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JOHN NORRIS

IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ECHOSTAR SATELLITE CORP., ECHOSTAR COMMUNICATIONS CORP., ECHOSTAR TECHNOLOGIES CORP., AND NAGRASTAR L.L.C.,

Plaintiffs,

v.

NDS GROUP PLC, NDS AMERICAS, INC., JOHN NORRIS, 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 JOHN NORRIS'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

I. Introduction.

Defendant John Norris ("Norris") has devoted the majority of his professional life to combating piracy. He is a key member of NDS's entirely legitimate program to stop and prosecute piracy in North and South America, and he works closely with law enforcement personnel in numerous jurisdictions as part of that effort. As such, allegations that he participated in any way in the piracy of plaintiffs' or anyone else's security system are false and offensive.

Plaintiffs' tactic of naming Norris as an individual defendant should be short-lived because, for all their length, the allegations of the TAC fail to state a claim against Norris. The most recent factual allegations in the TAC regarding conduct by Norris related to plaintiffs' claims allegedly occurred in 1999, when Norris allegedly provided the DISH Network ROM code to Tarnovsky. But the statute of limitations for every one of the TAC's asserted claims bars any claim based on this alleged conduct. The longest statute of limitations for any of plaintiffs' claims is four years, and Norris's last alleged conduct occurred over four years before Norris was named in this action. This Court should therefore dismiss all of the TAC's claims against Norris.

All of the claims should likewise be dismissed as to Norris because the TAC simply does not allege conduct by Norris that satisfies the elements of those claims. As described in NDS's motions to dismiss and to strike and in the concurrently filed motion to dismiss by defendant Christopher Tarnovsky, plaintiffs do not, and cannot, properly allege that Norris is legally responsible for the alleged conduct of others that may fulfill the elements of those claims. In addition, each of the claims suffers from incurable substantive defects as they relate to Norris's alleged conduct.

The result is that the entire TAC should be dismissed as to Norris, and this dismissal should be without leave to amend. John Norris has committed no acts, even as alleged by plaintiffs, which justify his continued presence in this lawsuit.

II. Discussion.

Many of the arguments dictating dismissal of plaintiffs' claims against Norris are identical to those requiring dismissal of plaintiffs' claims against NDS Group and NDS Americas ("NDS") and Christopher Tarnovsky. To avoid unnecessarily burdening the Court with duplicative arguments, Norris joins in both NDS's and Tarnovsky's concurrently filed motions to dismiss and supporting arguments as identified in the following discussion. Norris thus recommends that the Court review NDS's and Tarnovsky's motions to dismiss and supporting memoranda before reviewing this memorandum. Norris also specifically joins in NDS's concurrently filed motion to strike. These arguments demonstrate that plaintiffs have failed to state tenable claims against Norris, and he should therefore be dismissed from the case.

A. Norris Joins in NDS' Argument That Because the TAC is "Grounded in Fraud," its Allegations Must Be Pled With the Particularity Required by Rule 9.

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

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

The longest limitations period applicable to any of plaintiffs' claims is four years. John Norris, however, was not named as a defendant in this case until the filing of the SAC on February 18, 2004. Under controlling Ninth Circuit authority, the SAC does not relate back to the original complaint under Fed. R. Civ. P. 15(c). *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 858 (9th Cir 1986). Therefore, the limitations period must

be measured from the SAC's February 18, 2004 filing date. Turning to the allegations of the TAC, it is—like its predecessor—noticeably devoid of allegations of specific conduct by Norris. Indeed, the TAC's only allegations regarding Norris that are related to the alleged piracy of plaintiffs' security system are:

> Plaintiffs are informed and believe that Norris, Tarnovsky, and Hasak attended a meeting on or about 1999, whereby the full DISH Network secret ROM and EEPROM codes were given to Tarnovsky.

See e.g. TAC ¶ 35. But this alleged conduct and the conduct that allegedly preceded it are thus outside even the longest limitations period applicable to plaintiffs' claims. Because the TAC alleges no wrongful conduct by Norris within four years of filing the SAC, the statute of limitations bars all of plaintiffs' claims for relief.

Having been repeatedly apprised that their claims are time-barred, plaintiffs have included in the TAC vague assertions of conduct that allegedly occurred at some unspecified time. But these allegations are wholly insufficient for stating a claim against Norris for conduct within the statutes of limitations. The TAC adds the allegation that "Plaintiffs are informed and believe that after Norris learned that certain third parties had documentary proof that Tarnovsky was involved in the distribution network, Norris sent Tarnovsky Sr.—acting under the fictitious name 'Joe Zee'—to remove and delete all such evidence in the possession of this third party." TAC ¶ 85. Plaintiffs then allege that "Plaintiffs are informed and believe that Norris directed Menard to terminate his site and discard any and all evidence connecting same to Tarnovsky and/or NDS in a continued effort by NDS to conceal its involvement." TAC ¶ 295.

In addition to being substantively insufficient to state a claim against Norris, nothing in the TAC suggests that these alleged events occurred within the statutes of limitations. In fact, based upon the affidavit that plaintiffs' are presumably relying upon to make the absurd claim in paragraph 85, Tarnovsky Sr.'s visit to Canada to review computer files related to satellite television piracy of NDS products occurred on January

30 and 31, 2001, well beyond the statute of limitations for virtually all of plaintiffs' claims. *See* Affidavit of Joe Zee ¶ 4 (attached as Exhibit 1 to Plaintiffs' Opposition to Tarnovsky Sr. MTD the SAC).

Aside from these undated allegations, the only other allegations even arguably related to Norris are the TAC's conclusory and unsupported allegations that every named defendant is still "actively engaged" in unspecified wrongdoing. Norris 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 Norris' specifically alleged conduct occurred, even according to the TAC, before February 18, 2000, plaintiffs' claims for relief against Norris are time-barred and should be dismissed.

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

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) .

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

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

In addition to the defects noted in NDS's motion to dismiss, plaintiffs' RICO claim under § 1962(c) should be dismissed for the additional reason that plaintiffs have not alleged that Norris "conduct[ed] or participat[ed]" in the conduct of the alleged enterprise. 18 U.S.C. § 1962(c). In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), the Supreme Court held that to be liable under § 1962(c), the RICO defendant "must participate in the operation or management of the enterprise itself." *Id.* at 185. Plaintiffs have not alleged, however, that Norris took any part in the "operation or management" in the alleged enterprise. Furthermore, any such contention flatly contradicts the allegations that Norris worked "at the direction of, and under the direct and/or indirect control of NDS." TAC ¶ 33. Thus, even assuming as true plaintiffs' conclusory allegation of control, because the entirety of Norris alleged conduct was "on behalf of and under the control and direction of NDS" (TAC ¶ 62), Norris cannot be a RICO defendant for purposes of § 1962(c). *See Pedrina v. Chun*, 97 F.3d 1296, 1301 (9th Cir. 1996) (plaintiff's allegations "demonstrate that the wrongful conduct of which the [defendant] is accused relates not to his management of the alleged RICO enterprise, but rather to his having been controlled by it."). Plaintiffs' claim under § 1962(c) is properly dismissed for this additional independent reason.

The above defect in plaintiffs' allegations is likewise fatal to plaintiffs claim under § 1962(d). The Ninth Circuit requires that a RICO conspiracy claim under § 1962(d) must also be supported by allegations that the defendant agreed to have "some part in directing [the enterprise's] affairs." *Neibel v. Trans World Assurance Co.*, 108 F.3d 1123, 1128 (9th Cir. 1997) (quoting *Reves*, 507 U.S. at 179); *see also Howard v. Am. Online Inc.*, 208 F.3d 741, 751 (9th Cir. 2000). Because plaintiffs' TAC includes no such allegation with respect to Norris, their RICO claim under § 1962(d) should also be dismissed.

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

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

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

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

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

Particularly as it relates to Norris, the TAC is notably deficient in alleging any conduct that would support plaintiffs' asserted claims. Instead, as it does for other defendants, the TAC includes a variety of conclusory allegations designed to attempt to hold Norris liable for the acts of others. But all of these efforts fail, as described in NDS's memorandum. First, Norris cannot be held liable for the acts of alleged co-agents. Second, the TAC does not allege that Norris 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 Norris and his employer NDS. Norris expressly joins in these aspects of Tarnovsky's motion to dismiss. The sufficiency of plaintiffs' asserted claims for relief must be measured against conduct allegedly committed by Norris. As discussed in the following sections, measured against that standard, all of plaintiffs' claims fail.

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

After stripping away the TAC's improper attempts to taint Norris with the alleged acts of every defendant, the TAC's allegations regarding Norris are actually quite limited. The only alleged conduct by Norris relating to plaintiffs' claims is that "in or about 1999" he allegedly provided Tarnovsky with the full Canal+ and Echostar ROM Codes. *See, e.g.,* TAC ¶ 35.[1] 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 Chris Tarnovsky's 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). Norris 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 Norris violated any of these statutes. Because Plaintiffs do not allege any facts that would support a conclusion that Norris actually circumvented any technological measures, intercepted any protected communications, maintained any unauthorized connections to plaintiffs'

[1] The allegations in paragraphs 85 and 295 relate at most to the destruction of material or information. On their face, they do not allege any conduct constituting piracy of Echostar's access cards or satellite signal.

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. *See* NDS Mem. 23:4-23:23. Norris 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 Norris. *See* NDS Mem. 24:18-24:21. Norris 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.

Norris 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). *See* NDS Mem. 8 n. 2, 24:1-17.

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

Norris 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.).

III. Conclusion.

For at least the foregoing reasons, plaintiffs' TAC should be dismissed as to defendant Norris. And because plaintiffs have now had four opportunities to state a valid claim, the Court's dismissal should be with prejudice.

Dated: September 20, 2004

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