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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

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HONORABLE DAVID O. CARTER, JUDGE PRESIDING

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ECHOSTAR SATELLITE CORP.,)
et al.,)

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Plaintiffs,)

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vs.)

No. SACV-03-950-DOC
DAY 9, Vol. IV

13

NDS GROUP PLC, et al.,)

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Defendants.)

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REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Santa Ana, California

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April 23, 2008

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Federal Official Court Reporter
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(None)

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1 SANTA ANA, CALIFORNIA; WEDNESDAY, APRIL 23, 2008; 3:30 P.M.

2 (Jury not present)

3 THE COURT: We are on the record outside the
4 presence of the jury.

5 MR. KLEIN: We had a rule that polygraphs were not
6 supposed to be mentioned.

7 THE COURT: I know, and Mr. Tarnovsky decided to
8 inform us of that. Well, when it came out, it opened the
9 door. It came through Mr. Tarnovsky's direct. Fair game,
10 counsel.

11 MR. KLEIN: I understand. I just wanted to make
12 it clear on the record, Your Honor, that it wasn't something
13 I knew was going to be responded to in that way.

14 THE COURT: Let me constantly repeat this. The
15 lawyers in my court have been exemplary, period. I have got
16 the utmost admiration for both counsel on both sides. My
17 concern with corporations is well stated in this matter.

18 Now please get the jury.

19 (Jury present)

20 THE COURT: The jury is present. All counsel are
21 present. Mr. Tarnovsky is the witness. This is continued
22 cross-examination by Mr. Klein.

THE COURT: Thank you, counsel.

CHRISTOPHER TARNOVSKY, PLAINTIFFS' WITNESS, SWORN

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CROSS-EXAMINATION (Continued)

BY MR. KLEIN:

Q Mr. Tarnovsky, we have heard testimony about something called a stinger. Would you please tell the jury what is a stinger.

A A stinger was a device that -- it's an interface that allows you to take a Smart Card and connect it to a computer through the serial port. Its original intentions were to support the NDS additional -- the NDS access cards don't speak English, so to speak, where a normal Smart Card speaks English. They speak kind of a dialect of it.

So normal Smart Card readers or interfaces that you can find on the internet and purchase, they don't communicate properly at faster speed rates to the NDS technology. Therefore, the stinger was created to speak the language that the NDS access cards speak with some intelligence to where I could stage execution of commands.

However, as previously asked by Mr. Hagan, as far as running on its own, this feature has never been implemented to date.

Q You're mixing a few things together. First, let's just talk about what a stinger is.

Did you build something called a stinger?

A Yes.

Q Okay. Now, does it allow some kind of -- does that

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give you the ability to talk to the chip?

2 A It gives you the ability to basically communicate with
3 any type of device that's in a Smart Card format.
4 Q And did you do it as part of your duties with NDS?
5 A Yes.
6 Q Now, did NDS have stingers or devices similar to
7 stingers before you built one?
8 A They did. They were very large and cumbersome, though.
9 Q What were they called?
10 A Readers or something. I don't remember their model
11 numbers or anything.
12 Q Was the basic function of a reader the same as a
13 stinger?
14 A Yes. A reader or a programmer are basically just Smart
15 Card interfaces to connect the Smart Card to the PC.
16 Q Now, you then built something that you called a
17 stinger; and how was what you built, the stinger, different
18 from the readers and the devices that existed at NDS before
19 you built them?
20 A The stinger was a little in my mindset more robust and
21 easier to use in the form of communicationwise. It was
22 based on previous readers of the internet and then
23 improvised. The design was improvised on. The stinger
24 added -- I added a level of intelligence to it to where I
25 could tell it exactly how to pronounce the words, so to

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1 speak, to talk to the card.
2 So you could virtually talk to anything with it, not
3 just an NDS technology, which was my goal because we may
4 speak to -- we may develop an NDS technology today that
5 speaks the way it's been designed, and then tomorrow we may
6 speak Japanese, for example. And that's actually a very
7 serious point. The Japanese system spoke a totally
8 different language than normal NDS technology spoke because
9 of the Japanese law.
10 Q Okay. Now, how did you know how to build one?

11 A I took -- I don't really know how to explain this.
12 It's --
13 Q Was there existing devices that --
14 A -- it's very logical.
15 Q -- started it?

16 THE COURT: You spoke over the top of him.

17 MR. KLEIN: I'm sorry.

18 THE COURT: You didn't give him a chance to
19 answer. You started to say?

20 THE WITNESS: Yes, Your Honor. Yes, I had
21 previously had programmers from the internet, purchased on
22 the internet and such. I looked at how they were designed
23 and laid out. Marcus Kuhn had laid a schematic out on the
24 internet for free that you could use to build your own at
25 home if you wanted to. And I kind of added some

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1 functionality in the middle of the design and then nicknamed
2 it the stinger.

3 BY MR. KLEIN:

4 Q When you say you added functionality, you made it
5 smaller; right?

6 A Made it smaller, made it speak at a higher rate of
7 communications between the PC to the unit, and made it
8 buffer a list of actions, what I wanted it to do -- turn on
9 the power, turn off the power, reset the card, and so forth.

10 Q Now, before you built that, could a device that
11 performed the same basic functions be purchased over the
12 internet?

13 A The basic functions of it, yes.

14 Q Now, when you were being questioned by counsel, there
15 was an issue where -- as to whether it was a stand-alone
16 device, and counsel showed you Exhibit 772. And it
17 mentioned stand-alone in there, and you said, well, that's
18 just out of context. Do you recall that?

19 A I do.

20 Q What did you mean by that? Why was it out of context?

21 A The problem with that e-mail was that's one e-mail and
22 there's other things in front of it that are missing. So I
23 had just designed the stinger and laid out what I wanted it
24 to do, so that was basically my design requirements of how
25 this should interact.

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1 So everything that was listed was accurate except that
2 final comment about the 6805 emulator as well as running on
3 its own. Those two items were never completed.

4 Q Okay. So as far as it being a stand-alone device, were
5 you ever actually able to create one that was a stand-alone
6 device?

7 A Able or did I?

8 Q Did you?

9 A No. Excuse me. Yes, for the customs mission for the
10 operation, but it wasn't a stinger. It was just my
11 stand-alone programmer.

12 Q I am talking about a stinger. Did you ever create a
13 stand-alone device stinger?

14 A No.

15 Q Now, there was also testimony about something called a
16 sniffer. What's that?

17 A A sniffer is basically -- for example, you have the
18 set-top-box that you use to change the channels on, and you
19 have the access card that's inserted into the set-top-box
20 that you may not even know exists, but it's present on most
21 every technology out there.

22 The sniffer eavesdrops in between the set-top-box and
23 the card, for example, and it listens and it reports back
24 everything it sees into my PC so that I can then look at the
25 data that's come -- the transactions that have occurred, and

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1 make sure, for example, an ECM that NDS believes they have
2 launched in Israel actually came down in the United States
3 and zapped the card that's plugged into my sniffer.

4 Q Is there a difference between a sniffer and a logger?

5 A They're the same thing, just a different word.

6 Q When you did your work at NDS, why did you need a
7 sniffer?

8 A I needed a sniffer, for example, to verify that an ECM
9 or some type of a download or some type of a packet -- we
10 would get complaints. Customers would call in, "We don't
11 see this." DirectTV would say we don't know; we didn't catch
12 it; we hit the button like we were told to. Israel is
13 asking questions. I am catching everything coming down over
14 the air to that access card in the sniffer or logger.

15 So then I can say my card never got it or my card did
16 get it. What's wrong? It's a debugging tool basically.

17 Q Now, when you went to NDS and were working there, were
18 there sniffer-like devices that they had before you built
19 your sniffer?

20 A Yes. Dr. Kuhn, Marcus Kuhn, again had schematics on
21 the internet that he had posted back in 1994 for both reader
22 and sniffers.

23 Q Now, just to be clear, as far as a stinger, how did you
24 use that when you worked for NDS?

25 A I would use that in my daily activities to test

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1 technology that I was working on, NDS technology. For
2 example, I would design an ECM for DirectTV period two access
3 cards -- I would say 99 percent of the ECMs that DirectTV
4 launched for the DirectTV period two.

5 Before I would submit this to Israel I would test it on
6 my own access cards first to make share that the

7 countermeasure was proper, that it worked. So I needed the
8 stinger for that, for example.

9 Q Now, there were questions by counsel about the
10 approximately \$40,000 -- \$40,100, I think -- that was
11 received at a Texas mailbox. Subsequent to that event --
12 and we have heard testimony from a police officer or police
13 lieutenant from Texas -- were you ever arrested?

14 A No.

15 Q Any kind of prosecution ever occur as a result of that
16 \$40,100?

17 A No.

18 Q Any charges ever filed against you by any government
19 agency with respect to that \$40,100?

20 A No.

21 Q Just to be clear, you were asked some questions about
22 Mr. Menard. Did you ever provide any type of reprogramming
23 device to Mr. Menard?

24 A I have never provided Mr. Menard any type of
25 reprogramming device whatsoever.

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1 Q Did you ever provide Mr. Menard with any hacked
2 EchoStar cards?

3 A No.

4 MR. KLEIN: Perhaps we can show Exhibit 2002,
5 please.

6 BY MR. KLEIN:

7 Q Now, counsel asked you questions about Exhibit 2002.
8 Do you remember that?

9 A Yes, I do.

10 Q Okay. And I am going to ask you some questions, but I
11 want you to do your absolute best to take your time, because
12 when you answered some of counsel's questions, you spoke so
13 quickly that I think it was difficult to understand the
14 points you were making. So please make an effort to do

15 that.

16 First of all, I believe it was your testimony that you
17 believe part of Exhibit 2002 is something you wrote and part
18 of it is not. Am I right?

19 A Yes, that is correct.

20 Q What's legitimate? What did you write there?

21 A I believe that the entire header area would be
22 legitimate. However, the remainder from the "good news from
23 up north here, dot, dot, enjoy," to the end of the e-mail I
24 believe has been fabricated.

25 Q Okay. Now, tell us and tell the jury why you think --

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1 and do it slowly -- why you think the document other than
2 the heading, why do you think it was fabricated?

3 A At the time of life that this e-mail was written on, I
4 was using Qualcomm windows-based Eudora Pro.

5 Q What is that?

6 A Eudora Pro is an e-mail program. However, in previous
7 years I would run DOS. I didn't run windows. And I would
8 run Eudora for DOS. I believe it was Eudora for DOS. There
9 was no type of automated PGP on send button, so I --

10 Q Wait, wait, wait. Calm down. What did you just say?

11 A When I was in a DOS environment, which is like Unix --
12 if anybody knows Unix -- there was no type of gooey or
13 graphical user environment. So I needed to manually encrypt
14 something I wanted to send to somebody and then attach it
15 and then mail it. But I was always very, I don't want to
16 say paranoid, but I always knew people can sniff internet
17 traffic since the internet has existed. Act like they're
18 somebody but never talk back, just listen, like a logger or
19 a sniffer.

20 So given that this is sent using Qualcomm's
21 windows-based Eudora Pro 4, at this point in time if I was
22 using windows, I would have been using the windows version
23 of PGP encryption for this message. That would have meant

24 that the PGP version would have said something more like
25 version 5 point something, not 2.6. Version 2.6.3 is from

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1 1994 era of PGP.

2 Q Okay. Just to be clear, now, where it says version --
3 how do you know they're using version 2.6?

4 A This bottom highlighted area tells me that.

5 Q Okay. And you're saying that you wouldn't have used
6 that at this time?

7 A Given that the e-mail -- correct, given that the e-mail
8 was sent under a windows-based e-mail software.

9 Q Anything else about the body of this e-mail that leads
10 you to believe that it's not something you wrote?

11 A I did not know that this code came from a 16CF54 at the
12 time. I would learn this later during the litigation. I
13 believed it had come from the 16SF48 used in GSM sim cards
14 because this was publicly found on a website related to GSM
15 sim hacking where I found other algorithms and such related
16 to GSM sim card attacks, what has been what the hackers had
17 figured out. While I was --

18 Q Let's go back to that last one. It says in there
19 16CF54. Is that what you -- right after the end part one,
20 begin part two?

21 A Yes.

22 Q Okay. Now, are you saying that -- what is it that you
23 didn't know about that that makes you think that this is not
24 a legitimate e-mail?

25 A Point blankly I would not have written extremely top

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1 secret in the clear. This whole body would have been
2 encrypted, including the attachment, and nothing would be

3 visible. Yet it's visible here, except the attachment is
4 still encrypted.

5 If I am on windows right now sending this e-mail, I am
6 going to be using the free version of PGP for windows. Then
7 I just click a button, I tell it to attach this file, click
8 a button and pick Jan's key, and just click send, and that's
9 all it takes to encrypt this message.

10 I would never put down the file name 16CF54, because I
11 didn't believe it came from a 54. I believe it came from
12 the brother device of it that is used in GSM, as well as we
13 look later in this message that I learned today, looking at
14 it with Mr. Hagan, I realized that when it gets to the
15 actual code, the file name is changing from 16CF54 dot ASC
16 to when it was decrypted, it should have become a file
17 called 16CF54.txt.

18 However, this one didn't. This one became 16CF54
19 underscore full. So where's the truth in this e-mail? I
20 don't know, but there has definitely been contamination to
21 it. But I am not an expert. This is only my opinion.

22 Q You have exchanged e-mails over time with Mr. Saggiori?

23 A Several.

24 Q Did you ever give Mr. Saggiori an e-mail that contained
25 a hack of the EchoStar card?

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1 A It was not a hack. No, I have not.

2 Q Did you at one time give Mr. Saggiori some kind of an
3 e-mail that dealt with a Thompson chip?

4 A Yes, I have.

5 Q And did that chip that you gave him have anything to do
6 with the hack of EchoStar?

7 A No, it did not.

8 Q To the extent that you were dealing with Mr. Saggiori
9 after you became employed by NDS, was that part of your job?

10 A It wasn't part of my job, but it was a preexisting

11 relationship. So on two occasions when I traveled to
12 Europe, for example, they said why don't you see what he's
13 doing, that type of thing. Keep the relationship -- don't
14 dissolve the relationship, so to speak.

15 Q Who said that?

16 A I'm not sure. Mr. Norris -- someone came up with the
17 idea, probably John Norris or someone in Israel.

18 Q What was your understanding as to why they told you to
19 just keep the relationship going?

20 A Well, you always need to "sleep with your enemy to know
21 your enemy" type thing. So if I'm already established and
22 trusted by Jan, why dissolve a relationship that was
23 existing just kind of dormant? With me in America and Jan
24 in Switzerland, it's kind of hard to -- we don't have common
25 interests anymore, so to speak.

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1 So if there is a chance that I might be in Europe at
2 the time, NDS sees this as an opportunity to get in touch
3 with him, because he was always very paranoid.

4 Q Since you left NDS, do you have other employment?

5 A Yes, I do.

6 Q What are you doing?

7 A I started up -- the day I left NDS, I cashed in a stock
8 option. I used this money to then start up my own company
9 which I have since incorporated, and I perform semiconductor
10 hardware and software analysis for the manufacturers that
11 produce these products as well as some large companies that
12 use the end products.

13 Q Does your business, do you have clients?

14 A I do. It's growing.

15 Q Is NDS a client?

16 A No. NDS nor any of its affiliates are a client.

17 Q Now, since you have been in your own consulting
18 business, have you had occasion to give speeches at
19 conferences?

20 A I was invited to speak. And I have an open invitation
21 actually to speak at the Black Hat Security Conference, and
22 I have spoken twice so far.

23 Q Is that in Washington?

24 A Once in Washington and once in Amsterdam recently.

25 Q Now, since you have left NDS, have you ever spoken at

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1 the Black Hat Conference about hacking any Thompson chips?

2 A If I may clarify. Hacking is a very abused word. It
3 doesn't necessarily mean you're breaking the law. A hacker
4 -- a Linux person is a hacker. That means they're hacking
5 software together.

6 There is a difference between a pirate hacker and a
7 hacker. There are good hackers; there are bad. So I would
8 prefer to use the word analyzed. But, no, I have not.

9 Q Have you analyzed and spoken about analyzing the
10 Thompson chip since you left NDS?

11 A Yes, I have.

12 Q What in general did you say?

13 A I basically explained how it doesn't take one of seven
14 labs in the world, or however it was explained in this
15 complaint, to break any Thompson chip available on the
16 market today. In fact, I was able to do it with
17 approximately \$10 in materials.

18 Q Did you give any kind of speech about hacking an
19 EchoStar chip?

20 A No. None of this speech was related to EchoStar.

21 Q Now, did you also give a speech in Europe?

22 A Yes.

23 Q And when you gave that speech in Europe, was there
24 press coverage?

25 A There was.

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1 Q Did you speak to anybody from the press about the facts
2 of this case?
3 A No, I did not.
4 Q Were you quoted as having spoken about the facts of
5 this case? Any articles?
6 A I was quoted by -- yes.
7 Q Was the quote accurate?
8 A The only -- which quote?
9 Q well, what did you see? Did you see a quote that dealt
10 with an EchoStar -- with EchoStar and this case?
11 A Yes. And I did not say that statement.
12 Q Did the statement indicate that you had said something
13 about hacking an EchoStar chip?
14 A Yes, it said something to that effect.
15 Q Had you told that to the reporter?
16 A Absolutely not.
17 Q With respect to your relationship with Mr. Menard after
18 you joined NDS, were all of your contacts with Mr. Menard
19 known to NDS, or were you contacting him on the side in some
20 way?
21 A I don't understand the question.
22 Q Was NDS aware that you had a relationship with Mr.
23 Menard while you were working for NDS?
24 A Yes. NDS was aware of all my contacts when I came on
25 board, yes.

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1 Q And what was your understanding as to why NDS was
2 letting you have contact with Mr. Menard once you started
3 working with NDS?
4 A Mr. Menard was running probably the largest
5 pirate/hacker website for satellite-related pirate
6 activities in the world. The Europeans were on it,

7 Americans. worldwide users were there. He was a valuable
8 source of information to NDS.

9 Q Now, I want to direct your attention to Exhibit 41 for
10 a moment. That was another exhibit that counsel asked you
11 about.

12 A Yes.

13 Q First of all, with respect to that guess that you made
14 about 100,000 original cards, were you talking about all of
15 the EchoStar pirate cards out there as opposed to just the
16 ROM 3?

17 A I was -- regarding original cards, which would mean
18 their legitimate access cards that come with their
19 receivers, to get the card, you need to buy the receiver,
20 which means Mr. Ergen is making money. So is Mr.
21 Guggenheim --

22 THE COURT: Ergen meaning EchoStar?

23 THE WITNESS: Yes, sir, Your Honor -- as well as
24 Mr. Kudelski is making money, because they're selling access
25 cards; they're selling receivers.

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1 I don't know if I am clear on ROM 2 or ROM 3, but
2 I am clear that I am guessing about legitimate access cards
3 being modified.

4 THE COURT: Kudelski meaning NagraStar?

5 THE WITNESS: Yes, Your Honor.

6 BY MR. KLEIN:

7 Q My question is this: When you were making that guess,
8 did you have any way to distinguish as to how many pirated
9 ROM 2 cards versus ROM 3 cards were out there, or were you
10 just saying pirated cards?

11 A No. This was just a hunch just based off of the amount
12 of -- the flurry of activity on the internet that I saw. It
13 was purely a guess.

14 Q You weren't being specific to any particular ROM 2 or
15 ROM 3? That's my question.

16 A Could you repeat your question, please.

17 Q My question is: When you were asked to make this
18 guess, were you asked to make it as to how many ROM 3
19 pirated cards there are out there as opposed to how many
20 pirated EchoStar cards are out there? That's what I'm
21 asking you. And if you don't remember, you can tell us
22 that.

23 A I don't know the answer to that. I'm sorry.

24 Q Okay. When you had your conversation -- one other
25 question, again with respect to Exhibit 41. When you were

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1 asked to make that guess, were you in some way
2 distinguishing between cards that were pirated cards that
3 exist in Canada versus cards in the United States; or were
4 you just saying this is the total number of cards out there?

5 A I was just saying the total number of cards out there.
6 And that's literally. Could be worldwide since they shared
7 the same code in all their access cards.

8 Q Okay. You testified about the conversation with Mr.
9 Mordinson regarding the Headend Report, the one that
10 occurred after the postings. Do you recall that?

11 A Yes.

12 Q Just to be clear, once you had that conversation and
13 you said you had it because there was a dispute as to
14 whether the hole was closed -- do you remember that?

15 A Yes.

16 Q What conclusion did you and Mr. Mordinson reach as to
17 whether EchoStar had been able to close the hole?

18 A We reached the conclusion that they did indeed close
19 the hole.

20 Q Have you ever posted using the alias Nipper or any
21 variation of Nipper? Have you ever done that?

22 A No.

23 Q Have you ever posted using the alias xbr21 or any

24 variation of xbr21?

25 A No.

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1 Q Have you ever posted instructions on dumping the
2 contents of the EchoStar card?

3 A No.

4 Q Have you ever made any posting regarding the contents
5 of an EchoStar access card?

6 A No.

7 Q I mean, on the web have you ever posted?

8 A I don't believe I have. I am going to say no. It's
9 possible that I might have commented on some in a discussion
10 thread, but not directly about EchoStar, no.

11 Q And if you commented, were you commenting on
12 information that you had read on the internet?

13 A Yes.

14 Q Have you ever posted a code for reprogramming an
15 EchoStar access card?

16 A No.

17 Q During the years that you worked for NDS, to your
18 knowledge did you ever do anything to aid any pirate or
19 pirate organization that was not part of an NDS anti-pirate
20 operation?

21 A No.

22 MR. KLEIN: All right. Thank you. I have no
23 further questions.

24 THE COURT: Redirect examination, please.

25 MR. HAGAN: Yes, Your Honor.

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1 REDIRECT EXAMINATION

2 BY MR. HAGAN:

3 Q Now, Mr. Tarnovsky, if I understood your testimony
4 correctly in response to Mr. Klein's questioning, you said
5 that the reason you believe that the e-mail sent to Saggiori
6 with EchoStar's code on it or in it was inaccurate or
7 somehow doctored was because in that time period you weren't
8 using a Qualcomm Eudora version; is that correct?
9 A No. I stated that I was using Qualcomm Eudora, but it
10 was under windows.
11 Q And why do you believe that the e-mail sent to Saggiori
12 was inconsistent with that?
13 A Because due to the fact that at this time in life I was
14 using windows for e-mail, this entire message would have
15 been encrypted under PGP version 4 or 5 for windows. So the
16 version that says 2.6.3 would have said 5.0 or 4.0,
17 something of a window's version of the PGP release.
18 The message up at the top would have been encrypted. I
19 would never have written top secret. But if I had, this
20 would have been in gibberish because it would have been
21 encrypted against Jan's public key. As well, the file name
22 is very peculiar, given that I didn't know it came from this
23 actual chip as it's now labeled.
24 Q Mr. Tarnovsky, you also testified that you didn't
25 recall the time period when you were being paid by the News

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1 Corp. subsidiary HarperCollins. Let's take a look at your
2 2000 tax return. It's Exhibit 782. Do you have a copy of
3 that in front of you, Mr. Tarnovsky?
4 A Yes, I do.
5 Q If you look three pages in, the date on the top of the
6 1040 form, your individual tax return, is 2000; right?
7 A Yes.
8 Q And you produced these documents through the course of
9 this litigation after a little bit of a dispute; correct?
10 MR. KLEIN: Objection, Your Honor. Irrelevant.
11 THE COURT: Sustained as to the last portion.

12 Just reask the question.

13 BY MR. HAGAN:

14 Q You produced these tax returns during the course of
15 this litigation; correct, Mr. Tarnovsky?

16 A Yes, I did.

17 Q If you will flip, sir --

18 THE COURT: Counsel, any reason it can't be
19 received in so we can see this on the board?

20 MR. HAGAN: Certainly, Your Honor. I offer 782
21 into evidence.

22 THE COURT: Received, and you can put it on the
23 board.

24 (Exhibit 782 received.)

25 BY MR. HAGAN:

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1 Q If you will turn to page 4, several pages into the
2 document, but it's page 4 of the 1040 form. Let me know
3 when you have found that.

4 A I am there.

5 Q It says that you've got an entry for HarperCollins for
6 \$128,961.48. Do you see that?

7 A Yes, I do.

8 Q And that was for the year 2000; correct?

9 A Yes.

10 THE COURT: Page 4?

11 MR. HAGAN: It's not page 4 of the document, Your
12 Honor, but it's page 4 of the 1040, client information.

13 THE COURT: Just a moment.

14 MR. HAGAN: It's 20 pages in.

15 THE COURT: 20 pages in. Thank you.

16 MR. KLEIN: Your Honor, there is another number on
17 the bottom right-hand corner.

18 THE COURT: I can't find it quickly either,
19 counsel.

20
21 THE COURT: Look at your screen for a moment.
22 This is page 4. Is this the page you're referring to?
23 MR. HAGAN: Yes.
24 THE COURT: Thank you.
25 BY MR. HAGAN:

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1 Q So, Mr. Tarnovsky, you would agree with me as of the
2 year 2000 you were not being paid by NDS? You were being
3 paid by a News Corp. affiliate, HarperCollins Publishing;
4 correct?
5 A Yes. I agree.
6 Q Now, look at the last page of Exhibit 782. You have
7 got three entries, handwritten entries, on the additional
8 information page. Do you see that?
9 A I see two entries.
10 Q Well, there is one for \$7,500, one for \$5,000 bonus,
11 and one for \$20,000 from a colleague in 1998. Do you see
12 all three of those?
13 A Yes.
14 Q Let's talk about the \$7,500. That's the money that you
15 received from Mr. Menard; correct?
16 A Yes.
17 Q For providing him technical assistance for his website;
18 right?
19 A It was for providing him technical assistance over
20 several years with the servers. I don't know if they were
21 for his website or not. I can't be that specific.
22 Q How about the \$5,000 bonus in 2000?
23 A This was a bonus paid to me by NDS out of Israel for
24 work on either period three or the cablevision card in New
25 York. And the check was cut directly from Israel and came

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1 out of their budget. So taxes were on -- to make it quicker
2 -- I don't know exactly the logistics -- I needed to pay
3 taxes on this myself.

4 Q So the year of the Nipper post you got a \$5,000 bonus
5 from NDS Israel and \$7,500 from Mr. Menard; correct?

6 A Yes.

7 Q Now, that \$20,000, that's the money that you received
8 through the mail accounts concealed inside the electronic
9 equipment in 1998; correct?

10 A Probably 1998 to '99. But, yes, that's correct.

11 THE COURT: And the location again, counsel, to be
12 clear, is this Virginia or --

13 THE WITNESS: Manassas, Virginia. Yes, Your
14 Honor.

15 THE COURT: All right.

16 BY MR. HAGAN:

17 Q So you handwrote on there received \$20,000 from a
18 colleague in 1998; correct?

19 A Yes.

20 Q You didn't write on there received \$20,000 as part of
21 an undercover sting operation; right?

22 A No.

23 Q You didn't write on there received \$20,000 as part of
24 some legitimate DirectTV NDS anti-piracy operation; correct?

25 A No.

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1 Q Does the colleague that you're referring to, is that
2 Mr. Ereiser?

3 A Yes.

4 Q So you're paying -- two years after receiving this
5 money, you are finally declaring it?

6 A Counsel, you're incorrect in that statement. If you
7 look over the return, you will see clearly that I did not

8 pay any additional taxes on this \$20,000. These were notes.

9 This is my first year with the CPA, and I am clarifying
10 to him to make sure that everything is legitimate. And he's
11 reviewing the previous years in front of this tax return.
12 So I am telling him to please make sure that I pay the taxes
13 on my \$7,500 and my \$5,000. And then please verify that I
14 have paid the proper taxes due on this \$20,000 which, after
15 looking at it, actually was more like \$17,000. So I would
16 have been overpaying taxes on this.

17 Q You were being a good samaritan in 2000?

18 A Thank you.

19 Q You believed that you needed to report that money on
20 your income; correct?

21 A No. You're wrong.

22 Q You didn't believe that you needed to report that
23 money? Is that your testimony?

24 A No. My testimony is that at the time of life that this
25 was going on, I was being investigated. It was recommended

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1 to me at this time that I make sure that a valid CPA does my
2 taxes to make sure that all my i's are dotted and my t's are
3 crossed. I'll slow down. In doing so, I needed to supply
4 him -- this was my first year with him. He has my name
5 spelled wrong on this planner, as you can see at the top of
6 the page. He has a Z in front of the S, not a V.

7 I gave him '98 and '99 tax returns, and then these were
8 the notes to make sure that my i's were dotted and my t's
9 were crossed. He reviewed it and determined if I had
10 already paid the taxes or not and left me a memo on the very
11 first page of when he returned these documents to me.

12 Q You still have that \$20,000?

13 A Today, no.

14 Q Now, Mr. Tarnovsky, you testified earlier in your
15 examination with Mr. Stone that you were in Belgium in

16 December of 2000; correct?

17 A Yes.

18 Q But you're not testifying that because you were in
19 Belgium, you didn't have access to the internet; right?

20 A I had very slow access to the internet through dial-up,
21 and it was very slow.

22 Q Well, you had enough access to the internet to see the
23 NipperClause posting on the 21st and to send an e-mail to
24 NDS employees saying the cat's out of the bag on the 22nd;
25 right?

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1 A Yes.

2 Q Now, during your work for NDS you posted a number of
3 things on different pirate websites, including Mr. Menard's
4 website; correct?

5 A Yes.

6 Q And as part of those posts you would oftentimes use
7 what's called proxies or anonymizers or spoofing techniques;
8 correct?

9 A No.

10 Q Do you know what a proxy is, Mr. Tarnovsky?

11 A Yes, I do.

12 Q Can you tell the ladies and gentlemen of the jury what
13 that is?

14 A A proxy is when I would take my web browser and instead
15 of having it go directly onto the internet through my local
16 internet service provider, I would tell it to instead use
17 another person's IP address and then their port, kind of
18 like a different door to exit onto the internet through.

19 Proxies are typically used in corporations to keep
20 people from cruising to certain websites, and they can
21 content-filter their employees, for example. Proxies are
22 also used by people doing illegal activity or legal activity
23 that don't want to be -- they don't want their internet
24 address to be seen to where they're coming from, because

25 there is no such thing as true anonymity on the internet,

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1 but you can try to hide your identity through proxy servers.

2 Q Is it your testimony today under oath, Mr. Tarnovsky,
3 that you did not use any proxies when posting on the
4 internet?

5 A As far as I can remember, I have always used my ISP to
6 make any posts on the forums you were speaking about before.

7 MR. HAGAN: Your Honor, I would like to play page
8 517, line 24, through page 518, line 1, of Mr. Tarnovsky's
9 deposition. Actually it's two clips, Your Honor. It's
10 going to start on page 516, lines 20 through 22, and then
11 517, 24, through 518, 1.

12 THE COURT: What line do you want to start with on
13 page 517?

14 MR. HAGAN: Page 517, line 24.

15 THE COURT: Go ahead.

16 MR. HAGAN: And we don't have a clip number, Your
17 Honor, so I'm going to have to do it the old-fashioned way.

18 BY MR. HAGAN:

19 Q Mr. Tarnovsky, follow along with me.

20 A I don't have a copy.

21 Q We can get you a copy.

22 A Thank you.

23 Q At your deposition under oath, we had the following
24 exchange:

25 "Question: Did you ever use a proxy server in

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1 connection with your work for NDS?

2 "Answer: Yes.

3 "Question: And why would you do that in connection

4 with your work for the company?

5 "Answer: I didn't want people to see where I was
6 coming from, so I would go through -- go through a proxy
7 server.

8 "Question: So you used that proxy server to conceal
9 the ISP that you were using?

10 "Answer: Correct."

11 Now, Mr. Tarnovsky, that's not what you just told the
12 ladies and gentlemen of the jury, so I am going to give you
13 one more opportunity.

14 Did you ever use a proxy server in connection with your
15 work for NDS to conceal the ISP that you were using?

16 A That was not your question, counsel. Your question to
17 me was did I ever use a proxy server to post on the forums,
18 and I clearly stated to you what a proxy server was, and
19 then I clearly stated to you that I never used a proxy
20 server to post. I came directly through my ISP.

21 Now, cruising the internet I have used a proxy to do
22 this, to not see where I am, yes. But this is mixing up pre
23 2001, post 2001. You're going across a long window here and
24 being very vague.

25 Q Just to be clear though, Mr. Tarnovsky, you used those

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1 proxy servers to conceal your ISP address; correct?

2 A Absolutely. After 2001 there was no justification to
3 keep an ISP on the East Coast as well as an ISP on the West
4 Coast costing \$200 a month, if not more, to NDS. So if I am
5 only going to be coming out on a West Coast ISP at this
6 point in time, I am going to camouflage myself through a
7 proxy of some kind.

8 Q My question, Mr. Tarnovsky, was: You used these proxy
9 servers to conceal the ISP that you were using; correct?

10 A Post 2001, yes.

11 Q And no one within NDS ever required you to log or keep

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12 track of the proxy servers that you used; correct?
13 A We would share the proxy servers actually. We would
14 share them within the security group because they're very
15 hard to find.
16 Q Let me reask my question, Mr. Tarnovsky. Did anyone
17 within NDS ever ask you to log or keep track of the proxy
18 servers that you used?
19 A Yes.
20 MR. HAGAN: Christine, could you please hand Mr.
21 Tarnovsky page 518 of his deposition? Your Honor, we're
22 going to be going through the question at line 2 through the
23 answer at line 4.
24 THE COURT: That's 518, line 2?
25 MR. HAGAN: Through 4.

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1 THE COURT: You may.
2 BY MR. HAGAN:
3 Q Under oath at your deposition subject to the penalties
4 of perjury, Mr. Tarnovsky, we had the following exchange:
5 "Question: Did anyone within NDS ever ask you to log
6 or keep track of the proxy servers" --
7 THE COURT: Just a moment. This is page 518?
8 MR. HAGAN: 518, lines 2 through 4.
9 THE COURT: Counsel, my 518, line 2, starts with,
10 Question: Do you have an account with an anonymizer
11 website?
12 MR. HAGAN: I have that at 519. Perhaps my
13 citation is wrong, Your Honor.
14 THE COURT: Let's move on to another question.
15 BY MR. HAGAN:
16 Q Mr. Tarnovsky, you are familiar --
17 MS. WILLETTTS: 517.
18 MR. HAGAN: What's the line number?
19 MS. WILLETTTS: 517, line 2.
20 MR. HAGAN: Okay. Sorry, Your Honor. It's 517,

21 lines 2 through 4.

22 THE COURT: You may.

23 MR. HAGAN: "Question: Did anyone within NDS ever
24 ask you to log or keep track of the proxy servers that you
25 used?"

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1 "Answer: No."

2 BY MR. HAGAN:

3 Q Now, that's different from what you just told the
4 ladies and gentlemen of this jury. You changed no under
5 oath at your deposition to yes under oath today; correct?

6 A Yes, I did.

7 Q Okay. Let's move on. Now, Mr. Tarnovsky, you are
8 familiar with the following: Sxpilot@mail.anonymizer.com;
9 correct?

10 A Yes.

11 Q What is that?

12 A That's my e-mail account when I purchased -- proxies
13 are very hard to get, which is why we would share the
14 proxies, which is why I changed my answer to yes. So
15 anonymizer for \$100 a year would allow me to install some
16 software, and they would give me basically a high-speed
17 tunnel anonymously to the internet even though they probably
18 would log the traffic. I don't know. What was the
19 question?

20 Q You wanted to explain something. I am really not clear
21 what it is you wanted to explain. I think it was changing
22 your answer from yes to no.

23 MR. KLEIN: We would object, Your Honor. There is
24 a question --

25 THE COURT: Sustained. Reask the question.

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1 BY MR. HAGAN:
 2 Q You are familiar with the following e-mail address:
 3 Sxpilot@mail.anonymizer.com; correct?
 4 A Yes.
 5 Q And that was the account that you used to set up this
 6 anonymizer; correct?
 7 A Yes.
 8 Q Now, using these anonymizers, Mr. Tarnovsky, you were
 9 able to post information from one location. And if someone
 10 did an IP search, that post would show up from another
 11 location; correct?
 12 A Yes.
 13 Q So when you were posting information from, for example,
 14 your home in California, it would show up coming from the
 15 East Coast; correct?
 16 A I don't know.
 17 Q Well, let's take a look at page 521 of your deposition,
 18 lines 19 through 24.
 19 THE COURT: Do you have 519? I need 519 back.
 20 MS. WILLETTTS: It's 520.
 21 MR. HAGAN: 520, line 19, Christine?
 22 MS. WILLETTTS: 19 through 24.
 23 THE COURT: What lines, counsel?
 24 MR. HAGAN: 19 through 24, Your Honor.
 25 THE COURT: And your question was? You may read

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1 that portion.
 2 BY MR. HAGAN:
 3 Q At your deposition under oath and subject to the
 4 penalties of perjury, you testified as follows:
 5 "Question: So you were posting information from
 6 California, but it would show up as coming from the East
 7 Coast?

8 "Answer: Because I was physically logged on on an ISP
9 on the East Coast, yes."

10 Now, that's not what you just told the ladies and
11 gentlemen of this jury; correct, Mr. Tarnovsky?

12 A Mr. Hagan, you're mixing up events of time across '97
13 to 2007. Post 2001 I began using the anonymizer at some
14 point in time after all of this undercover stuff blew up
15 when I no longer had an ISP on the East Coast. My
16 deposition stands.

17 what I told you clearly said that I would actually dial
18 up into the East Coast via ISDN modem, which is basically
19 112 kilobit modem, and be logged on through an ISP Metro
20 2000 or M20.net, which you're aware of. And I would be
21 logged on from there. So that is what I am saying.

22 Q Did you use an anonymizer account when posting
23 information on website chat forums?

24 A I do not believe I have ever done that. I have cruised
25 the forums with the anonymizer.

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1 THE COURT: Let me get 519 back.

2 BY MR. HAGAN:

3 Q You are also familiar with the term spoofing; correct?

4 A Spoofing would be like a proxy basically.

5 Q And you used spoofing techniques as well; correct?

6 A Post 2001 all of these techniques you mentioned,
7 besides calling into the East Coast, were being used to
8 monitor internet sites. Yes.

9 Q One of the aliases that you used to post information on
10 these websites was Shrimp; correct?

11 A I believe that's correct, yes.

12 Q You used that alias or that internet persona in 1999;
13 correct?

14 A I don't know. I don't have a reason to disbelieve it.

15 Q And if a posting by Shrimp in 1999 says: "You must
16 always spoof, but make sure you are spoofing correct," does

17 that sound like some advice you would have given to the
18 pirates?

19 A This is a different type of spoofing now. So now
20 you're mixing up spoofing of internet access with spoofing
21 inside a DIRECTV period two access card, so that when we
22 launch a countermeasure, it doesn't get hit by the
23 countermeasure. So this is out of context.

24 Q You testified on cross-examination about attending a
25 Black Hat conference in Amsterdam recently?

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1 A Yes, I did.

2 Q Did you have an opportunity to speak to a reporter
3 named Francois at the conclusion of that conference?

4 A I briefly spoke to Mr. Francois something after, yes.

5 Q And you were aware that that journalist published an
6 article about your presentation at the Black Hat conference
7 and the discussion that he had with you after that
8 conference; correct?

9 A I saw the article, yes.

10 Q And in that article it says that you admitted to him
11 that you hacked Nagra?

12 A I read that, yes.

13 Q And it's your testimony now today that Mr. Francois was
14 not being accurate?

15 A This is my testimony. Mr. Francois is a liar, and he
16 was in this room earlier. Call him to the stand.

17 Q Now, you also talked about a government investigation
18 into your activities. Do you recall that testimony?

19 A Yes.

20 Q That investigation started with the Hays County in 2000
21 when those shipments of cash were intercepted; correct?

22 A I believe that's correct.

23 Q As you understood it, the U.S. Customs got involved and
24 eventually the Assistant United States Attorney's office got

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1 A Yes.

2 Q And I believe you testified that no charges were ever
3 filed against you?

4 A This is correct.

5 Q And you understood that the Assistant U.S. Attorney
6 initially in charge of that investigation was a gentleman by
7 the name of Richard Chang?

8 A Yes, I am.

9 Q And after Mr. Chang had the investigation for a little
10 while, the file was transferred to another U.S. Attorney
11 named James Spertus; correct?

12 A I don't know for sure.

13 Q You understood that Mr. Spertus was a friend and
14 colleague of your supervisor, John Norris; correct?

15 MR. KLEIN: Objection.

16 THE WITNESS: I don't know that information.

17 THE COURT: Overruled.

18 THE WITNESS: I don't believe that's correct,
19 though.

20 BY MR. HAGAN:

21 Q And after the Agent Spertus got the investigation, it
22 was eventually dropped with no charges?

23 THE COURT: He is not an agent.

24 MR. HAGAN: Sorry.

25 BY MR. HAGAN:

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1 Q After the U.S. Attorney James Spertus got the
2 investigation file, it was dropped and no charges were filed
3 against you; correct?

4 A I believe that's incorrect. I believe it was still
5 pursued, and it was found to be no cause.
6 THE COURT: We have no way of knowing what the
7 relationship is between Mr. Norris and U.S. Attorney Mr.
8 Spertus at that time, so I caution you that although I am
9 letting the relationship to develop and the testimony to
10 come in, that unless Mr. Spertus is called or Mr. Norris is
11 called back, Mr. Tarnovsky doesn't know what that
12 relationship is. So we don't want to form the assumption
13 from the question that there is such a relationship.
14 BY MR. HAGAN:
15 Q Now, Mr. Tarnovsky, were you aware that after the
16 investigation was dropped, Mr. Spertus left the United
17 States Attorney's Office?
18 A No.
19 Q Were you aware that he left the United States
20 Attorney's Office for a job at the MPAA?
21 A No.
22 Q Do you know what the MPAA is?
23 A No.
24 Q Never heard of the Motion Picture Association of
25 America?

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1 A Now I know, yes.
2 Q Do you believe, Mr. Tarnovsky, that there was any
3 connection between the investigation being dismissed and Mr.
4 Spertus getting a job at the MPAA?
5 MR. KLEIN: Your Honor, he's asking questions
6 where the witness already said --
7 THE COURT: Sustained. We will find Mr. Spertus.
8 We will bring Mr. Norris back.
9 BY MR. HAGAN:
10 Q Now, Mr. Tarnovsky, you also talked a little bit about
11 a polygraph test that you were given by the defendants;
12 correct?

13 MR. KLEIN: Your Honor, I would make a continuing
14 objection to this line of questioning.

15 THE COURT: That's overruled. There was
16 information on cross-examination where Mr. Tarnovsky spoke
17 about a polygraph test. The results of a polygraph test
18 have been held by Courts not to be credible evidence placed
19 in front of the jury.

20 By the same token, the questions asked on a
21 polygraph test may be relevant; they may not be. What
22 people decide to ask on a polygraph may be of import or they
23 may not be. That would be your decision.

24 I think after speaking with counsel tonight, I
25 will further instruct you. But it's important if questions

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1 are asked about the result, I need to speak with the counsel
2 outside the jury's presence about that.

3 Are you planning on going into the questions
4 themselves, counsel?

5 MR. HAGAN: No, Your Honor.

6 THE COURT: Are you planning on going into the
7 results?

8 MR. HAGAN: No, Your Honor.

9 THE COURT: What are you planning on doing, then?

10 MR. HAGAN: I plan to go into the questions that
11 were intentionally not asked.

12 THE COURT: Stop. I am going to ask you to excuse
13 yourself for a moment. I'm not quite certain that I heard
14 that on cross-examination, and I need to talk to counsel for
15 just a moment.

16 (Jury not present)

17 THE COURT: All right. Now, counsel, this isn't
18 going to take very long. We're going to go right back into
19 session.

20 This is my ruling. This Court spent substantial

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21 time on this issue of a polygraph. This was an in-limine
22 motion brought by NDS to suppress what I thought were the
23 questions asked of Mr. Tarnovsky. This polygraph was either
24 blurted out by Mr. Tarnovsky on cross-examination after the
25 Court had granted, I believe, NDS's motion, if I am not

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1 mistaken.
2 I expect that Mr. Tarnovsky would have either been
3 counseled concerning this in-limine motion which was
4 favorable to NDS. Now after having excluded all information
5 about a polygraph examination, these statements allow Mr.
6 Tarnovsky to come to the stand and appear credible when in
7 fact the questions asked may show some alleged connivance on
8 his part or may be used to his advantage. That is glaringly
9 inequitable.
10 It's not appropriate to allow Mr. Tarnovsky to
11 either unintentionally, quote, unquote, or for his --
12 without being properly counseled, or for Mr. Tarnovsky to
13 take advantage and choose to use the fact that a polygraph
14 test was given, leading to the inference that therefore he
15 is truthful because he has placed in front of the jury the
16 fact of a polygraph test, not to allow you to ask questions
17 in that area. Because by virtue of blurting that out or
18 intentionally making that statement, it negates the Court's
19 entire in-limine motion.
20 I don't know whether that was unintentional
21 because he wasn't properly counseled, Mr. Klein, after you
22 had won that motion; or whether this is an intentional act
23 on his part. It doesn't matter. In either case the door
24 was opened by Mr. Tarnovsky, and this now places this Court
25 in the position of reversing the entire prior ruling that I

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1 had made.

2 Now, eventually we are going to have to fashion an
3 instruction for the jury, counseling them that the results
4 of a polygraph test are not credible evidence. But I want
5 to know exactly where you're going with this, Mr. Hagan,
6 because I thought in the in-limine motion it's the
7 questions, quite frankly, that were not asked by NDS that
8 caused the issue.

9 So, therefore, I thought that where you were now
10 going to try to go was all the questions that were asked,
11 showing the questions that weren't asked, your argument
12 being that he wasn't asked the questions he should have been
13 asked by NDS. Now, where are you going, because I thought
14 that was very clear? But apparently you have something else
15 planned, and I don't --

16 MR. HAGAN: Forgive me if I was unclear, Your
17 Honor. Mr. Tarnovsky was only asked two questions on the
18 polygraph. I don't care about those questions. One is:
19 Since you have been hired by NDS, have you sold any modified
20 NDS Smart Cards?

21 The second one: Since you have been hired by NDS,
22 have you sold any NDS Smart Card secrets?

23 I want to talk to Mr. Tarnovsky about what was
24 intentionally not asked.

25 THE COURT: which was?

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1 MR. HAGAN: His involvement in the distribution of
2 EchoStar Smart Cards, which was not asked; the money that
3 was not intercepted by government officials through the mail
4 account in Texas, which was not asked; his involvement in
5 the publication of Canal+ codes and EchoStar codes on Mr.
6 Menard's website, which was not asked. And that's it.

7 THE COURT: Let's turn to Mr. Klein. Now, Mr.
8 Klein, go to the lectern. I think it would be unfair if we

9 got into that area, assuming that this was unintentional on
10 Mr. Tarnovsky's part. Listen to me before you speak. It
11 would be unfair to NDS not to be able to ask the very
12 questions that were in fact asked those two questions, and
13 the result is where does that lead us?

14 Of course, the jury is going to be curious about
15 what the results are, which is highly inappropriate. So if
16 I am going to let the questions be asked by EchoStar after
17 Mr. Tarnovsky blurted out the fact that he had had a
18 polygraph, insinuating that he's credible, then I would pay
19 you the same courtesy of asking those other two questions if
20 you choose to. You can make that tactical decision when
21 you're done if you decide to after talking to counsel.

22 MR. KLEIN: What I would like to do is just
23 clarify what I think happened.

24 THE COURT: Counsel, it doesn't matter what
25 happened. He either did this intentionally, or you didn't

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1 counsel him properly -- one of the two. You won that
2 motion, and then to have him blurt that out is not
3 appropriate.

4 MR. KLEIN: What I'm saying, Your Honor, is what
5 he blurted out was that when he was hired, they gave him a
6 polygraph test. What the motion was about was a polygraph
7 test that was given to Mr. Tarnovsky after the packages were
8 intercepted by the police in Texas.

9 And what I believe he said on the stand was when I
10 was hired, they gave me a polygraph test. He didn't say
11 anything at all with respect to the polygraph test that was
12 the subject of the motion.

13 THE COURT: Counsel, I swept this motion in your
14 favor. I am not going to parse it out. You absolutely
15 prevailed. I have held out all information concerning a
16 polygraph test.

17 want to make clear for the record that it was not my
18 intention and I believe it was not the witness's intention
19 to get into that topic at all. It wasn't planned, and I
20 think it just came out.

21
22 THE COURT: I am not finding fault. I am simply
23 saying the end result is very unfair now to EchoStar in my
24 opinion, and I just don't understand why it came out either
25 intentionally or unintentionally. I am not willing to make

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1 the finding that it was unintentional. I am not willing to
2 make the finding it was intentional. The results are the
3 same.

4 MR. KLEIN: Well, if I could just say, Your Honor,
5 for the record I would object, because I do believe that
6 what he said has no relationship to the entire gist of that
7 motion, which was related to the polygraph given after the
8 packages arrived in Texas. May I have a continuing
9 objection?

10 THE COURT: You may. Kristee, if you would be
11 kind enough to get the jury, and summon Mr. Tarnovsky also,
12 please.

13 MR. HAGAN: Can I give him a copy of the
14 polygraph, Your Honor?

15 THE COURT: Yes. Also make a further record while
16 the jury is coming in, Mr. Klein may parse that out. The
17 end result is it makes Mr. Tarnovsky appear more credible in
18 all particulars because he allegedly took a polygraph. So
19 it doesn't matter at this point that Mr. Klein may be
20 correct or Mr. Hagan.

21 (Jury present)

22 THE COURT: The jury is present. All counsel are
23 present. Counsel, thank you for your courtesy. This is
24 continued examination by Mr. Hagan.

25 BY MR. HAGAN:

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1 Q Mr. Tarnovsky, during your questioning with NDS's
2 counsel, you mentioned taking a polygraph test or a lie
3 detector test. Do you recall that testimony?

4 A Yes.

5 Q I want to focus on that lie detector test for just a
6 minute. You took more than one during the course of your
7 employment with the defendants; right?

8 A Yes.

9 Q And one of those lie detector tests was given to you
10 after this federal investigation started; is that right?

11 A After the investigation, before the lawsuits, yes.

12 Q Let's look at Exhibit 100.

13 THE COURT: Exhibit?

14 MR. HAGAN: 100.

15 THE COURT: Thank you.

16 BY MR. HAGAN:

17 Q Do you have that in front of you?

18 A Yes, I do.

19 MR. KLEIN: Your Honor, may we have a copy?

20 MR. HAGAN: Sure.

21 THE COURT: Counsel, you have a copy.

22 MR. KLEIN: I don't have one here, Your Honor.

23 THE COURT: Okay. Thank you. All right.

24 BY MR. HAGAN:

25 Q Now, Mr. Tarnovsky, the date of this lie detector test

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1 that you were given is February 16th of 2001, correct,
2 according to the document?

3 A Yes.

4 Q Do you recall sitting down and taking that lie detector

5 test?

6 A Yes.

7 Q And do you recall being asked a couple of questions on
8 that lie detector test?

9 A I don't recall the exact questions, but I remember the
10 atmosphere.

11 Q well, fortunately we have the exact questions on
12 Exhibit 100. You were asked two questions according to this
13 document. The first one: Since you have been hired by NDS,
14 have you ever sold, modified NDS Smart Cards?

15 The second one: Since you have been hired by NDS, have
16 you ever sold any NDS Smart Card secrets? Do you recall the
17 questions now?

18 A Yes.

19 Q Now, Mr. Tarnovsky, this was after government officials
20 interviewed you or attempted to interview you; correct?

21 A I thought I wasn't allowed to talk about that.

22 Q You're allowed to talk about a discussion that you had
23 with government officials, Mr. Tarnovsky. This polygraph
24 test was after you had that discussion; correct, sir?

25 THE COURT: Are you concerned about some agreement

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1 with government officials?

2 THE WITNESS: Your Honor, I was told not to
3 discuss that.

4 THE COURT: By whom?

5 THE WITNESS: By my counsel.

6 THE COURT: Because of your conversation with the
7 government?

8 THE WITNESS: I am not sure why, Your Honor.

9 THE COURT: I am going to order you to answer the
10 questions.

11 THE WITNESS: Yes, Your Honor.

12 MR. KLEIN: Your Honor, I think the witness is

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13 referring to something that there is a stipulation by
14 counsel --

15 THE COURT: Well, it may be. I don't know. But
16 if it's a government agency of some type, I will override a
17 government agency real quickly.

18 THE WITNESS: Yes, Your Honor.

19 BY MR. HAGAN:

20 Q Let's get back to the lie detector test, Mr. Tarnovsky.
21 You were given this lie detector test to determine whether
22 or not you were engaged in unlawful piracy activities as you
23 understood it; correct?

24 A Yes.

25 Q But the only questions that you were asked in this

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1 polygraph dealt with selling or distributing the defendant's
2 pirated Smart Cards; correct?

3 A Yes.

4 Q You weren't asked any questions about whether or not
5 you had distributed pirated EchoStar Smart Cards; correct?

6 A That's correct.

7 Q You weren't asked whether or not you posted information
8 about EchoStar's code on the internet on Menard's website in
9 December of 2000; correct?

10 A Correct.

11 Q You were not asked whether or not you posted the Canal+
12 code on Mr. Menard's website; correct?

13 A Correct.

14 Q You were not asked any questions about your knowledge
15 or involvement in those cash shipments coming through your
16 mail account in Texas; correct?

17 A I believe indirectly that's what these questions
18 pertain to.

19 Q Mr. Tarnovsky, please listen to my question. Neither
20 one of these two questions dealt with your knowledge or
21 involvement in those cash shipments through your mail

22 account in San Marcos, Texas; correct? And you can look
23 back to the questions if you need to.
24 A Can you repeat that question, please.
25 Q Neither one of the questions that you were asked on

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1 this lie detector test in February of 2001 dealt with the
2 cash shipments through your mail account in San Marcos,
3 Texas; right?
4 A I believe that these do in fact correlate to these two
5 packages. NDS is assuming for their own welfare have I done
6 anything with their technology that would create cause for
7 someone to mail moneys to me. They're not concerned with
8 Canal+. They're not concerned with Nagra.
9 None of these lawsuits had been filed yet. All that
10 happened was these U.S. government agents have come and
11 they're asking what's going on; are you doing something to
12 us.
13 Q Mr. Tarnovsky, the truth is, sir, you were
14 intentionally not asked those questions because they knew
15 what the answers would be.
16 MR. KLEIN: Objection. That's argument.
17 THE COURT: Sustained. You can argue that to the
18 jury later. Unless he had a conversation with somebody,
19 counsel, you can ask if he had a conversation about what
20 questions were going to be asked or not asked. But save
21 that other for argument.
22 BY MR. HAGAN:
23 Q Did you have any discussions with anyone at NDS about
24 this lie detector test before you took it?
25 A No.

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1 Q Did you tell anyone at NDS, don't ask me these
2 questions about EchoStar, because I can't answer them?

3 A No.

4 Q So it's just coincidental that those questions didn't
5 appear on that lie detector test; correct?

6 A No. I think it's actually very logical. There were no
7 accusations against piracy of Canal+ or Nagra against me at
8 this time.

9 Q Now, Mr. Tarnovsky, we looked at Exhibit 41 earlier
10 where you estimated over 100,000 E3M cards after the post.
11 But also on that e-mail you estimate 100,000 battery cards;
12 correct?

13 A I need to find it.

14 MR. HAGAN: Your Honor, I would offer Exhibit 100
15 into evidence.

16 THE WITNESS: I see what you're saying, and again
17 I'm guessing based on recycling technology used previously
18 against NDS.

19 BY MR. HAGAN:

20 Q But you were talking about at least 100,000 battery
21 cards used to pirate EchoStar systems in Exhibit 41?

22 A Actually I clearly state I would guess either \$5 AVR
23 cards or battery cards are being used, at that number you
24 just mentioned.

25 Q For EchoStar's security system?

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1 A I am discussing NagraVision, sir.

2 THE COURT: Exhibit 100 is denied in evidence,
3 counsel.

4 MR. HAGAN: Thank you, Your Honor.

5 THE WITNESS: NagraVision.

6 BY MR. HAGAN:

7 Q And EchoStar uses the NagraVision cards for their
8 security system. Let's not play games. You understand

9 that; right, Mr. Tarnovsky?
10 A Yes, I do. And I clearly see it says Canada as well as
11 America on this.
12 Q Mr. Tarnovsky, you understood that as a result of that
13 post and based on your prior testimony, there was an
14 explosion in EchoStar piracy. You also understood that as a
15 result of that post, EchoStar was forced to undergo a card
16 swap?
17 A That's not true, sir.
18 Q I know you've testified that --
19 THE COURT: Those are two different questions,
20 counsel.
21 MR. HAGAN: Let me break it up.
22 BY MR. HAGAN:
23 Q Mr. Tarnovsky, you agreed earlier this morning that the
24 Nipper post was a significant event in EchoStar piracy;
25 correct?

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1 A Yes.
2 Q You are not trying to change that testimony now; right,
3 sir?
4 A No.
5 Q Your e-mail also says that EchoStar had to do a card
6 swap; correct?
7 A The e-mail said something to the effects of the only
8 way that I believed they could fix this would be to swap it
9 out. However, EchoStar proved us differently and downloaded
10 a patch to fix the hole.
11 Q You're familiar with a pirate device called a blocker;
12 aren't you, Mr. Tarnovsky?
13 A Yes.
14 Q What does a blocker do?
15 A A blocker is in a way like a sniffer or a logger;
16 however, it doesn't have a connection to a PC. So it's kind
17 of intercepting traffic between the card and the

18 set-top-box, and it's monitoring all transactions going by.
19 And if it sees something that it doesn't want the card to
20 see, it can kind of open the switch or open the circuit so
21 the card never sees that data. Or it can change or
22 manipulate the data being sent out.
23 Q And you understood that pirates could use blockers to
24 block that ECM that you believe fixed the hole in EchoStar's
25 security system; correct, sir?

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1 A Yes.
2 Q You also understand what the term "glitching" means;
3 right?
4 A Yes.
5 Q And glitching is where you apply an electronic pulse to
6 the card; correct?
7 A Sometimes.
8 Q And you understand that glitching can be used to bounce
9 over that ECM that you now believe fixed the hole in
10 EchoStar's security system; correct?
11 A Yes.
12 Q Mr. Tarnovsky, you understand that card swaps and ECMs
13 from your work with the defendants cost money; right?
14 A Yes.
15 Q You understand that as a result of that, that can
16 increase the price for the programming that EchoStar was
17 offering to the American consumer; correct?
18 A Yes.
19 Q Mr. Tarnovsky, are you aware of any efforts engaged in
20 by the defendants to cover up their involvement or your
21 involvement in the piracy of EchoStar's system?
22 A No, I am not aware of any engagements like that.
23 Q You're aware of the lawsuit that DirectTV filed against
24 the defendants; correct?
25 A I don't know the details of this lawsuit.

1 Q You are aware that they retained Internet Crimes Group,
2 Inc., and TDI to investigate NDS and your involvement in
3 DirectTV piracy; correct?

4 A As of this morning, yes, I see this.

5 Q And you're aware that sometime after that lawsuit was
6 filed, News Corp. brought the controlling share of DirectTV;
7 correct?

8 A Yes.

9 Q And then after that, the lawsuit was resolved?

10 MR. KLEIN: Objection, Your Honor.

11 THE COURT: Sustained. This is argument, counsel.
12 You can argue these but not through this witness.

13 BY MR. HAGAN:

14 Q Mr. Tarnovsky, were you aware that after that purchase,
15 ICG was instructed to destroy all of their files and
16 evidence linking you to the Nipper alias?

17 MR. KLEIN: Your Honor, objection. Assumes facts
18 not in evidence.

19 MR. HAGAN: Your Honor, that evidence came in
20 through the video deposition earlier in the trial.

21 THE COURT: It came into evidence, but the issue
22 is whether he is aware.

23 THE WITNESS: I'm not aware.

24 THE COURT: Did you have any conversation with
25 either one of these investigating agencies?

1 THE WITNESS: No, Your Honor.

2 THE COURT: I will sustain the objection.

3 Counsel, this is subject to argument. In other words, you
4 can argue these points, but you are not going to argue

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5 through this witness. If he knows, if he's present, if he
6 hears a conversation, or you can find out if he is aware of
7 something, but --

8 MR. HAGAN: I will move on, Your Honor.

9 BY MR. HAGAN:

10 Q Mr. Tarnovsky, let's take a look at Exhibit 21. While
11 we're getting that out, you know a gentleman by the name of
12 Dean Love; correct?

13 A Yes.

14 Q During the time that you worked for the defendants, you
15 and Mr. Love got into a bit of a squabble; correct?

16 A Yes.

17 Q And during that period of time you threatened Mr. Love
18 to dump the code from his card condom, which was a pirate
19 device; correct?

20 A Yes.

21 Q And you threatened to publish that code on the
22 internet; correct?

23 A Something to this is correct, yes.

24 Q And let's look at Exhibit 21. You have got that in
25 front of you; don't you, sir?

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1 A Yes.

2 Q It's an e-mail exchange between nortsat. You
3 understood that to be Dean Love; right?

4 A Yes.

5 Q And Arthur Von Neumann. This Von is you; right?

6 A Yes, it is.

7 Q If you look down towards the bottom, you say: "Up
8 until now I simply dumped your condom, but I didn't post
9 your real keys to decrypt any of the names. If you're
10 willing to remove, excuse the language, the shit you wrote
11 on your page about dr7 and wheels, I will leave you alone
12 and your condom is still secure." Those are your words;
13 right, Mr. Tarnovsky?

14 A I believe them to be my words, yes.
15 Q And you're threatening Mr. Love to post his codes on
16 the internet; correct?
17 A Yes.
18 Q And you told Mr. Love that you wouldn't post these
19 codes on the internet as long as he removed some information
20 about Stan Frost; correct?
21 A Yes.
22 Q And we have established this morning that you and Mr.
23 Frost were acquaintances; right?
24 A I met him on one occasion, yes.
25 Q And Mr. Frost reached out to you and asked you to help

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1 him out with this particular situation; correct?
2 A Yes, he did.
3 Q And you were at least good enough acquaintances to
4 agree to help Mr. Frost out; correct?
5 A Yes.
6 Q In fact, you were willing to go so far as to threaten
7 to reverse engineer, dump codes, and post them on the
8 internet; correct?
9 A Yes.
10 Q Now, Mr. Tarnovsky, are you aware that in December of
11 2000 Dean Love contacted your supervisor, John Norris, and
12 told him he had evidence linking you and dr7 to the
13 distribution of EchoStar pirated cards? Are you aware of
14 that, sir?
15 A No, I'm not.
16 Q Mr. Norris never made you aware of that?
17 A No.
18 Q Mr. Norris never asked you whether or not the
19 allegations from Dean Love were true?
20 A On a few occasions Mr. Norris had asked me if I had
21 ever had anything to do with it, which I clearly said no.

22 Q Let's take a look at Exhibit 2030.

23 MR. HAGAN: Your Honor, at this time I would offer
24 Exhibit 21 into evidence.

25 THE COURT: Any objection?

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1 MR. KLEIN: No objection.

2 THE COURT: Received.

3 (Exhibit 21 received.)

4 BY MR. HAGAN:

5 Q Do you have Exhibit 2030 in front of you, Mr.
6 Tarnovsky?

7 A Yes.

8 Q This is an e-mail exchange between nortsat, who you
9 just said was Dean Love, and John Norris, who you know as
10 your supervisor; correct?

11 A Yes.

12 Q If you'll look down seven paragraphs in, it starts, "As
13 I told you." Do you see that, Mr. Tarnovsky?

14 A Yes.

15 Q Dean Love says to your supervisor in December of 2000,
16 "As I told you in one of my last e-mails, the guy who popped
17 the Echo is Von. Dr7 is a major front for Von as Von is
18 stateside, as I understand it. I have heard dr7, in
19 parentheses A1, has a box for loading Echo, and he loads all
20 the cards for coin. The box has a thousand-card limit that
21 needs to be reset by Von, parentheses Chris.

22 "Recently in the last two or three months another
23 source came out with an Echo fix, but it was a straight
24 clone of Von's E3M."

25 Now, you already testified that you understood E3M

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- 1 cards to be an Echo Three-Musketeer, a pirate card; correct?
- 2 A Yes.
- 3 Q And you understand from looking at this e-mail that Mr.
- 4 Love was telling your supervisor that he had evidence
- 5 linking you to the distribution network of pirated EchoStar
- 6 cards; correct?
- 7 A No, I see hearsay, counsel. I don't see any evidence
- 8 at all.
- 9 Q Well, Mr. Norris, your supervisor, thought enough of
- 10 this to investigate it. Were you aware that he followed up
- 11 on this?
- 12 A I would assume, which I guess is speculating, that Mr.
- 13 Norris would follow up on this, being that's what he should
- 14 be doing.
- 15 Q And Mr. Norris sent an individual under the name Joe Z
- 16 to inspect Dean Love's computers to see if he had any of
- 17 this evidence. You're familiar with the alias Joe Z;
- 18 correct?
- 19 A Yes.
- 20 Q Joe Z was the alias used by another NDS employee named
- 21 George Tarnovsky; correct?
- 22 A Yes.
- 23 Q And that's your father; isn't that right?
- 24 A Yes.
- 25 Q So of all the people that Mr. Norris could have sent on

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- 1 his team to go inspect this evidence, he chose your father
- 2 under the alias Joe Z; correct?
- 3 A That's incorrect.
- 4 Q Now, Mr. Tarnovsky, let me ask you this: Do you think
- 5 that Mr. Norris chose your father to go look at this
- 6 evidence because, A, he wanted your father to gather
- 7 evidence against you; or B, he wanted your father to make
- 8 sure that no such evidence ever surfaced?
- 9 A You're incorrect totally, counsel, and you don't have

10 your facts straight. He was not alone ever at any time.

11 Q Mr. Tarnovsky, you are aware that none of those files
12 from Mr. Love's computer were produced in this case that
13 linked you to Al Menard?

14 A Because there were no files, counsel.

15 Q So Dean Love was making that up in December of 2000?

16 A Dean Love had just been raided. They found tons of
17 marijuana, hundreds of thousands of dollars in his house,
18 and he was trying to settle with NDS. He agreed to allow
19 NDS to have a team of forensics people, including my father,
20 Mr. Tarnovsky, and myself at one point, to go up there and
21 see what was confiscated. At no time were these individuals
22 ever alone.

23 MR. HAGAN: Your Honor, I offer Exhibit 2030 into
24 evidence.

25 THE COURT: Any objection?

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1 MR. KLEIN: No objection.

2 THE COURT: Received.

3 (Exhibit 2030 received in evidence)

4 BY MR. HAGAN:

5 Q Now, Mr. Tarnovsky, let's talk a little bit about your
6 computers. When you were terminated from NDS, you had about
7 nine or ten computers; correct?

8 A I don't know how many. I don't believe that's an
9 accurate statement.

10 Q At least six or seven, according to your deposition,
11 were NDS issued computers. Do you recall that?

12 A No. Some would be -- I am sure you're correct,
13 counsel. Go on, please.

14 Q Now, are you aware, Mr. Tarnovsky, that we subpoenaed
15 forensic images of those computers?

16 A This was done, sir.

17 Q Are you aware that the defendants refused to produce

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18 forensic images of your computers to us?
19 MR. KLEIN: Objection, Your Honor.
20 THE COURT: You can answer that question.
21 THE WITNESS: I did not know that.
22 BY MR. HAGAN:
23 Q Are you also aware --
24 THE COURT: I don't want the jury to assume that
25 either at this point, but I want to find out if he is aware.

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1 BY MR. HAGAN:
2 Q Are you also aware, Mr. Tarnovsky, that the defendants
3 hired some experts in this case to opine on relevant issues?
4 A Could you clarify the word opine, please?
5 Q To provide an opinion.
6 A Thank you. I believe I was aware of this. I believe
7 that was the individuals that came to do the imaging.
8 Q Are you aware, Mr. Tarnovsky, that the defendants or
9 the experts they're going to bring into trial did not allow
10 any of those experts to forensically image your hard drives?
11 MR. KLEIN: Your Honor, objection.
12 THE WITNESS: I did not know that.
13 MR. HAGAN: Pass the witness, Your Honor.
14 THE COURT: Just a moment. We didn't get an
15 answer, and we have a pending objection. This is going to
16 require Mr. Tarnovsky to remain until the end of the defense
17 case, quite frankly. If you two want to have a discussion
18 about that, we'll do it, but this is outside my presence. I
19 have made certain orders.
20 MR. KLEIN: Your Honor, I will withdraw the
21 objection.
22 THE COURT: Okay. Counsel, reask the question.
23 Counsel, reask the question.
24 BY MR. HAGAN:
25 Q Mr. Tarnovsky, are you aware that the defendants did

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1 not allow any of those experts to forensically image and
2 analyze your computers?

3 THE COURT: Who are those experts?

4 MR. HAGAN: The experts that are going to testify
5 in this trial.

6 THE COURT: Thank you.

7 THE WITNESS: I am not aware of this. I don't
8 know.

9 BY MR. HAGAN:

10 Q At some point in time, Mr. Tarnovsky, did the
11 defendants ask you to set up an account on piracy?

12 A I don't recall that. It's possible.

13 MR. HAGAN: Christine, what exhibit number is
14 that? Let me see if I can refresh your recollection, Mr.
15 Tarnovsky.

16 THE WITNESS: Thank you.

17 MS. WILLETTS: Number 42.

18 MR. HAGAN: What is it?

19 MS. WILLETTS: 42.

20 MR. HAGAN: Thank you.

21 BY MR. HAGAN:

22 Q Do you have Exhibit 42 in front of you, Mr. Tarnovsky?

23 A Yes, I do.

24 Q This is an e-mail to you under the code name George
25 Michael or Michael George; is that right?

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1 A Yes.

2 Q This is dated October 24th of 2000; correct?

3 A Yes.

4 THE COURT: Before you go any further, let me ask
5 both of you. How long will you be on recross?

6 MR. KLEIN: I have no other questions at this
7 point.

8 THE COURT: Okay. Counsel.

9 BY MR. HAGAN:

10 Q That e-mail is dated October 24th of 2000; correct?

11 A Yes.

12 Q And in this e-mail you were being asked to set up an
13 account to get the defendants a subscription for pirate den;
14 correct?

15 A Yes. I see that.

16 Q And you understand that pirate den was one of the
17 websites where one of the Nipper postings was made shortly
18 after this e-mail; correct?

19 A I don't know. Actually I thought it was dr7 and
20 interesting devices?

21 MR. HAGAN: Christine, do we have a copy of
22 Exhibit 2017?

23 Your Honor, at this time I would offer Exhibit 42
24 into evidence.

25 THE COURT: Any objection?

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1 MR. KLEIN: No objection.

2 THE COURT: Received.

3 (Exhibit 42 received.)

4 BY MR. HAGAN:

5 Q Maybe we can cut through this.

6 Mr. Tarnovsky, do you recall ever receiving a document
7 entitled standards of business conduct from the defendants
8 during your employment?

9 A Yes.

10 Q Do you recall when you received that document?

11 A I don't, no.

12 Q You don't recall?

13 A No.

14 Q Did you sign anything whenever you received it
15 acknowledging that you received it?
16 A I believe so.
17 Q Do you know why that acknowledgment wasn't produced to
18 us in this case?
19 A I don't know.
20 MR. HAGAN: No further questions, Your Honor.
21 THE COURT: Recross, Mr. Klein?
22 MR. KLEIN: No further questions, Your Honor.
23 THE COURT: All right. Thank you. Mr. Tarnovsky,
24 I am going to -- you are here in the United States; is that
25 correct?

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1 THE WITNESS: Yes, Your Honor, 45 minutes away.
2 THE COURT: Okay. Then I will put you on 48-hour
3 call as I am all over the continental United States
4 witnesses. Everybody from overseas is on 72-hour call.
5 THE WITNESS: Thank you.
6 THE COURT: If you're needed back in this court,
7 you'll have 48 hours to return to this court. Otherwise, it
8 will be an adverse inference against the party not producing
9 you.
10 THE WITNESS: Yes, Your Honor.
11 THE COURT: Sir, thank you very much. You may
12 step down.
13 THE WITNESS: Thank you, Your Honor.
14 THE COURT: We were going to be starting at 7:30
15 tomorrow and doing some things this evening. I want to be
16 sure I have got enough time and you're not standing. Can we
17 make that 8:30 just to be sure? That way it's not wasted
18 time, and you're better off having a nice breakfast than
19 sitting back in that jury room. Let's make it 8:30 to make
20 sure. You are admonished not to discuss this matter amongst
21 yourselves or form or express any opinions.
22 I think this would be the appropriate time to just

23 admonish the jury one more time, and all counsel agree. We
24 expect there is going to be some increasing media coverage.
25 That can come in written form. It can come in media form.

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1 we don't know when that will occur, nor do we want to be
2 specific about the entity. It's just a reminder. We don't
3 expect you to cut yourself off from, you know, communication
4 in newspapers or television or radio. But we would ask you
5 if you think you recognize this case, please immediately
6 just turn to another channel, another television program, or
7 to set down that newspaper and go on to an acceptable
8 alternative.

9 I think that's the best way we can handle it.
10 That's with your ethics. Thank you very much. I appreciate
11 it.

12 (Jury not present)

13 THE COURT: I am going to give this to you to give
14 back to you to sort out with NDS so you can reuse these
15 documents again tomorrow. You can reuse them tomorrow.

16 I want a few moments in chambers, and I want you
17 to just take a break for a moment, use the rest rooms. I
18 want to meet you back here in 15 minutes, at 25 after the
19 hour.

20 Sharon, I will need you at that time also. Thank
21 you.

22 (Recess taken)

23 (Jury not present.)

24 THE COURT: All counsel are present. I want to
25 talk about who your next witness will be.

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1 MR. HAGAN: It will be Rob Rock, Your Honor.

2 THE COURT: Okay. Now, let me talk to you about
3 Mr. Shelton for a moment. Let's just have a conversation.
4 As far as Mr. Shelton is concerned, Mr. Rock, everything is
5 on the record.

6 In listening to Mr. Tarnovsky, Mr. Shelton's --
7 there is an argument that Mr. Shelton's numbers could
8 actually be conservative, but the methodology is inadequate.

9 The question is when Mr. Rock gets on the stand,
10 subject to argument of course from NDS, that Mr. Tarnovsky
11 took a wild guess, tentatively you are going to be minimally
12 able to argue to the jury 100,000, his last series of
13 questions concerning Exhibit 41 for the 100,000 cards.

14 The question was were they all cards or just ROM 3
15 cards. These 100,000 cards were just a hunch on his part.
16 He wasn't being specific as to ROM 2 or ROM 3. Then he said
17 he couldn't recall whether he was referring to ROM 2 or ROM
18 3. What we did in this period of time was take a look back
19 at the records. It shows that ROM 3s are overwhelming in
20 this time period. They overwhelm the ROM 2s.

21 Secondly, he wasn't sure if it was Canada or the
22 U.S., and I am not going to parse that out. That's for the
23 jury to decide. The sum with Canada is diminimus. Mr.
24 Klein, I will let you set your record in just a moment, or
25 Mr. Snyder, I think, has this issue.

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1 The problem is going to become when Mr. Rock takes
2 the stand, if you are tentatively starting at 100,000 cards,
3 there is no reason for the Court to preclude you at this
4 time to the what ifs. What if there were 120,000, 140,000,
5 160,000, up to 180,000, because that was Shelton's original
6 estimate, 154,000 to 165,000.

7 Now, the reason for that isn't that you have that
8 evidence. You have got right now at least in front of the
9 jury your best evidence is about 100,000 on a wild hunch

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10 supposedly from Mr. Tarnovsky. But then turning to NDS, I
11 don't know which of you gentlemen are going to take your
12 damages expert.
13 I am going to play this out all the way through so
14 that you don't think you are being gored somehow. And that
15 is, if you put a damages expert on and the damages expert
16 talks about swap-out, it ends at that point. I don't know
17 if there is any further discussion or concern on the Court's
18 part because you haven't put anybody up on lost profits.
19 But play this out tactically for a moment. You
20 put a damages expert up and you try to minimize the lost
21 profits. So your damage expert gets up and says there's 91
22 million in swap-out; there's another 9 million in swap-out
23 or less than that in swap-out; a diminimus amount if you
24 ever found liability, 20 million, 10 million, or whatever.
25 And then that expert tries to negate Tarnovsky's 100,000,

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1 and that expert says hypothetically at the most the piracy
2 in this period of time is 15,000 cards.
3 Once that expert gets into lost profits, that
4 expert is allowed to ask about other experts and other
5 reports and take those into account, and he can't deny that
6 he's examined Shelton's report, whether the methodology is
7 correct or not.
8 Now it occurs as Mr. Shelton might come rolling
9 right back into this case, and he comes at a tactically
10 inopportune time potentially for NDS. I am not saying that
11 these are ruins. I'm just not going to hear later on,
12 Judge, you excluded Mr. Shelton for all purposes and we
13 didn't expect him back. He could come back. He may never
14 come back. So those choices somewhat depend upon who your
15 damages experts are and how far you want to extend that.
16 I am not encouraging or discouraging you, but a
17 damages expert has the right to rely upon another expert's
18 report. So my greatest concern is this: If Mr. Rock gets

19 on the stand, I don't intend to limit him to 100,000 because
20 I don't know what NDS is going to do about lost profits. If
21 I allow this thing to go to the jury, which tentatively I
22 would on the 100,000 that Tarnovsky takes a, quote, unquote,
23 wild guess at.

24 Secondly, there is a strong argument that if
25 Tarnovsky's figures were anywhere close to accurate, which

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1 is uncannily similar to Shelton's figures, while it's not a
2 good basis for the Court to find a rough equivalence when I
3 have a tremendous distrust in the methodology, there is a
4 strong argument by February 2000 when the e-mail comes out
5 saying 100,000, his testimony is that by May piracy is on
6 the upswing. And how much is that? That could be, you
7 know, 180,000 easily. It could be more than that.

8 So when you put Shelton on the stand, you also
9 have a tactical decision to make. I don't want to hear that
10 you've been foreclosed from that later on. But also you
11 could look awfully foolish if it goes to the jury, you know,
12 on good faith on 100,000 and NDS doesn't put up any lost
13 profits. Basically put up a damage expert, they put
14 themselves in the tactical position of arguing, well, at the
15 worst Tarnovsky said 100,000, and he didn't know what he was
16 talking about. So, ladies and gentlemen, our argument on
17 behalf of NDS is 15,000 units.

18 By the same token, if that person swings over to
19 lost profits, then I don't see any reason why one expert
20 can't rely upon another expert's report, you can ask that.
21 Hearsay is allowable with experts. They're put up for a
22 variety of reasons, and frankly they become a vehicle for
23 you on EchoStar's side.

24 So the first option lies with you and how you
25 present Mr. Rock and whether you limit him to 100,000 to

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1 begin with and see what NDS does, or whether you go up the
2 ladder in 20,000 increments if you want to, knowing that
3 maybe that's a ridiculous situation you've gotten yourself
4 into because they never put a lost-profits testimony in
5 front of the jury.

6 I am not going to cause either one of you to make
7 a tactical decision. I just want to have that conversation
8 because I don't want to hear later on that NDS presupposes
9 that Shelton is excluded for all purposes and all time and
10 may not be true. It depends on the decision of NDS. And I
11 don't want to later on hear that you've been limited,
12 because if you want to take them up the ladder to begin with
13 in the 20,000, 120,000, you know, 140,000, 160,000, 180,000,
14 so be it.

15 I have a hard time believing that, you know, with
16 all the charts Mr. Shelton has presented to me, that you're
17 anyplace other than at the best 154,000 to 165,000, which
18 were his original figures. So whether Mr. Shelton remains
19 or not is up to you. Now, have you had a conversation with
20 Mr. Shelton, because I didn't close the door all the way on
21 you? Give him a chance to reconstruct this, but I am not
22 waiting for you too much longer. We have been going for
23 weeks. And if you're going to put him on, I would like to
24 hear what he is going to say tonight again.

25 Finally, let me ask Mr. Snyder this: Do you want

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1 him on the stand? You see, up to this point your in-limine
2 motion was to knock Mr. Shelton out, to have the Court grant
3 your request. If that's still your request, you're going to
4 prevail on this motion initially.

5 But unless I have this conversation with you later

6 on, you're going to feel like you were caught by surprise if
7 you make the wrong tactical decision or a tactical decision
8 that opens the door, and then Mr. Shelton's report or a
9 conversation comes in through cross-examination and hearsay,
10 and all of a sudden we're off and running with Mr. Shelton
11 having cast an opinion of 154,000 or 165,000 coming through
12 cross-examination, and you have no way to cross-examine Mr.
13 Shelton. Your own expert is doing that for you.

14 Then you're arguing back on the other side with
15 Tarnovsky. You know, Tarnovsky said 100,000, and we got a
16 bunch of hearsay in, which you're allowed to do not for the
17 truth but for the opinion. But who's kidding who? The jury
18 is going to hear that. And you're able to say the piracy
19 was much greater, and you never had a chance to take Mr.
20 Shelton on because he's disappeared and now you're stuck in
21 that cross-examination.

22 That's not well thought out by me, but it's pretty
23 well thought out in 15 or 20 minutes. I just want my
24 conversation very clear on the record. Nobody should expect
25 Mr. Shelton is either in or out at this point. I don't know

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1 if he would ever be recalled, but you may be able to
2 accomplish the same thing on cross-examination, depending
3 upon the tactical decisions that NDS makes.

4 So I think that's a nice ethical conversation on
5 my part, because that way nobody is saying later, well, we
6 weren't forewarned.

7 So, are you going to recall or attempt to call Mr.
8 Shelton this evening with some new figures?

9 MR. HAGAN: We are not, Your Honor.

10 THE COURT: Okay. You're going to move right to
11 Mr. Rock?

12 MR. HAGAN: That's correct.

13 THE COURT: I will leave that tactical decision
14 whether you're going to climb the ladder tomorrow or not to

15 you. Do you want to Mr. Shelton excluded, or do you want to
16 put him on the stand and attempt to drive him down to the
17 100,000, you know, number, stick him with that number based
18 upon his new calculations, because he's at 109,000 right
19 now? Or do you want -- and that depends quite frankly on
20 whether you were going to put on a lost profits and try to
21 diminish the lost profits, or whether you're going to hang
22 with Tarnovsky and the argument that Tarnovsky said a
23 hundred thousand but it doesn't mean anything.

24 Now, I am not going to require you to answer that.
25 By the same token, I want it well thought through.

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1 MR. SNYDER: I'd like to answer that question,
2 Your Honor.

3 THE COURT: Okay.

4 MR. SNYDER: The issue of lost profits should not
5 going to the jury at all. Let me give you three reasons:
6 First, Mr. Rock's opinion is based on -- Mr. Rock's opinion
7 regarding lost profits is based on three aspects of the
8 Carmel group. Originally it was based on three aspects of
9 the Carmel group.

10 First was the estimate of piracy, which has been
11 the subject of a lot of discussion and Mr. Shelton's
12 repeatedly revised opinions. Second, the percentage of
13 pirates that would convert to paying customers after a card
14 swap were secure. Third, the percentage of pirates that are
15 paying customers versus non-paying customers.

16 In Mr. Rock's original opinion all three of those
17 assumptions were based on the Carmel group. For the first
18 time last night, Mr. Shelton offered opinion on the last two
19 of those. There is no basis for Mr. Shelton's opinion that
20 he has ever described about the conversion rate other than
21 him saying in a deposition, "I looked at it and I thought it
22 was conservative." And there is no basis whatsoever for any

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23 opinion by Mr. Shelton or Mr. Rock regarding the allocation
24 of the percentage of customers that are paying customers
25 versus non-paying customers.

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1 If that is taken away, Mr. Rock's lost profit
2 calculation falls apart because it is a dependent number on
3 which all the following calculations are required. So when
4 that is gone, the lost profit calculation is gone.

5 THE COURT: I tend to agree with you tentatively,
6 but the issue becomes he simply becomes a statistician. I
7 don't think it's appropriate after having made that ruling
8 -- and I thought that would be clear, but maybe I need to
9 say it directly -- that now you continue to rely upon Mr.
10 Shelton unless you're going to put him on the stand.

11 But Mr. Shelton can calculate, because you're
12 working with a hundred thousand number from Tarnovsky. If
13 you're working with that number, then it's either 2,000 from
14 your standpoint or less, times a hundred thousand per
15 whatever years, because that's Tarnovsky's estimate, or a
16 little higher. So it's simply a math problem. But if
17 you're going back and relying upon Shelton, that wouldn't be
18 appropriate.

19 And the next thing is I don't understand, since
20 we're dealing with lost profits, where you get the 2,000
21 number. I understand the value of those services might be
22 to go out -- if I got all the things in the package, like
23 expectancy one or whatever it is, and Playboy and Disney and
24 the History Channel or Discovery, I understand that the cost
25 of me getting those services separately would be X amount.

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1 But when I'm dealing with lost profits, I would assume I am

2 dealing with lost profits to EchoStar. So I am dealing with
3 that lower number. I am dealing with that 77-dollar number
4 or whatever that was, 89-dollar number, or the average, and
5 up to this point I thought that you were pushing hard on
6 this 1,600 to 2,200. Are you?

7 MR. HAGAN: We are not, Your Honor. They are two
8 separate issues.

9 THE COURT: Okay. So it's the package, if you
10 will, the average package if they take Playboy and Great
11 Expectations and whatever it is?

12 MR. HAGAN: That's correct. One is on the high
13 end obviously, and that deals with the amount of money that
14 each package in total would cost the subscriber.

15 THE COURT: Okay. So let me run through. A
16 hundred thousand for a moment for 2002 -- 2001.

17 MR. HAGAN: Correct.

18 THE COURT: Is what? Times -- what's your average
19 figure? I just want to hear it tonight.

20 MR. WELCH: 2001, \$49.63.

21 THE COURT: How much is it?

22 MR. HAGAN: \$49.63 for 2002.

23 THE COURT: \$49.63 for 2001 or 2002?

24 MS. WILLETTS: 2001.

25 THE COURT: What is it for 2002?

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1 MS. WILLETTS: \$49.48.

2 THE COURT: It went down?

3 MS. WILLETTS: willetts \$49.48.

4 THE COURT: 2003.

5 MS. WILLETTS: \$51.30.

6 THE COURT: 2004.

7 MS. WILLETTS: \$55.

8 THE COURT: 2005.

9 MS. WILLETTS: \$58.04.

10 THE COURT: 2006.

11 MS. WILLETTTS: Our damage model stops at 2005.

12 THE COURT: I'm sorry. My apologies. Calculate
13 that out. I just want to know the rough numbers.

14 MR. SNYDER: This is the problem, Your Honor. You
15 can't calculate that out using those numbers. Let me
16 explain why. If you start with 100,000 pirates, okay, for
17 whatever reason and however you get there, if you start with
18 100,000 pirates, you have to estimate how many of those
19 become paying customers. And there is no basis for that
20 percentage other than the Carmel Group who they ever not
21 putting up, or Mr. Shelton who is not coming up. That's the
22 first step.

23 Then you have to determine of those customers who
24 converted, how many of them already had a subscription, and
25 how many of them would become new subscribers? This is why

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1 that is important. As the Court has heard, some of these
2 pirates are what are called E3M pirates. You buy a
3 subscription, you modify your card, and now you can get more
4 program. You can get all the program.

5 But you're already a paying subscriber, so you're
6 already paying some revenue to EchoStar. So the question is
7 how much more revenue would you get if you were not able to
8 use an E3M card. So you have to create two categories --
9 the category of pirates who are already paying customers,
10 and the category of pirates who are not paying at all
11 because they have some other kind of pirate device but would
12 convert into paying customers.

13 That percentage, that allocation, is based on,
14 according to Mr. Rock, the Carmel Group, and the Carmel
15 Group has been withdrawn.

16 THE COURT: But I know I've got a starting point.
17 Educate me. I know I've got a starting point that I'm
18 tentatively going to let go to the jury of 100,000. I know

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19 that there's strong testimony from Mr. Tarnovsky that even
20 up to May 2001 that that piracy went up, I think,
21 significantly.

22 Now, I don't think it's fair to preclude all of
23 the testimony in this area in these five years when
24 minimally we have 100,000, if the jury believes it, in 2002.
25 Why can't -- Mr. Shelton is certainly qualified enough,

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1 isn't he, to get on the stand as long as he is not using a
2 methodology to cast an opinion that the ROM 3s are going
3 down in this period of time? How much, I don't think I am
4 going to let him say, based on this methodology. But it
5 seems to me that the ROM 3s rise, I think, to -- I don't
6 have the chart -- 2003?

7 MR. SNYDER: Your Honor, I pointed out a minute
8 ago that I thought there were three reasons why lost profits
9 shouldn't go to the jury. May I articulate them, because I
10 think it may affect the conversation?

11 First, as I said, there are aspects of Mr. Rock's
12 lost profits opinion that require other information for
13 which there is no basis. The second point, I think it is
14 improper for the issue of lost profits to go to the jury
15 based on a self-recognized guess. To say that there is a
16 minimum number of 100,000, to say this number has some
17 significance, some reliability, when the sponsor of the
18 number, even at the time he is writing it down, says, "I am
19 guessing."

20 Let's put aside the issue of the geographic scope.
21 Let's put aside the issue of the stipulation that NDS is not
22 responsible for piracy of the ROM 2 system. Focus just on
23 that. They are going to be allowed to go to the jury with a
24 number in the tens or hundreds of millions of dollars based
25 on a guess, and they shouldn't be allowed to do that. It's

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1 unduly prejudicial.

2 Third, I think that it puts the defendants in a
3 completely untenable position. We had no intention and do
4 not have an intention of coming in with an expert who is
5 going to give a different estimate of piracy. But if we
6 have an expert who says, "I think that this lost profits
7 number isn't appropriate because it's based on a guess,"
8 then he starts getting asked about Mr. Shelton's opinions,
9 which should be excluded.

10 Now all of a sudden, the same material that should
11 be kept from the jury under these standards of expert
12 witnesses are now in front of the jury. As defense counsel,
13 there is no way for me to cut that Gordian knot. So I don't
14 think the issue of lost profits, given the record that we
15 have, should go to the jury at all.

16 THE COURT: I don't disagree with you. First, I
17 am not certain that Mr. Tarnovsky is credible or
18 noncredible. I remain neutral in that judgment call. But
19 he certainly was asked to come up with a number. He was
20 told basically by somebody at NDS that he was an expert in
21 many of the areas. He certainly wasn't in the shadow. He
22 was a person that NDS went to, and there is nobody else that
23 NDS reached out to with a relatively significant number.

24 Each statement can be argued away, but NDS
25 apparently relied upon that internally, not for

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1 advertisement purposes but internally, as a number that they
2 apparently vouched for in an internal memo distributed
3 amongst the company. And so whether we have a concrete
4 decision that's being made, certainly this goes throughout
5 the management structure and throughout NDS.

6 So my question isn't whether the hundred thousand

7 is going to the jury. My question is back to EchoStar. Why
8 do you need Mr. Rock? I mean, when you think about it, you
9 have got 100,000 that Tarnovsky is stating. It goes up in
10 May.

11 I guess the real difficulty you're having is the
12 diminishing amount or the increasing amount that bubbles,
13 2001, and then it starts way down when the ROM 3s are phased
14 out for the ROM 10. So I agree with Mr. Snyder that there
15 is not a basis, because the jury would be guessing at the
16 numbers, and it's not fair to hold to 100,000 consistently
17 for years 2001, 2003, 2004, 2005.

18 we all know there is some increase and then some
19 diminishment. The problem is when you put Mr. Rock on the
20 stand, he doesn't have that authority to rely upon in terms
21 of this methodology. Second, it would be harmful to NDS in
22 terms of decreasing numbers. But maybe we just leave the
23 record as such, and that is 100,000 with Tarnovsky. They
24 can believe him or not. Some increase, and I just leave it
25 to argument and each of you that these are numbers that went

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1 up and down.

2 MR. HAGAN: Your Honor, I would agree with that --

3 THE COURT: I am not going to -- Mr. Snyder, I am
4 not going to foreclose lost profits because we have a
5 problem on the back end of this in terms of the numbers for
6 2000, let's say, 4 and 5, which would be advantageous to
7 your side. Maybe Mr. Rock isn't needed at all.

8 Let me get off the bench and think about that for
9 a while. I only came out here to forewarn you of all the
10 tactical ways I could see Shelton coming back into the case.
11 And I was a little concerned that you then might feel or
12 attempt to make a record that somehow Mr. Shelton had been
13 foreclosed for all time, and therefore you were caught by
14 surprise if he came back on rebuttal or if his report was

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15 referred to, because, remember, I don't know your case.

16 I don't know if you would be putting on a lost
17 profits expert or not. And I don't know what your damages
18 expert is going to say. Only you do, and I'm not asking
19 right now. And not knowing that, it was fair warning to
20 both of you.

21 The second thing is I want to talk about this
22 polygraph. My rulings remain. The question is whether you
23 want a further limiting instruction -- I am not going to
24 allow Exhibit 100, because the results of that polygraph are
25 not to go before the jury. But if you want further

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1 instruction, I will give the jury instruction. The question
2 is do you want that in instruction form? Do you want a
3 further admonition, or is it sufficient at this time --
4 because it calls attention to it.

5 So what do each of you want? Take a moment for
6 that. Talk amongst yourselves.

7 MR. SNYDER: Well, Your Honor, while we're
8 thinking about that, may I raise another issue?

9 THE COURT: No. I want to stay with that issue.
10 I want to stay with the polygraph. You both have a coequal
11 interest in this. It helps and hurts each side.

12 MR. HAGAN: Your Honor, while they're continuing
13 to discuss, for plaintiff's position you gave three options
14 -- a written instruction, a further admonition, or just
15 leave it alone and leave it to argument.

16 THE COURT: And let me caution you. I am not
17 enthralled with the idea of an instruction in instruction
18 form because it highlights it. It takes a piece of evidence
19 and it designates it and sets it out and gives it increased
20 importance. So therefore my preference is either further
21 admonition drawn up by all of us this evening, or leave it
22 along.

23 MR. HAGAN: Our preference would be just to leave

24 it alone. I think the admonition that was given was
25 sufficient. I think any further admonition would do the

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1 same thing, have the functional equivalent of an
2 instruction; and that is, to heighten the issue of the
3 polygraph.

4 THE COURT: Let me see what NDS wants to do.

5 MR. SNYDER: The difficulty, Your Honor, is that
6 effectively the entire contents of the polygraph report have
7 been provided to the jury in question-and-answer form but
8 not the results. So either they're left wondering what the
9 result is and why they're not being told and draw the
10 inference that Mr. Tarnovsky did not pass the polygraph
11 test, which is not true.

12 So I think to make the record complete on the
13 issue, the jury would have to be told that Mr. Tarnovsky
14 passed the polygraph test.

15 THE COURT: That's a good point, because the
16 Courts -- in my memory at least this Court and other Courts
17 have never let a polygraph in. But the inference could be
18 that this was an unfavorable report. The problem is if I
19 went as far to let the polygraph in, which would be unheard
20 of, the results to those two questions, then it would demand
21 a further instruction to reemphasize the fact that Courts
22 normally do not allow polygraph results in because of their
23 inherent unreliability.

24 So it goes one step further. If you get the
25 result in, there is an instruction that would probably go

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1 along with it.

2 MR. SNYDER: But I think that is still preferable

3 to the jury drawing the inference that he failed and not
4 being instructed that polygraphs are unreliable.

5 MR. HAGAN: We would be willing, Your Honor, to
6 stipulate with them to the admissibility of the polygraph
7 with an instruction from Your Honor. That way both sides
8 are on equal footing. They can argue that Mr. Tarnovsky
9 passed the polygraph.

10 THE COURT: We may have the first agreement of
11 this entire trial. If there is going to be a further
12 instruction, I'd want to see it and have you draft it. The
13 stipulation would be that this polygraph result goes in by
14 both of you, because if I was sitting on the circuit, I
15 would be very concerned about a Court letting in the
16 results. If that's stipulated to, then I need a jointly
17 drafted instruction or giving each of you the opportunity to
18 draft it.

19 MR. SNYDER: Your Honor, I am struggling with how
20 to enter into the stipulation and yet -- and maybe a record
21 is adequate -- and preserve our objection to the questions
22 regarding the polygraph.

23 THE COURT: It's very simple. You in no way that
24 the Court understands are acceding to the Court's prior
25 rulings. Having made those rulings, you're simply agreeing

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1 that the polygraph comes in in its present form and without
2 waiving those.

3 MR. SNYDER: We are willing to do that.

4 THE COURT: That protects your record. I am not
5 trying to hurt any of you in terms of the appellate. This
6 case is going up on appeal regardless. I wish we were
7 starting all over again. I wish we went through the first
8 trial, and then we could immediately start the next trial,
9 because we've gotten more evidence. The problem is we will
10 never get these people back. We will never get this case

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11 off the ground again.
12 MR. SNYDER: In that vein, Your Honor, NDS moves
13 for a mistrial for two reasons. First, I believe it was
14 completely improper and unduly prejudicial for counsel to
15 have a witness comment on another witness's invocation of
16 the Fifth Amendment.
17 The Court has not indicated what instruction it is
18 going to give to the jury regarding the invocation of the
19 Fifth Amendment, but there is certainly the strong inference
20 by the questions to Mr. Tarnovsky that Mr. Frost's
21 invocation of the Fifth Amendment somehow indicated Mr.
22 Tarnovsky and NDS's participation and liability for the very
23 acts that are alleged.
24 THE COURT: Let me give you another reason also,
25 and that is that I have cautioned you not to get into the

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1 settlement between NDS and the other parties. Mr. Hagan,
2 that was one of your opening questions concerning Canal+ and
3 DirectTV. I told you to stay away from the fact that this
4 had settled, and yet we're right into that settlement area.
5 MR. SNYDER: There is one more reason, Your Honor.
6 Without any foundation and, we believe, without any shred of
7 truth whatsoever, counsel's questions to Mr. Tarnovsky have
8 strongly implied that NDS interfered with a federal
9 investigation, obstructed justice, and bribed a law
10 enforcement official into stopping an investigation.
11 There is no way that NDS can undo the prejudice to
12 the jury or in the eyes of the jury. Even if we were to
13 call Mr. Spertus and have him take the stand and say, "I was
14 an assistant U.S. attorney. Yes, I went and I worked for
15 somebody, but nobody interfered with my investigation. I
16 did it all correctly."
17 The inference is still there, and there is no way
18 to unring that bell. That cat is out of the bag, and there
19 is no way to undo it no matter what parade of witnesses we

20 bring.

21 THE COURT: Did Mr. Spertus leave the office?

22 MR. SNYDER: Mr. Spertus is no longer an assistant
23 U.S. attorney, is my understanding. I do believe that he
24 went to work at least briefly for the Motion Picture
25 Association of America. I have no idea where he works now,

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1 but he was in the High-Tech Crimes Unit.

2 THE COURT: Was he in charge of this case?

3 MR. SNYDER: I believe he signed the
4 non-prosecution letter that was sent to NDS and that's been
5 marked as an exhibit.

6 THE COURT: How long after he signed that letter
7 did he leave the office?

8 MR. SNYDER: I don't know the answer to that.

9 THE COURT: In other words, as you're running into
10 the facts, how long after he signed this prosecution letter
11 did he leave the United States Attorney's Office? And where
12 did he go?

13 MR. HAGAN: I don't have that time frame, but we
14 can see if we can find it.

15 THE COURT: Just a moment. I am asking questions.
16 You're answering them now. What was his relationship with
17 Mr. Norris? There was another question concerning the
18 friendship with Mr. Norris. Now, I don't know that they
19 even have a friendship. I think I sustained the objection
20 to it. Mr. Klein, my memory -- I can go back to the record,
21 but I think you objected? If you didn't --

22 MR. KLEIN: I did object.

23 MR. STONE: I think you overruled it.

24 THE COURT: Did I overrule it?

25 MR. STONE: Yes, you did, Your Honor.

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1 THE COURT: No. I overruled the portion about the
2 Fifth Amendment. My memory is I sustained the objection
3 concerning Mr. Spertus.

4 MR. STONE: I believe the witness testified he
5 didn't know about the relationship. He was allowed to
6 answer.

7 THE COURT: No, I don't think so. I think that
8 that's not correct. I know I ruled against NDS concerning
9 the Fifth Amendment. I want to go back and find Spertus for
10 just a moment. There was a colloquy about -- and if I'm
11 wrong, then we'll have an even better record. It's going to
12 be right after Exhibit 518. And it's going to go like this.
13 There's going to be a discussion, "Shrimp, you must always
14 spoof, but make certain you must always spoof correct." And
15 it came on redirect by EchoStar.

16 And if you look down the exhibits, if you look for
17 782, 517, 518. And then you're going to see a Black Hat
18 conference in Amsterdam, and he spoke to Francois. In the
19 article it states that Tarnovsky admits to hacking EchoStar,
20 and then I couldn't hear the answer. It was Francois was in
21 court earlier, and he is a hacker and a liar.

22 MR. HAGAN: It was a liar and something.

23 THE COURT: Well, I didn't understand it. I heard
24 liar. I thought he said a hacker and a liar. Then right
25 after that, Sharon, is what I'm looking for. The file was

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1 transferred to James Spertus, and then there is colloquy
2 about his being a friend and colleague of a gentleman named
3 John Norris. And then James Spertus leaves the U.S.
4 Attorney's office for Motion Picture -- MPAA. That's what
5 I'm looking for.

6 The Court admonished the jury that even though the

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7 Court did not uphold the objection, the Court had a colloquy
8 with the jury instructing them basically to disregard the
9 question that was asked.

10 Now, your next objection for a new trial was?

11 MR. SNYDER: Well, there's three, Your Honor, but
12 the admonition you gave to the jury related only to the
13 relationship between Mr. Norris and Mr. Spertus. We still
14 have the uncorrectable taint created by the inference that
15 NDS interfered with a criminal investigation, obstructed
16 justice, and bribed a federal official to end that
17 investigation.

18 THE COURT: Thank you. Your motion is denied.
19 Now your next request.

20 MR. SNYDER: Based on the questions to Mr.
21 Tarnovsky asking for him to comment on Mr. Frost's
22 innovation of the Fifth Amendment.

23 MR. HAGAN: Brief response, Your Honor.

24 THE COURT: No, not yet. Refresh my recollection.

25 MR. SNYDER: Mr. Tarnovsky was asked several

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1 questions by plaintiff's counsel whether he knew Mr. Frost
2 had invoked his Fifth Amendment right in response to several
3 questions, and whether he understood that that meant that
4 Mr. Frost -- whether Mr. Tarnovsky understood that Mr.
5 Frost's invocation of the Fifth Amendment could be
6 interpreted as an indication that the answer, if given,
7 would indicate that Mr. Frost was involved in criminal
8 conduct.

9 THE COURT: What's your third ground?

10 MR. SNYDER: The third ground is -- in fact, the
11 Court beat me to the punch and identified it as the
12 references to the resolution of the Canal+ and DirectTV
13 lawsuits.

14 We originally made motions in limine to exclude
15 all references to those lawsuits or the allegations. The

16 Court in its tentative ruling indicated that although the
17 complaints would come in, the plaintiffs would be allowed to
18 put on evidence of the underlying facts.

19 Since the trial started, plaintiffs have pushed
20 that door wider and wider open. There has now been
21 substantial testimony elicited by plaintiffs regarding the
22 allegations in those lawsuits. What was NDS accused of
23 doing? And now we have intonations by plaintiff's counsel
24 through their questions that those lawsuits were resolved
25 because of some control by News Corporation, thus creating

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1 prejudice unrelated to the facts of this case that is
2 undoable.

3 THE COURT: I am now becoming increasingly concerned
4 that I made the wrong ruling, and I may be reversing that
5 ruling. When this lawsuit started, I didn't fully
6 understand apparently the potential relationship. It is an
7 incredible oddity that DirectTV that was so hacked suddenly
8 after the purchase by NDS of DirectTV or vice versa, Mr.
9 Murdoch representing or owning NDS, and HarperCollins, of
10 which money was paid to Tarnovsky, buys DirectTV and hacking
11 stocks.

12 I may have simply made the wrong ruling on that.
13 I am going to go back and think about that ruling long and
14 hard.

15 MR. SNYDER: Those are not --

16 THE COURT: Regardless, I should have been put on
17 notice. It's as frustrating to me, quite frankly, as you
18 assuming that you can do that. And it's as frustrating as
19 what happened the other night, which is one of the things
20 that set me off yesterday -- everybody walking out of the
21 deposition and not even bother calling the Court.

22 well, you two have been at loggerheads and in
23 mortal combat for so long that apparently that conduct the

24 other evening of just simply walking out with Mr. Ereiser on
25 the one hand on whatever went on in terms of potential

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1 badgering on the other and not getting into the essence of
2 this import in five minutes gave each of you the thought
3 that apparently you could just get up and walk out of the
4 deposition and not bother the Court while we were still
5 here.

6 Although you may have left at 8:45, we were here
7 long after that. Anybody could have called and came back
8 down for that depo.

9 well, I will take a look at that also, counsel. I
10 am not going to deny your motion at this time. I'm not
11 going to grant it. I'll simply look at it. And I will
12 rethink that motion. I may be wrong about that, and now
13 it's seeming more and more relevant to the Court, that
14 casual happenstance, especially with the alleged history now
15 with Canal+, NDS, and DirectTV, and the allegations in this
16 case.

17 The purchase at that time may have been a
18 good-faith purchase. It may be somewhat motivated quite
19 frankly by a desire to end the lawsuit and a combination of
20 good business. I don't know. But I will rethink that
21 tonight.

22 MR. SNYDER: Your Honor, the record also indicates
23 that there was an unrelated reason for DirectTV becoming
24 secure at that point. I believe the testimony is clear that
25 the secure card, the P4 card, was introduced in 2002 and

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1 that DirectTV was unwilling to do a card swap and to turn off
2 the streams for the other cards.

be the case. As far as all of the potential motivations, though, the Court is deeply concerned now that this may be one of the motivations, the purchase by NDS of DirectTV. It's just too coincidental, quite frankly.

So I am not saying any one of these are predominant, but in business transactions a whole bunch of different variables go into the reason for buying and selling companies. So I may be rethinking that. But regardless, I would have appreciated if you would have called it to my attention concerning this settlement, and both of you gentlemen have done that on occasion.

All right. Now, what else do you want to do this evening?

MR. SNYDER: Your Honor, if Mr. Rock is going to take the stand and offer opinions different from those that he gave previously, we have not received any updated or amended report, and I would certainly like to know at least the night before what opinion he is going to offer.

THE COURT: What report would you possibly expect to receive? All Mr. Rock is bringing in is he's a high-paid mathematician. He has nothing to base his opinion on. At best he can say that there was a hundred thousand in 2001 or

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2002. And the best he can do is climb the ladder quite frankly at 20,000 increments just to be safe if you choose to go that route, because Tarnovsky said it went up, and we don't know how high up is.

MR. HAGAN: Your Honor, can I can be heard on two issues? The first is the issue before the Court right now. Based on the Court's ruling which we completely agree with with respect to Tarnovsky's estimate, I don't think that we need the testimony of Mr. Rock. I think that we can certainly argue in closing 100,000 pirate devices and ARPU, which comes from Exhibit 406, and do the math. And then

12 they can get up there and they can argue that that math is
13 incorrect, that the jury shouldn't give weight to the
14 hundred thousand devices.

15 Secondly, Your Honor, I would like an opportunity
16 at some point -- if the Court doesn't want it to be done
17 right now, that's fine.

18 THE COURT: Let's go now to the motion for
19 mistrial so I have that when I read back the record. I have
20 taken the time, the record should reflect, to go over the
21 issue I have denied the motion for mistrial on, and I am
22 satisfied the jury is properly admonished. If I need to, I
23 can give a further admonishment.

24 It's curable if there is error at this point. And
25 if NDS, having had the motion for mistrial denied, requests

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1 the Court to give further admonition to the jury concerning
2 that, I will be happy to do so.

3 Having had the motion for mistrial denied, is
4 there any further request by NDS? Otherwise you rest on the
5 record, but the Court is happy to further admonish the jury
6 concerning that. I thought it was adequate, but I can make
7 a further statement to the jury if you would like.

8 MR. SNYDER: May I have the evening to reflect on
9 that, Your Honor?

10 THE COURT: Sure.

11 MR. SNYDER: I think this is a very difficult
12 issue, and I --

13 THE COURT: Sure. And I appreciate the position
14 you're in. One, let's be blunt. The difficulty is if you
15 call attention to it by further admonition. So let's quit
16 playing games. Let's just talk about that for a moment. I
17 agree it's the way it's done. It can be swept in a series
18 of admonitions to the jury at the end concerning settlement,
19 for instance, you know, this other issue of Fifth Amendment,

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20 if I am wrong on that.

21 There is a series of ways to handle that so it's
22 across the board and it's not called attention to. But if
23 you simply take the position of, Judge, we're not going to
24 help at all or give suggestions, then I will rest on the
25 record and that is, you have no further requests. I will

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1 rest on my record also that I am offering you that
2 opportunity.

3 So there is ways to handle this easily with the
4 cooperation of both sides; and that is, for those errors in
5 a case like this that may be occurring, or close calls, we
6 can sweep the board between settlements, you know, Fifth
7 Amendment. I just need to go back and have a chance to look
8 at that record. And I'm not going to deny your motion for
9 mistrial, nor am I going to grant it at this point.

10 But the first issue I am fairly comfortable with,
11 that the Court has adequately admonished the jury on that.
12 And I am quite prepared to rest on that record. I am simply
13 offering you the opportunity. So think about it tonight and
14 tell me tomorrow. Okay?

15 And you're not limited to tomorrow in terms of an
16 admonition. I'll make a record that your appellate rights
17 have been preserved in that regard, that you find it
18 difficult to unring the bell. But by the same token, if you
19 want the Court's help, you've got it.

20 Remember this. I am trying to give you the
21 record, and if I'm wrong, we can get reversed. That's fine.
22 But I am not going to take that away from you, but I am
23 certainly not going to have a mistrial based upon the
24 Court's discussion with the jury.

25 Okay. What else do we do this evening? You

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1 wanted to address settlement, and you wanted to address the
2 Fifth Amendment issue concerning Mr. Frost.

3 MR. HAGAN: First, Your Honor, there were three
4 grounds that they moved for mistrial. One you denied, and I
5 will not address that.

6 THE COURT: The second one I don't know you should
7 be as concerned about. I'm prepared after I understand this
8 case better to, I think, reverse my ruling concerning the
9 settlements concerning Canal+ -- I'm sorry, the settlement
10 discussions. I am going to look at that closely. But it's
11 become relevant, and I think I was a little naive not
12 recognizing the import of that and the timing. I understood
13 the issue. I didn't understand the timing when we got into
14 that issue.

15 MR. HAGAN: And just one point on the settlement,
16 and then I'll address the Fifth Amendment. My understanding
17 of the Court's ruling on the motion in limine is that we
18 were precluded from introducing the complaints, from
19 introducing specific language of the allegations in the
20 complaints, from introducing prelitigation letters, and from
21 introducing the terms of the settlement.

22 None of my questions to Mr. Tarnovsky involved any
23 of those issues.

24 THE COURT: It was the fact of the settlement.

25 MR. HAGAN: There was a lawsuit that was filed.

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1 News Corp. bought DirectTV. The lawsuit was resolved. That
2 is the only point that I attempted to make, and those are
3 public facts.

4 THE COURT: Let me go back and look at my order
5 again.

6 MR. HAGAN: With respect to the Fifth Amendment,
7 two points, Your Honor. First, we have already briefed this

8 issue and the Court has already correctly ruled on the law
9 that Fifth Amendment comes in in civil cases, as well as the
10 inference that the jury can draw from an individual's
11 invocation of the Fifth Amendment.

12 Now, there was a question of whether or not we
13 could prove up a nexus between Mr. Frost, who invoked the
14 Fifth Amendment, and Mr. Tarnovsky and NDS on the other
15 hand, whom we are obviously trying to impune that upon.

16 we have established the relationship, the nexus,
17 between Mr. Frost and Mr. Tarnovsky.

18 THE COURT: I agree.

19 MR. HAGAN: So that's the first issue. The second
20 issue, I simply asked Mr. Tarnovsky if he requested that Mr.
21 Frost refuse to answer specific questions. That was the
22 only point that I was trying to make. He said that he did
23 not, and the jury can certainly take from that what they
24 will.

25 The jury heard the testimony of Mr. Frost where he

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1 agreed to answer certain questions and refused to answer
2 other questions that were highly relevant to material issues
3 in this litigation. Under both points I believe, and it's
4 our position, that the questions to Mr. Tarnovsky were
5 proper and that there is certainly no grounds for a
6 mistrial.

7 I will reserve further comment unless the Court
8 requires it.

9 THE COURT: I will look at those tomorrow.

10 MR. SNYDER: Your Honor, I have to respond on two
11 issues. May I have a moment?

12 THE COURT: Certainly.

13 MR. SNYDER: First, the Court's order on the
14 motions in limine regarding the invocation of the Fifth
15 Amendment where the plaintiffs were required to create a

16 nexus between Mr. Frost and NDS regarding sales of pirate
17 devices, Mr. Tarnovsky's attendance at a meeting in Toronto
18 in the Sky Dome does not create that nexus.

19 THE COURT: I respectfully disagree. I believe it
20 does.

21 MR. SNYDER: Second, Mr. Hagan's questions went
22 far beyond asking Mr. Tarnovsky merely whether he was aware
23 of Mr. Frost's invocation of the Fifth Amendment. In fact,
24 Mr. Hagan asked Mr. Tarnovsky whether he told Mr. Frost to
25 invoke his Fifth Amendment rights, somehow suggesting that

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1 there was a conspiracy between Mr. Tarnovsky and NDS by
2 implication and Mr. Frost in asserting his constitutional
3 rights, putting aside our continuing objection to whether
4 that should be before the jury or not. But that goes far
5 beyond simply asking a witness are you aware he asserted his
6 Fifth Amendment right, a question which I think is itself
7 improper.

8 THE COURT: I want each of you to pull that
9 transcript for me tomorrow -- you have a daily -- and show
10 it to me. Now, if you're not calling Mr. Rock tentatively,
11 and Mr. Shelton has temporarily been precluded, I just put
12 you on notice I don't know what NDS is going to do, and I'm
13 not asking. But Mr. Shelton may or may not be testifying
14 again. That will become their decision. Right now, of
15 course, he's not.

16 who else are you calling in this matter? My notes
17 show that you're resting with the exception of Mr. Graham
18 James.

19 MR. HAGAN: That's correct, Your Honor, and I have
20 an update for the Court on Mr. James. I received an e-mail
21 this morning. Mr. James's application for a travel visa,
22 even based on this Court's order, was denied by the
23 Government in the UK. We are getting a letter from the
24 Government that we will submit to the Court, but we have

25 done everything in our power to get Mr. James here.

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1 THE COURT: Wait for that argument until I get the
2 letter.

3 MR. HAGAN: With that, Your Honor, and obviously
4 with preserving our rights to call any necessary rebuttal
5 witnesses based on the evidence and the arguments made
6 through the defense case-in-chief, we rest.

7 THE COURT: All right. Now, if that's the case,
8 then I assume that you would like to bring a motion?

9 MR. SNYDER: Yes, Your Honor.

10 THE COURT: Why don't we do that this evening.
11 That means you will rest in front of the jury. That also
12 forewarns NDS that if their motions are denied or the Court
13 holds it in abeyance, which it might do, until the
14 conclusion of the defense case and even to the end of the
15 verdict if it chooses, then NDS would be prepared to go
16 forward tomorrow because everyone was put on notice that you
17 were starting until Thursday.

18 MR. SNYDER: Yes, Your Honor, and we are prepared
19 to start tomorrow morning.

20 THE COURT: Okay.

21 MR. SNYDER: NDS would like to make three motions
22 for directed verdict under Rule 50. Two of those motions
23 relate to issues. The third relates to a specific claim for
24 relief, the RICO claim. Let me sign-post those for Your
25 Honor so you know where I'm headed.

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1 First, we would move for a directed verdict upon
2 the issue of a distribution network. Second, and relatedly
3 but it is important under the law, we would move for a

4 directed verdict on the issue of a distribution network that
5 caused any sales of pirate EchoStar devices in the United
6 States. And third, we move for a directed verdict on the
7 claim for relief under the RICO statute. Let me take each
8 of those in turn.

9 First, plaintiffs -- one of plaintiff's two
10 theories of liability is that NDS orchestrated a
11 distribution network. It originated with Mr. Tarnovsky
12 creating a device, sending it to Mr. Menard, Mr. Menard then
13 sending it to a variety of other distributors -- Andre
14 Sergei, Shawn Quinn, Dave Dawson. There have been a number
15 of names thrown out.

16 There is no evidence of Mr. Menard distributing
17 cards to any one of those distributors. In fact, they have
18 been conspicuously not mentioned during this trial.

19 THE COURT: Mention their names again.

20 MR. SNYDER: Shawn Quinn, Andre Sergei, Ed Bruce,
21 and Dave Dawson.

22 THE COURT: Now, Mr. Dawson certainly has. Mr.
23 Sergei certainly has. Mr. Quinn has been mentioned also,
24 counsel.

25 MR. SNYDER: The names have come up but not in the

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1 context of Mr. Menard providing them with any devices or
2 cards for purposes of distribution. In fact, the only
3 witness to mention anyone other than Mr. Bruce was Mr.
4 Dionisi, who said he was aware they were selling EchoStar
5 cards but was not aware of any connection to Mr. Menard, to
6 dr7, to Chris Tarnovsky, or to NDS.

7 Now, whether or not those people were selling
8 EchoStar access cards is not the issue. The question is, is
9 there evidence connecting them somehow to NDS? And there is
10 none. Second, Your Honor --

11 THE COURT: Let me ask you: If, in fact, there is

12 evidence of Tarnovsky producing those cards and if there is
13 evidence of Menard being a distributor for those cards, are
14 you saying that the nexus fails between Menard and Dawson,
15 for instance?

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

22 THE COURT: Now, tell me about this second person,
23 Bruce.

24 MR. SNYDER: I am not aware of any evidence in the
25 record that connects Mr. Menard to providing materials,

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1 EchoStar piracy materials, to Mr. Bruce.

2 THE COURT: Quinn.

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

7 THE COURT: Sergei.

8 MR. SNYDER: Same answer. I don't believe there's
9 been any testimony or evidence connecting Mr. Menard to the
10 sale or distribution of pirated EchoStar devices to Mr.
11 Quinn.

12 THE COURT: If there is enough evidence in the
13 Court's opinion for distribution to have taken place between
14 Menard and Dawson, then does that go to the jury?

15 MR. SNYDER: Whether there was a distribution
16 involving those other individuals?

17 THE COURT: Is that the filled-out distribution
18 network?

19 MR. SNYDER: I don't believe so, Your Honor,
20 because there would have to be some evidence -- for the jury

21 to find that a distribution network involved those other
22 individuals, there would have to be some evidence on which
23 the jury could find that.

24 Let me give you an example.

25 THE COURT: I am confusing you, so my apologies.

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1 My view under RICO is that it only takes one prong. In
2 other words, I don't have -- the distribution network is not
3 defined as more than one person on the distributing end. I
4 don't need a galaxy of people under RICO. It's sufficient
5 if just Mr. Dawson is a distributor to fulfill that
6 requirement.

7 Now, if I'm wrong, if you believe that there needs
8 to be more than one distributor, then I would like to have
9 you make your record and argument on that.

10 MR. SNYDER: If I understand the Court's question
11 correctly, let me answer it in two ways. I want to try and
12 answer it directly. First, I don't believe that other than
13 the 1029 claim, the Section 1029 claim, the distribution
14 network is one of the predicate acts alleged in the RICO
15 claim. They allege criminal copyright infringement and a
16 violation of Section 1029.

17 There is no evidence in the record -- which is the
18 second issue I raised -- there is no evidence in the record
19 of sales in the United States of pirate EchoStar devices
20 connected to NDS, even if the Court accepts all reasonable
21 inferences based on the Allen Menard/Dave Dawson e-mails and
22 Mr. Dawson's hearsay to Ron Ereiser.

23 There is no evidence of any sales by Mr. Dawson in
24 the United States. In fact, the only evidence is that it
25 was in Canada and that it was legal at the time. That is

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1 the second issue on which we move, Your Honor, which is that
2 there is no evidence of sales connected to NDS in the United
3 States.

4 THE COURT: Isn't there a significant amount of
5 testimony about the -- well, strike that. It's the sales
6 back.

7 MR. SNYDER: The sales back, Your Honor. I
8 appreciate that there is evidence in the record regarding
9 these postings. I think it's a separate issue whether sales
10 somewhere in the United States connected to those postings
11 could create liability for NDS. My motion is on a different
12 issue, which is on sales in the United States that are
13 directly connected to Chris Tarnovsky or NDS through some
14 chain of a distribution network.

15 THE COURT: Okay. And your third was the claim
16 for relief under RICO?

17 MR. SNYDER: That's correct, Your Honor. RICO is
18 a complicated statute, so there are multiple bases for this.
19 As I mentioned a moment ago, there are two types of
20 predicate acts alleged by plaintiff under the RICO claim.
21 The first is criminal copyright infringement, which requires
22 that defendants willfully infringe plaintiff's copyright for
23 purposes of commercial advantage or private financial gain.

24 There has been generic references, testimony by
25 plaintiff's witnesses, that programming is copyrighted and

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1 that EchoStar's satellite transmissions contain some
2 EchoStar copyrighted material. There is not, however, any
3 evidence that defendants willfully infringed any copyright
4 owned by plaintiff for commercial advantage or private
5 financial gain. And, of course, that would have to occur in
6 the United States, because the United States copyright
7 statutes and its protections end at the United States

8 borders.

9 The only evidence I believe that plaintiffs may
10 have adduced on this subject of the receipt of a
11 transmission in the United States would be Mr. Tarnovsky's
12 testimony about reprogramming a DirectTV card on one
13 occasion. But there is no evidence that he received any
14 copyrighted EchoStar programming or that he did so for
15 purposes of commercial advantage or private financial gain.

16 So that once instance that is in the record is
17 facially insufficient to satisfy this predicate act, and
18 there is no other evidence of a copyright violation of
19 plaintiff's copyrights in the United States, which is
20 required.

21 THE COURT: I might -- I understand financial
22 gain. I don't understand your argument concerning no
23 commercial advantage.

24 MR. SNYDER: Mr. Tarnovsky's testimony is that
25 they were concerned that pirates might be able to use

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1 outdated DirectTV cards for purposes of pirating EchoStar.

2 THE COURT: If I took that to be true, you might
3 be right, but there is a lot of other evidence that that's
4 not in fact the case, that this was strictly for commercial
5 advantage.

6 MR. SNYDER: Other than Mr. Tarnovsky's testimony
7 on that incident, Your Honor, I don't believe there is any
8 other. Mr. Norris was present, but I don't believe there
9 has been any evidence that would suggest that Mr.
10 Tarnovsky's reprogramming of a DirectTV card -- remember,
11 this incident is very different than everything else they're
12 alleging. Mr. Tarnovsky reprogrammed a DirectTV card to see
13 if security devices provided by NDS could be reprogrammed to
14 intercept someone else's signal and could be misused by
15 pirates.

16 THE COURT: Do you believe that the act of

17 reprogramming that card, that then leads to wisdom,
18 knowledge, the ability to prove that a hack is taking place
19 and then further activities, given the plaintiff's best
20 position at least at this point in a directed verdict
21 motion, isn't commercial advantage?

22 In other words, if you just stop with that
23 argument, so be it. But it's the whole cascade of what
24 occurs after that, the reason for that card on one occasion
25 being tested or looked at, that then gives rise to the

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1 ability for NDS to allegedly recognize what an advantage
2 this would be and to the eventual postings.

3 MR. SNYDER: I'm sorry, Your Honor. I wasn't
4 sufficiently clear. I agree with the Court that what Mr.
5 Tarnovsky and Mr. Norris were doing was related to NDS's
6 business, but the --

7 THE COURT: Allegedly.

8 MR. SNYDER: Allegedly. But the way the statute
9 is written, the infringement of plaintiff's copyright has to
10 be for commercial gain, not just what you're doing. And
11 there is no evidence that they were trying to infringe,
12 willfully infringing a copyright owned by the plaintiffs for
13 the purpose of commercial gain.

14 THE COURT: There is where I think we disagree
15 even at summary judgment. I am going to go back and look at
16 that again, of course. I want to be cautious, but it would
17 seem to me that commercial gain under this act also includes
18 what I am going to call a negative gain, an advancement, if
19 you will, to the detriment of a competitor.

20 Commercial gain isn't simply getting money. It's
21 also placing yourself in a competitive advantage over a
22 competing company and by your acts denigrating that company
23 or their ability to earn revenue or causing harm to them.
24 But I'm going to go back and look.

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1 finish that point, learning that your own security device,
2 an NDS-supplied security device, using information available
3 on the internet could be used to pirate a competitor does
4 not assist NDS. They were, as Mr. Tarnovsky and Mr. Norris
5 both testified, concerned about the misuse of NDS security
6 devices.

7 THE COURT: Now you had a second.

8 MR. SNYDER: The second predicate act is
9 trafficking under Section 1029. Each of the subsections of
10 that statute requires that the defendant knowingly and with
11 intent to defraud either produce, use, traffic in a
12 counterfeit access device or device-making equipment, or
13 soliciting a person to do those acts; and that must occur in
14 the United States.

15 There is no evidence that defendants with the
16 intent to defraud EchoStar produced, used, or trafficked in
17 counterfeit access devices or device-making equipment, or
18 solicited someone to do those things.

19 THE COURT: Okay.

20 MR. SNYDER: Next, Your Honor, and related to
21 that, there is no evidence of a pattern of racketeering
22 acts. As the Court is well aware, the pattern requirement
23 under the RICO statute requires evidence of two predicate
24 acts and a threat of continuing criminal conduct. For the
25 same reasons that there is no evidence of either criminal

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1 copyright infringement or a violation of Section 1029, there
2 has been no evidence of a threat of continuing criminal
3 conduct in this case.

4
5 have to be based on the criminal copyright infringement or
6 the violations of Section 1029. And if the limit of the
7 evidence so far is Mr. Tarnovsky's reprogramming of a single
8 DirecTV device to understand whether that software works,
9 certainly a jury could not reasonably conclude that that
10 episode creates a threat of continuing criminal conduct.

11 THE COURT: Okay.

12 MR. SNYDER: The next issue under RICO, Your
13 Honor, there is no evidence of an enterprise. Using as our
14 guide Your Honor's draft jury instructions regarding an
15 enterprise, the enterprise has to have three requirements:
16 a structure for making decisions, a hierarchical or
17 consensual basis, a structure for controlling or directing
18 the affairs of that enterprise.

19 Actually it's two bases because we've excised the
20 traditional third one based on the Odom decision. So using
21 those two requirements, there has to be a structure for
22 making decisions and a mechanism for controlling and
23 directing its affairs. Again, that enterprise must be over
24 the predicate acts of criminal copyright infringement and
25 violations of Section 1029, both of which must occur in the

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1 United States.

2 There is no evidence of an enterprise beyond NDS
3 itself and actually, I don't believe, even within NDS. But
4 for purposes of this motion, there is no evidence of an
5 enterprise involving anyone who is involved in criminal
6 copyright infringement or violations of Section 1029 in the
7 United States over which NDS exercised some decision-making
8 authority or control. Without that, the enterprise
9 requirement of the RICO statute fails.

10 THE COURT: Okay.

11 MR. SNYDER: Finally, Your Honor -- this is a
12 related issue -- there is no evidence that NDS has

13 participated in an enterprise. It would be theoretically
14 possible under the RICO statute for there to be an
15 enterprise that goes beyond NDS that was controlled by
16 someone or something outside of NDS and in which NDS was
17 merely a participant.

18 But for NDS to be found to participate in an
19 enterprise, it must participate in the operation and
20 management of their enterprise, and there is no evidence of
21 that in this case.

22 THE COURT: Any other arguments?

23 MR. SNYDER: No, Your Honor.

24 THE COURT: All right. Now, I am going to let
25 Sharon go home. Sharon, thank you very much. You are going

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1 to respond tomorrow at 8:00.

2 (Thereupon, court was adjourned.)

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CERTIFICATE

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

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12 Date: April 23, 2008

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Sharon A. Seffens 4/23/08

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