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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

ECHOSTAR SATELLITE CORP., ECHOSTAR COMMUNICATIONS CORP., ECHOSTAR TECHNOLOGIES CORP., AND NAGRASTAR L.L.C., Plaintiffs, v. NDS GROUP PLC, NDS AMERICAS, INC., JOHN NORRIS, REUVEN HASAK, OLIVER KOMMERLING, JOHN LUYANDO, PLAMEN DONEV, VESSELINE NEDELTCHEV, CHRISTOPHER TARNOVSKY, ALLEN MENARD, LINDA WILSON, MERVIN MAIN, DAVE DAWSON, SHAWN QUINN, ANDRE SERGEI, TODD DALE, STANLEY FROST, GEORGE TARNOVSKY, BRIAN SOMMERFIELD, ED BRUCE, "BEAVIS," "JAZZERCZ," "STUNTGUY," and JOHN DOES 1 – 100. Defendants.	Case No. SA CV 03-950 DOC(ANX) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS NDS GROUP PLC'S AND NDS AMERICAS, INC.'S MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT** Date: December 13, 2004 Time: 8:30 a.m. Dept: Judge David Carter Courtroom 9D

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I. INTRODUCTION

Like the preceding Second Amended Complaint ("SAC"), plaintiffs' Third Amended Complaint ("TAC") is a morass of overlong and obfuscatory pleading, comprising an eye-glazing 403 paragraphs in 139 pages and divided into 22 putative claims. Many of the TAC's seemingly endless allegations are either false or are falsely-portrayed aspects of NDS's entirely legitimate program to stop and prosecute piracy. These deficiencies persist despite plaintiffs having numerous opportunities to replead their claims—the most recent of which followed the Court's dismissal of the SAC based on plaintiffs' deliberate failure to plainly state their claims against the various defendants. Although plaintiffs have filed an amended TAC that purports to address the deficiencies of the SAC identified by the Court, the changes are almost entirely cosmetic. *See* NDS Memo. ISO Mot. Strike, 3:10-8:9. Rather than address the substantive defects in their prior allegations, plaintiffs' response—like their response to the dismissal of their FAC—has been to add more heft to an already imposing bramble of irrelevant, untimely, or directly contradictory allegations, and to run away from their prior allegations. For example, despite the Court's dismissal of the SAC based on "the vague and misleading way in which the critical allegations of the [SAC] are alleged" (Court's Order of July 21, 2004 ("Rule 12(e) Order"), p. 2), the TAC includes only a bare handful of "new allegations" and ***still*** fails to specifically plead which defendants are alleged to have engaged in what conduct.

The vast majority of the asserted claims (Counts 1-8, 11-20 and 22)[1] should be dismissed as to NDS because the TAC simply does not include any allegations that NDS committed wrongful conduct within the applicable statutes of limitation. Indeed, the TAC's only factual allegations specific to NDS describe conduct that is either entirely legal and/or outside the applicable limitations periods. The scant few

[1] The face page of the TAC incorrectly numbers the asserted counts. The numbering of the TAC's counts referenced in this memorandum corresponds to that used by plaintiffs in the body of the TAC.

allegations within the applicable limitation periods involve conduct allegedly committed entirely by others or are merely unsupported boilerplate allegations of "continuing" wrongdoing. And although the TAC purports to allege several "theories" of secondary liability against NDS, even accepting the TAC's fanciful allegations, the TAC does not and cannot satisfy this Court's prior order that plaintiffs must specifically allege the factual basis for imputing liability to NDS.

Plaintiffs' equally overreaching RICO claims (Counts 9 and 10) should be dismissed for independent reasons. This Court previously dismissed plaintiffs' RICO claims because plaintiffs failed to allege a criminal "enterprise" as required by the statute. Now, despite voluminous allegations in the TAC specific to these claims, plaintiffs still do not satisfy this essential pre-requisite for a claim under § 1962(c) and the corollary conspiracy claim under § 1962(d). Plaintiffs also fail to allege the necessary predicate acts for a RICO claim, and they thus fail to allege the requisite "pattern of racketeering activity."

Several of the TAC's other claims should be dismissed for additional reasons. Plaintiffs' DMCA claims (Counts 1-3) should be dismissed because NDS's alleged conduct does not violate that statute. Plaintiffs' interference claims (Counts 17 and 18) should be dismissed for failing to identify the alleged relationships with the required particularity. And plaintiffs' have not alleged a contract between NDS and plaintiffs which would support the asserted breach of contract claim (Count 21).

The result of these myriad defects is that the entire TAC should be dismissed without leave to amend. This is plaintiffs' fourth unsuccessful attempt to state a viable cause of action against NDS—after four bites, the apple is gone.

II. DISCUSSION

A court should dismiss a claim under Rule 12(b)(6) where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a court must accept all well-pleaded facts as true, "conclusory allegations without more are insufficient to defeat a motion to dismiss for failure to state a claim." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). Under these standards, all of the TAC's claims should be dismissed.

A. Because the TAC is "Grounded in Fraud," Its Allegations Must Be Pled With the Particularity Required by Rule 9.

In *Vess v. Ciba-Geigy Corp. USA*, the Ninth Circuit ruled that where a complaint is "comprised of allegations of a unified fraudulent course of conduct," the complaint is considered "grounded in fraud." 317 F.3d 1097, 1106 (9th Cir. 2003). And where a complaint is grounded in fraud, the ***entirety*** of the complaint must meet the heightened pleading standards of Rule 9. *Id.* at 1106-07. Those allegations that fail this standard are stripped from the complaint. *Id.* at 1105.

Here, plaintiffs undeniably attempt to allege "a unified fraudulent course of conduct." Plaintiffs purport to allege that NDS Group and NDS Americas, along with 21 other named individual defendants and 100 unnamed "John Doe" defendants, fraudulently engaged in an "overriding NDS conspiracy to destroy Plaintiffs as a competitor in the DBS and CAS marketplaces" by "effectuating a wide-spread compromise of Plaintiffs' conditional access system." *See, e.g.,* TAC ¶¶ 20-21. According to plaintiffs, "NDS orchestrated this plan with the intent to defraud EchoStar of revenue from DISH Network subscriptions and to injure the effectiveness of Plaintiffs' Security System." TAC ¶ 135. And as plaintiffs further assert, the "SAC alleges throughout its over 170-pages that ... 'NDS orchestrated this plan with the intent to defraud EchoStar' ... and '[t]hrough this scheme to create an underground supply of Pirated EchoStar Access Cards ... NDS has furthered its intended fraud of facilitating others in obtaining unauthorized access to valuable DISH Network Programming.'" Opp. to NDS's Mot. to Dismiss SAC 16:20-17:2, *citing* SAC ¶¶ 70, 79, 82, 85, 151 & 195 (emphasis omitted).

Notably, the TAC is remarkably similar to the complaint in *Vess*:

Vess alleges a fraudulent conspiracy between the APA and the other

> defendants, but he does not provide the particulars of when, where, or how the alleged conspiracy occurred. He alleges that the APA received financial contributions from Novartis, but he offers scant specifics as to when or between whom the money changed hands. ... He charges that the APA sought to conceal its fraud by improperly clustering testing data for ADD with testing data for other conditions, but the allegation is unsupported by details, such as the names of those conditions. ... These allegations are not particular enough to satisfy Rule 9(b).

Id. at 1106-07.

As in *Vess*, the TAC purports to allege a "unified fraudulent course of conduct" involving 21 named and 100 unnamed defendants from at least four countries allegedly all conspiring in the shared nefarious goal of defrauding plaintiffs of subscription revenues. Nowhere does the TAC allege, however, "the particulars of when, where, or how the alleged conspiracy occurred." *See id.* The TAC purports to allege that NDS sought to conceal their supposed fraud in an effort to "CONTROL" the hacking of plaintiffs' access cards (TAC ¶ 19), but this allegation is unsupported by any details as to how the hack of plaintiffs' smart cards was supposedly "concealed," and is specifically contradicted by plaintiffs' own allegation that they knew in November of 1998 that their system had been hacked. FAC ¶ 52. As in *Vess*, the sufficiency of the TAC's allegations cannot be measured with reference to the liberal pleading policy of Rule 8(a). Rather, the allegations of the TAC must meet the heightened pleading standards of Fed. R. Civ. P. 9. *Id.* But whether judged against either Rule 9 or the more liberal Rule 8 "notice" standard, the allegations of the TAC fall far short.

B. Plaintiffs Do Not Timely Allege Wrongful Conduct by NDS.

In its Order granting in part and denying in part NDS's motion to dismiss plaintiffs' first amended complaint ("FAC Order"), this Court dismissed many of the claims asserted in plaintiffs' FAC because plaintiffs failed to plead any wrongdoing by NDS within the applicable limitations periods. *See* FAC Order, p. 4-5. Although the plaintiffs then filed a SAC purporting to address the dismissal of their time-barred claims, in its Order dismissing the SAC pursuant to Fed. R. Civ. P. 12(e), the Court noted again that the "vast majority" of plaintiffs' specific allegations occurred, if at all, more than three years before plaintiffs first brought suit against NDS. Rule 12(e) Order, p. 2. But rather than correct the untimeliness of the claims asserted in the FAC and SAC by alleging ***facts*** within the limitations applicable periods, the TAC instead merely alleges that every named defendant is still "actively engaged" in unspecified wrongdoing. *See, e.g.* TAC ¶¶ 224, 223, 309, 310, 312, 313, 319, 328, 344. As explained below, however, the TAC's conclusory and unsupported allegations of "continuing" wrongdoing satisfy neither Rule 9 nor the more liberal pleading standards of Rule 8 and therefore will not save plaintiffs' time-barred claims. Counts 1-8, 11-20, and 22 are properly dismissed.

1. The TAC's unsupported allegations that NDS is still "actively engaged" in wrongdoing do not satisfy Rule 9.

As required by *Vess*, the TAC's allegations must be pled with the particularity required by Rule 9—*i.e.*, the "who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir. 1990). "Mere allegations of fraud, corruption or conspiracy, averments to conditions of mind, or referrals to plans and schemes are too conclusional to satisfy the particularity requirement, no matter how many times such accusations are repeated." *Hayduk v. Lanna*, 775 F.2d 441, 444 (1st Cir. 1985). Here, the TAC repeatedly alleges that each of the named defendants (including NDS) was and continues to be engaged in unspecified wrongful conduct. *See, e.g.*, TAC ¶¶ 224, 233, 309, 310, 312, 313, 319, 328, 344. But these generic allegations merely parrot the statutory language of plaintiffs' asserted claims and include absolutely no supporting allegations describing when, where, or how this supposedly wrongful conduct occurred. *See, e.g.*, TAC ¶ 309 ("Defendants … were and are actively engaged in the business of knowingly and willfully making and maintaining unauthorized connections [sic] Echostar's system, in violation of California Penal Code § 593d(a)(1).") December 2000 is still the date of the most recent ***fact*** alleged in the TAC—although, as explained in Section B(4), *infra,* even if the alleged December 2000 posting could be attributed to NDS, it simply doesn't support the asserted claims. *See* TAC ¶ 39. As in the SAC, though plaintiffs plead "with excruciating detail a number of transactions, both relevant and arguably irrelevant, occurring in the year 2000 and before" (Rule 12(e) Order, p. 4), plaintiffs do not allege a single ***fact*** concerning conduct occurring after 2000.

Because the allegations of "continuing" wrongdoing in the TAC fall far short of the particularity demanded of a complaint "grounded in fraud," these allegations should be disregarded and stripped from the TAC. *Vess*, 317 F.3d at 1107.

2. <u>The TAC's allegations of "continuing" wrongdoing do not satisfy even the liberal pleading requirements of Rule 8.</u>

Even when considered under the more liberal pleading standards of Rule 8, the TAC's allegations of "continuing" wrongdoing are inconsistent with plaintiffs' specific allegations and are therefore properly disregarded. As this Court noted in its Rule 12(e) order, the TAC—as well as the three preceding complaints—are rife with specifically alleged ***facts*** concerning conduct that occurred, if at all, in 2000 or earlier. *See, e.g.*, TAC ¶¶ 39, 49, 134-135. The TAC's generic allegations of "continuing" wrongdoing, therefore, fly in the face of plaintiffs' ***specific*** allegations regarding conduct which occurred, if at all, no later than December of 2000. And where a general allegation is inconsistent with specific allegations, it is properly disregarded. *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal.App.3d 1371, 1389 (1990) ("[G]eneral pleadings are controlled by specific allegations.").

Plaintiffs are not the first litigant who has sought to rescue otherwise time-barred claims by making vague allegations of "continuing" wrongdoing. *See, e.g., Harshbarger v. Phillip Morris, Inc.*, 2003 U.S. Dist. LEXIS 25023 at *22-23 (N.D. Cal.). This improper stratagem, however, will not save plaintiffs' time-barred claims from dismissal:

> The Harshbargers allege many acts of misconduct by the Retail Defendants, and specifically detail this alleged wrongdoing throughout their complaint, including, for example the dates on which various allegedly misleading statements were made and allegedly false advertising was used. However, the complaint contains no specific allegations of misconduct in the three or four years prior to the commencement of this action. Plaintiffs make only vague and conclusory statements regarding alleged, continuing wrongful acts. ... [T]he statute of limitations on these causes of action has run.

Id. (citations omitted); *see also Favia v. N.Y.C. Bd. of Ed.*, 2000 WL 1229885 at *3 (S.D.N.Y.) ("Without any allegation of specific conduct within the limitations period, Favia's conclusory remark that the discrimination against her continues today is insufficient to allege a continuing violation.").

In addition to contradicting more specific allegations, the TAC's allegations of "continuing" wrongdoing also do not satisfy Rule 8. Merely repeating verbatim the statutory language underlying the asserted claims (as plaintiffs have done here) effectively denies the defendant any opportunity to know what he is alleged to have done wrong or to provide a meaningful response. *See Williams v. Lear Operations Corp.*, 73 F.Supp.2d 1377, 1381 (N.D. Ga. 1999). As the Court held in *Williams*, the tactic of "only provid[ing] a conclusory, 'bare bones' allegation that similar conduct occurred without describing the circumstances surrounding the alleged conduct, without giving even a vague description of the conduct (e.g., when, where or how it happened) and without indicating how many times such conduct [occurred] ... is insufficient to satisfy the purpose of notice pleading and fails as a matter of law." *Id.* Because the TAC's generic allegations regarding "continuing" wrongdoing fail to satisfy even the liberal pleading requirements of Rule 8, this provides a separate and independent reason for disregarding these allegations.

3. Counts 6, 17-20 and 22 of the TAC are properly dismissed as time-barred.

If the TAC's unsupported allegations of unspecified "continuing" wrongdoing are properly disregarded, the TAC plainly fails to plead any wrongful conduct by ***any*** defendant (much less NDS) within the 2-year limitations period applicable to many of the TAC's asserted claims—*i.e.*, after June 6, 2001. Accordingly, those claims having a two-year limitations period—*i.e.*, plaintiffs' ECPA and common law claims (Counts 6, 17-20, and 22)—are time-barred and should be dismissed.[2]

4. Counts 1-5, 7-8, and 11-15 of the TAC are also untimely.

Although the TAC purports to allege wrongdoing by NDS (*see, e.g.,* TAC ¶¶ 134-135, 15, 18, 149-150), this conduct occurred (if at all) in 1998 and 1999—more than three years before plaintiffs filed this action. Thus, even if NDS's alleged acts violated the statutes asserted by plaintiffs (and they would not, had they occurred), this Court has already ruled that this alleged conduct is outside the three-year limitations period applicable to most of plaintiffs' claims.[3] FAC Order, p. 4.

The only factual allegations against NDS within this three-year period are that portions of EchoStar's code were published to the Internet on December 23, 2000 under a pseudonym wrongfully attributed to Tarnovsky. *See* TAC ¶ 21. Plaintiffs' statutory claims, however, require actual piracy of plaintiffs' signal or actual counterfeiting of plaintiffs' access cards to incur liability. Plaintiffs' asserted claims for relief prohibit, for example, one from "circumventing" a technological protection measure, "intercepting" an electronic communication, "manufacturing" or "distributing" counterfeit access cards bearing plaintiffs' trademark, or making an

[2] Plaintiffs attempt to repackage their conspiracy "claim" as one for joint-contribution. (Count 22). But in accordance with the FAC Order, any claim for joint contribution cannot survive the dismissal of plaintiffs' state law claims. FAC Order, p. 8.

[3] Those claims having a three-year limitations period include (1) DMCA (Counts 1-3), (2) Communications Act (Counts 4-5), (3) Lanham Act (Counts 7-8), and (4) California Penal Code § 593 (Counts 11-15). These claims must be supported, if at all, by alleged wrongdoing occurring on or after June 6, 2000. Plaintiffs have failed, however, to allege any conduct after this date which would support these claims.

unauthorized connection to plaintiffs' satellite signal. *See* 17 U.S.C. § 1201(a)(1)(A) (prohibiting *circumventing* technological measures); 47 U.S.C. § 605(a) (prohibiting *interception* of radio communications); 18 U.S.C. § 2511(1)(a) (prohibiting *interception* ... of communications); 15 U.S.C. §§ 1114, 1125(a) (prohibiting *manufacturing* and *distributing* unauthorized products using another's registered trademark); Cal. Pen. Code §§ 593d(a), 593d(c) and 593e(a) (prohibiting *making* or *maintaining* unauthorized connections). The TAC does not, however, allege any such conduct by NDS within the three-year statutes of limitations. Thus, Counts 1-5, 7-8, and 11-15 of the TAC are time-barred and should be dismissed.

5. Plaintiffs' § 17200 claim is also time-barred and should be dismissed.

Plaintiffs § 17200 claim must be brought "within four years after the cause of action accrued." Cal. Bus. & Prof. Code § 17208. According to plaintiffs' allegations earlier in this case, on November 3, 1998, DirecTV first informed plaintiffs that their system had been hacked. FAC ¶ 52. Plaintiffs allege that they were harmed as of that date because NDS's conduct allegedly interfered with plaintiffs' ability to compete with NDS for the DirecTV bid. FAC ¶¶ 41-54. And although plaintiffs allege that they later suffered additional harm, for "accrual" purposes the relevant event is still the alleged act of misappropriating plaintiffs' security system. *See, e.g., Nesovic v. United States*, 71 F.3d 776 (9th Cir. 1995) (faulty tax assessment was the single wrongful act, while subsequent injuries were ill effects from original violation); *Stutz Motor Car of Am., Inc. v. Reebok Int'l, Ltd.*, 909 F.Supp. 1353, 1363-64 (C.D. Cal. 1995) ("Reebok's alleged wrong (misappropriation of the air bladder) was a single, irrevocable wrong as opposed to a series of multiple wrongs."). Thus, plaintiffs' § 17200 claim accrued ***no later than*** November 3, 1998—*i.e.*, nearly five years before plaintiffs first brought suit. *Id.* at 1363. (§ 17200 claim accrued on date defendant "misappropriated and began application and use of plaintiff's secret.").[4] Plaintiffs'

[4] Indeed, the § 17200 claim likely accrued even before November 3, 1998, as the "discovery rule" does not apply to § 17200 claims. *Stutz*, 909 F.Supp. at 1363.

claim under § 17200 is therefore barred as untimely.

C. NDS is Also Not Vicariously Liable for the Alleged Wrongdoing of Others.

Following the partial dismissal of their FAC, plaintiffs filed their SAC adding numerous (mostly irrelevant) allegations as well as numerous individual defendants to the case. But completely lacking from the SAC (and now from the TAC) were ***any*** alleged facts showing wrongdoing by NDS within the limitations periods applicable to plaintiffs' claims. Desperately attempting to mask this fatal defect, the SAC included numerous unsupported allegations in a failed attempt to support various theories of "agency liability" against NDS. *See, e.g.,* SAC ¶ 102. The Court, however, properly rejected plaintiffs' stratagem to unfairly impute liability to NDS and required that plaintiffs file an amended complaint plainly stating their claims. Rule 12(e) Order, p. 3. Addressing plaintiffs' unsupported "agency" theories, the Court specifically ordered that "[i]f Plaintiffs believe that other Defendants should be liable for [any alleged acts of piracy] through theories of agency, ***then Plaintiffs should plead facts that would lead to the legal conclusion that agency exists*** ..." Rule 12(e) Order, p. 4 (emphasis added).

In their fourth complaint, plaintiffs persist in asserting that each and every defendant is collectively liable for the alleged conduct of each and every other defendant and purport to allege several new theories of secondary liability, including: (a) "agency/sub-agency," (b) "agency by ratification," (c) "agency by estoppel," and (d) "co-conspirator" liability. *See* TAC, pp. 34-38. But despite the clear direction given by the Court in its Rule 12(e) Order, the TAC does not allege facts "that would lead to the conclusion that agency [or any of plaintiffs' alleged theories of secondary liability] exists" between NDS and any of the non-NDS defendants, or, alternatively, that any NDS employee engaged in conduct that would support a claim against NDS.

Thus, the limitations period begins to run when the cause of action accrues, "irrespective of whether plaintiff knew of its accrual." *Id.*

1. Neither Menard nor his alleged distributors are "agents" of NDS.

As they did in the SAC, plaintiffs again attempt in the TAC to impute liability to NDS for the alleged wrongdoing of Menard and his so-called "ring" of distributors by alleging that these defendants were "agents" of NDS. *See, e.g.,* TAC pp. 35-36. But like the deficient SAC, plaintiffs' TAC does not and cannot allege ***facts*** that, if true, would demonstrate an agency relationship between any individual defendant and NDS. And because an allegation that one party is the "agent" of another is a ***legal*** conclusion, it must be supported by sufficient factual allegations. Rule 12(e) Order, p. 4; *see also Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D. Md. 2000) ("Where a plaintiff is seeking to hold a defendant vicariously liable for the acts of its agents, it must allege the factual predicate for the agency relationship with particularity."); *Nuevo Mundo Holdings v. Pricewaterhouse Coopers LLP*, 2004 U.S. Dist. LEXIS 780 at *24-25 (S.D.N.Y.) (where "conclusory allegations of agency ... are unsupported by sufficient factual allegations," dismissal is the proper response).

Here, the TAC merely alleges that NDS was the ultimate source of the code that was allegedly posted on Menard's www.DR7.com website. *See, e.g.,* TAC ¶¶ 134-135. The TAC alleges that NDS, through Tarnovsky, provided this code to Menard in return for payment. *See, e.g.,* TAC ¶¶ 18, 58, 68. But these allegations, even if true, demonstrate nothing more than a supplier-distributor relationship. *See Arenson v. Whitehall Convalescent & Nursing Home*, 880 F.Supp. 1202, 1209 (N.D. Ill. 1995) (supplier-purchaser relationship insufficient to demonstrate control). In contrast, to establish an agency relationship "[t]he principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control." Restatement (Second) Agency, § 1, Comment a. Importantly, California law "presumes that a person is acting for himself and not as agent for another." *See Armato v. Baden*, 71 Cal.App.4th 885, 898-99 (1999) ("Generally, the law indulges in no presumption that an agency exists...").

The TAC alleges absolutely no facts that rebut this assumption. It lacks any allegations demonstrating: (1) that NDS indicated that Menard and/or his alleged distributors would act on behalf of NDS; (2) that Menard and/or his alleged distributors agreed to so act; or (3) that NDS exercised control over Menard and/or his alleged distributors.[5] And not only does the TAC lack any allegations supporting elements (1) and (2), but with respect to element (3), plaintiffs' own allegations demonstrate that it was Menard (and ***not*** NDS) who was "the primary decisionmaker" of the alleged distribution ring. *See* TAC ¶ 291; SAC ¶ 337; FAC ¶ 166.

Because plaintiffs have provided no factual allegations supporting the legal conclusion that Menard and/or the alleged "ring" of distributors[6] were agents of NDS, liability for the alleged wrongdoing of these defendants cannot and should not be imputed to NDS based on plaintiffs' unsupported "agency" theory.

2. <u>"Agency by ratification" cannot independently create an agency relationship with a non-agent.</u>

The TAC also purports to allege that NDS may be held secondarily liable for the wrongdoing of others under a theory of "agency by ratification." *See* TAC, p. 37. But although a principal may ratify the otherwise unauthorized tortious conduct of his agent, "the principal-agent relationship is still a requisite, and ratification can have no meaning without it." *Batzel v. Smith*, 333 F.3d 1018, 1036 (9th Cir. 2002). Thus, plaintiffs' suggestion that ratification by itself creates an agency relationship out of whole-cloth is flatly contrary to controlling Ninth Circuit authority. *See id.* Since plaintiffs have not alleged any facts showing that Menard or any of the other alleged

[5] And even if plaintiffs had alleged facts showing some degree of control over Menard by NDS, "[i]n the absence of an agreement to act on behalf of a principal, an agency does not exist, regardless of the degree of control one party exercises over another." *Iragorri v. United Techs. Corp.*, 285 F.Supp.2d 230, 241 (D. Conn. 2003), *vacated in part on other grounds*, 314 F.Supp.2d 110 (D. Conn. 2004).

[6] With respect to the alleged distributors, the allegations of the TAC are even more deficient than the SAC with respect to Menard. For example, the TAC alleges that Menard "solicited the help" of Dawson, Quinn, Sergei, Dale, Frost, Main and Wilson, and that these individual defendants thereby became agents of NDS. Of course, no authority exists for the proposition that merely "soliciting" assistance creates an agency relationship, and there is not even an allegation that the asserted "solicitation" was to act on NDS's behalf.

distributors were agents of NDS, NDS could not become liable for their conduct as a result of any "ratification," and plaintiffs' theory of "agency by ratification" fails.

3. Plaintiffs' reliance on an "agency by estoppel" theory of secondary liability is badly misplaced.

Plaintiffs' "agency by estoppel" theory of secondary liability fares no better. In California, "agency by estoppel," arises when a principal "intentionally, or by want of ordinary care, causes a third person to believe another to be his agent who is not really employed by him." *Am. Cas. Co. v. Krieger*, 181 F.3d 1113, 1121 (9th Cir. 1999) (citing Cal. Civ. Code § 2300). But none of the elements necessary for a showing of "agency by estoppel" or "ostensible agency" is alleged in the TAC. Even assuming the truth of plaintiffs' allegation that "NDS knowingly accept[ed] the benefits and commercial advantage obtained through the acts and omissions of Defendants" (TAC, p. 37, ll. 16-18), the TAC does not (and cannot) allege that NDS caused plaintiffs to believe that Menard and/or the alleged distributors were acting as NDS's agents. *See Preis v. American Indem. Co.*, 269 Cal.Rptr. 617, 622-23 (Ct. App. 1990) ("Ostensible authority must be established through the acts or declarations of the principal…"). More importantly, the TAC does not (and cannot) allege that plaintiffs relied to their detriment on any representation of agency by NDS. *Iragorri*, 285 F.Supp.2d at 242 (evidence of reliance necessary to make out claim for apparent authority). Unable to allege either a misrepresentation by NDS or reliance by plaintiffs, "agency by estoppel" simply does not apply.

4. Plaintiffs' "conspiracy" allegations are insufficient to impute liability to NDS.

Plaintiffs make one last attempt to impute secondary liability to NDS. The TAC alleges that sixteen of the individual defendants, including NDS's own employees, were "co-conspirators of NDS." *See* TAC, pp. 37-38. But like the TAC's "agency" allegations, the TAC's allegation that NDS is secondarily liable for the acts of another as a purported "co-conspirator" is a legal conclusion that must be supported by sufficient factual allegations. Rule 12(e) Order, p. 4; *see also Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1152 (9th Cir. 1998) (dismissing complaint where conspiracy claim was not pled with the requisite particularity). And to properly plead a conspiracy, plaintiffs must allege facts that demonstrate "both an agreement to participate in an unlawful act, and an injury caused by an unlawful overt act performed in furtherance of the agreement." *Alfus v. Pyramid Tech. Corp.*, 745 F.Supp. 1511, 1520 (N.D. Cal. 1990). Conclusory allegations of fraud or conspiracy are not sufficient. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) .

The "conspiracy" allegations of the TAC fall far short of satisfying the particularity requirements of Rule 9 or even the more liberal notice pleading requirements of Rule 8. For example, although the TAC alleges that "NDS, through, among others, Tarnovsky, conspired with Menard to assist in NDS's overall conspiracy" (*see* TAC, p. 38), plaintiffs do not allege what was agreed to, when it was agreed to, or how it was agreed to.[7] Nowhere does the TAC allege facts demonstrating that NDS and Menard (or any other defendant) had a conspiratorial agreement, whether explicit or tacit, to join the alleged conspiracy. In this regard, "[i]t is not enough to show that defendants might have had a common goal unless there is a factually specific allegation that they directed themselves towards this wrongful goal by virtue of a mutual understanding or agreement." *Alfus*, 745 F.Supp. at 1521. NDS's alleged conduct demonstrates, at most, only that NDS had a supplier/distributor relationship with Menard. But this purported relationship is insufficient to transform NDS and Menard into co-conspirators.[8] FAC Order, p. 11.

Lacking any alleged facts showing that NDS and Menard (or any other defendant) agreed to participate in the alleged "overarching NDS conspiracy," the

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[7] Indeed, plaintiffs do not even identify the supposed "others" with whom NDS supposedly conspired.

[8] As for the TAC's allegation that NDS is liable for conspiring with its own employees, it is well-established that a corporation cannot conspire with its own employees or agents. *See Black v. Bank of America*, 30 Cal.App.4th 1, 4 (1994).

conspiracy allegations of the TAC cannot withstand a motion to dismiss. *See Sameena,* 147 F.3d at 1152 (affirming dismissal of conspiracy count where "appellants failed to allege facts to support their allegations that the individual defendants agreed [to commit the alleged torts]."); *Berry v. Baca*, 2002 WL 356763 at *3 (C.D. Cal.) (dismissing conspiracy count where allegations failed to state: "(1) who agreed to engage in the conspiracy; (2) what was agreed to; (3) when it was agreed to; or (4) how it was agreed to.").

Because the TAC lacks any timely allegations of direct wrongdoing by NDS and because plaintiffs' "theories" of secondary liability are wholly insufficient to state a claim against NDS for the alleged acts of piracy by others, Counts 1-8, 11-20 and 22 of the TAC are time-barred and should be dismissed.

D. Plaintiffs' RICO Claims are Properly Dismissed.

The Court previously dismissed plaintiffs' 1962(c) RICO claim based on plaintiffs' failure to plead a RICO "enterprise" within the meaning of the statute. *See* FAC Order, pp. 11-12. The TAC attempts both to replead the § 1962(c) claim and to assert a second RICO claim under § 1962(d). *See* TAC, Counts 9-10. Both RICO claims, however, suffer from fatal pleading defects (including the defect that led to dismissal in the Court's FAC Order) and should be dismissed.

1. <u>The TAC still fails to allege an actionable criminal "enterprise."</u>

As noted in the Court's FAC Order, to state a claim under 18 U.S.C. § 1962(c) or § 1962(d), plaintiffs were required to allege a RICO "enterprise" having "an ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity." *Chang v. Chen*, 80 F.3d 1293, 1295 (9th Cir. 1996); *Wagh v. Metris Direct, Inc*, 348 F.3d 1102, 1112 (9th Cir. 2003). The Court noted that plaintiffs alleged two structures: (1) a "distribution and sales structure" controlled by Menard and including various individuals who allegedly work for him, and (2) a "technology structure" headed by NDS and its direct employees (including Tarnovsky). *See* FAC Order, p. 10. Because the FAC did not plead the requisite higher structure controlling both the "distribution and sales" and "technology" sub-structures, the Court properly dismissed plaintiffs' RICO claim. *See id.*, pp. 11-12.

The TAC realleges the same (1) "distribution and sales structure" controlled by Menard, and (2) "technology structure" headed by NDS. *See* TAC ¶¶ 290-294. But attempting to cure the fatal defect in the FAC, the TAC further alleges the existence of an unspecified "central decision making apparatus within NDS" that allegedly controlled both the "distribution and sales" and "technology" sub-structures. *Id.* ¶¶ 293-294. According to the TAC, this "decision making apparatus" allegedly "controlled" Menard by (1) directing Tarnovsky to provide Menard a "reprogrammer" for reprogramming plaintiffs' access cards, and (2) directing Tarnovsky to periodically provide Menard technical support and information on plaintiffs' access cards. *See, e.g.*, TAC ¶¶ 152-158, 294.[9] According to the TAC, because NDS was allegedly able to control the timing, extent, cost, and nature of the services provided by Tarnovsky to Menard, NDS exercised sufficient "control" over the "distribution structure" to allege a RICO "enterprise" within the meaning of 18 U.S.C. § 1962(c) and § 1962(d). *See id.*

But the TAC still lacks any alleged facts that would distinguish the asserted Tarnovsky/Menard relationship from a common recipient/supplier relationship. As this Court has noted previously, a supplier does not "control" a RICO enterprise merely because it provides goods or services to the enterprise. *See* FAC Order, p. 11; *Fidelity Fed. Sav. & Loan Ass'n v. Felicetti*, 830 F.Supp. 257, 260 (E.D. Pa. 1993) (even if appraiser's reports are "keystone" of enterprise's fraud, appraiser can not be liable under § 1962(c)); *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 477, 468 (S.D.N.Y. 1996) (even providing essential services to RICO enterprise does

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[9] The TAC also makes the conclusory allegation that NDS exerted control over Menard by deciding when and to what extent to "run interference" for Menard with the Royal Canadian Mounted Police ("RCMP"). *See* TAC ¶ 294. Nowhere in the TAC, however, do plaintiffs allege that NDS ever "ran interference" for Menard or explain how an entirely foreign company could accomplish such a feat. In fact, plaintiffs' allegations are exactly the opposite—plaintiffs allege that Menard's alleged distributors were ***repeatedly*** raided by the RCMP. TAC ¶¶ 159, 168, 296(b), 298(w).

not equate to control of enterprise); *Amsterdam Tobacco Inc. v. Philip Morris Inc.*, 107 F.Supp.2d 210, 217 (S.D.N.Y. 2000) (providing smuggled goods does not imply control over smuggling). In other words, alleged control over one part of the enterprise is not alleged control over the entire enterprise such that there exists the required "ascertainable structure separate and apart from the structure inherent in the conduct of the pattern of racketeering activity." *Chang*, 80 F.3d at 1295.

Equally importantly, plaintiffs' conclusory and unsupported allegations that the conduct of the RICO enterprise was controlled by a "central decision making apparatus within NDS" and that "NDS directed the affairs of … Menard, and Menard's distribution network on an ongoing basis" (*see* TAC ¶ 288), simply cannot be reconciled with the directly contrary allegation in the TAC and in plaintiffs' prior pleadings that Menard "was the primary decisionmaker of the distribution and sale structure" and that Menard "controll[ed] and direct[ed] the affairs of the group on an ongoing basis…" *See* TAC ¶ 291; SAC ¶ 337; FAC ¶¶ 166, 165. Allegations that are inconsistent with prior pleadings should be disregarded. *See Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-297 (9th Cir. 1990); *Salvioli v. Cont'l Ins. Co.*, 1996 WL 507297 at *4 (N.D. Cal.). The TAC has not (and cannot) allege a "mechanism for controlling and directing the affairs of the group," and plaintiffs' RICO claims should therefore be dismissed. *See Chang*, 80 F.3d at 1297.

2. <u>The TAC also does not allege a "pattern of racketeering activity" as required by § 1962(c) and § 1962(d).</u>

To establish a RICO "pattern," plaintiffs must not only allege at least two predicate acts, "it must also be shown that the predicates themselves amount to, or that they otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240 (1989) (emphasis in original). Although two alleged predicate acts are necessary, they are nonetheless insufficient to support a civil RICO claim if they do not establish the requisite pattern. *Sedima v. Imrex Co., Inc.*, 473 U.S. 479, 497 n.14 (1985). The TAC attempts to meet this requirement by alleging violations of 18 U.S.C. § 1029 (prohibiting the manufacture and/or possession of counterfeit access devices), 18 U.S.C. § 1341 (mail fraud), 18 U.S.C. § 1343 (wire fraud), and 18 U.S.C. § 2319 (criminal copyright infringement). But as explained below, these alleged predicate acts do not, as a matter of law, constitute a "pattern of racketeering activity." This failure provides a separate and independent basis supporting the dismissal of plaintiffs' RICO claims.

a. The TAC does not allege a violation of 18 U.S.C. § 1029.

In relevant part, 18 U.S.C. § 1029 prohibits the production, use, or trafficking in counterfeit or unauthorized "access devices" or "device-making equipment" within the United States. *Id.* Section 1029, however, does not apply to the manufacture or sale of smart cards for satellite television descramblers. In *U.S. v. McNutt*, 908 F.2d 561, 562 (10th Cir. 1990), the court held that "§ 1029 cannot be applied to satellite television descramblers." Here, all of the TAC's allegations relate to cards for descrambling satellite television signals. Accordingly, plaintiffs' allegation that NDS violated 18 U.S.C. § 1029 cannot demonstrate the requisite pattern of racketeering conduct.

b. The allegations of the TAC do not support plaintiffs' predicate acts of wire fraud and/or mail fraud.

A claim for mail fraud requires: (1) the existence of a scheme to defraud; (2) the participation by the defendant in the scheme with the specific intent to defraud; and (3) the use of the U.S. Mail in furtherance of the scheme. 18 U.S.C. § 1341. A claim for wire fraud includes the same requirements but substitutes the use of interstate wires for the use of the U.S. Mail as a requisite act. 18 U.S.C. § 1343. In pleading wire and/or mail fraud as a predicate act, it is well settled that supporting allegations must be pled with the specificity required by Rule 9. *See, e.g., Camp v. Pac. Fin. Group*, 956 F.Supp. 1541, 1550-1 (C.D. Cal. 1997).

The TAC asserts a host of communications that allegedly violate § 1341 or § 1343, but examination of these alleged communications reveals that none satisfy the requirements of either section. For example, the only allegations of the TAC that are even arguably relevant to plaintiffs' mail fraud claims are that Tarnovsky received funds totaling $40,100 via the U.S. Mail. *See* TAC ¶ 297 (l-m). There is no allegation, however, as to how these communications were "false" or "misleading." *See, e.g., Camp*, 956 F.Supp. at 1551 (Dismissing RICO claims based on insufficient allegations of wire fraud and mail fraud because "[t]o allege fraud with particularity, a plaintiff must set forth … what is false or misleading about a statement, and why it is false.") (quoting *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-8 (9th Cir. 1994)); *Lum v. Bank of Am.*, 2004 U.S. App. LEXIS 4637 at *20 (3d. Cir.).

Furthermore, "[i]t is well settled that, to maintain a civil RICO claim predicated on mail fraud, a plaintiff must show that the defendants' alleged misconduct proximately caused the injury." *Poulos v. Caesars World*, 2004 WL 1774835 at *7 (9th Cir.). In other words, plaintiffs "must draw a causal link between the alleged fraud and the alleged harm" by showing, for example, that plaintiffs relied on NDS's alleged fraud to their detriment. *See id.* Here, plaintiffs have not even ***alleged*** that NDS's purported acts of mail or wire fraud proximately caused plaintiffs' injury, much less drawn the required "causal link between the alleged fraud and the alleged harm." *See id.* Indeed, showing such causation would be impossible, since the TAC alleges that plaintiffs were not even aware of NDS's alleged acts of mail or wire fraud, and therefore could not have relied upon the alleged acts of mail and wire fraud.

Plaintiffs also contend that Tarnovsky's alleged receipt via the mail of certain testing and audio/video equipment constitutes mail fraud. *See* TAC ¶ 298(p-r). But again the TAC lacks any allegation that plaintiffs relied on these mailings and lacks any explanation of how these mailings were false or misleading. *See Poulos*, 2004 WL 1774835 at *7; *Camp*, 956 F.Supp. at 1551. The Plaintiffs' allegations concerning purported communications within NDS are similarly deficient (TAC ¶ 297), as are the remainder of plaintiffs' wire fraud allegations (TAC ¶ 298).

Because plaintiffs have not (and cannot) allege falsity, reliance, and/or causation for any of plaintiffs' mail fraud and wire fraud allegations, these allegations cannot, as a matter of law, demonstrate the "pattern of racketeering activity" required to sustain plaintiffs' claims under § 1962(c) and § 1962(d). *See Howard v. Am. Online, Inc.*, 208 F.3d 741, 748 (9th Cir. 2000); *Camp*, 956 F.Supp. at 1551*Poulos*, 2004 WL 1774835 at *7 (dismissing RICO complaint for failure to support predicate acts of mail fraud). Plaintiffs' RICO claims should therefore be dismissed.

c. The TAC fails to state a claim for criminal copyright infringement.

The TAC's sole allegation with respect to the asserted predicate act of criminal copyright infringement is that each of the named defendants "willfully infringed on EchoStar's copyrighted information for purposes of commercial advantage." TAC ¶ 299. Although federal courts follow admittedly liberal pleading practices, it is still the rule that "conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss." *Epstein v. Washington Energy Co.*, 83 F.3d 1136, 1140 (9th Cir. 1996). The TAC does not describe what "copyrighted information" was infringed or in what manner defendants infringed it. Plaintiffs' conclusory allegations of criminal copyright infringement therefore cannot support a finding that defendants engaged in a "pattern of racketeering activity."

3. <u>Plaintiffs' claim under 18 U.S.C. § 1962(d) should be dismissed for additional reasons.</u>

Count 10 of the TAC alleges that defendants engaged in conduct violating 18 U.S.C. § 1962(d). That subsection provides that "it shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." *Id.* Because the TAC fails to plead a violation of § 1962(c), the § 1962(d) claim must also fail. *See Wagh,* 348 F.3d at 1112; *Howard*, 208 F.3d at 751. Independently, plaintiffs have not alleged specific facts showing that the defendants engaged in any "conspiracy" to violate § 1962(c)—*i.e.*, "that each defendant agreed to conduct the affairs of an enterprise, that each agreed to the commission of at least two predicate acts, and that each defendant knew that those predicate acts were part of a pattern of racketeering activity." *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 352 (7th Cir. 1992) . Absent these details, conclusory allegations of a conspiracy are legally insufficient. *See Baumer v. Pachl,* 8 F.3d 1341, 1346-7 (9th Cir. 1993).

Because the TAC fails to state a claim under § 1962(c), plaintiffs' claim under § 1962(d) should likewise be dismissed. Further, the failure to show a conspiracy to commit the alleged predicate acts is also fatal to plaintiffs' claim under § 1962(d).

E. Additional Independent Reasons Support the Dismissal of Plaintiffs' State Law And DMCA Claims.

1. <u>Because the DMCA does not prohibit defendants' alleged conduct, Counts 1-3 of the TAC should be dismissed.</u>

Section 1201(a)(2) and 1201(b) of the DMCA apply to "any technology, product, service, device, component, or part thereof," that "is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title," or "is primarily designed or produced for the purpose of circumventing a technological measure that effectively protects a right of a copyright owner." 17 U.S.C. § 1201(a)(2)(A) and § 1201(b)(1)(A). But as noted above, the only timely conduct alleged in the TAC against NDS is that NDS directed that portions of EchoStar's code be published on the Internet. *See* TAC ¶ 21. The DMCA's prohibition on trafficking in technologies for the "circumvention" of a technological control measure, however, does not encompass the partial "publication" of plaintiffs' technological control measure as alleged in the TAC. This distinction follows from the purpose of the DMCA in precluding trafficking in "circumvention technologies designed to permit access to a work." *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 441 (2d Cir. 2001).

Recently, the Southern District of New York confirmed the statutes' limited scope when it ruled that a defendant's unauthorized use of a password to access plaintiff's service failed to state a claim under the "anti-circumvention" provisions of the DMCA. *I.M.S. Inquiry Mgmt. Sys. v. Berkshire Info. Sys.*, 307 F.Supp.2d 521, 532-

33 (S.D.N.Y. 2004). In dismissing the DMCA claim, the court recognized that using a misappropriated password to access the system did not thereby "circumvent," "avoid" or "bypass" the technological protection:

> More precisely and accurately, what defendant avoided and bypassed was permission to engage and move through the technological measure from the measure's author. Unlike the CFAA, a cause of action under the DMCA does not accrue upon unauthorized and injurious access alone; rather, the DMCA "targets the *circumvention* of digital walls guarding copyrighted material."

Id. at 532 (quoting *Corley*, 273 F.3d at 443).

The court's holding in *I.M.S.* is fatal to plaintiffs' oft-repeated assertion that "providing [plaintiffs'] 'keys' to known signal thieves to illegally 'unlock' Plaintiffs' satellite signal is precisely what the DMCA was drafted to proscribe." SAC Opp. 15:7-11; *I.M.S.*, 307 F.Supp. at 532 ("Defendant did not surmount or puncture or evade any technological measure to [access plaintiffs' system]; instead, it used a password intentionally issued by plaintiff to another entity."). Moreover, the alleged facts here are even more remote than the conduct rejected by the court in *I.M.S.*—rather than using a misappropriated key to access plaintiffs' programming, NDS is merely alleged to have posted a component of plaintiffs' "lock" on the internet. But a component of plaintiffs' "lock" is not a "key."

Other cases interpreting the DMCA further reinforce the conclusion that it does not reach NDS's alleged conduct—*i.e.*, the alleged publication of a part of a protection measure. *See, e.g., Universal City Studios v. Reimerdes*, 111 F.Supp.2d 294 (S.D.N.Y. 2000) (DMCA violated by DeCSS technology that circumvented CSS encryption technology); *Sony Computer Entm't Am., Inc. v. Gamemasters*, 87 F.Supp.2d 976, 987 (N.D. Cal. 1999) (defendant's "Game Enhancer" that "circumvents the mechanism on the Playstation console that ensures the console operates only when encrypted data is read from an authorized CD-ROM" violated the DMCA). Indeed, NDS is unaware of any case allowing a DMCA claim based on publication of a portion of "the technological measure that effectively controls access to a protected work."[10]

Because the TAC does not allege that NDS trafficked in any circumvention technology, plaintiffs' claims for relief under the DMCA (1-3) should be dismissed.

2. Plaintiffs' highly-speculative "interference" claims should be dismissed.

Plaintiffs' claims for interference with contractual relations and prospective contractual relations/economic advantage (Counts 17 and 18) should be dismissed for failing to identify the alleged contractual relations or prospective relationships with sufficient particularity. Rather than identify these relationships, the TAC refers only to alleged prospective relationships with "an as yet undetermined number of DISH Network subscribers and prospective subscribers." TAC ¶¶ 361, 367. But the "law precludes recovery for overly speculative expectancies by initially requiring proof the business relationship contained 'the probability of future economic relationship.'" *Silicon Knights, Inc. v. Crystal Dynamics, Inc.*, 983 F.Supp. 1303, 1311 (N.D. Cal. 1997); *see also Westside Center Ass'n v. Safeway Stores 23, Inc.*, 42 Cal.App.4th 507, 527-8 (1996) (tort does not encompass "economic relationship with the entire market of all possible but as yet unidentified buyers."). Plaintiffs' vaguely alleged relationships are the type of "speculative economic relationship" that the courts in *Silicon Knights* and other cases have specifically rejected. *Silicon Knights*, 983 F.Supp. at 1312; *Boris v. U.S. Football League*, 1984 WL 2864 at *1 (C.D. Cal.) ("California law clearly holds that a claim for intentional interference with prospective contractual relations requires an allegation of 'a specific economic relationship' with which the defendant is claimed to have interfered."). These claims should therefore be

[10] The DMCA's legislative history further confirms that it addresses distribution of devices for circumventing copyright protection systems, rather than partial publication of a protection system. H.R. Rep. No. 105-551, pt. 1, at 18 (1998) (Section 1201(a)(2) "is drafted carefully to target 'black boxes'," not actual copyright infringement.); S. Rep. No. 105-190, at 29 (1998) (same); *see also* H.R. Rep. No. 105-551, pt. 2, at 38 (1998) ("Section [1201](a)(2) is aimed fundamentally at outlawing so called 'black boxes' that are expressly intended to facilitate circumvention of technological protection measures…").

dismissed.

3. The dismissal of plaintiffs' state law claims requires the dismissal of plaintiffs' § 17200 claim (Count 16).

Furthermore, because the remainder of plaintiffs' claims are dismissed, no "unlawful" or "fraudulent" claims remain on which to base plaintiffs' § 17200 claim.

> The breadth of § 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. Here, plaintiff's § 17200 claim is based on the same facts forming the bases of plaintiff's other causes of action. As plaintiff has failed to plead sufficient facts to demonstrate that Viacom engaged in unlawful conduct as pleaded in those causes of action, plaintiff has failed to state a claim under § 17200 *et seq.*

Daly v. Viacom, Inc., 238 F.Supp.2d 1118, 1126 (N.D. Cal. 2002) (citations and quotations omitted). As in *Daly*, the conduct alleged to support plaintiffs' § 17200 claim is the same conduct underlying all plaintiffs' deficient claims. Because plaintiffs are unable to plead sufficient facts to preclude dismissal of their other claims for relief, this provides a separate reason for dismissing the § 17200 claim.

4. Plaintiffs' breach of contract claim (Count 21) should be dismissed.

To the extent that plaintiffs attempt to assert a breach of contract claim against NDS, the TAC lacks any alleged facts demonstrating that a contract existed between plaintiffs and NDS. Accordingly, this claim must be dismissed.[11]

F. The Court Should Dismiss Plaintiffs' Complaint With Prejudice.

When a complaint is dismissed for failure to state a claim, "leave to amend should be granted unless the court determines that the allegation of other facts

[11] And even if plaintiffs properly alleged a contract between plaintiffs and NDS, the "reverse engineering" they allege as a breach of this contract occurred, if at all, in 1998—*i.e.*, well outside the 4-year limitations period for breach of contract claims.

consistent with the challenged pleading could not possibly cure the deficiency." *See Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Leave to amend is properly denied "where the amendment would be futile." *See DeSoto Yellow Freight Sys.*, 957 F.2d 655, 658 (9th Cir. 1992); *Reddy*, 912 F.2d at 296. In this case, plaintiffs have already submitted a deficient complaint, a deficient first amended complaint, a deficient second amended complaint, ***and*** a deficient third amended complaint. Thus, despite ***four*** opportunities to "get it right," plaintiffs have nonetheless failed to allege a legally tenable claim against NDS.

In light of the numerous chances plaintiffs have been given to properly plead a claim against NDS, further amendment to the TAC would be "futile" and leave to amend should thus be denied. The previous discussion demonstrates that each of plaintiffs' 22 claims for relief suffers from fatal defects not correctable by further amendment. *See Sackett v. Beaman*, 399 F.2d 884, 892 (9th Cir. 1968); *Nuevo Mundo*, 2004 U.S. Dist. LEXIS 780 at *25-26. NDS has repeatedly advised plaintiffs of these fatal defects, and despite four efforts at "getting it right," plaintiffs remain unable to state a viable claim against NDS. Further leave to amend would therefore be futile. In short, "this is the plaintiff[s' fourth] complaint ... [four] bites at the apple is enough." *See, e.g., Dooner v. Keefe, Bruyette & Woods, Inc.*, 2003 WL 135706 at *4 (S.D.N.Y.).

III. CONCLUSION

For at least the foregoing reasons, the claims set forth in plaintiffs' TAC should be dismissed. Furthermore, because plaintiffs have had four opportunities to state a valid claim, the Courts' dismissal of the TAC should be with prejudice.

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O'MELVENY & MYERS ~~LLP~~

By [signature]

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