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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

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

Plaintiff,

vs.

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

Defendants.

CASE NO. SA CV 03-950 DOC(ANX)

DEFENDANT MERVYN MAIN'S NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MERVYN MAIN

Date: December 13, 2004
Time: 8:30 a.m.
Place: Courtroom of the Honorable David O. Carter

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1 TO THE CLERK OF THE ABOVE-TITLED COURT AND TO
2 PLAINITFFS AND THEIR ATTORNEYS OF RECORD:
3 PLEASE TAKE NOTICE that on December 13, 2004, at 8:30 a.m. or as
4 soon thereafter as counsel may be heard, in the Courtroom of the Honorable David
5 O. Carter, United States District Judge, at the Ronald Reagan Courthouse
6 (Courtroom 9-D), 411 West Fourth Street, Santa Ana, California, defendant
7 Mervyn Main, by and through his attorneys of record, will and hereby does move to
8 dismiss the Third Amended Complaint and the claims for relief alleged against him.
9 This Motion is made pursuant to Rule 12 of the Federal Rules of Civil
10 Procedure and upon each of the following grounds:
11 Plaintiffs have failed to show personal jurisdiction over Main, who is a
12 resident of Canada with no ties to California. Fed. R. Civ. P. 12(b)(2).
13 Plaintiffs have failed to state a proper claim for relief against Main. Fed. R.
14 Civ. P. 12(b)(6).
15 In the alternative, the entire Third Amended Complaint should be stricken.
16 Fed. R. Civ. P. 12(f).
17 This Motion is based upon this Notice of Motion and Motion, the attached
18 Memorandum of Points and Authorities, Main's joinder in the motion to dismiss
19 and motion to strike filed by defendants NDS Group PLC and NDS Americas, Inc.,
20 the attached Declaration of Mervyn Main, the files and records in this case, and
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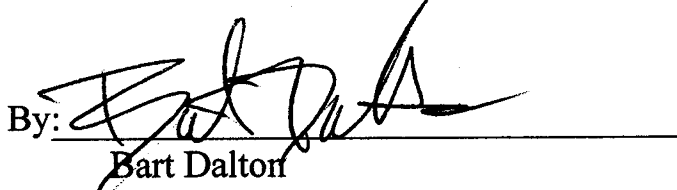
upon such further evidence and argument as this Court accepts at the hearing of this Motion.

Dated: September 20, 2004.

Respectfully submitted,

CORBIN & FITZGERALD LLP
ROBERT L. CORBIN
MICHAEL W. FITZGERALD
BART DALTON



By: ______________________
Bart Dalton
Attorneys for Defendants
ALLEN MENARD, LINDA WILSON, and MERVYN MAIN

MEMORANDUM OF POINTS AND AUTHORITY

I.

INTRODUCTION

Defendant Mervyn Main is a construction worker in Edmonton, Alberta. Main has no connection to California that would allow this Court to exercise jurisdiction over him. Main has never visited California. He does not own property here, conduct business here, and has never purposefully interjected himself into the affairs of this state.

Plaintiffs EchoStar Satellite Corporation, EchoStar Communications Corporation, EchoStar Technologies Corporation and NagraStar L.L.C have not alleged any conceivable basis for this Court to exercise personal jurisdiction over Main other than their tenuous allegations of agency and conspiracy between Main and defendants Allen Menard and NDS Americas, Inc. Plaintiffs do not allege how Main individually or collectively harmed them in any way. Instead, they allege several impertinent allegations, such as Main's being a "traffick[er] of illegal drugs, illegal signal theft devices, and currencies related to illegal drugs and illegal signal theft devices." (*See* Third Amended Complaint ("TAC"), ¶ 68, at 26). Plaintiffs also make a cryptic reference to a report from the Royal Canadian Mounted Police that Main's fingerprint was found on a DVD player defendant Christopher Tarnovsky received in San Marcos, Texas. (*Id*). How this ties into the underlying claims in the TAC is not explained.

Even if a conspiracy could be inferred from these allegations, they are insufficient to obtain personal jurisdiction over Main. These allegations fail to connect Main to California or the United States. Main has no property in California or the United States (Declaration of Mervyn Main ("Mervyn Decl., ¶ 3); he has no assets in California or the United States (*id.*); he has never visited California (Mervyn Decl., ¶ 4), and has never conducted any business in California or the United States. (Mervyn Decl., ¶ 5). Therefore, this Court lacks either specific or

general personal jurisdiction over Main. Accordingly, the TAC should be dismissed. Fed. R. Civ. P. 12(b)(2). Nor is personal jurisdiction available under Federal Rule 4(k)(2), a narrow rule that in rare cases allows jurisdiction over foreign defendants, but still requires both minimum contacts with the United States and reasonableness. Neither exists here.

Plaintiffs also fail to allege a proper claim for relief against Main. Fed. R. Civ. P. 12(b)(6). The alleged individual conduct of Main does not in itself give rise to a claim for relief, even given the broadest reaches of federal notice pleading. The TAC relies on allegations of conspiracy and agency. Yet these crucial allegations of conspiracy are too vague to save the TAC for dismissal. Similarly, Main cannot be held liable for the acts of his alleged "co-agents" or principles – there is no "reverse" respondeat superior.

Furthermore, plaintiffs' claims are barred by the applicable statutes of limitations of two years, three years or four years. The individual conduct alleged against Main is not dated in the TAC – only a supposed report of that conduct is given a date.

Therefore, in accordance with Rule 12(b) (6), this Court should dismiss the Third Amended Complaint against Main without leave to amend for these reasons:

- Counts 1-5 are barred by the three-year statute of limitations for actions under the Digital Millennium Copyright Act and the Communications Act.
- Count 6 is barred by the two-year statute of limitations under the Electronic Communications Privacy Act.
- Counts 7 and 8 are barred by the three-year statute of limitations under the Lanham Act.
- Counts 9 and 10, brought under RICO, fail to allege an actionable "enterprise" or "pattern of racketeering" as required under the statute.

Further, Main is not a proper "person" for purposes of the RICO statute.

- Counts 11-15 are barred by the three-year limitations period under the California Penal Code.
- Count 16 is barred by the four-year statute of limitations period under the California Business and Professions Code because plaintiffs first became aware that their system was compromised in 1998.
- Counts 17-20 are barred by the two-year statute of limitations applicable to plaintiffs' common law claims for tortious interference, unjust enrichment and conversion.
- Count 21 does not pertain to Main.
- Count 22, for joint contribution, fails because plaintiffs' other state law claims are time-barred.
- Collectively, plaintiffs' theories that Main is liable for the acts of others are too vague to attach liability to Main.

Finally, in the alternative, this Court should strike the entire TAC for the reasons set forth in the motion to strike filed by defendants NDS Group PLC and NDS Americas, Inc. Fed. R. Civ. P. 12(f).

II.

ARGUMENT

A. This Court Lacks Personal Jurisdiction Over Main.

Rule 12(b)(2) allows for motions to dismiss on the basis of lack of personal jurisdiction. Plaintiffs have the burden of making a *prima facie* showing that Main is subject to personal jurisdiction in this forum. *See Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 850 (9th Cir. 1993) (holding that it was not reasonable to obtain personal jurisdiction in the State of Washington over a Philippine shipping corporation that used Washington as a port of call on its shipping route). Plaintiffs cannot make this showing.

1 Without an applicable federal statute governing personal jurisdiction, the law
2 of the state in which the district court sits applies. *Core-Vent Corp. v. Nobel*
3 *Industries AB*, 11 F.3d 1482, 1484 (9th Cir. 1993) (granting motion to dismiss for
4 lack of personal jurisdiction because subjecting Swedish doctors to jurisdiction in
5 California would have been unreasonable). California's long arm statute allows
6 courts to exercise personal jurisdiction over defendants to the extent permitted by
7 the Due Process Clause of the United States Constitution. *See* Cal. Code Civ. Proc.
8 § 410.10. Due process is satisfied only when a non-resident defendant has "certain
9 minimum contacts with the forum such that the maintenance of the suit does not
10 offend traditional notions of fair play and substantial justice." *International Shoe*
11 *Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945).
12 Depending on the nature of a foreign defendant's contacts with the forum,
13 the plaintiff must show either specific or general jurisdiction over the defendant.
14 *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnaria Co.*, 284 F.3d 1114, 1123
15 (9th Cir. 2002) (granting motion to dismiss for foreign corporation for lack of
16 personal jurisdiction).
17 A court exercises specific jurisdiction where the cause of action arises out of
18 or has a substantial connection to the defendant's contacts with the forum. *Hanson*
19 *v. Denckla*, 357 U.S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958) (finding no
20 personal jurisdiction over defendant trust company where it had no office in
21 Florida, did not transact business in Florida, nor solicit business in Florida). A
22 court will exercise general jurisdiction if the defendant's contacts with the forum
23 are "substantial, continuous, and systematic." *Helicoptoros Nacionales de*
24 *Columbia, S.A. v. Hall*, 466 U.S. 408, 415 n.9, 104 S.Ct. 1869, 80 L.Ed.2d 404
25 (1984) (holding that Columbian company's contacts with Texas that consisted of
26 purchasing helicopters from Texas and related trips to Texas were insufficient to
27 assert personal jurisdiction over Columbian company in Texas).
28

With both general and specific jurisdiction, due process requires that "contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state." This ensures that a defendant will not be haled into a jurisdiction solely as a result of "random, fortuitous, or attenuated contacts." *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct 2174, 85 L.Ed.2d 528 (1985).

1. This Court Lacks Specific Jurisdiction Over Main.

Plaintiffs cannot demonstrate that specific jurisdiction over Main is appropriate. To evaluate the propriety of exercising specific jurisdiction, the Ninth Circuit applies a three-part test:

1. Whether the defendant purposefully availed themselves to the privileges of conducting activities in the forum.
2. Whether the claim arises out of or results from the defendant's forum-related activities.
3. Whether the exercise of jurisdiction is reasonable.

Meyers v. Bennett Law Offices, 238 F.3d 1068, 1072 (9th Cir. 2001).

a. ***Main Did Not Purposefully Avail Himself of the Privilege of Conducting Activities in California.***

Analyzing the first test, Main did not purposely avail himself of the privilege of conducting activities in California. The only insinuation in the TAC that Main did any wrongdoing against plaintiffs is an alleged statement from a report from the Royal Canadian Mounted Police that Main's fingerprint was on a package that defendant Christopher Tarnovsky received in San Marcos, Texas. (TAC, ¶ 68, at 26). Taking this allegation to an extreme and unsupported inference, any purposeful availment by Main of the privilege of conducting activities in the United States was directed at Texas, not California.

Plaintiffs do not allege any facts that Main engaged in any wrongful conduct directly against them. Therefore, the only conceivable basis for jurisdiction over Main would be under a "conspiracy theory" of jurisdiction. In other words, if this Court has jurisdiction over one defendant, then this Court has jurisdiction over all the other defendants because plaintiffs alleged they are co-conspirators. But the Ninth Circuit has never recognized this theory of jurisdiction. *See Steinke v. Safeco Ins. Co. of America*, 270 F. Supp. 2d 1196, 1200 (D. Mont. 2003) ("this [c]ourt has never recognized the conspiracy theory of jurisdiction, nor has the Ninth Circuit…"). In *Kipperman v. McCone*, 422 F.Supp. 860 (N.D. Cal. 1976), the district court ruled that, since the Supreme Court has rejected a theory of "vicarious venue" for co-conspirators, it followed that there could be no theory of "vicarious jurisdiction." *Id.* at 873 n.14 (collecting cases).

Similarly, state courts in California have rejected conspiracy as a basis for personal jurisdiction under California's long arm statute. In *Crea v. Busby*, 48 Cal. App. 4th 509, 55 Cal. Rptr. 2d 513 (1996), the plaintiff contended that an Oregon lawyer was subject to suit in California because the Oregon lawyer was a member of the California bar and was a member of a conspiracy whose members were subject to jurisdiction in California. *Id.* at 516. The Court of Appeal found for the lawyer. The court held that the acts of other parties cannot be imputed to another party for the purpose of assuming personal jurisdiction. *Id.* at 517. The court further concluded that personal jurisdiction over a non-resident individual must be premised upon forum-related acts personally committed by the individual. *Id. See also Kaiser Aetna v. Deal*, 86 Cal. App. 3d 896, 901, 150 Cal. Rptr. 615 (1978) (allegations of conspiracy do not create personal jurisdiction over each alleged conspirator because the purpose and acts of other co-conspirators cannot be imputed to non-resident defendant for purposes of jurisdiction).

1 Even if a "conspiracy theory" of jurisdiction existed, it would not apply here
2 because the TAC should be dismissed for failure to state a valid claim for relief,
3 preventing the finding of a valid conspiracy allegation.
4 Plaintiffs do not allege any facts indicating that Main purposefully availed
5 himself of the privilege of conducting activities in California. Plaintiffs only allege
6 that Main's fingerprint appeared on a package that was sent to Christopher
7 Tarnovsky in Texas. This allegation is not a sufficient basis for personal
8 jurisdiction over Main. Further, under established precedent in the Ninth Circuit
9 and California, the actions of other defendants cannot be imputed to Main under a
10 "conspiracy theory" of personal jurisdiction. Therefore, plaintiffs' allegations do
11 not meet the first test.
12 b. ***Plaintiffs' Claims do not Arise out of or Result from Main's***
13 ***Forum-Related Activities.***
14 To satisfy the second test, plaintiffs must show that it would not have been
15 injured "but for" Main's contacts with California. *Doe v. Unocal Corp.*, 248 F.3d
16 915, 924 (9th Cir. 2001) (per curium). But plaintiffs cannot show any contacts
17 Main had with California that caused them injury. Plaintiffs can only allege that
18 Main's fingerprint may have appeared on a package sent to Christopher Tarnovsky
19 in Texas. Plaintiffs do not elaborate on this dubious claim. Nevertheless, from this
20 allegation, plaintiffs determine that Main participated in a global conspiracy to
21 compromise their conditional access system. Plaintiffs are Nevada, Texas and
22 Colorado corporations with principal offices in Colorado. (*See* TAC, ¶¶ 27, 28,
23 29). So even if these allegations against Main are taken on face value, any harm
24 Main allegedly inflicted upon plaintiffs as part of a conspiracy would have occurred
25 in Nevada, Texas, or Colorado – plaintiffs' principal places of business -- not
26 California. Accordingly, this Court does not have specific jurisdiction over Main.
27
28

1 c. *It Would be Unreasonable to Exercise Personal Jurisdiction.*

2 In this case, it would be unreasonable to exercise personal jurisdiction over
3 Main. Main makes a modest salary as a construction worker in Edmonton, Alberta.
4 He has no contacts with the United States. Defending against a lawsuit in
5 California between two large corporations will consume both time and money. It is
6 unreasonable to ensnare Main in this litigation because of an allegation that his
7 fingerprint may have appeared on a package in Texas.

8 **2. This Court Lacks General Jurisdiction over Main.**

9 Similarly, plaintiffs' allegations cannot support a finding of general
10 jurisdiction over Main. To exercise general jurisdiction over Main, this Court must
11 consider his contacts and determine whether they constitute "the kind of continuous
12 and systematic general business contacts that 'approximate physical presence'."
13 *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)
14 (license with several California vendors insufficient to obtain personal jurisdiction
15 in California over golf club in Georgia).

16 In *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnaria Co.*, 284 F.3d
17 1114, 1123 (9th Cir. 2002), the defendant was a manufacturer and distributor of
18 rice. The defendant's contacts with California consisted of an independently
19 employed sales agent who imported and distributed the company's rice. The
20 defendant's contacts comprised of 16 rice shipments from India to California from
21 1987 to 2000. *Id.* at 1124. The court held that this was not sufficient to confer
22 personal jurisdiction over the defendant. *Id.* at 1125. The court maintained that the
23 "physical presence" necessary for an assertion of general jurisdiction requires more.
24 *Id.*

25 Here, Main has no contacts with California, let alone any that would
26 constitute an "approximate physical presence." He does not live in California nor
27 has he ever traveled here. He does not own property within the state or have any
28 connection to the state. He was not served with process in California and did not

consent to jurisdiction here. Therefore, this Court lacks general jurisdiction over Main.

Even if Main had the required minimum contacts to support general jurisdiction, the Court must analyze whether asserting jurisdiction would be reasonable. *Asahi Metal Industry Co., Ltd. v. Sup Ct.*, 480 U.S. 102, 113, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). In *Burger King v. Rudzewicz, supra*, the Supreme Court considered seven factors to assess the reasonableness of exercising jurisdiction:

1. The extent of a defendant's purposeful interjection into the forum state's affairs;
2. The burden on the defendant of defending in the forum;
3. The extent of conflict with the sovereignty of the defendant's home state;
4. The forum state's interest in adjudicating the dispute;
5. The most efficient judicial resolution of the controversy;
6. The importance of the forum to the plaintiff's interest in convenient and effective relief;
7. The existence of an alternative forum.

These seven factors point to this Court not exercising personal jurisdiction over Main.

- Main did not purposefully interject himself in the affairs of California. In fact, he has not done anything that affects the affairs of this state.
- The burden on defending this lawsuit is great. Main lives and works in Canada. He has no property in California. If plaintiffs' TAC is any indication, Main, a Canadian citizen, will have to defend himself in an exhaustively litigated case in another country.
- Whenever a defendant is from a foreign nation, the sovereignty barrier is high and undermines the reasonableness of personal jurisdiction. See *Amoco*

Egypt Oil Co. v. Leonis Navigation Co., 1 F.3d 848, 852 (9th Cir. 1993).

- Plaintiffs are Colorado, Texas, and Nevada corporations suing two non-California corporations and other individual foreign nationals. There appears to be scant interest in adjudicating this suit in California.
- Canada is an alternative forum for plaintiffs' putative claims against Main. Main does not have any property or assets in California. Even if plaintiffs attained a judgment against Main, it would not be convenient or effective for plaintiffs 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.")

Weighing all of these factors, plaintiffs have failed to demonstrate that exercising personal jurisdiction over Main would be reasonable.

Further, the unique burdens placed upon a foreign national defending himself in a foreign locale have significant weight in assessing the reasonableness of a local court's exercise of personal jurisdiction. *See Asahi Metal Industry Co., Ltd. v. Sup Ct.*, 480 U.S. at 114; *Rano v. Sipa Press, Inc.* 987 F.2d 580, 588 (9th Cir. 1993) ("higher jurisdictional barrier" required for aliens).

This principle has been adopted in several Ninth Circuit cases. In *Fields v. Sedgwick Associate Risks, Ltd.*, 796 F.2d 299, 301-302 (9th Cir. 1986), the Ninth Circuit held that it was unreasonable for California courts to exercise jurisdiction over an English insurer. The court reasoned that the burden on the insurer to defend in California was great and California had no strong interest in adjudicating the case.

Similarly, in *Core-Vent Corp. v. Nobel Industries AB*, *supra,* 11 F.3d 1482, the Ninth Circuit held that it was unreasonable to exercise personal jurisdiction over Swedish doctors in a defamation action. The action was based on an article the doctors had written in an international medical journal that allegedly defamed a

California corporation. The Ninth Circuit stated that even if the doctors had "purposefully interjected" themselves in California, requiring them to submit to jurisdiction in California would impose substantial burdens on them and would conflict with Swedish sovereignty. *Id.* at 1488. These factors and the availability of an alternative forum in Sweden outweighed any interest California might have in adjudicating the dispute. *Id.* at 1489-90.

Main lacks sufficient contacts with California. He did not purposefully interject himself in California. And requiring him to submit to jurisdiction would place a substantial burden upon him. Therefore, Main requests that the Court dismiss this action against him for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2).

3. This Court Lack Personal Jurisdiction over Main Pursuant to Federal Rule of Civil Procedure 4(k)(2).

Plaintiffs cannot establish jurisdiction over Main under Federal Rule of Civil Procedure 4(k)(2). Rule 4(k)(2) authorizes the exercise of extraterritorial jurisdiction over any defendant against whom a claim is made under federal law, if the federal law lacks a provision to reach the defendant and if the defendant is not subject to personal jurisdiction in the courts of general jurisdiction of any state. *See generally*, 4B Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1124 (3 ed. 2002) (hereinafter "Wright & Miller"). In essence, the rule provides a federal long arm statute in a narrow band of cases in which the United States serves as the relevant forum for a minimum contacts analysis. *See Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnaria Co., supra,* 284 F.3d at 1126.

Either under Rule 4(k)(2) or California's long-arm statute, personal jurisdiction is expanded to its constitutional limit. The purpose of Rule 4(k)(2) is to provide jurisdiction in the rare and odd situation in which a defendant would have minimum contacts with the United States as a whole, but not with any individual

State. 4B Wright & Miller, *supra*, § 1124. Moreover, even the exercise of this extraterritorial personal jurisdiction must be fair and reasonable. *United States v. Swiss American Bank, Ltd*, 274 F.3d 610, 621 (1st Cir. 2001) (rejecting use of Rule 4(k)(2) to confer personal jurisdiction over foreign defendant).

Even under Rule 4(k)(2), the Ninth Circuit has recognized that "minimum contacts" for personal jurisdiction requires a substantial level of contact with the United States. For example, in *Glencore Grain Rotterdam*, 284 F.3d at 1126, the Ninth Circuit held that a grain producer's seven shipments to the east coast of the United States and 16 shipments to California did not establish national contacts to support the exercise of jurisdiction under Rule 4(k)(2).

Similarly, in *Doe v. Unocal Corp*. 248 F.3d 915, 922 (9th Cir. 2001) (per curium), the Ninth Circuit found that a French company, which listed its stock on various stock exchanges in the United States and promoted its stock in the United States, did not have sufficient minimum contacts with the United States to establish personal jurisdiction under Rule 4(k)(2).

These cases illustrate that a plaintiff must establish more than attenuated contacts with the United States to confer personal jurisdiction over a foreign defendant. What is more, the foreign defendants in *Glencore* and *Unocal* had some significant contact with the United States, much more than what plaintiffs allege against Main.

The only specific paragraph in the TAC relating to Main is paragraph 68. This paragraph states that "on or about August 30, 2001, concerning Tarnovsky's receipt of $40,100 from his mailbox address in San Marcos, Texas, a report from the Royal Canadian Mounted Police's Latent Fingerprints operations matched the fingerprints lifted from the "Pioneer DVD" player and the "JVC DISC" containing the currency to Mervyn D. Main a/k/a Rymer." Deviating from the SAC, plaintiffs now construct the claim that "Main's fingerprints were 'positively identified' on the unlawfully obtained monies" (the SAC said that these fingerprints "matched"

1 Main's). (TAC, ¶ 68). Even so, the one purported contact that Main had with the
2 United States as alleged in the TAC does not satisfy the minimum contacts
3 requirement under Rule 4(k)(2) established by the Ninth Circuit in *Glencore* and
4 *Unocal*. Moreover, it does nothing to establish contact with California.

5 As to either specific jurisdiction or Rule 4(k)(2) jurisdiction, plaintiffs have
6 failed to show that the exercise is jurisdiction is reasonable. Main is a Canadian
7 citizen with no ties to California. It is plain that defending himself in this Court
8 would be incredibly burdensome.

9 **B. <u>In the Alternative, This Court Should Dismiss the TAC for Failure to</u>**
10 **<u>State a Claim.</u>**

11 Even if personal jurisdiction exists over Main, the TAC fails to state a proper
12 claim for relief against him.

13 A court should dismiss a claim under Rule 12(b)(6) where there is either a
14 "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a
15 cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699
16 (9th Cir. 1990). While a court must accept all well-pleaded facts as true,
17 "conclusory allegations without more are insufficient to defeat a motion to dismiss
18 for failure to state a claim." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th
19 Cir. 1988) (dismissing action after plaintiff could not allege elements of antitrust
20 claim). The court need not "assume the truth of legal conclusions merely because
21 they are in the form of factual allegations." *Western Mining Council v. Watt*, 643
22 F.2d 618, 624 (9th Cir. 1981) (case dismissed when plaintiffs did not plead facts
23 demonstrating standing to bring suit). Plaintiffs have failed to state a claim against
24 Main; he should therefore be dismissed from the case.

25 Main joins in the arguments of defendants NDS Group PLC, NDS Americas,
26 Inc., Christopher Tarnovsky, George Tarnovsky, Stanley Frost, John Norris, Allen
27 Menard and Linda Wilson expressed in their respective motions to dismiss under
28 Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Main

specifically raises the arguments that pertain to him and applies the authorities and arguments in those motions to his own facts.

1. The Allegations in the TAC are not Plead with Particularity.

The TAC is replete with references to defendants engaging in a unified fraudulent course of conduct to compromise Plaintiffs' conditional access system. (See TAC, ¶¶ 20-21, 135). When a party alleges a "unified fraudulent course of conduct", the complaint is considered "grounded in fraud." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (holding that complaint not sufficient under Rule 9). In these situations, Rule 9 requires that plaintiffs allege "the particulars of when, where or how the alleged conspiracy occurred." *Id.* at 1106-07.

Plaintiffs have not done so. Plaintiffs do not describe with any particularity what role Main played in any of the supposed wrongdoings described in the TAC. Plaintiffs do not illustrate how a fingerprint on a package – even if true – ties Main into the fraudulent conduct alleged in the TAC. Any other conduct ascribed to Main is not specifically alleged – only general statements of undefined wrongdoing. As set forth in the other motions, none of the claims for relief in the TAC are pleaded to meet the exacting requirements of Rule 9. Indeed, as will be shown, plaintiffs' pleading is so defective that it does not meet even the more liberal standards of Rule 8. Therefore, the TAC must be dismissed.

2. Allegations of the Conduct of Others Cannot Impute Liability to Main.

In the SAC, plaintiffs simply lumped all defendants together. As set forth in NDS' motion to strike, the cosmetic improvements in the TAC are still insufficient. The ongoing flaws discussed in the motion to strike also prevent the TAC from stating a claim under Rule 12(b)(6). Each defendant is not alleged to have personally committed conduct giving rise to a claim for relief; rather, it is the concert of action between the individual defendants and NDS that supposedly

supports the TAC. This purported concert of action also underlies the allegations that some conduct falls within the limitations periods.

Therefore, in the absence of properly-pled ties between defendants, there can be no valid complaint. The TAC still does not properly allege liability based on the conduct of other defendants, based on either agency or conspiracy. Therefore, the TAC must be dismissed.

a. *Main Cannot be Held Liable under an Agency Theory.*

To find defendants liable through theories of agency, this Court ordered plaintiffs to plead facts that would lead to the conclusion that agency exists. (Rule 12(e) Order at 4).

An allegation that one party is the agent of another is a legal conclusion and must be supported by sufficient factual allegations. *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250-52 (D. Md. 2000) (pleadings must indicate with particularity the factual predicate for the agency relationship). In the TAC, Plaintiffs allege that Main is an agent of Menard and a sub-agent of NDS. (TAC, ¶ 92(c)). But plaintiffs do not support this legal conclusion with any supporting facts demonstrating an agency relationship between Main and Menard. More important, plaintiffs do not allege any specific conduct by Main that could give rise to liability in this case. Plaintiffs do not explain how a fingerprint, allegedly Main's, being found inside a package in Texas gives rise to liability in this case.

To the extent that plaintiffs seek to hold Main liable for the actions of others under a theory of agency, the basic principles of agency prohibit an agent from being held liable for the acts of a principle or co-agent. *See Hernandez v. Gates*, 100 F. Supp.2d 1209, 1218 n.13 (C.D. Cal. 2000) ("'reverse' respondeat superior liability is not cognizable"). Allegations of agency do not save plaintiffs' infirm pleading against Main.

1 b. ***Conspiracy Allegations do not Impute Liability to Main.***

2 As an alternative theory of vicarious liability, plaintiffs allege that Main was
3 a co-conspirator with NDS and other defendants in compromising plaintiff's
4 security system. (TAC at 37-38). But plaintiffs may not impute liability to Main
5 based merely on allegations that Main was a co-conspirator with alleged
6 wrongdoers. The Federal Rules require more.

7 As set forth in other motions, the conspiracy allegations are in fact
8 insufficient under either Rule 9 or Rule 8, and merely resting on a bald allegation of
9 a "conspiracy" without alleging any supporting factual allegations will not avoid
10 dismissal. *Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1152 (9th Cir. 1998)
11 (dismissing complaint where conspiracy claim not pled with requisite particularity);
12 *Fries v. Helsper*, 146 F.3d 452, 457 (7th Cir. 1998) (affirming dismissal of § 1983
13 claim because "mere conclusory allegations of a conspiracy are insufficient to
14 survive a motion to dismiss"); *Arsenaux v. Roberts*, 726 F.2d 1022, 1024 (5th Cir.
15 1982) (mere conclusory allegations of conspiracy between lawyer and state trial
16 judge could not survive motion to dismiss absent reference to material facts). The
17 allegation of conspiracy is a legal conclusion, not a factual assertion. *First Nat'l*
18 *Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 259, 288-90, 88 S. Ct. 1575, 20 L. Ed.
19 2d 569 (1968); *Young v. Kann*, 926 F.2d 1396, 1405 n.16 (3d Cir.1991) (mere
20 averment of conspiracy without facts is a conclusion of law and insufficient to state
21 a claim).

22 Plaintiffs fail to allege facts supporting their allegations that Main agreed to
23 participate in the alleged conspiracy with NDS and the other defendants. Absent
24 these facts, plaintiffs' conspiracy theory of liability is insufficient to state a claim
25 against Main. *See Berry v. Baca*, 2002 WL 356763 at *3 (C.D. Cal. 2002)
26 (dismissing conspiracy count where allegations failed to state "(1) who agreed to
27 engage in the conspiracy; (2) what was agreed to; (3) when it was agreed to; or (4)
28 how it was agreed to.").

3. The Applicable Statute of Limitations Bar the Claims for Relief.

The date for the statute of limitations is February 18, 2004, when the Second Amended Complaint was lodged and Main was first named as a defendant in this case. *See* Fed. R. Civ. P. 15(c)(3).

The majority of the claims alleged in the TAC are governed by two- or three-year statute of limitations (Counts 1-8, 11-20 and 22). Plaintiffs allege that a report was generated about Main's fingerprints in 2001, but do not allege the date upon which any underlying conduct occurred. Still, plaintiffs do not allege any specific conduct that occurred after February 18, 2001. With no concrete evidence, plaintiffs now allege upon "information and belief" that Main engaged in unknown actionable conduct up until June 21, 2001. Plaintiffs further allege that Main and other defendants are "actively engaged" in unspecified wrongdoing. (TAC, ¶¶ 224, 223, 309, 310, 312, 313, 319 and 344).

These unsupported allegations do not satisfy the particularity requirements of Rule 9. *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990) (plaintiff must plead the "who, what, when, where, and how"). Mere allegations of fraud, corruption or conspiracy are too conclusionary to satisfy the particularity requirement of Rule 9. *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985) (dismissing an action for conspiracy to defraud after plaintiff failed to meet the particularity requirements of Rule 9).

These unspecified allegations of continuing wrongdoing do not even satisfy the more liberal standards of Rule 8. The TAC alleges detailed facts that occurred in December 2000 or earlier. However, the conduct alleged after December 2000 is limited to unspecified continuing wrongdoing. As set forth by the other defendants, this Court is not obliged to accept these allegations (as would ordinarily be true under Rule 12(b)(6)) because it goes against other specific allegations in the TAC, all of which point to discrete conduct for a finite period of time. *See, e.g.*, TAC, ¶¶ 39, 49, 134-135; *see Brian Clewer, Inc. v. Pan American World Airways, Inc.*, 674

F. Supp. 782, 785 (C.D. Cal. 1986); *Holden v. Hagopian*, 978 F.2d 1115, 1121 (9th Cir. 1992) (holding that conclusory allegations, unsupported by facts, are insufficient to state a claim).

Plaintiffs claim under California Business and Professions Code § 17200 (Count 16), which has a four-year statute of limitation, is also time-barred. As set forth in NDS's motion to dismiss, plaintiffs allege that they were first informed that their system had been hacked on November 3, 1998. For accrual purposes, the relevant date is the alleged act of misappropriating plaintiffs' security system. *See Nesovic v. United States*, 71 F.3d 776 (9th Cir. 1995) (holding that faulty tax assessment was the single wrongful act and other injuries were merely the effects of the original violation). Thus, the date of accrual for plaintiffs' claim under section 17200 is November 3, 1998. This is more than four years before plaintiffs brought this action against Main. Therefore, the statute has run.

Plaintiffs have not asserted any facts that Main has engaged in actionable conduct within the two- and three-year statute of limitations or the four-year statute of limitations for California Business and Professions Code § 17200. Accordingly, Counts 1-8, 11-20 and 22 should be dismissed against Main.

4. Plaintiffs' RICO Claims Should be Dismissed.

a. Plaintiffs' Claims under § 1962(c) and § 1962(d) Should be Dismissed for the Reasons Set Forth in NDS's Motion to Dismiss.

Main hereby joins defendant NDS in the arguments expressed in its motion to dismiss with respect to Plaintiffs' RICO claims under 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(d) (Counts 9-10). Particularly, plaintiffs fail to allege properly a criminal RICO "enterprise" necessary to support their § 1962(c) claim and the corollary conspiracy claim under § 1962(d). In addition, NDS's Motion to Dismiss demonstrates that the TAC fails to allege the necessary predicate acts for a RICO

claim and thus fails to allege the required "pattern of racketeering activity."

b. *Main is not a Proper "Person" for Purposes of RICO*

In order for a "person" to be liable under 1962(c), the person must participate in the "operation and management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 184, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). Plaintiffs do not allege that Main participated in the operation and management of the enterprise. Any contention that Main did participate in the operation and management of the enterprise would run counter to plaintiffs' allegation that Main "acted under the control of NDS." (TAC, ¶ 67).

5. Additional Independent Reasons Support the Dismissal of Plaintiffs' State Law Claims

a. *This Court Should Dismiss Plaintiffs' Speculative Interference Claims for the Reasons Given in NDS's Motion to Dismiss.*

Main joins in the arguments provided by NDS in its motion to dismiss with respect to plaintiffs' claims for interference with contractual relations and prospective contractual relations/economic advantage (Counts 17 and 18). This Court should dismiss these claims because they do not identify the alleged relationships with the required particularity.

b. *Plaintiffs' § 17200 Claim Should be Dismissed.*

Main joins in the arguments by NDS in its motion to dismiss concerning Plaintiffs' claims under section 17200 of the California Business & Professions Code. Specifically, plaintiffs' inability to plead sufficient facts for their other claims for relief precludes maintaining an action under section 17200. *See Daly v. Viacom, Inc.*, 238 F.Supp.2d 1118, 1126 (N.D. Cal. 2002) (dismissing section 17200 claims because claims underlying the section 17200 claim failed).

1 *c. The Claims under the California Penal Code do not*
2 *Pertain to Main.*

3 Plaintiffs bring Counts 11-15 under provisions of the California Penal Code
4 that prohibit the sale of signal theft devices or the unauthorized interception of
5 satellite signals. But the statutes underlying these counts do not purport to affect
6 the whole world, and would not apply to Main, a Canadian citizen who has never
7 visited California. Furthermore, there is no allegation that Main possessed anything
8 in California.

9 **6. The TAC Should Be Dismissed With Prejudice**

10 Plaintiffs have failed to state a claim for relief against Main. This Court does
11 not have personal jurisdiction over Main – a Canadian citizen with no ties to
12 California or the United States. Even if personal jurisdiction did exist, plaintiffs
13 have not supported their theories of agency or conspiracy. Virtually all of the
14 claims contained in the TAC are barred by the statute of limitations. Plaintiffs have
15 had four opportunities to plead a valid complaint, and they have failed each time.
16 Even with the Court pointing out these deficiencies and guiding plaintiffs on how to
17 cure them, the TAC fails. Four tries is enough. Therefore, this Court should
18 dismiss the TAC without leave to amend.

19 **C. <u>In the Alternative, this Court Should Strike the Entire Third</u>**
20 **<u>Amended Complaint</u>.**

21 Main joins in the motion to strike the TAC filed by defendants NDS Group
22 PLC and NDS Americas, Inc., etc. Fed. R. Civ. P. 12(f).

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III.

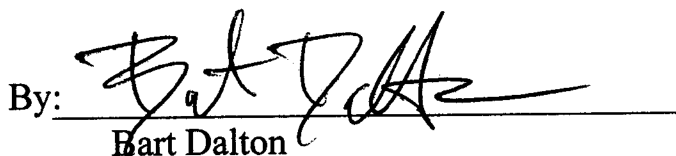
CONCLUSION

For the foregoing reasons, plaintiffs' TAC should be dismissed for lack of personal jurisdiction. If this Court finds that personal jurisdiction exists, then this Court should dismiss the TAC without leave to amend for failure to state a claim or should strike the TAC in its entirety.

Dated: September 20, 2004

Respectfully submitted,

CORBIN & FITZGERALD LLP
ROBERT L. CORBIN
MICHAEL W. FITZGERALD
BART DALTON

By: 
Bart Dalton
Attorneys for Defendants
LINDA WILSON, ALLEN MENARD,
and MERVYN MAIN

DECLARATION OF MERVYN MAIN

I, MERVYN MAIN, declare and state as follows:

1. I am a citizen of Canada and live in Edmonton, Alberta.

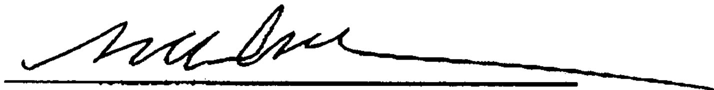
2. I work in the field of construction doing drywall and painting jobs.

3. I do not own property or have any other assets in California or the United States.

4. I have never visited California.

5. I have never conducted any business with or in California or the United States.

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed this 17 day of September, 2004, at Edmonton, Alberta, Canada.



MERVYN MAIN

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) ss.

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 601 West Fifth Street, Suite 1150, Los Angeles, California 90071-2025.

On September 20, 2004, I served the foregoing document described as DEFENDANT MERVYN MAIN'S NOTICE OF MOTION AND MOTION TO DISMISS THIRD AMENDED COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF MERVYN MAIN on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED MAILING LIST

[ ] Via U.S. Mail — I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

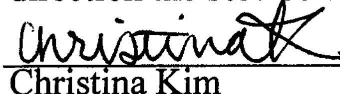
[ ] Via Facsimile — I am familiar with the office practice of Corbin & Fitzgerald, LLP for collecting, processing and transmitting documents via facsimile. Under that practice, I faxed the above-described document to the facsimile number(s) referenced herein. The facsimile of the above-described document was transmitted to the following parties from Los Angeles, California on September 20, 2004 at the times noted on the attached confirmation sheet(s).

[xx] Personal Service — I personally delivered such envelope to the offices of the addressee listed and noted on the attached mailing list.

Executed on September 20, 2004, at Los Angeles, California.

[ ] (State) — I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

[xx] (Federal) — I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Christina Kim

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EchoStar Satellite Corporation et al. V. NDS Group, PLC, et al.
Case No. SA CV 03-950 DOC(ANX)

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2 STATE OF CALIFORNIA)
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3 COUNTY OF LOS ANGELES)

4 I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 601
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SEE ATTACHED MAILING LIST

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[ ]	Via U.S. Mail	I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
[xx]	Overnight Delivery	I caused such envelope(s) to be deposited in an overnight courier drop-box at Los Angeles, California for next business day delivery.
[ ]	Personal Service	I caused such envelope to be delivered by hand to the offices of the addressee listed and noted on the attached mailing list.

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20 Executed on September 20, 2004, at Los Angeles, California.

[ ]	(State)	I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
[xx]	(Federal)	I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

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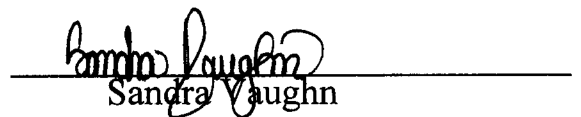

25 Sandra Vaughn

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1 ***EchoStar Satellite Corporation et al. V. NDS Group, PLC, et al.***
Case No. SA CV 03-950 DOC(ANX)

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