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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

HONORABLE DAVID O. CARTER, JUDGE PRESIDING

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ECHOSTAR SATELLITE CORP.,)	
et al.,)	
Plaintiffs,)	
vs.)	No. SACV-03-950-DOC
)	DAY 6, Vol. IV
NDS GROUP PLC, et al.,)	
Defendants.)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Santa Ana, California
April 17, 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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1 SANTA ANA, CALIFORNIA; THURSDAY, APRIL 17, 2008; 3:30 P.M.

2 (Jury present.)

3 PAUL ORBAN, PLAINTIFFS' WITNESS, PREVIOUSLY SWORN

4 DIRECT EXAMINATION (Continued)

5 BY MS. WILLETTS:

6 Q Do you have any knowledge of the infrastructure that
7 you're referring to in terms of was there equipment that had
8 to be bought?

9 A Yes.

10 Q And you also testified that it required research and
11 development on EchoStar and NagraStar's part as well?

12 A Yes.

13 Q Do you know how long it took to complete the card swap?

14 A It was approximately a year and a half.

15 Q And what was -- what role did your accounting team --
16 EchoStar's Accounting Team play in implementation of that
17 card swap?

18 A Well, we would have had to track all the costs and then
19 properly account for them in our financial statements.

20 Q Mr. Orban, I would like to direct your attention to
21 Exhibit 406, please. Do you recognize this document?

22 A Yes.

23 Q Can you tell us generally what it is?
24 A It was a document that my team and our financial group
25 put together in support of this case.

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1 Q Do you know how Exhibit 406 was prepared?
2 A Yes.
3 Q Can you tell us how that was done?
4 A Yeah. We gathered information, whether it was from our
5 SEC filings or from our accounting system, the mainframe
6 accounting system that we had, and summarized the
7 information so that it's in a digestible format.
8 Q So Exhibit 406, that is a document that just summarizes
9 a large amount of information regarding the cost of the card
10 swap; is that correct?
11 A That's correct. Our accounting software does not
12 produce reports like this that would show this in detail --
13 or I mean show it in summary like this.
14 Q Is it your understanding that EchoStar has provided the
15 defendants in this case with the underlying data that went
16 into making Exhibit 406?
17 A Yes.
18 Q And your team gathered that information?
19 A Yes.
20 MS. WILLETTS: Your Honor, at this time, EchoStar
21 offers Exhibit 406 into evidence as a summary under Rule
22 1006.
23 THE COURT: Any objection?
24 MR. STONE: Yes, hearsay and foundation.
25 THE COURT: Overruled. 406 is received.

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1 (Exhibit 406 received.)

2 BY MS. WILLETTS:

3 Q Let's turn to the first page of Exhibit 406.

4 Can you explain to the jury what this schedule
5 represents?

6 THE COURT: Do you have the underlying
7 documentation available? In other words, you have a summary
8 report here. The underlying documentation used in proposing
9 this report, is it available?

10 THE WITNESS: It's very detailed information in
11 our accounting system --

12 THE COURT: Is it available?

13 THE WITNESS: Yes.

14 THE COURT: Can you get it?

15 MS. WILLETTS: I believe it's been provided to the
16 defendants on a disk. It's been produced.

17 THE COURT: I see. Okay. Thank you very much.

18 BY MS. WILLETTS:

19 Q Mr. Orban, taking a look at page one of Exhibit 406,
20 can you explain to the jury what this table or schedule
21 represents?

22 A Yes. The first line is ARPU, which I described
23 earlier, which is average revenue per user, so that's the
24 revenue we earn on average from subscribers. In this case,
25 it was \$4,290 in 1999.

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1 The next line is what I referred to earlier as SAC, so
2 it's our subscriber acquisition costs. Those are the costs
3 that we incur up front in month one when we get a
4 subscriber. As you can see, in 1989, it was \$386.

5 The next line is "Subscription TV Services Margin."
6 Actually if you flip over to page three, you can see the
7 63.7, which is the third line down. That is the margin that
8 we got on the ARPU. Said another way our costs were
9 basically 36 percent of the ARPU number for 2004. It was 36
10 percent of the \$55 that's above it which would be our cost.

11 The next line is what we call our lowest tier or retail
12 price, so that was our lowest level programming package that
13 we offered, and back in 1999, that would have been called
14 American's Top 40, and that was the price point for that
15 package.

16 Q Are the calculations that are included on pages one
17 through three that we just went over -- are those based on
18 numbers that are audited?

19 A Yes. These numbers are derived from the 10-Ks and
20 10-Qs that we file with the SEC, and our auditors obviously
21 review them as they come out.

22 Q And these numbers are reported then publicly by
23 EchoStar?

24 A All of the numbers except for the margin are, yes.

25 Q These are the numbers that someone would need then if

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1 they wanted to calculate, for instance, lost profits; is
2 that correct?

3 A Yes.

4 Q Are the costs here on pages one through three of
5 Exhibit 406 accurately represented here in this document?

6 A Yes.

7 Q Can you please turn to page five of Exhibit 406? Could
8 you tell the jury what this page -- beginning on page five
9 represents, what that schedule is?

10 A This schedule calculates the cost that NagraStar and
11 EchoStar incurred as a result of the card swap.

12 Q If you look at I believe the first line -- the second
13 line, it says "Via Service Department." Can you explain
14 what that represents?

15 A Yes. The \$1,251,000 represents cards that we swapped
16 via our service organization. Earlier I described like if a
17 unit breaks and we get one back and we touch it, those are
18 the amount of the cards that we swapped out via that

19 process.

20 Q Was that something EchoStar did in order to reduce
21 costs as part of the card swap?

22 A Yes. We found that it's easier to do the card swap
23 ourselves versus having consumers do it. Sometimes they
24 have trouble doing it. Like in the case of my father, I had
25 to go to his house and do it for him. I'm sure there are

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1 other people just like him who had a card and had a hard
2 time doing it.

3 Q So for some reason if a box came back in, EchoStar
4 would just go ahead and do that exchange for the consumer?

5 A Yes.

6 Q Does that process of having EchoStar do the card -- do
7 the card exchange themselves, does that help EchoStar reduce
8 churn?

9 A Yes.

10 Q Can you tell the ladies and gentlemen of the jury what
11 churn is?

12 A Churn is the rate that our subscribers deactivate with
13 us. By having EchoStar perform the swap -- and in the case
14 of my father, if he didn't know me, he might have been
15 frustrated and said, "I can't do this," and, you know, left
16 us and went to another provider of some sort. So by us
17 doing it, it takes the hassle out of the consumer's hands.

18 Q Now, below the line that we were just talking about, it
19 refers to "Mass Exchange Process." Can you tell us what
20 that means?

21 A The mass exchange is where we mail the actual cards to
22 the consumers. So, for instance, if they had two receivers
23 in their household, they would get a mailer from us with two
24 the cards that had instructions on how to actually do the
25 swap, take the cards out and what to do.

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1 Q In total, how many cards did EchoStar have to exchange
2 via the mass exchange process?

3 A 8,405,903.

4 Q So how many cards in total, including the service in
5 mass exchange, did EchoStar have to swap out?

6 A It was 9,657,367.

7 Q As is represented here on 406, can you tell us how much
8 total EchoStar had to pay for those new cards?

9 A That's the last column. It's \$75,563,121.

10 Q If we look at the next section underneath that, there
11 is a section entitled "Subscriber Equipment."

12 Can you explain to us what those costs refer to?

13 A That was our first generation set-top-box that we made.
14 Software in those boxes was not large enough I guess to
15 handle the software that it would need to do the swap, so we
16 physically had to replace those boxes with newer equipment.
17 There were 40,670 that we had to replace with newer
18 set-top-boxes that costs us on average \$95.23.

19 Q Below the equipment section, there is another section
20 entitled "Other Direct Costs." Can you tell us what that
21 refers to?

22 A Those were the other direct costs for doing a mailer.
23 So in my example that I described earlier where someone had
24 two cards, there would be like a mailing package with the
25 cards in it and instructions on how to do it, so it's the

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1 cost of the mailer, the mailing, the packaging, and those
2 types of other direct costs.

3 Q Did EchoStar also have to employ customer service cost
4 centers to assist with this card swap?

5 A Yes. And that cost would include -- we hired
6 third-party cost centers to help us with that. The mailer

7 had a phone call saying call such and such a number, and
8 people could call that number to get help in doing the
9 exchange.

10 Q Am I correct that the breakdown of all of these other
11 costs are actually attached to the back of this as the
12 support in Exhibit 4-6?

13 A Yes. They are the last part of this document 406.

14 Q Where did EchoStar get each of these costs from that
15 were included in Exhibit 406?

16 A We used our accounting system. So, for instance, of
17 this 9.5 million number, I had everyone code and set up
18 discrete GL accounts or activity codes in our general ledger
19 which then coded all of the costs to a discrete cost center
20 or GL where I could track this and then manage those costs.

21 Q Can you describe for the jury the costs that are
22 itemized in the next section underneath that which is
23 entitled "Equipment"?

24 A Yes. As part of the exchange, we had to do the mailers
25 like I described. We had to buy a machine that actually

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1 stuffed them and put the cards in and did all of it. The
2 cost of that machine and the printing for the instructions
3 was \$1 million. To install it and get it all configured in
4 our warehouse to do it, we incurred another \$100,000 of
5 additional costs.

6 Q Under "IT Costs and Engineering Costs," where did those
7 two items come from?

8 A The \$2 million, the \$600,000, the \$1.26 million, those
9 came from NagraStar. Those were costs that their engineers
10 incurred to do the swap.

11 Q Bear with me. We are almost getting there. The last
12 section includes damages for consumer costs. What does that
13 refer to?

14 A Like I talked about earlier, we had this machine that

15 stuffed the cards in and put all the stuff in there. You
16 had to have people actually operating it and managing that
17 process. So we had 50 people at one point for five years
18 working on the swap, and they had an average salary of about
19 \$25,000. If you do the multiplication, that's a \$562,500
20 cost, as well as we had some management oversight of 1.5
21 people, and their average salary was about \$60,000. That
22 gets you the \$180,000 that's shown there.

23 Q So how much total did EchoStar calculate that it
24 suffered in damages as a result of the card swap?

25 A The total cost -- again, these are direct costs of

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1 NagraStar and EchoStar -- is the \$94,686,367 shown on this
2 schedule.

3 Q Now, let's shift gears a little bit here.

4 Has EchoStar ever undertaken to calculate the amount of
5 damages it suffers on a per satellite piracy device basis?

6 A Yes.

7 Q I would like to direct your attention to Exhibit 402.
8 Do you recognize this document?

9 A Yes, I do.

10 Q Can you tell us what Exhibit 402 is?

11 A 402 is an estimated schedule of lost revenue we would
12 have if someone pirated our service. It's an annual
13 calculation of what they would have gotten for free from
14 us -- the program they would have gotten free, and this
15 would have been the retail value of what it would have been
16 if they had paid us cash.

17 Q Is Exhibit 402 -- it was prepared by EchoStar; is that
18 right?

19 A Yes.

20 Q Was this document prepared by someone with knowledge of
21 the information that's contained within it?

22 A Yes.

23 Q It was prepared at or near the time that EchoStar

24 conducted the analysis of the cost for pirate devices?

25 A Yes. These are the prices at that point in time.

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1 Q Is it the regular practice of EchoStar to make such a
2 document?

3 A Yes.

4 Q Does EchoStar use this document, Exhibit 402 --

5 MS. WILLETTS: Actually, Your Honor, at this time
6 we would like to offer Exhibit 402 into evidence.

7 THE COURT: Do I understand this to be the
8 subscription rate for an individual concerning lost profits?

9 THE WITNESS: Yes. It's the annual cost.

10 THE COURT: For a hypothetical user?

11 THE WITNESS: Yeah. It's not everything. It's
12 very conservative. We left off a lot, but this is what most
13 people would see.

14 THE COURT: Is the hypothetical user using
15 "Playboy"?

16 THE WITNESS: We have a very high penetration rate
17 of "Playboy."

18 THE COURT: Thank you very much. I will receive
19 the document.

20 (Exhibit 402 received.)

21 MR. STONE: For the record, we object to this on
22 the same grounds.

23 THE COURT: I understand. I will take this
24 actually subject to a motion to strike, subject to
25 cross-examination. You can continue on.

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1 BY MS. WILLETTS:

2 Q The title of this is "Piracy Cost calculation."

3 Is Exhibit 402 -- how in the past has EchoStar used
4 this document to your knowledge?

5 A We have used this in other cases to prosecute people
6 who pirate our service.

7 Q So it's been relied on by courts in an anti-piracy
8 litigation?

9 A Yes.

10 Q How much did EchoStar determine it was costing them per
11 year to reprogram a card per a piracy device?

12 A If you go down to the bottom of the schedule there, our
13 estimated cost was \$2,656 annually.

14 Q Can you explain to the jury what that represents?

15 A That represents the revenue or the cash that we would
16 have received if the pirate was actually paying us cash for
17 the services that they were getting?

18 Q Now, I know you don't any knowledge --

19 THE COURT: This isn't what your subscribers pay.
20 This is the value if the person went out and purchased each
21 of these services separately, correct?

22 THE WITNESS: Yes.

23 THE COURT: In other words, the homeowner is not
24 paying \$2,600? If someone went out and paid for this
25 outside your package, for all these services, this is the

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1 amount the person would be paying? Like for "Playboy," they
2 might pay \$500 on the outside, but you package that for \$39
3 a month or whatever it is?

4 THE WITNESS: These are the monthly costs, and
5 it's not packaged, so this is if they order the
6 subscriptions one by one.

7 THE COURT: Exactly.

8 BY MS. WILLETTS:

9 Q Is it your understanding that the reason this
10 calculation was actually run was because a pirate device

11 actually opens all of that subscription, and those are the
12 services they are actually getting for free?

13 A Yes, exactly. It's free access, so they get every
14 channel that we put out. We have substantially more than
15 this, so in theory, this is real conservative. This is just
16 some of the main things that people typically subscribe to.

17 Q Now, I know you don't have any knowledge of the actual
18 number of piracy devices that are out in the field, but if
19 we assume, for instance, that there are 100,000 pirated
20 EchoStar cards available in the market, based on that number
21 of cards, how much programming in terms of value would
22 pirates be getting from that pirated EchoStar card?

23 MR. STONE: Objection. Assumes facts not in
24 evidence, calls for speculation.

25 THE COURT: Overruled.

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1 THE WITNESS: I would take the \$2,600 times
2 100,000, and that would be about \$265,000.

3 MS. WILLETTS: Pass the witness, Your Honor.

4 THE COURT: What did you multiply? Do that again.

5 THE WITNESS: Can I have a calculator?

6 BY MS. WILLETTS:

7 Q If there are 100,000 piracy devices out in the field,
8 based on EchoStar's calculation, how much in terms of
9 programming values are those pirated cards receiving?

10 A I would get a calculator and take \$2,656 times 100,000
11 since it appears that my first answer was wrong -- it's
12 either \$2.6 million or \$265,000, one of the two.

13 THE COURT: Somebody hand him a calculator.

14 THE WITNESS: I always use a calculator. It's
15 \$2.6 million.

16 MS. WILLETTS: Try one more time.

17 THE WITNESS: Can I borrow your pen? It's
18 \$265.6 million.

19 BY MS. WILLETTS:

20 Q So, Mr. Orban, just to be clear, the piracy cost
21 calculation is not the programming typically taken by a
22 subscriber; correct?

23 A I'm sorry. Could you say that again?

24 Q What's represented in Exhibit 402, the piracy cost
25 calculation, that's not the programming that's typically

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18

1 taken by an average subscriber; correct?

2 A These are some of the packages that subscribers
3 typically take.

4 Q But what is represented here is what it would cost a
5 pirate if he was actually paying what he was getting for
6 free?

7 A Yes.

8 MS. WILLETTS: Pass the witness.

9 THE COURT: Cross-examination, please.

10 CROSS-EXAMINATION

11 BY MR. STONE:

12 Q Good afternoon, Mr. Orban. I am Richard Stone
13 representing the NDS defendants.

14 Do I understand this correctly that pirates who try to
15 get free TV would pay 2,600 bucks for that programming?

16 A No, they get it for free.

17 Q So those pirates if they couldn't pirate wouldn't pay
18 \$2,600 for that set of programming?

19 A If they subscribed to these packages, they would pay
20 that.

21 Q Do you have any subscribers that subscribe to all those
22 packages at the same time and pay \$2,600 a year?

23 A We do have some, yes.

24 Q What's the average revenue per user again?

25 A Today we are at about \$70.

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- 1 Q You said it took four years to accomplish the card
2 swap?
- 3 A No. We did it in a year and a half.
- 4 Q So when did the card swap begin?
- 5 A The mass exchange happened in 2004, and we had it
6 completed substantially by 2005.
- 7 Q Do you know why the folks at Nagra and EchoStar didn't
8 stamp out more ROM 10 cards and swap them for ROM 3 in 2001?
- 9 A I'm not sure what a ROM 3 is or a ROM 4 card is.
- 10 Q Were there any cards available in January of 2001 that
11 were not compromised?
- 12 A I don't know.
- 13 Q Did anyone ever give you any memos explaining the
14 reason for the card swap in 2004?
- 15 A I did not see any memos, no.
- 16 Q Have you ever heard of something called free-to-air
17 piracy?
- 18 A I have heard the term.
- 19 Q Have you ever seen any financial projections that
20 project the cost of free-to-air piracy on the EchoStar
21 system?
- 22 A No, I have not.
- 23 Q Have those numbers ever been calculated?
- 24 A Not that I am aware of.
- 25 Q You actually didn't prepare Exhibit 406; correct?

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- 1 A No. People on my team as well as the director of
2 finance helped to prepare it.
- 3 Q Didn't you testify that you also did not assist in
4 preparing Exhibit 406?
- 5 A Correct.
- 6 Q I think when you testified a few minutes ago you said

7 they were prepared for this lawsuit.
8 A In this format, yes.
9 Q So this is a document created specifically for the
10 lawsuit?
11 A Yes.
12 Q You mentioned underlying documents.
13 For how long have those underlying documents been
14 available?
15 A They were -- I'm not quite sure.
16 Q Why aren't you sure?
17 A If you are asking when they have been available, the
18 underlying documents exists in our accounting software.
19 Q Do you know why we got 5,000 last week?
20 A No, I don't.
21 Q Do you know whether those documents we got even match
22 the numbers shown on Exhibit 406?
23 A I am not sure what you got, so I don't know.
24 Q You had no role in providing what are supposedly the
25 underlying documents for the spreadsheet; is that correct?

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21

1 A Can you repeat -- can you say that statement again or
2 that question again?
3 Q You had no role in assembling the underlying documents
4 that you believe relate to Exhibit 406; correct?
5 A I am responsible for the documents that are used to
6 prepare this, yes.
7 Q Were you responsible for collecting them to make them
8 available in this lawsuit?
9 A No, I did not physically collect them, no.
10 Q And you have never actually reviewed all those
11 documents that you say underlie the calculations in Exhibit
12 406; is that right?
13 A No, I have reviewed them. They are from our audited
14 financial statements, and our auditors have audited them.
15 Q Did you see any documents that provide evidence of

16 other direct costs?

17 A Yes.

18 Q Did you see IT cost documentation other than in that
19 exhibit I mean -- I mean the underlying documents?

20 A The IT costs and the engineering costs were provided by
21 the NagraStar employees, but all the other costs are
22 EchoStar costs.

23 Q The cards are purchased from NagraStar; correct?

24 A Yes.

25 Q Who owns 50 percent of NagraStar?

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22

1 A EchoStar Communications Corporation.

2 MS. WILLETTS: Could you show the witness, please,
3 Exhibit 1585-A, as in apple?

4 BY MR. STONE:

5 Q It's been represented to us this is one of the
6 underlying documents. It has a Bates stamp number of ESC
7 179159. Do you see that down at the bottom?

8 A Yes.

9 MS. WILLETTS: Your Honor, I would move Exhibit
10 1585-A.

11 THE COURT: Received.

12 (Exhibit 1585-A received.)

13 BY MR. STONE:

14 Q Have you seen documents like this before at EchoStar?

15 A It's difficult to read.

16 Q This time it's not my fault.

17 A I don't know if I have seen this specific one, but it
18 appears to have the same information that we talked about
19 earlier.

20 Q Who are the folks that would prepare a document like
21 this?

22 A I'm not sure who actually prepared this document.

23 Q Who wrote next to "Replacement Set-Top-Boxes - Total

24 guess on the cost"?

25 A I'm not sure who prepared this, so I'm not sure who

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23

1 would have done that.

2 Q Let's go down to construction for the room. Do you
3 know who wrote "Somewhat of a guess"?

4 A No, but it was a good guess because it ties to our GL
5 because I know I looked that number up.

6 Q Let's go down to the IT cost, your software cost.

7 A Yes.

8 Q I think to the right of that somebody wrote "Complete
9 guess."

10 A Those costs would have been NagraStar's costs of what
11 it took them to develop. We got that from NagraStar.

12 Q Go to "Set-Top-Box Costs." It says, "Somewhat of a
13 guess."

14 Q Do you know who wrote that?

15 A No, I don't.

16 Q what about down below under labor costs where it says
17 "Operator annual salary a guess based on \$10 an hour"?

18 A Again, I don't know who prepared that.

19 Q Next to "Management salary" where it says again "A
20 guess," you don't know who prepared that?

21 A No. This looks like this was probably a preliminary
22 draft of costs, which are the first thing that I testified
23 earlier, so this must have been at some point a draft of a
24 cost is my guess.

25 Q So it wouldn't be something that underlies Exhibit 406

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24

1 if it were represented to be?

2 A Again, I would have to see who prepared this and how it

3 was calculated, but it's probably related to it to some
4 degree, but it was a draft. It was not the final product.

5 Q Do you know who prepared Exhibit 402, the piracy cost
6 calculation document?

7 A Yeah. It was a joint effort between people in the
8 Accounting Finance Group and our Piracy Group.

9 Q Who in the Piracy Group?

10 A Don -- I can't think of his last name off the top of my
11 head but Don something is his name.

12 Q When was this first prepared?

13 A I believe it was prepared at some point shortly after
14 the dates that are shown here, which would have been 2001.

15 Q Do you know how the person who prepared this was able
16 to come up with each of these numbers?

17 A Yes. It's the stated rates there for the price
18 packages on our retail rates that anyone gets, and you
19 multiply it by 12 which gets you the annual cost, and then
20 for pay-per-view movies and pay-per-view events, we take the
21 retail price on those and multiply them times an average of
22 what someone would see. In the case of pay-per-view movies,
23 we are assuming ten pay-per-view movies per month, which
24 would get you to \$39.90.

25 Q What is 10 Ecstasy package?

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25

1 A Those are adult packages.

2 Q Is it the same for Eclipse?

3 A Yes.

4 Q And "Playboy"?

5 A Yes.

6 Q How was the pay-per-view total calculated?

7 A Again, as the document shows there, the number of
8 movies available from September 2000 through August of 2001
9 was 172. We assumed that a pirate would take ten movies
10 per month. You multiply that times \$3.99, which is the
11 retail rate, and you would get \$39.90 per month or \$478

12 annually.

13 Q Now, were you ever consulted with respect to whether a
14 software patch could have been issued prior to the December
15 2000 postings that are at issue in this case?

16 A No.

17 Q And it's your testimony that each pirate device that
18 was rendered inoperable would save the company \$2,656?

19 A My testimony was this is the amount of programming they
20 could get for free.

21 Q Let me have you look at, please, Exhibit 691.

22 Looking at 691, it's entitled "Kudelski Smart Card
23 Purchase Agreement," correct?

24 A Yes.

25 Q And you have seen this before?

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1 A I believe I have, yes.

2 MR. STONE: Your Honor, I would move in Exhibit
3 691 at this time.

4 MS. WILLETTS: No objection.

5 THE COURT: Received.

6 (Exhibit 691 received.)

7 BY MR. STONE:

8 Q Looking at Exhibit 691-2, there is a purchase price.
9 Do you see that down at the bottom?

10 A Yes.

11 Q It says the Smart Card purchase agreement statistical
12 price would be \$8 that NagraStar would pay to Kudelski,
13 correct?

14 A Yes. Again, that's what NagraStar paid Kudelski, not
15 what EchoStar paid.

16 Q Right, and we will get to that in a minute.

17 But the first step is that NagraStar gets the cards
18 from Kudelski?

19 A Correct, and this is for nonswap cards.

20 Q Right. And this warranty agreement was still in
21 existence in 2004 wasn't it -- this purchase agreement?
22 A There were a few different amendments to it, so I
23 believe so. I don't know if this was the final.
24 Q I didn't see any amendments. Our understanding is
25 this is the one and only Smart Card purchase agreement.

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1 Are you aware of some amendments to this agreement?
2 A Well, when I was thinking of amendments, there are
3 various agreements that go from EchoStar to NagraStar and
4 NagraStar to Nagra.
5 Q So there are amendments or there are not?
6 A I don't believe so.
7 Q Now, go to page 691-4. There is a Section 5.3 called
8 "Additional warranty." Do you see that?
9 A Yes.
10 Q How long have you been the controller?
11 A Six or seven years.
12 Q Do you have any recollection of this warranty ever
13 being used by EchoStar prior to 2004?
14 A Let me read the provision first.
15 Q Sure. Please.
16 A I believe the first time that we exercised those
17 provisions were when we started the swap.
18 Q Which swap are you talking about?
19 A The card swap.
20 Q The one in 2004?
21 A Yes.
22 Q Okay. Now, if I understand this additional warranty
23 correctly, if there is a swap because of a security breach
24 that has not been cured by Kudelski, the cost to NagraStar
25 is equal to the direct marginal cost of manufacturing of a

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1 Smart Card exclusive of all overhead costs?
2 A That's how I read it, too.
3 Q And if it's part of a warranty, presumably that's a lot
4 less than the \$8 normal purchase price that we saw earlier
5 in the agreement, correct?
6 A Not necessarily.
7 Q Have you seen any documents of the direct marginal cost
8 of manufacturing?
9 A No, I have never seen anything like that.
10 Q What is your understanding of what that means, marginal
11 cost of manufacturing?
12 A It's their cost of manufacturing the card with whatever
13 costs are related to it, the development --
14 Q Is the marginal cost the cost of each additional unit?
15 A I'm not sure.
16 Q Has anyone ever shown you documents evidencing the
17 direct marginal cost of manufacturing the Smart Cards?
18 A No, I have never seen that.
19 Q Wouldn't that be a document you would need to
20 accurately report the use of this warranty in the 10-Ks?
21 A No.
22 Q Wouldn't you want to verify what the direct marginal
23 cost of manufacturing is?
24 A The people who negotiated the contract to purchase the
25 Smart Cards would have done that.

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1 Q They would have done what?
2 A They would have gotten what the cost is per card.
3 Q Well, cost of manufacturing is not something that needs
4 to be negotiated. It's a physical fact; is it not?
5 A It depends on how you define "direct marginal cost."
6 Q Well, the cost of manufacturing is something that can
7 be determined? There is a cost as to how much it takes to

8 manufacture a Smart Card, right?

9 A There is a direct cost for the card itself. However,
10 there are all kinds of other costs that are incurred to
11 develop the software technology that goes in the card.

12 Q Isn't that why it says "direct marginal cost" which
13 excludes those development costs and is only the cost of
14 manufacturing?

15 A Direct cost would mean the cost of developing the
16 software.

17 Q Of manufacturing. Wouldn't the cost of developing the
18 software be development costs?

19 A Not necessarily.

20 Q well, if you had a secure card that was already in
21 existence, you wouldn't need to redesign it?

22 A There is a cost in developing that card that gets
23 shared by every card that's produced.

24 Q Let's say you decided to upgrade your card, and you
25 already had an existing card in the field that was secure

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1 and another version that wasn't.

2 You could simply use the existing secure card to swap
3 for the unsecured card, right?

4 A You are saying you could take a secure card and swap it
5 out for an unsecured card?

6 Q Right.

7 A Yes, you could do that.

8 MR. STONE: Could you show the witness Exhibit
9 828, please? It's in evidence, so we can show it.

10 BY MR. STONE:

11 Q This is a July 2, 1999, letter to NagraStar from
12 EchoStar from the corporate counsel for EchoStar.

13 Do you recognize the name Nicholas Sayeedi?

14 A Yes.

15 Q Who was he?

16 A Nick is a lawyer in our Legal Department.
17 Q Have you ever dealt with Mr. Sayeedi?
18 A Yes.
19 Q Did it come to your attention that there was a security
20 breach in early 1999 that precipitated a demand to swap
21 cards?
22 A This is the first time I saw this document, so, no.
23 Q So you don't know what the response was to this letter,
24 if any?
25 A No, I don't.

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1 Q Do you have any understanding as to why the ROM 10 card
2 was developed?
3 A Again, I am not good on that terminology, so I am not
4 sure what card that is.
5 Q Are you aware of any card that was developed in
6 response to this letter, Exhibit 828?
7 A Again, this is the first time I have seen it, so I am
8 not quite sure what was done with this or whatever.
9 Q This letter references the warranty section we just
10 saw, correct, down at the bottom in the last paragraph -- or
11 next to the last paragraph actually?
12 A Could you restate your question, please?
13 Q This letter cites to the warranty provision we just
14 saw, correct, the direct marginal manufacturing cost?
15 A It looks like the section reference is correct, yes.
16 Q Am I correct that if a card swap is being done not
17 because of a security breach but just because the cards are
18 old and need to be upgraded then the warranty would not
19 apply? Is that how you understand the situation?
20 A The warranty provision that you are referring to
21 discusses that the security system has to be breached for
22 this provision to kick in.
23 Q So if the cards are being swapped just as part of an
24 upgrade, then the cost of those cards may be more than the

25 warranty. Is that a fair statement?

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1 A Yeah, I think that's fair.

2 Q The lower warranty price applies if there is a security
3 breach, and that's the reason, right?

4 A Yes.

5 Q What was your role in the card swap again? You just
6 said it was from the accounting side?

7 A Yes. I had to ensure we properly accounted for all the
8 costs in our financial statements.

9 Q Who did you first learn from that there was going to be
10 a card swap?

11 A It's been so many years I don't remember.

12 Q Did anyone say to you that a card swap was necessary
13 because of any postings on the Internet in December 2000?

14 A I was not aware of that in December 2000, no.

15 Q Did anyone tell you in 2004 that the card swap was
16 being done because of something that happened in December
17 2000?

18 A I can't recall any conversation like that.

19 Q Any discussion with the auditors about the reason for
20 the card swap that began in 2004?

21 A Yes, I would have had numerous conversations with our
22 auditors.

23 Q Was there any discussion about the fact that the cards
24 were old and needed to be replaced?

25 A No.

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1 Q How often are cards swapped in this industry, do you
2 know?

3 A No, I am not aware of it.

4 Q If you could look at Exhibit 1584, please.

5 A Okay.

6 Q Do you recognize Exhibit 1584?

7 A Yes.

8 Q It's a purchase order from NagraStar?

9 A It appears that it's a purchase order from NagraStar to
10 Nagra Card for Smart Cards. It's for the swap cards.

11 Q So this is a purchase order that's part of the swap-out
12 process?

13 A Correct.

14 Q What's the date on this purchase order?

15 A I believe January 8, 2004.

16 Q You might want to look -- there are two page ones. The
17 second copy is better.

18 A Actually it's worse.

19 Q I tried.

20 A Actually page three is better. That is January 8,
21 2004.

22 MR. STONE: Your Honor, I would move Exhibit 1584
23 at this time.

24 THE COURT: Any objection?

25 MS. WILLETTS: No objection.

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1 THE COURT: Received.

2 (Exhibit 1584 received.)

3 BY MR. STONE:

4 Q Now, this is the only purchase order we got that
5 relates to the swap-out.

6 Down below the quantity appears to be 4 million, but
7 it's your testimony that the card swap involved more than 4
8 million cards?

9 A Yes.

10 Q So there should be additional purchase orders as far as
11 you know?

12 A Yes.

13 Q Is EchoStar about to undergo another card swap?

14 A Yes, I believe we are.

15 Q Are you using all that same equipment you bought to do
16 the card swap in '98?

17 A No.

18 Q Looking at this purchase order, are you able to read
19 the language in the paragraph that begins with "In the
20 event"? It's on the first page of the purchase order.

21 A Sort of.

22 Q Does SO1 stand for Swap-Out 1 Smart Cards?

23 A I'm not sure what that means.

24 Q This is one of the underlying documents we got. Do you
25 know who would know that information?

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1 A I am sure one of our engineers or the person who put
2 the PO in place. First of all, this is a NagraStar PO.
3 This is NagraStar to Nagra. This isn't an EchoStar
4 document.

5 THE COURT: Is it a NagraStar or EchoStar --

6 THE WITNESS: It's NagraStar to Nagra. This isn't
7 an EchoStar document.

8 BY MR. STONE:

9 Q NagraStar is the entity that buys the Smart Cards for
10 the swap-out?

11 A NagraStar is the entity that EchoStar purchases its
12 Smart Cards from. They in turn buy them from Nagra.

13 Q And EchoStar owns 50 percent of NagraStar?

14 A Yes.

15 Q Is there a markup along the way?

16 A Yes.

17 Q What's that markup?

18 A Well, for the normal cards that we use in production,
19 it's \$2. That's for building new set-top-boxes and things
20 of that sort, ad for the swap-out card, EchoStar purchased

21 them from NagraStar for \$7.50, so there would have a 50-cent
22 markup.

23 Q Then they bought from Nagra Card, which is a Kudelski
24 company, right?

25 A Yes.

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1 Q That owns the other 50 percent of NagraStar?

2 A Yes.

3 Q And there should be purchase orders then from NagraStar
4 to EchoStar is what your testimony is?

5 A Actually it would be from EchoStar to NagraStar.

6 Q You are correct.

7 A Yes.

8 Q And there should be purchase orders that total up to
9 something like 8 million cards?

10 A Actually there would be -- yes. It would be about 8.5
11 million.

12 Q It looks like when the cards were swapped in 2004 there
13 was some language added to the purchase order that says:
14 "In the event the S01 Smart Cards are compromised within
15 four years from each Smart Card shipment and security cannot
16 be restored in a reasonable time period without swapping
17 them during the warranty period of four years, Nagra Card
18 will replace for free the S01 cards shipped against this
19 PO." Do you see that?

20 A Yes.

21 Q That's substantially more favorable than the warranty
22 language we saw that provided direct marginal manufacturing
23 costs?

24 A Yes.

25 Q It doesn't get any better than free does it?

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1 A Well, yeah, it does if they would pay us the cost of
2 doing the swap, if they would help us with churn and all the
3 other costs that we incur when we are pirated. So it does
4 get better, but that's a pretty good deal.

5 Q That's a good benefit to both EchoStar and NagraStar
6 wouldn't you agree?

7 A Well, we bargained when we paid the \$7.50 for the Smart
8 Cards to get a secure card, so I wouldn't say it's a good
9 deal. I would just say we are getting what we paid for.

10 Q So part of this transaction involved getting free
11 replacement cards, and there is now going to be a new swap
12 in 2008; correct?

13 A I'm sorry?

14 Q Part of this bargain in the 2004 time frame involved
15 getting free replacement cards if there was any compromise?

16 A Yes. The PO stated that we would get -- if the Smart
17 Cards were compromised, they would be replaced for free.

18 Q And there is going to be a swap in 2008?

19 A Yes.

20 Q And those cards will be for free?

21 A Actually, no.

22 Q Well, are they being swapped because of a security
23 breach?

24 A Yes.

25 Q Why wouldn't the terms in this purchase order apply?

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1 A The two parties have negotiated a different -- a new
2 amendment to this warranty provision -- well, they are
3 contemplating doing it. Nothing has been actually
4 finalized.

5 Q Are they waiting for the outcome of this lawsuit?

6 A No.

7 Q As far as you know?

8 A No, they are not.

9 THE COURT: Let's find out who the two parties are
10 also.

11 BY MR. STONE:

12 Q Who is signature down at the bottom on the PO that
13 looks like a "C"?

14 A I am not quite sure, but it looks to be Charlie.

15 Q Meaning Mr. Ergen?

16 A Yes.

17 Q Who are the parties to these new negotiations, do you
18 know? Is it Mr. Ergen and Mr. Kudelski?

19 A Yes.

20 THE COURT: Which one Andre or Henry?

21 THE WITNESS: Actually I don't know. I know we
22 are talking with Kudelski, and I am not quite sure who. I
23 didn't know there was more than one Kudelski quite frankly.

24 BY MR. STONE:

25 Q Are you folks negotiating for something better than

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1 free cards?

2 A No. Actually it's going to cost us money.

3 Q So you are going from free cards to costing you money?

4 A Yes.

5 Q How much did DISH Network's revenues increase in 2001
6 over 2000?

7 A I would have to have a 10-K to tell you that number.

8 Q Does \$1.2 billion sound about right?

9 A It increased. I would have to see the 10-K. I can't
10 remember what it was in 2001.

11 Q Don't you recall in 2001 you had the single largest
12 percentage increase in revenues in the history of DISH
13 Network?

14 A No. I would have to look at the 10-K. That's many
15 years ago and many numbers ago.

16 Q Didn't you have a 50-percent increase in revenues in

17 2001 over 2000?

18 A Without our 10-K in front of us, I can't answer that
19 question with certainty that is.

20 Q Did anyone ever tell you in 2001 that the Conditional
21 Access System had been completely destroyed and fully
22 compromised?

23 A In 2001?

24 Q Yes, sir.

25 A I can't recall a conversation that that didn't happen.

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1 Q The same would be true for 2002?

2 A Yes.

3 MR. STONE: Thank you, sir. No further questions.

4 THE COURT: Redirect.

5 REDIRECT EXAMINATION

6 BY MS. WILLETTS:

7 Q Mr. Orban, counsel for the defendants referred you to
8 Exhibit 1585-A. Do you have that in front of you still?

9 A Yes.

10 Q I believe what you referred to when he was asking you
11 questions about some of the numbers in this exhibit was that
12 this was possibly a draft that you had used, and later on
13 Exhibit 406 ended up being the final based on numbers that
14 you had gathered as part of your efforts and your team's
15 efforts in this case; is that right?

16 A Yes, that's correct.

17 Q You don't contend that the numbers in Exhibit 406 are
18 exactly precise do you, Mr. Orban?

19 A Some of them are, and some are an estimate.

20 Q Based on Mr. Stone's questioning, is there any question
21 in your mind that EchoStar and NagraStar suffered
22 approximately \$94 million in damages as a result of the card
23 swap?

24 MR. STONE: Objection, calls for speculation.

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1 counsel. I am not too sure I am going to accept that
2 conclusion. For instance, looking at Exhibit 1584 with the
3 4 million -- do you see this?

4 THE WITNESS: Yes.

5 THE COURT: If you would turn to Exhibit 406, page
6 5 of 45, do you have that page?

7 THE WITNESS: Yes.

8 THE COURT: Do you see the total number 9,657,367
9 cards?

10 THE WITNESS: Yes.

11 THE COURT: Shouldn't the jury be entitled to know
12 where the other 5 million cards are in terms of packaging or
13 an order of some kind? In other words, we have 4 million
14 cards. Where's the other 5 million?

15 THE WITNESS: Well, again, these are POs from
16 NagraStar to Nagra --

17 THE COURT: I know somebody gathered these
18 figures. I am looking for the supporting documentation.
19 Where's the other 5 million?

20 THE WITNESS: We have POs in our system, and I
21 believe we provided it to defense counsel.

22 THE COURT: Are they on that disk?

23 THE WITNESS: I am not quite sure you go referring
24 to.

25 THE COURT: You said that they got a disk.

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1 THE WITNESS: I never said they got a disk.

2 MS. WILLETTS: Your Honor, that was my
3 representation. It's my understanding that there were

4 several more POS that were produced to the defendants in
5 this action.

6 THE COURT: That's what we are going to do
7 tonight. Unfortunately you will be coming back tomorrow.

8 THE WITNESS: I work at EchoStar. I am not a
9 stranger to that.

10 THE COURT: You have no idea.

11 THE WITNESS: I don't think you do either.

12 THE COURT: We will see when the sun comes up
13 tomorrow.

14 we have a little bit of work to do because I want
15 to see and verify that the documentation has been imparted
16 between counsel, where that came from. I think you are
17 entitled not only a summary but to know what the underlying
18 basis of that is. In other words, where is the other
19 packaging order? It's probably on a disk someplace, but we
20 will find out tonight.

21 You are admonished not to discuss this matter
22 amongst yourselves nor to form or express any opinion
23 concerning the case. We will see you tomorrow morning.

24 (Jury not present.)

25 THE COURT: Counsel, we are going to go through a

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1 search. You have that disk. Pull it out for me, either
2 side.

3 MS. WILLETTS: The disk was provided.

4 THE COURT: But you have got to have a copy, and
5 since you want the money --

6 MS. WILLETTS: We will locate it, Your Honor. Our
7 IT had a family emergency, so I will contact him.

8 THE COURT: Go find him. Meanwhile you might look
9 because let's just say you are not going to be in the best
10 favorable position if in fact they provided it to you. I
11 will impart it to the jury if you have it, so let's find it,
12 or let's find if it wasn't produced.

13 For my record, there has been so many accusations
14 over the last three years between NDS and EchoStar about
15 nonproduced documents, late discovery, incomplete records.
16 This is just a continuing issue that this Court has faced
17 with these two multi-national corporations.

18 (Recess.)

19 (Jury not present)

20 THE COURT: We are on the record. All the parties
21 are present. Counsel are present.

22 There was a request to receive 1268, which is a
23 letter from the United States Department of Justice signed
24 by James Spertus, Assistant United States Attorney, on
25 February 3, 2004.

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1 "Dear Mr. Dyer: As you know, during this past
2 year the United States Attorney's Office for the Central
3 District of California has been investigating allegations
4 that NDS Americas, NDS Group PLC, and other NDS affiliates
5 located in Israel have violated United States laws by
6 publishing or directing others to publish computer code to
7 enable third parties to compromise conditional access
8 devices manufactured by NDS and its competitors.

9 "Based on the information and evidence gathered as
10 a result of the investigation, this office has concluded
11 that there is insufficient evidence of wrongdoing by NDS to
12 seek criminal charges. This conclusion pertains only to
13 NDS, reflects only the judgment of this office, and does not
14 bind any other federal, state, or local prosecuting,
15 administrative, or regulatory authority."

16 There has been a request for the receipt of this
17 document by NDS.

18 Do either counsel wish to be heard further on this
19 matter?

20 MR. HAGAN: We do not, Your Honor.

21 MR. SNYDER: Yes, Your Honor. We have read the
22 Court's ruling, and we believe that plaintiffs have opened
23 the door to this investigation by referring to Mr. Norris's
24 meeting with Assistant United States Attorneys Chen and
25 Spertus, by referring to trial counsel by name as

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1 participating in that meeting, and that does not close the
2 loop, so to speak, on that investigation. By showing to the
3 jury the results of that investigation, it would be unduly
4 prejudicial to NDS.

5 THE COURT: I think you have already gotten into
6 evidence without this letter the fact that there was no
7 further criminal prosecution. I thought I was rather clear
8 about this before, but let me be even more clear.

9 During the testimony of John Norris, defense
10 counsel sought to introduce a letter written by Assistant
11 United States Attorney James Spertus indicating that the
12 United States Attorney's Office had insufficient evidence to
13 continue pursuing the case against NDS for publication of
14 EchoStar hack methodology on the Internet.

15 This document would have the effect of cleansing
16 NDS by showing that the United States Attorney in 1984
17 believed that NDS was not responsible for the conduct
18 alleged.

19 By the way, Mr. Spertus was in this courthouse at
20 that time and left shortly thereafter casting no aspersions
21 upon Mr. Spertus but for an industry very much related.

22 However, the document is substantially more
23 prejudicial than probative, and the Court will exclude it
24 under Federal Rule of Evidence 403. The document has the
25 potential to supplant the judgment of the jury with that of

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1 the United States Attorney's Office's limited information in
2 1984. Of course, the United States Attorney's Office is a
3 well-respected government agency. It might also give the
4 jury the impression that the United States Attorney's Office
5 approved of NDS's conduct, although such an interference may
6 be unwarranted.

7 Additionally, the fact that the United States
8 Attorney decided not to pursue the matter does not establish
9 that the acts in question did not occur. It merely reflects
10 a policy decision by the government agency in 2004. There
11 is no way of knowing what factors affect the decision to
12 terminate the investigation.

13 This document is excluded. You both have had a
14 full and fair opportunity to present your side of it in
15 terms of pursuit and not pursuit. This document under 403
16 is excluded.

17 Do you have a copy of this?

18 MR. STONE: Yes.

19 MR. HAGAN: Yes.

20 THE COURT: Defendants' brief concerning
21 evidentiary issues concerning Alan Guggenheim's testimony,
22 this arrived in chambers. Apparently it was filed
23 yesterday. I received it this morning. It takes a little
24 while to wind its way, but I find no fault with that.

25 As I understand it, you are concerned when

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1 Guggenheim takes the stand that he is going to relate a
2 conversation with Risler --

3 MR. STONE: Yes, and other people.

4 THE COURT: Let's take them one at a time.
5 Risler?

6 MR. STONE: Correct.

7 THE COURT: And Risler you say is classic hearsay.
8 Yet if you look at the document -- it's Mr. Norris I

9 believe -- if you look at document 1453, which is from
10 johnsurf@aol.com, which is John Norris -- two, look at the
11 portion I have outlined as well. Who is that?

12 THE COURT: Larry Risler of DirectTV.

13 THE COURT: So now we know that there is certainly
14 communication going on between Mr. Norris and who I assume
15 is Mr. Risler. There is a nexus. This isn't just hearsay
16 upon hearsay.

17 The difficulty becomes we all know that the
18 Federal Rules of Evidence would allow statements during the
19 course of an employment or agency relationship, but after
20 the termination of that relationship, the federal rules
21 would seem to speak to nonadmissibility, hearsay.

22 MR. STONE: Well, the statements -- the statements
23 are at a time when --

24 THE COURT: The difficulty is what we have are I
25 call sliding pirates.

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1 MR. STONE: As opposed to slippery pirates.

2 THE COURT: The difficulty is that you have people
3 who are, quote, "consultants," unquote, going to be employed
4 at different times by different entities. At the same time,
5 the companies are buying and selling parts of each other,
6 and it's the entire industry.

7 So when you start sorting that out, you have got a
8 crossover with some of these people who at one time claim to
9 have worked for one entity and at another time are
10 approached by another entity whether they worked with them
11 or not, so I am going to take the most expansive view.

12 These people are private contractors in a sense,
13 but also they are employed. The problem with this industry
14 is it has apparently shrunk to the point where we have two
15 or three competitors out there. Congress might be very
16 interested in that.

17 As such, with the nexus you can establish with
18 Risler, I am going to make the same ruling I did before
19 concerning the e-mails that NDS was concerned about subject
20 to a motion to strike because I think this is going to be
21 more fully developed as the case goes along. I feel very
22 confident that it's not hearsay, that there is a nexus, that
23 there is communication obviously with Mr. Norris in an
24 e-mail.

25 It's the same point you made yesterday about

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1 Mordinson and Shkedy in Israel when the Court was initially
2 concerned, and that is looking back at the whole Haifa
3 complex with Tarnovsky, the statements from Kommerling,
4 Kommerling is in Haifa, Kommerling is working with the
5 Israelis, working with Tarnovsky. There is a fairly good
6 foundation that I am not going to change that ruling, but we
7 will see.

8 As far as the first prong, the statements by
9 Risler to Guggenheim, they are admitted. Now, the problem
10 is -- and I am going to anticipate something. I am going to
11 anticipate the worst for the Court, and that is that Risler
12 now hears statements from somebody else, and we have got a
13 double hearsay problem. Is Risler going to convey
14 statements that he has heard from somebody else -- I mean --
15 I'm sorry. What's Guggenheim going to say? Risler told me
16 that Kommerling told me?

17 MR. HAGAN: I don't those are the specific
18 statements that Mr. Guggenheim is going to testify to, this
19 is what it is going to be used for --

20 THE COURT: I have to know the specific statements
21 that Mr. Guggenheim is going to testify to.

22 MS. WILLETTS: Which statements are you concerned
23 about?

24 THE COURT: What are you concerned about with
25 Risler?

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1 MR. STONE: The statements that are inconsistent
2 with his testimony is the vague statement Mr. Guggenheim
3 attributed to Mr. Risler that -- his statement was: "He is
4 a very nice gentleman, very professional, FBI and lawyer, so
5 it must have been a little subtle and discrete. I don't
6 recall the details." The gist of what Guggenheim said is
7 that Risler said something about him believing either NDS or
8 Tarnovsky were behind EchoStar piracy, and the details that
9 Mr. Guggenheim provided are just that. "It must have been a
10 little bit subtle and discrete. I don't recall the
11 details."

12 THE COURT: That's not inadmissible, but we need
13 to narrow that down to why Mr. Risler believes that. Is
14 there something that he heard within NDS? If so, from whom
15 and when?

16 Now, the second objection you had is on page --
17 first of all, under 403, the probative value outweighs the
18 prejudicial affect. You just need a nexus. It can't be
19 something that Guggenheim just says, well, I believe. I
20 heard and in the confines of NDS when I was CEO -- you know,
21 a description of "X" by somebody at around such and such a
22 date.

23 The second thing is we have three individuals --
24 Giles, Kaehlin, and Carayol, what are you concerned about
25 hearing from Guggenheim when he is on the stand initially

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1 with EchoStar about these three employees?

2 MR. STONE: My real concern is that it's just
3 going to be a launching pad for blatant hearsay, that he is
4 going to say that, well, they said that Mr. Tarnovsky was

5 involved, or they said NDS must be behind this.

6 THE COURT: So we don't know yet.

7 MR. STONE: I am anticipating it's going to be a
8 launching pad for --

9 THE COURT: What is he going to say?

10 MR. HAGAN: I don't think that Mr. Guggenheim is
11 going to attribute any statements made by Carayol or --

12 THE COURT: Is he or not?

13 MR. HAGAN: Certainly not during our
14 case-in-chief.

15 THE COURT: So it's not really a problem tomorrow.
16 You have to anticipate we are going to have a further
17 discussion about this. I don't think that these three
18 people are coming out on their case-in-chief.

19 You are lying in wait aren't you?

20 MR. HAGAN: Their names are coming out, and this
21 is why. We are only offering Guggenheim for one issue and,
22 that is, how he got these documents. He got these documents
23 through a joint investigation with the representatives of
24 Canal+ when they were suing NDS, and they were investigating
25 NDS. There was a meeting that occurred in Denver when Mr.

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1 Guggenheim met with Kaehlin, Carayol, and the attorney
2 representing Canal+, so their names will come out, but Mr.
3 Guggenheim -- I am not going to ask him what did they say?

4 THE COURT: But he can say I met with them in
5 Denver at 1:00 a.m. in the morning in a small airport -- I
6 am just kidding you.

7 MR. STONE: Thank you.

8 THE COURT: But then is the kicker going to be, by
9 the way, Tarnovsky told me he is Nipper?

10 MR. HAGAN: No.

11 THE COURT: If that's coming, you need to forewarn
12 me.

13 MR. HAGAN: I will be happy to tell Mr. Guggenheim
14 to answer just the question that he is asked and not to
15 volunteer additional evidence.

16 THE COURT: I don't think it's an issue right now,
17 but obviously it's going to become an issue.

18 First of all, you have a gentleman now who has
19 triplets on the way. For goodness sake, let's try to be
20 kind. If you are going to put somebody up here and he just
21 going to read a summary page, maybe he ought to know what
22 the underlying documents are.

23 So we have to minimally know where this 5 million
24 other units come from. I am not going to land on NDS
25 because it came so late in the game like of your discovery

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1 so both sides, so it's a little hard for me to say anything,
2 and I'm not going to. So we are going to find that, okay.
3 No. 2, you have got plenty of time. You have got four or
4 five attorneys.

5 The next thing is educate me. What's going on
6 with Kudelski and this warranty. I look at their sheet, and
7 it's \$10 per 9,500,000 some, but then if you look at the
8 sheet, it's \$8, and then there is a markup. So there are
9 two things. First of all, there is liability attached. No.
10 2, if it does attach, what is the fair amount of liability
11 before you ever get to punitives because you could be
12 \$25 million off, which might not be a large sum in this
13 lawsuit, but if you get liability hypothetically for
14 \$125 million, well, that \$25 million punitives could expand
15 two, three, five times.

16 So all of a sudden those figures mean a lot in
17 terms of liability because in the overall scheme of this
18 lawsuit, \$25 million might not be a lot of money, but if
19 you're asking for punitives that compounds then if the jury
20 agrees with your position, and that could become a
21 \$100 million error just like that. So that's what I am

22 bearing down on you to get accurate figures, and I don't
23 like the position Mr. Shelton is in.

24 If you noticed on cross-examination -- it was the
25 gentleman who came back and tried to clean up very quickly

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1 Tarnovsky's guesstimate within the document that there were
2 100,000 units.

3 MR. KLEIN: That was me.

4 THE COURT: Frankly, so we are blunt with each
5 other what is happening is NDS is terrified right now that I
6 might believe that when Norris got this figure of 100,000
7 that that's the figure that I would minimally let go to the
8 jury because that was Tarnovsky's estimate back to Norris.

9 So if you listen carefully what was said, golly,
10 gosh, you wouldn't rely on that figure at all would you, Mr.
11 Norris? Oh, no, I wouldn't because it lacks foundation. It
12 was just a wild guesstimate. The only problem is somebody
13 within NDS requested it. So it's kind of a tough call for
14 me because it may be a guesstimate. But how do I know that
15 until Tarnovsky is on the stand and I hear how he came out
16 with this either finite number or absolute figment of his
17 imagination? But he had to have something to convey this
18 100,000 figure. Now, that's a lot better than 150,000 we
19 started or 162,000 that we started with over the weekend,
20 but that doesn't mean it's accurate.

21 I don't want to get to the end of the case if
22 there is liability and then have to start reducing and
23 ferreting through our motions for a new trial that you
24 uniquely have at your disposal.

25 Mr. Snyder has been asking repeatedly for the

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1 subscribers activated --

2 MR. SNYDER: Activation.

3 THE COURT: Because what it does is it takes all
4 the guestimate for Mr. Shelton.

5 Do you have those figures yet?

6 MR. HAGAN: We have the figures that we had
7 yesterday, and that is --

8 THE COURT: I'm not interested.

9 Do you have the new figures?

10 MR. HAGAN: There are no new figures. There is no
11 way -- EchoStar tried to go back to their archive data.
12 They cannot track ROM version cards that were continuously
13 activated in a quarter.

14 THE COURT: Can they do it for a year?

15 MR. HAGAN: They can't do it at all.

16 THE COURT: Why? I am a subscriber. They know I
17 have been a subscriber since 1996 or 1997. They know my
18 card has been activated since 1997. Now, I might have a
19 change-out of a card. I might have upgraded my services
20 with hypothetically DirectTV or EchoStar, but you can count
21 and tell me how many subscribers out there.

22 In addition, he is after what I perceive to be
23 activations occurring in this time period. Why can't you
24 simply give the number of subscribers at the end of the
25 quarter and have him compare the beginning of the quarter or

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1 the beginning of the year. Why doesn't that work, Mr.
2 Snyder? It seems to me that it's a matter of subtraction,
3 so you may have enough already. I am just trying to get Mr.
4 Kudelski to perform because he is over in Switzerland.

5 MS. WILLETTS: Kudelski doesn't have this
6 information.

7 MR. WELCH: It would be within EchoStar.

8 THE COURT: Why can't you do that?

9 MR. SNYDER: What we are trying to get to -- I
10 will put on the record now or at a later time why I think
11 this is methodologically flawed, but the surrogate that the
12 Court has instructed EchoStar to try and develop is to take
13 some general number of estimated pirates and figure out how
14 many of those are ROM 2 pirates, ROM 3 pirates, ROM 10
15 pirates or something else.

16 The surrogate that the Court has instructed them
17 to come up with is how many people had those cards on a
18 given date? And we will assume that the amount of piracy is
19 evenly spread prorata. But you cannot get there by taking
20 how many cards were activated and how many subscribers there
21 were even if you take it over time and back numbers out
22 because you still don't know whether the same subscribers
23 continued.

24 Let me use a simple example. Let's say in one of
25 the earliest years someone got a ROM 2 card, 1997.

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1 THE COURT: And did not upgrade?

2 MR. SNYDER: And did not upgrade. They have got a
3 ROM 2 card until the card swap in 2004, that the soft swap
4 that Shelton testified about never happened. In 1997, he is
5 a subscriber, so we have a subscriber, and he goes all the
6 way through. Now you have got somebody who is a ROM 3 user
7 in 2001, and they go until 2004. So in 2003, you see one
8 person added, and you are going to then --

9 THE COURT: Old subscriber, a different household,
10 ROM 2; new subscriber, different household, ROM 3.

11 MR. SNYDER: Right.

12 THE COURT: Two.

13 MR. SNYDER: You have got a total of two. Now,
14 you are going to have years where you have multiple cards
15 being issued.

16 THE COURT: Multiple cards to the same subscriber?

17 MR. SNYDER: Multiple cards to the pool of

18 subscribers, and you are going to have people come out and
19 people come in.

20 THE COURT: So I am a subscriber, and are you
21 concerned that I have a ROM 2 card, and I switch out to a
22 ROM 3, and I keep my ROM 2 because I thought I had to trade
23 in my ROM 2 to get my ROM 3?

24 MR. SNYDER: If it's the same subscriber,
25 presumably they would only have one card.

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1 THE COURT: That's not what I'm concerned about.
2 What I am concerned about is that there is approximately --
3 what was the number -- I am concerned that there are about
4 9.5 million card swap cards produced, right?

5 MR. SNYDER: Of ROM 10 cards.

6 THE COURT: For the general swap-out.

7 MR. SNYDER: That was for the nonexistent soft
8 swap. There was about 9 million some ROM 10 cards, and they
9 had about 5 million subscribers.

10 THE COURT: That's what I was concerned about
11 concerning your argument. In other words, there is a huge
12 production of excess cards that EchoStar can potentially
13 claim damages on if this just rolls in when in effect they
14 cannot account for why they need the extra -- I may be naive
15 about this, but why do they need the extra 4 million cards?

16 If you have 5 million some subscribers and you are
17 going to switch out and you produce 9.4 million cards, it's
18 not fair to let EchoStar go to the jury calculating out
19 8 million or 9 million cards when many of those cards are
20 going to be in the warehouse and never go out to the
21 consumer or to a retailer sitting on a shelf and never go
22 out to a consumer, so minimally if we get to damages, there
23 is a tremendous discount on the number.

24 what are we going to do with this gentleman? He
25 is a nice man, a nice witness. He hasn't looked at these

1 documents. He has gotten up and read a summary. He had a
2 team prepare them that cooperated with another team. If he
3 can't produce some assemblance of what is underlying this,
4 I'm inclined --

5 MS. WILLETTS: He personally went through Exhibit
6 406 and the numbers in that exhibit and compared them -- he
7 personally went through every line item in there and
8 compared them with his general ledger.

9 THE COURT: It's not clear to me. I don't think
10 it's clear to the jury.

11 MR. WELCH: It's the card swap numbers.

12 THE COURT: It's what they know. If you are not
13 conveying it to them, you put them in a really unfair
14 position of guessing. You're both welcome to open that area
15 up again. There is no time rush.

16 Finally, because the documents keep coming to us
17 so late -- I really want to continue to compliment counsel,
18 all of you, in front of the jury. I am doing that privately
19 this evening, and I have got a record. I really appreciate
20 the fact that I really think counsel regardless of the
21 bickering between the two of you in an advocacy position
22 have really made an effort on behalf of your clients to get
23 this in to the court, but this last-moment foot-dragging
24 after three years with these documents coming in in this
25 fashion are bringing the chickens home to roost.

1 what I am doing to you now is I am opening up the
2 lawsuit. I remind you consistently I am not taking away
3 your arguments. I am giving them back to you. I find no
4 fault with counsel. I have a tremendous concern that these

5 multi-national corporations crossing international
6 boundaries are thinking quite frankly -- apparently somebody
7 or a group think they can get away with it. This has been
8 going on for three years now, and I am just leaving you to
9 your best arguments and my compliments to counsel. Counsel
10 have nothing to do with it.

11 what else are we going to do today? It's too
12 early to go home.

13 MR. SNYDER: I believe you wanted Mr. Norris in to
14 go over his phone book.

15 THE COURT: Invite Mr. Norris to come in.

16 MR. SNYDER: You said for him to be here at 6:00.

17 THE COURT: Who is going to testify tomorrow?

18 MR. HAGAN: We are going to finish up with Mr.
19 Orban, and then after that, the video clips of Allen Menard
20 for about an hour. That's total actually. After that, Mr.
21 Guggenheim on the one specific issue. From our side, it
22 will take 30 to 40 minutes.

23 THE COURT: Mr. Stone.

24 MR. STONE: How about 15?

25 THE COURT: So about two and a half hours so far.

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1 And then after that?

2 MR. HAGAN: Video clips of Stan Frost.

3 THE COURT: That's a logical breaking point to
4 send them home without splitting the testimony. You are
5 getting towards the end of your case. You have the people
6 coming from Europe on Tuesday, and we are going to be in
7 session on Tuesday.

8 On Tuesday, who is going to be called?

9 MR. HAGAN: Tarnovsky, Ereiser, Dionisi. Graham
10 James still hasn't gotten his travel visa. They pushed his
11 appointment to the 23rd. They don't want to offer him. We
12 do. So if we want to offer him, I know we have to have him
13 here live. Assuming that they give him permission, we may

14 have to call him in our rebuttal case or out of order in
15 their case.

16 THE COURT: If he is getting a passport, even
17 though you would be calling him late, I would let you call
18 him during their case if it's a couple days but not --

19 Is Mr. Tarnovsky going to be the first witness?

20 MR. WELCH: After Mr. Rubin.

21 THE COURT: Who is after Rubin?

22 MR. WELCH: Shelton.

23 THE COURT: Shelton is not getting on the stand
24 unless I have more.

25 MR. HAGAN: Ereiser, Dionisi, then Tarnovsky.

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1 THE COURT: Finally, what are we going to do -- I
2 think you are going to get to the jury just about the time
3 that Mr. Bender is ready to go see his daughter graduate in
4 Mississippi.

5 MR. SNYDER: North Carolina.

6 THE COURT: First of all, he is going to his
7 daughter's graduation. Those are great moments. You can do
8 one of two things. You can obviously discontinue the trial
9 for that period of time, but that might be devastating to
10 both of you. When the information is fresh in the jury's
11 mind, that's a difficult place to be, or what you could do
12 is this -- and I am not forcing this on you. We will decide
13 in a week or two and see how far we get. You could
14 designate him as an alternate. You could let him go because
15 as long as we have six jurors -- we have seven. We could
16 let him go, and he is the one alternate.

17 I toss that out to you if you want to keep the
18 case in deliberations consecutively. Otherwise, the jury
19 leaves on a Thursday, and that means they are out of session
20 Thursday, Friday, Saturday, and Sunday. So let's wait.
21 There is no decision now, but it's a way to keep the case

22 moving through deliberations.

23 It's now five after 6:00.

24 MR. KLEIN: I did not make it clear to Mr. Norris
25 that he needs to be back. I can have him here first thing

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1 tomorrow.

2 THE COURT: Pay him the courtesy of calling him.
3 As him before I let this go into the jury -- it's already
4 received. Just pay him the courtesy of checking and see if
5 there is any personal information -- you know, family,
6 things of that type, or friends, because the public is not
7 entitled to know it's them.

8 MR. KLEIN: We would be happy to stipulate --

9 THE COURT: You don't have to do that. Just call
10 the gentleman. If there is nothing on that page that is a
11 concern, the whole page goes in. It shows the relationship
12 of where Mr. Ergen's phone number is -- his old phone
13 number.

14 MR. WELCH: It's still his office number.

15 THE COURT: What else do we need to do for
16 tomorrow?

17 MR. EBERHART: I believe the Court was still
18 intending to issue a final ruling on Mr. Frost and his
19 assertion of the Fifth Amendment.

20 THE COURT: I am not going to allow the assertion
21 of the Fifth Amendment. I have now viewed the tape as well
22 as heard the evidence. That's objected to by NDS for all
23 the previous reasons, and it's a continuing objection.

24 MR. HAGAN: There is one thing I think -- and I
25 don't know how we need to make it clear to the jury. When

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1 Mr. Stone was cross-examining Christophe Nicolas he tried to
2 make the point to the jury that a lot of the attachments
3 weren't produced in discovery. I think when Mr. Cohan came
4 in here the next day and said, no, judge, here they are, I
5 think that you were under the impression that they were just
6 getting them. That's not the case. Those attachments were
7 produced months ago in discovery. They came in a separate
8 wave after the initial e-mails. There is only one thing
9 that I am aware that hasn't been located, and that's the
10 floppy disk.

11 So I don't know if we need to call Mr. Nicolas
12 back to the stand for five minutes to say you have seen
13 these documents. Were they produced in discovery?

14 THE COURT: A mutual way to handle that if you
15 want to, Mr. Stone, is simply a stipulation that the
16 documents have been produced, and you don't set a time
17 frame. It just removes 20 minutes of testimony and flying
18 Mr. Nicolas back.

19 MR. STONE: We got them produced the night before,
20 and that was in production. We will check again. If I am
21 wrong, I will be happy to stipulate to that.

22 MS. WILLETTS: I think the record needs to be
23 cleared up with Mr. Nicolas because impressions were made
24 that certain documents could have related to hacking when in
25 fact actually the attachments verify what he testified to,

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1 so I think that's necessary to clarify with the jury.

2 MR. HAGAN: In other words, the files were
3 distinct that were downloaded from the internet, and the
4 underlying documents establish that.

5 MR. STONE: We will check that.

6 THE COURT: We can check that tonight.

7 MS. WILLETTS: I have it with me here.

8 THE COURT: Do we need the reporter any longer?

9 MR. HAGAN: We don't.

10 MR. SNYDER: I don't believe so.

11 My understanding with respect to Mr. Shelton is
12 that he is not going to be allowed to testify until they are
13 able to produce the --

14 THE COURT: No, I didn't say that. I said I am
15 going to let this settle out and see what they produce.
16 They may have enough already from my perspective. You may
17 not have. I want to hear the representation on the record
18 that you can't make this run, and I want to hear Mr. Shelton
19 back up on the stand tomorrow at 1:00, and he will complete
20 his testimony.

21 MR. SNYDER: We don't know what he is going to
22 talk about at 1:00.

23 THE COURT: I don't either. I need to hear it.

24 MR. SNYDER: I can't represent that I will be
25 ready to cross-examine Mr. Shelton.

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1 THE COURT: I didn't say you would be.

2 Now, do we need the reporter?

3 MR. SNYDER: No, Your Honor.

4 (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 17, 2008

Sharon A. Seffens 4/17/08

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