APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1518

THOMAS H. KRAKAUER, on behalf of a class of persons,

Plaintiff – Appellee,

v.

DISH NETWORK, L.L.C.,

Defendant – Appellant.

DRI-THE VOICE OF THE DEFENSE BAR; PRODUCT LIABILITY ADVISORY COUNCIL, INCORPORATED,

Amici Supporting Appellants.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, District Judge. (1:14-cv-00333-CCE-JEP)

Argued: May 9, 2019 Decided: May 30, 2019

Before WILKINSON and KING, Circuit Judges, and Irene C. BERGER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Affirmed by published opinion. Judge Wilkinson wrote the opinion, in which Judge King and Judge Berger joined.

ARGUED: E. Joshua Rosenkranz, ORRICK, HERRINGTON & SUTCLIFFE, LLP, New York, New York, for Appellant. John William Barrett, BAILEY & GLASSER LLP, Charleston, West Virginia, for Appellee. **ON BRIEF:** Peter A. Bicks, Elyse D. Echtman, John L. Ewald, Christopher J. Cariello, New York, New York, Eric A. Shumsky, Kelsi Brown Corkran, Jeremy R. Peterman, Washington, D.C., Paul David Meyer, ORRICK, HERRINGTON & SUTCLIFFE LLP, San Francisco, California, for Appellant. Brian A. Glasser, BAILEY & GLASSER LLP, Charleston, West Virginia; Deepak Gupta, Jonathan E. Taylor, GUPTA WESSLER PLLC, Washington, D.C., for Appellee. Richard D. Kelley, BEAN KINNEY & KORMAN, Arlington, Virginia; Deirdre A. Fox, Stephanie Scharf, SCHARF BANKS MARMOR LLC, Chicago, Illinois, for Amicus Product Liability Advisory Council. David M. Axelrad, Felix Shafir, HORVITZ & LEVY LLP, Burbank, California; John F. Kuppens, President, DRI–THE VOICE OF THE DEFENSE BAR, Chicago, Illinois, for Amicus DRI–The Voice of the Defense Bar.

WILKINSON, Circuit Judge:

Congress enacted the Telephone Consumer Protection Act (TCPA) to prevent abusive telephone marketing practices. As part of this effort, the TCPA prohibits calls to numbers on the national Do-Not-Call registry. Dr. Thomas Krakauer brought suit against Dish Network, alleging that its sales representative, Satellite Systems Network (SSN), routinely flouted this prohibition. He sought to pursue his claim on behalf of all persons who, like him, had received calls on numbers listed in the Do-Not-Call registry. The district court certified the class and the case went to trial, where Dish ultimately lost. Dish now appeals, raising several objections to the proceeding below. Because we hold that the district court properly applied the law and prudently exercised its discretion, we affirm.

I.

A.

Telemarketing is big business, especially for television providers. Calls made on behalf of cable and satellite television companies have become ubiquitous. Many Americans are now accustomed to the standard sales pitch, asking them to make an upgrade or take advantage of a limited time offer. These calls are obviously effective, as consumers spend billions of dollars each year on television services marketed over the phone.

Telemarketing calls are also intrusive. A great many people object to these calls, which interfere with

their lives, tie up their phone lines, and cause confusion and disruption on phone records. Faced with growing public criticism of abusive telephone marketing practices, Congress enacted the Telephone Consumer Protection Act of 1991. Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified at 47 U.S.C. § 227 (2012)). As Congress explained, the law was a response to Americans "outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers," *id.* § 2(6), and sought to strike a balance between "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms," *id.* § 2(9). To meet these ends, the TCPA first imposed a number of restrictions on the use of automated telephone equipment, such as "robocalls." 47 U.S.C. § 227(b); *see Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 373 (2012). For in-person telemarketing calls, on the other hand, the law opted for a consumer-driven process that would allow objecting individuals to prevent unwanted calls to their homes.

The result of the telemarketing regulations was the national Do-Not-Call registry. *See* 47 C.F.R. § 64.1200(c)(2). Within the federal government's web of indecipherable acronyms and byzantine programs, the Do-Not-Call registry stands out as a model of clarity. It means what it says. If a person wishes to no longer receive telephone solicitations, he can add his number to the list. The TCPA then restricts the telephone solicitations that can be made to that number. *See id.*; 16 C.F.R. § 310.4(b)(iii)(B) ("It is an abusive telemarketing act or practice and a violation of this Rule for a telemarketer to … initiat[e] any outbound telephone call to a person when … [t]hat

person's telephone number is on the "do-not-call" registry, maintained by the Commission."). There are limited exceptions. For instance, a call does not count as a "telephone solicitation" if the caller and the recipient have an established business relationship, *see* 16 C.F.R. § 310.2(q), or if the recipient invited the call, *see* 47 U.S.C. § 227(a)(4). Barring an exception, however, telemarketers are expected to check the list and avoid bothering those who have asked to be left alone. In addition to the national registry, companies are also expected to keep individual Do-Not-Call lists, reflecting persons who have directly told the company that they do not wish to receive further solicitations. *See* 47 C.F.R. § 64.1200(d).

The TCPA can be enforced by federal agencies, state attorneys general, and private citizens. *Mims*, 565 U.S. at 370. Relevant to this appeal, the law allows a private right of action for violations of the Do-Not-Call registry regulations. Specifically, claims can be brought by "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection …." 47 U.S.C. § 227(c)(5). These private suits can seek either monetary or injunctive relief. *Id*. If damages are sought, the plaintiff is entitled to receive the greater of either his actual loss or statutory damages up to $500. *Id*. If the defendant's violation of the law was willful and knowing, those damages can be trebled, within the district court's discretion. *Id*. "[T]he court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.")

This private cause of action is a straightforward provision designed to achieve a straightforward result. Congress enacted the law to protect against invasions of privacy that were harming people. The law empowers each person to protect his own personal rights. Violations of the law are clear, as is the remedy. Put simply, the TCPA affords relief to those persons who, despite efforts to avoid it, have suffered an intrusion upon their domestic peace.

B.

Dr. Thomas Krakauer is just such a person. In May of 2009, he started getting telemarketing calls, asking him to buy services from Dish Network. These calls were placed by a firm called Satellite Systems Network (SSN), whose entire business model was to make calls like these on behalf of television service providers. During the time that SSN was calling Krakauer, the company only marketed Dish. J.A. 172. Krakauer called Dish to complain about the calls, and he was placed on the company's individual Do-Not-Call list. Fortunately for Krakauer, he had registered his phone number on the national Do-Not-Call registry in 2003. SSN's calls to him were therefore not only annoying, they were illegal. In 2015, Krakauer sued Dish Network for the improper calls under the TCPA, seeking redress for the calls made on its behalf by SSN.

In the years since, this litigation has wound its way through an array of pre-trial motions, a full jury trial, and a detailed post-trial claims process. In September of 2015, the court certified a class that closely followed the text of the TCPA, allowing

Krakauer to bring his claim on behalf all persons (1) whose numbers were on the national Do-Not-Call registry or the individual Do-Not-Call lists of either Dish or SSN for at least 30 days and (2) received two calls in a single year. J.A. 202-03. The court concluded that this definition satisfied the requirements for class certification. A few of the court's findings on this point are particularly relevant for this appeal. First, the court held that the class-wide issues raised by the plaintiffs were susceptible to common proof. *Id.* at 191, 195-96. As the court saw it, "[t]he essential elements of the class members' claim can be proven at trial with common, as opposed to individualized, evidence." J.A. 200. Looking to our court's precedents, the district court also concluded that the members of Krakauer's proposed class could be easily identified. *Id.* at 178 (citing *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014)).

Nearly a year after the initial certification, Dish moved to dismiss the entire case on the grounds that the class lacked Article III standing. The court rejected this argument, holding that "Dr. Krakauer's allegations show a concrete injury to him and to each class member," J.A. 246, and allowed the case to move forward. Prior to trial, the court granted a motion to further narrow the class in response to new class-wide data provided by the parties. *Id.* at 279-80. When the trial arrived, the court instructed the jury to resolve three factual disputes. First, the jury had to determine whether SSN was acting as Dish's agent at the time that it made the improper calls. Second, it had to determine whether SSN made, and the class members received, multiple calls to numbers on the national Do-Not-Call registry within a given period.

Third, if it found that such calls were in fact made, the jury was also asked to assign a damages award for each improper call. *Id*. at 510-28.

Ultimately, the jury returned a verdict in favor of Krakauer and the class plaintiffs. After finding that the telemarketing practices violated the TCPA and that Dish was liable for the calls placed by SSN, the jury awarded damages of $400 per call. *Id*. at 508. Once the trial was complete, the district court examined whether Dish's violations were willful and knowing, as provided for in the statute. The court found that they were, and trebled the damages award. *Id*. at 549-50. Dish responded with a motion for a new trial and renewed motion for judgment as a matter of law, raising many of the arguments that had been rejected at the class certification stage and in its earlier motions. All of these arguments were rejected, and the court began to process the class members' claims.

In developing a process to ensure that the money went to the right people, the parties presented wildly divergent proposals to the court. Dish asked the court to require a claims form for every single class member, even those for whom the class-wide evidence clearly established a valid claim. The plaintiffs on the other hand, asked for judgment to be entered immediately and for checks to be mailed to class members who had already responded to the class solicitation, without the need for adversarial process. J.A. 615-16.

The court opted for a middle position, declining to enter an immediate judgment and instead allowing

Dish to participate in the process and contest some individual claims. *Id*. at 626. Under this process, the court would appoint an administrator to oversee the distribution and completion of individual claims forms. The court left open the possibility that the plaintiffs could point to "class members who are identified fully and without contradiction in the data," for whom judgment without a claims form would be appropriate. *Id*. at 628. Applying this method, the district court granted judgment for approximately 11,000 plaintiffs without a claims form, finding that their entitlement to damages was clear. J.A. 671.

Many months later, and more than a year after the jury trial had concluded, the district court entered a final judgment in the case.[1] In entering the order,

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[1] We have jurisdiction over this appeal under 28 U.S.C. § 1291, which affords this court jurisdiction to review "final decisions of the district courts of the United States." The final judgment of April 5, 2018 fully describes the 18,066 class members, reflects the jury's verdict as to both liability and damages, and includes an aggregate damages award of $61,243,800. J.A. 687. All that remains at the district court are "questions as to distribution of the damages award [that] can be resolved expeditiously and easily via a claims process." *Id*. at 686.

In such a situation, where the remaining issues are "ministerial" and unlikely to alter the issues on appeal, "immediate appeal is allowed." *Parks v. Pavkovic*, 753 F.2d 1397, 1401 (7th Cir. 1985). *See also Barfield v. Sho-Me Power Elec. Coop.*, 309 F.R.D. 491 (W.D. Mo. 2015) *vacated on other grounds*, 852 F.3d 795 (8th Cir. 2017). The Supreme Court has exercised jurisdiction in an identical posture, where judgment was entered after trial, but before all of the funds were disbursed to class plaintiffs. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016).

the district court noted that Dish had not participated in the claims process in good faith, instead choosing to "bombard the court with irrelevant and voluminous materials," "repeat arguments the court has rejected many times," and "seek a second bite at the apple when it loses on grounds it could have raised the first time the apple was presented." J.A. 685. Given the futility of continuing a process that was only initiated to give Dish a seat at the table, the court "conclude[d] that the time ha[d] come to enter judgment in favor of the class." *Id*. The judgment totaled more than $61,000,000. *Id*. at 685-86.

It is at this point, prior to the complete disbursement of the funds, that this case arrives on appeal. Through each stage of the proceedings below, the record reflects substantial diligence and care by the district court in managing the class. When new evidence became available, the court modified the class appropriately. When Dish raised new arguments or rehashed old ones, the court thoroughly responded, carefully parsing the legal authorities that were presented. When the parties offered competing positions on how to handle the claims process, the court opted for the path that afforded Dish a chance to participate, and carefully scrutinized the plaintiffs' motions to ensure that purported class members did not recover without sufficient support for their claims.

Dish's contentions on appeal come in three varieties. First, it challenges the class certification on the grounds that the court lacks jurisdiction over the class under Article III. Second, it raises various objections to the district court's certification of the class as a matter of civil procedure. And third, it

challenges its own liability for the improper calls placed by SSN.

II.

As is customary, we first take up Dish's jurisdictional argument. As Dish sees the matter, Article III bars the court from certifying a class if the class is defined such that many members of the class will lack standing. The question of how to handle classes that may include uninjured class members has received considerable attention among our sister circuits in recent years. S*ee In re Asacol Antitrust Litig.*, 907 F.3d 42, 56-57 (1st Cir. 2018) (collecting cases). As these thoughtful opinions demonstrate, this question can be seen as implicating either the jurisdiction of the court under Article III or the procedural issues embedded within Rule 23's requirements for class certification. At times, the discussion of these two issues has run together. We are of the view, however, that to the extent Article III imposes distinct constraints on the composition of the class, that issue ought to be taken up separately. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 830-831 (1999).

Turning to the standing question alone, the class certified by the district court is entirely consonant with Article III's requirements. The class definition hewed tightly to the language of the TCPA's cause of action, and that statute itself recognizes a cognizable constitutional injury. There is therefore no untold number of class members who lack standing here, and we need not expound on what it would mean if there were.

To fall within the class certified below, a person had to receive two calls within one year to a number that was listed on the Do-Not-Call registry, just as the TCPA provides. J.A. 80. The question for us is whether this class definition, by its terms, stated an injury that is sufficient to support federal jurisdiction. The Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), provides the answer. *Spokeo* lays down a few clear propositions. First, the traditional requirements of standing—injury-in-fact, redressability, and traceability—apply to causes of action created by statute. Congress's determination that a cause of action exists does not displace this "irreducible constitutional minimum" of standing. *Id.* at 1547-48 ("Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." (quoting *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997)). Second, for an injury-in-fact to be cognizable under the Constitution, it must be both concrete and particularized. *Id.* at 1548-49. And third, in determining whether a given injury meets the constitutional threshold, we look to both historic practice and the judgment of Congress. *Id.*

Taken together, this guidance helps to preserve the traditional core of standing, which is a personal stake in the case. Private litigation, even if authorized by statute to serve a range of public ends, must vindicate the plaintiffs' interests, rather than serve solely a vehicle for ensuring legal compliance. *See Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 473 (1982) ("Were the federal courts merely publicly funded forums for the ventilation of public grievances

or the refinement of jurisprudential understanding, the concept of 'standing' would be quite unnecessary."). This is just as true of class actions as it is for any other "case" or "controversy" in federal court. *See Warth v. Seldin*, 422 U.S. 490, 498-99 (1975); *Sosna v. Iowa*, 419 U.S. 393 (1975).

Looking both to Congress's judgment and historical practice, as *Spokeo* instructs, the private right of action here plainly satisfies the demands of Article III. In enacting § 227(c)(5) of the TCPA, Congress responded to the harms of actual people by creating a cause of action that protects their particular and concrete privacy interests. To bring suit, the plaintiffs here must have received unwanted calls on multiple occasions. These calls must have been to a residential number listed on the Do-Not-Call registry. This is not a statute authorizing citizen-suits for any legal violation to which a plaintiff might take issue. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 571-72 (1992) (citing 16 U.S.C. § 1540(g)). The statute requires that an individual receive a call on his own residential number, a call that he previously took steps to avoid. There is nothing ethereal or abstract about it.

Our legal traditions, moreover, have long protected privacy interests in the home. Intrusions upon personal privacy were recognized in tort law and redressable through private litigation. *See generally* Restatement (Second) of Torts, § 652B (defining "[i]ntrusion upon seclusion" as "intentional[] intru[sion], physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns"). Cognizable intrusions include intrusions

made via phone calls. *Id*. The straightforward application of *Spokeo* thus neatly resolves this matter, as many other courts have held in similar settings. *See Susinno v. Work Out World Inc.*, 862 F.3d 346, 351-52 (3d Cir. 2017); *Van Patten v. Vertical Fitness Grp., LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017); *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5-6 (W.D. Wash. May 25, 2016) (holding that under *Spokeo* violations of the TCPA's robocalling provision are "sufficiently concrete to confer standing"); *Mey v. Got Warranty, Inc.*, 193 F. Supp. 3d 641 (N.D. W. Va. 2016) ("[U]nwanted phone calls cause concrete harm.").

The arguments to the contrary, made by both the appellant and its amici, deploy *Spokeo* in ways that go well beyond its holding and rationale. Rather than paying heed to Congress's judgment of what sort of particular and concrete harms ought to count, the appellants ask that we import the elements of common law torts, piece by piece, into any scheme Congress may devise. As they see it, Article III's injury-in-fact requirement is not met until the plaintiff's alleged harm has risen to a level that would support a common law cause of action. This sort of judicial grafting is not what *Spokeo* had in mind. *See Susinno*, 862 F.3d at 352. Our inquiry is focused on types of harms protected at common law, not the precise point at which those harms become actionable. Congress is empowered to "elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law," *Spokeo*, 136 S. Ct. at 1549 (citing *Lujan*, 504 U.S. at 578), and that is precisely what it did here.

The plaintiffs here do not seek redress for a procedural shortcoming, such as the defendant's failure to keep accurate Do-Not-Call records. Their claim under § 227(c)(5) accrues only once a telemarketer disregards the registry and actually places multiple calls. Since that harm is both particular to each person and imposes a concrete burden on his privacy, it is sufficient to confer standing. The appellant's suggestion otherwise is nothing more than an attempt to dismember the TCPA, converting a simple remedial scheme into a fact-intensive quarrel over how long a party was on the line or how irritated it felt when the phone rang. Obviously, Congress could have created such a cumbersome scheme if it wanted to. It instead opted for a more straightforward and manageable way of protecting personal privacy, and the Constitution in no way bars it from doing so.

III.

We now take up the various challenges to the plaintiffs' class under Rule 23. *See* Fed. R. Civ. P. 23. At the time of the trial, the class was defined to include:

> [1] All persons throughout the United States whose telephone numbers were listed on the federal Do Not Call registry for at least 30 days, but [2] who received telemarketing calls from SSN to promote the sale of Dish satellite television subscriptions [3] from May 1, 2010 to August 1, 2011.

J.A. 80.[2] Our review of class certification issues is deferential, cognizant of both the considerable advantages that our district court colleagues possess in managing complex litigation and the need to afford them some latitude in bringing that expertise to bear. *See Doe v. Chao*, 306 F.3d 170, 183 (4th Cir. 2002). In seeking class certification under Rule 23, the plaintiff has the burden of demonstrating that the requirements for class-wide adjudication have been met. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013). Since the requirements of Rule 23 are often "enmeshed in the factual and legal issues comprising the plaintiffs' cause of action," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982)), the district court must rigorously examine the core issues of the case at the certification stage.

Rule 23 begins with a list of threshold requirements applicable to all class actions, commonly referred to as "numerosity," "commonality," "typicality," and "adequacy." *See* Fed. R. Civ. P. 23(a). These "four requirements … 'effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.'" *Wal-Mart Stores*, 564 U.S. at 349 (quoting *Gen. Tel. Co. of Sw.*, 457 U.S. at 156). We have also noted that, apart from the enumerated requirements, "Rule 23 contains an implicit threshold requirement that the members

[2] The class certified by the district court initially included those whose numbers were listed on the individual companies' Do-Not-Call lists. By the time of trial, the class was narrowed to focus on only those numbers listed on the national Do-Not-Call registry.

of a proposed class be 'readily identifiable.'" *EQT Prod. Co.*, 764 F.3d at 358 (quoting *Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972)). Under this principle, sometimes called "ascertainability," "a class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id.*

Once these showings have been made, the plaintiff then bears the burden of demonstrating that the proposed class fits into one of the specific forms of class adjudication provided by Rule 23(b). *See Ortiz*, 527 U.S. at 833. The provision relevant here is Rule 23(b)(3), which is the common vehicle for "mass tort class actions," which seek damages for widespread wrongful conduct. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 424 (4th Cir. 2003). Unlike other forms of class actions, Rule 23(b)(3) requires notice to class members, who are afforded an opportunity to opt-out of the class at the certification stage. *See* Fed. R. Civ. P. 23(c)(2); 3 William Rubenstein et al., Newberg on Class Actions, § 8:1 (5th ed. 2018). The rule is "designed to secure judgments binding all class members save those who affirmatively elected to be excluded." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997).

To obtain certification under 23(b)(3), the plaintiff must show both that "[1] questions of law and fact common to class members predominate over any questions affecting only individual class members, and [2] that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). The two requirements are unsurprisingly labeled

"predominance" and "superiority." Since claims aggregated under Rule 23(b)(3) can be resolved without the class mechanism, these requirements ensure that a class action is only used when it makes sense.

A.

The application of Rule 23 often turns on the cause of action. *See, e.g., Erica P. John Fund, Inc. v. Halliburton*, 563 U.S. 804, 809 (2011). As a general matter, the limits of Rule 23 are designed to ensure vigorous adversarial process, efficient adjudication of class-wide questions, and a practical means of identifying and notifying those who may be affected by a judgment. Each of these issues is inextricably linked with the elements of a particular claim. A cause of action that includes a fact-bound element or a claim-specific affirmative defense may be less susceptible to class treatment than one that does not. Efficient and manageable classes require common proof, and the availability of such proof turns on what exactly needs to be proven. We therefore begin our analysis by looking to the particular cause of action created by the TPCA.

The private right of action in § 227(c)(5) offers many advantages for class-wide adjudication. It requires a plaintiff to initially show two things: a number on the Do-Not-Call registry, and two calls made to that number in a year. The damages, moreover, can be set at any amount up to $500 without any actual proof of loss. Other relevant issues, such as the existence of a business relationship between the solicitor and the recipient of

the call, are likely to be proven by records kept by the defendant company. The problems that so often plague class actions under Rule 23(b)(3) are wholly absent from this scheme. The liability determinations involve no questions of individual reliance, *see, e.g., Erica P. John Fund*, 563 U.S. at 810-11, no complicated contractual obligations, *see, e.g., Halvorson v. Auto-Owners Ins. Co.*, 718 F.3d 773, 779 (8th Cir. 2013), and no theories of probabilistic injury, *see, e.g., Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045-46 (2016). The damages calculations do not turn on individual evidence, *see, e.g., In re Asacol Antitrust Litig.*, 907 F.3d at 52-53, nor are they difficult to connect to the underlying harm, *see, e.g., Comcast*, 569 U.S. at 35-38. Put simply, a plaintiff suing under § 227(c)(5) is likely to be in the same position as a great many other people and can rely largely on common proof to make out his claim.

Given the remedial purpose of the TCPA, it is no surprise that its cause of action would be conducive to class-wide disposition. In enacting the law, Congress sought to deter an activity that, while pernicious and disruptive, does not trigger extensive liability in any single case. Since few individuals would have an incentive to bring suit, no matter how frustrated they were with the intrusion on their privacy, the TCPA opted for a model that allows for resolution of issues without extensive individual complications.

B.

Since the TCPA clearly supports class-wide resolution in the abstract, we now consider whether the statute supports this class in particular. Once

again, the district court certified a class definition that hewed closely to the TCPA's text, allowing Krakauer to sue on behalf of all "persons" who "received" violative calls during the class period. J.A. 80. Dish nonetheless asserts that this definition is overbroad. Despite the fact that the relevant definition of the class is pulled directly from the statute, Dish argues that the class necessarily includes a large number of people who have no statutory claim at all. As Dish sees it, the TCPA's private cause of action for violations of the Do-Not-Call registry can only be brought by telephone *subscribers*, meaning chiefly the individuals who are "responsible for the payment of the telephone bill," 47 C.F.R. § 64.1100(h), rather than any *person* who received an improper call.

We see no basis for imposing such a limit. The question of who can sue under a statutory cause of action turns on whether the party is within the statute's "zone of interests." *Lexmark Int'l., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129-30 (2014). If a plaintiff is the sort of person the law intended to protect, he can press his claim. To determine if a plaintiff is within the "zone of interests," we simply look to the statute itself. Accordingly, applying this test requires nothing more than "traditional principles of statutory interpretation," such that "the outcome will rise and fall on the meaning of the Congressionally enacted provision creating [the] cause of action." *Belmora LLC v. Bayer Consumer Care AG*, 819 F.3d 697, 708 (4th Cir. 2016) (quoting *Lexmark*, 572 U.S. at 128).

"Traditional principles of statutory interpretation" leave no doubt as to the right answer here. The private right of action allows suit by any "person" who "received" calls that were placed "in violation of" the TCPA regulations. 47 U.S.C. § 227(c)(5). Its coverage is clear, as are its limits. The text of the TCPA notes that it was intended to protect "consumers," not simply "subscribers," who were "outraged over the proliferation of intrusive, nuisance calls to their homes from telemarketers." Pub. L. No. 102-243, § 2(6). It protects these persons from "[u]nrestricted telemarketing," which "can be an intrusive invasion of privacy." *Id.* § 2(5). A non-subscriber who receives a call can suffer a privacy intrusion just as easily as a subscriber can. The extensive legislative history accompanying the TCPA confirms its broad reach. *See Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 325-26 (3d Cir. 2015) (interpreting the TCPA's robocalling cause of action).

The text, purpose, and history all cut against reading the statute as protecting only subscribers. It is highly unlikely that, in the face of such strong evidence supporting the plain text, that Congress would expect us to infer otherwise. Dish's proposed limit of the class to subscribers is even more dubious when one considers that Congress specifically referenced "subscribers" in other parts of the TCPA, *see, e.g.*, 47 U.S.C. § 227(f)(2), but did not do so here. We assume that Congress chooses its words carefully and does not lightly toss around broad language ("persons") when more precise language ("subscribers") is available. As such, we hold that the cause of action is § 227(c)(5) is not limited to telephone subscribers.

In response, Dish points us toward decisions interpreting a range of other federal statutes, none of which bear much resemblance to § 227(c)(5). Dish is surely correct that, as a general matter, the "zone of interests" framework is useful for identifying important limits on a cause of action which may not be expressly stated in the law. It is especially important when the cause of action's plain text does not supply meaningful constraints. Does a cause of action, for example, include competitors? *See Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). Is it available only to those with harm to their commercial interests, or also those with other sorts of injuries? *See Lexmark*, 572 U.S. at 132. The TCPA, however, does not leave such questions open. The statute marks its own boundary. Suit can only be brought by those who receive multiple violative calls. Calls are only violative if the phone number was on the Do-Not-Call registry. And a number can only be placed on such a registry if the number is a residential line. Whatever work we may be required to do for more broadly worded statutes, Congress did the work for us here.

Finally, Dish argues that the private right of action in § 227(c)(5) must be limited to "subscribers" because it is telephone subscribers who can list their phone numbers on the national Do-Not-Call registry. *See* 47 C.F.R. § 64.1200(c)(2). In the face of clear text pointing the other way, however, we see no reason that the private right of action should be limited only to those who can list their numbers on the registry. If a wife, as the subscriber, lists a home telephone number on the Do-Not-Call registry, but her husband happens to be the one who receives the improper calls,

the law has still been violated. Both the wife and the husband can suffer the harm that Congress sought to deter, and both are "persons" able to bring a claim under § 227(c)(5).

C.

With the statute properly in view, the appellant's challenge to this class falls away. Appellant's core argument seems to be that this class includes a large number of uninjured persons. Other courts to address the question of uninjured plaintiffs have done so through the lens of predominance, asking whether the differences among the class members are so great that individual adjudication subsumes the class-wide issues. *See In re Asacol Antitrust Litig.*, 907 F.3d at 51-53; *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244 (D.C. Cir. 2016); *Kleen Prods. v. Int'l Paper Co.*, 831 F.3d 919 (7th Cir. 2016). For its part, the district court took up the issue through the lens of ascertainability. Regardless of which approach is used, the issue has no bearing on this case. Because the private right of action is not as narrow as Dish and its amici suggest, there is simply not a large number of uninjured persons included within the plaintiffs' class.

With this red herring cast aside, the class certified by the district court easily meets the demands of Rule 23. First, the class members are ascertainable. As we previously explained, class litigation should not move forward when a court cannot identify class members without "extensive and individualized fact-finding or 'mini-trials.'" *EQT Prod. Co.*, 764 F.3d at 358. The goal is not to "identify

every class member at the time of certification," *id*., but to define a class in such a way as to ensure that there will be some "administratively feasible [way] for the court to determine whether a particular individual is a member" at some point. *Id*. (quoting 7A Charles Alan Wright et al., Federal Practice and Procedure, § 1760 (3d ed. 2005)).

The class-wide data obviated any concern on this score. The records in this case clearly showed when calls were placed and whether the call went through. The court was presented with data showing whether a number was residential and connecting the number to particular names and addresses. J.A. 179-80. The class members could therefore be identified on a large-scale basis, and notified of the class action accordingly.

Second, the issues common to the plaintiffs clearly predominated over individual issues. The predominance inquiry "calls upon courts to give careful scrutiny to the relation between common and individual questions in the case." *Tyson Foods*, 136 S. Ct. at 1045. The entire notion of predominance implies that the plaintiffs' claims need not be identical, and, as the Supreme Court has noted, a class can meet this requirement "even though other important matters will have to be tried separately." *Id*. (quoting 7AA Charles Alan Wright et al., Federal Practice and Procedure, § 1778 (3d ed. 2005)).

As the trial court thoroughly documented when certifying the class, all of the major issues in the case could be shown through aggregate records. As the above discussion demonstrates, class-wide records

were produced regarding when calls were made, whether they went through to the residence, and to which numbers they were directed. The facts that were relevant to Dish's liability were also common to the class. The plaintiffs argued that SSN was acting as Dish's agent at the time it made the improper calls. This was a question that in all likelihood was common to the class. And perhaps most significantly, the plaintiffs sought a statutory damages award, preventing the need to measure individual compensatory damages. *See In re Asacol Antitrust Litig.*, 907 F.3d at 51-53.

While Dish objected to various aspects of the plaintiffs' proposed data and argued that individual fact-finding would be required, the district court considered these arguments and found them unpersuasive. J.A. 192-98. For some of these issues, such as whether a phone number was residential or commercial, Dish was unable to show any significant error in the aggregate data offered by the plaintiffs. For other issues, such as whether the telemarketer had an existing business relationship with the person who was called, it would be reasonable to expect Dish to keep business records, which would themselves be relevant to the entire class. J.A. 196.

At bottom, the advantages of class resolution follow directly from the statute. The statute creates a simple scheme for determining if a violation occurred, whether a defense is available, and what the damages ought to be. The district court faithfully applied the statute when certifying this class. Because its

determinations were reasonable, there is no error for us to correct.[3]

Much like their arguments on standing, Dish and its amici devote a great deal of attention to the larger debates that are swirling around class certification. The question of how best to handle uninjured class members has led to well-reasoned opinions from our sister circuits. Were we empowered to issue advisory opinions, we might have something useful to contribute to the discussion. A litigated case is not a symposium, however, and whatever views we may have on these issues must be left for another day. The actual plaintiffs in this case can satisfy the requirements of class certification under well-settled and broadly accepted principles. Anyone looking for some grand pronouncement of law in this case has simply picked the wrong horse.

IV.

The final thrust of Dish's appeal concerns its own liability. Dish does not contest that widespread violations of the TCPA occurred, nor does it dispute

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[3] We similarly see no error in the district court's jury instructions. The court instructed the jury to determine whether SSN made two calls to the same number on the Do-Not-Call registry within a single year. J.A. 517-18. The court left the question of whether particular names and addresses matched those numbers to the post-trial claims process. This was appropriate. The jury heard evidence on whether the calls were placed and decided that question, which was common to the class. The court was within its discretion to allow the jury to resolve only the class-wide issues, while reserving individual claims disputes for later down the line.

that these violations were made for the sole purpose of selling Dish services. Dish does not even seriously contest that it knew of the violative conduct. Instead, it challenges both the jury's finding that it is liable for SSN's conduct and the district court's separate determination that Dish's violations of the law were knowing and willful.

Both arguments fail, and for the same reason: Dish characterizes what are essentially factual disagreements as questions of law, thereby failing to appreciate the substantial deference owed to the careful findings made in the proceeding below.

A.

We first consider whether Dish was properly held liable for the calls that SSN made to members of the class. The jury concluded that it was because SSN was acting as Dish's agent when the calls were made. By its plain language, the TCPA's private right of action contemplates that a company can be held liable for calls made on its behalf, even if not placed by the company directly. *See* 47 U.S.C. § 227(c)(5) (authorizing claims by "[a] person who has received more than one telephone call within any 12-month period *by or on behalf of* the same entity" (emphasis added)). While we have no clear definition of "on behalf of" in the TCPA, we may, at a minimum, assume that federal statutes are written with familiar common law agency principles in mind. *See Meyer v. Holley*, 537 U.S. 280, 285-86 (2003).

Under traditional agency law, an agency relationship exists when a principal "manifests

assent" to an agent "that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." *See* Restatement (Third) of Agency, § 1.01. Once such a relationship is formed, "traditional vicarious liability rules ordinarily make principals … vicariously liable for acts of their agents … in the scope of their authority." *Meyer*, 537 U.S. at 285-86 (collecting cases). "Generally, the existence and scope of agency relationships are factual matters," and are therefore often appropriately left to the jury. *Metco Products, Inc., Div. of Case Mfg. Co. v. NLRB*, 884 F.2d 156, 159 (4th Cir. 1989).

This settled law was clearly spelled out in the jury instructions. The jury was asked to find whether or not SSN was Dish's agent at the time it made the calls relevant to this case. J.A. 508. If the jury had answered that question in the negative, that would have ended the matter. The court carefully explained that Krakauer had the burden of showing such a relationship, and that the relationship required mutual assent and control by Dish. J.A. 514-15. The court also instructed the jury on the scope of authority. Specifically, the court instructed the jury how to assess a situation, as we have here, wherein the principal's guidance to the agent may not be explicit, but instead arises from the principal's acquiescence to a course of conduct. J.A. 515-16. As the district court explained, "to decide whether the principal acquiesced or consented, you must find that the principal knew of prior similar activities and consented or did not object to them." J.A. 516.

In sum, the district court interpreted the statute to apply standard legal principles. The question was then presented to the jury, which ultimately held Dish liable. Despite Dish's assertions that the district court somehow engaged in legal errors on this point, its challenges bottom out on no more than a disagreement about the facts.

And to prevail on the facts, Dish must show that the jury's conclusion lacks any meaningful support, viewing "the trial evidence in the light most favorable to the prevailing party." *See Roe v. Howard*, 917 F.3d 229, 231 (4th Cir. 2019). Dish has fallen far short of clearing that bar. The evidence supporting an agency relationship between Dish and SSN is considerable. First, there are the many provisions of the contract between Dish and SSN affording Dish broad authority over SSN's business, including what technology it used and what records it retained. J.A. 584. Second, SSN was authorized to use Dish's name and logo in carrying out its operation. Third, the jury had before it the Voluntary Compliance Agreement that Dish entered into with 46 state attorneys general, wherein Dish clearly stated its authority over SSN with regard to TCPA compliance. And on the issue of whether SSN was acting within the scope of its authority, an array of witnesses testified that Dish was aware of SSN's legal violations, took no meaningful action to ensure compliance, and profited from SSN's actions. Faced with this evidence, it was entirely reasonable for the jury to conclude both that SSN was acting as Dish's agent, and that SSN was acting pursuant to its authority when making the calls at issue in this case.

Dish offers two arguments in response. First, it contends that its contract with SSN, which expressly defined the relationship between the parties, ought to outweigh the evidence on the ground. It is a familiar rule of agency, however, that parties cannot avoid the legal obligations of agency by simply contracting out of them. *See* Restatement (Third) of Agency, § 1.02 ("Whether a relationship is characterized as agency in an agreement between the parties … is not controlling."). Agency law, including a principal's liability for acts done on his behalf, protects third parties, who themselves would receive no protection from a contractual disclaimer. This case demonstrates the need to look beyond the contract, as a failure to do so might lead to absolving a company, like Dish, that acquiesced in and benefitted from a wrongful course of conduct that was carried out on its behalf.

Parties are of course still free to enter into contracts establishing independent contractor relationships, which, among other advantages, allow large firms to take advantage of the expertise of smaller companies. The terms of the agreement between the firms will remain highly relevant to the legal status of their relationship. At no time, however, have we suggested that a contractual disclaimer was alone dispositive. *See Robb v. United States*, 80 F.3d 884, 893 n.11 (4th Cir. 1996). If the parties want the benefits of an independent contractor relationship, they have to actually have one. Dish wanted to exercise extensive control over SSN's conduct without taking on responsibility for that conduct, and that is what the law does not permit.

Second, Dish argues that because it occasionally instructed SSN to follow the law, no reasonable jury could conclude that SSN's improper telemarketing calls were done within the scope of SSN's authority as Dish's agent. Dish does not dispute that a principal can be liable for the illegal acts of an agent. Nor does it dispute that the acts of an agent can be within the scope of authority even when no express direction is given by the principal. The jury was properly instructed on these points and presented with evidence showing that Dish knew of SSN's statutory violations and its failure to comply with Dish's purported instructions. The evidence also showed that Dish failed to respond to these concerns in any serious way and was profiting handsomely from SSN's sales tactics. It may be that Dish believes that its warnings and admonitions should have been given greater weight by the jury. Because the jury resolved this question and had extensive evidentiary support for its conclusion, it does not matter whether Dish now believes its argument to be convincing. Dish had its chance to persuade the jury, and it lost.

B.

The TPCA authorizes a district court, at its discretion, to treble the jury's damages award if it finds that the defendant's violations of the law were "willful[] and knowing[]." 47 U.S.C. § 227(c)(5). After the jury found Dish liable for the telemarketing violations here, the district court trebled the damages under this provision. Examining the jury's findings, the court found both that the willful and knowing standard had been satisfied and that an increased award was needed "to deter Dish from future

violations and … give appropriate weight to the scope of the violations." J.A. 576. There is no basis, either with regards to the legal standard or the facts, for disturbing this conclusion on appeal.

We begin with the law. The court identified two alternative and independent bases for finding Dish's conduct to be "willful" and "knowing." The first was derived from traditional agency law. As the district court explained, it is a familiar principle of agency that "a principal is liable for the willful acts of his agent committed within the scope of the agent's actual authority." J.A. 570 (citing Restatement (Third) of Agency § 7.04). The second was grounded in Dish's own conduct, apart from the agency relationship. In articulating the standard applicable to Dish's actions standing alone, the court rightly acknowledged that mere negligence would not be enough to support trebling the award. Instead, Dish would only be liable if its actions demonstrated indifference to ongoing violations and a conscious disregard for compliance with the law. *Id.* at 571 (citing *United States v. Blankenship*, 846 F.3d 663, 673 (4th Cir. 2017)). This is a familiar willfulness standard that is common to many areas of law. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57 (2007) ("[W]here willfulness is a statutory condition of civil liability, we have generally taken it to cover not only knowing violations of a standard, but reckless ones as well.").

Turning to the facts, there is ample support for each of the district court's rationales in the record produced at trial. The court carefully parsed the trial evidence, noting which evidence it relied on and which

it did not. J.A. 553. Assessments of credibility were thoroughly explained. *Id*. On the first rationale, which imputed SSN's liability to Dish, the district court leaned heavily on the factual findings of the jury. The jury found that SSN was acting as Dish's agent when it made the calls in violation of the TCPA. It also found that this conduct was within the scope of SSN's authority as an agent of Dish. As set forth above, both of these findings were entirely appropriate. The court then assessed each of Dish's arguments against willfulness, rightly noting that many of these were little more attempts to absolve itself of legal liability by pointing to contractual terms and pro forma notices. In doing so, the court found that Dish's instructions to SSN were no more than "empty words" that obscured the true relationship between Dish and its retailer. J.A. 571.

Similarly, the second rationale, based on Dish's own willful conduct, was firmly supported by the evidence. The court documented the many occasions on which Dish noted SSN's noncompliance and failed to act. The trial court catalogued the lawsuits and enforcement actions brought against Dish for telemarketing activities, none of which prompted the company to seriously improve its business practices: "While Dish promised forty-six state attorneys general in 2009 that it would enforce TCPA compliance by its marketers, Dish did nothing to monitor, much less enforce, SSN's compliance with the telemarketing laws. When it learned of SSN's noncompliance, Dish repeatedly looked the other way." J.A. 549.

The district court also noted the half-hearted way in which Dish responded to consumer complaints, finding that the "evidence shows that Dish cared about stopping complaints, not about achieving TCPA compliance." J.A. 573. The court then assessed Dish's arguments to the contrary, finding that its refrain that it knew nothing of SSN's widespread violations was simply not credible: "Given the tens of thousands of violative calls SSN made in a span of just over a year, even a cursory investigation or monitoring effort by Dish would have uncovered the violations. Under these circumstances, what Dish calls a mistaken belief is actually willful ignorance." J.A. 574-75.

Stripped of their labels, Dish's arguments against treble damages are simply reassertions of those that were rejected elsewhere. Dish seems to think that so long as it includes certain language in a contract or issues the occasional perfunctory warning to a retailer the court will not look past the formalities and examine the actual control exercised by Dish. Moreover, Dish fails to recognize that repeated expressions of ignorance as to a widespread problem can evince more than simply negligence; they can also be a sign that the violations are known, tolerated, and even encouraged. Trebling is never to be done lightly. Given the consequences for a company, a trebled award must rest on solid evidence. Here there was.

V.

The TCPA was enacted to solve a problem. Simply put, people felt almost helpless in the face of repeated and unwanted telemarketing calls. S. Rep. No. 102-178, at 1-2 (1991). Congress responded with an Act

that featured a combination of public and private enforcement, allowing suits both to enjoin intrusive practices and deter future violations through money damages. The features of the private right of action in § 227(c)(5), whether statutory damages or strict liability, evince an intent by Congress to allow consumers to bring their claims at modest personal expense. These same features also make TCPA claims amenable to class action resolution. Dish's arguments, if accepted, would contort a simple and administrable statute into one that is both burdensome and toothless. It would be dispiriting beyond belief if courts defeated Congress' obvious attempt to vindicate the public interest with interpretations that ignored the purpose, text, and structure of this Act at the behest of those whose abusive practices the legislative branch had meant to curb.

This will not happen. Class adjudication is complicated, and getting it right requires a careful parsing of the claims and the evidence from the start. It also requires striking a balance between efficient administration and fairness to all those affected, whether they be the class members, the defendants, or absent parties who are nonetheless bound by the judgment. The proceedings below reflected just the measured and thorough approach that we might hope for in such demanding situations. For the foregoing reasons, the judgment is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

THOMAS H. KRAKAUER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	1:14-CV-333
	)	
DISH NETWORK L.L.C.,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

This matter is before the Court on a motion for class certification filed by the plaintiff, Thomas Krakauer. (Doc. 47.) Dr. Krakauer is a member of the proposed classes and has demonstrated that the members of the proposed classes are ascertainable. Dr. Krakauer's claims are typical of class members, common questions of law and fact predominate, and the class action is the superior method of adjudication. The defendant's arguments against predominance are largely speculative and otherwise present minor potential individual issues that are manageable and that do not defeat the predominance of the common, central issues in this case. The Court will grant the motion for class certification.

BACKGROUND

The Telephone Consumer Protection Act ("TCPA") authorizes the Federal Communications Commission to regulate telemarketing activities and prohibits sellers from making phone solicitations to people who list their phone numbers on a national do-not-call registry ("NDNC list") without consent. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2); *see also Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745-46 (2012). Congress enacted the TCPA "to curb abusive telemarketing practices that threaten the privacy of consumers and businesses" by "placing restrictions on unsolicited, automated telephone calls." *Ashland Hosp. Corp. v. Serv. Emps. Int'l Union*, 708 F.3d 737, 740-41 (6th Cir. 2013); *see also Mims*, 132 S. Ct. at 745. Individuals may register land-line and wireless telephone numbers on the NDNC list. *See United States v. Dish Network, L.L.C.*, 75 F. Supp. 3d 942, 961 (C.D. Ill. 2014), *vacated in part on other grounds on reconsideration*, __ F. Supp. 3d __, 2015 WL 682875 (C.D. Ill. Feb. 17, 2015).

The TCPA also requires sellers and telemarketers to maintain an "internal" do-not-call list ("IDNC list"), that is, "a list of persons who request not to receive telemarketing calls made by or on behalf of that [seller]." 47 C.F.R. § 64.1200(d); *see also Dish Network*, 75 F. Supp. 3d at 960. The TCPA prohibits a telemarketer from calling individuals on its IDNC list or on the IDNC list of a seller on whose behalf the telemarketer calls, even if those individuals' phone numbers are not on the NDNC list. *See* 47 C.F.R. § 64.1200(d)(3), (6).

The TCPA creates a private right of action for injunctive and monetary relief for any "person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the [TCPA] regulations." 47 U.S.C. § 227(c)(5); *see also* 47 C.F.R. § 64.1200(d)(3) (liability for IDNC list violations). These rules only apply to residential telephone numbers; calls to business are not actionable. *See* 47 C.F.R. § 64.1200(c)(2), (d)(3). Calls are also not actionable if a seller has an "established business relationship" ("EBR") with a person,[1] which is created after an individual makes a purchase, inquiry, or application for products or services and lasts for a certain number of months. *See* 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(c)(2), (f)(5); *see also Snow v. Glob. Credit & Collection Corp.*, No. 5:13-CV-721-FL, 2014 WL 5781439, at *4 (E.D.N.C. Nov. 6, 2014) (collecting cases).

DR. KRAKAUER'S MOTION FOR CLASS CERTIFICATION

In 2003, Dr. Krakauer registered his residential phone number on the NDNC list. (Doc. 48-1 at 8.) Dr. Krakauer alleges that Dish Network, a seller of satellite television programming and related services, (Doc. 56-4 at ¶ 5), or its authorized dealer, Satellite Systems Network ("SSN"), called him on this number numerous times between May 2009 and September

[1] The EBR defense does not apply to an individual's internal do-not-call request. *See* 47 C.F.R. § 64.1200(f)(5)(i) ("The subscriber's seller-specific do-not-call request … terminates an [EBR] for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.").

2011, including at least two calls in a 12-month period, in violation of the TCPA. (Doc. 32 at ¶¶ 25-30, 54-59.) In these calls, SSN attempted to sell Dr. Krakauer Dish services. (Doc. 32 at ¶ 26.) The calls continued even after Dr. Krakauer called Dish to complain about SSN's sales tactics and after Dish placed Dr. Krakauer on its IDNC list and instructed SSN to do the same. (Doc. 32 at ¶¶ 27-28; *see also* Doc. 81-51 at 3-12; Doc. 81-54.) During this time, SSN was an authorized dealer for Dish and only marketed for Dish. (Doc. 32 at ¶ 28; *see also* Doc. 48-5 at 6.)

Dr. Krakauer contends that Dish is liable for these calls under agency principles of actual authority, apparent authority, and ratification. (Doc. 32 at ¶¶ 30, 54-59.) He seeks injunctive and monetary relief, (Doc. 32 at 14), and class-wide relief on behalf of two proposed classes: (1) all persons whose telephone numbers were on the NDNC list for at least 30 days, but who received telemarketing calls from SSN to promote Dish between May 1, 2010, and August 1, 2011 (the "NDNC class"); and (2) all persons whose telephone numbers were on the IDNC list of Dish or SSN, but who received telemarketing calls from SSN to promote Dish between May 1, 2010, and August 1, 2011 (the "IDNC class"). (Doc. 47.)

ANALYSIS

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1432 (2013) (internal quotation marks omitted). To show that a case falls within the exception, the plaintiff "must affirmatively

demonstrate his compliance" with Federal Rule of Civil Procedure 23. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); *see also Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 318 (4th Cir. 2006) (noting that "district courts must conduct a rigorous analysis to ensure compliance with Rule 23" (internal quotation marks omitted)).

As threshold matters, the putative class representative must show that he is a member of the proposed class, *see* Fed. R. Civ. P. 23(a) ("One or more members of a class may sue … as representative parties on behalf of all members …."), and must establish that the members of the proposed class are "readily identifiable" or "ascertainab[le]." *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014). The plaintiff must then establish that the case satisfies all four requirements of Rule 23(a) and fits into at least one of the three subsections of Rule 23(b). *Comcast*, 133 S. Ct. at 1432; *see also Bussey v. Macon Cty. Greyhound Park, Inc.*, 562 F. App'x 782, 787-88 (11th Cir. 2014) (per curiam).

It is undisputed that each of Dr. Krakauer's two proposed classes is so numerous that joinder of all members is impracticable. *See* Fed. R. Civ. P. 23(a)(1). The NDNC class as proposed includes 20,450 members and the IDNC class includes 7,831 members. (*See* Doc. 48 at 10-12; Doc. 48-2 at 10-15.) Dish has not challenged that there are common questions of law and fact as to either class, *see* Fed. R. Civ. P. 23(a)(2); discussion infra, nor has Dish challenged Dr. Krakauer's ability to fairly and adequately protect the interests of the classes. *See* Fed. R. Civ. P. 23(a)(4); (*see generally* Doc. 56.) Thus

it is undisputed that Dr. Krakauer has met the requirements of Rule 23(a)(1), (2), and (4), and the Court so finds. As to the NDNC class, Dish also does not dispute that Dr. Krakauer is a member of the putative class. (*See* Doc. 56 at 33-34.)

As to the IDNC class, Dish challenges whether Dr. Krakauer has met the threshold requirement of membership in the class and therefore contends that his claims are not typical. (*See* Doc. 56 at 33-34); Fed. R. Civ. P. 23(a)(3). As to both proposed classes, Dish challenges whether the class members are ascertainable, (*see* Doc. 56 at 14-19), and whether common questions predominate over questions affecting only individual members as required by Rule 23(b)(3). (*See* Doc. 56 at 19-33); Fed. R. Civ. P. 23(b)(3).

I. Threshold Issues: Membership in the IDNC Class and Ascertainability

A. Membership in the IDNC Class

In 2009, Dr. Krakauer had an account with another satellite television provider, DirecTV. (Doc. 102 at 3.) In May 2009, he received a call from a man named "Ken" who led him to believe that he could save money on DirecTV. (*See* Doc. 102 at 14-15.) Dr. Krakauer gave Ken his credit card information and, later in the call, believed Ken had used this information to pose as him and get his account information from DirecTV. (*See* Doc. 102 at 15; Doc. 56-1 at 3.) At some point, Ken said if Dr. Krakauer switched to Dish he could save money. (*See* Doc. 102 at 15.) Dr. Krakauer became "annoyed" that Ken

posed as him to get details of his DirecTV account and ended the call. (Doc. 102 at 15.) When asked if he "told Ken not to call [him] back again," Dr. Krakauer testified that he did not. (Doc. 102 at 17.)

Days later, Dr. Krakauer called Dish and DirecTV to complain. (*See* Doc. 102 at 15-16.) Dr. Krakauer spoke to "Rebecca" with Dish who discovered that Ken worked for SSN. (*See* Doc. 102 at 15; Doc. 56-1.) Dr. Krakauer told Rebecca that he "was annoyed" and thought it "was completely inappropriate … what [Dish was] doing." (Doc. 102 at 15.) In explaining why he called Dish, Dr. Krakauer testified that he "was trying to find out what had happened, why [he] had received this call and why somebody affiliated with Dish Network would [call to get him] to change … to Dish" and that he called "to see if Dish Network could stop it." (Doc. 102 at 16.) Dr. Krakauer testified that someone with Dish told him that Ken was not a Dish employee, but a contractor, so Dish was "not able to do anything." (Doc. 102 at 16.)

In internal emails, Dish and SSN employees characterize Dr. Krakauer's complaint as a "DNC issue" or a "'Do Not Call' violation." (*See* Doc. 56-1; Doc. 74-7 at 2-3; Doc. 74-1 at ¶ 21.) In one email, a Dish employee states that she "received the DNC" and characterizes Dr. Krakauer's complaint as "his DNC issue." In SSN emails, an SSN employee states that, before Dr. Krakauer's complaint, SSN "did not know that [he] wanted off [SSN's] calling list" and characterizes the complaint as the type where a customer asks not to be contacted again. (*See* Doc. 74-7 at 2.) Dish also directed SSN to add Dr. Krakauer to

SSN's IDNC list. (*See* Doc. 81-54; *see also* Doc. 87 at 7 n.1.)

Dish does not dispute that Dr. Krakauer continued to receive calls from SSN promoting Dish. (*See generally* Doc. 56.) Dr. Krakauer testified that all calls after May 2009 were "virtually identical[]" on the caller's end and that, each time, he either "was pleasant and said [he was] not interested … or [he] just hung up." (Doc. 102 at 17.)

The TCPA regulations state that if a person makes "a request … not to receive calls" from a telemarketer, the telemarketer must place that person on its IDNC list and not call that person without consent. 47 C.F.R. § 64.1200(d)(3). Neither the TCPA nor its regulations define what constitutes "a request." Dish contends that Dr. Krakauer has not provided sufficient evidence "that he made an affirmative request not to receive future calls." (*See* Doc. 56 at 33-34.) Dr. Krakauer contends that no "magic words" are required and that he made a request. (*See* Doc. 81 at 18-20.)

Dish relies primarily on *Bailey v. Domino's Pizza, LLC*, 867 F. Supp. 2d 835 (E.D. La. 2012). (*See* Doc. 56 at 33-34; Doc. 74 at 12.) In *Bailey*, the court granted the defendant's motion to dismiss the plaintiff's IDNC claims because he did not allege that he made an "affirmative request" to not receive calls. *See Bailey*, 867 F. Supp. 2d at 842. Given the procedural posture and short discussion of the relevant regulations, that case is not particularly helpful in determining what language or evidence

would or would not would constitute "a request" not to receive calls. *See id.*

Dr. Krakauer's testimony as to what he told a Dish employee and the purpose of his calls to Dish along with Dish's and SSN's internal documents concerning his complaints support the determination that Dr. Krakauer made "a request" not to be called. Dr. Krakauer testified that he called Dish to find out why someone affiliated with Dish would call "to get [him] to change from DirecTV to Dish" and "to see if Dish … could stop it." (Doc. 102 at 16.) Dish contends that Dr. Krakauer was only trying to get Dish to "stop" having its retailers impersonate him to get account information. (*See* Doc. 87 at 5-7.) Dr. Krakauer's testimony is equally consistent with Dr. Krakauer asking Dish to "stop" having its retailers call him to get him to switch to Dish. That is in fact how Dish and SSN interpreted his calls, as their own internal documents show. (*See* Docs. 56-1, 74-7.)

Dish's argument to the contrary depends on a strained interpretation of its own internal documents and the internal documents of its authorized dealer and ignores their common sense meaning. In internal emails, Dish and SSN employees generally characterized Dr. Krakauer's complaint as a "DNC issue" or "'Do Not Call' violation," (*see* Docs. 56-1, 74-7), and discussed practices to remove such individuals who do not want to be called. (*See* Doc. 74-7 at 2.) While there was one email which characterized Dr. Krakauer's complaint as one based on harassment,

that email is ambiguous as to the DNC request.[2] The *post hoc* testimony from a Dish manager that Dish added Dr. Krakauer to its IDNC list "even though the … [c]omplaint d[id] not reflect that [Dr.] Krakauer requested to be added to DISH's IDNC list," (Doc. 56-4 at ¶ 14), is not persuasive in the face of the emails written at the time.

On the whole, Dr. Krakauer has established by a preponderance of the evidence that he is a member of the proposed IDNC class. *See Brown v. Nucor Corp.*, 785 F.3d 895, 931-32 (4th Cir. 2015) (collecting cases). For purposes of this motion, the Court so finds.

B. Ascertainability

As a threshold matter, Rule 23 requires "that the members of a proposed class be readily identifiable" or "ascertainab[le]." *EQT*, 764 F.3d at 358 (internal quotation marks omitted). "A class cannot be certified unless a court can readily identify the class members in reference to objective criteria." *Id.* The plaintiff bears the burden of offering "a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition." *Hayes v. Wal-Mart Stores, Inc.*, 725 F.3d 349, 355 (3d Cir. 2013). If a court cannot identify class members "without extensive and individualized fact-

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[2] In one Dish email, Dr. Krakauer's complaint is characterized as one for "harassment." Under "Nature of the complaint," Dish marked "Yes" beside "Harassment, a malicious call pattern"" and "No" beside "Caller hung up when asked for identity or to be added to DNC." (Doc. 56-1 at 3; *see also* Doc. 56-4 at ¶ 12.)

finding or 'mini-trials,' then a class action is inappropriate." *EQT*, 764 F.3d at 358; *see also* 7A Charles Alan Wright et al., *Federal Practice and Procedure* § 1760 (3d ed. 2005) ("[T]he requirement that there be a class will not be deemed satisfied unless … it is administratively feasible for the court to determine whether a particular individual is a member."). The Court concludes that the class members are ascertainable.

1. The putative class lists

Dr. Krakauer has offered evidence from Anya Verkhovskaya who, with her company A.B. Data, analyzed SSN's call records and other data to identify putative class members for both classes. (*See* Doc. 48 at 9-12; Docs. 48-2 to 48-4.) Dr. Krakauer received records for calls placed by SSN from Five9, Inc., a company that provided SSN with software to assist in making telemarketing calls. (*See* Doc. 48 at 10-11; Doc. 48-2 at 8-9; Doc. 56-8 at 4-5.) Ms. Verkhovskaya used a five-step process and other information from various data vendors to remove calls that could not possibly result in TCPA liability,[3] (*e.g.*, Doc. 103 at 11), and, as a result, identified 20,450 members in the NDNC class and 7,831 members in the IDNC class. (*See* Doc. 48 at 11-12; Doc. 48-2 at 10-16.)

[3] Dish separately challenged Ms. Verkhovskaya's report and analysis. (Doc. 57.) The Court denied Dish's motion to strike and found her expert report and testimony admissible. (Doc. 110.) That Order discusses Ms. Verkhovskaya's methodology in additional detail. (*See* Doc. 110 at 4-8.)

As to the NDNC class, Ms. Verkhovskaya determined which of the more than 1.6 million calls in the SSN records were "connected." (Doc. 48 at 11; Doc. 48-2 at 8-10; Doc. 103 at 21.) Second, she identified numbers that received more than one connected call in any 12-month period during the class period. (Doc. 48-2 at 10; Doc. 103 at 14-15); *see also* 47 U.S.C. § 227(c)(5). Third, she used data from Nexxa, Inc., a vendor that collects data on when individuals registered on the NDNC list, to determine which of these numbers were registered on the NDNC list as of April 1, 2010. (Doc. 48 at 11; Doc. 48-2 at 4, 10; *see also* Doc. 103 at 24-25.) Fourth, she removed non-actionable calls to businesses by (1) removing calls "assigned the disposition 'Business'" in the SSN call logs and then (2) coordinating with LexisNexis, a vendor that provides information on whether a number is associated with a business or residence during a specific time period, to remove additional business numbers. (Doc. 48 at 11; Doc. 48-2 at 5, 10-11; Doc. 103 at 26-28.) Last, she removed non-actionable calls to Dish customers by removing calls "assigned the disposition of 'Dish Customer'" in the SSN call logs. (Doc. 48-2 at 11; Doc. 48 at 11; Doc. 103 at 15.) This resulted in a list of 20,450 unique numbers that received 57,900 calls. (Doc. 48 at 11-12; Doc. 48-2 at 11-12.) Using information already in the SSN call logs and supplemented by Lexis data, she obtained the names and addresses of most persons associated with these numbers during the class period. (Doc. 48 at 12; Doc. 48-2 at 8-9, 12, 15-16; Doc. 103 at 34, 37; *see also* Docs. 48-2 to 48-4.) These persons make up the NDNC class. (*See* Doc. 47.)

For the IDNC class, she performed a similar analysis. (*See* Doc. 48-2 at 12-15.) As to Dish's IDNC list, Dr. Krakauer provided Ms. Verkhovskaya with files containing Dish's IDNC list, and she followed the same methodology as with the NDNC list and identified 7,117 unique numbers. (Doc. 48-2 at 12-14.) As to SSN's IDNC list, she used the SSN call logs to identify connected calls with "DNC" or "Do Not Call" in the disposition field, (Doc. 48-2 at 14); she took this to mean that these numbers were on SSN's IDNC list. (Doc. 103 at 15-17, 21-22.) She then performed steps two through five above and identified 714 unique numbers. (Doc. 48-2 at 14-15.) Adding the numbers from SSN's and Dish's IDNC lists, she identified 7,831 numbers that received 22,607 calls in the IDNC class. (*See* Doc. 48-2 at 13-15.) As with the NDNC class, Ms. Verkhovskaya used the SSN call logs supplemented by Lexis data to obtain the names and addresses of most persons associated with these numbers during the class period. (Doc. 48-2 at 13-16; *see also* Doc. 48-4 at 36-175.)

2. Standing to sue under Section 227(c)

First, Dish contends that only the telephone number subscriber has standing to sue under the TCPA for receiving a telemarketing call on a number on the NDNC list. (Doc. 56 at 15.) Dish contends that the data Ms. Verkhovskaya used does not identify the subscriber and therefore the class members for both proposed classes are not ascertainable. (Doc. 56 at 15-17; *see also* Doc. 103 at 37-38; Doc. 56-13 at ¶ 7.)

Section 227(c) of the TCPA and the related regulations protect the privacy of residential

telephone subscribers and allow them to register their numbers on the NDNC list. *See* 47 U.S.C. § 227(c); 47 C.F.R. § 64.1200(c)(2) ("No person or entity shall initiate any telephone solicitation to … [a] residential telephone subscriber who has registered his or her telephone number on the [NDNC list] …."); *see also Mims*, 132 S. Ct. at 746. The standing provision, Section 227(c)(5), states that "[a] person who has received" a call in violation of the Section 227(c) regulations may sue. 47 U.S.C. § 227(c)(5). Dish's argument that only the subscriber has standing to sue under Section 227(c) appears to focus on the provisions allowing subscribers to register their numbers on the NDNC list, *see id*. § 227(c)(1)-(3), and ignores the broader standing provision of Section 227(c)(5).

In *Moore v. Dish Network L.L.C.*, 57 F. Supp. 3d 639 (N.D.W. Va. 2014), the district court considered the standing provision under Section 227(b). *See Moore*, 57 F. Supp. 3d at 648-50. Section 227(b) prohibits the use of autodialers and prerecorded messages without the consent of the "called party" and allows "[a] person or entity" to sue for a violation. *See* 47 U.S.C. § 227(b)(1), (3). In *Moore*, the defendant contended that only the "called party" had standing to sue for a Section 227(b) violation. *Moore*, 57 F. Supp. 3d at 648. The court disagreed and sided with numerous other courts in concluding that the "plain language" of Section 227(b)'s standing provision does not limit standing to the called party and "simply states that 'a person or entity'" can sue. *See id*. at 648-50 (collecting cases); *see also* 47 U.S.C. § 227(b)(3).

In considering whether an individual has statutory standing, courts consider whether the individual "is a member of the class given authority by a statute to bring suit." *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011). "Normally, where the statutory language provides a clear answer, [the] analysis begins and ends with that language." *Id.* at 53 (internal quotation marks omitted). The *Moore* defendant presented a similar argument as Dish has here, and the standing provision under the TCPA section at issue in *Moore* and the one here are similarly broader than the *Moore* defendant and Dish contend. *Compare* 47 U.S.C. § 227(b)(3), *with* 47 U.S.C. § 227(c)(5); *see also Moore*, 57 F. Supp. 3d at 648-50; (Doc. 56 at 15.)

The TCPA simply states that "[a] person who has received" a call in violation of the Section 227(c) regulations may sue and, by its plain language, does not limit standing to only subscribers. *See* 47 U.S.C. § 227(c)(5); *see also Charvat v. EchoStar Satellite, LLC*, 630 F.3d 459, 465 (6th Cir. 2010); *Roylance v. ALG Real Estate Servs., Inc.*, No. 5:14-cv-02445-PSG, 2015 WL 1522244, at *3 (N.D. Cal. Mar. 16, 2015) (Grewal, M.J., report and recommendation, adopted by Freeman, J.) (stating that the plaintiff "has standing to pursue a claim under Section 227(c) because he alleges that he had received eight calls in violation of Section 227(c)"). As did the court in *Moore*, the Court rejects Dish's argument to the contrary.

3. Date of NDNC list registration

Dish contends that the data Ms. Verkhovskaya used to determine when individuals registered on the

NDNC list is inaccurate and therefore the members of the NDNC class are not ascertainable. (*See* Doc. 56 at 17-18.) The only example Dish provides concerns Dr. Krakauer's registration date. (*See* Doc. 56 at 17-18.) That example is a red herring.

The data from Nexxa that Ms. Verkhovskaya used indicates that he registered on June 1, 2003, but the NDNC list website shows that he registered on July 3, 2003. (*See* Doc. 56 at 17-18; Docs. 56-14, 56-15.) The discrepancy occurred because Dr. Krakauer registered his number twice; a Nexxa employee testified that Nexxa maintains the initial date of registration while the date on the NDNC website can be "overwritten" by a later registration. (*See* Doc. 76 at 14; Doc. 76-4 at ¶¶ 2-5.) This quirk seems unlikely to occur often, and it is unlikely to be material. As to Dr. Krakauer, under either date his number was on the NDNC list for at least 30 days before he received calls from SSN.

4. <u>Individuals on the IDNC lists of Dish or SSN</u>

Finally, Dish contends that the data Ms. Verkhovskaya used to identify individuals on the IDNC lists is inaccurate and unreliable and therefore the members of the IDNC class are not ascertainable. (*See* Doc. 56 at 18-19.) The TCPA regulations require telemarketers to maintain IDNC lists, that is, "a list of persons who request not to receive telemarketing calls made by or on behalf of [a] person or entity." 47 C.F.R. § 64.1200(d). A telemarketer must record on its IDNC list the name and number of a subscriber who

makes "a request" not to receive calls and honor that request. *Id.* § 64.1200(d)(3), (6).

Dish has offered evidence that its IDNC list is not limited to individuals who ask not to be called, but also includes other individuals Dish has decided not to call for other reasons, such as allegations of rude behavior. (*See* Doc. 56 at 19; Doc. 56-4 at ¶¶ 9-10.) Dish contends that because its IDNC list includes more than just individuals who request not to be called and because neither Dr. Krakauer nor Dish can tell who on the list made such a request, the members of the IDNC class are not ascertainable without "individual fact-finding" as to each putative class member. (*See* Doc. 56 at 19.)

Dish's argument that its IDNC list is overinclusive and therefore the IDNC class members are not ascertainable is not persuasive. Dish made this same argument in an earlier case, and the Court agrees with that court's reasoning. *See Dish Network*, 75 F. Supp. 3d at 1014. If the Court were to deny certification because Dish does not keep an accurate list as the regulations require and Dish itself cannot identify which individuals on the list actually requested not to be called, it would create the perverse incentive for entities to keep poor records and to violate the TCPA's clear requirement that such a list be kept. *See id.* at 1014 n.21; *see also Carrera v. Bayer Corp.*, No. 12-2621, 2014 WL 3887938, at *3 (3d Cir. May 2, 2014) (Ambro, J., dissenting) ("Where … a defendant's lack of records and business practices make it more difficult to ascertain the members of an otherwise objectively verifiable low-value class, the

consumers who make up that class should not be made to suffer.").

The fact that Dish has listed a person on its IDNC list is persuasive circumstantial evidence that a person associated with that number asked Dish not to make telemarketing calls. *See Dish Network*, 75 F. Supp. 3d at 1014. Dish's claim that it failed to distinguish persons who made an internal do-not-call request from other persons Dish says it decided not to call for different reasons does not make the list unreliable or the class members not ascertainable.

As to SSN, Dr. Krakauer did not receive files containing SSN's IDNC list as he did with Dish; rather, he took the disposition codes "DNC" and "Do Not Call" in SSN's call records to mean that the called individual was on SSN's IDNC list. (*See* Doc. 48-2 at 14-15; Doc. 103 at 33.) Dish has provided evidence that these codes mean something completely different: SSN's general manager testified that these codes "do not indicate a 'do not call' request," but rather signal other SSN agents to not call the individual because a "particular SSN agent would personally call back that individual (*i.e.*, it was 'their lead')." (Doc. 56-10 at ¶ 4; *see also* Doc. 56 at 18.) Dish contends that the IDNC class members Dr. Krakauer identified as coming from SSN's IDNC list are therefore not ascertainable. (Doc. 56 at 18-19.)

At the Court's June 30 hearing on the pending motions, Dish's counsel stated without dispute that "SSN is no longer in business, so there is no subpoena to SSN" for its IDNC list. (*See* Minute Entry June 30, 2015.) The list derived from SSN's call logs appears to

be the best record there is of the numbers on SSN's IDNC list.

This dispute does not make the SSN IDNC class members not ascertainable. Ascertainability only requires that a court be able to "identify the class members in reference to objective criteria," *EQT*, 764 F.3d at 358, which means "that identifying class members is a manageable process that does not require much, if any, individual inquiry." *Bussey*, 562 F. App'x at 787. Here, Dr. Krakauer's IDNC class definition is, *inter alia*, numbers on SSN's IDNC list during the class period. As discussed *supra*, every telemarketer is required to maintain an IDNC list and should have a system in place to notify its employees of who is on that list. The phrases "DNC" and "Do Not Call" in SSN's call records are, in context, persuasive circumstantial evidence that persons associated with those numbers had asked to not be called and, for purposes of this motion, suffice to provide the IDNC list required by the class definition. Thus, those class members are ascertainable. Dr. Krakauer is not required to prove that, without a doubt, every single person on the class list would be able to recover to satisfy the ascertainability requirement.[4] *See, e.g., In re Nexium Antitrust Litig.*, 777 F.3d 9, 22-23 (1st Cir. 2015); *see also* discussion *infra*.

[4] Whether Dr. Krakauer's list of persons on SSN's IDNC list will persuade a factfinder on the merits is simply a common question of fact. *See* discussion *supra*.

II. Rule 23(b)(3)

Dr. Krakauer asserts that this action falls under Rule 23(b)(3). (*See* Doc. 47; Doc. 48 at 13.) "Rule 23(b)(3) has two components: predominance and superiority." *Thorn*, 445 F.3d at 319. First, the predominance requirement tests whether the proposed class is "sufficiently cohesive to warrant adjudication by representation" and is satisfied when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 362 (4th Cir. 2004); *see also* Fed. R. Civ. P. 23(b)(3). "A common question is one that can be resolved for each class member in a single hearing" rather than one that "turns on a consideration of the individual circumstances of each class member." *Thorn*, 445 F.3d at 319. The predominance requirement focuses on the quality of common issues rather than just the quantity. *See Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 429 (4th Cir. 2003); *see also EQT*, 764 F.3d at 366 (noting that, to satisfy predominance, the plaintiff must show that the defendant's common conduct has sufficient bearing on the central issue in the litigation). Second, "[t]he superiority requirement ensures that 'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" *Thorn*, 445 F.3d at 319 (quoting Fed. R. Civ. P. 23(b)(3)).

Rule 23(b)(3) provides a non-exclusive list of factors for courts to consider in deciding whether a class action meets these two requirements:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3); *see also Thorn*, 445 F.3d at 319; *Stillmock v. Weis Mkts., Inc.*, 385 F. App'x 267, 278 (4th Cir. 2010).

Dr. Krakauer identifies a number of common questions of law and fact, (*see* Doc. 48 at 17-18), and specifically urges that two common issues appropriate for class resolution predominate over individual issues such that a class action is superior to other methods for resolving the case. (*See* Doc. 48 at 21-22); *see also* Fed. R. Civ. P. 23(b)(3). These issues are: (1) whether SSN called a number on the NDNC or IDNC lists; and (2) whether Dish is liable for SSN's actions. (Doc. 48 at 21-22.)

A. Predominance

1. Common Questions

a. Whether SSN called a putative class member

Dr. Krakauer proposes to prove that SSN called the numbers in both classes during the class period

through testimony from one expert witness and using the SSN call logs. (*See* Doc. 48 at 23.) Dish has not disputed that the SSN logs this expert used represent calls SSN made to promote and sell Dish products and services during the relevant period. (*See* Doc. 56 at 8, 11-13.) Nor has Dish disputed that the question of whether SSN called a number on the NDNC list, Dish's IDNC list, or SSN's purported IDNC list is a common question that can be decided in one hearing. (*See* Doc. 56 at 19-30.) This is the first key question for determining liability, and it is a common question of fact.

b. Vicarious liability of Dish for SSN's calls

The question of whether SSN made these calls on Dish's behalf is the second key question for determining liability, and its importance cannot be minimized. Indeed, it is the central issue on which liability depends. *See* 47 U.S.C. § 227(c)(5); 47 C.F.R. § 64.1200(d)(3). Dish concedes that the question of whether Dish may be held liable for SSN's calls under a theory of actual authority is a common question, but contends that questions as to liability based on apparent authority and ratification are not common questions. (*See* Doc. 56 at 30-33.)

Under the TCPA, a seller like Dish may be held vicariously liable for violations committed by a third-party telemarketer like SSN if the telemarketer is acting "on behalf of" the seller. *See* 47 U.S.C. § 227(c)(5*); see also Smith v. State Farm Mut. Auto. Ins. Co.*, 30 F. Supp. 3d 765, 773 (N.D. Ill. 2014) (noting that vicarious liability attaches to violations

of Section 227(c)(5)). While neither the TCPA nor its regulations define "on behalf of," courts have applied ordinary principles of agency law to make this determination. *See, e.g., Jackson v. Caribbean Cruise Line, Inc.*, __ F. Supp. 3d __, __, 2015 WL 667862, at *5-6 (E.D.N.Y. Feb. 17, 2015); *Smith*, 30 F. Supp. 3d at 777; *Donaca v. Dish Network, LLC.*, 303 F.R.D. 390, 394 (D. Colo. 2014); *Mey v. Monitronics Int'l, Inc.*, 959 F. Supp. 2d 927, 932 (N.D.W. Va. 2013). A seller can be held vicariously liable if there is actual authority, apparent authority, or ratification. *See Smith*, 30 F. Supp. 3d at 772-73; *Donaca*, 303 F.R.D. at 394; *Mey*, 959 F. Supp. 2d at 932. Dr. Krakauer relies on all three theories. (*See* Doc. 48 at 17-18; Doc. 75 at 19-23.)

It is well-established that whether an agency relationship exists is a factual determination. *See Ashland Facility Operations, LLC v. N.L.R.B.*, 701 F.3d 983, 990 (4th Cir. 2012). As noted *supra*, Dish does not dispute that the question of actual authority is a question common to all class members, (*see* Doc. 56 at 30-33), as actual authority depends only on the relationship and conduct between Dish and SSN. *See Ashland Facility*, 701 F.3d at 990. If Dr. Krakauer can prove to a jury's satisfaction that SSN had actual authority to make the calls at issue on Dish's behalf, the class may recover from Dish for any violations by SSN. Thus, the issue of actual authority is a common question of fact that is central to this case.

The issues of apparent authority and ratification are less clear. There is a significant dispute between the parties as to the appropriate legal tests to be

applied to determine liability under apparent authority and ratification.

For both theories, Dr. Krakauer relies on the FCC's interpretation embodied in a 2013 declaratory ruling. (*See* Doc. 75 at 19-23); *see also In re Dish Network, LLC*, 28 FCC Rcd. 6574, 2013 WL 1934349 (May 9, 2013); *Mey*, 959 F. Supp. 2d at 932. As to apparent authority, Dr. Krakauer contends that it is sufficient to show that Dish allowed SSN to hold itself out as an authorized Dish dealer or that Dish allowed SSN to use certain information and systems in Dish's control. (*See* Doc. 75 at 20-22); *see also In re Dish Network*, 2013 WL 1934349, at *15; *Mey*, 959 F. Supp. 2d at 932. As to ratification, he contends that it is sufficient to show that Dish was aware that SSN routinely violated the TCPA and did not terminate SSN as an authorized dealer. (*See* Doc. 75 at 22-23); *see also In re Dish Network*, 2013 WL 1934349, at *15. If Dr. Krakauer is correct, both theories would present common questions of fact as they, too, concern only the relationship between Dish and SSN.

Dish contends that apparent authority requires proof that: (1) the called individual reasonably believed that Dish consented to have SSN act for Dish; and (2) the individual's belief is based on some conduct traceable to Dish. (*See* Doc. 56 at 30-31.) Dish contends that ratification requires proof that: (1) SSN represent to each caller that it is calling on Dish's behalf; (2) Dish have knowledge of and assent to each call; and (3) knowingly accept some benefit from each call. (*See* Doc. 56 at 32; *see also* Doc. 74 at 22-25.) If Dish's view is correct, both theories would present individual questions of fact as to every class member.

Numerous courts have concluded that the FCC's guidance on apparent authority and ratification is not binding nor entitled to deference and have rejected this guidance as inconsistent with common law agency principles. *See, e.g., Dish Network, L.L.C. v. F.C.C.*, 552 F. App'x 1, 2 (D.C. Cir. 2014) (per curiam) ("The FCC agrees that the 'guidance' in question has no binding effect on courts [and] is not entitled to deference …."); *Toney v. Quality Res., Inc.*, 75 F. Supp. 3d 727, 744-45 (N.D. Ill. 2014); *Smith*, 30 F. Supp. 3d at 778-79; *Dish Network*, 75 F. Supp. 3d at 1018.

The question of what legal standard applies to the determination of apparent authority and ratification is a common question of law. Dish is highly likely to win on this question, however, as the reasoning in the cases it cited is quite persuasive. (*E.g.*, Doc. 56 at 30-32.) This would mean that apparent authority and ratification would involve many individual questions. On the other hand, it will not be necessary to reach apparent authority or ratification if Dr. Krakauer and the class prevail on an actual authority theory. It is also likely that Dr. Krakauer will be unable to muster sufficient evidence of apparent authority or ratification, *see Dish Network*, 75 F. Supp. 3d at 1016-18 (discussing the plaintiff's lack of class-wide evidence on these theories), such that these two issues will likely disappear from the case.

2. <u>Individual questions</u>

Dish identifies several issues concerning both classes that it says will have to be determined on an individual basis and contends that these individual issues predominate and preclude certification under

Rule 23(b)(3). (*See* Doc. 56 at 20.) Dish contends that an individual determination will have to be made as to whether: (1) a phone number, including a wireless number, is associated with a business; (2) Dish had an established business relationship with a class member at the time of a call; (3) an individual first called SSN; and (4) an individual consented to be called. (*See* Doc. 56 at 20-30.)

a. Is the number called a business number?

The TCPA section at issue only prohibits calls to residential numbers. *See* 47 C.F.R. § 64.1200(c)(2), (d)(3); *see also* 47 U.S.C. § 227(c)(5). Dr. Krakauer, as the plaintiff, bears the burden to prove that a number called was residential. *See Dish Network*, 75 F. Supp. 3d at 1024. Dish contends that Dr. Krakauer's expert did a poor job of removing business numbers from the putative class list and made no effort to remove wireless numbers associated with businesses. (*See* Doc. 56 at 23-26; *see also* Docs. 56-18 to 56-21.) As a result, Dish says that "hundreds" of individual inquiries will be needed. (*See* Doc. 56 at 23-26.)

Dish has not presented evidence to support these contentions. Dish has only presented evidence of a few dozen numbers that appear to be business or mixed use, (*see* Docs. 56-18 to 56-21), and has submitted no evidence, and indeed only counsel's assertions in a brief, that there are "hundreds" or "many" others. (*See* Doc. 56 at 23-26); *see also Adjabeng v. GlaxoSmithKline, LLC*, No. 1:12-CV-568, 2014 WL 459851, at *3 (M.D.N.C. Feb. 5, 2014) (collecting cases

holding that counsel's unsworn statements in briefs are not evidence).

The fact that a class list contains members whose claims may fail on the merits does not mean that the class cannot be certified. "[E]xcluding all uninjured class members at the certification stage is almost impossible in many cases, given the inappropriateness of certifying what is known as a 'fail-safe class'—a class defined in terms of the legal injury." *Nexium*, 777 F.3d at 22; *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (noting that a fail-safe class "is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment"). But, "a class should not be certified if it is apparent that it contains a great many persons who have suffered no injury at the hands of the defendant." *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 677 (7th Cir. 2009). "There is no precise measure for 'a great many.' Such determinations are a matter of degree, and will turn on the facts as they appear from case to case." *Messner*, 669 F.3d at 825.

Dr. Krakauer will have to prove that the class members are entitled to relief, *i.e.*, that their numbers were used for residential purposes at the time. Certifying the class with a few dozen possible business numbers included does not obviate Dr. Krakauer's ultimate burden of proof. Based on the record before the Court, it does not appear that the putative class list "contains a great many persons who have suffered no injury." *See Kohen*, 571 F.3d at 677. Even if resolution of these issues requires some

individualized inquiry, these issues are not complex and are entirely manageable. *See* Fed. R. Civ. P. 23(b)(3)(D).

As to wireless numbers, Dish additionally relies on *United States v. Dish Network* where the court noted that the FCC presumes that a wireless number on the NDNC list is residential but "may require a complaining wireless subscriber to provide further proof of the validity of that presumption." *Dish Network*, 75 F. Supp. 3d at 1024; (*see also* Doc. 56 at 26.) The wireless phone user still bears the burden of proving that the number was used for residential purposes; the "administrative presumption" only allows wireless users to register on the NDNC list. *See Dish Network*, 75 F. Supp. 3d at 1024; (*see also* Doc. 56 at 26.) Dish contends that this means that, at the certification stage, Dr. Krakauer must show that any wireless number is a residential number. (*See* Doc. 56 at 26.) However, the district court discussed the presumption in the context of summary judgment and noted that it was an issue of fact for trial as to whether the wireless calls were to residences. *See Dish Network*, 75 F. Supp. 3d at 1024. This case says nothing about the wireless residential/business issue at the certification stage.

To the extent Dish has evidence that some numbers on Dr. Krakauer's putative class list were associated with businesses during the class period, Dish can present that evidence through an expert witness using data from Lexis or another vendor. On the record before the Court, to the extent resolution of these issues presents individual questions, these questions appear few in number, straightforward,

and peripheral to the central issues in this litigation discussed *supra*.

b. Is there an established business relationship?

A call is exempt from TCPA section at issue if the seller has an established business relationship ("EBR") with the residential subscriber. *See* 47 U.S.C. § 227(a)(4), (c)(3)(F); 47 C.F.R. § 64.1200(c)(2), (f)(5), (f)(14)(ii); *see also Snow*, 2014 WL 5781439, at *4 (collecting cases); *Wolfkiel v. Intersections Ins. Servs. Inc.*, 303 F.R.D. 287, 291 (N.D. Ill. 2014); *but see supra* note 1. EBR is a defense for Dish to prove, and the absence of an EBR is not an element of a TCPA claim that Dr. Krakauer has to prove. *See Dish Network*, 75 F. Supp. 3d at 1008 (discussing the EBR defense and stating that "[a]n exemption from the general rule is treated as an affirmative defense for which [the defendant] bears the burden of proof"). Nonetheless, Ms. Verkhovskaya testified that she excluded from Five9 call logs phone numbers with "Dish Customer" in the disposition field. (*See* Doc. 103 at 15, 32; *see also* Doc. 48-2 at 11.)

Dish first contends that it provided a customer list to Dr. Krakauer and that he failed to remove "thousands" of customers on this list from the class. (*See* Doc. 56 at 21-22.) Dr. Krakauer contends that the list has not been prepared in a way that allowed him or his expert to exclude customers from the class list. (*See* Doc. 75 at 17.) The list itself is certainly incomprehensible, (*see* Doc. 75 at 17; *see, e.g.*, Doc. 56-16 at 2), and Dish has not provided evidence or

explained to the Court as to how it could be used to exclude such customers.

Dish next contends that Dr. Krakauer must offer a method that would allow Dish to prove this EBR defense on a class-wide basis and that he has failed to do so. (*See* Doc. 56 at 22-23.) This position is correct.

First, the presence of affirmative defenses does not "automatically" render class certification inappropriate. *See Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010). "Rather, like other considerations, affirmative defenses must be factored into the calculus of whether common issues predominate." *Gunnells*, 348 F.3d at 438. When the defendant's affirmative defenses "may depend on facts peculiar to each [class member's] case, class certification is erroneous." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (internal quotation marks omitted). In cases where the Fourth Circuit has denied certification based on issues presented by an affirmative defense, the defense at issue involved "considerable individual inquiry." *See Gunnells*, 348 F.3d at 434 (each class member's reliance); *Thorn*, 445 F.3d at 317 (each class member's knowledge); *Broussard*, 155 F.3d at 342-43 (both).

Here, Dish has again provided no evidence to support its assertion that there are "thousands" of customers on the class list as to whom it would be entitled to an EBR defense; indeed, it has identified only 16 such persons. (*See* Doc. 56 at 22; Doc. 56-17.) As noted *supra*, unsubstantiated claims in a brief do

not preclude class certification. *See Adjabeng*, 2014 WL 459851, at *3 (collecting cases).

Moreover, even if there are several times this number, it appears highly likely that this defense can in fact be resolved on a class-wide basis, at least in large part. As Dr. Krakauer has demonstrated, (*see* Doc. 48 at 21-22; Doc. 75 at 17), Dish can prove this defense by, for example, offering a comprehensible customer list along with testimony about the list and which calls were to Dish customers; the factfinder could then determine whether those individuals as a group are not entitled to recover because of an EBR. To the extent there are a few situations where individual inquiry into the dates during which Dish is entitled to the EBR defense may be needed or where the parties dispute these dates, these issues appear to be easily manageable.

Resolution of the EBR defense does not involve "considerable individual inquiry," and individual hearings will not be routinely necessary to determine if a putative class member was a Dish customer at the time of a call. *Cf. Gunnells*, 348 F.3d at 434; *Thorn*, 445 F.3d at 317. Rather, identifying a company's customers during a time period should be an "objectively verifiable" task. *See Carrera*, 2014 WL 3887938, at *3 (Ambro, J., dissenting). Dr. Krakauer has demonstrated how Dish can assert this defense on a class-wide basis. To the extent resolution of this defense involves any inquiry into individual circumstances, such an inquiry is simple and mundane. *See Gunnells*, 348 F.3d at 429.

c. <u>Did a putative class member contact SSN?</u>

If an individual first contacted SSN and made an "inquiry or application" for Dish products or services, this would establish an EBR and allow SSN to contact that individual for up to three months. *See* 47 C.F.R. § 64.1200(f)(5). Dish contends that such calls cannot be determined without individualized inquiry. (Doc. 56 at 26-28.) Just as with its arguments on business numbers and EBRs with customers, Dish has done little more than speculate about the frequency of this potential issue and the difficulties it would raise in a class setting.[5] (*See* Doc. 56 at 26-27; Doc. 56-22.)

Moreover, to the extent Dish contends that the call records on which Dr. Krakauer relies are insufficient to allow Dish to identify every possible call to which it can assert this defense, (*see* Doc. 56 at 27-28; Doc. 56-23 at 3; Doc. 56-10 at ¶¶ 9, 12), that is not Dr. Krakauer's fault. If the records that Dish and

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[5] Indeed, Dish's statement that there are "a multitude" of instances of a putative class member initiating a call to SSN, (Doc. 56 at 27), is of no moment, as unsworn statements by counsel in briefs such as these are not evidence. *See Adjabeng*, 2014 WL 459851, at *3 (collecting cases). Further, if one were to speculate, one might speculate that it is unlikely that a person who asked to be placed on a do-not-call list would actually initiate a telephone call to a telemarketer making calls on behalf of Dish. One might also speculate that a person interested in Dish products would call Dish, not a Dish telemarketer. Lastly, Dish has only presented an exhibit of 14 numbers it contends are instances of an individual first calling SSN. (*See* Doc. 56 at 27; Doc. 56-22.) For these few individuals, the Court can manage the individual EBR defense.

its affiliates keep do not allow Dish to identify every possible EBR, that should not preclude persons with valid claims from recovering, nor does it prevent class certification under Rule 23(b)(3).

d. Did a putative class member consent to be called on a NDNC number?

Dish maintains that there is no TCPA violation if an individual voluntarily gives a telemarketer a number registered on the NDNC or asks to be called back at such a number.[6] (Doc. 56 at 28-30); *see* 47 C.F.R. § 64.1200(c)(2), (f)(14)(i); *see also Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1118 (11th Cir. 2014). Ms. Verkhovskaya testified that her analysis did not identify calls where SSN first called an individual on a non-NDNC number and the individual asked to be called back on a different number on the NDNC list. (*See* Doc. 103 at 25, 37; Doc. 56 at 28.)

Dish contends that this gives rise to individual issues, but it again provides only a handful of examples supported by unsworn statements in a brief.[7] (*See* Doc. 56 at 29-30; Docs. 56-24, 56-25.)

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[6] Dish contends that these calls would be exempt from the TCPA either because of the called individual's consent, *see* 47 C.F.R. § 64.1200(c)(2), (f)(14)(i); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1118 (11th Cir. 2014), or by establishing an EBR based on an inquiry. *See* 47 C.F.R. § 64.1200(f)(5); *Hamilton v. Spurling*, No. 3:11cv00102, 2013 WL 1164336, at *10-11 (S.D. Ohio Mar. 20, 2013) (opinion of Ovington, M.J.); (Doc. 56 at 28-30.)

[7] As to the calls where Dish contends SSN first called an individual on a NDNC number and the individual asked to be

Second, as discussed *supra*, the fact that it is impossible to exclude all uninjured class members at this stage does not prevent certification. *See Nexium*, 777 F.3d at 22; *Kohen*, 571 F.3d at 677.

3. Evaluation of predominance

"[P]redominance under Rule 23(b)(3) requires that common issues predominate, but does not require all issues to be common." *In re Polyester Staple Antitrust Litig.*, No. 3:03CV1516, 2007 WL 2111380, at *27 (W.D.N.C. July 19, 2007) (collecting cases). There are two central factual issues that loom over this entire case: (1) whether SSN made the calls at issue; and (2) whether Dish is liable for SSN's calls under agency principles. To recover from Dish, Dr. Krakauer would have to prove that SSN called a

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called back, Dish cites an affidavit from an SSN general manager who testified that the call logs had a "Comments" field where SSN agents could enter notes or additional information about the calls. (*See* Doc. 56 at 30; Doc. 56-10 at ¶ 6.) This testimony says nothing about how frequently putative class members requested to be called back. Dish filed an exhibit including 10 numbers it contends are calls where an individual asked to be called back, but this conclusion appears to be based solely on Dish's counsel's interpretation of the comments. (*See* Doc. 56 at 30; Doc. 56-25.) Dish's assertion that this happened to any calls in the putative class list is largely speculative and unsupported by evidence. *See Adjabeng*, 2014 WL 459851, at *3 (collecting cases).

Moreover, to the extent that Dish has admissible evidence that these 10 calls were made in response to an individual's request to be called back, it can present such evidence, and the Court can easily manage any individual issues as to these few numbers and calls.

number on the NDNC list or the IDNC list of Dish or SSN at least twice during any 12-month period, that SSN made these calls on behalf of Dish, and that Dish is liable for SSN's actions under agency principles. (*See* Doc. 48 at 17, 21-22.)

These questions "can be resolved for each class member in a single hearing" and do not "turn[] on a consideration of the individual circumstances of each class member." *Thorn*, 445 F.3d at 319. Indeed, these are the central issues to this litigation and predominate in quality and complexity over any potential individual issues. *See EQT*, 764 F.3d at 366; *Gunnells*, 348 F.3d at 429 (noting that a greater quantity of individual issues as compared to common issues does not necessarily mean common issues do not predominate where the common issues "far exceed in complexity [as compared to] the more mundane individual … issues").

As discussed *supra*, the question of whether a putative class member was a Dish customer at the time of a call should be a simple and objectively verifiable task, requiring little more than reference to Dish's own records. Dish's claim that the putative class list contains "hundreds" or "a multitude" of non-actionable calls, (Doc. 56 at 23, 27), is not supported by evidence. While there are potentially a number of individual issues, these issues appear to apply to only a small number of class members and are straightforward. These minor, peripheral issues do not defeat the predominance of the central issue: whether the calls were made by Dish's agent. The essential elements of the class members' claims can

be proven at trial with common, as opposed to individualized, evidence. *See Hayes*, 725 F.3d at 359.

The Court finds that common questions of fact and law predominate.

B. Superiority

A class action is the superior method of litigation in this case. Given the relatively small statutory damages, *see* 47 U.S.C. § 227(c)(5), the class members likely have little interest in controlling the litigation in this case. *See* Fed. R. Civ. P. 23(b)(3)(A); *Gunnells*, 348 F.3d at 425; *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616-17 (1997); *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 533-34 (3d Cir. 2004). Further, the type of injury allegedly suffered by the class members is not, for example, a personal injury or death where a plaintiff would ordinarily have "a substantial stake in making individual decisions on whether and when to settle." *Amchem*, 521 U.S. at 616.

There is no evidence of any litigation begun by or against any class members, *see* Fed. R. Civ. P. 23(b)(3)(B); *Gregory v. Finova Capital Corp.*, 442 F.3d 188, 191-92 (4th Cir. 2006), and given the large number of class members and claims, class-wide adjudication of the claims would be more efficient. *See Gunnells*, 348 F.3d at 432-33; *Warfarin*, 391 F.3d at 533-34. Adjudicating these claims in one forum would provide flexibility, control, and consistency that would not exist with individual litigation. *See* Fed. R. Civ. P. 23(b)(3)(C); *Gunnells*, 348 F.3d at 425. And, as discussed *supra*, the potential individual issues do not

present great difficulties in managing the class. *See* Fed. R. Civ. P. 23(b)(3)(D).

The Supreme Court has noted that, through Rule 23(b)(3), "the Advisory Committee sought to cover cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results." *Amchem*, 521 U.S. at 615 (internal quotation marks and ellipsis omitted). Class-wide adjudication would achieve each of these goals.

Moreover, the legislative intent behind the TCPA supports the view that class action is the superior method of litigation. "[I]f the goal of the TCPA is to remove a 'scourge' from our society, it is unlikely that 'individual suits would deter large commercial entities as effectively as aggregated class actions and that individuals would be as motivated … to sue in the absence of the class action vehicle.'" *Jay Clogg Realty Grp., Inc. v. Burger King Corp.*, 298 F.R.D. 304, 309-10 (D. Md. 2014) (quoting *Landsman & Funk PC v. Skinder-Strauss Assocs.*, 640 F.3d 72, 95 (3d Cir. 2011)); *see also Amchem*, 521 U.S. at 617.

III. Conclusion

Dr. Krakauer has met the threshold requirements for class certification by demonstrating that he is a member of both proposed classes and that the class members are ascertainable. It is undisputed that Dr. Krakauer's proposed classes satisfy the numerosity, commonality, and adequacy of representation

requirements of Rule 23(a)(1), (2), and (4). By demonstrating membership in the classes, Dr. Krakauer has satisfied the typicality requirement of Rule 23(a)(3). Dr. Krakauer's proposed classes satisfy Rule 23(b)(3) as common questions of law and fact predominate, and class action is the superior method of adjudication. As to Dish's arguments against predominance, the Court concludes that Dr. Krakauer has demonstrated that Dish may raise most of its defenses on a class-wide basis with minimal, if any, individual inquiry and that Dish's other arguments are largely speculative; any individual issues that exist are minor and do not defeat the class action because common issues nevertheless predominate.

It is **ORDERED** that the motion for class certification, (Doc. 47), is **GRANTED**.

This the 9th day of September, 2015.

/s/ Catherine C. Eagles
UNITED STATES
DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

THOMAS H. KRAKAUER, Plaintiff,	)	
v.	)	1:14-CV-333
DISH NETWORK L.L.C., Defendant.	)	

ORDER

This matter is before the Court on defendant Dish Network L.L.C.'s motion to dismiss, or, in the alternative, decertify the NDNC and IDNC classes based on *Spokeo, Inc. v. Robins* and insufficient class notice. (Doc. 196). Dr. Krakauer's allegations show a concrete injury to him and to each class member, and the class notice was generally effective. The motion will be denied.

I. Concrete injury

"Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see generally* U.S. Const. art. III, § 2. To satisfy the doctrine of standing, a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 136 S. Ct. at 1547. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

In *Spokeo*, the Supreme Court re-affirmed the requirement that an injury must be "concrete." 136 S. Ct. at 1548. That case involved a class action under the Fair Credit Reporting Act where the defendant had moved to dismiss for lack of jurisdiction. *Id.* at 1546. In the Ninth Circuit's decision denying the motion, the court found that the injury was concrete because the plaintiff alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and that the plaintiff's "personal interests in the handling of his credit information are *individualized rather than collective*." *Id.* at 1548 (emphasis added in Supreme Court opinion). The Supreme Court held that this analysis failed to address concreteness and that the Ninth Circuit's analysis was therefore "incomplete." *Id.* at 1548, 1550. In particular, the Court held that a "bare

procedural violation [of a statute], divorced from any concrete harm," is not sufficiently concrete. *Id.* at 1549. The Supreme Court vacated the Ninth Circuit decision and remanded but took no position on the ultimate outcome of the standing analysis. *Id.* at 1550.

Spokeo clarified the meaning of a concrete injury, but it did not fundamentally change the doctrine of standing or jurisdiction. *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at *2 (N.D.W. Va. June 30, 2016) ("*Spokeo* appears to have broken no new ground."). A concrete injury must "actually exist," but it can be intangible. *Spokeo*, 136 S. Ct. at 1548-49. Concrete injuries include injuries whose "harms may be difficult to prove or measure," such as libel, and include injuries where there is a "*risk* of real harm." *Id.* at 1549 (emphasis added).

Dish now alleges that neither Dr. Krakauer nor any class member has alleged a concrete injury and that the suit should be dismissed for lack of subject matter jurisdiction. (Doc. 197 at 7). Dish alternately contends that the class should be decertified for the same reason. (*Id.* at 10). The concreteness requirement of constitutional standing has not previously been raised by Dish or discussed by the Court.[1]

[1] Dish contends that this Court previously addressed standing and made the same mistake as the Ninth Circuit in *Spokeo*. (Doc. 197 at 2). However, this Court's analysis—and Dish's objection—concerned *statutory* standing, not constitutional standing. (Doc. 111 at 13; Doc. 56 at 15). The two

Telemarketing calls made in violation of the Telephone Consumer Protection Act ("TCPA") are more than bare procedural violations; here, Satellite Systems Network, Dish's alleged agent, actually called the class members' numbers. These calls form concrete injuries because unwanted telemarketing calls are a disruptive and annoying invasion of privacy. *See* 137 Cong. Rec. 30,821 (1991) ("They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone right out of the wall."); *Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 376-77 (4th Cir. 2013) (recognizing that the TCPA "protects residential privacy" by allowing recipients to stop future calls); *see also Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 342 (4th Cir. 2005) (acknowledging that the Telemarketing Sales Rule's do-not-call provision allows consumers to stop call that might "disturb their peace").

While class members did not necessarily pick up or hear ringing every call at issue in this case, each call created, at a minimum, a *risk* of an invasion of a class member's privacy. *Spokeo* clarified that a "risk of real harm" was enough to show concrete injury. 136 S. Ct. at 1549. Therefore, each call made to a class member on a do-not-call list formed a concrete injury by creating a material risk of an injury to privacy.

Post-*Spokeo* cases have consistently concluded that calls that violate the TCPA establish concrete

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doctrines are separate. *See CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 52 (4th Cir. 2011).

injuries. *See Booth v. Appstack, Inc.*, No. C13-1533JLR, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) (finding that the injury caused by robocalls that violate the TCPA is "sufficiently concrete"); *Mey*, 2016 WL 3645195, at *3 (finding that "unwanted phone calls cause concrete harm"); *Rogers v. Capital One Bank (USA), N.A.*, No. 1:15-CV-4016, 2016 WL 3162592, at *2 (N.D. Ga. June 7, 2016) (finding that calls to cell phone numbers in violation of the TCPA establish concrete injuries). Some of these cases involved robocalls made with a pre-recorded voice message instead of, as is the case here, calls made by a live person; however, from the recipient's point of view, the injury caused is nearly identical.

Because Dr. Krakauer made allegations sufficient to show that he and all class members have suffered a concrete injury to their privacy, the Court will not dismiss the suit or decertify the class based on a lack of concrete injury.

II. Class notice

Separately, Dish moves for decertification of the class based on the results of the class notice process. Dish contends that, because Dr. Krakauer has been unable to locate some of the class members, the classes are not ascertainable. (Doc. 197 at 14).

Dish cites no cases where a class was decertified based on a failure to contact a certain threshold percentage of class members. Instead, Dish cites two cases where a court determined that locating class members had become unmanageable.

In *Thomas v. Baca*, the district court decertified a class when it became clear that the class of inmates in the Los Angeles County jails was "unmanageable" because of the existence of highly individualized questions with no feasible way to identify or notify class members. No. CV 04-08448, 2012 WL 994090, at *3 (C.D. Cal. Mar. 22, 2012). In *Pierce v. County of Orange*, the Ninth Circuit affirmed the decertification of a class of Orange County jail pre-trial detainees because of "expected difficulties identifying class members and determining appropriate damages," given that the only records of detainees were "incomplete." 526 F.3d 1190, 1200 (9th Cir. 2008).

Neither of these cases supports decertification. Dr. Krakauer has successfully contacted approximately seventy-five percent of the class members, (Doc. 206-1 at ¶ 12), which exceeds the representations he made when seeking approval of the class notice plan. (*See* Doc. 153 at 2 (proposing a plan to reach "at least … seventy percent" of the class)). By itself, this level of notice does not make the process of notice or classwide resolution of claims unmanageable.

It is **ORDERED** that the defendant Dish Network L.L.C.'s motion to dismiss or in the alternative to decertify the classes, (Doc. 196), is **DENIED**.

This the 5th day of August, 2016.

/s/ Catherine C. Eagles
UNITED STATES
DISTRICT JUDGE

APPENDIX D

United States Code
Title 47. Telecommunications

47 U.S.C. § 227

§ 227. Restrictions on use of telephone equipment

(a) Definitions

As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)).[1]

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment

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[1] So in original. The second closing parenthesis probably should not appear.

(1) Prohibitions

It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call, unless such call is made solely to collect a debt owed to or guaranteed by the United States;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes, is made solely pursuant to the collection of a debt owed to or guaranteed by the United States, or is exempted

by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution,

except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005, if the sender possessed the facsimile machine number of the recipient before July 9, 2005; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D),

except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions

The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection, subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an

unsolicited advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements;

(G)(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on July 9, 2005; and

(H) may restrict or limit the number and duration of calls made to a telephone number assigned to a cellular telephone service to collect a debt owed to or guaranteed by the United States.

(3) Private right of action

A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights

(1) Rulemaking proceeding required

Within 120 days after December 20, 1991, the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific "do not call" systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations

Not later than 9 months after December 20, 1991, the Commission shall conclude the rulemaking

proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted

The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under

subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method

If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone

numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action

A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b)

The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards

(1) Prohibition

It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines

The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after December 20, 1991, clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone number of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems

The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly

the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Prohibition on provision of inaccurate caller identification information

(1) In general

It shall be unlawful for any person within the United States, in connection with any telecommunications service or IP-enabled voice service, to cause any caller identification service to knowingly transmit misleading or inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value, unless such transmission is exempted pursuant to paragraph (3)(B).

(2) Protection for blocking caller identification information

Nothing in this subsection may be construed to prevent or restrict any person from blocking the capability of any caller identification service to transmit caller identification information.

(3) Regulations

(A) In general

Not later than 6 months after December 22, 2010, the Commission shall prescribe regulations to implement this subsection.

(B) Content of regulations

(i) In general

The regulations required under subparagraph (A) shall include such exemptions from the prohibition under paragraph (1) as the Commission determines is appropriate.

(ii) Specific exemption for law enforcement agencies or court orders

The regulations required under subparagraph (A) shall exempt from the prohibition under paragraph (1) transmissions in connection with—

(I) any authorized activity of a law enforcement agency; or

(II) a court order that specifically authorizes the use of caller identification manipulation.

(4) Repealed. Pub.L. 115-141, Div. P, Title IV, § 402(i)(3), Mar. 23, 2018, 132 Stat. 1089

(5) Penalties

(A) Civil forfeiture

(i) In general

Any person that is determined by the Commission, in accordance with paragraphs (3)

and (4) of section 503(b) of this title, to have violated this subsection shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this paragraph shall be in addition to any other penalty provided for by this chapter. The amount of the forfeiture penalty determined under this paragraph shall not exceed $10,000 for each violation, or 3 times that amount for each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of $1,000,000 for any single act or failure to act.

(ii) Recovery

Any forfeiture penalty determined under clause (i) shall be recoverable pursuant to section 504(a) of this title.

(iii) Procedure

No forfeiture liability shall be determined under clause (i) against any person unless such person receives the notice required by section 503(b)(3) of this title or section 503(b)(4) of this title.

(iv) 2-year statute of limitations

No forfeiture penalty shall be determined or imposed against any person under clause (i) if the violation charged occurred more than 2 years prior to the date of issuance of the required notice or notice or apparent liability.

(B) Criminal fine

Any person who willfully and knowingly violates this subsection shall upon conviction thereof be fined not more than $10,000 for each violation, or 3 times that amount for each day of a continuing violation, in lieu of the fine provided by section 501 of this title for such a violation. This subparagraph does not supersede the provisions of section 501 of this title relating to imprisonment or the imposition of a penalty of both fine and imprisonment.

(6) Enforcement by States

(A) In general

The chief legal officer of a State, or any other State officer authorized by law to bring actions on behalf of the residents of a State, may bring a civil action, as parens patriae, on behalf of the residents of that State in an appropriate district court of the United States to enforce this subsection or to impose the civil penalties for violation of this subsection, whenever the chief legal officer or other State officer has reason to believe that the interests of the residents of the State have been or are being threatened or adversely affected by a violation of this subsection or a regulation under this subsection.

(B) Notice

The chief legal officer or other State officer shall serve written notice on the Commission of any civil action under subparagraph (A) prior to initiating such civil action. The notice shall include a copy of the complaint to be filed to initiate such civil action, except that if it is not feasible for the State

to provide such prior notice, the State shall provide such notice immediately upon instituting such civil action.

(C) Authority to intervene

Upon receiving the notice required by subparagraph (B), the Commission shall have the right—

(i) to intervene in the action;

(ii) upon so intervening, to be heard on all matters arising therein; and

(iii) to file petitions for appeal.

(D) Construction

For purposes of bringing any civil action under subparagraph (A), nothing in this paragraph shall prevent the chief legal officer or other State officer from exercising the powers conferred on that officer by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(E) Venue; service or process

(i) Venue

An action brought under subparagraph (A) shall be brought in a district court of the United States that meets applicable requirements relating to venue under section 1391 of Title 28.

(ii) Service of process

In an action brought under subparagraph (A)—

(I) process may be served without regard to the territorial limits of the district or of the State in which the action is instituted; and

(II) a person who participated in an alleged violation that is being litigated in the civil action may be joined in the civil action without regard to the residence of the person.

(7) Effect on other laws

This subsection does not prohibit any lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or a political subdivision of a State, or of an intelligence agency of the United States.

(8) Definitions

For purposes of this subsection:

(A) Caller identification information

The term "caller identification information" means information provided by a caller identification service regarding the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service.

(B) Caller identification service

The term "caller identification service" means any service or device designed to provide the user of

the service or device with the telephone number of, or other information regarding the origination of, a call made using a telecommunications service or IP-enabled voice service. Such term includes automatic number identification services.

(C) IP-enabled voice service

The term "IP-enabled voice service" has the meaning given that term by section 9.3 of the Commission's regulations (47 C.F.R. 9.3), as those regulations may be amended by the Commission from time to time.

(9) Limitation

Notwithstanding any other provision of this section, subsection (f) shall not apply to this subsection or to the regulations under this subsection.

(f) Effect on State law

(1) State law not preempted

Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases

If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(g) Actions by States

(1) Authority of States

Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award

to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts

The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission

The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process

Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers

For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings

Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation

Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for

any violation as alleged in the Commission's complaint.

(8) "Attorney general" defined

As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(h) Junk fax enforcement report

The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 of this title during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

APPENDIX E

Code of Federal Regulations
Title 47. Telecommunication

47 C.F.R. § 64.1200

§ 64.1200. Delivery restrictions

(a) No person or entity may:

(1) Except as provided in paragraph (a)(2) of this section, initiate any telephone call (other than a call made for emergency purposes or is made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that

has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate, or cause to be initiated, any telephone call that includes or introduces an advertisement or constitutes telemarketing, using an automatic telephone dialing system or an artificial or prerecorded voice, to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section, other than a call made with the prior express written consent of the called party or the prior express consent of the called party when the call is made by or on behalf of a tax-exempt nonprofit organization, or a call that delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(3) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express written consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an advertisement or constitute telemarketing;

(iv) Is made by or on behalf of a tax-exempt nonprofit organization; or

(v) Delivers a "health care" message made by, or on behalf of, a "covered entity" or its "business associate," as those terms are defined in the HIPAA Privacy Rule, 45 CFR 160.103.

(4) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(6) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender

must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(4)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(4)(v) of this section;

(D) The notice includes—

(*1*) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(*2*) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or email address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or email address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(v) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(4)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vi) A facsimile broadcaster will be liable for violations of paragraph (a)(4) of this section, including the inclusion of opt-out notices on unsolicited advertisements, 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.

(5) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(6) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(7) Abandon more than three percent of all telemarketing calls that are answered live by a person, as measured over a 30-day period for a single calling campaign. If a single calling campaign exceeds a 30-day period, the abandonment rate shall be calculated separately for each successive 30-day period or portion thereof that such calling campaign continues. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting.

(i) Whenever a live sales representative is not available to speak with the person answering the call, within two (2) seconds after the called person's completed greeting, the telemarketer or the seller must provide:

(A) A prerecorded identification and opt-out message that is limited to disclosing that the call was for "telemarketing purposes" and states the name of the business, entity, or individual on whose behalf the call was placed, and a telephone number for such business, entity, or individual that permits the called person to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; provided, that, such telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges, and

(B) An automated, interactive voice- and/or key press-activated opt-out mechanism that enables the called person to make a do-not-call request

prior to terminating the call, including brief explanatory instructions on how to use such mechanism. When the called person elects to opt-out using such mechanism, the mechanism must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call.

(ii) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line or to any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii) of this section after the subscriber to such line has granted prior express written consent for the call to be made shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(iii) The seller or telemarketer must maintain records establishing compliance with paragraph (a)(7) of this section.

(iv) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by this paragraph (a)(7).

(8) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded voice telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a

business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated;

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign; and

(3) In every case where the artificial or prerecorded voice telephone message includes or introduces an advertisement or constitutes telemarketing and is delivered to a residential telephone line or any of the lines or telephone numbers described in paragraphs (a)(1)(i) through (iii), provide an automated, interactive voice- and/or key press-activated opt-out mechanism for the called person to make a do-not-call request, including brief explanatory instructions on how to use such mechanism, within two (2) seconds of providing the identification information required in paragraph (b)(1) of this section. When the called person elects to opt out using such mechanism, the mechanism, must automatically record the called person's number to the seller's do-not-call list and immediately terminate the call. When the artificial or prerecorded voice telephone message is left on an

answering machine or a voice mail service, such message must also provide a toll free number that enables the called person to call back at a later time and connect directly to the automated, interactive voice- and/or key press-activated opt-out mechanism and automatically record the called person's number to the seller's do-not-call list.

(c) No person or entity shall initiate any telephone solicitation to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the Federal Government. Such do-not-call registrations must be honored indefinitely, or until the registration is cancelled by the consumer or the telephone number is removed by the database administrator. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers

registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing

must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other

number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The term advertisement means any material advertising the commercial availability or quality of any property, goods, or services.

(2) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(3) The term clear and conspicuous means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures. With respect to facsimiles and for purposes of paragraph (a)(4)(iii)(A) of this section, the notice must be placed at either the top or bottom of the facsimile.

(4) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(5) The term established business relationship for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and

telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(6) The term established business relationship for purposes of paragraph (a)(4) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(7) The term facsimile broadcaster means a person or entity that transmits messages to telephone facsimile machines on behalf of another person or entity for a fee.

(8) The term prior express written consent means an agreement, in writing, bearing the signature of the person called that clearly authorizes the seller to deliver or cause to be delivered to the person called advertisements or telemarketing messages using an automatic telephone dialing system or an artificial or prerecorded voice, and the telephone number to

which the signatory authorizes such advertisements or telemarketing messages to be delivered.

(i) The written agreement shall include a clear and conspicuous disclosure informing the person signing that:

(A) By executing the agreement, such person authorizes the seller to deliver or cause to be delivered to the signatory telemarketing calls using an automatic telephone dialing system or an artificial or prerecorded voice; and

(B) The person is not required to sign the agreement (directly or indirectly), or agree to enter into such an agreement as a condition of purchasing any property, goods, or services.

(ii) 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.

(9) The term seller means 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.

(10) The term sender for purposes of paragraph (a)(4) of this section means 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.

(11) The term telemarketer means 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.

(12) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(13) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(14) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(15) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(16) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

(i) [Reserved]

(j) [Reserved]

(k) Voice service providers may block calls so that they do not reach a called party as follows:

(1) A provider may block a voice call when the subscriber to which the originating number is assigned has requested that calls purporting to originate from that number be blocked because the number is used for inbound calls only.

(2) A provider may block a voice call purporting to originate from any of the following:

(i) A North American Numbering Plan number that is not valid;

(ii) A valid North American Numbering Plan number that is not allocated to a provider by the North American Numbering Plan Administrator or the Pooling Administrator; and

(iii) A valid North American Numbering Plan number that is allocated to a provider by the North American Numbering Plan Administrator or Pooling Administrator, but is unused, so long as

the provider blocking the calls is the allocatee of the number and confirms that the number is unused or has obtained verification from the allocatee that the number is unused at the time of the blocking.

(3) A provider may not block a voice call under paragraph (k)(1) or (2) of this section if the call is an emergency call placed to 911.

(4) For purposes of this subsection, a provider may rely on Caller ID information to determine the purported originating number without regard to whether the call in fact originated from that number.

(l) A reporting carrier subject to § 52.15(f) of this title shall:

(1) Maintain records of the most recent date each North American Numbering Plan (NANP) telephone number allocated or ported to the reporting carrier was permanently disconnected.

(2) Beginning on the 15th day of the month after the Consumer and Governmental Affairs Bureau announces that the Administrator is ready to begin accepting these reports and on the 15th day of each month thereafter, report to the Administrator the most recent date each NANP telephone number allocated to or ported to it was permanently disconnected.

(3) For purposes of this paragraph (l), a NANP telephone number has been permanently disconnected when a subscriber permanently has relinquished the number, or the provider

permanently has reversed its assignment of the number to the subscriber such that the number has been disassociated with the subscriber. A NANP telephone number that is ported to another provider is not permanently disconnected.

(4) Reporting carriers serving 100,000 or fewer domestic retail subscriber lines as reported on their most recent Forms 477, aggregated over all the providers' affiliates, must begin keeping the records required by paragraph (l)(1) of this section six months after the effective date for large providers and must begin filing the reports required by paragraph (l)(2) of this section no later than the 15th day of the month that is six months after the date announced by the Consumer and Governmental Affairs Bureau pursuant to paragraph (l)(2).

(m) A person will not be liable for violating the prohibitions in paragraph (a)(1), (2), or (3) of this section by making a call to a number for which the person previously had obtained prior express consent of the called party as required in paragraph (a)(1), (2), or (3) but at the time of the call, the number is not assigned to the subscriber to whom it was assigned at the time such prior express consent was obtained if the person, bearing the burden of proof and persuasion, demonstrates that:

(1) The person, based upon the most recent numbering information reported to the Administrator pursuant to paragraph (l) of this section, by querying the database operated by the Administrator and receiving a response of "no", has verified that the number has not been permanently disconnected since the date prior express consent

was obtained as required in paragraph (a)(1), (2), or (3) of this section; and

(2) The person's call to the number was the result of the database erroneously returning a response of "no" to the person's query consisting of the number for which prior express consent was obtained as required in paragraph (a)(1), (2), or (3) of this section and the date on which such prior express consent was obtained.