Exhibit I

SUMMARY OF ECHOSTAR v. NDS RULINGS

I. NDS'S MOTIONS IN LIMINE

NDS' Motion in Limine No. 1 re: Limitation of Plaintiff's Damages for Card Swap

NDS filed this *Motion in Limine* to limit evidence of damages to the amount prescribed by the warranty provisions in EchoStar's contact with NagraStar and NagraStar's contract with NagraCard and/or the Kudelski Affiliates. In this Motion, NDS argued that EchoStar should be judicially estopped from taking a position inconsistent with that taken at summary judgment concerning the card swap – namely, that the December 2000 postings necessitated the full card swap. Additionally, NDS contends that EchoStar should be limited to evidence of damages related to the ROM 3 card only.

The Court finds that any limitation on EchoStar's damages in this regard will turn on whether EchoStar took reasonable steps to mitigate damages related to the December 2000 postings. Accordingly, evidence on this point will be permitted. Moreover, EchoStar's theory is that the December 2000 postings necessitated the swap out of all DNASP-II cards, including ROM 2, ROM 3, ROM 10 and potentially ROM 11. The extent of EchoStar's damages, and whether it took reasonable steps to mitigate those damages, is a question for the jury. Accordingly, EchoStar will be permitted to present evidence concerning the swap out, and will not be limited to evidence of the amount of damages contemplated by the warranty provisions.

However, EchoStar has been advised that if it fails to present sufficient evidence concerning the card swap and the warranty provisions, the Court is amenable to a directed verdict in this regard.

NDS' Motion in Limine No. 2 re: Carmel Group's Opinions Regarding Satellite Piracy and Any Evidence Relying Thereon

NDS filed this *Motion in Limine* disputing the admissibility of the findings of the Carmel Group, and the testimony of expert Robert Rock who intends to base (at least part of) his expert testimony on the Carmel Group's findings. NDS claims that the survey conducted by the Carmel Group fails to comport with the requirements for expert testimony under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

At an evidentiary hearing, EchoStar indicated that it would rely solely on James Shelton and not the Carmel Group's findings. However, Mr. Shelton was not able to isolate the incidence of ROM 3 piracy from other forms of piracy. Additionally, Mr. Rock was unable to relay any findings because he based his testimony on the Carmel Group rather than Mr. Shelton.

Consequently, the Court deferred ruling on Motion in Limine No. 2 until Mr. Shelton and Mr. Rock can adjust their calculations, and NDS has a full and fair opportunity to discover the basis of these new findings and prepare to challenge the findings. In opening statement the parties are limited to the statement that the jury may hear expert testimony concerning lost profits damages.

NDS' Motions in Limine Nos. 3 and 4 re: Prior Disputes with DirecTV and Canal+

Concerning the DirecTV suits, the parties have stipulated that evidence of the distribution network that Tarnovsky and Ron Ereiser engaged in will be properly admitted. However, the parties still dispute the propriety of presenting evidence of the litigation between DirecTV and NDS.

The Court concludes that allegations in the complaints, testimony based on the complaints, any reference to the settlement of those suits, and pre-litigation documents such as "threat letters" or "talking points" are unfairly prejudicial under Rule 403. *See also* Rule 408 (settlement cannot be admitted to prove liability). There is a significant risk that the jury will give undue consideration to those allegations, and they are not subject to cross examination. Additionally, there is a significant risk that the jury will conclude that NDS was liable because it settled the DirecTV suits, although there may have been other reasons for the settlement.

However, as a practical matter, the Court cannot fully preclude any reference to the litigation between NDS and DirecTV by witnesses. For instance, testimony concerning investigations conducted at DirecTV's behest as a result of that litigation necessarily include the fact that such a litigation occurred. However mere references to a prior litigation do not result in the same prejudice as presentation of the allegations themselves.

The Court will limit such testimony to the extent possible on a witness-by-witness basis. Additionally, NDS will be permitted to draft a limiting instruction concerning any such references.

Concerning the Canal+ action, the Court must exclude evidence of prior bad acts to show action in conformity therewith. *See* Fed. R. Evid. 404. However, rule 404(b) lays out a number of "non-character" purposes for evidence that appears to be character evidence. Here, EchoStar apparently relies on the "common plan or scheme" or "modus operandi" exceptions. In *Duran v. City of Maywood*, 221 F.3d 1127, 1132-33 (9th Cir. 2000), the Ninth Circuit laid out the framework for admissibility of such evidence; 1) there must be sufficient proof for the jury to find that the defendant committed the other act; 2) the other act must not be too remote in time;3) the other act must be introduced to prove a material issue in the case; and 4) the other act must, in some cases, be similar to the offense charged. Even then, the evidence must survive balancing under Rule 403.

In *Becker v. ARCO*, 207 F.3d 176, the Third Circuit engaged in a detailed and well-reasoned analysis of both the "common plan or scheme" and "*modus operandi*" prongs of Rule 404(b). In order to be considered parts of a "common plan or scheme" both the prior act and the accused act must be aimed at achieving the same goal, or must be interrelated as part of a singular plan. Aside from a generalized assertion that NDS has a goal of eliminating competitors by hacking and publishing sensitive information online, EchoStar has failed to identify the singular plan that ties these two events together, or submit evidence on this point.

For the *modus operandi* exception to apply, the identify of the perpetrator must be in issue, and

the acts must be sufficiently idiosyncratic to act as a "signature" or to identify the culprit. Identity is clearly an issue (in fact the central issue) in this case.

During informal argument EchoStar made the following offer of proof: that NDS reverse engineered the Canal+ smart card at its Haifa, Israel facility, that NDS recorded its findings in a report; that NDS distributed this report to hacker-employee Oliver Kommerling; and that the ROM code for a Canal+ smart card appeared on Allen Menard's website, allegedly through Tarnovsky. EchoStar intends to produce the testimony of NDS engineers David Mordinson and Zvi Shkedy, as well as testimony from Al Menard and Jan Saggiori on this point.

Although the mystery surrounding the posting on Menard's website, and the dubious nature of some of the testimony supporting this claim, gives the Court pause, at present EchoStar has presented a sufficient foundation to allow admission of this evidence under the *modus operandi* exception. The details of the hack appear sufficiently idiosyncratic particularly in light of the highly technical nature of the conduct at issue.

While the risk of prejudice is too great to allow EchoStar to present evidence related to the allegations or settlement of the prior action, the same is not true of evidence concerning the underlying conduct. *See* Fed. R. Civ. P. 403. Accordingly, EchoStar will not be permitted to present the complaint of the Canal+ action, any litigation materials or settlement-related materials from that action, or any testimony derived from or concerning those materials, the allegations or the settlement. However, EchoStar will be tentatively permitted to reference and present evidence concerning the conduct underlying that suit as outlined in their offer of proof.

EchoStar is advised in doing so that the Court is inclined to allow NDS to draft an adverse inference or to make its own comment if the evidence does not bear out EchoStar's offer of proof. Specifically, if the Court is not convinced that the alleged email to Jan Saggiori is authentic, or if Saggiori is evasive in providing information about that email, the Court is prepared to comment to the jury in this regard. Likewise, if the evidence does not substantiate the allegations of the Canal+ action, the Court is inclined to instruct the jury that any statements made concerning that action were unsubstantiated allegations.

Finally, as with the DirecTV litigation, it may be impossible as a practical matter to preclude any reference to the Canal+ litigation as it relates to the underlying conduct. For instance, in cross-examining Jan Saggiori, NDS may be inclined to point out that he made apparently contradictory statements in support of the Canal+ action. The Court will attempt to limit testimony concerning the Canal+ litigation on a witness-by-witness basis to the extent possible and NDS will be permitted to draft an appropriate limiting instruction.

NDS' Motion in Limine No. 5 to Exclude Evidence of NDS' Involvement in Free-to-Air Piracy

The parties stipulated that NDS was not directly involved with free-to-air piracy. EchoStar has never attempted to attribute free-to-air piracy to NDS. It has consistently admitted that it is not seeking damages for free to air piracy . Therefore documents on

this point were irrelevant and did not have to be produced. EchoStar made similar representations in the January 7, 2008 hearing, limiting lost profits to the ROM 3 card.

Therefore, NDS argues that EchoStar should be estopped from presenting evidence of any free to air piracy by NDS. EchoStar agrees that free to air piracy should be excluded by either party.

However, NDS seeks to argue that the card swap was a result of free to air piracy. This is an argument that NDS raised at summary judgment. EchoStar's witness, Christophe Nicholas, admitted that the card swap was partially or wholly caused by free to air piracy unrelated to NDS. It is only fair to allow NDS to defend by showing the totality of the circumstances that caused the swap of the DNASP-II system. What role each type of hacking played is a question for the jury.

Therefore, EchoStar's corollary motion in limine #2 is denied and NDS motion #5 is granted. However, the Court will EchoStar to present evidence that NDS hacked the ROM 3 card, which was published on the internet, and that the internet postings were followed by other hacking of the DNASP-II cards, and eventually led to free to air piracy. This was the theory presented by Nicholas. But EchoStar cannot present any evidence or argument that NDS employees specifically contributed to construction or implementation of free to air piracy.

NDS Motion in Limine No. 6 to Exclude Allegedly Fabricated Documents

Concerning each of the allegedly fabricated documents, the Court deferred ruling at the present time. Instead, it instructed EchoStar that it must produce an authenticating witness for each such document.

The first document is an email allegedly from Len Withall to Graham James. There are significant issues as to the authenticity of this document – namely, the email address allegedly used by Len Withall may not have existed at the time the email was sent. The Court required EchoStar to produce Withall and James to authenticate the document, otherwise the document is tentatively excluded.

The second document is an email from Jan Saggiori in which Tarnovsky allegedly sent Saggiori the EchoStar ROM 3 code. This email was supplemented by a follow up email approximately one year later in which Saggiori asked Tarnovsky for the code. It is not clear whether Saggiori was asking for the code in the first place or whether he was asking Tarnovsky to send him more code. The authenticity of the Tarnovsky to Saggiori document is also drawn into question because Saggiori testified in another case that the email contained the Canal+ code, not the EchoStar code. Tarnovsky will testify that he did not send the alleged email. The Court also tentatively excluded this email unless EchoStar produces Saggiori.

The third document is the DEI report and Steve Rogers which EchoStar would use to authenticate the Saggiori document. The question of whether this evidence is admissible is moot in light of the Court's ruling on the Saggiori document.

Finally, NDS seeks to include emails produced by EchoStar's paid consultant Ron Ereiser. These were purportedly emails between Allen Menard and Dave Dawson (another satellite pirate). Erieser produced these emails in response to letters rogatory. However, he only produced them as text documents, and has failed to produce them in their native format. This means that it would be quite easy to edit the emails or forge them. The Court tentatively excluded these documents unless Ereiser testifies.

NDS' Motion in Limine No. 7 to Exclude Evidence Withheld During Discovery

Stipulated.

NDS' Motion in Limine No. 8 to Exclude Polygraph Evidence

NDS filed this *Motion in Limine* to exclude any reference to the polygraph examinations of Chris Tarnovsky and Allen Menard. EchoStar seeks to present the questions asked of Tarnovsky and Menard to show that NDS intentionally avoided asking about their hacking activities, presumably based on the belief that they would not be able to deny engaging in such activity.

The Court granted this *Motion in Limine*, and excluded any evidence or reference of polygraph examinations. The Ninth Circuit has indicated that it is inhospitable to polygraph evidence. *Brown v. Darcy*, 783 F.2d 1389 (1986) (overturned by *Daubert* on a different point); *see also United States v. Marshall*, 526 F.2d 1349 ("a trial court will rarely abuse its discretion by refusing to admit [polygraph] evidence . . .") EchoStar argues that it is not presenting the evidence to show the veracity of Tarnovsky or Menard, and so it falls under the "operative facts" exception to the exclusion of polygraph evidence. *See U.S. v. Bowen*, 857 F.2d 1337 (9th Cir. 1988).

However, this characterization is misleading. This case is akin to those where an individual declines to undergo polygraph examination. The fact that NDS failed to ask certain questions is being used to show that NDS feared the ability of Tarnovsky and Menard to answer those questions without implicating NDS. It relies on the same impermissible inference as evidence of the refusal to submit to a polygraph test – i.e. that the Defendant feared the results of such test.

Because the probative value of this evidence is limited, and because the potential for prejudice is significant given the unreliability of polygraph testing, and the weakness of the inference that NDS knew that Tarnovsky and Menard could not answer truthfully, the evidence is properly excluded under Rule 403. *See U.S. v. Ramirez-Robles*, 386 F.3d 1234 (9th Cir. 2004) (polygraph evidence is excludable under Rule 403); *United States v. Benavidez-Benavidez*, 217 F.3d 720 (9th Cir. 2000).

NDS' Motion in Limine No. 9 to Exclude Evidence Related to the Knock and Talk

Stipulated

NDS' Motion in Limine No. 10 to Exclude Exhibit 39

Exhibit 39 appears to be an administrative record from the website www.piratesden.com, showing the user name "NiPpEr 2000" and the email address ChrisVon@s4.interpass.com. At summary judgment, the Court concluded that this evidence was admissible despite some question as to its authenticity and the potential that it constituted hearsay.

Although the evidence was considered on summary judgment, the Court must be more discerning in considering whether the evidence can be submitted to a jury. Therefore, even though this record may be highly probative, it cannot be admitted without some showing that it is authentic. It does bear some hallmarks of reliability, such as the pirates' den website address, however the Court tentatively concludes that these are insufficient to support a finding that the document is an administrative record from that website.

At the March 24, 2008 hearing, EchoStar represented that its consultant, Graham James, could corroborate the document by testifying that Chris Tarnovsky was responsible for posting on the pirates' den website. However, EchoStar seeks to present James' testimony via video deposition due to legal problems with bringing James to the United States to provide evidence in person. As the Court has intimated on innumerable occasions, it is not acceptable for the parties to present evidence of key witnesses – particularly witnesses that they employ – via deposition. Accordingly, the Court declines to adopt James' deposition testimony in order to authenticated exhibit 39.

Instead, Exhibit 39 is tentatively excluded unless EchoStar can present Graham James or some other witness to properly authenticate the record. Additionally, if Graham James provides evidence that Tarnovsky was responsible for the pirates' den posting, this may also provide a sufficient foundation to admit the website record as Tarnovsky's admission.

II. ECHOSTAR'S MOTIONS IN LIMINE

EchoStar's Motion in Limine No. 1

Stipulated.

EchoStar's Motion in Limine No. 2

This is a corollary to NDS' Motion in Limine No. 5 and is resolved accordingly.

EchoStar's Motion in Limine No. 3

Stipulated.

EchoStar's Motion in Limine No. 4

This motion seeks to preclude deposition testimony of NDS-controlled witnesses who are not going to appear at trial. This motion is overly broad as phrased. The Court is dealing with deposition testimony from party-controlled witnesses on a witness-by-witness basis.

EchoStar's Motion in Limine No. 5

Stipulated.

EchoStar's Motion in Limine No. 6

EchoStar seeks to preclude NDS from presenting evidence of claims and counterclaims that were previously dismissed. While NDS has stipulated not to present evidence of "causes of action" that were previously dismissed, it still seeks to present evidence that EchoStar believed that Tarnovsky was "xbr21," which has since been disproven.

This evidence is relevant to prove that EchoStar cannot satisfactorily identify the author of the Nipper postings and has merely pointed the finger at Tarnovsky. NDS has sought to present pleadings and interrogatory responses on this point.

The Court concluded that presenting a former complaint would be substantially more prejudicial than probative, such that it should not be permitted under Rule 403. The risk is too great that the jury will give undue consideration to allegations in the complaint and will place too much weight on the mistaken pleadings.

Accordingly, NDS will be limited to producing the interrogatory responses to prove the mistaken allegations. Additionally, NDS can question witnesses on this point and may show the witnesses the complaint as the basis of the questions. However, the Complaint will not be included in evidence.

EchoStar's Motion in Limine No. 7

Stipulated.

EchoStar's Motion in Limine No. 8

Stipulated.

EchoStar's Motion in Limine No. 9

Stipulated.

EchoStar's Motion in Limine No. 10

Stipulated.

EchoStar's Motion in Limine No. 11

Stipulated.

EchoStar's Motion in Limine No. 12

Stipulated.

EchoStar's Motion in Limine No. 13

This motion is Moot in light of the Court's instruction that NDS produce certain witnesses for deposition.

EchoStar's Motion in Limine No. 14

EchoStar has tried to prevent NDS from presenting evidence concerning the Kudelski affiliates' position during discovery. Particularly NDS seeks to present evidence that the Kudelski affiliates have helped EchoStar during the discovery process but refused to produce information for NDS. NDS indicated that its concern is its apparent inability to get Henri Kudelski and other Kudelski affiliated witnesses to trial.

The Court ordered EchoStar to produce Kudelski and Joel Conus. If EchoStar fails to do so, NDS will be permitted to write an adverse inference instruction concerning Kudelski's conduct.

EchoStar's Motion in Limine re Nipper Aliases

EchoStar *moved in limine* to exclude any evidence or reference to any specific person, aside from Christopher Tarnovsky, that might be responsible for the Nipper aliases and nipper postings. EchoStar claimed that NDS failed to disclose who it contended was responsible for these aliases in response to interrogatories, document requests, and deposition questions, and therefore EchoStar will be prejudiced if NDS is allowed to present such theories. Accordingly, EchoStar claims that Rule 37 requires the exclusion of such evidence or references.

Allowing NDS to present its theory that another person was responsible for the postings is hardly prejudicial. EchoStar has known all along that NDS intended to show that another person may have been responsible for the postings. Indeed, EchoStar has admitted to deposing and/or otherwise investigating most of the individuals that NDS identified as potential suspects. EchoStar's only claim is that it could have undertaken more investigation of certain of these individuals if it had known sooner that they were potential suspects. However, EchoStar has been diligent thus far in investigating potential suspects and anticipating NDS contentions. Consequently, there is no reason to suspect that EchoStar has failed to investigate these

individuals.

NDS identified the following persons as those it may claim to have been responsible for the Nipper aliases and Nipper postings. At trial, NDS will not be permitted to present evidence that any other person may have been responsible.

Concerning the Nipper claus posting, NDS represented that the following people may be responsible:

1. Jim Waters from Barrie Ontario (or his engineer)
2. The DishPlex piracy group including: William Jansen a/k/a Voyager (presently Plaintiff's employee), Larry Pilon, and Peter Beck.
3. Insiders of Plaintiffs including: Mr. Valsecchi, Jan Saggiori, and Charles Perlman

Concerning the Nipper 2000 posting, NDS suggests that the person will be identified by searching the databases above using the 16 bit code.

EchoStar represented that it had investigated both the DishPlex group, including Jansen, Renaud and Maldonado as well as any people located in lists prepared by investigator J.J. Gee or Alan Guggenheim. These lists include a number of piracy syndicates.

Finally, the Court granted EchoStar the ability to fully depose Michael Sankey to determine the extent of NDS investigation into other parties potentially responsible for the Nipper postings.

III. DEPOSITION TESTIMONY & RELATED OBJECTIONS

Stefanie Williams, Eric Lebson and the ICG Documents

Williams worked for ICG until August 23. ICG performed investigative work for DirecTV's lawsuit of NDS. Although she repeatedly stated that she did not directly investigate this case, she was the manager at ICG responsible for the reports and the case management and investigation. Beginning on page 35 is a repeated (and to this Court rather incredible) series of responses that are ambiguous and could be construed as feigned amnesia. It leaves this Court with the unfavorable impression, due to repeated protestations of memory lapse, that this witness is not being truthful.

After viewing both the video of her deposition, and reading the transcript of this deposition, as well as noting the present involvement of ICG on behalf of NDS, and even while recognizing that she is not at present an ICG employee, this Court finds that the documents are sufficiently authenticated by her testimony when corroborated with that of Eric Lebson to satisfy the minimal standard of Rule 901.

Lebson is a partner of TDI. TDI provides internet security and investigative services. They were retained by Jones Day to investigate the hack of DirecTV allegedly by NDS. DirecTV believed a

number of individuals were involved in this hack, perhaps in an organized effort with NDS hacking or engaging others to hack the DirecTV chip. This hack occurred during 2002 and 2003.

ICG was hired by TDI as an "internet investigation specialist" to conduct this specific investigation. TDI had retained ICG on at least 20 occasions.

Exhibit 351 is labeled TRAPDOOR.pdf. Trapdoor was the investigative name assigned the project by Lebson. This document was the alleged ICG work product document. Exhibit 351 gives information concerning pontential aliases used by Tarnovsky.

In the Exhibit 354, on page 2, the document indicates that Christopher Tarnovsky posted under the alias Nipper 2000 on the dr7 website. Lebson confirms that he had a conversation concerning this document, in which he discussed the postings on Menard's DR7 website.

Lebson goes on to discuss Exhibit 353, stating that he authored the document, but does not recall whether the document was sent to Jones Day. Exhibit 353 is Lebson's report based on boxes of ICG documents. Lebson compiled the report to send to Schetina, counsel at Jones Day. These underlying documents were destroyed by Megan McNulty and Jamie Deboise as a part of a document retention policy in late 2003, during the course of this litigation and after the purchase of DirecTV by News Corp. Once the underlying documents were destroyed, the source documents are no longer available.

Finally, the documents are internally consistent and bear independent hallmarks of credibility consistent with the testimony given by Williams and Lebson.

Although the October email written by Anthony Timek may be in conflict with Exhibit 353, which preceded the email, the potential conflict is an issue for the jury to determine. Moreover, this email does not necessarily impact Exhibit 351 which is dated after Timek's email or Exhibit 354 which is undated. Aside from the statement in Timek's email, it is not clear what information ICG relied on in developing the report. Therefore, the Court cannot conclude that the document is based on hearsay. Finally, the documents themselves are likely business Records under rule 803(6) and bear circumstantial guarantees of trustworthiness and provide perhaps the most probative evidence of Tarnovsky's link (whatever it may be) to the Nipper 2000 alias pursuant to Rule 807.

Concerning the potential that the documents will be unduly prejudicial under Rule 403, the Court finds that the documents are more probative than prejudicial. Although the use of the term "linked" is given a broad definition by TDI and ICG, and Lebson admitted that they lack conclusive evidence that Tarnovsky is Nipper 2000, this goes to the weight afforded the evidence, not its admissibility. While the statements of ICG and TDI bring the credibility of their findings into question, NDS will have the opportunity to present this evidence to the jury.

To the extent that the documents or testimony refer to the DirecTV litigation, they are not the same type of prejudicial information that is excluded under NDS' Motions in Limine Nos. 3 and 4. The testimony does not rely on unsupported allegations or litigation posturing and merely

relays why these individuals were retained by DirecTV.

Therefore, the testimony of these witnesses, and the ICG and TDI documents will be admitted.

Billy Joe Osbourne and Don Nance

Both Osbourne and Nance will testify to piracy efforts by a piracy group operating a sophisticated laboratory in Thunder Bay, Ontario, Canada. NDS would like to present the testimony of these witnesses to identify this group as a potential source of EchoStar piracy unreleated to NDS. EchoStar objected on the basis that this information constitutes hearsay and lacks foundation.

On the issue of hearsay, EchoStar claims that a great deal of this information came from Dennis Renaud who will not testify in this matter and apparently has not been located or deposed. Given that Mr. Renaud is unavailable, and that his admissions concerning hacking activities likely subject him to criminal liability, the statements by Mr. Renaud are statements against penal interest under Rule 804.

Concerning the foundation, although Osbourne and Nance never saw the Thunder Bay laboratory themselves, this does not mean that their testimony is irrelevant or lacks foundation. Instead, the foundation for the relevance of this testimony is provided by Osbourne's deposition on pages six and seven where he sets a rough time-frame for the time he heard about activities in the Thunder Bay laboratory that corresponds to the time-frame for the EchoStar hack.

Accordingly, EchoStar's objections to the testimony of Osbourne and Nance are overruled. Because Osbourne and Nance's testimony concerning Renaud and the dishplex group are admissible for purposes of identifying this group as a potential source of piracy, they are equally admissible to suggest Menard's and others' involvement in that piracy. Accordingly, NDS' objections to the testimony of Osbourne and Nance are likewise overruled.

Peter Kuykendall

The Court deferred ruling on Kykendall until NDS' case in chief.

Sean Quinn, Andre Sergei, Ed Bruce

The Court deferred ruling pending evidence of a nexus between these individuals and EchoStar piracy.

Stanley Frost

At his deposition, Stanley Frost invoked his Fifth Amendment right against self-incrimination as to all questions related to satellite piracy. These questions ranged from whether he was currently engaged in satellite piracy at the time of the deposition to whether he knew Chris Tarnovsky or engaged in distribution of EchoStar pirate cards with Tarnovsky and Al Menard.

EchoStar seeks to read portions of this deposition testimony into the record to show that Menard and Tarnovsky used Frost as part of a distribution network for pirated EchoStar cards. The Court has discretion to allow such an inference in a civil case. *See Baxter v. Palmigiano*, 425 U.S. 308 (1976); *SEC v. Colello*, 139 F.3d 674 (9th 1998). Indeed, EchoStar points out that the Fifth Amendment has even less impact because Frost is not a party to this suit. *RAD Services, Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271 (3d Cir. 1986).

EchoStar contends that an adverse inference is warranted from Frost's invocation of the privilege because other evidence corroborates this inference. *See Colello*, *supra* (requiring evidence in addition to invocation); *Doe ex rel Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1294 (9th Cir. 2000) ("lower courts interpreting *Baxter* have been uniform in suggesting that the key to the *Baxter* holding is that such adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer.")

Tarnovsky admits to attending a meeting at Frost's request in Canada. John Norris, Tarnovsky's supervisor, permitted Tarnovsky to do so in an under-cover capacity. Information gathered at his meeting lead to Frost's indictment on felony charges due to piracy. Additionally, Al Menard admits to meeting Tarnovsky at this 1999 "pow wow." Dionisi and Ereiser also admit to attending this meeting. In addition Tarnovsky confirmed that some of the participants in this Toronto meeting were engaged in EchoStar piracy.

However, NDS makes a valid point that Frost is not an NDS employee, and without some connection between Frost and NDS, it is unfair and misleading to allow an adverse inference to be drawn against NDS on the basis of Frost's invocation of the privilege. *LiButti v. United States*, 107 F.3d 110, 123-24 (2d Cir. 1997).

In the cases cited by Plaintiff, the Courts relied on the relationship between the non-party and the party against whom the inference was drawn. *See Brinks, Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 700) (former employees); *RAD*, *supra* (manager and director); *Rosebud*, *supra*. (corporate chairman); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987) (voting member of charity who is "key figure" in suit); *Federal Deposit Ins. Corp. v. Fidelity & Deposit Co.*, 45 F.3d 969 (5th Cir. 1995) (recipients of fraudulent loans, requiring corroboration).

The Second Circuit in *LiButti* found this relationship to be the most important factor in determining whether to draw an adverse inference. Additionally, that court considered the authority or control of the witness within the corporate party, the compatibility of interests between the party and the witness, and the role of the witness in the case – i.e. whether he or she is a "key witness. However, it also noted that different circumstances may be relevant in any given case and the overarching question is whether drawing an adverse inference is trustworthy and "advance[] the search for truth." *See also Emerson v. Wembly U.S.A., Inc.*, 433 F. Supp. 2d 1200 (D. Colo.) (declining to permit adverse inference despite past business relationship);

Here, Frost was indicted for hacking Galaxy Latin America, which would become DirecTV Latin America. He then acted as an informant for DirecTV and was later employed by DirecTV as a

"consultant" for the period of 2001 until at least 2007 when his deposition was taken. Although NDS has never paid Frost or employed him in any capacity, during a significant portion the period of Frost's employment with DirecTV, News Corp. held controlling interests in both DirecTV and NDS. Accordingly, while not a direct employer-employee arrangement, DirecTV did have some relationship with Frost during the relevant period.

Additionally, Frost was a defendant in this suit. Although he is no longer a named defendant, EchoStar suggests that he took a central part in the misconduct alleged in the present case. This means that the allegations against NDS are also allegations against Frost himself. While he does not have a direct interest in the litigation, he certainly belongs on NDS's side of this suit. Finally, Frost's conduct is fairly important to this case: he was allegedly part of the distribution network that is key to EchoStar's claims of piracy. Accordingly, his testimony (or lack of testimony) is highly relevant to the facts at issue.

Accordingly, drawing an adverse inference based on Frost's invocation of the Fifth Amendment is credible and warranted due to his relationship with NDS as well as known hackers, and the corroborating evidence of other witnesses.

Given the substantial probative value of Frost's potential testimony in determining whether the distribution network existed, allowing the jury to hear his invocation of the privilege is not unfairly prejudicial under Rule 403. This is particularly compelling given that the inference flows logically from the fact that Frost paid for Tarnovsky and Al Menard, the alleged principals of the network, to travel to Toronto to meet him during the relevant period. Although the inference is weakened by the fact that Frost made a blanket assertion of the privilege, it is not so weak as to be outweighed by the risk of prejudice.

However, neither party has attempted to subpoena Frost in compliance with the Court's prior order to subpoena all witnesses that either party would like to call. Accordingly, the Court cannot be certain that Frost would refuse to appear or refuse to give testimony if he did appear. If Frost does appear at trial, his deposition testimony may well be irrelevant. NDS should have the opportunity to procure Frost's attendance and encourage him to give live testimony.

Therefore, the parties will be prohibited from mentioning Frost's testimony or his invocation of the privilege during their opening statements. However, if Frost fails to appear, the Court will allow the parties to rely on his deposition testimony, including his invocations of the Fifth Amendment.