UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE DAVID O. CARTER, JUDGE PRESIDING

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ECHOSTAR SATELLITE CORP., et al.,	)))
Plaintiffs,	))
vs.	) No. SACV 03-950 DOC) Day 1, Vol. III
NDS GROUP PLC, et al.,	))
Defendants.	))
_____	)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Wednesday, April 9, 2008

Debbie Gale, CSR 9472, RPR

Federal Official Court Reporter

United States District Court

411 West 4th Street, Room 1-053

Santa Ana, California 92701

(714) 558-8141

EchoStar 2008-04-10 D1V3

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1   SANTA ANA, CALIFORNIA, WEDNESDAY, APRIL 9, 2008

2   Day 2, Vol. III

3   (1:28 p.m.)

4   (In the presence of the jury.)

5   THE COURT: All right. We're back in session.

6   The jury's present. All counsel are present.

7   Ladies and gentlemen of the jury: You're now the

8   jury in this case. I'm going to give you a couple

9   pre-instructions to help you at the beginning of the case.

10   It's my duty to instruct you on the law. You must

11   not infer from these instructions or from anything I may

12   have said or do as indicating that I have an opinion

13   regarding the evidence or what your verdict should be.

14   It is your duty to find the facts from all the

15   evidence in the case. To those facts you will apply the law

16   as I give it to you at the end of the case.

17   You must follow the law as I give it to you

18   whether you agree with it or not, and you must not be

19   influenced by any personal likes or dislikes, opinions,

20   prejudices, or sympathy. That means that you must decide

21   the case solely on the evidence before you. You will recall

22   that you took an oath to do so.

23   In following my instructions, you must follow all

24   of them and not single out some and ignore the others. They

25   are all important.

1   To help you follow the evidence, I'll give you a

2   brief summary of the positions of the parties.

3   The plaintiffs, EchoStar and NagraStar, seated at

4   plaintiff's table, claim that the defendants, NDS Group and

5   NDS Americas, violated the following laws: The Digital

6   Millennium Copyright Act, 17 USC Sections 1201(a)(1) and

7   1201(a)(2); the Communications Act of 1934; and

8   47 USC Section 605(a); and the Racketeer Influenced and

9   Corrupt Organizations Act, RICO, 18 USC Section 1962(c); and

10 the California Penal Code Sections 593(d)(a) and 593(e)(b).

11 Plaintiffs have the burden of proving these claims.

12   Defendants deny those claims and assert the

13 following affirmative defenses to those claims: Statute of

14 limitations, unclean hands, and mitigation of damages.

15 Defendants have the burden of proof on these affirmative

16 defenses.

17   Defendants NDS Group and NDS Americas, seated just

18 across the court from you, assert two counterclaims against

19 plaintiffs EchoStar and NagraStar: That EchoStar and

20 NagraStar misappropriated defendant's trade secrets in

21 violation of California Civil Code Section 3426 and violated

22 the Computer Fraud and Abuse Act, 18 USC Section 1030.

23 Defendants have the burden of proof on these counterclaims.

24   EchoStar and NagraStar deny each of the

25 defendant's counterclaims and assert the affirmative

1 defenses of estoppel, unclean hands, and mitigation of

2 damages. EchoStar and NagraStar have the burden of proof on

3 these affirmative defenses.

4   At the end of the presentation of evidence, I'll

5 provide you with additional instructions on the law

6 governing the specific claims of the parties that you are to

7 consider in deliberations.

8   After all the evidence has been heard and

9 arguments and instructions are finished, you will need to

10 make your decision. You will determine the facts from all

11 the evidence and other evidence that is presented. You are

12 the sole and exclusive judges of these facts. I must stress

13 that you are required to accept the rules of law that I give

14 you whether or not you agree with them.

15   The law permits me to comment on the evidence in

16 the case during the trial or while I instruct the jury.

17 Such comments are only expressions of my opinion as to the

18 facts. In fact, you may at the end of the case or during

19 the case hear something called an adverse inference, but

20 I'll wait to see how this case develops. You may disregard

21 these comments entirely because you are to determine for

22 yourself the weight of the evidence and credibility of each

23 of the witnesses.

24   There are rules of evidence that control what can

25 be received into evidence. When a lawyer asks a question or

1   offers an exhibit into evidence and a lawyer on the other

2   side thinks that it is not permitted by the rules of

3   evidence, that lawyer may object. If I overrule the

4   objection, the question may be answered or the exhibit

5   received. If I sustain the objection, the question cannot

6   be answered, and the exhibit cannot be received. Whenever I

7   sustain an objection to a question, you must ignore the

8   question and must not guess what the answer might have been.

9   Sometimes I may order the evidence to be stricken

10 from the record and that you should disregard it and ignore

11 the evidence. That means that when you are deciding the

12 case, you must not consider the evidence that I told you to

13 disregard.

14   I'm going to say a few words about the conduct of

15 the jurors, and I've already said these, but let me say them

16 again more formally.

17   First, you're not to discuss this case with

18 anyone, including the members of your family, people

19 involved in the trial, or anyone else. This includes

20 discussing the case in Internet chat rooms or through

21 Internet blogs, Internet bulletin boards, or e-mails, nor

22 are you allowed to permit others to discuss the case with

23 you. If anyone approaches you and tries to talk to you

24 about the case, please let me know about it immediately.

25   Second, do not read or listen to any news stories,

1   articles, radio or television or online reports about the

2   case or about anyone who has anything to do with it.

3   Third, do not do any research such as consulting

4   dictionaries, searching the Internet, or using any other

5   research materials, and do not make any investigation about

6   the case on your own. All the evidence will come to us in

7   court from people under oath who testify in your presence.

8   Fourth, if you need to communicate with me, simply

9   hand a signed note to me through Kristee, who's the Court

10 clerk, or another court member of my staff, and they'll give

11 it to me.

12 And fifth, do not make up your mind about what the

13 verdict should be until after you've gone to the jury room

14 to decide the case and you and your fellow jurors have

15 discussed the evidence. Keep an open mind until then.

16 Finally, until this case is given to you for your

17 deliberations and verdict, you're not to discuss the case

18 with your fellow jurors. You can talk about anything else,

19 but not this case.

20 During deliberations, you will have to make up

21 your decision -- or you will have to make your decision

22 based on what you recall of the evidence. You will not have

23 a transcript of the trial, but if necessary you'll be

24 allowed to ask for portions of the transcripts to be read

25 back to you during deliberations to refresh your memory. I

1   urge you to pay close attention to the testimony given.

2   Now, we're going to have probably three, possibly

3   four court reporters over the trial. Let's say you got to

4   witness No. 3 for either side, and you were in a dispute

5   about what that witness said and it was an issue. You could

6   send out a note and tell us what you need, and we'll bring

7   you back into open court and have it read to you. Bear with

8   me, though. That court reporter could be in Riverside or

9   downtown Los Angeles because we're going to shuffle a lot of

10   court reporters through our court. So I urge you to pay

11   close attention to the testimony given.

12   If at any time you cannot hear or see the

13   testimony, evidence, questions, or arguments, let me know so

14   I can correct the problem. And that includes restroom

15   breaks. If you have any issue concerning restroom breaks,

16   let me know because as judges we're trained not to take

17   them. I'm just kidding.

18   If you wish, you may take notes to help you

19   remember the evidence. If you do take notes, please keep

20   them to yourself until you and your fellow jurors go to the

21   jury room to decide the case. Do not let note-taking

22   distract you.

23   When you leave, your notes shall be left in the

24   jury room right on the seat that you occupy. Don't even

25   take them back to the deliberations. Just leave them on the

1 seat that you occupy. No one will read your notes, and

2 they'll be destroyed at the conclusion of the case unless

3 you wish to take 'em.

4   Whether or not you take notes, you should rely on

5 your own memory of the evidence. Notes are only to assist

6 your memory. You should not be overly influenced by your

7 notes or those of your fellow jurors.

8   Languages other than English may be used during

9 this trial. The evidence to be considered by you is only

10 that provided through the official court interpreters.

11 Although some of you may know the foreign language, it is

12 important for all jurors to consider the same evidence.

13 Therefore, you must accept the English translation, and you

14 must disregard any different meaning.

15   You must not make any assumptions about a witness

16 or a party based solely upon the use of an interpreter to

17 assist that witness or party.

18   During a trial, I may sometimes ask a witness

19 questions. Please do not assume that I have any opinion

20 about the subject matter of my request or questions. I may

21 ask a question simply to clarify a matter, not to help one

22 side of the case or hurt the other side. Remember at all

23 times that you as jurors are the sole judges of the facts in

24 this case.

25   A deposition is the sworn testimony of a witness

1 taken before trial. The witness is placed under oath to

2 tell the truth, and lawyers for each party may ask

3 questions. The questions and answers are videotaped. When

4 a person is unavailable to testify at trial, that deposition

5 of that person may be used at the trial.

6   You should consider deposition testimony presented

7 to you in court in lieu of live testimony insofar as

8 possible in the same way as if the witness had been present

9 to testify.

10   At times there may be exhibits referred to during

11 the deposition that have different numbers than the exhibits

12 used at trial. When this situation arises, the Court will

13 inform you of the correct trial exhibit number that is being

14 referred to in the deposition testimony.

15   So you may have had a deposition which is an

16 out-of-jury-presence hearing where both lawyers and the

17 Court -- the Court isn't there. And that deposition takes

18 place, let's say, in an office or a room. They may refer to

19 an exhibit that we've marked 5000, but at the deposition

20 they marked it 200. So we'll make sure when they're

21 referring to 200 on the deposition that might have occurred

22 a year ago, that we all know it's going to be Exhibit 5000.

23 And that will be clear to you.

24   Although certain exhibits were numbered

25 differently in the deposition, the trial exhibits you

 1   receive will be the same document referred to in the

 2   deposition, and you should not be concerned with any

 3   difference in numbering.

 4   Some witnesses because of education or experience

 5   are permitted to state opinions and the reasons for those

 6   opinions. Opinion testimony should be judged just like any

 7   other testimony. You may accept it or reject it and give it

 8   as much weight as you think it deserves, considering the

 9   witness' education and experience, the reasons given for the

10   opinion, and all the other evidence in this case.

11   Now, Counsel, there's a prior order for the

12   exclusion of live witnesses, so look around the room and

13   make certain if you have any witnesses that are going to

14   testify that they're in the hallway during the opening

15   statement.

16   That opening statement is not evidence. What

17   you're about to hear is a summation of what they believe the

18   evidence will show, but it may be materially different than

19   what you hear or eventually comes to you during this case.

20   So it's a summary, in a sense, of what they hope and expect

21   their case presentation will be.

22   In addition to that, please don't let note-taking

23   distract you, but you're more than welcome to take notes.

24   If you need more pads, just tell Kristee, and she'll put

25   them up there. Okay?

1   All right. Counsel, your opening statement on

2   behalf of NDS, and introduce yourself once again for the

3   jury by name and use the lectern so we can hear you.

4   MR. WELCH: Okay.

5   Good afternoon. As you recall, my name is Wade

6   Welch. I'm from Houston, Texas, and along with a lot of

7   people made this case possible. We've got Mr. Hagan, who

8   worked hard on the case; we've got Mr. Noll, he also works

9   with me; and Ms. Willett. They spent a long time working on

10   this, and we're glad to be here.

11   PLAINTIFF'S OPENING STATEMENT

12   MR. WELCH: I'd like to start out explaining to

13   you who the parties are. We've got my clients that I've

14   represented since approximately 1992. They're EchoStar

15   Communications Corporation, EchoStar Satellite Corporation,

16   EchoStar Technologies Corporation, and NagraStar. And we're

17   in the satellite business. We're in what's called

18   "subscription television" or "pay TV."

19   Everybody knows what pay TV is. It's like cable

20   or satellite. Some of you have satellite systems. You pay

21   monthly for programming. And how we deliver that

22   programming is, we have an uplink facility, we send it up in

23   a satellite and it comes back down; and you have a receiver,

24   and that receiver is in your home. It's attached to your

25   television.

1   Now, that programming that we deliver to

2   consumers, we buy that from some other companies. You know

3   them as HBO, Showtime, Cinemax, ABC, NBC, CBS, Fox, things

4   like that. Those are called "programmers." And we have to

5   pay them.

6   What are we required to do? We're required to

7   protect those revenues. And why do we do that? We're in

8   the business of providing good television at a fair price.

9   So we have to protect the signal so that people aren't out

10   there getting it for free. Because if the satellite signals

11   are received for free, then the rest of everybody else in

12   the United States is having to pay for these signals. Okay?

13   It increases costs and cuts down on the number of new

14   programs that you can see.

15   We had -- I remember back in the 1970s, you didn't

16   even have cable, and programming grew from there. And it

17   grows from there because you consumers buying the

18   programming and you get more choices. So we're required by

19   the programmers to keep those signals secure.

20   So why are we here? It's our contention that

21   defendants NDS -- and there's two defendants -- there's NDS

22   Americas and there's NDS Group. Okay? And they are in the

23   encryption business. We get our encryption from a company

24   call NagraStar. The defendants are competitors of

25   NagraStar.

1   So the basic allegation is, they hacked into our

2   system, thereby causing us harm. The harm was we ended up

3   having to replace all the cards in the system. You'll see

4   the evidence as it comes out. It's a little bitty smart

5   card like this.

6   Okay. So a lot of you are probably wondering, why

7   are we here in California? We're here in California because

8   this is where NDS has one of its headquarters. It's right

9   down the street at Newport Beach. In addition, one of the

10   main players for NDS that we allege did a lot of these acts,

11   his name is Christopher Tarnovsky. He lives in this area as

12   well.

13   Okay. So let me take you through EchoStar a

14   little bit.

15   Okay. These guys are my friends, and I'm very

16   passionate about this case. And I've worked with them for a

17   long time. And they believe in television.

18   And you're gonna hear from Mr. Ergen. He's going

19   to be our first witness, and he's going to tell you how the

20   business operates.

21   And what happened in this case -- okay -- is, we

22   entered into a merger agreement with them in June -- or

23   February of 1997. Okay? As part of that merger agreement,

24   their parent, News Corporation, wanted us to use their

25   conditional access system that NDS provided.

1   My clients wanted to have the best product

2   available that was the most secure and that was the most

3   economical to keep costs down for everybody. Okay? They

4   pulled out of that deal. They pulled out because we

5   wouldn't use their system. They couldn't prove that their

6   system was more secure and more economical.

7   And that's what Mr. Ergen wanted: He wanted the

8   best system so that we could provide the best television

9   available with the most choices. So they pulled out, and we

10 ended up having a dispute with them. And the crux of that

11 was, whose system was better?

12   At that time, in June of '97 when the parties

13 split ways -- it was basically May '97, okay -- at that

14 time, our conditional access supplier, NagraStar, had not

15 been hacked. But NDS, on the other hand, they had a

16 world-wide presence, and they were hacked throughout the

17 world. And they also had a presence in the United States

18 with DirecTV, who is a competitor of EchoStar.

19   DirecTV was hacked almost from its inception using

20 the NDS product. It was hacked in '94, it was hacked in

21 '95, it was hacked in '96, it was hacked in '97 when we did

22 our deal, and ours was secure. So when the lawsuit started,

23 they chose to prove that our conditional access system was

24 weaker. But it wasn't. There was no evidence.

25   And something else happened at that time as well.

1 DirecTV was getting fed up. They'd been hacked, losing

2 revenues, and NDS was in dire straits of losing that

3 contract and losing those revenues. So you have two things

4 going on in 1998. Their only presence in the United States

5 was DirecTV at the time, and now they're not gonna be with

6 EchoStar. So they weren't gonna have a business here

7 anymore.

8   So what did they do to fix this problem? They

9 came up with a plan. And their plan was, let's take the

10 pirates that are hacking us, NDS, take them off the street,

11 get them to quit hacking us -- quit hacking NDS -- and turn

12 'em on the competitors. Turn 'em on NagraStar, Kudelski.

13 Rather than coming up with a better product, they chose to

14 tear our product apart.

15   So what happens in 1998 is, they have a lab in

16 Haifa, Israel, and they commission a team, and they call

17 this team -- this is what they call it: They call it the

18 "Black Hat Team."

19   THE COURT: A black what?

20   MR. WELCH: Black hat.

21   THE COURT: Black hat.

22   MR. WELCH: You'll see documents, and you'll hear

23 testimony from their own witnesses. This is what they named

24 this team. And this team was tasked with taking our card --

25 you'll see, it's a little credit-sized -- credit card sized,

1   about that big -- and in the middle of it you'll see a

2   little square, and we'll let you see it. And it's a

3   microchip. And it's fascinating what things can do. You

4   can have this little bitty chip, and it can take these

5   signals and can unscramble it, and it can protect all these

6   revenues. And these revenues aren't just ours. They belong

7   to the programmers. We're a pass-through.

8   Okay? So let's talk about what they did in '98.

9   You have two individuals, and you're gonna hear from them.

10 There's Zvi Shkedy and David Mordinson.

11   Okay? So the first thing they do is, they take

12 this card. And if you look at it, it's got a foil covering,

13 so they're going to have to peel the foil off of it. This

14 is not as easy as it sounds. They had to use various

15 processes. The first thing they do is they take nitric

16 acid, and they have to vaporize this top layer off to expose

17 the underlying circuitry. And you'll see pictures of what

18 that looks like.

19   And then they take that circuitry, and they use

20 high-dollar equipment -- this is a very expensive lab in

21 Haifa. There's about a handful of 'em in the world. And

22 they -- what they do is, they use things called focused ion

23 beams, electron microscopes, and they slice this card up --

24 once they've got the little square, the microchip, they

25 slice it up, they dig into it, they drill into it. And what

1   they're trying to do, what Mr. Shkedy is trying to do, is

2   release what we call the "code." It's a series of ones and

3   zeros. It's binary. It's digital.

4   Once he does that -- and this he doesn't do

5   overnight -- once they do that, he passes it off to

6   David Mordinson, who's a software engineer. And it's

7   Mr. Mordinson's job to then take all this information that's

8   all scrambled up and make some sense of it. And so he does

9   that.

10   And you'll see the evidence. You'll actually see

11   the report that they come up with. And he's got all these

12   pretty charts, and he turns all this mess of scrambled

13   numbers into our code that tells you how our system works.

14   But in addition to that, it took them approximately six

15   months to complete this project.

16   Now, they're gonna tell you that this was lawful

17   reverse engineering. Okay? If that was the point, you

18   would look and they stop right there, and they would try to

19   make their product better.

20   But they took a fork in the road. They could have

21   gone left and hacked the system; they could have gone right

22   and reverse engineered it to keep it with them and make

23   their own product better. But you're not going to hear any

24   evidence that they made their product better.

25   What they did once they dumped this code, they had

1   to come to the United States because EchoStar had an

2   additional layer of protection. And it's called a "box

3   pairing key." What that means -- those of you that are

4   familiar with it -- you have a receiver, and the card sticks

5   in there. Okay? You can't just take the card out, go over

6   to your neighbor's house, and put the card in some other

7   box. When the box is activated, the card and the box get

8   married together, and that's the way it stays.

9   For them to be able to duplicate this, they had to

10   figure out how to circumvent that. What they did is, they

11   went on what I call "planes, trains, and automobiles."

12   Mr. Mordinson and Mr. Shkedy fly from Israel, they fly into

13   Baltimore, and they make two stops. One is in

14   Silver Springs, Maryland, and one is in Fort Lee,

15   New Jersey. What they do there is, they bring over a device

16   called a "nipper" that they have built. All this was set

17   up -- they did all this work over in Israel, and it was

18   designed to have an impact over in the United States.

19   So they put in this in line and activate the box,

20   and they basically log our data stream. They're trying to

21   figure out how this box activation works, the box pairing

22   keys.

23   So then they fly back to Israel, and they figure

24   that out. That's Mr. Mordinson.

25   Now, they're gonna come tell you we had a shoddy

1 product, that NagraStar had a shoddy product, but you got to

2 remember it took 'em six months to do this.

3   And they say it was reverse engineering to make

4 their product better? What you're gonna hear out of their

5 own mouth is that it was a different type of architecture.

6 So there is no way they could have used that information to

7 make theirs better. It was a different type of chip.

8   So they figure that out: how to get around the

9 box pairing keys. Then they come back for planes, trains,

10 and automobiles, part two. They fly back over to the

11 United States, they pick up a receiver -- they drive -- they

12 pick up a receiver, they drive back to Baltimore, they fly

13 to Cleveland, they rent a car, they come around, they go up

14 into Canada. And they did that because they didn't want to

15 pull the signal down in the United States 'cause they knew

16 what they were doing was wrong.

17   So they go over there, and they try to test their

18 actual hack: Let's see if we can actually make it work. So

19 they go over there. Sure enough, they put a card in. Now

20 they have a working hack.

21   So they reverse their steps, and then they fly

22 back to Israel, and they prepare a report. You're going see

23 it, it's Exhibit 98, and this is called the "Project

24 Head-End Report."

25   And the proof's in the pudding when you see the

1   report. Was this a lawful reverse engineer, or was this a

2   hack? You'll be able to look at it. It has two sections.

3   It says "DISH Network U.S.A. 3M hack in practice." It uses

4   the word "hack."

5   Nowhere in this report will you see anything where

6   they say, "We can make our card better, we can make our

7   product better. We need to make this change or that

8   change."

9   They don't do that.

10   So what do they do with it at that point?

11   They take that report, and Mr. Mordinson has it.

12   And he flies over to the United States, and he hands this

13   report to a gentleman by the name of Chris Tarnovsky. He's

14   a gentleman that lives here in California that works for NDS

15   Americas.

16   And let me back up and tell you a little bit about

17   Chris Tarnovsky. Now, remember, NDS provided conditional

18   access service to DirecTV. Chris Tarnovsky was one of the

19   individuals responsible for hacking DirecTV.

20   Now, you're gonna hear testimony from people in

21   worldwide security for NDS that will tell you when they

22   hired him, they knew he was a criminal. They knew he would

23   continue -- there was a risk that he would continue his

24   criminal ways.

25   So what they do is they put him over here, and

1 they don't have him supervised. He's actually working out

2 of his home. Their story is they're doing this so he can

3 infiltrate the pirate community. But if that's his job, why

4 does he need this report? Another question you need to ask

5 yourself.

6   Because he's not working -- you're gonna hear

7 testimony from him that he's not involved in making their

8 chips better.

9   So he goes over there -- and you'll like this.

10 Mr. Tarnovsky, he's gonna tell you about this. This happens

11 in 1999. Mordinson goes over to his house and he shows him

12 the report. And this is actually what he testifies to, that

13 Mordinson held this report -- and remember, if this is

14 lawful reverse engineering, it would be nice and normal.

15 What he does, he holds the report up and he flips the pages

16 for Mr. Tarnovsky to see.

17   Mr. Tarnovsky doesn't want to touch it. Why not?

18 So what do they do at that point if this is a lawful reverse

19 engineering? Okay. There's no problem with this report.

20 What do they do? They go down and they take this report and

21 they shred it together right away. They go down to his

22 basement together or his garage.

23   And subsequent to that, the code that was dumped

24 that you'll see in the report was posted on the Internet.

25 It was posted on the Internet in December of 2000.

1   What was posted was basically the instructions on

2   how to create your own card for DISH Network. It was

3   disseminated over the Internet. You had the entire pirate

4   community that could now look on the Internet with a series

5   of instructions and make their own card.

6   And at that point we didn't know how bad it was.

7   So what did we do? We tried to fight off the piracy through

8   electronic countermeasures.

9   And what electronic countermeasures are, they're

10   basically code that we can rewrite to the card to try and

11   plug up the holes.

12   We did that for a while. And then ultimately the

13   card was just -- it was widespread. We could not --

14   basically the hackers were coming up with new types of --

15   you know, it's like a virus: It spreads. There's new

16   strains. It started to spread to where it was hopelessly

17   cracked, and when it was hopelessly cracked, the only option

18   at that point was to replace all the cards in the field. So

19   you have -- to replace these cards is a monumental task.

20   Now, the second it was posted on the Internet --

21   I'm going to tell you right now, no, we did not go out and

22   start replacing cards. I mean, that wouldn't be prudent.

23   We had to try to fix it as cheaply, as economically, as

24   reasonably as we could. So we didn't panic.

25   And then at the same time we're going down this

1   parallel path of figuring out we may -- we might have to

2   replace cards. And that takes time for them to generate a

3   new version and get them out in the field. So at

4   approximately 2002 we start replacing the cards. And that

5   process goes through 2005.

6   Okay. And that's the general framework of the

7   lawsuit.

8   So now let me take you back and tell you some

9   other tidbits of information. What you're gonna hear about

10   Mr. Tarnovsky. Okay.

11   He was involved in hacking DirecTV both before

12   being hired by NDS as well as while he was on the NDS

13   payroll while NDS is selling their system to DirecTV.

14   They're just gonna turn a blind eye to it.

15   But that doesn't work either because what you'll

16   hear from John Norris, who was Mr. Tarnovsky's supervisor,

17   is that he knew that Mr. Tarnovsky was getting cash from

18   these pirate activities. He will actually testify that in

19   1998, while he was on their payroll, he went up to Canada,

20   met with some pirates up there.

21   They had cash, and he didn't want to bring it

22   across the border, so he set up this elaborate scheme where

23   it would go through a Mailbox and More, a PO box. And then

24   that money would go to that one PO box, and then it would go

25   to another PO box where he lived in Carlsbad, California.

1   Now, how do we know that NDS was aware of this,

2   condoned it, ratified it, authorized it? They knew he was

3   gonna do it before he went. Mr. Norris is gonna testify to

4   that.

5   And then when he came back, they let him keep the

6   money. And if this was some legitimate operation, why did

7   he have to go through all these different mailboxes? And

8   NDS was paying for these mailboxes.

9   They did the same thing; they used the same cash

10   scheme with EchoStar. And what happened is Mr. Tarnovsky

11   got caught. In approximately August of 2000, he had the one

12   in Manassas, Virginia. That was a DirecTV route for getting

13   cash.

14   In the EchoStar case he set up a Mailbox and More

15   account in San Marcos, Texas. He pretended to be a student

16   at Southwest Texas State University, which is in San Marcos,

17   Texas. And then he would have his mail forwarded to a

18   Mailbox and More type place in San Marcos, California.

19   And in August of 2000 -- you're gonna hear

20   testimony from Detective Mark Cumberland. He's with the

21   Hays County Narcotics Task Force. Mr. Tarnovsky was getting

22   these suspicious packages, and so somebody alerted the

23   authorities. So they came over and they opened up some of

24   the packages. They opened up two, to be exact.

25   And what they found in the first package was a DVD

1 player. And it had $20,000 cash tucked inside of it.

2   Two days later they get -- I think it was a CD

3 player first and then a DVD, but it's just electronics.

4 They find 20,100 that's getting shipped. So they found

5 those. And you'll hear testimony that those weren't the

6 only two shipments. He was getting shipments -- and he's

7 not gonna tell you what was in 'em, but you'll hear evidence

8 that he was getting shipments of these consumer electronics

9 devices approximately every other day.

10   Now, just like DirecTV where NDS was paying for

11 the Mailbox and More up there so they could funnel the cash,

12 NDS was paying for the San Marcos account that was being

13 used in connection with pirating our system.

14   And you're gonna hear testimony from various

15 witnesses that support their activities. And the important

16 thing you're going to do is when you see -- hear

17 Mr. Mordinson get on the stand -- he's their software

18 engineer that drafted up this report, this Exhibit 97. And

19 he's gonna tell you that they were the best in the world in

20 doing this type of thing, these type of hacks. And he's

21 gonna tell you that they're the only person in the world --

22 they're the only company in the world that had all the

23 components necessary to hack the EchoStar conditional access

24 system, post it on the Internet and do this harm.

25   And when he was deposed, he was deposed as a

1 corporate rep. What that means is he is NDS. He is

2 speaking for NDS. They don't get to have another witness

3 come up and contradict him. That was their position.

4   So you need to ask yourself -- they're gonna

5 have -- they're gonna come up and they're gonna try to say

6 that this was a lawful reverse engineering. They're not

7 gonna have explanations for why all the cash, why all the

8 planes, trains and automobiles. You're gonna hear

9 Mr. Mordinson, you're gonna hear Mr. Hasak, both NDS

10 employees, say that they didn't do anything to make their

11 card better. There was no need to do it.

12   So how do we know that he posted this information

13 on the Internet?

14   Mr. Tarnovsky would use various aliases to hide

15 his identity. He used aliases to hide his identify. He

16 used aliases such as Von, VonRat, which if you take

17 Tarnovsky backwards and take off the S-K-Y, you get Von Rat.

18 Shrimp. Da Shrimp.

19   And what's important in this case is the alias

20 Nipper. Because you'll see on December 24th and

21 December 21st the post of our code. On October 24th of

22 2000, Mrs. Avigail Gutman, an NDS Group employee, sends an

23 e-mail to Mr. Tarnovsky, tells him to open up an account

24 name on a website, a pirate website called PiratesDen.

25   Now, on December 24th that code was posted on

1   PiratesDen by a NiPpEr2000. Okay.

2   And now, how do we know that that code is ours?

3   We had a specific word put in our code that wasn't necessary

4   for the code. It was kind of like a fingerprint on the code

5   that you knew it was ours. If somebody hacked it, it would

6   show up. And that word was "Nipper." And where Nipper

7   comes from, it's the mascot for RCA, which RCA built the

8   original boxes for DirecTV. Those are the boxes that

9   Mr. Tarnovsky hacked.

10   So how do we know he's Nipper? DirecTV, once they

11   got fed up with what they were doing over here, they started

12   to investigate Mr. Tarnovsky and his direct supervisor,

13   Mr. Norris. Mr. Norris is the head of security for the

14   United States, who is supposed to be the direct supervisor

15   of Mr. Tarnovsky.

16   And they investigate, DirecTV does. They're not

17   trying to find out who NiPpEr2000 is that posted our code.

18   They're trying to figure out if the people that are selling

19   them their conditional access system are bad. As a

20   by-product of this, they issue a report. And you're gonna

21   see that report. It's Exhibit 2. It's by a company called

22   ICG. That's stands for Internet Crimes Group.

23   And so what they did is they performed an

24   investigation trying to figure out all the aliases that

25   Mr. Tarnovsky used.

1   And lo and behold! They found out that one of the

2   aliases was Nipper. Okay. That didn't help them for their

3   lawsuit, but it helped for ours. We didn't know that. They

4   did not do this for us. This is DirecTV. This is a

5   competitor that found out this. So that's how we know that

6   Mr. Tarnovsky -- we can link him.

7   In addition to that, you'll hear testimony from a

8   Dr. Avi Rubin. He's our software expert. He's from Johns

9   Hopkins University. And he's been hired by companies such

10   as Apple to do legitimate reverse engineering. And he'll

11   give you testimony on what's a legitimate reverse engineer

12   and what's not. And he's going to tell you that they went

13   too far. What he's also going to tell you is that the

14   methodology that's set forth in Exhibit 98, this project,

15   Headend Report, is the same methodology that appears in the

16   December 21st post and the December 24th. It's kind of like

17   its fingerprints are all over. It has the same

18   misspellings, things like that. So he's going to provide

19   that evidence.

20   Another thing that you're going to see is you're

21   going to see Exhibit 113. This is an e-mail from

22   Mr. Tarnovsky the day after the December 21st post.

23   And the "re" line on this e-mail -- he sends this

24   e-mail to his direct supervisor, John Norris. But we're not

25   talking just NDS Americas; he also copies NDS Group, the

1 people that did it over in Israel.

2 And the "re" line is "cat's out of the bag."

3 What other evidence do we have that he did this?

4 You're gonna see Exhibit 41, which is an internal

5 e-mail between Abigail Gutman, Chris Tarnovsky, using his

6 alias that NDS gave him of Mike George. And in this

7 e-mail -- you've got to understand they released it on

8 December 21st and the 24th.

9 January 21st of 2001 is the Super Bowl. So what

10 they did is they dumped this code in advance of the Super

11 Bowl. And they're gonna talk to you about what's called

12 Black Sunday. What they did is DirecTV was hacked. So they

13 sent down an ECM so that anybody on DirecTV, you weren't

14 getting the Super Bowl. And what did it do? It pushed

15 people over to try and get pirate cards for EchoStar. And

16 you're gonna see in Exhibit 41 where they actually make

17 light of this. And it says EchoStar lost XXX dollars while

18 DirecTV made zillions.

19 This comes from NDS Group in Israel. And it's to

20 the NDS Americas employees with Chris Tarnovsky. So did

21 they know what he was doing? You bet they knew what he was

22 doing. He worked under the direct supervision of John

23 Norris.

24 So what does that do? When our system's

25 hopelessly compromised like that, we have to go out and we

1   have to perform a card swap, and that took approximately

2   three years. And you're gonna hear testimony that that cost

3   approximately $90 million.

4   Now, you're also gonna hear testimony -- and I'm

5   not gonna give you the numbers right now, but you're also

6   gonna hear testimony of the different types of harm that it

7   causes. We talked about some of that while we were in voir

8   dire.

9   You have these viruses and they spread and they

10   shut down businesses and they take resources. You have

11   customer services that have spikes in calls while you're

12   doing these card swaps. And also, instead of having all

13   your subscribers, you have programmers, you have DISH

14   Network, and then you have the consumers. Instead of having

15   all paying consumers, that group splinters and you have

16   legitimate, honest, lawful consumers, and then you have the

17   illegal ones that have these pirate devices. That was part

18   of their plan.

19   And so the costs are borne by basically the rest

20   of America, all the law-abiding citizens, because we still

21   have to -- we have to pay the programming. And so it costs

22   us money. Instead of those people being paying subscribers,

23   they're pirate subscribers, and it costs everybody.

24   So that's pretty much the crux of the case. We

25   know they did it. They have a bunch of unanswered questions

1   that when they get up here they need to explain to you.

2   They need to give you a reason why all this cash was coming.

3   Now, what they did with Mr. Tarnovsky once they

4   found out -- did they fire him in 2000? No. What you're

5   gonna hear is they hung onto Mr. Tarnovsky through thick and

6   thin.

7   Now, we took Mr. Tarnovsky's deposition

8   approximately April 2nd-ish in 2007. The Friday before --

9   that was a Tuesday. The Friday before, they call

10   Mr. Tarnovsky into the attorney's office and they fire him.

11   And what we found out during that deposition is

12   they also fired another individual by the name of Al Menard.

13   We didn't know that Mr. Menard was on the payroll.

14   Mr. Menard was a gentleman that was sending him the money.

15   What happened is, after we filed the lawsuit against NDS,

16   they went and they hired Mr. Menard.

17   Now, this is a job that I want:

18   They paid him $6,000 a month to surf the Internet.

19   They paid him $383,000 and then fired him the very

20   same day they fired Chris Tarnovsky.

21   You've got to ask yourself why.

22   They just turn a blind eye to all the activities

23   that were going on because it was a designed play. They

24   meant for this harm to happen. And the proof's in the

25   pudding when you see all the documents.

1   So we appreciate you being here. It's been a long

2   fight and it's gonna be a long trial.

3   And you're gonna hear additional evidence. I'm

4   just giving you the framework so that you understand it.

5   And then you'll hear the evidence come on through witnesses.

6   You're gonna hear from Mr. Ergen first. He's gonna tell you

7   about the business, the growth of the business. You'll hear

8   from Mr. Pascal Lenoir, NagraStar. He's going to tell you

9   the things that they do, that they don't operate their

10 business that way and how they were harmed.

11   Now, they may come over and try to say that they

12 do the same things. But you're not gonna have any evidence

13 that we went through this elaborate scheme to hurt them.

14   And another thing is, if our card was so bad like

15 they claim, if I'm trying to make a new, better rubber tire,

16 am I going to reverse-engineer a wagon wheel? And that's

17 basically what they're saying, that their product was so bad

18 and they were superior. If that was the case, why did it

19 take 'em six months? And why did they even bother? Because

20 they wanted to hang onto the business in the United States

21 and continue their worldwide dominance in the conditional

22 access market.

23   We talked about competition in the voir dire.

24 And, yes, the Kudelski Group and NagraStar was a smaller

25 company. But smaller companies are where better mousetraps

1   come from. You get better ideas. Remember when IBM was all

2   the rage? All the PC's and everything were IBM. Then you

3   had Apple, and it was an upstart. And then calculators came

4   along.

5   There's always a better mousetrap. But instead of

6   making their product better, what they did is they kept

7   everybody else down. That's not fair competition by a long

8   shot. It's not lawful reverse engineering by a long shot.

9   So make them come up here and give you a good explanation,

10 'cause they don't have one.

11   Now, what they're gonna do is they're gonna say,

12 "It wasn't us."

13   I mean, you can't run from these e-mails, you

14 can't run from their project Headend Report. You can't run

15 from their testimony that nobody else in the world could

16 have done it.

17   But what they do is they go through a series and

18 they start trying to point here and there and everywhere.

19 And they're going to start talking about a company called

20 DISH Plex out of Barrie, Ontario, Canada.

21   But what that company did was it sold devices.

22 They're called EK1's. Okay. They were in the business of

23 selling a product: You know, let me sell you a Smart Card.

24 Okay. That's how they made their money.

25   They did not post this information on the

1   Internet. If they had posted the information on the

2   Internet, they would have put themselves out of business.

3   They're in the retail business. Okay. That's where DISH

4   Plex was.

5   It was not in the business of going and trying to

6   tear down a competitor. It had no motive. The only people

7   that had any motive to do anything in this situation were

8   these people over here. They wanted to encircle the globe

9   and they wanted to keep the United States, and so they did

10 it through improper means.

11   And we're here to have you set the record straight

12 once and for all because they have done this to DirecTV,

13 their own client and they've done it to us. And who knows

14 if they'll continue to do it. But it's time for you as the

15 citizens to decide what is fair competition in the

16 United States.

17   MR. STONE: Sorry to interrupt, but it seems like

18 we're getting a little bit beyond the evidence.

19   THE COURT: You're getting into argument, Counsel.

20   MR. WELCH: Thank you, Your Honor.

21   So you'll get to make the decisions. So the

22 questions that we'll ask you are did they do this act? Did

23 they intend this harm? Because all these works are

24 copyrighted, and so we're trying to protect the copyrights

25 with this conditional access system. And those are the

1   questions you're gonna be asked. Did they do it? Did they

2   do it either knowingly with the executives at NDS, or did

3   they do it through their employee, knowing that their

4   employee was gonna do it, and accept the benefits of that.

5   Now, one of the things we're also gonna be asking

6   you for is to disgorge NDS of the profits they made from

7   their activities. Because the evidence you'll hear is that

8   they were in dire straits of losing the DirecTV contract.

9   DirecTV recognized that NagraStar had a better product.

10   They actually -- DirecTV went to NagraStar and they paid

11   them a hundred thousand dollars to perform a study to see if

12   they could help them switch systems away from NDS. That's

13   why NDS hacked 'em. That's why NDS hacked NagraStar. And

14   the proof's in the pudding: They got their contract renewed

15   in '99. So they got a four-year deal with NDS.

16   Now, did NDS stop right there? No. They ended up

17   being hacked again. You're gonna hear Mr. Norris testify

18   that they were hacked consistently between 1994, '95, '96,

19   97, '98, '99, 2000, 2001, 2002, and 2003. But then they

20   became secure in 2004 for the first time in their history.

21   And why did they become secure?

22   We talked about News Corporation earlier that was

23   gonna do the merger with us back in '97. Well, News

24   Corporation purchased the controlling share of DirecTV. So

25   when it suited their needs, all of a sudden DirecTV became

1 secure. They control who's secure and who's not secure in

2 the conditional access because they have control of all

3 these pirates.

4   When you hear all the evidence, I think that

5 you're gonna put a stop to it.

6   So I thank you on behalf of my client. And they

7 thank you for your time and the time that you're gonna spend

8 listening to the evidence and going through all the

9 documents. And you're gonna see a lot of hard evidence.

10   Thank you.

11   THE COURT: Thank you very much, Counsel. Why

12 don't you take a brief recess. I want to get set up before

13 we start opening statement on behalf of the defendant.

14 Probably ten minutes at the most.

15   (Proceedings recessed at 2:23 p.m.)

16   (Further proceedings reported by Sharon

17   Seffens in Volume IV.)

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3   CERTIFICATE

4

5   I hereby certify that pursuant to Section 753,

6   Title 28, United States Code, the foregoing is a true and

7   correct transcript of the stenographically reported

8   proceedings held in the above-entitled matter and that the

9   transcript page format is in conformance with the

10   regulations of the Judicial Conference of the United States.

11

12   Date: April 10, 2008

13

14

15   _____

                      DEBBIE GALE, U.S. COURT REPORTER

16   CSR NO. 9472, RPR

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charts 19:12
chat 7:20
cheaply 24:23
chip 18:4 21:7
chips 23:8
choices 14:18
  16:9
chose 16:23 17:13
Chris 22:13,17,18
  31:5,20 33:20
CHRISTINE 2:5
Christopher
  15:11
Cinemax 14:3
circuitry 18:17,19
circumvent 20:10
citizens 32:20
  36:15
Civil 5:21
claim 5:4 34:15
claims 5:11,12,13
  6:6
clarify 10:21
clear 11:23
clerk 8:10
Cleveland 21:13
client 36:13 38:6
clients 13:13 16:1
close 9:1,11
code 5:10,21 19:2
  19:13,25 23:23
  24:10 28:21,25
  29:2,3,4,4,17
  31:10 39:6
come 8:6 19:11
  20:1,25 21:9,13
  28:3,5 34:5,11
  35:1,9
comes 12:19
  13:23 15:4 29:7
  31:19
coming 17:13
  24:14 33:2
comment 6:15
comments 6:17
  6:21
commission 17:16
communicate 8:8
Communications
  5:7 13:15

community 23:3
  24:4
companies 14:2
  30:9 34:25
company 14:23
  27:22 29:21
  34:25 35:19,21
competition
  34:23 35:7
  36:15
competitor 16:18
  30:5 36:6
competitors
  14:24 17:12
complete 19:15
components
  27:23
compromised
  31:25
Computer 5:22
concerned 12:2
concerning 9:15
conclusion 10:2
conditional 15:25
  16:14,23 22:17
  27:23 29:19
  34:21 36:25
  38:2
condoned 26:2
conduct 7:14
Conference 39:10
conformance
  39:9
connection 27:13
consider 6:7 7:12
  10:12 11:6
considered 10:9
considering 12:8
consistently 37:18
consulting 8:3
consumer 27:8
consumers 14:2
  14:17 32:14,15
  32:16
contention 14:20
continue 22:23,23
  34:21 36:14
contract 17:3
  37:8,14
contradict 28:3

control 6:24 38:1
  38:2
controlling 37:24
copies 30:25
Copyright 5:6
copyrighted
  36:24
copyrights 36:24
CORP 1:5
corporate 28:1
Corporation 2:3
  13:15,15,16
  15:24 37:22,24
correct 9:14
  11:13 39:7
Corrupt 5:9
cost 32:2
costs 14:13 16:3
  32:19,21,23
counsel 4:6 12:11
  13:1 36:19
  38:11
counterclaims
  5:18,23,25
countermeasures
  24:8,9
County 26:21
couple 4:8
court 1:1,21,22
  4:5 5:18 8:7,9
  8:10 9:3,7,8,10
  9:10 10:10 11:7
  11:12,17,17
  17:19,21 36:19
  38:11 39:15
covering 18:12
cracked 24:17,17
create 24:2
credibility 6:22
credit 17:25
credit-sized 17:25
Crimes 29:22
criminal 22:22,24
crux 16:10 32:24
CSR 1:21 39:16
Cumberland
  26:20
customer 32:11
cuts 14:13

	D	
D 2:5,19 3:1
Da 28:18
damages 5:14 6:2
DARIN 2:13
data 20:20
Date 39:12
David 1:3 2:13,24
  18:10 19:6
day 1:8 4:2 27:9
  30:22 33:20
days 27:2
deal 16:4,22
  37:15
Debbie 1:21 39:15
December 23:25
  28:20,21,25
  30:16,16,22
  31:8
decide 4:20 8:14
  9:21 36:15
deciding 7:11
decision 6:10 8:21
  8:21
decisions 36:21
defendant 2:11
  38:13
defendants 1:9
  5:4,12,15,17,23
  14:21,21,24
defendant's 5:20
  5:25
defenses 5:13,16
  6:1,3
deliberations 6:7
  8:17,20,25 9:25
deliver 13:21 14:1
deny 5:12,24
deposed 27:25,25
deposition 10:25
  11:4,6,11,14,15
  11:17,19,21,25
  12:2 33:7,11
deserves 12:8
designed 20:18
  33:23
destroyed 10:2
Detective 26:20
determine 6:10

6:21
develops 6:20
device 20:15
devices 27:9
  32:17 35:21
dictionaries 8:4
difference 12:3
different 10:14
  11:11 12:18
  21:5,7 26:7 32:6
differently 11:25
dig 18:25
digital 5:5 19:3
dire 17:2 32:8
  34:23 37:8
direct 29:12,14
  30:24 31:22
DirecTV 16:18,19
  17:1,5 22:18,19
  25:11,13 26:12
  27:10 29:8,10
  29:16 30:4
  31:12,13,18
  36:12 37:8,9,10
  37:24,25
discuss 7:17,22
  8:17
discussed 8:15
discussing 7:20
disgorge 37:6
DISH 22:3 24:2
  32:13 35:20
  36:3
dislikes 4:19
dispute 9:4 16:10
disregard 6:20
  7:10,13 10:14
disseminated
  24:3
distract 9:22
  12:23
District 1:1,2,22
DOC 1:7
document 12:1
documents 17:22
  33:25 38:9
doing 21:16 23:2
  27:20 29:11
  31:21,22 32:12
dollars 31:17

37:11
dominance 34:21
Dov 2:24
downtown 9:9
Dr 30:8
drafted 27:18
drill 18:25
drive 21:11,12
dumped 19:25
  23:23 31:10
duplicate 20:9
duty 4:10,14
DVD 26:25 27:3
D1V3 1:25

_____ E _____

E 3:1
earlier 37:22
easy 18:14
EBERHART
  2:13
EchoStar 1:5,25
  2:3 5:3,19,19,24
  6:2 13:14,15,16
  15:13 16:18
  17:6 20:1 26:10
  26:14 27:23
  31:15,17
ECM 31:13
economical 16:3,6
economically
  24:23
education 12:4,9
either 9:4 25:15
  37:2
EK1's 35:22
elaborate 25:22
  34:13
electron 18:23
electronic 24:8,9
electronics 27:3,8
em 10:3 17:12,12
  18:21 21:2 27:7
  34:19 37:13
Embarcadero
  2:14
employee 28:22
  37:3,4
employees 28:10
  31:20

encircle 36:8
encryption 14:23
  14:23
ended 15:2 16:10
  37:16
engineer 19:6
  22:1 27:18
  30:11
engineered 19:22
engineering 19:17
  21:3 23:14,19
  28:6 30:10 35:8
English 10:8,13
entered 15:22
entire 24:3
entirely 6:21
equipment 18:20
Ergen 15:18 16:7
  34:6
estoppel 6:1
et 1:5,8 2:3,11
eventually 12:19
everybody 13:19
  14:11 16:3
  32:23 35:7
evidence 4:13,15
  4:21 5:1 6:4,8
  6:11,11,15,22
  6:24,25 7:1,3,9
  7:11,12 8:6,15
  8:22 9:13,19
  10:5,9,12 12:10
  12:16,18 15:4
  16:24 19:10,24
  27:7 30:19 31:3
  34:3,5,12 36:18
  37:7 38:4,8,9
exact 26:24
exclusion 12:12
exclusive 6:12
executives 37:2
exhibit 7:1,4,6
  11:13,19,22
  21:23 27:18
  29:21 30:14,21
  31:4,16
exhibits 11:10,11
  11:24,25
expect 12:20
expensive 18:20

experience 12:4,9
expert 30:8
explain 33:1
explaining 13:12
explanation 35:9
explanations 28:7
expose 18:16
expressions 6:17
eye 25:14 33:22
e-mail 28:23
  30:21,23,24
  31:5,7
e-mails 7:21
  35:13

_____ F _____

facility 13:22
fact 6:18
facts 4:14,15 6:10
  6:12,18 10:23
fair 14:8 35:7
  36:15
familiar 20:4
family 7:18
far 30:13
fascinating 18:3
February 15:23
fed 17:1 29:11
Federal 1:21
fellow 8:14,18
  9:20 10:7
field 24:18 25:3
fifth 8:12
fight 24:7 34:2
figure 20:10,21
  20:23 21:8
  29:18,24
figuring 25:1
filed 33:15
Finally 8:16
find 4:14 27:4
  29:17
fingerprint 29:4
fingerprints
  30:17
finished 6:9
fire 33:4,10
fired 33:12,19,20
first 7:17 15:19
  18:11,15 26:25

27:3 34:6 37:20
fix 17:8 24:23
flies 22:12
flips 23:15
fly 20:12,12,23
  21:10,12,21
focused 18:22
foil 18:12,13
follow 4:17,23 5:1
following 4:23 5:5
  5:13
Force 26:21
foregoing 39:6
foreign 10:11
fork 19:20
formally 7:16
format 39:9
Fort 20:14
forth 30:14
forwarded 26:17
found 26:25 27:4
  30:1,5 33:4,11
Fountainview 2:7
four 9:3
Fourth 8:8
four-year 37:15
Fox 14:3
framework 25:6
  34:4
Francisco 2:15
Fraud 5:22
free 14:10,11
Friday 33:8,9
friends 15:15
funnel 27:11
Further 38:16

_____ G _____

Gale 1:21 39:15
garage 23:22
general 25:6
generate 25:2
gentleman 22:13
  22:14 33:14
gentlemen 4:7
George 31:6
getting 14:10 17:1
  25:17 26:12,21
  27:4,6,8 31:14
  36:18,19

give 4:8,16,17 5:1
  6:13 8:10 12:7
  30:11 32:5 33:2
  35:9
given 8:16 9:1,11
  12:9
giving 34:4
glad 13:10
globe 36:8
go 9:20 20:5
  21:13,17,19
  23:20,21 24:21
  25:23,24,24
  26:7 31:25
  35:17
goes 23:9,11 25:5
going 4:8 7:14 9:2
  9:9 11:22 12:13
  15:18,19 17:4
  18:13 19:23
  21:22 24:21,25
  27:16 30:12,13
  30:18,20,21
  33:23 34:8,16
  35:19 36:5 38:8
gonna 15:18 17:5
  17:6 18:9 19:16
  20:25 21:4
  22:20 23:6,10
  25:9,14 26:3,3
  26:19 27:7,14
  27:19,21 28:4,5
  28:5,7,8,9 29:20
  31:4,11,16 32:2
  32:4,5,6 33:5
  34:2,3,6,6,12
  35:11,11 37:1,4
  37:5,17,23 38:5
  38:7,9
good 13:5 14:8
  35:9
governing 6:6
grew 14:16
group 1:8 2:11
  5:4,17 14:22
  28:22 29:22
  30:25 31:19
  32:15 34:24
grows 14:17
growth 34:7

guess 7:8
Gutman 28:22
  31:5
guys 15:15

_____ H _____

hack 21:18,20
  22:2,3,4 27:23
hacked 15:1
  16:15,16,19,20
  16:20,21,21
  17:1 19:21 29:5
  29:9 31:12
  37:13,13,17,18
hackers 24:14
hacking 17:10,11
  17:11 22:19
  25:11
hacks 27:20
Hagan 2:5 13:7
Haifa 17:16 18:21
hallway 12:14
hand 8:9 16:15
handful 18:21
hands 5:14 6:1
  22:12
hang 34:20
happen 33:24
happened 15:21
  16:25 26:10
  33:15
happens 17:15
  23:10
hard 13:8 38:9
harm 15:2,2
  27:24 32:6
  33:24 36:23
harmed 34:10
HARTSON 2:18
Hasak 28:9
hat 17:18,20,21
Hays 26:21
HBO 14:3
head 29:13
Headend 30:15
  35:14
headquarters
  15:8
Head-End 21:24
hear 6:19 9:12

12:17,19 13:3
  15:18 17:22
  18:9 19:23 21:4
  22:20 23:6 25:9
  25:16 26:19
  27:5,7,14,16
  28:8,9 30:7 32:2
  32:4,6 33:5 34:3
  34:5,6,7 37:7,17
  38:4
heard 6:8
hearing 11:16
held 23:13 39:8
help 4:9 5:1 9:18
  10:21 30:2
  37:12
helped 30:3
he'll 30:10
hide 28:14,15
high-dollar 18:20
hired 22:22 25:12
  30:9 33:16
history 37:20
HOGAN 2:18
holds 23:15
holes 24:11
home 13:24 23:2
honest 32:16
Honor 36:20
HONORABLE
  1:3
hope 12:20
hopelessly 24:16
  24:17 31:25
Hopkins 30:9
house 20:6 23:11
Houston 2:8 13:6
hundred 37:11
hung 33:5
hurt 10:22 34:13

_____ I _____

IBM 35:1,2
ICG 29:22
ideas 35:1
identify 28:15
identity 28:15
ignore 4:24 7:7,10
III 1:8 4:2
illegal 32:17

immediately 7:24
impact 20:18
important 4:25
  10:12 27:15
  28:19
improper 36:10
inception 16:19
includes 7:19 9:14
including 7:18
increases 14:13
indicating 4:12
individual 33:12
individuals 18:9
  22:19
infer 4:11
inference 6:19
infiltrate 23:3
influenced 4:19
  5:8 10:6
inform 11:13
information 19:7
  21:6 25:9 28:12
  35:25 36:1
inside 27:1
insofar 11:7
instruct 4:10 6:16
instructions 3:3
  4:11,23 6:5,9
  24:1,5
intend 36:23
internal 31:4
Internet 7:20,21
  7:21 8:4 23:24
  23:25 24:3,4,20
  27:24 28:13
  29:22 33:18
  36:1,2
interpreter 10:16
interpreters
  10:10
interrupt 36:17
introduce 13:2
investigate 29:12
  29:16
investigation 8:5
  29:24
involved 7:19
  23:7 25:11
ion 18:22
Israel 17:16 20:12

20:17,23 21:22
  31:1,19
issue 9:5,15 29:20
IV 38:17

_____ J _____

January 31:9
Jersey 20:15
job 19:7 23:3
  33:17
John 25:16 30:24
  31:22
Johns 30:8
JUDGE 1:3
judged 12:6
judges 6:12 9:16
  10:23
Judicial 39:10
June 15:22 16:12
jurors 7:15 8:14
  8:18 9:20 10:7
  10:12,23
jury 1:15 3:3 4:4
  4:7,8 6:16 8:13
  9:21,24 13:3
jury's 4:6

_____ K _____

keep 8:15 9:19
  14:19 16:3
  19:22 26:5 36:9
KENNETH 2:19
kept 35:6
key 20:3
keys 20:22 21:9
kidding 9:17
kind 29:4 30:16
KLEIN 2:19
knew 21:15 22:22
  22:22 25:17
  26:2 29:5 31:21
know 7:24 9:13
  9:16 10:11
  11:22 14:2 24:6
  24:15 26:1
  28:12 29:2,10
  30:3,5 31:21
  32:25 33:13
  35:23
knowing 37:3

knowingly 37:2
knows 13:19
  36:13
Kristee 8:9 12:24
Kudelski 17:12
  34:24

_____ L _____

L 2:18
lab 17:15 18:20
Ladies 4:7
language 10:11
Languages 10:8
law 2:7,14,19 4:10
  4:15,17 6:5,13
  6:15
lawful 19:16 22:1
  23:14,18 28:6
  32:16 35:8
laws 5:5
lawsuit 16:22
  25:7 30:3 33:15
lawyer 6:25 7:1,3
lawyers 11:2,16
law-abiding 32:20
layer 18:16 20:2
leave 9:23,25
lectern 13:3
Lee 20:14
left 9:23 19:21
legitimate 26:6
  30:10,11 32:16
Lenoir 34:8
let's 9:3 11:18
  17:9 18:8 21:18
lieu 11:7
light 31:17
likes 4:19
limitations 5:14
line 20:19 30:23
  31:2
link 30:6
listen 7:25
listening 38:8
little 15:4,14
  17:25 18:2,4,24
  22:16 36:18
live 11:7 12:12
lived 25:25
lives 15:11 22:14

lo 30:1
log 20:20
long 13:9 15:17
   34:1,2 35:7,8
look 12:12 18:12
   19:18 22:2 24:4
looks 18:18
Los 2:21 9:9
losing 17:1,2,3
   37:8
lost 31:17
lot 9:9 13:6 15:6
   15:10 38:9

M

M 2:5
mail 26:17
Mailbox 25:23
   26:14,18 27:11
mailboxes 26:7,8
main 15:10
making 23:7 35:6
Manassas 26:12
Marcos 26:15,16
   26:18 27:12
Mark 26:20
marked 11:19,20
market 34:22
married 20:8
Maryland 20:14
mascot 29:7
materially 12:18
materials 8:5
matter 10:20,21
   39:8
mean 24:22 35:13
meaning 10:14
means 4:20 7:11
   20:3 28:1 36:10
meant 33:24
member 8:10
members 7:18
memory 8:25
   10:5,6
Menard 33:12,13
   33:14,16
merger 15:22,23
   37:23
mess 19:12
met 25:20

methodology
   30:14,15
microchip 18:3
   18:24
microscopes
   18:23
middle 18:1
Mike 31:6
Millennium 5:6
million 32:3
mind 8:12,15
minutes 38:14
misappropriated
   5:20
misspellings
   30:18
mitigation 5:14
   6:1
money 25:24 26:6
   32:22 33:14
   35:24
month 33:18
monthly 13:21
months 19:15
   21:2 34:19
monumental
   24:19
Mordinson 18:10
   19:6 20:12,24
   22:11 23:11,13
   27:17 28:9
Mordinson's 19:7
Moskowitz 2:24
motive 36:6,7
mousetrap 35:5
mousetraps 34:25
mouth 21:5
MYERS 2:12

N

N 3:1
NagraStar 5:3,19
   5:20,24 6:2
   13:16 14:24,25
   16:14 17:12
   21:1 34:8,24
   37:9,10,13
name 13:3,5
   15:11 22:13
   28:24 33:12

named 17:23
Narcotics 26:21
NBC 14:3
NDS 1:8 2:11 5:4
   5:5,17,17 13:2
   14:21,21,22
   15:8,10,25
   16:15,20 17:2
   17:10,11 22:14
   22:17,21 25:12
   25:12,13 26:1,8
   27:10,12 28:1,2
   28:9,22 30:25
   30:25 31:6,19
   31:20 33:15
   37:2,6,12,13,13
   37:15,16
necessary 8:23
   27:23 29:3
need 6:9 8:8 9:6
   12:24 22:7 23:4
   23:4 28:4,11
   33:1,2
needs 37:25
neighbor's 20:6
Network 22:3
   24:2 32:14
new 14:13 20:15
   24:14,15 25:3
   34:15
Newport 15:9
news 7:25 15:24
   37:22,23
nice 23:14
nipper 20:16
   28:20 29:6,6,10
   30:2
NiPpEr2000 29:1
   29:17
nitric 18:15
Noll 13:8
normal 23:14
Norris 25:16 26:3
   29:13,13 30:24
   31:23 37:17
note 8:9 9:6
notes 9:18,19,23
   10:1,4,5,7 12:23
note-taking 9:21
   12:22

number 11:13
   14:13
numbered 11:24
numbering 12:3
numbers 11:11
   19:13 32:5

O

O 1:3
oath 4:22 8:7 11:1
object 7:3
objection 7:4,5,7
occupy 9:24 10:1
occurred 11:21
October 28:21
offers 7:1
office 11:18 33:10
official 1:21 10:10
okay 12:25 13:4
   14:12,22 15:6
   15:13,15,21,23
   16:3,13 18:8,11
   19:17 20:5
   23:19 25:6,10
   29:1 30:2 35:22
   35:24 36:3
once 13:2 18:24
   19:4,5,25 29:10
   33:3 36:12
ones 19:2 32:17
online 8:1
Ontario 35:20
oOo 38:18 39:1
open 8:15 9:7
   28:23
opened 26:23,24
opening 3:4 12:14
   12:16 13:1,11
   38:13
operate 34:9
operates 15:20
operation 26:6
opinion 4:12 6:17
   10:19 12:6,10
opinions 4:19
   12:5,6
option 24:17
order 7:9 12:11
Organizations 5:9
original 29:8

out-of-jury-pre...
   11:16
overly 10:6
overnight 19:5
overrule 7:3
O'MELVENY
   2:12

P

package 26:25
packages 26:22
   26:24
pads 12:24
page 3:2 39:9
pages 23:15
paid 33:18,19
   37:10
pairing 20:3,21
   21:9
panic 24:24
parallel 25:1
parent 15:24
part 15:23 21:10
   32:17
parties 5:2 6:6
   13:13 16:12
party 10:16,17
   11:2
Pascal 34:8
passes 19:5
passionate 15:16
pass-through
   18:7
path 25:1
pay 9:1,10 13:18
   13:19,20 14:5
   14:12 32:21
paying 26:8 27:10
   27:12 32:15,22
payroll 25:13,19
   33:13
PC's 35:2
peel 18:13
Penal 5:10
people 7:18 8:7
   13:7 14:9 22:20
   29:18 31:1,15
   32:22 36:6,8
perform 32:1
   37:11

performed 29:23
permit 7:22
permits 6:15
permitted 7:2
  12:5
person 11:4,5
  27:21
personal 4:19
pick 21:11,12
pictures 18:17
piracy 24:7
pirate 23:3 24:3
  25:18 28:24
  31:15 32:17,23
pirates 17:10
  25:20 38:3
PiratesDen 28:24
  29:1
pirating 27:13
place 11:18 26:18
placed 11:1
PLAINTIFF 2:3
plaintiffs 1:6 3:4
  5:3,11,19
plaintiff's 5:4
  13:11
plan 17:9,9 32:18
planes 20:11 21:9
  28:8
play 33:23
player 27:1,3
players 15:10
PLC 1:8 2:11
please 7:24 9:19
  10:19 12:22
Plex 35:20 36:4
plug 24:11
PO 25:23,24,25
point 19:17 22:10
  23:18 24:6,18
  35:18
portions 8:24
position 28:3
positions 5:2
possible 11:8 13:7
possibly 9:2
post 27:24 28:21
  30:16,22 35:25
posted 23:24,25
  24:1,20 28:12

28:25 29:17
  36:1
practice 22:3
prejudices 4:20
Preliminary 3:3
prepare 21:22
presence 4:4 8:7
  16:16,17 17:4
present 2:23 4:6,6
  11:8
presentation 6:4
  12:21
presented 6:11
  11:6
PRESIDING 1:3
pretended 26:15
pretty 19:12
  32:24
pre-instructions
  4:9
price 14:8
prior 12:11
probably 9:2 15:6
  38:14
problem 9:14
  17:8 23:19
proceedings 1:14
  3:2 38:15,16
  39:8
process 25:5
processes 18:15
product 16:1,20
  17:13,14 19:19
  19:23,24 21:1,1
  21:4 22:7 34:17
  35:6,23 37:9
profits 37:6
programmers
  14:4,19 18:7
  32:13
programming
  13:21,22 14:1
  14:16,18 32:21
programs 14:14
project 19:15
  21:23 30:14
  35:14
proof 5:15,23 6:2
proof's 21:25
  33:24 37:14

protect 14:7,9
  18:5 36:24
protection 20:2
prove 16:5,23
provide 6:5 16:8
  30:18
provided 10:10
  15:25 22:17
providing 14:8
proving 5:11
prudent 24:22
pudding 21:25
  33:25 37:14
pull 21:15
pulled 16:4,4,9
purchased 37:24
pursuant 39:5
pushed 31:14
put 12:24 20:6,19
  21:19 22:25
  29:3 36:2 38:5
p.m 4:3 38:15

Q

question 6:25 7:4
  7:5,7,8 10:21
  23:4
questions 9:13
  10:19,20 11:3,3
  32:25 36:22
  37:1
quit 17:11,11

R

R 2:13
Racketeer 5:8
radio 8:1
rage 35:2
Rat 28:17
ratified 26:2
RCA 29:7,7
read 7:25 8:24 9:7
  10:1
reason 33:2
reasonably 24:24
reasons 12:5,9
recall 4:21 8:22
  13:5
receive 12:1
received 6:25 7:5

7:6 14:11
receiver 13:23,24
  20:4 21:11,12
recess 38:12
recessed 38:15
recognized 37:9
record 7:10 36:11
refer 11:18
referred 11:10,14
  12:1
referring 11:21
refresh 8:25
regarding 4:13
regulations 39:10
reject 12:7
release 19:2
released 31:7
rely 10:4
remember 9:19
  10:22 14:15
  21:2 22:17
  23:13 35:1
renewed 37:14
rent 21:13
rep 28:1
replace 15:3
  24:18,19 25:2
replacing 24:22
  25:4
report 19:11
  21:22,24 22:1,5
  22:11,13 23:4
  23:12,13,15,19
  23:20,24 27:18
  29:20,21 30:15
  35:14
reported 38:16
  39:7
reporter 1:21 9:8
  39:15
reporters 9:3,10
REPORTER'S
  1:14
reports 8:1
represented
  13:14
request 10:20
required 6:13
  14:6,6,18
research 8:3,5

resources 32:10
responsible 22:19
rest 14:11 32:19
restroom 9:14,15
retail 36:3
revenues 14:7
  17:2,3 18:6,6
reverse 19:17,22
  21:3,21 22:1
  23:14,18 28:6
  30:10,11 35:8
reverse-engineer
  34:16
rewrite 24:10
RICHARD 2:18
RICO 5:9
right 4:5 9:24
  13:1 15:8 19:18
  19:21 23:21
  24:21 32:5
  37:16
risk 22:23
Riverside 9:8
road 19:20
room 1:22 8:13
  9:21,24 11:18
  12:12
rooms 7:20
ROSS 2:6
route 26:12
RPR 1:21 39:16
rubber 34:15
Rubin 2:24 30:8
rules 6:13,24 7:2
run 35:13,14,14

S

SACV 1:7
San 2:15 26:15,16
  26:18 27:12
Santa 1:16,23 4:1
satellite 1:5 2:3
  13:15,17,20,20
  13:23 14:10
saying 34:17
says 22:3 31:17
scheme 25:22
  26:10 34:13
scrambled 19:8
  19:12

searching 8:4
seat 9:24 10:1
seated 5:3,17
second 7:25 24:20
secrets 5:20
Section 5:8,9,21
    5:22 39:5
sections 5:6,10
    22:2
secure 14:19 16:2
    16:6,22 37:20
    37:21 38:1,1,1
security 22:21
    29:13
see 6:20 9:12
    14:14 15:3
    17:22,25 18:1,2
    18:17 19:10,10
    21:18,22,25
    22:5 23:16,24
    27:16 28:20
    29:21 30:20,21
    31:4,16 33:25
    37:11 38:9
Seffens 38:17
sell 35:23
selling 25:13
    29:18 35:23
send 9:6 13:22
sending 33:14
sends 28:22 30:23
sense 12:20 19:8
sent 31:13
series 19:2 24:4
    35:17
service 22:18
services 32:11
session 4:5
set 20:16 25:22
    26:14 30:14
    36:11 38:12
share 37:24
Sharon 38:16
she'll 12:24
shipments 27:6,6
    27:8
shipped 27:4
Shkedy 18:10
    19:1 20:12
shoddy 20:25

21:1
shot 35:8,8
show 12:18 29:6
shows 23:11
Showtime 14:3
shred 23:21
Shrimp 28:18,18
shuffle 9:9
shut 32:10
side 7:2 9:4 10:22
    10:22
signal 14:9 21:15
signals 14:10,12
    14:19 18:5
signed 8:9
Silver 20:14
simply 8:8 10:21
single 4:24
situation 11:12
    36:7
six 19:14 21:2
    34:19
sized 17:25
slice 18:23,25
smaller 34:24,25
smart 15:4 35:23
SNYDER 2:13
software 19:6
    27:17 30:8
sold 35:21
sole 6:12 10:23
solely 4:21 10:16
somebody 26:22
    29:5
Sorry 36:17
sounds 18:14
Southwest 26:16
speaking 28:2
specific 6:6 29:3
spend 38:7
spent 13:9
spikes 32:11
splinters 32:15
split 16:13
spread 24:16 32:9
spreads 24:15
Springs 20:14
square 18:2,24
staff 8:10
stand 27:17

stands 29:22
Stars 2:20
start 13:12 24:22
    25:4 35:18,19
    38:13
started 16:22
    24:16 29:11
state 12:5 26:16
statement 3:4
    12:15,16 13:1
    13:11 38:13
States 1:1,22
    14:12 16:17
    17:4 20:1,18
    21:11,15 22:12
    29:14 34:20
    36:9,16 39:6,10
Statute 5:13
stays 20:8
stenographically
    39:7
steps 21:21
sticks 20:4
STONE 2:18
    36:17
stop 19:18 37:16
    38:5
stops 20:13
stories 7:25
story 23:2
straight 36:11
strains 24:16
straits 17:2 37:8
stream 20:20
street 1:22 15:9
    17:10
stress 6:12
stricken 7:9
student 26:15
study 37:11
subject 10:20
subscribers 32:13
    32:22,23
subscription
    13:18
subsequent 23:23
sudden 37:25
Suite 2:8,15,20
suited 37:25
summary 5:2

12:20
summation 12:17
Sunday 31:12
Super 31:9,10,14
superior 34:18
supervised 23:1
supervision 31:22
supervisor 25:16
    29:12,14 30:24
supplier 16:14
support 27:15
supposed 29:14
sure 11:20 21:19
surf 33:18
suspicious 26:22
sustain 7:5,7
swap 32:1
swaps 32:12
switch 37:12
sworn 10:25
sympathy 4:20
system 15:2,3,25
    16:5,6,8,11,23
    19:13,21 25:13
    27:13,24 29:19
    36:25
systems 13:20
    37:12
system's 31:24
S-K-Y 28:17

————————
            T
————————
T 2:4
table 5:4
take 9:16,18,19
    9:25 10:3,4
    12:23 15:13
    17:9,10 18:4,11
    18:15,19 19:7
    20:5 22:11
    23:20 25:8
    28:16,17 32:10
    34:19 38:12
taken 11:1
takes 11:17 25:2
talk 7:23 8:18
    18:8 31:11
talked 32:7 34:23
    37:22
talking 30:25

35:19
Tarnovsky 15:11
    22:13,17,18
    23:10,16,17
    25:10,17 26:10
    26:21 28:14,17
    28:23 29:9,12
    29:15,25 30:6
    30:22 31:5,20
    33:3,5,10,20
Tarnovsky's
    25:16 33:7
task 24:19 26:21
tasked 17:24
team 17:16,17,18
    17:24,24
tear 17:14 36:6
Technologies
    13:16
television 8:1
    13:18,25 14:8
    15:17 16:8
tell 9:6 11:2 12:24
    15:19 19:16
    20:25 22:16,21
    23:10 24:21
    25:8 27:7,19,21
    30:12,13 34:6,8
tells 19:13 28:23
ten 38:14
test 21:17
testifies 23:12
testify 8:7 11:4,9
    12:14 25:18
    26:3 37:17
testimony 9:1,11
    9:13 10:25 11:6
    11:7,14 12:6,7
    17:23 22:20
    23:7 26:20 27:5
    27:14 30:7,11
    32:2,4,6 35:15
Texas 2:8 13:6
    26:15,16,17
thank 36:20 38:6
    38:7,10,11
theirs 21:7
They'd 17:1
thick 33:5
thin 33:6

thing 18:11,15 26:9 27:16,20 30:20 34:14	**Tuesday** 33:9	**videotaped** 11:3	18:7 24:25 30:24 36:11,18	**zeros** 19:3
things 14:3 17:3	**turn** 17:11,12 25:14 33:22	**violated** 5:5,21	36:24 37:5	**zillions** 31:18
	turns 19:12	**violation** 5:21	**we've** 11:19 13:7	**Zvi** 18:10

thing 18:11,15
26:9 27:16,20
30:20 34:14
things 14:3 17:3
18:3,22 30:18
34:9,12 37:5
think 12:8 27:2
38:4
thinks 7:2
Third 8:3
thousand 37:11
three 9:2 32:2
tidbits 25:9
time 9:12 13:9
15:17 16:12,14
16:25 17:5
24:25 25:2
36:14 37:20
38:7,7
times 10:23 11:10
tire 34:15
Title 39:6
told 7:12
top 18:16
touch 23:17
trade 5:20
trained 9:16
trains 20:11 21:9
28:8
transcript 1:14
8:23 39:7,9
transcripts 8:24
translation 10:13
trial 1:15 6:16
7:19 8:23 9:3
10:9,18 11:1,4,5
11:12,13,25
34:2
tried 24:7
tries 7:23
true 39:6
truth 11:2
try 19:18 21:17
24:10,23 28:5
31:15 34:11
trying 19:1,1
20:20 29:17,18
29:24 34:15
35:18 36:5,24
tucked 27:1

Tuesday 33:9
turn 17:11,12
25:14 33:22
turns 19:12
TV 13:18,19
two 5:18 14:21
17:3 18:9 20:13
21:10 22:2
26:24 27:2,6
type 21:5,7 26:18
27:20,20
types 24:14 32:6

U

ultimately 24:12
unanswered 32:25
unavailable 11:4
unclean 5:14 6:1
underlying 18:17
understand 31:7
34:4
United 1:1,22
14:12 16:17
17:4 20:1,18
21:11,15 22:12
29:14 34:20
36:9,16 39:6,10
University 26:16
30:9
unscramble 18:5
uplink 13:22
upstart 35:3
urge 9:1,10
USC 5:6,8,9,22
use 10:16 13:3
15:24 16:5
18:14,19,22
28:14
uses 22:3
U.S 39:15
U.S.A 22:3

V

vaporize 18:16
various 18:14
27:14 28:14
verdict 4:13 8:13
8:17
version 25:3

videotaped 11:3
violated 5:5,21
violation 5:21
Virginia 26:12
virus 24:15
viruses 32:9
voir 32:7 34:23
Vol 1:8 4:2
Volume 38:17
Von 28:16,17
VonRat 28:16
vs 1:7

W

W 2:13
Wade 2:4,6 13:5
wagon 34:16
wait 6:20
want 21:14 23:17
25:21 33:17
38:12
wanted 15:24
16:1,7,7 34:20
36:8,9
wasn't 16:24 29:3
35:12
way 11:8 20:8
21:6 34:10
ways 16:13 22:24
weaker 16:24
website 28:24,24
Wednesday 1:17
4:1
weight 6:22 12:8
Welch 2:4,6 13:4
13:6,12 17:20
17:22 36:20
welcome 12:23
went 20:11 25:19
26:3 30:12
33:16 34:13
37:10
weren't 17:6 27:5
31:13
West 1:22 2:14
we'll 9:6 11:20
18:2 36:22
we're 4:5 9:2,9,16
13:10,16,17
14:6,7,18 15:7

18:7 24:25
30:24 36:11,18
36:24 37:5
we've 11:19 13:7
13:8,13
wheel 34:16
widespread 24:13
Willett 13:9
WILLETTS 2:5
wish 9:18 10:3
witness 9:4,5
10:15,17,18,25
11:1,8 12:9
15:19 28:2
witnesses 6:23
12:4,12,13
17:23 27:15
34:5
wondering 15:6
WOOTEN 2:6
word 22:4 29:3,6
words 7:14
work 20:17 21:18
25:15
worked 13:8
15:16 31:22
working 13:9
21:20 23:1,6
works 13:8 19:13
20:21 22:14
36:23
world 16:17 18:21
27:19,21,22
35:15
worldwide 22:21
34:21
world-wide 16:16
wouldn't 16:5
24:22
wrong 21:16

X

X 3:1
XXX 31:17

Y

year 11:22
years 32:2

Z

zeros 19:3
zillions 31:18
Zvi 18:10

$

$20,000 27:1
$383,000 33:19
$6,000 33:18
$90 32:3

0

03-950 1:7

1

1 1:8
1-053 1:22
1:28 4:3
10 39:12
1030 5:22
113 30:21
1201(a)(1) 5:6
1201(a)(2) 5:7
13 3:4
1400 2:20
17 5:6
18 5:9,22
1934 5:7
1962(c) 5:9
1970s 14:15
1992 13:14
1994 37:18
1997 15:23
1998 17:4,15
25:19
1999 2:20 23:11

2

2 4:2 29:21
2nd-ish 33:8
2:23 38:15
20,100 27:4
200 11:20,21
2000 23:25 26:11
26:19 28:22
33:4 37:19
2001 31:9 37:19
2002 25:4 37:19
2003 37:19
2004 37:20
2005 25:5

2007 33:8
2008 1:17 4:1
  39:12
2008-04-10 1:25
21st 28:21 30:16
  30:22 31:8,9
24th 28:20,21,25
  30:16 31:8
2401 2:7
2600 2:15
275 2:14
28 39:6

3
---
3 9:4
3M 22:3
310 2:21
3426 5:21

4
---
4 3:3
4th 1:22
41 31:4,16
411 1:22
415 2:16
47 5:8

5

5000 11:19,22
558-8141 1:23
593(d)(a) 5:10
593(e)(b) 5:10

6

605(a) 5:8

7
---
700 2:8
713 2:9
714 1:23
753 39:5
77057 2:8
785-4600 2:21

9
---
9 1:17 4:1
90067 2:21
92701 1:23
94 16:20
94111 2:15
9472 1:21 39:16

95 16:21 37:18
952-4334 2:9
96 16:21 37:18
97 16:12,13,21
  27:18 37:19,23
98 18:8 21:23
  30:14 37:19
984-8700 2:16
99 37:15,19