Cl. 761, 775 (Fed. Cl. 2014) (Campbell-Smith, J.) (no *Auer* deference because Department of Health and Human Services' interpretation of the regulatory provision did not reflect the agency's fair and considered judgment, but rather, reflected the agency's most recent litigating position, which had shifted over time).

Thus, the trajectory since 2009 is clear – the exceptions to the *Auer* doctrine have multiplied and the rationale for the doctrine generally is in disrepute. The architect of *Auer* deference, Justice Scalia, has announced that the doctrine should now be rejected as inconsistent with the Constitutional separation of powers. *See Talk America*, 131 S. Ct. at 2266; *Decker*, 133 S. Ct. at 1339-41. The Chief Justice and Justice Alito are also eager to reconsider the issue. *See Decker*, 131 S. Ct. at 1338-39. Further, whether *Auer* is ultimately overruled, all of the Justices have recognized its limitations and defects – especially in cases such as the present one where the agency in question announces its interpretation of an ambiguous regulation in the midst of litigation and seeks to impose massive liability based on that post-hoc interpretation.

III. THIS COURT SHOULD NOT ACCEPT THE FTC'S INTERPRETATION OF THE WORD "CAUSE"

Whether the Court chooses to apply the watered-down version of *Auer* deference set forth in *Christopher* and its progeny, or simply disregard *Auer* altogether, the result is the same: the Court should reject the FTC's interpretation of the word "cause" because it is wrong.

The interpretation does not reflect the FTC's fair and considered judgment, and it unfairly seeks to hold DISH liable without any notice that its conduct violated the TSR. As DISH has consistently argued, and even as Judge Scott found, the FTC's interpretation of the word "cause" creates strict liability for any seller whose goods and services are telemarketed by another. Judge Scott acknowledges the limitless liability under the FTC's interpretation by likening "cause" in the TSR to "gravity caus[ing] an object to fall to the earth." (d/e 20 at 10.) This overly broad definition was constructed from whole-cloth specifically for this litigation and does not represent the FTC's fair and considered judgment. The FTC provided no notice to DISH or others of this interpretation and it arises from a wholly unpersuasive reading of the TSR. Further, the FTC has acknowledged that, as a matter of federal policy, the TSR provisions and the provision of the Federal Communication Commission's regulations under the Telephone Consumer Protection Act ("TCPA") should be interpreted consistently. Yet, as set forth below, the FTC's interpretation of "cause" would create liability for sellers who would have no such liability for the exact same conduct under the TCPA. For all of these reasons, the overly broad interpretation of "cause" should be rejected.

A. The FTC Asserted Its Position In Opposition to DISH's Motion to Dismiss

In its motion to dismiss, DISH argued that accepting the allegations of the Complaint as true, DISH could not be liable under the TSR's "cause" section because the FTC ignored the need for a showing of some nexus between conduct engaged in by DISH and the alleged wrongful telemarketing conduct of the Independent Retailer (for example, DISH's providing a calling list to an Independent Retailer who uses that list to make violative calls). DISH further argued that the FTC's position that "cause" liability can arise through mere general business, arms-length transactions between DISH and the Independent Retailers was created without notice to any interested parties, and was unfairly prejudicial to DISH. (d/e 10.) In its opposition to the motion to dismiss, the FTC argued for *Auer* deference and attempted to justify its litigation position through the following, equally unavailing, pre-suit sources. (d/e 14.)

1. The 2004 Business Guidance Does Not Support Deference or the FTC's Position

The FTC cited a January 2004 "business guidance" document (and three complaints filed against other entities, which are discussed below). (d/e 14 at 7.) This "business guidance" document did not provide DISH (or anyone else) with any notice that the word "cause" would result in, as Judge Scott found, strict liability. The "business guidance" document located on the FTC's website plainly fails to disclose that a seller will be liable for everything that a third-party telemarketer does in an attempt to sell a seller's product or service. To the contrary, the document provides:

> If the seller had written Do Not Call procedures, but the telemarketer ignored them, the telemarketer will be liable for the Rule violation; the seller also ***might*** be liable, unless it could demonstrate that it monitored and enforced Do Not Call compliance and otherwise implemented its written procedures.

(d/e 14 at 8 (emphasis added).) This is a far cry from announcing that a seller will be considered to have "caused" independent retailers to have violated the TSR simply because the seller contracted with an independent retailer to offer the seller's goods or services as part of its general business strategy and not specifically in relation to telemarketing, and/or that DISH is responsible to monitor and enforce Do Not Call compliance by an Independent Retailer simply because the Independent Retailer decided on its own to utilize telemarketing.

The FTC's reliance on this "guidance" document also conflicts with its prior position on the meaning of the word "cause" announced in 1995 in the Notice of Proposed Rulemaking, which provided that "[a] seller may cause a telemarketer to engage in such calls by providing the telemarketer with a customer contact list that includes customers that should not be called." Telemarketing Sales Rule, 60 Fed. Reg. 8313-01, 8318, n.27 (proposed Feb. 14, 1995) (to be codified at 16 C.F.R. pt. 310). Again, in 2003, in its Statement of Basis and Purpose for the Final Amended Rule, the FTC stated:

> In addition, § 310.4(b)(1)(ii) prohibits anyone from directing another person to deny or interfere with a person's right to be placed on a "do-not-call" list. This aspect of the provision is intended to ensure that sellers who use third-party telemarketers cannot shield themselves from liability under this provision by suggesting that the violation was a single act by a "rogue" telemarketer where there is evidence that the seller caused the telemarketer to deny or defeat "do-not-call" requests.

Telemarketing Sales Rule, , 68 Fed. Reg. 4580, 4628 (final amended rule, Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). In all of these instances, the word "cause" is used to mean much more than simply contracting with a retailer. Indeed, according to the FTC, the seller must cause the telemarketer not just to telemarket but rather to actually violate the TSR by, for example, providing a call list with improper numbers or actually causing the telemarketer to interfere with a "do-not-call" request. Thus, the definition of "cause" advanced by the FTC prior to this case is plainly inconsistent with the definition advanced by the FTC during this litigation.[4] Such inconsistency is yet another reason why courts have denied deference.

In *Cardiosom, L.L.C. v. United States*, 115 Fed. Cl. 761 (Fed. Cl. 2014) (Campbell-Smith, J.), for example, the court refused to grant *Auer* deference because the Department of Health and Human Services' ("HHS") interpretation of the regulatory provision did not reflect the agency's fair and considered judgment, but rather, reflected the agency's most

[4] Further, the FTC's pre-suit identification of acts of "causing," as including a seller's providing a telemarketer a calling list or a seller's actively interfering with a telemarketer's duty to honor a do-not-call request, cannot be explained away as mere examples of what would fall within the FTC's broad interpretation of "cause." Such examples would be unnecessary and indeed confusing if "cause" were to have such a broad interpretation.

recent litigating position, which had shifted over time. *Id.* at 775. Review of both the proposed and final rule, as published in the Federal Register, showed that HHS gave no indication that it would interpret the regulation as it did presently. *Id.* at 776. Furthermore, HHS's effort to advance its litigation position through its chosen regulatory interpretation, and the lack of clear notice regarding the agency's position prior to the filing of its motion, suggested that "the offered interpretation may be more reflective of a favorable litigating position than a fair and considered judgment." *Id.* at 777; *see also Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106 (10th Cir. 2013) (same); *Vietnam Veterans of Am. v. Cent. Intelligence Agency*, No. C 09-0037 CW, 2013 WL 6092031, at *15 (N.D. Cal. Nov. 19, 2013) (Wilken, J.) (agency interpretation was a litigation position). Further, the FTC seeks to hold DISH liable for conduct that began as early as 2003, yet none of the documents that the FTC relied upon had even been created in or before 2003. Thus, on their face, these documents cannot possibly have informed DISH that its conduct with regard to Independent Retailers would expose DISH to massive liability. This is exactly the type of unfair surprise and prejudice that has led courts to reject *Auer* deference. *See, e.g.*, *Independent Training and Apprenticeship Program v. California Department of Industrial Relations*, 730 F.3d 1024, 1035 (9th Cir. 2013) (declining deference where it would "undermine the principle that agencies should provide regulated parties fair warning of the conduct a regulation prohibits or requires").

2. The FTC's Claim That Complaints and Outcomes In Other Actions Provide Notice of Its Position on Causing Liability Is Also Wrong

The FTC also cited to three federal court complaints brought by or on behalf of the FTC. (d/e 14 at 8, n.2.) These complaints were brought by or on behalf of the FTC against other parties. While the FTC cited these complaints as purportedly providing notice of its interpretation of the word "cause," these enforcement actions/litigation positions merely represent the FTC's allegations in those particular proceedings and do not contain any interpretation of the word "cause." Moreover, reliance on a mere complaint to give notice to the public about an agency's interpretation of a regulation would stretch the doctrine of deference too far. Regulated parties should not be required to search for and then discern agency positions by combing through the evidence and the parties' positions in adversarial proceedings. That is especially true here, where the complaints at issue were filed well after the supposedly wrongful conduct at issue in this case began. The fact that the government obtained settlements with those parties says absolutely nothing about the meaning of the word "cause" in the TSR as there are innumerable reasons why an entity may choose to settle a lawsuit.

Moreover, in the FTC's press release, cited in the FTC's opposition to DISH's motion to dismiss, the FTC stated that the subject proceeding showed that sellers would be liable under the TSR only for calls made "on their behalf." (d/e 14 at 8, n.2.) This language is nearly identical to a parallel provision in the TCPA. That TCPA provision requires an agency relationship between the seller and the telemarketer for liability to attach to the seller for the conduct of the telemarketer. *DISH Network FCC Declaratory Ruling*, 28 F.C.C. Rcd. 6574, 6598 (2013) *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (D.C. Cir. 2014) (FCC declaratory ruling stating that a seller could be liable for a third party telemarketing call violation if the relationship between the seller and telemarketer satisfied the federal common law agency principals). Obviously, the FTC chairman's use of agency-type language when talking about the scope of "cause" liability supports DISH's view that a nexus, such as an agency relationship, between DISH and Independent Retailers with respect to the telemarketing at issue, is necessary. Thus, the FTC's purported support for deference is not only lacking but also supports DISH's position.

Just recently, the Ninth Circuit confirmed the application of the agency standard in a very similar situation to that of DISH and the Independent Retailers. In *Thomas v. Taco Bell Corp.*, ___ Fed. App'x ___, No. 12-56458, 2014 WL 2959160 (9th Cir. July 2, 2014) (unpublished, not precedential), the plaintiff sought to hold Taco Bell liable under the TCPA for text messages she received that advertised Taco Bell products but were not sent by Taco Bell. *Id.* at *1. The texts were sent by various marketing and text messaging entities hired to promote Taco Bell products. *Id.* The Court affirmed the District Court's holding that there was no evidence of an agency relationship because Taco Bell had no control over the "manner and means of the text message campaign." *Id.* at *2. The Court held that, while Taco Bell could be liable for the text messages sent by others on the basis of apparent authority or ratification, the plaintiff failed to proffer sufficient evidence to support either theory. *Id.* Thus, under the TCPA, simply hiring a company to advertise your product does not show either apparent authority or ratification with respect to a TCPA violation. This decision further undercuts the FTC's sweeping interpretation of "cause."

3. The FTC's Comparison of "Cause" Liability to Mail and Wire Fraud Liability Set Forth in Its Opposition to DISH's Motion to Dismiss is Wholly Unpersuasive

Finally, the FTC attempts to justify its exceptionally broad definition of "cause" by comparing it to the mail and wire fraud statutes. (d/e 14 at 9-10.) But this comparison fails and actually supports DISH's position. In the mail and wire fraud statutes, as the FTC concedes, liability attaches only if the defendant caused the mails to be used or a wire transmission to be made "in furtherance of a fraudulent scheme." (d/e 14 at 9.) Thus, liability does not occur unless the defendant intended to further a fraudulent scheme. In the present case, in contrast, the FTC seeks to hold DISH liable for TSR violations for entering into contractual relationships with (and perhaps not monitoring) the Independent Retailers, regardless of whether DISH intended the Independent Retailer to commit any violations. That would be akin to charging someone with mail fraud simply for sending mail, without any allegation that they were attempting to further a fraud. That cannot be what the TSR means and, therefore, the Court should reject the FTC's interpretation of "cause," which creates such an absurd result.

B. The FTC's Strict Liability Position for National Do Not Call Registry ("NDNCR") and Pre-Recorded Call TSR "Causing" Violations is Inconsistent With the Standard for Liability for Those Same Violations Under the TCPA

The FTC has confirmed that seller liability under the TSR should be coextensive with seller liability under the TCPA for the type of conduct at issue in this case. *See* Notice of Ex Parte Presentation, Federal Trade Commission, CG Docket No. 11 - 50, *Dish Network, LLC Petition for Declaratory Ruling Concerning The Telephone Consumer Protection Act*, at p. 2 (October 20, 2011) (available at http://apps.fcc.gov/ecfs/document/view?id=7021716263) ("FTC staff emphasized the benefits of both the FCC and the FTC taking consistent legal approaches, and the rationale for doing so includes the fact that both agencies are enforcing telemarketing laws designed to protect consumers from the same harms. Also, the similarities between the TCPA, the Telemarketing Act, and their related regulations favor a consistent approach."); *DISH Network FCC Declaratory Ruling*, 28 F.C.C. Rcd. 6574, 6588, 6598 (2013) pet. for review dismissed, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (D.C. Cir. 2014)**.** However, the FTC's assertion of cause liability against DISH as a seller here is inconsistent with seller liability for the same conduct under the TCPA. This inconsistency is confirmed by a recent FCC letter brief to the Eleventh Circuit on the standard for seller liability under the TCPA. In that letter brief, the FCC addressed section 64.1200(c)(2) of the TCPA implementing regulations which, like the "cause" section of the TSR, addresses a seller's liability for NDNCR and pre-recorded call violations by a third party offering a seller's goods. The FCC compared seller liability under that regulation with seller liability under section 64.1200(f)(10), which concerns a third party sending unsolicited facsimiles offering a seller's goods or services. *See* Letter Brief of Counsel for FCC Re: Palm Beach Golf Center-Boca, Inc. v. Sarris, No. 13-14013, at 2, *Palm Beach Golf Center-Boca, Inc. v. Sarris*, No. 13-14013 (11th Cir. July 17, 2014).[5] In its letter brief, the FCC confirmed that under the TCPA regulations for NDNCR and pre-recorded call violations, an agency relationship is required to hold a seller liable. *See id.* at 3. As to facsimiles, the FCC noted that the TCPA regulation provided that a seller "whose goods or services are advertised or promoted in an unsolicited [facsimile] advertisement" would be liable for violating the TCPA without a showing of agency. *See id.* at 6. Thus, under the TCPA regulations, there is essentially strict liability for a seller whose product is the subject of an unsolicited facsimile, but for NDNCR and pre-recorded call violations, an agency relationship is required to hold the seller liable. *Id.* Thus, under the TCPA, while a seller could be strictly liable for unwanted facsimiles that advertise their goods, regardless of the seller's conduct or relationship to the third-party sender of the facsimile, a seller will only be liable for do-not-call or pre-recorded call violations if there is a showing of agency between the seller and the telemarketer.

Here, the FTC's interpretation of "cause" as creating strict liability for sellers for NDNCR and pre-recorded call violations creates a standard of liability that is inconsistent with the standard for liability for the same conduct under the TCPA. This inconstant regulatory standard is directly contrary to the FTC's stated position during the comment period for the FCC's Declaratory Ruling. *See* Notice of Ex Parte Presentation, Federal Trade Commission, CG Docket No. 11 - 50, *Dish Network, LLC Petition for Declaratory Ruling Concerning The Telephone Consumer Protection Act*, at p. 2 (October 20, 2011) (available at

[5] A true and correct copy of this FCC Letter Brief is attached hereto as Exhibit A.

http://apps.fcc.gov/ecfs/document/view?id=7021716263). Such a contradiction is further evidence that the FTC's interpretation is erroneous. The FTC's inconsistent claim as to "cause" liability for NDNCR and pre-recorded call violations should, therefore, be rejected.

IV. IF THIS COURT NEVERTHELESS BELIEVES IT IS COMPELLED TO GIVE DEFERENCE TO THE FTC'S INTERPRETATION OF THE WORD "CAUSE," THE ISSUE SHOULD BE CERTIFIED FOR AN INTERLOCUTORY APPEAL

Under Section 1292(b), certification for immediate appeal is appropriate where an order: (1) involves a controlling question of law; (2) as to which there is a substantial ground for difference of opinion; and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation. As the Seventh Circuit has recognized, "Section 1292(b) of the Judicial Code provides appellate courts with a flexible tool for interlocutory review of complex and controlling questions of law." *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1263 (7th Cir. 1980).

If this Court determines that it must still give *Auer* deference to the interpretation of the word "cause" in the TSR, that decision will satisfy all of the elements for an interlocutory appeal. First, the meaning of the word "cause" is a controlling question of law that depends, in large part, on whether deference is owed to the FTC's interpretation and, if so, what kind of deference. Second, as demonstrated above, there is now – in just the last five years – a growing body of case law that calls into doubt the continued validity and scope of the *Auer* doctrine. A decision to afford *Auer* deference in this case would be contrary to the decisions of multiple Courts of Appeals and several District Courts and contrary to the expressed opinion of one Justice of the Supreme Court (and the implied opinion of two others). In Judge Scott's Opinion denying DISH's Motion for Interlocutory Appeal (d/e 32), Judge Scott noted that:

> Two recent Court of Appeals decisions establish that this Court must defer to an agency's construction of its own rules unless that construction is plainly erroneous or inconsistent with the

> regulation. *Clancy v. Office of Foreign Assets Control of U.S. Dept. of Treasury*, 559 F.3d 595, 606 (7th Cir. 2009); *Sierra Club v. Franklin County Power of Illinois, LLC*, 546 F.3d 918, 931 (7th Cir. 2008).

(d/e 32 at 5). In light of the recent authority referenced herein and given Chief Justice Robert's invitation to revisit the issue of *Auer* deference in an appropriate case, Judge Scott's basic reason for denying interlocutory appeal no longer exists. There can be no serious dispute that there are now substantial grounds for a "difference of opinion" on this critical issue. Finally, as this Court recognized in its July 8, 2014 Order, the issue of whether to continue deferring to the FTC's interpretation in this case is central to this Court's decision on the pending motions for summary judgment. If deference is granted, an immediate appeal will "materially advance" the litigation by potentially eliminating all claims regarding the Independent Retailers.

Thus, if this Court affords *Auer* deference, DISH requests that this Court certify the issue for appeal or permit DISH to file a second motion for certification on this issue.

CONCLUSION

For the reasons set forth herein, the FTC's interpretation of "cause" is entitled to no deference and is not persuasive. Thus, the FTC's view should be rejected.

Dated: August 8, 2014

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

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

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby deposes and states that he caused the foregoing, **DEFENDANT DISH NETWORK L.L.C.'S SUPPLEMENTAL MEMORANDUM OF LAW REGARDING AGENCY DEFERENCE,** and exhibits thereto, to be electronically filed with the Clerk of the Court on August 8, 2014, using the ECF system, and served on all parties via the ECF system, pursuant to LR 5.3.

/s/ Henry T. Kelly
Henry T. Kelly

E-FILED
Friday, 08 August, 2014 03:00:03 PM
Clerk, U.S. District Court, ILCD

**IN THE 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

**EXHIBIT A
TO DEFENDANT DISH NETWORK L.L.C.'S SUPPLEMENTAL
MEMORANDUM OF LAW REGARDING AGENCY DEFERENCE**

Federal Communications Commission
Washington, D.C. 20554
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July 17, 2014

John Ley, Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: *Palm Beach Golf Center-Boca, Inc. v. Sarris*, No. 13-14013

Dear Mr. Ley:

The Federal Communications Commission respectfully submits this letter brief in response to the Court's request of July 7, 2014. In that request, the Court asked for the FCC's position "on whether the [Telephone Consumer Protection Act (TCPA)] and its accompanying regulations allow a plaintiff to recover damages from a defendant who sent no facsimile to the plaintiff, but whose independent contractor did." As we explain, the answer is yes.

In its letter, the Court adverted to the FCC's May 9, 2013 declaratory ruling in *DISH Network*, 28 FCC Rcd 6574 (2013), *pet. for review dismissed*, *DISH Network, LLC v. FCC*, 552 Fed. Appx. 1 (D.C. Cir. 2014), which addressed questions regarding the availability of direct and vicarious liability for unlawful telemarketing calls under the TCPA. As the Court observed, the TCPA and the FCC's implementing regulations "use[] different language in describing facsimile transmissions and telemarketing calls."

The *DISH Network* ruling did not address or alter the treatment of facsimile transmissions under the TCPA or the Commission's implementing regulations. Under the terms of the statute and regulations, the recipient of an unsolicited facsimile advertisement may recover damages from a defendant that does not itself transmit the offending facsimile, if the defendant has hired an independent contractor to transmit facsimiles advertising the defendant's goods or services. Such liability does not depend upon the application of federal common law vicarious liability principles.

BACKGROUND

1. Statutory and Regulatory Background. The Telephone Consumer Protection Act, Pub. L. No. 102-243, 105 Stat. 2394, codified at 47 U.S.C. § 227, contains an assortment of provisions designed to protect consumer privacy and prevent unwanted communications over telephone lines. Separate subsections of the statute address voice telephone calls and facsimile advertisements. Those subsections contain different language, and FCC rules implementing those provisions treat voice calls and faxes differently.

a. *Voice Telephone Calls*. The TCPA makes it unlawful, subject to certain exceptions, for any person within the United States to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice … without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). Such artificial or prerecorded voice calls are commonly referred to as "robo-calls." The statute also authorizes the FCC to establish a national do-not-call registry that consumers can use to notify telemarketers that they object to receiving telephone solicitations. 47 U.S.C. § 227(c)(1)-(4). The FCC's implementing regulations provide – again, subject to exceptions – that no person or entity may "initiate any telephone solicitation … [to any] residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry." 47 C.F.R. § 64.1200(c)(2).

In identifying the party that "initiates" calls in violation of these robo-call and do-not-call-registry prohibitions, the Commission's rules distinguish between the "telemarketer" and the "seller." The Commission defines the "telemarketer" as "the person or entity that *initiates* 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." 47 C.F.R. § 64.1200(f)(11) (emphasis added). By contrast, the "seller" is defined as "the person or entity *on whose behalf* a telephone call or message *is initiated* 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)(9) (emphasis added). Thus, for example, in the *DISH Network* context, DISH was the seller and its third-party telemarketers were the parties that initiated calls promoting DISH's satellite television services.

The *DISH Network* ruling arose in the context of primary jurisdiction referrals from TCPA litigation involving alleged violations of the robo-call and do-not-call prohibitions contained in the TCPA and associated FCC rules. In it, the FCC relied upon these regulatory definitions of "seller" and "telemarketer" to hold that the party that is directly liable for unlawfully "initiat[ing]" a robo-call or a call to a number on the do-not-call registry is the telemarketer that "takes the steps necessary to physically place a telephone call" and not the seller whose goods or services the telemarketer promotes. *DISH Network* ¶ 26; *see also id.* ¶ 27. But the Commission also ruled that although a seller is not *directly* liable for robo-call and do-not-call violations committed by its third-party telemarketers, the seller may nevertheless be *vicariously* liable for such violations under federal common law agency principles.[1] *Id.* ¶¶ 28-47.

b. *Facsimile Advertisements*. The TCPA uses different language governing facsimile transmissions. Specifically, the TCPA prohibits the "use [of] any telephone facsimile machine … to *send*, to a telephone facsimile machine, an unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C) (emphasis added). In contrast with the Commission's construction of "initiate" in the robo-call and do-not-call contexts – where FCC rules describe the directly-liable call "initiat[or]" as the "telemarketer" that physically makes the call – the FCC defines the directly-liable "sender," for purposes of the TCPA's unsolicited facsimile advertisement prohibition, as "the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement." 47 C.F.R. § 64.1200(f)(10). In other words, under the plain text of that definition – and unlike the robo-call and do-not-call contexts – direct liability for sending an unsolicited facsimile advertisement attaches to the entity (defined as the "sender") whose goods or services are being promoted, and *not* generally to the entity that physically transmits the facsimile.[2]

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[1] The *DISH Network* ruling addresses situations where a seller relies on third-party telemarketers; a seller could of course be directly liable if it acts as its own telemarketer.

[2] Under the FCC's rules, a party that transmits the unsolicited facsimile advertisement, but does not also meet the definition of "sender," may nevertheless be jointly and severally liable (along with the sender) "if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions." 47 C.F.R. § 64.1200(a)(4)(vii); *see Rules and Regulations Implementing the Telephone Consumer Protection Act of*

The FCC adopted the codified definition of "sender" in 2006. *Junk Fax Order*, 21 FCC Rcd at 3808 (¶ 39) ("We take this opportunity to emphasize that under the Commission's interpretation of the facsimile advertising rules, the sender is the person or entity on whose behalf the advertisement is sent."), 3822 (setting out codified definition of "sender"). That codification is consistent with the Commission's pre-existing uncodified interpretation that "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the rule banning unsolicited facsimile advertisements." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 10 FCC Rcd 12391, 12407 (¶ 35) (1995).

2. The District Court Proceedings Below. In the proceedings below, the plaintiff golf center (Palm Beach Golf) brought a private TCPA lawsuit against the defendant dental office (Sarris), alleging that Sarris had sent the golf center an unsolicited facsimile advertisement in violation of 47 U.S.C. § 227(b)(1)(C). *See District Court Order* at 10-11. The district court described the alleged link between defendant Sarris and the facsimile transmitted to the plaintiff golf center as follows: Sarris had "engaged an independent contractor" named Roberts to provide marketing services to his dental practice, giving Roberts "'free rein' to legally advertise the practice." *Id.* at 2. Roberts, in turn, allegedly contracted with an entity called Business to Business Solutions ("B2B"), which sold facsimile advertising services in the United States on behalf of a Romanian company called Macaw. *See id.* at 2-3. B2B/Macaw allegedly then transmitted the offending fax to the golf center. *See id.* at 3-4, 7-9, 11.

The golf center alleged that this link between Sarris and the fax was sufficient to create direct (as opposed to vicarious) liability on Sarris's part,

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1991, 21 FCC Rcd 3787, 3808 (¶ 40) (2006) (*Junk Fax Order*). Such "high degree of involvement" by the party transmitting the facsimile may include "suppl[ying] the fax numbers used to transmit the advertisement," "mak[ing] representations about the legality of faxing to those numbers," or "advis[ing] a client about how to comply with the fax advertising rules." *Junk Fax Order*, 21 FCC Rcd at 3808 (¶ 40); *see also Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14131 (¶ 196) & n.724 (2003) (noting that requisite high degree of involvement by the party transmitting the fax may also include a "role in reviewing and assessing the content of a facsimile message").

because Sarris met the definition of "sender" under the FCC's rules and the fax advertisement was unsolicited. *Id.* at 14.

The district court granted summary judgment in favor of the defendant dental office. *Id.* at 33. The court rejected the golf center's direct liability claim, ruling that it could establish liability, if at all, only on the basis of vicarious liability. *Id.* at 12-13. In doing so, the court relied on the FCC's ruling, in *DISH Network*, that the "seller" generally is not directly liable for unlawful telemarketing calls initiated by third-party telemarketers on the seller's behalf. *Id.* The court acknowledged that *DISH Network* "specifically examined the meaning of the word 'initiate' as used in the [statutory] telemarketing prohibition … instead of the word 'send' as used in the [statutory] unsolicited fax prohibition." *Id.* at 13 n.13. The court also conceded that *DISH Network* "specifically addressed the [FCC's rule defining the] term 'seller' in the telemarketing context, not [the definition of] 'sender' in the fax context." *Id.* at 13 n.13. The court nevertheless appeared to find that the Commission's analysis in *DISH Network* regarding the absence of direct seller liability in the telemarketing context also applied to foreclose direct sender liability in the fax advertising context, and hence foreclosed direct sender liability by the defendant dental office. *Id.* at 12-13.[3]

ARGUMENT

In holding "that a party is not directly liable" under the TCPA's prohibition against "send[ing]" unsolicited facsimile advertisements "unless it actually transmits a fax," the district court acknowledged the existence of, but did not cite or discuss, "pre-*DISH Network* decisions" to the contrary. *District Court Order* at 14; *see also Addison Automatics, Inc. v. The RTC Group, Inc.*, 2013 WL 3771423 at *4 (N.D. Ill. 2013) (direct TCPA liability available against party whose goods or services are advertised in fax transmitted by others); *Machesney v. Lar-Bev of Howell, Inc.*, 292 F.R.D. 412, 415 (E.D. Mich. 2013) (same). The court

[3] The district court went on to conclude that summary judgment for the defendant also was warranted because Palm Beach Golf had not established a case for vicarious liability under common law agency principles, *District Court Order* at 14-23, and because the plaintiff lacked Article III standing to present its TCPA claims, *id.* at 23-29. This Court's July 7 Letter did not ask the FCC to address these bases for the district court's decision and we express no view with respect to those issues (nor to the factual disputes addressed in the parties' briefs).

determined, however, that the *DISH Network* ruling supplanted any prior precedent on the subject and compelled the conclusion that a party whose goods or services were promoted in an unsolicited fax transmitted by a third party could be held liable, if at all, only "under federal common law principles of agency for the actions of a third-party." *Id.* That holding was in error.

First, the *DISH Network* ruling applies only to liability for telemarketing calls and neither addresses nor alters the Commission's pre-existing regulatory treatment of unsolicited facsimile advertisements. As noted above, the FCC issued the *DISH Network* ruling in response to primary jurisdiction referrals from TCPA litigation involving alleged violations of the robo-call and do-not-call prohibitions. *See DISH Network* ¶¶ 5-23. Those provisions prohibit the "initiat[ion]" of certain robo-calls and calls to telephone numbers listed on the national do-not-call registry. *See* 47 U.S.C. § 227(b)(1)(B) (robo-call prohibition); 47 C.F.R. § 64.1200(c)(2) (do-not-call prohibition); *see* pp. 2-3, above. In clarifying which party incurs direct liability for initiating a call in that context, the FCC found guidance in its rules defining "telemarketer" as the party that "initiates" a telephone call and "seller" as the party "on whose behalf a telephone call" is initiated. *DISH Network* ¶ 27 (citing 47 C.F.R. § 64.1200(f)(11) & (9)). The Commission determined on the basis of those definitions that the party that incurs direct liability for "initiat[ing]" an unlawful call is the telemarketer that physically makes the call and not the seller on whose behalf a call is made. *Id.* ¶¶ 26-27.

Because facsimile advertisements were not at issue in the *DISH Network* proceeding, the FCC had no occasion to opine on direct or vicarious liability in that context. Thus, nowhere in the *DISH Network* ruling does the FCC address the distinct prohibition against "send[ing]" unsolicited facsimile advertisements under 47 U.S.C. § 227(b)(1)(C), or the distinct definition of "sender" in the agency's rules (47 C.F.R. § 64.1200(f)(10)). The district court therefore improperly relied on the *DISH Network* ruling to hold that direct liability by the defendant dental office was foreclosed.

Second, as described above (at pp. 3-4), the FCC has defined the party that incurs direct liability for "send[ing]" an unsolicited facsimile advertisement under 47 U.S.C. § 227(b)(1)(C) very differently from the party that unlawfully "initiate[s]" a robo-call or do-not-call violation. By its plain terms, 47 C.F.R. § 64.1200(f)(10) defines the direct liability-incurring "sender" *not* as the party that physically transmits the fax, but as "the person or entity *on whose behalf* a facsimile unsolicited advertisement is sent *or whose goods or services are advertised or promoted in the unsolicited advertisement.*" (Emphasis added.) Read in light of that binding regulatory definition,[4] the unsolicited fax prohibition in section 227(b)(1)(C) clearly "allow[s] a plaintiff to recover damages [under a theory of direct liability] from a defendant who [transmitted] no facsimile to the plaintiff, but whose independent contractor did," July 7 Letter at 1, so long as the transmitted fax constitutes an unsolicited facsimile advertisement promoting the defendant's goods or services.

CONCLUSION

For the foregoing reasons, the district court misapplied the TCPA, the *DISH Network* ruling, and FCC regulations regarding unsolicited facsimile advertisements to the extent that it ruled, as a matter of law, that the defendant dental practice may not be directly liable under the TCPA for any unsolicited facsimile advertisement sent to the plaintiff golf center unless the defendant actually transmitted the fax.

Respectfully submitted,

/s/ Laurence N. Bourne

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[4] As the district court otherwise acknowledges, courts in non-Hobbs Act proceedings such as this one "must apply" – and may not entertain collateral attacks on – a final order or regulation of the FCC in deciding an issue addressed by such order or regulation. *District Court Order* at 13 n.13 (citing 28 U.S.C. § 2342(1)). *Accord CE Design, Ltd. v. Prism Business Media, Inc.*, 606 F.3d 443, 446 (7th Cir. 2010); *Self v. BellSouth Mobility, Inc.*, 700 F.3d 453, 461-64 (11th Cir. 2012).

In the
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PALM BEACH GOLF CENTER-BOCA, INC.	)
APPELLANT,	)
V.	) **NO. 13-14013**
JOHN G. SARRIS, D.D.S., P.A.	)
APPELLEE.	)

CERTIFICATE OF SERVICE

I, Laurence N. Bourne, hereby certify that on July 17, 2014, I electronically filed the foregoing Letter Brief with the Clerk of the Court for the United States Courts of Appeals for the Eleventh Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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/s/ Laurence N. Bourne

EXHIBIT 792

EXHIBIT 792

ECHOSTAR INSIDER TRADING POLICY AND RELATED CONDUCT
May 14, 2003

EchoStar Communications Corporation and its subsidiaries (hereinafter referred to as "EchoStar" or the "Company") has established this Policy on insider trading. **The Policy applies to all employees** and officers of EchoStar and to all members of its Board of Directors (collectively, "employees").

The Policy permits certain employees **who are NOT in possession of material non-public information** to trade in EchoStar stock at any time other than during announced Blackout Periods. Special restrictions on trading remain in place for all employees who are: (i) at or above the vice president level (including members of the board of directors); (ii) designated by EchoStar as "insiders" under Section 16 of the Securities Exchange Act of 1934; or (iii) in position to have access to certain confidential information on a regular or systematic basis.

Conduct and Responsibilities of Employees

The Policy prohibits insider trading (including "tipping"). If you possess material non-public information, then you are prohibited (by law and by this Policy) from: (1) purchasing, selling or otherwise trading in securities whose market price may be affected by such information, until the information has been effectively disclosed to the public; and (2) disclosing material non-public information to any other person (including other employees of EchoStar), except when and solely to the extent necessary to fulfill the responsibilities of your job, until after such information has been effectively communicated to the public.

This Policy governs trading in all EchoStar stock and options, including both stock exchange-traded options and employee stock options. It also governs trading in any other EchoStar securities (including debt-securities), the pledging as collateral of any EchoStar securities (including establishing or increasing margin loans), as well as engaging in transactions in securities of other companies if you learn something in the course of your duties that may affect their value. Note also that the law does not allow you to "guess" whether particular non-public information is positive or negative. For example, if you are aware of EchoStar's material and non-public financial results, which you believe will result in an increase or decrease in the price of EchoStar's stock upon announcement, you may not buy or sell until the information has been adequately publicly disseminated, even though you believe you are likely to be "leaving money on the table."

Definitions and Applications

What is Insider Trading? Insider trading is not defined in the written law, but courts generally have described it as: (1) trading of securities by an "insider" on the basis of material and non-public information; (2) communicating material and non-public information by an insider to others ("tipping"); or (3) use (by trading or tipping) of material and non-public information by a non-insider in violation of a duty to keep it confidential.

Who is an Insider? The concept of "insider" is broad. It includes officers, members of the board of directors, and employees of a company. In addition, a person can become a "temporary insider" if he or she enters into a special confidential relationship with the Company and, as a result, is given access to information solely for the Company's purposes under circumstances where there is a duty to keep the information confidential. Similarly, as an employee of EchoStar, you may come into possession of material non-public information about other companies whose stock is publicly traded, such as our suppliers or vendors. You may not purchase or sell the securities of such companies while in possession of material non-public information regarding such companies, or disclose this information to any other person, except as otherwise permitted in this Policy. Since it can be very difficult for an EchoStar employee to determine when it may be appropriate to trade in the securities of a supplier or vendor, you are strongly discouraged from making such investments in the first place.

What is Public Disclosure? Non-public, or "inside" information about EchoStar is any information which has not been effectively disclosed to the public. If you are in possession of material non-public or inside information, then you may not disclose such information to others, or trade on it yourself, until the information has been effectively disclosed to the public. EchoStar generally considers information to have been disclosed publicly at the beginning of the third trading day after: (1) the information has been released to the media by means of a press release, media advisory or other official communication (whether written or oral) intended for wide distribution--but only if the information is actually published or disseminated by the media; or (2) the filing of the information in a disclosure document EchoStar files with the Securities and Exchange Commission (SEC). Thus, if a press release is issued on Thursday afternoon and published by the media that same day, trading may occur on Tuesday if you comply with all of the other elements of this Policy. If a document is filed with the SEC on Monday morning before the securities markets have opened, you will be able to trade on Wednesday if you comply with (and are not otherwise restricted by) all of the other elements of this Policy. If you are uncertain as to the timing of the public disclosure of inside information and whether the disclosure has been effective, contact the Legal Department.

What is Material Non-Public Information? All of us who work at EchoStar possess information about the Company which we have learned because of our position here, but which has not been disclosed to the public. While such information is non-public information, it is not necessarily material information for purposes of this Policy. In general, information about EchoStar is material if a reasonable investor would consider it important in deciding whether or not to buy or sell any security of EchoStar. In other words, material information can be described as any information which might be expected to affect (either negatively or positively) the market price of any security of EchoStar. If non-public information is not material, its mere possession will not bar you from transactions in EchoStar securities (though you may well be barred for other reasons under this policy). Under the law, however, the mere fact that an "insider" trades on non-public information is evidence of its materiality. As a practical matter, therefore, if you are in possession of specific non-public information that causes you to want to buy or sell EchoStar securities, you should consider that information material and you must refrain from any transactions in EchoStar securities unless the information is made public (and the information has been given adequate time to be disseminated to the general public) prior to any sale or purchase by you and you comply with the guidelines set forth herein. Accordingly, if you have such information, you should consider it to be material. Except as otherwise permitted by this Policy, you should not disclose the information to any other person prior to its official public dissemination and should not purchase or sell any security of EchoStar which may be affected by the information.

Additional Factors

Purchase or Sale of EchoStar Securities by Immediate Family. This Policy also covers purchases and sales of EchoStar securities by you and your immediate family members. The term "immediate family" means your spouse, parents, natural and adopted children (or other minor dependents), siblings, mothers- and fathers-in-law, sons- and daughters-in-law and brothers- and sisters-in-law, no matter where they reside, as well as any individuals residing in your household. These individuals are included because securities laws will generally presume that they obtained material non-public information from the employee, unless the employee is able to successfully prove that the person obtained the information from another source. For example, you would be considered to be engaged indirectly in insider trading and to have violated this policy (and possibly the securities laws) if your spouse or other immediate family member trades in EchoStar securities at a time when you are prohibited from trading by this policy. No violation of this policy occurs, however, if you can clearly prove that you did not provide any material non-public information, intentionally or unintentionally, to the related person (be aware, however, that proving a negative is extremely difficult to do).

More about Tipping. You violate this Policy if you communicate material non-public information to a friend, immediate family member, or any other person, regardless of whether the other person trades in EchoStar securities. This is so because this Policy is designed to eliminate the risk that somebody else will trade in EchoStar securities or will communicate the information to another person who may trade while in possession of such information. If the person whom you tipped trades on the information, then you may have violated securities laws as well. The Policy against tipping is not violated by your disclosing material non-public information to another employee in the course of and solely to the extent necessary for fulfilling your duties or responsibilities to EchoStar. You can disclose material information to another employee when disclosure facilitates accomplishment of the duties of either employee. Of course, you are expected to exercise due care with respect to confidential information at all times, and should only share it with other employees on a “need to know” basis or as directed by your supervisor. In addition, disclosure of material non-public information to non-employees and outside organizations does not violate this policy where the disclosure is required in order to accomplish EchoStar's business and has been authorized by your supervisor. For example, disclosure of material non-public information is permitted, if it is necessary for investment bankers to fulfill their "due diligence" obligations under federal securities laws or if it is required by outside consultants who perform services for EchoStar and your supervisor has authorized you to reveal such information to them. However, in such instances, you must first (prior to disclosure) obtain the outside party's written agreement, in a form acceptable to EchoStar’s Legal Department, to keep such material non-public information strictly confidential.

Short Sales and Options Trading. Those who engage in short selling or in trading options, as discussed below, in many cases are attempting to profit from short-term swings in the market price of EchoStar's stock. Moreover, employees who engage in short selling and similar options transactions, place themselves in the awkward position of profiting from short-term reductions in the market price of stock. This is inconsistent with your expected commitment to the long-term prospects for EchoStar. Even more significant is the inference that employees who engage in short selling or who purchase options on the stock are motivated by knowledge of material non-public information about EchoStar or the stock which will cause a change in the market price of the stock to occur once the information is disclosed to the general public. For these reasons, options trading and short selling of EchoStar stock by any EchoStar employee is prohibited, unless the employee has obtained prior written approval from General Counsel. This prohibition includes the practice of selling for future delivery of EchoStar stock already owned (known as "selling against the box"), because--while such transactions are not technically short sales under the federal securities laws--they put the employee in the unacceptable position of potentially profiting from a short-term decline in the price of EchoStar stock. THIS PROHIBITION ON OPTIONS TRADING DOES NOT PRECLUDE YOU FROM EXERCISING ANY EMPLOYEE STOCK OPTION WHICH MAY BE ISSUED BY ECHOSTAR. Any employee can exercise employee stock options at any time. However, other factors, such as general insider trading rules or EchoStar's short-swing trading rules for certain officers and directors (prohibiting buys and sales within a six month period), may prohibit you from simultaneously selling shares obtained from the exercise of these options at various times.

Margin Loans. Entering into margin loans, or other transactions involving the pledging of EchoStar securities as collateral, are prohibited by this policy without the prior written approval of the Legal Department for the specific transaction you wish to engage in. The problem with such transactions is that if the collateral to loan ratio decreases below a certain value, you will get a “margin call” or notice that the lender will sell EchoStar securities in your account unless you increase cash or other collateral in your account. Federal securities regulators have raised concern that by making the decision not to add additional collateral in the event of a margin call (regardless of whether or not you have the funds to do so), you may have effectively made an affirmative decision to sell the collateralized securities. Thus, if at the time of sale you are in possession of material non-public information, you could be deemed to have violated insider trading laws.

Safeguards

This policy establishes safeguards against insider trading. Your failure to follow the safeguards established below is itself a violation of this Policy.

Disclosure of Material Non-public information Outside the Corporation. If, in connection with the fulfillment of your responsibilities, it will be necessary for you to disclose material non-public information to persons or organizations outside EchoStar, you should contact the Legal Department prior to disclosure to determine what steps (e.g., execution of a nondisclosure agreement) should be taken to prevent unauthorized dissemination of the sensitive information.

Requests for Information. Similarly, anyone who receives other requests for information from members of the public (including investment bankers, securities or equity analysts, vendors or EchoStar dealers) which may involve material non-public information, should first contact the Legal Department to discuss the appropriate course of action.

Blackout Periods on Securities Trading. Vice Presidents, employees above the Vice President level ("Executives") and other employees designated by EchoStar as employees with regular or systematic access to material non-public information may not trade in EchoStar securities during blackout periods ("Blackout Periods"). EchoStar Blackout Periods commence March 1, June 1, September 1, and December 1. The Blackout Periods end on the third trading day after the release by EchoStar of its next 10-Q or 10-K, unless the ending date of the Blackout Period is in the middle of another Blackout Period, which will typically be the case following the filing of the 10-K until the first 10-Q is filed. For example, if the third quarter 10-Q is to be released on October 14, then the Blackout Period for such insiders will generally commence on (and include) September 1 and will remain in effect until the third trading day following October 14. As another example, if the third quarter 10-Q is to be filed on November 14, the 10-K is to be filed on March 15 of the following year, and the first quarter 10-Q is to be filed on May 14 of such following year, then a Blackout Period is in effect for such insiders from (and including) December 1 until three (3) business days following May 14 (even though the end of one Blackout Period occurs on the third day after the 10-K is released, a new Blackout Period began on March 1). EchoStar's General Counsel may from time to time declare additional Blackout Periods or modify the Blackout Periods without notice. **No trading by Executives is permitted during Blackout Periods**.

Transactions in your 401(k) or Employee Stock Purchase Plan are, for Blackout Period purposes, no different than transactions for your own account. No changes may be made which affect an EchoStar investment during the Blackout Periods.

EMPLOYEES AT OR ABOVE THE VICE PRESIDENT LEVEL AND OTHER PERSONS DESIGNATED AS "SECTION 16 INSIDERS" MUST RECEIVE WRITTEN APPROVAL FROM GENERAL COUNSEL BEFORE ENGAGING IN **ANY** TRADES, EVEN TRADES OUTSIDE OF THE BLACKOUT PERIODS.

Structured Securities Trading Plans

The SEC's new Rule 10b5-1 provides a means by which an employee subject to blackout periods may structure securities trading plans with respect to stock, during an open trading window and when that employee is not aware of material nonpublic information, provided that the employee does not thereafter at any time exercise any influence over the transaction. If you desire to use a structured trading plan, you must obtain prior written approval from Company General Counsel. To be eligible for this type of transaction, you must follow the procedure established by the Company's legal department. The procedure includes all of the following:

First, you must have in place a **binding written, irrevocable and unalterable contract acceptable to EchoStar**, to purchase or sell the security, which contract must include instructions to another person to execute the trade for the your account. Once entered into, the binding written and irrevocable contract may not be modified in any manner. In other words, once you decide to put in place the structure to buy or sell the stock at certain future dates, you cannot later change your mind, even in an emergency. The form contract to be used, and which may not be modified, will be available through EchoStar's Legal department.

Second, the contract must: (1) expressly specify the amount, price, and date of the transaction; (2) provide a written formula or algorithm, or computer program, for determining amounts, prices, and dates; and (3) not permit you to exercise any subsequent influence over how, when, or whether to effect purchases or sales.

Third, you must ensure that the purchase or sale is done under **and after** the contract you signed and put in place. A purchase or sale is not done under the contract if, among other things, you altered or deviated from the contract or entered into or altered a corresponding or hedging transaction or position with respect to those securities.

In any event, the trading strategy described above may be available only if the contract was entered into in good faith and not as part of a scheme to evade the prohibitions of applicable SEC and other laws and regulations, or this Policy.

For further details about rules and guidelines concerning the foregoing securities trading method, please contact the Legal department.

Violation of this Policy

Disciplinary Actions. Violation of this Insider Trading Policy will subject you to discipline, which may include immediate termination of employment.

Civil and Criminal Penalties. Federal and state securities laws also impose or permit severe civil and criminal penalties, including jail sentences on companies, individual employees, and other insiders who violate the prohibitions on insider trading or improper disclosure of material non-public information. Such penalties can be applied even to persons who do not personally profit from their activities. EchoStar will not be responsible for the legal costs and expenses of any employee who violates this policy, and is accused of wrongdoing related to the violation. EchoStar also reserves all rights it may have against anyone who violates this policy.

Conclusion

If you have any doubts about the materiality of any non-public information, or if you have reason to doubt whether material non-public information has been effectively disclosed to the public, you should consult with the Legal Department, as discussed in this Policy, before disclosing any such information to any other person or purchasing or selling a security while in possession of such information.

Questions?

If after reading this Policy, or at any other time, you have questions about insider trading, you should contact the Legal Department.