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

16
17 ECHOSTAR SATELLITE
18 CORP., et al.,
19
20 v.
21 NDS GROUP PLC, et al.,
22
23 Defendants/
Counterclaim
Plaintiffs.

No. SA CV 03-950 DOC(JTLx)
**ECHOSTAR'S RESPONSE IN
OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE NO. 6**
(PUBLIC REDACTED VERSION)
Date: Final Pretrial Conference -
March 14, 2008
Time: 7:30 a.m.
Dept: Judge David Carter
Courtroom 9D

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1 **I. INTRODUCTION**

2 NDS's motion in limine number 6 asks the Court to exclude a bevy of
3 evidence that is separately admissible, undeniably consistent, and self-
4 authenticating when viewed in its collection. NDS has first asked this Court to
5 exclude the James document and any testimony from Mr. James that proves NDS's
6 involvement in the piracy of Canal+ code. NDS's Amended Motion In Limine No.
7 6. In addition, NDS seeks to exclude emails from Mr. Menard to Mr. Dawson that
8 help prove Mr. Menard's involvement in at least the distribution of pirated
9 EchoStar access cards. *Id.* NDS also seeks to exclude an email from Chris
10 Tarnovsky to Jan Saggiori that proves Chris Tarnovsky's – an NDS employee and
11 known hacker's – involvement in the hacking of EchoStar's conditional access
12 system. *Id.* This email includes an attachment containing a portion of proprietary
13 and secret object code used in EchoStar's system. This code could not have been
14 obtained by someone other than one who had wrongfully hacked into EchoStar's
15 system. Finally, NDS has also asked the Court to exclude EchoStar's expert Steven
16 Roger's expert report regarding the email. EchoStar opposes this motion.

17 First, NDS's motion deals with substantive rather than evidentiary issues.
18 Courts routinely deny such motions, and NDS's motion is thus inappropriate. In
19 addition, NDS attempts to use new and/or previously undisclosed evidence in
20 support of its motion. This is impermissible. After having lost their motions
21 concerning these very issues on Summary Judgment, NDS desperately tries to
22 exclude damaging evidence at trial. NDS's effort is misplaced.

23 Second, EchoStar provides sufficient evidence to prove the authenticity of
24 the James document and the emails from Mr. Menard to Mr. Dawson. In addition,
25 the jury is entitled to hear or read Mr. James's sworn deposition testimony and also
26 the Menard emails. Indeed, this Court in its Final Order on Motions for Summary
27 Judgment ("Final Order") found Mr. James's testimony to be sufficiently credible
28 and the Menard emails to be authentic to deny NDS's motions.

1 Third, NDS's complaints regarding authenticity of the email from Chris
2 Tarnovsky to Jan Saggiori fail because EchoStar has provided sufficient evidence to
3 establish that the email and its attachment are what they purport to be.
4 Furthermore, contrary to NDS's innuendo, EchoStar has provided all the evidence it
5 has related to this email. In addition, this Court has also noted in its Final Order
6 that there is sufficient evidence for a jury to believe that Mr. Tarnovsky sent an
7 email containing portions of EchoStar's code to Mr. Saggiori.

8 NDS has also asked the Court to exclude EchoStar's expert Steven Roger's
9 expert report regarding the email. *See* NDS's Amended Motion No.6, Section IV.
10 B, page 15. EchoStar will not introduce Roger's testimony to prove the
11 authenticity of the email because such testimony is not needed.

12 **II. ARGUMENT AND AUTHORITIES**

13 **A. Operative Legal Standards.**

14 It is axiomatic that motions in limine are designed to address evidentiary
15 questions and are inappropriate vehicles for resolving substantive issues. *See Luce*
16 *v. United States*, 105 S. Ct. 460, 462 n.2, 469 U.S. 38, 83 L. Ed. 2d 443 (1984);
17 *Nomo Agroindustrial SA DECV v. Enza Zaden N. Am., Inc.*, 2007 WL 1077023, at
18 *1 n.1 (D. Ariz. Apr. 9, 2007) (“[M]otions in limine are meant to deal with discrete
19 evidentiary issues related to trial, and are not another excuse to file dispositive
20 motions disguised as motions in limine.”) Thus, a motion in limine that addresses
21 issues which were, or could have been raised on summary judgment, should be
22 denied. *See Fidelity & Guar. Co. v. Lee Inves. LLC*, No. 1:99-cv-5583 OWW
23 SMS, 2006 WL 3780899, at *2 (E.D. Cal. Dec. 21, 2006) (“[T]he Court will not
24 hear disguised motions for summary judgment as motions in limine.”); *see also*
25 *Naoom v. Secured Assets Income Funds*, No. 05-CV-1207 H(CAB), 2006 WL
26 5201393, at *1 (S.D. Cal. Nov. 20, 2006) (denying motion in limine where party
27 merely “restate[d] their arguments from their motion for summary judgment”).
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B. The James Document is Authentic and Mr. James’s Testimony is Credible.

1. The James document and the context in which it was created contain sufficient indicia of authenticity.

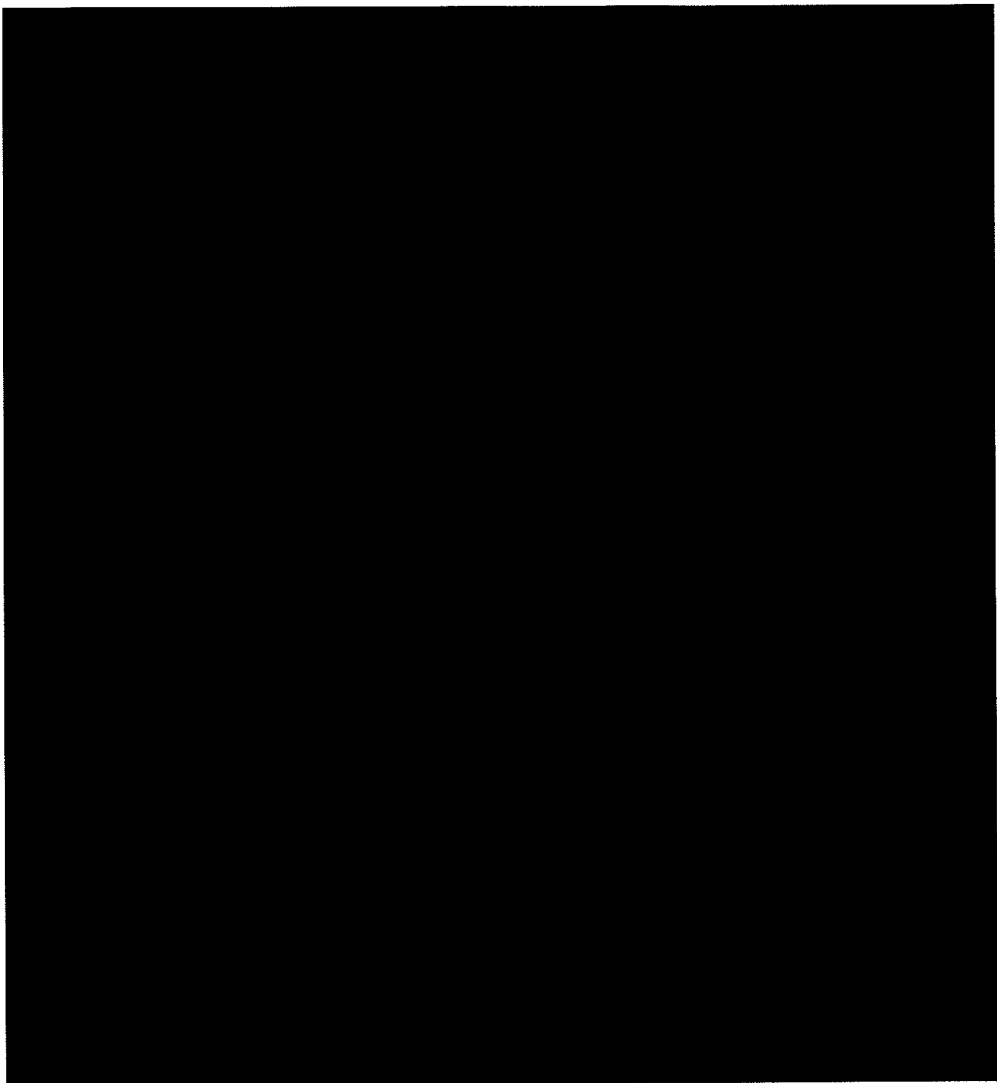
NDS is unable to deny that there was a business relationship between NDS and Graham Jones. [REDACTED]

[REDACTED] (Hagan Decl., Ex. 1 – [REDACTED]; Hagan Decl., Ex. 50 – “James Decl”. at 2.) [REDACTED]

[REDACTED] It is in this very context that the email from Mr. Withall to Mr. James –the James document –arose. (See Ex. A to James Decl.) Specifically, the circumstances surrounding this email are well laid out by Mr. James in his Declaration. (James Decl. at 3.) In short, Mr. James swore under oath that Mr. Withall sent him the Canal+ code via email so that Mr. James could distribute the code for profit.

But there was yet another and perhaps more important reason for Mr. Withall to send the Canal+ code to Mr. James. The reason being that a public distribution of the Canal+ code would force the users of the Canal+ encryption system to switch to NDS’s encryption. This is confirmed in Mr. James’s deposition testimony:

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(Hagan Decl., Ex. 9 – “James Dep.” 32:17-33:19.) The nature of Mr. James’s relationship with NDS and the circumstances surrounding this email clearly indicate that Mr. Withall did indeed send an email to Mr. James with the Canal+ code for public distribution.

Furthermore, Mr. James confirmed the authenticity of this email in his deposition testimony. (James Dep. 26:7-28:1.)



Strikingly, the follow-up email sent from Mr. Withall to Mr. James (Ex. B to James Decl.) that NDS *does not* claim is a forgery proves that Mr. Withall did indeed send the Canal+ code to Mr. James. (See Ex. B to James Decl. (“I have to told andy that I gave you the code so he wont be asking you

1 questions any more.”) It is not surprising that NDS does not argue that Exhibit B is
2 a forgery. NDS simply cannot. Mr. James’s Declaration adequately explains the
3 context of this email. (James Decl. at 4.)

4 The only unconvincing argument NDS makes that the James document is a
5 forgery is that the date on the email does not match up with the time-frame within
6 which Mr Withall actually opened his British Telecom account. (*See* Defs.’ Am.
7 Mot. In Limine No. 6 at 3-4.) First, the purported evidence used by NDS was either
8 brought to the Court’s attention in the Motions for Summary Judgment or could
9 have been raised in the motion.

10 [REDACTED]
11 [REDACTED]
12 [REDACTED] As discussed in Section A above, a *motion in limine* is not a
13 proper vehicle to introduce such evidence. In addition, at most, such evidence goes
14 to weight of the James document and not its admissibility. Furthermore, the
15 arguments and purported evidence used by NDS in its Amended Motion only puts
16 in dispute *when* Mr. Withall actually emailed the Canal+ code to Mr. James. The
17 fact that Mr. Withall *did* send the email with the code to Mr. James is indisputable
18 and is really what matters.

19 Indeed, the circumstances surrounding the James Document and the
20 overwhelming evidence provided by EchoStar regarding the authenticity of the
21 James document (the James Declaration and James deposition where he was
22 examined by both EchoStar and NDS attorneys) puts this matter beyond doubt. At
23 most, this is a fact for the jury decide and not something that can be resolved in a
24 *motion in limine*.

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1 2. There is no basis for excluding Mr. James's testimony and the
2 James document.

3 Fully aware that Mr. James's Declaration and Deposition testimony is
4 extremely damaging to its case, NDS makes a last-ditch attempt to get this evidence
5 excluded under the guise of sanctions. (*See* Defs.' Am. Mot. In Limine No. 6 at 4-
6 6.) NDS's position is untenable. As discussed above, there exist sufficient indicia
7 of authenticity regarding the James document. Thus, there is absolutely no basis
8 for NDS to claim that Mr. James fabricated the email. It necessarily follows that
9 the purported forgery of the James Document cannot be used as a basis to exclude
10 Mr. James's testimony.

11 Knowing the futility of its forgery argument, NDS then indulges in a vain
12 attempt to use Mr. James's purported bias towards NDS and Mr. Withall to seek
13 exclusion of Mr. James's testimony. (*Id.*) NDS's argument is legally flawed. That
14 a witness may be biased is not a reason alone to justify exclusion of his testimony.
15 Mr. James provided a sworn declaration and a sworn deposition testimony. In
16 addition, Mr. James provided hard copies of the emails he received from Mr.
17 Withall. Mr. James's declaration and testimony clearly explain the context of Mr.
18 Withall's emails and also authenticate the emails. And most importantly, NDS's
19 counsel had every opportunity to cross-examine Mr. James about this Declaration
20 and the concerned emails which they did. Any issue of alleged bias and the extent
21 to which the alleged bias may have affected Mr. James's credibility is for the jury
22 to decide and is not one to be resolved in a *motion in limine*. *DiCarlo v. Keller*
23 *Ladders, Inc.*, 211 F.3d 465, 468 (8th. Cir. 2000) ("Determining the credibility of a
24 witness is the jury's province, whether the witness is lay or expert.") Thus, there is
25 absolutely no basis for the exclusion of Mr. James's testimony from trial.

26 Moreover, based on the discussion above, EchoStar and its counsel have had
27 no reason to doubt Mr. James's testimony, his declaration, and hard-copy emails.
28 To the contrary, based on the several indicia of reliability surrounding Mr. James's

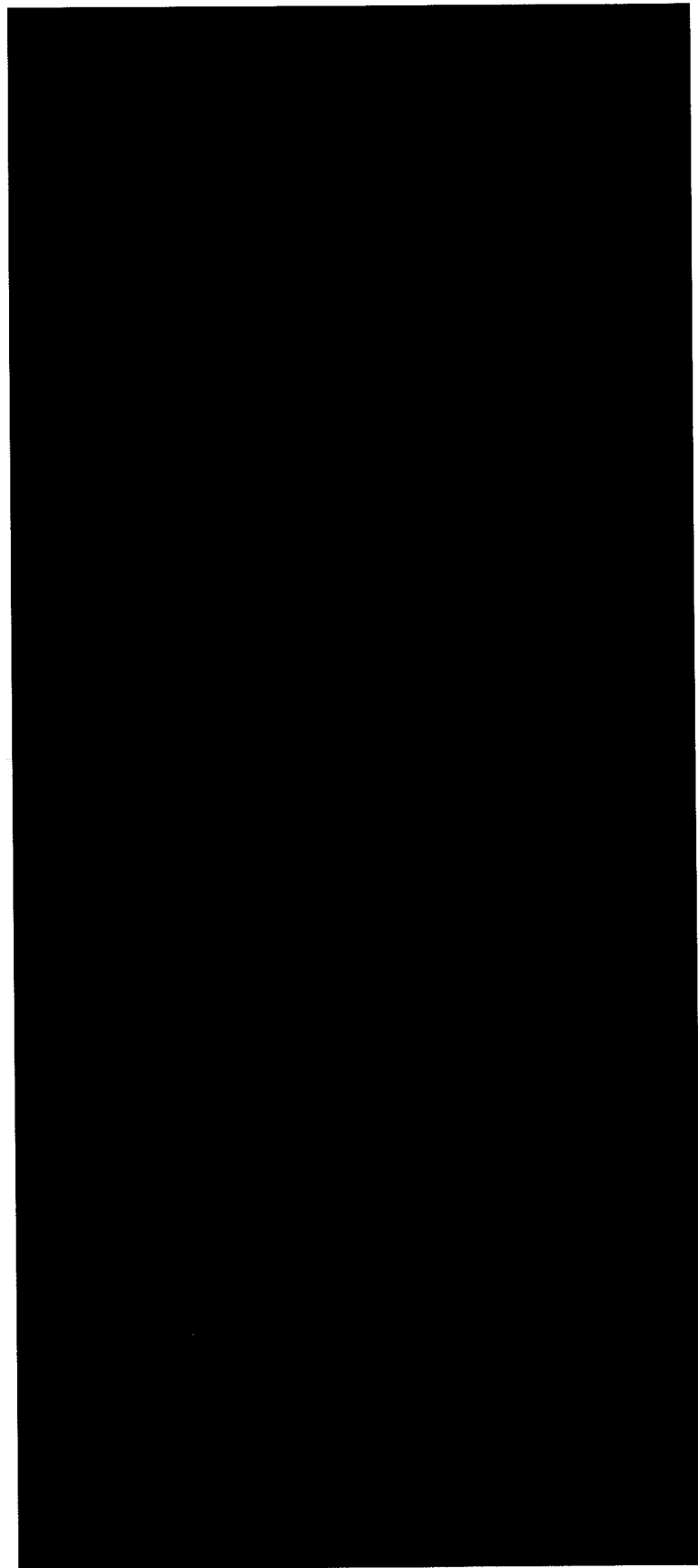
1 testimony and the associated papers, EchoStar has every right to rely on his
2 testimony and present it to the jury which it will. Any argument by NDS to the
3 contrary is utterly unsupported by the facts of this case and is nothing more than ill-
4 guided mud slinging. Therefore, there is no basis for excluding Mr. James's
5 testimony and the documents associated with his testimony.

6 **C. There is Sufficient Evidence to Prove the Authenticity of the Email**
7 **from Mr. Tarnovsky to Mr. Saggiori.**

8 Among many undisputed electronic, telephonic, and face-to-face
9 communications between Chris Tarnovsky and Jan Saggiori, NDS seeks to exclude
10 only one email (Trial Exhibit 37) in the email chain between the two. The evidence
11 highlighted in NDS's own motion undercuts its requested relief in many ways.
12 Further, NDS omits mention of the lions' share of testimony regarding the
13 relationship and emails between Mr. Tarnovsky and Mr. Saggiori which
14 demonstrate the authenticity, reliability, and value of the email NDS seeks to
15 exclude.

16 Mr. Saggiori specifically testified at length concerning Trial Exhibit 37 that
17 NDS asks be excluded on authenticity grounds. Mr. Saggiori testified:
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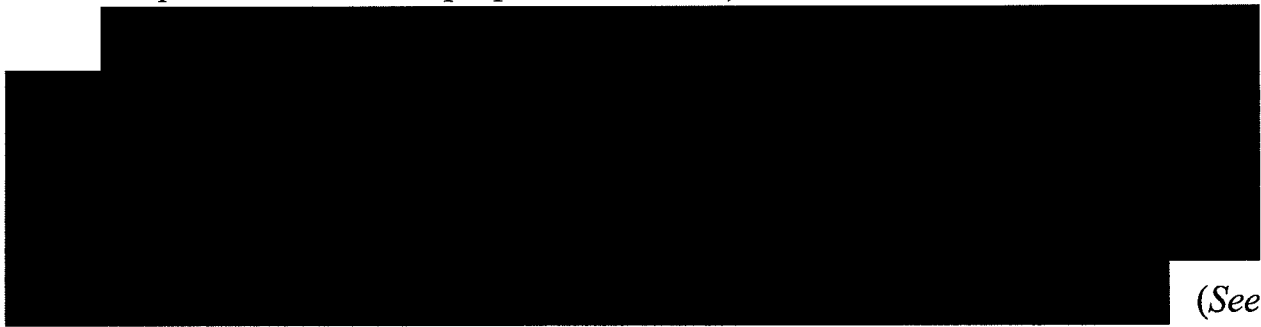
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(See Hagan Decl., Ex. 3 – “Saggiori Dep.” 38:9-39:8.) Mr. Saggiori’s testimony that Exhibit C to his declaration (Trial Exhibit 37) is “absolutely” true and correct plainly demonstrates the authenticity of the email under the Federal Rules of Evidence. *United States v. Childs*, 5 F.3d 1328, 1336 (9th. Cir. 1993) (holding that testimony from a witness with knowledge is sufficient to satisfy the authenticity requirement of the Federal Rules of Evidence.) Fed. R. Evid. 901(a) and 901(b)(1) (“Testimony of witness with knowledge [may be used] to support a finding that the matter in question is what its proponent claims.”)



(See Hagan Decl., Ex. 2 – “Saggiori Decl.” at 2; *see also* Saggiori Dep. 12:6-14:12.) This testimony was entirely consistent with and wholly supportive of the authenticity of the one email NDS asks be suppressed, the header of which is reproduced below.

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FROM: Arthur Von Neumann, INTERNET:von@metro2000.net
TO: SAGGIORI Jan, jan_saggiori
DATE: 28.03.99 13.36

Re: Re: Hi

Contents:

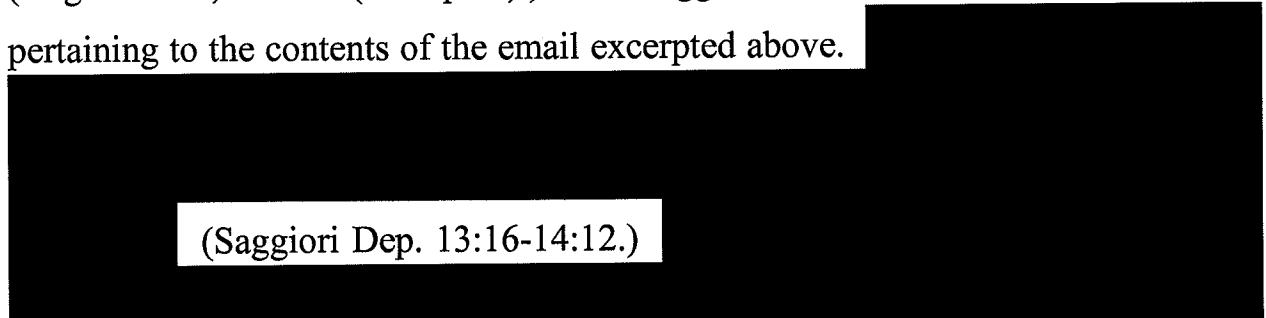
1 Internet Message Header
2 <no topic>

===== Begin Part 1 =====
Topic: Internet Message Header

Sender: von@metro2000.net
Received: from relay1.smtp.psi.net (relay1.smtp.psi.net [38.8.14.2])
by hplmgaaa.compuserve.com (8.8.8/8.8/HP-1.1) with ESMTP id NAA22853
for <jan_saggiori@compuserve.com>; Sun, 28 Mar 1999 13:36:11 -0500 (EST)
Received: from [38.223.67.2] (helo=ad2.com)
by relay1.smtp.psi.net with esmtp (Exim 1.90 #1)
for jan_saggiori@compuserve.com
id 1ORRFX-00070z-00; Sun, 28 Mar 1999 13:36:17 -0500
Received: from hers (38.12.3.110) by ad2.com
with ESMTP (Apple Internet Mail Server 1.1.1); Sun, 28 Mar 1999 10:41:36 -0700
Message-Id: <4.2.0.25.19990328183134.00a377d0@metro2000.net>
X-Sender: von@metro2000.net
X-Mailer: QUALCOMM Windows Eudora Pro Version 4.2.0.25 (Beta)
Date: Sun, 28 Mar 1999 18:32:42 +0000
To: SAGGIORI Jan <jan_saggiori@compuserve.com>
From: Arthur Von Neumann <von@metro2000.net>
Subject: Re: Hi
In-Reply-To: <199903281247_MC2-6FBD-5DC0@compuserve.com>
Mime-Version: 1.0
Content-Type: multipart/mixed;
boundary="===== _6511890_ ="

Good news from up north here. Enjoy, keep for you please.. extremely top
secret!

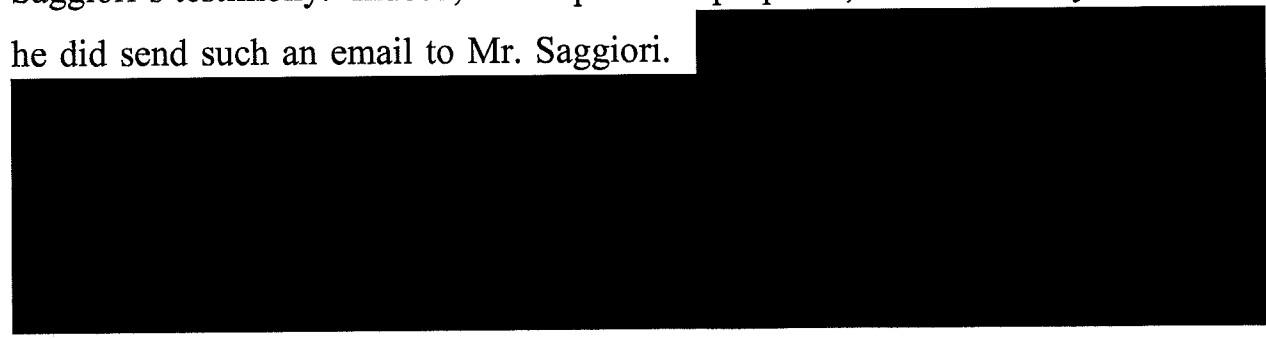
(Hagan Decl., Ex. 37 (excerpted).) Mr. Saggiori testified to specific information pertaining to the contents of the email excerpted above.



(Saggiori Dep. 13:16-14:12.)

(Saggiori Dep. 14:4-8.)

Mr. Tarnovsky – an NDS employee – does not directly contradict Mr. Saggiori’s testimony. Indeed, for all practical purposes, Mr. Tarnovsky admits that he did send such an email to Mr. Saggiori.



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[REDACTED]

NDS unsuccessfully uses Mr. Tarnovsky's feeble attempts in his testimony to discredit the email.

[REDACTED]

Mr. Tarnovsky, and for that matter NDS, cannot provide any further detail regarding the unfounded skepticism, favoring instead to insist that a native, electronic version of the email was needed.

(Tarnovsky Dep. 379:15-18.)

[REDACTED]

[REDACTED]

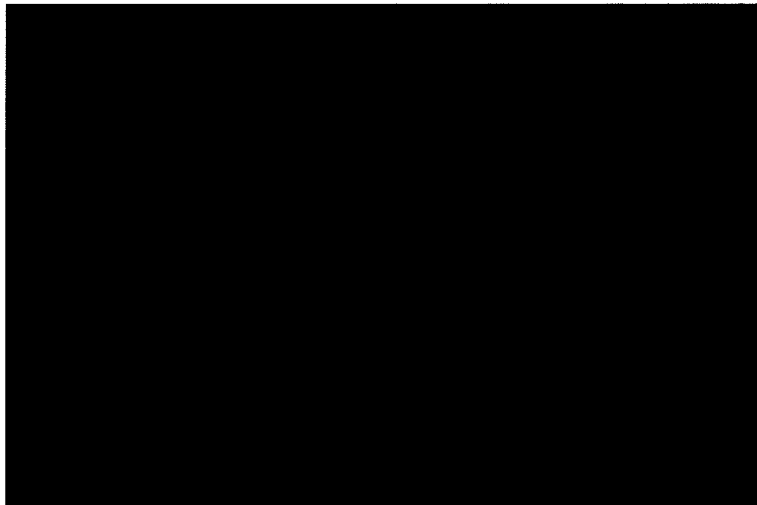
[REDACTED]

[REDACTED]

In sum, though NDS has had nearly a year to bring forward evidence supporting Mr. Tarnovsky's insinuation regarding the email, it has unsurprisingly failed. Now, NDS cries louder, but it still amounts to an unsupported, meaningless claim that NDS has a "strange" feeling concerning the email that is so revealing of their misconduct. Such a claim pales in comparison to the evidence EchoStar has provided to authenticate the email Mr. Tarnovsky sent to Mr. Saggiori containing EchoStar code.

NDS attempts to make much out of the fact that Mr. Tarnovsky and Mr. Saggiori were communicating coincidentally about both the Canal+ and the Nagra (EchoStar) code. (See Defs.' Am. Mot. In Limines 9-10.) NDS goes so far as to imply that Mr. Saggiori is confused as to whether the Canal + or the EchoStar code was being sent by Mr. Tarnovsky. This feigned confusion on NDS's part is explained with clarity in Mr. Saggiori's testimony:

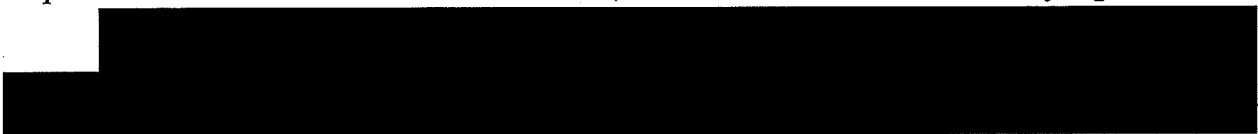
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(Saggiori Dep. 37:1-14.)



The subsequent request from Mr. Saggiori to Mr. Tarnovsky is revealing. NDS raises no criticism concerning the authenticity of the later email from Mr. Saggiori to Mr. Tarnovsky. (*See* Defs.’ Am. Mot. In Limine No. 6 at 10-11.) In fact, NDS relies on the Mr. Saggiori email (attached as Ex. 28 to Defs.’ Mot. In Limine No. 6) to support its motion. Further, on its face, the email asks for “the rest” of the code which undeniably indicates Mr. Saggiori had received before. This “some little part” is sought by Mr. Saggiori, obviously to confirm that what he had previously received was complete. NDS’s attempt to link the request for the “little part” to what was received before is a shell game. The additional code being requested was related to the Canal+ code, and NDS seems intent to saying it wasn’t.



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[REDACTED]

NDS breaks its back to avoid facing the cold-hard fact that Tarnovsky possessed EchoStar's ROM code and emailed it to Saggiori when asked.

[REDACTED]

Thus, Mr. Saggiori's extensive testimony authenticating the email, Mr. Tarnovsky's failure to contradict Mr. Saggiori's testimony regarding the authenticity of the email, the uncontradicted testimony about the nature of Mr. Saggiori's relationship with Mr. Tarnovsky, are sufficient to admit the email sent by Mr. Tarnovsky to Mr. Saggiori in to this trial.

NDS's motion is nothing but a back-door method of raising issues that could have been raised on summary judgment but were not. Motions in limine are designed to address evidentiary questions and are inappropriate vehicles for resolving substantive issues. *See supra* Section A.

Even if NDS's innuendo were considered probative in any way, this NDS's argument goes to the weight of the email, and not its admissibility. Indeed, NDS's own "expert" on the subject email – [REDACTED]

[REDACTED]

However, NDS would not allow him to see Tarnovsky's computer, which suggests that the computer contained forensic data further establishing the authenticity of Tarnovsky's email to Saggiori.

- 1 1. EchoStar has produced the email in its native electronic format
2 that proves its authenticity and this email satisfies the Best
3 Evidence Rule.

4 NDS wrongfully alleges that EchoStar has failed to provide documents
5 related to the email's authenticity. (*See* Defs.' Am. Mot. In Limine No. 6 at 12-13.)
6 But in the same breath, NDS directly contradicts itself. After lambasting EchoStar
7 for not producing related documents to the email, NDS admits that EchoStar did
8 provide a native electronic document of the email. (*Id.* at 13.) NDS still could not
9 accept the document after analyzing the native electronic document, or the
10 conspiracy it proves. There isn't anymore informative evidence that needs to be
11 produced. In fact, this electronic document is the available information, and it has
12 been produced.

13 Rather, NDS misapplies the Best Evidence Rule with respect to the email.
14 Regarding data stored in a computer or a "similar device," the Rules of Evidence
15 define an "original" as "any printout or other output readable by sight [and] shown
16 to reflect the data accurately." Fed. R. Evid. 1001(3). Courts too have held that an
17 email is the best evidence to prove the contents of the email. *United States v.*
18 *Culberson*, 2007 U.S. Dist. LEXIS 31044, at *6, 2007 WL 1266131, at *2-3 (E.D.
19 Mich. April 27, 2007) (holding that because the emails at issue were unavailable,
20 the government can rely on transcripts of the emails as secondary evidence under
21 FRE 1004(1).) In this case, EchoStar has provided the email in its native electronic
22 format. In addition, EchoStar has also provided a hard copy of the email to NDS
23 along with both, the encrypted and unencrypted version of the attachment (which
24 EchoStar contends was a portion of its proprietary ROM code), that Mr. Tarnovsky
25 emailed to Mr. Saggiori. (Exhibits C and D attached to the Saggiori Declaration).
26 NDS ignores this evidence.¹

27 ¹ Furthermore, the "original writing" standard as discussed by NDS (NDS Motion
28 No.6 at 5) pertains to handwriting. Fed. R. Evid. 1001(1) ("Writings and
recordings consists of letters, words, or numbers, or their equivalent, set down by

1 Though the natural format email is the best evidence available here, NDS
2 claims EchoStar is holding back. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 But by providing the email in its possession in both – the native
6 electronic format and a hard-copy format – EchoStar has provided NDS with all the
7 evidence within its control that can be used to authenticate the email. Furthermore,
8 these forms of the email satisfy the requirements of the Best Evidence Rule.

9 NDS will undoubtedly argue that the email provided by EchoStar does not
10 “reflect the data accurately,” and therefore does not satisfy the requirements of the
11 Best Evidence Rule. Courts have held that where a proponent of a document
12 proves that the document reflects the data accurately, then such a document is an
13 original and satisfies the requirements of the Best Evidence Rule. *Laughner v.*
14 *Indiana*, 769 N.E.2d 1147, 1159 (Ind. Ct. App. 3002) (holding that testimony from
15 a witness that the printouts of his online conversations with the accused “accurately
16 reflected the content of those conversations” was sufficient for the court to consider
17 the printouts as the “best evidence” of the conversations between the witness and
18 the accused.) As discussed above, EchoStar has provided uncontested testimony
19 from Mr. Saggiori, the recipient of the email, that the email as disclosed is what he
20 actually received from Mr. Tarnovsky – an email containing a portion of EchoStar’s
21 proprietary ROM code.

22 In addition, EchoStar’s expert Mr. Rogers was able to confirm the veracity
23 and authenticity of the email through his forensic analysis. NDS provides no
24 support at all for its allegation that Mr. Rogers was not fully satisfied with his own
25 analysis.

26
27 handwriting” (internal quotations omitted)). In this context, NDS has the
28 original writing in its own possession – it is on Mr. Tarnovsky’s computer. Fed. R.
Evid. 1002 and 1003. NDS is wholly confused concerning the presence of
electronic information.

1 The cases cited by NDS presume that the evidence is altered or falsified.
2 Aside from NDS's empty rhetoric, there is no reason to conclude that the email is
3 falsified. Saggiori's testimony at deposition, the email itself, the circumstances
4 surrounding the email, and related testimony of witnesses supports the authenticity
5 of the email. This supportive evidence is wholly omitted from NDS's motion.

6 EchoStar does not have any additional information or evidence to produce
7 related to this document. Mr. Saggiori no longer has the computer used to receive
8 the email from Tarnovsky. EchoStar has already produced an electronic version of
9 the subject email (which Saggiori testified was true and authentic). It is NDS who
10 has Tarnovsky's computers used to send the email, however, NDS refused to allow
11 EchoStar to forensically image Tarnovsky's computers despite EchoStar's
12 discovery requests and subpoenas to do so. [REDACTED]

13 [REDACTED]
14 [REDACTED]
15 Thus, because EchoStar has provided the email in all formats it has within its
16 possession — native electronic format and hard-copy — and because EchoStar has
17 provided sufficient uncontested testimony from the recipient of the email, Mr.
18 Saggiori, that the email reflects its contents accurately, the supplied email satisfies
19 the Best Evidence Rule.

20 2. NDS is not entitled to an adverse inference instruction.

21 EchoStar has provided all relevant evidence within its control to NDS.
22 Specifically, as discussed above, EchoStar has provided NDS with the subject
23 email in both, its native electronic format and in hard-copy format. Furthermore,
24 contrary to NDS's assertions, EchoStar does not have access to the PGP key and
25 passphrase used to decrypt the attachment. In addition, Mr. Saggiori no longer
26 possesses the computer from which he had accessed the email. Also, EchoStar does
27 not have the email Mr. Saggiori sent to Mr. Tarnovsky that elicited the email
28

1 response from Mr. Tarnovsky containing the EchoStar code. Instead, NDS's
2 request for an instruction that the email is a forgery is contradicted by the evidence
3 that NDS itself cites from Mr. Rogers and Mr. Saggiori – the proponents of the
4 authenticity of this email. Even Mr. Tarnovsky does not dispute his ongoing
5 involvement with Mr. Saggiori.

6 Thus, there is absolutely no basis for the Court to give an adverse inference
7 instruction to the jury. In addition, such instructions are highly disfavored and the
8 standard for such an instruction is not met here. *Lewy v. Remington Arms Co., Inc.*,
9 836 F.2d 1104, 1111 (8th. Cir. 1988) (“If a party fails to produce evidence which is
10 under his control and reasonably available to him and not reasonably available to
11 the adverse party, then you may infer that the evidence is unfavorable to the party
12 who could have produced it and did not”) (quoting E. Devitt, C. Blackmar, & M.
13 Wolff, 3 *Federal Jury Practice and Instructions* § 72.16 (4th ed. 1987)); *Hamilton*
14 *v. Signature Flight Support Corp.*, 2005 U.S. Dist. LEXIS 40088, at *9, 2005 WL
15 3481423, at *8 (N.D. Cal. December 20, 2005) (“[A] party seeking an adverse
16 inference instruction based on the destruction of evidence must establish (1) that the
17 party having control over the evidence had an obligation to preserve it at the time it
18 was destroyed; (2) that the records were destroyed with a culpable state of mind’;
19 and (3) that the destroyed evidence was relevant’ to the party’s claim or defense
20 such that a reasonable trier of fact could find that it would support that claim or
21 defense”) (quoting *Reilly v. Natwest Markets Group Inc.*, 181 F.3d 253, 267 (2d
22 Cir. 1999) (internal quotations and citations omitted)).

23 In this case, as discussed above, EchoStar does not have the documents and
24 items requested by NDS in its control. Indeed, some of these things, such as, for
25 example, Mr. Saggiori’s computer, do not even exist any more. Therefore, the
26 question of the court giving the jury an adverse inference instruction does not even
27 arise. Thus, because EchoStar has provided all the relevant documents related to
28

1 the email that are within its control, NDS is not entitled to an adverse inference jury
2 instruction.

3 **D. Mr. Saggiori's Testimony is Sufficient to Authenticate Email**
4 **Evidence.**

5 NDS correctly points out that Mr. Rogers is not on the witness list.
6 However, the testimony of Mr. Rogers is not necessary given that the authenticity
7 of the email is supported by the testimony of Mr. Saggiori himself. To this end,
8 EchoStar does not need the testimony of DEI/Steve Rogers nor his expert analysis
9 or report. The document is already authenticated for purposes of admissibility and
10 EchoStar will not waste time in its presentation of claims on unnecessary
11 testimony.

12 EchoStar's position here is not a concession that Dr. Roger's opinion
13 contradicts *Daubert* standards. *Daubert* is satisfied because Mr. Rogers's method
14 of analysis is tested and accepted, and this forms the basis for authentication. NDS
15 makes from whole cloth its allegation that Mr. Rogers did not have the proper
16 evidence. NDS is missing the point Mr. Rogers makes in his testimony and report.
17 Mr. Roger's report and testimony show that the email is consistent with what one
18 would find from a CompuServe database. NDS turns *Daubert* on its head, requiring
19 that NDS agree with an expert's conclusions before they are allowed in the case.
20 There is a dispute among experts here, and what is most revealing is that NDS's
21 expert uses the same tests for authenticity as Mr. Rogers – there is no complaint as
22 to methodology from Mr. Litchfield. (Litchfield Dep. 140:4-141:11.) There is no
23 dispute that the native electronic document was from a CompuServe email account
24 and from that Mr. Roger's conclusions flow.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] This testimony from Mr. Rogers has not been
4 questioned or contradicted by NDS or Mr. Litchfield. Certainly, there is also no
5 support in the record to show that Mr. Saggiori knew in advance that he should
6 modify contents of the email.

7 As discussed above, the email from Mr. Tarnovsky to Mr. Saggiori has been
8 sufficiently authenticated by the testimony of the receiver of the email, Mr.
9 Saggiori himself. Therefore, Mr. Roger's report and testimony is not needed to
10 authenticate the email. Notwithstanding, Mr. Roger's report, limited to the point
11 that the email is consistent with what one would find from a CompuServe database,
12 satisfies *Daubert*.

13 **E. The Menard/Dawson Emails are Admissible.**

14 1. The Menard/Dawson Emails are authentic under FRE 901.

15 Finally, in closing its desperate bid to somehow seek exclusion of damaging
16 evidence against it, NDS once again asks the Court to exclude documents whose
17 authenticity this Court has already accepted. (*See* Defs.' Am. Mot. In Limine No. 6
18 at 19.) These documents (which NDS refers to as the "Ereiser documents") are a
19 set of emails sent by Mr. Menard to Mr. Dawson that clearly prove Mr. Menard's
20 and Mr. Tarnovsky's involvement in the EchoStar hack. (*See* Hagan Decl., Exs.
21 988-991.) Specifically, these documents prove that Mr. Menard had in his
22 possession reprogramming equipment provided by Mr. Tarnovsky that could be
23 used to reprogram EchoStar's access cards. The subject emails include several
24 indicia of authenticity and the testimony surrounding these emails provide
25 sufficient corroborating evidence. Yet, NDS conveniently ignores all of these and
26 instead asks this Court, for all practical purposes, to reverse its ruling in its Final
27 Order.
28

1 As a threshold matter, NDS simply cannot do that. As discussed above in
2 Section A, NDS cannot use this motion to resolve issues that it has already raised or
3 could have raised and lost in its Motion for Summary Judgment. See Section A
4 above. Therefore, on this ground alone, NDS's motion should fail. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED] see also EchoStar's
8 Opp'n to Defs.' Mot. for Summary Judgment on Issue of NDS Distribution
9 Network at 4-5.) Not only is NDS effectively asking that this Court reconsider its
10 Final Order but NDS is also using an improper vehicle to do so. As discussed in
11 Section A above, NDS's argument is legally flawed.

12 [REDACTED]
13 [REDACTED]
14 [REDACTED] This Court has already rejected these
15 contentions while deciding that the authenticity of these emails passes muster under
16 FRE 901. (See Final Order at 49-50.)

17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED] Again, as a threshold matter, this argument must fail for at
21 least the reasons discussed above and in Section A [REDACTED]

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[REDACTED]


NDS's argument that "[t]hese documents omit any critical data underlying the documents which would have provided additional information regarding their authenticity," is also unavailing. (*See* Defs.' Am. Mot. In Limine No. 6 at 20.) EchoStar does not have the emails in their native file format or the corresponding metadata.



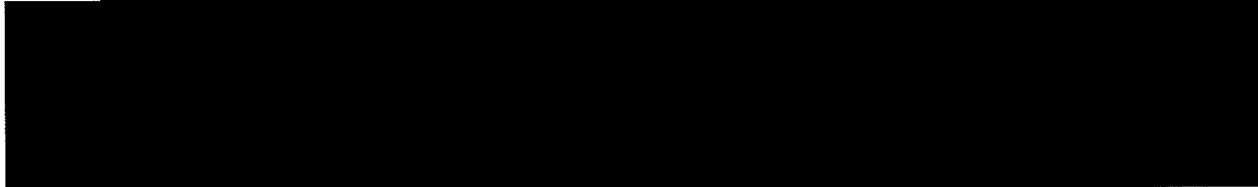

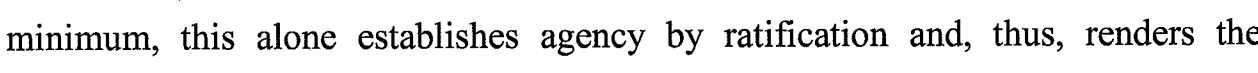
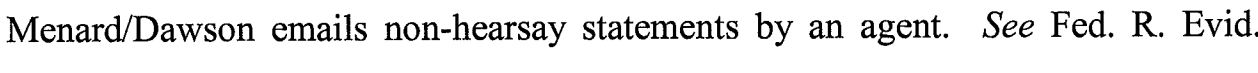

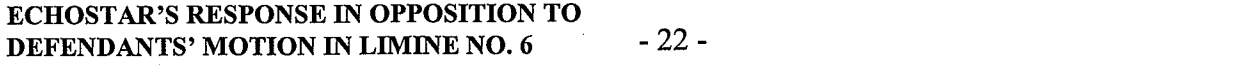

[REDACTED]

Considered together, the foregoing circumstances provide more than sufficient evidence that the Menard/Dawson emails are authentic. *See* Fed. R. Evid. 901(b)(4); *see also United States v. Siddiqui*, 235 F.3d 1318, 1322-23 (11th Cir. 2000) (authenticating email based entirely on circumstantial evidence, including e-mail address, contents which sender would have had to be familiar with, and use of nickname). Indeed, given the overwhelming indicia of authenticity, the Court has already properly held that these emails satisfy the requirements of Rule 901. (*See*

1 Final Order at 50.) Thus, there is absolutely no basis for a jury to believe that just
2 because the emails are not accompanied by meta data they are not authentic. In
3 fact, based on the mounds of evidence in support of the authenticity of these emails,
4 it is likely that a jury will come to the opposite conclusion – that the emails are
5 authentic and prove the involvement of Mr. Menard and Mr. Tarnovsky in the
6 EchoStar hack.

7 2. The emails are not hearsay.

8 NDS asserts that the Menard/Dawson emails are hearsay because they do not
9 pass muster under FRE 801(d)(2). (See Defs.’ Am. Mot. In Limine No. 6 at 21.)
10 Nothing could be further from the truth. First, EchoStar has alleged and proven
11 that, prior to be officially hired by NDS in 2003, Mr. Menard was associated with
12 Mr. Tarnovsky as an agent or employee of NDS and was part of the distribution
13 network of the EchoStar hack. 

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28 (Id.) At
minimum, this alone establishes agency by ratification and, thus, renders the
Menard/Dawson emails non-hearsay statements by an agent. See Fed. R. Evid.

1 801(d)(2)(D). Furthermore, the emails themselves are further evidence of the
2 existence of an agency relationship between Menard and Tarnovsky/NDS. Fed. R.
3 Evid. 801(d)(2) (providing that the contents of the statement shall be considered
4 when establishing the agency relationship). Finally, the Menard/Dawson emails
5 also constitute non-hearsay statements by a coconspirator under Fed. R. Evid.
6 801(d)(2)(E) because they demonstrate a conspiracy between Menard and
7 Tarnovsky/NDS and the statements at issue were made in furtherance of that
8 conspiracy, i.e. to facilitate the reprogramming and distribution of reprogrammed
9 EchoStar access cards through the assistance of NDS-employee Chris Tarnovsky.
10 (See Hagan Decl. - Exs. 988-991.) See Fed. R. Evid. 801(d)(2)(E) (providing that
11 the out-of-court statements themselves may be considered when determining the
12 existence of the conspiracy).

13
14
15 Perhaps more importantly, as it
16 has done before, NDS improperly uses this motion to resolve issues that it has
17 already raised and lost on Summary Judgment. See *supra* section A.²

18 3. The emails satisfy FRE 1002 and EchoStar has provided all the
19 relevant evidence pertaining to these emails.

20 NDS mistakenly claims that these emails should be excluded under FRE
21 1002 and 1003. (See Defs.' Am. Mot. In Limine No. 6 at 22.) But, as discussed in
22 Section D.1 above, there is no genuine issue as to the authenticity of these emails.
23 See *supra* section D.1. Furthermore, EchoStar does not possess the original emails.
24 Therefore, copies of these emails satisfy FRE 1003. See Fed. R. Evid. 1003.

25
26 ² NDS does not address Echostar's potential impeachment use of evidence showing
27 the involvement of Mr. Menard and Mr. Tarnovsky in the EchoStar hack. It is well
28 known that testimony used for impeachment purposes is not considered hearsay
because it is not being offered to prove the truth of the matter being asserted. Fed.
R. Evid. 801(c); see *Ostad v. Oregon Health Sciences Univ.*, 327 F.3d 876, 886
(9th. Cir. 2003)

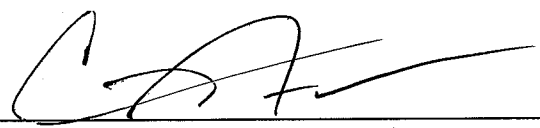
1 Finally, as discussed above in Section D.1, EchoStar has provided all the
2 evidence it has pertaining to these emails. This includes copies of these emails as
3 provided by Mr. Dawson (the recipient of these emails) to Mr. Ereiser.
4 Furthermore, Mr. Ereiser testified to the authenticity of these emails. Also, Mr.
5 Menard confirmed that the email address on these emails belonged to him.
6 EchoStar does not possess the original emails or the meta data associated with these
7 emails. In addition, EchoStar does not possess the emails from Mr. Dawson to Mr.
8 Menard to which Mr. Menard's emails respond. Nevertheless, this Court correctly
9 found the evidence provided by EchoStar sufficient to prove the authenticity of the
10 emails. Therefore, NDS's final argument to exclude the emails (that EchoStar has
11 not provided critical evidence contemporaneous with the emails) is also unavailing.

12 **III. CONCLUSION**

13 For at least the foregoing reasons, NDS's Motion in Limine No. 6 must be
14 denied.

15
16 DATED: March 3, 2008

17 Respectfully submitted,
18 **T. WADE WELCH & ASSOCIATES**

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PROOF OF SERVICE

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I, Melissa Gaunt, declare:

I am a resident of the State of Texas and over the age of eighteen years, and not a party to the within action. My business address is 2401 Fountainview Suite 700, Houston, Texas 77057.

On March 3, 2008, I served the foregoing documents described as:

ECHOSTAR'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE NO. 6 (PUBLIC REDACTED VERSION)

by electronically transmitting the foregoing document(s) to NDS-Service@omm.com, NDS-Service@Yarmuth.com and NDS-Service@HHLaw.com pursuant to the parties' service agreement in this litigation.

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California addressed as set forth below.

by causing personal delivery via **Federal Express** of the document(s) listed above to the person(s) at the address(es) set forth below.

by causing personal delivery via **MESSENGER** of the document(s) listed above to the person(s) at the address(es) set forth below.

PLEASE SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct.

Executed on March 3, 2008 at Houston, Texas.



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SERVICE LIST

EchoStar Satellite Corporation, et al. v. NDS Group PLC, et al.
United States District Court, Central District of California, Southern Division
Case No. SA CV 03-0950 DOC (JTLx)

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