PATRICK LYNCH (S.B. #39749)
MICHAEL G. YODER (S.B. #83059)
NATHANIEL L. DILGER (S.B. #196203)
O'MELVENY & MYERS LLP
610 Newport Center Drive, 17th Floor
Newport Beach, California 92660-6429
Telephone: (949) 760-9600
Facsimile: (949) 823-6994

DARIN W. SNYDER (S.B. #136003)
DAVID R. EBERHART (S.B. #195474)
O'MELVENY & MYERS LLP
Embarcadero Center West
275 Battery Street
San Francisco, California 94111-3305
Telephone: (415) 984-8700
Facsimile: (415) 984-8701

Attorneys for Defendant
REUVEN HASAK

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ECHOSTAR SATELLITE CORP., ECHOSTAR COMM. CORP., ECHOSTAR TECH. CORP., AND NAGRASTAR L.L.C.,

Plaintiffs,

v.

NDS GROUP PLC, NDS AMERICAS, INC., JOHN TARNOVSKY SR., REUVEN HASAK, OLIVER KOMMERLING, JOHN LUYANDO, PLAMEN DONEV, VESSELINE NEDELTCHEV, CHRISTOPHER TARNOVSKY, ALLEN MENARD, LINDA WILSON, MERVIN MAIN, DAVE DAWSON, SHAWN QUINN, ANDRE SERGEI, TODD DALE, STANLEY FROST, GEORGE TARNOVSKY, BRIAN SOMMERFIELD, ED BRUCE, "BEAVIS," "JAZZERCZ," "STUNTGUY," and JOHN DOES 1 – 100,

Defendants.

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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT REUVEN HASAK'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page

I. Introduction 1

II. Hasak Is Not Subject To Personal Jurisdiction In California 2

A. A Court In California Cannot Constitutionally Exercise "General" Personal Jurisdiction Over Hasak. 2

B. A Court In California Also Cannot Constitutionally Exercise "Limited" Personal Jurisdiction Over Hasak 5

1. Plaintiffs cannot meet the "effects test" and therefore cannot establish purposeful availment by Hasak in California 5

a. Hasak's alleged conduct was not "expressly aimed" at California 6

b. The brunt of plaintiffs' alleged harm occurred, if at all, outside California 7

2. Plaintiffs' asserted claims do not arise out of Hasak's nonexistent contacts with California 9

3. The exercise of jurisdiction over Hasak under these circumstances would be unreasonable 9

III. Plaintiffs' TAC Is Also Substantively Deficient And Should Be Dismissed For Additional Independent Reasons 12

A. Hasak Joins in NDS' Argument That Because the TAC is "Grounded in Fraud," its Allegations Must Be Pled "With Particularity." 13

B. Plaintiffs Allege No Wrongful Conduct by Hasak Within the Limitations Periods of Any Claims 13

C. Plaintiffs' RICO Claims Should Be Dismissed as to Hasak 14

1. The TAC does not allege an actionable criminal "enterprise" or a "pattern of racketeering activity" as required by § 1962(c) 14

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

3. The TAC also does not allege that Hasak committed or agreed to commit predicate acts 16

D. Additional, Independent Reasons Support the Dismissal of the Other Claims Against Hasak 16

1. Hasak is not vicariously liable for the alleged wrongdoing of others 16

2. Hasak's alleged conduct does not support any of plaintiffs' statutory claims 17

TABLE OF CONTENTS
(continued)

Page

3. The Court should dismiss plaintiffs' speculative interference claims for the reasons given in NDS's Motion to Dismiss 18

4. The Court should dismiss plaintiffs' breach of contract claim for the reasons given in NDS's Motion to Dismiss 18

5. The dismissal of plaintiffs' state law claims requires the dismissal of plaintiffs' § 17200 claim and civil conspiracy claim 18

E. The Court Should Dismiss Plaintiffs' Third Amended Complaint With Prejudice. 19

IV. Conclusion 19

TABLE OF AUTHORITIES

Page

CASES

Amoco Egypt Oil Co. v. Leonis Navigation Co.,
1 F.3d 848 (9th Cir. 1993) 2, 10

Asahi Metal Industry Co. Ltd. v. Sup. Ct.,
480 U.S. 102 (1987) 10

Belmont Industries,
31 Cal. App. 3d 281 (1973) 11

Black Radio Network, Inc. v. NYNEX Corp.,
44 F.Supp.2d 565, (S.D.N.Y. 1999) 16

Burger King,
471 U.S. at 478 .... 6, 9

Calder v. Jones,
465 U.S. 783 (1984) 3, 5

Callaway Golf Corp. v. Royal Canadian Golf Assoc.,
125 F. Supp. 2d 1194 (C.D. Cal. 2000) 7, 8

Congoleum Corp. v. DLW Aktiengesellschaft,
729 F.2d 1240 (9th Cir. 1984) 4

Core-Vent Corp. v. Nobel Indus. AB,
11 F.3d 1482 (9th Cir. 1993) 2, 6, 7, 8

Davis v. Metro Prods., Inc.,
885 F.2d 515 (9th Cir. 1989) 4, 6

Dole Food Co. v. Watts,
303 F.3d 1104 (9th Cir. 2002) 8

Dooner v. Keefe, Bruyette & Woods, Inc.,
No. 00 Civ. 572(JGK), 2003 WL 135706 (S.D.N.Y. Jan. 17, 2003) 19

Floyd J. Harkness Co. v. Amezcua,
60 Cal.App.3d 687 (1976) 4

Foley v. Marquez,
2004 WL 603566, at *4 (N.D. Cal. 2004) 6

Gates Learjet Corp. v. Jensen,
743 F.2d 1325 (9th. Cir. 1984) 4

Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.,
284 F.3d 1114 (9th Cir. 2002) .... passim

Goren v. New Vision Int'l, Inc.,
156 F.3d 721 (7th Cir. 1998) 16

Helicopteros Nacionales de Colombia, S.A. v. Hall,
466 U.S. 408, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984) 3

Howard v. America Online Inc.,
208 F.3d 741 (9th Cir. 2000) 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 5

Kilkenny v. Arco Marine Inc., 800 F.2d 853 (9th Cir 1986) 13

Loral Terracom v. Valley National Bank, 49 F.3d 555 (9th Cir. 1995) 9

Neibel v. Trans World Assurance Co., 108 F.3d 1123 (9th Cir. 1997) 15

Panavision Int'l, L.P. v. Toeppen, 141 F.3d 1316 (9th Cir.1998) 7, 8

Pedrina v. Chun, 97 F.3d 1296 (9th Cir.1996) 15

Peterson v. Kennedy, 771 F.2d 1244 (9th Cir. 1985) 4

Rano v. Sipa Press, Inc., 987 F.2d 580 (9th Cir. 1993) 10

Reves v. Ernst & Young, 507 U.S. 170 (1993) 15

Sackett v. Beaman, 399 F.2d 884 (9th Cir. 1968) 19

Schwarzenegger v. Fred Martin Motor Co., 374 F.3d 797 (9th Cir. Jun. 30, 2004) 3, 5, 6, 8

Thos. P. Gonzalez Corp. v. Consejo Nacional de Production de Costa Rica, 614 F.2d 1247 (9th Cir. 1980) 4

Travelers Cas. & Sur. Co. v. Telstar Constr. Co., 252 F. Supp. 2d 917 (D. Ariz. 2003) 9

Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097 (9th Cir. 2003) 13

Yahoo Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 379 F.3d 1120 (9th Cir. 2004) 7

STATUTES

18 U.S.C. § 1962(d) 15, 16

RULES

Fed. R. Civ. P. 15 (c) (3) 13

I. Introduction

Reuven Hasak, a life-long citizen and resident of Israel, has been named as a defendant in this case for no other reason than to intimidate and harass NDS and its employees. Even according to the offensive allegations of the SAC, Hasak's sole connection to this case is the alleged transmission of plaintiffs' ROM code in 1999, outside the limitations periods applicable to every claim asserted by Defendants. And perhaps more importantly, even before reaching the substance of the few allegations about Hasak, he should be dismissed because the Court lacks personal jurisdiction over him. As the TAC alleges, and as his declaration confirms, he is a resident of Israel lacking anything even approaching the "continuous and systematic" contacts with California that would create general jurisdiction over him. Nor does he have the "minimum contacts" necessary to establish limited personal jurisdiction over him. Reuven Hasak should be dismissed for lack of personal jurisdiction.

Independent of the lack of personal jurisdiction and the untimeliness of plaintiffs' claims, Hasak'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 inadequate and conclusory allegation that he is legally responsible for the alleged conduct of others. But plaintiffs do not, and cannot, properly allege facts that would make Hasak liable for any conduct alleged in the TAC. He should be dismissed for this additional reason.

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

/

/

II. Hasak Is Not Subject To Personal Jurisdiction In California

In one of their most outrageous stunts to date, plaintiffs attempt to force Israeli citizen Reuven Hasak to appear in a foreign country to defend against plaintiffs' spurious allegations. Fortunately, however, the United States Constitution protects against such an unfair result by requiring that, as a preliminary matter, plaintiffs ***first*** establish that the Court may exercise either general or specific personal jurisdiction over Hasak. *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. Civ. P. § 410.10; *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993). If plaintiffs fail to make this required showing of personal jurisdiction, dismissal is required. *Id.*

But as explained below and in Hasak's accompanying Declaration, Hasak is a citizen and resident of Israel with no California contacts that would permit haling him into court in this distant forum. Hasak Decl. ¶ 4-9. He does not have "substantial and continuous" contacts with California that would support general jurisdiction over him (and plaintiffs do not allege otherwise), nor do the facts support even limited personal jurisdiction. *Id.* Lacking any alleged facts in the TAC supporting the exercise of either general jurisdiction or "limited" personal jurisdiction over Hasak, the U.S. Constitution requires that he be dismissed from this case.

A. A Court In California Cannot Constitutionally Exercise "General" Personal Jurisdiction Over Hasak.

A federal court may only exercise general personal jurisdiction over a defendant that is either domiciled in the forum state or has "continuous and systematic general business contacts that 'approximate physical presence." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114,

1124 (9th Cir. 2002); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). The Ninth Circuit has described the test for general personal jurisdiction as "an exacting standard, as it should be, because a finding of general jurisdiction permits a defendant to be haled into court in the forum state to answer for any of its activities anywhere in the world." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801 (9th Cir. Jun. 30, 2004).

As described in his accompanying declaration, Hasak is a life-long citizen and resident of Israel. He is not domiciled in California, was not personally served in California, and did not consent to jurisdiction in California. Hasak Decl. ¶¶ 2, 3. His contacts with California amount to taking his wife to visit her doctor in San Francisco approximately once a year and occasionally visiting NDS Americas' headquarters in Newport Beach. *Id.* at ¶ 11. He does not own property in California, has no employees or agents in California, and does not solicit business in California. *Id.* at ¶ 5, 8, 9, 12. Hasak has nothing even remotely approaching "continuous and systematic general business contacts that approximate physical presence" in California and plaintiffs have not even alleged otherwise.[1] *Glencore*, 284 F.3d at 1124. Accordingly, this forum cannot constitutionally exercise general jurisdiction over him.

Although Hasak is a foreign subcontractor employed by one of the corporate defendants (NDS Group PLC), his relationship with NDS Group in no way supports a finding of general jurisdiction in California. Not only is NDS Group headquartered in the United Kingdom, but it is well settled that simply being employed by an entity over which jurisdiction may be asserted does not "impute" jurisdiction to the nonresident employee, let alone a subcontractor of a foreign corporation. *See Calder v. Jones*, 465 U.S. 783, 790 (1984) (noting that "[p]etitioners are correct that their contacts with California are not to be judged

[1] Indeed, his contacts with the United States as a whole are extraordinarily limited.

according to their employer's activities there. ... Each defendant's contacts with the forum state must be assessed individually"); *see also Davis v. Metro Prods., Inc.*, 885 F.2d 515, 521 (9th Cir. 1989).

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

Also, having regular and consistent communication with the forum is insufficient to assert general jurisdiction over a non-resident defendant. The "use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the [forum] state." *Peterson v. Kennedy,* 771 F.2d 1244, 1264 (9th Cir. 1985) (citations omitted); *see also Thos. P. Gonzalez Corp. v. Consejo Nacional de Production de Costa Rica*, 614 F.2d 1247, 1254 (9th Cir. 1980) (same); *Floyd J. Harkness Co. v. Amezcua*, 60 Cal.App.3d 687, 692-93 (1976).

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

B. A Court In California Also Cannot Constitutionally Exercise "Limited" Personal Jurisdiction Over Hasak.

Unable to demonstrate general jurisdiction over Hasak, plaintiffs must establish that this Court may appropriately exercise "limited" personal jurisdiction over him. Plaintiffs, however, have not made and cannot make this showing.

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

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

1. <u>Plaintiffs cannot meet the "effects test" and therefore cannot establish purposeful availment by Hasak in California</u>.

To establish limited personal jurisdiction in California, plaintiffs must demonstrate that Hasak "purposefully availed" himself of the privilege of conducting activities in California. *Id.* Where the underlying claim is one based on tort, the purposeful availment requirement is satisfied by application of the "effects test." *Calder v. Jones*, 465 U.S. 783, 789-90 (1984); *Schwarzenegger*, 374 F.3d at 802. This "effects test" requires that the plaintiffs demonstrate (1) intentional actions that are expressly aimed at the forum state, and (2) that cause harm, "the

1 brunt of which is suffered—and which the defendant knows is likely to be
2 suffered—in the forum state." *Core-Vent*, 11 F.3d at 1486. All these elements
3 must be established in order to support a finding of purposeful availment.
4 *Schwarzenegger*, 374 F.3d at 805. But even accepting for this limited purpose the
5 TAC's allegations, Hasak neither "expressly aimed" intentional actions towards
6 California nor caused any harm in California.

7
8 **a. Hasak's alleged conduct was not "expressly aimed" at California.**

9 The purpose of the "expressly aimed" requirement is to ensure "that a
10 defendant will not be haled into a jurisdiction solely as a result of random,
11 fortuitous, or attenuated contacts or of the unilateral activity of another party or of a
12 third person." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (citations
13 omitted). In assessing whether plaintiffs have alleged that Hasak "expressly aimed"
14 any activities toward California, this Court can only "consider the forum-related
15 acts personally committed by [Hasak] rather than the imputed conduct of co-
16 conspirator[s]." *Foley v. Marquez*, 2004 WL 603566 at *4 (N.D. Cal.); *see also*
17 *Davis v. Metro Productions, Inc.*, 885 F.2d at 521 ("Each defendant's contacts with
18 the forum state must be assessed individually."). Courts follow this important rule
19 because "the conduct of a co-conspirator is generally too tenuous to warrant the
20 exercise of personal jurisdiction." *Foley*, 2004 WL 603566 at *4.

21 The scant allegations of the TAC specific to Hasak do not suggest that Hasak
22 expressly aimed any actionable activities toward California. Plaintiffs allege that
23 Hasak "conspired with the satellite pirates NDS hired," and that he gave plaintiffs'
24 code to Norris with instructions to give it to Tarnovsky. TAC ¶¶ 35, 38, 39. But
25 these sparse allegations, even if true, do not have any connection with California
26 and do not describe conduct "expressly aimed" at California.

27 In the Ninth Circuit, the "expressly aimed" requirement for showing specific
28 personal jurisdiction is "satisfied when the defendant is alleged to have engaged in

wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l, Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Here, plaintiffs are not California residents, are not incorporated in California, and do not have their principal place of business in California. *See, e.g.*, TAC ¶¶ 27-30. To the contrary, plaintiffs are incorporated in Colorado, Nevada and Texas. *Id.* Thus, even assuming that Hasak's alleged conduct was indeed wrongful (and as demonstrated in Section III, *infra*, it was not), the alleged conduct clearly was not "targeted at a plaintiff whom the defendant knows to be a resident of [California]." *Yahoo*, 379 F.3d at 1124.

Accordingly, plaintiffs cannot show that Hasak expressly aimed conduct at California, and they therefore also cannot establish the purposeful availment necessary for jurisdiction.

b. The brunt of plaintiffs' alleged harm occurred, if at all, outside California.

In addition to showing that Hasak "expressly aimed" conduct at California, plaintiffs must also show that this conduct caused plaintiffs harm, "the brunt of which is suffered—and which the defendant knows is likely to be suffered—in [California]." *Core-Vent*, 11 F.3d at 1486. But plaintiffs cannot satisfy this requirement either. Even assuming that plaintiffs were indeed harmed by Hasak's alleged conduct, any such harm was felt, if at all, where plaintiffs were located—i.e., Colorado, Nevada and Texas. *See Callaway Golf Corp. v. Royal Canadian Golf Assoc.*, 125 F.Supp.2d 1194, 1200 (C.D. Cal. 2000); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1321-22 (9th Cir. 1998) (harm from cybersquatter's registration of www.panavision.com website was felt in Panavision's principal place of business). As the Court noted *Core-Vent*, because "Core-Vent's principal place of business was in the forum state … any economic effects were arguably ultimately felt there." 11 F.3d at 1487.

Furthermore, even if the brunt of plaintiffs' alleged harm had been felt in

California, plaintiffs must also demonstrate that Hasak ***knew*** that the alleged harm was likely to be felt in California. *Core-Vent*, 11 F.3d at 1486; *Callaway*, 125 F.Supp.2d at 1200-01. In *Callaway*, this Court refused to exercise jurisdiction over the non-resident defendant based on this Court's conclusion that, even assuming that defendant targeted its injurious activity towards the plaintiff, "plaintiff does not adduce facts sufficient to establish that defendant knew or should have known plaintiff was a resident of California, had its principal place of business in California, or otherwise would feel the brunt of the effects of defendant's actions in California."[2] *Id.* at 1200. Here, even assuming the truth of plaintiffs' fanciful allegations against Hasak, plaintiffs have not alleged and cannot allege that Hasak knew that the "brunt" of the conduct alleged in the TAC would be felt in California.

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

[2] In concluding that the evidence was insufficient to impute knowledge of plaintiff's residency to defendants, this Court distinguished *Panavision* because the defendant in that case had sent cease and desist letters to the plaintiff in California and thus knew it was located in California. *Callaway*, 125 F.Supp.2d. at 1200. Also, this Court noted that in *Panavision*, the defendant should have known the plaintiff, a manufacturer of television and motion picture equipment, would have felt the brunt of its injuries in 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) (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 Hasak could have known of the alleged harm to plaintiffs in California.

2. Plaintiffs' asserted claims do not arise out of Hasak's nonexistent contacts with California.

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

Critically, the scant allegations in the TAC relating to Hasak's alleged conduct have no connection with California. Plaintiffs do not allege any conduct by Hasak in California or conduct that is aimed at California and is related to their alleged injury. Indeed, his alleged conduct appears to have occurred, if at all, entirely within Israel. TAC ¶¶ 35, 38, 39. Thus, even accepting plaintiffs' allegations, nothing in the TAC supports the conclusion that NDS would not have been injured "but for" Hasak's alleged contacts with California. This Court cannot constitutionally exercise limited personal jurisdiction over Hasak for this additional and independent reason.

3. The exercise of jurisdiction over Hasak under these circumstances would be unreasonable.

In addition to satisfying the "purposeful availment," and "but for" prongs required to establish limited personal jurisdiction, a party seeking to exercise jurisdiction over a non-resident defendant must also demonstrate that the exercise of personal jurisdiction would be reasonable. *Glencore*, 284 F.3d at 1125. And to assess the reasonableness of exercising jurisdiction, the Ninth Circuit has adopted *Burger King's* seven-part inquiry. *Id.* Even a cursory consideration of these

factors, however, reveals that subjecting Hasak, an individual citizen of Israel having only the most tenuous connection to the wrongdoing alleged in the TAC, to jurisdiction in California would be more than unreasonable—it would be unconscionable.

1. The extent of a defendant's purposeful interjection into the forum state's affairs: As discussed above, plaintiffs have not alleged, and indeed cannot allege, that Hasak purposefully interjected himself into the affairs of California. Hasak is not alleged to have done anything in California or anything to California residents.

2. The burden on the defendant of defending in the forum: Hasak is an individual citizen of a foreign country located one ocean and two continents away from the state of California. As the Supreme Court has cautioned, "great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi Metal Industry Co. Ltd. v. Sup. Ct.*, 480 U.S. 102, 114-115 (1987). The Ninth Circuit has expressly found that "litigation against an alien defendant requires a higher jurisdictional barrier than litigation against a citizen from a sister state." *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993). In a lawsuit that has already continued over a year, the burden that would be imposed on an individual defendant forced to litigate this case from Israel would be extraordinary.

3. The extent of conflict with the sovereignty of the defendant's home state: Whenever a defendant is from a foreign nation, the sovereignty barrier is high and undermines the reasonableness of asserting jurisdiction over the defendant. *See Amoco*, 1 F.3d at 850 (9th Cir. 1993).

4. The forum state's interest in adjudicating the dispute: Neither California nor plaintiffs have a particular interest in litigating putative claims against Hasak in California. None of the plaintiffs are California citizens or have their principal places of business inside California. Only defendant NDS Americas

has its principal place of business in California, and only two of the 24 named defendants are allegedly California residents. *See, e.g.,* TAC ¶¶ 33, 54.

5. The most efficient judicial resolution of the controversy: This is not a situation where dismissing Hasak will result in dismissing plaintiffs' case. Rather, his alleged role is so minimal and so attenuated, his dismissal should have no impact whatsoever on future proceedings in this case. In fact, Hasak was not even named as a defendant in plaintiffs' original complaint or in their first amended complaint.

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

7. The existence of an alternative forum: As noted above, Hasak's presence in this lawsuit is not necessary for plaintiffs to obtain complete relief. Should plaintiffs wish to pursue relief against Hasak, however, Israel provides an alternative forum. Indeed, based on their allegations that the "origination of the hack of the full DISH Network secret ROM and EEPROM codes was at NDS's Matam laboratory located in Haifa, Israel," *see, e.g.,* TAC ¶ 35, any physical evidence concerning this conduct or witnesses to this alleged conduct would apparently be in Israel. *Belmont Industries*, 31 Cal.App.3d 281, 289 (1973) (California an inconvenient forum where "the jobsite, the owner, the offices of the general contractor and of petitioner, the original plans and specifications, and the completed drawings … are located in either Pennsylvania or Maryland.")

Thus, ***every*** factor considered by the Ninth Circuit demonstrates that it would be unreasonable to exercise jurisdiction over Hasak. *See Glencore*, 284 F.3d at 1126.

As demonstrated above, plaintiffs have failed to establish either general or limited personal jurisdiction over Hasak. He lacks both "substantial and continuous" contacts with California that would support general jurisdiction over him. And plaintiffs cannot establish limited personal jurisdiction over Hasak because plaintiffs cannot establish (1) purposeful availment by Hasak in California, or (2) that plaintiffs' claims arise out of or result from Hasak's limited contacts with California, or (3) that the exercise of jurisdiction here would be reasonable. Therefore, because this Court cannot constitutionally exercise personal jurisdiction over Hasak in California, he should be dismissed from this lawsuit.

III. Plaintiffs' Tac Is Also Substantively Deficient And Should Be Dismissed For Additional Independent Reasons

Many of the substantive arguments that dictate dismissal of plaintiffs' claims against Hasak are identical to those that also require dismissal of plaintiffs' claims against NDS Group and NDS Americas ("NDS") and Christopher Tarnovsky. To avoid unnecessarily burdening the Court with duplicative arguments, Hasak joins in both NDS's and Tarnovsky's concurrently filed motions to dismiss and supporting arguments as identified in the following discussion. Hasak thus recommends that the Court review NDS's and Tarnovsky's motions to dismiss and supporting memoranda before reviewing this memorandum. Hasak also specifically joins in NDS's concurrently filed motion to strike. These arguments demonstrate that plaintiffs have failed to state tenable claims against Hasak, and that—in addition to the jurisdictional defects noted above—he should be dismissed for additional substantive reasons.

1 A. **Hasak Joins in NDS' Argument That Because the TAC is "Grounded in Fraud," its Allegations Must Be Pled "With Particularity."**

3 For the reasons discussed in NDS's memorandum, the TAC purports to
4 allege a "unified course of fraudulent conduct" and is therefore "grounded in fraud"
5 pursuant to controlling Ninth Circuit authority. *See* NDS Mem. 3:4-4:23.
6 Accordingly, the TAC's allegations must therefore be pled "with particularity" as
7 required by Rule 9. *Vess v. Ciba-Geigy Corp. USA,* 317 F.3d 1097, 1105 (9th Cir.
8 2003). Because numerous allegations of the TAC plainly fail to meet this standard,
9 they are properly stripped from the complaint. *See id.*

10 B. **Plaintiffs Allege No Wrongful Conduct by Hasak Within the Limitations Periods of Any Claims.**

12 The longest limitations period applicable to any of plaintiffs' claims is four
13 years. Hasak, however, was not named as a defendant in this case until the filing of
14 the SAC on February 18, 2004. Under controlling Ninth Circuit authority, the SAC
15 does not relate back to the original complaint under Fed. R. Civ. P. 15 (c) (3).
16 *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 858 (9th Cir. 1986). Therefore, the
17 limitations period must be measured from the SAC's February 18, 2004 filing date.
18 Like its predecessor, the TAC is noticeably devoid of allegations of specific
19 conduct by Hasak. Indeed, the TAC's only allegation regarding Hasak related to
20 the alleged piracy of plaintiffs' security system is that:

21 Plaintiffs are informed and believe that Norris, Tarnovsky, and Hasak
22 attended a meeting on or about 1999, whereby the full DISH Network
23 secret ROM and EEPROM codes were given to Tarnovsky. The
24 origination of the hack of the full DISH Network secret ROM and
25 EEPROM codes was at NDS's Matam laboratory located in Haifa,
26 Israel.

27 TAC ¶ 35.

28

This conduct, however, occurred, if at all, "on our about 1999"—i.e., more than four years before plaintiffs first asserted their claims against Hasak. Thus, this alleged conduct and the conduct that allegedly preceded it are outside even the longest limitations period applicable to plaintiffs' claims. Because the TAC alleges no wrongful conduct by Hasak within four years of filing the SAC, the statute of limitations bars all of plaintiffs' claims for relief.

Aside from these barred allegations, the only other allegations even arguably related to Hasak are the TAC's conclusory and unsupported allegations that every named defendant is still "actively engaged" in unspecified wrongdoing. Hasak specifically joins in NDS's arguments that these allegations satisfy neither Rule 9 nor the more liberal pleading standards of Rule 8 and therefore will not save plaintiffs' time-barred claims. *See* NDS Mem. 5:13-7:27.

Because all of Hasak' specifically alleged conduct occurred, even according to the TAC, before February 18, 2000, plaintiffs' claims for relief against Hasak are time-barred and should be dismissed.

C. Plaintiffs' RICO Claims Should Be Dismissed as to Hasak.

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

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

Hasak joins in NDS's arguments that plaintiffs' have not alleged an actionable criminal "enterprise" because the TAC does not plead the requisite higher structure controlling both the "distribution and sales" and "technology" sub-structures. NDS Mem. 15:17-17:17. Hasak also joins in NDS's arguments that plaintiffs' have not alleged a "pattern of racketeering activity" because the alleged predicate acts do not, as a matter of law, constitute a "pattern of racketeering

1 activity." *See* NDS Mem. 17:18-20:16. Counts 9 and 10 of the TAC are thus
2 critically deficient for these reasons and should be dismissed.

3 2. Hasak is not a proper RICO "person," and plaintiffs' RICO claims
4 should be dismissed for this additional and independent reason.

5 In addition to the defects noted in NDS's motion to dismiss, plaintiffs' RICO
6 claim under § 1962(c) should be dismissed for the additional reason that plaintiffs
7 have not alleged that Hasak "conduct[ed] or participat[ed]" in the conduct of the
8 alleged enterprise. *See* 18 U.S.C. § 1962(c). In *Reves v. Ernst & Young*, 507 U.S.
9 170 (1993), the Supreme Court held that to be liable under § 1962(c), the RICO
10 defendant "must participate in the operation or management of the enterprise
11 itself." *Id.* at 183. Plaintiffs have not alleged, however, that Hasak took any part in
12 the "operation or management" in the alleged enterprise. Furthermore, any such
13 contention flatly contradicts plaintiffs' allegation that Hasak worked "at the
14 direction of, and under the direct and/or indirect control of NDS. *See* TAC ¶ 37.
15 Thus, even assuming as true plaintiffs' conclusory allegation of control, because the
16 entirety of Hasak alleged conduct was "on behalf of and under the control and
17 direction of NDS," Hasak cannot be a RICO defendant for purposes of § 1962(c).
18 *See Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996) (plaintiff's allegations
19 "demonstrate that the wrongful conduct of which the [defendant] is accused relates
20 not to his management of the alleged RICO enterprise, but rather to his having been
21 controlled by it."). Plaintiffs' claim under § 1962(c) is properly dismissed for this
22 additional independent reason.

23 The above defect in plaintiffs' allegations is likewise fatal to plaintiffs' claim
24 under § 1962(d). The Ninth Circuit requires that a RICO conspiracy claim under §
25 1962(d) must also be supported by allegations that the defendant agreed to have
26 "some part in directing [the enterprise's] affairs." *Neibel v. Trans World Assurance*
27 *Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997); *see also Howard v. Am. Online Inc.*, 208
28 F.3d 741, 751 (9th Cir. 2000). Because plaintiffs' TAC includes no such allegation

1 with respect to Hasak, their RICO claim under § 1962(d) should also be dismissed.

2 3. The TAC also does not allege that Hasak committed or agreed to
3 commit predicate acts.

4 Independently, plaintiffs have not alleged specific facts showing that Hasak
5 committed at least two predicate acts or that he engaged in a "conspiracy" to violate
6 § 1962(c)—i.e., that Hasak and the alleged co-conspirators consciously agreed to
7 commit the asserted predicate acts. *See Black Radio Network, Inc. v. NYNEX*
8 *Corp.*, 44 F.Supp.2d 565, 581 (S.D.N.Y. 1999). In fact, the TAC contains ***no***
9 mention of Hasak with respect to the alleged facts forming the basis of the
10 purported "predicate acts." *See* TAC ¶¶ 296-298. Although the TAC need not
11 allege that Hasak personally committed two predicate acts, plaintiffs must at least
12 allege that Hasak agreed to "participate in an endeavor which, if completed, would
13 constitute a violation" of RICO. *See Goren v. New Vision Int'l, Inc.*, 156 F.3d 721,
14 731-32 (7th Cir. 1998). Lacking any allegation that Hasak either personally
15 committed or agreed to the commission of two predicate acts, plaintiffs' claims
16 under § 1962(c) and § 1962(d) must be dismissed.

17

18 **D. Additional, Independent Reasons Support the Dismissal of the Other Claims Against Hasak.**

19 1. Hasak is not vicariously liable for the alleged wrongdoing of others.

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

25 Particularly as it relates to Hasak, the TAC is notably deficient in alleging
26 any conduct that would support plaintiffs' asserted claims. Instead, as it does for
27 other defendants, the TAC includes a variety of conclusory allegations apparently
28

intended to hold Hasak liable for the acts of others. But as described in Tarnovsky's memorandum, all of these efforts fail. First, Hasak cannot be held liable for the acts of alleged co-agents. Second, the TAC does not allege that Hasak and any other defendant had a conspiratorial agreement—either explicit or tacit—to join any alleged conspiracy. And third, as explained in the Tarnovsky motion to dismiss, plaintiffs may not rely on general allegations of "conspiracy" or on an alleged conspiracy between Hasak and his employer NDS. Hasak expressly joins in these aspects of Tarnovsky's motion to dismiss. Tarnovsky Mem. 6:16-9:16. The sufficiency of plaintiffs' asserted claims for relief must be measured against conduct allegedly committed by Hasak. And discussed in the following sections, measured against that standard, all of plaintiffs' claims fail.

2. Hasak's alleged conduct does not support many of plaintiffs' statutory claims.

After stripping away the TAC's improper attempts to taint Hasak with the alleged acts of every defendant, the TAC's allegations regarding Hasak are virtually non-existent. The only alleged conduct by Hasak actually relating to plaintiffs' claims is that "on or about 1999" he allegedly had a meeting with Norris and Tarnovsky where the Echostar ROM Codes were given to Tarnovsky. *See*, *e.g.*, TAC ¶ 35. This allegation, even if it were true, does not support the claims for relief asserted in plaintiffs' TAC that require actual piracy of plaintiffs' signal, actual counterfeiting of plaintiffs' access cards, or trafficking in any circumvention technology. As explained in Tarnovsky's memorandum in support of his motion to dismiss, such conduct is necessary to satisfy the elements of plaintiffs' claims under the DMCA (Count 1-3), the Communications Act (Counts 4 and 5), the ECPA (Count 6), the Lanham Act (Count 7-8), and California Penal Code §§ 593d and 593e (Counts 11-15). Hasak joins in the portion of Tarnovsky's motion to dismiss describing the legal limits of these claims. *See* Tarnovsky Mem. 11:8-12:24.

But the TAC does not allege facts that support the conclusion that Hasak

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

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

Even if not barred by the two-year statute of limitations applicable to these claims, plaintiffs' claims for interference with contractual relations and prospective contractual relations/economic advantage (claims 17 and 18) should be dismissed for failing to identify the alleged relationships with the required particularity. NDS Mem. 23:4-23:23. Hasak joins in these arguments and seeks dismissal of these claims for this additional and independent reason.

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

Even if not barred by the statute of limitations, plaintiffs' claim for breach of contract (claim 21) should be dismissed for failing to allege facts demonstrating that a contract existed between plaintiffs and Hasak. NDS Mem. 24:18-24:21. Hasak joins in these arguments and seeks dismissal of this claim for this additional and independent reason.

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

Hasak expressly joins NDS's argument that the dismissal of plaintiffs' state law claims requires the dismissal of plaintiffs § 17200 claim (claim 16) and conspiracy claim (claim 22). NDS Mem. 8 n. 2; 24:1-17.

E. The Court Should Dismiss Plaintiffs' Third Amended Complaint With Prejudice.

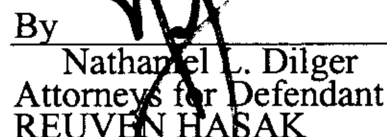
Hasak expressly joins NDS's argument that the dismissal of plaintiffs' TAC should be with prejudice. The previous discussion demonstrates that each of plaintiffs' 22 claims for relief suffers from fatal defects not correctable by further amendment. *See Sackett v. Beaman*, 399 F.2d 884, 892 (9th Cir.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

IV. Conclusion

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

Dated: September 20, 2004

PATRICK LYNCH
MICHAEL G. YODER
DARIN W. SNYDER
DAVID R. EBERHART
NATHANIEL L. DILGER
O'MELVENY & MYERS LLP



By ______________________
Nathaniel L. Dilger
Attorneys for Defendant
REUVEN HASAK

IR1:1058172.1