

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

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ECHOSTAR SATELLITE CORP., et)	
al.,)	
)	
Plaintiffs,)	
)	
vs.)	No. SACV 03-950 DOC
)	Day 10, Volume I
NDS GROUP PLC, et al.,)	
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
Jury Trial
Santa Ana, California
Thursday, April 24, 2008

Debbie Gale, CSR 9472, RPR
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
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EchoStar 2008-04-24 D10V1

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EXHIBITS

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511-A	Posting	59

1 SANTA ANA, CALIFORNIA, THURSDAY, APRIL 24, 2008

2 Day 10, Volume I

3 (8:08 a.m.)

4 (Outside the presence of the jury.)

5 THE COURT: All right. On the record.

6 All counsel are present. The jury's not present.

7 The Court wants to revisit the issue concerning
8 lost profits.

9 NDS relied upon and circulated an estimate from
10 Christopher Tarnovsky, which is Exhibit 41. The internal
11 document was Exhibit 2027.

12 If I could get 2027 and Exhibit 41.

13 MR. WELCH: Do you mean 1270, Your Honor?

14 THE COURT: My apologies. I mean 1270. Thank
15 you. 1270.

16 So I need 41, I believe, from memory, and I need
17 1270.

18 Now, I want to look at the first page because I
19 didn't have it with me last night. And I want to look at
20 the top heading on that first page, which should be bolded,
21 and there should be two lines, two bolded lines -- just give
22 it to me. Excellent.

23 It reads "Marketing Competitive Intelligence." I
24 emphasize the word "marketing."

25 And then it goes on to state "NDS and the Nagra

1 Conditional Access Systems, a Technical and Business
2 Analysis."

3 Not only is 1270 relied upon and circulated by
4 NDS, based upon by Mr. Tarnovsky's estimate, but the Court
5 had forgotten yesterday when I had my colloquy with counsel
6 that this was labeled "Marketing Competitive Analysis." And
7 last evening, sometime in the early morning, the Court
8 recalled the heading on this document.

9 It was represented to the Court that this is not
10 advertising, and I agreed, but it is a marketing analysis.
11 NDS attacked the credibility of this hundred thousand
12 estimate, but Exhibit 41, Exhibit 1270, and eventually
13 Exhibit 2027 pave the way for some analysis to take place in
14 front of the jury that has some concrete numbers to it.

15 And although NDS attacked the credibility of its
16 own internal document and its own estimate, Tarnovsky's
17 estimate in the e-mail to Mr. Norris is apparently the
18 underlying information that NDS relied upon in Exhibit 1270.

19 Tarnovsky testified and appears to be the most
20 reliable person relied upon by NDS. He testified that only
21 he knew the North America area. The methodology Tarnovsky
22 employed was no better or no worse than that employed by
23 Shelton. It was monitoring the Internet, from his
24 testimony, the same as Mr. Shelton.

25 The Court did not find and still does not find

1 that there's a sufficient methodology for Mr. Shelton to
2 testify based upon his calculations and the methodology, but
3 does note once again that the numbers between Mr. Shelton
4 and Mr. Tarnovsky are uncannily close to one another in
5 similarity.

6 EchoStar should be allowed to argue that the
7 profits based on Tarnovsky's estimate -- or the lost
8 profits -- should be based on Tarnovsky's estimate from
9 monitoring the Internet and relied upon by NDS. Once again,
10 Tarnovsky is certainly the most knowledgeable and perhaps
11 the most motivated to not only monitor but also to give a
12 fairly accurate range at a time when there's absolutely no
13 motivation for him either to pump the numbers or to decrease
14 the numbers. After all, this is a confidential
15 communication, he believes, between Mr. Norris and himself
16 in an e-mail.

17 Therefore, this Court finds it hard for the
18 accusation to be made that he's fabricating. The e-mail is
19 information that Tarnovsky conveys to Norris that has every
20 indicia of a good faith estimate. The real issue is the
21 accuracy. The real issue is whether this is a guess, and
22 that's for the jury to ferret out in argument.

23 Now, the Court notes that NDS has argued that lost
24 profits should not be calculated and cannot go to the jury
25 and that no evidence, therefore, should be allowed

1 concerning any lost profits. This Court rejects that
2 argument. To this Court, that's incorrect.

3 The question isn't whether the lost profits should
4 go to the jury. There are, obviously, some lost profits.
5 It's the accuracy of those lost profits placed in front of
6 the jury.

7 The remedy is not exclusion, but the Court does
8 not want to place EchoStar in the position of a freewheeling
9 analysis that literally casts numbers at the jury and places
10 NDS in the unfair position of virtually almost no limitation
11 based upon the hundred thousand numbers. This area of
12 estimating is first noted by this Court to be unique and
13 would not have precluded Mr. Shelton in a Kuhmo Daubert
14 analysis originally because I do subscribe to EchoStar's
15 argument that this is an almost impossible area to quantify.
16 By the same token, its uniqueness lends credence to the
17 ability of experts. Once again, it's the methodology.

18 But the numbers in front of us are sitting right
19 in front of us. It occurred to me last evening about 1:00
20 or 2:00 o'clock in the morning that we have 2027. This
21 shows the number of subscribers, after multiple runs and
22 requests by the Court, in the starting year and also
23 computes the starting years for ROM 2, ROM 3, ROM 10,
24 ROM 11, and those numbers show a comparative basis and when
25 each of these are being interjected into the EchoStar

1 system.

2 Since ROM 3 is only going to the jury concerning
3 lost profits, eventually a good faith argument could be
4 made, depending upon the tactics of counsel for both sides.
5 This Court recognizes it will not be completely accurate
6 because there is some confusion concerning the hundred
7 thousand pirated subscriber cards and whether they're ROM 2
8 or 3, but they can be calculated, and a good faith estimate
9 can be given based upon the numbers in 2027 -- the same
10 process we went through out of the presence of the jury with
11 Mr. Shelton.

12 The Court knows, out of the presence of the jury,
13 that at least one good faith estimate is about 10 percent of
14 the market. Both parties really hold the ability to
15 calculate this within their own tactics and decision-making
16 process.

17 Simple calculations that the Canadian market is
18 about 10 percent can be argued, but it's not in front of the
19 jury at the present time. Simple calculations concerning
20 the ratio of ROM 2 to ROM 3 and the dates in question and
21 the advent of ROM 10 can be argued because now we have those
22 numbers, but they're not in front of the jury at this time.

23 And once again, the Court states that at least
24 we're in the ballpark. And while the remedy is not
25 exclusion on one side, the remedy cannot also be the ability

1 of EchoStar to argue a hundred thousand, 2001, and then
2 carry that over on documents that are before this Court in
3 an in camera hearing that the jury doesn't have possession
4 to of a hundred thousand the next year, a hundred thousand
5 the next year, a hundred thousand the next year. Because if
6 these documents were in front of the Court, you would be
7 able to make the same argument of the advent of ROM 10 and
8 the proportionality of ROM 2 and 3.

9 So this 2027 is not a document, though, that
10 Mr. Shelton caused to be produced. It came from EchoStar,
11 from somebody within EchoStar. And whoever prepared that is
12 the appropriate authenticator of this document.

13 Now, NDS has the ability to limit damages by
14 literally presenting this evidence, and the Court would
15 require that person to come from EchoStar to lay the
16 foundation. If the tactical choice, though, Counsel, on
17 behalf of NDS is simply to remain moot and rely upon this
18 Court's judgment and then hopefully argue from your
19 perspective to the Circuit Court, I want a clear record that
20 this could be cleared up very, very easily, and that's
21 simply a tactical choice. In other words, Judge Carter was
22 wrong, this was a guesstimate on Tarnovsky's part, it should
23 never have gone to the jury. And if you prevail, then the
24 case will come back, at least in terms of lost profits if
25 there's liability.

1 But if I'm correct that this is a jury
2 determination, then I would want to talk this through with
3 both of you, because putting yourself in that all-or-nothing
4 position will become a tactical choice.

5 You have the ability through the last-minute
6 document prepared by EchoStar, 2027, to limit your lost
7 profit damages, if we ever get to that point.

8 Now, I recognize the difficult tactical position
9 is deciding if you want to leave the record as it is or take
10 the chance -- taking the chance that you're correct and I'm
11 wrong, an all-or-nothing position. And I recognize also
12 that if you place this document in front of the jury, you
13 may tactically be giving credence to this document. In
14 other words, you may place yourself in the position of
15 driving the estimate down to a hundred thousand units,
16 thereby shining a bright light and appearing that if
17 liability is found and we move to lost profits, that you're
18 accepting this hundred thousand number and some number below
19 that as a starting point because of the Canadian market
20 being backed out, the confusion between ROM 2 and 3.

21 But EchoStar is in the posture and position of
22 limiting what right now would appear to be, from the glint
23 of counsel's eyes yesterday on EchoStar's part, the ability
24 to argue, because there's nothing in front of this jury --
25 100,000 units in 2001, the testimony of Tarnovsky that's

1 going up to May, that there's no ability to quantify those
2 numbers at the present time, that they could be
3 astronomical, according to some of your other witnesses --
4 and to continue to argue that compilation all the way
5 through 2002, 2003, 2004 when, in fact, the Court knows and
6 all counsel knows that if these documents are correct coming
7 from EchoStar, 2002 -- or 2027, that there's a swing; the
8 ROM 3 starts significantly down, that they can be figured
9 out very quickly on a percentage basis.

10 So this Court feels that the chart should be
11 before the jury if it's authentic, but I leave that to the
12 decision of each counsel tactically.

13 And therefore you're going to prevail in terms of
14 your argument, EchoStar going to the jury in terms of lost
15 profits, recognizing Tarnovsky's estimate, monitoring the
16 same Internet that Shelton was. And the difference is
17 Tarnovsky actually has increased credibility. He has no
18 motivation to look backward in time. He's there at the
19 time. He has no motivation to fabricate these figures.
20 He's talking to his employer in an e-mail.

21 An example is, obviously, if you think you're
22 being monitored by phone, you're careful about what you say.
23 When you don't think you're being monitored in a
24 confidential conversation, we're usually more motivated to
25 give accurate numbers.

1 Second, NDS is in a poor posture, as far as the
2 Court's concerned, because this is a marketing analysis.
3 It's an internal document whether it's, quote/unquote,
4 advertising or not. It's relied upon by a corporate entity;
5 it's spread throughout the corporate entity.

6 Finally, I know, although I wouldn't base my
7 decision, what an uncanny number that Mr. Shelton and
8 Mr. Tarnovsky come to. If you calculate out Shelton, you're
9 about 109,000. In fact, he may be conservative in that
10 number, as he said. And Tarnovsky bears that out because
11 there's a tremendous increase from his testimony between
12 February 2001 and May of 2001, according to his testimony.

13 So I leave that to you. I simply say to NDS that
14 the ship has left the harbor. You have the ability to cure
15 this. You have the ability to force NDS to bring this
16 document in.

17 EchoStar, you have the ability also to bring this
18 document in in your case in chief. Whoever decides to do
19 that needs to get that authenticator here. And if the
20 Kudelski group ran this or EchoStar ran this, that person
21 needs to be in court.

22 Now, the second issue I want to take up, so
23 nobody's caught by surprise, is this issue concerning
24 James Spertus.

25 It's fascinating to the Court the way that this

1 has unwound because it's the danger of a Court making
2 in limine decisions at an early stage of these proceedings.
3 And being much more knowledgeable about the case, first, the
4 relevance of this started with the in limine motion
5 concerning whether or not the lawsuit involving
6 DirecTV v. NDS was ever going to come into this case as a
7 same or similar offense.

8 There's a motion for mistrial because of the
9 irreparable harm done to Mr. Spertus' reputation as it
10 reflects upon NDS, from Mr. Snyder's arguments last night,
11 the impugning of his integrity by the question that was
12 asked, the inference that the United States Attorney's
13 Office has left apparently for some private job sometime in
14 relation to a clearance letter being sent by NDS.

15 But if you look back at the entire record, it's a
16 fascinating record, and it can't be decided in the vacuum of
17 what's occurred.

18 It starts with DirecTV v. NDS and the Court's
19 decision that this was same or similar conduct. You
20 prevailed on that motion, and the Court had found basically
21 that Tarnovsky's hacking and distribution of DirecTV had the
22 same -- same or similar indicia that would allow that to
23 come in front of the Court.

24 Now, then, NDS came back through -- I forget,
25 Mr. Klein, Mr. Snyder, I don't remember -- but NDS counsel

1 came back and were concerned about the Court's ruling and
2 sought to limit that ruling. And the way that that
3 limitation was sought was, there was a deep concern that by
4 that evidence coming in, there would be the inference that,
5 in fact, NDS had committed this crime, and if a settlement
6 had taken place that the inference would be that NDS would
7 have been found liable. And, therefore, the jury should
8 accept that inference in showing the same liability when
9 EchoStar is suing NDS.

10 This Court allowed a certain amount of evidence.
11 I think, Mr. Klein, this was your portion of the case,
12 because I was also deeply concerned that that inference
13 would be drawn. But my order was relatively clear in terms
14 of the contents of the complaint not coming in, your
15 pretrial documents not coming in, and the contents of the
16 settlement not coming in.

17 I don't view your question as improper. You asked
18 about the purchase. Your question was directed, from my
19 standpoint when I heard it, to the oddity of the purchase
20 taking place by Rupert Murdoch and NDS of DirectTV and the
21 fact that that purchase then caused, if you will, any
22 further hacking of DirectTV to cease. That is not an
23 improper area. And therefore, if I conveyed any limitation
24 on that before, with the wisdom of hearing this case, that
25 is not grounds for a mistrial, and I deny the grounds for a

1 mistrial at this time.

2 Second, I'm becoming increasingly concerned that
3 while the corporate world may segment out EchoStar and
4 NagraStar and Harper Collins and NDS, that initially at
5 counsel's request for NDS I had singled out
6 Mr. Rupert Murdoch at their request for some protection.
7 Apparently he has a good or bad reputation, and there was
8 concern on NDS's part. It's becoming increasingly clear to
9 this Court that the corporate entities don't have the same
10 sanctity that they normally should, that these are really
11 four primary responsible parties involved. It's not Henri
12 Kudelski, it's Andrew Kudelski, it's Charles Ergen, it's
13 Rupert Murdoch, and it's -- Dr. Peled. Thank you very much.

14 And the intermeshing between these corporate
15 entities is fascinating. Fifty percent ownership of some
16 shares, the combination of factors, give credence now to the
17 corporate structure, quite frankly, if not being
18 meaningless, significantly diminished.

19 And while I don't intend to allow you to focus on
20 Ergen or Murdoch and continue to use their names in vain,
21 I'm not as concerned any longer that their names aren't a
22 part of this lawsuit.

23 So, then, continuing on with what happened to
24 Mr. Spertus. After that concern by the Court that NDS would
25 appear to be liable because of the investigation and NDS's

1 desire to have some information in front of the jury that
2 there was some absolution, the Court allowed a certain
3 amount of that. Then, of course, Mr. Klein believed --
4 strike that.

5 Counsel for NDS believed that the door had opened,
6 and without alerting the Court or asking, rose to the
7 occasion to introduce the document, in front of the jury,
8 which I had specifically excluded.

9 This has gone back and forth on both sides in
10 terms of neither trusting or relying upon the Court, and
11 counsel for EchoStar did the same thing yesterday in terms
12 of the polygraph. And maybe that polygraph is coming in,
13 but I think I should have the courtesy at least of knowing
14 if you're leaving a deposition at night, and I should
15 certainly have the courtesy of knowing when those critical
16 documents that I've excluded and made known to you, whether
17 it's a polygraph, or a document that Mr. Klein takes upon
18 himself to believe that he can just stand the occasion,
19 should come before the Court. But if we're not going to do
20 that, then I'm warning you both. I've got a lot of weapons
21 in front of the jury. I'm going to protect my record, and
22 I'm going to protect this jury.

23 So if I see any more of that, you're now
24 forewarned. I've been very neutral in front of the jury in
25 terms of my comments. None of you have been harmed in front

1 of this jury. I will protect my record in this regard from
2 this point forward.

3 So Mr. Klein then rises to the occasion -- strike
4 that.

5 One of the counsel from NDS rises to the occasion,
6 trying to get in a document believing that they've got carte
7 blanche, which they don't, and then yesterday EchoStar
8 strikes back. There's no information in front of this jury
9 other than the question asked, that, one, Mr. Spertus left.
10 I'm assuming he must have left in close proximity to the
11 clearance letter. There's no information in front of this
12 jury who he went to work for. The question assumes he went
13 to work for some organization apparently connected in some
14 way, if not to NDS, to a general industry, and I can't
15 ferret that out from the question. And there's some strong
16 innuendo that Mr. Norris had some type of either personal or
17 professional relationship, which is hard to sort out from
18 that question.

19 Now, having the wisdom of time, this whole area is
20 collateral. In other words, looking back in time, the same
21 or similar act should have simply come in on behalf of
22 EchoStar. My ruling would not change. And looking back
23 with the wisdom of hindsight, I don't believe that there
24 should have been any discussion about any potential
25 protection of NDS and any discussion about a clearance

1 letter by the U.S. Attorney's office.

2 And therefore, my remedy is to inform the jury --
3 although I offered NDS carte blanche last night -- the
4 admonition that whatever occurred in terms of the United
5 States Attorney's Office and their investigation and their
6 absolution or not has no effect on this jury; that they are
7 only -- the only people who are going to hear the totality
8 of this evidence, and there's no inference to be drawn from
9 the United States Attorney's actions. And there's no
10 inference to be drawn concerning Mr. Spertus and whether he
11 went to work in an industry-related job or he had some
12 personal or professional association with Mr. Norris.

13 Because what's occurring is the inference that
14 really this clearance letter is something that the jury
15 should rely upon collaterally and therefore absolve NDS.
16 And it really strikes, in a sense, against the Court's
17 ruling that was favorable to EchoStar in terms of
18 introducing the NDS DirecTV lawsuit.

19 Now, I was wise enough at least to catch that
20 after the questions came rapidly yesterday, and the Court
21 tried to cure that with an admonition to the jury at that
22 time. It was inartful. It was the best I could do under
23 the circumstances with the fast-flowing questions asked
24 between counsel. But it did say to the jury that we didn't
25 have Mr. Spertus here.

1 So there's two options. One, we leave the record
2 as it is with your motion for mistrial; or, two, I simply
3 step back in and cure this and admonish the jury that any
4 action by the United States Attorney's Office is irrelevant,
5 and any actions or insinuations concerning Mr. Spertus are
6 irrelevant, that this area is to be stricken from their
7 consideration.

8 Now, since I've already made a record, although
9 it's inartful yesterday, at least the Circuit Court knows
10 that when they focus on this issue, they need to go back
11 through the entire record and look at the way it developed.

12 Your motion for mistrial is denied.

13 Third, the Fifth Amendment and the question asked
14 of Mr. Tarnovsky -- "Did you ask Mr. Frost to assert the
15 Fifth Amendment?" -- is not grounds for a mistrial.

16 The Court has made the ruling that the assertion
17 of the Fifth comes before the jury. The Court's not going
18 to negate that ruling or cause a mistrial when in fact
19 there's a nexus, a strong nexus, between Mr. Frost and
20 Mr. Tarnovsky. If that question would have been asked in a
21 vacuum concerning, for instance, a Mr. Quinn where the Court
22 has, you know -- and I agree with Mr. Snyder, little or no
23 nexus at the present time -- then I think that would be well
24 taken. But where I have Mr. Frost, who's been intimately
25 involved in this hacker group, this hacker community,

1 Mr. Tarnovsky intimately involved, the Court finds that's a
2 proper question to ask, and you're entitled to ask that.
3 And I'm denying the motion for mistrial.

4 Fourth, I don't want the Circuit to misconstrue,
5 if there is liability for either party, that this Court
6 thinks that the case should start over because of
7 evidentiary rulings. My comments yesterday started with
8 Mr. Snyder rising to his feet correctly to back the Court
9 that maybe a new trial should take place. My comments
10 weren't directed at the Court's rulings thus far.

11 My concern is that this evidence that has
12 literally been shredded, hidden, not produced, has only --
13 by both entities -- has only come forward, in this Court's
14 opinion, literally within the last couple months.

15 And because of that, I wish that this evidence
16 would have been before both of you two or three years ago,
17 and the depositions that were conducted would have been more
18 full and complete because each of the parties, I think, were
19 equally harmed by this. And therefore I'm keeping these
20 statements neutral, not only on the record -- this is all
21 outside the presence of the jury. And my frustration with
22 the case is outside the presence of the jury.

23 My comments are directed to the fact that this
24 discovery has been an abysmal process and probably every bit
25 as frustrating for you as counsel representing your clients

1 as it is for the Court watching this record of destruction,
2 shredding, noncompliance by attorneys -- one in Canada -- in
3 violation of the Court's orders.

4 So, therefore, if there was any colloquy
5 yesterday, it's only in light of the fact that I wish that
6 the discovery would have been forthcoming between the
7 parties and we would have had your cooperation earlier.

8 But as far as the evidentiary rulings are
9 concerned, I'm convinced that this case literally cannot be
10 retried.

11 I don't believe that with the badgering that this
12 Court has entered into, quite frankly, with both of you,
13 that I could be in any posture having counsel's compliance
14 and the messages you've sent back to your clients. I don't
15 think, for instance, Mr. Ereiser is ever coming back in a
16 new trial. Menard is never appearing. We're not going to
17 be in any better position in some court in the future --
18 this Court or another court will be in the position of
19 depositions from this trial.

20 It's been absolutely essential that the jury view
21 the demeanor of witnesses who are testifying. And at least
22 we've cut that number from 18 or so who weren't coming, to
23 approximately 14 now of those 18 who are appearing -- and I
24 may be a little off in my numbers.

25 So it's about as fair as we can have in terms of

1 demeanor in front of the jury with the lack of cooperation
2 with these multinational corporations and the
3 decision-makers behind them.

4 Once again, let me be very clear. My comments
5 have nothing to do with the excellent performance of trial
6 counsel in my court.

7 Therefore, on your three grounds, your motions for
8 mistrial are denied.

9 Concerning the admonition, I'll leave that to you
10 quickly to decide. Because if I'm going to admonish the
11 jury, I'm going to do it immediately upon their entering the
12 courtroom. If not, I'm going to take your silence as
13 acquiescence in terms of letting the record stand with
14 Mr. Spertus.

15 I note for the record Mr. Spertus is local. He's
16 appeared in my court. Either one of you can get him if you
17 want to continue down this line, and if you can't reach a
18 resolution, and/or you can bring Mr. Norris back to find out
19 what kind of relationships there are.

20 Defendants, finally, had moved for summary
21 judgment as a matter of law pursuant to Federal Rule of
22 Civil Procedure 50(a). According to Rule 50(b), if the
23 Court does not grant a motion for judgment as a matter of
24 law made under Rule 50(a), the Court is considered to have
25 submitted the action to the jury, subject to the Court's

1 later deciding the legal questions raised by the motion.

2 This Court does not want to leave this in an
3 unresolved condition prior to the time it goes to the jury,
4 but in searching Rule 50(a,) it's unlike a Court trial where
5 the Court can delay that decision until the end of the
6 defense case. And I would simply ask, so that I don't put
7 NDS in the position of having not thoroughly and
8 thoughtfully considered this, that there's a stipulation
9 that once again we can raise this at the end of the defense
10 case, moving in the same procedural format as we would in a
11 court trial.

12 Therefore, you're given two opportunities: To
13 raise these same questions again, but it's very fair to
14 EchoStar because, quite frankly, a large part of your case
15 may come through NDS's testimony just like a large part of
16 NDS's case has already come in through EchoStar's
17 presentation of witnesses.

18 These witnesses have been sometimes hostile, from
19 EchoStar's position. And many of the witnesses NDS calls,
20 like Guggenheim, may be hostile to NDS's position.

21 Now I may be wrong about 50(a), but that's what my
22 research shows. Last evening we stayed quite late trying to
23 look at that procedure, and 50(a) is a little different. It
24 requires this horrendous jump, Mr. Snyder, from the initial
25 decision on a directed verdict at the end of the plaintiffs'

1 case to, literally, the Court having the ability and not
2 granting the judgment as a matter of law to submit this
3 action to the jury.

4 But right now, tentatively, I would deny your
5 motion. There's the nexus to Dawson, as far as I'm
6 concerned.

7 But this Court is in a minority of courts in the
8 country, and in having a frank discussion with you, I think
9 I need to make a record that this Court historically has
10 been very concerned about the application of civil RICO and
11 this concept. This Court's used to dealing with criminal
12 RICO. It was written by the gentleman from Notre Dame. It
13 was written for organized crime, and the judiciary has
14 carried this concept of civil RICO through affirmances and
15 nonaffirmances into the area of civil law.

16 This Court had initially granted summary judgment
17 on behalf of NDS in the Sogecable case. The Ninth Circuit
18 corrected this Court. This Court is a very humble Court in
19 light of the Ninth Circuit's ruling, and I'm bound, and
20 whatever my history is in terms of deep concern about civil
21 RICO, this Court humbly takes its direction from the
22 Ninth Circuit and will obey their admonition.

23 So, therefore, I think I've made it known to
24 you -- privately on some of the Saturday sessions -- my
25 concern, and I want to state that on the record, quite

1 frankly. I've been corrected, and therefore RICO is back
2 with us. I'll act in a very neutral regard, whatever my
3 personal concerns have been about that. That's off the
4 table.

5 Right now, tentatively, I believe that there's
6 enough to go to the jury on civil RICO. I'm going to deny
7 Mr. Snyder's directed verdict, but I'm going to find that
8 this allows you to reraise this again at the end of the
9 defense case, although I can't find the specificity in
10 Rule 50(a) that allows that.

11 I think because of the posture of the case and in
12 fairness to both sides, the Court's going to be even wiser
13 at the end of the presentation of the defense case and can
14 make another considered decision.

15 Now, therefore, you have a record for appellate
16 purposes. If, in fact, in denying Mr. Snyder's directed
17 verdict, and if I can't reconsider this again at the end of
18 the defense case, then that's final. And if I did knock out
19 civil RICO at that time, you have every right to take that
20 to the circuit and say that Judge Carter was wrong in the
21 posture he put the case in.

22 So I need a little bit of research by you on
23 behalf of NDS. That's why I wanted all of you in here. I
24 really need to know if I have that authority or if I'm, in a
25 sense, now dooming you and closing the gate to an even more

1 thoughtful consideration in terms of civil RICO at the end
2 of your case, and it just goes over to the jury. But that's
3 as much research as we could do last night because we wanted
4 to focus back on the three motions for mistrial, try to look
5 at some of the predicate acts, try to take into
6 consideration, but right now, in calling for a directed
7 verdict, that's denied.

8 Now, I have a lot of other things that we can take
9 up this morning.

10 There's a number of documents out there, but I
11 want NDS to have a thoughtful conversation about whether, in
12 fact, the entire area should call for this Court's
13 admonition to the jury. And in no way are you acquiescing
14 to my prior rulings. In fairness, I want both of you in as
15 good a tactical position as possible. But I'm prepared and
16 offer to you -- and I'm inclined to unless I hear an
17 objection -- an admonition that this entire area concerning
18 the U.S. Attorney's findings, their investigation, is
19 collateral, should not be considered by this jury, should be
20 stricken, as well as any inferences concerning Mr. Spertus.

21 Why don't you talk for a moment and tell me your
22 positions.

23 Counsel, while you're deciding that, if you need
24 James Spertus, either one of you, if you decide to decline
25 the Court's admonition, I can certainly get him here. He's

1 local.

2 And Mr. Norris is ordered back, or we can strike
3 the entirety of this by an admonition.

4 My guess is that NDS is thoughtfully considering
5 the import of their request to limit this and to show the
6 U.S. Attorney's efforts, and my guess is that EchoStar would
7 like to take up the Court's offer that's been offered to
8 NDS. But that's just a guess.

9 Mr. Klein, why don't you have a seat, sir.

10 Thank you for your courtesy.

11 MR. KLEIN: If I might, Your Honor, I will answer
12 the Court's question, but I want to explain why the question
13 has particular relevance this morning because the first
14 witness who is going to testify is Mr. Peluso, and
15 Mr. Peluso would testify, unless the Court rules otherwise,
16 about the letter and contacts with Mr. Spertus as well as
17 the U.S. Attorney in San Diego.

18 Mr. Peluso was an Assistant United States
19 Attorney, and he would testify that he wanted to speak to
20 Mr. Norris with respect to satellite piracy; that he did not
21 meet with Mr. Norris because he was made aware of this
22 investigation.

23 He would further testify that he had
24 communications with the U.S. Attorney in San Diego as well
25 as Mr. Spertus and at some point in time became aware that

1 the investigation was not going anywhere, that it was going
2 to be concluded, and eventually received the letter. He saw
3 the letter that Mr. Spertus wrote, and, based on the
4 conversations and the letter, began speaking to Mr. Norris.
5 And, in fact, that's developed into a situation where
6 Mr. Norris aided him on a number of investigations and
7 prosecutions.

8 THE COURT: The first part may be entirely
9 irrelevant; the last part may be very relevant.

10 Once again, bluntly, the whole import of this
11 letter is to influence this jury that the United States
12 Attorney's Office gave a clean bill of health to NDS and
13 that this should carry over into their decision-making
14 process in this case.

15 I'm having NDS complaining on one hand about
16 EchoStar's question yesterday, and yet NDS has opened this
17 door, quite frankly, to have this jury draw the inference.

18 MR. KLEIN: One other point I need to make,
19 Your Honor. There was no ruling on this letter, 1268. I
20 did not give it to you when we talked about the exhibits
21 because I had no intention of putting the exhibit in.
22 Didn't even have the exhibit with me. I did put it in based
23 on what -- the questions that counsel asked about the U.S.
24 Attorney's Office, but there was no ruling that this Court
25 had made with respect to that letter.

1 THE COURT: Well, that's true. There's no ruling
2 on the record, but there was certainly direct rulings on
3 Saturday. And I didn't see you here.

4 I saw Mr. Snyder here and David. I saw David --

5 MR. EBERHART: Eberhart.

6 THE COURT: Eberhart. My apologies. Maybe
7 Mr. Snyder was gone on Saturday.

8 MR. SNYDER: I was here, Your Honor.

9 THE COURT: Okay. Maybe Richard --

10 MR. STONE: Stone.

11 THE COURT: Mr. Hagan, I know you were here.

12 MR. KLEIN: I was here on Saturday, Your Honor.

13 THE COURT: Mr. Klein, I didn't see you on
14 Saturday.

15 MR. KLEIN: I was here Saturday.

16 THE COURT: Did you hear my admonition to you on
17 Saturday? It couldn't have been any more direct. That
18 letter's not coming in.

19 What really happened -- and I'm finding no fault;
20 it happened on both sides -- it was clear to me that the
21 polygraph shouldn't have come up in terms of the request
22 for -- neither one of you want to slow down and ask the
23 Court for its wisdom. You just want to rise to the occasion
24 in front of the jury. Fine. We can argue about that, but
25 from my standpoint, it's clear.

1 MR. KLEIN: Well, one other thing I would ask the
2 Court to clarify as far as Mr. Peluso's testimony, because I
3 need to obviously speak to him and tell him what he can say
4 and what he can't say.

5 Can the Court just make clear -- as I say, our
6 position is the letter should come in, and Mr. Peluso should
7 be able to testify about these communications. But
8 obviously, whatever the Court's ruling is, I will speak to
9 him and make sure that he does not say anything that the
10 Court believes should not be said. I just would like to
11 clarify what he shouldn't say.

12 THE COURT: I think I'm going to clarify the
13 record. I don't think I'm getting any help from either
14 counsel on either side, and therefore this is a collateral
15 matter. It shouldn't be in front of the jury. They
16 shouldn't be drawing an inference from whether the
17 United States Attorney's Office gave a clearance or didn't
18 give a clearance. Mr. Spertus' reputation should not be
19 cast in this light in terms of questions, and I'm going to
20 admonish them to strike this entire area.

21 So Kristee, get the jury.

22 MR. KLEIN: Your Honor, may I speak to Mr. Peluso
23 so for a moment and tell him?

24 THE COURT: Certainly. Kristee, just a moment. I
25 want to pay the courtesy.

1 THE CLERK: Okay.

2 THE COURT: All the other aspects of the testimony
3 are relevant. I heard nothing that causes the Court any
4 concern, but the clearance is not.

5 MR. KLEIN: Okay. Well, should he say -- can he
6 say he had conversations with those -- can he say why he
7 didn't speak to Mr. Norris right away? Which would be
8 because there was an investigation going on.

9 THE COURT: Certainly.

10 MR. KLEIN: Okay. And then he can say at some
11 point he spoke to Mr. Norris?

12 THE COURT: Certainly.

13 MR. KLEIN: And can he say that it was after
14 contact with the U.S. Attorney that he spoke to Mr. Norris?

15 THE COURT: Certainly.

16 MR. KLEIN: But not mention the letter?

17 THE COURT: And not mention the clearance from
18 this point forward. I'm going to have them strike that from
19 their minds, and I'm going to have them strike the innuendos
20 concerning Mr. Spertus' character also from their minds.

21 MR. KLEIN: I understand.

22 THE COURT: By the way, both of you can open that
23 door again if you want to bring Spertus and Norris here, but
24 we're not doing it through leading questions and
25 insinuations like EchoStar.

1 And I think in this effort to listen to Mr. Snyder
2 and to protect you against this alleged bias that it's
3 gotten to the point now that the jury may assume, because of
4 this clearance letter of the U.S. Attorney, that all of this
5 evidence was in front of them. It's not.

6 MR. KLEIN: For the record, Your Honor, NDS's
7 position would be that the admonition would make it worse.
8 We will -- our position is the record should be left the way
9 it is.

10 THE COURT: Just the way it is?

11 MR. KLEIN: Yes, Your Honor.

12 MR. HAGAN: Your Honor, may I be heard on this?

13 THE COURT: Yes. No further discussion, then,
14 unless Mr. Norris is called or Mr. Spertus is called.

15 MR. KLEIN: Yes, Your Honor.

16 THE COURT: That's your position?

17 MR. KLEIN: Yes.

18 THE COURT: You can take that up because the Court
19 would be forewarned, and you paid me the courtesy of telling
20 me about this beforehand -- Mr. Spertus or Mr. Norris.

21 MR. KLEIN: Yes, Your Honor.

22 THE COURT: All right. Counsel on behalf of
23 EchoStar.

24 MR. HAGAN: Yes, Your Honor, I would like to make
25 two points.

1 First, we think that an instruction or admonition
2 to the jury is required. We think that it is unfairly
3 prejudicial for the defendants to argue through any of their
4 witnesses that somehow the United States Attorney's Office
5 gave them clearance or has already considered all of this
6 evidence and has made a determination. The jury is not in a
7 position to understand the difference between a beyond all
8 reasonable doubt standard of proof and a preponderance of
9 evidence standard of proof. And we would request that the
10 Court provide that admonition to the jury.

11 The second point, Your Honor: My question to
12 Mr. Tarnovsky was based on facts. And the reason that that
13 question was asked was because the defendants intend to call
14 a former U.S. Attorney as their first witness, Mr. Peluso.

15 We deposed Mr. Peluso. In his deposition, he
16 acknowledged that there was some sort of colloquial or
17 professional relationship between NDS and Mr. Norris and
18 AUSA Spertus. That was the sole basis for that question.
19 And if the Court is not inclined to give the jury some type
20 of an admonition or instruction, I would like to be able to
21 ask Mr. Peluso, if he testifies about this --

22 THE COURT: And if you do, then, why isn't
23 Mr. Klein in the posture of being able to bring this out at
24 the beginning?

25 MR. HAGAN: And that's why I think the way to cure

1 this is an admonition to the jury to disregard any actions
2 taken by the United States Attorney's Office. It is not
3 binding, and it should not influence their decision in this
4 case in any regard.

5 THE COURT: Okay. We're going to take a brief
6 recess.

7 I'll be back in about 15 minutes.

8 (Recess held at 8:59 a.m.)

9 (Proceedings resumed at 9:15 a.m.)

10 (Outside the presence of the jury.)

11 THE COURT: All right. We're back on the record.
12 The parties are present.

13 Counsel, any further comments so I'm courteous and
14 I hear you fully?

15 Mr. Hagan.

16 MR. HAGAN: Yes, Your Honor, I would just add one
17 thing.

18 The questions about Mr. Norris's or NDS's
19 relationship with AUSA Spertus were made in good faith. The
20 inference is certainly one that the jury can draw, and that
21 is the timing of leaving the AUSA and the declination letter
22 and the inference that can be drawn between that
23 relationship.

24 And I would just like to be on the record saying
25 that there was certainly no malintent on our part. We were

1 anticipating that they call Mr. Peluso first, which they are
2 doing, and it was based on testimony that he gave at his
3 deposition.

4 THE COURT: Okay. Thank you.

5 I'm going to turn to Mr. Klein as a courtesy.

6 MR. SNYDER: May I respond?

7 THE COURT: Mr. Snyder.

8 MR. SNYDER: Thank you, Your Honor.

9 Two things: First, we continue to believe that an
10 admonition that the jury not consider for any purpose the
11 results of the investigation would be unduly prejudicial in
12 the context of the case.

13 It is a fact that the investigation occurred and
14 that the Government declined to prosecute. And we are all
15 aware of the multifarious reasons for which -- based on
16 which that decision can be made. But it is a fact.

17 When the defendants asked to introduce the letter
18 from Mr. Spertus, as I understood it, part of the Court's
19 rationale was that the evidence of the Government not taking
20 action was already before the Court in the context of the
21 witness's testimony, and thus it would be unnecessary and,
22 in the Court's words, unduly prejudicial to have the letter
23 introduced. But those facts still remain.

24 If the Court gives the admonition, it is now
25 indicated, and that testimony is struck from the record.

1 Then we are left only with testimony about an investigation
2 having occurred with no resolution of that investigation,
3 which could be highly prejudicial to the defendants if the
4 jury were to draw the inference that there was some kind of
5 prosecution or charges or other kind of conduct made.

6 Second point, Your Honor: The Court's admonition
7 regarding the investigation by the Government occurs in the
8 context when there have been allegations made against the
9 defendants in a number of contexts, including the DirecTV
10 litigation and the Canal+ litigation about which there has
11 been substantial testimony, including, as was part of the
12 discussion last night, the resolution of those cases.

13 Indeed, it has become a part of the plaintiffs'
14 theory of the case that those cases were resolved in a way
15 that suggest liability on behalf of NDS and some kind of
16 control by News Corp. in trying to resolve those cases to
17 insulate it from liability for some misconduct. Allegations
18 that we vehemently deny.

19 If the Court gives the admonition regarding the
20 U.S. Attorney's investigation but the jury is still allowed
21 to consider the resolution of those cases in the context of
22 plaintiffs' theory that those cases were resolved in a way
23 to protect NDS from allegations of misconduct or from actual
24 misconduct, that is severely prejudicial to the defendants
25 and hamstring us in our ability to create a proper record.

1 THE COURT: Okay.

2 Mr. Hagan.

3 MR. HAGAN: Brief response, Your Honor.

4 The record is clear, based on the testimony of
5 Mr. Norris and Mr. Tarnovsky, that the investigation was
6 ultimately dismissed, that no charges were filed, and that
7 there was a declination by the U.S. Government to pursue
8 charges. So an admonition to the jury that they not
9 consider that is sufficient to protect both sides. And it
10 takes away the ability -- or the necessity for either side
11 to make the arguments that have been attempted to be made
12 through the initial witnesses in this case.

13 With respect to the DirecTV and Canal+
14 litigations, I'd respectfully disagree with Mr. Snyder's
15 characterization, and I would point out that EchoStar has
16 several claims that still survive, including the civil RICO
17 claim, which require us to establish a pattern and practice
18 and predicate acts, which Mr. Snyder raised last night.

19 The jury can certainly consider the underlying
20 conduct in those litigations, and we are certainly able to
21 argue the inferences that could be drawn from News Corp.
22 purchasing controlling interest in those companies, the
23 lawsuits being dismissed, and the destruction of evidence,
24 including on the part of ICG and TDI, as being somehow
25 related to that.

1 THE COURT: Okay.

2 Mr. Snyder.

3 MR. SNYDER: Thank you, Your Honor.

4 And I think that Mr. Hagan -- well, let me respond
5 to both of the points.

6 First of all, unless I'm entirely mistaken about
7 how admonitions from the Court work, if the Court admonishes
8 the jury that they are not to consider for any purpose the
9 results of that investigation, I would be inviting error if
10 NDS, in closing, argues that the jury should consider those
11 things. And I suspect the Court would react strongly to
12 those. So I don't understand the comment he's making about
13 how an admonition would be sufficient, and yet the jury can
14 consider the evidence. It cannot do both, consider it and
15 not consider it.

16 Second, the theory that resolution of the DirecTV
17 and Canal+ cases was somehow indicative of misconduct is a
18 theory that was never pled in any complaint in this case and
19 in fact was first articulated in one of the Saturday
20 sessions before we began putting on evidence. It has not
21 been the subject of discovery; it has not been part of this
22 case until immediately before trial; and most importantly,
23 it is not a part of the RICO claim.

24 The predicate acts which are required to be pled
25 with particularity in the RICO claim are criminal copyright

1 infringement of plaintiffs' copyrights. Those are not at
2 issue in the DirecTV case; those are not at issue in the
3 Canal+, even in the broadest form.

4 And second, violations of 1029: Those also
5 require interception of plaintiffs' signal. Those are not
6 at issue in the DirecTV case; those are not at issue in the
7 Canal+ case. So for plaintiffs to argue that somehow the
8 allegations in the DirecTV case and the Canal+ case are
9 relevant to a RICO claim, it is relevant to a RICO claim
10 that is not part of this case and has never been pled.

11 THE COURT: Mr. Hagan.

12 MR. HAGAN: Yes, Your Honor. With respect to the
13 RICO claim, we are required to establish a pattern and
14 practice of racketeering activities. That requirement does
15 not apply solely to plaintiffs' conditional access system;
16 it applies to all conditional access systems for any of the
17 competitors in this market. And that is clear by the other
18 element of RICO, which is that we are required to prove a
19 likelihood of continued misconduct. That does not require
20 us to prove it by solely to EchoStar's conditional access
21 system. That allows us to argue that the continuing wrong
22 could continue with -- as it did DirecTV, Canal+, Sogecable,
23 and EchoStar.

24 THE COURT: Mr. Snyder -- although I'm sure you're
25 both exhausted, and I invite your arguments, and then we'll

1 go back to Mr. Hagan. I'm not chilling you at all. In
2 fact, I'm inviting you to comment.

3 MR. SNYDER: I appreciate your courtesy,
4 Your Honor, but with respect to Mr. Hagan, I don't believe
5 that his argument addresses the point at all that this is an
6 eleventh hour or twelfth hour or 1:00 a.m. introduction to
7 this case. And the allegations they're making, the theory
8 that they are articulating, is not one that they pled. A
9 requirement that they plead those acts, the predicate acts
10 which lead to or potentially lead to an allegation or
11 pattern of misconduct, those are not part of this case.
12 They're not.

13 THE COURT: It's difficult for a Court when it's
14 trying to give each party the dignity, through their
15 exquisite preparation, of arguing a lawsuit. I've been
16 involved as a litigator where the judge took my lawsuit from
17 me, and I've never forgotten that experience. So I've been
18 trying to let each of you develop within the rules of law
19 the best possible presentations for both sides as respective
20 plaintiffs and counterplaintiffs and defendants and
21 counterdefendants.

22 But when the Court's faced with a motion for
23 mistrial, then the Court has to move to protect its record
24 also. Therefore, I don't think the parties can have it both
25 ways. And in giving you that option and ability, when

1 motions for mistrial are made, the Court has to move to
2 protect this jury.

3 Now, I'm going to bring this lawsuit in. You're
4 encouraged to keep your expansive nature on both sides.
5 There's no chilling effect. There's nothing frustrating
6 about counsel as far as this Court's concerned -- only with
7 the companies involved, obviously.

8 But the admonition will be as follows:

9 Yesterday counsel engaged in a discussion
10 involving former United States Attorney James Spertus.
11 Counsel for NDS had previously asked a witness about the
12 United States Attorney's investigation of NDS. The Court is
13 concerned that you might draw some inference based upon the
14 decisions by the United States Attorney's Office concerning
15 the liability or nonliability of the parties before the
16 Court in this civil lawsuit.

17 Those decisions have no bearing and should have no
18 bearing on your decision. There should be no implication of
19 any misconduct by the United States Attorney's Office or
20 Assistant United States Attorney James Spertus.

21 You are the only trier of fact that has heard all
22 of the evidence in this case. You should strike from your
23 consideration any testimony regarding the investigation of
24 NDS by the United States Attorney's Office.

25 That will be my admonition in just a few moments.

1 Second, your first witness will not be the
2 gentleman from the United States Attorney's Office. I'm
3 leery now. I want to hear a full offer of proof, and I
4 don't want to answer quickly when you start talking to me
5 about different areas you can get into. You'll call another
6 witness out of order.

7 This time the Court's going to take its time out
8 of the presence of the jury and hear exactly what this
9 gentleman's going to say in light of my admonition.

10 Kristee, get the jury, please.

11 That should be a curative instruction; that should
12 resolve it; and I hope that the reviewing court recognizes
13 that the Court inartfully tried to cure that yesterday,
14 initially, when it saw and realized what was occurring.
15 That was my initial attempt, so this is not anything other
16 than a follow-up from yesterday's inartful wording to the
17 jury.

18 (In the presence of the jury.)

19 THE COURT: Good morning.

20 We're back on the record, and I want to thank the
21 ladies and gentlemen of the jury.

22 Counsel, thank you for your courtesy. If you'll
23 please be seated.

24 Any delay is entirely my responsibility. It is
25 not to reflect on hard-working counsel for both sides. It

1 is my inability, quite frankly, to foresee some issues,
2 et cetera, and thank you for your forbearance.

3 I'm going to admonish you as follows:

4 I had a colloquy with you yesterday concerning a
5 James Spertus, an Assistant United States Attorney, and
6 informed you at that time that Mr. Spertus was not before
7 the Court. But upon further reflection, I will continue
8 along that same vein that I attempted to talk to you about
9 yesterday.

10 Yesterday counsel engaged in a discussion
11 involving former Assistant United States Attorney
12 James Spertus. Counsel for NDS had previously asked a
13 witness about the United States Attorney's investigation of
14 NDS, and that came in through other witnesses earlier in the
15 trial. This Court's concerned that you might draw some
16 inference based upon the decisions by the United States
17 Attorney's Office concerning liability or nonliability of
18 the parties before the Court in this civil lawsuit.

19 Those decisions have no bearing and should have no
20 bearing on your decision in this lawsuit. There should be
21 also no implication of any misconduct by the United States
22 Attorney's Office or Assistant United States Attorney
23 James Spertus.

24 You are the only trier of fact that has heard and
25 will be hearing all of this evidence. You should strike

1 from your consideration any testimony regarding the
2 investigation of NDS by the United States Attorney's Office.
3 In other words, this is this lawsuit. Let's hear the
4 evidence in this lawsuit from the witness stand. Okay? And
5 no inference is to be drawn either for or against either of
6 these parties.

7 Okay. Now, later on I'll have further discussion
8 with counsel, but at this time that admonition stands. And
9 I started to inartfully try to tell you that yesterday;
10 that's a more formal admonition to you.

11 Now, also I've been informed last evening that
12 counsel for EchoStar is resting.

13 Is that correct, Counsel?

14 MR. HAGAN: That's correct, Your Honor.

15 THE COURT: And are you formally resting at this
16 time in front of the jury?

17 MR. HAGAN: We are formally resting at this time.

18 (Plaintiffs rest.)

19 THE COURT: Now, there may be, Counsel, through
20 the last nine days a series of evidence that we may have
21 neglected. In other words, we didn't have time last evening
22 to go over each item of evidence, and I don't want the
23 resting to be a preclusion of a request for some other item
24 of evidence that we might have overlooked.

25 So if I can have your stipulation that we can go

1 over those evidentiary items this evening and check them off
2 with Kristee, then we could keep moving the case along.

3 Would that be acceptable to EchoStar?

4 MR. HAGAN: Yes, Your Honor.

5 THE COURT: And to NDS?

6 MR. SNYDER: Yes, Your Honor.

7 THE COURT: And the same courtesy to NDS. When
8 you rest your case, if there is any rebuttal or surrebuttal
9 in that matter, we can go over the evidentiary list during
10 the evening.

11 Then EchoStar has formally rested their case.

12 NDS has been prepared for quite a while. We all
13 believed that we would be starting the case involving NDS
14 today, so we're right on schedule, actually.

15 So Counsel on behalf of NDS, Mr. Klein.

16 MR. KLEIN: Thank you, Your Honor.

17 THE COURT: Thank you.

18 MR. KLEIN: Ken Klein representing NDS.

19 And defendants call Mr. Marco Pizzo, Your Honor.

20 THE COURT: Thank you.

21 Mr. Pizzo.

22 Mr. Pizzo, if you would be kind enough to raise
23 your right hand, please.

24 MARCO PIZZO, DEFENSE WITNESS, SWORN

25 THE WITNESS: I do.

1 THE COURT: Thank you, Mr. Pizzo.

2 If you would have a seat, please, in the witness
3 box.

4 And after you're seated, sir, would you be kind
5 enough to face the jury, make sure that the microphone's
6 close to you and state your full name for the jury, please.

7 THE WITNESS: My name is Michael Jerome Pizzo.

8 THE COURT: Sir, would you spell your last name
9 for the jury.

10 THE WITNESS: Sure. P-I-Z-Z-O.

11 THE COURT: Thank you.

12 This is direct examination by Mr. Klein on behalf
13 of NDS.

14 MR. KLEIN: Thank you, Your Honor.

15 DIRECT EXAMINATION

16 BY MR. KLEIN:

17 Q. Good morning, Mr. Pizzo.

18 A. Good morning.

19 Q. Are you familiar with the nickname "xbr21"?

20 A. Yes.

21 Q. Whose nickname is that?

22 A. It's my nickname.

23 Q. How long have you used that nickname?

24 A. After '95, I would say.

25 Q. 1995?

1 A. That's right.

2 Q. Are you still using it today?

3 A. Yes.

4 Q. How did you choose that particular nickname?

5 A. I was -- it is a nice nickname. It had xbr, you know,
6 it's the name of the Sony xbr line of televisions, and 21 is
7 like a lucky number. So it was kind of short.

8 Q. Okay. Now, I'd like you to tell the jury a little bit
9 about yourself.

10 How old are you?

11 A. I'm going to be 39 years old June 6.

12 Q. Where do you live?

13 A. I live in St. Louis, Missouri.

14 Q. St. Louis?

15 A. Yes.

16 Q. And how long have you lived there?

17 A. Oh, about 20 years now.

18 Q. Did you graduate from high school?

19 A. Yes.

20 Q. Did you go to college?

21 A. Yes, I did.

22 Q. Where did you go to college?

23 A. I went to University of Missouri, Rolla. When I
24 graduated, I got a bachelors in electrical engineering.

25 THE COURT: Electrical engineering?

1 THE WITNESS: That's correct.

2 THE COURT: You say you worked at the University
3 of Missouri, Roll?

4 THE WITNESS: Rolla. R-O-L-L-A.

5 THE COURT: Thank you very much.

6 BY MR. KLEIN:

7 Q. And what was your degree in when you graduated?

8 A. Got a bachelor in electrical engineering.

9 Q. Are you employed?

10 A. Yes, I am.

11 Q. Where do you work?

12 A. I work at CH2M Hill.

13 Q. What does CH2M Hill do?

14 A. It's a consultant engineering company that deals with,
15 you know, industrial designs.

16 Q. And what do you do?

17 A. I'm an industrial engineer, and I design facilities,
18 you know. I deal with consulting for a company like Boeing,
19 BSF, Monsanto. I design their industrial facility.

20 Q. Does your job have anything to do with satellite TV?

21 A. Uh, no.

22 Q. Are you married?

23 A. Yes, I am.

24 Q. Have any children?

25 A. Yes. Two boys.

1 Q. Two boys. How old?

2 A. I've a six-years-old and an eight-years-old.

3 Q. Now, do you today or have you ever had any relationship
4 at all with NDS?

5 A. Uh, no, no.

6 Q. Now, to your knowledge, before being contacted by
7 investigators from NDS a few months ago, have you ever had
8 any contact with any other NDS employees?

9 A. No.

10 Q. Now, did you ever -- do you know what a glitcher is?

11 A. Yes.

12 Q. What's a glitcher?

13 A. Well, it's also called an unlooper. It's a device that
14 allows you to change a frequency and voltage and apply it to
15 another device, you know, like a Smart Card.

16 Q. And is a glitcher used sometimes to get free satellite
17 TV?

18 A. That's correct.

19 Q. Did you ever use a glitcher?

20 A. Yes, I have.

21 Q. Did you ever use a glitcher to obtain free DirecTV?

22 A. Yes, I did.

23 Q. About how long did you do that for?

24 A. Several months.

25 Q. When, approximately?

1 A. '97, '98 probably.

2 Q. Have you used a glitcher to obtain free DirecTV since
3 that '97, '98 time period?

4 A. Nowadays it's impossible to use it.

5 Q. When you say it's impossible, why is that?

6 A. Because the Dalas stream is secure.

7 Q. I'm sorry. What is secure?

8 A. The dish network -- the DirecTV data stream is secure
9 these days, so it would be impossible to use it.

10 Q. Your glitcher didn't work anymore?

11 A. No.

12 Q. Now, have you over the years had a subscription to
13 EchoStar?

14 A. That's correct. I was one of the very early
15 subscribers.

16 Q. And did you ever obtain satellite programs from
17 EchoStar without paying for them?

18 A. Well, I had a subscription and -- and I did learn
19 through the forums, you know, how to obtain, you know, free
20 TV.

21 Q. And did you obtain free EchoStar --

22 A. I did some testing, yes, and it worked.

23 Q. And about how long did you do that for?

24 A. About a year.

25 Q. And did there come a time when you stopped?

1 A. Oh, yes. Yes.

2 Q. When was that?

3 A. After the year 2000, probably.

4 Q. Now, why did you use a nickname like xbr21 instead of
5 using your real name?

6 A. Because in the forums, you don't use your real name.
7 You use a handle, you know, nickname.

8 Q. Now, have you ever had occasion to go to a website
9 called dr7.com?

10 A. Yes.

11 Q. When did you start going to that website?

12 A. It was about late '97.

13 Q. Why did you go there?

14 A. It was one of the prominent sites for information about
15 satellites.

16 Q. Now, did there come a time when you were going to
17 dr7.com when you began reading messages that dealt with
18 hacking of DirecTV?

19 A. Right. In '97 there were messages, and it was dealing
20 with DirecTV.

21 Q. And then did there come a time when you started reading
22 messages on dr7.com that dealt with hacking of EchoStar?

23 A. That's right. That's correct.

24 Q. And when did you start seeing those messages?

25 A. Well, I started seeing it from the front page of dr7.

1 There was something imminent that was gonna be released.

2 Q. And based on what you were reading on the Internet
3 sites that you were going to, did you come to an
4 understanding at some point in time whether EchoStar was
5 successfully being hacked by satellite pirates?

6 A. Yes.

7 Q. When did you come to that understanding?

8 A. By the files that were posted on the dr7 website, about
9 all the chatter, all the people who have confirmed that it's
10 been hacked.

11 Q. And about when did you start seeing that chatter that
12 EchoStar was being successful -- what year?

13 A. '98. I will say in November '98.

14 Q. Now, in '98, '99, the year 2000, was it possible to go
15 to Internet websites and buy devices over the Internet that
16 would allow people to receive free EchoStar programming?

17 A. Yes.

18 Q. And did you get some understanding from reading the
19 messages on the websites -- as to whether these devices that
20 people were selling to get free EchoStar programming -- as
21 to whether they worked?

22 A. Yes. They did work.

23 Q. Now, when you first started going to www.dr7, did you
24 understand what people were actually doing to successfully
25 hack EchoStar?

1 A. Yes. It began -- I was learning, so -- and then I
2 understood. I pieced it all together with time.

3 Q. So eventually you began to understand --

4 A. Yes.

5 Q. -- what they were doing?

6 A. Through the postings.

7 THE COURT: Let's make sure that you hear the
8 question and then take a breath so that you don't talk over
9 the top of each other.

10 THE WITNESS: Okay.

11 THE COURT: And then Counsel will control that by
12 asking you a question. Okay?

13 THE WITNESS: Okay. Yes.

14 THE COURT: Thank you very much.

15 BY MR. KLEIN:

16 Q. Now, based on what you were seeing on the Internet on
17 sites like www.dr7.com, did you get an understanding, say,
18 back in the year 2000, as to whether EchoStar had a strong
19 security system?

20 A. It had a weak security system.

21 Q. Now, were there other websites besides dr7.com that you
22 were going to, say, around 1999, 2000, that dealt with
23 satellite piracy?

24 A. Yes.

25 Q. Tell us some of the other sites you went to.

1 A. Okay. I went to a UK website known as Interesting
2 Devices.

3 Q. By "UK," what do you mean?

4 A. It was located in the UK.

5 Q. United Kingdom?

6 A. That's right.

7 Q. Okay. Continue.

8 A. Originated from there. Then there was another website
9 like itechsats. And the PiratesDen, that would be another
10 one.

11 Q. Now, let's take the year 2000. During that year, can
12 you give us an understanding of how frequently you visited
13 www.dr7.com or those other websites that you just mentioned?

14 About how frequently did you go there?

15 A. Dr7 every other day was like my home base.

16 Q. And was that during the year 2000?

17 A. Yes.

18 Q. Now, when you went to dr7 in 2000, what did you
19 typically do when you actually got on the site?

20 A. Well, my first thing -- my routine it was, uh, check
21 the front news to see what's the latest news, check the file
22 section to see any new files been added. And then I would
23 proceed and go into the forum, you know, and open the forum
24 with EchoStar on it, and then I will look any threads on the
25 forum which are the freshest, you know. They got more

1 responses, more chatter.

2 Q. Now, you said that you typically went every other day.

3 If you missed a day or two on dr7, you didn't get to go

4 there for some reason, and then after, say, two days'

5 absence you went to dr7, was there some way that you could

6 determine what happened on the days that you were not there?

7 A. Right. The nature of the forum is a static place. You

8 post it, a message, and it will stay there. And if it is

9 something of importance, there will be a lot of chatter. It
10 will be right at the top.

11 Q. Okay. Well, let's say you don't go on the website on

12 Monday and Tuesday, and you go on Wednesday. My question

13 is, is there some way that you could tell what was posted on

14 Monday and Tuesday even though you hadn't been there?

15 A. Everything is dated. So I would have known if

16 something was new.

17 Q. I couldn't hear that.

18 A. Everything is dated, so if something gets added for

19 some of the file section, it will be in chronological order.

20 Or the new section, if any news would be added, I would be

21 able to catch up right away because I would know what was

22 the last item that I read last week.

23 Q. Just so I understand, is what you're saying that even

24 if you did not go on the file, say Monday and Tuesday, when

25 you went on Wednesday, you could look back to the last date

1 you did go on, say it was Sunday?

2 A. Right.

3 Q. And then read the messages that were posted between --
4 or from Sunday, from Monday, from Tuesday, and that's how
5 you could catch up?

6 A. That's right. And always the freshest messages always
7 right at the top when you click it.

8 Q. Now, during the, say, the year 2000 when you were on --
9 going to www.dr7.com, did you ever recall somebody named
10 StuntGuy posting on that site?

11 A. Of course.

12 Q. What about Nipper? Do you recall someone named Nipper
13 posting during the year 2000?

14 A. Yes.

15 Q. Now, I want to direct your attention to December of
16 2000.

17 A. Okay.

18 Q. Did you have occasion to go to the website Interesting
19 Devices in December of 2000?

20 A. Yes, I did.

21 Q. And that was the website you said originated in the
22 United Kingdom?

23 A. Yes, originated in the United Kingdom. That's correct.

24 Q. Now, in December of 2000, did you see a posting from a
25 person called "Nipper Clause"?

1 A. Yes, I did.

2 Q. Was there something significant about that posting that
3 causes you to remember it?

4 A. It was at the very top, it was the freshest, and they
5 had a lot of reposting, a lot of chatter on it.

6 Q. Now, when you say it was at the very top, does that
7 give you some understanding as to how long --

8 A. It is the most discussed recent topic.

9 Q. Now, what was the subject of that posting that you saw
10 on Interesting Devices?

11 A. It was some code.

12 Q. And when you looked at it, did you understand what it
13 was?

14 A. At first, no.

15 Q. Did you think it was significant in some way when you
16 looked at it?

17 A. Yes.

18 Q. Why did you think it was significant?

19 A. Because it was a code snippet, and a lot of people were
20 talking about it -- what is it, what it does. And three
21 posts down says it works, and I said, what works? It was
22 something of significance to me.

23 Q. Were you are able to tell whether it involved EchoStar?

24 A. Yes, because it was in the EchoStar section that it was
25 posted.

1 Q. I see. And did you read the comments that were posted
2 about that particular posting --

3 A. Yes, I did.

4 THE COURT: Strike the question and reask the
5 question.

6 BY MR. KLEIN:

7 Q. I think what you need to do is, when I ask my question
8 maybe count to one or two so you don't answer until I
9 finish.

10 A. Okay. Try to do that.

11 Q. When you saw the posting on Interesting Devices, I
12 think you said that there were a lot of other postings
13 commenting on it?

14 A. Yes.

15 Q. And at some point, did you decide to repost that
16 posting somewhere else?

17 A. Yes.

18 Q. By "reposting," what does that mean?

19 A. Well, I took this post and I did a cut and paste,
20 meaning I highlighted the text and I copied the clipboard,
21 ready to be reposted to a different place.

22 Q. Okay. And where were you going to repost it?

23 A. In my home base, dr7.

24 Q. And what was there about this posting that you saw on
25 Interesting Devices that you thought was important enough

1 that you wanted to repost it on dr7?

2 A. I wanted to repost on dr7 so there would be talk at
3 dr7.

4 Q. And did you repost it?

5 A. Yes, I did.

6 Q. Can you give us some understanding as to how much time
7 lapsed between when you saw the post on Interesting Devices
8 and then reposted it on www.dr7.com?

9 A. Okay. A matter of hours.

10 MR. KLEIN: Now, Your Honor, I would ask that the
11 witness be shown Exhibit 511-A, please.

12 THE COURT: 511-A?

13 MR. KLEIN: Yes, Your Honor.

14 THE COURT: Thank you.

15 MR. KLEIN: Your Honor, I'm not sure if this has
16 been received in evidence, but I would ask that this be
17 received into evidence at this time.

18 THE COURT: So I'll receive it in evidence at this
19 time, Counsel.

20 (Exhibit No. 511-A received in evidence.)

21 (Document displayed.)

22 BY MR. KLEIN:

23 Q. Now, looking at Exhibit 511-A, we see -- I guess, it's
24 the third posting. It says, "xbr21 member."

25 Do you see that?

1 A. Yes. I see it.

2 Q. It says it's posted December 23rd, 2000.

3 Now, is that what you reposted on dr7?

4 A. Right. That's correct.

5 Q. Now, when you reposted it on dr7, how many times did
6 you actually post it there?

7 A. Twice.

8 Q. Why did you do that?

9 A. Because since I was on dial-up, it didn't show up right
10 away that I posted, so I clicked it again to make sure it
11 gets posted.

12 Q. Now, we see the first line. It says, "You want
13 Nipper Clause here" and then a colon. Do you see that?

14 A. Yes, I do.

15 Q. Who wrote that?

16 A. I did.

17 Q. Okay. And then after that, it begins, "There will be
18 no boxes anymore. There will be no more fighting amongst
19 us," and it goes on. Is that, beginning with "There will be
20 no boxes," is that what you had seen on Interesting Devices
21 and had copied and pasted onto dr7?

22 A. Yes. In its entirety, yes.

23 Q. So the only thing you added was, "You want
24 Nipper Clause here"?

25 A. That's correct.

1 Q. Now, after you posted Exhibit 511-A, was there any
2 response from other individuals?

3 A. Yes, it was, you know, lot of responses.

4 Q. Now, when you say there were a lot of responses, what
5 was the nature of the responses?

6 A. Well, first, some people were saying what is it, and
7 then some people said it works. It was, you know, a code to
8 basically get inside the EchoStar card.

9 Q. And was that discussed in the responses that came after
10 you reposted this?

11 A. Not immediately, but thereafter, yes. You know, after
12 like several hours.

13 Q. And were you on the site watching the responses after
14 you posted your --

15 A. Yes, I was.

16 Q. Okay. Now, had you ever seen this Nipper Clause
17 posting on dr7 before you saw it on Interesting Devices?

18 A. No.

19 Q. Had you ever seen it on Interesting Devices before you
20 saw it on the day that you've testified about?

21 A. No.

22 Q. Had you ever seen any references to this posting on
23 Interesting Devices for the day that you saw it and reposted
24 it?

25 A. No references.

1 Q. Had you ever seen any references to this posting on dr7
2 before the day that you posted it?

3 A. No reference on dr7.

4 Q. Do you believe you were the first person to post this
5 code on dr7?

6 A. Yes.

7 Q. Why do you think that?

8 A. Well, first of all, there's -- there's no one claiming
9 that I double-posted. They will tell me right away it's
10 been discussed in another thread.

11 Q. So are you saying if someone had posted it before, then
12 you would expect that somebody might come on and say, "Gee,
13 we've seen this before. Why are you showing us old stuff?"
14 Something like that?

15 A. Yes, I would be alerted.

16 Q. And you didn't see that?

17 A. No.

18 Q. And any other reasons you believe that you were the
19 first one to post it?

20 A. I didn't see -- I never seen on the website.

21 Q. Did you see anybody else say anything to indicate that
22 it had been posted before on dr7 before you did it?

23 A. No reference.

24 Q. Did you see anyone -- any reference by anyone saying
25 they had seen it on any website -- dr7 or any other

1 website -- before you posted it?

2 A. No reference.

3 Q. Now, you said that you didn't go to the website every
4 day. Well, how do you know that this same NipperClause
5 posting didn't appear on dr7 on one of the days that you
6 just weren't there?

7 A. There would be some traces left.

8 Q. What do you mean by that?

9 A. Well, even if it was deleted, somebody would say, "Hey,
10 somebody deleted this."

11 Q. I'm sorry. You're saying if it were deleted, somebody
12 would have said something? I'm not sure --

13 A. If you delete a post within a forum, it will automatic
14 mark and say "edited," either by moderator or the guy who
15 posted it. And somebody would have talked about it.

16 Q. Okay. So you're saying if it appeared before you
17 posted it, and if it was for some reason deleted, you would
18 still expect to see some discussion about it?

19 A. That's correct.

20 Q. And did you see any such discussion indicating to you
21 that this posting had appeared before you posted it and been
22 deleted?

23 A. I didn't see such discussion.

24 Q. Now, you sat for a deposition in this case. Do you
25 remember that?

1 A. Yes.

2 Q. In your deposition, you were asked a question about,
3 "Well, if the file was taken down before the next occurrence
4 when you visited the website, then you would have no
5 knowledge that it had been taken down?"

6 And you said, "Correct," you wouldn't have any
7 knowledge.

8 I'm not quite sure if -- is it your testimony that if
9 it was up on that website before you posted, you would --
10 you would know it, or you wouldn't know it?

11 A. Well, it is possible it could have been posted and
12 30 seconds later removed. But if it stayed there enough to
13 be clicked, you know, somebody would have known it.

14 Q. Okay. So you're saying it could have been up there for
15 a few seconds and removed before anybody saw it, and that
16 way you wouldn't see any postings?

17 A. Right.

18 Q. And that could have occurred?

19 A. That's correct.

20 Q. But you're saying if it was up on the website long
21 enough for someone to click -- and by "click," you mean long
22 enough for somebody to see it --

23 THE COURT: Let's stop.

24 BY MR. KLEIN:

25 Q. You're saying if it was up on the website long enough

1 for somebody to click, and that means see it and write some
2 kind of response, then you would know about it?

3 A. Yes.

4 Q. And how would you know about it?

5 A. There will be talk. Talking about it. Posts about it.

6 Q. And you didn't see anything like that?

7 A. I didn't see any postings.

8 Q. Now, when you visited the website www.dr7.com in
9 December of 2000, did you ever see a single posting that
10 said in words or in substance that this NipperClause
11 posting, Exhibit 511-A, or anything similar to it, had
12 appeared on that site before you posted it?

13 A. It never appeared on that site before I posted it.

14 Q. Now, this posting, Exhibit 511-A, you said that you
15 read the comments about it, and you started to learn what it
16 was and the significance of it?

17 A. Yes.

18 Q. Did you learn that this posting dealt with a hole in
19 the EchoStar security system?

20 A. Yes.

21 Q. Did there come a time when you read postings over the
22 Internet site www.dr7 that indicated that this hole that was
23 discussed in Exhibit 511-A, that this hole was fixed? Did
24 that ever happen?

25 A. Afterwards.

1 Q. Yeah. I'm saying after you posted Exhibit 511-A, did
2 there come a time later when you read other postings that
3 indicated that the hole was fixed by EchoStar?

4 A. Several months later.

5 Q. Now, within the last few months, you were contacted by
6 investigators from NDS?

7 A. Yes.

8 Q. Before they contacted you, had you ever heard the name
9 Chris Tarnovsky?

10 A. Never.

11 Q. Have you ever heard of a "logger"?

12 A. Yes.

13 Q. And did you hear about loggers when you visited the
14 websites that you were visiting?

15 A. Yes, on dr7.

16 Q. And based on your trips to dr7 and the other websites,
17 did you have an understanding as to whether someone could
18 obtain a logger over the Internet?

19 A. You could obtain a logger over the Internet or build
20 your own.

21 Q. I'm sorry. The last part?

22 A. Build your own logger.

23 Q. You're saying that you could get schematics over the
24 Internet?

25 A. Yes.

1 Q. Now, do you know what a reader is?

2 A. Yes.

3 Q. And based on your going on the web back in 2000, was it
4 possible in 2000 to obtain a reader over the Internet?

5 A. By reader, ISO7816 -- is that what you call it?

6 Q. Did you ever hear the term "reader"?

7 A. Right.

8 Q. Have you heard that?

9 A. Yes.

10 Q. What does a "reader" mean?

11 A. Well, a reader is for a Smart Card. It's a special
12 reader. It's an ISO7816.

13 Q. Is it sometimes used by hackers?

14 A. Right, and it's -- that's correct.

15 Q. And my question is, back in 2000, was it your
16 understanding from going to these websites that you could
17 obtain a reader over the Internet?

18 A. Yes.

19 Q. With respect to a logger, what's a logger?

20 A. A logger is like a wedge device. It goes between a
21 Smart Card and a receiver and allows you to tap into the
22 communication between the receiver and the Smart Card
23 through a computer and basically log it.

24 Q. And do satellite hackers typically use loggers?

25 A. Yes.

1 Q. And back in 2000, that was when you said you could
2 obtain the schematics for a logger over the Internet?

3 A. Yes.

4 Q. Now, I want to direct your attention to 2004. I want
5 to skip ahead a couple of years.

6 A. Okay.

7 Q. Did you become aware, some time around 2004, that
8 EchoStar did a card swap?

9 A. Yes.

10 Q. Based on what you were seeing on the websites -- and,
11 by the way, in 2004 were you still going to these various
12 pirate websites?

13 A. Yes, I was still reading.

14 Q. Based on what you were seeing on the websites in 2004,
15 after EchoStar did their card swap, were hackers able to
16 hack their new card?

17 A. Almost immediately.

18 Q. What about today? Do you still go to some of those
19 websites?

20 A. I check some news website, yes.

21 Q. Based on what you're seeing, is EchoStar still being
22 hacked?

23 A. Ostensibly.

24 Q. Now, did you ever hear of a term called "free-to-air"?

25 A. Yes.

1 Q. And have you heard about that over the website?

2 A. Yes.

3 Q. What is free-to-air?

4 A. Well, free-to-air -- it's a receiver to receive a
5 digital signature unencrypted, and it came from Europe.

6 Q. And are hackers using free-to-air to hack EchoStar?

7 A. That is correct. You know, with the free-to-air
8 receiver and some additional patching programming to the
9 firmware of this receiver, you be able to receive it.
10 Without a DISH Network card or a DISH Network receiver, you
11 will receive DISH Network programming.

12 Q. You said that at some point you were contacted by
13 investigators from NDS. Did anybody from EchoStar ever
14 contact you with respect to the posting, Exhibit 511-A, that
15 you made?

16 A. No.

17 Q. So today are you still posting as xbr21 on various
18 satellite-related websites?

19 A. Not anymore, actually.

20 Q. When did you --

21 A. Like till a few months -- few months ago.

22 MR. KLEIN: Your Honor, I would ask that the
23 witness be shown Exhibit 1343, please.

24 THE COURT: 1343.

25 MR. HAGAN: Your Honor, we would object to this

1 exhibit on the grounds of hearsay.

2 THE COURT: Thank you.

3 BY MR. KLEIN:

4 Q. Is everything you've testified today truthful?

5 A. Yes, it is.

6 Q. Has NDS paid you any money to testify?

7 A. No money.

8 Q. Are you a consultant for NDS?

9 A. No.

10 MR. KLEIN: Thank you, Your Honor. I have no
11 further questions.

12 THE COURT: I haven't received 13-

13 MR. KLEIN: I understand. I'm not going to offer
14 it at this time.

15 THE COURT: So he's just holding it.

16 MR. KLEIN: Yes, Your Honor.

17 THE COURT: Okay. You can put that down, sir.
18 Thank you.

19 Cross-examination by Mr. Hagan.

20 CROSS-EXAMINATION

21 BY MR. HAGAN:

22 Q. Good morning, Mr. Pizzo.

23 A. Good morning, Chad.

24 Q. We've met one time before; is that right?

25 A. That's right. You had a red shirt from "Colonels." I

1 remember you.

2 Q. And on that one occasion I took your deposition; is
3 that correct?

4 A. Yes.

5 Q. And you swore to tell the truth at that deposition
6 under penalties of perjury?

7 A. Yes, I did.

8 Q. Same oath that you took here today?

9 A. Yes.

10 Q. You testified a moment ago that you don't have any
11 relationship or affiliation with NDS whatsoever, is that
12 correct?

13 A. That's correct.

14 Q. But that's not entirely accurate, Mr. Pizzo. You, in
15 fact, a couple of months ago entered into a release and
16 indemnity agreement with NDS, correct?

17 A. That's correct.

18 Q. And NDS investigators approached you and told you they
19 had evidence that you had possessed pirate devices at one
20 point in time in your life?

21 A. I possessed an unlooper, yes.

22 THE COURT: Okay. Now, wait for the question.
23 Slow down.

24 Now, what was your answer?

25 THE WITNESS: Yes.

1 BY MR. HAGAN:

2 Q. And during that meeting, they told you that they would
3 be willing to release you of all of your past misconduct if
4 you would come testify in this trial, correct?

5 A. Not this way, but yes, essentially.

6 Q. And in addition to releasing you, they would also
7 indemnify you for any of your past misconduct, correct?

8 A. That's what the agreement said, yes.

9 Q. So you do have some relationship with the defendants;
10 isn't that right, Mr. Pizzo? And that started a couple of
11 months ago, correct?

12 A. They came December.

13 Q. Okay. So a few months ago?

14 A. Few months.

15 Q. All right. Now, you also testified that the posting
16 you made under xbr21 never appeared on dr7 before you posted
17 it; is that correct?

18 A. That is correct.

19 Q. And are you absolutely certain about that testimony?

20 A. Yes.

21 Q. Are you as certain about that testimony as you are the
22 rest of your testimony?

23 A. I'm about certain that testimony, yes.

24 Q. Let's take a look at what has previously been
25 introduced into evidence --

1 THE COURT: I'm going to negate those questions,
2 Counsel.

3 The line that goes, "Are you certain about this as
4 you are that," I want to disregard those kind of questions.
5 It's not a comparison. So you're not to reflect back
6 because it was wrong on one particular part that he's wrong
7 on another. He's stating he's certain about that. That's
8 good enough, Counsel. This is not a comparison.

9 BY MR. HAGAN:

10 Q. Let's look at Exhibit 113, Mr. Pizzo.

11 MR. HAGAN: Your Honor, this has already been
12 introduced into evidence.

13 THE COURT: 113.

14 MR. HAGAN: Clint, can we blow that up?

15 (Document displayed.)

16 BY MR. HAGAN:

17 Q. Mr. Pizzo, I'm giving you a copy of what has been
18 introduced as Exhibit 113, and I'm going to represent to you
19 that Chris Tarnovsky testified that this is an e-mail that
20 he sent using his alias, Michael George, to various NDS
21 employees.

22 And if you'll look at the text of the e-mail,
23 Mr. Tarnovsky is bragging, saying the "Cat's out of the
24 bag." And what he says is that there's a public file he saw
25 on Interesting Devices.com as well as dr7.com, and it's the

1 syntax to dump any NagraVision card. Do you see that, sir?

2 A. Yes, I see that.

3 Q. The date of your post, xbr21, on the dr7 web site was
4 December 23rd of 2000?

5 A. That's correct.

6 Q. And you're certain of that?

7 A. That's -- it's stamped on the posting, yes.

8 Q. Can you read for the ladies and gentlemen of the jury
9 the date of Mr. Tarnovsky's e-mail bragging about this
10 post --

11 A. December 22nd.

12 Q. So the day before you reposted the file, correct?

13 A. Yes.

14 Q. Do you have any reason to dispute that Mr. Tarnovsky
15 bragged about that file being on dr7 the day before you
16 reposted it?

17 A. I don't know Mr. Tarnovsky.

18 Q. You don't know if Mr. Tarnovsky is Nipper, correct?

19 A. I don't know Mr. Tarnovsky.

20 Q. And if there's any evidence that has been introduced in
21 this trial that links Mr. Tarnovsky to Nipper, you have no
22 way of disputing that, correct?

23 MR. KLEIN: Objection.

24 THE COURT: Overruled. You can answer that.

25 THE WITNESS: I don't know Mr. Tarnovsky.

1 THE COURT: You were monitoring the Internet. You
2 can answer that.

3 BY MR. HAGAN:

4 Q. And so we're clear, Mr. Pizzo, the xbr21 posting that
5 you made was simply a repost, correct?

6 A. It was a repost.

7 Q. You copied and pasted it and put it on the dr7 website
8 on December 23rd, correct?

9 A. Hours later. After it was posted on the Interesting
10 Devices website.

11 Q. On December 23rd, correct?

12 A. December 23rd.

13 Q. Now, you didn't develop that hack methodology, did you,
14 Mr. Pizzo?

15 A. No.

16 Q. And during your deposition, you described it as a hack
17 recipe. Do you recall that?

18 A. Yes.

19 Q. You didn't develop that hack recipe for EchoStar's
20 system, did you?

21 A. I didn't.

22 Q. You didn't write any of the code for that hack recipe,
23 correct?

24 A. That's correct.

25 Q. You didn't even understand the code at the time you

1 copied and pasted it, correct?

2 A. At first, yes. But after few hours, it was known what
3 it was for.

4 Q. But when you copied and pasted it, you did not
5 understand what it meant, correct?

6 A. At the moment, yes.

7 Q. Now, Mr. Pizzo, at the time that you copied and pasted
8 that code, you did not understand the way that the I/O
9 buffer overflow, the RAM ghost effect, the index variable,
10 or the exception handler behavior of EchoStar's Smart Card
11 worked, correct?

12 A. Correct.

13 Q. Now, you would agree, Mr. Pizzo, and I believe you
14 testified in your deposition that as a result of that
15 posting, there was an explosion in EchoStar piracy, correct?

16 A. Yes. There was another way to hack the card,
17 basically.

18 Q. And that was because this public file had been made
19 available to all pirates?

20 A. That's correct.

21 Q. Now, Mr. Pizzo, the original author of that file posted
22 under the name NipperClause, correct?

23 A. Yes.

24 Q. You're not NipperClause?

25 A. I'm not NipperClause.

1 Q. You have no way of disputing that Christopher Tarnovsky
2 used the alias NipperClause, correct?

3 A. I do not know Chris Tarnovsky.

4 Q. Now, you also testified that you believed EchoStar had
5 a weak security system; is that right?

6 A. Yes.

7 Q. Were you aware, Mr. Pizzo, that EchoStar's security
8 system had not been compromised until the defendants
9 developed a hack for that system?

10 A. Please rephrase the question. I don't understand that
11 question.

12 MR. KLEIN: Objection.

13 THE COURT: I'm going to sustain the objection.

14 Just reask the question.

15 (To the jury:) You'll decide if it's the
16 defendant --

17 MR. HAGAN: Certainly, Your Honor.

18 THE COURT: -- in this matter.

19 (To counsel:) So the question's proper without
20 the last portion. Just restate it.

21 BY MR. HAGAN:

22 Q. Mr. Pizzo, were you aware that the defendants engaged
23 in efforts to reverse-engineer and develop a hack for
24 EchoStar's secure system with their Haifa team in 1998?

25 A. I -- I'm not aware of that.

1 Q. And the first time I believe that you said you saw any
2 piracy postings related to EchoStar's security system was
3 after 1998, correct?

4 A. It was in -- by '98, the system was already hacked.

5 Q. November of '98, correct?

6 A. That's correct.

7 Q. And you haven't seen a copy of the defendants' report
8 describing how to hack EchoStar, have you, sir?

9 A. I haven't seen it, no.

10 Q. So you have no way of knowing that that report was
11 dated November of 1998?

12 MR. KLEIN: Objection, Your Honor. Just argument.

13 THE COURT: Overruled.

14 You can answer the question.

15 THE WITNESS: I don't understand the question.

16 Please rephrase.

17 BY MR. HAGAN:

18 Q. You've not seen a copy of the defendants' report that
19 describes how to hack EchoStar's security system, correct?

20 A. I haven't seen the defendants' report, but on the
21 website in '98 there were files that will tell you how to
22 hack the EchoStar system.

23 Q. November of 1998, correct?

24 A. That's correct. November '98.

25 THE COURT: Now, it's clear, Counsel. His

1 knowledge is limited to the postings. So the last portion
2 of Mr. Klein's objection is going to be sustained.

3 And if you can confine your questions to what he
4 knows.

5 BY MR. HAGAN:

6 Q. Mr. Pizzo, did you ever engage in any efforts to use a
7 focus ion beam, a laser cutter, or a scanning electron
8 microscope to disassemble the chip in EchoStar's card?

9 A. No, I'm not that savvy.

10 Q. You would not consider yourself one of the best
11 engineers in the world for reverse-engineering Smart Cards;
12 would you, sir?

13 A. My expertise is different. Different field.

14 Q. You would not consider yourself one of the two best
15 hackers in the world?

16 A. No.

17 Q. You never developed software applications to work with
18 hacking EchoStar's system --

19 A. No.

20 Q. -- such get AtR, SC talk or anything further, correct?

21 A. No.

22 Q. And you never engaged in efforts to travel across
23 international borders and reprogram EchoStar Smart Cards in
24 basements to intercept the signal, have you, sir?

25 A. No.

1 MR. KLEIN: Objection, Your Honor.

2 MR. HAGAN: No further questions, Your Honor.

3 THE COURT: As to the last question, your
4 objection is sustained.

5 MR. KLEIN: Thank you.

6 THE COURT: Redirect.

7 MR. KLEIN: Thank you, Your Honor.

8 REDIRECT EXAMINATION

9 BY MR. KLEIN:

10 Q. With respect to the post you originally saw on
11 Interesting Devices --

12 A. Yes.

13 Q. -- have you gone back to Interesting Devices after
14 the -- after you saw it that first day to see if it was
15 still there?

16 A. Yes.

17 Q. Was it still?

18 A. Oh, yes.

19 THE COURT: I couldn't hear you.

20 THE WITNESS: Yes.

21 THE COURT: Okay.

22 BY MR. KLEIN:

23 Q. Now, just to be clear, when you saw the post on
24 Interesting Devices, you said that it was a number of hours
25 between when you saw it on Interesting Devices and when you

1 reposted it on www.dr7.com?

2 A. That's my estimation.

3 Q. Now --

4 MR. KLEIN: Your Honor, I would ask that
5 Exhibit 1343 be received in evidence.

6 MR. HAGAN: Same objection, Your Honor. Hearsay.

7 THE COURT: It's received, Counsel. It goes
8 towards corroboration, so now it becomes relevant.

9 MR. KLEIN: Thank you.

10 BY MR. KLEIN:

11 Q. Do you still have Exhibit 1343 in front of you?

12 THE COURT: I used the word "corroboration." It
13 also goes towards credibility so you'll know what's been
14 offered and not offered in terms of this indemnity
15 agreement. I think the jury has a right to see it.

16 BY MR. KLEIN:

17 Q. Do you recognize Exhibit 1343?

18 A. Yes.

19 Q. What is that?

20 A. It's an agreement between me and NDS.

21 Q. And was this agreement signed when you met the NDS
22 investigators a number of months ago?

23 A. Yeah.

24 Q. Now, was it your understanding that part of this
25 agreement required that you testify truthfully about this

1 case?

2 A. Yes.

3 Q. And have you done that?

4 A. Yes, I have.

5 Q. Did the agreement say that NDS would provide you with a
6 counsel if you needed one with respect to this matter?

7 A. Yes, they provide me counsel.

8 Q. And did the agreement tell you that NDS would release
9 you of any claims for piracy of DirecTV?

10 A. Yes.

11 Q. Did the agreement say that NDS would indemnify you
12 for -- if you had legal action as a result of the testimony
13 in this case?

14 A. They provide legal counsel.

15 Q. Yeah. And again, as far as the things that NDS said
16 they would do for you, was it your understanding that none
17 of that would happen if you did not testify truthfully?

18 A. That's correct. It's one of the stipulates -- to tell
19 the truth.

20 Q. And have you done that?

21 A. Yes, I have.

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

24 THE COURT: Recross-examination by Mr. Hagan on
25 behalf of EchoStar.

RE-CROSS-EXAMINATION

1
2 BY MR. HAGAN:

3 Q. Mr. Pizzo, you did agree to testify truthfully today;
4 correct, sir?

5 A. Yes, I did.

6 Q. And your truthful testimony is that you are not
7 NipperClause, correct?

8 A. I'm not NipperClause.

9 Q. Your truthful testimony is that you did not post the
10 nipperclauz file, the original one, on any website, correct?

11 A. I don't understand what you're saying. The original
12 file?

13 Q. The one that you copied and pasted.

14 A. That's a posting. It's not a file.

15 Q. Okay.

16 A. It's different.

17 Q. Your truthful testimony is, you weren't responsible for
18 putting that posting out onto the Internet, correct?

19 A. I reposted from the Interesting Device website on
20 December 23rd into my home base, dr7.

21 Q. Your truthful testimony is that you didn't develop that
22 hack recipe; is that correct?

23 A. I didn't develop -- that's correct.

24 Q. Your truthful testimony is, you copied and pasted that
25 hack recipe from one website and posted it on December 23rd

1 on dr7, correct?

2 A. That's correct.

3 Q. Your truthful testimony is that you have no reason to
4 rebut Mr. Tarnovsky's e-mail seeing that post on
5 December 22nd?

6 A. I don't know Mr. Tarnovsky. You asked me to speculate
7 on somebody that I don't know.

8 THE COURT: Well, the information, Counsel, in 113
9 is what you're referring to. He didn't know Tarnovsky.

10 BY MR. HAGAN:

11 Q. Mr. Pizzo, you have never registered the alias
12 "NipperClause," correct?

13 A. That's correct.

14 Q. And you never --

15 A. That's correct.

16 Q. And you've never registered the alias "NiPpEr2000"?

17 A. That's correct.

18 Q. You've never used the e-mail address
19 ChrisVon@s4.interpass.com to register a Nipper alias; is
20 that correct?

21 A. That's correct.

22 Q. You've never used the alias "Von" to post?

23 A. Never used the alias, Von.

24 Q. You've never used the alias "Von Neumann"?

25 A. No.

1 Q. And your truthful testimony is, you simply reposted the
2 NiPpErClAuZ 00 hack recipe, correct?

3 A. I reposted this recipe from December 23rd from the
4 Interesting Device website, UK website, into my home base at
5 dr7.

6 MR. HAGAN: Thank you. No further questions,
7 Your Honor.

8 THE COURT: Sir, we're placing all of the
9 witnesses on call. I don't know if you're coming back. I
10 seriously doubt it.

11 THE WITNESS: Okay.

12 THE COURT: But I want to be cautious so we don't
13 have any delay. So you live in Missouri?

14 THE WITNESS: Yes, I do.

15 THE COURT: We're going to put you on 48 hours'
16 call.

17 THE WITNESS: Okay.

18 THE COURT: If you're needed, from that time
19 forward, we'll expect you back within 48 hours. I doubt it
20 that we'll need you.

21 THE WITNESS: Okay.

22 THE COURT: I'm going to ask that you remain
23 available until June 15th, but we're going to conclude the
24 case in the early part of May. And we'll call you
25 immediately and tell you that you don't have to remain

1 available.

2 THE WITNESS: Okay, Your Honor.

3 THE COURT: You may step down.

4 (Witness excused subject to recall.)

5 THE COURT: Counsel, your next witness, please.

6 MR. SNYDER: Thank you, Your Honor.

7 Defendants call Jeff Bedser.

8 (Live reporter switch at 10:23 a.m.)

9 (Further proceedings reported by Jane Rule in
10 Volume II.)

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3 CERTIFICATE

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

11
12 Date: April 25, 2008

13
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15 _____
16 DEBBIE GALE, U.S. COURT REPORTER

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