

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK
DERIVATIVE LITIGATION.

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.

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SUPREME COURT No. 69012
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**JOINT APPENDIX
VOLUME 13 of 44**

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Date	Document Description	Volume	Bates No.
2014-08-29	Affidavit of Service re Second Amended Complaint Kyle Jason Kiser	Vol. 18	JA004272 – JA004273 ¹
2014-08-29	Affidavit of Service re Second Amended Complaint Stanton Dodge	Vol. 18	JA004268 – JA004271
2014-08-29	Affidavit of Service re Second Amended Complaint Thomas A. Cullen	Vol. 18	JA004274 – JA004275
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000040

¹ JA = Joint Appendix

Date	Document Description	Volume	Bates No.
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000041
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000042
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000043
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2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000045
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000046
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000047
2013-08-22	Affidavit of Service re Verified Shareholder Complaint	Vol. 1	JA000048
2016-01-27	Amended Judgment	Vol. 43	JA010725 – JA010726
2014-10-26	Appendix, Volume 1 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004958 – JA004962
2014-10-27	Appendix, Volume 2 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 20	JA004963 – JA004971

Date	Document Description	Volume	Bates No.
2014-10-27	Appendix, Volume 3 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation and Selected Exhibits to Special Litigation Committee's Report: Exhibit 162 (Omnibus Objection of the United States Trustee to Confirmation dated Nov. 22, 2013); Exhibit 172 (Hearing Transcript dated December 10, 2013); and Exhibit 194 (Transcript, Hearing: Bench Decision in Adv. Proc. 13-01390-scc., Hearing: Bench Decision on Confirmation of Plan of Debtors (12-12080-scc), In re LightSquared Inc., No. 12-120808-scc, Adv. Proc. No. 13-01390-scc (Bankr. S.D.N.Y. May 8, 2014)); Exhibit 195 (Post-Trial Findings of Fact and Conclusion of Law dated June 10, 2014 (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.)); Exhibit 203 (Decision Denying Confirmation of Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.))	Vol. 20 Vol. 21 Vol. 22 Vol. 23	JA004972 – JA005001 JA005002 – JA005251 JA005252 – JA005501 JA005502 – JA005633
2014-10-27	Appendix, Volume 4 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005634 – JA005642

Date	Document Description	Volume	Bates No.
2014-10-27	Appendix, Volume 5 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation and Selected Exhibits to Special Litigation Committee's Report: Exhibit 395 (Perella Fairness Opinion dated July 21, 2013); Exhibit 439 (Minutes of the Special Meeting of the Board of Directors of DISH Network Corporation (December 9, 2013). (In re LightSquared, No. 12-120808 (Bankr. S.D.N.Y.)) (Filed Under Seal)	Vol. 23	JA005643 – JA005674
2014-10-27	Appendix, Volume 6 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005675 – JA005679
2014-06-18	Defendant Charles W. Ergen's Response to Plaintiff's Status Report	Vol. 17	JA004130 – JA004139
2014-08-29	Director Defendants Motion to Dismiss the Second Amended Complaint	Vol. 18	JA004276 – JA004350
2014-10-02	Director Defendants Reply in Further Support of Their Motion to Dismiss the Second Amended Complaint	Vol. 19	JA004540 – JA004554

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2013-08-12	Errata to Verified Shareholder Complaint	Vol. 1	JA000038 – JA000039
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2015-09-18	Findings of Fact and Conclusions of Law Regarding The Motion to Defer to the SLC's Determination That The Claims Should Be Dismissed	Vol. 41	JA010074 – JA010105
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2013-12-19	Hearing Transcript re Motion for Reconsideration	Vol. 14	JA003332 – JA003367
2015-07-16	Hearing Transcript re Motion to Defer	Vol. 41	JA010049 – JA010071
2015-01-12	Hearing Transcript re Motions including Motion to Defer to the Special Litigation Committee's Determination that the Claims Should be Dismissed and Motion to Dismiss (Filed Under Seal)	Vol. 25 Vol. 26	JA006228 – JA006251 JA006252 – JA006311

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2015-10-02	Notice of Entry of Findings of Fact and Conclusions of Law re the SLC's Motion to Defer	Vol. 41	JA010106 – JA010142
2016-01-12	Notice of Entry of Order Granting in Part and Denying in Part Plaintiff's Motion to Retax	Vol. 43	JA010716 – JA010724
2013-10-16	Notice of Entry of Order Granting, in Part, Plaintiffs Ex Parte Motion for Order to Show Cause and Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction on Order Shortening Time and Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 7	JA001562 – JA001570

Date	Document Description	Volume	Bates No.
2015-02-20	Notice of Entry of Order Regarding Motion to Defer to The SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006315 – JA006322
2016-01-08	Order Granting in Part and Denying in Part Plaintiff's Motion to Retax	Vol. 43	JA010712 – JA010715
2013-10-15	Order Granting, in Part, Plaintiffs Ex Parte Motion for Order to Show Cause and Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction on Order Shortening Time and Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 7	JA001557 – JA001561
2015-02-19	Order Regarding Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006312 – JA006314
2013-09-13	Plaintiff's Appendix of Exhibits to Motion for Preliminary Injunction and For Discovery on an Order Shortening Time	Vol. 1 Vol. 2 Vol. 3 Vol. 4 Vol. 5	JA00132 – JA00250 JA00251 – JA00501 JA00502 – JA00751 JA00752 – JA001001 JA001002 – JA001028
2013-10-03	Plaintiff's Appendix of Exhibits to Status Report	Vol. 5 Vol. 6	JA001115 – JA001251 JA001252 – JA001335
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2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 1 (Filed Under Seal)	Vol. 7 Vol. 8	JA001607 – JA001751 JA001752 – JA001955
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 2 (Filed Under Seal)	Vol. 8 Vol. 9 Vol. 10	JA001956 – JA002001 JA002002 – JA002251 JA002252 – JA002403
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 3 (Filed Under Seal)	Vol. 10 Vol. 11 Vol. 12 Vol. 13	JA002404 – JA002501 JA002502 – JA002751 JA002752 – JA003001 JA003002 – JA003065
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2013-09-13	Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 1	JA000095 – JA000131
2015-11-03	Plaintiff's Motion to Retax	Vol. 43	JA010589 – JA010601

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2014-09-19	Plaintiff's Opposition to the Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004509 – JA004539
2015-11-20	Plaintiff's Reply in Further Support of its Motion to Retax	Vol. 43	JA010644 – JA010658
2015-12-10	Plaintiff's Response to SLC's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010700 – JA010711
2013-10-03	Plaintiff's Status Report	Vol. 5	JA001098 – JA001114
2014-06-06	Plaintiff's Status Report	Vol. 14	JA003368 – JA003384
2014-10-30	Plaintiff's Status Report	Vol. 23	JA005680 - JA005749
2015-04-03	Plaintiff's Status Report	Vol. 26	JA006323 – JA006451
2013-11-18	Plaintiff's Supplement to its Supplement to its Motion for Preliminary Injunction	Vol. 13	JA003066 – JA003097

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2013-11-08	Plaintiff's Supplement to Motion for Preliminary Injunction (Filed Under Seal)	Vol. 7	JA001571 – JA001606
2014-06-16	Plaintiff's Supplement to the Status Report	Vol. 16 Vol. 17	JA003951 – JA004001 JA004002 – JA004129
2014-12-15	Plaintiff's Supplemental Authority to its Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed	Vol. 24 Vol. 25	JA005994 – JA006001 JA006002 – JA006010
2015-06-18	Plaintiff's Supplemental Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed (Filed Under Seal)	Vol. 26 Vol. 27	JA006460 – JA006501 JA006502 – JA006511
2014-10-24	Report of the Special Litigation Committee (Filed Under Seal)	Vol. 19 Vol. 20	JA004613 – JA004751 JA004752 – JA004957
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2013-11-20	Special Litigation Committee Report Regarding Plaintiff's Motion for Preliminary Injunction (Filed Under Seal)	Vol. 13	JA003098 – JA003143
2015-01-06	Special Litigation Committee's Appendix of Exhibits Referenced in their Reply In Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006046 – JA006227

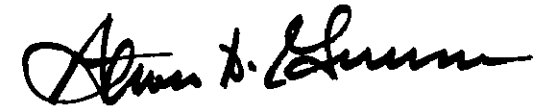
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2015-07-02	Special Litigation Committee's Appendix of Exhibits to their Supplemental Reply in Support of their Motion to Defer (Exhibits Filed Publicly) (Includes Exhibits: A, B, F, G, H, I, L and M)	Vol. 37 Vol. 38	JA009921 – JA009251 JA009252 – JA009498
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer (Exhibits Filed Under Seal) (Includes SLC Report Exhibits 298, 394, 443, 444, 446, 447 and 454)	Vol. 41	JA0010002 – JA010048
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer (Exhibits Filed Publicly) (Includes SLC Report Exhibits 5, 172, and 195)	Vol. 39 Vol. 40	JA009633 – JA009751 JA009752 – JA010001
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2015-11-16	Special Litigation Committee's Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010602 – JA010643
2014-10-02	Special Litigation Committee's Reply in Support of Their Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004555 – JA004612
2015-01-05	Special Litigation Committee's Reply in Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006011 – JA006045
2013-10-03	Special Litigation Committee's Status Report	Vol. 6 Vol. 7	JA001336 – JA001501 JA001502 – JA001554
2015-04-06	Special Litigation Committee's Status Report	Vol. 26	JA006452 – JA006459
2015-12-08	Special Litigation Committee's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010690 – JA010699
2015-07-02	Special Litigation Committee's Supplemental Reply in Support of the Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed (Filed Under Seal)	Vol. 38 Vol. 39	JA009499 – JA009501 JA009502 – JA009552
2013-09-12	Verified Amended Derivative Complaint	Vol. 1	JA000049 – JA000094

Date	Document Description	Volume	Bates No.
2013-08-09	Verified Shareholder Derivative Complaint	Vol. 1	JA000001 – JA000034

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION
DERIVATIVE LITIGATION

Case No: A-13-686775-B
Dept. No.: XI

**PLAINTIFF'S SUPPLEMENT TO ITS
SUPPLEMENT TO MOTION FOR
PRELIMINARY INJUNCTION**

Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff"), by and through its undersigned counsel of record, respectfully submits this Supplement to its Supplement to Motion for Preliminary Injunction (the "Supplement to its Supplement").

This Supplement to its Supplement is made and based upon the papers and pleadings on file, the below Memorandum of Points and Authorities, the exhibits attached hereto and

1 incorporated by reference, together with such other evidence and argument as may be presented
2 and considered by this Court at any hearing regarding the Response.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**
4 **SUPPLEMENTAL SUBMISSION**

5 We write to inform the Court about a key factual development since our filing of the
6 November 8, 2013 supplemental brief.

7 On November 15, 2013, LightSquared brought a lawsuit against Ergen and Dish that is
8 premised on Ergen's control over Dish. A true and correct copy of LightSquared's complaint in
9 intervention dated November 15, 2013 is attached hereto as **Exhibit "1"**. We note that on
10 October 30, 2013, Defendants insisted to this Court that "[g]iven the absence of any claim by
11 Harbinger or LightSquared ... injunctive relief is no longer required and the case may proceed
12 on a normal non-expedited schedule." Defendants' October 30, 2013 Motion for NRCP 60(b)
13 Relief at 17. The LightSquared complaint makes clear that LightSquared's "action arises out of *a*
14 *plan devised by Charles Ergen – acting through entities that he controls and dominates,*
15 *DISH, Echostar and SPSO* – to acquire LightSquared's spectrum assets on terms and conditions
16 that were dictated by Mr. Ergen." See Exhibit "1" at ¶1 (emphasis added). Thus, Dish is once
17 again being sued in the LightSquared bankruptcy proceedings based on Ergen's control and
18 disregard for basic corporate governance norms. See Exhibit "1" at pgs. 26-27 (prayer for relief
19 seeking compensatory and punitive damages from Dish and Ergen).

20 LightSquared's complaint refutes any assertion that the interests of Dish and Ergen are
21 currently aligned. LightSquared seeks disallowance of Ergen's bankruptcy claims based on his
22 secret purchases of \$1 billion of LightSquared debt. See Exhibit "1" at pgs. 26-27. If
23 LightSquared is successful, Ergen's debt claims may not be paid at all (or paid at a significant
24 discount) when a LightSquared bankruptcy plan is confirmed. LightSquared's complaint further
25 makes clear that Ergen's and the Board's breaches of duty have harmed and continue to harm
26 Dish. According to LightSquared, Dish's asset purchase agreement – *i.e.* the agreement the
27 Special Committee wanted to negotiate on Dish's behalf before the Committee was
28

1 unceremoniously terminated – provides Ergen a release from LightSquared’s claims. See
2 Exhibit “1” at ¶83 (noting that “as part of the asset purchase agreement incorporated in the
3 creditor’s plan of reorganization, DISH, Mr. Ergen and their affiliates, including SPSO, would
4 obtain a release of claims LightSquared may have against them by acquiring those claims as part
5 of the sale”). Had the Special Committee been allowed to do its work, it may well not have
6 insisted on LightSquared releasing any claims against Ergen as part of Dish’s purchase of
7 LightSquared’s spectrum assets. Even today, if Dish could act through independent directors
8 (which is not possible unless the Court grants Plaintiff’s requested injunction), Dish could at
9 least explore with LightSquared a settlement in which Dish would amend its asset purchase
10 agreement by carving out LightSquared’s claims against Ergen in return for LightSquared’s
11 agreement to: (1) dismiss Dish from the November 15, 2013 lawsuit; and (2) not oppose Dish’s
12 status as a good faith purchaser if it is the winning bidder in the upcoming bankruptcy auction.

13 Finally, we note that Dish’s current situation is exactly the kind of conflict that the
14 Special Committee warned about when it conditioned its July 21 recommendation for the
15 LightSquared bid on the requirement that “the Committee and its legal and financial advisors
16 would remain involved in all negotiations regarding the proposed transaction going forward, so
17 that the Committee would be able to, among other things, monitor and manage potential conflicts
18 of interest as they arise.” See Exhibit 31 to Plaintiff’s Supplement Brief at pg. 5 (Minutes of the
19 July 21, 2013 meeting of the Special Committee).

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1 **CONCLUSION**

2 Based upon this new, but not unexpected development, Plaintiff respectfully submits that
3 the LightSquared complaint further underscores that the requested injunctive relief is both
4 warranted and necessary, and thus Plaintiff's Motion for Preliminary Injunction should be
5 granted in its entirety.

6 Dated this 18th day of November, 2013.

7 **COTTON, DRIGGS, WALCH,**
8 **HOLLEY, WOLOSON & THOMPSON**

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EXHIBIT 1

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	
In re:	: Chapter 11
LIGHTSQUARED INC., <i>et al.</i> ,	: Case No. 12-12080 (SCC)
	: Jointly Administered
Debtors.	: Adv. Proc. No. 13-01390 (SCC)
-----X	
LIGHTSQUARED LP, LIGHTSQUARED INC.,	:
LIGHTSQUARED INVESTORS HOLDINGS INC.	:
TMI COMMUNICATIONS DELAWARE	:
LIMITED PARTNERSHIP, LIGHTSQUARED GP INC.,	: COMPLAINT-IN-
ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP.,	: INTERVENTION
LIGHTSQUARED INC. OF VIRGINIA,	:
LIGHTSQUARED SUBSIDIARY LLC,	:
SKYTERRA HOLDINGS (CANADA) INC., AND	:
SKYTERRA (CANADA) INC.	:
Plaintiff-Intervenors,	:
- against-	:
SP SPECIAL OPPORTUNITIES LLC,	:
DISH NETWORK CORPORATION,	:
ECHOSTAR CORPORATION,	:
AND CHARLES W. ERGEN,	:
Defendants.	:
-----X	

Plaintiffs LightSquared LP, LightSquared Inc., LightSquared Investors Holdings Inc., TMI Communications Delaware Limited Partnership, LightSquared GP Inc., ATC Technologies, LLC, LightSquared Corp., LightSquared Inc. of Virginia, LightSquared Subsidiary LLC, SkyTerra Holdings (Canada) Inc., and SkyTerra (Canada) Inc., as debtors and debtors in possession (collectively, with certain of their affiliate debtors and debtors in possession, “LightSquared”)¹ in the above-captioned chapter 11 cases (the “Chapter 11 Cases”) and plaintiff-intervenors in this adversary proceeding, hereby file this Complaint-in-Intervention against Defendants SP Special Opportunities, LLC (“SPSO”), DISH Network Corporation (“DISH”), EchoStar Corporation (“EchoStar”), and Charles W. Ergen. In support of the requested relief, LightSquared alleges as follows:

NATURE OF ACTION

1. This action arises out of a plan devised by Charles Ergen—acting through entities that he controls and dominates, DISH, EchoStar, and SPSO—to acquire LightSquared’s spectrum assets on terms and conditions that were dictated by Mr. Ergen. In so doing, SPSO, DISH, EchoStar, and Mr. Ergen violated LightSquared’s October 10, 2010 Credit Agreement (as amended, modified, and amended and restated, the “Credit Agreement”), a related Assignment and Assumption agreement, and the law.

2. For many years, DISH, under the direction of Mr. Ergen, has been seeking to diversify away from its core satellite television subscription business and into the terrestrial

¹ The debtors in these Chapter 11 cases, 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).

wireless business. As part of that strategy, DISH has already purchased significant amounts of wireless spectrum and continues to pursue opportunities to acquire more spectrum. Because of LightSquared's bankruptcy, DISH, acting through its agent Mr. Ergen, apparently saw a chance to purchase LightSquared's valuable assets at a price dictated by DISH, and devised and implemented a plan to achieve that goal.

3. Events in these Chapter 11 Cases have revealed that Mr. Ergen's plan had three elements. *First*, from April 2012 to April 2013, DISH sought to purchase enough LightSquared debt to block the approval of any plan of reorganization not supported by DISH. However, because both DISH and EchoStar were prohibited from purchasing LightSquared's debt, Mr. Ergen, who is the Executive Chairman and controlling shareholder of both companies, purchased LightSquared debt through an investment vehicle, SPSO.² By May 2013, DISH through SPSO had acquired the sought-after blocking position in LightSquared's debt.

4. *Second*, another investment vehicle, L-Band Acquisition LLC ("LBAC")—owned first by Mr. Ergen and later by DISH—made an unsolicited cash bid for LightSquared's spectrum assets. Because DISH already controlled a blocking position in LightSquared's debt at the time this bid was made on May 15, 2013, LightSquared's other creditors had little choice but to put forward and support a plan of organization that called for DISH acquiring LightSquared's spectrum. Such a plan was submitted on July 23, 2013, just days after exclusivity terminated.

5. *Third*, to complete Mr. Ergen's plan, if the creditors' plan of reorganization were approved, part of the purchase price paid by LBAC (using the cash of DISH's shareholders) would then be used to pay off Mr. Ergen's prior purchases of

² Mr. Ergen, as a natural person, is similarly prohibited from purchasing LightSquared debt.

LightSquared's debt through SPSO.³ In effect, DISH's corporate assets would be used to purchase LightSquared's spectrum assets to benefit DISH's long-term business strategy. As an observer noted to an EchoStar senior executive, "Watching Charlie in action is fascinating if not truly awesome. He has boxed everyone in. There is no place to hide without giving him control of the spectrum required to build out the network. Or without paying him enough money that all his efforts will be paid off handsomely."

6. This plan, however, was predicated on one key component: DISH would have to purchase LightSquared's debt in violation of LightSquared's Credit Agreement. To circumvent the transfer restrictions in the Credit Agreement, DISH disguised its purchases of interests in the loan (the "LP Debt") by having DISH and EchoStar act through their Executive Chairman, Mr. Ergen, with the help of DISH's Treasurer and EchoStar executive, Jason Kiser, and investment advisory firm, Sound Point Capital Management L.P. ("Sound Point") and its founder Stephen Ketchum.

7. Under the Credit Agreement, LightSquared LP's direct competitors, including DISH and EchoStar, and their subsidiaries, are "Disqualified Companies" that cannot be "Eligible Assignees" of rights under the Credit Agreement. In other words, the Credit Agreement explicitly bars DISH, EchoStar, and any entity they directly or indirectly control from holding the LP Debt.

8. Because DISH was determined to augment its spectrum holdings with the spectrum holdings of LightSquared, Mr. Ergen created SPSO, through another entity Special Opportunities Holdings LLC ("SO Holdings"), and acquired over \$1 billion worth of the LP Debt. Mr. Kiser directed SPSO's purchases of the LP Debt through Sound Point.

³ If this plan is completed, plaintiffs in related litigation have alleged that Mr. Ergen stands to make a substantial personal profit at DISH's expense.

9. In the weeks leading up to the expiration of LightSquared's exclusive period to file a plan of reorganization that it had negotiated with an ad hoc group of lenders under the Credit Agreement (the "Ad Hoc Secured Group"), SPSO delayed the closing of trades. And then, in May 2013, DISH, through its agent Mr. Ergen and using a different entity, LBAC, submitted a bid for LightSquared's spectrum assets.

10. The net effect of this scheme was three-fold. *First*, a direct competitor of LightSquared had joined its capital structure contrary to the language of LightSquared's Credit Agreement and held a sufficient stake to direct LightSquared's bankruptcy cases. *Second*, LightSquared was deprived of its statutory and bargained-for right to negotiate exclusively with its stakeholders to develop a plan of reorganization because SPSO had become its largest creditor. *Third*, DISH had virtually guaranteed that its bid, through LBAC, for LightSquared would be successful because, through SPSO, it had substantial leverage over any plan of reorganization that would not result in LightSquared's assets being transferred to LBAC. In addition, the plan of reorganization required LightSquared to release DISH, Mr. Ergen, and their affiliates from all claims that LightSquared or any interested party may assert against them. In other words, DISH would absolve itself from liability for its wrongful conduct in breaching the Credit Agreement, which was the key component of its plan to secure LightSquared's assets.

11. Therefore, LightSquared brings this action (i) against SPSO for declaratory relief, (ii) against SPSO for breach of contract, (iii) against SPSO for disallowance of claim under 11 U.S.C. § 502(b), (iv) against SPSO for equitable disallowance⁴ of SPSO's LP

⁴ LightSquared recognizes that the Court has ruled that equitable disallowance does not exist as a claim for relief in this jurisdiction. Thus, LightSquared asserts this claim to preserve its right to take any appeal from the Court's ruling.

Debt, and (v) against SPSO, DISH, EchoStar, and Mr. Ergen for tortious interference with the Credit Agreement.

JURISDICTION AND VENUE

12. This is an adversary proceeding pursuant to rule 7001 of the Federal Rules of Bankruptcy Procedure.

13. The Court has original jurisdiction under 28 U.S.C. § 1334(b) in that this is a civil proceeding.

14. This adversary proceeding is a “core” proceeding pursuant to 28 U.S.C. § 157 because it concerns the administration of LightSquared’s estates and seeks disallowance of claims against the estates. Alternatively, this adversary proceeding is related to the Chapter 11 Cases to the extent that the claims arise out of conduct involving SPSO’s acquisition of claims against the estates.

15. This Court has personal jurisdiction over SPSO, DISH, EchoStar, and Mr. Ergen pursuant to rule 7004(f) of the Federal Rules of Bankruptcy Procedure because this is a civil proceeding arising under, and related to a case, under the Bankruptcy Code.

16. Venue of this adversary proceeding in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

PARTIES AND KEY PLAYERS

17. Plaintiff LightSquared LP is a limited partnership organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. LightSquared LP is a debtor in these Chapter 11 Cases.

18. Plaintiff LightSquared Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia.

LightSquared Inc. is a debtor in these Chapter 11 Cases.

19. Plaintiff LightSquared Investors Holdings Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. LightSquared Investors Holdings Inc. is a debtor in these Chapter 11 Cases.

20. Plaintiff TMI Communications Delaware Limited Partnership is a limited partnership organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. TMI Communications Delaware Limited Partnership is a debtor in these Chapter 11 Cases.

21. Plaintiff LightSquared GP Inc. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. LightSquared GP Inc. is a debtor in these Chapter 11 Cases.

22. Plaintiff ATC Technologies, LLC is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. ATC Technologies, LLC is a debtor in these Chapter 11 Cases.

23. Plaintiff LightSquared Corp. is a corporation organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. LightSquared Corp. is a debtor in these Chapter 11 Cases.

24. Plaintiff LightSquared Inc. of Virginia is a corporation organized and existing under the laws of the State of Virginia with its principal place of business in Reston, Virginia. LightSquared Inc. of Virginia is a debtor in these Chapter 11 Cases.

25. Plaintiff LightSquared Subsidiary LLC is a limited liability company organized and existing under the laws of the State of Delaware with its principal place of business in Reston, Virginia. LightSquared Subsidiary LLC is a debtor in these Chapter 11 Cases.

26. Plaintiff SkyTerra Holdings (Canada) Inc. is a corporation organized and existing under the laws of the Province of Ontario with its principal place of business in Ontario, Canada. SkyTerra Holdings (Canada) Inc. is a debtor in these Chapter 11 Cases.

27. Plaintiff SkyTerra (Canada) Inc. is a corporation organized and existing under the laws of the Province of Ontario with its principal place of business in Ontario, Canada. SkyTerra (Canada) Inc. is a debtor in these Chapter 11 Cases.

28. Defendant SPSO is a limited liability company organized and existing under the laws of the State of Delaware with its headquarters in New York, New York. SPSO's sole member and managing member is SO Holdings. SO Holdings is a limited liability company whose sole member and managing member is Mr. Ergen.

29. Defendant Mr. Ergen is a citizen of the State of Colorado. He is the Executive Chairman of the board of directors, an employee, and majority owner of both DISH and EchoStar. Mr. Ergen—personally and through his family trusts—beneficially owns and controls over 88% of DISH's voting shares and over 80% of EchoStar's voting shares. Therefore, Mr. Ergen is the controlling shareholder of DISH and EchoStar. By virtue of his voting and ownership stake in DISH and EchoStar, Mr. Ergen controls DISH's and EchoStar's day-to-day affairs. At all material times, Mr. Ergen was and is an authorized agent of both DISH and EchoStar, acting for their benefit. Mr. Ergen controls SPSO by serving as managing member

of SO Holdings, the managing member of SPSO. DISH and EchoStar control SPSO, directly or indirectly, through Mr. Ergen.

30. Defendant DISH is a public corporation organized and existing under the laws of the State of Nevada with its principal place of business in Englewood, Colorado. DISH provides broadband and satellite television services and aims to expand its broadband offerings, including by building a terrestrial broadband network. DISH is a direct competitor of LightSquared.

31. Defendant EchoStar is a public corporation organized and existing under the laws of the State of Nevada with its principal place of business in Englewood, Colorado. EchoStar is a satellite communications company that currently operates, leases, or manages a number of satellites, including the satellites that provide services to DISH. EchoStar is a direct competitor of LightSquared.

32. LBAC is a wholly-owned subsidiary of DISH, even though it was initially established by Mr. Ergen. Mr. Ergen formed LBAC for the sole purpose of bidding on, and acquiring, LightSquared's spectrum assets with funds from DISH and/or EchoStar. DISH and EchoStar control LBAC directly and through Mr. Ergen.

33. Mr. Kiser is an employee of both DISH and EchoStar and served as Treasurer of DISH and an executive at EchoStar. At all material times, Mr. Kiser was and is an authorized agent of both DISH and EchoStar, acting within the scope of his agency and for their benefit. Mr. Kiser, in his capacity as Treasurer of DISH and an executive of EchoStar, controlled SPSO by directing SPSO's purchases of the LP Debt. DISH and EchoStar controlled SPSO, directly or indirectly, through Mr. Kiser.

34. Sound Point is an investment management and advisory firm. At all material times, it served as trading manager and investment advisor for SPSO—whose portfolio comprises entirely of its holdings of the LP Debt.

35. Mr. Ketchum is the founder and managing member of Sound Point. He managed SPSO's trades in the LP Debt.

GENERAL ALLEGATIONS

A. DISH Seeks To Acquire LightSquared's Spectrum

(i) LightSquared Offers Significant Integrated Wireless Broadband Capabilities

36. Since its founding, LightSquared has provided wholesale mobile satellite communications and broadband services throughout North America. Through its ownership of several satellites and licenses to use mobile satellite service spectrum issued by the Federal Communications Commission ("FCC") issues, LightSquared delivers voice and data services to mobile devices used by the military, first responders and other safety professionals, and individuals throughout North America.

37. Over the past few years, LightSquared has sought to develop an ancillary terrestrial network ("ATC Network") that would integrate its satellite service with terrestrial satellite ground stations to provide fourth generation long term evolution (4G-LTE) broadband mobile services all over the United States.

38. In 2010, LightSquared obtained FCC authorization to build an ATC Network that would provide broadband coverage to at least 260 million people by the end of 2015. LightSquared invested billions of dollars to develop its ATC Network.

39. In February 2012, in response to allegations from GPS manufacturers that LightSquared's proposed use of its spectrum would cause interference with GPS devices, the

FCC issued a notice proposing to suspend indefinitely LightSquared's authorization to build out its ATC Network.

40. LightSquared was unable to proceed with the build out of its ATC Network as a result of the FCC's notice. LightSquared sought to reach an agreement with its creditors that would allow it to pursue a resolution with the FCC, while forbearing on its obligations under its respective credit agreements. When those negotiations were unsuccessful, on May 14, 2012, LightSquared commenced these Chapter 11 Cases.

(ii) DISH Seeks To Expand Its Spectrum Holdings

41. Although they are separate publicly-traded companies (DISH spun-off from EchoStar in 2008), DISH and EchoStar operate as a combined enterprise. Several high-ranking executives, including Mr. Ergen, hold the exact same positions at both entities. Several employees, including Mr. Ergen and Mr. Kiser, have email addresses at both DISH and EchoStar. A majority of the members of EchoStar's board of directors are current or former DISH officers or directors.

42. DISH and EchoStar have a symbiotic relationship. DISH depends on EchoStar's infrastructure—EchoStar owns and operates the satellites that DISH uses to provide its subscription satellite television and broadband services. DISH and EchoStar are party to cooperation agreements between and among their respective wholly- or partially-owned subsidiaries to provide wireless broadband service.

43. Since at least 2008, DISH has focused on expanding its wireless broadband capabilities. Instead of obtaining spectrum licenses directly, DISH's business strategy has been and is to purchase spectrum licenses held by other industry players, including DISH's direct competitors. In 2008, for instance, DISH acquired about \$712 million of 700

MHz wireless spectrum licenses. On March 9, 2012, DISH bought reorganized DBSD North America, Inc. (a satellite communications company) and the assets of TerreStar Networks, Inc. (a wireless broadband provider), including 40MHz of 2 GHz wireless spectrum licenses, for \$2.86 billion. In April 2013, DISH made a bid for Sprint Nextel Corporation. More recently, DISH unsuccessfully attempted to buy Clearwire Corporation from Sprint Nextel Corporation. Thus, DISH's strategic plan is to obtain more wireless broadband spectrum capacity.

B. DISH and EchoStar Cannot Acquire LP Debt Directly or Indirectly

44. To finance the build out of its ATC Network, on October 10, 2010, LightSquared LP and certain of its affiliates entered into the Credit Agreement with UBS AG, Stamford Branch ("UBS"), as Administrative Agent, and entities that were, or would serve as, "Lenders" under the Credit Agreement.

45. Although "Lenders" have the right to assign their rights under the Credit Agreement to third parties, the Credit Agreement contains strict transfer restrictions regarding those assignments. Specifically, section 10.04(b) of the Credit Agreement provides that a Lender can only "assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement." The Credit Agreement proscribes that "Eligible Assignee" "shall not include Borrower or any of its Affiliates or Subsidiaries, any natural person or any Disqualified Company." (Credit Agreement, § 1.01.) A "Disqualified Company" is "any operating company that is a direct competitor of the Borrower," as well as "any known subsidiary thereof." (Id.)

46. Section 10.04(b)(ii)(C) of the Credit Agreement requires an assignee to execute and deliver to UBS an "Assignment and Assumption." In each "Assignment and Assumption," the assignee represents and warrants, among other things, that "it meets all

requirements of an Eligible Assignee under the Credit Agreement.” (Annex 1 to Assignment and Assumption, § 1.2(a).)

47. Each “Assignment and Assumption” is a “Loan Document,” and thus, is part of the entire contract between the parties to the Credit Agreement. At all relevant times, LightSquared was an intended beneficiary of each “Assignment and Assumption.”

48. The parties intended for the transfer restrictions to prohibit LightSquared’s direct competitors from acting as “Lenders,” themselves or through other entities they had the power to control in anyway.

49. The parties intended for the transfer restrictions to be as broad as possible, yet specific about which entities the Credit Agreement forbade from holding the LP Debt. Thus, the Credit Agreement includes a list of “Disqualified Companies.” As of October 10, 2010, EchoStar was on the “Disqualified Company” list. On May 9, 2012, LightSquared added DISH and several other entities. Therefore, DISH, EchoStar, and all entities they control directly or indirectly in any way cannot be “Eligible Assignees.”

C. SPSO, on Behalf of DISH and EchoStar, Purchases LP Debt

(i) DISH’s Treasurer and EchoStar Senior Executive Directs SPSO’s Purchases

50. Notwithstanding these clear transfer restrictions, in April 2012, SPSO began buying portions of the LP Debt in the marketplace on behalf of Bal Harbour Capital Management, LLC. Upon information and belief, Bal Harbour Capital Management is a money manager for Mr. Ergen.

51. At all material times, SPSO used personnel from DISH and EchoStar to handle all trades. Specifically, Mr. Kiser directed the trades at Mr. Ergen’s behest.

52. The process generally worked as follows: Mr. Ketchum or his colleagues at Sound Point would contact Mr. Kiser at DISH/EchoStar, offering a specific amount of the LP Debt at a discounted price. Mr. Kiser would then authorize Mr. Ketchum to make the purchases. In connection with each purchase, as required by section 10.04(b)(ii)(C) of the Credit Agreement, SPSO executed and delivered to UBS an "Assignment and Assumption." In each "Assignment and Assumption," SPSO represented and warranted that "it meets all requirements of an Eligible Assignee under the Credit Agreement."

53. For instance, on April 13, 2012, Mr. Kiser made the first purchase from UBS. Mr. Ketchum offered Mr. Kiser \$5 million of the LP Debt. Mr. Kiser then ordered him to "[b]uy them (flat)." In connection with this purchase (and all subsequent purchases), on September 6, 2012, SPSO executed an "Assumption and Assignment," in which it represented and warranted that "it meets all requirements of an Eligible Assignee under the Credit Agreement."

54. Similarly, on May 2, 2012, Mr. Ketchum told his colleague "EchoStar wants up to \$50mm LightSquared at [redacted]." That same day, Mr. Kiser sought Mr. Ergen's consent to make the purchase of "\$10-\$20mm lightsquared block." Mr. Ergen told Mr. Kiser that he "will take it" and authorized him to purchase more "if the size goes up." On May 3, 2012, Mr. Ketchum confirmed to Mr. Kiser, "[w]e bought \$20 million LightSquared at [redacted]. Confirming \$30 million more to go."

55. On May 4, 2012, a Sound Point employee told Mr. Kiser that he had "[b]ought \$247,259,046 of LightSquared TL for Bal Harbour @ [redacted] via Jefferies today." Mr. Kiser responded, "[C]onfirmed." Upon information and belief, officers of DISH/EchoStar managed and oversaw all of SPSO's trades in the LP Debt.

56. At all relevant times, DISH and EchoStar knew that the trades violated the Credit Agreement's transfer restrictions. For example, on May 9, 2012, Mr. Ketchum told Mr. Kiser that "[a]n amendment was just created whereby DISH Network Corp, DBSD, Clearwire, DirecTV, XM Satellite Radio Inc. were named as disqualified buyers. Charlie is not named."

57. The next day, Mr. Ketchum forwarded to Mr. Kiser the amendment to the Credit Agreement that added DISH as a "Disqualified Company." The amendment he forwarded included handwritten notes that circled the words "Disqualified Company" and stated "includes any known Subsidiary thereof."

58. On October 4, 2012, Mr. Kiser wrote Mr. Ergen specifically regarding the transfer restrictions, stating, "I still can't get confirmation the restricted list they had in place that prevented the company from buying them has fallen away due to the BK. Any interest."

59. Notwithstanding, Mr. Ergen, on that same day, responded, "If we can't be sure the company can buy them, then I am interested to increase my position at the 75 level at least up to a 33% ownership level of the class." In other words, while LightSquared had the benefit of the exclusivity periods, Mr. Ergen wanted DISH/EchoStar to acquire a blocking position in the LP Debt—either through direct purchases by "the company" or through SPSO. The purpose of these purchases was to assist DISH's goal to purchase LightSquared's spectrum assets by blocking any other plan of reorganization.

60. By April 2013, Mr. Kiser had ordered over \$1 billion of the LP Debt.

(ii) *SPSO Actively Conceals, and Misrepresents, Its Ties to DISH and EchoStar*

61. Throughout the trading process, Sound Point worked to conceal that DISH, EchoStar, and Mr. Ergen were behind the large purchases of the LP Debt.

62. On May 6, 2012, when rumors of the one of the trades began circulating in the news media, a Sound Point employee asked Mr. Ketchum, “Are Charlie/Jason going to be mad about this?”

63. Mr. Ketchum responded, “They are not really mad although they would prefer it wasn’t public.” That same day, Mr. Ketchum instructed his colleagues to keep the buyer’s identity concealed: “FYI—the WSJ and Reuters are nosing around about last week’s large LightSquared trade. We obviously don’t respond to calls from financial reporters about matters like this, but Sound Point may be referenced in the financial press as part of this trade.”

64. On May 7, 2012, the rumors continued to build tying DISH and Mr. Ergen to the trades. One Sound Point employee asked another, “Did Steve [Ketchum] tell you what to say here? I don’t know what we are supposed to disclose.” The other employee responded, “He in general said to refer everything to him and not comment.”

65. The same day, Mr. Ketchum approached Mr. Kiser to develop a strategy for outright denying that DISH, EchoStar, or Mr. Ergen had anything to do with the trades: “I am not responding, but we should discuss whether we should employ a more strenuous strategy around denial.”

66. The denials continued for over a year, and as a result, so did the rumors concerning the true identity of the LP Debt purchasers. Indeed, some press reports suggested that the buyer was Carlos Slim, chief executive of Telmex and America Movil, and Cablevision Systems Corporation, a cable television and broadband internet provider—not DISH, EchoStar, or Mr. Ergen.

67. For instance, a July 9, 2012 Forbes article stated, “Ergen has neither confirmed nor denied any attempted grab at LightSquared debt, and [an analyst] says that people

involved have begun to speculate it might be Carlos Slim or others behind the purchase. Sources have speculated that Cablevision, owned by the Dolan family and one of the country's largest telecom and media company, could be a potential suitor as well."

68. In fact, it was not until May 21, 2013 that SPSO's counsel confirmed for the first time the connection between SPSO and Mr. Ergen.

69. Even then, SPSO continued to deny that DISH and EchoStar had any involvement in the trades despite the fact that executives of both companies were initiating and directing those trades. For instance, in a July 9, 2013 submission to the Court, SPSO's counsel stipulated that "Mr. Ergen has not disclosed to DISH or EchoStar the amounts, prices or dates of SPSO's purchases of Prepetition LP Obligations."⁵ The implication was that DISH and EchoStar had no knowledge at all of SPSO's trades at all. This statement does not square with the facts. It was the Treasurer of DISH and an executive at EchoStar, Mr. Kiser, who directed and authorized each trade at particular prices on particular dates, and thus, DISH and EchoStar were well aware of the prices, dates, and amounts of SPSO's purchases. Moreover, several other DISH and EchoStar executives and officers knew that Mr. Ergen was trading in the LP Debt, including members of DISH's legal and business teams.

D. SPSO Manipulates Trade Closings

70. On August 29, 2012, LightSquared filed a motion seeking to extend its exclusive period to file a chapter 11 plan until February 8, 2013 to give LightSquared more time to resolve its regulatory issues. Ultimately, after LightSquared reached an agreement with the

⁵ See Exhibit A to the *Joinder of SP Special Opportunities, LLC to the Ad Hoc Secured Group of LightSquared LP Lenders' (I) Reply in Further Support of the Emergency Motion of the Ad Hoc Secured Group of LightSquared LP Lenders to Enforce this Court's Order Pursuant to 11 U.S.C. § 1121(d) Further Extending LightSquared's Exclusive Periods to File a Plan of Reorganization and to Solicit Acceptances Thereof, and (II) Objection to LightSquared's Cross-Motion for Entry of Order Pursuant to 11 U.S.C. § 105(a) Relieving LightSquared of Certain Obligations Thereunder, and the Joinders Thereto* [Docket No. 728].

parties, the Court extended LightSquared's exclusive period to file a chapter 11 plan until January 31, 2013.

71. On January 17, 2013, LightSquared filed another motion seeking to further extend its exclusive period to file a chapter 11 plan to July 20, 2013.

72. After conducting a contested hearing on the motion, LightSquared negotiated a resolution to the motion with its stakeholders, including the Ad Hoc Secured Group. The agreement was reflected in the Court's February 13, 2013 *Order Pursuant to 11 U.S.C. § 1121(d) Further Extending LightSquared's Exclusive Periods to File a Plan of Reorganization and to Solicit Acceptances Thereof* [Docket No. 522] (the "Exclusivity Stipulation"). Among other provisions, the Exclusivity Stipulation extended LightSquared's exclusive period until July 15, 2013. It also required the parties to engage in good faith negotiations regarding the terms of a consensual chapter 11 plan.

73. Over the subsequent weeks, SPSO purchased another \$648,757,090.54 of the LP Debt.

74. Between March and May 2013, the Ad Hoc Secured Group and its professionals could not determine whether it had sufficient holdings to constitute a group because several trades with its existing members had not closed after weeks of being "hung." This made it impossible for LightSquared to identify with whom to negotiate a plan while the exclusivity period gradually expired.

75. On January 14, 2013, UBS sought to close a trade with SPSO that had been pending for months. Mr. Ketchum, in an email to his colleague, said he "forwarded this to EchoStar." Three days later, his colleague, asked Mr. Ketchum "would you mind following up with EchoStar [because] UBS has asked to close again." By January 24, 2013, UBS was still

pressuring to close the trades and Sound Point continued to delay. “Try and hold them off for another day,” another Sound Point executive responded.

76. Then, on February 13, 2013, according to the same Sound Point employee, “Jefferies was eager to settle” over \$82 million of trades. Those trades took months to close.

77. On April 17, 2013, Mr. Ketchum forwarded an email to Mr. Kiser concerning over \$289 million of the LP Debt that had still not been funded.

78. On April 23, 2013, Mr. Ketchum wrote Mr. Kiser, “Kevin thinks we can hold them off on any payments until at least May 15.”

79. On April 25, 2013, Jefferies followed up with Sound Point to close \$88 million of trades. When a Sound Point employee sought from Mr. Ketchum “a reason and an eta” on why the trades had not closed, a Sound Point executive suggested to tell Jefferies “we are waiting on funding from our investor.” Mr. Ketchum rejected that idea, proposing instead, “Let’s not say that. Let’s just say we are in the process of exiting some other large positions we have to pay for this and that I have spoken with Steve Sander (head of sales) about this.” None of these reasons were true, and the trades remained pending for several weeks.

80. Eventually, on June 13, 2013, SPSO joined the Ad Hoc Secured Group and within days closed several hundreds of millions of dollars in “hung” trades.

E. DISH, Through LBAC, Bids for LightSquared’s Assets

81. On May 15, 2013, LBAC, DISH’s other controlled entity, submitted an unsolicited bid for LightSquared’s L-Band spectrum for \$2 billion—approximately the amount of the outstanding LP Debt.

82. On July 23, 2013—a week after the exclusivity period expired—the Ad Hoc Secured Group filed the DISH/EchoStar-friendly plan of reorganization, supported by

SPSO, that contemplates a sale of LightSquared's spectrum assets with LBAC serving as a stalking horse bidder at its sub-par price for LightSquared's spectrum assets.

83. Mr. Ergen's plan was complete. DISH and EchoStar had become LightSquared's largest creditors, through SPSO, with sufficient voting powers to block any competing plan of reorganization that did not result in a sale of LightSquared's spectrum to DISH at a price they dictated, through LBAC. In addition, as part of the asset purchase agreement incorporated in the creditors' plan of reorganization, DISH, Mr. Ergen, and their affiliates, including SPSO, would obtain a release of claims LightSquared may have against them by acquiring those claims as part of the sale. DISH, through LBAC, would acquire from LightSquared "all rights, privileges, claims, demands, choses in action, prepayments, deposits, refunds, indemnification rights, warranty claims, offsets and other claims of Sellers arising out of the Acquired Assets ("Actions"), including, without limitation, any Avoidance Actions relating to the Acquired Assets or to Purchaser or any of Purchaser's Affiliates [defined to include Mr. Ergen, DISH, EchoStar, and their respective affiliates] [...]."⁶ Mr. Ergen had indeed "boxed everyone in."

CLAIMS FOR RELIEF

First Claim for Relief

(Declaratory Relief Against SPSO)

84. LightSquared repeats and realleges each and every allegation in paragraphs 1 through 83 above as if fully set forth herein.

⁶ See Exhibit F to the *Notice of Filing By Ad Hoc LP Secured Group of Solicitation Version of First Amended Plan and Disclosure Statement* [Docket No. 970].

85. As alleged above, on October 10, 2010, LightSquared entered into the Credit Agreement. Section 10.04(b) of the Credit Agreement only authorizes an existing lender to “assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement.” “Eligible Assignee” excludes “any Disqualified Company.” A “Disqualified Company” is “any operating company which is a direct competitor of the Borrower [including DISH and EchoStar and] any known subsidiary thereof.” In addition, section 10.04(b)(ii)(C) of the Credit Agreement requires every assignee of the LP Debt to execute and deliver to UBS an “Assignment and Assumption.” In section 1.2(a) of the “Assignment and Assumption,” the assignee represents and warrants that “it meets all requirements of an Eligible Assignee under the Credit Agreement.” At all relevant times, LightSquared was an actual and intended beneficiary of each “Assignment and Assumption.”

86. SPSO is a subsidiary of DISH and EchoStar. DISH and EchoStar controlled SPSO, among other reasons, because their Executive Chairman, Mr. Ergen, and DISH’s Treasurer and EchoStar executive, Mr. Kiser, acting within the scope of their agency and for the benefit of DISH and EchoStar, directed the management and investment policies of SPSO, specifically, its purchase of interests in the LP Debt. Therefore, SPSO is not an “Eligible Assignee” and is in breach of section 10.04(b) of the Credit Agreement and section 1.2(a) of each “Assignment and Assumption” for all purchases it made.

87. Upon information and belief, defendants assert that they are Eligible Assignees. As such, a real case or controversy exists. This controversy is within the jurisdiction of this Court and warrants the issuance of a declaratory judgment.

88. By reason of the foregoing, LightSquared requests a declaration that SPSO is not an “Eligible Assignee” under the Credit Agreement and is therefore in breach of section

10.04(b) of the Credit Agreement and section 1.2(a) of each “Assignment and Assumption” for all purchases it made and such other and further relief as the Court may deem proper, including, but not limited to, an unwinding of the purchases and assignments.

Second Claim for Relief

(Breach of Contract Against SPSO)

89. LightSquared repeats and realleges each and every allegation in paragraphs 1 through 88 above as if fully set forth herein.

90. As alleged above, on October 10, 2010, LightSquared entered into the Credit Agreement.

91. Section 10.04(b) of the Credit Agreement only authorizes an existing lender to “assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement.” “Eligible Assignee” excludes “any Disqualified Company.” A “Disqualified Company” is “any operating company which is a direct competitor of the Borrower [including DISH and EchoStar and] any known subsidiary thereof.” In addition, section 10.04(b)(ii)(C) of the Credit Agreement requires every assignee of the LP Debt to execute and deliver to UBS an “Assignment and Assumption.” In section 1.2(a) of the “Assignment and Assumption,” the assignee represents and warrants that “it meets all requirements of an Eligible Assignee under the Credit Agreement.” At all relevant times, LightSquared was an actual and intended beneficiary of each “Assignment and Assumption.”

92. SPSO is a subsidiary of DISH and EchoStar. DISH and EchoStar controlled SPSO, among other reasons, because their Executive Chairman, Mr. Ergen, and DISH’s Treasurer and EchoStar executive, Mr. Kiser, acting within the scope of their agency and for the benefit of DISH and EchoStar, directed the management and investment policies of

SPSO, specifically, its purchase of interests in the LP Debt. Therefore, SPSO is not an “Eligible Assignee” and is in breach of section 10.04(b) of the Credit Agreement and section 1.2(a) of each “Assignment and Assumption” for all purchases it made.

93. By reason of the foregoing, LightSquared is entitled to damages to be determined at trial and such other and further relief as the Court may deem proper.

Third Claim for Relief

(Disallowance of Claim Under 11 U.S.C. § 502(b) Against SPSO)

94. LightSquared repeats and realleges each and every allegation in paragraphs 1 through 93 above as if fully set forth herein.

95. Under 11 U.S.C. § 502(b), the Court may disallow all or a portion of a creditor’s claim where “such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b).

96. As alleged above, section 10.04(b) of the Credit Agreement only authorizes an existing lender to “assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement.” “Eligible Assignee” excludes “any Disqualified Company.” A “Disqualified Company” is “any operating company which is a direct competitor of the Borrower [including DISH and EchoStar and] any known subsidiary thereof.” In addition, section 10.04(b)(ii)(C) of the Credit Agreement requires every assignee of the LP Debt to execute and deliver to UBS an “Assignment and Assumption.” In section 1.2(a) of the “Assignment and Assumption,” the assignee represents and warrants that “it meets all requirements of an Eligible Assignee under the Credit Agreement.” At all relevant times, LightSquared was an actual and intended beneficiary of each “Assignment and Assumption.”

97. SPSO is a subsidiary of DISH and EchoStar. DISH and EchoStar controlled SPSO, among other reasons, because their Executive Chairman, Mr. Ergen, and DISH's Treasurer and EchoStar executive, Mr. Kiser, acting within the scope of their agency and for the benefit of DISH and EchoStar, directed the management and investment policies of SPSO, specifically, its purchase of interests in the LP Debt. Therefore, SPSO is not an "Eligible Assignee" and is in breach of section 10.04(b) of the Credit Agreement and section 1.2(a) of each "Assignment and Assumption" for all purchases it made.

98. By reason of the foregoing, LightSquared is entitled to judgment disallowing SPSO's claims against LightSquared under 11 U.S.C. § 502(b) and such other and further relief as the Court may deem proper.

Fourth Claim for Relief

(Equitable Disallowance Against SPSO)

99. LightSquared repeats and realleges each and every allegation in paragraphs 1 through 98 above as if fully set forth herein.

100. SPSO engaged in the following inequitable conduct, among others. *First*, SPSO improperly acquired the LP Debt in violation of the transfer restrictions in section 10.04(b) of the Credit Agreement by not being an "Eligible Assignee." *Second*, SPSO concealed the involvement of DISH and EchoStar in its purchases of the LP Debt. *Third*, it delayed closing its acquisitions of the LP Debt.

101. The confluence of SPSO's conduct caused LightSquared harm. As a subsidiary of DISH and EchoStar, SPSO was a direct competitor of LightSquared but had joined LightSquared's capital structure and held a sufficient stake to direct LightSquared's bankruptcy cases. LightSquared was unable to negotiate with its stakeholders to develop a plan of

reorganization during its exclusivity period. Moreover, LBAC's bid guaranteed that DISH and EchoStar would acquire LightSquared's spectrum at a price dictated by DISH because SPSO, through its holdings of the LP Debt, could vote to block any plan of reorganization that would not result in LBAC being the successful bidder for the assets.

102. Equitable disallowance of SPSO's claims against LightSquared's estates is consistent with the Bankruptcy Code and applicable law.

103. By reason of the foregoing, LightSquared is entitled to judgment equitably disallowing SPSO's claims in full, or, at a minimum, in part to the extent that SPSO would receive an unjust profit for its inequitable conduct and such other and further relief as the Court may deem proper.

Fifth Claim for Relief

(Tortious Interference with Contractual Relations Against SPSO, DISH, EchoStar, and Mr. Ergen)

104. LightSquared repeats and realleges each and every allegation in paragraphs 1 through 103 above as if fully set forth herein.

105. LightSquared and UBS, among others, are parties to the Credit Agreement, which is a valid and enforceable contract.

106. DISH, EchoStar, SPSO, and Mr. Ergen knew of the Credit Agreement and its key terms and conditions, including its provisions regarding who could and could not purchase the LP Debt.

107. Section 10.04(b) of the Credit Agreement only authorizes an existing lender to "assign to one or more Eligible Assignees all or a portion of its rights and obligations under this Agreement." "Eligible Assignee" excludes "any Disqualified Company." A

“Disqualified Company” is “any operating company which is a direct competitor of the Borrower [including DISH and EchoStar and] any known subsidiary thereof.”

108. UBS’s transfer of the LP Debt to SPSO despite the fact that SPSO was not an “Eligible Assignee” under the Credit Agreement breached section 10.04(b) of the Credit Agreement.

109. SPSO, DISH, EchoStar, and Mr. Ergen intentionally caused UBS to breach section 10.04(b) of the Credit Agreement before SPSO itself became a party to that agreement. On September 6, 2012, Mr. Ergen, through his agents, caused SPSO to misrepresent in the “Assignment and Assumption” regarding SPSO’s April 13, 2012 purchase of the LP Debt that “it meets all requirements of an Eligible Assignee under the Credit Agreement.” As a result, UBS assigned its holdings of the LP Debt to a “Disqualified Company.”

110. DISH, EchoStar, and Mr. Ergen also intentionally interfered with the Credit Agreement by controlling, directing, authorizing and executing the LP Debt trades that caused and resulted in the breach of the Credit Agreement, including section 10.04(b) thereof.

111. SPSO’s, DISH’s, EchoStar’s, and Mr. Ergen’s actions caused harm to LightSquared because they allowed a direct competitor of LightSquared to join LightSquared’s capital structure in violation of the transfer restrictions of the Credit Agreement.

112. By reason of the foregoing, LightSquared is entitled to damages to be determined at trial and such other and further relief as the Court may deem proper.

DEMAND FOR JURY TRIAL

113. LightSquared demands a trial by jury on all issues and claims so triable.

PRAYER FOR RELIEF

114. WHEREFORE, LightSquared prays for judgment against SPSO, DISH, EchoStar, and Mr. Ergen as follows:

- (a) disallowing SPSO's claims in full, or, at a minimum, in part to the extent that SPSO would receive an unjust profit for its inequitable conduct;
- (b) subordinating SPSO's claims to all claims except as to LightSquared's equity interest holders;
- (c) awarding compensatory damages in an amount to be proven at trial;
- (d) awarding punitive damages in an amount to be proven at trial;
- (e) awarding pre- and post- judgment interest at the applicable rates until such time as the judgment rendered in LightSquared's favor is paid in full;
- (f) awarding costs (including attorneys' fees and costs taxable and non-taxable under applicable law) incurred in bringing this adversary proceeding; and
- (g) awarding such other and further relief as this Court may deem proper.

New York, New York
Dated: November 15, 2013

Respectfully submitted,

/s/ Alan J. Stone

Matthew S. Barr

Alan J. Stone

Andrew M. Leblanc

Karen Gartenberg

MILBANK, TWEED, HADLEY & McCLOY LLP

One Chase Manhattan Plaza

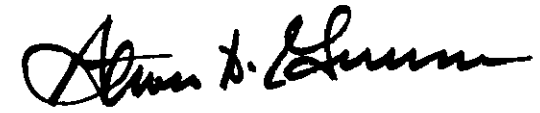
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*Counsel to Plaintiff-Intervenors
and Debtors and Debtors in Possession*

REDACTED VERSION FILED

REDACTED VERSION FILED



CLERK OF THE COURT

ERR

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*Attorneys for the Special Litigation Committee
of Dish Network Corporation*

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

**ERRATA TO REPORT OF THE
SPECIAL LITIGATION COMMITTEE
OF DISH NETWORK CORPORATION
REGARDING PLAINTIFF'S MOTION
FOR PRELIMINARY INJUNCTION**

HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, NV 89134

1 The Special Litigation Committee of Nominal Defendant DISH Network Corporation
2 (the "SLC") submits this Errata to the Report of the SLC Regarding Plaintiff's Motion for
3 Preliminary Injunction (the "Report") to correct errors discovered in the Report.

4 *First*, the sentence of the Report at 4:11-14 should be corrected as follows:

5 Furthermore, Mr. Ergen cannot ~~not~~ use any voting power associated with his personal
6 investment in the debt and equity of LightSquared ("Mr. Ergen's LightSquared Investments") to
7 adversely affect the sale price or the bidding process due to a voting agreement, as discussed in
8 more detail below.

9 *Second*, the sentence of the Report at 10:7-10 should be corrected as follows:

10 In fact, until DISH determined that it would not acquire Sprint at the end of June 2013,
11 DISH could not have bid for LightSquared ~~and risk~~ without losing the financing from its banks
12 for the Sprint bid and thus losing the opportunity to acquire Sprint.

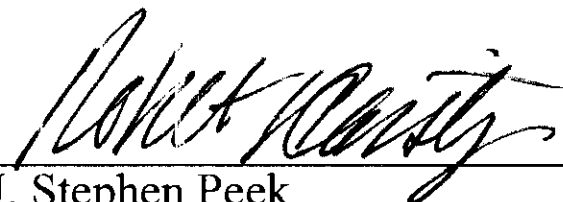
13 *Third*, the sentence of the Report at 34:26-35:2 should be corrected as follows:

14 Plaintiff has cited no cases in which a bidder was found ~~not~~ to have acted in bad faith
15 based upon its own internal decision not to employ a special committee in making its bid.

16 *Finally*, the sentence of the Report at 36:7-9 should be corrected as follows:

17 As a result, Plaintiff asserts, the competing Harbinger Plan, which does not contemplate a
18 sale of the LP Assets, would be strengthened.

19 DATED November 21, 2013.

20
21 

22 J. Stephen Peek
23 Robert J. Cassity
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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I hereby certify that on the 21st day of November, 2013, I served a true and correct copy of the foregoing **ERRATA TO REPORT OF THE SPECIAL LITIGATION COMMITTEE OF DISH NETWORK CORPORATION REGARDING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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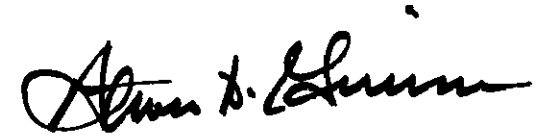
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An Employee of Holland & Hart LLP



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

IN RE DISH NETWORK CORPORATION .
DERIVATIVE LITIGATION .

CASE NO. A-686775

DEPT. NO. XI

**Transcript of
Proceedings**

.

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

MONDAY, NOVEMBER 25, 2013

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.

APPEARANCES:

FOR THE PLAINTIFF:

BRIAN W. BOSCHÉE, ESQ.
MARK LEBOVITCH, ESQ.
WILLIAM MILLER, ESQ.
ADAM HULLANDER, ESQ,

FOR THE DEFENDANTS:

BRIAN FRAWLEY, ESQ.
J. STEPHEN PEEK, ESQ.
ROBERT CASSITY, ESQ.
ROBERT BRADY, ESQ.
BARR FLINN, ESQ.
JOSHUA M. REISMAN, ESQ.
JEFFREY S. RUGG, ESQ.
TARIQ MUNDIYA, ESQ.

1 LAS VEGAS, NEVADA, MONDAY, NOVEMBER 25, 2013, 10:06 A.M.

2 (Court was called to order)

3 THE COURT: Okay. Are we ready to start? Has
4 everybody signed in so the clerk can identify you?

5 (Pause in the proceedings)

6 THE COURT: Okay. Are we now ready? Okay. Let's
7 deal with the pro hac applications first.

8 Mr. Peek.

9 MR. PEEK: Your Honor, I have three pro hacs.
10 Present this morning is Barr Flinn from Young Conaway Stargatt
11 & Taylor in Delaware.

12 MR. FLINN: Good morning, Your Honor.

13 THE COURT: 'Morning.

14 MR. PEEK: And with him is his partner Bob Brady
15 behind me.

16 THE COURT: Good morning.

17 MR. BRADY: Good morning, Your Honor.

18 MR. PEEK: And think the third pro hac was --

19 THE COURT: David McBride.

20 MR. PEEK: -- David McBride, who is not here. But I
21 would ask that all three --

22 THE COURT: Okay. Does anyone have an objection to
23 Barr Flinn, Robert Brady, David McBride?

24 MR. BOSCHEE: Plaintiffs have no objection, Your
25 Honor.

1 MR. RUGG: None, Your Honor.

2 THE COURT: They'll be approved.

3 MR. PEEK: Thank you, Your Honor.

4 THE COURT: Anything else of a housekeeping nature?

5 MR. PEEK: That is all I have of a housekeeping
6 issue, Your Honor. Thank you.

7 THE COURT: I understand that you resolved your
8 motion to unseal so that we would be able to deal with the
9 issues in an organized form.

10 MR. BOSCHEE: That is correct. We don't necessarily
11 agree that everything's confidential. We've agreed to
12 withdraw the motion at this time, and then if we need to
13 refile it after the 10th, after all the dust settles with all
14 the other matters in bankruptcy we'll do that if need be. And
15 we will present -- again, as agreed to by counsel, present
16 evidence that Your Honor has seen that we, you know -- that is
17 not controversial to anybody at the table. And if it is,
18 they'll I'm sure let me know. They agree to it.

19 THE COURT: Okay. If there is a concern at some
20 point in time that a -- because I know some of the briefs were
21 filed in their entirety under seal, some of the exhibits and
22 appendices were submitted partially under seal and partially
23 not under seal. Those motions are not set for hearing until
24 December 27th on the chambers calendar. If someone has a
25 concern related to any information that is being discussed

1 here in open court, I would urge you to make that objection
2 sooner, rather than later, so if there is a confidentiality
3 issue that you are concerned about I can address it before I
4 can unring the bell.

5 MR. PEEK: Your Honor, I think there certainly will
6 be references, as Mr. Boschee said, to certain of the exhibits
7 during the course of this proceeding today.

8 MR. FRAWLEY: Your Honor, it's Brian Frawley. I
9 think that we've agreed with the plaintiffs that as we
10 understand what's to be said in court today for purposes of
11 this hearing I think DISH and the other defendants are happy
12 for this to proceed publicly. If anything comes up, we'll be
13 alert, and we'll be happy to alert the Court. Thank you.

14 THE COURT: Okay. Hold on a second. I've got to go
15 find something.

16 (Pause in the proceedings)

17 THE COURT: Okay.

18 MR. BOSCHEE: Also, Your Honor, the binders that
19 everybody's talking about, we have one for your law clerk and
20 Your Honor to follow along.

21 THE COURT: Okay.

22 MR. BOSCHEE: So may I approach?

23 THE COURT: Sure. Is anything in the binder of a
24 confidential nature?

25 MR. BOSCHEE: No. I picked up a binder, and we just

1 discussed that while Your Honor was in chambers.

2 THE COURT: Court's Exhibit 1.

3 MR. RUGG: I was just going to say --

4 THE COURT: What?

5 MR. RUGG: I just going to suggest what you already
6 got to, that it's a Court exhibit. So thank you, Your Honor.

7 THE COURT: That's what I always do. Same thing I
8 always do.

9 Ready? It's your motion.

10 MR. BOSCHEE: Yes, Your Honor. Brian Boschee, Mark
11 Lebovitch, Will Miller, Adam Hullander, and also Bobby Rainey
12 from Jacksonville -- from the plaintiff. He's the manager of
13 the fund, and he has come here from Florida to join us for the
14 hearing today. Mr. Lebovitch is going to be doing the
15 presentation for our side today.

16 THE COURT: Okay.

17 MR. LEBOVITCH: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. LEBOVITCH: Thank you for having us. This is
20 the time set for the injunction motion of plaintiff
21 Jacksonville Police and Fire Pension Fund. Bobby is the
22 assistant chief of the Jacksonville City Police Department and
23 the chairman of the pension fund.

24 Understanding that Your Honor surely has specific
25 questions from reviewing all the papers, we prepared a focused

1 affirmative presentation which I do hope will answer those
2 questions along the way. Obviously whenever Your Honor has a
3 question we'll follow the Court's lead.

4 THE COURT: So can I start with a huge question.

5 MR. LEBOVITCH: Sure.

6 THE COURT: There is an issue as to whether Mr.
7 Ergen was or was not aware of the special committee's --
8 special transaction committee's formation sometime between
9 May 8th before May 20th. In reading your brief I do not see
10 any specific references to any notification to Mr. Ergen by
11 either the company or the special transaction committee
12 related to their formation and appointment.

13 MR. LEBOVITCH: Yes, Your Honor. We have a document
14 that references on May 7th a phone call that Mr. Moskowitz
15 said to the committee he was going to have with Mr. Ergen. We
16 actually find that Mr. Ergen -- numerous reasons why Mr. Ergen
17 -- we don't believe it's conceivable that he didn't know about
18 the committee.

19 THE COURT: But that's a credibility issue. I'm
20 looking for a document issue, as opposed to --

21 MR. LEBOVITCH: The document is -- why don't we
22 turn it on and go to Slide 23. Your Honor, if you look at
23 Slide 23, what Your Honor will see is Mr. Moskowitz writes to
24 the committee, "Assuming Charlie gets back to Denver on time
25 this afternoon, I am going to meet with him at about 4:30 p.m.

1 today. If any of you have any questions you want to be sure I
2 raise with him, please call me."

3 And then Mr. Goodbarn responds, and this is May 7th,
4 "A simple one. Does he understand the need of the directors
5 for independent counsel?"

6 Now, with Your Honor's permission, I'd also touch on
7 the reasons why it's simply not credible that he didn't know
8 about the committee. May 2nd is when he came and presented it
9 to the committee -- to the board. He openly talked about his
10 debt purchases. There was a discussion about the fact that
11 there was a conflict there. He is an admitted micromanager.
12 He's a controlling shareholder, he's a chairman. We've seen
13 the email where on May 7th he was supposed to be told about
14 this.

15 Of course, on May 8th there's a board meeting and
16 there's a resolution that's passed that we'll spend some time
17 on. We find that on that alone it's not credible that he
18 didn't know. We actually really don't believe that a
19 reasonable juror could even find that he didn't know. But
20 there's another proof that in making his proposal on May 15th,
21 the \$2 billion offer that we say set a floor and boxed in the
22 whole process -- let's say he didn't know there was a
23 committee. He didn't tell the board, either. So if he didn't
24 know somehow, which we find inconceivable, that a committee
25 would be created specifically in response to his conflict and

1 he's the chairman and controlling shareholder and nobody would
2 tell him that this committee was created. It's completely
3 existent with the most basic kind of corporate notice type
4 process. There's no indication that he said to the board, oh,
5 by the way, guys, I'm making this offer. And so, you know, we
6 think that the idea was he made the offer in order to box in
7 the committee. And, you know, I can address now a little bit
8 more about the timing of the offer and what his arguments are,
9 or I could -- if Your Honor's satisfied on this point, I could
10 go back to --

11 THE COURT: Well, the other issue I have is you're
12 asking me regardless of whether I find there's irreparable
13 harm at this point to make a finding that you have a
14 substantial likelihood of success on the merits on the breach
15 of fiduciary duty claims. Why do you think that's appropriate
16 in Nevada?

17 MR. LEBOVITCH: Because I think one of the elements
18 of ruling on injunction -- the first element is is there a
19 likelihood of success on the merits. That's a necessary
20 element to any injunction assessment. And then the second one
21 really goes to irreparable harm and balancing public interests
22 and balancing of the equities. And so we think -- I'd like to
23 present to Your Honor we think that it's clear that if the
24 record doesn't already show that there were breaches of duty
25 in connection with the termination of the committee, that

1 termination -- or that breach is an ongoing breach, ongoing
2 harm. And I'll lay that out. But we think that the record
3 already -- the record before Your Honor already shows enough
4 to find that that was a breach. We necessarily think that
5 we've more than met the standard to show likelihood of
6 success. I understand Your Honor will have questions on
7 irreparable harm, and I think, you know, pretty early on I can
8 deal with some of those, as well.

9 THE COURT: All right. I'm sorry to have
10 interrupted your presentation, Mr. --

11 MR. LEBOVITCH: No problem, Your Honor. Anytime
12 Your Honor has a question.

13 Well, we just touched on -- I mean, there really are
14 two discrete questions. The first is does the board's
15 termination of the committee likely violate Nevada corporate
16 law; and then the second is, if so, does the Court see
17 adequate remedies at trial, or is judicial intervention
18 required to avoid irreparable harm.

19 Your Honor, when we were here last in person there
20 was an extensive oral argument about the merits of the case.
21 So before digging into the details of why we think the
22 defendants' take on the fact is not reliable I would like to
23 identify for the Court two points that were presented to the
24 Court back when we were here that are no longer I think even
25 credible to argue. And I do think that for all the disputed

1 facts out there these few salient points could themselves show
2 a likelihood of success on the merits.

3 After that, and I'll be a few minutes, I'd like to
4 touch on some new developments about irreparable harm that
5 have come up since the last time Your Honor heard us on what
6 we'll call the Harbinger dismissal argument just a few weeks
7 ago. And so considering defendants' and the SLC's rhetoric
8 about irreparable harm and arguments about it, I do imagine
9 the Court has some questions about it. I think that we can up
10 front identify concisely and hopefully persuasively why the
11 basis to enjoin Ergen and his people from controlling the
12 bidding process is a compelling one. And then after going
13 through the chronology, which I know Your Honor's familiar
14 with, and rebutting defendants' take, I'll get back to the
15 rest of the irreparable harm argument. So I'll try and put it
16 up front now.

17 And, Your Honor, when you listen to the arguments
18 today, you know, hopefully you'll find us lawyers' arguments
19 persuasive. But I think there's a better way for the Court to
20 go. You could give weight to the words of the only directors
21 involved in this case whose independence, loyalty, and good
22 faith has never been questioned by anyone. That's Messrs.
23 Goodbarn and Howard. They've told you the story, Your Honor.
24 I think they should be trusted, and I think in corporate
25 disputes like this it's appropriate and very common for the

1 judge to give weight to the people whose independence is not
2 questioned. Your Honor, those are basic facts.

3 In light of Ergen's huge conflict of interest that
4 was disclosed on May 2nd, everyone realized an independent
5 committee was needed. They created a committee on May 8th,
6 delegated the board's authority to the committee. The only pl
7 who could be on the committee are Goodbarn and Howard. The
8 independent committee showed Ergen that they won't give him a
9 free pass on his debt purchases.

10 Ergen didn't react well to the committee showing its
11 independence. When the committee gave a highly conditional
12 recommendation and says it is ready to go ahead and do the
13 rest of its delegated responsibilities, the board terminated
14 the committee, we submit clearly to protect Ergen.

15 Your Honor, this is the first and only time I'll
16 mention a Harvey Pitts report. But his reaction to the record
17 here I think is telling. He is very clear to not presume to
18 tell the Court about what Nevada law requires. He does say,
19 however, based on his experience -- based on his experience
20 advising thousands of corporate directors across the country
21 over many decades that the board's termination of the
22 committee is -- he says a couple things. He calls it a
23 polling and reflects abnormal treatment of special committees.
24 He says it reflects a disregard for the rights of public
25 company shareholders, and at 5.14 he says, it confirms the

1 disdain the defendants have for universally accepted and
2 applied corporate governance procedures. These are pretty
3 strong words coming from someone who's spent his career and
4 spent decades advising controllers, special committees, and
5 boards generally.

6 Now, I'd like to turn to why perhaps Mr. Pitt had
7 such a visceral reaction to defendants' conduct here. Let's
8 start with a change from the last time Your Honor heard us.
9 When we were last here we argued very clearly that in light of
10 Ergen's status as LightSquared's largest creditor that the
11 Court will ultimately have to decide whether the transaction
12 is fair. Defendants made a representation in opposing
13 discovery at the time that seemed to cut to the heart of that
14 argument. On Slide 1 what you see is that in both Hollinger
15 and T. Rowe Price a controlling shareholder disbanded a
16 special committee in order to impose a plan the committee
17 rejected. And then they say here, "The DISH board created a
18 special committee of two independent directors who voted in
19 favor of the LightSquared transaction and who received an
20 outside fairness opinion.

21 If the committee that we admitted was independent to
22 prove the transaction is fair, that's a fact that helps
23 defendants. That's why they told it to Your Honor just a few
24 months ago. We saw the documents, and we saw that the
25 committee's five conditions cast some doubt on that

1 representation to the Court. Then when I deposed Mr. Goodbarn
2 we realized that the premise of this fairness defense
3 essentially blew up. When I was done with my questioning I
4 expected Ergen's counsel to cross-examine Mr. Goodbarn. He
5 didn't. I then saw something I've never really seen before.
6 DISH's lawyer started cross-examining a sitting DISH director.

7 Now, Goodbarn in response to questioning about the
8 fairness opinion from the committee essentially killed the
9 idea that they had in fact passed on fairness.

10 (Pause in the proceedings)

11 THE COURT: Let's continue, please.

12 MR. LEBOVITCH: Okay. Well, so, Your Honor, you can
13 see the question is, "Was the judgment --" this is Slide 2.
14 "Was the judgment of the special committee at the time it made
15 that recommendation that the transaction recommended to the
16 board was fair to the DISH shareholders?" And the answer from
17 Mr. Goodbarn is, "No, because we had not completed the
18 process. We only reached a conclusion on the valuation, we
19 did not reach a conclusion regarding the conflict of interest.
20 And that's really integral to that decision. That has not
21 been -- that decision has not been reached."

22 Your Honor, Mr. Goodbarn also made very clear in
23 response to his company's lawyer's questioning that any
24 fairness assessment had to ask DISH -- had to ask if DISH was
25 already paying too much and whether Ergen should give up some

1 or all of his trading profits. On the second page of Slide 2,
2 "And is there anything --" question, "Is there anything in
3 respect of the issues that you contend have not been addressed
4 that might cause that conclusion to be revisited?"

5 "Well, we have not."

6 And then he says, "Could we have gone into an
7 alternate world where Charlie did not own LightSquared
8 Securities and acquire this asset for less money? That's
9 unanswered. Could we, should we go after any profits that
10 Charlie has in those bonds and say those belong to DISH? We
11 specifically reserved that. Those -- those are still open
12 issues that really have never been vetted."

13 Now, Your Honor, DISH's counsel persisted, didn't
14 want to take no fairness for an answer, and on the last page
15 of Slide 2 what you see is, question, "I understand that
16 they're open issues that have never been vetted. I'm trying
17 to understand how -- how the resolution of those issues might
18 affect your judgment as to recommending the transaction or the
19 price of the transaction."

20 So the objection is, "Asked and answered."

21 Then the answer is, "Well, again, as I've said, we
22 documented that we felt this process was incomplete. We
23 focused our efforts on being able to participate and not lose
24 an opportunity to acquire an asset at a beneficial price, and
25 to do that we needed a fairness opinion that said at least

1 supported the price that we were willing to talk about to
2 third parties. But to say that, you know, that was all fair
3 to DISH shareholders, that full vetting by the committee has
4 not been done." That has not been. There is no conclusion
5 there on that.

6 But despite what the defendants previously told this
7 Court, the committee clearly has not determined that the
8 transaction as a whole is fair. Now what we saw last
9 Wednesday in the defendants' briefs is that they've gone to
10 Plan B. They know that they don't have a fairness opinion
11 from their committee, so now they argue that Nevada does not
12 have a fairness doctrine. As per Slide 3, what they argue at
13 I believe it's page 27 or -- yeah, page 27 of the director
14 defendants' brief they say that Nevada has not adopted the
15 entire fairness standard. They say that NRS 78.140 sets forth
16 conditions that provide a safe harbor for interested director
17 transactions, and they say, therefore, no fairness review is
18 required.

19 Your Honor, I don't believe that that's Nevada law.
20 Contrary to what defendants and Mr. Kim's legal report assert,
21 Nevada has long required judges like Your Honor to test the
22 fairness of a conflict transaction where a majority of the
23 board is interested or not independent of those who are
24 interested.

25 And this is Slide 4, Your Honor. The Foster versus

1 Errata case makes clear that a director is a fiduciary, so is
2 a dominant or controlling stockholder or group of
3 stockholders. Their powers are powers in trust. Their
4 dealings with the corporation are subjected to rigorous
5 scrutiny, and the burden is on the director or controlling
6 stockholder not only to prove the good faith of the
7 transaction, but also to show its inherent fairness from the
8 viewpoint of the corporation and those interested therein.
9 The essence of the test is whether or not under all the
10 circumstances the transaction carries the earmarks of an
11 arm's-length bargain.

12 And, Your Honor, through the passing of 78.140
13 didn't change it. We cited -- I don't really understand what
14 would change this, but Leavitt versus Leisure Sports,
15 Incorporation [sic] says that even under 78.140 a transaction
16 is valid. The statute deals with what's void or voidable.
17 That's a different question. That's about the company's
18 powers to void a transaction. That doesn't go to the Court's
19 equitable powers. A transaction is valid only if at the time
20 of their making they are fair to the corporation. And then,
21 of course, we cited Schoen versus SHC Holding Corp. that uses
22 the phrase "entire fairness."

23 THE COURT: And you know that's Mr. Peek's case;
24 right?

25 MR. LEBOVITCH: The Schoen case?

1 THE COURT: Yeah.

2 MR. LEBOVITCH: That was a long-running case, Your
3 Honor.

4 Now, this test of fairness, Your Honor, flows
5 directly from the statute. NRS 78.138, it says, "Directors
6 and officers shall exercise their powers in good faith and
7 with a view to the interests of the corporation." That's the
8 requirement. Now, Nevada, like every other state, has the
9 business judgment rule; but the business judgment rule can be
10 rebutted. If a director is conflicted or beholden to someone
11 who's conflicted, the court does not presume that they are
12 acting in good faith. Judicial inquiry is needed. And the
13 director or controlling shareholder has the burden to prove
14 that good faith.

15 Now, we think that when Your Honor sees that there
16 was no independent assessment of the fairness of the
17 transaction and if Your Honor agrees with us that Nevada does
18 have a fairness doctrine in conflict transactions like this,
19 we think it becomes pretty straightforward to find at least a
20 likelihood of success on the merits. We may still have to
21 fight over whether the transaction is ultimately fair, but on
22 this record in light of what I'll go through in the chronology
23 and what Your Honor's seen we think that we've shown that
24 there's enough questions on the face of it and the fact that
25 there's no fairness opinion and a board that is majority

1 controlled by Ergen that we've shown a likelihood of success.

2 But before I get into the chronology and rebutting
3 defendants' arguments I do want to touch on the latest
4 developments on irreparable harm. Now, the last time the
5 Court heard us on irreparable harm Harbinger's claims had been
6 dismissed and defendants moved to shut down discovery and this
7 hearing. Today their arguments have evolved. What I see in
8 the papers now is they have two core arguments about why there
9 shouldn't be an injunction even if there was a breach on July
10 21st. First they say that the board has nothing to do here,
11 so this is all academic. Second they say there's no risk to
12 DISH and we're just the boy who cried wolf.

13 The first argument appears in the defendants' own
14 brief, and this is Slide 5, Your Honor. This is in the
15 director defendants' brief. And they say that, "Plaintiff
16 seeks this injunction without ever alleging, much less
17 proving, that the DISH board will be required to make any
18 future decisions in respite of the bankruptcy. Plaintiff
19 nowhere even attempts to specify what issues in the future
20 will be presented to the DISH board of directors."

21 Your Honor, we saw this argument and we were quite
22 struck by it. What are they talking about? How can the board
23 not be making decisions on a regular basis here? There's an
24 active bidding war going on. It's going to continue until
25 December 3rd at the least. Someone has to make decisions in

1 real time here.

2 So we inferred, okay, I guess if it's not the board
3 it must just be Ergen. There's a lawsuit against both Ergen
4 and DISH that's being litigated regularly. Doesn't the board
5 have a role to play there? Before the Bankruptcy Court
6 dismissed Harbinger's claims on standing grounds all we ever
7 heard from the defendants is that Phil Falcone is a fraudster,
8 that Harbinger is essentially a loser in its investments, and
9 that originally LightSquared is controlled by Harbinger.

10 Now, that changes, because defendants can't attack
11 the independence of LightSquared. That's because in the
12 bankruptcy the defendants pushed for a special committee to
13 control LightSquared's decision making. They pushed and they
14 won. So they can't sit here and say, oh, LightSquared is just
15 an arm of Harbinger. It's a little ironic that that was the
16 litigation in the Bankruptcy Court.

17 But on November 15th, after the last time we were
18 before Your Honor, LightSquared did in fact re-plead the same
19 claims based on the same allegations of Ergen's control.
20 Defendants since then have changed their tune. Now they just
21 say, none of it matters, the arguments are all frivolous.
22 It's also ironic because they also tell you that they're
23 involved in a scorched-earth, fight-to-the-death litigation
24 over these frivolous arguments. We think the LightSquared
25 complaint does matter and it does show an ongoing conflict and

1 risk of harm.

2 LightSquared does seek disallowance of Ergen's debt
3 in the LightSquared bankruptcy. Ergen's debt is clearly at
4 risk. I asked him, Your Honor, do you understand what
5 disallowance means; and he understood it means he could lose
6 his investment. And I said to him, and this is page 385 of
7 his deposition, I asked him, "And you understand that the plan
8 contemplates disallowing your claims?" "Yes." And then I
9 said to him, "You wouldn't be too happy to lose an \$800
10 million investment, would you?" He says, "I prefer not to."
11 Kind of obvious. That's at risk. The whole investment's at
12 risk, and that creates potential conflicting interest between
13 DISH and Ergen.

14 Now, the LightSquared complaint raised something
15 that wasn't in the Harbinger complaint. They said that
16 Ergen's control since firing the committee -- they tell us
17 indirectly that Ergen's control since firing the committee or
18 since the termination of the committee has actually slanted
19 DISH's actions and practice in the bankruptcy that's hurting
20 DISH today. Part of why DISH was sued, and this is Slide 6,
21 Your Honor, is because the release that DISH put into its
22 asset purchase agreements --

23 Let me step back. This is the same asset purchase
24 agreement that the committee said they thought they were
25 required and should be reviewing and negotiating. Well, they

1 never got that chance. That asset purchase agreement, Your
2 Honor, has a release that says, we're going to buy these
3 assets from you, which is what DISH wants, and you're going to
4 give a release for all of our parties, including Ergen. So
5 LightSquared says, no, we don't want to do that, that's an
6 asset of the estate. If DISH could act independently, Your
7 Honor, it could at least explore whether there's an ability to
8 get the claims against it dismissed, settled, resolved in
9 exchange for a simple change to the release to say, look, your
10 claim's against a third party, right, if we're an independent
11 company, DISH, we'd say, we don't mean to release your claims
12 against a third party, that's not what's happening. And I'll
13 get to that in a minute. They are defending this release.
14 And again, we're not saying that DISH has to do that or that
15 LightSquared would accept a proposal. What we're saying is
16 under the current state of affairs it is impossible that they
17 would be able to do that.

18 Now, Ergen's conflicting interest in wanting a DISH
19 purchase of the assets to get him a release is creating
20 another problem. Your Honor, this emerged only after we filed
21 our reply on Friday, okay. After we filed our reply brief we
22 learned that the U.S. Bankruptcy Trustee -- this is a
23 representative of the Department of Justice -- actually
24 objected to the approval of DISH's bid because of the release
25 including Ergen.

1 Your Honor, if I may, we printed this up. Can I
2 approach with a copy of the U.S. Trustee's objection?

3 THE COURT: Sure.

4 MR. BOSCHÉE: And obviously we have one for all
5 their counsel, as well.

6 MR. PEEK: Actually, Your Honor, I'd brought a copy,
7 as well, because I thought it was very telling for the Court
8 to have this.

9 THE COURT: I'm happy to have it.

10 This will be Court's Exhibit 2.

11 Do you have another copy?

12 MR. LEBOVITCH: Yes, I do.

13 THE COURT: That way I won't write on the official
14 version by accident.

15 MR. LEBOVITCH: Okay. Thank you.

16 Now, Your Honor -- Your Honor, the focus -- the U.S.
17 Trustee's objections to all of the bankruptcy plans, and
18 there's a common objection to each of the plans that have been
19 proposed, and this is on page 2 of the document, the U.S.
20 Trustee writes that it objects to the confirmation of each of
21 the plans because they all contain overly broad, non-debtor,
22 third-party releases, exculpations, and injunction provisions
23 that do not comport with Second Circuit law or the Bankruptcy
24 Code.

25 So, Your Honor, even if the defendants can impugn

1 LightSquared --

2 THE COURT: So this is an objection to all of the
3 plans of reorganization, not just --

4 MR. LEBOVITCH: Objection, yes, to all of the plans.
5 Yes.

6 THE COURT: Okay.

7 MR. LEBOVITCH: It's not just DISH. It's an
8 objection to all of the plans.

9 THE COURT: So all the prospective bidders are
10 putting in the overbroad release language?

11 MR. LEBOVITCH: They're getting different kinds of
12 broad releases. The document shows different releases.

13 THE COURT: Okay.

14 MR. LEBOVITCH: But they're all challenged because
15 you're giving third-party releases. And again, this is not a
16 situation where someone's buying the entire company. DISH is
17 bidding for just certain asserts.

18 Now, Your Honor, what happens when you're told by
19 the federal government that your release is too broad because
20 you're including third parties? Very possible that those
21 bidders say, all right, you know, we could fix this, we could
22 easily fix this, they engage with the U.S. Trustee, they
23 engage with LightSquared, and they fix the problem. Again, I
24 think the other bidders have that opportunity. On the current
25 state of affairs that is not possible for DISH.

1 Now, I would think the DISH board has a decision to
2 make here. Remember, they said, there's no decisions to make.
3 You would think they'd have something to do. But what we
4 learned hours after the U.S. Trustee's objection at least
5 became public -- I don't know when defendants knew it was
6 coming -- it turns out the board has in fact completely
7 abdicated their duties to Ergen in the bankruptcy.

8 I have one more document that I'd like to present,
9 and then after that we don't have any new exhibits, we don't
10 expect. Your Honor, may I approach with a filing from LBAC,
11 which is a 100 percent owned subsidiary of DISH, that was made
12 after 11:00 p.m. on Friday night.

13 MR. BOSCHEE: And we also have one for all counsel.

14 THE COURT: That'd be great.

15 MR. LEBOVITCH: May I approach, Your Honor?

16 THE COURT: You may.

17 MR. LEBOVITCH: Two copies. Thank you, Your Honor.

18 THE COURT: Dulce, if you'd please mark this as
19 Exhibit 3.

20 THE CLERK: Yes, Your Honor.

21 THE COURT: And LBAC's the entity that was bought
22 for a dollar by DISH?

23 MR. LEBOVITCH: It is the entity that was bought by
24 a dollar from -- for DISH from Ergen, yes.

25 THE COURT: Thank you.

1 MR. LEOVITCH: Now, Your Honor, so this is a
2 response to LightSquared's claims regarding the release. This
3 was in response I believe to the LightSquared's assertion, but
4 it happened to come in right after the U.S. Trustee. Rather
5 than seeking some accommodation with LightSquared or perhaps
6 the U.S. Trustee, LBAC, the 100 percent subsidiary of DISH, is
7 fighting hard to defend the release as is. At first we
8 wondered why DISH's board is so aggressively defending the
9 release. And then, Your Honor, we looked at the top left
10 corner of the document, right on page 1, and then we really
11 appreciated what the board meant when they said that they have
12 no decisions to make in connection with the bankruptcy and
13 therefore no injunction should issue.

14 The filing on behalf of a 100 percent subsidiary of
15 DISH is made by Wilke Farr, Ergen's personal counsel, Your
16 Honor. This board has completely abdicated its fiduciary
17 responsibilities by giving all control over to Ergen and his
18 person lawyers.

19 So while the defendants demand and plead with the
20 Court that the Court not, you know, quote, "remove the board
21 from its control of the company," the fact is that has already
22 happened. On July 21st the board removed the committee and
23 Cadwalader from the scene. This was not done so the board
24 could assume control; it was done so the board could hand it
25 back to Ergen. They're not fighting in this court to preserve

1 their ability to exercise judgment for the benefit of DISH;
2 they're only fighting to preserve Ergen's control over the
3 process to the exclusion of any independent directors.

4 So, Your Honor, I do submit that the plaintiff here
5 is the one fighting to re-empower the board through its
6 independent director.

7 In short, Your Honor, the second argument was we're
8 the boy who cried wolf. The Court should not be surprised
9 when the wolf tells the boy to stop crying. The risks we
10 identify are real, they're current, and they're irreparable.
11 And now after going into the chronology for a little bit I
12 will get back to rebutting some more of defendants' arguments
13 on this point.

14 I'm told that now the videos might actually work, so
15 we'll see what happens. Let me go through the chronology, and
16 anytime Your Honor is familiar with the facts, you know, I'll
17 jump ahead. I'm trying to focus on defendants' spin and our
18 answers to that.

19 The May 2nd meeting was a significant surprise to
20 the board. It's interesting that Mr. Ergen says that he had
21 previously told the board that he was buying the debt, and
22 actually the SLC and the directors don't. They say May 2nd is
23 when they first learned he's buying debt. But DISH's board
24 has spent several years spending billions of dollars acquiring
25 all the spectrum it can lay its hands on, and he comes in and

1 he says, by the way, guys, I've spent the last 18 months
2 spending over 800 million buying all the LightSquared
3 securities I can lay my hands on. He also says, I want to buy
4 LightSquared personally, but I might let you -- I'll let you
5 guys participate in the bid.

6 Considering that DISH itself was in fact hurt in the
7 DBSD case that Your Honor's familiar with, it's always amazed
8 us that he didn't ask the board up front about going to buy
9 these bonds. Even if there wasn't an opportunity, which there
10 was, still you know you're putting the company at risk when
11 you go ahead and buy this debt and then go make a proposal.

12 Now, on this point I'd like to address one of the
13 core arguments from all the defendants and from the special
14 litigation committee. They say that the May 15th \$2 billion
15 bid shouldn't come as a surprise because that's what Ergen
16 told the board he would do on May 2nd. That's actually not
17 what his own document shows. Slide 7 is an excerpt from
18 Ergen's May 2nd presentation to the board. It's his proposal.
19 And he talks about time considerations. And what he puts in
20 the bullet is, "Submit offer now," now, that's May 2nd,
21 "subject to minimal conditions and require prompt acceptance,
22 e.g., by May 15, before the marketing process gets underway."

23 Now, Your Honor, it's not that surprising that maybe
24 Mr. Ergen went to the May 2nd meeting and thought the board
25 would say, this is a great idea, let's go make a bid. But the

1 board didn't do that. The board created and empowered a
2 committee. The board did not assume he would just go ahead
3 and make his own bid just because he made a proposal to the
4 board. They took his proposal under consideration. Now,
5 remember this evidence when you hear the defendants try to
6 justify the May 15th bid by saying that everyone expected that
7 to happen. The document that he created refutes that
8 assertion, Your Honor.

9 Now, everyone recognized Ergen's serious conflicts
10 of interest. I asked Mr. Goodbarn why the board wanted a
11 committee to vet the deal. We now have the video, and we'll
12 play it.

13 (Video played - Mr. Goodbarn)

14 "Because we had a huge conflict of interest with the
15 controlling shareholder."

16 MR. LEBOVITCH: Ergen himself understood that he has
17 a conflict, as well, though he frames it as a perception item.
18 This is Mr. Ergen's testimony. This is Slide 8.

19 (Video played - Mr. Ergen)

20 "Okay. What was the purpose in your mind -- or
21 strike that. What was the utility in your mind of
22 having a special committee consider the LightSquared
23 transaction?"

24 "Well, I think because I owned debt -- bank debt in
25 the company personally through SSPO and were DISH to

1 make a bid for the company and if for some reason I
2 was to make a profit from that, that would -- that
3 would be certainly a perception item and potentially
4 a conflict of interest with me, and we would need
5 the board or some independent committee or whatever
6 to make sure that that was fair to the
7 shareholders."

8 MR. LEBOVITCH: So defendants realized that if they
9 want the process to have any integrity, any chance of
10 satisfying the rigorous judicial scrutiny that's discussed in
11 the Foster versus Errata case and its progeny, it needed a
12 committee. They realized that the only two people who could
13 credibly be on it are Howard and Goodbarn.

14 On May 8th the board meets. Under NRS 78.125 the
15 board is allowed to delegate any of its powers to a committee.
16 It does just that, and it passes some very clear resolutions
17 that acknowledge Ergen's conflicts and specifically delegated
18 broad powers and rights to the committee. This is the way a
19 resolution creating a committee should be written, and the
20 resolution is important because of what ultimately happens.
21 Starting on Slide 10, what you see are the May 8th enabling
22 resolutions. The board delegated all the powers and authority
23 of the board, not some limited delegation. The committee was
24 specifically tasked -- I guess this is maybe Slide 11. They
25 were tasked to review and evaluate the LightSquared deal,

1 including any potential conflicts of interest. They were
2 tasked to determine whether it is in the best interests of
3 DISH and its stockholders to proceed with the LightSquared
4 bid. They were told to engage in negotiations relating to the
5 LightSquared deal, and, critically, Your Honor, they were
6 delegated the power of the board to reject any proposal from
7 Mr. Ergen relating to the LightSquared deal.

8 The committee's job was not limited to deciding
9 whether to bid. In the event it wanted to bid the board
10 specifically delegated the committee to power to -- and this
11 is Slide 12 -- negotiate the definitive agreements with
12 parties, not internally, not just with Mr. Ergen, with
13 parties, concerning the terms and conditions of the
14 LightSquared deal. So if the committee still existed today
15 and the U.S. Trustee put in its objection, it would be their
16 responsibility to go engage with the U.S. Trustee and see if
17 there's something that could be done.

18 Slide 13. They were empowered to determine whether
19 such terms and conditions, if any, of the transaction are fair
20 to the corporation. We're not going to go back, but I wish
21 Your Honor had heard Mr. Goodbarn explain that they had not
22 said it was fair. But we do have the transcript. We'll see
23 Mr. Goodbarn later.

24 These resolutions all conveyed the same idea. The
25 committee was broadly empowered to protect DISH's interests,

1 including, but not limited to, navigating Ergen's conflicts
2 and potential conflicts from that moment through the end of
3 the LightSquared acquisition process.

4 The May 8th resolution also contained provisions
5 necessary to support the committee's independence. Slide 14
6 says that the DISH board had resolved that it would not
7 approve a LightSquared deal without a prior favorable
8 recommendation of such transaction by the Ergen LightSquared
9 transaction committee. That commitment to not override
10 efforts by Ergen to force the board to approve a transaction,
11 that's what created the necessary leverage with Ergen. That
12 is the independence of the committee.

13 The committee was unilaterally empowered to retain
14 independent financial and legal advisors at DISH's expense.
15 This is Slide 15 showing those portions of the resolution.

16 Now, of course, Your Honor, a committee that could
17 be shut down at any moment by a controlled board has no
18 independence at all. It's just a rubber stamp if the
19 controller can kill the committee for disobeying. So the DISH
20 board's decision to let the committee decide when it finished
21 its job has real legal significance.

22 This is Slide 16, Your Honor. The committee could
23 only be terminated in two instances, if the company decides
24 that it's going to terminate its pursuit of the LightSquared
25 transaction, or, two, the Ergen LightSquared transaction

1 committee's determination in its sole and absolute discretion
2 has set forth in its written notice to the chairman of the
3 board of directors. So the committee gets to decide when it's
4 done so long as DISH is pursuing LightSquared.

5 Your Honor, I submit that corporate resolutions
6 matter. A board decision to delegate authority matters. A
7 board facing a conflict like this needs to mean what it says.
8 We'll ask the Court to keep in mind the May 8th resolution as
9 we -- as Your Honor reviews the frankly hundreds of pages of
10 facts about what happened with the committee. Because we
11 think in the briefing the defendants in the SLC, they're
12 whistling past this resolution. They talk a lot about a lot
13 of different issues, but they really don't talk about why it
14 was appropriate to simply ignore the resolution on July 21st.
15 They don't have a justification for doing so.

16 Now, the ink on the resolution was still wet when
17 Ergen started ignoring the committee's authority and in fact
18 boxing in the committee and DISH itself. As I mentioned to
19 Your Honor, the committee was empowered to reject any proposal
20 from Mr. Ergen relating to LightSquared. That power to reject
21 is important. If the committee is supposed to be DISH's
22 strategy vis-a-vis LightSquared, then it has to be able to
23 tell Ergen to hold off with anything, to let DISH bid first,
24 or to go ahead with his own bid, but with conditions. Ergen
25 may not like having his options limited, Your Honor, but

1 that's the price of having shareholders and fiduciary duties.

2 On May 15th, without telling the board, without
3 telling the committee, Ergen made a personal bid, \$2 billion
4 bid to buy LightSquared's assets. Obviously they never had a
5 chance to reject that proposal. Now, I want to show you --
6 you know, while the defendants -- I think the May 2nd
7 presentation shows he didn't say he's making a bid on
8 May 15th. But the defendants say, oh, it's no big deal, the
9 \$2 billion bid, it didn't box anyone in. Well, I want to show
10 the committee's reaction, Slide 17. And there's a video clip.

11 (Video played - Mr. Goodbarn)

12 "Were you surprised when you find out he had made
13 the offer, though, without previously telling you or
14 the board?"

15 "Well, clearly I was surprised."

16 MR. LEBOVITCH: And in fact the Howard affidavit,
17 that's Gary Howard, the other member of the committee, he
18 makes clear -- and this is Slide 18. He says, "It was my
19 expectation that Mr. Ergen would not make any LightSquared bid
20 without first discussing with the DISH board and the special
21 committee in order to get their approval, since any such bid
22 could impact DISH's own strategy vis-a-vis LightSquared."

23 Ergen's bid was a bid deal, Your Honor. It set a
24 \$2 billion floor for the bid, for any bid by DISH. Howard
25 testified that the committee's options were in fact narrowed

1 by the bid. This is Slide 19. He says, "The bid narrowed the
2 scope and ability of the special committee to fully explore
3 alternative strategies for DISH to pursue with respect to
4 LightSquared, as well as to define and/or negotiate Mr.
5 Ergen's role with respect to DISH's strategy."

6 Ergen himself admitted that his bid did set a
7 practical floor price for any chance for DISH to win
8 LightSquared. Let's play Slide 20.

9 (Video played - Mr. Ergen)

10 "Having made a bid of 2 billion, what was the
11 scenario that would actually allow you to end up
12 with a deal at less than 2 billion?"

13 "I don't know of one."

14 MR. LEBOVITCH: And Steve Goodbarn's testimony on
15 this point was also interesting. Defendants' including the
16 SLC, miscite this to say that Goodbarn's view is he wasn't --
17 that they weren't affected by the \$2 billion bid. His
18 testimony, Your Honor, was that the bid didn't change the job
19 for the committee and the analysis the committee did, they
20 still had to do their own independent assessment of value.
21 But then he made clear there's a practical matter. They
22 couldn't expect to actually make a bid at 1.5 billion. Let's
23 look at Mr. Goodbarn."

24 (Video played - Mr. Goodbarn)

25 "I'm still not understanding. So why would it be

1 difficult to make a bid that's below his bid?"

2 "Mr. Mundiya: Objection."

3 "Well, if he's stuck with a bid and takes a big loss
4 -- let's say he wins. He's committed to 2 billion,
5 there's no other bidder, and we come in at a billion
6 five, that does not make a very happy chairman."

7 MR. LEBOVITCH: Your Honor, Charlie Ergen's May 15th
8 bid had a very specific purpose. That purpose was to make
9 sure that Ergen was made whole on his debt holdings. Let's
10 take a look at his May 15th offer letter, the one that he
11 didn't show the committee until later. This is Slide 22, Your
12 Honor. And what you can see is he tells LightSquared one of
13 the benefits of his offer is that can be used -- \$2 billion,
14 Your Honor, it could be used to pay off the company's secured
15 debt. \$2 billion was enough for Charlie Ergen to be made
16 whole on his secured debt. I ask the Court to remember that
17 when the defendants say that the July 21st termination of the
18 committee was justified because the \$2.22 billion meant Ergen
19 was paid in full on his secured and thus no longer faced a
20 conflict.

21 We submit, Your Honor, that Ergen's May 15th bid
22 eliminated that conflict, because he was already going to be
23 paid fully on his secured. We submit and we'll talk about why
24 the board's excuse for terminating the committee is just a
25 pretext. Because the conflict ceased to exist on May 15th,

1 two months before the committee was terminated when it stood
2 up to Ergen.

3 Now, I've addressed the issue of whether Ergen knew
4 that the committee existed, so, unless Your Honor has more
5 questions on that, you know, we think, again, it defies common
6 sense. We have the May 7th email, and, frankly, we think
7 that, you know, whether it's an inference or based on the
8 evidence, we don't even think a reasonable juror would really
9 struggle with saying Ergen must have known about this.

10 Now, the Court has -- Ergen interfered with the
11 committee's actions, and in the interest of time -- I mean, I
12 know Your Honor's read the papers -- I won't go through all
13 the ways in which he interfered, I just want to show some
14 pieces of evidence that I think rebut the defendants' spin on
15 whether he interfered and whether this was a problem.

16 Obviously a special committee was entitled to retain
17 independent advisors. As soon as Ergen learns that they hired
18 Cadwalader he criticized them for being ahead of their skis
19 here. He says, why would you have special committee counsel.
20 I can't even fathom a controlling shareholder complaining that
21 an independent committee gets special committee counsel.

22 He also gets a, for lack of a better term, cheap --
23 and this is Slide 25. He writes to I guess it was Howard. He
24 says -- he says the committee can't talk to his counsel, Wilke
25 Farr, since they're already spending money on their own. Your

1 Honor, we're talking about a \$20 billion-plus company looking
2 at a \$2 billion acquisition that's strategically important.
3 Yes, it's Plan B to the pursuit of Sprint. The Sprint deal
4 was already on the fritz by the late May-early June period.
5 There was a vote coming in on the Sprint deal in early June,
6 okay. But here's the thing. Even if this Plan B, the idea
7 that DISH on such an important thing would penny pinch on
8 getting lawyers, it's almost ludicrous. And, with all due
9 respect, DISH doesn't penny pinch on its lawyers, it knows how
10 to lawyer up. It's because the special committee hired
11 lawyers. That was the problem. And it wasn't you sit and
12 wait, because here's the other thing. There was a deadline
13 for LightSquared. We all knew that sometime in June Sprint
14 was either going to come to pass, which was unlikely, or it
15 was going to fail. July 15th was Ergen's date for coming to
16 closure on LightSquared, okay. If you want a special
17 committee to get the process started and be ready to hit the
18 ground running for July 15th, you don't tell them that you're
19 not willing to pay for the lawyers. But the committee didn't
20 fight with Ergen. They said, all right, we'll cope. They
21 were tough. They agreed to go into a holding pattern.

22 Now, it's not what the bank -- you know, the bankers
23 were eventually retained, but I want Your Honor to hear what
24 the Perella banker had to say about his own expectation of the
25 engagement.

1 (Video played - Perella)

2 "And as you were at the July 21st meeting with the

3 special committee did you believe that Perella would

4 be involved in the process in advising the special

5 committee [inaudible] resolution and the conclusion

6 that led to a bankruptcy process?"

7 "To the extent that the special committee and DISH

8 continued to have interest in the asset we had the

9 expectation there would be a vote."

10 MR. LEBOVITCH: And, Your Honor, I asked Mr.

11 Goodbarn, you know, there's the email that says, okay, we're

12 in a holding pattern, we understand that the end game is a far

13 way off. So I showed that to Mr. Goodbarn and I asked him

14 what did "end game" mean. So let's listen to him.

15 (Video - Mr. Goodbarn)

16 "Now, he writes here, 'We know the end game will

17 take a long time to play out.' Do you see that?"

18 "Correct."

19 "Okay. From a special committee perspective was the

20 end game, you know, either -- either rejecting a

21 LightSquared transaction or bringing one to

22 successful closure?"

23 "Well, if you look at the way that it's transpired,

24 and this was sort of predicted at the time, is that

25 it would end up being an auction and it would run

1 through the fall and into the -- you know, perhaps
2 early winter."

3 "So there wasn't -- there wasn't really a desperate
4 hurry in May to do all of your work because your
5 main focus was do you want to pursue the
6 opportunity, then actually pursuing it to closure;
7 correct?"

8 "Correct."

9 MR. LEBOVITCH: Your Honor, we submit that things
10 went south with the committee because the committee pushed for
11 information about Ergen's debt -- his investments in
12 LightSquared. What Ergen wanted was a clean recommendation to
13 make the LightSquared bid and the committee would be fine
14 because they're approving whatever Ergen wants. He did not
15 want the committee snooping around his debt trades. From
16 May 21st on the committee keeps on asking for information
17 about his trades. He keeps saying, yeah, I'll get it to you.
18 He never does.

19 Now, the SLC -- and what we found to be surprising
20 -- and the defendants, they actually tell the Court that Ergen
21 was fully responsive to the requests. Let's actually listen
22 to the guy who was asking for the information. This is
23 Slide 28.

24 (Video played - Mr. Goodbarn)

25 "Did you receive the information that you were

1 seeking from Charlie relating to the potential
2 conflict of interest?"

3 "No."

4 MR. LEBOVITCH: Your Honor, the May 8th resolution
5 required the committee to ask those questions. That seemed --
6 because of conflict. That conflict was what gave Ergen a
7 motive to conceal it. And now, Your Honor, the committee was
8 onto something. Recall prior arguments before Your Honor when
9 the defendants were I guess getting excited, if not jumping up
10 and down, about how we, how the plaintiff in this case, how
11 Mr. Deal was either disingenuous or dumb or sloppy because we
12 didn't realize that the credit agreement and the company's
13 charter were somehow show stoppers for any claim on Ergen's
14 debt purchases. I just want to point out that these
15 arguments, the charter and the credit agreements are
16 essentially accepted by the SLC in its report of last week,
17 which is giving away any leverage it could have had to go
18 after Ergen's debt purchases in the future.

19 Now, the committee, the special transaction
20 committee of Goodbarn and Howard and their lawyers at
21 Cadwalader, they heard each of these arguments, and they
22 weren't as easily persuaded as the SLC. Once again, Your
23 Honor, don't listen to the lawyer arguing on this, listen to
24 the far smarter lawyers at the corporate law firm of
25 Cadwalader, Wickersham & Taft. They knew about the credit

1 agreement, they knew about the charter, and they still kept
2 poking around. In fact, after not getting information the
3 committee sent a letter on June 17th that was very clear in
4 saying, we're not persuaded. They asked for more information
5 about the debt, and then -- and this is Slide 29. They ask --
6 they ask a question and they say, "We want to understand your
7 -- how your acquisition of the debt was not prohibited under
8 the applicable agreement and why there isn't a viable
9 structure for DISH, directly or indirectly, to do it." I
10 mean, what they're saying is, we see the credit agreement, but
11 if you have a way to buy the debt, why couldn't we. It's a
12 viable question.

13 And, Your Honor, I mean, the fact is that DISH has
14 claims here one way or another even if there's not the
15 opportunity to buy the debt. Your Honor ultimately -- and,
16 frankly, the SLC should have been preserving this issue and
17 preserving this question, is Ergen used his power over the
18 company to make a very riskless investment. And I asked him
19 in his deposition, and this is at page 106, 107 of his
20 deposition -- we don't have a clip on it, but I asked him if
21 he's ever made a comparable investment in his life. I mean, I
22 understood that if he's a regular distressed debt investor
23 maybe that's just what's going on, he's buying into
24 LightSquared.

25 His answer was twofold. He said, well, in terms of

1 magnitude, when I bought my first car that was about all the
2 money I had. I said, how about since you became a
3 billionaire; and he says, I put money in U.S. Government
4 securities. He's not a distressed investor. He likes a sure
5 thing. And front running DISH's LightSquared bid was a sure
6 thing. Cadwalader and the committee were onto something when
7 they kept asking questions about it.

8 Now, once he saw the committee would not give him a
9 free pass Ergen again raised the pressure level. There's the
10 July 3rd call. Your Honor's familiar with the July 3rd call
11 when he -- having told them to stay in a holding pattern, he
12 flips and says, I need a recommendation by July 8th. I would
13 like the Court to just hear Mr. Goodbarn describe what
14 happened on the call.

15 (Video played - Mr. Goodbarn)

16 "So we had a call. He was angry that we had moved
17 ahead and retained counsel and were moving ahead. I
18 mean, we -- we had -- Perella had been setting up
19 meetings with management on our behalf."

20 "Uh-huh."

21 "And so he was very unhappy about that for about the
22 first 10 or 15 minutes of the call. And then he
23 said, we need to move fast, you need to move your
24 advisors, can you -- can you get something like a
25 preliminary conclusion by -- I believe that the date

1 was July 8th.

2 "So the first 15 minutes were, why did you guys move
3 ahead, and the last half was, move as fast as you
4 can to be in a position to, you know, weigh in on
5 this bid as soon as possible."

6 MR. LEBOVITCH: Now, Your Honor, the briefing
7 touching on the issues of indemnification and fees. The board
8 approved indemnification and approved fees for the committee,
9 then Charlie Ergen complained, and then they withdrew it. I
10 think it's useful to listen to Mr. Goodbarn explain why the
11 committee was so concerned about the dispute with the board
12 about its own indemnification. Because he said, this goes to
13 our independence. Slide 31.

14 (Video played - Mr. Goodbarn)

15 "Okay. Explain to me why there would be a
16 relationship between the scope of the indemnity
17 provided and your independence to act as a special
18 committee."

19 "Well, as a committee you want to be able -- by the
20 committee being DISH independent of Charlie we could
21 get into a situation where we are hostile to
22 Charlie, who controls DISH. So you want an
23 indemnification so that you could not be pressured,
24 you know; because if you have to retain counsel,
25 its' beyond, you know, people's means to do that

1 without being, you know, covered by the company.

2 "The importance of the indemnification was for the
3 other board members to take a position that endorsed
4 the committee. It was for the other board members
5 to take a position that was independent."

6 MR. LEBOVITCH: Your Honor, on the fee point I just
7 want to make one observation. The special litigation
8 committee in their report, in the many pages there, they
9 actually comment and almost applaud the board for approving
10 the \$25,000 in fees for the committee members. It's kind of a
11 standard thing. There's no mention in this report about the
12 fact that when Charlie objected to the \$25,000 in fees the
13 board turned around and withheld the fees. We don't
14 understand why that wouldn't even be addressed, but it's part
15 and parcel with the way we think the SLC members -- we're not
16 blaming their lawyers; they have clients they have to answer
17 to -- but the way the SLC members have approached this
18 investigation is to just breeze past anything that Ergen
19 doesn't like.

20 Now, with the July 15th letter to the board, which
21 is Exhibit 29, the committee made clear any recommendation
22 would have conditions. Ergen against raised the ante, and he
23 threatens to make another personal bid. Slide 32 is the
24 relevant excerpt from the July 24th letter by the committee.
25 The key is that on July 19th Wilke Farr informs the committee

1 that "Charlie's intending to proceed with a proposal to
2 acquire the L-Band spectrum from LightSquared." And he gives
3 teeth to his threat; because, as rich as he is, someone might
4 question, can you really pay more than \$2 billion out of
5 pocket. So what he does is he says, "I've got EchoStar
6 funding 40 percent of it." EchoStar is another controlled
7 company of Ergen's. So what he does he gives heft to his
8 threat to the committee.

9 Now, Ergen's threat put the committee in a tough
10 situation, because they did want the chance to pursue the
11 asset, but they had not done -- they didn't get the chance to
12 do the other work they were supposed to do.

13 Now, I want to for the last time focus on the SLC
14 report again. It may be the last time. They completely
15 ignore this key fact. It was prominent in our brief, it's
16 prominent in the discovery. They actually say in the report
17 that the rush in timing on July 21st was due to events in the
18 bankruptcy. There's no citation, no record. That's just a
19 conclusion they reached. There were no events in the
20 bankruptcy, Your Honor, and the SLC knows it. We see it as
21 the SLC is so wary of ever challenging Ergen that they ignore
22 his July 19th threat even though it's prominent in our papers.

23 And I think, you know, to kind of close out on the
24 SLC, we'd previously briefed about the SLC here. We think
25 that their refusal to be objective in the papers and deal with

1 the evidence, it does discredit them. We know the advocates
2 here are being advocates, but the SLC is also being an
3 advocate. We do question their independence. Your Honor's
4 seen, I mean, Brokaw's kid, Mr. Brokaw's kid calls Candy Ergen
5 "Godmother." The idea that Brokaw would turn around and sue
6 the Ergens, it just defies human nature.

7 Mr. Ortolf, he has a 35-year relationship with
8 Ergen, served as president of DISH for years, has numerous
9 business dealings and social dealings, and, frankly, we think
10 he obviously can't serve as an SLC member, because he should
11 face liability for his role in supporting the termination of
12 the committee on July 21st. And, again, we respect Mr. Peek
13 and the efforts he makes, but he has counsel -- he clients he
14 has to answer to. If his clients don't want to challenge
15 Ergen, it's hard for him to do so. And, of course, you know,
16 whether it's Mr. Peek or the Delaware counsel who are leading
17 the process here, they all know what happened to Cadwalader
18 when they crossed Ergen.

19 Briefly, there's also the candor issue. When you
20 got the October 3rd report, Your Honor, the biggest conflict
21 Ortolf has is that his son worked at DISH and his daughter
22 works at DISH. That gives Ergen some leverage over Ortolf,
23 and it wasn't disclosed to the Court. We think that should
24 also be considered in addition to the lack of objectivity that
25 we think the report reflects.

1 But, again, you know, I will not ask the Court to
2 rely on lawyers' arguments. I asked Mr. Goodbarn why did he
3 recuse himself from serving on the SLC. This is the SLC
4 created the night before our last hearing. Let's listen to
5 Mr. Goodbarn.

6 (Vide played - Mr. Goodbarn)

7 "You did in fact remove yourself from
8 consideration?"

9 "Yes."

10 "Why?"

11 "Because, number one, the discussion was being led
12 by David Moskowitz; number two, we were back to the
13 same compensation and indemnification issues that we
14 had with the earlier meeting, and no one else was
15 raising any objection. And I wasn't going to be on
16 a committee that could not be independent.

17 "Okay."

18 "Those are all independent issues, in my mind."

19 "Okay. So it was your view that nobody else could
20 act in an independent way of Charlie; correct?"

21 "That is correct."

22 MR. LEBOVITCH: Your Honor, for all of Charlie
23 Ergen's threats the committee had a pragmatic solution. They
24 would approve a bid for LightSquared, but make it highly
25 conditional. The minutes of the meeting, Exhibit 31, this is

1 Slide 34, it just shows the conditions. Your Honor is
2 familiar with them, and I'll kind of go through them quickly.
3 But the committee wanted to remain involved, it wanted to
4 negotiate the deals, and it expressly preserved for DISH the
5 right to obtain all of the requested information and the right
6 to explore the corporate opportunity issues in connection with
7 Ergen's purchase of the debt.

8 Now, we submit that in response to this conditional
9 recommendation the board rallied to protect Ergen. The
10 committee presents its conditional recommendation on Sunday
11 night, July 21st. And, Your Honor, what happens that night,
12 it really -- it is like President Nixon firing on a late
13 Saturday night Archibald Cox for not backing down in his
14 investigation. July 21st is DISH's Sunday Night Massacre,
15 Your Honor. After the committee delivered its recommendation
16 with all of its conditions the board excused Cadwalader and
17 Perella from the room. With the committee members alone,
18 David Moskowitz started the execution. Goodbarn testified
19 what happened and about he was surprised.

20 (Video played - Mr. Goodbarn)

21 "And what about the termination? Who said what?"

22 "David said, now that Charlie has been made whole
23 there's no more reason for the committee, and
24 something to the effect, you know, we should move to
25 end the committee."

1 "Okay. But that took you by surprise?"

2 "Yes."

3 "Okay. Did you agree with that?"

4 "No."

5 MR. LEBOVITCH: He didn't agree with it, but the
6 rest of the board played along.

7 And while the defendants say that Howard and
8 Goodbarn didn't object at the meeting, we submit it's because
9 they were surprised. They were stunned. But what matters is
10 pursuant to the May 8th resolution the committee could only be
11 terminated in those two instances, withdrawal of the
12 LightSquared interest, or the committee deciding to disband
13 itself. Neither of those conditions had been satisfied. Just
14 the opposite. The committee made clear, we expect to continue
15 to do our work.

16 The board's termination of the special committee
17 should be treated as a legal nullity, okay. And if not
18 treated as a legal -- and we think Your Honor can make that
19 finding, and that essentially can resolve the injunction.
20 That puts the company back into the status quo as of
21 July 21st.

22 The other way to tackle the issue is to say, even
23 if, of course, a board under the right process -- which we
24 don't think was followed here, but with the right process a
25 board can revisit a resolution. We're not saying you can

1 never. But there's a corporate governance process that has to
2 be enforced. We don't think this system was -- did it. But
3 even if you want to say, okay, there's a process to do it and
4 it's not a legal nullity per se, it's done in bad faith. It
5 was done in bad faith and therefore not a valid act. That's a
6 violation of 78.138.

7 You know, defendants, they hate when we mention the
8 Hollinger case. And I think there's -- Beaumarco [phonetic]
9 has some facts similar to Ergen, and T. Rowe Price. There's a
10 lot of cases that have conduct similar. I don't think
11 anything really amounts to Charlie Ergen. But they really
12 hate when we talk about Conrad Black, because he's a convicted
13 felon. But the case is not about him being a convicted felon.
14 That only happened a long time later. The case really is
15 about -- at least part of the case is about his termination of
16 the committee that stood up to him. And the court in that
17 case says, even if he had the power to terminate this
18 committee, in that case by changing bylaws, it was disloyal to
19 do so under the circumstances. It's on all fours, Your Honor.

20 Now, after the committee's disbanded DISH
21 misrepresented the committee's recommendation publicly. You
22 know, Exhibit 35 in the binder shows the 8-K. They don't
23 disclose that the committee gave a conditional recommendation.
24 They don't say that the committee still wanted to investigate
25 Ergen's purchases or negotiate the deals or that they insisted

1 on remaining involved with LightSquared because of ongoing
2 conflicts of interest. Your Honor, in light of this
3 disclosure it's fair to ask had Gary Howard never resigned
4 would we even be here today. This was very close to a
5 successful, we submit respectfully, coverup.

6 Now, on July 24th, though, the committee that
7 apparently didn't object to their termination, they sent a
8 letter pretty clearly objecting. And I want to focus on just
9 one part of the letter. This is Slide 37. They make clear to
10 the board right away they did not recommend or endorse the
11 termination of the Ergen LightSquared transaction committee,
12 and, "As is clear from the conditions that accompanied our
13 recommendation, we believe that there are continuing issues
14 that relate to the fairness of the transaction and potential
15 conflicts of interest with the chairman that we believe should
16 be subject to independent scrutiny and evaluation."

17 Again, Your Honor, when you're looking at the
18 ongoing breach, the ongoing harm, I think it's appropriate for
19 the Court to give weight to the independent directors whose
20 good faith nobody can question. They said, we believe there
21 are continuing issues that require independent oversight.
22 And, in fact, just to be sure, I asked Mr. Goodbarn, showing
23 him this language from his July 24th letter, if that was his
24 view then. And here's his testimony.

25 //

1 (Video played - Mr. Goodbarn)
2 "Was that your belief then?"
3 "Yes."
4 "Is that still your position now?"
5 "Yes."
6 "Okay. And your point was there would remain issues
7 relating to the fairness of a transaction and
8 potential conflicts of interest beyond your initial
9 recommendation of whether to present a bid;
10 correct?"
11 "Yes, as sort of set forth in these five points."
12 MR. LEBOVITCH: Your Honor, before I turn to the
13 irreparable harm issue I just want to touch on the defendants'
14 mantra in their papers about how Nevada is pro business. We
15 agree. We actually think that being pro business on these
16 facts is a reason to rule for the shareholders in this case.
17 Approving the defendants' conduct here is not pro business.
18 We think Nevada becomes pro business by giving weight to the
19 business judgment of the independent directors, who have no
20 conflicting interest and are presumed to do what is best for
21 the company. We think that for defendants to win here on
22 these facts Nevada would not be pro business, it would be
23 respectfully permissive of abuse by controlling shareholders
24 and disrespecting the interests of independent directors. To
25 restate the end of our reply brief that we filed Friday, if

1 DISH faces no consequence here, if Ergen and his board face no
2 consequences here, then the likes of Ergen will pack their
3 boards with their wives, their best friends, their godsons,
4 and their employees, and the best independent directors, those
5 who take their jobs seriously, will think twice about serving
6 in Nevada corporations.

7 Now, Your Honor, looking at irreparable harm, we
8 touched on some of this. I mean, we saw the board created the
9 committee because of the need to protect DISH from potential
10 conflicts through the process. As per the July 24th letter,
11 Howard and Goodbarn thought it should continue. Ergen still
12 has a conflict, okay. Defendants' real justification for
13 terminating the committee is that, well, Ergen doesn't have a
14 conflict anymore because he's made whole in the secured.
15 Again, we knew that on May 15th -- or he knew that on May 15th
16 with his \$2 billion bid. So the approval of a \$2.2 billion
17 bid didn't change that, the economics of it.

18 But besides his debt he does have a pretty massive
19 interest in LightSquared preferred. And while defendants say
20 he may never close on it, I asked him, did you cancel the
21 trade; no. Will you honor agreement to close the trade if
22 you're allowed to; yes. It's a lot of money for anybody.

23 THE COURT: But it's been blocked; right?

24 MR. LEOVITCH: Well, it's been blocked to date,
25 okay. It's been blocked to date. But we don't know what can

1 happen. We don't know what happens if DISH is going to win
2 the assets, we don't know what the process will be. But he
3 has -- Your Honor's familiar with the number. I just don't
4 remember -- I mean, I don't remember whether the number's -- I
5 think they made the number public. They wrote 125 million.
6 He has a preferred trade that is outstanding. He made it.
7 It's been blocked to date, but he hasn't cancelled it; it's
8 still outstanding, it's still an interest that's out there.
9 And again, when they raised the bid from 2 billion to
10 2.2 billion it didn't change his position on the secured; all
11 that did is put some money into the pockets of the preferreds.
12 He admitted that if there's a higher bid it's more money for
13 the preferreds. Whether he can close or not shouldn't
14 override that there is a conflict and a concern out there.

15 But, again, his conflicts aren't static. They
16 continue to pop up and evolve with new developments. I
17 mentioned the U.S. Trustee's objection and LightSquared's
18 objection to the release. Again, as long as he controls
19 what's going on with DISH and his lawyers are making filings
20 on behalf of LBAC, there's no chance DISH is going to separate
21 itself from Ergen and say, you know what, we want to buy these
22 assets, we'll carve up the release and make it appropriate so
23 the federal government doesn't have an objection to it.

24 Also, as I mentioned, Ergen's debt claims are still
25 at risk in fact. So is DISH's ability to purchase

1 LightSquared's spectrum assets. This was the committee's job.
2 We think that when the committee said there's a continuing
3 prospect of conflicts, we think frankly the LightSquared
4 complaint shows that that's alive and well, the U.S. Trustee's
5 objection shows it. The Bankruptcy Court has approved DISH as
6 a stalking horse bidder for the auction on December 3rd.
7 There's apparently some question in some very recent filings
8 from LBAC and a report about whether that stalking horse bid I
9 guess is locked in or is bona fide. But, in all events, the
10 court just made them a stalking horse bidder initially and has
11 made absolutely clear in her opinions that they have not
12 determined that DISH is acting in good faith. Any challenges
13 to DISH's status as a good-faith bidder will be decided on
14 December 10th. Any party, including the federal government or
15 Harbinger or LightSquared or competing bidders, anybody can
16 object.

17 It is in DISH's interest to refute allegations that
18 it is just an arm of Ergen. I submit that any public
19 corporation in America would do just that, and they would have
20 an independent committee very publicly guiding DISH's process.
21 Charlie Ergen tried having an independent committee once, and
22 we know what happened with that. And that's why there's no
23 independence for DISH right now.

24 Now, one other argument the defendants make, and I
25 can't remember if the SLC adopts this, but I know all the

1 other defendants say this, our premise is silly because why
2 would Ergen risk billions to make millions. The assertion is
3 -- respectfully, is frivolous. We were last here and they
4 made that argument, and I think we discussed it. They had no
5 evidence to make any inference about what a stock price would
6 or wouldn't do, okay. They might have pointed to one research
7 report, but I'm sure Your Honor understands that there's a
8 research report, you know, it's like Snoopy's -- you know,
9 it's like, you know, 5 cents for a lollipop. No court in the
10 country would just accept defendants' uncited, unverified, no-
11 evidence assertion that he's risking billions. If they wanted
12 to put it in evidence, they know how. I assume Your Honor's
13 familiar with event studies. So there is a way to prove their
14 assertion. They didn't because they couldn't.

15 But I can give Your Honor a very simple and
16 straightforward math formula that shows why the conflict is
17 very real. He owns 50 percent of DISH, okay. Let's say DISH
18 overpays LightSquared by \$500 million. Ostensibly that costs
19 him \$250 million. If his profit on his transactions is
20 300 million, that's what I call an efficient breach of
21 fiduciary duty. He's made money on it.

22 Defendants' arguments about the speculative nature
23 of damages further supports the issuance of an injunction. I
24 think the real message coming out of the defendants is that
25 Your Honor should just let them run their process and even if

1 it's unfair and even if it's appropriate and even if it hurts
2 DISH they're just going to leave a mess here before Your Honor
3 in the future. They're basically saying, just stay out of it
4 and you'll figure it out with damages in the future. But
5 we're all, you know, repeat players. We've been to this rodeo
6 before, and I've seen it. The argument is, Your Honor, you
7 can't give an injunction now, you can't give an injunction,
8 you can deal with this in money damages. I assure you as sure
9 as the sun will rise in the east they'll turn around a month
10 from now and say, how can you ever figure out if you could
11 have bought the company for less than 2 billion, we don't know
12 if they could have bought it at 1.8 or 1.5. And, Your Honor,
13 I'll try as hard as we can, and we think we'll be able to with
14 experts and evidence articulate why they might have been able
15 to get the company at less. And if there's a breach of the
16 duty of loyalty, there's caselaw that says it's appropriate
17 for the Court to make inferences for the shareholders in
18 imposing a remedy.

19 However, I don't know that it's appropriate where
20 there's irreparable harm now and a prospect of harm. And that
21 harm can be significant. And it's real. And it can be cured
22 so easily or limited so easily by simply bringing DISH in
23 conformity with what happens with essentially any other
24 company.

25 If Your Honor finds breaches of duty, DISH and its

1 minority shareholders need a remedy to avoid an inequitable
2 outcome when these guys turn around and say, you can't
3 unscramble the eggs, you can't rewrite history, we
4 respectfully request Your Honor to grant the injunction.

5 Now, the last comment I have here, Your Honor, is
6 that the relief we seek really is modest and sensible. We're
7 not --

8 THE COURT: So what is that relief, Counsel?
9 Because I've tried to figure out exactly what you're asking
10 for.

11 MR. LEBOVITCH: Enjoin Ergen and his loyalists on
12 the board from controlling DISH's bid. Put another way, Your
13 Honor, essentially say that the May 8th resolution got it
14 right and let them repass that resolution. It was appropriate
15 for independent directors to guide and control DISH's bidding
16 process, and it is appropriate today. All we're saying is if
17 Your Honor says Ergen, who has a conflict, and his directors
18 who are loyal to him are beholden, independent -- they're
19 enjoined. The defendants have the keys to the jailhouse door.
20 They can empower an independent director. That's exactly what
21 the board approved on May 8th, Your Honor.

22 Does that answer Your Honor's question about the
23 relief we're seeking?

24 THE COURT: No, Counsel, it doesn't.

25 MR. LEBOVITCH: Is --

1 THE COURT: So what specific relief are you asking
2 me to do?

3 MR. LEBOVITCH: I'm asking Your Honor to enjoin
4 Ergen and his people from controlling DISH's bid, not preclude
5 them --

6 THE COURT: You just repeated the exact words that
7 you told me again. Maybe if you use different words.

8 MR. LEBOVITCH: Okay. I am trying to be helpful,
9 Your Honor. If there's an independent committee with any
10 company, the committee can confer with people. They can ask
11 Ergen for his views. You know what, Your Honor, can I let --
12 maybe I'll let Mr. Ergen answer that question, because I
13 actually asked him, what's wrong with having independent
14 directors in charge. Maybe I can just show that clip, and if
15 it doesn't answer, I'll continue. But I actually think his
16 answer may show you that he didn't even have a problem with
17 what defendants say is so outrageous.

18 (Video played - Mr. Ergen)

19 "And when there was a special committee previously
20 you were able to give your guidance, opinion, and
21 knowledge to facilitate the process; correct?"

22 "If I was asked my opinion, I gave it. When I was
23 asked what my thought process was on the valuation,
24 I gave it. When I wasn't asked, I wasn't giving any
25 information."

1 "Okay. And you're okay with that; right?"

2 "Mr. Mundiya: Object to form."

3 "You were okay with the way that special committee
4 process functioned; right?"

5 "I was generally okay with it."

6 MR. LEBOVITCH: Your Honor, here the defendant's
7 talking about how this is some outrageous relief that we're
8 seeking and it's disempowering the board. I think I showed
9 the board's already disempowered itself. But here Charlie
10 Ergen, who's not shy about letting people know when he has a
11 problem, testified that he didn't have a problem with the
12 structure that was in place until July 21st.

13 And what we're asking for is by enjoining -- the
14 effect of enjoining Ergen and his people from running the
15 process is really just the judicial corollary to empowering an
16 independent committee. But the Court can give a negative
17 injunction, and the easy answer is empower independent
18 directors. That's all the Court has -- all the Court has to
19 do is enjoin the controller from controlling the process. The
20 May 8th resolution achieved that.

21 And then the follow on is simply to say they can
22 cure it by just empowering independent directors. They've
23 already shown that they're willing to do it. We submit the
24 only reason they're not willing to do it now is because those
25 directors showed independence.

1 Does that -- does that -- I mean, I really do want
2 to answer your question. It's an important one.

3 THE COURT: Thank you, Counsel. Anything else?

4 MR. LEBOVITCH: Subject to some rebuttal, that's it
5 for my --

6 THE COURT: Who has the shortest presentation on
7 your side? Because I've got 15 minutes before I'm breaking
8 for lunch.

9 MR. PEEK: Your Honor, I would like to take the
10 lead. And you know that it's not going to be a short
11 presentation. I appreciate the question that you asked --

12 THE COURT: I am aware of that.

13 MR. PEEK: And I appreciate the question you asked,
14 but I think it would take us out of the flow of the argument
15 to go that way. But I'm certainly -- I would --

16 THE COURT: You can start. Just know I'm breaking
17 in 15 minutes or so.

18 MR. PEEK: Okay.

19 THE COURT: I told you guys when we set this I would
20 be breaking for lunch --

21 MR. PEEK: No, I know that. And I was actually here
22 when you set another hearing at 1:00 o'clock.

23 THE COURT: Yeah, but it's not going anymore.

24 MR. PEEK: It's not going? Okay. May I -- may we
25 have at least a short break, Your Honor, for me to get set up

1 and make sure I have everything up there?

2 THE COURT: Sure.

3 MR. PEEK: Thank you, Your Honor.

4 (Court recessed at 11:26 a.m., until 11:30 a.m.)

5 THE COURT: Are you ready now?

6 MR. PEEK: I am, Your Honor. Thank you very much
7 for giving me that time. So I have to 11:45?

8 THE COURT: Yeah. And then I'll be back 1:00-ish,
9 1:15, 1:10.

10 MR. PEEK: Okay. Thank you, Your Honor, for letting
11 me start.

12 Good morning, Your Honor. It's Stephen Peek on
13 behalf of the special litigation committee of DISH.

14 And, Your Honor, when I was reading through the
15 briefs of the plaintiff I came to one specific conclusion that
16 I thought was important to this hearing. And I was surprised
17 this morning to not hear that same conclusion that I saw in
18 the opening brief and in the supplemental brief and in the
19 reply brief, which I thought was something upon which all of
20 the parties agreed. There are two things. One is that
21 spectrum is important to the future of DISH. That was
22 certainly something that all of the parties stated. The
23 second thing that I thought I found within the body of the
24 briefs is that the purchase price of the stalking horse bid of
25 \$2.22 billion was fair to DISH. And those two things I think

1 are important, Your Honor, to the arguments that I'm going to
2 make as I walk through the process of the transaction
3 beginning in May of 2013. Because fairness is certainly
4 important to both sides' argument, because we find fairness
5 and the concept of fair not only in the statute, but in the
6 cases. I don't think anybody said within the body of their
7 brief that fairness was not important.

8 But what do we have --

9 THE COURT: I think everybody recognized fairness
10 was important. It was just a different analysis as to whether
11 fairness includes the conditions that the special transaction
12 committee included in their memo.

13 MR. PEEK: That's exactly -- you know, that's
14 exactly I think where we got. Because they talked -- Mr.
15 Lebovitch wants to focus on the process as being important, as
16 opposed to the price at which LBAC, now a 100 percent
17 subsidiary bid for the spectrum. He doesn't say to you that
18 the \$2.22 billion is not fair to DISH. He does talk,
19 certainly, about a transaction in which less could have been
20 bid, as opposed to the \$2.22 billion, but he leaves out a
21 number of facts I think that give rise to that.

22 But let me go back again, Your Honor, and talk about
23 the process. Because we know that the special transaction
24 committee was created by board resolution on May 8th, not on
25 May 7th, not on May 6th, May 7th being the email from Mr.

1 Moskowitz to Mr. Ergen and others. And it's that resolution
2 that was created in the absence of the Ergens on May 8th that
3 gave rise to the process under which the special transaction
4 committee began its investigation. And although Mr. Lebovitch
5 casually mentions the Sprint Nextel transaction, as well as
6 the Clear Wire transaction, he doesn't put those in the
7 context of Mr. Ergen's email in May, early May -- or mid May,
8 excuse me, in which he says, you're getting way ahead of your
9 skis. So we need to put that email in the context of the fact
10 that in May the company, DISH, was still considering a
11 transaction with Sprint Nextel. So to say, you're getting way
12 ahead of your skis, is, yes, you are getting way ahead of your
13 skis because we still haven't resolved whether we are or are
14 not going to go forward with the Sprint Nextel transaction.

15 So to make that -- so Mr. Lebovitch wants to make
16 much of that by saying, well, you shouldn't be hiring lawyers.
17 Well, we know they hired lawyers. We know they hired
18 Cadwalader and, well, they weren't going to hire investment
19 advisors, but we know they hired investment advisors. In
20 fact, Cadwalader was in the process early on. Perella came a
21 little bit later because of the process that they went through
22 to find, vet, make sure no conflicts existed with any
23 investment advisors that could give them in a very short time
24 frame an opinion of the fairness of the transaction to DISH.

25 So was there a process that the special transaction

1 committee undertook? Yes. They hired lawyers, and they hired
2 not just one lawyer, but they hired two sets of lawyers. They
3 hired Covington with respect to an evaluation of the spectrum
4 from an FCC standpoint; because, as we know, there was an
5 issue with the LightSquared 40 megahertz of low-band spectrum,
6 as to whether or not some of it interfered and that's the
7 reason why LightSquared went into bankruptcy. They had to
8 look at that. And then they had Cadwalader to also look at
9 the bankruptcy issues revolving around the pursuit of the
10 acquisition, because this is a bankruptcy issue. LightSquared
11 was in bankruptcy. There were issues as to when the
12 exclusivity period would expire, there are issues of how do
13 you submit a bid, there were issues of stalking horse bids,
14 and there were issues of who makes the bid and whether or not
15 the value of the spectrum from the standpoint of the
16 submission of a bid would be fair to the company.

17 And even Mr. Goodbarn himself, despite the many
18 quotes that we have and the arguments that are made, let's
19 look at some of the other statements by Mr. Goodbarn; because
20 they argue to you, well, the issue of the purchase by Mr.
21 Ergen of the debt and the issue of the purchase by Mr. Ergen
22 of the preferred stock, which was bundled with a purchase of
23 the debt, were important as to whether or not to submit a bid.

24 So I call your attention to it's actually their
25 Exhibit 2 to their supplement, Your Honor, the Goodbarn

1 deposition. I'm reading here from page 165, lines 19 through
2 25.

3 "Okay." This is a question by Mr. Lebovitch.

4 "Okay. Did -- was it important to you to
5 communicate to the board that you didn't have
6 further insight into the bond purchases?"

7 Answer, "Yes, because we had reached -- we as a
8 committee had reached no conclusions, but reserve
9 all rights with respect to those purchases."

10 Reserve all rights.

11 "But given the -- that was not an important matter
12 in whether we wanted -- whether we could determine
13 whether it was worth making a bid and at -- and at
14 what value."

15 So to say that the special transaction committee
16 didn't make a recommendation of value, didn't make a -- didn't
17 come to a conclusion of the fair value of the spectrum that
18 they presented to the board as to what that bid would be isn't
19 supported by Goodbarn.

20 "That was an important matter whether we wanted --
21 whether we could determine whether it was worth
22 making a bid and at what value."

23 It was not an important matter. It was not an
24 important matter.

25 And what do we also know? We also have another

1 exhibit which is an email from Mr. Howard. This is Exhibit
2 57, Your Honor. And this is on July 20th, on the eve of the
3 meeting of the special transaction committee in the morning to
4 meet with Perella to receive from Perella the fairness
5 opinion, and on the day before, that evening meeting of the
6 board that was scheduled to take place to determine whether or
7 not -- or what the valuation was and whether to make a bid.
8 So there were two events on the 21st that were taking place.

9 So let's look at what Mr. Goodbarn says. And he's
10 writing to the members of the board of DISH. "I want to give
11 everyone a heads up that the committee and advisors are
12 working on the L2 transaction and are in contact with
13 SoundPoint's advisors --" they're in contact with SoundPoint's
14 advisors "-- regarding the APA --" that's the asset purchase
15 agreement "-- this weekend. This is accelerated from the
16 timing we discussed Tuesday evening. We have a draft report
17 from our advisors and are reviewing it, but my general comment
18 is that this appears to an opportunity DISH wants to pursue
19 100 percent at some of the valuation ranges being considered.
20 Given the need to act fast, please check your phone and email
21 periodically, as we may need to consider a proposal at some
22 point this weekend."

23 Not, we don't have Charlie's information. Not, we
24 have to resolve this issue of opportunity of Charlie. It's,
25 this is an opportunity the company should pursue and we're

1 meeting with our advisors and we've been reviewing the APA.
2 The APA is the same APA that was submitted with the ad hoc
3 committee's plan on July 23rd.

4 So what else do we have? We have -- Howard sends a
5 text, as well, and that is Exhibit 58. This is a text on
6 Saturday, July 20th. It's at 5:04 p.m. "Quick update. Got
7 materials from Perella Wineberg, spent day reviewing along
8 with FCC counsel opinion. Pretty good deck," slide deck,
9 which we thought we saw, "good presentation and positive on
10 opportunity. We have a starting at 7:30 -- we have a starting
11 conference call --" excuse me. "We have a conference call
12 starting at 7:30 a.m. Sunday to go over all materials," all
13 materials, "and be able to provide guidance to full board."
14 So all materials and guidance to board. "I assume you will be
15 around Sunday so we can talk. Gary." And this is actually to
16 Mr. Ergen.

17 Follows on the following morning in the text he
18 writes again, "Just finished call. Moving ahead for DISH
19 board call early evening to recommend proceeding."

20 How clear can you get of a statement that there was
21 a recommendation by the special transaction committee to move
22 forward with a bid based upon the Perella valuation that they
23 had that morning at their meeting? So to say there has been
24 no recommendation is belied by the actual documents
25 themselves.

1 And what do we also have? We also have another
2 place from which Mr. Lebovitch read, and I want to go back and
3 read from the same place, if you will, but I want to read a
4 little bit more than what Mr. Lebovitch shared with you. And
5 these are actually excerpts on pages 235 all the way up
6 through 239. And I'm not going to read all of those, Your
7 Honor, but I want to read those that I think are critical to
8 this.

9 THE COURT: How about we wait and start with that
10 when we come back, Mr. Peek.

11 MR. PEEK: That will be fine, Your Honor. Thank you
12 very much.

13 THE COURT: 1:15?

14 MR. PEEK: 1:15 is fine, Your Honor. Thank you,
15 Your Honor.

16 (Court recessed at 11:44 a.m., until 1:20 p.m.)

17 THE COURT: Okay. Hope you had a nice lunch.
18 Mr. Peek, you're up again.

19 MR. PEEK: Thank you, Your Honor.

20 THE COURT: Still.

21 MR. PEEK: And what I wanted to read and I'm going
22 to now, Your Honor, is from the deposition of Mr. Goodbarn.
23 Again, this is on pages 235 all the way through 239. And I'm
24 subject going to read some brief quotes, hopefully.

25 This is now on page 235. And he's asked the

1 question by Mr. Lebovitch:

2 "Did any of the interactions that you had with
3 Mr.Ergen or any other DISH representative affect
4 your ability to reach an independent judgment in
5 respect to the LightSquared transaction?"

6 And then Mr. Goodbarn responds, "So let's clarify.
7 Making an evaluation decision or making an overall
8 decision on the transaction? Because we never
9 completed the process as a committee."

10 We know that. We've heard that from the other side.
11 But I'm talking about the valuation and the fair value under
12 78.140.

13 And he goes on to answer that very same question,
14 because there's some interruption and Mr. Lebovitch says,
15 "Right." So in terms of --

16 The deponent says, "I mean, you asked a broad
17 question about the transaction, and we only reached
18 a conclusion on the valuation as a committee."

19 So this argument that there was no recommendation,
20 no conclusion as to value is not supported by Mr. Goodbarn's
21 testimony.

22 And then further on 236:

23 "At some point you made a recommendation to the
24 board on behalf of the special committee to proceed
25 with potential LightSquared acquisition; correct?"

1 Answer, "Correct."

2 So they did make that recommendation, they did reach
3 that conclusion, and they did tell the board to proceed with a
4 potential LightSquared acquisition.

5 And further, these are questions by Mr. Frawley.

6 "And was the judgment of special committee at the
7 time it made that recommendation that the
8 transaction recommended to the board was fair to the
9 DISH shareholders?"

10 He does say, "No, because we had not completed the
11 process. We only reached a conclusion on the
12 valuation. We did not reach a conclusion regarding
13 the conflict of interest. And that's really
14 integral to that decision. This has not been --
15 that decision has not been reached.

16 But he did say that they reached a conclusion on the
17 valuation.

18 He goes on further to say on 237:

19 "In the context of what I just said we only reached
20 conclusion on the valuation. We did not participate
21 or review in the transaction. That was separate.
22 That took place after the committee was dismissed."

23 And it is taking place today with a special
24 engagement committee.

25 And then he goes on again now on page 238:

1 "So, I mean, I guess if it's a quick answer, it's
2 no. Because we reached a conclusion, and that
3 valuation, it was an asset worth pursuing."

4 "And so you reached a conclusion that the asset was
5 worth pursuing at a price of 2.2 billion; correct?"

6 Answer, "Yes."

7 And then in response -- and Mr. Lebovitch read this
8 to the Court, and it was one of his slides, this is on page
9 239:

10 "We focused our efforts on being able to participate
11 and not lose an opportunity to acquire an asset at a
12 beneficial price, and to do that we needed a
13 fairness opinion that said at least supported the
14 price that we were willing to talk about to third
15 parties. But to say that, you know, that was all
16 fair to DISH shareholders, that full vetting by the
17 committee has not been done."

18 Again talking about the issue of the conflict and
19 the issue of the opportunity.

20 So, no, they haven't made a decision on those other
21 issues, and we acknowledge that. But as to whether or not
22 they met the standard of fairness under 238 -- excuse me,
23 under 78.140, they met that standard.

24 So when we look at the process of the special
25 transaction committee and we look at what the special

1 transaction committee did to come back to the board on
2 July 21st with its opinion, it retained Perella, Perella came
3 to the board with its letter, that's an exhibit, that draft
4 and that final with, of course, some redactions. I'm not
5 going to talk about those. But within that opinion of Perella
6 what do we know? Perella told the special transaction
7 committee and the special transaction committee reported to
8 the board later that day. Perella was there. Perella did
9 give its opinion of the fair value of the transaction, and
10 that their value was the price at which the board determined
11 that it would offer for the LightSquared spectrum. That's the
12 \$2.22 billion.

13 Now, there is much made about the fact that it was
14 an increase over the price at which Mr. Ergen had offered in
15 May and what that means. But what do we know about that? We
16 have a July 17th letter from the ad hoc committee, and the ad
17 hoc committee sending a letter to LBAC's counsel, Rachel
18 Strickland [phonetic]. Says, in order to get the support of
19 the ad hoc committee we think -- we, the ad hoc committee,
20 think it's prudent that you increase your bid above that bid
21 price -- or that offer price, it was only an offer from Mr.
22 Ergen, that offering price of \$2 billion. So they took that
23 into consideration, as well, because they needed the support
24 of the ad hoc committee. Because the ad hoc committee was
25 composed of the other secured lenders involved in the

1 LightSquared bankruptcy.

2 THE COURT: Depending on how you count it, 60 to
3 80 percent?

4 MR. PEEK: That's correct, Your Honor.

5 THE COURT: Okay.

6 MR. PEEK: And we pointed that out in our brief,
7 that even if you were to exclude Ergen from the transaction or
8 from the -- excuse me, the count, if you will, of the debt and
9 what it took to vote, that committee by agreement is obligated
10 to vote in favor of the LightSquared transaction.

11 So we have Perella thinking it's a fair price; we
12 have Mr. Goodbarn saying, that's the valuation, we thought it
13 was a fair price; we have the ad hoc committee submitting its
14 plan -- because this is not Mr. Ergen's plan, this is not
15 LBAC's plan, this is the plan of the ad hoc committee. And
16 attached to that plan is the asset purchase agreement under
17 which LightSquared would purchase the debt for \$2.22 billion,
18 subject, of course, to approval of that plan; subject, of
19 course, to the auction process; subject, of course, to what
20 that price is ultimately going to be at which LightSquared, if
21 their plan or our plan -- excuse me, the ad hoc committee's
22 plan is approved, as opposed to the Harbinger plan, we'll
23 determine what the fair value is based on the auction process.
24 But at least we knew as of July 21st, when the special
25 transaction committee submitted its report, that that was a

1 fair valuation.

2 So, yes, did they submit conditions? Yes, they did
3 submit conditions. But from the standpoint of the company,
4 the company's position was, well, we have a fair value, there
5 are still issues extant, and we'll deal with those issues down
6 the road, but in terms of meeting those conditions related to
7 the fair value, meeting the conditions that we not change it,
8 that there be no material change to that, all of those
9 conditions were met. The condition that the special
10 transaction committee was still going to evaluate, that was
11 going to be set aside, another date. It wasn't as though it
12 was going to be, as they argue, not considered, not
13 investigated. And in fact that is our charge, to investigate.

14 So where do we go after the July 21st termination of
15 the special transaction committee? And let me just address at
16 least one point. I think that Mr. Rugg is going to make this
17 point, as well as Mr. Reisman, are going to make this point of
18 what is ultra vires. It was not an ultra vires act on the
19 part of the board to terminate the committee, because an ultra
20 vires act is a violation of the statute and/or the violation
21 of the articles of incorporation. No evidence is submitted by
22 the plaintiff in this case to show that it's been a violation
23 of statute, no evidence has been submitted that it is a
24 violation of the articles of incorporation. So it is not an
25 ultra vires act.

1 Now, a question might be asked of the Court, well,
2 is it a breach of fiduciary duty as they argue? It's not a
3 breach of fiduciary duty once you reach the conclusion that
4 the price at which the LightSquared spectrum is going to be
5 purchased is a fair value. And that's critical, I think, Your
6 Honor, under 78.140.

7 Because what do we find in 78.140? And we've quoted
8 the statute within the body of our brief, and the Court I know
9 is well familiar with it. But let me just quickly review it.
10 It gives a definition of a transaction is not void or voidable
11 for the reasons, and then it gives I think four reasons there,
12 and then it also goes on to say, "if one or more of the
13 following circumstances exist," in subsection (2). So we have
14 to look at subsection (2) to determine whether or not one of
15 those four conditions does exist. And we have subpart (d).
16 Subpart (d) says the transaction is fair.

17 So the fairness test has been met. And why is that
18 important at least for purposes of this hearing as to whether
19 or not this Court should restrain and enjoin, as Counsel
20 asked, that the controlling director, as well as those that
21 they claim are deemed to be controlled by Mr. Ergen, should
22 not participate and should be restrained and enjoined from any
23 further action with respect to the LightSquared transaction.
24 That we think is important.

25 So 78.140, Your Honor, is the controlling law in the

1 state of Nevada. It's not something that has been decided
2 anew in Delaware, it's not something that's been decided
3 elsewhere; it's what it is that Nevada's statute provides.
4 And I haven't seen anything in the arguments from counsel for
5 the plaintiffs that would suggest that we have not met the
6 burden or that they, in supporting the fairness, in presenting
7 this case and saying in their own papers that the transaction
8 is fair.

9 So I look back to their motion. Their motion at
10 page 9, line 9, "DISH bid was recommended by the special
11 transaction committee." That's what they say. So I thought
12 when I stood up here that we were all in agreement that the
13 transaction was fair.

14 And what else do they say then? And I'm quoting now
15 from page 27, lines 2 to 3. "LightSquared is a valuable asset
16 whose value to DISH, DISH's long-term strategy cannot be
17 replaced as -- cannot be replaced or readily quantifiable."
18 Again, they accept that it is fair.

19 And what do they also say further on on page 27,
20 lines 19 through 20? "It is a unique and transformative
21 opportunity to acquire LightSquared's spectrum."

22 This is not a situation, Your Honor, where they
23 contest the validity of the transaction and they say you must
24 enjoin and restrain DISH from entering into the transaction.

25 They go on to say in their brief -- and this is now

1 in their supplemental brief, page 2, lines 21 through 22,
2 "LightSquared's own strategic assets are what DISH needs to
3 buy."

4 So everywhere in terms of fairness they accept the
5 fairness of that transaction. The process resulted in a fair
6 price. You can't go any further than the Perella opinion.

7 So now let's go now to the next focus of what
8 happened after the termination. We know that the ad hoc
9 committee submitted its plan, we know the ad hoc attached to
10 its plan the asset purchase agreement, and they're set to go.
11 We had some intervening steps between the submission of that
12 plana and the ultimate approval by the Bankruptcy Court on
13 October 1st of the stalking horse bidder, which is LBAC. We
14 have on August 6th a filing of Harbinger's complaint. Later
15 that month we have a pleading styled "Notice of Intervention
16 by LightSquared" in that complaint. But in the face of those
17 two pleadings, first the pleading itself seeking to attack
18 DISH and Ergen for their actions in acquiring the debt, we
19 have a hearing in front of the Court in which the Court says,
20 I'm going to accept LightSquared -- excuse me, the LBAC bid,
21 I'm going to qualify it as the stalking horse bid, and I'm
22 going to approve, as well, a \$51 million breakup fee so if
23 LightSquared is not the successful bidder, it gets a \$51
24 million breakup fee. The Court did that in the face of the
25 allegations within the complaint.

1 Then we have, as we know, a later hearing in front
2 of the Bankruptcy Court on the motion to dismiss the Harbinger
3 complaint. And we've quoted at least in our brief, Your
4 Honor, what Judge Chapman's thinking was about the issue of
5 corporate governance and a good-faith bidder. And what she
6 characterized it as, the bid is apples, the stalking horse bid
7 is apples, and the issues framed by the Harbinger complaint
8 are oranges and don't confuse the two; because the standard of
9 the review of whether or not there is a good-faith bid
10 submitted by LBAC is whether there has been fraud, whether
11 there has been collusion or some activity that affects the
12 validity of that bid, that bid itself.

13 Now, plaintiffs cite you to the DBSD case. What do
14 we know about the DBSD case? We know, yes, that the actions
15 of Mr. Ergen in DBSD did in fact affect his debt. But what we
16 also know is that it did not bar Ergen and DISH from
17 participating in the bid process and in fact it was the
18 successful bidder of the spectrum in the DBSD bankruptcy. So
19 while there is that decision out there that talks about Mr.
20 Ergen and Mr. Ergen's conduct, there's also, more importantly,
21 support for the fact that there was no fraud, no collusion,
22 and nothing that affected LBAC's -- or, excuse me, DISH's bid
23 in DBSD. And that's what they want you to try to believe
24 here. They want you to believe that the conduct of Mr. Ergen
25 by acquiring the LightSquared debt and by acquiring the

1 preferred stock somehow, speculative at best, is going to
2 affect the ability of LBAC to acquire the spectrum. They
3 don't show you any evidence at all that there is fraud in the
4 submission of the bid, that there is collusion in the
5 submission of the bid, or that they somehow have corrupted the
6 trustee to allow the bid to go forward. You have no evidence
7 of that, no citation to any record. They only cite to the
8 DBSD case for the proposition that Mr. Ergen's debt was
9 somehow impaired as a result of the his conduct, but not that
10 the bid itself nor the acquisition of that spectrum was denied
11 to DISH.

12 So we have now the motion to dismiss. And in the
13 motion to dismiss in the concept of the apples and oranges
14 Judge Chapman did dismiss it. She dismissed it not only on
15 grounds of standing, but she also dismissed it on the grounds
16 of failure to plead. So there were two reasons. She also
17 dismissed it, importantly, on the fact that the notion that
18 there is equitable disallowance of claims is not supported by
19 Section 502 of the Bankruptcy Code. And in fact if you read a
20 footnote, I think it's on page 3 or 4 of the new LightSquared
21 complaint, LightSquared acknowledges that Judge Chapman had
22 dismissed the equitable disallowance claim, and even though
23 they were re-pleading it in their new complaint, they said,
24 we're re-pleading it for purposes of preserving our record and
25 protecting it on appeal. But they acknowledge that Judge

1 Chapman had dismissed the disallowance claim. And yet Mr.
2 Lebovitch still makes much of the fact that this complaint out
3 there has something to do with disallowance, but it has
4 something to with disallowance of Ergen.

5 And what do we also know from that complaint and the
6 relief that they sought? Which is an interesting --
7 interesting, because it really is different than what is being
8 argued here today in terms of opportunity. What LightSquared
9 says and what Harbinger had said previously, and it's repeated
10 in this new complaint, is that Ergen, through SoundPoint, was
11 not an eligible assignee and he was in fact a disqualified
12 bidder.

13 So what the LightSquared complaint says is, your
14 acquisition through SoundPoint, SPSO, of all of this debt was
15 in violation of my credit agreement that I had with my
16 lenders, because you did not -- you were not qualified to
17 purchase it, you were not an eligible assignee, and you were
18 in fact a disqualified bidder.

19 And what I brought to the Court today -- and I don't
20 know whether the Court will have time to read this before it
21 makes its decision, but I did bring Judge Chapman's decision,
22 because I think Judge Chapman's decision is important to think
23 about in this case. If I may, Your Honor.

24 THE COURT: Sure. Does everybody have a copy?

25 MR. PEEK: I'm going to give them all copies in just

1 a moment.

2 THE COURT: All right. Then this will be Court's
3 Exhibit 4.

4 (Pause in the proceedings)

5 MR. PEEK: But as you read through Judge Chapman's
6 opinion and then when you read through the very same complaint
7 that was filed by LightSquared, I don't know whether you'll
8 come to the same inescapable conclusion that I reached, but in
9 reading her decision and reading the new LightSquared
10 complaint, which really just repeats all of the same
11 allegations, with the exception of some regarding Mr. Kaiser,
12 they plead equitable disallowance, they plead tortious
13 interference, they plead declaratory relief, they plead
14 disallowance, and they plead breach of contract. So these are
15 the very same complaints, with the exception of there's no
16 fraud, as had been argued in the Harbinger complaint.

17 And when you read her analysis of the concept of
18 equitable disallowance and how she traces the legislative
19 history, as well as the statutory scheme, and how she
20 addresses two other different decisions by other colleagues of
21 hers in the Bankruptcy Court and distinguishes their opinions
22 -- or actually just says, I don't agree with their opinion.
23 So this notion that somehow this complaint by LightSquared is
24 going to affect the ability of LBAC to continue in the process
25 is speculative at best.

1 We know that there are bids taking place today, we
2 know that there is a hearing on December 3rd to consider all
3 of the bids and to actually have an auction on December 3rd of
4 the spectrum. And we know that it's speculative at best as to
5 what that process will be. We don't know today whether or not
6 LBAC's bid will actually be the only bid. We don't know
7 whether or not LBAC or, if there any competing bids, whether
8 any of those other bids may or may not qualify as bids.
9 Because it's a qualification process. There are terms and
10 conditions that any competing bidder must meet in order to
11 submarket a bid and participate in the auction and be known as
12 a qualified bidder.

13 I'm reminded of a saying by my partner Edward Hale
14 years ago that cash is king. This is an all-cash bid. It
15 satisfies all of the debt of the ad hoc committee, all of the
16 secured debt, it certainly doesn't pay the equityholder
17 Harbinger anything, but it certainly does pay at least the
18 debt. So that conflict has been removed.

19 So then the next conflict that they raise is, well,
20 there's this preferred stock that has been blocked. And it
21 may get unblocked somehow. What do we know about that? We
22 know at least that LightSquared through its counsel has sent a
23 letter saying, you don't have my approval, you don't meet the
24 conditions, you can't acquire the preferred stock. So again
25 another one of those speculative natures that they want you to

1 somehow conclude that LightSquared will remove its condition
2 and say, yes, you can acquire the LightSquared preferred
3 stock.

4 You know from our papers and what we've said that
5 Mr. Ergen himself has no understanding of whether or not he
6 will be able to acquire the preferred stock and whether that
7 will even be an impediment. Because, again, it gets back to
8 is the corporate governance something that the Court is going
9 to consider in whether or not LBAC is a good-faith bidder?
10 Because corporate governance doesn't come into play -- that's
11 the oranges versus the apples of is it fair, is it the right
12 price, does it satisfy all of the constituents of
13 LightSquared, does it pay off the creditors of LightSquared.
14 Because that is what the judge is most interested in
15 considering. And so long as there's not fraud or collusion in
16 the bid process, that bid will satisfy the constituents and
17 their claims. And we have no evidence whatsoever of any fraud
18 or any collusion. In fact what we have is Mr. Goodbarn's
19 opinions about fairness, we have Perella's opinions about
20 fairness, we have the ad hoc committee saying you need to bid
21 2.22 billion, and that's what they did. So all of those
22 factors make this bid a fair bid and meeting the standard of
23 78.140.

24 So whether or not Mr. Lebovitch will stand up here
25 and say, we agree, as we said in our papers, that the spectrum

1 is a strategic advantage for DISH to acquire, that Perella was
2 wrong, that Perella somehow under either the Price Rowe case
3 -- or T. Rowe Price -- I said that wrong -- or under the
4 Hollinger case, whether there has been any interference with
5 the fairness of that bid, you don't meet that standard.
6 There's nothing here that says Perella was wrong. There's
7 nothing here that says Perella somehow reached a conclusion
8 based upon something that Mr. Ergen did or something that the
9 board of directors did. You don't have any of that evidence
10 at all.

11 So we say to you, Your Honor -- well, let me deal
12 with I guess one other point that's made, and that is the
13 issue of the release. Because you were submitted at least
14 United States Trustee's objection to the plan. And I think
15 that's telling. First of all, to say, as Mr. Lebovitch did,
16 that, well, the federal government has even objected, that's
17 the job of the United States Trustee. That's what they do.
18 They object to those. You know that. I don't have to tell
19 you that. But what do we also know? The release provision in
20 the --

21 First of all let's look at the release provision in
22 the asset purchase agreement. There's a footnote in the asset
23 purchase agreement that says there will be a release. I think
24 it's Footnote 9. I don't remember what page it is. But it's
25 common in what's called 363 sales to have those types of

1 provisions in an asset purchase agreement because both sides
2 don't want to deal with claims afterwards. You want to be
3 able to acquire the asset free and clear of all the liens.
4 That's what 363 says. So that's why you have release
5 provisions. That's not something new. That is standard
6 conduct, standard process when you're seeking to have a
7 363 sale. You want it free and clear of all the liens. You
8 don't want to pay \$2.22 billion and then get sued later or
9 have disruption of bankruptcy estate issues without the
10 release.

11 What do we also know? Is that in the United States
12 Trustee's judgment -- I gave that away, I think -- there's the
13 omnibus objection. And I think that's Exhibit 2, Your Honor.

14 THE COURT: I believe so.

15 MR. PEEK: And if we look at page 5 of Exhibit 2
16 what do we see? We see a release provision within
17 LightSquared's plan to which the United States Trustee
18 objects. And who are the release parties in the LightSquared
19 plan? The debtors, the wind-down debtors, the DIP agent, and
20 DIP lenders, "(d) each stalking horse bidder," that's LBAC,
21 "each purchaser, and each of the foregoing entities." So each
22 of the foregoing entities, stalking horse bidder in this case,
23 respective predecessors, successors, and assigns, and current
24 and former shareholders, affiliates, subsidiaries, members,
25 officers, and so forth. So LightSquared itself put forward

1 the same release, because that's standard practice.

2 Then you look at the other plans, the ad hoc secured
3 plan group. That's included there. You look at the U.S. Bank
4 Mass Plan, the language is still there because it's still
5 releasing the stalking horse bidder, and then you look at the
6 Harbinger plan, it's the same thing, although it doesn't
7 specifically address the stalking horse bidder. But these are
8 provisions to which the United States Trustee was objecting.

9 So to say that this somehow creates a divergence and
10 a conflict when each and every one of the competing plans,
11 with the exception of the Harbinger plan, has a similar
12 release provision is, again, speculative at best.

13 And he says, well, if you have a single director
14 because you've excluded Mr. Ergen and six of the seven, so if
15 you have Mr. Goodbarn as the party engaged in the process, he
16 would be able to negotiate, he would be able to change this
17 provision. So what does Mr. Goodbarn say about negotiations
18 with Harbinger at least? And remember, Harbinger is the 80
19 percent owner of LightSquared, and its principal Falcone is
20 the principal behind Harbinger.

21 So he's asked on page 181:

22 "From a DISH perspective did you view it as a
23 potential form -- advantage if you would work out
24 some amicable deal with Falcone and Harbinger?"

25 Answer, "Not -- certainly not at this time. We were

1 not evaluating a separate deal with Falcone and
2 Harbinger."

3 Mr. Lebovitch goes on and says, "Well, then I should
4 rephrase it. Did you view it as potential advantage
5 for DISH to be able to make a proposal that Falcone
6 and Harbinger would actually support?"

7 Answer, "We were not thinking along those lines."
8 And he goes on, says, "Go ahead."

9 This is the answer. "So Falcone and Harbinger I
10 think had something like a 6 billion loss in this.
11 The potential of doing any deal with them in my
12 opinion was -- was so remote that this -- that that
13 just wouldn't -- I mean, yeah, you keep all
14 possibilities open, but, you know, the potential to
15 go and say, we're going to make you good on your
16 6 billion, is just not -- I don't know any other way
17 that you could take it."

18 So to say now that you could go out and negotiate I
19 think is again speculative at best.

20 Some of the other points that they make besides the
21 release is they argue -- and I think I went over this, about
22 getting ahead of his skis. I think I did that.

23 They argue about the indemnification and
24 compensation. And what do we know about the indemnification?

25 THE COURT: And you're back to the special

1 transaction committee?

2 MR. PEEK: Right. Back to the special transaction
3 committee.

4 THE COURT: Okay.

5 MR. PEEK: Sorry, Your Honor. I'm --

6 THE COURT: It's all right.

7 MR. PEEK: I don't mean to skip around in my
8 timelines, but these are some of the points that were made by
9 Mr. Lebovitch. That the indemnification was important. What
10 do we know about the indemnification, what the objections to
11 the indemnification were? And you saw this in our papers, as
12 well as the attachments, is the concern was that the
13 indemnification which Mr. Goodbarn sought was above and beyond
14 the existing indemnification that was granted under the bylaws
15 and under the statute. He wanted more. He and his lawyers
16 Cadwalader wanted more than what all the other directors
17 received.

18 So the way the parties negotiated the resolution of
19 that -- and Mr. Goodbarn at least accepted this, although Mr.
20 Lebovitch I think would argue with me on that -- he did say --
21 or the board did say, well, look, if your concern is that
22 somehow Mr. Ergen might change the bylaws or the board might
23 change the bylaws such that the current indemnification that
24 you have under the bylaws, which is we will pay fees and we
25 will advance fees, that provision will not be changed and

1 cannot be changed so you are going to receive today that which
2 you bargained for and that which exists within the bylaws,
3 we're not going to change that. And he says, well, Goodbarn
4 hasn't been paid. Well, Goodbarn has been paid. He certainly
5 wasn't paid \$25,000 a month; he was paid \$25,000, because
6 that's what the board agreed was proper for the -- what would
7 that be, May to July, so that's the fifth through the seventh
8 month, \$25,000 total for two months' work, not \$25,000 a
9 month.

10 So when we get to the issue of whether or not this
11 Court should grant an injunction, and I think that's what
12 we're all here to discuss, is whether or not there has been,
13 one, a reasonable likely likelihood of success on the merits,
14 I think I've addressed that, it's all speculation as to
15 whether or not LBAC will be prohibited from buying or whether
16 LBAC, because of the so-called conflicted interest of Mr.
17 Ergen, which has been resolved through the payment of the
18 debt, 100 cents on the dollar, and the blocked sales that
19 exist, there is not a reasonable likelihood of success on the
20 merits. And to say that, well, there's this LightSquared
21 complaint out there which doesn't ask for anything other than
22 to deny Ergen the benefit of the LightSquared debt that he
23 acquired. It doesn't seek to change the bid process, it
24 doesn't seek to deny LBAC the right to bid, it only seeks to
25 say by declaratory relief is that DISH and SPSO and Ergen were

1 not qualified -- excuse me, qualified assignees and they were
2 not eligible assignees and they could not acquire the debt and
3 so therefore, because they could not acquire the debt, you
4 must disallow that debt.

5 That doesn't change the value of the spectrum to
6 DISH, that doesn't change the value that they agreed to pay
7 for it, that doesn't change the strategic advantage that DISH
8 will achieve if it acquires the spectrum. None of that at all
9 seeks any kind of relief other than damages from Mr. Ergen,
10 from SPSO, and from DISH. And whether or not that complaint
11 will even survive a motion to dismiss, as I said, is a real
12 challenge on the part of LightSquared given what Judge Chapman
13 said in her earlier opinion which I provided to the Court.

14 Everything that they say about reasonable likelihood
15 of success on the merits, that they say cries out for
16 equitable relief in the form of an injunction does not exist.
17 The company decided to terminate the special transaction
18 committee, but the company accepted the fair valuation opinion
19 and the recommendation of the special transaction committee to
20 acquire the LightSquared spectrum. That hasn't changed. That
21 will not change in the bid process. We don't even know today,
22 as I said, who there will be -- or whether there will be other
23 bids, whether or not they will be qualified if there are other
24 bidders, whether or not at an auction process on December 3rd
25 there may be somebody who will step up even -- and bid even

1 more from this group of qualified bidders who have to submit
2 their qualifications today. So we don't know any of those
3 facts. Those are all speculation.

4 THE COURT: And those should all have been submitted
5 by now, since it's after 5:00 o'clock Eastern Time; right?

6 MR. PEEK: You know, you're right, Your Honor. It
7 is now -- yep. They've all been submitted. I don't know what
8 the outcome is, because I'm not there because I'm here with
9 you. And I'm not even sure that we will know even tomorrow
10 what those bids are, because there is a process by which
11 LightSquared in reviewing the bids will determine whether or
12 not they qualify under the guidelines set by the Court in this
13 order in October of 2013. And then there certainly will be
14 objections, I suppose, if folks think that LightSquared has
15 qualified somebody that they don't believe are in fact a
16 qualified bidder. So there's a process, and that process is
17 going to go forward on December 3rd.

18 And it doesn't require you to enjoin six of the
19 seven directors and Mr. Ergen. And why? For a \$2.22 billion
20 transaction and more if they're going to bid why would you
21 exclude Mr. Ergen, who's the most knowledgeable and has been
22 the leader of DISH in acquiring spectrum? Because, as we know
23 even from the plaintiff's papers that DISH's business today is
24 a business that is not going to have its same attractiveness
25 in the future, that subscriptions to TV and satellite service

1 or going to change. And we all know why they change.

2 I'll give you one example, Your Honor. I just
3 recently bought an Apple TV, which is a little \$99 device that
4 Apples sells, that gives you access to many, many channels on
5 television, NetFlix, HBO, ESPN. That's how I receive some of
6 my media today. I receive it through the Internet. There's
7 -- also as part of my Apple TV I downloaded some of the apps
8 from NBC, CBS, ABC.

9 THE COURT: Do you know what an app is?

10 MR. PEEK: I don't, Your Honor.

11 THE COURT: You can have Mr. Cassity explain it for
12 you later.

13 MR. PEEK: I'll have Mr. -- I'll have one of the
14 younger lawyers explain that to me, Your Honor. But I did --
15 it's call my App Store on my -- I know that much.

16 So Fox TV, a news TV. And so what do I do? If I
17 want to watch one of my favorite programs -- I'll tell you
18 some of the things I watch. I watch "The Good Wife," I watch
19 "Blue Bloods." So these are some of the things that I watch.
20 I watch "Castle." So these are the network television. What
21 I do is I go to CBS or ABC or NBC, wherever the show is
22 showing, I mirror that image -- and I learned this recently
23 from a young lawyer about how to do this, and so I did it --
24 and I actually get to watch this program on my TV.

25 So those are the types of things that Mr. Ergen sees

1 in the future. He sees that spectrum is going to be important
2 to the business of DISH. And to exclude him from the process,
3 to exclude him from making that decision as the chairman and
4 the director is frankly nonsense. And does 78.140 compel the
5 fact that he should be excluded? No, it doesn't. In fact,
6 78.140 allows him to be included in the process. And why?
7 Because it's a fair transaction.

8 So we know that our statutory scheme wouldn't even
9 deny Mr. Ergen the right to participate. They don't say
10 78.140 excludes him, because they have to acknowledge that it
11 does include him.

12 Similarly, when you take away all of the other
13 directors who are going to have an active voice in whether or
14 not to acquire this spectrum and commit the company's
15 resources to acquire this spectrum and to put it in the hands
16 of one individual, one individual, is not good corporate
17 governance and is not supported by either the caselaw or by
18 our statutory scheme.

19 So then we get to the so-called irreparable injury.
20 And I'm trying to really understand the argument about
21 irreparable injury. And I'm still having difficulty
22 understanding it. But as I understand, the fact that the
23 special transaction committee was terminated and the fact that
24 a resolution creating them is somehow binding on the board to
25 continue to keep the special transaction committee is somehow

1 irreparable harm because there may be something later on that
2 might affect the bid process and might affect LBAC's ability
3 to acquire, and so if you take these other individuals out of
4 the process, you eliminate that so-called irreparable injury
5 that exists. And I'm sorry, I just -- I can't quite get
6 there, that there is an irreparable injury to deny the board
7 the right to participate and make the decision in a
8 \$2.22 billion transaction, as opposed to vest all of those
9 rights in one person. So the relief that they seek is not
10 warranted.

11 I think others may talk behind me about whether or
12 not this is, as described by Mr. Lebovitch, a negative
13 injunction or it is a status quo ante injunction. I'm not
14 sure I really understand it, but I'll leave that to the
15 members of the board of directors and Mr. Ergen to address
16 those issues. I mean, I did address it in my papers. I don't
17 think I need to go over it with this Court.

18 So then when you look at the balance -- the
19 balancing test, because there are at least -- there's at least
20 those three standards of the balance of hardships. And I
21 think I really addressed the balance of hardships by excluding
22 that person and the board members who are most knowledgeable
23 about spectrum and its importance to the strategic growth and
24 the strategic livelihood of the company, that's a hardship
25 that you cannot overcome. There is -- there's more of a

1 hardship by denying this active participation in that
2 individual most knowledgeable about spectrum and the strategic
3 objectives of the company, as well as the board members, from
4 participating in that process. There's more harm to the
5 company than there would be to the minority shareholders.

6 So when you look at that third element you can't
7 come to a conclusion that the balance weighs in favor of the
8 plaintiff in this case. And we all know that, you know, one
9 of the tests in the balancing of the hardships, as I recall,
10 and this is a little bit from Nevada law and also from the
11 Ninth Circuit, is if the harm is great, the likelihood of
12 success standard is reduced. On the other hand, if it is not
13 -- the harm is not great, the burden in the likelihood of
14 success is even a greater burden. That's part of the
15 balancing test that one must undertake and which this Court
16 would undertake in determining the likelihood and the
17 irreparable injury and the balancing.

18 And we've gone over and I'm not going to repeat it
19 again what the test is or what the hardship is to the company.
20 So the burden is greater, and they haven't met that burden.

21 Trying to see if there's anything else that I may
22 have missed, Your Honor.

23 And without -- you know, there are a lot of parts in
24 my papers that really address these issues, and I don't think
25 I need to regurgitate many of those very same points that we

1 made in our papers about the four reasons why they say that we
2 should -- why they should have injunctive relief.

3 But I do want to focus on something that they said
4 in one of their supplements and as well as in their reply.
5 They said, well, you know, you don't necessarily have to issue
6 an injunction, but what I want you to do is I want you to
7 find, though you don't grant injunctive relief, that there is
8 a reasonable likelihood of success that there has been a
9 breach of fiduciary duty. Excuse me. I don't think that's
10 what this -- I mean, that may be what they're asking this
11 Court to do, but I don't think that's something within the
12 purview of this Court to do. Because they want you to somehow
13 say that when the determination is made by the company that
14 the transaction was the strategic objective of the board and
15 that the purchase price and the value at which we were
16 offering to buy the spectrum and become the stalking horse
17 bidder and the price that we pay that had been determined by
18 Perella was all fair to the company, how you can then reach
19 some conclusion that there was a breach of fiduciary duty.
20 There's not a breach of fiduciary duty if the transaction was
21 fair; there's not a breach of fiduciary duty if the value was
22 fair; there's not a breach of fiduciary duty if you have an
23 independent valuation that you accept; there's not a breach of
24 fiduciary duty to terminate the special transaction committee,
25 because its job was done, and if we need to reconvene them at

1 another time to evaluate the opportunity, we will do so. That
2 doesn't -- the fairness -- none of those affect the fairness
3 of the purchase of the LightSquared spectrum by LBAC.
4 Everything else that they talk about is speculation. They
5 want to focus on the termination of the special transaction
6 committee and the importance of the special transaction
7 committee to the process. Well, they had done their job.
8 They had reached the value. There was nothing left for them
9 to do unless it later came up as to whether or not there was a
10 opportunity that existed.

11 So as you go through each of their claims, Your
12 Honor --

13 Well, let me talk just a little bit about Hollinger,
14 because I think Hollinger and T. Rowe Price are a couple of
15 cases that they cite. And if we look at Hollinger and what
16 the elements of Hollinger were and what Conrad Black did, you
17 only have to look at page 21 of their supplement to the
18 motion. Because there they give you what the elements of
19 Black were. First of all, Black had agreed to use his best
20 efforts to support Hollinger's pursuit of strategic options.
21 If you read the case, you will find that the agreement was a
22 contractual obligation on the part of Black. It wasn't the
23 resolution that they talk about here, it was a contractual
24 obligation of Black. But what did Black do? They go on and
25 say, "Black engaged in secret discussions for a third-party

1 deal that would enrich him at Hollinger's expense." What
2 Black was going to do was to sell a company of which he was a
3 controlling member to this third party that would give the
4 third party the very same assets that the company was
5 attempting to sell.

6 We're not -- you don't see that here. This is not a
7 transaction that they're seeking to enjoin. They say the
8 transaction should go forward. In Black's case Black was
9 seeking to enrich himself through the sale of the very same
10 assets. Of course, now we know that the independent committee
11 sought to stop Black's favored transaction, a favor
12 transaction that benefitted only Black. We don't have here
13 something that's favoring only Ergen. "When the independent
14 committee sought to stop Black's favored transaction Black
15 used his majority voting control to force Hollinger to abolish
16 the committee and prevent Hollinger's independent directors
17 from challenging his misconduct." We don't even have that
18 here. The court held that all of Black's acts in total were
19 inequitable and invalid. He breached the contract. He sought
20 to sell his holding company, rather than the assets of the
21 Hollinger Company. We don't have any of those facts here.

22 T. Rowe Price, I think, Your Honor, is also
23 similarly inapposite to this case. And if you read a couple
24 of the decisions out of Delaware that they cite and that we
25 cite, the Kahn case, and the Tratos case, which is actually an

1 opinion by the Court of Chancery in August of this year, and
2 there's actually -- in the Tratos opinion there's actually a
3 very good discussion by the judge there of the issue of
4 fairness and the valuation and why in the Tratos case he
5 reached the conclusion that the transaction on valuation is
6 fair and ought to be pursued by the company.

7 So in all of these you can't -- I don't see how it's
8 warranted that you would, as Mr. Lebovitch suggests, restrain
9 and enjoin the controlling individual, Mr. Ergen, and his six
10 of seven controlled directors from participating in the
11 process to acquire the LightSquared spectrum, because
12 everything that he argues is speculative at best. Thank you.

13 THE COURT: Thank you.

14 Mr. Rugg.

15 THE COURT: Hold on a second.

16 (Pause in the proceedings)

17 THE COURT: Sorry, Mr. Rugg.

18 MR. RUGG: That's okay, Your Honor.

19 THE COURT: You can go while I find this proof from
20 Dulce so I'm sure I'm right and she's wrong.

21 MR. RUGG: One of the remarkable things about this
22 case -- and I now represent these individual director
23 defendants. The company is now represented by the special
24 litigation committee, so to avoid any confusion, I'll start
25 off there. But one of the remarkable things about this case

1 is that two months ago Your Honor asked the question to the
2 plaintiffs that you asked again today. So, notwithstanding
3 binders and binders and binders and supplements to supplements
4 and replies that were not approved by the Court,
5 notwithstanding all of that, Your Honor still has the same
6 question, what are you asking for. And the what are you
7 asking for seems to bring out the same answer. It's actually
8 paragraph 119, if I remember off the top of my head, of their
9 amended complaint, that somehow all these folks, the folks I
10 represent and Mr. Ergen should not influence or interfere with
11 this process. Your Honor, that's not an injunction.
12 Respectfully, if that injunction's issued, I don't know
13 anybody who could say, well, what is interference, what is
14 influence. Plaintiffs want to suggest that they can go ahead
15 and ask questions of Mr. Ergen or Mr. Vogel or Mr. Moskowitz
16 and get input. But if you're Mr. Vogel --

17 THE COURT: Or consult with them, according to their
18 brief --

19 MR. RUGG: Or consult with them.

20 THE COURT: -- which would seem to be inconsistent
21 with the relief they're asking for.

22 MR. RUGG: I agree completely, Your Honor. I don't
23 know how that wouldn't be called influence. So now you have
24 individuals walking around thinking, am I in contempt of
25 court, or am I helping DISH. I don't know. We could get into

1 the default situation of all these directors have to say
2 nothing and we're leaving it only to Mr. Goodbarn to make this
3 \$2 billion decision.

4 Now, what if Mr. Goodbarn in plaintiff's world is
5 empowered to make this full decision and he decides these
6 assets, because of what's happening in the Bankruptcy Court --
7 and we don't know what happened there today -- suddenly we
8 should bid \$6 billion for it. And I didn't just pull
9 \$6 billion out of the air, because 6 billion is the number Mr.
10 Goodbarn used that Harbinger wants to get. yeah, plaintiffs
11 think that we need the assets, Goodbarn is empowered by
12 plaintiffs in this court, so let's bid \$6 billion of DISH's
13 money and we get Harbinger completely out of it, because they
14 get their money. Not exactly, but it's random math.

15 Mr. Ergen shouldn't have a say in that? Mr. Ergen,
16 who owns 53 percent of the company shouldn't have a say in
17 that? Mr. Moskowitz, who owns shares in this company, these
18 duly empowered directors should have no say in whether
19 \$6 billion is going to be spent? But that's the injunction
20 that plaintiffs appear to be asking.

21 Now, today they put a little twist on it. And this
22 comes back to the fact that they've been twisting their story
23 all the way along. Today they put a little twist, let's just
24 go back to the July -- excuse me, the May 8th resolution, undo
25 the July 21st resolution that dissolved the company. Well,

1 wait a minute. There's a problem with that. Plaintiffs
2 haven't identified it. The May 8th resolution is that that
3 special committee was supposed to make a recommendation to the
4 full board. So at best -- and we don't think this is
5 appropriate relief, but at best you're going back to the board
6 would still be making the full decision just on the
7 recommendation of Mr. Goodbarn, whether he recommends it or
8 not. That's not -- that's not going to get plaintiffs what
9 they want. So I don't really think that's part of where we're
10 going here.

11 Another question that plaintiffs leave open is who
12 exactly is their focus of their injunction. Do they want to
13 enjoin DISH from doing something, or do they want to enjoin my
14 clients? I'm not sure at this point. I don't know whether
15 this is something they want DISH to pass a resolution and
16 create a special committee or they just want my defendants not
17 to participate in board decisions. I don't think we can have
18 an injunction on those speculative, non-specific bases. And
19 I'm pretty sure the Court is on point with that.

20 Now we come back to different issues that we've
21 talked about before, including when we were here on
22 November 1st. Plaintiff has told you repeatedly that there's
23 disaster waiting for DISH in the Bankruptcy Court. But the
24 disaster keeps changing, and we have a new one today. First
25 it was the stalking horse bid. We know that DISH got the