

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

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ECHOSTAR SATELLITE)	
CORPORATION, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	No. SACV 03-0950-DOC
)	
NDS GROUP PLC, et al.,)	
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Evidentiary Hearing
Santa Ana, California
Monday, April 14, 2008

Jane C.S. Rule, CSR 9316
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
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08-04-14 EchoStarNDS

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I N D E X

EVIDENTIARY HEARING RE: EXPERTS

EXAMINATION

Witness Name	Direct	Cross	Redirect	Recross
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SHELTON, JAMES				
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By Mr. Hagan	10			
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SAGGIORI, JAN				
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Examination by The Court, page 48				
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1 SANTA ANA, CALIFORNIA, MONDAY, APRIL 14, 2008

2 (3:09 p.m.)

3 THE COURT: Okay. We are on the record.

4 Mr. Shelton is present in court. All counsel are present
5 today.

6 It's 3:00, and over the weekend, I've invited
7 counsel to join the Court at 3:00 with Mr. Shelton. We've
8 also decided to have a further deposition of Mr. Shelton
9 this morning, and I assume that's taken place.

10 MR. SNYDER: Your Honor, thank you.

11 THE COURT: Thank you very much. And those
12 further issues are?

13 MR. SNYDER: First, your Honor, we received on
14 Friday night, at the end of the court day, a CD with
15 additional documents that plaintiffs were producing. It
16 contained about -- somewhere between 5,000 to 6,000 pages of
17 documents that we have never seen before. There are two --
18 there are lots of things to talk about in the late --

19 THE COURT: So you received -- let me get my --
20 I'm sorry -- on Friday evening, about 5,000 to 6,000 pages
21 of documents.

22 MR. SNYDER: I believe it's about 5,600 pages.

23 THE COURT: Okay. What are they?

24 MR. SNYDER: They are -- the majority of them are
25 financial documents that appear to underlie some of the

1 schedules that were prepared for Mr. Rock, documents we've
2 been requesting since his deposition, if not before, which
3 was many, many months ago, and we received them for the
4 first time on Friday.

5 THE COURT: Mr. Rock.

6 MR. SNYDER: Mr. Rock is their damages expert.
7 Several of them relate to the claimed lost profits damages,
8 but many of them also relate to the alleged cost of the card
9 swap, so --

10 THE COURT: Obviously you haven't had time to go
11 through those.

12 MR. SNYDER: We've -- we've made a preliminary
13 review of them, but because they're financial schedules,
14 making a real analysis of them is quite a time-consuming
15 task, and we think inappropriate for production during
16 trial, not even before trial.

17 THE COURT: Okay. Were these recently discovered,
18 manufactured, what?

19 MR. HAGAN: No, your Honor. During the course of
20 discovery, we produced some summaries of hundreds and
21 thousands of pages of documents.

22 THE COURT: Right.

23 MR. HAGAN: In other words, what did the card swap
24 cost, truck rollouts, all of these types of things, mailing,
25 postage, and we produced those in spreadsheets, because it

1 was the easiest way to do it. After Mr. Rock's deposition,
2 Mr. Snyder sent me a letter asking for all of the underlying
3 dates --

4 THE COURT: Deposition on what date?

5 MR. HAGAN: I don't recall the date of that --

6 THE COURT: Well, it makes a difference. How long
7 ago, approximately?

8 MR. SNYDER: August, approximately.

9 THE COURT: Okay. August of 2007?

10 MR. SNYDER: Yes.

11 THE COURT: And you received a letter from --

12 MR. HAGAN: It was either a letter or an e-mail
13 from Darin asking for some underlying data, in other words,
14 what documents went into generating these particular
15 spreadsheets. When I received that, I forwarded it on to my
16 client, and I said, "We need, you know, all of the
17 additional data." I think these are summaries under 1 -- 1
18 of '06, and they are admissible as long as you produce the
19 underlying data for inspection.

20 THE COURT: Right.

21 MR. HAGAN: We produced additional documents, what
22 I thought was the extent of all the rest of the documents.
23 And I believe about a week ago, Darin sent me another
24 e-mail, and he said, "We want all these other documents.
25 We've reviewed your production and we're" --

1 THE COURT: Just a moment. "All these others"
2 meaning additional or the same type of --

3 MR. HAGAN: The same type of documents, but they
4 reviewed the ones that were produced, and I think in their
5 opinion there were some holes in the production.

6 THE COURT: Okay.

7 MR. HAGAN: And so they cited to some specific
8 types of documents, some QuickBook entries, and what have
9 you, that underlie the damages spreadsheets, and so I sent
10 that to my client. I just got that information back. We
11 burned it to a CD, and we produced it within, I believe,
12 about 15 hours of receiving it.

13 THE COURT: So in other words, last week you got
14 in the same letter or type of request you had gotten in
15 August --

16 MR. HAGAN: This --

17 THE COURT: And from that same request, you got
18 additional documents that should have been produced in
19 August?

20 MR. HAGAN: The request that I got last week was a
21 little bit more specific. I believe it was a page and a
22 half of just bullet points, and there were specific
23 documents that they wanted with depo citations. So I
24 forwarded that back out to my client. I said, "Here's what
25 I produced when you sent it to me the first time."

1 This is Darin's new letter, and he says, "We
2 received some of this material, but it looks like all of
3 this other stuff is missing."

4 So I sent that to him. They produced everything
5 else they had, which consisted of the stuff I had before,
6 plus more detailed documents, burned those documents to a CD
7 and produced them to Darin.

8 Now, we only had an obligation to make that stuff
9 available for inspection during trial. We produced the bulk
10 of it long before trial, and the rest of it during our case
11 in chief within 15 hours of them asking for it. So I -- you
12 know --

13 THE COURT: I heard two things, that you only had
14 the obligation to produce this during trial.

15 MR. HAGAN: We just have to make it -- and we
16 don't even have to produce it. The rule says we have to
17 make it available for inspection. In other words, we've got
18 a summary that summarizes 10,000 pages of documents. If the
19 opposing party wants to look at the underlying data, then we
20 have an obligation to make that data available for
21 inspection, and we've done that.

22 MR. SNYDER: We requested the data after
23 Mr. Rock's deposition, your Honor, and I think by
24 Mr. Hagan's own admission and description, all of this
25 information produced on Friday falls within the scope of

1 what we requested after the deposition.

2 THE COURT: Well, I'm going to go back and look at
3 the actual rule, because I can't be of any benefit to either
4 side, unless it comes to my attention. In other words, I
5 can't step in after the fact and find fault with either one
6 of you. I'm going to look at the literal meaning of the
7 rule. And if the rule is it's to be made available and
8 doesn't set -- set a time constraint, I'm not quite certain
9 what to do with that, because while you may technically be
10 correct, it impedes the ability to cross-examine or take a
11 deposition.

12 MR. SNYDER: Like --

13 THE COURT: So let me see how egregious that is,
14 but right now, Mr. Shelton, take the stand.

15 MR. SNYDER: May I identify the second issue, your
16 Honor?

17 THE COURT: Mr. Shelton, take the stand.

18 THE WITNESS: Yes, your Honor.

19 JAMES SHELTON, PLAINTIFFS' WITNESS, RECALLED

20 THE COURT: Thank you very much.

21 We are going to do one thing at a time, and then
22 we'll take care of this squabble later on, but we are going
23 to get to the crux of your direct examination today, and
24 then I'll resolve the rest of this while I still have my
25 court reporter's services.

1 Now, are you also prejudiced in terms of your
2 cross-examination of Mr. Shelton because some of these
3 documents produced by Mr. Rock affect Mr. Shelton?

4 MR. SNYDER: Very much, your Honor. We are not
5 prepared to cross-examine him today.

6 THE COURT: Okay. Let's get through the direct
7 examination, then. I want to hear, at least, the direct.

8 MR. HAGAN: Your Honor, these are the three
9 documents that we previously entered in Mr. Shelton's direct
10 examination.

11 THE COURT: Thank you. I haven't seen the second
12 document yet, but --

13 MR. HAGAN: Okay. The -- I've just been informed
14 the second two are -- these are the -- his revised numbers.

15 THE COURT: Now your questions, Counsel. We are
16 done with all of the peripheral. We are going right back to
17 Mr. Shelton. Your first question today is?

18 MR. HAGAN: Thank you, your Honor.

19 DIRECT EXAMINATION (Continued.)

20 BY MR. HAGAN:

21 Q Mr. Shelton, before we broke, or when we broke at the
22 last hearing, you were requested by the Court to take your
23 piracy calculations, the ones that you testified to during
24 that hearing and to back out just the ROM 3 cards, in other
25 words, to isolate just those number of pirated devices; do

1 you recall that, sir?

2 A Yes, sir, I do.

3 Q And since that time, have you been able to do that?

4 A Yes, I worked on it over the weekend, and then I met
5 with you on Monday evening, both you and Christine, to
6 finalize the information.

7 Q And what did you do in order to isolate just the number
8 of pirated ROM 3 cards from the overall piracy calculations
9 that you testified about previously?

10 A Well, our Smart Card numbers pretty well capped out
11 about half a million, and what I did was I took all the
12 shipment information from the ROM 2, ROM 3, 10 and 11, and
13 then did a way to average as to how many would be ROM 3.

14 THE COURT: Explain that once again.

15 THE WITNESS: Your Honor, what I did was I took
16 the information provided to me as to the total number of
17 manufactured Smart Cards, both ROM 2, ROM 3, 10 and 11, and
18 then I took my half a million pirate Smart Cards --

19 THE COURT: Right.

20 THE WITNESS: -- and assigned a way to average of
21 how many would be ROM 3.

22 THE COURT: I'm okay until we get to the weighted
23 average.

24 THE WITNESS: Okay.

25 THE COURT: So let's do this again. I'm going to

1 explain back to you what I just heard.

2 THE WITNESS: Okay.

3 THE COURT: "Judge, we have about a half million
4 Smart Cards out there that could be 2, 3, 10 or 11."

5 THE WITNESS: Yes.

6 THE COURT: I'm going to back out the three Smart
7 Cards, but I took a weighted average from the shipment
8 records. That's what I don't understand. I don't
9 understand if you actually have the shipment records and
10 you can specify which are ROM 3 compared to 2, or what this
11 weighted average means and how you get a weighted average.

12 THE WITNESS: Yes, your Honor. They gave me the
13 actual production date of each category of Smart Card and
14 the volume manufactured, and so what I did was -- and what I
15 mean by weighted average, around 33 percent were ROM 3
16 cards.

17 THE COURT: Okay. So what I'm going to say again
18 is this. You don't know if those ROM 3 cards were actually
19 shipped or somewhere in warehouse. The best you can do is
20 say X-amount of ROM cards were produced that are 3 ROM
21 cards.

22 THE WITNESS: That's correct.

23 THE COURT: And my weighted average, then, is an
24 assumption that those were shipped proportionally to 2, 10
25 and 11?

1 THE WITNESS: Correct.

2 THE COURT: So we have 33 percent manufactured
3 Smart Cards. Your assumption is that 33 percent were
4 shipped?

5 THE WITNESS: Based upon the volume that they gave
6 me.

7 THE COURT: All right. I understand that. So you
8 basically take 33 percent of 500,000, and that's your best
9 estimate. And that assumes a weighted average, because in
10 theory, you could have 60 percent shipped, you could have
11 10 percent shipped. I'm being ludicrous about that.

12 THE WITNESS: Well, you're -- you're absolutely
13 right, your Honor. If -- if I had a reason to monitor on
14 the pirate forums the activity per card and track --

15 THE COURT: Okay.

16 THE WITNESS: -- in the very beginning, that would
17 be much more accurate.

18 THE COURT: Now, in this industry, I don't
19 understand, were ROM 2 cards the first cards shipped?

20 THE WITNESS: Yes, sir, March of 1996.

21 THE COURT: Okay. So in March, ROM 2 is shipped
22 in March of 1993.

23 THE WITNESS: '96.

24 THE COURT: '92, I'm sorry. Thank you.

25 THE WITNESS: Of '96.

1 THE COURT: Of '96.

2 THE WITNESS: Yes.

3 THE COURT: Thank you. Okay, 1996.

4 ROM 3 starts shipping when?

5 THE WITNESS: Can I reference my notes?

6 THE COURT: Please.

7 THE WITNESS: In -- out of that ROM 2, there was

8 1.4 million manufactured and shipped between March '96

9 through June of '97.

10 THE COURT: Okay. Now, just a moment.

11 THE WITNESS: Okay.

12 THE COURT: ROM 2 has 1.4 million produced from

13 what dates?

14 THE WITNESS: From March of '96 through June of

15 '97.

16 THE COURT: Through June of 1997.

17 THE WITNESS: Correct.

18 THE COURT: Okay.

19 THE WITNESS: The ROM 3 cards were manufactured

20 starting in June of '97 through June of 2000, and there were

21 7.6 million manufactured.

22 THE COURT: 7.6 million of the ROM 3 produced.

23 THE WITNESS: Correct.

24 THE COURT: Or manufactured, all right.

25 ROM 10.

1 THE WITNESS: That's -- the manufacturing started
2 in March of 2000 through August of 2000, and there were
3 9.6 million manufactured.

4 THE COURT: 9.6 million between March 2000 and
5 August 2000.

6 THE WITNESS: Correct, your Honor.

7 THE COURT: Okay. I keep repeating back so --

8 THE WITNESS: That's okay.

9 THE COURT: -- you know that I've got that
10 correct.

11 ROM 11.

12 THE WITNESS: ROM 11, manufacturing started in
13 September of 2001 through November 2001. It was a short
14 manufacturing run of only 900,000 cards.

15 THE COURT: All right. 9 million --

16 THE WITNESS: 900,000.

17 THE COURT: Oh, that's .9 million. 900,000 is
18 9.9.

19 THE WITNESS: Correct.

20 THE COURT: All right. So I've got 1.4 million
21 ROM 2, 7.6 million ROM 3, 10 -- or 9.6 million ROM 10; and
22 ROM 11, .9.

23 Now, walk me through your numbers again concerning
24 ROM 3; what did you do?

25 THE WITNESS: Could I show you the spreadsheet,

1 your Honor? It might be easier.

2 THE COURT: I can't wait.

3 THE WITNESS: Okay.

4 THE COURT: That's perfect. That will help me
5 follow it.

6 THE WITNESS: Yes.

7 THE COURT: And do you want to put that up on the
8 ELMO, also? Do you have a copy of this?

9 MR. HAGAN: I'm not sure which spreadsheet --

10 THE COURT: Kristee, would you put this up on the
11 ELMO for a second and turn that on.

12 THE WITNESS: The highlighted "ROM 3" is in blue,
13 and, of course, it has the ROM 2 numbers.

14 THE COURT: I want to just understand ROM 3 for a
15 moment.

16 And where they are putting it up, you seem to
17 stabilize at 33 percent in the year 2002 through 2005.

18 THE WITNESS: Correct, your Honor.

19 THE COURT: And you're 41 percent in the year
20 2000, you're 85 percent in the year 1999 and 39 percent in
21 the year 2001, so you slowly start to decrease in 2000 --
22 well, you have a dramatic drop-off in 1999 to 2000, because
23 the ROM 3 are coming in.

24 THE WITNESS: Correct.

25 THE COURT: And then you decrease two percentage

1 points in 2001, and then it looks like you've got what you
2 consider a stable client base in there of about what?

3 THE WITNESS: About half a million pirate cards in
4 the marketplace, because there was a -- a cap --

5 THE COURT: Just a moment. About half a million
6 pirate cards --

7 THE WITNESS: Correct, your Honor.

8 THE COURT: -- for ROM 3?

9 THE WITNESS: No. Total.

10 THE COURT: Total?

11 THE WITNESS: Correct.

12 THE COURT: In the marketplace?

13 THE WITNESS: Correct.

14 THE COURT: And once again, remind me, how did you
15 get to that half million pirate cards for 2, 3, 10 and 11,
16 and when you say "in the marketplace," what year? First of
17 all, let's start the year. Half a million cards when?

18 THE WITNESS: It was approximately 2001.

19 THE COURT: Okay. Just a moment.

20 In 2001, how many pirate cards do I have before we
21 find out how you reached the figure by 2005?

22 THE WITNESS: Well, essentially, your Honor, I --
23 what I was tracking was the price of those cards --

24 THE COURT: Answer my question. How many general
25 pirate cards by 2005?

1 THE WITNESS: By 2005, still right around half a
2 million total.

3 THE COURT: Okay. I'll get to your explanation
4 about how you track them in a moment.

5 THE WITNESS: Okay.

6 THE COURT: All right. Now, so I bottom line it
7 first before I hear the minutia, how did you determine -- of
8 the 500,000 pirate cards, what would my total be from your
9 perspective -- just give me the conclusion first -- of ROM 3
10 cards?

11 THE WITNESS: 33 percent.

12 THE COURT: Okay. 33 percent of 500,000 is what,
13 167,000?

14 THE WITNESS: Correct, and it's -- there is a
15 highlighted line with that number on that spreadsheet in
16 blue.

17 THE COURT: About 156,000 to 165,000 is your
18 range.

19 THE WITNESS: Correct, your Honor.

20 THE COURT: So let me just take in rough figures
21 160,000.

22 THE WITNESS: Okay.

23 THE COURT: Okay. Now, if I have 160,000 pirated
24 ROM 3 cards, your chart seems to indicate that that holds
25 relative steady between 2001 -- strike that -- 2002 and

1 2005 --

2 THE WITNESS: Yes, sir.

3 THE COURT: -- right?

4 THE WITNESS: Yes, sir.

5 THE COURT: Is your assumption that the loyal
6 clientele for EchoStar have, in a sense, just hung in there
7 with ROM 3, not needing any upgrade to ROM 2 -- I mean, 10
8 or 11?

9 THE WITNESS: That's correct, your Honor. There
10 was some indication that they tried to change out any
11 inventory pipeline with the ROM 10, thus, the high volume of
12 manufactured ROM 10 in a short period to take out as much
13 piracy as they could without doing a card swap.

14 THE COURT: Okay. Where did you get the 1.4,
15 9.6 -- or 7.6, 9.6 and .9 million figures from?

16 THE WITNESS: From JJ Gee.

17 THE COURT: JJ Gee?

18 THE WITNESS: Yes, sir, at NagraStar.

19 THE COURT: And those were the cards produced?

20 THE WITNESS: Correct, your Honor.

21 THE COURT: Now, we don't know from the produced
22 cards, do we, how many were actually sent out into the
23 market?

24 THE WITNESS: Authorized?

25 THE COURT: No, no, I don't care if it's

1 authorized. I'm just going to kid you for a moment.

2 THE WITNESS: Okay.

3 THE COURT: I produce them, I'm the company, I
4 send them out.

5 THE WITNESS: Yes, sir. The assumption is that
6 they are going out into the marketplace to be inserted into
7 receivers and then shipped.

8 THE COURT: All 1.4 ROM 2s?

9 THE WITNESS: Yes, sir.

10 THE COURT: All 7.6 million ROM 3s?

11 THE WITNESS: Yes.

12 THE COURT: I find that hard to believe. I'm not
13 quibbling over numbers, maybe just 6 million were shipped
14 out, but we've always got to have a warehouse inventory.
15 We've always got to have cards that we produced in an
16 economical fashion for trading. We are always going to
17 overproduce in this market, because we don't want our good
18 customers waiting for a card, and to start up that
19 production again is not cost-effective.

20 THE WITNESS: Right.

21 THE COURT: So we're going to make a run of 7.6
22 over maybe a year for a million.

23 THE WITNESS: Ending in --

24 THE COURT: So I've always got some excess
25 inventory there, and what I'm trying to get my hands around

1 is how much.

2 THE WITNESS: That's in the pipeline basically.

3 THE COURT: No, it's not in the pipeline. It's
4 sitting in a warehouse. That's different than the pipeline.
5 Because I already have 5 million customers, I might have
6 2.6 million cards.

7 So I'm not going to make the assumption -- let me
8 start with this.

9 THE WITNESS: Okay.

10 THE COURT: I won't make the assumption, but I
11 don't know how much to discount. Let's say of the ROM 3
12 7.6 million cards, I don't believe the 7.6 went out to
13 clients. I believe 7.6 was produced, and you can supply the
14 underlying figures to the defendant, but I need -- you know,
15 I'd need a warehouse inventory. I need to know is there a
16 50 percent holdback, a 5 percent holdback. It may be a
17 de minimis holdback, but I know --

18 THE WITNESS: Correct.

19 THE COURT: -- that they're not all going to the
20 market.

21 THE WITNESS: The only information I had to go on,
22 your Honor, for that was that I -- I know that 8.7 million
23 cards were swapped out in consumer homes.

24 THE COURT: So in -- is that the ROM 10?

25 THE WITNESS: No. They use the ROM 103 for that

1 card swap.

2 THE COURT: Just a moment. The ROM 103 was our
3 card -- was our card swap, and once again, was that 2005?

4 THE WITNESS: That was 2005, completed September
5 at 8.7 million.

6 THE COURT: And they had 8.7 million. Now, I'm
7 going to play with this, and you are going to show me I'm
8 wrong.

9 THE WITNESS: That's okay.

10 THE COURT: It's hard for me, then, to believe if
11 I have a universal card swap -- which it would never be
12 universal, by the way. Some of us just don't trade in our
13 beloved card. By the way, I don't -- I don't take DirectTV,
14 and I don't take this service, so I don't have a beloved
15 card. I'm just kidding you.

16 THE WITNESS: You're correct.

17 THE COURT: And after this case, I don't know that
18 I ever will. I'm just joking with you.

19 (Laughter.)

20 THE COURT: I want you to add this up for a
21 moment. I mean, the argument could be made that you've got
22 1.4, 7.6, 9.6 and .9. If you really wanted to stretch the
23 envelope, you could argue that there were that many cards
24 out there. And without telling me how many cards kicked
25 back in, you could have a foolish judge like me add that up

1 and say, "Oh, that's about 19 million cards," but that's
2 really not what happened. We have a -- a much smaller
3 universe. We have about 8.7 million swap out, but that
4 might not be a fair number to you, because there might be
5 people holding onto the beloved old card.

6 THE WITNESS: Correct.

7 THE COURT: They just don't want to be
8 inconvenienced and send it in, but it has to be a small
9 number.

10 So my best number is about 8.7 million, and if
11 that's 8.7 million and I'm just dealing with ROM 3, that's
12 only 7.6 million. So I've got to assume I've got some
13 ROM 2s out there, I've got some ROM 10s out there, and I've
14 got ROM 11s out there. And if my memory is correct, your
15 ROM 10 is the highest at 9.6 million, so why couldn't have
16 all these cards been -- I mean, in theory, just having fun
17 with this, why couldn't have all of these cards been ROM
18 10s?

19 THE WITNESS: What I was informed, your Honor, the
20 reason they did a fast and, you know, large production room
21 of the ROM 10 at 9.6 was to try to eliminate what was in
22 inventory and replace it with what was secure at that point
23 in time, being the ROM 10.

24 THE COURT: Oh, no. Let me come back to it.

25 THE WITNESS: Okay.

1 THE COURT: I've confused you.

2 The argument could be made. It's a foolish
3 argument, because I know that this is not a purist --

4 THE WITNESS: Right.

5 THE COURT: -- hypothetical. But the argument
6 could be made, "You know, Judge, all these people,
7 hypothetically, got rid of ROM 2s and 3s, never liked them,
8 never got them, and there's enough ROM 10 cards, which are
9 not the subject of our damages, 9.6, that this entire swap
10 out in 2005 of the 103, the 8.7 million fits nicely into
11 that, and therefore, there's no damages for ROM 3."

12 Now, you and I know that that can't be. There has
13 to be some ROM 3s. The question, though, from the defense
14 side is how many, and you can't tell me.

15 THE WITNESS: No. All I could do was that percent
16 that hit the market.

17 THE COURT: Yeah.

18 THE WITNESS: The only other way to be more
19 exact --

20 THE COURT: Now I need to know what was the
21 advertising for the ROM 10. In other words, what I'm in the
22 dark about is I -- I'm a consumer, I'm a client, and I got a
23 ROM 2, or I've got a ROM 3. I know my universe out there is
24 about 8.7, hypothetically, users.

25 THE WITNESS: Correct.

1 THE COURT: So most of us have to be trading in
2 our ROM 2s or 3s to generate the 9.6 to be produced. In
3 other words, the company must have produced 9.6 million
4 cards of the ROM 10, figuring that the combination of ROM 2
5 at 1.4 and ROM 3 at 7.6 came out to about 9 million cards.
6 So what they did with ROM 10 is they produced 9.4 million
7 just to cover the base, because it was cheap to produce.

8 THE WITNESS: Your Honor, but they didn't use the
9 ROM 10 to do the consumer swap out in -- in the homes. They
10 used the ROM 103 --

11 THE COURT: No. Time out.

12 THE WITNESS: Okay.

13 THE COURT: But they produced those ROM 10s for
14 some reason.

15 THE WITNESS: Yes, to --

16 THE COURT: Weren't they afraid that they --
17 weren't they trying to tell the consumer that "There's a
18 problem out there with our patch, and you've got this ROM 10
19 available"? They didn't produce this ROM 10 just for jolly
20 good fun.

21 THE WITNESS: No, sir. They -- the reason they
22 produced such a high volume, it was explained to me, was to
23 try to get as much out of the inventory that were ROM 3 and
24 2 to take away the ability to economically get your hand on
25 a card.

1 THE COURT: That's my exact point, because they
2 wanted to get rid of the ROM 2 or 3 to stop the piracy,
3 because it hurt, so they had to advertise some way.
4 Someplace in this period of time, if you're going to
5 produce that many cards, you've got to say, "We have a
6 potential problem, and if you want a card, we've got it
7 right here."

8 THE WITNESS: A new, secure --

9 THE COURT: Because why -- why else produce it,
10 right?

11 THE WITNESS: That's exactly right.

12 THE COURT: Okay. So if that's true, it makes
13 sense that they produce a little over 9 million, because
14 they hoped that ROM 2 and 3 would be swept up. And now my
15 question is what did EchoStar do to tell the client how
16 pervasive or widespread was the notice, "We might have a
17 problem, and we've got these new cards waiting for you with
18 this patch on it"?

19 THE WITNESS: I do not know, your Honor, the
20 answer to that question. I do know what I saw as far as the
21 price of any ROM 2 or 3 cards going up to \$400 each,
22 because --

23 THE COURT: Say that again.

24 THE WITNESS: They went up to \$400.

25 THE COURT: The ROM 103?

1 THE WITNESS: The ROM 103.

2 THE COURT: Went up to \$400, but that was for a
3 complete -- in other words, all my channels.

4 THE WITNESS: Well, they became more scarce is
5 what happened.

6 THE COURT: ROM -- ROM 10?

7 THE WITNESS: ROM 2 and 3, because they were using
8 the ROM 10 to get it out of inventory.

9 THE COURT: But why would ROM 2 and 3 become more
10 expensive? Those are old cards. They don't even have a
11 patch on them.

12 THE WITNESS: But they could be hacked. Thus, the
13 pirates were looking for those cards to purchase in order to
14 steal the content.

15 THE COURT: More purchase on the black market.

16 THE WITNESS: Exactly.

17 THE COURT: But not more -- not more expensive for
18 me as the client.

19 THE WITNESS: No, sir. No, only on the black
20 market.

21 THE COURT: Well, that doesn't mean I have lost
22 profits from a company's standpoint, you're just telling me
23 how much I have to purchase the ROM 2 or 3 so I might be
24 able to hack. From the client or the -- and the company's
25 perspective, the price is the same.

1 THE WITNESS: Yes. 10, 12 bucks.

2 THE COURT: So there's no relevance to me, quite
3 frankly, what it costs on the black market. Those are
4 hackers buying them out there, because the hackers aren't
5 looking for legitimate cards. I'm more concerned about what
6 it cost the consumer.

7 THE WITNESS: The -- I did not track what it cost
8 the consumer, because basically what they were -- the
9 consumer was purchasing the complete system, which -- the
10 objective of Nagra was to make sure those systems had a
11 ROM 10 and not a pirated -- or a card that could be pirated,
12 being the ROM 2 or 3.

13 THE COURT: Okay. Now, I'm not so naive to
14 believe that there aren't ROM cards existing out there, and
15 I don't know that I'm so naive to believe I'm going to
16 preclude the plaintiff from presenting some kind of evidence
17 in that regard. But I'm very, very concerned about this --
18 this assumption, you know, that there really are -- well,
19 you believe 500,000 ROM 3s?

20 THE WITNESS: No, that's a total pirate card --

21 THE COURT: So you believe 160 pirated ROM 3s?

22 THE WITNESS: Correct.

23 THE COURT: 160,000, approximately. You go from
24 156- to 165,000.

25 THE WITNESS: Correct.

1 THE COURT: Okay. I've asked enough questions
2 right now. I've displayed my naiveness to both -- all
3 counsel.

4 All right, Counsel. Continue with your questions.

5 BY MR. HAGAN:

6 Q Mr. Shelton, were you able to isolate the number of
7 ROM 3 cards in the field to be a percentage of the total
8 pirated cards in the field for EchoStar's DNASP-II system?

9 THE COURT: He said, "Yes, 160,000"?

10 THE WITNESS: Yes.

11 BY MR. HAGAN:

12 Q And that was for one particular year, correct?

13 THE COURT: No. They're consistent throughout the
14 years. They have a range from 156,000 to 165,000 over a
15 four-year period from 2002 to 2005.

16 THE WITNESS: Correct.

17 BY MR. HAGAN:

18 Q Now --

19 THE COURT: Was that your answer?

20 THE WITNESS: Yes.

21 BY MR. HAGAN:

22 Q The numbers -- the numbers that you provided earlier
23 for the Court, and that is the number of cards in the field,
24 that number came from NagraStar, correct?

25 A That's correct.

1 Q And you understood that to be the number of cards that
2 were activated, not the number of total cards manufactured,
3 correct?

4 A I don't understand that question. The numbers we've
5 been reviewing for manufactured --

6 THE COURT: That's exactly -- excuse me. That's
7 exactly what I didn't hear. I didn't hear that they were
8 activated. I heard that he's taking this on a production
9 basis.

10 THE WITNESS: And shipped.

11 THE COURT: He doesn't know if they were shipped
12 out.

13 BY MR. HAGAN:

14 Q Are your numbers from a production basis or a shipment
15 basis? Because I understood them to be from a shipment
16 standpoint.

17 A Well, they gave me the production dates, and then the
18 total number they shipped from this date to the next year's
19 date.

20 Q Okay.

21 THE COURT: And shipped not to the consumer.

22 THE WITNESS: That's correct.

23 THE COURT: Inside the manufacturer to EchoStar.

24 THE WITNESS: Correct.

25 THE COURT: Okay. So this has nothing to do with

1 what went out on the marketplace. Don't try to confuse me
2 with that. This is from the manufacturer into a warehouse
3 someplace for distribution, potentially. You don't have
4 those numbers that went out to the client.

5 MR. HAGAN: So we need the number shipped to the
6 consumers to back out from the number shipped to EchoStar?

7 THE COURT: That's what you are missing. You are
8 missing those shipment records or some good faith, you know,
9 basis for what was shipped out to that consumer. And if I
10 have that number, then I'm pretty certain that -- and it's
11 tentative subject to cross-examination -- I've got a pretty
12 good feel for what that market is, then. Because what --
13 what's really happening here is you've got to -- it's not
14 fair to you, Mr. Shelton.

15 THE WITNESS: It's the dynamic.

16 THE COURT: Yeah, you've got a number -- Kudelski
17 or somebody manufactures them. They ship them over to
18 EchoStar. And where you -- you get left, and all you can do
19 is take a weighted number from that point. They've got the
20 records out there. They can show us -- EchoStar can show us
21 what was shipped out.

22 THE WITNESS: It's -- I believe their terminology
23 was "archive data."

24 THE COURT: That's nice, nice terminology. Go
25 find me the records of what was shipped out.

1 MR. HAGAN: Okay.

2 THE COURT: It's as simple as that. And what was
3 shipped out is going to show me on a yearly basis. You've
4 got those records someplace. It's a computer run, for
5 goodness sakes. Where Mr. Gee stopped was, you know, here
6 is the manufacturer, here is where it went to EchoStar, and
7 we stopped. That's not fair to you.

8 THE WITNESS: And he got that information that day
9 at lunchtime --

10 THE COURT: Yeah.

11 THE WITNESS: -- and then I spent the weekend --

12 THE COURT: Yeah. He can get back on his
13 computer, and he can run the cards shipped, and he probably
14 knows what the ROM 3 cards are. Computers can do that.

15 MR. HAGAN: I -- I believe the confusion was on my
16 part, your Honor. I understood the number of ROM 3 cards in
17 the field to be in the field of consumers, not in the field
18 of cards manufactured.

19 THE COURT: Yeah.

20 MR. HAGAN: So if those numbers are incorrect,
21 which apparently they are, we can try to determine the
22 number of ROM 3 cards that were shipped and back that out
23 from the number of ROM cards that were manufactured.

24 THE COURT: Why don't you go get on the phone
25 right now for just a moment and see how long that would

1 take. Now, if he can't produce that, then I think, you
2 know, let's start the cross-examination and find out. But
3 if he can produce that, we are kind of wasting time until we
4 get those figures in here and get some foundation from
5 Mr. Gee or whoever, and I think we're wasting time right now
6 until we get that, because it's a real misunderstanding,
7 apparently, on EchoStar's part or just a number.

8 Now, I'm going to recess for a moment, give you a
9 chance to get on the phone. Let's find out the information.

10 MR. SNYDER: Your Honor, before we do that, can I
11 raise an issue that's very much related to Mr. Shelton's
12 calculations?

13 THE COURT: Very quickly, though. I want him on
14 the phone; I want these numbers.

15 MR. SNYDER: We learned for the first time on
16 Friday what Mr. Shelton has eluded to today. There was some
17 kind of card swap in 2000 where ROM 10 cards were being
18 swapped for ROM 2 and ROM 3 cards.

19 THE COURT: Uh-huh.

20 MR. SNYDER: And the -- there are larger
21 consequences to that that I won't talk about right now in
22 favor of your admonition, but for Mr. Shelton's analysis,
23 because there was a card swap going on merely identifying
24 the number of cards that were shipped to consumers or
25 shipped out to -- shipped out would not be accurate, because

1 some of those cards were brought back. So for example --

2 THE COURT: Oh, I know that. I know that this is
3 not going to be an absolute number. I know some cards are
4 brought back, returned; I understand that.

5 MR. SNYDER: But we are talking about millions of
6 cards is my point, your Honor, because they made the card
7 swap.

8 THE COURT: Maybe, and I'll wait till the
9 cross-examination. I'm just suggesting unless we make the
10 phone call, we start off with minutia again on the defense
11 side. You've got no way of cross-examining this, and I've
12 got no way of telling this number right now.

13 MR. SNYDER: Thank you, your Honor.

14 THE COURT: So I suggest you make the phone call,
15 and we'll just wait.

16 So, Mr. Shelton, why don't you step down for just
17 a moment. Let them make the phone call.

18 THE WITNESS: Thank you.

19 THE COURT: Thank you.

20 (Recess.)

21 THE COURT: Okay. Let's go back on the record.

22 All counsel are present, and Mr. Hagan's returned from
23 making his phone call.

24 MR. HAGAN: This is where we are. From EchoStar's
25 standpoint, each of the ROM cards that were received from

1 NagraStar, in other words, the numbers that we gave to
2 Shelton and the numbers that were given to the other side
3 and to the Court, all of those, unless they slipped through
4 the crack, a card or two fell off in a crack somewhere, left
5 EchoStar's possession and went to one of three places,
6 retailers, distributors or direct to consumers. So all of
7 the numbers that we have from NagraStar for ROM 2, 3, 10 and
8 11 left EchoStar's possession.

9 THE COURT: Now, here is the problem. For those
10 that went to clients, direct clients, I understand the lost
11 profits. For those who went to distributors, I don't know
12 what that means. I don't know how many are retained in the
13 warehouse. You are asking for money. You are asking for an
14 expert. Do the work.

15 MR. HAGAN: This is the -- the only option I'm
16 going to propose, because this is what they can do --

17 THE COURT: I am going to tell you what to do.

18 MR. HAGAN: We can do it by number of cards
19 activated, and it's going to be lower than the numbers that
20 we have. But in other words, they think they can construct
21 a spreadsheet --

22 THE COURT: Okay.

23 MR. HAGAN: -- which shows of these 1.2 million
24 that went out into the field, how many were actually
25 activated for subscription.

1 THE COURT: How do they do that, because that's an
2 immensely helpful number. It gives the Court something to
3 look at and then make an intelligent decision one way or the
4 other. Because the argument can be, "Judge, they were
5 activated by all the warehouse people." I'm just kidding
6 you, but there is also the real argument, and that is, from
7 your standpoint, they were activated because people were
8 actually consuming this product. How long does that take?

9 MR. HAGAN: The gentleman I spoke to said it
10 should be able to be done within 48 hours. I told him I
11 needed it within 12. You know, I don't know how long it's
12 going to take. They're going to have to look at their
13 records and tell me what was activated.

14 THE COURT: Wise advice. They can work overnight.

15 MR. SNYDER: Can we get their information, your
16 Honor, by month or by year, because it's going to vary over
17 time.

18 THE COURT: Yeah. Yeah, you are absolutely right.
19 We need it by, I would think, at the worst case scenario,
20 for NDS by year. I'm not too certain that I need it by
21 month, but it would be helpful, because you have partial
22 years. For instance, you start in June of 2000 -- you start
23 in June 1997 through June of 2000. There is no reason that
24 your expert has to wait that out. You ought to be able to
25 get specific figures easily for the year 1998 and 1999,

1 which are complete years. And instead of just taking a
2 yearly figure for 1997 and cutting it in half, which you are
3 not really doing, it's five months, right, and seven months.

4 So you've got a seven-month run in '97 and a
5 six-month run here, don't you? So if we do that, I think I
6 would be satisfied with the complete year for -- of '99 --
7 strike that -- '98, '99, and then will run by month or from
8 June forward in 1997, and then your expert isn't waiting.
9 He is not having to wait, he's got activations.

10 MR. SNYDER: To be clear, your Honor, I think we
11 need to know the number of active cards, not just the number
12 of -- we need to know the number of active cards, not just
13 the number of activations. And let me explain why that's
14 important.

15 THE COURT: What's the difference?

16 MR. SNYDER: Here is the difference. One of the
17 things that apparently happened in 2000 -- and we started to
18 see this for the first time in the documents produced Friday
19 night, and Mr. Shelton has alluded to it today -- is they
20 were doing a -- they were doing a soft swap of ROM 10 cards.
21 So as a ROM 2 or ROM 3 card would come in from the field,
22 let's say somebody -- their machine breaks or they need a
23 repair, they need a new something, the service techs take
24 the card out, the ROM 2 or ROM 3 card out. They put a
25 ROM 10 card in. And this is all happening in 2000, in

1 middle of 2000 before the NipperClause posting, before any
2 of this, because the ROM 10 card, among other things, does
3 not have the buffer overflow vulnerability. And the reason
4 this is important is that the ROM -- let's say there was a
5 ROM 2 card activated in 1988, but in 2000 --

6 THE COURT: Well, let's say it occurred in 1997.

7 MR. SNYDER: Okay, 1997.

8 THE COURT: Let's say May of '97.

9 MR. SNYDER: May of '97. In mid-2000, that
10 consumer brings their machine and says, "Ah, the darn thing
11 isn't working." And the service techs, as part of their
12 checklist say, "Ah, we're in the middle of a soft swap, so
13 I'm going to" -- "the card wasn't bad, but I'm going to take
14 that ROM 2 card out. I am going to put a ROM 10 card in."

15 If you just go by activations --

16 THE COURT: No. You wouldn't have a ROM -- in the
17 middle of 2000 --

18 MR. SNYDER: In the middle of 2000 --

19 THE COURT: You have a ROM 3 card --

20 MR. SNYDER: No, I don't believe so, your Honor.

21 THE COURT: Strike that. You are absolutely
22 right. You'd have a ROM 10 as of March 2000. Thank you.

23 MR. SNYDER: So they were doing this soft swap.
24 So in activation in '97 of ROM 2, that card disappeared. It
25 was no longer active if it was swapped for a ROM 10. So we

1 need to know how many cards are active in each of these
2 periods, not just how many were activated.

3 THE COURT: That makes sense to me. And of
4 course, the number is going to be smaller than the 160,000
5 when we are done when we'll be dealing with reality.

6 We are going back in the back and just talk about
7 our discussion for a moment. Let us start drafting some --
8 some of our thoughts. And tell me why that information
9 couldn't be obtained.

10 MR. HAGAN: I don't know. I -- I know that the
11 number -- what they can obtain is the number of each
12 particular card that was activated by a consumer, because
13 the number of cards that came in, the number that we used
14 for Mr. Shelton, the number that he used for his
15 calculations is the same number that EchoStar sent out. I
16 don't know how many of those cards were activated by a
17 retailer, by a consumer individually, by a distributor
18 through other retailers; that, I don't know.

19 So the only -- the best number that I think
20 EchoStar can get is the number of each ROM version cards
21 that was actually activated by consumer. In other words,
22 someone actually set up a description, plugged their box
23 into a phone line and accessed EchoStar's computer system to
24 activate that card.

25 THE COURT: Okay.

1 MR. SNYDER: The difficulty, your Honor, is that
2 the way they are treating this, it assumes that that card,
3 then, was active forever, or at least throughout the damages
4 period, and we know -- logically, we know that's not true.
5 But aside from just knowing that that is not going to
6 happen, from time to time the cards are going to be taken
7 offline, we know that in 2000 they specifically undertook a
8 program to get ROM 2 and ROM 3 cards out of the field and
9 were, of course, concerned with ROM 3 cards.

10 THE COURT: So why wouldn't it be -- and this is
11 naive on my part, why wouldn't the assumption be -- you see,
12 the overlap between ROM 3 and ROM 10, it's a three-month
13 period of time. Let me -- I may be wrong about that. Is
14 this naive?

15 There is a three-month period from the ROM 10
16 coming into production, or whatever, March of 2000. The
17 ROM 3s are extending to June of 2000. So there is a
18 four-month overlap in that period of time. Wouldn't the
19 assumption be, although it brings your number down, that any
20 card prior to March 2000 has to be a ROM activated -- a
21 ROM 3 activated card? And what we don't know what to do,
22 and the problem is that four-month -- one of the problems is
23 that four-month period of time. Now, I may not be making
24 sense, but --

25 MR. SNYDER: If I could try and help, your Honor?

1 THE COURT: Yeah.

2 MR. SNYDER: There is an obvious difficulty in
3 understanding which cards were being used by consumers
4 during that overlapping four months, but I think the problem
5 is actually much larger than that, because we now know, and
6 this came as a complete surprise, but we now know that there
7 was actually an intentional program to take ROM 2 and 3
8 cards out of the field. So knowing that a card was issued
9 in 1998 and was a ROM 3 card, if someone brought that in for
10 service in 2000, in mid-2000, they had a program to replace
11 that ROM 3 card with a ROM 10 card.

12 Now, from the subscriber information that they've
13 provided to us -- this is Exhibit 1510, because we asked
14 them to track the backdoor password in the NipperClause
15 posting and find the card ID and to produce the subscriber
16 information for that card -- from the limited subscriber
17 information that they produced for that card, we believe
18 that they track when a card is disabled, and this is the
19 example that -- that Mr. Stone has pulled out for you. So
20 it should be possible to know how many active cards of each
21 type there are in the field, which is what we would need.
22 Because presumably the soft swap of intentionally taking
23 ROM 2 and ROM 3 cards out of the field and replacing them
24 with ROM 10 cards would affect a very large number of cards,
25 and, in fact, there is something in Mr. Shelton's documents

1 that suggest it affected millions of cards.

2 THE COURT: And that's why your number could be
3 astronomically high and unfair to NDS?

4 MR. SNYDER: Correct.

5 THE COURT: All right. Let's go back and think
6 about that for just a moment. We'll be right back.

7 And I'll return this to you.

8 MR. STONE: Sure. Thank you, your Honor.

9 (Recess.)

10 THE COURT: All right. We are back on the record.

11 All parties are present, Mr. Shelton is present.

12 Mr. Shelton has identified on direct examination
13 the total number of pirated EchoStar Smart Cards in the
14 field as approximately 500,000 cards. At the previous
15 evidentiary hearing, the Court asked Mr. Shelton to isolate
16 the number of pirated ROM 3 cards. He was given information
17 by EchoStar concerning the total number of each type of card
18 produced and shipped and developed a weighted average
19 according to the proportion of cards produced and shipped by
20 EchoStar. The weighted average attributed to the ROM 3 card
21 was approximately 33 percent throughout the relevant period,
22 and the Court's heard that figure, of course, today,
23 Mr. Shelton.

24 Using this weighted average, you've determined
25 that the pirated ROM 3 cards varied in quantity, I think,

1 from 150 to 165. I think the actual number was 154,000 to
2 164 or 165,000.

3 However, determining the number of cards produced
4 and shipped by EchoStar takes into account both those
5 shipped directly to consumers and those sent to retailers or
6 distributors. Accordingly, the weighted average based on
7 total number produced and shipped may take too many total
8 cards into account in that it is partially based on cards
9 that never actually reached consumers.

10 Additionally, in light of newly discovered
11 evidence, some of the ROM 3 cards may have been swapped for
12 ROM 10 cards as early as March 2000. There is an overlap
13 period, in fact, from March 2000 to June 2000 suggesting
14 that the proportion of produced and shipped ROM 3 cards may
15 overstate the proportion pirated cards.

16 Mr. Shelton indicated that the price of pirated
17 ROM 3 cards increased towards the end of the period
18 suggesting a decrease in supply. Plaintiff might have
19 sufficiently accurate information to show lost profits in
20 1998 and 1999 on the basis of the present evidence, but as
21 soon as the card swap started in 2000, the information may
22 no longer be safely relied upon.

23 In order to approximately discount the 500,000
24 total piracy figure to isolate ROM 3 cards only, EchoStar
25 must determine the proportion of ROM 3 cards in use versus

1 ROM 2, ROM 10 and ROM 11 cards. One way of determining the
2 proportion of active ROM 3 cards at any given time would be
3 to compare the subscriber information for ROM 3 cards versus
4 ROM 2, ROM 10 and ROM 11 cards.

5 Subscriber information is available in EchoStar's
6 database dating back several years. This Court finds it
7 difficult to believe that it's not. This information would
8 give a more accurate estimate of the proportion of active
9 ROM 3 card users, and the total number of piracy could be
10 discounted to reflect this proportion.

11 Now, it's just as simple as that. Unless you
12 produce that information, you can guess what my ruling is
13 going to be. Mr. Kudelski, et al., can run this. They can
14 run it very quickly. They can run it overnight, and they
15 can pay overtime. And I won't make a final ruling now, but
16 if you can't guess that final ruling, something is wrong.
17 In addition, you have the ability to do this. You control
18 this information.

19 Finally, it protects this jury from excessive
20 damages, if, in fact, they are awarded. It makes a huge
21 difference if we get to punitives and how those are
22 compounded. And you're asking for money, you have that
23 responsibility. I won't countenance or hear that this is an
24 impossibility or it takes time or it's inconvenient or it
25 costs money.

1 So I leave that to you, and I don't see any
2 further reason to continue on with Mr. Shelton today.

3 I think, Mr. Shelton, you've been very clear. I
4 want to thank you. I find no fault. I think that these
5 plaintiffs can provide you with accurate information and can
6 reduce it, and they've chosen not to, frankly, either
7 through inadvertence, negligence, laziness or inability to
8 produce this. So let me be kind across the board.

9 And I don't think, sir, you should be up on the
10 stand having to guess, and my jury is not going to be
11 guessing either. And this isn't going to come back to me
12 from the Circuit because there's a guess in terms of a
13 weighted case load, so I find no fault with your
14 methodology. We are given these numbers. That's the best
15 you can work with.

16 So, Counsel, we are simply going to wait, and the
17 longer it takes, if it comes to me later, I can hear
18 Mr. Snyder, who's about to have a seat for a moment, and who
19 is going to say I didn't have enough time to examine these
20 figures. So it's up to you to get these done very quickly,
21 and if they are thinking 48 hours, something is wrong.

22 Okay. Now, Mr. Snyder.

23 MR. SNYDER: My only question, your Honor, is it
24 understood that if EchoStar produces this information and
25 Mr. Shelton provides revised numbers, it is still subject to

1 our ability to cross-examine him about his methodology in
2 determining whether or not it's admissible?

3 THE COURT: Absolutely.

4 MR. SNYDER: Thank you.

5 THE COURT: In all likelihood, what I'll do is
6 allow Mr. Shelton to testify, because then methodology is
7 going to make tremendous sense to the Court. And -- and if
8 that occurs and it occurs in a timely fashion, and I can't
9 emphasize that enough, Mr. Kudelski, et al., are not staying
10 in Switzerland claiming that they don't have the ability,
11 means to do this. But I don't think it's irreparable,
12 because if those numbers are produced as I've directed you
13 to do so, then although NDS will -- will obviously claim
14 prejudice, there is direct examination, and then there is a
15 ways to go in this case.

16 And, of course, Mr. Shelton, you'll, in all
17 likelihood, be back. I'll let the testimony be split, in
18 all likelihood.

19 That relieves the problem with Mr. Rock. I don't
20 know how this is going to turn out, but I would suggest that
21 at some point you get started with those boxes, so --

22 All right. Now, is there anything further that we
23 need to do on the record tonight before we start, you know,
24 off the record with some of these exhibits so that the Court
25 goes over every exhibit this evening prior to the testimony

1 of the witnesses tomorrow?

2 MR. HAGAN: There was one other issue that your
3 Honor wanted to address this evening, and that is the
4 testimony of Jan Saggiori. We did get him to come here live
5 from Switzerland. He is going to testify about his
6 knowledge of Chris Tarnovsky and certain information that
7 Chris Tarnovsky e-mailed to him. We have him with us
8 tonight. I don't know how you best want to address that
9 issue.

10 THE COURT: Counsel?

11 MR. SNYDER: The reason we wanted Mr. Saggiori
12 present, your Honor, is there is a question about the
13 authenticity of an e-mail about which Mr. Saggiori himself
14 has provided contradictory testimony.

15 THE COURT: Ask Mr. Saggiori to come in. Let's
16 put him on the stand quickly and find out the merits of
17 this.

18 Let me get --

19 Kristee, would you swear the gentleman in just a
20 moment? I left my notebook back on the floor, and I'm going
21 to get it.

22 (Interruption in the proceedings.)

23 THE COURT: Okay. Thank you, Mr. Saggiori.

24 Has the gentleman been sworn in?

25 THE CLERK: Not yet.

1 THE COURT: Will you raise your right hand,
2 please.

3 JAN SAGGIORI, PLAINTIFFS' WITNESS, SWORN

4 THE WITNESS: Yes.

5 THE COURT: Thank you, sir. Would you please be
6 seated in the witness box.

7 And Mr. Saggiori, would you state your full name,
8 sir.

9 THE WITNESS: Jan Saggiori.

10 THE COURT: Would you spell your last name.

11 THE WITNESS: My last name is my family name?

12 THE COURT: Yes, please.

13 THE WITNESS: Yes. "S" like Sierra, "a" like
14 angel, "g" like golf, "g" like golf, "i" like Italy, "o"
15 like Oscar, "r" like Romeo and "i" like Italy.

16 THE COURT: Thank you very much.

17 This is going to be a limited discussion this
18 evening, and then you are going to be testifying tomorrow.

19 THE WITNESS: Uh-huh.

20 THE COURT: And I think we can represent to you we
21 should hope to finish with you tomorrow.

22 THE WITNESS: Thank you.

23 THE COURT: Thank you very much.

24 Counsel --

25 MR. NOLL: Your Honor, we -- David Noll for the

1 plaintiffs. We don't have any questions for Mr. Saggiori.
2 We have Mr. Saggiori here in court with a PGP key that
3 contains the e-mail in issue, which is a March 31st, 1999
4 e-mail that he received from Christopher Tarnovsky. And
5 Mr. Saggiori is prepared to open that e-mail in front of the
6 Court and to show the other side that he has it
7 electronically and to provide them a copy of it on this
8 memory key drive.

9 THE COURT: Excellent. Well, thank you. Would
10 you like to do that for us, sir?

11 THE WITNESS: Yes, sir.

12 THE COURT: Thank you.

13 THE WITNESS: Would you like --

14 THE COURT: If you'd come up, bring the
15 computer --

16 THE WITNESS: I have to --

17 THE COURT: Plug that in.

18 Counsel, if you'd like to look over his shoulder?

19 MR. SNYDER: We'd like -- we'd also like to have a
20 copy of the e-mail and the --

21 THE COURT: Counsel, let's look over his shoulder
22 and see it opened up first.

23 MR. NOLL: Okay. I've got a couple work product
24 documents I'm going to close.

25 THE COURT: Well, yeah, why don't we go down to

1 that desk. It would be easier.

2 THE WITNESS: Okay.

3 THE COURT: Why don't we provide -- that way all
4 counsel for NDS can gather, also.

5 MR. NOLL: Okay. You have your -- you have your
6 key; is that correct, Jan?

7 THE WITNESS: It is ready.

8 MR. NOLL: What he did is we went back in the
9 back, and these are -- this is all the files that he has on
10 his memory key, and he put them on my laptop --

11 THE WITNESS: Yes.

12 MR. NOLL: -- when we went back in the attorney
13 room.

14 THE COURT: Thank you.

15 Now, Mr. Saggiori, speak into the microphone.

16 THE WITNESS: Okay. Too short.

17 Okay.

18 THE COURT: Okay.

19 THE WITNESS: So the first e-mail of 36FF0FBE.plx
20 is the --

21 MR. NOLL: Talk slow, talk slow.

22 THE WITNESS: Yeah.

23 MR. NOLL: She's typing everything.

24 THE WITNESS: Oh, sorry.

25 So the first file here, the 36FF0FBE.plx is the

1 file from the CompuServe database software, and that's the
2 e-mail. And that's -- that's the e-mail that I received
3 from Chris from the CompuServe software.

4 THE COURT: And that's Chris Tarnovsky?

5 THE WITNESS: Yes, absolutely.

6 THE COURT: Is that the e-mail in question?

7 THE WITNESS: That's the e-mail, this one.

8 THE COURT: Well, why don't we open it?

9 THE WITNESS: Exactly. So that's what I'm doing
10 now.

11 So this is a scramble, so I can try to open it
12 with the software so you will see the text from it. Let's
13 see -- so that's the e-mail --

14 THE COURT: Thank you.

15 THE WITNESS: -- with the header. And that's
16 the -- yeah, that's the encrypted part of the e-mail.

17 THE COURT: Okay. Now, let's wait. Let's stop.

18 THE WITNESS: Okay.

19 THE COURT: Do you have any further questions,

20 Mr. --

21 MR. SNYDER: Not so far, your Honor.

22 THE COURT: Any questions?

23 MR. SNYDER: Not so far.

24 THE COURT: I think they are done with the direct
25 examination.

1 MR. SNYDER: Well, we -- what we've seen so far is
2 a bunch of nonsense characters.

3 THE COURT: And what would you like?

4 MR. SNYDER: We need it decrypted.

5 THE WITNESS: Exactly.

6 THE COURT: Decrypted.

7 THE WITNESS: I'm going to do that.

8 THE COURT: Can you decrypt that for us?

9 THE WITNESS: Absolutely.

10 THE COURT: Would you do that?

11 THE WITNESS: Yes. So I will use PGP software.

12 The name of the file is 36FF0FB.plx.

13 THE COURT: Just a moment.

14 Dot, period? One more time.

15 THE WITNESS: I'm entering the command, that is
16 PGP, like pretty good privacy, 36FF0FBE.plx, that is the
17 name of the file.

18 THE COURT: Okay.

19 THE WITNESS: So now it requests me, so it's Jan
20 Saggiori, my key, it recognized it, and it asked me to enter
21 my secret phrase.

22 Okay. So the phrase is good, and it descrambled
23 the file that is here. It's 8 kilobyte files, which is the
24 same name of the file, 36FF0FBE of 8 kilobytes.

25 THE COURT: Just a moment. 36 --

1 THE WITNESS: 36FF0FBE.

2 THE COURT: She's taking a transcript.

3 THE WITNESS: Okay. And that's the 8,000 bytes, 8
4 kilobytes that we discussed. That is the scrambled file
5 that is on my testimony.

6 THE COURT: Okay.

7 THE WITNESS: So we -- I think that's the file
8 that we need to see so they are sure that what we thought is
9 true.

10 THE COURT: Okay.

11 MR. SNYDER: Your Honor, I'm not -- I'm not sure
12 if we've actually decrypted the right thing. The --

13 THE WITNESS: Look here. This is the file you see
14 before, 36FF --

15 MR. SNYDER: Could you move it up to the top,
16 please?

17 THE WITNESS: Yes, sure.

18 From (inaudible) Newman (inaudible) .net, and you
19 have the "to Saggiori, Jan, 28 March '99, 18:32," and they
20 sent it. "Good news from up north here. Enjoy, keep for
21 you please. Extremely top secret."

22 THE COURT: Just a moment. Put it back.

23 THE WITNESS: Okay.

24 THE COURT: "Good news from up north here. Enjoy,
25 keep for you please. Extremely top secret."

1 THE WITNESS: And the name of the file,
2 16CF54.asc.

3 THE COURT: 16CF54.asc, and I'm just repeating
4 what you are saying so the court reporter -- because you
5 have a slight accent.

6 THE WITNESS: Absolutely, I'm sure.

7 (Laughter.)

8 MR. SNYDER: Is the file that you decrypted --

9 THE WITNESS: Yeah.

10 MR. SNYDER: -- 16CF54.asc?

11 THE WITNESS: That's the PGP software to the PGP
12 data from it that you can see starting here, begin PGP
13 usage --

14 THE COURT: Slower, slower.

15 THE WITNESS: -- and went up to the end of the
16 file here of this e-mail, and PGP message, and open that
17 data and descramble it with my key and created the file. It
18 has exactly the same name here, 36FF0FBE from the 36FF0B --
19 0FBE.plx file.

20 THE COURT: From the 36FF0FBE.plx.

21 MR. SNYDER: And what is the date of the .plx
22 file?

23 THE WITNESS: The date of the .plx file, I will
24 show you. .Plx, it's the 28th March, '99 at 9:29 p.m.

25 MR. NOLL: For the record, I misspoke. I said the

1 31st, but obviously it's the 28th of 1999.

2 THE WITNESS: This is exactly the file as it was
3 received, and it's exactly the date when I downloaded the
4 file.

5 THE COURT: Believe it or not, we are almost done
6 with this hearing this evening, but I want to provide any
7 additional questions that Mr. Snyder may want to ask.

8 MR. SNYDER: I have no further questions, your
9 Honor, other than a request. We've been asking for this
10 file literally for over a year. We would like the -- an
11 electronic version of the file produced along with the PGP
12 key and the pass phrase so that our expert can analyze it to
13 determine the authenticity of the e-mail and the translated
14 version.

15 THE COURT: How hard would that be to do?

16 THE WITNESS: It's -- I think it's difficult,
17 because for two reasons. First, the PGP key is opening all
18 my files and all my privacy --

19 THE COURT: Which --

20 THE WITNESS: -- after 2004.

21 THE COURT: That --

22 THE WITNESS: So all my e-mails. And I'm happy to
23 open it in front of them, but I am not happy to give my
24 private key. That will open my private life for 10 years.

25 THE COURT: Just a moment. How do we reach a

1 compromise so his privacy is not compromised, but we either
2 get you the information or bring your expert here, you know,
3 to examine it? In other words, I'm going to open that for
4 you, but I'm not going to allow this to go beyond this
5 document.

6 MR. SNYDER: If I understood Mr. Saggiori's
7 testimony correctly, the PGP key and password that we are
8 interested in, he has not used, now, for at least three and
9 probably four years.

10 THE COURT: Is that true?

11 THE WITNESS: Yes, but it's --

12 MR. SNYDER: Just a second.

13 THE COURT: No, no. He said "but."

14 THE WITNESS: It's probably up to 2004, all my
15 life.

16 THE COURT: Up --

17 THE WITNESS: Up to 2004, all my life.

18 THE COURT: Okay.

19 MR. SNYDER: Second, we are not asking him to
20 produce all his e-mails or any other encrypted material. We
21 are only asking him to produce the encrypted e-mail, which,
22 of course, the e-mail, the password and the key can be
23 produced under the protective order, and we would be bound
24 as officers of the Court to protect that information just as
25 we would any of the other confidential information exchanged

1 in the case.

2 THE COURT: We have -- we have Judge Smith here
3 tomorrow anyway. Can we use Judge Smith for this purpose?

4 MR. SNYDER: I don't know. I have not yet spoken
5 to our expert, Mr. Litchfield. I don't know what his
6 availability is.

7 THE COURT: Well, go call him.

8 He's going to call him. We'll go off the record.
9 We'll call him.

10 THE WITNESS: And I would like to add just one
11 thing --

12 THE COURT: No, no, no.

13 (Discussion held off the record.)

14 THE COURT: All right. We are on the record. All
15 counsel are present.

16 Mr. Saggiori, I believe, has concluded his
17 testimony. Mr. Snyder has a proposal.

18 MR. SNYDER: First, your Honor, we object to the
19 untimely production of the encrypted message. We've been
20 asking for the message for quite some time, and it was not
21 produced, and we believe unduly prejudicial for it to be
22 introduced literally the night before Mr. Saggiori
23 testifies.

24 THE COURT: Okay.

25 MR. SNYDER: Without waiving that objection and in

1 the interest of moving the trial forward, we have agreed
2 with plaintiffs' counsel that they will produce to us the
3 encrypted version of the message which we will provide to
4 our expert. Mr. Saggiori will testify tomorrow and be
5 cross-examined tomorrow. Our expert will review that and
6 provide his testimony at the appropriate time in case --
7 before that, identify other -- any other information that he
8 believes is required to complete his analysis.

9 THE COURT: Acceptable?

10 MR. NOLL: That's acceptable, your Honor.

11 MR. HAGAN: That's acceptable, your Honor, with
12 two points that I need to make.

13 First of all, this entire dispute is over whether
14 or not the e-mail that Chris Tarnovsky sent to Mr. Saggiori
15 is true and authentic or if it's been altered in any way.
16 We produced that e-mail in hard copy. They requested an
17 electronic copy. We sent that copy over. Now, it seems
18 they want this encrypted copy, which Mr. Saggiori brought
19 with him to the United States pursuant to a request that I
20 made conveying the request of Mr. Snyder.

21 Their expert testified based on the evidence that
22 he had that he couldn't determine one way or another
23 whether this e-mail was authentic or altered. I think that
24 Mr. Saggiori opened that e-mail in front of the Court and
25 the defendants' counsel under oath. He explained that

1 process, articulated each step of that process. Mr. Snyder
2 had no further questions. Now, we will produce the
3 electronic copy, the encrypted copy that they want, and if
4 Mr. Litchfield, their expert, has any new opinions or
5 conclusions, just like they did with Mr. Shelton, we would
6 like the opportunity to depose him on that limited issue
7 before he testifies at trial.

8 MR. NOLL: Can I add one thing, your Honor?

9 To the extent -- sorry, your Honor. To the extent
10 that Mr. Litchfield feels he needs the PGP key, I spoke to
11 Mr. Snyder about this off the record. He doesn't -- the --
12 the defense, as I understand it, has no problem with
13 handling that should we get there through the special
14 master, Judge Smith, although our hope is that we don't go
15 there.

16 THE COURT: Okay. You were saying --

17 MR. SNYDER: In addition to the encrypted file,
18 your Honor, we would like the decrypted file that
19 Mr. Saggiori created in court today so we can compare the
20 encrypted and decrypted files.

21 MR. HAGAN: That's fine.

22 THE COURT: Mr. Saggiori, my thoughts are this,
23 and that is we should pay the same courtesy to you that we
24 do all of the other witnesses. I would expect that your
25 testimony will conclude tomorrow, then you would be back on

1 the plane, but is the flight next day?

2 MR. HAGAN: I believe so, your Honor.

3 THE COURT: Okay. But you are subject to
4 returning to court as all of the witnesses are. If we have
5 this agreement that's been stated on the record, then
6 Mr. Litchfield can testify to whatever his findings are, and
7 it becomes Mr. Hagan's choice about whether you are recalled
8 or you return. So I think we've reached an accommodation in
9 this regard.

10 Also, if Mr. Litchfield is concerned, I would
11 think he'd be here tomorrow. And I know that there is a
12 question of, quote-unquote, availability or
13 non-availability, but with the fees that are being paid by
14 the respective sides to report for this case, I don't
15 believe Mr. Litchfield can't be here because of another
16 client.

17 Now, if he's on vacation, et cetera, so be it, but
18 a lot of people have been scrambling to get to court on
19 short notice, and if Mr. Litchfield can't, it's of great
20 concern.

21 MR. DILGER: I've spoken to Mr. Litchfield just
22 now, and my understanding --

23 (Interruption in the proceedings.)

24 THE COURT: He's sworn in as a U.S. citizen
25 tomorrow.

1 MR. DILGER: Yeah, he is being sworn in as a U.S.
2 citizen tomorrow.

3 THE COURT: What time?

4 MR. DILGER: I am not sure about the time; I can
5 find out.

6 THE COURT: Amazingly, we'll wait for him tomorrow
7 night. It's a two-hour and 45-minute flight. I can name
8 the schedule back and forth from Portland, Oregon. I grew
9 up there.

10 MR. DILGER: Okay. I'll speak with --

11 THE COURT: He can get here easily. He can get
12 here by 8:00 or 9:00. I conduct those ceremonies. They're
13 usually in the morning. There's no reason he can't be on
14 the afternoon flight.

15 Then, is there anything further to do this
16 evening? I am satisfied concerning Mr. Saggiori.

17 MR. SNYDER: Nothing further regarding
18 Mr. Saggiori. I do have a couple of other issues that I
19 believe is appropriate for the record, your Honor.

20 THE COURT: Sure.

21 MR. SNYDER: First, the Court indicated -- the
22 Court has provided us with written rulings regarding
23 in-limine motions, indicated at the time that those rulings
24 were tentative. If the Court has since determined that
25 those rulings are final, that information would be

1 important, particularly to the objections that we do or do
2 not make during the trial.

3 THE COURT: There's a lot of motions. For
4 instance, Frost is still out there. I want to look at the
5 video of Frost this evening, the actual video that's going
6 to be shown. I want to see the assertion of the Fifth, how
7 he asserts the Fifth, if he continues to assert the Fifth,
8 whether I think the continued assertion is prejudicial, if
9 one is enough. So I'm not certain it's too broad a
10 question. I won't respond to that.

11 Now, what's the next issue?

12 MR. SNYDER: Next, your Honor, the Court had
13 indicated in its ruling on the motions in limine regarding
14 DirecTV and Canal Plus that defendants could seek a limiting
15 instruction regarding those cases. We've now already had
16 several witnesses testify about those litigations. I think
17 it would be appropriate for the Court to give a limiting
18 instruction indicating that those cases -- that the
19 allegations in those cases were, in fact, allegations, and
20 that people such as Mr. Williams, Ms. Williams or Mr. Lebson
21 repeating those allegations, and we've had several live
22 witnesses, in fact, repeat those allegations, that it is not
23 evidence, and that repeating the allegations does not mean
24 that the allegations were true.

25 THE COURT: You draft that first for my

1 consideration.

2 MR. SNYDER: We've drafted something, your Honor.

3 THE COURT: And then show that to counsel, and
4 we'll discuss that later this evening.

5 MR. SNYDER: Thank you, your Honor.

6 Next, your Honor, I mentioned at the outset of the
7 hearing that we received a substantial number of documents
8 last Friday, Friday night. Some of -- some of those
9 documents, as well as Mr. Shelton's testimony this morning,
10 indicated that there was a soft card swap, at least, of
11 the -- of ROM 10 cards for ROM 2 and 3 cards in mid-2000
12 before the NipperClause posting. This is the first we've
13 heard of that card swap, and the extent or circumstances of
14 that card swap could have enormous implications for
15 plaintiffs' other theories.

16 If, for example, that card swap was effective in
17 substantially reducing, if not nearly eliminating, the ROM 2
18 and 3 cards in the field, the jury could easily find that
19 the later 2004 card swap was not necessitated by ROM 3
20 piracy.

21 Similarly, if that card swap was the result of
22 EchoStar or NagraStar or NagraCard's recognition that the
23 ROM 3 card was vulnerable, that could have enormous impact
24 on the jury's decision of whether the plaintiffs had
25 adequately mitigated damage or whether there was any

1 causation caused by the subsequent NipperClause posting for
2 either lost profits or the card swap. So we would request
3 that the plaintiffs be ordered to produce all documents
4 regarding the ROM 10 card swap in 2000.

5 THE COURT: Be more specific.

6 MR. SNYDER: Documents indicating the reasons for
7 the card swap, indicating whether it was in response to the
8 1999 demand from EchoStar to Kudelski for the -- to replace
9 cards under the warranty, purchase orders indicating the
10 number and --

11 THE COURT: Draft it for me.

12 MR. SNYDER: Okay. We'll do that.

13 THE COURT: I'll see it in written form this
14 evening. In other words, I don't want a simple record as
15 you go along. I want to pay you the courtesy of taking a
16 moment of putting down a specific request so I can see them
17 in chambers.

18 All right. What else?

19 MR. HAGAN: Just a response.

20 THE COURT: Mr. Snyder.

21 MR. SNYDER: An issue regarding the proposed
22 testimony for Mr. Dov Rubin.

23 THE COURT: Okay.

24 MR. SNYDER: On Saturday, plaintiffs indicated
25 that they intend to call defendants' general manager, the

1 person in charge of North America, Dov Rubin, to testify
2 about NDS's revenues from the DirectTV contract. And the
3 rationale for this proposed testimony was under a newly
4 articulated theory that defendants could be required to
5 disgorge the profits associated with those contracts.

6 I think it would be premature to elicit
7 Mr. Rubin's -- actually, Dr. Rubin's testimony about the
8 revenues from the DirectTV contract before the Court has had
9 an opportunity to rule on whether or not plaintiffs will be
10 able to present to the jury this new disgorgement theory.

11 THE COURT: Anything else?

12 MR. SNYDER: There is one other thing, your Honor.
13 You had invited me to make a record regarding the e-mails
14 that were allegedly exchanged between Mr. Dawson and
15 Mr. Menard. As we identified or articulated in our Motion
16 in Limine Number 6, the only evidence regarding the
17 authenticity of the e-mails supposedly exchanged between
18 Mr. Menard and Mr. Dawson and subsequently produced by
19 Mr. Ereiser is the testimony of Mr. Menard, who testified
20 that those e-mails are all forgeries.

21 As described further in our briefs and at the oral
22 argument on the motions in limine, defendants, therefore,
23 object to any testimony regarding those e-mails and believe
24 that they should be excluded, because they lack foundation.
25 The only evidence regarding their authenticity is that they

1 are forgeries, and that the admissions of those e-mails,
2 even if testimony about their authenticity is allowed, would
3 be unduly prejudicial under 403.

4 THE COURT: And once again, remind me about the
5 availability and non-unavailability of Mr. Dawson.

6 MR. SNYDER: We don't have any communications with
7 Mr. Dawson. He is a well-known pirate that we have chased
8 for quite some time, your Honor.

9 MR. HAGAN: We have -- we have no -- absolutely no
10 connection with Mr. Dawson. The only connection that we are
11 aware of is his connection with Mr. Menard and
12 Mr. Tarnovsky. We have attempted to serve him on several
13 occasions. He has evaded service to the extent that we --
14 we haven't been able to serve him. We don't even -- we
15 aren't even able to locate him.

16 THE COURT: Okay. Mr. Snyder, anything else?

17 MR. SNYDER: That I believe Mr. Eberhart has an
18 issue, your Honor.

19 MR. EBERHART: Your Honor, we -- we raised
20 initially on Saturday with the Court our objection to the
21 use of Exhibits 390 and 610-A with Mr. John Norris.
22 Plaintiffs are proposing to use those exhibits with
23 Mr. Norris, and it's our position that those exhibits were
24 specifically excluded by the Court's ruling on Motion in
25 Limine Number 3. That was the motion in limine dealing with

1 the NDS, DirecTV litigations.

2 THE COURT: Tentatively, I believe you are
3 correct, and you will be precluded tentatively. I'll look
4 at that again this evening after all parties have left, but
5 390 and 610 will not be before this jury. It would violate
6 the Court's order and the spirit of the Court's order.

7 Now, anything else?

8 All right. Now, let me turn to Mr. Hagan. Do you
9 want to respond, or do you want new areas of concern?

10 MR. HAGAN: Let me start with -- with a response,
11 your Honor.

12 First of all, we believe that Mr. Snyder has
13 misrepresented the record with respect to the documents that
14 were produced. I believe he said several times today that
15 over 5,000 documents were produced to him on Friday. That
16 is incorrect. Our records show that it was less than 700
17 documents that were produced on Friday. There were over
18 4,500 documents that were produced Monday or Tuesday earlier
19 during the week and before the trial started, and those
20 documents were documents that they had not requested before
21 but were demanding at the last minute. It's my
22 understanding that those were monthly financial summaries.

23 THE COURT: I see.

24 MR. HAGAN: And we produced end of fiscal year
25 financial summaries. They wanted us to go back and get each

1 particular month for the '98 to '05 time frame. So that
2 deals --

3 THE COURT: The problem is -- this is curable.
4 We've got time.

5 MR. HAGAN: Correct.

6 THE COURT: I am not as concerned because the
7 summaries can be validated or not, and we have a significant
8 way to go in the defense case.

9 MR. HAGAN: Secondly, with respect to what
10 Mr. Snyder has characterized as a ROM 10 swap, the only
11 evidence that I'm aware of about this ROM 10 swap apparently
12 comes from Mr. Shelton, and when I questioned him about
13 that, his only basis was a conversation that he had with
14 JJ Gee. I need to find out whether or not this ROM 10 swap
15 ever happened.

16 THE COURT: That's true.

17 MR. HAGAN: And if it did, the number of ROM 3
18 cards that were swapped out with ROM 10 cards, so that he
19 can back that number out of his piracy calculations as well.
20 I hope to have that information within the next day or two.

21 THE COURT: It would be appropriate if you found
22 that out.

23 MR. HAGAN: Third, your Honor, with respect to
24 Dov Rubin's testimony, we are only -- as the Court knows, we
25 are only offering him for a limited purpose, and that is to

1 authenticate a document that he produced, which we
2 questioned him about in his deposition that shows the
3 defendants' revenues from DirectTV. This is not a newly
4 minted theory of damages. Disgorgement is expressly allowed
5 under the statutes that we pled.

6 THE COURT: I required briefing by, I believe,
7 Friday or Saturday morning. I allow you to brief that
8 document subject to a motion to strike. I am not going to
9 cast an opinion at this time. Whether you get there between
10 disgorgement or not, subject to argument, it's easily cured.

11 MR. HAGAN: Number four, the e-mails between
12 Mr. Menard and Mr. Dawson have indicia of authenticity
13 separate and apart from Mr. Menard's testimony. We will be
14 bringing, as the Court knows, live to testify, Ron Ereiser.
15 That is the source of those particular e-mails, and that
16 will cure any problems that the defendants may have.

17 THE COURT: I am going to delay that ruling,
18 except is Menard's tape going to be played prior to Ron
19 Ereiser's testimony?

20 MR. SNYDER: Yes, that's the current schedule.

21 THE COURT: That -- that's the difficulty.

22 I anticipate this is going to be easily cured with
23 Ron Ereiser. In other words, it's going to be a question
24 for the jury. It's not going to go to admissibility. It's
25 going to go to weight. But the way we have it arranged, we

1 have Menard prior to Ereiser. So I'd take that subject to a
2 motion to strike, but the problem is the cat is out of the
3 bag, and it's not easy to unring that bell. So I'm kind of
4 curious why Mr. Ereiser can't be here before Mr. Menard's
5 testimony. I don't see how that harms your case.

6 MR. HAGAN: It's my understanding that Mr. Ereiser
7 is getting his passport on the 21st and is flying from
8 Canada here on the 21st.

9 THE COURT: Because you asked for it late in the
10 game.

11 MR. HAGAN: Just so the record is clear, I've
12 always requested Mr. Ereiser to be here. It was my client
13 who put additional pressure on him after speaking with the
14 Court.

15 THE COURT: Oh, I didn't mean it personally, put
16 pressure on him. He suddenly saw the light.

17 MR. STONE: The green.

18 MR. HAGAN: With respect to Exhibits 390 and 6 --

19 THE COURT: Frankly, I'm going to take that offer
20 of proof. You are going to be able to play Menard's tape
21 subject to the motion to strike. The harm is not that
22 great, and I can cure it with quite a pointed instruction if
23 Mr. Ereiser does not come, and, in fact, the curative
24 instruction might be worse than -- well, let me just leave
25 it there. It's easy to cure.

1 MR. HAGAN: With respect to Exhibits 390 and
2 610-A, we understood the Court's ruling on Motion in Limine
3 Number 3 to exclude any pre-litigation exchanges of -- of
4 letters, communications, obviously because the parties at
5 that point have a vested interest in spinning their side of
6 the story.

7 The two documents at issue, and specifically,
8 Exhibit 390, is a DirecTV memorandum. It is not a
9 communication that goes to NDS, and it is a memorandum that
10 details what they characterize as flawed strategies engaged
11 in by the defendants. Those strategies include hiring
12 hackers, giving them access to sensitive information and
13 hoping that they pirate NDS's competitors' technology and
14 not their own. That is precisely one of the arguments that
15 we have made in opening statement and intend to pound on in
16 closing arguments, that the defendants either knew this was
17 going on or turned a blind eye. It's not that --

18 THE COURT: I'll come back to both of those this
19 evening. I'll put out something written for you.

20 MR. HAGAN: And I think that is all of the issues
21 that we have. Let me check with counsel.

22 That's everything that we have for this evening,
23 your Honor.

24 THE COURT: Just a moment.

25 Mr. Saggiori has a key.

1 THE WITNESS: I copied the two files, the .plx
2 file and the result that we had before of the descrambling
3 of the file, the 8 kilobyte file I've shown you, on the
4 stick for them.

5 THE COURT: The key is now being handed to the
6 defense.

7 THE WITNESS: So they have -- they have the
8 original file, and they have the reserved descrambled file.

9 THE COURT: That should resolve it.

10 MR. SNYDER: Your Honor, two issues related to
11 Mr. Menard very quickly.

12 First, the Court indicated it was going to
13 determine whether or not it was going to give an adverse
14 inference instruction to the jury at the playing of
15 Mr. Menard's tape, and I don't know if the Court has made --
16 yet made that decision or not. We certainly would be
17 interested when the Court is ready to deliver it.

18 THE COURT: I am not inclined to do so with
19 Menard.

20 MR. SNYDER: Okay.

21 THE COURT: I think he's outside both of your
22 control, and I think his testimony is subject to argument by
23 all of the parties.

24 MR. SNYDER: One, regarding the -- one last point
25 regarding the exhibits, the e-mails between Mr. Menard and

1 Mr. Dawson. Because Mr. Menard's testimony is taped, one
2 possibility would be to segregate his testimony about those
3 e-mails from the remainder of the portions being played and
4 to play that portion after the -- if the Court finds that an
5 adequate foundation has been laid.

6 THE COURT: I'm fairly confident. A
7 representation's been made to me. I can easily cure that,
8 and I don't think I'm going to chop that up. I've taken
9 each of your representation about different people appearing
10 at different times, and I'm -- I'm satisfied that
11 Mr. Ereiser is going to be here. You can play the tape.

12 MR. SNYDER: That was all, your Honor. Thank you.

13 THE COURT: Jane --

14 MR. EBERHART: Your Honor, briefly on the DirectTV
15 Motion in Limine 3, I would just direct the Court to
16 pages 202 and 203 of Mr. Kahn's deposition where he
17 specifically testifies about Exhibit 390 being
18 pre-litigation talking points.

19 THE COURT: Thank you very much.

20 (Recess.)

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2 CERTIFICATE

3
4 I hereby certify that pursuant to Section 753,
5 Title 28, United States Code, the foregoing is a true and
6 correct transcript of the stenographically reported
7 proceedings held in the above-entitled matter and that the
8 transcript page format is in conformance with the
9 regulations of the Judicial Conference of the United States.

10
11 Date: April 15, 2008

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14 _____
15 JANE C.S. RULE, U.S. COURT REPORTER

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A	<p>address 47:3,8 adequate 73:5 adequately 63:25 admissibility 69:24 admissible 6:18 46:2 admission 8:24 admissions 66:1 admonition 33:22 adverse 72:13 advertise 26:3 advertising 24:21 advice 36:14 affect 10:3 41:24 afraid 25:16 afternoon 61:14 ago 5:3 6:7,23 agreed 58:1 agreement 60:5 Ah 38:10,12 al 1:6,9 2:3,11 44:13 46:9 allegations 62:19 62:19,21,22,23 62:24 alleged 5:8 allegedly 65:14 allow 46:6 56:4 69:7 allowed 66:2 69:4 alluded 37:19 altered 58:15,23 Amazingly 61:6 America 65:1 Ana 1:17,23 4:1 analysis 5:14 33:22 58:8 analyze 55:12 angel 48:14 answer 17:24 26:20 29:19 anticipate 69:22 anyway 57:3 apart 69:13 apparently 32:21 33:7 37:17 68:11 appear 4:25 APPEARANCES</p>	<p>2:1 appearing 73:9 appropriate 58:6 61:19 62:17 68:21 approximately 6:7,8 17:18 28:23 42:14,21 43:23 April 1:18 4:1 74:11 archive 31:23 areas 67:9 argue 22:23 argument 22:21 24:2,3,5 36:4,6 65:22 69:10 72:22 arguments 71:14 71:16 arranged 69:25 articulated 59:1 65:4,15 aside 40:5 asked 29:1 41:13 42:15 52:20 70:9 asking 6:2,13 8:11 35:13,13 44:22 55:9 56:19,21 57:20 assert 62:7 assertion 62:6,8 asserts 62:7 assigned 11:20 associated 65:5 ASSOCIATES 2:4 assume 4:9 23:12 assumes 13:9 40:2 assumption 12:24 13:3 19:5 20:5 21:7,10 28:18 40:11,19 astronomically 42:3 attempted 66:12 attention 9:4 attorney 2:20 50:12</p>	<p>Attorneys 2:5,7 2:12,14,19 attributed 42:20 August 6:8,9 7:15 7:19 15:2,5 authentic 58:15 58:23 authenticate 69:1 authenticity 47:13 55:13 65:17,25 66:2 69:12 authorized 19:24 20:1 availability 57:6 60:12 66:5 available 8:9,17 8:20 9:7 25:19 44:5 average 11:13,20 11:23 12:7,11 12:11,15,23 13:9 42:18,20 42:24 43:6 awarded 44:20 aware 66:11 68:11</p>	<p>31:9 32:3 43:20 68:13 Battery 2:15,21 beginning 13:16 believe 4:22 6:23 7:11,21 20:12 21:12,13 22:10 28:14,15,19,21 31:22 32:15 38:20 41:17 44:7 55:5 57:16 57:21 60:2,15 61:19 65:23 66:17 67:2,12 67:14 69:6 believes 58:8 bell 70:3 beloved 22:13,14 23:5 benefit 9:3 best 12:19 13:8 23:10 39:19 45:14 47:8 beyond 56:4 bit 7:21 black 27:15,19 28:3 blind 71:17 blue 16:12 18:16 board 45:8 bottom 18:6 bound 56:23 box 39:22 48:6 boxes 46:21 breaks 37:22 brief 69:7 briefing 69:6 briefly 73:14 briefs 65:21 bring 49:14 56:2 bringing 69:14 brings 38:10 40:19 broad 62:9 broke 10:21,21 brought 34:1,4 41:9 58:18 bucks 28:1 buffer 38:3 bulk 8:9</p>
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