

Nos. 09-55005 and 09-55633

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EchoStar Satellite L.L.C., EchoStar Communications Corporation, EchoStar
Technologies Corporation, and NagraStar L.L.C.,

Plaintiffs-Appellees,

vs.

NDS Group PLC (N/K/A NDS Group Limited) and NDS Americas, Inc.,

Defendants-Appellants.

EchoStar Satellite L.L.C., EchoStar Communications Corporation, EchoStar
Technologies Corporation, and NagraStar L.L.C.,

Plaintiffs-Appellants,

vs.

NDS Group PLC (N/K/A NDS Group Limited) and NDS Americas, Inc.,

Defendants-Appellees.

Appeal From the United States District Court for the Central District of California

The Honorable David O. Carter

Case No. SA CV 03-950 DOC (JTLx)

**PRINCIPAL AND RESPONSE BRIEF OF PLAINTIFFS-
APPELLANTS/APPELLEES ECHOSTAR SATELLITE L.L.C.,
ECHOSTAR COMMUNICATIONS CORPORATION, ECHOSTAR
TECHNOLOGIES CORPORATION, AND NAGRASTAR L.L.C.**

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Plaintiffs-Appellants/Appellees' Rule 26.1 Corporate Disclosure Statement

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure Plaintiffs-Appellants/Appellees hereby state:

EchoStar Satellite, L.L.C., now known as DISH Network, L.L.C., is a single-member limited liability company whose sole member is DISH DBS Corporation, which is an indirect wholly-owned subsidiary of EchoStar Communications Corporation, now known as DISH Network Corporation, a publicly traded company (NASDAQ: DISH).

EchoStar Technologies Corporation, now known as EchoStar Technologies, L.L.C. is a single-member limited liability company whose sole member is EchoStar Corporation, a publicly traded corporation (NASDAQ: SATS).

NagraStar L.L.C. is a limited liability company whose sole members are EchoStar Corporation and Kudelski SA; each entity is a fifty-percent owner of NagraStar L.L.C. Kudelski SA is publicly traded on the Swiss VTX Exchange under the symbol KUD.VX.

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INTRODUCTION

Plaintiffs EchoStar Satellite L.L.C., EchoStar Communications Corporation, EchoStar Technologies Corporation, and NagraStar L.L.C. (collectively, “EchoStar”), filed suit against Defendants NDS Group PLC n/k/a NDS Group Limited and NDS Americas, Inc. (collectively, “NDS”), averring that NDS was responsible for the compromise of EchoStar’s satellite television programming security system. After nearly five years of contentious litigation, including a long trial, a jury returned a verdict in EchoStar’s favor, finding NDS had violated three of the six statutes under which EchoStar brought claims and finding for EchoStar on NDS’s counterclaim. Based upon the verdict, the District Court subsequently issued an injunction against NDS and awarded EchoStar restitution under California’s Unfair Competition Law. When both parties moved for attorneys’ fees and costs, the District Court awarded both parties attorneys’ fees, awarded EchoStar “reasonable costs” of suit, and denied NDS its costs.

Both parties now appeal the District Court’s award of fees and costs. EchoStar brings its appeal on the ground that the District Court erred in awarding EchoStar only taxable costs of suit when “full costs” were explicitly required under the plain language of the statutes under which EchoStar prevailed. EchoStar also appeals the District Court’s limitation of fees and costs, based entirely upon the Court’s misinterpretation of the jury’s finding of liability, because the question of

the basis of liability was not put to the jury and the basis of the jury's finding of liability is unclear from the general verdict. While courts may infer implicit factual findings by a jury where the verdict clearly supports that conclusion, there are many possible reasons in this case why the jury decided as it did. Only the jury knows on what basis it found NDS liable, and the District Court should not have inferred from the jury's general verdict that EchoStar had not proven its principal theory of liability and reduced EchoStar's fees and costs award.

NDS appeals on the grounds that the District Court should not have reduced NDS's fee award or denied NDS its costs, and should not have awarded EchoStar attorneys' fees and costs at all. NDS's appeal is misplaced. The District Court did not abuse its discretion in: (1) excluding from NDS's fee award time spent on claims on which EchoStar ultimately prevailed on a practical level or claims the District Court determined were unrelated; (2) reducing NDS's award based on the District Court's knowledge of the history of the case and the degree of NDS's success in the claims on which it prevailed; (3) awarding EchoStar fees and costs where the District Court excluded fees it deemed not reasonably expended and took into consideration the relief EchoStar obtained at trial; and (4) denying NDS its costs and awarding EchoStar taxable costs upon a determination that EchoStar was the prevailing party.

JURISDICTIONAL STATEMENT

EchoStar brought claims against NDS under federal statutes 15 U.S.C. §§ 1114 and 1125, 17 U.S.C. § 1201, 18 U.S.C. §§ 1030, 1962, 2511, and 2512, and 47 U.S.C. § 605. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1332(a)(1), 1338, and 1367.

This Court has jurisdiction under 28 U.S.C. § 1291. On February 13, 2009, the District Court entered a Joint Final Judgment. ER0009-0015, 1265. EchoStar moved to correct or amend the Judgment under Federal Rules of Civil Procedure 59(e) and 60(a), but the District Court entered an order denying that motion on March 26, 2009. ER0006-0008, 1266. EchoStar timely filed its Notice of Appeal on April 27, 2009. ER1270, 1280-1296; Fed. R. App. P. 4(a)(4)(A)(iv), (vi); Fed. R. Civ. P. 6(a).

STATEMENT OF THE ISSUES

1. Did the District Court err in awarding EchoStar only taxable costs of suit when “full costs” were required under the plain language of the statutes on which EchoStar prevailed?

2. Did the District Court err in basing its fees and costs award to EchoStar on the Court’s interpretation of the jury’s finding of liability, where the question of the basis of liability was not put to the jury and the basis of the jury’s finding of liability is unclear from the general verdict?

3. Did the District Court abuse its discretion in excluding from NDS's fee award time spent on EchoStar's California Penal Code ("CPC") and other claims where EchoStar obtained a favorable verdict on two CPC claims, three claims were voluntarily withdrawn to narrow the issues for trial, and the District Court determined that the remaining claims were unrelated?

4. Did the District Court abuse its discretion in awarding NDS only some of the fees it requested based on the District Court's knowledge of the history of the case and the degree of NDS's success in the claims on which it prevailed?

5. Did the District Court abuse its discretion in awarding EchoStar fees and taxable costs where the District Court excluded fees it deemed not reasonably expended and took into consideration the relief EchoStar obtained at trial?

6. Did the District Court abuse its discretion in denying NDS its costs and awarding EchoStar taxable costs upon a determination that EchoStar was the prevailing party?

STATEMENT OF THE CASE

EchoStar filed suit against NDS on June 6, 2003, alleging that NDS improperly compromised EchoStar's satellite television programming security system. ER0033-0034; ER1147. After nearly five years of contentious litigation, EchoStar's claims at trial included violations of the Digital Millennium Copyright Act ("DCMA"), 17 U.S.C. §§ 1201(a)(1)(A) and 1201(a)(2); the Communications

Act, 47 U.S.C. § 605(a); CPC §§ 593d(a) and 593e(b); and the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962(c).

ER0034. NDS in turn asserted a counterclaim under the California Uniform Trade Secrets Act (“CUTSA”), California Civil Code § 3426. *Id.*

The jury returned a general verdict in EchoStar’s favor, finding that NDS had violated the Communications Act and CPC provisions and that EchoStar had not violated the CUTSA. ER0034, 0109-0111, 0115. It also found that NDS had not violated the DMCA or RICO, and did not act with oppression, fraud, or malice in violating the CPC or engage in a conspiracy to violate CPC § 593e(b). ER0034, 0107-0108, 0110-0113. The jury awarded Echostar \$45.69 in actual damages and \$1,500.00 in statutory damages. ER0034, 0109-0111.

The District Court then issued findings of fact and conclusions of law on a claim by EchoStar under California Business and Professions Code § 17200 for unfair business practices, awarding EchoStar \$284.94 in restitution and issuing an injunction against NDS based upon a finding that it is likely that NDS will repeat its unlawful conduct. ER0009-0012, 0034. In the process, the District Court concluded that the jury had implicitly found that NDS was liable based on a routine but unlawful test conducted on EchoStar’s security system and not for other wrongful acts that EchoStar alleged. ER0032, 0037-0040. But the verdict form contained no explicit findings regarding the bases of the jury’s general

verdict. ER0106-0116.

Both parties then moved for attorneys' fees and costs. ER1257-1260. On December 4, 2008, the District Court issued an Order granting NDS \$8,968,118.90 in fees and no costs and EchoStar \$12,972,547.91 in fees plus "full costs of suit." ER0016-0027. NDS filed a Notice of Appeal on January 5, 2009. ER0082. On February 13, 2009, the District Court entered the Joint Final Judgment, changing the award of costs to EchoStar to "reasonable costs." ER0009-0015. EchoStar moved to correct the Judgment to an award of "full costs" as indicated in the December 4, 2008 Order, but the District Court denied that motion on March 26, 2009. ER0006-0008. NDS filed an Amended Notice of Appeal on April 10, 2009. ER0081. EchoStar filed its Notice of Appeal on April 27, 2009. ER1280-1296. The court clerk subsequently taxed costs of \$236,895.93 against NDS.¹ ER0083. Both parties moved to re-tax costs, but the District Court denied the motions on July 17, 2009. ER0001-0005. The Court based its fees and costs awards partly on its conclusion that the basis of NDS's liability was implicit in the jury's verdict and that EchoStar had not prevailed on its principal theory of liability, as well as the jury's express finding that NDS engaged in illegal conduct. ER0005, 0022-0026.

STATEMENT OF FACTS

Plaintiff EchoStar sells satellite television programming to subscribers in the

United States under the name DISH Network. ER0029. EchoStar and its major competitor, nonparty DirecTV, are the largest satellite television providers in the country. *Id.* Both EchoStar and DirecTV rely on conditional access systems (“CAS”) to provide security for their satellite signals so that only authorized subscribers may access them. *Id.* EchoStar purchased its CAS from plaintiff NagraStar, a joint venture between EchoStar and nonparty the Kudelski Group. *Id.* DirecTV purchased its CAS from defendant NDS, the Kudelski Group’s biggest competitor. ER0029-0030.

A CAS protects the satellite television provider’s programming through encryption, or “scrambling,” of the broadcast signal. ER0029. Subscribers are provided with a “set-top box” that in conjunction with a “SmartCard” or credit card-sized device inserted in the set-top box, decrypts certain channels or programming for which the subscriber has paid. *Id.* The SmartCard contains keys that act in conjunction with keys in the set-top box to determine those signals the subscriber may unlock. *Id.* For providers of satellite television security, a secure CAS is essential to remaining competitive with other providers. ER0030. Both EchoStar and DirecTV have suffered security problems due to piracy. *Id.*

In a “work with your enemy if you cannot beat him” strategy, NDS attempted to deal with its piracy problems by hiring Christopher Tarnovsky, one of

¹ This was \$194,489.31 less than EchoStar’s requested amount of \$431,385.24.

the best satellite pirates and SmartCard hackers in the world. *Id.* Tarnovksy had been involved in the highly successful piracy of DirecTV's system in the late-1990s, and had engaged in the commercial distribution of hacked DirecTV SmartCards. ER0031. Tarnovsky had extensive relationships with satellite pirates around the world. *Id.* NDS eventually approached Tarnovksy and hired him, ostensibly to help it combat piracy of its own system. *Id.* Tarnovsky often worked for NDS out of an NDS-provided laboratory in his California home, where, among other activities, he designed and built SmartCard reprogramming devices. *Id.*

In addition to its activities with Tarnovsky, NDS reverse engineered or hacked an EchoStar SmartCard at a facility in Haifa, Israel. *Id.*; ER1297-1299. This enabled NDS to extract code from the card to identify its vulnerabilities. *Id.* NDS incorporated its findings in a document called the "Headend Report." The Headend Report described the vulnerabilities of EchoStar's SmartCard and how a hacker could use those vulnerabilities to obtain all of EchoStar's programming with only a basic subscription. ER0031-0032. An NDS employee who had worked on the EchoStar SmartCard hack shared the Headend Report with Tarnovsky. ER0032.

In December 2000, an individual using the alias "NiPpEr2000" posted a "hack methodology" for EchoStar's SmartCard on a website popular with satellite

television pirates. *Id.* An associate of Tarnovsky operated this website. ER1300-1302. The hack methodology in the post, which came to be known as the “Nipper Post,” shared many similarities with the methodology in the Headend Report. ER0032-0033. The day after the hack was posted by NiPpEr2000, Tarnovsky sent an email to other NDS employees stating, the “Cat is out of the bag.” ER0033. The following day, the hack was reposted on the website by others. *Id.*

As a result of these postings, piracy of EchoStar’s SmartCards increased significantly. *Id.* NagraStar set up a team of engineers to develop countermeasures for the hack, but the satellite piracy community was able to circumvent the countermeasures. *Id.* Eventually, EchoStar was forced to engage in a “card swap,” which required EchoStar to replace all its SmartCards with new cards containing a new encryption system, at a cost of \$94,638,636.10. *Id.* EchoStar then filed suit, alleging that NDS, through Tarnvosky, was responsible for the Nipper Post and an ensuing distribution network of pirated EchoStar SmartCards. ER0033-0034.

STANDARD OF REVIEW

This Court reviews a district court’s attorneys’ fees and costs award for abuse of discretion. *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1118 (9th Cir. 2000) (attorneys’ fees); *Ass’n of Mexican-American Educators v. California*, 231 F.3d 572, 593 (9th Cir. 2000) (costs). A district court’s discretion in determining the

amount of an award “is appropriate in view of the district court’s superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters.” *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). However, the Court of Appeals “only arrive[s] at discretionary review if [it] is satisfied that the correct legal standard was applied and that none of the district court’s findings of fact were clearly erroneous.” *Thomas v. City of Tacoma*, 410 F.3d 644, 647 (9th Cir. 2005). The District Court’s factual findings are reviewed for clear error. *Id.* Any element of legal analysis which figures in the District Court’s decision is reviewed *de novo*. *Id.*

SUMMARY OF ARGUMENT

The District Court **erred** in awarding EchoStar only taxable costs of suit when “full costs” are required under the plain language of the statutes on which it prevailed. Both the Communications Act and the CPC provisions state that “full costs” “shall” be awarded. Both legislatures made a deliberate choice to use the term “full costs” as opposed to simply “costs.” As this Court has held, the term “full costs” must be interpreted to include non-taxable costs because to do otherwise would read the word “full” out of the statutes, making surplusage of chosen terms and ignoring legislative intent. Thus, EchoStar should be awarded full costs of suit under both statutes and not just taxable costs as awarded by the District Court.

The District Court also **erred** in basing its fees and costs award to EchoStar on the Court's misinterpretation of the jury's finding of liability, where the question of the basis of liability was not put to the jury and the basis of the jury's finding of liability is unclear from the general verdict. In its Findings of Fact and Conclusions of Law on EchoStar's unfair business practices claim, the District Court concluded that the jury's finding of NDS's liability in its general verdict was implicitly based on a routine but unlawful test on EchoStar's security system and not for other acts alleged by EchoStar. The District Court correctly noted that in making its conclusions, it was bound by the explicit and implicit findings of the jury. But unlike in other cases where a jury's implicit findings can be inferred because its verdict leads to only one possible conclusion, there are many possible reasons here why the jury reached the verdict it did. In fact, the Court's conclusion that the jury's verdict is implicitly based on the test renders the verdict inconsistent. Had the jury found that this test was the basis for liability on the Communications Act and CPC claims, it necessarily would have found for EchoStar on the DMCA claims also, as the test meets the elements of those statutes as well. But there are many reasons why the jury may have accepted EchoStar's theory of liability and found the way it did. The basis of liability cannot be inferred from the general verdict. Thus, the District Court should not have limited EchoStar's attorneys' fees and costs based on its interpretation of the jury's finding

of liability.

The District Court did **not abuse its discretion** in awarding attorneys' fees and costs to EchoStar, limiting the amount of attorneys' fees awarded to NDS, and declining to award NDS its costs. NDS is not entitled to fees on EchoStar's CPC claims because the District Court correctly determined that EchoStar was the prevailing party. EchoStar obtained a jury verdict on two of its CPC claims and voluntarily withdrew three others based on other CPC subsections at the behest of the District Court to pare down the issues before the jury. Thus, the District Court correctly determined that EchoStar prevailed and is entitled to the mandatory fee award. The Court also correctly exercised its discretion in not awarding NDS attorneys' fees on purportedly "related" claims after determining that the claims were not sufficiently intertwined to qualify as related and held no independent basis for an award of fees.

The District Court also correctly exercised its discretion in reducing the amount of fees awarded NDS by taking account of NDS's limited success and applying a mathematical formula accordingly. Based on its knowledge of the history of the case and NDS's degree of success on the three claims for which NDS was awarded fees, the District Court properly exercised its discretion to exclude 50% of NDS's requested fees in order to exclude claims on which NDS was not entitled to fees. The District Court also properly exercised its discretion when it

then reduced NDS's requested fees by 25% in calculating the reasonable fees to which NDS is entitled, by comparing the amount of time spent by EchoStar's attorneys with the amount of time spent by NDS's attorneys and reducing the amount of the award accordingly.

Also, with the exception noted above regarding the District Court's erroneous limitation on EchoStar's fee and costs award, the District Court did not abuse its discretion when it awarded EchoStar its fees and taxable costs rather than awarding fees and costs only to NDS, or in determining that EchoStar is entitled to a greater award of fees than NDS. Contrary to NDS's suggestion, the District Court was not required to undertake an hour-by-hour analysis of EchoStar's fee request. Instead, the District Court correctly considered the evidence submitted, along with its own knowledge of the case, excluded time spent on unsuccessful claims, and considered the reasonableness of the approximate time spent on the successful claims (though as noted above, the District Court did erroneously limit EchoStar's fee award by considering only the P1 Test as the basis of NDS's liability). The District Court also considered EchoStar's relative success and the quality of representation and fashioned its fee award accordingly.

Finally, the District Court properly awarded EchoStar its taxable costs after exercising its discretion under the local rules to determine the prevailing party where there was a partial recovery. As the District Court noted, EchoStar obtained

a jury verdict on its Communications Act and CPC claims, uncovered NDS's illegal conduct and forced it to publicly sever ties with well-known hackers, and obtained injunctive relief against NDS to prevent future illegal conduct. Thus, EchoStar was properly awarded both attorneys' fees and taxable costs.

ARGUMENT

I. THE DISTRICT COURT ERRED IN AWARDING ECHOSTAR ONLY TAXABLE COSTS OF SUIT WHEN THE STATUTE REQUIRES AN AWARD OF "FULL COSTS."

The plain language of the statutes on which EchoStar prevailed mandates the recovery of "full costs." The Communications Act provides that in a civil action for violation of the Act, the Court "*shall* direct the recovery of *full costs*, including awarding reasonable attorneys' fees to an aggrieved party who prevails." 47 U.S.C. § 605(e)(3)(B)(iii) (emphasis added). Similarly, the relevant CPC provision reads: "In any civil action filed pursuant to this section, the court *shall* allow the recovery of *full costs* plus an award of reasonable attorney's fees to the prevailing party." Cal. Penal Code § 593e(d) (emphasis added).

Courts are bound to interpret a statute according to its plain language. *See Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 911 (9th Cir. 1989) ("[I]t is a basic canon of statutory construction that Congress intended to give its words their ordinary meaning...."); *In re Reddington Invs. Ltd. P'ship-VIII*, 90 B.R. 429, 431 (9th Cir. 1988) ("It is serious error for a court to ignore the plain

language of a rule....”); accord *California Teachers Ass’n v. Governing Bd. of Rialto Unified Sch. Dist.*, 14 Cal. 4th 627, 632 (1997). (“In interpreting statutes, we follow the Legislature’s intent, as exhibited by the plain meaning of the actual words of the law, ‘whatever may be thought of the wisdom, expediency, or policy of the act.’” (quoting *People v. Weidert*, 39 Cal. 3d 836, 843 (1985))). A court errs when it enters an order that is contrary to the controlling statute’s plain language. See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 577(1982) (reversing and remanding case where district court imposed limitation on damages contrary to plain language of the statute).

When looking at the statute’s plain language, courts “must give every word ... meaning. To do otherwise would be to violate the long standing principle of statute interpretation that ‘statutes should not be construed to make surplusage of any provision.’” *Twentieth Century Fox Films Corp. v. Entertainment Distrib.*, 429 F.3d 869, 885 (9th Cir. 2005) (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 834 (9th Cir. 1996)).

In drafting the costs provision of Section 605 of the Communications Act, Congress made a deliberate choice to use the term “full costs” rather than “costs.” Compare 47 U.S.C. § 605(e)(3)(B)(iii) (court “shall direct the recovery of full costs”) with 17 U.S.C. § 1203(4) (court “in its discretion may allow the recovery of costs”) and 49 U.S.C. § 60121 (“The court may award costs....”) (emphasis

added). Likewise, the drafters of Section 593e of the CPC selected the term “full costs,” a term noticeably absent from cost provisions in other sections of the CPC. Compare Cal. Penal Code § 593e(d) (providing for recovery of “full costs”) with Cal. Penal Code § 1276.5(e) (providing for recovery of “court costs”) and § 11172(c)(1) (providing for recovery of “costs”) (emphasis added).

As this Court has already held, the term “full costs” must be interpreted to include non-taxable costs, because to do otherwise would “effectively read[] the word ‘full’ out of the statute.” *Twentieth Century Fox*, 429 F.3d at 885. In *Twentieth Century Fox*, the provision at issue read: “In any civil action under this title, the court in its discretion may allow the recovery of full costs....” 17 U.S.C. § 505; *id.* at 884. Accordingly, the Court affirmed the District Court’s award of the prevailing party’s “full” non-taxable costs because “there [could] be no other import to the phrase ‘full costs’” within the meaning of the statute.²

NDS argues that this holding stands for the proposition that an award of full costs is discretionary in all cases. In fact, while the Court in *Twentieth Century Fox* did hold that a court “may award otherwise non-taxable costs ... under § 505,” the language of that particular statute is distinguishable from the statutes here

² While there is no apparent controlling case law concerning the costs provision of CPC § 593e(d), California interprets the CPC consistent with the Communications Act provision. See *People v. Patton*, 147 Cal. App. 3d Supp. 1, 8 (1983) (“We find that this state statute [CPC § 593e(d)] acts to further the purposes of 47 United States Code § 605.”).

because the statute in that case made any award of costs discretionary by use of the word “may” and also by including the language “the Court in its discretion.” *See* 429 F.3d at 885; 17 U.S.C. § 505. Here, in contrast, the provisions at issue use mandatory language— namely, “shall”—with regard to awarding “full costs.” *See Int’l Cablevision, Inc. v. Sykes*, 997 F.2d 998, 1009 (2d Cir. 1993) (noting Congress amended Section 605 to replace the word “may” with “shall,” making an award of costs “mandatory”); *see also Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984) (holding Congress’s choice of the language “shall” makes act mandatory, not discretionary); *Common Cause of California v. Board of Supervisors*, 49 Cal. 3d 432, 443 (1989) (“It is a well-settled principle of statutory construction that the word ‘may’ is ordinarily construed as permissive, whereas ‘shall’ is ordinarily construed as mandatory....”). As the preceding authority and *Twentieth Century Fox* demonstrate, the terms “shall” and “full,” taken together, mandate and award and recovery of *all* costs. To read the statutes otherwise would be to ignore their plain language, make surplusage of carefully chosen terms, and ignore legislative intent. EchoStar should be awarded its full costs of suit under both statutes and not just taxable costs as awarded by the District Court.

II. THE DISTRICT COURT ERRED IN BASING ITS FEES AND COSTS AWARD TO ECHOSTAR ON THE COURT'S INTERPRETATION OF THE FACTUAL BASIS OF THE JURY'S VERDICT, WHERE THE QUESTION OF THE BASIS OF LIABILITY WAS NOT PUT TO THE JURY AND THE BASIS OF THE JURY'S FINDING OF LIABILITY IS UNCLEAR FROM THE GENERAL VERDICT.

EchoStar's theory of liability for its claims against NDS was that NDS, through Tarnvosky, was responsible for the Nipper Post and the ensuing distribution network of pirated EchoStar SmartCards. ER0033-0034. As part of its case, EchoStar questioned two witnesses about Tarnovsky's testing of a pirated access card in an EchoStar receiver to gain unauthorized access to programming. ER0149-0152, 0166-0168, 0171-0173. Both parties briefly mentioned the test in their closing arguments. ER0122-0123, 0127-0128, 0138-0139. The test came to be known as the "P1 Test" in post-trial filings. ER0032.

In its October 15, 2008 Findings of Fact, which relate only to EchoStar's unfair business practices claim and do not establish liability under the Communications Act or CPC, the Court expressly found that for purposes of EchoStar's unfair business practices claim, the P1 test violated the Communications Act and CPC §§ 593d(a) and 593e(b). ER0032. The Court went further and also concluded that as a matter of law, the **jury's** finding of liability under those statutes (and thus implicitly under the entire case) was based on the P1 Test and nothing else. ER0037-0040. This—in and of itself—was error; however, the Court committed further error by limiting its attorneys' fees and costs award to

EchoStar and awarding attorneys' fees to NDS based on this erroneous finding even though the jury had decided liability in EchoStar's favor under the Communications Act and CPC. ER0008, 0024-0025.

The District Court correctly noted that in making its conclusions, however, it was bound by the jury's explicit and implicit findings. ER0035 (citing *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993)). The jury made no explicit finding concerning the basis of NDS's liability. See ER. Based upon the evidence introduced at trial, there are many possible implicit, if not explicit, reasons for the jury to find NDS liable to EchoStar, such that an accurate post-verdict inference is impossible. This is in direct contrast to the situation in *Gates*, where this Court made an inference because the jury's verdict left only one possible conclusion. See 995 F. 2d at 1473-74. There is not but one possible reason for the jury's finding NDS liable to EchoStar.

In *Gates*, a discharged police officer brought a federal civil rights action against the City of Los Angeles and several police officials. *Id.* at 1470. The Police Department had served an administrative search warrant on the officer to search his home, but he refused to cooperate. *Id.* at 1471. The officer was charged with insubordination for the warrant incident and other charges and eventually dismissed. *Id.* In the officer's suit, the district court first determined that the warrant violated the Fourth Amendment, making the imposition of discipline for

the officer's objection improper. *Id.* A jury then decided the issue of damages, and returned a verdict for damages in the officer's favor. *Id.* The officer subsequently moved for the equitable relief of reinstatement and back pay based on the Police Department's unconstitutional actions. *Id.* at 1472. The district court denied the relief on the ground that, notwithstanding the unconstitutionality of the insubordination charge, the officer would have been discharged anyway. *Id.*

The officer appealed, arguing that the district court's finding that he would have been discharged regardless conflicted with the jury's findings that were implicit in the jury's \$1 million verdict in the officer's favor. *Id.* at 1473. Noting that the jury made no express finding regarding whether the officer would have been discharged in any event, this Court then considered whether a finding could be inferred from the jury's verdict. *Id.* After reviewing the relevant jury instructions, this Court determined that "in light of the [applicable] instruction and the manner in which the case was presented to the jury, it could *not* have awarded the level of damages it awarded without finding that [the officer] would not have been discharged except for his refusal to be illegally searched." *Id.* at 1474. Thus, this Court found that the jury's verdict left only one possible conclusion.

Similarly, in *Westinghouse Electric Corporation v. General Circuit Break & Electric Supply, Inc.*, this Court upheld a district court's determination of the jury's implicit factual findings where the jury instructions and verdicts left only

one possible conclusion, 106 F.3d 894 (9th Cir. 1997). In that case, the jury returned inconsistent verdicts, finding that the defendants had established affirmative defenses to all of the plaintiff's claims but one. *Id.* at 897. The district court observed that if the affirmative defenses, which were the same on all claims, applied to one particular claim, they should have applied to the other claims. *Id.* at 898. The district court concluded that the jury had been given an erroneous jury instruction only on the one claim that the defendants lost. *Id.* The district court was then able to determine what the outcome implicitly would have been in the absence of the erroneous instruction, and was able to enter judgment in the defendant's favor. *Id.* at 898. This Court affirmed "because in the limited circumstances of [that] case it [was] possible to determine the jury's implicit factual findings from the pattern of verdicts and thereby to remedy the prejudice caused by the flawed instructions..." *Id.*

In contrast, here, as discussed below, there are many possible reasons why the jury might have found NDS liable as it did, and the pattern of verdicts do not lead to only one possible conclusion regarding the basis of NDS's liability. Instead, the jury's verdict shows only whether a particular statute was violated, the damages, and in the case of EchoStar's CPC claims, whether there was malice. ER0107-0115. Only the jury knows the basis of its findings.

In fact, the Court's conclusion that the jury's verdict is implicitly based on

the P1 test necessarily renders the verdict inconsistent. The jury found that NDS violated the Communications Act and the CPC, but not the DMCA. Yet under the instructions given to the jury, the P1 test was a clear violation of the DMCA. Section 1201(a)(1)(A) of the DMCA prohibits circumvention of a technological measure that effectively controls access to a protected work. ER1316-1331. The P1 test satisfies these elements: Tarnovsky used an altered P1 card to circumvent EchoStar's CAS and access its encrypted programming. ER0032.

Similarly, the jury was instructed that the DMCA Section 1201(a)(2) prohibits the manufacture or provision of any technology, product, device, component, or part designed for the purpose of circumventing a technological measure that effectively controls access to a protected work. ER1319-1320. Again, this is the very conduct in which Tarnovsky engaged when he generated a pirated P1 card for the purpose of circumventing EchoStar's CAS and accessing its encrypted programming. ER0032. If the jury believed that the P1 Test was the basis for NDS's liability on the EchoStar's Communications Act and CPC claims, it would necessarily have found that NDS violated the DMCA as well.

On the other hand, if the jury accepted EchoStar's theory of liability based on the Nipper Post, there are many possible reasons for its verdict. For example, the jury may have found violations of the Communications Act and the CPC but not the DMCA because of a jury instruction on territorial application that was

unique to the DMCA claim. The jury was instructed that “[e]ach element of a direct violation must have occurred in the United States for the Digital Millennium Copyright Act to be violated.” ER1321. As the District Court observed, the Nipper Post arguably occurred in Canada, where the servers of the website on which it was posted were located, and much of NDS’s hacking activity occurred in Israel. ER0038; ER1297-1299. While the same jury instruction allowed for “contributory violations based on acts occurring outside the United States if those acts contributed to others’ direct violations within the United States,” the jury may not have found a sufficient connection between conduct that occurred in Haifa and Canada, and the resulting direct violations that indisputably occurred in the United States. *See id.* On the other hand, the jury did not receive a territorial application instruction for EchoStar’s Communications Act claim, and the jury was instructed that NDS could be found liable under the CPC if at least one act contributing to a violation occurred in California. ER1322-1326; 1329; 1331.

The Jury’s damages award also has many potential bases. For example, the jury may have accepted NDS’s arguments on causation and the amount of the damages EchoStar suffered. NDS argued that the Nipper Post did not cause the \$94 million card swap because the hack methodology disclosed was effectively countered within a few months. ER1308-1314. NDS also argued that the need for the card swap arose from a 1999 hack of EchoStar’s CAS and not the Nipper Post.

ER1306-1309. Finally, NDS suggested that EchoStar was not actually damaged by the card swap because it received the swap for free. ER1303-1305. Thus, the nominal damages that the jury awarded to EchoStar does not lead to the necessary conclusion that the Jury rejected EchoStar's Nipper Post theory of liability in favor of a liability theory based on the P1 test. The amount of damages the jury awarded to EchoStar instead may be simply an indication that the jury found that EchoStar was not monetarily damaged by the Nipper Post.

The basis of NDS's liability to EchoStar cannot be inferred from the general verdict. Thus, the Court erred in limiting EchoStar's attorney's fees and costs to those expended in proving the P1 Test. There is simply no indication that the limited testimony on the P1 Test is the sole basis for EchoStar's success and NDS's liability. What the jury verdict does unquestionably show is that EchoStar proved NDS violated the Communications Act and the CPC. EchoStar should be awarded its full attorneys' fees and costs and its fees and costs should not be limited, as the District Court did, to those fees and costs incurred to prove the P1 Test.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING FROM NDS'S FEE AWARD TIME SPENT ON ECHOSTAR'S CALIFORNIA PENAL CODE CLAIMS AND PURPORTEDLY "RELATED" CLAIMS.

The District Court did not abuse its discretion in excluding from its fee award to NDS time spent on EchoStar's CPC claims or other allegedly related

claims. EchoStar prevailed on its CPC claims, and the District Court found that EchoStar's "remaining" claims – those that did not make it to the jury – were not sufficiently related to merit an award of fees to NDS.

A. NDS Is Not Entitled To Fees On The CPC §§ 593d And 593e Claims For Which EchoStar Obtained A Favorable Verdict.

Where, as in the case of CPC §§ 593d(f)(2) and 593e(d), attorneys' fees are mandatory to the prevailing party in a statutory claim, the court must still determine, in its discretion, which party is the prevailing party. *See Castro v. Superior Court of Los Angeles*, 116 Cal. App. 4th 1010, 1018. It is clear from the District Court's December 4, 2008 Order, and is fully supported by the record and prevailing case law, that the District Court found EchoStar to be the prevailing party on EchoStar's CPC §§ 593d and 593e claims *in toto*. Accordingly, NDS is not entitled to attorneys' fees for its defense of EchoStar's CPC §§ 593d and 593e claims.

NDS's apparent attempt to analyze the fee award under the CPC piecemeal, based upon a code subsection-by-subsection basis, in order to be found the prevailing party under three subsections of CPC §§ 593d and 593e, is **without** merit and is misplaced. EchoStar's CPC claims against NDS were based on CPC §§ 593d and 593e. EchoStar prevailed on its CPC claims under these sections, indeed on the most expansive of these sections. The fact that EchoStar did not obtain a jury verdict on three subsections of CPC § 593 is irrelevant to the

attorneys' fee analysis and does not entitle NDS to an award of attorneys' fees for any effort to defeat EchoStar's CPC claims. *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1034-35 (9th Cir. 2006). From a practical perspective, EchoStar was successful on its CPC claims. Therefore there is no question that EchoStar is *the* prevailing party on these claims for purposes of the attorneys' fees provisions, CPC §§ 593d(f)(2) and 593e(d). *Id.* The District Court correctly analyzed the CPC claims in this manner, and did not abuse its discretion in refusing to award fees to NDS for defending any aspect of EchoStar's CPC claim. *Id.*

It is undisputed that the jury found NDS guilty of two provisions of the CPC – CPC §§ 593d and 593e. ER0110-111. Moreover, as the District Court found, EchoStar obtained significant relief in this lawsuit, obtaining the important litigation objective of revealing NDS's illegal conduct (in fact, under the CPC, the conduct in which NDS engaged is criminal), forcing NDS to sever ties with at least two known hackers, and obtaining an injunction preventing NDS from engaging in future similar illegal and criminal conduct, in addition to obtaining actual and statutory damages. ER0022, 21; Cal. Penal Code §§ 593d(a), 593e(b). This is sufficient for EchoStar to have prevailed on its CPC claims. ER0023; *see Park*, 464 F.3d at 1034-35; *Thomas*, 410 F.3d at 648.

The case law upon which NDS relies does not suggest, much less demand, a

different result. For example, in *Berkla v. Corel Corporation*, this Court found that the United States District Court for the Eastern District of California did not abuse its discretion when it refused to find the plaintiff the prevailing party in his contract claim because his damages were significantly less than the amount he sought at trial. 302 F. 3d 909, 920 (2002). However, in that case, the District Court found that the plaintiff had failed to obtain his litigation objective – “a substantial financial payoff for [the plaintiff].” *Id.* In this case, as is clear from record and the District Court’s own Order, EchoStar did obtain **significant** trial objectives in (1) drawing attention to NDS’s illegal and criminal conduct; (2) forcing NDS to sever ties with at least two known hackers; and (3) obtaining an injunction preventing NDS from engaging in future similar illegal and criminal conduct – which the District Court acknowledged was likely without such an injunction. ER0022, 21. Accordingly the District Court, which the Supreme Court of the United States has acknowledged is in the best position to evaluate attorneys’ fees because of its “superior understanding of the litigation,” exercised its discretion to find that based upon all of the factors, EchoStar prevailed in its CPC claims. ER0022; *Hensley*, 461 U.S. at 437. There is no basis for this finding to now be reversed.

B. NDS Is Not Entitled To Fees For EchoStar’s Voluntarily Withdrawn Claims Under CPC §§ 593d(c), 593d(b), And 593e(a).

NDS is clearly not entitled to fees on EchoStar’s CPC claims since EchoStar indisputably prevailed and the subsections should not be analyzed piecemeal.

However, even if the fee analysis can be broken down by subsection, NDS is not entitled to fees on EchoStar's voluntarily withdrawn CPC claims.

Where a plaintiff voluntarily withdraws a claim before the end of trial, the defendant is not automatically deemed the prevailing party for purposes of an attorneys' fee award; rather, a court may properly determine that the defendant did *not* prevail and is *not* entitled to fees. *See Castro*, 116 Cal. App. 4th at 1019, 1021.

There is no dispute that under California law the prevailing party is one that achieves its litigation objectives. *Id.* at 1019. When determining whether a party is entitled to fees for claims voluntarily withdrawn by the opposing party, there are several factors that a court should analyze. These factors include the reasons for dismissal (in particular, whether the claims were abandoned simply to avoid liability for attorneys' fees), which party would have prevailed on the merits, and whether the plaintiff overall obtained its litigation objectives despite withdrawal of certain claims. *See Castro*, 116 Cal. App. 4th at 1021, 1023.

In this case, EchoStar voluntarily withdrew its claims under CPC §§ 593d(c), 593d(b) and 593e(a). ER0907.³ EchoStar's CPC § 593d(c) claim was voluntarily withdrawn before trial began in order to narrow down the issues at trial. ER0907. It is clear from the record, including the fact that EchoStar pursued its

³ EchoStar's voluntary withdrawal of its CPC §§ 593d(b) and 593e(a) claims was not made explicitly on the record; however the lack of any order from the District

other CPC claims that EchoStar did not dismiss its claim under CPC § 593d(c) to avoid attorneys' fee liability; each of EchoStar's CPC § 593d claims were subject to the same attorneys' fee provision. Cal. Penal Code § 593d(f)(2). As noted above, EchoStar achieved its overall litigation objectives under CPC § 593d *in toto* by obtaining a favorable verdict on its § 593d(b) claim; accordingly, there is no basis for deeming NDS the prevailing party on any part of EchoStar's CPC § 593d claims for attorneys' fee purposes. *Castro*, 116 Cal. App. 4th at 1018-19.

Similarly, EchoStar's CPC §§ 593d(b) and 593e(a) claims were voluntarily withdrawn during trial and not given to the jury in the course of the several charging conferences. These claims were withdrawn at the advice and urging of District Court Judge Carter specifically to pare down the issues before the jury. EchoStar's CPC §§ 593d(b) and e(a) claims were withdrawn because they are unquestionably subsumed by EchoStar's CPC claims that were presented to the jury on which EchoStar was successful; accordingly, even if EchoStar had presented its §§ 593(d)(b) and 593e(a) claims to the jury, it would not have made EchoStar more successful on its CPC claims or entitled EchoStar to any more relief than it obtained. These four similarly worded CPC subsections are repeated below:

CPC § 593d(b)	CPC § 593e(b)	CPC § 593e(a)	CPC § 593d(a)
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Court clearly demonstrates that the Court did not make any findings regarding these claims.

Voluntarily Withdrawn	EchoStar Prevailed	Voluntarily Withdrawn	EchoStar Prevailed
<p>[A]ny person who <u>knowingly and willfully manufactures, assembles, modifies, imports into this state, distributes, sells, offers to sell, advertises for sale, or possesses</u> for any of these purposes, <u>any device or kit for a device, designed, in whole or in part, to decrypt, decode, descramble, or otherwise make intelligible any encrypted, encoded, scrambled, or other nonstandard signal</u> carried by a multichannel video or information services provider, unless the device has been granted an equipment authorization by the Federal Communications Commission (FCC), is guilty of a public offense.</p>	<p>Every person who, without the express authorization of a subscription television system, <u>knowingly and willfully manufactures, imports into this state, assembles, distributes, sells, offers to sell, possesses, advertises for sale, or otherwise provides any device, any plan, or any kit for a device or for a printed circuit, designed in whole or in part to decode, descramble, intercept, or otherwise make intelligible any encoded, scrambled, or other nonstandard signal</u> carried by that subscription television system, is guilty of a misdemeanor punishable by a fine not exceeding ten thousand</p>	<p>Every person who <i>knowingly and willfully makes or maintains an unauthorized connection or connections, whether physically, electrically, or inductively, or purchases, possesses, attaches, causes to be attached, assists others in or maintains the attachment of any unauthorized device or devices to a television set or to other equipment designed to receive a television broadcast or transmission, or makes or maintains any modification or alteration to any device installed with the authorization of a subscription television system, for the purpose of intercepting, receiving, or using</i></p>	<p>[A]ny person who, for the purpose of intercepting, receiving, or using any program or other service carried by a multichannel video or information services provider that the person is not authorized by that provider to receive or use, commits any of the following acts is guilty of a public offense:</p> <p>(1) <i>Knowingly and willfully makes or maintains an unauthorized connection or connections, whether physically, electrically, electronically, or inductively, to any cable, wire, or other component of a multichannel video or information services provider's system or to a cable, wire or other media, or receiver that is</i></p>

	<p>dollars (\$10,000), or by imprisonment in a county jail, or by both that fine and imprisonment. A second or subsequent conviction is punishable by a fine not exceeding twenty thousand dollars (\$20,000), or by imprisonment in a county jail for up to one year, or by both that fine and imprisonment.</p>	<p><i>any program or other service carried by the subscription television system which the person is not authorized by that subscription television system to receive or use, is guilty of a misdemeanor punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding 90 days, or by both that fine and imprisonment. For the purposes of this section, each purchase, possession, connection, attachment or modification shall constitute a separate violation of this section.</i></p>	<p><i>attached to a multichannel video or information services provider's system.</i> <i>(2) Knowingly and willfully purchases, possesses, attaches, causes to be attached, assists others in attaching, or maintains the attachment of any unauthorized device or devices to any cable, wire, or other component of a multichannel video or information services provider's system or to a cable, wire or other media, or receiver that is attached to a multichannel video or information services provider's system.</i> <i>(3) Knowingly and willfully makes or maintains any modification or alteration to any device installed with the authorization of a</i></p>
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			<p><i>multichannel video or information services provider.</i></p> <p><i>(4) Knowingly and willfully makes or maintains any modifications or alterations to an access device that authorizes services or knowingly and willfully obtains an unauthorized access device and uses the modified, altered, or unauthorized access device to obtain services from a multichannel video or information services provider.</i></p>
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Indeed, as is clear from the underlined and italicized provisions of each code subsection, the conduct prohibited by CPC §§ 593d(b) and 593e(a) is also prohibited by the slightly more expansive CPC §§ 593d(a) and 593e(b) – claims on which it is indisputable that EchoStar was successful. ER0110-111. The District Court did not abuse its discretion when it declined to award fees to NDS for its defense of EchoStar’s CPC §§ 593d(b) and 593e(b) claims. *See Castro*, 116 Cal. App. 4th at 1023. NDS is not entitled to a fee award, much less a mandatory fee award, on any of EchoStar’s CPC claims; EchoStar prevailed on its CPC claims.

C. NDS Is Not Entitled To Fees On “Related” Claims.

NDS argues that it is entitled to fees on EchoStar’s 22 claims that were not presented to the jury because these claims are related to the claims on which NDS was successful. A District Court may, in its discretion, award fees to a prevailing party on claims on which it was successful where there are no independent grounds for such a fee award, on the basis that such claims are related to the successful claims on which the prevailing party is entitled to fees. *See Hensley*, 461 U.S. at 435. If the court finds such claims **insufficiently** related to the successful claims then the court shall not award fees for time spent on those insufficiently related claims. *Traditional Cat Assoc. v. Gilbreath*, 340 F.3d 829, 834 (9th Cir. 2003). Here, the District Court determined that the 22 “remaining” claims were not sufficiently related to warrant an award of fees in NDS’s favor, and that the claims did not have any independent basis for an award of fees; accordingly, the District Court refused to award fees to NDS for its defense of these claims. ER0024.

As an initial matter, NDS’s argument that it is entitled to a fee award for defending the 22 “remaining claims” fails for the same reasons NDS’s argument that it is entitled to a fee award for defending against EchoStar’s CPC claims, as NDS bases its argument that it is entitled to fees on EchoStar’s “remaining” claims (those which were not submitted to the jury) on its argument that it is entitled to fees on EchoStar’s CPC claims. Defendants-Appellants NDS Group Limited’s and

NDS Americas, Inc.'s Principal Brief ("NDS's Opening Brief") at 36. As this basic foundation is incorrect, NDS's argument must topple. Indeed, it is nonsensical that NDS should be entitled to fees for claims that are related to claims on which EchoStar was successful and properly awarded fees. Under NDS's reasoning, it is **EchoStar** that should be entitled to fees for these "related" claims, if they are in fact related to the CPC claims on which EchoStar was successful. *See Hensley*, 461 U.S. at 435.

The District Court currently held that it was "not persuaded that a discretionary award of attorney's fees under [the purportedly related claims] is necessary under *Hensley's* intertwined principle." ER0024, citing *Hensley*, 461 U.S. at 434-35. Contrary to NDS's assertion, the District Court analyzed the purportedly related to EchoStar's DMCA and RICO claims to merit an award of fees under *Hensley*. ER0024; NDS's Opening Brief at 36. The District Court upheld its duty to evaluate whether the "remaining" claims were sufficiently related to the DMCA and RICO claims. *See Entm't Research Group, Inc. v. Genesis Creative Group, Inc.* 122 F. 3d 1211. Because the District Court found that the claims were not sufficiently related to merit a fee award, it was not necessary for the District Court to proceed to the second prong of the analysis, NDS's overall success. *Traditional Cat*, 340 F. 3d at 833-34.

Additionally, The District Court further correctly found that there was no

independent basis for a fee award to NDS on the remaining claims. ER0024. To award fees to NDS for its defense of the claims that were not presented to the jury would be to open the floodgates for attorneys' fee claims on causes of action of all descriptions, even if those causes of action would not otherwise entitle a party to fees, simply because they arise from a common nucleus of facts. For example, under NDS's theory, EchoStar should be entitled to fees for its successful Cal. Bus. Code § 17200 claim, which was based upon the same facts that allowed EchoStar to prevail on its CPC claims; indeed, EchoStar's Cal. Bus. Code § 17200 claim was based upon EchoStar's success in its CPC claims. ER0036-37. However a fee award is not permitted for Cal. Bus. Code § 17200 claims, and no fees were awarded to EchoStar despite its success on its Cal. Bus. Code § 17200 claim. *Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel, Co.*, 20 Cal. 4th 163, 179 (1999); ER0025.

Finally, awarding fees to NDS on claims that may be argued to be related to EchoStar's DMCA and RICO claims – the only claims on which NDS may arguably be permitted a fee award – ignores the fact that NDS advanced multiple and completely unsuccessful counterclaims. Indeed, NDS unsuccessfully asserted several counterclaims, which were lost on summary judgment, withdrawn, or flatly rejected by the jury. *E.g.*, ER00115; ER00942. Equity dictates that NDS's complete failure in its own counterclaims, combined with EchoStar's indisputable

success on its claims under the CPC, the Communications Act, and Cal. Bus. Code § 17200, would render an award of fees to NDS on EchoStar's "related" claims unjust. Such equitable determinations are in the District Court's discretion, as the court most familiar with the facts and history of the case.

The District Court did not abuse its discretion in denying NDS a fee award for its defense of EchoStar's CPC claims and remaining claims not presented to the jury when EchoStar prevailed on its CPC claims and the District Court found the remaining claims insufficiently related to the DMCA and RICO claims to merit an award of fees to NDS.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN REDUCING NDS'S REQUESTED FEES.

As the District Court made clear, and as discussed above, NDS is not entitled to fees incurred to defend EchoStar's CPC and the remaining purportedly "related claims." ER0024. Instead, NDS is only entitled to fees under the DMCA and RICO. *Id.* Accordingly, the District Court appropriately excluded from NDS's fee award fees for unsuccessful defenses or claims the District Court deemed insufficiently related. *Id.*; *Schwartz v. Sec'y of Health & Human Servs.*, 73 F. 3d 895, 904-905; *see also Traditional Cat*, 340 F.3d at 834. The District Court also properly examined NDS's success and failures, the history of the case, and the fees NDS purportedly expended, and determined, in its discretion, NDS's reasonable attorneys' fees incurred to defend against EchoStar's DMCA and RICO

claims. ER0025-26. The Court did not abuse its discretion in reducing NDS's fees incurred to defend against EchoStar's DMCA and RICO claims by 25%.

A. The District Court Did Not Err In Beginning Its Analysis Of NDS's Fee Award By Dividing NDS's Fees In Half.

As previously discussed, a court must determine whether a party is entitled to fees on claims "related" to those on which it was successful. *Traditional Cat*, 340 F. 3d at 833-34. After making such a determination, a court then begins its lodestar analysis by excluding time spent on unsuccessful and unrelated claims. *Hensley*, 461 U.S. at 435-36. A district court has discretion to either identify specific hours that should be eliminated, or simply reduce the award to account for the party's limited success. *Schwartz*, 73 F.3d at 904. A district court may reduce the amount of the fees requested by resorting to an imprecise mathematical formula. *Id.* (affirming an award based upon the district court's reduction of fees by 25% based on the plaintiff's limited success).

NDS complains of the District Court's resorting to a "crude" mathematical formula based upon the number of claims won and lost at trial. However, the District Court did not resort to or use a "crude" mathematical formula to exclude time spent on unsuccessful or unrelated claims. NDS appears to claim fees for 27 of EchoStar's 29 total claims in this case. ER088; ER1332-1342 (indeed, the only claim for which NDS does not appear to seek fees are those incurred in its defense of the Communications Act and Cal. Bus. Prof. Code § 17200). The District Court

determined that NDS was not entitled to fees on EchoStar's CPC claims, Lanham Act claims, or "remaining" claims, but instead was only entitled to fees incurred in its defense of EchoStar's DMCA and RICO claims. ER0023-25, 26. Had the District Court merely awarded NDS fees in an amount equal to the percentage of claims on which it was successful at trial, the District Court would not have cut NDS's total fees in half, but by nearly 90% (representing 26 of the 29 claims, since NDS was awarded fees to defend against EchoStar's DMCA and RICO claims). Instead, based upon its knowledge of the history of the case and the degree of success in the three claims to which NDS was entitled to fees, the District Court in its discretion to excluded only 50% of NDS's counsel's time spent on the case – even though the District Court found NDS prevailed in only on three of EchoStar's claims.

The cases cited by NDS in support of its argument are not inconsistent with this analysis. For example, in *Gates v. Deukmejian*, NDS's primary case in support of its criticism of the District Court's percentage reduction, the district court's fee award was overturned because it failed to "articulate [its] reasons for selecting specific percentage reductions. 987 F.2d 1392, 1399, 1400 (9th Cir. 1992). However, in that case, the district court had simply ordered a 10% reduction in fees to account for overbilling, but had failed to provide any numeric explanation for this reduction. *Id.* at 1400. Here, the District Court provided

ample explanation for its denial of NDS's claim for fees on 26 of the 29 claims, its finding that NDS is not entitled to fees in all but three of EchoStar's claims, and its method of using a 50% reduction. ER0023-26. Additionally, in *Gates*, the reduction was not related in any way to unsuccessful or unrelated claims, as is the case here, but simply a reduction based upon the court's perceived reasonableness of fees expended in successful claims. 987 F.2d at 1396.

Additionally, as noted above, in declining to award NDS fees incurred to defend against EchoStar's remaining claims, the District Court did consider whether the remaining claims were related. *See supra* Part III.C. Indeed, the District Court determined that the claims were not sufficiently related to warrant an award of fees to NDS. *Id.*

The District Court did not abuse its discretion by reducing cutting NDS's counsel's time by 50%. This Court should defer to the District Court's discretionary reduction. *See Schwartz*, 73 F.3d at 904.

B. The District Court Did Not Abuse Its Discretion When Reducing By 25% NDS's Requested Fees To Defend Against EchoStar's DMCA And RICO Claims.

NDS complains that the District Court abused its discretion when it further reduced the amount of NDS's requested fees by 25% because this reduction was based upon a comparison to EchoStar's attorneys' time spent on the case, it was incorrectly tallied because it did not take into consideration the time of non-legal

professionals, and the District Court failed to explain how the hours spent resulted in a 25% reduction. NDS's Opening Brief at 41-43.

Contrary to NDS's assertion, comparison of the two parties' attorneys' time in evaluating the reasonableness of fees is not *per se* impermissible, or even *per se* questionable, much less demonstrative that the District Court abused its discretion; indeed, as this Court has stated, a review of opposing counsel's time spent is helpful to the analysis. *See Chalmers v. Los Angeles*, 796 F.2d 1205, 1214 (9th Cir. 1986). Such a comparison was proper here considering the District Court's familiarity with the history of the case and counsel. *Id.*; ER0024.

Nor does *Ferland v. Conrad Credit Corp.*, suggest otherwise. 244 F.3d 1145 (9th Cir. 2001). NDS erroneously relies on *Ferland* in objecting the District Court's comparison of the time spent by NDS's attorneys to the time spent by EchoStar's attorneys. In *Ferland*, this Court reasoned that comparing the time of plaintiff's counsel to that of defendant's counsel does not "*necessarily* indicate whether the hours expended by the party seeking fees were excessive." *Id.* at 1151 (emphasis added). The Court further reasoned that based upon their different roles in the case, counsel have different responsibilities, and that the prevailing party would possibly spend more time on the case because she did better work, hence her victory in the case; this Court indicated that such factors must be considered in comparing the time spent by each side's counsel. *Id.* However, in *Ferland*, there

were no counterclaims. Additionally, in *Ferland*, there was only *one* prevailing party. *Id.* Here, both parties served the role of claimant and respondent – indeed, NDS asserted several counterclaims. The parties were therefore similarly situated except that NDS was not **the** prevailing party. ER0024-26. The District Court did not abuse its discretion in concluding that NDS did not spend more time and do better work and is not more deserving of more fees than EchoStar. Quite the opposite; the District Court, in considering the matter and based upon its long history with the case, in its discretion concluded that each side did similar quality and quantity of work. ER0026. This was not an abuse of discretion.

Love v. The Mail on Sunday, upon which NDS also relies, is neither persuasive nor instructive on whether the District Court abused its discretion. 2007 WL 2709975 (C.D. Cal. 2007). In *Love*, the United States District Court for the Central District of California rejected the plaintiff's argument that the defendant's requested fee award was unreasonable because it was double the amount of plaintiff's fees. 2007 WL 2709975 *10. The district court determined that the defendant's counsel was forced to spend more time "[d]efending against an over-pled complaint packed with a barrage of convoluted allegations" and that "the greater amount of time defense counsel committed to this case was reflected in the higher quality of their work" thus, *in that case*, "the difference in hours that Plaintiff and Defendants spent has no bearing on the reasonableness of Defendants'

work.” *Id.* Such is not the case here. Rather, as demonstrated by the fact that NDS was not successful in defeating many of EchoStar’s claims on summary judgment and EchoStar’s success on multiple of its claims at trial, NDS was not defending an “over-pled complaint packed with a barrage of convoluted allegations.” *See* ER0862-942; ER0109-111, 115. Even if this were true, it was not an abuse of discretion for the District Court to reduce NDS’s requested fees by 25% as it did, since the District Court is in the best position to know what is reasonable in each particular case.

NDS further erroneously complains that the District Court erred mathematically when comparing the number of hours that each side’s counsel spent because the number of hours used for EchoStar’s counsel’s time included only attorneys, and the number of hours used for NDS’s counsel’s time included both attorneys and paralegals. However, the Declaration of Darin Snyder of O’Melveny & Myers, the firm that billed the greatest amount to NDS, indicates that his tally includes only attorney time: “The ‘lodestar’ figure, which represents the presumptively reasonable fee, was calculated by multiplying the total number of hours O’Melveny **attorneys** worked on this case from August, 2003 until August, 2008 multiplied by the then-current hourly rate of the **attorneys**. The number of hours worked totaled 42,908.80 for a lodestar figure of \$17,570,803.14.” ER0729 (emphasis added). The Declaration of Scott Wilsdon of

Yarmouth, Wilsdon, Calfo, a firm that also billed a considerable number of hours to NDS, does not specify whether the time spent was attorney time or paralegal time, or how the hours were allocated between attorneys and paralegals. ER0751. Finally, the Declaration of Julie Shepard of Hogan & Hartson does not provide a summary of hours spent by attorneys or paralegals at that firm, but instead simply provides the amount of fees sought. ER0742. Though each declaration included as exhibits the invoices sent to NDS, the District Court is not obliged to review each invoice to ensure it is consistent with the sworn affidavits of counsel. *See Joseph F. Sanson Inv. Co. v. 268, Ltd.*, 789 F.2d 674, 677-78 (relying upon counsel's affidavit); *see also Avago Technologies General IP PTE, Ltd. v. Elan Microelectronics Corp.*, 2007 WL 2013716 (N.D. Cal. 2007). Based on the information NDS's counsel provided, the District Court did its best to compare EchoStar's attorney time to a reasonable approximation of NDS's attorney time. The District Court did not abuse its discretion in making this conclusion.

NDS suggests that whether the District's Court's mathematical calculation is correct or not, there is no correlation between the 25% reduction and the District Court's rationale such that the District Court abused its discretion. NDS's Opening Brief at 44. This is incorrect. NDS's claims that the total hours its counsel

expended was approximately 57,997.⁴ *Id.* at 43. The District Court construed this time estimate as **attorney** time. ER0026. EchoStar's total attorney time was approximately 45,958. ER0774-77, ER0811, ER0823, ER0847. This is a difference of roughly 21%. But even if the District Court compared apples and oranges when comparing EchoStar's approximately 45,000 hours to NDS's 57,000 hours, the error was harmless; NDS's total **fees** (not hours) sought were approximately 34% more than those sought by EchoStar. ER0025-26. In reducing NDS's fees by only 25%, it actually gave NDS the benefit of a greater award than that to which it was entitled. The District Court did not abuse its discretion by reducing NDS's requested attorneys' fees by 25%.

V. THE DISTRICT COURT DID NOT ERR IN AWARDING ECHOSTAR ITS FEES AND TAXABLE COSTS.

NDS next complains that the District Court abused its discretion in awarding fees and costs to EchoStar. NDS argues that the District Court was obliged to review EchoStar's detailed time entries, and obliged to exclude fees not "reasonably expended," and finally to reduce EchoStar's fee award in proportion to the damages the jury awarded EchoStar.

A. The District Court Was Not Obligated To Conduct A Detailed Review Of EchoStar's Time Entries.

NDS first argues that the District Court erred by failing to sufficiently

⁴ But this number is not supported by the declarations that NDS submitted since the

scrutinize EchoStar's fee records – pointing to the fact that EchoStar did not submit detailed time entries for the District Court's review. Submission of detailed time entries is not required by the Federal Rules of Civil Procedure, the Local Rules of Practice for the United States District Court for the Central District of California, and is not the only means by which a court may allocate time under prevailing case law. Fed. R. Civ. P. 54; C.D. Cal. R 54-1-12; *see Traditional Cat*, 340 F.3d at 829 (stating that a court may, and should, rely upon its own knowledge of a case in apportioning fees). Nor is the District Court required to undertake an hour-by-hour analysis of a fee request. *Gates*, 987 F. 2d at 1399. Instead, the District Court is obliged only to make a reasonable approximation of the time spent on the successful claims and unsuccessful claims based upon the evidence submitted and the District Court's own knowledge of the case, exclude the time on the unsuccessful claims, and then consider the reasonableness of the approximate time spent on the successful claims. *See id.*, *see also Schwartz*, 73 F.3d at 905; *Traditional Cat*, 340 F.3d at 829; *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975). This is precisely what the District Court did as reflected in the District Court's its Order. ER0024-26. The District Court did not abuse its discretion.

Sheperd Declaration does not include a calculation of hours. ER0742.

B. The District Court Excluded Fees It Deemed Not Reasonably Expended; The District Court's Fee Award To EchoStar Took Into Consideration The Relief EchoStar Obtained At Trial.

There is no dispute that a court should consider the relative success of a party in fashioning its fee award. *Hensley*, 461 U.S. at 436. However, such an analysis does not oblige a district court to make a direct mathematical correlation between the damages recovered and the fees awarded. *Id.* Indeed, where, as here, a party has obtained success that is difficult to quantify in a dollar amount, the court must consider the value of the success achieved. *Id.*

In this case, the District Court looked not only to the monetary value of the damages awarded to EchoStar, but to the substance of EchoStar's victory. As the District Court indicated, EchoStar achieved a substantial victory by revealing NDS's illegal, and potentially criminal, conduct; forced NDS to sever its ties with known hackers; and established that NDS was likely to repeat this illegal conduct in the future without an injunction to prevent such conduct; thereby justifying the District Court's continued jurisdiction over NDS through an injunction. ER0022. The District Court did not abuse its discretion in considering this significant change in the legal relationship between the parties when determining the amount of fees to award to EchoStar. *Hensley*, 461 U.S. at 433. The District Court did not abuse its discretion in awarding fees and costs to EchoStar.

VI. THE COURT DID NOT ABUSE ITS DISCRETION IN AWARDING ECHOSTAR AN “ADDITIONAL” \$5 MILLION IN FEES.

NDS argues that the District Court further abused its discretion in awarding EchoStar an additional \$5 million in attorneys’ fees because the District Court lacked authority to enhance the fees based upon the relative sizes of each parties’ fee award, the evidence the District Court relied upon to enhance the fees was insufficient to support an enhanced award, and the District Court failed to explain why it selected \$5 million as the amount by which to enhance EchoStar’s fee award. NDS’s Opening Brief at 54-56. NDS’s arguments suffer from a fundamental error – the District Court increased EchoStar’s attorney fee award by \$5 million as part of its **initial** reasonableness analysis, **not** as an enhancement to the fees calculated as the lodestar. There is no abuse of discretion.

The District Court’s Order is quite clear – the District Court first undertook an analysis of which party prevailed on which claims. ER0023-25. The District Court then determined the appropriate degree of success to attribute to each party on these claims, and whether there were any claims sufficiently related to the successful claims to merit an additional award of fees. ER0025-26. The District Court essentially determined that EchoStar was half successful, and NDS was half successful. ER0026.

The District Court then undertook an analysis of the reasonableness of the fees attributable to each party’s’ successful claims. ER0026. The District Court

considered the *Kerr* factors, including the time and labor required and results obtained. *Id.*; *Kerr*, 526 F.2d at 69-70. In evaluating these factors, the District Court determined, for the reasons discussed above, that NDS's requested fees, even when cut in half to account for the unsuccessful and unrelated claims, were not reasonable, and determined an appropriate lodestar. *Id.* The District Court then calculated EchoStar's reasonable fees based upon the quality of representation and the significant victory that EchoStar obtained. ER0026. The "additional" \$5 million was not an "enhancement" of EchoStar's fees, it was part and parcel of the District Court's evaluation of EchoStar's fees. *Id.*

As with the reductions it made to NDS's fee award in its discretion, the District Court based its award of fees to EchoStar on the evidence submitted and its own knowledge of the case. ER0024-26; *Traditional Cat*, 340 F.3d at 829; *Schwartz*, 73 F.3d at 905; *Kerr*, 526 F. 2d at 69-70. The District Court need not describe in detail each step it took in the process of determining the amount of EchoStar's fee award, so long as it provides an indication that it is familiar with controlling law, and has considered the appropriate evidentiary elements, which the District Court did have. *See McGinnis v. Kentucky Fried Chicken of California*, 51 F.3d 805, 809 (9th Cir. 1994). The District Court's award of fees is supported by the evidence; indeed, EchoStar's final award is less than the amount it sought overall, all of which was amply supported by affidavit, and just over half

of what NDS sought in total. ER0026. The District Court did not abuse its discretion when awarding fees to EchoStar.

Even if the \$5 million was an enhancement, the alleged enhancement was based on factors other than the *Kerr* factors, and therefore is permissible. *See Blum v. Stenson*, 465 U.S. 886, 900 (prohibiting enhancement of fee award based only upon the *Kerr* factors that have been subsumed into the lodestar analysis). Instead, the District Court considered the relative equity of awarding less fees to EchoStar than to NDS despite EchoStar's significant victory and NDS's bad acts that resulted in the jury's verdict against NDS and in EchoStar's favor. ER0026. The District Court did not abuse its discretion in awarding EchoStar an "additional" \$5 million in fees.

VII. THE COURT DID NOT ABUSE ITS DISCRETION IN DENYING COSTS TO NDS AND AWARDING COSTS TO ECHOSTAR.

NDS finally complains that the District Court erred in denying NDS its costs, and awarding taxable costs to EchoStar. NDS's Opening Brief at 57-58. NDS argues that NDS, not EchoStar, was the prevailing party, and also that NDS was entitled to costs as a matter of law as the prevailing party on EchoStar's CPC claims. *Id.* NDS then argues that the District Court erred in awarding costs to EchoStar because EchoStar failed to establish that the costs were incurred in connection with the P1 test. *Id.* Once again, NDS's arguments must fail.

Pursuant to Local Rule 54-2.3, the District Court found that EchoStar was

the prevailing party on EchoStar's Communications Act and CPC claims. C.D. Cal. 54-2.3 ("The Court shall determine the prevailing party when there is a partial recovery or a recovery by more than one party."); 47 U.S.C. § 605(e)(3)(B)(iii); Cal. Penal Code §§ 593d(f)(2), 593e(d). The prevailing party determination for purposes of taxable costs is completely within the District Court's discretion, but is generally considered the same analysis as the prevailing party determination for purposes of awarding attorneys' fees. *E.g., Pembroke v. Wood County*, 981 F.2d 225, 230 (5th Cir. 1993). In this case, the District Court did not err in finding EchoStar to be the prevailing party for purposes of taxable costs, because EchoStar obtained a jury verdict against NDS on its Communications Act and CPC claims, which included damages. ER0024-26. EchoStar obtained injunctive relief against NDS to prevent future illegal conduct, plus achieved the significant relief of uncovering NDS's illegal conduct, and forcing NDS to sever ties with known hackers. ER0024. The District Court did not err in the exercise of its discretion in refusing to award NDS its costs.

Similarly, the District Court did not err in awarding EchoStar its taxable costs. EchoStar was the prevailing party, and is entitled to costs under the Communications Act and CPC.⁵ ER0024-26; C.D. Cal. R. 54-2.3; 47 U.S.C. § 605(e)(3)(B)(iii); Cal. Penal Code §§ 593d(f)(2), 593e(d). The fact that EchoStar

did not obtain the entire monetary amount it sought does not preclude a finding that EchoStar is the prevailing party; indeed, even an award of nominal damages may render a plaintiff prevailing party status. *See Farrar v. Hobby*, 506 U.S. 103, 111-13 (1992). Moreover, just because the District Court found that both EchoStar and NDS prevailed on certain claims, it did not abuse its discretion when awarding costs only to EchoStar since EchoStar prevailed in the only claims that *required* an award of costs. *E.g., Roberts v. Madigan*, 921 F.2d 1047, 1058 (10th Cir. 1990); *Hillside Enterprises v. Carlisle Corp.* 69 F.3d 1410, 1416 (8th Cir. 1995); Cal. Penal Code §§ 593d(f)(2), 593e(d).

NDS further erroneously complains that the District Court awarded costs to EchoStar “regardless of the purpose for which they were incurred.” NDS’s Opening Brief at 59. Such a statement completely misses the protections inherent in Fed. R. Civ. P. 54(d) and L.R. 54-4 and ignores the District Court’s hard work in the exercise of its discretion. These rules dictate what is and what is not recoverable as taxable costs—accordingly, these rules prevent a court from allowing taxable costs “regardless of the purpose for which they were incurred.” *E.g., C.D. Cal. R. 54-4.8* (“Interpreter’s and Translator’s Fees. Fees paid to interpreters and translators, including: (a) The salaries, fees, expenses, and costs of an interpreter as provided by 28 U.S.C. §§ 1827 and 1828; and (b) Fees for

⁵ As noted above, *supra* Part I, EchoStar is entitled to “full” costs, not just taxable

translation of documents received in evidence, used as part of the proceeding or when otherwise reasonably necessary to the preparation of the case.”).

Moreover, for costs to be awarded pursuant to Fed. R. Civ. P. 54(d), EchoStar need only establish that it requested costs sought fall within the permissible category of taxable costs in order to establish the “strong presumption” that costs will be awarded “in full measure.” *See Concord Boat Corp. v. Brunswick Corp.*, 309 F.3d 494, 497-98 (8th Cir. 2002). As is clear from EchoStar’s Bill of Costs, the Bill of Costs that the Clerk ultimately entered and the District Court’s Order Denying the Motions to Re-tax Costs, the Clerk only taxed costs permissible under Federal Rule of Civil Procedure 54(b) and Local Rule 54-4.⁶ ER0001-0005, 0083. Accordingly, the District Court did not err in awarding taxable costs to EchoStar.

The cases on which NDS relies do not dictate otherwise. For example, in *Crandall v. City & County of Denver*, upon which NDS relies to establish that EchoStar must demonstrate the relationship between its reasonable costs and the P1 test,⁷ do not so hold. 594 F. Supp. 2d 1245 (D.C. Colo. 2009). In *Crandall*, the

costs.

⁶ Although EchoStar disputes that it was only entitled to taxable costs, and that certain of the costs that the District Court did not tax should have been taxed, to the extent the District Court awarded taxable costs, neither party disputes that the costs allowed are of the type permitted under Fed. R. Civ. P. 54(b) and L.R. 54-4.

⁷ As noted above in Section II, EchoStar disputes that the jury found that NDS was liable for only the P1 test.

District Court of Colorado was concerned about whether the plaintiff had established that the costs sought were in fact recoverable under Rule 54(b). *Id.* at 1245, 1247, 1253 (for example, the court was asked to examine whether certain transcripts were necessary for trial, whether certain depositions were used at trial). Similarly, in *Sevenson Environmental Services, Inc. v. Shaw Environmental, Inc.*, the district court for the Western District of New York considered whether certain costs were related to evidence used in the plaintiff's motion for summary judgment. 246 F.R.D. 154, 155 (W.D.N.Y. 2007). Neither court in *Crandall* or *Sevenson* considered whether costs that it had determined to be taxable costs needed to be apportioned among the many claims in the case. Here, the District Court evaluated EchoStar's Bill of Costs, and explicitly rejected not only those that it found not taxable and not recoverable under Fed. R. Civ. P. 54(b) or L.R. 54-4, but also those that it found to be excessive or unnecessary; the District Court only permitted those costs that it found squarely fit into the strict requirements of Fed. R. Civ. P. 54(b) and L.R. 54-4. ER0001-0005. The District Court did not abuse its discretion in awarding EchoStar its taxable costs.

CONCLUSION

For the foregoing reasons, EchoStar respectfully requests that this Court reverse the District Court's decisions limiting EchoStar's award of costs to taxable costs only and limiting EchoStar's award of attorneys' fees and costs awards to

time spent proving the P1 Test, and remand for a determination of EchoStar's full costs of suit and fees expended on its successful claims. EchoStar further requests that this Court uphold the District Court's fee award to NDS's and denial of costs to NDS. Plaintiffs-Appellants/Appellees hereby request oral argument.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Plaintiffs-Appellants/Appellees state that they are not aware of any related cases pending before the Ninth Circuit.

Dated: September 11, 2009

Respectfully submitted,

s/ Cynthia A. Ricketts

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**Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and
Circuit Rule 32-1**

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached principal and response brief is proportionately spaced, has a typeface of 14 points or more and contains 13,068 words.

s/ Cynthia A. Ricketts

CYNTHIA A. RICKETTS

9th Circuit Case Number(s) 09-55005 and 09-55633

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