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2 MR. SNYDER: NDS would like to make three motions
3 for direct verdict under Rule 50. Two of those motions
4 relate to issues. Third relates to specific claim for
5 relief the RICO claim. Let me those Your Honor so you know
6 where I know we would move for a directed verdict issue of
7 directed verdict.

8 Secondly and relatedly we would move for a
9 directed verdict on the distribution network that caused any
10 sales of piracy Echostar devices in the United States.

11 And third, we move for directed verdict on the
12 claim for relief under the RICO statute.

13 Let me take each of those in turns. First,
14 plaintiffs -- one of plaintiffs two theories of liabilities
15 is that NDS orchestrated a distribution network. It
16 originated with Mr. Tarnovsky creating a device send it to
17 Mr. Menard. Mr. Menard then sending to vary the other
18 distributors, Dave Dawson -- a number of names thrown out.

19 There is no evidence of Mr. Menard distributing
20 cards to any one of those distributors. In fact, they had
21 been conspicuously not mentioned.

22 THE COURT: Shawn Quinn, Andre Sergay, Ed Bruce,
23 and Dave Dawson.

24 THE COURT: Mr. Dawson certainly has.

25 THE COURT: Mr. Sergay certain has Mr. Quinn has

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18:41:50 1 been mentioned flask glass the names have been mentioned not
2 in the context of Mr. Menard providing them with any devices
3 arrest cords for purposes of distribution. In fact the only
4 witness to mention anyone other than Mr. Bruce was
5 Mr. Dionisi who said he was aware they were selling Echostar

6 cars but was not aware of any connection to Mr. Menard dr7
7 Chris Tarnovsky or to NDS.

8 Now whether or not those people were selling
9 Echostar access cards is not the issue. The question is is
10 there evidence connecting them somehow to NDS, and there is
11 and there is none.

12 Second, Your Honor. --

13 THE COURT: If in fact there is evidence of
14 Tarnovsky producing those cards and if there is evidence of
15 Menard being a distributor for those cards, and you saying
16 the nexus fails between Menard and Dawson for instance.

17 MR. SNYDER: I do believe Your Honor that the
18 evidence between Menard and Dawson fails, but that is
19 based -- I will recognize on our objection to e-mails that
20 we do not believe are and you know then particular and the
21 Court has ruled those objections and we have a continuing
22 objection on that.

23 I am not aware of any evidence in the record that
24 connects Mr. Menard to providing materials -- Echostar
25 piracy materials to Mr. Bruce.

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18:43:39 1 THE COURT: Quinn.

2 MR. SNYDER: Similarly, I am not aware of any
3 evidence in the record that connects Mr. Menard to the sale
4 or distribution of pirated Echostar devices to Mr. Quinn.

5 THE COURT: Sergay.

6 MR. SNYDER: Same. I don't believe any
7 distribution pirated Echostar to Mr. Quinn.

8 THE COURT: You have had distribution Menard and
9 Dawson. Then does that go to the jury.

10 MR. SNYDER: whether there was a distribution
11 involving those other individuals.

12 THE COURT: Is that the filled out distribution
13 network.

14 MR. SNYDER: I don't believe so because there

15 would have to be some evidence for distribution network
16 involved those other individuals. There would have to be
17 some evidence on which the jury could find that.

18 THE COURT: I am confusing you so my apologies.

19 THE COURT: My view under RICO that it only takes
20 one prong the distribution network is not defined as more
21 than one person on the distributing end. I don't need a
22 galaxy of people under RICO. It's sufficient if just
23 Mr. Dawson is distributor to fulfill that requirement.

24 If you believe their needs to be more than one
25 distributor, then then I would like to have you make your

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18:45:16 1 record and arguments on that.

2 MR. SNYDER: I want to answer it directly. First
3 I don't believe that other than the 1029 claim the
4 distribution network work is one of the predicate acts
5 alleged in the RICO claim. They alleged criminal copyright
6 infringement and violation of Section 1029.

7 There is no evidence in the record which is the
8 second issue I raised -- there is no evidence in the record
9 of sales in the United States of piracy Echostar devices
10 connected to NDS. Request even if the Court accepts all
11 reasonable inferences based on the Allen Menard, Dave
12 Dawson, e-mails, and Mr. Dawson hearsay to Ron Ereiser.

13 There is no evidence of any sales to Mr. Dawson in
14 the United States. The only evidence that it was in Canada
15 and that it was legal at the time. That is the second issue
16 on which we move, which there is no evidence of sales
17 connect to NDS in the United States.

18 THE COURT: Isn't there a significant amount of
19 testimony about -- strike that. It's the sales back.

20 MR. SNYDER: The sales back, Your Honor. I
21 appreciate -- I appreciate there is in the thereto evidence
22 in the record these postings. I think it's a separate

23 issue. whether sales somewhere in the United States connect
24 to those postings could create liability for NDS. My motion
25 is on a different issue, which is on sales in the United

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18:47:19 1 States that are directly connected to Chris Tarnovsky or NDS
2 through some change chain of a distribution network.

3 And your third was the claim for relief under
4 RICO.

5 MR. SNYDER: That's correct. RICO is complicated
6 statute. There are multiple bases for this. As I mentioned
7 a moment ago, there are two types of predicate acts alleged
8 by plaintiff under the RICO claim. The first is is criminal
9 copyright infringement. Which requires the defendants
10 willfully infringe plaintiffs copyright for purposes of
11 commercial advantage or private financial gain. There has
12 been generic references, testimony by plaintiffs' witnesses
13 that programming is copyrighted, and that Echostar's
14 satellite transmissions contain some Echostar copyrighted
15 material.

16 There is not, however, any evidence that
17 defendants willfully infringe any copyright owned by
18 plaintiff for commercial advantage or private financial
19 gain. Of course that would have to occur in the United
20 States because the United States copyright statutes and its
21 protections end at the United States borders.

22 The only evidence I believe that plaintiffs may
23 have abuse d on this subject of the receipt of a
24 transmission in the United States would be Mr. Tarnovsky's
25 testimony about reprogramming a DirectTV card on one

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18:49:05 1 occasion, but there is no evidence that he received any

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2 copyrighted Echostar programming or that he did so for
3 purposes of commercial advantage or private financial gain,
4 so that once instance that is in the record is facially
5 insufficient to satisfy this predicate act, and there is no
6 other evidence of copyright violation of plaintiffs'
7 copyright in the United States which is required.

8 THE COURT: I might understand financially gain.
9 Beyond your argument concerning no commercial advantage.

10 MR. SNYDER: Mr. Tarnovsky's testimony is that
11 they were concerned that pirates might be able to use
12 outdated DirectTV cards for purposes of pirating Echostar.

13 THE COURT: If I took that to be true, you might
14 be right, but there is a lot of other evidence that that's
15 not in fact the case. That this was strictly for customers
16 advantage.

17 MR. SNYDER: Other than Mr. Tarnovsky's testimony
18 on that incident Your Honor, I don't believe there is any
19 other. Mr. Norris was present, but I don't believe there
20 has been any evidence that would suggest that
21 Mr. Tarnovsky's reprogram of a DirectTV card -- this incident
22 is very different than everything else they are alleging
23 Mr. Tarnovsky reprogrammed a DirectTV card to see if security
24 devices provided by NDS could be reprogrammed programmed to
25 send someone's signal and could be misused by pirates.

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18:50:48 1 THE COURT: Do you believe that the act of
2 reprogramming that card that then leads to wisdom knowledge
3 the ability to prove prove that a hack is taking place and
4 then further activities given the plaintiffs' best position
5 at this point in a direct verdict motion isn't commercial
6 advantage? In other words, if you just stop with that
7 argument so be it, but it's the whole cascade of what occurs
8 that -- the occasion of that card being tested or looked at
9 gives rise to the ability for NDS to allegedly recognize
10 what an advantage this would be and to the eventual

11 postings.

12 MR. SNYDER: I wasn't sufficiently clear. I agree
13 with the Court that what Mr. Tarnovsky and Mr. Norris were
14 doing was related to NDS's business, but the --

15 THE COURT: Allegedly.

16 MR. SNYDER: Allegedly but the way the statute is
17 written the infringement of plaintiff copyright has to be
18 commercial gain, not just what you are doing. There is no
19 evidence that they were trying to willfully infringe a
20 copyright owned by the plaintiffs for the purpose of
21 commercial gain.

22 THE COURT: There is where I think disagree even
23 at summary judgment. I am going to go back and look at that
24 again. It would seem to me that commercial gain under this
25 act also includes what I am going to call a negative gain

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18:52:27 1 and an advancement, if you will, to the detriment of a
2 competitor. Commercial gain isn't simply getting money.
3 It's also placing yourself in a competitive advantage over a
4 competing company. By your act denigrating that company or
5 earn revenue you are causing harm to them.

6 MR. SNYDER: Just to finish that point, learning
7 that your own security device, an NDS security device, using
8 information available on the Internet could be used to
9 piracy a competitor does not assist NDS. They were as
10 Mr. Tarnovsky and Mr. Norris both testified concerned about
11 the misuse of NDS security devices.

12 The second predicate act is trafficking under
13 section 1029. Each of the subsections of that statute
14 require that the defendant knowing and with intent to
15 defraud either produce, use, traffic in a counterfeit access
16 device or device making equipment for soliciting a person to
17 do those acts. That must occur in the United States.

18 There is no evidence that defendants with the

19 intent to defraud Echostar produced, used or trafficking in
20 counterfeit acts device making or solicits someone to do
21 those things.

22 THE COURT: Okay.

23 MR. SNYDER: Next, Your Honor and related to that,
24 there is no evidence of a pattern of racketeering acts. As
25 the Court is well aware, the pattern under two predicate

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18:54:34 1 acts and continuing threat of criminal conduct. For the
2 same reasons that there is no evidence of either criminal
3 copyright infringement a violation of Section 1029. There
4 has been no evidence of a threat of continuing criminal
5 conduct in this case.

6 That threat of continuing criminal conduct would
7 have to be based on the criminal copyright infringement or
8 the violations of Section 129, and if the limit of evidence
9 so far is Mr. Tarnovsky's reprogramming after single DirectTV
10 device to understand with why that software work a jury
11 could not reasonably conclude that that episode creates a
12 threat of continuing criminal conduct.

13 The next issue under RICO there is no evidence of
14 an enterprise. Using as our guide Your Honor's draft jury
15 instructions regarding an enterprise, the enterprise has to
16 have three requirements. A structure for making decisions a
17 higher architectural or consensual basis a structure for
18 controlling or directing the affairs of that enterprise.
19 Actually it's two both east. We have exercised third one
20 based on the Odom decision. There has been structure for
21 making a decision and mechanism for controlling and
22 directing the over criminal copyright infringement and
23 violations of Section 1029, both of which must occur in the
24 United States.

25 There is no evidence of an enterprise beyond NDS

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18:56:27 1 itself, and actually I don't believe even within NDS, but
2 for purposes of this motion, there is no evidence of an
3 enterprise involving anyone who is involved in criminal
4 copyright infringement or violations of section 1029 in the
5 United States over which NDS exercised some decisionmaking
6 authority or control.

7 without that, the enterprise requirement of the
8 RICO statute fails.

9 THE COURT: Okay.

10 MR. SNYDER: Finally, there is related issue.
11 There is no evidence that NDS has participated in
12 enterprise. It would be theoretically possible under the
13 RICO statute for there to be an enterprise that goes beyond
14 NDS. There was that was controlled by someone or something
15 outside of NDS and which NDS was merely a participant, but
16 for NDS to be found to participate in enterprise, it must
17 participate in the operation and management of their
18 enterprise and there is no evidence of that in this case.

19 THE COURT: Any other arguments.

20 MR. SNYDER: No.

21 THE COURT: I am going to let Sharon go home. You
22 are going to respond tomorrow at 8:00.

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