

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. \_\_\_\_\_

DOUGLAS DOWDY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

ECHOSTAR COMMUNICATIONS CORPORATION,  
CHARLES W. ERGEN,  
DAVID RAYNER,  
MICHAEL R. MCDONNELL,  
PAUL W. ORBAN, and  
DAVID MOSKOWITZ,

Defendants.

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**CLASS ACTION COMPLAINT FOR VIOLATION OF  
FEDERAL SECURITIES LAWS AND JURY DEMAND**

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Plaintiff, by and through his attorneys, alleges the following upon information and belief, except as to those allegations concerning Plaintiff, which are alleged upon personal knowledge. Plaintiff's information and belief are based upon, among other things, his and/or counsel's investigation, which included without limitation: (a) review and analysis of filings made by EchoStar Communications Corp. ("EchoStar" or the "Company") with the Securities and Exchange Commission ("SEC"); (b) review and

analysis of securities analysts' reports concerning EchoStar; (c) review and analysis of press releases and other publications disseminated by certain of the Defendants; (d) review of news articles and shareholder communications concerning EchoStar; and/or (e) review of other publicly available information concerning EchoStar. Plaintiff believes that further substantial evidentiary support will exist for the allegations herein after a reasonable opportunity for discovery. Many of the facts supporting the allegations contained herein are known only to Defendants or are within their control.

### **SUMMARY OF CLAIMS**

1. This is a class action against EchoStar and certain of its officers and/or directors for violations of the federal securities laws. Plaintiff brings this action on behalf of himself and all other persons or entities, except for Defendants and certain of their related parties as described below, who purchased EchoStar securities (the "Class" or "Plaintiffs") during the period from August 10, 2004 through and including March 9, 2005 (the "Class Period").

2. EchoStar is a holding company, which together with its subsidiaries operate two interrelated business units. The subsidiaries and their business units are (1) The Dish Network ("DBS") which provides a direct broadcast satellite subscription television service in the United States; and (2) EchoStar Technologies Corporation ("ETC") which designs and develops DBS set-top boxes, antennae and other digital equipment for the DISH Network, which equipment is referred to collectively as "EchoStar receiver

systems.” ETC also designs, develops and distributes similar equipment for international satellite service providers. In its SEC filings, EchoStar refers to EchoStar Communications Corporation and its subsidiaries, DBS and ETC, as "we", "us", and the "Company." EchoStar's common stock is traded actively on NASDAQ under the symbol "DISH."

3. EchoStar is largely controlled by its founder and Chief Executive Officer Charles Ergen. Ergen, a Bloomberg article reported on March 10, 2005, controls the company, with 91% of the shareholder votes and stock valued at close to \$7 billion. Ergen is an individual Defendant in this action.

4. Along with Defendant Ergen, Defendants David Rayner, Paul Orban, Michael McConnell and David Moscovitz are collectively the “Individual Defendants.” At all relevant times hereto (unless otherwise noted), the Individual Defendants were as follows:

a. Charles Ergen was the Company’s Chairman and Chief Executive Officer;

b. David Rayner was the Company's Chief Financial Officer (since December 27, 2004);

c. Michael R. McDonnell was the Company's Senior Vice President and Chief Financial Officer until August 13, 2004;

d. Paul W. Orban was the Company's Principal Financial Officer from August 14, 2004 through December 26, 2004 and remains the Company's Vice President

and Corporate Controller; and

e. David Moskowitz was a Senior Vice President, General Counsel and Director.

5. As described in more detail below, EchoStar and the Individual Defendants made material misrepresentations and/or omitted to make material disclosures throughout the Class Period by issuing financial statements and reports on EchoStar's operations that were not in compliance with Generally Accepted Accounting Principles ("GAAP"). As discussed herein, the Company's Class Period financial statements and disclosures were materially false and misleading and in violation of GAAP because, upon information and belief: (1) the Company lacked internal controls adequate to ensure that the information contained in the Company's financial reports fairly presented in all material respects, the financial condition and results of operations of the Company; (2) the Company failed to adequately disclose all related party transactions as required by GAAP; and (3) the Company improperly booked certain transactions with vendors and engaged in improper accounting.

6. The truth about Defendants' incomplete disclosures and faulty reporting began to emerge on March 10, 2005, when the market learned that EchoStar's audit committee had launched an internal accounting probe and that the Company and Defendant Ergen were the subjects of an SEC inquiry.

7. According to a March 10, 2005 Reuters article, the probe relates to the

booking of transactions with suppliers and consulting payments to a friend of Defendant Ergen, the Company's Chief Executive Officer. A March 10, 2005 Bloomberg article reported that the probe by EchoStar's audit committee was prompted by KPMG's audit of the Company and that the SEC inquiry concerns Defendant Ergen's role in to the Company's accounting. The Bloomberg article cited unnamed sources familiar with the internal investigation who claimed that the investigation had uncovered "evidence", including "company records that showed Ergen may have directed or authorized vendor transactions and consulting payments to an unidentified friend." The article also noted that since July 2004, the SEC has been examining the way EchoStar and other companies in the telecommunications industry account for subscribers.

8. Following the March 10, 2005 disclosure, the market price of EchoStar's common stock dropped from a high of \$34.38 per share during the Class Period to as low as \$28.20 per share on March 10, 2005, the lowest price at which EchoStar has traded since August 2004. Trading in EchoStar common stock on March 10, 2005 exceeded 15 million shares, which is nearly eight times the average daily trading volume for DISH common stock for the previous three months of 1.876 million shares.

9. As discussed herein, during the Class Period, the Individual Defendants and other officers and/or directors collectively engaged in massive insider trading that is suspicious both in timing and amount. According to an article published by FT.com after the market closed on March 10, 2004, regulators are probing insider trading in EchoStar.

## **JURISDICTION AND VENUE**

10. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1337, and 1367, and Section 27 of the Securities Exchange Act of 1934 (the “Exchange Act”) (15 U.S.C. § 78aa).

11. This action arises under Sections 10(b) and 20(a) of the Exchange Act (15 U.S.C. § § 78j(b) and 78t(a)) and Rule 10b-5 promulgated under Section 10(b) (17 C.F.R. § 240.10b-5).

12. Venue is proper in this District pursuant to Section 27 of the Exchange Act (15 U.S.C. § 78aa) and 28 U.S.C. § 1391(b) and (c). Substantial acts in furtherance of the alleged fraud and/or its effects have occurred within this District and the Company maintains its principal executive offices in this District.

13. In connection with the acts and omissions alleged in this complaint, defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including, but not limited to, the mails, interstate telephone communications, and the facilities of the national securities markets.

## **PARTIES**

14. Plaintiff purchased EchoStar securities during the Class Period, as set forth in the certification attached hereto.

15. Defendant EchoStar is a Nevada corporation with its principal place of

business at 9601 S. Meridian Boulevard, Englewood, Colorado 80112.

16. The Individual Defendants, who were among the Company's principal executive officers, controlled EchoStar and its public disclosures. Each of them made false and misleading statements and/or failed to disclose material adverse information concerning the Company's business and operations during the Class Period, as detailed herein.

17. Because of the Individual Defendants' positions with the Company and status as executive officers, they had access to the adverse undisclosed information about its business, operations, products, operational trends, financial statements, markets, and present and future business prospects via access to internal corporate documents (including the Company's operating plans, budgets, and forecasts and reports of actual operations compared thereto), conversations and connections with other corporate officers and employees, attendance at management and/or Board of Directors meetings and committees thereof, and via reports and other information provided to them in connection therewith.

18. It is appropriate to treat the Individual Defendants as a group for pleading purposes and to presume that the false, misleading and incomplete information conveyed in the Company's public filings, press releases and other publications, as alleged herein, were the collective actions of the narrowly defined group of defendants identified above. Each of the above officers and/or directors of EchoStar, by virtue of their high-level

positions with the Company, directly participated in the management of the Company, was directly involved in the day-to-day operations of the Company at the highest levels, and was privy to confidential proprietary information concerning the Company and its business, operations, products, growth, financial statements, and financial condition, as alleged herein. Said defendants were involved in drafting, producing, reviewing and/or disseminating the false and misleading statements and information alleged herein, were aware or deliberately disregarded that the false and misleading statements were being issued regarding the Company, and approved or ratified these statements in violation of the federal securities laws.

19. As executive officers and/or directors and controlling persons of a publicly held company whose securities were, and are, registered with the SEC pursuant to the Exchange Act, traded on the NASDAQ, and governed by the provisions of the federal securities laws, the Individual Defendants each had a duty to disseminate promptly accurate and truthful information with respect to the Company's financial condition and performance, growth, operations, financial statements, business, products, markets, management, earnings, and present and future business prospects, and to correct any previously issued statements that had become materially misleading or untrue, so that the market price of the Company's securities would be based upon truthful and accurate information. The Individual Defendants' misrepresentations and omissions during the Class Period violated these specific requirements and obligations.

20. The Individual Defendants participated in the drafting, preparation and/or approval of the various public, shareholder and investor reports and other communications complained of herein, and were aware of, or deliberately disregarded, the misstatements contained therein and omissions therefrom, and were aware of their materially false and misleading nature. Because of their Board membership and/or executive and managerial positions with EchoStar, each of the Individual Defendants had access to the adverse, undisclosed information about the Company's operations, the financial condition and performance of the Company as particularized herein and knew (or deliberately disregarded) that these adverse facts rendered the positive representations made by or about EchoStar and its business issued or adopted by the Company materially false and misleading.

21. The Individual Defendants, because of their positions of control and authority as executive officers and/or directors of the Company, were able to and did control the content of the various SEC filings, press releases and other public statements pertaining to the Company during the Class Period. Each Individual Defendant was provided with copies of the documents alleged herein to be misleading prior to or shortly after their issuance and/or had the ability and/or opportunity to prevent their issuance or cause them to be corrected. Accordingly, each of the Individual Defendants is responsible for the accuracy of the public reports and releases detailed herein and is therefore primarily liable for the representations contained therein.

22. Each of the defendants is liable as a participant in a wrongful scheme and course of business that operated as a fraud or deceit on those who purchased or otherwise acquired EchoStar common stock by disseminating materially false and misleading statements and/or concealing material adverse facts. The scheme deceived the investing public regarding EchoStar's business, operations, and the intrinsic value of the Company's securities, and caused plaintiff and other members of the Class to purchase EchoStar securities at artificially inflated prices.

### **CLASS ACTION ALLEGATIONS**

23. Plaintiff brings this action as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3) on behalf of all persons who purchased EchoStar securities during the Class Period. Excluded from the Class are Defendants, officers and directors of the Company, members of the immediate families of the individual Defendants and each of their legal representatives, heirs, successors or assigns and any entity in which any Defendant has or has had a controlling interest.

24. This action is properly maintainable as a class action because:

- a. the members of the Class for whose benefit this action is brought are dispersed throughout the United States and are so numerous that joinder of all Class members is impracticable. While the exact number of Class members is unknown to Plaintiff at this time and can only be ascertained through appropriate discovery, Plaintiff believes that Class members number in the thousands. The Company has 454,480,000

shares of common stock outstanding, 107,200,000 of which are held by non-insiders and are reported as float by Yahoo Finance. The average daily reported trading volume, over the previous three months according to Yahoo Finance, is 1,876,000 shares. Record owners and other members of the Class may be identified from records maintained by EchoStar or its stock transfer agent and may be notified of the pendency of this action by mail, using a form of notice similar to that customarily used in securities class actions;

b. Plaintiff's claims are typical of those of the Class as all members of the Class are similarly affected by Defendants' actionable conduct in violation of federal law that is alleged herein;

c. Plaintiff will fairly and adequately protect the interests of the Class and has retained counsel competent and experienced in class action litigation. Plaintiff has no interests antagonistic to, or in conflict with, the Class that Plaintiff seeks to represent;

d. A class action is superior to other available methods for the fair and efficient adjudication of the claims asserted herein, because joinder of all members is impracticable. Furthermore, because the damages suffered by individual members of the Class may be relatively small, the expense and burden of individual litigation make it virtually impossible for Class members to redress the wrongs done to them. The likelihood of individual Class members prosecuting separate claims is remote;

e. Plaintiff anticipates no difficulties in the management

of this action as a class action; and

f. the questions of law and fact common to the members of the Class predominate over any questions affecting individual members of the Class.

Among the questions of law and fact common to the Class are:

- i. whether the federal securities laws were violated by Defendants' acts and/or omissions as alleged herein;
- ii. whether the Company's Class Period public statements and filings misrepresented and/or omitted material facts;
- iii. whether Defendants acted with knowledge or with reckless disregard for the truth in misrepresenting and/or omitting material facts;
- iv. whether Defendants participated in and pursued the common course of conduct complained of herein;
- v. whether the market price of EchoStar securities was inflated artificially as a result of Defendants' material misrepresentations and/or omissions during the Class Period;  
and
- vi. to what extent the members of the Class have sustained damages and the proper measure of damages.

## **SUBSTANTIVE ALLEGATIONS COMMON TO ALL COUNTS**

### **Background**

25. Since July 2004, according to a Bloomberg article dated March 10, 2005, the SEC has been investigating the way EchoStar and 19 other companies in the telecommunications industry account for subscriptions.

26. On July 12, 2004, Defendant McConnell resigned as Chief Financial Officer, effective August 13, 2004. McConnell's resignation was announced in a Form 8-K filed on the same day. According to the 8-K, McDonnell "intends for personal reasons to relocate and take a position nearer to family on the East Coast." The Form 8-K, which had a signature block for an unidentified officer of EchoStar and of DBS, was filed unsigned. McDonnell had signed the previous Forms 8-K filed by the Company as Executive Vice President and Chief Financial Officer.

### **The Class Period Begins**

27. The Class Period begins on August 10, 2004, when the price of DISH common stock jumped up in response to the Company's filing of its Form 10-Q for the second quarter of fiscal year 2004 ending June 30, 2004 (the "Second Quarter 2004 Form 10-Q") on August 9, 2004 after the market closed. Defendant McConnell, in one of his last acts as Chief Financial Officer of the Company, signed a Sarbanes-Oxley certification in connection with the Second Quarter 2004 Form 10-Q.

28. The certification stated:

CERTIFICATION OF CHIEF FINANCIAL OFFICER  
Section 302 Certification

I, Michael R. McDonnell, certify that:

1. I have reviewed this quarterly report on Form 10-Q of EchoStar Communications Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the registrant and have:
  - a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and

c) disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and

5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):

a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and

b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: August 9, 2004

/s/ Michael R. McDonnell

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Executive Vice President and Chief Financial Officer

29. Defendant Ergen also executed an identical Sarbanes-Oxley certification in connection with the Second Quarter 2004 Form 10-Q.

30. In the Second Quarter 2004 Form 10-Q, Defendants represented that:

The accompanying unaudited condensed consolidated financial statements have been prepared in accordance with accounting principles generally accepted in the United States ("GAAP") and with the instructions to Form 10-Q and Article 10 of Regulation S-X for interim financial information.

31. Defendants reported mixed news in the Second Quarter 2004 Form 10-Q. Profit fell 34%, the Company said, as the Company spent more on programming and customer-support systems. Subscriber-related expenses rose 38%. The expenses rose partly, the Company said, because EchoStar is installing larger satellite dishes that allow customers to receive local broadcast stations and partly because it provided equipment to customers who received service through its partnership with SBC Communications, Inc. ("SBC"). The Company is marketing satellite-TV service with SBC to compete with cable companies that are selling phone service.

32. Defendants, however, emphasized their subscription numbers and revenues. Defendants reported that EchoStar had added 340,000 new subscribers during the quarter and ended the quarter with 10.1 million subscribers. Sales rose, the Company reported, by 26% to 1.78 billion. EchoStar's sales topped the average estimate of \$1.67 billion from 18 analysts surveyed by Thomson Financial. In the comparative period, sales had been \$1.41 billion.

33. DISH common stock rose \$2.29 per share, or 8.4%, to \$29.95 by the close of trading on August 10, 2004.

34. The representations contained in paragraphs 28-32 were materially false and misleading because, as discussed herein: (1) the Company lacked adequate internal controls necessary to produce reliable financial reports; (2) the Company is believed to have engaged in improper accounting relating to the booking of transactions with

suppliers; (3) the Company failed to disclose that it made suspect consulting payments to a friend of Defendant Ergen; and (4) upon information and belief, the Company failed to disclose that the SEC was investigating the Company's accounting. In light of the suspicious timing of Defendant McConnell's resignation and the filing of an unsigned Form 8-K announcing that McConnell was supposedly leaving for "personal reasons", it is also reasonable to infer that McConnell's departure was prompted by the SEC inquiry into accounting.

35. On September 20, 2004, EchoStar announced that it plans to sell \$1 billion of notes, reviving a sale that it had canceled after McConnell's resignation announcement in July, 2004. Proceeds of the debt offering will be used for general purposes, the Company said. EchoStar in July had planned the offering of 10-year notes to pay off 10.375 percent notes maturing in 2007.

36. Following McConnell's resignation, Defendant Orban became the Company's Principal Financial Officer. As such, Orban signed the certification required by Sarbanes-Oxley in the Company's next quarterly filing, which was made on November 9, 2004.

37. In the Company's Form 10-Q for the quarter ending September 30, 2004 (the "Third Quarter 2004 Form 10-Q"), which Defendant Orban certified, along with Defendant Ergen, Defendants represented that "[t]he accompanying unaudited condensed consolidated financial statements have been prepared in accordance with accounting

principles generally accepted in the United States (“GAAP”)."

38. In the Third Quarter 2004 Form 10-Q, Bloomberg reported, the Company revealed that "profit almost tripled as [the Company] added subscribers and raised prices."

39. Net income, the Company reported in the Third Quarter 2004 Form 10-Q, rose to \$102 million, or 22 cents a share, from \$35 million, or 7 cents, a year earlier. Revenue reportedly rose 28% to \$1.86 billion. EchoStar also claimed to have boosted its subscriber count 3.5 percent to 10.5 million in the quarter, while its larger competitor, DirecTV Group Inc., a Bloomberg article dated November 9, 2004 said, raised its customer count 4 percent to 12.1 million.

40. EchoStar's Third Quarter 2004 subscriber-related expenses, which include customer retention, programming and installation costs, rose 36% to \$929 million partly because of the higher number of users, according to the Company. Promotion subsidiaries were reported to have increased 52 percent to \$256 million.

41. The Third Quarter 2004 Form 10-Q, which was the first and only Form 10-Q that Defendant Orban certified, also mysteriously included a statement that had not appeared in its previous Form 10-Q. In the Third Quarter 2004 Form 10-Q, this statement appeared:

**DISCLOSURE REGARDING FORWARD-LOOKING STATEMENTS**

We are in the process of evaluating and testing our internal controls

over financial reporting in order to satisfy the requirements of Section 404 of the Sarbanes-Oxley Act. If we are unable to report that our internal controls over financial reporting are effective as of December 31, 2004 (or if our auditors are unable to attest that our management's report is fairly stated or they are unable to express an opinion on our management's evaluation or on the effectiveness of our internal control over financial reporting), we could lose investor confidence in the accuracy of our financial reports, which in turn could have a material adverse effect on our stock price and our business....

42. Yet, Defendants Ergen and Orban signed the 3rd Quarter 2004 Form 10-Q and executed Sarbanes-Oxley certifications. Ergen's certifications are set forth below, and Orban signed identical versions:

**CERTIFICATION OF CHIEF EXECUTIVE OFFICER**  
Section 302 Certification

I, Charles W. Ergen, certify that:

1. I have reviewed this quarterly report on Form 10-Q of EchoStar Communications Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all

material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;

4. The registrant's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) for the registrant and have:
  - a) designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - c) disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting;

- and
5. The registrant's other certifying officers and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of registrant's board of directors (or persons performing the equivalent function):
- a) all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: November 9, 2004

/s/ Charles W. Ergen

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Chairman and Chief Executive Officer

**CERTIFICATION OF CHIEF EXECUTIVE OFFICER**  
Section 906 Certification

Pursuant to 18 U.S.C. § 1350, the undersigned officer of EchoStar Communications Corporation (the "Company"), hereby certifies that to the best of his knowledge the Company's Quarterly Report on Form 10-Q for the three months ended September 30, 2004 (the "Report") fully complies with the requirements of Section 13(a) or 15(d), as applicable, of the Securities Exchange Act of 1934 and that the information contained in the

Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Dated: November 9,  
2004

Name: /s/ Charles  
W. Ergen

Title: Chairman of  
the Board of  
Directors  
and Chief  
Executive  
Officer

43. On November 9, 2004, the Company also issued a press release, which it then filed with the SEC in a Form 8-K signed by Executive Vice President and General Counsel David Moskowitz, announcing that it had declared a "one-time" stock dividend.

44. In a conference call discussing the third quarter results, Defendant Ergen, Bloomberg reported in its November 9 report, said that "controlling those costs was one of his top priorities." Costs, an analyst with Janco Partners said, is "something that they absolutely have to address." This is particularly true since EchoStar beat analysts' revenue expectations of \$1.81 billion but profit was still less than the average estimate of 23 cents a share.

45. On the November 9 conference call, EchoStar Treasurer Jason Kiser explained that the dividend, which amounted to approximately \$1 per share, was issued because of "favorable tax laws and confidence in our cash position." In reality, however,

as demonstrated throughout the Class Period, Defendants were intent on trying to prop up the stock price, despite the declining profit margins, by giving investors false assurances that all was well in the Company.

46. The representations contained in paragraphs 36-42 and 45 were false and misleading because, as discussed herein: (1) the Company lacked adequate internal controls necessary to produce reliable financial reports; (2) the Company is believed to have engaged in improper accounting relating to the booking of transactions with suppliers; (3) the Company failed to disclose that it made suspect consulting payments to a friend of Defendant Ergen; and (4) upon information and belief, the Company failed to disclose that the SEC was investigating the Company's accounting.

47. On November 12, 2004, the Company filed a Form 8-K announcing that Defendant Rayner has been appointed Chief Financial Officer effective December 27, 2004 upon the commencement of his employment. The 8-K also announced that Rayner will also be designated as principal financial officer for EchoStar and DBS, replacing Defendant Orban, who would continue as the Company's Vice President and Corporate Controller.

48. On January 12, 2005, the Company filed a Form 8-K/A, amending the Current Report on Form 8-K that it had filed on July 21, 2004 concerning Defendant McDonnell's resignation. The amendment provided the conformed signatures for EchoStar and DBS, which the Company said, were inadvertently omitted from the

original filing. The amendment also reiterated that Mr. McDonnell had resigned "for personal reasons to relocate and take a position nearer to his family on the East Coast." Upon information and belief, the filing of the original Form 8-K announcing McConnell's resignation before it was signed was not inadvertent. Given that McConnell had been the officer signing Forms 8-K prior to the announcement of his resignation and in light of the allegations herein, it is reasonable to infer that McConnell had been unwilling to sign the Form 8-K that indicated that blamed McConnell's departure on his alleged intention to resign for personal reasons and to relocate.

49. On January 31, 2005, the Company issued a press release, which it then filed with the SEC in a Form 8-K, in which it reported that the "DISH Network Passes 11 Million Customer Milestone."

50. On March 8, 2005, the Company filed a Form 8-K signed by its Executive Vice President, General Counsel and Secretary, David K. Moskowitz. The 8-K announced that EchoStar had agreed to settle an insurance claim it had filed several years prior which settlement will be worth \$240 million if all carriers agree to pay their proportionate share of the claims. Currently, the Company reported, it had received signed agreements from insurers representing 83% of the \$240 million aggregate claim. The Company also noted that it had previously recorded a \$106 million receivable as a result of the claims it had filed against the insurers through arbitration. Thus, any amount collected in this settlement in excess of the \$106 receivable will be recognized in income

during the period in which the respective insurers sign the settlement agreement.

### **The Truth Begins to Emerge**

51. On March 10, 2005, Bloomberg reported that EchoStar "may have improperly booked transactions with suppliers and made suspect consulting payments to a friend of" Defendant Ergen, according to people Bloomberg described as "familiar with an internal probe of the [C]ompany's accounting." The investigation by the Company's audit committee, Bloomberg said, was prompted by KPMG "which uncovered evidence of potentially illegal conduct while auditing the [C]ompany's 2004 accounts, according to Bloomberg's source[s]." Two people told Bloomberg, the article said, that the SEC had opened an inquiry into Defendant Ergen's role in the accounting.

52. The article also noted that the investigation led by Raymond Friedlob, an outside director and chair of the audit committee, uncovered "evidence", including "company records that showed Ergen may have directed or authorized vendor transactions and consulting payments to an unidentified friend."

53. On this news, the price of DISH common stock closed down \$1.87 or 6.11% from the previous trading day's close. Over 15.6 million shares traded on March 10, 2005, which is nearly eight times the average daily trading volume in DISH, according to Yahoo Finance, for the previous three months. DISH shareholders lost over \$200 million in market capitalization on this day alone.

## **COUNT I**

### For Violations of Sections 10(b) of The Exchange Act And SEC Rule 10b-5 Promulgated Thereunder

54. Plaintiff repeats and realleges each of the preceding paragraphs, as if set forth fully herein.

55. In connection with the sale of EchoStar's securities throughout the Class Period, the Defendants participated, directly or by acquiescence, despite a duty to act, in the preparation and/or issuance of materially false and misleading statements and omissions.

56. The Defendants knew, or were reckless in not knowing, that the statements contained in EchoStar's public filings and statements were materially false and misleading. Plaintiff relied, directly or indirectly by reliance on the integrity of the market, on these Defendants' misstatements and/or omissions and was damaged as a result. But for these Defendants' misrepresentations and/or omissions, Plaintiff would not have purchased EchoStar securities or would have purchased them at non-artificially inflated prices.

### **Fraud-On-The-Market Allegations**

57. Plaintiff and the Class also rely on the fraud-on-the market doctrine, which affords a presumption of reliance based on the existence of an efficient market for

EchoStar securities. This doctrine is premised on the fact that brokers and investors nationwide have immediate access to press releases and trading information about EchoStar through computer and news wire systems. These systems display, within minutes of the release or transaction taking place, pertinent information and the most recent trades and prices.

58. Plaintiff and the Class will rely, in part, upon the presumption of reliance established by the fraud-on-the-market doctrine in that:

- a. the Defendants made public misrepresentations and/or failed to disclose facts during the Class Period;
- b. the omissions and misrepresentations of fact were material;
- c. EchoStar met the requirements for listing and was listed on the NASDAQ, an open, highly efficient, and automated market;
- d. as a public company, EchoStar filed periodic public reports with the SEC;
- e. EchoStar's trading volume during the Class Period was substantial;
- f. the misrepresentations and/or omissions alleged herein would tend to induce a reasonable investor to misjudge the value of EchoStar's securities;
- g. Plaintiff and the members of the Class purchased their securities

during the Class Period without knowledge of the omitted or misrepresented facts; and

h. Analysts employed by major brokerage firms followed EchoStar and wrote reports that were distributed to the sales force and certain customers and were available to the public through various automated data retrieval services. Thus, each of these reports entered the public marketplace and was publicly available.

59. Based upon the foregoing, Plaintiff and the members of the Class are entitled to a presumption of reliance upon the integrity of the market for their Exchange Act claims.

#### **Defendants Had the Requisite Scienter**

60. As alleged herein, Defendants acted with scienter in that Defendants knew that the public documents and statements issued or disseminated in the name of the Company were materially false and misleading; knew that such statements or documents would be issued or disseminated to the investing public; and knowingly and substantially participated or acquiesced in the issuance or dissemination of such statements or documents as primary violators of the federal securities laws. As set forth elsewhere herein in detail, Defendants, by virtue of their receipt of information reflecting the true facts regarding EchoStar, their control over, and/or receipt and/or modification of EchoStar's allegedly materially misleading misstatements and/or their associations with EchoStar which made them privy to confidential proprietary information concerning

EchoStar, participated in the fraudulent scheme alleged herein.

61. As a result of the above-described acts, the Defendants, severally and in concert, directly and indirectly, by use of the means and instrumentalities of interstate commerce, violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder by knowingly or recklessly: (a) employing devices, schemes and artifices to defraud; (b) making untrue statements of material facts or omitting to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading; and/or (c) engaging in acts, practices and a course of business that operated as a fraud or deceit upon Plaintiff and the Class in connection with their purchases of the Company's securities.

62. As a result of the deceptive practices and false statements described herein, the market price of the Company's securities was inflated artificially throughout the Class Period.

63. Plaintiff, relying on the Defendants' misrepresentations and the integrity of the market, purchased EchoStar securities during the Class Period at artificially inflated prices. Had Plaintiff known the truth concerning the misrepresentations and/or omitted facts described herein, he would not have purchased EchoStar securities at the prices that were paid, if at all. During the Class Period, the true value of EchoStar securities was substantially less than the prices paid by Plaintiff and the Class. Accordingly, Plaintiff and the Class have been damaged as a result of the Defendants' wrongdoing.

64. Plaintiff and the Class have also been damaged by insider trading by several of the Individual Defendants and other officers and/or directors of EchoStar during the Class Period, while in possession of material, non-public adverse information. During the Class Period, eight officers or directors, including Defendants McConnell, Orban and Moskowitz, sold over 1 million shares for over \$35 million in sales proceeds during the six month period from August 6, 2004 through February 10, 2005. As shown in the chart below, during the previous six months, these same individuals collectively sold only 84,000 shares for \$2.6 million in proceeds.

Officer or Director	Class Period Sales Between August 10, 2004 and February 10, 2004	Sales Proceeds	Sales During the Prior Six Months	Sales Proceeds
Nolan Daniel	80,000	\$2,671,650	75,000	\$2,325,000
Michael Dugan	250,000	\$8,136,686	0	0
Mark Jackson	100,000	\$3,275,000	0	0
Michael McConnell	12,054	\$373,567	0	0
David Moskowitz	154,000	\$5,042,049	0	0
Paul Orban	18,360	\$650,108	0	0
Steven Schaver	444,635	\$14,760,232	0	0
Michael Schuman	10,440	\$342,954	9,000	\$269,100
TOTALS	1,069,489	\$35,252,246	84,000	\$2,594,100

65. By virtue of the foregoing, these Defendants have violated Section 10(b) of the Exchange Act and Rule 10b-5 promulgated thereunder and are liable to Plaintiff and the Class in an amount to be determined at trial.

## **COUNT II**

### **For Violation Of Section 20(a) Of The Exchange Act**

(Against the Section 20(a) Defendants, as defined below)

66. Plaintiff repeats and realleges each of the preceding paragraphs, as if fully set forth herein.

67. This claim is brought against the Individual Defendants (collectively, the “Section 20(a) Defendants”).

68. The Section 20(a) Defendants were control persons within the meaning of the Securities Exchange Act of 1934.

69. As set forth above, the Defendants violated Section 10(b) of the Exchange Act, and Rule 10b-5 promulgated thereunder, by their acts and omissions as alleged in this complaint. By virtue of their positions as control persons, the Section 20(a) Defendants are liable pursuant to Section 20(a) of the Exchange Act.

70. As a direct and proximate result of the Section 20(a) Defendants’ wrongful conduct, Plaintiff suffered damages in connection with his purchase(s) of the Company’s

securities during the Class Period.

**NO SAFE HARBOR**

71. The statutory safe harbor provided for forward-looking statements under certain circumstances does not apply to any of the allegedly false statements pleaded in this Complaint. The statements alleged to be false and misleading herein all relate to then-existing facts and conditions. In addition, to the extent certain of the statements alleged to be false may be characterized as forward looking, they were not identified as “forward-looking statements” when made, there was no statement made with respect to any of those representations forming the basis of this Complaint that actual results “could differ materially from those projected,” and there were no meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the purportedly forward-looking statements. In the alternative, to the extent that the statutory safe harbor is deemed to apply to any forward-looking statements pleaded herein, Defendants are liable for those false forward-looking statements because at the time each of those statements was made, the speaker had actual knowledge that the forward-looking statement was materially false or misleading, and/or the forward-looking statement was authorized or approved by an executive officer of EchoStar who knew that the statement was false when made.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of himself and all other Class members, prays

for judgment as follows:

- A. A determination that this action is a proper class action and a certification of Plaintiff as class representative under Rule 23 of the Federal Rules of Civil Procedure;
- B. An award of compensatory damages in favor of Plaintiff and the other Class members against all Defendants for damages sustained as a result of Defendants' wrongdoing, including interest thereon;
- C. An award to Plaintiff and the Class of their reasonable costs and expenses incurred in this action, including counsel fees, expert fees and other disbursements; and
- D. A grant of such other relief as the Court may deem just and proper.

**JURY TRIAL DEMANDED**

Plaintiff hereby demands a trial by jury.

Dated: March 11, 2005

CHITWOOD & HARLEY, LLP

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Martin D. Chitwood  
Georgia Bar No. 124950  
Lauren S. Antonino  
Georgia Bar No. 652408  
2300 Promenade II  
1230 Peachtree Street, NE  
Atlanta, Georgia 30309  
Tel: (404) 873-3900  
Fax: (404) 876-4476