

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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|----------------------------|-----------------------------------|
| FS PARALLEL FUND, L.P., FS | §                                 |
| EMPLOYEE INVESTORS LLC,    | §                                 |
| FURMAN SELZ INVESTORS II   | § No. 521, 2004                   |
| L.P., ING FURMAN SELZ      | §                                 |
| INVESTORS III L.P., ING    | § Court Below – Court of Chancery |
| BARINGS GLOBAL LEVERAGED   | § of the State of Delaware,       |
| EQUITY PLAN LTD. and ING   | § in and for New Castle County,   |
| BARINGS U.S. LEVERAGED     | § C.A. No. 19853                  |
| EQUITY PLAN LLC,           | §                                 |
|                            | §                                 |
| Plaintiffs Below,          | §                                 |
| Appellants,                | §                                 |
|                            | §                                 |
| v.                         | §                                 |
|                            | §                                 |
| CHARLES W. ERGEN, DAVID    | §                                 |
| MOSKOWITZ, STEVE SCHAUVER, | §                                 |
| MARK JACKSON, ECHOSTAR     | §                                 |
| COMMUNICATIONS             | §                                 |
| CORPORATION, ECHOSTAR      | §                                 |
| SATELLITE CORPORATION and  | §                                 |
| ECHOBAND CORPORATION,      | §                                 |
|                            | §                                 |
| Defendants Below,          | §                                 |
| Appellees.                 | §                                 |

Submitted: May 24, 2005

Decided: July 21, 2005

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices, constituting the Court *en Banc*.

**ORDER**

This 21st day of July 2005, it appears to the Court that:

1) The plaintiffs-appellants, FS Parallel Fund L.P., FS Employee Investors LLC, Furman Selz Investors II L.P., ING Furman Selz Investors III L.P., ING Barings Global Leveraged Equity Plan Ltd. and ING Barings U.S. Leveraged Equity Plan LLC (collectively, the “Plaintiffs”) appeal from an opinion and order of the Court of Chancery dated November 3, 2004, denying the Plaintiffs leave to file an amended complaint against the defendants-appellees, Charles W. Ergen, David Moskowitz, Steve Schaver, Mark Jackson (“Individual Defendants); and EchoStar Communications Corporation, EchoStar Satellite Corporation and EchoBand Corporation (“Corporate Defendants”) (collectively the “Defendants”).

2) The FS Investors and the Corporate Defendants were both stockholders of StarBand Communications, Inc., a Delaware corporation. The Plaintiffs alleged that EchoStar assumed control of StarBand in September 2001 and then intentionally ruined StarBand’s business and financial viability. On May 31, 2002, StarBand declared bankruptcy. Shortly thereafter, StarBand settled all claims it had against EchoStar and the other Defendants.

3) The Plaintiffs filed their original complaint on August 20, 2002. In the complaint, the Plaintiffs alleged two causes of action. First, the Plaintiffs alleged that all of the Defendants breached their duties of care and

loyalty to the FS Investors by “taking steps to ensure that StarBand would no longer be viable.” According to the complaint, the Defendants purposefully destroyed StarBand because, if StarBand failed, government regulators would be more likely to approve EchoStar’s proposed merger with competitor Hughes Electronics Corporation. Second, the Plaintiffs’ original complaint alleged that the Corporate Defendants “consciously and deliberately aided and abetted the Individual Defendants in the breach of the individual defendants’ fiduciary duties.”

4) The Defendants filed a Motion to Dismiss the original complaint pursuant to the Court of Chancery Rules 12(b)(6) and 23.1, arguing that all of the Plaintiffs’ claims were derivative and that the StarBand settlement agreement reached as part of the bankruptcy proceedings precluded any derivative claims. On July 28, 2003, the Court of Chancery dismissed the original complaint on the basis that the Plaintiffs’ claims were derivative and therefore precluded by the settlement agreement.

5) The Plaintiffs appealed the Court of Chancery’s decision to this Court, arguing that their claims were direct. On April 15, 2004, this Court issued an order, *FS Parallel Fund, L.P. v. Ergen*, 847 A.2d 1121, remanding the case to the Court of Chancery to evaluate its decision in light of this

Court's ruling in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

6) Before the Court of Chancery acted on this Court's remand order, the Plaintiffs requested leave to amend their original complaint. The Defendants objected to the Plaintiffs' request for leave to amend without demonstrating good cause or providing a proposed amended complaint to evaluate. The Court of Chancery required the Plaintiffs to file a motion for leave to amend, including a proposed amended complaint.

7) On June 4, 2004, the Plaintiffs filed a Motion for Leave to File an Amended Complaint, which attached a proposed amendment. The Defendants opposed the motion. On November 3, 2004, the Court of Chancery issued a letter opinion, ruling that (i) this Court's remand order precluded amendment of the complaint; (ii) Court of Chancery Rule 15(aaa) barred amendment of the complaint, and (iii) the proposed amended to the original complaint would be futile. The Plaintiffs filed this appeal.

8) The Court of Chancery stated that it was denying the Plaintiffs Motion for Leave to File an Amended Complaint to Amend for three *independent* reasons, as outlined in its letter opinion dated November 3, 2004, to wit: first, that leave to amend would exceed the scope of this Court's order on remand; second, that granting leave to amend would be in

contravention of Court of Chancery Rule 15(aaa); and third, that the amendments would be futile and subject to dismissal under Court of Chancery Rule 12(b)(6).

9) It is unnecessary for this Court to address the first two independent reasons given by the Court of Chancery for denying the Plaintiffs' Motion for Leave to File an Amended Complaint because we agree with the third stated independent basis: that the amendments would be futile and subject to dismissal under Court of Chancery Rule 12(b)(6).<sup>1</sup>

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgment of the Court of Chancery is affirmed on the basis of the third independent reason and accompanying analysis set forth in its letter opinion dated November 3, 2004.

BY THE COURT:

/s/ Randy J. Holland  
Justice

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<sup>1</sup> See *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).