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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. SA CV03-950 DOC(ANx) Date July 25, 2005

Title ECHOSTAR SATELLITE CORPORATION, et. al., -v- NDS GROUP PLC, et. al.,

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PRESENT:

HON. DAVID O. CARTER, JUDGE

Kristee Hopkins	Deborah Parker
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
Chad M. Hagan	Darin W. Snyder
Stuart T. Miller	Anthony B. Gordon
David M. Noll	Michael W. Fitzgerald
	Nathaniel L. Dilger

PROCEEDINGS:

1. MOTION BY DEFENDANT NDS TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
2. MOTION BY DEFENDANT NDS TO STRIKE PORTIONS OF PLAINTIFFS' FOURTH AMENDED COMPLAINT
3. MOTION BY DEFENDANT JOHN NORRIS TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
4. MOTION BY DEFENDANT GEORGE TARNOVSKY TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
5. MOTION BY DEFENDANT REUVEN HASAK TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
6. MOTION BY DEFENDANT STANLEY FROST TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
7. MOTION BY DEFENDANT ALLEN MENARD TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
8. MOTION BY DEFENDANT LINDA WILSON TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
9. MOTION BY DEFENDANT MERVYN MAIN TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT
10. MOTION BY DEFENDANT CHRISTOPHER TARNOVSKY TO DISMISS PLAINTIFFS' FOURTH AMENDED COMPLAINT

Tentative rulings issued to counsel, copies of which attached hereto.

The matter is called. Counsel state their appearances. Argument by counsel.

Motions taken under submission.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

CASE NO. SACV 03-950 DOC (ANx)

[TENTATIVE] O R D E R GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE PORTIONS OF THE FOURTH AMENDED COMPLAINT

Defendants NDS Group PLC and NDS Americas, Inc. (collectively "NDS") move to strike portions of the Fourth Amended Complaint ("4AC"). For the reasons stated below, the

Court GRANTS IN PART AND DENIES IN PART the motion to strike.

I. LEGAL STANDARD

Under Rule 12(f), a party may move to strike "any redundant, immaterial, impertinent, or scandalous matter from the pleadings." Fed. R. Civ. P. 12(f). "The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993) *rev'd on other grounds in Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 114 S. Ct. 1023 (1994) (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)). Motions to strike are generally viewed with disfavor and are not frequently granted. *Lazar v. Trans Union LLC*, 195 F.R.D. 665, 669 (C.D.Cal. 2000). "Further, courts must view the pleadings under attack in the light more favorable to the pleader." *Id.* Motions to strike "are generally not granted unless it is clear that matter to be stricken could have no possible bearing on the subject matter of litigation." *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D.Cal. 1992).

II. DISCUSSION

NDS argues that any allegation concerning conduct before June 6, 1999 and any allegation regarding the Canal+ litigation should be struck from the complaint because those allegations are irrelevant to Plaintiffs claims and serve only to confuse the issues and inflame the jury. Although the 4AC is replete with detailed allegations of conduct that occurred before June 6, 1999, those background facts are not wholly irrelevant to Plaintiffs' claims. To the extent that Plaintiffs will be unable to present evidence supporting these allegations at trial, the Court will also entertain motions to prevent the jury from seeing the allegations. But striking the allegations from the complaint at this point would serve no purpose.

NDS also argues that personal information, such as address and phone number, of Christopher Tarnovsky should be stricken from the complaint. While the Court agrees that it is unnecessary and potentially dangerous to include Tarnovsky's personal information in the complaint, no such information is included. Tarnovsky's personal information has already been redacted.

Next, NDS argues that numerous inflammatory and argumentative allegations as well as selective quotations should be stricken from the complaint. Although the complaint is rife with innuendo and argument, no allegation is so inflammatory that it must be stricken from the complaint. If NDS is concerned that statements in the complaint will unfairly inflame the jury, then after discovery and motions for summary judgment, NDS can move to preclude the jury from seeing those portions of the complaint. If NDS is, on the other hand, concerned that portions of the complaint will be seen by customers and damage NDS's reputation, whatever damage that may be done has already been done. The complaint and previous versions are already available to the public.

Finally, NDS argues that the Court should strike Plaintiffs' improper request for "restitution on behalf of their customers who were mislead [sic] and defrauded by Defendants' actions" under California Business & Professions Code section 17200. *See* 4AC ¶ 443. NDS is correct that Plaintiffs are not bringing a representative action on behalf of the general public and, thus, Plaintiffs cannot seek restitution on behalf of Plaintiffs' customers. NDS also argues that Plaintiff's request for "monetary damages to be paid from Defendant to Plaintiff to the extent that Defendants have directly taken money or property from Plaintiffs" should be stricken. *See* 4AC ¶ 443. NDS is correct that because Plaintiffs do not claim that Defendants took money or property directly from Plaintiffs, this request for relief is improper. These two portions of paragraph 443 are STRICKEN from the complaint.

III. DISPOSITION

For the reasons stated above, the Court GRANTS IN PART AND DENIES IN PART NDS's motion to strike. The portions of paragraph 443 quoted above are STRICKEN from the Fourth Amended Complaint.

IT IS SO ORDERED.

DATED: July 25, 2005

DAVID O. CARTER
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ECHOSTAR SATELLITE CORP., ECHOSTAR COMMUNICATIONS CORP., ECHOSTAR TECHNOLOGIES CORP., and NAGRASTAR L.L.C., Plaintiffs, v. NDS GROUP PLC, NDS AMERICAS, INC., JOHN NORRIS, REUVEN HASAK, OLIVER KOMMERLING, JOHN LUYANDO, PLAMEN DONEV, VESSELINE NEDELTCHEV, CHRISTOPHER TARNOVSKY, ALLEN MENARD, LINDA WILSON, MERVYN MAIN, DAVE DAWSON, SHAWN QUINN, ANDRE SERGEI, TODD DALE, STANLEY FROST, GEORGE TARNOVSKY, BRIAN SOMMERFIELD, ED BRUCE, "BEAVIS," "JAZZERCZ," "STUNTGUY," and JOHN DOES 1-100, Defendants.	CASE NO. SACV 03-950 DOC (ANx) [TENTATIVE] O R D E R DENYING MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION BY GEORGE TARNOVSKY AND STANLEY FROST and GRANTING MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION BY REUVEN HASAK, EDWIN BRUCE, MERVYN MAIN, AND LINDA WILSON

Before the Court are motions to dismiss for lack of personal jurisdiction by Defendants Reuven Hasak, George Tarnovsky ("Tarnovsky Sr."), Stanley Frost, Edwin Bruce, Mervyn

Main,[1] and Linda Wilson. After reviewing the moving, opposing, and replying papers, the Court DENIES the motions of Tarnovsky Sr. and Frost and GRANTS the motions of Hasak, Bruce, Main, and Wilson.

I. BACKGROUND

Echostar and NDS are competitors in the "conditional access systems" market. Echostar owns and operates a subscription-based television service known as the DISH Network. In order to subscribe to the DISH Network, a consumer must have the necessary equipment, which consists of: (1) a satellite dish antenna, (2) an integrated receiver/decoder ("set-top box"), and (3) an EchoStar Access Card. 4AC ¶ 74. The Access Card is the size of a credit card and it contains a microprocessor chip that works in conjunction with the receiver to allow the receiver to decrypt encrypted signals coming from satellites. The Access Card microprocessor, in conjunction with the receiver/decoder, is programmed to handle routine telecommunications over telephone lines with respect to a viewer purchase of a pay-per-view movie or other event. Echostar has a security system to encrypt its satellite signal. The system is provided by NagraStar, also a Plaintiff in the suit. Defendant NDS competes with NagraStar in the "conditional access systems" market, and is an English corporation. NDS supplies a conditional access system to DirecTV, a U.S. company.

Echostar's claims are all essentially based on one unified scheme involving all defendants, which was allegedly orchestrated by NDS. As alleged by Echostar, between 1995 and 1997, NDS was experiencing problems due to the fact that its security system had been hacked into and compromised a number of times. Rather than competing legitimately, NDS undertook a scheme to control the compromising of its own conditional access system and to direct the compromise of its competitors' systems. As alleged, this scheme occurred in two phases. The first phase consisted of controlling piracy of NDS's own system whereas the second phase, occurring in four steps, consisted of compromising the security systems of NDS's

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[1]When the Court refers to Mervyn Main, it is referring to the individual sued under the name "Mervin Main."

competitors.

In the first phase, NDS hired "the world's most infamous hackers" as double agents to control the hacking of its own conditional access system. Phase one occurred sometime during or prior to 1997. In this first phase, NDS allegedly hired defendants Christopher Tarnovsky, Oliver Kommerling, Plamen Donev, Vesselin Nedeltchev, and others to hack into NDS's own security system and to simultaneously provide "electronic counter measures" or ECMs that NDS then sold to its own customers to fix any problems caused by the compromised security.

The second phase of the alleged scheme occurred in four steps and involved NDS turning its hacker employees against Plaintiffs' conditional access system. Step one occurred in Haifa, Israel and it consisted of cracking the Read Only Memory ("ROM") and Electronically Erasable Programmable Read Only Memory ("EEPROM") codes used in Plaintiffs' Access Cards. The hacking of such a security system is a very difficult process and requires sophisticated technology and a sophisticated laboratory equipped with an electron microscope. Plaintiffs have proof that NDS has such facilities in the way of a declaration by Kommerling who was a principal shareholder of ADSR, a company that provides security services to NDS. He declares that he was instrumental in establishing such a lab for NDS in Haifa, Israel in 1996. He also declares that NDS engineers in the Haifa facility performed a similar invasive attack on other access cards.

Step two of the second phase involved transferring these unlawfully extracted ROM and EEPROM codes to a pirating software engineer capable of using them to unlawfully access and reprogram Plaintiffs' Access Cards. Plaintiffs allege that NDS accomplished step two at a meeting between Tarnovsky, Rueven Hasak from Israel and John Norris from California when Hasak and Norris transferred Plaintiffs' ROM and EEPROM codes to Tarnovsky. Tarnovsky then used Plaintiffs' codes to build a pirating device, allegedly called "the stinger," that was capable of reprogramming Plaintiffs' Access Cards thereby allowing others to gain unauthorized access to Plaintiffs' satellite television.

Step three of the second phase involved distributing the reprogrammed Echostar Access Cards to the pirating community through the use of a controlled distribution network. NDS and

Tarnovsky enlisted the aid of Allen Menard and his website for hackers, www.dr7.com, to distribute the reprogrammed cards. Other alleged Internet-based distributers include Dave Dawson, Shawn Quinn, Todd Dale, Andre Sergei, and Stanley Frost. Mervyn Main, Linda Wilson, and Edwin Bruce are not alleged to have owned or operated any of the websites, but are each alleged to have assisted in the distribution network in some way.

Plaintiffs allege that NDS controlled this distribution network because the "stinger," which was developed by NDS and Tarnovsky and subsequently provided to Menard, would only reprogram a predetermined number of Access Cards before it would "lock up." At that point, Menard would send cash payments to Tarnovsky in California. Once Tarnovsky received the payments, he would write a program to reactivate the "stinger" and enable it to reprogram more Access Cards. Plaintiffs undertook a number of electronic counter measures in attempts to disable the reprogrammed Access Cards.

Step four of the second phase involved NDS releasing the instructions and procedures necessary to obtain Plaintiffs' ROM and EEPROM codes directly to the pirating community in an effort to destroy Plaintiffs. Plaintiffs claim that NDS released the information to the pirating community because Plaintiffs' electronic counter measures thwarted the functioning of the controlled distribution network. Plaintiffs allege that on December 23 and 24, 2000, Tarnovsky posted to the internet a sequence of events and data, along with accompanying instructional code, that provided satellite pirates around the world with Plaintiffs' ROM code, Plaintiffs' EEPROM code and accompanying secret keys, and instructions on how to internally hack or access Plaintiffs' microprocessor. Plaintiffs allege that the distribution network continued to distribute reprogrammed access cards and continued to provide assistance to hackers through the use of websites until June of 2003.

Plaintiffs originally filed the complaint in this matter on June 6, 2003. On December 22, 2003, the Court granted in part and denied in part Defendants' motion to dismiss the First Amended Complaint. Plaintiffs filed the Second Amended Complaint on March 26, 2004. On July 21, 2004, the Court granted Defendants' motion for a more definite statement. On August 8, 2004, Plaintiffs filed the Third Amended Complaint. On February 28, 2005, the Court again

granted Defendants' motion for a more definite statement. Plaintiffs filed the Fourth Amended Complaint ("4AC") on March 30, 2005. Defendants now have filed motions to dismiss for lack of jurisdiction and for failure to state a claim and a motion to strike. This Order disposes only of the motions to dismiss for lack of personal jurisdiction.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(2), a court must dismiss a case when the court lacks jurisdiction over the person. Fed. R. Civ. P. 12(b)(2). When a defendant moves to dismiss for lack of personal jurisdiction before the court has heard testimony or made findings of fact, the plaintiff has the burden of making "a prima facie showing of jurisdictional facts." *John Doe I v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001) (citing *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th Cir. 1995)). Eventually, the plaintiff must establish jurisdiction by a preponderance of the evidence, either at a pretrial evidentiary hearing or at trial, but until such time, a prima facie showing suffices. Where not directly controverted, plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion to dismiss. *Id.* (citing *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996)). Likewise, conflicts between the facts in the parties' affidavits must be resolved in the plaintiff's favor. *Id.* The required prima facie showing must be of either general or specific jurisdiction.

Where there is no federal statute controlling the Court's exercise of personal jurisdiction, federal courts must look to the forum state's jurisdictional statute to determine whether it is proper to assert personal jurisdiction. *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482, 1484 (9th Cir. 1993); *see also Data Disc, Inc. v. Sys. Tech. Ass'n, Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977). The California long-arm statute provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code § 410.10. California courts have held that the limits of the state long-arm statute are co-extensive with the limits of the federal constitution. *Core-Vent*, 11 F.3d at 148; *Haisten v. Grass Valley Med. Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th Cir. 1986).

Under the due process clause, courts may exercise either general or specific jurisdiction.

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984). General personal jurisdiction is established where a defendant's activities in the forum state are "continuous and systematic." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 477-78, 105 S. Ct. 2174, 2182 (1985). Specific personal jurisdiction is established if the defendant has "minimum contacts" with the forum state that, although not "continuous and systematic," are sufficiently related to the cause of action "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Data Disc,* 557 F.2d at 1287 (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). Due process therefore requires that the defendant have fair warning that a particular activity may subject it to jurisdiction in the forum state. *Burger King*, 471 U.S. at 472, 105 S. Ct. at 2181 (1985).

In the Ninth Circuit, a three-part test is used to determine whether the defendant has "minimum contacts" with the forum state sufficient for specific jurisdiction: (1) The nonresident defendant must purposefully direct its activities at, or consummate some transaction with, the forum or resident thereof; or perform some act by which it purposefully avails itself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and (3) the exercise of jurisdiction must be reasonable. *Core-Vent*, 11 F.3d at 1485. If the defendant purposefully directed its activities at forum residents, exercise of jurisdiction is presumptively reasonable. *Haisten*, 784 F.2d at 1397.

In the context of Internet-based contacts, the Ninth Circuit has adopted a "sliding scale" test whereby the likelihood that personal jurisdiction can be exercised constitutionally is directly proportional to "the nature and quality of the commercial activity that an entity conducts over the Internet." *Gator.com Corp. v. L.L. Bean, Inc.*, 341 F.3d 1072, 1079 & n.8 (9th Cir. 2003) (quoting *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D Pa. 1997)). At one end of the scale are cases where general jurisdiction is proper because "a defendant clearly does business over the Internet" by way of a "highly interactive" "virtual store," which is so substantial in nature that it "approximates physical presence." *Id.* at 1079-80 (finding that retailer L.L. Bean's website that permitted California residents to view and purchase products

online as well as interact with L.L. Bean customer service representatives live over the internet was highly interactive and, thus, was adequate to confer general jurisdiction in California). At the other end of the scale are cases where a defendant has created a purely passive website that simply permits anyone who can find the site to view the information posted there. *Id.* at 1079 n.8; *see also Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418-20 (9th Cir. 1997) ("the essentially passive nature of [the defendant's] activity in posting a home page on the World Wide Web that allegedly used the service mark of [the plaintiff] does not qualify as purposeful activity invoking the benefits and protections of [the plaintiff's home state]"). "The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer." *Gator.com*, 341 F.3d at 1079 n.8 (quoting *Zippo*, 952 F. Supp. at 1124). In determining a website's location on the sliding scale, a court may consider the level of interactivity and the commercial nature of the exchange of information. *Cybersell*, 130 F.3d at 418.

III. ANALYSIS

A. Reuven Hasak

Defendant Hasak is a citizen and resident of Israel. According to the Fourth Amended Complaint, Hasak is an employee of Defendant NDS Group PLC and was involved in developing and using a laboratory in Haifa, Israel to hack into Plaintiffs' microprocessor embedded in EchoStar Access Cards. 4AC ¶ 152. Defendants, including Hasak, allegedly hacked into Plaintiffs' microprocessor for the purpose of extracting ROM and EEPROM Codes, which could then be used to develop a reprogramming device, allegedly known as "the stinger." *Id.* at ¶ 14-15. Other Defendants, not including Hasak, developed the stinger and used it to reprogram EchoStar Access cards, which were subsequently distributed on the black market to people who used them to access the DISH Network programming without authorization. *Id.* at ¶ 112.

Plaintiffs' theory of jurisdiction over Hasak is based on Federal Rule 4(k)(2). Rule 4(k)(2) provides:

> If the exercise of jurisdiction is consistent with the Constitution and

> laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

Fed. R. Civ. P. 4(k)(2). For jurisdiction to be proper under this rule, Plaintiffs must demonstrate that three conditions are satisfied: "(1) the cause of action must arise under federal law; (2) the defendant must not be subject to the personal jurisdiction of *any* state court of general jurisdiction; and (3) the federal court's exercise of personal jurisdiction must comport with due process." *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1126 (9th Cir. 2002). "Thus, the rule provides for what amounts to 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." *Id.* (citing Fed. R. Civ. P. 4 advisory committee's note 1993 Amendments).

The first condition is satisfied because Plaintiffs assert a number of federal causes of action against Hasak. The second condition is not satisfied. Plaintiffs simply assert that "[t]he second requirement . . . is also satisfied because Hasak has admitted as to this fact." Pl. Opp. to Hasak Mot. to Dismiss 4AC, 4:6-8. The question of whether Hasak is subject to the jurisdiction of any state in the United States is not a question of fact that Hasak can simply admit. Plaintiffs have the burden of demonstrating that Hasak is not subject to the jurisdiction of any state court of general jurisdiction. Plaintiffs have not even attempted to meet this burden and, as discussed below with respect to the third condition, Plaintiffs have inadvertently demonstrated that Hasak may be subject to the jurisdiction of the states of Colorado, Nevada, and Texas.[2] Because the

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[2]The long-arm statutes of Colorado, Nevada, and Texas, like the California long-arm statute, all extend personal jurisdiction to the fullest extent permitted by the Due Process Clause of the Federal Constitution. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 580, 119 S. Ct. 1563, 1568 (1999) ("Texas' long-arm statute, see Tex. Civ. Prac. & Rem. Code Ann. § 17.042 (1997), authorizes personal jurisdiction to the extent allowed by the Due Process Clause of the Federal Constitution."); *Benton v. Cameco Corp.*, 375 F.3d 1070, 1075 (10th Cir. 2004) ("Colorado's long arm statute is coextensive with

second condition fails, the Court need not reach the question of whether the third condition is satisfied. But because Plaintiffs' efforts to satisfy the third condition (minimum contacts with the United States as a whole) effectively demonstrate the failure of the second condition (lack of minimum contacts with any particular state), some discussion is appropriate.

Plaintiffs assert that Hasak has the minimum contacts with the United States under the "effects test," first announced by the Supreme Court in *Calder v. Jones,* 465 U.S. 783, 104 S. Ct. 1482 (1984). Under the effects test, "a foreign act that is both aimed at and has effect in the forum state satisfies the purposeful availment prong of the specific jurisdiction analysis" as long as three requirements are satisfied: "the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). Plaintiffs argue that Hasak's actions at the NDS laboratory in Israel were intentional acts that were expressly aimed at Plaintiffs in the United States and that Hasak knew would cause harm to Plaintiffs in the United States.

Even if the Court accepts Plaintiffs' argument that minimum contacts with the United States as a whole exist under the effects test, it is immediately clear that minimum contacts with Colorado, Nevada, and Texas would also exist. Although a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does," *Cybersell,* 130 F.3d at 420, generally "a corporation suffers the brunt of harm in its principal place of business." *Panavision Int'l, L.P. v. Toeppen* 141 F.3d 1316, 1322 n.2 (9th Cir. 1998). Plaintiff NagraStar L.L.C. and Plaintiff EchoStar Satellite L.L.C. are Colorado corporations with their principal places of business in Colorado. Plaintiff EchoStar Communications Corporation is a Nevada corporation with its principal place of business in Colorado. Plaintiff EchoStar Technologies

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constitutional limitations imposed by the due process clause."); *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1019 (9th Cir. 2002) ("Nevada's long-arm statute permits the exercise of jurisdiction to the same extent as the Constitution. Nev. Rev. Stat. § 14.065 (2001).").

Corporation is a Texas corporation with its principal place of business in Colorado. Thus, the brunt of any harm suffered by Plaintiffs occurred in Colorado. Although Plaintiffs do not flatly allege that Hasak knew the brunt of the harm would be suffered in Colorado, they do assert that Hasak knew Plaintiffs would be harmed in the United States. Moreover, Plaintiffs allege that Hasak was a knowing participant in a very sophisticated scheme to harm Plaintiffs. Accepting those allegations as true also requires the Court to infer that Hasak would have known exactly whom or what he was harming. Thus, it appears that Hasak may have the requisite minimum contacts with Colorado. Because a court of general jurisdiction in Colorado, and possibly Nevada or Texas, could exercise jurisdiction over Hasak, this Court cannot use Rule 4(k)(2) to obtain jurisdiction over him.

Defendant Hasak's motion to dismiss for lack of personal jurisdiction is GRANTED.[3]

B. George Tarnovsky

As alleged by Plaintiffs, George Tarnovsky ("Tarnovsky Sr.") played a relatively minor role in the overarching conspiracy. Tarnovsky Sr. is a citizen of the United States residing in Virginia, 4AC ¶ 53, and he is an employee of Defendant NDS Americas. *Id.* at ¶ 62. Tarnovsky Sr. is also the father of Defendant Christopher Tarnovsky, allegedly "a well-known and technically competent satellite hacker/computer engineer" who also works for NDS. *Id.* at ¶ 110. Paragraphs 155 through 164 purport to outline the wrongful conduct and theories of liability alleged against NDS Americas and its employees, including Defendant Norris, Defendant Christopher Tarnovsky, and Defendant Tarnovsky Sr. Other than the heading preceding these paragraphs, they do not allege any wrongful conduct by Tarnovsky Sr. Rather,

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[3]Although Plaintiffs request jurisdictional discovery, they have failed to indicate what discoverable facts would aid in establishing jurisdiction. Courts should grant a request for jurisdictional discovery when "jurisdictional facts are contested or more facts are needed." *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1093 (9th Cir. 2003). But "refusal to grant discovery to establish jurisdiction is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." *Id.* Because it is not clear to the Court what additional facts would help to establish jurisdiction, Plaintiffs request for jurisdictional discovery is DENIED.

the only facts alleged against Tarnovsky Sr. appear to be the facts underlying Plaintiffs' Twentieth Cause of Action for breach of contract. *See* 4AC ¶¶ 483-492.[4]

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[4]Specifically, Plaintiffs claim that Tarnovsky Sr. purchased a DISH Network receiver from Sears and Roebuck and activated EchoStar services on November 6, 1998. 4AC ¶ 483. Plaintiffs assert that Tarnovsky Sr. breached his agreement not to tamper with the DISH Network receiver, but they do not explain how the alleged tampering ties into the alleged overarching conspiracy. As discussed above with respect to Defendant Hasak, Plaintiffs' theory is that Defendants obtained Plaintiffs' proprietary codes when Hasak and other NDS employees in Israel extracted the ROM and EEPROM Codes from the microprocessor embedded in the EchoStar Access Cards. *See id.* at ¶ 152. It is not clear what, if anything, Tarnovsky Sr.'s alleged breach of contract has to do with the acts alleged to have occurred in Israel. The specific allegations against Tarnovsky Sr. are as follows:

> 483. On or about November 6, 1998, Defendant Tarnovsky, Sr. activated EchoStar Programming services on a 3500 model JVC DISH Network Receiver, which he purchased from Sears and Roebuck. As part of this transaction, Defendant Tarnovsky, Sr. agreed to be bound by Plaintiffs' Residential Subscriber Agreement ("Agreement").
>
> 484. On or about August 3, 1999, Defendant Tarnovsky activated EchoStar Programming Services on a 7120 model Webstar DISH Network Receiver, which he purchased from Fry's Electronics. Additionally, as part of this transaction, Defendant Tarnovsky also agreed to be bound by the Agreement.
>
> 485. Pursuant to the Agreement, Plaintiffs granted Defendants Tarnovsky, Sr. and Tarnovsky a license to use EchoStar Access Cards in conjunction with their respective EchoStar Receivers – with Plaintiffs retaining legal title thereto. In relevant part, the Agreement states, *inter alia*:
>
> > DISH DBS Smart Cards are [EchoStar's] property and ***any tampering or other unauthorized modification to the Smart Card may result in, and subject you to, legal action*** . . . Smart cards are not transferable. Your Smart Card will only work in the DISH Network receiver to which it was assigned by DISH Network.
>
> 486. Plaintiffs are informed and believe that Defendants Tarnovsky, Sr. and Tarnovsky have unlawfully

Plaintiffs assert that the Court has jurisdiction over Tarnovsky Sr. on theories of both general and specific personal jurisdiction.

1. General Jurisdiction

Plaintiffs assert that "the alleged cause of action arises out of an activity perpetrated by the defendant at the time he was domiciled in [California]." Pl. Opp. to Tarnovsky Sr.'s Mot. to Dismiss, 4:12-13. But Plaintiffs' argument is factually very thin. The only basis for asserting that Tarnovsky Sr. was ever a California resident, let alone a resident at any time relevant to the causes of action alleged, is an affidavit filed by Tarnovsky Sr. under the alias "Joe Zee" in a case brought by NDS in Winnipeg, Manitoba, Canada ("Joe Zee Affidavit"). The Joe Zee Affidavit, dated and notarized February 4, 2002, states:

> I Joe Zee of the City of Newport Beach State of California make oath and say as follows.
>
> 1. Joe Zee is not my real name but is the name I use in context of my work and investigation with respect to this case. My work as an employee of NDS investigating satellite television piracy puts me at risk not only of the compromise of each investigation but also my personal safety. Accordingly, I must carefully maintain an undercover profile in each case in which I am involved and as part of that profile I routinely

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> tampered with or made other unauthorized modifications to their respective EchoStar Access Cards, in violation of their respective Agreements with EchoStar. . . .
> 490. As a proximate result of Defendants George and Christopher Tarnovsky's breach, Plaintiffs have suffered the damages, including but not limited to, loss of net profits, damages for the publication of Plaintiffs' proprietary information and Codes on the Internet, disclosure of Plaintiffs' Codes as facilitated by these Defendants' illegal actions which were in breach of the parties' agreement.

Id. at ¶¶ 483-490.

> adopt aliases. Not only would divulging my real name imperil other satellite television investigations in which I am involved, I am also very concerned that my personal safety would be compromised.

Pl. Opp. to Tarnovsky Sr.'s Mot. to Dismiss, Ex. B. These statements in the Joe Zee Affidavit alone form the basis for Plaintiffs' contention that this Court has general personal jurisdiction over Tarnovsky Sr. Plaintiffs have submitted no other evidence to attempt to support jurisdiction in California over Tarnovsky Sr. On the other hand, Tarnovsky Sr. has submitted a declaration in which he swears that he has been a resident of Manassas, Virginia for the past eight years and that he has never been a resident of California. Tarnovsky Sr. Mot. to Dismiss 4AC, Ex. 1. Counsel for Tarnovsky Sr. argues that the Joe Zee Affidavit cannot establish that Tarnovsky Sr. was a resident of California because the Joe Zee Affidavit itself explains that the affidavit was made by Tarnovsky Sr. using an assumed identity in order to protect NDS's investigation as well as Tarnovsky Sr.'s personal security.

Plaintiffs have not met their prima facie burden of demonstrating that general jurisdiction over Tarnovsky Sr. exists. Where not directly controverted, plaintiff's version of the facts is taken as true for the purposes of a 12(b)(2) motion to dismiss. *Doe*, 248 F.3d at 922 (citing *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996)). Likewise, conflicts between the facts in the parties' affidavits must be resolved in the plaintiff's favor. *Id.* Here, however, Plaintiffs' version of the facts is controverted by the sworn declaration of Tarnovsky Sr. in which he states that he has been a resident of Virginia for the past eight years. There is no conflict in parties' affidavits because Plaintiffs have not supported their assertion of jurisdiction with any affidavit. Rather, Plaintiffs offer only the Joe Zee Affidavit, which Tarnovsky Sr. executed in relation to a separate matter in a Canadian court. In other words, this is not a situation where the parties have each submitted affidavits containing conflicting factual assertions. Tarnovsky Sr., by way of declaration, has controverted Plaintiffs' version of the facts and Plaintiffs offer only the Joe Zee Affidavit in support of their version. Under these circumstances, the Court need not assume Plaintiffs' version of the facts to be true.

Furthermore, the Joe Zee Affidavit is not sufficient to meet Plaintiffs' burden of establishing jurisdiction, even at this early stage in the litigation. The Joe Zee Affidavit itself explains that Joe Zee is an alias assumed in order to protect the affiant's true identity. It is reasonable to infer from that fact that the residence contained in the Joe Zee Affidavit, Newport Beach, California, was not the affiant's true residence. Absent some other showing that Tarnovsky Sr. was a California resident– for example, property records or a declaration from a landlord or neighbor– the Court cannot simply assume that he was. Moreover, even if the Court were to assume that the Joe Zee Affidavit is sufficient to show that Tarnovsky Sr. was a California resident in February 2002, nothing indicates that he was a California resident in 1998, when Tarnovsky Sr. allegedly breached his agreement with Plaintiffs. Tarnovsky Sr. is not subject to general jurisdiction in California.

2. Specific Jurisdiction

In order for a defendant's contacts to be sufficient to establish specific jurisdiction, three requirements must be satisfied: "(A) some action must be taken whereby defendant purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (B) the claim must arise out of or result from defendant's forum-related activities; and (C) exercise of jurisdiction must be reasonable." *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990).

a. Purposeful Availment

Tarnovsky Sr. has purposefully availed himself of the benefits and protections of the state of California by carrying on a contractual employment relationship with NDS Americas, a Delaware corporation with its principal place of business in Newport Beach, California. Tarnovsky Sr.'s admitted employment relationship with NDS Americas demonstrates that, although Tarnovksy Sr. may not have been a California resident, he "created continuing obligations between himself and residents of the forum" and "manifestly has availed himself of the privilege of conducting business there." *T.M. Hylwa, M.D., Inc. v. Palka*, 823 F.2d 310, 314 (9th Cir. 1987) (quoting *Burger King*, 471 U.S. at 476, 105 S. Ct. at 2184). Given Tarnovsky Sr.'s ongoing employment relationship with corporation located in California, he could have

reasonably anticipated being haled into court for claims arising from that employment relationship. *See id.* at 314-15.

b. Causation

"The second requirement for specific jurisdiction is that the contacts constituting purposeful availment must be the ones that give rise to the current suit. [The Ninth Circuit] measure[s] this requirement in terms of 'but for' causation." *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1088 (9th Cir. 2000). Plaintiffs have met their burden of establishing, prima facie, that their claims against Tarnovsky, Sr. would not have arisen but for his employment with NDS Americas. Plaintiffs assert that Tarnovsky Sr. would not have engaged in the alleged acts (modifying the EchoStar Access Card) but for his employment relationship with NDS. At this point, Tarnovsky Sr. has not directly contradicted this assertion. Thus, Plaintiffs have met their prima facie burden of establishing but-for causation.

c. Reasonableness

Because Plaintiffs have established purposeful availment, the exercise of jurisdiction is presumed to be reasonable unless Defendant can make a "compelling case" to the contrary. *Id.* To determine reasonableness, the Court considers seven specific factors:

> (1) the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's 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, and (7) the existence of an alternative forum.

Id. (citing *Burger King*, 471 U.S. at 476-77, 105 S. Ct. at 2184). First, Tarnovsky Sr.'s purposeful interjection into California is quite extensive in that it consists of his on-going employment relationship with a corporation located in California. Although Tarnovsky Sr. only occasionally travels to California, Tarnovsky Sr.'s employment as an electrical engineer who

supports the engineering and security departments of NDS Americas presumably consists of far more than simply physically showing up for work. Second, The burden on Tarnovsky Sr. of litigating in California may be greater than the burden of litigating in Virginia would be, but it is not a substantial burden. Traveling across the country from the D.C. area to Orange County, California is not difficult, nor is communicating between those two points. Third, there is no discernable conflict with the sovereignty of the state of Virginia and, fourth, Virginia has little interest in adjudicating a dispute, sounding in both tort and contract, between a corporation located in California and a Virginia resident when the claims against the Virginia resident allegedly occurred in the course of the Virginia resident's employment with a corporation located in California. Fifth, adjudicating the dispute in California results in the most efficient resolution of the controversy because the claims against Tarnovksy Sr. are a part of a complex case against many defendants. Sixth, the complexity of the overall case means that it is very important to Plaintiffs that they be able to present their case against all defendants as a cohesive whole. Seventh, although Virginia is clearly an appropriate alternative forum, this factor alone does not amount to a compelling case against the exercise of jurisdiction.

Defendant Tarnovsky Sr.'s motion to dismiss for lack of personal jurisdiction is DENIED.

C. Stanley Frost

Defendant Frost is a resident of Brooklyn, New York and he has lived his entire life in the state of New York. 4AC ¶ 51; Frost Decl., ¶ 3. As alleged in the complaint, Frost fits into the overall scheme as an internet distributor of pirated EchoStar Access Cards. 4AC ¶¶ 114-124. Plaintiffs allege that another defendant, Allen Menard, was directed by NDS through Tarnovsky to establish an Internet distribution network for the pirated EchoStar Access Cards. *Id.* at ¶ 114. The individuals selected by Defendant Menard include Frost. *Id.* at ¶ 115. Plaintiffs allege:

> From 1999 to at least June 25, 2003, NDS through Tarnovsky and Menard, used Dawson, Quinn, Dale, Sergi [sic] and Frost, and their respective websites, to advertise, sale [sic], distribute and otherwise traffick in unlawfully altered EchoStar access cards that were

reprogrammed by NDS's 'stinger' through Tarnovsky and Menard.

Id. at ¶ 118. Thus, Plaintiffs allege that Frost "facilitated the compromise of Plaintiffs' Security System by advertising, selling, distributing, providing, and/or otherwise trafficking in, among others, illegally reprogrammed EchoStar Access Cards and/or other Signal Theft Devices" through the use of the Internet website www.newfrontiergroup.com, which he owned and operated until the website was shut down on June 25, 2003. *Id.* at ¶ 67. Although Frost does not deny that he owned and operated the www.frontiergroup.com website, and although Frost does not directly deny that the website advertised and sold reprogrammed EchoStar Access Cards, Frost does assert that he does "not regularly solicit or transact business in California, whether through the Internet or by any other means" and does "not do any advertising that is specifically intended for California residents." Frost Decl., ¶¶ 9, 12.

Plaintiffs assert that specific jurisdiction exists over Frost. As discussed above, in order for specific jurisdiction to exist, three requirements must be satisfied: "(A) some action must be taken whereby defendant purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (B) the claim must arise out of or result from defendant's forum-related activities; and (C) exercise of jurisdiction must be reasonable." *Sher*, 911 F.2d at 1361.

1. Purposeful Availment

Plaintiffs allege that Frost purposefully availed himself of the benefits and protections of the state of California by operating his website, www.newfrontiergroup.com, which is alleged to be an interactive commercial website. Frost has submitted a declaration in support of his motion to dismiss, but Plaintiffs have submitted no further proof of the alleged jurisdictional facts. Thus, a large part of Frost's argument for dismissing the complaint turns on whether Plaintiffs have met their burden of rebutting Frost's declaration. Therefore, the Court will first examine whether the allegations of the complaint, assuming no contradiction by Frost, would be sufficient to establish prima facie jurisdiction over Frost. Second, the Court will consider whether Frost's declaration is adequate to contradict the allegations that are material to jurisdiction.

Assuming that Plaintiffs can prove the facts alleged in the complaint, specific jurisdiction over Frost exists in California. As explained more fully above, in the context of Internet-based contacts, the Ninth Circuit evaluates where on a sliding scale a website occurs based on "the nature and quality of the commercial activity that an entity conducts over the Internet." *Gator.com*, 341 F.3d at 1079 & n.8. The complaint alleges that Frost advertised and sold the pirated EchoStar Access Cards through his website, although the complaint does not describe the exact manner of the alleged sales. Surely, even if Frost's website had the character of a virtual store, the business done through the website was not as extensive as the business done, for example, by L.L. Bean's website. *See Gator.com*, 341 F.3d at 1079-80. But based on Plaintiffs' allegations, it is reasonable to infer that Frost's website was a sort of virtual store through which anyone with access to the internet could purchase the pirated EchoStar Access Cards. Additionally, the complaint specifically alleges that Frost used his website to sell pirated EchoStar Access Cards "to individuals and entities within the State of California, among others." 4AC ¶ 30. Thus, the complaint adequately alleges that Frost used his website to engage in the stream of Internet commerce and that there is "something more" in the form of actual sales to California residents. *See Asahi Metal Ind. Co., Ltd. v. Super. Ct. of Cal.*, 480 U.S. 102, 112, 107 S. Ct. 1026, 1032 (1987); *Cybersell*, 130 F.3d at 418.

Frost has attempted to controvert the allegations of the complaint by way of a declaration. Where not directly controverted, plaintiff's versions of the facts is taken as true for the purposes of a 12(b)(2) motion to dismiss. *Doe*, 248 F.3d at 922. But "mere allegations of the complaint, when contradicted by affidavits, are [not] enough to confer personal jurisdiction of a nonresident defendant. In such a case, facts, not mere allegations, must be the touchstone." *Taylor v. Portland Paramount Corp.*, 383 F.2d 634, 639 (9th Cir. 1967). Frost's declaration contains the following two statements relevant to the minimum contacts inquiry:

> 9. I do not regularly solicit or transact business in California, whether through the Internet or by any other means. . . .
>
> 12. I do not do any advertising that is specifically intended for California residents, nor do I advertise in any publications that

are directed primarily towards California residents.

Frost Decl., ¶¶ 9, 12. Frost's declaration does not specifically deny that he owned and operated www.newfrontiergroup.com, that he advertised and sold EchoStar Access Cards on his website in general, or that he ever sold such EchoStar Access Cards to a California resident. Rather, Frost generally asserts that he does not "regularly" do business in California and that he does not "specifically intend" for his advertising to reach California. These precise statements do not directly contradict the factual allegations of the complaint. Thus, despite Frost's declaration, the Court can, at this point in the litigation, continue to assume the allegations of the complaint are true and find that Plaintiffs have met their prima facie burden of demonstrating minimum contacts with California.

2. Causation

The claims asserted against Frost arise out of the alleged advertising and sale of EchoStar Access Cards on Frost's website. In other words, the facts underlying Plaintiffs' substantive claims are the same as the facts underlying Plaintiffs' assertion of jurisdiction. Thus, but for Frost's contacts with California in the form of advertising and selling the EchoStar Access Cards on the internet to California residents, Plaintiffs' causes of action against him would not have arisen.

3. Reasonableness

Because Plaintiffs have established purposeful availment, the exercise of jurisdiction is presumed to be reasonable unless Frost can make a "compelling case" to the contrary. *Bancroft*, 223 F.3d at 1088. To determine reasonableness, the Court considers seven specific factors:

> (1) the extent of the defendant's purposeful interjection into the forum state, (2) the burden on the defendant in defending in the forum, (3) the extent of the conflict with the sovereignty of the defendant's 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, and (7) the existence of an

alternative forum.

Id. (citing *Burger King*, 471 U.S. at 476-77, 105 S. Ct. at 2184).

The first two factors– the extent of the purposeful interjection and the burden on the defendant in defending in the forum– do not favor exercise of jurisdiction in California. Frost's purposeful interjection into California is not extensive. As alleged in the complaint, Frost engaged in general Internet commerce and did some business with customers in California. These allegations just barely satisfy the minimum contacts requirement. Additionally, it is clear that litigating in California will probably be a burden on Frost, who is a resident of New York. As with Tarnovsky Sr., however, the burden is not so great, in this era of telecommunications and inexpensive travel, as to decisively make exercise of jurisdiction unreasonable. The seventh factor– existence of an alternative forum– is also favorable to Frost because Plaintiffs could bring their claims against him in New York.

On the other hand, there is no discernable conflict with the sovereignty of the state of New York and resolution of the claims against Frost is both important to Plaintiffs' interests and in the interest of efficient resolution of the dispute. Plaintiffs bring their claims against Frost as part of a complex case against NDS. The overarching theory of Plaintiffs' case is that NDS funded and directed a scheme that involved extracting Plaintiffs' proprietary codes from the EchoStar Access Cards, creating pirated EchoStar Access Cards, and distributing those pirated cards through the Internet (specifically, through the websites of Frost and others). Having all claims tried in one action permits Plaintiffs to present their case as a cohesive whole and it avoids duplication of efforts by courts. These interests weigh heavily in favor of exercising jurisdiction over Frost. Because of these interests and because the burden on Frost of traveling from New York to southern California is not great, the exercise of jurisdiction over Frost is reasonable.

Defendant Frost's motion to dismiss for lack of jurisdiction is DENIED.

D. Edwin Bruce

Defendant Bruce is an individual and citizen of Canada, residing in British Columbia, Canada. 4AC ¶ 55. Bruce plays a very minor role in Plaintiffs' overarching theory. As

discussed above, Plaintiffs' basic theory is that NDS, in an attempt to destroy competitor EchoStar, hired the world's most infamous hackers to extract EchoStar's proprietary codes, create pirated EchoStar Access Cards, and distribute these pirated cards on the black market over the Internet. NDS, through Defendant Tarnovsky, directed Defendant Menard to create the Internet distribution network. That network consisted of Defendants Dawson, Quinn, Dale, Sergei, and Frost, all of whom are alleged to have owned and operated websites, which advertised and sold the pirated EchoStar Access Cards as well as provided technical support to the purchasers of those cards. Notably, Defendant Bruce is not alleged to be an actual distributor. Rather, Bruce is alleged to have "assist[ed] in the NDS/Tarnovsky/Menard distribution network by, among other acts, hosting Quinn's hacker website www.hitecsat.com." 4AC ¶ 69. Based on Bruce's alleged act of hosting Quinn's website, Plaintiffs assert that specific jurisdiction is proper in California.

1. Specific Jurisdiction Under Rule 4(k)(1)(A)

Federal Rule of Civil Procedure 4(k)(1)(A) permits a federal court to "establish jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located." Fed. R. Civ. P. 4(k)(1)(A). As discussed repeatedly above, the California long-arm statute provides that "[a] court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States." Cal. Civ. Proc. Code § 410.10. Thus, to establish that jurisdiction is consistent with due process, "(A) some action must be taken whereby defendant purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (B) the claim must arise out of or result from defendant's forum-related activities; and (C) exercise of jurisdiction must be reasonable." *Sher*, 911 F.2d at 1361.

Plaintiffs cannot meet their burden of establishing that Bruce has purposefully availed himself of the benefits and protections of California. As explained more fully above, in the context of Internet-based contacts, the Ninth Circuit evaluates where on a sliding scale a website occurs based on "the nature and quality of the commercial activity that an entity conducts over

the Internet." *Gator.com*, 341 F.3d at 1079 & n.8. An operator of a purely passive website that simply permits anyone who can find the site to view the information posted there is not, without more, subject to the jurisdiction of a state where a person viewed the information. *See Cybersell*, 130 F.3d at 418-20 ("the essentially passive nature of [the defendant's] activity in posting a home page on the World Wide Web that allegedly used the service mark of [the plaintiff] does not qualify as purposeful activity invoking the benefits and protections of [the plaintiff's home state]"). Although Plaintiffs do not elaborate upon what "hosting" entails, a "web host" is generally understood to be a business that provides the technologies and services, such as space on a server, needed to permit a consumer to own and operate his own web site with his own domain name. *See* Web Hosting, http://en.wikipedia.org/wiki/Web_hosting (last accessed Jul. 12, 2005).[5] Plaintiffs do not allege that Bruce had any control over the web site he hosted. Rather, the complaint suggests that Defendant Quinn controlled the web site. Bruce's involvement in Internet commerce, as alleged in the complaint, is far less extensive even than the owner and operator of a purely passive website. Bruce, simply by hosting a website that was owned and operated by a Canadian citizen, could not have reasonably anticipated being haled into court in California to answer for claims arising out of activities of the website owner and operator. Nothing alleged in the complaint even suggests that Bruce purposefully directed any activity at California. Thus, jurisdiction is not proper under Rule 4(k)(1)(A).

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[5]A web host is similar to an Internet service provider, as defined by 17 U.S.C. § 512. "Service provider" is defined as:

> [A]n entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received. . . .
>
> [or] a provider of online services or network access, or the operator of facilities therefor.

17 U.S.C. § 512.

2. Specific Jurisdiction Under Rule 4(k)(2)

Plaintiffs alternatively assert that if the minimum contacts between Bruce and California are lacking, then the minimum contacts exist at least between Bruce and the United States as a whole. The Court disagrees. Bruce's role as a web host for a website owned and operated by a Canadian citizen in no way suggests that Bruce should have reasonably anticipated being haled into court in the United States to answer for the acts of the person who owned and operated the website. Although Canadian websites are accessible in the United States, simply hosting a Canadian website is not an activity purposefully directed toward the United States.

Defendant Bruce's motion to dismiss for lack of jurisdiction is GRANTED.[6]

E. Mervyn Main

Defendant Main is an individual and citizen of Canada, residing in Edmonton, Alberta, Canada. 4AC ¶ 47. According to the complaint, Main is a relatively minor player in the overall scheme. Main is alleged to have assisted Defendant Menard in the "day-to-day maintenance of the NDS distribution network and Menard's hacker website." *Id.* at ¶ 177. Additionally, Plaintiffs allege that Main was a "courier" of some sort for Menard and somehow assisted Menard in sending payments to Tarnovsky. *Id.* at ¶¶ 139, 159. Beyond these vague allegations of involvement, the complaint alleges no facts specifically relating to Main.

Plaintiffs assert that jurisdiction is proper under either Rule 4(k)(1)(A) based on Main's minimum contacts with California or, alternatively, Rule 4(k)(2) based on Main's minimum contacts with the United States as a whole. Plaintiffs assert that Main has the requisite minimum contacts under the "effects test," first announced by the Supreme Court in *Calder v. Jones,* 465

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[6]Although Plaintiffs request jurisdictional discovery, none of the jurisdictional facts are contested. Courts should grant a request for jurisdictional discovery when "jurisdictional facts are contested or more facts are needed." *Laub*, 342 F.3d at 1093. But "refusal to grant discovery to establish jurisdiction is not an abuse of discretion when it is clear that further discovery would not demonstrate facts sufficient to constitute a basis for jurisdiction." *Id.* Because no jurisdictional facts are in dispute, it is not clear how further discovery would demonstrate facts sufficient for jurisdiction. Plaintiffs request for jurisdictional discovery is DENIED.

U.S. 783, 104 S. Ct. 1482 (1984). Under the effects test, "a foreign act that is both aimed at and has effect in the forum state satisfies the purposeful availment prong of the specific jurisdiction analysis" as long as three requirements are satisfied: "the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Bancroft*, 223 F.3d at 1087.

Regardless of whether the Court considers the relevant forum to be California under Rule 4(k)(1)(A) the United States under Rule 4(k)(2), Plaintiffs have clearly failed to allege minimum contacts. First, the Fourth Amended Complaint is unclear as to what "intentional act" Main is alleged to have committed. Despite the vague allegations of assistance in maintenance of the distribution network and in sending money to Tarnovsky, Plaintiffs cannot point to any specific intentional act undertaken by Main that would form the basis of jurisdiction. Second, and more obviously, Plaintiffs have not shown any express aiming at either California or the United States. Even if Main assisted Menard in maintaining his website or in sending packages to Tarnovsky, it is not at all clear that Main was aware of any larger scheme or that he aimed his conduct toward California or the United States in any way. Third, Plaintiffs have alleged no facts suggesting that Main knew his actions– whatever they were– would cause harm likely to be suffered in either California or the United States.

Given the dearth of factual allegations against Main, Plaintiffs have failed to establish that the requisite minimum contacts exist with either California or the United States as a whole. Defendant Main's motion to dismiss for lack of personal jurisdiction is GRANTED.[7]

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[7]As alleged, Main is, like Bruce and Wilson are, peripheral to Plaintiffs' overall theory. Because the Court has so few facts about Main's alleged involvement, it may be desirable to permit limited jurisdictional discovery. *Laub*, 342 F.3d at 1093. However, the Court is mindful that it will be difficult to properly confine any discovery purely to jurisdictional facts relating to Main. The Court's concern is that with so few facts alleged against Main in the complaint, the jurisdictional discovery will be an unfocused fishing expedition. Thus, until Plaintiffs specify what additional jurisdiction facts discovery would reveal, Plaintiffs' request is DENIED.

F. Linda Wilson

Defendant Wilson is an individual and citizen of Canada, residing in Edmonton, Alberta, Canada. 4AC ¶ 46. The complaint contains very few allegations against Wilson and, from those few allegations, it is clear that she played a minor role in the alleged overall scheme. The lone allegation specifically against Wilson is that"Wilson was successfully solicited by Menard to serve as the registrant and administrative contact of Menard's hacker website." *Id.* at ¶¶ 178, 159. Wilson is the mother of Defendant Menard. Wilson Decl. ¶ 3. Wilson admits in her declaration that "[i]n or around 1998, [her] son used [her] name and address as a 'contact person' for the registration of his internet domain name for his company, X-Factor Web Design, Inc." *Id.* at ¶ 4. Wilson explained that "[she] agreed to be named as the contact person because [her] son was going to be moving from his home to another home within a few months." *Id.* at ¶ 5. Wilson specifically stated that she was not involved in her son's business and "only had a vague notion that the business involved computers in some way." *Id.* at ¶¶ 7, 9.

Without submitting any additional evidence to rebut Wilson's declaration, Plaintiffs assert that specific jurisdiction exists over Wilson based on her role as the registrant and administrative contact for Menard's website. To establish that jurisdiction is consistent with due process, "(A) some action must be taken whereby defendant purposefully avails himself or herself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of the forum's laws; (B) the claim must arise out of or result from defendant's forum-related activities; and (C) exercise of jurisdiction must be reasonable." *Sher*, 911 F.2d at 1361. Invoking both Rule 4(k)(1)(A) and Rule 4(k)(2), Plaintiffs assert that Wilson has the requisite minimum contacts with either California or the United States as a whole. To support this assertion, Plaintiffs argue that the minimum contacts exist under either the sliding-scale test used for Internet-based contacts or the effects test used for foreign acts that have effects in the forum state.

1. Sliding-Scale Test of Internet-Based Contacts

As discussed above, in the context of Internet-based contacts, the Ninth Circuit evaluates where on a sliding scale a website occurs based on "the nature and quality of the commercial

activity that an entity conducts over the Internet." *Gator.com*, 341 F.3d at 1079 & n.8. This test is not appropriate for determining Wilson's contacts with either California or the United States because, as alleged in the complaint and as established by Wilson's unrebutted declaration, Wilson was not the owner or operator of the website. Her role in Menard's website was limited solely to providing her name and address for the registration of her son's internet domain name. The limited allegations of the complaint do not permit the Court to conclude that simply by registering the domain name www.dr7.com, Wilson was effectively engaging in Internet commerce and availing herself of the benefits and privileges of the laws of either California or the United States as a whole.

2. Effects Test

Under the effects test, "a foreign act that is both aimed at and has effect in the forum state satisfies the purposeful availment prong of the specific jurisdiction analysis" as long as three requirements are satisfied: "the defendant must have (1) committed an intentional act, which was (2) expressly aimed at the forum state, and (3) caused harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the forum state." *Bancroft*, 223 F.3d at 1087. The only act alleged against Wilson is that she registered her son's domain name and served as an administrative contact for her son's company. Neither of these two acts can reasonably be considered to be expressly aimed at the United States or California. Nor can it be said that because she undertook these acts of registering her son's domain name and serving as an administrative contact for his company, Wilson should have reasonably anticipated being haled into court in California or the United States.

Because Plaintiffs have failed to meet their burden of establishing that Wilson has the requisite minimum contacts with either California or the United States as a whole, this Court cannot exercise jurisdiction over her. Defendant Wilson's motion to dismiss for lack of personal jurisdiction is GRANTED.[8]

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[8]Like Main, Wilson is alleged to have played a peripheral role in the overall scheme. Until Plaintiffs specify what additional facts would help to establish jurisdiction,

IV. DISPOSITION

For the reasons stated above, the Court GRANTS Hasak's motion to dismiss for lack of personal jurisdiction, DENIES Tarnovsky Sr.'s motion to dismiss for lack of personal jurisdiction, DENIES Frost's motion to dismiss for lack of jurisdiction, GRANTS Bruce's motion to dismiss for lack of jurisdiction, GRANTS Main's motion to dismiss for lack of personal jurisdiction, and GRANTS Wilson's motion to dismiss for lack of personal jurisdiction. Because Plaintiffs have had five opportunities to establish jurisdiction over Defendants, all claims against Hasak, Bruce, Main, and Wilson are DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

DATED: July 25, 2005

DAVID O. CARTER
United States District Judge

Plaintiffs' request for jurisdictional discovery is DENIED.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ECHOSTAR SATELLITE CORP., ECHOSTAR COMMUNICATIONS CORP., ECHOSTAR TECHNOLOGIES CORP., and NAGRASTAR L.L.C., Plaintiffs, v. NDS GROUP PLC, NDS AMERICAS, INC., JOHN NORRIS, REUVEN HASAK, OLIVER KOMMERLING, JOHN LUYANDO, PLAMEN DONEV, VESSELINE NEDELTCHEV, CHRISTOPHER TARNOVSKY, ALLEN MENARD, LINDA WILSON, MERVYN MAIN, DAVE DAWSON, SHAWN QUINN, ANDRE SERGEI, TODD DALE, STANLEY FROST, GEORGE TARNOVSKY, BRIAN SOMMERFIELD, ED BRUCE, "BEAVIS," "JAZZERCZ," "STUNTGUY," and JOHN DOES 1-100, Defendants.	CASE NO. SACV 03-950 DOC (ANx) [TENTATIVE] O R D E R GRANTING IN PART AND DENYING IN PART MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM BY NDS GROUP PLC AND NDS AMERICAS, INC.; and GRANTING MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM BY CHRISTOPHER TARNOVSKY, JOHN NORRIS, ALLEN MENARD, GEORGE TARNOVSKY, AND STANLEY FROST

Before the Court are motions to dismiss the Fourth Amended Complaint ("4AC") for failure to state a claim filed by Defendants NDS Group PLC and NDS Americas, Inc.

(collectively "NDS"), Christopher Tarnovsky ("Tarnovsky"), John Norris, Allen Menard, George Tarnovsky ("Tarnovsky Sr."), and Stanley Frost.[1] After reviewing the moving, opposing, and replying papers, and for the reasons set forth below, the Court GRANTS IN PART AND DENIES IN PART NDS's motion, and GRANTS the motions of Tarnovsky, Norris, Menard, Tarnovsky Sr., and Frost.

I. BACKGROUND

A. Factual Background

Echostar and NDS are competitors in the "conditional access systems" market. Echostar owns and operates a subscription-based television service known as the DISH Network. In order to subscribe to the DISH Network, a consumer must have the necessary equipment, which consists of: (1) a satellite dish antenna, (2) an integrated receiver/decoder ("set-top box"), and (3) an EchoStar Access Card. 4AC ¶ 74. The Access Card is the size of a credit card and it contains a microprocessor chip that works in conjunction with the receiver to allow the receiver to decrypt encrypted signals coming from satellites. The Access Card microprocessor, in conjunction with the receiver/decoder, is programmed to handle routine telecommunications over telephone lines with respect to a viewer purchase of a pay-per-view movie or other event. Echostar has a security system to encrypt its satellite signal. The system is provided by NagraStar, also a Plaintiff in the suit. Defendant NDS competes with NagraStar in the "conditional access systems" market, and is an English corporation. NDS supplies a conditional access system to DirecTV, a U.S. company.

Echostar's claims are all essentially based on one unified scheme involving all defendants, which was allegedly orchestrated by NDS. As alleged by Echostar, between 1995 and 1997, NDS was experiencing problems due to the fact that its security system had been

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[1]Defendants Reuven Hasak, Edwin Bruce, Mervyn Main, and Linda Wilson have also filed motions to dismiss for failure to state a claim. In a separate Order, however, the Court has granted motions to dismiss by those four defendants for lack of personal jurisdiction. Thus, the motions to dismiss for failure to state a claim of those four defendants will not be addressed on the merits and are DENIED AS MOOT.

hacked into and compromised a number of times. Rather than competing legitimately, NDS undertook a scheme to control the compromising of its own conditional access system and to direct the compromise of its competitors' systems. As alleged, this scheme occurred in two phases. The first phase consisted of controlling piracy of NDS's own system whereas the second phase, occurring in four steps, consisted of compromising the security systems of NDS's competitors.

In the first phase, NDS hired "the world's most infamous hackers" as double agents to control the hacking of its own conditional access system. Phase one occurred sometime during or prior to 1997. In this first phase, NDS allegedly hired defendants Christopher Tarnovsky, Oliver Kommerling, Plamen Donev, Vesselin Nedeltchev, and others to hack into NDS's own security system and to simultaneously provide "electronic counter measures" or ECMs that NDS then sold to its own customers to fix any problems caused by the compromised security.

The second phase of the alleged scheme occurred in four steps and involved NDS turning its hacker employees against Plaintiffs' conditional access system. Step one occurred in Haifa, Israel and it consisted of cracking the Read Only Memory ("ROM") and Electronically Erasable Programmable Read Only Memory ("EEPROM") codes used in Plaintiffs' Access Cards. The hacking of such a security system is a very difficult process and requires sophisticated technology and a sophisticated laboratory equipped with an electron microscope. Plaintiffs have proof that NDS has such facilities in the way of a declaration by Kommerling who was a principal shareholder of ADSR, a company that provides security services to NDS. He declares that he was instrumental in establishing such a lab for NDS in Haifa, Israel in 1996. He also declares that NDS engineers in the Haifa facility performed a similar invasive attack on other access cards.

Step two of the second phase involved transferring these unlawfully extracted ROM and EEPROM codes to a pirating software engineer capable of using them to unlawfully access and reprogram Plaintiffs' Access Cards. Plaintiffs allege that NDS accomplished step two at a meeting between Tarnovsky, Rueven Hasak from Israel and John Norris from California when Hasak and Norris transferred Plaintiffs' ROM and EEPROM codes to Tarnovsky. Tarnovsky

then used Plaintiffs' codes to build a pirating device, allegedly called "the stinger," that was capable of reprogramming Plaintiffs' Access Cards thereby allowing others to gain unauthorized access to Plaintiffs' satellite television.

Step three of the second phase involved distributing the reprogrammed Echostar Access Cards to the pirating community through the use of a controlled distribution network. NDS and Tarnovsky enlisted the aid of Allen Menard and his website for hackers, www.dr7.com, to distribute the reprogrammed cards. Other alleged Internet-based distributers include Dave Dawson, Shawn Quinn, Todd Dale, Andre Sergei, and Stanley Frost. Mervyn Main, Linda Wilson, and Edwin Bruce are not alleged to have owned or operated any of the websites, but are each alleged to have assisted in the distribution network in some way.

Plaintiffs allege that NDS controlled this distribution network because the "stinger," which was developed by NDS and Tarnovsky and subsequently provided to Menard, would only reprogram a predetermined number of Access Cards before it would "lock up." At that point, Menard would send cash payments to Tarnovsky in California. Once Tarnovsky received the payments, he would write a program to reactivate the "stinger" and enable it to reprogram more Access Cards. Plaintiffs undertook a number of electronic counter measures in attempts to disable the reprogrammed Access Cards.

Step four of the second phase involved NDS releasing the instructions and procedures necessary to obtain Plaintiffs' ROM and EEPROM codes directly to the pirating community in an effort to destroy Plaintiffs. Plaintiffs claim that NDS released the information to the pirating community because Plaintiffs' electronic counter measures thwarted the functioning of the controlled distribution network. Plaintiffs allege that on December 23 and 24, 2000, Tarnovsky posted to the internet a sequence of events and data, along with accompanying instructional code, that provided satellite pirates around the world with Plaintiffs' ROM code, Plaintiffs' EEPROM code and accompanying secret keys, and instructions on how to internally hack or access Plaintiffs' microprocessor. Plaintiffs allege that the distribution network continued to distribute reprogrammed access cards and continued to provide assistance to hackers through the use of websites until June of 2003.

B. Procedural History

On September 27, 2002, Echostar filed a motion to intervene in a separate action, *Canal+ v. NDS*. That case settled before the court ruled on Echostar's motion. Echostar filed this action on June 6, 2003, originally only against the NDS corporate defendants. On December 22, 2003, the Court granted in part and denied in part the motion to dismiss the first amended complaint ("FAC") filed by NDS. On February 18, 2004, in response to the Court's December 22, 2003 order, Plaintiffs lodged their second amended complaint ("SAC"). The SAC was lodged on February 18, 2004 and added the individual and John Doe defendants to the action. The Court granted defendants' motion for a more definite statement on July 21, 2004 and on August 6, 2004 accepted the TAC as adequate with the express caveat that defendants were not prevented from further challenging the specificity or sufficiency of the complaint. On February 28, 2005, the Court granted Defendants' motion for a more definite statement. Plaintiffs lodged the 4AC on March 30, 2005 and the Court accepted it as adequate on April 12, 2005. Defendants now move to dismiss the 4AC.

C. Claims in the 4AC

The 4AC asserts twenty-one claims. Claims one and two allege violation of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§ 1201(a)(1)(A) and 1201(a)(2) and (b)(1), based on circumvention of technological measures and trafficking in devices primarily used circumvention. These claims have a three-year limitations period. 17 U.S.C. § 507(b). Claims three and four allege violation of the Communications Act, 47 U.S.C. § 605(a) and (e)(4), which prohibits receiving or assisting in receiving any wire or radio communication without authorization and which also prohibits the distribution of any device or equipment knowing that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming. These claims have a three-year limitations period. 17 U.S.C. § 507(b); *Nat'l Satellite Sports, Inc. v. Time Warner Entertainment Co.*, 255 F. Supp. 2d 307, 313-14 (S.D.N.Y. 2003). Claim five alleges violation of the Electronic Communications Privacy Act ("ECPA"), 18 U.S.C. § 2511, which subjects to suit any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any

wire, oral, or electronic communication." 18 U.S.C. §§ 2511(1)(a), 2520(a). This claim has a two-year limitations period. 18 U.S.C. § 2520(e). Claims six and seven allege trademark infringement and designation of false origin in violation of the Lanham Act, 15 U.S.C. §§ 1114, 1125(a). These claims have a three-year limitations period. *Karl Storz Endoscopy Am., Inc. v. Surgical Techs., Inc.*, 285 F.3d 848, 857 (9th Cir. 2000). Claims eight and nine are for violation of the Racketeering Influenced and Corrupt Organizations Act ("RICO") and for conspiracy to commit such violations. 18 U.S.C. § 1962(c), (d). These claims have a four-year limitations period. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 2767 (1987). Claims ten through fourteen allege violations of the California Penal Code §§ 593d(a), (b), and (c) and 593e(a) and (b), which prohibit the making of unauthorized connections. These claims have a three-year limitations period. Cal. Civ. Proc. Code § 338(a). Claim fifteen alleges unfair competition in violation of California Business and Professions Code section 17200. This claim has a four-year limitations period. Cal. Bus. & Prof. Code § 17208. Claims sixteen and seventeen are for tortious interference with contractual relations and tortious interference with prospective contractual relations. These claims have a two-year limitations period. Cal. Civ. Proc. Code § 339(1). Claims eighteen and nineteen are for unjust enrichment and conversion. These claims have a three-year limitation period. Cal. Civ. Proc. Code § 338(c). Claim twenty is alleged only against Tarnovsky and Tarnovsky Sr. and is for breach of contract. This claim has a four-year limitation period. Cal. Civ. Proc. Code § 377(1).[2]

In summary, claims five, sixteen, and seventeen have a two-year limitations period. Claims one through four, claims six and seven, ten through fourteen, and eighteen and nineteen have a three-year limitations period. Claims eight and nine, claim fifteen, and claim twenty have a four-year limitations period.

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[2]The twenty-first cause of action for "Civil Conspiracy/Joint Contribution" is not a separate cause of action. *People v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 136 (Cal.Ct. App. 2003) ("Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration."). Thus, it is STRICKEN from the 4AC.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a complaint must be dismissed when a plaintiff's allegations fail to state a claim upon which relief can be granted. The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02 (1957); *see Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990) (stating that a complaint should be dismissed only when it lacks a "cognizable legal theory" or sufficient facts to support a cognizable legal theory). The Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the complaint in the light most favorable to the plaintiff. *Westlands Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 670 (9th Cir. 1993); *Balistreri*, 901 F.2d at 699; *NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Dismissal without leave to amend is appropriate only when the Court is satisfied that the deficiencies of the complaint could not possibly be cured by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987).

As with the Third Amended Complaint, Rule 9(b) applies to the entirety of the 4AC because Plaintiffs have chosen to "allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of [their] claims." *See Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1103 (9th Cir. 2003). "[W]here fraud is not a necessary element of a claim," a plaintiff may still predicate the entire claim on a unified course of fraudulent conduct. *Id.* In such a case, "the claim is said to be 'grounded in fraud' or to 'sound in fraud,' and the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)." *Id.* at 1103-04. Here, Plaintiffs allege that twenty-one causes of action have arisen against two corporate entities, twenty-one named individuals, and 100 unnamed individuals all as a result of an overriding conspiracy led by NDS to hack Plaintiffs' access system and flood the market with unauthorized reprogrammed EchoStar Access Cards while simultaneously maintaining the appearance that NDS was a legitimate competitor. The substance of the claims alleged in the

4AC are the same as the claims of the Third Amended Complaint in spite of Plaintiffs' attempts to expunge the word "fraud" from the claims and also in spite of Plaintiffs' attempts to explain that "Plaintiffs' claims are based on a multi-layed [sic] conspiratorial web consisting of corporate entities seeking to gain dominance in the CAS marketplace and individuals seeking to profit from serving their respective roles in carrying out this anticompetitive objective." 4AC ¶ 61. Every cause of action alleged in the complaint is grounded in Plaintiffs' extensive allegations of calculated and fraudulent conduct. Thus, because Plaintiffs have chosen to predicate the entire complaint on sweeping allegations of conspiracy and fraud, the complaint must satisfy Rule 9(b)'s heightened pleading requirements in addition to satisfying Rule 8's requirement of directness, simplicity, and clarity.

Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." *Semegen v. Weidner,* 780 F.2d 727, 731 (9th Cir. 1985). "The complaint must specify such facts as the times, dates, places, benefits received, and other details of the alleged fraudulent activity." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). "The purpose of Rule 9(b) is to prevent the filing of a complaint as a pretext for the discovery of unknown wrongs." *In re Silicon Graphics, Inc. Secs. Litig.*, 970 F. Supp. 746, 752 (N.D. Cal. 1997) (citing *Semegen*, 780 F.2d at 731).

III. ANALYSIS

Although Plaintiffs are suing twenty-three separate defendants and is currently facing eleven motions to dismiss for failure to state a claim, Plaintiffs have filed only one substantive opposition to the motions to dismiss. Plaintiffs attempt to allow their opposition to the NDS motion to dismiss to serve as the opposition to all other motions to dismiss. Although the Court appreciates the effort to "avoid burdening the Court with multiple opposition briefs reiterating the same arguments and authorities," not all arguments that apply to NDS apply to other defendants and the other defendants also may have additional defenses that are not available to

NDS. Although Plaintiffs have attempted to lump all defendants together, the Court now attempts to discern whether the 4AC states a claim against each separate defendant.

A. NDS Corporate Defendants

1. Statute of Limitations

NDS argues that dismissal of the non-RICO claims is appropriate because those claims are barred by the applicable statutes of limitations. The defense of statute of limitations "may be raised by a motion for dismissal or by summary judgment motion." *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). "If the running of the statute is apparent on the face of the complaint, the defense may be raised by a motion to dismiss." *Id.* Such a motion "may be granted only if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled" and only if "it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim." *Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206-07 (9th Cir. 1995).

Broadly, the 4AC alleges conduct occurring sometime between 1998 and 2003. The 4AC alleges that from as early as 1998, NDS employed and controlled satellite pirates and hackers, including Defendant Tarnovsky. 4AC ¶ 10. Sometime on or after 1998, NDS carried out the alleged hack-and-distribute scheme, which allegedly involved employing the hackers to hack into both NDS's and Echostar's security systems and setting up and controlling a network for distributing reprogrammed Echostar Access Cards. Specifically, on December 23 and 24, 2000, Tarnovsky, under the pseudonym "nIpPeR cLaUz 00'," allegedly posted to the Internet (www.piratesden.com), a sequence of events and data, along with accompanying instructional code, effectively giving other satellite hackers EchoStar's proprietary ROM and EEPROM Codes and instructions on how to access EchoStar's microprocessor. *Id.* ¶ 21. Plaintiffs allege that Tarnovsky continued to reprogram EchoStar Access Cards at least until January 9, 2001, when United States Customs agents visited Tarnovsky's home and saw the stinger. 4AC ¶ 162. Plaintiffs further allege that after the 2000 posting, NDS through Tarnovsky continued to provide technical support through updates, patches, and fixes for the reprogrammed EchoStar cards. *Id.* ¶ 24. Because of this assistance, the distributors (Menard, Dawson, Quinn, Dale,

Frost, and Sergei) continued to reprogram EchoStar Access Cards, sell such cards, update such cards, and provide technical assistance to those who had purchased such cards. *Id.* This activity allegedly continued until the distributors' websites were shut down:

> (1) Menard – www.dr7.com – June 21, 2001; (2) Dawson – www.dsscanada.com – June 19, 2003; (3) Quinn – www.hitecsat.com – June 19. 2003; (4) Sergei – www.koinvision.com – January 28, 2001; (5) Dale – www.dr7.com - June 21, 2001; and Frost – www.newfrontiergroup.com – June 25, 2003.

Id. ¶ 25.

Defendants argue that all of Plaintiffs' non-RICO claims accrued at least as early as November 3, 1998. This argument is based on allegations that are not contained in the 4AC, but allegations that were included in the First Amended Complaint ("FAC"). In the FAC, Plaintiffs alleged that they were informed "[o]n or about November 3, 1998," by DirecTV representatives that Plaintiffs' "Security System had recently been hacked and [DirecTV] provided detailed non-public information of a highly technical nature concerning how the system was actually attacked." FAC ¶ 52. Plaintiffs received this information in the course of competing with NDS to provide encryption services to DirecTV. FAC ¶¶ 41-54. Defendants argue that because Plaintiffs knew that this hack had occurred and that the hack had harmed Plaintiffs' proposal to DirecTV, Plaintiffs knew of the injury that forms the basis for all their non-RICO claims as of November 3, 1998.

a. Date on Which Plaintiffs First Asserted Their Rights

Plaintiffs originally filed their complaint against the NDS Corporate Defendants on June 6, 2003. The date on which Plaintiffs actually filed their complaint, June 6, 2003, is the date on which Plaintiffs asserted their claims against NDS for statute of limitations purposes. Contrary to Plaintiffs' argument, Plaintiffs' attempt to intervene in a separate lawsuit on September 27, 2002 is not the date on which Plaintiffs' first asserted their rights against NDS.

Although Plaintiffs cite cases holding that the filing of a motion to intervene determines

the commencement of the action for purposes of the statute of limitations, those cases are distinguishable because they involved situations where the plaintiff had filed a motion to intervene within the limitations period, the court granted the motion to intervene, and the intervenor filed its complaint after the limitations period had expired. *See U.S. for Use & Benefit of Canion v. Randall & Blake*, 817 F.2d 1188, 1192 (5th Cir. 1987); *Farris v. Sears, Roebuck & Co.*, 415 F. Supp. 594, 596 (W.D. Ky. 1976). Plaintiffs filed a motion to intervene in a different action with similar facts against NDS, *Canal+ v. NDS et al.*, on September 27, 2002. That action was settled before the court ruled on the motion to intervene and Plaintiffs filed this suit on June 6, 2003. The Court can find no authority for Plaintiffs' contention that an unsuccessful motion to intervene in one action can toll the statute of limitations in a separate action. Thus, the date when Plaintiffs first asserted their rights against NDS is June 6, 2003.

In other words, for those causes of action having a two-year statute of limitations (claims 5, 16, and 17), the claim must have accrued sometime after June 6, 2001 for the complaint to be timely. For those causes of action having a three-year statute of limitations (claims 1-4, 6, 7, 10-14, 18, and 19), the claim must have accrued sometime after June 6, 2000 for the complaint to be timely. And for those causes of action having a four-year statute of limitations (eight, nine, fifteen, and twenty), the claim must have accrued sometime after June 6, 1999.

b. Accrual

"Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *TwoRivers v. Lewis*, 174 F.3d 987, 991-92 (9th Cir. 1999). To determine the proper time of accrual, the Court must determine what constitutes an "injury" for each claim alleged.

Many of Plaintiffs' claims arise from the alleged facts of either hacking into Plaintiffs' security system or creating and distributing reprogrammed EchoStar Access Cards. For example, Plaintiffs' first claim alleges violation of the DMCA under 17 U.S.C. § 1201(a)(1)(A),

which prohibits circumvention of technological measures.[3] The injury associated with this claim is the act of circumvention, i.e., hacking into Plaintiffs' system. Plaintiffs were aware that their system had been hacked no later than November 3, 1998. FAC ¶ 52.[4] Plaintiffs' second claim alleges a violation of the DMCA under 17 U.S.C. § 1201(a)(2) and (b)(1), which prohibit the manufacture, importation or offering to the public of circumvention devices. The injury for these causes of action is the distribution of the device that is designed to circumvent copyright protection or allow unauthorized decryption of satellite broadcasting. If Plaintiffs were not aware of the distribution of such a device as of November 3, 1998, Plaintiffs certainly became aware of such distribution by July 23, 1999, when Defendant Tarnovsky sent the president of Nagrastar an email, which stated:

> After a visit to your website http://www.nagra.com, we noticed that the information about the Echostar Corporation is outdated. We would greatly appreciate if you updated the subscriber count to 2.5 million + 50000 pirate customers. Best Regards, The Swiss Cheese Production.

TAC ¶ 144. After receiving such an email, and knowing that the EchoStar security system had been hacked, Plaintiffs were certainly on notice that reprogrammed EchoStar devices were being distributed. Except for walking up to Plaintiffs and slapping them across the face with a white glove, Tarnovsky could not have done much more to let Plaintiffs know that they had a cause of action.

Thus, Plaintiffs' first cause of action initially accrued when Plaintiffs knew that their security system had been hacked, November 3, 1998, and Plaintiffs' second cause of action

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[3]Section 1201(a)(1)(A) states: "No person shall circumvent a technological measure that effectively controls access to a work protected under this title." 17 U.S.C. § 1201(a)(1)(A).

[4]Although Plaintiffs have omitted some of the key dates from the 4AC, the Court incorporates allegations of earlier complaints on the principle that an amended complaint may only allege facts consistent with earlier pleadings. *Reddy Litton Inds., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990).

accrued when Plaintiffs knew that a large number of reprogrammed EchoStar devices had been distributed, July 23, 1999. Similarly, the majority of Plaintiffs other federal and state statutory claims also arise out of either the hacking of Plaintiffs' system or the distribution of the EchoStar Access Cards. Those claims that arise out of the hacking of Plaintiffs' system include the third,[5] fifth,[6] tenth,[7] twelfth,[8] and thirteenth[9] claims. Also, Plaintiffs' fifteenth claim, for unfair competition, accrued upon Plaintiffs learning that their system had been hacked. Those claims

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[5]The third claim alleges violation of 47 U.S.C. § 605(a), which states:

> No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person.
>
> No person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use such communication (or any information therein contained) for his own benefit or for the benefit of another not entitled thereto.

47 U.S.C. § 605(a).

[6]The fifth claim alleges violation of 18 U.S.C. § 2511(1)(a), which provides that any person who "intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" shall be liable to the person whose communication is intercepted. 18 U.S.C. §§ 2511(1)(a), 2520.

[7]The tenth claim alleges violation of California Penal Code § 593d(a), which prohibits the unauthorized interception, receipt, or use of any program or service carried by a multichannel video or information services provider. Cal. Penal Code § 593d(a).

[8]The twelfth claim alleges violation of California Penal Code § 593d(c), which prohibits making unauthorized connections to a multichannel video or information services provider's system for the purpose of interfering with, altering, or degrading any such service being transmitted to others. Cal. Penal Code § 593d(c).

[9]The thirteenth claim alleges violation of California Penal Code § 593e(a), which prohibits knowingly and willfully making an unauthorized connection to or attaching an unauthorized device to a television set or other equipment designed to receive a television broadcast. Cal. Penal Code. § 593e(a).

that arise out of the distribution of reprogrammed EchoStar Access Cards include the fourth,[10] sixth,[11] seventh,[12] eleventh,[13] and fourteenth[14] claims. Additionally, Plaintiffs' claims of tortious

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[10]The fourth claim alleges violation of 47 U.S.C. § 605(e)(4), which provides a right of action and civil penalties against:

> Any person who manufactures, assembles, modifies, imports, exports, sells, or distributes any electronic, mechanical, or other device or equipment, knowing or having reason to know that the device or equipment is primarily of assistance in the unauthorized decryption of satellite cable programming, or direct-to-home satellite services, or is intended for any other activity prohibited by subsection (a) of this section.

47 U.S.C. § 605(e)(4).

[11]The sixth claim alleges violation of 15 U.S.C. § 1114, which states:

> (1) Any person who shall, without the consent of the registrant--
>
> (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive; or
>
> (b) reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive,
>
> shall be liable in a civil action by the registrant for the remedies hereinafter provided. Under subsection (b) hereof, the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such imitation is intended to be used to cause confusion,

interference with contract (16), tortious interference with prospective contractual relations (17),

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or to cause mistake, or to deceive.

15 U.S.C. § 1114.

[12]The seventh claim alleges violation of 15 U.S.C. § 1125(a), which states:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
>
> (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a).

[13]The eleventh claim alleges violation of California Penal Code § 593d(b), which prohibits the manufacture, advertisement, possession, distribution, or sale of any device designed to decrypt, decode, descramble, or otherwise made intelligible any encrypted, encoded, scrambled, or other nonstandard signal carried by a multichannel video or information services provider. Cal. Penal Code § 593d(b).

[14]The fourteenth claim alleges violation of California Penal Code § 593e(b), which prohibits the unauthorized manufacture, advertisement, possession, distribution, or sale of any device, plan, or kit for a device or for a printed circuit designed to decode, descramble, intercept, or otherwise make intelligible, any encoded, scrambled, or other nonstandard signal carried by a subscription television system. Cal. Penal Code § 593e(b).

unjust enrichment (18), and conversion (19) all arise out of the alleged distribution of EchoStar Access Cards. Thus, these claims accrued no later than July 23, 1999.

Notably, Plaintiffs allege not that these acts of hacking and distributing occurred once, but they allege that Defendants repeatedly hacked Plaintiffs' system and distributed reprogrammed cards. As discussed below, these repeated violations do not constitute one continuing wrong, but each discrete violation does give rise to a new and separate cause of action. Therefore, although Plaintiffs' claims initially accrued on November 3, 1998 and July 23, 1999, separate and discrete claims may have continued to accrue and may be timely asserted.

c. Tolling

Given that all of Plaintiffs' non-RICO claims alleged against NDS initially accrued as discussed above on either November 3, 1998 or July 23, 1999, and given that Plaintiffs did not sue NDS until June 6, 2003, all of those claims that arose more than two, three, or four years before June 6, 2003 are barred by the applicable statutes of limitation unless a tolling doctrine applies. Plaintiffs argue that a number of tolling doctrines save their otherwise barred claims.

Plaintiffs first argue that by filing their motion to intervene in the separate Canal+ litigation, Plaintiffs tolled the statute of limitations. As discussed above, an unsuccessful motion to intervene in one action does not toll the statute of limitations for purposes of another action. Plaintiffs' unsuccessful attempt to intervene in the Canal+ litigation did not toll the statute of limitations. Moreover, even if the Court were to assume that filing the motion to intervene on September 27, 2002 was the first time that Plaintiffs asserted their rights against NDS, that date still falls outside the limitations period for most of Plaintiffs' claims.

Second, Plaintiffs argue that California's doctrine of equitable tolling applies as of September 27, 2002 when Plaintiffs filed their motion to intervene. In order for a statute of limitations to be equitably tolled, (1) the plaintiff must give timely notice to the defendant of plaintiff's claim, (2) the resultant delay must not have caused defendant prejudice, and (3) plaintiff must have acted reasonably and in good faith. *Ervin v. Los Angeles County*, 848 F.2d 1018, 1019 (9th Cir. 1988). As discussed above, even if the Court assumes that Plaintiffs' motion to intervene in the Canal+ litigation gave NDS notice of Plaintiffs' claims, that notice

was still not timely. Because Plaintiffs did not seek intervention until after the limitations period had expired, equitable tolling does not apply. Furthermore, Plaintiffs have made no showing that Plaintiffs were acting in good faith when they moved to intervene in the Canal+ litigation, which was in the course of settlement when the motion was filed. If Plaintiffs had wanted to preserve their rights against NDS, Plaintiffs easily could have filed their own complaint against NDS instead of attempting to intervene in a case that was on the verge of settlement. Because the facts of Plaintiffs' motion to intervene do not demonstrate that Plaintiffs acted reasonably and in good faith, equitable tolling is not appropriate.

Third, Plaintiffs argue that the statutes of limitations are tolled because the alleged violations are continuing violations based on continual unlawful acts. Although Plaintiffs devote minimal argument to this point, it appears that Plaintiffs are attempting to use more recent unlawful acts to permit Plaintiffs to reach back and sue for older acts, outside the limitations period. The types of wrongs alleged, however, are not continuing wrongs. Rather, they may be separate and discrete incidents, each one of which gives Plaintiffs a cause of action. In other words, because Plaintiffs filed their complaint against NDS on June 6, 2003, Plaintiffs may assert claims that have a two-year period of limitations based on acts that occurred on or after June 6, 2001; Plaintiffs may assert claims having a three-year period of limitations based on acts that occurred on or after June 6, 2000; and Plaintiffs may assert claims having a four-year period of limitations based on acts that occurred on or after June 6, 1999. Plaintiffs may not, however, use the later occurring acts to reinvigorate extinguished claims based on older acts.

The complaint does allege acts that occur within two, three, and four years before the filing of the complaint against NDS. Because of these allegations, the Court cannot simply dismiss the non-RICO claims.[15]

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[15]Additionally, for those causes of action for which co-conspirator liability is available and if Plaintiffs can prove a civil conspiracy, Plaintiffs may obtain the benefit of the "last overt act doctrine," which tolls the statute of limitations until the last overt act of the conspiracy occurs. *See People v. Beaumont Inv., Ltd.*, 111 Cal. App. 4th 102, 137 (Cal. Ct. App. 2003).

d. Allegations of Direct Liability for NDS

Plaintiffs allege that NDS is liable for the acts of its employees, specifically Tarnovsky. Plaintiffs allege that up to and including January 9, 2001, NDS through its employee Tarnovsky was unlawfully reprogramming EchoStar Access Cards. 4AC ¶ 141, 162, 15, 18, 26. Plaintiffs allege that Tarnovsky's reprogramming and distributing activities continued until at least January 9, 2001 by specifically alleging that on January 9, 2001, United States Customs agents visited Tarnovsky's home in California and saw a device ("a card emulator") pushing out reprogrammed EchoStar Access Cards. 4AC ¶ 141. This allegation is pled with particularity and is within three years of June 6, 2003, when Plaintiffs filed their complaint. Thus, this factual allegation may be able to support those claims having a three or four year limitation period.

Plaintiffs also allege that NDS through Tarnovsky continued to distribute reprogrammed cards and provide technical support, software fixes, patches, updates, and accompanying codes for the reprogrammed Access Cards through their distribution network up to June 25, 2003, when the last distribution website was taken down. 4AC ¶ 161. However, the allegation that the activity continued until the websites were taken down is not adequately supported by facts in the complaint. Plaintiffs baldly assert that all of the activities, the bulk of which clearly occurred in the years 1998, 1999, and 2000, continued to occur up until June 25, 2003, when Defendant Frost's website was shut down. 4AC ¶ 161. Plaintiffs do not, however, allege any specific activities that occurred through the website. Plaintiffs also fail to allege any facts supporting the assertion that the website owners continued distributing reprogrammed cards or providing technical support up until June 25, 2003. Plaintiffs have not alleged the existence of a single specific transaction that occurred through the use of these websites.

The only specific fact that Plaintiffs allege with respect to the websites is that on May 31, 2001, "a Pirates Den 'DISH Network' File Search yielded" a number of allegedly illegal file downloads. 4AC ¶ 137. Paragraph 137 does not specifically state the URL or web address from which these files were available. The Court assumes that Plaintiffs are referring to the website, www.piratesden.com, which is the same site where Tarnovsky allegedly published Plaintiffs' ROM and EEPROM Codes on December 23 and 24, 2000. 4AC ¶ 21-22, 131. Oddly, Plaintiffs

do not link this particular web address, www.piratesden.com, to any particular defendant.[16] Without linking this website to any particular defendant, the Court cannot hold any particular defendant responsible for the files posted on it. Moreover, the lack of particular facts about the allegedly unlawful activities that may or may not have been occurring on the other websites precludes the Court from finding that the distribution of reprogrammed EchoStar Access Cards continued until the last of the websites was shut down. The Court cannot find that the violations were ongoing without any specific facts alleged to that effect.

Thus, the last specific act that the Court can consider to be a factual allegation against NDS is the fact alleged against NDS employee Tarnovsky that Tarnovsky was continuing to make and distribute reprogrammed EchoStar Access Cards up to and including January 9, 2001. An employer is liable under the doctrine of respondeat superior for the acts of its employee if the employee's acts were (1) "substantially within the time and space limits authorized by the employment," (2) "motivated, at least in part, by a purpose to serve the employer," and (3) "of a kind that the employee was hired to perform." *Oki Semiconductor Co. v. Wells Fargo Bank, Nat'l Ass'n*, 298 F.3d 768, 775-76 (9th Cir. 2002). Plaintiffs allege that Tarnovsky is and employee of NDS. 4AC ¶ 93. Additionally, Plaintiffs allege that Tarnovsky was hired for the purpose of compromising Plaintiffs' security system. Thus, drawing all reasonable inferences in favor of Plaintiffs, Tarnovsky's alleged actions were carried out in an attempt to serve NDS and

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[16]Plaintiffs repeatedly link the distributor Defendants to particular websites. For example, Plaintiffs repeatedly allege that the unlawful conduct continued until the respective websites were shut down and list the following dates and websites:

> (1) Menard – www.dr7.com – June 21, 2001; (2) Dawson – www.dsscanada.com – June 19, 2003; (3) Quinn – www.hitecsat.com – June 19. 2003; (4) Sergei – www.koinvision.com – January 28, 2001; (5) Dale – www.dr7.com - June 21, 2001; and Frost – www.newfrontiergroup.com – June 25, 2003.

Id. ¶ 25, 135. Plaintiffs do not link the www.piratesden.com website to any particular defendant.

were of the sort NDS hired him to perform. Later, after discovery, NDS may be able to prove that Tarnovsky was not acting for NDS's benefit, but at this early stage of the litigation, Plaintiffs' allegations are adequate.

Because Plaintiffs have not alleged facts for which NDS may be held liable occurring within two years of the filing of the complaint, those claims having a two-year limitations period (claims 5, 16, 17) are properly dismissed. Claims having a three-year and four-year period of limitations remain.

e. Allegations of Secondary Liability for NDS

Those two-year claims cannot be revived by invoking theories of secondary liability. First, as discussed below, the claims of tortious inference with present and prospective contractual relations are substantively deficient. Second, NDS is not secondarily liable under 18 U.S.C. § 2511(1)(a) for both factual and legal reasons. Factually, Plaintiffs have failed to allege any specific acts of other Defendants occurring within two years of filing the complaint against NDS. Although Plaintiffs baldly state that the unlawful activities continued until June of 2003, the complaint alleges no facts to that effect. Thus, the complaint alleges no facts that would support secondary liability against NDS. Additionally, as discussed in more detail below, NDS cannot be held liable under a theory of aiding and abetting or conspiracy because Congress has not explicitly included those theories within the scope of 18 U.S.C. § 2511. *See Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 182, 114 S. Ct. 1439, 1450-51 (1994).

2. RICO Claims

NDS moves to dismiss claims eight and nine, alleging violations of RICO, 18 U.S.C. § 1962(c), (d), on the ground that Plaintiffs have failed to plead a RICO "enterprise." Previously, this Court dismissed the RICO claim in Plaintiffs' First Amended Complaint for failure to plead a RICO enterprise. Order Granting in Part and Denying in Part Motion to Dismiss, Dec. 22, 2003, 9:22-12:1. At the time, the Court found that Plaintiffs failed to allege a criminal structure that controlled both the distribution and technology sub-structures.

To state a claim under 18 U.S.C. § 1962(c) or (d), a plaintiff must plead the existence of

an "enterprise" that is engaged in a pattern of racketeering activity or collection of unlawful debt. The RICO statute defines "enterprise" to mean (1) "any individual, partnership, corporation, association, or other legal entity," and (2) "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

In this case, Plaintiffs' RICO claim is based on an enterprise of the second variety. The Supreme Court has held that an associated in fact enterprise under RICO must (1) have an ongoing formal or informal organization and (2) function as a continuing unit. *See United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528 (1981). The Ninth Circuit has further stated that "the predicate acts of racketeering activity, by themselves, do not satisfy the RICO enterprise element." *Chang v. Chen*, 80 F.3d 1293, 1299 (9th Cir. 1996). "A RICO plaintiff must allege a structure for the making of decisions separate and apart from the alleged racketeering activities, because 'the existence of an enterprise at all times remains a separate element which must be proved.'" *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1112 (9th Cir. 2003) (citing *Chang*, 80 F.3d at 1299 and *Turkette*, 452 U.S. at 583, 101 S. Ct. at 2528).

In the 4AC, as in the FAC, Plaintiffs allege two separate structures: (1) a distribution and sales structure, led by Allen Menard, and (2) a technology structure, consisting of NDS and its direct employees who hacked Plaintiffs' system and developed the method of reprogramming EchoStar Access Cards. To determine whether the allegations meet the RICO enterprise requirement, the critical question for the Court is whether Plaintiffs have sufficiently alleged a higher criminal structure that controls both the distribution and technology sub-structures. Again, they have not.

Plaintiffs allege that the distribution side and the technology side were both "controlled primarily by the single-decision making [sic] apparatus within NDS, which determined when and what hacked software code to release to the public." 4AC ¶ 299. This alleged control over the distribution of the reprogrammed EchoStar cards consisted of supplying Menard with the equipment and technology necessary for distribution. *Id.* ¶ 300. Additionally, to the extent that Plaintiffs now allege that NDS was in control of the distribution structure, those allegations are inconsistent with the allegations of the FAC, which stated that Menard was the primary decision

maker of the distribution and sale structure and that Menard exerted control over the direction of the enterprise. FAC ¶¶ 164-65. Again, as with the FAC, Plaintiffs have not alleged facts that, if true, would demonstrate that NDS exerted any greater control over the Menard distribution network than any other supplier exerts over any other distribution network. Plaintiffs have essentially alleged that NDS supplied Menard with equipment and technology that Menard then independently distributed through a network established by Menard. Plaintiffs have not alleged that NDS was in control of who was a part of the distribution network or how the products were distributed.

Thus, Plaintiffs have failed to allege a criminal enterprise as defined by 18 U.S.C. § 1961 and Ninth Circuit precedent and therefore fail to allege an essential element of their civil RICO claims under 18 U.S.C. § 1962(c) and (d). Claims eight and nine are properly dismissed.

3. DMCA Claims

NDS argues that Plaintiffs' first and second claims for violation of the DMCA must be dismissed because "the only conduct alleged in the 4AC against NDS within the limitations period is that NDS directed that portions of EchoStar's code be published on the Internet. *See* 4AC ¶ 21." Mem. in Support of NDS Mot. to Dismiss, 21:15-17.

To allege a violation of the DMCA under 17 U.S.C. § 1201(a)(1)(A), a plaintiff must allege that the defendant circumvented a technological measure that effectively controls access to a protected work. 17 U.S.C. § 1201(a)(1)(A). To allege a violation of 17 U.S.C. § 1201(a)(2) and (b)(1), a plaintiff must allege that the defendant manufactured, imported, or offered to the public a circumvention device. 17 U.S.C. § 1201(a)(2), (b)(1). Any violation of § 1201 has a three-year period of limitations. Thus, because Plaintiffs brought their complaint against NDS on June 6, 2003, Plaintiffs must allege that some violation of § 1201 occurred on or after June 6, 2000.

The Court does not agree that the only act alleged to have occurred after June 6, 2000 is Tarnovsky's posting to the Internet. Minimally, Plaintiffs allege that NDS employee Tarnovsky continued to unlawfully reprogram EchoStar Access Cards up to and including January 9, 2001, when federal officials visited his home. 4AC ¶ 162. This specific allegation, if true, is sufficient

to give rise to an inference that Tarnovsky was manufacturing and distributing reprogrammed EchoStar Access Cards until January 9, 2001. Although NDS raises a very interesting question of whether posting the ROM and EEPROM Codes to the Internet constitutes a violation of the DMCA, the Court need not answer that question at this time because other acts alleged in the 4AC are adequate to support Plaintiffs' DMCA claims.

4. Tortious Interference Claims

Plaintiffs argue that the Court should dismiss the sixteenth and seventeenth claims for tortious interference with contractual relations and with prospective contractual relations, respectively, because Plaintiffs have failed to allege what contractual relationships or prospective contractual relationships were disrupted. Although these claims are barred by the statute of limitations, as discussed above, they also fail for additional substantive reasons.

To state a claim for intentional tortious interference with contractual relations, the following elements are required: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." *Pac. Gas & Elec. Co. v. Bear Stearns & Co.*, 50 Cal. 3d 1118, 1126 (Cal. 1990). To state a claim for interference with prospective economic advantage, the following elements are required: "(1) the existence of a specific economic relationship between [plaintiff] and third parties that may economically benefit [plaintiff]; (2) knowledge by the [defendants] of this relationship; (3) intentional acts by the [defendants] designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to the [plaintiff]." *Rickards v. Canine Eye Registration Foundation, Inc.*, 704 F.2d 1449, 1456 (9th Cir.1983).

For both of these claims, Plaintiffs' allege that NDS interfered with the present and prospective contractual relations between EchoStar and its DISH Network subscribers and content providers by

> [I]nducing . . . an as yet undetermined number of DISH Network subscribers not to perform their respective contracts with EchoStar

> by designing, developing, manufacturing . . . Pirated EchoStar Access Cards and other Circumvention or Signal Theft Devices to DISH Network subscribers, and advertising and providing software, information, and technical support services relating to Pirated EchoStar Access Cards and other Circumvention or Signal Theft Devices to DISH Network subscribers thereby causing the breach or termination of DISH Network subscribers' accounts resulting in damage to EchoStar.

4AC ¶ 447. Plaintiffs do not specifically allege the existence of any particular contract that was breached. Plaintiffs also do not allege that NDS knew of any of the subscriber contracts or specifically designed their actions to target DISH Network subscribers. Plaintiffs' argument that they cannot plead specific contracts that were breached because they have not yet had the opportunity to conduct discovery is unavailing. Plaintiffs are in possession of their own records of DISH Network subscriptions. If the events alleged in the complaint occurred at the same time as, for example, a spike in breaches of subscriber agreements, Plaintiffs would have access to that information. Yet the complaint alleges no such facts. Thus, Plaintiffs have failed to plead a claim for tortious interference with present or prospective contractual relations.

5. Claim Under California Business & Professions Code Section 17200

NDS argues that claim fifteen, unfair competition in violation of California Business & Professions Code section 17200, must be dismissed because Plaintiffs have failed to allege that any conduct constituting unfair competition occurred in California.[17] California's unfair competition law bans unfair business practices, but it does not "regulate claims of nonresidents arising from conduct occurring entirely outside of California." *Norwest Mortgage, Inc. v. Super. Ct.*, 72 Cal. App. 4th 214, 222 (Cal. Ct. App. 1999). Here, however, Plaintiffs allege that at least

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[17]NDS also argues that because it is proper to dismiss all other causes of action, the section 17200 claim must also be dismissed. As the Court has rejected the argument that all other claims must be dismissed, the Court also rejects the argument that the section 17200 claim must be dismissed.

part of the conduct constituting the unfair competition occurred in California. Defendant Tarnovsky resided in California at all times relevant to this case and NDS Americas, Inc. has its principal place of business in Newport Beach, California. 4AC ¶¶ 36, 44. Specifically, Plaintiffs allege that Tarnovsky had a device in his home that he used for reprogramming EchoStar Access Cards. 4AC ¶ 141. Thus, NDS's argument fails.

B. Christopher Tarnovsky

Tarnovsky moves to dismiss the 4AC on virtually all the same arguments made by NDS.

1. Statute of Limitations

As with NDS, it is clear that the non-RICO claims[18] against Tarnovsky first accrued on November 3, 1998 or on July 23, 1999. Plaintiffs did not sue Tarnovsky until they lodged their SAC on February 18, 2004. The last allegedly unlawful act by Tarnovsky occurred on January 9, 2001, when Customs officials saw Tarnovsky reprogramming EchoStar Access Cards in his home. 4AC ¶ 162. This conduct occurred more than three years before Plaintiffs named Tarnovsky as a defendant in this action. Thus, all of Plaintiffs' claims against Tarnovsky having a two-year or three-year limitations period (claims 1-7, 10-14, 16-19) are barred as untimely.

2. Breach of Contract

Plaintiffs' claim of breach of contract against Christopher Tarnovsky is not barred by the statute of limitation on the face of the complaint. Breach of contract claims are subject to a four-year period of limitation, which begins to run on the date of the breach. Cal. Civ. Proc. Code § 337(1). Here, Plaintiffs allege that Tarnovsky entered into a license agreement with Plaintiffs on August 3, 1999, but they do not specifically allege when the breach occurred. Thus, Plaintiffs' claim for breach of contract is not clearly barred by the statute of limitation.

At the same time, Plaintiffs' failure to allege any specific facts to support the claim of breach requires dismissal of the claim. As Plaintiffs' have chosen to allege all claims as an overriding fraudulent conspiracy, Plaintiffs must support all claims with specific factual allegations. *See* Fed. R. Civ. P. 9(b). Here, Plaintiffs simply allege that they are "informed and

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[18]Excluding the claim for breach of contract, which is discussed separately below.

believe" that Tarnovsky engaged in activities that violated the 1999 licensing agreement. 4AC ¶ 486. Plaintiffs' allegations do not put Tarnovsky on notice of what the alleged breach consisted of or when it occurred and, thus, the allegations fail. Claim twenty is properly dismissed.

3. RICO Claims

For the reasons stated above with respect to NDS's motion to dismiss, the RICO claims asserted against Tarnovsky under 18 U.S.C. § 1962(c) and (d) also fail and must be dismissed.

4. Claim Under California Business & Professions Code Section 17200

All claims other than the claim of violation of California Business & Professions Code section 17200 are either barred by the statute of limitations or substantively deficient. "[T]he breadth of [section] 17200 does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition." *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001). Thus, Plaintiffs' claim under section 17200 against Tarnovsky must also be dismissed.

C. John Norris

The 4AC alleges a minimal amount of conduct by Norris. Specifically, the 4AC alleges that in October and November 1997, Norris was allegedly involved in recruiting Tarnovsky to work for NDS. 4AC ¶¶ 93, 97. In March 1999, Norris and Tarnovsky allegedly attended a show in Las Vegas together and Norris introduced Tarnovsky to someone as "Mike." 4AC ¶ 98. In December 1997, Norris allegedly sent someone a letter stating that Tarnovsky had concerns about NDS protecting him. 4AC ¶ 103. The critical allegation against Norris appears to be that "[o]nce NDS had successfully extracted Plaintiffs' secret and proprietary ROM and EEPROM Codes, they were transferred via Hasak and Norris, to Tarnovsky along with specific instructions." 4AC ¶ 109. As discussed above, the allegations of the FAC make clear that this initial hack of Plaintiffs' codes occurred no later than November 3, 1998. FAC ¶ 52. Beyond these allegations, the 4AC alleges no facts against Norris. As discussed below, all claims are properly dismissed against Norris.

1. Statute of Limitations

Setting aside the question of whether the above alleged conduct would give rise to a cause

of action against Norris, it is clear that all of the alleged conduct occurred too far in the past to be actionable. All of the conduct alleged against Norris clearly occurred no later than March 1999 (the Las Vegas show). Plaintiffs named Norris in the SAC, lodged on February 18, 2004. Thus, because all causes of action alleged have a two-year, three-year, or four-year limitation period, any claim based on Norris' conduct is plainly barred on the face of the complaint.

2. Secondary Liability

The only way that Plaintiffs could hold Norris liable is by establishing that he is secondarily liable for the acts of another. Plaintiff alleges that:

> NDS Americas and its employees (Norris and Tarnovsky) are secondarily liable under the following theories: (1) agency with Menard, . . . (2) agency/subagency with the distributors of the NDS/Tarnovsky/Menard distribution network (Dawson, Dale, Quinn, Sergi [sic] and Frost), . . . (3) contributory and vicarious copyright infringement by Menard, . . . and the distributors of the NDS/Tarnovsky/Menard distribution network . . . , as well as the pirating end-users purchasing the reprogrammed cards and/or receiving technical support for same, . . . (4) agency by ratification of the foregoing acts engaged in by the distributors of the NDS/Tarnovsky/Menard distribution network . . . (5) aiding and abetting Menard, . . . [and] the distributors . . . and (6) conspiracy.

4AC ¶ 164.

First, Plaintiffs have alleged no facts supporting the bald claim that Menard and the other alleged distributors are agents of Norris. Because Plaintiffs have not specifically opposed Norris' motion, but instead have chosen to adopt the arguments made in opposition to NDS's motion to dismiss, Plaintiffs have made no attempt to explain how the complaint alleges agency with respect to Norris. The Court is left to infer that Plaintiffs are attempting to treat NDS and Norris as one and the same. However, Norris cannot be held liable for all acts of NDS simply because Norris is an NDS employee. There is no reverse respondeat superior liability. In short,

Plaintiffs allegations of agency or subagency are wholly unsupported.

Second, Plaintiffs' argument that Norris is liable for "contributory and vicarious copyright infringement" is odd because Plaintiffs do not even allege infringement, whether direct or contributory, as a cause of action. Plaintiffs cannot impose secondary liability on Norris or any other defendant for the claims alleged in the complaint simply by analogizing to the concept of contributory infringement.

Third, the assertions that Norris should be liable for aiding and abetting or for conspiracy fail for both legal and factual reasons. "[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Central Bank*, 511 U.S. at 182, 114 S. Ct. at 1450-51. If Congress had intended to include aiding and abetting liability in the statutes under which Plaintiffs are suing, Congress would have done so explicitly. *Id.* at 176-77, 114 S. Ct. at 1448. Similarly, if Congress had intended to prohibit conspiracy to violate any of the statutes under which Plaintiffs are suing, Congress would have done so explicitly, as it has in the context of civil RICO liability. *See* 18 U.S.C. § 1962(d). Thus, Plaintiffs cannot simply add Defendants onto their claim against NDS by invoking general principles of aiding and abetting or conspiracy. Moreover, even if aiding and abetting liability or conspiracy liability were available, Plaintiffs have failed to plead any facts that would show that Norris gave any substantial assistance to the allegedly unlawful activities of any other defendant.

3. RICO Claims

As discussed above, the RICO claims fail against all Defendants because of Plaintiffs failure to plead an enterprise. *See* 18 U.S.C. § 1962(c), (d).

D. Allen Menard

Plaintiffs allege that Menard was instrumental in the distribution of the reprogrammed EchoStar Access Cards. Plaintiffs further allege that Menard's distribution activities continued up until the distribution websites run by Menard and others were shut down. The last of the websites was shut down on June 25, 2003. 4AC ¶ 25. Defendant Menard challenges these

allegations on many of the same grounds raised by other Defendants.

1. Statute of Limitations

Menard joins in the arguments of the other Defendants that the majority of the claims accrued by November 1998. As discussed above, Plaintiffs' bald allegations that unlawful activity continued until the last of the websites was shut down is inadequate. *See* 4AC ¶ 161. Plaintiffs allege no facts supporting the assertion that any unlawful activity was occurring through the websites until the dates on which they were shut down. Plaintiffs also allege no facts indicating what was available for viewing on the websites as of June 25, 2003. Without specific factual allegations of wrongdoing by specific Defendants, the Court cannot simply assume that each Defendant was engaged in unlawful acts simply because websites were still available for viewing on the Internet. The only specific allegation about a website's content relates to the website www.piratesden.com, and it alleges that as of May 31, 2001, certain files were available for downloading. *See* 4AC ¶ 137. Plaintiffs do not specifically tie Defendant Menard or any other Defendant to this particular website. Thus, it cannot be the basis of any claims against Menard. In short, the complaint contains no specific allegations of wrongdoing by Menard within the three years preceding the SAC. Thus, all claims having a two-year or three-year period of limitations (claims 1-7, 10-14, 16-19) are barred as untimely.

2. RICO Claims

As discussed above, the RICO claims must be dismissed against all Defendants because Plaintiffs have failed to allege a RICO enterprise. *See* 18 U.S.C. § 1962(c), (d).

3. Claim Under California Business & Professions Code Section 17200

All claims other than the claim of violation of California Business & Professions Code section 17200 are either barred by the statute of limitations or substantively deficient. "[T]he breadth of [section] 17200 does not give a plaintiff license to 'plead around' the absolute bars to relief contained in other possible causes of action by recasting those causes of action as ones for unfair competition." *Glenn K. Jackson Inc.*, 273 F.3d at 1203. Thus, Plaintiffs' claim under section 17200 against Menard must also be dismissed.

E. Stanley Frost

Defendant Frost is alleged to have been the owner and operator of a website, www.newfrontiergroup.com, through which Frost is alleged to have distributed reprogrammed EchoStar Access Cards. *See* 4AC ¶ 25. Defendant Frost moves to dismiss the 4AC on many of the same grounds raised by the other Defendants.

Frost's website is alleged to have been the final website to shut down on June 25, 2003. 4AC ¶ 25. Still, the 4AC contains no specific allegations of wrongdoing by Frost at all, let alone within the three years prior to naming Frost as a Defendant. As with the other Defendants alleged to have been involved in the distribution scheme, the complaint contains only vague and conclusory allegations about Frost's involvement. The complaint contains no specific allegations as to how many sales of the reprogrammed EchoStar Access Cards Frost made or how Frost is alleged to have provided technical assistance to those people using reprogrammed EchoStar Access Cards. Thus, the allegations of the complaint do not state a claim against Defendant Frost.

F. George Tarnovsky

The 4AC alleges only the most minimal facts against Tarnovsky Sr. The only claims alleged against Tarnovsky Sr. based on his own direct conduct are the RICO claims 8 and 9 and the claims for unjust enrichment, conversion, and breach of contract (claims 18 through 20). More importantly, however, the only facts alleged against Tarnovsky Sr. relate to Plaintiff's claim for breach of contract. *See* 4AC ¶¶ 483-92. Specifically, Plaintiffs claim that Tarnovsky Sr. purchased a DISH Network receiver from Sears and Roebuck and activated EchoStar services on November 6, 1998. 4AC ¶ 483. Plaintiffs assert that they are "informed and believe" that Tarnovsky Sr. breached his agreement not to tamper with the DISH Network receiver, but they do not explain when or how the breach occurred or how the alleged tampering ties into the alleged overarching conspiracy.

1. Breach of Contract, Unjust Enrichment, Conversion

As discussed above with respect to Christopher Tarnovsky, Plaintiffs' claim of breach of contract against Tarnovsky Sr. is not barred by the statute of limitation on the face of the complaint. Breach of contract claims are subject to a four-year period of limitation, which

begins to run on the date of the breach. Cal. Civ. Proc. Code § 337(1). Here, Plaintiffs allege that Tarnovsky Sr. entered into a license agreement with Plaintiffs on November 6, 1998, but they do not specifically allege when the breach occurred. Thus, Plaintiffs' claim for breach of contract is not clearly barred by the statute of limitation.

At the same time, Plaintiffs' failure to allege any specific facts to support the claim of breach requires dismissal of the claim. As Plaintiffs' have chosen to allege all claims as an overriding fraudulent conspiracy, Plaintiffs must support all claims with specific factual allegations. *See* Fed. R. Civ. P. 9(b). Here, Plaintiffs simply allege that they are "informed and believe" that Tarnovsky Sr. engaged in activities that violated the 1999 licensing agreement. 4AC ¶ 486. Plaintiffs' allegations do not put Tarnovsky Sr. on notice of what the alleged breach consisted of or when it occurred and, thus, the allegations fail. Claim twenty is properly dismissed as against Tarnovsky Sr.

2. RICO Claims

For the reasons discussed above with respect to NDS's motion to dismiss, the RICO claims alleged under 18 U.S.C. § 1962(c)(and (d) must be dismissed for failure to allege an enterprise. Thus, these claims are properly dismissed as to all Defendants, including Tarnovsky Sr.

3. Statute of Limitations

a. Direct Liability

The only remaining claims that are alleged directly against Tarnovsky Sr. are the claims of unjust enrichment and conversion. These claims have a two-year limitations period.

b. Secondary Liability

The remaining claims alleged against Tarnovsky Sr. are based on a theory of secondary liability.[19] Factually, Plaintiffs have not substantiated their allegations of secondary liability. Tarnovsky Sr. appears to have been lumped together with Tarnovsky and Norris because

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[19]The remaining claims are one through seven, ten through fourteen, and sixteen and seventeen. Tarnovsky Sr. is not named in Claim 15, Unfair Competition in violation of California Business & Professions Code section 17200.

Tarnovsky Sr. is an employee of NDS and because Tarnovsky Sr. is Tarnovsky's father. Under each separate claim (1-7, 10-14, 16-17), Plaintiffs include in the 4AC the following paragraph or a nearly identical paragraph:

> Defendants NDS Americas and its employees Norris, Tarnovsky and Tarnovsky Sr. are also secondarily liable for the [cause of action as it relates to] Defendants Menard, the "dealers" in the NDS/Tarnovsky/Menard distribution network (Frost, Dawson, Quinn, Dale and Sergei), Bruce, Main, Wilson and other conduct stated in ([4]AC ¶¶ 156-164 & incorporated citations) under the theories advanced therein.

4AC ¶¶ 185, 199, 215, 232, 248, 264, 278, 318, 332, 397, 411, 424, 450, 463. However, Plaintiffs allege no facts to demonstrate that Tarnovsky Sr. should be secondarily liable for the acts of any other defendant. According to the complaint, Tarnovsky Sr. is an NDS employee. While this employment relationship may subject NDS to liability for Tarnovsky Sr.'s acts on a theory of respondeat superior, the employment relationship cannot subject Tarnovsky Sr. to liability for acts of his employer NDS. The only other relationship between Tarnovsky Sr. and another defendant alleged in the complaint is the relationship between Tarnovsky Sr. and his son Christopher Tarnovsky. As a general rule, a father-son relationship is not sufficient to hold a father liable for the acts of his son. The 4AC does not allege any that any relationship even existed between Tarnovsky Sr. and any other defendant. Thus, Plaintiffs' allegations of secondary liability against Tarnovsky Sr. fail.

Moreover, as demonstrated above, Plaintiffs have failed to allege any specific facts occurring within the limitations period that would support their claims against any other Defendant. Thus, the complaint alleges no facts for which the Court could find Tarnovsky Sr. secondarily liable.

G. CLAIMS ARE DISMISSED WITH PREJUDICE

As Plaintiffs have had five opportunities to plead their claims, the Court is convinced that the deficiencies of the complaint could not possibly be cured by amendment. *See Chang v.*

Chen, 80 F.3d 1293, 1296 (9th Cir. 1996); *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987). Thus, those claims that are dismissed, are dismissed with prejudice.

IV. DISPOSITION

For the reasons stated above, the Court GRANTS IN PART AND DENIES IN PART NDS's motion to dismiss. Claims five, eight, nine, sixteen, and seventeen are DISMISSED WITH PREJUDICE as to NDS. As to the remainder of the claims, NDS's motion is DENIED. The Court GRANTS the motions by Tarnovsky, Norris, Menard, Tarnovsky Sr., and Frost. All claims against those Defendants are DISMISSED WITH PREJUDICE. Claim 21 ("Civil Conspiracy/Joint Contribution") is STRICKEN because it is not a cause of action.

IT IS SO ORDERED.

DATED: July 25, 2005

DAVID O. CARTER
United States District Judge