

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

- - - - -

ECHOSTAR SATELLITE)	
CORPORATION, et al.,)	
)	
Plaintiffs,)	
)	
vs.)	No. SACV 03-0950-DOC
)	
NDS GROUP PLC, et al.,)	
)	Day 16, Volume I
Defendants.)	
_____)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Tuesday, May 6, 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
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08-05-06 EchoStarD16V1

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I N D E X

EXAMINATION

Witness Name	Direct	Cross	Redirect	Recross
KUDELSKI, ANDRE				
By Mr. Hagan	24			
By Mr. Stone		41		

EXHIBITS

Exhibit	Identification	Evidence
Plaintiffs' Nos. 17, 19, 27, 988, 989, 990, 991		17
Plaintiffs' Nos. 53, 75, 103, 1082		18
Plaintiffs' Nos. 1073, 1073-A		18
Plaintiffs' Nos. 1073, 1073-A, 1296, 1297		19

1 SANTA ANA, CALIFORNIA, TUESDAY, MAY 6, 2008

2 DAY 16 - VOLUME I

3 (8:05 a.m.)

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

6 THE COURT: We are on the record in EchoStar
7 versus NDS.

8 Counsel, good morning. I hope all of you had a
9 nice weekend.

10 There was a motion in limine filed with the Court
11 yesterday excluding certain subjects concerning Dr. Peled's
12 testimony.

13 And Mr. Snyder, thank you for the e-mail. We got
14 that last evening; it's appreciated.

15 I know that EchoStar hasn't had time, obviously,
16 to respond to the motions, nor write anything up, and I'm
17 not certain when we'll do that. Is there any concern if
18 we -- if you call Dr. Kudelski first and we try to buy some
19 time over the lunch hour to resolve these issues, or at a
20 late break?

21 MR. HAGAN: That's fine, your Honor.

22 THE COURT: It concerns five areas. Let me give
23 you some tentative thoughts just for a moment. And these
24 are only tentative, because of course, I haven't had the
25 courtesy of hearing from -- from EchoStar, and obviously

1 because it was filed last -- yesterday afternoon, and you
2 probably didn't get it until last evening, so --

3 The first in-limine motion concerns Michael
4 Kleiner's (phonetic) relationship with NDS. Michael Kleiner
5 was a co-founder of NDS, and he was forced out of the
6 company in 1992, and NDS found that he was conspiring with
7 another employee to defraud NDS.

8 NDS successfully sued Kleiner, and at present, the
9 testimony doesn't seem relevant to the Court, but once
10 again, these are just tentative thoughts and only one-sided,
11 because I only have one-sided briefing under 401. And
12 unless plaintiffs can point to some relevance, just
13 initially, and with one-sided briefing, it doesn't seem to
14 be relevant under 402.

15 Concerning Israeli tax authorities' investigation,
16 at some point, a question arose as to whether NDS should be
17 treated as an Israeli or United Kingdom company. The
18 Israeli tax authorities investigated NDS, and the dispute
19 was settled. On the face of it, until I hear from EchoStar,
20 it seems to be facially irrelevant under 401. It seems to
21 be character evidence, basically, which is inadmissible
22 under 404.

23 Concerning Boris Floricic's suicide,
24 F-l-o-r-i-c-i-c-s, Boris Floricic committed suicide under
25 suspicious circumstances, apparently at a park in West

1 Germany after writing a research paper on reverse
2 engineering and meeting with NDS employees. Now, it's my
3 understanding that NDS documents were actually found on his
4 body; is that correct?

5 MR. SNYDER: No, your Honor. I'm not aware of
6 that -- that at all.

7 THE COURT: Okay. Plaintiffs alluded in their
8 Complaint to -- Floricic's suicide being connected in some
9 way to Rupert Murdoch. Tentatively, this seems relevant, if
10 at all, only as to impermissible character evidence under
11 401, 402 and 404. Additionally, whatever probative value,
12 may be substantially outweighed by the prejudicial impact
13 and the undue consumptive -- consumption of time. In other
14 words, I -- I want to know what the nexus is between the
15 suicide in West Germany -- and it was in a park, wasn't it?

16 MR. HAGAN: Yes, your Honor.

17 THE COURT: He was the gentleman whose stockings
18 were --

19 MR. HAGAN: Was found hanging from a -- a tree in
20 the park.

21 THE COURT: Hanging from a tree. So I need to
22 hear why you believe that that's relevant, where we are
23 going with this, and remember, this is only one-sided
24 briefing so far. These are just initial thoughts that we
25 could put together last evening and early this morning.

1 The fourth is Yossi Tsuria, T-s-u-r-i-a, and the
2 Dome of the Rock. Yossi Tsuria was involved in some fashion
3 with the attempt to bomb the Dome of the Rock in the early
4 1980s. According to Reuven Hasak, he was convicted and sent
5 to, quote-unquote, "a prison without walls" by Israeli
6 authorities for knowing what the -- about the plot and
7 failing to report it to police.

8 Now, some of this evidence flowed in during
9 Hasak's testimony, and I forget which party raised this
10 evidence, but it came in without objection at the time, and
11 I don't know whether EchoStar raised it or NDS. I just -- I
12 just don't recall.

13 It may have been appropriate during Hasak's
14 testimony to show the level of steps taken by NDS to prevent
15 elicited activities by employees, in other words, the
16 employment of this gentleman. Apparently, plaintiffs are
17 going to contend that NDS hired hackers and quote-unquote,
18 "criminals." Therefore, they are negligent in hiring and
19 failing to adequately supervise them. In this sense,
20 Tsuria's character would be an issue and would be
21 admissible, however, its relevance is -- is of great concern
22 to the Court, as the conduct alleged was that of terrorism,
23 and it's not directly related to piracy or hacking in this
24 case, and of course, has the potentiality to inflame the
25 jury based on the allegations that Tsuria was a terrorist.

1 That's why I'd had a sidebar with counsel in the hallway,
2 and it really encouraged both of you to get out the fact
3 that this was not terrorism aimed at the United States,
4 which I think a lot of our jurors would have assumed when
5 this came flowing into evidence.

6 Now, the other side of that coin, though, is that
7 the virtue of each of your respective corporations, EchoStar
8 and NDS, has been testified to voluminously by different
9 witnesses. So it may have relevance in terms of not only
10 the type of people being hired, but the depth of their prior
11 activity, their unsavoriousness (sic), but once again, it
12 appears to be for character, except I noticed that Hasak was
13 very, very voluntary. He was quick to put in that this was
14 a prison without walls, and the only import of that answer
15 could have been "no harm, no foul, he's really not very
16 dangerous." And with the voluntariness of that statement,
17 it may have a great effect in terms of the fact that no,
18 this is a relatively involved and dangerous character. So
19 I'm going to wait to hear your response, but right now, that
20 hangs in balance. I am just not certain until I hear the
21 courtesy of -- or have the courtesy of EchoStar replying.

22 Concerning Kommerling's statements concerning
23 Chris Tarnovsky, Dr. Peled's testimony contains statements
24 regarding conversations with NDS joint venturer Oliver
25 Kommerling. Kommerling indicated to Dr. Peled that he

1 believed -- allegedly that he believed that Tarnovsky was
2 responsible for hacking into the Canal+ and EchoStar
3 systems, and that Tarnovsky posted the results on the
4 internet. Kommerling advised Peled to contact Tarnovsky,
5 and Peled may or may not have done so. It's still unclear
6 to this Court whether Dr. Peled then called Tarnovsky and
7 had a direct conversation with him.

8 Did he from the deposition that you've undertaken?

9 MR. WELCH: No, sir, your Honor. Ray Adams
10 contacted --

11 THE COURT: Thank you. So Dr. Peled did not?

12 MR. WELCH: He contacted Kommerling.

13 THE COURT: All right.

14 Now, statements made by Tarnovsky are claimed the
15 admissions of a party-agent within the scope of his agency.
16 There is evidence in the record sufficient to demonstrate
17 that Tarnovsky was involved in piracy and/or anti-piracy
18 efforts within NDS and was hired for his skill as a gifted
19 hacker. Statements that he was involved in hacking and
20 piracy were plainly within the scope of Tarnovsky's
21 employment. Therefore, the statements are admissible as
22 non-hearsay pursuant to Federal Rule of Evidence 801(d).

23 Kommerling's statements were also statements of a
24 party's agent within the scope of his agency. While
25 Kommerling was no longer an employee, he certainly was a

1 joint venturer and continued to work on NDS's behalf. He
2 was intimately involved in the Haifa laboratory. The fact
3 that Kommerling set up a shell corporation to conduct
4 business with multiple companies does not foreclose the
5 possibility that he still acted as NDS's agent insofar as he
6 was reporting potential misconduct by NDS employees to
7 Dr. Peled. It defies common sense to think that NDS stopped
8 exercising control over Kommerling because he became,
9 quote-unquote, "an independent consultant" after working as
10 an NDS employee. Because Kommerling was also hired as a
11 skilled hacker, the scope of his agency included piracy,
12 anti-piracy and hacking. Moreover, the fact that he was
13 reporting this to Dr. Peled suggests that it was within the
14 scope of Kommerling's employment relationship with NDS.

15 The testimony also comes in under the residual
16 hearsay exception pursuant to Federal Rule of Evidence, 807.
17 It bears sufficient guarantees of trustworthiness in that it
18 was made by a contractor or agent of NDS to NDS's CEO, if
19 this is true. It suggests a motive to be truthful and
20 provide good information, continued employment with one
21 or -- of two major firms in the CAS market. Additionally,
22 there was some indication that Dr. Peled followed up on
23 these conversations, suggesting that Dr. Peled himself
24 believed the information to be truthful.

25 The evidence is offered to prove a material fact.

1 That is, that Tarnovsky was responsible for hacking EchoStar
2 and the December 2000 postings, and also, the continued
3 activities pursuant to the Court's ruling allowing the
4 Canal+ evidence to come before this jury. It's also more
5 probative than other evidence on that issue. Testimony
6 coming directly from NDS's CEO is especially probative, not
7 only on the fact that the conduct occurred, but on NDS's
8 response, if any, to that conduct. And finally, it serves
9 the general purposes of the rules of evidence and interest
10 of justice to allow the evidence in that allayed the jury
11 substantially in finding the truth of who committed the acts
12 in issue will bear significantly on NDS's response to those
13 acts.

14 Even if the statements were not admitted for the
15 truth, they proved Dr. Peled's, and therefore, NDS's
16 knowledge of Tarnovsky's conduct. This, combined with the
17 fact that NDS did not evidently do anything to remedy that
18 contact, would be circumstantial evidence of NDS's
19 complicity in the scheme, as well as the fact that Tarnovsky
20 was acting asking within the scope of his employment.
21 Moreover, the jury may well consider NDS's knowledge of any
22 misconduct in their efforts, if any, to remedy that
23 misconduct when assessing punitive conduct. Therefore, the
24 evidence is admissible, both for its truth, and for
25 non-hearsay purposes.

1 Now, that's tentative, also. Of course, I haven't
2 heard EchoStar's position. I can imagine what your position
3 would be.

4 So, once again, going back, it appears, to me,
5 Michael Kleiner's relationship with NDS is irrelevant at the
6 present time.

7 Number two, the Israeli tax authorities'
8 investigation appears to be impermissible character
9 evidence. It appears on the face of it to be irrelevant.

10 Boris Floricic's suicide, on the face of it, it
11 appears unduly consumptive of time, extremely prejudicial.
12 The import is that a suicide took place with the auspices of
13 it being a murder. We can't go anyplace else with that.
14 Apparently, the German authorities believe this to be a
15 suicide. There is a lot of inference out there that it was
16 a murder, and his body was apparently dragged to the
17 location. The difficulty is this. I don't know how -- how
18 you use it. In other words, I'm stretching my imagination
19 to find out how that would be relevant. If documents were
20 found on him, the argument could be made that these are NDS
21 documents, but certainly if somebody within that
22 organization, by the wildest stretch of imagination, wanted
23 him killed, why would somebody leave NDS documents on him?
24 It seems rather silly and very unprofessional.

25 So I'm deeply concerned about the -- the suicide.

1 Where does that take us, except into another couple weeks,
2 if you want, of -- of death testimony, and you can get the
3 West German authorities here. And so if I open that door,
4 I'm opening it all the way, and I'm reluctant to do that.

5 And finally, Tsuria and the Dome of the Rock,
6 that's really in play. Reuven Hasak was more than happy to
7 tell us, in so many words, the virtue of this employee by,
8 you know, not being in prisoned within -- a prison without
9 walls. And the virtue of these different corporations about
10 never doing anything wrong, whether it's EchoStar or NDS,
11 appears to be nonsensical at this point. And the equality
12 of hiring this gentleman, whatever his special skills were,
13 may be relevant. I don't know if he's an accomplished
14 hacker, and therefore, he has the qualities that would be
15 limited and would probably lead me to exclude him, or if
16 he's a security person. And if he's a security person, the
17 criminality of trying to blow up the Dome of the Rock,
18 regardless of what religion is involved, is rather
19 astounding, but I'm waiting to see why it's relevant. I'm
20 concerned.

21 And finally, I'm concerned whether the prejudicial
22 effect finally outweighs the prejudicial value in the last
23 analysis. Although it's already before the jury, and I've
24 already cautioned both of you to clean this up so that when
25 terrorism was mentioned and this gentleman was mentioned at

1 our sidebar, I was very pleased to see, I think, Mr. Snyder,
2 you know, take that extra step, and thank you. I think our
3 jurors would have assumed that this was a terrorist aimed at
4 the United States. So on one hand, the cat's already out of
5 the bag. I'm not too sure what the harm is at this point,
6 not making it clear, and the spill over already occurs to
7 NDS, however this -- I think there was also some general
8 mention of Dome of the Rock in the testimony before. It's
9 just how long you dwell on it.

10 Now, I'll simply wait for the next recess, but
11 EchoStar has rested. I've given you the opportunity to
12 reopen if you like to. Would you like to continue your
13 position of resting at this time?

14 MR. SNYDER: Yes, your Honor.

15 THE COURT: Okay.

16 MR. SNYDER: Although, as previously indicated, in
17 compliance with the Court's Order, Dr. Peled is present.

18 THE COURT: Thank you very much.

19 Now, I've also had the representation that
20 Dr. Peled will be called, and he will be called, but the
21 order will be this. I'm not giving you the opportunity of
22 changing your order. Your order will be Andre Kudelski. He
23 will be your first witness. I will control that. As a
24 courtesy, he's flown here. We'll get him on and off the
25 stand. Dr. Peled has been here twice, now. We'll get to

1 Dr. Peled as soon as we finish Andre Kudelski.

2 What other evidence do you have in rebuttal?

3 MR. HAGAN: That is it, your Honor.

4 THE COURT: None?

5 Have you worked out the stipulations?

6 MR. HAGAN: We have worked out the stipulation,
7 and we're -- we're waiting for the defense counsel's office
8 to courier it up here. We have the additional exhibits to
9 attach to it.

10 THE COURT: Okay. And then it's surrebuttal. You
11 know if Dr. Peled is testifying, Andre Kudelski is
12 testifying. Rupert Murdoch has been invited, but I'm not
13 going to force him in, as I did -- I'm not going to force
14 him in. I am not sure what the relevance is, yet, so --

15 MR. SNYDER: Your Honor, we currently don't
16 anticipate any additional witnesses. There is the
17 possibility that we would want to call Mr. Dan Dehan
18 (phonetic) to respond to certain testimony that may be
19 elicited from Andre Kudelski.

20 THE COURT: Okay. Concerning the items of
21 evidence before I bring this jury in to open court, I know
22 that you worked with Kristee yesterday and concerning the
23 items of evidence on behalf of EchoStar.

24 MS. WILLETTS: Your Honor, I believe we've
25 reached -- reached a stipulation as to a couple of

1 outstanding items that weren't officially offered into
2 evidence with the exception of one document, which is the --

3 THE COURT: Let's hear the stipulation first.
4 Let's see how far you've gotten.

5 MS. WILLETTS: I don't believe we've yet drafted
6 up the actual language, yet, but we have an agreement in
7 principle on the items to be included.

8 THE COURT: This will be the stipulation. We're
9 going to state it on the record. We'll do it now.

10 MS. RICKETTS: Your Honor, with respect to
11 Exhibit 17, 19, 27 --

12 THE COURT: Exhibit 17, 19 --

13 MS. RICKETTS: 27, Exhibit 988, 89.

14 THE COURT: Just a moment. 27, 988.

15 I'm going to repeat them back to you.

16 29.

17 MS. WILLETTS: Not 29, your Honor.

18 THE COURT: I'm going to do this again. We are
19 going to slow way down, okay?

20 First exhibit, what is it?

21 MS. RICKETTS: Exhibit 17?

22 THE COURT: No. I thought it was 1117.

23 MS. RICKETTS: No, your Honor, I'm sorry. 17.

24 THE COURT: Okay. Exhibit 17.

25 MS. RICKETTS: 19.

1 THE COURT: 19.

2 MS. RICKETTS: And 27.

3 THE COURT: And 27.

4 MS. RICKETTS: 988.

5 THE COURT: Okay.

6 MS. RICKETTS: 989.

7 THE COURT: All right.

8 MS. RICKETTS: 990 and 991.

9 THE COURT: 991. Thank you.

10 MS. RICKETTS: With respect to those seven
11 exhibits, those are subject to NDS's motion in limine. We
12 understand that the record reflects that those were admitted
13 over our objection, so we are stipulating that they can be
14 put into evidence subject to the fact that we're -- without
15 waiving our objections that are already in the record.

16 THE COURT: I understand. That -- that will not
17 hurt your appellate rights, then, if I've made an incorrect
18 ruling.

19 MS. RICKETTS: Right.

20 THE COURT: That's fair.

21 MS. RICKETTS: That's --

22 THE COURT: They are received.

23 (Plaintiffs' Exhibit Nos. 17, 19, 27, 988,
24 989, 990 and 991 are received into evidence.)

25 MS. RICKETTS: Then with respect to Exhibit 75,

1 103 and 1082, as well as 53, we have stipulated that those
2 can be put into the record.

3 THE COURT: All right. 75, 103, 1082 and 53 are
4 received.

5 (Plaintiffs' Exhibit Nos. 53, 75, 103 and
6 1082 are received into evidence.)

7 MS. RICKETTS: We are in the midst of preparing
8 redacted copies of interrogatory responses from each side
9 that are going to be admitted into evidence. That includes
10 Exhibit 1073 and a new Exhibit 1073-A.

11 THE COURT: Okay.

12 MS. RICKETTS: And we have an agreement with
13 respect to 1296 and 1297, right?

14 MS. WILLETTS: Yes.

15 THE COURT: 1296 and --

16 MS. RICKETTS: 1297.

17 THE COURT: 1297, okay.

18 MS. RICKETTS: And --

19 THE COURT: And are each of these to be received
20 into evidence, 1073, or is it the redacted 1073-A?

21 MS. RICKETTS: Redacted 1073 and redacted 1073-A.

22 THE COURT: Okay. Both are received, then.

23 (Plaintiffs' Exhibit Nos. 1073 and 1073-A are
24 received into evidence.)

25 THE COURT: And 1296?

1 MS. RICKETTS: Is redacted, and that's -- we've
2 stipulated that that should be received into evidence.

3 THE COURT: Okay. And 1297?

4 MS. RICKETTS: Is not redacted.

5 THE COURT: Is not redacted?

6 MS. RICKETTS: But it should be in evidence.

7 THE COURT: Okay. Each of those are received,
8 1073 in a redacted form; 1073-A, redacted form; 1296,
9 redacted form; 1297 in its entirety, non-redacted.

10 (Plaintiffs' Exhibit Nos. 1073, 1073-A, 1296
11 and 1297 are received into evidence.)

12 MS. RICKETTS: Non-redacted, yes.

13 THE COURT: Okay.

14 MS. RICKETTS: And then, that just leaves
15 Exhibit 12-A, which is a duplicate of 191.

16 THE COURT: Well, then 191 is relevant. 12-A was
17 the first item that came into evidence.

18 MS. RICKETTS: I don't believe -- most of the
19 testimony, your Honor, has been with respect to 1291, and
20 that one's in evidence, 191, I'm sorry. 191 is in evidence.

21 THE COURT: No, the first -- the first item marked
22 was 12-A.

23 MS. WILLETTS: I believe, your Honor, it was the
24 first time it was discussed was -- was with reference to
25 12-A, and we don't have an official transcript showing that

1 it was received into evidence, but it was the first item
2 discussed.

3 THE COURT: It was the one -- it was the first one
4 marked. I'm going to take the first in time. It's as
5 simple as that.

6 MS. RICKETTS: Well, your Honor, with respect --
7 if I may just be heard with respect to that Exhibit, 12 --
8 I'm sorry, 191. The significance of 191 is that it's a
9 document from EchoStar's document production.

10 THE COURT: Work it out. Otherwise, it's 12-A.
11 In other words, I'm glad to accept both, as long as there is
12 a limiting instruction or comment by the Court so that each
13 of you can show where the document came from, but if you put
14 me to the test, it's 12-A.

15 MS. RICKETTS: Okay.

16 THE COURT: Simple as that.

17 MS. WILLETTS: Then, we would say both.

18 THE COURT: Okay, both. All right. So 12-A and
19 191, and that will give each of you the advantage of showing
20 where it came from, and that's fair. And so it will be one
21 of the few documents that we have that's duplicated, and
22 that way you can each argue that it came from the other
23 party, okay?

24 MS. RICKETTS: Okay.

25 THE COURT: Okay.

1 MS. RICKETTS: Thank you, your Honor.

2 THE COURT: Now, do you have anything else on
3 behalf of EchoStar or NDS, or does that conclude all of the
4 documents that were in contention?

5 MS. WILLETTS: There -- there is one document,
6 it's the stipulation that we have reached regarding the
7 screen shots relating to Christopher Tarnovsky's account and
8 the Don Branton account, and that's still being worked out.

9 THE COURT: Well, you don't have much time left to
10 work that out.

11 MR. SNYDER: I believe that we provided the Court
12 with a written version of that and signed it by both parties
13 on Friday evening.

14 MR. HAGAN: The only thing that's left to do is
15 to -- is to put the actual screen shots behind the
16 stipulation, as I understand if, but we are having another
17 copy brought up to the Court so that we can file a complete
18 copy so that there is not going to be any problems with --

19 THE COURT: No problems.

20 MR. HAGAN: -- different versions.

21 THE COURT: No problems.

22 MR. HAGAN: Correct.

23 THE COURT: All right. We'll see. All right.

24 Okay. Then, any reason for me not to get the
25 jury, then?

1 (No audible response.)

2 THE COURT: All right. Kristee, if you would be
3 so kind to get the jury for us.

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

6 THE COURT: Good morning, again.

7 The jury is present. All counsel are present.

8 Counsel, thank you for your courtesy. If you'd
9 please be seated.

10 And Counsel, in rebuttal on behalf of EchoStar,
11 your first witness, please.

12 MR. HAGAN: Thank you, your Honor. EchoStar --
13 EchoStar calls the CEO of Kudelski Group, Andre Kudelski.

14 THE COURT: Thank you. And if you'd ask the
15 gentleman to step forward, please.

16 And thank you, and the interpreter is present,
17 also.

18 If you'd ask Mr. Kudelski to stop at that
19 location, and ask the gentleman to raise his right hand,
20 please. Kristee, who is the clerk, will administer the oath
21 to him.

22 ANDRE KUDELSKI, PLAINTIFFS' WITNESS, SWORN

23 THE WITNESS: I do.

24 THE COURT: Thank you, sir. Would you please be
25 seated, here, in the witness box on my left.

1 And Counsel, if you'd like to retrieve these
2 documents on the edge of the witness box, please.

3 Sir, would you state your full name for the
4 record, please.

5 THE WITNESS: My name is Andre Kudelski.

6 THE COURT: And would you spell your last name for
7 the jurors, please.

8 THE WITNESS: It's K-u-d-e-l-s-k-i.

9 THE COURT: Thank you.

10 Now, you have an interpreter with you. Do you
11 feel comfortable communicating in English to the jury?

12 THE WITNESS: I will at least try to do so.

13 THE COURT: And if you have problems, would you
14 stop and make certain that you rely on the interpreter so
15 you fully understand the questions, or if you need to answer
16 in your native language, it can be reinterpreted at any
17 time; is that acceptable to you, sir?

18 THE WITNESS: Yes, sir.

19 THE COURT: And if the jurors have any difficulty
20 understanding the gentleman, just raise your hand. But
21 otherwise, we'll proceed slowly, and I'll make counsel go
22 slowly with the questions.

23 Counsel, direct examination, Mr. Hagan.

24 MR. HAGAN: Thank you, your Honor.

25

1 DIRECT EXAMINATION

2 BY MR. HAGAN:

3 Q Good morning, Mr. Kudelski.

4 A Good morning Mr. Hagan.

5 Q Before we get started today, I'd like to give you an
6 opportunity to introduce yourself to the ladies and
7 gentlemen of the jury and tell them a little bit about what
8 you do.9 A My name is Andre Kudelski. I'm born in 1960 in
10 Lausanne, Switzerland. My father has founded a company
11 called Kudelski in 1951. So company has been active for
12 more than 57 years, first, in professional tape recorders,
13 and after, in digital TV conditional access, but just
14 meantime, analog paid TV system. In the first three decade
15 of the company, the company has worked by producing
16 professional tape recorders for radio industry, for movie
17 industry, but also for governmental agencies. And many
18 product have been developed for the U.S. government,
19 including some for the FBI to track, how to say, criminals.20 Now, in 1991, I have had the opportunity to become the
21 chairman and CEO of the company, my goal, and that was a
22 difficult challenge. I was 31 years old, wants to transform
23 the company from a company that was in a situation that was
24 not easy due to a very strong competition from the Far East,
25 and to transform this company in a new sector that was first

1 analog paid TV, and after, digital paid TV.

2 So company was counting about 100 employee in 1991, and
3 we have built our team up to 2,700 employee just now. We
4 have today close to 400 employees working for us in United
5 States, and we are a net exporter from United States with
6 the different elements that we do here.

7 Q Thank you, Mr. Kudelski.

8 Now, you mentioned that part of Kudelski Group or the
9 family -- Kudelski family of companies deals with
10 conditional access technology. And we've heard a lot about
11 that during this trial, so we won't go into it, but what I
12 want to focus you on first is the analog system. Did the
13 Kudelski family of companies provide conditional access
14 technology for analog systems?

15 A Yes, and I will phrase it we have started this company
16 in 1984, a diversification program to develop analog paid TV
17 system. The system was digital processing analog paid TV,
18 and we have been awarded the Canal+ group in 1989. This
19 technology has been deployed over the '90s, with over
20 15 million decoder with Smart Card, so smart key deployed.
21 And we have the conditional access of this system that has
22 been completely secure for more than 10 years, and we were
23 very proud of having a concept of zero piracy in this
24 technology.

25 Q Now, at some point, you changed your focus to digital

1 systems and conditional access technology for digital
2 systems; is that correct?

3 A That's correct. We have to adapt our company to a
4 changing environment. The television was going digital, and
5 we have explore way to enter into digital TV market. And we
6 have responded to different request for information and for
7 proposal, and we won in February -- in February 1995 a
8 contract with EchoStar.

9 Q And is EchoStar Kudelski's largest client here in the
10 United States?

11 A Yes, it is, and so basically, we were very proud of
12 being selected as a small company by EchoStar. EchoStar was
13 also a much smaller company than it is today, and we have
14 tried to build together something that was new and
15 challenging.

16 Q Now, what is the primary goal of the conditional access
17 technology that the Kudelski family of companies provides to
18 EchoStar for use in its DISH -- DISH Network here in the
19 United States?

20 A So the primary goal of the conditional access,
21 especially our conditional access, is to protect contents
22 against illegal user. So idea is that content needs to be
23 purchased by an operator like EchoStar and to have something
24 fair. You have people that get access to these contents
25 without paying EchoStar, and EchoStar is able to pay its

1 content providers. And so basically, our technology was
2 here and is here today to protect the contents that EchoStar
3 is sending and broadcasting to the end users.

4 Q Now, is the system that EchoStar uses here in the
5 United States, is that the analog system or the digital
6 system?

7 A It's a digital system. Today we have, how to say,
8 deployed at EchoStar the second generation of digital TV
9 conditional access system from Nagra.

10 Q Now, you testified a moment ago that with respect to
11 the analog system, the Kudelski conditional access
12 technology remained uncompromised for a decade; is that
13 correct?

14 A That's correct.

15 Q And was EchoStar aware of that when they entered into
16 negotiations to use the Kudelski conditional access
17 technology?

18 A I would say that EchoStar, from my understanding, was
19 looking to have a solution that was following open
20 standards, and one of the open standards that was created in
21 the early '90s was DVB. And they were looking for a DVB
22 compliant system, and basically, the two major suppliers
23 that have proven to know how to do conditional access system
24 in analog, because before digital was really widely
25 introduced, it's the closest conditional access system that

1 can be used in a digital TV environment were the European
2 conditional access system, because the way it were treated
3 in analog was still digital -- was already digital. So
4 basically, one of the logical, how to say, choice would have
5 been surprise to the European market.

6 Q And when did Kudelski first start putting its
7 conditional access technology into EchoStar's products?

8 A So it's a delivery -- the volume delivery have started
9 in first quarter to -- by 1996.

10 Q And during the year 1996, did EchoStar or Kudelski's
11 conditional access technology used in the United States
12 suffer from any piracy?

13 A May you just repeat the question?

14 Q Certainly.

15 In the year 1996, was the conditional access technology
16 that you provided to EchoStar and used in the United States,
17 was that technology secure?

18 A Yes.

19 Q And then in the year 1997, was the technology that you
20 provided to EchoStar here in the United States secure?

21 A Yes.

22 Q And for the majority of 1998, was that technology
23 secure?

24 A Absolutely.

25 Q Now, when was the first time that you learned that

1 EchoStar's conditional access technology in the United
2 States was compromised?

3 A The first element that I heard were between very end of
4 1998 and early 1999 where we have seen some sign, some that
5 people have had access to memory of our Smart Card.

6 Q And what were those signs?

7 A The signs were some contents extract of this memory on
8 the internet.

9 Q And as you understood it, that content was published on
10 piracy-related websites?

11 A That's my understanding.

12 Q And through the course of this litigation, have you
13 learned that the defendants engaged in any efforts to hack
14 EchoStar's conditional access technology in 1998?

15 A Unfortunately, yes.

16 Q Okay. Let's take a quick look at Exhibit 98.

17 Have you seen this document before, Mr. Kudelski?

18 A I have seen it two to three days ago.

19 Q And can you describe for the jury in your own words
20 what this document is.

21 A I must say that my -- when I have seen the content of
22 this document, I have been pretty shocked. The reason for
23 that is basically my understanding is that our competitor
24 has done reverse engineering of our Smart Card. When --
25 when I have had a look at this document, I have come to a

1 different conclusion. It's not what I would consider as a
2 reverse engineering, but a hack manual that allow people,
3 not really specialists, to enter into the Smart Card and to
4 manipulate and to take control of the Smart Card.

5 What I have also a problem with is own -- our own
6 company we do test our own Smart Cards, and I can see that
7 such a report even done internally on our own product would
8 not be a good idea. What you need in such an analysis is to
9 find what are the strengths, what are the weaknesses, but in
10 principle in the ways that you can correct a problem, not in
11 a way that if such a document or part of this document is
12 all disappearing or in hands that are uncontrollable creates
13 unlimited damage. And that is basically what I'm not
14 comfortable with, as I would not be comfortable to have
15 within my own organization a document like that.

16 Q Now, Mr. Kudelski, did you have -- when you were first
17 provided with this report, did you have an opportunity to
18 review it?

19 A I have had a quick reading over this document.

20 Q And I understand that -- that you believe it is a
21 description of how to hack EchoStar and Kudelski's
22 conditional access technology, but did you see any part of
23 this document, this report, that described lawful reverse
24 engineering or how to use the results of that to improve the
25 defendants' technology?

1 A I'm afraid that I have not seen a lot of element that I
2 consider important. My understanding is the following: In
3 the way we have designed our technology, and the technology
4 is not just a Smart Card, it's a system plus a Smart Card,
5 we have integrated specific element in terms of
6 architecture, specific element to create the possibility to
7 adapt a Smart Card to specific changing environment. And
8 that are elements that we are proud of, and I have seen no
9 sign within this report about this point.

10 Q Now, Mr. Kudelski, if you would, turn briefly to
11 page 16 of 40. It's at the bottom right-hand corner.
12 You'll see the page number.

13 A Yes.

14 Q Section 4 and 4.1 are entitled "3M hack in practice,
15 DISH Network USA." Can you describe for the jury what those
16 two sections of the defendants' report describe.

17 MR. STONE: Objection. Best evidence.

18 THE COURT: Overruled.

19 You may answer the question, sir.

20 THE WITNESS: Thank you.

21 I understand that not only that was an attempt to
22 see what -- how to hack, theoretically, but how to really
23 realize manipulation of a Smart Card to convert a legitimate
24 Smart Card into a pirate Smart Card. In addition to that, I
25 see some elements, technically, to give very important

1 insight how to attack the Smart Cards through some buffer
2 attack.

3 BY MR. HAGAN:

4 Q And are you familiar with the term "3M card" or
5 "EchoStar 3M card"?

6 A Absolutely. We are speaking about cards that were
7 originally EchoStar cards that are legitimate user or
8 non-initialized cards that will be turned to pirate cards
9 through manipulation following what is written in this
10 report.

11 Q Now, Mr. Kudelski, you are not here to say that you
12 believe all reverse engineering in the marketplace is bad,
13 are you?

14 A Absolutely. So I believe that reverse engineering, if
15 you do that for specific purpose and with specific rules, is
16 something that is absolutely regular and can benefit to the
17 industry.

18 Q But do you believe that in this particular instance,
19 especially looking at the contents of Exhibit 98, that the
20 defendants went beyond lawful reverse engineering?

21 A But once more, for me, here the reverse engineering
22 part is very limited. The part that is really detailed is
23 how to hack. It's not to understand the strength and the
24 weaknesses or to do something that is compatible, but it's
25 basically a report that hurts.

1 Q And in fact, the Kudelski family of companies has done
2 some lawful reverse engineering?

3 A Yes, we have done.

4 Q Can you tell us about one example of that?

5 A One example is that we have tried to enter the U.S.
6 cable market, and basically, the U.S. cable market is and
7 was a duopoly between Motorola and Scientific Atlanta. So
8 FCC has, for example, tried for years to find a way to open
9 this market for the benefit of the end user.

10 We have initiated a program, first to address new, how
11 to say, cable operators, but also, to find a way to be
12 compatible with the existing decoder base within U.S. cable.
13 To doing that, we have authorized that a team has looked
14 through reverse engineering, how to make our solution
15 compatible with the scrambling, descrambling and transport
16 stream of Motorola.

17 Q So it's your opinion that testing compatibility or
18 reverse engineering products in the market to determine
19 whether or not your product is compatible with that
20 technology, that can be done for a lawful and legitimate
21 purpose?

22 A That's my opinion. I would say that to avoid any
23 element of doubt, we have asked to have lawyers following
24 very precisely what is done in such entity in a way that we
25 strictly follow all the elements that should be done.

1 Q Now, turning back to EchoStar's security system --

2 A I was -- sorry.

3 Q Go ahead.

4 A I was just interested to add one element, is to say
5 that we have had for years very good relationship with
6 Motorola, and we continue to have such a good relationship.

7 Q And Motorola was one of the companies involved in the
8 compatibility reverse engineering?

9 A They were the ones that we were looking after.

10 Q Now, Mr. Kudelski, turning back to the state of piracy
11 of EchoStar system in late 1998, do you believe that the
12 defendants' report describing how to hack EchoStar system
13 had any impact on the state of piracy of EchoStar system in
14 the United States?

15 A I'm convinced.

16 MR. STONE: Objection. Speculation. Closing
17 argument.

18 THE COURT: Well, it's foundational, but Counsel,
19 I -- I'm concerned about the general opinion, you know, just
20 the answer "yes." I don't know where this is going. Is it
21 the --

22 MR. HAGAN: I'll rephrase the question, your
23 Honor.

24 THE COURT: In 1998, if this isn't made public,
25 I -- I don't see how a conclusion can be drawn. I think I'm

1 going to sustain the objection at this time and have you
2 restate the question.

3 MR. HAGAN: Thank you, your Honor.

4 BY MR. HAGAN:

5 Q Mr. Kudelski, the date of this report is November 1st
6 of 1998. After the date of this report, did your technology
7 used in EchoStar security system in the United States, did
8 it become vulnerable to piracy?

9 A It has become gradually vulnerable. I would say that
10 basically the first information that have been filed on the
11 internet end of '98, early '99 was not just enough to
12 compromise in a complete way the security of our system. We
13 have countermeasure. We have all sort of element to play
14 against that. It's when more than the content, but the
15 recipe has been posted on internet, then we have had a
16 serious issue.

17 Q Was Kudelski and NagraStar able to effectively combat
18 the level of piracy in 1999 and 2000?

19 A Yes, we were, and we have been able to successfully
20 deploy countermeasure and to limit the effect of piracy that
21 were just to very few individuals and not material at this
22 time.

23 Q Did anything in particular happen in the end of --
24 of -- excuse me. Did anything in particular happen at the
25 end of 2000 that caused a change in the status of EchoStar

1 piracy?

2 A That has been, from my understanding during the last
3 few days, end of December 2000 a posting on the internet
4 that have given not only information of what was inside the
5 Smart Card, but basically recipes that allow to enter into a
6 Smart Card to take control for any person that is a pirate
7 without very advanced experience, and that is making a lot
8 as a difference.

9 Q And after those December 2000 postings of the hacking
10 recipe, did Kudelski and NagraStar and EchoStar continue to
11 try to combat piracy through software patches and electronic
12 countermeasures?

13 A Of course. I would say that replacing Smart Card in
14 the field is something that is not easy, not easy for the
15 operator and not easy for the end user. That's an element
16 where you can lose some subscriber. So everything that we
17 can do to maintain the security was done, and that is also a
18 question of reputation for our company.

19 Q Now, did there come a point in time where Kudelski,
20 NagraStar and EchoStar had to work together to complete a
21 card swap?

22 A Yes. We have first discuss in 2001, but basically the
23 decision to make a complete swap, so when we refer to a
24 swap, it's sending new Smart Card through mail to subscriber
25 in a way that they replace existing Smart Card. So final

1 decision was taken in the range of 2003.

2 Q Now, during the 1998 time frame when the defendants'
3 technology was compromised and the Kudelski technology was
4 secure, were you approached by DirectTV with an offer of them
5 to solicit proposals to a new CA provider?

6 MR. STONE: Objection.

7 THE WITNESS: Yes.

8 MR. STONE: Misstates the testimony in evidence.

9 THE COURT: By DirectTV?

10 MR. HAGAN: Yes, your Honor.

11 THE COURT: Just restate the question. I don't
12 think I understood it. Just restate it.

13 BY MR. HAGAN:

14 Q Did there come a point in time in 1998 where DirectTV
15 approached the Kudelski family of companies?

16 THE COURT: You may answer the question.

17 THE WITNESS: Yes, we have been approached to make
18 a proposal of our technology to make a commercial offer, and
19 later on we got a contract of \$100,000 to look more into
20 details how we can not only introduce our technology, but
21 replace by our technology, technology of our competitor.

22 BY MR. HAGAN:

23 Q And at the time that you were approached by DirectTV,
24 did they explain to you why they were looking for a new
25 conditional access provider?

1 A They have given us two reason, reason of security and
2 reason of having the impression to pay very high prices.

3 Q After the negotiation process with DirecTV and the
4 Kudelski family of companies submitting proposals to
5 DirecTV, did they ultimately decide to switch to your
6 technology?

7 A No, they have not chosen to switch to our technology.

8 Q And do you recall approximately when that was?

9 A I would say that it's second half 1999.

10 Q And that was shortly after the encryption technology or
11 conditional access technology used by EchoStar here in the
12 United States began to suffer from a minimal level of
13 piracy, correct?

14 A That's my understanding.

15 Q Did DirecTV indicate to you in any way why they decided
16 not to switch?

17 MR. STONE: Objection. Hearsay.

18 THE COURT: Well, let's find out. I'm going to
19 sustain that. Is he personally present when "they," I'd
20 like to know who, when, where.

21 MR. HAGAN: Certainly, your Honor.

22 THE COURT: Who's discussing this with the
23 gentleman, or if he's hearing this from other people within
24 his organization, and if so, who.

25 BY MR. HAGAN:

1 Q Mr. Kudelski, did you personally attend meetings and
2 conferences with representatives of DirecTV during the
3 period in time where they were considering switching to your
4 technology?

5 A Yes.

6 Q And do you recall the names of any of those DirecTV
7 representatives?

8 A I can give you names. Dennis Flatee (phonetic), Greg
9 Gagnon (phonetic), Mr. -- maybe Crosby, but that a few
10 example. I have also met, but later on, with
11 Mr. Hachtenstein (phonetic). So that just three example,
12 but when we have meetings -- and Ray Kahn, of course. I
13 cannot not remember him. And so, basically we have had
14 quite a number of meetings when you have up to 20 people of
15 DirecTV present in the room.

16 Q And when DirecTV communicated their intent not to
17 switch to your conditional access technology, did they
18 explain to you why?

19 A I --

20 MR. STONE: Objection. Hearsay. Sorry.

21 THE COURT: Overruled. You may state the answer.
22 You may answer, sir.

23 THE WITNESS: Okay. I have got information in
24 different phases. First information I have got was question
25 of security not to switch from one system that was broken to

1 another system that was not perfectly secure.

2 Second element was to say not to take the risk of
3 the legal litigation with NDS. What I have understood after
4 by discussing with people from DirecTV in the following
5 years is that that has been some report shown to DirecTV by
6 our competitors about the potential weaknesses of our
7 technology.

8 BY MR. HAGAN:

9 Q Do you believe that the report that they are referring
10 to, DirecTV was referring to, is Exhibit 98?

11 A That's my understanding.

12 Q Now, Mr. Kudelski, based on the meetings that you had
13 and discussions that you had with DirecTV representatives,
14 do you believe that they would have changed to your
15 technology if they had not learned that your technology was
16 compromised in the United States?

17 MR. STONE: Objection. Speculation. Hearsay.

18 THE COURT: Overruled. He can state his opinion.
19 You can state your opinion, sir.

20 THE WITNESS: My opinion was that I was pretty
21 confident that I was able to win this deal.

22 MR. HAGAN: Thank you, Mr. Kudelski.

23 THE WITNESS: You're welcome.

24 THE COURT: Cross-examination. This would be
25 Mr. Stone on behalf of NDS.

1 MR. STONE: Thank you, your Honor.

2 CROSS-EXAMINATION

3 BY MR. STONE:

4 Q Mr. Kudelski, did I hear you correctly that you said it
5 was within the last few days that you gained the
6 understanding that there was some postings on the internet
7 in December 2000 that caused some piracy?

8 A My understanding was, since I had it, was the first
9 time I have had access to such a document.

10 Q Did you testify there was -- within the last few days
11 that you gained this understanding about the December 2000
12 postings?

13 A May you just rephrase the question?

14 Q Sure.

15 Did you just testify that it was only within the last
16 few days that you gained an understanding about some
17 December 2000 postings?

18 A No. It was about this specific posting and the
19 consequences.

20 Q Who made the posting?

21 A My understanding from the last few days, that it's
22 Nipper is the name.

23 Q Have you ever heard of xbr21?

24 A I have heard the name, but I cannot tell you who is.

25 Q Now, you remember me from taking your deposition last

1 night, correct?

2 A Yes.

3 Q In this courtroom or courthouse?

4 A It was on the other one.

5 (Live reporter switch with Debbie Gale.)

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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.

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11 Date: May 7, 2008

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