

1 Chad M. Hagan (*pro hac vice*)  
2 [chagan@twlaw.com](mailto:chagan@twlaw.com)  
3 T. WADE WELCH & ASSOCIATES  
4 2401 Fountainview, Suite 700  
Houston, Texas 77057  
Telephone: (713) 952-4334  
Facsimile: (713) 952-4994

5 DLA PIPER  
6 David A. Grenardo (State Bar No.223142)  
7 Cynthia A. Ricketts (*pro hac vice*)  
8 [david.grenardo@dlapiper.com](mailto:david.grenardo@dlapiper.com);  
9 [cynthia.ricketts@dlapiper.com](mailto:cynthia.ricketts@dlapiper.com)  
10 1999 Avenue of the Stars, 4<sup>th</sup> Floor  
Los Angeles, CA 90067-6022  
Telephone: (310) 595-3031  
Facsimile: (310) 595-3331

11 Attorneys for Plaintiffs  
12 ECHOSTAR SATELLITE CORP. et al.

13 **UNITED STATES DISTRICT COURT**  
14 **CENTRAL DISTRICT OF CALIFORNIA**  
15 **SOUTHERN DIVISION**

16 ECHOSTAR SATELLITE  
17 CORP., et al.,

18 Plaintiffs/  
19 Counterclaim  
Defendants,

20 v.

21 NDS GROUP PLC, et al.,

22 Defendants/  
23 Counterclaim  
24 Plaintiffs.

No. SA CV 03-950 DOC(JTLx)

**ECHOSTAR'S POSITION  
STATEMENT RE: DEFENDANTS'  
UNTIMELY DISCLOSED TRIAL  
WITNESSES**

Date: April 9, 2008  
Time: 8:30 a.m.  
Dept: Judge David Carter  
Courtroom 9D

EchoStar hereby submit its position statement concerning Defendants' Second Amended List of Trial Witnesses and, further, move to exclude five new trial witnesses disclosed therein. These disclosures – on the eve of trial – are untimely, improper, and will substantially prejudice EchoStar. Therefore these witnesses should be excluded from testifying at trial.

**I. Defendants Improperly Disclose Five New Witnesses on the Eve of Trial.**

At 5:59 P.M. on Tuesday, April 8, just hours before the start of trial, Defendants filed their Second Amended List of Trial Witnesses. On this list, Defendants purport to list 5 new “trial” witnesses who were previously undisclosed:

- i) Anthony Maldonado
- ii) Christopher Maskell
- iii) Paul McGuire
- iv) Tom McGuire
- v) Scott Wilsdon.

Defendants' Second Amended Witness List at 1.

Mssrs. Maskell, P. McGuire, T. McGuire, and Wildsdon have never been identified as potential trial witnesses, nor were they ever identified as “individuals likely to have discoverable information” pursuant to Rule 26(a)(1)(A). None of these 5 witnesses have been subject to document subpoenas, discovery, or depositions.

**II. Defendants' Disclosure Is Untimely, Improper, and Prejudicial.**

Defendants' disclosure is untimely as a matter of law. Fed. R. Civ. P. 26(a)(3) requires disclosure of trial witnesses no later than 30 days before trial. Fed. R. Civ. P. 26(a)(3). Also, Local Rule 16-5 requires parties to file and serve their witness lists at the same time as their Memoranda of Contentions of Fact and

1 Law no later than 21 days before the Final Pretrial Conference. L.R. 16-5. Msrs.  
 2 Maskell, P. McGuire, T. McGuire, and Wildsdon are newly identified fact  
 3 witnesses disclosed after the close of discovery – just hours before opening  
 4 statements – and must therefore be excluded as a matter of law.

5 Moreover, the disclosures are improper under Fed. R. Civ. P. 26(e)(1)  
 6 because they were not made at an appropriate interval. Fed. R. Civ. P.  
 7 26(e)(1)(imposing a duty to supplement initial disclosures and/or discovery  
 8 responses); *E.E.O.C. v. Lennar Homes of Arizona, Inc.*, 2006 WL 1734594, \*3  
 9 (D. Ariz. 2006) (“Rule 26(e)(1) requires a party to supplement its disclosure  
 10 statement ‘at appropriate intervals.’ This supplemental disclosure statement filed  
 11 weeks before trial is not filed at an “appropriate” interval.”).

12 Finally, EchoStar will be substantially prejudiced if these untimely  
 13 disclosures are allowed to stand. Because these five witnesses were never  
 14 previously disclosed as potential trial witnesses (indeed, four of the five were  
 15 never even disclosed as persons with knowledge) EchoStar was not afforded any  
 16 opportunity to conduct any discovery (document subpoenas, depositions, or  
 17 identifying and disclosing appropriate rebuttal witnesses) on these witnesses.

### 18 **III. Defendants Five New Witnesses Should Be Excluded.**

19 Because the disclosures are inexcusably untimely and will cause substantial  
 20 prejudice to EchoStar, these witnesses should be excluded from testifying at trial  
 21 pursuant to Fed. R. Civ. P. 37(c). *Baden Sports, Inc. v. Kabushiki Kaisha Molten*,  
 22 2007 WL 2285857, \*1 (W.D.Wash.) (W.D.Wash.,2007) (“This delay is  
 23 inexcusable and prejudicial to Baden. Defendants may not call Mr. Barker at trial.  
 24 See Fed.R.Civ.P. 37(c).”)

25 Through this eleventh-hour disclosure, Defendants attempts to engage in the  
 26 very gamesmanship and “trial-by-ambush” that the Federal Rules were amended  
 27 to prevent against. Therefore, and for the reasons set forth above, EchoStar  
 28

1 respectfully requests that these five newly-disclosed trial witnesses be excluded  
2 from testifying at trial.

3  
4 **T. WADE WELCH & ASSOCIATES**

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6  
7 Dated: April 8, 2008

By: /s/ Chad M Hagan

8 Chad M. Hagan (*pro hac vice*)  
9 2401 Fountainview, Suite 700  
Houston, Texas 77057  
10 Telephone: (713) 952-4334  
11 Facsimile: (713) 952-4994

12 **DLA PIPER US LLP**

13 David A. Grenardo (State Bar No.223142)  
14 Cynthia A. Ricketts (*pro hac vice*)  
15 1999 Avenue of the Stars, Fourth Floor  
Los Angeles, California 90067  
16 Telephone: (310) 595-3000  
Facsimile: (310) 595-3300

17 Attorneys for Plaintiffs  
18 ECHOSTAR SATELLITE CORPORATION,  
19 ECHOSTAR COMMUNICATIONS  
20 CORPORATION, ECHOSTAR TECHNOLOGIES  
21 CORPORATION, AND NAGRASTAR L.L.C.  
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