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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10 SOUTHERN DIVISION  
11

12 ECHOSTAR SATELLITE  
CORPORATION, ECHOSTAR  
13 COMMUNICATIONS  
CORPORATION, ECHOSTAR  
14 TECHNOLOGIES  
CORPORATION, AND  
15 NAGRASTAR L.L.C.

16 Plaintiff,

17 vs.

18 NDS GROUP PLC, NDS  
AMERICAS INC., JOHN NORRIS,  
19 RUEVEN HASAK, OLIVER  
KOMMERLING, JOHN  
20 LUYANDO, PLAMEN DONEV,  
VASSELINE NEDELTCHEV,  
21 CHRISTOPHER TARNOVSKY,  
ALLEN MENARD, LINDA  
22 WILSON, MERVYN MAIN, DAVE  
DAWSON, SHAWN QUINN,  
23 ANDREI SERGEL, TODD DALE,  
STANLEY FROST, GEORGE  
24 TARNOVSKY, BRIAN  
SOMMERFIELD, ED BRUCE,  
25 "BEAVIS," "JAZZERCZ,"  
"STUNTGUY," and DOES 1-100.

26 Defendants.  
27  
28

CASE NO. SA CV 03-950 DOC(ANX)

DEFENDANT LINDA WILSON'S  
NOTICE OF MOTION AND MOTION  
TO DISMISS THIRD AMENDED  
COMPLAINT; MEMORANDUM OF  
POINTS AND AUTHORITIES;  
DECLARATION OF LINDA WILSON

Date: December 13, 2004

Time: 8:30 a.m.

Place: Courtroom of the  
Honorable David O. Carter

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1 TO THE CLERK OF THE ABOVE-TITLED COURT AND TO  
2 PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on December 13, 2004 at 8:30 a.m., or as  
4 soon thereafter as counsel may be heard, in the Courtroom of the Honorable David  
5 O. Carter, United States District Judge, at the Ronald Reagan Courthouse  
6 (Courtroom 9-D), 411 West Fourth Street, Santa Ana, California, defendant Linda  
7 Wilson, by and through her attorneys of record, will and hereby does move to  
8 dismiss the Third Amended Complaint and the claims for relief alleged against her.

9 This Motion is made pursuant to Rule 12(b) of the Federal Rules of Civil  
10 Procedure. This Motion should be granted upon each of the following grounds:

11 Plaintiffs have failed to show personal jurisdiction over Wilson, who is a  
12 resident of Canada with no ties to California or the United States. Fed. R. Civ. P.  
13 12(b)(2).

14 Plaintiffs have failed to state a proper claim for relief against Wilson. Fed.  
15 R. Civ. P. 12(b)(6).

16 Finally, in the alternative, this Court should strike the entire Third Amended  
17 Complaint for the reasons set forth in the motion to strike filed by defendants NDS  
18 Group PLC and NDS Americas, Inc. Fed. R. Civ. P. 12(f).

19 This Motion is based upon this Notice of Motion and Motion, the attached  
20 Memorandum of Points and Authorities, the attached Declaration of Linda Wilson,  
21 Wilson's joinder in the motion to dismiss and motion to strike filed by defendants  
22 NDS Group PLC and NDS Americas, Inc., the files and records in this case, and

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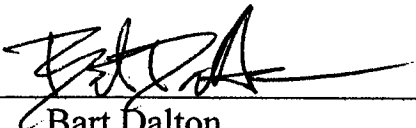
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1 upon such further evidence and argument as the Court accepts at the hearing on this  
2 Motion.

3 Dated: September 20, 2004.

4 Respectfully submitted,

5  
6 CORBIN & FITZGERALD LLP  
7 ROBERT L. CORBIN  
8 MICHAEL W. FITZGERALD  
9 BART DALTON

10 By:   
11 Bart Dalton

12 Attorneys for Defendants  
13 LINDA WILSON, ALLEN MENARD,  
14 and MERVYN MAIN  
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1 MEMORANDUM OF POINTS AND AUTHORITY

2 I.

3 INTRODUCTION

4 Defendant Linda Wilson is a retired caretaker for elderly nuns in Edmonton,  
5 Alberta. She also is the mother of defendant Allen Menard, which is the only  
6 apparent reason why plaintiffs named her in this lawsuit.

7 Of the 139 pages of the Third Amended Complaint ("TAC"), plaintiffs allege  
8 only one specific fact about Wilson – that she was the "registrant" and "contact  
9 person" for her son's company, X-Factor Design, Inc. (TAC, ¶¶ 64, 65). Aside  
10 from this statement, plaintiffs do not describe what part Wilson played in any of the  
11 conduct contained in the TAC. With no evidence of wrongdoing by Wilson,  
12 plaintiffs allege that "upon information and belief" further discovery will show that  
13 Wilson "continued to provide assistance and/or facilitation for the unlawful piracy  
14 of plaintiffs' DISH Network signal up through and including June 21, 2001." (TAC,  
15 ¶ 66). Yet plaintiffs do not elaborate on this allegation or provide any basis for this  
16 remark.

17 Plaintiffs cannot maintain this action against Wilson, for these reasons:

18 **First**, these vague allegations are insufficient to confer personal jurisdiction  
19 over Wilson. Plaintiffs have not demonstrated that Wilson has the minimum  
20 contacts with California or the United States to subject her to personal jurisdiction  
21 in this forum. Wilson is a Canadian citizen who lives in Carlyle, Saskatchewan.  
22 (Declaration of Linda Wilson ("Wilson Decl.") ¶ 1). Wilson has never visited  
23 California; she owns no property in the California or the United States; and she has  
24 never conducted business in California or the United States. (Wilson Decl., ¶¶ 10-  
25 11). Plaintiffs cannot establish personal jurisdiction – either general or specific -  
26 from these sparse facts. In fact, plaintiffs apparently concede this point in paragraph  
27 26 of the TAC. Because of this lack of personal jurisdiction, this Court should  
28 dismiss the case against Wilson. Fed. R. Civ. P. 12(b)(2).

1           **Second**, plaintiffs fail to state a claim for relief against Wilson. Plaintiffs'  
2 claims are barred by the applicable statutes of limitations, either two years (Counts  
3 6, 17-20, and 22), three years (Counts 1-5, 7-8, and 11-15) or four years (Count 16).  
4 Plaintiffs attempt to avoid their problems with the statute of limitations by now  
5 alleging that every named defendant is still "actively engaged" in unspecified  
6 wrongdoing. These unsupported allegations do not satisfy the heightened pleading  
7 standards of Rule 9 -- or even the liberal pleading policy of Rule 8 -- and should  
8 therefore be dismissed.

9           **Third**, for the reasons set forth in the motion to dismiss of defendants NDS  
10 Group PLC and NDS Americas, Inc., plaintiffs' RICO claims must be dismissed  
11 (Counts 9 and 10). Specifically, plaintiffs fail to allege a "criminal enterprise" and  
12 "pattern of racketeering activity" required under the statute.

13           **Fourth**, plaintiffs' interference claims (Counts 17 and 18) should be  
14 dismissed for independent reasons. Specifically, plaintiffs do not allege the  
15 relationships with the required particularity and should therefore be dismissed.

16           Therefore, in accordance with Rule 12(b) (6), this Court should dismiss the  
17 Third Amended Complaint against Wilson without leave to amend for these  
18 reasons:

- 19           • Plaintiffs attempt to circumvent the TAC's infirmities by pleading  
20 vague theories of agency and conspiracy does not attach liability to  
21 Wilson.
- 22           • Counts 1-5 are barred by the three-year statute of limitations for  
23 actions under the Digital Millennium Copyright Act and the  
24 Communications Act.
- 25           • Count 6 is barred by the two-year statute of limitations under the  
26 Electronic Communications Privacy Act.
- 27           • Counts 7 and 8 are barred by the three-year statute of limitations under  
28 the Lanham Act.

- 1 • Counts 9 and 10, brought under RICO, fail to allege an actionable  
2 “enterprise” or pattern of racketeering” as required under the statute.  
3 Further, Wilson is not a proper “person” for purposes of the RICO  
4 statute.
- 5 • Counts 11-15 are barred by the three-year limitations period under the  
6 California Penal Code.
- 7 • Count 16 is barred by the four-year statute of limitations period under  
8 the California Business and Professions Code because plaintiffs first  
9 became aware of their compromised system in 1998.
- 10 • Counts 17-20 are barred by the two-year statute of limitations  
11 applicable to plaintiffs’ common law claims for tortious interference,  
12 unjust enrichment and conversion.
- 13 • Count 21 is not directed at Wilson.
- 14 • Count 22, for joint contribution, fails because plaintiffs’ other state law  
15 claims are time-barred.

16 Finally, in the alternative, this Court should strike the entire TAC for the  
17 reasons set forth in the motion to strike filed by defendants NDS Group PLC and  
18 NDS Americas, Inc. Fed. R. Civ. P. 12(f).

## 19 II.

### 20 ARGUMENT

#### 21 A. This Court Lacks Personal Jurisdiction Over Wilson.

22 Rule 12(b)(2) allows for motions to dismiss on the basis of lack of personal  
23 jurisdiction. Plaintiffs have the burden of making a *prima facie* showing that  
24 Wilson is subject to personal jurisdiction in this forum. *See Amoco Egypt Oil Co. v.*  
25 *Leonis Navigation Co.*, 1 F.3d 848, 850 (9th Cir. 1993) (holding that it was not  
26 reasonable to obtain personal jurisdiction in the state of Washington over a  
27 Philippine shipping corporation that used Washington as a port of call on its  
28 shipping route). Plaintiffs cannot make this showing.

1 Without an applicable federal statute governing personal jurisdiction, the law  
2 of the state in which the district court sits applies. *Core-Vent Corp. v. Nobel*  
3 *Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (granting motion to dismiss for  
4 lack of personal jurisdiction because subjecting Swedish doctors to jurisdiction in  
5 California would have been unreasonable). California's long arm statute allows  
6 courts to exercise personal jurisdiction over defendants to the extent permitted by  
7 the Due Process Clause of the United States Constitution. *See* Cal. Code Civ. Proc.  
8 § 410.10. Due process is satisfied only when a non-resident defendant has "certain  
9 minimum contacts with the forum such that the maintenance of the suit does not  
10 offend traditional notions of fair play and substantial justice." *International Shoe*  
11 *Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945).

12 Depending on the nature of a foreign defendant's contacts with the forum, a  
13 federal court may obtain either specific or general jurisdiction over the defendant.  
14 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnaria Co.*, 284 F.3d 1114, 1123  
15 (9th Cir. 2002) (granting motion to dismiss for foreign corporation for lack of  
16 personal jurisdiction). A court exercises specific jurisdiction where the cause of  
17 action arises out of or has a substantial connection to the defendant's contacts with  
18 the forum. *Hanson v. Denckla*, 357 U.S. 235, 251, 78 S.Ct. 1228, 2 L.Ed.2d 1283  
19 (1958) (finding no personal jurisdiction over defendant trust company where it had  
20 no office on Florida, did not transact business in Florida, nor solicit business in  
21 Florida). A court exercises general jurisdiction if the defendant's contacts with the  
22 forum are "substantial, continuous, and systematic." *Helicopteros Nacionales de*  
23 *Columbia, S.A. v. Hall*, 466 U.S. 408, 415 n.9, 104 S.Ct. 1869, 80 L.Ed.2d 404  
24 (1984) (holding that Colombian company's contacts with Texas that consisted of  
25 purchasing helicopters from Texas and related trips to Texas was insufficient to  
26 assert personal jurisdiction over Colombian company in Texas).

27 With both general and specific jurisdiction, due process requires that  
28 "contacts proximately result from actions by the defendant himself that create a

1 'substantial connection' with the forum state." This ensures that a defendant will  
2 not be haled into a jurisdiction solely as a result of "random, fortuitous, or  
3 attenuated contacts." *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct 2174,  
4 85 L.Ed.2d 528 (1985).

5 **1. This Court Lacks Specific Jurisdiction Over Wilson.**

6 Plaintiffs cannot demonstrate specific jurisdiction over Wilson. In exercising  
7 specific jurisdiction, the Ninth Circuit applies a three-part test:

- 8 1. Whether a defendant purposefully availed himself or herself of the  
9 privileges of conducting activities in the forum.
- 10 2. Whether the claim arises out of or results from the defendant's forum-  
11 related activities.
- 12 3. Whether the exercise of jurisdiction is reasonable.

13 *Meyers v. Bennett Law Offices*, 238 F.3d 1068, 1072 (9th Cir. 2001).

14 a. ***Wilson did not purposefully avail herself of the privilege of***  
15 ***conducting activities in California.***

16 Analyzing the first test, Wilson did not purposely avail herself to the  
17 privilege of conducting activities in California. In fact, Wilson has never been to  
18 California. (Wilson Decl. ¶ 10). To the extent that her son's company, X-Factor  
19 Web Design, Inc, availed itself of California, Wilson had no role in the company or  
20 any particular California-related activity. (Wilson Decl. ¶ 7). She merely  
21 functioned as a mail drop for the company; she did not even know what her son's  
22 company did. (Wilson Decl. ¶ 9).

23 No allegations in the TAC against Wilson can be construed as her purposely  
24 availing herself of California. Thus, the only conceivable basis for jurisdiction over  
25 Wilson would be under a "conspiracy theory" of jurisdiction. In other words, if this  
26 Court has jurisdiction over one defendant, then this Court has jurisdiction over all  
27 the other defendants because plaintiffs alleged they are co-conspirators. But the  
28 Ninth Circuit has never recognized this theory of jurisdiction. *See Steinke v. Safeco*

1 *Ins. Co. of America*, 270 F.Supp. 2d 1196, 1200 (D. Mont. 2003) (numerous district  
2 courts in the Ninth Circuit have rejected the conspiracy theory and “this [c]ourt has  
3 never recognized the conspiracy theory of jurisdiction, nor has the Ninth  
4 Circuit...”). In *Kipperman v. McCone*, 422 F.Supp. 860 (N.D. Cal. 1976), the  
5 district court ruled that, since the Supreme Court has rejected a theory of “vicarious  
6 venue” for co-conspirators, it followed that there could be no theory of “vicarious  
7 jurisdiction.” *Id.* at 873 n.14 (collecting cases).

8 Similarly, state courts in California have rejected conspiracy as a basis for  
9 personal jurisdiction under California’s long arm statute. In *Crea v. Busby*, 48  
10 Cal.App.4<sup>th</sup> 509, 55 Cal.Rptr. 2d 548 (1996), the plaintiff contended that an Oregon  
11 lawyer was subject to suit in California over an Oregon lawsuit because the Oregon  
12 lawyer was a member of the California bar and was a member of a conspiracy  
13 whose members were subject to jurisdiction in California. *Id.* at 516. The Court of  
14 Appeal found for the lawyer. The court held that the acts of other parties cannot be  
15 imputed to another party for the purpose of assuming personal jurisdiction. *Id.* at  
16 517. The court further concluded that personal jurisdiction over a non-resident  
17 individual must be premised upon forum-related acts personally committed by the  
18 individual. *Id.* See also *Kaiser Aetna v. Deal*, 86 Cal. App. 3d 896, 901, 150  
19 Cal.Rptr. 615 (1978) (allegations of conspiracy do not create personal jurisdiction  
20 over each alleged conspirator because the purpose and acts of other co-conspirators  
21 cannot be imputed to non-resident defendant for purposes of jurisdiction).

22 Even if a “conspiracy theory” of jurisdiction existed, it would not apply here  
23 because the TAC should be dismissed for failure to state a valid claim for relief,  
24 preventing the finding of a valid conspiracy allegation.

25 Therefore, plaintiffs’ allegations do not meet the first test.

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1                   **b.     *Plaintiffs' claims do not arise out of or result from Wilson's***  
2   ***forum-related activities.***

3                   To satisfy the second test, plaintiffs must show that it would not have been  
4 injured "but for" Wilson's contacts with California. *Doe v. Unocal Corp.*, 248 F.3d  
5 915, 924 (per curium). But plaintiffs cannot show any contacts Wilson had with  
6 California that caused them injury. Plaintiffs can only state that Wilson was named  
7 as a contact person for her son's small Canadian based company and wildly  
8 speculate that she was part of a global conspiracy to compromise their conditional  
9 access system. Plaintiffs are Colorado, Nevada and Texas corporations with  
10 principal offices in Colorado. (See TAC at ¶¶ 27, 28, 29, 30). Even if these  
11 allegations against Wilson are taken at face value, any harm Wilson allegedly  
12 inflicted upon them as part of a conspiracy would have been done in Nevada,  
13 Texas, or Colorado – plaintiffs' principal places of business -- not California.  
14 Accordingly, the Court does not have specific jurisdiction over Wilson.

15                   **c.     *It would be unreasonable to exercise personal jurisdiction.***

16                   In this case, it would be unreasonable to exercise personal jurisdiction over  
17 Wilson. Wilson recently retired as a caretaker at a convalescent home for elderly  
18 nuns in Edmonton, Alberta and has no other business interests. Moreover, Wilson  
19 has no contacts with the United States or California. Defending against a lawsuit in  
20 California principally between two large corporations would consume both time  
21 and money. It is unreasonable to thrust her into this case by the mere fact that she  
22 acted as a "contact person" for her son's company, especially since she was not  
23 involved in the operations of the company. Indeed, she was not even sure what the  
24 company did.

25                   **2.     This Court Lacks General Jurisdiction Over Wilson.**

26                   Similarly, plaintiffs' allegations cannot support a finding of general  
27 jurisdiction over Wilson. To exercise general jurisdiction over Wilson, this Court  
28 must consider her contacts and determine whether they constitute "the kind of

1 continuous and systematic general business contacts that ‘approximate physical  
2 presence.’” *Bancroft & Masters, Inc. v. Augusta Nat’l Inc.*, 223 F.3d 1082, 1086  
3 (9<sup>th</sup> Cir. 2000) (license with several California vendors insufficient to obtain  
4 personal jurisdiction over Georgia golf club).

5 In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnaria Co.*, 284 F.3d  
6 1114, 1123 (9<sup>th</sup> Cir. 2002), the defendant was a manufacturer and distributor of rice.  
7 The defendant’s contacts with California consisted of an independently employed  
8 sales agent who imported and distributed the company’s rice. Defendant’s contacts  
9 comprised of 16 rice shipments from India to California between 1987 to 2000. *Id.*  
10 at 1124. The court held that this was not sufficient to confer personal jurisdiction  
11 over the defendant. *Id.* at 1125. The court maintained that the “physical presence”  
12 necessary for an assertion of general jurisdiction requires more. *Id.*

13 Here, Wilson has no contacts with California, let alone any that would  
14 constitute an “approximate physical presence.” She does not live in California nor  
15 has she ever traveled here. She does not own property within the state or have any  
16 connection to the state. She was not served with process in California and did not  
17 consent to jurisdiction here. Therefore, this Court lacks general jurisdiction over  
18 Wilson.

19 Even if Wilson had the required minimum contacts to support general  
20 jurisdiction, this Court must analyze whether asserting jurisdiction would be  
21 reasonable. *Asahi Metal Industry Co., Ltd. v. Sup Ct.*, 480 U.S. 102, 113, 107 S. Ct.  
22 1026, 94 L. Ed. 2d 92 (1987). In *Burger King v. Rudzewicz*, *supra*, the Supreme  
23 Court considered seven factors to assess the reasonableness of exercising  
24 jurisdiction:

- 25 1. The extent of a defendant’s purposeful interjection into the forum  
26 state’s affairs;
- 27 2. The burden on the defendant of defending the forum;

28 ///



- 1           3.     The extent of conflict with the sovereignty of the defendant's home
- 2           state;
- 3           4.     The forum state's interest in adjudicating the dispute;
- 4           5.     The most efficient judicial resolution of the controversy;
- 5           6.     The importance of the forum to the plaintiff's interest in convenient
- 6           and effective relief;
- 7           7.     The existence of an alternative forum.

8           These seven factors point to the Court not exercising personal jurisdiction  
9 over Wilson.

- 10         • Wilson did not purposefully interject herself in the affairs of California. In  
11         fact, she has not done anything that affects the affairs of this state.
- 12         • The burden on defending this lawsuit is great. Wilson lives and works in  
13         Canada as a caretaker at a convalescent home, which is her sole means of  
14         support. She has no property in California. (*See* Wilson Decl. ¶ 10). If  
15         plaintiffs' Third Amended Complaint is any indication, Wilson, a Canadian  
16         citizen, will have to defend herself in an exhaustively litigated case in  
17         another country.
- 18         • Whenever a defendant is from a foreign nation, the sovereignty barrier is  
19         high and undermines the reasonableness of personal jurisdiction. *See Amoco*  
20         *Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 852 (9<sup>th</sup> Cir. 1993).
- 21         • Plaintiffs are Colorado, Texas, and Nevada corporations suing two non-  
22         California corporations and other individual foreign nationals. There appears  
23         to be only a slight interest in adjudicating this suit in California.
- 24         • Canada is an alternative forum for plaintiffs' putative claims against Wilson.  
25         Wilson does not have any property or assets in California. (*See* Wilson Decl.  
26         ¶ 10). Even if plaintiffs attained a judgment against Wilson, it would not be  
27         convenient or effective for plaintiffs to receive relief in California. *See*  
28         *Glencore*, 284 F.3d at 1126 ("absent any evidence of assets in the California

1 forum against which [plaintiff] could enforce its award, we find [plaintiff's]  
2 relief is frustrated, not promoted, by bringing suit here.”)

3 Weighing all of these factors, plaintiffs have failed to demonstrate that  
4 exercising personal jurisdiction over Wilson would be reasonable.

5 Furthermore, the unique burdens placed upon a foreign national defending  
6 herself in a foreign locale have significant weight in assessing the reasonableness of  
7 a local court's exercise of personal jurisdiction. *See Asahi Metal Industry Co., Ltd.*  
8 *v. Sup Ct.*, 480 U.S. 102, 114, 107 S.Ct. 1026 (1987); *Rano v. Sipa Press, Inc.* 987  
9 F.2d 580, 588 (9<sup>th</sup> Cir. 1993) (“higher jurisdictional barrier” required for aliens).

10 This principle has been adopted in several Ninth Circuit cases. In *Fields v.*  
11 *Sedgwick Associate Risks, Ltd.*, 796 F.2d 299, 301-302 (9<sup>th</sup> Cir. 1986), the Ninth  
12 Circuit held that it was unreasonable for California courts to exercise jurisdiction  
13 over an English insurer. The court reasoned that the burden on the insurer to  
14 defend in California was great and California had no strong interesting adjudicating  
15 the case.

16 Similarly, in *Core-Vent Corp. v. Nobel Industries AB, supra*, 11 F.3d 1482,  
17 the Ninth Circuit held that it was unreasonable to exercise personal jurisdiction over  
18 Swedish doctors in a defamation action. The action was based on an article the  
19 doctors had written in an international medical journal that allegedly defamed a  
20 California Corporation. The Ninth Circuit stated that even if the doctors had  
21 “purposefully interjected” themselves in California, requiring them to submit to  
22 jurisdiction in California would impose substantial burdens on them and would  
23 conflict with Swedish sovereignty. *Id.* at 1488. These factors and the availability  
24 of an alternative forum in Sweden outweighed any interest California might have in  
25 adjudicating the dispute. *Id.* at 1489-90.

26 Wilson lacks sufficient contacts with California. She did not purposefully  
27 interject herself in California. And requiring her to submit to jurisdiction would

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1 place a substantial burden upon her. Therefore, Wilson requests that the Court  
2 dismiss this action against her for lack of personal jurisdiction under Rule 12(b)(2).

3 **3. This Court Lacks Jurisdiction Under Fed R. Civ P. 4(k)(2).**

4 Plaintiffs cannot rely on Fed. R. Civ. P. 4(k)(2) to confer personal  
5 jurisdiction over Wilson. Rule 4(k)(2) authorizes the exercise of extraterritorial  
6 jurisdiction over any defendant against whom a claim is made under federal law, if  
7 the federal law lacks a provision to reach the defendant and if the defendant is not  
8 subject to personal jurisdiction in the courts of general jurisdiction of any state. *See*  
9 *generally*, 4B Charles A. Wright and Arthur R. Miller, *Federal Practice and*  
10 *Procedure* § 1124 (3 ed. 2002) (hereinafter “Wright & Miller”). In essence, the  
11 rule provides a federal long arm statute in a narrow band of cases in which the  
12 United States serves as the relevant forum for a minimum contacts analysis. *See*  
13 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnaria Co.*, 284 F.3d 1114, 1126  
14 (2002).

15 The purpose of Rule 4(k)(2) is to provide jurisdiction in the rare and odd  
16 situation in which a defendant would have minimum contacts with the United  
17 States as a whole, but not with any individual State. (4B Wright & Miller, *supra*, §  
18 1124). Moreover, even the exercise of this extraterritorial personal jurisdiction  
19 must be fair and reasonable. *United States v. Swiss American Bank, Ltd.*, 274 F.3d  
20 610, 621 (1<sup>st</sup> Cir. 2001) (rejecting use of Rule 4(k)(2) to confer personal jurisdiction  
21 over foreign defendant).

22 Even under Rule 4(k)(2), the Ninth Circuit has recognized that “minimum  
23 contacts” for personal jurisdiction requires a substantial level of contact with the  
24 United States. For example, in *Glencore Grain Rotterdam*, 284 F.3d at 1126, the  
25 Ninth Court held that a grain producer’s seven shipments to the east coast of the  
26 United States and 16 shipments to California did not establish national contacts to  
27 support the exercise of jurisdiction under Rule 4(k)(2). Similarly, in *Doe v. Unocal*  
28 *Corp.* 24 F.3d 915, 922 (9th Cir. 2001), the Ninth Circuit found that a French

1 company, which listed its stock on various stock exchanges in the United States and  
2 promoted stock in the United States, did not have sufficient minimum contacts with  
3 the United States to establish personal jurisdiction under Rule 4(k)(2).

4 These cases illustrate that a plaintiff must establish more than attenuated  
5 contacts with the United States to confer personal jurisdiction over a foreign  
6 defendant. What is more, the foreign defendants in *Glencore* and *Unocal* had at  
7 least *some* contact with the United States. Plaintiffs have not established any  
8 contacts Wilson has had with the United States.

9 Plaintiffs have not alleged any facts that would subject Wilson to personal  
10 jurisdiction in California or the United States. Plaintiffs implicitly concede that  
11 Wilson's personal role in her son's company by itself is insufficient for personal  
12 jurisdiction. (See TAC, ¶ 26). Therefore, Wilson does not have the minimum  
13 contacts necessary for personal jurisdiction in this forum.

14 **B. In the Alternative, This Court Should Dismiss the TAC for Failure to**  
15 **State a Claim.**

16 Even if this Court should find that personal jurisdiction exists over Wilson,  
17 the TAC fails to state a proper claim for relief against her.

18 A court should dismiss a claim under Rule 12(b)(6) where there is either a  
19 "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a  
20 cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699  
21 (9th Cir. 1990). While a court must accept all well-pleaded facts as true,  
22 "conclusory allegations without more are insufficient to defeat a motion to dismiss  
23 for failure to state a claim." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th  
24 Cir. 1988) (dismissing action after plaintiff could not allege elements of antitrust  
25 claim). The court need not "assume the truth of legal conclusions merely because  
26 they are in the form of factual allegations." *Western Mining Council v. Watt*, 643  
27 F.2d 618, 624 (9th Cir. 1981) (case dismissed when plaintiffs did not plead facts

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1 demonstrating standing to bring suit). Plaintiffs have failed to state a claim against  
2 Wilson; she should therefore be dismissed from the case.

3 Wilson joins in the arguments of defendants NDS Group PLC, NDS  
4 Americas, Inc., Christopher Tarnovsky, George Tarnovsky, Stanley Frost, John  
5 Norris, Allen Menard and Mervyn Main expressed in their respective motions to  
6 dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be  
7 granted. Wilson specifically raises the arguments that pertain to her and applies the  
8 authorities and arguments in those motions to her own facts.

9 **1. The Allegations in the TAC are Not Pled With Particularity.**

10 Plaintiffs allege that Wilson, along with the other defendants, engaged in a  
11 unified fraudulent course of conduct to compromise plaintiffs' conditional access  
12 system. (*See* TAC, ¶¶ 20-21, 135 & SAC 70, 79, 82, 85, 151 & 195). When a  
13 complaint, like the TAC, comprises of allegations of a "unified fraudulent course of  
14 conduct", the complaint is considered "grounded in fraud." *Vess v. Ciba-Geigy*  
15 *Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (holding that complaint not  
16 sufficient under Rule 9). In these situations, Rule 9 requires that plaintiffs allege  
17 "the particulars of when, where or how the alleged conspiracy occurred." *Id.* at  
18 1106-07.

19 Plaintiffs have not done so. Plaintiffs do not describe with any particularity  
20 what role Wilson played in any of the supposed wrongdoings described in the TAC.  
21 Plaintiffs have only alleged that Wilson was the contact person for her son's  
22 website. As set forth in the other motions, none of the claims for relief in the TAC  
23 are plead to meet the exacting requirements of Rule 9. Therefore, the TAC must be  
24 dismissed.

25 **2. Allegations of the Conduct of Others Cannot Impute Liability to**  
26 **Wilson.**

27 In the SAC, plaintiffs simply lumped all defendants together. As set forth in  
28 NDS' motion to strike, the cosmetic improvements in the TAC are still insufficient.

1 The ongoing flaws discussed in the motion to strike also prevent the TAC from  
2 stating a claim under Rule 12(b)(6). Each defendant is not alleged to have  
3 personally committed conduct giving rise to a claim for relief; rather, it is the  
4 concert of action between the individual defendants and NDS that supposedly  
5 supports the TAC. This purported concert of action also underlies the allegations  
6 that some conduct falls within the limitations periods.

7 Therefore, in the absence of properly-pled ties between defendants, there can  
8 be no valid complaint. The TAC still does not properly allege liability based on the  
9 conduct of other defendants, based on either agency or conspiracy. Therefore, the  
10 TAC must be dismissed.

11 **a. *Wilson cannot be held liable under an agency theory.***

12 In its Rule 12(e) Order, this Court addressed plaintiffs' unsupported agency  
13 allegations contained in the SAC. To find defendants liable through theories of  
14 agency, this Court ordered plaintiffs to plead facts that would lead to the conclusion  
15 that agency exists. (Rule 12(e) Order at 4).

16 An allegation that one party is the agent of another is a legal conclusion and  
17 must be supported by sufficient factual allegations. *Adams v. NVR Homes, Inc.*,  
18 193 F.R.D. 243, 250-52(D. Md. 2000) (pleadings must indicate with particularity  
19 the factual predicate for the agency relationship). In the TAC, plaintiffs allege that  
20 Wilson is an agent of Menard and a sub-agent of NDS. (TAC, ¶ 92(c)). But  
21 plaintiffs do not support this legal conclusion with any supporting facts  
22 demonstrating an agency relationship between Wilson and Menard. More  
23 important, plaintiffs do not allege any specific conduct by Wilson that could give  
24 rise to liability in this case. Plaintiffs do not elaborate on how being named as a  
25 "contact person" for a company gives rise to liability. To the extent that plaintiffs  
26 seek to hold Wilson liable for the actions of others under a theory of agency, the  
27 basic principles of agency prohibit an agent from being held liable for the acts of a  
28 principle or co-agent. *See Hernandez v. Gates*, 100 F. Supp.2d 1209, 1218 n.13

1 (C.D. Cal. 2000) ("reverse' respondeat superior liability is not cognizable").  
2 Allegations of agency do not save plaintiffs' infirm pleading against Wilson.

3 **b. Conspiracy allegations do not impute liability to Wilson.**

4 As an alternative theory of vicarious liability, plaintiffs allege that Wilson  
5 was a co-conspirator with NDS in compromising plaintiffs' security system. (TAC  
6 at 37-38). But plaintiffs may not impute liability to Wilson based merely on  
7 allegations that Wilson was a co-conspirator with other alleged wrongdoers.

8 As set forth in other motions, the conspiracy allegations are in fact  
9 insufficient under either Rule 9 or Rule 8, and merely resting on a bald allegation of  
10 a "conspiracy" without alleging any supporting factual allegations will not avoid  
11 dismissal. *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1152 (9<sup>th</sup> Cir. 1998)  
12 (dismissing complaint where conspiracy claim not plead with requisite  
13 particularity); *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) (affirming  
14 dismissal of § 1983 claim because "mere conclusory allegations of a conspiracy are  
15 insufficient to survive a motion to dismiss"); *Arsenaux v. Roberts*, 726 F.2d 1022,  
16 1024 (5th Cir. 1982) (mere conclusory allegations of conspiracy between lawyer  
17 and state trial judge could not survive motion to dismiss absent reference to  
18 material facts). The allegation of conspiracy is a legal conclusion, not a factual  
19 assertion. *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 259, 288-90, 88  
20 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); *Young v. Kann*, 926 F.2d 1396, 1405 n.16 (3d  
21 Cir. 1991) (mere averment of conspiracy without facts is a conclusion of law and  
22 insufficient to state a claim).

23 Plaintiffs fail to allege facts supporting their allegations that Wilson agreed to  
24 participate in the alleged conspiracy with NDS and the other defendants. Without  
25 this showing, plaintiffs' conspiracy theory of liability is insufficient to state a claim  
26 against Wilson. *See Berry v. Baca*, 2002 WL 356763 at \*3 (C.D. Cal. 2002)  
27 (dismissing conspiracy count where allegations failed to state (1) who agreed to

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1 engage in the conspiracy; (2) what was agreed to; (3) when it was agreed to; or (4)  
2 how it was agreed to.”).

3 **3. The Applicable Statutes of Limitations Bar the Claims for Relief.**

4 Under Rule 15(c)(3) of the Federal Rules of Civil Procedure, the claims  
5 against Wilson, who was first named in the Second Amended Complaint, would not  
6 relate back to the original complaint filed on June 6, 2003. Therefore, the date for  
7 the statute of limitations is February 18, 2004, when the Second Amended  
8 Complaint was lodged.

9 Like the Second Amended Complaint, the majority of the claims alleged in  
10 the TAC are governed by a two- or three-year statute of limitations (Counts 1-8, 11-  
11 20 and 22). In the Second Amended Complaint, plaintiffs did not allege any  
12 actionable conduct by Wilson, let alone any after February 18, 2001. Seeking to  
13 cure this defect, plaintiffs now allege upon “information and belief” that Wilson  
14 engaged in unknown actionable up until June 21, 2001. Plaintiffs further allege that  
15 Wilson and other defendants are “actively engaged” in unspecified wrongdoing.  
16 (TAC, ¶¶ 224, 223, 309, 310, 312, 313, 319 and 344).

17 These unsupported allegations do not satisfy the particularity requirements of  
18 Rule 9. *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7<sup>th</sup> Cir. 1990) (plaintiff must  
19 plead the “who, what, when where, and how”). Mere allegations of fraud,  
20 corruption or conspiracy are too conclusional to satisfy the particularity  
21 requirement of Rule 9. *Hayduk v. Lanna*, 775 F.2d 441, 444 (1<sup>st</sup> Cir. 1985).

22 These unspecified allegations of continuing wrongdoing do not even satisfy  
23 the more liberal standards of Rule 8. The TAC alleges detailed facts that occurred  
24 in December 2000 or earlier. On the other hand, the conduct alleged after  
25 December 2000 is limited to unspecified continuing wrongdoing. Under Rule 8,  
26 the Court need not rely on vague allegations of continuing conduct, when the  
27 specific allegations refer to acts that are not within the limitations period. *Brian*

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1 *Clewer, Inc. v. Pan American World Airways, Inc.*, 674 F.Supp. 782, 785 (C.D. Cal.  
2 1986); *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9<sup>th</sup> Cir. 1992).

3 Plaintiffs claim under California Business and Professions Code § 17200  
4 (Count 16), which has a four-year statute of limitation, is also time-barred.

5 Plaintiffs allege that they were first informed that their system had been hacked on  
6 November 3, 1998. For accrual purposes, the relevant date is the alleged act of  
7 misappropriating plaintiffs' security system. *See Nesovic v. United States*, 71 F.3d  
8 776, 778-79 (9th Cir. 1995) (holding that faulty tax assessment was the single  
9 wrongful act and other injuries were merely the effects of the original violation).

10 Thus, the date of accrual for plaintiffs' claim under section 17200 is November 3,  
11 1998. This is more than four years before plaintiffs brought this action against  
12 Wilson. Therefore, the statute has run.

13 Plaintiffs have not asserted any facts that Wilson has engaged in actionable  
14 conduct within the two and three-year statute of limitations or the four-year statute  
15 of limitations for California Business and Professions Code § 17200. Accordingly,  
16 Counts 1-8, 11-20 and 22 should be dismissed against Wilson.

17 **4. Plaintiffs' RICO Claims Should be Dismissed.**

18 a. *Plaintiffs' claims under § 1962(c) and § 1962(d) should be*  
19 *dismissed for the reasons set forth in NDS's Motion to*  
20 *Dismiss.*

21 Wilson hereby joins defendant NDS in the arguments expressed in its Motion  
22 to Dismiss with respect to plaintiffs' RICO claims under 18 U.S.C. § 1962(c) and  
23 18 U.S.C. § 1962(d) RICO claims (Counts 9-10). Particularly, plaintiffs fail  
24 properly to allege a criminal RICO "enterprise" necessary to support their § 1962(c)  
25 claim and the corollary conspiracy claim under § 1962(d). In addition, NDS's  
26 Motion to Dismiss demonstrates that the TAC fails to allege the necessary predicate  
27 acts for a RICO claim and thus fails to allege the required "pattern" of racketeering  
28 activity.

1                   **b.     *Wilson is not a proper "person" for purposes of RICO.***

2                   In order for a "person" to be liable under 1962(c), the person must participate  
3 in the "operation and management of the enterprise itself." *Reves v. Ernst &*  
4 *Young*, 507 U.S. 170, 184, 113 S.Ct. 1163, 122 L. Ed. 2d 525 (1993). Plaintiffs do  
5 not allege that Wilson participated in the operation and management of the  
6 enterprise. Any contention would run counter to plaintiffs' allegation that Wilson  
7 "acted under the control of NDS." (TAC, ¶ 64).

8                   **5.     Additional Independent Reasons Support the Dismissal of**  
9                   **Plaintiffs' State Law Claims.**

10                   **a.     *This Court should dismiss plaintiffs' speculative interference***  
11                   ***claims for the reasons given in NDS's Motion to Dismiss.***

12                   Wilson joins in the arguments provided by NDS in its motion to Dismiss  
13 with respect to plaintiffs' claims for interference with contractual relations and  
14 prospective contractual relations/economic advantage. (Counts 17 and 18). This  
15 Court should dismiss these claims because they do not identify the alleged  
16 relationships with the required particularity.

17                   **b.     *Plaintiffs' § 17200 should be dismissed.***

18                   Wilson joins in the arguments by NDS in its Motion to Dismiss with respect  
19 to plaintiffs' claims under section 17200 of the California Business & Professions  
20 Code. Specifically, plaintiffs' inability to plead sufficient facts for their other  
21 claims for relief precludes maintaining an action under section 17200. *See Daly v.*  
22 *Viacom, Inc.*, 238 F.Supp.2d 1118, 1126 (N.D. Cal. 2002).

23                   **c.     *The claims under the California Penal Code do not***  
24                   ***pertain to Wilson.***

25                   Plaintiffs bring Counts 11-15 under provisions of the California Penal Code  
26 that prohibit the sale of signal theft devices or the unauthorized interception of  
27 satellite signals. But the statutes underlying these counts do not purport to affect  
28 the whole world, and would not apply to Wilson, a Canadian citizen who has never

1 visited California. There is no allegation that Wilson possessed anything in  
2 California.

3 **6. The TAC Should Be Dismissed Without Leave to Amend.**

4 Plaintiffs have failed to state a claim for relief against Wilson. This Court  
5 does not have personal jurisdiction over Wilson – a Canadian citizen with no ties to  
6 California or the United States. Even if personal jurisdiction did exist, plaintiffs  
7 have not supported their theories of agency or conspiracy. Virtually all of the  
8 claims contained in the TAC are barred by the statute of limitations. Plaintiffs have  
9 had four opportunities to plead a valid complaint, and they have failed each time.  
10 Even with the Court pointing out these deficiencies and guiding plaintiffs on how to  
11 cure them, the TAC fails. Four tries is enough. Therefore, this Court should  
12 dismiss the TAC without leave to amend.

13 **C. In the Alternative, this Court Should Strike the Entire Third**  
14 **Amended Complaint.**

15 Wilson joins in the motion to strike the Third Amended Complaint filed by  
16 defendants NDS Group PLC and NDS Americas, Inc., etc. Fed. R. Civ. P. 12(f).

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**III.**

**CONCLUSION**

For the foregoing reasons, plaintiffs' TAC should be dismissed for lack of personal jurisdiction. If this Court finds that personal jurisdiction exists, then this Court should dismiss the TAC without leave to amend for failure to state a claim or should strike the TAC in its entirety.

Dated: September 20, 2004

Respectfully submitted,

CORBIN & FITZGERALD LLP  
ROBERT L. CORBIN  
MICHAEL W. FITZGERALD  
BART DALTON

By:   
Bart Dalton

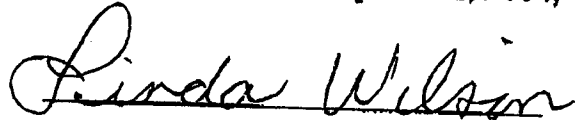
Attorneys for Defendants  
LINDA WILSON, ALLEN MENARD,  
and MERVYN MAIN

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**DECLARATION OF LINDA WILSON**

I, LINDA WILSON, declare and state as follows:

1. I am a Canadian citizen. I live in Carlyle, Saskatchewan.
  2. I recently retired as a caretaker at a convalescent home for elderly nuns in Edmonton, Alberta.
  3. I am the mother of Allen Menard, a named defendant in this case.
  4. In or around 1998, my son used my name and address as a "contact person" for the registration of his internet domain name for his company, X-Factor Web Design, Inc.
  5. I agreed to be named as the contact person because my son was going to be moving from his home to another home within a few months.
  6. I was the logical choice as the contact address because I did not intend to move from my house at that time.
  7. I was not involved in my son's business.
  8. I did not serve any function to the company besides being named as a "contact person."
  9. I only had a vague notion that the business involved computers in some way.
  10. I do not own property or have any other assets in California or the United States. In fact, I have never visited California.
  11. I have never conducted any business in California or the United States.
- I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed this 15<sup>th</sup> day of September, 2004, at Carlyle, Saskatchewan, Canada.



LINDA WILSON

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 COUNTY OF LOS ANGELES ) ss.

4 I am employed in the County of Los Angeles, State of California. I am  
5 over the age of 18 and not a party to the within action; my business address is 601  
6 West Fifth Street, Suite 1150, Los Angeles, California 90071-2025.

7 On September 20, 2004, I served the foregoing document described as  
8 DEFENDANT LINDA WILSON'S NOTICE OF MOTION AND MOTION TO  
9 DISMISS THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS  
10 AND AUTHORITIES; DECLARATION OF LINDA WILSON on the interested  
11 parties in this action by placing a true copy thereof enclosed in a sealed envelope  
12 addressed as follows:

13 **SEE ATTACHED MAILING LIST**

14 [ ] Via U.S. Mail I caused such envelope with postage thereon fully  
15 prepaid to be placed in the United States mail at Los  
16 Angeles, California. I am "readily familiar" with the  
17 firm's practice of collection and processing  
18 correspondence for mailing. It is deposited with U.S.  
19 postal service on that same day in the ordinary course of  
20 business. I am aware that on motion of party served,  
21 service is presumed invalid if postal cancellation date or  
22 postage meter date is more than one day after date of  
23 deposit for mailing in affidavit.

24 [ ] Via Facsimile I am familiar with the office practice of Corbin &  
25 Fitzgerald, LLP for collecting, processing and  
26 transmitting documents via facsimile. Under that  
27 practice, I faxed the above-described document to the  
28 facsimile number(s) referenced herein. The facsimile of  
the above-described document was transmitted to the  
following parties from Los Angeles, California on  
September 20, 2004 at the times noted on the attached  
confirmation sheet(s).

[xx] Personal Service I personally delivered such envelope to the offices of the  
addressee listed and noted on the attached mailing list.

Executed on September 20, 2004, at Los Angeles, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of  
California that the foregoing is true and correct.

[xx] (Federal) I declare that I am employed in the office of a member of the  
bar of this court at whose direction the service was made.

27 Christina Kim  
28 Christina Kim

1                    **EchoStar Satellite Corporation et al. V. NDS Group, PLC, et al.**  
2                    Case No. SA CV 03-950 DOC(ANX)

3  
4                    **Attorneys for Plaintiffs, EHOSTAR**  
5                    **SATELLITE CORPORATION,**  
6                    **EHOSTAR COMMUNICATIONS**  
7                    **CORPORATION, EHOSTAR**  
8                    **TECHNOLOGIES CORPORATION,**  
9                    **AND NAGRASTAR**

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1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA )  
3 COUNTY OF LOS ANGELES ) ss.

4 I am employed in the County of Los Angeles, State of California. I am  
5 over the age of 18 and not a party to the within action; my business address is 601  
6 West Fifth Street, Suite 1150, Los Angeles, California 90071-2025.

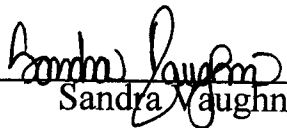
7 On September 20, 2004, I served the foregoing document described as  
8 DEFENDANT LINDA WILSON'S NOTICE OF MOTION AND MOTION TO  
9 DISMISS THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS  
10 AND AUTHORITIES; DECLARATION OF LINDA WILSON on the interested  
11 parties in this action by placing a true copy thereof enclosed in a sealed envelope  
12 addressed as follows:

13 **SEE ATTACHED MAILING LIST**

- 14 [ ] Via U.S. Mail I caused such envelope with postage thereon fully  
15 prepaid to be placed in the United States mail at Los  
16 Angeles, California. I am "readily familiar" with the  
17 firm's practice of collection and processing  
18 correspondence for mailing. It is deposited with U.S.  
19 postal service on that same day in the ordinary course of  
20 business. I am aware that on motion of party served,  
21 service is presumed invalid if postal cancellation date or  
22 postage meter date is more than one day after date of  
23 deposit for mailing in affidavit.
- 24 [xx] Overnight Delivery I caused such envelope(s) to be deposited in an  
25 overnight courier drop-box at Los Angeles, California  
26 for next business day delivery.
- 27 [ ] Personal Service I caused such envelope to be delivered by hand to the  
28 offices of the addressee listed and noted on the attached  
mailing list.

Executed on September 20, 2004, at Los Angeles, California.

- 29 [ ] (State) I declare under penalty of perjury under the laws of the State of  
30 California that the foregoing is true and correct.
- 31 [xx] (Federal) I declare that I am employed in the office of a member of the  
32 bar of this court at whose direction the service was made.

33   
34 Sandra Vaughn



1 *EchoStar Satellite Corporation et al. V. NDS Group, PLC, et al.*  
2 Case No. SA CV 03-950 DOC(ANX)

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