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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)

**ECHOSTAR SATELLITE L.L.C.’S  
RESPONSE TO FREETECH’S MOTION  
FOR PROTECTIVE ORDER**

Date: September 15, 2008

Time: 9:00 a.m.

Place: Courtroom 8, 4th Floor, San Jose

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. STATEMENT OF ISSUES**

Whether this Court should issue a protective order prohibiting EchoStar from prosecuting its case or rebutting Freetech's defenses and counterclaims when the evidence sought is clearly relevant and discoverable.

### **II. INTRODUCTION**

EchoStar is in the business of providing copyrighted pay-TV programming via satellite broadcast to its more than 13 million authorized subscribers across the U.S. This programming comes from content providers such as HBO, ABC, CNBC, CNN, ESPN, subscribers' local network channels, pay-per-view programming, and hundreds of other content providers. To protect this programming from unauthorized access (i.e., satellite piracy), EchoStar encrypts its DISH Network satellite signals with technology provided by Plaintiff NagraStar. Authorized subscribers of DISH Network are provided a satellite dish and receiver (or set-top box) which grants them access to decrypt only the copyrighted programming included in that subscriber's authorized programming package. EchoStar expends millions of dollars and other substantial resources to protect its signal from satellite piracy—a problem that costs Plaintiffs tens of millions of dollars annually.

Defendants are in the business of selling so called free-to-air ("FTA") receivers which are primarily designed, marketed, and used for the piracy of EchoStar's DISH Network programming. Defendants distribute these FTA receivers through a network of authorized dealers. On July 25, 2008, EchoStar issued subpoenas to these dealers seeking customer lists and contact information, limited to the period of January 1, 2003 to June 30, 2008, helpful toward conducting discovery to assist EchoStar in prosecuting its claims against Defendants. Defendants' current Motion for Protective Order ("MPO") not only seeks to obstruct EchoStar's discovery efforts, but also seeks to limit EchoStar's ability to defend against Defendants' counterclaims and defenses. In other words, Defendants hope to use their MPO as a shield and a sword—a shield to obstruct EchoStar's discovery efforts and a sword by alleging defenses and

1 counterclaims to which the same discovery efforts are related to rebutting.

2 As set forth more fully below, these customer lists and contact information are directly  
3 relevant to key elements of EchoStar's claims. This evidence is also relevant to enable EchoStar  
4 to defend against Freetech's defenses and counterclaims. Accordingly, this evidence falls  
5 squarely within the ambit of Rule 26 and the broad, liberal standard for permissible discovery that  
6 is reasonably calculated to lead to the discovery of admissible evidence. Furthermore,  
7 Defendants' tenuous privacy concerns do not support denying EchoStar's request - - otherwise  
8 litigants would always be capable of raising weak, illusive privacy concerns to eliminate  
9 opposing litigants' ability to discover relevant evidence. For these reasons, and those set forth  
10 more fully below, Defendants' motion to prevent EchoStar from obtaining this relevant evidence  
11 should be denied.

### 12 III. LEGAL STANDARD

13 Motions for Protective Order, like the one urged by Freetech here, should not be used as  
14 both a shield and a sword—a shield to obstruct a party's discovery efforts and a sword by alleging  
15 defenses and counterclaims to which the same discovery efforts are related to rebutting. *See Sony*  
16 *Computer Entm't Am., Inc. v. NASA Elecs. Corp.*, 249 F.R.D. 378, 384-85 (S.D. Fla., February  
17 12, 2008) (“[Plaintiff] is correct that Defendants should not be permitted to use a protective order  
18 as both a sword and a shield, by resting their defenses on third parties and then restricting  
19 [Plaintiff]'s efforts to test their defenses by examining those parties.”). “Litigants have a right to  
20 every man's evidence and that wide access to relevant facts serves the integrity and fairness of the  
21 judicial process by promoting the search for the truth.” *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th  
22 Cir. 1993) (internal quotations omitted). The party seeking protection bears a high burden and  
23 must show specific prejudice or harm if no protective order is granted. *See Phillips ex rel. Estates*  
24 *of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1211-12 (9th Cir. 2002). To meet its burden, the  
25 movant must offer more than “broad allegations of harm, unsubstantiated by specific examples or  
26 articulated reasoning.” *Id.*; *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir.  
27 1992). As demonstrated below, Freetech fails to meet its burden and, in fact, has no legal or  
28 factual bases to prevent EchoStar from obtaining the discovery sought.

## IV. ARGUMENT

### A. The Subpoenaed Information is Relevant to the Claims and Defenses in the Litigation

A party may discover any nonprivileged matter that is relevant to any party's claim or defense. Fed. R. Civ. P. 26(b)(1). Relevant information must merely be reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1); *Degen v. U.S.*, 517 U.S. 820, 825-26, 116 S.Ct. 1777, 1782 (1996). Moreover, "[t]his requirement is liberally construed to permit the discovery of information which ultimately may not be admissible at trial." *Gonzalez v. Google, Inc.*, 234 F.R.D. 674, 680 (N.D. Cal. 2006).

EchoStar alleges Freetech was and is actively engaged in the business of manufacturing, importing to the public, providing, or otherwise trafficking in the sale of illegal pirate devices, components, and technology in violation of federal law including the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. §§ 1201(a)(2) and 1201(b)(1), and the Communications Act, 47 U.S.C. § 605(e). (Compl. ¶¶ 46, 58.) EchoStar further alleges Freetech directly and/or in concert with others provided assistance to intercept and/or receive DISH Network's encrypted satellite signals. *See* 47 U.S.C. § 605(a). (Compl. ¶ 53.)

To support EchoStar's discovery of relevant evidence, subpoenas were served on third parties seeking: "Documents sufficient to identify each Person who purchased or otherwise obtained a Coolsat Receiver or Receivers from You during the period January 1, 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." (Declaration of Chad M. Hagan ("Hagan Decl."), ¶ 2). This request was designed to obtain information to show the number of Coolsat receivers sold and provide EchoStar contact information it may use to determine the extent of piracy committed using Coolsat receivers.<sup>1</sup>

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<sup>1</sup> Freetech alleges EchoStar wants to pry into the viewing habits of Coolsat users. EchoStar is not interested in the viewing habits of Coolsat receiver users except insofar as viewing habits are necessary to determine the existence of piracy.

1                   (1) Customer Lists and Contact Information Are Relevant to  
2                   EchoStar's Claims

3                   ***(a) Digital Millennium Copyright Act: 17 U.S.C. § 1201***

4                   The DMCA expressly protects against products that 1) are “primarily designed or  
5                   produced for the purpose of circumventing” an access control system; 2) have “only limited  
6                   commercially significant purpose or use other than to circumvent” an access control system; or 3)  
7                   are “marketed by that person or another acting in concert with that person with that person's  
8                   knowledge for use in circumventing” an access control system. *See* 17 U.S.C. §§ 1201(a)(2) and  
9                   1201(b)(1).

10                  EchoStar's requests for customer lists and contact information are reasonably calculated to  
11                  discover evidence relevant to determine: 1) the consumer uses of Coolsat receivers; and 2) the  
12                  extent to which Freetech and/or those acting in concert with Freetech marketed Coolsat receivers  
13                  specifically for the piracy of DISH Network's satellite signals.

14                  The extent of piracy and actual consumer uses of Coolsat receivers may provide evidence  
15                  of the fact Coolsat receivers have a limited commercially significant purpose or use other than to  
16                  circumvent DISH Network's access control system. *See* 17 U.S.C. §§ 1201(a)(2)(B) and  
17                  1201(b)(1)(B). Moreover, it may provide evidence that Coolsat receivers were specifically  
18                  designed to circumvent DISH Network's access control system. *See* 17 U.S.C. §§ 1201(a)(2)(A)  
19                  and 1201(b)(1)(A). The fact Coolsat receivers were marketed specifically for the piracy of DISH  
20                  Network's satellite signals may show that Freetech had knowledge that Coolsat receivers are  
21                  primarily used to circumvent DISH Network's access control system. *See* DMCA 17 U.S.C. §§  
22                  1201(a)(2)(C) and 1201(b)(1)(C).

23                  ***(b) Communications Act: 47 U.S.C. § 605***

24                  The Communications Act protects against assisting others to intercept and/or receive  
25                  encrypted satellite signals. 47 U.S.C. § 605(a). It further protects against persons designing,  
26                  manufacturing, selling or otherwise distributing devices while “knowing or having reason to  
27                  know” that the devices are *primarily used* to decrypt “direct-to-home satellite services.” 47  
28                  U.S.C. § 605(e)(4).

1 EchoStar's requests for customer lists and contact information are reasonably calculated to  
2 discover evidence relevant to determine: 1) to what extent Freetech provided Coolsat users  
3 assistance to intercept and/or receive encrypted satellite signals; 2) the extent to which Freetech  
4 and/or those acting in concert with Freetech marketed Coolsat receivers specifically for the piracy  
5 of DISH Network's satellite signals; and 3) the consumer uses of Coolsat receivers.

6 Freetech's assistance to Coolsat users on how to intercept and/or receive DISH Network's  
7 encrypted satellite signals is expressly prohibited by the Communications Act, and the only  
8 presently known source of this information is Coolsat receiver purchasers. *See* 47 U.S.C. §  
9 605(a). Moreover, such assistance may provide evidence that Freetech had knowledge that  
10 Coolsat receivers are primarily used to decrypt DISH Network's satellite signals. *See* 47 U.S.C. §  
11 605(e)(4). Freetech's marketing efforts may provide evidence that Freetech was providing  
12 assistance to intercept and/or receive DISH Network's satellite signals and provide further  
13 evidence that Freetech had knowledge that its Coolsat receivers were primarily used to decrypt  
14 DISH Network's satellite signals. *See* 47 U.S.C. § 605(a) & 605(e)(4). The extent of piracy and  
15 actual consumer uses of Coolsat receivers may provide evidence of the fact Coolsat receivers'  
16 *primary use* is the decryption of DISH Network's satellite signals. *See* 47 U.S.C. § 605(e)(4).

17 (2) Customer Lists and Contact Information Are Relevant to Rebut  
18 Freetech's Counterclaims and Defenses

19 More importantly, Freetech has pled several defenses and counterclaims which permit the  
20 requested discovery. (DEFENDANT FREETECH, INC.'S AMENDED ANSWER AND  
21 COUNTERCLAIMS ("Am. Answer")). For example, within its Counterclaims, Freetech alleges  
22 "[i]t is not the case that Coolsat satellite receivers have only limited commercially significant  
23 purpose or use other than to circumvent" DISH Network's access control system. (Am. Answer  
24 at 12, ¶¶ 43-44). Freetech further alleges it "could not know or have reason to know that Coolsat  
25 receivers are primarily of assistance" in circumventing DISH Network's access control system.  
26 (Am. Answer at 12, ¶ 47). In addition, Freetech seeks declaratory judgments on all of EchoStar's  
27 claims. (Am. Answer at 13-15, ¶¶ 51-68).

28

1 Freetech specifically denied several of EchoStar's allegations. For example, Freetech  
2 denied having any "knowledge that the devices, components, and technology are used to  
3 circumvent" DISH Network's access control system as required by DMCA §§ 1201(a)(2) and  
4 1201(b)(1). (Am. Answer at 5, ¶ 47). Freetech denied it had knowledge or even reason to know  
5 that Coolsat receivers "are used primarily to assist in the unauthorized interception and decryption  
6 of" DISH Network's satellite signals as required by the Communications Act, 47 U.S.C. § 605(a).  
7 (Am. Answer at 5, ¶ 54). Freetech further denied knowing that its Coolsat receivers "were and  
8 are used primarily to assist in the unauthorized interception and decryption of direct-to-home  
9 satellite services in violation of" the Communications Act, 47 U.S.C. § 605(e)(4). (Am. Answer  
10 at 5, ¶ 59). These facts are in issue thus EchoStar must be able to discover evidence to disprove  
11 them.

12 Not only does Freetech hope to shield relevant evidence from EchoStar, but Freetech also  
13 clearly hopes to use this same tactic as a sword by alleging defenses and counterclaims to which  
14 the same discovery efforts are related to rebutting. *See Sony Computer Entm't Am., Inc. v. NASA*  
15 *Elects. Corp.*, 249 F.R.D. 378, 384-85 (S.D. Fla., February 12, 2008) ("Defendants should not be  
16 permitted to use a protective order as both a sword and a shield, by resting their defenses on third  
17 parties and then restricting [Plaintiff]'s efforts to test their defenses by examining those parties.").  
18 Such tactics should not be countenanced.

### 19 (3) The Discovery of Customer Lists and Contact Information Is 20 Commonly Allowed

21 Freetech incorrectly alleges there is no case law in support of EchoStar's request for  
22 customer lists and contact information. (MPO at 7). However, there are an overwhelming  
23 number of cases from decades of sound jurisprudence directly supporting EchoStar's request for  
24 this information.<sup>2</sup>

25 \_\_\_\_\_  
26 <sup>2</sup> *See, e.g., VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472 (9th Cir. 1986) (holding district  
27 court abused its discretion by not allowing discovery of the defendant's mailing and customer lists when  
28 the most probative source of evidence were those on the defendant's mailing and customer lists);  
*Geophysical Sys. Corp. v. Raytheon Co. Inc.*, 117 F.R.D. 646, 649 (C.D. Cal.1987) (ordering disclosure of  
defendant's customer lists subject to protective order); *Turmenne v. White Consol. Indus., Inc.*, 266  
F.Supp. 35 (D. Mass. 1967) (plaintiff was entitled to discovery of customer lists in order to contact  
defendant's customers to discover evidence regarding defendant's marketing efforts to customers);

1 In *VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, Plaintiff sued Defendant for  
2 trademark infringement. 784 F.2d 1472 (9th Cir. 1986). Plaintiff alleged public confusion  
3 regarding Defendant's trademark and sought to question Defendant's customers directly to  
4 support its allegations. *Id.* at 1476. The District Court denied the request, but the Ninth Circuit  
5 reversed recognizing that the "most probative evidence of confusion was to be found by  
6 questioning the actual recipients of [Defendant's] mailing[s]" which contained the infringing  
7 trademark. *Id.* Similar to the *VISA* case, evidence of Freetech's unlawful marketing efforts,  
8 provision of assistance to intercept and/or receive encrypted satellite signals, and primary use of  
9 Coolsat receivers can be "found by questioning the actual recipients" of Freetech's unlawful  
10 marketing efforts, assistance to intercept and/or receive encrypted satellite signals, and its Coolsat  
11 receivers. *See id.*

12 In *Geophysical Systems Corp. v. Raytheon Co., Inc.*, Plaintiff requested Defendant's  
13 customer lists in order to perform discovery related to its claims. 117 F.R.D. 646, 649  
14 (C.D.Cal.1987). The Court held that the customer lists were discoverable because the Plaintiff  
15 needed to communicate with Defendant's customers in order to properly prepare its case. *Id.*  
16 Just like the plaintiff in *Geophysical Systems*, EchoStar's discovery on Coolsat receiver  
17 purchasers will help EchoStar prosecute its claims and defend against Freetech's defenses and  
18 counterclaims. *See id.*

19 In *Turmenne v. White Consol. Indus., Inc.*, Defendant needed to question Plaintiff's  
20 customers regarding Plaintiff's marketing efforts. 266 F.Supp. 35 (D. Mass. 1967). The Court  
21 held that Defendant was entitled to question Plaintiff's customers and that Plaintiff must produce

22  
23 *Nutratch, Inc. v. Syntech (SSPF) Int'l., Inc.*, 242 F.R.D. 552, 554-55 (C.D. Cal. 2007) (noting that  
24 customer lists are customarily produced and can be protected by appropriate designation under protective  
25 order); *Atmel Corp. v. St. Paul Fire & Marine*, No. C 04-04082 SI, 2005 WL 3692874, at \*1 (N.D. Cal.  
26 Aug. 31, 2005) (compelling production of customer lists and noting adequate protection by designation  
27 under protective order); *N.L.R.B. v. Cable Car Advertisers, Inc.*, 319 F.Supp. 2d 991, 997 (N.D. Cal.  
28 2004) (requiring disclosure of customer lists subject to protective order because lists were relevant to  
matter under investigation); *Nalco Chemical Co. v. Hydro Techs., Inc.*, 149 F.R.D. 686, 696-97 (E.D. Wis.  
1993) (requiring disclosure of customer information); *Electromatic (PTY) Ltd. v. Rad-O-Lite of  
Philadelphia, Inc.*, 90 F.R.D. 182, 185 (E.D. Pa. 1981) (requiring disclosure of customer information);  
*Chesa Int'l, Ltd. v. Fashion Assocs., Inc.*, 425 F.Supp. 234, 237 (S.D.N.Y. 1977) (customer names subject  
to protective order are proper subject of discovery).

1 its customer lists. *Id.* at 36. The Court recognized “[i]t would be a virtually impossible task for  
2 [Defendant] to track down in rural New England customers or potential customers contacted by  
3 the plaintiff without their addresses.” Just like the defendant in *Turmenne*, EchoStar should be  
4 allowed to perform discovery on Coolsat receiver purchasers to help EchoStar prosecute its  
5 claims and defend against Freetech’s defenses and counterclaims. *See id.* Furthermore, Coolsat  
6 receiver purchasers are located throughout the United States, thus “[i]t would be a virtually  
7 impossible task for [EchoStar] to track down” Coolsat purchasers without their contact  
8 information. *See id.*

9 In hopes of supporting its position, Freetech halfhazardly points to *Viacom Int’l Inc. v.*  
10 *Youtube Inc.*, Nos. 07-2103, 07-3582, 2008 WL 2627388 (S.D.N.Y. July 2, 2008). (MPO at 7).  
11 In that case, Viacom alleges Youtube.com violated the Copyright Act of 1976 by posting  
12 infringing videos owned by Viacom on the internet available for public consumption without  
13 Viacom’s authorization. *Id.* at \*1. Viacom sought discovery related to the use of its copyrighted  
14 videos on Youtube.com including the user’s logon ID, a video ID and the user’s IP address. *Id.* at  
15 \*4.

16 In order to better illuminate the flaw in Freetech’s reliance upon *Viacom* and other  
17 internet-related cases, some background related to the differences in internet and satellite  
18 technologies is necessary. Very different from satellite infrastructure, the internet consists of a  
19 series of interconnected computers and networks. When an internet user visits a website, a  
20 request is made where a series of data is sent to a web server and the web server responds by  
21 returning a corresponding series of data to the internet user’s browser (e.g., Microsoft Explorer,  
22 Firefox). Upon receiving the web server’s response, the internet user’s browser displays the  
23 requested web page. A web server, without a corresponding request from an internet user, does  
24 not continuously send data for user consumption. This request/response architecture of the  
25 internet enables litigants to determine what videos internet users watched without directly  
26 questioning the internet user assuming the web server saved the allegedly infringing request and  
27 response on the web server with information such as the user’s logon ID, the user’s IP address,  
28 the watched video’s ID, and any other information the web server’s owner wishes to capture and

1 save.

2 Similar to that just described, the internet users in the *Viacom* case sent requests to  
3 Youtube.com's web server(s), and Youtube.com's web server(s) would respond by sending data  
4 allegedly containing video that infringed upon Viacom's copyrights. *Id.* During this  
5 request/response over the internet, Youtube.com's web server(s) saved information including the  
6 user's logon ID, the video ID, the user's IP address, and other information. *Id.* Thus, Viacom  
7 had no need to question Youtube.com's users directly about what videos they watched because  
8 the watched videos' IDs were already saved on Youtube.com's web server(s)! *See id.*

9 In stark contrast, DISH Network's satellites continuously transmit satellite signals to  
10 Earth. These transmissions can be received by anyone "listening" with a satellite dish much like  
11 how anyone can "listen" to broadcast TV through the use of an antenna. Because anyone can  
12 listen to its satellite signals, DISH Network encodes its signals to protect against unauthorized use  
13 (i.e., piracy). Unlike the internet, a satellite's signal is not responsive to a request, rather, it is  
14 continuous just like broadcast TV. Because there are no corresponding requests made by users, it  
15 is impossible for EchoStar to determine whether individuals are pirating DISH Network's satellite  
16 signals or even "listening" without more, such as conducting a survey analysis.

17 In the instant case, Coolsat receiver users are located throughout the country. Many  
18 Coolsat users purchased their receiver over the internet. These Coolsat users' identities,  
19 locations, and piracy habits are largely unknown to EchoStar. Many of these Coolsat users are  
20 "listening" to DISH Network's satellite signals yet incapable of detection unlike the situation in  
21 the *Viacom* case and other internet-related cases. *See id.* Accordingly, EchoStar seeks customer  
22 information helpful to conduct discovery on Coolsat receiver purchasers which will result in  
23 highly-probative evidence directly related to EchoStar's claims. Indeed, some of these purchasers  
24 are likely critical fact witnesses who should have been disclosed in Freetech's Rule 26(a)  
25 disclosures.

## 26 **B. The Subpoenas Are Not Harassing, Annoying, or Oppressive**

27 Freetech alleges that "[h]arassment, annoyance, and oppression have been [EchoStar's]  
28 goals from the start of this case." (MPO at 7). In its next sentence, Freetech goes on to claim

1 EchoStar is “aim[ing] at torpedoing business relations among Freetech, its distributors, and end  
2 users.” (MPO at 7). Freetech then claims that EchoStar’s “latest round of 17 subpoenas seeking  
3 customer information [necessary to conduct a survey analysis of the only individuals in  
4 possession of the relevant and necessary evidence] crosses the line.” (MPO at 7).

5 A party seeking a protective order has the burden to prove that it will suffer specific  
6 prejudice or harm. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1130-31 (9th Cir.  
7 2003). To meet its burden, the movant must offer more than “broad allegations of harm,  
8 unsubstantiated by specific examples or articulated reasoning.” *Beckman Indus., Inc. v. Int’l Ins.*  
9 *Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Accordingly, to demonstrate “good cause” as Rule 26(c)  
10 requires, the movant must provide “specific demonstrations of fact, supported where possible by  
11 affidavits and concrete examples, rather than broad, conclusory allegations of potential harm.”  
12 *Foltz* at 1130-1131 (quoting *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D.Md.1987));  
13 and Fed. R. Civ. P. 26(c).

14 However, Freetech does not offer any specific examples or articulated reasoning as to why  
15 it or its distributors have “good cause” for a protective order as required by long-standing  
16 precedent and Rule 26(c). *See Foltz* at 1130-31; *Beckman Indus., Inc.* at 476; and Fed. R. Civ. P.  
17 26(c). Conversely, the only thing Freetech offers related to it and its distributors is conclusory  
18 allegations that do not even articulate what specific harms might result. *See id.* Consequently,  
19 Freetech fails to meet its burden for a protective order based on concerns related to it or its  
20 distributors. *See id.* Freetech’s other grounds for a protective order—the privacy interests of  
21 Coolsat receiver users—are addressed immediately below.

### 22 **C. Freetech’s Privacy Concerns Do Not Support Denying EchoStar’s** 23 **Request of Customer Lists and Contact Information**

24 Freetech alleges the subpoenas will “invade [Coolsat receiver] purchasers’ privacy” but  
25 offers scant support for its claim.<sup>3</sup> (MPO at 7). Freetech distorts the holding of a recent decision  
26 from this Court, *Gonzalez v. Google, Inc.*, 234 F.R.D. 674 (N.D. Cal. 2006), and ignores decades

27 <sup>3</sup> The EFF’s Amicus brief raises similar arguments – again, with no support. For the reasons set forth herein, both  
28 Freetech and the EFF’s alleged privacy concerns can be adequately safeguarded and addressed by designation of the  
discovery as CONFIDENTIAL pursuant to a protective order limiting the use and disclosure. *See supra*, FN.2 and  
cases cited therein.

1 of precedent allowing the exact type of discovery EchoStar seeks. *See* cases cited in *supra* note 2  
2 and accompanying text; (MPO at 8).

3 In *Gonzalez*, the federal government sought information from Google related to its users'  
4 search queries. *Id.* It is true, as Freetech claims, that this Court denied the federal government's  
5 request for search queries. *Id.* But Freetech fails to mention the categorical differences between  
6 the federal government's requests upon Google and the customer information EchoStar seeks.  
7 Freetech further distorts the holding in *Gonzalez* by ignoring the duplicative nature of the  
8 government's discovery requests and even suggests this Court's only basis for denying the  
9 government's requests were privacy concerns. *See id* at 686 (the Court held that the "marginal  
10 burden of loss of trust by Google's users" outweighed the "duplicative disclosure's likely benefit  
11 to the Government's study.").

12 In *Gonzalez*, this Court recognized that although the federal government's subpoenas  
13 sought two categories of information (i.e., a sample of URLs and search queries), both categories  
14 had the same "presumed utility to the Government's study" in building a URL "test set". *Id.*  
15 Thus, the federal government's request for both categories of information was "unreasonably  
16 cumulative and duplicative". *Id.* Consequently, this Court rightfully allowed only for discovery  
17 of the first category of information because the second category provided no added benefit due to  
18 its duplicative character. *Id.*

19 Unlike the government in *Gonzalez*, EchoStar is not seeking "unreasonably cumulative  
20 and duplicative" information. *See id.* In fact, EchoStar's subpoenas, just like so many cases that  
21 came before it, seek only customer lists of Coolsat purchasers from Coolsat distributors that  
22 EchoStar will use to conduct discovery helpful to prosecuting its claims and rebutting Freetech's  
23 defenses and counterclaims. *Cf. id.* EchoStar's only apparent sources for this information are  
24 Coolsat distributors and each distributor possesses what should be a unique customer list barring  
25 situations where a customer purchased Coolsat receivers from more than one distributor. Thus,  
26 unlike the government's case in *Gonzalez* each Coolsat distributor's response should be a unique  
27 customer list of Coolsat purchasers. *See id.*

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1 Furthermore, EchoStar’s request does not intrude upon privacy like the government’s  
2 request in *Gonzalez*. In *Gonzalez*, this Court raised sua sponte privacy concerns about the federal  
3 government discovering Google users’ search queries. *Id.* at 687. Specifically, the Court  
4 recognized that some users entered information into search queries that the user had a privacy  
5 interest in and may even include the user’s own name (e.g., “[user name] third trimester abortion  
6 san jose”). *Id.* (recognizing that search queries sometimes include topics the user has a privacy  
7 interest in such as abortion or sexually explicit material). The Court also “recognize[d] that there  
8 may be a difference between a private litigant receiving potentially sensitive information and  
9 having this information be produced to the Government pursuant to civil subpoena.” *Id.*

10 Two critical facts entirely distinguish the instant case from the *Gonzalez* case. First,  
11 EchoStar is a private litigant; not the federal government. Second, EchoStar is not seeking  
12 information recognized to raise a strong privacy interest. EchoStar has merely requested from  
13 Coolsat distributors their Coolsat purchasers’ “name[s], address[es], phone number[s], and email  
14 address[es], and the purchase date, purchase price, purchase quantity, and model number for each  
15 Receiver” for the purpose of conducting discovery. EchoStar is not seeking any information  
16 related to procreation, abortion, marriage, contraception, religion, affiliations, associations, race,  
17 gender, age, sexual preferences or legitimacy. *Cf. id.* (the federal government’s request would  
18 ultimately capture information the Google user had a privacy interest in such as abortion and/or  
19 sexually-explicit material).

20 Freetech goes on to twist *Paramount Pictures Corp. v. Replay TV* in yet another failed to  
21 attempt to support its position. *Paramount Pictures Corp. v. Replay TV*, CV 01-9358 2002 WL  
22 32151632 (C.D. Cal. May 30, 2002); (MPO at 9-10). In *Replay TV*, the Court held that  
23 Defendants were “obligat[ed] to provide plaintiffs customer-use information presently collected”  
24 by Replay TV. *Id.* at \*3. Thus, Replay TV was ordered to produce evidence regarding how its  
25 customers *actually used* their Replay TV digital video recorders to assist in discovering whether  
26 and to what extent Replay TV users were infringing Paramount’s copyrights—that is, the Court  
27 determined Replay TV users’ privacy interests (e.g., viewing habits) were outweighed by  
28 Paramount’s discovery needs. *See id.* However, as was described above and unlike *Replay TV*,

1 satellite architecture does not offer the ability to determine whether and to what extent Coolsat  
2 users pirate DISH Network's satellite signals without more, such as conducting a survey analysis.  
3 *See id.* Further unlike Replay TV, Freetech and its distributors do not maintain a log indicating to  
4 what extent its customers pirate DISH Network's satellite signals. *See id.* Thus, the only source  
5 of this information is the Coolsat users themselves.

6 Accordingly, the privacy concerns of Coolsat users alleged by Freetech are substantially  
7 outweighed by EchoStar's discovery needs and its right to prosecute its case.

8 **D. Any Alleged Privacy Concerns Can Be Adequately Protected By**  
9 **Designation of the Evidence as Confidential Under a Protective**  
10 **Order**

11 EchoStar has demonstrated to Freetech the relevance of the sought information, its  
12 discoverability and has even offered to enter into a stipulated protective order limiting the use of  
13 the information sought to attorneys and experts only. (Hagan Decl. ¶ 4.) A protective order is the  
14 appropriate method to protect against any of Freetech's privacy concerns. *See* cases cited in  
15 *supra* note 2 and accompanying text. Any privacy concerns may be protected by a properly  
16 fashioned protective order just as has been done in the bulk of other similar cases. *See* cases cited  
17 in *supra* note 2 and accompanying text.

18 **V. CONCLUSION & PRAYER**

19 For at least the reasons set forth above, Freetech's Motion for Protective Order must be  
20 denied. The information sought is relevant to EchoStar's claims, and probative to EchoStar's  
21 defenses to Freetech's counterclaims and alleged affirmative defenses. Freetech cannot be  
22 permitted to use their Motion for Protective Order as both a shield and a sword. Accordingly,  
23 EchoStar respectfully requests that the Court DENY Freetech's Motion and grant EchoStar all  
24 further relief to which it is entitled.

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Dated: August 25, 2008

Respectfully submitted,

**T. WADE WELCH & ASSOCIATES**

By: /s/ Chad Hagan  
Chad Hagan (*pro hac vice*)

Attorneys for Plaintiffs/Counter-defendants