



2. Denies the allegations in Paragraph 2 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

3. Denies the allegations in Paragraph 3 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4 of the Amended Complaint, except denies those allegations with respect to EchoStar.

5. Denies the allegations in Paragraph 5 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

6. Denies the allegations in Paragraph 6 of the Amended Complaint.

7. Denies the allegations in Paragraph 7 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

8. Denies the allegations in Paragraph 8 of the Amended Complaint, except admits that on or about June 20, 2007, EchoStar wrote Network a letter and respectfully refers the Court to EchoStar's June 20, 2007 letter for its contents.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 9 of the Amended Complaint, except denies those allegations with respect to EchoStar, except admits that in October 2007, EchoStar conducted an audit of Network's annual spending.

10. Denies the allegations in Paragraph 10 of the Amended Complaint, except admits that on or about November 16, 2007, EchoStar wrote a letter to Network and respectfully refers the Court to EchoStar's November 16, 2007 letter for its contents.

11. Denies the allegations in Paragraph 11 of the Amended Complaint, except admits that on or about January 5, 2008, Network wrote EchoStar a letter and respectfully refers the Court to Network's January 5, 2008 letter for its contents.

12. Denies the allegations in Paragraph 12 of the Amended Complaint, except admits that on or about January 24, 2008 EchoStar's representatives met with Network's representatives in Colorado.

13. Denies the allegations in Paragraph 13 of the Amended Complaint, except admits that on or about January 28, 2008, Network wrote a letter to EchoStar and respectfully refers the Court to Network's January 28, 2008 letter for its contents.

14. Denies the allegations in Paragraph 14 of the Amended Complaint, except admits that on or about January 30, 2008, EchoStar wrote Network a letter, in which the quoted passage appeared, and respectfully refers the Court to EchoStar's January 30, 2008 letter for its contents.

15. Denies the allegations in Paragraph 15 of the Amended Complaint, except admits that on or about February 1, 2008, EchoStar began to offer certain high definition channels through "dishHD Essential" and that the fifteen VOOM channels were distributed through "dishHD Ultimate."

16. Denies the allegations in Paragraph 16 of the Amended Complaint, except admits that on or about February 4, 2008, Network wrote EchoStar a letter and respectfully refers the Court to Network's February 4, 2008 letter for its contents.

17. Denies the allegations in Paragraph 17 of the Amended Complaint, except admits that on or about May 13, 2008, Network wrote EchoStar a letter and respectfully refers the Court to Network's May 13, 2008 letter for its contents. EchoStar also admits that as of May 14, 2008, EchoStar no longer carried the VOOM channels.

18. Denies the allegations in Paragraph 18 of the Amended Complaint, except admits that on or about November 16, 2007 and January 30, 2008, EchoStar wrote Network and respectfully refers the Court to EchoStar's November 16, 2007 and January 30, 2008 letters for their contents.

19. Denies the allegations in Paragraph 19 of the Amended Complaint.

20. Denies the allegations in Paragraph 20 of the Amended Complaint.

21. Denies the allegations in Paragraph 21 of the Amended Complaint, except admits that on or about June 20, 2007, EchoStar wrote Network a letter and respectfully refers the Court to EchoStar's June 20, 2007 letter for its contents

22. Denies the allegations in Paragraph 22 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

23. Denies the allegations in Paragraph 23 of the Amended Complaint, except admits that the VOOM channels were not distributed as part of "dishHD Essential."

24. Denies the allegations in Paragraph 24 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

25. Denies the allegations in Paragraph 25 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

### **THE PARTIES**

26. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 26 of the Amended Complaint.

27. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 27 of the Amended Complaint, except admits that, upon information and belief, Rainbow Media owns, in whole or in part, the Independent Film Channel, AMC and WEtv.

28. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 28 of the Amended Complaint, except admits that Rainbow LLC Member and EchoStar LLC Member are parties to a LLC Agreement and respectfully refers the Court to the LLC Agreement for its contents, and further admits that EchoStar LLC Member is a Colorado corporation.

29. Admits the allegations in Paragraph 29 of the Amended Complaint.

### **JURISDICTION AND VENUE**

30. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 30 of the Amended Complaint, except admits that the Court has jurisdiction over this matter.

31. Admits the allegations in Paragraph 31 of the Amended Complaint.

32. Admits the allegations in Paragraph 32 of the Amended Complaint.

## **BACKGROUND**

33. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 33 of the Amended Complaint, except admits that for a number of years, EchoStar and DirecTV have been the two major domestic providers of Direct Broadcast Satellite (“DBS”) television entertainment services.

34. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 34 of the Amended Complaint.

35. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 35 of the Amended Complaint.

36. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 36 of the Amended Complaint, except admits that Rainbow LLC Member and EchoStar LLC Member are parties to a LLC Agreement and respectfully refers the Court to the LLC Agreement for its contents. EchoStar further admits that ECC, Rainbow Media, Network and Rainbow LLC Member are parties to an Investment Agreement and respectfully refers the Court to the Investment Agreement for its contents. EchoStar further admits that it and Network are parties to an Interim Operating Agreement, dated April 28, 2005 (the “Interim Agreement”) and respectfully refers the Court to the Interim Agreement for its contents.

37. Denies the allegations in Paragraph 37 of the Amended Complaint, except admits that EchoStar and Network are parties to an Interim Agreement and respectfully refers the Court to the Interim Agreement for its contents.

38. Denies the allegations in Paragraph 38 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement

for its contents. EchoStar further admits that in or around February 2006, EchoStar launched fifteen high definition channels pursuant to the Agreement.

39. Denies the allegations in Paragraph 39 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

40. Denies the allegations in Paragraph 40 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

41. Denies the allegations in Paragraph 37 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

42. Denies the allegations in Paragraph 42 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

43. Denies the allegations in Paragraph 43 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

44. Denies the allegations in Paragraph 44 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

45. Denies the allegations in Paragraph 45 of the Amended Complaint.

46. Denies the allegations in Paragraph 46 of the Amended Complaint, except avers that before entering into the Agreement, EchoStar undertook due diligence with respect the overall transaction.

47. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 47 of the Amended Complaint.

48. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 48 of the Amended Complaint.

49. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 49 of the Amended Complaint.

50. Denies the allegations in Paragraph 50 of the Amended Complaint, except avers, upon information and belief, that prior to or during the negotiation of the Agreement and/or the LLC Agreement, there were discussions about the allocation of expenses among VOOM, Rainbow and/or Cablevision.

51. Denies the allegations in Paragraph 51 of the Amended Complaint, except avers that during the negotiation of the Agreement, EchoStar received financial information about Rainbow Media.

52. Denies the allegations in Paragraph 52 of the Amended Complaint.

53. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 53 of the Amended Complaint, except denies those allegations with respect to EchoStar.

54. Denies the allegations in Paragraph 54 of the Amended Complaint, except admits that on or about June 19, 2007 Kevin Cross of EchoStar wrote a letter to Network in which the

quoted passage appeared, and respectfully refers the Court to EchoStar's June 19, 2007 letter for its contents.

55. Denies the allegations in Paragraph 55 of the Amended Complaint, except admits that on or about June 20, 2007, Kevin Cross of EchoStar wrote a letter to Network, in which the quoted passage appeared, and respectfully refers the Court to EchoStar's June 20, 2007 letter for its contents.

56. Denies the allegations in Paragraph 56 of the Amended Complaint, and refers to the Court to EchoStar's June 19, 2007 letter and to EchoStar's June 20, 2007 letter for their contents.

57. Denies the allegations in Paragraph 57 of the Amended Complaint, except admits that EchoStar did not terminate the Agreement in June 2007.

58. Denies the allegations in Paragraph 58 of the Amended Complaint, except admits that Network and EchoStar entered into a Letter Agreement dated June 28, 2007, and respectfully refers the Court to the Letter Agreement for its contents.

59. Denies the allegations in Paragraph 59 of the Amended Complaint, except admits that on or about July 11, 2007, Network emailed EchoStar an Excel Spreadsheet entitled "VOOM HD Networks Analysis of 2006 Actual Cash Spending by Category -- DRAFT-FOR DISCUSSION PURPOSES ONLY", and respectfully refers the Court to that Spreadsheet for its contents.

60. Denies the allegations in Paragraph 60 of the Amended Complaint, except admits that in October 2007, EchoStar conducted an audit of records provided by Network purporting to reflect Network's annual spending for 2006.

61. Denies the allegations in Paragraph 61 of the Amended Complaint, except admits that EchoStar wrote Network a letter dated November 16, 2007, in which the quoted passage appeared, and respectfully refers the Court to EchoStar's November 16, 2007 letter for its contents.

62. Denies the allegations in Paragraph 62 of the Amended Complaint, except admits that EchoStar wrote Network a letter dated November 16, 2007 and respectfully refers the Court to EchoStar's November 16, 2007 letter for its contents.

63. Denies the allegations in Paragraph 63 of the Amended Complaint.

64. Denies the allegations in Paragraph 64 of the Amended Complaint, except admits that Network sent EchoStar an email on or about December 4, 2007, in which the quoted passage appeared, and respectfully refers the Court to Network's December 4, 2007 email for its contents.

65. Denies the allegations in Paragraph 65 of the Amended Complaint, except admits that on or about January 24, 2008, EchoStar's representatives met with Network's representatives in Colorado.

66. Denies the allegations in Paragraph 66 of the Amended Complaint.

67. Denies the allegations in Paragraph 67 of the Amended Complaint, except admits that EchoStar wrote Network a letter dated January 30, 2008 and respectfully refers the Court to EchoStar's January 30, 2008 letter for its contents.

68. Denies the allegations in Paragraph 68 of the Amended Complaint.

69. Denies the allegations in Paragraph 69 of the Amended Complaint, except admits that the VOOM channels were not distributed as part of "dishHD Essential."

70. Denies the allegations in Paragraph 70 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

71. Denies the allegations in Paragraph 71 of the Amended Complaint, except admits that EchoStar has notified Network of breaches of the Agreement other than breaches of Section 10 of the Agreement.

72. Denies the allegations in Paragraph 72 of the Amended Complaint, except admits that EchoStar has asserted claims based on Network's breaches of Section 4 of the Agreement.

73. Denies the allegations in Paragraph 73 of the Amended Complaint, except admits that EchoStar and Network exchanged emails on November 16, 2007 regarding compliance with Section 4 of the Agreement and respectfully refers the Court to the email correspondence for its contents.

74. Denies the allegations in Paragraph 74 of the Amended Complaint.

75. Denies the allegations in Paragraph 75 of the Amended Complaint, except admits that on or about May 13, 2008, Network wrote EchoStar a letter and respectfully refers the Court to Network's May 13, 2008 letter for its contents. EchoStar also admits that as of May 14, 2008, EchoStar no longer carried the VOOM channels.

76. Denies the allegations in Paragraph 76 of the Amended Complaint.

## COUNT I

### **(BREACH OF CONTRACT – IMPROPER SECTION 10 TERMINATION - DAMAGES)**

77. In response to the allegations in Paragraph 77 of the Amended Complaint, EchoStar repeats and realleges each and every response to Paragraphs 1 through 76 of the Amended Complaint, as if fully set forth herein.

78. Paragraph 78 of the Amended Complaint sets forth legal conclusions that EchoStar is not required to admit or deny. To the extent that a response is required, EchoStar denies the allegations in Paragraph 78 of the Amended Complaint and respectfully refers the Court to the Agreement and to the November 16, 2007 letter from Eric Sahl to Josh Sapan for its contents.

79. Denies the allegations in Paragraph 79 of the Amended Complaint.

80. Denies the allegations in Paragraph 80 of the Amended Complaint.

81. Denies the allegations in Paragraph 81 of the Amended Complaint.

82. Denies the allegations in Paragraph 82 of the Amended Complaint.

## COUNT II

### **(BREACH OF CONTRACT – SECTION 5 – RE-TIERING - DAMAGES)**

83. In response to the allegations in Paragraph 83 of the Amended Complaint, EchoStar repeats and realleges each and every response to Paragraphs 1 through 83 of the Complaint, as if fully set forth herein.

84. Paragraph 84 of the Amended Complaint sets forth legal conclusions that EchoStar is not required to admit or deny. To the extent that a response is required, EchoStar admits that it was a party to the Agreement and respectfully refers the Court to the Agreement and to the November 16, 2007 letter from Eric Sahl to Josh Sapan for their contents and otherwise denies the allegations in Paragraph 84 of the Amended Complaint.

85. Denies the allegations in Paragraph 85 of the Amended Complaint.
86. Denies the allegations in Paragraph 86 of the Amended Complaint.
87. Denies the allegation in Paragraph 87 of the Amended Complaint.
88. Denies the allegations in Paragraph 88 of the Amended Complaint.

### **COUNT III**

#### **(BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING)**

89. In response to the allegations in Paragraph 89 of the Complaint, EchoStar repeats and realleges each and every response to Paragraphs 1 through 88 of the Complaint, as if fully set forth herein.

90. Paragraph 90 of the Amended Complaint sets forth legal conclusions that EchoStar is not required to admit or deny. To the extent that a response is required, EchoStar admits that it was a party to the Agreement and respectfully refers the Court to the Agreement and to the November 16, 2007 letter from Eric Sahl to Josh Sapan for their contents and otherwise denies the allegations in Paragraph 90 of the Amended Complaint.

91. Denies the allegations in Paragraph 91 of the Amended Complaint.

92. Paragraph 92 of the Amended Complaint sets forth legal conclusions that EchoStar is not required to admit or deny. To the extent that a response is required, EchoStar denies the allegations in Paragraph 92 of the Amended Complaint.

93. Denies the allegations in Paragraph 93 of the Amended Complaint.

94. Denies the allegations in Paragraph 94 of the Amended Complaint.

## **COUNT IV**

### **(ATTORNEYS' FEES AND DISBURSEMENTS)**

95. In response to the allegations in Paragraph 95 of the Amended Complaint, EchoStar repeats and realleges each and every response to Paragraphs 1 through 94 of the Amended Complaint, as if fully set forth herein.

96. Denies the allegations in Paragraph 96 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

97. Denies the allegations in Paragraph 97 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

98. Denies the allegations in Paragraph 98 of the Amended Complaint, except admits that EchoStar was a party to the Agreement and respectfully refers the Court to the Agreement for its contents.

99. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 99 of the Amended Complaint.

100. Denies the allegations in Paragraph 100 of the Amended Complaint, except admits that the Complaint purports to assert certain rights and seek certain relief with respect to EchoStar.

### **FIRST AFFIRMATIVE DEFENSE**

101. The Amended Complaint fails, in whole or in part, to state a claim against EchoStar upon which relief may be granted.

### **SECOND AFFIRMATIVE DEFENSE**

102. Plaintiff's claims are barred based on a failure of the Agreement's essential purpose.

### **THIRD AFFIRMATIVE DEFENSE**

103. Plaintiff's claims are barred, in whole or in part, because of a lack of irreparable injury.

### **FOURTH AFFIRMATIVE DEFENSE**

104. Plaintiff's claims are barred based on unclean hands.

### **FIFTH AFFIRMATIVE DEFENSE**

105. Plaintiff's claims are barred based on Network's breach of the Agreement.

### **SIXTH AFFIRMATIVE DEFENSE**

106. EchoStar reserves the right to amend and/or supplement this Answer, including, without limitation, to assert additional defenses.

### **COUNTERCLAIMS**

Plaintiff Dish Network L.L.C. f/k/a EchoStar Satellite L.L.C. ("EchoStar"), by and through its undersigned attorneys, brings these counterclaims action against VOOM HD Holdings LLC ("Network"), and alleges as follows:

1. This is an action for breach of contract and breach of the covenant of good faith and fair dealing, as alleged herein.

### **PARTIES**

2. Plaintiff EchoStar is a Colorado limited liability company with its principal place of business located at 9601 South Meridian Boulevard, Englewood, Colorado. EchoStar is a wholly owned subsidiary of EchoStar DBS Corporation ("EDBS"), which in turn is an indirect

wholly owned subsidiary of Dish Network Corporation f/k/a EchoStar Communications Corporation (“ECC”), a publicly-traded holding company listed on the NASDAQ National Market under the symbol “DISH.” Subsidiaries of ECC and EDBS, including EchoStar, operate the DISH Network, a leading provider of Direct Broadcast Satellite (“DBS”) television entertainment services to customers across the United States.

3. On information and belief, VOOM HD Holdings LLC (“Network”) is a Delaware limited liability company with its principal place of business located at 11 Pennsylvania Plaza, New York, New York. Network is a subsidiary of Rainbow Media Holdings LLC (“Rainbow Media”), which in turn is a subsidiary of Cablevision Systems Corporation (“Cablevision”).

#### **JURISDICTION AND VENUE**

4. Jurisdiction over this action is proper under New York Civil Practice Law and Rules § 301.

5. Venue is proper under New York Civil Practice Law and Rules § 503(a), and in that Network resided in New York County when this action was commenced.

#### **BACKGROUND**

##### **A. EchoStar’s Services**

6. EchoStar is a provider of DBS television entertainment services. DBS providers use satellites to digitally beam television programming signals directly to subscribers’ homes. EchoStar’s competitors in the market for distributing multichannel, video programming include cable systems franchised by local municipalities (“Cable Systems”) and another major DBS provider – DirecTV.

7. To remain competitive in the direct-to-home television market, EchoStar must provide a desirable mix of channels at a competitive price. To succeed, EchoStar must select and offer quality channels while keeping retail prices low.

8. An important shift in the market for television services is the growing demand for quality HD television programming, not only in the United States, but all over the world. Cable Systems and DBS providers are increasingly looking for programs to meet this demand. Therefore, programmers that can provide *quality* HD television programming have substantial opportunities to distribute programming over a variety of Cable Systems and DBS systems, both domestically and internationally.

B. Network's Services

9. Upon information and belief, in 2003, Cablevision, through its subsidiaries, commissioned a satellite to enter the DBS market. To distinguish its DBS business from the other DBS providers, Cablevision developed a suite of 21 HD channels that would be distributed exclusively through its DBS service. Cablevision's DBS service failed to attract more than a minimal number of subscribers, and in April 2005, Cablevision decided to terminate the venture. Before terminating the service, however, Cablevision negotiated for ten of the proprietary HD channels to be carried by EchoStar on an interim basis pursuant to the Interim Agreement, dated April 28, 2005.

10. On or about November 17, 2005, the parties entered into the Agreement pursuant to which EchoStar agreed to distribute the Service. As of November 17, 2005, the date on which the parties entered into the Agreement, the Service was comprised of ten channels, not twenty-one channels.

11. Upon information and belief, Network has since substantially expanded delivery of the Service beyond just EchoStar's DISH Network. Network's channels are now available domestically to approximately 900,000 Cablevision HD subscribers (as of the end of third quarter 2007). Network also provides the Service through other distribution channels in over thirty-five countries around the world, including "China, South Korea, England, India, Japan, Romania, Hungary, Thailand, Australia, Sweden, Norway, Finland, Denmark and throughout the Middle East."

12. Upon information and belief, Network has previously declined to take advantage of other distribution opportunities because entering into such arrangements would require providing the same terms to EchoStar pursuant to the Agreement.

C. The Agreement

13. EchoStar and Network executed the Agreement as of November 17, 2005. Pursuant to the Agreement, EchoStar agreed to distribute the Service. To ensure that the Service met EchoStar's quality standards, Section 4 of the Agreement contains specific content requirements. In addition, Network agreed that it would spend at least \$100 million on the Service during each of the first five calendar years of the term of the Agreement and that, if it failed to do so, EchoStar would have the right to terminate the Agreement. EchoStar relied on these content requirements and on the expenditure requirement to ensure that Network would invest in and improve the quality of its previously unsuccessful programming.

14. The Agreement between EchoStar and Network is non-exclusive. Network has always had the right to license its Service to other satellite or cable providers. Nothing in the Agreement prevents Network from entering into distribution agreements with any of the major cable or satellite providers, including but not limited to: DirecTV (16,600,000 subscribers) (as

of September 30, 2007); Comcast Cable Communications (24,141,000 subscribers); Time Warner Cable (13,391,000 subscribers); Cox Communications (5,424,000 subscribers); Charter Communications (5,376,800 subscribers); Bright House Networks LLC (2,327,100 subscribers); Suddenlink Communications (1,416,800 subscribers); Mediacom Communications Corp. (1,344,000 subscribers); and Insight Communications (1,341,000 subscribers) (all as of June 2007).

D. Pre-Audit Communications and Negotiations

15. On or about February 27, 2007, Network sent to EchoStar a letter in which it purported to certify its compliance with Section 4 of the Agreement as required by Section 4(g) of the Agreement. This certification letter was deficient in multiple ways. For example, it failed to certify compliance with the Non-Repeat Programming Commitment provisions of the Agreement. In addition, it failed to certify that one of the Service channels (Animania) complied with the HD and Original HD Commitment provisions of the Agreement. Moreover, it failed to certify that the Service had contained 21 or more hours of Premier Programming during Prime Time for HD News.

16. During the spring of 2007, Carolyn Crawford, EchoStar's Vice President of Programming, received copies of a majority of Network's monthly unaudited financial statements for the 2006 calendar year and began a review to determine whether Network had complied with its \$100 million expenditure requirement. While these unaudited statements do not include cash flow statements and, therefore, do not show exactly what Network had actually spent, Ms. Crawford, over time, was able to estimate roughly whether Network could have possibly met its expenditure requirement. After working over the course of several weeks to

aggregate the monthly financial statements, Ms. Crawford ultimately concluded in early June 2007 that it was unlikely Network had met its expenditure obligations for calendar year 2006.

17. In light of these preliminary conclusions, on June 19, 2007, Kevin Cross, EchoStar's Corporate Counsel, sent a letter to Network stating that, pursuant to the Agreement, EchoStar intended to undertake an audit in connection with Network's expenditure obligations. The following day, Mr. Cross wrote to Network again and requested written certification of the amounts that Network spent on the Service during 2006.

18. In early July 2007, John Huffman, an Executive Vice President for Rainbow Media, a subsidiary of Cablevision, sent Ms. Crawford a series of spreadsheets purporting to show the Network's 2006 expenditures. Those spreadsheets, in fact, showed that Network had spent only \$59.1 million on actual programming and licensing costs, far below its contractual obligation to spend \$100 million on the Service.

19. On July 13, 2007, EchoStar sent a letter to Network stating that the February 27, 2007 letter from Network to EchoStar failed to comply with the certification requirements in Section 4(g) of the Agreement. In addition, this letter noted that Network had failed to comply with the actual content requirements of Section 4.

20. On July 25, Ms. Crawford and Carl Vogel, the President of EchoStar, met with Network executives and raised EchoStar's concern that Network had not met its spending obligation. Network executives said that they believed Network had met the spending requirement based, in part, on overhead allocations as well as a \$6.3 million intra-company transfer of expenses. EchoStar and Network agreed that EchoStar would proceed with its field audit, which was then scheduled for late October.

21. On July 20, 2007, EchoStar sent a letter to Network regarding Network's non-compliance with the requirements of Section 4 of the Agreement. In that letter, EchoStar stated "[a]s previously articulated in prior correspondence, [Network's] non-compliance and failure to certify are material breaches of the Agreement."

E. The October 2007 Audit of Network

22. EchoStar's auditors performed an extensive review of Network's books and records from October 22-26, 2007 at Network's offices in Long Island. This audit confirmed that, as shown in the spreadsheet sent by Mr. Huffman, Network had spent only \$59.1 million on the Service. In addition, even though Network claimed that it had "spent" \$12 million in overhead allocations from Cablevision and Rainbow Media, Network did not give the auditors access to those records and therefore, the auditors could not validate the claim. In view of these findings, EchoStar concluded that Network had not spent \$100 million on the Service, and, therefore, EchoStar had the right to terminate the Agreement.

F. EchoStar's Termination of the Agreement

23. On November 16, 2007, Eric Sahl, EchoStar's Senior Vice President for Programming, wrote Joshua Sapan, CEO of Rainbow Media, confirming that, following the audit, EchoStar concluded that Network failed to meet its \$100 million expenditure obligation and that, therefore, EchoStar had the right to terminate the Agreement. Nonetheless, in light of EchoStar LLC Member's 20% equity share in Network and EchoStar's strong desire to reach an accommodation short of actual termination, EchoStar offered to continue to carry the Service on certain conditions.

24. Over the next several weeks, representatives of EchoStar met with representatives of Network and Cablevision in an effort to explore various business alternatives and salvage the

relationship. On December 14, 2007, Charlie Ergen, the Chairman of EchoStar, Mr. Sahl and Ms. Crawford met in Denver with Chuck Dolan, the Chairman of Cablevision, Tom Rutledge, Cablevision's COO, and Mr. Sapan to discuss the situation and explore alternatives. Mr. Ergen outlined Network's failure to comply with various provisions of the Agreement, including the fact that Network spent only \$59.1 million on the Service during 2006. The participants discussed a number of alternatives to avoid the termination of the Agreement, without reaching any resolution.

25. On January 24, 2008, the parties met again in Denver. Mr. Ergen reviewed the situation and Network's failure to comply with the \$100 million expenditure requirement and stated that the breach gave EchoStar a right to terminate and that the breach was not curable. After about an hour and a half of discussion, Mr. Ergen told Mr. Dolan, Mr. Sapan and Mr. Rutledge that EchoStar was going to terminate the Agreement effective February 1, 2008, unless the parties agreed to a 30-day standstill, which would allow the parties to negotiate a solution. EchoStar wanted to do everything it could to avoid terminating the Agreement.

26. On January 28, 2008, Network sent a letter to EchoStar rejecting the proposals that Mr. Ergen had made at the January 24, 2008 meeting. On January 30, 2008, EchoStar sent a letter to Network confirming that it was terminating the Agreement, effective February 1, 2008.

**FIRST COUNTERCLAIM**  
**(BREACH OF CONTRACT)**

27. EchoStar repeats and realleges the allegations set forth in Paragraphs 1 through 22 as if fully set forth herein.

28. Network has breached the Agreement, by among other acts or omissions, failing to spend \$100 million per calendar year on the Service as required by Section 10 of the

Agreement and breach of the content and certification provisions under Section 4 of the Agreement.

29. EchoStar has performed all obligations on its part to be performed under the Agreement.

30. As a direct and proximate result of Network's breach of the Agreement, EchoStar has suffered substantial damages in an amount to be determined at trial.

### **SECOND COUNTERCLAIM**

#### **(BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING)**

31. EchoStar repeats and realleges the allegations set forth in Paragraphs 1 through 26 as if fully set forth herein.

32. The Agreement contains an implied covenant requiring the parties to act with good faith toward the other party with respect to their contract.

33. Network has breached this covenant of good faith and fair dealing with respect to the Agreement.

34. Network willfully refused to invest in and improve the Service. When Network did spend money on the Service, it did so in a manner that was not in keeping with the intent, purpose or spirit of the Agreement. In violation of the duty of good faith and fair dealing, Network spent a disproportionate amount of money on the Service in the last part of the year and on items that did not contribute directly to the quality of the programming.

35. Network sought to conceal its failure to meet its funding obligations by including in the financial statements provided to EchoStar amounts that it knew were not actually spent on the Service.

36. When EchoStar attempted to obtain additional information regarding Network's compliance with its spending obligations in accordance with EchoStar's audit rights under Section 10 of the Agreement, Network repeatedly refused to provide complete information to EchoStar and EchoStar never received the information as a result.

37. Network refused to certify compliance with its obligations under Section 10 of the Agreement.

38. As a direct and proximate result of Network's breach of the duty of good faith and fair dealing, EchoStar has suffered substantial damages in an amount to be determined at trial.

WHEREFORE, EchoStar is entitled to judgment against Network as follows:

- A. dismissing the Complaint with prejudice;
- B. awarding EchoStar damages on its Counterclaims in an amount to be determined at trial.
- C. awarding EchoStar interest, costs, attorneys' fees, and such other and further relief as to the Court deems just and proper.

Dated: New York, New York  
June 24, 2008

MORRISON & FOERSTER LLP

By: 

Charles L. Kerr  
J. Alex Lawrence  
1290 Avenue of the Americas  
New York, New York 10104-0050  
(212) 468-8000

Attorneys for Defendant