

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

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ECHOSTAR SATELLITE	)	
CORPORATION, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. SACV 03-0950-DOC
	)	
NDS GROUP PLC, et al.,	)	
	)	Day 15, Volume III
Defendants.	)	
_____	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial  
Santa Ana, California  
Friday, May 2, 2008

Jane C.S. Rule, CSR 9316  
Federal Official Court Reporter  
United States District Court  
411 West 4th Street, Room 1-053  
Santa Ana, California 92701  
(714) 558-7755  
08-05-02 EchoStarD15V3

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## I N D E X

## EXAMINATION

Witness Name	Direct	Cross	Redirect	Recross
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KAHN, RAYNOLD

By Mr. Eberhart

9

OSBORNE, WILLIAM

(Via Videotape)

By Mr. Snyder 16

By Mr. Hagan

56

## EXHIBITS

Exhibit	Identification	Evidence
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Defendants' No. 141

89

Defendants' No. 136-A

89

1 SANTA ANA, CALIFORNIA, FRIDAY, MAY 2, 2008

2 DAY 15 - VOLUME III

3 (1:01 p.m.)

4 (The following proceedings is taken outside  
5 the presence of the jury.)

6 THE COURT: All right. We are back on the record.  
7 All counsel are present.

8 Thank you for your courtesy, Counsel.

9 And Counsel, we are going to recall Mr. Kahn?

10 MR. EBERHART: Yes, your Honor.

11 THE COURT: Okay.

12 MR. SNYDER: Your Honor, before we get the jury,  
13 can I tell you NDS's --

14 THE COURT: Certainly. Have a seat.

15 MR. SNYDER: Thank you.

16 We'd like to finish with Mr. Kahn, and then play  
17 the video of Mr. Osborne, and then NDS will rest.

18 THE COURT: Okay. Now, let me make certain that I  
19 consistently --

20 I'm sorry, Mr. Kahn, pardon my discourtesy. If  
21 you'd wait outside for just a moment.

22 I think your position is in stone, and I hear  
23 that; I respect it. I take it that you have not called  
24 Dr. Peled.

25 MR. SNYDER: Actually, your Honor, I did speak

1 briefly to Dr. Peled.

2 THE COURT: Okay. And is your position still the  
3 same, that he will not appear?

4 MR. SNYDER: Yes, sir.

5 THE COURT: Okay. Then this has tremendous  
6 ramifications, potentially, for NDS, not in terms of  
7 judicial proceedings, but I hope that you and Dr. Peled have  
8 discussed his position representing NDS, just as Mr. Ergen  
9 or Kudelski represent their respective companies. For a  
10 significant period of time, not only have I placed all  
11 parties on notice concerning the gravity of the allegations,  
12 but also tried to make a record that people were put on the  
13 stand who had limited information, regardless of your  
14 designating them corporate representatives. Mr. Lenoir,  
15 Mr. Rubin, very nice gentlemen, but limited information,  
16 from my perspective, and I think the jury's.

17 Not only is the conflict between the two of you --  
18 have taken on some of the aspects of a duopoly, but in  
19 reflecting on my prior comments, I not only believe it  
20 affects the American subscriber, but it affects the  
21 respective shareholders of your corporations. And whether  
22 it's Mr. Peled or Mr. Ergen, if you're publicly traded, you  
23 place yourself in a far different position than you do as a  
24 privately held company.

25 So if a verdict returns that's unfavorable to

1 either of the parties, and those who have what appears to be  
2 the most information and are available to that company --

3 Mr. Eberhart, why don't you have a seat.

4 Then, unrelated to this case, I can imagine that  
5 the shareholder suits that might grow out of -- out of that  
6 failure or unwillingness for the very echelon or top people  
7 to appear. Now, that has nothing to do with this lawsuit,  
8 but it has a lot to do with presidents and CEOs taking those  
9 responsible positions and realizing that they not only  
10 represent shareholders explicitly, but also the effect of  
11 this lawsuit does affect the subscribing public, generally.

12 It's almost unimaginable to me that the heads of  
13 corporations, although I haven't said that to the jury and I  
14 will not, and all my comments have rather been insulated  
15 from the jury, except for the somewhat facetious  
16 tongue-in-cheek statement that all parties were warmly  
17 invited to attend. Beyond that, none of my comments have  
18 come in front of the jury thus far.

19 The question becomes whether this Court would view  
20 this as an adverse inference, and I will probably decline to  
21 call for the jury making an adverse inference, but  
22 Mr. Peled, on behalf of NDS, the company he ably represents,  
23 puts himself in the position when the jury is informed of  
24 his ability to appear and actually having had him here, and  
25 a videotape is then played of not having the following

1 benefit. And I just want to say this to you, abide by your  
2 decision. Sometimes that what seems harmful is mollified by  
3 virtue of taking the witness stand and being able to comment  
4 upon what the meaning of -- of a statement is. It's never  
5 quite as bad, in other words, as it seems, and it's never  
6 quite as good as it seems, and that's supposed to be the  
7 American adversarial system.

8 Well, Dr. Peled, literally, is here and apparently  
9 makes the choice, and maybe with the advice of counsel, I'm  
10 not going to subscribe to that, leaves this jurisdiction.  
11 This Court's already taken its position, and from the  
12 beginning of this case to the end, I've been consistent in  
13 that, and I will not back away from it.

14 Now, how I word that I hope will be informational,  
15 and I'll let the jury draw their own inference from the  
16 instructions, because there's an instruction concerning  
17 consciousness of guilt or the unwillingness or ability not  
18 to produce a party. And by that party having been here and  
19 taken the conscious choice so close in time to a deposition  
20 that may or may not be favorable, which literally, NDS now  
21 controls in terms of how they play this deposition -- I'm  
22 sorry, EchoStar now controls in how they play this  
23 deposition. It places Dr. Peled, potentially, in the worse  
24 position of having all the bad things played that might have  
25 occurred, and of course, your designations following, but he

1 can't explain. He can't mollify. He can't say the intent  
2 that was on his mind or the goodness he had for the company.  
3 So I think it's actually with great sadness, not with any  
4 joy in my heart, that I'm going to need to take that  
5 position with the jury. But in consistently forewarning  
6 both of you, I set the stage early on, so this should come  
7 as no surprise to EchoStar, whose been leaned on very hard  
8 by the Court, and it should come to no surprise as to NDS.

9 I think you're right, Mr. Snyder, you have the  
10 way -- you have the right to control the tactics of your  
11 case. You can make those decisions. I'm sure you've  
12 expressed or talked about the potentiality of any  
13 shareholder suits that grow out of this if there is an  
14 adverse verdict and Dr. Peledson (sic) not taking the stand  
15 to explain NDS's position personally. But I think the  
16 greatest concern is that if there is material information  
17 that he possesses, of all the people in the corporate  
18 structure, Charlie Ergen and Dr. Peledson (sic) appear to be  
19 the two primary people that really represent the  
20 corporations and set the tone of responsibility. And it's a  
21 little difficult to watch EchoStar and NDS put on a case  
22 where well-intentioned and semi-knowledgeable people take  
23 the stand, but there is always an insulation that they  
24 weren't at a particular meeting, didn't have that  
25 responsibility or segmented out in some way.



1           So I know you thoughtfully considered it. It's,  
2 frankly, with great sadness and great concern on my part  
3 that the Court's in this position. I will follow through,  
4 though, on my admonishment.

5           All right. If you'd be kind enough to have  
6 Mr. Kahn take the stand, and we'll say, instead of  
7 admonishment, information to the jury.

8           Oh, and by the way, on that subject, the Court's  
9 found numerous cases in which the Court can draw an adverse  
10 inference, which I will not be drawing, that it be left for  
11 argument and instructions. And the Court believes that this  
12 will be the middle position in terms of sharing this  
13 information with the jury.

14           (The following proceedings is taken in the  
15 presence of the jury.)

16           THE COURT: The jury is present. All counsel are  
17 present. The parties are present.

18           Counsel, thank you for your courtesy.

19           And Counsel, if you'd like to proceed with your  
20 examination.

21           This is Mr. Eberhart.

22           RAYNOLD KAHN, DEFENDANTS' WITNESS, RESUMED

23                               REDIRECT EXAMINATION

24 BY MR. EBERHART:

25 Q       Good afternoon, Dr. Kahn.

1           Before we took the lunch break, you were asked several  
2 questions about whether you were comfortable with certain  
3 information being shared. I have a few questions for you  
4 along those lines as well.

5           Would you be comfortable with confidential DirecTV  
6 documents being shared with Ron Ereiser?

7           A     Absolutely not.

8           Q     Would you be comfortable with stolen DirecTV documents  
9 being in the hands of NagraStar and EchoStar?

10          A     Absolutely not.

11          Q     Would you be comfortable with NagraStar's investigator,  
12 JJ Gee, purchasing stolen DirecTV documents for \$5,000 from  
13 a known pirate?

14          A     Absolutely not.

15          Q     You testified before lunch that DirecTV did not care  
16 about the status of piracy of the vendors they were talking  
17 to in 1998 and '99. Can you explain to the jury why that  
18 was the case?

19          A     Well, what I said was that the fact that a particular  
20 card which was already an old card was pirated was not a  
21 concern, because it was an expectation. What was much more  
22 interesting to us would be how a security company would  
23 respond to piracy, both in terms of countermeasures and  
24 operational capability, and also, in talking to companies  
25 that we might work with to what their technical security

1 technology capabilities were that we could work together  
2 with in order to develop what we knew was a necessity to  
3 jointly develop a next generation card --

4 Q Okay.

5 A -- which was not available on the market at that time.

6 Q You also testified about potential acquisition of a  
7 conditional access company by DirecTV; do you recall that?

8 A Yeah.

9 Q What company was that?

10 A I was not directly involved, but I believe there were  
11 talks with Irdeto in that direction.

12 Q Now, you also testified this morning that the  
13 engineering group at DirecTV was skeptical about doing a  
14 swap in the 1998 or 1999 time frame; why was that?

15 A Well, besides the fact that -- that a conditional  
16 access system would require many changes in order to match  
17 our requirements, and those are all of the parts of the  
18 system, the card as well as the headend systems, there were  
19 a few other issues that were a real problem.

20 One of the issues was that the card needs to interface  
21 with software in the set-top box, and at that time, a large  
22 part, if not the majority of the set-top boxes that DirecTV  
23 had fielded in the field were of original legacy models,  
24 which did not have the capability for any kind of software  
25 download. So for that population of 3 or 4 million boxes,

1 a -- a swap of CA would not entail only the cards, but would  
2 necessitate sending completely new boxes to all of those  
3 customers.

4 And then the other -- and the other subset of boxes  
5 which were capable of software downloads, the way DirecTV at  
6 that point managed set-top boxes was that there were many  
7 different companies that provided set-top boxes, and each of  
8 those companies developed their own software. And so in  
9 order to do a -- upgrade those boxes for a new CA system,  
10 there would need to be an integration process with every one  
11 of those manufacturers and development of new software and  
12 scheduled downloads, a potential nightmare. Some of the  
13 older boxes that were downloadable, the manufacturers were  
14 no longer supporting further changes, so that part of it was  
15 very difficult.

16 But another part that is not insignificant at all is  
17 the impact on -- on the normal operations of our business.  
18 I mean, it's amazing when you have to mail out millions of  
19 Smart Cards, just simple Smart Cards that you put in an  
20 envelope and send to someone, how much that disrupts normal  
21 business operations and how much customer service calls you  
22 have to field just to deal with customer questions. And so  
23 having to replace millions of set-top boxes or downloads to  
24 boxes that are synchronized with -- when new cards arrive is  
25 really a nightmare, not only in terms of the cost involved

1 and in terms of the effort, but it -- it kind of violates  
2 our prime directive, which is to keep our customers happy.  
3 And I mean, that's -- that's the most important thing, is to  
4 provide the -- the quality television experience to the  
5 customers. So there's a -- the risk of disrupting our  
6 service by -- by doing something like -- like -- like a  
7 swap-out would -- of that nature would be, you know,  
8 extreme.

9 And looking at our headend systems, that -- it's very  
10 sensitive, and it's taken a long time to stabilize, you  
11 know, a billing system that runs smoothly and that customers  
12 have -- you know, have continual availability and  
13 scalability and interfaces. It's a very difficult process,  
14 and to take a system that you've spent seven years, seven,  
15 eight -- eight years developing and -- and fine-tuning, and  
16 then sort of ripping it out or rewriting it and starting  
17 from fresh, it really is -- you know, it's a threat to the  
18 business to undertake such a thing.

19 So it's -- it was our evaluation that -- that, you  
20 know, such an undertaking would not, you know, be anything  
21 that -- that the business would really undertake. But we  
22 needed to go through the -- the analysis and be able to show  
23 to our management this is what we'll have to change, and  
24 this will be the impact, and this is how much it's going to  
25 cost the company, and they would bear that in mind while

1 looking at financial options. You know, so the amount of  
2 financial savings in such an approach would have to be, you  
3 know, really major.

4 And -- and so that's part of the reason why we believe  
5 that, you know, since we had secured the right through our  
6 negotiation with NDS that if DirecTV became the successor  
7 contractor, then DirecTV had the rights to use all of the  
8 technology, and so we would continue to use the system as  
9 built and make improvements thereupon, which was -- which  
10 had much less risk to our, you know, fundamental business.

11 MR. EBERHART: Michael, could you show the witness  
12 Exhibit 1565, please.

13 BY MR. EBERHART:

14 Q Mr. Kahn -- Dr. Kahn, I only have one question about  
15 this document that plaintiffs' counsel showed you before  
16 lunch. Who is the recipient of this request for  
17 information?

18 A Well, it says "Nagra."

19 Q It's not NagraStar, is it?

20 A No, it's not.

21 MR. EBERHART: Could you show the witness  
22 Exhibit 1556, please.

23 BY MR. EBERHART:

24 Q Who is the contracting party with DirecTV on  
25 Exhibit 1566, which is the study contract?

1 A Kudelski, SA.

2 Q It's not NagraStar or EchoStar, is it?

3 A No.

4 MR. EBERHART: Please show the witness  
5 Exhibit 530.

6 THE COURT: I'm sorry, sir, what was that last  
7 exhibit? Was that 1556 that was in front of you?

8 MR. EBERHART: 1566, your Honor.

9 THE COURT: 1566.

10 BY MR. EBERHART:

11 Q Dr. Kahn, who is the recipient of Exhibit 530, which is  
12 a letter from DirecTV?

13 A It's Alan Guggenheim, Nagra, Kudelski, SA.

14 Q And is there an address there?

15 A Cheseaux, Switzerland.

16 Q That letter is not addressed to NagraStar or EchoStar,  
17 is it?

18 A No.

19 Q In fact, none of DirecTV's interactions with potential  
20 conditional access vendors were with NagraStar or EchoStar;  
21 that's correct, isn't it?

22 A Yes.

23 MR. EBERHART: Nothing further.

24 THE COURT: Counsel, any questions?

25 MR. HAGAN: No further questions, your Honor.

1 THE COURT: Thank you very much. You may step  
2 down.

3 And I believe that the evidence will conclude no  
4 later than next Tuesday, so if you can remain available,  
5 sir, until the date of -- well, I'm going to say May 9th  
6 just to be certain, but the jury is going to be gone -- just  
7 May 9th, sir, okay?

8 Thank you very much.

9 Counsel, if you'd like to call your next witness,  
10 please.

11 MR. SNYDER: Thank you, your Honor. The defense  
12 calls by video William Osborne.

13 THE COURT: Thank you very much.

14 This is a videotape, again, of the witness.

15 Is it William Osborne, Counsel?

16 MR. SNYDER: Yes, William Osborne. He goes by  
17 "Billy Joe."

18 THE COURT: Okay. You may play the videotape of  
19 William Osborne.

20 (Videotape played of William Joe Osborne.)

21 6:10 Q. Good morning, Mr. Osborne. Would you  
22 please state your full name for the record.

23 6:12 A. Bill -- actually, Billy Joe Osborne, Jr.

24 6:13 Q. And where do you reside, Mr. Osborne?

25 6:14 A. In Pikeville, Tennessee.



1                   6:15 Q. And approximately how long have you lived  
2 in Tennessee?

3                   6:17 A. Four years.

4                   6:18 Q. Where did you reside before then?

5                   6:19 A. Bolingbrook, Illinois. It's over by

6                   6:20 Chicago.

7                   Page Range: 7:14-7:16

8                   7:14 Q. And you understand that you are giving  
9 testimony today under oath?

10                  7:16 A. Yes.

11                  Page Range: 051:22-54:22

12                  51:22 Q. Now, who were the members of the Dishplex  
13 and Digital Adventures groups? And I say groups in the  
14 plural because it sounds like there's --

15                  51:25 A. Multiple groups.

16                  52: 52 Q. Multiple groups, and -- but with a lot  
17 of associations, whether they're obvious associations or  
18 not.

19                  52: 4 A. Right. Well, let's see. Digital  
20 Adventures was spearheaded by Dennis Renaud, and he had  
21 Larry Pilon working with him and Pat St. James in Canada.

22                  52: 7 The U.S. arm would include Bob and John --

23                  52: 8 Q. And Bob and John, would that be Bob  
24 Schultz?

25                  52: 9 A. Yeah, Bob Schultz.

1 52:10 Q. And is it John Winiecki?

2 52:11 A. Yeah, it's John Winiecki.

3 52:12 Q. Okay.

4 52:13 A. And Chad Arnett, alias, which would be  
5 Tim Nemeth, and myself.

6 52:15 Q. How about Dale Kubin? Was he an associate  
7 of either Digital Adventures or Dishplex?

8 52:17 A. He was. He was like myself. We were -- we  
9 never tied ourselves down to one particular group.

10 52:19 I mean we were -- we would go where the  
11 technology was.

12 52:21 Q. And what about Don Nance? Was he  
13 associated with Digital Adventures?

14 52:23 A. Don Nance was associated with Dishplex.

15 52:24 Anybody involved with Dishplex, it's safe to  
16 say that they were involved in all groups --

17 53: 1 Q. Okay.

18 53: 2 A. -- that I've mentioned here today.

19 53: 3 Q. Was Bryan Dorsett involved in Digital

20 53: 4 Adventures or Dishplex?

21 53: 5 A. To a point. When -- when there was  
22 something -- when Pete would get stuck on an item he would  
23 e-mail part of some source code to Bryan Dorsett which would  
24 take a look at it, and then he would tell Don about it. And  
25 it was -- it was more of like a favor-type deal. They

1 weren't expecting anything out of it except maybe to make  
2 their own devices.

3 53:13 Q. Okay. Am I correct that Mr. Dorsett was  
4 an active hacker as known by you?

5 53:15 A. Yes, probably the best out there.

6 53:16 Q. And was there a particular system that  
7 Mr. Dorsett hacked?

8 53:18 A. Yes, the DIRECTV.

9 53:19 Q. Okay. And am I correct that Mr. Dorsett  
10 is currently incarcerated?

11 53:21 A. Yes.

12 53:22 Q. You mentioned a collaboration it sounds  
13 like between Mr. Dorsett and Pete. Do you know Pete's last  
14 name?

15 53:25 A. No, not off --

16 54: 1 Q. Do you --

17 54: 2 A. -- the top of my head.

18 54: 3 Q. Do you know where Pete resides?

19 54: 4 A. He -- he lived down in a -- in a rented  
20 house from Dennis Renaud in Thunder Bay.

21 54: 6 Q. Did Pete use an alias or nickname as  
22 known by you?

23 54: 8 A. He had one in an -- in an IRC channel. I  
24 don't recall what it was though off the top of my head.

25 54:11 Q. Are you familiar with the name Dish

1 Farmer?

2 54:12 A. Yes.

3 54:13 Q. Do you associate that name with this  
4 individual Pete?

5 54:15 A. It's been so long. That Dish Farmer  
6 name -- I -- you know, two people come to mind when I hear  
7 that. Pete is one of them, and then the other one is someone  
8 that was known as Gunsmoke 2, but Dish Farmer was -- was  
9 always in the -- in Dishplex IRC channels. So I would -- I  
10 would take an educated guess -- I can't be for sure it was  
11 so long ago -- that Dish Farmer I'm fairly certain was Pete.

12 Page Range: 072:16-74:8

13 72:16 Q. Now, in spring of 2000 as relates to this  
14 date, to your knowledge was there a -- an available hack for  
15 the EchoStar system?

16 72:19 A. Spring of 2000?

17 72:20 Q. Yes.

18 72:21 A. To my knowledge there was always a hack  
19 for EchoStar.

20 72:23 Q. When was the first time you were aware  
21 that there was a hack for the EchoStar system?

22 72:25 A. It was a -- you know, I would say as soon  
23 as I got involved with Dishplex, I always knew that you  
24 know, all of the smaller dishes could be hacked to some  
25 degree. The -- the actual hack, we really weren't focused on

1 that for EchoStar until -- until we started having problems  
2 with DIRECTV. And then that's when the groups started their  
3 really hard push for EchoStar.

4 73: 8 I mean, it was always there, but then they  
5 tried to hack it and secure the hack, which is very  
6 difficult to do even in the best -- even the best programmer  
7 couldn't keep that from happening.

8 73:12 Q. Okay. Let's understand this better. When  
9 was the first time you put your hands on a device for  
10 hacking the EchoStar system, if you recall?

11 73:15 A. I don't recall the date. The first time  
12 would be when I had the key puller dropped off at my house.

13 73:18 Q. And that was the device you received from  
14 Mr. Renaud?

15 73:20 A. Yes. And it was dropped off by Bob  
16 Schultz and John Winiecki.

17 73:22 Q. Okay. And that would have been when you  
18 were still living in Illinois?

19 73:24 A. Yes. They -- they dropped it off because  
20 they were going to spend the next two weeks in Thunder Bay  
21 setting up Pete's lab.

22 74: 2 Q. What is this lab that you're referring  
23 to?

24 74: 3 A. It's a house that was rented and Bob and  
25 John had rented some pretty heavy duty equipment, one being

1 a focused ion beam, and other devices that Pete said he  
2 would need to continue to hack the EchoStar and the DIRECTV  
3 without the assistance of Don Nance and Dorsett.

4 Page Range: 076:13-78:10

5 76:13 Q. Okay. Let me -- let me better understand  
6 this lab that you're referring to. You said that it was in  
7 Thunder Bay, Ontario, correct?

8 76:16 A. Yes.

9 76:17 Q. And the lab was set up at least by  
10 Mr. Renaud; is that correct?

11 76:19 A. Yes.

12 76:20 Q. And the technical person that was  
13 associated with this lab was Pete whose last time you do not  
14 know, correct?

15 76:23 A. Right, yes.

16 76:24 Q. And you said that -- I think you said Bob  
17 and John provided certain equipment to the lab?

18 77: 1 A. Yeah. They -- they provided the -- they  
19 provided the financial needs for the lab. If there wasn't  
20 any working devices or no monies coming in from any type of  
21 sale or devices then, you know Bob and John would pull it  
22 out of their own pockets. Yeah. I know that they -- they had  
23 rented a lot of that equipment that -- that was up there.

24 77: 9 Q. And did you ever visit the lab in Thunder  
25 Bay?

1                   77:11 A. No. I was -- I was unable to go into  
2 Canada. I only went to Canada twice because of a prior  
3 felony conviction. Canada -- Canada would not let me in.

4                   77:15 Q. Okay. And -- but when you say Bob and  
5 John were getting equipment for the lab, did they provide it  
6 to Thunder Bay as far as you know?

7                   77:18 A. Yes, they -- they drove it up there.

8                   77:19 Q. Okay. And what type of equipment did you  
9 understand they were bringing to this lab?

10                  77:21 A. Well, one that really sticks out the most  
11 was the -- the focus ion beam, big microscope thing they had  
12 because I know that was a fairly expensive piece of  
13 equipment. And they had rented it, and they were making some  
14 pretty substantial payments.

15                  78: 1 I just remember them telling me verbally  
16 from all of them that, you know, they're paying upwards of  
17 \$20,000 a month in rental fees for all the different items  
18 that they had up there, not to mention paying Peter a  
19 salary.

20                  78: 6 Q. Okay. And you -- you refer to Bob and  
21 John. That's Bob Schultz?

22                  78: 8 A. Yes.

23                  78: 9 Q. And John Winiecki?

24                  78:10 A. Yes.

25                  Page Range: 079:5-80:25

1           79: 5 Q. Okay. And what was the purpose of  
2 acquiring the focus ion beam?

3           79: 7 A. From my understanding, it's what's needed  
4 to look into that gold chip on the back.

5           79: 9 Q. And you're referring to the  
6 microprocessor that is found on the EchoStar access Card?

7           79:11 A. Yes.

8           79:12 Q. And the purpose for getting into that  
9 chip if you will was for what? What -- why would one need  
10 this piece of equipment to get into the chip?

11           79:15 A. Well, they needed to pull the source code  
12 from that chip and they needed it to navigate through the  
13 chip if I'm not mistaken.

14           79:18 Q. Do you know if Pete or anyone associated  
15 with this lab was successful in that respect?

16           79:20 A. Yes.

17           79:21 Q. And how do you know that?

18           79:22 A. Because it was -- part of it was posted  
19 on Dishplex website for validity that, hey, this was hacked  
20 and this is what -- they gave, you know -- they gave like a  
21 few lines of it that a -- a good programmer might be able to  
22 realize, okay, yeah, this was actually pulled.

23           80: 3 Q. So am I correct that as you understood  
24 portions of the EchoStar code were extracted from the  
25 EchoStar card and posted on the Dishplex website?



1           80: 7 A. Yes. If I'm not mistaken, I -- I think I  
2 may have that. Might be in there in that software that I  
3 gave you guys.

4           80:10 Q. And it's your belief that the purpose for  
5 doing that was to show that the group had successfully  
6 hacked into the EchoStar card?

7           80:13 A. Yes.

8           80:14 Q. And do you know when about that -- what  
9 time that took place?

10          80:16 A. I can't recall exact time.

11          80:17 Q. 2000, 2001?

12          80:18 A I would still -- I would still say it was  
13 2000.

14          80:20 Q. Okay. Was the research used to develop a  
15 particular device or product?

16          80:22 A. Yes, the EK-1.

17          80:23 Q. Okay. So this research took place prior  
18 to the development of the EK-1?

19          80:25 A. Yes.

20          Page Range: 082:10-84:6

21          82:10 Q. And you understood that other pieces of  
22 equipment were being acquired for purposes of -- of this lab  
23 up in Thunder Bay?

24          82:13 A. Yes.

25          82:14 Q. And, again, this equipment was to be used

1 for hacking the EchoStar system, correct?

2 82:16 A. Yes.

3 82:17 Q. Did Pete also engage in hacking other  
4 satellite systems?

5 82:19 A. DIRECTV stuff.

6 82:20 Q. Okay. So the lab was being used for both  
7 purposes?

8 82:22 A. Yes.

9 82:23 Q. But the results of the hack research at  
10 least as it related to EchoStar was the posting of code  
11 extracted from the card on the Dishplex website?

12 83: 2 A. Yes.

13 83: 3 Q. As well as the development of the EK-1  
14 device?

15 83: 5 A. Yes.

16 83: 6 Q. Would it have also included the  
17 development of the key puller device that you testified  
18 about?

19 83: 8 A. Yes.

20 83: 9 Q. Were there other devices or technology  
21 that were developed out of the lab in Thunder Bay that  
22 related the EchoStar system?

23 83:12 A. I'm sure there were some others out  
24 there. The names elude me at present. I would -- how that  
25 lab operated -- the lab always operated in a catch-up mode,

1 meaning that Dennis and Pete were always in competition with  
2 Don Nance and Bryan Dorsett. Bryan Dorsett would be your,  
3 let's say the Ferrari of programmers, and Pete would be  
4 your -- your Dodge Charger, let's sort of say, you know.

5 83:20 So, there was a lot of -- there was some  
6 sharing on the premise that, hey, we're all in -- in one  
7 group, but one group stemmed in a bunch of little groups.  
8 And, you know, no -- everybody didn't know what the other  
9 hand was doing. It was -- it's -- oh, it was like everybody  
10 for themselves almost.

11 84: 2 Q. But the group shared a common goal that  
12 if you developed a device like the EK-1, you all --

13 84: 4 A. Yes.

14 84: 5 Q. -- benefited from the sales?

15 84: 6 A. Yes.

16 Page Range: 098:15-99:18

17 Page 5

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19 98:15 Q. Okay. Would it be fair to say that there  
20 was a point in time when you were aware there were ways to  
21 hack the EchoStar system?

22 98:18 A. Well, from day one when I first found  
23 hacks for the DIRECTV.

24 98:20 Q. So back in 1998, '99, you were aware that  
25 there were --

1 98:22 A. Yes.

2 98:23 Q. -- ways to hack? But that your personal  
3 interest in hacking the EchoStar system came about when the  
4 EK-1 device was developed; is that correct?

5 99: 2 A. Yes.

6 99: 3 Q. And that device was developed because  
7 there was a shift in the market and the sale of hack devices  
8 for the EchoStar system were either more popular or easier  
9 to manufacture than devices for the DIRECTV system?

10 99: 8 A. Yeah. It worked like that and -- and --  
11 and it's like a supply and demand type issue. There was  
12 really -- there was two really big ECMs that DIRECTV had  
13 shot down and that kept -- that kept users down a couple of  
14 months. And during that couple of months, you know,  
15 everybody was starting to look at EchoStar then because the  
16 primary -- the first thought of it was that, okay, they shut  
17 it down for good this time. And then that's when Dorsett,  
18 you know, came across the -- the patch or the fix for the  
19 Black Sunday.

20 Page Range: 089:9-93:14

21 89: 9 Q. Okay. So the first step in this process  
22 would be the customer would give you his or her --

23 89:11 A. Card.

24 89:12 Q. -- EchoStar card? Okay. You would extract  
25 the key from that card and give it to the customer?

1           89:14 A. Yes. You know, there were times that the  
2 customer did have their keys already.

3           89:16 Q. Okay. And then you indicated that the --  
4 there is source code that is stored on the Atmel chip that  
5 is -- the chip on the circuit board is pictured in Exhibit  
6 Number 141?

7           89:20 A. Yes.

8           89:21 Q. And how was that source code applied?

9           89:22 A. Through an Atmel chip programmer.

10          89:23 Q. Was that a function that you performed?

11          89:24 A. No.

12          89:25 Q. Who performed that function?

13          90: 1 A. Chips were given to me personally by Bob  
14 and John.

15          90: 3 Q. And that would be Bob Schultz --

16          90: 4 A. Bob Schultz and John Winiecki.

17          90: 5 Q. Okay. And so the -- the devices were  
18 given to you already with the source code on the Atmel chip?

19          90: 8 A. Yes.

20          90: 9 Q. Was any other code needed to be applied  
21 at that point for the device to function?

22                   Page 6

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24          90:11 A. No.

25          90:12 Q. Okay. And then you said the next step in

1           90:13 this process was to insert the circuit board  
2 into the IRD, correct?

3           90:15 A. Yes.

4           90:16 Q. And how would you insert the device?  
5 Where would it go?

6           90:18 A. It would go in where the card normally  
7 goes.

8           90:19 On the bottom of the EK-1, as you can see  
9 here, there's a little pad that would go to the IRD inside  
10 the receiver, and that would go back into here in the chip  
11 replacing card.

12           90:23 Q. Okay. Just so I'm correct in  
13 understanding the circuit board was actually inserted into  
14 the card slot on the IRD?

15           91: 1 A. Yes.

16           91: 2 Q. And on a lawfully subscribed EchoStar  
17 system, there'd be an EchoStar access Card in that slot?

18           91: 5 A. Yes.

19           91: 6 Q. But on a hack system, this circuit board  
20 device would be inserted in place of the card?

21           91: 8 A. Yes, that's correct.

22           91: 9 Q. And then you described one last step in  
23 this process. You said something about rolling keys. Can  
24 you explain what you meant?

25           91:12 A. The -- to my knowledge, the security that

1 EchoStar was using, they would remodulate the keys or they  
2 would do something that required numeric codes to be typed  
3 into this device.

4 91:16 I don't know the exact mechanics of it on  
5 the -- on the -- the source code level, but I'm familiar  
6 with, you know, the string of keys. I want to say they're  
7 double digits, maybe seven keys. If I remember correctly,  
8 maybe seven parts of keys. And they were each, like, dual  
9 sides like 01 08 17. Things of that nature. And they would  
10 be typed in there.

11 91:24 Q. Okay. Well, let's -- let's break that  
12 down.

13 91:25 The -- as you understood, EchoStar was  
14 issuing commands that required new keys to be entered for  
15 these devices to function, correct?

16 92: 3 A. Yes.

17 92: 4 Q. What was your understanding of why  
18 EchoStar did that?

19 92: 6 A. That was their -- their way of counter  
20 measuring the theft.

21 92: 8 Q. So they were trying to stop pirate  
22 devices?

23 92: 9 A. Yes.

24 92:10 Q. Okay. And your response to that was to  
25 supply your customers, and I think you said you did it by

1 e-mail --

2 92:13 A. Yes.

3 92:14 Q. -- with the new keys?

4 92:15 A. Yes.

5 92:16 Q. And those new keys would be inputted into  
6 the EK-1 device using the key pad that you identified?

7 92:19 A. Yes.

8 92:20 Q. How would you or your group obtain the  
9 new keys that had to be inputted by the customers?

10 Page 7

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12 92:22 A. Those were handed down from -- or by  
13 Dennis by way of Peter.

14 92:24 Q. So was this part of the research that was  
15 taking place in Thunder Bay?

16 93: 1 A. Yes.

17 93: 2 Q. And so as part of that research as  
18 Understood by you, the new keys were being identified or  
19 extracted and being sent to you or to the customers of  
20 Dishplex and Digital Adventures?

21 93: 6 A. Yes.

22 93: 7 Q. And did those new keys work?

23 93: 8 A. Yes.

24 93: 9 Q. Did you personally go through this  
25 process of entering keys into a device?



1 93:11 A. Yes.

2 93:12 Q. And how frequently would you have enter  
3 these new keys for the device to work?

4 93:14 A. Usually once a week.

5 Page Range: 015:16-17:16

6 15:16 Q. Okay. You were associated with this  
7 entity called Digital Adventures; is that correct?

8 15:18 A. Yes.

9 15:19 Q. And there's a description on this  
10 Airbill -- directing your attention to the handwritten  
11 portion towards the bottom of the document. Can you just  
12 read for the court reporter what it says there?

13 15:23 A. It's an EK-1.

14 15:24 Q. And what was an EK-1?

15 15:25 A. An EK-1 was a device that was designed by  
16 Dennis and with another gentleman by the name of Peter.  
17 Basically what it was, it was a circuit board that would  
18 slide into the receiver, and attached to it was a ribbon,  
19 like a cable ribbon and it had a keypad on the end of it.  
20 And the keypad, it would put in the keys that -- that  
21 EchoStar, DISH Network, would require to activate the card,  
22 the sequence to get it to go and use all the channels.

23 16:10 Q. Okay. Let me see if I can break that  
24 down.

25 16:11 You indicated this was a device designed by

1 Dennis and Peter. Am I correct that Dennis is Dennis Renaud?

2 16:14 A. Yes.

3 16:15 Q. Okay. And you previously showed us  
4 shipping records between yourself and Mr. Renaud; is that  
5 correct?

6 16:18 A. Yes.

7 16:19 Q. And you indicated that there was somebody  
8 named Peter who was also involved in designing the EK-1?

9 16:22 A. Yes.

10 16:23 Q. And am I correct that the purpose of the  
11 EK-1 was to receive satellite television programming?

12 17: 1 A. Yes.

13 17: 2 Q. What satellite service was the EK-1 used  
14 to -- to receive the program?

15 Page 8

16 Osborne\_Designations\_V1

17 17: 4 A. For DISH Network.

18 17: 5 Q. Okay. So the -- the EK-1 would allow the  
19 user to receiver DISH Network television programming?

20 17: 8 A. Yes.

21 17: 9 Q. And would the user be required to pay for  
22 that programming?

23 17:11 A. Yes. A one-time fee for the EK-1 device  
24 itself.

25 17:13 Q. Okay. So they would be paying to purchase

1 the EK-1 device, but would not as far as you were aware  
2 paying EchoStar or the operator?

3 17:16 A. No, they were not.

4 Page Range: 086:15-86:23

5 86:15 Q. Okay. I'd like to show you what the court  
6 reporter has marked. And the sticker is on the back of the  
7 document, but this is Exhibit Number 141. Can you identify  
8 that document for me?

9 86:19 A. It's an EK-1.

10 86:20 Q. This is the device you have testified  
11 that your group was responsible for making; is that correct?

12 86:23 A. Yes.

13 Page Range: 021:3-23:10

14 21: 3 Q. So the transaction that we see in  
15 exhibit -- in the document ending in the Bates number 1041  
16 was a payment by Digital Adventures either by yourself or  
17 Mr. Nemeth to Mr. Renaud; is that correct?

18 21: 7 A. Yes.

19 21: 8 Q. And the monies were being sent to  
20 Mr. St. James who you identified as a runner for Mr. Renaud?

21 21:11 A. Yes.

22 21:12 Q. And what was the nature of the payment?

23 21:13 What was the purpose for that?

24 21:14 A. The payment at this time -- I don't see  
25 the date. It could have been payment for pulling keys off of

1 cards or it could have been proceeds from U.S. sales of the  
2 EK-1 going to Dennis Renaud, his share of those proceeds of  
3 the -- from the sale.

4 21:19 Q. Let's break that down for a minute. Am I  
5 correct that as part of your association with Digital  
6 Adventures, you were pulling keys; is that correct?

7 21:23 A. Yes, I did.

8 21:24 Q. And when you say pulling keys, can you  
9 describe for the record what that entailed? What was the  
10 purpose of pulling a key?

11 22: 2 A. Dennis had -- Dennis and Pete had a --  
12 they devised a machine about -- about that wide  
13 (indicating) --

14 22: 5 Q. Okay.

15 22: 6 A. -- kind of tall. It had 12 slots in it  
16 that would fit DISH Network cards into them. And you would  
17 run a simple DOS program on any computer, and it would  
18 generate the actual keys that were involved for the DISH  
19 Network. To the best of my knowledge, that was how that  
20 was -- that worked.

21 22:12 Q. Did you use this particular machine?

22 22:13 A. Yes, I did.

23 22:14 Q. Okay. And am I correct in understanding  
24 that you used the machine to identify keys that were  
25 necessary to hacking the EchoStar system?

1                   22:17 A. Yes.

2                   22:18 Q. And you gave one possible interpretation  
3 of the exhibit we just looked at as the shipment of monies  
4 to Mr. Renaud. That would be monies for using his machine?

5                   22:22 A. Yes.

6                   22:23 Q. You also indicated that the payment could  
7 have related to your sale -- or strike that. You also  
8 testified that the shipment that we just looked at in the --  
9 the exhibit ending in 1041 could have been the sale of EK-1  
10 devices by Digital Adventures, correct?

11                   23: 4 A. Yes.

12                   23: 5 Q. And you testified that the EK-1 device  
13 was a device for hacking the EchoStar system?

14                   23: 7 A. Yes.

15                   23: 8 Q. And that was a device that you and  
16 Mr. Nemeth sold as part of Digital Adventures?

17                   23:10 A. Yes.

18                   Page Range: 115:16-116:6

19                   115:16 Q. Were you aware of DIRECTV ever suing  
20 people engaged in satellite signal theft?

21                   115:18 A. Yes.

22                   115:19 Q. The dealers and developers?

23                   115:20 A. Yes.

24                   115:21 Q. To your knowledge did EchoStar take any  
25 steps to have your group criminally prosecuted?

1 115:23 A. No.

2 115:24 Q. Did DIRECTV ever take such steps?

3 115:25 A. Yes.

4 116: 1 Q. In fact, you were indicted on DIRECTV  
5 satellite piracy, isn't that correct?

6 116: 3 A. Yes.

7 116: 4 Q. And is it your understanding that that  
8 was initiated by DIRECTV?

9 116: 6 A. Yes.

10 Page Range: 030:12-030:16

11 30:12 Q. And what was the nature of that  
12 prosecution?

13 30:13 A. It was for the illegal manufacturing of  
14 satellite piracy devices. The actual charge conspiracy to  
15 commit copyright infringement, also to modify Access Cards.

16 Page Range: 030:24-31:6

17 30:24 Q. And what is the document that we've  
18 marked as Exhibit Number 139?

19 Page 10

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21 31: 1 A. It is a federal indictment against myself  
22 and Dale Kenneth Kubin.

23 31: 3 Q. And was Mr. Kubin a -- an associate of  
24 yours in the business of Digital Adventures?

25 31: 5 A. He was. I -- I can't remember the

1 exact -- how much he was involved exactly.

2 Page Range: 031:23-31:25

3 31:23 Q. And what is the status of this case?

4 31:24 A. It is over with. I pled guilty and  
5 sentenced was -- just sentenced April 2nd.

6 Page Range: 32:1-33:18

7 32: 1 Q. Okay. There are two counts in the  
8 indictment that's marked as Exhibit Number 139. Do you see  
9 the two counts identified in the document?

10 32: 4 A. What page was that on?

11 32: 5 Q. Page 4.

12 32: 6 A. Page 4. Yes, I see it there.

13 32: 7 Q. Am I correct that the government charged  
14 you with conspiracy to sell and distribute satellite signal  
15 theft devises --

16 32:10 A. Yeah.

17 32:11 Q. -- in violation of 47, U.S. C, 605  
18 (e) (4)?

19 32:12 A. Yes.

20 32:13 Q. And that there's a second count that  
21 charged you with sale and distribution of signal theft  
22 devices in violation of 47, U.S.C., 605 (4)?

23 32:16 A. Yes.

24 32:17 Q. You indicated a moment ago that you had  
25 entered a guilty plea; is that correct?

1 32:19 A. Yes.

2 32:20 Q. And that occurred on April 2nd of this  
3 year?

4 32:21 A. Well, the sentencing was April 2nd of  
5 this year. The guilty plea was sent -- was given prior.

6 32:23 Q. I appreciate the clarification. So you  
7 previously had entered a guilty plea?

8 32:25 A. Yes.

9 33: 1 Q. Did you plead guilty to both counts?

10 33: 2 A. No, I did not.

11 33: 3 Q. Do you recall which count you entered a  
12 guilty plea?

13 33: 5 A. For the conspiracy.

14 33: 6 Q. And would that be conspiring with Mr.  
15 Kubin and others?

16 33: 8 A. Yes.

17 33: 9 Q. To your knowledge, has Mr. Kubin entered  
18 any kind of plea in this case?

19 33:11 A. Yes.

20 33:12 Q. What did -- what plea did Mr. Kubin  
21 enter?

22 33:13 A. Guilty.

23 33:14 Q. And has Mr. Kubin also been sentenced?

24 33:15 A. Yes.

25 33:16 Q. The complaint relates to the theft of



1 satellite signal services; is that correct?

2 33:18 A. Yes.

3 Page 11

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5 Page Range: 033:19-34:5

6 33:19 Q. And you were charged with these two  
7 counts relating to the sale and distribution of signal theft  
8 devices; is that correct?

9 33:22 A. Yes.

10 33:23 Q. What satellite system are you alleged to  
11 have had?

12 33:25 A. On the -- on these particular charges, I

13 34: 1 believe they were DIRECTV.

14 34: 2 Q. And so when you entered a guilty plea,  
15 you were pleading guilty to hacking the DIRECTV satellite  
16 system?

17 34: 5 A. Yes.

18 Page Range: 34:6-34:15

19 34: 6 Q. What sentence did you receive on  
20 April 2nd of this year?

21 34: 8 A. Three years probation with six months of  
22 at-home confinement.

23 34:10 Q. Was any restitution ordered?

24 34:11 A. Yes.

25 34:12 Q. In what amount?

1 34:13 A. \$800,000.

2 34:14 Q. To whom is the restitution owed?

3 34:15 A. DIRECTV.

4 Page Range: 34:25-35:14

5 34:25 Q. Do you recall that the lawyers for NDS  
6 Americas submitted a letter on your behalf to the sentencing  
7 judge in this case?

8 35: 3 A. Yes.

9 35: 4 Q. Can you identify that document, please?

10 35: 5 A. This would be the said letter that was  
11 given to my attorney and myself and to Judge Trauger.

12 35: 7 Q. And when was that letter sent?

13 35: 8 A. March 14th.

14 35: 9 Q. Okay. Prior to your sentencing?

15 35:10 A. Yes.

16 35:11 Q. That would make sense.

17 35:12 A. Yes.

18 35:13 Q. And obviously prior to today's  
19 deposition?

20 35:14 A. Yes.

21 Page Range: 35:23-36:6

22 35:23 Q. Am I correct that NDS supported the plea  
23 agreement that you had reached --

24 35:25 A. Yes.

25 36: 1 Q. -- with the government?

1           36: 2 A. Yes, it was -- it was favorable, yes.

2           36: 3 Q. And do you know if the sentencing judge  
3 took that comment into account in rendering your sentence  
4 against -- in your case?

5           Page 12

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7           36: 6 A. I believe so, yes.

8           Page Range: 040:8-40:14

9           40: 8 Q. Okay. And you mentioned that you came in  
10 touch with Dennis Renaud; is that correct?

11          40:10 A. Yes.

12          40:11 Q. Was Mr. Renaud associated with a  
13 particular website at that time?

14          40:13 A. Yes, Dishplex. He was the owner and  
15 operator.

16          Page Range: 116:7-117:11

17          116: 7 Q. I'd like to review with you some of the  
18 parties to this lawsuit, this civil action in California,  
19 and ask you to what extent these groups or individuals were  
20 in any way associated with the development of the EK-1  
21 device --

22          116:12 A. Okay.

23          116:13 Q. -- for hacking the EchoStar system. To  
24 your knowledge, was NDS Group PLC in any way involved with  
25 the development of the EK-1?

1 116:16 A. That name does not sound familiar.

2 116:17 Q. You've never heard of the company?

3 116:18 A. No, NDS I have.

4 116:19 Q. Okay. But the company NDS, to your  
5 knowledge did they have any involvement with your group in  
6 developing the EK-1?

7 116:22 A. No, not to my knowledge.

8 116:23 Q. Okay. How about NDS Americas? Is that a  
9 company that you've heard of?

10 116:25 A. Yeah, I've heard of it.

11 117: 1 Q. And did that company have any  
12 involvement of any kind with the development of the EK-1  
13 device?

14 117: 3 A. No.

15 117: 4 Q. How about an individual named John  
16 Norris?

17 117: 5 A. John who?

18 117: 6 Q. John Norris.

19 117: 7 A. Norris?

20 117: 8 Q. Yes.

21 117: 9 A. No.

22 117:10 Q. Reuven Hasak?

23 117:11 A. No.

24 Page Range: 117:20-118:9

25 117:20 Q. Christopher Tarnovsky?

1           117:21 A. That name sounds familiar. That name  
2 sounds real familiar. I just can't recollect.

3           117:23 Q. Okay. Was -- was Mr. Tarnovsky as you  
4 recall in any way associated with the Dishplex group?

5           118: 1 A. No.

6           118: 2 Q. Was he in any way associated with the  
7 development of the EchoStar hack at the --

8           118: 4 A. No.

9           118: 5 Q. -- Thunder Bay lab?

10          Page 13

11          Osborne\_Designations\_V1

12          118: 6 A. No.

13          118: 7 Q. Was he in any way involved with you in  
14 selling those devices through Digital Adventures?

15          118: 9 A. No.

16          Page Range: 118:10-118:19

17          118:10 Q. Okay. But you have heard of the name  
18 Christopher Tarnovsky?

19          118:12 A. Yes.

20          118:13 Q. Okay. How about Allen Menard? Was he  
21 involved with Dishplex?

22          118:15 A. No. He had his own website, DR7.

23          118:16 Q. Okay. Was Mr. Menard in any way  
24 associated with the efforts of the lab in Thunder Bay  
25 Ontario?

1 118:19 A. No, he was their rival.

2 Page Range: 121:1-121:8

3 121: 1 Q. Any persons using the alias Nipper 2000?

4 121: 2 A. No.

5 121: 3 Q. Nipper Clause?

6 121: 4 A. No.

7 121: 5 Q. XBR21?

8 121: 6 A. No.

9 121: 7 Q. Are any of those aliases familiar to  
10 you?

11 121: 8 A. No.

12 Page Range: 123:3-124:6

13 123: 3 Q. Okay. So would it be fair to say that at  
14 least at some point in fall of 2000 you had a device for  
15 hacking the EchoStar system?

16 123: 6 A. Yes.

17 123: 7 Q. And your hack was developed through the  
18 lab that your group was running in Thunder Bay Ontario?

19 123:10 A. Yes.

20 123:11 Q. And it did not involve Mr. Menard, who  
21 was doing business as DR7?

22 123:13 A. No, it did not.

23 123:14 Q. And it didn't involve any of the people  
24 that we just reviewed a moment ago?

25 123:16 A. No, it did not.

1           123:17 Q. Based on your personal knowledge then,  
2 would it be an -- would it be an incorrect statement for  
3 EchoStar to allege in this case that Mr. Menard was the only  
4 person until early 2001 to be able to hack the EchoStar  
5 system?

6           123:22 A. Before 2001?

7           123:23 Q. Yeah.

8           123:24 A. That he was the only one?

9           123:25 Q. Yeah.

10          124: 1 A. No.

11          124: 2 Q. Because in fact your group was doing it?

12          124: 3 A. Yes.

13          124: 4 Q. And selling it to customers in Canada  
14 and the United States?

15          Page 14

16          Osborne\_Designations\_V1

17          124: 6 A. Yes.

18          Page Range: 041:16-42:3

19          41:16 Q. To your knowledge who was responsible for  
20 developing and selling the Wild Thing?

21          41:18 A. Well, he goes by several names, Ron  
22 Silver Ron E-Rizer, Hooks.

23          41:20 Q. Where does Mr. Ereiser live, if you know?

24          41:21 A. Canada.

25          41:22 Q. And to your knowledge was Mr. Ereiser

1 active in hacking the DIRECTV satellite system?

2 41:24 A. Yes.

3 41:25 Q. How did you know that?

4 42: 1 A. Through various conversations with other  
5 people in the industry and eventually by his own mouth to my  
6 ear.

7 Page Range: 043:7-45:20

8 43: 7 Q. And you do remember that Mr. Ereiser was  
9 active in hacking the DIRECTV satellite system based on the  
10 conversations you had with him personally and with others?

11 43:11 A. Yes.

12 43:12 Q. Did Mr. Ereiser ever provide you with any  
13 devices for hacking the DIRECTV satellite system?

14 43:14 A. Yes.

15 43:15 Q. What -- what device or what was the name  
16 of the device that he provided?

17 43:17 A. It was the Wild Thing unlooper.

18 43:18 THE COURT REPORTER: What?

19 43:19 BY MR. WILSDON:

20 43:20 Q. What was the purpose for the Wild Thing  
21 unlooper?

22 43:22 A. It was a device that would -- if there  
23 was an ECM that was sent out, it would -- it would repair  
24 the damage that an ECM would do. You could also use it as  
25 programmer.



1           44: 1 Q. Okay. Again, just so I'm clear, you've  
2 testified that ECMs were electronic counter measures  
3 initiated by the broadcaster, in this case DIRECTV, to  
4 disable signal theft devices, correct?

5           44: 5 A. Yes.

6           44: 6 Q. And so the device that Mr. Ereiser sold  
7 you allowed you to restore pirate functionality of those  
8 devices?

9           44: 9 A. Yes.

10          44:10 Q. In effect overcoming the effects of the  
11 electronic counter measure?

12          44:12 A. Yes.

13          44:13 Q. Did you receive any other hacking  
14 equipment from Mr. Ereiser?

15          44:15 A. Software updates.

16          44:16 Q. And how did Mr. Ereiser transmit these  
17 software updates to you?

18          44:18 A. Via e-mail.

19          44:19 Q. And what was the purpose of these  
20 updates?

21          44:20 A. There was a few tough ECMs that came down  
22 through -- over the -- over the period of time that needed  
23 special changes -- modifications made to the software, and  
24 then that next part of it was glitching, a certain way of  
25 glitching the card.

1                   44:25 Q. Okay. Am I correct in understanding that  
2 these software fixes are sometimes referred to as a patch?

3                   45: 3 A. Yes.

4                   45: 4 Q. Okay. And Mr. Ereiser was providing these  
5 patches -- patches to you; is that correct?

6                   45: 6 A. Yes.

7                   45: 7 Q. And you used those patches to continue to  
8 Receive free satellite television programming?

9                   45: 9 A. Yes.

10                  45:10 Q. To your knowledge, was Mr. Ereiser  
11 selling these devices like the Wild Thing unlooper? Was he  
12 selling those to other people?

13                  45:13 A. Yes.

14                  45:14 Q. And was he providing these patches that  
15 you've testified about? Was he providing those to other  
16 people?

17                  45:17 A. Yes.

18                  45:18 Q. Do you recall approximately when you  
19 purchased the Wild Thing unlooper from Mr. Ereiser?

20                  45:20 A. I would say in 1999.

21                  Page Range: 47:17-47:21

22                  47:17 Q. So, for example, the Wild Thing that you  
23 received from Mr. Ereiser, that wouldn't work --

24                  47:19 A. No.

25                  47:20 Q. -- to modify an EchoStar card?

1 47:21 A. No.

2 Page Range: 124:14-125:11

3 124:14 Q. To your knowledge, was Mr. Ereiser  
4 involved in selling hack devices for the EchoStar system?

5 124:16 A. No. He was not, not with us.

6 124:17 Q. Okay. Not through your group at least?

7 124:18 A. Yeah. To my knowledge, he had nothing to  
8 do with the EchoStar.

9 124:20 Q. Okay. But he was active in the DIRECTV  
10 hack?

11 124:22 A. Yes.

12 124:23 Q. Would you -- would it be fair to say he  
13 was a prominent figure in the hack of the DIRECTV system?

14 125: 1 A. Yes.

15 125: 2 Q. Prominent in the sense that he had  
16 access to technology before others had that?

17 125: 4 A. Yes.

18 125: 5 Q. And that he controlled distribution of  
19 the DIRECTV hack?

20 125: 7 A. Yes. For quite some time until Don Nance  
21 broke his partnership with him.

22 125: 9 Q. Okay. There was some partnership between  
23 Mr. Nance and Mr. Ereiser at some point?

24 125:11 A. Yes.

25 Page 16

1 Osborne\_Designations\_V1

2 Page Range: 126:16-127:5

3 126:16 Q. Did you have any personal experience  
4 with Mr. Ereiser?

5 126:18 A. Telephone conversations.

6 126:19 Q. In those conversations or any of your  
7 interactions with Mr. Ereiser, did you have any concerns for  
8 your personal safety?

9 126:22 A. I didn't myself; others have.

10 126:23 Q. Can you describe those?

11 126:24 A. Well, there was death threats made to  
12 Dennis, to Don, to Matt, just about all the -- all the head  
13 guys that were involved.

14 127: 2 Q. And where did those threats originate?

15 127: 3 A. From him.

16 127: 4 Q. From Mr. Ereiser?

17 127: 5 A. Yes.

18 Page Range: 127:6-127:8

19 127: 6 Q. Were you concerned for your personal  
20 safety with respect to Mr. Ereiser?

21 127: 8 A. No.

22 Page Range: 127:25-129:9

23 127:25 Q. So Mr. Ereiser hired somebody to surveil  
24 a mailbox that you were using as part of your business?

25 128: 3 A. Yes. He also -- he also paid somebody to

1 go in there with a fake ID and try to act like myself to get  
2 into those mailboxes.

3 128: 6 Q. Would that be pretexting? Is that a term  
4 you're familiar with?

5 128: 8 A. No.

6 128: 9 Q. Okay. You're not familiar with the term?

7 128:10 A. No.

8 128:11 Q. Somebody was pretending to be you?

9 128:12 A. Yes. Yes.

10 128:13 Q. And you believe that was done at the  
11 direction of Mr. Ereiser?

12 128:15 A. Yes. And I actually confronted him about  
13 it.

14 128:17 Q. And what did he say?

15 128:18 A. He said that he was willing to do just  
16 about anything to get his hands on that hack.

17 128:20 A. And by confronting, you're talking about  
18 confronting Mr. Ereiser?

19 128:22 A. Yes. On the phone I confronted him about  
20 his behavior towards myself and other people involved in the  
21 group.

22 128:25 Q. And did these events give -- cause you  
23 to re-think or in any way change your involvement in this  
24 business?

25 129: 3 A. Well, it brought a lot of attention to

1 the fact that there's a lot of desperate people out there  
2 that were willing to do just about anything to get their  
3 hands on this technology, and it probably started myself  
4 thinking that this is something that I don't want to be  
5 involved in anymore.

6 Page Range: 129:24-130:15

7 129:24 Q. Would you judge Mr. Ereiser based your  
8 interaction with him to be a truthful person?

9 130: 1 A. No.

10 130: 2 Q. Would you judge him to be honest?

11 130: 3 A. No.

12 130: 4 Q. Or reliable?

13 130: 5 A. Reliable? He was reliable in delivering  
14 Wild Thing devices when they were asked for.

15 130: 7 Q. How about reliable in the sense of being  
16 candid and being truthful?

17 130: 9 A. No.

18 130:10 Q. And you testified Mr. Ereiser had made  
19 threats against members of your group, correct?

20 130:12 A. Yes.

21 130:13 Q. Did Mr. Ereiser ever acknowledge making  
22 those threats?

23 130:15 A. Yes.

24 Page Range: 42:4-42:5

25 42: 4 Q. Did you ever meet with Mr. Ereiser?

1 42: 5 A. No, not in person, always on the phone.

2 Page Range: 46:2-46:4

3 46: 2 Q. When is the last time you were in  
4 communication with Mr. Ereiser?

5 46: 4 A. End of '99 into 2000 probably.

6 Page Range: 133:17-134:10

7 133:17 Q. Okay. It's been a long morning and --  
8 and part of an afternoon. And thinking back on your  
9 testimony, is there anything to which you've testified about  
10 that you wish to clarify or explain?

11 133:22 A. No. I believe -- I believe I've answered  
12 your questions as best as I could.

13 133:24 Q. So to the best of your knowledge, you've  
14 fulfilled your obligation to testify fully and truthfully in  
15 this matter?

16 134: 2 A. To date, yes.

17 134: 3 Q. Has anybody told you what you should be  
18 testifying about?

19 134: 5 A. No.

20 134: 6 Q. And you're here on your own -- on your  
21 own behalf? You're not --

22 134: 8 A. Yes.

23 134: 9 Q. -- being paid by any respect?

24 134:10 A. No.

25 (Videotape ended.)

1 MR. SNYDER: That concludes the defendants'  
2 designations, your Honor.

3 THE COURT: Any cross-designations?

4 MR. HAGAN: Yes, your Honor.

5 THE COURT: If you'd like to play the  
6 cross-designations, then, at this time, please.

7 MR. HAGAN: Thank you.

8 (Videotape played of William Joe Osborne.)

9 131:15 Q. And the court reporter has marked for  
10 you Exhibit Number 144. Can you identify that document for  
11 the record?

12 131:18 A. It is the letter that was handed to  
13 Judge Trauger by you guys, by your firm.

14 131:20 Q. Counsel for NDS, correct?

15 131:21 A. Yes.

16 131:22 Q. And this was in connection to your  
17 sentencing on the hack of the DIRECTV satellite system,  
18 correct?

19 131:25 A. Yes.

20 132: 1 Q. And do you recall what the purpose of  
21 this letter was?

22 132: 3 A. It was a -- it was a -- not so much a  
23 character letter as a factual letter of what I've -- I am  
24 doing today and what I have been doing, cooperating with you  
25 to the fullest of my ability.



1           132: 7 Q. And directing your attention to the last  
2 sentence of the letter, can you just please read that for  
3 the record?

4           132:10 A. Sure.

5           132:11 Q. It begins at the bottom of page 2.

6           132:12 A. Mr. Osborne's cooperation has materially  
7 contributed to NDS's understanding of the hack of it's  
8 Period 3 Access Cards and the identities and roles of other  
9 individuals who participated in that effort.

10           132:17 Mr. Osborne was candid and forthcoming. NDS  
11 as a victim of the activity charged in the indictment  
12 believes that Mr. Osborne has provided substantial  
13 cooperation to NDS anti-piracy investigation. NDS submits  
14 this letter in support of the plea agreement that was  
15 reached between the government and Mr. Osborne and  
16 respectfully request that the Court consider the cooperation  
17 NDS received in sentencing Mr. Osborne.

18           133: 1 Q. Just to summarize, it was your  
19 understanding that this letter was in support of the plea  
20 agreement that you and your lawyer negotiated with the  
21 government?

22           133: 5 A. Yes.

23           133: 6 Q. And you were in fact -- you did in fact  
24 plead guilty?

25           133: 8 A. Yes.

1 133: 9 Q. And you did in fact receive a sentence?

2 133:10 A. Yes.

3 133:11 Q. Three years' probation?

4 133:12 A. Yes.

5 133:13 Q. Six months' home confinement?

6 133:14 A. Yes.

7 133:15 Q. And a restitution order?

8 133:16 A. Yes, restitution of \$800,000.

9 Page 2

10 Osborne Counters

11 Description: Page 136:16-136:20

12 136:16 Q. And if I understood your testimony,  
13 prior to your involvement with the EK-1 hack, you didn't  
14 have any involvement with any devices that could be used to  
15 hack DISH Network; is that correct?

16 136:20 A. That's correct.

17 Description: Page 137:10-137:14

18 137:10 Q. Prior -- all right, withdrawn. Prior to  
19 you becoming involved with the EK-1 device, did you know how  
20 DISH Network could be hacked, what were the methods?

21 137:14 A. No.

22 Description: Page 138:23-139:3

23 138:23 Q. Prior to your involvement in the EK-1  
24 hack had you ever seen a hacking device for DISH

25 138:25 Network?

1 139: 1 A. No.

2 139: 2 Q. Actually seen one in use?

3 139: 3 A. No.

4 Description: Page 149:10-149:24

5 149:10 Q. And did I understand your testimony that  
6 the EK-1 was the only device you ever dealt with that could  
7 hack DISH Network programming?

8 149:13 A. Yes.

9 149:14 Q. So after the EK-1, you had no  
10 involvement in any type of device that could hack DISH  
11 Network?

12 149:16 A. Yeah, that's right.

13 149:17 Q. And I believe you said that the EK-1 was  
14 a short-lived device?

15 149:19 A. Yes, it was.

16 149:20 Q. And, I mean, in fact, it only lasted a  
17 couple of months, right?

18 149:22 A. Yes.

19 149:23 Q. So you didn't make much money from that?

20 149:24 A. No.

21 Description: Page 151:11-151:25

22 151:11 Q. Ever heard of a 3M Card?

23 151:12 A. Yes.

24 151:13 Q. What's a 3M Card? Let me go on, have you  
25 ever heard of an E3M Card?

1 151:15 A. No. E3M, it sounds familiar.

2 151:16 Q. Well, maybe I should back up. Let's go  
3 back to 3M. To your knowledge, what's a 3M Card?

4 151:18 A. Give me a minute here. I want to --

5 151:19 Q. Sure.

6 151:20 A. 3M Card, the term sounds really  
7 familiar. I may have spoke to quick on saying that I knew  
8 what that was.

9 151:23 Q. That's fine.

10 Page 4

11 Osborne Counters

12 151:24 A. 3M. I'm going to leave that one alone  
13 for right now.

14 Description: Page 152:13-152:16

15 152:13 Q. That's fine. You testified previously  
16 that DR7 was a competitor to your group on Dishplex,  
17 correct?

18 152:16 A. Yes.

19 Description: Page 152:22-155:2

20 152:22 Q. Are you -- did you ever become aware  
21 that the website DR7 was selling equipment that could hack  
22 DISH Network programming?

23 152:25 A. Yes.

24 153: 1 Q. And when did -- when did you become  
25 aware of that?

1                   153: 3 A. I actually knew that when I first got  
2 involved with Dishplex because Dennis Renaud had told me  
3 about the strenuous relationships that he's had with all the  
4 other websites with all the other people involved like  
5 Ereiser, Shawn Quinn, all those guys. And I decided out of  
6 all of them that Dennis Renaud was the most trustworthy  
7 person.

8                   153:10 Q. So when you first became involved with  
9 Dishplex --

10                   153:12 A. Dishplex.

11                   153:13 Q. -- Dennis Renaud told you that DR7 had a  
12 hack for DISH Network programming?

13                   153:15 A. Yes.

14                   153:16 Q. And you said he explained to you the  
15 kind of the bad relationship that he had had with other  
16 websites?

17                   153:19 A. All of them. He don't -- he don't have a  
18 working -- he don't -- he never had a working relationship  
19 with any of them. That's why I think I was important as far  
20 as he's concerned is because I -- I was -- I've always been  
21 good with people and I'm not a vindictive person like Dennis  
22 Renaud is. Dennis Renaud a big, very scary-looking man when  
23 he wants to be.

24                   154: 2 Q. Do you recall, him -- Mr. -- or Dennis  
25 Renaud telling anything specifically about his relationship

1 with DR7?

2 154: 5 Q. Just that they -- they constantly  
3 bickered back and forth publicly in the forums, calling each  
4 other at home, cell phones. It was just a very bad-blood  
5 type of relationship.

6 154: 9 Q. Did the term flaming -- is that a term  
7 you're familiar with?

8 154:11 A. If -- well, flaming as far as in the IRC  
9 we go in there and the -- the forums, yeah. They would flame  
10 each other pretty hard.

11 154:14 Q. Do you recall anything else he told --  
12 Mr. -- Dennis Renaud told you about his relationship -- his  
13 prior relationship with the DR7 website?

14 154:18 A. No. Just that him and his -- Dennis's  
15 partner, Larry, constantly nonstop all the time would just  
16 go on that guy's website and torture him. And then of course  
17 he would in turn -- it was -- it was like they were in  
18 kindergarten. It was really bad.

19 154:24 Q. Uh-huh. And when you first became  
20 involved in Dishplex, do you remember how long after that  
21 the EK-1 device came out?

22 155: 2 A. It was more than a year.

23 Description: Page 155:3-155:9

24 155: 3 Q. When you first got involved in Dishplex,  
25 was your focus hacking DIRECTV?

1 155: 5 A. Yes.

2 155: 6 Q. And selling a -- selling materials that  
3 could be used to hack DIRECTV?

4 155: 8 A. Yes. Actually I had -- I had -- I wanted  
5 to affiliate myself with one of these websites and --

6 Description: Page 155:12-155:16

7 155:12 Q. And so -- and so it's fair to say that  
8 you were involved in Dishplex for more than a year before  
9 you became involved in the EK-1, the device to hack DISH  
10 Network programming?

11 155:16 A. Yes.

12 Page 7

13 Osborne Counters

14 Description: Page 157:15-157:22

15 157:15 Q. You weren't involved in the actual  
16 development of -- or the creation of the EK-1 card, right?

17 157:18 A. No.

18 157:19 Q. That was all -- as far as you were you  
19 aware, that was being handled by Dennis Renaud in Canada?

20 157:22 A. Yes, and Pete.

21 Description: Page 158:7-158:10

22 158: 7 Q. Once -- I'll try to repeat it -- once  
23 you actually started selling the EK-1 devices, you only had  
24 about a couple of months where you could actually sell the  
25 device, correct?

1 Description: Page 158:12-158:21

2 158:12 THE WITNESS: The -- the device was

3 158:13 sold with no problems for a couple of  
4 months. You know, myself, personally, backed away from that  
5 project because during that time, Don Nance and Bryan  
6 Dorsett came up the way to repair the -- I want to say the H  
7 cards at the time. And so I withdrew myself basically from  
8 the EK-1. What happened to it after that, I'm kind of  
9 sketchy on my -- on my part because my focus was always and  
10 has been toward DIRECTV.

11 Description: Page 158:23-159:2

12 158:23 Q. And as far as your -- withdrawn. It's  
13 your understanding that actually a couple of months after  
14 the EK-1 device came out there was some code posting on the  
15 internet that basically made the EK-1 worthless, right?

16 Description: Page 159:7-159:13

17 159: 7 THE WITNESS: I wouldn't say worthless. I  
18 would say not as worth it -- not as worth what it was. It  
19 gave -- it gave end users or anybody with a soldering gun or  
20 basic knowledge of circuitry could very well build their own  
21 product for probably around \$40 at the time if my math is  
22 right as far as the parts are concerned.

23 (Videotape ended.)

24 THE COURT: Does that conclude the  
25 cross-designations?



1 MR. HAGAN: Yes, your Honor.

2 THE COURT: All right. Now, Counsel, just a  
3 moment. I am going to excuse the jury for just a moment.

4 I'll be back with you anywhere between five  
5 minutes and five hours.

6 (Laughter.)

7 THE COURT: I'm just kidding you.

8 I am going to speak to counsel for just a moment.  
9 Why don't you take at least a 20-minute recess, and I'll  
10 come back and get you in just a moment.

11 Please don't discuss this matter, nor form or  
12 express any opinion concerning the case.

13 See you in 20 minutes.

14 (The following proceedings is taken outside  
15 the presence of the jury.)

16 THE COURT: Now, last evening, informally,  
17 Mr. Stone approached the Court with all counsel present  
18 sometime in the evening hours and stated that you wanted to  
19 have Mr. Barr testify as an expert, and there was a  
20 discussion between counsel concerning what Mr. Barr would  
21 testify to. One of the areas that the Court was not  
22 concerned with was Mr. Barr having gone to Barrie, Ontario,  
23 I believe, and witnessed a black -- black box in Barrie,  
24 Ontario. The part that had concerned the Court was that  
25 apparently EchoStar represented that there would be an

1 attempt to match that black box to another similar black box  
2 that was compared in a photograph obtained from --

3 MR. STONE: Mr. Masco (phonetic).

4 THE COURT: From Mr. Masco?

5 MR. STONE: Mr. Masco, yes.

6 THE COURT: Who may be Jim Waters?

7 MR. STONE: No. He dealt with Jim Waters.

8 THE COURT: Okay. And the Court was concerned and  
9 did not acquiesce to that, based upon the offer of proof  
10 being made by either side, EchoStar and NDS, and indicated  
11 that I wanted a full and complete hearing outside the  
12 presence of the jury, and see what that evidence would be  
13 that was forthcoming.

14 Also, EchoStar was concerned that there were a  
15 number of statements that were not being conveyed to the  
16 Court last evening by NDS and called to the Court's  
17 attention on behalf of EchoStar what you believed to be a  
18 series of hearsay statements. I took the rather cautious  
19 approach and told counsel for all parties that I would hear  
20 that outside the presence of the jury, try to fit it in over  
21 the lunchtime and decided not to, because I wanted the court  
22 reporters to have an hour break. But it's 2:15, and if your  
23 representation is correct and you are prepared to rest, so  
24 be it. If you want to call Mr. Barrie (sic), I think we  
25 have enough time to take his testimony and to make rulings

1 and hopefully get back to the jury. Now, if we don't, so be  
2 it. I don't know what it entails, but I'll certainly pay  
3 you that courtesy, and I don't want you precluded.

4 MR. STONE: I understand that, your Honor. For a  
5 variety of reasons, we've decided to withdraw Mr. Barr  
6 and -- and rest today.

7 THE COURT: All right.

8 Now, let me discuss two other things with you.  
9 Your resting is the same as I perceive EchoStar's resting,  
10 and that is, you need to go over each item of evidence.  
11 Make certain each item that you believe has been received  
12 into evidence is, in fact, received, and I've reserved that  
13 for both of the parties.

14 I don't expect items to be brought in front of the  
15 Court that were not moved into evidence and simply  
16 neglected, but I do expect that your records would comport  
17 with those items you believe are in evidence. And let me  
18 state to you that if an item is amiss as far as the jury is  
19 concerned, I will not grant a new trial. At the end of our  
20 discussion today or this evening, you'll sign an evidence  
21 tag that Kristee prepares, and that means that each of you  
22 have gone over each piece of evidence, that you believe that  
23 the record is in order. And that way, in case a piece of  
24 evidence is missing, I view that as counsel's entire  
25 responsibility. Motion with new trial will be met with a

1 denial.

2 Third, I still don't know if we're going to the  
3 jury on Tuesday or Wednesday, but I'm hopeful that we do.  
4 So, Counsel, who do you propose to call in rebuttal so I  
5 know when to bring the jury back?

6 MR. HAGAN: Our rebuttal case, your Honor, will  
7 consist of the following:

8 We will call Mr. Andre Kudelski. If we are not  
9 able to reach a stipulation with the defendants on two  
10 particular pieces of evidence from EchoStar's CSG database,  
11 we will call NagraStar's CEO, Pascal Lenoir, to authenticate  
12 a couple of documents. And then we will conclude with  
13 reading certain portions of Dr. Peled's testimony into the  
14 record. And I just want to make clear to the Court we --  
15 that deposition was taken at the courthouse, and it was not  
16 able to be videotaped.

17 THE COURT: No, and in fact, it was my order that  
18 it not be videotaped, because the expectation was Dr. Peled  
19 would testify, and therefore, the jury would be further  
20 precluded from seeing his demeanor because of the  
21 expectation that he would, in fact, testify.

22 Each of you are aware of why Pascal Lenoir would  
23 be testifying. Are you able to reach an agreement, or is he  
24 going to take the stand? In other words, what I'm trying to  
25 sort out is, is the case really going to the jury on Tuesday

1 or Wednesday. I assumed that the transcripts of Dr. Peled  
2 and the cross-designations may not be that long, but I just  
3 don't know. I haven't gotten a time estimate yet. I don't  
4 know how long Pascal Lenoir testifies, and I have no idea  
5 what the expectation is concerning Andre Kudelski.

6 MR. HAGAN: If -- I think that Darin and I will be  
7 able to reach a stipulation, and we can work on that.

8 THE COURT: I'll -- I'll wait.

9 MR. HAGAN: This afternoon.

10 THE COURT: Why don't you go over and talk to him.  
11 In other words, let's find out right now, and if you can't,  
12 that's fine, and if you can, that's fine. Then I'm going to  
13 have that stipulation, if you do reach it, put on the record  
14 now. If you can't reach it, so be it.

15 (Attorney discussion held off the record.)

16 THE COURT: All right. Now, while the jury is out  
17 of our presence, I want to discuss how the Court is going to  
18 handle the information conveyed to the jury concerning  
19 Dr. Peled. I want to keep this as neutral as possible,  
20 convey the information, and then let each of you argue  
21 whatever you'd like to. So I think the most appropriate  
22 thing is the following:

23 Dr. Peled is the CEO, president of NDS. He was  
24 not subpoenaed by EchoStar, and voluntarily flew to the  
25 United States and was placed on the witness list by NDS as a

1 witness in this trial and was to testify. He arrived  
2 earlier this week and had his deposition taken outside of  
3 your presence on Wednesday evening, April 30th.

4 Dr. Peled flew back to the United Kingdom on  
5 Thursday evening, May 1st, 2008. In the absence of  
6 Dr. Peled, the Court will allow EchoStar to read into the  
7 record portions of his testimony, and NDS to cross-designate  
8 and read into -- and read into the record portions of  
9 Dr. Peled's testimony.

10 Now, that simply informs when he was present, when  
11 he left, and you can argue all the inferences which are left  
12 to the jury. I'm a little concerned if I go any further  
13 than that factual misstatement and it turns into an adverse  
14 inference, and it causes the Court concern. By the same  
15 token, I think it gives NDS the right to argue and EchoStar,  
16 certainly, the right to argue that Peled was here,  
17 available, and you have an instruction right on point in  
18 your instruction packet, if you look at it, about witnesses  
19 able to testify.

20 Now, the question is, of course, NDS is going to  
21 object to any instruction to the jury, and of course you  
22 want a stronger inference given to the jury. I think that's  
23 a well-balanced statement by the Court and doesn't carry the  
24 Court's frustration over to the -- to the jury, so it gives  
25 EchoStar the leeway to argue that he wouldn't subject

1 himself to an appearance in court. And by the same token,  
2 it isn't the Court making that statement, which is harmful.

3 But let me hear from EchoStar concerning that.

4 MR. HAGAN: Two points, your Honor. First, I  
5 think it is within the Court's discretion to issue an  
6 adverse inference for Mr. Peled's failure to attend trial  
7 and failure to allow us to cross-examine him in front of the  
8 jury.

9 THE COURT: And by the way, over the weekend, we  
10 are going to look at that further, if I read this or another  
11 admonition or adverse inference, however you want to do  
12 that, or information. I want to see what the outer  
13 parameters are. In other words, courts oftentimes can give  
14 an adverse inference, but it's an extreme measure. This  
15 doesn't pass, though, without, you know, factual comment  
16 about what occurred. But yes, I can give an adverse  
17 inference.

18 MR. HAGAN: And in the event that the Court is not  
19 inclined to do that, which -- to preserve our record, we  
20 would object to, especially given the history of the Court's  
21 guidance and instructions for all other witnesses who have  
22 attended live at trial, then we would ask if the Court,  
23 subject to our objections, if the Court is going to give a  
24 factual statement about the circumstances surrounding  
25 Mr. Peled's leaving the United States and going back to the

1 United Kingdom, we would ask that that statement be a  
2 complete factual record of what happened, and that is, that  
3 Mr. Peled left without us having the opportunity to subpoena  
4 him, because he left without notifying the Court or  
5 notifying plaintiffs' counsel before getting on a plane and  
6 leaving the jurisdiction.

7 THE COURT: Okay. In other words, it's not fair  
8 to say that -- from your perspective, that he was not  
9 subpoenaed by EchoStar, but by the same token, it's not fair  
10 to recognize that NDS had him voluntarily appear. So that's  
11 the beginning point, that's the truth. But once he was  
12 here, your concern is that you didn't subpoena him, relying  
13 upon your expectation that he would, in fact, testify.

14 MR. HAGAN: Our expectations and the  
15 representations of the defense counsel.

16 THE COURT: And those representations were made to  
17 the Court, also, that he would testify, and the frustrating  
18 part to the Court is it reminds me of the deposition that  
19 everybody walked out on in the middle of the evening and  
20 didn't notify the Court. Here is another example of the  
21 Court not being notified, and the gentleman is already on  
22 the airplane while we are sitting here in court on Thursday  
23 evening.

24 Well, whatever I do in this regard, it will occur  
25 Tuesday, because it's the appropriate place for that



1 admonition or that information or that adverse inference to  
2 take place. It's not this evening on the resting of NDS's  
3 case. It also gives NDS every opportunity over the weekend  
4 to rethink their position, which I assume they're not, but I  
5 want to be as cautious as possible, give NDS all the time to  
6 contemplate the ramifications of this.

7 All right. While I'll not settled on it, let me  
8 turn to Mr. Snyder so he can make his record, and of course,  
9 that will be that nothing should be said.

10 MR. SNYDER: Thank you, your Honor. I am not  
11 going to repeat my previous objection.

12 THE COURT: I -- I want you to. I want you to  
13 protect your client. I want it on the record.

14 MR. SNYDER: I believe I previously put on the  
15 record, and I -- I will repeat that I do not believe that it  
16 was appropriate for the Court to comment on Dr. Peled's  
17 absence, essentially, for two reasons.

18 First, Dr. Peled was never requested by the  
19 plaintiffs. He was never asked to appear, never appeared on  
20 their witness list.

21 Second, as I've indicated to the Court previously,  
22 it is the defendants' position that our defense in this case  
23 is based on not having participated, not having committed  
24 the alleged conduct and that we have -- we have obviously  
25 made the decision on behalf of the defense that for a

1 variety of reasons regarding the quality of that defense and  
2 presenting it to the jury, that it is in the company's best  
3 interest not to present Dr. Peled's testimony.

4 THE COURT: You do understand, though, that  
5 although I agree that you have the option of producing  
6 Dr. Peled, and if he had not been produced in any way, shape  
7 or form, it simply would have been an inference that I'm  
8 allowing both counsel to argue or the parties to argue about  
9 who's not appearing, whether it's Kudelski, who I believed  
10 would not appear up until recently. I'm still not sure if  
11 he'll really be here, or Murdoch or Peled.

12 But what I've deprived EchoStar of, based on my  
13 belief and your representation, I mean, you collectively,  
14 not personally, but NDS's -- I want to take the attorneys  
15 out of this -- was that a video deposition wasn't necessary,  
16 and therefore, what EchoStar doesn't have is the benefit of  
17 a deposition that is videotaped, because everybody's  
18 expectation was that Peled would testify, and I'd supplied  
19 the same opportunity concerning Charles Ergen. So now, the  
20 jury has an even more difficult task, because with that  
21 expectation and non-notice to the Court and simply Dr. Peled  
22 leaving for the United Kingdom, this jury doesn't even have  
23 the equal ability to have a video deposition, as some of the  
24 witnesses who testified. I'm a little concerned that at  
25 least the Court didn't have notice until he was already in

1 England.

2 MR. SNYDER: Your Honor, may we make one other  
3 point for the record?

4 THE COURT: Uh-huh.

5 MR. SNYDER: As I indicated previously, NDS does  
6 not believe that Mr. Peled's proper -- proffered testimony  
7 on the topics identified by plaintiffs are proper rebuttal,  
8 and likewise, notes that plaintiffs rested their case before  
9 there was any indication that Mr. Peled would appear, which  
10 would negate any suggestion that plaintiffs believed that  
11 Mr. Peled's testimony was necessary for their case.

12 THE COURT: And in response to this not being  
13 appropriate rebuttal?

14 MR. WELCH: Your Honor, that's where we had cut  
15 off earlier in the -- in the day when I was listing the  
16 things that -- that's where we got cut off earlier in the  
17 day when I was listing the things that Dr. Peled testified  
18 about, your Honor. He was also going to testify about his  
19 knowledge or the lack of knowledge about the cash payments,  
20 his lack of knowledge about NDS paying for the mailboxes,  
21 and that he would have liked to know this type of  
22 information. It would have been important to him. This  
23 also gives a great deal of testimony about how satellite  
24 operators make their business decisions, and that satellite  
25 operators do not run out and automatically perform card

1 swaps. They try to perform these ECMs or patches as long as  
2 you can. That directly refutes their argument that EchoStar  
3 should have gone out and made changes in an immediate  
4 fashion.

5 In addition, he talks about the types of harm that  
6 falls upon satellite operators when you have piracy. In  
7 addition to that, he discusses the effects that the Canal+  
8 post would have on Sogecable, which is still pending. That  
9 came down from the Ninth Circuit, so Sogecable still has a  
10 claim. That's presumably one of the reasons why they do not  
11 want his testimony to be heard by the jury, because it shows  
12 the widespread pervasiveness and the harm that they did on  
13 the entire industry.

14 Another point that he will talk about in his  
15 deposition is the state of the knowledge that NDS had at the  
16 time the lab was built, who the major competitors were, and  
17 that what they did with this lab was, rather than make their  
18 product better, they went and they attacked the various  
19 other systems that were their major competitors.

20 He also discusses the fact that DirecTV was  
21 potentially looking to switch. There is a variety of  
22 reasons that they did not bring him, and he covers most of  
23 the topics, but are the subject of their counterclaim. He  
24 talks about the documents and how flippant the claim is that  
25 Ray Adams allegedly said that these were stolen, and that

1 he -- that's where we are really harmed by not having a  
2 video, because he just is like -- the fact that his wife's  
3 car got broken into, the less expensive car, spoke volumes,  
4 and it's those type of things that were prejudiced by not  
5 having a video.

6 In addition, your Honor, as the Court's well  
7 aware, we didn't take a full deposition, because there are  
8 some things that we would like to save for trial. At the  
9 end of the deposition, I made the comment to Mr. Snyder  
10 that, "I guess we're going to see Mr. Peled at trial," and  
11 Darin cut me off and said, "Tomorrow."

12 Based on that, and the fact --

13 THE COURT: Is that on the video?

14 MR. WELCH: It is. It's in the -- it's in the  
15 record, your Honor, at page 170.

16 THE COURT: Read it to me.

17 MR. WELCH: Starting at line 8.

18 THE COURT: Read it to me.

19 MR. WELCH: "We've concluded our questioning for  
20 the day of Dr. Peled, and I guess we're going to see him at  
21 trial."

22 Mr. Snyder cuts me off and says, "Tomorrow," and I  
23 said, "Tomorrow."

24 And in addition, I said, "And we've made a couple  
25 of document requests of you, and I guess you are going to

1 take those, you're going to think about that tonight, and  
2 you'll let us know in the morning."

3 Now, one of the things that Dr. Peled had was a  
4 time line of various events that occurred. I asked  
5 Mr. O'Donnell, who's their paralegal, as well as Mr. Snyder  
6 yesterday, by e-mail on various occasions. And I also told  
7 him to let Chad know and provide the document to Chad. They  
8 failed to respond at all. Even as of late last night, they  
9 failed to respond. It was not until 6:00 a.m. this morning  
10 that first they say, "Here is our lineup."

11 And I said, "So I assume you're not going to be  
12 calling Dr. Peled, or are you?"

13 And then Mr. Snyder responded, "You can infer that  
14 I'm not going to call him."

15 Now, I don't know if he was on a direct flight to  
16 the UK from here, or if he flew from here to New York, and  
17 then he took the first flight out of New York, and they  
18 waited until such time as he was in the air from New York  
19 before they gave us their tactical decision. I don't know  
20 why they delayed, but we asked numerous times for the time  
21 line, and there is information in the time line that we're  
22 not going to be able to ask Mr. Peled about.

23 In addition to that, your Honor, there are certain  
24 documents that we would have liked to question Dr. Peled  
25 about. We're not going to get to do that, because he is not

1 on the stand. For instance, your Honor, there is a  
2 January 30th, 2001 press release issued by NDS that we were  
3 going to mark as an exhibit. And in that document, it  
4 clearly shows that not only they get the DirecTV conditional  
5 access revenues, but they've built an entire business off of  
6 keeping the DirecTV business, because it was their first  
7 digital platform.

8 THE COURT: But you had no power to get Dr. Peled  
9 here other than his voluntary appearance. In other words, I  
10 hear that you're chagrined once he was here and how  
11 frustrating that is. By the same token, in an abundance of  
12 caution, you could have subpoenaed him. You relied upon the  
13 representation of other counsel, which you feel you've been  
14 misled by. But Dr. Peled had the choice of never appearing,  
15 and you would have never had that opportunity.

16 MR. WELCH: Had they told us, had they not  
17 mentioned that they were going to be here on Thursday,  
18 because we were going to -- they were going to call him at  
19 noon, and we were late Wednesday night speaking with your  
20 Honor. They again made that representation that we would  
21 see him, because they -- he wanted to catch a flight to go  
22 home.

23 THE COURT: On what day?

24 MR. WELCH: That he was going to catch a flight  
25 after Thursday's testimony.

1 THE COURT: Now, the expectation on Thursday,  
2 according to my notes, was that we were hopeful of finishing  
3 Christopher Dalla, David Kumar and Jim Emerson. And we had  
4 also stated -- I'm sorry.

5 MR. WELCH: That was Wednesday.

6 THE COURT: That was on Wednesday, my apologies.

7 And on Thursday, we believed that we were going to  
8 have started Reuven Hasak either late Wednesday or early  
9 Thursday, and there was a request to have Dr. Peled testify,  
10 and I believe that Dr. Peled would testify on Thursday.  
11 Dr. Peled could have been called anytime on Thursday, but  
12 instead, after Reuven Hasak finished, we went on to --

13 MR. WELCH: Maldonado.

14 THE COURT: Maldonado?

15 MR. WELCH: Yes, sir, your Honor.

16 THE COURT: So there can't be any confusion in  
17 this record that NDS did have the ability and had requested  
18 that he testify on Thursday, but it was no fault of any of  
19 the parties, nor the Court, because we could have gotten to  
20 him in some portion, if not totally, on Thursday.

21 MR. SNYDER: May I make two points, your Honor?

22 THE COURT: Please.

23 MR. SNYDER: First, as I believe the Court has  
24 pointed out, whatever concerns plaintiffs' counsel may have  
25 about Dr. Peled, they are unquestionably in a better



1 position now than if Dr. Peled had never appeared and had  
2 not been deposed. It was always the defendants' choice  
3 whether to bring him. He was not subpoenaed; he was not  
4 requested. He did not appear on a plaintiffs' witness list,  
5 and the plaintiffs rested without any indication that  
6 Dr. Peled would appear.

7 Second, although plaintiffs have identified a  
8 number of topics on which they will either present  
9 Dr. Peled's testimony or would present Dr. Peled's  
10 testimony, I don't believe that any of those are properly  
11 rebuttal topics. They are all topics that go to plaintiffs'  
12 case in chief, which they were voluntarily willing to rest  
13 without the presence of Dr. Peled.

14 THE COURT: Just a moment. Just a minute.

15 (Interruption in the proceedings.)

16 THE COURT: Now, Counsel, there are a lot of other  
17 options. One, trying to balance the fact that Dr. Peled did  
18 not appear or did not have to appear originally, I can  
19 simply stop the proceedings, bring the jury back in a week  
20 and give you the option, and Dr. Peled, of conducting a  
21 deposition by video if you believe you're severely harmed in  
22 London.

23 Mr. Hagan is shaking his head.

24 Number two, I can state in front of the jury  
25 without giving the present admonition that the Court's

1 requesting Dr. Peled return to the United States, giving NDS  
2 another week to produce him. And then if I read an  
3 admonition, I'll have a much stronger record. And that  
4 means the record goes -- I bring the jury back in a week.

5 Now, think about that for a moment. I am not  
6 proposing either of them. I am tossing out all the possible  
7 options here.

8 (Attorney discussion held off the record.)

9 THE COURT: Because you see, Counsel, I think I'm  
10 on safe ground, quite frankly, with the initial research  
11 I've done, but I want the weekend. I could give an adverse  
12 inference. I may choose not to place myself in that  
13 position and have you argue that adverse inference, in other  
14 words, just simply give the jury the facts of what occurred.  
15 But I am not certain that the facts I'm giving are balanced,  
16 because you're right, there are some things that occurred  
17 that should be added to this transcript. By the same token,  
18 no matter what I add, you're deprived, once he was here, of  
19 a video deposition, because everybody expected that he would  
20 testify, just like Charles Ergen. But in a sense, I am also  
21 calling you on your statement and forcing you to respond,  
22 that if you believe that that video deposition is, you know,  
23 so important. The Court's not on a fast-track concerning  
24 this case. They can return in a week. They would probably  
25 welcome it.

1 (Attorney discussion held off the record.)

2 MR. WELCH: Your Honor, after consulting with our  
3 client, what we'd like to do is read the deposition to keep  
4 the process moving quickly and accept whatever admonition  
5 the Court would like to give to the jury.

6 THE COURT: You see, that puts me in a position of  
7 quashing down the admonition. When I start giving you  
8 options and you decline them, it moves the Court away from,  
9 quite frankly, the strength that I feel that is called for  
10 in this situation. So I want to be very certain that you're  
11 turning down a video deposition in London. Now, I don't  
12 know if he'll comply.

13 Number two, requesting that NDS produce Dr. Peled  
14 under these circumstances, and then having Dr. Peled not  
15 return, places this Court in a better position concerning  
16 the admonition or the information, and it may strengthen  
17 your position concerning his unwillingness to be here.

18 Now, all that negates, though. All that causes a  
19 delay, and you have to decide, you know, with the tactics  
20 that both EchoStar and NDS are employing, you know, how old  
21 your case is getting to the jury. But by the same token, if  
22 this goes over a week, that's my discretionary call, the  
23 case gets old for NDS, also. Frankly, right now NDS is  
24 pushing to get this to the jury, because, in my opinion, the  
25 evidence is freshest in the minds of the jurors with the

1 presentation of the defense case.

2 I'd continue this case a week or two weeks and  
3 find out when the jury is available. This case is now old  
4 for everybody, though, and you've accomplished much of your  
5 case on behalf of EchoStar through NDS, just as NDS  
6 accomplished much of their case through EchoStar's  
7 presentation, so it's kind of balanced. Each of you have  
8 to, really, weigh how much you gained when supposedly it was  
9 your case in chief, but each of you made, you know,  
10 tremendous strides in terms of your own presentation.

11 In what is supposed to be the plaintiffs' case,  
12 NDS had some good points. And what was supposed to be NDS's  
13 case, EchoStar had some good points. So if it's harmful to  
14 both of you, then that last option is off the table, but I  
15 want to discuss all of those. If I was sitting on the  
16 circuit, I'd want to make certain that, you know, all of the  
17 options were heard by the trial court and all the options  
18 were considered by counsel.

19 Now, why don't you have another discussion. NDS  
20 ought to talk about this for a moment.

21 (Attorney discussion held off the record.)

22 THE COURT: And Counsel, I will understand if you  
23 decline to go to London. It will take NDS off the hook,  
24 because the claim would be, of course, Dr. Peled could have  
25 testified and you didn't want to go, so be careful.

1 (Attorney discussion held off the record.)

2 THE COURT: All right. Counsel on behalf of  
3 EchoStar.

4 MR. HAGAN: Your Honor, our preference would be  
5 and our request would be that the Court compel the  
6 defendants to produce Dr. Peled live for testimony on  
7 Tuesday morning.

8 THE COURT: And -- and how can I do that?

9 MR. HAGAN: He's a -- he's the CEO of a party, and  
10 this is a particular issue that we briefed prior to the  
11 trial when we made a motion to compel the trial attendance  
12 of the Israeli engineers, David Mordinson and Zvi Shkedy,  
13 and I will rest on the legal arguments that are in those  
14 briefs. If the Court is not inclined to compel --

15 THE COURT: Well, if I -- if I had the power,  
16 Counsel. If I had the power in a criminal matter, certainly  
17 under these circumstances, that person would appear. The  
18 question is if I have that power.

19 MR. HAGAN: I think that the Court does have that  
20 power, and I think that the legal authority from the Ninth  
21 Circuit supporting that is in our brief, which we filed  
22 prior to trial, moving to compel the attendance of  
23 Mr. Mordinson and Mr. Shkedy, one of which was a 30(b)(6)  
24 representative for the defendants. If the --

25 THE COURT: Now, let's assume that NDS finds,

1 tactically, that his depositional testimony was so harmful  
2 and declines the order. What would the order -- what would  
3 the Court do then, find NDS in contempt?

4 MR. HAGAN: No.

5 THE COURT: In other words, I shouldn't make a  
6 frivolous order that I am not willing to back up.

7 MR. HAGAN: I think that the -- that the impact of  
8 a decision, a tactical decision by the defendants to fail to  
9 comply with that order should be a fairly harsh adverse  
10 inference, which the Court has on numerous occasions through  
11 the course of this trial indicated that it was willing to  
12 give --

13 THE COURT: Uh-huh.

14 MR. HAGAN: -- and if that -- if the Court's  
15 concern -- and first of all, we think that you do have  
16 the -- the authority and the discretion to give that type of  
17 an adverse inference, but if the Court is concerned about  
18 what the circuit may or could do, and the Court wants to  
19 take the conservative approach, which is the middle ground,  
20 then we would request that that instruction be factually  
21 accurate and include a provision that said Dr. Peled -- it  
22 was represented to us that Dr. Peled would appear live. He  
23 left the country without notifying the Court or plaintiffs'  
24 counsel and affording them an opportunity to issue a  
25 subpoena.

1           THE COURT: Okay. I'll need a copy of that  
2 transcript, because I don't have it.

3           All right. Mr. Snyder.

4           MR. SNYDER: Your Honor, as I've indicated  
5 previously, plaintiffs never put Dr. Peled on any iteration  
6 of their witness list.

7           THE COURT: Just a moment. How could they? They  
8 allegedly didn't have the authority to subpoena him, but now  
9 they are telling me that they do have the authority or I  
10 have the authority to order him into court.

11          MR. SNYDER: They requested the presence at trial  
12 of several NDS employees, including employees from Israel,  
13 and NDS complied with that request at -- at the Court's  
14 urging, but in cooperation with the Court and plaintiffs'  
15 counsel and the administration of this trial. They never  
16 requested that Dr. Peled appear as a trial witness.  
17 Defendants indicated that they would call Dr. Peled and made  
18 the decision not to call Dr. Peled.

19          If the Court is inclined to give an instruction, I  
20 agree that it need be factually accurate, although I do not  
21 agree to the addition of the material that plaintiffs have  
22 suggested, which, for example, omits the accurate fact that  
23 plaintiffs never requested Dr. Peled's appearance at the  
24 trial. They rested their case without requesting Dr. Peled  
25 or even any indication that Dr. Peled would appear, so they

1 did not believe that his testimony was critical or even  
2 important to their presentation of the evidence.

3 THE COURT: Okay. Well, it gives me the weekend  
4 to resolve this, and I think the better part of caution  
5 right now is simply to send the jury home, that I make no  
6 further statement to them, certainly, without trying to  
7 think this out over the weekend, or any state to them -- any  
8 statement to them at this time. And if the Court's going to  
9 make any type of statement, the most appropriate time would  
10 obviously be on Tuesday morning just before the playing of  
11 this deposition.

12 Now, knowing who those parties are that are going  
13 to be called in rebuttal, is there surrebuttal?

14 (Attorney discussion held off the record.)

15 MR. SNYDER: Your Honor, at the moment, we don't  
16 contemplate a surrebuttal, but I do not yet know what the  
17 scope of Mr. Kudelski's testimony is going to be.

18 THE COURT: All right. Then, is there anything  
19 further as far as the jury is concerned other than you  
20 resting in their presence and sending them home, and then we  
21 can continue on this evening with other matters?

22 MR. SNYDER: I don't believe so, no, your Honor.

23 THE COURT: Okay. Kristee, would you be kind  
24 enough to get the jury.

25 MR. SNYDER: Oh, actually, we will want to move



1 two exhibits, your Honor.

2 THE COURT: Sure.

3 (The following proceedings is taken in the  
4 presence of the jury.)

5 THE COURT: The jury is present. All counsel are  
6 present.

7 Mr. Snyder on behalf of NDS.

8 MR. SNYDER: Thank you, your Honor.

9 Defendants move Exhibit 141, which is the photo of  
10 the EK1 device described by Mr. Osborne.

11 THE COURT: Any objection, Counsel?

12 MR. HAGAN: No objections, your Honor.

13 THE COURT: 141 is received.

14 (Defendants' Exhibit No. 141 is received into  
15 evidence.)

16 MR. SNYDER: We also move Exhibit 136-A, which are  
17 the airbills identified by Mr. Osborne in his testimony.

18 MR. HAGAN: No objections, your Honor.

19 THE COURT: Received.

20 (Defendants' Exhibit No. 136-A is received  
21 into evidence.)

22 MR. SNYDER: Thank you, your Honor.

23 And with that, the defense rests.

24 THE COURT: NDS has rested, and we are absolutely  
25 right on schedule. We said four weeks. Next Tuesday is

1 actually the end of the four-week period. We are well aware  
2 of different needs that you have. Your daughter's  
3 graduation, vacation is planned. Our hoped schedule from  
4 this point forward is to conclude rebuttal and possibly  
5 surrebuttal sometime on Tuesday of next week, to hopefully,  
6 in a perfect world, read a pack of instructions to you  
7 Tuesday afternoon and send you home and have argument take  
8 place on Wednesday.

9           Now, of course, when are you going to deliberate?  
10 Well, we've been discussing that, and all counsel want to  
11 keep all eight of you. It's not a situation where they are  
12 asking to shed one of the jurors. But when the case is  
13 eventually submitted to you, we don't want your -- your  
14 personal lives, vacation, et cetera, to be affected, and  
15 we're going to try to work with you in that regard. But  
16 also, these case facts need to be rather fresh in mind, and  
17 so does the evidence. So six of you don't have commitments,  
18 two of you do at various times. I think about the best we  
19 can say is that we'll see how you do.

20           So right now, tentatively, we're planning on going  
21 through Wednesday and planning on being out of session on  
22 Thursday and Friday, because we've known about the  
23 commitment of your daughter's graduation. And on Monday,  
24 you know that that day is blanked out for the Court.

25           Now, if we do complete jury deliberations, though,

1 I am going to ask you -- you know, jury instructions and  
2 arguments on Monday, I'm going to ask you to reconvene the  
3 following Monday for a change. So you have Monday, Tuesday,  
4 Wednesday, Thursday.

5 And we believe that you leave as a juror on  
6 Friday.

7 THE JUROR: Thursday.

8 THE COURT: On Thursday. We've got out -- what  
9 time, in the morning or the afternoon?

10 THE JUROR: It's a business trip.

11 THE COURT: In the morning or afternoon?

12 THE JUROR: I leave early Thursday morning.

13 THE COURT: How long will you be gone?

14 THE JUROR: Two weeks. I don't come back until  
15 after --

16 THE COURT: Okay. We are going to have to discuss  
17 that amongst ourselves. We are all aware of it. I don't  
18 know how counsel are going to feel about that.

19 THE JUROR: We are willing to stay late when we  
20 deliberate.

21 THE COURT: I mean, so be it, but remember, I'm  
22 also cautioning you I -- I don't want that to be a rush to  
23 judgment. It may take literally hours, or it may take a lot  
24 of days, you just don't know, yet. So let's just work  
25 together. We'll do our best, and I know you already have.

1           But I can assure you, we are on a schedule. We  
2 got half an hour, literally, behind one day, and we got an  
3 hour and a half ahead another day, so we're there. But the  
4 case hasn't concluded, yet. There is more rebuttal and  
5 possibly surrebuttal evidence on -- on Tuesday, and I am  
6 going to ask you not to form or express any opinion  
7 concerning this case.

8           Now, let me talk to counsel about one more thing  
9 before you leave.

10           Counsel, could I just see just counsel for a  
11 moment in the hallway.

12           (The following proceedings is held in camera,  
13 outside the presence of the jury.)

14           THE COURT: We are on the record at sidebar out of  
15 the presence of the jury, actually in the hallway. And I  
16 wanted to raise with counsel the news media that the Court  
17 is most concerned about in terms of nationwide coverage and  
18 jury influence, and that is the -- the gentleman who has  
19 been with us from ABC, Len Tepper, very nice gentleman, but  
20 he's repeatedly called Millie and the Court keeping track of  
21 the case and apparently has a long-term interest in this and  
22 represented to all of you, and I heard that I think he's  
23 with Dateline --

24           MR. NOLL: Nightline.

25           MR. SNYDER: Nightline.

1           THE COURT: And when a media story hits, at least  
2 in my experience with the AB and Mexican Mafia, if it hits  
3 the national AP or Reuters, because every paper picks it up,  
4 but the far more difficult thing for this Court to deal with  
5 in the past was something like the History Channel, National  
6 Geographic, believe it or not, on something like the Aryan  
7 Brotherhood or Anna Nicole Smith. And what happens is that  
8 when a national story hits, those agencies that weren't  
9 interested, including local media agencies, now flock to the  
10 courthouse. I have no way unless I reach out to Mr. Tepper,  
11 which I'm reluctant to do in a personal conversation and ask  
12 when he is going to run that story. I think he's a real  
13 gentleman. I think he'll probably tell the Court, but that  
14 story can literally run Tuesday of next week, Wednesday of  
15 next week and immediately when you are done with your  
16 arguments, and you know they are out of session Wednesday  
17 and Thursday. One is gone and seven are here.

18           So I raise with you both again as a courtesy, I  
19 don't have any particular wisdom in this area, but I had an  
20 awful lot of cases like this where there was national  
21 coverage, and in the past we've just taken it head-on. So  
22 far we've been kind of nebulous about there might be some  
23 immediate coverage and stay away from it. If that's your  
24 present position and say nothing, let's just let the jury go  
25 home today. If it's not, if any of you have any thoughts,

1 then, and you want to take this head-on, then we need to  
2 forewarn them, because what I will not do is if one of them  
3 watches a portion of it, and they have a great lead-in piece  
4 of some type before they recognize the story, or see enough  
5 of it to turn it off, I'm not going to grant a new trial,  
6 nor am I going to hear that the jury was unfairly tarnished,  
7 because we all had choices.

8           We said to stay away from Nightline and ABC, you  
9 know, for the next week or two. The problem with that is  
10 once you start singling out one service, it does two things.  
11 It raises the perception in the jury's mind that this is a  
12 really important case. And the second thing is, if you get  
13 into that trap, why shouldn't we be warning the jury of the  
14 next article that comes out?

15           Now, I'm not concerned about the printed press.  
16 They are going to follow that admonition. I'm concerned  
17 about television. That really has an impact, and I'm  
18 concerned about the internet, but you have to consider  
19 Google, the internet, and if this isn't getting national  
20 play on the front page of the New York Times or the  
21 Washington Post, it isn't going to get front page on AOL or  
22 Google, in my opinion, until and unless ABC does the story,  
23 and then it might.

24           So if you have any wisdom, tell me now; otherwise,  
25 I'll just follow our course and send the jury home with our

1 thanks, and we'll see them Tuesday at 8:00. So why don't  
2 you talk about that separately back here for just a moment,  
3 because I -- I'm saying to all of you that I'm not going to  
4 grant a new trial or be too concerned of jury prejudice and  
5 placing people on notice. We do have options.

6 MR. SNYDER: Thank you.

7 THE COURT: And by this time, for NDS and  
8 EchoStar, Darin and Chad, you're both in the same position,  
9 now. My fear was that this was going to hit partway through  
10 with just the head report out, and I think Len Tepper has  
11 been a real gentleman about that in terms of holding off so  
12 you ought to have a flavor of everything that's happened  
13 right now, have a pretty balanced story.

14 MR. SNYDER: Thank you.

15 (Attorney discussion held off the record.)

16 THE COURT: Okay.

17 MR. SNYDER: Thank you, your Honor.

18 NDS's preference would be that we not give the  
19 jury any admonition.

20 THE COURT: Okay.

21 Your thoughts?

22 MR. HAGAN: We are fine with that. The standard  
23 admonition of not to form or express --

24 THE COURT: I agree. Until we come to a  
25 consolidated agreement on that, I agree at this point. I

1 just want to keep raising it with each of you, make you  
2 aware that the court clerk's been getting phone calls,  
3 Millie has downstairs. It's --

4 MR. SNYDER: Thank you.

5 THE COURT: All right.

6 (The following proceedings is taken in the  
7 presence of the jury.)

8 THE COURT: We are back in session. The jury is  
9 still present. All counsel are now present.

10 I'll see you Tuesday at 8:00. Please drive  
11 safely. Rebuttal will begin at 8:00 promptly Tuesday. Good  
12 night.

13 Once again, please do not discuss this matter  
14 amongst yourselves, nor form or express any opinion  
15 concerning this case, and don't discuss it with anybody  
16 else.

17 All right. Counsel, if you'd be seated, please.

18 (The following proceedings is taken outside  
19 the presence of the jury.)

20 THE COURT: I want to raise one other issue before  
21 we go into chambers and do some work and you do some work,  
22 also.

23 I want to raise the last testimony of Mr. Kahn for  
24 a moment in relation to the lost profits disgorgement issue.  
25 I think we agreed last evening, as EchoStar was laying out



1 various exhibits for the Court's consideration, that it was  
2 premature for the Court to make a ruling until the Court had  
3 heard from Mr. Kahn. And I think it was also agreed that it  
4 was premature for the Court to make a ruling on this issue  
5 until the Court had heard from, potentially, Mr. Andre  
6 Kudelski if he was appearing.

7 Now -- now, the interesting thing about this is,  
8 what standard should the Court be applying? It's a strange  
9 question to ask, but if this was a Rule 50, for instance,  
10 all inferences are made on behalf of the plaintiff,  
11 basically, all reasonable inferences, or is this by  
12 preponderance or -- or clear and convincing? I don't know.  
13 And I'd like, in whatever I'm doing, to have some standard  
14 to operate by in making this ruling, rather than just  
15 handing down an edict. Now, maybe there is no standard I --  
16 I should be paying attention to, but I'm not quite certain  
17 if I'm to draw all favorable inferences on behalf of the  
18 plaintiff in this regard.

19 The second thing is, the gentleman who testified,  
20 Mr. Kahn, in looking through the documents, it could be  
21 argued, isn't even a part of these meetings. He's -- he's  
22 an engineer who is testifying in an area that he has no  
23 familiarity with, quite frankly. By the same token, that is  
24 the record in front of the Court right now, the separateness  
25 of these entities. So what am I going to hear, potentially,

1 from Mr. Kudelski, or is this going to be a state of the  
2 evidence that I'm going to rule on, or do you even know?  
3 Because what -- what I can't do is this. What I'm not going  
4 to do is get pushed into a box where I'm deciding that  
5 important an issue, you know, at 11:55 after Mr. Kudelski  
6 testifies and I'm supposed to read instructions at 2:00.  
7 It's too vital an issue. I'll just send the jury home, and  
8 if I have to send them home for a day or two, that's what  
9 I'll do, and we'll start the following week. So I'm not  
10 going to put myself in a box intellectually on something  
11 that is so important, \$800 million, potentially, in  
12 disgorgement that you are arguing for and \$800 million,  
13 potentially, that could be swept off the table. How are we  
14 going to handle that?

15 MR. HAGAN: Three points, your Honor.

16 The first, we believe that the appropriate  
17 standard of review is the standard for Rule 50, which  
18 is consistent.

19 THE COURT: How do I know that? I know you  
20 believe that. Where do I find that?

21 MR. HAGAN: The language of Rule 50 and the case  
22 law interpreting it. There is also a case, Anderson v.  
23 Liberty Lobby, Inc. --

24 THE COURT: Now, just a moment. What's my proper  
25 standard of review concerning this question, NDS?

1 MR. SNYDER: Well, I think that -- that there is  
2 ultimately two standards, your Honor. We do intend to move  
3 for a directed verdict under Rule 50 on the disgorgement  
4 issue, given Mr. Kahn's testimony, and that, of course, will  
5 have to be decided under the Rule 50 standard.

6 THE COURT: And you know that in all likelihood, I  
7 have the latitude of either denying that or delaying that,  
8 and I can delay that until the jury, so with that possible  
9 expectation, waiting for Mr. Kudelski.

10 MR. SNYDER: The -- I believe the plaintiffs would  
11 have to prove by a preponderance of the evidence, and there  
12 are certain rules on what kinds of evidence can be  
13 considered in these circumstances. They would have to prove  
14 by the -- preponderance of the evidence that, but for the  
15 defendants' alleged conduct, they would have received the  
16 contract.

17 THE COURT: And where do I find support for  
18 preponderance of the evidence?

19 MR. SNYDER: I -- I'm sorry, your Honor, I can't  
20 cite the case to you right now, but I can --

21 THE COURT: Okay. Well, you are both on fair  
22 notice that we are looking at that in chambers, and any help  
23 that you can give to the Court this evening would be  
24 beneficial to either preponderance standard or the Rule 50  
25 standard.

1           Now, I think in reality, this Court's going to  
2 need whatever is left of Tuesday and Tuesday night to make  
3 that final decision after I hear Mr. Kudelski. And so,  
4 therefore, I think you are going to be placed in the  
5 position of either having the Court instruct on Tuesday  
6 morning and both of you trying to argue Tuesday, or arguing  
7 Tuesday and have the Court instruct after your argument.

8           MR. SNYDER: Excuse me, your Honor. Do you mean  
9 Wednesday?

10          THE COURT: I mean Wednesday. I'm sorry, I said  
11 Tuesday. Thank you, Mr. Snyder.

12          I just want you to anticipate that. Do you still  
13 want two-and-a-half hours?

14          MR. WELCH: Yes.

15          THE COURT: I promised each of you that, and if  
16 one of you wants it, that's what you've got.

17          All right. Now, how long will it take you to go  
18 through the record this evening and get these evidentiary  
19 items out of the way? Because that's another reason that  
20 this case will not go to the jury until I know I've got a  
21 complete record concerning that evidence, and so if you  
22 don't have it tonight and you don't have it Tuesday  
23 afternoon, all that takes time.

24          MS. WILLETTS: We're prepared to go through the  
25 exhibits this evening or right now.

1 THE COURT: Okay. Kristee will be at 5:00.

2 MR. HAGAN: And before we go off the record, your  
3 Honor, I anticipate that both parties will need to urge  
4 certain Rule 50 motions on a couple of issues, whether it be  
5 claims or defenses. The defendants just formally rested in  
6 front of the jury, and so we would request that the Court  
7 set a time so that both sides could preserve their record  
8 and make any Rule 50 motions that --

9 THE COURT: Do you want to do your Rule 50 motions  
10 now?

11 MR. SNYDER: We could do it now, your Honor.

12 THE COURT: Why don't we do it right now.

13 I'll just caution you, you're getting yourselves  
14 in a time box with the evidence, so if one of you who is  
15 sitting there could designate yourself out to be the person  
16 who goes through the evidence, because I have no hesitancy  
17 putting this case over.

18 (Attorney discussion held off the record.)

19 (Live reporter switch with Debbie Gale.)

20 -oOo-

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2 CERTIFICATE

3  
4 I hereby certify that pursuant to Section 753,  
5 Title 28, United States Code, the foregoing is a true and  
6 correct transcript of the stenographically reported  
7 proceedings held in the above-entitled matter and that the  
8 transcript page format is in conformance with the  
9 regulations of the Judicial Conference of the United States.

10  
11 Date: May 5, 2008

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15 JANE C.S. RULE, U.S. COURT REPORTER

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