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20 **UNITED STATES DISTRICT COURT**
21 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
22 **SAN JOSE DIVISION**

23 ECHOSTAR SATELLITE L.L.C. et al.,

24 Plaintiffs,

25 v.

26 FREETECH, INC. and DOES 1-10,

27 Defendants.

28 _____
29 FREETECH, INC.,

30 Counterclaimant,

31 v.

32 ECHOSTAR SATELLITE L.L.C. et al.,

33 Counter-defendants.

Case No. CV-07-6124 (JW)

**PLAINTIFFS' RESPONSE TO AMICUS
CURIAE BRIEF OF THE ELECTRONIC
FRONTIER FOUNDATION IN SUPPORT
OF DEFENDANT FREETECH'S MOTION
FOR PROTECTIVE ORDER**

Date: September 10, 2008

Time: 9:30 a.m.

Dept.: Courtroom 4, 5th Floor, San Jose

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Plaintiffs EchoStar Satellite L.L.C., EchoStar Technologies Corporation, and NagraStar
3 L.L.C. (collectively, "Plaintiffs") hereby submit their Response to the Amicus Curiae Brief by the
4 Electronic Frontier Foundation ("EFF"), and in support state:

5 **I. STATEMENT OF THE ISSUE**

6 Whether the disclosure of names and contact information for Freetech, Inc. customers
7 seriously intrudes upon the customer's right of privacy to such an extent that Plaintiffs' need for
8 this highly relevant evidence should be disregarded?

9 **II. INTRODUCTION & RELEVANT FACTS**

10 Plaintiffs filed this case against Freetech, Inc. for illegally trafficking in Coolsat-branded
11 receivers and related software files that are designed, produced, and marketed for use in stealing
12 Plaintiffs' subscription-based satellite television programming. It is Plaintiffs' steadfast position
13 that Coolsat receivers have virtually no viable purpose or use aside from circumventing Plaintiffs'
14 security system and intercepting Plaintiffs' encrypted satellite signals. Freetech, of course, denies
15 that its products are used primarily to steal. Having framed the issue, a common sense way to go
16 about determining the predominant use of Coolsat receivers is to query the persons that purchased
17 and presumably operated them. To this end, and as authorized by Rule 45 of the Federal Rules of
18 Civil Procedure, Plaintiffs subpoenaed Freetech's authorized dealers on July 16, and a second
19 group of dealers on July 25, to respond to a narrowly tailored request seeking:

20 Documents sufficient to identify each Person who purchased or otherwise
21 obtained a Coolsat Receiver or Receivers from You during the period January 1,
22 2003 to June 30, 2008, including each Person's name, address, phone number,
and email address, and the purchase date, purchase price, purchase quantity, and
model number for each Receiver.

23 Freetech, and now EFF, wants to close off this discovery for various reasons, arguing everything
24 from relevance to protecting privacy interests of the end users – most of whom are likely stealing
25 Plaintiffs' satellite programming.

26 EFF's amicus brief is high on hyperbole and speculation, and nothing more. Not once
27 does EFF state a legal basis for the alleged privacy right it claims to protect. From what Plaintiffs
28 can discern, the privacy issues raised by EFF essentially boil down to whether Plaintiffs should be

1 permitted to contact an expected satellite pirate and inquire about his or her use of Freetech's
2 products. It is hard to image how this would equate to a serious intrusion on any privacy right of
3 Freetech customers, and the California courts, both at the federal and state level, are in agreement.
4 Notwithstanding, to the extent there is a legally protected privacy right being advanced by EFF,
5 any potential invasion of that right is outweighed by Plaintiffs' need for the undeniably relevant
6 customer data.

7 EFF colorfully analogizes its stance in this case to the savior of a few innocent dolphins
8 that might potentially get trapped in Plaintiffs' proverbial litigation net. But as a court remarked
9 in the context of gathering third-party evidence, which is exactly what Plaintiffs are seeking, "one
10 can't know what one has caught until he fishes."¹ EFF's unfounded concern that Plaintiffs may
11 later take indiscriminate action against Freetech customers is insufficient to warrant a protective
12 order, and severely mitigated by the pleading requirements in federal and state court specifically
13 designed to weed out trivial lawsuits.

14 **III. LEGAL STANDARD**

15 A protective order shielding evidence from discovery under Rule 26 of the Federal Rules
16 of Civil Procedure should issue only if the movant satisfies the "heavy burden" of establishing
17 "good cause." *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827 (9th Cir. 2004). Good cause exists only
18 "where it is specifically demonstrated that disclosure will cause a 'specific prejudice or harm.'"
19 *Id.* (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th
20 Cir. 2002)). "Broad allegations of harm, unsubstantiated by specific examples or articulated
21 reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d
22 470, 476 (9th Cir. 1992). Only after particular harm has been confirmed, in this case the alleged
23 intrusion of privacy rights, must the court balance that harm with the non-movant's need for the
24 discovery. *See Phillips*, 307 F.3d at 1211.

25 **IV. EFF'S SPECULATIVE PRIVACY CONCERNS ARE INSUFFICIENT TO** 26 **SHIELD THE HIGHLY RELEVANT CUSTOMER DATA FROM DISCOVERY.**

27 "Federal courts ordinarily recognize a constitutionally-based right of privacy that can be
28

¹ *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 931 (7th Cir. 2004).

1 raised in response to discovery requests.” *Soto v. City of Concord*, 162 F.R.D. 603, 606 (N.D.
 2 Cal. 1995) (citing *Breed v. United States Dist. Court*, 542 F.2d 1114, 1116 (9th Cir. 1976)).
 3 “Resolution of a privacy objection or request for a protective order requires a balancing of the
 4 need for the information sought against the privacy right asserted.” *Id.* at 616. The balancing test
 5 makes clear that privacy rights are by no means absolute, but subject to invasion depending on the
 6 circumstances.²

7 **A. The Disclosure of Customer Data Is Hardly Intrusive of Privacy Rights.**

8 EFF offers little more than conclusory assertions that identities, and presumably contact
 9 information, of Freetech customers constitute a legally protected privacy interest. [See Amicus
 10 Br. at 2:12-16, 3:1-6, 14-18.] No doubt personal information is afforded constitutional protection
 11 in certain circumstances. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 716-17, 120 S. Ct. 2480, 2489
 12 (2000); *Whalen v. Roe*, 429 U.S. 589, 599, 97 S. Ct. 869, 877 (1977). The customer data at issue,
 13 however, is a far cry from the confidential, sensitive, or embarrassing information commonly
 14 protected, such as financial matters, medical records, political affiliations, or sexual activity. See
 15 *Nelson v. Nat’l Aeronautics & Space Admin.*, 530 F.3d 865, 877 (9th Cir. 2008); *Narayan v. EGL,*
 16 *Inc.*, No. C05-04181 RMW (HRL), 2006 WL 3507918, at *2 (N.D. Cal. Dec. 5, 2006) (“‘Human
 17 experience’ tells this court that few negative consequences are likely to result from disclosure to
 18 plaintiffs of the names and contact information ...”).

19 Through the third-party subpoenas, Plaintiffs seek basic discovery routine to all civil
 20 litigation. The identity and contact information of a potential witness – essentially what is being
 21 sought in this case – is expressly made discoverable by the Federal Rules of Civil Procedure. See
 22 Fed. R. Civ. P. 26(b)(1) (“Parties may obtain discovery regarding any non-privileged matter that
 23 is relevant to any party’s claim or defense – including ... the identity and location of persons who
 24 know of any discoverable matter.”). Not surprisingly, California federal district courts have

25 _____
 26 ²The privacy interest in Article I, Section I of the California Constitution is treated as a privilege in the discovery
 27 context, and need not be considered here because Plaintiffs’ federal statutory claims invoke federal law on privilege.
 28 See *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n.10 (9th Cir. 1992); *Charles O Bradley Trust v. Zenith*
Capital LLC, No. C-04-2239 JSW (EMC), 2005 WL 1030218, at *2 (N.D. Cal. May 3, 2005). Notwithstanding, the
 state cases cited herein demonstrate that the Freetech customer data fails to raise legitimate privacy concerns, and
 certainly does not offset Plaintiffs’ need for this discovery – both of which are requirements under California privacy
 law. See *Pioneer Elecs. (USA), Inc. v. Superior Court*, 40 Cal. 4th 360, 370-71, 150 P.3d 198, 204 (2007).

1 ordered disclosure of contact data finding any threatened intrusion on the individual's privacy is
2 negligible. *See, e.g., Tierno v. Rite Aid Corp.*, No. C 05-02520 TEH, 2008 WL 3287035, at * 3
3 (N.D. Cal. July 31, 2008); *Humphreys v. Regents of the Univ. of California*, No. C 04-03808 SI,
4 2006 WL 335275, at *1 (N.D. Cal. Feb. 13, 2006); *see also Nat'l Labor Relations Bd. v. Cable*
5 *Car Advertisers, Inc.*, 319 F. Supp. 2d 991, 998-99 (N.D. Cal. 2004) (ordering disclosure of
6 customer identities and leaving privacy concerns to be addressed through a protective order).
7 California state courts, applying the broader state right of privacy, have reached the same result.
8 *See Pioneer*, 40 Cal. 4th at 372-73 (ordering disclosure of contact information for complaining
9 purchasers of defective DVD players); *Puerto v. Superior Court*, 158 Cal. App. 4th 1242, 1256
10 (2008) (ordering disclosure of contact information for already identified nonparty witnesses).³

11 In an attempt to trump up the feared invasion of privacy, EFF speculates that Freetech
12 customers will be "drawn into litigation" and forced to respond to "further nonparty discovery."
13 [See Amicus Br. at 4:5-17.] For starters, EFF's unsubstantiated beliefs are insufficient to warrant
14 the issuance of a protective order. *See Beckman Indus.*, 966 F.2d at 476. It also goes without
15 saying that there is a significant distinction between having Freetech customers provide relevant
16 information for this case, and pursuing them in a full-blown litigation crusade. As a consequence,
17 EFF's one-sided narrative of the DirecTV anti-piracy campaign is irrelevant. [See Amicus Br. at
18 4:23-6:19.] And though Plaintiffs have no present intent to initiate additional lawsuits, customers
19 that are found to be engaged in satellite piracy should not be permitted to use so-called "privacy
20 rights" as a shield to avoid detection and civil liability. The hypothetical risk of "indiscriminate
21 enforcement efforts" [*id.* at 6:12-15], is adequately safeguarded by the pleading requirements in
22 Rule 11 of the Federal Rules of Civil Procedure and state law equivalents. *See Cooter & Gell v.*
23 *Harmax Corp.*, 496 U.S. 384, 393, 110 S. Ct. 2447, 2454 (1990) ("the central purpose of Rule 11
24 is to deter baseless filings in district court").

25 Similarly, the fact that Freetech customers may be asked to respond to inquiries regarding
26 satellite piracy does not elevate the disclosure of customer data to a legally protected invasion of

27
28 ³ The *Puerto* court makes clear that under state law the number of nonparties potentially being disclosed has no impact on whether there is a serious invasion of privacy in the first instance. *See* 158 Cal. App. 4th at 1255.

1 privacy rights. In the cases cited above, the identity and contact information was disclosed for the
2 specific purpose of facilitating communication with nonparties. *See Tierno*, 2008 WL 3287035,
3 at * 3; *Humphreys*, 2006 WL 335275, at *1; *see also Pioneer*, 40 Cal. 4th at 363; *Puerto*, 158 Cal.
4 App. 4th at 1256-57. To hold otherwise as EFF suggests, would lead to an absurd situation where
5 nonparty witnesses would never be disclosed, solely because of the risk that privacy rights might
6 be invaded if they were later subpoenaed or otherwise contacted.

7 In short, EFF's speculation that the disclosure of Freetech customer data will somehow
8 serve as a stepping stone for future lawsuits and discovery fails to establish a privacy interest
9 deserving of protection. Under state privacy law the inquiry would end here, *see Pioneer*, 40 Cal.
10 4th at 523; however, federal law may still require a balancing of the alleged privacy right with the
11 need for discovery.

12 **B. Customer Data Is Directly Relevant to the Parties' Claims and Defenses.**

13 The information that Plaintiffs seek through the third-party subpoenas goes to the heart of
14 what has already become a highly disputed issue in this case: the overwhelming use of Coolsat-
15 branded receivers for satellite piracy. This information bears directly on Count I of the complaint
16 asserting violations of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 1201 *et*
17 *seq.*, and Counts II and III asserting violations of the Communications Act of 1934, as amended,
18 47 U.S.C. §§ 605(a), (e)(4), respectively. [*See Compl.* ¶¶ 45-61.] EFF concedes the relevancy of
19 the Freetech customer data. [*See Amicus Br.* at 7:17-8:2.]⁴ Instead, and rather astounding, EFF
20 actually suggests that Plaintiffs dismiss their claims under certain sections of the DMCA, namely
21 17 U.S.C. §§ 1201(a)(2)(B) and (b)(1)(B), because other portions of the statute would remain
22 available and not require Freetech customer data. [*See id.* at 8:3-9:2.]

23 As an initial matter, the Freetech customer data pertains to more than just subpart (B) of
24 the DMCA claims in this case. Freetech customers are also likely to have discoverable evidence
25 regarding other claims, including (1) marketing tactics employed by Freetech and its authorized
26 dealers, a relevant topic under 17 U.S.C. §§ 1201(a)(2)(C), (b)(1)(C); (2) efforts by Freetech and

27 _____
28 ⁴ Regarding the relevancy and need for Freetech customer data, Plaintiffs incorporate Part A of "EchoStar Satellite L.L.C.'s Response to Freetech's Motion for Protective Order," at 3:1-8:25 [Dkt. 46], rather than restating those arguments in full here.

1 its authorized dealers to assist in the interception of Plaintiffs' satellite programming under 47
2 U.S.C. § 605(a); (3) actual interception by end users of Coolsat receivers to the extent Freetech is
3 going to contend this is a requirement under § 605(a); and (4) Coolsat receivers primary use in the
4 interception of Plaintiffs' programming under 47 U.S.C. § 605(e)(4). Further, EFF does not cite
5 any authority for the proposition that Plaintiffs must forfeit claims, or forego the discovery of this
6 extremely relevant information, to accommodate the alleged privacy interest in customer data –
7 again which is negligible in this case. *See supra* Part IV.B.

8 Finally, EFF's belief that Plaintiffs have alternative means to establish the largely illegal
9 use of Coolsat receivers, such as industry experts and website data, is a nonstarter. [*See Amicus*
10 *Br.* at 8:3-9:14.] EFF would have Plaintiffs sacrifice a clearly sensible way of establishing its
11 claims in exchange for two proposed alternatives, neither of which are demonstrated by EFF to be
12 sufficient from a burden of proof or evidence admissibility perspective. Tellingly, Freetech does
13 not make a similar concession that industry experts and website data could effectively establish
14 the predominantly illegal use of Coolsat-branded receivers and related software – even though
15 Freetech and EFF are working hand in hand on this motion for protective order. Plaintiffs will
16 not be tricked into accepting EFF's self-labeled "alternatives" only to have Freetech subsequently
17 challenge these "alternatives" as insufficient.⁵ EFF fails to carry its burden of establishing there
18 are equally effective and less intrusive alternatives. *See Rivera*, 384 F.3d at 827; *Hill v. Nat'l*
19 *Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 38, 49-50, 865 P.2d 633, 656, 663-64 (1994) (imposing
20 burden on party advancing privacy interest to establish less intrusive alternatives) (citing *Whalen*,
21 429 U.S. at 600-602).

22 **C. Any Lingering Concerns Over the Disclosure of Customer Data Should Be**
23 **Addressed Through a Protective Order.**

24 Privacy concerns are often eliminated through a protective order that limits disclosure to
25 the necessary parties and their representatives. *See Soto*, 162 F.R.D. at 616; *Pioneer*, 40 Cal. 4th
26 at 371 ("if intrusion is limited and confidential information is carefully shielded from disclosure

27 _____
28 ⁵ It should also be pointed out that the alternatives proposed by EFF may be inadequate to show actual interception of satellite transmissions by end users of Coolsat receivers, which Freetech might later claim is required to establish violations of section 605(a) of the Communications Act.

1 except to those who have a legitimate need to know, privacy concerns are assuaged”); *see also*
2 *ASIS Internet Servs. v. Active Response Group*, No. C07 6211 TEH, 2008 WL 2129417, at *4
3 (N.D. Cal. May 20, 2008) (“Although Plaintiffs argue that ‘publicly disclosing thousands of email
4 addresses to hundreds or thousands of internet marketers’ could lead to misuse of the normally
5 confidential information, Plaintiffs have not shown that disclosure will inevitably lead to harm
6 even if a protective order is in place.”). To the extent deemed necessary by the Court, Plaintiffs
7 propose that a protective order issue limiting disclosure of the customer data to Plaintiffs, their
8 counsel and experts in this case. Such limitations will adequately safeguard any privacy concerns
9 of the Freetech customers.

10 **V. CONCLUSION**

11 Plaintiffs’ need for the Freetech customer data is compelling and substantially outweighs
12 any minimal intrusion on the privacy interests of those customers, which in any event could be
13 remedied with a simple protective order. For at least these reasons, EFF’s attempt to come to the
14 rescue of Freetech and preclude Plaintiffs from obtaining information about the unlawful conduct
15 of Freetech customers fails.

16 DATED: August 29, 2008

17 Respectfully submitted,

18 **T. WADE WELCH & ASSOCIATES**

19
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PROOF OF SERVICE

I, the undersigned, declare that I am a resident of the State of Texas, over the age of eighteen years, and not a party to the within action. My business address is 2401 Fountainview, Suite 700, Houston, Texas 77057. I am familiar with the practice at my place of business for collection and processing of correspondence for mailing. Such correspondence is deposited with the United States Postal Service on the same day in the ordinary course of business.

On August 29, 2008, I served the following document described as:

PLAINTIFFS' RESPONSE TO AMICUS CURIAE BRIEF OF THE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF DEFENDANT FREETECH'S MOTION FOR PROTECTIVE ORDER

X by **Electronically Transmitting** the document to the person(s) set forth below through the Case Management/ Electronic Case Filing (CM/ECF) system, and/or pursuant to the email address provided in the parties' agreement on electronic service of documents in this action.

— by placing the document in a sealed envelope with postage thereon fully prepaid in the **United States Mail** at Houston, Texas addressed as set forth below.

— by causing personal delivery via **Federal Express** of the document to the person(s) at the address(es) set forth below.

— by causing personal delivery via **Messenger** of the document to the person(s) at the address(es) set forth below.

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I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on August 29, 2008 at Houston, Texas.

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