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 17, Volume III
NDS GROUP PLC, et al.,   )
)
            Defendants.   )
_____)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Jury Trial

Santa Ana, California

Wednesday, May 7, 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 2008-05-07 D17V3

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ALSO PRESENT:
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        Dov Rubin

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1   SANTA ANA, CALIFORNIA, WEDNESDAY, MAY 7, 2008

2   Day 17, Volume III

3   (1:03 p.m.)

4   (In the presence of the jury.)

5   THE COURT: All right. We're back in session.

6   The jury's present. All counsel are still present. The

7   parties are present.

8   Thank you for your courtesy, Counsel.

9   This is Mr. Snyder continuing his closing argument

10 on behalf of NDS.

11   MR. SNYDER: Thank you, Your Honor.

12   DEFENSE CLOSING ARGUMENT

13   MR. SNYDER: When we broke for lunch, we were

14 talking about the circle of evidence and the evidence from

15 the ICG reports that the plaintiffs rely on. Let me talk

16 now about some of the other evidence that they rely on.

17   The plaintiffs have presented to you a series of

18 witnesses. Every single one of those witnesses is being

19 paid by them. Most of them have grudges against NDS. And

20 all of them provided information to EchoStar and NagraStar

21 long after they had decided that Chris Tarnovsky was

22 responsible for the Nipper posting and, in many instances,

23 after this lawsuit was even filed.

24   Let me take a few minutes to talk about some of

25 these witnesses.

1   I'm going to talk at length about Mr. Ereiser in a

2   few minutes. But you've also heard from Mr. Saggiori.

3   There's an e-mail from Mr. Saggiori they're very excited

4   about. I think you were all here -- I know you were all

5   here when I was questioning Mr. Saggiori and it became very

6   apparent, what effect the money being paid to Mr. Saggiori

7   has.

8   When he was asked in the Canal+ lawsuit, and he

9   was being paid by Canal+, what that e-mail related to, he

10 said, "Oh, it's Canal+ code." Swears under oath that's what

11 it was. Then, in this case when he was getting paid by

12 EchoStar and NagraStar, he said, "Oh, that code in that

13 e-mail, that's EchoStar code. Pay me for that."

14   And the reason he can do that is that is an

15 encrypted e-mail that's encrypted only to his key. So he

16 can attach anything he wants to it and decrypt it. And

17 there's not a person in the world who can decrypt that and

18 tell you what it is or tell you that he's wrong. So when

19 it's convenient, when it suits him, it's Canal+ code; when

20 it's convenient and it suits him, it's EchoStar code. Who

21 knows what it's going to be next week.

22   There's another witness on this list, Mr. Charles

23 Perlman. Now, they didn't bring Mr. Perlman. And I'd like

24 to pause there for a moment and let you ask yourself, why is

25 that?

1   You heard testimony that Mr. Perlman was the

2   administrator on the dr7 website. He was the administrator.

3   That means he could look at what other people were doing, he

4   could see who had registered as what, he could actually

5   control what is available on the website, take things down,

6   put things up.

7   Mr. Perlman was the administrator of the dr7

8   website in December 2000 when these postings were made. He

9   didn't take 'em down. He didn't find out information about

10   the sources of those postings and come and testify and tell

11   you about that. He didn't provide information about the

12   sources of those postings and have that presented to you.

13   Where was Mr. Perlman?

14   There's another person on this list, Larry Harman

15   (phonetic). You heard Mr. Gee testify about Mr. Harman.

16   Mr. Harman is in an asylum, and so I don't think that we

17   ought to put a lot of credibility or a lot of credence to

18   his testimony when he says that whoever posted the Nipper

19   code, he thinks they're in the CIA, which is essentially

20   what he told Mr. Gee.

21   The last person on that list is Larry Pilon.

22   Larry Pilon is also a consultant for NagraStar. Larry

23   Pilon, you heard Billy Joe Osborne explain, was a part of

24   the DISH Plex group. He worked with Dennis Renaud. He was

25   one of the people who knew that they had a scanning electron

1   microscope in Thunder Bay, knew that they had the equipment

2   necessary to do invasive attacks. And they didn't bring him

3   here to testify either, and yet he's working for them.

4   There's some other people who were not on that

5   list, people that you did hear from. They're not paying

6   Marco Pizzo. He came here by himself. He's not being paid

7   by anybody. And he told you that he was xbr21.

8   Anthony Maldonado didn't make any money by coming

9   to testify for you either. In fact, he told you that he

10   wanted to do the right thing for once in his life. He sat

11   in that chair and he told you that he was the person who had

12   gotten those boxes and told you his story.

13   Chris Dalla wasn't getting paid anything for being

14   here either. And he showed up and he sat in that chair and

15   he told you that he was StuntGuy and he was the person

16   responsible for all that information on the Internet.

17   Not one of those three people had any connection

18   to NDS, had any connection to Chris Tarnovsky or testified

19   that they did.

20   Now, there's some other people that they've talked

21   with who weren't in that chair. You didn't hear from Dave

22   Bruce, Andre Sergei, Sean Quinn. These are supposedly

23   people who were part of this distribution network that

24   they've concocted. You didn't hear from any of them.

25   Now, the one person that you did hear from that's

1   supposedly part of the distribution network is Stan Frost.

2   And Stan Frost took the Fifth Amendment. Stan Frost also

3   told you at the beginning of his testimony that he had been

4   chased by DirecTV and NDS, that he had been convicted of

5   DirecTV piracy. Is it any surprise he's not very eager to

6   talk about his involvement in piracy? I don't think so.

7   He took the Fifth Amendment on virtually every

8   single question, including questions like: Did you receive

9   any piracy devices from EchoStar? Did you receive any money

10   from EchoStar? He took the Fifth on both of those

11   questions. He didn't want to talk about piracy, and that's

12   his constitutional right. But given his history with

13   DirecTV and his history with NDS, I don't think it should

14   surprise anybody that that was the right he invoked.

15   Now, let's talk a little bit more about

16   Mr. Ereiser 'cause Mr. Ereiser is the source of a lot of

17   interesting information and a lot of important evidence that

18   you need to consider. And I think that Mr. Ereiser's

19   history is likewise important.

20   Ron Ereiser admitted to you that he was involved,

21   deeply involved in DirecTV piracy. In fact, he was the

22   person who recruited Chris Tarnovsky to DirecTV piracy.

23   Chris Tarnovsky had been involved in piracy before, while he

24   was in the military, providing free TV essentially as a

25   hobbyist. But he wasn't making any money. Then he came to

1   the United States, and he got involved in commercial piracy

2   with Ron Ereiser. Mr. Ereiser was then indicted for his

3   involvement in piracy, and he admitted that to you.

4   He also hacked DirecTV's P2 card which is supplied

5   by NDS. And after hacking that card, he was caught and he

6   was sued by NDS. And he told you about that as well.

7   Mr. Ereiser is apparently a pretty aggressive

8   pirate. You heard Billy Joe Osborne explain that

9   Mr. Ereiser had made death threats against him and others.

10 You also heard Mr. Osborne explain that Ron Ereiser had

11 actually paid somebody to impersonate him so he could go to

12 his mailbox and try and get his hands on an EchoStar hack.

13 And what did Mr. Osborne tell you Ron Ereiser told him when

14 he confronted him about it? "I'd do anything to get my

15 hands on that code."

16   You also heard from Mr. Hasak and saw the evidence

17 that Ron Ereiser worked with Gilles Kaehlin to try and

18 blackmail NDS. They sent NDS and Reuven Hasak materials and

19 said, "If you pay us the right amount of money, we can make

20 sure that everybody stays quiet."

21   I don't think Mr. Hasak is the kind of person that

22 you should try and blackmail. There are probably a lot of

23 reasons for that, but the most important one is he is a man

24 of integrity. And he did not accept that offer, nor would

25 he.

1   And now you see the effects of that. Mr. Ereiser

2   comes here with all the money he's getting paid by

3   NagraStar, and he tells you these stories.

4   What else did Mr. Ereiser do for them?

5   Mr. Ereiser is the person who got thousands and thousands of

6   pages of documents and delivered them to J.J. Gee and Alan

7   Guggenheim in an airport in Canada.

8   I asked Mr. Ereiser about his feelings for NDS,

9   and he certainly didn't equivocate. He admitted that

10   they're not his favorite people. And when I asked him if he

11   told people that he hated NDS, he said, "I suppose I have

12   said something like that, yes."

13   And when I asked him whether he'd told people that

14   he had it in for NDS big time, he said, "I guess it's

15   possible."

16   And finally, when I asked him, "Isn't it also true

17   that you said you hate John Norris," his answer was, "Yes,

18   I'm sure I've said that."

19   Now, there's one big reason that Ron Ereiser has

20   this great antipathy for NDS. NDS worked a very successful

21   undercover operation against him, and you've heard about

22   that operation, code-named Johnny Walker.

23   Ron Ereiser had recruited Chris Tarnovsky to

24   commercial piracy, and NDS had gotten Chris out of that

25   piracy, had gotten him involved in the other side, doing

1   antipiracy work, doing engineering work. But initially

2   Mr. Tarnovsky continued to operate undercover, and he worked

3   against Ron Ereiser.

4   And you heard about that operation, how, with

5   DirecTV's permission, they took software for reprogramming

6   DirecTV devices, sent it to Ron Ereiser so that he could use

7   that to program cards and they would be able to turn it off

8   when they wanted to.

9   Ron Ereiser sent Chris Tarnovsky $20,000 for that

10   in a number of different shipments, all of them shipped

11   inside electronic devices.

12   Now this is apparently Mr. Ereiser's time for a

13   little bit of payback.

14   Let's take a look at some of the similarities

15   between what they are -- plaintiffs are alleging and what

16   Ron Ereiser is alleging in Operation Johnny Walker. The

17   similarities might surprise you.

18   Both of them involve software that was written by

19   Chris Tarnovsky, Operation Johnny Walker and this case.

20   Both of them involve a programmer that supposedly programs a

21   limited number of cards. You saw the documents about

22   Operation Johnny Walker where it was specifically written so

23   that the dongle they created would only program a certain

24   number of cards so they wouldn't let it get out of control.

25   They allege the same thing in this case in the

1   series of e-mails that were provided only by Ron Ereiser.

2   In both cases there was a central distribution

3   point that supposedly sent out cards and programmers to

4   others. In Operation Johnny Walker it was Ron Ereiser and

5   his actual distribution network. In this case they're

6   accusing Al Menard of being that distribution point and

7   sending it to people like Dave Bruce and Sean Quinn and

8   Andre Sergei.

9   And finally, in both instances there's allegations

10   of money being shipped inside electronic devices. There's

11   no question that Ron Ereiser shipped money to Ron Ereiser --

12   I'm sorry. There's no question that Ron Ereiser shipped

13   money to Chris Tarnovsky inside electronic devices. He

14   admitted it to you. Chris Tarnovsky admitted receiving it.

15   And now one of the allegations in this case is

16   that Chris Tarnovsky received money from the supposed

17   distribution network stuffed inside electronic devices.

18   There's one other thing about Mr. Ereiser that I

19   think you need to focus on for a moment. All of those

20   e-mails, the four e-mails that plaintiffs' attorneys want

21   you to focus on -- Exhibits 989, 990, 991, 988 -- missed one

22   at the front end of that sequence. All of those e-mails

23   were provided by Ron Ereiser. They did not come from Dave

24   Dawson. They did not come from Al Menard. In fact, Al

25   Menard says that they're forgeries, and he explained to you

1 why, why they're inconsistent with his encryption practices.

2 They were all produced by Ron Ereiser as text files. And

3 Mr. Ereiser admitted that a text file is something -- all

4 you have to do is type it in.

5   And what did he say when I asked him about that?

6 "Mr. Ereiser, anybody can type a text file; isn't that

7 right?

8   "Sure. Anybody can type a text file. But if they

9 can copy e-mail with the headers like this and the times

10 that it went through the servers and everything that can be

11 verified, you'll want to hire that guy."

12   That's exactly what NagraStar did. They hired

13 that guy. He's been working for them for years, and within

14 months of the beginning of his deposition, they decided to

15 pay him an extra $6,000 a month. So he's making about

16 150 grand a year surfing the Internet and assisting EchoStar

17 and NagraStar.

18   Mr. Ereiser is the source, the only source for all

19 of this information. And of all the people in this case

20 with a grudge against NDS, he is by far the biggest.

21   Now let's go back to that similarity that we

22 talked about, the Texas mailbox.

23   It's true, there were two packages found with

24 money in 'em in a mailbox in Texas. NDS did not pay for

25 that mailbox. There is no evidence of that. Doesn't matter

1 what plaintiffs' lawyers tell you. In fact, the evidence

2 was just to the contrary. Mr. Norris told you he didn't

3 know anything about that mailbox until early 2001.

4   You also heard Mr. Cumberland. Mr. Cumberland

5 told you that they found no connection in that mailbox to

6 satellite piracy or in the packages that they intercepted.

7   They never made any arrests, they never filed any

8 charges, they never issued any indictments, they never

9 convicted anybody of anything. But it did lead to an

10 investigation. And you heard Mr. Hasak tell you about that

11 investigation. He got on an airplane, and he came to

12 Southern California so that he could interrogate and meet

13 Chris Tarnovsky. John Norris did the same thing.

14   They were very concerned because the allegation

15 was that Mr. Tarnovsky was involved in DirecTV piracy. And

16 NDS, being DirecTV's conditional access provider, would be

17 very concerned if one of their own employees was involved in

18 DirecTV piracy. And that explains what they asked him when

19 he was being investigated. That explains why they didn't

20 ask him about EchoStar piracy, and it explains why they

21 didn't ask him about any other competitor piracy. There

22 wasn't any allegation at that time that Chris was involved

23 in any of that conduct.

24   The concern was -- the allegation was he was

25 involved in DirecTV piracy. And they determined that that

1   allegation was false, and so they went forward.

2   Later on, however, they found out some information

3   they did not know before, information that the plaintiffs

4   had, information that NDS did not. They found out that

5   there was a fingerprint inside those packages, and that

6   fingerprint apparently belonged to be Merv Main. And

7   Mr. Tarnovsky was confronted with that information, and he

8   didn't have a good explanation for it. And so Mr. Hasak

9   fired him.

10   Now, they want to make a big deal out of the fact

11   that that was days before his deposition. Well, ladies and

12   gentlemen, that's when we got the information. That's when

13   Mr. Hasak got the information, and that's when the decision

14   was made.

15   But let me ask you this: If you've got a

16   long-time employee who's gonna testify in a very important

17   case, and you'd sort of like his testimony to be in your

18   favor, do you fire him right before he goes into the

19   deposition? I don't think so.

20   Mr. Tarnovsky took the stand. Mr. Tarnovsky

21   testified under oath in his deposition and said, "I have

22   nothing to do with EchoStar piracy. I had nothing to do

23   with DirecTV piracy. I don't know where the money in those

24   mailboxes came from."

25   I don't know either. But there's something about

1   the timing of those boxes, the packages in those boxes that

2   is a little bit suspicious.

3   Let's take a look at Mr. Ereiser's history with

4   NDS. In June of 1997 Mr. Ereiser was indicted for piracy

5   involving NDS and DirecTV. And later that year, NDS

6   launched Operation Johnny Walker. Seven months later NDS

7   got more than a 14 million-dollar judgment against

8   Mr. Ereiser. And later that same year, Mr. Ereiser sent

9   money hidden inside electronic devices to Chris Tarnovsky,

10   part of the Operation Johnny Walker.

11   Now, February 2000, based on some of the results

12   from Operation Johnny Walker, NDS and DirecTV sued Ron

13   Ereiser again. And only a few months later, Mr. Ereiser, by

14   his own admission in July 2000, agreed to start working with

15   and helping NagraStar. The very next month those packages

16   show up in Texas.

17   Mr. Ereiser is the only person who you heard any

18   testimony from who ever sent money to Chris Tarnovsky hidden

19   inside electronic devices. You did not hear from Chris

20   Tarnovsky or any other witness that that had happened. And

21   suspiciously enough, those packages in Texas showed up one

22   month after Ron Ereiser agreed to start working with

23   NagraStar.

24   Now, plaintiffs' evidence comes from more than

25   just paying witnesses. They've apparently also paid for

1   documents. You heard Mr. Gee admit that he'd paid $5,000

2   for a copy of documents that had been stolen by someone

3   named Igor Serebryany, DirecTV documents that relate to the

4   P4 card which was designed and developed by NDS. Mr. Gee

5   acknowledged that they were highly sensitive DirecTV

6   documents regarding the P4 technology. And when he was

7   asked why he took them, all he could say was that he was

8   curious. It seems like a lot of money for curiosity over

9   documents for the P4 card when Mr. Gee is hardly a technical

10   person.

11   You also heard from Mr. Gee that he bought cards,

12   also P4 cards, tried to get modified and virgin cards from

13   "satansplayhouse." And he was asked, "Why would you do

14   that?" And again, the only answer that he could come up

15   with was "Curiosity."

16   Now, I mentioned before that they had gotten

17   thousands of pages of documents from their consultant, their

18   informant Ron Ereiser. We were gonna wheel all those

19   documents in here, but it's about 26,000 pages, and we

20   didn't think we needed to kill that many trees. So we

21   actually did a stipulation with the plaintiffs' counsel to

22   list out the numbers. And that stipulation, as Judge Carter

23   will tell you when he gives the instruction, is just as

24   binding as any other evidence because it's an agreement

25   between the parties.

1   And as part of that stipulation, the parties

2   agreed that the documents bearing the Bates stamp

3   Nos. ESC0129863 through ESC0155899 are copies of documents

4   that Ron Ereiser provided to Alan Guggenheim and Jerry Gee.

5   If you do the math on those page numbers, there's just over

6   26,000 pages of documents.

7   And you heard Mr. Ereiser explain that he knew

8   those were internal NDS documents. He'd done searches on

9   them because he was interested to see what they might show

10 about him. He told Mr. Gee and Mr. Guggenheim that they

11 should come get the documents because he thought they would

12 be helpful to his case. And you heard them testify that it

13 was because they were internal NDS documents.

14   And when we asked Mr. Guggenheim and Mr. Gee if

15 they knew where the documents came from, they said no. Why

16 not? Not because someone refused to tell them. Because,

17 they claimed, they never asked.

18   Now, if somebody has some information that you

19 think might be useful in a very important lawsuit, and

20 you're not sure where it comes from, you ask. The only

21 reason you wouldn't ask is if you already know or if you

22 just don't want to know. And you can't blind yourself to

23 that kind of theft.

24   Even after we started talking to Mr. Ereiser about

25 those documents, he actually went and destroyed information

1 about them. I asked him the following: "You didn't ask

2 questions about the stolen documents. You just thought that

3 this was good stuff?

4   "Good stuff, bad stuff, green stuff, yellow stuff,

5 I didn't ask questions. It just didn't matter."

6   Then I asked him: "So about a week and a half

7 before your deposition in this case, you erased all evidence

8 of those e-mails from your computer?

9   "Yes. When I was ordered to erase them, I erased

10 them. I took the original copies and gave them to my lawyer

11 in Victoria.

12   "Now, when you say you were ordered to erase them,

13 you mean you were told by your lawyer, correct?

14   "Yes.

15   "This was the lawyer that NagraStar was paying

16 for?

17   "Yes."

18   So if we want information about those documents,

19 what was done with them, when they were accessed, answers to

20 any of those questions, Mr. Ereiser and the lawyer paid for

21 by NagraStar made sure that we would never see it, and more

22 importantly, that you would never see it.

23   These documents, however, contain significant

24 information. You heard from Mr. Dov Rubin -- actually

25 Dr. Dov Rubin, about a few of these documents. One of them

1   is Exhibit 366. And he explained how that document contains

2   secret information about NDS's system, information that

3   would damage NDS in the hands of a competitor.

4   You also heard him describe Exhibit 1270. This is

5   the exhibit that they're -- plaintiffs are so fond of

6   talking about. And it contains information about how NDS

7   can control its system, can control its signal, how it can

8   target ECM's and blackout messages that is also proprietary.

9   You also heard Dr. Dov Rubin talk about

10   Exhibit 391. And Exhibit 391 is an important document for a

11   couple of reasons. One is it contains some very sensitive

12   information between NDS and its customer DirecTV about one

13   of its cards.

14   You also heard -- it's also important for another

15   reason. It shows that NDS was also working with its

16   customers to evaluate the vulnerabilities in their own

17   cards.

18   In talking about the Headend Report, plaintiffs'

19   counsel challenges, they said, "Show us a document where NDS

20   does the same kind of analysis on its own cards that they

21   were doing on the EchoStar card."

22   Now, I'm not gonna tell you that Exhibit 391 is

23   exactly that kind of report, 'cause it's not an internal NDS

24   engineering report. But it does show NDS and DirecTV

25   covering precisely the same kinds of topics: What are the

 1   vulnerabilities in the card? How do you attack the card?

 2   How would you circumvent the card? And how would you

 3   protect against that?

 4   The very kind of information that they're

 5   complaining about in the Headend Report was not unusual.

 6   This is the kind of engineering you do when your job is to

 7   try and be secure, when you're trying to provide conditional

 8   access that's not going to be hacked. And that's exactly

 9   what Exhibit 391 shows.

10   You also heard about another document from

11   Mr. Reuven Hasak, and that's Exhibit 447. That's an

12   internal operations document regarding operational security.

13   And in that document they talk about a number of informants

14   and the work that they're doing. And, in fact, some of the

15   information in that document relates to Chris Tarnovsky and

16   Ron Ereiser as well as a number of other informants and

17   pirates that NDS was trying to chase down and bring to

18   justice.

19   I asked Mr. Hasak what would happen if that got

20   into the wrong hands. He made it very clear that it could

21   even put Mr. Tarnovsky in danger particularly if this

22   document were in the hands of Ron Ereiser, who was the

23   target of that operation. As Mr. Hasak said, "As mentioned

24   before, pirate community is a violent community, and it

25   would be a big risk."

1   Now, the plaintiffs tried to tell you that these

2   documents somehow show that NDS was engaged in bad conduct.

3   And they actually pull a couple of them out and they show

4   them to you; the main story document, for example.

5   There is not a single one of these documents --

6   and they are not going to show you a single one of these

7   thousands of pages that suggest any involvement in EchoStar

8   piracy, that suggest any involvement in Canal+ piracy, that

9   suggest any involvement in trying to hack or injure a

10   competitor's system.

11   All of these documents are internal documents

12   about operational security and other operations at NDS. Far

13   from supporting the plaintiffs' case, they show that NDS was

14   engaged in legitimate antipiracy and engineering activities.

15   In fact, essentially what plaintiffs are trying to

16   do is take NDS's antipiracy work and somehow make it a

17   nefarious enterprise.

18   NDS actually originated many aspects of the

19   antipiracy program that is now common to conditional access

20   providers. They were the first ones to hire professional

21   investigators in the Smart Card industry. They were the

22   first one to create and join professional organizations

23   dedicated to antipiracy. They were the ones to lobby for

24   antipiracy legislation. They were the ones that started

25   using undercover informants and trying to protect their

 1   identities, using something as simple as having them paid

 2   through another company.

 3   It's hardly suspicious that NDS would take

 4   advantage of the opportunity to pay Chris Tarnovsky through

 5   HarperCollins when you heard Dr. Peled explain that that's a

 6   pretty regular occurrence at the company, to pay someone

 7   through another entity when doing that allows them to keep

 8   Chris Tarnovsky's identity secret even within the company.

 9   And you heard Mr. Hasak, Mr. Norris and even Chris

10   Tarnovsky explain that they were so concerned about

11   information getting out about Mr. Tarnovsky that even within

12   the company they used an alias. Most people within the

13   company weren't even allowed to know that he had been hired.

14   And so it hardly seems surprising that they would pay him

15   for a few years through HarperCollins.

16   Now, they tried to focus this morning on one

17   exhibit, Exhibit 189. And it's a long message from Ray

18   Adams. And in it, according to plaintiffs, they're asking

19   for more money. And if you take a look at Exhibit 189

20   during your deliberations, I think you're going to find that

21   he is asking for more money. But he's not asking for more

22   money to hack competitors. He's not asking for money to

23   increase piracy.

24   Take a look at that document if you have any

25   questions at all. He is asking for more money to fight

1   piracy. They're concerned about piracy against NDS. And

2   he's asking for an increased budget to try and fight that

3   piracy.

4   There is nothing suspicious or dangerous or wrong

5   about that e-mail or anything in it. And, in fact, NDS's

6   innovative antipiracy program worked. They were able to

7   take some very dangerous pirates and turn them to a life

8   that was focused on antipiracy.

9   They were able to take down hundreds of websites,

10   one of which is dr7. And don't you think it's interesting

11   that the one site that is the focus of this case was taken

12   down by NDS, not by the plaintiffs? You heard Mr. Menard

13   testify to that. You heard Mr. Norris testify to that. The

14   company that went after dr7 and ultimately shut him down was

15   NDS.

16   Now, Chris Tarnovsky is an example of some of the

17   effectiveness of NDS's antipiracy program. When they hired

18   Chris Tarnovsky, it is true and everyone acknowledges that

19   there was a theoretical risk that Mr. Tarnovsky would

20   continue in piracy. But you heard Mr. Hasak and Mr. Norris

21   explain why they thought that that risk was controlled,

22   particularly given Mr. Tarnovsky's background.

23   They took a number of steps to try and make sure

24   that Chris did not participate in piracy going forward.

25   They actually relocated him across the country so that he

1   could be close to John Norris and John Norris could visit

2   him regularly. They communicated with him almost daily,

3   face to face, on the telephone, by e-mail.

4   They made it very clear -- when I say "they,"

5   Mr. Hasak and Mr. Norris and the people that Chris Tarnovsky

6   worked with -- made it very clear to him that he was not

7   supposed to participate in any illegal conduct, including

8   piracy.

9   They were also able to monitor his online

10   postings. And you heard about NDS's unit in Jerusalem that

11   monitors the Internet. So if Chris Tarnovsky were making

12   postings, they would be able to know about that. And

13   finally, they were able to cross-reference Chris Tarnovsky's

14   information with other sources to make sure that they knew

15   what he was doing.

16   Now, the plaintiffs want to take some of Chris

17   Tarnovsky's conduct, his perfectly legitimate antipiracy

18   conduct, and they want to make it into something sinister.

19   Let me give you some examples of that. They put

20   up a slide and said to you, "Chris Tarnovsky participated in

21   DirecTV piracy even after he was hired by NDS."

22   Do you remember that slide? What are they talking

23   about? There is evidence that Chris Tarnovsky participated

24   in DirecTV piracy after being hired by NDS: Operation

25   Johnny Walker. And other than working undercover to try and

1   bring down Ron Ereiser, one of the most dangerous pirates

2   around, there is no other evidence of Chris Tarnovsky being

3   involved in DirecTV piracy after he was retained by NDS.

4   They also asked you to look at Exhibit 51, which

5   is an e-mail that John Norris sent about Chris Tarnovsky

6   reprogramming a DirecTV card. First they told you it was an

7   EchoStar card but, of course, that's false. There's no

8   evidence that Chris Tarnovsky ever did that.

9   He did reprogram a DirecTV card, though, to

10 receive EchoStar programming. Is there something sinister

11 or dangerous about that? No. Chris Tarnovsky explained

12 that to all of you. He said that he had seen a program on

13 the Internet that reprogrammed DirecTV cards to receive

14 EchoStar programming, and because it involved cards supplied

15 by NDS, they were very concerned about that. So he tested

16 the program. And he tested it for his boss, John Norris.

17   That doesn't make Chris Tarnovsky a criminal.

18 That doesn't mean that he's engaged in EchoStar piracy. He

19 was engaged in exactly the antipiracy effort for which NDS

20 hired him.

21   They also want to try and make something sinister

22 out of the fact that we haven't paraded around every one of

23 Chris Tarnovsky's hard drives. But I thought we had put

24 that issue to rest a long time ago. You heard Nigel Jones

25 testify that there was more than a terabyte of information

1   on Chris Tarnovsky's hard drives, that it had all had been

2   preserved, and it had been keyword searched. I believe he

3   said he looked through six pages of keywords and couldn't

4   imagine what wasn't included in that long list. He then

5   reviewed every single document that was identified as a

6   result of those searches. And you heard Mr. Jones testify

7   that he did not see a single document that implicated Chris

8   Tarnovsky in any kind of EchoStar piracy.

9   And every one of those documents was equally

10   available to the plaintiffs. And they did not come in here

11   and bring to you a single document to say, "See, this is

12   what was found on Chris Tarnovsky's computer when we ran

13   these searches," because there isn't anything that helps

14   their case.

15   Let me give you one more example of how they're

16   trying to take legitimate activity and make it into

17   something suspicious. They showed you a picture of the

18   sniffer earlier this morning. It's a device that

19   Mr. Tarnovsky created. He created it for antipiracy

20   purposes. And you heard him and Mr. Norris explain how it

21   is now actually used very successfully for antipiracy

22   purposes.

23   Now they want to say, "Well, Mr. Dionisi heard

24   that description, and it sounded a lot like the device he

25   saw Al Menard use to reprogram 52 cards; so therefore, Chris

1   Tarnovsky must be at the head of this distribution network."

2   We asked Mr. Dionisi, "Was there any indication

3   from Mr. Tarnovsky or Mr. Menard that they were working

4   together to engage in any kind of piracy at all?"

5   And he said, "No."

6   This is something that they've tried to put

7   together to take a perfectly legitimate device and make it

8   sound sinister because it suits their purposes.

9   That device was created for antipiracy purposes.

10 It's been used for antipiracy purposes, and there is no

11 evidence to the contrary.

12   You've also heard substantial evidence that NDS

13 has tried to assist its competitors with piracy,

14 particularly since it was so far ahead in its antipiracy

15 program. You heard John Norris take the stand and explain

16 how he had told and volunteered to Charlie Ergen that he

17 would assist them in antipiracy.

18   And Mr. Ergen actually gave him his direct-dial

19 phone number. I think we can all bet that it's been changed

20 by now. But they acknowledged that that was, in fact,

21 Mr. Ergen's personal direct-dial number.

22   You also heard Mr. Norris testify that he tried to

23 call that number and assist them. He got hold of Mr. Ergen.

24 Mr. Ergen transferred him to Mr. Guggenheim. And Mr. Norris

25 actually tried to give Mr. Guggenheim a tutorial on how you

1   work with law enforcement effectively to assist in

2   prosecutions of pirates.

3   You heard Mr. Hasak explain how NDS had worked

4   with Irdeto to bring a pirate in Southeast Asia, named Mad

5   Max, to justice.

6   And finally you heard Mr. Hasak explain that in

7   the UK where Nagra is the conditional access provider for

8   the cable systems, NDS is actually extremely active in

9   trying to combat piracy of a Nagra system.

10   One other thing you've heard about throughout the

11   course of this trial is that plaintiffs do virtually ever --

12   the same things, virtually everything that they're

13   complaining about for NDS. You heard yesterday that

14   plaintiffs -- Nagra engages in reverse-engineering a

15   competitor's conditional access system, the BBCO project.

16   They denied that in the past, and then we found

17   out yesterday that that wasn't true, that they'd had a

18   multimillion-dollar, two-year project to try and break into

19   the chip used by the Motorola box, the ACE project.

20   You heard them -- about purchasing competitors'

21   Smart Cards -- and in particular, the P4 card. We've seen

22   e-mails in which they were being instructed to analyze NDS

23   ECMs. You saw e-mails in which they collected ROM dumps for

24   the HU card, which is an NDS card, and sent it to

25   Switzerland to be analyzed.

1   You saw numerous e-mails about them purchasing

2   pirate devices for NDS. You saw numerous pieces of evidence

3   in which they were purchasing competitor pirate devices for

4   competitors' systems, particularly NDS's.

5   And you've certainly heard evidence about how

6   they're employing pirates. The difference is, instead of

7   using them for undercover operations, using them to bring

8   other pirates to justice, they primarily used them for

9   witnesses in this case.

10   You've also heard evidence about how they use

11   those pirate devices. They want to complain about

12   Chris Tarnovsky doing an experiment where he reprogrammed a

13   DirecTV card. But you heard about no less a person than

14   Mr. Ergen, the CEO of EchoStar, during a meeting with

15   Dov Rubin tell someone at EchoStar to "light this up like a

16   Christmas tree," take a pirate DirecTV card and put it in

17   the system.

18   My point here is not that they're just as bad as

19   NDS. To the contrary, my point is that all of these things

20   are legitimate activities. There's nothing wrong with them.

21   Piracy is wrong. Piracy is illegal. But this conduct, this

22   conduct when it's used for antipiracy is perfectly

23   legitimate. And in each one of these instances, that's what

24   NDS was doing. And they're gonna stand up, and they're

25   gonna tell you, "Yeah, NagraStar and EchoStar did these

1   things, but it was okay because we did them for legitimate

2   reasons." And that's the same -- the same is true for NDS.

3   Now, let me pause for a moment and talk about

4   reverse engineering because you've heard a lot about reverse

5   engineering, and you've heard a lot about the Haifa lab and

6   NDS's various reverse-engineering projects. But there are a

7   lot of things about reverse engineering that are worth

8   emphasizing.

9   First of all, reverse-engineering is legal and

10   routine, and when Judge Carter instructs you, he's going to

11   tell you that reverse engineering is legal. He's going to

12   tell you that piracy is illegal. He's going to tell you

13   that if reverse engineering turns into piracy, it is

14   illegal. And NDS does not dispute any of that. But reverse

15   engineering by itself is legal.

16   You also heard Mr. Jones explain that the

17   techniques that Haifa used were described in a publicly

18   available article in 1996. There wasn't any big secret

19   about that. In that same article, Mr. Anderson reported

20   that pay-TV pirates had already used that same technique to

21   attack a pay-TV system.

22   And then that same year, 1996, there were actually

23   hundreds of labs around the world that were capable of using

24   those invasive techniques to hack a system. And earlier

25   today we saw some of the pirates who had those -- that

1   ability: The lab in Thunder Bay, the group in Barrie,

2   Ontario, the EROM group, the people who were supplying

3   StuntGuy, Chris Dalla, with all that information. You heard

4   from Mr. Jones that those labs could be rented for less than

5    $10,000. And, in fact, you even heard from Mr. Ereiser how

6   they used -- they rented time on one of those labs in

7   Montana to hack the NDS card.

8   You also heard from plaintiffs' expert,

9   Dr. Avi Rubin. He's an expert in reverse engineering.

10   There's no doubt about that. That's what he does

11   professionally. He calls it responsible disclosure.

12   But compare for a moment what Dr. Rubin does to

13   what NDS does. NDS engaged in a project that they intended

14   to keep forever secret other than to use it to improve their

15   own products. Dr. Rubin reverse-engineered the iPhone, and

16   what did he do with the information? He contacted Apple,

17   and he said, "I'm going to disclose this information." He

18   didn't say, "I'm going to disclose it if you approve." He

19   didn't say, "I'm going to disclose the information unless

20   you do X." He said, "I'm going to disclose the

21   information." So perhaps he did them the courtesy of

22   letting them know in advance it was coming out, but his

23   point from the very beginning was disclosure of the

24   information.

25   That was never NDS's goal. You heard

1   Mr. Mordinson and Mr. Shkedy describe the extreme efforts

2   they went to, to maintain the confidentiality of that

3   information. They weren't engaged in responsible

4   disclosure; they were engaged in nondisclosure. And that is

5   far less than what Dr. Rubin does and what Dr. Rubin

6   considers legitimate.

7   Finally, you've now heard evidence that plaintiffs

8   engaged in reverse engineering. When Mr. Nicolas was on the

9   stand, he was asked: "Has NagraCard or NagraVision ever

10   engaged in any efforts to develop any software applications

11   or reverse engineering or hacking any of its competitors'

12   technology?"

13   "ANSWER: That's correct. We never developed any of

14   those tools or software."

15   But that was not quite true. You heard Dan DeHaan

16   explain yesterday that they had -- Nagra had a

17   multimillion-dollar project to get into the Motorola ACE

18   chip to try and design a competitive product and take market

19   share away from Motorola.

20   Now, NDS has never denied the existence of the

21   Haifa Research Center. It has never denied that it was

22   engaged in reverse engineering. It never denied it engaged

23   in reverse engineering the EchoStar chip. In fact, you

24   heard Dr. Peled, the CEO of the company, come and explain to

25   you where he thought that was important.

1   When he arrived at NDS in 1995, he thought their

2   technology was deficient. He thought that they were badly

3   pirated, and he wanted to develop more secure chips. And he

4   told you about the multiprong program he had to do that.

5   One part of that was improved research and development,

6   hiring literally hundreds of engineers to make better chips.

7   Some of those engineers were trained and tasked with

8   precisely the process of attacking NDS technology, attacking

9   other people's technology in the hopes of making NDS

10   technology better.

11   Now, they told you in the opening that we would

12   not be able to show you any improvements that were made as a

13   result of NDS's reverse engineering efforts, and they

14   repeated that again for you this morning. But that is not

15   what the evidence is.

16   Mr. Shkedy and Mr. Mordinson both identified at

17   least three specific ways in which NDS's card have been

18   improved because of their reverse engineering efforts. One

19   of them is, they implemented specific countermeasures

20   designed to prevent against glitching. Another one was that

21   they divided the memory in the card to prevent unauthorized

22   access. They called it mixing the blocks. You take the

23   different parts of the design, and you scramble them up so

24   the pirates can't readily identify what they are. You heard

25   Mr. Shkedy explain that one of the ways they were able to

1   get into cards was the instruction latch. In fact, that was

2   one of the techniques they were able to use to get into the

3   EchoStar card. They now know that that was eliminated from

4   NDS chips, and they know that because when they were trying

5   to reverse-engineer NDS chips, they found out that there

6   wasn't one.

7   Part of NDS's legitimate reverse-engineering

8   activity is testing their techniques, seeing if their

9   information works. And this is another aspect of what NDS

10 does that the plaintiffs now want to try and make sound

11 suspicious or wrong in some way.

12   It's true that they had to get cards and devices

13 to work on. If you're gonna reverse-engineer a card, you're

14 gonna have to take it apart. So they had to get cards.

15   So they did get cards. And they showed you an

16 e-mail, Exhibit 391, where they're talking about getting

17 cards. And is it any surprise that they point out in that

18 e-mail that they don't want to be able to trace where the

19 cards come from? This was, after all, a secret project.

20   Now they make a big point of telling you that one

21 of the boxes that is mentioned in that e-mail actually

22 traces to Chris Tarnovsky. I don't think that should

23 surprise anybody, either. You heard Mr. Hasak say that when

24 they needed equipment, they went to the people who were in

25 those local areas to get it -- cards and boxes, et cetera.

1   But there's one thing they didn't tell you, and

2   that omission is enormous. They did not tell you that that

3   box connected to Mr. Tarnovsky was connected to any piracy

4   of any sort. All they did was, they said that that number

5   in that e-mail traces to Chris Tarnovsky.

6   There are also card numbers in that e-mail. And

7   if you look at the very same exhibit that traces the set-top

8   box number to Chris Tarnovsky, it traces those card numbers.

9   Those card numbers don't go to Chris Tarnovsky. And those

10 card numbers, even more importantly, are not connected to

11 any piracy whatsoever. There is no evidence of that at all.

12   Now, part of plaintiffs' theory is that somehow

13 Chris Tarnovsky saw the Headend Report, and that he took a

14 piece of that Headend Report, and he published it on the

15 Internet. And we told you in the opening that the evidence

16 was going to be conclusive that Chris Tarnovsky did not see

17 the Headend Report, any part of the Headend Report, until

18 after those postings had already been made in December of

19 2000. And I think that we have fulfilled that promise to

20 you.

21   Let's take a look at that sequence of events. The

22 Headend project was from April to November of 1998, and as

23 you've heard many, many times, the Headend Report,

24 Exhibit 98, is from early November 1998. The postings, of

25 course, are in December of 2000. The record is

1 uncontroverted that Chris Tarnovsky did not see any part of

2 that report until August of 2001. But you heard Chris

3 Tarnovsky testify to that, you heard David Mordinson testify

4 to that. But you don't have to take just their word for it.

5 There are two specific e-mails both before and after that

6 visit that help you identify the specific date.

7   In Exhibit 1452, Mr. Mordinson and Chris Tarnovsky

8 are exchanging e-mails about the planning of their meeting.

9 And they say, "So we're sealed on August 1st." Then, in

10 Exhibit 1443, Mr. Tarnovsky, using the alias George Michael,

11 reports to his boss, John Norris. In his weekly report, he

12 says, "This week has been spent with David" -- David

13 Mordinson. And that e-mail is sent August 10th, the very

14 next week.

15   Now plaintiffs somehow think it's suspicious that

16 David Mordinson would show Chris Tarnovsky a couple pages

17 from that report to try and settle a fight. And, in fact,

18 the subject matter of that fight confirms that it had to

19 have been after the December 2000 postings because the fight

20 was about those postings and the effect of the ECM.

21   Now, you saw David Mordinson testify at some

22 length, and you saw Mr. Tarnovsky testify at some length.

23 After spending some time with them, I don't think it's at

24 all surprising that they would fight about whether an ECM

25 were effective or not. These are both two very intelligent

1   guys who are focused on precisely this technology.

2   One of them thought the hole could not be closed.

3   Mr. Mordinson said he analyzed the card, and it couldn't be

4   done. Mr. Tarnovsky said he was wrong. He said they did

5   close the hole. They fought about it. They fought about it

6   for a long time. They fought about it so much that they

7   went out, bought an EchoStar receiver, brought it back to

8   the house, and tried the hack on it and it didn't work.

9   Chris was right, and Mr. Mordinson admitted that he was

10   wrong.

11   That explains exactly why they had -- that

12   David Mordinson showed a couple of pages of the Headend

13   Report to Chris Tarnovsky, and it confirms without any doubt

14   exactly when that took place because there was no reason for

15   them to have that fight unless it was after the postings

16   and, in fact, after the ECMs.

17   Plaintiffs also want you to draw some inference

18   about NDS's conduct in this case because of allegations that

19   were made in the Canal+ case and because NDS also engaged in

20   reverse engineering of the Canal+ card.

21   Just like with EchoStar, there is no doubt, there

22   is no dispute, and NDS doesn't deny that it

23   reverse-engineered the Canal+ card back in 1998. As soon as

24   it heard an allegation that NDS was involved in that posting

25   in some way, Reuven Hasak did an investigation. He was not

1   comfortable doing the investigation himself, so he hired

2   someone else to do the investigation. And he explained that

3   to all of you. He said, "I asked one of my partners,

4   Mr. Melca, to run a thorough investigation in Haifa to try

5   and find out what are the loopholes in the security system

6   in Haifa.

7   And there he checked the system, he talked to the

8   employees, he checked the guarding company, he talked to

9   people who worked on the same floor, he checked all the

10 access control -- I mentioned it -- and he checked the

11 access to the computers. And it took about four weeks -- or

12 three or four weeks -- and then he was asked, "During the

13 investigation, did they find any evidence that someone at

14 NDS was involved in posting that Canal+ code on the

15 Internet?"

16   "No."

17   Likewise, there was never any evidence whatsoever

18 that Chris Tarnovsky was involved in posting Canal+ code.

19 The only evidence that you've heard is that

20 Oliver Kommerling made that allegation.

21   And let's pause for a moment and think about when

22 that happened and what was going on at the time. I talked

23 earlier about the circle of evidence and how it actually

24 turns out that Canal+ and EchoStar and DirecTV had a very

25 close -- a much closer relationship in 2001 and 2002 than

1   they ever would have let on.

2   In September 2001, when Oliver Kommerling and Dr.

3   Abe Peled had that dinner, Oliver Kommerling wasn't an NDS

4   employee. He was working for a join venture, ADSR. And you

5   heard Dr. Peled explain who that biggest -- that company's

6   biggest customer was: Canal+. And you also heard Dr. Peled

7   explain that at that very same time Canal+ was up to some

8   very interesting conduct trying to acquire NDS.

9   And it was only a few months later that Canal+

10   invested a billion and a half dollars in EchoStar.

11   Actually, its parent company, Vivendi, invested a billion

12   and a half dollars in EchoStar to aid it with the

13   acquisition of DirecTV.

14   These allegations were not evidence of misconduct

15   by NDS. They were not evidence of misconduct by

16   Chris Tarnovsky. All they were, were more of the circle of

17   evidence that they want to try and get to you believe.

18   But the main issue in this case and the issue that

19   plaintiffs told you that you have to decide is whether those

20   postings are somehow connected to the reverse-engineering in

21   Haifa.

22   MR. SNYDER: And I think, Your Honor, before I

23   turn to that, it would be a good time for a break.

24   THE COURT: You're admonished not to discuss this

25   matter amongst yourselves nor form or express any opinion

1   concerning the case.

2   We'll come and get you about a quarter after the

3   hour. Have a nice recess.

4   Okay. Have a nice recess, Counsel.

5   We'll see you a quarter after the hour.

6   MR. SNYDER: Thank you.

7   (Recess held at 1:57 p.m.)

8   (Proceedings resumed at 2:17 p.m.)

9   (In the presence of the jury.)

10   THE COURT: All right. We're back in session.

11   The jury's present. All counsel are present.

12   Counsel, thank you for your courtesy.

13   Mr. Snyder, if you'd like to continue with your

14   closing argument.

15   MR. SNYDER: Thank you, Your Honor.

16   When we broke, I promised you that I would talk

17   about the lack of any connection between NDS's Headend

18   project and the postings that were on the Internet.

19   There is no doubt that on December 23rd,

20   Marco Pizzo posted on the dr7 website a recipe for getting

21   into an EchoStar card. And there is no doubt that on

22   December 24th, NiPpEr2000 posted on PiratesDen a card --

23   code from a card that had been reprogrammed to receive all

24   permissions, a 3M hack. Those postings did not come from

25   NDS. And you heard substantial, un-rebutted expert

1   testimony showing each of you that that was, in fact, true.

2   And I'd like to review that if I could.

3   You first heard from Dr. Avi Rubin, the

4   plaintiffs' expert, and he explained to you that there were

5   four pillars on which his opinion stood: four similarities

6   between those postings and NDS code written by David

7   Mordinson.

8   What he didn't tell you at the time was that all

9   four of those are actually indicative of any buffer overflow

10 attack on the ROM 3 card. In other words, it didn't matter

11 whether they did it in Haifa or in Phoenix, Arizona or in

12 Tampa, Florida or in Barrie, Ontario. If you did a buffer

13 overflow attack on the ROM 3 card, it would have every one

14 of those four attributes. Mr. Nigel Jones explained that to

15 you, and there was no answer. So those four similarities

16 aren't actually evidence of any similarity at all between

17 the postings and Mr. Mordinson's code written in Haifa.

18   What you then heard from Mr. Jones was that there

19 were ten important differences between the Headend Report

20 and the code that was posted on the Internet, the xbr21

21 code.

22   I'm not gonna go through every one of those, but I

23 do want to remind you of some of Mr. Jones' testimony.

24   One of his points, for example, was that the code

25 was different. And he showed you this graphic, where the

1   red identifies the code that is the same, and the gray

2   boxes -- I'm sorry -- the red identifies the code that is

3   different -- it's an important thing to get right -- the red

4   identifies the code that is different, and the gray

5   identifies the code that is the same. And I think there are

6   a total of seven gray boxes on that entire chart. So you

7   can tell the code is different lengths, and the code, in

8   fact, is very different.

9   Another one of the differences that Mr. Jones

10   identified was the way that the code invokes a write

11   routine. The xbr21 code uses a routine that is built in.

12   Uses one line of code. Mr. Mordinson wrote a routine

13   himself, and as a result there are 36 lines of code. You

14   not only heard about this difference from Mr. Jones, but

15   Mr. Mordinson immediately identified this even during a

16   brief review of the code that was posted on the Internet.

17   You also heard from Mr. Jones about a difference

18   in the way that the programs terminate. The xbr21 program

19   terminates by providing a special parameter for a

20   subroutine. The Mordinson code goes into an infinite loop.

21   And as a result, if you try to load Mordinson's code onto

22   the card, it crashes the card. It doesn't work. So this is

23   not only a difference between them, but it is a functional

24   difference.

25   Mr. Rubin showed you a graphic which Mr. Jones was

1   kind enough to color in for us to show us the similarities

2   according to Dr. Rubin. When Dr. Rubin put this up, he

3   said -- and explained to you in front of everybody on an

4   easel -- how this shows that there is similarity in the two

5   programs, the only difference being the one part, the buffer

6   portion, was moved to the end. But Mr. Jones explained

7   there was, in fact, a mistake in this representation, and he

8   corrected it to show that, in fact, when you look at them,

9   they're very different.

10   Mr. Jones also explained several additional --

11   summarized his conclusions regarding these differences.

12   First, they are different in ten important ways.

13   He pointed out that Dr. Rubin agreed that the programs were

14   different. He pointed out that Dr. Rubin's graphics

15   contained highly misleading errors. He pointed out that the

16   four pillars of Dr. Rubin's opinion were actually

17   characteristic of any buffer overflow attack for the ROM 3

18   cards, and he also explained that David Mordinson's

19   methodology was superior, not inferior, as Dr. Rubin

20   alleged.

21   And Mr. Jones explained why it was, in fact,

22   superior in the way it would download, in the maximum size

23   of the shell code and in the index variable that it used.

24   And these differences show that Mr. Mordinson's code was

25   not, in fact, a precursor to the xbr21 posting. That would

1   be almost inconceivable.

2   Now, what was Dr. Rubin's response to all of this

3   testimony by Nigel Jones? Dr. Rubin was here. He was here

4   for much of the trial. Even while Mr. Jones was testifying,

5   he was here. In fact, he came and stood next to all of you

6   to make sure he could see Mr. Jones' presentation.

7   And after Mr. Jones was done, what was Dr. Rubin's

8   rebuttal? He left. He didn't have anything to say. There

9   was no response. He never took the stand and said that

10 there was anything wrong with any of Nigel Jones'

11 conclusions. No other witness took the stand and said that

12 there was anything wrong with Mr. Jones' conclusions.

13   All of the analysis, all of the conclusions that

14 Nigel Jones presented to you are completely un-rebutted,

15 every one of those ten differences.

16   Mr. Jones also had other conclusions that are

17 extremely important to this case. Mr. Jones analyzed the

18 black box code. Now, we don't have the actual block box, so

19 we don't know precisely what code is in there, but Mr. Jones

20 explained that in the files that were produced, there was

21 some code he was able to analyze. And he identified several

22 differences between that code and Mr. Mordinson's code. And

23 there was no response to that, either.

24   Mr. Jones then demonstrated the similarities

25 between the black box code, the xbr21 code, posted by -- the

1   Nipper code posted by xbr21, and Mr. Mordinson's code and

2   showed you the dramatic similarities between the black box

3   code and the code posted on the Internet and the very

4   significant difference between those two and the code

5   developed by David Mordinson in Haifa.

6   Mr. Jones wasn't the only person to identify these

7   similarities and differences. Anthony Maldonado took the

8   stand and said when he saw the code posted on the Internet,

9   he recognized a very important fingerprint in the code that

10   he had in his black box. He said there was a CRC check.

11   And because of that, he could check that, and he could see

12   that it was identical, and he knew that because of that

13   fingerprint the codes were related.

14   Christophe Nicolas said exactly the same thing.

15   He said that the black box code and the code posted by xbr21

16   were related, used the same technique. And now Mr. Jones

17   has explained that those two are the same, and they are

18   different from David Mordinson's code, and there's been no

19   response whatsoever to that testimony.

20   Mr. Jones also explained to you that the code

21   prepared in Haifa was different from any of the code done by

22   Swiss Cheese Productions. And Mr. Jones explained that he

23   had reviewed every one of the files extracted in Haifa and

24   compared it to the code produced by Swiss Cheese

25   Productions, and he prepared this chart that has really

1   little writing on it to show you how every single one of

2   them is different.

3   Plaintiffs could have done exactly this analysis.

4   All of this material was available to them. All of this

5   material was available to Dr. Rubin. If there was some

6   question about any of these conclusions, they could have had

7   someone take the stand and explain to you why it is wrong,

8   but they didn't do that.

9   Mr. Jones explained these opinions to you. He

10   took the time to explain the rationale for you to try and

11   illustrate and demonstrate to you the reasoning behind these

12   conclusions. And there is no response at all.

13   Now, earlier this morning, plaintiffs' counsel

14   tried to talk to you or talked to you about some things that

15   don't make any sense. And he suggested that NDS somehow had

16   a motive for participating in EchoStar piracy because of the

17   failed merger with ASkyB or because of their interest in the

18   DirecTV contract. And I think that those things, when you

19   look at them, have to fall in the category of things that

20   make no sense. The News Corp deal with ASkyB was actually

21   in 1996 when it started. The agreement was in February of

22   1997, and it failed during that year. And it failed because

23   they refused to use the NDS system. There's no dispute

24   about that.

25   So in late 1997 they have this dispute. When were

1   the events that they're complaining about so much in this

2   case? When were the events that they claim destroyed their

3   conditional access system? December of 2000, more than

4   three years later. If there was really some motive to try

5   and destroy EchoStar's system, why do you wait three years

6   until everything is done? The same is actually true of the

7   DirecTV deal.

8   You heard from Ray Kahn. You heard from

9   Dr. Peled. The negotiations over the DirecTV contract were

10   in 1997 when they did a one-year extension and then again in

11   1998. If NDS or anyone else wanted to try and sabotage

12   EchoStar's conditional access system to try and deter

13   DirecTV from entering into a contract with EchoStar, why do

14   you post code in December of 2000? That doesn't make any

15   sense.

16   What plaintiffs want to do is have it both ways.

17   They want to tell you on the one hand that there were some

18   postings and modest piracy in 1998 that somehow was

19   significant enough that it affected these transactions, but

20   it didn't actually affect their conditional access system

21   because they remained secure, and piracy was at a tolerable

22   level. And those things just don't make any sense.

23   And as a result of that, it wouldn't have --

24   wouldn't serve any purpose for employees from News Corp. to

25   some in here and explain to you why EchoStar piracy or NDS

1   had nothing to do with the acquisition -- the merger with

2   ASkyB.

3   You heard from Dr. Peled. He explained to you

4   that News Corp. had no role in any of these decisions. He

5   was the one who decided to reverse-engineer competitor

6   chips. News Corp., none of its executives, had any role in

7   the decision of what -- of the DirecTV contract. That was

8   done by DirecTV -- by NDS, by Dr. Dov Rubin and by Dr. Abe

9   Peled.

10   I will show you something, though, that does

11   perhaps make some sense, and that's EchoStar's acquisition

12   of DirecTV and the suspicious timing that arises out of

13   that.

14   In October of 2001 -- and remember this is just a

15   couple of months after Oliver Kommerling, who was working

16   with Canal+, made his allegations. EchoStar signs an

17   agreement to merge with DirecTV. In September we learned

18   that the DOJ was gonna deny that transaction. The official

19   announcement was in October. And in that same month, in

20   October, EchoStar attempts to intervene in the Canal+

21   lawsuit. Later that year, EchoStar has to pay a

22   600 million-dollar break-up fee. And you heard Mr. Ergen

23   explain that.

24   Then in April, News Corp. announces that it was

25   gonna try and acquire DirecTV. In June of '03, EchoStar

1   filed this lawsuit, and the very next week -- very next week

2   opposed News Corp.'s acquisition of DirecTV citing this

3   lawsuit as one of the reasons. That is a much more

4   plausible explanation for a motive for filing this lawsuit.

5   I'll tell you another explanation. And that is

6   because EchoStar wanted somebody to pay for their card swap.

7   You heard Mr. Kummer admit that when you put Smart Cards in

8   the field, they are eventually going to be compromised, and

9   they are eventually going to be replaced. He says everybody

10 knows that with one exception. Who is that exception?

11 Mr. Ergen. Mr. Ergan, he said, thinks they ought to last

12 forever. And he had to pay money for a card swap, and he

13 wants somebody else to pay for it.

14   You heard from Mr. Mark Jackson about how he met

15 with Dr. Dov Rubin about using NDS as their conditional

16 access provider. The negotiations turned on price, not on

17 whether or not NDS participated in hacking or piracy of

18 EchoStar's system.

19   You heard Mark Jackson take the stand. And when

20 he saw Dov Rubin, what did he say? "Hi, Dov. I didn't see

21 you over there." Ladies and gentlemen, if you think that

22 somebody has caused you hundreds of millions of dollars in

23 damage, if you think that somebody has stolen from you, is

24 that how you greet them? But if you want to do business

25 with somebody in the future, if you're trying to get the

1   best business deal that you can, maybe that is what you do.

2   Maybe you say, "Hi."

3   Now, plaintiffs this morning talked about the

4   different claims in this case, and I'd like to take some

5   time to do that as well. Because one of the things I'm

6   concerned about and NDS is concerned about is that the

7   claims that you have to answer, the questions that you have

8   to answer on the special verdict form, may be a little bit

9   different than you expect.

10   The first of those claims is whether or not NDS

11   violated the Digital Millennium Copyright Act. And it may

12   come as a surprise to you that the question isn't "who's

13   Nipper?" The question is whether or not there's a violation

14   of this particular law, which has some very specific

15   requirements.

16   To find a violation of this statute, EchoStar has

17   to prove that they used a technological measure which

18   effectively controls access to a copyrighted protected work.

19   They did that. There's no dispute about that.

20   Then they have to prove that the defendants

21   circumvented EchoStar's technological measure. There's a

22   big dispute about that.

23   There are two other requirements that you have to

24   keep in mind. They have to prove that this circumvention

25   occurred after October 28, 2000, long after the Headend

1   Report project was done in 1998, long after Mr. Mordinson

2   and Mr. Shkedy had visited the United States and Canada.

3   They also have to prove that each element of the

4   violation occurred in the United States.

5   And even if you assume that everything that

6   plaintiffs have told you is true -- and I certainly don't

7   suggest that you should -- but even if for a moment you did

8   that, think about their distribution network. Where does

9   this all supposedly take place? In Canada.

10   You heard Mr. Gee explain all the people that he

11   ticked off -- even Stanley Frost who lives in New York --

12   Mr. Gee said had his distribution network in Nova Scotia.

13   They tried to get him to say it was in New York. He said,

14   "No, I think it was in Nova Scotia."

15   They have not proved any piracy in the

16   United States after October 2000, much less any piracy that

17   is associated with NDS.

18   And so the first question you're going to be asked

19   on the special verdict form is whether plaintiffs have

20   proved by a preponderance of the evidence that NDS violated

21   the Digital Millennium Copyright Act. And, of course, it's

22   up to you to decide how to answer that question. But based

23   on the evidence, I believe that the answer to that is "no."

24   Now, if you answer that question, you then -- if

25   you answer that question "yes," you then have to determine

1   whether or not damages are appropriate, and plaintiffs have

2   the burden of proving damages. They also have the burden of

3   showing that these damages were actually caused by NDS's

4   conduct.

5   And I think when you review the evidence, you'll

6   find that the card swap that they're complaining about was

7   certainly not caused by anything NDS did; and, in fact,

8   wasn't even caused by the postings about which you've heard

9   so much.

10   When plaintiffs wanted to demand a card swap, they

11   knew exactly how to do it. And this is Exhibit 828 that

12   you've seen so many times.

13   In the second paragraph that we've pulled out,

14   they say, "Kudelski, NagraStar, and EchoStar have also

15   discussed a fix involving the swap-out of Smart Cards to be

16   completed in the next six months."

17   This wasn't after the December 2000 postings.

18   This demand was in 1999. And remember, it's the plaintiffs

19   who are trying to tell you that you are supposed to respect

20   a satellite provider's decision on when to swap cards.

21   EchoStar knew when they wanted to swap cards. They wanted

22   to swap cards in 1999, not after the December 2000 postings.

23   They even knew how to disclose it in their SEC

24   filings. In EchoStar's annual report filed with the SEC for

25   the year ending 1999, they said that ultimately, if other

1   measures are not successful, it could be necessary to

2   replace the credit card-sized card that controls the

3   security of each consumer set-top box at a material cost to

4   us. But now, several years later, nobody remembers this

5   1999 command.

6   Mr. Ergen, the CEO, said that he didn't think he'd

7   seen it. David Kummer, the senior vice president of

8   engineering and systems, said that he might have been told

9   about it; he didn't remember. But he knew he hadn't seen

10   the letter.

11   Mr. Orban, their controller, said that it was the

12   first time he'd ever seen the letter.

13   So in 1999, EchoStar wanted a card swap, but now

14   nobody remembers it. In fact, Mr. Andre Kudelski said he

15   didn't even think it was a real demand. He said it was just

16   some kind of safety net.

17   But let's compare what they did in 1999 to what

18   they did after the 2000 postings.

19   In January of 2000 -- this is Exhibit 812 -- the

20   president of EchoStar, Mike Dugan, said that they had driven

21   piracy back to the hobbyist level. So in January 2001, he

22   writes: "We need a hundred percent focus on this stuff. We

23   have made great progress. We have destroyed the commercial

24   aspect of stealing. We have made it clear this is not

25   commercial and driven back to the hobbyist."

1   There was no demand letter after the posting.

2 There was no disclosure in their SEC filings. Instead, in

3 January of 2001, the president acknowledges that it is at

4 the hobbyist level.

5   It's also clear that they knew about the hole that

6 they are now claiming caused them so much problem. There

7 were several incidents that happened along the way that

8 caused them to be aware of exactly where that hole was.

9   When the code was written in 1996, they

10 intentionally left the hole open. They didn't check the

11 size of the incoming message and whether it would overflow

12 the buffer because they didn't think that there was memory

13 there.

14   In early 2000, Mr. Nicolas met with

15 representatives from STMicro, the manufacturer of the chip,

16 who told them about the memory aliasing. They already knew

17 about the buffer overflow vulnerability, and according to

18 Mr. Nicolas, once you know about the memory aliasing, then

19 you know that it's a problem. So they knew about it then,

20 in early 2000.

21   Then in October 2000, after they received the

22 black box from Mr. Ereiser, they further confirmed it. They

23 knew that that black box actually exploited the buffer

24 overflow vulnerability to create a piracy device. And still

25 they did nothing.

1   What they did do, though, is introduce a new chip,

2   a new card, and that was the ROM 10 card -- I'm sorry -- the

3   ROM 3 card. They actually corrected it with a patch in

4   January. And Mr. Jones showed you the code or the comment

5   to the code where they corrected it. Where they have

6   cleared the LEN and the APDU_index to ensure no buffer

7   hanky-panky. They fixed it.

8   Mr. Jones explained that it was fixed; he said it

9   was completely effective and, in fact, Dr. Rubin also

10   explained that the patch closed the buffer overflow

11   vulnerability.

12   But you don't have to take the experts' word for

13   it. If you look at the internal documents, they

14   consistently describe the hole as being closed. As early as

15   February 2001 in Exhibit 1185, the ROM 3 card was described

16   as secured. VIP rights in some cards blocked cards not

17   affected by update.

18   Then, in March of 2001, in Exhibit 1186, they

19   wrote, "The blocker code that has been published cannot be

20   widely used." So although they continued to report that

21   some cards were behind blockers, they knew as early as

22   March 2001 that that did not affect very many cards, and

23   they were able to control the VIP rights that were mentioned

24   in that first message.

25   By December 11, 2001, in Exhibit 1674, they

1   reported, "Hole closed. Some cards have blocker software."

2   And, in fact, they used that same language in Exhibit 1687,

3   in May of 2002, and Exhibit 1670, in June of 2003, and in

4   Exhibit 1676, in June of 2003.

5   When Mr. Henri Kudelski was on the stand, he told

6   you that he had seen reports that the hole was open. But

7   they never showed you a single one of those. In fact, to

8   the contrary, Nigel Jones said that he had reviewed six

9   large binders that contained every one of Joe Conus'

10   security reports. And in every single one of them, the hole

11   was identified as closed, with one exception: Mr. Jones,

12   NDS's expert, was the one who knew the details. He

13   explained that for 11 days in the summer of 2001, the hole

14   was reopened, and it was immediately closed again. That is

15   the evidence.

16   The hole that was supposedly exploited, the buffer

17   overflow vulnerability, was fixed with two lines of code.

18   It was fixed in January and February of 2001. And other

19   than a very brief period in the summer of 2001, it was never

20   reopened. And as a result of that, it would be nonsense to

21   suggest that the postings that exploited that buffer

22   overflow vulnerability somehow caused the card swap.

23   In fact, let's take a look at the state of piracy

24   of NagraStar's cards about the time of the card swap. In

25   January of 2003 -- and this is from Exhibit 1670 -- they

1   report the DNASP-II card -- this is the ROM 2 card -- was

2   hole open. Some cards have blocker software.

3   For the ROM 3 card, the hole is closed. Some

4   cards have blocker software.

5   For the ROM 10 card, freeware E3M with autoroam

6   blocker code available for nonpatched cards. And for the

7   ROM 11, freeware E3M available for nonpatched cards.

8   The ROM 3 card was the most secure card they had.

9   And consistent with that, you have not seen a single

10   document suggesting that the card swap was a result of the

11   postings or the defects in the ROM 3 card. In fact,

12   Mr. Orban said --

13   "Did anyone say to you that a card swap was

14   necessary because of any postings on the Internet in

15   December 2000?"

16   "ANSWER: I was not aware of that in

17   December 2000, no.

18   "QUESTION: Did anyone tell you in 2004 that the

19   card swap was being done because of something that happened

20   December 2000?

21   "ANSWER: I can't recall any conversation like

22   that."

23   You have not seen a single document, not one, that

24   suggests to you that that card swap was a result of the

25   December 2000 postings.

1   In fact, the evidence suggests that the reason for

2   this card swap was free-to-air piracy. Mr. Ergen

3   testified -- the very first witness in the case -- the

4   decision to make a card swap wasn't made until 2002, two

5   years after the posting. Until then, ECMs were effective in

6   controlling piracy.

7   Mr. Kummer said exactly the same thing. And what

8   changed in 2002 and 2003 was that FTA piracy became rampant,

9   and that's what took piracy from a tolerable level to an

10   intolerable level. And that was his testimony on the stand:

11   That's when the piracy became an intolerable level for us,

12   and we had to complete the card swap."

13   That card swap was not the result of the postings.

14   It was not the result of any piracy that was caused or

15   associated in any way with NDS. It was the result of

16   free-to-air piracy. And there is no evidence at all that

17   that is connected in any way to NDS. There's not even an

18   allegation of such a thing.

19   There are a few other things related to their

20   claims for damages that I want to point out to you.

21   First of all, NagraStar actually made money on

22   these cards, so if you're gonna award any damages, you

23   shouldn't be awarding any damages to NagraStar. They

24   increased the cost by 50 cents a pop. So of those 9 million

25   cards they sold, NagraStar somehow made a profit of about

1   four-and-a-half-million bucks.

2   The other thing we saw from Mr. Orban is that many

3   of the bases for their costs were mere guesses. Although

4   they had deleted that language from the final report, we

5   showed them the early draft which had exactly the same

6   numbers, and that included phrases like "total guess on the

7   cost," "somewhat of a guess," "a complete guess," "somewhat

8   of a guess, "a guess," again, "a guess."

9   You can't award damages based on those guesses.

10   That would be highly inappropriate.

11   Now, there's one other aspect of the damages that

12   you have to consider if you find that any damages should be

13   awarded at all, and that's mitigation.

14   The plaintiffs have an obligation to mitigate

15   their damages. They have to use reasonable efforts to do

16   that mitigation. And if you find -- and you should only

17   award the amount that could be prevented using those

18   reasonable mitigation efforts -- but plaintiffs did not

19   mitigate their damages. If there were any damages caused by

20   that buffer overflow vulnerability and exposing it, then

21   that card swap or any other action they should have taken

22   should have been taken months and months, if not years,

23   before.

24   They knew, for example, that in 1999, there was --

25   the buffer overflow vulnerability would be corrected in the

1 ROM 10 cards, and that's when the ROM 10 cards were

2 introduced.

3   You heard from Mr. Nicolas: "And the ROM 10 card

4 was not subject to buffer overflow, correct?"

5   "ANSWER: So as we said, we have introduced a new

6 hardware, the ST19 hardware, the ROM 10 and ROM 11. And

7 that ROM 10 and ROM 11 don't have the ROM ghost effect."

8   And so without that ROM ghost effect, as you heard

9 all of them testify, the buffer overflow vulnerability does

10 not work.

11   In the year 2000, long before the postings,

12 EchoStar could have replaced all of those cards. They had

13 the cards ready, but they chose not to. And if they didn't

14 want to take that mitigation step, that's not NDS's fault.

15   Finally, you've heard lots of testimony about a

16 warranty. When EchoStar originally purchased these cards,

17 they had a warranty -- and this is Exhibit 691 with

18 Kudelski -- and that warranty said that Kudelski would

19 replace all outstanding Smart Cards which were delivered by

20 Kudelski no more than 48 months prior to the date of such

21 notice at a cost to Nagra equal to the direct marginal cost

22 of manufacturing the Smart Cards. And, in fact, when

23 EchoStar demanded a replacement in 1999, they cited that

24 paragraph. So they knew about it. There wasn't any secret.

25   So you're left with essentially two possibilities:

 1   First, the card swap was not the result of a defect in the

 2   card. If it's not the result of piracy, then the warranty

 3   doesn't apply. But if it's not the result of piracy, you

 4   certainly can't award it as damages.

 5   Second, the other possibility is if the card swap

 6   was the result of piracy. And if it were, then this

 7   warranty ought to apply, and the price should be the direct

 8   marginal cost of manufacturing the Smart Cards. But did you

 9   hear anything about the direct marginal cost of

10   manufacturing the Smart Cards? Nothing whatsoever. All

11   they told you was that they had a separate agreement.

12   Mr. Kudelski took the stand and said that they did

13   not apply the warranty. They had a gentleman's agreement

14   for some other price. And you saw evidence that that other

15   price actually included a cost-free warranty if the cards

16   needed to be replaced again.

17   Now, there's another aspect of their damages that

18   I need to spend a few minutes talking about, and that's

19   their lost profits.

20   THE COURT: Counsel, you've got about

21   seven minutes. If you want to extend the time, I'll

22   probably grant that, but I'm not going to just extend

23   seven minutes extra for rebuttal. In other words, I'm not

24   going to open up the door for rebuttal for whatever time you

25   need also. So that way it's fair.

1   MR. SNYDER: Okay. Thank you, Your Honor.

2   THE COURT: It's up to you.

3   MR. SNYDER: Judge Carter is going to give you

4   instruction that damages may not be speculative. They must

5   be based on the evidence and not based on speculation,

6   guesswork, or conjecture.

7   The lost profits that they want you to award are

8   based only on guesswork, and the documents make that very

9   clear.

10   In Exhibit 41, Mr. Tarnovsky's e-mail, he makes it

11   quite clear that he is guessing that there are at least a

12   hundred thousand original cards that are professional E3Ms

13   or EchoStar 3M. The other thing he makes clear is that

14   those are not in the United States.

15   If you look at the very next paragraph of his

16   note, he says: "Now that the ROM for two of the three ROMs

17   presently in use by the USA are public." He's not saying

18   that those cards are in the USA. He's saying that the

19   piracy is of two different types of cards of the three that

20   are in use.

21   And this is significant for a couple of reasons.

22   First of all, NDS can only be responsible in this case for

23   ROM 3. The plaintiffs have agreed -- and you'll be

24   instructed by Judge Carter -- that lost profits cannot be

25   awarded for lost profits for piracy of the ROM 2, 10, or 11

1   cards or lost profits due to free-to-air piracy.

2   You've also heard from Mr. Kummer that even he

3   agrees that they are only guesses. He said that everyone

4   has their own guess, their own multiple guesses, but

5   ultimately it's always a guess. You can't award based on a

6   guess, and that is all that you have.

7   You also know that there were multiple ROM

8   versions hacked. We saw that in the earlier reports. It is

9   actually in Mr. Conus' report in Exhibit 824 from

10   January 2001. Both the ROM 2 and ROM 3 card were hacked.

11   And finally, you can't award lost profits based on

12   piracy devices outside the United States. And Mr. Tarnovsky

13   testified that his guesstimate of a hundred thousand

14   included the entire footprint for EchoStar: Mexico and

15   Canada as well.

16   There is no evidence in this case of any piracy in

17   the United States. The alleged distribution network, all

18   the pirates that they've identified, were in Canada with two

19   exceptions: Mr. Maldonado was in the United States, and

20   Billy Joe Osborne was in the United States. But neither one

21   of them had anything to do with NDS. Mr. Maldonado got his

22   piracy devices from Barrie, Ontario, and Billy Joe Osborne

23   obtained his from the DISH Plex group in Thunder Bay,

24   Ontario.

25   Now, I want to go to the second question on the

1 special verdict form -- or the second claim, which is also a

2 Digital Millennium Copyright claim.

3   That claim is also much more complicated than just

4 deciding whether Nipper is somehow connected to NDS.

5 Instead, what you have to decide is whether defendants

6 manufactured, imported, offered to the public, provided, or

7 otherwise trafficked in any technology, product, service,

8 device, component, or part thereof of that meets certain

9 requirements. And you have to decide as a jury that NDS is

10 responsible for meeting each one of those requirements.

11   And like the first claim, you also have to decide

12 that it was conduct after June of 2000, and that each

13 element occurred in the United States.

14   And just like Claim 1, the decision is left to

15 you, but I believe the evidence is consistent in this case

16 that NDS was not responsible for any such conduct in the

17 United States after June of 2000.

18   Now, the third claim is related to the

19 Communications Act. And that claim requires that you find a

20 number of things related to the receipt of EchoStar

21 programming. And again, it requires that you find that it

22 occurred after June of 2000.

23   The only evidence that you've heard of the receipt

24 of EchoStar programming by anyone associated with NDS is

25 Mr. Tarnovsky's experiment in the fall of 2000. One time.

1   Reprogramming of a DirecTV card. And even that one doesn't

2   meet these requirements because it was not conduct -- it was

3   not for commercial gain or the benefit of NDS or for the

4   benefit of another.

5   The same is true, ladies and gentlemen, of the

6   other claims. If you go through the elements for each one

7   of those, and the Judge will instruct you about those

8   elements, I think you'll find that the evidence does not

9   meet them. In fact, in every instance it depends on a

10   finding that NDS was responsible for not just those

11   postings, but that NDS was responsible for conduct in the

12   United States that amounts to piracy. And there is no

13   evidence of that.

14   Now, before plaintiffs return, I want to ask you a

15   few questions because I'm not gonna get a chance to come

16   back and talk to you again. This is my last chance.

17   As you listen to the plaintiffs and their

18   concluding remarks, there are a few questions I'd like you

19   to ask yourself -- and more importantly ask the plaintiffs.

20   First, why didn't EchoStar find xbr21 or StuntGuy?

21   That information was available to them. NDS tracked them

22   down. Why didn't they find 'em?

23   Second, why didn't EchoStar follow the roads to

24   Barrie? We showed you all the information in their hands

25   that connected piracy to Barrie, Ontario. They didn't find

1 them.

2 Third, what is the response to Nigel Jones? He

3 explained all of this to you. He took the time to show you

4 the differences between the code written by Mr. Mordinson

5 and the code posted on the Internet by xbr21, the Swiss

6 Cheese Productions, the code in the black box, and in every

7 instance it was different. And they had no response at all.

8 Fourth, where are the documents showing that the

9 card swap or any damages at all were the result of the

10 posting? If this had been such a significant event, don't

11 you think there would be some record of it at EchoStar or

12 NagraStar? There's not a single one.

13 And finally, if piracy had so damaged EchoStar,

14 why do they keep setting those record revenues every single

15 year? They want you to award extemporary sums as damages in

16 this case, and yet every single year their revenue has

17 increased enormous amounts.

18 I've tried to focus on the evidence that you've

19 seen, and there is an enormous amount of it. As a result,

20 I've tried to synthesize it for you and explained to you

21 what it really shows and doesn't show.

22 The lie that NDS was responsible for EchoStar

23 piracy went a long way around the world before it got to

24 this courtroom, but it's time for that lie to stop. NDS had

25 nothing to do with EchoStar piracy. NDS engaged in

1   legitimate reverse-engineering. It engaged in legitimate

2   antipiracy activities, and it would be wrong to suggest that

3   NDS had anything to do with the piracy of EchoStar's system.

4   Thank you.

5   THE COURT: Thank you.

6   And Counsel, on your rebuttal, how long would you

7   like the jury to take a recess so you're ready?

8   MR. HAGAN: 20, 25 minutes.

9   THE COURT: About 20 minutes, then. You're

10   admonished not to discuss this matter amongst yourselves nor

11   form or express any opinion concerning the case.

12   Counsel, please remain for just a moment.

13   (Jury recessed.)

14   (Outside the presence of the jury.)

15   THE COURT: Mr. Hagan, why don't you continue to

16   prepare.

17   I want to talk to the remaining Counsel, though,

18   for just a moment about one of the jurors and some

19   information Kristee just conveyed to me.

20   It's only a scheduling problem, so it's of no

21   interest. If the audience wants to take a break, go use the

22   restroom, et cetera, this isn't exciting stuff.

23   Kristee, would you relate for counsel what

24   Mr. Bender told you about, including the contempt.

25   THE CLERK: Mr. Bender indicated that he has

1   another commitment Wednesday, which would be May 15th in the

2   afternoon. He has to be there at 1:00 p.m. And he made

3   this commitment a couple of months ago, and that he would

4   risk contempt of court or being thrown off the jury so he

5   would not miss this commitment, whatever it is that he has.

6   THE COURT: So therefore you're just notified that

7   Mr. Bender has, besides the three-day graduation now and the

8   other half day, apparently another commitment that we

9   weren't even aware of.

10   Now, you better both think this out, because you

11   have another juror who's indicated -- Juror No. 4, I

12   believe -- that she's got a two-week business commitment.

13   You might think of the following: If this jury's

14   going to reach a verdict without putting it over, you know,

15   three days and then another two weeks, which is going to

16   make your case extremely old, you might consider making

17   Mr. Bender an alternate and letting him go so the jury could

18   continue on and start their deliberations literally tomorrow

19   while it's fresh in mind concerning your closing arguments.

20   And if we needed Mr. Bender, at least he would be available

21   next Tuesday if we ran into problems or trouble.

22   If you don't do that -- and it's no concern to

23   me -- I mean, you can bring the jury back in July. That's

24   up to you. But I think your arguments are fresh in mind for

25   both sides, and I think there's a tremendous damage that's

1 going to be done by putting the matter over.

2   But I leave that to each of you, and unless

3 there's a stipulation, we'll continue along this course.

4   Thank you.

5   (Recess held at 2:59 p.m.)

6   (Further proceedings reported by Jane rule in

7   Volume IV.)

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3   CERTIFICATE

4

5   I hereby certify that pursuant to Section 753,

6   Title 28, United States Code, the foregoing is a true and

7   correct transcript of the stenographically reported

8   proceedings held in the above-entitled matter and that the

9   transcript page format is in conformance with the

10   regulations of the Judicial Conference of the United States.

11

12   Date: May 8, 2008

13

14

15   _____

                      DEBBIE GALE, U.S. COURT REPORTER

16   CSR NO. 9472, RPR

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