

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
HONORABLE DAVID O. CARTER, JUDGE PRESIDING

- - - - -

|                              |   |                     |
|------------------------------|---|---------------------|
| ECHOSTAR SATELLITE CORP., et | ) |                     |
| al.,                         | ) |                     |
|                              | ) |                     |
| Plaintiffs,                  | ) |                     |
|                              | ) |                     |
| vs.                          | ) | No. SACV 03-950 DOC |
|                              | ) | Day 3, Volume IV    |
| NDS GROUP PLC, et al.,       | ) |                     |
|                              | ) |                     |
| Defendants.                  | ) |                     |
| _____                        | ) |                     |

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Friday, April 11, 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 2008-04-11 D3V4

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I N D E X

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1 SANTA ANA, CALIFORNIA, FRIDAY, APRIL 11, 2008

2 Day 3, Volume IV

3 (4:38 p.m.)

4 (Outside the presence of the jury.)

5 THE COURT: All right. The Court has all counsel  
6 present. The jury, of course, is not present.

7 I made a very inarticulate comment before lunch,  
8 which I want to clarify, which was out of the presence of  
9 the jury; and that is, I'm going to anticipate some problems  
10 that might occur so that all counsel are forewarned, in  
11 fairness, and that three or four weeks from now no one is  
12 caught by surprise.

13 This Court's already made the statement to counsel  
14 that it believes that, coequally finding no fault, that  
15 there's been a tremendous attempt at insulation by,  
16 generally speaking, the parties involved. I have been  
17 extremely concerned in the past that pirates would literally  
18 dictate when they had their deposition taken, what they were  
19 going to say, many of them choosing not to come to court,  
20 but still either literally employed or seeking employment  
21 for one or either of these companies.

22 I've also recognized that this is a small group of  
23 companies at the present time, and that even some of these  
24 pirates, in their self-interest, have slid and can slide  
25 between these two litigants, NDS and NagraStar/EchoStar, and

1 on occasion DirecTV.

2 In listening to this trial, I'm concerned that  
3 Mr. Mordinson epitomizes some of the difficulties involved.  
4 He is an engineer who has described to the jury his efforts,  
5 but he's not management. And I think that I've allowed  
6 counsel a wide latitude in seeking where he got direction.  
7 But as he stated, and I think future witnesses will state  
8 for both sides -- if these kinds of witnesses continue to be  
9 called, we'll never know if these allegations are true on  
10 both sides in the claims and counterclaims, you know, where  
11 these kinds of directions come from, assuming, if there was  
12 satellite piracy, a direction from NDS; and if there was the  
13 theft of NDS's 26,000 confidential documents, the direction  
14 from EchoStar.

15 This could be entrepreneurs in the pirate  
16 industry. This could be, though, middle management, higher  
17 management. But I'm concerned, eventually, that the jury  
18 may believe that leadership takes all forms; that, from the  
19 President to federal courts, to Generals in the Marine  
20 Corp., the top of the echelon and pyramid should be  
21 responsible for the organization. They may not do the  
22 specific act, but responsibility and leadership usually  
23 should be perceived to fall at the top of the ladder.

24 But in our society, and generally speaking, this  
25 concept of plausibility/deniability has grown up, where the

1 top of these various institutions are somewhat insulated by  
2 those who work in different capacities, who, in a sense make  
3 the everyday decisions and oftentimes end up or sometimes  
4 end up in court.

5           It's a difficult position to foresee, but with the  
6 allegations involved in this rather small competitive  
7 market, that I may be approached four weeks from now by  
8 EchoStar, wishing to argue that not only is this a satellite  
9 piracy, but this has to have occurred at the highest levels  
10 of NDS's management structure. And since the Court is not  
11 bifurcating liability and punitives and is going to the jury  
12 at one time, there is only one opportunity during your cases  
13 in chief, on behalf of EchoStar and NDS, to put your best  
14 foot forward in front of this jury.

15           If liability was found, in that same argument,  
16 you'll probably seek to argue that not only is this  
17 egregious, but it could only be conducted over this period  
18 of time -- with these stakes -- not by middle management,  
19 but by the very top of the NDS power structure. And perhaps  
20 you'll pick names, and I don't know that that's fair. I  
21 haven't heard the evidence yet. I don't know how far I'll  
22 let those arguments go. But there's every possibility.

23           And the same thing on NDS's behalf. It's been  
24 represented to me that they're going to be able to show that  
25 26,000 pages of NDS documents were literally stolen, that

1 has great weight to NDS; and that that's transferred in some  
2 airport near the North Pole or someplace in Canada in the  
3 middle of the night to one Mr. Ereiser, who then gets that  
4 back to EchoStar.

5 Now, those are horrendous allegations on both  
6 sides. And I assume you're going to be arguing, if not  
7 Mr. Ergen, somebody else had to know at the very top of this  
8 power structure of EchoStar that that kind of activity and  
9 those kinds of documents that you rely upon carry great  
10 weight. And this couldn't be carried out, quite frankly,  
11 without somebody if not condoning it or ordering it,  
12 certainly becoming aware of it, even at the topmost part of  
13 the structure, and doing something about it.

14 MR. STONE: The CEO actually was the person  
15 involved. The CEO actually went to the airport.

16 THE COURT: I've already heard it. I mean, you  
17 can see where this is going.

18 And the reason I raise this is, besides the legal  
19 rulings a Court makes, I want to make sure this trial is as  
20 fair as I can make it. That's why I've been leaning on  
21 Counsel. And I'll state it again. These are exemplary  
22 counsel who have had tremendous pressure applied to them by  
23 the Court: The threat of adverse inferences to force these  
24 pirates, who still have tentacles, to come into court and  
25 literally the top management structures of each company, and

1 the salient witnesses so this jury isn't faced with pirates  
2 who pick and choose when to testify, what to say, and then  
3 claim that they're outside the jurisdiction of the  
4 United States; and management, quite frankly, who can't get  
5 to court 'cause it inconveniences them.

6 So you've had tremendous pressure on you, and you  
7 have my compliments, including some of the counsel sitting  
8 here who have been the forebearer of the Court's news.

9 Mr. Ergen has testified. I have no opinion, nor  
10 state any opinion concerning his testimony. But I would  
11 assume from EchoStar's perspective he's been an excellent  
12 witness for you. And because of that, he's been able to  
13 deny any knowledge of these 26,000 documents. He's looked  
14 the jury right in the eye and said, "I know nothing about  
15 it." He's also been able to tell how aggrieved the company  
16 was from a nonengineering standpoint, and so has the other  
17 gentleman.

18 And Mr. Kudelski, I assume, will be every bit as  
19 good a witness when he comes into court. You previously  
20 asked the Court to order Mr. Murdoch into court and to order  
21 Mr. Peled into court.

22 I'll say the same thing to you that I said to  
23 EchoStar, but maybe not with the same strength. Since  
24 they're asking for money, as the plaintiff, and  
25 significantly more sums than you are, they have a real duty



1 to get people here. But so do you.

2 And I'll ask you this without casting an opinion:  
3 I'm not going to hear later on that there's any unfairness,  
4 because you have the opportunity of bringing Mr. Peled and  
5 having him make the same presentation, and you have the  
6 opportunity of bringing Mr. Murdoch and making the same  
7 presentation. You have the right to have him look this jury  
8 in the eye and say, "I not only didn't know about this, but  
9 I have no subsequent knowledge of it."

10 Here's why it's was important: The worst position  
11 for either of you is that liability is found and you're into  
12 the punitive phase. If you get to the punitive phase, and  
13 any one of these jurors assume that the top of the  
14 organization had any information concerning this or had  
15 information and didn't act upon it, I can promise you that  
16 most jurors are going to drive those punitive damages up as  
17 they get towards the top of the pyramid. And that's the  
18 danger. That could be hundreds of millions of dollars.

19 So NDS is almost -- or EchoStar's almost done with  
20 your presentation. Mr. Kudelski's coming also. I know  
21 there's two Kudelskis.

22 But I throw back to you, you know, be careful on  
23 NDS's part. There's no adverse inferences that I'll draw  
24 from that, by the way. I will not instruct the jury with an  
25 adverse inference. But without the ability of Mr. Murdoch

1 and Mr. Peled to get on the stand and briefly say, "I didn't  
2 do it," and "I didn't know about it," there's a real risk  
3 that this jury, if they do find liability and they get to  
4 the punitive phase, may inflict a much more cost problem.  
5 And, of course, the reverse works: I never want to leave  
6 out EchoStar with the NDS claims.

7 I well understand that DirectTV, for a significant  
8 period of time, was concerned about NDS's activities. And  
9 Mr. Murdoch, for instance, may not be as relevant as  
10 Mr. Peled. The difficulty, though, that may need to be  
11 sorted out is that, at some point, News Corp., through  
12 Mr. Murdoch, purchased NDS. And when that occurred, of  
13 course, it killed the lawsuit that was taking place between  
14 DirectTV and NDS. There's no reason to continue it.

15 MR. WELCH: Well, he purchased --

16 THE COURT: No. Shhh...

17 So right now, by putting you on warning -- I'm  
18 saying that it will occur -- but I don't know that I'm going  
19 to limit your arguments in terms of making the accusation  
20 that there's some inference. I don't know that absolute  
21 proof is needed if there's a logical inference. "Argument,  
22 by law, can give flight to imagination." There's a pretty  
23 good law that uses that exact quote.

24 And the same -- I'm not gonna preclude you from  
25 that revenge factor that you stated. Did he say revenge?

1 No. Can you argue revenge? Of course, you can, on  
2 Mr. Ergen's part.

3 I think that that's enough said about that. And  
4 the reason I chose to put that on the record is protecting  
5 each of you as counsel, quite frankly. By making this, I  
6 protect myself, because you're forewarned about arguments  
7 and how expansive they can be on both sides.

8 The second thing, it gives you the chance to reach  
9 out to anybody you want to, knowing the Court's thoughts  
10 about how expansive this could be. You may want both  
11 Kudelskis here.

12 And third, if there is liability on either side,  
13 you've got punitives, and it can act as a mitigating factor.  
14 You know, maybe this is some manager that does this for  
15 either side, or makes the decision; maybe this is an  
16 entrepreneur. But if it is a manager, maybe it never  
17 reached the top of either one of your power structures.  
18 Maybe these poor CEO's and presidents, quite frankly, are  
19 absolutely in the dark about some of the stuff that's  
20 occurring.

21 I'm almost done. Let me check my notes.

22 By making this statement, it gives you the power  
23 of counsel to go back with a transcript and waive it in  
24 front of your respective clients, quite frankly, and say,  
25 "The Court's not kidding." Because, otherwise, you have to

1 go out of here and say, "I had a discussion with  
2 Judge Carter and he thinks the following -- because he said  
3 it on a Saturday and we don't have a transcript, and this is  
4 how dangerous it could be." So it's a way of protecting all  
5 you as counsel to let you take that back.

6 Do you understand that? It's really a courtesy.  
7 Now, normally, I wouldn't make that comment. But this could  
8 go pretty far in terms of the far-reaching arguments that  
9 are going to ensue.

10 They're going to be accusing you of revenge, the  
11 \$600 million paid, you know, Ergen striking back, the swap  
12 was vindictive, it was an outmoded system, it should have  
13 been paid for anyway by EchoStar, and you sloughed it off on  
14 NDS. But NDS is going to be arguing just as strongly that,  
15 if this isn't the top of the pyramid, how couldn't it be,  
16 with this period of hacking and the people involved; and  
17 that, when you start hiring these kinds of people,  
18 et cetera, that this has to reach all the way to the top,  
19 and it doesn't just stop with some security adviser, you  
20 know, in Haifa; that this is serious stuff when the industry  
21 is that small and there's billions on the line in  
22 competitive advantage.

23 Okay. So everybody's forewarned. I'm not saying  
24 what I'm going to do. I'll let the evidence develop. But  
25 now, there can't be any disagreement about what's occurred.

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Okay. We'll go off the record.

(At 4:43 p.m., proceedings were adjourned.)

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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: April 12, 2008

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16 DEBBIE GALE, U.S. COURT REPORTER

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| <b>A</b>  | <b>B</b>  | <b>C</b>   | <b>D</b>  | <b>E</b>   |
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