

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

- - - - -

ECHOSTAR SATELLITE CORPORATION,)
et al.,)
)
Plaintiffs,)
)
vs.) No. SACV 03-950 DOC
) Day 7, Volume II
NDS GROUP PLC, et al.,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Friday, April 18, 2008

Debbie Gale, CSR 9472, RPR
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
(714) 558-8141

EchoStar 2008-04-18 D7V2

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APPEARANCES OF COUNSEL:

FOR PLAINTIFF ECHOSTAR SATELLITE CORPORATION, ET AL.:

T. WADE WELCH & ASSOCIATES

BY: CHAD M. HAGAN

CHRISTINE D. WILLETTS

WADE WELCH

DAVID NOLL

Attorneys at Law

2401 Fountainview

Suite 700

Houston, Texas 77057

(713) 952-4334

FOR DEFENDANT NDS GROUP PLC, ET AL.:

O'MELVENY & MYERS

BY: DARIN W. SNYDER

DAVID R. EBERHART

Attorneys at Law

275 Embarcadero Center West

Suite 2600

San Francisco, California 94111

(415) 984-8700

-and-

HOGAN & HARTSON

BY: RICHARD L. STONE

KENNETH D. KLEIN

Attorneys at Law

1999 Avenue of the Stars

Suite 1400

Los Angeles, California 90067

(310) 785-4600

ALSO PRESENT:

David Moskowitz

Dov Rubin

I N D E X

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SANTA ANA, CALIFORNIA, FRIDAY, APRIL 18, 2008

Day 7, Volume II

(12:22 p.m.)

(In the presence of the jury.)

THE COURT: All right. The jury's present. All counsel are. Thank you for your courtesy.

If you would like to continue playing Mr. Frost's testimony.

STANLEY FROST, PLAINTIFF'S WITNESS

PRODUCED VIA VIDEO DEPOSITION

PLAINTIFF'S DESIGNATIONS

(Excerpt of Frost video deposition played.

Transcript of video incorporated herein as provided by plaintiff's counsel as follows:)

Page 178:13-178:17

178:13 A. I have to take the Fifth on that.

178:14 Q. Did you ever receive any packages

178:15 from Allen Menard where he used the sender

178:16 information NCRYPT, all in capital letters,

178:17 N-C-R-Y-P-T?

Page 178:19-178:21

178:19 A. I have to take the Fifth.

178:20 Q. Did you ever receive a gift

178:21 certificate to Toys-R-Us from Allen Menard?

Page 178:23-178:23

1 178:23 A. No.

2 Page 136:19-137:6

3 136:19 Q. Have you ever had any conversations
4 136:20 with Christopher Tarnovsky regarding NDS
5 136:21 reverse engineering EchoStar's conditional
6 136:22 access system?

7 136:23 A. I'll have to take the Fifth on
8 136:24 that.

9 136:25 Q. Have you ever had any conversations
10 137: 1 Highly Confidential - Frost
11 137: 2 with Allen Menard regarding NDS reverse
12 137: 3 engineering EchoStar's conditional access
13 137: 4 system?

14 137: 5 A. I'll have to take the Fifth on
15 137: 6 that.

16 Page 135:7-135:11

17 135: 7 Q. Have you ever had any conversations
18 135: 8 with Christopher Tarnovsky about NDS's
19 135: 9 knowledge of his involvement in satellite
20 135:10 piracy of EchoStar conditional access system?

21 135:11 A. I have to take the Fifth on that.

22 Page 134:16-134:23

23 134:16 Q. Have you ever had a conversation
24 134:17 with Christopher Tarnovsky dealing with
25 134:18 issues relating to his involvement in

1 134:19 reprogrammed EchoStar access cards and NDS's
2 134:20 knowledge of his involvement?

3 134:21 A. It's a twofold question.

4 134:22 No, I have to take the Fifth on
5 134:23 that.

6 Page 145:9-145:13

7 145: 9 Q. Have you ever had any conversations
8 145:10 with Christopher Tarnovsky regarding his
9 145:11 ability to circumvent EchoStar's conditional
10 145:12 access system?

11 145:13 A. I have to take the Fifth.

12 Page 151:17-151:22

13 151:17 Q. Did Christopher Tarnovsky ever
14 151:18 indicate to you that NDS could provide you
15 151:19 with protection from RCMP raids or
16 151:20 investigations if you agreed to participate
17 151:21 in the distribution of reprogrammed EchoStar
18 151:22 access cards?

19 Page 151:24 -151:24

20 151:24 A. I have to take the Fifth on that.

21 Page 141:13-141:15

22 141:13 Q. Have you ever communicated with
23 141:14 Christopher Tarnovsky using the alias Von?

24 141:15 A. I'll take the Fifth on that.

25

1 Page 142:22-143:2

2 142:22 Q. Have you ever had any
3 142:23 communications with Christopher Tarnovsky
4 142:24 with him using the alias Big Gun or an
5 142:25 abbreviated form of it, BG?

6 143: 1 Highly Confidential - Frost

7 143: 2 A. I'll take the Fifth on that.

8 Page 140:19-141:6

9 140:19 Q. Have you ever had a conversation
10 140:20 with Christopher Tarnovsky regarding his use
11 140:21 or alleged use of the alias Nipper 2000 to
12 140:22 post information relating to EchoStar's
13 140:23 conditional access system?

14 140:24 A. I'll take the Fifth on that.

15 140:25 Q. Have you ever had a conversation

16 141: 1 Highly Confidential - Frost

17 141: 2 with Allen Menard regarding Christopher
18 141: 3 Tarnovsky's use of the alias Nipper 2000 to
19 141: 4 post information relating to EchoStar's
20 141: 5 conditional access system?

21 141: 6 A. I'll take the Fifth on that.

22 Page 143:8-143:16

23 143: 8 Q. Have you ever had any
24 143: 9 communications with Christopher Tarnovsky
25 143:10 with him using the alias Nipper 2000?

1 143:11 A. I'm take the Fifth on that.

2 143:12 Q. Have you ever had any

3 143:13 communications with Christopher Tarnovsky

4 143:14 with him using the alias Nipper Clauze,

5 143:15 C-l-a-u-z-e?

6 143:16 A. I'll take the Fifth on that.

7 Page 145:14-145:18

8 145:14 Q. Have you ever had any conversations

9 145:15 with Christopher Tarnovsky regarding NDS's

10 145:16 instructions to him relating to issues of

11 145:17 EchoStar piracy?

12 145:18 A. I'll have to take the Fifth.

13 Total Length - 00:22:49

14 (End of plaintiff's designations.)

15 THE COURT: Does that conclude the tape?

16 MR. HAGAN: For the plaintiffs, it does.

17 The defendants have some additional offering.

18 THE COURT: Please.

19 These are the designated portions by the plaintiff

20 that have just been played.

21 Now, these are now designated portions by the

22 defendant.

23

24 DEFENSE DESIGNATIONS

25 (Excerpt of Frost video deposition played.

1 Transcript of video incorporated herein as
2 provided by defense counsel as follows:)

3 Page Range: 009:2-009:6

4 9: 2 Q. And you're appearing today with
5 9: 3 your attorney; is that correct?

6 9: 4 A. That's correct.

7 9: 5 Q. And your attorney's name is who?

8 9: 6 A. Anthony Gordon.

9 Page Range: 062:2-62:10

10 62: 2 Q. When did you retain Mr. Gordon to
11 62: 3 represent you?

12 62: 4 A. Within a month after the -- I
13 62: 5 received the subpoena I would say.

14 62: 6 Q. A subpoena for this litigation?

15 62: 7 A. No. I was a defendant originally,
16 62: 8 because they had me as a witness, and I
17 62: 9 hadn't returned their phone calls, and they
18 62:10 turned me into a defendant.

19 Page Range: 063:18-63:21

20 63:18 Q. Do you have any agreement with NDS
21 63:19 regarding your legal fees in connection with
22 63:20 the EchoStar-NDS litigation?

23 63:21 A. No.

24 Page Range: 039:25-40:11

25 39:25 Q. Okay. Have you ever been employed

1 40: 1 Highly Confidential - Frost

2 40: 2 by NDS?

3 40: 3 A. No.

4 40: 4 Q. Have you ever been a consultant for

5 40: 5 NDS?

6 40: 6 A. No.

7 40: 7 Q. Have you ever been paid by NDS?

8 40: 8 A. No.

9 40: 9 Q. Have you ever been paid by anyone

10 40:10 on behalf of NDS?

11 40:11 A. No.

12 Page Range: 059:18-060:2

13 59:18 Q. What work have you done for DirecTV

14 59:19 in 2007?

15 59:20 A. I -- I monitor any satellite piracy

16 59:21 that's going on.

17 59:22 Q. And which forms? On the Internet?

18 59:23 A. Yeah, on the Internet.

19 59:24 Q. Any other forms?

20 59:25 A. Through contacts, people I know,

21 60: 1 Highly Confidential - Frost

22 60: 2 phone.

23 Page Range: 053:24-054:7

24 53:24 Q. Have you provided services to any

25 53:25 other clients in 2007 separate and apart from

1 54: 1 Highly Confidential - Frost

2 54: 2 DirecTV or Galaxy Latin America?

3 54: 3 A. No. No.

4 54: 4 Q. Who are the clients that you

5 54: 5 serviced in 2006?

6 54: 6 A. It would be the same. It would be

7 54: 7 the same answer for the last five years.

8 Page Range: 080:25-081:7

9 80:25 Q. Who recruited you to come work for

10 81: 1 Highly Confidential - Frost

11 81: 2 DirecTV?

12 81: 3 A. Larry Rissler.

13 81: 4 Q. How long after your arrest in May

14 81: 5 of 2001 did Mr. Rissler approach you about

15 81: 6 working for DirecTV?

16 81: 7 A. About nine months.

17 Page Range: 081:19-82:15

18 81:19 Q. Describe for me the facts and

19 81:20 circumstances surrounding Larry Rissler

20 81:21 talking with you about coming to work for

21 81:22 DirecTV.

22 81:23 A. I had been communicating with Larry

23 81:24 via e-mail, I don't know, about four, five,

24 81:25 six months. I don't know how it started.

25 82: 1 Highly Confidential - Frost

1 82: 2 It's kind of weird. And I -- I gave him some
2 82: 3 information, helped him out with some things
3 82: 4 that he was working on. And then the P3 hack
4 82: 5 came out, and before it came out I had heard
5 82: 6 something about it, and I asked Larry if he
6 82: 7 wanted me to check into it for him, and he
7 82: 8 did, and I ended up sending him -- this was
8 82: 9 even before it was being sold on the street
9 82:10 or, you know, on the websites. And had --
10 82:11 people actually sent me three cards, and I
11 82:12 sent a couple of them to DirecTV. This was
12 82:13 before it was being sold, period, so --

13 82:14 Q. Who sent you those three cards?

14 82:15 A. People out of Detroit.

15 Page Range: 084:13-86:16

16 84:13 Q. Do you know why you received these
17 84:14 three cards in the mail?

18 84:15 MR. GORDON: Objection. Calls for
19 84:16 speculation. No foundation.

20 84:17 A. I had asked some people if they --
21 84:18 I -- see, I knew DirecTV would be interested
22 84:19 in these, after that new card, and so I put
23 84:20 the word out that I was interested in buying
24 84:21 a lot, maybe 500 cards, and I got the call.
25 84:22 Of course I -- I -- I don't want to speculate

1 84:23 on --

2 84:24 Q. Okay. And they, these people whose

3 84:25 names you can't remember --

4 85: 1 Highly Confidential - Frost

5 85: 2 A. I don't remember.

6 85: 3 Q. -- who you'd never met before --

7 85: 4 A. I only has his first name.

8 85: 5 Q. That's fine. I just want to make

9 85: 6 sure I understand your testimony.

10 85: 7 These people whose names you can't

11 85: 8 remember --

12 85: 9 A. Right.

13 85:10 Q. -- who you had never met before --

14 85:11 A. Right.

15 85:12 Q. -- sent you three DirecTV access

16 85:13 cards?

17 85:14 A. Yes.

18 85:15 Q. Okay. Were they modified or

19 85:16 pirated in any way?

20 85:17 A. Yes.

21 85:18 Q. How did you know?

22 85:19 A. I put one in my receiver.

23 85:20 Q. And it worked.

24 85:21 A. Yes.

25 85:22 Q. And this was after you were

1 85:23 arrested in May of 2001 for signal theft,
2 85:24 correct?

3 85:25 A. Yes.

4 86: 1 Highly Confidential - Frost

5 86: 2 Q. And then you sent those three cards
6 86: 3 to DirecTV?

7 86: 4 A. Yeah.

8 86: 5 I just want to say that U.S.

9 86: 6 Customs knew these cards were coming to me,
10 86: 7 as I informed them of what was going on, and
11 86: 8 they were up to date on everything that was
12 86: 9 going on with this.

13 86:10 Q. So you were working undercover.

14 86:11 A. (Inaudible). They knew it was
15 86:12 coming. DirecTV knew, U.S. Customs knew,
16 86:13 everyone knew it was coming.

17 86:14 Q. And you sent these cards to
18 86:15 DirecTV.

19 86:16 A. Right.

20 Page Range: 098:20-99:11

21 98:20 Q. Have you ever provided assistance
22 98:21 to any state or federal government agency?

23 98:22 A. Yes.

24 98:23 Q. Have you ever provided assistance
25 98:24 to any Canadian state or federal government

1 98:25 agency?

2 99: 1 Highly Confidential - Frost

3 99: 2 A. Yes.

4 99: 3 Q. Can you list those agencies for me.

5 99: 4 A. RCMP.

6 99: 5 Q. What else?

7 99: 6 A. That's the only one I recall.

8 99: 7 Q. With respect to the U.S. Government

9 99: 8 agencies, other than U.S. Customs, have you

10 99: 9 provided any assistance whatsoever to any

11 99:10 other federal or state government agency?

12 99:11 A. Yes. FBI and U.S. Attorney.

13 Page Range: 231:11-231:18

14 231:11 Q. Who is Ron Ereiser?

15 231:12 MR. HAGAN: Foundation.

16 231:13 A. He's a -- I think he's working for

17 231:14 EchoStar right now.

18 231:15 Q. Are you aware of any involvement by

19 231:16 Ron Ereiser in EchoStar piracy?

20 231:17 MR. HAGAN: Foundation.

21 231:18 A. I have to take the Fifth on that.

22 Page Range: 231:22-232:13

23 231:22 Q. Are you familiar with an individual

24 231:23 who uses the nickname Wave Guy?

25 231:24 A. I have to take the Fifth on that.

1 231:25 Q. Are you aware of any involvement in
2 232: 1 Highly Confidential - Frost
3 232: 2 EchoStar piracy by an individual who uses the
4 232: 3 name Wave Guy?
5 232: 4 A. I have to take the Fifth on that.
6 232: 5 Q. Are you familiar with a person or
7 232: 6 entity that uses the name El Camino?
8 232: 7 A. I have to take the Fifth on that.
9 232: 8 Q. Are you familiar with any
10 232: 9 involvement in EchoStar piracy by an
11 232:10 individual or entity that uses the name El
12 232:11 Camino?
13 232:12 MR. HAGAN: Foundation.
14 232:13 A. I have to take the Fifth.
15 Page Range: 232:20-233:11
16 232:20 Q. Are you familiar with an individual
17 232:21 named Peter Beacock?
18 232:22 A. I have to take the Fifth on that.
19 232:23 Q. Are you familiar with an individual
20 232:24 named Jeff Pelletier?
21 232:25 A. I have to take the Fifth on that.
22 233: 1 Highly Confidential - Frost
23 233: 2 Q. Are you familiar with any
24 233: 3 involvement on EchoStar piracy by Jeff
25 233: 4 Pelletier?

1 233: 5 MR. HAGAN: Foundation, form.

2 233: 6 A. I have to take the Fifth on that.

3 233: 7 Q. Are you familiar with any

4 233: 8 involvement in EchoStar piracy by Peter

5 233: 9 Beacock?

6 233:10 MR. HAGAN: Same objection.

7 233:11 A. I have to take the Fifth on that.

8 Page Range: 233:13-234:3

9 233:13 Q. Are you familiar with any EchoStar

10 233:14 piracy by Larry Pylon or Peter Beacock?

11 233:15 MR. HAGAN: Form.

12 233:16 A. I have to take the Fifth.

13 233:17 MR. HAGAN: Foundation.

14 233:18 Q. Are you aware of the identities of

15 233:19 any people who have developed pirate

16 233:20 technology for EchoStar?

17 233:21 A. I have to take the Fifth on that.

18 233:22 MR. HAGAN: Same objections.

19 233:23 Q. Are you aware of the identities of

20 233:24 any persons who distributed pirate technology

21 233:25 for EchoStar?

22 234: 1 Highly Confidential - Frost

23 234: 2 MR. HAGAN: Foundation.

24 234: 3 A. I have to take the Fifth on that.

25

1 Page Range: 223:2-223:6

2 223: 2 Q. You also testified earlier today
3 223: 3 that EchoStar sought to recruit you as a
4 223: 4 witness. Did I understand your testimony
5 223: 5 correctly?

6 223: 6 A. Yes.

7 Page Range: 223:10-223:17

8 223:10 Q. What did you mean by that?

9 223:11 A. Well, they had tried to get in
10 223:12 contact with me prior to -- I think -- hm.
11 223:13 They contacted me prior to being made a
12 223:14 defendant in this case. I think they had Ron
13 223:15 Ereiser call me up.

14 223:16 Q. When did Mr. Ereiser call you on
15 223:17 behalf of EchoStar?

16 Page Range: 223:21-224:24

17 223:21 Q. Would you repeat your answer?

18 223:22 A. About a month before the -- the
19 223:23 second amended complaint came out.

20 223:24 Q. And what did Mr. Ereiser tell you?

21 223:25 MR. HAGAN: Form, foundation.

22 224: 1 Highly Confidential - Frost

23 224: 2 A. He -- he wanted me to -- to
24 224: 3 cooperate with EchoStar's attorneys in a
25 224: 4 lawsuit.

1 224: 5 Q. And did Mr. Ereiser tell you that
2 224: 6 he was working on behalf of EchoStar?

3 224: 7 MR. HAGAN: Form, foundation.

4 224: 8 A. No.

5 224: 9 Q. What did he say about his
6 224:10 relationship with EchoStar?

7 224:11 MR. HAGAN: Same objection.

8 224:12 A. I don't know. It was two years
9 224:13 ago. I don't really recall, but it was to --
10 224:14 to the extent that if -- you know, if you're
11 224:15 not going to be a witness or help out, then
12 224:16 you end up being a defendant.

13 224:17 Q. And was that the -- the first time
14 224:18 that EchoStar had sought to recruit you as a
15 224:19 witness in this case?

16 224:20 MR. HAGAN: Form, foundation.

17 224:21 A. JJ Gee had tried to contact me for
18 224:22 about a month, again, before the second
19 224:23 amended complaint. I didn't return his phone
20 224:24 calls.

21 Page Range: 235:13-235:22

22 235:13 Q. You testified that you had an
23 235:14 agreement with EchoStar that they would not
24 235:15 sue you, and yet they did name you as a
25 235:16 defendant?

1 235:17 A. Hm. Yes.

2 235:18 Q. Do you know why?

3 235:19 MR. HAGAN: Form, foundation, calls

4 235:20 for speculation.

5 235:21 A. I believe to put pressure on me so

6 235:22 I would help them in their case.

7 Page Range: 234:4-234:13

8 234: 4 Q. Did you ever receive any technology

9 234: 5 for EchoStar piracy from any employee of

10 234: 6 EchoStar?

11 234: 7 A. I have to take the Fifth on that.

12 234: 8 Q. Did you ever receive any monies --

13 234: 9 MR. HAGAN: Foundation, form.

14 234:10 Q. -- related for EchoStar -- related

15 234:11 to EchoStar piracy from any employee of

16 234:12 EchoStar?

17 234:13 A. I have to take the Fifth on that.

18 Total Length - 00:11:20

19 (End of defense designations.)

20 MS. WILLETTS: Your Honor, we have one
21 counterclip.

22 THE COURT: Okay.

23 PLAINTIFF'S REBUTTAL DESIGNATIONS

24 (Excerpt of Frost video deposition played.

25 Transcript of video incorporated herein as

1 provided by plaintiff's counsel as follows:)

2 Page 11:10-11:18

3 11:10 Q. Are you paying your legal fees in
4 11:11 this action?

5 11:12 A. Same answer.

6 11:13 Q. There was no objection to that
7 11:14 question.

8 11:15 A. I imagine I am.

9 11:16 Q. Is NDS paying your legal fees in
10 11:17 this action?

11 11:18 A. I don't -- wouldn't know.

12 Total Rebuttal Length - 00:00:21

13 (End of Plaintiff's rebuttal designations.)

14 THE COURT: Does that conclude the clips from both
15 parties' standpoint from EchoStar and NDS?

16 MR. SNYDER: Yes, Your Honor.

17 MR. HAGAN: Yes, Your Honor.

18 THE COURT: All right. Would somebody please
19 recall Mr. Guggenheim, please.

20 MR. WELCH: Certainly, Your Honor.

21 THE COURT: Go get Mr. Guggenheim in the hallway.
22 Thank you.

23 Mr. Guggenheim, if you would be seated back in the
24 witness box.

25 ALAN GUGGENHEIM, PLAINTIFF'S WITNESS PREVIOUSLY SWORN

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RESUMED THE STAND

THE COURT: This is Mr. Stone's continued cross-examination of Mr. Guggenheim.

MR. STONE: Thank you, Your Honor.

CROSS-EXAMINATION (Continued)

BY MR. STONE:

Q. Mr. Guggenheim, I've met a man named Charles Pearlman about two to three times?

A. Yes.

Q. And I think you testified you have meet him in an EchoStar dealer summit?

A. That's correct.

Q. And you knew Mr. Pearlman had been an informant for EchoStar, correct?

A. Yes.

Q. And did Mr. Pearlman ever provide you any documents?

A. Personally, I don't recall.

Q. And am I correct that you learned that Mr. Pearlman was an administrator with administrator privileges on the dr7 website when Mr. Menard was *injured?

MR. HAGAN: Your Honor, we're going to object to the scope. I believe Mr. Guggenheim's going to be back later in the trial.

THE COURT: Well, he will be. I'll give Mr. Stone that option.

1 (To the jury:) What I'm really trying to ferret
2 out is how many times you're going to hear evidence. It's
3 prejudicial if you hear the same person saying the same
4 thing redundantly. So counsel are making tactical choices
5 on both sides. If we're going to hear this testimony now,
6 in all likelihood, we won't be hearing that during the
7 presentation of NDS's case when they were going to bring him
8 back. So Mr. Stone has that option.

9 MR. STONE: Thank you, Your Honor.

10 THE COURT: Everybody's forewarned about that.

11 Did somebody come and visit you during the recess
12 and go over those summary documents with you?

13 THE WITNESS: No.

14 THE COURT: All right.

15 Counsel.

16 BY MR. STONE:

17 Q. So the question is, did you ever learn that Mr. Menard
18 had an administrator of his website named Mr. Pearlman, who
19 was the same informant to EchoStar?

20 A. Yes.

21 Q. Okay. And how did you learn that?

22 A. I think from J.J. Gee.

23 Q. And do you recall whether at any point in time
24 Mr. Pearlman gave any documents to Mr. Gee?

25 A. I would not know.

1 MR. STONE: Thank you, Your Honor. We'll reserve
2 further questioning of Mr. Guggenheim about other issues in
3 our case in chief.

4 THE COURT: All right. And I'll expect an offer
5 of proof about that so we don't sort through that same
6 information.

7 MR. STONE: Correct.

8 THE COURT: All right. I'll provide that
9 latitude.

10 When would you like the gentleman back. I'm going
11 to give him a specific date.

12 MR. STONE: April 24th, Your Honor, would that
13 work?

14 THE CLERK: It's a Monday.

15 THE COURT: I don't know that we'll be in session
16 on that Monday. It's a Monday.

17 MR. STONE: The 30th, then, because we have the
18 source code here on the 29th.

19 THE COURT: The 29th, and so 30.

20 Sir, I'm going to order you back to this Court on
21 April 30th.

22 THE WITNESS: Okay.

23 THE COURT: That means you're one of the few
24 witnesses who can plan ahead, which is good. And so I'll
25 expect you here promptly at that time, sir.

1 THE WITNESS: Thank you.

2 THE COURT: Thank you very much. You may step
3 down. And I'm going to admonish you not to discuss your
4 testimony with anybody in the meantime. It's been agreed by
5 both parties that you were going to be called partly during
6 the plaintiff's case and partly during the defense case.
7 That's why this oddity is occurring. Okay. Thank you very
8 much, sir.

9 Counsel, your next witness, please.

10 MR. HAGAN: We had discussed last night that
11 Mr. Guggenheim was it for the day.

12 THE COURT: Oh, he was going to be the last
13 witness.

14 MR. HAGAN: That's correct.

15 THE COURT: You're absolutely, right.

16 (To the jury:) Well, I'm going to let you go,
17 then. I'm going to ask you to come back at 8:30 on Tuesday,
18 not 8:00. I'm going to need another half hour in there.

19 I've got a different calendar that morning. I'll
20 simply order you back at 8:30 that day so I'm certain you're
21 not waiting.

22 Now, we'll go off the record.

23 (Jury excused at 12:45 p.m.)

24 (Outside the presence of the jury.)

25 THE COURT: Back on the record.

1 If you have a witness like Mr. Guggenheim for
2 either side, and you're going to go through that, I'm not
3 going to preclude you. You can go through all 26,000
4 documents. You're not precluded, but we're not going through
5 it paragraph-by-paragraph form. I'll let you do a little
6 bit of that to point out that this is super secret stuff for
7 NDS, but we're not walking through that again. So get that
8 witness out in the hallway for both sides. You know, take
9 that witness through privately each of those sections you
10 intend to examine or cross-examination he or she on bring
11 them into court and tell me what you're going to do -- don't
12 surprise me -- and I'll give you the latitude. You can walk
13 through a couple documents, like you did. But I was losing
14 faith, and that's why you got cut off. I didn't know if you
15 were going to continue on.

16 And then, we're going to take up Mr. Shelton,
17 who's supposed to be here at?

18 MR. HAGAN: He's here, Your Honor.

19 THE COURT: He is?

20 MR. HAGAN: Yes.

21 THE COURT: Let's stay on the record.

22 Call Mr. Shelton. Let's get some work done until
23 2:00 o'clock, then.

24 MR. SNYDER: Your Honor, before Mr. Shelton is
25 called, the last clip that plaintiff's played of Mr. Frost's

1 testimony -- the counter-counter-counter designation, we had
2 not been given notice of.

3 THE COURT: I didn't know about it. But I only
4 looked at the first clip out of the presence of the jury. I
5 hadn't looked at yours because it wasn't key to me. I
6 didn't know about the last clip.

7 MR. SNYDER: We were not told that there was going
8 to be a counter-counter designation, nor have there been for
9 any other witnesses by video.

10 THE COURT: I assumed that you two agreed upon it.

11 MS. WILLETTS: That's incorrect.

12 (To Mr. Snyder:) I provided you with a list of
13 that, and I sent that over in table format that included
14 that counter designation.

15 MR. SNYDER: It may have included the designation,
16 your Honor, but I don't recall any notice that they were
17 going to be playedmade in that order.

18 THE COURT: All right. Mr. Shelton, if you would
19 retake the stand, let's use our reporter resources wisely,
20 then we'll take that up later on.

21 Sir, if you would please be seated.

22 STANLEY SHELTON, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

23 RESUMED THE STAND

24 THE COURT: Now, I'm going to ask EchoStar one
25 more time. Why can you not obtain what I'm going to call

1 "active subscriber information"?

2 MR. HAGAN: Your Honor, we don't have that data.
3 What we have is "activations."

4 THE COURT: You don't have the data, but you have
5 access to that data. I'm firmly convinced that you can find
6 subscriber information.

7 MR. HAGAN: And we have it, Your Honor. We have
8 subscriber information, but it is by activation. In other
9 words, anytime an EchoStar subscriber signs up, we have that
10 activation and know what tlype of a card it is. So we have
11 been able to figure out how many of those cards of each ROM
12 version are in the field, and then isolate the ROM 33 cards.
13 And Mr. Shelton takes the percentage of whatever those ROM 3
14 cards is, and multiplies that times the number of pirate
15 households.

16 THE COURT: So NDS, or better yet, DirecTV,
17 cannot -- or EchoStar, or NagraStar, any of these symptoms
18 cannot tell me the number of subscribers on August 31st or
19 August 30th, 2007?

20 I don't believe it.

21 MR. HAGAN: The problem -- they can tell you the
22 numbers of subscribers. What they can't tell is who had
23 what ROM version. All they can tell is the activations of
24 ROM versions.

25 THE COURT: But, at least if we had the numbers of

1 subscribers, we wouldn't have the cumulative affect that NDS
2 is complaining about.

3 MR. HAGAN: And we've produced that information.
4 It's in the public filings, the 10-K's, for each year, the
5 number of authorized subscribers, which came in through
6 Mr. Ergen.

7 So they have the number of authorized subscribers
8 by year, and what they also now have is the number of each
9 ROM that were activated by quarter.

10 THE COURT: Okay. Now, are you prepared to go
11 forward today?

12 MR. HAGAN: Mr. Shelton got new numbers. I
13 haven't look at 'em yet. I just got the piece of paper.

14 I'm happy to have him explain to, Your Honor, what
15 he did.

16 Why don't you show those to Mr. Snyder.

17 MS. WILLETTS: Your Honor, the information that's
18 contained in here is based on what was shown to them last
19 night. It just also includes a calculation based on the
20 underlying evidence.

21 MR. WELCH: And that document was one of the
22 documents Mr. Stone put in evidence today -- that earlier
23 sheet that he put in through Mr. Orban. So, basically, it's
24 just running the numbers through a calculator.

25 THE COURT: All right. Counsel, if you would like

1 to proceed.

2 MR. HAGAN: Thank you, Your Honor.

3 DIRECT EXAMINATION (Continued)

4 BY MR. HAGAN:

5 Q. Now, Mr. Shelton, the last time we broke, you were
6 asked by counsel for both sides and by the Court to take the
7 numbers that you originally had and to isolate the number of
8 ROM 3 cards for the relevant time periods.

9 Have you been able to do that?

10 A. Yes, I have.

11 Q. And can you explain to us the method that you used to
12 derive those numbers?

13 THE COURT: And those would be for the years 2001,
14 2002, 2003, 2004, 2005, specifically.

15 THE WITNESS: And -- exactly.

16 THE COURT: You may have gone further than that,
17 those but those are the claimed damage years.

18 THE WITNESS: Correct. I -- like, for example,
19 2005, I went beyond September because I got yearend
20 activation numbers.

21 BY MR. HAGAN:

22 Q. Well, walk us through the process of how you isolated
23 the number of ROM 3 pirated cards, the estimated number.

24 A. Well, basically, this exercise helped validate what I
25 was confirming taking place in the pirate market.

1 If you take a look at the volume that was shipped of
2 ROM 2, which was 1.4 million cards, which I previously had,
3 and you take a look at the total activation --

4 THE COURT: Just a minute.

5 THE WITNESS: Okay.

6 THE COURT: Why don't we put this up on the screen
7 somehow.

8 (Document displayed.)

9 THE COURT: Okay. Now, let's see if we can blow
10 that up.

11 Okay. Now, start again.

12 If we take the activation of the ROM.

13 THE WITNESS: -- 2 starting now.

14 THE COURT: And, then, you mentioned 1.4 million?

15 THE WITNESS: Yes. We knew and had the
16 information that they had manufactured and shipped
17 1.4 million. But if you look at the far right corner, you
18 can see the activation periods, and it totals 1.3 million.

19 THE COURT: Just a moment.

20 Why don't you use this up here.

21 Damion, Ryan, if you want to, come over and take a
22 look. And all counsel can come up also.

23 Just stand you and point to it so we're not
24 jumping around.

25 THE WITNESS: Let me reference my sheet, since

1 it's not showing the full picture.

2 THE COURT: Okay.

3 THE WITNESS: Okay. Previously, I was giving --
4 or I was given -- what I requested was how many Smart Cards
5 of the different versions were manufactured and shipped.
6 And basically, out of the ROM 2, starting with ROM 2, the
7 total number manufactured was 1.4.

8 THE COURT: Show me.

9 THE WITNESS: And here's the line. If we could go
10 over to the total, there is the 1.3 that have been
11 activated, and it shows the periods, the time, which is what
12 I would have expected: That early on, when the roll out,
13 there's gonna be more activations. It drops and decreases.
14 But I definitely expected there would be a number
15 unaccounted for through theft, service repair, damage.

16 And I did the same thing for the --

17 THE COURT: So, in other words, you started with
18 1.4, which was confusing to me because I couldn't find it on
19 your new screen.

20 You're giving me an explanation of why it's 1.267
21 now --

22 THE WITNESS: Exactly.

23 THE COURT: -- and showing me how credible you
24 were with your first number.

25 THE WITNESS: Correct. Because, when you do the

1 same process, through everything that's been shipped --

2 THE COURT: Quit explaining it to me, and show me
3 the methodology again. Walk me through this.

4 THE WITNESS: Okay. Can we start back?

5 THE COURT: Yeah, start back.

6 MR. HAGAN: Christine, move it back to the
7 beginning.

8 MS. WILLETTS: (Complies.)

9 THE WITNESS: Thank you.

10 The ROM 2 was manufactured starting in March of
11 '96, prior to the satellite -- or the launch of the service.

12 THE COURT: Right.

13 THE WITNESS: They started activating in June of
14 '96, with the first subscribers. And you can see the volume
15 that continued year after year.

16 And, obviously, the highest volume is when the
17 first two years occurred because that's the cards that were
18 going out into the field.

19 THE COURT: Okay.

20 THE WITNESS: Now, the issue before us that I
21 understood was, "Okay. Well, how many were still sitting in
22 inventory?"

23 Well, this gives you a good feel for over time
24 that all these cards eventually got activated to where it
25 ended in 2005.

1 THE COURT: Now, just a moment.

2 How do I know that the ROM 2's eventually got
3 activated, when I've got ROM 3 starting to kick in with a
4 huge number in 1998 of 1.351 million?

5 Why would I assume that all these ROM 3's that
6 were produced were, in fact, activated?

7 THE WITNESS: Because we knew that they produced
8 7.7 million.

9 THE COURT: So what?

10 THE WITNESS: And manufactured.

11 THE COURT: That doesn't mean they got activated.

12 THE WITNESS: This is activations coming from
13 EchoStar. In other words, the first time that card got
14 activated, this was recorded for each year until it
15 totaled -- well, at 2005, the number's much smaller, but it
16 totaled 7.3, which tells me --

17 THE COURT: No. Those are the ROM 3's totaling
18 7.4.

19 THE WITNESS: Exactly. Because here's when the
20 card swap occurred, also. Okay. So there were no longer --
21 there's 300,000 unaccounted for cards, Your Honor, is what
22 it comes down to. 'Cause the card swap ended in
23 September 2005, so they are no longer shipping or activating
24 any more, but there's 300,000 unaccounted for.

25 All the activity totals down to where there's

1 1 million cards total unaccounted for that got manufactured,
2 activated, and eventually authorized in a consumer's home.
3 That's the reason my piracy figure is capped at half a
4 million, because out of that 1 million unaccounted for, I
5 said there can't be more than half a million pirates.

6 And that's what I was seeing in the marketplace.
7 Such as the November of 2000, to buy a card on the market
8 for a pirate was \$400.

9 And if you look back to 2000, you can see that
10 primarily it was just ROM 2 and ROM 3 in the marketplace.

11 THE COURT: No. Just a moment.

12 THE WITNESS: Okay.

13 THE COURT: Just a moment. Just a moment.

14 In what year?

15 THE WITNESS: In 2000 --

16 THE COURT: Okay.

17 THE WITNESS: -- was when the market -- the pirate
18 market -- the card cost \$400.

19 THE WITNESS: Well, there's 974,000, almost a
20 million, ROM 10's.

21 THE WITNESS: Exactly. They just started entering
22 the market in 2000, but the hack hadn't occurred on ROM 10.
23 It was still primarily ROM 3 and ROM 2.

24 THE COURT: Okay.

25 THE WITNESS: Bottom line, in my previous reports

1 to NagraStar, I said, "If you could give me all this
2 information and confirm what is unaccounted for, then I know
3 my ceiling on piracy is proper at half a million."

4 THE COURT: Okay.

5 THE WITNESS: Okay. There's service and damage
6 card. But unaccounted for cards is a good estimate as to
7 how much could that -- or how high could that ceiling be.
8 And I said half a million.

9 THE COURT: Okay.

10 THE WITNESS: So I capped that out.

11 Now, going on down, we have the cumulative -- oh,
12 and one other thing that I did not have before was, I did
13 not have the -- and it was my fault because I asked for
14 Smart Cards manufactured and shipped.

15 EchoStar embedded the security chip in the
16 receiver. There was no Smart Card. So I -- that number is
17 now included --

18 THE COURT: Okay.

19 THE WITNESS: -- in the total.

20 BGA is just an engineering term for the way they
21 socket and solder on the board.

22 So that's been added in.

23 I have argued with counsel about adding in 101 and
24 102, because it's really second generation card developed.
25 It was backwards compatible with the first, and they said

1 add it in because, technically, a pirate could pirate it
2 while that first generation data stream was out there in the
3 field.

4 THE COURT: But you have some concerns about that?

5 THE WITNESS: Well, it's a separate -- you know,
6 all I'm saying is it makes the number much more
7 conservative. Because once they shut down the first
8 generation data stream in 2005, then any piracy occurring on
9 those cards went down, too.

10 THE COURT: Thank you.

11 THE WITNESS: So I, then, start tracking what the
12 cumulative '03 cards DISH Network '03 card's activations
13 were. And there was a small number in '96 for a test. But,
14 then, you can see how it grows with the shipment volumes.

15 THE COURT: Okay. Now I've been told, just
16 naively playing with these numbers that there are two and a
17 half cards, on the average, per household.

18 THE WITNESS: Correct.

19 THE COURT: Would you take two and a half in
20 34,976 in 2005. Tell me what that is.

21 THE WITNESS: Can we go over to 2005?

22 THE COURT: Isn't that about roughly 14 million?

23 THE WITNESS: Well, here --

24 THE COURT: Yes or no?

25 THE WITNESS: No.

1 THE COURT: Okay.

2 THE WITNESS: Here's what happens, and I tie back
3 to the authorized --

4 THE COURT: No. I'm not going to let you do that.
5 Now, let's stop for a moment.

6 THE WITNESS: Okay.

7 THE COURT: 2005, look at that 34 million number.
8 If there are two and a half cards -- and this is
9 naive on my part. If there's two and a half cards per
10 household, then I would expect about 14 million subscribers,
11 give or take, maybe 15 million, maybe 16 million actual
12 subscribers; is that correct?

13 THE WITNESS: Correct.

14 THE COURT: Well, do we have 16 million actual
15 subscribers in 2005? See, you haven't gotten me the
16 subscriber number yet.

17 MR. HAGAN: It's in the 10-K.

18 THE COURT: Show me the 10-K.

19 MR. SNYDER: Your Honor, this is a page from one
20 of their internal financial reports. It's a large document
21 so I just copied this pages and just grabbed this now. This
22 is key performance indicators for the quarter ended
23 December 31st, 2004. It shows the told number of ending
24 describer -- subscribers. It also, I think will help the
25 Court because it shows the number of receivers per

1 subscribers household, which is, at this point, 1.67 with
2 just about 11 million ending subscribers.

3 THE COURT: Okay. Now, show me the 2005, 10-K.

4 MR. SNYDER: Would you like a copy?

5 THE COURT: I want 2005.

6 MR. WELCH: We're getting you the electronic
7 version, Your Honor.

8 MR. SNYDER: Your Honor, we found it.

9 THE COURT: Show me the number of subscribers that
10 are claimed on the 10-K in 2005.

11 Now, "subscriber," I assume, means a household?

12 MR. WELCH: Yes, sir.

13 MR. EBERHART: I believe it's page 51, Your Honor.

14 MR. WELCH: Yes. It's got 12 million, 0-4-0, and
15 that's going to be a thousand -- so that would be
16 12 million.

17 THE COURT: Okay.

18 MR. WELCH: And that's yearend 2005.

19 THE COURT: Now, if I'm told that there are two
20 and a half devices per household, Smart Cards, your figures
21 appear to be inflated to me.

22 THE WITNESS: It's because these are activation
23 figures and not deactivation figures, Your Honor. It also
24 doesn't reflect the card swap numbers.

25 THE COURT: Where are my deactivation figures?

1 THE WITNESS: I only have the activation to
2 account for --

3 THE COURT: And I do, too.
4 Why can't I get deactivation figures?

5 THE WITNESS: Basically --

6 THE COURT: No. Why can't I get deactivation
7 figures?

8 I'm being told I can't get actual subscriber
9 figures, which I don't believe, frankly.

10 THE WITNESS: It's a very dynamic market,
11 Your Honor.

12 THE COURT: I could care less.

13 THE WITNESS: Okay.

14 THE COURT: I could care less about cost. I
15 couldn't care about time.

16 Why can't I get actual deactivation figures?

17 MR. WELCH: Your Honor, may I interject for a
18 second?

19 THE COURT: No.

20 Mr. Shelton, have you asked for those?

21 THE WITNESS: Basically, what I asked for was, by
22 quarter --

23 THE COURT: Have you asked for those deactivation
24 figures?

25 THE WITNESS: Yes, sir.

1 THE COURT: Who did you ask deactivations of?

2 THE WITNESS: With the Cable Services Group that
3 provides a subscriber management software for EchoStar.

4 THE COURT: And you could not get those now, or
5 forever?

6 THE WITNESS: It's not forever. It's basically
7 getting the historical archive tapes, retrieving the
8 snapshot at that given period of time -- you have your --

9 THE COURT: And given the last three years, why
10 couldn't we get this?

11 THE WITNESS: That, I can't answer, Your Honor.

12 MR. HAGAN: Your Honor, the reason --

13 THE COURT: All right. Counsel.

14 MR. HAGAN: The reason that these numbers are
15 high -- it's 34.9 million in 2005 -- that's activations
16 accumulated. What it doesn't take into account is Churn.
17 Mr. Rock takes that into account when he applies these
18 numbers to a damage model.

19 MR. WELCH: And Churn's supplied in the 10-K's.
20 It's in the same table on 51. That tells you deactivations.

21 THE COURT: And tell me what the churn number is
22 so I can divide it out, eventually, by two and a half.

23 MR. WELCH: Okay.

24 THE COURT: And then multiply that into a yearly
25 Churn so I can subject my 34,976,000 from the yearly Churn.

1 In other words, let just start with how accurate we are just
2 in terms of *RUSS numbers, before we go through this
3 methodology again, and the assumption that 33 percent of the
4 cards are pirated cards.

5 Counsel, I just want to check rough numbers before
6 I get into the minutia. I just want to know that we're in
7 the basic ballpark.

8 I'm not worried about a half million. I get
9 really concerned about 3 or 4 million.

10 MR. WELCH: And another thing, Your Honor --

11 THE COURT: No, I'm not interested. I'm
12 interested in what I asked you to do.

13 MR. WELCH: Okay.

14 (Pause in the proceedings at 1:19 p.m.)

15 (Proceedings resumed at 1:22 p.m.)

16 THE COURT: All right. We're back on the record.
17 The Court had asked counsel to get the 10-K for
18 2005.

19 MR. WELCH: Do you have it on your computer,
20 Clint? It's going to be Exhibit 654, page 51.

21 (Document displayed.)

22 MR. WELCH: You've got yearend sub, and you've
23 subscriber additions throughout the year.

24 THE COURT: Point that out to me.

25 MR. WELCH: If we start --

1 THE COURT: Walk up to the screen and point.

2 MR. WELCH: At 2001, Your Honor? Or do you want
3 to do you 2005?

4 THE COURT: I want to do 2005.

5 MR. WELCH: You've got yearend subs of 12.04, and
6 this is what we added. We added 3.3 we added that for the
7 year. 3.397.

8 Throughout the year --

9 THE COURT: Now, just a moment.
10 Your total for 2005, is 12,040,000.

11 MR. WELCH: 12,040,000. That is at the end of the
12 year.

13 THE COURT: I understand that. You claim on the
14 10-K, the public document, that you added 3.397 --

15 MR. WELCH: Minus --

16 THE COURT: No. Just a moment.
17 -- subscribers.

18 MR. WELCH: Yes.

19 THE COURT: That, you added that number?

20 MR. WELCH: Yes.

21 THE COURT: And then on your 10-K, you have --
22 just a moment. Let me walk through this.

23 You have, I'm going for call it a "drop rate" of
24 1.135 million; is that correct? Or is that --

25 MR. WELCH: No, no. This is the net additions.

1 So you dropped actually 2.26.

2 THE WITNESS: The key word is "gross."

3 MR. WELCH: Gross. This is gross adds.

4 THE COURT: Okay. Gross.

5 MR. WELCH: Okay. And then, over here, you've got
6 what you actually ended up with net.

7 THE COURT: Just a moment.

8 MR. WELCH: See, you take the 10.9, add the 1.1,
9 that gets you this.

10 THE COURT: That get you the 12,040,000.

11 MR. WELCH: Yes.

12 THE COURT: All right. Stop for a moment.

13 So you're subscriptions increased 1.5 million?

14 MR. WELCH: 1.135.

15 THE COURT: 1.135.

16 THE COURT: Just a moment.

17 MR. WELCH: That's net.

18 THE COURT: Just a minute.

19 Walk me back to 2004 and -- let me walk you
20 through that for a moment.

21 I'm actually going to begin with the figure of
22 9.425 --

23 MR. WELCH: Yes, sir.

24 THE COURT: -- with the net -- or strike that --
25 the net of 1.480, which will give me my 10.905 gross

1 subscriber number in 2004. Yes or no?

2 MR. WELCH: The 10.905 is what you end up with,
3 active subscribers, at the end of year 2004.

4 THE COURT: Okay. And, of course, following down
5 in like fashion, I would take 2002, 8.180, take my net for
6 2003, which would be 1.245, which would give me
7 9.425 million.

8 At the end, who are my subscribers in 2003?

9 MR. WELCH: At the end of 2003, that's 12/31.

10 THE COURT: Explain to me what the Churn factor is
11 again. No.

12 I want Mr. Shelton.

13 THE WITNESS: Basically, when it says, "Gross new
14 authorizations," then they're having to net out what the net
15 effect was from the Churn. And that's why the term "gross
16 new authorizations" because that key. But when it comes to
17 the net effect of the churn, then they got to reflect,
18 "Okay. Here's the percent of churn to come to my net
19 authorized additions."

20 THE COURT: What's a Churn?

21 THE WITNESS: Churn is customers deauthorizing.

22 THE COURT: Okay.

23 Now, instead of the 20 percent estimate that I was
24 about to hear from you, or the other gentleman, isn't my
25 churn, then, simply reflected between -- well, can't I

1 figure out my churn accurately from these documents?

2 THE WITNESS: Yes, sir.

3 THE COURT: Show me.

4 I think I can. In other words, I don't think I
5 need to guess at what the churn factor is. You may have it
6 on your 10-K, in terms of deauthorizations, which is what
7 I've been asking for all along.

8 THE WITNESS: Well, essentially -- and this is the
9 first time I've looked at these numbers. But they're taking
10 their starting base. They're saying that "We add a gross
11 2.722 new customers." However, the churn of 1.6 brought it
12 down to a net addition of 1.570, which then brings us over
13 to the 8.180.

14 THE COURT: Now, that's 2001, 2002.

15 I want to stay with 2005. I want you to walk
16 three through that again. Same explanation you just gave
17 me.

18 THE WITNESS: This is yearend 2005. So they're
19 starting out 2004 with 10.905.

20 THE COURT: All right.

21 THE WITNESS: They're adding gross new customers
22 to the tune of 3.441. But because of the 1.62 percent
23 churn, then they're only getting a net gross of 1.480 to
24 come up with the 12.040.

25 THE COURT: All right.

1 Do it again.

2 THE WITNESS: Okay.

3 THE COURT: Same thing.

4 THE WITNESS: Yeah, this -- the language --

5 THE COURT: Same thing.

6 THE WITNESS: 10.905 is the starting point.

7 They add throughout the year 3.41 -- 3.441.

8 THE COURT: Right.

9 THE WITNESS: But because of the 1.62 percent
10 deauthorizations, they're only netting new authorizations of
11 1.480.

12 THE COURT: Once again, if I add together the
13 10.905 and 1.480, I'm going to get 12.040.

14 THE WITNESS: Correct.

15 Does it make sense?

16 THE COURT: No. I'm going to get the 12.040
17 because I've added here 1.135 and my 10.905. That's how I'm
18 going to get the 12.040.

19 THE WITNESS: Correct. Yeah, you're looking at
20 yearend 2005.

21 THE COURT: That's exactly what I'm looking at.
22 Do it again.

23 THE WITNESS: Okay. For year end 2005 you're
24 adding 3.397.

25 THE COURT: That's over here. You're not over

1 here.

2 THE WITNESS: But -- okay.

3 THE COURT: Here's where you got turned around.

4 You started tracing out down the number. No.

5 You're starting with this figure, but you're
6 adding what I'm going to call your net between your new
7 subscribers and your churn or dropout factor, and that's
8 going to be your 1.135. And you're adding the end figure in
9 2004 to your net figure in 2005, which gives you yearend
10 subscriptions of 12,040,000.

11 THE WITNESS: Correct.

12 THE COURT: This that you started to relate in
13 2004 is a calculation that has to go back and take into
14 account 2003.

15 THE WITNESS: Right.

16 THE COURT: All right. Now, just a moment.

17 MR. WELCH: Your Honor, can I explain that?

18 THE COURT: No.

19 Now, I don't have this by month, as Mr. Snyder
20 requested. And I don't have this by card yet. But at least
21 I've got this by year. And you've got it sitting right in
22 the 10-K.

23 All right. Now, walk me through your calculation.

24 THE WITNESS: Okay.

25 THE COURT: I'm simply going to assume a "drop

1 rate." That's all it means. Big fancy word "drop."

2 THE WITNESS: Okay.

3 THE COURT: Okay. Walk me through your
4 calculation.

5 THE WITNESS: Okay. So all we did was total up in
6 a grand total by the types of cards that are out in the
7 field being activated per year, and, then, we took the
8 cumulative ROM 3 activations in order to come up with the
9 percent of ROM 3 cards to the grand total of activations.

10 THE COURT: All right. Okay. Do I have my papers
11 over there besides you?

12 LAW CLERK: We have them.

13 THE COURT: Thank. Counsel, give me another one
14 of these updated slips for just a moment.

15 MS. WILLETTS: (Complies.)

16 THE COURT: Thank you very much much.

17 Now show me again how you calculate out the ROM 3
18 or the ROM 2.

19 THE WITNESS: Well, we know which year the ROM 2,
20 ROM 3, and all the different versions of Smart Cards got
21 turned on for the first time. And we know the cumulative
22 number, and we also know the cumulative number that got
23 shipped.

24 THE COURT: Okay.

25 THE WITNESS: So we know what's unaccounted for.

1 It's not sitting in inventory.

2 THE COURT: 'Cause they were activated.

3 THE WITNESS: They were activated --

4 THE COURT: Okay.

5 THE WITNESS: -- in a consumer's home at one point
6 in time. You're correct, we don't have the deactivation
7 data, netting or anything. However, by adding in all the
8 other types of cards that are in the field up through 2005,
9 we know the percent of the ROM 3, which is near the bottom.
10 It starts out high because it only ROM 2 and ROM 3 in the
11 field.

12 THE COURT: So in 2001, which is the beginning of
13 the damages calculation, you've got a 53.2 percent.

14 THE WITNESS: And, then, it starts dropping.

15 THE COURT: To ROM 3.

16 THE WITNESS: Correct.

17 THE COURT: In 2001, the calculation would be 53.2
18 percent.

19 THE WITNESS: Correct.

20 THE COURT: In 2002, the ROM 2/ROM 3 percentage,
21 the ROM 3's dropped to 38.2 percent; in 2003, the figure for
22 ROM 3 compared to ROM 2 or other ROMs -- let's say ROM 10
23 et cetera --

24 THE WITNESS: Correct.

25 THE COURT: -- obviously, drops to 28.8 percent.

1 In 2004 it drops to 23.5 percent ROM 3. Of course, the
2 ROM 10's have kicked in by this time.

3 THE WITNESS: And the 101's.

4 THE COURT: And 2005 to 21.2 percent. If I took
5 those years, you previously -- well, strike that.

6 Now, your universe is going to be, what? 500,000?

7 THE WITNESS: Right around -- capped at 500,000.

8 THE COURT: So if it's 500,000, you wanted to
9 apply before a figure of a 33 percent piracy rate.

10 THE WITNESS: Correct, on the previous.

11 THE COURT: How did you come up with that
12 33 percent piracy rate?

13 THE WITNESS: That was a percent of the half a
14 million households using the pirate card that had to have
15 been using a ROM 3.

16 THE COURT: No, I know that. How did you come up
17 with that 33 percent? Was this an informal survey amongst
18 18 people?

19 THE WITNESS: No. No, sir.

20 THE COURT: How did you come up with that?

21 THE WITNESS: That was based upon the cards that
22 were shipped in the field.

23 THE COURT: How do I know that there's two and a
24 half devices per household?

25 THE WITNESS: That would go back to the 10-K and

1 basically what they're saying is, "We know a customer is a
2 household, and a customer has, on average, two and a half
3 receivers in his house."

4 THE COURT: How do we know that?

5 THE WITNESS: By authorization data is how they
6 would know. There were promotions --

7 THE COURT: Where's that data?

8 THE WITNESS: That's Cable Service Group.

9 THE COURT: And where is that underlying data?
10 How would NDS, for instance, be able to examine that data?

11 THE WITNESS: It should be -- I'm not sure if it's
12 in the 10-K. I have not looked at that, Your Honor.

13 THE COURT: Take a look.

14 THE WITNESS: It's not on this page.

15 THE COURT: So, then, calculate out your actual
16 numbers, your universe for me. Take 2001, how many ROM 3
17 pirated devices, in your opinion, exist?

18 THE WITNESS: Out of the 400,000 pirate
19 households?

20 THE COURT: You're telling me.

21 THE WITNESS: There would be 53 percent, based
22 upon what was shipped and in the field, in order to pirate
23 the ROM 3, which came to 212,957.

24 THE COURT: And, then I'll just trace the figures
25 across: 38 percent in 2002 yields the 187,231.

1 THE WITNESS: And it starts dropping.

2 THE COURT: Why wouldn't I believe that that's
3 partially cumulative? Why isn't the argument able to be
4 made that, "We really can also calculate that as a
5 cumulative effect or at least some percentage thereof"? In
6 other words, that the 187--

7 THE WITNESS: It starts dropping because you have
8 new cards entering the field that actually start getting
9 hacked.

10 THE COURT: Okay.

11 All right. Counsel, questions.

12 BY MR. HAGAN:

13 Q. Now, Mr. Shelton, based on your methodology of
14 calculating or estimating the number off, first, ROM 3 cards
15 in the field, and then the percentage of those ROM 3 cards
16 that were in pirate households, do you believe that the
17 numbers reflected in what I've marked as trial demonstrative
18 No. 10, the chart that you have in front of you, do you
19 believe that those numbers are aggressive or conservative?

20 A. I believe they're conservative, because of, the pirate
21 activity that occurred on the ROM 101 and 102 was very --
22 very, very little because because they knew -- the pirates
23 knew it was gonna be a new data stream.

24 And we added those numbers in.

25 THE COURT: Are these figures solely for the

1 United States of America market or did they include Canada?

2 THE WITNESS: By law, they're solely for the
3 United States of America market. In reality, shipments can
4 go into Canada.

5 THE COURT: Now, watch.

6 I want to assume that pirating is legal in Canada.

7 THE WITNESS: I understand that. I've seen that.
8 I know all about it.

9 THE COURT: Royal Canadian Mounted Police are
10 purchasing these cards.

11 THE WITNESS: Sure.

12 THE COURT: Counsel, can you stipulate when this
13 became illegal?

14 MR. SNYDER: We have the date of the Canadian
15 Supreme Court decision, and it was in 2002. I don't recall
16 what part of the year --

17 THE COURT: Okay.

18 MR. SNYDER: -- oh, approximately June.

19 THE COURT: I would expect -- let me say this a
20 different way. I assume that all people are moral, and
21 Canadians are every bit as moral as Americans.

22 Having made that statement: If this is legal in
23 Canada, I would expect a higher percentage of Canadians
24 believing that this illegal hacking in the United States was
25 acceptable.

1 THE WITNESS: It wasn't -- the Supreme Court
2 ruling was May 8th of 2002.

3 THE COURT: Of 2002.

4 So if that's the case, why wouldn't I have a
5 higher number of pirating households in Canada, where the
6 common citizen believed that this was legal, and a lesser
7 number of pirated households in the United States, where
8 people feared the law? Why wouldn't I have a
9 disproportionate percentage of, let's say, 60 percent in
10 Canada and 10 percent in the United States?

11 THE WITNESS: Well --

12 THE COURT: We're dealing with the United States
13 market here.

14 THE WITNESS: Correct.

15 THE COURT: Okay. How do I deal with that when
16 this figure's thrown at the jury?

17 THE WITNESS: What we've dealt with in the past
18 was that Canada was 10 percent the size of the households in
19 the United States.

20 THE COURT: Okay. 10 percent size. What would
21 you estimate, from our perspective, the theft rate to be up
22 there? 60 percent? 50 percent? 80 percent? This is free
23 after all.

24 THE WITNESS: Well, a lot of the subscribers in
25 Canada are subscribing to cable. There's entities that were

1 tracking in Canada the illegal subscriptions and they were
2 estimating around 700,000.

3 THE COURT: I want to take the world's worst
4 figure for a moment, so I'm as conservative as possible.

5 THE WITNESS: Okay.

6 THE COURT: I want to assume that the Canadians
7 believing under their law that this this is legal -- every
8 one of them from our perspective pirating -- what would
9 deduct from your figure?

10 THE WITNESS: When I said 700,000, that was
11 DirecTV and DISH Network.

12 So I believe I had some reports on the DISH
13 Network, breaking that out separate. I did not bring 'em
14 with me. But from what I can recall, it was on average of
15 10,000 to 50,000 households with DISH Network.

16 THE COURT: Okay. So what would that do to my
17 figures? I mean, if I took that ludicrous, outside example,
18 because Canadians believe under their law that this was
19 legal -- in fact, the pirating community moved to Canada.

20 THE WITNESS: Exactly. They always have --

21 THE COURT: That's why they're in Thunder Bay.

22 THE WITNESS: They always have been there.

23 THE COURT: Okay. Give me the worse scenario,
24 then, from EchoStar's viewpoint, if I deduct all the
25 Canadians, what does that do to my 212,000 number in 2001?

1 Does it bring it right back down in your range of
2 154- to 165- we started with?

3 THE WITNESS: Pretty close.

4 THE COURT: Pretty close.

5 Now, you didn't make that assumption?

6 THE WITNESS: No.

7 THE COURT: But I still get in that ballpark
8 figure, don't I?

9 THE WITNESS: (Nods.)

10 THE COURT: All right. Counsel, any further
11 questions.

12 MR. HAGAN: Just for purposes of making sure we
13 have a complete record, Your Honor.

14 BY MR. HAGAN:

15 Q. Mr. Shelton, looking down at Trial Demonstrative
16 No. 10, what is the estimate that you calculated of total
17 households using pirate ROM 3 cards for the year 1999?

18 A. In 1999 it was 38,000.

19 Q. And for pirated ROM 3 cards or ROM 3 households in the
20 year 2000, how much did you calculate?

21 A. Right around 113,000.

22 Q. And for the number of pirated ROM 3 cards in the year
23 2001, what was your estimate?

24 A. 213,000.

25 Q. For 2002?

1 A. Starts dropping down to 187,000.

2 Q. 2003?

3 A. It drops further to 143,000.

4 Q. 2004?

5 A. Down to 110,000.

6 Q. And 2005?

7 A. Down to 104,000.

8 Q. And based on your experience and your analysis of the
9 pirate market during the 2000/2001 time frame, in your
10 opinion, what is the reason that the number of pirated ROM 3
11 cards doubled from the year 2000 to 2001?

12 A. That was the bulk of the cards that were in the
13 marketplace -- was ROM 3.

14 THE COURT: Well, just a moment.

15 Because you have 7,363,000 compared to the ROM 10
16 starting to kick in at 4,129,000?

17 THE WITNESS: Correct.

18 THE COURT: All right.

19 Okay. Now, once again, I want you to deduct the
20 entire Canadian market from your figure and tell me what
21 your bottom line figures are.

22 THE WITNESS: I'm sorry?

23 THE COURT: I want you to deduct the entire
24 Canadian market from your figures and tell me what your
25 bottom line figures is. Because I'm going to assume the

1 Canadians are doing lawful things, and one of the lawful
2 things are that they can do what we think is illegal, and
3 that, is pirate DirectTV or EchoStar. In fact, the Royal
4 Canadian Mounted Police, you've heard, were lining up to buy
5 them.

6 THE WITNESS: Correct.

7 THE COURT: Okay. And that's going to change your
8 212 significantly.

9 THE WITNESS: Yes.

10 THE COURT: And I want the entire market
11 deducted -- the entire Canadian market.

12 THE WITNESS: It would basically bring --

13 THE COURT: Just take a moment with your
14 calculator. Bring each one of these down for me: 2001,
15 2002, 2003, 2004, and 2005. Use your percentages, your
16 53.2, your 38, the 28, the 23 and the 21 after you're
17 deducted the Canadian market.

18 By the way, does EchoStar --

19 Counsel, I'm dealing with United States. I'm
20 dealing with Canada.

21 What else am I dealing with? Mexico?

22 MR. HAGAN: We don't have authorized subscribers
23 in Mexico.

24 THE COURT: Okay. So I'll ask again: We're
25 dealing with Canada and the United States with these

1 figures?

2 MR. HAGAN: It's my understanding, Your Honor,
3 that the Canadian piracy was already backed out of of these
4 numbers.

5 THE COURT: That's not my understanding.

6 BY MR. HAGAN:

7 Q. Mr. Shelton, did you take into consideration Canadian
8 DBS piracy when calculating the numbers in Trial
9 Demonstrative No. 10? In other words --

10 THE COURT: He's already told me he didn't,
11 Counsel.

12 THE WITNESS: Well, I need to refer to my April
13 2007 report. Because we did separate the U.S. market versus
14 the Canadian market.

15 MR. SNYDER: Your Honor, the April 2007 report is
16 a Carmel Group report, and I thought it was clear that we're
17 not relying on Carmel Group reports.

18 THE WITNESS: Those numbers in that report came
19 from me. We were asked to break out the U.S. versus
20 Canadian in that report.

21 MR. SNYDER: That was not Mr. Schaeffler's
22 testimony, Your Honor.

23 THE WITNESS: I know who produced the numbers, and
24 I --

25 THE COURT: Well, are you going to carry out my

1 calculation or not?

2 THE WITNESS: And that's starting in 2001?

3 THE COURT: 2001.

4 Now, the difficulty we're having, frankly -- and
5 I'll say this to EchoStar.

6 You placed yourself in this position: You haven't
7 even attempted to back out -- and I'm critical of you about
8 this -- the ROM 3 cards until I asked you to do that. And
9 we've been playing with this for three years. So we're
10 going to a lot of work with a lot of information that was
11 sitting right in that 10-K form -- maybe not by month as
12 Mr. Snyder asked, but we're getting closer anyway.

13 Counsel, I'm not going to allow, if I allow any of
14 this -- and this is subject to Mr. Snyder's
15 cross-examination and some ability to prepare concerning
16 these changing numbers -- until after Tarnovsky testifies.

17 I state again: I don't know how Tarnovsky came up
18 with this hundred thousand number. I'm waiting to hear -- I
19 know, from the e-mail where he got it.

20 MR. WELCH: Your Honor, we have something better.

21 Exhibit 1270 that Mr. Stone was talking about with
22 Mr. Guggenheim, that is the basis of their counterclaim.

23 MR. HAGAN: On page 9 of 10.

24 THE COURT: Show it to me.

25 Let see how Tarnovsky comes up with a hundred

1 thousand.

2 MR. WELCH: Well, what they did is they put it
3 in -- Your Honor asked yesterday if he did that -- they
4 relied it it for some business reason. Exhibit 1270,
5 Your Honor, is one of their marketing documents they put
6 together so they could go out and get business. And they
7 incorporate it in there and they tell their salespeople with
8 Mr. Rubin's, Vice President, worldwide marketing -- or
9 United States marketing -- and they talk in here, as this is
10 dated May 2001, and it talks about the Black Sunday, and it
11 says it had over a hundred thousand EchoStar pirate cards
12 out there.

13 So this is something they used in their business.

14 THE COURT: Okay. Thank you.

15 What are your figures, sir, concerning 2001,
16 backing out the Canadian market in its entirety?

17 THE WITNESS: In 2001, it would be 210,000 net of
18 the Canadian market.

19 In 2002, it would be 168,300 net of the Canadian
20 market.

21 THE COURT: 2002. 168,300?

22 THE WITNESS: Correct.

23 THE COURT: 2003?

24 THE WITNESS: Would be 129,588.

25 THE COURT: 2004?

1 THE WITNESS: Would be 99,623.

2 THE COURT: And 2005?

3 THE WITNESS: 93,511.

4 THE COURT: Reading from the NDS "Highly
5 Confidential" memo: "Nagra is not capable of successfully
6 launching an electronic countermeasure to fight a hack. In
7 the United States, pirates have found Nagra's electronic
8 countermeasures, ECMs, easy to overcome. Hackers are always
9 aware of Nagra's attempts a day prior to a Nagra
10 counterattack due to the length of time it takes them to
11 actually broadcast the attack. This gives the hackers the
12 chance to defend their illegal viewers. In some cases such
13 as Via Digital in Spain, the installed Nagra CA system
14 doesn't even support ECM functionality at all.

15 "NDS has years of proven experience in
16 successfully recovering from hacks via ECM's. Our customers
17 use our unique electronic countermeasures to knock out
18 illegal viewers right before their key events.

19 "As of the end of January 2001, both EchoStar,
20 Nagra and DirectTV, NDS, in the United States were hacked.
21 NDS successfully countered a DirectTV pirate attempt in the
22 US on what is being called "Black Sunday" by the hacker
23 community."

24 And I assume that once again is the Super Bowl on
25 Sunday.

1 MR. HAGAN: Yes.

2 THE COURT: "NDS's countermeasures were sent right
3 before the Super Bowl. According to external literature,
4 over 200,000 pirate devices were disabled. NDS fieldfeel
5 contacts confirm that Nagra did not start sending an ECM
6 until after the game was over. Anyone with a pirated Nagra
7 card saw the game for free.

8 "Our estimate is that this commercial loss to
9 EchoStar probably accounted for over 100,000 nonpaying
10 subscriber."

11 Now, this was not quote/unquote advertised, as you
12 stated, counsel, by NDS. This is an internal Highly
13 Confidential document, and it's obvious that this
14 information in all likelihood came from Tarnovsky subject to
15 that e-mail.

16 Not that it may make a difference, but it's not
17 advertised.

18 MR. WELCH: Your Honor, may I direct your
19 attention to one part of this document?

20 THE COURT: Okay.

21 MR. WELCH: If you go to the very first page on
22 the exhibits, it's marked ESC0135955.

23 THE COURT: Why don't you start putting this up on
24 the board and blowing this up for me.

25 (Document displayed.)

1 THE COURT: Okay. What are you trying to show me?

2 MR. WELCH: It says in here -- it says, "We
3 encourage -- "While we encourage readers to utilize this
4 information, as required during the course of business" --
5 so what they're doing is they're going out when they're
6 marketing to people their NDS services.

7 THE COURT: Well, are they marketing that there's
8 a hundred thousand hacks on the ROM 3 system of EchoStar?

9 MR. WELCH: It depends on if they're trying to --

10 THE COURT: Show me such an advertisement.

11 MR. SNYDER: Actually, Your Honor, could you read
12 the rest of that sentence?

13 THE COURT: Sure.

14 MR. SNYDER: It says, "While we encourage readers
15 to utilize this information as required during the course of
16 business, copies of this document are not intended for
17 distribution outside of NDS."

18 THE COURT: Thank you very much, Counsel.

19 You can take that back. I've concluded already
20 that this was it intended to be an internal document.

21 Unless someone can show me advertizing in the
22 outside market, where EchoStar (sic) is it attempting to
23 take advantage by number of the hack, then this is an
24 internal document.

25 Mr. Snyder, if you have any questions, so be it.

1 If you want to reserve, that would be fine.

2 MR. SNYDER: If the Court is inclined to allow
3 EchoStar to go Gordon --

4 THE COURT: They're much closer.

5 MR. SNYDER: -- with Mr. Shelton's opinion, I
6 would like to reserve.

7 May I make three points, Your Honor?

8 THE COURT: Uh-huh.

9 MR. SNYDER: First, if you'll recall -- let me
10 sign-post better.

11 First, I do not think that it is credible for them
12 to say that they cannot give the Court information about the
13 number of active cards. And let me tell you why.

14 Exhibit 1510 is the document ultimately provided
15 with the customer information about -- that came from the
16 back-door password in the nipper posting of December 24th.
17 That back-door password was then sent to Kudelski, as we
18 were told. They came up with a card ID, and then EchoStar
19 created that one-page table that is Exhibit 1510 that shows
20 the status of that account.

21 There is no reason, as the Court has indicated
22 previously, that that cannot be done for all subscribers.
23 It is certainly known by them whether a card ID number --
24 what type of card that is: Is a certain card ID number a
25 ROM 2, a ROM 3 or a ROM 10 card.

1 It should be possible to identify how many active
2 cards of each type were in the field. And that would be a
3 much more accurate surrogate -- and still we're talking
4 about surrogates -- than what we have to far.

5 THE COURT: What would your estimate be, if that
6 was carried out?

7 MR. SNYDER: Based on the very large number of
8 ROM 10 cards that were shipped in 2000, I believe that, by
9 the time we get to 2001, the number of active ROM 3 cards in
10 the field would have dramatically reduced and the
11 predominance of cards would likely be ROM 10 cards.

12 THE COURT: Why would they want to disturb a
13 customer -- an old customer with a swap out of the ROM 10 in
14 2001? Because they were doing a soft swap then.

15 MR. SNYDER: Correct. And what Mr. Shelton told
16 the Court is precisely that: That they were doing a soft
17 swap, and the documents -- a document that he produced to us
18 identified two different categories. One category was what
19 is sometimes been referred to as a "service swap." So if
20 the receiver comes back, it's broken, it's defective,
21 there's something wrong, while there in the process of doing
22 their maintenance or replacing that receiver, they give the
23 customer a new card. The customer is none the wiser.

24 The second category that was identified in this
25 document -- it was provided to us by EchoStar as part of

1 Mr. Shelton's previous analysis, going back two or three
2 generations -- was an inventory swap where they went to
3 retailers, distributors, basically the sales channel, and
4 replaced ROM 3 -- ROM 2 and 3 cards with ROM 10 cards.

5 The two of those together accounted for millions
6 of cards, according to the document from Mr. Shelton.

7 THE COURT: You've told me in the past that I
8 should be concerned about activated cards, and I should be
9 careful not to allow a calculation based upon what I'm going
10 to call "warehouse cards" or "distributor cards."

11 How do I know at any given time that eventually
12 those ROM 3 cards weren't distributed?

13 MR. SNYDER: Because, if they were distributed and
14 activated, they would each show up, by definition, in the
15 list of cards that are active at any given moment. So
16 that's my first point, Your Honor. They ought to be able to
17 come up with this information.

18 Second point, Your Honor. There is an obvious
19 problem with the opinion that Mr. Shelton is now rendering.
20 Essentially -- let me take one step back.

21 Last night, the Court indicated that EchoStar
22 needed to go back to the drawing board, because just looking
23 at each -- the number of cards activated in each year, was
24 inadequate. What they have done since is come back to the
25 Court and accumulate all of the activations over a given

1 period of time.

2 So if you look at Mr. Shelton's chart, he is
3 saying that there is just as much likelihood in 2005 of a
4 card being pirated, that was issued in 2005, as a card that
5 was issued in 1996. Because, what he does is he takes every
6 single card that is issued and activated from 1996, every
7 year, and adds them all up, and then allocates that
8 percentage, even though that total vastly exceeds the number
9 of cards that were active in the field at any one time.

10 Third point, Your Honor. We still -- we are still
11 dealing only with a surrogate. And Mr. Shelton has already
12 indicated that his numbers include Canadians -- and the
13 Court asked him to back Canadians out. And I have no idea
14 how he did that. Looking at the numbers just now, it
15 appears he assumes for reasons that none of us know, that it
16 was 10 percent. But if he has a new opinion, before I
17 attempt to cross-examination him or make a fuller record, I
18 certainly need to know what that opinion is. And it appears
19 to have changed in just the last hour and a half.

20 THE COURT: When you backed the Canadian
21 population out, how many subscribers in total did you assume
22 that there were in Canada?

23 THE WITNESS: We always assume that 10 percent of
24 the active -- activity is in Canada.

25 THE COURT: Okay. How many subscribers would that

1 be?

2 THE WITNESS: I can add that up, Your Honor.

3 THE COURT: Just give me the year 2005 for a
4 moment.

5 THE WITNESS: Okay. In the year 2005.

6 That would be 10,390.

7 THE COURT: All the subscribers in Canada are
8 10,390?

9 THE WITNESS: As far as the ROM 3.

10 THE COURT: No. I want all the subscribers.

11 Now I understand what --

12 THE WITNESS: Oh.

13 THE COURT: I want a hundred percent swept, not
14 the 10 percent. I want a hundred percent of that population
15 swept off the board. Because, there, Canadians believe it's
16 a legal activity.

17 I want to assume that every Canadian is illegally
18 using this card from our perspective, and legally using it
19 from theirs.

20 THE WITNESS: Then, I would back it out the total
21 households --

22 THE COURT: That's right.

23 THE WITNESS: -- instead of the ROM 3.

24 THE COURT: That's right.

25 Now tell me those figures.

1 Counsel, where he's probably getting the
2 10 percent is just a population basis between Canada and the
3 United States, frankly. About 300 million roughly to about
4 30 million.

5 MR. SNYDER: And therein lies the problem,
6 Your Honor.

7 THE COURT: No, but the benefit may be, if I
8 deduct out 100 percent of Canadian population, because they
9 belief that they're doing something legal in this
10 timeframe --

11 MR. SNYDER: Well, to be clear, Your Honor. Are
12 you asking him to deduct the total number of Canadian users
13 or his estimated number of Canadian pirates?

14 THE COURT: Users.

15 MR. SNYDER: I'm not sure he has the total number
16 of users on this sheet anywhere. So I'm not sure what
17 Mr. Shelton is doing.

18 THE COURT: Well, we'll find out.

19 THE WITNESS: I'm basically backing out the
20 490,000 pirate households in 2005, 10 percent of 'em being
21 in Canada, and then I'll apply the same percentage, the
22 21 percent, having ROM 3.

23 THE COURT: Another way to do it, Mr. Snyder, is
24 this; and that is, to take approximately 12 million
25 households in the 10-K in 2005, subscribers, for a moment.

1 Give me the entire subscriber population in
2 Canadian. The entire subscriber population would be what?

3 THE WITNESS: I'm sorry. What was the question?

4 THE WITNESS: In 2005, what would be the entire
5 subscriber population be in Canada?

6 THE WITNESS: Both cable, satellite, everybody?
7 It would be -- and I'm operating from recall -- right around
8 11 million.

9 THE COURT: Households?

10 THE WITNESS: Households.

11 Bulk of those being cable households. A very
12 small percentage being satellite, Bell ExpressVu.

13 THE COURT: Well, we're dealing with satellite
14 piracy here. So less take satellites.

15 THE WITNESS: That would be Bell ExpressVu.

16 THE COURT: Which would be how much?

17 THE WITNESS: Right around a million.

18 THE COURT: A million. So if I took subscribers,
19 and I assumed all Canadians using satellites were, what we
20 would call 'hacking', and I backed out a million people, I
21 drop to about 11 million.

22 THE WITNESS: That wouldn't be correct. Because
23 all 11 million of Bell ExpressVu subscribers are not
24 pirates. There's only a smaller percent that are actually
25 pirates.

1 MR. SNYDER: And you would have to reduce that --
2 if you assumed, Your Honor, that that million people were
3 pirates, you would have to deduct it from the pirate number,
4 not from the EchoStar subscriber number.

5 THE WITNESS: Yeah, they're two separate entities,
6 but the same technology.

7 THE COURT: Okay. Do you have any questions you
8 want to ask him right now, Mr. Snyder?

9 MR. SNYDER: Those were the issues I wanted to
10 raise, Your Honor.

11 THE COURT: Okay. Why don't we take a recess.
12 Why to don't I go take the plea and give the court reporter
13 a rest for a moment.

14 And if was you, depending on when you want to go
15 home this evening, I would start getting out the jury
16 instructions. Okay.

17 Your ordered to remain, Mr. Shelton. We'll come
18 back to this in about an hour or so. But you can use the
19 table over here, and I'd like to see the instructions you
20 have done, which we laid out before, the common packet.

21 And by this evening, I would expect that I
22 minimally had the elements of the DCMA-1, 2, the California
23 Penal Code Sections where I saw the controversy between the
24 two of you involving each of those. So we'll come back and
25 join you probably within an hour.

1 Mr. Shelton, thank you. If you would remain, sir.

2 (Recess held at 2:15 p.m.)

3 (Proceedings resumed at 3:34 p.m.)

4 (Outside the presence of the jury.)

5 THE COURT: All right. We're on the record. All
6 counsel are present. Mr. Shelton's present.

7 The Court has two questions. The first: What
8 happens to a Smart Card after a user drops the service or
9 the card's swapped? Does it get returned to EchoStar or
10 does the user keep the card?

11 Another way of phrasing that is, is there an
12 incentive system for an EchoStar user to return that card so
13 it's simply not discarded and abandoned.

14 Let me repeat that to you. What happens to a card
15 after a user drops the service or the card is swapped? Does
16 it get returned to EchoStar or does the user keep the card?

17 And I've heard a lot of concern on NDS's part that
18 "Judge, uh, you could have a multitude of cards out there."
19 What I'm trying to find out is if there's an incentivized
20 system for the return of a card on a soft swap, hard swap,
21 you know, what gets that card back?

22 Second, in order, Mr. Shelton to pirate an
23 EchoStar service, do you need to activate the card that you
24 would reprogram or can you activate any card and then get a
25 pirated card for somewhere else? For example, could I sign

1 up and activate a ROM 10 card, lets say in 2001, and then
2 use a pirated ROM 3 card in my set-top box? And if so,
3 would this be recorded as an active ROM 3 card or an active
4 ROM 10 card?

5 Let me say that again. In other words, can I go
6 to a store, buy a receiver, buy a ROM 10 card, activate me
7 ROM 10 card, and then go get a ROM 3 card that's hacked, put
8 that in my receiver and make it work? Because if a user who
9 pirates a ROM 3 card must be associated with the ROM 3 card,
10 then I'm really not going to know if I've got that
11 interchangeability. Person bought a ROM 10, but might never
12 show a ROM 3.

13 So let me say it again. So counsel here's it.

14 In order to pirate EchoStar's service, do I need
15 to activate the card that you reprogram or can you active
16 sate any card and they get a pirated card from somewhere
17 else? So, for example, could I sign up and activate my
18 ROM 10 card, and then use a pirated ROM 3 card on my set-top
19 box? And if so, would this be recorded as an active ROM 3
20 card or a ROM 10 card?

21 Now, I want to take a recess for a moment, give
22 you all the time you want in answering that question.

23 Okay. Do you understand the question,
24 Mr. Shelton?

25 THE WITNESS: Yes, I do.

1 THE COURT: You sure?

2 THE WITNESS: Yes. Let me repeat it.

3 THE COURT: Sure.

4 THE WITNESS: Basically, a user purchases a
5 satellite receiver with a ROM 10 card. He activates the
6 ROM 10.

7 THE COURT: Right.

8 THE WITNESS: Then, he wants to use a ROM 3 card
9 in that same satellite receiver.

10 THE COURT: Exactly.

11 THE WITNESS: And then does it show up as an
12 active ROM 3?

13 THE COURT: Or an active ROM 10.

14 THE WITNESS: Or active ROM 10.

15 THE COURT: Yeah. Yeah, you've got it.
16 Okay. I'll wait.

17 (Pause in the proceedings 3:37 p.m.)

18 (Proceedings resumed at 6:02 p.m.)

19 THE COURT: All right. We're on the record. All
20 counsel are present. The parties are present. The jury, of
21 course, has been excused.

22 And in answer to the Court's first question, "What
23 happens to a card after a user drops the service or the card
24 is swapped? In other words, does it get returned to
25 EchoStar or does the user keep the card?"

1 MR. WELCH: We have an answer.

2 Okay. Question one, that's what we're on, has
3 four parts to the answer.

4 (Reading:) "For subscribers that lease a box and
5 deactivate, EchoStar has a return rate to its service
6 organization for those IRD's and Smart Cards of
7 approximately 85 percent."

8 'Cause you people that lease and you have people
9 that purchase.

10 THE COURT: Repeat that for me.

11 MR. WELCH: "For subscribers that lease a box and
12 deactivate, EchoStar has a return rate" --

13 THE COURT: Of 85 percent.

14 Is that because there's some type of incentive fee
15 that they lose by not returning the box?

16 MR. WELCH: That's the next section, Your Honor.

17 THE COURT: Okay. Two.

18 MR. WELCH: Okay. "Of the 15 percent of
19 subscribers with leased boxes who deactivate and fail to
20 return their EchoStar IRD and Smart Card, 92 percent of
21 those individuals pay EchoStar the price of the IRD and
22 Smart Card through automatic charges on their credit card on
23 file with EchoStar."

24 Do you want me to continue to read?

25 THE COURT: Yes.

1 MR. WELCH: That deals with deactivations.

2 THE COURT: Okay.

3 MR. WELCH: Now, "For a service swap, EchoStar
4 removes the Smart Card and replaces it with a new or
5 refurbished Smart Card before sending the IRD back out into
6 the field."

7 THE COURT: Okay.

8 MR. WELCH: Okay. Ready for the next section?

9 THE COURT: Yes.

10 MR. WELCH: "For the mass card swap" -- where we
11 send it out, mail it out. "For the mass card swap, EchoStar
12 did not require subscribers to return the old card because
13 the DNASP-II" -- that's Digital Nagra Advanced -- whatever
14 it was.

15 THE COURT: System Protection.

16 MR. WELCH: Is it System Protection?

17 THE COURT: Or Security Protection.

18 MR. WELCH: Whatever.

19 "-- DNASP-II stream was shut down" --

20 THE COURT: If Quarter 3.

21 MR. WELCH: -- in Q3 of 2005." That actually
22 should be "the end of Q3, 2005" -- "when the mass swap was
23 completed; therefore, those cards could no longer be used
24 for piracy."

25 THE COURT: Okay.

1 Question two was, "If it is" --

2 MR. WELCH: The Question two had some flaws in the
3 way it was worded, with all due respect, Your Honor.

4 THE COURT: Okay. Please tell me.

5 MR. WELCH: We like this example, though, so we
6 answered based on your example because we figured your
7 example gave clarity to the question.

8 THE COURT: Okay.

9 MR. WELCH: "If a subscriber activated with a
10 ROM 10 card, it was possible for that subscriber to then use
11 a pirated ROM 3 card which was paired with the subscriber's
12 original IRD" -- IRD being the set-top box -- "This required
13 extracting that IRD's box keys and reprogramming the ROM 3
14 card to include those box keys. That subscriber could:
15 (a) continue to pay the minimum subscription price to
16 EchoStar but steal all EchoStar programming using the
17 pirated ROM 3 card; or (b), deactivate and stop paying
18 monthly fees altogether and continue to steal all EchoStar
19 programming using the pirated ROM 3 card. In either case,
20 that subscriber showed up as a ROM 10 subscriber in
21 EchoStar's database."

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

23 MR. WELCH: We didn't just wipe out lost profits,
24 did we?

25 THE COURT: But in either case, that shows up as

1 an activated ROM .

2 MR. LENOIR: Yes.

3 THE COURT: Okay. What about the purchase instead
4 of the least of a box? How many of these boxes are
5 purchased versus leased? I don't know the area that well.

6 MR. WELCH: Don't have an answer for that one
7 right now.

8 MR. LENOIR: It's mostly leased.

9 MS. WILLETTS: It's mostly leased.

10 THE COURT: You've come into court and informally
11 represented that you had made tremendous progress with
12 subscriber information.

13 MR. WELCH: The subscribers information can be
14 found in the 10-Q's.

15 THE COURT: She's going to state what that is.
16 Pull the microphone closer.

17 MS. WILLETTS: Your Honor, previously, you had had
18 concerns that the numbers that were driving the ROM 3 --
19 total number of ROM 3 cards were based on activations and
20 didn't account for deactivated cards.

21 We requested that our client provide the total
22 number of active cards as well as a breakdown of active
23 cards by ROM version.

24 They didn't have that data readily available,
25 however, they were able to create a query of some sort to

1 run those numbers and give us back number of active Smart
2 Cards by ROM version by quarter.

3 THE COURT: Excellent. By quarter.

4 MS. WILLETTTS: By quarter.

5 And those numbers actually line up directly with
6 the published subscriber count that comes from the 10 --

7 MR. WELCH: The 10-Q's, which you can pull off of
8 SEC.gov.

9 THE COURT: When would you feel comfortable
10 submitting that to the Court and counsel?

11 MS. WILLETTTS: On active Smart Card count by ROM
12 version, we can produce in a spreadsheet right now.

13 Mr. Shelton will need to plug these numbers into
14 his analysis, and we can do that by tomorrow.

15 THE COURT: But there's no reason, then, to have
16 Mr. Shelton back tomorrow, because I don't have reporter
17 resources Saturday. I'll work with counsel informally on
18 instructions and other matters. So I think it has to be
19 Monday, let's say, at 3:00 o'clock, so I can get through the
20 afternoon calendar -- or try to.

21 And could I have a copy of those overnight to look
22 at?

23 MS. WILLETTTS: Certainly.

24 THE COURT: And could counsel, Mr. Snyder, have a
25 copy overnight to look at.

1 MS. WILLETTS: Certainly. We can print them out
2 right now for you.

3 THE COURT: Okay.

4 Now, if it turns out, Mr. Hagan, that this is
5 correct, it may be the information that the Court was trying
6 to sort through. I'm not making a ruling yet on this. But
7 I was prepared to state the following, and had informally
8 stated the following to Christine, and to Darin, to
9 Mr. Snyder, and that was I was prepared to rule that,

10 "Exhibit 1510 demonstrates that EchoStar has a
11 database listing subscriber data by card ID. This
12 subscriber data shows when a card was activated, how long it
13 was activated, and when it was deactivated. It also shows
14 how many people were issue and activated the same card.

15 Presumably, card ID's can be sorted by ROM
16 version; therefore, it should be fairly simple to sort the
17 subscriber data according to ROM version, as well. Once the
18 data is sorted in this fashion, EchoStar should be able to
19 calculate the number of each ROM version that was active in
20 any given month. Although --"

21 And this was a tentative ruling it's about to hand
22 down to you.

23 "Although defendant is correct in pointing out
24 that this is a surrogate for actual piracy, it may be
25 difficult or impossible to get any closer to the actual

1 number, at least, if the calculations are based on the
2 proportion of active ROM 3 cards in each given month. The
3 surrogate is as accurate as possible in that it will exclude
4 cards that were disabled, remain in warehouse or retail
5 inventory, or were replaced before entering the market.

6 "Although it may seem harsh to make EchoStar
7 produce these figures with limited notice, EchoStar has had
8 three and a half years to calculate their damages. They
9 have also been on notice that they would have to isolate
10 ROM 3 piracy since early January, when they stipulated to do
11 so. It does not appear that they made any effort to do so
12 until the Court threatened to exclude their lost profits
13 evidence altogether, despite having every opportunity.
14 Therefore, it's not unfair to preclude them from presenting
15 any expert testimony on lost profits until they can provide
16 accurate calculations."

17 Therefore, I wasn't closing the door on you,
18 but...

19 Now, since you're getting these figures to us, you
20 need to have them, you know, FedEx'd overnight. They'll be
21 wanting some of the underlying data so that NDS has access,
22 and I'm not going to require cross-examination.

23 Now, our evaluation, quite frankly, in chambers
24 was that you could create a program; that it was simply
25 uncomfortable and inconvenient. And I've stated from the

1 beginning, frankly, that I didn't believe that that couldn't
2 be done.

3 So I don't think that there's anything further
4 until tonight. We ought to look at this information. I'll
5 discuss it with informally tomorrow. I won't hand down a
6 final decision.

7 Mr. Shelton, you've got to plug these numbers in.
8 Of course, in a perfect world, this would be by month.
9 We're getting closer. I don't know if quarters suffice or
10 not, but we're getting closer, so I'm not going to say
11 anything further. If it can be run month by month, it's
12 better. Everybody's at risk. But you know your lost
13 profits were almost not presented to the jury.

14 So is there anything further this evening?

15 MR. SNYDER: No, Your Honor.

16 MR. WELCH: So do we need to provide Your Honor
17 with anything else other than Mr. Shelton on the stand?

18 THE COURT: I don't know yet. I'm going to go
19 back and look at these figures, also. It's totally your
20 responsibility to get these to me. And, quite frankly, I
21 find no fault with Mr. Shelton. I find fault with the
22 information provided to him.

23 And we were prepared to publish quite an expanded
24 article on why we found, not the methodology necessarily,
25 but the foundation for this to be inadequate.

1 MR. SNYDER: And, Your Honor, you will advise us
2 over the weekend what you expect us to be prepared to do
3 Monday at 3:00?

4 THE COURT: No. I'm not going to press you,
5 Darin. You do whatever you want to Monday at 3:00. I'm not
6 requiring you to go forward. By the same token, if I think
7 that this is good enough, that it passes the Kuhmo/Daubert
8 methodology test, and now you finally have the foundation,
9 then, tentatively, I'll tell you when to get Mr. Shelton in
10 and be ready.

11 MR. WELCH: Will that be tomorrow?

12 THE COURT: No. That will probably be on Monday.
13 I need to hear from Mr. Shelton.

14 MR. WELCH: Is there anything else that we need to
15 provide to them?

16 THE COURT: If it was me, I was be jumping through
17 hoops at this late date. I would be trying to break this
18 down by month. You've done it by quarter. No reason you
19 can't break it down by month.

20 MS. WILLETTS: Mr. Shelton's actual pirate
21 calculations are by -- his number of pirates are by year, so
22 I'm not certain how that affects this breakdown.

23 THE COURT: I'm not certain either, but this is
24 the breakdown I'm looking for. Mr. Shelton needs to adjust
25 to this. This doesn't adjust to Mr. Shelton.

1 MS. WILLETTS: Okay.

2 THE COURT: And I think when you're dealing with
3 lost profits, which is on top of the swap, as accurate as
4 you can be -- you control this information. Nobody else
5 does. This isn't a situation where you've got a sliding
6 pirate, or the other side's got it and you couldn't get it.
7 This is all within your request for money.

8 MR. WELCH: So you want us to bring it down by
9 month, if possible?

10 THE COURT: I certainly would. I'm not saying
11 that this is not adequate, but I am saying that it may not
12 be. And if I was you, I'd be going back right now and
13 requesting it by month.

14 You've got the time. You've got the program.
15 You're asking for millions if not hundreds of millions of
16 dollars. So that's you to you. You go at your own risk,
17 and you see where your risk was. You were going to be out
18 of the court for lost profits, frankly.

19 Okay. Thank you. Good night.

20 (At 6:16 p.m., proceedings were adjourned.)

21 -oOo-

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3 CERTIFICATE

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

11
12 Date: April 19, 2008

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15 _____
16 DEBBIE GALE, U.S. COURT REPORTER

17 CSR NO. 9472, RPR
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