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19 **UNITED STATES DISTRICT COURT**
20 **CENTRAL DISTRICT OF CALIFORNIA**
21 **SOUTHERN DIVISION**

22 ECHOSTAR SATELLITE
23 CORP., et al.,

24 Plaintiffs/
25 Counterclaim
26 Defendants,

27 v.

28 NDS GROUP PLC, et al.,

Defendants/
Counterclaim
Plaintiffs.

No. SA CV 03-950 DOC(JTL)

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' OBJECTIONS TO
PLAINTIFFS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW;
PLAINTIFFS' OBJECTIONS TO
DEFENDANTS' PROPOSED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Date: TBD
Time: 8:30 a.m.
Dept: Judge David Carter
Courtroom 9D

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1 **I. Introduction**

2 Defendants admit that they have indeed violated both state and federal law,
3 and in doing so they have admitted a *per se* violation of § 17200 that entitles
4 Plaintiffs to relief. Despite this, Defendants ask this Court to conclude that their
5 violations of not one, but three California statutes and a federal statute should be
6 excused. Indeed, Defendants admit their violations in an attempt to persuade this
7 Court that their conduct, though technically illegal, should not subject them to any
8 liability. Ironically, Defendants admit that they have violated the law in one
9 instance in an effort to evade responsibility for Plaintiffs' damages flowing from
10 Defendants' violations of the law in other instances.

11 Defendants' attempts to throw up a flare to distract the Court from further
12 analyzing their conduct are ineffectual. Regardless of Defendants' characterization
13 of their own conduct or attempts to read into the Jury's Verdict factual findings that
14 simply do not exist, the fact remains that the Jury Verdict undeniably establishes
15 that Defendants violated the law; therefore, Defendants have undeniably violated
16 § 17200. Moreover, Defendants have demonstrated a proclivity to conducting their
17 business in an unlawful or unfair manner such that Plaintiffs are entitled to an
18 injunction to prevent such conduct. Defendants have engaged in illegal conduct,
19 and Plaintiffs are entitled to protection to prevent further harm – that is the very
20 purpose of the injunction and restitution remedies under § 17203.

21 Defendants further attempt to force this Court into interpreting the Jury's
22 Verdict in such a way as to foreclose Plaintiffs' § 17200 claim, rather than making
23 independent findings of fact. However, as will become clear, Plaintiffs' Proposed
24 Findings of Fact and Conclusions of Law do not contradict the Jury's Verdict, but
25 instead are supported by the Jury's finding that Defendants violated 47 U.S.C.
26 § 605(a) and California Penal Code §§ 593d(a) and 593e(b). Indeed, that
27 Defendants were responsible for the Nipper Post is the only logical conclusion to be
28 drawn from the facts and arguments at trial, and the Jury's Verdict.

1 Concurrent with complaining that Plaintiffs' Proposed Findings of Fact and
 2 Conclusions of Law are inconsistent with the Verdict, Defendants disingenuously
 3 attempt to foist upon this Court their own Findings of Fact and Conclusions of Law
 4 that are inconsistent with the Jury's Verdict.¹

5 **II. The Jury Verdict Unquestionably Establishes That The Defendants**
 6 **Violated The Law, A Per Se Violation of § 17200; Therefore Plaintiffs Are**
 7 **Entitled To An Appropriate Remedy.**

8 Under the unlawful prong of § 17200, a violation of the law is a *per se*
 9 violation of § 17200. *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 959 (2002). The Jury
 10 Verdict establishes that the Defendants have violated § 17200. (Verdict Tr.,
 11 5/15/08, pp. 33:12-42:22.) What remains is for this Court to fashion an appropriate
 12 remedy to compensate Plaintiffs for the harm they have suffered – *i.e.*, an
 13 injunction and/or restitution. Cal. Bus. & Prof. Code § 17203.

14 **A. Plaintiffs Are Entitled To An Injunction To Prevent The Threat**
 15 **Of Defendants' Continued Illegal Conduct.**

16 As identified in Plaintiffs' Proposed Findings of Fact, Defendants wrenched
 17 from Plaintiff very valuable property – Plaintiffs' security system. (Plaintiffs'
 18 Proposed Findings of Fact and Conclusions of Law Re California Business and
 19 Professions Code § 17200 ("Plaintiffs' Proposed Findings of Fact and Conclusions
 20 of Law") at 18.) Plaintiffs have demonstrated that, in the past, Defendants have
 21 engaged in the conduct of which Plaintiffs complain here, and therefore are likely
 22 to repeat the conduct, necessitating an injunction. (*Id.* at 19); *People v. Toomey*,
 23 157 Cal. App. 3d 1, 26 (1984) (Plaintiffs need only show a reasonable probability
 24 that Defendants will repeat the offenses).

25 _____
 26 ¹ Moreover, Defendants' commentary on the presence at trial of the "author" of
 27 EchoStar's brief is entirely inappropriate. As counsel and this Court are aware,
 28 EchoStar's counsel was present for all aspects of this trial. Moreover, as is clear
 from EchoStar's brief, each and every factual contention is supported by the trial
 record.

1 Contrary to Defendants' assertion, Plaintiffs do not seek an injunction simply
2 to prevent "reverse engineering." (Objections at 64.) A careful review of
3 Plaintiffs' Proposed Injunction Order reveals that Plaintiffs seek to enjoin
4 Defendants from the *very conduct in which the Jury found the Defendants had*
5 *engaged* – the injunction essentially tracks the language of §§ 605(a), 593d(a), and
6 593e(b). (Plaintiffs' [Proposed] Injunction Order at 2.) The Proposed Injunction
7 Order further seeks to enjoin Defendants from using reverse engineering for
8 improper purposes, such as engaging in or causing satellite piracy, or otherwise
9 using it for an illegal purpose to gain a commercial advantage - the very conduct
10 that Defendants agreed was illegal in Jury Instruction No. 24, "Reverse Engineering
11 and Piracy." After four weeks of trial, there can be no doubt that providing data
12 resulting from the reverse engineering of EchoStar's products to a known satellite
13 pirate (even one that is an employee of Defendants) may result in piracy of
14 EchoStar's signal. (*See generally*, Plaintiffs' Proposed Findings of Fact; Plaintiffs'
15 [Proposed] Injunction Order at 3.) In fact, Defendants themselves terminated Mr.
16 Tarnovsky because he was not candid with them about his involvement with piracy
17 activities, thus NDS understands first hand the inherent risk in this conduct. (Norris
18 Trial Tr., 4/17/08, Vol. 1, pp. 54:15-55:23; Hasak Trial Tr., 5/1/08, Vol. 1, p. 45:9-
19 23; Peled Trial Tr., 5/6/08, Vol. 3, pp. 7:23-8:2.)² Finally, there can be no question
20 that distributing or publishing data resulting from the reverse engineering of
21 EchoStar's products, which could in turn lead to satellite piracy, is likely an illegal,
22 or at least unfair, business practice. (*See* Plaintiffs' Proposed Findings of Fact and
23 Conclusions of Law at 13, 15-17.) Plaintiffs' Proposed Injunction is warranted, and
24

25 ² In fact, Defendants also knew that there was a risk that Tarnovsky would continue
26 to engage in his illegal hacking activities when they hired him. (D. Rubin Trial Tr.,
27 4/22/08, Vol. 1, p. 15:3-12 (testified that he knew Tarnovsky was a hacker and he
28 knew there was risk Tarnovsky would do it again to both NDS and competitors);
Segoly Trial Tr., 4/11/08, Vol. 2, pp. 77:22-78:2, 78:13-16.)

1 seeks to enjoin conduct in which Defendants have unquestionably engaged and that
2 violates § 17200.

3 Moreover, all Plaintiffs must show to demonstrate their entitlement to
4 restitution is that Defendants took from Plaintiffs property to which Plaintiffs are
5 entitled. *People v. Beaumont Inv., Ltd*, 111 Cal. App. 4th 102, 135 (2003). In this
6 case, that property was Plaintiffs' secure SmartCard system, which was free from
7 mass piracy until Defendants engaged in the conduct described in Plaintiffs'
8 Proposed Findings of Fact (to the extent that the Court adopts the relevant Proposed
9 Findings of Fact).

10 As set forth in Plaintiffs' Proposed Findings of Fact, Plaintiffs' claim for
11 restitution in the amount of \$94,638,625.10 is supported by the facts and the law.
12 This amount is the value of the card swap, which EchoStar defined as the creation
13 and circulation of a secure card. (Plaintiffs' Findings of Fact and Conclusions of
14 Law at 12, 18.)

15 Plaintiffs have established that Defendants violated § 17200, that Plaintiffs
16 were harmed by Defendants' conduct through the loss of valuable property, the
17 value of the property lost, and Defendants' proclivity to conduct their business in an
18 unlawful or unfair manner. Therefore, Plaintiffs are entitled to an injunction and
19 restitution under § 17203.

20 **III. The Court Should Adopt Plaintiffs' Proposed Findings of Fact.**

21 **A. The Court Must Make Its Own Findings Of Fact; The Jury Did**
22 **Not Make Explicit Or Implicit Findings Of Fact On The Conduct**
23 **Underlying Plaintiffs' Claims.**

24 The Court must make its own independent findings of fact in an equitable
25 action. *See A-C Co. v. Sec. Pac. Nat. Bank*, 173 Cal. App. 3d 462, 474 (Cal. App.
26 4th Dist. 1985) (a court's failure to make its own independent findings on an
27 equitable claim is reversible error). A Court's findings only violate the Seventh
28 Amendment where there is in fact a clear explicit or implicit finding of fact – in

1 other words, where the jury has made an explicit finding in the verdict form, or
2 where the jury's verdict can lead to no other conclusion. *See L.A. Police Protective*
3 *League v. Gates*, 995 F. 2d 1469, 1473 (9th Cir. 1993) (jury could not have
4 awarded the plaintiff the amount of damages it did unless the jury found that the
5 defendants terminated plaintiff illegally).

6 In this case, the Jury did not make explicit findings of fact on any of the facts
7 contained in Plaintiffs' Proposed Findings of Fact and Conclusions of Law.
8 (Verdict Tr., 5/15/08, pp. 33:12-42:22.) Rather, the Jury made specific findings
9 regarding whether Defendants violated the six statutes on which Plaintiffs' claims
10 presented to the Jury were based, and if Defendants did so, Defendants engaged in a
11 conspiracy and/or acted with malice, oppression, or fraud. (*Id.*) For purposes of
12 Plaintiffs' Proposed Findings of Fact and Conclusions of Law, Plaintiffs do not ask
13 this Court to find that Defendants violated DMCA § 1201(a)(1)(A), DMCA §
14 1201(a)(2), or 18 U.S.C. § 1962 (RICO). (*See generally*, Plaintiffs' Proposed
15 Findings of Fact and Conclusions of Law.) Nor do Plaintiffs ask this Court to find
16 that Defendants engaged in a conspiracy, or acted with malice, oppression, or fraud.
17 *Id.*

18 Defendants' reliance upon the Ninth Circuit's decision in *Gates* is misplaced.
19 The Ninth Circuit's decision in *Gates* does not require the Court to reject Plaintiffs'
20 Proposed Findings of Fact because, as Defendants argue, the Jury's damages award
21 can only lead to the conclusion that the Jury rejected each of Plaintiffs' Proposed
22 Findings of Fact. (*See* NDS's Objections to Plaintiffs' Proposed Findings of Fact
23 and Conclusions of Law Re Section 17200 ("Objections") at 3.) However, *Gates* is
24 the inverse of the situation now before the Court. Here, there are many factors that
25 may have lead the Jury to award Plaintiffs only nominal damages, whereas in
26 *Gates*, the large sum the jury awarded could only have been a result of a liability
27 finding. *Gates*, 995 F. 2d at 1473. In other words, in *Gates*, there was only one
28 possible legal conclusion flowing from the verdict; whereas in this case, there are

1 many possible conclusions. Indeed, the Jury rejection of Plaintiffs' Proposed
2 Findings of Fact is not the only conclusion to be drawn from the Jury's Verdict. In
3 fact, as explained more fully below, this conclusion is neither logical nor
4 reasonable. There is no basis for the Court to reject Plaintiffs' Proposed Findings
5 of Fact even if it is assumed that one possible conclusion to be drawn from the
6 Verdict is that the Jury rejected these facts. *See Intel Corp. v. Advanced Micro*
7 *Devices*, 1992 U.S. Dist. LEXIS 18806 at *10 (N.D. Cal. 1992) ("When a jury
8 returns a general verdict in which it could have made all or some of several
9 findings, the trial court is not bound by the jury verdict in determining related
10 issues without a jury.").

11 Indeed, and of particular note, Plaintiffs proffered a single theory of liability
12 Defendants promulgated a scheme to cause the mass piracy of EchoStar's system
13 by hacking Plaintiffs' SmartCard and causing the distribution of pirated cards, with
14 the scheme culminating in the Defendants' posting on the Internet the code needed
15 to pirate EchoStar's system. (*See* Trial Tr., 4/9/08, Vol. 3, pp. 13:5-38:10; Trial
16 Tr., 5/07/08, Vol. 1, pp. 11:18-48:18; Vol. 2, pp. 4:14- 19:24; Vol. 4, pp. 4:13-
17 20:24.) Plaintiffs did not suggest to the Jury that Defendants' liability is premised
18 on their own admitted internal piracy of EchoStar's signal (*i.e.*, the P1 "Test").
19 (*Id.*)

20 **B. The Plaintiffs' Proposed Findings Of Fact And Conclusions Of**
21 **Law Are Not Inconsistent With The Verdict.**

22 The Nipper Post is the only theory of liability supported by the facts and
23 arguments presented at trial and this theory is consistent with the Jury's Verdict. In
24 the course of the four-week trial, Plaintiffs consistently maintained that Defendants'
25 liability stems from their involvement in the Nipper Post and proffered substantial
26 evidence to support this theory. (For a summary of this evidence, *see* Plaintiffs'
27 Proposed Findings of Fact.) The alleged P1 "Test" was an inconsequential fact
28 discussed briefly with few witnesses. *See, e.g.*, Tarnovsky Trial Tr., 4/23/08, Vol.

3, pp. 22:2-23:1; Norris Trial Tr., 4/17/08, Vol. 1, p. 22:2-8.) Therefore, this Court can, and should, adopt Plaintiffs’ Proposed Findings of Fact.

1. The Nipper Post is a violation of §§ 605(a), 593d(a), and 593e(b).

The Jury’s finding that Defendants violated §§ 605(a), 593d(a), and 593e(b) is consistent with Plaintiffs’ Proposed Findings of Fact that Defendants are responsible for the Nipper Post and the damages flowing therefrom. Indeed, as the elements of each statute detailed below demonstrate, the Nipper Post and resulting piracy are violations of §§ 605(a), 593d(a), and 593e(b):

Jury Instruction No. 38:	Jury Instruction No. 42: Cal. Pen. Code § 593d(a)	Jury Instruction No. 49 Cal. Pen. Code § 593e(b)
<p>... (2) Defendant(s) did one or more of the following: ... d. <u>Assisted another</u> to receive and decrypt EchoStar programming signals. 3) EchoStar did not authorize the interception or receipt of any EchoStar programming signal in number 2 of this Instruction; and 4) Defendants used EchoStar programming signals described in number 2 of this Instruction for its benefit or for the benefit of another.</p>	<p>For the purpose of intercepting, receiving, or using any program or other service that Defendants were not allowed to intercept, receive or use, Defendants b. Knowingly and willfully purchased, possessed, attached, <u>caused to be attached, assisted others in attaching</u>, or maintained the attachment of any unauthorized device...to any component of EchoStar’s system.</p>	<p>[W]ithout EchoStar’s authorization, Defendants knowingly and willfully manufactured, imported into this state, assembled, distributed, sold, offered to sell, possessed, advertised for sale, or <u>otherwise provided</u> any device, <u>any plan</u>, or any kit for a device designed in whole or in part to decode, descramble, intercept, or otherwise make intelligible any encoded, scrambled, or other nonstandard signal carried by EchoStar.</p>

Given Jury Instructions at pp. 46, 51-52, 60. Furthermore, the fact that the Jury did not find Defendants contributorily liable for DMCA §§ 1201(a)(1)(A) and (a)(2) does not mean, as Defendants suggest, that the Jury found that Defendants were not responsible for the Nipper Post. (Objections at 4.) Instead, the standard for

1 contributory liability in the Given Jury Instructions, to which Plaintiffs objected,
2 does not have the same standard as the “assisted,” “caused,” and “otherwise
3 provided” elements of §§ 605(a), 593d(a), and 593e(b). *See* Given Jury Instructions
4 No. 27 at pp. 31-32, No. 33 at pp. 39-40.

5 It is ridiculous for Defendants to insist that this Court must conclude that the
6 Jury rejected the facts in EchoStar’s Proposed Findings of Fact merely because the
7 Jury did not find Defendants liable on certain of EchoStar’s claims when the clear
8 language of the statutes under which the Jury found Defendants liable support
9 Plaintiffs’ Proposed Findings of Fact.

10 **2. *The Jury’s failure to find liability under the DMCA and RICO***
11 ***do not suggest that Defendants are not responsible for the***
12 ***Nipper Post.***

13 There is nothing in the language of DMCA §§ 1201(a)(1)(A) or (a)(2) that
14 suggests the Jury was required to reject Defendants’ liability if the Jury did not
15 believe Defendants were responsible for the Nipper Post. As Defendants note,
16 DMCA § 1201(a)(1)(A) prohibits circumvention of Plaintiffs’ technological
17 measure. 17 U.S.C. § 1201(a)(1)(A). To circumvent a technological measure
18 means to “descramble a scrambled work, decrypt an encrypted work, or otherwise
19 avoid, bypass, remove, deactivate or impair a technological measure without the
20 authority of the copyright owner.” 17 U.S.C. § 1201(a)(3). DMCA § 1201(a)(2)
21 prohibits the manufacture, import, offer to the public, provision, or otherwise
22 traffick in any technology, etc. designed for the purpose of circumventing a
23 technological measure, or which has limited commercially significant purpose. *See*
24 Given Jury Instruction No. 32 at 37. There is nothing in the statutes’ language that
25 requires the conclusion that Jury’s found that Defendants were not responsible for
26 the Nipper Post simply because the Jury rejected liability under these statutes.

27 Similarly, finding that Defendants are responsible for the Nipper Post is not
28 inconsistent with the Jury’s finding that Defendants violated 18 U.S.C. § 1962(c)

1 (RICO). As is clear from the energy that this Court and counsel expended to craft
2 an acceptable jury instruction, the RICO statute requires several elements that have
3 no relationship to whether NDS employee Christopher Tarnovsky posted
4 EchoStar's code to the Internet. Instead, the RICO statute requires an explicit
5 finding that a RICO enterprise existed, that Defendants were employed by that
6 enterprise, and that Defendants participated in the conduct of affairs of the
7 enterprise, among others. *See* Given Jury Instruction No. 59 at 72-73. That the
8 Jury may not have been persuaded that the NDS Defendants were engaged in a
9 RICO conspiracy with, for example, News Corporation, HarperCollins, or any of
10 the other NDS entities, does not also mean that Mr. Tarnovsky did not post the
11 EchoStar code to the Internet. Indeed, whether Defendants conspired with other
12 entities is not even part of Plaintiffs' Proposed Findings of Fact. Plaintiffs'
13 Findings of Fact and Conclusions of Law at 1-13.

14 **3. *Plaintiffs' Proposed Findings of Fact are not inconsistent with***
15 ***the Jury's finding that Defendants did not engage in a***
16 ***conspiracy, or act with malice, oppression, or fraud.***

17 Plaintiffs' Proposed Findings of Fact are not inconsistent with the Jury's
18 Verdict that Defendants did not engage in a conspiracy or act with malice,
19 oppression, or fraud. For example, in the Verdict, the Jury may have determined
20 that one or the other of the Defendants acted on the other's behalf as a corporate
21 agent when undertaking the conduct in question, or simply that Defendants did not
22 enter into an agreement to carry out the wrongful conduct outlined in Plaintiffs'
23 Proposed Findings of Fact. *See* Given Jury Instructions No. 43 at 53.

24 If the Jury believed that Defendants acted solely out of a desire to protect
25 themselves rather than out of a desire to harm EchoStar (even if recognizing that
26 harm to EchoStar would be a natural result of its conduct), Defendants' conduct
27 does not rise to the level of malice. *E.g.*, Cal. Pen. Code § 7(4) ("The words
28 'malice' and 'maliciously' import a wish to vex, annoy, or injure another person, or

1 an intent to do a wrongful act, established either by proof or presumption of law.”).
2 Similarly, in such a scenario, Defendants’ conduct also would not rise to the level
3 of oppression. Oppression results from the use of one party’s power over another
4 to cause it harm. Black’s Law Dictionary (Oppression is defined as “an act of
5 subjecting to cruel and unjust hardship; an act of domination”). In this case, the
6 parties were on relatively equal footing, other than Defendants’ unlawful and unfair
7 conduct in causing the piracy of Plaintiffs’ SmartCard. (Plaintiffs’ Proposed
8 Findings of Fact and Conclusions of Law at 1-5, 11-13.)³

9 The Jury’s Verdict is limited only to consideration of the specific statutes that
10 Plaintiffs alleged Defendants violated and presented to the Jury. The Verdict leaves
11 open the conduct that the Jury found to have violated these statutes. (Verdict Tr.,
12 5/15/08, pp. 33:12-42:22.) The Verdict also leaves open whether Defendants
13 violated Section 17200 as that claim was not presented to the Jury. Therefore, the
14 Court cannot simply adopt the Jury’s Verdict, but instead must make its own
15 findings of fact. Plaintiffs’ Proposed Findings of Fact are consistent with the Jury’s
16 Verdict and are supported by the record.

17 **4. *The Jury’s damages award is not inconsistent with a finding***
18 ***that Defendants are responsible for the Nipper Post or with***
19 ***Plaintiffs’ restitution claim.***

20 For each of the claims for which the Jury found liability – §§ 605(a), 593d(a),
21 and 593e(b) – the Jury was asked to calculate actual damages and statutory
22 damages. (Verdict Tr., 5/15/08, pp. 33:12-42:22.) The Jury, however, was not
23 instructed to calculate the amount of appropriate restitution, nor is restitution a
24 remedy available to Plaintiffs for a violation of any of the statutes the Jury

25
26 ³ Plaintiffs did not proffer any theory that Defendants acted fraudulently. Nor did
27 Plaintiffs allege that Plaintiffs asked Defendants whether they had hacked
28 Plaintiffs’ CAS or that Plaintiffs relied upon any representation that Defendants
made that they did not hack Plaintiffs’ CAS. *See* Plaintiffs’ Findings of Fact.

1 considered. *See* 47 U.S.C. § 605(e); Cal. Pen. Code §§ 593d, e. Therefore, the Jury
2 has not made any findings as to the value of Plaintiffs' lost property and the amount
3 that Defendants shall pay to Plaintiffs for restitution of that property. (Verdict Tr.,
4 5/15/08, pp. 33:12-42:22.)

5 The fact that the Jury awarded Plaintiffs only \$45.69 in damages on
6 Plaintiffs' §§ 605(a) and 593d(a) claims does not lead to the inevitable conclusion
7 that the Jury's liability finding was based upon Defendants' P1 test. (Objections at
8 7-15.) Contrary to Defendants' representations, there are no facts in evidence that
9 support the Jury's award of \$45.69. Not a single witness testified that EchoStar or
10 NagraStar suffered damages in this amount. While Trial Exhibit 406 suggests that
11 the average revenue per unit ("ARPU") in 2000 was \$45.69, there was no testimony
12 that this number represents the loss suffered by either Plaintiff as a result of
13 Defendants' violations of Section 605(a) of the Communications Act or Sections
14 593d(a) and 593e(b) of the California Penal Code. (TR EX 406 at 1, 2.) Indeed,
15 even if there was only one pirated card as a result of Defendants' conduct (a fact
16 contradicted by Defendants' own admissions), the damages suffered by EchoStar
17 would be at least \$2,650.00 – revenue lost per pirated card. (Orban Trial Tr. Vol. 4,
18 p. 15:10-17, April 17, 2008; TR EX 402; Tarnovsky Trial Tr. 04/23/08, Vol. 4, pp.
19 17:7-19:7; TR EX 41.) The Jury's award of \$45.69 does not preclude this Court
20 from finding that the amount of restitution that Defendants owe Plaintiffs is
21 \$94,638,625.10.

22 **5. *The Jury's finding that there was only a single violation of §§***
23 ***605(a) and 593e(b) also does not lead to the inevitable***
24 ***conclusion that the Jury's only theory of liability was based***
25 ***upon Defendants' P1 test.***

26 While each of the 100,000 cards pirated as a result of Defendants' Nipper
27 Post is a violation of §§ 605(a) and 593e(b), there was not a single jury instruction
28 that instructed the Jury on this point. *See* Given Jury Instructions. Importantly, the

1 determination of how many separate violations of §§ 605(a) and 593e(b) resulted
2 from Defendants' Nipper Post is a mixed legal and factual question for the Court
3 and not simply a factual determination that the Jury was either obliged, or in a
4 position, to determine. *See Century ML Cable Corp. v. Carrillo Diaz*, 39 F. Supp.
5 2d 121, 125 (D.P.R. 1999). Defendants admitted that there were at least 100,000
6 cards resulting from this post. (Tarnovsky Trial Tr. Vol. 4, pp. 17:7-19:7, April 23,
7 2008; TR EX. 41; TR EX. 1270.)⁴ As a matter of law, thus, there were 100,000
8 violations. *Century*, 39 F. Supp. 2d at 125. Assuming the Jury determined that
9 Defendants in fact posted the EchoStar code, the Jury may have believed the
10 posting was a single violation of §§ 605(a) or 593e(b). The Jury's failure to include
11 each of these 100,000 violations in its calculations, or appropriately calculate the
12 damages flowing to Plaintiffs because of a mistaken belief that this single violation
13 did not, unto itself, cause the Plaintiffs harm, does not foreclose this Court from
14 adopting a finding of fact that Defendants were responsible for each of the 100,000
15 violations.

16 **IV. Plaintiffs' Responses To Defendants' Objections To Plaintiffs' Proposed** 17 **Findings Of Fact.**

18 Plaintiffs hereby respond to Defendants' Objections to Plaintiffs' Proposed
19 Findings of Fact:⁵

20 11. Plaintiffs' Proposed Finding of Fact No. 11 is consistent with the
21 evidence at trial. Despite Defendants' Objections, Plaintiffs' Proposed Finding of
22 Fact No. 11 does not distinguish between the U.S. or worldwide market. Proposed
23 Findings of Fact at 2.

24 ⁴ Although the Jury's damages award is unsupported by the evidence introduced at
25 trial, Plaintiffs do not challenge that award for purposes of the briefing on
26 Plaintiffs' § 17200 claim.

27 ⁵ Plaintiffs address in this section only Proposed Findings of Fact to which
28 Defendants have objected. The numbers in this Section correlate to the numbered
paragraphs in Plaintiffs' Proposed Findings of Fact.

1 14. Plaintiffs' Proposed Finding of Fact No. 14 is consistent with the
2 evidence at trial. The testimony cited by Defendants does not rebut the notion that
3 NDS's technology was compromised from 1997-2002. For example, Mr.
4 Tarnovsky testified that in 1997, NDS's technology was indeed compromised, but
5 that he was not sure if this included Europe. (Objections at 18; Tarnovsky Trial Tr.,
6 4/23/08, Vol. 1, p. 58:9-20.) Mr. Tarnovsky also testified that NDS's technology
7 had been compromised and that NDS had implemented a card swap in 1996.
8 (Objections at 18; Tarnovsky Trial Tr., 4/23/08, Vol. 1, p. 58:16-20.) As Plaintiffs'
9 Proposed Finding of Fact No. 14 deals only with 1997-2002, this testimony does
10 not rebut Plaintiffs' Proposed Finding of Fact No. 14; particularly in light of Mr.
11 Tarnovsky's earlier testimony that NDS's card had been compromised in 1997.
12 (Tarnovsky Trial Tr., 4/23/08, Vol. 1, p. 58:9-20.)

13 Mr. Segoly's testimony cited by Defendants deals only with BSkyB, and
14 does not give a complete picture of the extent to which Defendants' system was
15 compromised from 1997-2002. (Objections at 18; Segoly Trial Tr., 4/11/08, Vol. 2,
16 pp. 83:21-84:1.) Similarly, Mr. Dov Rubin's testimony cited by Defendants
17 indicates that while BSkyB was allegedly secure, DirecTV was in fact
18 compromised in 1997. (Objections at 18; D. Rubin Trial Tr., 4/22/08, Vol. 2, pp.
19 13:21-14:9.) Finally, Plaintiffs' Proposed Finding of Fact No. 14 does not relate to
20 any NDS card released subsequent to the time period 1997-2002; thus, Mr. Kahn's
21 testimony cited by Defendants related to the P4 card and is irrelevant to Plaintiffs'
22 Proposed Finding of Fact No. 14. (Objections at 18.)

23 15. Plaintiffs' Proposed Finding of Fact No. 15 is consistent with the
24 evidence at trial. While Mr. Kahn's testimony was cited by Defendants to establish
25 that in 1998-1999 DirecTV was not considering a relationship with NagraStar, Mr.
26 Andre Kudelski's testimony (cited in Plaintiffs' Proposed Findings of Fact)
27 provides sufficient evidence for the Court to conclude that DirecTV was in fact
28 considering a relationship with NagraStar.

1 14 Q Did there come a point in time in 1998 where DirecTV
2 15 approached the Kudelski family of companies?

3 16 THE COURT: You may answer the question.

4 17 THE WITNESS: Yes, we have been approached to make
5 18 a proposal of our technology to make a commercial offer, and
6 19 later on we got a contract of \$100,000 to look more into
7 20 details how we can not only introduce our technology, but
8 21 replace by our technology, technology of our competitor.

9 (A. Kudelski Trial Tr., 5/6/08, Vol. 1, p. 37:14-21.)⁶ Furthermore, Mr. Kahn's
10 testimony cited by Defendants to establish that DirecTV was not considering
11 replacing NDS only demonstrates that in 1998-1999, in Mr. Kahn's opinion,
12 switching to another conditional access provider was an alternative that DirecTV
13 considered, but that no one at DirecTV believed it was feasible to replace NDS.
14 (Objections at 19; Kahn Trial Tr., 5/2/08, Vol. 2, pp. 14:23-15:6, 44:21-45:15.)
15 This, coupled with Mr. Andre Kudelski's testimony cited above, provides sufficient
16 evidence for the Court to conclude that DirecTV was considering replacing NDS,
17 and that NagraStar was one possible replacement.

18 16. Plaintiffs' Proposed Finding of Fact No. 16 is consistent with the
19 evidence at trial. Indeed, Mr. Dov Rubin testified that in 2000, which is within the
20 1997-2002 time frame that is Plaintiffs' focus, he met with Mr. Ergen and others at
21 EchoStar to discuss NDS products in which Mr. Rubin thought EchoStar would be
22 interested. (Plaintiffs' Findings of Fact and Conclusions of Law at 3; D. Rubin
23 Trial Tr., 4/22/08, Vol. 1, pp. 77:25-78:17.)

24 17. As noted above in Plaintiffs' Finding of Fact No. 16, the Court can
25 infer from the testimony that DirecTV was considering replacing NDS as a result of
26 the compromise of DirecTV's system. Moreover, Mr. Peled's and Mr. Hasak's
27 testimony cited by Defendants to establish that NDS did not expect its pirate-
28 employees to engage in piracy is clearly undermined by Defendants' own

⁶ This transcript was not yet available at the time Plaintiffs' Proposed Findings of Fact and Conclusions of Law was filed.

1 admission that it pirated EchoStar's programming when it undertook the P1 test.
2 (Objections at 20; Objections at 7-13.) Thus, the Court may infer that NDS's
3 pirate-employees in fact engaged in piracy while employed by NDS. Moreover, as
4 is clear from Mr. Tarnovsky's own testimony, NDS's system was compromised
5 long before the 1997-2002 time period upon which Plaintiffs focus. Therefore,
6 even if Mr. Tarnovsky and Mr. Kommerling were hired before NDS began to
7 renegotiate its contract with DirecTV in 1998, the Court may still reasonably
8 conclude and infer that Mr. Tarnovsky and Mr. Kommerling were hired to prevent
9 the loss of DirecTV. (Objections at 19; Tarnovsky Trial Tr., 4/23/08, Vol. 1, p.
10 58:9-20 (NDS was compromised in 1995-1996 such that it was required to
11 undertake a card swap in 1996.))⁷

12 19. In response to Defendants' Objections to Plaintiffs' Proposed Finding
13 of Fact No. 19, Plaintiffs reiterate and incorporate herein their response to
14 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 17.

15 21. Plaintiffs' quote to TR EX 6A is not inaccurate, it is simply incorrectly
16 punctuated. The citation to TR EX 6A in Plaintiffs' Proposed Finding of Fact No.
17 21 should read, "My name is Chris Tarnovsky [and] I am a hacker." This
18 punctuation change does not change the substance of Plaintiffs' Proposed Finding
19 of Fact No. 21.

20 23. Plaintiffs' Proposed Finding of Fact No. 23 is consistent with the
21 evidence at trial. It is disingenuous for Defendants to complain that NDS was not
22 aware of any hacking activities by Mr. Tarnovsky, when it admits that Mr.
23 Tarnovsky undertook the P1 test on behalf of NDS and that his supervisor, a high
24 ranking NDS executive, Mr. Norris, was present for the P1 test (which NDS also
25 admits is a violation of at least three of the statutes upon which Plaintiffs' claims
26 are based). (Objections at 22, 7-13.)

27 _____
28 ⁷ Regardless of the status of TR EX 390, the testimony Plaintiffs cite supports their
Finding of Fact No. 17.

1 29. Plaintiffs' Proposed Finding of Fact No. 29 is consistent with
2 testimony at trial. Plaintiffs' Proposed Finding of Fact No. 29 neither states nor
3 suggests that Defendants reversed engineered any card other than the ROM3 card,
4 as Defendants accuse. (Objections at 23; Plaintiffs' Proposed Findings of Fact at 4-
5 5.)

6 33. Plaintiffs' Proposed Finding of Fact No. 33 is consistent with the
7 evidence at trial. Mr. Mordinson's testimony cited by Defendants does not relate to
8 the basement in which the test was undertaken (the testimony to which Defendants
9 refer appears to be on p. 70 at lines 15-21, not 69:10-70:3). In any case, Mr.
10 Mordinson does not dispute that the test was undertaken in the basement of the
11 home in Windsor, Canada; that the basement was half-office is not at all relevant to
12 where the room was located (and it was indeed on the first floor of the building).
13 (Objections at 25; Mordinson Trial Tr., 4/11/08, Vol. 1, p. 70:15-21.)

14 34. Plaintiffs' Proposed Finding of Fact No. 34 is consistent with the
15 evidence at trial. In addition to the testimony of Messrs. Mordinson and Shkedy
16 cited by Plaintiffs, Mr. Avi Rubin testified that the hack contained in the Headend
17 Report could provide hackers with a method for breaking EchoStar's CAM.
18 (Plaintiffs' Proposed Findings of Fact at 5; A. Rubin Trial Tr., 4/16/08, Vol. 2, p.
19 72:5-14.) Moreover, Plaintiffs have not alleged that the Headend Report code is the
20 Nipper code; rather, as was proved at trial, the Nipper code was based upon and
21 obtained from the Headend Report. *E.g.*, Plaintiffs' Proposed Findings of Fact at 9-
22 10, Nos. 65, 66, 67.) Plaintiffs have not denied that the Nipper Code varies in
23 certain respects from the code contained in the Headend Report. (*Id.*) That the
24 Headend Report code ends in an infinite loop does not establish that the code was
25 otherwise consistent with a commercial hack and could not be used by pirates to
26 effectuate a large-scale attack on Plaintiffs' CAS. (Plaintiffs' Proposed Findings of
27 Fact at 5; A. Rubin Trial Tr., 4/16/08, Vol. 2, p. 72:5-14.)
28

1 35. In Response to Defendants' Objections to Plaintiffs' Proposed Finding
2 of Fact No. 35, Plaintiffs reiterate and incorporate herein their Response to
3 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 34.

4 36. Plaintiffs' Proposed Finding of Fact No. 36 is consistent with the
5 evidence at trial. Dr. Avi Rubin was qualified as an expert, and his testimony
6 reflects his expert opinion, which the Court admitted at trial. (A. Rubin Trial Tr.,
7 4/16/08, Vol. 2, pp. 60:18-61:8, 71:2-3.)

8 37. In response to Defendants' Objections to Plaintiffs' Proposed Finding
9 of Fact No. 37, Plaintiffs reiterate and incorporate herein their Response to
10 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 36.

11 38. Plaintiffs' Proposed Finding of Fact No. 38 is consistent with the
12 evidence at trial. NDS does not dispute that the Headend Report does not contain
13 any information regarding improving NDS's products. (Objections at 26.)
14 Moreover, as noted above, there is no jury verdict regarding whether the Headend
15 Report contains information regarding improving NDS's product. (Verdict Tr.,
16 5/15/08, pp. 33:12-42:22.) Therefore, Plaintiffs' Proposed Finding of Fact No. 38
17 remains uncontroverted.

18 39. In response to Defendants' Objections to Plaintiffs' Proposed Finding
19 of Fact No. 39, Plaintiffs reiterate and incorporate herein their Response to
20 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 38.

21 40. Plaintiffs' Proposed Finding of Fact No. 40 is consistent with the
22 evidence at trial. The evidence is uncontroverted that NDS did not use the ST
23 Thomson chip ST16CF54. (Objections at 28.) Moreover, there is no jury verdict
24 regarding NDS's use of the chip. (Verdict Tr., 5/15/08, pp. 33:12-42:22.)
25 Therefore, Plaintiffs' Proposed Finding of Fact No. 40 remains uncontroverted.

26 41. Plaintiffs' Proposed Finding of Fact No. 41 is consistent with the
27 evidence at trial. It is uncontroverted that knowing the structure of the fields of the
28 memory code in the ST Thomson chip did not improve the security of NDS's

1 security technology. (Objections at 28; Shkedy Trial Tr., 4/10/08, Vol. 3, p. 27:2-
2 5.) Plaintiffs' Proposed Finding of Fact No. 41 does not state that NDS did not
3 benefit from reverse engineering Plaintiffs' SmartCard; however, reverse
4 engineering is far more broad than the issue of whether Defendants benefited from
5 knowing the structure of the memory code fields in the ST Thomson chip.
6 (Plaintiffs' Proposed Findings of Fact at 6.) There also is no jury verdict regarding
7 any benefit to Defendants of knowing the structure of the ST Thomson chip.
8 (Verdict Tr., 5/15/08, pp. 33:12-42:22.) Plaintiffs' Proposed Finding of Fact No. 41
9 remains uncontroverted.

10 42. Plaintiffs' Proposed Finding of Fact No. 42 is consistent with the
11 evidence at trial. Defendants improperly attempt to mislead through their objection
12 to Plaintiffs' Proposed Finding of Fact No. 42. This proposed finding of fact does
13 not address whether NDS's security ultimately improved as a result of reverse
14 engineering Plaintiffs' SmartCard; rather, it states the uncontroverted fact that the
15 Headend Project was not undertaken for the purpose of combating the piracy
16 suffered by DirecTV and NDS. (Plaintiffs' Proposed Finding of Fact and
17 Conclusions of Law at 6; Objections at 29; Shkedy Trial Tr., 4/10/08, Vol. 3, pp.
18 10:20-11:1.) There is no jury verdict regarding the reason why NDS undertook the
19 Headend Project. (Verdict Tr., 5/15/08, pp. 33:12-42:22.)

20 43. Plaintiffs' Proposed Finding of Fact No. 43 is consistent with the
21 evidence at trial. There is no jury verdict regarding whether the Headend Report
22 teaches anyone how to create a 3M hack of the EchoStar SmartCard. (Verdict Tr.,
23 5/15/08, pp. 33:12-42:22.) Nor is the fact that the Headend Report teaches a reader
24 how to perform the 3M hack controverted. (Objections at 29; Shkedy Trial Tr.
25 4/10/08, Vol. 3, p. 28:6-9.) Whether Defendants' security system otherwise
26 benefited from the Headend Report is not relevant to or part of Plaintiffs' Proposed
27 Finding of Fact No. 42 (or otherwise). (Plaintiffs' Proposed Findings of Fact at 6.)
28

1 44. Plaintiffs' Proposed Finding of Fact No. 44 is consistent with the
2 evidence at trial. There is no jury verdict regarding whether the Headend Report
3 describes how to view EchoStar's signals without paying for them. (Verdict Tr.,
4 5/15/08, pp. 33:12-42:22.) Indeed, this fact was well established at trial and
5 remains uncontroverted. (Objections at 30; Shkedy Trial Tr. 4/10/08, Vol. 3, p.
6 13:9-13; A. Rubin Trial Tr., 4/16/08, Vol. 2, p. 72:5-14.)

7 45. In response to Defendants' Objections to Plaintiffs' Proposed Finding
8 of Fact No. 45, Plaintiffs reiterate and incorporate herein their Response to
9 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 44.

10 46. Plaintiffs' Proposed Finding of Fact No. 46 is consistent with the
11 evidence at trial. Mr. Mordinson testified that the Headend Report was confidential
12 within NDS. (Mordinson Trial Tr., 4/10/08, Vol. 2, p. 45:34-47.) Thus, showing
13 the report to Mr. Kommerling is inconsistent with this designation. The fact that
14 Mr. Kommerling was permitted to view the Headend Report is uncontroverted.
15 (Objections at 30.)

16 47. Plaintiffs' Proposed Finding of Fact No. 47 is consistent with the
17 evidence at trial. It is uncontroverted that Mr. Tarnovsky participated in technical
18 exchanges in Israel. (Objections at 30.) Moreover, based upon Mr. Tarnovsky's
19 testimony and Plaintiffs' Proposed Findings of Fact, the Court may reasonably
20 conclude that Mr. Tarnovksy viewed the Headend Report at one of these
21 exchanges. (Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 7-8,
22 Nos. 49-50.)

23 48. Plaintiffs' Proposed Finding of Fact No. 48 is consistent with the
24 evidence at trial. It is uncontroverted that Mr. Mordinson showed to Mr. Tarnovsky
25 the Headend Report when Mr. Mordinson visited Mr. Tarnovsky in California in
26 2001. (Objections at 32; Tarnovsky Trial Tr., 4/23/08, Vol. 3, pp. 11:5-13:24.)

27 49. Plaintiffs' Proposed Finding of Fact No. 49 is consistent with the
28 evidence at trial. It is uncontroverted that Mr. Tarnovsky gave conflicting

1 testimony at his deposition and in trial; indeed, he admitted that he had done so.
2 (Tarnovsky Trial Tr., 4/23/08, Vol. 3, pp. 16:25-17:11.) As the finder of fact on
3 Plaintiffs' § 17200 claim, the Court may resolve this conflict. *See A-C Co.*, 173
4 Cal. App. 3d at 474. Moreover, contrary to Defendants' assertion, Plaintiffs are not
5 improperly using deposition testimony (Objections at 32); rather, Mr. Tarnovsky
6 was specifically questioned regarding his deposition testimony (to which
7 Defendants did not object), and his responses are part of the trial record.
8 (Tarnovsky Trial Tr., 4/23/08, Vol. 3, pp. 16:25-17:11.)

9 50. Plaintiffs' Proposed Finding of Fact No. 50 is consistent with Mr.
10 Saggiori's testimony at trial. The Court may evaluate the credibility of Mr.
11 Tarnovsky's testimony that he did not send the e-mail originating from an e-mail
12 address Mr. Tarnovsky admits he used. (Objections at 33, 34.) Moreover, the e-
13 mail contains information that the Court may reasonably infer originated from the
14 Headend Report (*compare* TR EX 2002 *with* TR EX 98).

15 52. In response to Defendants' Objections to Proposed Finding of Fact No.
16 52, Plaintiffs reiterate and incorporate herein their Response to Defendants'
17 Objection to Plaintiffs' Proposed Finding of Fact No. 50.

18 53. Plaintiffs' Proposed Finding of Fact No. 53 is a conclusion supported
19 by the testimony and documentary evidence in the subsequent Proposed Findings of
20 Fact and the entire record.

21 54. Plaintiffs' Proposed Finding of Fact No. 54 is consistent with the
22 evidence at trial. Indeed, it is uncontroverted that the term "Nipper": (1) was found
23 by Defendants in the EchoStar code during their hack of the EchoStar code
24 (Mordinson Trial Tr., 4/11/08, Vol. 2, p. 50:1-6; Objections at 35); and (2) was the
25 alias used by the person who posted the EchoStar code to the Internet (*Id.*).
26 Whether others could have viewed the term in the EchoStar code, or otherwise been
27 aware of the term, is not the subject of Plaintiffs' Proposed Finding of Fact No. 54.
28 (Objections at 35; Plaintiffs Proposed Findings of Fact at 8.) Nor is it relevant to

1 any issue. Finally, there is no jury verdict regarding whether the term “Nipper” was
2 contained in EchoStar’s code, found by Defendants, or was the alias of the person
3 who posted EchoStar’s code to the Internet. (Verdict Tr., 5/15/08, pp. 33:12-
4 42:22.)

5 55. Plaintiffs’ Proposed Finding of Fact No. 55 is consistent with the
6 evidence at trial. Defendants’ Objection that the facts, even if true, do not prove
7 Defendants are responsible for the Nipper Post is inapposite. Indeed, no single fact
8 in this case is expected to prove or disprove Plaintiffs’ § 17200 claim. Rather,
9 Plaintiffs’ Findings of Fact *in sum* demonstrate that it is more likely true than not
10 that Defendants are responsible for the Nipper Post. Moreover, there is no jury
11 verdict addressing whether NDS was or was not responsible for the Nipper Post.
12 (Verdict Tr., 5/15/08, pp. 33:12-42:22.)

13 56. In response to Defendants’ Objections to Plaintiffs’ Proposed Finding
14 of Fact No. 56, Plaintiffs reiterate and incorporate herein their Response to
15 Defendants’ Objection to Plaintiffs’ Proposed Finding of Fact No. 55.

16 57. In response to Defendants’ Objections to Plaintiffs’ Proposed Finding
17 of Fact No. 57, Plaintiffs reiterate and incorporate herein their Response to
18 Defendants’ Objection to Plaintiffs’ Proposed Finding of Fact No. 55.

19 58. Plaintiffs’ Proposed Finding of Fact No. 58 is supported by TR EX 42.
20 This exhibit demonstrates that Defendants requested Mr. Tarnovsky to obtain an
21 account on Pirateden.com. (TR EX 42.) TR EX 39 provides the e-mail address to
22 which the Nipper Post was registered. (TR EX 39.) The Court may draw logical
23 conclusions and reasonable inferences from these facts and the record as to whether
24 the account identified in TR EX 39 is the account requested in TR EX 42. The
25 Court similarly may draw logical conclusions and reasonable inferences from these
26 facts and the record as to whether Defendants’ request for an account on
27 Pirateden.com in one instance makes it more likely than not that Defendants
28 requested Mr. Tarnovsky to create an account registered to

1 ChrisVon@s4interpass.com. (TR EX 39.) In further response to Defendants'
2 Objections to Plaintiffs' Proposed Finding of Fact No. 58, Plaintiffs reiterate and
3 incorporate herein their Response to Defendants' Objection to Plaintiffs' Proposed
4 Finding of Fact No. 55.

5 59. Plaintiffs' Proposed Finding of Fact No. 59 is consistent with TR EX
6 351; the alias Nipper2000 was registered on Pirateden.com using the e-mail address
7 ChrisVon@s4interpass.com. (TR EX 351.) Based upon the facts in evidence, the
8 Court may reasonably conclude and infer that Mr. Tarnovsky created this account at
9 the behest of, instruction by, or on behalf of Defendants. In further response to
10 Defendants' Objections to Plaintiffs' Proposed Finding of Fact No. 59, Plaintiffs
11 reiterate and incorporate herein their Response to Defendants' Objection to
12 Plaintiffs' Proposed Finding of Fact No. 55.

13 60. In response to Defendants' Objections to Plaintiffs' Proposed Finding
14 of Fact No. 60, Plaintiffs reiterate and incorporate herein their Response to
15 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 55.

16 61. Plaintiffs' Proposed Finding of Fact No. 61 is supported by TR EXs 39
17 and 42, and inferences drawn from Mr. Tarnovsky's trial testimony. Indeed, these
18 exhibits demonstrate that on at least one occasion Defendants requested Mr.
19 Tarnovsky to set up an account on Pirateden.com, and that the Nipper alias on
20 Pirateden.com was registered to ChrisVon@s4interpass.com. (TR EX 42, 39.)
21 Moreover, the conclusions drawn by Mr. Tarnovsky's testimony regarding the ICG
22 report provide sufficient evidence that Mr. Tarnovsky used the e-mail address
23 ChrisVon@s4interpass.com to register the Nipper alias. (*See* Plaintiffs' Proposed
24 Findings of Fact at 9, No. 62.) In further response to Defendants' Objections to
25 Plaintiffs' Proposed Finding of Fact No. 61, Plaintiffs reiterate and incorporate
26 herein their Response to Defendants' Objection to Plaintiffs' Proposed Finding of
27 Fact No. 55.

28

1 62. Plaintiffs' Proposed Finding of Fact No. 62 is consistent with the
2 evidence at trial. Indeed, NDS does not contest that ICG "linked" Mr. Tarnovsky to
3 the Nipper alias. (Objections at 39.) Moreover, Mr. Bedser's testimony states that
4 while his use of the term does not signify "definitive" proof between an e-mail
5 address and an individual, it does signify that there is a connection between the two.
6 (Bedser Trial Tr., 4/24/08, Vol. 2, p. 9:2-8.) The Court may conclude from the
7 uncontroverted fact that ICG found a connection between Mr. Tarnovsky and the
8 Nipper alias, as well as the other facts contained in Plaintiffs' Proposed Findings of
9 Fact, that Defendants are responsible for the Nipper Post.

10 63. Plaintiffs' Proposed Finding of Fact No. 63 is consistent with the
11 evidence at trial. Contrary to Defendants' assertion, Mr. Tarnovsky did not deny
12 using the alias "ChrisGeo." (Objections at 41; Tarnovsky Trial Tr., 4/123/08, Vol.
13 2, p. 60: 13-15 ("Q: You testified a moment ago that you've used [the ChrisGeo]
14 alias, correct? A: I believe so.") Mr. Tarnovsky then *changed* his testimony and
15 stated that he did not "believe" that he had used the alias "Chris Geo," but instead,
16 that he had used a very similar alias, "ChristoGeo." (*Id.* at 60:24-25.) Again
17 contrary to Defendants' assertions, Mr. Tarnovsky testified that he used the e-mail
18 address "Geo@tfb.com"; thus, Mr. Tarnovsky did not deny using the alias "Geo."
19 (*Id.* at 61:11-15.) Mr. Tarnovsky's trial testimony supports the conclusion that the
20 only alias that Mr. Tarnovsky specifically denied using was the Nipper alias. (*See*
21 Plaintiffs' Proposed Finding of Fact No. 63.) In further response to Defendants'
22 Objections to Plaintiffs' Proposed Finding of Fact No. 63, Plaintiffs also reiterate
23 and incorporate herein their Response to Defendants' Objection to Plaintiffs'
24 Proposed Finding of Fact No. 55.

25 64. Plaintiffs' Proposed Finding of Fact No. 64 is consistent with Mr.
26 Tarnovsky's trial testimony. Leaving aside the question of the aliases addressed in
27 Plaintiffs' Proposed Findings of Fact No. 63, Mr. Tarnovsky admitted that the
28 remainder of the information about which he was questioned on the ICG report was

1 substantially accurate. For example, Mr. Tarnovsky admitted that the financial
2 information reported on the ICG report was accurate. (Tarnovsky Trial Tr.,
3 4/23/08, Vol. 2, pp. 63:15-64:16.) He also admitted that the information reported
4 under the heading “Site Survey” was accurate. (*Id.* at 64:17-65:6.) Mr. Tarnovsky
5 admitted that the report accurately reflected that he traveled to Dayton, Ohio in
6 2002. (*Id.* at 66:25-67:4.) Mr. Tarnovsky further agreed with the information
7 contained in the section of the ICG report entitled, “Connection to Texas.” (*Id.* at
8 67:23-68:20.)

9 65. Plaintiffs’ Proposed Finding of Fact No. 65 is consistent with the
10 evidence at trial. Dr. Avi Rubin specifically testified that the code contained in the
11 Nipper Post of December 2000 is materially identical to the code contained in the
12 Headend Report. (A. Rubin Trial Tr., 4/16/08, Vol. 3, p. 43:15-18.) As such,
13 Plaintiffs reject the notion that Mr. Nigel Jones’s testimony to the contrary is
14 un rebutted. (Objections at 42.) Indeed, Dr. Rubin specifically rebutted Mr. Jones’s
15 testimony in several respects. (*E.g., id.* at 41:25-42:6, 42:7-43:14.) In further
16 response to Defendants’ Objections to Plaintiffs’ Proposed Finding of Fact No. 65,
17 Plaintiffs reiterate and incorporate herein their Response to Defendants’ Objection
18 to Plaintiffs’ Proposed Finding of Fact No. 55.

19 66. In response to Defendants’ Objections to Plaintiffs’ Proposed Finding
20 of Fact No. 66, Plaintiffs reiterate and incorporate herein their Responses to
21 Defendants’ Objection to Plaintiffs’ Proposed Findings of Fact Nos. 55 and 65.

22 67. In response to Defendants’ Objections to Plaintiffs’ Proposed Finding
23 of Fact No. 67, Plaintiffs reiterate and incorporate herein their Responses to
24 Defendants’ Objection to Plaintiffs’ Proposed Findings of Fact Nos. 55 and 65.

25 68. Plaintiffs’ Proposed Finding of Fact No. 68 is consistent with the
26 evidence at trial. Mr. Pizzo testified that he identified and reposted EchoStar code,
27 which others confirmed was sufficient to pirate EchoStar’s signal. (Pizzo Trial Tr.,
28 4/24/08 Vol. 1, pp. 56:18-57:25, 58:15-23, 61:4-8.) In further response to

1 Defendants' Objections to Plaintiffs' Proposed Finding of Fact No. 68, Plaintiffs
2 reiterate and incorporate herein their Response to Defendants' Objection to
3 Plaintiffs' Proposed Finding of Fact No. 55.

4 69. In response to Defendants' Objections to Plaintiffs' Proposed Finding
5 of Fact No. 69, Plaintiffs reiterate and incorporate herein their Response to
6 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 55. Indeed,
7 Defendants do not deny that Mr. Tarnovsky e-mailed his colleagues at NDS on
8 December 22 reporting that the EchoStar code was available on the DR7 website
9 even though Mr. Pizzo testified that he posted the code on December 23.⁸

10 70. Plaintiffs' Proposed Finding of Fact No. 70 is supported by the
11 evidence at trial. For example, Mr. Mordinson testified that he was involved in the
12 Canal+ hack on behalf of NDS, that the Canal+ hack was posted on the Internet,
13 and that he used the same processes and techniques to hack the Canal+ card as he
14 used to hack the EchoStar card. (Mordinson Trial Tr., 4/11/08, Vol. 1, pp. 35:25-
15 36:14.)

16 71. Plaintiffs' Proposed Finding of Fact No. 71 is supported by the
17 evidence at trial. Indeed, Defendants do not contest the accuracy of this Proposed
18 Finding of Fact. (Objections at 46.) Moreover, there is no jury verdict as to
19 whether Mr. Tarnovsky was paid by HarperCollins. (Verdict Tr., 5/15/08, pp.
20 33:12-42:22.)

21 72. Plaintiffs' Proposed Finding of Fact No. 72 is supported by the
22 evidence at trial. Indeed, Defendants do not contest the accuracy of this Proposed
23 Finding of Fact. (Objections at 46.) Moreover, there is no jury verdict as to
24
25

26 ⁸ Plaintiffs' Proposed Finding of Fact No. 69 does contain a mis-cite. The correct
27 citation to the record should be: Tarnovsky Trial Tr., 4/23/08, Vol. 4, pp. 30:22-
28 31:1, not p. 27:21-25. This was an inadvertent error not intended to mislead or
confuse the Court or Defendants.

1 whether Mr. Tarnovsky received a bonus from NDS Israel. (Verdict Tr., 5/15/08,
2 pp. 33:12-42:22.)

3 73. Plaintiffs' Proposed Finding of Fact No. 73 is supported by the
4 evidence at trial. Indeed, Defendants do not contest that the EchoStar hack posted
5 to the Internet was effective as to all EchoStar cards and allowed pirates to pirate
6 ROM3 cards. (Objections at 47.) Plaintiffs' conclusion that Defendants were
7 responsible for the posting, and that the posting contained the methodology
8 developed by Defendants, is supported by Plaintiffs' Proposed Findings of Fact as
9 described above. Furthermore, testimony by various witnesses at trial demonstrates
10 that the patches generated in 2001 were insufficient to stem the piracy caused by
11 the Internet post. (A. Rubin Trial Tr., 4/16/08, Vol. 3, p. 134:2-16, Vol. 4, p. 4:7-9;
12 Nicholas Trial Tr., 4/15/08, Vol. 1, pp. 71:16-72:5; Tarnovsky Trial Tr. 4/23/08,
13 Vol. 4, pp. 54:22-25, 55:7-10.) Finally, there is no jury verdict as to whether
14 Defendants were responsible for the Nipper Post. (Verdict Tr., 5/15/08, pp. 33:12-
15 42:22.)

16 74. In response to Defendants' Objections to Plaintiffs' Proposed Finding
17 of Fact No. 74, Plaintiffs reiterate and incorporate herein their Responses to
18 Defendants' Objection to Plaintiffs' Proposed Findings of Fact Nos. 43, 55, and 73.

19 76. Plaintiffs' Proposed Finding of Fact No. 76 is consistent with Dr.
20 Rubin's testimony at trial. In fact, although he describes it as negligible, Mr.
21 Jones's testimony is also consistent with Dr. Rubin's testimony and Plaintiffs'
22 Proposed Finding of Fact No. 76. Mr. Jones admits that a change to the code would
23 slow communications between the receiver and the card by 10%. (Jones Trial Tr.,
24 4/16/08, Vol. 3, p. 30:6-7.)

25 77. In response to Defendants' Objections to Plaintiffs' Proposed Finding
26 of Fact No. 77, Plaintiffs reiterate and incorporate herein their Response to
27 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 76.
28

1 78. In response to Defendants' Objections to Plaintiffs' Proposed Finding
2 of Fact No. 78, Plaintiffs reiterate and incorporate herein their Responses to
3 Defendants' Objection to Plaintiffs' Proposed Findings of Fact Nos. 43, 55, and 73.

4 79. In response to Defendants' Objections to Plaintiffs' Proposed Finding
5 of Fact No. 79, Plaintiffs reiterate and incorporate herein their Responses to
6 Defendants' Objection to Plaintiffs' Proposed Findings of Fact Nos. 43, 55, and 73.

7 80. Plaintiffs' Proposed Finding of Fact No. 80 is consistent with the
8 evidence at trial. Indeed, as cited in this Proposed Finding of Fact, even Mr.
9 Tarnovsky agreed that a card swap was necessary. (Plaintiffs' Proposed Findings
10 of Fact and Conclusions of Law at 12; Tarnovsky Trial Tr., 4/23/08, Vol. 3, pp.
11 35:18-36:1.) As such, Defendants are incorrect that Mr. Jones's testimony is not
12 rebutted in this respect. (Objections at 50.) There is sufficient evidence in the
13 record for this Court to conclude that the card swap was indeed necessary.
14 (Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 12.)

15 81. Plaintiffs' Proposed Finding of Fact No. 81 is supported by the
16 evidence at trial, and Defendants do not rebut the accuracy of this Proposed Finding
17 of Fact. (Objections at 50-51.) As repeated several times above, there is no verdict
18 as to whether Defendants were responsible for the Internet Post and therefore the
19 card swap; rather, this conclusion is drawn and inferred from the factual findings in
20 Plaintiffs' Proposed Findings of Fact, which are in turn consistent with the
21 testimony at trial.

22 82. Plaintiffs' Proposed Finding of Fact No. 82 is supported by the
23 evidence at trial. Indeed, Mr. Orban testified that the cost of the card swap was
24 \$94,638,625.10. (Orban Trial Tr., 4/17/08, Vol. 4, pp. 8:7-13:2.) It is a logical
25 conclusion and reasonable inference that the value of a secure card includes the
26 same elements as a card swap, as it reflects the creation and circulation of a secure
27 card. (*Id.*) Finally, Plaintiffs' Proposed Finding of Fact No. 82 does not relate to
28 whether a card swap would become inevitable at some point regardless of the

1 Nipper Post, nor is there a jury verdict that supports Defendants' allegation.
2 (Objections at 51.)

3 83. Plaintiffs' Proposed Finding of Fact No. 83 is supported by the
4 evidence at trial. As a corporate representative, it is of no consequence whether Mr.
5 Lenoir was employed by NagraStar at the time that it was damaged by Defendants'
6 conduct. Rather, Mr. Lenoir testified as to his corporate knowledge. (Lenoir Trial
7 Tr., 4/10/08, Vol. 1, p. 64:11-16.) Finally, Plaintiffs' Proposed Finding of Fact No.
8 83 does not relate to whether a card swap would become inevitable at some point
9 regardless of the Nipper Post. (*See* Plaintiffs' Proposed Finding of Fact No. 83.)

10 84. In response to Defendants' Objections to Plaintiffs' Proposed Finding
11 of Fact No. 84, Plaintiffs reiterate and incorporate herein their Response to
12 Defendants' Objection to Plaintiffs' Proposed Finding of Fact No. 83.

13 85. Plaintiffs' Proposed Finding of Fact No. 85 is supported by the
14 evidence at trial. Indeed, as demonstrated in the Proposed Finding of Fact, Mr.
15 Peled agreed that consumers ultimately bear the cost of piracy; Defendants did not
16 proffer a witness to comment upon the amount by which consumers are taxed or
17 whether any such increase harms EchoStar's business. Indeed, Defendants do not
18 cite to anything in the record to support their allegations in their Objection to
19 Plaintiffs' Proposed Finding of Fact No. 85. Finally, there is no jury verdict as to
20 whether the consumer bears the ultimate price of piracy. Therefore, Plaintiffs'
21 Proposed Finding of Fact No. 85 remains uncontroverted.

22 **V. Plaintiffs' Response to Defendants' Objections to Plaintiffs' Proposed**
23 **Conclusions of Law.**

24 Defendants object to Plaintiffs' Proposed Conclusions of Law because
25 Defendants argue that the Court may not adopt Plaintiffs' Proposed Findings of
26 Fact and therefore the Conclusions of Law are unsupported. (Objections at 54.)
27 However, as noted above, the Court must make its own Findings of Fact regarding
28 the conduct underlying Plaintiffs' Section 17200 claim, and is not obliged to adopt

1 the findings in the Jury's Verdict because the findings do not relate to Plaintiffs'
2 Section 17200 claim. *A-C Co.*, 173 Cal. App. 3d at 474. Therefore, Plaintiffs may
3 ask the Court to find Defendants liable for causing the Nipper Post. (Objections at
4 55; Plaintiffs' Proposed Findings of Fact at 11-13.)

5 Defendants also attack Plaintiffs' standing to seek restitution from
6 Defendants. (Objections at 55.) However, Plaintiffs have demonstrated that
7 Defendants took from Plaintiffs the value of a secure card, that Plaintiffs were
8 harmed by this conduct, and that the value of a secure card is \$94,638,625.10.
9 (Plaintiffs' Proposed Findings of Fact at 4-11, 1-3, 11-13.) Plaintiffs therefore have
10 not only established standing to assert a claim for restitution and an injunction
11 under § 17200, but have also established that Defendants violated § 17200.

12 Moreover, Defendants' unclean hands is not an affirmative defense to
13 Plaintiffs' § 17200 claim as Defendants contend. (Objections at 65.) However, as
14 was true with respect to Defendants' effort to raise unclean hands as an affirmative
15 defense to those claims the Jury considered, the conduct that is the basis of
16 Defendants' unclean hands affirmative defense does not relate to the conduct that is
17 the subject of Plaintiffs' § 17200 claim. *See* May 6, 2008 Order re Rule 50 Motions
18 ("Order") at 13. The relationship between Plaintiffs' Section 17200 claim and the
19 conduct allegedly constituting unclean hands must be direct. *See Cal. Satellite Sys.,*
20 *Inc. v. Nichols*, 170 Cal. App. 3d 56, 70 (1985); *Fibreboard Paper Prods. Corp. v.*
21 *East Bay Union of Machinists*, 227 Cal. App. 2d 675, 728 (1964). Conduct in the
22 abstract unrelated to the claim to which it is asserted as a defense does not
23 constitute unclean hands. *Republic Molding Corp. v. B.W. Photo Utils.*, 319 F.2d
24 347, 349 (9th Cir. 1963).

25 Defendants again raise the allegation that Plaintiffs improperly acquired
26 several thousand pages of stolen trade secret documents. (Objections at 65.) But
27 by the time this alleged misconduct occurred, Plaintiffs' Section 17200 claim had
28 already existed "for some time," precluding a finding that the two were related.

1 (Order at 13.) The alleged misappropriation of documents is simply not related to
2 Defendants' piracy, which is the basis of Plaintiffs' Section 17200 claim. *Id.*
3 Moreover, Defendants did not establish at trial that Plaintiffs engaged in this
4 conduct. Indeed, Plaintiffs' alleged theft of documents was the basis of
5 Defendants' counterclaim for trade secret misappropriation, which the Jury
6 completely rejected. (Verdict Tr., 5/15/08, Vol. 1, pp. 40:3-15.) Defendants cannot
7 argue, as they do, that, on the one hand, the Court is tied to the Jury's findings with
8 respect to their conduct but, on the other hand, the Court is not tied to the Jury's
9 findings with respect to Plaintiffs' conduct.

10 Finally, Defendants argue that Plaintiffs engaged in conduct similar to their
11 own. (Objections at 65-66.) But it stretches credibility to suggest that an alleged
12 demonstration given by EchoStar President Charles Ergen at a meeting with
13 Defendants to show them that their system was compromised is conduct similar to
14 the secretive and illegal conduct in which Defendants engaged. (D. Rubin Trial
15 Testimony, 4/22/08, Vol. 2, pp. 14:16-15:15.) The Court should reject Defendants'
16 attempt to raise the unclean hands affirmative defense to Plaintiffs' Section 17200
17 claim. Plaintiffs' Proposed Conclusions of Law are supported by the evidence and
18 the law.

19 Plaintiffs respond below to Defendants' Objections to Plaintiffs' Proposed
20 Conclusions of Law:⁹

21 2. Plaintiffs' Proposed Conclusion of Law No. 2 is consistent with the
22 facts and the Jury's Verdict. In fact, the Verdict establishes that Defendants
23 violated §§ 605(a), 593d(a), and 593e(b), which establish a *per se* violation of §
24 17200. *Kasky*, 27 Cal. 4th at 959 (2002).

25
26
27 ⁹ Plaintiffs respond herein only to those Conclusions of Law to which Defendants
28 object. The number paragraphs correlate to the paragraph of each of Plaintiffs'
Proposed Conclusions of law.

1 3. Plaintiffs' Proposed Conclusion of Law No. 3 is consistent with the
2 facts and the Jury's Verdict. The facts demonstrate that Defendants engaged in an
3 unfair business practice when they caused the EchoStar hack to be posted on the
4 Internet. Cal. Bus. & Prof. Code § 17200; *Cel-Tech Comm., Inc. v. Los Angeles*
5 *Cellular Tele. Co.*, 20 Cal. 4th 163, 180 (1999).

6 4. Plaintiffs' Proposed Conclusion of Law No. 4 is consistent with the
7 facts and the Jury's Verdict. Plaintiffs have demonstrated that Defendants took
8 from them the value of a secure card. (Plaintiffs' Proposed Findings of Fact and
9 Conclusions of Law at 3-11.) Plaintiffs also have demonstrated that the value of a
10 secure card is the creation and circulation of the card. (*Id.* at 12, 19.)

11 5. Plaintiffs have demonstrated that, in the past, Defendants have
12 engaged in the conduct of which Plaintiffs complain here, and therefore are likely
13 to repeat the conduct, necessitating an injunction. *Id.* at 19; *Toomey*, 157 Cal. App.
14 3d at 26 (Plaintiffs need only show a reasonable probability that Defendants will
15 repeat the offenses).

16 **VI. Plaintiffs' Objections To Defendants' Proposed Findings Of Fact And** 17 **Conclusions of Law.**

18 **A. Defendants' Proposed Findings Of Fact Are Not Supported By** 19 **The Evidence.**

20 Defendants' Finding of Fact ("FOF") 1. In response to Defendants' FOF No.
21 1, Plaintiffs do not contest the fact that NDS has engaged in various efforts to
22 identify satellite pirates, including those that pirated EchoStar's signal. However,
23 Plaintiffs object to Defendants' Proposed Finding of Fact No. 1, the extent that
24 NDS's conduct in working with law enforcement to identify satellite pirates
25 indicates that NDS did not engage in piracy; indeed, the fact that NDS was engaged
26 in such efforts indicates that NDS had access to the identities and information about
27 satellite pirates such that it was uniquely positioned to undertake the
28 anticompetitive conduct of which complained of. (Objections at 66.)

1 FOF 2. In response to Defendants' Proposed Finding of Fact No. 2,
2 similarly, Plaintiffs do not contest NDS's contention that John Norris and Chris
3 Tarnovksy were engaged in efforts to identify satellite pirates. As noted above, this
4 fact again demonstrates that NDS had access to the identities and practices of
5 satellite pirates – including those that pirated EchoStar's signal. (Objections at 66-
6 67.) In further response to Defendants' Proposed Finding of Fact No. 2, Plaintiffs
7 also reiterate its objections to Finding of Fact No. 1.

8 FOF 3. Plaintiffs object to Defendants' Proposed Finding of Fact No. 3 to
9 the extent that Mr. Tarnovsky's testimony cited by Defendants does not establish
10 that he "observed postings on the Internet." Rather, Mr. Tarnovsky testified that
11 NDS was allegedly "disturbed" to discover that someone could download a file
12 from the Internet that would allow them to reprogram an NDS card to pirate
13 EchoStar's signal. (Objections at 67; Tarnovsky Trial Tr., 4/23/08, Vol. 3, pp.
14 22:2-23:1.) Plaintiffs further object to the extent that Mr. Tarnovsky's alleged
15 "viewing" of such Internet postings suggests that Defendants are not responsible for
16 the Nipper Post.

17 FOF 4. Plaintiffs agree that the evidence supports a finding that Mr.
18 Tarnovsky downloaded EchoStar code from the Internet, loaded it onto a P1 card,
19 and inserted it into an EchoStar receiver. Plaintiffs object to Defendants' Finding
20 of Fact No. 4 to the extent that it suggests that Mr. Tarnovsky was merely "testing
21 the website's claims," as the evidence at trial suggests that Mr. Tarnovsky was
22 responsible for posting the EchoStar code to the Internet. (See Plaintiffs' Proposed
23 Findings of Fact and Conclusions of Law at 8-11.)

24 FOF 5. No objection.

25 FOF 6. Plaintiffs agree that Mr. Tarnovsky intercepted EchoStar's signal
26 without EchoStar's authorization using a pirated card in violation of state and
27 federal law. (Objections at 67, 11-12.)
28

1 FOF 7. Plaintiffs object to Defendants' Proposed Finding of Fact No. 7 on
2 the basis that the testimony of Mr. Nicholas and Mr. Kudelski cited by Defendants
3 does not establish that Plaintiffs used pirated devices on legitimate DirecTV boxes
4 and accessed DirecTV programming. Indeed, both of these men testified that they
5 did not know whether this occurred. (Kudelski Trial Tr., 4/29/08, Vol. 1, pp.
6 29:18-34:3; Nicholas Trial Tr., 4/15/08, Vol. 2, pp. 30:8-31:18.) Moreover, the trial
7 transcript to which Defendants cite as containing Mrs. Guggenheim's testimony
8 does not contain Mrs. Guggenheim. (Objections at 68.) Indeed, Trial Tr. 4/30/08,
9 Vol. 4 contains only the testimony of Messrs. Hasak and Kummer. (See Trial Tr.,
10 4/30/08, Vol. 4, p. 3:1-12.) Finally, Mr. Rubin's testimony, cited by Defendants,
11 establishes that Mr. Rubin and an NDS employee were present at the meeting with
12 Mr. Ergen in which a pirated DirecTV card was tested. (Objections at 68; D. Rubin
13 Trial Tr., 4/22/08, Vol. 2, p. 15:1-13.) Clearly, Defendants were at all times aware
14 of and in fact participated in this test. Plaintiffs further object to Defendants'
15 Proposed Finding of Fact No. 7 to the extent that it suggests that Plaintiffs' test of
16 the pirated DirecTV card described in Mr. Rubin's testimony is the same conduct
17 about which Plaintiffs complain herein that Defendants engaged. As is clear from
18 the testimony of Mr. Kudelski, cited by Defendants, NagraStar acquired, not
19 developed, piracy devices. (Objections at 68; Kudelski Trial Tr., 4/29/08, Vol. 1,
20 pp. 29:18-34:3.) Plaintiffs did not hide from NDS their test of the pirated DirecTV
21 card, but instead performed the test in Mr. Rubin's presence. (D. Rubin Trial Tr.,
22 4/22/08, Vol. 2, p. 15:1-13.) This is an important distinction.

23 FOF 8. Plaintiffs object to Defendants' Proposed Finding of Fact No. 8 to
24 the extent that it suggests that Mr. Gee was acting on Plaintiffs' behalf when he
25 purchased DirecTV documents. In fact, as is clear from the Jury's Verdict
26 completely rejecting Defendants' trade secret misappropriation counterclaim,
27 Defendants did not establish that Mr. Gee was working on the Plaintiffs' behalf
28 when he purchased the DirecTV documents, and Plaintiffs did not illicitly purchase

1 stolen documents. (Verdict Tr., 5/15/08, Vol. 1, p. 40:3-15.) Likewise, the
2 evidence does not establish that Plaintiffs “used” Mr. Ereiser to obtain stolen NDS
3 documents. Rather, the trial testimony demonstrates that Mr. Ereiser was not
4 instructed to obtain these documents, he did not inform Plaintiffs of the source of
5 the documents, and Mr. Guggenheim did not learn that the documents were stolen
6 until after this lawsuit was filed. (Ereiser Trial Testimony, 4/22/08, Vol. II, pp.
7 39:16-22, 52:1-3; Guggenheim Trial Testimony, 04/18/08, Vol. I, pp. 100:10-
8 101:19, 134:19-22.)

9 **B. Defendants’ Conclusions of Law Are Not Supported By The Facts**
10 **Or Law.**

11 Defendants’ Proposed Conclusion of Law (“COL”) 1. Plaintiffs object to
12 Defendants’ COL No. 1 because Plaintiffs have demonstrated that Defendants
13 engaged in an unlawful business practice in violation of Cal. Bus. & Prof. Code §
14 17200 and Plaintiffs have standing to bring a claim against Defendants for this
15 violation because they have been harmed. Plaintiffs’ Proposed Findings of Fact
16 and Conclusions of Law at 13-14, 18-19; *Kasky*, 27 Cal. 4th at 959 (a violation of
17 the underlying law is a *per se* violation of § 17200).

18 COL 2. Plaintiffs object to Defendants’ COL No. 2 because Plaintiffs have
19 demonstrated that Defendants engaged in an unfair business practice in violation of
20 Cal. Bus. & Prof. Code § 17200 and Plaintiffs have standing to bring a claim
21 against Defendants for this violation because they have been harmed. Plaintiffs’
22 Proposed Findings of Fact and Conclusions of Law at 15-17; 18-19; *Cel-Tech*
23 *Comm., Inc.*, 20 Cal. 4th at 186.

24 COL 3. Plaintiffs object to Defendants’ COL No. 3 because, as
25 demonstrated *infra* Section II.d, Plaintiffs have demonstrated that they are entitled
26 to restitution in the amount of \$94,638,625.10 under Cal. Bus. & Prof. Code
27 §§ 17200 and 17203. Plaintiffs have also demonstrated that Defendants do not
28 have an unclean hands affirmative defense to Plaintiffs’ § 17200 claim.

1 COL 4. Plaintiffs object to Defendants' COL No. 4 because Plaintiffs have
2 demonstrated that they are entitled to an injunction under Cal. Bus. & Prof. Code
3 §§ 17200 and 17203, and that Defendants do not have an unclean hands affirmative
4 defense to Plaintiffs' Section 17200 claim.

5 DATED: June 26, 2008

6 Respectfully submitted,

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8

9
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