

**RESPONSE TO PARAGRAPH NO. 260:**

Denied.

**RESPONSE TO PARAGRAPH NO. 261:**

DIRECTV and Hughes admit that EchoStar is able to fairly compete in the marketplace. DIRECTV and Hughes deny the remaining allegations of this paragraph.

**RESPONSE TO PARAGRAPH NO. 262:**

Denied.

**RESPONSE TO PARAGRAPH NO. 263:**

Denied.

**AFFIRMATIVE AND OTHER DEFENSES**

Defendants DIRECTV and Hughes assert the following affirmative and other defenses to Plaintiffs' claims, without assuming the burden of proof where the burden of proof would otherwise be on the Plaintiffs:

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.
2. Plaintiffs have suffered no antitrust injury.
3. Plaintiffs' allegations regarding the licensing of receivers/decoders and sports programming challenge the lawful exercise of patents and copyrights and, for that reason, are beyond the scope of the antitrust laws.
4. Plaintiffs are estopped by their own conduct from asserting these claims, in whole or in part.
5. Plaintiffs' claims are barred, in whole or in part, by the doctrines of unclean hands and *in pari delicto*.
6. Plaintiffs' claims are barred, in whole or in part, by the applicable statutes of limitations.

7. Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.
8. Plaintiffs' claims are barred, in whole or in part, because they have failed to mitigate damages, if any.
9. Plaintiffs lack standing to bring these claims, in whole or in part.
10. Plaintiffs have waived any rights to bring these claims, in whole or in part.
11. The doctrine of collateral estoppel precludes Plaintiffs from relitigating issues raised in their Complaint.
12. Even if Plaintiffs were entitled to recover damages, Defendants would be, and are entitled to, a set-off for damages recoverable by Defendants under their Counterclaim.
13. Plaintiffs' state law claims are preempted by applicable federal or state statutes, rules or orders.
14. Plaintiffs' claim of deceptive trade practices under the Colorado Consumer Protection Act fails, in whole or in part, because any allegedly disparaging statements were made in good faith or without knowledge of the allegedly deceptive character of such statements.
15. Plaintiffs' claims of interference with contract, interference with expected business relations and unfair competition fail, in whole or in part, because DIRECTV's and Hughes' alleged actions were privileged and/or proper to further their own economic, competitive or other legally protected rights or interests.
16. Plaintiffs' claims and allegations of business disparagement and unfair competition fail, in whole or in part, because the allegedly disparaging statements were fair comment, were made to compete for future business or to protect business interests, or were made in reply or self-defense.

WHEREFORE. Defendants DIRECTV Enterprises, Inc., DIRECTV, Inc., DIRECTV Merchandising, Inc., DIRECTV Operations, Inc. and Hughes Electronics Corporation (incorrectly identified as Hughes Network Systems) request that Plaintiffs' Complaint be dismissed with prejudice, that Plaintiffs recover nothing on their claims, and that Defendants be awarded their costs and expenses to defend this action, including reasonable attorneys' fees, and such other relief as is fair and just.

### **COUNTERCLAIM**

Counterclaimants DIRECTV, Inc. and Hughes Electronics Corporation ("Hughes") allege the following Counterclaim against Counterdefendants EchoStar Communications Corporation, EchoStar Satellite Corporation, and EchoStar Technologies, Inc. (collectively "EchoStar"):

#### **I. NATURE OF THE ACTION**

1. DIRECTV, Inc. and Hughes allege claims based on four separate wrongful business practices of EchoStar. First, EchoStar has wrongfully interfered with DIRECTV, Inc.'s contractual relationship with Kelly Broadcasting Systems ("KBS"). In October 1999, DIRECTV, Inc. entered into a contract to acquire programming and services from KBS. After working together for months, however, DIRECTV, Inc. was recently told by KBS that EchoStar and KBS had entered into a contract under which EchoStar and KBS were to merge. Such a merger between KBS and one of DIRECTV, Inc.'s competitors constitutes breach by KBS of the DIRECTV, Inc./KBS contract. EchoStar's efforts to induce KBS to breach its contract with DIRECTV, Inc. were unlawful and have injured DIRECTV, Inc.

2. Second, for the past two years, EchoStar falsely advertised to consumers that it

had the right to offer network programming. In fact, EchoStar had no right to sell copyrighted network programming to many of its subscribers during this time period. Its sales of distant and local network programming violated the copyright laws. As a result, EchoStar misled subscribers into believing they were lawfully entitled to receive the copyrighted programming when in fact they did not qualify. DIRECTV, Inc. suffered significant competitive injury from EchoStar's false advertising and unfair competition.

3. Third, EchoStar has engaged in a pattern of unfair and unlawful acts in an attempt to convert Primestar satellite television subscribers to EchoStar service. Primestar is owned by Hughes. EchoStar has misused and infringed the registered PRIMESTAR® marks in its advertising and marketing, has conspired with its dealers to create misleading advertising using the Primestar marks, and has encouraged its dealers to engage in misleading and fraudulent practices to trick customers into switching from Primestar to EchoStar. As a result of the consumer confusion caused by EchoStar, viewers who would have stayed with Primestar or who would have subscribed to DIRECTV, Inc. have been misled into signing up with EchoStar instead.

4. Fourth, EchoStar's marketing of National Football League ("NFL") games on DISH Network has been misleading. EchoStar has misleadingly advertised that an extensive schedule of NFL games were available on DISH Network; however, the claimed number of games was available only to the limited number of subscribers who qualified for and paid extra to receive two packages of distant network signals under the Satellite Home Viewer Act ("SHVA"). Adding to consumer deception was EchoStar's marketing campaign, which touted that EchoStar was "Your Ticket to the NFL." In fact, EchoStar's use of the NFL trademark was unlawful and unauthorized by the NFL. This slogan and EchoStar's marketing campaign created

the likelihood that consumers would believe the EchoStar NFL offering was the same as, or was affiliated with, DIRECTV, Inc.'s "NFL Sunday Ticket," a program package offered with the approval and authorization of the NFL. This has harmed DIRECTV, Inc. through loss of subscribers, revenue, and goodwill.

## II. PARTIES

5. DIRECTV, Inc. is a California corporation with its principal place of business at 2230 E. Imperial Highway, El Segundo, California 90245.

6. Hughes Electronics Corporation is a Delaware Corporation with its principal place of business in El Segundo, California.

7. Upon information and belief, EchoStar Communications Corporation is a Nevada corporation with its principal place of business at 5701 South Santa Fe, Littleton, Colorado 80120.

8. Upon information and belief, EchoStar Satellite Corporation is a Colorado corporation with its principal place of business at 5701 South Santa Fe, Littleton, Colorado 80120.

9. Upon information and belief, EchoStar Technologies Corporation is a Texas corporation with its principal place of business at 5701 South Santa Fe, Littleton, Colorado 80120.

## III. JURISDICTION AND VENUE

10. DIRECTV, Inc. and Hughes raise the following counterclaims pursuant to Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) (false description and designation of origin); the Colorado Consumer Protection Act, Colo. Rev. Stat. §§ 6-1-101 et seq.; the California Business and Professions Code §§ 17200 and 17500 et seq.; the common law of unfair competition; and

Section 32 of the Lanham Act, 15 U.S.C. § 1114 (trademark infringement).

11. DIRECTV, Inc. and Hughes, on the one hand, and EchoStar, on the other hand, are residents of different states, and the amount in controversy exceeds \$75,000, including interest and costs.

12. This Court has jurisdiction of these counterclaims pursuant to 28 U.S.C. §§ 1331, 1332, 1338, and 1367.

13. EchoStar has its principal place of business in Littleton, Colorado.

14. EchoStar has filed a complaint against DIRECTV, Inc., Hughes and others in this District.

15. EchoStar is licensed to do business, transact business, and/or is found in this District, and a substantial part of the acts or omissions giving rise to the counterclaims herein occurred in this District. EchoStar's acts have caused harm to DIRECTV, Inc., Hughes and consumers in this District.

16. This Court has personal jurisdiction over EchoStar.

17. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(b).

#### **IV. ECHOSTAR'S UNLAWFUL BUSINESS PRACTICES**

##### **A. EchoStar's Tortious Interference with DIRECTV, Inc.'s Contract with Kelly Broadcasting Systems.**

18. Kelly Broadcasting Systems, Inc. ("KBS") is a provider of ethnic broadcast programming, such as Greek, Asian/Indian and Brazilian programming, to cable and satellite operators. KBS is owned by Michael Kelly, who serves as chief executive officer.

19. In late summer 1999, DIRECTV, Inc. and KBS – led by Michael Kelly – entered into contract negotiations. DIRECTV, Inc. and KBS finalized and executed their agreement, effective October 14, 1999 ("October 14 Agreement"). Pursuant to the October 14 Agreement,

KBS agreed to give DIRECTV, Inc. access to Asian/Indian, Russian, Arabic, Italian, Korean, Greek, and Chinese channels, and KBS agreed to serve as a DIRECTV, Inc. sales agent. The parties also agreed to finalize a warrant purchase agreement, which would give DIRECTV, Inc. an ownership interest in KBS. The essential terms and conditions of the Warrant Purchase Agreement were agreed to in writing by DIRECTV, Inc. and KBS, and are set forth in an attachment to the executed October 14 Agreement.

20. The October 14 Agreement was non-assignable unless the assigning party obtained written consent from the other party, or on the occurrence of certain other conditions not relevant here. The October 14 Agreement expressly prohibited assignment of KBS's rights and obligations to a competitor of DIRECTV, Inc. EchoStar is such a competitor.

21. Information provided to KBS by DIRECTV, Inc. under the October 14 Agreement was subject to strict confidentiality provisions. KBS agreed not to reveal DIRECTV, Inc.'s confidential information. KBS obtained confidential information from DIRECTV, Inc. under the October 14 Agreement.

22. After DIRECTV, Inc. and KBS executed the October 14 Agreement, DIRECTV, Inc. issued a press release announcing that it had entered into a multiyear contract with KBS, under which DIRECTV, Inc. stated that it would distribute KBS programming. Michael Kelly was also publicly quoted concerning the Agreement: "We are excited to partner with DIRECTV, Inc. to bring a diverse lineup of quality ethnic programming to consumers nationwide." The October 14 Agreement was widely reported in the trade publications.

23. After completing the October 14 Agreement, DIRECTV, Inc. and KBS continued to work together and to execute attachments and exhibits as provided for in the October 14 Agreement.

24. Upon information and belief, EchoStar learned of the DIRECTV, Inc./KBS deal when it was publicly announced. Thereafter, EchoStar engaged in an intentional course of conduct to improperly interfere with the October 14 Agreement.

25. In early March 2000, without any prior notice, Michael Kelly informed DIRECTV, Inc. that KBS had signed an agreement to merge with EchoStar.

26. The agreement to sell KBS to EchoStar constituted a material breach of KBS's obligations under the October 14 Agreement, including but not limited to the non-assignment, cooperation, best efforts and confidentiality provisions of the October 14 Agreement. Consummation of the merger would constitute further material breach by KBS.

27. Upon information and belief, EchoStar's actions to induce KBS to violate its agreement with DIRECTV, Inc. were improper, and were taken with knowledge of the October 14 Agreement. EchoStar intentionally interfered with KBS's performance under the October 14 Agreement in order to injure DIRECTV, Inc. Had EchoStar not improperly induced KBS to breach the October 14 Agreement, KBS would have performed its obligations thereunder.

28. As a result of EchoStar's tortious conduct, DIRECTV, Inc. has suffered (and will suffer) damages, including irreparable injury.

**B. EchoStar's False Advertising and Unfair Competition Concerning Local and Distant Network Programming.**

29. In January 1998, EchoStar announced that it was launching a new local network programming service to its subscribers in twenty of the top U.S. television markets. Subscribers in these markets would be able to receive their local network programming through EchoStar's DISH Network satellite television service. EchoStar CEO Charlie Ergen stated, "When customers go into a store interested in a satellite television system, eight out of ten of those

people walk out of the store without making a purchase when they find out they cannot get their local channels. . . . Only EchoStar and DISH Network can provide that guarantee.”

30. Because the programming carried on the local channels is copyrighted, EchoStar needed a license in order to lawfully transmit the local channels to subscribers. For this purpose, EchoStar relied on the compulsory license provisions of the SHVA. 17 U.S.C. §§ 119 *et seq.* The SHVA allows a satellite carrier to transmit copyrighted programming without the permission of the copyright holder only to “unserved households,” a restriction known as the “white area restriction.” At the time EchoStar launched its local channel plan, the statute defined unserved households in part as those “who cannot receive through use of a conventional outdoor rooftop antenna an over-the-air signal of grade B intensity (as defined by the Federal Communications Commission) of a primary network station affiliated” with the relevant network, and who also had not subscribed to cable within the last 90 days. 17 U.S.C. § 119(d)(10)(a). Although the SHVA was modified in November 1999 to delete the “no cable” requirement, Congress retained the same less-than-grade B signal requirement.

31. In the months following its January 1998 announcement, EchoStar began local service in numerous large television markets. By May 1998, EchoStar was providing local network service to 13 television markets. EchoStar accompanied its local network service with a marketing campaign designed to inform consumers about the new service and to compete against DIRECTV, Inc. This marketing included a series of press releases (posted on the company’s Internet web site), wherein it claimed to be “the only direct broadcast satellite company to offer local channels.” EchoStar’s local channel advertisements falsely implied that EchoStar had a legal right to transmit the local channels to subscribers in “served” households. EchoStar failed to disclose that it lacked permission of the copyright holders or any other right to transmit the

local programming to such subscribers.

32. At the same time that it was inaugurating its local channel service, EchoStar also offered two packages of distant network signals, one from cities on the East Coast and the other from cities on the West Coast. These signals were provided to EchoStar pursuant to a contract with PrimeTime 24 Joint Venture (“PrimeTime 24”), for whom EchoStar acted as a distributor.

33. In order to transmit these copyrighted distant network signals to subscribers, EchoStar also relied on the SHVA’s compulsory license. Only subscribers located in unserved households were eligible to receive the distant network signals.

34. PrimeTime 24 provided EchoStar with a qualification methodology to determine whether a subscriber was in an “unserved household.” This methodology was based on asking subscribers three questions: (1) would the signals be viewed in their home, (2) did the household receive an acceptable quality picture using a conventional rooftop antenna, and (3) did the household have cable within the past 90 days. Subscribers who wanted the service for residential use and who answered in the negative to questions two and three were deemed eligible under the SHVA to receive the network programming.

35. In 1996, CBS Broadcasting, Inc., Fox, Inc. and several affiliates brought suit against PrimeTime 24 in federal court in Miami, Florida, alleging that PrimeTime 24's qualification methodology – the same methodology used by its distributor EchoStar – was inadequate under the SHVA and that their copyrights in the network programming had been infringed (the “Miami Action”). CBS and Fox sought a preliminary and permanent injunction against PrimeTime 24's use of the three-question qualification methodology nationwide and to require termination of service to existing ineligible subscribers.

36. ABC, Inc. also brought suit against PrimeTime 24 in the Middle District of North

Carolina. seeking similar injunctive relief from the same conduct. but limited to the Raleigh-Durham television market area.

37. In May 1998, the Miami Court indicated that it was going to grant the requested preliminary injunction against PrimeTime 24. After reviewing the legislative history behind the SHVA, related federal regulations, and the statute itself, the Miami Court construed the SHVA against PrimeTime 24. It rejected PrimeTime 24's three-question SHVA qualification methodology (described above in Paragraph 34). The Miami Court ruled that PrimeTime 24 and its distributors could presumptively satisfy the SHVA by using a signal propagation model to predict signal strength at individual households known as the Individual Location Longley-Rice methodology ("ILLR"). The Miami Court also prescribed a methodology for signal strength testing at individual households which also would satisfy the SHVA.

38. Under Fed. R. Civ. P. 65, distributors such as EchoStar that were "acting in concert" with PrimeTime 24 were also bound by the ruling. Within a few weeks of the Miami Court's issuance of the preliminary injunction in July 1998, EchoStar terminated its relationship with PrimeTime 24 and ceased being its distributor.

39. After a trial on the merits in August 1998, the Miami Court made permanent the requirements of the preliminary injunction described above. The North Carolina Court ruled against PrimeTime 24 on summary judgment and imposed a similar injunction, a decision thereafter affirmed by the Fourth Circuit Court of Appeals.

40. DIRECTV, Inc. altered its qualification methodology in July 1998 to conform to the Miami Court's injunction.

41. EchoStar, however, refused to conform its qualification methodology to the construction given the SHVA by the Miami and North Carolina federal courts. It did not adopt

any form of the ILLR. nor did it implement signal strength testing at individual households. Instead, EchoStar implemented a different qualification methodology.

42. EchoStar's practice uses different parameters and methodology than the ILLR approved by the Miami Court and codified in the current version of the SHVA.

43. EchoStar has not adequately determined whether any particular household actually qualifies as "unserved" by receiving less than a Grade B signal. In fact, EchoStar has significantly overestimated the number of qualified subscribers, allowing it to sign up thousands of ineligible subscribers. Upon information and belief, EchoStar has further compromised a flawed ZIP code-based methodology by entering inaccurate ZIP codes rather than the true ZIP codes of its subscribers' homes. As a result of intentionally entering the wrong ZIP codes, even more ineligible subscribers have been signed up for network services.

44. EchoStar admitted in a recent report to its shareholders that if it were compelled to conform its SHVA qualification methodology to that prescribed in the Miami Action and used by DIRECTV, Inc. (and now codified by the Satellite Home Viewer Improvement Act), it would have to terminate network service to a significant number of its subscribers.

45. Not only has EchoStar used its inadequate methodology to determine the eligibility of new subscribers to receive distant network programming, but it has failed to take steps to ensure that the subscribers to whom it was transmitting network programming as of July 1998 – subscribers who had been qualified under the methodology that the Miami and North Carolina courts found to be wholly inadequate under the SHVA – are in fact eligible. Upon information and belief, EchoStar has not requalified any of these pre-July 1998 subscribers, yet it continues to illegally provide them network programming.

46. The less restrictive and legally inadequate qualification methodology used by

EchoStar has given it an unfair competitive advantage against DIRECTV, Inc., taking subscribers from DIRECTV, Inc. and signing up new subscribers with the lure of offering network programming, when in fact these subscribers do not qualify under the SHVA to receive it.

47. Throughout the period that it has been using the invalid qualification methodology, EchoStar has advertised the fact that it offered local and distant network programming, without informing potential and current subscribers that the method it was using to determine their eligibility was totally inadequate under the law. EchoStar's advertising implied to consumers that it had a legal right to transmit the copyrighted network programming and that they had a legal right to receive it. Advertisements omitted the fact that there were legal restrictions on eligibility to receive network programming, or inadequately described the restrictions, and none disclosed that EchoStar did not have a legal right to transmit the programming. In fact, EchoStar had no such right for the majority of the subscribers it signed up for the service. Thus, EchoStar's advertising deceived consumers into believing, erroneously, that EchoStar was legally permitted to transmit the programming.

48. One such marketing campaign was launched on EchoStar's Internet web site. Potential and current subscribers could go to EchoStar's web site, enter their address and ZIP code, and they would be told whether they qualified to receive network programming. Many were told that they did so qualify. This was false and misleading because EchoStar's methodology was legally inadequate under the SHVA, and a subscriber's ZIP code is an insufficient basis to determine eligibility for the vast majority of households.

49. EchoStar also carried out an extensive campaign in the local markets where it offered local channels, including print and television advertisements, capitalizing on its improper

practices. In one such television ad, run in Phoenix, Arizona in August 1999, EchoStar in large type announced it offered "PHOENIX LOCAL CHANNELS." with a voice-over stating "Get Phoenix local channels on DISH Network without a rooftop antenna." Similarly, in a full-color advertisement, EchoStar compared features of DISH Network with DIRECTV, Inc. and cable. One line of the advertisement compares "Local Broadcast Networks From Satellite" available on DISH, DIRECTV, Inc. and cable. EchoStar claimed to offer 60 such "local" broadcasts, while DIRECTV, Inc. was shown as offering only 8. EchoStar could do this only on the basis of improper practices. Upon information and belief, EchoStar conducted similar television and print advertising in the other markets where it offered local channels.

50. The actual and implied misrepresentations and misleading statements of fact and law were material. Upon information and belief, EchoStar's advertising and course of conduct significantly impacted the public as actual or potential consumers of its services. Consumers were likely to be, and in fact were, confused and misled concerning the nature, characteristics and qualities of EchoStar's network programming service. EchoStar's advertising was likely to confuse, and actually did confuse, consumers into believing that EchoStar had the right to transmit the copyrighted network programming. The consumers residing in served households who signed up for EchoStar's network services became unwitting participants in EchoStar's widespread pattern of copyright infringement.

51. Many of these consumers would not have signed up with EchoStar if EchoStar had not misled and confused them as to their eligibility to receive network programming under the SHVA. Some of these consumers would have signed up with DIRECTV, Inc. instead. As a result of EchoStar's false advertising and unfair competition with respect to local and distant network programming DIRECTV, Inc. has suffered (and will suffer) damages, including

irreparable injury.

**C. EchoStar's Illegal Practices with Respect to Conversion of Primestar Subscribers.**

52. Primestar is a provider of multi-channel video programming to subscribers via satellite, including both the programming and the hardware necessary to receive programming.

53. In 1991, Primestar lawfully registered the service mark PRIMESTAR<sup>®</sup> with the United States Patent and Trademark Office, U.S. Registration No. 1,663,679. A copy of this registration is attached hereto as Exhibit A. Primestar has filed an Affidavit of Continued Use which was accepted by the U.S. Patent and Trademark Office in 1997. Primestar's registration of the PRIMESTAR<sup>®</sup> mark therefore continues in full force and effect.

54. In 1999, Hughes acquired the PRIMESTAR<sup>®</sup> name and mark and associated goodwill. Hughes then granted Primestar, Inc. a license to use the PRIMESTAR<sup>®</sup> name and mark. Hughes, the parent of Primestar, Inc., is the owner of all rights in the PRIMESTAR<sup>®</sup> name and mark and associated goodwill.

55. Since November 1990, Primestar has prominently used the PRIMESTAR<sup>®</sup> name and mark in connection with its services and related goods. Primestar has spent millions of dollars since 1990 displaying, promoting and advertising the PRIMESTAR<sup>®</sup> name and mark. Because the PRIMESTAR<sup>®</sup> mark has been in continuous use for five consecutive years subsequent to the date of registration and is still in use in commerce, the PRIMESTAR<sup>®</sup> registration is incontestable under 15 U.S.C. § 1065.

56. In addition to its PRIMESTAR<sup>®</sup> mark, as part of its digital TV entertainment services, Primestar has used, displayed, promoted and advertised a family of marks that begin with the word "PRIME." This family of marks includes PRIMEValue<sup>®</sup>, PRIMECinema<sup>®</sup>, PRIMEAudio<sup>®</sup>, and PRIMEEntertainment<sup>®</sup>. These marks are all owned by Hughes and licensed

back to Primestar, Inc.

57. The PRIMESTAR® name and mark have gained widespread recognition as an indicator of a source of high-quality service in the multi-channel video programming distribution industry. Primestar's name and service mark are distinctive, well-known and famous based in part on Primestar's high visibility and superior reputation in the multi-channel video programming distribution industry.

58. Based on the first and exclusive use of the PRIMESTAR® mark in advertising and on services and related goods, Primestar created strong common law rights in the PRIMESTAR® mark. These rights, with associated goodwill, have been assigned to Hughes, and the rights to the name and mark have been licensed back to Primestar, Inc.

59. In 1999, EchoStar began a national advertising and marketing campaign entitled the "Primestar Promotion." EchoStar has made decisions concerning the content, type, placement and approval of such advertising from its headquarters and other facilities in Colorado. EchoStar's "Primestar Promotion" advertising campaign made multiple uses of, and traded on, the goodwill associated with the PRIMESTAR® name and mark. Rather than being a promotion of Primestar programming and hardware, however, the "Primestar Promotion" was actually an EchoStar campaign specifically targeted at then-current Primestar customers with the likelihood to mislead, confuse and/or deceive Primestar customers into believing that the goods and services offered therein were endorsed, sponsored or otherwise affiliated with Primestar and its products and services. Specifically, the "Primestar Promotion" offered by EchoStar was likely to mislead, confuse and/or deceive Primestar customers into unwittingly switching from Primestar to DISH Network programming and hardware in the mistaken belief that there was some form of affiliation, sponsorship or approval of DISH Network by DIRECTV, Inc. and/or

Hughes.

60. The “PrimeStar Promotion” appeared in several different media. EchoStar operates web sites on the Internet. On certain of those sites, as part of its “Primestar Promotion” program, EchoStar used the PRIMESTAR<sup>®</sup> name and mark in a manner likely to confuse, mislead and deceive consumers into believing that the services and goods offered therein were endorsed by or otherwise affiliated with Hughes and its subsidiary Primestar. An EchoStar site further referred to a “PRIME UPGRADE” that was offered to Primestar customers. Use of this phrase by EchoStar was likely to confuse consumers because of its similarity with Hughes’ family of “PRIME” marks.

61. Also as part of its “Primestar Promotion,” EchoStar had a hyperlink stating “DO YOU HAVE Primestar?” on one of its web sites. Customers using this hyperlink on the EchoStar web site were transferred to a new and different web page where they were greeted with an advertisement stating, “DEAR **Primestar** CUSTOMER: TAKE ADVANTAGE OF PRIME UPGRADE SPECIAL NOW!” The same language was used in print advertisements and promotional materials that were designed, sponsored and funded by EchoStar and disseminated by its authorized dealers nationwide. Identical language also was used in co-op advertising slicks located on EchoStar’s dealer web site. These ads were funded by EchoStar for use by its retail dealers. These aspects of the EchoStar “Primestar Promotion” were intended to reach current Primestar customers and were likely to mislead, confuse and/or deceive Primestar customers into unwittingly switching from Primestar to DISH Network programming and hardware in the mistaken belief that they were simply upgrading their Primestar service.

62. EchoStar’s use of the word “PRIME” and the phrase “PRIME UPGRADE” in its “Primestar Promotion” shows further EchoStar’s intent to create confusion and trade on goodwill

created by Primestar. EchoStar's use of the word "PRIME" and the phrase "PRIME UPGRADE" in its "Primestar Promotion" followed the same style of marks used by Primestar in the "PRIME" family of marks and was designed and likely to confuse, mislead and or deceive customers into believing that the services and goods offered by EchoStar were endorsed by, sponsored by, or otherwise affiliated with Primestar or Hughes.

63. EchoStar did not need to use the PRIMESTAR® name or mark to advertise or promote its goods or services. Even if there were any legitimate reason for EchoStar to use the PRIMESTAR® name or mark, EchoStar made far greater use of the PRIMESTAR® name and mark in its "Primestar Promotion" than was necessary to identify any product or service of EchoStar.

64. In addition, as part of EchoStar's misleading and unauthorized "Primestar Promotion," EchoStar encouraged its dealers to engage in misleading and even fraudulent practices as part of EchoStar's efforts to induce Primestar customers to switch to EchoStar's DISH Network system. In an EchoStar promotional broadcast, EchoStar corporate officers Charlie Ergen and Jim DeFranco encouraged EchoStar dealers to visit known Primestar customers claiming that they were there to "upgrade" their Primestar systems when, in fact, they were there to mislead, confuse and/or deceive Primestar customers into unwittingly switching from Primestar to DISH Network programming and hardware in the mistaken belief that they were simply upgrading their Primestar service.

65. In the promotional broadcast, the EchoStar officers further recommended to EchoStar dealers that, in order to secure their sales and protect their commissions, they should remove or completely disassemble the Primestar satellite equipment so as to make reinstallation of the Primestar system virtually impossible if the Primestar customers learned that they had

been victims of EchoStar's misleading and confusing "Primestar Promotion." The EchoStar officers even went so far as to suggest that the EchoStar dealers should "lose" disassembled Primestar parts or "leave them there" but make sure "they're harder to find." Upon information and belief, EchoStar dealers have, in fact, engaged in these and other deceptive and unfair practices based on the instructions and encouragement of EchoStar.

66. Upon information and belief, EchoStar intentionally used the PRIMESTAR<sup>®</sup> name and mark for its "Primestar Promotion," in order to (i) trade on the goodwill associated with the PRIMESTAR<sup>®</sup> name and mark; (ii) cause consumers to associate EchoStar and DISH Network with Primestar, or to believe that EchoStar's DISH Network service is affiliated, sponsored, approved or authorized by Primestar and Hughes; and (iii) wrongly benefit from the widespread name recognition, fame and goodwill associated with the PRIMESTAR<sup>®</sup> name and mark.

67. EchoStar's unauthorized use of the PRIMESTAR<sup>®</sup> name and mark in its advertising has misled, confused and deceived Primestar customers into switching from Primestar to DISH Network programming and hardware. In addition, the unfair business practices by EchoStar dealers at the homes of Primestar customers, engaged in at the direction of and with the encouragement of EchoStar, has resulted in confusion and deceit of Primestar customers and damage to Primestar property.

68. DIRECTV, Inc. is likely to be and has been damaged by the foregoing acts of false and misleading advertising, trademark infringement and unfair competition. Primestar subscribers have been confused and misled and have switched to EchoStar's DISH Network as a direct result of the foregoing acts. Some of these subscribers would have switched to DIRECTV, Inc. (or remained with its affiliate) rather than switching to EchoStar, had they not

been deceived by EchoStar's tactics, causing loss of subscribers and loss of revenue to DIRECTV, Inc.

69. Hughes has been damaged by EchoStar's trademark infringement.

**D. EchoStar's False and Misleading Advertisements Concerning the NFL.**

70. Beginning in 1996, EchoStar repeatedly promoted its DISH Network satellite television service by advertising (1) that extensive coverage of NFL football games is available through DISH Network; (2) that DISH is the viewers' "Ticket to the NFL"; and (3) that up to 147 games are available through DISH. EchoStar has made decisions concerning the content, type, placement and approval of such advertising from its headquarters and other facilities in Colorado.

71. EchoStar's NFL campaign appeared in various forms in different media. These ads first appeared at the beginning of the football season in 1996. EchoStar conducted a similar campaign in 1997 and 1998.

72. DIRECTV, Inc. negotiated and paid for the right to use the NFL trademark to promote DIRECTV, Inc.'s service. The trademark "NFL" is registered to NFL Properties, Inc., from whom DIRECTV, Inc. licensed rights to use the NFL mark. In contrast, EchoStar did not pay for and has no right to use the NFL trademark to advertise or promote its satellite television service.

73. Despite objection from the NFL, EchoStar engaged in unauthorized use of the NFL trademark over at least a three-year period. The use of the trademark was likely to cause, and did cause, consumer confusion as to the origin and sponsorship of EchoStar's television service by misleading consumers to believe that EchoStar's service had been endorsed or approved by the NFL and/or DIRECTV, Inc.

74. Since 1994, DIRECTV, Inc. has used the mark "NFL Sunday Ticket" to promote its package of over 200 NFL games. DIRECTV, Inc. has spent substantial sums promoting the NFL Sunday Ticket package. DIRECTV, Inc. used the mark "NFL Sunday Ticket" to promote DIRECTV, Inc. in interstate commerce approximately two years before EchoStar made public use of the slogan "Your Ticket to the NFL." The distinctive "NFL Sunday Ticket" mark has gained widespread recognition and is well-known and famous.

75. EchoStar's use of the slogan "Your Ticket to the NFL" was likely to cause, and did cause, consumer confusion with respect to DIRECTV, Inc.'s "NFL Sunday Ticket" package of NFL games. Consumers were likely to be misled, confused or deceived into the belief that EchoStar's NFL offerings were the same as DIRECTV, Inc.'s and were affiliated with or approved by DIRECTV, Inc. and/or the NFL.

76. EchoStar's advertisements were also false, misleading and deceptive with respect to the description of the number of NFL games available on DISH Network. In large print, EchoStar advertised that up to 147 games are available. Yet, these advertisements failed to disclose that only a small portion of EchoStar's potential or current subscribers could receive all of the claimed 147 games – those who qualified and paid for two distant network signal packages. Subscribers who did not qualify or wish to pay for the distant network signal packages were unable to receive a significant number of the claimed 147 games.

77. The foregoing practices were also unlawful, unfair and fraudulent acts of unfair competition.

78. As a result of EchoStar's false, misleading and deceptive advertising, unauthorized use of the NFL and NFL Sunday Ticket marks, and acts of unfair competition, consumers were likely to be and have been misled, deceived and confused. As a result of the

deceptive advertisements, DIRECTV, Inc. has been damaged by loss of subscribers, revenue and goodwill.

## **V. CAUSES OF ACTION**

### **COUNT I**

#### **Tortious Interference with Contract**

##### **(Brought by DIRECTV, Inc.)**

79. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count I.

80. DIRECTV, Inc. and Kelly Broadcasting System entered into an Agreement effective October 14, 1999.

81. Upon information and belief, EchoStar learned of the existence and general terms of the October 14 Agreement.

82. Upon information and belief, EchoStar intentionally, improperly and maliciously caused KBS to repudiate and breach the October 14 Agreement. EchoStar used wrongful means to accomplish its goal of disrupting the business relationship between KBS and DIRECTV, Inc.

83. As a direct and proximate result of EchoStar's actions, DIRECTV, Inc. has suffered damages and has been irreparably harmed. DIRECTV, Inc. is entitled to compensatory and punitive damages from EchoStar, in amounts to be demanded and proven at trial.

## COUNT II

### **Unfair Competition in Violation of Section Forty-Three of the Lanham Act and Demand for Accounting of Illegal Profits**

**(Brought by DIRECTV, Inc.)**

84. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count II.

85. EchoStar has made, in commerce, material false and misleading representations of fact in connection with the commercial advertising or promotion of its product, which have been and are likely to cause confusion or mistake as to the characteristics, origin and approval of its products and services.

86. These misrepresentations include, but are not limited to, all of those representations described above, including:

- a. that EchoStar had a legal right to transmit local programming to subscribers in served households under the SHVA;
- b. that EchoStar had a legal right to transmit distant network programming to subscribers in served households under the SHVA;
- c. that EchoStar was using an adequate and lawful method to determine eligibility to receive network programming under the SHVA;
- d. that the "Primestar Promotion" and other practices related to converting Primestar subscribers to EchoStar were affiliated with, approved by, or originated with Hughes or its subsidiary Primestar;
- e. that the NFL approved or sponsored EchoStar's DISH network;
- f. that "Your Ticket to the NFL" indicated approval or affiliation of DISH Network by the NFL and/or DIRECTV, Inc., or that EchoStar's service originated with

DIRECTV, Inc. and/or the NFL; and

g. that up to 147 NFL games were available on DISH Network to all subscribers.

87. DIRECTV, Inc. has suffered damage (including irreparable injury) to its business and/or property as a direct and proximate result of EchoStar's unfair competition in violation of Section 43 of the Lanham Act, 15 U.S.C. § 1125(a), in amounts to be demanded and proven at trial.

### **COUNT III**

#### **Deceptive Trade Practices in Violation of the Colorado Consumer Protection Act**

**(Brought by DIRECTV, Inc.)**

88. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count III.

89. The acts and practices described herein constitute violations of the Colorado Consumer Protection Act, including but not limited to, Colo. Rev. Stat. § 6-1-105(1)(a, b, c, e, i, u, z).

90. All of the above unfair and deceptive practices occurred in the course of EchoStar's business, and they have all significantly impacted the public as actual or potential customers of EchoStar's services.

91. EchoStar's conduct as alleged above has been in bad faith, within the meaning of the Consumer Protection Act.

92. DIRECTV, Inc. has suffered damage (including irreparable injury) in the course of its business, in part in Colorado, as a direct and proximate result of EchoStar's deceptive trade practices in violation of Colo. Rev. Stat. § 6-1-105, in amounts to be demanded and proven at trial.

COUNT IV

**Common Law Unfair Competition**

**(Brought by DIRECTV, Inc.)**

93. DIRECTV incorporates the allegations of Counterclaim paragraphs 1 through 78 as if fully set forth in this Count IV.

94. As described above, EchoStar advertised the availability of local and distant network programming and sold such programming to its subscribers in violation of federal law.

95. As described above, EchoStar has misused and infringed the PRIMESTAR<sup>®</sup> mark and engaged in an unfair, deceptive and illegal course of conduct intended to convert Primestar customers to EchoStar's DISH Network.

96. As described above, EchoStar has misused the trademark NFL and has created consumer confusion through its use of the slogan "Your Ticket to the NFL."

97. EchoStar's actions are illegal and unfair and were intended to obtain an unfair competitive advantage and to adversely affect DIRECTV, Inc.'s ability to compete.

98. Because of these unfair and illegal practices, certain prospective DIRECTV, Inc. customers have chosen to purchase EchoStar's services instead, and certain existing DIRECTV, Inc. customers have switched to DISH Network.

99. As a direct and proximate result of EchoStar's unfair and illegal practices, DIRECTV, Inc. has suffered damage (including irreparable injury) in its trade and business in markets throughout the United States, in amounts to be demanded and proven at trial.