

## Federal Judge Hands AT&T Huge Win in \$4B False Advertising Case

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By *Mark Curriden*

(Aug. 17) – A federal judge in California gave AT&T a potential \$4 billion victory Thursday in a false advertising case brought by the Federal Trade Commission against DIRECTV.

U.S. District Judge Haywood Gilliam of the Northern District of California ruled Thursday that the FTC “definitively failed to prove its case” that DIRECTV misled customers in tens of thousands of TV, websites and newspaper advertisements over an eight-year span.

In a 45-page decision, Judge Gilliam said his examination “found that the true terms are adequately and accurately disclosed in the advertisements.”



Jeff Tillotson

The FTC sued DIRECTV, which is a subsidiary of Dallas-based AT&T, in 2015 for allegedly failing to disclose key terms regarding its discounted pricing, including that the term of the contract is two years, that there is a \$20 early termination fee and that users must affirmatively cancel subscriptions to premium channels, such as HBO, to avoid monthly charges.

In a nine-day bench trial last August, the FTC claimed that millions of Americans were financially injured as a result of DIRECTV’s advertising efforts. The agency sought \$3.95 billion in restitution.

Lawyers for AT&T, which include Dallas trial attorneys Jeff Tillotson and *Pete Marketos*, argued that the federal government completely failed to prove its case.

“No FTC witness testified to any false impression conveyed by a DIRECTV advertisement,” AT&T lawyers told the judge in a motion to have the case dismissed. “No survey or other empirical data was offered to prove a false impression conveyed by any single advertisement — let alone all of them. The FTC

introduced no false statements by DIRECTV, no consumer testimony, and no evidence that customers signed up for DIRECTV as a result of misleading advertising.”

Judge Gilliam agreed. He said the FTC “failed to establish that there was any misleading ‘net impression’ or even to identify clearly what it claims the net impression was.

“Neither a facial review of these advertisements nor the FTC’s extrinsic evidence established that these materials are likely to mislead a reasonable consumer,” the judge wrote.

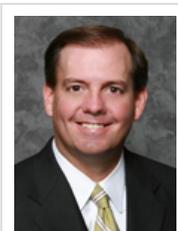


Pete Marketos

“The evidence at trial conclusively established that the FTC failed in its case-in-chief to meet its burden of proving a Section 5 claim based on any of DIRECTV’s non-website advertisements,” Judge Gilliam wrote. “The FTC’s ambition in attempting to show that over 40,000 advertisements were likely to deceive substantially exceeded the strength of its evidence: this case did not involve the type of strong proof the Court would expect to see in a case seeking nearly \$4 billion in restitution, based on a claim that all of DIRECTV’s 33 million customers between 2007 and 2015 were necessarily deceived.”

While Judge Gilliam dismissed most of the FTC’s claims against DIRECTV, he did not dismiss the government’s allegations that the programming provider may have had misleading advertisements on the company’s website. But even then, Judge Gilliam told FTC lawyers that they have a steep hill to climb in proving those claims.

The judge set a hearing for Sept. 4 to discuss the remaining claims.



David McAtee

The victory is the second this summer for AT&T General Counsel David McAtee, who also oversaw the telecom company’s successful battle to defeat antitrust allegations brought by the U.S. Department of Justice.

Besides Tillotson and Marketos, AT&T also used lawyers from Sidley Austin in California, including partners Chad Hummel and Bridget Johnsen.

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