

1
2 UNITED STATES BANKRUPTCY COURT
3 DISTRICT OF MAINE
-----x

4 In re:

5 PEGASUS SATELLITE TELEVISION, INC., Chapter 11
6 et al., Case No.
04-20878

7 Debtors,
-----x

COPY

8
9 Deposition of DANIEL E. POSNER, taken in the
10 above-entitled matter before RICHARD GERMOSEN, a
11 Certified Shorthand Reporter, Registered Professional
12 Reporter, Certified Realtime Reporter and a Notary
13 Public within and for the States of New York and New
14 Jersey, taken at the offices of BROWN RUDNICK BERLACK
15 ISRAELS, L.L.P., 120 West 45th Street, New York, New
16 York 10036, on Wednesday, August 18, 2004, commencing
17 at 2:40 p.m.
18
19
20
21
22
23
24
25

A P P E A R A N C E S:

SIDLEY AUSTIN BROWN & WOOD, L.L.P.

BY: JOHN G. HUTCHINSON, ESQ.

787 Seventh Avenue

New York, New York 10019

Attorneys for the Debtor

AKIN GUMP STRAUSS HAUER & FELD, L.L.P.

BY: STEPHEN M. BALDINI, ESQ.

-and-

BY: DAVID H. BOTTER, ESQ.

590 Madison Avenue

New York, New York 10022-2524

Attorneys for the Unsecured Creditor's Committee

DEBEVOISE & PLIMPTON, L.L.P.

BY: DENNIS H. HRANITZKY, ESQ.

919 Third Avenue

New York, New York 10022

Attorneys for Pegasus Communications Corporation

BROWN RUDNICK BERLACK ISRAELS, L.L.P.

BY: JEFFREY L. JONAS, ESQ.

One Financial Center

Boston, Massachusetts 02111

Attorneys for DE Shaw & Company

WEIL, GOTSHAL & MANGES, L.L.P.

BY: RICHARD P. KRASNOW, ESQ.

767 Fifth Avenue

New York, New York 10153-0019

Attorneys for DirecTV

ALSO PRESENT:

BRANDON BAER, DE Shaw & Co., L.P.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I N D E X

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
---------	--------	-------	----------	---------

DANIEL E. POSNER				
------------------	--	--	--	--

BY MR. HUTCHINSON	6			
BY MR. BOTTER		89		

1
2 IT IS HEREBY STIPULATED AND AGREED, by
3 and between the attorneys for the respective parties
4 herein, that filing and sealing be and the same are
5 hereby waived.

6 IT IS FURTHER STIPULATED AND AGREED
7 that all objections, except as to the form of the
8 question, shall be reserved to the time of trial.

9 IT IS FURTHER STIPULATED AND AGREED
10 that the within deposition may be signed and sworn
11 to before any officer authorized to administer an
12 oath, with the same force and effect as if signed
13 and sworn to before the Court.
14
15
16
17
18
19
20
21
22
23
24
25

DANIEL E. POSNER

P R O C E E D I N G S

MR. HUTCHINSON: Mark this as
Posner Exhibit 1.

(Whereupon, document bearing
Bates stamps Laminar 000031 through 000163, is
received and marked as Posner Exhibit 1 for
Identification.)

MR. HUTCHINSON: Mark this one as
Posner 2.

(Whereupon, document bearing
Bates stamps Laminar 0000001 through 000438, is
received and marked as Posner Exhibit 2 for
Identification.)

MR. HUTCHINSON: Mark this as
Posner 3.

(Whereupon, document entitled
objection of DE Shaw, et cetera, is received and
marked as Posner Exhibit 3 for Identification.)

MR. HUTCHINSON: Mark that one as
4.

(Whereupon, document bearing
Bates stamps Laminar 000164 through Laminar
000242, is received and marked as Posner Exhibit

1 DANIEL E. POSNER

2 4 for Identification.)

3 MR. HUTCHINSON: All right. Thank
4 you.

5 (Whereupon, a short recess is
6 taken.)

7
8 D A N I E L E. P O S N E R,

9 conducting business at DE Shaw & Co., L.P., Tower
10 45, 120 West 45th Street, New York, New York
11 10036, residing at 500 West End Avenue, New York,
12 New York 10024, having been first duly sworn by a
13 Notary Public within and for the States of New
14 York and New Jersey, was examined and testified as
15 follows:

16 EXAMINATION BY MR. HUTCHINSON:

17 Q. Good afternoon, Mr. Posner.

18 My name is John Hutchinson. I'm
19 with Sidley Austin Brown & Wood representing the
20 debtors.

21 Have you ever been deposed before?

22 A. No.

23 Q. Okay.

24 I'm going to ask you questions.

25 The court reporter is going to take them down.

DANIEL E. POSNER

There will be a transcript produced. You will have an opportunity to look at it.

If you don't understand a question or I ask a rotten question no reasonable person would understand just ask me, tell me you don't understand it and I will try and ask a less rotten question the next time.

Fair enough?

You need to reply audibly so that the court reporter need not guess at your response which means not nodding your head and not uh-huh but a yes or a no or a more narrative answer.

Fair enough?

A. Yes, that's fair.

Q. If you want to take a break at any time just let us know and we will.

By whom are you employed, sir?

A. DE Shaw & Company.

Q. What is your position with DE Shaw & Company?

A. I'm a senior vice-president.

Q. How long have you been employed there?

1 DANIEL E. POSNER

2 A. Since January 2002.

3 Q. What is the business of DE Shaw &
4 Company?

5 A. The firm is a hedge fund.

6 Q. It is a single hedge fund?

7 A. Do you know what, the firm amongst
8 its business activities are that it runs a hedge
9 fund.

10 Q. And is that what you do?

11 A. I am part of -- I'm an employee
12 that works in the investment advisor that works,
13 that runs the hedge fund.

14 Q. A single hedge fund?

15 A. There are a number of different
16 groups and I'm in one of the groups that is part
17 of the hedge fund.

18 Q. But a number of different groups
19 servicing a single hedge fund?

20 A. Just to clarify.

21 Q. Sure.

22 A. The word hedge fund has a lot of
23 different meanings.

24 Q. How do you mean it?

25 A. So when I use the word hedge fund

1 DANIEL E. POSNER

2 my group runs a specific area within the firm
3 that invests in special situations and distressed
4 companies.

5 Q. That's what your group does?

6 A. Yes.

7 Q. It invests in distressed
8 companies?

9 A. And special situations.

10 Q. What is a special situation that
11 would not be a distressed company?

12 A. There are a whole variety of
13 special situations that are not distressed.

14 Q. Like what?

15 A. Given a company to perfectly --
16 giving capital to perfectly healthy companies.
17 That might be a special situation.

18 Q. What would be special about it?

19 A. Maybe that company wouldn't
20 necessarily use the typical capital markets
21 group. Might be too small. Company might be
22 involved in a merger, an acquisition.

23 Q. And so your group focuses solely
24 on distressed companies or special situations,
25 the group you are involved in?

10

1 DANIEL E. POSNER

2 A. Yes.

3 Q. And how large is that group?

4 A. The group in New York is fourteen
5 people and eight people in Houston.

6 Q. Do they all report to you?

7 A. No.

8 Q. Prior to coming to DE Shaw what
9 did you do?

10 A. I worked as a research analyst at
11 Intermarket Corporation.

12 MR. KRASNOW: Could you speak up a
13 bit because I'm having trouble hearing you.

14 THE WITNESS: Sure.

15 MR. KRASNOW: Thank you.

16 BY MR. HUTCHINSON:

17 Q. Where was that?

18 A. In New York.

19 Q. During what period of time did you
20 do that?

21 A. That was from 1999 to 2002.

22 Q. And your title was research
23 analyst?

24 A. My title was vice-president.

25 Q. But you were, in fact, a research

11

1 DANIEL E. POSNER

2 analyst?

3 A. Yes.

4 Q. What did you do before that?

5 A. I worked for UBS O'Connor.

6 Q. In what position?

7 A. Was a research analyst and an
8 investment banker.

9 Q. Here in New York?

10 A. Yes.

11 Q. During what period of time?

12 A. I believe it was from 1996 to
13 1999.

14 Q. Anything before that?

15 A. Deloitte & Touche Consulting Group
16 from '94 to '96.

17 Q. What was your title there?

18 A. I don't recall.

19 Q. Okay.

20 A. I believe it was senior -- I
21 believe it was senior associate.

22 Q. And before that?

23 A. Before that I was in business
24 school.

25 Q. So that was your first position

12

1 DANIEL E. POSNER

2 out of business school Deloitte & Touche?

3 A. Yes.

4 Q. Okay.

5 A. Deloitte & Touche Consulting
6 Group.

7 Q. When did you graduate from
8 business school?

9 A. 1994.

10 Q. Where was that?

11 A. The University of Chicago.

12 Q. Your educational background prior
13 to that?

14 A. I have a BA from Yeshiva
15 University.

16 Q. From Yeshiva University?

17 A. Yes.

18 Q. What year?

19 A. 1991.

20 Q. What is DE Shaw Laminar
21 Portfolios, LLC?

22 A. That is the group that invests the
23 money in the distressed and special situations
24 group fund.

25 Q. So the group in which you work has

13

1 DANIEL E. POSNER

2 its own entity through which it makes
3 investments?

4 A. Yes.

5 Q. And other groups servicing the
6 same hedge fund operate through different
7 entities?

8 A. That is not the sole group -- that
9 is not the sole fund that we invest through, but
10 that's amongst the fund that we invest through,
11 but yes, other groups, the answer to your
12 question is yes.

13 Q. So is DE Shaw Laminar Portfolios,
14 LLC, is that itself a hedge fund?

15 A. That in itself is a fund.

16 Q. And there are -- and DE Shaw &
17 Company is involved in many funds?

18 A. Yes.

19 Q. But to the extent your group makes
20 investments they are all through DE Shaw Laminar
21 Portfolios, LLC?

22 A. Not necessarily.

23 Q. Under what circumstances are they
24 not?

25 A. There are certain types of

14

1 DANIEL E. POSNER

2 investments that are not in Laminar Portfolios.

3 Q. That your group works on?

4 A. Yes.

5 Q. What are those?

6 MR. JONAS: I'm going to object.
7 I'm not sure what the relevance is and where
8 we're going with it.

9 You can answer the question the
10 best you can.

11 A. I mean I'm happy to answer it. I
12 just don't know the relevance either, but our
13 lending practice often we don't make loans
14 through this area through that fund.

15 Q. The lending practice doesn't make
16 loans through that fund?

17 A. Through that fund.

18 Q. Okay.

19 Is the lending practice part of
20 your group?

21 A. Yes.

22 Q. Okay.

23 A. That's amongst one of the
24 activities that use other funds.

25 Q. I understand.

15

1 DANIEL E. POSNER

2 A. That would be an example.

3 Q. Did you do anything to prepare for
4 the deposition today?

5 A. Yes.

6 Q. What did you do? Did you review
7 any material?

8 MR. JONAS: I will just caution
9 the witness you can answer what you did. I don't
10 want you to testify as to any communications,
11 instructions taken from me in connection with our
12 preparation or anybody else in the office in
13 connection with preparation, but you can answer
14 the question as stated in terms of what you did.

15 A. I just looked through some notes.

16 Q. Handwritten notes?

17 A. No. Mostly research reports.
18 Things that have been sent over. Things that had
19 been -- a couple of research reports. Something
20 else. Some questions about the case itself.

21 Q. You reviewed some written
22 questions?

23 A. Yes.

24 Q. That your counsel prepared for
25 you?

16

1 DANIEL E. POSNER

2 A. Yes.

3 Q. Did you review any notes in the
4 sense of what one understands as notes, written
5 notes?

6 A. No.

7 Q. Anything else reviewed by you?

8 A. I reviewed our motion.

9 Q. You mean your objection?

10 A. Our objection.

11 Q. I am going to show you what's been
12 marked as Exhibit 1.

13 Did you review the materials in
14 that exhibit?

15 A. I have to go through this.

16 Q. Okay. Would you do that.

17 A. No.

18 Q. You didn't review anything in
19 Exhibit 1 in connection with preparing for your
20 deposition, that's correct?

21 A. That is correct.

22 Q. Did you review any email
23 communications in connection with preparing for
24 your deposition?

25 A. No.

17

1 DANIEL E. POSNER

2 Q. How about Exhibit 2, did you
3 review any of those materials?

4 MR. JONAS: Just give me one
5 minute.

6 MR. HUTCHINSON: Take your time.

7 Let's go off the record.

8 (Whereupon, a discussion is held
9 off the record.)

10 MR. HUTCHINSON: Let's go back on
11 the record.

12 BY MR. HUTCHINSON:

13 Q. I notice you see there is a number
14 of reports in the documents you are going through
15 page by page?

16 A. Yes.

17 Q. And I take it you don't know
18 whether you reviewed the report in connection
19 with your deposition unless you review every
20 page?

21 A. I'd like to make sure that I am
22 going through every page to make sure that there
23 is nothing in there that I haven't seen. You are
24 asking me a question. I want to be able to
25 answer it.

18

1 DANIEL E. POSNER

2 Q. My question is you need to review
3 every page in order to answer whether you
4 reviewed those documents for your deposition?

5 A. No.

6 MR. JONAS: Objection.

7 Q. Well, that's the only question
8 you've asked.

9 MR. JONAS: You can answer the
10 question.

11 Q. All I want to know is whether
12 you've reviewed these documents in connection
13 with your deposition.

14 A. I'm just looking --

15 Q. Preparing for it?

16 A. I'm reading all the documents.
17 I'm just looking through all the documents to
18 make sure that I've read through all of it to be
19 able to answer your question.

20 Q. In order to answer the question of
21 whether you've reviewed them in preparation for
22 your deposition?

23 A. Yes.

24 Q. Okay.

25 I will tell you what: You've wore

19

1 DANIEL E. POSNER

2 me down. Why don't you review the rest of them
3 at a break.

4 A. That's fine.

5 Q. And you can stop where you are in
6 Exhibit 2.

7 A. I'm happy to do that.

8 MR. JONAS: John, I'm sorry to do
9 this to you. Just give me one minute.

10 MR. HUTCHINSON: Okay.

11 (Whereupon, a short recess is
12 taken.)

13 MR. HUTCHINSON: Let's go back on
14 the record.

15 BY MR. HUTCHINSON:

16 Q. Did there come a time, Mr. Posner,
17 when you became involved with Pegasus in
18 connection with DE Shaw?

19 A. Yes.

20 Q. When did you first become involved
21 approximately?

22 A. Sometime over the summer.

23 Q. Summer of this summer 2004?

24 A. I believe, I believe it was, it
25 may have been earlier, but I believe it was

20

1 DANIEL E. POSNER

2 sometime, sometime in the beginning of 2004 I
3 believe.

4 Q. How did you come to be involved in
5 connection with Pegasus or the Shaw investment in
6 Pegasus?

7 A. We purchased bonds in the company.

8 Q. And you believe you did that
9 sometime in 2004 for the first time?

10 A. It may have been sometime at the
11 end of 2003, but it was certainly within the last
12 year.

13 Q. Okay.

14 A. Last twelve months is my
15 recollection.

16 Q. Did you make that --

17 A. I'm sure we can get more precise.

18 Q. I just want as best you recall.

19 A. Okay.

20 Q. But on further reflection it was
21 not the summer of 2004?

22 A. My original connection with the
23 company was I believe it could have been as far
24 back as twelve months from now, but I am not
25 certain, I can't tell you that it was not the

21

1 DANIEL E. POSNER

2 summer of 2004.

3 Q. So it could be as far back as --
4 your first involvement your testimony is could be
5 as far back as twelve months ago or as recent as
6 this summer?

7 A. I can't tell you that factually
8 for certain. I can produce the documents and let
9 you know exactly.

10 Q. But as you sit here today?

11 A. As I sit here today my belief is
12 that my first involvement was with Pegasus as far
13 back as twelve months ago.

14 Q. Or as recently as this summer?

15 A. Yes.

16 Q. As between the two you just don't
17 recall?

18 A. Correct.

19 Q. Okay.

20 Did you make that investment
21 decision?

22 A. We make investment decisions by
23 team.

24 Q. And you were on the team that made
25 the initial investment decision?

22

1 DANIEL E. POSNER

2 A. Yes.

3 Q. And this is thirteen and a half
4 percent subordinated notes, correct?

5 A. Yes. I believe it's senior
6 subordinated notes.

7 Q. Unsecured, correct?

8 A. Yes.

9 Q. DE Shaw is a member of the
10 Official Committee of Unsecured Creditors in the
11 Pegasus bankruptcy, correct?

12 A. Yes.

13 Q. Have you attended committee
14 meetings?

15 A. Yes.

16 Q. You are aware, are you not, that
17 you've been identified as the only potential
18 DE Shaw witness in this motion?

19 A. I am not aware of that.

20 MR. JONAS: Objection.

21 You can answer if you can.

22 A. I am not aware of that.

23 Q. Are you aware that you've been
24 identified as a potential witness for DE Shaw?

25 A. Yes.

1 DANIEL E. POSNER

2 MR. JONAS: You can answer.

3 Q. Are you aware that on June 21st
4 the court in the Pegasus bankruptcy denied
5 Pegasus' request for a TRO and then for a
6 preliminary injunction in connection with its
7 termination by DirecTV or its termination by NRTC
8 of its member agreements?

9 A. Can you rephrase that question?

10 Q. I will.

11 Are you aware that the court
12 issued a decision on June 21st, 2004 denying
13 Pegasus' request for a TRO and a preliminary
14 injunction in connection with the termination of
15 its signal from DirecTV?

16 A. I am aware of this. I am not
17 certain that it was on the date that you
18 specified.

19 Q. Okay. On or about that date?

20 A. On or about that date I am aware
21 of that.

22 Q. After the court's decision of
23 June -- well, I will tell you it was June 21st.

24 A. Great.

25 Q. It's correct, is it not, that Shaw

24

1 DANIEL E. POSNER

2 among other committee members told the debtors
3 that it wanted them to negotiate a sale
4 transaction?

5 A. That is correct.

6 Q. And that the committee was, in
7 fact, negotiating such a sale transaction?

8 A. Yes.

9 Q. And that Shaw was participating in
10 that, correct?

11 A. Shaw had participation in it, yes.

12 Q. And after June 21st Shaw along
13 with other members of the committee made clear
14 that the committee had lost faith in the debtor's
15 litigation positions?

16 A. I don't believe that's true, but
17 can you just rephrase the question?

18 Q. Sure.

19 A. I will make sure that I am
20 answering correctly.

21 Q. After June 21st DE Shaw along with
22 other members of the committee indicated that
23 they had lost faith in the debtor's litigation
24 positions?

25 MR. JONAS: Objection.

25

1 DANIEL E. POSNER

2 You can answer if you can.

3 A. I mean it seems -- the question
4 seems very vague to me so I'm not quite -- I mean
5 can you be a little bit more specific in your
6 question? I mean when you say --

7 Q. Let me ask it a different way.

8 After June 21st Shaw along with
9 the committee members indicated that they wanted
10 the debtor to pursue a sales strategy in lieu of
11 a litigation strategy?

12 A. I believe that was the committee's
13 view and I am not certain if that was DE Shaw's
14 view.

15 Q. Well, did DE Shaw --

16 A. I believe that that was not
17 DE Shaw's view, but I am not certain.

18 Q. Did DE Shaw articulate a different
19 view to the debtors?

20 A. I don't know.

21 Q. And it's correct, is it not, that
22 Shaw along with other members of the committee
23 made clear to the debtors after June 21st, 2004
24 that it was not prepared to take the risk that
25 DirectTV would or would not turn off Pegasus'

26

1 DANIEL E. POSNER

2 signal after August 31st, 2004?

3 MR. JONAS: Objection.

4 I am not sure I understand.

5 MR. HUTCHINSON: Want to read it
6 back? It's sort of a mouthful.

7 (Whereupon, the requested portion
8 is read back by the reporter as follows:

9 "QUESTION: And it's correct, is
10 it not, that Shaw along with other members of
11 the committee made clear to the debtors after
12 June 21st, 2004 that it was not prepared to take
13 the risk that DirectTV would or would not turn
14 off Pegasus' signal after August 31st, 2004?")

15 A. I still don't understand the
16 question. There's too many negatives, double
17 negatives in that question.

18 Q. You can't answer that question?

19 A. That specific question in the way
20 it was phrased I cannot answer.

21 Q. It's correct, is it not, that
22 after June 21st Shaw along with other members of
23 the committee made clear to the debtors that the
24 debtors needed to act before the August 31st,
25 2004 deadline for turning off its signal?

27

1 DANIEL E. POSNER

2 A. It is correct that DE Shaw and the
3 committee asked to have a sale proceed prior to
4 August 31st.

5 The last part of the statement I'm
6 not sure if it's correct or not.

7 Q. Well, did Shaw and the committee
8 make clear that they wanted that sale to be
9 conducted and concluded prior to August 31st,
10 2004?

11 A. Yes.

12 Q. And it's correct, is it not, that
13 Shaw among other committee members actually
14 participated in negotiating with DirecTV and
15 eight hundred and seventy million, seventy-five
16 million settlement and sale amount plus
17 forgiveness of the sixty million plus seamless
18 judgment?

19 A. That's my understanding.

20 Q. Okay.

21 A. I was not directly --

22 Q. But you know that that's correct,
23 right?

24 A. That is my understanding, yes.

25 Q. And it's correct too that after

28

1 DANIEL E. POSNER

2 these amounts were negotiated Shaw expressly
3 advised the debtors that it was broadly
4 supportive of the terms of the transaction,
5 including price, releases and other terms?

6 MR. JONAS: Objection.

7 You can answer if you can.

8 A. I don't know that that's true.

9 Q. In fact --

10 A. I don't believe -- I don't know.
11 It could be true.

12 Q. In fact, didn't you personally say
13 that to Mr. Pagan?

14 A. Did I personally say that what?

15 Q. That Shaw supported the
16 transaction.

17 A. I personally said to Mr. Pagan the
18 exact opposite. That DE Shaw did not support the
19 current transaction and Mr. Pagan personally said
20 to me at a sidebar of the meeting that he and the
21 company would not support decision that wasn't a
22 unanimous decision by the committee, that he and
23 the company would not support a plan that the
24 entire committee did not support and he
25 specifically said that he wanted the subs on

29

1 DANIEL E. POSNER

2 board. He said that to me in two different
3 conversations.

4 Q. And you do not recall prior to
5 that telling Mr. Pagan or other representatives
6 of the debtor that DE Shaw supported the
7 transaction that had been negotiated?

8 A. I never said that. I have no
9 recollection of saying that and furthermore I had
10 two separate conversations with Mr. Pagan
11 regarding this, one in person and one via
12 telephone call.

13 MR. KRASNOW: Could we get a time
14 frame here?

15 MR. HUTCHINSON: Yes.

16 Q. When is the conversation -- let me
17 finish.

18 When is the conversation you claim
19 to have had with Mr. Pagan personally?

20 A. That was at a sidebar during a
21 committee meeting and I'm trying to remember
22 the -- I wouldn't be able to tell you an exact
23 date unless I looked at my calendar and the
24 following conversation I believe was several days
25 later. I think it was a Monday morning.

30

DANIEL E. POSNER

Q. By phone?

A. By phone. I think it was a Thursday afternoon.

Q. What did you say to Mr. Pagan and he say to you at the first face to face conversation?

A. The conversation, I can't tell you the exact words, but I said to Mr. Pagan specifically that we didn't believe the route of the 9019 team was best for the company and best for all of the stakeholders.

I told him that the sub holders were not on board with the plan and he said to me that we, you know, and he said to me that we are interested in having the entire committee be voting and approving this plan and that would be the only way that we would -- we would -- sorry, not the only way, but he said don't -- we would support a plan that the entire committee votes for.

Q. Anything else you recall about this conversation?

A. I had a similar conversation with him telephonically the following week.

31

1 DANIEL E. POSNER

2 Q. Who participated in the face to
3 phase conversation?

4 A. Ken Henderson, myself and Marc
5 Pagan.

6 MR. KRASNOW: I'm sorry, I'm
7 confused as to the time frame.

8 Are we talking about June, July,
9 August, beginning, end, middle of a month as best
10 you can recall?

11 I'm sorry.

12 MR. JONAS: Just so I'm clear,
13 Richard --

14 MR. HUTCHINSON: I think he is
15 just trying to clarify. I don't have any problem
16 with that.

17 MR. KRASNOW: I'm sorry.

18 MR. HUTCHINSON: It's fine.

19 THE WITNESS: Is it all right if I
20 ask --

21 MR. JONAS: Well, no. You answer
22 as best you can.

23 THE WITNESS: Okay.

24 BY MR. HUTCHINSON:

25 Q. You can't even say what month it

32

1 DANIEL E. POSNER

2 was?

3 A. I believe it was July or August.

4 Q. That's the best you can do?

5 A. Yes.

6 Q. And the phone conversation I take
7 it same thing, the best you could do is July or
8 August?

9 A. It was several days following
10 the --

11 Q. And the best you can do to
12 identify that is July or August?

13 A. Yes, yes.

14 Q. What was said on the phone
15 conversation?

16 A. Similar to the conversation that I
17 had during the sidebar during the meeting which
18 was that we were not on board with the plan. We
19 didn't think the 9019 team was the best route for
20 the company.

21 We thought having a fair auction
22 would enable other people to come and having a
23 side deal with DirectTV was hurtful to the estate.
24 Was hurtful to all of the stakeholders.

25 We thought that another bidder

33

1 DANIEL E. POSNER

2 wouldn't be able to find out exactly what they
3 were bidding against and I made that clear to him
4 and he said, you know, we want to make sure that
5 all of the committee members are on board with
6 the plan.

7 Q. Now, the committee spoke to other
8 parties that it thought or party that it thought
9 might be interested in purchasing assets of
10 Pegasus, correct?

11 A. Yes.

12 Q. And Shaw participated in that
13 process, did it not?

14 A. I believe so.

15 Q. When did those discussions take
16 place and with whom?

17 A. I believe the committee had
18 discussions with other parties in July and maybe
19 the beginning of August.

20 Q. With whom did those discussions
21 take place?

22 A. My belief is that there was one
23 other party that was EchoStar that I know of.
24 There may have been other parties that they tried
25 to contact as well.

1 DANIEL E. POSNER

2 I believe that one of the advisors
3 that had talked about making contact with another
4 party as well.

5 Q. What other party?

6 A. Don't recall.

7 Q. Do you know whether such contact
8 was made?

9 A. No.

10 Q. And you have no idea who it was?

11 A. I don't know the name.

12 Q. Who at Shaw participated in these
13 conversations? I take it it was not you?

14 A. I was not involved in those
15 conversations. I believe Max Holmes participated
16 in some and I believe Ken Henderson might have
17 participated in some, but those were the other
18 two people who have been in mostly the primarily
19 people on the project.

20 Q. And the entity -- and you
21 understand that Shaw and the committee spoke to
22 EchoStar?

23 A. Yes.

24 Q. When did Shaw and the committee --

25 A. The committee. The committee

1 DANIEL E. POSNER

2 talked to EchoStar.

3 Q. And Shaw, right?

4 A. I believe that they were part of
5 those discussions as well.

6 Q. So Shaw and the committee, right?

7 A. I believe that to be the case.

8 Q. When did those discussions first
9 take place?

10 A. I believe that to be shortly
11 after, shortly after at the end -- shortly after
12 that June 21st date. So it would be the end of
13 June and during July.

14 Q. Were there any discussions with
15 the committee by the committee with EchoStar
16 prior to June 21st, 2004?

17 A. I don't know.

18 Q. We can agree, can we not, that the
19 list of realistic buyers for these assets was a
20 list of one namely EchoStar?

21 MR. JONAS: Objection.

22 You can answer if you can.

23 A. I don't think we can agree on that
24 at all.

25 Q. Do you have anybody else who you

36

1 DANIEL E. POSNER

2 view to be a realistic buyer?

3 A. There could be financial buyers
4 who might be interested in it in the asset.

5 Q. Are you aware of any?

6 A. I don't think we've really made
7 the attempt to go after other buyers or there
8 just hasn't been enough time.

9 Q. Did Shaw try and talk to anyone
10 else?

11 A. I don't know.

12 Q. You don't know?

13 A. I don't.

14 Q. Did the committee talk to anyone
15 else?

16 A. I don't know.

17 Q. Did you ever ask?

18 A. No.

19 Q. In the conversation with EchoStar
20 that you have some understanding about was
21 EchoStar prepared to make any bid?

22 A. Yes.

23 Q. What was the bid?

24 A. I don't have the exact details,
25 but my understanding was that the bid was in the

1 DANIEL E. POSNER

2 range of one thousand dollars per subscriber.

3 That was converted.

4 Q. You don't have any details?

5 A. I don't have the specific details.

6 Q. You don't know what the bid was

7 since you testified --

8 MR. JONAS: Objection.

9 You've asked it and he's answered
10 it.

11 Q. Is that what you understand to be
12 the total --

13 A. One thousand dollars per
14 subscriber for converted subscriber.

15 Q. That's the sum and substance of
16 the bid as you understand it?

17 A. That is if you look at it on a per
18 subscriber basis that's what they were willing to
19 pay.

20 Q. Did you -- did they make a bid?

21 A. I believe that that was their bid
22 one thousand dollars per scriber.

23 Q. And you believe that they've made
24 a bid?

25 A. I believe there was a bid. There

38

1 DANIEL E. POSNER

2 was certainly some strong -- some discussion
3 about a one thousand dollar per subscriber
4 valuation.

5 Q. One thousand dollars per converted
6 subscriber you believe is the EchoStar bid?

7 A. Correct.

8 Q. And do you believe that bid is
9 pending?

10 A. When you say pending meaning
11 that's on the table today?

12 Q. Correct.

13 A. I don't know.

14 Q. Did you ever ask?

15 A. No.

16 Q. Do you have any understanding as
17 to whether there were any conditions to that bid?

18 A. Condition that I understand was
19 converted subscriber.

20 Q. Did you have any understanding as
21 to whether EchoStar required the signal to be on
22 for an additional ninety to a hundred and twenty
23 days?

24 A. Yes.

25 Q. That refreshes your recollection

39

1 DANIEL E. POSNER

2 about that?

3 A. Yes.

4 Q. And it did so require? That was a
5 condition of the bid?

6 A. I don't know if it was ninety to a
7 hundred and twenty days, but there was some
8 amount of days. I thought it was sixty days.

9 Q. Did you have any discussions as to
10 how that condition would be satisfied in light of
11 the court's decision?

12 A. I did not.

13 Q. Do you recall whether there was a
14 condition that the debtors would have to ensure
15 EchoStar that they could sell their subscriber
16 list?

17 A. Can you repeat the question,
18 please.

19 Q. Do you recall another condition
20 being the debtors having to assure EchoStar they
21 could sell the subscriber list?

22 A. I have a vague recollection, but
23 really not really.

24 Q. Just vague? Could be, could not
25 be?

40

1 DANIEL E. POSNER

2 A. Correct.

3 Q. Do you recall a condition being
4 that a requirement that the debtors assure
5 EchoStar that DirecTV would not use the
6 subscriber list?

7 A. No.

8 Q. Don't recall that one?

9 A. No.

10 Q. Isn't it the fact that in your
11 discussions --

12 Strike that.

13 Do you know whether the committee
14 encouraged EchoStar to make a bid without
15 conditions?

16 A. I don't.

17 Q. Did DE Shaw encourage EchoStar to
18 do that?

19 A. I don't know.

20 Q. Did DE Shaw encourage EchoStar to
21 actually make a written bid?

22 A. I don't know.

23 Q. You just don't know if that ever
24 happened?

25 A. No.

41

1 DANIEL E. POSNER

2 Q. And you never asked?

3 MR. JONAS: Objection.

4 You can answer if you can.

5 A. No.

6 Q. Do you know whether EchoStar ever
7 expressed a willingness to make a written bid?

8 A. I don't.

9 Q. Let me ask you to turn to Exhibit
10 1 and the page stamped 162.

11 Do you recall receiving this email
12 from Mr. Holmes on or about July 19th?

13 A. Yes.

14 Q. Do you recall being advised by
15 Mr. Holmes that EchoStar did not make a written
16 proposal? Does that refresh your recollection?

17 A. After reading this I recollect it.

18 Q. Okay.

19 Do you --

20 A. I did not make a mental note that
21 EchoStar did not make a written proposal. So
22 after reading this it is more -- it comes to
23 be -- it is more clear.

24 Q. After reading this whatever mental
25 note you made is now refreshed, right?

DANIEL E. POSNER

A. I didn't make --

MR. JONAS: Objection.

A. I didn't make any --

MR. JONAS: Hold on.

Objection.

You can answer it if you can.

A. I didn't make any mental note of this.

Q. Do you recall Mr. Holmes advising you that EchoStar acknowledged to him that its offer was below that of DirecTV?

Strike that.

Do you recall Mr. Holmes advising you that EchoStar had acknowledged that its presentation or numbers being discussed were below that of DirecTV?

A. Yes.

Q. Do you know what the five hundred million is referring to here?

A. No.

Q. Do you recall being told by Mr. Holmes that it's unclear when we will hear from EchoStar?

A. After reading the email same as

43

1 DANIEL E. POSNER

2 before I see it now, but it wasn't nothing I made
3 a mental note of.

4 Q. Do you know if Mr. Holmes or
5 DE Shaw heard from EchoStar after July 19th?

6 A. I don't know.

7 Q. Have there been discussions with
8 the committee that you are aware with EchoStar
9 after the settlement motion was filed?

10 A. Not that I am aware of.

11 Q. Has DE Shaw had any conversations
12 with EchoStar or anyone else about buying
13 Pegasus' assets after the filing of the
14 settlement motion?

15 A. Not to my belief.

16 Q. So are you aware of any
17 conversations or any attempts to have any
18 conversations after July 19th?

19 MR. JONAS: Objection.

20 Asked and answered.

21 Go ahead if you can.

22 A. Same as before. I am not aware of
23 any conversations.

24 Q. But EchoStar has had an
25 opportunity to submit a higher proposal than the

1 DANIEL E. POSNER

2 DirecTV proposal, has it not?

3 MR. JONAS: Object.

4 Q. In fact, you initially understood
5 it has a bid pending.

6 MR. JONAS: Objection.

7 You can answer it if you can.

8 A. When you say the word opportunity,
9 you know, if you set up a fair auction I believe
10 that they would have the opportunity, more fair
11 opportunity to make a bid.

12 Q. But you understand they have a
13 bid?

14 A. What's that?

15 Q. You understand they have a bid,
16 right?

17 A. Who is they?

18 Q. EchoStar. That's your testimony?

19 A. That EchoStar has a bid?

20 Q. Right. A pending bid, right?

21 MR. JONAS: Objection.

22 A. I don't know. Did I make that
23 testimony?

24 MR. JONAS: Objection.

25 Are you asking a question.

1 DANIEL E. POSNER

2 MR. HUTCHINSON: Yes.

3 Q. Isn't it the case that you
4 understand they have a pending bid?

5 MR. JONAS: I will also object to
6 that.

7 If you can answer that question
8 you can answer it.

9 A. I don't believe I'm making that
10 testimony now.

11 Q. Are you aware of any impediment on
12 the committee from obtaining bids from EchoStar?

13 A. All I know is if I were a buyer --

14 Q. That's not my question.

15 Are you aware of any impediment on
16 the committee from obtaining --

17 A. I believe the whole deal is an
18 impediment. The whole 9019 is an impediment upon
19 getting a bid from anyone including EchoStar.

20 Q. Why is that?

21 A. Because there is a side deal with
22 DirecTV between Pegasus and DirecTV that has a
23 number of elements to it that another buyer could
24 bid on the same terms as DirecTV.

25 Q. When you say side deal what do you

1 DANIEL E. POSNER

2 mean?

3 A. There are, you know, there are a
4 number of elements within the current deal
5 between DirecTV and Pegasus including items such
6 as claims that have been forgiven that an outside
7 bidder wouldn't be able to come in into the
8 same -- and bid on the same terms as DirecTV has.

9 Q. EchoStar knows precisely what
10 DirecTV's bid is, does it not?

11 A. I don't believe so.

12 Q. Has Shaw encouraged EchoStar to
13 make a bid?

14 A. I believe the committee has
15 encouraged --

16 Q. Has Shaw done that?

17 A. I believe the committee has.

18 Q. Has Shaw done that?

19 A. Shaw is part of the committee.

20 Q. Has Shaw individually or through
21 its representatives encouraged EchoStar to make a
22 bid post June 21st?

23 A. I believe so. It's part of the
24 committee.

25 Q. And your understanding is they've

47

1 DANIEL E. POSNER

2 expressed the willingness to pay a thousand
3 dollar per converted subscriber with the several
4 conditions you vaguely recalled, correct?

5 MR. JONAS: Objection.

6 Answer it if you can.

7 A. Yes.

8 Q. Did you encourage -- did Shaw
9 encourage EchoStar to make a better bid?

10 A. I believe the committee had
11 extensive negotiations with EchoStar.

12 Q. Did the committee encourage
13 EchoStar to make a better bid?

14 A. Yes. That is my understanding.

15 Q. And did Shaw do that itself?

16 A. I don't know. In fact, I don't
17 think so.

18 Q. Why not?

19 A. As part of the way a committee
20 work typically there is one or two people within
21 that committee that form a subcommittee that do
22 many of the negotiations because it's difficult
23 to negotiate with one party versus many, many
24 parties.

25 Q. But you filed an objection. You

1 DANIEL E. POSNER

2 are aware of that, right?

3 A. Yes.

4 Q. During the pendency of that
5 objection have you encouraged EchoStar to make a
6 bid or a better bid?

7 A. I don't know.

8 Q. You just don't know whether you've
9 done it or not?

10 A. I don't know.

11 Q. And you haven't asked?

12 A. No.

13 Q. I may have asked you this before:
14 Are you aware of discussions that the committee
15 or Shaw had prior to June 21st with EchoStar or
16 any other potential bidder?

17 A. I don't recall.

18 Q. One way or the other?

19 A. Correct.

20 MR. JONAS: John, if it's
21 convenient any time soon I just want to take a
22 break.

23 MR. HUTCHINSON: Yes. Just give
24 me five minutes to find or less to find. If I
25 haven't done it in five you can walk out.

1 DANIEL E. POSNER

2 MR. JONAS: Okay.

3 BY MR. HUTCHINSON:

4 Q. Do you know how much money would
5 be necessary in a sale for Shaw to participate in
6 any recovery?

7 MR. JONAS: Objection.

8 Asks for a legal conclusion in
9 some respect, but if you can answer he can try
10 and answer.

11 A. I believe on a per subscriber
12 basis it would be somewhere in the area of twelve
13 to thirteen hundred, twelve hundred per
14 subscriber I believe is where Shaw would get in
15 the absolute priority terms Shaw would be getting
16 some recovery.

17 Q. How about total dollars?

18 A. I don't know.

19 Q. You have no idea? Do you know
20 within a hundred million?

21 MR. JONAS: John, objection.

22 John, you can do the math I think as the witness
23 Mr. Fortgang told us this morning you know how
24 many subscribers, you know what he's mentioned in
25 terms of per subscriber. We could torture him

50

1 DANIEL E. POSNER

2 with this.

3 A. I believe it's about one point two
4 to one point three billion dollars within a three
5 hundred million dollar error bar.

6 Q. In other words, you don't know
7 within three hundred million dollars?

8 A. I want to make sure that I'm
9 precise.

10 Q. Okay.

11 So to be precise you need a three
12 hundred million dollar error margin?

13 MR. JONAS: Objection.

14 A. I just want to be safe.

15 Q. But that's correct, right? You
16 are not able to do it more precisely than that?

17 A. I don't have the numbers in front
18 of me right now. Off the top of my head I can't
19 do that, but if I did have a spreadsheet I would
20 be able to tell you specifically exactly how much
21 it would be.

22 Q. But as you sit here today you
23 can't within three hundred million dollars?

24 MR. JONAS: Objection.

25 A. As I sit here in front of you

51

1 DANIEL E. POSNER

2 right now I can't do it within three hundred
3 million dollars, but if I went back to my office
4 I could tell you within probably thousands of
5 dollars.

6 Q. Okay.

7 MR. HUTCHINSON: We could break.

8 MR. JONAS: Thanks.

9 THE WITNESS: Thanks.

10 (Whereupon, a short recess is
11 taken.)

12 MR. HUTCHINSON: Let's go back on
13 the record.

14 BY MR. HUTCHINSON:

15 Q. Let me ask you to look at Exhibit
16 1 again, sir.

17 You seem to be reading from a
18 document.

19 A. I'm not reading from anything.

20 Q. Do you have a document in front of
21 you?

22 A. I do have a document in front of
23 me.

24 Q. What is that document?

25 A. These are list of questions.

1 DANIEL E. POSNER

2 Q. For you?

3 A. They were prepared for me.

4 Q. Can I see them?

5 MR. BAER: No. They're prepared
6 by counsel.

7 MR. JONAS: Those documents, it's
8 my document and why it's over there on the table
9 I don't know, but it's my document. We prepared
10 it. It's privileged. Not going to share that
11 with you.

12 MR. HUTCHINSON: Well, I disagree.
13 If this is something that was given the witness
14 in preparation for his deposition and he is
15 reading it at the deposition --

16 A. I am not reading it. I am not
17 reading it. I'm happy to turn it over.

18 MR. JONAS: It shouldn't be there.
19 If you want to give it to me, but you know, we're
20 not going to give it to you since it's my
21 document so.

22 MR. KRASNOW: Maybe it can just be
23 marked.

24 MR. JONAS: No, we are not going
25 to mark it. We are not going to do anything to

53

1 DANIEL E. POSNER

2 it.

3 MR. HUTCHINSON: The witness
4 testified he reviewed a series of questions in
5 preparation for his deposition. I think the
6 Rules of Evidence are pretty clear that that
7 document needs to be produced.

8 MR. JONAS: No, he testified -- we
9 are not going to produce it so let's not waste
10 time on it. We can deal with it later as
11 appropriate.

12 MR. HUTCHINSON: Okay.

13 BY MR. HUTCHINSON:

14 Q. If you would turn to Page 107 of
15 Exhibit 1.

16 MR. JONAS: Here you go.

17 A. Okay.

18 Q. It's dated April 21st, 2004 from a
19 Mr. Henderson to you, Mr. Holmes c.c.'ed to a
20 Mr. Sole.

21 Do you recall receiving this
22 email?

23 MR. HUTCHINSON: While he reviews
24 it I guess I'd like to clarify many, many of the
25 documents we received have redacted on them or

54

1 DANIEL E. POSNER

2 they are blank pages that don't say redacted, but
3 I can only assume they were redacted. Have these
4 documents been redacted for privilege or for some
5 other reason?

6 MR. JONAS: Well, there certainly
7 are certain documents that were redacted for
8 privilege.

9 As to and I will have to check
10 with our team to see. Usually, John, as you know
11 we prepare a log and tell you what was redacted
12 and why. I will inquire and I can talk to you
13 about that later.

14 MR. HUTCHINSON: Okay.

15 I notice and it may simply be that
16 they would be the later productions and you were
17 just trying to get them out, but on the later
18 ones they don't say redacted, but there is huge
19 numbers of blank pages.

20 MR. JONAS: Okay.

21 MR. HUTCHINSON: Thank you.

22 MR. JONAS: Yes.

23 BY MR. HUTCHINSON:

24 Q. I am not going to ask you about
25 the whole thing.