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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TIVO, INC. . DOCKET NO. 2:04CV01
V. . TEXARKANA, TEXAS
ECHOSTAR COMMUNICATIONS . SEPTEMBER 4, 2008
CORPORATION . 9:58 A.M.

MOTION HEARING

BEFORE THE HONORABLE DAVID FOLSOM,
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR PLAINTIFF
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PROCEEDINGS RECORDED BY STENOMASK VERBATIM REPORTING,
TRANSCRIPT PRODUCED BY CAT SYSTEM.

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P R O C E E D I N G S

TEXARKANA, TEXAS

SEPTEMBER 4, 2008

(OPEN COURT)

THE COURT: PLEASE BE SEATED. GOOD MORNING, LADIES AND GENTLEMEN. WE ARE HERE ON TWO MOTIONS, A MOTION CONCERNING THE INJUNCTION AND A MOTION CONCERNING DAMAGES. I HAVE GIVEN EACH SIDE FIFTEEN MINUTES ON EACH MOTION TO PRESENT, TO RESPOND. SO ARE THE PARTIES READY TO GO FORWARD?

MR. BAXTER: GOOD MORNING, YOUR HONOR. SAM BAXTER, MORGAN CHU, ANDREI IANCU, TINA BYRD AND WE ARE READY TO GO, YOUR HONOR.

THE COURT: I WOULD SUGGEST -- YES.

MR. MCELHINNY: GOOD MORNING, YOUR HONOR. DAMON YOUNG, JOHN PICKETT, RACHEL KREVANS, AND HAROLD MCELHINNY. WE ARE READY.

THE COURT: I WOULD SUGGEST TO START WITH THE MOTION CONCERNING THE INJUNCTION, AND I WOULD LIKE MOTION, RESPONSE, AND THEN IF YOU WANT TO RESERVE SOME REPLY TIME. THEN WE WILL TAKE UP THE DAMAGE ISSUE.

MR. CHU: VERY WELL, YOUR HONOR. I WANT TO FOCUS ON THREE KEY FACTS AND THEN THE APPLICATION OF ESTABLISHED LAW TO THOSE FACTS TO EXPLAIN WHY ECHOSTAR SHOULD BE HELD IN CONTEMPT.

THE FIRST KEY FACT IS THE TERMS OF THE INJUNCTION AND THE

1 WAY IN WHICH THOSE TERMS CAME INTO BEING. AFTER ECHOSTAR WAS
2 FOUND TO HAVE INFRINGED WILLFULLY VALID PATENT CLAIMS OF TIVO,
3 WE MADE A MOTION FOR A PERMANENT INJUNCTION, AND YOUR HONOR
4 WILL PROBABLY REMEMBER THAT IT WAS HOTLY CONTESTED. THERE WAS
5 A FIGHT OVER WHETHER THERE SHOULD BE AN INJUNCTION AND A FIGHT
6 OVER THE TERMS.

7 FOCUSING ON THE TERMS, ECHOSTAR SPECIFICALLY ARGUED TO
8 THE COURT THAT THE COURT SHOULD, QUOTE, "ENJOIN ONLY THE
9 PROVISION OF INFRINGING DVR SOFTWARE UPON ACTIVATION." AND
10 THAT'S THE QUOTE ON THE LEFT-HAND SIDE FROM THEIR ARGUMENT TO
11 YOUR HONOR. AND AT THAT TIME WE RESPONDED BY SAYING THIS IS
12 GOING TO ALLOW ECHOSTAR TO ENGAGE IN MISCHIEF. THEY ARE GOING
13 TO BE ABLE TO DEEM WHAT THEY CONSIDER TO BE INFRINGING OR NOT
14 INFRINGING, AND THEN DOWNLOAD THROUGH THE SATELLITE SOME NEW
15 LINES OF SOFTWARE CODE AND CLAIM THAT IT'S NONINFRINGING.

16 AFTER THE FIGHT, YOUR HONOR RULED ON THE EXACT TERMS OF
17 THE INJUNCTION, AND HERE IS THE KEY PROVISION OF THE
18 INJUNCTION, QUOTE, "THAT ECHOSTAR SHOULD DISABLE THE DVR
19 FUNCTIONALITY, I.E., DISABLE STORAGE TO AND PLAYBACK FROM A
20 HARD DISK DRIVE OF TELEVISION DATA IN THE INFRINGING PRODUCTS
21 THAT HAVE BEEN PLACED WITH AN END USER SUBSCRIBER." THAT'S
22 THE FIRST KEY FACT.

23 THE SECOND KEY FACT IS WHAT HAPPENED NEXT ON APPEAL.
24 ECHOSTAR THEN SOUGHT AN APPEAL ON AN EMERGENCY BASIS TO STAY
25 THE INJUNCTION BEFORE THE FEDERAL CIRCUIT. THEY DIDN'T ARGUE

1 THAT THE TERMS WERE TOO BROAD, AMBIGUOUS, OR THEY DIDN'T
2 UNDERSTAND THE TERMS. INDEED, THEY SPECIFICALLY ARGUED TO THE
3 FEDERAL CIRCUIT THAT THEY UNDERSTOOD THE TERMS MEANT THAT THEY
4 HAD TO DISABLE THE DVR FUNCTIONALITY IN SEVERAL MILLION UNITS
5 OF THE INSTALLED BASE, AND THAT DOING SO, DOING SO PENDING
6 APPEAL WOULD WREAK HAVOC, CAUSE DAMAGES OF \$90 MILLION A MONTH
7 OR MORE.

8 THEY GOT THE STAY BASED ON THOSE ARGUMENTS AND THEN THEY
9 APPEALED THE MAIN CASE. AND THEY APPEALED MANY ISSUES, MANY
10 CLAIM CONSTRUCTION ISSUES, WHETHER DR. POLISH SHOULD HAVE BEEN
11 ABLE TO TESTIFY TO THIS OR THAT, TESTIMONY ABOUT PROFESSOR
12 GIBSON, WHETHER CERTAIN EVIDENCE OUGHT TO HAVE BEEN ADMITTED,
13 ARGUMENTS ABOUT WHETHER ARGUMENT OF COUNSEL WAS APPROPRIATE.

14 AFTER FULL BRIEFING ON THE SECOND APPEAL TO THE FEDERAL
15 CIRCUIT, THE MAIN APPEAL, THE FEDERAL CIRCUIT AFFIRMED.
16 ECHOSTAR CHOSE NOT TO SAY THE TERMS OF THE INJUNCTION WERE TOO
17 BROAD, AMBIGUOUS, OR THEY DIDN'T UNDERSTAND THE TERMS. SO THE
18 SECOND KEY FACT IS THAT IF ECHOSTAR HAD ANY CONCERN ABOUT THE
19 TERMS OF THE INJUNCTION, THEY HAD A FULL OPPORTUNITY ON THE
20 EMERGENCY APPEAL, THE SECOND MAIN APPEAL; AND INDEED EVEN IN
21 THEIR PETITIONS FOR REHEARING AND REHEARING EN BANC TO THE
22 FEDERAL CIRCUIT, THEY DIDN'T RAISE ANYTHING ABOUT THE
23 APPROPRIATENESS OF YOUR HONOR'S INJUNCTION OR THE PRECISE
24 TERMS, AND SPECIFICALLY THE PRECISE PROVISION THAT WE ARE
25 LOOKING AT ON THE SCREEN. THAT'S THE SECOND KEY FACT.

1 AND THE THIRD KEY FACT IS STRAIGHTFORWARD. THEY DID NOT
2 DISABLE THE FUNCTIONALITY OF THE DEFINED INFRINGING PRODUCTS.
3 IT'S A DEFINED TERM WITH A CAPITAL I, CAPITAL P, AND IT'S
4 DEFINED ELSEWHERE IN YOUR HONOR'S ORDER TO BE CERTAIN MODEL
5 NUMBERS, DP501, 508, AND OTHER VERY SPECIFIC MODEL NUMBERS.
6 THEY DIDN'T IN ANY REAL WORLD SENSE DISABLE THE DVR
7 FUNCTIONALITY. I DO NOT THINK THAT THEY COULD REPRESENT TO
8 YOUR HONOR THAT THEY COULD POINT TO THOSE DVRS AND SAY FOR ANY
9 OF THOSE MODEL NUMBERS THESE WERE DISABLED IN A REAL WORLD
10 SENSE FOR A MONTH OR ANY MEANINGFUL PERIOD OF TIME. SO THOSE
11 ARE THE THREE KEY FACTS.

12 NOW LET'S APPLY ESTABLISHED CASE LAW. THERE IS A WELL
13 ESTABLISHED LINE OF CASES. IT STARTS WITH THE UNITED STATES
14 SUPREME COURT. OBVIOUSLY THE FIFTH CIRCUIT AND THE FEDERAL
15 CIRCUIT FOLLOWS THIS LINE. AN EXAMPLE OF THE CASE INCLUDES
16 *WALKER V. CITY OF BIRMINGHAM*. IT'S A CASE THAT GOES TO THE
17 UNITED STATES SUPREME COURT. IT'S CITED IN THE BRIEFS. AND
18 THE ARGUMENT THERE IS WHETHER CIVIL RIGHTS MARCHERS, INCLUDING
19 MARTIN LUTHER KING, CAN VIOLATE AN INJUNCTION ON ITS FACE OR
20 DO THEY HAVE TO CHALLENGE THE TERMS OF THE INJUNCTION? AND OF
21 COURSE IN A CASE LIKE THAT THERE ARE IMPORTANT CONSTITUTIONAL
22 FREE SPEECH ISSUES. AND THE SUPREME COURT SAYS UNLESS THERE
23 ARE ABSOLUTELY EXTRAORDINARY CIRCUMSTANCES, YOU HAVE GOT TO
24 CHALLENGE THE TERMS OF THE INJUNCTION. YOU CAN'T USE SELF
25 HELP TO VIOLATE IT ON YOUR OWN.

1 SO TOO HAS THE FIFTH CIRCUIT RULED, AND HERE WE POINT TO
2 A FEDERAL CIRCUIT CASE, *CARBORUNDUM*, WHERE A SIMILAR ISSUE
3 AROSE. THERE WAS AN INJUNCTION. THE DISTRICT COURT ENJOINED
4 THE DEFENDANT FROM SELLING CERTAIN PARTS. IN THIS CASE THEY
5 WERE REPAIR PARTS. AND DEFENDANT ARGUED IT WAS INAPPROPRIATE
6 TO ENJOIN THE REPAIR PARTS OR TO HOLD IT IN CONTEMPT BECAUSE
7 THE INJUNCTION SHOULD NOT HAVE INCLUDED REPAIR PARTS, ALTHOUGH
8 IT DID. AND THE FEDERAL CIRCUIT STATED QUITE CLEARLY, QUOTE,
9 "EVEN IF WE WERE TO ACCEPT DEFENDANTS' ARGUMENT, DEFENDANT WAS
10 NOT FREE TO IGNORE THE COURT'S ORDER AS IT DID."

11 IT ALSO CITED A SUPREME COURT CASE. BEFORE I GET TO THAT
12 SUPREME COURT CASE, LET ME MENTION THAT ECHOSTAR MAKES AN
13 ARGUMENT ABOUT A SEPARATE LINE OF CASES THAT EXIST SIDE BY
14 SIDE AS THESE CASES. THEY REFER TO *KSM* AND A SERIES OF OTHER
15 CASES.

16 THE COURT: I WAS GOING TO ASK YOU ABOUT *KSM*. WHY DO
17 YOU THINK THE FACTS OF *KSM* ARE DIFFERENT FROM THE FACTS OF
18 THIS CASE?

19 MR. CHU: *KSM* --

20 THE COURT: BECAUSE IT'S MY UNDERSTANDING, MY READING
21 OF THAT, BASICALLY THE DISTRICT JUDGE FOUND THAT THE DEFENDANT
22 WAS IN CONTEMPT FROM A PLAIN READING OF THE INJUNCTION, AND
23 THE FEDERAL CIRCUIT SAID, NOPE, YOU'VE GOT TO DETERMINE
24 WHETHER THE DESIGN AROUND IN FACT INFRINGED, I THINK IN THAT
25 CASE, THE '219. SO WHY IS THAT ARGUMENT INAPPROPRIATE FOR THE

1 FACTS OF THIS CASE?

2 MR. CHU: HERE ARE THE KEY DIFFERENCES IN THAT CASE
3 AND IT EXTENDS TO OTHER CASES IN THAT LINE, REMEMBERING THESE
4 TWO LINES EXIST SIDE BY SIDE. FIRST OF ALL, KSM IS A
5 SETTLEMENT. THERE IS A CONSENT TO --

6 THE COURT: IS A WHAT?

7 MR. CHU: A SETTLEMENT. IT'S NOT A FULL TRIAL ON THE
8 MERITS. THERE IS A CONSENT DECREE IN THE SETTLEMENT THAT THE
9 PARTIES PUT BEFORE THE COURT JOINTLY.

10 THE COURT: WELL, WHY IS THAT IMPORTANT YOU FEEL?

11 MR. CHU: WELL, FIRST OF ALL, THERE ISN'T A FULL
12 ADJUDICATION, BUT HERE IS THE KEY DIFFERENCE. WE HAVE
13 SEPARATE PRODUCTS. WE HAVE THE THERMAL-LOCK PRODUCTS THAT
14 WERE THE EXPRESSED SUBJECT OF THE CONSENT DECREE IN THE
15 SETTLEMENT. SO THEY STOPPED SELLING THERMAL-LOCK. THAT
16 WASN'T THE SUBJECT OF THE CONTEMPT. INSTEAD, THERE WERE NEW
17 PRODUCTS CALLED THE ULTRA-LOK I AND LATER THE ULTRA-LOK II
18 PRODUCTS. THERE WAS NO ADJUDICATION BY A COURT ON THOSE
19 PRODUCTS. THEY WERE NOT INCLUDED IN THE CONSENT DECREE.
20 THERE WASN'T LANGUAGE SAYING, AND WE ARE GOING TO STOP YOU
21 FROM USING OR YOU HAVE TO DISABLE THE OPERATION AS AN EXAMPLE
22 OF THE ULTRA-LOK PRODUCTS AT ALL.

23 SO, IT'S A TYPICAL CIRCUMSTANCE, YOUR HONOR, WHERE THERE
24 IS AN INJUNCTION AND SAYS THOU SHALL NOT SELL PRODUCT A, OR
25 SIMILAR PRODUCTS, OR INFRINGING PRODUCTS. NOW, PRODUCT B

1 COMES ALONG AND THEN THE QUESTION IS, WHAT'S THE PROCEDURE AND
2 IS CONTEMPT APPROPRIATE? THAT'S WHAT KSM ADDRESSES. IT DOES
3 NOT ADDRESS THE SITUATION WHERE WE HAVE AN ADJUDICATION, A
4 JURY VERDICT, POST TRIAL MOTIONS, AFFIRMED ON APPEAL OF
5 EXACTLY THE PRODUCTS THAT THEY FAILED TO DISABLE. THAT IS A
6 CRITICAL DIFFERENCE. THERE ARE SOME OTHER DIFFERENCES FOR THE
7 KSM CASE. FOR EXAMPLE, THE --

8 THE COURT: WELL, CAN YOU CITE ME TO A FEDERAL
9 CIRCUIT CASE THAT STANDS FOR THE PROPOSITION THAT YOU CAN FIND
10 CONTEMPT ON THE DESIGN AROUND WITHOUT CONSIDERING WHETHER THE
11 DESIGN AROUND INFRINGES OR NOT?

12 MR. CHU: THE *CARBORUNDUM* ISN'T EXACTLY DESIGN AROUND
13 BUT IT --

14 THE COURT: THAT WOULD BE YOUR CLOSEST CASE FOR THAT
15 PROPOSITION, YOU THINK?

16 MR. CHU: IT'S THE CLOSEST CASE TO THE FOLLOWING
17 PROPOSITION. IF THE TERMS OF THE INJUNCTION ARE CLEAR ON
18 THEIR FACE, CAN THE DEFENDANT VIOLATE THOSE TERMS WITHOUT
19 ASKING THE APPELLATE COURT, WHICH IT COULD HAVE, TO CHANGE
20 THOSE TERMS? IT DID ASK YOUR HONOR TO CHANGE THE TERMS IN THE
21 FIRST INSTANCE WHEN IT ASKED YOUR HONOR TO ENJOIN ONLY
22 INFRINGING PRODUCTS. WE HAD IT ON THE EARLIER SLIDE. I THINK
23 IT'S SLIDE 22. IF WE COULD PUT THAT UP AGAIN FOR THE MOMENT,
24 THIS IS THEIR ARGUMENT. THEY ASKED YOUR HONOR TO, QUOTE,
25 "ENJOIN ONLY THE PROVISION OF INFRINGING DVR SOFTWARE UPON

1 ACTIVATION." THAT'S EXACTLY THE SITUATION HERE. AND IT WAS
2 PERHAPS JUST LUCKY ON OUR PART. WE SAID IT INVITES MISCHIEF.
3 YOUR HONOR REJECTED THAT POSITION. AND THEN THEY WENT AHEAD
4 AND USED SELF HELP ANYWAY. THAT'S WHY THE *CARBORUNDUM* CASE
5 AND THAT'S WHY THE *WALKER V. CITY OF BIRMINGHAM*, AND I AM
6 GOING TO CITE ANOTHER SUPREME COURT CASE, APPLIED DIRECTLY TO
7 THIS CIRCUMSTANCE. AND THIS IS A CASE THAT IS CITED IN THE
8 *CARBORUNDUM* CASE. YOU SEE IT AT THE VERY BOTTOM OF THE SLIDE,
9 *GTE SYLVANIA V. CONSUMER UNION*. AND THE FEDERAL CIRCUIT
10 QUOTES FROM THAT CASE, QUOTE: "A PERSON SUBJECT TO AN
11 INJUNCTIVE ORDER ISSUED BY A COURT WITH JURISDICTION ARE
12 EXPECTED TO OBEY THAT DECREE UNTIL IT IS MODIFIED OR REVERSED
13 EVEN IF THEY HAVE PROPER GROUNDS TO OBJECT TO THE ORDER."
14 THEN THE FEDERAL CIRCUIT GOES ON TO SAY, QUOTE: "THEREFORE THE
15 COURT DID NOT ABUSE ITS DISCRETION WHEN IT HELD DEFENDANT IN
16 CONTEMPT." THAT'S OUR CASE HERE. THANK YOU.

17 THE COURT: RESPONSE.

18 MR. MCELHINNY: THANK YOU, YOUR HONOR. *KSM* CLEARLY
19 IS THE KEY CASE HERE AND GOVERNS THIS DECISION. IT'S AN
20 IMPORTANT CASE PARTICULARLY BECAUSE --

21 THE COURT: WHY DIDN'T YOU SIMPLY TELL THE COURT BACK
22 IN SEPTEMBER OF '06 THAT YOUR CLIENT IS IN THE PROCESS OF AN
23 ATTEMPTED DESIGN AROUND, OR THE FEDERAL CIRCUIT WHEN YOU ASKED
24 FOR THE STAY?

25 MR. MCELHINNY: THERE ARE -- WELL, THERE ARE TWO

1 QUESTIONS. ONE, WE WERE AT THE BEGINNING OF THE PROCESS AND
2 WE DIDN'T KNOW IF WE COULD BE ABLE TO DO IT. AND, TWO --

3 THE COURT: WELL, WHY COULDN'T YOU SIMPLY TELL THE
4 COURT, JUDGE, WE ARE ATTEMPTING A DESIGN AROUND? OR WHY
5 DIDN'T YOU TELL THE FEDERAL CIRCUIT WE ARE ATTEMPTING A DESIGN
6 AROUND?

7 MR. MCELHINNY: THE ANSWER TO THAT IS THAT THERE IS
8 IN FACT ON THE OTHER SIDE A FAIR AMOUNT OF LAW OF COURTS THAT
9 DO NOT GIVE ADVICE IN ADVANCE OF HAVING A PRODUCT OR HAVING
10 SOMETHING PRESENTED TO THEM. AND TO HAVE SOMEBODY COME IN AND
11 SAY, YOU KNOW, YOUR HONOR -- IT WASN'T RELEVANT TO ANYTHING
12 THAT WOULD HAVE BEEN BEFORE THE COURT WHAT WE WERE INTENDING
13 TO DO OR TRYING TO DO.

14 THE COURT: SO YOUR CLIENT MADE THAT DECISION RATHER
15 THAN ME OR THE FEDERAL CIRCUIT.

16 MR. MCELHINNY: OUR CLIENT CERTAINLY MADE THE
17 DECISION, YOUR HONOR.

18 THE COURT: THAT IT WAS NOT RELEVANT?

19 MR. MCELHINNY: OUR CLIENT CERTAINLY -- IT WAS NOT --
20 I DON'T KNOW IF THE CLIENT DID. I MEAN, WE --

21 THE COURT: OR YOU?

22 MR. MCELHINNY: OR IN TERMS OF THE ARGUMENTS --

23 THE COURT: WELL, YOU SAID IT WAS NOT RELEVANT, BUT
24 YOU DIDN'T LET ME MAKE THAT DECISION OR THE FEDERAL CIRCUIT IS
25 MY POINT.

1 MR. MCELHINNY: IT IS CORRECT, YOUR HONOR, THAT WE
2 HAVE NOT PRESENTED AT ANY POINT IN ANY OF THE ARGUMENTS THAT
3 WE WERE ANTICIPATING A DESIGN AROUND. THAT IS CORRECT.

4 THE COURT: WHAT IS THE STATUS OF THE DELAWARE
5 ACTION?

6 MR. MCELHINNY: THE DELAWARE ACTION IS PENDING. IT
7 HAS A MOTION TO DISMISS PENDING.

8 THE COURT: I GUESS I FIND MYSELF -- WE HAD A
9 CONFERENCE, IF WHAT I HAVE BEEN TOLD IS CORRECT OR REPRESENTED
10 TO, A CONFERENCE A COUPLE OF MONTHS AGO, AND WITHIN 30 OR 45
11 MINUTES LATER YOU FILED THE, ON BEHALF OF YOUR CLIENT, THE DEC
12 ACTION IN DELAWARE.

13 MR. MCELHINNY: I DID, YOUR HONOR, AND IN FAIRNESS --
14 I DID THAT. AND IN FAIRNESS, AT THAT CONFERENCE BEFORE YOUR
15 HONOR AND BEFORE YOU HAD HAD A CHANCE TO READ THESE BRIEFS AND
16 READ THESE CASES, I STOOD HERE IN FRONT OF YOU AND SAID THE
17 ONLY APPROPRIATE WAY TO PROCEED AGAINST A DESIGN AROUND THAT
18 HAS SUBSTANTIAL CHANGES IS TO BRING A SUBSEQUENT ACTION. AND
19 --

20 THE COURT: WELL, OBVIOUSLY YOU KNEW YOU WERE GOING
21 TO BRING IT WITHIN 30 OR 45 MINUTES.

22 MR. MCELHINNY: -- AND, WELL, I AM SORRY. BUT IN
23 FAIRNESS, I SAID TO YOU --

24 THE COURT: WELL, WHAT ABOUT FAIRNESS? DO YOU THINK
25 IT WOULD HAVE BEEN FAIR TO ADVISE ME ON THAT DAY?

1 MR. MCELHINNY: I BELIEVE, YOUR HONOR, THAT I
2 SPECIFICALLY AT THAT DAY ASKED YOU NOT TO SET A SCHEDULE OF
3 ROLLING CONTEMPT HEARINGS BECAUSE OUR CLIENT IS IN THE
4 POSITION OF BEING ACCUSED PUBLICLY OF INFRINGING THE PATENTS.

5 THE COURT: I RECALL YOU TAKING THAT POSITION BUT YOU
6 CERTAINLY DIDN'T ALERT THE COURT THAT WAS GOING TO BE FILED
7 WITHIN 30 OR 45 MINUTES OF THE HEARING CONCLUDING. AND MAYBE
8 YOU ARE NOT OBLIGATED TO DO SO, BUT YOU ARE TALKING IN TERMS
9 OF FAIRNESS AND I JUST WANTED TO ASK YOU IN THAT REGARD.

10 MR. MCELHINNY: AND IN FAIRNESS, YOUR HONOR, IF I HAD
11 BEEN SUCCESSFUL BEFORE YOUR HONOR, WE WOULDN'T HAVE BEEN IN A
12 POSITION WHERE WE HAD TO FILE IT. BUT THAT -- I MEAN, THE
13 POINT IS WE DO NEED A DETERMINATION ABOUT WHETHER OR NOT THIS,
14 THIS, OUR MODIFIED SOFTWARE, INFRINGES THE PATENT. WE NEED
15 THAT. AND --

16 THE COURT: AND I DON'T KNOW IF I WOULD NECESSARILY
17 DISAGREE, BUT IT SEEMS YOUR CLIENT COULD HAVE GONE ABOUT THIS
18 IN A MUCH DIFFERENT FASHION THAN THEY HAVE DONE. BUT ANYWAY,
19 YOU MAY CONTINUE.

20 MR. MCELHINNY: THANK YOU, YOUR HONOR. THE CONTEXT
21 OF *KSM* IS IMPORTANT BECAUSE CONTEXT -- BECAUSE *KSM* WAS AN
22 EARLY FEDERAL CIRCUIT CASE. AND THE ORIGINAL ISSUE IN FRONT
23 OF *KSM* WAS WHETHER OR NOT THE COURT WAS GOING TO REVIEW THE
24 LANGUAGE THAT WAS IN DISTRICT COURT INJUNCTIONS. AND WHAT *KSM*
25 SAYS IS, WE ARE NOT GOING TO BE ABLE TO POLICE ALL OF THE

1 DISTRICT COURTS IN TERMS OF SPECIFIC LANGUAGE AS TO
2 INJUNCTION.

3 THE COURT: I NOTICE -- BUT WHILE WE ARE ON THAT
4 SUBJECT -- I AM NOT QUITE READY TO LEAVE IT. I NOTICE IN YOUR
5 BRIEFING YOU SAID, WELL, WE ALERTED. THEY VERY WELL COULD
6 HAVE READ THE SEC FILINGS, I THINK THAT WAS YOUR CLIENT'S
7 POSITION IN THE BRIEFING, TO FIND OUT ABOUT THE DESIGN AROUND,
8 CORRECT?

9 MR. MCELHINNY: YES, YOUR HONOR.

10 THE COURT: DO YOU EXPECT THE COURT TO READ THEM?

11 MR. MCELHINNY: NO, YOUR HONOR.

12 THE COURT: OKAY. YOU MAY CONTINUE.

13 MR. MCELHINNY: YOUR HONOR, I MEAN, AGAIN AT THE
14 SEPTEMBER HEARING OR THE -- THE REASON WE ARE HERE IS BECAUSE
15 WE INFORMED -- AS SOON AS WE ROLLED IT OUT, WE INFORMED TIVO
16 AND PRESENTED THEM WITH ALL THE INFORMATION AND GAVE THEM THE
17 OPTION ABOUT WHETHER OR NOT THEY WANTED TO -- WHETHER THEY
18 WANTED TO FILE A DECLARATORY JUDGMENT OR CONTEMPT. AND WHEN
19 THEY PROCEEDED IN CONTEMPT AND YOUR HONOR SET THE PRETRIAL
20 HEARING, WE CAME BEFORE YOU, WE LAID OUT FOR YOU, WE GAVE YOU
21 THE OPINIONS, WE TOLD YOU THAT WE HAD DONE A DESIGN AROUND,
22 AND WE SUGGESTED AT THAT TIME THAT CONTEMPT WAS NOT THE WAY TO
23 DO IT.

24 THE COURT: WELL, BUT I THINK YOU AGREE UNDER THE
25 CASE LAW SIMPLY BECAUSE THERE IS THE DESIGN AROUND DOESN'T

1 NECESSARILY MEAN I CANNOT APPROACH THIS SUBJECT ON A CONTEMPT
2 PROCEEDING. YOU DO ADMIT THAT, DO YOU NOT?

3 MR. MCELHINNY: UH --

4 THE COURT: DEPENDS UPON THE EXTENT OF THE DESIGN
5 AROUND.

6 MR. MCELHINNY: IT DOES, YOUR HONOR.

7 THE COURT: NOT NECESSARILY THEY ARE AUTOMATICALLY
8 ENTITLED TO A CONTEMPT PROCEEDING NOR ARE YOU AUTOMATICALLY
9 ENTITLED TO A THIRD -- OR A NEW ACTION. DO YOU AGREE WITH
10 THAT? THERE COULD BE A MIDDLE GROUND?

11 MR. MCELHINNY: THERE CAN BE A MIDDLE GROUND, YOUR
12 HONOR.

13 THE COURT: VERY WELL.

14 MR. MCELHINNY: AND IN DEFINING THE MIDDLE GROUND,
15 WHAT THE FEDERAL CIRCUIT HAS TOLD US IS THAT IF THE NATURE OF
16 THE DESIGN AROUND IS SUCH THAT IT IS ANY KIND OF A SUBSTANTIAL
17 CHANGE SUCH THAT IT REQUIRES DISCOVERY --

18 THE COURT: BUT YOU ARE ACCEPTING -- YOU ARE
19 BASICALLY ASKING ME TO ACCEPT THAT WITH NOTHING MORE.

20 MR. MCELHINNY: NO, I AM NOT. AND ON A LITTLE BIT
21 FRIENDLIER GROUND HERE, NO, I AM REALLY NOT BECAUSE WHEN I WAS
22 HERE IN FRONT OF YOU IN SEPTEMBER, AND I WAS BECAUSE WE HADN'T
23 GIVEN YOU THE CASES, YOU DIDN'T SEE THE STUFF, AND I WAS
24 SAYING THIS IS THE WAY THIS WILL TURN OUT. YOU KNOW, WHICH
25 AND YOU SAID, AS YOU ARE CORRECT TO DO, FILE A MOTION, LET ME

1 LOOK AT IT, LET ME SEE, YOU KNOW, WHAT IS PRECEDED. AND NOW
2 WE HAVE GONE THROUGH A TWO AND A HALF MONTH. YOU HAVE --

3 THE COURT: BUT I DIDN'T ALLOW DISCOVERY ON THE ISSUE
4 OF THE DESIGN AROUND.

5 MR. MCELHINNY: YOU ALLOWED SOME DISCOVERY. THEY
6 WANT, AS YOU WOULD NOT BE SURPRISED, A LOT MORE AND THERE ARE
7 DISPUTES THAT ARE PENDING THE RULING OF TODAY, BECAUSE IF YOUR
8 HONOR DOES NOT HOLD US IN SOME SORT OF SUMMARY CONTEMPT TODAY,
9 THEY THEN WANT TO ROLL IT OVER INTO ANOTHER CONTEMPT HEARING
10 WITH DISCOVERY AND EXPERT OPINIONS. AND WE THINK THAT YOUR
11 HONOR NOW HAS A SUFFICIENT RECORD TO SAY THAT THE DIFFERENCES
12 ARE SUBSTANTIAL ENOUGH THAT IT'S NOT COLORABLE.

13 THE COURT: WHAT IS IN THE RECORD THAT WOULD ALLOW ME
14 TO MAKE THAT DECISION?

15 MR. MCELHINNY: YOU HAVE THREE THINGS IN THE -- WELL,
16 TWO AT LARGE. YOU HAVE THE OPINIONS OF COUNSEL, WHICH ARE
17 SUBSTANTIAL, AND YOU HAVE THE DECLARATION OF MR. MINNICK WHICH
18 LAYS OUT THE NATURE OF THE DESIGNS.

19 THE COURT: I WOULD BE SURPRISED IN THIS CASE IF THE
20 OTHER SIDE DOESN'T DISAGREE.

21 MR. MCELHINNY: WELL, IT'S INTERESTING. I MEAN --

22 THE COURT: I MEAN, IF THEY -- MAYBE THEY WON'T. BUT
23 --

24 MR. MCELHINNY: CLEARLY THEY DISAGREE, BUT IF YOU
25 LOOK AT THEIR PAPERS, IN THEIR REPLY BRIEF AND IN FOOTNOTES

1 THEY HAVE TOLD YOU THAT THEY THINK THAT THERE IS -- THAT THEY
2 ARE GOING TO DISAGREE. BUT IN THIS BRIEFING THEY DID NOT
3 SUBMIT A SINGLE DECLARATION. THEY DID NOT SUBMIT A SINGLE
4 PIECE OF EVIDENCE THAT WOULD SUGGEST THAT THERE IS ANY REASON
5 TO GO FORWARD FURTHER. AND THAT IS WHY WE CITED TO YOUR HONOR
6 JUDGE WARD'S ORDER IN THE *MATHWORKS* CASE WHERE HE HAD A
7 PRELIMINARY HEARING MUCH LIKE THIS AND HE SAID BASED ON THAT
8 RECORD AND JUST LOOKING AT IT, HE WAS CLEAR THAT CONTEMPT WAS
9 NOT THE WAY TO PROCEED AND THAT THE WAY TO PROCEED WAS A
10 DECLARATORY JUDGMENT ACTION, WHICH IN FAIRNESS TIVO CAN STILL
11 FILE. I MEAN, IF YOUR HONOR THINKS WE ARE IN THE WRONG COURT,
12 IF THE DELAWARE COURT THINKS WE ARE IN THE WRONG COURT --

13 THE COURT: THAT'S NOT MY DECISION. I THINK THAT'S
14 THE DELAWARE'S COURT TO MAKE THAT DECISION.

15 MR. MCELHINNY: WELL, AND IT'S SORT OF TIVO'S
16 DECISION BECAUSE THEY CAN CHOOSE WHETHER TO GO FORWARD THERE
17 OR WHETHER TO COME FILE HERE AND STRAIGHTEN THIS ALL OUT
18 EVENTUALLY. BUT WE DO THINK THAT YOUR HONOR NOW HAS A RECORD
19 IN FRONT OF YOU THAT WOULD ALLOW YOU TO SAY THAT MORE
20 BRIEFING, MORE DISCOVERY, MORE PROCESS IN ORDER TO TRY TO
21 DEFINE WHETHER THESE ARE MERE COLORABLE DIFFERENCES IS
22 NOT LIKELY TO TURN INTO SOMETHING THAT CAN BE DECIDED
23 SUMMARILY.

24 IN MY REMAINING, I WANT TO ADDRESS THE LEGISLATIVE
25 HISTORY ISSUE, THIS QUESTION OF THE ARGUMENT THAT WE MADE.

1 THIS IS BRIEFED, BUT I JUST WANT TO CALL IT TO YOUR HONOR'S
2 ATTENTION, WHICH IS THE ARGUMENT THAT WAS MADE ABOUT WHAT THE
3 LANGUAGE OF THE INJUNCTION SHOULD BE WAS IN A COMPLETELY
4 DIFFERENT CONTEXT AND IN A CONTEXT IN WHICH WE SUCCEEDED
5 BECAUSE THE ARGUMENT THAT WAS MADE WAS AT THE TIME TIVO WAS
6 ASKING YOU TO ORDER US TO RECALL BOXES THAT WERE AT
7 DISTRIBUTORS THAT HAD NOT YET BEEN INSTALLED. AND IN THAT
8 CONTEXT WE SAID IF WE CAN INSTALL THOSE BOXES WITH NEW
9 NONINFRINGING SOFTWARE, WE SHOULDN'T HAVE TO RECALL THEM
10 BECAUSE THEY HAVE OTHER USES.

11 AND THAT WAS THE CONTEXT THAT WE MADE THE ARGUMENT, AND
12 IN AN ORAL ARGUMENT TIVO CONCEDED THAT POINT. AND YOUR
13 INJUNCTION DOES NOT HAVE THE LANGUAGE THAT THEY WERE ASKED FOR
14 AT THE TIME ABOUT RECALLING THE BOXES BECAUSE EVERYBODY
15 RECOGNIZED THAT THE BOX ITSELF, IF IT COULD BE MODIFIED WITH
16 NONINFRINGING SOFTWARE, WOULD NOT VIOLATE EITHER THE LAW OR
17 YOUR INJUNCTION.

18 THE LAST THING THAT I WANT TO ADDRESS IS THIS ARGUMENT
19 ABOUT THE *WALKER* AND THE, YOU KNOW, YOU HAVE TO CHALLENGE THE
20 LANGUAGE OF THE INJUNCTION. THAT'S A CIRCULAR, NONSENSICAL
21 ARGUMENT. IN ORDER TO GET THERE, YOU HAVE TO READ YOUR
22 ORIGINAL INJUNCTION AS HAVING ORDERED US TO TAKE ACTION
23 AGAINST NONINFRINGING PRODUCTS. AND AS YOU KNOW FROM *PAICE*,
24 AS YOU KNOW DIRECTLY FROM THE FEDERAL CIRCUIT, DISTRICT COURTS
25 CANNOT ENJOIN NONINFRINGING PRODUCTS. SO THERE WAS NOTHING

1 ERRONEOUS ABOUT YOUR ORDER. YOUR ORDER WAS EXACTLY RIGHT. IT
2 WAS WRITTEN EXACTLY AS THE FEDERAL CIRCUIT TELLS YOU TO DO IT
3 TO ENJOIN THE USE OR THE CONTINUED USE OF INFRINGING PRODUCTS.
4 BUT WHAT KSM TEACHES IS YOU CAN MODIFY THOSE PRODUCTS SUCH AS
5 THEY ARE NO LONGER INFRINGING, YOU ARE ENTITLED -- UNLESS IT'S
6 A SHAM, YOU ARE ENTITLED TO A TRIAL ON THE QUESTION OF WHETHER
7 THESE NEW PRODUCTS INFRINGE.

8 THE COURT: I DON'T KNOW IF A SHAM IS THE CORRECT
9 TERM.

10 MR. MCELHINNY: IT'S MERE COLORABLE DIFFERENCE, WHICH
11 IN THE MOST RECENT DECISION AND I CONCEDE IN A --

12 THE COURT: AND MAYBE I AM WRONG. MAYBE -- I DIDN'T
13 SEE ANY CASES THAT USE THE WORD SHAM, BUT --

14 MR. MCELHINNY: MERE COLORABLE DIFFERENCES IS THE
15 CODE LANGUAGE, BUT IN THE MOST --

16 THE COURT: DOES THAT EQUATE TO SHAM, IN YOUR
17 OPINION?

18 MR. MCELHINNY: -- IN THE MOST RECENT DECISION FROM
19 THE FEDERAL CIRCUIT IN A SLIGHTLY DIFFERENT CONTEXT IN THE
20 QUESTION OF RES JUDICATA, THEY SAID UNLESS THEY ARE NEARLY
21 IDENTICAL. AND -- WELL, I DON'T KNOW WHAT THE ALLEGATIONS
22 WILL BE IN THIS CASE, BUT THERE IS NO FACTUAL BASIS IN THIS
23 CASE FOR CLAIMING THAT THESE THINGS ARE ANYTHING OTHER THAN
24 MAJOR AND SUBSTANTIVE AND, WE THINK, PATENTABLE DIFFERENCES.

25 THE TWO LAST POINTS THAT I NEED TO MAKE, OR ONE, IF YOUR

1 HONOR DISAGREES WITH US ABOUT OUR READING OF THE CASE OR THE
2 RIGHT THING, AND IF YOUR HONOR IS GOING TO HOLD US IN
3 CONTEMPT, WE WOULD ASK YOU TO STAY THAT ORDER TO ALLOW US TO
4 SEEK REVIEW OF IT. AND LAST, WHAT I WAS GOING TO SAY, BUT I
5 WILL SAY IT ANYWAY --

6 THE COURT: WELL, I THINK -- AND I AM NOT SAYING I AM
7 GOING TO FIND YOU IN CONTEMPT. I THINK IT'S HIGHLY UNLIKELY.
8 IF I THINK YOU ARE IN CONTEMPT OF MY ORDER, I AM GOING TO STAY
9 IT. MAYBE THE FEDERAL CIRCUIT WOULD, BUT I DON'T THINK YOU
10 CAN LOOK TO ME FOR RELIEF IN THAT REGARD.

11 MR. MCELHINNY: IN THE TWO AND A HALF YEARS THAT WE
12 HAVE BEEN IN FRONT OF YOU ON THIS HARD-FOUGHT CASE, WE HAVE
13 NEVER EVER DISOBEYED ANY ONE OF YOUR ORDERS. AND THE RECORD
14 SHOWS THAT WHETHER WE AGREED OR DISAGREED WITH THEM, WE
15 TREATED THEM WITH THE UTMOST RESPECT AND FOLLOWED THEM TO THE
16 LETTER. AND WE HAVE DONE SO HERE IN A WAY THAT HAPPENS
17 HISTORICALLY IN ALMOST EVERY PATENT CASE WHICH IN RESPONSE TO
18 THE ADVERSE DECISION THAT WE GOT, WE INVENTED A BETTER PRODUCT
19 WHICH IS NOW AVAILABLE ON THE MARKET. THANK YOU, YOUR HONOR.

20 THE COURT: THANK YOU. REPLY?

21 MR. CHU: YOUR HONOR, I DON'T THINK I NEED TO RESPOND
22 TO COUNSEL'S POINTS, BUT MR. --

23 THE COURT: WHY DON'T YOU GO TO THE PODIUM, MR. --

24 MR. CHU: EXCUSE ME?

25 THE COURT: WHY DON'T YOU GO TO THE PODIUM IF YOU ARE

1 GOING TO --

2 MR. CHU: EXCUSE ME. I WAS JUST SAYING I DON'T THINK
3 I NEED TO RESPOND, BUT MR. BAXTER HAS SOME BACKGROUND ABOUT
4 THE CASE BEFORE JUDGE WARD THAT I THINK WOULD BE PERTINENT.

5 THE COURT: I WOULD LIKE TO ASK YOU, DO YOU AGREE
6 THAT ASSUMING I FEEL I CANNOT FIND ECHOSTAR IN CONTEMPT
7 WITHOUT AN INFRINGEMENT ANALYSIS ON THE DESIGN AROUND, DO YOU
8 CONCEDE THAT THAT'S NOT AN ISSUE, THAT IT SHOULD BE A DIRECT
9 ACTION, OR IS THAT STILL A SUBJECT FOR THE COURT TO DETERMINE
10 IF I CAN GO FORWARD ON A CONTEMPT ACTION TRYING TO DETERMINE
11 IF THERE IS AN INFRINGEMENT, AND IF THERE IS THE APPROPRIATE
12 DISTINCTION THAT WOULD ALLOW ME TO DO SO UNDER THE CASE LAW?
13 ARE YOU ESSENTIALLY CONCEDED, AS MR. MCELHINNY SAYS, THAT
14 WITH THE OPINION OF COUNSEL THAT HAS BEEN PROVIDED THAT
15 PERHAPS THIS IS NOT AN ISSUE? IT'S A RATHER LONG QUESTION.

16 MR. CHU: WE DISAGREE WITH THE POSITION TAKEN BY
17 ECHOSTAR. THERE ARE TWO SEPARATE ISSUES, ALTHOUGH THEY BOTH
18 HAVE THE WORD CONTEMPT IN THEM. THE FIRST QUESTION IS, WAS
19 THE INJUNCTION ON ITS FACE VIOLATED? AND WHEN THE INJUNCTION
20 SAYS THOU SHALT --

21 THE COURT: AND IF I FIND NO, WHERE DO YOU THINK THAT
22 LEAVES TIVO, THEN?

23 MR. CHU: OKAY. SUPPOSE YOU RULE THAT IT WAS
24 COMPLIED WITH AND THAT THEY ACTUALLY DISABLED --

25 THE COURT: WELL, THEN IT'S NOT VIOLATED ON ITS FACE.

1 MR. CHU: OKAY. THEN THERE IS THIS SECOND HEARING IN
2 YOUR COURT, I THINK IT WAS IN MAY, WHEN YOU ESTABLISHED --
3 AFTER THE MAY HEARING, YOU ESTABLISHED TWO SEPARATE HEARINGS.
4 ONE TO SEE IF THERE WAS CONTEMPT AND IT COULD BE DETERMINED
5 THROUGH THIS PROCEEDING AND THIS HEARING WITHOUT THE NEED TO
6 GO INTO THEIR ARGUMENTS ON THE TECHNOLOGY AND WHETHER THE
7 CHANGES WERE MATERIAL OR NOT. OKAY, SO THAT'S THIS HEARING.

8 THE SEPARATE HEARING DEALS WITH NEW PRODUCTS. AND MY
9 UNDERSTANDING IS THAT THEY SHIPPED NEW BOXES, THEY SHIPPED NEW
10 PRODUCTS, AND THEN THE QUESTION THERE WOULD BE THE APPLICATION
11 OF THAT LINE OF CASES, SHOULD THAT BE CONSIDERED IN TERMS OF
12 CONTEMPT? SO THAT WOULD STILL BE A LIVE ISSUE.

13 I WANT TO MAKE ONE OTHER NOTE ABOUT THE CONTEMPT
14 PROCEEDING THAT WE HAVE HERE TODAY. IF YOUR HONOR DOES FIND
15 THAT THERE IS CONTEMPT, THEN WE WOULD NEED TO COME BACK TO
16 YOUR HONOR FOR WHAT THE EXACT REMEDIES WOULD BE. PRESUMABLY
17 ECHOSTAR WOULD THEN COMPLY WITH THE TERMS OF THE ORDER AND
18 DISABLE THE SPECIFIED DVRS BY PRODUCT NUMBER. BUT THEN THERE
19 IS THE QUESTION OF WHAT OTHER REMEDIES WOULD BE APPROPRIATE
20 AND REMEDIES SUCH AS ATTORNEYS' FEES OR FURTHER DAMAGES MIGHT
21 BE APPROPRIATE.

22 THE COURT: HOW MUCH TIME DO THEY HAVE REMAINING?

23 THE CLERK: A MINUTE.

24 THE COURT: YOU HAVE -- MR. BAXTER HAS A MINUTE IF HE
25 WANTS TO MAKE ANY COMMENTS.

1 MR. CHU: THANK YOU, YOUR HONOR.

2 MR. BAXTER: MY SOLE COMMENT WAS HAVING BEEN IN THAT
3 NI CASE, YOUR HONOR, THE POSITION THAT WE WERE PLACED IN THAT
4 CASE IS WE HAD TO ADMIT THAT SOME PRIOR ART WHICH THE
5 DEFENDANT HAD BEEN USING PRIOR TO CHANGING IT INFRINGING OUR
6 PATENTS, WE HAD TAKEN THE POSITION AT TRIAL THAT THAT ART
7 DIDN'T INFRINGE, AS WE HAD TO. AND WHAT THEY DID IS THEY
8 SIMPLY WENT BACK TO THAT PRIOR ART. IT WASN'T MUCH OF A FIGHT
9 AT THE END OF THE DAY, AND SO I THINK THAT CASE WOULD NOT BE
10 APPLICABLE TO THE SITUATION WE HAVE HERE WAS MY SOLE POINT,
11 YOUR HONOR.

12 THE COURT: LET'S GO FORWARD WITH THE SECOND MOTION.

13 MS. BYRD: GOOD MORNING, YOUR HONOR. CHRISTINE BYRD
14 OF IRELL & MANELLA REPRESENTING TIVO. I AM GOING TO ADDRESS
15 THE DAMAGES MOTION. THE DAMAGES IN TODAY'S MOTION TOTAL \$220
16 MILLION, AND WHAT THESE DAMAGES COVER ARE THE DVRS THAT ARE
17 IDENTIFIED IN THE INJUNCTION AND IT COVERS THEM FOR THE TIME
18 PERIOD THAT THE INJUNCTION WAS STAYED BY THE FEDERAL CIRCUIT'S
19 ORDER. AND THAT TIME PERIOD IS SEPTEMBER 9, 2006. THAT DATE
20 IS THE DAY AFTER THE FILING OF THE AMENDED JUDGMENT AND
21 PERMANENT INJUNCTION IN THIS MATTER THAT WAS FILED SEPTEMBER
22 8TH. SO DAMAGES START SEPTEMBER 9TH AND THEY GO THROUGH APRIL
23 18TH OF 2008, WHICH IS THE DAY THAT THE FEDERAL CIRCUIT'S STAY
24 WAS DISSOLVED. AND THE PERIOD AFTER APRIL 18TH OF 2008 RELATES
25 TO THE CONTEMPT ISSUES, AND THAT IS NOT COVERED BY THIS

1 MOTION.

2 NOW THESE DAMAGES THAT ARE IN THE STAY PERIOD FALL INTO
3 THREE CATEGORIES. THE FIRST CATEGORY IS DVRS THAT ARE PLACED
4 WITH CUSTOMERS, INSTALLED IN HOMES, AND THESE ARE EXACTLY THE
5 SAME DVRS THAT THE JURY FOUND TO BE INFRINGING. AND BECAUSE
6 OF ALL OF THIS TALK ABOUT THE DESIGN AROUND, I THINK IT'S EASY
7 TO LOSE TRACK OF THE FACT THAT ECHOSTAR HAD APPROXIMATELY 4
8 MILLION OF THESE DVRS IN THE FIELD IN SEPTEMBER OF 2006. THEY
9 WERE EXACTLY THE SAME AS THE DVRS FOUND BY THE JURY TO BE
10 INFRINGING, SAME MODEL NUMBER, SAME EVERYTHING. THERE IS NO
11 WHIFF OF AN ALLEGED REDESIGN AT THIS POINT. SO THESE ARE THE
12 ADJUDICATED RECEIVERS, AND DAMAGES ON THESE RECEIVERS ARE \$55
13 MILLION.

14 AND ON THIS CATEGORY ECHOSTAR AGREES THE DAMAGES ARE OWED
15 ON EACH OF THESE DVRS. ECHOSTAR DISAGREES ON HOW TO CALCULATE
16 IT. THEY DISAGREE ON WHAT RATE SHOULD BE APPLIED AND WHETHER
17 LOST PROFITS APPLY, THINGS LIKE THAT. BUT THEY DO NOT DENY
18 THAT DAMAGES ARE DUE ON THIS CATEGORY OF DVRS.

19 THE COURT: AND WHAT TIME -- I AM SORRY I DIDN'T
20 WRITE THAT DOWN. WHAT TIME PERIOD ARE WE TALKING ABOUT?

21 MS. BYRD: THIS IS THE SAME TIME PERIOD, YOUR HONOR.
22 IT WOULD START ON SEPTEMBER 9TH OF 2006.

23 THE COURT: AND END?

24 MS. BYRD: AND THEORETICALLY, THE DAMAGES WOULD GO
25 ALL THE WAY THROUGH APRIL 18TH; HOWEVER, AS A PRACTICAL MATTER,

1 THESE --

2 THE COURT: APRIL 18TH OF THIS YEAR?

3 MS. BYRD: 2008, YES. AS A PRACTICAL MATTER, THESE
4 DVRS DID RECEIVE REDESIGNS BEFORE THE APRIL 18, 2008, BUT
5 THERE WAS A SUBSTANTIAL PERIOD OF TIME BEFORE THAT. SO THESE
6 DAMAGES ARE ALL BEFORE ANY REDESIGN TOUCHES THESE DVRS.

7 THE COURT: I GUESS, I DON'T RECALL TOO MUCH ABOUT
8 THE DAMAGE PERIOD IN THE ORIGINAL CASE, BUT MY RECOLLECTION,
9 THE JURY VERDICT WAS SOME \$73 MILLION DOLLARS. I GUESS I AM
10 HAVING A DIFFICULT TIME WRAPPING MY MIND AROUND WHY DO YOU
11 FEEL YOU ARE ENTITLED TO THREE TIMES THE DAMAGES FOR THIS
12 SHORT PERIOD IN QUESTION VERSUS THE JURY VERDICT?

13 MS. BYRD: IT'S VERY SIMPLE, YOUR HONOR. ONE REASON
14 IS BECAUSE WE ARE TAKING LOST PROFITS AS OF OCTOBER 8TH OF
15 2006. WE ARE SAYING IF THE INJUNCTION HAD NOT BEEN STAYED AND
16 ECHOSTAR HAD BEEN FORCED TO DISABLE ALL OF ITS DVRS, HUNDREDS
17 OF THOUSANDS OF CUSTOMERS, APPROXIMATELY 375,000 CUSTOMERS
18 WOULD HAVE COME TO TIVO. ACTUALLY MILLIONS WOULD HAVE WANTED
19 TIVO'S ACCORDING TO THE SURVEY RESEARCH THAT WE HAD. WE
20 DIDN'T HAVE MILLIONS OF TIVO BOXES, SO WE HAVE DONE A
21 CALCULATION. WE COULD HAVE ADDED 375,000 CUSTOMERS, AND THOSE
22 ARE THE LOST PROFITS WE ARE ASKING FOR.

23 THE OTHER REASON IS BECAUSE ON THE ROYALTY RATE WE HAVE
24 APPLIED WE HAVE RAISED THE ROYALTY RATE FROM \$1.25 TO \$2.25.
25 NOW THIS IS NOT A VERY SUBSTANTIAL RAISE. IT'S FAIRLY

1 REASONABLE. IN FACT, DURING THIS SAME TIME PERIOD ECHOSTAR
2 ACTUALLY RAISED ITS RATES ON ITS DVRS BY THE SAME DOLLAR. SO
3 WE ARE SIMPLY RAISING THE PROPOSED ROYALTY RATE BY THE SAME
4 AMOUNT THAT ECHOSTAR RAISED ITS RATES. ECHOSTAR WAS
5 COLLECTING THAT EXTRA DOLLAR THROUGH THIS TIME PERIOD, AND SO
6 THAT WOULD APPLY TO THE DAMAGES.

7 THE COURT: WELL, IT'S MY UNDERSTANDING READING THE
8 PAPERS THAT ECHOSTAR STARTED IMPLEMENTING THIS DESIGN AROUND
9 IN OCTOBER OF '06, IS THAT YOUR UNDERSTANDING, AND COMPLETED
10 IT IN APRIL OF '07?

11 MS. BYRD: THEY BEGAN IMPLEMENTING IN OCTOBER, BUT I
12 WANTED TO POINT OUT THAT IT WAS ONLY ABOUT 20,000 UNITS AND IT
13 WAS THE END OF OCTOBER. SO IT WAS AFTER THEY SHOULD HAVE SHUT
14 THEM OFF.

15 THE COURT: OKAY. WELL, LET ME -- AND I KNOW YOU
16 OBVIOUSLY DISAGREE, BUT LET ME ASK YOU TO ASSUME FIRST THAT I
17 FIND THAT CONTEMPT ON THE FACE OF THE ORDER IS NOT
18 APPROPRIATE, AND THEN FOR WHATEVER REASON LET'S SAY I DECIDE
19 THAT THIS IS BEST DETERMINED BY THE ACTION EITHER IN DELAWARE
20 OR A NEW ACTION HERE. WHERE DOES THAT LEAVE YOU ON YOUR
21 DAMAGES?

22 MS. BYRD: WELL CLEARLY, YOUR HONOR, THIS FIRST SET
23 OF DAMAGES THAT HAVE NOTHING TO DO WITH THE DESIGN AROUND,
24 THESE DAMAGES WOULD BE TOTALLY UNAFFECTED BY YOUR RULING.

25 THE COURT: SO YOU THINK YOU ARE ENTITLED TO THE SAME

1 DAMAGES WHETHER THE INJUNCTION -- I MEAN, WHETHER THERE IS A
2 CONTEMPT FINDING OR NOT? OR --

3 MS. BYRD: YOUR HONOR, THERE ARE THREE CATEGORIES OF
4 DAMAGES, AND ON THIS FIRST CATEGORY, YES, I WOULD SAY THAT
5 THIS CATEGORY WOULD BE UNAFFECTED BY ANY RULING ON THE
6 CONTEMPT ISSUE. THE SAME WOULD BE TRUE OF THE SECOND CATEGORY
7 OF DAMAGES. AND IF I COULD HAVE THE NEXT SLIDE I WILL PUT UP
8 THAT AMOUNT. THAT'S THE DOLLAR AMOUNT THAT INCLUDES THE FIRST
9 AND SECOND CATEGORIES.

10 AND THAT SECOND CATEGORY IS JUST THESE SAME ADJUDICATED
11 DVRS BUT THAT HAD THIS SOFTWARE DOWNLOAD DOWNLOADED TO THEM
12 AFTERWARDS THROUGH THE SATELLITE. AND THE REASON I WOULD SAY
13 THAT THOSE DAMAGES WOULD STILL BE APPROPRIATE IS JUST A VERY
14 SIMPLE BUT-FOR ANALYSIS. BUT FOR THE STAY, THESE DVRS
15 WOULDN'T HAVE BEEN OUT THERE IN THE FIELD. THEY WOULDN'T HAVE
16 BEEN FUNCTIONING. NEW ONES WOULDN'T HAVE BEEN PLACED, AND SO
17 THERE WOULD BE NOTHING FOR THIS DOWNLOAD TO DOWNLOAD TO.

18 SO IF YOU TAKE A SIMPLE BUT-FOR ANALYSIS, BUT FOR THE
19 STAY, NONE OF THESE DVRS WOULD BE FUNCTIONING. THERE WOULD BE
20 NOTHING THERE FOR REDESIGN SOFTWARE AND THEREFORE, YES, ON
21 THESE UNITS WE WOULD SAY REGARDLESS OF THE COURT'S RULING ON
22 THE CONTEMPT, THESE DAMAGES WOULD STILL BE APPROPRIATE.

23 THERE IS A THIRD CATEGORY OF DAMAGES AND THAT'S WHAT
24 BRINGS US UP TO THE TOTAL OF \$220 MILLION. THE THIRD CATEGORY
25 OF DAMAGES WOULD BE AFFECTED BY YOUR HONOR'S RULING. THIS

1 CATEGORY IS THE -- THESE WOULD BE ADJUDICATED RECEIVERS WHERE
2 THIS ALLEGED REDESIGN WAS IN THE RECEIVERS WHEN THEY WERE
3 PLACED WITH THE CUSTOMER. SO WHEN THE CUSTOMER OPENED THE
4 BOX, PUT IT IN THE TV, STARTED WORKING, THEY ALREADY HAD THE
5 REDESIGN. THAT'S THE CATEGORY OF DAMAGES THAT WOULD BE
6 AFFECTED BY A CONTEMPT RULING. I HOPE I MADE THAT CLEAR.

7 THE COURT: AND HOW MUCH? WHAT ARE THE DAMAGES IN
8 THAT CATEGORY, HOW MUCH?

9 MS. BYRD: IT WOULD BE THE DIFFERENCE BETWEEN THE
10 \$168 MILLION FIGURE AND THE \$220 MILLION FIGURE, YOUR HONOR.

11 AND I DID WANT TO ADDRESS THE QUESTION OF THE ROYALTY
12 RATE. AND IF I COULD HAVE SLIDE 15. I THINK THIS JUST
13 EXPLAINS WHAT I SAID EARLIER THAT ECHOSTAR RAISED ITS PRICES
14 BY A DOLLAR DURING THE SAME TIME PERIOD. WE ARE ASKING FOR A
15 DOLLAR INCREASE ALSO. SO WE THINK THAT THIS IS NOT THE
16 ANALYSIS THAT OUR EXPERT DID, BUT I THINK THIS IS AT A GUT
17 LEVEL, THIS SHOWS THAT THE INCREASED RATE IS JUSTIFIED.

18 NOW, ECHOSTAR HAS TAKEN THE POSITION THAT THE COURT
19 SHOULD USE THE JURY RATE OF \$1.25 AND NOT CHANGE IT. AND OF
20 ALL THE RATES -- OF ALL THE RATES THAT ECHOSTAR COULD HAVE
21 CHOSEN, THIS IS THE ONE RATE THAT THEY SHOULD NOT HAVE CHOSEN
22 BECAUSE THIS IS CONTRARY TO THE *AMADO* DECISION. UNDER THE
23 *AMADO V. MICROSOFT* DECISION, THE COURT HAS A LOT OF
24 DISCRETION, BUT THE DECISION SAYS TWO THINGS. ONE IS THAT THE
25 COURT MUST SELECT A NEW RATE FOR POST-JUDGMENT DAMAGES. AND

1 THE OTHER THING IT SAYS IS THAT THE NEW RATE MUST BE HIGHER
2 THAN THE JURY RATE. AND SO BY ASKING THE COURT TO USE THE
3 JURY RATE, ECHOSTAR IS ASKING THIS COURT TO COMMIT ERROR. AND
4 I RESPECTFULLY SUBMIT THAT THE \$2.25 MONTHLY RATE THAT TIVO
5 HAS SUGGESTED IS THE ONE THAT SHOULD BE ACCEPTED.

6 UNLESS THE COURT HAS ANY FURTHER QUESTIONS, I WILL
7 RESERVE MY TIME FOR REBUTTAL.

8 THE COURT: MR. MCELHINNY?

9 MR. MCELHINNY: THANK YOU, YOUR HONOR. OUR VIEW IS
10 THAT THE APPROPRIATE -- THE MANDATE FROM THE COURT OF APPEALS
11 IS FOR YOU TO DETERMINE WHETHER TIVO SUFFERED DAMAGES, IF ANY,
12 DURING THE STAY PERIOD OF THE INJUNCTION. IT'S AN UNUSUAL
13 PROCEDURE BECAUSE UNLIKE IN MOST CASES IN REMEDIES 101, NOBODY
14 ASKED FOR A BOND PENDING THE INJUNCTION. SO UNLIKE IN *AMADO*
15 OR IN *PAICE* OR WHEREVER, YOU ARE NOT DEALING WITH A COURT
16 ORDER THAT SET A GOING FORTH PROCESS. THE QUESTION IS TO
17 DETERMINE WHETHER YOU CAN RETROACTIVELY FIGURE OUT DAMAGES
18 AND, IF SO, WHAT THE APPROPRIATE RATE IS.

19 OUR VIEW IN ORDER TO RESOLVE THIS IS THAT THE APPROPRIATE
20 RATE IS TO TAKE THE \$1.25, WHICH THE JURY FOUND WHICH WAS WHAT
21 THE PARTIES AGREED FOR THE ONE TIME THEY STIPULATED AND WHICH
22 WAS ADOPTED BY THE COURT OF APPEALS, AND TO APPLY THAT TO
23 INFRINGING DEVICES.

24 THE COURT: THEN WHAT WOULD BE THE DAMAGES UNDER
25 THAT?

1 MR. MCELHINNY: UNDER THAT THEORY, THE ADDITIONAL
2 DAMAGES WOULD BE \$16,400,809.00 PLUS INTEREST, YOUR HONOR.

3 THE COURT: SO YOU AGREE THAT'S A VERY, VERY MINIMUM
4 AMOUNT?

5 MR. MCELHINNY: NO, YOUR HONOR, WE THINK THAT THAT'S

6 --

7 THE COURT: OKAY.

8 MR. MCELHINNY: I HAD AN EXTRA SHOT OF COFFEE IN MY
9 LATTE THIS MORNING, SO I WAS FINE ON THAT ONE. NO, WE DON'T,
10 YOUR HONOR. WE AGREE THAT THAT'S THE ONLY RATE IN THE RECORD
11 THAT IS ADOPTABLE BECAUSE IT IS THE ONE THAT HAS BEEN STIP --

12 THE COURT: THEN, WHAT DO YOU CONCEDE THE DAMAGES
13 ARE, IF ANY, OR DO YOU SAY THEY ARE ZERO?

14 MR. MCELHINNY: WE WOULD SAY -- WE WOULD SAY TWO
15 THINGS. ONE, WE WOULD AGREE WITH WHAT YOUR HONOR SAID, WHICH
16 IS ALL OF THE DAMAGES FOR THE POST-JUDGMENT PERIOD CAN BE
17 PICKED UP IN A SUBSEQUENT LITIGATION IF THERE WERE SALES OF
18 INFRINGING DEVICES. AND THERE IN FACT IS FEDERAL CIRCUIT
19 OPINION THAT SAYS THAT AT LEAST AS TO THE DESIGN AROUND THAT
20 SHOULD BE TRUE, BUT IT'S ALSO TRUE AS A MATTER OF LAW AS TO
21 THE NONDESIGNING ONES. SO WE DON'T THINK THAT THERE IS --

22 THE COURT: WELL, I MEAN, EVEN YOU ADMIT, DO YOU NOT,
23 THAT DURING A CERTAIN PERIOD OF THIS TIME THERE WAS NOT A
24 DESIGN AROUND?

25 MR. MCELHINNY: WE --

1 THE COURT: AND I DON'T KNOW IF MAYBE I DIDN'T DIG
2 DEEP ENOUGH, BUT ACCORDING TO MY NOTES THE DESIGN AROUND, YOUR
3 CLIENT STARTED IMPLEMENTING THAT SOMETIME IN OCTOBER OF '06
4 AND MAYBE COMPLETED IN APRIL OF '07. AND I AM ASSUMING, ARE
5 THE NUMBERS A PART OF THE RECORD WHEN THOSE UNITS WENT ON
6 LINE, THE EXACT NUMBERS?

7 MR. MCELHINNY: THEY ARE AS PART OF OUR EXPERT'S
8 REPORT WHICH IS HOW WE GOT TO THE \$16 MILLION BECAUSE HE
9 CREDITED IT TO THE DAY A DESIGN AROUND WAS ROLLED OUT. THEY
10 ARE, YOUR HONOR. BUT WHAT I AM DISAGREEING WITH IS, AND I
11 WILL JUMP RIGHT TO THE AMADO STUFF, WE DON'T THINK THERE IS A
12 MECHANISM UNDER THE LAW FOR THE COURT TO SET DE NOVO A DAMAGE
13 RATE POST-VERDICT TO DO A DETERMINATION RETROACTIVELY FOR A
14 DAMAGE PERIOD DURING AN INJUNCTION.

15 THE COURT: I GUESS YOU HAVE READ *PAICE V. TOYOTA*?

16 MR. MCELHINNY: WE HAVE, YOUR HONOR, AND WE HAVE READ
17 *AMADO*. AND IN *PAICE*, WHICH WAS VERY INTERESTING AND GROUND
18 BREAKING AND, YOU KNOW, YOUR HONOR IS CARRYING THAT ONE ON IN
19 SETTING, YOU KNOW, THE TREND. IN *PAICE* WHAT YOUR HONOR DID,
20 WHICH IS A VERY SMART, I MEAN, WELL, IN *PAICE* WHAT YOUR HONOR
21 DID WAS YOU SET A FORTH GOING ROYALTY AND YOU TOLD THE PARTIES
22 THAT YOU WERE NOT GOING TO GRANT AN INJUNCTION BASED ON
23 SETTING A ROYALTY. AND NO ONE HAD EVER DONE THAT, AND THERE
24 WAS A QUESTION ABOUT WHETHER OR NOT THE DISTRICT COURTS COULD
25 DO THAT. AND THE FEDERAL CIRCUIT SAID YOU WERE RIGHT TO DO

1 THAT, AND THEY SENT IT BACK FOR AN EXPLANATION OF HOW YOU GOT
2 TO THE SPECIFIC RATE. THAT'S PAICE. BUT IT'S AN ADJUSTMENT IN
3 A VERY SPECIFIC CONTEXT WHERE A DISTRICT COURT JUDGE HAS
4 DECIDED THAT AN ONGOING ROYALTY IS APPROPRIATE IN LIEU OF AN
5 INJUNCTION. AND IN THAT CASE IF THE PARTY HADN'T AGREED --

6 THE COURT: WELL, SEEMS LIKE THEN YOU ALMOST HAVE TO
7 CONCEDE \$16,400,000 MAYBE AND CHANGE IS THE VERY MINIMUM
8 THAT'S OWED TIVO.

9 MR. MCELHINNY: ACTUALLY IT WAS A TACTICAL DECISION.
10 I MEAN, I DON'T --

11 THE COURT: WELL, I MEAN, ARE YOU WILLING TO CONCEDE
12 THAT OR NOT?

13 MR. MCELHINNY: I AM. I AM WILLING TO CONCEDE THAT,
14 YOUR HONOR.

15 THE COURT: VERY WELL.

16 MR. MCELHINNY: BUT THE REASON I AM WILLING TO
17 CONCEDE IT IS BECAUSE IT IS THE JURY RATE, SO IT WAS
18 DETERMINED BY A JURY. AND, TWO, IT WAS THE RESULT OF A
19 STIPULATION BETWEEN THE PARTIES SUBSEQUENTLY THAT YOUR HONOR
20 ADOPTED AS TO WHAT WAS A FAIR RATE, AND IT'S BUILT INTO THE
21 ESCROW THAT ALLOWS YOUR HONOR TO ADD TO THE ESCROW BASED ON
22 THAT RATE. SO WE CONTRACTED IT INTO THAT POSITION.

23 WHAT I AM NOT STIPULATING TO IS THAT RETROACTIVELY --

24 THE COURT: I CAN MODIFY THE RATE.

25 MR. MCELHINNY: EXACTLY, YOUR HONOR.

1 THE COURT: I UNDERSTAND.

2 MR. MCELHINNY: AND IN *AMADO*, WHICH IS THE CLOSEST
3 THEY HAVE GOT, BUT EVEN IN *AMADO*, WHAT THE FACTS THERE ARE IS
4 THAT IN LIEU OF AN -- IN -- AS A CONDITION FOR A STAY PENDING
5 APPEAL, THE COURT ESTABLISHED AN ESCROW AND SET UP AN ESCROW
6 RATE FOR PAYMENTS PENDING THAT APPEAL. AND THE QUESTION ON
7 APPEAL IN *AMADO* IS IN FACT HOW TO ALLOCATE THAT ESCROW WHICH
8 THE COURT HAD SET UP AND THE PARTIES HAD NOT CHALLENGED. AND
9 SO IT'S NOT A QUESTION THAT INVOLVES THE SEVENTH AMENDMENT.
10 IT'S NOT A QUESTION THAT INVOLVES THESE WHETHER THERE IS
11 TRIALS ON MODIFIED ISSUES ABOUT WHETHER OR NOT A COURT
12 RETROSPECTIVELY CAN GO BACK AND REDO DAMAGES. SO THAT'S THE
13 OVERALL -- THAT'S WHY WE THINK \$1.25 JUST WORKS, FRANKLY.

14 IF YOU GET PAST THAT AND YOU GET INTO THE ECONOMIC
15 ANALYSIS, WHICH IF YOUR HONOR WOULD EXTEND MY PERIOD FOR AN
16 HOUR I WILL GO INTO IN GREAT DETAIL.

17 THE COURT: I WISH I HAD AN HOUR BUT -- I WOULD LOVE
18 TO HEAR IT, BUT UNFORTUNATELY I HAVE --

19 MR. MCELHINNY: IT IS SET OUT IN OUR PAPERS.

20 THE COURT: I HAVE SOME LAWYERS WAITING FOR THE 11:00
21 HOUR.

22 MR. MCELHINNY: I THOUGHT THEY WERE HERE TO HEAR ME,
23 YOUR HONOR, BUT MAYBE NOT.

24 THE COURT: WELL, SOME OF THEM. I AM CONFIDENT A LOT
25 OF THEM ARE.

1 MR. MCELHINNY: I KNOW THAT'S WHY MR. BAXTER CAME.
2 BUT IN *AMADO*, WHAT *AMADO* ACTUALLY SAYS IS IF YOU ARE GOING TO
3 DO IT RETROACTIVELY, YOU HAVE TO LOOK AT ALL OF THE NEW ISSUES
4 THAT HAVE ARISEN DURING THAT PERIOD OF TIME. AND THERE IS A
5 LONG LINE OF CASES THAT WE NOW HAVE FACTS THAT SAY THE UPPER
6 LIMIT FOR MOST CASES IN DAMAGES IS GOING TO BE THE COST OF
7 WHAT IT WOULD TAKE SOMEBODY TO DESIGN AROUND, BECAUSE IF THEY
8 ARE GOING TO NEGOTIATE FOR A LICENSE THE COST OF THEIR DESIGN
9 AROUND, AND WHAT OUR EXPERT SAYS IS IF YOU DO AN *AMADO*
10 ANALYSIS, YOU TAKE THE COST OF OUR DESIGN AROUND, WHICH IS
11 ABOUT \$2.5 MILLION, AND YOU DOUBLE IT FOR RISK AND \$5 MILLION
12 WOULD HAVE BEEN THE TOTAL DAMAGES UNDER THAT ANALYSIS. WE ARE
13 STIPULATING TO MORE THAN THAT BASED ON THE CONTRACTS THAT WE
14 ENTERED INTO WITH THEM. THANK YOU, YOUR HONOR.

15 THE COURT: THANK YOU. REPLY?

16 MS. BYRD: YOUR HONOR, MR. MCELHINNY MENTIONED THIS
17 ESCROW IDEA AND TRIED TO DRAW PARALLEL BETWEEN THE ESCROW IN
18 THIS CASE AND THE ESCROW IN THE *AMADO* CASE AND THEREBY ARGUE
19 THAT THE COURT DIDN'T HAVE AUTHORITY TO DO WHAT TIVO IS
20 REQUESTING. MR. MCELHINNY IS TOTALLY AND COMPLETELY
21 MISREPRESENTING THE TIVO ESCROW IN THIS CASE. THE ESCROW IN
22 THIS CASE IS NOT AN ESCROW OF ONGOING ROYALTIES AS IT WAS IN
23 *AMADO*. *AMADO* IS WHAT WE USED TO CALL A COMPULSORY LICENSE AND
24 NOW WE CALL THEM ONGOING ROYALTIES. THEY ARE ROYALTIES AS A
25 CONDITION TO A STAY OF THE INJUNCTION. THE ONLY ESCROW IN

1 THIS CASE IS A RULE 62(D), AS IN DAVID, ESCROW. IT IS A --
2 PROVIDES THAT THE RULE 62(D) SAYS IN ORDER TO STAY THE
3 EXECUTION OF A JUDGMENT YOU HAVE TO POST A BOND ON APPEAL.
4 THE PARTIES STIPULATED THAT INSTEAD OF A BOND THE MONEY COULD
5 BE DEPOSITED IN ESCROW AND EARN SOME INTEREST. THAT IS
6 TOTALLY AND COMPLETELY DIFFERENT THAN WHAT WE HAVE IN THE
7 AMADO SITUATION. AND I THINK THAT IT IS DISTURBING TO EVEN
8 TRY TO SAY THAT ONE IS SIMILAR TO THE OTHER.

9 NOW IF WE COULD RETURN TO AMADO, THE AMADO CASE AND THE
10 PAICE CASE, WHICH OF COURSE YOU ARE INTIMATELY FAMILIAR WITH,
11 SAY QUITE CLEARLY THAT IT -- A COURT --

12 THE COURT: HAD ALL THESE SAME ARGUMENTS IN PAICE FOR
13 THOSE, MR. BAXTER IS WELL AWARE. WE WERE HERE FOR A FULL DAY
14 A FEW WEEKS AGO AND WE HAD, SURPRISINGLY ENOUGH, THE
15 PLAINTIFFS TAKING EXACTLY THE POSITION IN PAICE YOU ARE TAKING
16 HERE AND THE DEFENDANT TAKING EXACTLY THE POSITION OF TOYOTA
17 IN THE PAICE CASE.

18 MS. BYRD: AS TO WHETHER YOU NEED A JURY OR WHETHER
19 IT'S EQUITABLE. WELL, THEN I AM NOT GOING TO USE UP MY TIME
20 ARGUING IT, BUT THERE IS -- THERE IS CLEARLY -

21 THE COURT: OH, YOU CAN ADD TO THE MIX.

22 MS. BYRD: -- THERE IS CLEARLY AUTHORITY AND THE
23 AUTHORITY IS BOTH THE STATUTORY AUTHORITY AND THE DECISION IN
24 THE PAICE CASE THAT SAYS THAT THE COURT HAS THE AUTHORITY TO
25 DO THIS AS AN EQUITABLE MATTER AND THAT IT'S WITHIN THE

1 COURT'S DISCRETION.

2 NOW, I ALSO WANTED TO TALK ABOUT THE \$16 MILLION DOLLAR
3 AMOUNT THAT MR. MCELHINNY I BELIEVE HAS CONCEDED WOULD BE THE
4 MINIMUM AMOUNT THAT ECHOSTAR WOULD OWE. IN EXHIBIT 23 TO DR.
5 UGONE'S DECLARATION, HE HAS CALCULATED DAMAGES IN DIFFERENT
6 WAYS. ONE OF THE -- AND THE DOLLAR AMOUNT THAT MR. MCELHINNY
7 IS REFERRING TO IS ONLY ROYALTY AMOUNTS. HE HAS NOT INCLUDED
8 ANY LOST PROFITS IN THAT CALCULATION. IF AT A MINIMUM YOU
9 WERE TO INCLUDE LOST PROFITS ON THE VERY INITIAL DVRS, NO
10 DESIGN AROUND, NO ISSUES ON THAT, THAT DAMAGES AMOUNT SHOULD
11 BE \$43,031,721.00. SO TO THE EXTENT THAT HE IS CONCEDED THE
12 DAMAGES AT THE BEGINNING OF THE STAY PERIOD, IT'S NOT \$16.4
13 MILLION, IT'S \$43 MILLION.

14 THE COURT: I AM QUITE PLEASED, IN VIEW OF THE
15 HISTORY OF THIS CASE, THAT WE ARE SO CLOSE BETWEEN 223 AND 16
16 MILLION. IT'S GREAT PROGRESS.

17 MS. BYRD: WELL, THE OTHER DOLLAR AMOUNT, AS I HAVE
18 EXPLAINED EARLIER, I THINK WE HAVE TRIED TO CATEGORIZE THE
19 DAMAGES SO THAT IT WILL BE EASY FOR THE COURT TO DECIDE BASED
20 ON THE ROYALTY RATE THAT IT CHOOSES AND THE TIME PERIOD THAT
21 IT CHOOSES WHAT THE PROPER DOLLAR AMOUNTS ARE. AND I WOULD
22 SAY EXHIBIT 23 TO DR. UGONE'S DECLARATION SHOWS ALL OF THE
23 VARIOUS ALTERNATIVE DAMAGES CALCULATIONS.

24 NOW, UNLESS THE COURT HAS FURTHER QUESTIONS, IF I COULD
25 JUST CONSULT A MOMENT WITH MY COLLEAGUES. ALL RIGHT. THANK

1 YOU, YOUR HONOR.

2 THE COURT: I APPRECIATE EVERYONE'S COMMENTS ON BOTH
3 ISSUES. FASCINATING ISSUES. THE PROBLEM WITH THESE CASES,
4 THEY DON'T EVER END IT SEEMS. THIS CASE AND PAICE, THEY KEEP
5 YOU OCCUPIED FOR YEARS. WISH I COULD SAY I HAD THE TIME TO
6 HAVE AN ORDER OUT ON BOTH ISSUES IN A DAY OR TWO. OBVIOUSLY
7 MR. MCELHINNY AND MR. BAXTER ARE KEEPING ME QUITE BUSY ON
8 ANOTHER MATTER VERY SOON IN OCTOBER IN MARSHALL, AND OTHER
9 MATTERS. SO I DON'T KNOW IF I CAN HAVE AN ORDER OUT PRIOR TO
10 BEING OFF TO MARSHALL FOR MOST OF THE MONTH OF OCTOBER OR NOT,
11 BUT I WILL GIVE IT ALL THE ATTENTION I CAN WHEN I CAN.

12 ANY OTHER MATTERS WE NEED TO TALK ABOUT?

13 MR. CHU: JUST A QUESTION, YOUR HONOR. WHAT WOULD BE
14 YOUR PREFERENCE WITH RESPECT TO THE OTHER HEARING WHICH WOULD
15 ADDRESS, IF IT'S NECESSARY TO HAVE IT, THE TECHNICAL ASPECTS?
16 ONE POSSIBILITY WOULD BE TO SET IT NOW TWO, TWO AND A HALF
17 MONTHS DOWN THE ROAD, SO THAT COUNSEL CAN WORK TOWARDS IT. IF
18 IT'S CONVENIENT FOR YOUR HONOR'S CALENDAR AND IF WE HAVE TO
19 HAVE THAT HEARING, THEN WE HAVE GOT IT IN PLACE, OR TO LEAVE
20 IT OPEN AND NOT SET IT.

21 THE COURT: MR. MCELHINNY TAKES THE POSITION
22 OBVIOUSLY THAT NEXT HEARING IS UNNECESSARY.

23 MR. MCELHINNY: JUST TO COMPLETELY MAKE SURE THE
24 COURT IS AWARE OF ALL THE FACTS, THERE IS A HUGE PENDING
25 DISCOVERY FIGHT OVER HOW MUCH ADDITIONAL DISCOVERY IS GOING TO

1 NEED TO HAPPEN IN THAT CASE.

2 THE COURT: I UNDERSTAND.

3 MR. MCELHINNY: AND WE THINK WE HAVE GIVEN THEM TONS,
4 BUT WE REALLY WOULD APPRECIATE IT IF THE COURT WOULD LOOK AT
5 WHETHER OR NOT THIS IS --

6 THE COURT: I WISH I HAD THE TIME, MR. MCELHINNY.

7 MR. MCELHINNY: NO, NO, NO, NO, TO LOOK AT WHETHER
8 THIS IS THE WAY YOU WANT TO GO, YOUR HONOR, AS OPPOSED TO --

9 THE COURT: I THOUGHT YOU WANTED ME TO DECIDE THOSE
10 DISCOVERY ISSUES.

11 MR. MCELHINNY: THIS AFTERNOON, YOUR HONOR, IF WE
12 COULD --

13 THE COURT: YEAH, I THINK I HAVE GOT A FULL DAY
14 MONDAY --

15 MR. MCELHINNY: YOU DO, YOUR HONOR.

16 THE COURT: -- WITH A CASE BOTH OF YOU ARE INVOLVED
17 IN. SO I WILL RESERVE HOW TO GO FORWARD ON THAT ISSUE UNTIL I
18 DO A LITTLE MORE LOOKING. I APPRECIATE BOTH OF YOUR COMMENTS.
19 THEY HAVE BEEN HELPFUL AND, LIKE I SAID, THERE ARE NEVER ANY
20 EASY ANSWERS TO MOST OF THESE ISSUES, EVEN THOUGH THE PARTIES
21 FEEL THERE ARE EASY ANSWERS. WE WILL BE IN RECESS.

22 (ADJOURNED AT 10:48 A.M.)

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REPORTER'S CERTIFICATION

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I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DATE: SEPTEMBER 9, 2008

/S/LIBBY CRAWFORD

LIBBY CRAWFORD, CSR

OFFICIAL COURT REPORTER