predicate breach and the harm. Those are the elements of an -- the key elements of an injunction that you prove through discovery. We want to show that Mr. Ergen's handling of the special committee was itself a predicate breach, his insistence on controlling the process right now is an ongoing breach, and that those breaches create the ongoing risk of irreparable harm. That's what we're focused on.

Now, I want to on for now some of the defendants' arguments that we saw in last night's briefs. So I tried to prepare some responses very quickly. Start really with Mr. Goodbarn's motion and perhaps highlight what it doesn't say.

Mr. Goodbarn's focus -- he never says -- he's one of the two members, of course. He never says you shouldn't grant the injunction, he never says it wouldn't help the company if independent directors were in control of the process, he never says there's no harm. What he basically says is, I don't want to be deposed, I don't want to have to produce my own documents. Of course, a lot of our requests, as I'll explain, really go to the company anyway, but there are requests that would go to the committee's files and to Mr. Goodbarn.

The fact is, Your Honor, these cases -- these cases of breach of fiduciary duty that turn on bad on faith, they're very sensitive to the evidence. We cited to leading cases that I'll talk about, the Hollinger case and the T. Rowe Price case, and, you know, what I can say with personal experience

on T. Rowe Price, because I was the clerk for Vice Chancellor Lamb when he wrote that opinion, the end product, that opinion was nowhere to be found when the complaint was filed, nowhere to be found. And in fact the defendants in that case, as I know the defendants in the Hollinger case also, started out saying, demand is not excused and business judgment rule applies and there's nothing to see here, please move on, Your Honor. And on the discovery it was a close call, because there were strong arguments of why you might apply the business judgment rule in the T. Rowe Price fact pattern. They went all out on that. And the court made a decision, which, you know, I think the court said --

THE COURT: You know our statute's a little bit different than the Delaware statute; right?

MR. LEBOVITCH: For good cause? I guess which statute are we talking, Your Honor?

THE COURT: When there is an acquisition our statute is slightly different on what we're supposed to consider.

MR. LEBOVITCH: Your Honor, the differences I don't think would make a difference here, because we still look at the conflicts and the fairness. In other words, there's still a duty of loyalty, and here we're not talking about a duty to maybe maximize value or something like that. We're talking about a conflict transaction, okay, a bid by the company that's being controlled by Mr. Ergen. And you still need

good- faith loyalty and independent -- an independent process. And so I understand that there's differences, but I don't think those differences would change an outcome here, Your Honor.

THE COURT: Under the Nevada analysis you think that there is the same analysis for disinterestedness as there is in Delaware?

MR. LEBOVITCH: I think under the Amerco case, which for demand futility --

THE COURT: Some of us call it Schoen II.

MR. LEBOVITCH: Schoen II. Okay.

THE COURT: Not the Supreme Court, but those of us who've lived through all these --

MR. LEBOVITCH: Every time I come here, Your Honor, I'll learn more of the local tendencies.

THE COURT: You'll learn something new, yes.

MR. LEBOVITCH: I will.

So under, you know, Schoen I and then Schoen II the Nevada courts will look to Delaware. Obviously there could be places where there's differences. I think on the facts here, and we could talk about the independence of the board, it's -- I'm not aware of any state in the country that would actually look and conclude that half or a majority of this board is independent. And we can get to that. But, again, we say we need to show the predicate breach. And, again, in the

Hollinger case and T. Rowe Price they're a close call till you get the records. And even the records -- in T. Rowe Price I can tell you, and it's in the opinion, the minutes are sanitized. The key fact in the T. Rowe Price case was the special committee members' handwritten notes. And I remember because I found them, Your Honor. Those notes during meetings that they took and kept said, how can this be fair, what are we supposed to do when he's forcing it on us no matter what we do. And that shows itself in the opinion, Your Honor. That's what these cases are made of.

Now, the defendants say that we're seeking relief, you know, based on future facts and that's prospective. In a certain respect that's obviously true. That's what injunctive relief is for. You have to show a predicate breach and ongoing prospective harm that you're trying to stop, enjoin, avoid. And so in the end that discovery that we're seeking goes to the heart of what the Court would need to essentially even consider the elements of an injunction and also to consider how to fashion the relief in an appropriate way. This is a unique fact pattern, although, again, I think the legal principles of loyalty and good faith are -- should be clear, and I think the evidence will make even clearer.

One last point about Mr. Goodbarn before I move on is he says -- kind of says he shouldn't be deposed and that his counsel should not be deposed. As to him we put in a

sentence in our brief at the end that it may be -- and we wanted to flag it, Your Honor -- it may be that we take one of committee members and one of the other directors. We said that. And, again, you know, if we had had a chance to discuss it with Mr. Goodbarn's counsel, that may have been something we would do, because we may not need both special committee members. Clearly we think we need one.

As far as counsel goes, we're not trying to get someone's privileged advice unless it's going to be waived. But in a corporate transactional context lawyers are -- the corporate lawyers, not Mr. Markel, but he's going to have a corporate partner who is advising the committee just like a banker. They negotiate with the other side, with Ergen. They're adversarial, and it is very typical that lawyers there would be deposed. Again, in the T. Rowe Price case my recollection is that that happened. I don't remember if the opinion identifies that. And the Hollinger case was very heavily lawyered. Some of the lawyers in this room or at least their firms were involved, and lawyers were being deposed, because I remember I was on the defense side for one of the parties at that time.

The relief we're seeking is really not radical. The defendants like to say we've changed our whole complaint, abandoned our whole complaint. I think we dealt with that. We simply reorganized it, because it was true with all these

new facts we have to clarify for the Court and for everyone what is the relief we're seeking, but the relief we're seeking is not this mandatory injunction. In fact, part of the relief that was granted in the Hollinger case is very similar. In the Hollinger case Mr. Black, when he decided that the special committee, the independent directors were being too independent, posed a threat to him, he disbanded it. Now, he did it through bylaws, but he disbanded that committee. There that committee kept fighting. And what the court said on the record that was before the court is, this disbanding is of no use, it's not a valid act, it's a breach of fiduciary duty because it was disloyal and not taken in good faith. That was then Vice Chancellor Strine's -- now he's a chancellor -- but that was based on a very full record. And so this is not -- it may be unusual because the situation doesn't come up, but there's precedent for saying, I'm not going to let you take away from independent directors something that you had granted to them for good reason and in part because that's creating an ongoing harm.

The assertion that we're supporting Harbinger or supplanting the Bankruptcy Court doesn't really fly. Just the opposite. Any independent board facing this situation, Your Honor -- and I don't know -- we'll try to present evidence if that's helpful to the Court -- any independent board here would say, we need an independent process, because of the

ongoing lawsuits we need independent process, and so all we're trying to do is make it harder for the Bankruptcy Court to hurt Dish here by getting a ruling here, absent any agreement with the defendants, to send the message to the Bankruptcy Court Dish is acting independently, you shouldn't punish Dish even if you're not happy with what Mr. Ergen did. That's we believe Corporate Governance 101, and that's really what -- we're just trying to bring the parties back to that situation.

Now, again, there's an ongoing problem. It's not hypotheticals, who you see a lot in our papers it's hypotheticals of what may or could happen, it's the nature of injunctions, but our facts that will support the injunction are based on ongoing breaches, which is, we allege, buying the debt without telling the board, knowing that it's going to put Dish in a precarious position when it tries to pursue a strategic objective that Mr. Ergen himself has said is essential, and also disbanding the committee to ensure that he controls what Dish does, rather then face the chance that the committee actually goes against his wishes.

And, again, there's ongoing harm. And I want to talk about the conflict, because there's a fair amount of discussion that there's really not a conflict. If you assume the only question is will Ergen be paid and you assume the bidding has already cleared his price, well, that's what the defendants want to focus on, that's he'll be paid as long as

the bidding goes there. But they're just ignoring the key facts that we put in the complaint, put in the brief. Harbinger and LightSquared are attacking his position. They're seeking to invalidate it, they're seeking to disallow his economic claims. A billion-dollar personal investment that he that has is under attack is under attack. Dish has a very significant strategic objective that it's trying to pursue. And the only reason why it faces a risk from the Bankruptcy Court -- I mean, in other words, it's always going to face a risk of losing in the bidding, but the only risk it faces of losing its stalking horse status or other equitable relief the Bankruptcy Court can provide is because Ergen's not letting go.

So we have a very real conflict, because there's a real lawsuit, they're real claims, and really, you know, again, had Ergen not bought the debt and not disbanded the committee, these risks either would not exist or would be significantly mitigated. And what we're asking the Court to do is take a look at a real-world problem and provide a real-world solution to it.

Now, the DBSD case, there's an argument that the defendants make that, you know, the facts of DBSD are different. We don't dispute that. The facts are different. The point is that to show the broad equitable powers that the Bankruptcy Court has and, more importantly, show that the

board knows that Dish itself has already gotten into trouble in the past in being found to have acted in bad faith. That just supports why any board acting in good faith, acting independently of Ergen would kick him out of the room. It's just what happens. You say, Mr. Ergen, you've got a conflict, get out of the room. And I think we -- I don't remember if it was in our brief or not, Your Honor, but picture a slightly alternative scenario. Picture a board that doesn't have a controlling shareholder, picture a board that has some activist, a Carl Icahn or a Bill Ackman or, you know, you name it, someone who gets himself on the board and the company's looking to buy a bankrupt entity, and then Carl Icahn, who's not in control of the board, says, oh, by the way, I bought a billion dollars of the target's debt. There should be no doubt in anybody's mind that that board would say, Carl, you're out of the room, you're not part of this process at all, we're not going to debate it, we're not going to justify it, you're out. And I don't think Mr. Icahn would have any problem with that, because he'd understand he has to be isolated.

Demand. I think that -- I believe it was the Dish brief -- and, again, we got them late last night, but I believe it was the Dish brief that talks about demand. And it's interesting, they cite a lot of law that you have to establish demand. They don't actually give any facts that

show that the board is independent. And that's because they can't, Your Honor. All they say is there's no conflict. They'd have to show that a majority of the board could consider a demand. There's an eight-member board at the time this complaint was filed. Mr. Ergen, Mrs. Ergen, his best friend and business partner for 40 years, and the CEO, that's half the board right there. And I am -- again, you know, I don't think there's any basis in Nevada law or the law of essentially any state that looks at independence to say that ties like that, I mean, family relations, a CEO with a controlling shareholder or a best friend and business partner for 40 years would not be disqualified for demand purposes. And then obviously we also talk about the other three directors who were question because of their longstanding ties with Ergen and being current or former executives.

But in the end it's about the conflict, Your Honor. They say there's no conflict, therefore you don't have to consider demand because there's no reason to look at independence. It Your Honor sees that there's no conflict here, then that position is going to be ripe. But if Your Honor sees the potential for conflict that warrants discovery and a possible hearing, which we think should be eminently reasonable, if not very much a given, then demand is going to be excused for these purposes.

Irreparable harm. Again, we think the defendants

try to change the story. They say, well, we're going to have a bidding process for the spectrum so we know what it's worth. That's really not the issue from a Dish perspective. The question is what is the benefit to Dish of getting the spectrum and what is the harm from Ergen's breaches. And our point, Your Honor, is there may be scenarios where with hindsight we could say, well, you know, Ergen cost the company an extra $200 million or $400 million, and we could award money damages. But there's a lot of very obvious scenarios where it would be very difficult to quantify that in court. If they could have gotten the company at 2 billion and now they have to bid 2.4, how much of that extra cost will be attributable to the problems Dish has because of what I'll call the Ergen baggage? If they lose the bidding -- if there's no sale of the spectrum -- you know, that's what Harbinger's proposing; they're also attacking Ergen's debt, so is it possible that the spectrum would be sold if you didn't have all this distraction with Ergen's debt purchases and controlling Dish? That's entirely possible, Your Honor. And so while anyone can talk about what, you know, scenarios can result in money damages, and we recognize that there were scenarios that can result in money damages, there's a high likelihood that Ergen's breaches are currently impairing Dish, and if there's going to be any harm, it may well be irreparable harm. So that's really what we're trying to do.

And, again, Dish just wants to be treated like a third-party bidder. They just want to top anyone else that's out there, win the bidding. Ergen's involvement is impeding that, and that's what the special committee told Your Honor.

Pretty much at the end, and then I'll turn to the discovery requests, if Your Honor would like. But the balancing of harms and the public policy, we see an argument from I guess it was Dish or Ergen that the board has done a good job for the company, that was kind of the argument. We don't dispute that. When there's no conflict of interest between Ergen and the shareholder -- and the other shareholders, they do a good job of running the business. That's not uncommon with a controlled company. The whole question is what happens when there's a conflict between the controller and the shareholders. That's the point. And so the fact that they're good at other times doesn't mean you shouldn't have an independent process when there's a conflict.

Again, with the Bankruptcy Court, Your Honor would not be supplanting the Bankruptcy Court's findings at all. All Your Honor would be doing, if we can convince Your Honor on the evidence, is saying, Dish is going to act independently, that can only send a positive message to the court -- the Bankruptcy Court to say, there's no reason to hurt Dish here.

And then really, on the discovery, I can go -- I

don't know if Your Honor wants me to go through the requests, but they are very focused --

THE COURT: I don't want you to go through the requests. I read them. I understand them. I know what they say.

MR. LEBOVITCH: Okay. They're very focused on the special committee's actions and what's happening now. And if there's --

THE COURT: Talk to me about the impact of the special litigation committee.

MR. LEBOVITCH: Okay. Okay. There's -- the special litigation committee is not taking over the process right now. As far as I could tell and as far as any special litigation committee I've seen, particularly one that I guess may or may not be getting off the ground before October 7th, they're not going to reach a conclusion and take action by the end of October, early November, which is when we believe injunctive relief is warranted. They might look into the debt purchases, but we're not even seeking to expedite that. That's a long-term process. So we don't know their charge, we don't know their timing. We have a history, obviously, with Mr. Ergen disbanding the last special committee. All we got is an 11:00 p.m. email saying, a committee's been created. No information about what it does.

Now, what would -- and I understand Nevada can

approach these things differently, but we did find some precedent in Delaware where the Delaware courts have said, I'm not going to slow things down because of a special litigation committee. And particularly because the board member's not officially joined until October 7th and we don't know what role will be had or what timing is being imposed on the committee, so it's very possible that the irreparable harm will come and pass long before the committee gets off the ground, much less takes action. And I say that because, from experience, these committees do investigations -- when they're thorough and not just a whitewash it takes time. They hire their own lawyers, it takes time.

But in the Kaufman versus Computer Associates I believe it was Vice Chancellor Lamb who said that, "A sham SLC that is established merely as a device for delaying litigation will receive little respect from the court." And I do note, Your Honor, that Dish has already said they're going to be moving to dismiss. We were surprised to hear that Mr. Goodbarn is not on the special litigation committee, that it's a different director whose independence has been challenged here, he's a former executive. And what you have, though, is in the Kaufman case Vice Chancellor Lamb actually explains, you know, these people, they're not only named as defendants that comprise now this newly created special litigation committee, they move to dismiss, they move to dismiss. And he

says, "Rather than taking steps to investigate at the time the allegations were brought, they filed a motion to dismiss. How can I ignore that?" And, again, Your Honor, the cite -- the cite for it is 2005 WL 3470589, (Del.Ch. December 21st, 2005).

So we think that the special litigation committee, maybe it's going to do a great job down the road, maybe it's going to find that the charter provision, notwithstanding what Mr. Ergen and Dish have said, you know, is an absurd argument, maybe they'll find it's a good argument. We know the old special committee thought it was good enough that they wanted the ability to disgorge. But that's not going to solve the immediate problem, and we don't think that getting the limited discovery we seek in any way impairs the special committee's efforts. We think if there's confidentiality concerns, it is standard, as all the lawyers here sign all time, we could do attorneys' eyes only confidentiality agreements to preserve the confidentiality of anything that's sensitive. And again, if the special litigation committee looks at our complaint and finds it meritorious, in our experience they'd talk to us and work with us. That's almost universally what happens if they're actually finding merit in the cases. And so the fact that we get some discovery now over the next few weeks, before the committee even gets off the ground, is frankly completely relevant. And, again, I think it would be very prejudicial to assume the independence of the committee right now knowing

that one of the members, his independence is already being questioned in this litigation and also the timing of the committee's creation and the lack of clarity about what they're doing, coupled with the near impossibility that this special litigation is actually going to have the time or ability to take over the process to save Dish now while we're seeking injunctive relief. Does that satisfy Your Honor, or at least answer your question?

THE COURT: Thank you. I'll let you have a chance to stand up again if you want.

MR. LEBOVITCH: Thank you, Your Honor.

THE COURT: Mr. Rugg.

MR. RUGG: Thank you, Your Honor.

This case is really not complex. The complex machinations of plaintiff set aside, the issues presented to the Court are pretty straightforward. Number one, is there a conflict that needs to be enjoined? Plaintiff can't point to a conflict. They keep looking backwards, they keep saying that the debt creates a conflict. We've presented and the facts support that Mr. Ergen's affiliates' ownership of the debt is not creating an ongoing conflict at this point. Everybody's interests are in line in seeing Dish succeed in the bidding process. What plaintiffs want is the extreme remedy of taking out the duly elected board, setting them aside, and leaving -- I'm still not exactly sure -- I think

one board member, Mr. Goodbarn. But they sued him, too, so I'm not even sure that he qualifies under their independence rules, to make very important decisions on a multibillion-dollar transaction going forward. That is an extreme remedy and is not something that you can point to precedent that's been allowed by anything. Nevada in Schoen and its statutes say that a board controls the business of the company. Nevada also has a statute, as Your Honor has pointed out, 78.140, that deals with transactions that might involve a conflicted director. It doesn't mean that you have to take out the conflicted director. There are several ways that a board can act within it's fiduciary duties and conduct a transaction where there's an interested director.

So we think that either way, even if there was a conflict here -- and we don't think there's a conflict going forward at this point. But even if there was a conflict here, it can be resolved by the Court by looking and being advised on 78.140 and actng in compliance with it. If down the line plaintiff still contends that that transaction is then -- wasn't appropriately handled, that's a case plaintiff can bring at that time. But there's no need to enjoin the duly elected directors from doing their job.

And coming back to the conflict, all they point to is the debt. Now, they talked to Harbinger, as well. Now, Harbinger is a --

THE COURT: Under the items in the Nevada statute that doesn't seem to be a conflict, the debt.

MR. RUGG: Yeah. Harbinger --

THE COURT: I mean, there's certainly issues, but --

MR. RUGG: Right. Because in some ways by arguing Harbinger they're saying that whenever a corporation is sued its board must have breached its fiduciary duties. And we know that's not the case. Harbinger, by the way, is suing everybody in the industry to try to stop them from getting the debt. I mean, they've started -- I understand from my New York colleagues they've started actually a RICO case against pretty much everybody in the GPS industry to try to keep them away from their spectrum. Harbinger is desperate to go through bankruptcy, get rid of its debt, but keep its asset. I'm not going to comment here on the bankruptcy process. I've had my own experiences over there in Bankruptcy Court that color it to some extent, but that's a question for the Bankruptcy Court. And let the Bankruptcy Court deal with it. It's not something for this Court, and it doesn't -- just the fact that Harbinger has sued Dish doesn't mean that Dish has done anything wrong or that its board has breached its fiduciary duties or that there's an existing conflict going forward. Otherwise, as we've said, once a company is sued they'd have to appoint non directors to figure out how to handle even a lawsuit against the company.

Now, just to be clear about the facts that I think motivated the amended complaint. They want to point to a Wall Street Journal article. The Wall Street Journal article, bunch of unnamed sources. And if we're going to go by the Wall Street Journal article, we've provided a different Wall Street Journal article to Your Honor that says the Dish board is actually doing pretty well by its spectrum and it's increased it by --

THE COURT: And I try not to worry about what the media says.

MR. RUGG: And I think that's fair. So we set aside the Wall Street Journal article. We've already talked about the Harbinger complaint. Let's talk about the other facts that caused plaintiff to amend its complaint.

The other facts were facts that they should have known, the articles of Dish. The articles of Dish deal with the situation. They accuse Mr. Ergen of having stolen a compare opportunity. The articles dealt with it, it's proper under Nevada law, 78.080. The articles say -- and this is a place where plaintiffs kind of pervert what the articles say. The articles say that amongst the three items that are part of the test is that the opportunity must have been presented to the board member solely in his role, or her role, as a board member. They pervert that to he learned of it. That's not what the articles say, and you don't get to go there.

Now, plaintiffs try to distance themselves for purposes of this hearing and say, well, we're just focused on forward conflicts, but then they argue that everything in that happened in the past somehow should cause Your Honor to grant them expedited discovery and in the future a preliminary injunction. And the articles deal with that issue clearly, not in a complex fashion.

The other thing that came out from our prior opposition, which is why I think it's still effective, and we did a supplement for the company, is the credit agreement. It goes back to what Harbinger's motivation here is. Harbinger was in the process of trying to keep everybody out of its debt so that none of them when it went bankrupt could come in and buy its assets from the preferred position of the stalking horse. They knocked out Dish. We don't dispute that. That's [unintelligible] an issue that's before the Bankruptcy Court. But they did not knock out Mr. Ergen, and Mr. Ergen made the purchases. So it can't be that he stole a corporate opportunity, because Dish never had that corporate opportunity. It was disallowed by Harbinger, the folks that plaintiffs align themselves with.

Now, that -- to move us past the simple aspect of this case that is not complex, because we're just focused on expedited discovery, and I'm not going to try to argue the whole preliminary injunction here, though it does go to the

issue of good cause. When you talk about good cause you have to have some reason to do this. We focus on Count 1. That's the only count that plaintiffs say that they're going to move for injunction on. So is there any substance to Count 1, the demand futility issue?

Count 1 can be knocked out on demand futility. Demand futility is appropriately heard on a case-by-case basis. Demand futility happens to be one of the rare places in Nevada law where the Nevada Supreme Court has said, by the way, we'll look at Delaware for this aspect of law. I know Your Honor has heard many lawyers come in here and say that Nevada should look to Delaware corporate law on almost anything; but this was a very unique place where the Nevada Supreme Court has been clear and said, for demand futility we'll look to Delaware law, [unintelligible].

So let's look -- but that does wrap us back into where there's a conflict, because the question is independence. And independence is whether there's a conflict. Going forward on this prospective-looking claim there is no conflict. The board that's in place is actually more interested in its own personal holdings in Dish than they could possibly interested in Mr. Ergen's affiliates' ownership of the debt. Even Mr. Ergen himself, as we put together some math for Your Honor, is more interested in his holdings in Dish than he would be by any possible profit he could make on

the affiliates' ownership of the debt. So if the demand had been made, this board would have been on this claim to consider with its independent judgment and decide going forward.

And that goes to really plaintiffs are seeking. Plaintiffs are seeking to displace the judgment of the board on an issue that's really just a matter of business judgment; because there is no conflict. All they're talking about is what's the best way to proceed to get in the bidding process to win the bid. And that's just a matter of business judgment. Nevada has a statutory business judgment rule, and it should be applied here and allow the board to do its job.

Other things that the plaintiff has thrown out in its pleadings that don't stand up. Number one, they do admit that the Dish board's actions so far has actually put it in a pretty good position in the bankruptcy. They got aligned with the ad hoc group of lenders -- actually, they negotiated with an independent group of the ad hoc group of lenders -- that was presented and attached to our prior opposition -- and put themselves as the cornerstone of that ad hoc group's proposed claim, which could make it the stalking horse in the process.

Additional facts that go against what plaintiffs claim is the problem here. They actually ignore what the market has done. And we've talked about the Wall Street Journal, but we've also attached an analyst's report. The

analyst's report from City Research shows that Dish has put itself in position to make a seventeen -- to increase the stock price by $17. That's actually a pretty good position, and plaintiffs should be happy about that.

Additionally, they talk about Mr. Howard's resignation as meaning something and being in protest. It's actually not even what their Wall Street Journal article says. Mr. Howard resigned. There's not really much more I can say about it without -- without potentially violating federal securities law. I don't really know much more about it. But also, plaintiffs haven't told you a case that says because somebody resigned you should issue an injunction or you should issue expedited discovery or there's any good cause for a claim. Mr. Howard resigned. It's a fact. We can get away with it. They claim that that was going to put us in danger of delisting with NASDAQ. That was never really the case. NASDAQ has a rule. The rule allows for between six months and a year, depending on where your annual meeting is, to replace a board member. The company has already done it. They announced it two days ago. There's now a new independent board member coming on. He'll be effective October 7th. So that was just a red herring from plaintiffs.

And now, even though plaintiff would rely on their allegation or assertion that there's a breakdown in corporate governance, the corporate board of Dish has taken another

logical step and put together a special litigation committee. It's hardly unusual, and I'm going to try to talk at the end a bit about why the special litigation committee should be considered by Your Honor on --

THE COURT: Why don't you talk about it now.

MR. RUGG: Sure. And actually we did take time -- I appreciate that it was 11:00 a.m. on East Coast. It was actually 8:00 p.m. here --

THE COURT: You mean 11:00 p.m.?

MR. RUGG: They said 11:00 p.m. on the East Coast. And I thought we were all here on the Pacific Time Zone, so it was actually at 8:00. But -- and that was when I found out and I was able to provide the information. So I did.

But this is an interesting area, because it does cross into the question of whether Nevada should follow Delaware. There's not a lot of Nevada law, if any, on the question of what to do with the special litigation committee. I don't know if Your Honor has been -- had seen a case on a --

THE COURT: I've had special litigation committees before.

MR. RUGG: Okay. Not something I'd seen in front of you, so I didn't know. And, of course, not a lot of published caselaw out there. But it is -- it is an aspect that follows the issue raised in Schoen of demand futility, because it does relate to the demand futility question and whether the board

can step in and do a special litigation committee. Delaware has some pretty clear caselaw -- the key case is Zappata -- that says that what you do with a special litigation committee is you test its independence after it reaches conclusions. So we let the special litigation committee go forward with an investigation. There's also a Delaware case, Abbey [phonetic], that talks about why it stays important to allow that to happen. I was only aware of one Nevada case that talks about special litigation committees. It's over in the Federal Court. It's actually not published. It involves Sands Corp. And in that case Judge Du followed Delaware law and granted a stay to allow the special litigation committee to do its work.

We did take a little bit of time -- we had a short, four-page memorandum of law, if Your Honor wants it, that goes through some of the Zappata -- you know, what happened in the Sands case and Zappata and --

THE COURT: No. I've had special litigation committee cases before.

MR. RUGG: Okay. So I think that in this case --

THE COURT: And they predated Max. So they're old cases.

MR. RUGG: I've got to hire more of your clerks, Your Honor.

THE COURT: Why don't you call Steve Peek and ask

him what he did, you know.

MR. RUGG: But the bottom line is that the special litigation committee is an extension of what Nevada appreciates in both Schoen and its statute to allow the board to operate the company. And this is a way for the special litigation committee, as delegated the power by the full board, to investigate these claims and act for the company.

THE COURT: I need two things from you on the special litigation committee. Tell me what their scope of their authority is. Hold on. Let me go to my statutes.

What is the committee's designated authority?

MR. RUGG: I don't believe there's a formal resolution yet, so I'm only going to tell you what I understand. But I would rather present you with the formal resolution so that I'm not misspeaking for the board. Because that's not my place.

THE COURT: Tell me what you think the designated authority is.

MR. RUGG: They've been designated to investigate the claims brought in this case, the Jacksonville Fire and Police case, and make a decision for the corporation how to proceed or whether to seek a dismissal or whether to act on behalf of the company on these claims.

THE COURT: Okay. And what is the timing of the special litigation committee's investigation?

MR. RUGG: That I don't have an answer for, because it's going to be up to that committee that was just formed last night. So you have Mr. Ortolf, who is an independent member of the board, he's on the audit committee, and Mr. Brokaw, who is coming as a citizen, a non board member, but will be a board member within a couple weeks.

THE COURT: And do we know if the special committee has yet hired counsel to assist them in their investigation?

MR. RUGG: That -- I'm fairly sure they have not yet hired counsel.

THE COURT: Not since 8:00 o'clock last night.

MR. RUGG: Right. Though I understand that's going to be one of the things that they look at first, which, you know, puts me in an awkward position, I suppose. But still we're here right now.

THE COURT: Usually they have separate counsel from everybody else in this room.

MR. RUGG: I understand, Your Honor. But given that they're --

THE COURT: It's important to know what their -- the reason I'm going to back to the statute is we have a Nevada statute that relates to an overlapping issue. I need to know what their designated authority is.

MR. RUGG: And as soon as we have the resolution we can provide that for Your Honor. I don't think it's

appropriate for me to paraphrase it any more than I have.

THE COURT: I understand what you're saying, Mr. Rugg.

MR. RUGG: So I do think that down that line --

THE COURT: So they're not investigating the ongoing transaction and bidding process or having any responsibility of that; they're looking at what is alleged in the complaint to be the prior conflicts and potential breaches.

MR. RUGG: Correct, Your Honor.

THE COURT: Okay.

(Pause in the proceedings)

MR. RUGG: As Mr. Frawley was sharing with me, of course, the complaint does add that aspect. The complaint says there's an ongoing complaint.

THE COURT: That's Claim 1, injunctive relief.

MR. RUGG: Right. So it is part of their task in investigating these claims to address that issue, but it's not specific. And I thought that's what Your Honor was asking about.

THE COURT: Well, no. I was going to my statutory language of what the committee's designated authority is.

For those of you who aren't familiar with Nevada statutes, that's in 78.138(2)(c).

MR. RUGG: It's pretty much right below the business judgment rule.

THE COURT: It's part of the business judgment rule.

MR. RUGG: I think that answers the Court's questions about the special litigation committee. I'm not sure.

THE COURT: That did. I was just trying to find out where I was going to be on this.

MR. RUGG: On other issues of whether there's good cause to issue -- demand expedited discovery there is a question here of whether what plaintiffs are asking the Court to do is prejudge an issue that's before the Bankruptcy Court, whether it be the -- what Bankruptcy refers to as designation of Mr. Ergen's affiliates' vote or whether it be the role of Dish where Harbinger wants to say Mr. Ergen's acting for Dish in order to get around -- you know, in order to meet the issue of their credit agreement. Plaintiffs seem to want to take the position that Mr. Ergen is controlling Dish, as opposed to Dish controlling Mr. Ergen, back and forth. Either way, those are issues that are before that Bankruptcy Court. There is a motion to dismiss that's been filed by Dish in the adversary proceeding brought by Harbinger and LightSquared that will be heard at a hearing on October 29th. I'm not counsel there, so I can't say much more than that. But that's something that the Bankruptcy Court's already prepared to address, and I think it's an area where this Court's discretion comes into play and whether it should allow the Bankruptcy Court to make

a decision that's appropriately before the Bankruptcy Court and that the DBSD case that plaintiffs like to rely on actually says is something for the expertise of a bankruptcy judge. And, with all due respect to Your Honor, there is -- there are differences over there in that bankruptcy world.

THE COURT: Yes. I understand that. And I never practiced in Bankruptcy Court on purpose.

MR. RUGG: I was just -- just to supplement that, the bankruptcy judge has indicated that she intends to rule either on October 29th or soon thereafter on that issue.

THE COURT: Who's the bankruptcy judge?

MR. FRAWLEY: Your Honor, it's Shelly Chapman in the Southern District of New York.

MR. RUGG: So when we look down -- and the reason to look at the injunction claim right now on good cause is just to see whether there's any likelihood of success and whether there's irreparable harm. For likelihood of success we've already been through the issue of whether there's a conflict. Mr. Ergen's getting -- Mr. Ergen's affiliate is going to be paid on the debt, the rest of the board and Mr. Ergen all have a strong financial interest in Dish and are motivated to help Dish. So in terms of their ongoing conflict claim there does not appear to be a likelihood of success on the merits.

With regard to the DBSD case there are significant differences, and it's kind of interesting, because plaintiff

in their complaint suggest that if dish had been given the corporate opportunity, if it had been a corporate opportunity, to buy the debt, they would have found a way to do it; but that would have put them closer to the facts of DBSD and more dangerously closer to the facts of DBSD, though --

THE COURT: And arguably violated the credit agreement.

MR. RUGG: And arguably violate the credit agreements and be knocked out for that. But the real issue in DBSD that the court was concerned about was what interest did the creditor have. And in that case the DBSD debt had been bought at 100 percent par when you already knew the bankruptcy plan was going to pay you at 100 percent par. So there wasn't an interest on a return. Here plaintiffs trumpet the fact that Mr. Ergen's affiliate entity stands to make a return on its debt, and that takes it outside the DBSD context and takes it outside of the caselaw, because the caselaw is focused on what is your real interest, do you have an interest as a creditor. And plaintiffs themselves say that Mr. Ergen's affiliate entity has an interest as a creditor. The interest happens not to be in conflict with Mr. Ergen's interest in Dish.

We've already talked about Mr. Howard's resignation and that being relatively meaningless.

On irreparable harm, you know, the money amounts

here are not insignificant, obviously, but they really are just money amounts. There are analysts ready and able to consider what a spectrum is worth. In fact, that's what the Dish board, whether it be the existing Dish board that's duly elected or the Dish board that plaintiff wants to make this decision, will have to decide on a dollar figure that the spectrum's worth. And that's not irreparable harm once you have a dollar figure.

On the relevancy of discovery. Everything plaintiffs are looking at is backward looking. The special committee -- the previous special committee, not as special litigation committee, considered an individual question. That question is no longer relevant to what is going forward in terms of conflict of interest. That question was about whether to make an initial bid. They made a recommendation, the board followed the recommendation, initial bid is made. Nothing that can be undone by an injunction at this point. So looking at that won't tell the Court anything about whether there's going to be a future problem.

In terms of whether there's a future problem it's really just two questions, and we put this in our brief. It's, you know, they want to say that it's a conflict because of the debt. That fact's known. They want to say that Mr. Ergen controls the board. The proxies that we can produce for the Court, they're all public, that show what Mr. Ergen's

interest is in the company and what his relationship is with the other board members, you know, they're a huge stack of documents, but they all say the same thing. Plaintiff knows this. It's a controlled company. Nothing improper about that. It's fully disclosed. If plaintiffs think that's enough, then we can go forward on their preliminary injunction motion just on that, and we'll argue that at the appropriate time.

In terms of the depositions, a little bit of a moving target here, because now I think plaintiffs have moved from five depositions to two. One of those depositions seems to -- Mr. Howard, I don't know how Mr. Howard's going to tell you what the board's doing now. He resigned. So that's not forward looking. If it's Mr. Goodbarn, Mr. Goodbarn has addressed the issues for the Court, and I don't need to go over those again. But it's still not going to tell the Court whether there's a future breach of fiduciary duty that the Court has to prevent through an injunction.

I know I was a little haphazard there, but I'm mixing between myself and responding to some of what plaintiffs said. So unless the Court has further questions, I'll sit down.

THE COURT: I don't have any more questions.

MR. RUGG: Thank you.

MR. REISMAN: We're just going to rest on our

briefs, Your Honor.

MR. MARKEL: Your Honor, if I may be heard briefly.

THE COURT: Absolutely.

MR. MARKEL: And thank you for that. My name is Gregory Markel, representing Mr. Goodbarn. And I just have a couple of very brief points I would like to make.

As a matter of background, we have -- and this is just a brief background -- we have moved to dismiss -- I know it's not on today -- but the reason for that is because there are no allegations of wrongdoing by Mr. Goodbarn. He doesn't belong as a defendant in this case. And in fact in their preliminary injunction motion, and this is a quote, plaintiff goes so far as to say that, "Mr. Goodbarn possibly engaged in fiduciary duties." It doesn't allege that he did -- breaches of fiduciary duties. It doesn't say that he did, it says "possibly" he did. So that's a bit of background here that we think that he is not a proper defendant and -- but that's not for today's decision.

I think the two points I do want -- that I do think are for today, and Mr. Rugg has already mentioned one of them, but I just want to emphasize that Mr. Goodbarn was a member of the special committee that operated earlier this summer, and the plaintiff nowhere alleges that he lacked independence in both his qualifications and in the way he acted as a member of that committee. He is -- that committee is no longer in

existence. He has not -- he has not -- and I don't know the details about the formation of the new special committee, I found out about it last night, but he is not on that committee.

THE COURT: But he remains on the board.

MR. MARKEL: He remains on the board. And so if we're looking at the difference between -- and I thought Your Honor's questions were very clear, both last time and today, how does the proposed discovery relate to the requested relief on the preliminary injunction. If that is what we're focused on today, then as I understand it, although I may have it wrong, but I've heard a few times and read it several times, my understanding is that the relief that's being requested on the preliminary injunction is that in the future somehow Mr. Ergen be barred from interfering with the process of bidding on this spectrum. That's what I understand is being requested.

Whatever happened with respect to the special committee that no longer is, I suggest to Your Honor, irrelevant to the question of whether or not an injunction in the future should be granted. And so, as Mr. Lebovitch said, they have -- they're focusing their discovery requests here on this preliminary injunction motion, expedited discovery that they're asking for, they're focusing that on something that happened in the past and that involves different people and

has nothing to do with what they're requesting from this Court on a preliminary injunction motion. And that is, as I understand, Your Honor -- and correctly me, obviously if I've got it wrong -- that's the only issue on which we are talking about expedited discovery.

So, Your Honor, I would respectfully request that the discovery of the activities of the special committee and Mr. Goodbarn in particular and all of the people whose depositions are being requested with respect to this expedited discovery are unnecessary in connection with the preliminary injunction.

The only other point, and it's even briefer, Your Honor, is my understanding is that under Nevada law that discovery of counsel for a party is only granted in exceptional circumstances.

THE COURT: That is Nevada law.

MR. MARKEL: Right. Thank you. And, Your Honor, what I hear is, well, sometimes it's happened in other cases that Mr. Lebovitch has been involved in. I don't question that it may have happened in other cases, perhaps in other jurisdictions with perhaps very different fact patterns. I don't know specifically. But what I do know is that at least in my humble opinion nothing close to exceptional circumstances have been demonstrated here for taking discovery from counsel to that special committee. Thank you very much

for hearing me, Your Honor.

THE COURT: Thank you.

Can I ask one question of Mr. Rugg before we go back to the plaintiffs. Mr. Rugg, Exhibit 5 to your brief that was filed yesterday is the report from the City Research folks.

MR. RUGG: Yes, Your Honor.

THE COURT: That is a report that was not requested by the corporation or the board or special committee, it was just something in the market; is that correct?

MR. RUGG: Correct, Your Honor.

THE COURT: I just wanted to make sure. Thank you.

MR. RUGG: Independent piece of research. Yeah, they do these all the time.

THE COURT: Somebody in the market doing whatever the market's going to do.

MR. RUGG: Correct, Your Honor.

THE COURT: All right. Thank you.

MR. BOSCHEE: I have -- I have one request of Your Honor before we rebut or -- I have calendar call in nine minutes in front of Judge Bare.

THE COURT: Okay. We'll take a short break for you to go to the third floor.

MR. BOSCHEE: Fair enough. I will be back. If you want to --

THE COURT: How long are you going to be?

MR. BOSCHEE: I'm happy to let Counsel continue without me.

THE COURT: No. Go. How long are you going to be?

MR. BOSCHEE: I shouldn't be more than 10 or 15 minutes, I hope.

THE COURT: I'll see you when you get back. Everybody else feel like taking a personal comfort break?

(Court recessed at 10:49 a.m., until 11:08 p.m.)

THE COURT: Anybody want to add anything before I hear rebuttal? Okay.

MR. LEBOVITCH: Thank you, Your Honor. Thank you for your patience.

Let's briefly start with where we ended, and then I'll go through Mr. Rugg's arguments. But as far as Mr. Goodbarn goes we do concede his independence, Your Honor, and, frankly, in terms of an injunction that would bring back, you know, the status quo, the appropriate position -- I mean, one way to implement the injunction, an obvious way would be to put Mr. Goodbarn and if there's another independent director -- apparently the company just hired -- just retained a new director. If there's two independent directors, that would be a logical way to cure essentially any injunction that's granted. It's the easiest thing. We did name Mr. Goodbarn. There's really multiple reasons, and, I'll be very frank about it, we didn't want an argument that he's an indispensable

party if he's not named, even tough we concede his independence -- to the extent we concede his independence, because he is the person who we're saying should be in charge. So that's one issue.

And also, he didn't resign. Mr. Howard resigned. We believe it was a protest. We think that's confirmed. We didn't know what happened, but, you know, frankly the focus is we're seeking relief, which logically gets cured by empowering Mr. Goodbarn and, if there is another truly independent director, perhaps another independent director. But we think that and our approach always has been if it turns out he really has been acting independently and perhaps without resigning trying to fight for the shareholders, we would not be continuing the claim against him.

I'll get to Mr. Markel's discovery points in the context of dealing with Mr. Rugg's other issues. I'll try to be very efficient. We're really not asking to take out the duly elected board. I mean, again, I think -- that's the way companies work. They set up a board however they want to. This board happened to have two independent directors initially. They expect that when there's a conflict they're going to have an independent committee take over. That's what happens. It happened in Hollinger, it's what happens many companies that are controlled companies. Here our view is Mr. Ergen changed his mind. He didn't want to let the independent

directors have their authority. That's exactly the problem here. But, again, there's nothing radical about it, that the conflicted directors routinely step aside and let the independent directors do their thing.

Section 78.140, it doesn't have -- it talks about what's void or voidable, Your Honor, the statute. It also talks about fairness, and it doesn't say anything about injunctive relief. And so our position on it is this provision, 78.140, is similar to other interested transaction statutes in other states. While the words will be different, there's going to be nuances, we don't see anything in that provision that goes beyond saying a transaction is not void or voidable -- a transaction that has taken place is not void or voidable solely because of a conflict if you have certain criteria met. But many, if not most or all, of the courts who've interpreted similar positions have said that this doesn't eliminate fiduciary duties. The statute does talk about a transaction still be fair. And, again, I think there's a lot of precedent that says, well, we read that fairness as an overlay to the provision, and so you're protecting third parties who engage in transactions with the company, you're protecting the contracts themselves that get executed. It doesn't mean there can't be equitable relief.

Mr. Rugg spoke about Harbinger, saying, well, they're suing everyone. We're not -- we're not trying to

prove Harbinger's claims, okay. Our point is that the board, by allowing Ergen to control its process, is lending credence to Harbinger's claims, whereas, again, obviously if the independent directors were controlling Dish's process, harbinger's claims against Dish would be fair less forceful.

The articles, the articles of incorporation, the charter, that -- really we tried to be very express. That claim for corporate opportunity, which we do think is valid, we think the special committee must have seen some validity to it, we're prepared to litigate that on a non-expedited schedule, but I will note, Your Honor, there is no reading of the charter that would permit Mr. Ergen to misappropriate corporate information in order to identify his business opportunities, nor would it absolve him of his duty of loyalty such that even if he's allowed to pursue an opportunity under the charter, he can't pursue an opportunity which knowingly, predictably will cause harm to Dish. And so that's a breach of the duty of loyalty independent of the charter.

Now, Harbinger knocked out Dish with its investments contract, its loan contract. It didn't knock out Ergen. I mean, that's an issue that is being litigated in Bankruptcy Court. We're not trying to prove that Ergen could or could not have bought the debt pursuant to the investment agreement. It is possible that that provision will be struck down, in which case Dish could have done something. But that's not the

issue now. Again, our point, simple point is Ergen, by buying the debt knowing he's the controller of Dish, it's not surprise that he and Dish would get sued for the way he bought the debt, which we've alleged was secretive and indirect. That is bad faith. He used corporate information about where Dish would look to buy spectrum, to find his target, and he also knew that that was going to expose Dish to a lawsuit which -- it's Exhibit 2 to my affidavit, Your Honor. I mean, they're seeking $4 billion in damages and various other remedies against Ergen, and there's other filings that seek remedies against Dish.

The point about the lack of a conflict, Your Honor, and Ergen's interest in Dish being very significant, the board's stock in Dish, I just want to start, I guess, with maybe the basic premises. I'm not aware of any precedent that would say that the fact the directors own stock in a company will outweigh them otherwise being beholden to a director. The cases -- I'm not aware of anyone -- any situation where a director -- where a court says, well, this director under the law would be beholden but they own stock and so therefore they're not. I've never even heard of that.

But let's talk about the argument about Ergen's incentives. It's a billion-dollar personal investment. Now, he's a wealthy man, but he has a billion-dollar personal investment that faces going to zero. That's what Harbinger

and LightSquared are trying to do if they disallow the claims or he'll take a huge loss on it.

THE COURT: And you're talking about the debt purchases.

MR. LEBOVITCH: The debt purchases that he made in his own account. So let's assume he's allowed to pursue that opportunity, Your Honor. He's facing economic risk. He's facing the loss of his voting rights. That's real and immediate. The City Group report that the defendants put in, which I'll talk about a little bit more, I mean, analysts will say a lot of things. This analyst is saying something which we agree with, is buying the spectrum would be a really good thing. It's not a controversial statement. It doesn't establish I think for the Court's purposes what in fact the market thinks or does. I mean, that's done with expert reports and submissions.

But that's one analyst's report that says it would be a good thing. We agree. We want Dish to get the spectrum. But that's not proof that Ergen is going to see the stock drop -- his stock drop if they fail. In fact, because of the Wall Street Journal article, because of knowledge coming out that Ergen is dominating the process, it's entirely possible that other analysts would say, well, yeah, the reason there's $17 of upside is because the market right now is skeptical because Ergen is interfering, he is dominating the process. That's

creates a discount on the stock. Well, what there's no showing of, and I could go back, but what there's no showing of, Your Honor, is that Ergen has a choice of I'm going to lose a couple hundred million dollars here or I'm going to lose anything on the Dish side. The lost opportunity may already be priced into the stock. There's no evidence to say right now on a motion to expedite to allow discovery for the Court to essentially adopt and say, well, he's going to lose much more if Dish is hurt than he would preserve by preserving his debt at Dish's expense. We know there's an immediate risk, and there's a completely abstract, hypothetical possibility that Dish stock would go down if they don't get the spectrum, and yet there's equal reason to believe that right now Dish stock has upside because it's been depressed by controlling shareholder misconduct.

The SLC very briefly. Again, I'm not aware of any precedent that says that the creation of an SLC can override the Court's ability to expedite and consider an injunction. I'm not arguing a case where that's actually happened. Typically an SLC happens where there's a non-expedited matter, there's no irreparable harm. What we -- what I think I heard is there's no resolution yet even creating this SLC. There's a decision to do so. And I've not heard any explanation how the SLC could actually provide the relief sought in Count 1 if it finds it meritorious. And I think that's critical, because

it's not good enough for our friends to say, well, they're going to have authority over the amended complaint. Well, as a particular matter the committee is putting the proverbial rabbit in the hat, because there's no way they can give the relief sought in Count 1, well, then what they're doing is they've already denied Count 1 through their creation, because Count 1 either will -- it'll rise and fall over the next few weeks. It's not a count that can be remedied in six months, nine months, or a year. So really what they're saying is, well, we'll consider the non-expedited matters, but they have no practical ability to consider the expedited matters. And I just think that, again, the SLC's existence can be a factor for the other claims. But if Your Honor believes we should get the chance to get discovery, what we think is limited, and present the record to Your Honor, it is no offense to the SLC to say, you go do your thing but right now I'm not going to stop my process, because I know that if I stop my process plaintiff's lose Count 1, they'll never get a remedy if I rely on you.

Mr. Rugg said something about Harbinger's theory is that Ergen's acting for Dish and our theory is Dish is acting at the whim of Ergen. I think -- I think it's a little bit semantic. Your Honor, our whole point is that right now today Dish needs to act independently of Ergen. That's the Corporate Governance 101 point that we make, that's the point

that in light of the creation of a special committee, its subsequent disbanding when they try to act independently, that's the remedy that we seek, which unquestionably can only help Dish in connection with its problem, which is a lawsuit that it never wanted. And that's Exhibit 2.

I talked about Ergen's financial interest.

The DBSD case, again, Mr. Rugg talked about, you know, how this isn't DBSD. The fear we have is not that the Court's going to say DBSD is being repeated, let's impose bad faith. The fear we have is the Harbinger complaint and the other filings in the Bankruptcy Court that do put Dish at risk today. The DBSD point is really to show this board knows it can get in trouble, should be hypersensitive even though we think any independent board would keep Ergen out of the process here.

The discovery. I'm getting down to the end, Your Honor. The discovery, I believe Mr. Rugg said it's all backwards looking, Mr. Markel said the special committee -- you know, what happened there was irrelevant to what's happening today. We disagree and we think again we're putting the rabbit in the hat. I'm sure that if that argument had any validity, then there would be no discovery until what happened in the Conrad Black case, because he had already disbanded his committee. And so if that committee disbanded and it's not relevant because that's all old history, why would you ever

have a record developing how you got here. And in the end, Your Honor, I believe anytime that Your Honor or frankly any judge has considered a basis for injunctive relief, to the extent there's any record it's a record of what has happened to date. So there's always a backwards-looking view. And what we say is the way to identify the predicate breaches and the harm and to shape the relief that Your Honor may grant is to say, okay, we know a committee was created, the defendants stipulated to that, but why were they created, what was their charge, what did they do, what were their conditions. Because there's a representation that they authorized a bid to be made. Well, I do think that that Journal article substantiates our concerns that maybe there were conditions to the bid. we know the committee wasn't around when the bid was actually made, so we don't know what problems that committee had. And by finding out what they expected in the process, what the independent directors wanted to see in the process then Your Honor can say, okay, I can see that having the independent process would put Dish in a better position and I can craft my remedy around essentially what the correct process looked like, assuming the special committee's process was a truly independent process. This is what I'm now seeing. So to say that we don't get to prove the predicate breach in an injunction hearing is, again, to put the rabbit in the hat and to just say, well, you'll never prove your claims.

So if Your Honor has concerns, thinks it's conceivable that you will grant an injunction, we -- I respectfully submit that we should get the discovery until what happened with the committee.

The depositions, I think Mr. Rugg said we seek two. No, no. We seek Mr. Ergen, who knows what's going on now. We asked for Mr. Goodbarn, and I said that, you know, maybe that's a conversation that can happen. We ask for Mr. Howard. Again, you know, maybe we would drop one of those and take one of the current directors. And we ask for the advisors. And on the advisors, I mean, the banker -- to the extent that Perella Weinberg did an analysis and gave advice to the committee and negotiated, those negotiations clearly are fair game, and we think the bankers' advice is not subject to attorney-client privilege. And for the lawyers I don't know how much more I can say. Unless they waive a privilege, we're not trying to force them to waive a privilege, but when you have a contract negotiated by lawyers or a transaction or a proposal negotiated typically by lawyers and bankers, not the special committee members handling those negotiations, they are the best source of that evidence, and I do think, Your Honor, when the lawyers are the ones doing the negotiation it's routine. If it turns out, Your Honor, that the lawyers here were not having the negotiations --

THE COURT: It's not routine here.

MR. LEBOVITCH: I understand. And again, we're not asking for litigation counsel --

THE COURT: I mean, in Nevada it's clearly not routine when they're negotiating deals. Even though it may not be privileged, it's clearly not routine.

MR. LEBOVITCH: You know, I appreciate that, Your Honor. And in the end I think that if we get other -- if we have another ability to provide discovery and the fact that we may not have a principal negotiator I guess used against us, then I'm not going to -- I'm not going to push for the lawyer. I just am trying to go to the best source of what happened in the discussions. But if it's -- you know, we think it would be appropriate, and we're not going to try to pierce a privilege, but if Your Honor would prefer we not do it, then I'm not going to push it.

THE COURT: It's not me. It's the Nevada Supreme Court, those guys in Carson City.

MR. LEBOVITCH: Understood, Your Honor. We think that if someone was leading a negotiation that that would be acceptable. But --

THE COURT: I understand what you're saying.

MR. LEBOVITCH: Yes.

THE COURT: I'm just telling you that's not it here.

MR. LEBOVITCH: I don't dispute that it's not routine.

THE COURT: Okay. Anything else you want to tell me?

MR. LEBOVITCH: I believe the answer to that is no. I think that covers it, Your Honor.

THE COURT: Okay. I want to thank counsel for the arguments you've made today. They are very informative, and I want to tell you they are very well done. I sat on a panel with Chief Justice Steel earlier in the week, so I'm familiar with Delaware law and the quality of practitioners, and it's been refreshing to have that quality of folks in front of me.

The formation of the special litigation to me -- committee to me is a very important step that the company has made, and I'm going to give the special litigation committee a little bit of leeway to do some things. So here's the plan.

The plaintiff's going to make a demand on the special litigation committee within 24 hours. So that means by Monday at maybe 10:00 a.m. Pacific Time you're going to have your demand to the special litigation committee.

The special litigation committee by noon Pacific Time on October 3rd will respond to that demand. That does not mean they have to complete their investigation; it simply means they must respond to that demand.

I need a status report by counsel by close of business Pacific Time on October 3rd. The matter will be on my chambers calendar on Friday, October 4th, and I will issue

a written decision on the motion for expedited discovery.

MR. LEBOVITCH: Your Honor, may I ask one question?

THE COURT: You can ask as many questions as you want.

MR. LEBOVITCH: I just -- we will follow the Court's instructions, make a demand. And I may be unfamiliar with this aspect of Nevada law. I just don't want to concede any challenge to independence particularly to Mr. Ortolf.

THE COURT: You're not conceding anything.

MR. LEBOVITCH: Okay. Just sometimes making a demand is a concession. I just -- as long as we preserve our arguments --

THE COURT: I'm not saying you've conceded anything.

MR. LEBOVITCH: That's fine, Your Honor.

THE COURT: I'm telling you I want to give the special litigation committee the benefit of the doubt and the opportunity to act. They can't do that if you don't make the demand on them.

MR. LEBOVITCH: We will make a demand as Your Honor instructed.

THE COURT: You probably don't know the Schoen case went up and down, up and down, and up and down, and I think Steve Peek and the others settled it, what, on the fourth attempt in front of Brent Adams. So, I mean, it's --

MR. LEBOVITCH: We'd hope to avoid that kind of

rollercoaster.

THE COURT: We're not going to do that. We're just going to do this. I understand it may have issues, it may cause concerns. We're going to make the demand, I'm going to then make a decision. What you put in the status reports may influence what I decide to do. But I've heard the documents, I have an idea about what I think we should do, but I want to wait and give the special litigation committee the opportunity to do something.

Mr. Ferrario, go catch your plane.

MR. FERRARIO: Thank you, Your Honor.

THE COURT: You're supposed to be in Cleveland at a deposition.

MR. BOSCHEE: And all the parties are going to file a separate status report? Is that what Your Honor's contemplating, just so I'm clear?

THE COURT: I would prefer separate status reports, because my guess is you guys won't see eye to eye, and by giving you the very short time frame I did it will be impossible to work out the issues that would permit it to be a joint status report.

MR. BOSCHEE: I just want to make sure, Your Honor.

THE COURT: Remember, I gave you very short time frames.

MR. LEBOVITCH: Yes, Your Honor.

THE COURT: And the reason is because I'm cognizant about the issues related to the injunctive relief that's being requested.

Anything else?

MR. LEBOVITCH: Thank you, Your Honor. Thank you for hearing us.

THE PROCEEDINGS CONCLUDED AT 11:28 A.M.

* * * * *

CERTIFICATION

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

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
Las Vegas, Nevada 89146

9/24/13

FLORENCE HOYT, TRANSCRIBER — DATE

EXHIBIT 7

Mark Lebovitch
(212) 554-1519
markl@blbglaw.com

September 27, 2013

BY EMAIL

Special Litigation Committee of Dish Network Corporation
c/o Messrs. George R. Brokaw and Tom A. Ortolf

Re: *Jacksonville Police and Fire Pension Fund on behalf of Dish Network Corporation v. Charles W. Ergen, et al.*

Dear Messrs. Brokaw and Ortolf:

As you know, we represent the Jacksonville Police and Fire Pension Fund in the above-referenced derivative action on behalf of Dish Network Corporation ("Dish"). We write because the refusal by the special litigation committee formed by Dish's board of directors (the "Board") on September 18, 2013 (the "SLC") to engage with us in any respect increases our concern about the SLC's willingness and ability to act independently of Dish's controlling shareholder, Charles W. Ergen, for the benefit of Dish and its minority shareholders

On September 23, 2013, we asked you to inform us by no later than September 26, 2013 of (i) the scope of the authority of the SLC; (ii) the basis for the SLC's purported independence; (iii) how the SLC is funded; (iv) who will act as the SLC's counsel (and its other advisors, if any); and (v) the expected timing for the SLC's work. We also requested that you provide a copy of the Board minutes or Board resolution approving the creation of the SLC as well as comprehensive disclosure regarding any relationships between the SLC's members (including any of their relatives or business affiliates), on the one hand, and Dish and/or Mr. Ergen (including other companies Mr. Ergen controls), on the other hand.

While we would have engaged with you in good faith if you had contacted us and indicated that you needed more time to provide all the requested information, or that you could provide some but not all of the information in accordance with our letter, it is troubling that you have not responded to our request at all. Much of the information we seek, such as the Board resolution creating the SLC, the name(s) of the SLC's counsel, and the expected timing for the SLC's work should be readily available to the SLC by this time. If it is not, such continued lack

of form to the SLC's work casts significant doubt on the SLC's ability to do the job that was described to the Court at the last hearing. As noted in our September 23, 2013 letter, time is of the essence.

Please provide the requested materials or otherwise contact us as soon as possible, so that we can all work together to achieve a result that protects Dish and its shareholders, and gives no favor to Mr. Ergen's personal wishes.

Sincerely yours,

Mark Lebovitch /jvl

Mark Lebovitch

EXHIBIT 8

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
LIGHTSQUARED INC., *et al.*,	)	Case No. 12-12080 (SCC)
Debtors.[1]	)	Jointly Administered

ORDER (A) ESTABLISHING BID PROCEDURES, (B) SCHEDULING DATE AND TIME FOR AUCTION, (C) APPROVING ASSUMPTION AND ASSIGNMENT PROCEDURES, (D) APPROVING FORM OF NOTICE, AND (E) GRANTING RELATED RELIEF

Upon the motion (the "Motion")[2] of LightSquared Inc. and certain of its affiliates, as debtors and debtors in possession (collectively, "LightSquared" or the "Debtors")[3] in the above-captioned chapter 11 cases (the "Chapter 11 Cases"), for entry of an order (the "Order"), pursuant to sections 105, 503, 507, 1123, and 1129 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"), Rules 2002, 6004, 6006, 9007, 9008, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), Rules 6004-1, 6006-1, and 9006-1 of the Local Rules for the United States Bankruptcy Court for the Southern District of New York (the "Local Rules"), and General Order M-383 of the United States

[1] The debtors in these Chapter 11 Cases (as defined below), along with the last four digits of each debtor's federal or foreign tax or registration identification number, are: LightSquared Inc. (8845), LightSquared Investors Holdings Inc. (0984), One Dot Four Corp. (8806), One Dot Six Corp. (8763), SkyTerra Rollup LLC (N/A), SkyTerra Rollup Sub LLC (N/A), SkyTerra Investors LLC (N/A), TMI Communications Delaware, Limited Partnership (4456), LightSquared GP Inc. (6190), LightSquared LP (3801), ATC Technologies, LLC (3432), LightSquared Corp. (1361), LightSquared Finance Co. (6962), LightSquared Network LLC (1750), LightSquared Inc. of Virginia (9725), LightSquared Subsidiary LLC (9821), Lightsquared Bermuda Ltd. (7247), SkyTerra Holdings (Canada) Inc. (0631), SkyTerra (Canada) Inc. (0629), and One Dot Six TVCC Corp. (0040). The location of the debtors' corporate headquarters is 10802 Parkridge Boulevard, Reston, VA 20191.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion or the Bid Procedures, as applicable.

[3] For the avoidance of doubt, any decision to be made, or action to be taken, by LightSquared under the Bid Procedures, the Auction, and any resulting Sale, shall be made or taken at the direction of the independent committee of LightSquared's board of directors.

Bankruptcy Court for the Southern District of New York ("General Order M-383"),

(i) establishing the proposed bid procedures (the "Bid Procedures") for the sale(s) (the "Sale") of all or substantially all of the assets of LightSquared, or any grouping or subset thereof, including authorizing LightSquared to grant bidder protections in connection with the Sale; (ii) authorizing and scheduling a date and time to hold an auction (the "Auction") to solicit higher or otherwise better bids for LightSquared's assets; (iii) approving assumption and assignment procedures (the "Assumption and Assignment Procedures"); (iv) approving the form and manner of notice (the "Sale Notice") with respect to the Sale and the Auction; and (v) granting related relief, all as more fully set forth in the Motion; and it appearing that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the Amended Standing Order of Reference Re: Title 11, dated January 31, 2012 (Preska, C.J.); and it appearing that this proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and it appearing that venue of this proceeding and the Motion in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and notice of the Motion appearing adequate and appropriate under the circumstances; and the Court having found that no other or further notice is needed or necessary; and the ad hoc secured group of Prepetition LP Lenders (the "Ad Hoc Secured Group") having timely filed a motion for entry of an order establishing certain other bid procedures and granting related relief [Docket No. 809] (the "Ad Hoc Secured Group Motion"); and U.S. Bank National Association ("U.S. Bank") and MAST Capital Management, LLC (on behalf of itself and its management funds and accounts collectively, "MAST") having timely filed a motion for entry of an order establishing certain other bid procedures and granting related relief [Docket No. 834] (the "U.S. Bank/MAST Motion" and, together with the Ad Hoc Secured Group Motion, the "Lender Motions"); and the Ad Hoc Secured Group having timely filed an objection to the Motion [Docket No. 850] (the

"Ad Hoc Secured Group Objection"); and U.S. Bank and MAST having timely filed an objection to the Motion [Docket No. 844] (the "U.S. Bank/MAST Objection" and, together with the Ad Hoc Secured Group Objection, the "Lender Objections"); and the ad hoc group of holders of, advisors or affiliates of advisors to holders of, or managers of various accounts that hold Series A Preferred Units of LightSquared LP (the "Ad Hoc Preferred LP Group") having timely filed a statement with respect to the Bid Procedures Motions [Docket No. 842] (the "Statement"); and objections to the Ad Hoc Secured Group Motion and U.S. Bank/MAST Motion having been timely filed by (i) LightSquared [Docket No. 847], (ii) SIG Holdings, Inc. [Docket No. 849], (iii) Centaurus Capital LP [Docket No. 848], and (iv) Harbinger Capital Partners, LLC [Docket No. 845] (together, the "Stakeholder Objections"); and the Ad Hoc Secured Group having timely filed an omnibus reply to the Stakeholder Objections [Docket No. 863] (the "Ad Hoc Secured Group Reply"); and LightSquared having timely filed an omnibus reply to the objections to the Motion [Docket No. 864] (the "LightSquared Reply" and, together with the Ad Hoc Secured Group Reply, the "Replies"); and the Court having reviewed the Motion, the Lender Motions, the Stakeholder Objections, the Lender Objections, the Statement, and the Replies and having heard statements in support of the Motion at a hearing held before the Court on September 24, 2013 and a hearing held before the Court on September 30, 2013 (collectively, the "Hearing"); and LightSquared having modified the Order in response to the Lender Motions, the Stakeholder Objections, the Lender Objections, the Statement, the Replies, and all other issues raised at the Hearing; and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and it appearing, and the Court having found, that the relief granted by this Order is in the best interests of LightSquared, its estates, its creditors, and other parties in interest; and any objections to the relief requested in

the Motion having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY FOUND AND DETERMINED THAT:[4]

A. **Bid Procedures.** The Bid Procedures, in the form annexed hereto as Schedule 1 and incorporated herein by reference, are fair, reasonable, and appropriate under the circumstances and are designed to maximize recovery on, and realizable value of, LightSquared's estates.

B. **LBAC Bid Protections and Designation of LBAC as Qualified Bidder.** LightSquared and/or other parties in interest have demonstrated that payment to L-Band Acquisition Corp. ("LBAC") of a break-up fee of $51.8 million, subject to upward adjustment in accordance with the Bid Procedures (the "LBAC Break-Up Fee" and, together with the LP Expense Reimbursement,[5] the "LBAC Bid Protections") is an actual and necessary cost and expense of preserving the LP Debtors' estates within the meaning of section 503(b) of the Bankruptcy Code. For purposes of this Order and the Bid Procedures, LBAC shall be deemed a Qualified Bidder.

C. **MSAC Bid Protections and Designation of MSAC as Qualified Bidder.** In connection with the MSAC Bid, MAST Spectrum Acquisition Corp. and/or one or more of its affiliates or designees ("MSAC") shall be entitled to the Inc. Expense Reimbursement.[6] For purposes of this Order and the Bid Procedures, MSAC shall be deemed a

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4 Regardless of the heading under which they appear, any (1) findings of fact that constitute conclusions of law shall be conclusions of law and (2) conclusions of law that constitute findings of fact shall be findings of fact. See Fed. R. Bankr. P. 7052. All findings of fact and conclusions of law announced by the Court at the Hearing in relation to the Motion are incorporated herein to the extent inconsistent herewith.

5 "LP Expense Reimbursement" has the meaning set forth in the *Order Approving Expense Reimbursement and Related Relief for L-Band Acquisition, LLC and MAST Spectrum Acquisition Company LLC and Related Entities* [Docket No. 880] (the "Expense Order").

6 "Inc. Expense Reimbursement" has the meaning set forth in the Expense Order.

Qualified Bidder.

D. **Further Stalking Horse Bid Protections.** LightSquared has demonstrated a compelling and sound business justification for authorizing the payment of bid protections (the "Potential Stalking Horse Bid Protections") with respect to the applicable Assets as follows: (i) a break-up fee payable to the Potential Stalking Horse Bidder of up to 3% of the cash purchase price of the applicable Assets set forth in the Potential Stalking Horse Bid and (ii) a maximum expense reimbursement payable to the Potential Stalking Horse Bidder of up to $2,000,000. LightSquared has further demonstrated that payment of the Potential Stalking Horse Bid Protections (subject to the provisions set forth in decretal paragraphs 10 through 12 hereof) is supported under the circumstances, timing, and procedures set forth in the Bid Procedures and by LightSquared's compelling and sound business justification.

E. The Potential Stalking Horse Bid Protections, if authorized pursuant to the provisions of this Order, are fair, reasonable, and provide a benefit to the applicable LightSquared estates, creditors, stakeholders, and other parties in interest in these Chapter 11 Cases.

F. If necessary, and subject to the provisions set forth in decretal paragraphs 10 through 12 hereof in respect of the Potential Stalking Horse Bid Protections, LightSquared's payment to a Potential Stalking Horse Bidder of the Bid Protections is (i) an actual and necessary cost and expense of preserving the applicable LightSquared estates, within the meaning of section 503(b) of the Bankruptcy Code, (ii) of substantial benefit to the applicable LightSquared estates, and (iii) reasonable and appropriate in light of, among other things, (a) the size and nature of the proposed Sale, (b) the substantial efforts that will have been expended by a Potential Stalking Horse Bidder, notwithstanding that such the Sale is subject to higher or better

offers, and (c) the substantial benefits a Potential Stalking Horse Bidder will have provided to the applicable LightSquared estates, their creditors, and all parties interest herein, including, among other things, by increasing the likelihood that the best possible price for the applicable Assets will be received.

G. The entry of this Order is in the best interest of LightSquared and its estates, creditors, interest holders, and other parties in interest herein.

THEREFORE, IT IS ORDERED THAT:

1. The Motion is granted solely to the extent provided herein.

Bid Procedures

2. The Bid Procedures are hereby approved in all respects and shall apply with respect to, and shall govern all proceedings related to, the Auction and Sale of substantially all of the Assets or any grouping or subset of the Assets. Failure to specifically include or reference a particular provision of the Bid Procedures in this Order shall not diminish or impair the effectiveness of such provision.

3. At or before the Confirmation Hearing (as defined below), consistent with the Bid Procedures and to obtain the highest or otherwise best offer(s) for the Assets, LightSquared, after consultation with the Stakeholder Parties, may impose such other terms and conditions as it may determine (after consultation with the Stakeholder Parties) to be in the best interests of LightSquared's estates and creditors.

Bid Deadline, Auction, and Confirmation Hearing

4. The deadline for a Potential Bidder to submit bids shall be November 20, 2013 at 5:00 p.m. (prevailing Eastern time) (the "Bid Deadline"). LightSquared may, in its reasonable discretion (after providing advance notice to the Stakeholder Parties of such

decision), extend the Bid Deadline once or successively, but it is not obligated to do so; provided, that in no event shall the Bid Deadline be extended beyond November 25, 2013. If LightSquared extends the Bid Deadline, it shall promptly notify all Potential Bidders of the extension.

5. If LightSquared receives a Qualified Bid (other than the LBAC Bid or the MSAC Bid) prior to the Bid Deadline, the Auction shall be held on November 25, 2013 at 10:00 a.m. (prevailing Eastern time) (provided, however, that if the Bid Deadline is extended in LightSquared's reasonable discretion, after providing advance notice to the Stakeholder Parties of such decision, to November 25, 2013, the Auction shall be conducted on December 3, 2013 beginning at 10:00 a.m. (prevailing Eastern time)) at the offices of Milbank, Tweed, Hadley & McCloy LLP, One Chase Manhattan Plaza, New York, NY 10005. The Auction may be adjourned by LightSquared, with the consent of the Lender Parties, to any date agreed to by LightSquared and the Lender Parties; provided, that the Auction shall not be adjourned beyond December 6, 2013.

6. The Court shall hold a hearing on December 10, 2013 at 10:00 a.m. (prevailing Eastern time) (the "Confirmation Hearing") in the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton Custom House, Courtroom No. 621, One Bowling Green, New York, NY 10004, at which time the Court shall consider the Sale[7] as set forth in the Motion. The Confirmation Hearing may be continued from time to time by the Court or LightSquared (at the Court's direction) without further notice other than by adjournment being announced in open court or by a notice of adjournment filed with the Court and served in accordance with the Case Management Order.

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[7] For the avoidance of doubt, a "Sale" shall be deemed to include a sale of any grouping or subset of the Assets.

7. Any objections to the Court's approval of the Sale must be filed and served in accordance with the Disclosure Statement Order[8] by November 26, 2013 at 4:00 p.m. (prevailing Eastern time) and on the following parties: (i) Milbank, Tweed, Hadley & McCloy LLP, One Chase Manhattan Plaza, New York, NY 10005, Attn: Matthew S. Barr, Esq., Steven Z. Szanzer, Esq., and Karen Gartenberg, Esq., counsel to LightSquared, (ii) Kirkland & Ellis LLP, 601 Lexington Avenue, New York, NY 10022 (Attn: Paul M. Basta, Esq. and Joshua A. Sussberg, Esq.), counsel to the Independent LightSquared Committee, (iii) the Notice Parties, and (iv) any additional entities on the Master Service List (as defined in the Case Management Order); provided, however, that objections to LightSquared's selection of the highest and otherwise best bid only must be filed, served, and received by the aforementioned parties by December 6, 2013 at 11:59 p.m. (prevailing Eastern time). The failure to file and serve an objection to the Court's approval of the Sale shall be a bar to the assertion thereof at the Confirmation Hearing or thereafter.

Bid Protections

8. ***LBAC Bid Protections.*** The LBAC Break-Up Fee set forth in the Bid Procedures is hereby approved to the extent set forth herein. LightSquared is authorized and directed to pay the LBAC Break-Up Fee to LBAC in accordance with the terms of the LBAC Stalking Horse Agreement and the Bid Procedures, without further order of this Court; provided, however, the LBAC Stalking Horse Agreement shall not be modified as it relates to the LBAC Bid Protections, including with respect to the timing or circumstances under which the LBAC Bid Protections are earned and become an allowed administrative claim against the LP Debtors;

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[8] "Disclosure Statement Order" means *Order (I) Approving Disclosure Statements, (II) Approving Solicitation and Notice Procedures with Respect to Confirmation of Competing Plans, (III) Approving Forms of Various Ballots and Notices in Connection Therewith, (IV) Approving Scheduling of Certain Dates in Connection with Confirmation of Competing Plans, and (V) Granting Related Relief.*

provided, further, and notwithstanding anything to the contrary in the LBAC Stalking Horse Agreement, the LBAC Break-Up Fee shall be earned (and any claim of LBAC in respect of same shall be an allowed administrative expense claim against the LP Debtors) at the times set forth in the LBAC Stalking Horse Agreement, but shall not be payable by the LP Debtors until consummation of an alternative transaction; provided, further, and for the avoidance of doubt, termination of the LBAC Stalking Horse Agreement pursuant to section 8.1(b) thereof, which shall be deemed to occur as a result of an event contemplated in section 8.1(b), shall not result in or otherwise trigger the payment of the LBAC Bid Protections pursuant to section 8.3 of the LBAC Stalking Horse Agreement or otherwise.

9. ***MSAC Bid Protections.*** In connection with the MSAC Bid, MSAC shall be entitled to the Inc. Expense Reimbursement.

10. ***Potential Stalking Horse Bid Protections.*** To the extent LightSquared determines to proceed with a transaction proposed by a Potential Stalking Horse Bidder that includes the payment of Potential Stalking Horse Bid Protections, LightSquared shall (a) provide a confidential written Notice of Proposed Grant of Potential Stalking Horse Bid Protections (a "Bid Protections Notice") by hand delivery, e-mail, facsimile, or overnight courier to each of the Stakeholder Parties and each of their respective counsel and financial advisors (the "Bid Protections Notice Parties"), inviting the Bid Protections Notice Parties to a meeting at the offices of Milbank, Tweed, Hadley & McCloy LLP on not less than one (1) business day's notice, and (b) orally advise counsel to the Bid Protections Notice Parties of (i) the name of the Potential Stalking Horse Bidder, (ii) LightSquared's estimated range of aggregate consideration offered by such bidder and the form thereof, (iii) the proposed Potential Stalking Horse Bid Protections to be provided, and (iv) any material conditions to the proposed transaction (the "Bid

Protections Disclosure").

11. The Bid Protections Notice Parties and the respective members of each of the Stakeholder Parties shall be obligated to maintain the confidentiality of the Bid Protections Notice, the Bid Protections Disclosure, and the contents thereof, and shall not disclose or discuss the Bid Protections Notice, the Bid Protections Disclosure, or the contents thereof with any person or entity that did not receive a copy of the Bid Protections Notice. If no Bid Protections Notice Party objects to the grant of the Potential Stalking Horse Bid Protections pursuant to paragraph 12 below, then the grant of such Potential Stalking Horse Bid Protections shall be deemed approved pursuant to this Order without further notice, hearing, or order of the Bankruptcy Court.

12. If a Bid Protections Notice Party objects to the grant of the Potential Stalking Horse Bid Protections as disclosed in the Bid Protections Disclosure, such party shall have one (1) business day following the holding of the scheduled meeting pursuant to paragraph 10 above to provide counsel to LightSquared and the other Bid Protections Notice Parties with written notice by facsimile and e-mail transmission of any such objection (the "Bid Protections Objection"). Any Bid Protections Objection shall remain confidential and be served on, and made available only to, the Bid Protections Notice Parties. On request of LightSquared, the Court shall schedule and hold an emergency, expedited hearing to consider any Bid Protections Objection (which hearing may be conducted in person or telephonically) as soon as the Court can hear the parties (the "Bid Protections Hearing"). At any Bid Protections Hearing, this Court only shall consider whether the grant of the proposed Potential Stalking Horse Bid Protections, as disclosed in the Bid Protections Disclosure, should be approved. The Bid Protections Hearing

shall be conducted *in camera* and attendance and participation shall be limited to the Bid Protections Notice Parties.

13. The Potential Stalking Horse Bid Protections are hereby approved pursuant to sections 105, 503, 507, and 1123 of the Bankruptcy Code.

Authorization

14. LightSquared is authorized and directed to take such actions as contemplated by the Bid Procedures prior to the Auction and the Confirmation Hearing, including, without limitation, actions to notify creditors, customers, regulators, or other interested parties regarding the Sale and to obtain any necessary consents or approvals regarding the Sale or any other actions necessary to effectuate the Sale.

Notice

15. Notice of (a) the Motion, (b) the Bid Procedures, (c) the Auction, (d) the Sale, (e) the Confirmation Hearing, and (f) the proposed assumption and assignment of the Selected Contracts or other similarly selected contracts to the Successful Bidder(s) shall be good and sufficient, and no other or further notice shall be required, if the following is given:

(a) Notice of Bid Procedures, Auction, and Related Deadlines. Within five (5) business days after entry of this Order, LightSquared (or their agents) shall:

i. provide a copy of (A) this Order and (B) notice, in substantially the form attached hereto as Schedule 2 (the "Sale Notice"), of the Bid Procedures, Sale, Auction, and Confirmation Hearing by email, mail, facsimile, and/or overnight delivery service, upon: (1) the Notice Parties, (2) the Internal Revenue Service, (3) the United States Attorney for the Southern District of New York, (4) the Federal Communications Commission, (5) Industry Canada, (6) all other parties who have filed a notice of appearance in the Chapter 11 Cases, and (7) all known entities that have previously expressed a bona fide interest in purchasing the Assets in the twelve (12) months preceding the date of the Motion (collectively, the "Sale Notice Parties");

ii. publish the Sale Notice (in a format modified for publication) on one occasion each in *The Wall Street Journal* (national edition) and *The Globe and Mail* (national edition); and

iii. cause the Sale Notice to be published on the Website.

(b) Notice of Successful Bidder(s). After LightSquared has selected one or more Successful Bid(s) in accordance with the terms of the Bid Procedures, LightSquared shall, as soon as immediately practicable after the Auction but no later than one (1) business day after the conclusion of the Auction, provide electronic notice of the results of the Auction, which will include a list of any executory contracts and unexpired leases (the "Selected Contracts") to be assumed by LightSquared and assigned to the proposed Successful Bidder(s), which list may be amended or modified at any time prior to the closing of the applicable Sale transaction in accordance with the Confirmation Order(s) and applicable purchase agreement, on the Court's docket.

(c) Notice of Confirmation Hearing. Pursuant to the Disclosure Statement Order, notice of the Confirmation Hearing shall be served to all holders of claims or equity interests in the Chapter 11 Cases and published no later than October 29, 2013.

(d) Assumption, Assignment, and Cure Notice.

i. No later than seven (7) calendar days prior to November 29, 2013, LightSquared shall file with the Court, and serve upon the counterparties to the executory contracts and unexpired leases to be assumed, or assumed and assigned, by LightSquared under a chapter 11 plan, a notice regarding the proposed assumption, or assumption and assignment, of its executory contract or unexpired lease and the proposed cure obligations in connection therewith (the "Cure Costs"), substantially in the form attached as Schedule 6 to the Disclosure Statement Order and attached hereto as Schedule 3 (the "Contract and Lease Counterparties Notice"). The Contract and Lease Counterparties Notice will (A) list the applicable Cure Costs, if any, (B) describe the procedures for filing objections to the proposed assumption, or assumption and assignment, or Cure Costs, and (C) explain the process by which related disputes shall be resolved by the Court.

ii. Any objection by a counterparty to an executory contract or unexpired lease to a proposed assumption, assumption and assignment, or related cure amount must be filed, served, and actually received by (A) Milbank, Tweed, Hadley &

McCloy LLP, One Chase Manhattan Plaza, New York, NY 10005 (Attn: Matthew S. Barr, Esq., Steven Z. Szanzer, Esq., and Karen Gartenberg, Esq.), counsel to LightSquared, (B) the applicable Qualified Bidder, and (C) any other notice parties identified on the Contract and Lease Counterparties Notice no later than 4:00 p.m. (prevailing Eastern time) on November 29, 2013; provided, however, that any objection by a counterparty to an executory contract or unexpired lease solely to the proposed purchaser's financial wherewithal must be filed, served, and actually received by the aforementioned parties no later than 11:59 p.m. (prevailing Eastern time) on December 6, 2013.

iii. KCC will serve each counterparty to an executory contract or unexpired lease with a copy of the Confirmation Hearing Notice to ensure that such parties receive notice of the Confirmation Hearing.

iv. Neither the exclusion nor inclusion of any contract or lease on the Contract and Lease Counterparties Notice, nor anything contained in any chapter 11 plan filed in these Chapter 11 Cases, shall constitute an admission by the applicable plan proponent(s) that any such contract or lease is or is not, in fact, an executory contract or unexpired lease pursuant to section 365 of the Bankruptcy Code. The inclusion of any contract or lease on the Contract and Lease Counterparties Notice does not ultimately establish that such contract or lease shall be assumed, or assumed and assigned, as all plan proponents expressly reserve the right to alter, amend, modify, or supplement the Contract and Lease Counterparties Notice at any time prior to the effective date of, and in accordance with, the applicable chapter 11 plan.

v. At the Confirmation Hearing, only those Selected Contracts (and the corresponding Cure Costs) listed on the Contract and Lease Counterparties Notice that have been selected to be assumed by the Successful Bidder at the Auction shall be the Selected Contracts subject to approval by the Court, and all plan proponents shall reserve their rights for all other contracts.

vi. If no objection with respect to a Selected Contract is timely received, (A) the counterparty to such Selected Contract shall be deemed to have consented to the assumption and assignment of the Selected Contract to the Successful Bidder and shall be forever barred from asserting any objection with regard to such assumption and assignment, and (B) the Cure

Costs set forth in the Contract and Lease Counterparties Notice shall be controlling, notwithstanding anything to the contrary in any Selected Contract, or any other document, and the counterparty to a Selected Contract shall be deemed to have consented to the Cure Costs and shall be forever barred from asserting any other claims related to such Selected Contract against LightSquared or the Successful Bidder, or the property of any of them.

vii. Any objection not consensually resolved prior to the Confirmation Hearing shall be heard at the Confirmation Hearing, with any related Cure Costs or adequate assurance of future performance fixed by the Court.

viii. Except as may be otherwise agreed to by all parties to a Selected Contract, on or before the closing of the applicable Purchase Agreement, the cure of any defaults under a Selected Contract necessary to permit the assumption and assignment thereof shall be by: (A) payment of the undisputed Cure Costs and/or (B) establishment of a reserve with respect to any disputed Cure Costs. The party responsible for paying the Cure Costs shall be set forth in the Purchase Agreement of the applicable Successful Bidder.

16. Notwithstanding any other provision of this Order or any other Order of this Court, no assignment or transfer of control of any rights and interests of LightSquared in any federal license or authorization issued by the Federal Communications Commission (the "FCC") shall take place prior to the issuance of FCC regulatory approval for such assignment pursuant to the Communications Act of 1934, as amended, and the rules and regulations promulgated thereunder. The FCC's rights and powers to take any action pursuant to its regulatory authority, including, but not limited to, imposing any regulatory conditions on such assignments or transfer of control and setting any regulatory fines or forfeitures, are fully preserved, and nothing herein shall proscribe or constrain the FCC's exercise of such power or authority to the extent provided by law.

17. Nothing in the Bid Procedures or this Order shall prohibit, restrict, or otherwise limit the ability of any party to file and prosecute any competing chapter 11 plan,

including a plan that contemplates the retention by LightSquared, or the alternative disposition, of the Assets, or any ability of any party in interest to object to any plan or Sale, or contest any determinations made by LightSquared under the Bid Procedures.

18. This Court shall retain jurisdiction to hear and determine all matters arising from the interpretation, implementation, and enforcement of this Order.

Dated: October 1, 2013
New York, New York

/s/ Shelley C. Chapman
HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Schedule 1

Bid Procedures

BID PROCEDURES

Set forth below are the procedures (the "Bid Procedures") to be employed in connection with the proposed auction (the "Auction") and sale (the "Sale") of (i) substantially all of the assets (the "LP Assets") of LightSquared LP ("LSLP"), ATC Technologies, LLC, LightSquared Corp., LightSquared Inc. of Virginia, LightSquared Subsidiary LLC, LightSquared Finance Co., LightSquared Network LLC, Lightsquared Bermuda Ltd., SkyTerra Holdings (Canada) Inc., and SkyTerra (Canada) Inc. (collectively, the "LP Debtors"), (ii) substantially all of the assets (the "Inc. Assets" and, together with the LP Assets, the "Assets") of LightSquared Inc., LightSquared Investors Holdings Inc., SkyTerra Rollup LLC, One Dot Four Corp., One Dot Six Corp., SkyTerra Rollup Sub LLC, One Dot Six TVCC Corp., TMI Communications Delaware, Limited Partnership, LightSquared GP Inc., and SkyTerra Investors LLC (the "Inc. Debtors" and, together with the LP Debtors, the "Debtors" or "LightSquared"),[1] or (iii) any grouping or subset of the Assets.

A hearing (the "Confirmation Hearing") to consider approval of the Sale of the Assets, or any grouping or subset thereof, shall be conducted on December 10, 2013 at 10:00 a.m. (prevailing Eastern time) at the United States Bankruptcy Court for the Southern District of New York, Alexander Hamilton U.S. Custom House, Courtroom No. 621, One Bowling Green, New York, NY 10004 (the "Bankruptcy Court"). The Confirmation Hearing may be continued from time to time by the Bankruptcy Court or LightSquared (at the Bankruptcy Court's direction) without further notice other than by such adjournment being announced in open court or by a notice of adjournment filed with the Bankruptcy Court and served in accordance with the *Order Establishing Certain Notice, Case Management, and Administrative Procedures* [Docket No. 121] (the "Case Management Order").

a. **Assets to Be Sold.** LightSquared will offer for Sale all or substantially all of the Assets. For the avoidance of doubt, in connection with the Sale and these Bid Procedures, any Potential Bidder (as defined below) may submit a bid for any or all of the Assets of LightSquared, and, for purposes hereof, "Sale" shall be deemed to include a sale of any grouping or subset of the Assets. LightSquared, in consultation with (i) the Ad Hoc Secured Group, exclusive of SPSO[2] and its affiliates (the "Independent Ad Hoc Secured

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[1] For the avoidance of doubt, any decision to be made by LightSquared under these Bid Procedures, or in connection with the plan process, including, without limitation, the acceptance of any Successful Bid (or Second-Highest Bid) (each as defined below), shall be made by the independent committee of LightSquared's board of directors (the "Independent LightSquared Committee"). Actions taken by the Independent LightSquared Committee may be taken (a) on the advice of Kirkland & Ellis LLP ("Kirkland"), as counsel to the Independent LightSquared Committee, and/or the advice of Moelis & Company ("Moelis"), as LightSquared's financial advisor, or (b) by Kirkland or Moelis, in each case at the direction of the Independent LightSquared Committee. For further avoidance of doubt, in connection with any decision made by the Independent LightSquared Committee under these Bid Procedures, or in connection with the plan process, the Independent LightSquared Committee may also consult with counsel to, and advisors for, any other party in LightSquared's chapter 11 cases, including, without limitation, LightSquared's regulatory counsel.

[2] The "Ad Hoc Secured Group" means that certain ad hoc secured group of holders of loans made pursuant to that certain Credit Agreement, dated as of October 1, 2010, between LSLP, as borrower, certain of LSLP's affiliates (including, but not limited to, the other Sellers), as guarantors, the lenders party thereto,

Group"), and (ii) MAST Capital Management, LLC (on behalf of itself and its management funds and accounts, collectively "MAST") and U.S. Bank National Association ("U.S. Bank" and, collectively with the Independent Ad Hoc Secured Group and MAST, the "Lender Parties" and, collectively with the Ad Hoc Group of LP Preferred Shareholders and SIG Holdings, Inc., the "Stakeholder Parties"), through the Stakeholder Parties' respective advisors, will appropriately assess any bid to determine whether it is a Qualified Bid (as defined below).

b. **Bidding Process.** LightSquared, in consultation with the Stakeholder Parties, shall, in its reasonable discretion: (i) determine whether any person is a Potential Bidder; (ii) coordinate the efforts of Potential Bidders in conducting their respective due diligence investigations regarding LightSquared's businesses and Assets; (iii) receive offers from Qualified Bidders (as defined below); and (iv) negotiate any offer made to purchase Assets by a Qualified Bidder (collectively, the "Bidding Process").

c. **Due Diligence for Potential Bidders.** LightSquared, in consultation with the Stakeholder Parties, shall provide each Potential Bidder with reasonable due diligence information upon reasonable request. In addition, LightSquared shall make available to all Potential Bidders (including, without limitation, each Stalking Horse Bidder (as defined below)) draft disclosure schedules by no later than 5:00 p.m. (prevailing Eastern time) on October 1, 2013, and a proposed schedule of third-party consents and approvals that would be necessary to consummate a sale of the Assets or any subset thereof by no later than 5:00 p.m. (prevailing Eastern time) on October 4, 2013. None of LightSquared, the Ad Hoc Secured Group, U.S. Bank, MAST, or any of the foregoing parties' affiliates, representatives, or advisors, is obligated to furnish any information relating to the Assets to any person except, in the case of LightSquared and its controlled affiliates, representatives, and advisors as applicable, to Potential Bidders prior to the Bid Deadline (as defined below). Potential Bidders are advised to exercise their own discretion before relying on any information regarding the Assets, whether provided by LightSquared, its representatives, or any other party. The due diligence period will end on the Bid Deadline. To be a "Potential Bidder," each bidder (other than LBAC and MSAC (each as defined below)):

i. must have delivered an executed confidentiality agreement in form and substance reasonably satisfactory to LightSquared, in consultation with the Lender Parties, unless such bidder informs LightSquared that it does not seek access to any non-public diligence materials and intends to submit a bid not conditioned on due diligence and receipt of information from LightSquared;

UBS AG, Stamford Branch, as administrative agent, and UBS Securities LLC, as arranger, syndication agent, and documentation agent (as amended, restated, supplemented, and/or modified, the "Prepetition LP Credit Agreement"), as such group may be reconstituted from time to time. "SPSO" means SP Special Opportunities, LLC.

ii. must have delivered the most current audited (if applicable) and the most current unaudited financial statements (collectively, the "Financials") of the Potential Bidder, or, if the Potential Bidder is an entity formed for the purpose of acquiring Assets, the Financials of the Potential Bidder's equity holder(s) or other financial backer(s), or such other form of financial disclosure and evidence reasonably acceptable to LightSquared, in consultation with the Stakeholder Parties, demonstrating such Potential Bidder's financial ability to: (A) close the proposed transaction (the "Proposed Transaction") contemplated by the Potential Bidder's proposed purchase agreement (together with its exhibits and schedules, and any ancillary agreements related thereto, the "Proposed Agreement"); and (B) provide adequate assurance of future performance to counterparties to any executory contracts and unexpired leases to be assumed by LightSquared and assigned to the Potential Bidder; provided, that if a Potential Bidder is unable to provide Financials, LightSquared, in consultation with the Stakeholder Parties, may accept such other information sufficient to demonstrate to LightSquared's reasonable satisfaction (after consultation with the Stakeholder Parties) that such Potential Bidder has the financial wherewithal and ability to consummate the Proposed Transaction; and

iii. shall comply with all reasonable requests for additional information by LightSquared, in consultation with the Stakeholder Parties, or LightSquared's advisors, in consultation with the Stakeholder Parties, regarding such Potential Bidder's financial wherewithal and ability to consummate and perform obligations in connection with the Sale. Failure by a Potential Bidder to comply with requests for additional information may be a basis for LightSquared, in consultation with the Stakeholder Parties, to determine that a bid made by such Potential Bidder is not a Qualified Bid.

d. **Form Purchase Agreement, Stalking Horse Bids, and Related Protections.**

i. ***Form Purchase Agreement.*** With these Bid Procedures, LightSquared is providing a form purchase agreement (with certain ancillary agreements thereto, the "Form APA"), a true and correct copy of which is attached as Schedule 1-A hereto.

ii. ***LBAC.*** L-Band Acquisition, LLC ("LBAC"), as set forth in that certain purchase agreement attached as Exhibit F to the Disclosure Statement for Joint Chapter 11 Plan for LightSquared LP, ATC Technologies, LLC, LightSquared Corp., LightSquared Inc. of Virginia, LightSquared Subsidiary LLC, LightSquared Finance Co., LightSquared Network LLC, Lightsquared Bermuda Ltd., SkyTerra Holdings (Canada) Inc., and SkyTerra (Canada) Inc. Proposed by the Ad Hoc Secured Group of LightSquared LP Lenders filed on July 23, 2013 [Docket No. 765] (as

expressly modified by these Bid Procedures or the Approval Order, the "LBAC Stalking Horse Agreement"), has submitted a Qualified Bid (as expressly modified by these Bid Procedures or the Approval Order, the "LBAC Bid") for the purchase of the LP Assets of (A) cash in the amount of $2.22 billion; plus (B) the value of Employee Obligations assumed by LBAC; plus (C) certain Cure Amounts; plus (D) the amount of liabilities specifically designated in the LBAC Stalking Horse Agreement as assumed liabilities. In addition, the LBAC Bid provides that receipt of the FCC Consent and Industry Canada Approval is not a condition precedent for the funding of the cash purchase price payable thereunder.[3] In connection with the LBAC Bid, LBAC shall be entitled to a break-up fee of $51.8 million, i.e., 2 1/3% of the cash purchase price offered by the LBAC Bid (the "LBAC Break-Up Fee" and, together with the LP Expense Reimbursement,[4] the "LBAC Bid Protections"), which shall be payable to LBAC on the terms and conditions set forth in the LBAC Stalking Horse Agreement and Approval Order (as defined below); provided, that in the event that LightSquared agrees to provide a break-up or similar fee to any other Stalking Horse Bidder that exceeds the LBAC Break-Up Fee (e.g., a larger percentage and/or a fee based on cash and non-cash consideration) (a "Larger Break-Up Fee") and such Larger Break-Up Fee is approved by the Bankruptcy Court in accordance with these Bid Procedures, the LBAC Break-Up Fee shall be deemed to increase such that the LBAC Break-Up Fee shall be equal to the Larger Break-Up Fee, expressed as a percentage of the applicable components of the applicable Stalking Horse Bid. Upon approval of any Larger Break-Up Fee in accordance with these Bid Procedures, LightSquared shall provide written notice (which may include email from counsel to LightSquared) to LBAC of same as well as of the calculation method of such Larger Break-Up Fee.[5]

iii. ***MSAC.*** Mast Spectrum Acquisition Corp. and/or one or more of its affiliates or designees ("MSAC"), as set forth in that certain purchase agreement attached as Exhibit B to the Specific Disclosure Statement for Chapter 11 Plan for One Dot Six Corp. Proposed by U.S. Bank National Association and MAST Capital Management, LLC filed on August 30, 2013 [Docket No. 824] (the "MSAC Stalking Horse Agreement"), has submitted a Qualified Bid in the form of a credit bid (the "MSAC Bid") for the purchase of the assets of One Dot Six Corp. (the "One Dot Six

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3 Terms used in this paragraph and not otherwise defined herein shall have the meanings set forth in the LBAC Stalking Horse Agreement.

4 "LP Expense Reimbursement" has the meaning set forth in the *Order Approving Expense Reimbursement and Related Relief for L-Band Acquisition, LLC and MAST Spectrum Acquisition Company LLC and Related Entities* [Docket No. 880] (the "Expense Order").

5 The summary of the LBAC Bid contained in this section (d)(ii) is qualified in its entirety by the terms of the LBAC Stalking Horse Agreement. In the event of any conflict between the summary of the LBAC Bid contained herein and the LBAC Stalking Horse Agreement, the LBAC Stalking Horse Agreement, as expressly modified by these Bid Procedures and the Approval Order, shall control.

Assets") in an amount equal to (A) all Obligations (as defined in the DIP Credit Agreement) owing under the DIP Credit Agreement, plus (B) $1.00 of obligations owing under the Inc. Facility Credit Agreement held by MAST in the form of the Inc. Facility – One Dot Six Guaranty Claims, plus (C) cash in the amount necessary to satisfy those obligations under any plan of reorganization that are required to be paid in cash, if any; plus (D) certain Cure Costs; plus (D) the liabilities specifically designated in the MSAC Stalking Horse Agreement as assumed liabilities.[6] In connection with the MSAC Bid, MSAC shall be entitled to the Inc. Expense Reimbursement.[7]

iv. ***Potential Stalking Horse Bids.*** Prior to the Bid Deadline, LightSquared may, in consultation with the Stakeholder Parties, seek approval from the Bankruptcy Court to enter into an agreement (a "Potential Stalking Horse Agreement" and, collectively with the LBAC Stalking Horse Agreement and the MSAC Stalking Horse Agreement, the "Stalking Horse Agreements") with any Qualified Bidder that will act as a stalking horse bidder (each, a "Potential Stalking Horse Bidder" and, together with LBAC and MSAC, the "Stalking Horse Bidders") for all or any grouping or subset of LightSquared's Assets, if, in LightSquared's judgment, after consultation with the Stakeholder Parties, such resulting bid (the "Potential Stalking Horse Bid" and, together with the LBAC Bid and the MSAC Bid, the "Stalking Horse Bids") will better promote the goals of the Bidding Process. LightSquared may, in consultation with the Stakeholder Parties and subject to the Bankruptcy Court's approval, grant such Potential Stalking Horse Bidder(s) bid protections (the "Potential Stalking Horse Bid Protections" and, together with the LBAC Bid Protections and the Inc. Expense Reimbursement, the "Bid Protections") with respect to the applicable Assets as follows: (A) a break-up fee payable to the Potential Stalking Horse Bidder of up to 3% of the cash purchase price of the applicable Assets set forth in the Potential Stalking Horse Bid and (B) a maximum expense reimbursement payable to the Potential Stalking Horse Bidder of up to $2,000,000. For the avoidance of doubt, a Stalking Horse Bid may contemplate the purchase of any grouping or subset of the Assets and there may be more than one Stalking Horse Bidder, whether for different, the same, or a subset of the Assets.

(A) To the extent LightSquared determines to proceed with a transaction proposed by a Potential Stalking Horse Bidder

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[6] Terms used in this paragraph and not otherwise defined herein shall have the meanings set forth in the MSAC Stalking Horse Agreement. In addition, the summary of the MSAC Bid contained in this section (d)(iii) is qualified in its entirety by the terms of the MSAC Stalking Horse Agreement. In the event of any conflict between the summary of the MSAC Bid contained herein and the MSAC Stalking Horse Agreement, the MSAC Stalking Horse Agreement, as expressly modified by these Bid Procedures and the Approval Order, shall control.

[7] "Inc. Expense Reimbursement" has the meaning set forth in the Expense Order.

that includes the payment of Potential Stalking Horse Bid Protections, LightSquared shall (1) provide a confidential written Notice of Proposed Grant of Potential Stalking Horse Bid Protections (a "Bid Protections Notice") by hand delivery, e-mail, facsimile, or overnight courier to each of the Stakeholder Parties and each of their respective counsel and financial advisors (the "Bid Protections Notice Parties"), inviting the Bid Protections Notice Parties to a meeting at the offices of Milbank, Tweed, Hadley & McCloy LLP on not less than one (1) business day's notice, and (2) orally advise counsel to the Bid Protections Notice Parties of (w) the name of the Potential Stalking Horse Bidder, (x) LightSquared's estimated range of aggregate consideration offered by such bidder and the form thereof, (y) the Potential Stalking Horse Bid Protections to be provided, and (z) any material conditions to the proposed transaction (the "Bid Protections Disclosure").

(B) The Bid Protections Notice Parties and the respective members of each of the Stakeholder Parties shall be obligated to maintain the confidentiality of the Bid Protections Notice, the Bid Protections Disclosure, and the contents thereof, and shall not disclose or discuss the Bid Protections Notice, the Bid Protections Disclosure, or the contents thereof with any person or entity that did not receive a copy of the Bid Protections Notice. If no Bid Protections Notice Party objects to the grant of the Potential Stalking Horse Bid Protections pursuant to section d(iv)(C) below, then the grant of such Potential Stalking Horse Bid Protections shall be deemed approved pursuant to the Approval Order without further notice, hearing, or order of the Bankruptcy Court.

(C) If a Bid Protections Notice Party objects to the grant of the Potential Stalking Horse Bid Protections as disclosed in the Bid Protections Disclosure, such party shall have one (1) business day following the holding of the scheduled meeting pursuant to section (d)(iv)(A) above to provide counsel to LightSquared and the other Bid Protections Notice Parties with written notice by facsimile and e-mail transmission of any such objection (the "Bid Protections Objection"). Any Bid Protections Objection shall remain confidential and be served on, and made available only to, the Bid Protections Notice Parties. On request of LightSquared, the Bankruptcy Court shall schedule and hold an emergency, expedited hearing to consider any Bid

Protections Objection (which hearing may be conducted in person or telephonically) as soon as the Bankruptcy Court can hear the parties (the "Bid Protections Hearing"). At any Bid Protections Hearing, this Court only shall consider whether the grant of the Potential Stalking Horse Bid Protections, as disclosed in the Bid Protections Disclosure, should be approved. The Bid Protections Hearing shall be conducted *in camera* and attendance and participation shall be limited to the Bid Protections Notice Parties.

(D) To the extent LightSquared, in consultation with the Stakeholder Parties, enters into any such Potential Stalking Horse Agreement(s), the agreement(s) shall be placed on the Bankruptcy Court's docket and notice thereof shall be given to all parties on LightSquared's master service list maintained by KCC pursuant to Rule 2002 of the Federal Rules of Bankruptcy Procedure and Rule 2002-2 of the Local Rules for the United States Bankruptcy Court for the Southern District of New York and any entities that have filed a request for service of filings pursuant to Bankruptcy Rule 2002.

v. The Qualified Bid made by the applicable Stalking Horse Bidder plus the applicable Bid Protections will then act as the minimum Qualified Bid (the "Baseline Bid") for the applicable Assets for purposes of, and subject to higher and better offers at, the Auction.

e. **Participation Requirements.** Unless otherwise ordered by the Bankruptcy Court, to participate in the Bidding Process, each person that is a Potential Bidder (each, a "Qualified Bidder") must submit a bid that adheres to the requirements below (each, a "Qualified Bid"). Notwithstanding anything in these Bid Procedures to the contrary, each Stalking Horse Bidder shall be deemed to (i) be a Qualified Bidder, (ii) have submitted a Qualified Bid, and (iii) shall not be required to take any further action in order to participate at the Auction (if any). Nothing in these Bid Procedures shall prohibit Harbinger Capital Partners, LLC ("Harbinger") and its affiliates from submitting a Qualified Bid.

i. Qualified Bidders must deliver written copies of their bids no later than **5:00 p.m. (prevailing Eastern time) on November 20, 2013 (the "Bid Deadline")** to: (A) Milbank, Tweed, Hadley & McCloy LLP, One Chase Manhattan Plaza, New York, NY 10005 (Attn: Matthew S. Barr, Esq. and Karen Gartenberg, Esq.), counsel to LightSquared; (B) Kirkland & Ellis LLP, 601 Lexington Avenue, New York, NY 10022 (Attn: Paul M. Basta, Esq. and Joshua A. Sussberg, Esq.), counsel to the Independent LightSquared Committee, (C) White & Case LLP, 1155 Avenue of the Americas, New York, NY 10036 (Attn: Thomas E Lauria, Esq., Glenn M.

Kurtz, Esq., and Andrew C. Ambruoso, Esq.), counsel to the Ad Hoc Secured Group; and (D) Akin Gump Strauss Hauer & Feld LLP, One Bryant Park, New York, NY 10036 (Attn: Philip C. Dublin, Esq., Kenneth A. Davis, Esq., and Meredith A. Lahaie, Esq.), counsel to MAST and U.S. Bank, as administrative agent under the Prepetition Inc. Credit Agreement and administrative agent under the DIP Credit Agreement (each as defined below) (collectively, the "Notice Parties"). LightSquared may, in its reasonable discretion (after providing advance notice to the Stakeholder Parties of such decision), extend the Bid Deadline once or successively, but it is not obligated to do so; provided, that in no event shall the Bid Deadline be extended beyond November 25, 2013. If LightSquared extends the Bid Deadline, it shall promptly notify all Potential Bidders of the extension.

ii. All Qualified Bids must be in the form of an offer letter, which letter states:

(A) that such Qualified Bidder offers to purchase any grouping or subset of Assets without indemnification and upon other terms and conditions set forth in a Proposed Agreement, copies of which (one hard copy executed by an individual authorized to bind such Qualified Bidder together with electronic copies in Word format of (1) a clean version of the Proposed Agreement and (2) a marked version or versions of the Proposed Agreement against the Form APA and/or the applicable Stalking Horse Agreement (showing amendments and modifications thereto)), are to be provided to the Notice Parties;

(B) that such Qualified Bidder is prepared to consummate the transaction set forth in the Proposed Agreement promptly following (1) entry of an order of the Bankruptcy Court approving the Sale to the Successful Bidder(s) pursuant to the terms of one or more plans of reorganization (the "Confirmation Order(s)") and (2) receipt of other requisite governmental and regulatory approvals on the terms set forth in such Proposed Agreement;

(C) that the offer shall remain open and irrevocable as provided below;

(D) that the Qualified Bidder consents to the jurisdiction of the Bankruptcy Court; and

(E) which of LightSquared's leases and executory contracts are to be assumed and assigned in connection with the consummation of the Qualified Bidder's bid.

iii. All Qualified Bids shall be accompanied by a deposit into escrow with LightSquared of an amount in cash equal to:

(A) with respect to a Qualified Bid for the LP Assets, a subset of the LP Assets, or any grouping or subset of the LP Assets and the Inc. Assets, $100,000,000; or

(B) with respect to a Qualified Bid solely for the Inc. Assets, or any subset thereof, 5% of the proposed purchase price, as determined by the amount of consideration to be provided to the applicable Debtors' estates in connection with the proposed Sale, exclusive of the assumption of liabilities (the amounts set forth in clause (A) or this clause (B), each a "Good Faith Deposit");

provided, however, that any Qualified Bidder who is also a secured lender to LightSquared and submits a Qualified Bid by credit bid shall not be required to provide a Good Faith Deposit; provided, that a majority in amount of such Qualified Bid (determined by reference to the aggregate consideration to be provided to LightSquared's estates on account of such Qualified Bid) is in the form of a credit bid. For the avoidance of doubt, consistent with the rights provided to them pursuant to the *Final Order, Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364, and 507, (a) Authorizing Inc. Obligors To Obtain Postpetition Financing, (b) Granting Liens and Providing Superpriority Administrative Expense Status, (c) Granting Adequate Protection, and (d) Modifying Automatic Stay* [Docket No. 224] (as amended, the "DIP Order"), MAST and U.S. Bank shall be entitled to credit bid their claims arising under the Prepetition Inc. Credit Agreement and the DIP Credit Agreement (each as defined in the DIP Order).

iv. Qualified Bids may provide for forms of consideration that include cash or a combination of cash and other distributable forms of consideration that may be distributed under a plan of reorganization or further order of the Bankruptcy Court (for the avoidance of doubt, other than with respect to assumed liabilities), which shall be delivered to the applicable Debtors' estates on the Closing Date; provided, however, that a Qualified Bid must include a minimum cash component sufficient to pay any applicable Bid Protections plus all of the following allowed Claims, to the extent required by, and as defined in, the applicable plan(s): Administrative Claims, Priority Tax Claims, Other Priority Claims, and U.S. Trustee Fees.

v. A Qualified Bid must exceed the aggregate consideration to be paid to or for LightSquared's applicable estates as follows:

(A) a Qualified Bid solely in respect of (1) the LP Assets or any grouping or subset thereof, or (2) any grouping or subset of

the LP Assets and Inc. Assets must exceed the aggregate consideration to be paid to, or for the benefit of, LightSquared's estates as set forth in the applicable Baseline Bid(s) plus $50,000,000, the minimum overbid increment at the Auction; and

(B) a Qualified Bid solely in respect of the Inc. Assets, or any subset thereof, must exceed the aggregate consideration to be paid to or for the benefit of the Inc. Debtors' estates as set forth in the applicable Baseline Bid(s) plus $10,000,000, the minimum overbid increment at the Auction;

provided, that LightSquared expressly reserves its right to accept, after consultation with the Stakeholder Parties, some other lesser minimum overbid increment if it determines such increment to be appropriate under the circumstances and will better promote the goals of the Bidding Process.

vi. All Qualified Bids shall be accompanied by satisfactory evidence, in the opinion of LightSquared, in consultation with the Stakeholder Parties, of the Qualified Bidder's ability to: (A) fund the purchase price proposed by the Qualified Bidder with cash on hand (or sources of immediately available funds) or other distributable forms of consideration, and (B) otherwise perform all transactions contemplated by the Proposed Agreement.

vii. All Qualified Bids must fully disclose the identity of each entity that will be bidding for the applicable Assets or otherwise participating in connection with such bid (including any equity holder or other financial backer if the Qualified Bidder is an entity formed for the purpose of acquiring Assets), and the complete terms of any such participation, as well as whether each such person or entity holds an interest in another mobile satellite service provider or terrestrial wireless operator and, if so, the name of the mobile satellite service provider or terrestrial wireless operator and the nature and size of the interest; provided, that LightSquared and the Stakeholder Parties will keep such information confidential and will not disclose such information without the written consent of the applicable Potential Bidder, except to the Information Officer, who shall also keep such information confidential. Further, each bid must provide sufficient information regarding both the Potential Bidder and any participants (and each of their ultimate controlling persons, if any) to permit LightSquared and the Stakeholder Parties to ascertain whether a petition for declaratory ruling to permit indirect foreign ownership of LightSquared's Federal Communications

existence. He has not -- he has not -- and I don't know the details about the formation of the new special committee, I found out about it last night, but he is not on that committee.

THE COURT: But he remains on the board.

MR. MARKEL: He remains on the board. And so if we're looking at the difference between -- and I thought Your Honor's questions were very clear, both last time and today, how does the proposed discovery relate to the requested relief on the preliminary injunction. If that is what we're focused on today, then as I understand it, although I may have it wrong, but I've heard a few times and read it several times, my understanding is that the relief that's being requested on the preliminary injunction is that in the future somehow Mr. Ergen be barred from interfering with the process of bidding on this spectrum. That's what I understand is being requested.

Whatever happened with respect to the special committee that no longer is, I suggest to Your Honor, irrelevant to the question of whether or not an injunction in the future should be granted. And so, as Mr. Lebovitch said, they have -- they're focusing their discovery requests here on this preliminary injunction motion, expedited discovery that they're asking for, they're focusing that on something that happened in the past and that involves different people and

has nothing to do with what they're requesting from this Court on a preliminary injunction motion. And that is, as I understand, Your Honor -- and correctly me, obviously if I've got it wrong -- that's the only issue on which we are talking about expedited discovery.

So, Your Honor, I would respectfully request that the discovery of the activities of the special committee and Mr. Goodbarn in particular and all of the people whose depositions are being requested with respect to this expedited discovery are unnecessary in connection with the preliminary injunction.

The only other point, and it's even briefer, Your Honor, is my understanding is that under Nevada law that discovery of counsel for a party is only granted in exceptional circumstances.

THE COURT: That is Nevada law.

MR. MARKEL: Right. Thank you. And, Your Honor, what I hear is, well, sometimes it's happened in other cases that Mr. Lebovitch has been involved in. I don't question that it may have happened in other cases, perhaps in other jurisdictions with perhaps very different fact patterns. I don't know specifically. But what I do know is that at least in my humble opinion nothing close to exceptional circumstances have been demonstrated here for taking discovery from counsel to that special committee. Thank you very much

for hearing me, Your Honor.

THE COURT: Thank you.

Can I ask one question of Mr. Rugg before we go back to the plaintiffs. Mr. Rugg, Exhibit 5 to your brief that was filed yesterday is the report from the City Research folks.

MR. RUGG: Yes, Your Honor.

THE COURT: That is a report that was not requested by the corporation or the board or special committee, it was just something in the market; is that correct?

MR. RUGG: Correct, Your Honor.

THE COURT: I just wanted to make sure. Thank you.

MR. RUGG: Independent piece of research. Yeah, they do these all the time.

THE COURT: Somebody in the market doing whatever the market's going to do.

MR. RUGG: Correct, Your Honor.

THE COURT: All right. Thank you.

MR. BOSCHEE: I have -- I have one request of Your Honor before we rebut or -- I have calendar call in nine minutes in front of Judge Bare.

THE COURT: Okay. We'll take a short break for you to go to the third floor.

MR. BOSCHEE: Fair enough. I will be back. If you want to --

THE COURT: How long are you going to be?

MR. BOSCHEE: I'm happy to let Counsel continue without me.

THE COURT: No. Go. How long are you going to be?

MR. BOSCHEE: I shouldn't be more than 10 or 15 minutes, I hope.

THE COURT: I'll see you when you get back. Everybody else feel like taking a personal comfort break?

(Court recessed at 10:49 a.m., until 11:08 p.m.)

THE COURT: Anybody want to add anything before I hear rebuttal? Okay.

MR. LEBOVITCH: Thank you, Your Honor. Thank you for your patience.

Let's briefly start with where we ended, and then I'll go through Mr. Rugg's arguments. But as far as Mr. Goodbarn goes we do concede his independence, Your Honor, and, frankly, in terms of an injunction that would bring back, you know, the status quo, the appropriate position -- I mean, one way to implement the injunction, an obvious way would be to put Mr. Goodbarn and if there's another independent director -- apparently the company just hired -- just retained a new director. If there's two independent directors, that would be a logical way to cure essentially any injunction that's granted. It's the easiest thing. We did name Mr. Goodbarn. There's really multiple reasons, and, I'll be very frank about it, we didn't want an argument that he's an indispensable

party if he's not named, even tough we concede his independence -- to the extent we concede his independence, because he is the person who we're saying should be in charge. So that's one issue.

And also, he didn't resign. Mr. Howard resigned. We believe it was a protest. We think that's confirmed. We didn't know what happened, but, you know, frankly the focus is we're seeking relief, which logically gets cured by empowering Mr. Goodbarn and, if there is another truly independent director, perhaps another independent director. But we think that and our approach always has been if it turns out he really has been acting independently and perhaps without resigning trying to fight for the shareholders, we would not be continuing the claim against him.

I'll get to Mr. Markel's discovery points in the context of dealing with Mr. Rugg's other issues. I'll try to be very efficient. We're really not asking to take out the duly elected board. I mean, again, I think -- that's the way companies work. They set up a board however they want to. This board happened to have two independent directors initially. They expect that when there's a conflict they're going to have an independent committee take over. That's what happens. It happened in Hollinger, it's what happens many companies that are controlled companies. Here our view is Mr. Ergen changed his mind. He didn't want to let the independent

directors have their authority. That's exactly the problem here. But, again, there's nothing radical about it, that the conflicted directors routinely step aside and let the independent directors do their thing.

Section 78.140, it doesn't have -- it talks about what's void or voidable, Your Honor, the statute. It also talks about fairness, and it doesn't say anything about injunctive relief. And so our position on it is this provision, 78.140, is similar to other interested transaction statutes in other states. While the words will be different, there's going to be nuances, we don't see anything in that provision that goes beyond saying a transaction is not void or voidable -- a transaction that has taken place is not void or voidable solely because of a conflict if you have certain criteria met. But many, if not most or all, of the courts who've interpreted similar positions have said that this doesn't eliminate fiduciary duties. The statute does talk about a transaction still be fair. And, again, I think there's a lot of precedent that says, well, we read that fairness as an overlay to the provision, and so you're protecting third parties who engage in transactions with the company, you're protecting the contracts themselves that get executed. It doesn't mean there can't be equitable relief.

Mr. Rugg spoke about Harbinger, saying, well, they're suing everyone. We're not -- we're not trying to

prove Harbinger's claims, okay. Our point is that the board, by allowing Ergen to control its process, is lending credence to Harbinger's claims, whereas, again, obviously if the independent directors were controlling Dish's process, harbinger's claims against Dish would be fair less forceful.

The articles, the articles of incorporation, the charter, that -- really we tried to be very express. That claim for corporate opportunity, which we do think is valid, we think the special committee must have seen some validity to it, we're prepared to litigate that on a non-expedited schedule, but I will note, Your Honor, there is no reading of the charter that would permit Mr. Ergen to misappropriate corporate information in order to identify his business opportunities, nor would it absolve him of his duty of loyalty such that even if he's allowed to pursue an opportunity under the charter, he can't pursue an opportunity which knowingly, predictably will cause harm to Dish. And so that's a breach of the duty of loyalty independent of the charter.

Now, Harbinger knocked out Dish with its investments contract, its loan contract. It didn't knock out Ergen. I mean, that's an issue that is being litigated in Bankruptcy Court. We're not trying to prove that Ergen could or could not have bought the debt pursuant to the investment agreement. It is possible that that provision will be struck down, in which case Dish could have done something. But that's not the

issue now. Again, our point, simple point is Ergen, by buying the debt knowing he's the controller of Dish, it's not surprise that he and Dish would get sued for the way he bought the debt, which we've alleged was secretive and indirect. That is bad faith. He used corporate information about where Dish would look to buy spectrum, to find his target, and he also knew that that was going to expose Dish to a lawsuit which -- it's Exhibit 2 to my affidavit, Your Honor. I mean, they're seeking $4 billion in damages and various other remedies against Ergen, and there's other filings that seek remedies against Dish.

The point about the lack of a conflict, Your Honor, and Ergen's interest in Dish being very significant, the board's stock in Dish, I just want to start, I guess, with maybe the basic premises. I'm not aware of any precedent that would say that the fact the directors own stock in a company will outweigh them otherwise being beholden to a director. The cases -- I'm not aware of anyone -- any situation where a director -- where a court says, well, this director under the law would be beholden but they own stock and so therefore they're not. I've never even heard of that.

But let's talk about the argument about Ergen's incentives. It's a billion-dollar personal investment. Now, he's a wealthy man, but he has a billion-dollar personal investment that faces going to zero. That's what Harbinger

and LightSquared are trying to do if they disallow the claims or he'll take a huge loss on it.

THE COURT: And you're talking about the debt purchases.

MR. LEBOVITCH: The debt purchases that he made in his own account. So let's assume he's allowed to pursue that opportunity, Your Honor. He's facing economic risk. He's facing the loss of his voting rights. That's real and immediate. The City Group report that the defendants put in, which I'll talk about a little bit more, I mean, analysts will say a lot of things. This analyst is saying something which we agree with, is buying the spectrum would be a really good thing. It's not a controversial statement. It doesn't establish I think for the Court's purposes what in fact the market thinks or does. I mean, that's done with expert reports and submissions.

But that's one analyst's report that says it would be a good thing. We agree. We want Dish to get the spectrum. But that's not proof that Ergen is going to see the stock drop -- his stock drop if they fail. In fact, because of the Wall Street Journal article, because of knowledge coming out that Ergen is dominating the process, it's entirely possible that other analysts would say, well, yeah, the reason there's $17 of upside is because the market right now is skeptical because Ergen is interfering, he is dominating the process. That's

creates a discount on the stock. Well, what there's no showing of, and I could go back, but what there's no showing of, Your Honor, is that Ergen has a choice of I'm going to lose a couple hundred million dollars here or I'm going to lose anything on the Dish side. The lost opportunity may already be priced into the stock. There's no evidence to say right now on a motion to expedite to allow discovery for the Court to essentially adopt and say, well, he's going to lose much more if Dish is hurt than he would preserve by preserving his debt at Dish's expense. We know there's an immediate risk, and there's a completely abstract, hypothetical possibility that Dish stock would go down if they don't get the spectrum, and yet there's equal reason to believe that right now Dish stock has upside because it's been depressed by controlling shareholder misconduct.

The SLC very briefly. Again, I'm not aware of any precedent that says that the creation of an SLC can override the Court's ability to expedite and consider an injunction. I'm not arguing a case where that's actually happened. Typically an SLC happens where there's a non-expedited matter, there's no irreparable harm. What we -- what I think I heard is there's no resolution yet even creating this SLC. There's a decision to do so. And I've not heard any explanation how the SLC could actually provide the relief sought in Count 1 if it finds it meritorious. And I think that's critical, because

it's not good enough for our friends to say, well, they're going to have authority over the amended complaint. Well, as a particular matter the committee is putting the proverbial rabbit in the hat, because there's no way they can give the relief sought in Count 1, well, then what they're doing is they've already denied Count 1 through their creation, because Count 1 either will -- it'll rise and fall over the next few weeks. It's not a count that can be remedied in six months, nine months, or a year. So really what they're saying is, well, we'll consider the non-expedited matters, but they have no practical ability to consider the expedited matters. And I just think that, again, the SLC's existence can be a factor for the other claims. But if Your Honor believes we should get the chance to get discovery, what we think is limited, and present the record to Your Honor, it is no offense to the SLC to say, you go do your thing but right now I'm not going to stop my process, because I know that if I stop my process plaintiff's lose Count 1, they'll never get a remedy if I rely on you.

Mr. Rugg said something about Harbinger's theory is that Ergen's acting for Dish and our theory is Dish is acting at the whim of Ergen. I think -- I think it's a little bit semantic. Your Honor, our whole point is that right now today Dish needs to act independently of Ergen. That's the Corporate Governance 101 point that we make, that's the point

that in light of the creation of a special committee, its subsequent disbanding when they try to act independently, that's the remedy that we seek, which unquestionably can only help Dish in connection with its problem, which is a lawsuit that it never wanted. And that's Exhibit 2.

I talked about Ergen's financial interest.

The DBSD case, again, Mr. Rugg talked about, you know, how this isn't DBSD. The fear we have is not that the Court's going to say DBSD is being repeated, let's impose bad faith. The fear we have is the Harbinger complaint and the other filings in the Bankruptcy Court that do put Dish at risk today. The DBSD point is really to show this board knows it can get in trouble, should be hypersensitive even though we think any independent board would keep Ergen out of the process here.

The discovery. I'm getting down to the end, Your Honor. The discovery, I believe Mr. Rugg said it's all backwards looking, Mr. Markel said the special committee -- you know, what happened there was irrelevant to what's happening today. We disagree and we think again we're putting the rabbit in the hat. I'm sure that if that argument had any validity, then there would be no discovery until what happened in the Conrad Black case, because he had already disbanded his committee. And so if that committee disbanded and it's not relevant because that's all old history, why would you ever

have a record developing how you got here. And in the end, Your Honor, I believe anytime that Your Honor or frankly any judge has considered a basis for injunctive relief, to the extent there's any record it's a record of what has happened to date. So there's always a backwards-looking view. And what we say is the way to identify the predicate breaches and the harm and to shape the relief that Your Honor may grant is to say, okay, we know a committee was created, the defendants stipulated to that, but why were they created, what was their charge, what did they do, what were their conditions. Because there's a representation that they authorized a bid to be made. Well, I do think that that Journal article substantiates our concerns that maybe there were conditions to the bid. we know the committee wasn't around when the bid was actually made, so we don't know what problems that committee had. And by finding out what they expected in the process, what the independent directors wanted to see in the process then Your Honor can say, okay, I can see that having the independent process would put Dish in a better position and I can craft my remedy around essentially what the correct process looked like, assuming the special committee's process was a truly independent process. This is what I'm now seeing. So to say that we don't get to prove the predicate breach in an injunction hearing is, again, to put the rabbit in the hat and to just say, well, you'll never prove your claims.

So if Your Honor has concerns, thinks it's conceivable that you will grant an injunction, we -- I respectfully submit that we should get the discovery until what happened with the committee.

The depositions, I think Mr. Rugg said we seek two. No, no. We seek Mr. Ergen, who knows what's going on now. We asked for Mr. Goodbarn, and I said that, you know, maybe that's a conversation that can happen. We ask for Mr. Howard. Again, you know, maybe we would drop one of those and take one of the current directors. And we ask for the advisors. And on the advisors, I mean, the banker -- to the extent that Perella Weinberg did an analysis and gave advice to the committee and negotiated, those negotiations clearly are fair game, and we think the bankers' advice is not subject to attorney-client privilege. And for the lawyers I don't know how much more I can say. Unless they waive a privilege, we're not trying to force them to waive a privilege, but when you have a contract negotiated by lawyers or a transaction or a proposal negotiated typically by lawyers and bankers, not the special committee members handling those negotiations, they are the best source of that evidence, and I do think, Your Honor, when the lawyers are the ones doing the negotiation it's routine. If it turns out, Your Honor, that the lawyers here were not having the negotiations --

THE COURT: It's not routine here.

MR. LEBOVITCH: I understand. And again, we're not asking for litigation counsel --

THE COURT: I mean, in Nevada it's clearly not routine when they're negotiating deals. Even though it may not be privileged, it's clearly not routine.

MR. LEBOVITCH: You know, I appreciate that, Your Honor. And in the end I think that if we get other -- if we have another ability to provide discovery and the fact that we may not have a principal negotiator I guess used against us, then I'm not going to -- I'm not going to push for the lawyer. I just am trying to go to the best source of what happened in the discussions. But if it's -- you know, we think it would be appropriate, and we're not going to try to pierce a privilege, but if Your Honor would prefer we not do it, then I'm not going to push it.

THE COURT: It's not me. It's the Nevada Supreme Court, those guys in Carson City.

MR. LEBOVITCH: Understood, Your Honor. We think that if someone was leading a negotiation that that would be acceptable. But --

THE COURT: I understand what you're saying.

MR. LEBOVITCH: Yes.

THE COURT: I'm just telling you that's not it here.

MR. LEBOVITCH: I don't dispute that it's not routine.

THE COURT: Okay. Anything else you want to tell me?

MR. LEBOVITCH: I believe the answer to that is no. I think that covers it, Your Honor.

THE COURT: Okay. I want to thank counsel for the arguments you've made today. They are very informative, and I want to tell you they are very well done. I sat on a panel with Chief Justice Steel earlier in the week, so I'm familiar with Delaware law and the quality of practitioners, and it's been refreshing to have that quality of folks in front of me.

The formation of the special litigation to me -- committee to me is a very important step that the company has made, and I'm going to give the special litigation committee a little bit of leeway to do some things. So here's the plan.

The plaintiff's going to make a demand on the special litigation committee within 24 hours. So that means by Monday at maybe 10:00 a.m. Pacific Time you're going to have your demand to the special litigation committee.

The special litigation committee by noon Pacific Time on October 3rd will respond to that demand. That does not mean they have to complete their investigation; it simply means they must respond to that demand.

I need a status report by counsel by close of business Pacific Time on October 3rd. The matter will be on my chambers calendar on Friday, October 4th, and I will issue

a written decision on the motion for expedited discovery.

MR. LEBOVITCH: Your Honor, may I ask one question?

THE COURT: You can ask as many questions as you want.

MR. LEBOVITCH: I just -- we will follow the Court's instructions, make a demand. And I may be unfamiliar with this aspect of Nevada law. I just don't want to concede any challenge to independence particularly to Mr. Ortolf.

THE COURT: You're not conceding anything.

MR. LEBOVITCH: Okay. Just sometimes making a demand is a concession. I just -- as long as we preserve our arguments --

THE COURT: I'm not saying you've conceded anything.

MR. LEBOVITCH: That's fine, Your Honor.

THE COURT: I'm telling you I want to give the special litigation committee the benefit of the doubt and the opportunity to act. They can't do that if you don't make the demand on them.

MR. LEBOVITCH: We will make a demand as Your Honor instructed.

THE COURT: You probably don't know the Schoen case went up and down, up and down, and up and down, and I think Steve Peek and the others settled it, what, on the fourth attempt in front of Brent Adams. So, I mean, it's --

MR. LEBOVITCH: We'd hope to avoid that kind of

rollercoaster.

THE COURT: We're not going to do that. We're just going to do this. I understand it may have issues, it may cause concerns. We're going to make the demand, I'm going to then make a decision. What you put in the status reports may influence what I decide to do. But I've heard the documents, I have an idea about what I think we should do, but I want to wait and give the special litigation committee the opportunity to do something.

Mr. Ferrario, go catch your plane.

MR. FERRARIO: Thank you, Your Honor.

THE COURT: You're supposed to be in Cleveland at a deposition.

MR. BOSCHEE: And all the parties are going to file a separate status report? Is that what Your Honor's contemplating, just so I'm clear?

THE COURT: I would prefer separate status reports, because my guess is you guys won't see eye to eye, and by giving you the very short time frame I did it will be impossible to work out the issues that would permit it to be a joint status report.

MR. BOSCHEE: I just want to make sure, Your Honor.

THE COURT: Remember, I gave you very short time frames.

MR. LEBOVITCH: Yes, Your Honor.

THE COURT: And the reason is because I'm cognizant about the issues related to the injunctive relief that's being requested.

Anything else?

MR. LEBOVITCH: Thank you, Your Honor. Thank you for hearing us.

THE PROCEEDINGS CONCLUDED AT 11:28 A.M.

* * * * *

CERTIFICATION

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

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

FLORENCE HOYT
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9/24/13

FLORENCE HOYT, TRANSCRIBER — DATE

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DISTRICT COURT

CLARK COUNTY, NEVADA

JACKSONVILLE POLICE AND FIRE PENSION FUND, derivatively on behalf of nominal defendant DISH NETWORK CORPORATION, Plaintiff, v. CHARLES W. ERGEN; JOSEPH P. CLAYTON; JAMES DEFRANCO; CANTEY M. ERGEN; STEVEN R. GOODBARN; DAVID K. MOSKOWITZ,; TOM A. ORTOLF; CARL E. VOGEL; DOES I-X, inclusive and ROE ENTITIES I-X, inclusive, Defendants. DISH NETWORK CORPORATION, a Nevada corporation, Nominal Defendant.	Case No.: A-13-686775-B Dept. No.: XI **STATUS REPORT**

STATUS REPORT

Pursuant to this Court's Minute Order on September 19, 2013, Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff"), by and through its undersigned counsel of record, respectfully submits its Status Report. This Status Report is made and based upon the papers and pleadings on file, the below Memorandum of Points and Authorities, the exhibits attached to the Appendix to this Status Report (the "Appendix") filed concurrently with the Status Report and incorporated by reference, together with such other evidence and argument as may be presented and considered by this Court at any hearing regarding the Status Report.

Dated this 3rd day of October, 2013.

COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Jacksonville Police And Fire Pension Fund ("Plaintiff" or "Jacksonville P&F") has moved for narrowly-tailored and highly relevant expedited discovery in support of its pending motion for preliminary injunction (the "Motion") with respect to Count I of the Verified Amended Derivative Complaint (the "Complaint"). Time is of the essence given the LightSquared bankruptcy auction, which is scheduled to commence on November 25, 2013. The Defendants have previously agreed that they can and will produce any and all documents that the Court orders be produced within seven (7) days of any such order. Thus, the question is whether the Court will give Plaintiff the opportunity to assemble a record and present its Motion.

Although the Dish Network Corporation ("Dish" or the "Company") board of directors (the "Board") has now formed a special litigation committee (the "SLC") to consider Plaintiff's claims, an independent process is still needed to ensure that Dish's pursuit of LightSquared's spectrum assets in the bankruptcy auction is driven by the interests of the Company and its public shareholders, rather than Defendant Charles Ergen ("Ergen"). At least six, and Plaintiff contends seven, of the Dish directors at the time this suit was filed plainly lack that independence. Even if the SLC were independent – which most assuredly is not the case for the reasons explained below – its charge does not include acting with respect to the LightSquared bidding process. And the SLC does not recommend isolating Ergen and his loyalists. Thus, independent directors will only guide Dish's bidding if this Court grants Plaintiff's Motion.

On September 19, the Court instructed Plaintiff to serve a prompt demand on the SLC. A copy of that demand letter is attached as Exhibit 1. The Court instructed the SLC to respond by noon today. A copy of that response letter is attached as Exhibit 2.

. . .

From the beginning of this case and continuing until today, the actions of both the Board and the SLC make clear that they are Ergen-controlled, rather than independent or effective. The initial special committee that was formed to consider Dish's bid for LightSquared's spectrum, before Ergen envisioned that his own directors could challenge his interests, consisted only of Gary Howard ("Howard") and Steven Goodbarn ("Goodbarn"). No other director – including Tom Ortolf ("Ortolf") – was independent of Ergen and, therefore, they could not serve on a committee. Once Goodbarn and Howard actually asserted their independence by challenging Ergen's autonomy, Ergen and his Board (including Ortolf) prematurely disbanded the committee, leading to Howard's abrupt resignation and this lawsuit.

Instead of creating an independent special committee as soon as Plaintiff initiated this action on August 9, 2013, the Board uniformly insisted that these claims have no merit. They changed course only late the evening before the Court would hear Plaintiff's request for expedited discovery. The SLC was created as a litigation tactic, not from a genuine desire to investigate. Indeed, even though Plaintiff's counsel has conceded that Goodbarn is capable of acting independently of Ergen, the Board refuses to empower him. Instead they chose the conflicted Mr. Ortolf for the SLC. Moreover, when Plaintiff asked both the Board and the SLC to simply disclose the resolution setting forth the SLC's powers, scope, and authority, those purportedly independent bodies played a proverbial game of "hot potato," sending Plaintiff to call the other body, without either body actually producing the document until this afternoon.

The SLC's response to Plaintiff's demand further confirms its lack of independence, its lack of effectiveness, and its desire to shut down this litigation rather than actually pursue potential claims against Ergen. First, the facts disclosed in the SLC's own independence analysis show why neither SLC member can be expected to actually challenge Ergen and his loyalists on the Board. Ortolf admits to a 35-year relationship with Ergen through numerous business and

social ventures. This fact disclosed by the SLC, taken alone, casts doubt on his independence. Most troubling, however, is that the SLC does not give full disclosure of the extent of Ortolf's conflict because, as discussed below, Ergen has also caused Dish to employ ***both Ortolf's son and his daughter*** in significant positions. Yet these critical facts are concealed from Dish's public filings and were not disclosed in the SLC's response to the demand. Unless the SLC discloses these key facts in their status report to the Court, serious credibility questions arise. As to Brokaw, defendant Cantey Ergen is ***both Charles Ergen's wife and the godmother of Brokaw's son***. We cannot choose our blood relatives. In that sense, a person's selection of a godmother to his son – something akin to identifying the person most trusted to care for a child in an emergency – is a voluntary and deeply personal relationship. The idea that Brokaw would bring a lawsuit against the godmother of his own son in order to protect Dish suggests a lack of humanity bordering on cruelty that this Court should not accept as viable or realistic.

Moreover, the SLC's assessment of Plaintiff's claim is so flawed that it shows it cannot be trusted. The SLC clearly has not reviewed any documents outside the court filings, and has not bothered to speak with anyone involved in the prior special committee, including Mr. Goodbarn. The entire premise of this case is that the Board's premature termination of the special committee when it asserted independence from Ergen illustrates why independent leadership is needed now. The SLC's refusal to look at the very documents that would either support or refute Plaintiff's claim for injunctive relief illustrates the lack of good faith of their position. Moreover, the SLC glibly repeats Ergen's counsel's mantra that because Ergen cannot make any more money than he already has regardless of the bidding, there is no conflict. This is plainly untrue. As the SLC also recognizes, Ergen still faces a direct risk to his billion dollar personal investment in LightSquared debt. Even if he cannot make any *more* money, the Court can easily see that Ergen stands to lose, by December 6, 2013, more money than most people

could fathom ever making. Nothing in the record supports an inference that Ergen would do what is best for Dish if this resulted in an immediate personal loss on his debt purchases exceeding $1 billion . Moreover, the SLC ignores that with Harbinger and LightSquared still attacking Ergen, Dish needs to be able to act like any other bidder (including Harbinger) – any of which would gladly make a winning bid premised on requiring Ergen to take a haircut on his debt position.

The SLC also states in a conclusory way that Dish faces no "material risk" of harm even if Ergen faces consequences for his alleged misconduct. Yet, the SLC does nothing to substantiate this assertion, and ignores that Dish should face ***no risk of harm*** on account of its inability to act independently of Ergen. Nowhere does the SLC dispute that showing the bankruptcy court that Dish's bidding efforts are being guided by independent directors would affirmatively help Dish in its ability to acquire the LightSquared assets and to protect against Harbinger's claims. Nor does the SLC ever explain how empowering independent directors could conceivably harm Dish.

Last, the SLC's opposition to giving Plaintiff discovery lacks principle or logic. The SLC says that giving Plaintiff its requested discovery would be a burden and unwelcome distraction to Dish while it is bidding for LightSquared. Defendants have already agreed they can and will produce documents ***within the next seven days.*** Plaintiff can take the several short depositions it seeks before October is done, well before the November 25 auction takes place. The SLC cannot explain why Plaintiff's discovery is such a distraction, while the SLC's own plan is to conduct a thorough investigation and take an undetermined number of interviews in late November and early December, ***while the auction and subsequent confirmation process takes place.*** Clearly, the SLC just wants to find a way to shut down this action.

. . .

As Plaintiff has previously observed, delay in the resolution of Count I of the Complaint, which seeks to enjoin Ergen and the controlled directors from influencing or interfering with Dish's efforts in the ongoing LightSquared bidding process, only helps Ergen and will irreparably harm Dish. The SLC's response does not satisfy its burden of demonstrating the requisite diligence and independence needed to deny Plaintiff the modest relief it seeks. Rather, the SLC has dragged its feet, placing the Company and its public shareholders at risk of real harm absent the prompt resolution of Count I. The Court can find definitively that the SLC should be disregarded entirely. But even if it wants to consider more evidence in the future, the Court should allow Plaintiff the limited discovery it seeks and set an injunction hearing.

II. The Court Should Grant Limited Expedited Discovery

Plaintiff seeks limited expedited discovery in order to present the Court with a full record to decide Plaintiff's pending motion for a preliminary injunction. As Plaintiff has shown, there is good cause to permit the requested discovery. *See* Motion at 34-36; *see also First Option Mortgage, LLC v. Tabbert*, 2012 WL 1669430, at *4 (D.Nev. May 11, 2012) (granting expedited discovery in part because "discovery of this evidence will assist the court in ruing on the motion for preliminary injunction"). Indeed, Defendants have conceded that much of the requested documentary evidence can be provided in a matter of days.

The SLC's October 3, 2013 letter concedes that, since its creation on September 18, 2013 (*i.e.* more than two weeks ago), the SLC has not done any investigation of the facts and circumstances that caused Plaintiff to commence this action. Although readily available, the SLC has not requested any documents concerning the premature termination of the Special Committee once its members insisted that the Special Committee remain involved in the LightSquared bidding process. Nor has the SLC interviewed any of the percipient witnesses, including Goodbarn, who may shed light on Ergen's conflicts and the Special Committee's

determination that it should control Dish's bidding and Ergen should, at a minimum, share profits from his secret debt purchases. Instead, the SLC asks the Court to accept the SLC's contested speculation about Ergen's conflicts, to stay this action for at least four months, and to deny expedited discovery – in effect dismissing Count I of the Complaint – without the benefit of a fully developed record. The Court should deny the SLC's unsubstantiated request and permit limited expedited discovery.[1]

A. The SLC Does Not Meet Its Burden To Obtain A Stay

Courts have discretionary power to stay proceedings in their own court. *See Apollo Grp., Inc. v. Sperling*, 2012 WL 79237, at *1 (D. Ariz. Jan. 11, 2012). However, "[i]f there is even a fair possibility that the stay will work damage to someone else, ***the party seeking the stay must make out a clear case of hardship or inequity***." *Id.* (emphasis added). The SLC has not met its burden. ***First***, the SLC concedes that "the matters raised by [Plaintiff's] injunction motion are complex," thereby supporting an order permitting expedited discovery. *See* NRCP 16(f) (authorizing waiver of mandatory pre-trial discovery requirements where a case involves "complex issues," "difficult legal questions" or "unusual proof problems").

Second, the requested expedited discovery is narrowly targeted and readily available. *See* Motion at 34-36. Moreover, the SLC has offered no support for its assertion that the requested discovery would interfere with Dish's ability to prepare for and participate in the auction for LightSquared. Indeed, the LightSquared bankruptcy auction is not scheduled until November 25 – *after* expedited discovery would be completed and *after* the requested preliminary injunction hearing. Showing its lack of impartiality, the SLC asserts that Plaintiff's discovery will distract, yet the SLC purportedly plans to conduct a broader investigation

[1] A truly independent SLC would surely have reviewed the documents at the heart of Plaintiff's claims, including documents reflecting the disbanding of the prior committee. Doing so might make it easier for Plaintiff to justify production of those documents, but would show integrity of the SLC's efforts. The SLC's choice to keep its head out of those documents shows its true purpose of shutting down Plaintiff's efforts, not helping Dish.

(covering all the claims in the Complaint) and to take an undetermined number of interviews during late November and early December, while the bidding is at its hottest.

Third, the SLC's argument that Plaintiff's pursuit of injunctive relief would somehow require Plaintiff to make arguments that will "damage Dish's defense of Harbinger's adversary proceeding" is absurd. Plaintiff is seeking injunctive relief requiring Ergen and his loyalists on the Board to be insulated from Dish's bid for LightSquared's assets, thereby removing the premise of Habringer's claims. If anything, it is the SLC's refusal to pursue Count I of the Complaint (seeking to insulate Ergen from the Dish bid for LightSquared) without doing any substantive investigation and the SLC's baseless objection to Plaintiff's request for expedited discovery that harm Dish vis-à-vis Harbinger.

B. The Flawed Composition of the SLC

The SLC has the burden of establishing its own independence "by a yard-stick that must be like Caesar's wife – above reproach." *London v. Tyrell*, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010).[2] The SLC has not met that burden.

A director's decisions must be "based on the corporate merits of the subject before the board rather than extraneous considerations or influences." *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1984). Genuine independence is especially necessary for a special litigation committee in light of "the extraordinary importance and difficulty of such a committee's responsibility," and the great difficulty in "finding that there is reason to believe that [a] fellow director has committed serious wrongdoing and that a derivative suit should proceed against him." *In re Oracle Corp. Derivative Litig.*, 824 A.2d 917, 940 (Del. 2003). Accordingly, a special litigation committee cannot have judicial force where ostensibly "independent" directors are beholden to a defendant or to an otherwise interested party. *See, e.g.*, *London v. Tyrell*, 2010 WL 877528, at

[2] Where there is no contrary Nevada precedent, Nevada courts have found Delaware law instructive when addressing shareholder-derivative lawsuits. *In re Amerco Derivative Litig.*, 252 P.3d 681, 697 (Nev. 2011).

*14-15 (Del. Ch. Mar. 11, 2010) (SLC not independent where (i) SLC member's wife was defendant's cousin, and (ii) defendant was formerly employed by other SLC member's company); *Oracle*, 824 A.2d at 921 (SLC members who were Stanford University professors determined not independent from directors who had made donations to the school); *Biondi v. Scrushy*, 820 A.2d 1148, 1156-58, 1165 (Del. Ch. 2003) (refusing to stay litigation despite SLC investigation where SLC member served on other board with CEO accused of wrongdoing).

Here, instead of empowering Goodbarn, the only legitimately independent member of the Dish Board, Ergen placed conflicted directors Ortolf and Brokaw on the SLC. As detailed in the Complaint and Plaintiff's preliminary injunction papers and further revealed in the SLC Letter, Ortolf has strong historical connections to Ergen dating back to 1977 when the two were officemates at Frito Lay. In 1987, Ortolf invested $1.4 million in the predecessor company to Dish and became the company's President and Chief Operating Officer. Ortolf stepped down from his executive post in 1991 and cashed out his investment, which had appreciated in value nearly 400%. Ortolf has also served as a member of the boards of directors of Ergen-controlled Dish and EchoStar since 2005 and 2007, respectively, gaining about $1.25 million in fees.

Additionally, although not detailed in the Complaint, Plaintiff's ongoing investigation has uncovered the fact that both Ortolf's son and daughter have been or currently are employees at Dish, further ensuring Ortolf's loyalty to Ergen. Specifically, Ortolf's son Paul was employed by Dish from April 2008 until March 2013, first working as a programming coordinator and later being promoted to international programming specialist. *See* LinkedIn Profile of Paul Ortolf (attached as Exhibit 3). Ortolf's daughter Meaghan was hired by Dish in May 2011 as an operations analyst. In March 2013, Meaghan was promoted to operations coordinator and continues to work at Dish today. *See* LinkedIn Profile of Meghan Ortolf (attached as Exhibit 4). Paul and Meaghan Ortolf's employment at the Company reflects Ergen's influence and control

over Dish, and is stark evidence that Ortolf is beholden to Ergen. At the very least, these facts raise real doubts about Ortolf's willingness or ability to challenge, much less sue, Ergen. *See In re China Agritech, Inc.*, 2013 Del. Ch. LEXIS 132 (Del. Ch. May 21, 2013) ("Dai also cannot consider a demand that would place Chang or Teng at risk because his daughter's primary employment depends on the good wishes of the Company's controlling stockholders."); *see also Oracle*, 824 A.2d at 938-39, 940 (recognizing difficulty in "caus[ing] a corporation to sue" "a friend, relative, colleague, or boss"; "Beholden . . . does not mean just owing in the financial sense, it can also flow out of personal or other relationships to the interested party" (internal quotation marks omitted)).

Despite the clear conflict of interest created by the fact that Mr. Ortolf's children have or currently are employed by Dish, the SLC neglects to mention this information in their letter to Plaintiff's counsel. It is inconceivable Mr. Ortolf was not asked about this by SLC Counsel. This glaring omission casts doubt on the fulsomeness and candor of the SLC's representations.

SLC member Brokaw is similarly incapable of acting independently. As was revealed in the SLC Letter, Mr. Ergen's wife Cantey (also a Dish Board member) is the godmother to Brokow's son. This voluntary, yet deeply personal, bond is a greater indication of mutual trust and loyalty than even the typical family relation. Brokaw has potentially entrusted Charles and Cantey Ergen to raise Brokaw's son in the event something tragic would happen to Brokaw and his wife. It is inconceivable that Brokaw would now turn around and sue Ergen.

Plaintiff's serious concerns about the SLC's ability to act independently and effectively are both confirmed and exacerbated by the substance of the SLC's response to Plaintiff's demand letter. The SLC, composed of directors with close personal and professional ties to Ergen, refused to pursue injunctive relief or expedited discovery under Count I, based purely on the Complaint and not on any independent investigation. *See* Ex. 2 at 2. Accordingly, that decision

lacks a sound, good faith basis, and should be disregarded. *See City of Orlando Police Pension Fund v. Page*, 2013 WL 5402087, at *4 (N.D. Cal. Sept. 26, 2013) (applying Delaware law and disregarding 149-page SLC report and decision to refuse demand; "if plaintiff can show that the board did not act independently in responding to the demand, those facts will undermine any finding that the investigation was undertaken unreasonably and in good faith").

C. Plaintiff's Communications With Dish's and the SLC's Counsel Reflect its Lack of Independence and Effectiveness

At the September 19 hearing, Dish's counsel gave only vague and unsure answers about the SLC's scope of authority, representing that there was not a formal resolution in place designating the SLC's authority, and that he could not make any representation regarding the timing of the SLC's investigation. Tr. of 9/19/13 Hr'g on Mot. For Expedited Disc. (attached as Ex. 6) at 41:8 – 42:10.

As noted, on September 23, 2013, Plaintiff sent the SLC a demand letter. Ex. 1. In that letter, Plaintiff made substantive demands, including that the Board reconstitute the special transaction committee that was previously formed to control Dish's pursuit of LightSquared's spectrum assets but then prematurely terminated, and that the Board allow the independent Goodbarn and that committee's counsel and advisors to control Dish's bidding process. In addition, Plaintiff's counsel asked Brokaw and Ortolf to respond by September 26, 2013, with basic information about the SLC: its scope, the basis for its independence, how the SLC is funded, the identities of its counsel and advisors, and the expected timing of the SLC's decisions.

On September 27, after receiving no response, Plaintiff's counsel sent a follow-up letter to the SLC, reiterating Plaintiff's requests for basic information about the SLC. 9/27/13 Ltr. from M. Lebovitch to SLC (attached as Ex. 7). On September 28, 2013 – ten days after the SLC was established and five days before the SLC was due to respond to the demand letter – the SLC

retained counsel, who immediately informed Plaintiff's counsel that no further information would be provided until October 3.

On September 30, Plaintiff's counsel spoke by phone with the SLC's counsel. When Plaintiff asked for a copy of the resolution setting forth his client's charge, the SLC counsel merely described his understanding of the resolution and indicated it was still in flux, and said that Plaintiff's counsel should contact Dish's counsel for the resolution.

On October 1, 2013, Plaintiff's counsel again contacted SLC counsel to offer assistance. In particular, Plaintiff's counsel observed that Plaintiff viewed a decision to insulate Dish's bidding activities from interference by Ergen and his loyalists as an obvious benefit to Dish that has no cognizable downside risk. Nevertheless, Plaintiff suggested that if the SLC genuinely wanted more time to make a final decision about barring Ergen from the LightSquared bidding process, it could pursue an interim step of supporting Plaintiff's request for expedited discovery and the setting of an injunction hearing, while retaining the ability to make a final recommendation about the request for injunctive relief later on. Plaintiff's counsel suggested that, because the SLC would need the same discovery that Plaintiff has requested in order to adequately and timely assess the merits of Plaintiff's claims, including the requested injunctive relief, there is no reason for the SLC to oppose expedited discovery. In response, the SLC's counsel represented only that the SLC would respond to the demand letter by the noon deadline on October 3.

III. Update on Case Developments Other Than Events Specific to the SLC

A. Recent Developments in the LightSquared Bankruptcy Process

As Defendants in this matter continue to fight against discovery and use every available tactic to delay proceedings and to avoid walling Ergen off from Dish's pursuit of LightSquared's spectrum assets, the LightSquared bankruptcy proceedings continue apace, reinforcing the need

for a prompt resolution of Plaintiff's requests for expedited discovery and injunctive relief. Indeed, the date of the bankruptcy auction was recently moved up to November 25, 2013, with bids due November 20. The debtor can adjust deadlines somewhat, but in no event will the auction go beyond December 6. In light of that exigency, expedited discovery and a prompt hearing to address injunctive relief are needed to protect the Company and its public shareholders. Notably, there have been no developments that would reduce the risk to Ergen that his secret debt purchases will be disallowed and not paid.

On September 30, 2013, the bankruptcy court held a hearing regarding bid procedures for LightSquared's assets. The bankruptcy court appointed Dish-controlled L-Band Acquisition, LLC ("LBAC") as a stalking horse for LightSquared assets. Despite that decision, Dish remains at risk of losing its status as a "stalking horse," remains at risk of losing out on LightSquared's spectrum and remains exposed to billions of dollars in liability. Specifically, the Bankruptcy Court only provisionally appointed LBAC as a stalking horse. Pursuant to the Bid Procedures Order dated September 30, 2013, LightSquared can propose an alternate stalking horse bidder on one days' notice if that bidder "will better promote the goals of the bidding process." *In re Lightsquared Inc.* Bid Procedures Order (attached as Ex. 8) at Schedule 1 p. 5. Thus, LightSquared may at any time propose an alternate stalking horse based on a determination that Dish's bid is tainted by Ergen's control and bad faith.

Further, following the auction, the bankruptcy court will hold a hearing pursuant to § 363 of the Bankruptcy Code in order to determine whether the court will approve the sale to the winning bidder. *Id.* at Schedule 1 p.1. Until that hearing, any objector (including Harbinger) can challenge the sale of LightSquared assets to Dish based on bad faith conduct during the sales process. *See In re Gucci*, 126 F.3d 380, 390 (2d Cir. 1997) ("good faith analysis is focused on the purchaser's conduct in the course of the bankruptcy proceedings. ***This includes the***

purchaser's actions ... during the sale itself") (emphasis added). Moreover, nothing in the stalking horse agreement provides for payment of a break-up fee to Dish if it is the successful bidder at auction only to have its bid disallowed because Dish is found to have acted in bad faith based on Ergen's secret debt purchases.

The LightSquared bankruptcy bidding procedures also do not address Harbinger's competing bankruptcy plan, which, if approved, would not lead to reorganization without sale of the LightSquared spectrum. As noted in Plaintiff's pending Motion, Harbinger has asserted that its plan is superior over the Ad Hoc Secured Group's plan with Dish's stalking horse bid because Dish is not a good faith purchaser. *See* Motion at 18.

Meanwhile, the bankruptcy court is very focused on insulating the auction against clear conflicts of interest. Thus, the bankruptcy court sought express confirmation that Ergen – despite being LightSquared's largest creditor – is completely walled off from the decisions and actions of the Ad Hoc Secured Group. The court's insistence that Ergen be isolated from similarly situated creditors illustrates that it views Ergen and Dish as a single bidder entity, the key premise to Habringer's claims. This fact further highlights the critical importance of Plaintiffs' pending Motion, which is currently the only way to demonstrate to the bankruptcy court that Dish is distinct from Ergen, and that Ergen's conduct (or misconduct) should not be imputed to Dish.

B. Plaintiff's Voluntary Dismissal of Goodbarn

Following the September 19 hearing, Plaintiff's counsel contacted Goodbarn's counsel to discuss Goodbarn's status as a defendant in this matter. In light of Plaintiff's effort to empower independent directors like Goodbarn, Plaintiff sought to confirm that, if invited, Goodbarn would serve on an appropriately funded and structured independent committee for the benefit of Dish and its shareholders. Goodbarn confirmed that he would so serve. In addition, the parties agreed

to a stipulation and proposed order dismissing Goodbarn from the case without prejudice. *See* Stip. & Order for Dismissal Without Prejudice for Def. Steven R. Goodbarn (attached as Ex. 9). Notably, the stipulation, which was shared with the SLC, documents Goodbarn's willingness to serve on a proper and independent committee. The SLC's refusal to make use of Goodbarn's willingness to act to protect Dish further casts doubt on its good faith and independence.

C. Additional Complaint and Consolidation

Following the September 10, 2013 *Wall Street Journal* article that Plaintiff previously brought to the Court's attention, various shareholder plaintiffs have sought to pursue litigation substantially similar to this pending action. One such plaintiff filed suit in this Court. *See DCM Multi-Manager Fund, LLC v. Charles W. Ergen, et al.*, Case No. A-13-688862-C. Plaintiff and DCM Multi-Manager Fund have agreed to consolidate the two pending actions, and seek appointment of Bernstein Litowitz Berger & Grossmann LLP as Lead Derivative Counsel and Cotton, Driggs, Walch, Holley, Woloson & Thompson as Nevada Liaison Counsel for Plaintiffs. A stipulation and proposed order to that effect will be submitted to the Court as soon as possible.

IV. Conclusion

As discussed above, Plaintiff has diligently pursued information from and communication with the SLC and its counsel in an effort to ensure that the SLC can act independently and effectively, in order to protect Dish and its public shareholders. However, those efforts have been fruitless, despite the fast pace of the LightSquared bankruptcy proceedings, which underscores the need for Plaintiff's requested expedited discovery. Given these exigencies, regardless of whatever decisions the SLC ultimately reaches, Plaintiff is entitled to the narrow, targeted discovery it seeks, which will help create the factual record necessary to determine the proper scope and contours of injunctive relief in this matter. As Defendants have already conceded, they could produce the requested discovery within seven

days (and, indeed, may have already produced some of the requested documents in the Harbinger litigation). For those reasons, Plaintiff respectfully requests that, whether or not the SLC continues its investigation of Plaintiff's claims, the Court grant Plaintiff's motion for expedited discovery and deny any requested stay of proceedings.

Dated this 3rd day of October, 2013.

COTTON, DRIGGS, WALCH, HOLLEY, WOLOSON & THOMPSON

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DISTRICT COURT

CLARK COUNTY, NEVADA

JACKSONVILLE POLICE AND FIRE PENSION FUND, derivatively on behalf of nominal defendant DISH NETWORK CORPORATION, Plaintiff, v. CHARLES W. ERGEN; JOSEPH P. CLAYTON; JAMES DEFRANCO; CANTEY M. ERGEN; STEVEN R. GOODBARN; DAVID K. MOSKOWITZ,; TOM A. ORTOLF; CARL E. VOGEL; DOES I-X, inclusive and ROE ENTITIES I-X, inclusive, Defendants. DISH NETWORK CORPORATION, a Nevada corporation, Nominal Defendant.	Case No.: A-13-686775-B Dept. No.: XI **APPENDIX OF EXHIBITS TO STATUS REPORT** [*Filed concurrently with Plaintiff's Status Report*]

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EXHIBIT 1

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September 23, 2013

BY EMAIL

Special Litigation Committee of Dish Network Corporation
c/o Messrs. George R. Brokaw and Tom A. Ortolf

Re: *Jacksonville Police and Fire Pension Fund on behalf of Dish Network Corporation v. Charles W. Ergen, et al.*

Dear Messrs. Brokaw and Ortolf:

We represent the Jacksonville Police and Fire Pension Fund ("Jacksonville P&F") in the above-referenced derivative action on behalf of Dish Network Corporation ("Dish" or the "Company"). Late in the evening of September 18, 2013, we learned that the Dish board of directors (the "Board") created a special litigation committee (the "SLC") to assess the claims asserted in Jacksonville P&F's Verified Amended Shareholder Derivative Complaint (the "Complaint"), a copy of which is enclosed as Exhibit 1. During the September 19, 2013 hearing before the Hon. Elizabeth Gonzalez, counsel working for controlling shareholder Charles Ergen and Board members loyal to Mr. Ergen represented that although the SLC's founding resolution was not complete, it will have broad authority to investigate the claims in the Complaint and take actions the SLC deems beneficial for Dish and its minority shareholders.

Noting the timing of the SLC's creation, our continuing doubt about Mr. Ortolf's independence, and defense counsel's vague statements about the SLC's charge, we expressed to the Court our concerns about placing too much reliance on the SLC's ability to adequately protect the rights of Dish and its minority shareholders without regard to Mr. Ergen's personal desires, preferences and interference. In addition, Count I of the Complaint seeks an injunction to prevent Mr. Ergen or any directors lacking independence of Mr. Ergen from controlling, influencing or interfering with Dish's efforts to acquire LightSquared's spectrum assets. We reminded the Court that in light of the timing of LightSquared's auction process, any relief on Count I must either be granted or denied within a matter of weeks, not months, and any delay by the SLC in taking prompt corrective action will *de facto* constitute a denial of Count I in its entirety. The Court instructed Jacksonville P&F to make an immediate demand on the SLC, and allowed the SLC until October 3 to provide a response. The Court made clear that our sending this demand is not a concession that a pre-suit demand was required and does not waive any of Jacksonville P&F's rights.

As per the Court's instructions, and despite Mr. Ortolf's significant ties to and dependence on Mr. Ergen, we are giving the SLC a chance to act in good faith to achieve for Dish and its minority shareholders the outcome that Jacksonville P&F will otherwise have to obtain through litigation. Thus, we send this letter to request information about the SLC and to demand that the SLC pursue – and/or support Jacksonville P&F's pursuit of – the claims in the Complaint. Below, we identify the information that should be produced immediately. Next, we provide a brief summary of the Complaint. Last, we outline Jacksonville P&F's immediate demands for SLC action (as to Count I of the Complaint) and its longer term demands.

This demand is made on the SLC only and not on the Board as a whole. For the reasons stated in the Complaint and Jacksonville P&F's motion for a preliminary injunction (enclosed as Exhibit 2), demand on the Board was and remains futile.[1] In order to protect and give any credence to the integrity of the SLC process, this letter must not be shared with Dish's controlling shareholder and chairman, defendant Charles W. Ergen ("Ergen"), Ergen's advisors (including Willkie Farr & Gallagher, Sullivan & Cromwell, their respective Nevada counsel, or any other advisor subject to Ergen's control and influence), or other Board members who are defendants in this action until the SLC has responded to the demand as per the Court's instructions.[2] Moreover, we remind you that any influence that Mr. Ergen or the other defendants have into the SLC process, including the SLC's retention of counsel, investigation, and handling of its task, casts serious doubt about the SLC's independence and effectiveness.

Finally, we note our concern that even if the SLC members would otherwise like to act independently, Mr. Ergen may simply be too much of a micromanaging controlling shareholder to properly empower and not interfere with the SLC's actions. Nevertheless, we approach this demand with an open mind and in good faith. In particular, we encourage the SLC to open a genuine and ongoing dialogue with us throughout the SLC's process. In our experience working with other special litigation committees, we have found that committees that engage with us and maximize the sharing of information and ideas tend to achieve the best possible results. We are experienced advocates for shareholder rights, and in structuring resolutions and corrections to

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[1] The Board's purported September 18, 2013 vote to create the SLC does not change the analysis for determining whether demand was futile when this action was brought. *See Fagin v. Gilmartin*, 432 F.3d 276, 284-85 (3d Cir. 2005) (district court improperly considered special litigation report on a motion to dismiss).

[2] For the avoidance of doubt, by making this demand, Plaintiff does not concede that the SLC is independent, that its charge and scope of authority is proper, or that it has otherwise been given the opportunity to effectively protect the rights of Dish and its minority shareholders. *See London v. Tyrell*, 2010 WL 877528, at *12 (Del. Ch. Mar. 11, 2010) (the special litigation committee has the burden of establishing its own independence "by a yard-stick that must be like Caesar's wife—above reproach"). In addition, as explained below, the most immediate demand made on the SLC is to reconstitute the special committee that was formed to assess Dish's bid for LightSquared's assets. While disclosures and discussions that may yet take place between the SLC and Jacksonville P&F in connection with this process may shed light on what happened and clarify Mr. Ortolf's role in the Board's prior breaches of duty, we note for present purposes that Mr. Ortolf was not placed on that special committee for a reason, and he evidently supported the patently disloyal decision to disband the special committee long before its work was done.

prior governance failures like those giving rise to the Complaint, we often supplement our own expertise with input and ideas from some of the nation's foremost corporate governance experts.

I. Request for Information

During the September 19, 2013 hearing, Dish's counsel was unable to provide specific information concerning the SLC's purpose, authority, funding and counsel. Information about these issues is critically important to ensure the SLC's ability to perform its investigation independently and in a timely manner. Please inform us, no later than September 26, 2013: (i) the scope of the SLC's authority; (ii) the basis for the SLC's purported independence; (iii) how the SLC is funded; (iv) who will act as the SLC's counsel (and its other advisors, if any); and (v) the expected timing for the SLC's work. In this regard, please provide a copy of the Board minutes or Board resolution approving the creation of the SLC as well as comprehensive disclosure regarding any relationships between the SLC's members (including any of their relatives or business affiliates), on the one hand, and Dish and/or Ergen (including other companies controlled by Ergen), on the other hand.

In addition, we do not know whether Mr. Ergen has permitted Dish to properly notify the Company's directors' and officers' insurance carriers about the claims made in the Complaint. Recognizing that we have not seen the insurance policies and that certain of the claims made against Ergen may be subject to contractual exclusions, we believe many of the claims at issue may be properly covered by insurance policies. In order to provide maximum protection to Dish's ability to obtain relief, please provide us, by September 26, written confirmation that the SLC has directly informed Dish's insurers of the SLC's creation, scope of authority, anticipated timeline, and its assertion on Dish's behalf of all available rights under the insurance policies.

II. Summary of the Complaint[3]

A. Events leading to the creation of the Special Transaction Committee

Five years ago, Ergen determined that Dish should diversify its business by acquiring wireless spectrum assets. After prior success in acquiring out of bankruptcy certain spectrum owners, Dish's attempts to acquire Sprint or Clearwire failed, and Dish continues to search for a potential takeover target owning significant spectrum.

LightSquared has developed significant spectrum assets in the L-Band. Following certain problems with the Federal Communications Commission (the "FCC"), on May 14, 2012, LightSquared filed a petition pursuant to Chapter 11 of the Bankruptcy Code in the bankruptcy court for the Southern District of New York.

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[3] This summary is for the SLC's convenience only, and does not attempt or purport to identify every material allegation or theory of the Complaint.

Ergen created SP Special Opportunities, LLC ("Sound Point")—an investment vehicle to secretly purchase LightSquared debt using Ergen's personal funds. By April 2013, Ergen had spent almost $850 million through Sound Point to purchase $1 billion of LightSquared secured debt, making Ergen LightSquared's single largest creditor in bankruptcy. Ergen did not inform the Board of his actions.

Ergen's debt purchases create numerous fiduciary problems. First, Ergen clearly misappropriated Dish's confidential strategic plans to identify and insulate his ability to personally profit on LightSquared debt. Ergen's job is setting Dish's strategy, including a potential acquisition of LigthSquared's spectrum assets. We are unaware of Ergen acting as a distressed debt investor for his personal account. The risk of buying LightSquared debt using personal wealth is a less risky proposition if the purchaser – Ergen – also controls a company that he knows is interested in and may have specific plans to buy LightSquared itself. Putting aside other fiduciary problems that his actions raise, Ergen's misuse of corporate information for personal profit is a breach of the duty of loyalty.

Second, Ergen's decision to indirectly and secretly buy LigthSquared debt even though Dish clearly wants to buy LigthSquared is itself a bad faith and disloyal act because his actions very predictably exposed Dish to the risk of serious harm. Three years ago, the same bankruptcy court overseeing the LightSquared bankruptcy found that Dish was not acting in good faith in the DBSD bankruptcy because Dish had purchased DBSD debt in an illicit effort to influence the bankruptcy proceedings so that it could obtain DBSD's spectrum rights. *In re DBSD North America, Inc.*, 421 B.R. 133, 139-40 (S.D.N.Y. Bankr. 2009). The bankruptcy court disqualified Dish's vote against a competing reorganization plan, finding that Dish improperly intended to "use [its] status as a creditor to provide advantages over proposing a plan as an outsider, or making a traditional bid for the company or its assets." *Id.* The district court and Second Circuit Court of Appeals affirmed the bankruptcy court's finding of Dish's bad faith. *See In re DBSD*, 2010 WL 1223109 (S.D.N.Y. March 24, 2010); *In re DBSD*, 627 F.3d 496 (2d Cir. 2010); *In re DBSD*, 634 F.3d 79, 104 (2d Cir. 2011) (finding that "DISH purchased the claims as votes it could use as levers to bend the bankruptcy process toward its own strategic objective of acquiring DBSD's spectrum rights, not toward protecting its claim").

Dish's recent history of being found to act in bad faith in a bankruptcy bidding process, coupled with LightSquared's effort to ensure that neither Dish nor entities working on Dish's behalf could use debt purchases to leverage a bankruptcy buyout, made it patently obvious that any debt purchases by Ergen would expose Dish to potentially catastrophic litigation. Indeed, the risk that his debt purchases would lead to problems similar to those Dish suffered in the *DBSD* case likely explains why Ergen did not inform the Board about his actions until it was too late for the Board to object to and stop those actions.

Third, and finally, to the extent that Dish was precluded from buying LightSquared debt

on its own, it is likely that Ergen was equally precluded.[4] In contrast, if Ergen was able to buy LightSquared debt despite the restrictions in LightSquared's debt agreements, then it is possible Dish would also have been able to buy the debt for its own benefit. While the bankruptcy court is going to construe the scope of LightSquared's debt agreement, any ruling that would leave room for Dish to have bought the debt means Ergen misappropriated a corporate opportunity. As set forth in the Complaint and the motion papers, we do not believe that the language of the Dish charter actually insulates Ergen's actions here.

B. The Termination of the Special Committee and Howard's Abrupt Resignation

The Board evidently learned of Ergen's debt purchases when Ergen made a personal $2 billion bid to buy LightSquared. Recognizing the absurdity of Ergen competing with Dish for assets that were strategically important to Dish, the Board formed a special transaction committee (the "STC") in May 2013 to determine how Dish should respond. Only directors Goodbarn and Howard were arguably independent enough to serve on the committee.

In July 2013, the STC (assisted by Perella Weinberg and Cadwalader Wickersham & Taft) recommended that Dish make a $2.2 billion stalking horse bid for LightSquared's spectrum assets, conditioned on: (1) the STC having an ongoing role in Dish's bid for the LightSquared assets; and (2) Dish being able to share in any profits arising from Ergen's LightSquared debt purchases. On July 21, 2013, a Sunday, the STC was suddenly disbanded, to the surprise of Messrs. Howard and Goodbarn,

On July 23, 2013, a group of LightSquared's secured creditors, including Ergen (the "Ad Hoc Secured Group"), submitted a bankruptcy plan that, if approved, will result in the sale of LightSquared's assets in a public auction, which included a "stalking horse agreement" whereby Dish bid about $2.2 billion to acquire substantially all of LightSquared's assets. The proposed stalking horse agreement contains significant deal protections favoring Dish. Two days later, on July 25, 2013, Howard abruptly resigned from the Board. Howard's resignation was so sudden and abrupt that Dish was in violation of NASDAQ listing rules.

C. Harbinger's and LightSquared's Pending Claims

On August 6, 2013, LightSquared's principal shareholder, Harbinger Capital Partners, LLC ("Harbinger"), sued both Dish and Ergen for more than $4 billion in damages based on fraud and civil conspiracy. The crux of Harbinger's claims against *Dish* is that Ergen's LightSquared debt purchases and Dish's bid are part of a fraudulent conspiracy to manipulate the

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[4] LightSquared's credit agreement (the "Credit Agreement") prohibited Dish from directly acquiring LightSquared's debt, but the ability of affiliates of Dish to do so is still subject to determination by the bankruptcy court. Harbinger has sued Ergen and Dish claiming that, among other things, Ergen and Dish are not "Eligible Assignees" (*i.e.*, authorized purchasers) of LightSquared debt under the Credit Agreement.

bankruptcy process so that Dish can obtain LightSquared's spectrum assets. LightSquared has filed a notice of intent to intervene as a plaintiff in the Harbinger action, seeking to equitably disallow Ergen's debt claims. In addition, LightSquared has submitted a proposed reorganization plan contemplating a bidding process led by LightSquared itself (not the secured lenders) in which Dish could be denied the coveted "stalking horse bidder" status.

On August 30, 2013, Harbinger filed its own reorganization plan, proposing to pay off all creditors *other than* Ergen's contested debt claims through the distribution of cash and new notes, and *without* selling LightSquared's spectrum. Harbinger's Disclosure Statement asserts a number of advantages of Harbinger's plan over the plan submitted by the Ad Hoc Secured Group (*i.e.*, Dish's $2.2 billion bid), including that "Dish, the presumptive stalking horse purchaser is not a good faith purchaser." Harbinger's claims and plan hinge on Ergen's control over Dish and pose a significant risk to Dish's ability to purchase the LightSquared spectrum assets.

D. Ergen's Continued Involvement in the Bid Confirms Harbinger's Claims and Puts Dish at Risk

The risks created by Ergen's undisclosed debt purchases have materialized, and are being exacerbated by Ergen's refusal to permit independent directors to control Dish's actions in the bidding process. The Board's refusal to isolate Ergen from influencing Dish's bid is itself an act of bad faith. Put simply, if any truly independent board learned that one of its directors was the largest creditor of the company's principal takeover target with a personal financial interest in any bid, that independent board would surely isolate the director/creditor from the company's assessment and execution of its bidding efforts. Moreover, a board's refusal to completely exclude the director/creditor from the bidding process to show that the company should not be tainted by the director's potential wrongdoing when his debt position led to a multi-billion lawsuit against the company and legal filings that would impair the company's ability to execute its takeover strategy is plainly disloyal.

Here, Ergen's undisclosed debt purchases are continuing to harm the Company. Indeed, unless Dish distances itself from Ergen's influence and shows it is not part of a fraudulent conspiracy, Dish may be found not to be a good faith purchaser and barred from acting as a stalking horse or acquiring LightSquared's spectrum altogether. The bankruptcy court may also designate the votes associated with Ergen's LightSquared debt, otherwise jeopardize Dish's status as stalking horse, or support the Harbinger plan (ruling out any sale of LightSquared spectrum). As the *DBSD* rulings show, these risks are far from speculative and, in this case, all hinge on a finding that Dish is not acting independently from Ergen's personal interests. In sum, with Ergen in control of Dish's bid, Ergen remains protected at the expense of Dish and its public shareholders.

E. COUNT I: Jacksonville P&F's Claim for Injunctive Relief

As set forth in the Complaint and explained in the motion, Ergen's actions in becoming LightSquared's largest creditor knowing Dish's interest in acquiring LightSquared, together with his refusal to give up control over Dish's bid to acquire LightSquared from bankruptcy, have resulted in harm to Dish and threaten to continue to exacerbate that harm. Further, Defendant Ergen's personal interests are not aligned with those of the Company and its public shareholders. Ergen has an incentive to protect his personal investment of almost $850 million in LightSquared debt even if doing so comes at the expense of Dish's interest in buying LightSquared's spectrum assets at the lowest possible price. In contrast, Dish and its public shareholders have an interest in achieving Dish's strategic objective of acquiring LightSquared's assets on the best terms, regardless whether the best way to do so would result in impairment of Ergen's personal claims.

In all events, the risk that Dish will suffer additional harm in the LightSquared bankruptcy proceedings is significantly greater if Ergen continues to control Dish's bid. Ergen and the rest of the Board owe a duty to allow Dish to pursue its strategic objectives without interference or influence from Ergen and to mount a stronger defense against Harbinger's claims by attacking the factual premise for Harbinger's claims: Ergen's control over Dish and Dish's $2.2 billion bid. Because Ergen and the Ergen-controlled directors refuse to give up control over Dish's actions in the LightSquared bankruptcy, they are continuing and increasing the risk that Dish will suffer billions of dollars of monetary damages and that Dish's ability to acquire LightSquared will be derailed or impaired.

Since the opportunity to acquire LightSquared in connection with the bidding process set to close on December 6, 2013 is a unique opportunity, the impairment of which is irreparable, Jacksonville P&F seeks an injunction against Ergen or any of the directors he controls from controlling, further interfering with or influencing Dish's efforts to buy LightSquared. To be frank, a reconstitution of the STC that was improperly disbanded would solve many problems.

F. COUNTS II THROUGH V: Jacksonville P&F's Claims for Money Damages

Ergen's debt purchases and influence over Dish's bidding efforts after the Board improperly terminated the STC have harmed Dish by increasing the risk that Dish will suffer monetary damages, will need to pay additional money for acquiring LightSquared or its assets (including because of Ergen's bid setting an artificial floor for LightSquared's assets), and incurs related costs defending itself from LightSquared's claims. In addition, Dish is entitled to share in any profits that Ergen realizes on debt purchases that he made based on Dish's confidential information, using Dish's bid, and without disclosing the opportunity to the Board. Accordingly, Counts II through V of the Complaint seek monetary damages from Ergen and the Ergen-controlled directors on the Board.

Specifically, Count II of the Complaint seeks an award of monetary damages from Ergen

and the Ergen-controlled Board members reflecting the additional costs Dish has already incurred and will incur in its efforts to acquire LightSquared and defending itself against Harbinger's claims.

Count III seeks compensation for any damages caused by Ergen's decision not to inform the Board of his plan to purchase LightSquared debt. When Ergen decided to purchase LightSquared debt – a business opportunity that arose because of Ergen's access to confidential Dish information and that was likely to increase the risk to the Company's ability to purchase LightSquared's assets in the bankruptcy proceedings – Ergen was obligated to inform the Board of his plans. If Ergen had informed the Board, Dish's independent directors could have determined whether Ergen's pursuit of the opportunity should be permitted or should be conditioned in any respect to protect Dish's interests. For example, the independent directors could have protected Dish's interests by conditioning Ergen's debt purchases on an agreement that Ergen would not personally bid on LightSquared assets (to set a floor) and the formation of a special transaction committee to be exclusively in charge of a Dish bid for LightSquared assets (if any). Another condition could have been an agreement by Ergen to share with Dish in the profits from any debt purchases that were realized using Dish's confidential information. Ergen's improper decision to keep the Board in the dark precluded the Board from making any determination and imposing any conditions to protect Dish's interests.

Count IV seeks disgorgement of Ergen's profits on the LightSquared debt to compensate Dish for Ergen's usurpation of a corporate opportunity. Having identified an opportunity to profit from purchasing LightSquared debt because of his work on finding strategic targets for Dish, Ergen's fiduciary duties required that he disclose his interest in exploiting this opportunity to the Board and allow the Board's independent members to decide whether it was in Dish's best interests to purchase LightSquared's debt itself. Dish's Charter also required Ergen to inform Dish of the opportunity to buy LightSquared debt.[5]

Here, seeing that Ergen was able to buy the debt through a newly-formed company which he controlled despite various contractual restrictions, the independent directors may well have found a way for Dish to indirectly purchase LightSquared's debt for the Company, thus lowering the cost to Dish of purchasing LightSquared's assets from bankruptcy and enhancing Dish's leverage in any bidding contest for LightSquared's coveted spectrum.

Count V seeks damages for Ergen's unjust enrichment. Specifically, to the extent that Ergen ultimately profits on his LightSquared debt purchases, Ergen has been unjustly enriched at

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[5] Although NRS § 78.070(8) allows Nevada corporations to renounce any interest or expectancy to participate in specified business opportunities, the statute does not excuse a director who breaches his or her duties when identifying or pursuing the opportunity, even if the corporation has otherwise renounced its interest in such opportunity. Also, neither the statute nor the charter permit Ergen to misuse confidential corporate information as a means to identify and protect his pursuit of an otherwise renounced opportunity.

Dish's expense because he identified and pursued the opportunity using confidential Dish information that he obtained in his capacity as Dish's Chairman.

III. Demands

Jacksonville P&F demands that the SLC pursue – or support Jacksonville P&F's continued pursuit of – each of the claims asserted in the Complaint. Specifically, Jacksonville P&F demands:

1. **Immediate reconstitution of the STC**.

1.1. The SLC must reconstitute the STC and give it sole and exclusive authority to act on behalf of Dish in the LightSquared bankruptcy proceedings.

1.2. To ensure continuity and to correct prior breaches, Steven Goodbarn must be included in the STC (assuming that he is willing to serve).

1.3. The SLC must guarantee that the STC receive any funding that STC requests and can hire any experts and counsel that it believes appropriate (including the same financial and legal experts that advised the original STC), without input or interference from Ergen or other Board members who lack independence of Ergen.

1.4. The SLC as currently constituted must not be permitted to undertake work that would otherwise be done by the STC. With all due respect, Mr. Ortolf's support for disbanding the STC disqualifies him from being a member of any reconstituted STC, even if Mr. Ortolf personally believes he is independent. Moreover, we have uncovered significant information showing why Mr. Ortolf would not have been a proper addition to the STC. Placing him on the STC, or allowing the SLC to do the work of the STC, simply raises the same problems that the original STC was supposed to avoid.

1.5. The Board must agree to provide the STC with information upon request, while the STC's process and analysis will only be shared with Ergen or other Board members to the extent the STC deems such disclosure proper and in the interest of Dish.

1.6. The STC should be asked to immediately inform the bankruptcy court deciding LightSquared's bankruptcy that Dish's bid is pursued independently from Ergen.

2. **Pursuit of money damages from Ergen and the Ergen-controlled directors**.

2.1. Ergen's and the Board's prior disloyal acts, including Ergen's misuse of confidential corporate information to identify the opportunity to profit on LightSquared debt purchases, Ergen's purchase of the debt despite the known

likelihood that those purchases would complicate or imperil Dish's ability to effectuate its strategic plan, Ergen's decision not to inform the Board about his LightSquared debt purchases until after he had made those purchases, the premature disbandment of the STC, the refusal to isolate Ergen from the Dish bid, and the Board's decision not to demand from Ergen that Dish share in the profits of the LightSquared debt purchases, have harmed and will further harm Dish financially.

2.2. Ergen should face disgorgement for any personal profits arising from his usurpation of a corporate opportunity belonging to Dish in a manner that breached his fiduciary duties, and (even if Dish could not directly take the opportunity) to account for Ergen's unjust enrichment.

2.3. The SLC should thoroughly investigate these claims and, preferably after articulating its assessment to and coordinating efforts with Jacksonville P&F, negotiate a significant monetary recovery for Dish's benefit.

3. **Implementation of comprehensive corporate governance improvements**.

3.1. The events giving rise to the Complaint reflect serious corporate governance breakdowns and deficiencies at Dish. The SLC should aggressively act to implement governance enhancements that are likely to prevent any similar breakdown in the future.

3.2. As noted, we have considerable expertise in crafting novel and meaningful corporate governance enhancements tailored to company-specific problems.

As the SLC is aware, the LightSquared bankruptcy proceedings are moving quickly and time is of the essence. A refusal to at least reconstitute the STC as set forth in Demand 1 above by October 3, 2013, would be a clear sign that the September 18, 2013 formation of the SLC is merely aimed at stalling the proceedings in this Action for the benefit of Ergen rather than a good faith attempt to investigate Jacksonville P&F's claims for the benefit of Dish.

Please contact us with any questions about Jacksonville P&F's demand or to discuss developments that may impact the demand. We are, of course, available to discuss possible solutions with the SLC in the interest of Dish.

Sincerely yours,

Mark Lebovitch

Encl. (2)

EXHIBIT 2

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Attorneys at Law

WILMINGTON
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October 3, 2013

VIA EMAIL

Mark Lebovitch
Bernstein Litowitz Berger & Grossmann LLP
1285 Avenue of the Americas
New York, NY 10019-6028

Re: *Jacksonville Police and Fire Pension Fund on behalf of DISH Network Corporation v. Charles W. Ergen, et al.*

Dear Mr. Lebovitch:

On behalf of the Special Litigation Committee ("SLC") of DISH Network Corporation ("DISH"), we write in response to your September 23, 2013 letter, demanding that the SLC pursue – or support your client's pursuit of – each of the claims asserted in the Complaint (the "Demand"). Your letter also urges the SLC to pursue immediate relief, by reconstituting the Special Transaction Committee, and requests certain information concerning the SLC. You have subsequently clarified by telephone that the immediate action your client demands from the SLC need not take the form of reconstituting the Special Transaction Committee, that any immediate action that provides the relief sought by your preliminary injunction motion would suffice.

Response to Demand That Claims Be Pursued

Under the governing DISH Board resolutions, which are attached,[1] the SLC has been granted full authority to investigate each of the claims of the Complaint, to determine whether their pursuit is in the best interests of DISH and to act on behalf of DISH in this litigation. The SLC has retained independent counsel, specifically my firm, Young Conaway Stargatt & Taylor, LLP, and Holland & Hart LLP, which together have substantial experience in corporate governance, bankruptcy and special litigation committee matters. The SLC has received advice of counsel concerning its fiduciary duties as members of a special litigation committee.

[1] We are providing the DISH Board resolutions on a confidential basis, pending the entry of an appropriate confidentiality order.

The SLC takes seriously each of the claims asserted in the Complaint and will conduct a thorough investigation. Upon completion of the investigation, the SLC will determine whether pursuit of the claims is in the best interests of DISH and respond to your demand that they be pursued.

To thoroughly investigate all the claims of the Complaint, the SLC expects that it will need approximately four months to complete its investigation. It expects, during the coming weeks, to request and review documents from DISH and other relevant persons and to complete its review of documents by early November. The SLC further expects to conduct interviews of relevant persons during November and early December. Thereafter, it will deliberate to determine the appropriate course of action in response to the Demand. Since issues may arise that may require more time to investigate than now estimated, the SLC cannot be certain when it will complete its investigation. However, it currently projects that it will complete its investigation by the end of January 2014. It would not make sense for the SLC to conclude its investigation until after the Bankruptcy Court has confirmed a bankruptcy plan because future events in that proceeding could affect the SLC's determinations.

Response to Request for Immediate Relief

The SLC has considered your client's demand for immediate action that would provide the relief sought by your client's motion for preliminary injunction. Specifically, the SLC has considered whether it would be in the best interest of DISH for the SLC to seek to prevent Ergen and the directors that allegedly lack independence from him from influencing DISH's decisions in the auction or concerning more generally DISH's efforts to acquire LightSquared's assets.

Based primarily upon a few points set forth in the Complaint, to which all parties apparently agree, the contents of filings in the Bankruptcy Court, including the recent order establishing LBAC as the "stalking horse" bidder, and various principles of relevant corporate governance and bankruptcy law, as well as certain practical considerations, the SLC does not believe that the requested action would serve the best interests of DISH.

The SLC believes that such actions are unwarranted and also would harm DISH, including in its effort to acquire LightSquared's assets. The SLC believes that the actions are unwarranted for the following reasons: As you have correctly alleged in the Complaint, due to the bids previously submitted by Ergen, through L-Band Acquisition, LLC, and DISH, who has now been established as the "stalking horse" bidder, Ergen will receive par plus substantially all accrued interest on his secured debt of LightSquared, if LightSquared is to be sold. For this reason, even if Ergen were to control decisions by DISH in the bidding process, he could not increase the value of his interest in LightSquared's secured debt. He therefore no longer has any material personal interest that might induce him to make decisions for DISH that are not in DISH's best interest but might increase the value of his personal interest in the secured debt. No further decision by DISH could increase that value because the value could never exceed its existing value at par plus substantially all accrued interest. Ergen therefore no longer has any

material personal interest in DISH's decisions that diverges from those of DISH's remaining stockholders. In fact, as the owner of 52% of DISH's equity, his interests are well aligned with DISH and its other stockholders.

As for whether Ergen's participation in decisions by DISH might impede or impair DISH's efforts to acquire LightSquared's assets in the bankruptcy proceeding, the SLC believes that there is no material risk that this will occur. DISH is now beyond any material risk that Ergen's participation might prevent DISH's LBAC from becoming the "stalking horse" bidder. With full knowledge of Harbinger's allegations concerning Ergen's acquisition of the secured debt and Ergen's relationship to DISH and LBAC, the Bankruptcy Court determined last Monday that LBAC would be the "stalking horse" bidder potentially entitled to a $51.8 million "break up" fee, if an alternative transaction is consummated, subject to certain exceptions. DISH therefore is now well positioned in the bankruptcy auction.

The Harbinger adversary proceeding does not present a material risk that DISH will be precluded or hindered in its efforts to acquire LightSquared's assets. The Complaint states that Harbinger seeks, in the adversary proceeding, "a bankruptcy designation that DISH is not a good faith bidder." This is not correct. Harbinger's complaint asserts no such claim for relief. The only claims against DISH are for damages.

Harbinger *has* asserted that DISH's LBAC is not a good faith bidder in support of its effort to have the Bankruptcy Court approve its proposed bankruptcy plan, which does not permit a sale to LBAC or any other bidder. However, the SLC believes that there is not a material risk that, if LBAC is the winning bidder, the Bankruptcy Court would effectively reject LBAC's bid and approve Harbinger's plan, based upon the notion that LBAC is not a good faith bidder. To do so, the Bankruptcy Court would have to forgo alternative plans that it believes provide greater value to LightSquared and its creditors, and subject LightSquared and its creditors to the $51.8 million "break up" fee, which it approved while knowing of the argument that LBAC is not a good faith bidder. If the Bankruptcy Court ever develops a concern about Ergen's acquisition of the secured debt of LightSquared, while controlling DISH and LBAC, the most direct remedy for the Bankruptcy Court would be to simply disallow Ergen's secured debt, the remedy that Harbinger is already seeking in its adversary proceeding, disqualify its vote or otherwise affect the debt. It seems exceedingly unlikely that the Bankruptcy Court would penalize LightSquared and its creditors, by denying them the value of a plan that would provide them with more value, including a winning LBAC bid, and subjecting them to the "break up" fee, when it has available a remedy that would harm only Ergen.

The SLC further believes that it would be harmful to DISH to prevent Ergen and the directors that allegedly lack independence from him – seven of the existing eight directors – from influencing DISH's decisions concerning the acquisition of LightSquared. It would be detrimental to DISH's effort to acquire LightSquared's assets to preclude nearly the entire board from functioning fully at such a critical moment.

Responding to expedited discovery and preparing for the requested evidentiary hearing on the motion for preliminary injunction would consume valuable time of the defendant directors, management and counsel. Since this time might otherwise be invested in the efforts to acquire LightSquared, the requested discovery and preliminary injunction would interfere with DISH's ability to properly prepare for and participate in the auction of LightSquared. Even if your client limits the requested discovery, the matters raised by its injunction motion are complex, the discovery burden would still be substantial and many of the directors, DISH's management and outside counsel would be needed to help prepare DISH's defense and possibly to testify.[2] The requested injunction hearing and expedited discovery would undermine the very purpose for which the injunction is ostensibly sought.

Moreover, pursuing the injunctive relief would require the movant to make arguments that would be damaging to DISH's defense of Harbinger's adversary proceeding, which seeks $2 billion from DISH. The motion for preliminary injunction is predicated in substantial part upon the notion that Harbinger's position in the bankruptcy proceedings presents a risk to DISH's efforts to acquire LightSquared's assets. To establish that there is such a risk, the movant will necessarily need to demonstrate that Harbinger's claims may have merit. If they are meritless, there would be no risk and no need for injunctive relief. To demonstrate that there is risk, the Complaint indeed quotes extensively from the Harbinger complaint and goes so far as to allege that the conduct of DISH and Ergen at the present time is "similar" to DISH's conduct in the DBSD case, in which DISH was found to have acted in bad faith in acquiring debt of a debtor in bankruptcy. This is the same argument made by Harbinger. In seeking to obtain a preliminary injunction, the movant would have to prove or come close to proving a central aspect of Harbinger's claims, thereby increasing the possibility of a $2 billion damages award against DISH.

Although the SLC does not believe that pursuing preliminary injunctive relief is in the best interests of DISH, it will be attending DISH Board meetings. If Ergen's personal interest diverges from the interests of DISH and its remaining stockholders or if the SLC otherwise has reason to believe that the Board may not act in the best interests of DISH, the SLC will promptly seek remedial action and, if it is not forthcoming, advise the Court about the concern and seek appropriate injunctive or other relief.

The SLC has reached no views on the remaining aspects of the Complaint and will not do so until it has investigated them fully by, among other measures, obtaining and reviewing relevant documents, interviewing relevant persons and considering relevant legal principles.

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[2] *Cf. Rosenblum v. Sharer*, 2008 U.S. Dist. LEXIS 65353, at *25 (C.D. Cal. July 28, 2008) (granting motion to stay and stating: "[I]t seems sensible for [the company] and its stockholders that [the company's] resources be devoted for some time to the federal securities action").

Response to Requests for Information

As for your requests for information, we attach hereto, on a confidential basis, the final resolutions establishing the SLC and defining the scope of its authority. The resolutions also address the SLC's funding. We detail below the relevant facts pertaining to the independence of the members of the SLC. We identify above the firms that will act as the SLC's counsel. We also set forth above the expected timeline for the SLC's investigation.

The following are the disclosures concerning the independence of the members of the SLC:

Mr. Ortolf has served on the DISH Board since May 2005 and is a member of its Audit Committee, Compensation Committee and Nominating Committee. He is also a member of the Board of EchoStar Corporation ("EchoStar"). He was one of the first employees and later was President of EchoStar, which then included the business that is now DISH. For nearly 20 years, he has been the President of Colorado Meadowlark Corp., a privately held investment management firm.

Mr. Ortolf met Ergen in 1977 at Frito-Lay, where they were office mates. They have maintained a generally friendly professional relationship since then.[3] With the exception noted below, Mr. Ortolf has not had any other involvement with Mr. Ergen other than in his capacity as a director of DISH and EchoStar, for which he has received disclosed director's fees and options, and as a former member of EchoStar's management, for which he received annual W-2 compensation of less than $100,000 annually. In 1983, Mr. Ortolf began working at Ecosphere Corporation ("Echosphere"), earning a salary and also earning equity. In 1986, he sold his equity interest to Ecosphere for $1 million. In 1987, he invested the $1 million plus approximately $400,000, which he had borrowed, in Echostar's predecessor, of which he was then President and Chief Operating Officer. There, he earned a salary and earned a percentage of the company's profits. During the course of his employment at EchoStar's predecessor, the amount of profits distributed to him were in the amounts needed to cover the taxes that he owed on his percentage of the profits. Upon leaving EchoStar in 1991, his initial investment, the appreciation on his initial investment and the profits to which he was entitled that had not

[3] "Allegations of mere personal friendship or a mere outside business relationship, standing alone, are insufficient to raise a reasonable doubt about a director's independence." *Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart*, 845 A.2d 1040, 1050 (Del. 2004). *See also, e.g.*, *Zimmerman v. Crothall*, 2012 Del. Ch. LEXIS 64, at *44 (Mar. 5, 2012) ("To rebut the presumption of director independence, a plaintiff must allege more than that the directors 'moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as "friends."'" (citations omitted)).

previously been distributed for taxes, all of which totaled about $7 million, were distributed to him. After subsequently lending a portion of the $7 million to EchoStar, it was repaid to him by EchoStar within about six months.

The exception referenced above is that, in 1992, Mr. Ortolf invested with Echosphere and another entity unrelated to Ergen in a new venture called Titan Satellite Systems, Inc., which discontinued business at a loss within eighteen months. The amount invested and lost by Mr. Ortolf was approximately $600,000.

Mr. Ortolf owns 60,000 shares of DISH stock, with a market value of approximately $2.75 million. He also own 12,000 shares of EchoStar stock, with a market value of approximately $500,000. The shares of DISH and EchoStar were acquired by Mr. Ortolf with cash.[4]

Mr. Brokaw will join the DISH Board on October 7, 2013. Over the years, he has served on the boards of directors of multiple companies, including Capital Business Credit LLC, Timberstar, Value Place Holdings LLC and North American Energy Partners Inc. (a NYSE-listed company), where Mr. Brokaw served on the audit committee. He is deeply experienced in investment and mergers and acquisitions matters, having most recently served as Managing Director of Highbridge Principal Strategies, LLC, until September 30, 2013. Between 2005 and 2012, Mr. Brokaw was a Managing Partner and Head of Private Equity at Perry Capital, L.L.C. Prior to joining Perry Capital, in 2005 Mr. Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. Mr. Brokaw has had no prior relationship with DISH, EchoStar or any other entity related to Ergen. Mr. Brokaw's mother-in-law is friends from childhood with Cantey Ergen. Due to this relationship and because Mr. Brokaw's in-laws now live outside the United States, in Australia, at the request of Mr. Brokaw's wife, Ms. Ergen was made godmother to Mr. Brokaw's son. Mr. Brokaw has seen one or both of the Ergens once or twice a year. From time to time, Mr. Ergen has solicited Mr. Brokaw's professional views on

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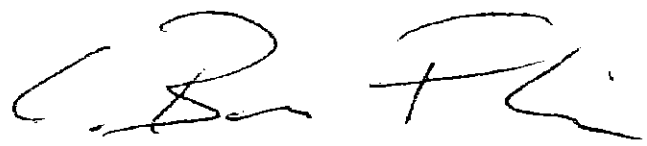
[4] DISH did not exclude Mr. Ortolf from participation on the STC due to concerns about his independence from Mr. Ergen. Rather, Mr. Ortolf recused himself from participation on the STC because, at the time, Mr. Ortolf was a member of the board of directors of EchoStar, and EchoStar had a potential interest in bidding on the LightSquared assets. EchoStar later determined that it was not interested in submitting a bid, and the DISH/EchoStar conflict that existed at the formation of the STC ceased.

some matters, without compensation. In 2003, Mr. Brokaw, as an investment banker for Lazard Frères & Co. LLC, on behalf of SBC, acted adversely to Mr. Ergen, on behalf of EchoStar, in negotiating the unwinding of an agreement between SBC and EchoStar.

Very truly yours,



C. Barr Flinn

CBF:jkm

DISH NETWORK CORPORATION

CERTIFICATE OF THE ASSISTANT SECRETARY

The undersigned, being the Assistant Secretary of DISH Network Corporation (the "Corporation"), a Nevada Corporation, hereby certifies that:

> Attached hereto as Exhibit A is a true and correct copy of resolutions duly adopted by the board of directors of the Corporation (the "Board of Directors") at the Special Meeting of the Board of Directors held on September 18, 2013.

IN WITNESS WHEREOF, I have hereunto signed my name effective as of the 3rd day of October, 2013.

Brandon Ehrhart
Vice President, Associate General
Counsel and Assistant Secretary

Exhibit A

Formation of the Special Litigation Committee

WHEREAS, the board of directors (the "Board of Directors") of DISH Network Corporation (the "Corporation") believes it is in the best interests of the Corporation to establish a special committee of the Board of Directors (the "Special Litigation Committee"), consisting of Messrs. Tom A. Ortolf and George R. Brokaw (each a "Committee Member" and collectively the "Committee Members"), pursuant to NRS 78.125 (the "Nevada Statute") and the applicable provisions of the Bylaws of the Corporation, for the purposes set forth herein; and

WHEREAS, the Board of Directors has determined that the Committee Members are independent of the claims asserted in the shareholder derivative action filed by the Jacksonville Police and Fire Pension Fund in the District Court, Clark County, Nevada (together with any amendments, revisions or other pleadings related thereto or generated thereby) and any similar shareholder derivative actions that may be filed from time to time (collectively, the "Derivative Litigation");

NOW, THEREFORE, BE IT RESOLVED, that in light of the foregoing, the Board of Directors has determined, in the good faith exercise of its reasonable business judgment, that it is advisable and in the best interests of the Corporation and its stockholders to establish the Special Litigation Committee to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Special Litigation Committee be, and it hereby is, established, in accordance with the Nevada Statute and the applicable provisions of the Bylaws of the Corporation with all the powers and authority of the Board of Directors to accomplish the purposes and to carry out the intent of the resolutions herein; and further

RESOLVED, that the Board of Directors has determined that each of Tom A. Ortolf and George R. Brokaw are independent of the claims asserted in the Derivative Litigation and neither of them has, or is subject to, any interest that, in the opinion of the Board of Directors, would interfere with the exercise by him of his independent judgment as a member of the Special Litigation Committee and that, each of them be, and they hereby are, appointed as the Committee Members to hold such office for so long as is necessary to carry out the functions and exercise the powers expressly granted to the Special Litigation Committee as shall be authorized in the resolutions herein; and further

RESOLVED, that the Board of Directors hereby delegates to the Special Litigation Committee the power and authority of the Board of Directors

to: (1) review, investigate and evaluate the claims asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith; (3) determine whether it is in the best interests of the Corporation and/or to what extent it is advisable for the Corporation to pursue any or all of the claims asserted in the Derivative Litigation taking into consideration all relevant factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on behalf of the Corporation any claims asserted in the Derivative Litigation; and (5) direct the Corporation to formulate and file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith, including, without limitation, the filing of other litigation and counterclaims or cross complaints, or motions to dismiss or stay the proceedings if the Special Litigation Committee determines that such action is advisable and in the best interests of the Corporation; and further

RESOLVED, that, in furtherance of its duties as delegated by the Board of Directors, the Special Litigation Committee is hereby authorized and empowered to retain and consult with such advisors, consultants and agents, including, without limitation, legal counsel and other experts or consultants, as the Special Litigation Committee deems necessary or advisable to perform such services, reach conclusions or otherwise advise and assist the Special Litigation Committee in connection with carrying out its duties as set forth in the resolutions herein; and further

RESOLVED, in connection with carrying out its duties as set forth in the resolutions herein, the Special Litigation Committee is hereby authorized and empowered to enter into such contracts providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel, accountants and other experts or consultants as the Special Litigation Committee deems necessary or advisable, and that the Corporation is hereby authorized and directed to pay, on behalf of the Special Litigation Committee, all fees, expenses and disbursements of such legal counsel, experts and consultants on presentation of statements approved by the Special Litigation Committee, and that the Corporation shall pay all such fees, expenses and disbursements and shall honor all other obligations of the Corporation and/or the Special Litigation Committee under such contracts; and further

RESOLVED, that, in connection with carrying out its duties as set forth in the resolutions herein: (1) the officers of the Corporation are hereby authorized and directed to provide to the Special Litigation Committee, each Committee Member and any of their advisers, agents, counsel and designees, such information and materials, including, without limitation, the books and records of the Corporation and any documents, reports or

studies pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (2) the Special Litigation Committee is authorized and empowered to meet with both present and past members of the Board of Directors who are not members of the Special Litigation Committee or with the officers of the Corporation to solicit the views of such directors and/or officers pertaining to the Derivative Litigation as may be useful or helpful in the discharge of the Special Litigation Committee's duties or as may be determined by the Special Litigation Committee, or any member thereof, to be appropriate or advisable in connection with the discharge of the duties of the Special Litigation Committee; (3) the Special Litigation Committee may but shall not be required to make such reports to the Board of Directors with respect to its deliberations and recommendations at such times and in such manner as it considers appropriate and consistent with carrying out its duties as set forth in the resolutions herein; and (4) to the fullest extent consistent with law, the deliberations and records of the Special Litigation Committee shall be confidential and maintained as such by each Committee Member and any legal counsel, experts and consultants engaged by the Special Litigation Committee and, without limiting the generality of the foregoing, all statutory and common law privileges shall be available with respect to legal advice rendered to, and documents prepared by counsel to assist, the Special Litigation Committee in its deliberations; and further

RESOLVED, that the Corporation shall indemnify each Committee Member in the manner and to the extent set forth under the current practices of the Corporation under the Articles of Incorporation of the Corporation in effect as of the date of this meeting (the "Current Articles") and under the Bylaws of the Corporation in effect as of the date of this meeting (the "Current Bylaws") regarding indemnification and advancement of expenses to the members of the Board of Directors against permitted items (as set forth in the Current Articles and Current Bylaws) arising out of the fact that the Committee Member is a member of the Special Litigation Committee, regardless of whether the Current Articles and the Current Bylaws are amended or modified in the future; with the sole exception that the advancement of expenses (including, without limitation, attorney's fees) incurred in defending against any such permitted items shall be determined in the sole discretion of the chairman of the Audit Committee of the Board of Directors (the "Audit Committee") if not a member of the Special Litigation Committee (or the next most senior member of the Audit Committee who is not a member of the Special Litigation Committee if the chairman of the Audit Committee is a member of the Special Litigation Committee (or the Chief Financial Officer of the Corporation if all members of the Audit Committee are

members of the Special Litigation Committee)), but otherwise subject to the terms and conditions applicable under the Current Articles and Current Bylaws, including, without limitation, that subject to an undertaking by or on behalf of the Committee Member to repay such amount if it shall ultimately be determined by a final order of a court of competent jurisdiction that he is not entitled to be indemnified by the Corporation for such permitted items; and further

RESOLVED, that, as of the date of this meeting, Mr. Brokaw be, and hereby is, designated as a Beneficiary (as defined in the D&O Trust (as defined below)) under the terms and conditions of that certain 2004 Indemnification Trust entered into by and between the Corporation and U.S. Bank National Association as of November 22, 2004 (the "D&O Trust"), with all of the rights, duties and obligations of a Beneficiary as set forth in the D&O Trust; and further

RESOLVED, that for their services on the Special Litigation Committee, each Committee Member shall be entitled to receive compensation as set forth on Schedule A (at the times specified therein), together, during the pendency of their service on the Special Litigation Committee, with prompt reimbursement of expenses reasonably incurred in connection with their services on the Special Litigation Committee; and further

General Enabling Resolutions

RESOLVED, that the proper officers be, and each one of them acting alone or with one or more other proper officers hereby is, authorized, empowered and directed, in the name and on behalf of the Corporation and its subsidiaries and under their corporate seals or otherwise, from time to time, to make, execute and deliver, or cause to be made, executed and delivered, all such other and further agreements, certificates, instruments or documents, to pay or reimburse all such filing fees and other costs and expenses, and to do and perform or cause to be done or performed all such acts and things, as in their discretion or in the discretion of any of them may be necessary or desirable to enable the Corporation and its subsidiaries to accomplish the purposes and to carry out the intent or the foregoing resolutions; and further

RESOLVED, that any and all actions previously taken by any of the proper officers of the Corporation and its subsidiaries within the terms of the foregoing resolutions be, and the same hereby are, ratified and confirmed in all respects.

Schedule "A"

Special Litigation Committee Compensation

Each Committee Member will be compensated $5,000 per month while serving on the Special Litigation Committee; provided that, the Board of Directors shall review the amount of such compensation following the date that is five (5) months after the date of this meeting.

EXHIBIT 3

Paul Ortolf

Student at Thunderbird School of Global Management

Phoenix, Arizona Area | Telecommunications

Previous Dish Network

Education Thunderbird School of Global Management

258 connections

www.linkedin.com/pub/paul-ortolf/29/b6b/33a

Contact Info

Background

Experience

International Programming Specialist
Dish Network
March 2011 – March 2013 (2 years 1 month)

International Programming Coordinator
Dish Network
May 2009 – February 2011 (1 year 10 months)

Programming Coordinator
Dish Network
April 2008 – May 2009 (1 year 2 months)

Skills & Expertise

Most endorsed for...

5	Team Leadership
4	Strategic Planning
4	Competitive Analysis
4	Project Management
3	Analytics
3	Business Analysis
2	Vendor Management
2	Leadership
1	Data Analysis
1	Process Improvement

Education

Search for people, jobs, companies, and more... Advanced

Home Profile Network Jobs Interests

Thunderbird School of Global Management
Master of Business Administration (MBA), Global Management
2013 – 2014 (expected)

Baylor University
B.B.A, Finance/International Business
2003 – 2007

Fluent in Spanish. Minor from Baylor University in Accounting and Spanish.

Activities and Societies: Phi Gamma Delta, International Business Seminar in Europe, International Study Abroad Program in Mendoza, Argentina

Groups

DFW Market Information & Opportunities
Join

Satellite Industry Professionals
Join

Following

Telecommunications
254,510 followers
Follow

Dish Network
Telecommunications
Follow

People Similar to Paul

Carl Steele
Technical Team Leader
Connect

EXHIBIT 4

Meaghan Ortolf

Operations Coordinator at Dish Network

Greater Denver Area | Public Relations and Communications

Previous Dish Network, EYETOPIA EYE CARE, BAYLOR MARKETING AND COMMUNICATIONS

Education Baylor University

204 connections

www.linkedin.com/pub/meaghan-ortolf/22/2b7/147

Contact Info

Background

Summary

Recent graduate looking for a challenging position that will utilize and strengthen the organizational, motivational and business skills acquired in over four years of dedicated study at Baylor University.

Specialties:Microsoft Office Suite, Adobe Photoshop, Adobe InDesign, Officemate, Examwriter, proficient in both PC and Mac environments, type 65 WPM, excellent communication and interpersonal skills. Intelligent and energetic with an unmatched desire to achieve.

Experience

Operations Coordinator
Dish Network
March 2013 – Present (8 months)

Operations Analyst
Dish Network
May 2011 – March 2013 (1 year 11 months)

Operations Analyst
Dish Network
2011 – 2011 (less than a year)

Front Desk Coordinator
EYETOPIA EYE CARE
June 2010 – April 2011 (11 months)

Respond to roughly 75 phone calls per day, generating an average of 10 new patients and $1K revenue per week.
Develop and maintain strong business relationships with manufacturing laboratories for both contact lenses and prescription glasses.
Assume full responsibility in dealing with insurance companies to validate patients' insurance coverage for both medical and vision.
Organize and coordinate schedule for the entire practice.
Play a key role in managing contact lens orders, prescription verifications, and day-to-day patient needs.
Efficiently oversee a hundreds of individual patient accounts that established organization.

Notable Contributions:
Remarkably reduced production time by 50% and significantly minimized scheduling conflicts by implementing a new process of distributing pre-appointment letters.
Earned a $150 bonus as an award for boosting sales of Cooper Vision Contacts.

Intern
BAYLOR MARKETING AND COMMUNICATIONS
September 2009 – December 2009 (4 months)

Assumed full responsibility in conducting interviews with several members of Baylor's faculty, staff, and alums in various schools and professions.
Analyzed and revised diversity of media in accordance with the Associated Press Stylebook Standard; this initiative provided the opportunity to improve and hone technical writing acumen.

Notable Contributions:
Significantly improved interviewing skills and wrote eight student profiles published in Baylor's Gameday Magazine.

Sales Associate 2007
VANITY FASHION RETAIL
September 2007 – October 2008 (1 year 2 months)

Utilized retail sales knowledge and selling ability through excellent customer relations.
Provided expert assistance in organizing stocks and performing quality control of inventory.
Assumed full responsibility in overseeing the store operations and daily bank deposit.

Notable Contributions:
Extremely decrease store shrinkage from 1.6% to .04% by providing proactive leadership to the team.

Education

Baylor University
BA, Journalism
2005 – 2009

Baylor University, Waco, TX
Awarded a Bachelor of Arts in December 2009, majoring in Journalism with an emphasis on Public Relations with a minor in Marketing and Management. Knowledge of the field of Public Relations gained from internship in marketing and communications. Classes in writing for media markets, editing, advanced public relations and public relations media
programs.

Activities and Societies: Kappa Kappa Gamma, Public Relations Student Society of America

Baylor University
Bachelor of Arts, Journalism; Public Relations
2005 – 2009

2009)
Field of Study: Writing for Media Markets, Editing, Advanced Public Relations, and Media Programs

Additional Info

Interests

Writing, hiking, professional networking, reading novels, international travel

Organizations

Additional Organizations

Pen Pal for Parkdale Elementary School, Waco, TX Kappa Omega Tau Fishery, Waco, TX Samaritan Purse (Operation Christmas Child), Highlands Ranch, CO Member of Kappa Kappa Gamma

Groups

EXHIBIT 5

C. Barr Flinn

Partner
bflinn@ycst.com

p 302.571.6692
f 302.576.3292

Wilmington, DE

Mr. Flinn is a member of the Corporate Counseling and Litigation Section and the former Co-Chair of the Litigation and Trial Practice Section. He has successfully tried or argued numerous cases in the Delaware Court of Chancery and other Delaware courts, concerning all manner of complex disputes including: contested mergers and acquisitions, appraisals, proxy disputes, dilutive stock issuances, foreclosures on equity interests, alleged fraud, alleged breach of fiduciary duty upon insolvency and alleged misuse of confidential information and trade secrets.

More specifically, such cases have involved, among other issues, a private equity firm's foreclosure on stock controlling $2 billion of hotel properties, *CNL-AB LLC v. Eastern Property Fund I SPE (MS REF) LLC*, C.A. No. 6137-VCP (preliminary injunction argument), the dilution of a controlling shareholder's interest in a corporation, *Benihana of Tokyo v. Benihana, Inc.*, C.A. No. 550-N-VCP (trial), the alleged misuse of confidential information, *Seibold v. Camulos Partners LP*, C.A. No. 5176-CS (trial), the alleged breach of alleged duties to warrant holders, *Corporate Property Associates 14, Inc. v. CHR Holding Corporation*, C.A. No. 3231-S (dismissal and summary judgment arguments), the appraisal of preferred stock of an investment banking firm, *Shiften v. Morgan Joseph Holdings, Inc.*, C.A. No. 6424-CS (summary judgment argument), and the transfer of assets to an affiliate allegedly in breach of a bond indenture, *U.S. Bank National Association v. U.S. Timberlands Klamath Falls, L.L.C.*, C.A. No. 112-N-VCL (trial).

Mr. Flinn also has defended cases for damages allegedly arising from unfair mergers, including parallel class actions challenging the same merger on substantially the same grounds brought in Delaware and New York by different class counsel, *In re Allion Healthcare, Inc Shareholders Litigation*. Consol. C.A. No. 5022-CC. Mr. Flinn is a member of the bars of both Delaware and New York.

Mr. Flinn has handled prominent special committee investigations, including an investigation by a committee of the board of directors of FINRA concerning whether FINRA should assert claims against its existing and former directors based upon FINRA's 2008-2009 investment losses and compensation practices. *Report of the Amerivet Demand Committee of the Financial Industry Regulatory Authority, Inc.* (September 13, 2011).

Mr. Flinn frequently also serves as co-counsel, assisting non-Delaware attorneys successfully to defend or prosecute claims in the Delaware Court of Chancery. Such cases have included derivative litigation against the board of directors of BP p.l.c. for alleged damages arising from the explosion on the Deepwater Horizon oil rig in the Gulf of Mexico, *South Eastern Pennsylvania Transportation Authority v. Hayward*, C.A. No. 5511-CC.

After graduating from Princeton, with Honors, and Duke Law School, *cum laude*, Mr. Flinn began his legal career in Delaware, clerking for Chancellor William T. Allen of the Court of Chancery.

DISTINCTIONS

- *The Best Lawyers in America®*, Litigation - Mergers & Acquisitions, recognized since 2009

MEMBERSHIPS AND AFFILIATIONS

- Delaware State Bar Association, Member
- American Bar Association, Member

RELATED SERVICES

- Bankruptcy and Corporate Restructuring
  - Bankruptcy Litigation
  - Portfolio Company Specialty Group
- Corporate Counseling and Litigation
  - Alternative Entity Litigation
- Intellectual Property Litigation

EDUCATION

- Duke University, J.D., L.L.M., *cum laude*
- Princeton University, A.B., *with Honors*

BAR ADMISSIONS

- Delaware
- New York

CLERKSHIPS

- Honorable William T. Allen, Chancellor, Court of Chancery of the State of Delaware

COURT ADMISSIONS

- U.S. District Court for the District of Delaware
- U.S. District Court for the Eastern District of New York
- U.S. District Court for the Southern District of New York
- Supreme Court of the State of Delaware
- U.S. Court of Federal Claims

PRIOR EMPLOYMENT

- Sullivan & Cromwell, Associate 1992-93, 95-2000
- J.P. Morgan, Assistant Vice President Corporate Finance, 1983-1988

- International Bar Association
- Wilmington Institute Library, Board of Managers

EXHIBIT 6

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACKSONVILLE POLICE AND FIRE PENSION FUND	.	
Plaintiff	.	CASE NO. A-686775
vs.	.	
	.	DEPT. NO. XI
CHARLES ERGEN, et al.	.	
	.	**Transcript of Proceedings**
Defendants	.	

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION FOR EXPEDITED DISCOVERY

THURSDAY, SEPTEMBER 19, 2013

APPEARANCES:

FOR THE PLAINTIFF:	BRIAN W. BOSCHEE, ESQ. MARK LEBOVITCH, ESQ.
FOR THE DEFENDANTS:	JEFFREY S. RUGG, ESQ. BRIAN FRAWLEY, ESQ. MAX FETAZ, ESQ. GREGORY MARKEL, ESQ. MARK E. FERRARIO, ESQ. JOSHUA M. REISMAN, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 19, 2013, 9:35 A.M.

(Court was called to order)

THE COURT: You can sit down. All right. For those of you who don't know, Mr. Fetaz was most recently my law clerk after a two-year stint. I'm now training a new law clerk. But he never worked on any of this case, because it didn't exist when he was still here, and we had blocked him from Brownstein Hyatt cases from the time he got an offer.

(Pause in the proceedings)

THE COURT: I was going to start with them and grill them first.

MR. RUGG: I just wanted to give the Court one piece of information. I shared this with all counsel last night, and I think's material for Your Honor to know.

At a board meeting, a Dish board meeting last night the board voted to put together a special litigation committee to consider the allegations made in the first amended complaint. And I think it's likely to and that we should anticipate that the special litigation committee will make an appropriate motion to stay this case while it does its investigation.

THE COURT: Okay.

MR. RUGG: I called counsel about that last night so they wouldn't be surprised.

THE COURT: Aren't you glad you knew that ahead of

time? I would have liked to know that.

MR. REISMAN: Your Honor, also just kind of a housekeeping measure. Charles Ergen has his motion to associate counsel pending today, and it's unopposed.

MR. BOSCHEE: We have no opposition to it, Your Honor.

THE COURT: Granted. Anything else?

MR. REISMAN: And I have an order for the Judge. Should I submit it after --

THE COURT: You can.

Anything else before I grill you?

MR. BOSCHEE: Before I let my co-counsel --

THE COURT: Because I've been on a roll grilling people today.

MR. BOSCHEE: And I appreciate that, Your Honor. Before I let you grill my co-counsel, primarily, who is going to directly and specifically answer all your questions this week, I did want to say we did hear Your Honor's concern. That's why we amended the complaint. I think -- and I actually did a lunch training. I think we complied with terms of 227 in terms of our appendix and everything that we submitted with our order, but you're probably --

THE COURT: Your motion is too long. It's only allowed to be 30 pages.

MR. BOSCHEE: How long was the motion we submitted?

THE COURT: Thirty-seven. My kids asked me that last night when I said, I wonder if I should just stop reading at the page limit they're required to use.

MR. BOSCHEE: I was going to say I thought the authority was only 30 pages. I thought the extras was what put it over, the appendix and whatnot. But that was a clerical error on my part. I'm sorry. I thought that -- because we do have like a three-and-a-half or four-page appendix.

THE COURT: In CityCenter I actually struck one that was -- but it was like 44 pages.

MR. BOSCHEE: Well, the idea --

THE COURT: Maybe it was 66.

MR. BOSCHEE: The idea was to submit, obviously, a 30-page motion with obviously the long appendix and the properly numbered documentation.

I did want to address before I let co-counsel apparently get grilled by Your Honor, with respect to the special litigation committee we did have -- and I appreciate Counsel sending an email last night. The committee apparently was formed approximately, giving Jeff the benefit of the doubt that he let us know immediately after he knew, was formed at about 11:00 o'clock Eastern Time last night, our concern being why was a special litigation committee formed last night at 11:00 o'clock, on the eve of this hearing, as opposed to when

the Bankruptcy Court had presented issues, when we had filed our complaint, when we initially come before Your Honor. I mean, it seems a little odd to us.

THE COURT: Probably because you filed a new amended complaint and it's something they should look at.

MR. BOSCHEE: But then why didn't the committee form -- wasn't it formed at that point? That's our concern.

THE COURT: I don't know.

MR. BOSCHEE: And we also --

THE COURT: It doesn't really matter.

MR. BOSCHEE: Well, we also don't know anything about the committee was the other primary concern. We don't know who's on it, we don't know what charge it has.

THE COURT: Who's on the committee, Mr. Rugg?

MR. RUGG: We require 48 hours' notice before a meeting, so we couldn't do it right away. So --

THE COURT: Who's all on the committee?

MR. RUGG: The committee is made up of Mr. Tom Ortolf, who's a board member, and actually the day before the meeting a new board member was elected to the board. There's an AK on that. I'm happy to give it to you. His name is Mr. George Brokaw. He is appointed to the committee. Though he's not starting as a director until October 7th, he will be serving on the committee immediately, which is allowed under Nevada law. As long as there's one director you can have non

directors on it. So that's the membership of the committee.

THE COURT: So it's a two-member special litigation committee?

MR. RUGG: It's a two-member special litigation committee.

THE COURT: It's okay.

MR. BOSCHEE: Charged with what doing what precisely and under what timeline is the other concern we had. Because that was something that wasn't addressed in the email. Those are just concerns we have. At this late date we don't think that should, absent a motion, interfere with anything that we're going to talk about today. It's good to know, but --

THE COURT: Let me ask Mr. Rugg a question. Is the special litigation committee going to only be concerned with this litigation, or are they also going to look at the other litigation that is identified in these pleadings?

MR. RUGG: My understanding is they're charged with investigating the complaints made by this plaintiff.

THE COURT: Okay. That's fine. Anything else?

MR. BOSCHEE: Is the a time -- well, yes. I mean, under what timeline? Because obviously one of our concerns is there's --

THE COURT: I'm going to grill you now, not your co-counsel.

MR. BOSCHEE: Okay.

THE COURT: One of the things that I sent you away to do after our last discussion on whether I was going to allow expedited discovery at this point in time was I need a preliminary injunction motion. I now have that. And I'm going to give you a break to answer this question.

MR. BOSCHEE: Okay.

THE COURT: What are you really seeking to enjoin? Because I've read your motion, and it's long and it's over the page limit, but I still can't figure out, other than you want to "enjoin Ergen and his loyalists on the board from influencing or interfering with Dish's efforts to buy LightSquared asset." Figure out what you're trying to do.

So how about I take a break for -- very short break. As soon as you're done caucusing with your co-counsel I need you to tell me what you are seeking by way of the preliminary injunction so I can then make a determination if it is appropriate, especially given the special litigation committee, to allow expedited discovery before I have an evidentiary hearing on the preliminary injunction. But I need clarification.

MR. BOSCHEE: More clarification, more specificity. We will have that for you, Your Honor.

(Court recessed at 9:41 a.m., until 9:50 a.m.)

THE COURT: Sit down, please.

All right. Team Plaintiff, what's the answer?

MR. BOSCHEE: We want to enjoin -- the short answer, we want to enjoin the people currently controlling the bid process from controlling going forward. We believe that given the conflict situation and really Corporations 101, the people controlling the process in a conflict situation, the disinterested, the non-conflicted directors should be the ones that are actually controlling the process. And the fact that that isn't happening is creating an ongoing and, you know, potentially even greater harm to Dish getting this LightSquared bid. And truthfully, again, since the last time we were here the Wall Street Journal article came out, and we now know that's exactly what the special committee wanted to happen, was for the disinterested directors to control this process. And then Mr. Ergen just disbanded that committee.

So we believe at this point that's -- at the end -- I mean, I could expound on it, if Your Honor wants, but really at the end of the day that's what we're looking for in terms of an injunction, is for the people that are with Ergen, loyal to Ergen, that Ergen clearly is controlling not be the ones directing this process, that the disinterested directors -- and it sounds like we have at least two of them, because they're on the special litigation committee -- would be the ones controlling this process.

Also, Your Honor, one thing that Mr. --

THE COURT: And by "this process" you mean --

MR. BOSCHEE: The bidding process.

THE COURT: -- the bid process at the live auction the Bankruptcy Court is going to conduct in New York.

MR. BOSCHEE: That's correct. And everything leading up to that. Everything leading up to that, yes.

THE COURT: Okay.

MR. BOSCHEE: And also, Your Honor, I did note one thing that Mr. Rugg said that I think is probably important for consideration of the preliminary injunction. I don't think the new director starts until October 8th, is what he said --

MR. RUGG: 7th.

MR. BOSCHEE: 7th. Okay.

THE COURT: He's going to start on the committee ahead of time because he's allowed to under Nevada law as long as there's one director on the committee.

MR. BOSCHEE: I understood that. My question was going to be is he actually going to do that before he takes -- starts as a director on October 7th.

THE COURT: I thought that was what Mr. Rugg said.

MR. RUGG: That's my understanding.

MR. BOSCHEE: Okay. And --

THE COURT: And everybody in the back row is saying yes.

MR. BOSCHEE: I didn't -- that wasn't clear to me.

THE COURT: Thank you, gentlemen, for that.

MR. BOSCHEE: And with that I will --

THE COURT: Okay. Let me tell what I have so -- because, as you can see, I have a large pile, so that if someone thinks you submitted something that I don't have that you can tell me.

I have the amended complaint that I reviewed with interest last night, I have the motion for preliminary injunction, I have Ergen's opposition, I have Dish Network's supplemental opposition, I have Goodbarn's response, I have a really fine appendix that makes other appendixes pale in comparison, and I have two motions to associate counsel.

Mr. Ferrario, do you want me to grant Mr. Markel's request?

MR. FERRARIO: Yes, Your Honor. And I have an order here --

THE COURT: Okay. You can approach.

MR. FERRARIO: -- that I can submit after the hearing.

THE COURT: And I think that's all I have. Does someone think I have something more that's not in here? This is from our prior hearing, this part of the pile.

MR. MARKEL: Your Honor, Gregory Markel. I'm not sure if you want to include it, because I'm not sure it's relevant to today, but there also was a motion to dismiss by a

couple of the parties, as well.

THE COURT: I don't have those on today.

MR. MARKEL: No, they're not on today. I didn't know whether you wanted to --

THE COURT: I'm not going to do them, because they're not on today.

All right. It's plaintiff's motion.

MR. LEBOVITCH: Your Honor, would you prefer to grill me while I'm standing here, or at the lectern?

THE COURT: It doesn't matter to me as long as you keep voice up. As I think I said -- I don't know if you were in the room when I said this last time you were here. We use a digital audio-video recording system, and it triggers by who's talking. So sometimes it's really important that if more than one of you talk at a time that we wait and be polite and let others talk, because my record gets screwed up if too many people try and talk at once. It will pick you up at either the table or the lectern, but it is important that you keep your voice up. And the recorder will give you a high sign or something if she's having trouble hearing you. And if it's really bad, the marshal will come hit you on the shoulder.

MR. LEBOVITCH: I will speak slowly, which is my normal problem. Volume has never been --

THE COURT: Never been your issue, huh?

MR. LEBOVITCH: -- never been a problem for me.

THE COURT: I look forward to that.

MR. LEBOVITCH: Most people complain about me being too loud.

Well, thank you, Your Honor. And, as Mr. Boschee said, we took to heart Your Honor's comments. We realized that it made sense, and it really was an opportunity to update our complaint to take into account the many new facts that had arisen since we filed the initial complaint. Also to organize it. The defendants had said that they weren't sure which counts were implicated by our request for injunctive relief, and so that's really the change that was made, is having Count 1 articulate our basis for injunction. And, of course, there was a Wall Street Journal article. And our complaint really tried -- our amended complaint tried to crystallize the problem that Dish faces, Your Honor. Put simply, if not for the baggage from Charles Ergen's prior and ongoing breaches of duty, Dish would participate in a strategically critical bidding process just like any other third-party bidder. That's all Dish and its shareholders would ask for here.

And what we see now is that Harbinger and LightSquared, which is the debtor and its lead shareholder, they had pitted Ergen and Dish against each other, and they've done so through a series of filings challenging -- they seek to disallow Ergen's debt claims. That's a billion-dollar

personal investment by Charles Ergen that LightSquared and Harbinger are seeking to disallow. They're also seeking to disallow his vote, so he would lose voting rights.

They put Dish and Ergen together because Dish and Ergen are acting in unison, and they say Dish is not a good-faith bidder and therefore it should not get the benefits of its stalking horse status. That's extremely valuable in an auction, to get the bankruptcy law benefits of a stalking horse. If Your Honor wants any clarification of what those benefits are, I could talk about them, but --

THE COURT: No. I understand what they are.

MR. LEBOVITCH: They're very significant. Okay. And Harbinger is proposing -- so you have LightSquared proposing a bidding process that does not give Dish stalking horse status. That's a bidding advantage. Harbinger is proposing a reorganization plan that, as I said, attacks Ergen's position and also would keep the spectrum in the first place. So you have very -- numerous competing interests among Dish and Ergen.

The Wall Street Journal article that came out the day of hearing, I guess later that night, we did feel -- we recognized that in our initial complaint we were making some inferences. We said, this is very unusual to have Mr. Howard resign in the time that he did. We understood that we didn't know exactly why we were asking the Court to make an

inference. The Wall Street Journal article confirms that he resigned in protest. It confirmed something we didn't know, which is that the committee was actually disbanded before Dish even made its initial bid. It confirmed that the board only put two members on. That was in our initial complaint, but it was an inference. The board essentially conceded there's only two people that could be on the independent committee, Mr. Howard and Mr. Goodbarn.

Now, why did the committee get disbanded? Because it tried to act independently. It wanted to control the bidding process going forward, and it wanted the ability to have Mr. Ergen disgorge some of his profits on the debt that he had purchased.

Now, why did the special committee have these conditions? We talk about the DBSD litigation, which was a prior negative event.

THE COURT: And that's before the bankruptcy judge?

MR. LEBOVITCH: It's before the same Bankruptcy Court. I can't represent that it's the same judge, Your Honor.

THE COURT: Okay.

MR. LEBOVITCH: I could look -- I could look that up, but I don't know offhand.

THE COURT: If you don't know the answer, don't guess.

MR. LEBOVITCH: I will not. But the special committee and the board, having just lived through this, of course they're aware of the prior debacle that Dish had to suffer, and so it makes sense for them to say, we need to control the process here because what you're doing is upsetting LightSquared and Harbinger and we want to make friends with them. And, of course, they say, we're not going to let you make a bid if it means you get to keep all the profits. We think there is a question about why you made those -- about why you made those debt purchases and whether, irrespective of what any charter says, you used confidential corporate information --

THE COURT: And some of those purchases were made prior to the bankruptcy filings.

MR. LEBOVITCH: Some of those were prior to the bankruptcy filing. There was some small -- I mean, well, hundreds of millions of dollars, but we're talking about I think a billion dollars of debt was purchased at discounts, I believe it was like somewhere between seven or $800 million out of pocket for Mr. Ergen. But we know when the committee said, here's our conditions, he disbanded the committee, makes the offer for LightSquared afterwards.

Now, all we're asking for today, Your Honor, is discovery. We can talk about it, but we obviously think it's very narrowly tailored, and it's -- we want to show the

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK DERIVATIVE LITIGATION.	SUPREME COURT No. 69012
JACKSONVILLE POLICE AND FIRE PENSION FUND, Appellant, vs. GEORGE R. BROKAW; CHARLES M. LILLIS; TOM A. ORTOLF; CHARLES W. ERGEN; CANTEY M. ERGEN; JAMES DEFRANCO; DAVID K. MOSKOWITZ; CARL E. VOGEL; THOMAS A. CULLEN; KYLE J. KISER; AND R. STANTON DODGE, Respondent.	SUPREME COURT No. 69729

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[1] JA = Joint Appendix

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executive. She was not the top dog at Barnes & Noble ten years ago, who is now on the board dealing with some comparatively young pup. Her boss and mentor and friend is still the top dog at Barnes & Noble. She never really fully left Barnes & Noble. She's derived a lot of benefits economically from being on the board. And it's pled, frankly, that she is in a mentor-protege relationship of longstanding with Len Riggio. It's really odd to me. It says, as pled, "Largely owes her career and professional success to Riggio, her former boss and good friend." This is not just being a former executive.

The other thing, she's been resolutely independent for well over a decade. So then you have -- who else is on there? Another long-term friend, Monaco. Been on the board since the middle of '95. Been a monitor before on the comp committee. I didn't read the report, but it didn't work out so well for everybody involved. She got removed from the comp committee because there was this little problem with backdating. Kind of shocking, by the way, the pervasiveness of society. The idea that you don't know that you can't backdate things. But that's -- hopefully we've all learned that. But she wasn't

really -- she apparently had failed in that monitoring role. I'm not saying she failed in any way that made her legally culpable, but it didn't work out great. She gets put over on the audit committee -- kind of a strange relocation position -- and then ends up on this.

Then we have Dillard. I'm going to express to Mr. Nachbar, Mr. Dillard didn't really stand out much in the prior case. And it may be -- and I take seriously, frankly, plaintiffs better be careful with what they allege. If at a later stage it's nonsense, that's not cool. What's alleged in this complaint with particularity is that Dillard and Riggio are close friends and frequently socialize and play golf together. He's also on the nominating committee. People -- frankly, it's hard not to take into account, when the founder and chairman leaves, leaves the CEO, but he's not really a controller, but he just puts his little brother in as CEO and there's no search for anyone else -- that's what's alleged -- just put the little brother in there. And that Mr. Dillard. He's a wealthy guy. I'm not saying in any of this that these folks owed their wealth -- maybe in Miss Miller's case she owed a lot of

management opportunities to Mr. Riggio. And she's done well on the board.

In Dillard's case he has his own wealth. He also controls his own company called Dillard. He may have a certain view with how you deal with controllers and the respect that they're owed. And these are -- he's also been resolutely independent since 1993. 16 years.

The defendants say, this is just like Beam. Mere allegations. Now, Beam, the Supreme Court says, Stewart and other directors moved in the same social circles, attended the same weddings, and described each other as friends. And they keep saying mere allegations of personal friendship. Well, I don't think this is that. I'm not convinced it's just the mere. In terms of Miller's case, it's not. We're talking about a very important mentor-protege relationship, unbroken working relationship over a generation.

Dillard. It's alleged personal friendship. Again, being around this whole time.

Monaco. Friendship. It is -- I say, I do believe that it stresses the notion of independence when you've been resolutely independent

going on a generation. That's a long time.

Now, the problem under the first prong is I have to make some sort of binary labeling. I don't actually want to put an opinion in A.2d saying Miss Miller is not independent. But honestly, I'm not really prepared to put in the A.2d saying that she is.

And the second prong, in my view, in part, exists so that you don't make some sort of irrevocable decision prematurely based on close calls. I don't know that it credits the defendants or the process that three of the four members of the special committee seem to be strange choices, especially where there's a couple others where there's not really anything pled, but they weren't on the committee.

The second prong says very clearly, and Disney and other cases say that, if you plead with particularity facts that support an inference that the process -- that the transaction was the product of breach of fiduciary duty, then demand is excused.

Doctrinally, I would admit that there's much force in Mr. Nachbar's argument about does this mean, in terms of the logical relationship of the first and second prongs, that you have to plead a nonexculpated claim as to a majority of the

directors. Because if it's only one of the directors who faces liability, you know, we're really ultimately looking at the issue of demand excusal. And that's just not enough.

I actually believe I can put that hard issue aside, for reasons that I'm going to discuss. But I admit that it's a real issue. The thing that is troubling is the notion that you would put that aside. That in a case where there's a genuine controller, who is on the board himself, that he's -- that demand would be excused when particularized facts suggest a breach of fiduciary duty, even if exculpated by the outside directors, and a breach of duty of loyalty by that controller. I don't believe there's a Supreme Court decision that says that.

And upon looking at Lear on the break, the context in Lear was quite different. Carl Icahn wasn't even on the board. And I wasn't even clear, having -- I only had a half hour. I was saying a 12(b)(6) claim was stated in Lear. But I admit there's a lot in what Mr. Nachbar says. Part of the second prong is really, if there's a sufficient fear of liability, because they met a particularized standard, it's hard for you to be objective. I

question whether our Supreme Court would let that be a gateway for controllers, particularly at -- if the second prong is to be a safety valve in a situation where noncontrol -- again, maybe we're coming down to control -- noncontrol being important. And I'm going to talk about that now in terms of why I think the second prong -- and I do think the second prong is met.

You know, both sides -- Mr. Nachbar, as usual, is very precise and he makes the point about, "Well, for example, the Revlon point. If he's already in control, why does it matter?" Well, you can have indicia in control and you can be in absolute control. There are gradations. But I do start in looking at this and why the second prong -- Mr. Riggio has a lot of the attributes of control. He is the largest stockholder. He's been the chairman continuously. He structured how this went public. Even when he left as CEO, it seems to be that he has the major strategic vision for the company. I have no doubt he has the best office. And even, if you look at this transaction, when you bought in College Bookstores, it was structured in a way that Mr. Riggio could take the College Bookstores' shares of

Barnes & Noble that were held and he kept them with him.

Was there an opportunity here potentially? Maybe it could have been a sell to the public to reduce his control to actually acquire those shares and increase everybody's interest. I don't know. But he kept them.

When he stepped down as CEO. Who comes? An outside executive? Is there a nationwide search? No. It's his little brother. So, he only has 31 percent of the vote, but he's got the chairmanship and his brother is the CEO. It's rather different than just having 31 percent and being a passive investor, being Warren Buffett and having professional management. The two key officers in the company are both held by people named Riggio.

Defendants point out trademarks. Hey, we could get our trademarks back. Well, who kept them? He kept the trademark for the company who needed it the most in a College Bookstores chain where the stores -- it's not even obvious they're Barnes & Noble stores in the first instance? Does that mean he didn't have control? Sounds like a fairly -- something that could have been a calculated

way of retaining leverage.

Why did it not go to the public company in the first instance? He could use that as a bargaining chip.

I can't ignore -- it may be that it's all fair. But it sounds like a pretty good source of ongoing revenue to a lot of other companies Mr. Riggio controls -- Barnes & Noble, the public company. Even if it's a market rate -- a guaranteed market rate of profitable businesses can be a pretty good thing. Right? That's why there was all kinds of concerns about oligopolies, about public utilities. "Okay. I'll take the market rate. Market rate is 7 percent return on capital. I guarantee I have a shipping company. Every year I'm going to get tens of millions of dollars of shipping business from Barnes & Noble. That makes me able to run a shipping company." That's a pretty good thing.

The client we already have. Right? Mad Men fans were getting over the loss of Lucky Strike. Lost Lucky Strike. It's difficult. You know, a billion dollars of intercompany transactions in the two years preceding the transaction. There's been concerns about other things. The fact that

Mr. Zilvay is on the board, too. There's another subordinate. So we got the little brother subordinate, we got Zilavy subordinate, we got the protege subordinate.

Now, Miss Tikellis took the Lynch pressure off. Right? I'm not going to Kahn v. Lynch this. I don't start with the assumption that every transaction with the controller is subject to sort of the entire fairness from the get-go standard. That does not mean that interested transactions are automatically business judgment rule. They're still an interested transaction. And you have to look at the approval process. And if there are pled facts that suggest that the approval by the disinterested members of the board was tainted, then the interested party has always been on the hook, even if they act in subjective good faith. That's the whole point of it. Otherwise it's not much of a guarantor in the end of fairness.

So I'm going to assume it doesn't really matter. There's enough here that, when we're not doing Kahn v. Lynch, this is a very influential insider. Extremely influential. He controls the trademarks. He's able to get the board to do a

billion dollars of intercompany transactions with his other companies in the previous two years. He's managed to populate the board with three people who are either his current or former management subordinates. He's also able to populate the board with people who are his friends and who have been on the board for 15 years. So, when you get to this -- what is it? All together, frankly, the plaintiffs have pled a bunch of specific facts that, when piled up together, give off a pretty fishy smell at a pleading stage. And they give me a reasonable doubt about the board's compliance with their fiduciary duties. I'll just tick through them.

The committee. I already mentioned it. I think it's a very oddly formed committee. Why would anybody pick Miss Miller to chair this company? Why would you pick Mr. Riggio's protege and friend of 15 years to chair a committee to negotiate this? Why would you then supplement her with another long-term friend and person who got removed from the comp committee in terms of Miss Monaco? Why would you add Dillard on top of that, who is a controller of his own business. Why would you do this?

And then it just -- when you have a

doubt -- as I'm going to get to later -- when you have a doubt, you don't dismiss. I'm not talking about irrational doubt. I'm not talking about some conspiracy theories. I'm not talking about weekly news of the world. I'm talking about something that a rational mind wrestles with.

The committee configuration is odd to me. In that regard, I want to say, I find it odd. And this is part of the transaction approval process, and I'll start with it. I find the conflict waiver eyebrow-raising. I just don't -- I don't really get it. When waivers are given, there needs to be a benefit. It's not a question of no detriment.

Frankly, here, there's a detriment to be explained. The committee is already at an informational disadvantage. The person who knows more in the world about College Bookstores and Barnes & Noble than anyone else is Leonard Riggio. Then his brother. You can't have their advice. You can't trust their advice. So they get to take company counsel with them? Why? What is the justification? Because Mr. Riggio wants it? That's another question right from the start. Why? Why put yourself at any other informational disadvantage. Why give anyone

else any leg up?

Now, maybe I'm being harsh. The reality is, it bears explanation and it's an environmental factor that's created on top of a committee that's already sort of odd.

Now, you get things about the transaction. I think there's -- is it outrageously priced? Who knows. That's not the main theory. There is the suggestion that it's mispriced. I'm fairly edgy. I am not willing to go and rule on this on the note and say, because there was a reference to these minutes, it's substantively true that Mr. Riggio wanted cash, didn't want these notes. These notes were a great deal. That's not what's pled. It's specifically pled the company could have done this, could have gotten access to credit at a lower rate. And they paid him at an above-market rate. Guaranteed 8 or 10 percent investment in this market. Pretty cool.

The larger thing, though, is what's really pled here is -- and this is, again, where I'm going. I beg indulgence of the defendants in some ways because, again, I can't unknow. But Mr. Riggio was saying things about retail in this environment

that are, again, you know, this may be Emersonian. There may actually be no inconsistency. It's a very strange thing. It would be strange at the pleading stage for me to resolve it on that ground and say there's no inconsistency. He seems not to have had a real appetite for retail -- doing more retail. This is more retail. It may be a different kind of retail, a related kind of retail. But I put that on top of a couple factors that lead me to have concerns. One is Borders. Okay. Maybe Borders is different. But you know, when industries are consolidating, I happen to think -- maybe it's because I'm a reader -- I hope bookstores don't go away. The opportunity to perhaps buy Borders and be the singular college -- singular retail, that might be a better opportunity than buying in the company that your founder decided 15 years ago should be separate. Appears there really wasn't any big consideration given to that. That was ruled out.

Okay. Now I've been pointed to this -- deeper in this document -- where I'm supposed to either believe, one, this has been a long-standing desire of the board to bring this in, resisted by Len Riggio, which suggests, as the Credit Suisse report, which I'm also supposed to look at would

suggest, that Riggio's good at market timing. And the fact that he wanted to sell now suggests it was good for him to sell now, which may suggest to other people maybe it's not the right time to buy. It's all redolent of a situation -- again, this is an inference. That's the most important part I want to make clear. It's an inference. I'm at a stage where I have to draw rational inferences in one direction. It is rational to suppose that this is one of those situations where even subjectively, well-motivated people blinkered their options because they were in a situation where they perceived the options to be ones put on the table only by Len Riggio. So maybe the idea is retail is not good. Maybe. Okay. Let's benchmark a stock deal. "Len, you want us to do this? We'll do it with stock."

Oh, that's Revlon. Well, good. Maybe it's a time for us to look at maybe we sell. You want to monetize your investment. Maybe it's a good time for everybody to monetize the investment. It's an opportunity that the special committee exercise leverage. No, we didn't go that route.

We got another record redolent of using the fact that there's legal doctrine managing

the legal doctrine. We've got to stay out of Revlon. We'll do the note. The note is a great thing because I should look into the documents and conclude it's a great thing. I don't know. Why not use stock? Because it would be Revlon.

Well, what's so bad about Revlon? Well, Len Riggio wouldn't like that. Or we might have to have a stockholder vote if we use stock. Well, what's so bad about that? Special committees have actually been known to insist on a majority of the minority vote in situations where one would not be required. You could subject the transaction to require ratification. It appears from what's pled -- again, it's what's pled -- but legal doctrines were managed, not used as opportunities to extract leverage. I think it's a situation -- it said to me this is a plausible transaction. It's time to put these together. That may be a really great argument at summary judgment or at trial.

There's also the notion, if it was such a good argument, why has Len Riggio been allowed to keep it separate for so long? Why did none of these people, who have been resolutely independent for 15 years, never think or insist upon it? I don't

think at a pleading stage I should just pretend that that doesn't leave real doubt and ignore it. It does.

The larger issue of financial fairness here is really teed up in the Credit Suisse report, which is sort of: what are you thinking? If you were going to do this, why now? At a time when ebook and Kindle is coming on, we're doubling down on retail and Len is getting out with a half billion dollars? Why does he want to get out? Why doesn't he buy us? How about he takes College Bookstores and its future awesome capacity and buy us? It's something that comes to mind; right?

If you're thinking as a disinterested person, when someone themselves -- see, I once had a situation where a very, very smart controller sat on the stand and he was talking about why this one company had a really great future and this other company that was a cash cow had a really weak future, when he was doing a transaction in which he was increasing his exposure to the one with the weak future and reducing his exposure to the strong. Because it turned out he owned the one with the strong future. He owned 91 percent of it, and he owned a lot less of the one that was the business of the future.

And he sold the one that he owned more of to the other.

Well, it's pretty easy to say he wanted to keep for him as a good deal. Then he explained -- he actually said on the stand, "Well, it was like taking pocket money out of one pocket and putting it in the other." With all due respect to the excellent counsel representing Len Riggio today, it is not the same profile for him and the public stockholders. He didn't act like he was playing The Monkey song, "I'm a believer," about College Bookstores. If he was playing that song, he would have kept it. What he did is, he sold it, monetized the investment, diversified his family's wealth portfolio, and put the future of College Bookstores, mingled it with Barnes & Noble. That might be good for Barnes & Noble. But there's a powerful, powerful question that has to be asked about the motivation of Len Riggio in that circumstance because, again, if College Bookstores' ready to kick butt, Len Riggio had 100 percent of it. And he could reap all those benefits.

If this was so logical -- it's been logical since early 1990s. Again, I have no desire to

have an appraisal case at a pleading standard situation. I can't. But I would not be being honest if I didn't have myself about a gazillion questions that I have on my mind about why this board did this then, why they went down this route, why they gave a conflict waiver, why they didn't think of other alternatives. Why didn't they insist on asking: why don't you just buy us? Why shouldn't we? Potentially we should be looking at this is a fairly good transformation. Maybe this is an opportunity, Len, frankly, to reduce your influence over the company. Maybe what we should do is sell us your Barnes & Noble stock.

So it gets down to, I'm not going to dismiss under Aronson because I have a particular -- I think there's a host of particular facts which, when put together, create in my mind a reasonable doubt whether there was a breach of fiduciary duty. I can avoid the doctrinal question about nonexculpation for the following reason. Riggio, clearly under 12(b)(6) -- there's a claim stated for breach of the duty of loyalty against Riggio. He took benefits directly from the transaction.

Zilavy. The fair inference is that he

took material benefits from the transaction. He was also an officer, manager of Bookstore. But he took personally -- there was a darn big bonus pool that, but for this transaction, would not have been available to him. So I think, loyalty, nonexculpated claim, 102(b)(7) does not help them.

You have two directors, Campbell and Higgins, who I don't think the plaintiffs have laid a glove on and who are out under 102(b)(7).

You then get down to the hard question. And I've wrestled with this. I really have spent much of the last week on the following issue, which is, do Dillard, Monaco and Miller get out under 102(b)(7)? I believe it's a very close call. For this reason, I am -- I don't want to make a binary determination on a limited record and call someone nonindependent. But I do think that there are multiple questions raised that cast out on their independence and cast out in my mind about the following. Would these directors have approved this transaction in this form if the owner of College Bookstores was anyone in the world other than Len Riggio? And that's -- I also -- I put it down to this and I reserve the right later in the case to hold

the following. These people acted in subjective good faith, but just blew it because of the context in which they were operating. And that could be a situation where they are not liable under 102(b)(7), even if they didn't fulfill their duties as monitor. But they put themselves in a very awkward situation and maybe they get out. But I can't rule out -- it's when you wrestle with something you know. And this is what I want to say. I've been wrestling with this. And when you wrestle with something and you -- you can have a residual doubt about whether people were influenced consciously in their behavior, whether they knew, frankly, that they were going down a road that they wouldn't have gone down for anybody, other than Len. They tried to make it as good as they could, but they still knew it was suboptimal and not the best way to go for Barnes & Noble.

When you have that doubt, our Supreme Court's teachings are clear. I'm not allowed to dismiss under 102(b)(7) in that because there is a potential for nonexculpated breach of duty. So I'm not classifying this. I don't want this cited back to me that Strine held that you're necessarily not an independent director. What Strine held here is, in a

very unusual situation, with a bunch of particularized facts pled, including business circumstances that bear explanation on a fuller record, that I'm not prepared to rule out the possibility that ties of personal friendship and long-standing business relationships influenced these directors to do something that strayed from what was best for the company and that they knew that.

Later on, after a fuller record and realizing it may be that they played miniature golf once at the kids' part of a Ritz Carlton, and that's the only time that Mr. Dillard and Mr. Riggio got together, it may all come clear. That's why I don't want to write something that taints the law or these folks either way.

But at this stage, with respect to three of the four members of the special committee, I'm not going to dismiss the case under 12(b)(6) against them either. And given that that's the situation -- and with respect to Mr. Del Giudice, I'm in the same kind of camp. He wasn't on the special committee but he voted on the deal.

The hard question is, I guess, Steve Riggio. You kind of feel for him, I guess. I don't

know. He's the little brother in the scenario. It's tough being the little brother. But with being little brother, you got to be chief executive officer, a major executive of an American public company. I assume there's a little bit of compensation that comes with that.

What I'm troubled with in applying the abstention doctrine as an automatic safe harbor is just that. He was the chief executive officer. I reserve the right later in the case to say, yeah, he did step aside. No breach of duty. Okay. But there's something that comes with being the chief executive officer. You have a duty to do your job -- to try to do your job. What I'm supposed to take comfort in is that there was a really wonderful group of people dealing with this entirely rational and obviously sensible transaction, and that the CEO could pull himself out of the process and just let them protect the company. And so long as he did no harm, he automatically fulfilled his fiduciary duties.

You know, I think getting the coolest, or in this case the second coolest chair in the company, getting the biggest furniture budget, all that kind of stuff that comes with it, I'm not

prepared to say on this record, without a lot more briefing, that that's an okay safe harbor for a CEO.

I think pulling yourself out -- there's some situations where you pull yourself out because that is what's meaningfully distinct. Most of the cases where the CEOs don't vote, they're Leonard Riggio. They don't get off the hook because they're interested and the entire fairness doctrine, everything else, holds them ultimately accountable in damages if it's unfair. They don't get any free thing.

What we're talking about here is someone who is in a critical -- the most critical -- I'll take formalism on its face. Mr. Leonard Riggio indicated that his brother was the most important source of managerial advice for the company. He was the most important source of managerial authority. And in the largest transaction that Barnes & Noble has faced in recent history, Steve Riggio went missing. I have no doubt. I have no idea whether he felt this was really good or whether this was something his brother just wanted to do. What if he thinks it was stupid? But he just couldn't say boo to his brother. Does he get to just not vote or does he have a duty to

speak? I don't know that you get off so easy being the CEO on the abstention doctrine. You got a job to do.

And I'm troubled by creating this safe harbor. It seems like a very odd situation, like where people get rewarded for being placed in a situation of helpless conflict and not speaking up or doing anything about it. Maybe Strine's made an odd CEO based thing. But that is the CEO. It's not just somebody else. It's not an assistant VP. You didn't put your cousin just in an independent board seat. You made him the principal executive officer of a public company. That's a pretty critical thing.

So I'm -- I believe, given that -- I'm not comfortable saying that Steve Riggio owed no fiduciary duties in this situation, given all the facts pled. So therefore, for all these reasons, I've thrown out the waste count, I've thrown out the aiding and abetting count, I've thrown out the unjust enrichment count. I dismissed the case as to Higgins and Campbell, but the case otherwise goes forward.

I suggest that you all talk about an implementing order and get me over an order that cleans that up, and you talk about a schedule for

discovery and other things going forward. I appreciate your patience with my many questions. It is an interesting and unusual case. That's why, in large measure, I believe it actually should be dealt with at a time when, honestly, I can take freer account for the full factual dynamic that the board faced. I am constrained. That's one of the tactical issues that defense counsel confronts all the time. I have to credit their story. And this is a situation rife with interesting issues that raise questions in a rational mind about why people behaved.

The great thing about our process obviously is that after discovery, and there's the opportunity on a full record for me to consider it more freely, because there are also -- and I want to say, people tend to come out of these things and you only hear what hurts you most. Sometimes you hear what you like most or whatever. But it's all contextual and you have to take into account everything that a judge says.

I recognize that for everything where I've said that there's a question, there's potentially a very good confidence-inspiring answer. But the way our system works is that good confidence-inspiring

answer is one that the Court should consider after the plaintiffs have had an opportunity to actually inquire themselves fairly and then to determine whether, you know, on a fuller record, those answers are sufficient. It's not at the pleading stage for me to say, "Oh, well, yeah, I have about 27 things I'd like to ask that really bother me about this and that create an inference in my mind that there could have been a breach of fiduciary duty and put that aside and assume that what the defendants are telling me is true, and that there are really good assurances." That's just not the way 12(b)(6) or even 23.1 operates in our system.

So I hope the defendants recognize that there will be another day. They get to tell their story. And that the plaintiffs will ultimately have to meet the burden to show that there's something wrong with this. But on the plaintiff-friendly standard that applies today, a large majority of the complaint stands.

Thank you and have a good day.

(Court adjourned at 3:12 p.m.)

CERTIFICATE

I, DIANE G. McGRELLIS, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 163 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Vice Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 22nd day of October, 2010.

/s/Diane G. McGrellis
Official Court Reporter
of the Chancery Court
State of Delaware

Certification Number: 108-PS
Expiration: Permanent

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JACKSONVILLE POLICE AND FIRE PENSION FUND Plaintiff vs. CHARLES ERGEN, et al. Defendants	.	CASE NO. A-686775 DEPT. NO. XI **Transcript of Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION FOR EXPEDITED DISCOVERY

THURSDAY, SEPTEMBER 19, 2013

APPEARANCES:

FOR THE PLAINTIFF:	BRIAN W. BOSCHEE, ESQ. MARK LEBOVITCH, ESQ.
FOR THE DEFENDANTS:	JEFFREY S. RUGG, ESQ. BRIAN FRAWLEY, ESQ. MAX FETAZ, ESQ. GREGORY MARKEL, ESQ. MARK E. FERRARIO, ESQ. JOSHUA M. REISMAN, ESQ.
COURT RECORDER:	TRANSCRIPTION BY:
JILL HAWKINS District Court	FLORENCE HOYT Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript produced by transcription service.

LAS VEGAS, NEVADA, THURSDAY, SEPTEMBER 19, 2013, 9:35 A.M.

(Court was called to order)

THE COURT: You can sit down. All right. For those of you who don't know, Mr. Fetaz was most recently my law clerk after a two-year stint. I'm now training a new law clerk. But he never worked on any of this case, because it didn't exist when he was still here, and we had blocked him from Brownstein Hyatt cases from the time he got an offer.

(Pause in the proceedings)

THE COURT: I was going to start with them and grill them first.

MR. RUGG: I just wanted to give the Court one piece of information. I shared this with all counsel last night, and I think's material for Your Honor to know.

At a board meeting, a Dish board meeting last night the board voted to put together a special litigation committee to consider the allegations made in the first amended complaint. And I think it's likely to and that we should anticipate that the special litigation committee will make an appropriate motion to stay this case while it does its investigation.

THE COURT: Okay.

MR. RUGG: I called counsel about that last night so they wouldn't be surprised.

THE COURT: Aren't you glad you knew that ahead of

time? I would have liked to know that.

MR. REISMAN: Your Honor, also just kind of a housekeeping measure. Charles Ergen has his motion to associate counsel pending today, and it's unopposed.

MR. BOSCHEE: We have no opposition to it, Your Honor.

THE COURT: Granted. Anything else?

MR. REISMAN: And I have an order for the Judge. Should I submit it after --

THE COURT: You can.

Anything else before I grill you?

MR. BOSCHEE: Before I let my co-counsel --

THE COURT: Because I've been on a roll grilling people today.

MR. BOSCHEE: And I appreciate that, Your Honor. Before I let you grill my co-counsel, primarily, who is going to directly and specifically answer all your questions this week, I did want to say we did hear Your Honor's concern. That's why we amended the complaint. I think -- and I actually did a lunch training. I think we complied with terms of 227 in terms of our appendix and everything that we submitted with our order, but you're probably --

THE COURT: Your motion is too long. It's only allowed to be 30 pages.

MR. BOSCHEE: How long was the motion we submitted?

THE COURT: Thirty-seven. My kids asked me that last night when I said, I wonder if I should just stop reading at the page limit they're required to use.

MR. BOSCHEE: I was going to say I thought the authority was only 30 pages. I thought the extras was what put it over, the appendix and whatnot. But that was a clerical error on my part. I'm sorry. I thought that -- because we do have like a three-and-a-half or four-page appendix.

THE COURT: In CityCenter I actually struck one that was -- but it was like 44 pages.

MR. BOSCHEE: Well, the idea --

THE COURT: Maybe it was 66.

MR. BOSCHEE: The idea was to submit, obviously, a 30-page motion with obviously the long appendix and the properly numbered documentation.

I did want to address before I let co-counsel apparently get grilled by Your Honor, with respect to the special litigation committee we did have -- and I appreciate Counsel sending an email last night. The committee apparently was formed approximately, giving Jeff the benefit of the doubt that he let us know immediately after he knew, was formed at about 11:00 o'clock Eastern Time last night, our concern being why was a special litigation committee formed last night at 11:00 o'clock, on the eve of this hearing, as opposed to when

the Bankruptcy Court had presented issues, when we had filed our complaint, when we initially come before Your Honor. I mean, it seems a little odd to us.

THE COURT: Probably because you filed a new amended complaint and it's something they should look at.

MR. BOSCHEE: But then why didn't the committee form -- wasn't it formed at that point? That's our concern.

THE COURT: I don't know.

MR. BOSCHEE: And we also --

THE COURT: It doesn't really matter.

MR. BOSCHEE: Well, we also don't know anything about the committee was the other primary concern. We don't know who's on it, we don't know what charge it has.

THE COURT: Who's on the committee, Mr. Rugg?

MR. RUGG: We require 48 hours' notice before a meeting, so we couldn't do it right away. So --

THE COURT: Who's all on the committee?

MR. RUGG: The committee is made up of Mr. Tom Ortolf, who's a board member, and actually the day before the meeting a new board member was elected to the board. There's an AK on that. I'm happy to give it to you. His name is Mr. George Brokaw. He is appointed to the committee. Though he's not starting as a director until October 7th, he will be serving on the committee immediately, which is allowed under Nevada law. As long as there's one director you can have non

directors on it. So that's the membership of the committee.

THE COURT: So it's a two-member special litigation committee?

MR. RUGG: It's a two-member special litigation committee.

THE COURT: It's okay.

MR. BOSCHEE: Charged with what doing what precisely and under what timeline is the other concern we had. Because that was something that wasn't addressed in the email. Those are just concerns we have. At this late date we don't think that should, absent a motion, interfere with anything that we're going to talk about today. It's good to know, but --

THE COURT: Let me ask Mr. Rugg a question. Is the special litigation committee going to only be concerned with this litigation, or are they also going to look at the other litigation that is identified in these pleadings?

MR. RUGG: My understanding is they're charged with investigating the complaints made by this plaintiff.

THE COURT: Okay. That's fine. Anything else?

MR. BOSCHEE: Is the a time -- well, yes. I mean, under what timeline? Because obviously one of our concerns is there's --

THE COURT: I'm going to grill you now, not your co-counsel.

MR. BOSCHEE: Okay.

THE COURT: One of the things that I sent you away to do after our last discussion on whether I was going to allow expedited discovery at this point in time was I need a preliminary injunction motion. I now have that. And I'm going to give you a break to answer this question.

MR. BOSCHEE: Okay.

THE COURT: What are you really seeking to enjoin? Because I've read your motion, and it's long and it's over the page limit, but I still can't figure out, other than you want to "enjoin Ergen and his loyalists on the board from influencing or interfering with Dish's efforts to buy LightSquared asset." Figure out what you're trying to do.

So how about I take a break for -- very short break. As soon as you're done caucusing with your co-counsel I need you to tell me what you are seeking by way of the preliminary injunction so I can then make a determination if it is appropriate, especially given the special litigation committee, to allow expedited discovery before I have an evidentiary hearing on the preliminary injunction. But I need clarification.

MR. BOSCHEE: More clarification, more specificity. We will have that for you, Your Honor.

(Court recessed at 9:41 a.m., until 9:50 a.m.)

THE COURT: Sit down, please.

All right. Team Plaintiff, what's the answer?

MR. BOSCHEE: We want to enjoin -- the short answer, we want to enjoin the people currently controlling the bid process from controlling going forward. We believe that given the conflict situation and really Corporations 101, the people controlling the process in a conflict situation, the disinterested, the non-conflicted directors should be the ones that are actually controlling the process. And the fact that that isn't happening is creating an ongoing and, you know, potentially even greater harm to Dish getting this LightSquared bid. And truthfully, again, since the last time we were here the Wall Street Journal article came out, and we now know that's exactly what the special committee wanted to happen, was for the disinterested directors to control this process. And then Mr. Ergen just disbanded that committee.

So we believe at this point that's -- at the end -- I mean, I could expound on it, if Your Honor wants, but really at the end of the day that's what we're looking for in terms of an injunction, is for the people that are with Ergen, loyal to Ergen, that Ergen clearly is controlling not be the ones directing this process, that the disinterested directors -- and it sounds like we have at least two of them, because they're on the special litigation committee -- would be the ones controlling this process.

Also, Your Honor, one thing that Mr. --

THE COURT: And by "this process" you mean --

MR. BOSCHEE: The bidding process.

THE COURT: -- the bid process at the live auction the Bankruptcy Court is going to conduct in New York.

MR. BOSCHEE: That's correct. And everything leading up to that. Everything leading up to that, yes.

THE COURT: Okay.

MR. BOSCHEE: And also, Your Honor, I did note one thing that Mr. Rugg said that I think is probably important for consideration of the preliminary injunction. I don't think the new director starts until October 8th, is what he said --

MR. RUGG: 7th.

MR. BOSCHEE: 7th. Okay.

THE COURT: He's going to start on the committee ahead of time because he's allowed to under Nevada law as long as there's one director on the committee.

MR. BOSCHEE: I understood that. My question was going to be is he actually going to do that before he takes -- starts as a director on October 7th.

THE COURT: I thought that was what Mr. Rugg said.

MR. RUGG: That's my understanding.

MR. BOSCHEE: Okay. And --

THE COURT: And everybody in the back row is saying yes.

MR. BOSCHEE: I didn't -- that wasn't clear to me.

THE COURT: Thank you, gentlemen, for that.

MR. BOSCHEE: And with that I will --

THE COURT: Okay. Let me tell what I have so -- because, as you can see, I have a large pile, so that if someone thinks you submitted something that I don't have that you can tell me.

I have the amended complaint that I reviewed with interest last night, I have the motion for preliminary injunction, I have Ergen's opposition, I have Dish Network's supplemental opposition, I have Goodbarn's response, I have a really fine appendix that makes other appendixes pale in comparison, and I have two motions to associate counsel.

Mr. Ferrario, do you want me to grant Mr. Markel's request?

MR. FERRARIO: Yes, Your Honor. And I have an order here --

THE COURT: Okay. You can approach.

MR. FERRARIO: -- that I can submit after the hearing.

THE COURT: And I think that's all I have. Does someone think I have something more that's not in here? This is from our prior hearing, this part of the pile.

MR. MARKEL: Your Honor, Gregory Markel. I'm not sure if you want to include it, because I'm not sure it's relevant to today, but there also was a motion to dismiss by a

couple of the parties, as well.

THE COURT: I don't have those on today.

MR. MARKEL: No, they're not on today. I didn't know whether you wanted to --

THE COURT: I'm not going to do them, because they're not on today.

All right. It's plaintiff's motion.

MR. LEBOVITCH: Your Honor, would you prefer to grill me while I'm standing here, or at the lectern?

THE COURT: It doesn't matter to me as long as you keep voice up. As I think I said -- I don't know if you were in the room when I said this last time you were here. We use a digital audio-video recording system, and it triggers by who's talking. So sometimes it's really important that if more than one of you talk at a time that we wait and be polite and let others talk, because my record gets screwed up if too many people try and talk at once. It will pick you up at either the table or the lectern, but it is important that you keep your voice up. And the recorder will give you a high sign or something if she's having trouble hearing you. And if it's really bad, the marshal will come hit you on the shoulder.

MR. LEBOVITCH: I will speak slowly, which is my normal problem. Volume has never been --

THE COURT: Never been your issue, huh?

MR. LEBOVITCH: -- never been a problem for me.

THE COURT: I look forward to that.

MR. LEBOVITCH: Most people complain about me being too loud.

Well, thank you, Your Honor. And, as Mr. Boschee said, we took to heart Your Honor's comments. We realized that it made sense, and it really was an opportunity to update our complaint to take into account the many new facts that had arisen since we filed the initial complaint. Also to organize it. The defendants had said that they weren't sure which counts were implicated by our request for injunctive relief, and so that's really the change that was made, is having Count 1 articulate our basis for injunction. And, of course, there was a Wall Street Journal article. And our complaint really tried -- our amended complaint tried to crystallize the problem that Dish faces, Your Honor. Put simply, if not for the baggage from Charles Ergen's prior and ongoing breaches of duty, Dish would participate in a strategically critical bidding process just like any other third-party bidder. That's all Dish and its shareholders would ask for here.

And what we see now is that Harbinger and LightSquared, which is the debtor and its lead shareholder, they had pitted Ergen and Dish against each other, and they've done so through a series of filings challenging -- they seek to disallow Ergen's debt claims. That's a billion-dollar

personal investment by Charles Ergen that LightSquared and Harbinger are seeking to disallow. They're also seeking to disallow his vote, so he would lose voting rights.

They put Dish and Ergen together because Dish and Ergen are acting in unison, and they say Dish is not a good-faith bidder and therefore it should not get the benefits of its stalking horse status. That's extremely valuable in an auction, to get the bankruptcy law benefits of a stalking horse. If Your Honor wants any clarification of what those benefits are, I could talk about them, but --

THE COURT: No. I understand what they are.

MR. LEBOVITCH: They're very significant. Okay. And Harbinger is proposing -- so you have LightSquared proposing a bidding process that does not give Dish stalking horse status. That's a bidding advantage. Harbinger is proposing a reorganization plan that, as I said, attacks Ergen's position and also would keep the spectrum in the first place. So you have very -- numerous competing interests among Dish and Ergen.

The Wall Street Journal article that came out the day of hearing, I guess later that night, we did feel -- we recognized that in our initial complaint we were making some inferences. We said, this is very unusual to have Mr. Howard resign in the time that he did. We understood that we didn't know exactly why we were asking the Court to make an

inference. The Wall Street Journal article confirms that he resigned in protest. It confirmed something we didn't know, which is that the committee was actually disbanded before Dish even made its initial bid. It confirmed that the board only put two members on. That was in our initial complaint, but it was an inference. The board essentially conceded there's only two people that could be on the independent committee, Mr. Howard and Mr. Goodbarn.

Now, why did the committee get disbanded? Because it tried to act independently. It wanted to control the bidding process going forward, and it wanted the ability to have Mr. Ergen disgorge some of his profits on the debt that he had purchased.

Now, why did the special committee have these conditions? We talk about the DBSD litigation, which was a prior negative event.

THE COURT: And that's before the bankruptcy judge?

MR. LEBOVITCH: It's before the same Bankruptcy Court. I can't represent that it's the same judge, Your Honor.

THE COURT: Okay.

MR. LEBOVITCH: I could look -- I could look that up, but I don't know offhand.

THE COURT: If you don't know the answer, don't guess.

MR. LEBOVITCH: I will not. But the special committee and the board, having just lived through this, of course they're aware of the prior debacle that Dish had to suffer, and so it makes sense for them to say, we need to control the process here because what you're doing is upsetting LightSquared and Harbinger and we want to make friends with them. And, of course, they say, we're not going to let you make a bid if it means you get to keep all the profits. We think there is a question about why you made those -- about why you made those debt purchases and whether, irrespective of what any charter says, you used confidential corporate information --

THE COURT: And some of those purchases were made prior to the bankruptcy filings.

MR. LEBOVITCH: Some of those were prior to the bankruptcy filing. There was some small -- I mean, well, hundreds of millions of dollars, but we're talking about I think a billion dollars of debt was purchased at discounts, I believe it was like somewhere between seven or $800 million out of pocket for Mr. Ergen. But we know when the committee said, here's our conditions, he disbanded the committee, makes the offer for LightSquared afterwards.

Now, all we're asking for today, Your Honor, is discovery. We can talk about it, but we obviously think it's very narrowly tailored, and it's -- we want to show the

predicate breach and the harm. Those are the elements of an -- the key elements of an injunction that you prove through discovery. We want to show that Mr. Ergen's handling of the special committee was itself a predicate breach, his insistence on controlling the process right now is an ongoing breach, and that those breaches create the ongoing risk of irreparable harm. That's what we're focused on.

Now, I want to on for now some of the defendants' arguments that we saw in last night's briefs. So I tried to prepare some responses very quickly. Start really with Mr. Goodbarn's motion and perhaps highlight what it doesn't say.

Mr. Goodbarn's focus -- he never says -- he's one of the two members, of course. He never says you shouldn't grant the injunction, he never says it wouldn't help the company if independent directors were in control of the process, he never says there's no harm. What he basically says is, I don't want to be deposed, I don't want to have to produce my own documents. Of course, a lot of our requests, as I'll explain, really go to the company anyway, but there are requests that would go to the committee's files and to Mr. Goodbarn.

The fact is, Your Honor, these cases -- these cases of breach of fiduciary duty that turn on bad on faith, they're very sensitive to the evidence. We cited to leading cases that I'll talk about, the Hollinger case and the T. Rowe Price case, and, you know, what I can say with personal experience

on T. Rowe Price, because I was the clerk for Vice Chancellor Lamb when he wrote that opinion, the end product, that opinion was nowhere to be found when the complaint was filed, nowhere to be found. And in fact the defendants in that case, as I know the defendants in the Hollinger case also, started out saying, demand is not excused and business judgment rule applies and there's nothing to see here, please move on, Your Honor. And on the discovery it was a close call, because there were strong arguments of why you might apply the business judgment rule in the T. Rowe Price fact pattern. They went all out on that. And the court made a decision, which, you know, I think the court said --

THE COURT: You know our statute's a little bit different than the Delaware statute; right?

MR. LEBOVITCH: For good cause? I guess which statute are we talking, Your Honor?

THE COURT: When there is an acquisition our statute is slightly different on what we're supposed to consider.

MR. LEBOVITCH: Your Honor, the differences I don't think would make a difference here, because we still look at the conflicts and the fairness. In other words, there's still a duty of loyalty, and here we're not talking about a duty to maybe maximize value or something like that. We're talking about a conflict transaction, okay, a bid by the company that's being controlled by Mr. Ergen. And you still need

good- faith loyalty and independent -- an independent process. And so I understand that there's differences, but I don't think those differences would change an outcome here, Your Honor.

THE COURT: Under the Nevada analysis you think that there is the same analysis for disinterestedness as there is in Delaware?

MR. LEBOVITCH: I think under the Amerco case, which for demand futility --

THE COURT: Some of us call it Schoen II.

MR. LEBOVITCH: Schoen II. Okay.

THE COURT: Not the Supreme Court, but those of us who've lived through all these --

MR. LEBOVITCH: Every time I come here, Your Honor, I'll learn more of the local tendencies.

THE COURT: You'll learn something new, yes.

MR. LEBOVITCH: I will.

So under, you know, Schoen I and then Schoen II the Nevada courts will look to Delaware. Obviously there could be places where there's differences. I think on the facts here, and we could talk about the independence of the board, it's -- I'm not aware of any state in the country that would actually look and conclude that half or a majority of this board is independent. And we can get to that. But, again, we say we need to show the predicate breach. And, again, in the

Hollinger case and T. Rowe Price they're a close call till you get the records. And even the records -- in T. Rowe Price I can tell you, and it's in the opinion, the minutes are sanitized. The key fact in the T. Rowe Price case was the special committee members' handwritten notes. And I remember because I found them, Your Honor. Those notes during meetings that they took and kept said, how can this be fair, what are we supposed to do when he's forcing it on us no matter what we do. And that shows itself in the opinion, Your Honor. That's what these cases are made of.

Now, the defendants say that we're seeking relief, you know, based on future facts and that's prospective. In a certain respect that's obviously true. That's what injunctive relief is for. You have to show a predicate breach and ongoing prospective harm that you're trying to stop, enjoin, avoid. And so in the end that discovery that we're seeking goes to the heart of what the Court would need to essentially even consider the elements of an injunction and also to consider how to fashion the relief in an appropriate way. This is a unique fact pattern, although, again, I think the legal principles of loyalty and good faith are -- should be clear, and I think the evidence will make even clearer.

One last point about Mr. Goodbarn before I move on is he says -- kind of says he shouldn't be deposed and that his counsel should not be deposed. As to him we put in a

sentence in our brief at the end that it may be -- and we wanted to flag it, Your Honor -- it may be that we take one of committee members and one of the other directors. We said that. And, again, you know, if we had had a chance to discuss it with Mr. Goodbarn's counsel, that may have been something we would do, because we may not need both special committee members. Clearly we think we need one.

As far as counsel goes, we're not trying to get someone's privileged advice unless it's going to be waived. But in a corporate transactional context lawyers are -- the corporate lawyers, not Mr. Markel, but he's going to have a corporate partner who is advising the committee just like a banker. They negotiate with the other side, with Ergen. They're adversarial, and it is very typical that lawyers there would be deposed. Again, in the T. Rowe Price case my recollection is that that happened. I don't remember if the opinion identifies that. And the Hollinger case was very heavily lawyered. Some of the lawyers in this room or at least their firms were involved, and lawyers were being deposed, because I remember I was on the defense side for one of the parties at that time.

The relief we're seeking is really not radical. The defendants like to say we've changed our whole complaint, abandoned our whole complaint. I think we dealt with that. We simply reorganized it, because it was true with all these

new facts we have to clarify for the Court and for everyone what is the relief we're seeking, but the relief we're seeking is not this mandatory injunction. In fact, part of the relief that was granted in the Hollinger case is very similar. In the Hollinger case Mr. Black, when he decided that the special committee, the independent directors were being too independent, posed a threat to him, he disbanded it. Now, he did it through bylaws, but he disbanded that committee. There that committee kept fighting. And what the court said on the record that was before the court is, this disbanding is of no use, it's not a valid act, it's a breach of fiduciary duty because it was disloyal and not taken in good faith. That was then Vice Chancellor Strine's -- now he's a chancellor -- but that was based on a very full record. And so this is not -- it may be unusual because the situation doesn't come up, but there's precedent for saying, I'm not going to let you take away from independent directors something that you had granted to them for good reason and in part because that's creating an ongoing harm.

The assertion that we're supporting Harbinger or supplanting the Bankruptcy Court doesn't really fly. Just the opposite. Any independent board facing this situation, Your Honor -- and I don't know -- we'll try to present evidence if that's helpful to the Court -- any independent board here would say, we need an independent process, because of the

ongoing lawsuits we need independent process, and so all we're trying to do is make it harder for the Bankruptcy Court to hurt Dish here by getting a ruling here, absent any agreement with the defendants, to send the message to the Bankruptcy Court Dish is acting independently, you shouldn't punish Dish even if you're not happy with what Mr. Ergen did. That's we believe Corporate Governance 101, and that's really what -- we're just trying to bring the parties back to that situation.

Now, again, there's an ongoing problem. It's not hypotheticals, who you see a lot in our papers it's hypotheticals of what may or could happen, it's the nature of injunctions, but our facts that will support the injunction are based on ongoing breaches, which is, we allege, buying the debt without telling the board, knowing that it's going to put Dish in a precarious position when it tries to pursue a strategic objective that Mr. Ergen himself has said is essential, and also disbanding the committee to ensure that he controls what Dish does, rather then face the chance that the committee actually goes against his wishes.

And, again, there's ongoing harm. And I want to talk about the conflict, because there's a fair amount of discussion that there's really not a conflict. If you assume the only question is will Ergen be paid and you assume the bidding has already cleared his price, well, that's what the defendants want to focus on, that's he'll be paid as long as

the bidding goes there. But they're just ignoring the key facts that we put in the complaint, put in the brief. Harbinger and LightSquared are attacking his position. They're seeking to invalidate it, they're seeking to disallow his economic claims. A billion-dollar personal investment that he that has is under attack is under attack. Dish has a very significant strategic objective that it's trying to pursue. And the only reason why it faces a risk from the Bankruptcy Court -- I mean, in other words, it's always going to face a risk of losing in the bidding, but the only risk it faces of losing its stalking horse status or other equitable relief the Bankruptcy Court can provide is because Ergen's not letting go.

So we have a very real conflict, because there's a real lawsuit, they're real claims, and really, you know, again, had Ergen not bought the debt and not disbanded the committee, these risks either would not exist or would be significantly mitigated. And what we're asking the Court to do is take a look at a real-world problem and provide a real-world solution to it.

Now, the DBSD case, there's an argument that the defendants make that, you know, the facts of DBSD are different. We don't dispute that. The facts are different. The point is that to show the broad equitable powers that the Bankruptcy Court has and, more importantly, show that the

board knows that Dish itself has already gotten into trouble in the past in being found to have acted in bad faith. That just supports why any board acting in good faith, acting independently of Ergen would kick him out of the room. It's just what happens. You say, Mr. Ergen, you've got a conflict, get out of the room. And I think we -- I don't remember if it was in our brief or not, Your Honor, but picture a slightly alternative scenario. Picture a board that doesn't have a controlling shareholder, picture a board that has some activist, a Carl Icahn or a Bill Ackman or, you know, you name it, someone who gets himself on the board and the company's looking to buy a bankrupt entity, and then Carl Icahn, who's not in control of the board, says, oh, by the way, I bought a billion dollars of the target's debt. There should be no doubt in anybody's mind that that board would say, Carl, you're out of the room, you're not part of this process at all, we're not going to debate it, we're not going to justify it, you're out. And I don't think Mr. Icahn would have any problem with that, because he'd understand he has to be isolated.

Demand. I think that -- I believe it was the Dish brief -- and, again, we got them late last night, but I believe it was the Dish brief that talks about demand. And it's interesting, they cite a lot of law that you have to establish demand. They don't actually give any facts that

show that the board is independent. And that's because they can't, Your Honor. All they say is there's no conflict. They'd have to show that a majority of the board could consider a demand. There's an eight-member board at the time this complaint was filed. Mr. Ergen, Mrs. Ergen, his best friend and business partner for 40 years, and the CEO, that's half the board right there. And I am -- again, you know, I don't think there's any basis in Nevada law or the law of essentially any state that looks at independence to say that ties like that, I mean, family relations, a CEO with a controlling shareholder or a best friend and business partner for 40 years would not be disqualified for demand purposes. And then obviously we also talk about the other three directors who were question because of their longstanding ties with Ergen and being current or former executives.

But in the end it's about the conflict, Your Honor. They say there's no conflict, therefore you don't have to consider demand because there's no reason to look at independence. It Your Honor sees that there's no conflict here, then that position is going to be ripe. But if Your Honor sees the potential for conflict that warrants discovery and a possible hearing, which we think should be eminently reasonable, if not very much a given, then demand is going to be excused for these purposes.

Irreparable harm. Again, we think the defendants

try to change the story. They say, well, we're going to have a bidding process for the spectrum so we know what it's worth. That's really not the issue from a Dish perspective. The question is what is the benefit to Dish of getting the spectrum and what is the harm from Ergen's breaches. And our point, Your Honor, is there may be scenarios where with hindsight we could say, well, you know, Ergen cost the company an extra $200 million or $400 million, and we could award money damages. But there's a lot of very obvious scenarios where it would be very difficult to quantify that in court. If they could have gotten the company at 2 billion and now they have to bid 2.4, how much of that extra cost will be attributable to the problems Dish has because of what I'll call the Ergen baggage? If they lose the bidding -- if there's no sale of the spectrum -- you know, that's what Harbinger's proposing; they're also attacking Ergen's debt, so is it possible that the spectrum would be sold if you didn't have all this distraction with Ergen's debt purchases and controlling Dish? That's entirely possible, Your Honor. And so while anyone can talk about what, you know, scenarios can result in money damages, and we recognize that there were scenarios that can result in money damages, there's a high likelihood that Ergen's breaches are currently impairing Dish, and if there's going to be any harm, it may well be irreparable harm. So that's really what we're trying to do.

And, again, Dish just wants to be treated like a third-party bidder. They just want to top anyone else that's out there, win the bidding. Ergen's involvement is impeding that, and that's what the special committee told Your Honor.

Pretty much at the end, and then I'll turn to the discovery requests, if Your Honor would like. But the balancing of harms and the public policy, we see an argument from I guess it was Dish or Ergen that the board has done a good job for the company, that was kind of the argument. We don't dispute that. When there's no conflict of interest between Ergen and the shareholder -- and the other shareholders, they do a good job of running the business. That's not uncommon with a controlled company. The whole question is what happens when there's a conflict between the controller and the shareholders. That's the point. And so the fact that they're good at other times doesn't mean you shouldn't have an independent process when there's a conflict.

Again, with the Bankruptcy Court, Your Honor would not be supplanting the Bankruptcy Court's findings at all. All Your Honor would be doing, if we can convince Your Honor on the evidence, is saying, Dish is going to act independently, that can only send a positive message to the court -- the Bankruptcy Court to say, there's no reason to hurt Dish here.

And then really, on the discovery, I can go -- I

don't know if Your Honor wants me to go through the requests, but they are very focused --

THE COURT: I don't want you to go through the requests. I read them. I understand them. I know what they say.

MR. LEBOVITCH: Okay. They're very focused on the special committee's actions and what's happening now. And if there's --

THE COURT: Talk to me about the impact of the special litigation committee.

MR. LEBOVITCH: Okay. Okay. There's -- the special litigation committee is not taking over the process right now. As far as I could tell and as far as any special litigation committee I've seen, particularly one that I guess may or may not be getting off the ground before October 7th, they're not going to reach a conclusion and take action by the end of October, early November, which is when we believe injunctive relief is warranted. They might look into the debt purchases, but we're not even seeking to expedite that. That's a long-term process. So we don't know their charge, we don't know their timing. We have a history, obviously, with Mr. Ergen disbanding the last special committee. All we got is an 11:00 p.m. email saying, a committee's been created. No information about what it does.

Now, what would -- and I understand Nevada can

approach these things differently, but we did find some precedent in Delaware where the Delaware courts have said, I'm not going to slow things down because of a special litigation committee. And particularly because the board member's not officially joined until October 7th and we don't know what role will be had or what timing is being imposed on the committee, so it's very possible that the irreparable harm will come and pass long before the committee gets off the ground, much less takes action. And I say that because, from experience, these committees do investigations -- when they're thorough and not just a whitewash it takes time. They hire their own lawyers, it takes time.

But in the Kaufman versus Computer Associates I believe it was Vice Chancellor Lamb who said that, "A sham SLC that is established merely as a device for delaying litigation will receive little respect from the court." And I do note, Your Honor, that Dish has already said they're going to be moving to dismiss. We were surprised to hear that Mr. Goodbarn is not on the special litigation committee, that it's a different director whose independence has been challenged here, he's a former executive. And what you have, though, is in the Kaufman case Vice Chancellor Lamb actually explains, you know, these people, they're not only named as defendants that comprise now this newly created special litigation committee, they move to dismiss, they move to dismiss. And he

says, "Rather than taking steps to investigate at the time the allegations were brought, they filed a motion to dismiss. How can I ignore that?" And, again, Your Honor, the cite -- the cite for it is 2005 WL 3470589, (Del.Ch. December 21st, 2005).

So we think that the special litigation committee, maybe it's going to do a great job down the road, maybe it's going to find that the charter provision, notwithstanding what Mr. Ergen and Dish have said, you know, is an absurd argument, maybe they'll find it's a good argument. We know the old special committee thought it was good enough that they wanted the ability to disgorge. But that's not going to solve the immediate problem, and we don't think that getting the limited discovery we seek in any way impairs the special committee's efforts. We think if there's confidentiality concerns, it is standard, as all the lawyers here sign all time, we could do attorneys' eyes only confidentiality agreements to preserve the confidentiality of anything that's sensitive. And again, if the special litigation committee looks at our complaint and finds it meritorious, in our experience they'd talk to us and work with us. That's almost universally what happens if they're actually finding merit in the cases. And so the fact that we get some discovery now over the next few weeks, before the committee even gets off the ground, is frankly completely relevant. And, again, I think it would be very prejudicial to assume the independence of the committee right now knowing

that one of the members, his independence is already being questioned in this litigation and also the timing of the committee's creation and the lack of clarity about what they're doing, coupled with the near impossibility that this special litigation is actually going to have the time or ability to take over the process to save Dish now while we're seeking injunctive relief. Does that satisfy Your Honor, or at least answer your question?

THE COURT: Thank you. I'll let you have a chance to stand up again if you want.

MR. LEBOVITCH: Thank you, Your Honor.

THE COURT: Mr. Rugg.

MR. RUGG: Thank you, Your Honor.

This case is really not complex. The complex machinations of plaintiff set aside, the issues presented to the Court are pretty straightforward. Number one, is there a conflict that needs to be enjoined? Plaintiff can't point to a conflict. They keep looking backwards, they keep saying that the debt creates a conflict. We've presented and the facts support that Mr. Ergen's affiliates' ownership of the debt is not creating an ongoing conflict at this point. Everybody's interests are in line in seeing Dish succeed in the bidding process. What plaintiffs want is the extreme remedy of taking out the duly elected board, setting them aside, and leaving -- I'm still not exactly sure -- I think

one board member, Mr. Goodbarn. But they sued him, too, so I'm not even sure that he qualifies under their independence rules, to make very important decisions on a multibillion-dollar transaction going forward. That is an extreme remedy and is not something that you can point to precedent that's been allowed by anything. Nevada in Schoen and its statutes say that a board controls the business of the company. Nevada also has a statute, as Your Honor has pointed out, 78.140, that deals with transactions that might involve a conflicted director. It doesn't mean that you have to take out the conflicted director. There are several ways that a board can act within it's fiduciary duties and conduct a transaction where there's an interested director.

So we think that either way, even if there was a conflict here -- and we don't think there's a conflict going forward at this point. But even if there was a conflict here, it can be resolved by the Court by looking and being advised on 78.140 and actng in compliance with it. If down the line plaintiff still contends that that transaction is then -- wasn't appropriately handled, that's a case plaintiff can bring at that time. But there's no need to enjoin the duly elected directors from doing their job.

And coming back to the conflict, all they point to is the debt. Now, they talked to Harbinger, as well. Now, Harbinger is a --

THE COURT: Under the items in the Nevada statute that doesn't seem to be a conflict, the debt.

MR. RUGG: Yeah. Harbinger --

THE COURT: I mean, there's certainly issues, but --

MR. RUGG: Right. Because in some ways by arguing Harbinger they're saying that whenever a corporation is sued its board must have breached its fiduciary duties. And we know that's not the case. Harbinger, by the way, is suing everybody in the industry to try to stop them from getting the debt. I mean, they've started -- I understand from my New York colleagues they've started actually a RICO case against pretty much everybody in the GPS industry to try to keep them away from their spectrum. Harbinger is desperate to go through bankruptcy, get rid of its debt, but keep its asset. I'm not going to comment here on the bankruptcy process. I've had my own experiences over there in Bankruptcy Court that color it to some extent, but that's a question for the Bankruptcy Court. And let the Bankruptcy Court deal with it. It's not something for this Court, and it doesn't -- just the fact that Harbinger has sued Dish doesn't mean that Dish has done anything wrong or that its board has breached its fiduciary duties or that there's an existing conflict going forward. Otherwise, as we've said, once a company is sued they'd have to appoint non directors to figure out how to handle even a lawsuit against the company.

Now, just to be clear about the facts that I think motivated the amended complaint. They want to point to a Wall Street Journal article. The Wall Street Journal article, bunch of unnamed sources. And if we're going to go by the Wall Street Journal article, we've provided a different Wall Street Journal article to Your Honor that says the Dish board is actually doing pretty well by its spectrum and it's increased it by --

THE COURT: And I try not to worry about what the media says.

MR. RUGG: And I think that's fair. So we set aside the Wall Street Journal article. We've already talked about the Harbinger complaint. Let's talk about the other facts that caused plaintiff to amend its complaint.

The other facts were facts that they should have known, the articles of Dish. The articles of Dish deal with the situation. They accuse Mr. Ergen of having stolen a compare opportunity. The articles dealt with it, it's proper under Nevada law, 78.080. The articles say -- and this is a place where plaintiffs kind of pervert what the articles say. The articles say that amongst the three items that are part of the test is that the opportunity must have been presented to the board member solely in his role, or her role, as a board member. They pervert that to he learned of it. That's not what the articles say, and you don't get to go there.

Now, plaintiffs try to distance themselves for purposes of this hearing and say, well, we're just focused on forward conflicts, but then they argue that everything in that happened in the past somehow should cause Your Honor to grant them expedited discovery and in the future a preliminary injunction. And the articles deal with that issue clearly, not in a complex fashion.

The other thing that came out from our prior opposition, which is why I think it's still effective, and we did a supplement for the company, is the credit agreement. It goes back to what Harbinger's motivation here is. Harbinger was in the process of trying to keep everybody out of its debt so that none of them when it went bankrupt could come in and buy its assets from the preferred position of the stalking horse. They knocked out Dish. We don't dispute that. That's [unintelligible] an issue that's before the Bankruptcy Court. But they did not knock out Mr. Ergen, and Mr. Ergen made the purchases. So it can't be that he stole a corporate opportunity, because Dish never had that corporate opportunity. It was disallowed by Harbinger, the folks that plaintiffs align themselves with.

Now, that -- to move us past the simple aspect of this case that is not complex, because we're just focused on expedited discovery, and I'm not going to try to argue the whole preliminary injunction here, though it does go to the

issue of good cause. When you talk about good cause you have to have some reason to do this. We focus on Count 1. That's the only count that plaintiffs say that they're going to move for injunction on. So is there any substance to Count 1, the demand futility issue?

Count 1 can be knocked out on demand futility. Demand futility is appropriately heard on a case-by-case basis. Demand futility happens to be one of the rare places in Nevada law where the Nevada Supreme Court has said, by the way, we'll look at Delaware for this aspect of law. I know Your Honor has heard many lawyers come in here and say that Nevada should look to Delaware corporate law on almost anything; but this was a very unique place where the Nevada Supreme Court has been clear and said, for demand futility we'll look to Delaware law, [unintelligible].

So let's look -- but that does wrap us back into where there's a conflict, because the question is independence. And independence is whether there's a conflict. Going forward on this prospective-looking claim there is no conflict. The board that's in place is actually more interested in its own personal holdings in Dish than they could possibly interested in Mr. Ergen's affiliates' ownership of the debt. Even Mr. Ergen himself, as we put together some math for Your Honor, is more interested in his holdings in Dish than he would be by any possible profit he could make on

the affiliates' ownership of the debt. So if the demand had been made, this board would have been on this claim to consider with its independent judgment and decide going forward.

And that goes to really plaintiffs are seeking. Plaintiffs are seeking to displace the judgment of the board on an issue that's really just a matter of business judgment; because there is no conflict. All they're talking about is what's the best way to proceed to get in the bidding process to win the bid. And that's just a matter of business judgment. Nevada has a statutory business judgment rule, and it should be applied here and allow the board to do its job.

Other things that the plaintiff has thrown out in its pleadings that don't stand up. Number one, they do admit that the Dish board's actions so far has actually put it in a pretty good position in the bankruptcy. They got aligned with the ad hoc group of lenders -- actually, they negotiated with an independent group of the ad hoc group of lenders -- that was presented and attached to our prior opposition -- and put themselves as the cornerstone of that ad hoc group's proposed claim, which could make it the stalking horse in the process.

Additional facts that go against what plaintiffs claim is the problem here. They actually ignore what the market has done. And we've talked about the Wall Street Journal, but we've also attached an analyst's report. The

analyst's report from City Research shows that Dish has put itself in position to make a seventeen -- to increase the stock price by $17. That's actually a pretty good position, and plaintiffs should be happy about that.

Additionally, they talk about Mr. Howard's resignation as meaning something and being in protest. It's actually not even what their Wall Street Journal article says. Mr. Howard resigned. There's not really much more I can say about it without -- without potentially violating federal securities law. I don't really know much more about it. But also, plaintiffs haven't told you a case that says because somebody resigned you should issue an injunction or you should issue expedited discovery or there's any good cause for a claim. Mr. Howard resigned. It's a fact. We can get away with it. They claim that that was going to put us in danger of delisting with NASDAQ. That was never really the case. NASDAQ has a rule. The rule allows for between six months and a year, depending on where your annual meeting is, to replace a board member. The company has already done it. They announced it two days ago. There's now a new independent board member coming on. He'll be effective October 7th. So that was just a red herring from plaintiffs.

And now, even though plaintiff would rely on their allegation or assertion that there's a breakdown in corporate governance, the corporate board of Dish has taken another

logical step and put together a special litigation committee. It's hardly unusual, and I'm going to try to talk at the end a bit about why the special litigation committee should be considered by Your Honor on --

THE COURT: Why don't you talk about it now.

MR. RUGG: Sure. And actually we did take time -- I appreciate that it was 11:00 a.m. on East Coast. It was actually 8:00 p.m. here --

THE COURT: You mean 11:00 p.m.?

MR. RUGG: They said 11:00 p.m. on the East Coast. And I thought we were all here on the Pacific Time Zone, so it was actually at 8:00. But -- and that was when I found out and I was able to provide the information. So I did.

But this is an interesting area, because it does cross into the question of whether Nevada should follow Delaware. There's not a lot of Nevada law, if any, on the question of what to do with the special litigation committee. I don't know if Your Honor has been -- had seen a case on a --

THE COURT: I've had special litigation committees before.

MR. RUGG: Okay. Not something I'd seen in front of you, so I didn't know. And, of course, not a lot of published caselaw out there. But it is -- it is an aspect that follows the issue raised in Schoen of demand futility, because it does relate to the demand futility question and whether the board

can step in and do a special litigation committee. Delaware has some pretty clear caselaw -- the key case is Zappata -- that says that what you do with a special litigation committee is you test its independence after it reaches conclusions. So we let the special litigation committee go forward with an investigation. There's also a Delaware case, Abbey [phonetic], that talks about why it stays important to allow that to happen. I was only aware of one Nevada case that talks about special litigation committees. It's over in the Federal Court. It's actually not published. It involves Sands Corp. And in that case Judge Du followed Delaware law and granted a stay to allow the special litigation committee to do its work.

We did take a little bit of time -- we had a short, four-page memorandum of law, if Your Honor wants it, that goes through some of the Zappata -- you know, what happened in the Sands case and Zappata and --

THE COURT: No. I've had special litigation committee cases before.

MR. RUGG: Okay. So I think that in this case --

THE COURT: And they predated Max. So they're old cases.

MR. RUGG: I've got to hire more of your clerks, Your Honor.

THE COURT: Why don't you call Steve Peek and ask

him what he did, you know.

MR. RUGG: But the bottom line is that the special litigation committee is an extension of what Nevada appreciates in both Schoen and its statute to allow the board to operate the company. And this is a way for the special litigation committee, as delegated the power by the full board, to investigate these claims and act for the company.

THE COURT: I need two things from you on the special litigation committee. Tell me what their scope of their authority is. Hold on. Let me go to my statutes.

What is the committee's designated authority?

MR. RUGG: I don't believe there's a formal resolution yet, so I'm only going to tell you what I understand. But I would rather present you with the formal resolution so that I'm not misspeaking for the board. Because that's not my place.

THE COURT: Tell me what you think the designated authority is.

MR. RUGG: They've been designated to investigate the claims brought in this case, the Jacksonville Fire and Police case, and make a decision for the corporation how to proceed or whether to seek a dismissal or whether to act on behalf of the company on these claims.

THE COURT: Okay. And what is the timing of the special litigation committee's investigation?

MR. RUGG: That I don't have an answer for, because it's going to be up to that committee that was just formed last night. So you have Mr. Ortolf, who is an independent member of the board, he's on the audit committee, and Mr. Brokaw, who is coming as a citizen, a non board member, but will be a board member within a couple weeks.

THE COURT: And do we know if the special committee has yet hired counsel to assist them in their investigation?

MR. RUGG: That -- I'm fairly sure they have not yet hired counsel.

THE COURT: Not since 8:00 o'clock last night.

MR. RUGG: Right. Though I understand that's going to be one of the things that they look at first, which, you know, puts me in an awkward position, I suppose. But still we're here right now.

THE COURT: Usually they have separate counsel from everybody else in this room.

MR. RUGG: I understand, Your Honor. But given that they're --

THE COURT: It's important to know what their -- the reason I'm going to back to the statute is we have a Nevada statute that relates to an overlapping issue. I need to know what their designated authority is.

MR. RUGG: And as soon as we have the resolution we can provide that for Your Honor. I don't think it's

appropriate for me to paraphrase it any more than I have.

THE COURT: I understand what you're saying, Mr. Rugg.

MR. RUGG: So I do think that down that line --

THE COURT: So they're not investigating the ongoing transaction and bidding process or having any responsibility of that; they're looking at what is alleged in the complaint to be the prior conflicts and potential breaches.

MR. RUGG: Correct, Your Honor.

THE COURT: Okay.

(Pause in the proceedings)

MR. RUGG: As Mr. Frawley was sharing with me, of course, the complaint does add that aspect. The complaint says there's an ongoing complaint.

THE COURT: That's Claim 1, injunctive relief.

MR. RUGG: Right. So it is part of their task in investigating these claims to address that issue, but it's not specific. And I thought that's what Your Honor was asking about.

THE COURT: Well, no. I was going to my statutory language of what the committee's designated authority is.

For those of you who aren't familiar with Nevada statutes, that's in 78.138(2)(c).

MR. RUGG: It's pretty much right below the business judgment rule.

THE COURT: It's part of the business judgment rule.

MR. RUGG: I think that answers the Court's questions about the special litigation committee. I'm not sure.

THE COURT: That did. I was just trying to find out where I was going to be on this.

MR. RUGG: On other issues of whether there's good cause to issue -- demand expedited discovery there is a question here of whether what plaintiffs are asking the Court to do is prejudge an issue that's before the Bankruptcy Court, whether it be the -- what Bankruptcy refers to as designation of Mr. Ergen's affiliates' vote or whether it be the role of Dish where Harbinger wants to say Mr. Ergen's acting for Dish in order to get around -- you know, in order to meet the issue of their credit agreement. Plaintiffs seem to want to take the position that Mr. Ergen is controlling Dish, as opposed to Dish controlling Mr. Ergen, back and forth. Either way, those are issues that are before that Bankruptcy Court. There is a motion to dismiss that's been filed by Dish in the adversary proceeding brought by Harbinger and LightSquared that will be heard at a hearing on October 29th. I'm not counsel there, so I can't say much more than that. But that's something that the Bankruptcy Court's already prepared to address, and I think it's an area where this Court's discretion comes into play and whether it should allow the Bankruptcy Court to make

a decision that's appropriately before the Bankruptcy Court and that the DBSD case that plaintiffs like to rely on actually says is something for the expertise of a bankruptcy judge. And, with all due respect to Your Honor, there is -- there are differences over there in that bankruptcy world.

THE COURT: Yes. I understand that. And I never practiced in Bankruptcy Court on purpose.

MR. RUGG: I was just -- just to supplement that, the bankruptcy judge has indicated that she intends to rule either on October 29th or soon thereafter on that issue.

THE COURT: Who's the bankruptcy judge?

MR. FRAWLEY: Your Honor, it's Shelly Chapman in the Southern District of New York.

MR. RUGG: So when we look down -- and the reason to look at the injunction claim right now on good cause is just to see whether there's any likelihood of success and whether there's irreparable harm. For likelihood of success we've already been through the issue of whether there's a conflict. Mr. Ergen's getting -- Mr. Ergen's affiliate is going to be paid on the debt, the rest of the board and Mr. Ergen all have a strong financial interest in Dish and are motivated to help Dish. So in terms of their ongoing conflict claim there does not appear to be a likelihood of success on the merits.

With regard to the DBSD case there are significant differences, and it's kind of interesting, because plaintiff

in their complaint suggest that if dish had been given the corporate opportunity, if it had been a corporate opportunity, to buy the debt, they would have found a way to do it; but that would have put them closer to the facts of DBSD and more dangerously closer to the facts of DBSD, though --

THE COURT: And arguably violated the credit agreement.

MR. RUGG: And arguably violate the credit agreements and be knocked out for that. But the real issue in DBSD that the court was concerned about was what interest did the creditor have. And in that case the DBSD debt had been bought at 100 percent par when you already knew the bankruptcy plan was going to pay you at 100 percent par. So there wasn't an interest on a return. Here plaintiffs trumpet the fact that Mr. Ergen's affiliate entity stands to make a return on its debt, and that takes it outside the DBSD context and takes it outside of the caselaw, because the caselaw is focused on what is your real interest, do you have an interest as a creditor. And plaintiffs themselves say that Mr. Ergen's affiliate entity has an interest as a creditor. The interest happens not to be in conflict with Mr. Ergen's interest in Dish.

We've already talked about Mr. Howard's resignation and that being relatively meaningless.

On irreparable harm, you know, the money amounts

here are not insignificant, obviously, but they really are just money amounts. There are analysts ready and able to consider what a spectrum is worth. In fact, that's what the Dish board, whether it be the existing Dish board that's duly elected or the Dish board that plaintiff wants to make this decision, will have to decide on a dollar figure that the spectrum's worth. And that's not irreparable harm once you have a dollar figure.

On the relevancy of discovery. Everything plaintiffs are looking at is backward looking. The special committee -- the previous special committee, not as special litigation committee, considered an individual question. That question is no longer relevant to what is going forward in terms of conflict of interest. That question was about whether to make an initial bid. They made a recommendation, the board followed the recommendation, initial bid is made. Nothing that can be undone by an injunction at this point. So looking at that won't tell the Court anything about whether there's going to be a future problem.

In terms of whether there's a future problem it's really just two questions, and we put this in our brief. It's, you know, they want to say that it's a conflict because of the debt. That fact's known. They want to say that Mr. Ergen controls the board. The proxies that we can produce for the Court, they're all public, that show what Mr. Ergen's

interest is in the company and what his relationship is with the other board members, you know, they're a huge stack of documents, but they all say the same thing. Plaintiff knows this. It's a controlled company. Nothing improper about that. It's fully disclosed. If plaintiffs think that's enough, then we can go forward on their preliminary injunction motion just on that, and we'll argue that at the appropriate time.

In terms of the depositions, a little bit of a moving target here, because now I think plaintiffs have moved from five depositions to two. One of those depositions seems to -- Mr. Howard, I don't know how Mr. Howard's going to tell you what the board's doing now. He resigned. So that's not forward looking. If it's Mr. Goodbarn, Mr. Goodbarn has addressed the issues for the Court, and I don't need to go over those again. But it's still not going to tell the Court whether there's a future breach of fiduciary duty that the Court has to prevent through an injunction.

I know I was a little haphazard there, but I'm mixing between myself and responding to some of what plaintiffs said. So unless the Court has further questions, I'll sit down.

THE COURT: I don't have any more questions.

MR. RUGG: Thank you.

MR. REISMAN: We're just going to rest on our

briefs, Your Honor.

MR. MARKEL: Your Honor, if I may be heard briefly.

THE COURT: Absolutely.

MR. MARKEL: And thank you for that. My name is Gregory Markel, representing Mr. Goodbarn. And I just have a couple of very brief points I would like to make.

As a matter of background, we have -- and this is just a brief background -- we have moved to dismiss -- I know it's not on today -- but the reason for that is because there are no allegations of wrongdoing by Mr. Goodbarn. He doesn't belong as a defendant in this case. And in fact in their preliminary injunction motion, and this is a quote, plaintiff goes so far as to say that, "Mr. Goodbarn possibly engaged in fiduciary duties." It doesn't allege that he did -- breaches of fiduciary duties. It doesn't say that he did, it says "possibly" he did. So that's a bit of background here that we think that he is not a proper defendant and -- but that's not for today's decision.

I think the two points I do want -- that I do think are for today, and Mr. Rugg has already mentioned one of them, but I just want to emphasize that Mr. Goodbarn was a member of the special committee that operated earlier this summer, and the plaintiff nowhere alleges that he lacked independence in both his qualifications and in the way he acted as a member of that committee. He is -- that committee is no longer in