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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

HONORABLE DAVID O. CARTER, JUDGE PRESIDING

- - - - -

ECHOSTAR SATELLITE CORP.,)	
et al.,)	
Plaintiffs,)	
vs.)	No. SACV-03-950-DOC
)	DAY 5, Vol. V
NDS GROUP PLC, et al.,)	
Defendants.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Santa Ana, California
April 16, 2008

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

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(None)				
PLAINTIFFS' EXHIBITS:		MARKED		RECEIVED
(None)				
DEFENSE WITNESSES:	DIRECT	CROSS	REDIRECT	REXCROSS
(None)				
DEFENSE EXHIBITS:		MARKED		RECEIVED

(None)

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1 SANTA ANA, CALIFORNIA; WEDNESDAY, APRIL 16, 2008; 5:00 P.M.

2 (Jury not present.)

3 THE COURT: Mr. Saggiori, the same oath that we
4 administered this morning still applies to your testimony
5 this evening. Do you understand that, sir?

6 THE WITNESS: Yes.

7 JAN SAGGIORI, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

8 THE COURT: After this gentleman's testimony, we
9 will get to the issue you have with 816.

10 Mr. Saggiori has retaken the stand. All counsel
11 are present. The jury is not present.

12 I appreciate the quickness with which you like to
13 answer questions. I suggest that you take a deep breath,
14 and you answer my questions in non-paragraph form.

15 THE WITNESS: I will try to be short.

16 THE COURT: You will.

17 I am going to retrace to you some of your
18 testimony and summarize concerning your testimony about a
19 gentleman named Oliver Kommerling.

20 You told me this morning when Exhibit 2005 -- can
21 I see 2005 for just a moment? I just gave that back.

22 would you turn to page 3439, please.

23
24 like. Thank you very much. If you would blow up the
25 portion under "Matrix Configuration." Unrelated to the real

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5

1 reason you are here this evening, I didn't understand your
2 answer to why that had been blacked out and who had blacked
3 that out.

4 THE WITNESS: I don't know who blacked it out.
5 The precision I wanted to give today about this document is
6 that Oliver told me that this document was coming from NDS
7 and that one part was black like that.

8 THE COURT: How did you receive this document?

9 THE WITNESS: Chris Tarnovsky gave me it. I don't
10 remember how I got it, if I download from his server, his
11 PC, he left on during the night, or he just sent me by
12 e-mail, but he passed me it after I discussed about that at
13 the end of '99.

14 THE COURT: So you don't know if you printed this
15 document out from an e-mail?

16 THE WITNESS: I don't know.

17 THE COURT: Or if this came to you in the mail?

18 THE WITNESS: I don't know how it came to me.

19 THE COURT: Did it come to you in a personal
20 meeting?

21 THE WITNESS: No. It was --

22 THE COURT: So we can rule out a personal meeting.

23 THE WITNESS: It was not a personal meeting.

24 THE COURT: Thank you.

25 THE WITNESS: It was electronically.

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1 THE COURT: You didn't hear another question did

2 you?

3 THE WITNESS: No.

4 THE COURT: We have taken most of the day, and I
5 have enjoyed your testimony, but now it's time for you to
6 listen, and I want you to think about your answers.

7 THE WITNESS: Okay.

8 THE COURT: I want you to tell me as best you can
9 recall what the conversation was about Exhibit 2005, which
10 is in front of you, and what Mr. Kommerling said about this
11 document.

12 THE WITNESS: He told me that this document was
13 coming from NDS, and he advised me about the part that was
14 black like that inside of the document.

15 THE COURT: Could I see, please, the rest of
16 Exhibit 2005, the entire exhibit?

17 what significance did you attach to this when it
18 was given to you by Mr. Tarnovsky allegedly?

19 THE WITNESS: This was to understand better the ST
20 code.

21 THE COURT: The Thompson chip code?

22 THE WITNESS: Yes.

23 THE COURT: I don't see at the top, for instance,
24 a fax number. I don't know if this is the face page. You
25 have told me it did not come to you in person, so that only

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1 leaves a few other possibilities, and one is an e-mail
2 attachment or something that you printed.

3 THE WITNESS: We were using e-mails to exchange
4 information.

5 THE COURT: I am going to narrow that down. I
6 don't see a fax number.

7 THE WITNESS: We were using FTP, file transfer
8 protocol. It was activating the machine. I was downloading
9 the file.

10 THE COURT: I understand.

11 You told me you didn't receive this in person; is
12 that correct?

13 THE WITNESS: Exactly.

14 THE COURT: You didn't have a meeting with him and
15 obtain this in 2005?

16 THE WITNESS: Exactly.

17 THE COURT: It wasn't faxed to you because I don't
18 see a fax header.

19 THE WITNESS: It wasn't faxed.

20 THE COURT: That seems to leave only one
21 possibility, a transfer somehow by Internet, by e-mail.

22 THE WITNESS: Yes, by Internet.

23 THE COURT: Where is the accompanying e-mail that
24 would go with what I am assuming is this attachment?

25 THE WITNESS: I tried to search that, and that's

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8

1 what remembered me, that were exchanging files through
2 computers, FTP, so it's a download transfer through the
3 Internet.

4 THE COURT: So what that means is that the traffic
5 had to be either so prolific or so familiar that this could
6 simply arrive at your e-mail and you knew who it was from.
7 In other words, if somebody just started sending me a data
8 sheet this evening at home and somebody else sent me
9 something else, I might be a little concerned.

10 THE WITNESS: I can explain. I ask him for this
11 data sheet when I met him in November '99. As soon as he
12 returned back home, he told me, okay, you can get it, and I
13 don't remember if he sent it to me by e-mail or if I
14 downloaded it from his computer via FTP.

15 THE COURT: Now, we know that in November '99 you
16 asked him for 2005.

17 THE WITNESS: Yes.

18 THE COURT: How did you ask him?

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THE WITNESS: Like when we were together.

19

THE COURT: Where?

20

THE WITNESS: In Geneva when we discussed about
the actual situation of the piracy in Europe.

21

22

THE COURT: How long after Geneva did this
document arrive?

23

24

THE WITNESS: A few days after he returned to the

25

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1 U.S.A.

2 THE COURT: Since I didn't receive this, only a
3 small amount of wisdom tells me that normally I would have
4 something accompanying this document. "Hi. I am sending
5 you the information you'd asked for in Geneva." Where is
6 that document?

7 THE WITNESS: I have no idea. I tried to search,
8 and I don't recall the way I received it. That's why I gave
9 you these different options.

10 THE COURT: We know when you say you don't recall
11 how you received it that it wasn't in person.

12 THE WITNESS: Um-hum.

13 THE COURT: That it wasn't by fax.

14 THE WITNESS: Um-hum.

15 THE COURT: It had to be by e-mail.

16 THE WITNESS: Electronically.

17 THE COURT: And I have a hard time understanding
18 or believing that this just arrived. Usually there would be
19 something that says, "Hi. I enjoyed seeing you in Geneva.
20 Here is the information you asked for."

21 THE WITNESS: He gave me the user name and
22 password to enter into his computer that was in his home --
23 or in his office, and that was the way I was downloading
24 things. As I didn't find the e-mail attached to that -- I
25 have only the file -- I cannot be precise on the way I got

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1 it.

2 THE COURT: I know the way you got it. I just
3 know that you don't have the accompanying document that goes
4 with it. You don't have what I call the lead-in e-mail.
5 That's my supposition. I am just telling you that.

6 THE WITNESS: I didn't find it.

7 THE COURT: which means you either haven't
8 searched hard enough, or you're hiding it, or you just don't
9 remember.

10 THE WITNESS: I searched for it. I didn't find
11 it. If I could find it, I would really bring it to you
12 immediately as I gave everything else.

13 THE COURT: I'm sure you would, and I appreciate
14 your efforts.

15 There has been an objection to what NDS purports
16 to be hearsay, and the Court hasn't decided yet whether to
17 strike the following. You testified in summary fashion that
18 Oliver Kommerling told you that he had trained persons at
19 the Haifa Israel laboratory -- I want to make sure my notes
20 are correct because I am writing and listening at the same
21 time -- and that there was a hack of Canal+.

22 THE WITNESS: That was the software.

23 THE COURT: By whom? who has Canal+?

24 THE WITNESS: They told me that they dumped the
25 Canal+ card. They told me that the engineers --

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1 THE COURT: who?

2 THE WITNESS: They extracted the code from the
3 card.

4 THE COURT: They extracted the code from the
5 Thompson --

6 THE WITNESS: Canal+ card.

7 THE COURT: who is they?

8 THE WITNESS: He didn't precisely tell me the
9 person. He told me that they extracted the code and that
10 the dates that the codes were extracted was the same as the
11 file that was in Canada.

12 THE COURT: So he didn't name Mr. Tarnovsky?

13 THE WITNESS: No.

14 THE COURT: He didn't name Mr. Ereiser?

15 THE WITNESS: I had no names.

16 THE COURT: No names, just they?

17 THE WITNESS: Yeah.

18 THE COURT: But it's obvious to you that Mr.
19 Kommerling must have had knowledge about who they were.

20 THE WITNESS: I'm pretty sure.

21 THE COURT: And he said -- you told me he said
22 that it was posted on the Internet, the Canal+ code?

23 THE WITNESS: The code that was posted in Canada
24 was the same as the one in Haifa.

25 THE COURT: But I am interested in what Mr.

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1 Kommerling said to you.

2 THE WITNESS: Yes.

3 THE COURT: what did he say to you about posting
4 on this code?

5 THE WITNESS: He told me that the post that was in
6 Canada -- the files were the same name, same destination, as
7 the files extracted in Haifa.

8 THE COURT: Did he tell you who posted the code in
9 Canada?

10 THE WITNESS: We were assuming that it was dr7
11 because that was the dr7 posting we were talking about.

12 THE COURT: Did he say it was dr7?

13 THE WITNESS: We were talking about the binary
14 code in Canada posted on the dr7 website.

15 THE COURT: You told me this morning that Mr.
16 Kommerling told you that this hacked code, the Canal+ code,
17 was passed from the Haifa or Israel laboratory to John
18 Norris; is that correct? Is that what you were told?

19 THE WITNESS: Yes.

20 THE COURT: And then Mr. Norris told you to pass
21 it to Mr. Tarnovsky?

22 THE WITNESS: Yes.

23 THE COURT: Now, later on in cross-examination by
24 Mr. Snyder, do you recall a series of questions where Mr.
25 Snyder starting asking if Mr. Tarnovsky has asked you for

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1 the phone number of Vesco, which is one of the two Bulgarian
2 gentlemen?

3 THE WITNESS: Yes.

4 THE COURT: For reverse engineering the Smart Card
5 of DirecTV?

6 THE WITNESS: Yes.

7 THE COURT: Accurate so far?

8 THE WITNESS: Yes, perfect.

9 THE COURT: Right after that, there was testimony
10 and we started to get into some dates, but we never
11 concluded the question that I was interested in. So we are
12 going to go through slowly, and if I am incorrect about
13 these dates, regardless of what you said before -- DirecTV
14 and NDS sued you in approximately February of 2000?

15 THE WITNESS: I don't recall the exact date, but
16 it was in the year 2000, the beginning of the year 2000.

17 THE COURT: Did both DirecTV and NDS sue you, or
18 are my notes incorrect?

19 THE WITNESS: I think, yes, the document I
20 received was with both names.

21 THE COURT: I am not going to quibble about the
22 contents of the document. I am just after some dates right
23 now. In May 2000 or approximately in that time frame, there

24 was an injunction handed down against you, and I think you
25 were shown the very first page, the very bottom portion, and

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1 then I think you were shown paragraph five on the second
2 page. You seem to recall that injunction.

3 THE WITNESS: Yes, I recall the injunction.

4 THE COURT: I am not interested in the back and
5 forth between counsel. I just want some dates from you.

6 Then you told me that in approximately 2001 to
7 2004 that you had a contract with Canal+.

8 THE WITNESS: I started at the beginning with a
9 Canal+ contract and then moved to Seagate II. It was the
10 same.

11 THE COURT: I don't care. Are the time frames
12 correct, 2001 to 2004 that you eventually had a contract
13 with Canal+?

14 THE WITNESS: It started 3rd of January 2001.

15 THE COURT: How long did it last?

16 THE WITNESS: They changed it. The company had to
17 end the contract, but I was still doing the same job up to
18 October 2004.

19 THE COURT: I know you got about 6,000 euros a
20 month, which was roughly 7,000 American dollars at that time
21 after inflation hit or at least the marking down of the
22 dollar.

23 You testified that they were paying you for
24 litigation -- well, explain to me the relationship, if any,
25 in 2001 when you initially went to work for Canal+ and any

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1 relationship with NDS. Were they related in your mind in
2 any way, or were they simply -- was NDS supplying any

3 security for Canal+ in 2001?

4 THE WITNESS: I don't think so.

5 THE COURT: What do you understand eventually
6 happened to Canal+? Are they still existing today?

7 THE WITNESS: Yes, they are still existing today.
8 They are using still old technology that was developed by
9 the division that I was working for at Canal+.

10 THE COURT: Did you work with Canal+ until 2004?

11 THE WITNESS: Up to the 15th of October 2004.

12 THE COURT: Then you stated on August 2004 that
13 you went to work for NagraStar.

14 THE WITNESS: I had a consultant agreement, like
15 Canal+ was a consultant agreement.

16 THE COURT: By this time we know that NagraStar
17 and EchoStar were suing NDS.

18 THE WITNESS: Yes.

19 THE COURT: And then we went through a series of
20 questions about NagraStar was paying you about \$3,500 a
21 month, but you had gotten a \$200 raise to \$3,700 a month.

22 The unanswered question that I have was at any
23 time have you ever been a consultant, worked with, or
24 received any money -- I want to make this the broadest
25 possible question -- from NDS, who is the defendant, and any

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1 of the NDS entities in this case?

2 THE WITNESS: No.

3 THE COURT: Never have?

4 THE WITNESS: No, not to my knowledge.

5 THE COURT: That doesn't mean anything to me.

6 THE WITNESS: Sorry. No, I have never had any
7 contract with NDS.

8 THE COURT: So the answer is no?

9 THE WITNESS: No.

10 THE COURT: Have you had any personal contact by

11 e-mail or any type of conversation at any time in any form
12 with John Norris?

13 THE WITNESS: Never.

14 THE COURT: Have you been cc'd on any e-mails?

15 THE WITNESS: No, I don't -- no.

16 THE COURT: Tell me more about Mr. Kommerling. Is
17 he a retired satellite pirate?

18 THE WITNESS: To my knowledge, he started to work
19 in the beginning of 2000 for Canal+ and is still working for
20 the division Seagate II in the South of France.

21 THE COURT: For Canal+?

22 THE WITNESS: For Canal+ to my knowledge.

23 THE COURT: Is he associated with Al Menard? Does
24 he know Al Menard?

25 THE WITNESS: I have absolutely no idea. I don't

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17

1 know.

2 THE COURT: But we know from the conversation that
3 you told me about that he must have some association with
4 dr7 in Canada because you told me that he had said that
5 there was a posting in Canada, and you understood that you
6 both were talking about dr7 and that they, which encompassed
7 Mr. Kommerling, had somehow obtained the Canal+ code.

8 THE WITNESS: He was aware of the posting in
9 Canada like I was aware.

10 THE COURT: Remember I asked you about five
11 minutes ago. I was very careful to ask you about what they
12 meant. You excluded yourself. You didn't know. I asked
13 you if there was a name. I asked you to help me with what
14 they meant, and I think we reached an agreement that they
15 seemed to encompass Mr. Kommerling. Now that's changed a
16 little bit. It's like he is aware.

17 THE WITNESS: Can I have a translator because --

18 THE COURT: It's too complicated. I understand.
19 That's my fault. Let me say it again.

20 Do you have any knowledge of Mr. Kommerling ever
21 being involved in satellite piracy?

22 THE WITNESS: I was aware that he was involved in
23 piracy in the '90s.

24 THE COURT: Tell me more about your awareness of
25 his piracy.

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1 THE WITNESS: That he had familiarity with NDS
2 because he was doing piracy on NDS in the middle of the '90s
3 and that he settled with NDS a case that they had with him.

4 THE COURT: Now I couldn't understand, so I may
5 need the interpreter's help in just a moment. We are going
6 to go over that again.

7 In the middle of 1990 he had some relationship
8 with NDS?

9 THE WITNESS: He started some relationship with
10 NDS.

11 THE COURT: What do you understand that
12 relationship to have been in the 1990s?

13 THE WITNESS: Security for developing their chips.

14 THE COURT: What chips?

15 THE WITNESS: The chips on the Smart Cards.

16 THE COURT: What's the name of it?

17 THE WITNESS: He told me that he was working on
18 the first digital vision of Sky.

19 THE COURT: On which Smart Card?

20 THE WITNESS: On the first generation digital for
21 Sky England.

22 THE COURT: For Sky England.

23 THE WITNESS: Yes.

24 THE COURT: And you believe that he was working
25 with NDS in either a consulting or salaried capacity?

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1 THE WITNESS: We discussed about his company, DSR,
2 that he was working, so that company was selling the service
3 to NDS.

4 THE COURT: Can you help me a little bit more
5 about what period of time?

6 THE WITNESS: It's my belief from '96 up to 2000.

7 THE COURT: Now, you pirated the Sky adult
8 channel. Was NDS the encryption company for Sky?

9 THE WITNESS: Yes.

10 THE COURT: And you believe that Kommerling was
11 pirating the satellite encryption from Sky?

12 THE WITNESS: He was on the CO9 version.

13 THE COURT: NDS, who is a customer in your belief
14 anyway -- NDS who was servicing Sky is pirating Sky's
15 encryption through Mr. Kommerling?

16 THE WITNESS: I mean, I remember that Mr.
17 Kommerling sent me something like 20 cards. That was Sky 11
18 I think.

19 THE COURT: Now, just because Kommerling works for
20 NDS, why would Kommerling want to pirate a client of NDS, a
21 well-paying client like Sky that they're protecting? Is
22 this an individual effort by Mr. Kommerling to make money
23 for himself and others, or why should I or the jury believe
24 that there is an association with NDS when NDS is paying Mr.
25 Kommerling?

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1 THE WITNESS: You ask me a very difficult
2 question.

3 THE COURT: Sometimes you can work for somebody
4 and then want to have a private business on the side. I am
5 interested if there were any conversations about that. In
6 other words, in summary, if you are correct, I am trying to

7 find out why NDS as a company would be put together with Mr.
8 Kommerling when I don't understand the motivation for NDS to
9 pirate Sky because they are the client.

10 Now, there is allegation here that NDS had pirated
11 DirectTV, but the jury and I may not know if this is a
12 private effort by allegedly Tarnovsky on the one hand or
13 Kommerling on the other or whether this is tied into NDS
14 pirating their own clients. Do you understand all that?

15 THE WITNESS: Yes.

16 THE COURT: I am looking for conversation you
17 might have had, something Kommerling might have said to you
18 that might help me.

19 THE WITNESS: I can only guess myself.

20 THE COURT: This would be your opinion?

21 THE WITNESS: Yes.

22 THE COURT: Nothing that Kommerling said to you?

23 THE WITNESS: Absolutely.

24 THE COURT: Does Kommerling know Tarnovsky?

25 THE WITNESS: Yes.

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21

1 THE COURT: How?

2 THE WITNESS: They were like the two fighters in
3 the same group, the two competitors in the same group. One
4 was U.S.A. and one was Europe, and they were just fighting
5 each other.

6 THE COURT: To see who was the best?

7 THE WITNESS: Yes, like an ego game.

8 THE COURT: How about you? Are you as good as
9 they are?

10 THE WITNESS: I don't think so.

11 THE COURT: That's not good for business.

12 THE WITNESS: I have a study past of finance and
13 economics and the computer, so my job is more to allow
14 management to understand the fears of technology.

15 THE COURT: Do you know in 2004 of your own

16 personal knowledge from conversations you might have had
17 with Kommerling or whomever why he left Canal+, or is he
18 still employed by Canal+?

19 THE WITNESS: I think so.

20 THE COURT: To this day?

21 THE WITNESS: I think so today still. I mean, up
22 to one year ago I believe --

23 THE COURT: Well, let me turn to NDS for just a
24 moment.

25 Mr. Snyder, does NDS have any -- there would be so

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1 many buyouts, 40 percent shareholders, et cetera. Does NDS
2 have any -- stake is a big word -- but stake in Canal+
3 through News Corp? I don't care how tangential that is.

4 MR. SNYDER: The answer to your question is no. I
5 don't want it to be misleading, so may I explain something?

6 THE COURT: Yes.

7 MR. SNYDER: Canal+ is a media conglomerate in
8 many ways like News Corp. It had a company call Canal+
9 Technologies that was responsible for its encryption
10 business.

11 As you saw in Mr. Shkedy's diagram, there are
12 different parts to encryption. There is the base station
13 that does the encryption that gets beamed up to the
14 satellite, and then it comes down to the set-top-box, and
15 there is a card, and it gets decoded --

16 THE COURT: Let me make my question simpler. I'm
17 not going to let the corporation segment out.

18 My question is for any of the Canal+ entities -- I
19 don't care if it's a holding company, a limited liability,
20 an LTD. I don't care how you define. I am going to use
21 Canal+ in it's broadest sense. Does NDS or any of its
22 entities or holding companies have any interest in Canal+?

23 MR. SNYDER: No.

24 THE COURT: Do you disagree with that, and, if so,
25 be specific? Does at the present time NDS have any stake --

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23

1 and I am not going to get let this segmented out by closely
2 corporations, holding companies, et cetera -- and then show
3 me specifically if they do what that stake is?

4 MR. HAGAN: My understanding is this. In 2004,
5 Canal+ Technologies which was 100 percent owned by Canal+
6 was broken up. Half of that was sold either to NDS or News
7 Corp. or some affiliate. The other half was sold to Nagra
8 France. That was the conditional access portion of it. So
9 I don't know technically the answer to your question.

10 THE COURT: It got split between the plaintiff and
11 the defendant?

12 MR. HAGAN: Yes. The assets got -- the company
13 was dissolved --

14 THE COURT: This is a small area of competition.

15 MR. HAGAN: The company was dissolved, but the
16 assets of the company were split, 50 percent purchased by
17 those guys and 50 percent by us under your definition of
18 control. Our 50 percent was through Nagra France, which is
19 owned by Kudelski.

20 THE COURT: Okay, this is what I am going to do.
21 I am going to wait concerning your motion to strike what may
22 be hearsay testimony. I am going to let the case develop
23 further so I have a better understanding of Menard,
24 Tarnovsky, et cetera, because it's starting to wind
25 together. You can renew that motion at the end of the

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24

1 plaintiffs' case or prior to that if it's an appropriate
2 time, but what I don't want to do is unwind that ruling if I

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3 am wrong right now.

4 I am not certain I am wrong on that. I am going
5 to do some research. I am going to see if this ties
6 together under RICO, but I am waiting to see if Kommerling
7 is going to appear. Kommerling solves the entire problem
8 for me. It solves the Circuit's problem for me.

9 How are we going to get Mr. Kommerling here?

10 MR. HAGAN: Mr. Kommerling was formerly employed
11 by NDS. You heard Zvi Shkedy testify that he taught Shkedy
12 and Mordinson and the Haifa team how to reverse engineer and
13 hack Smart Cards.

14 THE COURT: What years?

15 MR. HAGAN: This was I believe in 1996 or '97.

16 THE COURT: After that period of time, what's his
17 association with NDS?

18 MR. HAGAN: At some point in time, Kommerling and
19 NDS formed a company called ADSR.

20 THE COURT: When?

21 MR. HAGAN: I think that was later in '97 or '98.

22 THE COURT: What does that company do?

23 MR. HAGAN: It provided some type of consultancy
24 work on security matters related to conditional access.

25 THE COURT: How long did that relationship last?

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1 MR. HAGAN: I believe that it was dissolved when
2 Canal+ filed the lawsuit against NDS and Mr. Kommerling
3 testified in a declaration on behalf of Canal+.

4 THE COURT: You say Kommerling testified on behalf
5 of?

6 MR. HAGAN: Canal+.

7 THE COURT: So it was in this period of time when
8 ADSR and NDS formed that the training of Mordinson and
9 Shkedy are taking place?

10 MR. HAGAN: I don't know if the training of the
11 Haifa team -- I believe it was before and then ADSR was

12 formed -- or if it happened contemporaneously.

13 THE COURT: Is there any further known
14 relationship between Kommerling and NDS?

15 MR. HAGAN: Not that I have any personal knowledge
16 of. I have been informed that as late as last month NDS or
17 someone acting on their behalf made some type of offer to
18 Mr. Kommerling to assist them with their next generation
19 Smart Card.

20 THE COURT: Have you or are you going to make an
21 effort to get Mr. Kommerling to come to court?

22 MR. HAGAN: We have made several efforts in the
23 past, and we will make an additional effort based on the
24 Court's comments from today. I can tell you that all of my
25 clients would like for Mr. Kommerling to testify live and

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1 have approached him on several occasions, and he has
2 declined.

3 THE COURT: He's gaining his livelihood at the
4 present time from amongst other companies other than
5 EchoStar's group and NDS's group, and that's through Canal+,
6 so he may not have the same motivation.

7 MR. HAGAN: As I understand it, Your Honor, he is
8 working for a company called Titus, who does consulting work
9 for a company called CK2, which is 100 percent owned by the
10 surviving entity Canal+, which neither side as I understand
11 it have any control or ownership interest in. That is a
12 separate Canal company than Canal+ Technologies, which was
13 purchased -- the assets anyway -- in 2004, half by them and
14 half by us.

15 THE COURT: Assume for a moment that you prevail
16 in this lawsuit for "X" hundred million dollars, and assume
17 for a moment that this Court found that under the civil
18 RICO -- the conspiratorial law that comes out of civil RICO
19 that there was a nexus at the end of the evidence -- this

20 would be one of those areas if I were sitting on the Circuit
21 that I would look very close at because this isn't your
22 normal hearsay objection. This is a specific conversation
23 that states basically that the Haifa lab passed this to Mr.
24 Norris. Now, I expect Mr. Norris to say tomorrow he didn't
25 get this.

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1 I don't know what I am going to do right now. I
2 am not going to unring the bell. I am not sure where this
3 winds out. I am going to let NDS renew their objection. I
4 think we will do that at a later time. Right now the best
5 course of action for me is not to go back and forth on this
6 decision but to wait.

7 Now, your objections are continuing, and we will
8 closely examine the relationship as we go through, and I
9 will start making little lines and little linkages and see
10 where this potentially ends up. We will go back and do some
11 research on your RICO provision and conspiracy.

12 The question that I asked was also designed to
13 find out from Mr. Saggiori if there was any potentiality of
14 this fitting under what I call the Penal Code Section, for
15 want of a better word, a person who makes a statement about
16 an involvement in a crime that places them in jeopardy, and
17 I am really equivocal about what I am hearing. That word
18 "they" is why I focused on they at the very beginning of
19 this hearing and what his understanding of that was.

20 We are going to have Mr. Saggiori back, though.
21 We are not done with this issue. I think this is a very
22 important issue for appellate purposes if the case is
23 decided unfavorably against NDS, and if I was representing
24 NDS, this would be the first thing I would take to the
25 Circuit, so this is a close call.

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1 Now, I could also unwind that at the present time,
2 Mr. Snyder, but my wisdom says not to do that, because if I
3 rewind it, it has a real potential devastating effect. In
4 other words, it heightens it. So if I have made a mistake
5 here, I will know much better towards the end of the
6 plaintiffs' case and make the decision, but if you want me
7 to make a decision now, I am happy to listen to your
8 argument now, and if pressed, I am quite capable of making
9 the decision now. Perhaps you are right, and perhaps I
10 unwind it at this point, but I don't think so. I think the
11 better part of wisdom says I have got time to look at this
12 and let the evidence develop, but I would like to hear from
13 you.

14 MR. KLEIN: There is a related issue. We have
15 testimony from Mr. Norris, and Mr. Tarnovsky will be
16 following soon thereafter. As I understand it, the Court
17 has made a tentative ruling to deny our motion in-limine
18 with respect to the general subject of Canal+ and DirectTV.

19 THE COURT: We are retracing this. I want to stay
20 with the issue.

21 Mr. Snyder.

22 MR. SNYDER: Your Honor, I am comfortable with the
23 Court's inclination to reserve a ruling on this until later
24 in the case with the understanding that we have a continuing
25 objection. I think it would be prejudicial for me to pop up

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1 and object every time Canal+ is mentioned.

2 THE COURT: Let me hear from Norris. I am
3 assuming what Norris is going to say, and I haven't heard
4 what Norris is going to say. I am assuming what Tarnovsky
5 is going to say. I need to get through minimally those two
6 persons and actually have a record of what they are saying
7 and then see how that cross-examination goes.

8 If I am wrong on that, I will back away from
9 ruling and instruct the jury, but I want to let that
10 develop. Let's leave it at that for this evening.

11 Mr. Saggiori, thank you very much, sir. It's been
12 a pleasure. You may step down. If you see Mr. Kommerling
13 or talk to him, tell him I would like to see him here in
14 court.

15 THE WITNESS: I will pass him the message.

16 MR. HAGAN: May I make one point that I think may
17 help the Court in doing the research and looking at this
18 issue a little bit further outside the presence of all
19 counsel? I understand the concern to be what if you don't
20 address this now and it does go up to the Circuit? I think
21 that can be resolved very easily.

22 MR. KLEIN: Before Mr. Saggiori leaves, may I make
23 a request? We have our expert, Mr. Richfield, here present.
24 His only request is that he would like to observe Mr.
25 Saggiori decrypt his message in the same way he demonstrated

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1 it for the parties Monday night.

2 THE COURT: Sure.

3 MR. HAGAN: As I understand the issue, Mr.
4 Saggiori testified about a conversation that he had with an
5 individual that used to work for NDS Haifa named Oliver
6 Kommerling. According to Mr. Saggiori's testimony, Oliver
7 Kommerling told him several things: No. 1, that Mr.
8 Kommerling was retained by the defendants to train the NDS
9 engineers, including David Mordinson and Zvi Shkedy.

10 THE COURT: And you have corroborating testimony
11 from Shkedy and Mordinson that that occurred.

12 MR. HAGAN: That's correct.

13 THE COURT: I understand that.

14 MR. HAGAN: No. 2, that the NDS engineers using
15 the techniques taught to them by Oliver Kommerling reverse

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16 engineered the Canal+ card and extracted the code from that
17 card. When those codes were extracted, there is a date and
18 time stamp on that file that was created in Haifa.
19 Ultimately, that file was posted on Al Menard's website, the
20 dr7 website.

21 THE COURT: In '99?

22 MR. HAGAN: That's correct. After the publication
23 of that file, Mr. Saggiori called Chris Tarnovsky and said,
24 "Chris, there is a portion of the code that is missing."

25 THE COURT: So what you are saying is it's close

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1 in time -- the relationship with NDS if you are correct is
2 closer in time to '99, which is really the relevant date?
3 It's not looking backwards in 2007?

4 MR. HAGAN: That's correct. That's the first
5 point. We have indicia of reliability there, but we don't
6 even have to reach that point nor does the Ninth Circuit if
7 this issue ever gets in front of them because the
8 defendants' own witnesses already called in this trial have
9 testified consistently with what Mr. Kommerling told Mr.
10 Saggiori; and, that is, that they were trained by
11 Kommerling, that he assisted in setting up the Haifa
12 facility, that he taught them the techniques that they used
13 to hack the Canal+ card, to hack the EchoStar card, that the
14 engineers created reports for both of those hacks, and they
15 gave the Canal+ report to Oliver Kommerling. They
16 stipulated to that in open court. They gave at least
17 portions of the EchoStar report or showed those portions to
18 Christopher Tarnovsky. They admit that.

19 Now, there is a dispute as to what date that
20 occurred. Mr. Tarnovsky says both dates in his deposition,
21 and the jury will have to decide which one they will
22 believe. One was in '99. One was in 2001. Obviously the
23 2001 date helps them since the post was in December of 2000.

24 Both of those hack methodologies at least for the

25 EchoStar system was posted on Menard's website. That's not

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1 in dispute. The Canal+ post posted on Menard's website,
2 that's not in dispute. The evidence that that particular
3 code has that we do not is that it has the same date and
4 time stamp as the file extracted by the defendants in their
5 lab in Haifa, Israel.

6 So the only portion of the conversation that Mr.
7 Kommerling had with Mr. Saggiori that we don't at this point
8 in the trial have corroborating evidence of is the statement
9 that Haifa passed that file, the Canal+ file with the time
10 and date stamp, to John Norris who passed it to Chris
11 Tarnovsky before it ultimately got posted on Chris's friend,
12 Al Menard -- Al Menard's website in Canada.

13 So if there is at any point in the trial a
14 situation where the Court feels like that particular part of
15 the discussion wasn't corroborated, which we are certainly
16 not going to concede that -- but the limiting instruction
17 that should go to the jury should only be focused on the
18 part of the discussion between Kommerling and Saggiori that
19 wasn't corroborated by other evidence.

20 That instruction should only be given if the Court
21 finds that an exception or an exclusion to the hearsay rule,
22 such as an admission by a party opponent -- Mr. Kommerling
23 certainly had knowledge of this -- or a part of our civil
24 RICO claim, in other words, statements against
25 co-conspirators or statements against penal interest or some

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1 other exception or exclusion to the rule applies, including
2 807.

3 I know that you are not at the point of ruling on

4 this now, but I would like for the Court to consider that
5 when doing the research and before issuing any type of
6 limiting instruction to the jury.

7 THE COURT: I don't doubt that there is foundation
8 that the two of them know each other and have conversed.
9 That's not the issue. The issue is the content of the
10 statement between the two. Under at least criminal RICO --
11 and I need to see what the cases say involving civil RICO --
12 where you have a network tied together and they are tied
13 together in lose for want of a better word "conspiratorial
14 act," selling narcotics or whatever or in this case
15 potentially piracy, and there is eventually a link to
16 Menard, Kommerling, Tarnovsky, et al., you may have an
17 exception.

18 In addition, you may have an exception if it's
19 against penal interest, which is why I asked what "they"
20 meant, but it's not coming in not for the truth of the
21 matter asserted. It's absolutely coming in for the truth of
22 what was said if it's coming in. I am moving cautiously in
23 that regard because you prevailed on the first blurted out
24 objection today because of Mordinson and Shkedy and what I
25 understand is this developing web.

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1 Now, I could be wrong. By the time NDS is done
2 with cross-examination, it may be shown that Kommerling
3 isn't part of this ring. I always thought and believed that
4 Mordinson and Shkedy -- that he was a pirate. He was a part
5 of this group which included -- I will reserve judgment on
6 that but included -- so initially you got a favorable
7 ruling. I am just being very cautious about that.

8 So I am giving NDS a chance to develop and come
9 back. I don't think I want to unring the bell in caution
10 right now because it just heightens it if I let it back in.
11 It's like curing it two and three times. It resonates, so I

12 will simply wait, and you can renew your objection later on
13 subject to a motion to strike.

14 MR. KLEIN: Your Honor, we specifically moved
15 in-limine before the trial to exclude references to the
16 dispute between NDS and Canal+, and the Court's tentative
17 ruling was that that information would be excluded subject
18 to plaintiffs demonstrating a connection between that
19 posting and Chris Tarnovsky.

20 I believe that we are still at that point. I
21 wanted to remind Your Honor that this was originally part of
22 a larger context, and we maintain our objection to that
23 material because, among other things, we believe it's unduly
24 prejudicial.

25 THE COURT: That's a continuing objection, so you

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1 don't have to tactically get up in front of the jury each
2 time and call attention to it.

3 would one of counsel be kind enough to hand me
4 816? During Mr. Stone's cross-examination of Mr. Nicolas --
5 I am just reading from my notes. Basically my handwritten
6 notes show that when we got to 816 Mr. Stone was attempting
7 to show that NagraStar is what I call wearing the white hat.
8 816 is an e-mail from Koenis dated December 21, 2001.
9 Amongst the recipients are Guggenheim, Nicolas, Gee, Henry
10 Kudelski.

11 I said December. It should be November, correct?

12 MR. STONE: November.

13 THE COURT: Counsel, each of you should have 816.
14 I want you to go over 816 with me once again. It refers to
15 that ROM dump.

16 Do you believe that there is an attachment to
17 this? I don't think that there is an attachment

18 MR. STONE: You are correct. The attachments were
19 in two other exhibits, 526 and 1251. We got it late last
20 night. That one references a floppy disk that had the ROM

21 dump on it, which should be --

22 THE COURT: So counsel has been kind enough
23 representing Mr. Kudelski to come in this morning, and as
24 far as the e-mails are concerned, he has gotten you the
25 e-mails. You are just suspicious that there is another

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1 piece of independent ROM dump evidence out there because
2 it's referred to, but counsel can't go any further --
3 counsel has represented this morning that he has gotten all
4 the e-mails. He has gotten the attachments from the
5 e-mails, so it's really out of counsel's hands. It's just
6 that there obviously was a ROM dump.

7 MR. STONE: Correct.

8 THE COURT: But it's not an attachment. It's not
9 something we can click and bring up.

10 MR. STONE: It's not an attachment.

11 THE COURT: Mr. Cohan, thank you. It's an
12 excellent job.

13 With that kind of evidence, the question is going
14 to be at the end of the case if I have this neutral
15 instruction that's not pinpointed and let each of you argue
16 that possession within the control of a party that's not
17 appearing in the court is subject to fair game for
18 argument -- I think I am inclined to do that, but I'm going
19 to wait, and I will tell you why.

20 Each of you are going to get gored during the
21 trial. That may be mutual by the time we are done. Right
22 now I think, frankly, NDS would love this instruction. I am
23 not too sure NDS will want this instruction at the end of
24 the case that they present. So I just want to put you on
25 notice I am more than happy -- I am thinking, quite frankly,

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1 because of all of the problems we have had with all the
2 accusations about hidden evidence and evidence quite frankly
3 within the control of one party or the other that hasn't
4 been produced of that neutral instruction and letting you
5 argue.

6 In your case, Mr. Stone, you would be arguing
7 where is it? It was in their control. Why isn't it in
8 court? They saved everything else. And the same courtesy
9 back to EchoStar. Now, let's delay that for a moment. I'm
10 just putting you on notice that I'm thinking about that
11 instruction. It would be neutral. It wouldn't point out
12 EchoStar, and it wouldn't point out NDS, but it would allow
13 you to argue that evidence within the control of the parties
14 should have been produced.

15 Third, I am going to send my court reporter home
16 with the deepest appreciation.

17 Is there anything else you would like to put on
18 the record? The next thing we are going to go this evening
19 is go over Menard's testimony and make certain that's ready
20 to go in case you get to Menard tomorrow. I assume
21 according to our schedule that Mr. Rubin is after Mr. Norris
22 because of the Sabbath.

23 MR. KLEIN: Our hope would be to take Mr. Rubin
24 first thing in the morning. I don't know how long Mr.
25 Norris will be. Mr. Rubin has to leave at 11:00.

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1 THE COURT: How long will Mr. Norris be?

2 MR. NOLL: Probably an hour, maybe a little bit --
3 an hour and 15 maybe.

4 THE COURT: How long will you be?

5 MR. KLEIN: Hour and a half to two hours.

6 THE COURT: I am not going to chop up the case.
7 This is the order. You are going to finish with Norris.

8 Then we are going to move to Rubin. Otherwise, he is going
9 to be here on Friday. So that's the way it is. So either
10 trim it down on both sides and get to it or Rubin is here.
11 We are not working around his schedule.

12 Now, after Mr. Norris and Mr. Rubin, then you told
13 me we were going to have the videotape of Al Menard. Then
14 we are going to go to Mr. Guggenheim, and then you told me
15 about Paul Orban who is in a difficult position because of
16 some tragedy in his family. There I might be willing to
17 take the gentleman out of order. He is a half-hour witness
18 supposedly for each party. You told me you were going to
19 fly him down this evening. Is he here?

20 MS. WILLETTS: He gets in this evening.

21 MR. HAGAN: I think he gets here at 7:15, Your
22 Honor.

23 THE COURT: Is he a hostile witness to you?

24 MR. HAGAN: No. We are calling him for purposes
25 of authenticating a couple of documents.

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1 THE COURT: How long is he going to take?

2 MR. HAGAN: From our side, 15 to 20 minutes.

3 THE COURT: How long on your side, Mr. Stone?

4 MR. STONE: About the same.

5 THE COURT: What's the tragedy in his family?

6 MR. HAGAN: He was able to deal with it today.
7 His wife is pregnant with triplets, and there were some
8 complications. They had an appointment this afternoon with
9 the doctor. That's the reason why he couldn't leave to fly
10 out here until the later flight. He made that appointment.
11 He is going to make it out here at 7:15 this evening, and we
12 can fit him in at anytime tomorrow.

13 THE COURT: We are going to finish Mr. Norris
14 uninterrupted. Why don't we move immediately after that --
15 if you want the videotape of Al Menard next, that's fine.
16 If you want to move Mr. Orban up, that's fine under those

17 circumstances. Then it's Menard and then Guggenheim. We
18 will get Mr. Rubin out of here, but I don't know about
19 11:00. He is not going to dictate time that finely to the
20 Court.

21 what else can we do on the record? Anything else
22 before we get off the record?

23 MR. HAGAN: We have nothing else. I was able to
24 find one document that may help you with the Kommerling
25 issue. It was produced by the defendants. It's the

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1 employment and service agreement that they entered into with
2 Mr. Kommerling and his company, ADSR, in December 2000.

3 THE COURT: So that moves the date up.
4 Anything else you would like on the record this
5 evening?

6 MR. STONE: Nothing further.

7 MR. HAGAN: Nothing further, Your Honor.

8 THE COURT: All right.

9 (Thereupon, court was adjourned.)

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CERTIFICATE

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

Date: April 16, 2008

Sharon A. Seffens 4/16/08

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