

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

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ECHOSTAR SATELLITE CORP., et)	
al.,)	
)	
Plaintiffs,)	
)	
vs.)	No. SACV 03-950 DOC
)	Day 15, Volume IV
NDS GROUP PLC, et al.,)	
)	
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Friday, May 2, 2008

Debbie Gale, CSR 9472, RPR
Federal Official Court Reporter
United States District Court
411 West 4th Street, Room 1-053
Santa Ana, California 92701
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EchoStar 2008-05-02 D15V4

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I N D E X

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

2 Day 15, Volume IV

3 (3:26 p.m.)

4 (Live reporter switch.)

5 (Previous proceedings reported by Jane Rule
6 in Volume III.)

7 THE COURT: All right.

8 We're still on the record. All counsel are
9 present.

10 And, Counsel, your Rule 50 motion, please.

11 MR. SNYDER: Thank you, Your Honor.

12 Three motions, and I'll present two of them and
13 Mr. Stone will present the third.

14 First, defendants move for directed verdict on the
15 you issue of disgorgement.

16 The written record indicates that there never was
17 any contract between DirecTV and any of the plaintiffs -- in
18 either of the plaintiffs in this case, EchoStar or
19 NagraStar. Indeed, the only written agreement was between
20 DirecTV and Kudelski SA, which is not a party to this case.

21 Further, the testimony of Mr. Kahn, who is the
22 only person from DirecTV to have testified and was indeed
23 the corporate designee of DirecTV on these issues, is that
24 DirecTV did not have an agreement and would not have had an
25 agreement with EchoStar or NagraStar. And he articulated

1 sound business reasons for that.

2 He would never have had any such agreement with
3 EchoStar because it was a direct competitor and was not a
4 conditional access provider. And he would not have had such
5 an agreement with NagraStar because it was half owned by
6 their primary competitor and thus would have required a
7 disclosure and approval of a company controlled by a
8 competitor for them to move forward technologically.

9 Mr. Kahn also articulated additional reasons
10 internally within DirecTV indicating that they would not --
11 they were not going to at that time replace their
12 conditional access system.

13 Finally, Mr. Kahn testified in testimony that is
14 consistent with the testimony of Dr. Dov Rubin that NDS was
15 never informed of the competitors with whom DirecTV was
16 communicating.

17 Thus, while I think the first two arguments are
18 absolutely dispositive, even if the Court were to find that
19 there was some possibility of an agreement between DirecTV
20 and one of the plaintiffs, the evidence fails to indicate
21 any connection or any possibility of a connection between
22 NDS having a motive for interfering with EchoStar's
23 conditional access system because they were not aware that
24 DirecTV was even talking to the supplier of that conditional
25 access system, Kudelski.

1 It is also Mr. Kahn's testimony that the status of
2 that system, although a consideration, was not a primary
3 consideration and, in fact, would not have changed their
4 mind about with whom they would make their ultimate supplier
5 contract.

6 THE COURT: And I thought I had expressed the
7 opinion last evening that I wanted to listen to
8 Mr. Kudelski, since now he was apparently going to testify,
9 to find out if there, in fact, was not such an awareness.

10 But let me turn to -- on the issue of
11 disgorgement, then, to Mr. Hagan.

12 MR. HAGAN: Certainly, Your Honor.

13 First, I believe that a ruling on this is
14 premature at this point, as the Court has already pointed
15 out.

16 Second, even assuming that Mr. Kudelski was not to
17 come testify, there is still sufficient evidence in the
18 record to support our claim for disgorgement going to the
19 jury. That claim comes under the California Penal Code.

20 And I would like to make a couple of points.

21 First, the separateness of entities is not a
22 relevant factor. The fact that DirecTV was in negotiations
23 with NagraVision or Kudelski, which is a 50 percent owner of
24 Plaintiff NagraStar, is not a relevant inquiry. The
25 relevant inquiry is whether or not but for the defendants'

1 misconduct, which would be the acts underlying our
2 California Penal Code claim, DirecTV would not have stayed
3 with NDS as their encryption provider and would have
4 switched to some other company, regardless of which company
5 that would be.

6 The premise of disgorgement is punitive in nature,
7 and in this particular instance, it's disgorgement of
8 revenues, not profits. So the message to be sent by that
9 portion of the statute is to punish the defendants for
10 unlawful or improper conduct.

11 Second, Mr. Kahn's testimony is certainly not
12 dispositive of the issue. As Mr. Snyder conceded, Mr. Kahn
13 admitted during his cross-examination that the piracy of
14 EchoStar's conditional access platform in the United States
15 in 1998 and 1999 was a factor that was considered by DirecTV
16 when they decided not to switch to NagraVision's conditional
17 access technology.

18 Finally, Mr. Kahn's testimony certainly is not
19 dispositive on the issue of whether or not NDS had knowledge
20 of DirecTV's request to other CA providers.

21 Mr. Mordinson and Mr. Hasak and others have
22 testified that NDS was fully aware of DirecTV's discontent
23 in the 1997-1998 time frame and that they were considering
24 looking at other vendors or other options to replace their
25 CA technology.

1 One of those other viable options would
2 necessarily be Nagra, which is the only other major
3 competitor in the industry.

4 THE COURT: Okay.

5 MR. SNYDER: Could I respond to the first two of
6 those points, Your Honor?

7 THE COURT: Let's make sure Mr. Hagan's done.

8 MR. SNYDER: Of course.

9 MR. HAGAN: So without waiving those arguments,
10 Your Honor, I still believe that the Court should hear the
11 testimony of Mr. Kudelski on Tuesday of next week before
12 considering the ruling on this particular motion.

13 THE COURT: All right. Mr. Snyder.

14 MR. SNYDER: Thank you, Your Honor.

15 The conversations that the Court has had with
16 counsel on this issue recently -- and the Court has been
17 very gracious with its time in thinking through these
18 issues -- have been in the context of the application of the
19 Last Overt Act Doctrine and whether the Court should allow
20 the plaintiffs to reach back beyond the statute of
21 limitations.

22 Our motion for directed verdict is not focused on
23 that issue. It is, instead, focused on the conditional
24 assumption that if the Court were to allow the plaintiffs to
25 reach back, they still would not be able to have the remedy

1 of disgorgement based on the DirecTV contract because of a
2 failure of causation.

3 If DirecTV would have made the same decision
4 regardless of the allegation -- the alleged conduct charged
5 by plaintiffs, then there is no disgorgement. This must be
6 a "but for" causation. And that is why the first two points
7 that Mr. Hagan raises, I think, are unfounded.

8 First, I think it would be -- I think it is almost
9 nonsensical to suggest that the separateness of the entities
10 is irrelevant. If that were accepted, the Court could be in
11 the very peculiar situation -- or a series of courts could
12 be in a peculiar situation of charging disgorgement to a
13 variety of different plaintiffs, all based on the same
14 conduct. Each plaintiff could come in and say but for some
15 conduct, the contract would not have gone to the defendant;
16 therefore, the defendant must disgorge their revenues to me,
17 if there's always a question of what is the correct
18 plaintiff. And in this circumstance there is no evidence of
19 any communications, any contracts and certainly no "but for"
20 contracts between DirecTV and the plaintiffs.

21 The second argument that Mr. Hagan makes is that
22 Mr. Kahn's testimony allows them to proceed because he
23 acknowledges that the state of piracy on EchoStar's system
24 was a factor.

25 But I believe that Mr. Kahn's testimony was

1 equivocal -- unequivocal when he said that although it was a
2 factor, it did not affect the decision. They would not have
3 made the decision otherwise.

4 And so they can consider any variety of things.
5 But unless the alleged conduct creates "but for" causation,
6 the plaintiffs cannot get an award. And Mr. Kahn's
7 testimony is going to be the only competent testimony on
8 that subject because he is the only one from the contracting
9 party who is uniquely in the position to decide where the
10 contract is going to be awarded.

11 THE COURT: His name doesn't appear on any of the
12 documents.

13 MR. SNYDER: Whether or not Dr. Kahn was a
14 signatory to the letter or to the request for information,
15 it is clear that it never proceeded to the request for
16 proposal stage. There never was a contract. And he, as the
17 person in charge of technical evaluation at DirecTV, would
18 be in the position to say that from an engineering
19 perspective, that option was not acceptable.

20 And I believe that was his testimony. And I
21 believe he also testified to his position in the engineering
22 organization at DirecTV.

23 THE COURT: Okay. Thank you.

24 Mr. Hagan.

25 MR. HAGAN: Yes, your Honor.

1 August 3rd of 1998, DirecTV sent out their request
2 for information. That is Exhibit 1565. That is consistent
3 with the testimony of a number of witnesses in both sides'
4 presentations of their cases, that DirecTV was dissatisfied
5 in the '98 time frame and they were shopping around.
6 Exhibit 1565 is a request for information from DirecTV to
7 Nagra.

8 Exhibit 1566, which was admitted through the
9 testimony of Mr. Kahn -- Dr. Kahn, I apologize -- was dated
10 March 31st of 1999. That is a signed study contract between
11 Nagra and DirecTV.

12 Exhibit 1035, which was admitted into evidence
13 through Dr. Kahn, is the proposal provided by Nagra to
14 Kudelski, the Project Phoenix, or white paper.

15 And Exhibit 530 is an October 6, 1999 letter from
16 DirecTV to Alan Guggenheim advising Nagra that DirecTV was
17 not prepared to move forward with a swap of their
18 conditional access technology.

19 Those documents, plus the testimony of a number of
20 witnesses establishing the relevant timeline and the mental
21 state of DirecTV and NDS and Nagra in the '98 and '99 time
22 frame, is more than sufficient for this jury to conclude
23 that but for the hack of Nagra's technology, DirecTV would
24 have swapped to their system.

25 We're also going to hear from Andre Kudelski, who

1 was a principal participant in the negotiations between
2 Nagra and DirecTV on the specific issue of whether or not
3 they would swap to Nagra's CA technology.

4 Mr. Kudelski -- we also anticipate that
5 Mr. Kudelski will testify about attending meetings with
6 representatives from DirecTV. And that once he was advised
7 from representatives of DirecTV that there was information
8 published on the Internet demonstrating that the Nagra
9 conditional access technology was compromised, including
10 compromised DISH Network system in the United States, that
11 was a controlling factor in DirecTV's decision not to switch
12 to Nagra's technology.

13 THE COURT: And what's the reason that a lawsuit
14 didn't occur in that period of time?

15 MR. HAGAN: At that time, Your Honor, we were not
16 aware who was responsible for the hack of EchoStar's system
17 or the publication of information related to EchoStar's
18 system.

19 THE COURT: And Nipper, the 1998 posting of Nipper
20 is simply a partial post. In other words, if it caused
21 concern, it wasn't a complete breach of your security
22 system.

23 MR. HAGAN: It was just enough --

24 THE COURT: It had some nuisance value, it had
25 some problem, but it didn't cause eventual harm.

1 MR. HAGAN: That's correct. It was just enough
2 for DirecTV to know that our system had been compromised.

3 THE COURT: All right. The second issue for the
4 Court after disgorgement.

5 MR. SNYDER: Can I make two more points on
6 disgorgement, Your Honor? I will try very hard not to
7 repeat myself.

8 First, although plaintiffs' counsel frequently
9 invokes the word "Nagra," in this context that term has to
10 be clarified. All these communications between DirecTV and
11 Nagra are with NagraCard or NagraVision, a subsidiary of
12 Kudelski. None of them, not one is with NagraStar, a party
13 to this case.

14 Second, Your Honor, it is not consistent with the
15 record to say that because of the piracy, DirecTV decided
16 not to make a card swap. The process, according to the only
17 evidence in the record, is that it ended much earlier than
18 that.

19 Exhibit 530, which is in evidence, says that
20 DirecTV is not even going to proceed to the request for
21 proposal stage. They started with a request for
22 information. The next step in the process, according to
23 Dr. Kahn, would be a request for proposal which, if
24 accepted, could potentially lead to a contract.
25 Exhibit 530 makes clear they are not even going to that next

1 stage of a request for proposal.

2 THE COURT: All right. Mr. Hagan.

3 MR. HAGAN: Your Honor, subject to the testimony
4 that we anticipate receiving from Mr. Kudelski -- which
5 again I reiterate I do not think is necessary for us to
6 create a fact issue to go to the jury on disgorgement under
7 the California Penal Code -- I think that we have adequately
8 stated our position.

9 THE COURT: Okay. The second issue for purposes
10 of Rule 50.

11 MR. SNYDER: The second issue on which we move for
12 directed verdict, Your Honor, is the statute of limitations.

13 Early in this case the plaintiffs' complaint was
14 dismissed as time-barred. Plaintiffs resurrected their case
15 in part by alleging that their system was ultimately
16 destroyed by postings in December 2000 on dr7 and
17 PiratesDen.

18 During the course of this case, in testimony by
19 Christophe Nicolas on behalf of Nagra, and David Kummer, who
20 was in charge of the antipiracy for EchoStar, there was
21 testimony about a post by someone named Nipper, using the
22 alias Nipper, in November of 1990- -- I'm sorry, December of
23 1998. And that is in Exhibit 2008. Both of them testified
24 that because that post used the code phrase starting with
25 the word "Nipper," that they were aware at that time that

1 their code had been dumped, that it was in the hands of
2 pirates, and that the changeover in their system was
3 therefore inevitable.

4 And that is found in both the testimony of
5 Mr. Nicolas and in the testimony of Mr. Kummer.

6 If that is true and their testimony is that they
7 were aware of that post at the time, they were aware that in
8 the hands of the pirates was the code which could only be
9 obtained by extracting the EEPROM, then they knew at that
10 time all of the damages that they now claim flowed from that
11 information being in the hands of the pirates.

12 The only defense we have heard is that the
13 plaintiffs were unaware of the identity of the poster at
14 that time, which this Court has previously and correctly
15 recognized is not sufficient to toll the statute of
16 limitations.

17 THE COURT: But the response to that that I am
18 anticipating and what's been argued to the Court
19 historically is that a partial compromise of the system
20 isn't the same as the eventual Nipper posting in December of
21 2000 which, in Tarnovsky's own words, created a hole that
22 couldn't be closed.

23 MR. SNYDER: I believe, Your Honor, that the
24 hole -- the testimony's been consistent from all of the
25 technical experts, the hole is in the card. And so it's

1 whether or not pirates have access to that hole to create
2 pirate devices.

3 And I believe it is true of Mr. Nicolas' testimony
4 and Mr. Kummer's testimony that they knew that pirates were
5 aware of how to get into the card once the secret phrase
6 appeared on the Internet. Because the only way to get to
7 that phrase was to have access to the EEPROM. Whether it
8 was exploiting the buffer overflow vulnerability or by some
9 other method, they knew at that time, it was their
10 testimony, that the pirates had access to it, which meant
11 that the code had been exposed and piracy could proceed.

12 THE COURT: Counsel on behalf of EchoStar.

13 MR. HAGAN: Certainly, Your Honor.

14 Two points. First, we have adequately briefed
15 tolling under two theories, the Last Overt Act Doctrine
16 which the Court is still determining what that applies to.
17 I believe it's just going to be the California Penal Code
18 claims. And also under RICO.

19 Under each one of those tolling theories, we are
20 allowed --

21 THE COURT: Just a moment. I already handed down
22 my ruling concerning the federal claims last evening.

23 MR. HAGAN: Correct.

24 THE COURT: Okay.

25 MR. HAGAN: The jury's allowed to consider

1 evidence of acts that occurred outside of the statute of
2 limitations for purposes of RICO, predicate acts, as well as
3 to determine whether or not it's more likely than not acts
4 occurring within the statute of limitations can be
5 attributed to the defendants.

6 In this particular case, one example of those acts
7 would be the December 2000 postings on Mr. Menard's website
8 and the PirateDen website under Nipper aliases.

9 Now, second, there is sufficient evidence to
10 establish that those postings were made by Chris Tarnovsky.
11 I don't think that is one of the issues being urged by the
12 defendants' motion.

13 But the issue of whether or not the 1998 posting
14 by Nipper, which is Exhibit 2008 -- the date of that is
15 November 12, 1998 -- was the driving force behind the card
16 swap.

17 Now, the defendants have raised the affirmative
18 defense of mitigation: Failure to mitigate damages. They
19 simply cannot have it both ways. They cannot argue on one
20 hand that the plaintiffs failed to mitigate their damages by
21 not doing ECM's or countermeasures or taking other
22 appropriate action to diminish their damages as much as
23 possible under the circumstances, and then on the second
24 hand argue that that 1998 post was the driving force behind
25 the swap.

1 The evidence that we've heard from Christopher
2 Tarnovsky, including Exhibit No. 41 and Chris Dalla and Leo
3 Dumov, was that the December 2000 Nipper posting was the
4 significant event in EchoStar piracy that created a
5 situation which could not be resolved without doing a global
6 card swap.

7 There is sufficient evidence for the jury to
8 conclude that, as well as to conclude that the 1998 conduct
9 and postings by Nipper, as well as the activities of
10 Mr. Mordinson and Mr. Shkedy, are related to the
11 December 2000 postings such that the Last Overt Act Doctrine
12 would apply, as well as RICO predicate acts, which
13 plaintiffs have alleged in their complaint.

14 THE COURT: All right. Mr. Snyder.

15 MR. SNYDER: Thank you, Your Honor.

16 Regarding the first point, Mr. Hagan's argument
17 applies only to those claims for which the Court has ruled
18 it may reach -- they may reach back beyond the traditional
19 statute of limitations.

20 That argument for tolling would not apply to the
21 DMCA claims or the Communications Act claims for which they
22 must have actionable conduct after the middle of 2000 -- and
23 it varies slightly, depending on which of those claims
24 you're referring to.

25 If the Court rules that the Last Overt Act

1 Doctrine applies to the Penal Code claims and that there is
2 sufficient evidence for plaintiffs to go forward on a
3 conspiracy theory with an overt act, a last overt act within
4 the statute of limitations, I would agree that this evidence
5 of their knowledge in November of 1998 would not completely
6 bar the claim.

7 Similarly for RICO, if the Court found sufficient
8 evidence of a conspiracy to go forward and a predicate act
9 of either criminal copyright infringement or a violation of
10 1026, then I also agree that this would not -- this argument
11 would not apply to the RICO claim, although I do not believe
12 that there's sufficient evidence of that.

13 But at a minimum, this argument would not apply to
14 the Communications Act or DMCA claims because the Court has
15 already ruled on the tolling as it relates to those -- I'm
16 sorry, the argument would apply and directed verdict would
17 be appropriate to those.

18 Plaintiffs' counsel's second argument is that
19 although they were aware of the posting and they were aware
20 that the code was in the hands of pirates, they were not
21 aware of the extent of the damage, just as they were not
22 aware at that time that Nipper was Mr. Tarnovsky. That
23 argument, however, as a matter of law, is unavailing. If
24 the plaintiff is aware of the damage, they need not be aware
25 of the full extent of it for the statute of limitations to

1 be triggered.

2 And having changed their theory of the case from
3 one that is based on their first notice occurring at the
4 time of these postings to one that is based on having
5 earlier evidence of postings allegedly by Chris Tarnovsky
6 under the alias of Nipper, they now must live with the
7 consequences of that decision, which is that they had an
8 awareness in November of 1998 that triggered under the law
9 the statute of limitations. And when they brought their
10 claim in 2003, it was barred.

11 THE COURT: Okay. Thank you.

12 Mr. Hagan.

13 MR. HAGAN: Yes, Your Honor.

14 We are not seeking damages, nor are we alleging
15 that the November 1998 Nipper posting was the cause of the
16 card swap. Our argument, which has been consistent
17 throughout the course of this trial and pretrial motions, as
18 well as the dispositive motions fully briefed by the
19 parties, is that the significant posting is the
20 December 2000 Nipper posting. And but for that posting,
21 plaintiffs would not have to have effectuated a card swap or
22 had the lost profits that are associated with, at minimum,
23 the hundred thousand pirate devices estimated in
24 Mr. Tarnovsky's e-mail and the internal NDS document.

25 Second, with respect to time limitations, I think

1 that the Court has already addressed this in the jury
2 instructions by including an instruction that advises the
3 jury on when they can and when they cannot consider acts
4 occurring outside the statute of limitations.

5 Finally, plaintiffs' damages, which consist of the
6 card swap and whether or not that card swap relates to the
7 1998 Nipper posting or the December 2000 Nipper posting
8 apparently is an issue of contention, which would mean that
9 it's an issue of fact supported by evidence, at least on the
10 December 2000 side and, if I understand Mr. Snyder's
11 position, on the 1998 Nipper posting. And that is an issue
12 of fact that must be resolved by the jury.

13 THE COURT: Mr. Snyder.

14 MR. SNYDER: Thank you, Your Honor.

15 I'm not going to repeat my previous arguments, but
16 Mr. -- plaintiffs' counsel's response does indicate the need
17 to -- if this motion for directed verdict is not granted, to
18 adjust the jury instructions.

19 The time limitations that the Court has included
20 in the jury instructions prepared to date are based on
21 violations that occur within the relevant period. This
22 motion is addressing a different aspect of the statute of
23 limitations, which is whether or not plaintiffs' claim was
24 timely brought. And if the claim was not timely brought, it
25 does not preserve their ability to recover damages during

1 any period.

2 And if the motion is denied, we would then ask for
3 an instruction and a question in the special verdict form
4 asking the jury to determine at what point plaintiffs were
5 sufficiently aware that they were on notice of their claim
6 and thus, in whatever the proper legal language was, started
7 the statute of limitations clock ticking.

8 THE COURT: All right.

9 Mr. Hagan.

10 MR. HAGAN: Your Honor, unless the Court feels the
11 need for additional briefing on this issue, I think that we
12 have covered the relevant points, the most important being
13 this is a fact issue that must go to the jury for
14 determination.

15 THE COURT: Okay. The third Rule 50 motion?

16 MR. STONE: Thank you, Your Honor.

17 This motion addresses the card swap damages, and
18 it's actually being committed to a written brief that I will
19 file after argument for the Court's edification if it's
20 helpful.

21 If the Court will recall in ruling on Motion in
22 Limine No. 1, the Court warned that EchoStar has been
23 advised that if it fails to present sufficient evidence
24 concerning the card swap and warranty provisions, the Court
25 is amenable to a directed verdict in this regard.

1 In essence, the Court was giving the plaintiffs an
2 opportunity to prove that they took sufficiently reasonable
3 steps to enforce and benefit from the warranty but were
4 unsuccessful in getting Kudelski to comply.

5 Now that we've heard all the evidence, we know
6 that the only evidence from Kudelski to date was from
7 Christophe Nicolas, and he conceded -- in fact,
8 emphasized -- that the card swap was a result of the system
9 being so badly compromised from the December 2000 Internet
10 postings that the Smart Cards had to be swapped. So the
11 official Kudelski testimony and position in this case is
12 that there was indeed a security breach.

13 THE COURT: Now, let me stop you for a moment.

14 MR. STONE: Sure.

15 THE COURT: I heard you're going to file a brief.

16 MR. STONE: Yes, sir.

17 THE COURT: When did you expect a response to be
18 and also get this matter to the jury? In other words, I'm
19 happy to accept your brief; but remember, I take my time
20 with those. In other words, you file a brief, I'll read it,
21 I'll respond. But I'm giving an option of response right
22 back to the -- so be careful with that.

23 MR. STONE: I'll pass on the brief.

24 THE COURT: No, you don't have to.

25 MR. STONE: No. But you make sense.

1 THE COURT: I want to make sure my record's clear.
2 I'm not chilling you. I'm just not going to get pushed into
3 a box where I'm making decisions because of a time schedule
4 by another party. This jury can go home for a week and come
5 back the following Monday.

6 MR. STONE: I understand. I will waive the
7 briefing, Your Honor.

8 THE COURT: Because otherwise you have the option
9 of responding on EchoStar's part, and I'll give you a couple
10 days for it. Okay?

11 MR. STONE: Fair enough, Your Honor. I understand
12 that.

13 THE COURT: So you're not chilled. If you submit
14 the brief, then two more days for EchoStar to respond.

15 MR. STONE: I will not do so, Your Honor. I will
16 simply argue it orally.

17 So the testimony from the only Kudelski witness
18 was that there was a security breach; therefore, the
19 warranty would apply. The testimony of Paul Orban, the only
20 EchoStar witness to directly address this, was to the same
21 effect, that the card swap was necessitated by a compromise
22 of the system. Mr. Orban also admitted that the lower
23 warranty price applies if there is a security breach. He
24 also admitted these warranties were in effect in 2004 when
25 the swap was done and that the warranties had never been

1 amended.

2 In light of that, there is absolutely no testimony
3 that EchoStar so much as ever demanded compliance with the
4 warranty. Mr. Ergen -- starting with Mr. Ergen -- testified
5 that he never directed anyone to send a letter demanding a
6 card swap, including authorizing a lawyer to do so. There
7 is no letter or any other demand in the record for a card
8 swap pursuant to the warranty. The warranty prices,
9 Your Honor will recall, is the direct marginal manufacturing
10 cost of Kudelski. That is the appropriate warranty price if
11 a swap is necessitated by a security breach.

12 There has been absolutely no evidence put in of
13 the direct marginal manufacturing costs, nor has any
14 evidence been put in to excuse performance under the
15 warranty.

16 So what we have is a warranty that clearly applies
17 based on the undisputed testimony of the one Kudelski
18 witness, Mr. Nicolas; the financial person from EchoStar who
19 addressed this issue, Mr. Orban; and we have Mr. Ergan's
20 testimony that no demand was made for the warranty. And no
21 other witness has ever testified in this trial that a demand
22 was made under those warranties pursuant to a security
23 breach of the system.

24 So plaintiffs have failed to put in any of the
25 evidence the Court invited in ruling on Motion in Limine

1 No. 1, either that the warranty did not apply, was not
2 enforceable, or that there had been reasonable efforts to
3 enforce it and seek the lower warranty price as described by
4 Mr. Orban, which is the direct marginal manufacturing cost.

5 THE COURT: Okay. Counsel on behalf of EchoStar,
6 Mr. Hagan.

7 MR. HAGAN: Yes, Your Honor.

8 I would like to review their brief if that is a
9 possibility, but just going off of Mr. Stone's urging this
10 motion orally, I think there are two points that need to be
11 raised.

12 First, whether or not EchoStar took diligent
13 efforts to enforce a warranty, whether or not that warranty
14 provision applied in the first instance, or whether or not
15 the cost of the card swap cards was, in fact, a direct
16 manufacturing marginal cost. That goes to the defendants'
17 affirmative defense of mitigation. That does not abrogate
18 plaintiffs' claims for the cost of the card swap. Even
19 assuming that it did, there is sufficient evidence in the
20 record that plaintiffs had an arms-length negotiation with
21 representatives of Kudelski, and that evidence came through
22 Mr. Jackson, Mr. Ergen and/or Mr. Orban, and that the
23 decision was reached between the parties to purchase the
24 card swap cards at a reduced rate. That rate was \$7.50 as
25 opposed to \$10, which was the typical cost of Smart Cards at

1 that time.

2 In the event that the Court believes it is somehow
3 plaintiffs' burden to prove direct manufacturing costs,
4 Mr. Kudelski, I would imagine, could certainly address that
5 issue. But it is our position that the burden or the onus
6 is not on us. The defendants at no time in this case sought
7 discovery on what the direct marginal costs were for these
8 cards, and the evidence that is in the record -- inclusive
9 of the testimony of Messrs. Jackson, Ergan, and Orban as
10 well as the purchase orders of the Smart Cards that were
11 used in the card swap -- established that the cost of those
12 cards was \$7.50 as opposed to \$10, which was the cost of
13 cards not subject to the card swap.

14 THE COURT: Mr. Stone.

15 MR. STONE: Actually, Mr. Ergen testified there
16 would be a lower warranty price if there was a security
17 breach. The only testimony about negotiations dealt with
18 negotiations that are ongoing as this lawsuit progresses and
19 involves a reduced price, actually a free card swap for 2008
20 and a restructuring of the business model.

21 There was no testimony about any negotiations
22 related to the warranties that apply to this card swap, nor
23 was there any evidence that Kudelski rejected or would
24 reject any claim to apply the warranty price, and nor could
25 there be, given the undisputed testimony of Mr. Nicolas that

1 the card swap was a result of the compromise of the system
2 from the December 2000 postings, which could only be cured
3 by a card swap, which was the definition of security breach
4 within the warranty.

5 So nobody has provided any evidence to excuse
6 plaintiffs' affirmative obligation -- and they do have the
7 affirmative obligation -- to mitigate damages and seek the
8 warranty price.

9 Defendants clearly met their burden by
10 establishing that those warranties existed, that according
11 to Mr. Orban they had not been amended, that there was a
12 security breach that resulted in the card swap. Beyond
13 that, it is plaintiffs' burden to establish, as the Court
14 pointed out in ruling on Motion in Limine No. 1, a reason
15 why that lower warranty price would not apply if indeed the
16 card swap was necessitated by a security breach.

17 If the card swap was not as a result of the
18 security breach, and that is why they did not avail
19 themselves of the warranty, then they have no causation on
20 the card swap damages at all because it must result from
21 something other than a compromise from the December 2000
22 postings.

23 THE COURT: Mr. Hagan.

24 MR. HAGAN: First, it is plaintiffs' burden to
25 establish actual damages. We have done that. The

1 defendants have raised the affirmative defense of failure to
2 mitigate. If they wish to argue to the jury that one
3 component of that failure to mitigate damages was a failure
4 to avail themselves of the specific warranty provision at
5 issue, they are free to do so, and the jury is free to
6 consider that in the event that the Court allows them to
7 consider mitigation of damages for one or more of
8 plaintiffs' claims.

9 It is the defendants' burden to establish that
10 failure to mitigate affirmative defense, which would include
11 failure to establish -- sorry -- which would include failure
12 to take full advantage of the warranty provision.

13 Finally, there is sufficient evidence that
14 plaintiffs mitigated their damages as evidenced by the
15 purchase orders, which show a 25 percent reduction in the
16 cost of the cards used for the card swap as opposed to the
17 cost of the cards that were purchased outside of the card
18 swap. That testimony came in through the purchase orders
19 and through Mr. Orban and was supported by the testimony of
20 Charlie Ergan and Mark Jackson and which will be further
21 supported by the testimony of Mr. Andre Kudelski.

22 MR. STONE: Your Honor, all that testimony --
23 which I don't think states what counsel says -- but in any
24 event, all that testimony would establish is that plaintiffs
25 failed to avail themselves of the warranty, 'cause the

1 warranty is quite specific that the amount is the direct
2 marginal manufacturing cost of Kudelski, which plaintiffs
3 fail to put any evidence in the record of. And it is quite
4 clear that the negotiations, whatever they were, had nothing
5 to do with the warranty.

6 Moreover, failure to mitigate can and has been
7 decided as a matter of law. One case, for example, is
8 EEOC v. Farmer Brothers, 31 F.3d 891 at 906, Ninth Circuit
9 1994.

10 And again, it is the plaintiffs' affirmative
11 obligation to mitigate their damages.

12 So on this record, it is clear, based on
13 plaintiffs' own witnesses, that there was a security breach
14 that allegedly resulted in the card swap, that the
15 warranties applied and were not amended, and that the proper
16 warranty price is the direct marginal manufacturing cost.
17 That was the testimony of Mr. Nicolas and that of Mr. Orban.

18 THE COURT: All right.

19 Mr. Hagan.

20 MR. HAGAN: Your Honor, I believe that there is
21 sufficient evidence in the record to establish plaintiffs
22 have met their burden of proving actual damages. And to the
23 extent that it is plaintiffs' affirmative burden to
24 establish that they mitigated their damages, there's
25 sufficient evidence of that as well through, among other

1 things, the purchase orders.

2 And unless the Court would like additional
3 briefing on this issue, I think that the record is clear
4 that this is a fact issue that goes to the jury and that
5 goes to the defendants' affirmative defense of failure to
6 mitigate and not plaintiffs' establishing the prima facie
7 case in the first instance.

8 THE COURT: All right. I'll be back to you in a
9 few moments or a few hours.

10 Let's go off the record.

11 (Brief pause in the proceedings.)

12 THE COURT: All right. Counsel, this is the
13 Rule 50 motions brought by EchoStar.

14 MR. HAGAN: Thank you, Your Honor.

15 We wish to move for Rule 50 on three issues.

16 The first is the defendants' CUTSA claim, their
17 only remaining counterclaim. They have failed to prove by a
18 preponderance of evidence or offer any admissible evidence
19 whatsoever on the issue of actual damages. They have
20 provided no evidence of actual loss, out-of-pocket expenses,
21 unjust enrichment to the plaintiffs, or reasonable royalty
22 to the extent that would apply in this particular instance.

23 The Court already addressed this issue at the
24 summary judgment stage.

25 THE COURT: Now, Mr. Snyder, you were going to

1 look back in the record. We've looked back. We don't see
2 any additional -- I want you to be satisfied.

3 MR. SNYDER: Thank you, Your Honor.

4 There was testimony by Mr. Dov Rubin regarding the
5 damage to NDS if the documents he identified, the DirecTV
6 materials, would be in the hands of a competitor.

7 He did not identify a specific dollar amount for
8 that damage, nor do I believe that he is required to for the
9 issue of damages to at least go to the jury.

10 Mr. Hasak also testified, although we do not yet
11 have the transcript, that if the information taken from
12 Mr. Adams' hard drive was in the hands of pirates or in the
13 hands of a competitor, it would be damaging to NDS because
14 it could expose their agents and internal security
15 operations.

16 Again, Mr. Hasak did not identify a specific
17 dollar amount, but I do not believe that that is required
18 for the issue of damages to go to the jury.

19 THE COURT: Okay. All right.

20 Your next issue, Counsel.

21 MR. HAGAN: Plaintiffs also move under Rule 50 for
22 an order striking the defendants' affirmative defense of
23 unclean hands as it relates to plaintiffs' claims. I know
24 we have had several discussions off the record about this,
25 Your Honor, but for purposes of preserving our record, we

1 move for Rule 50 on the grounds that the affirmative defense
2 of unclean hands only applies if the relationship between
3 the plaintiffs' alleged misconduct and the plaintiffs' harm
4 is direct and not incidental.

5 There are several cases that address this issue.
6 One citation for the record is Blain v. Doctors Company,
7 222 Cal.App. 2d, 1048 at Page 1063. It's 1990.

8 And the Unilogic case, which we have already
9 briefed.

10 The defendants have failed to produce any evidence
11 showing that plaintiffs' unclean hands, which relates to the
12 alleged theft of these documents, is directly related to
13 plaintiffs' claims or ability to recover for those claims
14 against the defendants for hacking the security system,
15 providing that information into the pirate community, or
16 publishing that information on the Internet.

17 MR. SNYDER: Your Honor, allow me to supplement
18 the briefing on this issue with only two points.

19 First, Mr. Alan Guggenheim testified that when he
20 went to France and met with lawyers for Canal+ and four
21 lawyers from EchoStar, they agreed that they would
22 participate in a joint defense, thus creating an agreement
23 among all of those parties to participate in this conduct
24 and the related misconduct.

25 Second, plaintiffs proved the relationship, or at

1 least their claim about the relationship of this material to
2 the allegations in this case, when they repeatedly
3 questioned Mr. Hasak using as exhibits documents that were
4 part of these stolen materials, including questioning him
5 about operations in which NDS was participating.

6 I believe the other issues have all been
7 identified in our briefing on the topic.

8 THE COURT: Counsel.

9 MR. HAGAN: That still doesn't have a direct
10 relationship to the claims that plaintiffs have asserted,
11 which is required under controlling law.

12 THE COURT: Counsel.

13 MR. SNYDER: I think, Your Honor, we may just have
14 a disagreement of what "related to the conduct" means. The
15 plaintiffs' conduct in hiring pirates, participating with
16 them in the creation of materials that are proffered as
17 evidence, purchasing stolen documents, purchasing --
18 acquiring, whether or not directly or indirectly purchased,
19 materials stolen from the defendant, and using that in the
20 name -- all of that material and effort -- in the name of
21 prosecuting a case is certainly related to the conduct at
22 issue.

23 THE COURT: All right. Your third motion under
24 Rule 50.

25 MR. HAGAN: Yes, Your Honor.

1 Plaintiffs' claims for disgorgement under the
2 California Penal Code allow for disgorgement of revenues.
3 We have met our burden of establishing revenues through
4 numerous witnesses, most recently with Mr. Kahn today.

5 We would ask that the Court strike Exhibit 1597
6 and any testimony by Dov Rubin or any other representative
7 of the defendants as to any costs that they believe offset
8 the revenues.

9 The standard under the California Penal Code is
10 not disgorgement of profits. If it was, that evidence may
11 be relevant. Since it is not, it is not properly before the
12 jury, and the jury should be instructed not to consider it.

13 THE COURT: Okay.

14 MR. SNYDER: Your Honor, I don't think that
15 Mr. Kahn testified about the revenues, although he did read
16 from an exhibit. But with the fundamental -- I think the
17 fundamental issue can be correctly stated; whether or not
18 NDS has evidence of expenses related to DirecTV is relevant.

19 If the Court has decided that the standard under
20 the Penal Code is disgorgement, then I would agree that
21 DirecTV's -- I'm sorry -- NDS's expenses related to the
22 DirecTV contract would not be deductible.

23 If, however, the Court finds that the standard
24 under the Penal Code is the defendants' profits, which
25 particularly in this context would seem far more appropriate

1 and reasonable, then this is certainly relevant and
2 appropriate for the jury's consideration.

3 And I think that the plaintiffs' argument that
4 disgorgement could apply in this context highlights the
5 strain that they are putting on those Penal Code statutes.

6 Those statutes, on their face, are directed to
7 recovering either the revenue or profit that a pirate
8 obtained by selling a pirate device to an end user.

9 There is no indication that the legislature ever
10 contemplated that those statutes would apply to a situation
11 where someone would argue that, as a result of some indirect
12 participation in piracy, they had achieved a long-term
13 contract and thus would have to disgorge hundreds of
14 millions of dollars in revenue.

15 There are several steps of causation that are
16 nowhere contemplated in the text of that statute, which
17 appears on its face to be directly related to the sale of
18 pirate devices.

19 THE COURT: Mr. Hagan.

20 MR. HAGAN: Yes, Your Honor.

21 I believe that the statute clearly says that
22 disgorgement is to revenues and not to profits, and so we
23 would ask that the Court strike Exhibit 1597 and instruct
24 the jury to disregard that as well as any testimony from any
25 of the defendants' witnesses related to it.

1 And one thing that I need to add to our first
2 Rule 50 motion -- and that is there has been no evidence
3 that Plaintiff EchoStar engaged in any wrongdoing to obtain
4 what the defendants have mischaracterized as stolen
5 documents. Reuven Hasak testified that even he did not
6 believe that Mr. Adams' hard drive or his computer was
7 stolen, but rather that he provided that information freely
8 into a number of different communities, including
9 Gilles Kaehlin and Canal+.

10 The only evidence in the record that any of the
11 plaintiffs had any involvement in the obtaining of those
12 documents is as to Plaintiff NagraStar. Both sets of
13 documents went from Gilles Kaehlin and Canal+ to
14 Alan Guggenheim in Paris, France and from Ron Ereiser to
15 Alan Guggenheim and J.J. Gee in Canada.

16 Both of those individuals are employed by
17 Plaintiff NagraStar, and because there is no evidence to
18 suggest that Plaintiff EchoStar was involved, we would ask
19 that at minimum the Court strike the counterclaim and grant
20 a Rule 50 motion and unclean hand -- and defendants' unclean
21 hands affirmative defense as to Plaintiff EchoStar.

22 THE COURT: Okay. Mr. Snyder.

23 MR. SNYDER: Thank you, Your Honor.

24 First, the plaintiffs cannot have it both ways.
25 They cannot argue on the one hand that they're entitled to

1 disgorgement, even though DirecTV's contracts were with
2 Kudelski SA, and at the same time argue that there is
3 sufficient separateness between EchoStar and NagraStar that
4 the unclean hands defense cannot apply to both.

5 THE COURT: I think I've either formally or
6 informally already indicated that they go hand-in-hand.

7 So there's a good possibility if disgorgement does
8 not lie, that unclean hands doesn't, and if disgorgement
9 does, unclean hands does.

10 MR. HAGAN: But that is a separate issue as to --

11 THE COURT: I'm sorry. Mr. Snyder wasn't done.

12 MR. SNYDER: Second, Your Honor, whether or not
13 the hard drive was actually stolen from Mr. Adams does not
14 resolve the issue of whether it was by Mr. Adams or by
15 someone else from Mr. Adams. The material was stolen from
16 NDS. There was no authorization for that material to leave
17 NDS. It was affirmative obligation to maintain its
18 confidentiality. And it was somehow transferred from
19 Mr. Adams to Mr. Kaehlin, and we then pick up the trail from
20 Mr. Kaehlin through their pirate consultant Ron Ereiser or
21 directly into the hands of NagraStar.

22 And Mr. Guggenheim testified, in fact, that
23 counsel for EchoStar was also present, and they agreed to
24 enter into a joint defense for that purpose.

25 So under the law of misappropriation, whether or

1 not it was -- whether or not people believed that Mr. Adams'
2 car was broken into and the hard drive stolen from the back,
3 the material was misappropriated from NDS, and that
4 misappropriated material ended up under circumstances which
5 would qualify as misappropriation under the law of trade
6 secrets.

7 THE COURT: Okay. Thank you very much.

8 If you would remain a little while, I want to go
9 into chambers and hopefully will rejoin you.

10 (Proceedings recessed at 4:18 p.m.)

11 (Proceedings resumed at 5:41 p.m.)

12 (Outside the presence of the jury.)

13 THE COURT: We're on the record. All counsel are
14 present.

15 Counsel, thank you for your courtesy this evening.

16 It's almost 6:00 o'clock. And the Court holds as
17 follows and rules as follows:

18 Rule 45 requires the Court to quash a subpoena if
19 it requires a person who is neither a party nor a party's
20 officer to travel more than 100 miles from where that person
21 resides, is employed, or regularly transacts business.

22 Some Courts have thus implied, even in foreign
23 corporations, that officers living in foreign countries can
24 be compelled to give testimony in the United States. The
25 Court cites *Younis, Y-O-U-N-I-S, v. American University of*

1 Cairo, 30 F.Supp. 2d 390, Southern District of New York
2 1998. Also, In Re Teknek LLC, 206 WL 2136046, which is a
3 bankruptcy court in the Northern District of Illinois, 2006,
4 which this Court was the District Court in, and Judge Cox
5 was the bankruptcy court. Also, Application to Enforce
6 Administrative Subpoena's Duces Tecum of SEC v. Knowles,
7 87 F.3d 413, Tenth Circuit 1996.

8 Likewise, it has been held that, quote, "a foreign
9 corporation doing business in a district is subject to all
10 processes, including subpoenas in that district," citing
11 Less v. Taber Instrument Corporation, 53 FRD 645, 646,
12 Western District of New York, 1971. Moreover, the Court has
13 discretion to require the corporation to produce the
14 individual director named in the subpoena; see also, Elder
15 Beerman, B-E-E-R-M-A-N, Stores Corporation v. Federated
16 Department Stores, Inc., 45 FRD 515, Southern District of
17 New York, 1968.

18 This Court sees no reason why such a conclusion
19 would not equally apply to a CEO of a party company. The
20 trial court's discretion extends to issuing sanctions if a
21 party fails to produce a corporate officer or director in
22 compliance with such an order. The Court once again cites
23 Federal Rule of Civil Procedure, Comments 45 and 16.

24 Now, there isn't a lot of discussion in the
25 Northern District, California case that we saw. They just

1 simply cited rule 45. They didn't cite the bankruptcy
2 court. We've also found some other case law that we believe
3 supports our position. Therefore, I'm going to order
4 Dr. Peled to return to this Court and appear in this court.

5 Now, having made that order, I'm going to turn to
6 NDS and let them have a conference for a moment. That can
7 be done in two ways: He'll either be here, ready to testify
8 at 8:00 o'clock in the morning, as a courtesy. And I will
9 preclude EchoStar from going into the area about his leaving
10 and returning, et cetera. The prejudicial effect outweighs
11 the probative value, as far as the Court's concerned.

12 If there is some concern, I'm going to order NDS,
13 if -- unless there's a representation to this Court by
14 Mr. Snyder on behalf of NDS, then I will simply delay the
15 proceedings. I'll order EchoStar to subpoena him, so that I
16 keep building my jurisdiction in London, and we'll simply
17 wait. But he will be returning.

18 So, Mr. Snyder, why don't you have a consultation
19 with your co-counsel and make your decision.

20 (Pause in the proceedings at 5:44 p.m.)

21 (Proceedings resumed at 5:53 p.m.)

22 THE COURT: We're back on the record. All counsel
23 are present.

24 Mr. Snyder, what's your position?

25 MR. SNYDER: Your Honor, we've heard the Court's

1 order. And I understand that it requires us to produce
2 Dr. Peled.

3 I have not been able to speak to Dr. Peled, nor
4 have I been able to talk to my client, so it's difficult for
5 me to give the Court any answer other than I have heard the
6 Court's order.

7 THE COURT: Okay.

8 MR. SNYDER: And I -- and if there is some time --
9 if the Court can give us some time to get ahold of them and
10 give the Court and the parties an answer about whether
11 Dr. Peled will appear, I would appreciate that.

12 THE COURT: I'll absolutely pay you that courtesy.

13 My thought is this: I want to do this as humanly
14 as possible. And if you want, I'll put this out in a minute
15 order; but, because of the press coverage, I'd recommend
16 against it. I think the easiest way to resolve this is by
17 transcript, and by you relaying that to your client first.

18 If there's any difficulty, then I will simply
19 require -- to make sure I've dotted all my "I's" and crossed
20 the "T's," I will simply stop the proceedings on Tuesday.

21 (To plaintiff's counsel:) And require you to
22 serve the gentleman, also.

23 I believe I absolutely have this power because
24 it's a corporation, multinational, but focused here in the
25 United States, doing business here, receiving money here.

1 Focusing on the corporate entity, there's no question in my
2 mind that it's an appropriate order.

3 MR. SNYDER: Your Honor, may I make one
4 additional --

5 THE COURT: No. Let me finish, and then you've
6 got the rest of the day.

7 (To plaintiff's counsel:) That means you're
8 probably going to London. You're probably going to serve
9 him if it requires service in London, and I may just stop.
10 And the problem with that is Andre Kudelski. So I don't
11 know that Andre Kudelski should suffer, nor should you
12 suffer bringing the gentleman here, so I'm going to give you
13 the option.

14 But no matter what, it will not go forward until
15 I'm certain that every effort's been made on my part. And I
16 may take that one extra step of subpoenaing. I don't think
17 I have to. I just want to be cautious.

18 Oh, I said the "Northern District of New York," I
19 meant the Southern District of New York simply refers to
20 Rule 45. There is not much of an analysis there. But I
21 have a much stronger fact situation here than even the Court
22 in the Southern District of New York has.

23 Now, Mr. Snyder, please.

24 MR. SNYDER: Your Honor, I wanted to inquire, if I
25 could, about the scope of the testimony that plaintiff's

1 will be allowed to elicit from Dr. Peled. And my concerns
2 fall into two categories:

3 First, matters that are not -- that have not been
4 at issue in this trial. The Court has, over our objection,
5 allowed query into the Canal+ and DirecTV litigations. And
6 I certainly understand that order and would anticipate that
7 Dr. Peled would be asked questions about that. But there
8 are other matters involving NDS affairs of various vintages
9 that, based on plaintiff's counsel's comments and some of
10 the questions at deposition, I anticipate they intend to
11 question Dr. Peled about while he's in front of the jury.
12 And it puts -- that puts us in the difficult position of
13 either allowing that testimony or objecting and thus making
14 an issue out of it in front of the jury.

15 Second, Your Honor, there is a -- I'm frankly
16 concerned about the intentions of plaintiff's counsel to
17 question Dr. Peled repeatedly about matters over which he
18 admits he has no knowledge. And while I understand that the
19 plaintiffs have a right to show Dr. Peled documents, to find
20 out whether he has information, to ask him questions whether
21 he has information, I think that it is unfairly prejudicial
22 for the Chief Executive to essentially sit in the witness
23 stand and -- for what is essentially argument in the form of
24 questions.

25 THE COURT: If I knew with more particularly what

1 those concerns were, I could respond to them. But I will
2 not bargain with Dr. Peled nor hand down a ruling that gives
3 him the choice of either coming or not coming based upon my
4 ruling. He's here first, and then we discuss the issues.
5 And I'll take the time to do that with you.

6 And I share your concern. He shouldn't be
7 embarrassed. But by the same token, he should be able to be
8 asked relevant information. And if he's here, maybe I can
9 find out what that is.

10 So the first question is, do I have this power.
11 And I believe I do pursuant to the case law that we've been
12 researching. And frankly, I've been hesitant to use that in
13 the past, but I've always believed that I have the power to
14 order in some of these persons who were or were not going to
15 appear.

16 Quite frankly, I thought an equitable balance had
17 been reached; that there was no reason to really pursue
18 Kudelski anymore; that was his choice -- or Murdoch; that
19 was his choice -- and that the balance-out, if you will,
20 just equitably between Ergan and whomever, which turned out
21 to be Dr. Peled, was the end of the discussion.

22 But I'm quite convinced that I have the power.

23 MR. SNYDER: I'm not trying to bargain with the
24 Court, Your Honor. I have heard your order.

25 THE COURT: Okay.

1 MR. SNYDER: I wanted to raise my concerns so that
2 the Court would understand them.

3 THE COURT: And if you get the information to
4 me -- Mr. Snyder, if you get the information to me, I can
5 look at it. I can see what those categories are. So maybe
6 over the weekend you can set forth what the concerns are.
7 Nobody's trying to embarrass him. And I don't want that to
8 happen either with any of the CEO's.

9 I mean, Ergan had a pretty strenuous direct and
10 cross-examination, so I'm not going to protect him; but by
11 the same token, he shouldn't be asked repeated questions.
12 But if it pertains to Kommerling, for instance, or
13 Tarnovsky, certainly that appears to be appropriate.

14 You can raise the double hearsay objection. One
15 seems to be "exception against penal interest" and the other
16 is an "adverse party." But at least I can deal with those.
17 Right now, I'm just dealing with whether I had the power to
18 bring him back. And I'd assumed I had before, but I was
19 being, I thought, somewhat of a gentleman with both sides
20 and encouraging you to do that, and then letting you argue
21 if you chose not to. But in Peled's position, it's moved
22 far beyond that.

23 As far as Kudelski, that's his choice, though.
24 And it's Murdoch's choice. I'm not going to employ this
25 kind of power.

1 Peled presents a unique problem to me now. So I
2 think the guidelines for each of you is simply this: If
3 Peled is here, as I'm ordering, at 8:00 o'clock in the
4 morning on Tuesday, we're not going to act surprised.
5 You're simply going to move to reopen. The Court's going to
6 say it was aware of that earlier on, so there's no
7 insinuation that anything has happened, because all this has
8 been outside the presence of the jury.

9 And I'm limiting NDS so that there's no discussion
10 about this. I think the prejudicial effect outweighs the
11 probative value with whatever occurred concerning why he
12 left.

13 If he's not present, then I've got two options.
14 One is a series of sanctions, and the Court doesn't want to
15 employ those. They range all the way up to default, which
16 is rather ridiculous and not the option this Court would
17 chose, frankly. But it does potentially call for other
18 sanctions. I would be remiss to employ any of those
19 sanctions, frankly, until I took the next step; and that is,
20 I would cause a subpoena, although I think he's a corporate
21 officer, obviously, and I have -- under my ruling power, I
22 would take that extra cautious step.

23 I probably would look to EchoStar at that time to
24 determine, you know, whether or not Peled, who's eventually
25 going to be here, would have a tactical advantage through

1 NDS of having him called afterwards, or if you want to wait
2 until he arrives. And, unfortunately, we've got to send
3 Mr. Kudelski home. But Mr. Kudelski should be here on
4 Tuesday. And that deposition should take place, also, I
5 think, on Monday. Monday?

6 MR. HAGAN: Monday afternoon.

7 THE COURT: Monday afternoon.

8 Okay.

9 MR. SNYDER: Is it your intention, Your Honor,
10 that Dr. Peled would be called by the defendants --

11 THE COURT: Absolutely.

12 MR. SNYDER: -- as opposed to the plaintiff's
13 rebuttal case?

14 THE COURT: Yeah, if you chose to. I'm giving you
15 the first option all the way along the line. The only
16 option I'm not giving you is having Dr. Peled not return.
17 If you want to fit him into your case and reopen, so be it.
18 If you want him called by the plaintiffs, so be it.

19 (To plaintiff's counsel:) But if I'm bringing him
20 back and NDS decides not to call him, I want to hear your
21 true representation that you are going to call him, 'cause
22 I'm not bringing him back across the world to inconvenience
23 the gentleman. I'm bringing him back 'cause he's a material
24 witness, quite frankly.

25 MR. HAGAN: Yes, Your Honor, we will call him.

1 THE COURT: You'll call him in your rebuttal case?

2 MR. HAGAN: If he appears.

3 THE COURT: Well, he --

4 MR. SNYDER: Would --

5 THE COURT: You mean, if he voluntarily appears.

6 He'll appear. It's just how long it takes, that's
7 all.

8 MR. SNYDER: And I've heard the Court's order,
9 Your Honor. If he is called in plaintiff's case as a
10 rebuttal witness, would he be treated as a rebuttal witness?

11 THE COURT: Yes. But the rebuttal is so broad,
12 that's the problem. You've got general denials running
13 through this case on both sides. And I need to have you
14 narrow that for me on paper and express what your concerns
15 are if he's called. Because it's not fair for me to make a
16 general ruling and then feel -- you know, you or the
17 EchoStar feel that I've said one thing and done something
18 else. So I need to know what those concerns are.

19 Certainly, as to Kommerling and Tarnovsky, that's
20 certainly relevant -- amongst other things that I've heard.
21 But a repeated badgering of him is not. Documents should be
22 shown in good faith. Those documents that a corporate
23 representative of his stature would be expected to see can
24 certainly be shown.

25 The question becomes -- I don't know what's out

1 there. I wasn't at the deposition. I don't know if there's
2 an e-mail, for instance, from Hasak to somebody else and,
3 you know, they're parading that in front of the CSO, who
4 might not ever see that document but, by the same token,
5 should. I mean, I've got to see those documents. I don't
6 know enough, I think, to make a ruling right now -- a
7 sweeping ruling.

8 So I think the best we can expect is this: He'll
9 either be here pursuant to this order, or I'll deal with it
10 at that time on Tuesday morning.

11 And Kudelski should be deposed if he's coming, and
12 he should be prepared to testify on Tuesday. If -- I don't
13 want to look ahead. The order's the order. It says what it
14 says. And the only question I've got is, if you need this
15 further explained to Dr. Peled, I'm happy to issue this
16 other than the oral ruling that's contained in the
17 transcript, which takes time to prepare and probably won't
18 be out until Monday or Tuesday. Or I can simply issue this
19 in a memo form, which then becomes widespread and, quite
20 frankly, everybody knows about it quickly.

21 MR. SNYDER: Transcript's sufficient, Your Honor.

22 THE COURT: Okay. At least for this time, that's
23 a courtesy I can pay you, and that takes Dr. Peled,
24 hopefully, off the hook; and hopefully, he hears this order
25 loud and clear.

1 I think I'd appreciate Monday evening an informal
2 phone call to Kristee. I'm going to be out of the
3 jurisdiction for some period of time on Monday, and then
4 back in. And so I won't know on Monday -- although you can
5 reach me tomorrow, and you can reach me Sunday. There's
6 part of Monday I'm just not available.

7 And I'd appreciate it if the two of you would talk
8 to each other on EchoStar and NDS's respective sides,
9 because we don't want to inconvenience, if we can help it,
10 Dr. Peled and Andre Kudelski. I'd like to get them into
11 court and out of court as a courtesy.

12 Okay. So in short, with all the things we have
13 left to do, I hope we're going to the jury on Tuesday
14 afternoon and Wednesday. But I'm not confident of that
15 right now. And a lot of that depends upon Dr. Peled.

16 Now, is there anything further this evening?
17 Otherwise, I'm going to let Debbie go home to her family --
18 who's my court reporter, for the record, and it's 6:10 on
19 Friday.

20 Counsel on behalf of EchoStar?

21 MR. HAGAN: Nothing, Your Honor.

22 THE COURT: Okay. And on behalf of NDS?

23 MR. SNYDER: Nothing further, Your Honor.

24 THE COURT: Okay. Do you want this in written
25 form so you can do some research? That is the order.

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MR. SNYDER: You mean an informal writing,
Your Honor?

THE COURT: Sure.

MR. SNYDER: Yes, that would be helpful.

THE COURT: Sure, sure.

(At 6:09 p.m., proceedings were adjourned.)

-oOo-

1 -oOo-

2
3 CERTIFICATE

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

11
12 Date: May 6, 2008

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

17 CSR NO. 9472, RPR
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