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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
)	Hearing Re:
NDS GROUP PLC, et al.,)	Expert Witness
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Hearing Re: Expert Witness

Santa Ana, California

Monday, April 21, 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
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EchoStar 2008-04-21 Hearing

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WITNESSES	DIRECT	CROSS	REDIRECT	RE CROSS
SHELTON, James				
By Ms. Willetts	4		49	
By Mr. Snyder		11		52
By Ms. Willetts (further)			54	

EXHIBITS

EXHIBIT NO.	IDENTIFICATION	IN EVIDENCE
2028	Handwritten notes re security key changes	49
2029	Website printout	49

1 **SANTA ANA, CALIFORNIA, MONDAY, APRIL 21, 2008**

2 **Hearing Re: Expert Witness**

3 (3:39 p.m.)

4 *(Outside the presence of the jury.)*

03:39:29 5 THE COURT: All right. We're on the record in the
03:39:29 6 matter of EchoStar v. NDS. All counsel are present.

03:39:35 7 Mr. Shelton, would you be kind enough to retake
03:39:38 8 the stand, please.

03:41:13 9 *(Brief pause in proceedings.)*

03:41:14 10 THE COURT: All right. We're back on the record.

03:41:16 11 Counsel, would you like to proceed?

03:41:21 12 MS. WILLETTS: Your Honor, I have Mr. Shelton.

03:41:23 13 THE COURT: Thank you. This is the continued
03:41:25 14 hearing.

03:41:53 15 Counsel, your questions.

10:21:10 16 **JAMES SHELTON, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN**

17 **RESUMED THE STAND**

08:07:44 18 **DIRECT EXAMINATION (Continued)**

19 BY MS. WILLETTS:

03:41:56 20 Q. Mr. Shelton, the last time you were here testifying,
03:41:58 21 you testified regarding a methodology for estimating the
03:42:03 22 total number of EchoStar pirate households in the
03:42:07 23 United States. And I think there was a little bit of
03:42:09 24 confusion on whether or not those numbers included Canadian
03:42:14 25 pirate households.

03:42:16 1 Were you able to determine whether your original total
03:42:19 2 pirate household numbers excluded the Canadian households?
03:42:24 3 A. Yes, they did. That confusion actually was caused by
03:42:29 4 me. I normally will label every chart "U.S. Households." I
03:42:33 5 was asked by counsel last year to only include U.S.
03:42:37 6 households.
03:42:39 7 Q. And since you also last testified, have you been now
03:42:43 8 able to estimate the number of ROM 3 pirate households and
03:42:50 9 exclude that out from your total number of pirate
03:42:53 10 households?
03:42:54 11 A. Yes. From the information received last Friday
03:42:58 12 concerning subscriber authorizations and the ROM versions
03:43:14 13 that they're authorized from, I was able to break out the
03:43:18 14 ROM 3 per active subscriber.
03:43:21 15 Q. And where did you receive that information from?
03:43:23 16 A. From Cable Services Group.
03:43:28 17 Q. Who is Cable Services Group?
03:43:30 18 A. Cable Services Group has been around since the '80s.
03:43:32 19 They provide subscriber management software systems for,
03:43:38 20 well, cable initially, now satellite. And they're very
03:43:42 21 effective as far as analytical capabilities and running
03:43:48 22 subscriber data.
03:43:49 23 Q. And what was the data, again, that you received from
03:43:51 24 Cable Services Group that you're now relying upon to isolate
03:43:55 25 ROM 3?

03:43:56 1 A. I was -- I received subscriber count, authorized
03:43:59 2 subscriber count by ROM version.

03:44:35 3 Q. Mr. Shelton, can you tell us again what documents or
03:44:38 4 data you're relying upon now to estimate or isolate the
03:44:42 5 number of ROM 3 pirate cards -- or pirate households, I'm
03:44:48 6 sorry.

03:44:49 7 A. The document I'm relying on is the one provided last
03:44:52 8 Friday from Cable Services Group where it broke out the
03:44:56 9 different ROM versions that are authorized per active
03:45:00 10 subscriber.

03:45:01 11 Q. And how were you able --

03:45:02 12 THE COURT: What label is that, 2026?

03:45:07 13 MS. WILLETTS: No, Your Honor. We can label that
03:45:09 14 Exhibit 2027.

03:45:13 15 THE COURT: Just a moment. You just handed me
03:45:15 16 2026 today.

03:45:17 17 MS. WILLETTS: That's his new calculations based
03:45:22 18 on -- no, not -- based on the schedule that we provided you
03:45:31 19 with last Friday.

03:45:38 20 THE COURT: Is this what you provided last Friday?

03:45:40 21 MS. WILLETTS: Chad has it right here, Your Honor.

03:45:40 22 THE COURT: That's 2027. I've got it.

03:45:50 23 Next question.

03:45:50 24 BY MS. WILLETTS:

03:45:56 25 Q. Can you explain for us, Mr. Shelton, how you were able

03:46:00 1 to isolate ROM 3 piracy from all other versions of piracy
03:46:05 2 for EchoStar?

03:46:06 3 A. Yes. I used the subscriber count by ROM version, and
03:46:10 4 then I basically only took the ROM 3, divided it into the
03:46:16 5 authorized subscriber base, which gave me a percent of ROM 3
03:46:22 6 that were active in subscribers' homes. I took that percent
03:46:25 7 and then multiplied it times the pirate households to come
03:46:31 8 up with the ROM 3 pirate household number.

03:46:53 9 Q. So can you provide us with an example of that? Say,
03:46:56 10 for quarter 4 of 2001, can you explain to us your
03:47:00 11 methodology for isolating ROM 3 piracy?

03:47:04 12 A. Sure. If you take a look at the column that says DN,
03:47:11 13 which stands for DISH Network 3.

03:47:15 14 Q. And you're looking at Exhibit 2026, correct?

03:47:18 15 A. That is correct.

03:47:23 16 In the fourth quarter of 2001, there are 3,345,545
03:47:31 17 active ROM 3 authorized in consumers' homes.

03:47:37 18 THE COURT: Put that up on the ELMO.

03:47:41 19 All right. Please continue.

03:47:48 20 THE WITNESS: I divide that number into the --

03:47:50 21 THE COURT: Just a moment. You're in fourth
03:47:52 22 quarter 2001, correct?

03:47:52 23 THE WITNESS: Correct.

03:47:53 24 THE COURT: You have DN2, 461,737?

03:47:57 25 THE WITNESS: And then I'm focused on the DN3.

03:48:01 1 THE COURT: You have 3,345,545.

03:48:06 2 THE WITNESS: Correct.

03:48:07 3 THE COURT: Okay. Thank you.

03:48:07 4 THE WITNESS: Then I divide it by the active
03:48:09 5 authorized subscriber base of 6,830,000, which gives me the
03:48:18 6 49 percent ROM 3 authorized in the active subscriber homes.
03:48:26 7 I take the 49 percent and multiply it by the 400,000 pirate
03:48:32 8 households using Smart Cards to derive the 195,932 pirate
03:48:41 9 households using a pirate ROM 3.

03:48:43 10 BY MS. WILLETTS:

03:48:49 11 Q. Now, do you believe that -- the methodology you use to
03:48:51 12 derive the number of ROM 3 pirate households, do you believe
03:48:56 13 that methodology to be conservative or aggressive?

03:49:00 14 A. It's conservative because, as you can see, over time
03:49:03 15 that was actually the peak. That was the highest number,
03:49:06 16 because as the ROM 3 base continues to shrink and the
03:49:11 17 subscriber authorized households continue to increase, my
03:49:14 18 percent drops, as far as the calculated percentage of pirate
03:49:20 19 households, to where it continues dropping to 1,300. It's
03:49:28 20 very conservative.

03:49:30 21 Q. Can you explain why that is conservative, why that's
03:49:33 22 consistent?

03:49:34 23 A. Well, from historical experience, whenever you see an
03:49:38 24 active base of pirates using a pirate device, unless there's
03:49:42 25 a reason for them to cease using that pirate device, then

03:49:50 1 they continue on until security is completely restored.

03:49:53 2 Q. So based on your experience in satellite security,

03:49:56 3 would you expect at the peak for the number of pirate ROM 3

03:50:03 4 households to flatline?

03:50:06 5 A. I would expect it to flatline, yes, definitely.

03:50:10 6 Q. But using your methodology here, it actually decreases?

03:50:14 7 A. That's correct.

03:50:15 8 Q. And that's why you believe it is conservative?

03:50:18 9 A. Correct.

03:50:18 10 Q. Now, Mr. Rock, our lost profits expert, relies upon a

03:50:25 11 25 percent conversion rate for EchoStar subscribers in order

03:50:30 12 to calculate his lost profits, meaning that if the system

03:50:33 13 were secure, 25 percent of those pirates would become

03:50:36 14 legitimate subscribers. Based on your experience in

03:50:41 15 security, is that estimate accurate?

03:50:44 16 A. It's conservative. The subscriber has already

03:50:48 17 installed a system, and they have the choice of, one,

03:50:54 18 subscribing to cable -- they already have a DISH Network

03:51:13 19 system installed that they were using to steal programming.

03:51:17 20 So they could either subscribe to cable or purchase a

03:51:20 21 DirecTV system and install it or take off air signals.

03:51:25 22 From what I've monitored on activity when security is

03:51:29 23 restored, typically they'll go legit and purchase a Smart

03:51:33 24 Card and start subscribing, using their current system.

03:51:37 25 That's a larger percentage than the 25 percent.

03:51:41 1 Q. And when calculating lost profits, Mr. Rock also relies
03:51:45 2 upon a 60/40 split between the number of pirates who are
03:51:53 3 subscribing to a minimum package of programming, meaning
03:51:57 4 60 percent of those pirates subscribe to a minimum package,
03:52:00 5 versus 40 percent who don't subscribe or pay anything at
03:52:05 6 all.

03:52:06 7 Based on your experience, is that 60/40 split accurate?

03:52:10 8 A. That is an accurate number.

03:52:12 9 Q. Why do you believe it is accurate?

03:52:14 10 A. When I was involved in restoring security for the video
03:52:17 11 cipher division of General Instrument, we only exchanged
03:52:23 12 modules and upgraded the consumers that had an untampered
03:52:29 13 module. So I had to electronically identify out of the
03:52:32 14 authorized base how many were stealing using a
03:52:35 15 Three-Musketeer type of piracy. And I found that 60 percent
03:52:40 16 of my base was using that type of method. So they did not
03:52:45 17 qualify for a free upgrade.

03:52:49 18 Q. So you believe that that 60/40 percent method is
03:52:54 19 consistent with what you have seen in the past with piracy?

03:52:56 20 A. Correct.

03:52:58 21 MS. WILLETTS: We have no further questions for
03:52:59 22 Mr. Shelton, Your Honor.

03:53:01 23 THE COURT: Cross-examination, if you chose to go
03:53:02 24 forward. If you don't, you can call him at another time.

03:53:04 25 MR. SNYDER: I would like to ask Mr. Shelton a few

03:53:06 1 questions if I could, Your Honor.

03:53:08 2 THE COURT: Sure. And you can reserve additional
03:53:10 3 questions if you like.

03:53:11 4 MR. SNYDER: Thank you.

08:07:44 5 **CROSS-EXAMINATION**

01:59:57 6 BY MR. SNYDER:

03:53:13 7 Q. Mr. Shelton, I would like to start with the last two
03:53:15 8 opinions that you offered. On this 25 percent conversion
03:53:19 9 rate after pirates are no longer pirates, 25 percent of them
03:53:25 10 convert to legitimate subscribers. That's your opinion?

03:53:28 11 A. Correct.

03:53:29 12 Q. Okay. Before tonight -- what is it, 3:50 on Monday,
03:53:33 13 April the 21st -- have you offered an opinion on that
03:53:38 14 subject in this case?

03:53:42 15 A. Not in this case.

03:53:43 16 Q. Okay. This is the first time that you've offered this
03:53:46 17 opinion in the entire time that you've been retained in this
03:53:50 18 entire matter; isn't that true?

03:53:52 19 A. That's correct.

03:53:52 20 Q. Okay. Now, you are familiar with a report that was
03:53:54 21 done by the Carmel Group in 2003, correct?

03:53:57 22 A. Correct.

03:53:58 23 Q. And they actually prepared some numbers for you -- or
03:54:02 24 you prepared some numbers that were included in that report,
03:54:04 25 correct?

03:54:05 1 A. I reviewed the spreadsheets in the back of that report.
03:54:08 2 Q. Right. And that was the only role that you had in that
03:54:11 3 report, correct?
03:54:12 4 A. Correct.
03:54:13 5 Q. Now, in that report there is a reference to a
03:54:16 6 conversion rate after an effective ECM, correct?
03:54:20 7 A. Correct.
03:54:20 8 Q. You had no role in that whatsoever; isn't that right?
03:54:24 9 A. That's correct.
03:54:24 10 Q. That was prepared by the Carmel Group?
03:54:26 11 A. Correct.
03:54:27 12 Q. And you didn't provide any information for that number,
03:54:31 13 correct?
03:54:32 14 A. I never saw the body of the --
03:54:34 15 Q. You never even saw it, so you couldn't opine on whether
03:54:38 16 it was correct or not, right?
03:54:40 17 A. That's correct.
03:54:40 18 Q. Okay. Now, this 25 percent opinion that you've
03:54:42 19 articulated for the first time this afternoon, you say it
03:54:46 20 was based on experience?
03:54:48 21 A. Correct.
03:54:49 22 Q. Okay. Have you tracked the conversion of pirates to
03:54:54 23 paying subscribers in any way in the time that you have been
03:54:58 24 tracking satellite piracy?
03:55:00 25 A. Yes, I have.

03:55:00 1 Q. Okay. Do you have any records of that?

03:55:02 2 A. Yes, I do.

03:55:03 3 Q. Where are those records?

03:55:05 4 A. They would relate to the video cipher, restoring

03:55:08 5 security on the video cipher.

03:55:09 6 Q. Oh, they relate to the video cipher system?

03:55:12 7 A. Correct.

03:55:12 8 Q. I see. And what is the video cipher system?

03:55:15 9 A. Video cipher system was the decoder device for the

03:55:19 10 large C-band dish market.

03:55:22 11 Q. In what years was the video cipher system used?

03:55:26 12 A. It started in 1987, and security -- and the module swap

03:55:31 13 occurred and was completed in April of '93.

03:55:33 14 Q. So '90 to '93?

03:55:35 15 A. '86 --

03:55:36 16 Q. I'm sorry.

03:55:36 17 A. '86 to '93.

03:55:52 18 Q. '86 to '93.

03:55:54 19 A. On --

03:55:54 20 Q. And your experience from 1986 to 1993 with the video

03:55:58 21 cipher system is the exclusive basis for your opinion that

03:56:02 22 25 percent of pirates would convert to paying subscribers

03:56:05 23 after an effective ECM or security is restored; is that

03:56:09 24 right?

03:56:09 25 A. That's correct.

03:56:09 1 Q. Okay. Your opinion is not based on any observations or
03:56:15 2 studies involving EchoStar piracy?
03:56:18 3 A. Not involving EchoStar.
03:56:20 4 Q. And your opinion is not based on any observations or
03:56:23 5 experience involved with small dish, DirectTV or EchoStar or
03:56:30 6 ExpressVu, piracy; is that right?
03:56:33 7 A. No, that's not correct. I've watched the activity on
03:56:39 8 DirectTV quite closely once they restored security.
03:56:43 9 Q. I understand that. But your testimony was that your
03:56:46 10 opinion related to the 25 percent conversion rate is based
03:56:51 11 exclusively on your experience with the video cipher system,
03:56:53 12 correct?
03:56:54 13 A. Correct, along with the observation of DirectTV.
03:56:57 14 Q. Right. But it does not involve EchoStar?
03:56:59 15 A. No.
03:57:00 16 Q. Now, let's look at your -- this other opinion that
03:57:03 17 you've had that 60 percent of pirates subscribe to a minimum
03:57:08 18 package?
03:57:09 19 A. Correct.
03:57:10 20 Q. Before today, at any time in this entire case, have you
03:57:13 21 offered an opinion on the percentage of pirates that
03:57:17 22 purchase a minimum subscription?
03:57:22 23 A. No, I have not.
03:57:23 24 Q. And you were also -- you remember, again, that 2003
03:57:26 25 Carmel Group Report?

03:57:28 1 A. Correct.

03:57:29 2 Q. And it includes an observation that 60 percent of

03:57:33 3 pirates pay a minimum subscription, correct?

03:57:36 4 A. Correct.

03:57:37 5 Q. But you didn't even see that text before it was

03:57:40 6 prepared, correct?

03:57:40 7 A. I didn't see the text. It was broken out in the

03:57:44 8 spreadsheet.

03:57:45 9 Q. You have -- you don't know anything about the basis for

03:57:47 10 that figure, do you?

03:57:48 11 A. No, I do not.

03:57:50 12 Q. And you do not know whether or not that figure -- the

03:57:53 13 basis for that figure is reliable; isn't that right?

03:57:56 14 A. Other than experience on the video cipher and testing

03:57:59 15 electronically --

03:58:11 16 Q. Right. So you've --

03:58:11 17 A. Other than relying on the experience of electronically

03:58:14 18 identifying on the video cipher pirate modules which percent

03:58:18 19 were illegal using the Three-Musketeer.

03:58:20 20 Q. Okay. So again, your estimate that 60 percent of

03:58:25 21 pirates purchase a minimum subscription is based on your

03:58:30 22 experience with the video cipher system, correct?

03:58:33 23 A. Correct.

03:58:34 24 Q. And that's a system that was in effect from '87 to '93?

03:58:37 25 A. It still is in existence. What happened in '93 was

03:58:41 1 there was a module swap to restore security with the
03:58:45 2 BC2 plus decoder. So there's still a C-band market out
03:58:51 3 there. It has shrunk over the years, but the system is
03:58:54 4 still secure.

03:58:55 5 Q. But your opinion that 60 percent of pirates purchase a
03:58:58 6 minimum subscription is based on your experience with the
03:59:02 7 video cipher system; is that right?

03:59:04 8 A. Correct.

03:59:05 9 Q. It is not based on any experience or observations
03:59:09 10 involving the EchoStar system, correct?

03:59:13 11 A. That's correct.

03:59:14 12 Q. All right. Thank you, Mr. Shelton.

03:59:16 13 Now, let's talk for a few minutes about the numbers of
03:59:26 14 people -- not even pirates, just people who are using
03:59:30 15 EchoStar ROM 3 cards. Do you have Exhibit 2027 in front of
03:59:40 16 you? You used it a few moments ago with plaintiff's
03:59:44 17 counsel.

03:59:44 18 A. Yes.

03:59:46 19 THE COURT: Why don't we put that up on the board.

03:59:48 20 MR. SNYDER: Thank you.

03:59:49 21 *(Document displayed.)*

22 BY MR. SNYDER:

03:59:50 23 Q. Could you look, please -- did you do anything to verify
03:59:53 24 any of these numbers?

03:59:56 25 A. Yes, I did.

03:59:57 1 Q. What did you do?

04:00:01 2 A. That's a different exhibit on the board. But you're

04:00:04 3 talking about this one?

04:00:07 4 Q. I am talking about that one.

04:00:09 5 A. Basically I looked at, okay, the authorized base as far

04:00:13 6 as the published subcount, and tied it back to the 10-Q --

04:00:16 7 10-K to make sure that it was accurate.

04:00:21 8 And I also looked at the active Smart Card information.

04:00:28 9 I chose to use the subcount by ROM version because I track

04:00:33 10 pirate households not by device but actual pirate

04:00:37 11 households, and that matched up as an apples-and-apples

04:00:42 12 comparison.

04:00:42 13 Q. So let me make sure I understand correctly what you did

04:00:45 14 to verify these numbers.

04:00:47 15 You checked the total number of subscribers against

04:00:49 16 their SEC filings to make sure those matched?

04:00:52 17 A. Correct.

04:00:53 18 Q. And then you used the total number of subscribers

04:00:55 19 'cause that matched with your households?

04:00:58 20 A. Correct.

04:00:59 21 Q. Other than making sure that the total number of

04:01:01 22 subscribers matched the total number of subscribers in the

04:01:04 23 SEC filings, did you do anything to make sure that the

04:01:09 24 numbers were verified or accurate?

04:01:13 25 A. Other than -- previously I'd been provided with

04:01:17 1 shipping information, so I checked it against that. This
04:01:19 2 has much more detail and goes further than what I've been
04:01:24 3 provided in the past. So --

04:01:30 4 Q. Did you do anything, Mr. Shelton, to verify the
04:01:36 5 accuracy of the Smart Card information?

04:01:41 6 A. I'm not sure I understand that question. On a
04:01:44 7 particular person?

04:01:44 8 THE COURT: Don't answer it, then. Just reask it.

04:01:48 9 MR. SNYDER: Sure. I'll ask a different question.
04:01:49 10 Maybe we can get to the point.

04:01:50 11 BY MR. SNYDER:

04:01:51 12 Q. Did you notice, Mr. Shelton, that in several quarters
04:01:55 13 the number of active Smart Cards was actually smaller than
04:01:58 14 the number of subscribers?

04:02:03 15 A. I noticed that the active Smart Cards by ROM version
04:02:08 16 was larger than the subcount by ROM version.

04:02:11 17 Q. Well, let's take a look at the very first line, 1996
04:02:14 18 Q-2. There's only one active Smart Card ROM version, and
04:02:19 19 that's DN2, which is in the upper left-hand corner.

04:02:24 20 A. Correct.

04:02:25 21 Q. It says 38,231. Do you see that?

04:02:29 22 A. Yes, I do.

04:02:30 23 Q. And then if you look to the right on the subcount in
04:02:33 24 1996, Q-2, the total is 70,000?

04:02:39 25 A. Correct.

04:02:40 1 Q. Did it trouble you at all that the number of active
04:02:43 2 Smart Cards was about half the number of subscribers?
04:02:48 3 A. No, because it actually starts changing as you go on
04:02:52 4 down per quarter.
04:02:54 5 Q. I understand it's changing. But did you ask anybody
04:02:57 6 how you could have subscribers without active Smart Cards?
04:03:01 7 A. No, I did not.
04:03:03 8 Q. Let's look at the next line just to make sure this
04:03:07 9 isn't an anomaly. In 1996 Q-3, again there's still only one
04:03:12 10 type of card. And do you see where it says 119,467?
04:03:17 11 A. Correct.
04:03:18 12 Q. According to this, that's the number of active cards,
04:03:21 13 correct?
04:03:22 14 A. Correct.
04:03:22 15 Q. And if you read across to the right, the number of
04:03:25 16 subscribers in that same quarter is 190,000. Do you see
04:03:30 17 that?
04:03:30 18 A. Yes, I do.
04:03:31 19 Q. Did you ask anybody how those 70,000 people with
04:03:35 20 subscriptions without active Smart Cards were getting a
04:03:38 21 signal?
04:03:39 22 A. No, I have not.
04:03:41 23 Q. You didn't notice that there was this discrepancy?
04:03:44 24 A. No, I did throughout the body. As you go on down, the
04:03:48 25 cards are much higher than what the subscribers are.

04:03:51 1 THE COURT: The next year it switches.

04:03:54 2 THE WITNESS: Exactly.

04:03:54 3 THE COURT: In 1996 why is it switching?

04:03:58 4 THE WITNESS: I have not asked or had the

04:04:00 5 opportunity to ask that question yet. But it's my

04:04:02 6 understanding as multiple units went out into a subscriber's

04:04:08 7 home, then it starts switching. So you have more than one

04:04:12 8 card per household.

04:04:13 9 BY MR. SNYDER:

04:04:14 10 Q. But you can't have less than one card per household,

04:04:17 11 can you?

04:04:19 12 A. No, you should not.

04:04:20 13 THE COURT: Just a moment. Let me look down at

04:04:21 14 the figures.

04:04:23 15 Is there any other quarter where the active Smart

04:04:37 16 Cards are less than the subscribers?

04:04:46 17 MR. SNYDER: I believe that's true for each of the

04:04:50 18 first five quarters.

04:04:52 19 THE COURT: Just a moment.

04:05:01 20 And then so I'm reading this correctly, that

04:05:03 21 switches in 1997, quarter 4.

04:05:06 22 MR. SNYDER: In 1997 Q-3 the number of active

04:05:10 23 Smart Cards for the first time appears to exceed the number

04:05:13 24 of subscribers.

04:05:14 25 THE COURT: I'm sorry, I misspoke. Quarter 3,

04:05:17 1 1997, okay. Thank you.

04:05:19 2 THE WITNESS: Correct.

11:59:57 3 BY MR. SNYDER:

04:05:26 4 Q. Now, just to make sure I understand, on Exhibit 2026,

04:05:28 5 which is the other page you used this afternoon --

04:05:33 6 A. Yes.

04:05:33 7 Q. -- there's -- near the left-hand side there's a heading

04:05:38 8 near the top that says Total U.S. Households Using Pirate

04:05:46 9 EchoStar Smart Cards -- or Pirate EchoStar Cards. Is that

04:05:50 10 right? There's a heading in the upper --

04:05:52 11 A. Yes, I see that.

04:05:54 12 Q. Okay. And that has two columns underneath it, one

04:05:58 13 labeled Annual Estimate and one labeled Prorated Quarterly?

04:06:04 14 A. Correct.

04:06:05 15 Q. And the annual estimate is your estimate of the number

04:06:07 16 of EchoStar pirated Smart Cards in the United States?

04:06:13 17 A. Correct.

04:06:15 18 Q. Does that estimate include free-to-air piracy?

04:06:19 19 A. No, sir, it does not.

04:06:21 20 Q. Is that estimate the same estimate that you gave this

04:06:25 21 Court previously of the net EchoStar pirates?

04:06:32 22 A. Yes. It's the U.S. households using Smart Cards.

04:06:37 23 THE COURT: I thought you told me it was 500,000.

04:06:39 24 Am I mistaken?

04:06:41 25 THE WITNESS: It grows to 500,000, Your Honor.

04:06:44 1 THE COURT: Oh, I see. Thank you.

04:06:46 2 THE WITNESS: Okay.

04:06:46 3 THE COURT: Down in 2004.

04:06:48 4 THE WITNESS: Correct.

04:06:49 5 THE COURT: Quarter 1.

04:06:49 6 BY MR. SNYDER:

04:06:50 7 Q. Keep that exhibit handy for a moment, Mr. Shelton.

04:06:56 8 MR. SNYDER: Mr. Dilger, could you hand him

04:07:00 9 Exhibit 1603?

04:07:02 10 THE COURT: And put that up on the board, please,

04:07:05 11 1603.

04:07:06 12 *(Document displayed.)*

04:07:06 13 BY MR. SNYDER:

04:07:15 14 Q. Now, this is the sheet that you handed out at one of

04:07:18 15 our previous hearings; is that right, Mr. Shelton?

04:07:21 16 A. Yes, it is.

04:07:23 17 Q. Okay. And at the very top, the first row is labeled

04:07:29 18 Shelton & Associates, Shelton Net Piracy Total. Do you see

04:07:34 19 that?

04:07:34 20 A. Yes, I do.

04:07:35 21 Q. Okay. Now, those numbers are not the same as the

04:07:38 22 numbers that you're using on Exhibit 2026, are they?

04:07:45 23 THE COURT: Just a moment. Let me -- bear with me

04:07:48 24 for a moment.

04:07:49 25 Let me look before hearing from you.

04:07:52 1 THE WITNESS: Okay.

04:08:06 2 THE COURT: All right. Thank you. Please proceed

04:08:07 3 with your answer.

04:08:08 4 THE WITNESS: My numbers are higher than what we

04:08:11 5 reported and tracked.

04:08:14 6 THE COURT: Yeah. Because in 2004 aren't you

04:08:16 7 estimating 38 percent -- well, strike that. I want to make

04:08:21 8 sure I'm reading this correctly.

04:08:23 9 And in 2004 on the new sheet -- no, I'm mistaken.

04:08:29 10 Why don't you explain that to me.

04:08:35 11 THE WITNESS: Okay. If you look at 1999.

04:08:37 12 THE COURT: No, I'm at 2004.

04:08:39 13 THE WITNESS: Okay. 2004, I've got .97. The

04:08:43 14 percent below is just a percentage change from the previous

04:08:47 15 year.

04:08:48 16 Basically what it's doing is it's comparing with

04:08:51 17 the 2003 Carmel report, which would be a forecasted number

04:08:55 18 since they did their report in 2003. Then it compares with

04:09:00 19 the 2007 report. But it breaks out just the Smart Card

04:09:05 20 numbers down below where it stays total EchoStar Smart Card

04:09:10 21 pirates.

04:09:10 22 BY MR. SNYDER:

04:09:13 23 Q. Now, the total EchoStar -- let's make sure we can all

04:09:18 24 follow along.

04:09:19 25 A. Okay.

04:09:20 1 Q. So on Exhibit 1603, in the middle of the page on the
04:09:25 2 right-hand side under the heading April 2007 Report, there's
04:09:29 3 a label that says, "Total EchoStar FTA Pirates." It
04:09:36 4 originally says Smart Cards, but that's been scratched out,
04:09:39 5 and it says FTA, right?

04:09:42 6 A. Correct.

04:09:42 7 Q. And then beneath that, "Total EchoStar Smart Card
04:09:47 8 Pirates," correct?

04:09:47 9 A. Correct.

04:09:48 10 Q. And that's the number that you used for Exhibit 2026,
04:09:50 11 the total EchoStar Smart Card pirates; is that right?

04:10:01 12 A. That's correct.

04:10:02 13 THE COURT: Now, just a moment.

04:10:03 14 THE WITNESS: There's some rounding.

04:10:05 15 THE COURT: So you used the figure 1,036,454 on
04:10:11 16 this document, 1603?

04:10:19 17 THE WITNESS: That total number down --

04:10:21 18 THE COURT: Just yes or no.

04:10:22 19 THE WITNESS: No.

04:10:23 20 THE COURT: No?

04:10:25 21 THE WITNESS: Because that's cards plus FTA at the
04:10:28 22 bottom.

04:10:29 23 THE COURT: Oh, that's including free-to-air.

04:10:31 24 THE WITNESS: Free-to-air. And I've --

04:10:33 25 THE COURT: Just a moment. So you are -- 536,454.

04:10:39 1 THE WITNESS: Correct.

04:10:41 2 THE COURT: Okay. Now, just a moment.

04:10:45 3 Well, now I'm off the chart, Counsel, as far as

04:10:48 4 2026. So I have no way to relate that back to see the

04:10:53 5 accuracy.

04:10:54 6 Why don't we pick on 2005.

7 BY MR. SNYDER:

04:10:57 8 Q. Sure. So let's take a look at 2005. In 2005, on

04:11:01 9 Exhibit 2026, your -- you estimated 490,000 total U.S.

04:11:09 10 households using pirate EchoStar cards, correct?

04:11:13 11 A. Correct.

04:11:13 12 Q. And that number ties to the .49 under -- on

04:11:19 13 Exhibit 1603 under the heading 2005 and in the row labeled

04:11:26 14 Total EchoStar Smart Card Pirates, which is the second row

04:11:32 15 from the bottom, in the first box?

04:11:41 16 A. You lost me there.

04:11:43 17 THE COURT: Yeah, me too.

04:11:44 18 So the end result is in 2005 -- the most simple

04:11:47 19 approach from the Court's perspective is you estimated on

04:11:51 20 Exhibit 1603 Smart Card pirates are 485,000?

04:11:57 21 THE WITNESS: Correct.

04:11:58 22 THE COURT: And what you did on Exhibit 2026,

04:12:00 23 which is a relatively new document, you ranged in 2005

04:12:05 24 between 475,000 and 490,000 per quarter?

04:12:14 25 THE WITNESS: Correct.

04:12:15 1 THE COURT: So, therefore, you've got an
04:12:16 2 average -- if I took 475, 480, 485 and 490,000 and just
04:12:21 3 averaged it out, about the same rough ballpark figure?

04:12:26 4 THE WITNESS: Correct.

04:12:26 5 THE COURT: Okay, Counsel.

6 BY MR. SNYDER:

04:12:27 7 Q. Mr. Shelton, let's look back at Exhibit 1603. And I've
04:12:32 8 tried to blow up the headings here so we can all see them a
04:12:37 9 little bit better.

04:12:40 10 There's this section, total EchoStar Smart Card
04:12:44 11 Pirates, and that should actually be FTA pirates, right?
04:12:50 12 There was a mistake in the heading?

04:12:57 13 A. Yes, there was. I'm not sure if this is the corrected
04:13:00 14 version. Give me a moment and I can tell.

04:13:07 15 Q. Well, if that's not right --

04:13:09 16 A. It's --

04:13:09 17 Q. -- then we started with FTA pirates in 1999. I'm not
04:13:13 18 sure anybody thinks that happened.

04:13:16 19 A. No.

04:13:17 20 Q. So let's -- and so that row that is labeled Total
04:13:21 21 EchoStar FTA Pirates should actually be Smart Card Pirates?

04:13:26 22 A. I can't see the numbers on --

04:13:27 23 Q. Sure.

04:13:28 24 A. I think that's a little bit -- there we go. That's
04:13:35 25 correct --

04:13:35 1 Q. Okay.

04:13:35 2 A. -- on that.

04:13:36 3 Q. Just so we're clear, that row that says Total EchoStar
04:13:40 4 FTA Pirates is really total EchoStar Smart Card Pirates, and
04:13:47 5 it's the information from that row that you have transferred
04:13:51 6 onto Exhibit 2026?

04:13:55 7 THE COURT: I'm not sure of that. I'm not sure
04:13:57 8 he's not transferring this row. See, look at the bottom. I
04:14:03 9 think Mr. Snyder's transferring the Smart Card Pirates,
04:14:07 10 whatever the confusion is here. I think he's working off
04:14:11 11 that bottom row.

04:14:13 12 THE WITNESS: My document is the corrected
04:14:14 13 version.

04:14:16 14 BY MR. SNYDER:

04:14:17 15 Q. Oh, okay. And so you've got the bottom row, Total
04:14:20 16 EchoStar Smart Card Pirates, in the top row of that second
04:14:24 17 box on the bottom of 1603; is that right?

04:14:29 18 A. That's correct, in the top row.

04:14:31 19 Q. Okay. And then beneath that is the Estimated Total
04:14:34 20 EchoStar FTA Pirates?

04:14:37 21 A. Correct.

04:14:37 22 Q. And then the Total EchoStar Pirates. And that Total
04:14:41 23 EchoStar Pirates ties up to the numbers that were in the
04:14:44 24 Carmel Group's April 2007 report?

04:14:48 25 A. Because it included FTA, correct.

04:14:50 1 Q. Because -- okay. So the April -- you started with the
04:15:09 2 April 2007 Carmel Group numbers and subtracted the FTA
04:15:16 3 estimate, and that's how you got the estimated Smart Card
04:15:20 4 numbers; is that right?

04:15:21 5 A. Correct.

04:15:23 6 Q. How did you estimate the number of FTA pirates?

04:15:27 7 A. We -- according to what I monitor and track is we -- I
04:15:33 8 separate basically the types --

04:15:35 9 THE COURT: No, that's not the question. How did
04:15:38 10 you estimate 'em? "Hi, I'm a pirate. I'm using
04:15:41 11 free-to-air."

04:15:42 12 How did you estimate it? It's like going out and
04:15:42 13 taking a survey? "Hi, I'm a narcotics user. I want to take
04:15:46 14 your survey."

04:15:47 15 How did you estimate it?

04:15:49 16 THE WITNESS: By the volume of activity on the
04:15:51 17 pirate websites pertaining to free-to-air only.

11:59:57 18 BY MR. SNYDER:

04:15:55 19 Q. Mr. Shelton, isn't it true that to estimate the number
04:15:59 20 of FTA pirates, you relied on the Carmel Group's survey of
04:16:04 21 FTA distributors or pirates or whatever survey it is that
04:16:08 22 they did?

04:16:09 23 THE COURT: Yeah. Didn't you simply just transfer
04:16:11 24 the numbers?

04:16:12 25 THE WITNESS: No, sir.

04:16:12 1 THE COURT: Didn't you? Okay. Tell me what you
04:16:13 2 did.

04:16:14 3 THE WITNESS: Basically I went through on the
04:16:15 4 pirate forums that were promoting the free-to-air pirate
04:16:20 5 activity, and I tracked the activity growth of the
04:16:22 6 free-to-air sections.

04:16:31 7 BY MR. SNYDER:

04:16:32 8 Q. Mr. Shelton, you had your deposition taken about a week
04:16:35 9 ago, right? A second deposition in this case?

04:16:38 10 A. Last Monday, yes.

04:16:39 11 Q. And in that deposition were you asked this question,
04:16:41 12 and did you give this answer:

04:16:43 13 "QUESTION: So using 2004 as an example, you realized
04:16:47 14 that there was 800,000 total black market pirates?

04:16:51 15 "ANSWER: Correct.

04:16:52 16 "QUESTION: Right. How did you determine that 300,000
04:16:56 17 of those were FTA pirates?

04:16:59 18 "ANSWER: We started tracking free-to-air in -- I
04:17:02 19 started tracking free-to-air in 2003. In 2004 is when the
04:17:07 20 volume picked up because of DirecTV securing their
04:17:12 21 encryption. Thus the pirates that were stealing DirecTV
04:17:15 22 started migrating over to the free-to-air-type piracy.

04:17:20 23 "In order to track that, because it doesn't require
04:17:23 24 Smart Card, we, that being Sean, under the basis of putting
04:17:26 25 together a story about free-to-air, we would contact -- or

04:17:29 1 Sean would contact and discuss with the distributors and the
04:17:33 2 manufacturers of the free-to-air units as to the volume of
04:17:36 3 shipments they were doing."

04:17:38 4 Was that your deposition testimony?

04:17:40 5 A. Correct. And then I go on to state what I tracked on
04:17:43 6 the pirate websites.

04:17:45 7 THE COURT: Read the rest to me.

04:17:48 8 MR. SNYDER: "QUESTION: And this was one of the
04:17:50 9 surveys you described in the April 2007 report, right?

04:17:54 10 "ANSWER: No, it's not. It wasn't a survey. It
04:17:56 11 was more on the basis of an editorial article that was being
04:18:00 12 put together on the benefits of free-to-air receivers.

04:18:03 13 "QUESTION: Who put together this editorial
04:18:05 14 article?

04:18:05 15 "ANSWER: It wasn't published until, I believe,
04:18:07 16 late 2007. And it was published on the Carmel Group
04:18:12 17 website. The reason it was delayed is because, well, one,
04:18:15 18 the manufacturers kept asking when we are going to publish
04:18:19 19 the story. And so we had to publish something in order to
04:18:22 20 continue the relationship and be able to obtain the
04:18:25 21 information.

04:18:26 22 "QUESTION: So when I asked who put together this
04:18:29 23 editorial website, I understand your answer to mean the
04:18:32 24 Carmel Group?

04:18:33 25 "ANSWER: Correct."

04:18:37 1 THE COURT: So didn't you get it from the Carmel
04:18:39 2 Group?

04:18:42 3 THE WITNESS: I'm sorry, what was the question?

04:18:44 4 THE COURT: Did you get this from the Carmel
04:18:46 5 Group?

04:18:47 6 THE WITNESS: The Carmel Group provided some
04:18:49 7 numbers --

04:18:49 8 THE COURT: Did you get this from the Carmel
04:18:51 9 Group?

04:18:54 10 THE WITNESS: A piece of it, yes, sir.

04:18:56 11 THE COURT: Okay. Which piece?

04:18:58 12 THE WITNESS: The piece of information that they
04:19:00 13 provided compared to my information that I was tracking,
04:19:04 14 which my information is what I relied on.

04:19:09 15 THE COURT: Okay. Do you have records of that?

04:19:10 16 THE WITNESS: Yes, sir. It's in the back of
04:19:12 17 Exhibit 1603.

04:19:14 18 THE COURT: Okay.

11:59:57 19 BY MR. SNYDER:

04:19:18 20 Q. Let's take a look at that.

04:19:20 21 Mr. Shelton, the second page of 1603, that's the one
04:19:25 22 you're referring to?

04:19:26 23 A. Yes.

04:19:26 24 Q. That's the total number of -- or your projections of
04:19:30 25 the number of members of pirate websites?

04:19:34 1 A. Correct.

04:19:34 2 Q. There's no reference to FTA piracy on there, is there?

04:19:39 3 A. If you look at the name of the websites, they're

04:19:42 4 basically FTA, like free2airtv.

04:19:48 5 THE COURT: The second page.

04:19:49 6 MR. SNYDER: It's the second page of Exhibit 1603,

04:19:53 7 Your Honor.

04:19:54 8 THE COURT: Thank you.

9 BY MR. SNYDER:

04:19:55 10 Q. Some of those websites, their names focus on FTA

04:20:00 11 piracy, correct?

04:20:01 12 A. Correct.

04:20:01 13 Q. But you didn't use that as the numbers that you used to

04:20:05 14 break out FTA piracy for purposes of this estimate; isn't

04:20:08 15 that right, Mr. Shelton?

04:20:10 16 A. No, I did use that information.

04:20:11 17 Q. That's not what you testified to, though, is it? When

04:20:14 18 you were asked under oath where those FTA numbers came from,

04:20:17 19 you referred exclusively to the Carmel Group; isn't that

04:20:21 20 right?

04:20:21 21 A. That was one piece.

04:20:22 22 Q. Did you mention at any time any other piece?

04:20:24 23 A. I was not asked.

04:20:25 24 Q. Weren't you asked the basis for those numbers?

04:20:30 25 A. That, I don't recall.

04:20:31 1 Q. Isn't that the text I just read you, Mr. Shelton?

04:20:41 2 A. I -- I don't recall.

04:20:42 3 Q. Let's look at another one. Page 400 of your
04:20:45 4 deposition, starting at line 6. You were asked again:

04:20:49 5 "QUESTION: And what you relied on from the Carmel
04:20:51 6 Group was solely the discussions between Mr. Badding and the
04:20:56 7 FTA manufacturers, correct?

04:20:57 8 "ANSWER: Correct.

04:20:59 9 "QUESTION: So to the extent your numbers required you
04:21:03 10 to break out FTA piracy, you relied on the Carmel Group,
04:21:07 11 right?

04:21:07 12 "ANSWER: Correct. What we gathered along with the
04:21:12 13 fact that I knew there was a limit on the Smart Card piracy
04:21:15 14 that could occur."

04:21:16 15 Do you remember that testimony?

04:21:18 16 A. Yes. There was a ceiling on the Smart Card piracy, and
04:21:21 17 the emphasis at that point in time was tracking free-to-air.

04:21:26 18 Q. You didn't mention in that answer, did you,
04:21:29 19 Mr. Shelton, that there were websites that were devoted to
04:21:33 20 FTA piracy?

04:21:34 21 A. Without the deposition I don't -- I don't recall
04:21:37 22 answering that.

04:21:38 23 Q. We can show it to you, Mr. Shelton.

04:21:41 24 A. Okay.

04:21:42 25 Q. It was a week ago. Do you remember it?

04:21:44 1 A. Yes, I remember the deposition that morning.

04:21:46 2 Q. And you -- and you read it again this morning?

04:21:49 3 A. No, I have not.

04:21:50 4 Q. At any point do you recall saying that you made an

04:21:53 5 estimate of FTA pirates based on something other than the

04:21:58 6 Carmel Group and your knowledge that there had to be some

04:22:03 7 upper limit to the number of pirates?

04:22:04 8 A. On Smart Card Pirates, yes.

04:22:07 9 Q. On FTA pirates?

04:22:09 10 A. No, sir, not on FTA. There is no upper limit.

04:22:12 11 Q. Okay. So when you testified -- I'm sorry, withdrawn.

04:22:14 12 When you estimated the number of FTA pirates, you

04:22:18 13 relied on the surveys and communications that Mr. Sean

04:22:23 14 Badding of the Carmel Group had with FTA manufacturers;

04:22:27 15 isn't that right?

04:22:28 16 A. That is one piece. I relied on my monitoring as to the

04:22:32 17 FTA pirate websites and their growth.

04:22:36 18 Q. But when you were asked that question in your

04:22:38 19 deposition no more than seven days ago, the only answer you

04:22:42 20 gave, twice, was that you relied exclusively on the Carmel

04:22:46 21 Group; isn't that right, Mr. Shelton?

04:22:49 22 A. If it's in my deposition. But I believe we also

04:22:51 23 discussed this, too. *(Indicating.)*

04:22:53 24 Q. But not in the context of estimating FTA pirates; isn't

04:22:57 25 that right, Mr. Shelton?

04:22:58 1 A. This is a key portion of my FTA monitoring, yes.
04:23:02 2 (*Indicating.*)
04:23:03 3 Q. This second page of Exhibit 1603 is all pirates,
04:23:07 4 correct?
04:23:10 5 A. That's correct. It starts out with the Smart Card, and
04:23:13 6 then it -- you can clearly see the evolution into
04:23:17 7 free-to-air.
04:23:18 8 Q. So let's make sure everyone understands.
04:23:20 9 A. Okay.
04:23:20 10 Q. When you were coming up with your estimate of the total
04:23:23 11 number of EchoStar pirates, you included your figures
04:23:27 12 monitoring pirate websites; isn't that right?
04:23:30 13 A. Correct.
04:23:31 14 Q. But to come up with the number of pirates that use
04:23:36 15 Smart Cards, you had to subtract from that the number of
04:23:40 16 pirates engaged in FTA piracy; isn't that right?
04:23:44 17 A. Correct.
04:23:44 18 Q. And to come up with that number, you testified at your
04:23:48 19 deposition on at least two occasions that you relied
04:23:53 20 exclusively on FTA information that came from the Carmel
04:23:55 21 Group; isn't that right?
04:23:57 22 A. Not exclusively. I never relied exclusively on the
04:24:02 23 Carmel Group.
04:24:03 24 THE COURT: Counsel, here's the confusion. I know
04:24:05 25 what you're bearing down on. But today he's stating under

04:24:08 1 oath that he relied on something else. And I have also
04:24:12 2 heard the answer, that he wasn't asked.

04:24:14 3 MR. SNYDER: Well, we've got on the record what he
04:24:17 4 was asked.

04:24:18 5 THE COURT: It's good for the jury, but I'm not
04:24:21 6 sure that this is under oath. If he's stating that today,
04:24:24 7 he's going to leave the Court in a quandary.

04:24:27 8 BY MR. SNYDER:

04:24:28 9 Q. Mr. Shelton, have you identified before this afternoon
04:24:32 10 any basis for your estimate of the number of FTA pirates
04:24:35 11 that you've listed on the first page of Exhibit 1603?

04:24:46 12 A. My number is at the very top. It includes FTA and
04:24:50 13 Smart Cards.

04:24:51 14 Q. That's your -- when you say your number at the very
04:24:54 15 top, that's the one under the heading Shelton & Associates,
04:24:56 16 Shelton Net Piracy Total?

04:24:59 17 A. Correct.

04:24:59 18 Q. And when you say that's your number, what do you mean?

04:25:02 19 A. Well, overall, basically what happens is, whenever
04:25:04 20 you're monitoring pirate websites, it's always gonna be
04:25:08 21 higher, and so I adjust downward to account for multiple
04:25:12 22 members of the household registering.

04:25:14 23 Q. Right. And that's the 20 percent duplicate factor that
04:25:17 24 you include on the bottom of the second page of
04:25:20 25 Exhibit 1603?

04:25:22 1 A. Correct.

04:25:22 2 Q. And you use that number to come up with this Shelton

04:25:26 3 Net Piracy Total?

04:25:28 4 A. Correct.

04:25:29 5 Q. Is that right?

04:25:30 6 A. Correct.

04:25:30 7 Q. Now, how did you get from the Shelton Net Piracy Total

04:25:34 8 to the total EchoStar black market pirates -- total EchoStar

04:25:43 9 Pirates, which is the very last line of the first page --

04:25:43 10 Total EchoStar Pirates, which is the last row on the first

04:25:51 11 page of Exhibit 1603?

04:25:54 12 A. Which includes cards, plus FTA.

04:25:57 13 Q. It does. That's right. So how did you get from --

04:26:01 14 let's take it a piece at a time.

04:26:03 15 The first row, which says, "Shelton Net Piracy Total,"

04:26:06 16 very top of the first page of 1603, that includes cards and

04:26:11 17 FTA and AVR's and all kinds of EchoStar piracy; is that

04:26:17 18 right?

04:26:18 19 A. There's no FTA until 2003.

04:26:22 20 Q. Okay. But that row includes all types of EchoStar

04:26:25 21 piracy, correct?

04:26:26 22 A. Correct.

04:26:26 23 Q. And that includes FTA piracy, correct?

04:26:29 24 A. Starting in 2003.

04:26:31 25 Q. Okay. Now, at the bottom row of the first page of this

04:26:35 1 exhibit, Total EchoStar Pirates, those numbers are not the
04:26:40 2 same as the numbers in the first row, Shelton Net Piracy
04:26:44 3 Total; isn't that right?
04:26:46 4 A. That's correct.
04:26:46 5 Q. Okay. Those numbers are different?
04:26:49 6 A. Correct.
04:26:49 7 Q. How did you get from Shelton Net Piracy Total in the
04:26:52 8 first row to Total EchoStar Pirates, cards plus FTA? Maybe
04:26:57 9 you can just describe that for us.
04:26:59 10 A. Sure. In order to -- since monitoring pirate activity
04:27:04 11 is not an exact science, it's a barometer --
04:27:08 12 THE COURT: Just describe it for us.
04:27:09 13 THE WITNESS: -- I'd go conservative.
04:27:11 14 THE COURT: Just describe it for us. We're not
04:27:13 15 looking for all the dialogue. Describe it.
04:27:16 16 THE WITNESS: I deduct and report more
04:27:18 17 conservative numbers than what I'm seeing on the pirate
04:27:20 18 websites.
04:27:21 19 BY MR. SNYDER:
04:27:21 20 Q. You just deducted some number?
04:27:23 21 A. To get the households.
04:27:26 22 Q. And how did you decide what number to deduct?
04:27:30 23 A. It's based upon the activity going on on the pirate
04:27:33 24 websites and what I feel is overstated and understated.
04:27:39 25 Q. So let me make sure I understand, 'cause I don't want

04:27:43 1 to put words in your mouth. On page 2 of Exhibit 1603, you
04:27:47 2 added up your projected number of members of 27 pirate
04:27:54 3 websites and some miscellaneous smaller sites?

04:28:02 4 A. Yes, correct.

04:28:02 5 Q. And then you deducted a 20 percent duplicate factor,
04:28:06 6 correct?

04:28:06 7 A. Correct.

04:28:07 8 Q. And that's how you got the Shelton & Associates Shelton
04:28:11 9 Net Piracy Total. Right so far?

04:28:13 10 A. Correct.

04:28:13 11 Q. And then you deducted something else to get the Total
04:28:16 12 EchoStar Pirates, cards plus FTA, which is the last line of
04:28:21 13 the first page of Exhibit 1603; is that right?

04:28:26 14 A. Correct. If you want to --

04:28:28 15 Q. And can you tell us how you came up with the "something
04:28:31 16 else?" How you decided what else to deduct?

04:28:36 17 A. For example, in 1999, I was tracked at .07 --

04:28:42 18 Q. I can do the math, Mr. Shelton. I just need you to
04:28:46 19 describe the methodology that you used to get from one
04:28:48 20 number to the next.

04:28:50 21 A. What I used for the pirate numbers in 1999 came from a
04:28:53 22 report that I did for Bell ExpressVu, which was at 50,000.
04:28:57 23 That report was dated in August. So that's what I used as
04:29:03 24 my pirate numbers starting from the very beginning.

04:29:06 25 If you look at the next year, it tracks to the 150,000.

04:29:10 1 The next year, the 400,000.

04:29:14 2 And then pretty much on down the line, other than free

04:29:17 3 to air comes in --

04:29:19 4 Q. Well, now, let's make sure that we do this accurately.

04:29:23 5 In 2002 the Shelton Net Piracy Total is .56. 560,000?

04:29:29 6 A. Correct.

04:29:29 7 Q. And the -- in 2002 the total EchoStar Pirates, cards

04:29:35 8 plus FTA, is 492,000. That's a difference of about

04:29:41 9 10 percent, a little bit more, right?

04:29:45 10 A. Correct.

04:29:45 11 Q. How did you decide to deduct -- what's the methodology

04:29:49 12 for determining how much you deduct?

04:29:54 13 A. In 2002 I started having a change and shift in the type

04:30:03 14 of piracy. And so I went conservative on the Smart Card

04:30:08 15 side.

04:30:09 16 Q. Okay. So the decision was to just go conservative?

04:30:13 17 A. No. What happens is, as the market starts evolving and

04:30:16 18 the information gets diluted, as far as what I'm seeing in

04:30:22 19 free-to-air entering the market, then I'm gonna go

04:30:26 20 conservative on the numbers being reported.

04:30:29 21 Q. Other than going conservative, can you describe for the

04:30:32 22 Court with any more specificity at all the methodology that

04:30:37 23 you used to go from the Shelton Net Piracy Total to Total

04:30:42 24 EchoStar Pirates?

04:30:46 25 A. Could you repeat that question?

04:30:47 1 Q. Sure. Sure, 'cause I'm not trying to confuse you, and
04:30:50 2 I think it was long.

04:30:51 3 Other than saying that you were going conservative,
04:30:53 4 which I think were your words, can you describe with any
04:30:57 5 more specificity how you went from Shelton Net Piracy Total,
04:31:01 6 which is the first row on the first page of Exhibit 1603 --

04:31:07 7 A. Uh-huh.

04:31:08 8 Q. -- to the Total EchoStar Pirates, cards plus FTA, which
04:31:12 9 is the last row on the first page of Exhibit 1603?

04:31:56 10 A. No. I'd have to go back and analyze because I'm seeing
04:31:59 11 some other errors in the body of the report.

04:32:01 12 Q. Okay. But have you produced any notes or records or
04:32:05 13 documents or materials, anything at all that would help the
04:32:09 14 Court understand how you went from your Shelton Net Piracy
04:32:14 15 Totals to the Total EchoStar Pirates, cards plus FTA, which,
04:32:19 16 as we've already found, are the numbers that you've used for
04:32:23 17 your estimate on Exhibit 2026?

04:32:29 18 A. 2026?

04:32:30 19 Q. Sure. That's --

04:32:32 20 A. Oh.

04:32:32 21 Q. That's your total U.S. households using pirate EchoStar
04:32:36 22 ROM 3 cards. That's the money page.

04:32:39 23 A. Yeah. Basically I didn't include any FTA in that
04:32:43 24 number. It's strictly Smart Cards --

04:32:45 25 Q. Okay. Now --

04:32:46 1 A. -- which has a limited universe.

04:32:49 2 Q. I -- I'm just trying to figure out the pieces here.

04:32:52 3 Now, let's look at that bottom box on Exhibit 1603.

04:32:55 4 Total EchoStar Pirates, cards plus FTA, the last row, is

04:33:05 5 derived by adding Total EchoStar Smart Card Pirates and

04:33:10 6 Total EchoStar FTA Pirates; is that right?

04:33:13 7 A. Starting in --

04:33:14 8 Q. Every one of those years, 1999 to 2007.

04:33:18 9 A. No. There was no free-to-air in 1999.

04:33:21 10 Q. That's why you have a zero in some of them?

04:33:23 11 A. Correct.

04:33:24 12 Q. Okay. So if I go down the row and I add up Total

04:33:27 13 EchoStar Smart Card Pirates with Total EchoStar FTA Pirates,

04:33:31 14 I get Total EchoStar Pirates, cards plus FTA; is that right?

04:33:39 15 A. At the very bottom of the chart.

04:33:40 16 Q. Right?

04:33:41 17 A. So in '99 it's strictly Smart Cards.

04:33:44 18 Q. It appears that way. And then starting in 2003, you've

04:33:47 19 got a hundred thousand FTA pirates, and it increases from

04:33:51 20 there; is that right?

04:33:55 21 A. Correct.

04:33:55 22 Q. This is the piece I need to understand, Mr. Shelton.

04:33:58 23 A. Okay.

04:33:59 24 Q. How did you estimate the number of FTA pirates?

04:34:03 25 A. By the FTA pirate website activity.

04:34:06 1 Q. Okay. Do you have any notes, any documents, any
04:34:11 2 scribbles on a piece of paper that you can show the Court to
04:34:14 3 explain how you came up with these numbers of Total EchoStar
04:34:19 4 FTA Pirates on the first page of Exhibit 1603?

04:34:23 5 A. I do have those. I thought the summary -- the printed
04:34:29 6 version summarizes everything, yes.

04:34:31 7 Q. Have you produced that? Have you given those to your
04:34:35 8 lawyers?

04:34:36 9 A. I believe I produced those at the last request before
04:34:38 10 the next depo that I took Monday.

04:34:41 11 Q. And this shows the estimate of FTA pirates and how you
04:34:44 12 derived that number?

04:34:45 13 A. Notes, scribbling, also even the key changes by day.

04:34:50 14 Q. And when you were asked that question in your
04:34:53 15 deposition about where the number of FTA pirates came from,
04:34:56 16 and you referred to the Carmel Group surveys, why didn't you
04:35:00 17 mention that it was based on some website survey you did?

04:35:05 18 A. I believe we did discuss it in the deposition.

04:35:11 19 MR. SNYDER: Your Honor, I assume it would be
04:35:12 20 redundant to review that deposition testimony again.

04:35:15 21 THE COURT: You can do it again.

04:35:17 22 MR. SNYDER: Okay.

04:35:17 23 THE COURT: You're having a good time.

04:35:19 24 MR. SNYDER: I really am.

04:35:21 25 THE WITNESS: Just warming up.

04:35:25 1 MR. SNYDER: Let's take a look.

04:35:26 2 THE COURT: Excuse me. The same answer, by the

04:35:28 3 way: "I wasn't asked."

04:35:28 4 There was one expert that was --

04:35:29 5 BY MR. SNYDER:

04:35:30 6 Q. Well, let's see if we were asked. That actually is a

04:35:34 7 valid question.

04:35:34 8 On page 298, line 11, and we're going to go to 299,

04:35:40 9 line 3:

04:35:42 10 "QUESTION: So using 2004 as an example, you realized

04:35:48 11 that there were 800,000 total black market pirates?

04:35:51 12 "ANSWER: Correct.

04:35:54 13 "QUESTION: Right. How did you determine that 300,000

04:35:58 14 of those were FTA pirates?"

04:36:02 15 That's the question.

04:36:03 16 "ANSWER: We started tracking free-to-air in -- I

04:36:07 17 started tracking free-to-air in 2003. In 2004 is when the

04:36:13 18 volume picked up because of DirecTV securing their

04:36:17 19 encryption. Thus the pirates that were stealing DirecTV

04:36:20 20 started migrating over to the free-to-air piracy.

04:36:24 21 "In order to track that, because it doesn't require

04:36:27 22 Smart Card, we -- that being Sean -- under the basis of

04:36:31 23 putting together a story about free to air, we would

04:36:35 24 contact -- or Sean would contact and discuss with the

04:36:38 25 distributors and manufacturers of the free-to-air units as

04:36:42 1 to the volume of shipments they were -- they were doing."

04:36:47 2 A. Correct.

04:36:48 3 Q. You didn't mention monitoring any FTA websites, did
04:36:52 4 you?

04:36:54 5 A. I do not have that deposition. I believe I did.

04:37:00 6 Q. Let's take a look at what happened when you were asked
04:37:03 7 again. This is on page 400, line 6 to line 15.

04:37:29 8 "And what you relied on from the Carmel Group was
04:37:33 9 solely the discussions between Mr. Badding and the FTA
04:37:37 10 manufacturers?

04:37:50 11 "ANSWER: Correct."

04:37:50 12 Here's the money question.

04:37:51 13 "QUESTION: So to the extent your numbers required you
04:37:56 14 to break out FTA piracy, you relied on the Carmel Group,
04:38:01 15 right?

04:38:02 16 "ANSWER: Correct.

04:38:04 17 "We gathered -- what we gathered along with the fact
04:38:08 18 that I knew there was a limit on the Smart Card piracy that
04:38:11 19 occurred."

04:38:14 20 You didn't mention counting up websites there, did you,
04:38:17 21 either?

04:38:17 22 A. I believe I did in other portions, but I haven't had a
04:38:21 23 chance to see my depo.

04:38:23 24 Q. Now, Mr. Shelton, when you were coming up with your
04:38:28 25 estimates that are on the back of exhibit -- second page of

04:38:32 1 Exhibit 1603, these pirate member projections --

04:38:37 2 A. Correct.

04:38:38 3 Q. -- what did you rely on for that?

04:38:41 4 A. Primarily the pirate websites that focus on
04:38:44 5 free-to-air.

04:38:45 6 Q. Okay. But you don't remember what the number of pirate
04:38:49 7 member projection was in 1999, do you? Do you have that
04:38:55 8 stored in your memory?

04:38:56 9 A. Oh, no. In summary sheets.

04:38:58 10 Q. You have those on summary sheets?

04:39:00 11 A. Correct.

04:39:00 12 Q. But as of the time of your deposition, those hadn't
04:39:03 13 been produced, had they?

04:39:05 14 A. I believe they were. And it was also produced in the
04:39:07 15 Bell ExpressVu report.

04:39:10 16 Q. Those were your handwritten numbers of sites?

04:39:13 17 A. And also the numbers discussed with Bell ExpressVu in
04:39:17 18 August of 1999.

04:39:19 19 THE COURT: Just a moment, Counsel.

04:39:35 20 All right, Counsel.

04:39:37 21 Mr. Shelton, can you produce notes of your
04:39:43 22 monitoring of free-to-air piracy during this period of time?

04:39:48 23 THE WITNESS: Yes, I can.

04:39:49 24 THE COURT: That has a tremendous amount to do
04:39:56 25 with credibility. In other words, his statement is he's

04:40:00 1 monitoring free-to-air piracy; he's deducting that.

04:40:04 2 Does anybody know where those notes are?

04:40:08 3 MR. SNYDER: I --

04:40:09 4 THE COURT: Because if those notes exist, this is
04:40:11 5 unduly consumptive of time. If they don't exist, it has to
04:40:15 6 do with credibility.

04:40:15 7 MR. SNYDER: I think it also goes to the
04:40:16 8 admissibility of the opinion.

04:40:18 9 THE COURT: And methodology. Well, credibility
04:40:20 10 kind of works that way too.

04:40:22 11 MR. SNYDER: They're related.

04:40:23 12 THE COURT: Where are those notes that would prove
04:40:25 13 that he's monitoring free-to-air piracy?

04:40:33 14 MS. WILLETTS: Jim, are those included in what
04:40:35 15 you've already provided to us?

04:40:37 16 THE WITNESS: Well, I was requested to scan -- and
04:40:39 17 yes, those were included.

04:40:43 18 MS. WILLETTS: We've produced everything that he
04:40:43 19 has provided to us on that.

04:40:45 20 THE COURT: Find them.

04:40:45 21 MS. WILLETTS: Yes, Your Honor.

04:40:45 22 THE COURT: Go find those.

04:40:45 23 MR. SNYDER: Maybe they can identify those numbers
04:40:47 24 for us, Your Honor, and I can reserve my remaining questions
04:40:50 25 until we've had a chance to look at them.

04:40:52 1 THE COURT: How long would that take?

04:40:54 2 MS. WILLETTS: We can go do it now.

04:40:55 3 THE COURT: Okay. Let's go do it now.

04:40:57 4 Mr. Shelton, step down. Why don't you help

04:41:00 5 counsel find those notes.

04:41:02 6 *(Pause in the proceedings at 4:41 p.m.)*

05:39:34 7 *(Proceedings resumed at 5:44 p.m.)*

05:44:07 8 *(Outside the presence of the jury.)*

05:44:08 9 THE COURT: Okay. We're back on the record. All

05:44:09 10 counsel are present.

05:44:10 11 The Court had previously asked counsel to produce

05:44:13 12 some records concerning the pirate tracking that Mr. Shelton

05:44:20 13 had stated that he had undertaken. The reason that's

05:44:25 14 important is, obviously, it's a matter of credibility. It's

05:44:29 15 a matter of the time duration or period that he was

05:44:33 16 tracking.

05:44:34 17 And the Court is a little confused still about

05:44:36 18 how -- and what happened to that 70,000 number. I think

05:44:40 19 it's the difference between 492 and 5-point -- it's in 1999.

05:44:49 20 I'll go back and look at 1603.

05:44:53 21 Mr. Shelton.

10:21:10 22 **JAMES SHELTON, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN**

23 **RESUMED THE STAND**

24

25

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REDIRECT EXAMINATION

BY MS. WILLETTS:

Q. Mr. Shelton --

MS. WILLETTS: May I approach, Your Honor?

THE COURT: You may.

BY MS. WILLETTS:

Q. I'm handing you two exhibits that we're labeling 2027 and 2028.

THE COURT: I think you've already got a 2027.

MS. WILLETTS: Should I relabel it?

THE COURT: Are these new?

MS. WILLETTS: They are.

THE COURT: They're going to be 2028 and 2029 if they're new exhibits.

(Exhibit No. 2028 marked for identification.)

(Exhibit No. 2029 marked for identification.)

BY MS. WILLETTS:

Q. 2028 and 2029, can you identify those for the Court, Mr. Shelton?

A. Yes. 2029 basically is my handwritten notes where I kept track of daily key changes or the free-to-air receivers.

THE COURT: What year, what time period?

THE WITNESS: This was dated 3/15/05.

THE COURT: I'm sorry, 3/15/05?

05:45:58 1 THE WITNESS: Correct.

05:45:59 2 THE COURT: And pirate tracking on free-to-air.

05:46:00 3 What's 2029?

05:46:02 4 THE WITNESS: It's security keys changes.

05:46:05 5 THE COURT: Security keys?

05:46:07 6 THE WITNESS: Yes. Yes, sir.

05:46:09 7 THE COURT: Okay. Counsel in a few moments is

05:46:12 8 going to ask you to go earlier. They're going to want to

05:46:15 9 know how early you started tracking free to air to get your

05:46:23 10 subtraction number. So have you been able to find records,

05:46:26 11 let's say, 2004, 2003, 2002?

05:46:30 12 THE WITNESS: Actually the free to air did not

05:46:32 13 start until 2003, Your Honor. And that's what we're looking

05:46:35 14 for, is my handwritten notes.

05:46:38 15 THE COURT: Okay. But you say that you've got

05:46:39 16 2005.

05:46:40 17 THE WITNESS: Yes.

05:46:41 18 THE COURT: Or some portion thereof.

05:46:45 19 THE WITNESS: Correct. And basically what we're

05:46:47 20 searching right now is the tablet sheets.

05:46:50 21 THE COURT: Was this given to the defense?

05:46:53 22 THE WITNESS: Yes, Your Honor.

05:46:54 23 THE COURT: It was? Counsel, was this given to

05:46:56 24 the defense?

05:46:57 25 MR. SNYDER: I believe it was produced,

05:46:58 1 Your Honor. I just didn't know what it was until now, and
05:47:02 2 I'm still not sure I know what it is.

05:47:05 3 THE COURT: At least we have what appears to be
05:47:07 4 2005.

05:47:08 5 Tell us what this is.

05:47:09 6 THE WITNESS: Basically, in order to battle
05:47:11 7 free-to-air piracy, one of the methods that EchoStar was
05:47:14 8 using was to rapidly change the different keys. There's two
05:47:20 9 sets of keys, key zero and key 01.

05:47:24 10 And essentially what I did was monitor on a daily
05:47:29 11 basis as to -- as those keys changed, what were the new keys
05:47:34 12 and how fast the pirates were able to distribute the new
05:47:38 13 keys after the key change occurred.

05:47:42 14 THE COURT: Okay.

05:47:43 15 BY MS. WILLETTS:

05:47:43 16 Q. And can you explain to us what Exhibit 2028 is?

05:47:48 17 THE COURT: That's the pirate tracking of the
05:47:50 18 free-to-air handwritten notes of March 15, 2005.

05:47:55 19 MS. WILLETTS: Was that 2029?

05:47:56 20 THE WITNESS: No. That was 2029. 2028 is just --
05:48:00 21 it's just a pirate website basically where it has the
05:48:06 22 different pirate free-to-air equipment being sold.

05:48:09 23 THE COURT: So let me see 2028. Is that correct?

05:48:13 24 THE WITNESS: Yes, sir.

05:48:13 25 THE COURT: And that would show that you're

05:48:15 1 tracking pirate sites, correct?

05:48:19 2 THE WITNESS: Correct.

05:48:20 3 THE COURT: What year?

05:48:21 4 THE WITNESS: That one's pretty current right now,
05:48:23 5 in 2008, I believe.

05:48:26 6 THE COURT: 2008. And what about 2003, '4, '5,
05:48:30 7 '6?

05:48:31 8 THE WITNESS: That's where my handwritten notes
05:48:33 9 basically recap activity for the year along with the sites.

05:48:37 10 THE COURT: 2029? That's only 2005.

05:48:40 11 THE WITNESS: Oh. This is just a portion.
05:48:41 12 They're still searching for the others.

05:48:43 13 THE COURT: Okay. So we can produce those this
05:48:46 14 evening to the defense.

05:48:49 15 THE WITNESS: Correct.

05:48:50 16 MR. SNYDER: Can I ask one question, Your Honor?

05:48:51 17 THE COURT: Certainly. You can ask as many as you
05:48:54 18 like.

08:07:44 19 **RECROSS-EXAMINATION**

20 BY MR. SNYDER:

05:48:55 21 Q. On 2029 is there something on there that identifies the
05:49:03 22 number of free-to-air pirates? I understand it's key
05:49:06 23 changes, but is there something on there I could look at
05:49:07 24 that identifies the number or the estimated number of
05:49:10 25 pirates?

05:49:18 1 THE COURT: So the 3/15 --

05:49:25 2 THE WITNESS: No. It cuts off in August. And I
05:49:29 3 would have to research my case number there I reference on
05:49:33 4 6/2 to see what's there.

05:49:36 5 THE COURT: It would be very helpful if you had
05:49:39 6 not only evidence in your handwritten notes of tracking
05:49:45 7 pirates, let's say 2003, 2004, 2005. It would probably take
05:49:50 8 the credibility issue out that's about to be argued.

05:49:54 9 THE WITNESS: Okay.

05:49:55 10 THE COURT: And second, it would be very helpful
05:49:57 11 if you could find any notes concerning, you know, numbers of
05:50:01 12 pirates or even a methodology. Okay?

05:50:04 13 THE WITNESS: Okay.

05:50:05 14 THE COURT: That would be corroborative evidence.
05:50:07 15 Because there's a lot of confusion about what was asked,
05:50:11 16 what your response was. The defense is always going to say
05:50:15 17 in front of the jury, or now: Noncredible, first time the
05:50:20 18 notes appeared, haven't seen 'em before.

05:50:25 19 And I think before that bear trap gets laid, if we
05:50:28 20 even get that far, it's not fair to the defense that these
05:50:31 21 haven't been produced before, if they exist; or if they are
05:50:37 22 there with the massive documents, let's find them tonight.
05:50:41 23 That way counsel's not walking into a situation on
05:50:44 24 cross-examination because of lack of discovery, and then in
05:50:48 25 rebuttal or at another time, you're trapped, Mr. Snyder.

05:50:52 1 That's not a fair place to be.

05:50:55 2 So why don't we just step down --

05:50:58 3 MS. WILLETTS: Your Honor --

05:50:58 4 THE COURT: -- and continue searching.

05:51:01 5 MS. WILLETTS: -- I have a couple other questions
05:51:02 6 that relate to some of the areas Mr. Snyder covered.

05:51:08 7 THE COURT: All right.

08:07:44 8 **FURTHER REDIRECT EXAMINATION**

05:51:09 9 BY MS. WILLETTS:

05:51:09 10 Q. Mr. Shelton, I have just two more quick issues for you.

05:51:14 11 Mr. Snyder asked you whether or not you ever testified
05:51:17 12 at deposition whether one of the basis for the FTA numbers
05:51:22 13 that you had was your review of pirate websites. Do you
05:51:26 14 recall that line of questioning?

05:51:28 15 A. Yes. Yes, I do.

05:51:29 16 Q. And you believe that you had, in fact, testified to
05:51:33 17 that in prior deposition; is that right?

05:51:35 18 A. Correct.

05:51:37 19 MS. WILLETTS: Your Honor, can I read from
05:51:39 20 Mr. Shelton's September 7th deposition a question and
05:51:45 21 answer?

05:51:47 22 THE COURT: Sure. Identify the date.

05:51:50 23 MS. WILLETTS: September 7, 2007.

05:51:50 24 THE COURT: September 7, 2007. You may.

25

05:51:50 1 BY MS. WILLETTS:

05:51:51 2 Q. Page 155, starting at line 9:

05:51:53 3 "QUESTION: So the primary research you describe in
05:51:56 4 this paragraph here is twofold. It is the review of the FTA
05:52:00 5 executives and notorious black market pirates and extensive
05:52:05 6 review of pirate websites and forums?

05:52:09 7 "ANSWER: Correct."

05:52:10 8 THE COURT: Now, just a moment. Who was present
05:52:13 9 from NDS?

05:52:17 10 MR. SNYDER: Mr. Dilger.

05:52:20 11 THE COURT: Mr. Dilger?

05:52:25 12 He can search back through the records and see if
05:52:29 13 he disagrees. Otherwise I'm going to assume that that's a
05:52:32 14 correct reading.

05:52:33 15 BY MS. WILLETTS:

05:52:34 16 Q. The next question.

05:52:35 17 "QUESTION: And that is the basis -- that is the
05:52:37 18 primary basis for the numbers you list on page 14?

05:52:40 19 "ANSWER: Correct."

05:52:42 20 THE COURT: Okay.

05:52:43 21 MR. SNYDER: Your Honor, can I make one small
05:52:46 22 point?

05:52:46 23 THE COURT: Certainly.

05:52:47 24 MR. SNYDER: That testimony relates to page 14 of
05:52:50 25 the 2007 Carmel report. That report does not purport to

05:52:57 1 break out FTA numbers. I have a copy of the report. Be
05:53:02 2 happy to show Mr. Shelton or the Court.

05:53:05 3 Page 14 of that document has Total U.S. Pirates,
05:53:08 4 has Total EchoStar Pirates, has Total DirecTV Pirates.
05:53:14 5 There is no breakout of FTA pirates in that report in any
05:53:20 6 place. And they're not talking about that.

05:53:22 7 Moreover, he expressly refers to the FTA private
05:53:26 8 survey done by the Carmel Group, which they have disavowed.

05:53:30 9 THE COURT: So in other words, your whole point
05:53:32 10 is, look, he's simply relying on the Carmel surveys?

05:53:38 11 MR. SNYDER: The Carmel numbers rely on the Carmel
05:53:41 12 surveys, yes. And this new FTA estimate, I still don't know
05:53:45 13 where it comes from.

05:53:50 14 THE COURT: And did you cooperate with the Carmel
05:53:52 15 Group in their survey?

05:53:54 16 THE WITNESS: Your Honor, the only cooperation I
05:53:56 17 had in any survey was to just call and ask for numbers, and
05:54:02 18 I'll compare it with my numbers.

05:54:04 19 THE COURT: Okay. You can do that.

05:54:08 20 Lastly -- well, not lastly. Mr. Snyder asked you
05:54:14 21 in 2002 the difference between 560,000 or five-point -- or
05:54:22 22 .56, and the 492,000. There's roughly about 70,000 that is
05:54:33 23 somewhat in question.

05:54:36 24 Do you recall after this recess what you were
05:54:44 25 subtracting? Because you told me free-to-air piracy didn't

05:54:49 1 start until 2003.

05:54:50 2 THE WITNESS: -3.

05:54:51 3 THE COURT: So what were you subtracting in -- I
05:54:52 4 mean, it may be favorable to NDS. That's not the point.
05:54:56 5 It's the methodology. Because it may be -- reducing 70,000
05:55:00 6 is something NDS will appreciate, if we ever get there. But
05:55:04 7 it's the underlying methodology, what you're doing.

05:55:09 8 THE WITNESS: Well, basically what I was trying to
05:55:11 9 do is accomplish a very conservative number. Because when
05:55:14 10 I'm tracking as far as activity --

05:55:17 11 THE COURT: I know. I understand that.

05:55:19 12 THE WITNESS: All right.

05:55:19 13 THE COURT: Let me say that again.

05:55:21 14 How did you come up with that number? And what is
05:55:24 15 that number?

05:55:55 16 THE WITNESS: Okay. I know what it is,
05:55:56 17 Your Honor.

05:55:56 18 THE COURT: Okay. Tell me.

05:55:57 19 THE WITNESS: The activity that I was seeing from
05:56:00 20 the pirate websites was, in my opinion, way too high to
05:56:05 21 justify because I knew there had to be a cap of Smart Cards
05:56:09 22 that were out there that could be pirated.

05:56:11 23 THE COURT: So is that an arbitrary number you
05:56:13 24 picked?

05:56:15 25 THE WITNESS: Yes. I started backing down, said

05:56:17 1 it can't keep growing.

05:56:20 2 THE COURT: Based on what? Just a guesstimate:

05:56:22 3 "It's just too high. I'm going to subtract 70,000?"

05:56:28 4 THE WITNESS: Based on the price of the Smart Card
05:56:30 5 being very, very high. So I knew the growth could not
05:56:34 6 continue, meaning it had to cap out right around half a
05:56:34 7 million.

05:56:36 8 THE COURT: Is that a 20 percent reduction? In
05:56:39 9 other words, I'm still looking for why that number.

05:56:43 10 THE WITNESS: It's --

05:56:44 11 THE COURT: See, the arguments going to be, look,
05:56:46 12 if you're arbitrary in one area, you're arbitrary in another
05:56:52 13 area. So whether or not you get on the stand, it's
05:56:55 14 devastating cross-examination. And I think Mr. Snyder has
05:56:59 15 the right to know, you know, why you pick about a 70,000
05:57:05 16 number reduction.

05:57:08 17 I know you're conservative. I've heard that.

05:57:10 18 THE WITNESS: Okay.

05:57:11 19 Part of it was -- if I recall on this report --

05:57:28 20 THE COURT: Do you have notes or something
05:57:29 21 someplace that would refresh your recollection?

05:57:31 22 THE WITNESS: I would like to be able to check
05:57:33 23 that, yes, Your Honor. That would be great.

05:57:36 24 THE COURT: Okay. Before you answer that, then,
05:57:37 25 why don't you do that.

05:57:39 1 THE WITNESS: Okay.

05:57:39 2 THE COURT: All right. Now, Counsel, do you have

05:57:40 3 additional questions?

05:57:42 4 MS. WILLETTS: I do have one more question,

05:57:44 5 Your Honor.

05:57:44 6 BY MS. WILLETTS:

05:57:46 7 Q. And it relates to the 25 percent conversion rate that

05:57:51 8 Mr. Snyder questioned you about. I believe his question to

05:57:53 9 you was whether or not you had ever opined regarding that

05:57:57 10 conversion rate.

05:58:03 11 A. Correct.

05:58:03 12 Q. But you did testify to the 25 percent conversion rate

05:58:06 13 at your deposition in this case with the defendants,

05:58:09 14 correct?

05:58:09 15 A. Yes, as discussed.

05:58:11 16 THE COURT: Which deposition? Last week?

05:58:12 17 BY MS. WILLETTS:

05:58:14 18 Q. What deposition was that at, Mr. Shelton?

05:58:17 19 A. September 2007.

05:58:19 20 THE COURT: Okay.

05:58:19 21 BY MS. WILLETTS:

05:58:19 22 Q. And during that deposition, what did you testify to

05:58:21 23 regarding the 25 percent conversion rate?

05:58:25 24 A. That I felt it was very conservative.

05:58:30 25 THE COURT: Mr. Snyder, do you have additional

05:58:33 1 questions this evening? You're not forced to ask those.

05:58:36 2 MR. SNYDER: No, not this evening, Your Honor.

05:58:38 3 I'll wait for the additional notes.

05:58:41 4 THE COURT: Okay. Mr. Shelton, if you would be
05:58:43 5 kind enough to step down, sir. Thank you.

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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 22, 2008

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17 CSR NO. 9472, RPR
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