UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DIREXION SHARES, ETF TRUST,

Plaintiff,

-against-

LEVERAGED INNOVATIONS LLC,

Defendant.

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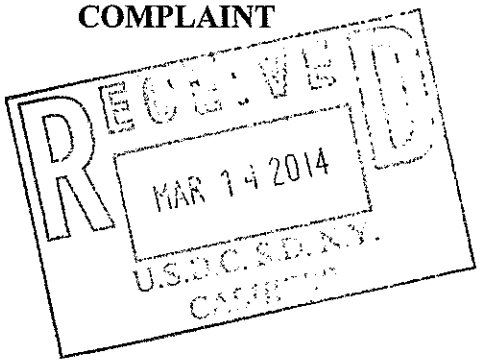
14 CV 1777

14 Civ. ____

COMPLAINT



Plaintiff Direxion Shares, ETF Trust ("Direxion"), by and through its undersigned attorneys, Wollmuth Maher & Deutsch LLP, for its Complaint against Defendant Leveraged Innovations LLC ("Leveraged Innovations"), alleges upon knowledge with respect to its own acts, and upon information and belief as to all other matters, as follows:

NATURE OF THE ACTION

1. This is an action for declaratory relief that Direxion owes no liability or obligation with respect to any patent claims or demand for license royalties by Leveraged Innovations, or any of its principals, predecessors, successors, and assigns, and to compel Leveraged Innovations to cease its harassment of Direxion.

2. Direxion has a family of "exchange-traded funds," also known as ETFs, that at all relevant times have been exclusively listed on the NYSE Arca, Inc. ("NYSE Arca"), a successor to the American Stock Exchange LLC ("AMEX").

3. Leveraged Innovations is a patent assertion entity – or, more derogatively, a "patent troll" – that sues other companies and seeks to extract license royalties from them in

connection with patents that it holds but does not manufacture products or supply services based on the patents.

4. In 2000, the AMEX commenced a declaratory judgment action against a predecessor of Leveraged Innovations, Mopex, Inc., and one if its principals, Kenneth Kiron (collectively "Mopex"), for a declaration that certain patents allegedly held by Mopex related to ETFs were invalid. In March 2003, AMEX and Mopex entered into a Settlement Agreement and Release pursuant to which Mopex (on behalf of itself and its successors) released, and made a covenant not to sue, AMEX and all "AMEX-Listed ETF Funds," for any and all claims asserting "infringement of any patent relating to Exchange-Traded Funds" (the "AMEX Settlement Agreement").

5. Despite this release, Leveraged Innovations (a successor of Mopex and also owned by Kenneth Kiron) has once again begun to shake down ETFs for royalties based on alleged patents relating to ETF trading.

6. In April 2012, this Court granted summary judgment dismissing patent infringement asserted claims by Leveraged Innovations against another group of NYSE Arca-listed ETFs – ProShares funds – holding that the NYSE Arca was a successor to the AMEX and that all claims against ETFs that are exclusively listed on NYSE Arca were barred by the release and covenant not to sue in the AMEX Settlement Agreement. *See Leveraged Innovations, LLC v. NASDAQ OMX Group, Inc., et al.*, No. 11 Civ. 03203 (KBF), 2012 U.S. Dist. LEXIS 60459 (S.D.N.Y. Apr. 20, 2012) ("*ProShares*"). Leveraged Innovations is collaterally estopped from challenging this decision.

7. Leveraged Innovations has now turned to Direxion, asserting that Direxion ETFs are infringing its patents and demanding that Direxion pay royalties despite the fact that its infringement claims are directly contrary to this Court's holding in *ProShares* and, like the

claims against the ETFs in *ProShares*, are barred by the release and covenant not to sue in the AMEX Settlement Agreement.

8. Direxion is entitled to a declaration that all of Leveraged Innovation's patent claims against, and demands for royalties from, Direxion are barred by the release and covenant not to sue in the AMEX Settlement Agreement and an order permanently enjoining Leveraged Innovations or any of its successors or assigns from asserting any ETF-related patent claims against Direxion, its ETFs, or any other NYSE Arca-listed ETF.

9. Although the Court need not reach these issues, the Leveraged Innovations patents, by their terms, are intended to solve a problem that is, and at all relevant times was, simply irrelevant to the type of index-based ETF products that Direxion offers, which have been in existence since at least 1993. Therefore, Direxion also seeks, in the alternative, declaratory relief that it has not breached and is not breaching Leveraged Innovations patents and/or that the patents are invalid as applied to Direxion's products.

PARTIES

10. Plaintiff Direxion Shares ETF Trust is a Delaware statutory trust with its principal place of business in New York. Direxion is an investment company that offers a number of ETF products, which are listed exclusively on the NYSE Arca.

11. On information and belief, Defendant Leveraged Innovations is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business at 450 Park Avenue, New York, New York. Leveraged Innovations is a successor and/or assign of Mopex and falls within the definition of "Mopex" in the AMEX Settlement Agreement.

12. Non-party Kenneth Kiron is President and Chief Executive Officer of Leveraged Innovations. Kiron is the former co-owner of Mopex.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this dispute pursuant to 28 U.S.C. §§ 1331 and 1338.

14. This Court has personal jurisdiction over Leveraged Innovations because Leveraged Innovations has its principal place of business in New York, New York, and because the terms of the AMEX Settlement Agreement provide that this Court retains jurisdiction to enforce it and that the parties thereto agreed to submit to the jurisdiction of this Court.

15. Venue in this district is proper pursuant to 28 U.S.C. § 1391 because Leveraged Innovations resides and has its principal place of business in this district. Venue in this district is also proper because the AMEX Settlement Agreement provides any legal action relating to or arising from that agreement shall be commenced exclusively in this Court.

SUBSTANTIVEE ALLEGATIONS

A. The AMEX Settlement Agreement

16. AMEX commenced a declaratory judgment action against Mopex in 2000 entitled *American Stock Exchange. LLC v. Mopex, Inc.*, 00 Civ. 5943 (S.D.N.Y.), relating to Mopex's assertion of claims relating to a Patent No. 6,088,685 (the "'685 patent"). AMEX alleged, among other things, that the '685 patent was invalid.

17. The '685 patent is closely related to the three patents at issue in this action: U.S. Patent No. 7,698,192 (the "'192 patent"), U.S. Patent No. 7,917,422 (the "'422 patent"), and U.S. Patent No. 8,204,815 (the "'815 patent") (collectively, the "Patents"). The Patents each state that it is a continuation of a previous application that became the '685 patent.

18. On February 4, 2003, Hon. Shira Scheindlin granted summary judgment to AMEX, finding that the '685 patent invalid as anticipated by prior art. *American Stock Exchange. LLC v. Mopex, Inc,* 250 F. Supp. 2d 323 (S.D.N.Y. 2003).

19. Following Judge Scheindlin's decision, AMEX and Mopex entered into the AMEX Settlement Agreement, which, by its terms, avoided entry of a final judgment of invalidity as to the '685 patent and necessarily curbed further litigation, including AMEX's pursuit of attorneys' fees. In addition, the AMEX Settlement Agreement included various covenants by Mopex not to sue. The AMEX Settlement Agreement, in other words, "bought peace" for AMEX and AMEX-listed ETF funds.

20. A true and correct copy of the AMEX Settlement Agreement is annexed hereto as Exhibit A.

21. Among other things, Mopex agreed to release and not to sue "any AMEX-Listed ETF Fund." AMEX Settlement Agreement, ¶ 10. Specifically, Mopex covenanted that it would not sue or require a royalty or compensation from

> any AMEX-Listed ETF Fund for any alleged infringement of any of Mopex's Patent Rights or alleged infringement of any patent, trade secret, or other intellectual property related to Exchange-Traded Funds, provided that such alleged infringement resulted from activities undertaken in connection with an [ETF] that is at the time of the alleged infringement listed for trading on the AMEX. . . .

AMEX Settlement Agreement ¶ 10.

22. The AMEX Settlement Agreement also included a release by Mopex of any ETF-related patent claims against AMEX-Listed ETF Funds. Specifically, Mopex agreed to

> fully and completely release and forever discharge any and all AMEX-Listed ETF Funds from any and all existing or potential claims . . . resulting from Mopex's Patent Rights or alleged infringement of any patent, trade secret, or other intellectual property related to Exchange-Traded Funds, provided that such alleged infringement resulted from activities undertaken in connection with an [ETF] that is at the time of the alleged infringement listed for trading on the AMEX. . . .

AMEX Settlement Agreement ¶ 6.

23. "AMEX" is defined in the AMEX Settlement Agreement to include

AMEX or its "successors." AMEX Settlement Agreement ¶ 1(a).

24. NYSE Arca is a successor of AMEX and falls within the definition of "AMEX" in the AMEX Settlement Agreement.

25. "Mopex" is defined in the AMEX Settlement Agreement to include Mopex or any of its successors. AMEX Settlement Agreement ¶ 1(j).

26. Leveraged Innovations is a successor to Mopex and falls within the definition of "Mopex" in the AMEX Settlement Agreement.

27. The AMEX Settlement Agreement defines "AMEX-Listed ETF Fund" as "an ETF listed exclusively for trading on the AMEX." AMEX Settlement Agreement ¶ 1(f).

28. The term "listed" is defined to mean "listed for trading on an exchange or marketplace in accordance with the listing rules and standards of such exchange or marketplace and shall not mean or extend to the trading of a security on an exchange or marketplace pursuant to unlisted trading privileges." AMEX Settlement Agreement ¶ 1(i).

B. The *ProShares* Decision

29. On May 5, 2011, Leveraged Innovations commenced an action against NASDAQ and its affiliated entities and ProShares Trust I and II alleging claims for infringement of the '192 patent and '422 patent. *See Leveraged Innovations, LLC v. NASDAQ OMX Group, Inc., et al.*, No. 11 Civ. 03203 (S.D.N.Y.). Leveraged Innovations further alleged that ProShares "holds itself out as the world's largest manager of ETFs." Of ProShares' 131 ETFs, 127 were listed on NYSE Arca.

30. On April 20, 2012, Hon. Katherine B. Forrest issued the *ProShares* decision, granting summary judgment dismissing Leveraged Innovation's infringement claims with respect to the 127 ProShares ETFs listed on the NYSE Arca on the ground that the claims were barred by Mopex's covenant not to sue AMEX-Listed ETF Funds in the AMEX Settlement

Agreement. In so ruling, Judge Forrest held that NYSE Arca is a successor to the AMEX and that an ETF listed on the NYSE Arca at the time of the alleged infringement was an AMEX-Listed ETF Fund under the terms of the AMEX Settlement Agreement.

31. On information and belief, Leveraged Innovations and ProShares entered into a settlement of the claims with respect to the remaining four ProShares ETFs that were not listed on NYSE Arca, and therefore Leveraged Innovations declined to appeal the *ProShares* decision.

C. Leveraged Innovations Asserts Claims and Demands For Royalties In Violation of the AMEX Settlement Agreement

32. Direxion offers 55 ETFs, all of which are "listed exclusively" on NYSE Arca.

33. Direxion's ETFs – like the 127 ProShares ETFs dismissed in *ProShares* – are also traded on other exchanges (and in off-exchange transactions) but they are only "listed" for trading on NYSE Arca.

34. Direxion's ETFs are Amex-Listed ETF Funds under the terms of the AMEX Settlement Agreement.

35. By letter dated December 2, 2013, counsel for Leveraged Innovations asserted that Direxion's ETFs used technology covered by the Patents. Counsel for Leveraged Innovations further proposed "to grant a release and non-exclusive license to Direxion under the 192 patent, the 422 patent, the 815 patent and any future, related patents" on "commercially acceptable terms." A true and correct copy of the December 2, 2013 letter is annexed hereto as Exhibit B.

36. In subsequent communications, Leveraged Innovations repeated claims that Direxions' ETFs infringe the Patents and it demanded payment of royalties in return for a

non-exclusive license.

37. Leveraged Innovation's assertions that Direxion ETFs infringe the Patents and its demand for royalties are barred by the release and covenant not to sue in the AMEX Settlement Agreement.

38. As AMEX-Listed ETF Funds, Direxion's ETFs are disclosed, intended third-party beneficiaries of the AMEX Settlement Agreement empowered to sue to enforce its terms. AMEX Settlement Agreement ¶ 11.

D. The Patents Apply To Portfolios of Actively Managed Mutual Funds, Not Index ETFs

39. The Patents purport to address the problem that investors could not engage in intra-day trading of the thousands of actively-managed, open ended mutual funds in the market. Portfolio managers of mutual funds often buy and sell securities during the day so it was difficult for investors to value the fund in real time because it was not possible for investors to know the exact composition the basket of securities held in the fund at any particular point in time. In other words, the purpose of the Patents was to allow the trading of a basket of securities about which there was not complete transparency.

40. Direxion ETFs do not hold shares of actively-managed, open ended mutual funds. Instead, Direxion ETFs are "index ETFs" and are based on specific market indices such as the Standard & Poor's 500 Composite Stock Price Index ("S&P 500 Index"). Thus, each Direxion's ETF seeks to track the performance of a particular index by holding in its portfolio either the contents of the index or a representative sample of the securities in the index.

41. Unlike actively managed mutual funds, index ETFs (and leveraged index ETFs) – like index mutual funds and leveraged index mutual funds – offer complete transparency. The composition of an index (unlike the composition of an actively-managed

mutual fund) is always known to the market, and therefore there has never been an impediment to intra-day trading of index ETFs. In fact, the SEC requires index ETFs to disseminate the intra-day indicative value of their shares every 15 seconds.

42. Index ETFs were in existence and actively traded well before October 12, 1995, the application date for the earliest predecessor of the Patents. The first index ETF – the SPDR (pronounced "spider") – was introduced in January 1993 by a subsidiary of AMEX and issued shares based on the basket of stocks in the S&P 500 Index. The Patents, themselves, acknowledge the existence of the SPDR as prior art.

43. Therefore, the Patents, by their own terms, purport to describe an invention for intra-day trading of actively-managed mutual funds that is not relevant to index ETFs like the pre-existing SPDR and Direxion's ETFs.

FIRST CAUSE OF ACTION

(Declaration That Infringement Claims Are Barred By Release And Covenant Not To Sue)

44. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

45. Direxion's ETFs are disclosed, intended third-party beneficiaries of the AMEX Settlement Agreement.

46. There is an actual and justiciable controversy between the parties arising under the AMEX Settlement Agreement.

47. Direxion is entitled to a declaration, in accordance with 28 U.S.C. § 2201, that that any claims of patent infringement or demand for royalties of Leveraged Innovations, Kenneth Kiron, or Kevin Bander, or any of their respective successors and assigns, against Direxion or its ETFs is barred by the release and covenant not to sue in the AMEX Settlement Agreement.

SECOND CAUSE OF ACTION
(Declaration of Non-infringement of the '192 Patent)

48. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

49. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1, et seq., concerning Direxion's non infringement of the claims of the '192 patent.

50. Direxion has not and does not infringe directly or indirectly, contributorily and/or by inducement, any valid and/or enforceable claim of the '192 patent.

51. Direxion is entitled to a declaration by the Court that it has not and does not infringe any valid and/or enforceable claim of the '192 patent.

THIRD CAUSE OF ACTION
(Declaration of Non-infringement of the '422 Patent)

52. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

53. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1, et seq., concerning Direxion's non-infringement of the claims of the '422 patent.

54. Direxion has not and does not infringe directly or indirectly, contributorily and/or by inducement, any valid and/or enforceable claim of the '422 patent.

55. Direxion is entitled to a declaration by the Court that it has not and does not infringe any valid and/or enforceable claim of the '422 patent.

FOURTH CAUSE OF ACTION
(Declaration of Non-infringement of the '815 Patent)

56. Direxion repeats and realleges the allegations in the preceding paragraphs

as if set forth herein.

57. There is an actual and justiciable controversy between the parties arising under the Patent Act, 35 U.S.C. § 1, et seq., concerning Direxion's non-infringement of the claims of the '815 patent.

58. Direxion has not and does not infringe directly or indirectly, contributorily and/or by inducement, any valid and/or enforceable claim of the '815 patent.

59. Direxion is entitled to a declaration by the Court that it has not and does not infringe any valid and/or enforceable claim of the '815 patent.

FIFTH CAUSE OF ACTION
(Declaration of Invalidity of the '192 Patent)

60. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

61. There is an actual and justiciable controversy between the parties concerning the validity of the claims of the '192 patent.

62. The claims of the '192 patent are invalid for failure to comply with the requirements for patentability set forth in the patent laws of the United States, Title 35, United States Code §§ 1 et seq., including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and/or 112.

63. As an example, and without limitation, all of the claims of the '192 patent are invalid for failure to provide the written description required by 35 U.S.C. § 112, paragraph 1, because the '192 patent's specification does not describe a "[leveraged] exchange traded product" comprising "a leveraged portfolio of securities."

64. The '192 patent's specification describes an invention for intra-day trading of actively-managed mutual funds that is not relevant to index ETFs like the pre-existing SPDR and Direxion's ETFs.

65. Each of the 82 claims of the '192 patent requires a "[leveraged] exchange traded product" comprising "a leveraged portfolio of securities." But the '192 patent's specification describes an invention for intra-day trading of a portfolio of actively-managed mutual funds that is not relevant to index ETFs like the pre-existing SPDR and Direxion's ETFs.

66. The "leveraged" product and portfolio concept is also absent from the specification of the '192 patent, whether as originally filed in 1995 as the application for the '192 patent's ultimate parent, or as re-filed on April 20, 2001, as the application that would later become the '192 patent. This concept—the subject of every claim of the 92 patent—is nowhere described or even mentioned.

67. Accordingly, the '192 patent's specification as filed never provided any written description of the "leveraged portfolio of securities." As a result, every claim is invalid for lack of written description.

68. As an example, and without limitation, all of the claims of the '192 patent are invalid for failure to enable one of ordinary skill in the art to make and use the alleged invention, as required by 35 U.S.C. § 112, paragraph 1.

69. As an example, and without limitation, all of the claims of the '192 patent are invalid under 35 U.S.C. § 101 as being directed toward nonstatutory subject matter.

70. As an example, and without limitation, all of the claims of the '192 patent are invalid under 35 U.S.C. § 102 as applied to Direxion's products because they were anticipated by prior art.

71. Direxion is entitled to a declaration by the Court that the claims of the '192 patent are invalid.

SIXTH CAUSE OF ACTION
(Declaration of Invalidity of the '422 Patent)

72. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

73. There is an actual and justiciable controversy between the parties concerning the validity of the claims of the '422 patent.

74. The claims of the '422 patent are invalid for failure to comply with the requirements for patentability set forth in the patent laws of the United States, Title 35, United States Code §§ 1 et seq., including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and/or 112.

75. As an example, and without limitation, all of the claims of the '422 patent are invalid for failure to provide the written description required by 35 U.S.C. § 112, paragraph 1, because the '422 patent's specification does not describe an "exchange traded product" comprising "a leveraged portfolio of securities."

76. Each of the 24 claims of the '422 patent requires an "exchange traded product" comprising "a leveraged portfolio of securities." But the '422 patent's specification describes an invention for intra-day trading a portfolio of actively-managed mutual funds that is not relevant to index ETFs like the pre-existing SPDR and Direxion's ETFs.

77. The "leveraged" portfolio concept is also absent from the specification of the '422 patent, whether as originally filed in 1995 as the application for the '422 patent's ultimate predecessor, or as re-filed on December 31, 2009, as the application that would later become the '422 patent. This concept—the subject of every claim of the '422 patent—is nowhere described or even mentioned.

78. Accordingly, the '422 patent's specification as filed never provided any written description of a product with a "leveraged portfolio of securities." As a result, every

claim is invalid for lack of written description.

79. As an example, and without limitation, all of the claims of the '422 patent are invalid for failure to enable one of ordinary skill in the art to make and use the alleged invention, as required by 35 U.S.C. § 112, paragraph 1.

80. As an example, and without limitation, all of the claims of the '422 patent are invalid under 35 U.S.C. § 101 as being directed toward nonstatutory subject matter.

81. As an example, and without limitation, all of the claims of the '422 patent are invalid under 35 U.S.C. § 102 as applied to Direxion's products because they were anticipated by prior art.

82. Direxion is entitled to a declaration by the Court that the claims of the '422 patent are invalid.

SEVENTH CAUSE OF ACTION
(Declaration of Invalidity of the '815 Patent)

83. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

84. There is an actual and justiciable controversy between the parties concerning the validity of the claims of the '815 patent.

85. The claims of the '815 patent are invalid for failure to comply with the requirements for patentability set forth in the patent laws of the United States, Title 35, United States Code §§ 1 et seq., including, but not limited to, 35 U.S.C. §§ 101, 102, 103, and/or 112.

86. As an example, and without limitation, all of the claims of the '815 patent are invalid for failure to provide the written description required by 35 U.S.C. § 112, paragraph 1, because the '815 patent's specification does not describe an "exchange traded product" comprising "a leveraged portfolio of securities."

87. Each of the claims of the '815 patent requires an "exchange traded product" comprising "a leveraged portfolio of securities." But the '815 patent's specification describes an invention for intra-day trading a portfolio of actively-managed mutual funds that is not relevant to index ETFs like the pre-existing SPDR and Direxion's ETFs.

88. The "leveraged" portfolio concept is also absent from the specification of the '815 patent, whether as originally filed in 1995 as the application for the '815 patent's ultimate predecessor, or as re-filed in 2011, as the application that would ultimately become the '815 patent. This concept—the subject of every claim of the '815 patent—is nowhere described or even mentioned.

89. Accordingly, the '815 patent's specification as filed never provided any written description of a product with a "leveraged portfolio of securities." As a result, every claim is invalid for lack of written description.

90. As an example, and without limitation, all of the claims of the '815 patent are invalid for failure to enable one of ordinary skill in the art to make and use the alleged invention, as required by 35 U.S.C. § 112, paragraph 1.

91. As an example, and without limitation, all of the claims of the '815 patent are invalid under 35 U.S.C. § 101 as being directed toward nonstatutory subject matter.

92. As an example, and without limitation, all of the claims of the '815 patent are invalid under 35 U.S.C. § 102 as applied to Direxion's products because they were anticipated by prior art.

93. Direxion is entitled to a declaration by the Court that the claims of the '815 patent are invalid.

EIGHTH CAUSE OF ACTION
(Injunctive Relief)

94. Direxion repeats and realleges the allegations in the preceding paragraphs as if set forth herein.

95. Leveraged Innovation's assertion of patent rights, demand for license royalties, and other harassment of Direxion in violation of the AMEX Settlement Agreement is causing, and will continue to cause, irreparable harm to Direxion for which there is no adequate remedy at law.

96. Direxion is entitled to an order permanently enjoining Leveraged Innovations, Kenneth Kiron, or Kevin Bander, or any of their respective successors and assigns, from making any assertion or claim of patent infringement against, or any demand for royalties from, Direxion, its ETFs, or any other AMEX-Listed ETF Fund, as that term is defined in the AMEX Settlement Agreement, including without limitation, any EFT fund listed exclusively on the NYSE Arca.

PRAYER FOR RELIEF

WHEREFORE, Direxion prays for relief as follows:

a. A declaration that any claims of patent infringement or demand for royalties of Leveraged Innovations, Kenneth Kiron, or Kevin Bander, or any of their respective successors and assigns, against Direxion is barred by the release and covenant not to sue in the AMEX Settlement Agreement;

b. In the alternative, a declaration that Direxion has not infringed the '192 patent;

c. In the alternative, a declaration that Direxion has not infringed the '422 patent;

d. In the alternative, a declaration that Direxion has not infringed the '815 patent;

e. In the alternative, a declaration that the '192 patent is invalid;

f. In the alternative, a declaration that the '422 patent is invalid;

g. In the alternative, a declaration that the '815 patent is invalid;

h. An order permanently enjoining Leveraged Innovations, Kenneth Kiron, or Kevin Bander, or any of their respective successors and assigns, from making any assertion or claim of patent infringement against, or any demand for royalties from, Direxion, its ETFs, or any other AMEX-Listed ETF Fund, as that term is defined in the AMEX Settlement Agreement, including without limitation, any ETF fund listed exclusively on the NYSE Arca.

i. Attorneys' fees and costs incurred by Direxion in connection with this action; and

f. Such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff hereby demands a trial by jury on all issues so triable.

Dated: March 13, 2014
New York, New York

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