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11  
12 **IN THE UNITED STATES DISTRICT COURT**  
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**  
14 **SOUTHERN DIVISION**

15  
16 EHOSTAR SATELLITE CORP.,  
EHOSTAR COMMUNICATIONS  
17 CORP., EHOSTAR TECHNOLOGIES  
CORP., AND NAGRASTAR L.L.C.,

18 Plaintiffs,

19 v.

20 NDS GROUP PLC, NDS AMERICAS,  
21 INC., JOHN NORRIS, REUVEN  
HASAK, OLIVER KÖMMERLING,  
22 JOHN LUYANDO, PLAMEN DONEV,  
VESSELIN NEDÉLTCHEV,  
23 CHRISTOPHER TARNOVSKY, ALLEN  
MENARD, LINDA WILSON, MERVIN  
24 MAIN, DAVE DAWSON, SHAWN  
QUINN, ANDRE SERGEI, TODD  
25 DALE, STANLEY FROST, GEORGE  
TARNOVSKY, BRIAN  
26 SOMMERFIELD, ED BRUCE,  
"BEAVIS," "JAZZERCZ,"  
27 "STUNTGUY," and JOHN  
DOES 1 - 100.

28 Defendants.

Case No. SA CV 03-950 DOC(JTLX)

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEFENDANT GEORGE  
TARNOVSKY'S MOTION TO  
DISMISS PLAINTIFFS' THIRD  
AMENDED COMPLAINT**

Date: December 13, 2004  
Time: 8:30 a.m.  
Dept: Judge David Carter  
Courtroom 9D

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**I. Introduction.**

Even before reaching the substance of the few allegations about George Tarnovsky (“Tarnovsky, Sr.”),<sup>1</sup> he should be dismissed because the Court lacks personal jurisdiction over him. As the TAC alleges, and as his declaration confirms, he resides in Virginia. He does not have anything approaching the “continuous and systematic” contacts with California that would create general jurisdiction over him. He does not even have the “minimum contacts” necessary to establish limited personal jurisdiction over him. George Tarnovsky should be dismissed for lack of personal jurisdiction.

Independent of the lack of personal jurisdiction, Tarnovsky Sr.’s alleged conduct is insufficient to support any of the 22 claims the TAC asserts against him and every one of the more than two dozen defendants. The TAC simply does not allege that he did anything that gives plaintiffs a claim against him. Instead, the TAC apparently relies on the allegation that he is legally responsible for the alleged conduct of others. But plaintiffs do not, and cannot, properly allege the facts that would make Tarnovsky Sr. liable for any conduct alleged in the TAC. He should be dismissed for this additional reason.

The transparent purpose of naming Tarnovsky Sr. as a defendant is to bully and intimidate. This misuse of the judicial system should be ended immediately, and Tarnovsky Sr. should be dismissed.

**II. Defendant Tarnovsky Sr. Is Not Subject To Personal Jurisdiction.**

Before this Court may consider plaintiffs’ claims against Tarnovsky Sr., plaintiffs bear the burden of first establishing that the Court may exercise either general or specific personal jurisdiction over him. *See Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850 (9th Cir. 1993). In the Ninth Circuit, this requires that the exercise of personal jurisdiction comport with Federal Due Process. *See Cal. Code.*

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<sup>1</sup> To avoid confusion, this brief uses the abbreviation Tarnovsky Sr. to differentiate between defendant George Tarnovsky and his son Christopher Tarnovsky.

1 Civ. P. § 410.10; *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir.  
2 1993). If plaintiffs fail to make a *prima facie* showing of personal jurisdiction,  
3 dismissal is appropriate.

4 But as explained below and in Tarnovsky Sr.'s accompanying Declaration,  
5 Tarnovsky Sr. is a resident of Virginia with no contacts with California that would  
6 permit haling him into court in this distant forum. Tarnovsky Decl. ¶¶ 3-11. He does  
7 not have "substantial and continuous" contacts with California that would support  
8 general jurisdiction over him (and plaintiffs do not allege otherwise), nor do the facts  
9 support even limited personal jurisdiction. *Id.* Accordingly, because plaintiffs' have  
10 not sustained and cannot sustain their initial burden of demonstrating that this Court can  
11 constitutionally exercise personal jurisdiction over Tarnovsky Sr., he should be  
12 dismissed from this case.

13 **A. California Cannot Constitutionally Exercise "General" Personal Jurisdiction**  
14 **Over Tarnovsky Sr.**

15 A federal court may exercise "general" personal jurisdiction over a defendant  
16 that is either domiciled in the forum state or has "continuous and systematic general  
17 business contacts that 'approximate physical presence.'" *Glencore Grain Rotterdam*  
18 *B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1124 (9th Cir. 2002); *see also*  
19 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16, 80 L. Ed. 2d  
20 404, 104 S. Ct. 1868 (1984). The Ninth Circuit has described the test for general  
21 personal jurisdiction as "an exacting standard, as it should be, because a finding of  
22 general jurisdiction permits a defendant to be haled into court in the forum state to  
23 answer for any of its activities anywhere in the world." *Schwarzenegger v. Fred Martin*  
24 *Motor Co.*, 374 F.3d 797, 801 (9th Cir. 2004).

25 Tarnovsky Sr. is not domiciled in California, was not served in California, and  
26 did not consent to jurisdiction in California. Tarnovsky Decl. ¶¶ 3-11. His contacts  
27 with California amount to occasional visits to his son. *Id.* at ¶ 10. He does not own  
28 property in California, does not keep a bank account in California, has no employees or



1 agents in California, and does not solicit business in California. *Id.* at ¶¶ 3-11. Plainly,  
2 general jurisdiction does not exist over Tarnovsky Sr. *See Glencore*, 284 F.3d at 1124.

3 Although Tarnovsky Sr. is employed by one of the corporate defendants (NDS  
4 Americas), his relationship with NDS Americas in no way supports a finding of general  
5 jurisdiction in California. It is well settled that simply being employed by an entity over  
6 which jurisdiction may be asserted does not somehow “impute” jurisdiction to the  
7 nonresident employee. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (noting that  
8 “[p]etitioners are correct that their contacts with California are not to be judged  
9 according to their employer’s activities there . . . . Each defendant’s contacts with the  
10 forum state must be assessed individually”); *see also Davis v. Metro Prods., Inc.*, 885  
11 F.2d 515, 521 (9th Cir. 1989) ).

12 Nor do Tarnovsky Sr.’s infrequent visits to California support a finding of  
13 general personal jurisdiction in California. In *Gates Learjet Corp. v. Jensen*, 743 F.2d  
14 1325, 1330-31 (9th Cir. 1984), the court held that it did not have general jurisdiction  
15 over the defendants despite their several visits and purchases in the forum, the  
16 solicitation of a contract in the forum that included choice of law provision favoring the  
17 forum, and extensive communication with forum. Similarly, in *Davis & Cox v. Summa*  
18 *Corp.*, 751 F.2d 1507, 1526 (9th Cir. 1984), the court held that it lacked both general  
19 and specific jurisdiction over the defendant despite the defendant’s vacation and  
20 business trips to the forum state “amounting to an average of about three weeks a year.”  
21 And in *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1243 (9th Cir.  
22 1984), the court held that developing a sales force in the forum state was insufficient for  
23 maintaining general jurisdiction.

24 Also, having regular and consistent communication with the forum is  
25 insufficient to assert general jurisdiction over a non-resident defendant. The “use of the  
26 mails, telephone, or other international communications simply do not qualify as  
27 purposeful activity invoking the benefits and protection of the [forum] state.” *Peterson*  
28 *v. Kennedy*, 771 F.2d 1244, 1264 (9<sup>th</sup> Cir. 1985); *see also Thos. P. Gonzalez Corp. v.*

1 *Consejo Nacional de Production de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980)  
2 (same); *Floyd J. Harkness Co. v. Amezcua*, 60 Cal. App. 3d 687, 692-93 (1976).

3 Plaintiffs' allegations and Tarnovsky Sr.'s declaration demonstrate that he has  
4 nothing even remotely approaching "continuous and systematic general business  
5 contacts that approximate physical presence" in California. *Glencore*, 284 F.3d at 1124.  
6 Accordingly, this forum cannot constitutionally exercise general jurisdiction over him.

7 **B. A Court in California Also Cannot Constitutionally Exercise "Limited"**  
8 **Personal Jurisdiction Over Tarnovsky Sr.**

9 Unable to demonstrate general jurisdiction over Tarnovsky Sr., plaintiffs must  
10 show "limited" personal jurisdiction over Tarnovsky Sr. Plaintiffs, however, have not  
11 made and cannot make this showing.

12 To establish limited personal jurisdiction in this forum, plaintiffs must establish  
13 that Tarnovsky Sr. has "minimum contacts" with California sufficiently related to the  
14 cause of action "such that the maintenance of the suit does not offend traditional notions  
15 of fair play and substantial justice." *See Glencore*, 284 F.3d at 1123, *quoting Int'l Shoe*  
16 *Co. v. Washington*, 326 U.S. 310, 316 (1945). The Ninth Circuit has established a  
17 three-part test for determining when the requirements for limited personal jurisdiction  
18 have been met: (1) the nonresident defendant must purposefully avail itself of the  
19 privilege of conducting activities in the forum state, thereby invoking the benefits and  
20 protections of its laws; (2) the claim must arise out of or result from the defendant's  
21 forum-related activities; and (3) the exercise of jurisdiction must comport with fair play  
22 and substantial justice – *i.e.*, it must be reasonable. *Schwarzenegger*, 374 F.3d at 802.

23 Because plaintiffs' allegations fail to satisfy any of the above requirements for  
24 exercising limited jurisdiction over Tarnovsky Sr., he should be dismissed.

- 25 1. Plaintiffs cannot meet the "effects test" and therefore cannot establish  
26 purposeful availment by Tarnovsky Sr. in California.

27 To establish limited personal jurisdiction in California, plaintiffs must  
28 demonstrate that Tarnovsky Sr. "purposefully availed" himself of the privilege of

1 conducting activities in California. *Id.* Where the underlying claim is one based on tort,  
2 the purposeful availment requirement is satisfied by application of the “effects test.”  
3 *Calder v. Jones*, 465 U.S. 783, 789-90 (1984); *Schwarzenegger*, 374 F.3d at 802. This  
4 “effects test” requires that the plaintiffs demonstrate (1) intentional actions that are  
5 expressly aimed at the forum state, and (2) which cause harm, “the brunt of which is  
6 suffered – and which the defendant knows is likely to be suffered – in the forum state.”  
7 *Core-Vent*, 11 F.3d at 1486. All these elements must be established in order to support  
8 a finding of purposeful availment. *Schwarzenegger*, 374 F.3d at 805. But even  
9 accepting for this limited purpose the TAC’s allegations, Tarnovsky Sr. neither  
10 “expressly aimed” intentional actions towards California nor caused any harm in  
11 California.

12 a. **Tarnovsky Sr.’s alleged conduct was not “expressly**  
13 **aimed” at California.**

14 The purpose of the “expressly aimed” requirement is to ensure “that a defendant  
15 will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated  
16 contacts or of the unilateral activity of another party or of a third person.” *Burger King*,  
17 471 U.S. at 478-79. In assessing whether plaintiffs have alleged that Tarnovsky Sr.  
18 “expressly aimed” any activities toward California, this Court can only “consider the  
19 forum-related acts personally committed by [Tarnovsky Sr.] rather than the imputed  
20 conduct of co-conspirator[s].” *Foley v. Marquez*, 2004 WL 603566, at \*4 (N.D. Cal.  
21 2004); *see also Davis v. Metro Productions, Inc.*, 885 F. 2d at 521 (“Each defendant’s  
22 contacts with the forum state must be assessed individually.”). This is because “the  
23 conduct of a co-conspirator is generally too tenuous to warrant the exercise of personal  
24 jurisdiction.” *Foley*, 2004 WL 603566, at \*4.

25 Turning to the bare handful of allegations specific to Tarnovsky Sr., the TAC  
26 alleges that he allegedly purchased a DISH Network receiver and entered into a  
27 Residential Subscriber Agreement (“Agreement”) in November 1988, TAC ¶ 386, that  
28 he “reverse engineered” plaintiffs’ cards in breach of the Agreement, TAC ¶ 390, that a

1 package was sent from Virginia to Christopher Tarnovsky, TAC ¶ 197, and he – “acting  
2 as Joe Zee” – was sent to Canada to remove and delete “documentary proof that  
3 Tarnovsky was involved in the distribution network.” TAC ¶ 85; *see also* Affidavit of  
4 Joe Zee ¶ 4 (attached as Exhibit 1 to Plaintiffs Memorandum in Opposition to George  
5 Tarnovsky’s Motion to Dismiss Plaintiffs Second Amended Complaint (“Joe Zee  
6 Affidavit”). But these sparse allegations, even if true, do not have any connection with  
7 California and do not describe conduct “expressly aimed” at California. In the Ninth  
8 Circuit, the “expressly aimed” requirement for showing specific personal jurisdiction is  
9 “satisfied when the defendant is alleged to have engaged in wrongful conduct targeted at  
10 a plaintiff whom the defendant knows to be a resident of the forum state.” *Yahoo Inc. v.*  
11 *La Ligue Contre Le Racisme Et L’Antisemitisme*, 379 F.3d 1120, 1124 (9th Cir. Aug.  
12 23, 2004) (French defendant did not “expressly aim” conduct at California by obtaining  
13 Court order blocking plaintiffs’ website content in France). Here, plaintiffs are not  
14 California residents, are not incorporated in California, and do not have their principal  
15 place of business in California. *See, e.g.*, TAC ¶¶ 27-30. To the contrary, plaintiffs are  
16 incorporated in Colorado, Nevada and Texas. *Id.* Thus, even assuming that Tarnovsky  
17 Sr.’s alleged conduct was indeed wrongful (and as demonstrated in **Section III**, *infra*, it  
18 was not), the alleged conduct clearly was not “targeted at a plaintiff whom the defendant  
19 knows to be a resident of [California].” *Yahoo*, 379 F.3d at 1124.

20 Accordingly, plaintiffs cannot show that Tarnovsky Sr. expressly aimed conduct  
21 at California, and they therefore also cannot establish the purposeful availment  
22 necessary for jurisdiction.

23 **b. The “brunt” of plaintiffs’ alleged harm occurred, if at all,**  
24 **outside California.**

25 In addition to showing that Tarnovsky Sr. “expressly aimed” conduct at  
26 California, plaintiffs must also show that this conduct caused plaintiffs harm, “the brunt  
27 of which is suffered – and which the defendant knows is likely to be suffered – in  
28 [California].” *Core-Vent*, 11 F.3d at 1486. But plaintiffs cannot satisfy this requirement

1 either. Even assuming that plaintiffs were indeed harmed by Tarnovsky Sr.'s alleged  
2 conduct, any such harm was felt, if at all, where plaintiffs were located – *i.e.*, Colorado,  
3 Nevada and Texas. *See Callaway Golf Corp. v. Royal Canadian Golf Assoc.*, 125 F.  
4 Supp. 2d 1194, 1200 (C.D. Cal. 2000); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d  
5 1316, 1319-20 (9th Cir.1998) (harm from cybersquatter's registration of  
6 [www.panavision.com](http://www.panavision.com) website was felt in Panavision's principal place of business). As  
7 the Court noted *Core-Vent*, because "Core-Vent's principal place of business was in the  
8 forum state . . . any economic effects were arguably ultimately felt there." 11 F.3d at  
9 1487.

10 Furthermore, even if the brunt of plaintiffs' alleged harm had been felt in  
11 California, plaintiffs must further demonstrate that Tarnovsky Sr. *knew* that the alleged  
12 harm was likely to be felt in California. *Core-Vent*, 11 F.3d at 1486; *Callaway*, 125 F.  
13 Supp. 2d at 1200-01. In *Callaway*, this Court refused to exercise jurisdiction over the  
14 non-resident defendant based on this Court's conclusion that even assuming that  
15 defendant targeted its injurious activity towards the plaintiff, "plaintiff does not adduce  
16 facts sufficient to establish that defendant knew or should have known plaintiff was a  
17 resident of California, had its principal place of business in California, or otherwise  
18 would feel the brunt of the effects of defendant's actions in California."<sup>2</sup> *Id.* at 1200.  
19 Here, even assuming the truth of plaintiffs' fanciful allegations against Tarnovsky Sr.,  
20 plaintiffs have not alleged and cannot allege that Tarnovsky Sr. knew that the "brunt" of  
21 the tenuous conduct alleged in the TAC would be felt in California.

22 <sup>2</sup> In concluding that the evidence was insufficient to impute knowledge of plaintiff's  
23 residency to defendants, this Court distinguished *Panavision* because the defendant in  
24 that case had sent cease and desist letters to the plaintiff in California and thus knew it  
25 was located in California. *Callaway*, 125 F.Supp.2d. at 1200. Also, this Court noted  
26 that in *Panavision*, the defendant should have known the plaintiff – a manufacturer of  
27 television and motion picture equipment – would have felt the brunt of its injuries in  
28 California "where the movie and television industry is centered." *Id.*; *see also Dole*  
*Food Co. v. Watts*, 303 F.3d 1104, 1112 (9th Cir. 2002) (finding personal jurisdiction  
where defendants "knew that plaintiff's principal place of business was in California,  
knew that the plaintiff's decisionmakers were located in California, and communicated  
directly with those California decisionmakers." Nothing alleged in the TAC even  
suggests that Tarnovsky Sr. could have known of the alleged harm to plaintiffs in  
California.

1 Plaintiffs have not alleged facts demonstrating (1) that Tarnovsky Sr. expressly  
2 aimed conduct at California, or (2) that the “brunt” of the alleged harm from this  
3 conduct occurred in California, or (3) that Tarnovsky Sr. knew that the brunt of the  
4 harm would likely be suffered in California. *Core-Vent*, 11 F.3d at 1486. A plaintiff  
5 wishing to establish purposeful availment, however, must demonstrate all these factors.  
6 *Id.* Accordingly, this Court cannot constitutionally exercise limited personal  
7 jurisdiction over Tarnovsky Sr. and he should therefore be dismissed from this case.  
8 *Schwarzenegger*, 374 F.3d at 805.

9 2. Plaintiffs’ asserted claims do not “arise out of” Tarnovsky Sr.’s nonexistent  
10 contacts with California.

11 Even if plaintiffs were able to show purposeful availment by Tarnovsky Sr. in  
12 California, plaintiffs must also demonstrate that the contacts constituting purposeful  
13 availment are the ones that give rise to the current suit – *i.e.*, the plaintiffs would not  
14 have been injured “but for” Tarnovsky Sr.’s contacts with California. *See Loral*  
15 *Terracom v. Valley National Bank*, 49 F.3d 555, 561 (9th Cir. 1995); *Travelers Cas. &*  
16 *Sur. Co. v. Telstar Constr. Co.*, 252 F. Supp. 2d 917, 935 (D. Ariz. 2003) (dismissing  
17 for lack of personal jurisdiction where defendant’s alleged contacts “relate to general  
18 jurisdiction, not jurisdiction specifically related to this action.”). Plaintiffs, however,  
19 cannot make such a showing here.

20 The scant allegations in the TAC relating to Tarnovsky Sr.’s alleged conduct  
21 have no connection with California. Plaintiffs do not allege any conduct by Tarnovsky  
22 Sr. in California or conduct that is aimed at California and is related to their alleged  
23 injury. Thus, even accepting plaintiffs’ allegations, nothing in the TAC supports the  
24 conclusion that NDS would not have been injured “but for” Tarnovsky Sr.’s alleged  
25 contacts with California. This Court cannot constitutionally exercise limited personal  
26 jurisdiction over Tarnovsky Sr. for this additional and independent reason.

1           3.     The exercise of jurisdiction over Tarnovsky Sr. under these circumstances  
2                     would be unreasonable.

3           In addition to satisfying the “purposeful availment,” and “but for” prongs  
4 required to establish limited personal jurisdiction, a party seeking to exercise  
5 jurisdiction over a non-resident defendant must also demonstrate that the exercise of  
6 personal jurisdiction would be reasonable. *Glencore*, 284 F.3d at 1125. And to assess  
7 the reasonableness of exercising jurisdiction, the Ninth Circuit has adopted *Burger*  
8 *King’s* seven part inquiry. *Id.* Even a cursory consideration of these factors, however,  
9 reveals that subjecting a resident of Virginia having only the most tenuous connection to  
10 the wrongdoing alleged in the TAC to jurisdiction in California would be unreasonable:

11           **1.     The extent of a defendant’s purposeful interjection into the forum**  
12 **state’s affairs:** As discussed above, plaintiffs have not alleged, and indeed cannot  
13 allege that Tarnovsky Sr. purposefully interjected himself into the affairs of California.  
14 Tarnovsky Sr. is not alleged to have done anything in California or anything to  
15 California residents.

16           **2.     The burden on the defendant of defending in the forum:** Tarnovsky Sr.  
17 is an individual resident of Virginia. In a lawsuit that has already seen the sort of “hard  
18 tactics” employed by plaintiffs, the burden that would be imposed on an individual  
19 defendant forced to litigate this case from a state on the other side of the country would  
20 be extraordinary. *See* Tarnovsky Decl. ¶ 12.

21           **3.     The extent of conflict with the sovereignty of the defendant’s home**  
22 **state:** Plaintiffs’ principal claims against Tarnovsky Sr. involve his entry into the  
23 Residential Subscriber Agreement. Because this agreement was entered into in Virginia  
24 and presumably allegedly breached in Virginia, TAC ¶¶ 386, 390, 392, Virginia’s  
25 interest, however minimal, in adjudicating this dispute is greater than California’s.

26           **4.     The forum state’s interest in adjudicating the dispute:** Neither  
27 California nor plaintiffs have a particular interest in litigating putative claims against  
28 Tarnovsky Sr. in California. None of the plaintiffs are California citizens or have their

1 principal places of business inside California. Only defendant NDS Americas has its  
2 principal place of business in California, and only two of the 24 named defendants are  
3 allegedly California residents. *See, e.g.*, TAC ¶¶ 33, 54.

4 **5. The most efficient judicial resolution of the controversy:** This is not a  
5 situation where dismissing Tarnovsky Sr. will result in dismissing plaintiffs' case.  
6 Rather, his alleged role is so minimal and so attenuated, his dismissal should have no  
7 impact whatsoever on future proceedings in this case.

8 **6. The importance of the forum to the plaintiff's interests in convenient**  
9 **and effective relief:** In the unlikely event plaintiffs' receive a judgment against  
10 Tarnovsky Sr., it would both inconvenient and ineffective for them to receive relief in  
11 California. *See Glencore*, 284 F.3d at 1126 ("absent any evidence of assets in the  
12 California forum against which [plaintiff] could enforce its award, we find [plaintiff's]  
13 relief is frustrated, not promoted by bringing suit here.")

14 **7. The existence of an alternative forum:** As noted above, Tarnovsky Sr.'s  
15 presence in this lawsuit is not necessary for plaintiffs to obtain complete relief. Should  
16 plaintiffs wish to pursue relief against Tarnovsky Sr., however, Virginia provides an  
17 alternative forum as personal jurisdiction may be had over Tarnovsky Sr. in that forum.

18 Thus, the factors considered by the Ninth Circuit all demonstrate that it would  
19 be unreasonable to exercise jurisdiction over Tarnovsky Sr. *See Glencore*, 284 F.3d at  
20 1126.

21 As demonstrated above, plaintiffs have failed to establish either general or  
22 limited personal jurisdiction over Tarnovsky Sr. He lacks both "substantial and  
23 continuous" contacts with California that would support general jurisdiction over him,  
24 and with respect to limited personal jurisdiction, plaintiffs cannot establish (1)  
25 purposeful availment by Tarnovsky Sr. in California, or (2) that plaintiffs' claims arise  
26 out of or result from Tarnovsky Sr.'s limited contacts with California, or (3) that the  
27 exercise of jurisdiction here would be reasonable. Therefore, because this Court cannot  
28



1 constitutionally exercise personal jurisdiction over Tarnovsky Sr. in California,  
2 Tarnovsky Sr. should be dismissed from this lawsuit.

3 **III. Plaintiffs' TAC Is Also Substantively Deficient and Should Be Dismissed For**  
4 **Additional Independent Reasons.**

5 Many of the substantive arguments that dictate dismissal of plaintiffs' claims  
6 against Tarnovsky Sr. are identical to those that also require dismissal of plaintiffs'  
7 claims against NDS Group and NDS Americas ("NDS") and his son Christopher  
8 Tarnovsky. To avoid unnecessarily burdening the Court with duplicative arguments,  
9 Tarnovsky Sr. joins in both NDS's and Tarnovsky's concurrently filed motions to  
10 dismiss and supporting arguments as identified in the following discussion.  
11 Tarnovsky Sr. thus recommends that the Court review NDS's and Tarnovsky's motions  
12 to dismiss and supporting memoranda before reviewing this memorandum. Tarnovsky  
13 Sr. also specifically joins in NDS's concurrently filed motion to strike. These  
14 arguments demonstrate that plaintiffs have failed to state tenable claims against  
15 Tarnovsky Sr., and that – in addition to the jurisdictional defects noted above – he  
16 should be dismissed from the case for these additional reasons.

17 **A. Tarnovsky Sr. Joins in NDS' Argument That Because the TAC is "Grounded**  
18 **in Fraud," Its Allegations Must Be Pled With the Particularity Required by**  
19 **Rule 9.**

20 For the reasons discussed in NDS's memorandum, the TAC purports to allege a  
21 "unified course of fraudulent conduct" and is therefore "grounded in fraud" pursuant to  
22 controlling Ninth Circuit authority. *See* NDS Mem. 3:4 – 4:23. Accordingly, the  
23 TAC's allegations must therefore be pled "with particularity" as required by Rule 9.  
24 *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1105 (9th Cir. 2003). Because  
25 numerous allegations of the TAC plainly fail to meet this standard, they are properly  
26 stripped from the complaint. *See id.*  
27  
28

1 **B. Plaintiffs Allege No Wrongful Conduct By Tarnovsky Sr. Within the**  
2 **Limitations Period Of Any Claim.**

3 The longest limitations period applicable to any of plaintiffs' claims is four years.  
4 George Tarnovsky, however, was not named as a defendant in this case until the filing  
5 of the SAC on February 18, 2004. Under controlling Ninth Circuit authority, the SAC  
6 does not relate back to the original complaint under Fed. R. Civ. P. 15 (c) (3). *Kilkenny*  
7 *v. Arco Marine Inc.*, 800 F.2d 853, 858 (9th Cir 1986). Therefore, the limitations period  
8 must be measured from the SAC's February 18, 2004 filing date. But like the SAC, the  
9 TAC is noticeably devoid of allegations specific to Tarnovsky Sr. According to the  
10 TAC, Tarnovsky Sr.:

11 (1) Allegedly purchasing a DISH Network receiver and entered  
12 into a Residential Subscriber Agreement in November 1998.

13 *See* TAC ¶ 386.

14 (2) Allegedly "reverse engineering" plaintiffs' access cards in  
15 breach of his agreement with DISH Network. *See* TAC ¶ 390.

16 This reverse engineering is alleged to have been completed no  
17 later than "February of 1998." *See, e.g.*, TAC ¶¶ 48, 147.

18 (3) Allegedly sending a package from Virginia to Christopher  
19 Tarnovsky. TAC ¶¶ 197, 298(a-e).

20 But all of Tarnovsky Sr.'s alleged conduct relevant to plaintiffs' claims occurred  
21 no later than 1998. This alleged conduct and the conduct that allegedly preceded it are  
22 thus outside even the longest limitations period applicable to plaintiffs' claims. Because  
23 the TAC alleges no wrongful conduct by Tarnovsky Sr. within four years of filing the  
24 SAC, the statute of limitations bars all of plaintiffs' claims for relief.

25 No doubt aware that their claims are time barred, plaintiffs have included in the  
26 TAC vague assertions of conduct that allegedly occurred at some unspecified time. But  
27 these allegations are wholly insufficient for stating a claim against Tarnovsky Sr. for  
28 conduct within the statutes of limitations. Also, the TAC adds the allegation that

1 “Plaintiffs are informed and believe that after Norris learned that certain third parties  
2 had documentary proof that Tarnovsky was involved in the distribution network, Norris  
3 sent Tarnovsky Sr. – acting under the fictitious name “Joe Zee” – to remove and delete  
4 all such evidence in the possession of this third party.” TAC ¶ 85. Nothing in the TAC  
5 suggests that these alleged events occurred within the statutes of limitations. In fact,  
6 according to the affidavit on which plaintiffs’ presumably rely for this absurd claim,  
7 Tarnovsky Sr.’s visit to Canada to review computer files related to satellite television  
8 piracy of NDS products occurred on January 30 and 31, 2001, well beyond the statute of  
9 limitations for virtually all of plaintiffs’ claims.<sup>3</sup> See Joe Zee Affidavit ¶ 4. More  
10 importantly, however, this allegation is substantively insufficient to state a claim against  
11 Tarnovsky Sr. It is not enough to simply identify some conduct within the statute of  
12 limitations. It must be conduct that gives rise to a claim for relief. But none of the  
13 TAC’s 22 claims is based, even in part, on the offensive allegation that Tarnovsky Sr.  
14 was sent to “remove and delete” evidence.

15 Aside from these allegations, the only other allegations even arguably related to  
16 Tarnovsky Sr. are the TAC’s conclusory and unsupported allegations that every named  
17 defendant is still “actively engaged” in unspecified wrongdoing. Tarnovsky Sr.  
18 specifically joins in NDS’s arguments that these allegations satisfy neither Rule 9 nor  
19 the more liberal pleading standards of Rule 8 and therefore will not save plaintiffs’  
20 time-barred claims. See NDS Mem. 5:13 – 7:27.

21 Because all of Tarnovsky Sr.’s specifically alleged and relevant conduct occurred,  
22 even according to the TAC, before February 18, 2000, plaintiffs’ claims for relief  
23 against Tarnovsky Sr. are time barred and should be dismissed.

24 <sup>3</sup> Additionally, as explained in the Joe Zee Affidavit, “Joe Zee of the City of Newport  
25 Beach State of California” is an “undercover profile” used to protect Tarnovsky Sr.’s  
26 identity and the integrity of his work “investigating satellite television piracy” and to  
27 ensure his personal safety. In the TAC, however, plaintiffs cavalierly disregard these  
28 concerns and openly publicize the very information that the “Joe Zee” alias was  
intended to protect. Of note, this is not the only example where plaintiffs have abused  
the litigation privilege in an apparently deliberate effort to intimidate and endanger  
defendants by including highly sensitive, personal information in public filings. See  
Mem. Mot. Strike, **Section (C)(3)**.

1 **C. Plaintiffs' RICO Claims Should Be Dismissed As to Tarnovsky Sr.**

2 For the reasons discussed below and in NDS's memorandum, plaintiffs' RICO  
3 claims suffer from fatal pleading defects (including the defect that led to dismissal in the  
4 Court's FAC Order) and should be dismissed.

- 5 1. The TAC does not allege an actionable criminal "enterprise" or a "pattern  
6 of racketeering activity" as required by § 1962(c).

7 Tarnovsky Sr. joins in NDS's arguments that plaintiffs' have not alleged an  
8 actionable criminal "enterprise" because the TAC does not plead the requisite higher  
9 structure controlling both the "distribution and sales" and "technology" sub-structures.  
10 NDS Mem. 15:17 – 17:17. Tarnovsky Sr. also joins in NDS's arguments that plaintiffs'  
11 have not alleged a "pattern of racketeering activity" because the alleged predicate acts  
12 do not, as a matter of law, constitute a "pattern of racketeering activity." See NDS  
13 Mem. 17:18 – 20:16. Counts 9 and 10 of the TAC are thus critically deficient for these  
14 reasons and should be dismissed.

- 15 2. Tarnovsky Sr. is not a proper RICO "person," and plaintiffs' RICO claims  
16 should be dismissed for this additional and independent reason.

17 In addition to the defects noted in NDS's motion to dismiss, plaintiffs' RICO  
18 claim under § 1962(c) should be dismissed for the additional reason that plaintiffs have  
19 not alleged that Tarnovsky Sr. "conduct[ed] or participat[ed]" in directing the affairs of  
20 the alleged enterprise. See 18 U.S.C. § 1962(c). In *Reves v. Ernst & Young*, 507 U.S.  
21 170, 113 S. Ct. 1163 (1993), the Supreme Court held that to be liable under § 1962(c),  
22 the RICO defendant "must participate in the operation or management of the enterprise  
23 itself." *Id.* at 1173. Plaintiffs have not alleged, however, that Tarnovsky Sr. took any  
24 part in the "operation or management" in the alleged enterprise. Furthermore, any such  
25 contention flatly contradicts plaintiffs' allegation that Tarnovsky Sr. worked "at the  
26 direction of, and under the direct and/or indirect control of NDS. See TAC ¶ 84. Thus,  
27 assuming as true plaintiffs' conclusory allegation of "control," because the entirety of  
28 Tarnovsky Sr.'s alleged conduct was "on behalf of and under the control and direction

1 of NDS,” Tarnovsky Sr. cannot be a RICO defendant for purposes of § 1962(c). *See*  
2 *Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996) (plaintiff’s allegations  
3 “demonstrate that the wrongful conduct of which the [defendant] is accused relates not  
4 to his management of the alleged RICO enterprise, but rather to his having been  
5 controlled by it.”). Plaintiffs’ claim under § 1962(c) is properly dismissed for this  
6 additional independent reason.

7 The above defect in plaintiffs’ allegations is likewise fatal to plaintiffs claim  
8 under § 1962(d) . The Ninth Circuit requires that a RICO conspiracy claim under §  
9 1962(d) must also be supported by allegations that the defendant agreed to have “some  
10 part in directing [the enterprise’s] affairs.” *Neibel v. Trans World Assurance Co.*, 108  
11 F.3d 1123, 1128 (9th Cir. 1997); *see also Howard v. America Online Inc.*, 208 F.3d 741,  
12 751 (9th Cir. 2000). Because plaintiffs’ TAC includes no such allegation with respect  
13 to Tarnovsky Sr., their RICO claim under § 1962(d) should also be dismissed.

14 3. The TAC also does not allege that Tarnovsky Sr. committed or agreed to  
15 commit predicate acts.

16 Independently, plaintiffs have not alleged specific facts showing that  
17 Tarnovsky Sr. committed at least two predicate acts or that he engaged in a  
18 “conspiracy” to violate § 1962(c), *i.e.*, that Tarnovsky Sr. and the alleged co-  
19 conspirators consciously agreed to commit the asserted predicate acts. *See Black Radio*  
20 *Network, Inc. v. NYNEX Corp.*, 44 F. Supp. 2d 565, 581 (S.D.N.Y. 1999). In fact, the  
21 TAC contains *no* mention of Tarnovsky Sr. with respect to the alleged facts forming the  
22 basis of the purported “predicate acts.” *See* TAC ¶¶ 296-298. Although the TAC need  
23 not allege that Tarnovsky Sr. personally committed two predicate acts, plaintiffs must at  
24 least allege facts which, if true would demonstrate that Tarnovsky Sr. agreed to  
25 “participate in an endeavor which, if completed, would constitute a violation” of RICO.  
26 *See Goren v. New Vision Int’l, Inc.*, 156 F.3d 721, 731-32 (7th Cir. 1998). Lacking any  
27 allegation that Tarnovsky Sr. either personally committed or agreed to the commission  
28

1 of two predicate acts, plaintiffs' claims under § 1962(c) and § 1962(d) must be  
2 dismissed for this additional and independent reason.

3 **D. Additional, Independent Reasons Support the Dismissal of the Other Claims**  
4 **Against Tarnovsky Sr.**

5 1. Tarnovsky Sr. is not vicariously liable for the alleged wrongdoing of  
6 others.

7 For the reasons discussed in NDS's memorandum, *see* NDS Mem. 10:1 – 15:9,  
8 and Christopher Tarnovsky's memorandum, *see* Tarnovsky Mem. 6:16 – 9:16, the TAC  
9 does not satisfy the requirement specifically identified by this Court to "*plead facts that*  
10 *would lead to the legal conclusion that agency exists ...*" between Tarnovsky Sr. and  
11 any of the individual defendants. *See* Rule 12(e) Order, p. 4 (emphasis added).

12 Particularly as it relates to Tarnovsky Sr., the TAC is notably deficient in  
13 alleging any conduct that would support plaintiffs' asserted claims. Instead, as it does  
14 for other defendants, the TAC includes a variety of conclusory allegations apparently  
15 intended to hold Tarnovsky Sr. liable for the acts of others. But as described in  
16 Tarnovsky's memorandum, all of these efforts fail. First, Tarnovsky Sr. cannot be held  
17 liable for the acts of alleged co-agents. Second, the TAC does not allege that Tarnovsky  
18 Sr. and any other defendant had a conspiratorial agreement – either explicit or tacit – to  
19 join any alleged conspiracy. And third, as explained in the Tarnovsky motion to  
20 dismiss, plaintiffs may not rely on general allegations of "conspiracy" or on an alleged  
21 conspiracy between Tarnovsky Sr. and his employer NDS. Tarnovsky Sr. expressly  
22 joins in these aspects of Tarnovsky's motion to dismiss. Tarnovsky Mem. 6:16 – 9:16.  
23 The sufficiency of plaintiffs' asserted claims for relief must be measured against  
24 conduct allegedly committed by Tarnovsky Sr. And discussed in the following sections,  
25 measured against that standard, all of plaintiffs' claims fail.

1           2.     Tarnovsky Sr.'s alleged conduct does not support many of plaintiffs'  
2           asserted claims.

3           Other than the TAC's improper attempts to hold Tarnovsky Sr. liable for the  
4 alleged acts of every defendant, the TAC's allegations regarding Tarnovsky Sr. are  
5 nearly non-existent. The only conceivably alleged conduct by Tarnovsky Sr. relating to  
6 plaintiffs' claims is that he allegedly purchased a DISH Network receiver and that he  
7 and Christopher Tarnovsky allegedly reverse engineered plaintiffs' access card, *see*,  
8 TAC ¶¶ 385-390. But these allegations, even if they were true, do not support the  
9 claims for relief asserted in plaintiffs' TAC that require actual piracy of plaintiffs'  
10 signal, actual counterfeiting of plaintiffs' access cards, or trafficking in any  
11 circumvention technology. As explained in Tarnovsky's motion to dismiss, such  
12 conduct is necessary to satisfy the elements of plaintiffs' claims under the DMCA  
13 (Count 1-3), the Communications Act (Counts 4 and 5), the ECPA (Count 6), the  
14 Lanham Act (Count 7-8), and California Penal Code §§ 593d and 593e (Counts 11-15).  
15 Tarnovsky Sr. joins in the portion of Tarnovsky's motion to dismiss describing the legal  
16 limits of these claims. *See* Tarnovsky Mem. 11:8 – 12:24.

17           But the TAC does not allege facts that support the conclusion that Tarnovsky Sr.  
18 violated any of these statutes. Because Plaintiffs do not allege any facts that would  
19 support a conclusion that Tarnovsky Sr. actually circumvented any technological  
20 measures, intercepted any protected communications, maintained any unauthorized  
21 connections to plaintiffs' satellite signal, or distributed counterfeit access cards, Counts  
22 1-8 and 11-15 of the TAC should be dismissed. *Id.*

23           3.     The Court should dismiss plaintiffs' speculative interference claims for the  
24           reasons given in NDS's Motion to Dismiss.

25           Even if not barred by the two-year statute of limitations applicable to these  
26 claims, plaintiffs' claims for interference with contractual relations and prospective  
27 contractual relations/economic advantage (claims 17 and 18) should be dismissed for  
28 failing to identify the alleged relationships with the required particularity. NDS Mem.,

1 23:4 – 23:23. Tarnovsky Sr. joins in these arguments and seeks dismissal of these  
2 claims for this additional and independent reason.

3 4. The Court should dismiss plaintiffs’ breach of contract claim for the  
4 reasons given in Tarnovsky’s Motion to Dismiss.

5 Even if not barred by the statute of limitations, (see Tarnovsky Mem. 6:6-15),  
6 plaintiffs’ claim for breach of contract (claim 21) is additionally deficient because it  
7 alleges the breach of a contract apparently occurring before the contract was even  
8 alleged to have been executed. Tarnovsky Sr. joins in the arguments set forth in  
9 Tarnovsky’s memorandum and seeks dismissal of this claim for this additional and  
10 independent reason. Tarnovsky Mem. 13:8-21.

11 5. The dismissal of plaintiffs’ state law claims requires the dismissal of  
12 plaintiffs’ § 17200 claim and civil conspiracy claim.

13 Tarnovsky Sr. expressly joins NDS’s argument that the dismissal of plaintiffs’  
14 state law claims requires the dismissal of plaintiffs’ § 17200 claim (claim 16) and  
15 conspiracy claim (claim 22). NDS Mem., 8 n. 2, 24:1-17.

16 **E. The Court Should Dismiss Plaintiffs’ Third Amended Complaint With**  
17 **Prejudice.**

18 Tarnovsky Sr. expressly joins NDS’s argument that the dismissal of plaintiffs’  
19 TAC should be with prejudice. The previous discussion demonstrates that each of  
20 plaintiffs’ 22 claims for relief suffers from fatal defects not correctable by further  
21 amendment. See *Sackett v. Beaman*, 399 F.2d 884, 892 (9th Cir. 1968); *Nuevo Mundo*  
22 *Holdings v. Pricewaterhouse Coopers LLP*, No. 03 Civ. 0613 (GBD), 2004 U.S. Dist.  
23 LEXIS 780, \*25-26 (S.D.N.Y. Jan. 22, 2004). Plaintiffs have been repeatedly advised  
24 of these fatal defects, and despite four efforts at “getting it right,” plaintiffs remain  
25 unable to state a viable claim. Further leave to amend would therefore be futile.  
26 In short, “this is the plaintiff[s] fourth] complaint ... [four] bites at the apple is enough.”  
27 See, e.g., *Dooner v. Keefe, Bruyette & Woods, Inc.*, 2003 WL 135706 at \*4 (S.D.N.Y.).  
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**IV. Conclusion.**

Plaintiffs' failure to establish the grounds for exercising either general or limited personal jurisdiction over Tarnovsky Sr. requires dismissal of the TAC. Even if personal jurisdiction did exist in California, plaintiffs have nonetheless failed to state a viable claim against Tarnovsky Sr. In addition to being time barred, the claims of the TAC are substantively deficient. For the reasons given above, defendant Tarnovsky Sr. requests that the Court dismiss the TAC with prejudice.

Dated: September 20, 2004

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