

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, Volume V |
| 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 2008-04-09 D1V5

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| WITNESSES | DIRECT | CROSS | REDIRECT | RECROSS |
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| ERGEN, Charles William | | | | |
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|--------------|--|--|--|---|
| By Mr. Welch | | | | 5 |
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| By Mr. Stone | | | | 40 |
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EXHIBITS

| EXHIBIT NO. | IDENTIFICATION | IN EVIDENCE |
|-------------|----------------|-------------|
|-------------|----------------|-------------|

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| 535 | Joint venture | 16 |
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agreement between

EchoStar and Kudelski

NagraVision to form

NagraStar

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| 651 | 10-K report | 40 |
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| 653 | 10-K report | 40 |
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| 654 | 10-K report | 40 |
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| 828 | Letter from | 66 |
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Mr. Sayeedi

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| 1377 | 10-K Report | 40 |
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| 1378 | 10-K report | 40 |
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| 1379 | 10-K report | 40 |
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| 1380 | 10-K report | 40 |
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| 1381 | 10-K report | 40 |
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| 1382 | 10-K report | 40 |
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1 SANTA ANA, CALIFORNIA, WEDNESDAY, APRIL 9, 2008

2 Day 1, Volume V

3 (4:10 p.m.)

4 (In the presence of the jury.)

5 THE COURT: We're back on the record. The jury's
6 present. All counsel are present. All parties are present.

7 Counsel, if you would be seated. Please call your
8 first witness on behalf of plaintiff.

9 MR. WELCH: Your Honor, plaintiffs call
10 Mr. Charles Ergen.

11 THE COURT: Thank you.

12 Would you be kind enough to raise your right-hand.

13 CHARLES WILLIAM ERGEN, PLAINTIFF'S WITNESS, SWORN

14 THE WITNESS: Yes, I do.

15 THE COURT: Thank you, sir. If you would please
16 have a seat in the witness box. After you're seated, would
17 you be kind enough to state your full name for the jury,
18 please.

19 THE WITNESS: Charles William Ergen.

20 THE COURT: Spell your last name.

21 THE WITNESS: E-R-G-E-N.

22 THE COURT: Are you comfortable?

23 THE WITNESS: Yes, I am.

24 THE COURT: This is direct examination by counsel.

25 MR. WELCH: Thank you, Your Honor.

DIRECT EXAMINATION

1
2 BY MR. WELCH:

3 Q. Mr. Ergen, can you the tell us what you do for a
4 living?

5 A. Ism the chairman and chief executive officer of
6 EchoStar Communications Corporation.

7 Q. Okay. And what is the business of EchoStar
8 Communications Corporation?

9 A. Our prime business is really to sell satellite
10 television. So it's really satellite dish in your home and,
11 basically, pay television similar to cable television,
12 except we transmit that to your home by satellite instead of
13 a cable.

14 Q. Okay. What I want to direct your attention to --
15 'cause I want to start off with this because it's fresh in
16 the jury's mind -- Mr. Stone said that your motivation for
17 filing the instant lawsuit was to because of a merger that
18 was gonna take place between News Corporation and DirecTV.
19 Do you know approximately when that deal, the
20 News Corp./DirecTV transaction occurred?

21 A. I believe they reached an agreement sometime in 2003,
22 first half of 2003.

23 Q. Okay. Did you file a lawsuit against NDS to retaliate
24 because DirecTV was gonna get bought -- or the majority
25 share of DirecTV was gonna get bought by News Corporation?

1 A. No, we did not.

2 Q. Okay. So if Mr. Stone told the jury that, then that's
3 incorrect?

4 A. If that's what he said, I would think that he's
5 incorrect, yes.

6 Q. Okay. When was the first time that you filed suit or
7 that EchoStar filed suit against NDS for these claims?

8 A. It would have been in the fall of 2002.

9 Q. Now, in the fall of 2002, that precedes Mr. Murdoch's
10 and News Corporation's attempt to purchase DirecTV, correct?

11 A. I'm not sure I understood the question.

12 Q. Well, there's no way that this -- that motivation for
13 filing the lawsuit could be Mr. Murdoch and News
14 Corporation's attempt to purchase DirecTV?

15 MR. STONE: Objection. Leading.

16 THE COURT: Sustained, Counsel. Plus, it's
17 argument. And you can certainly argue that.

18 You can ask him his intent and motivation
19 certainly.

20 MR. WELCH: Okay.

21 BY MR. WELCH:

22 Q. Are you generally familiar with the claims that are
23 brought against the defendants in this lawsuit?

24 A. Yes, I am.

25 Q. Okay. And what is your understanding of those claims?

1 A. Well, in the simplest form, a defendant basically went
2 out and hacked -- hacked our security system that we use for
3 pay television, thus, causing us to have to go out and spend
4 an awful lot of money to send that new encryption card to
5 our customers.

6 Q. Okay. Before we get into the details of the case,
7 could you please tell the jury a little bit about yourself.
8 Where are you from?

9 A. I was born in Oak Ridge, Tennessee, East Tennessee, and
10 currently reside in Littleton, Colorado, which is just
11 outside of Denver.

12 Q. Are you married, sir?

13 A. I've married been married over 25 years. I have five
14 kids.

15 Q. Is your wife part of the business, as well?

16 A. Yes, she is.

17 Q. I want to focus you on the lawsuit for a minute. There
18 are four plaintiffs in this lawsuit. Could you tell us who
19 they are?

20 A. There's EchoStar Communications Corporation. We call
21 that ECC. That's our -- that's essentially a holding
22 company; in other words, it's a company that owns the
23 other -- two of the other companies, one of which is
24 EchoStar Technology Corporation, which is primarily a
25 company that develops set-top boxes, so kind of the

1 converter box you put by your TV in your house for
2 television. And the other one is EchoStar Satellite
3 Corporation, which is -- essentially, we go by the name of
4 DISH Network. So if you're familiar with pay television --
5 you may have heard of your cable operator, like Comcast, you
6 may have heard of DirectTV, and we're a competitor to those
7 companies. We're DISH Network.

8 And the final company is a company that we own, that
9 ECC owns, or EchoStar Communications Corp. owns 50 percent
10 of, which is called NagraStar.

11 Q. Okay. What did -- EchoStar Satellite Corporation, is
12 that the actual operating entity?

13 A. Yes. That's the company that owns the satellites and
14 has all the employees.

15 Q. Okay. When was EchoStar Satellite Corporation -- when
16 did it begin operations?

17 A. We got our first customer in March of 1996.

18 Q. Could you please describe for the jury what type of
19 services DISH Network offers to consumers in the
20 United States?

21 A. Well, primarily, we have -- we offer about 500 channels
22 of television. We have various packages. Most customers
23 generally subscribe to a package of maybe 100 of those
24 channels, and we -- those channels are all digital. It
25 includes your local broadcasting stations. Typically, it's

1 channels you may have heard of, like Nickelodeon or Disney
2 or ESPN or TNT, WTBS, USA Network -- those kind of channels.
3 Many people call 'em cable channels.

4 We also have premium channels like HBO or Showtime. We
5 also offer a wide variety of international channels. We
6 have a lot of Spanish channels, but we've got about 60
7 different languages because the United States is a melting
8 pot of many people from many countries.

9 Q. Okay. Now, this programming that you get, do you get
10 that for free or do you have to pay for it?

11 A. No, we don't get it for free. We contract with the
12 actual programming company. These are companies you may
13 have heard of. But, typically, it's companies like Disney,
14 who owns ESPN, the Disney Channel. It may be Viacom, who
15 owns Nickelodeon, MTV Networks, those kind of companies. It
16 might be a company like NBC, which owns USA Network or
17 Bravo. And it might be CBS, which owns Showtime; Time
18 Warner, which owns HBO, CNN News, so forth.

19 And we contract with them, and, then, we typically --
20 we pay them a fee for each subscriber.

21 BY MR. WELCH:

22 Q. Mr. Ergen, are you familiar with the term "copyright"?

23 A. Yes, I am.

24 Q. And could you generally tell us what that means.

25 A. Well, "copyright" is -- it means a variety of things,

1 but typically when people have -- invent things or
2 intellectual property, they copyright that and then are
3 able, then, to sell it. Probably the easiest example would
4 be -- to understand, would be a book. So, if somebody
5 copyrights that book, they're able to sell that book and
6 people can't copy that book without paying them. In
7 programming, they do a very similar thing in that they have
8 copyright to the actual programs.

9 And then, therefore, we can't duplicate or steal those
10 programs without paying -- without having a contract and,
11 then, without paying them.

12 Q. Okay. So the money that you receive from consumers, do
13 you get to keep all that?

14 A. No, we don't.

15 Q. Okay. And where does part of that money go to?

16 A. Our biggest expense is -- typically, a customer, for
17 example, might pay us about 40 or \$50 for programming per
18 month for TV. And about half of that will go to the actual
19 programmers.

20 Q. Does EchoStar, itself, does it have copyrighted
21 programming that it puts up on this program?

22 A. Yes. EchoStar, itself, has some of its own copyrighted
23 material.

24 Q. Okay. Have you heard of a concept in the pay
25 television business known as "piracy"?

1 A. Yes, I have.

2 Q. Can you tell what is your understanding of piracy is?

3 A. Well, piracy -- this the simplest form -- is somebody
4 taking your signal or video signals or your content that you
5 broadcast, and taking it without authorization, and they
6 don't pay you for it. So, essentially, they steal your
7 channels.

8 Q. Do you -- as a company, EchoStar, do you take steps to
9 try and prevent piracy?

10 A. Yes, we do.

11 Q. Okay. How do you do that?

12 A. Well, the main way we do it is that we spend an awful
13 lot of money on encryption services so there are ways to
14 encrypt or to scramble the signal so that someone can't
15 steel it. So it might be as simple as a magnetic strip on
16 the back of your credit card that you have in your wallet
17 that has encrypted information so you can only use your ATM,
18 and somebody else can't use it.

19 In our case, it's code words and so forth that we use
20 from the satellite to the set-top box to make sure that
21 someone doesn't -- doesn't steal the signal. So there's a
22 lot of technology and microprocessors and so forth that go
23 into doing that.

24 Q. This encryption that you've just told the jury about,
25 is that the same thing that we've referred to as

1 "conditional access"?

2 A. Yes. In general, yes.

3 Q. Okay. And do you enter into contracts with conditional
4 access suppliers to protect your copyrights and programming?

5 A. Yes, we, yes.

6 Q. Can you tell us whether or not programmers require you
7 to do that?

8 A. Yes. Almost all of our programming agreements with the
9 copyright holder require us, then, to make sure that we
10 encrypt the signal so that only legitimate customers can get
11 the signal. Therefore, we get paid; therefore, they get
12 paid.

13 Q. Does protecting these copyrighted works also benefit
14 consumers in addition to the programmers?

15 A. Well, it does. It ultimately -- from a consumer --
16 when legitimate people pay for signals, it ends up in lower
17 costs for everybody. And, of course, obviously, the
18 copyright holder then has the incentive to go out and make
19 their product better.

20 So the reason you see really good TV shows is because
21 people know they're gonna get paid for that TV show. If
22 they didn't think they would get paid for that TV show, they
23 would never produce that TV show 'cause they have costs.

24 Q. Has the number of programming offerings grown over
25 time?

1 A. Oh, yes. When we first started in 1996, I think we
2 started with 40 channels, and now we have over 500.

3 Q. Now, if you don't have a secure system to protect the
4 copyrighted programming, how could that affect your company?

5 A. Well, if you can't protect it, then a couple things
6 happen. One is, primarily, you're not gonna get paid for
7 your programming so your -- therefore, your costs will be
8 higher. You'll be less profitable as a company.

9 You have additional costs that you invest in your
10 customers when you first go out and do the installation for
11 the customer, and so forth, that you don't get a return on.
12 And, in fact, your programming costs from the programmers
13 could be higher than it otherwise would be to use, so your
14 costs all go up. And then, it's also possible that a
15 programmer might not do business with you if they didn't
16 feel like you were gonna secure their signal.

17 Q. Okay. I want to talk about the conditional access
18 system right now.

19 Could you generally describe for the jury how a
20 conditional access system works. I don't want you to give
21 them the nuts and bolts. You can just generally tell them
22 the way the system works.

23 A. Yeah. I'm not sure I could get into the nuts and
24 bolts. But it -- essentially, the conditional access system
25 does two things: It says that you, as a customer, have

1 subscribed to these channels, and so, of those 500 channels,
2 it says these are the hundred channels that you're willing
3 to pay for.

4 And the second thing it does is it sends a key to
5 your -- a key, through the satellite, down into your
6 satellite dish that actually gets into your in set-top box
7 through what we call a "Smart Card." And that key really
8 unlocks those channels that you paid for and doesn't unlock
9 those channels that you haven't paid for.

10 So we actually transmit a -- this is -- you know, it's
11 probably more technical than this. But it transmits,
12 actually, the key to unlock those channels you've paid for.

13 Q. Okay. Now, is EchoStar in the business of providing
14 conditional access services?

15 A. No. We don't -- EchoStar, itself -- EchoStar
16 Communications does not provide conditional access.

17 Q. Okay. So you don't manufacture Smart Cards and you
18 don't compete with NDS in the conditional access business as
19 EchoStar?

20 A. No, we do not.

21 Q. Okay. Now, where do you -- if we talk about when
22 EchoStar began operations in 1996, who was the conditional
23 access supplier that you had at that time?

24 A. A company called Kudelski NagraVision.

25 Q. And where are they located?

1 A. They're located in Switzerland.

2 Q. Did there come a time when you changed where you were
3 buying your conditional access services from?

4 A. Yes.

5 Q. And do you know approximately when that was?

6 A. Well, that was probably couple years later, so I would
7 think it was about 1998 or so.

8 Q. Now, if we talk about the time period -- let me ask you
9 this: Who did you buy your Smart Cards and your conditional
10 access services from starting in mid '98?

11 A. A company called NagraStar.

12 Q. And that's one of the plaintiffs in this lawsuit,
13 correct?

14 A. That's correct.

15 Q. Okay. I'd like you to --

16 MR. WELCH: Could you please hand Mr. Ergen
17 Exhibit 535.

18 (Document provided to witness.)

19 BY MR. WELCH:

20 Q. Mr. Ergen, could you please tell us what Exhibit 535
21 is.

22 A. This appears to be our agreement to actually form
23 NagraStar, the company NagraStar.

24 Q. Okay.

25 A. The formation of it. Essentially, a joint venture

1 between EchoStar and Kudelski NagraVision?

2 Q. If you turn to the second page, page number 1 on the
3 document, it is -- do you see the first paragraph where it
4 says, "This agreement to form NagraStar"?

5 A. Okay.

6 Q. What was the date this agreement was entered into?

7 A. The 23rd of June 1998.

8 Q. Okay. If you could please turn to page 14 of the
9 agreement.

10 A. (Witness complies.)

11 Q. Is that your signature, Mr. Ergen?

12 A. Yes, it is.

13 MR. WELCH: Your Honor, we'd like to move for the
14 admission of Exhibit 535.

15 THE COURT: Any objection?

16 MR. STONE: No objection.

17 THE COURT: Received.

18 (Exhibit No. 535 received in evidence.)

19 BY MR. WELCH:

20 Q. Other than just selling Smart Cards as NagraStar
21 selling Smart Cards to EchoStar, does NagraStar also provide
22 other services than the actual sale of the cards?

23 A. Yes, they do.

24 Q. What type of services does NagraStar provide to
25 EchoStar?

1 A. Well, they do some engineering work. And how we --
2 it's a little complicated. But how we actually send the
3 signals, the keys, up to the satellite -- so we have to have
4 an uplink center to do that. They are chartered with the
5 security of the system, so they would be involved in making
6 sure that the system is secure, or if there's evidence of a
7 hack and so forth, they would be the ones that would work on
8 that.

9 They work on countermeasures so that, if somebody -- if
10 somebody tries to steal a signal, is there something we can
11 do to prevent them from stealing it electronically. There
12 may be other things that they would do with, but those would
13 be the main things.

14 Q. Okay. Can you turn to Appendix D-1 of Exhibit 535.
15 It's Bates labeled on the bottom ESC0158717.

16 THE COURT: (To the jurors:) If you want to, the
17 jury box now belongs to you. You can move down and sit
18 anyplace you want to.

19 THE WITNESS: All right.

20 BY MR. WELCH:

21 Q. Now, could you tell us what this document is?

22 A. This is a software license agreement with the company
23 Kudelski NagraVision.

24 Q. Okay. Now, could you turn to Exhibit E-3 of that
25 document. It's actually the last exhibit to it.

1 A. The number on the bottom is?

2 Q. Yes, sir. It is ESC0158754.

3 A. Okay.

4 Q. Can you tell us what this document is?

5 A. This is the Smart Card purchase agreement.

6 Q. This deals with the actual sale of the Smart Cards from
7 NagraStar to EchoStar?

8 A. So this is the actual -- perhaps, I should explain what
9 a Smart Card is.

10 That's the card that has the -- that you send the key
11 to, to unlock the channels that you pay for. It's a card
12 that -- almost like a credit card -- that goes in your
13 set-top box.

14 Q. Now, I want to focus your attention on the claims
15 brought in this case. There are two defendants in this
16 case: NDS Americas and NDS Group PLC.

17 Can you tell us who those companies are?

18 A. Well, those are -- one is the American subsidiary of
19 maybe what they call "holding company" or "company of "--
20 and they also provide conditional access services to people
21 in the pay television business.

22 Q. When did you first become familiar with NDS?

23 A. Probably in the early 1990's.

24 Q. And --

25 A. Certainly, by 1994.

1 Q. Okay. And how did you come across the knowledge -- or
2 what were you doing that led you to discover what the
3 business of NDS was?

4 A. Well, we had decided at EchoStar Communications to
5 launch our own satellite and enter the pay television
6 business and compete against cable television companies back
7 in 19- -- by 1992, we had started construction on our first
8 satellite. We knew we weren't gonna launch until probably
9 1995, but we knew we needed a conditional access system. So
10 between 1992 and 1995, we went around the world and looked
11 at everybody's system and compared the different systems so
12 that we could get the most secure, best, economical -- the
13 most secure and most economical system that we could
14 purchase that would be state-of-the-art when we started our
15 business.

16 Q. Now, before you started your business, before you
17 actually launched in March of 1996, did you basically do
18 some due diligence and compare different companies that were
19 providing conditional access services?

20 A. Yes. We actually visited all the companies that we --
21 that were in the business. We had them come into our
22 corporate headquarters, make presentations to our teams of
23 engineers, who visited their locations typically, talked to
24 their customers, read about 'em, asked other people who had
25 used 'em, you know, did reference checks, so to speak, and

1 so we were very familiar at the time with all the
2 conditional access players in the world at the time.

3 Q. In 1996, you chose Kudelski, correct?

4 A. Based on all that due diligence, based on all that
5 analyzing and all that legwork, we felt that Kudelski from
6 Switzerland had the best system, the Nagra system.

7 Q. Did you consider using NDS to provide conditional
8 access services before you launched your -- the DISH Network
9 service in 1996?

10 A. Yes, we did.

11 Q. Why did you opt to not use NDS?

12 A. Well, there were two reasons. One they were a little
13 bit more expensive; and two, at the time, they were -- their
14 system that they used was hacked.

15 Q. And are you familiar with company called BSkyB?

16 A. Yes, I am.

17 Q. And what is BSkyB?

18 A. BSkyB is a satellite television company in England or
19 the UK.

20 Q. And --

21 A. They don't operate in the United States, but they
22 operate in the United Kingdom.

23 Q. In the 1996 time frame, was BSkyB operating?

24 A. Yes, they were.

25 Q. And who owned BSkyB in 1996? Are you aware of that?

1 A. Yes.

2 Q. And who was that?

3 A. Well, there was several owners. The primary owner was
4 Rupert Murdoch's News Corporation.

5 Q. Okay. So News Corporation owns a part of BSKyB?

6 A. That's correct. They were the majority owner at the
7 time.

8 Q. And BSKyB's revenues were being protected by who?

9 A. Their conditional access system was NDS.

10 Q. And NDS was -- who owned NDS at that point in time?

11 A. I believe News Corp. owned them at that time --

12 Q. At the time --

13 A. -- as well.

14 Q. At the time you were looking at BSKyB and NDS in 1996,
15 was BSKyB hacked?

16 A. I believe it is -- it was, yes -- or it had been.

17 Q. And when we talking about "hacking," what does that
18 mean to you?

19 A. It just means that -- it means that people are able,
20 through perhaps a variety of methods, to steal the signal
21 and not pay to get the channels that they want to watch.

22 Q. Okay. You mentioned a company named News Corporation.
23 Could you tell the jury what News Corporation is, what their
24 business is?

25 A. Well, News Corporation is a large multi-media company,

1 worldwide company. We know them in the United States
2 because they own Fox Networks. They own the Fox Studios.
3 They own, now, the Wall Street Journal. They own a
4 variety -- they own newspapers, so they -- and they own
5 satellite platforms around the world. The most -- the
6 biggest of these is BSkyB in the United Kingdom.

7 Q. Was there a time when News Corporation itself tried to
8 enter into the United States satellite market providing
9 satellite services direct to home?

10 A. Yes, they did.

11 Q. And when was that?

12 A. It was approximately the 1996 time frame that they
13 tried to enter the United States. They already were the
14 dominate player in Europe with their BSkyB in the UK, and
15 they tried in the United States.

16 Q. Okay. In 1996, how many companies were providing DBS
17 services or direct to home satellite services to consumers?

18 A. There were three.

19 Q. There were three?

20 A. Three.

21 Q. If we talk about the small dish, the 18-inch dish, how
22 many companies were providing that?

23 A. There were two companies: DirecTV and DISH Network.

24 Q. In 1996 or 1997, was News Corp. successful in launching
25 a satellite service in the United States?

1 A. No, they were not.

2 Q. Okay. I want to focus your attention to the time
3 period of early 1997, specifically February 1997. Did you
4 have any dealings with News Corporation?

5 A. Yes, I did.

6 Q. Okay. Could you generally tell us what those were?

7 A. Well, in early 1997, I received a call from
8 Mr. Murdoch, who was the CEO of News Corp., and said that he
9 would like to try to buy our company so he could enter the
10 business, the pay TV business in the United States. I
11 basically said that I didn't want to sell the company. And
12 that led to a couple meetings, which led to, essentially, us
13 acquiring his company through a merger -- his satellite
14 assets in the United States through a merger. And we
15 ultimately consummated an agreement. Again, it might have
16 been March, but it was sometime in early 1997 we actually
17 entered into an agreement.

18 MR. WELCH: Could you please hand Mr. Ergen
19 Exhibit 1577.

20 BY MR. WELCH:

21 Q. While he's looking for that exhibit, Mr. Ergen, there
22 was a time when you actually entered into an agreement with
23 News Corporation?

24 A. Yes, we did.

25 Q. Okay. Were you involved in the negotiations of that

1 agreement?

2 A. Yes, I was.

3 Q. Now, were there certain terms that that agreement to
4 the best of your knowledge that dealt with conditional
5 access?

6 A. There were.

7 Q. Okay. And can you tell the jury basically what those
8 terms were to the best of your recollection?

9 A. Well, because News Corp. owned NDS, News Corp. wanted
10 us to switch to use their conditional access system from
11 them. At that time, Kudelski NagraVision system we used.
12 And so one of the requirements of the deal was, as long as
13 their system was secure and economical, that we will use --
14 we would switch to the NDS system.

15 Q. Okay. I'm going to represent to you that agreement was
16 dated approximately February 19th of 1997. Okay?

17 At that point in time, was the Kudelski system that you
18 were using, was it secure? Had y'all been hacked?

19 A. At that time our system was secure. Our Kudelski
20 NagraVision system was secure and had not been hacked.

21 Q. At the time, was the NDS system that was being utilized
22 by DirecTV, was it hacked?

23 A. Yes, it was.

24 Q. Okay. Now, did you give consideration -- after you
25 entered into the agreement, did you give consideration to

1 using NDS?

2 A. Yes, we did.

3 Q. Could you generally tell us some of the things that you
4 did.

5 A. Well, we had -- because their system was hacked, which
6 they weren't readily admitting, we went through design
7 reviews with them on a couple issues. One was how could we
8 make their system more secure, and how would we be able to
9 implement the change into our system without -- in a way
10 that our system would be secure once we implemented the
11 change.

12 Q. Okay. Was there ever a time where there became a
13 disagreement between the parties over the conditional access
14 system?

15 A. Yes. Yes, there did. Yes, there was. Yes, sir.
16 Yeah. At some time there became a disagreement there.

17 Q. Did you have any conversation with anybody at
18 News Corp. about the disagreement related to conditional
19 access?

20 A. Yes, I did.

21 Q. Who were those conversations with?

22 A. I had my conversations primarily with Mr. Murdoch.

23 Q. And what did Mr. Murdoch tell you in connection with
24 the conditional access system?

25 A. He basically said we had to use the system -- that his

1 system wasn't -- that it was secure; that it wasn't hacked.
2 We had to use the system or he wasn't going to proceed with
3 the merger, with the agreement.

4 Q. Did you ask him for any evidence that he had that the
5 Kudelski system had been hacked?

6 A. I told him -- I guess I'd say it this way: I said,
7 "The system we have we know is secure. We believe your
8 system is hacked." And we showed him that it was. And, you
9 know, and he didn't have any evidence -- I guess we did ask,
10 and he didn't have any evidence that the Nagra system was,
11 in fact, hacked.

12 Q. Now, this pre-sale or merger, did that go through?

13 A. No, it did not.

14 Q. Did Mr. Murdoch give you a reason why he was not going
15 to proceed with the merger?

16 A. Yes, he did.

17 Q. And what was that reason?

18 A. The reason he gave us was that we wouldn't use -- if we
19 weren't gonna use his system, he was not gonna -- if we were
20 not going to use the NDS system, he was not gonna proceed
21 with the merger.

22 Q. When the merger didn't go through, what did you do?

23 A. We -- well, we continued our business in the
24 marketplace, and we ultimately -- and we filed a lawsuit
25 against News Corp. for breach of contract, I guess, would be

1 the legal -- simplest way to put it.

2 Q. Were you ultimately -- were you intimately involved in
3 that litigation?

4 A. I was pretty involved. I don't know if I was
5 intimately involved, but I was pretty involved in it.

6 Q. And when was that litigation filed to the best of your
7 recollection?

8 A. That would have been 1997.

9 Q. Now, did News Corporation, to the extent you know,
10 vigorously defend that litigation?

11 A. Yes, they did.

12 Q. Did you review the pleadings that were filed in that
13 litigation?

14 A. Yes, I did.

15 Q. Okay. What was your understanding of the central crux
16 of the disputes in that litigation? What was the main
17 issue?

18 A. Well, the main issue was they had entered into an
19 agreement with us, which they were no longer -- which they
20 were not agreeing, then, to proceed with, and their main
21 reason given was that we weren't -- if we didn't use their
22 NDS conditional access system, they weren't gonna proceed
23 with us and -- you know, as required by the contract, if it
24 was secure.

25 Q. While your lawsuit was pending against News

1 Corporation, did News Corporation try to sell those very
2 same assets to somebody else?

3 A. Yes, they did.

4 Q. And who was that? Who did they try to sell it to?

5 A. A company owned by cable operators call PrimeStar,
6 which had a little bit bigger dish, but also was in the
7 satellite -- they were in the cable business. They were in
8 the satellite business, as well.

9 Q. Do you know when that sale took place or that attempted
10 sale?

11 A. Several months after we sued, I believe, News Corp. for
12 breach of contract. So it would have been in 1997.

13 Q. Did that sale ever --

14 THE COURT: Excuse me, Counsel. Just one moment.

15 MR. WELCH: Yes, sir.

16 THE COURT: You had ask a question, "Did
17 News Corp. try to sell those very same assets to somebody
18 else?"

19 I want to make sure, Mr. Ergen, what those same
20 assets were.

21 THE WITNESS: That's a good question.

22 The assets that they were selling to us, and
23 ultimately tried to sell to somebody else, were two -- were
24 four satellites and an uplink center that would consolidate
25 all the signals and beam them up to the satellite. So four

1 satellites and the uplink center.

2 THE COURT: And the jury might have misunderstood
3 those to be companies, not assets like a satellite.

4 Thank you very much.

5 THE WITNESS: Yeah.

6 BY MR. WELCH:

7 Q. Now, the proposed transaction between News Corporation
8 and PrimeStar, did that ever take place? Did it get
9 consummated?

10 A. No, it did not.

11 Q. Do you know why not?

12 A. Yes. The Justice Department blocked the sale.
13 United States Department of Justice.

14 Q. After the Department of Justice blocked the sale, did
15 you have any discussions with News Corporation after that?

16 A. We did.

17 Q. And what did those discussions center around?

18 A. Well, they ultimately centered around us acquiring
19 those assets from News Corporation. So, ultimately, we
20 acquired those assets from News Corporation.

21 Q. So you got the very same assets that you had in the
22 earlier deal?

23 A. That's correct.

24 Q. And do you know --

25 A. But without News Corp. as a partner.

1 Q. And approximately when was that?

2 A. That would have been in 1998, I think.

3 Q. Okay. Was the deal entered in '98, or did it close in
4 '98?

5 A. We would have entered into the deal in 1998, I think.

6 Q. And do you know when it closed?

7 A. Gosh, probably 1999.

8 Q. Now, as part of that deal, were you required to use the
9 NDS conditional access system?

10 A. No, we were not.

11 Q. At that point in time, was the NDS conditional access
12 system still hacked, to the best of your knowledge?

13 A. I believe that it was, yes.

14 Q. And at that point in time, was it your understanding
15 that you will still secure?

16 A. Yes.

17 Q. I want to get back into this lawsuit.

18 Generally, what are you suing NDS for? What is
19 EchoStar suing NDS for?

20 MR. STONE: Objection. Best evidence.
21 Argumentative.

22 THE COURT: Overruled.

23 You can answer that question, sir.

24 THE WITNESS: We're basically suing NDS for, in
25 simplest terms, for providing a hack to our DISH Network

1 system that deprived us of revenue from customers, and the
2 cost of replacing the security system that we wouldn't have
3 otherwise had to replace.

4 BY MR. WELCH:

5 Q. Does piracy have an effect on the prices that you
6 charge consumers for DISH Network services?

7 A. It can.

8 BY MR. WELCH:

9 Q. Could you explain that to us?

10 A. If the honest person pays and the dishonest doesn't
11 pay, then as we know, the honest person ends up paying a
12 little bit more than if there weren't dishonest people.

13 We invest in customers when we put the equipment in,
14 and then if we don't get a return on the investment, we may
15 pay a little bit more for -- we may get fewer subscribers,
16 but we still have satellite costs and we still have fixed
17 costs. We have a cost, then, of replacing the security. So
18 all those things can lead to -- we could get higher prices
19 from our programmers. All those could lead to higher
20 prices.

21 Q. Was there a point in time that you learned that your
22 system may have been hacked?

23 A. Yes.

24 Q. Do you know approximately when that was?

25 A. My best recollection was -- it probably came to my

1 attention sometime in 1999.

2 Q. Was this a widespread hack in 1999?

3 A. Well, my first recollection was, we just had some
4 rumors that the system -- that somebody had hacked the
5 system; and then, ultimately, I think we were able to verify
6 that in fact somebody had built a board or something to --
7 and he was stealing or could steal the signal with it.

8 Q. What did you do at that point in time? Did you just
9 sit back, or did you take some proactive efforts to try and
10 combat that piracy?

11 A. Well, we generally got the engineers together, and we
12 worked with NagraStar to look at -- to try to find out how
13 somebody might be hacking the system and what could we do to
14 make sure that we could stop that -- you know, what were our
15 options to stop somebody from stealing our signal.

16 Q. And what do you recall were your options at that point
17 in time?

18 A. Well, in the 1999 time frame, my recollection was it
19 was very limited to just a few kind of hobbyist people who
20 stole the signal, and it was a case of a few people stealing
21 the signal, but it wasn't a very economical way for
22 somebody. So they actually spent more money to steal the
23 signal than they would pay to be a legitimate customer in
24 some cases. So it wasn't very widespread. But it obviously
25 concerned us, and we looked at the different options that we

1 might have to secure the system.

2 Q. Did NagraStar take steps to combat that piracy?

3 A. It's my understanding that they did, yes.

4 Q. What were some of the things that they did?

5 A. Well, they looked at the way someone stole the signal,
6 and they were able to develop things called "electronic
7 countermeasures." So we call that an "ECM." That stands
8 for electronic countermeasure. And there you're able to --
9 if the person is stealing your signal, it's not very
10 sophisticated or not as -- then you're able to go out and do
11 something different with your key -- all right -- and I
12 don't know all the details, but you're able to do something
13 a little bit different. And then they -- electronically
14 they're not able to steal your signal anymore.

15 Q. Now, is it possible to just switch out the cards as a
16 mechanism to try to restore the security?

17 A. That's also an option. Another option is to actually
18 take every card that you have in the box and send out a new
19 card and replace the old card because the card itself has a
20 microprocessor in it, and you can change that
21 microprocessor -- very similar to what's in your computer --
22 and you can replace that microprocessor and change the keys
23 and the way it works that way.

24 Q. Now, why didn't you change out cards right away when
25 you first learned it was hacked?

1 A. Well, again, I have a general understanding. I think
2 the first rule is, you don't panic when you -- you make sure
3 you look at all the facts. And this case, at that
4 particular time frame, the security system only had very
5 minor problems. We also, from NagraStar, had
6 countermeasures that were working that were eliminating the
7 problem.

8 Second reason you wouldn't replace the card at that
9 point is it costs a lot of money to do that. So you've got
10 to send a card to all your customers. Some customers have
11 one box, two boxes, three boxes, depending on the number of
12 TVs they have. You've got to send all those cards. You've
13 got to make sure your customer actually receives that card
14 and they don't think it's junk mail and throw it away.
15 Sometimes you've got to replace multiple cards. The
16 customer sometimes gets confused when he puts the card in
17 'cause it doesn't work exactly right, so he has to call you.
18 And another thing you have to do is, you have to make sure
19 that if somebody beats your system, you have to go invent a
20 counter-technology and that engineering takes time as well
21 to invent a way to do it a better way so that the hacker
22 can't rehack you.

23 Q. Was there a point in time where you ultimately did have
24 to swap out the cards?

25 A. Yes, there was.

1 Q. Do you know approximately when that started to take
2 place?

3 A. Well, I guess my recollection is it was probably -- we
4 probably started that in 2002, and it probably took us about
5 three years in total to completely replace all the cards to
6 a new system.

7 Q. Okay. Is that a simple process just to go ahead and
8 swap out all the cards?

9 A. It might sound simple, but it was a very complicated
10 process. And again, it was complicated because we -- well,
11 we had to buy a machine that would automatically insert a
12 card into -- and match an envelope with a customer's address
13 and then figure out how many boxes or TVs they had in their
14 house, and then be prepared to replace cards when somebody
15 didn't get their card -- or sometimes they broke in the
16 mail. So if the post office twisted that card a little bit,
17 they would break, the seal would break, so they didn't work.
18 So we had never done it before. So it was -- it was quite a
19 painful experience.

20 Q. Now, other than having to pay for the swap-out and
21 incur those expenses, does a card swap-out or break in your
22 conditional access system disrupt your business?

23 A. It does disrupt your business because a normal customer
24 who's calling up with a legitimate question about their
25 programming or about maybe wanted to add programming is also

1 calling the same place that somebody's calling about that
2 they didn't get their Smart Card or they got their new Smart
3 Card but it doesn't work, or "Where is my Smart Card?
4 Because now I don't have my signal and I haven't got my
5 Smart Card."

6 So it was quite disrupting. And sometimes you have to
7 send a truck to the customer's house so you can help the
8 customer because we can't identify the problem on the phone.
9 So it's actually better to go out to the customer's house.

10 Q. And this period where you're having to change out the
11 conditional access system, when did you actually ultimately
12 turn off that original stream? Do you know when that was?

13 A. Well, I'm not sure the jury understands what that is.
14 But when you switch out the system, you have another set of
15 keys that are going down from the satellite, and you have to
16 turn off the old ones. And so -- but while you're changing
17 'em out, you have to send both keys -- you have to send both
18 sets down. And I think ultimately in 2005 we would have
19 turned off the original set of keys.

20 Q. And who ended up paying for that card swap?

21 A. EchoStar did. We did.

22 Q. Now, do you know if EchoStar retained an expert in this
23 case to calculate how much that card swap-out cost?

24 A. It's my understanding that we have, yes.

25 Q. And who is that expert?

1 A. I think it's Mr. Rock.

2 Q. Okay. I'm not going to ask you about that. We'll ask
3 Mr. Rock about that.

4 Now, was EchoStar injured in any way in its business
5 other than having to pay for the card swap?

6 A. Well, I mean, I think we were injured in the sense we
7 just had a lot more costs, mailing costs. We had truck
8 rolls. We lost customers because either we didn't get a
9 card to them or we gave poor customer service or poor or
10 worse customer service than we otherwise would have. We had
11 tougher negotiations with programmers who asked the
12 questions about -- we may not have gotten as good deals as
13 we otherwise would have. Those would be a few of the ways
14 that you suffer, kind of peripherally to the problem.

15 Q. Did it affect your ability to make profits?

16 A. It did. We still were profitable. I don't want to
17 misstate that. I mean, we still made profits during this
18 time because fortunately there's a lot more honest customers
19 in the world today or at least in the United States than
20 there are dishonest customers. So we still continued to
21 grow. We were still a profitable company. Actually, I
22 don't know if we were profitable during this time, but we
23 certainly continued to grow, but it certainly cost us a lot
24 of money.

25 Q. Okay. Did EchoStar retain an expert in this case to

1 determine lost profits?

2 A. I believe we did.

3 Q. And who was that?

4 A. I think it's Mr. Rock.

5 Q. Okay. Now, I just want to ask you some general
6 questions.

7 As the CEO and chairman of EchoStar, are you aware of
8 any actions taken by EchoStar, DISH Network, to further
9 piracy?

10 A. No -- no, I am not.

11 Q. What is EchoStar's stance on piracy?

12 A. Well, we're against it because we don't have a business
13 if there's piracy. So we're strongly against it. And when
14 we see people doing the wrong thing, if it comes to piracy,
15 then we believe we need to take action against that, the
16 strongest action we possibly can.

17 Q. Did EchoStar, at any time that you're aware of, give
18 NDS the authorization or allow them to hack the conditional
19 access system being utilized by EchoStar?

20 A. Not that I'm aware of.

21 Q. Okay.

22 MR. WELCH: Could you please hand Mr. Ergen --

23 BY MR. WELCH:

24 Q. I'm going to hand you a series of Exhibits, Mr. Ergen,
25 then we'll be done with your examination.

1 MR. WELCH: Can you please hand Mr. Ergen
2 Exhibits 1377, 1378, 653, and 1379.

3 What I'm going to do, Your Honor, these are the
4 10-Ks. I'm just going to move for their admission, kind of
5 en mass.

6 So Ms. Willetts, if you can hand him 1379, 1380,
7 1381, 651, 654 and 1382.

8 MS. WILLETTS: (Complies.)

9 BY MR. WELCH:

10 Q. Could you generally just tell us what those are,
11 Mr. Ergen.

12 A. These are the Form 10-Ks from EchoStar Communications
13 Corporation that we file with the Security and Exchange
14 Commission. As a public company, we file our -- on an
15 annual basis, we file pretty much the state of our business
16 along with our financial reports as required by all the
17 requirements of a public company.

18 Q. Does that pretty much describe the operations of
19 DISH Network?

20 A. They do.

21 Q. And what years are covered by those documents?

22 A. These exhibits are 1998 -- or the years 1998 until
23 2005, I think.

24 MR. WELCH: Your Honor, we'd move for the
25 admission of Exhibits 1377, 1378, 1379, 653, 1380, 1381,

1 651, 654, and 1382.

2 THE COURT: Is there any objection?

3 MR. STONE: None whatsoever, Your Honor.

4 THE COURT: Received.

5 (Exhibit Nos. 651, 652 and 653 received in
6 evidence.)

7 (Exhibit Nos. 1377 to 1382 received in evidence.)

8 MR. WELCH: Your Honor, I think that completes my
9 examination of Mr. Ergen.

10 THE COURT: All right. Let me check with the
11 jury.

12 Would you like to go longer this evening or recess
13 this evening and start tomorrow?

14 Okay. Cross-examination.

15 MR. STONE: Thank you, Your Honor.

16 CROSS-EXAMINATION

17 BY MR. STONE:

18 Q. Now, Mr. Ergen, you're the chief executive officer of
19 EchoStar, correct?

20 A. Yes.

21 Q. And that means all the other officers of the company
22 report to you, correct?

23 A. I believe that's true, yes.

24 Q. And between the date the company came into existence
25 and today, if somebody asked, "Who is the boss of EchoStar,"

1 the answer would be "Charles Ergen," correct?

2 A. I think I'm one of the bosses, yes. I have a board of
3 directors and ultimately the board of directors on certain
4 matters would -- as a group would be the boss.

5 Q. And am I correct that you're the person that authorized
6 EchoStar to file this lawsuit against NDS?

7 A. Yes, that's true.

8 Q. And EchoStar has a group of engineers who had
9 responsibilities to monitor the status of EchoStar's
10 security system, correct?

11 A. Yes.

12 Q. And you would agree that you do not have a specific
13 recollection that any of the engineers in your security
14 department ever provided you with any facts that relate to
15 this lawsuit prior to the time the lawsuit was filed?

16 A. You have to repeat that. I'm not sure that's true.

17 Q. Sure. Would you agree that you don't have any specific
18 recollection that any of the employees or engineers provided
19 you with any facts regarding the security of the system
20 prior to the filing of the lawsuit?

21 A. I don't know that that's true. Probably peripherally I
22 probably did have some information from engineers.

23 MR. STONE: If I could play, Your Honor --

24 BY MR. STONE:

25 Q. Well, actually first of all, Mr. Ergen, do you recall

1 giving your deposition in this case?

2 A. Yes, I do.

3 Q. And do you recall that you were under oath when you
4 testified?

5 A. Yes, I was.

6 Q. And you gave your most accurate testimony at that point
7 in time?

8 A. Yes, I did.

9 MR. STONE: Your Honor, I'd like to play Page 159,
10 Lines 10 through 16.

11 THE COURT: Do I have a copy at my disposal? I'm
12 not going to thumb through documents as I'm listening to
13 evidence. That's not what a Court does. That should be on
14 my desk also.

15 MR. STONE: 159, Lines 10 through 16.

16 THE COURT: Counsel, move along with your next
17 question.

18 MR. STONE: Thank you, Your Honor.

19 BY MR. STONE:

20 Q. NagraStar was the company whose main focus was to
21 monitor the security system for EchoStar, correct?

22 A. That's true.

23 Q. And you don't recall receiving any written reports from
24 NagraStar updating you on the status of EchoStar's security
25 system during the period 2000 through 2007, correct?

1 A. I may have, but generally I was in meetings and got
2 periodic updates. I mean, I would have gotten updates,
3 whether written or not. I don't have a recollection that I
4 did.

5 Q. So you don't recall receiving any written reports that
6 updated you on the status of the security system. Is that a
7 fair statement?

8 A. It's possible that I don't recall receiving written
9 reports.

10 Q. And are you aware that in June 2003, EchoStar filed
11 with this Court a complaint containing the allegations
12 against NDS that started the lawsuit?

13 A. Yes, I am.

14 Q. And so that means, as of that date that you authorized
15 this lawsuit, you do not recall receiving any written
16 reports from the security people at NagraStar updating you
17 on the status of the security system?

18 A. I'm not sure I understand it. Can you repeat that
19 question?

20 Q. Sure. Am I correct that at the time you authorized the
21 filing of the lawsuit, you do not recall having received any
22 written reports from NagraStar about the status of the
23 security system?

24 A. After 2003?

25 Q. Prior to filing the lawsuit, correct, sir.

1 A. I don't recall getting written reports on the security
2 system from NagraStar personally.

3 Q. Would you agree that you never read the complaint in
4 this lawsuit?

5 A. No.

6 THE COURT: No, you did not read the complaint?

7 THE WITNESS: I wouldn't have read the entire
8 complaint. I would have gone through sections and
9 discussions with the attorneys. I wouldn't -- I would agree
10 I probably have not read every detail -- it's a very
11 technical complaint. I would agree that I probably did not
12 read all of the technicalities of the complaint, but it
13 would have been generally -- I would have had a good general
14 understanding of it.

15 MR. STONE: Your Honor, I'm going to like to play
16 from Mr. Ergen's deposition Page 202, Lines 19 through 24.

17 THE COURT: Is it impeaching, Counsel?

18 MR. STONE: Yes, it is, Your Honor.

19 THE COURT: And the line begins, Counsel?

20 MR. STONE: 19 through 24.

21 THE COURT: Of page?

22 MR. STONE: 202.

23 THE COURT: Overruled. You may not.

24 MR. STONE: Thank you, Your Honor.

25 THE COURT: It's not impeachment.

1 BY MR. STONE:

2 Q. Now, the fifth amended complaint filed by EchoStar
3 states: "Shortly after defendant's December 2000
4 publications, the first harmful effect evolved into the
5 outright destruction and full compromise of plaintiff's
6 security system." And you've testified, based on what you
7 know, that you believe that to be true; is that correct?

8 A. I don't know that I would use that terminology. But
9 yes, I believe that ultimately the system became compromised
10 as a result of that, yes.

11 Q. And you agreed, didn't you, that it was true that the
12 system was outright destroyed and fully compromised as a
13 result of the December 2000 publications. Fair statement?

14 A. Yeah. I think that's what we say in our complaint.

15 Q. And didn't you --

16 A. And I probably would use -- I'm not an engineer, so
17 that's probably a bit more engineering terminology; but yes,
18 the system was badly broken and hacked and didn't work
19 anymore. That's probably how I would term it.

20 Q. Didn't you admit that the only thing more negative that
21 could have occurred in the security system than outright
22 destruction and full compromise would be if it burned down
23 houses?

24 THE COURT: Too fast. You don't have a record,
25 Counsel. Once again, please.

1 BY MR. STONE:

2 Q. Didn't you admit that the only thing more negative that
3 could occur to the security system than outright destruction
4 and full compromise would be if it burned down houses?

5 A. My recollection during my deposition is, you continued
6 to ask the same question many times, and finally you said --
7 you asked me, "What could be worse?"

8 I said, "I don't know."

9 You said, "Give me an example."

10 And I said, "Well, I guess, yeah, I think the system --
11 to our business, the system being compromised was pretty bad
12 'cause we lost, of course, the revenue and the cost. But,
13 yes, it could have been worse hypothetically, if not only
14 did you lose the -- not only if you lost the revenue of your
15 encryption system, but, yeah, if the encryption system also
16 were to cause a fire in a house, that would certainly be
17 maybe worse."

18 And I think it was probably a fairly facetious answer
19 to a pretty facetious question, quite frankly.

20 Q. Do you have any recollection of receiving any e-mails
21 about the December 2000 postings?

22 A. I may have, but I don't have a recollection of that,
23 no.

24 Q. Do you have a recollection of writing any e-mails about
25 the December 2000 postings?

1 A. I doubt that I would. I typically -- I typically have
2 meetings with my staff pretty regularly. I'm a pretty
3 hands-on manager, so I would normally go over those things
4 in meetings. I don't find that e-mail is the most
5 productive way for me. I'm a little old-school in a
6 management style. My kids would probably do it by e-mail.

7 Q. And it's your testimony that it was not until the
8 2002 time frame that you first learned that EchoStar's
9 security system had suffered outright destruction and full
10 compromise as a result of the December 2000 postings on the
11 Internet, correct?

12 A. I think that's generally correct. That was probably
13 the time frame when I realized the system was totally,
14 totally hacked and there was not a way for us to do
15 electronic countermeasures and those kinds of things as a
16 way for us to recover the system.

17 Q. Am I correct that even though in the 2002 time frame
18 you believe you learned that the system had suffered
19 outright destruction and full compromise, you did not
20 receive any document that listed the status of the
21 conditional access system as fully destroyed or fully
22 compromised at any time. Is that a fair statement?

23 A. I just -- you know, again, I don't -- I think that
24 you're using some engineering words which I think are
25 probably -- engineers probably understand 'em a little bit

1 better than I do. My background is accounting. So in
2 accounting terms I understand a little better, but I think
3 the system in that time frame of 2002 was, in fact, fully
4 hacked and compromised in a way that the system had to be
5 replaced, and we had to go through the expense to replace
6 it. That was the decision that we came to.

7 Q. So you would not have received any document from anyone
8 that listed the status of the system as fully destroyed or
9 fully compromised; is that correct?

10 A. In 2002, probably -- what time frame?

11 Q. At any time.

12 A. I think ultimately there was the lawsuit in this case.
13 Actually, a lawsuit in a previous case earlier than that, I
14 think, in 2000 time frame, that language may have been used
15 from a legal perspective. May have been used.

16 Q. I was focusing more on an internal company document.
17 Is it fair to say you never received any internal company
18 document from executives that listed the status as fully
19 destroyed and fully compromised?

20 A. Those exact words, I don't think so, no.

21 Q. And am I correct you never sent any document that
22 listed the status of the conditional access system as fully
23 destroyed or fully compromised at any time?

24 A. Using those words, I don't think so, no.

25 Q. And am I correct that even though you learned that the

1 security system suffered outright destruction and full
2 compromise in the 2002 time frame, it was not until
3 somewhere in the range of 2003 to 2004 that anyone told you
4 there was a posting by a person using the alias "Nipper" on
5 the Internet that impacted the EchoStar security system?

6 A. Other than attorneys, no.

7 Q. Am I correct that you never told anyone at EchoStar or
8 NagraStar to investigate the source of the two postings on
9 the Internet in December of 2000 that damaged EchoStar's
10 system?

11 A. I don't believe I would have had that conversation, no.

12 Q. And am I correct that after the December 2000 postings,
13 no one at NagraStar ever informed you that there were ways
14 to trace Internet postings to particular subscribers?

15 A. It's possible, but I don't have a recollection of that,
16 no.

17 Q. And since you didn't know whether they could do it, I
18 take it that no one at NagraStar had made efforts to trace
19 the December 2000 postings that you were aware of?

20 A. I don't know that I can make that assumption. I just
21 don't have knowledge.

22 Q. Did you ever receive a report from NagraStar regarding
23 their investigation into piracy including these postings?

24 A. I probably got a writ -- a verbal report.

25 Q. Did you ever receive a written report from NagraStar

1 regarding their investigation into piracy including these
2 postings?

3 A. It's possible, but I don't have a recollection of that,
4 no.

5 Q. Now, you were the person who made the final decision to
6 replace the system and do the card swap, correct?

7 A. Yes, I was.

8 Q. But you cannot recall whether you ever wrote any
9 e-mails regarding the reasons for the card swap; is that
10 correct?

11 A. Well, again, I guess you'd have to be in our company to
12 understand this, but I think it's -- but I have meetings
13 with my staff every day. I'm in the office every day, most
14 every day when I'm not traveling, and I tend to have
15 consistent meetings with -- where we go through a number of
16 topics, and that's the way I like to manage the business.
17 So it's possible there was an e-mail, but it would be
18 unlikely.

19 Q. Now, the card supplier is located in Switzerland; is
20 that correct?

21 A. The company that we bought the cards -- well, the
22 company that we buy the cards from is NagraStar, which in
23 this time frame of 2002 -- which is located in Denver,
24 Colorado. I believe -- not to misdirect anybody, but I
25 believe that they purchased the cards from a company in

1 Switzerland.

2 Q. And NagraStar is a joint venture of EchoStar and
3 Kudelski in Switzerland?

4 A. That's correct. So EchoStar owns 50 percent of
5 NagraStar; and the Kudelski group, who was the original
6 provider of our conditional access, owns the other
7 50 percent.

8 Q. And am I correct that you cannot recall ever receiving
9 any e-mails regarding the reasons for the card swap? Is
10 that right?

11 A. It's possible, but -- but I think I certainly had
12 reports on it. But whether I got an e-mail on it or not, I
13 don't know.

14 Q. Am I correct you're not aware of a single document or
15 e-mail or report or memo that explains any or all of the
16 reasons for the card swap decision in 2002?

17 A. It's possible. But I certainly knew the reasons.

18 Q. Well, am I correct that you have no recollection of
19 seeing a single e-mail, report, or memo that explains the
20 reasons for the card swap?

21 A. It's possible, but I don't have a recollection of -- of
22 e-mails on the subject.

23 Q. And am I correct that no one told you that instructions
24 had been published on the Internet in early 1999, almost two
25 years before the December 2000 Internet postings, resulted

1 in a security breach of EchoStar's conditional access
2 system?

3 A. Can you repeat that?

4 Q. Sure. Am I correct that no one told you that
5 instructions had been published on the Internet in early
6 1999 that had resulted in a security breach of EchoStar's
7 conditional access system?

8 MR. WELCH: I would object to form, Your Honor.
9 Kind of hard to follow.

10 THE COURT: Do you understand the question?

11 THE WITNESS: Why don't we have him repeat it. I
12 think I got it the second time, so maybe he can repeat it.

13 BY MR. STONE:

14 Q. Am I correct that no one told you that instructions had
15 been published on the Internet in 1999 that resulted in a
16 security breach of EchoStar's conditional access system?

17 A. I think that's correct.

18 MR. STONE: I would like to show the witness
19 Exhibit 828, please.

20 THE COURT: Eight twenty-eight.

21 THE WITNESS: Do we have another copy of this? I
22 can't read it.

23 THE COURT: I can't read it either.

24 Counsel, next question. It's unreadable.

25 BY MR. STONE:

1 Q. Do you recall seeing any letters sent in July of 1999
2 that demanded a card swap from NagraStar?

3 A. No.

4 Q. And am I correct that it's your testimony you had no
5 knowledge that, in response to a 1999 posting on the
6 Internet -- that you were not aware that corporate counsel
7 has sent a letter demanding such a card swap?

8 A. I don't have a recollection of that, no.

9 Q. And am I correct that no one told you regarding that
10 1999 Internet posting that counsel had said in a letter that
11 the fix of which the Smart Card swap-out is only one piece,
12 extremely important, and must be accomplished as soon as
13 possible?

14 MR. WELCH: Objection. Your Honor, he's reading
15 from a document that's not in evidence, and also we haven't
16 established any foundation.

17 THE COURT: Sounds like you're reading from a
18 document. And frankly, if that was 828 -- would you be kind
19 enough to take that over to counsel and show him what I
20 perceive to be an unreadable document.

21 MR. WELCH: I've got it Your Honor, and it's not
22 legible on my end either.

23 THE COURT: That was an order. It's not a
24 request. That's not your document, Counsel. It's NDS's
25 document.

1 Look at the first page.

2 MR. STONE: I believe, Your Honor --

3 THE COURT: Next question.

4 MR. STONE: The second page without the exhibit
5 stamp is the larger one.

6 THE COURT: Next question, Counsel.

7 MR. WELCH: Your Honor, I'd like to move to strike
8 his question.

9 THE COURT: It's stricken.

10 BY MR. STONE:

11 Q. Now, when you authorized the lawsuit against NDS, had
12 you become aware of any card swap demand that had preceded
13 the December 2000 postings?

14 A. I don't believe so, no.

15 Q. Now, is it your testimony that you do not recall a
16 conversation with anybody from NagraVision in 2001 after the
17 Internet postings telling you that the ROM 3 card was
18 secured?

19 A. Repeat that again.

20 Q. Sure. Do you recall any conversation with anyone from
21 NagraVision in 2001 after the Internet postings telling you
22 that the ROM 3 card was secured?

23 A. I don't have a recollection of that, no.

24 Q. Have you ever heard the name Joel Conus, C-O-N-U-S?

25 A. I don't recognize that name.

1 Q. Are you aware as of February 2001, Mr. Conus was a
2 software engineer for Kudelski, the company that created the
3 software code for the cards?

4 A. No.

5 Q. Let me show you, if I could, Exhibit 830, and it should
6 be the second page?

7 MR. WELCH: Your Honor, I'm going to object to
8 this. It's also another document that's illegible.

9 MR. STONE: The second page should be readable.

10 THE COURT: This I can read. Can you read that,
11 sir?

12 THE WITNESS: If you can read it, I bet you I can
13 read it.

14 Are the -- just for -- is the last page the same
15 as the first page, or are there some differences?

16 THE COURT: This page right here. All right.
17 Counsel.

18 THE WITNESS: I think I can read this.

19 BY MR. STONE:

20 Q. The first page has the exhibit stamp, and it's smaller.
21 The second page should have larger type.

22 It's an e-mail from Joel Conus dated February 23rd,
23 2001, to several individuals including Mr. Guggenheim, and
24 it also shows J. J. Gee at EchoStar.com.

25 Now, Mr. Guggenheim, as I understand it correctly, was

1 the CEO of NagraStar, the joint venture, at this point in
2 time?

3 A. I believe that's correct in this 2001 time frame. I
4 believe that's true, yes.

5 Q. And I'll represent to you for the purposes of these
6 questions that DNASP-003 is the same thing as the ROM 3.

7 THE COURT: Counsel, Mr. Guggenheim is going to be
8 here; is that correct?

9 MR. STONE: That's correct.

10 MR. WELCH: Yes.

11 THE COURT: Why is this witness being examined on
12 an e-mail he didn't send?

13 MR. STONE: There was any discussion that he
14 recalls relating to this e-mail.

15 THE COURT: Answer the question.

16 THE WITNESS: No. Not me. There might have been
17 discussion, but I wasn't aware of it.

18 THE COURT: Ask him if he was aware of it.

19 BY MR. STONE:

20 Q. Were you aware of any discussion about the status of
21 the ROM 3 card as of February 23rd, 2001?

22 A. No. Not as it relates to this.

23 Q. Have you ever heard the term "secure" used with respect
24 to the ROM 3 card?

25 A. Well, it's possible, but that doesn't sound like a

1 familiar term to me.

2 THE COURT: Just a moment. I sometimes have
3 people say "it's possible." Did you or not?

4 THE WITNESS: No.

5 THE COURT: Okay. Yes or no.

6 THE WITNESS: I just don't recognize that
7 particular term.

8 THE COURT: Okay.

9 BY MR. STONE:

10 Q. Had there been a software patch or electronic
11 countermeasure that you were aware of that had been issued
12 in response to any postings on the Internet in
13 December 2000?

14 A. Not specifically. I wasn't involved in that.

15 Q. Now, NagraStar had the lead role in combating piracy of
16 EchoStar, correct?

17 A. I think that's true, yes.

18 Q. And Mr. Guggenheim would have had more knowledge about
19 the state of EchoStar's security system in 2001 than
20 yourself. Is that a fair statement?

21 A. I think that's probably true.

22 Q. Do you recall Mr. Guggenheim ever telling you about a
23 software patch that was used to secure the EchoStar access
24 cards in 2001?

25 A. I don't have a specific recollection.

1 Q. And who is Mr. Dugan?

2 A. Mr. Dugan at this point in time was the president of
3 EchoStar Technology Corporation, which was the company that
4 did the engineering for DISH Network.

5 Q. And am I correct that in 2001 Mr. Dugan had general
6 responsibilities for the total security system from an
7 engineering perspective?

8 A. For DISH Network as our employee. He was our employee
9 at DISH Network, yes.

10 Q. And he and Mr. Jackson would have been the most senior
11 executives who would have had knowledge of the status of
12 EchoStar's security system, correct?

13 A. They would be the ones I would think would have. There
14 may be other engineers at lower levels that actually
15 technically may have had more knowledge, but they would be
16 the ones that I would go to.

17 Q. Okay. I'd like to show you Exhibit 828, which is an
18 e-mail from Mr. Dugan, dated January 31, 2001 -- I
19 apologize, I said 828 -- I apologize -- 812. And it should
20 be the second page again.

21 This is an e-mail in the middle from Mr. Dugan, dated
22 January 31, 2001, which would be a full month after December
23 2000; is that correct?

24 A. Yes, it would be.

25 Q. Do you have any recollection of seeing this e-mail

1 before you authorized the filing of the lawsuit in this
2 case?

3 A. No.

4 Q. Do you have any reason to believe Exhibit 812 is
5 inaccurate when it says EchoStar had destroyed the
6 commercial aspect --

7 THE COURT: Counsel, that's improper.

8 MR. WELCH: I'm going to object, Your Honor.

9 THE COURT: I assume Mr. Dugan's available. He
10 said no.

11 BY MR. STONE:

12 Q. Had you had any discussions with Mr. Dugan in 2001
13 about the status of the security system?

14 A. I would say, yes.

15 Q. Did Mr. Dugan ever inform you that the system had been
16 secured through an electronic patch in early 2001?

17 A. No.

18 Q. Now, sir, you have an accounting background?

19 A. Yes, I do.

20 Q. And you've been licensed as a CPA?

21 A. I was, many, many years ago. I'm not currently
22 licensed.

23 Q. And then you actually worked as an internal auditor for
24 a period of time?

25 A. I did. I worked for a textile company as an internal

1 auditor for one year.

2 Q. And then you would typically meet on an annual basis
3 with the auditors to go over the financial statements,
4 correct?

5 A. Well, when I was internal auditor I don't think that
6 was part of my job -- I don't think I did do that, no.

7 Q. As CEO of EchoStar, would you typically meet with the
8 auditors on an annual basis to go over their financial
9 statements?

10 A. No, I didn't go over their financial statements.

11 Q. And am I correct that in performing or preparing the
12 10-K's that you provide the auditors the information that
13 you have about the security system at the time?

14 A. Maybe I misunderstand your question. But -- I would,
15 yes, I would meet with our -- as a public company, we have
16 external auditors.

17 THE COURT: Just a moment. You have filed these
18 as a matter of law.

19 THE WITNESS: Yes.

20 THE COURT: You're a public company. You read
21 these and sign them, don't you?

22 THE WITNESS: Yes.

23 THE COURT: Then you should be aware of them.
24 Counsel, you can inquire into this area.

25 MR. STONE: Thank you, Your Honor.

1 THE COURT: He should be aware of these.

2 You signed them.

3 THE WITNESS: I didn't understand his question.
4 It was something about the auditors. It wasn't nothing --
5 it was about auditors, it wasn't about financial statements.
6 It was about auditors. It was about financial statements
7 that auditors have. I don't know what they do.

8 THE COURT: He's about to ask.

9 THE WITNESS: Okay.

10 BY MR. STONE:

11 Q. Would you have provided the auditors with the best
12 update and the most accurate information you had at the time
13 you meet with them to discuss the financial statements?

14 A. Yes, I do. Yes, I will.

15 Q. Am I correct, you would never sign a form 10-K unless
16 it was accurate to the best of your knowledge?

17 A. That is true.

18 Q. Prior to meeting with the auditors, do you typically
19 try to gather information that is necessary to convey the
20 most accurate information?

21 A. Yes, I do.

22 Q. And your engineers would have also given the auditors
23 the information that they had on the security system,
24 correct?

25 A. I would imagine the engineers would be the most

1 accurate people, yes, for the auditors to talk to.

2 Q. Okay. I'd like to show you Exhibit 1380, which is the
3 2001 10-K.

4 (Document displayed.)

5 BY MR. STONE:

6 Q. Going to page 1380-64, please.

7 A. Can you give that to me again?

8 Q. Sure. 1380-64. I believe this is in evidence.

9 THE COURT: It is, Counsel.

10 THE WITNESS: It says "signatures" on top?

11 BY MR. STONE:

12 Q. Yes, sir.

13 A. Okay.

14 Q. And did you sign this document on or about March 4th,
15 2003?

16 A. I didn't sign this document, but I would have signed
17 something very similar to this.

18 Q. And am I correct that you believe that during 2002, the
19 security system was compromised in a way that the company
20 was not going to be able to resecure unless it sent out a
21 new card?

22 A. I would say that -- it depends on the timing of that.
23 I would say that sometime in 2002, we probably came to that
24 conclusion.

25 Q. Now, in Exhibit 1380, at page 1380-13 there is a

1 two-paragraph section entitled Conditional Access System,
2 correct?

3 A. Can you give me that number again?

4 Q. Sure. 1380-13.

5 THE COURT: Do you have that page?

6 THE WITNESS: I think so, yeah.

7 THE COURT: Okay.

8 THE WITNESS: Table of contents at the top?

9 BY MR. STONE:

10 Q. Now, this would be the section that covers the status
11 of the conditional access system in each 10-K, correct?

12 A. Excuse me. Say that again. Would you ask that again?

13 Q. This would be a section that is in each 10-K that
14 covers the status of the conditional access system, correct?

15 A. Yes.

16 Q. And in 2002, the year you said the system was
17 compromised and could not be resecured without new cards,
18 the 10-K says down at the bottom, "However, there can be no
19 assurance that these security measures or any future
20 security measures we may implement will be effective in
21 reducing piracy of our programming signal," correct?

22 A. Yes.

23 Q. Now, let me show you Exhibit 1378, which is the 10-K
24 for December 31st, 1999.

25 MR. STONE: It's in evidence.

1 (Document displayed.)

2 THE WITNESS: What page are we going to, sir?

3 BY MR. STONE:

4 Q. Page 1378-05 -- 005. It looks like there are two
5 paragraphs that also discuss the conditional access system.

6 Now, in the 1999 10-K, where it describes the status of
7 the system, it says at the bottom, "Ultimately, if other
8 measures are not successful, it could be necessary to
9 replace the credit card-size card that controls the security
10 of each consumer's set-top box at a material cost to us."

11 That would refer to a card swap, correct?

12 THE WITNESS: Where are you at?

13 BY MR. STONE:

14 Q. Second paragraph, that begins with "ultimately."

15 A. Yes, I believe that's talking about a potential card
16 swap.

17 Q. And the 2002 10-K does not reference any possibility of
18 replacing the credit card-size Smart Card, correct?

19 A. On that particular sheet, no.

20 Q. And this is the paragraph that covers the conditional
21 access system, which is the same paragraph we see in 1999,
22 correct?

23 A. Well, it's about a 200-page document, but that's
24 certainly one place where it talks about it.

25 Q. Well, in 1999 this is the paragraph that discussed the

1 possibility of replacing the credit card-size cards,
2 correct?

3 A. Yes, I think that's what it says.

4 Q. And this language followed a letter from counsel,
5 corporate counsel of EchoStar, demanding a card swap because
6 of instructions on the Internet in 1999; is that correct?

7 MR. WELCH: Object, Your Honor. I think he's
8 already tried to ask Mr. Ergen questions about that, and
9 there was no foundation.

10 THE COURT: Overruled.

11 You can answer the question, sir.

12 THE WITNESS: I don't know.

13 MR. STONE: Well, if we could show the good copy
14 of Exhibit 828 which should have the second page.

15 BY MR. STONE:

16 Q. Now, who's that a letter by?

17 A. The letter looks to be authored by Nick Sayeedi.

18 Q. And who is Nick Sayeedi?

19 A. He is one of the lawyers at EchoStar.

20 Q. And am I correct, Mr. Sayeedi would have been
21 authorized to send a legal letter such as Exhibit 828?

22 A. Probably, yes.

23 MR. STONE: Your Honor, I would move Exhibit 828
24 into evidence.

25 THE COURT: Any objection?

1 MR. WELCH: No objection, Your Honor.

2 THE COURT: Received.

3 (Exhibit No. 828 received in evidence.)

4 BY MR. STONE:

5 Q. Now, you notice in the first paragraph of this letter
6 Mr. Sayeedi discusses in the fourth line down that there
7 were discussions about instructions published on the
8 Internet that permit emulation of the Smart Card. Do you
9 see that?

10 A. Yes, I do.

11 Q. And that would be a hack of the Smart Card, correct?

12 A. I don't know.

13 Q. Well, it goes on to say, "As we first pointed out in
14 those February discussions, the security breach needs to be
15 remedied immediately."

16 Am I correct that a security breach would be a hack or
17 piracy of the system?

18 A. I don't know what he -- I don't know exactly what he's
19 referring to here.

20 Q. Do you have any reason to believe that your corporate
21 counsel was mistaken when he says in the middle paragraph
22 that "a card swap-out is only one piece, is extremely
23 important and must be accomplished as soon as possible"?

24 A. I don't have any reason to agree or disagree.

25 Q. Well, can you think of any reason the employees at

1 EchoStar would not have informed you, the CEO, of a security
2 breach requiring a card swap in 1999?

3 A. No, I can't.

4 Q. And is it your testimony no one brought to your
5 attention at all that in 1999 there was a compromise of the
6 security system that your corporate counsel believed
7 required a card swap to fix?

8 A. Well, I am just not aware of it at that time. There
9 may be logical reasons.

10 Q. When you authorized the lawsuit with respect to the
11 December 2000 postings, you did not know that your corporate
12 counsel had written Exhibit 828 in July of 1999; is that
13 correct?

14 A. I don't think so.

15 Q. You don't think you had seen it, or you think you did
16 see it?

17 A. No, I don't think I had seen it.

18 Q. When you authorized the lawsuit with respect to the
19 December 2000 postings, did you know that your corporate
20 counsel had gone on record in Exhibit 828 saying that the
21 1999 security breach made a card swap extremely important?

22 A. No.

23 Q. Is it also true you have no knowledge of who posted the
24 instructions on the Internet that led to Exhibit 828 being
25 written?

1 A. No.

2 Q. And am I correct that it's your testimony that you do
3 not know whether the instructions posted on the Internet in
4 early 1999 resulted in outright destruction and full
5 compromise of EchoStar's security system?

6 A. I don't know.

7 Q. And am I correct that after the December 2000 postings,
8 you don't know of any letter being sent by EchoStar's
9 corporate counsel requesting a card swap after the
10 December 2000 postings?

11 A. I don't know, no.

12 Q. And you did not direct any lawyer to send a letter to
13 the card supplier demanding a card swap as a result of the
14 December 2000 postings which are the subject of this
15 lawsuit, correct?

16 A. No.

17 Q. Is that correct? I think we have a double negative.

18 THE COURT: Double negative.

19 THE WITNESS: Maybe repeat the question.

20 BY MR. STONE:

21 Q. Sure. Am I correct that you never directed any lawyer
22 to send a letter demanding a card swap in response to the
23 December 2000 postings?

24 THE COURT: That's still confusing. "Did you."

25 BY MR. STONE:

1 Q. Did you send or authorize any lawyer to send a letter
2 demanding a card swap as a result of the December 2000
3 postings?

4 A. No.

5 Q. Am I correct you don't recall ever seeing a letter
6 demanding a card swap as a result of the December 2000
7 postings?

8 A. I don't recall seeing a letter.

9 Q. Okay. I'd like to show you Exhibit 653, please, which
10 is the 2000 10-K.

11 A. Do you have a page?

12 Q. The page I'm directing you to is page 653-52. It's the
13 signature page.

14 You signed this 2000 10-K, correct, sir?

15 A. Not this particular one, but I would have signed a very
16 similar document, yes.

17 Q. And you would have reviewed it to make sure it was
18 accurate before you signed it?

19 A. I would have reviewed the pertinent parts that they
20 would bring to me, yes.

21 Q. Do you have any reason to believe that Exhibit 653,
22 which your counsel put into evidence, is not an accurate
23 copy of the 10-K?

24 A. I don't have any reason to believe it's not accurate.

25 Q. And the signature indicator, if you will, is for

1 March 12, 2001. Is it your recollection you would have
2 signed the 10-K around that point in time?

3 A. Yes.

4 Q. And that's two and a half months after the December
5 postings, correct?

6 A. That would be about two and a half months.

7 Q. Now, if I could direct your attention to the bottom of
8 page 653-5, please. And it's that same paragraph that
9 discusses the conditional access system.

10 (Document displayed.)

11 BY MR. STONE:

12 Q. Am I correct that it provides in part, "if we cannot
13 promptly correct our compromise in our encryption
14 technology, it would adversely affect our revenue and our
15 ability to contract for video and audio services provided by
16 programmers"? Do you see that?

17 A. Yes, I do.

18 Q. And you believe that to be a true statement, correct?

19 A. I believe that to be true and accurate at the time
20 we -- at the time we made the statement, yes.

21 Q. And programmers would include the companies you
22 discussed -- HBO, Showtime, ESPN -- which allow EchoStar to
23 show their programs, correct?

24 A. Those would be some of them, yes.

25 Q. And the reason not promptly correcting a compromise in

1 EchoStar's encryption technology would adversely affect
2 EchoStar's revenue is because, one, EchoStar wouldn't get
3 paid if people were watching for free, right?

4 A. That's correct.

5 Q. And programmers could chose not to let EchoStar show
6 their programs, which would lead to a loss of customers and
7 a loss of revenue, correct?

8 A. I think that's true, yes.

9 Q. All right. If you could go to Exhibit 1379, which is
10 the 10-K for the year ending December 31st, 2001, please.

11 A. You got a page? Do you have a page?

12 Q. Yes, sir. Page 70 of that document.

13 Okay. Now, this 10-K would have been filed in February
14 of 2002. Does that sound about right?

15 A. February or March. I don't see the date on here, but
16 it would be late February or early March.

17 Q. So about 14 months after the December 2000 Internet
18 postings, correct?

19 A. That's probably the way the math works, yeah.

20 Q. And would you agree that this document, Exhibit 1379,
21 at page 70 shows that the DISH Network revenue went from
22 2.35 billion in 2000 to 3.6 billion in 2001?

23 MR. WELCH: Your Honor, my 1379 doesn't have a
24 page 70. Is it the right exhibit?

25 MR. STONE: F5.

1 THE COURT: You may continue.

2 THE WITNESS: I do have a page 70. And the answer
3 to your question is yes.

4 BY MR. STONE:

5 Q. Were you aware when you authorized the filing of this
6 lawsuit that EchoStar's revenue not only did not decrease in
7 the 12 months after December 2000 when the postings occurred
8 but actually increased by 1.25 billion?

9 A. I wouldn't maybe have known the exact amount, but I
10 would have generally known that, yes.

11 Q. And would you agree that the increase in revenues of
12 1.25 billion was due to subscriber growth and higher than
13 average revenue per subscriber?

14 A. I think those would be the two primary reasons, yes.

15 Q. And am I correct that as of the end of 2001, you are
16 not aware of any impact that the December 2000 Internet
17 postings had on EchoStar's ability to contract for video and
18 audio services provided by programmers?

19 A. I think in that time frame we probably had questions
20 from some programmers. But I believe we were able to
21 contract with programmers, albeit maybe at a higher price.

22 Q. Am I correct that you do not know of any of EchoStar's
23 relationships with programmers that were adversely affected
24 by any postings on the Internet in December of 2000?

25 A. At that time frame, I don't think so.

1 Q. When you say --

2 A. That I'm aware of. I mean, it's possible. I wasn't
3 the programming contract guy.

4 Q. My question is: At any time was EchoStar's
5 relationship with any of its programmers adversely affected
6 by any postings on the Internet in December of 2000?

7 A. At any time?

8 Q. Yes, sir.

9 A. Yes.

10 Q. Okay. I'd like to show your deposition at page 260,
11 lines 14 through 20.

12 THE COURT: You may not, Counsel. There's one
13 copy. I get a copy. He gets a copy. You only have one
14 copy. Move on now.

15 BY MR. STONE:

16 Q. Am I correct that you do not know of any programmer
17 that refused to renew its contract because of the state of
18 piracy of EchoStar's system from December 31st, 2000 to
19 January 1st, 2003?

20 A. I think that's a true statement.

21 Q. So in 2001, the year after the December 2000 Internet
22 postings, there was not a decrease in revenue, nor was there
23 an impact on contracting for programming, correct?

24 A. I think that's true.

25 Q. Okay. Now, you testified earlier that you believe the

1 complaint is accurate in stating that shortly after the
2 December 2000 postings, the first harmful effect evolved
3 into the outright destruction and full compromise of
4 EchoStar's security system, correct?

5 A. Repeat that.

6 Q. Sure. You earlier testified that it's accurate to say
7 that shortly after the December 2000 postings, the first
8 harmful effect evolved into the outright destruction and
9 full compromise of EchoStar's security system?

10 A. I mean, again, that's probably not exactly the words
11 I'd use, but the engineering words probably mean the same
12 thing. But I think that's generally true, yes.

13 Q. And you also testified that it was in the 2002 time
14 frame that you first learned about the outright destruction
15 and full compromise of the security system, correct?

16 MR. WELCH: Your Honor, we're just rehashing.
17 Asked and answered.

18 THE COURT: Counsel, I'll let you ask the question
19 another time.

20 Go ahead. Let him finish.

21 THE WITNESS: I would say a different way. I
22 think in the 2002 time frame is when I found out that the
23 system was fully compromised, that it didn't work anymore,
24 and that we may have to -- one of the options we may have to
25 take was to replace the card and go to the expense and time

1 to do that.

2 BY MR. STONE:

3 Q. Let me direct your attention again to Exhibit 1380, the
4 2002 10-K, at page 13.

5 (Document displayed.)

6 THE WITNESS: Is there a page number?

7 BY MR. STONE:

8 Q. 13. It's got a Bates stamp at the bottom.

9 A. I got it.

10 Q. Does the 2002 10-K that you signed and filed in March
11 of 2003 reflect that EchoStar's security system was
12 destroyed and fully compromised?

13 A. It talks about compromises to our system. I don't
14 think it uses the word "fully destroyed."

15 Q. My question is: Do you believe it reflects that
16 EchoStar's security system was fully destroyed and fully
17 compromised as of 2002?

18 A. I think it reflects the information that we had at the
19 time, which is that the system was fully -- or was
20 compromised.

21 Q. But not destroyed and fully compromised, you would
22 agree, sir?

23 A. Well, I don't want to mislead anybody. This is an
24 accounting document for the Securities and Exchange
25 Commission, so you use accounting terms; you don't normally

1 use lots of engineering terms. I believe that what we
2 reflected here was accurate at the time we wrote it. I
3 believe its accurate today and truthful.

4 Q. Does the complaint use --

5 A. I don't think it uses the word "destroyed." It does
6 talk about compromises. It doesn't talk about language
7 "fully destroyed." I don't think it says that, no.

8 Q. Does the complaint use engineering terms or accounting
9 terms when it uses the phrase "outright destruction" and
10 "full compromise"?

11 A. I -- well, I think in the legal lawsuit you would use
12 whatever terms best accurately describe your -- you know,
13 the state. And maybe that's different -- I'm not a lawyer.
14 Right. I'm speaking -- so from a legal perspective, I don't
15 know -- I don't draft words. I have a fairly good knowledge
16 of accounting terminology and what you would file in a 10-K
17 for the Securities and Exchange Commission. I'm more
18 competent there. I don't see the words "fully destroyed" in
19 the -- in the 2002 10-K.

20 Q. Okay. Do the 10-K's, to your knowledge, indicate that
21 anything unusual happened to the conditional access system
22 in the year 2000?

23 A. I think in 2002 you would be talking about 2002 events.
24 And I think it talks about the system has been compromised.
25 But I think it's referred -- and it doesn't really give a

1 date there, but it -- it's clear that it's compromised in
2 the year 2002.

3 Q. And it was compromised in the year 1999, correct?

4 A. I think the word "compromise" -- well, we could look.
5 I can't remember what it said, but if it's up here. The
6 word "compromise" may be in there in 1999 as well or
7 whenever we filed it, in 2000. I can look.

8 Q. Sure.

9 A. Which exhibit is that?

10 Q. Give me one second and I'll tell you. 1378, page 5.

11 A. It does say there's a -- we responded to compromises of
12 the system.

13 Q. And do you see any material difference in the language
14 between 1999 and 2002 regarding the state of the security
15 system?

16 THE COURT: Why don't you look at that this
17 evening. You'll be back on the stand tomorrow. It will go
18 much more smoothly tomorrow, I promise you.

19 You're admonished not to discuss this matter
20 amongst yourselves nor form or express any opinions in the
21 case.

22 Now, what time do you feel comfortable being here?
23 I'm going to test your patience for a while until we settle
24 into what we feel is comfortable. Not 4:00 o'clock or 4:30.
25 But 5:00 o'clock is fine, 6:00 o'clock is fine, 7:00 o'clock

1 is fine. I just don't know that you can hold up.

2 8:00 o'clock's fine. I'd like to get to work at
3 eight. But if I do that, you need to be here promptly at
4 eight. Counsel will be here at 7:30. Can you all be here
5 at 8:00 o'clock?

6 Please don't discuss this matter. Go home, have
7 dinner and get some sleep.

8 Counsel, we'll get back to work this evening.

9 Please drive safely.

10 Don't discuss this matter amongst yourselves.

11 Thank you, sir. Why don't you step down and you
12 can look at that out of the presence of the jury.

13 THE WITNESS: Okay.

14 (Jury recesses at 5:58 p.m. for the evening.)

15 (Outside the presence of the jury.)

16 THE COURT: Mr. Ergen, why don't you remain for
17 just a moment and have a seat.

18 We're out of the presence of the jury. I have a
19 few questions for you, Mr. Ergen.

20 I gave counsel the courtesy of allowing you to
21 testify when you weren't going to be a witness. And, of
22 course, that causes some last-moment flurry and disruption.

23 I want to go back to Echosphere IC, which was a
24 company in your deposition that you stated that you were a
25 40 percent shareholder of. Is that correct?

1 THE WITNESS: That's correct. I think. I mean, I
2 don't know exactly.

3 THE COURT: Well, were you or weren't you?

4 THE WITNESS: Well, I was definitely a
5 shareholder. The exact percentage, I don't remember.

6 THE COURT: You stated at your deposition that you
7 probably owned 40 percent, so that hedge of "probably" means
8 you don't quite know.

9 THE WITNESS: Right.

10 THE COURT: Who else were the other shareholders
11 with you at that time, sir? And did any shareholder have a
12 greater percentage than you did?

13 THE WITNESS: No. I would have had the -- I would
14 have been the largest shareholder. That, I'm sure of.

15 THE COURT: Okay. So largest shareholder. Who
16 were the other shareholders?

17 THE WITNESS: Candy Ergen, my wife.

18 THE COURT: And she's your wife.

19 THE WITNESS: Jim DeFranco.

20 THE COURT: And Jim DeFranco.

21 Anybody else?

22 THE WITNESS: There may be others.

23 THE COURT: Okay. Would your wife have had a
24 coequal share?

25 THE WITNESS: No.

1 THE COURT: Okay. Less share than you had?

2 THE WITNESS: Yes.

3 THE COURT: What position did you hold in
4 EchoStar -- or Echosphere? Were you the CO of the company
5 or CEO?

6 THE WITNESS: No.

7 THE COURT: What position did you hold?

8 THE WITNESS: I was originally president of the
9 company.

10 THE COURT: Okay.

11 THE WITNESS: I think we formed that company
12 probably in about 1983 or so. I could be off a bit, by a
13 year or so.

14 THE COURT: 1983.

15 THE WITNESS: 1983 would be my best guess. I was
16 president for probably two or three years. Then a fellow
17 name Scott Zimmer, Z-I-M-M-E-R, was president.

18 THE COURT: Scott Zimmer. And Mr. Zimmer was
19 president, then, from approximately 1985 to?

20 THE WITNESS: Well, maybe 1996.

21 THE COURT: 1996. And after Mr. Zimmer in 1986?

22 THE WITNESS: I believe he remained president
23 until the company went out of business.

24 THE COURT: 1991?

25 THE WITNESS: No. Probably 1992.

1 THE COURT: 1992, you're right. Dissolved in
2 1992. Thank you.

3 So he would have been president from 1985 to 1992,
4 you believe?

5 THE WITNESS: Well, I'm going to say 1986, but
6 that -- or 1987 maybe.

7 THE COURT: Who was president from 1987 to 1992?

8 MR. WELCH: Scott Zimmer.

9 THE COURT: I'm going to repeat this back. You
10 were president from 1983 to 1985.

11 THE WITNESS: Or '86 even.

12 THE COURT: Scott Zimmer was president from 1985
13 or '6 until the company dissolved in 1991 -- or 1992.

14 THE WITNESS: That's my best recollection.

15 THE COURT: Okay.

16 I'm particularly interested in the time period in
17 1991. What was your position other than a significant
18 shareholder in 1991?

19 THE WITNESS: I don't believe I had any other
20 position with the company at that time.

21 THE COURT: Okay. What was happening in your
22 professional life at that time? Were you thinking about
23 forming another company? Were you -- or were you just a
24 shareholder?

25 THE WITNESS: Well --

1 THE COURT: You were too young at that time just
2 to be laying around, so what were you doing?

3 THE WITNESS: Well, I had a competent person to
4 run the company, and it was strictly international business.
5 And I think it was -- the primary business was over in
6 Holland. It was actually in Europe. There was some U.S.
7 business.

8 Maybe I can make this clearer. The business it
9 was in was big dishes, what we call C-band. And if you're
10 familiar with the technology, those are those 10-foot
11 dishes.

12 THE COURT: I've learned since the case came to be
13 what they are now.

14 THE WITNESS: So they were in the big dish
15 business. We had made the decision by that time to go into
16 the little dish business, or the DBS business. And so we
17 pretty much shut down all of our big dish business in
18 1992 because there obviously wasn't much business there to
19 begin with, but it certainly wasn't going to be much
20 business going forward.

21 And when you ask, "What was going on in your
22 professional life," I was pretty much full time at that
23 point designing the system to go into DBS and working to
24 raise the money to do that.

25 THE COURT: Let me call to your attention -- from

1 the deposition, I believe that Echosphere was reorganized --
2 and that may be the wrong word -- after the 1992 dissolution
3 into DISH Limited in 1993. Is that your recollection?

4 THE WITNESS: There was Echosphere -- the original
5 companies were called Echosphere, E-C-H-O-S-P-H-E-R-E. I
6 think it was Echosphere International which became dissolved
7 in the big dish business for the international operations.
8 And there was Echosphere Corporation which basically got
9 dissolved -- I don't know if it got dissolved, but it
10 basically went away to become EchoStar Communications
11 Corporation. But we may have called it DISH Limited back
12 then. I just don't remember.

13 THE COURT: How many employees did you have in
14 Echosphere in 1991? Do you know?

15 THE WITNESS: Echosphere?

16 THE COURT: Echosphere.

17 THE WITNESS: Probably about 2,000.

18 THE COURT: About 2,000 employees?

19 THE WITNESS: Would be my best guess.

20 THE COURT: In March 8th of 1991, Echosphere, I
21 think IC or International, pled guilty to criminal charges
22 in Texas involving violation of federal export control laws.
23 And also pled guilty to similar charges in Arizona on
24 April 29th, 1991. So I'm assuming that those are the same
25 or a continuing set of violations in two different

1 jurisdictions.

2 THE WITNESS: They were violations -- the
3 background there that the company was -- was investigated by
4 the U.S. customs department, and we had at the time, I
5 think, six locations. And the two where they found
6 violations were in -- they were all the same -- it was the
7 same investigation where they found violations, or the
8 violations that we pled to were in Arizona and Texas.

9 THE COURT: Okay. Now, at that time there was
10 apparently an allegation and later a plea involving two
11 employees who engaged in unlawful exportation of
12 commodities, and the sentencing memorandum made the notation
13 that Echosphere IC was not a rogue company.

14 I want to be absolutely clear that in 1991, you're
15 stating to me that you had what I call no managerial or
16 control status over the operation of Echosphere IC, that you
17 were a shareholder at that time. Is that what I've heard
18 you state?

19 THE WITNESS: I was a shareholder. In 1991 I was
20 not involved in the operation of Echosphere International.
21 I don't want to confuse you. I was involved in
22 Echosphere U.S.

23 THE COURT: Okay. Just a moment.

24 Now, Echosphere U.S., though, was not -- no
25 criminal charges were brought, to my understanding, against

1 Echosphere U.S.

2 THE WITNESS: That's correct.

3 THE COURT: So while you might have been involved
4 in that corporate entity, you were not involved, once
5 again --

6 THE WITNESS: I was not involved in the day-to-day
7 operations. I was not involved in the day-to-day operations
8 of Echosphere International in 1991.

9 THE COURT: That's been very helpful to me. Thank
10 you, sir. If you would remain for just a moment.

11 Now, Counsel, do you have any brief questions of
12 this gentleman?

13 MR. STONE: Yes, sir.

14 BY MR. STONE:

15 Q. Who were the members -- sir, do you recall who were the
16 members of the board of Echosphere International in the
17 1990/1991 time frame?

18 A. No, I don't.

19 Q. Were you ever on the board of Echosphere International
20 Corporation?

21 THE COURT: In 1991.

22 THE WITNESS: I don't believe I was in 1991.

23 THE COURT: Just a moment. "I don't believe,"
24 that's the way police officers talk to me. I'm going to kid
25 you.

1 THE WITNESS: I wasn't.

2 THE COURT: Was or not?

3 THE WITNESS: I wasn't a board member in 1991.

4 THE COURT: Thank you.

5 BY MR. STONE:

6 Q. And who determined that Mr. Zimmer would head the
7 company up?

8 A. I would have been involved in that decision.
9 Mr. DeFranco would have been as well. Probably --
10 probably -- my wife probably was in that.

11 THE COURT: You can ask a few more questions,
12 Counsel, but I'm concerned that this is tenuous concerning
13 impeachment.

14 BY MR. STONE:

15 Q. Between you and your wife, what percentage of shares
16 did you own in Echosphere International Corporation?

17 A. I believe 40 percent together.

18 Q. At the time of the violations that were the subject of
19 the plea agreement, how many employees did Echosphere
20 International Corporation have?

21 A. Echosphere International, I believe about 200.

22 THE COURT: Just a moment. Echosphere
23 International Corporation had about 200?

24 THE WITNESS: Right. Echosphere Corporation had
25 about 2,000.

1 THE COURT: Okay. Thank you. I put down 2,000.
2 200. Thank you.

3 BY MR. STONE:

4 Q. What was the relationship between Echosphere
5 International Corporation and Echosphere?

6 A. There really wasn't a relationship other than
7 Echosphere -- Echosphere International's main business was
8 in Europe. They did share some office space with Echosphere
9 Corporation in Miami and Denver, Dallas, Arizona.

10 And they were, for lack of a better term, a mirror
11 image -- they were the international -- they dealt just
12 outside the United States typically in terms of -- or their
13 customers were all outside the United States. They didn't
14 have any U.S. customers.

15 Echosphere only had U.S. customers. So if I could make
16 an analogy -- this may not be exactly accurate. I don't
17 want to mislead anybody. Echosphere International was the
18 CIA., it dealt outside the country; and Echosphere was the
19 FBI, which dealt domestically.

20 Q. Okay. And were any of these office space locations
21 that were shared with EIC the subject of the raid and later
22 plea agreement?

23 A. Yes. Both -- both Dallas and -- both Dallas and
24 Arizona, I believe, when they came in -- when the U.S.
25 customs came in, the location they came to was a location

1 that the vast majority of the building was Echosphere, but
2 Echosphere International had a sublease of part of it, is my
3 recollection.

4 Q. And when Echosphere International Corporation
5 dissolved, did any other entity acquire its assets?

6 A. No.

7 Q. And Echosphere continued on in the guise of DISH
8 Limited?

9 A. Echosphere continued on a little bit longer. The
10 international business had gone to the smaller dish first.
11 And so I would -- my recollection, Echosphere continued on a
12 little bit longer.

13 THE COURT: But not IC. IC went to dish first.

14 THE WITNESS: EchoStar International just got
15 dissolved. There just wasn't any business internationally
16 for the big dish.

17 THE COURT: When I say International, that's the
18 200 employees.

19 THE WITNESS: That's the 200 employees. That's
20 the one that was the subject of the investigation.

21 THE COURT: Wait for the next question.

22 MR. STONE: Nothing further, Your Honor.

23 THE COURT: Counsel, you do you have any
24 questions?

25 MR. WELCH: We have no questions, Your Honor.

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THE COURT: Sir, thank you very much. We'll see you promptly at 8:00 o'clock. All right. We'll go off the record.

Debbie, thank you very much. Sharon will be here at 8:00, right?

THE REPORTER: That's correct.

(At 6:13 p.m., proceedings were adjourned.)

-oOo-

1 -oOo-

2
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: Month Date , Year

13
14
15 _____
16 DEBBIE GALE, U.S. COURT REPORTER

17 CSR NO. 9472, RPR
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