

1

2

3

4

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

5

6

7

8

HONORABLE DAVID O. CARTER, JUDGE PRESIDING

9

- - - - -

10

EHOSTAR SATELLITE CORP.,)
et al.,)

11

Plaintiffs,)

12

vs.)

No. SACV-03-950-DOC
DAY 2

13

NDS GROUP PLC, et al.,)

14

Defendants.)

15

16

17

18

(Continued Testimony of Charles Ergen)

19

REPORTER'S TRANSCRIPT OF PROCEEDINGS

20

Santa Ana, California

21

April 10, 2008

22

23

SHARON A. SEFFENS
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
(714) 543-0870

24

25

SHARON SEFFENS, U.S. COURT REPORTER

1

2

I-N-D-E-X

3

PAGE

4

PLAINTIFFS'

5

WITNESS: DIRECT CROSS REDIRECT RECROSS

†

6 CHARLES ERGEN
7 (Continued) 4 26 39
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

SHARON SEFFENS, U.S. COURT REPORTER

3

1 SANTA ANA, CALIFORNIA; THURSDAY, APRIL 10, 2008; 8:00 A.M.
2 E-X-C-E-R-P-T
3 (Jury present.)
4 CHARLES ERGEN, PLAINTIFF'S WITNESS, SWORN
5 CROSS-EXAMINATION (Continued)
6 BY MR. STONE:
7 Q Mr. Ergen, when we left off, you were going to answer
8 the question of whether there was a material difference
9 between the 1999 10-K and the 2002 10-K language with
10 respect to the status of the Conditional Access System. Do
11 you recall that?
12 A Yes.
13 Q Did you spend some time last night reviewing that
14 language?

15 A No, I did not.

16 Q Did you spend any time reviewing the language at all?

17 A I didn't go beyond what I had seen right before we
18 broke, but I had kind of read it.

19 Q Are you able to identify a material difference or do
20 you agree that there is no material difference between 2002
21 and 1999?

22 A There is one difference. I don't know if it's a
23 material difference, but there is one difference. In the
24 1999 10-K, it does talk about we may have to swap the card
25 out. That specific language was not used in 2002. Other

SHARON SEFFENS, U.S. COURT REPORTER

♀

4

08:30:33 1 than that, the language is pretty similar about a potential
2 compromise to the system.

3 Q So you would agree that the language in the 1999 10-K,
4 if anything, was more ominous than the language in the 2002
5 10-K?

6 A I wouldn't term it that way, no.

7 Q 2002 is the year you testified that a decision was made
8 that the system was so destroyed that a card swap was
9 necessary, correct?

10 A No, I think what I said was in 2002 that I think we
11 reached the conclusion that we may have to swap the card
12 to -- we had run out of ammunition to do electronic
13 countermeasures to the hackers.

14 Q And the 2002 10-K doesn't even mention the possibility
15 of a card swap; isn't that true?

16 A I think it was -- I think it's certainly inferred from
17 the fact that if it were compromised -- I think people from
18 reading our previous 10-Ks would know that, but having said
19 that, no, it doesn't talk about a potential -- it doesn't
20 talk about a card swap in 2002, specific language.

21 It did -- normally what we would do is sit down with
22 our -- we would talk to engineers, get the status of the

23 system. We would sit down with the accountants, and these
24 are outside accountants, auditors. You may have heard of
25 them, Arthur Anderson, KPMG. And we would go through the

SHARON SEFFENS, U.S. COURT REPORTER

♀

5

08:31:57 1 status, and then we would go through what disclosure we
2 would need to make to make sure that we'd give accurate
3 information for our investors and for the Securities &
4 Exchange Commission under accounting rules, and that's what
5 we did.

6 Q Is there language in here that you believe reflects to
7 an investor that in 2002 a decision had been made to swap
8 cards because of the destruction of the system?

9 A That's because the decision at that point -- there is
10 not language that you have shown in your exhibit there that
11 talks about swapping cards, and that is because --

12 Q Thank you.

13 If you could look, please, at the --

14 THE COURT: Just a moment. Go ahead and finish
15 your answer.

16 THE WITNESS: And that is because as we sat down
17 with the engineers and outside auditors I think -- my
18 recollection is we made the decision to do what I would call
19 a soft swap. A soft swap meant that we were not going to go
20 and replace the card if you already were an existing
21 customer of ours and you had a system in your house. We
22 weren't going to go out and swap that card.

23 what we were going to do was go to a new
24 generation card and new customers, people who didn't have a
25 box, but we had to go out and get the card produced. So we

SHARON SEFFENS, U.S. COURT REPORTER

♀

6

08:33:14 1 couldn't just snap our fingers and get the card produced.

April 10, 2008 Volume 1 Ergen.txt
2 when we explained that to our auditors, this was
3 the language -- usually you have lawyers, and you have
4 outside auditors, and you have your internal people. This
5 is the language that they felt most comfortable with that
6 most accurately reflected where we were.

7

8

9 BY MR. STONE:

10 Q Were these the same auditors and engineers that were
11 around in 1999?

12 A The auditors may have switched by then. I could look.
13 If I can take the time -- and maybe you know, sir. We had
14 Arthur Anderson I believe in 1999. At some point, that
15 switched -- Arthur Anderson went out of business and shut
16 down, and we switched to KPMG auditors.

17 Q Who was the most senior executive in charge of the
18 Conditional Access System in 1999 to your recollection?

19 A At EchoStar?

20 Q Yes.

21 A At EchoStar, it would have been Mike Dugan.

22 Q Was Mike Dugan still with the company in 2002?

23 A Yes, he was.

24 Q If I could direct your attention to the 2001 10-K which
25 is Exhibit 1379, specifically if you go to page 65 which has

SHARON SEFFENS, U.S. COURT REPORTER

♀

7

08:34:54 1 a stamp at the bottom of 28676, did you sign the 2001 10-K
2 in February of 2002?

3 A Yes, I did.

4 Q Specifically February 28, 2002?

5 A Yes.

6 Q Can you identify the names of the executives or
7 engineers who were involved in informing you of the status
8 of the Conditional Access System in 2002?

9 A My recollection is the most senior person would be Mike
10 Dugan, probably may have talked with Mark Jackson, and

11 potentially with other similar level engineers as well who
12 may have been more specific to the project. They may have
13 been in some conversation.

14 Q If you could go to page eight of Exhibit 1379 of the
15 2001 10-K.

16 A Page eight?

17 Q Yes, 1379, page eight. I am focusing at the bottom
18 under the heading "Conditional Access System." It continues
19 over to the next page which provides the second paragraph on
20 the Conditional Access System, which is identical to the
21 paragraph we have on the blowup. It's at the top of the
22 page. It begins with "The delivery of subscription
23 programming."

24 A I see that.

25 Q Is there any material difference between that language

SHARON SEFFENS, U.S. COURT REPORTER

♀

8

08:37:04 1 and the language from the 1999 10-K, Exhibit 1378?

2 A I would have to look -- it's a pretty broad question.
3 This is about a 200-page document, so I would have to look
4 at the 1999 10-K.

5 Q I am focusing specifically on that paragraph about the
6 Conditional Access System. I don't know if you can see the
7 blowup.

8 A Again, I think it's very similar to the answer we had
9 before, which is that in 1999 we talked about maybe
10 replacing the card, and in 2001, we don't use that language.
11 We still talk about the compromise to the system.

12 Q Isn't the language in the 2001 10-K identical to the
13 language in the 1999 10-K with respect to the Conditional
14 Access System?

15 A I would have to put them -- what is it?

16 Q It's 1379, page 9, and --

17 A I can just put them side by side and read them.

18 Q And 1378, page 5. It's also on the blowup.

19 A Which page is the 1999?
20 Q 1378, page 5 or 27343 at the bottom as well.
21 A If I am reading this correct, I don't think the
22 language is identical, no.
23 Q Is it virtually identical other than one word perhaps?
24 A It doesn't look virtually identical if I am reading it
25 correctly.

SHARON SEFFENS, U.S. COURT REPORTER

9

08:39:48 1 THE COURT: Counsel, why don't we let the jury
2 determinate that.
3 MR. STONE: Absolutely.
4 BY MR. STONE:
5 Q Were the engineers who were involved in discussing the
6 Conditional Access System with auditors in 2002 the same
7 ones that were involved in the 1999 10-K as far as you know?
8 A Certainly at Mr. Dugan's level and at Mr. Jackson's
9 level. They were there in 1999. They would have been there
10 in 2000, 2001.
11 Q Did you have an understanding as to what it was in 1999
12 that caused them to tell the auditors something that
13 required a disclosure of a potential card swap?
14 A I have a general understanding, yes.
15 Q Does it relate to that letter we saw, Exhibit 828?
16 A Probably indirectly.
17 Q Am I correct that each of these 10-Ks were completely
18 accurate and truthful as far as you knew at the time you
19 signed them?
20 A That's correct.
21 Q And did any of the 10-Ks that we have looked at
22 disclose that anything significant or different occurred to
23 the Conditional Access System in 2000 versus the other
24 years?
25 A I think in 2000 we had -- my recollection was we had --

SHARON SEFFENS, U.S. COURT REPORTER

08:41:19 1 that the 1999 concern that we had had been eliminated as an
2 economic concern. While we still had a compromised system,
3 we had been able to do countermeasures to get that back
4 under control. Therefore, the disclosure changed slightly
5 because we didn't believe based on the countermeasures and
6 changes we had made to the system that we would have to --
7 at least at the time, we didn't believe we were going to
8 have to switch out the card.

9 Q Didn't you testify on direct that in 1999 the system
10 was secure?

11 A I think the system was secure in 1999. Again, it
12 depends on your definition, but I think I testified that I
13 became aware that someone had hacked the system, although it
14 was more of a hobbyist kind of thing, and it wasn't very
15 widespread.

16 Q Sir, do you have any belief that you used the word
17 "secure" with respect to the Conditional Access System in a
18 way that is different than the engineers at EchoStar
19 responsible for the Conditional Access System?

20 A Oh, I think it's quite likely I would use different
21 words than engineers just because it's not my background.

22 Q When you said there was a decision to engage in a soft
23 swap, was that different than the decision to swap the
24 existing cards?

25 A Well, I think it was part of a two-part decision is

SHARON SEFFENS, U.S. COURT REPORTER

♀

08:42:58 1 probably the best way I would describe it. The soft swap --
2 when we decided that we were hopelessly compromised and
3 there wasn't anything we were going to be able to do so we
4 were going to go to the expense and time to swap out the
5 card, we first had to get a new card. So we had to have a
6 card that was better than the system that we had, so we had

7 to have our vendor in Switzerland develop that.

8 The second thing we had to do was to make sure it
9 worked. So to do that, we started really a two-part
10 decision with the first decision being made and the second
11 decision not being fully made until we got results from the
12 first part.

13 The first part was to do what I would call a soft swap
14 where we took new customers and inserted a new card and
15 where we -- my other recollection is perhaps you were a
16 customer, and you had a problem with your set-top-box. You
17 sent it back for repair. When we got that box for repair,
18 we would switch out the card in the box to the new card. We
19 would then go through a period of time to make sure nobody
20 hacked that card.

21 Then the second part of that decision was now that we
22 -- and you also have to ramp your production up of a card
23 not only for your new customers but also for all your old
24 customers. That process took to my recollection a year or
25 two. Then at some point we made the decision to swap out

SHARON SEFFENS, U.S. COURT REPORTER

♀

12

08:44:35 1 existing customers, which is where the major expense and
2 pain to our company was going to be. We made that decision
3 to then swap out all of our customers, which means we had to
4 go to existing customers and make sure that we communicated
5 and got you a new card and got you installed properly.

6 Q Just to be clear, the year in which it was hopelessly
7 compromised was 2002? That's your testimony?

8 A I became aware in 2002 I think in my mind that we were
9 going to have to go to a new security card and that the
10 system was in fact -- we did not have the ability as we had
11 in the past to do electronic countermeasures to resecure the
12 system.

13 Q So it's correct that in 2002 you believed it was
14 hopelessly compromised?

15 A I don't know if I would use those exact words, but I
16 believed in my mind we were going to have to ultimately
17 switch out. We had to do something different to the
18 security system and probably switch out the security system.
19 I didn't know how we were going to do that, but that's the
20 conclusion as I recall that I came to internally in my mind.

21 Q I thought "hopelessly compromised" were your words.

22 A I would say that the system was compromised, and we had
23 to switch out a new card. I think "hopelessly compromised"
24 probably is a general description of that.

25 Q Sir, let's move to another topic if we can. I will

SHARON SEFFENS, U.S. COURT REPORTER

♀

13

08:45:59 1 take these down.

2 In October 2001, EchoStar signed agreements to merge
3 with DirectTV, correct?

4 A That date sounds correct, yes.

5 Q At the time, you believed EchoStar would receive
6 specific benefits from a merger with DirectTV, specifically
7 synergies, correct?

8 A Yes, I did.

9 Q Am I also correct that if the merger did not close with
10 you who owned DirectTV, then under the agreement, EchoStar
11 would have to pay a \$600 million failed deal fee?

12 A That's correct.

13 Q And you went through with the deal because you believed
14 the \$600 million downside was outweighed by billions of
15 dollars of potential upside?

16 A Well, I weighed the risk of -- I believed we would be
17 allowed to merge, and I believed that had a benefit to our
18 company and our shareholders. It's typical in a business
19 deal like that where -- we were the company that was going
20 to acquire DirectTV. It's typical in a deal like that if you
21 are unsuccessful and the company takes itself off the
22 market, so to speak, that they get something called a
23 breakup fee, so we agreed to that fee and believed that was

24 a fair deal for us at the time.

25 Q \$600 million you believed was also a material amount of

SHARON SEFFENS, U.S. COURT REPORTER

♀

14

08:47:38 1 money to EchoStar at the time you entered into the
2 agreement?

3 A Yes, I did.

4 Q And you and your family owned approximately 50 percent
5 of EchoStar's shares at the time?

6 A Yes, we did.

7 Q And you were aware that News Corp. had opposed
8 EchoStar's attempt to acquire DirectTV, correct?

9 A I don't think at the time they opposed us. They had a
10 competing bid, so they were a competitor to -- both News
11 Corp. and EchoStar wanted to acquire DirectTV. I don't know
12 if they opposed us in that literal sense, but they were a
13 competitor.

14 Q Maybe if I could play from your deposition to help
15 refresh your recollection, page 272, lines 3 through 5.

16 THE COURT: You may show that to him to refresh
17 his recollection.

18 THE WITNESS: Where are we looking?

19 MR. STONE: Page 272.

20 THE WITNESS: Well, I think you are trying to --

21 THE COURT: Just answer the question.

22 THE WITNESS: What was the question?

23 BY MR. STONE:

24 Q Does that refresh your recollection that News Corp. had
25 opposed EchoStar's attempted acquisition of DirectTV?

SHARON SEFFENS, U.S. COURT REPORTER

♀

15

08:49:16 1 A Yes, it does.

2 Q And you recall that they in fact did oppose it?

3 A They opposed it after we got the deal to acquire
4 DirectTV. After we won the competition, then my recollection
5 is they opposed our ability -- they opposed with the
6 government our acquisition of it, but they didn't oppose us
7 while we were still -- I don't think I misunderstood your
8 question, but your previous question was a time frame before
9 we brought DirectTV. I don't believe they opposed us at that
10 time. Your question in this deposition was I believe did
11 they oppose you after the deal, and I think the answer is
12 yes.

13 Q To your knowledge, did News Corp. do anything during
14 the time when the deal was pending to oppose the acquisition
15 by EchoStar of DirectTV?

16 A I think they had a competing offer, and I don't know
17 that that -- I don't know that I would term that opposition,
18 no.

19 Q When you said News Corp. opposed EchoStar's attempted
20 acquisition of DirectTV, you're saying that's not during the
21 time that the deal was pending?

22 A Let's make sure we don't miss -- we both had competing
23 offers for DirectTV. Their board of directors ultimately
24 chose EchoStar's deal over DirectTV's. I don't believe
25 during that period of time News Corp. was opposing our deal.

SHARON SEFFENS, U.S. COURT REPORTER

♀

16

08:50:44 1 They just had a competing offer.

2 Once we were declared the winner by DirectTV, then you
3 had to go get regulatory approval from the U.S. Government,
4 so you had to get Justice Department approval and Federal
5 Communications Commission approval. I believe at that point
6 in time once News Corp. had lost the deal they then opposed
7 us, as was their right to do so.

8 Q When the deal fell through, you were depressed that
9 EchoStar had to pay \$600 million in a failed deal fee?

10 A I mean in a facetious way, yes, I was depressed.

11 Q Isn't that what you testified to?
12 A I think I was. Our company was out \$600 million
13 because we had not been able to get approval for the deal.
14 Q After that merger fell apart, you learned that News
15 Corp. was going to acquire DirectTV, correct?
16 A Months later then DirectTV -- once our deal -- after the
17 Justice Department opposed our deal, then, yes, I became
18 aware that DirectTV did in fact go back and make another
19 offer that DirectTV accepted.
20 Q The deal between EchoStar and DirectTV fell apart in the
21 fall of 2002, correct?
22 A My recollection is that it was at the end of --
23 Q October of 2002?
24 A I think it was -- I think we ultimately agreed with
25 DirectTV to stop our attempt to merge in December of 2002.

SHARON SEFFENS, U.S. COURT REPORTER

♀

17

08:52:31 1 Q And the regulatory approvals had been denied in
2 October 2002. Does that ring a bell?
3 A I believe the Justice Department denied us in October.
4 We still had the option at that point to go to -- you still
5 have the option then to go to court to overturn the Justice
6 Department. We decided -- my recollection is -- in December
7 of 2002, we agreed that the likelihood of success of
8 overturning the Justice Department was unlikely, so I
9 believe that's when we officially terminated the deal.
10 Q Then EchoStar opposed the deal by News Corp. to acquire
11 DirectTV?
12 A Yes, we did.
13 Q If EchoStar opposed that, it means you opposed it,
14 correct?
15 A Well, the company opposed -- I guess we can personalize
16 it. I mean, as CEO of EchoStar, I certainly was against
17 that deal. I certainly opposed it as CEO of Echostar.
18 Q The \$600 million failed deal fee was paid around
19 December 2002?

20 A My recollection is it would have been paid on or about
21 that time. It might have been January of 2003 but on or
22 about that time.

23 Q Am I correct that you consider NDS to be a part of the
24 News Corp. family of companies?

25 A My recollection is NDS is at least -- it may be

SHARON SEFFENS, U.S. COURT REPORTER

♀

18

08:54:00 1 different now -- 80 percent owned by News Corp.

2 Q Ultimately, the Federal Communications Commission
3 approved News Corp.'s acquisition of an interest in DirectTV?

4 A That's my recollection, yes.

5 Q Do you recall that before that occurred EchoStar filed
6 a petition with the FCC opposing DirectTV being acquired by
7 News Corp.?

8 A Yes.

9 Q Do you recall that was signed by the Director of
10 Business & Legal Affairs on June 13, 2003?

11 A I don't remember the exact date, but that sounds about
12 right of when we would have filed our opposition as was our
13 right.

14 Q Let me show you Exhibit 1512 at page 71. That may
15 refresh your recollection.

16 THE COURT: what page?

17 MR. STONE: It would be the second tab.

18 THE COURT: The second tab would be 071 at the
19 bottom.

20 MR. STONE: Yes.

21 THE WITNESS: Okay.

22 BY MR. STONE:

23 Q Does that refresh your recollection that the Director
24 of Legal & Business Affairs signed the petition on June 13,
25 2003?

SHARON SEFFENS, U.S. COURT REPORTER

♀

08:55:24 1 A That's correct.

2 Q And do you recall that one of the grounds that EchoStar
3 and NagraStar cited to the FCC to block News Corp.'s
4 acquisition was the EchoStar complaint against NDS that had
5 recently been filed in the Central District of California?

6 A My recollection is we had a number of reasons we
7 opposed this acquisition, and I believe one of the reasons
8 was as you stated.

9 Q The complaint that had recently been filed against NDS
10 in the Central District of California, correct?

11 A Well, I think it was -- I think that peripherally was
12 part of it. One of the standards that the Federal
13 Communications Commission has is a character standard, so I
14 think as part of that we filed the NDS case as part of that.

15 Q The lawsuit?

16 A The case and their actions.

17 Q Do you recall that the original complaint filed in the
18 Central District of California was filed on June 6, 2003?

19 A I think the original complaint was filed my
20 recollection is in the fall of 2002.

21 Q I know there was another action, but the one in the
22 Central District of California was filed on June 6, 2003.
23 Does that ring a bell?

24 A Let's see, the first action was 2002. Yes, that sounds
25 about right. It would have been 2003.

SHARON SEFFENS, U.S. COURT REPORTER

♀

08:56:59 1 Q Now, let's talk a little bit about Mark Jackson. He
2 was the president of EchoStar Technologies Corporation?

3 A At which time frame?

4 Q In the 2006 time frame.

5 A In 2006, Mark Jackson was the president of EchoStar
6 Technologies. That's our set-top-box engineering company.

7 Q What were Mr. Jackson's duties and responsibilities as
8 you understood them at the time?

9 A As president, he had general overall profit and loss
10 responsibility for us and managed the employees' day-to-day
11 operations of EchoStar Technologies.

12 Q Was he responsible for contacting conditional access
13 suppliers as well?

14 A If it was part -- if he got a request to do that from
15 one of his customers, he certainly would do that, yes.

16 Q You are aware that Mr. Jackson in 2006 and 2007 met
17 with NDS representatives to discuss NDS replacing Nagra as
18 the supplier of the conditional access system?

19 A My recollection is he did meet with them. One of the
20 customers -- EchoStar Technologies Corporation sells their
21 set-top-boxes to other customers in other countries, and one
22 of his customers in Canada had asked him to look at putting
23 NDS in the set-top-boxes instead of Nagra. I think as a
24 result of that he did meet with them, yes.

25 Q And that customer was Bell Express View; is that

SHARON SEFFENS, U.S. COURT REPORTER

♀

21

08:58:45 1 correct?

2 A That's correct.

3 Q The largest independent customer that EchoStar had?

4 A I believe that's true, yes.

5 Q And you did not have a problem with Mr. Jackson
6 entering into discussions with NDS about replacing Nagra as
7 EchoStar's security provider, correct?

8 A Not if his customer -- I mean, we run the company for
9 our customers, so if our customer in Canada was as you say
10 the largest independent customer and wanted us to do that,
11 we certainly would do that, and they would pay us to do
12 that.

13 Q Well, Mr. Jackson was meeting with NDS to consider NDS
14 for the EchoStar system? You understood that?

15 MR. WELCH: All this line of questioning goes to a

16 time period subsequent to all the relevant time periods in
17 this lawsuit.

18 MR. STONE: That's what makes it relevant.

19 THE COURT: Are you driving at character evidence
20 about the ongoing negotiations and therefore --

21 MR. STONE: Correct.

22 THE COURT: Overruled. You can answer the
23 question.

24 THE WITNESS: well, my recollection is he met with
25 the NDS at the request of Bell Express View as you said. My

SHARON SEFFENS, U.S. COURT REPORTER

♀

22

09:00:04 1 understanding is that during the conversation NDS proposed
2 also the security system for EchoStar.

3 BY MR. STONE:

4 Q In entering into those negotiations with NDS, EchoStar
5 was doing that in good faith?

6 A I think we would do that in good faith, yes.

7 Q Did you tell Mr. Jackson that he should not consider
8 NDS as a replacement conditional access supplier because of
9 what you believed NDS did to EchoStar?

10 A well, I don't think I would have used those words, no.

11 Q In fact, you didn't have that conversation at all with
12 Mr. Jackson; is that true?

13 A My recollection is that Mr. Jackson looked at NDS at
14 the request of Express View, that during the course of
15 conversation NDS suggested they also could be EchoStar's
16 vendor, and EchoStar chose not to do that, and Bell Express
17 View chose not to use NDS either after those conversations.

18 Q In entering into discussion with NDS, EchoStar was
19 looking for the best system at the best price?

20 A I think in engineering you always have to -- I think
21 that's generally true, yes.

22 Q Did Mr. Jackson tell you after meeting with NDS that
23 his general read was he didn't think it was going to be

24 economical to switch to NDS for security?

25 A I think there were a number of issues from

SHARON SEFFENS, U.S. COURT REPORTER

♀

23

09:01:35 1 Mr. Jackson's point of view that the NDS system would be
2 difficult to be put into our system as secure. Bell Express
3 View ultimately decided that they did not feel comfortable
4 making that change, and there was a trust factor that was
5 lacking obviously.

6 Q Did he tell you that his read was it was not going to
7 be economical?

8 A Well, I think I answered that, but I think what he said
9 was it wouldn't -- he said he thought there was a security
10 issue in changing it to ours. There was a cost issue, and
11 there was a trust issue.

12 Q Did Mr. Jackson tell you that he had invited price
13 quotations from NDS to replace Nagra as the conditional
14 access supplier?

15 A I would think that -- you would have to get price
16 quotations to settle economics. I believe that was done,
17 yes.

18 Q Would it be fair to say that Mr. Jackson had the direct
19 dealings with NDS in these discussions?

20 A As far as far as I know, Mr. Jackson and Bell Express
21 View were the two people that talked to him.

22 Q Do you know who they had the meetings with at NDS?

23 A No, I do not.

24 Q And I take it you did not participate directly in any
25 of those meetings.

SHARON SEFFENS, U.S. COURT REPORTER

♀

24

09:02:55 1 A No, I did not.

2 Q Now, are you aware that a man named Martin Mullen or

3 Marty Mullen was a consultant to EchoStar?

4 A No.

5 Q None of your employees ever told you that an individual
6 named Martin Mullen was hired by EchoStar as a consultant?

7 A No.

8 Q Did you have any knowledge during the time period that
9 Mr. Mullen was being paid as a consultant for EchoStar and
10 NagraStar he was arrested by federal agents in Florida and
11 charged with satellite piracy? Did anyone bring that to
12 your attention at any time?

13 A No.

14 Q Did anyone at EchoStar and NagraStar ever bring to your
15 attention that Mr. Mullen had pled guilty to charges of
16 satellite piracy?

17 A No.

18 Q Did anyone ever tell you that EchoStar was paying
19 Mr. Mullen's attorney's fees?

20 A No.

21 Q Is it your testimony you don't recall Mr. Mullen at
22 all?

23 A I don't recall a Mr. Mullen -- I actually know a guy
24 named Marty Mullen, but he was a high school friend.

25 Q Do you have any recollection of shipping VC-2

SHARON SEFFENS, U.S. COURT REPORTER

♀

25

09:04:12 1 descramblers to Mr. Mullen's company?..

2 A No.

3 Q Do you have any recollection of Mr. Mullen visiting you
4 on multiple occasions in Colorado?..

5 A No, I do not.

6 Q Now, is it your testimony that it has never come to
7 your attention that EchoStar possessed certain confidential
8 documents of NDS that had been stolen?

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

10 Q Have you ever heard of an EchoStar consultant named Ron
11 Ereiser?

12 A No, I haven't.
13 Q Now, yesterday when you took the stand you made a
14 pledge to tell the truth under penalty of perjury. Do you
15 recall that?
16 A Yes.
17 Q In 1999, in a federal court called CBS Broadcasting
18 versus EchoStar, you also made a formal pledge to the
19 District Court under penalty of perjury?
20 A Yes.
21 Q It's your testimony that you did not completely keep
22 that promise you made under oath to the District Court, but
23 you felt you had a good reason not to?
24 A I think that's generally correct, yes.
25 Q Do you believe it would be okay today not to tell the

SHARON SEFFENS, U.S. COURT REPORTER

♀

26

09:05:10 1 complete truth if you felt you had a good reason not to?
2 A I would say it in a little different way. I think you
3 misconstrue that. I believe I did tell the truth in that
4 case, and events changed. I do believe it's important to
5 tell the truth in this court today.
6 MR. STONE: No further questions.
7 THE COURT: Redirect.
8 MR. WELCH: Just a short redirect, Your Honor.
9 THE COURT: Once again for the record, just
10 reintroduce yourself.
11 MR. WELCH: Wayne Welch.
12 REDIRECT EXAMINATION
13 BY MR. WELCH:
14 Q Good morning.
15 A Good morning.
16 Q I am going to try and clarify a few areas of the
17 examination that Mr. Stone went through with you. First I
18 want to talk about the card swap. When we talked about the
19 card swap, I think you talked about a soft swap and then a

20 harder swap.

21 In '99, you became aware of a possible break, correct,
22 that you previously testified about?

23 A I did, yes.

24 Q How would you describe that potential break or that
25 possible break in '99?

SHARON SEFFENS, U.S. COURT REPORTER

♀

27

09:06:36 1 A well, I think originally maybe there was a little panic
2 that we had heard that the system -- somebody had broken the
3 system, but our engineers along with NagraStar were able to
4 use electronic countermeasures to control that. The actual
5 break was more of a hobbyist kind of a thing where you
6 needed a big -- you actually spent more money to perhaps
7 break the system than being a legal customer, so it wasn't
8 something that was economically for somebody to resell and
9 put out in the marketplace.

10 Q were you able to slow down that piracy through the use
11 of these electronic countermeasures?

12 A Yes, we were.

13 Q Did there come a point in time where you learned that
14 there may have been a wire spread hack?

15 A I think later in the 2000 and 2001 and 2002 time frame
16 there became other hacks, a different kind of hack, and we
17 were able to control that with electronic countermeasures
18 for a period of time until about 2002 when as I have
19 testified I came to the conclusion that we probably were
20 going to have replace the security system.

21 Q Mr. Stone put in front of you varying 10-Ks, and I want
22 to try and get some clarity on some of these issues.

23 If you could look at Exhibit 653 for me, which is the
24 2000 10-K.

25 A Is there a page?

SHARON SEFFENS, U.S. COURT REPORTER

♀

09:08:21 1 Q Could you turn to page two for me, please?

2 A Okay.

3 Q If you look down at the last paragraph, could you read
4 for the jury the second sentence where it starts "However"?

5 A "However, theft of cable and satellite programming has
6 been widely reported, and our signal inscription has been
7 pirated and could be further compromised in the future. We
8 continue to respond to compromises of our inscription system
9 with measures intended to make signal theft of our
10 programming commercially uneconomical.

11 "We utilize a variety of tools to continue to
12 accomplish this goal. Ultimately, if other measures are not
13 successful, it could be necessary to replace the credit card
14 size card that controls the security of each consumer
15 set-top-box at a material cost to us. If we cannot properly
16 correct the compromise in our inscription technology, it
17 would adversely affect our revenue and our ability to
18 contract for video and audio services provided by
19 programmers."

20 Q Your testimony is consistent with what was provided in
21 the 10-K to the public, correct?

22 MR. STONE: Objection, leading.

23 BY MR. WELCH:

24 Q Was your testimony that you gave today consistent with
25 what you reported in the 10-K?

SHARON SEFFENS, U.S. COURT REPORTER

♀

09:09:58 1 THE COURT: Overruled. You can answer that.

2 THE WITNESS: I believe so, yes.

3 BY MR. WELCH:

4 Q Now, subsequent to that time frame in 2000, did you
5 learn that the system may have been subject to a larger
6 compromise?

7 A Yes.

8 Q How did you learn that? I think we mentioned that
9 Mr. Dugan was in charge of ETC. Were there any
10 conversations with Mr. Dugan?..

11 A Yes. I mean, in normal engineering reviews, it would
12 have come up that the system -- well, take a step back. In
13 1999, this disclosure -- I believe we came to where -- I at
14 least became convinced that it was uneconomic for people to
15 break the system based on this. Later there was additional
16 information that hacks had gotten more sophisticated. There
17 were additional new kinds of hacks to the system, and by
18 2002, I became convinced that we probably had to replace the
19 system.

20 Q Approximately when did you have your conversations with
21 Mr. Dugan where he told you that you may have to replace the
22 system?

23 A I believe that would have been in 2002. Before that, I
24 think there was a high degree -- there was confidence that
25 -- maybe not a high degree, but there was certainly some

SHARON SEFFENS, U.S. COURT REPORTER

♀

30

09:11:15 1 confidence that we could use those electronic
2 countermeasures to stay ahead of the pirates.

3 Q If we take the period 2000 to 2002, did you take
4 measure to -- or did decide that you were going to take
5 measures to try and mitigate any harm?

6 A Yes.

7 Q What were those?

8 A We took a lot of measures. We spent a lot of time
9 figuring out what the pirates were doing or the hackers were
10 doing and then how we would counterattack. It became a bit
11 of a cat and mouse game is the way I would describe it where
12 we would do something that would turn the signal off to the
13 hackers, and then they would come up with a new way to get
14 the signal back, and then we would come up with a way to
15 turn them off. Ultimately, by 2002, they were getting the

16 better end of the -- they had us on the run. They were
17 winning. I didn't think at that point we could win without
18 changing the system out.

19 Q Now, in 2002, did you start to take measures to
20 actually implement the change of a Conditional Access
21 System?

22 A This is where I think we kind of went ultimately to the
23 soft swap, so we did do some things in 2002.

24 Q Had you already spent money on cards that were in
25 inventory in the mid 2002 time frame?

SHARON SEFFENS, U.S. COURT REPORTER

31

09:12:38 1 A I think the best way is to explain what a soft swap is.
2 In 2002, we would go to new customers, and we had a new card
3 that we thought would work, so we put that card in. Then we
4 had some inventory in stock of -- well, our security
5 inventory could be several months, maybe as much as six
6 months, on certain models of old cards. Before we sent them
7 out, we would replace those cards, but they wouldn't be
8 going to your home. They would be in our warehouse where we
9 would do that. Then we would have some service units coming
10 back in during this time frame, or if it came back for
11 repair, we would switch the card out before we sent it back
12 to the customer. That was kind of the soft swap.

13 Q So approximately how long did that soft swap take --
14 when did that soft swap period start?

15 A Well, my recollection is that would have been probably
16 in the second half of 2002, and that probably went on for
17 about 18 months.

18 Q Was there a time period where you actually started a
19 hard card swap out?

20 A I believe in 2004 -- my recollection is in 2004. Then
21 we went to what I would call the massive swap, which was to
22 actually go to the customers we had, go to their homes and
23 send them a new card to their home, which was much more
24 complicated.

25 Q Now, if you could turn to Exhibit 1381, which is a 2003

SHARON SEFFENS, U.S. COURT REPORTER

♀

32

09:14:15 1 10-K, on page ten of that document which is labeled on the
2 bottom ESC --

3 A What's it called?

4 Q Exhibit 1381. The Bates label on the right-hand
5 bottom --

6 A I'm not sure I have 1381. Did we talk about it
7 yesterday?

8 Q Yes.

9 A Okay, what page?

10 Q It's Bate labeled on the bottom ESC 0030381.

11 MR. STONE: Your Honor, we don't have a copy.

12 THE COURT: Please continue, counsel. They will
13 find a copy.

14 THE WITNESS: Okay.

15 BY MR. WELCH:

16 Q Do you see the second to the last paragraph that starts
17 "Theft of"?

18 A Yes.

19 Q Could you read for us that first line?

20 A "Theft of subscription television programming has been
21 widely reported, and our signal encryption has been pirated
22 and could be further compromised in the future."

23 Q Then read the second to the last sentence that starts
24 with "we continue."

25 A "we continue to respond to compromises of our

SHARON SEFFENS, U.S. COURT REPORTER

♀

33

09:16:16 1 encryption system with security measures intended to make
2 signal theft of our programming more difficult. In order to
3 combat piracy and maintain the functionality of active

4 set-top-boxes that have been sold to subscribers, we intend
5 to replace old generation Smart Cards with newer generation
6 Smart Cards in the future. However, there can be no
7 assurance that these security measures or any other future
8 security measures we may implement will be effective in
9 reducing piracy of our programming signals."

10 Q So right there you were telling everybody that you may
11 actually have to do a hard card swapout, correct?

12 A That's correct.

13 Q Is there anywhere in the 10-K where it talks about the
14 approximate number of subscribers you had in the field or
15 boxes you had in the field at the end of 2003?

16 A There probably is, yes.

17 Q Could you find that for us?

18 THE COURT: Counsel, if you have a page in mind,
19 that page could be turned to.

20 MR. WELCH: I will come back to that, Your Honor.
21 We will find that page.

22 BY MR. WELCH:

23 Q Now I would like you to turn to Exhibit 651, page 17.

24 A Do I have that up here?

25 Q This is the 2004 10-K, correct?

SHARON SEFFENS, U.S. COURT REPORTER

♀

34

09:18:55 1 A That's correct.

2 Q 2004 is the year we actually started to do the hard
3 card swap?

4 A Yes, the massive swap started in 2004.

5 Q Could you read for us beginning with just the first
6 sentence on the second full paragraph?

7 A What page?

8 Q 651-17.

9 A "Our signal encryption system has been pirated allowing
10 illegal receipt of our programming, and our security systems
11 could be further compromised in the future."

12 Q Now, if you would go down and read the second to the
13 last sentence in that second full paragraph for us.

14 A "To further combat piracy and maintain the
15 functionality of active set-top-boxes, we are in the process
16 of replacing older generation Smart Cards with newer
17 generation Smart Cards. We expect to complete the
18 replacement of older generation Smart Cards during the
19 second half of 2005."

20 Q That's the hard card swapout where you do everything in
21 the field?

22 A That's where we go to you as a customer in your home.

23 Q Going back to the end of 2003, which is Exhibit 1381 in
24 the 10-K -- it's page 36 in the document, but it's Bates
25 labeled ESC 0030409.

SHARON SEFFENS, U.S. COURT REPORTER

35

09:20:49 1 A Okay.

2 Q Does that page talk about the number of DISH network
3 subscribers that were active as of the end of 2003?

4 A Yes, it does.

5 Q Could you read for us how many DISH network subscribers
6 it says that you have, which is the very first sentence in
7 the first paragraph?

8 A As of December 31, 2003, we had approximately 9.425
9 million DISH network subscribers.

10 Q And those were the subscribers that you had to do the
11 hard swap on?

12 A Those were for the most part -- since we started in
13 2004 would be the people we had to hard swap.

14 Q One other area that I want to get into that Mr. Stone
15 talked to you about is this \$1.2 billion in revenues that
16 you made. I want to clarify that for the jury.

17 If you could turn to Exhibit 1379, page 37, which is
18 Bates labeled ESC 0028650.

19 A Okay.

20 Q Do you see a line there where it talks about the

21 \$1.2 billion in revenues?

22 A Yes.

23 Q As I understand his argument, he is trying to say that
24 you couldn't have been affected by piracy if you made this
25 \$1.2 billion in revenues. Could you explain to the jury why

SHARON SEFFENS, U.S. COURT REPORTER

36

09:22:33 1 that argument isn't correct?

2 A Well, I think for his argument to be correct everybody
3 in the United States would have to be a hacker and a pirate
4 and steal things. What happens fortunately in America today
5 is most people are honest, and most people -- even if
6 someone approached you and said we can give you free TV,
7 most people will pay for TV because they know it's the right
8 thing to do, and it's not breaking the law. So we are
9 fortunate in the United States that most people are honest.
10 Therefore, we were able to grow our revenue because we have
11 got more honest customers than dishonest customers. But
12 having said that, that doesn't mean we weren't injured by
13 the fact that people did in fact steal our signal.

14 Q But for the piracy that's alleged in this lawsuit,
15 would that number have been larger?

16 A I believe that number would have been larger, yes.

17 Q And that is what Mr. Rock is going to testify about?

18 MR. STONE: Objection, calls for speculation.

19 THE COURT: That's improper. Sustained.

20 THE WITNESS: I don't know what he is going to
21 testify to.

22 BY MR. WELCH:

23 Q One other area I want to clarify is this whole time
24 frame that Mr. Stone tried to say that you filed a current
25 lawsuit in retaliation for -- in connection with

SHARON SEFFENS, U.S. COURT REPORTER

09:23:41 1 Mr. Murdock's purchase of DirectTV. I would like to focus
2 you on that.
3 Now, when did you get the winning bid for DirectTV?
4 A Again, that was -- the date was --
5 Q I want to talk about your merger with -- the EchoStar
6 Communications merger with DirectTV.
7 A I believe we got that in 1999.
8 Q In your earlier testimony, I think you talked about the
9 government denied it in October 2002.
10 Does that refresh your recollection that it was
11 earlier? It wasn't '99?
12 A It might have been 2001.
13 Q Do you know approximately when in 2001?
14 A I think it was October 2001.
15 Q Now, your testimony was the government denied that in
16 October 2002, but you could have appealed that up through
17 the point of December 2002?
18 A We could have appealed that actually quite a bit
19 longer. We just ultimately chose to -- we didn't believe we
20 would be successful, so we chose to terminate the agreement
21 I believe in December 2002.
22 Q Now, one of the things he talked about was that you
23 filed your petition with the FCC, which was Exhibit 1512,
24 and the date he gave you that you testified about was
25 6/13/03.

SHARON SEFFENS, U.S. COURT REPORTER

♀

09:25:21 1 A June 13. That's correct.
2 Q I would like you to take a look at what has been marked
3 as Exhibit 1579. Could you tell us what that is?
4 A This is a lawsuit filed by EchoStar, EchoStar
5 Communications Corporation, EchoStar Technologies, and
6 NagraStar against NDS Group.
7 Q Now, this is the lawsuit that you talked about earlier

8 that was filed in the Northern District -- or up in
9 San Francisco?

10 A That's correct.

11 Q Could you tell us what date that was actually filed?

12 A The date is January 9, 2003, is what it looks like.
13 I'm not sure -- the filing date is September 27, 2002.

14 Q So not only did you file that original lawsuit against
15 NDS before Mr. -- let me back up.

16 When did Mr. Murdock actually have his agreement to
17 purchase DirectTV?

18 A That was later in 2003, probably six to nine months
19 after this lawsuit was filed.

20 Q So nine months before Mr. Murdock ever even
21 attempted --

22 THE COURT: Counsel, you mean News Corp.?

23 MR. WELCH: News Corp.

24 BY MR. WELCH:

25 Q So approximately nine months before News Corporation

SHARON SEFFENS, U.S. COURT REPORTER

‡

39

09:27:09 1 entered into its agreement to acquire the controlling shares
2 of DirectTV, you already had on file a lawsuit -- or
3 attempted to file a lawsuit in September 2002 in California?

4 A That's correct.

5 Q Actually you filed that lawsuit while your attempt to
6 purchase DirectTV was still pending?

7 A At the time -- my recollection is at the time we filed
8 this lawsuit against -- the 2002 lawsuit against NDS, we
9 believed that we would be successful with the acquisition of
10 DirectTV, and we certainly had no knowledge that News Corp.
11 was going to be in any position to pursue DirectTV.

12 Q So did this lawsuit have anything at all to do with
13 retaliating against News Corporation and its attempt to
14 purchase DirectTV?

15 A No, it did not.

16 MR. WELCH: I have no further questions.

17 THE COURT: Recross by Mr. Stone on behalf of NDS.

18 RECCROSS-EXAMINATION

19 BY MR. STONE:

20 Q Mr. Ergen, am I correct that the 2002 lawsuit you
21 referenced was not the lawsuit cited in opposition to the
22 News Corp. deal in 2003?

23 A I think that's correct, yes.

24 Q The one that was cited was the lawsuit that we are here
25 on filed in the Central District of California; is that

SHARON SEFFENS, U.S. COURT REPORTER

♀

40

09:28:32 1 correct?

2 A That is correct.

3 Q Now, you were shown Exhibit 1381, page 380. Could you
4 pull that out again, please?

5 A Okay.

6 Q I am focusing on the second to the last paragraph.

7 A Okay.

8 Q Down below it says, "In order to combat piracy and
9 maintain the functionality of active set-top-boxes that have
10 been sold to subscribers, we intend to replace older
11 generation Smart Cards with newer generation Smart Cards in
12 the future."

13 would you agree that this 10-K does not reflect that
14 replacement of older cards is because the system was
15 hopelessly compromised because of any events that occurred
16 in the year 2000?

17 A I don't think it references 2000. I think the words as
18 you read them don't talk about 2000.

19 Q And the little panic that you said occurred in 1999
20 resulted in a disclosure in the 10-K about the possibility
21 of a card swap?

22 A Yes, I think it did.

23 Q You said the pirates were winning in 2002, but you
24 agree that there was nothing in the 2002 10-K that discussed

SHARON SEFFENS, U.S. COURT REPORTER

41

09:30:28 1 A I would say that -- I would say that the fact that it
2 was compromised -- probably indirectly one of the
3 consequences would have potentially been that, but I don't
4 think the specific language of a card swap was in 2002
5 because at that point we were just pursuing with a soft
6 swap. My recollection is as we sat down with the lawyers
7 and the accountants, the independent outside accountants,
8 they felt comfortable that was the right disclosure to make
9 per accounting and Securities & Exchange Commission rules.
10 Q They thought it was the right disclosure in 1999 as
11 well?
12 A That's correct.
13 Q Do you recall or are you aware of any letter to the
14 card supplier demanding a card swap other than in the year
15 1999?
16 A No, I'm not.
17 Q And your 10-K's state that if there is a compromise
18 that is not correct that it could affect your ability to
19 contract with programmers. You are familiar with that?
20 A Yes.
21 Q You are not aware of any impact on any contracts with
22 programmers due to anything in the year 2000?
23 A I don't believe so in 2000, no.
24 Q Did EchoStar's revenues increase by almost \$1 billion
25 in the year 2002 versus 2001 that was a \$1.2 billion

SHARON SEFFENS, U.S. COURT REPORTER

42

09:32:01 1 increase over 2000?
2 A You went too fast for me.
3 Q We have seen that from 2000 to 2001 revenues increased

4 \$1.2 billion.
5 A That's correct.
6 Q Did they increase in 2002 by almost a billion?
7 A I would have to look and see.
8 Q Do you have any recollection as you sit here today?
9 A I would expect that -- well, I think I can look and
10 give you an accurate description. What years are we talking
11 about?
12 Q 2002.
13 A 2002 to 2003?
14 Q No, 2002 over 2001.
15 A So the 2002 10-K.
16 what's the exhibit number?
17 Q 1379.
18 A Do you have a page number?
19 Q No.
20 THE COURT: All right, then, counsel, let's move
21 along.
22 MR. STONE: It's page 37 I have been told.
23 THE COURT: Page 37.
24 would you turn to page 37, please.
25 THE WITNESS: Do you have a number on the bottom?

SHARON SEFFENS, U.S. COURT REPORTER

♀

43

09:33:29 1 Is it 1379, page 37?
2 THE COURT: They are going to help, sir.
3 THE WITNESS: I've got it.
4 BY MR. STONE:
5 Q What was the increase in revenues from 2002 over 2001?
6 A This only shows 2001 over 2002. I think it's about --
7 this shows revenue from -- this shows a revenue increase in
8 2001 over 2002, and that number is approximately
9 \$1.2 billion that we have talked about before.
10 Q Am I correct that the way the auditors get their
11 information is what you and the employees tell them when
12 they prepare the 10-K?

13 A That is the majority of the way auditors -- the members
14 may know. They do an audit as well. They come in and
15 review your records and go to your facilities, count your
16 inventories and so forth and so on.

17 Q Were the cards used in the soft swap the same cards
18 used for the hard swap in 2004?

19 A I don't know.

20 Q What were the new kinds of hacks that occurred in 2002?

21 A I don't know that I am competent to discuss -- they
22 were just -- they became more economical. They became -- my
23 recollection is they could just duplicate the card, so you
24 didn't have to be a hobbiet and build a big circuit board.
25 They actually could just copy the card and put a card in the

SHARON SEFFENS, U.S. COURT REPORTER

♀

44

09:35:09 1 slot, and it would work like the original card, so they
2 became much smaller or sophisticated and very inexpensive.

3 MR. STONE: No further questions.

4 THE COURT: Thank you very much, sir.

5 * * *

6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

21
22
23
24
25

SHARON SEFFENS, U.S. COURT REPORTER

♀

45

09:35:20 1

-oOo-

2

3

CERTIFICATE

4

5

I hereby certify that pursuant to Section 753,
Title 28, United States Code, the foregoing is a true and
correct transcript of the stenographically reported
proceedings held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United States.

11

12 Date: April 10, 2008

13

14

Sharon A. Seffens 4/10/08

15

SHARON A. SEFFENS, U.S. COURT REPORTER

16

17

18

19

20

21

22

23

24

25

SHARON SEFFENS, U.S. COURT REPORTER

♀