



3. To the extent the allegations of paragraph 3 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, admit the allegations thereof.

4. To the extent the allegations of paragraph 4 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, admit the allegations thereof.

### **PARTIES**

5. Deny knowledge or information sufficient to form belief as to the truth or falsity of the allegations of paragraph 5 of the Complaint.

6. Deny each and every allegation of paragraph 6 of the Complaint, except admit that DirecTV has more satellite television customers than any other satellite television service provider in the United States and that it offers sports, news, movie and family programming channels, some of which are available in high definition in some of the packages DirecTV offers.

7. Deny each and every allegation of paragraph 7 of the Complaint except admit that DISH Network Corporation is Colorado corporation with its principal place of business at 9601 S. Meridien Blvd., Englewood, CO 80112.

8. Admit the allegations of paragraph 8 of the Complaint. [

9. Admit the allegations of paragraph 9 of the Complaint.

10. Admit the allegations of paragraph 10 of the Complaint.

### **BACKGROUND**

11. Deny each and every allegation of paragraph 11 of the Complaint.

12. Deny each and every allegation of paragraph 12 of the Complaint, except admit that DISH Network began running a nationwide television commercial entitled "*Man on the Street*" (the "Commercial") in early February which has appeared over the airwaves in this

District and except refer to that Commercial for a true and complete statement of the contents thereof.

13. Deny each and every allegation of paragraph 13 of the Complaint, except refer to the Commercial for a true and complete statement of the contents thereof.

14. Deny each and every allegation of paragraph 14 of the Complaint, except refer to the Commercial for a true and complete statement of the contents thereof.

15. Deny each and every allegation of paragraph 15 of the Complaint, except refer to the Commercial for a true and complete statement of the contents thereof.

16. Deny each and every allegation of paragraph 16 of the Complaint, except refer to the Commercial for a true and complete statement of the contents thereof.

17. Deny each and every allegation of paragraph 17 of the Complaint, except refer to the Commercial for a true and complete statement of the contents thereof.

18. Deny each and every allegation of paragraph 18 of the Complaint thereof.

19. Deny each and every allegation of paragraph 19 of the Complaint thereof.

20. To the extent the allegations of paragraph 20 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof, except admit that there is a minor difference in the number of video and music channels offered by DISH Network and DirecTV in their respective and comparable packages, and deny knowledge or information sufficient to form belief as to the truth or falsity of the allegations regarding the total number of nationwide video channels in DirecTV's CHOICE XTRA package.

21. To the extent the allegations of paragraph 21 are allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to

be allegations of fact, deny each and every allegation thereof, except admit that the comparison in the Commercial is a comparison between DirecTV's CHOICE package and its own America's Top 120 package ("AT120").

22. Deny each and every allegation of paragraph 22 of the Complaint.

23. Deny each and every allegation of paragraph 23 of the Complaint.

24. Deny each and every allegation of paragraph 24 of the Complaint, except refers to the Commercial for a true and complete statement of the contents thereof.

25. Deny each and every allegation of paragraph 25 of the Complaint..

26. Deny each and every allegation of paragraph 26 of the Complaint, except deny knowledge or information sufficient to form a belief as to the accuracy and completeness of the Schedule annexed as Exhibit B to the Complaint.

27. Deny each and every allegation of paragraph 27 of the Complaint, except deny knowledge or information sufficient to form a belief as to the accuracy and completeness of the Schedule annexed as Exhibit B to the Complaint and except also deny knowledge and information sufficient to form a belief as to the number of DirecTV subscribers or consumers in this district that the 60-second MAN ON THE STREET spot reached in the first three days of the campaign.

28. To the extent the allegations of paragraph 28 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof, except admit that DISH Network intends to continue advertising and promoting its services.

29. Deny each and every allegation of paragraph 29 of the Complaint.

30. Deny each and every allegation of paragraph 30 of the Complaint.

31. To the extent the allegations of paragraph 31 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

### COUNT I

32. DISH Network repeats and realleges its responses to paragraph 1 through and including 31 set forth hereinabove, as if the same were fully set forth herein.

33. To the extent the allegations of paragraph 33 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

34. To the extent the allegations of paragraph 34 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

35. To the extent the allegations of paragraph 35 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

36. To the extent the allegations of paragraph 36 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

37. To the extent the allegations of paragraph 37 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

38. To the extent the allegations of paragraph 38 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

**COUNT II**

39. DISH Network repeats and realleges its responses to paragraph 1 through and including 38 set forth hereinabove, as if the same were fully set forth herein.

40. To the extent the allegations of paragraph 40 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

41. To the extent the allegations of paragraph 41 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

42. To the extent the allegations of paragraph 42 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

43. To the extent the allegations of paragraph 43 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

44. To the extent the allegations of paragraph 44 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

**COUNT III**

45. DISH Network repeats and realleges its responses to paragraph 1 through and including 44 set forth hereinabove, as if the same were fully set forth herein.

46. To the extent the allegations of paragraph 46 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

47. To the extent the allegations of paragraph 47 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

48. To the extent the allegations of paragraph 48 of the Complaint are deemed to be allegations of law, defendants are not required to plead thereto; to the extent the allegations of the said paragraph are deemed to be allegations of fact, deny each and every allegation thereof.

49. Deny each and every allegation of paragraph 49 thereof.

**AS AND FOR A FIRST AFFIRMATIVE DEFENSE**

50. The Complaint fails, in whole or in part, to state a claim for relief.

**AS AND FOR A SECOND AFFIRMATIVE DEFENSE**

51. The statements in the Commercial, whether expressed or implied, are true.

**AS AND FOR A THIRD AFFIRMATIVE DEFENSE**

52. Certain of the statements made in the Commercial are opinion and/or puffery.

**AS AND FOR A FOURTH AFFIRMATIVE DEFENSE**

53. Plaintiff has unclean hands in connection with the same conduct it accuses defendant of and thus is not entitled to invoke the equitable powers of this Court.

**AS AND FOR A FIFTH AFFIRMATIVE DEFENSE**

54. Plaintiff is barred from equitable relief by the doctrines of laches, acquiescence and waiver.

**AS AND FOR A SIXTH AFFIRMATIVE DEFENSE**

55. Assuming *arguendo* a misstatement or a misleading statement in the Commercial, any such statement is not and could not be material to consumers' purchasing decisions.

**AS AND FOR A SEVENTH AFFIRMATIVE DEFENSE**

56. Plaintiff has suffered no damage or injury as a consequence of any of the advertising challenged in the Complaint.

**AS AND FOR A EIGHTH AFFIRMATIVE DEFENSE**

57. DISH Network Corporation is not a proper party to this action

**AS AND FOR A FIRST COUNTERCLAIM  
AND AN NINTH AFFIRMATIVE DEFENSE  
(False and Deceptive Advertising Under The Lanham Act)**

58. DISH Network repeats and realleges its responses to paragraph 1 through and including 49 set forth hereinabove, as if the same were fully set forth herein..

**Background Facts Pertinent to All Counterclaims**

59. As pleaded in the Complaint, DISH Network and DirecTV are competitors; they each offer various satellite television packages to consumers nationwide. They each advertise and promote their respective packages in interstate commerce through national advertising on television, the Internet, the radio, and in print media.

60. Both DISH Network and DirecTV have the capability of delivering television programming in “high definition” (“HD”) to subscribers’ homes, and both offer HD services as an add-on to certain of their respective packages offered to subscribers.

**The “Source Matters” Campaign**

61. In or around the fall of 2006, DirecTV commenced an advertising campaign under the theme “SOURCE MATTERS” which purported to compare the HD signals offered by DirecTV with those offered by cable companies. In essence, DirecTV claimed that its satellite signal delivered higher quality HD television to subscribers than cable companies could supply. Time Warner Cable sued DirecTV in this Court for false advertising, alleging, *inter alia*, that the commercials in that advertising campaign were false by necessary implication. The campaign

was preliminarily enjoined by this Court and that decision was affirmed by the Second Circuit Court of Appeals.

62. Consequently, DirecTV ceased that advertising campaign and embarked upon other advertisements in various media in interstate commerce, some of which compared to DirecTV's packages and services to DISH Network and its packages and services in various respects, and some of which continue to focus on attributes of DirecTV's HD television offerings. As detailed below, certain of those advertisements, which are the subject of DISH Network's counterclaims against DirecTV, are false and/or misleading in material respects and are likely to influence consumers' purchasing decisions, individually and collectively, as each aspect of the campaign reinforces the false and misleading messages to consumers in other aspects of the campaign.

### **The HD Campaign**

#### **A. False and Deceptive Advertising Related to Price**

63. In or around September of 2009, DirecTV commenced an extensive new advertising campaign promoting the virtues of its HD television offerings, which included television commercials, Internet advertisements, and print media.

64. Among the specific television commercials which aired and/or are continuing to air on national television as part of that campaign, and have been posted on DirecTV's website at [www.directv.com](http://www.directv.com), are the following recent series of ads which tout DirecTV's HD programming, yet conclude by displaying the promotional price for its basic subscription package, which does not include any HD channels, thereby falsely, deliberately and misleadingly enticing consumers with a price – \$29.99 – that does not include the key HD features advertised.

65. As part of that campaign, DirecTV ran a national ad featuring the actors David Spade and (the late) Chris Farley. In the commercial, Mr. Spade appears as though observing a

scene from the movie “Tommy Boy” first-hand, with Mr. Spade then asserting “I could be at home watching DirecTV. No matter what I want to watch it’s in sweet, beautiful HD”. The commercial concludes with a large graphic featuring a price of \$29.99. DirecTV has no package that includes HD available at this price. In fact, a DirecTV customer would have to pay \$10.00 more per month to receive *any* HD channels. A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

66. Another national TV commercial in this campaign features the pop singer Christina Aguilera, who asserts: “You know what else keeps getting better? – DirecTV. To supercharge your high def TV, you gotta hook it up”. Again the commercial concludes with the display of a price point of \$29.99 for the DirecTV package which does not include any HD channels. In fact, a DirecTV customer would have to pay \$10.00 more per month to receive *any* HD channels. A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

67. Also in late 2009 and early 2010, and as part of the HD campaign, DirecTV ran a series of national television commercials featuring James Lipton of *Inside The Actors’ Studio* fame. In one such ad, Lipton, sitting on a stage, interviews “Brian Woo” who, after switching to DirecTV from cable, is said to enjoy a “future of 200 HD channels”. The visual shown at the end gives the price of “\$29.99 for 12 months” – the then-promotional price for DirecTV’s basic CHOICE package without *any* HD channels – while a simultaneous voiceover states: “To get the most out of your High-Def TV, you gotta get DirecTV”. In fact, a DirecTV customer would have to pay \$10.00 more per month to receive *any* HD channels. A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

68. In another ad in the same James Lipton series, Lipton interviews a “renaissance man” and sports fan about DirecTV, beginning with the statement that “DirecTV offers more

sports in HD than anyone”. The sports fan replies: “Football, NASCAR and the National Hacky Sack Finals all in HD? Now that’s a perfect day”. Despite the fact that the commercial focuses exclusively on HD content, the visual shown at the end gives the price of “\$29.99 for 12 months” – again, the promotional price for DirecTV’s basic CHOICE package without *any* HD channels – while a simultaneous voice-over states that “To get the most out of your High-Def TV, you gotta get DirecTV”. A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

69. Another series of national DirecTV commercials in this campaign features the actor Ed Begley, Jr. leading dramatized cable company board meetings. One of these ads focused on high-definition services and concludes with a voiceover saying: “For a future of over 200 HD channels, call 1-800-DirecTV” while displaying the price of \$29.99 for the CHOICE package, which does not include *any* HD channels. A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

70. Numerous print advertisements and free-standing newspaper inserts were published in late 2009 and early 2010 as part of this same campaign. One such example, entitled “6 Reasons to Switch to DirecTV”, alleges that DirecTV has “the best HD picture quality”, “the most HD channels now” and offers the best value with “the most HD channels, the best HD picture”. The stated price in this advertisement is \$29.99 – the price for DirecTV’s CHOICE package without *any* HD channels. This ad also makes the deceptive claim that “[n]othing comes close to the [99.9% signal] reliability and quality of DirecTV”. In truth and in fact, DISH Network’s signal reliability is the same as that of DirecTV – 99.9%. A copy of this ad, which was published in the PennySaver, is annexed hereto as **Exhibit B**.

71. A radio spot, which aired throughout December 2009 and January 2010 in major cities across the United States as part of this same campaign, asked listeners: “Do you want more from your TV? DirecTV gives you more than DISH Network or cable! More channels in HD, more movies in 1080p [*i.e.*, at HD resolution], and more sports in HD. Get 150 channels of DirecTV for just \$29.99 a month for a full year”. In truth and in fact, DirecTV does not offer an HD package for \$29.99 and does not offer 150 HD channels in any of its packages. A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

72. A DirecTV direct mail advertisement (a copy of which is annexed hereto as **Exhibit C**) is similarly false and deceptive. In that mailer, which touts DirecTV’s HD subscriptions, channels and services, former DirecTV customers are invited back to DirecTV with an offer of “over 150 channels for just \$29 a month”. In truth and in fact, DirecTV does not offer an HD package for \$29.99 and does not offer 150 HD channels in any of its packages.

73. In or around January 7, 2010, DISH Network, through its counsel, complained to DirecTV regarding the HD Campaign and demanded that DirecTV cease and desist from misleading the consuming public as above-stated.

74. In response, DirecTV refused to cease the advertising campaign and/or to remove the series of its past national television advertisements from its website.

75. Notwithstanding that blanket refusal to cease and desist from using the commercials in the HD Campaign, at some time on or after DISH Network’s January 7 cease and desist letter but before February 6, 2010 when DirecTV filed the instant action, DirecTV made certain minor changes to some of its advertisements in the HD Campaign. Notwithstanding those changes, the commercials in question continue to confuse and deceive the consuming

public and to affect the purchasing decisions of potential subscribers of either satellite or cable television.

**B. False and Deceptive Advertising Related to Number of HD Channels**

76. Also in connection with its HD campaign, DirecTV has repeatedly advertised that it has the *capacity* for 200 channels of HD programming, without clarifying that DirecTV does *not actually offer* 200 channels, in a manner that is likely to mislead consumers. Examples of representative ads in various media are set forth below.

77. In a DirecTV direct mail piece distributed in interstate commerce in January 2010 to households that do not currently subscribe to DirecTV, DirecTV exalts its capacity for 200 HD channels, stating “NEW! DirecTV now has the capacity for over 200 HD channels. DISH Network and cable can’t even come close”! Later in the same direct mailer, the number “130” in the phrase “Over 130 HD Channels. Nobody offers more HD than DirecTV” has been crossed out and replaced with the words “New! 200”. DirecTV does not offer 200 HD channels. (*See Ex. C.*)

78. Several direct mail pieces distributed by DirecTV in interstate commerce in the period December 2009 – February 2010 include a chart comparing the number of HD channels offered by cable, DISH Network and DirecTV. This chart conveys the false and deceptive message to consumers that DirecTV has “over 200” HD channels, while DISH Network has “barely over 115”. In truth, DirecTV actually offers just over 130 HD channels. Representative samples are annexed hereto as **Exhibits C and D**.

79. A DirecTV promotional e-mail, distributed in February 2010 and including links to DirecTV’s website, likewise stated:

DirecTV has the most channels in HD. Period . . . With the most full-time HD channels now – we’re now able to deliver 200 – DirecTV has more of the channels you want to watch than anyone.

As stated above, DirecTV does not currently offer 200 HD channels. The relevant pages of this advertisement are annexed hereto as **Exhibit E**.

80. In the nationwide television commercial in which James Lipton interviews “Brian Woo” (*see* paragraph 67, *supra*, and **Exhibit A**), the focus of the interview is “what [drove] Brian Woo” to switch from cable to DirecTV. In response to Lipton’s question, Woo states, “200 HD channels! Hello”! Nowhere in the commercial does DirecTV acknowledge that it *currently* offers just over 130 HD channels – not 200.

### C. False and Deceptive Comparative Advertising

81. In or around February of 2010, DirecTV launched a series of national television commercials that mimic look and feel of certain ads in DISH Network’s WHY WOULD YOU EVER PAY MORE FOR TV campaign, complained of in the Complaint. Those DirecTV ads feature two television screens, side-by-side, one bearing DISH Network’s logo and the other DirecTV’s. A number of the “side-by-side” ads are also available on DirecTV’s website and have been broadcast as cross-channel television ads, *i.e.*, television commercials that are only seen by the subscribers of a particular service, in this case, DirecTV’s subscribers.

82. One of these cross-channel TV commercials, which is currently airing on television and is also available on DirecTV’s website as “Don’t be Fooled”, purports to compare the number of HD channels *currently offered* by DirecTV and DISH Network:

DISH Network claims they have more HD channels than DirecTV. Oh, really? What DISH Network doesn’t tell you is that 25 of their HD channels are only in high-def part of the time. So with DISH, when you turn on your flat screen, you might get HD . . . or you might not. DirecTV now has the capacity for over 200 HD channels – all in HD, all the time. So don’t be fooled by DISH Network. When you compare, DirecTV wins, every time.

Again, DirecTV *does not currently offer* “over 200” HD channels, whether full-time or otherwise.

83. In another such cross-channel TV commercial, referred to on DirecTV's website as "Excessive Extra Fees", purports to identify hidden fees associated with DISH Network:

DISH Network claims they have the same TV as DirecTV for less. Oh, really? What DISH doesn't tell you about is all of their excessive, extra changes, like \$5 just to change your programming package, another \$25 for suspending your service for a few months, or how about \$40 just to save shows to your own hard drive? DirecTV provides all of these services at no extra charge. So don't be fooled by DISH. DirecTV wins every time.

A copy of this commercial is included on the DVD annexed hereto as **Exhibit A**.

84. A copy of this commercial, which is false and deceptive in several respects, is annexed hereto as Exhibit A. First, while a \$5 fee may be assessed if customers downgrade their package, DISH Network does not charge a fee for any other changes made by its customers to programming packages. Second, although DirecTV claims "to provide[] all of these services at no extra charge", DirecTV's current Customer Agreement (available at [http://www.directv.com/DTVAPP/content/legal/customer\\_agreement](http://www.directv.com/DTVAPP/content/legal/customer_agreement)) states that subscribers may be responsible for "[u]p to \$10.00 Change of Service Fee, if you change your Service package to a lower-priced package". Customer Agreement ¶ 2(c)(5) (emphasis in original).

85. In addition, the statement that DISH Network subscribers must pay \$25 to "suspend their service for a few months" is literally false. In truth and in fact, Dish Network's Residential Customer Agreement ("RCA") provides that the actual fee to suspend service is \$5/month. RCA ¶ 2(d) (available at <http://www.dishnetwork.com/downloads/legal/RCA.pdf>).

86. Lastly, DISH Network subscribers only incur a one-time fee of \$39.99 to "save TV programs", as claimed in this DirecTV cross-channel commercial, if they purchase their own hard drives and wish to attach those to DISH Network's equipment, rather than using the hard drive provided by DISH Network. *Id.*

### The “To Tell the Truth” Campaign

87. On or about March 11, 2010, DirecTV launched a new nationwide campaign, featuring Alex Trebek, based on the game show “To Tell the Truth”. As described in an email sent to DirecTV’s authorized retailers on March 12, 2010, the campaign purports to expose both cable and DISH Network’s “exaggerated,” “misleading” and “ridiculous” claims and “manipulation of the facts”, and to reveal the “truth” about DirecTV. This campaign incorporates several of the same false and misleading messages seen in DirecTV’s above-described advertising campaigns, including the advertising related to price and composition of current packages.

88. As part of this new campaign, DirecTV updated its website with a “To Tell the Truth” look and feel that further propagates and reinforces the campaign’s false and deceptive messages. For example, in the sections purporting to compare the HD service offered by DirecTV and DISH Network, consumers are told that “if [they] want . . . the most HD channels, [they’ve] got to get DirecTV” and that “DirecTV has more full-time HD channels than anyone, now with the capacity for over 200 HD channels”. As discussed in paragraphs 75-81 above, these statements are false and misleading – DirecTV *does not offer* 200 HD channels in *any* package. In addition, DirecTV also makes the literally false claim that DISH Network “make[s] subscribers] pay extra to watch [their] local sports teams”. In fact, local channels (in HD where available) are included in DISH Network’s core packages.

89. As part of this same campaign, DirecTV has devoted a portion of its website to a false characterization of DISH Network’s MAN ON THE STREET commercials, beginning with the literally false statement – belied by MAN ON THE STREET commercial itself – that DISH Network is making an “apples to oranges comparison” of its basic package, AT120, with DirecTV’s mid-level package, CHOICE XTRA. (Copies of the relevant pages of DirecTV’s

website are annexed hereto as **Exhibit F.**) In fact, DISH Network is comparing equivalent packages – DirecTV’s CHOICE package and DISH Network’s AT120 – and equivalent equipment configurations. Despite its criticism of DISH Network’s alleged “apples to oranges comparison”, DirecTV then purports to make an “apples to apples comparison” of the very *same two packages* – DISH Network’s basic AT120 package and DirecTV’s mid-level CHOICE XTRA package – stating that DirecTV “offers almost twice as many channels” or “90 more channels” than DISH Network. These statements are false, internally inconsistent, and likely to mislead consumers.

90. The front page of DirecTV’s website currently advertises a “Limited Time Offer” featuring “two free upgrades” –an HD DVR and an HD receiver – for the price of \$29.99 a month for “over 150 channels”. In truth and in fact, and as discussed above in paragraphs 62 through 74, DirecTV does not offer an HD package for \$29.99, which is the promotional price for its CHOICE package without *any* HD channels, and does not offer 150 HD channels in any of its packages. A copy of the advertisement currently displayed on DirecTV’s website is annexed hereto as **Exhibit G.**

91. DirecTV also claims to be “America’s Fastest Growing Satellite TV Service”. This too is literally false. Since the last six months of 2009, DISH Network has been the fastest growing Satellite TV service. Yet on December 13, 2009, and continuing in January, 2010, DirecTV ran newspaper inserts in national publications making the false “Fastest Growing” claim.

92. The false and deceptive nature of the above-described commercials in this advertising campaign (as well as others in that campaign) is not an isolated occurrence. As noted above, DirecTV has in the recent past been enjoined by this Court for its “SOURCE MATTERS”

commercials promoting HD television. It is also currently being sued by the Attorney General of the State of Washington for false and deceptive advertising, and over 37,000 complaints about DirecTV have been filed with the California Better Business Bureau (where DirecTV has its principal place of business).

93. Potential subscribers to DirecTV packages include virtually every American household with a television set, including those who currently subscribe to cable, currently subscribe to DISH Network, or those who at present rely upon free television broadcast signals.

94. DirecTV's commercials in the above-described campaigns are likely to influence buying decisions by those potential customers.

95. As a direct competitor of DirecTV, DISH Network has an interest reasonably to be protected in preventing such false and deceptive advertising with regard to satellite television services and the parties' respective satellite television packages.

96. All of the above-described advertisements (and, upon information and belief, others in these campaigns) are either literally false, literally false by necessary implication, and/or contain implied false messages to the consumer, including, but not limited to, deceptive messages related to package pricing, the number of HD channels offered by DirecTV, the number of HD channels offered by DISH Network and purported excessive or extra charges associated with DISH Network.

97. All of the above statements are false and misleading in material respects and are likely to have a material effect on consumers' purchasing decisions.

98. Each and every one the individual commercials, advertisements, statement and claims made by DirecTV and above-described, in combination, reinforce the false and misleading messages DirecTV has imparted to the consuming public. Each of these

advertisements is part of an orchestrated and deliberate false and misleading campaign to convince consumers that DirecTV offers better prices, more fulsome packages, better quality HD television and the like, than do DISH Network or the cable companies. Consumers are likely to be exposed to more than one of these advertisements in the same and/or different media and therefore the messages in each such advertisement trade and build upon the other false and misleading messages in the overall campaigns.

99. Upon information and belief, there are numerous other commercials and other forms of advertising in each of the campaigns above-described which DirecTV has distributed in interstate commerce, making the same or similar false and/or misleading statements. DISH Network will seek information in discovery as to the exact messages, media, and other particulars of those additional examples of false and misleading advertising published by DirecTV.

**False Advertising under The Lanham Act**

100. As set forth hereinabove, DirecTV has engaged in false advertising in violation of § 43(a)(1)(B) of the Lanham Act, 15 U.S.C. §1125(a)(1)(B).

101. DirecTV has made false and misleading statements and representations of fact in its commercial advertising and promotion concerning the nature, characteristics and qualities of its own services and commercial activities and those of DISH Network in violation thereof.

102. DirecTV's false and misleading descriptions and representations of fact have deceived and are likely to deceive consumers into, among other things, purchasing such services from DirecTV, unfairly and shifting income and profit from other providers of television services including DISH Network, to DirecTV.

103. DirecTV's false and misleading statements about its own services and about the packages and services of DISH Network have damaged and/or or likely to damage DISH Network's good will and reputation and are likely to impact upon its sales.

104. DISH Network has been and will likely continue to be damaged by DirecTV's false and misleading representations in an amount to be determined at trial.

105. On information and belief and based upon DirecTV's previous above-described advertising practices of like import, DirecTV's conduct is willful, deliberate, intentional and in bad faith.

106. By reason of the foregoing acts, DirecTV has caused and unless preliminarily and permanently enjoined will continue to cause, irreparable injury to DISH Network.

107. DISH Network has no adequate remedy at law.

108. As direct and proximate consequence thereof, DISH Network has sustained and will continue to sustain damages in an amount presently unknown and to be determined at time of trial.

**AS AND FOR A SECOND COUNTERCLAIM  
AND A TENTH AFFIRMATIVE DEFENSE  
(Violation of New York General Business Law §§ 349 and 350)**

109. DISH Network repeats and realleges paragraphs 1 through and including 49 and 59 through and including 99 set forth hereinabove, as if the same were fully set forth herein.

110. DirecTV has engaged in consumer-oriented acts and practices that are materially misleading to the consuming public and continues to engage in such acts and practices.

111. DISH Network has been directly and proximately injured as a result.

112. DirecTV's foregoing acts constitute deceptive acts and practices and false advertising in violation of N.Y. Gen. Bus. Law §§ 349 and 350.

113. As a direct and proximate consequence, DISH Network has been and will likely continue to be damaged by DirecTV's deceptive acts and practices in an amount to be determined at trial.

114. Upon information and belief and based upon its above-stated former acts and practices, DirecTV's conduct is willful, deliberate, intentional and in bad faith.

115. By reason of the foregoing acts, DirecTV has caused, and unless preliminarily and permanently enjoined will continue to cause, irreparable injury to DISH Network.

116. DISH Network has no adequate remedy at law.

**AS AND FOR A THIRD COUNTERCLAIM  
AND A ELEVENTH AFFIRMATIVE DEFENSE  
(Common Law Unfair Competition)**

117. DISH Network repeats and realleges its allegations in paragraphs 1 through and including 49 and 59 through and including 99 set forth hereinabove, as if the same were set forth fully herein.

118. DirecTV's above-described acts and practices constitute unfair competition under the common law of the State of New York.

119. DirecTV's false and misleading representations are likely to mislead and deceive the public and have already misled and deceived the public and, unless enjoined, DirecTV is likely to continue to mislead and deceive the public.

120. DISH Network has been and will most likely continue to be damaged by DirecTV's false and misleading representations in an amount to be determined at trial.

121. Upon information and belief and based upon DirecTV's prior deceptive acts and practices as above-described, its conduct is willful, deliberate, intentional and in bad faith.

122. By reason of the foregoing acts, DirecTV has caused, and unless enjoined will continue to cause, irreparable injury to DISH Network.

123. DISH Network has no adequate remedy at law.

#### **PRAYER FOR RELIEF**

For the foregoing reasons, DISH Network seeks judgment in its favor on the complaint of plaintiff DirecTV's dismissing the complaint with prejudice and awarding DISH Network its reasonable attorneys fees under 15 U.S.C. § 1117 (a)(3).

Further, DISH Network seeks judgment on its counterclaims against DirecTV as follows:

1. Entering judgment declaring that DirecTV has violated the Lanham Act, 15 U.S.C. § 1125(a)(1)(B); the N.Y. Gen. Bus. Law §§ 349 and 350; and the common law of unfair competition;

2. Preliminarily and permanently enjoining DirecTV, its officers, directors, agents, employees, attorneys, successors, and assigns, and all others in active consort or participation with any of them, from directly or indirectly engaging in any further false advertising and promotion and from competing unfairly with DISH Network;

3. Ordering DirecTV to retract and correct its false and misleading advertising claim;

4. Ordering DirecTV to pay DISH Network:

(a) all profits, gains and advantages obtained by DirecTV from its unlawful conduct;

(b) all monetary damages sustained and to be sustained by DISH Network as a consequence of DirecTV's unlawful conduct, including lost profits and corrective advertising damages, in an amount to be determined at trial;

(c) exemplary damages;

- (d) DISH Network's costs and disbursements on these counterclaims including its reasonable attorneys fees pursuant to 15 U.S.C. § 1117 (a)(3); and
- (e) awarding DISH Network such other and further relief as to this Court should seem just and proper.

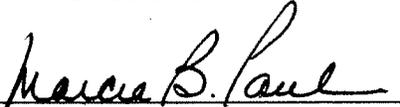
**DEMAND FOR JURY TRIAL**

Pursuant to F.R.Civ.P. Rule 38(b), DISH Network respectfully demands a trial by jury of all issues triable by jury on its counterclaims.

Dated: New York, New York  
March 22, 2010

Respectfully submitted,

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