valuable spectrum assets.

The questions before the Court among others, are whether SPSO's debt purchases violated the LightSquared LP credit agreement and whether its now approximately one-billion-dollar, inclusive of interest, should therefore be disallowed, or alternatively, whether SPSO's claim should be equitably subordinated by virtue of its conduct in connection with the debt purchases and/or in connection with these Chapter 11 cases.

The Court's analysis is as follows:

And at this point I skip ninety pages of parties' procedural history and findings, and I pick up at page 94 with the discussion.

INTRODUCTION.

And I also will be sparing you a good deal of the footnotes which contain a lot of important materials, but will interrupt the flow of the decision.

The complaints assert a variety of causes of action against defendants DISH, EchoStar, SPSO and Mr. Ergen. The complaints seek redress against Mr. Ergen and the entities he controls for his allegedly unlawful conduct in purchasing the LP debt in violation of the provisions of the credit agreement that prohibit disqualified companies from purchasing the debt.

Under one or more of several theories of liability, plaintiffs maintain that SPSO is not an eligible assignee and

that therefore the claim of SPSO should be disallowed, or in the alternative, subordinated pursuant to Section 510(c) of the Bankruptcy Code.

The complaints also assert that SPSO and Mr. Ergen engaged in additional inequitable conduct during the course of these cases, conduct which plaintiffs assert provides further reason for the Court to impose the remedy of equitable subordination to redress the harm caused to innocent creditors.

For the reasons discussed below, the Court has determined that, although the SPSO claims shall not be disallowed, it shall be equitably subordinated in an amount to be determined.

II. SPSO CANNOT BE HELD LIABLE FOR BREACH OF THE EXPRESS TERMS OF THE CREDIT AGREEMENT.

A) SPSO was not technically prohibited from purchasing the LP debt.

At the center of this contractual dispute is the term "eligible assignee", a common term included in loan agreements in order to limit a lending institution's ability to assign the loan to other entities. See, e.g., Meridian Sunrise Village v. N.B. Distressed Debt Investment Fund, Ltd. 2014 Westlaw 909219, (W.D. Wash.).

Here the credit agreement permits only eligible assignees to acquire LP debt. Excluded from the definition of "eligible assignee are": one, natural persons, and

two disqualified companies. And as such, these entities are not eligible to purchase LP debt.

A disqualified company is defined in the credit agreement in relevant part as any operating company which is a direct competitor of the borrower, and set forth on schedule 101-A, as well as any known subsidiary thereof.

Although "Subsidiary", upper case, is defined in the credit agreement in relevant part as any other person that is otherwise controlled by the parent and one or more subsidiaries of the parent, the word "subsidiary" as used in the definition of disqualified company is not capitalized.

As disqualified companies included on Schedule 101-A, DISH and EchoStar were not permitted to purchase the LP debt, nor was Mr. Ergen permitted to purchase the debt personally, as the credit agreement does not permit a natural person to be an eligible assignee.

SPSO, however, was not precluded by the express terms of the credit agreement from purchasing the LP debt, inasmuch as it is not an operating company which is a direct competitor of LightSquared listed on Schedule A. If, however, it is a known subsidiary of a disqualified company, it cannot be an eligible assignee.

Because the capitalized term "Subsidiary" was not utilized in the definition of disqualified company the Court looks to the commonly understood definition of the word

subsidiary. The dictionary definition of subsidiary used as a noun is a shortened version of subsidiary corporation, which is defined by Black's Law Dictionary as "a corporation in which a parent corporation has controlling share."

Similarly, courts have held that a subsidiary is commonly understood to mean a corporation "that is controlled by another corporation by reason of the latter's ownership of at least a majority of the shares of the capital stock. National Gear & Piston v. Cummins Power System, 2013 Westlaw 5434638 (S.D.N.Y.).

As the Delaware Supreme Court has observed, "The ordinary and plain meaning of subsidiary requires ownership of more than half the stock of the subsidiary by the parent." Liggett Group Inc. v. ACE Property and Casualty, 798 A.2d. 1024, (Del. 2002).

Neither DISH nor EchoStar controls SPSO by reason of its ownership of the majority of the shares of SPSO. In fact the evidence has established that Mr. Ergen wholly owns SPSO. SPSO is not a subsidiary of DISH or EchoStar.

While the term subsidiary is well understood to reference ownership, the broader term "affiliate" used elsewhere throughout the credit agreement includes entities controlled by or under common control with one another. See Delaware Insurance Guarantee Association v. Christiana Care Health Services -- Health Services 892 A.2d, 1073 (Del. 2006).

While SPSO may in fact be an affiliate of DISH and EchoStar the definition of disqualified company in the credit agreement does not include the term "affiliate", which the credit agreement defines in relevant part as "with respect to a specified person, another person that is under common control with the person specified."

By its terms the credit agreement does not prohibit affiliates of disqualified companies from buying LP debt. Moreover, as this Court previously observed in its decision on the motions to dismiss, even if one were to assume that the term subsidiary as used in the definition of disqualified company has the meaning of the defined term Subsidiary, such that control by DISH or EchoStar was the key inquiry, plaintiffs have not proven that DISH or EchoStar has the ability to control SPSO or that Mr. Ergen acts subject to the control of DISH or EchoStar as an agent would.

In fact, plaintiffs allege just the opposite, that Mr. Ergen controls DISH and EchoStar, makes decisions on their behalf and acts with complete authority for DISH and EchoStar to carry out those decisions.

Accordingly, in analyzing the plain words of the credit agreement, SPSO is an eligible assignee, and the Court finds no breach of an express term of the credit agreement.

And here I will read a footnote. To recover on a claim for tortious interference, a party must prove: one, the

existence of a valid contract between the plaintiff and the third party; two, defendant's knowledge of the contract; three, defendant's intentional procurement of the third-party's breach of contract without justification; four, actual breach of the contract; and five, damages resulting therefrom. See Kirch v. Liberty Media Corporation 449 F.3d 338 (2d Cir. 2006).

Because the Court finds no breach of an express term of a contract, the Court also finds that plaintiffs have failed to prove their claims against DISH and EchoStar for tortious interference with the contract.

III. SPSO'S ACQUISITION OF THE LP DEBT VIOLATED THE SPIRIT OF THE CREDIT AGREEMENT AND IS A BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING.

Although the Court declines to find that SPSO breached an express term of the credit agreement, there nonetheless remains the question of whether SPSO's acquisition of the LP debt was made on behalf of DISH or for the benefit of DISH, and if so, what consequences flow from that conclusion.

There is overwhelming evidence in the record that SPSO's acquisition of LP debt, at least as of April 2013 and possibly earlier, was carried out for the benefit of DISH with a tacit approval of or at least no interference by the members of the DISH board and certain members of DISH senior management, including its CFO and general counsel.

The facts are these:

A) SPSO's LP debt purchase.

1. The fall of 2011: Mr. Ergen identifies LightSquared as attractive and begins buying in April 2012.

Mr. Ergen testified that in the fall of 2011 he believed the spectrum and satellites of LightSquared might be an attractive investment opportunity for DISH and therefore began looking into acquiring LightSquared's LP debt. He asked Jason Kiser, the treasurer of DISH and a vice president of corporate development and DISH and EchoStar, to provide him with information.

Mr. Kiser testified at trial that until it was clear that DISH and EchoStar could not purchase the debt, the LightSquared investment was considered a corporate opportunity.

After reviewing the credit agreement and consulting with Sound Point and Sullivan & Cromwell, DISH's corporate counsel, and not Mr. Ergen's personal counsel, Mr. Kiser determined that both DISH and EchoStar were prohibited from buying the LP debt and communicated this to Mr. Ergen.

No evidence was submitted that Mr. Kiser or Mr. Ergen made a more formal inquiry to the boards of directors of DISH or EchoStar, or consulted with management of either company prior to making any personal purchases of LP debt.

Having gotten the all clear from Mr. Kiser, Mr. Ergen through SPSO began buying the LP debt in April 2012. In order to enable Mr. Ergen to purchase the LP debt, Mr. Kiser created

two limited liability companies, Bal Harbour Capital Management LLC and Bal Harbour Holdings LLC, which were subsequently replaced by two other entities: one, Special Opportunities Holdings LLC, which is solely owned by Mr. Ergen; and two, its wholly owned subsidiary, SPSO.

Mr. Kiser testified that the change to SPSO as the investment vehicle was necessary because Bal Harbour's formation documents listed a Littleton, Colorado address, which Mr. Ergen and Mr. Kiser determined may have compromised Mr. Ergen's anonymity and "might lead people to Mr. Ergen's doorstep."

Defendants maintained that Mr. Ergen desires to keep his personal investments confidential. Plaintiffs allege that the desire for anonymity here stems from Mr. Ergen's desire to conceal his purchases of LP debt to facilitate his intentional violation of the credit agreement.

2. The LP debt is a "good investment". Between April 13th, 2012 and April 26th, 2013, Mr. Ergen through SPSO, contracted to purchase over one billion dollars in par value of LP debt of which SPSO actually closed trades for approximately 844 million in par value. Specifically, prior to LightSquared's petition date on May 14th, 2012, SPSO purchased a total of approximately 287 million dollars in par value of LP debt with SPSO's largest purchase comprised of the May 4th, 2012 purchase of Carl Icahn's approximately 247-million-dollar

position.

These initial purchases were made between 48.75 cents and 60.25 cents on the dollar. Mr. Ergen testified that at this time he believed the debt was a good investment and that he did not have an idea of how much SP -- how much debt SPSO would eventually buy.

3. "I would have them vote 'no' on LightSquared's forbearance request."

On May 4th, 2012, after Mr. Ergen agreed to purchase Mr. Icahn's 247-million-dollar position in the LP debt, but before the trade closed, he was given the option of directing the seller's vote on whether to authorize an amendment to the credit agreement pursuant to which the lenders would forebear from exercising remedies and which would have allowed LightSquared to continue to work toward a consensual arrangement with its lenders and possibly avoid a bankruptcy filing.

Despite, one, being told that Mr. Icahn was inclined to support the request for a short forbearance, and two, not having reviewed the terms of the amendment itself, Mr. Ergen directed a no vote on the Friday evening prior to the Monday response deadline.

His testimony that he voted no because he had been unable to review the proposed amendment was not credible, as the evidence reveals that the amendment documents could have

been obtained by Sound Point had Mr. Ergen and Mr. Kiser indicated an interest in reviewing them over the weekend. There was also no evidence introduced that Mr. Kiser or Mr. Ergen made any effort to discuss the proposed amendment with any of the other lenders.

While the debtors argue that these actions on the part of Mr. Ergen reveal that with respect to LightSquared debt he was not interested in acting like a traditional creditor, it is worth noting that there is nothing that requires a creditor to support a forbearance request.

That Messrs. Kiser and Ergen failed to testify truthfully about the reasons for the no vote is significant, however, and is part of a troubling pattern of noncredible testimony.

4. There might be some truth to the press reports of Ergen's LightSquared LP debt purchases.

After SPSO purchased Mr. Icahn's 247-million-dollar position in the LP debt, the Denver Post reported that Mr. Ergen had "snatched up" 350 million dollars of LightSquared debt.

This article prompted an e-mail from Gary Howard, a DISH board member to Stanton Dodge, DISH's general counsel and to other members of the board asking if the story was accurate.

Mr. Dodge's May 16th, 2012 e-mail reply on which he copied the entire DISH board, including Mr. Ergen, stated:

"Further to Gary's e-mail below and since another board member inquired about the recent press reports regarding LightSquared bonds, I wanted to send a brief note to the full board; the company, DISH, did not buy any LightSquared bonds."

Notably, Mr. Dodge's reply did not address the direct question of whether Mr. Ergen had purchased LightSquared debt personally, and there is no evidence that any member of the DISH board followed up in order to receive a clear response to this question, consistent with the fiduciary duties owed by the DISH directors to examine whether the purchases may have been a corporate opportunity.

While the Court will not insert itself in matters of DISH corporate governance that are the province of DISH and its shareholders, the Court will infer from this inaction that the members of the DISH board, who from press reports had more than an inkling of Mr. Ergen's purchases, were tacitly acquiescing to Mr. Ergen's foray into LightSquared's capital structure and they did not see fit to double-check the corporate opportunity questions it obviously raised.

Mr. Dodge's reply reveals the apparent attitude of members of the DISH board and senior management that where Mr. Ergen was concerned, it was better not to ask a lot of questions and to let him conduct his business as he saw fit.

Members of DISH senior management also first learned from the press of Mr. Ergen's LP debt purchases, made their own

inquiries to Mr. Ergen directly and were rebuffed. After Mr. Ergen did not provide them with candid answers, they also did not inquire further. Specifically, when Mr. Dodge confronted Mr. Ergen about the press report of his purported purchases of the LP debt, Mr. Ergen responded coyly, that there "might be some truth" to the report. There is no evidence that Mr. Dodge made further inquiry.

Mr. Cullen, who as executive vice president of corporate development, leads DISH's strategic acquisitions and is considered to be "Ergen's closest confidante on all things wireless with an office next to Ergen's," also asked Mr. Ergen about the reports of his LightSquared debt purchases, but was only able to elicit confirmation from Mr. Ergen that there either is or might be some truth to the reports.

At trial, Mr. Cullen acknowledged that he owed fiduciary duties to DISH but testified that upon learning of Mr. Ergen's purchases of LP debt he: one, did not ask Mr. Ergen why DISH was not buying the debt; two, did not ask in-house counsel whether there was an issue with Mr. Ergen making a personal investment in the debt; and three, did not take any steps to determine whether Mr. Ergen's purchases were a corporate opportunity.

Together these e-mails and conversations reveal a striking lack of candor between Mr. Ergen and the members of DISH's board of directors and senior management. In addition

to demonstrating that "no one crosses the chairman," as explicitly stated by one member of the DISH board, the inquiries or lack thereof posed to Mr. Ergen also suggest that the DISH board and senior executives may have been unconcerned about Mr. Ergen's personal LightSquared debt purchases and later his LBAC bid, because they had confidence that his strategy would inure to the benefit of DISH.

Regardless, it is notable that there were no further inquiries. Mr. Ergen testified at trial that until the May 2nd, 2013 board presentation, he did not speak to anyone at DISH besides Mr. Kiser regarding his purchases of LP debt.

5. "If we can't be sure the company can buy, then I am interested to increase my position."

After his initial purchases in April and May of 2012 Mr. Ergen did not purchase any -- pursue any purchases of LP debt until October 4th, 2012. Around that time, Mr. Ergen asked Mr. Kiser to check whether the restrictions on DISH's ability to acquire LightSquared debt had changed as a result of LightSquared's bankruptcy filing.

After Mr. Kiser wrote to Mr. Ergen that he could not get confirmation that the restrictions on DISH purchasing the debt had fallen away, Mr. Ergen responded, "If we can't be sure the company can buy them, then I am interested to increase my position at the seventy-five level at least up to a thirty-three percent ownership level of the class." This statement by

Mr. Ergen establishes that at least from that moment in time the preferred purchaser of the LP debt was DISH.

Mr. Kiser's testimony that the reason for again checking the credit agreement was to confirm that there was no corporate opportunity for DISH, was not credible and is not consistent with the precise words of Mr. Ergen's directive. In fact, it would appear that there did exist a path for DISH to become a lender under the credit agreement. The credit agreement by its express terms contains no restrictions on affiliates of disqualified companies becoming lenders.

The Court was presented with no evidence that the DISH board was in fact aware of this and considered whether to create an affiliate to purchase LP debt nor any other evidence to support the contention that Mr. Ergen's focus was on making sure that he was not usurping a DISH corporate opportunity.

Notwithstanding, from Mr. Ergen's choice of words in inquiring about whether DISH could purchase the LP debt, the Court can reasonably draw an inference that Mr. Ergen's statement that his investment was conceived of and always intended to be purely for personal purposes was not truthful. It is clear that DISH was the preferred purchaser.

After Mr. Ergen decided to acquire through SPSO at least a thirty-three-percent stake in LightSquared debt, Mr. Kiser asked Mr. Ketchum to track whether SPSO had a blocking position. Although Mr. Ketchum initially testified that he did

not recall discussing acquiring a blocking position with Mr. Kiser, he later admitted that Kiser had told him, "he was very interested in tracking whether or not SPSO had a blocking position with respect to LightSquared." Mr. Ketchum was not a credible witness on this point and many others.

6. "You've just bought a spectrum company."

When asked about the desire for a blocking position, both Mr. Kiser and Mr. Ergen testified that thirty-three percent ownership of the LP debt would provide SPSO and therefore Mr. Ergen with a blocking position, such that SPSO could enforce certain rights during the bankruptcy proceeding. However, neither Mr. Ergen nor Mr. Kiser would admit to any intended linkage between obtaining a blocking position in the debt and making a bid for the company, or how the former could pave the way for the latter: DISH's acquisition of LightSquared spectrum.

It is clear from the evidence, however, that such a strategy began to emerge by late March, early April 2013.

By March 25th, 2013, Mr. Ergen needed to purchase another 112 million dollars of LP debt to reach a blocking position. On March 28th, 2013, he initiated a trade for 160 million dollars face amount of LP debt at ninety-six cents on the dollar, almost double the price he initially paid for the LP debt in April 2012.

Notably, in this trade, he also sought to purchase the

preferred stock of LightSquared LP that was bundled with the LP debt and offered to pay between ninety-two and ninety-five cents on the dollar for that, or approximately 122 million dollars, just so, as Mr. Kiser testified, Mr. Ergen could have the "privilege" of obtaining that LP debt.

At trial, Mr. Ergen continued to deny the fact that he was willing to pay that price because he wanted to secure a blocking position, instead stating that he bought substantial amounts at close to par because "he loved the investment."

Notwithstanding, on March 28th, 2013 the date Messrs. Ergen and Kiser believed that they had achieved their intended goal of obtaining a blocking position, providing the trade closed, Mr. Ketchum sent an e-mail to Mr. Kiser stating "You've just bought a spectrum company." Later in that same e-mail, Ketchum said internally to his colleague, "We now control the company."

B) Mr. Ergen's conduct in the spring of 2013 establishes that he was acting for DISH.

Indeed, Mr. Ergen acknowledged at trial that his LightSquared strategy had changed as of April 2013. Mr. Ergen testified that at that time, because of changes in the wireless industry and at the FCC he saw a "window of opportunity." He stopped looking at LightSquared as a debt investment and began to view it as a potential acquisition candidate.

Mr. Ergen testified that he had a general

understanding of the exclusivity stipulation and believed that if he wanted to make a bid for LightSquared he would have to do so by July. He hired Willkie Farr as bankruptcy counsel because in his words, "I don't need them for an investment, but I need them if I'm going to reach out, if I'm potentially going to look at LightSquared as an acquisition."

1. 320 million dollars at ninety-six cents on the dollar and confidence in the collateral.

Through four separate trades entered into between April 1, 2013 and April 26, 2013, Mr. Ergen, through SPSO, purchased approximately 300 million dollars of LP debt at ninety-six cents on the dollar. These were the final purchases of LP debt completed by SPSO, bringing its total ownership of the LP debt to approximately 844 million dollars in face value, the face amount it still owns today.

When asked about his substantial purchases at ninety-six cents on the dollar, Mr. Ergen testified that he was "very confident in the collateral," and as a result he bought whatever people would sell at that price because, "he felt it was a great investment."

Noticeably absent from the picture painted by Mr. Ergen's testimony is the fact that SPSO's April 2013 acquisitions of 320 million dollars of LP debt at ninety-six cents on the dollar, which gave SPSO more than fifty percent ownership of the LP debt, achieved by indirection, something

that it could not have achieved directly, the creation of leverage for DISH to acquire LightSquared's assets.

It is within the scope of Mr. Ergen's broad authority as chairman of the boards of directors and executive chairman of both DISH and EchoStar to lead DISH and EchoStar's strategic acquisition of spectrum assets. And the evidence demonstrates that Mr. Ergen's objective, beginning in April 2013, included preserving for DISH the option to bid for LightSquared's spectrum assets.

While in May 2012 it may have been unclear even to Mr. Ergen whether he was purchasing LP debt for his own benefit or for the benefit of DISH, as of April 26th, 2013, a few days before Mr. Ergen formally presented the opportunity to DISH, there is no doubt that he was acting for the benefit of DISH.

2. "Mr. Ergen's substantial interests in L2 debt and preferred stock complement any acquisition strategy."

Mr. Ergen's actions at the DISH and EchoStar board meetings held on May 1st and May 2nd, 2013, shortly after SPSO obtained its blocking position and DISH completed its April 3rd capital raise, further reveal his intention to benefit DISH by his debt acquisition, and paved the way for DISH to acquire LightSquared spectrum assets.

After disclosing his LP debt acquisition to the boards of DISH and EchoStar for the first time, Mr. Ergen gave the Ergen presentation, including his proposal for "any combination

of Mr. Ergen, EchoStar, and/or DISH based on company interest to acquire LightSquared's assets for 2 to 2.1 billion dollars." Specifically the Ergen presentation informed each board that Mr. Ergen's blocking position in the LP debt could help facilitate any bid for LightSquared's assets. "Mr. Ergen's substantial interest in L2 debt and preferred stock complement any acquisition strategy and could have significant influence in L2's Chapter 11 cases."

Mr. Ergen understood the critical nature of the timing of the bid, and he testified at trial that given the July 15th termination of the debtors' exclusive periods it was likely that LightSquared "could begin exploring strategic alternatives in early June if no restructuring or sale strategy emerges." His understanding was that "anyone could come to the court to make an offer for LightSquared, that that might be a corporate opportunity for DISH and for EchoStar."

Because Mr. Ergen recognized, however, that the DISH Board was at the time focusing on the potential Sprint and ClearWire transactions, had performed no analysis of LightSquared, and did not authorize a bid for LightSquared at that time, Mr. Ergen planned to make a bid "personally" to preserve "optionality" for DISH and/or EchoStar to bid on LightSquared assets. He did not, however, seek approval from either board to make a bid personally.

3. Mr. Ergen makes a bid himself, keeping options

open for DISH.

Two weeks later on May 15th, 2013, Mr. Ergen by his counsel submitted an unsolicited cash bid for LightSquared's spectrum for two billion dollars, the LBAC bid, on behalf of LBAC which had not yet been formed. The wording of the LBAC bid provided optionality for DISH to be the ultimate purchaser, stating that the newly formed buyer would be "owned by one or more of Charles Ergen, affiliated companies, and/or other third parties."

Nonbinding and expiring on May 31st, 2013, the bid emphasized LBAC's "willingness to fund the purchase prices on a nonrefundable basis prior to receipt of FCC and Industry Canada approvals and authorizations," and it explicitly stated that the cash purchase price of two billion dollars could be used to pay off LP debt.

With its lack of conditionality and offer of cash consideration sufficient to pay off the LP debt in full, the LBAC bid accomplished the objectives set forth in the Ergen presentation given to the DISH board two weeks earlier of proposing a bid that would "be highly attractive to stakeholders and put pressure on L2 fiduciaries to consider the proposal."

The existence of the LBAC bid quickly hit the press. Upon learning of the bid, no member of the boards of directors or management of DISH or EchoStar formally objected to Mr.

Ergen's having made a personal bid for LightSquared's assets.

Mr. Ergen, a top DISH execu -- Mr. Cullen, a top DISH executive, stated that he learned of the bid through news reports but did not ask Mr. Ergen if he was usurping a corporate opportunity, despite not being aware at that time that Mr. Ergen had presented the DISH board with the option to make a bid.

The Court can infer from the inaction of DISH's board and management upon learning of Mr. Ergen's personal bid that they either, one, understood that the LBAC bid and the strategy behind it were ultimately for the benefit of DISH, even if made by Mr. Ergen personally at that time; or two, they did not wish to impede Mr. Ergen's forward movement on his own bid, notwithstanding their fiduciary obligations.

4. "You were way ahead of your skis here."

On May 8th, 2013, one week prior to the LBAC bid, the DISH board had formed a special committee consisting of two directors independent of Mr. Ergen, Mr. Goodbarn and Mr. Howard. Pursuant to board resolutions, the special committee was vested with the power and authority to: one, review and evaluate, including any potential conflicts of interest arising out of Mr. Ergen's proposal to the DISH board regarding LightSquared and his personal interest in LightSquared; a potential bid for LightSquared; and whether such bid was in the best interests of DISH and its shareholders; and to discuss

and/or negotiate with such a transaction; two, negotiate definitive agreements with the parties concerning the terms and conditions of the potential bid; and three, determine whether such terms and conditions are fair to DISH.

The board formally resolved that the special committee's authority would expire only upon the special committee's "determination in its sole and absolute discretion as set forth in its written notice to the chairman of the board of directors 'as long as the bid for LightSquared's assets remains viable'."

As it turned out, such resolutions were not worth the paper they were written on. The evidence reveals that these board resolutions were quickly and flagrantly disregard. Despite being in existence for three months, the special committee was forced to work under a compressed timetable because of Mr. Ergen's interference with their ability to begin their task.

Upon learning on May 22nd, 2013 of the special committee's recent engagement of independent counsel, Mr. Ergen pushed them to hold off asking why special committee counsel was needed and cautioning that "you are way ahead of your skis here."

Similarly, at a May 31st, 2013 meeting, Mr. Ergen suggested that the special committee should delay engaging its financial advisor, as in Mr. Ergen's view, there would be

"little activity, if any, in the coming weeks regarding a LightSquared transaction."

After delaying the retention of its professionals and keeping the committee in what Mr. Howard later described as a holding pattern, Mr. Ergen suddenly reversed course in early July, urging the special committee to complete its evaluation quickly and make a recommendation to the DISH board.

The existence and amount of the LBAC bid created a significant challenge to the special committee's task of evaluating a DISH potential bid and determining what terms and conditions were fair to DISH. Upon learning of the LBAC bid from news alerts on May 20th and 21st, 2013, Mr. Howard stated that he was surprised as it "was his expectation that Mr. Ergen would not make any LightSquared bid without first discussing it with the DISH board and the special committee in order to get their approval since any such bid could impact DISH's own strategy vis-a-vis LightSquared."

When asked whether the special committee considered proposing that DISH make a bid for LightSquared spectrum below the amount of the LBAC bid, Mr. Goodbarn stated that the LBAC bid "made it difficult socially to do that, because Ergen has put a line in the sand on the bid and we're part of a, you know, a DISH board and he owns a majority of the company."

Pressed further on why it would be difficult for DISH to make a bid lower than Mr. Ergen's bid, Mr. Goodbarn

explained that if Mr. Ergen had committed to a two-billion-dollar bid with no other bidder present and the special committee then bid 1.5 billion dollars, Mr. Ergen may take a big loss on his debt investment and, "that does not make a very happy chairman."

These statements by an independent board member demonstrate that Mr. Ergen as chairman of the board and majority owner of DISH exercised significant control. The special committee did not determine to bid the lower price, as Mr. Ergen had already staked out the territory with a bid that would ensure that he, as a substantial holder of LP debt, would be paid in full, and no one was interested in making him unhappy by altering that.

Furthermore, although the role of the special committee included evaluating any potential conflicts of interest, the repeated requests of the committee to Mr. Ergen for information regarding his LP trade debts were ignored, and Mr. Ergen never provided the committee with the requested schedule of his trades.

The special committee's stated reasons for seeking such information were significant: "To assess Mr. Ergen's conflict, to determine the potential profit that Mr. Ergen would make if DISH made a successful bid, and to assess whether DISH should have been entitled to pursue the corporate opportunity of buying LightSquared debt before permitting Mr.

Ergen to do so for his personal account."

Mr. Howard stated that the he did not recall ever hearing from Mr. Ergen or his counsel that the committee's request for information were improper or that Mr. Ergen had no obligation under DISH's charter to bring potential corporate opportunities to the attention of the DISH board. Yet, Mr. Ergen provided no reason for leaving the special committee in the dark on this key inquiry.

On July 3, 2013, Mr. Ergen sent to the special committee and David Moskowitz, an in-house attorney and a senior vice president for DISH and EchoStar, via e-mail, a presentation for the special committee and the DISH board.

In the e-mail, Mr. Ergen stated, "This is just a high-level view of LightSquared and its potential relation to DISH. Please feel free to share with the board or advisors. Also not on here would be the possibility of freeing up at least two of the existing DBSD TerreStar satellites that could be possibly be monetized."

The presentation, dated July 8th, 2013, was entitled "Strategic Investment Opportunity L-band Acquisition Corporation LLC", hereinafter referred to as the Ergen July 8th presentation. It was delivered to the DISH board of directors by Mr. Ergen at a special meeting on July 8th, 2013.

The Ergen July 8th presentation provided, for discussion purposes, in the context of considering whether DISH

would participate in the LBAC bid, certain valuation information relating to LightSquared's spectrum as of that date.

Under a line item entitled Net -- Implied Net Primary Asset Value, the Ergen July 8th presentation lists a range of values of between 3.341 billion and 5.213 billion, with a midpoint of 4.277 billion, referring to Mr. Ergen's estimate of the value of 20 megahertz LightSquared spectrum assets and its satellites, excluding its 10 megahertz of lower downlink spectrum.

Under the heading entitled Implied Supplemental Asset Value, the Ergen July 8th presentation lists a range of values of between 1.833 billion and 3.783 billion, with a midpoint of 2.308 billion, for what it identifies as the total of: one, 5 megahertz of reclaimed unusable AWS-4; two, 5 megahertz of reclaimed impaired AWS-4; and three, L-band downlink spectrum.

The implied supplemental asset value was Mr. Ergen's estimate of, A, the increase in value of DISH's existing spectrum that would flow from DISH's acquisition of LightSquared spectrum, which would permit unusable and impaired uplink AWS-4 spectrum to be converted to downlink; and B, his range of values for 20 megahertz of LightSquared's downlink spectrum.

In other words, the supplemental value of LightSquared's assets to DISH was estimated by Mr. Ergen to be

between 1.833 and 3.783 billion dollars, combined with a net -- implied net primary asset value of 3.341 billion to 5.213 billion. The total value of LightSquared's assets in DISH's hands was estimated by Mr. Ergen to be between 5.174 billion and 8.996 billion, with a midpoint of 7.085 billion.

On July 21st, 2013, the special committee presented its conclusion to the DISH board, recommending that DISH pursue the LBAC bid for 2.2 billion dollars, subject to five express conditions, four of which implicated further review and decision making by the special committee: one, that any material changes to the terms of the bid and/or APA would be subject to the review and approval of the special committee; two, that DISH would acquire one hundred percent of LBAC to the exclusion of EchoStar; three, that the special committee and its legal and financial advisors would remain involved in all negotiations regarding the proposed transaction going forward; four, that the special committee would review and approve the terms of the acquisition by DISH of Mr. Ergen's interest in LBAC; and five, that the committee expressly reserved the right to obtain all of the requested information regarding Mr. Ergen's acquisition of the debt and/or other securities issued by LightSquared as well as the right to evaluate potential corporate opportunities.

Even though the DISH board resolutions permitted disbandment of the special committee only upon the special

committee's own decision, so long as a bid for LightSquared remained viable, immediately after the special committee delivered its conditional approval of the LBAC bid, the DISH board abruptly disbanded the special committee without advanced notice.

Other than Messrs. Howard and Goodbarn who abstained, the board vote was unanimous.

On July 22nd, 2013, DISH agreed to buy LBAC from Mr. Ergen for one dollar without the special committee ever reviewing the terms of the acquisition agreement. On July 23, 2013, DISH announced its intention to bid through LBAC for LightSquared spectrum.

The special committee had been disbanded, despite the fact that its conditions remain unsatisfied. In particular, the committee had neither negotiated nor approved the draft plan support agreement or the draft asset purchase agreement, which were filed with the Court together with the joint plan of reorganization on July 23rd, 2013, and which explicitly stated they were subject to further negotiation and approval by DISH.

One notable feature of the APA, incorporated by reference into the PSA, was its broad release of all claims against Mr. Ergen, DISH, EchoStar and SPSO, in contemplation of the full allowance of the SPSO claim. The proposal of such a release belies the assertions made by SPSO and DISH that they have no ties to one another, and supports the inference that Mr. Ergen and SPSO were acting for DISH in creating a path

where DISH, through LBAC, could take over as purchaser while still protecting Mr. Ergen from any down side on his substantial investment.

Despite many attempts to characterize it otherwise, the proposal of such a release reveals the strong linkage between SPSO's debt and DISH's bid and the inability to disguise such linkage with so-called separate hats.

While it is not the Court's role to pass judgment on the corporate governance and practices of DISH, the Court nonetheless concludes that the facts surrounding the special committee process show that, notwithstanding the existence of the special committee, Mr. Ergen himself was the driving force behind each step DISH took on the path toward DISH's LightSquared bid, including the actions taken in connection with his evolving acquisition strategy in the spring and summer of 2013.

Although the special committee was created to be independent, the blatant disregard and the conditions set forth in its recommendation for DISH's participation in its LightSquared acquisition, its abrupt dissolution by the DISH board, and its lack of involvement in the negotiations of the LBAC transactional documents, as they evolved in the late summer and into the fall of 2013, despite the explicit board resolutions to the contrary, indicate that the special committee was little more than window dressing.

5. Mr. Ergen was not acting solely on his own behalf in making a "personal bid" or in purchasing LP debt.

Even after acknowledging his change of strategy in April 2013 and his interest in making a bid for LightSquared, and faced with allegations that his debt purchases and the initial LBAC bid remain in contemplation of the potential DISH acquisition of LightSquared spectrum, Mr. Ergen has continued to deny that he acted other than for his own personal benefit.

Specifically, Mr. Ergen steadfastly maintains that he had an interest in purchasing and owning LightSquared spectrum assets personally and was prepared to own and operate a spectrum business himself. In response to the Court's questioning, Mr. Ergen testified that he believes he could operate a spectrum business without creating a conflict with DISH.

At the time of the May 15th LBAC bid, however, Mr. Ergen did not have any financing agreements lined up with investors and had not even received a term sheet related to a possible financing. A draft term sheet was only received by Mr. Ergen on July 18th, 2013 and its draft form indicated that no deal had been reached. Mr. Ergen also stated that at the time of the LBAC bid he had made no decisions about headquarters, employees or management of his personal spectrum company.

Taken as a whole, Mr. Ergen's statements that he was

prepared to run a spectrum business personally, and in competition with DISH, are farfetched, to say the least. Rather, they caused the Court to conclude that, at the time of the April 2013 LP debt purchases and the initial LBAC bid, the intended strategic investor was not Mr. Ergen, but rather DISH.

The evidence demonstrates that Mr. Ergen's substantial investment in LightSquared debt in April 2013 was made in full contemplation and in furtherance of DISH's potential acquisition of LightSquared spectrum.

The Ergen July 8th presentation and the valuation contained therein demonstrate the significant benefit to DISH from acquiring LightSquared spectrum, with the implied net supplemental asset value to DISH which had a midpoint of 2.308 billion dollars alone, coming in above the LBAC bid amount of 2.2 billion dollars, without even looking at the total aggregate value of the spectrum to DISH, which Mr. Ergen estimated at a value of between 5.174 and 8.996 billion. Such an enormous value could not simply have occurred to Mr. Ergen in an epiphany in the days or weeks before making such a detailed presentation to the DISH board. Rather, Mr. Ergen must have perceived the synergistic value reflected in this presentation much earlier, as he monitored the actions of the FCC and the movement of the pieces on the wireless spectrum chessboard, some of which he, himself, was moving.

In their post-trial brief, SPSO and Mr. Ergen also

argue that the evidence does not establish that SPSO's LP debt purchases were for the benefit of DISH because, as an initial matter, purchasing even one-third of the outstanding debt of the company did not confer on SPSO any rights to acquire the company.

As Mr. Ergen himself stated in the Ergen presentation, however, his substantial interests in L2 debt and preferred stock compliment any acquisition strategy and could have significant influence in L2's Chapter 11 cases. A competitor who obtains a substantial position in the debt of a distressed company and then bids for the assets often has a significant advantage which dissuades other bidders from participating in any sale process.

While Mr. Ergen's substantial near par purchases of LP debt in April 2013 are consistent with a plan to obtain a blocking position in order to acquire the underlying company, they are somewhat inconsistent with a personal investment by a typical creditor seeking to make a profit on distressed debt by buying low and selling high.

Indeed, Mr. Ergen's final purchase of LP debt, on April 26, 2013, was made just one week prior to his presentation to the DISH board on May 2, 2013, and less than three weeks before he made the LBAC bid.

While his substantial investment in LP debt reflects, he says, his confidence in the intrinsic value of LightSquared

spectrum assets, it also reflects his certainty that, in this capacity as DISH's controlling shareholder and chairman of its board of directors, he could cause DISH to do what he wanted to affect the acquisition of the assets at a price that would return his investment and possibly make a profit, while also benefiting DISH with valuable spectrum.

And the Ergen July 8th presentation makes clear just how valuable LightSquared spectrum could be for DISH, permitting unusable and impaired uplink AWS-4 spectrum owned by DISH to be converted to downlink and yielding a supplemental value to DISH of 1.833 billion to 3.783 billion dollars.

Given the control Mr. Ergen exercised over the DISH board, as evidenced, in particular, by his bullying of the special committee, it is clear that Mr. Ergen believed that after making the LBAC bid he could and would get DISH to step in as purchaser.

Finally, Mr. Ergen's substantial LP debt purchases are wholly inconsistent with his investing history. The evidence demonstrates that before his investment in LightSquared, Mr. Ergen had a history of diversified investing in conservative low-risk liquid assets, rather than investing a substantial sum in the distressed debt of a single company.

In fact, the evidence reveals that Mr. Ergen had never made a personal investment in distressed debt of anything close to the magnitude of his eventual 844-million-dollar investment

in LightSquared, nor had he ever made a significant personal investment, one, in a competitor of DISH or EchoStar; two, in a company considered a strategic investment for either one; or three, in any company owning spectrum assets. According to Mr. Ergen, he did not even discuss the almost one-billion-dollar investment with his wife, who was also the co-trustee of the fund that funded the purchases.

Mr. Ergen, who testified that, as the chairman of DISH, he focuses on the strategic direction of the company, was clearly planning for DISH, and the inconsistency of his LightSquared investment with his prior investing history only lends further support to the inference that SPSO's debt purchases were made to pave the way for DISH to acquire control of LightSquared's assets.

C) Breach of the implied covenant of good faith and fair dealing.

Based on the foregoing, the Court concludes that the conduct of Mr. Ergen and SPSO, undertaken on behalf of or for the benefit of DISH, was an end run around the eligible assignee provisions of the credit agreement that breached the implied covenant of good faith and fair dealing arising under the credit agreement. See Standard Chartered Bank v. AWB Ltd., 210 WL 532515 (S.D.N.Y. 2010). Simply put, that which a corporation is contractually unable to accomplish itself, in its own name, cannot be accomplished by interposing a shell

company. As the Court stated in Standard Chartered, "It is not a matter of piercing corporate veils. It is a matter of requiring a party to honor the contract and its covenants and not attempt to defeat assigned rights by interjecting an affiliated company."

Under New York Law, every contract contains an implied covenant of good faith and fair dealing in the course of performance. See Empresas Cablevision v. JPMorgan Chase, 680 F. Supp. 2d 625 (S.D.N.Y. 2010). That implied covenant is, in spirit, a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.

In Empresas, a case in this district, District Judge Rakoff found that "conduct technically permissible under a credit agreement may nevertheless give rise to a breach of the implied covenant of good faith and fair dealing if it is intended to achieve a result that is prohibited by the agreement and would do away with the fruits of the contract". Id. at 632.

The facts of Empresas are straightforward. Empresas Cablevision borrowed 225 million dollars from JPMorgan Chase. The governing credit agreement restricted JPMorgan's ability to assign loan to another party without Cablevision's prior written consent. The credit agreement did allow JPMorgan to sell participations in the loan, which it could do without

Cablevision's consent, but only if the relationship between JPMorgan and Cablevision, as well as JPMorgan's rights and obligations under the credit agreement, remained unchanged.

In his decision, Judge Rakoff noted that Cablevision negotiated for and obtained a veto right over assignments in order to protect against the possibility of an unsuitable party being given the rights to enforce restrictive covenants or to receive information under the loan. Subsequently, JPMorgan agreed to assign ninety percent of the loan to Banco Inbursa, a bank under common ownership with a competitor of Cablevision.

After JPMorgan sought Cablevision's consent, Cablevision's counsel replied by letter stating that it would not consent to the proposed assignment because "It would be inappropriate and cause serious harm to our business and our competitive position if one of our major competitors is allowed to gain access to confidential and competitively sensitive information about us, or to exert any control over our business and affairs and hinder the development of our business."

The letter also stated that JPMorgan's sale of a participation of ninety percent of the loan to Inbursa, instead of an assignment, would similarly be unacceptable and would violate the "duty of good faith owed by JPMorgan under the credit agreement".

Notwithstanding, JPMorgan proceeded ahead with negotiating sale of a ninety-percent participation in the loan

to Inbursa and did not disclose the participation to Cablevision, even after the participation agreement was signed. By selling the participation, rather than assigning the loan, JPMorgan avoided the transfer restrictions in the credit agreement that necessitated borrower consent.

When Cablevision learned that the agreement between JP Morgan and Inbursa, it promptly sought a preliminary injunction preventing JP Morgan from effectuating the transfer.

It argued that the participation agreement was, for all relevant purposes, "a disguised but unconsented-to assignment" that breached the credit agreement or that "so subverts the purpose underlying Cablevision's right to veto assignments of the loan as to breach the covenant of good faith and fair dealing implied by law in the credit agreement." Judge Rakoff enjoined the transfer, finding that JPMorgan violated the implied covenant of good faith and fair dealing by attempting, through the "guise of a purported participation" to effectuate a prohibited assignment that it could not have implemented directly.

While the Court observed that JPMorgan's argument that the participation was "technically consistent" with the credit agreement may be "superficially correct," its actions were nevertheless impermissible because they "effectuated what is in substance a forbidden assignment that the transfer restrictions were designed to prevent," thus undermining Cablevision's veto

rights under the credit agreement.

Had the transfer been allowed, the participation agreement would have given Inbursa the potential to access extensive confidential information about the business affairs and financial condition of Cablevision, all of which Cablevision desired to keep its competitors from obtaining.

Thus, the Court granted Cablevision's request for a little near injunction concluding that "JPMorgan violated at a minimum the covenant of good faith and fair dealing automatically implied by law in the credit agreement and "that such an end run, if not a downright sham, was not permissible as it did away with the fruits of the contract."

Here, as in Empresas, in which consent to sell a participation was technically not required by the credit agreement, the Court's finding that SPO (sic) is technically an eligible assignee under the credit agreement might end the analysis, but as in Empresas, contracts must be read in context. The context here requires reading the eligible assignee provision and the rest of the credit agreement in the context of the intent on the part of LightSquared to prevent competitors from gaining access to its capital structure.

This intent was readily apparent from the face of the credit agreement and is overtly evidenced by, one, the language utilized in the definitions of eligible assignee and of disqualified company, which refers to direct competitors of

LightSquared, designed to limit ownership of the LP debt; and two, LightSquared's May 9th and May 12th amendments to the credit agreement to add additional LightSquared competitors, including DISH, to the list of disqualified companies.

As set forth in detail in the findings of fact, which I'm not reading now, pursuant to the credit agreement, eligible assignees are entitled to receive substantial nonpublic information about LightSquared and are granted access to LightSquared's officers and directors for information regarding LightSquared's ongoing business and operations, and they also receive a right to vote on certain material matters, including waivers, exercise of remedies, and other similar matters.

The debtors have appropriately pointed out that one could reasonably expect a competitor to vote differently than a noncompetitor lender on material matters concerning LightSquared, and more significantly, a competitor given access to material nonpublic information about LightSquared may use it to LightSquared's detriment given that a competitor may possess a desire to see LightSquared fail. As a result, LightSquared has a legitimate basis for its desire to prohibit competitors from becoming holders of its LP debt.

The problem is that the credit agreement was not crafted sharply enough to achieve that intent. Moreover, the problem was exacerbated by the lack of action by LightSquared in the face of rampant public speculation about the debt

purchases.

Mr. Ergen found a loophole in the express terms of the credit agreement and exploited it. That is not wrong in and of itself.

The wrong arises from Mr. Ergen's purchases of the LP debt beginning in the spring of 2013 when he intended his substantial interests in the debt to complement any acquisition strategy and have significant influence in the bankruptcy cases. He intended and preferred that are it be DISH that acquired LightSquared's spectrum and he pursued such purchases to preserve valuable options for the benefit of DISH.

These purchases violate the spirit of the credit agreement, as the harm that LightSquared sought to avoid, a competitor entering its capital structure and acting against its interests, has now come to pass. Mr. Ergen's use of SPSO to evade the terms of the credit agreement that prevented him and DISH from buying the LP debt, thus deprive LightSquared of the fruits of the credit agreement's restrictions.

While technically permitted to buy LP debt, SPSO was essentially a front used by Mr. Ergen to implement his strategy to the benefit of DISH, a forbidden lender under the credit agreement. That SPSO's strategy was formulated specifically to chief an end run around restrictions in the credit agreement is amply supported by the record.

The Court concludes that at least as of mid-April 2013 during the period in which SPSO acquired an additional 320

million dollars of LP debt Mr. Ergen, through SPSO, was not acting on his own behalf to acquire LP debt as a personal investment. Rather, he was acting to acquire a strategic advantage which he knew he would have to tender to the DISH Board to give DISH the option of acting via the vehicle of a bid for LightSquared's spectrum assets, which were clearly attractive to DISH whether or not DISH consummated a transaction with Sprint.

The record also supports the conclusion that Mr. Ergen's strategy was deployed on behalf of DISH as early as October 2012 when he told Mr. Kiser "if we can't be sure the company can buy them, then I am interested to increase my position at the seventy-five level at least up to a thirty-three percent ownership level of the class." Simply put, had he been advised that DISH could buy the LP debt, Mr. Ergen's words reflect that his preference that DISH, the preferred purchaser, buy the debt. But having identified a roadblock in the credit agreement, Mr. Ergen simply created a special purpose vehicle, drove around the roadblock, and took an alternate route to his destination.

Nor can it be seriously maintained that Mr. Ergen did not personally direct and indeed control virtually every aspect of the process leading to the formulation of the LBAC bid in its ultimate pursuit by DISH. From his stunning lack of candor with the DISH Board and management to the stonewalling and

disbanding of the special committee, the message is loud and clear. No one crosses or even questions the actions of the chairman. Charles Ergen is, in every sense, the controlling shareholder of DISH and wields that control as he sees fit. His acquisition through SPSO of the LP debt violated the covenant of good faith and fair dealing, automatically implied by law in a credit agreement.

Indeed, the extent to which DISH believed an end run around the terms of the credit agreement was perfectly acceptable was made crystal clear during closing arguments. When asked by the Court if an affiliate of DISH could have purchased LP debt without running afoul of the credit agreement, counsel for DISH agreed "based on the words of the contract".

After a further hypothetical situation was posed to counsel, if SPSO had hypothetically a side agreement with DISH, that DISH would guarantee the return of DISH's capital on his investment of LP debt, counsel responded that he still believed that SPSO would not have breached the credit agreement under such a scenario, even if SPSO was hedged with a disqualified company such as DISH.

DISH's view, in other words, is that, if the credit agreement does not explicitly prohibit a particular transfer by its express terms, any contrivance or subterfuge to avoid running afoul of those express terms is A-okay. This cannot be

correct.

Finally, defendants' attempts to distinguish Empresas are unavailing. They argue that Empresas is entirely different from this case because in Empresas, JPMorgan colluded with Inbursa to alter fundamentally the agreement between Cablevision and JPMorgan, and Inbursa actively bargained for nonstandard provisions in the participation agreement with JPMorgan, both facts which are not present here.

Regardless of whether collusion occurred here or not, and there have been no allegations that Mr. Ergen in fact colluded with any lenders from whom he purchased LP debt, and notwithstanding the fact that SPSO's LP debt purchases were made under standard terms, the violation of the spirit of the credit agreement in each case remains the same.

Having been informed more than once that DISH and EchoStar could not purchase the LP debt under the express terms of the credit agreement, Mr. Ergen sought to do indirectly what he knew was not permitted directly. As in Empresas, although the LP debt purchases by SPSO may have appeared "superficially permissible", those purchases which by April 13th were made essentially for DISH in contemplation of a potential DISH acquisition were intended to circumvent the creditor agreement's restrictions on transfers to DISH.

Contrary to defendant's assertions, the restrictions on competitors becoming lenders were bargained for by

LightSquared in the same way that Cablevision bargained for the right to veto assignees, but neglected to include such provision the right to veto parties' purchasing participations.

SPSO must be held accountable for its conduct in context. Mr. Ergen's multiple hats, personal, SPSO, LBAC, DISH, cannot be selectively deployed to disguise SPSO or insulate SPSO from responsibility for its actions in using a guise to achieve an end run around the substance of the eligible assignee restrictions in the credit agreement, and undercut what Mr. Ergen certainly knew the restrictions were designed to prevent.

IV. SPSO'S CLAIMS SHOULD NOT BE DISALLOWED.

A) SPSO's LP debt claim is not void or voidable even if the court were to have found an express breach and even though the court finds an implied breach.

Section 502 of the Bankruptcy Code provides that a properly filed proof of claim is deemed allowed unless a party-in-interest objects, 11 U.S.C. 502(a). Various other subsections of Section 502 set forth the grounds for disallowing a claim, including Section 502(b)(1), which authorizes disallowance because the claim is unenforceable under any agreement or applicable law. Section 502(b) provides "the court shall allow such claim in such amount except to the extent that, one, such claim is unenforceable against the debtor and property of the debtor under any agreement or

applicable law."

SPSO maintains that even if it was not an eligible assignee, the SPSO claim would still be enforceable against the LightSquared estate, as nothing in the credit agreement treats transfers as void or voidable even if they are made in violation of the transfer restrictions.

The Court concludes that SPSO is correct on this point. Even if the Court had found that SPSO breached the express terms of the credit agreement and was not an eligible assignee, the plain language of the credit agreement does not support disallowance of the SPSO claim.

Plaintiffs argue that the credit agreement provides that a transferee, who is not an eligible assignee, acquires no rights under the credit agreement, and therefore, such transferee cannot assert a claim against the company with respect to any purchase of the LP debt.

Accordingly, they argue any claim of SPSO based on the credit agreement must be disallowed. In support of this argument, plaintiffs rely on Section 10.04(a) of the credit agreement which provides that "nothing in this agreement express or implied shall be construed to confer upon any person other than the parties hereto, their respective successors and assigns permitted hereby, participants to the extent provided in paragraph D of this section, and to the extent expressly contemplated hereby the other indemnities any legal or

equitable right, remedy or claim under or by reason of this agreement."

As Mr. Ergen and SPSO point out, however, plaintiffs failed to mention that other relevant provisions of the credit agreement, which provide that any breach by a lender or participant of the transfer restrictions under the credit agreement, does not excuse performance by LightSquared.

Specifically, Section 10.04 of the credit agreement provides in pertinent part that LightSquared "agrees that any breach by any lender or participant or subparticipant of the restrictions on assignment hereunder shall not excuse in any respect performance by the borrower under the loan documents.

Contrary to plaintiff's argument, Section 10.04(d) of the agreement makes clear that neither a breach of the express terms of the credit agreement nor a breach of the implied covenant of good faith and fair dealing renders wrongfully transferred debt claims unenforceable against LightSquared and therefore disallow it. SPSO also points out that similar language has been found insufficient to invalidate transfers. See LCE Lux HoldCo v. Entretenimiento GM de Mexico, 287 F.R.D. 30 (S.D.N.Y. 2012).

Under any circumstances, even in the case of an express breach, in order for a claim to be disallowable, the contract must expressly provide that any breach of the contract such as an assignment in violation of the agreement shall

render the assignment wholly void or invalid. See In re: 785 Partners LLC, 2012 Westlaw 401, 497, (S.D.N.Y 2012) citing Pravin Banker Associates v. Banco Popular, 109 F.3d 850 (2d Cir. 1997), assignment of loan is valid rendering the assignee a secured creditor and party-in-interest in the bankruptcy even if the assignee did not meet the definition of an eligible lender where the contract language invalidating improper assignment. See also -- see Purchase Partners LLC v. Federal Savings Bank, 914 F.Supp 480 (S.D.N.Y. 2012), contractual provisions prohibiting assignment are not enforceable except where "the relevant provision of the contract contains clear, definite, and appropriate language declaring an assignment invalid".

Here, the credit agreement does not contain clear language voiding an assignment to a party that is not an eligible assignee, or invalidating a claim by such party relating to the credit agreement. Thus, even if the Court had found that SPSO is not technically an eligible assignee under the express terms of the credit agreement, the SPSO claim would not be void or voidable.

B) The inaction and delay of LightSquared and Harbinger preclude the award of affirmative damages.

Beginning in May 2012, LightSquared and Harbinger new or had strong reason to believe that Mr. Ergen was the purchaser of LP debt. Substantial documentary evidence in the

record reflects that at a minimum, beginning with the sale of Carl Icahn's 247 million dollar LP debt position to a Sound Point client on May 4th, 2012, which was reported in the press, the debtors and Mr. Falcone harbored serious suspicions that Mr. Ergen had entered LightSquared's capital structure. For example, on May 5th, 2012, Mr. Falcone responded to an e-mail from a LightSquared creditor writing, "Maybe we shouldn't file if Ergen is circling the wagons, though I think it a positive, may bring in another strategic".

Falcone's e-mail to Ara Cohen of Knighthead, Mr. Marc Montagner of LightSquared to Stan Holtz of Moelis, "Ketchum, with his 175 million dollar fund, bought 350 of the debt on Friday. He is probably a front for Charlie Ergen."

Falcone to Ara Cohen, "I can understand why you guys balked. Charlie will definitely give you guys twenty-five percent and an independent board and your full claim." Sarcasm aside, Mr. Falcone surmised that the buyer of LP debt was Mr. Ergen, was also set forth in a number of e-mails he sent to members of the press. See Falcone to Matthew Goldstein of Thompson Reuters, "Ergen will prompt more strategics to step in."

May 16th, Falcone to Greg Bensinger of the Wall Street Journal, "Carlos Slim apparently involved with Ergen as purchasers of LP debt, and after questions from Bensinger adding that "he clearly wants the spectrum and the satellites.

Let me know before I tell someone else if you are going to write anything."

After sending these e-mails, Mr. Falcone testified he understood that the Wall Street Journal may write an article based on the information provided.

LightSquared and Harbinger attempt to explain such e-mail correspondence as either idle banter or, with respect to the media, a fishing expedition to prod for information on the identity of the buyer.

When asked at trial about his e-mails to Mr. Bensinger of the Wall Street Journal about Mr. Ergen and Carlos Slim, Mr. Falcone explained that he was "trying to get Bensinger to get information for me to confirm because, before he does anything, he's got to go out and corroborate."

Other e-mails touting Mr. Ergen as a purchaser were, according to Mr. Falcone, sent either, one, to fish for information or, two, in the hope that Mr. Ergen's presence would get other competitors interested in LightSquared as strategic investors. For example, on October 4th, 2012, Mr. Falcone emailed Omar Jaffrey, a banker, telling him "you may want to circle up with your contact at AT&T and let him know Ergen continues to buy bonds."

At trial, Mr. Falcone explained that in sending this e-mail he was fishing for information to "corroborate what he believed", and he was also hoping Mr. Jaffrey could "get AT&T

involved because LightSquared was looking for strategic investors at the time." As Mr. Falcone testified to "have a strategic kind of kicking the tires on your company validates the asset and it may bring in, it may prompt other strategics to get involved."

None of these e-mails reflects alarm on the part of Mr. Falcone or LightSquared that a competitor who might act against LightSquared's interests had likely entered its capital structure or that the uncertainty of such party -- the uncertain identity of such party was troubling to them.

Quite the contrary, the correspondence and evidence reveals that Mr. Falcone conveniently used his suspicions of Mr. Ergen's trading in LP debt as an item to publicize in order to drum up possible interest in LightSquared from strategic investors, some of whom themselves were LightSquared competitors.

And as the trading price of LP debt increased from forty-eight cents on the dollar in April 2012 to ninety-six cents on the dollar in April 2013, Mr. Falcone seemed even less inclined to complain about the allegedly harmful presence of a competitor in the capital structure.

Even as late as March 28th, 2013, Mr. Falcone and Drew McKnight of Fortress both expressed in an e-mail chain their views that it was beneficial that a potential strategic investor, Mr. Ergen, was also buying LightSquared preferred

stock in addition to LP debt. Mr. Falcone explained at trial that he considered this a validation of spectrum value, and in addition, as stated in the e-mail exchange, he felt that Mr. Ergen's LP debt acquisition could help blow up the ad hoc secured group unless Mr. Ergen joined them.

Well, he denied at trial that he knew the details of the exclusivity stipulation between the debtors and the ad hoc secured group, which required the debtors to start preparatory work on a sale process on June 3rd, 2013 and to formally commence a sale process on July 15th, 2013 upon the termination of exclusivity if the ad hoc secured group still remained the largest holder -- holders of LP debt and no consensual deal between the parties had been achieved. Mr. Falcone admitted that he understood that such requirement would fall away if Mr. Ergen became the largest holder of LP debt.

At trial Mr. Falcone maintained that depending on the day and the information he received, his belief changed as to who was behind Sound Point's purchases. For example, when asked on May 9th, 2012 if he still believed that it was Mr. Ergen buying the LP debt, he answered, I don't know if it was the Carlos Slim and Charlie Ergen day, but it could have been one or the other. Also, I just didn't know, you know, depending upon, at this point in time, what minute of the day it was, I had believed on the one hand it could be AT&T, and then six minutes later, I changed my mind, I think it's Ergen.

Notwithstanding the contention that Mr. Falcone and LightSquared were unsure whether the purchaser of the LP debt was related to DISH rather than Carlos Slim, the owner of one of the largest telecommunications empires in the world, or Cablevision, one of the largest cable providers in the United States and a disqualified company, all competitors of LightSquared suggests that LightSquared was not overly concerned about the presence of any of these parties in its capital structure.

In fact, the addition of DISH to the credit agreement's list of disqualified companies on May 9th, 2012 appears to have been pursued by Mr. Falcone, at least partially in spite, to trap Mr. Ergen in a minority position in the LP debt after he had acquired Mr. Icahn's position. On May 6th, 2012, after learning of the purchase of Mr. Icahn's 247 million dollar position in the LP debt, Mr. Falcone wrote to Ara Cohen of Knighthead, "Well, I'm working on giving Ergen a nice surprise by adding DISH to the list of disqualified companies."

Despite the significant amount of documentary evidence indicating that they knew or should have known, LightSquared and Harbinger maintain that it was not until May 21st, 2013 that they first received confirmation that Mr. Ergen was the party behind SPSO's purchases of LP debt. They argue that prior to being informed by SPSO's counsel on May 21st, 2013 public information provided them with no certainty as to who

was behind SPSO's purchases. They emphasized the widespread speculation in the media and that news reports, blogs, and rumors at various times pointed to Carlos Slim, the Dolan family or Mr. Ergen as the purchaser.

Moreover, LightSquared and Harbinger maintain that they made diligent efforts to determine who was behind Sound Point's purchases of LP debt, pointing to, among other things, voicemails left by Mr. Montagner for Mr. Ketchum, efforts by Moelis to obtain information from Mr. Ketchum and from Willkie Farr, their attempts through UBS, and Mr. Falcone's efforts to reach out to people on the street such as reporters, Mr. Cullen, and representatives of AT&T and Sprint.

Notwithstanding the fact that beginning in May 2012 there was a long history of speculation in the express but no definitive confirmation that Mr. Ergen was the purchaser, it is clear from the totality of the evidence that for nearly a year LightSquared knew or had reason to believe that Mr. Ergen was behind SPSO.

Despite LightSquared's protestations that it attempted to ascertain the identity of the purchaser and the efforts to which it points, the fact remains that LightSquared, a Chapter 11 debtor, did nothing to seek to obtain that information through the many tools available to it under the Bankruptcy Code, including Bankruptcy Rule 2004, or to seek any relief from this Court with respect to the debt purchases by SPSO,

which requested relief may have included a motion to enforce the restrictions in the credit agreement or an injunction similar to that obtained in Empresas.

In fact, there appears to have been a certain degree of ambivalence as to whether the presence of Mr. Ergen was a positive or a negative for LightSquared, one, in its search for strategic investors, and two, in terms of the implication of Mr. Ergen's holdings under the requirements set forth in the exclusivity stipulation. Regardless of LightSquared's ultimate view, what is clear is that no action was ever taken.

LightSquared's breach of contract allegations have been asserted too late in the game to be actionable. The equitable doctrine of laches requires that the following elements be shown: one, conduct giving rise to the situation complained of; two, delay by the plaintiff in asserting a claim despite the opportunity to do so; three, lack of knowledge on the defendant's part that a claim would be asserted; and four, injury or prejudice to the defendant if relief is granted to the plaintiff. Caldor v. S Plaza Associates, 217 B.R. 121 (S.D.N.Y. 1998).

To equitably estop a plaintiff from asserting its claim, a defendant must demonstrate that the complaint of, one, made a false representation or concealed material facts; two, intended that such conduct would be acted upon by the defendant; and three, had knowledge of the true facts. In

their answer to LightSquared's complaint, SPSO and Mr. Ergen raise each of these equitable doctrines and others as defenses barring any recovery against them.

The Court finds that while all the elements of the doctrines of laches or equitable estoppel have not been met, sufficient elements of each doctrine have been satisfied to conclude the pursuit or award of affirmative damages to LightSquared and Harbinger with respect to SPSO's conduct in acquiring LP debt.

The Court has concluded that LightSquared and Harbinger knew or had strong suspicions that Mr. Ergen was behind SPSO's purchases through Sound Point. Yet, even assuming any uncertainty on the part of LightSquared and Harbinger, they failed to act to confirm the identity of the purchaser of the LP debt, and once confirmed, they failed to take any action to prevent Mr. Ergen from closing trade after trade, instead delaying in filing of suit until after Mr. Ergen had acquired 844 million dollars in LP debt and made a bid for LightSquared's assess.

Meanwhile, for over one year, SPSO had purchased its LP debt and other than in connection with the bundled March 28th trade never heard a peep of protest from LightSquared. As far as SPSO can reasonably conclude, the debtors appeared to have no concern about SPSO's status as purchaser. Such inaction and delay now preclude the Court from making an

affirmative award of damages to LightSquared on account of Mr. Ergen's conduct.

V -- do you need a drink, Mr. Dugan?

MR. DUGAN: Thank you.

THE COURT: V. SPSO'S CLAIM SHOULD BE EQUITABLY SUBORDINATED TO THE EXTENT OF INJURY CAUSED TO INNOCENT CREDITORS.

Although SPSO cannot be found to have breached the technical requirements of the credit agreement, its conduct and that of its principal are nonetheless far from blameless.

Mr. Ergen's carefully crafted and strategically deployed decision to acquire the LP debt, despite the restrictions in the credit agreement, and in furtherance at least as of April 2013 of his strategic objective to acquire LightSquared's assets for DISH, supports equitable subordination of SPSO's conduct to the extent creditors have been injured by such conduct.

Moreover, as discussed in detail below, SPSO's additional misconduct in connection with the delayed closing of hundreds of millions of dollars of LP debt trades and its stunning lack of candor on this issue provides an additional basis for equitable subordination of its claim. Taken as a whole, SPSO's conduct not only violates the covenant of good faith and fair dealing implied in all contracts but also constitutes an affront to the duty of good faith imposed on

those who participate in Chapter 11 proceedings.

A) Applicable law.

Bankruptcy courts have brought equitable powers and have the ability to invoke equitable principles to achieve fairness and justice in their reorganization process. See Momentum Manufacturing v. Employees Creditors Committee, 25 F.3d 1132 (2d Cir. 1994). See also Law v. Siegel, 134 S.C. 1188 (2014).

The doctrine of equitable subordination codified in section 510(c) of the Bankruptcy Code is one such equitable power that the Bankruptcy Court may employ to rearrange the priorities of creditors' interests and to place all or part of a wrongdoer's claim in an inferior status in order to achieve a just result in the reorganization of a debtor.

The equitable subordination doctrine empowers the Bankruptcy Court to consider "whether notwithstanding the apparent legal validity of a particular claim, the conduct of the claimant in relation to other creditors is or was such that it would be unjust or unfair to permit the claimant to share pro rata with the other claimants of equal status. In re: Adler, Coleman Clearing Corporation, 277 B.R. 520 (S.D.N.Y. 2002), citing 80 Nassau Associates, 169 B.R. 837 (S.D.N.Y. 1994), In re: Enron Corporation, 169 B.R. 837, In re: Enron Corporation, 333 B.R. 205 (2005).

First articulated in the seminal case Pepper v.

Litton, 308 U.S. 295 (1939), the doctrine itself empowers the Court to look beyond the apparent facial validity of a claim and evaluate the conduct giving rise to the claim.

The test for equitable subordination was originally articulated in Benjamin v. Diamond, In re: Mobil Steel, and has since been adopted by courts in the Southern District of New York. See 80 Nassau Associates, Adler, Enron, ABF Capital Management v. Kidder Peabody, also known as In re: Granite Partners.

As such, in order for this Court to exercise its power of equitable subordination, three conditions must be satisfied: one, the claimant must have engaged in some type of inequitable conduct; two, the conduct must have resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and three, equitable subordination of a claim must not be inconsistent with the provisions of the Bankruptcy Act.

In determining whether these three conditions are satisfied, Mobil Steel instructs the Court to be mindful of three principals. First, inequitable conduct directed against the debtor or its creditors may be sufficient to warrant subordination of or a claim irrespective of whether it was related to the acquisition or assertion ever that claim. Second, a claim or claim should be subordinated to the extent and only to the extent necessary to offset the harm which the

debtor and its creditors suffered on account of the inequitable conduct. And third, an objection on equitable grounds must contain some substantial factual basis to support its allegations of impropriety.

Prong 1, inequitable conduct. Prong 1 of the Mobil Steel test requires a showing that the claimant engaged in some type of inequitable conduct. Inequitable conduct is not limited to fraud or breach of contract. Rather, it includes even lawful conduct that shocks one's good conscience. As Judge Bernstein noted in 80 Nassau Associates, inequitable conduct means, among other things, a secret or open fraud, lack of faith or guardianship by a fiduciary, an unjust enrichment, not enrichment beau chance, astuteness or business acumen but enrichment through another's loss brought about by one's own unconscionable, unjust, unfair, close or double dealing, or foul conduct.

Traditionally, equitable subordination was inapplicable to ordinary creditors as opposed to insiders, but it is now well settled that the doctrine applies to general creditors or noninsiders, though the circumstances warranting equitable subordination of a noninsider's claim arise less frequently because the opportunities for abuses triggering equitable subordination tend to be more readably available to insiders.

In order to identify the precise type of conduct

supporting equitable subordination of noninsider's claim, some courts have applied a heightened standard of wrongdoing, the majority requiring conduct that is gross and egregious. However, courts in this district have held that there is no different or heightened standard by which to judge a noninsider's conduct, though there may be fewer traditional grounds available because neither undercapitalization nor breach of fiduciary duty applies to the conduct of a noninsider. Unless the noninsider has dominated or controlled the debtor to gain an unfair advantages, the type of inequitable conduct that justifies subordination of a noninsider's claim is breach of an existing, legally recognized duty under contract, tort or other area of law.

In commercial cases, the proponent of equitable subordination must demonstrate, for example, "a substantial breach of contract and advantage taking by the creditor". Where a proponent is able to establish inequitable conduct in connection with contractual obligation, courts have granted equitable subordination. See In re: Model Imperial holding that a creditor's creation of a scheme to circumvent contractual obligations including negative covenants in the loan documents, which provided it with an unfair advantage, warranted equitable subordination of its allowed claim.

In the absence of a contractual breach, the proponent must demonstrate fraud, misrepresentation, estoppel or similar

conduct that justifies the intervention of equity. 80 Nassau Associates, Accord Lois U.S.A. A violation of the implied covenant of good faith and fair dealing may provide a grounds for equitable subordination. See Lois U.S.A. Declining to make a substantive determination with respect to the extent to which a claim for violation of the covenant of good faith and fair dealing would support equitable subordination, pending further development of the facts but noting that if proven, such conduct may justify equitable subordination.

See also Enron, 333 B.R. 220, holding that Section 510(c) of the Bankruptcy Code affords the court discretion when considering subordination of claims based on common law concepts of the equitable doctrine and stating that the Bankruptcy Court has the equitable power to circumstances surrounding any claim to see that injustice or unfairness is not done. Accordingly, creditor misconduct in connection with a Chapter 11 process itself, irrespective of applicable nonbankruptcy law, provides an appropriate creditor for equitable subordination of such creditor's claim.

Prong 2. Injury. Once inequitable conduct has been found, the court must next determine whether the claimant's conduct caused injury to the debtor or its creditors or resulted in an unfair advantage to the claimant. Mobil Steel, 563 at 700. For a creditor to have achieved an unfair advantage as required under the Mobil Steel test, there must

have been a benefit to the creditor. In turn, for equitable subordination to be warranted, such a benefit or unfair advantage must have resulted in an injury to the debtor or its creditors. Without injury, there would be no reason to equitably subordinate a claim. See 9281 Shore Road Owners Corp v. Seminole Realty. See also In re: Marketex Holdings Corporation.

Equitable subordination requires injury and an unfair advantage because subordination is a remedial measure designed to offset the harm resulting from the inequitable conduct. It is not penal in nature. See Mobil Steel, "a claim or claims should be subordinated only to the extent necessary to offset the harm which the bankrupt and its creditors suffered on account of inequitable conduct."

In calculating the extent to which a claim should be subordinated, the Bankruptcy Court should "attempt to identify the nature and extent of the harm it intends to compensate in the manner that will permit a judgment to be made regarding the proportionality of the remedy to the injury that has been suffered by those who will benefit from the subordination. In re: Papercraft v. Citicorp Venture Capital, 2002 WL 34702177 (W.D. Pa. 2002).

While the harm and amount of injury should be based on the supportive evidence in the record, the remedy of equitable subordination should remain flexible to deal with the

inequitable conduct at issue.

As the court noted in In re: Teltronics Services, Inc., the remedy of equitable subordination must remain sufficiently flexible to deal with manifest injustice resulting from the violation of the rules of fair play. Where ingenuity spawns unprecedented vagaries of unfairness, bankruptcy courts should not decline to recognize their marks nor hesitate to turn the twilight for offending claimants into a new dawn for other creditors. 29 B.R. 139 (E.D.N.Y. 1983). Because equitable subordination is remedial rather than punitive in nature, the extent of equitable subordination of a claim is not related to the amount paid for the claim by the offending claimant.

Purpose of equitable subordination is to protect creditors against unfairness and to restore creditors to the position they would have been in if the misconduct did not occur. As such, there is no justification for linking equitable subordination of claim to the amount the creditor paid for the claim or the profit the creditor received or may receive from such purchase. If the injury sustained by the estate or other creditors is greater, the equitable subordination should be greater. Conversely, if the injury to creditors is less than, then the profit realized by the offending creditor, the extent of equitable subordination should be less. Simply put and contrary to Papercraft, there

is no nexus between the amount a creditor pays for its claim and the amount of injury sustained by other creditors of the estate as a result of the creditor's misconduct.

Indeed, capping the recovery on a creditor's claim to the amount it paid for the claim is inconsistent with the notion that equitable subordination is remedial in nature. Rather, the court should engage in an evaluation of the harm that the estate's other creditors suffered as a result of the creditor's misconduct based upon the supportive evidence of the record.

Nonetheless, Papercraft identifies three categories of economic harm that provide a useful template for determining the extent of equitable subordination: one, quantifiable monetary harm that results from delay; two, harm that results from uncertainty; and three, harm that results from delay that can be measured by professional fees and administrative expenses incurred by the estate as a result of the litigation.

The facts of Papercraft, a ten-year litigation saga that resulted in a suite of eight decisions, are instructive. Citicorp Venture Capital, CBC, an insider and fiduciary of the debtor Papercraft attempted to take control of Papercraft's assets and obtain a significant profit of the expense of other creditors by secretly purchasing claims against Papercraft for a deeply discounted amount and then objecting to the confirmation of a plan of reorganization proposed by the debtor

in favor of a competing plan favoring CBC. Papercraft's unsecured creditors committee filed a motion for summary judgment, seeking to limit the allowance of claims held by CBC.

The bankruptcy court issued a memorandum, opinion, and order finding that the purchases at issue were all found to have occurred during the seven-month period between the time the debtor filed its plan of reorganization and the time it filed its disclosure statement, and therefore, CBC's purchases at a discount, without disclosure, while an insider, constituted breaches of CBC's fiduciary duty to Papercraft. Accordingly, the Bankruptcy Court limited CBC's allowed claim and distribution in the plan to the purchase price of the claim.

After a trial on the issue of equitable subordination of CBC's claim, the court withdrew and vacated its prior decision, finding that CBC breached its fiduciary duty to the debtor as an insider for failing to disclose its identity in purchasing the claims and as an equitable subordination remedy limiting CBC's claim to the extent of the purchase price of the claim. But the Bankruptcy Court declined to equitably subordinate CBC's claim holding that further subordination of CBC's thus limited claims, pursuant to the principles of equitable subordination, was not appropriate because the Bankruptcy Court was already limiting CBC's allowed claim to the amount it paid for such claim.

The parties then cross appealed, and on appeal, the district court affirmed the Bankruptcy Court's factual findings that CBC had acted inequitably and caused injury to Papercraft and its creditors and gained an unfair advantage and agreed with the Bankruptcy Court's finding that CBC's claim should be limited to the amount it paid for such claim so as to eliminate any potential profit.

The district court reversed the Bankruptcy Court on the issue of further subordination and held that any subordination beyond the limitation of CBC's recovery to the amount paid for such claim should be supported by factual findings and reconciled with principles of equity. Accordingly, the district court remanded the Bankruptcy Court for a further finding on the extent to which CBC's allowed claim should be equitably subordinated.

On remand, the Bankruptcy Court found that CBC's recovery would be further subordinated for, one, additional administrative expenses incurred during the delay caused by CBC; two, interest in dividends lost by creditors during delay; and three, professional fees and expenses incurred and/or paid by the estate.

I'm sparing you a million citations.

Additional appeals ensued and the district court affirmed the Bankruptcy Court's decision but reduced the lost interest component of the subordinated claim.

Ultimately, the Third Circuit upheld the additional subordination of CBC's claim for attorney's fees, reasoning that the Bankruptcy Court did not award a monetary judgment for attorney's fees to penalize CBC but rather to return to other creditors the position they would have been in had CBC not acted inequitably and affirmed the district court's reduction of the lost interest component of CBC's subordinated claim.

In determining the amount of harm, the Bankruptcy Court in Papercraft explained that it need not arrive at a figure with precise accuracy and that any difficulty in precisely quantifying the harm should not go down to the benefit of the wrongdoer.

Prong 3. Consistency with the Bankruptcy Code. The third prong of the Mobil Steel test acknowledges that equitable subordination cannot be used to alter the statutory scheme imposed by bankruptcy law. Accordingly, while a Bankruptcy Court can apply the equitable doctrine at its discretion, it's power to subordinate and allow a claim is not boundless, and courts cannot use equitable principles to disregard unambiguous statutory language in the bankruptcy code.

The application of the third prong of the Mobil Steel test ensures that the full breadth of the remedy of equitable subordination is available while ensuring that its reach does not violate any provision of the Bankruptcy Code or become punitive as opposed to remedial. The requirement that

subordination be consistent with bankruptcy law comes into play only after the court has concluded that the first two prongs have been satisfied.

By virtue of the codification of the doctrine in Section 510(c) of the code, the third prong of the Mobil Steel doctrine warrants little attention.

B) Mobil Steel prong 1, SPSO's inequitable conduct.

1. Breach of the implied covenant of good faith and fair dealing.

As the Court has found, Mr. Ergen's acquisition of the LP debt through SPSO violated the spirit and purpose of the credit agreement's restrictions designed to prevent competitors from purchasing LP debt and breached the credit agreement's implied covenant of good faith and fair dealing. This Court has held that a violation of the implied covenant of good faith and fair dealing may provide grounds for equitable subordination.

Although many aspects of SPSO's conduct are, as has been suggested, perfectly lawful, including making purchases anonymously, acquiring a blocking position, and making an unsolicited cash bid for distressed assets, its purchases of LP debt in order to preserve a strategic option for the benefit of DISH, a disqualified company, violated the spirit of the credit agreement's restrictions on competitors owning LP debt. Such conduct, as described more fully above, constitutes inequitable

conduct sufficient to warrant the imposition of equitable subordination of the SPSO claim.

2. SPSO through the conduct of Kiser and Ketchum purposefully delayed the closing of LP debt trades.

In addition to SPSO's inequitable conduct in acquiring the LP debt, SPSO also engaged in inequitable conduct by effectively sidelining hundreds of millions of dollars of LP debt during the weeks and months leading to the court sanction, termination of exclusivity, on July 15th, 2013, all while SPSO, Mr. Ergen and eventually LBAC and DISH fine-tuned their bid strategy. SPSO, through Mr. Ergen, did so by purposefully delaying the closing of LP debt trades in the face of repeated demands to close and despite the ready availability of the funds necessary to close.

Even if SPSO's acquisition of LP debt was faultless, its intentional delay in closing its trades of LP debt alone is sufficient to constitute the type of inequitable conduct necessary for the imposition of equitable subordination by the Court. The evidence of purposeful delay could not be more clear.

SPSO was formed by Mr. Ergen with an initial capital contribution of only ten dollars and its operating agreement did not require additional capital contributions from Mr. Ergen as managing member.

Even though Sound Point knew that SPSO was funded with

an insufficient amount of initial capital to buy a significant amount of LP debt, it nevertheless traded for SPSO because Mr. Ketchum understood that SPSO was backstopped by Mr. Ergen. The evidence establishes that after Sound Point executed a trade for SPSO, the trade would be funded only very shortly before or on the closing date.

At that time Mr. Kiser would contact Mr. Ergen's asset manager, Bear Creek Asset Management, and tell Bear Creek how much money was needed to close the trade, after which Mr. Ergen would then authorize the wire transfer and Bear Creek would liquidate investments to fund the transfer. Liquidity was not created by Mr. Kiser immediately upon placing a trade. Rather, as admitted by Mr. Kiser at trial, only after delaying for as long as possible on closing a trade were the funds for the purchase wired for closing. Of the twenty-five trades entered into by SPSO for purchases of LP debt, eighteen of them took over two months to settle, and of those eighteen trades six took over four months to settle.

By May 20th, 2013, SPSO had contracted for, but had failed to settle approximately 593,757,000 dollars in face amount of LP debt trades and approximately 610 million dollars, counting trades held by brokers on that date, more than thirty-three percent of the total outstanding amount of LP debt obligations, and had kept open a number of trades that it had entered into as far back as December 12th, 2012. Mr. Kiser

explained the delays as stemming from the fact that he and Mr. Ergen were not in any rush to close the LP debt trades. In their view, the trades "didn't need to be closed until you absolutely had to" as there was "wasn't an economic benefit to doing it."

As Mr. Kiser testified, Mr. Ergen was getting a return on his capital and his investment. So if he didn't have to pay for it and he can make money on another end where his money was invested, that seemed like a smart move. The documentary evidence on this point is to the contrary, as bank statements produced by Bear Creek indicate that Mr. Ergen earned a relatively low rate of interest on the funds in his trust accounts. In addition, there were economic penalties imposed on SPSO for leaving LP debt trades open for an extended period of time, including having to forego adequate protection payments. This fact further undermines the economic explanation advanced by Mr. Kiser to explain the delay.

Moreover, no evidence was introduced that either Mr. Ergen or Mr. Kiser took the possibility of a penalty to SPSO into account in determining, one, when to close unsettled trades, or two, which of Mr. Ergen's investments to liquidate to pay for SPSO's debt trades, despite the fact that Messrs. Ergen and Kiser had been made aware of how the adequate protection payments worked.

Bear Creek, which independently selected which of Mr.

Ergen's assets would be liquidated to fund the trades, was not even made aware that SPSO would have to pay cost of carry fees and forego adequate protection payments if the LP debt trades were not closed by a certain date. In fact, there is no evidence that any analysis at all was done by Mr. Ergen, Mr. Kiser or Bear Creek to determine the return on any of the assets in Mr. Ergen's personal trust to determine which assets to liquidate for closing. The economic benefit justification for delaying the closing of trades simply does not pass muster.

Liquidity concerns were another purported reason for the delayed closing of the LP debt trades, according to Mr. Kiser. At trial Mr. Kiser first denied that liquidity reasons caused any delays, until he was reminded that he had testified otherwise at his deposition when he suddenly recalled giving that as an explanation. Asked if there was ever a time when Mr. Ergen lacked the liquidity to promptly close a trade, Mr. Kiser testified at trial that where Mr. Ergen may not have had funds available, yes, that occurred.

Mr. Kiser equivocated, however, when pressed as to whether he could identify any investments that Mr. Ergen would have needed to exit, which would have taken longer than three days, saying, it depended. Mr. Ergen had things that were all over the gamut of types of investments. Some were a lot less liquid.

Mr. Kiser's testimony on the liquidity issue lacks

credibility. And even Mr. Ergen admitted that as far as he knew, there was not a delay in closing because of any liquidity issue, stating that "I don't believe other than several days or perhaps a Friday where it didn't make economic sense to wire money, there was any delays because of that reason." Bear Creek also confirmed that after Mr. Ergen authorized a wire transfer from his personal trust, Bear Creek could make it available for transfer within several days.

Even a cursory glance at Mr. Ergen's bank statements showed that funds were liquidated on a rolling basis from the investments held by his personal trust with hundreds of millions of dollars in cash sometimes sitting in Mr. Ergen's trust account for several weeks before they were used to fund a trade. The evidence further shows that at least in one case liquid funds were readily available, but Mr. Kiser instructed Bear Creek to hold off wiring funds.

The alleged liquidity issue was clearly manufactured by Mr. Kiser and the lies to counterparties regarding liquidity were passed along by Mr. Ketchum, who was often informed by Mr. Kiser that funds were "not available to close a trade" and asked no further questions.

Mr. Kiser and Mr. Ergen also blamed the delays in closing the SPSO trades on the need to complete upstream paperwork and on false starts from both the seller and the SPSO sides of the trades. Neither of these was a credible

explanation for what the documentary evidence clearly reveals was a concerted effort to delay on the part of Messrs. Kiser and Ergen.

Mr. Ergen testified that the variation in the dates between trading and closing in LP debt trade had to do with the upstream paperwork that had to be done to verify who the actual owners were, which was not that easy and could take anywhere from weeks to months.

Because of this time to verify and the need to have both documents and funding ready to close a trade, Mr. Kiser testified that there were a lot of false starts that went both ways. None of this testimony was credible.

The volume of e-mails admitted into evidence reveals that counterparties to the trades that had been held open for months were, in fact, ready and eager to close, and they became more frustrated as time went on.

Parties repeatedly reached out to Sound Point to settle trades, but often they could get little traction. See Sound Point, January 24th, 2013 replying, "Sorry, but we are not able to settle that one right now," in response to weekly inquiries from UBS seeking to close a trade.

March 7th, 2013, Sound Point e-mail stating it would be to settle "next week" in response to repeated inquiries since February 13th regarding a December 2012 trade.

In particular, Jefferies, the executing broker for the

majority of the LP debt trades, was pushed aside for months by Sound Point, who provided excuse after excuse for the failure to close numerous open trades.

In February 2013, Jefferies sent ongoing e-mail and telephone requests to Sound Point to close multiple trades with trades dates going back as early as October 23rd, 2012.

At that time an employee of Ketchum reminded him that "we have been pushing Jefferies off for nearly three weeks."

On April 23rd, 2013 Mr. Ketchum wrote to Mr. Kiser that "Kevin" of Sound Point, "thinks we can hold Jefferies off on any payments until at least May 15th in connection with over 289 million dollars in LP debt that had not settled."

After Jefferies followed up with Sound Point on April 25th seeking to close eighty-eight million dollars of open trades, Mr. Ketchum inquired whether he could plausibly blame SPSO's delay on the upstreams but was told by Sound Point personnel that the work had already been completed. Mr. Ketchum then e-mailed back and forth with a colleague about which lie to use, whether he should tell the counterparty "that we are still doing legal work on the upstreams, that we are waiting for funding from our investor, or that we are in the process of executing some other large positions we have to pay for this."

It was ultimately determined that the colleague should use the latter excuse, together with the statement that Mr.

Ketchum has spoken with Steve Sander, the head of sales at Jefferies, about this.

The need to delay Jefferies was based on Mr. Ketchum's understanding from Mr. Kiser that SPSO did not have capital available to fund the trade and thus Jeffries needed to be put off for a period of time.

As of May 9th, SPSO had seven open trades with Jefferies totaling 588 million dollars in LP debt trades dating back as far as January 2013. Jefferies was imploring Sound Point to close the trades. Mr. Sanders at Jefferies appealed to Mr. Ketchum "this is a big problem for me. I would like to come down and talk to you this afternoon around 4 or 5 p.m. mano a mano. Is this possible?"

Mr. Ketchum replied that he was waiting for other "trades to settle" -- a lie -- and that he "had already pushed extremely hard to get to where we are now in terms of closing." None of the open trades closed for another several weeks.

As he knew, Mr. Ergen did not like to hold up funds which could be invested elsewhere, Mr. Kiser testified that he instructed Mr. Ketchum to prepare a schedule for him showing unsettled trades and expected settlement dates so that he could have the money available on those dates in order to avoid the back and forth with counterparties who may not have been ready to close when the funds were made available.

Mr. Ketchum also testified that proposed settlement dates for the unsettled trades were requested by Jefferies, and he tried to act as intermediary between SPSO and Jefferies, an anxious counterparty who was trying to get trades settled.

Mr. Ketchum stated that the "proposed settlement dates in the schedule e-mailed to Mr. Kiser on May 8th, 2013 which were up to four months or more after the trade date were suggested by Mr. Ketchum as a compromise solution in order to get the open Jefferies trades settled, and he proposed the schedule to Mr. Kiser before conveying such dates to Jefferies in order to see if a schedule of this kind was capable of execution by SPSO. While it is not clear whether such proposed dates were actually sent to Mr. Jefferies, Mr. Ketchum's testimony on this point was not credible.

The proposed settlement dates contained in the schedule e-mailed from Mr. Ketchum to Mr. Kiser on May 8th, 2013 reflect not a prediction for liquidity planning purposes of when trades would be ready to close, but rather a game plan for delaying the closing of open trades as long as possible.

In fact, in addition to this schedule, Sound Point had also prepared an analysis of the average days it took to settle an LP debt trade with Jefferies after the trade date, sixty-nine days, and the average days after the industry norm "contractual settlement date of T plus twenty", or twenty days after the trade date, which was thirty-eight days. There is to

reason for Sound Point to have performed such an analysis other than to provide support for its proposed further delays.

In fact, with the exception of the Icahn trade, all of SPSO's trades failed to close before a T-plus-twenty contractual settlement date.

Astonishingly, Mr. Ketchum testified on direct examination that even when the counterparty to a trade was ready and eager to settle a trade, Mr. Kiser had instructed them to delay the closing. See January 15th transcript, Ketchum.

"Q. Did you ever have a discussion with Mr. Kaiser in which you and Mr. Kiser agreed that you should delay the closing of a trade?

"A. Yes."

See also Plaintiff's Exhibit 204, Sound Point employee e-mailing Ketchum on June 4th regarding a LightSquared trade entered into on May 3rd and stating ,"Jefferies is looking to settle the other two trades. Do you want to or delay?"

Mr. Kiser admitted that even when directly informed that counterparties were ready to close, he sought to defer settlement as long as possible.

This goal was evident in much of the documentary evidence submitted. See, e.g., Plaintiff's 495, Ketchum to Kiser, "We need to close our March 25th trade before month end, for example May 25th or so, to stave off Jefferies."

The spring of 2013 was a crucial time in the debtor's Chapter 11 cases. The exclusivity stipulation approved by this Court in February 2013 extended LightSquared's exclusive period to file a reorganization to July 15th, 2013.

The parties did not reach a deal for a consensual plan by June 3rd. Preparatory work for a sale process of all or substantially all of the debtor's assets was required to begin with the formal sale process commencing on July 15th.

In the spring of 2013, LightSquared and its stakeholders, in particular, significant holders of LP debt, were involved in negotiations with respect to terms for consensual plan of reorganization.

Beginning in late May 2013 and continuing thereafter, Moelis had also contacted over ninety parties to discuss a joint venture or strategic partnership.

On June 7th, 2013, the debtors received court approval to enter into and perform under an engagement letter with Jefferies in connection with securing potential exit financing for the debtors, after which a roadshow kicked off to seek to raise capital.

During this period SPSO continued to amass large quantities of LP debt and intentionally delayed the closing of large blocks of trades, all without formally revealing its identity. As a result, all of these parallel movements forward by the parties were stymied.

LightSquared has alleged that it was not sure which lenders to negotiate with and whether the ad hoc secured group was able to carry a class, such that it could enter into a binding commitment with respect to a plan, such that any hope of achieving a consensual plan during this period was derailed.

Without spending the cash necessary to close hundreds of millions of dollars of open trades and by intentionally leaving them in limbo for three to four months longer, Mr. Ergen arrogated to himself the power to control the forward motion or lack thereof of the bankruptcy case beginning in April 2013.

Indeed, the exclusivity stipulation provided that it could be terminated if the ad hoc secured group collectively ceased to be the largest holder of LP debt. On June 13th, 2013, SPSO "joined" the ad hoc secured group specifically to ensure that the termination conditions contained in paragraph 15 of the stipulation would not be triggered.

Within days of nominally joining the ad hoc secured group, several hundreds of millions of dollars in hung trades just happened to close, making SPSO the controlling member of the group by virtue of the size of its holdings.

SPSO's decision to join the ad hoc secured group was undoubtedly made for the strategic purpose of controlling the sale process for the debtor's assets with DISH as the buyer. And the fact that it rendered the negotiated and court-ordered

exclusive period meaningless was ignored.

Mr. Ergen understood that the exclusivity stipulation would terminate in July, and enabling the stipulation to remain in place until then furthered his interest of keeping the status quo until the DISH board had authorized DISH to step into the shoes of LBAC and pursue the bid.

While a creditor who is not an insider is not a fiduciary, a creditor nonetheless does not have the unfettered right to engage in such purposeful obstruction of the process. SPSO failed to act in a way that is consistent with the most basic concepts of good faith that are fairly to be expected of Chapter 11 creditors, especially those who voluntary join the capital structure of a debtor well after distress has set in.

As SPSO vehemently maintains, many aspects of SPSO's conduct are entirely acceptable, albeit aggressive, and do not provide grounds for equitable subordination. Such lawful and acceptable conduct includes buying distressed debt, buying distressed debt anonymously, buying distressed debt anonymously at prices close to par, acquiring a blocking position in a class of debt, and making an unsolicited bid for the assets of a debtor.

Nothing in this Court's decision should in any way alter such conduct in the distressed debt marketplace. The Bankruptcy Code and the Chapter 11 process tolerate and even contemplate self-interested and aggressive creditor behavior.

Notwithstanding, SPSO's conduct in acquiring the LP debt and in controlling the conduct of the Chapter 11 case through purposeful delays in closing hundreds of millions of dollars of LP debt trades during a critical time frame in these cases breaches the outer limits of what can be tolerated.

While it is generally acceptable to obtain and deploy a blocking position to control the vote of a class with respect to a proposed plan of reorganization, it is not acceptable to deploy a blocking position to control the conduct of the case itself, to subvert the intended operation of a court-approved exclusivity termination arrangement, and to prevent the Court from directing and having visibility into events unfolding in the case.

In response to the allegations that they purposefully sidelined hundreds of millions of dollars in debt and prevented the Chapter 11 cases from moving forward, SPSO and Mr. Ergen say no harm, no foul, citing to the fact that there is no evidence that SPSO had any impact on plan negotiations in the spring and summer of 2013, but that is not true.

Had there been clarity with respect to the ownership of the LP debt during that time period, the parties may have made substantial progress on a plan and it is possible that the debtor's exclusive periods could have been extended, a game changer in the course of the debtor's cases. See Mobil Steel prong two, how SPSO's conduct harmed creditors.

Having acquired a controlling position in the LP debt by use of the special purpose vehicle, whose special purpose was to achieve an end run around the credit agreement and then purposefully sidelining hundreds of millions of dollars of LP debt while fine-tuning its acquisition strategy, SPSO has harmed the creditors of LightSquared.

Having seized control of the class of LP debt, SPSO seized control of the case itself, rendering meaningless the heavily negotiated and court-ordered process leading to the termination of exclusivity on July 15th, 2013.

SPSO's inequitable conduct has inflicted as yet unquantified harm on LightSquared's creditors as a result of the delay, uncertainty and increased administrative costs suffered by these estates.

While various numbers and calculations of harm have been suggested by plaintiffs and by the ad hoc secured group, quantification of the amount of harm is beyond the agreed-upon scope of this first phase of the adversary proceeding and will be determined after further proceedings before this Court.

D. Remedy.

SPSO has gone to great lengths to identify the many things that it did that are "perfectly legal" and just plain smart and warns ominously that any finding of liability would roil the debt markets. But its otherwise lawful pursuit of aggressive and profitable distressed debt transactions does not

entitle it to do what it did to the LightSquared estate and cases.

As Mr. Ergen so colorfully explained during the trial, "You can live in a bubble if you want to and probably never get any disease, but you go play in the mud and the dirt and you probably aren't going to get disease either because you get immune to it. So you pick your poison and I think we choose to go play in the mud."

Here playing in the mud involved end running the LightSquared credit agreement and then purposefully holding in limbo hundreds of millions of dollars of debt trades and undermining the ability of the debtor, the constituents and even the Court to conduct the case. Determining the amount of the harm that has occurred to these estates as a result of SPSO's conduct, while difficult, will not be impossible, and the SPSO claim will be subordinated accordingly.

CONCLUSION:

For the foregoing reasons the Court finds that the SPSO claim will be equitably subordinated in an amount to be determined after further proceedings before this Court. The Court's findings and conclusions remain subject in all respects to a complete decision to be filed in these cases as soon as practicable.

We're going to take a short break.

The next one is a little shorter, but not by much.

they're making is, look, the board didn't meet, there was no authorization, this started with one -- I think it was a five million dollar trade. The only thing you have is that it was facilitated, executed by Mr. Kiser. You have nothing.

In fact, when you play the tape forward, you have everyone agreeing that when the board ultimately was informed a year later or so, the board knew nothing about the prior trades and that lack of knowledge is evidence of the lack of authorization. So that's, I think, a fair statement of at least part of the argument.

How could you say that they were authorized when you have a big public company that has to dot its i's and cross it's t's, and everyone agrees that this was news to them when they were informed about it after the fact? So how do I get around that?

MR. STONE: Right. So I'm not -- I guess we would not agree that everyone agrees that that didn't happen because none of that is of record but I think the real point here is that the cases they cite make it very clear that authority can be actual, apparent or implied. So you have to have an inference of some kind of authority.

Now here, the authority is clearly implied by the titles, alone, of Ergen and Kiser. And they are high-ranking employees and officers of DISH and EchoStar. And there's a case called Old Republic v. Hansa World Cargo that we cite in

our brief, that says that -- just that: that a title is enough. But you could also look at the restatement -- the Second Restatement on agency, Section 103: by placing an agent in a position that has a customary scope that constitutes a manifestation by the principal, an assent and intention are to be inferred from the surrounding facts and circumstances.

So the fact that Mr. Ergen is the executive chairman and Mr. Kiser is the treasurer, we think that, alone, raises the inference of authority.

THE COURT: But then you get to the point that was made that if Mr. Ergen decided to buy a parcel of land or an item of some kind and he had Mr. Kiser do that for him, then in every case is he buying something for DISH? I mean how do I draw that line?

MR. STONE: Right, so part of this goes to again, you have to infer from the facts and circumstances, are these things that would normally be in the scope of that type of person's authority? And here we have the executive chairman and the treasurer who actually makes investments for the company. So it is a reasonable inference that they are acting within the scope of their authority.

We can also look at Nevada law which really this should be a Nevada law issue; they cite New York cases. There's a case called USACM Liquidating Trust v. Deloitte & Touche, 764 F.Supp 2d 1210. Now, the Court there held that the

company's majority stakeholders who were also officers of the company were acting within the scope of their employment and authority because "the movement of corporate assets and decisions about which investments to make, which creditors to pay and what information to disclose are ordinary functions of management which typically would be attributed to the company."

THE COURT: All right. But here he was spending his own money.

MR. STONE: Well, we don't know that. We don't know where the money came from. We know that in that -- that was his claim in Nevada, that that was his own money but that hasn't been established as of record yet.

THE COURT: Okay.

MR. STONE: I would also note, Your Honor, that the two cases that they do cite, Cromer and Imburgio, we think don't apply at all. And one of those cases, it was a New York Supreme Court case, they dismissed the complaint because the acts that alleged were acts that clearly the agent could not take -- could never have taken under any circumstances.

And in the Cromer case, there was an effort by the plaintiff there to establish Ernst & Young International as an agent of a U.S. affiliate and the Court found that there was no implied authority because they were completely separate companies and really had no relationship.

Your Honor, just one more word with respect to the use

of information from Nevada and I regret that we put a few bullet points in our brief. I really opened Pandora's box. It would have been a lot easier not to do that.

THE COURT: I skipped them.

MR. STONE: And I only go back to this point because Mr. Dugan said the law is very clear that you can rely on things that we've put into the record. Well, we haven't put anything into the record. The Court can take judicial notice of the fact that Mr. Ergen testified X, Y, Z in Nevada, but it's not evidence and it's not something that can defeat our allegations.

And the cases that they cite in their brief are really cases where, for instance, a plaintiff makes a claim under a proxy statement that there was a false disclosure and the proxy itself bears out precisely the opposite. That's understandable.

But if you have two documents, one document says X and that's alleged in the complaint and they come back with a document that says Y, those are subject to proof. So the way the system works is we get to test those statements and this court gets to make credibility determinations about witness statements.

Arguments contained in briefs are of, I would contend, of even lesser dignity, and certainly the arguments that Mr. Ergen made in the Nevada proceedings would fall into that

category. So we think by injecting the Nevada pleadings into the motion to dismiss, they've just created more problems for themselves because all those things really do is raise fact issues.

THE COURT: Can I ask you a couple of questions about the complaint?

MR. STONE: Yes.

THE COURT: So I'm trying to square the prayer for relief with the various counts and allegations and I'm having a little bit of a hard time. You're asking for disallowance of SPSO's claims in full which has to be based on some other applicable law or agreement, right? We're not doing the equitable disallowance thing.

MR. STONE: That's correct, Your Honor.

THE COURT: Okay. And then you say or at a minimum, in part to the extent that SPSO would receive an unjust profit for its inequitable conduct, why is that an appropriate measure of damages for me to consider? Why should I be concerned with an unjust profit as opposed to some damage that you can prove occurred to the creditors of this estate? Why do I care about whether or not there's a profit there, just or unjust?

MR. STONE: Well, we think that Your Honor can fashion a lot of remedies. This is a court of equity, and we believe that to the extent that there was a manipulation or at least an upset to the bankruptcy process, that it could be appropriate

for a court to take into account the fact that this party that didn't belong in the capital structure in the first place and had -- and took actions that caused an effect in the bankruptcy proceeding, could be subject to having their claim disallowed which would leave more funds for the other constituents.

THE COURT: Okay. Then in 114(b) you ask for a subordination of SPSO's claims to all claims -- all claims. You're not just talking about at the LP entity. You're talking about all creditors' claims? Because it's different from what Harbinger asked for. Harbinger asked for subordination, just at the LP debt. Do you mean all claims?

MR. STONE: No, I think just at the LP stage.

THE COURT: Just at the LP.

MR. STONE: Yes, I think that would --

THE COURT: So you're not asking for subordination to the Inc. debt?

MR. STONE: No, Your Honor. We don't think that would be appropriate.

THE COURT: Neither do I. Okay. Is subordination in your existing plan?

MR. STONE: In the complaint?

THE COURT: In the plan.

MR. STONE: Oh, in the plan.

THE COURT: Mr. Barr?

MR. BARR: For the record, Matt Barr from Milbank

Tweed. Your Honor, the current plan has a provision that says it could take into account subordination and the effect of subordination. It does not currently provide for the subordination of any particular creditor.

THE COURT: Okay, thank you.

So is it your position that if I don't find an underlying breach, I should nonetheless and can nonetheless equitably subordinate some or all of the claim? There's no -- hypothetically I don't find a breach.

MR. STONE: Yes, Your Honor. I think that there is a separate argument, separate from the breach of contract that if Mr. Ergen or SPSO or other parties engaged in inequitable conduct that had an effect on the bankruptcy proceeding, that that's an available remedy.

THE COURT: Okay. So for the breach of contract, case law has been cited to me that -- for the proposition that if a claim is transferred in violation of a prohibition or an assignment, there's nonetheless a valid claim. How do I get around that? In other words, the credit agreement does not state that an assignment in contravention of the assignment provisions of the credit agreement means that the assignment is void or voidable. The credit agreement doesn't say that; everybody agrees on that.

MR. STONE: That's true, Your Honor.

THE COURT: And the case law, at least some of the

case law that's been pointed to me says that you still have a valid claim even if you hold an assignment in violation of a prohibition on assignment but there's a breach of contract claim against the original assignor obligor. So how do I get around that?

MR. STONE: Well, two things, Your Honor; first, I would point out that the LCE Lux HoldCo case that they cite, the Court recognized there that when the agreement evinces a clearly stated intent to render a party powerless to assign, there's no need for the nonassignment clause to also contain talismanic language or magic words describing the effect of any attempt by the payee to make an assignment. And the Court went on there to say that in that particular case, it didn't render it per se void because of some other language in the credit agreement.

Our point is we don't have to use words null and void here. We think they didn't have a claim. We recognize that there is language talking about a participation. And so while they may have had or may still have some economic interest, they don't have a true claim. And that's one of the things I think that goes into our theory of harm which is we didn't really know who to deal with at various points in this process because if they didn't belong in the credit agreement -- or, I'm sorry, in the capital structure, they didn't have a claim. And what we read that to mean is they may have an economic

participation but they shouldn't have been able to vote on anything. They probably shouldn't have been able to participate even in the ad hoc committee.

THE COURT: The next thing that I wanted to talk about was damages because I think one of the additional arguments that's been made both by Mr. Dugan and by Mr. Giuffra is that what's the damage. What's the damage here? We're having an auction tomorrow, weather permitting. What's the damage?

MR. STONE: Yes. And Your Honor, I think, to the extent that we're talking about money damages which is in our prayer for relief, that's something that we will have to develop after the evidence comes in. But we could have certainly been harmed in a number of ways including the fact that maybe there's per se harm because they really don't belong in the capital structure here and it's --

THE COURT: But I don't know what that means.

MR. STONE: Well --

THE COURT: I don't know what that means, "per se harm". If you go back to the reasons that this provision was put into place, and if you look at, I think from the stand point of what it took to put somebody into that category, it had to be established with the administrative agent that you were putting into that category, I think the language was, a bona fide operating company.

So in other words, the agent didn't want the borrower

to be able to simply say willy-nilly these ten entities can't buy. It had to actually be a bona fide operating company that was a competitor, right? So you look at the context of that and yet we're now at a spot where we are, and I don't know what they're doing, but one would imagine that the bankers who are involved in the sale process are, in fact, actively encouraging competitors to take a look at what's for sale.

MR. STONE: Right.

THE COURT: So I'm chasing my tail a little bit.

MR. STONE: Right, but they're doing that in the context of one competitor having somewhat of a leg up in the sense that they were on the scene first, they bought up all this debt when we argue they should not have been able to, and among other things, that could have a chilling effect on other parties coming in to bid. So that's one possible harm. And we also think --

THE COURT: But it's not that simply that somebody owns debt that they bought at a discount, right? Because that's --

MR. STONE: No.

THE COURT: -- SOP; that's standard operating procedure, right?

MR. STONE: That's correct, Your Honor. This is part of -- in our view, part of an overall plan to buy the debt, to bid for the assets in a way that would assure a result for

Ergen/DISH/EchoStar that would be highly beneficial to them and not necessarily the most beneficial for the estate.

THE COURT: But that's the part I don't understand because we're having an auction; we're having a sale process. Anybody who wants to can come in and bid. So that's the part that I don't understand in terms of the causation factor that on the one hand you can say look, there was a breach; they violated the prohibition on assignments; there has to be a consequence. We can say okay, hold that thought. And then over here we can say, okay, well, what was the damage because we're now at the point where anybody can come in and bid. You're in a court-supervised process. There are standards that have to be complied with. I'm just trying to -- I'm just struggling to understand the relationship between the acts complained of and the damage and the causation of the damage.

MR. STONE: Yeah, I mean, Your Honor, I think that, without knowing more in discovery, we don't know precisely what the damages are. But I think our theory is that by becoming a part of the capital structure when they weren't entitled to, that they were able to direct this case in a way that is different. And you're right that we ended up in this particular place that we are, but we think that maybe we would have gotten to a different place, and maybe we would have been in a place that was more beneficial to all of the constituents in this case.

THE COURT: Okay.

MR. BARR: Your Honor, can I just add one, maybe, answer to your question?

THE COURT: I gave Ms. Strickland a hard time, so I have to be equal opportunity here.

MR. BARR: Can I then hand him a piece of paper?

MS. STRICKLAND: I think that's fair.

THE COURT: Thank you, Ms. Strickland. You can --

MR. BARR: So I should hand it?

THE COURT: You can go whisper to him --

MR. BARR: Okay.

THE COURT: -- just to keep it totally -- totally equal.

MR. STONE: Yeah, I'd -- Mr. Barr was putting a finer point on my point that Mr. Ergen/LBAC has a leg up in the sense that 60 cents of every dollar goes -- he's bidding with $1.60 for every dollar that the other competitors would bid.

THE COURT: But that's the point -- that's the point I made about three minutes ago, which is that that structure, schema, doesn't describe anything different from somebody who buys debt at a discount and then is in a position to credit bid. So that's not different.

The distinction that you were making to me was this is a competitor. This was somebody who wasn't allowed to come in. And there's just -- those two things are not the same. So

there's no general prohibition about somebody buying debt at a discount and then they have a strategic advantage when it comes time for a plan of reorganization. So I can't go down that path.

Before I let you off the hook, though, can I ask one more thing, because --

MR. STONE: Certainly, Your Honor.

THE COURT: A lot's been made of the fact that the debtor or Harbinger -- and/or Harbinger knew that Mr. Ergen was making these purchases, knew that SPSO was making the purchases. It was widely reported in the press, and nothing was done. So what am I supposed to do with that allegation?

I mean, some of it can be taken as a fact. I can take judicial notice of the press reports, not for the truth but that they existed.

MR. STONE: Yes.

THE COURT: So what am I supposed to do with that on the motion to dismiss?

MR. STONE: I think that all that Your Honor can do is give those press reports that you're taking judicial notice of the weight that they deserve, which isn't much, because there is a whole factual record out there that I think will show that we weren't aware of it, but that's for another day.

THE COURT: You think it's possible that Mr. Falcone was aware of it and just didn't tell the rest of the company?

MR. STONE: Well, I suppose that's possible. I don't know that to be the case. I only know that based on our due diligence in bringing this complaint, I think we would have been hard pressed to bring this complaint had we known from day one that this was Mr. Ergen buying the debt.

THE COURT: Well, if there was a press report, for example, that there was a press report that "anonymous" is hacking into LightSquared's computer system, you would have gone out and looked into that, right?

MR. STONE: Correct.

THE COURT: Okay. So there's a press report that Charlie Ergen is buying into your capital structure. One would think you would go out and try to figure that out, right?

MR. STONE: Exactly. We did that. We were stonewalled at every turn.

THE COURT: From May, 2012.

MR. STONE: Yes.

THE COURT: Okay. Anything else?

MR. STONE: No. That's all, Your Honor.

THE COURT: Okay. I think we are going to -- Mr. Friedman, if you don't mind?

MR. FRIEDMAN: I'd love a break. That would be great.

THE COURT: Okay. Let's just take a break and we'll come back at 3:15. Okay? And if you folks want to bring in coffee or other drinks, that's fine.

UNIDENTIFIED SPEAKER: Great. Thank you, Your Honor.

UNIDENTIFIED SPEAKER: Thanks.

(Recess from 3:05 p.m. until 3:21 p.m.)

THE COURT: Okay. Mr. Friedman, good afternoon.

MR. FRIEDMAN: Your Honor, good afternoon. David Friedman for Harbinger.

Your Honor, I find myself in the unfamiliar role this afternoon as being a cheerleader for the debtor. When people think of cheerleaders they rarely think of me.

THE COURT: But now, from now on everybody is going to, so --

MR. FRIEDMAN: From now on -- hopefully --

But we are -- I mean, to put this simply, if Your Honor -- we think the debtor has filed a good complaint. We thought we could -- we thought it was in our interests and in the interests of those who similarly share in this litigation to join.

We were given leave to file an objection to the claim as well, but what we tried to do was just simply to add additional facts and make some, I think, modest changes in terms of the prayers for relief, just tweaking --

THE COURT: But the technical aspect of it is that as a technical matter your Counts I and II shouldn't stand, right?

MR. FRIEDMAN: Well, I think that -- I think, as Your Honor granted us, we thought, and I thought that Mr. Dugan said

this as well, that these, that I, II go together. I thought they were all sort of the same point.

THE COURT: Well, I think what you're trying to do is -- I's the declaratory relief, right? II is the breach of contract. III is the --

MR. FRIEDMAN: Claim disallowance.

THE COURT: -- claim disallowance. So to me it's all baked into the claims disallowance.

MR. FRIEDMAN: I think it is, but I would say, and we were careful, because we noticed a tort claim peering out from the debtors' complaint, and we, on the one hand, we thought well, we weren't granted leave to do that, so we better be careful --

THE COURT: Right.

MR. FRIEDMAN: -- because I --

THE COURT: But that didn't reply to the equitable subordination.

MR. FRIEDMAN: Well, so then we thought about it some more and said well, the truth is in the way that this litigation has now morphed we were dismissed. We were off to the side. Now the debtor has moved to the front of the line with their complaint. And we looked at it, and we thought what's -- we didn't want to -- we didn't think we had anything to add on the tort claim, because it was too reminiscent of our own litigation. We really didn't want to go back there again.

THE COURT: Right.

MR. FRIEDMAN: But we thought that the -- we really thought that under Caldor, as simply a party-in-interest, we could join in all that relief. So we didn't think it had -- we thought that apart from -- there was leave granted to us, but then -- and that would be -- let's assume the debtor never did anything, so we would have leave granted to us to do whatever we were granted leave to do.

THE COURT: Right.

MR. FRIEDMAN: Then the debtor jumps in and files a lawsuit.

THE COURT: Right.

MR. FRIEDMAN: And I think that under Caldor, under the Second Circuit's decision in Caldor, I think anybody can jump into that adversary proceeding in a "me too" capacity. And that's, really, where we are on all these other claims. We're in a "me too" capacity.

Now, could we restrain ourselves to not throw in a few words that we thought made it better or more helpful? We did, but we --

THE COURT: But if you're in a "me too" capacity then we have the opposite of what we had at the beginning, which was the debtor being in a "me too" capacity.

MR. FRIEDMAN: Exactly. Exactly.

THE COURT: Right?

MR. FRIEDMAN: Yes.

THE COURT: So if all you're saying is that you're in a "me too" capacity that's different than prosecuting claims derivatively on behalf of the estate.

MR. FRIEDMAN: Oh, of course. Absolutely.

THE COURT: So I think that, maybe, you and I don't have that much to talk about if we agree that, essentially -- well, I'm going to come back to equitable subordination, but Counts I and II go. Count III is identical to the debtors' count. I don't think you get anything more or less by being involved. Equitable disallowance goes, consistent with the first decision. And then you get to the equitable subordination, which you could have done in a plan, which you could do in a plan, and what it seems to be saying is if you find this then we're going to be able -- then we're going to propose a plan that it's going to be predicated on. I'm reading between the lines.

MR. FRIEDMAN: The sequencing doesn't work, because you're going to decide this, presumably, at confirmation time if you have a trial, so people are going to have to decide earlier than that whether it's a proposal plan that has some subordination in it.

THE COURT: Well, you can -- I know you know how to do this -- you can do a plan that has different toggles in it.

MR. FRIEDMAN: We sure can. So, and just --

THE COURT: Right.

MR. FRIEDMAN: -- by coincidence, tomorrow is the deadline to file a plan, so look at that.

THE COURT: Right.

MR. FRIEDMAN: So --

THE COURT: So what I'm trying to understand, though, I mean, I'm just -- I'm trying to be procedurally efficient here -- is that at the end of the day, I think it all will not matter. I mean, even if I were to grant the motion to dismiss the equitable subordination, I don't know that that would stand as preclusion of your proposing a plan based on that. I mean, maybe it would, but I don't think that's where we are here today.

MR. FRIEDMAN: I would ask, Your Honor, because I think the -- equitable subordination, I'd just jump -- if you don't mind if I just jump to that, because we're on the topic.

THE COURT: Sure.

MR. FRIEDMAN: Equitable subordination is a claim in which the remedy is sometimes the hardest thing to tailor, because people could all agree what bad conduct looks like, but the remedy has to be tailored, really, to fit the crime. It's supposed to just be remedial, not do any more.

THE COURT: Right.

MR. FRIEDMAN: It's not really punitive. It's more remedial.

THE COURT: Right.

MR. FRIEDMAN: So --

THE COURT: But can I just stop you for one minute?

MR. FRIEDMAN: Yes.

THE COURT: Because you're asking for equitable subordination wearing the hat of a creditor at LP, right?

MR. FRIEDMAN: Yes.

THE COURT: Right?

MR. FRIEDMAN: Yes.

THE COURT: Because all you're saying is that -- subordinate the claim to the claims of other creditors, and you're asking to do that as a creditor at LP.

MR. FRIEDMAN: Yes. Yes.

THE COURT: What's your claim? What's the claim of Harbinger at LP?

MR. FRIEDMAN: We have a trade claim at LP. It's not a meaningful claim, but we're at a derivative capacity. I mean, just to be clear. I mean, we are joining the debtors' claim for equitable subordination. We're not specifically speaking.

What we think the Court should consider, I don't think you can reach -- there's no way to reach a remedy today. It's almost like you have a patient that is exposed to some toxicity. They're really going to the doctor tomorrow. Tomorrow they start seeing the doctor, and maybe they'll go to

some specialists over the next couple of weeks, but in terms of determining the extent to which -- and I will be very careful not to go beyond that -- but the extent to which there has been harm is really playing itself out as we speak, and, perhaps, over the next few days. So I think it's almost impossible to consider a remedy.

But the remedy that we would seek would be a remedy that belongs to the estate. I mean, we're not seeking -- we're just joining in the -- we're intervening in the estate's desire to equitably subordinate. We can't do it on our own because we don't have a particular harm to our particular claim that we can allege. So under the Second Circuit's decision, they're right. We don't have our own equitable subordination claim. So it's only the estate's claim.

And we rise and fall with the debtor here. We don't have any independent rights.

THE COURT: So then I should just dismiss your complaint in its entirety?

MR. FRIEDMAN: No.

THE COURT: I'm just trying to understand what's left of your complaint.

MR. FRIEDMAN: No. Everything that is in our complaint is either, in the case of the objection to claim, our own independent right to object to a claim --

THE COURT: That one is --

MR. FRIEDMAN: But they're doing it too.

THE COURT: Right.

MR. FRIEDMAN: So if they were to win we wouldn't have to win again. And --

THE COURT: But if you had come in with a complaint that was just the claims disallowance clean --

MR. FRIEDMAN: Yes.

THE COURT: Then we wouldn't be having any of this other conversation.

MR. FRIEDMAN: Right.

THE COURT: And nothing would have precluded you, as the proponent of a plan, from proposing a plan that called for the equitable subordination of all or part of any claim you --

MR. FRIEDMAN: Right.

THE COURT: -- thought you could equitably subordinate, right?

MR. FRIEDMAN: Right. Right.

THE COURT: So isn't that --

MR. FRIEDMAN: But then you'd have to -- you wouldn't want to start litigating that on January 9. I mean, you wouldn't want to start hearing about that on January 9th, I would think. You'd want to start at least getting that process started now. Meaning there's two elements to equitable subordination. There's liability and there's damages, right?

THE COURT: Right.

MR. FRIEDMAN: So right now the debtor has --

THE COURT: But right now all I'm doing is a motion to dismiss.

MR. FRIEDMAN: Right. Right.

THE COURT: Right?

MR. FRIEDMAN: But we'll --

THE COURT: So --

MR. FRIEDMAN: But you'd have to get past that. I mean, we'd have to get to this eventually. I thought we were doing this now so that by January 9th we have -- whatever's left, we know what's left of these cases.

THE COURT: But if something's left then we're going to start a trial on those issues --

MR. FRIEDMAN: Yes.

THE COURT: -- on January 9th.

MR. FRIEDMAN: Yes. Yes.

THE COURT: And what's the deadline for the proposal of your plan?

MR. FRIEDMAN: Tomorrow.

THE COURT: Right. So nothing I say today, other than the possibility that as a matter of law there's not going to be equitable disallowance, which --

MR. FRIEDMAN: Subordination. Oh, I'm sorry.

THE COURT: -- which -- subordination. Thank you. You have to put in a plan tomorrow --

MR. FRIEDMAN: No question.

THE COURT: -- that's going to have to have a placeholder for it, one way or the other, and we're --

MR. FRIEDMAN: Yes.

THE COURT: We're dealing with a common set of facts.

MR. FRIEDMAN: Right.

THE COURT: I mean, this all --

MR. FRIEDMAN: There --

THE COURT: The same set of transactions --

MR. FRIEDMAN: Right.

THE COURT: -- that everybody's talking about.

MR. FRIEDMAN: So the rest of our complaint is just a platform for us to get up and try to make our arguments as a party -- as under 1109, under Caldor, why we think they're right. I'm just here to say why I think Mr. Stone is right and make a couple of more points.

THE COURT: But Counts I and II you couldn't plead, because they were beyond the scope of what you were given permission to plead.

MR. FRIEDMAN: Right.

THE COURT: And you needed a motion. So those are going to be dismissed.

MR. FRIEDMAN: But he pled them. So why can't I join in those? In other words, Caldor says that anybody who's a party -- under 1109 --

THE COURT: Right.

MR. FRIEDMAN: -- anybody, even Harbinger -- anybody has the right to intervene in an adversary proceeding brought by the debtor.

THE COURT: Okay.

MR. FRIEDMAN: Anybody. There's no barrier to entry.

THE COURT: Right.

MR. FRIEDMAN: It's an unconditional, absolute right.

THE COURT: But you didn't file an intervention. You filed a separate complaint.

MR. FRIEDMAN: I filed it because there were already -- Your Honor, I thought it was -- we were given the right to file a second amended complaint. I thought that to intervene in a complaint and intervention was somewhat awkward. I mean, so -- because the intervention took the lead, so we kind of tried to slip in underneath it.

But I thought it was clear from our complaint, because we provided Your Honor a redline from it, we took every single word in their complaint. We just added some additional words to it. That's all.

THE COURT: You did. But it was their first time pleading a complaint because, as you just said, they intervened.

Look, I think this is all a lot of procedure, but I don't want to make any mistakes in how I tee this up. In my

mind, the cleanest thing to do is that you dismiss Counts I and II. I haven't gotten to whether or not Count III, the disallowance goes or not.

MR. FRIEDMAN: Um-hum.

THE COURT: The equitable disallowance is gone. And then you have left equitable subordination, which I have to decide whether it survives a motion to dismiss, but I think that you didn't have to bring that in an adversary. That could have been done in a plan. You get to the same place.

MR. FRIEDMAN: Okay. I mean, sometimes it's hard to know, and you have to, so --

THE COURT: Sure. I understand. I don't think there -- it's not mandated one way or the other.

MR. FRIEDMAN: Right.

THE COURT: But the Rules say that you can --

MR. FRIEDMAN: Your Honor, if you deny the motion to dismiss as to the debtors' complaint and simply say Harbinger has a right to participate in that litigation, participate in discovery and cross-examine witnesses, appear in court, file briefs, then that's fine. You can dismiss our claims. That was the only reason to have joined, for that purpose.

THE COURT: Okay.

MR. FRIEDMAN: But --

THE COURT: Do you want to talk about the motion to dismiss on the merits with respect to the claims disallowance?

MR. FRIEDMAN: Yeah. Just a couple of things. I do.

First of all, I just want to speak about agency for a minute, because I think agency ties into all this. I mean, I don't think that -- I don't need to go through it now verbatim, but I do think that the complaint was well pled in terms of Mr. Ergen and Mr. Kiser acting within the scope of their employment on behalf of DISH.

Also, in connection with the purchase of the LightSquared debt, in other words, this is not a piece of land in the middle of Colorado or wherever. I mean, this was -- and that's always the issue. I mean, if Mr. Ergen hit somebody with his car, DISH is not liable. But when he acts within the scope of his employment, and in particular, I mean, this is -- this is, kind of, the uber-scope of his employment. That's what he does. He looks to buy spectrum assets, and there's no question from the beginning -- this was pled in the debtors' complaint -- this was all part of a plan by DISH to acquire spectrum assets, and it was planned by DISH. And I think one of their points was Mr. Ergen himself is alleged to have sort of viewed DISH as the default purchaser, but if they couldn't, he'd take it on his balance sheet until DISH could figure out a way to benefit from it. But it was always DISH as, sort of, the intended purchaser.

And that's what they pled. I mean, it may or may not be true. I mean, I'm just -- but for purposes of the

complaint, that is what they pled. I believe it to be true, but it doesn't matter what I believe.

The other thing is about --

THE COURT: But the Ergen defendants take the same predicate facts --

MR. FRIEDMAN: Right.

THE COURT: -- and put a different interpretation on it. They say from the beginning Mr. Ergen asked can DISH buy this debt, and he was told no. And he said okay, I'm going to buy it myself.

MR. FRIEDMAN: Right.

THE COURT: Right?

MR. FRIEDMAN: Right.

THE COURT: And they say that that demonstrates that he bought it for himself and not for DISH, because he knew that DISH couldn't acquire it.

MR. FRIEDMAN: So there's two -- so which interpretation would you like? There's their interpretation, which is he always wanted to keep it separate because he knew that it was not permitted for DISH to be the buyer, or would you like a different interpretation, which is that he knew DISH couldn't be the buyer, so he created an artifice to do it through DISH but to make sure that DISH didn't have its fingerprints on it? I mean, they're -- this is what makes horse races. I mean, there are multiple interpretations of

these facts. I don't think it makes sense to get beyond that right now.

But I do want to say thing about this notion of authorization because it just kind of hit home given what I do most of the time for a living. This idea that debtors are not -- or that corporations are not bound by the unauthorized acts of their employees, like I say, I wish that there were true. I mean, Adelphia's board, as we all know, did not authorize the Rigases to commit a fraud. Nonetheless, Adelphia was almost indicted and put out of business, okay? A lot of innocent were almost harmed because of those acts.

Unfortunately, corporations are, in fact, bound not just by the authorized acts, but by the unauthorized acts. That's Kirschner (ph.). That's Bennett Funding. That's the Breeden (ph.) case. I mean, there's hundreds of cases about that. So this idea that you need auth -- now, authorization was pled. It was pled that Ergen and Kiser had authority. But if they didn't, I think the law's like -- I think the Kirschner case said that the law for like for over a hundred years has been that corporations are bound by the unauthorized acts of their employees, as well as the authorized acts.

If we didn't have that problem, we would have no in pari delicto doctrine, which is why I say what I do for a living. I mean, this whole notion that you attribute or impute the actions of agents that are principals, even when

unauthorized, is what created the in pari delicto doctrine.

THE COURT: So hypothetically, assuming that you have a controlling shareholder who owns eighty-eight percent of a company --

MR. FRIEDMAN: Um-hum, right.

THE COURT: -- and he wants to engage in a transaction, how does he go about making sure that there's no allegation after the fact that he wasn't acting on behalf of the company? You've got the control, but then you've got a person who may have any number of businesses or interests or investments. What --

MR. FRIEDMAN: I think -- Your Honor said the word "context", and that's the easiest way. I mean, if Mr. Ergen went out and bought himself a beautiful house in Aspen, that would have nothing to do -- he wouldn't have to go to the DISH board for that. There are some times when the line is difficult to define. This is not one of those times. This is a time when what he is buying, purportedly, personally -- and this is, I think, the fundamental factual dispute between the sides -- but what he is buying purportedly in a personal capacity is the very thing that he's in the business of buying for DISH.

In other words, he was the mastermind when DISH wanted to buy Clearwire or Sprint. I mean, he's -- in fact, I -- you know what? I won't even say what happened in Nevada, but that

was clearly the point that he is the critical employee of DISH when it comes to buying spectrum assets.

THE COURT: So I think that the defendants made the point that he wasn't clairvoyant. He started buying the debt well before the proceeding, right?

MR. FRIEDMAN: There was -- he started buying the debt at a time when it was a distressed investment. No question about it. So remember, this is a company with no cash flow, so any blimp and it is in trouble. And there's no question that it was a distressed investment from the first day.

Look, I want to just -- in terms of the definition of the word "subsidiary", we spent way too much time on this the last time, so I'm not going to say anything other than I think what we concluded --

THE COURT: Can -- is there a path for the plaintiff to prevail if I don't find that SPSO is a subsidiary of DISH?

MR. FRIEDMAN: Yes, there is a path to prevail because you have that -- I think you used the word "sham", and let me just bring that back to the case -- it's the Spanish Cablevision case, the Empresas Cablevision. Judge Rakoff decided that in 2010, where he looked at -- it was, oddly enough, a media company with a sale where there is an injunction sought to prevent the bank, the lender from selling a piece of debt to a competitor. And under that credit agreement, there was no way under the credit agreement to

actually -- what happened was they realized they couldn't sell the debtor to a competitor. So the lender sold the participation. And he didn't have the architecture here where the participants themselves had to qualify.

So a large participation in the bank debt was sold to a competitor -- or it was about to be sold to a competitor. And the borrower went out and sought an injunction. And what Judge Rakoff said is, you know what, I can comb through this entire agreement and I can't find anything here that says you can't do this, but you really can't do it because this is just too smart by half. I mean, you've actually identified something which has exactly the same substantive impact as what was trying to be avoided, and yet you found a clever way to avoid the tactical provisions.

And he said one cannot enter into a contract and then do everything in his power to prevent the other party from getting the benefits of that contract. And I think that's really -- that's sort of the answer to your point, sort of the sham. You don't have to pierce the veil for that. You just need to show that there was an intention by the parties to do this in a way to frustrate the benefits that the parties knew each other had come to expect in the context of that contract. I think it's a very unique case and very much on point in that context.

But getting back to "subsidiary", I don't really -- I

thought where we left it, I thought where we left off is Your Honor was skeptical as to whether or not "subsidiary", with a small S meant "Subsidiary", with a large S. And I thought where we left off was, okay, we can't prove to you as a matter of law that "subsidiary" means "Subsidiary". But no one can prove the contrary, either, meaning whatever "subsidiary" means, okay, either to prove that it doesn't mean the defined term or that it means in common parlance and we have a specific understanding of what that means. I don't think this is provable as a matter of law.

So you may conclude at the end of a trial that the debtor didn't meet its burden of proof of showing what "subsidiary" means. But I just don't think it's there for the --

THE COURT: But they're saying -- they're quoting the stuff we learned first year in law school that you only go to extrinsic evidence when you have an ambiguity.

MR. FRIEDMAN: Right.

THE COURT: And they're saying that it says "subsidiary". Everybody knows what a "subsidiary" is. And as a matter of law, SPSO is not a "subsidiary" --

MR. FRIEDMAN: Um-hum, well --

THE COURT: -- of DISH or EchoStar.

MR. FRIEDMAN: So I think what the debtor did, and I think what we did also, was to canvas the definitions of

"subsidiaries". And some were good, some were bad. Certainly, there's a few of them out of there which would indicate as to an entity which another entity controls. So control, in and of itself, some definitions, could be a subsidiary. I just don't think you can get there as a matter of law.

I mean, I'm not going to go through this again, but I just think that this is an issue which is -- Your Honor, I almost would say to you if it doesn't mean -- we cited a case where a court said come on, capital letter, not capital letter, it's got to be the same thing. So maybe they were wrong. Maybe Your Honor's right. But at the end of the day, I don't think anybody can say definitively from the record what "subsidiary" means, whether it's the common parlance definition of "subsidiary" or if we're trying to work within the credit agreement.

I think it is the paradigmatical ambiguous provision. And if we're talking about ambiguous provisions, you sort of have to add the second one, which is what does it mean when Section 10.04 says nothing in this agreement, express or implied, shall be construed to confer upon any person other than -- I'm paraphrasing -- other than eligible assignees any rights under this agreement. Okay, so it says that. Then, it says someplace else that if you have a bad assignment, it doesn't relieve the borrower.

THE COURT: Right. But it also doesn't say that the

assignment in violation of the provision of the credit agreement is void or voidable.

MR. FRIEDMAN: Right. But if --

THE COURT: So --

MR. FRIEDMAN: But just think about that for a second. If it said that, what would that tell us? If it said that, it was void or voidable, it would say that you should be talking to Carl Icahn. You should be talking to Appaloosa. You should be -- because that's the context of it. If that's -- no one is voiding these trades, and they sort of are where they are. They're in the hands of SPSO. So now we have to decide, in the hands of SPSO -- because there's nothing that reverts them back to their original sellers. So in the hands of SPSO --

THE COURT: That would be a pretty market-disruptive thing to do, right?

MR. FRIEDMAN: Well, it's not what the agreement says, though. So I don't know that it even matters. I mean, it's not what the agreement says. But -- so now in the hands of SPSO, what are SPSO's rights under the contract if they are ineligible? It says that they don't have any rights at all, and then it says something of -- there's some kind of a savings clause, which either applies to them, or it means that if they breach the credit agreement, it doesn't enable LightSquared to say okay, you got -- I don't owe anybody anything. I'm --

THE COURT: This is the free house.

MR. FRIEDMAN: It's a free house. Right. So --

THE COURT: Right.

MR. FRIEDMAN: -- I just think that these are not issues that are readily susceptible to a legal definition.

Your Honor, you have anything else for me? Otherwise, I don't know that I have anything else to say.

THE COURT: I don't. Thank you, Mr. Friedman.

MR. FRIEDMAN: Well, thank you.

MR. DUBLIN: Good afternoon, Your Honor. Philip --

THE COURT: Good afternoon.

MR. DUBLIN: -- Dublin, Akin Gump, on behalf of Mast and U.S. Bank.

And Your Honor, I'll be very brief. Both Mr. Stone and Mr. Friedman, in talking about the equitable subordination, were focused on the LP estates.

THE COURT: Right.

MR. DUBLIN: The LP lenders have claims against Inc. as well. Inc. is a guarantor of the LP debt. And we now --

THE COURT: Right.

MR. DUBLIN: -- right now don't know ultimately what transactions are going to be approved. So it's possible for value at LP not to provide sufficient val -- not to be sufficient value at LP to pay them in full.

THE COURT: Right.

MR. DUBLIN: In which case, it would be our view that

the equitable subordination at Inc. would be alive, assuming it survives today, and that the SPO claims would be subordinated to the payment of the Inc. claims, because, otherwise, we're pari where we don't have collateral at Inc. So it's not just an LP estate issue. It's an Inc. estate issue as well, depending on --

THE COURT: It's --

MR. DUBLIN: -- the ultimate form of the transaction.

THE COURT: -- it's the Inc. estate's claim against the LP estate, right?

MR. DUBLIN: No, the LP lenders have claims at Inc. because they have guarantee claims.

THE COURT: Right.

MR. DUBLIN: And Inc. is obligated on our debt as well.

THE COURT: Right.

MR. DUBLIN: So if --

THE COURT: But how does the equitable subordination -- in other words, everybody at LP has to be -- if they're paid in full, than that's -- then they don't come --

MR. DUBLIN: But if they're -- but if they're not --

THE COURT: -- they don't co --

MR. DUBLIN: -- but if they're not, because we don't know what the ultimate form of the transaction is going to be.

THE COURT: Right. But why does equitable

subordination -- the equitable subordination has to do with the order of priority in which the LP creditors get paid. If they're all paid in full, right, there's no impact up at Inc.

MR. DUBLIN: Correct. But if they're not --

THE COURT: Right.

MR. DUBLIN: -- if they're not paid in full --

THE COURT: Right.

MR. DUBLIN: -- there could be impact at Inc.

THE COURT: Right. But --

MR. DUBLIN: In which case, we believe, to the extent the Inc. lenders have not been paid in full and there was improper conduct by SPSO in his capacity as an LP lender and we're both fighting over pots of value at Inc., for which we're unsecured creditors on account of our guarantees, they should be subordinated to us, because --

THE COURT: Okay.

MR. DUBLIN: -- otherwise we'd be pari. So we think the comments have been made that equitable subordination is only an LP estate issue. It's an Inc. estate issue as well.

THE COURT: Okay. Well, I mean, this gets back to all the difficulties that we've been having for these many months now on intervening and how you do it. So you've said that, but that doesn't live -- that doesn't live anywhere else. Is that something that's in your plan?

MR. DUBLIN: It's -- well, it's in the complaint.

It's in the debtors' complaint. It seeks to subordinate the LP claims -- the LP lenders' claims held by SPSO to --

THE COURT: All claims.

MR. DUBLIN: -- other claims of the LightSquared estates.

THE COURT: Okay. So the --

MR. DUBLIN: So it's --

THE COURT: -- answer --

MR. DUBLIN: -- on an estate-by-estate basis where those claims reside they would be subordinate.

THE COURT: All right. It's mushed to use a technical, legal term.

MR. DUBLIN: It's a very good technical, legal term.

THE COURT: Yeah.

MR. DUBLIN: Yeah.

THE COURT: It's mushed now. So as and when we get there, we'll have to --

MR. DUBLIN: It may --

THE COURT: -- we'll have to --

MR. DUBLIN: Exactly.

THE COURT: -- make it clearer that that's what people are talking about, because it's not clear now. I hear you. You've just --

MR. DUBLIN: Okay.

THE COURT: -- made it clear --

MR. DUBLIN: Okay.

THE COURT: -- what your position is. But in reading -- putting all this together, that was not clear.

MR. DUBLIN: Okay, understood. Thank you, Your Honor.

THE COURT: So Mr. Barr, is that what you intended for Mr. Stone? I'm just not smart enough to follow this through, because it's definitely not clear.

MR. BARR: Your Honor, you asked a question before, and we clarified that it was the LP.

THE COURT: Right.

MR. BARR: Mr. Dublin reminded us -- and we have lots of things that we have in our head -- that there is an unsecured guarantee claim.

THE COURT: There is.

MR. BARR: Right. So --

THE COURT: Right. That's why I asked you the question, and I thought you gave me the answer. But --

MR. BARR: So there --

THE COURT: -- but not so much.

MR. BARR: -- there could be a deficiency claim at Inc. And then, if the conduct yields equitable subordination, the Inc. creditors would have the same type of argument for subordination to them. So they would be both, Your Honor.

THE COURT: Okay. And your -- anything further, Mr. Dugan? Do you want to go again?

MR. DUGAN: Your Honor, if you don't mind?

THE COURT: Sure.

MR. DUGAN: Just to make a few points. I'll try to be as brief as possible.

THE COURT: It's okay. The sun just came out, so --

MR. DUGAN: I'll take that as a good sign. What Your Honor -- I did just want to hit on a few points made by counsel for Harbinger and for LightSquared. Just on the agency point, because I think it's important. I did not hear counsel for LightSquared take the position that they were seeking here or they were alleging here was that DISH is Ergen and Ergen is DISH in those terms. I think -- I'm supposing the reason why they didn't say that is because they understand that they haven't really pled an alter ego claim in their complaint. And an alter ego claim, Your Honor, is difficult to prove. It's hard to prove, and you have to prove --

THE COURT: Well, I --

MR. DUGAN: -- specific facts.

THE COURT: -- I don't know. We're putting different nuances on what people said. I thought that what Mr. Friedman very much was saying was that Mr. Ergen and DISH should be equated for the purposes of determining whether or not the purchases by SPSO were made by an eligible assignee, and he does so knowing that I don't believe in equitable disallowance. So that has to be so as a matter of violation of the contract.

So now you stand up and say that's not what he said.

MR. DUGAN: Well, I'm really focused on LightSquared's complaint first because they're the complaint that I think is the governing complaint --

THE COURT: Okay.

MR. DUGAN: -- and the one that I think should control --

THE COURT: Okay.

MR. DUGAN: -- what we're focused on in terms of what this trial, if we're going to have one, would be about. And so I would address what Mr. Friedman said differently. But with respect to what the LightSquared complaint alleges, it doesn't allege an alter ego theory. It doesn't say -- it doesn't allege the kind of facts that Twombly/Iqbal require, which are facts that can lead to plausible inferences of the following things that you have to allege when alleging an alter ego theory, which is comingling of funds, undercapitalization -- not of SPSO; of DISH, because the allegation is DISH is Ergen and Ergen is DISH -- so comingling of the funds of Ergen and DISH. Undercapitalization of DISH; that would be very hard to allege. I think it would be actually an impossible hurdle given that DISH is a twenty-billion-dollar company, absolutely no suggestion at all. And there can't be that it is in anyway undercapitalized. There's no suggestion or allegation that Mr. Ergen, in some sense, directed DISH's assets without DISH's

authorization. These are the kinds of things that you would need to be able to allege to show an alter ego theory, a unity of interest between -- a complete unity of interest between Ergen and DISH such that one was the alter ego of the other.

They have not alleged that. I think what Mr. Stone pointed to repeatedly in his argument was that the titles of Ergen and Kiser should be enough that -- their titles -- he was the chairman, Kiser was the treasurer -- should be enough to enable them to put forth an agency theory. I do want to point out, Your Honor, that the doctrine he was using to make that argument -- the implied authority doctrine -- basically would be -- would work like this. Ergen would say I'm the chairman of DISH. I'm buying these as the chairman of DISH. That allegation would set forth an implied authority claim.

But here, there's no allegation that Ergen was out in the market place as the chairman of DISH buying these trades. There's no allegation that he was purporting to be the chairman of DISH while he was buying these trades. What they're alleging is he was buying these trades, and he was the chairman of DISH, not that he was using his title in any way. There's no allegation sufficient to suggest an implied authority in that context, Your Honor.

Just touching very briefly on the context question, Your Honor. Putting aside Nevada -- you don't have to look at any pleadings in Nevada -- looking only at the facts of this

bankruptcy proceeding and the facts that were in the record in this bankruptcy proceeding regarding when Ergen bought the debt, when he started buying the debt and the other events that occurred, Your Honor, I think, can take notice when Mr. Ergen began buying the debt, there was no bankruptcy case. There was no exclusivity period in place.

There was no sale of assets proposed. I think, Your Honor, because Sprint and Clearwire -- not from Nevada but from SEC filings and other documents; in fact, Mr. Friedman referred to those transactions -- Sprint and Clearwire were on the scene. Those were twenty-billion-dollar transactions that DISH was consumed with. If you look at the context of when Mr. Ergen began his debt purchases and the context of those purchases, I don't think it supports the argument that there was unity of interest among DISH and SPSO with respect to Mr. Ergen's purchases. I think it shows that those were quite different things that happened at different points of time as matters unfolded.

Your Honor, Mr. Stone made an argument that, with respect to damages, that maybe we would be in a different place in this proceeding if Mr. Ergen's purchases had not occurred, if SPSO was not an ad hoc lender -- a secured lender. What Mr. Stone is overlooking, though, is that since way before SPSO's identity was known, the ad hoc secured group has been pushing for a sale of this company. They fought an exclusivity battle

with the debtors in order to advocate and push for a sale of the assets of this company.

I think it's very likely to believe that even if SPSO was not a debtor in any way -- I'm sorry, a creditor in any way, that LBAC would still have made a bid for these assets, that that bid would still have been well received by the ad hoc secured group. There's nothing really we can point to, to suggest that we would be in a different place now had these SPSO debt purchases not occurred.

Your Honor, Mr. Friedman mentioned the case, Empresas, I believe: not a bankruptcy case, Your Honor. That case has been out there since 2010.

THE COURT: But the thing -- the concern of the LP lenders all along is they weren't going to be paid in full, right? They're -- so of course they were pleased when the bid came in when it did because it paid them in full. But they were -- their concern was that the bid would come in lower.

MR. DUGAN: Your Honor, yes, you're right. But my point is only to say that there's no basis to think that because of SPSO's debt purchases that we're now in a different position --

THE COURT: Well, the theory --

MR. DUGAN: -- than we would have otherwise have been.

THE COURT: -- the theory that was alleged in the first Harbinger complaint was that because such a large amount

of the trades were hung or were hanging at the time that it roiled the markets and it made the debtor unable to take advantage of its exclusive period. That was --

MR. DUGAN: And I guess all we're really saying, Your Honor, is that the different interests and different goals of the ad hoc -- I'm sorry -- secured group and LightSquared were matters of public record from way before SPSO got involved. I mean, the secured lenders wanted a sale of the assets. LightSquared and Harbinger did not, and that was a battle they fought repeatedly for many months before SPSO was ever on the scene.

It really was not because of SPSO that that battle was being fought. It was because, as Your Honor has rightly identified, the lenders were concerned that they wouldn't get paid in full.

THE COURT: Well, the hypothesis, though -- their hypothesis is that had there been -- I'm not saying I agree with it, but they're saying that if they knew who held the debt, they would have known who they could negotiate with. Or, if they had known that those trades weren't going to close, they could have been released from some of their obligations with respect to exclusivity, and that then there would have been a different plan and that therefore, there would not have been an LBAC bid. That's the -- whether you believe that that's a likely causal chain or not, that's what they're

saying.

So exclusivity would not have been expired. They would have filed a different plan, and that would have precluded the LBAC bid. That's, I think, what they say would have happened.

MR. DUGAN: Understood, Your Honor. And I think we can leave it at that. Our only point is to suggest that the differing goals and objectives of LightSquared, Harbinger and the lenders are a matter of record and don't support the inference that were not for SPSO they would have come together. That's the point we're making.

THE COURT: I see what you're saying.

MR. DUGAN: Yeah, that's the point we're making.

THE COURT: The peace in the valley point.

MR. DUGAN: Exactly, Your Honor.

THE COURT: Okay.

MR. DUGAN: Sorry it took me so long to get there.

THE COURT: That's okay.

MR. DUGAN: The only other point I was going to make is with respect to the Empresas case, if I'm saying it correctly, that Mr. Friedman pointed out. That has been -- to the extent it's applicable here, Your Honor, that has certainly -- has been a case that's been decided since 2010. It was out there. Your Honor noted during one of counsel's arguments that there was certainly public record information

about Mr. Ergen's involvement in this from very early on. 2004 discovery was an option for the debtors, certainly as of the bankruptcy proceeding, to seek discovery of SPSO if that was something that they thought was indicative of wrongdoing in any way that -- they never did that.

They didn't seek to stop these trades in any way. We've made this point before. I will add that Harbinger's complaint specifically references an inquiry in December of 2012 by Mr. Falcone in which he says I know you're buying the debt. Now, he was writing to Tom Cullen, who was a senior executive at DISH. Their point is that was an inquiry. We were asking him. We weren't saying we -- I know we said we knew. We didn't really know. We were just asking. Well, they never sent an e-mail to Carlos Slim, I don't think. My only point is, as much as they might want to sort of backpedal from it, the identity of SPSO was not a big question mark in their minds, I think, at any point during this.

THE COURT: But shouldn't we have a trial where we can ask Mr. Falcone that very question?

MR. DUGAN: I think that would be a very short trial, Your Honor, but it's possible. But we think that the record on this case would enable you to draw the inferences that are there from the pleadings that have been filed the appropriate way, which would lead to dismissal.

THE COURT: Okay. Thank you. Mr. Giuffra?

MR. GIUFFRA: Thank you, Your Honor. I'd like to try to simplify this a bit. And I think Mr. --

THE COURT: Sure.

MR. GIUFFRA: -- if that's possible, at least maybe get two of the parties out of the case, but maybe all. Mr. Stone said something interesting, and I went back and looked at Count V of the complaint. And I think it's important to sort of -- to take the Court through it. Paragraph 109, which we were --

THE COURT: Give me a moment to get there, okay? Paragraph 105, you said?

MR. GIUFFRA: 109, 109.

THE COURT: 109? Okay?

MR. GIUFFRA: That's the paragraph that references UBS and that the tortious interference that was supposedly engaged in by DISH and EchoStar related to UBS' relationship vis-a-vis the credit agreement. And it says SPSO, DISH, EchoStar, and then Mr. Ergen. And I guess we probably should have focused even more on this. And then, on 110, they suddenly drop out SPSO. Do you see that? And then, they have just a generalized oh, he said well, this is sort of just generalized interfering with the credit agreement, and I presume with LightSquared's relationship vis-a-vis the credit agreement.

Now, if you then turn back to paragraph 86, where they make the allegation that SPSO is a subsidiary of DISH and

EchoStar, right, which is sort of the lynchpin allegation in the complaint, and then you turn to the next page, second claim for relief, that's a breach of contract claim against SPSO. Now, it's black letter law that you can't bring a breach of contract claim and a tortious interference claim with the same entity. You have basically a choice. You can bring your breach of contract claim or you can bring your tortious interference claim.

Now, what they've done, Your Honor, is they essentially say -- they say in paragraph 86, SPSO is a subsidiary of DISH, EchoStar. Okay. Well, if it's a subsidiary of DISH, EchoStar, then you're bringing a breach of contract action in Count II against a subsidiary of DISH, EchoStar, and then you're trying to bring a tortious interference case against, I guess, the parent or maybe just another subsidiary of the Charlie Ergen enterprise in para -- in Count V. And just basic black letter law is you can't do that. There's an inconsistency in the pleading in that on the one hand, they want to say that SPSO is a subsidiary. They want to bring a breach of contract claim in Count II. Then, in Count V, by sort of just dropping SPSO from 109 and 110, they want to --

THE COURT: No, SPSO is in 109.

MR. GIUFFRA: It's --

THE COURT: SPSO is not --

MR. GIUFFRA: -- is dropped in 110.

THE COURT: -- in 110.

MR. GIUFFRA: So --

THE COURT: Okay?

MR. GIUFFRA: -- so they want to try to bring sort of a different tortious interference claim against SPSO in Count V, but then, they want to bring sort of a more broad tortiously interfering with the credit agreement claim in --

THE COURT: Okay. But --

MR. GIUFFRA: -- Count --

THE COURT: -- so is what you're saying then that -- I mean, the simply answer to what you're saying -- and it's not at all simple -- is that you would simply strike Count V as it's alleged against SPSO?

MR. GIUFFRA: And also against DISH, EchoStar --

THE COURT: Why? They're not --

MR. GIUFFRA: -- because DISH -- because the allegation in 86 is that SPSO is a subsidiary of --

THE COURT: Right. So there's different causes of action. This is what our -- what we spent the whole day talking about.

MR. GIUFFRA: I don't believe, Your Honor, as a matter of law, you can have a tortious interference claim against a -- bring a breach of contract action --

THE COURT: Again --

MR. GIUFFRA: -- against a subsidiary of the same entity, and then have another one against another subsidiary for a tortious interference.

THE COURT: Why not?

MR. GIUFFRA: I think they're conflicting, because if the theory --

THE COURT: If you've got a --

MR. GIUFFRA: -- of the case --

THE COURT: -- if you've got a contract party -- you've got a contract party at the sub. The sub is a contract counterparty --

MR. GIUFFRA: Correct. That's the claim.

THE COURT: -- and the parent directs the sub to breach the contract.

MR. GIUFFRA: And then, you have a breach of contract against the subsidiary and whatever claims --

THE COURT: Right.

MR. GIUFFRA: -- flow from that. You don't have a --

THE COURT: And --

MR. GIUFFRA: -- separate --

THE COURT: Why don't you have a separate tortious --

MR. GIUFFRA: I don't --

THE COURT: -- interference claim against the parent?

MR. GIUFFRA: -- I don't think you would that, because if your theory is that they're one in the same, which is, I

think, the theory that they're asserting, you can't do --

THE COURT: Well, they're pleading -- I'm trying not to blue pencil the complaint because I don't think it's appropriate for me to do that. But I'm not following the --

MR. GIUFFRA: Okay. Let me see if I can restate it.

THE COURT: No, I understand the point that you're making. I'm just not sure that it's correct that you could not have -- you have a breach of contract claim against the contract counterparty. Period. Full stop. You don't have a breach of contract claim against somebody who's not a part to the contract. But if another party procures the breach or tortiously interferes with the rights, then you can state a tortious interference against that other party even though they're the parent of the breaching party.

MR. GIUFFRA: Your Honor, I don't believe you can, because I think that if the parent controls the subsidiary, which is the theory of their complaint, they're essentially one and the same. It's not like -- usually tortious interference claims are third parties interfering with contracts on behalf of another party. Here, they're basically saying the parent is interfering in a contract that the subsidiary is breaching because the parent is helping the subsidiary execute the breach. Okay, what's the claim here? That Mr. Ergen directs all of this with the assistance of Mr. Kiser, through SPSO, which they claim is a subsidiary. So it's the fact that Mr.

Kiser works for DISH --

THE COURT: Mr. Giuffra, aren't you listening to the -- this is -- the notion that this should be disposed of on a motion to dismiss is just -- it's extremely -- it's extremely difficult. We have allegations -- specific allegations about conduct that occurred here. You've all pointed to me and not pointed to me about things that are going on in Nevada. Everybody selectively uses Nevada when it's in their interest.

The fact of the matter is that there are predicate allegations here that involve conduct by the treasurer of DISH. There are communications that refer to the desire of EchoStar to purchase the debt. Maybe the answer is these folks come in and they say I was speaking loosely; I didn't mean that. And that's fine. But on a motion to dismiss, where I'm supposed to draw every inference most favorably to the plaintiff, just on the four corners of the complaint, I'm just having a very hard time getting there.

MR. GIUFFRA: My only point, Your Honor, is they can't bring -- they can't allege a parent-subsidiary relationship, sue the subsidiary for breach of contract, and then bring a tortious interference claim against the parent. They could bring the breach of contract against the subsidiary. My point is that they're trying to drag -- drag the parent into a case where they have, on their pleading, a claim against the subsidiary. That's my only point. I don't believe that you

can bring -- you would agree, Your Honor -- I mean, I think it's fair; they couldn't bring a tortious interference claim --

THE COURT: And a contract --

MR. GIUFFRA: -- and a breach of contract claim --

THE COURT: Correct.

MR. GIUFFRA: -- against SPSO.

THE COURT: Right, and --

MR. GIUFFRA: My point is that just -- if you accept the allegation that SPSO is DISH/EchoStar -- that's the allegation they've made -- they're essentially trying to do the same thing that they can't do --

THE COURT: At the end of the day, if I find that DISH and SPSO are not one and the same, though, but I find that DISH directed SPSO to engage in the trades and to secure the advantage for DISH so that it subsequently could bid, why might that not support a tortious interference claim against DISH?

MR. GIUFFRA: The reason would -- well, that's a different claim, and it's a different claim than the one that they're pleading, because the claim they're pleading is that DISH and EchoStar and SPSO are all one and the same. I mean, I'm -- look, my only point is I don't think you can do that. You clearly can't bring a tortious interference claim and a breach of contract claim against the same entity.

THE COURT: That --

MR. GIUFFRA: I don't believe you can do it vis-a-vis

parent and sub; that's my only point.

THE COURT: Okay.

MR. GIUFFRA: Now, the other point, Your Honor, is on this question of pleading. In Your Honor's decision on November 21st, at pages 31 and 32, at the bottom of the page, you made the point about how -- and essentially the same allegations that were made by Harbinger were -- have been restated here by LightSquared, with the addition of the Kiser e-mail; that's really the only difference.

And so at that point in time, in Your Honor's decision, you made the point you didn't understand, as a matter of law, how Ergen could be both an agent and a principal. And then you talked about how Harbinger's theory of agency fails because there's no other -- they don't allege alter ego; they don't allege veil piercing.

Our point is -- and it's the same point and not to repeat it again -- this complaint doesn't have any specifics that would justify veil piercing. It doesn't have any specifics that would justify board approval on a billion-dollar transaction that would -- there's no disclo -- they sort of throw out, oh, this was DISH's money that was used. They have no support for that.

Now, a point that Mr. Dugan made earlier is, well, what's the relevance of the Nevada complaint. What's the relevance of the Nevada information is they have a Rule 11

obligation to basically have well-pled complaints before Your Honor and to do an investigation. They've got to take into account the facts in Nevada and what everyone has said in Nevada. And they've got to square what's been said in Nevada with what they're pleading in this complaint. They can't just sort of make a -- well, you know -- they can't make this that SPSO is a subsidiary of DISH and this was all directed by DISH, but they're aware of what's alleged in Nevada. So --

THE COURT: And they believe -- and they believe that what's been alleged in Nevada supports their theory. That's the problem that I'm having. That's what's fascinating about this. You're each looking at pleadings and facts and drawing different inferences. So they're looking at things that have been filed and pled in Nevada and taking the position that it supports them, and you're saying that it doesn't.

MR. GIUFFRA: No, my point, Your Honor, is they have nothing in the complaint that supports the notion that this billion-dollar debt purchase was an authorized transaction. And Mr. Ergen is obviously -- he's a multi-billionaire -- is free to engage in all kinds of transactions. And it can't be, as a matter of law, that just the pure allegation that he's the executive chairman of DISH and EchoStar means that all of his actions in the telecommunications space are suddenly the actions of DISH/EchoStar without anything more. And that's essentially what they've done.

My only point is in making that bare conclusory pleading, they have to also take into account, as a matter of Rule 11 and their investigation responsibility, the allegations in Nevada which, in our view, are completely to the contrary and basically make the point he's not authorized to engage in a billion-dollar debt transaction. That's my only point.

To turn to another --

THE COURT: But they're also looking at what occurred with respect to the process that the special committee underwent, right? I mean, I'm just trying to follow where you're going with this because if you --

MR. GIUFFRA: My first point is that in terms of the pleading of the complaint, they have nothing more than what Harbinger had when Your Honor said it was insufficient back in November, other than the Kiser allegations, because Kiser's just a mere tool of -- if you accept the allegations of the complaint, he's someone who's executing Mr. Ergen's directions, right? They alleged that Mr. Ergen was directing all of this back in the Harbinger complaint. Your Honor said that was not enough --

THE COURT: Right, and now we have --

MR. GIUFFRA: -- public company, and the only difference that they have now is the Kiser allegations. My point being, I don't think that gets --

THE COURT: That's a difference.

MR. GIUFFRA: It's a difference, but I don't think it's a difference that gets them over to the point of pleading plausibly --

THE COURT: That the treasurer of a public company is spending this time executing hundreds of millions of dollars of trades is not something that is different from what Harbinger pled?

MR. GIUFFRA: Well, they haven't pled that he was doing so in his capacity as the treasurer of DISH. It's the same, basically, agency theory based on titles, which is legally insufficient.

THE COURT: Well, anything else?

MR. GIUFFRA: Yes. On the issue of contracts interpretation and large S and small S in "subsidiary", I think it's correct that on a motion to dismiss, in my experience, courts interpret contracts on motions to dismiss unless those contracts are ambiguous. No one has come into this court and said there's some drafting history about what small s and big S means. So I think Your Honor should interpret the contract on a motion to dismiss. It's something that, in my experience, courts routinely do. We cite cases where that is done.

Just one last point and then I'll be done. They also have to plead damages and an injury, and there's been a lot of speculation here about damages and injury. I have not heard -- well, just look at the complaint; there's nothing but

conclusory allegations of injury and damage. It's about things that might happen in the future or things that happened in the past. To the extent it's with respect to things that happened in the past, that's things that are within their knowledge and they should be able to put it in a complaint. They haven't done so. So Your Honor, I don't think they've pled injury, damage, and that's an element of a tortious interference claim.

THE COURT: Okay. Thank you.

MR. GIUFFRA: Thank you.

THE COURT: Anything else?

MR. DUGAN: Your Honor, I don't have any argument, but I just wanted to amend something --

THE COURT: Sure.

MR. DUGAN: -- to point something out. I know you had questions about the release, and what -- the release clearly was troubling, in some respect, to Your Honor. We just wanted to invite Your Honor -- I'll give you the docket number of the release, if you -- I don't know if you've looked at it any time recently, but it's docket number 970. It's exhibit to the disclosure statement -- Exhibit F to the disclosure statement of the ad hoc, I think, secured lenders group. And I think, Your Honor, if you look at the release and the language of the release, our view is it doesn't show an identity of interest between LBAC and SPSO, but I don't want to argue it; I just wanted to point out that that's where it is.

THE COURT: I don't know what that statement means, Mr. Dugan. So if you want to unpack it, that's fine, but I don't understand what the point is of what you just said.

MR. DUGAN: Well, it's just -- the point is, Your Honor, the release is a very standard release. It doesn't spell out any disallowance claim. It doesn't highlight any disallowance claim.

THE COURT: Well, I don't know what to do about this, because this issue comes up about every four hours like clockwork. And I've asked before if that means that it means an affirmative -- a release of affirmative claims, damage claims, or if it means that as a condition to the LBAC bid, SPSO's claims must be allowed in full. And I was told before that it means the latter; it means both. So I don't know now if you're trying to tell me something different from that.

MS. STRICKLAND: Your Honor, may I address this?

THE COURT: Sure.

MS. STRICKLAND: Because I addressed this the first time.

THE COURT: Yes.

MS. STRICKLAND: So when Your Honor asked me the question of what does the release mean, I wanted to answer you to let you know all of the possible effects of the drafting. What I heard Your Honor to say today was you infer something from the fact that LBAC was drafting to get the affirmative

allowance of SPSO's claims. That is not what the release says.

However, in the same way that "claim", as broadly defined under 101(5) of the Code, can encompass a whole lot of things, I didn't want Your Honor to feel that we had misled you when you say does it include this, does it include this, does it include this, if we later came back and said, yes, it's a super-broad general release; it includes all of those things, that you would not think, well, that's not what you told me before. But when LBAC, as far as Your Honor drawing an inference about drafting implies a relationship between those parties because LBAC was drafting to protect parties it had an identity of interest with, I think that goes too far.

THE COURT: But --

MS. STRICKLAND: It is a very broad --

THE COURT: But here's the part --

MS. STRICKLAND: -- general release --

THE COURT: Here's the part that I don't understand, that -- and I mean, you're inviting me to go there, so I'm going to go there with you. Mr. Ergen forms LBAC, right?

MS. STRICKLAND: Correct.

THE COURT: Okay. LBAC makes the bid on behalf of -- it's going to be some --

MS. STRICKLAND: LBAC submitted an offer letter on May 15th --

THE COURT: Right.

MS. STRICKLAND: -- Your Honor.

THE COURT: And it's going to be some combination of, right?

MS. STRICKLAND: It leaves the possibility open.

THE COURT: Cor --

MS. STRICKLAND: At the time he bids --

THE COURT: Right.

MS. STRICKLAND: -- he's letting the target know that --

THE COURT: That --

MS. STRICKLAND: -- at some point --

THE COURT: Right.

MS. STRICKLAND: -- the situation may change, but as of right now --

THE COURT: It --

MS. STRICKLAND: -- LBAC is entirely owned by Mr. Ergen.

THE COURT: Entirely owned by him.

MS. STRICKLAND: Correct.

THE COURT: Right. And before that bid gets put in, right, the release means that his debt claim gets paid in full.

MS. STRICKLAND: Your Honor, at the time that the May 15th letter went in, it was merely a letter. There was no asset purchase agreement.

THE COURT: Okay.

MS. STRICKLAND: There was no --

THE COURT: Then skip forward to when there is an asset purchase agreement.

MS. STRICKLAND: -- document whatsoever. So at the point in time that there is an asset purchase agreement, there is a -- prior to the submission of the bid, DISH decides that it wants to acquire LightSquared. It transfers the ownership interest in the acquisition vehicle, which is LBAC, for a dollar.

THE COURT: Right.

MS. STRICKLAND: And a purchase agreement comes into being that has a broad general release --

THE COURT: Right.

MS. STRICKLAND: -- and a broad general release says against the debtors' claims against the LP debtors' sellers, is the way its drafted -- the LP debtors' claims, as broadly as that could be defined, and it has that long litany of chose as an action and all of these other --

THE COURT: Right.

MS. STRICKLAND: -- words that lawyers include in these broad general releases, against the purchaser or purchaser's affiliates. And it's just binding on sellers.

THE COURT: Right.

MS. STRICKLAND: It's not -- on the LP debtors. It's not binding --

THE COURT: Right.

MS. STRICKLAND: -- on anyone else.

THE COURT: Right.

MS. STRICKLAND: But it's this broad general release. So when Your Honor said, well, could the release do this, could the release do this, could it bar all of these things, the answer is yes, it could, because it's a very broad --

THE COURT: But the ques --

MS. STRICKLAND: -- broadly worded agreement.

THE COURT: But the --

MS. STRICKLAND: But that's different from is it a condition that the claim be allowed. There's nothing in the release, whatsoever, that says SPSO, that talks about debt, that talks about allowance at all.

THE COURT: But if I were to say right now --

MS. STRICKLAND: Um-hum.

THE COURT: -- I am separating out the claims allowance process, I'm separating out the 502(b)(1) proceeding from the bidding, you're not going to know until next June whether or not that claim is allowed. The bids not going to go forward. The facts on the ground are that the bid, as I understand it, requires that the claim be allowed in full. That's what -- I mean, if that's not the case, somebody ought to tell me. I keep asking the same question over and over again.

MS. STRICKLAND: Your Honor, that's why I think Mr. Dugan was pointing you to the language of the release itself, and the docket number, which is on your docket --

THE COURT: I know --

MS. STRICKLAND: -- before Your Honor, because there are -- as an example, the LP debtors are the only parties giving a release. If the LP debtors want the bag of money that LBAC is offering, they have to agree to the agreement, or they have to negotiate a different agreement. But there's not any other way around that.

THE COURT: Right, and the question is --

MS. STRICKLAND: You are correct.

THE COURT: -- as it relates to what we're talking about now and not the auction, the question is, is why is a bid of DISH, which is a separate entity from SPSO -- say, the defendants -- why does the bid of DISH care about whether or not SPSO gets its claim in full? DISH has determined that it wants to pay 2.2 billion dollars for the spectrum. It shouldn't care what happens to that 2.2 billion dollars after it gets into the debtors' hands, whether or not -- whoever's claims are allowed. DISH wants the spectrum; it's going to pay 2.2 billion dollars, and there's going to be that switch. And what happens after that should be of no concern to DISH. That's the theory. That's what I'm focused on --

MS. STRICKLAND: I understand, Your Honor.

THE COURT: -- only insofar as it relates to the allegations of identity of interest.

MS. STRICKLAND: And Your Honor is well aware that when parties draft general releases, they say, me, my affiliates --

THE COURT: Sure.

MS. STRICKLAND: -- successors, assigns. That's what the document says.

THE COURT: But now that all of this has shaken out, it's still in there, and query whether taking it out now would matter, because it was in there. In other words, when LBAC went from being owned by Mr. Ergen to being owned by DISH, nothing happened. So it's in there, it was in there, it still is in there, and I'm not so sure taking it out now makes any difference. But I'm just not --

MS. STRICKLAND: Right, Your Honor, obviously you're not negotiating a credit agreement with me, and were you asking me to negotiate that provision --

THE COURT: Right.

MS. STRICKLAND: -- I would refer you to someone else, because as a result of the injunction in Nevada, I would not be the lawyer having that --

THE COURT: Right.

MS. STRICKLAND: -- negotiation. However, this isn't a negotiation. This is a question about whether or not facts

as pled infer something --

THE COURT: Right.

MS. STRICKLAND: -- or don't infer something. And my only reason for rising at all is I don't think that you can infer that because as of a moment in time in July a company wrote a general release that said affiliates, successors, assigns, claims, broad, broad, broad, broad, broad, broad, that that means that there was an identity of interest with everybody in that broad release.

THE COURT: Sure. I --

MS. STRICKLAND: That was --

THE COURT: I agree with you.

MS. STRICKLAND: -- my only point, and not --

THE COURT: I --

MS. STRICKLAND: And to distinguish from your prior question of me of what is the effect of this broad general language, I didn't want Your Honor to think that there was a gotcha somewhere in there. A broad release is a broad release, as opposed to it demonstrates an identity of interest or an intent, frankly, for LBAC to get something for SPSO, as opposed to the contract says what it says, it's been public, it's been there all along, and it's very, very broad, because of routine language, not because of a sneaky conspiracy identity of interest. So it's merely about the inference. And if there becomes an appropriate point in time for anyone to negotiate

with LBAC regarding any aspect of the agreement, I'm sure they'll ask all of the things they want to ask, and the appropriate lawyers, who are permitted under various legal orders, will respond. But that's not --

THE COURT: Okay.

MS. STRICKLAND: -- where we are today. Today we're merely concerned about the inferences, and I didn't want Your Honor to think that the release said I require SPSO's --

THE COURT: Look, I mean everybody --

MS. STRICKLAND: -- claims to be allowed; it doesn't.

THE COURT: We keep -- we're all talking about Nevada, and then we're not talking about Nevada. And what I've tried to do here, which I think is my job, is to look at the complaint, and to look at reasonable inferences that can be drawn from the complaint, and apply Iqbal versus Twombly and all the very standard issue Second Circuit law on whether and when you let a complaint survive a motion to dismiss.

So I'm not sure how -- if you went back and look over this transcript, probably a law professor would say that ninety percent of what we talked about has nothing to do with the motion to dismiss. And I just want to say back to you, I appreciate what you're saying, and I'm trying very hard to not get distracted by things that really aren't in the complaint. To your point -- right? You're making this point because you don't want me to be distracted by something that's not in the

complaint, right?

MS. STRICKLAND: That's correct. But Your Honor, the only reason why Nevada came in here -- because I was also the lawyer that stood before you, not that long ago, and said Nevada is totally irrelevant. The reason why Nevada was so prominent today is because when plaintiffs pled their complaints, they attached things like reports that got filed in Nevada, e-mails about Nevada, and facts from Nevada in their complaint. And our only point, on this side of the table, is you can't plead something and say please only look at one one-hundredth of it. If they're going to use it, they have to be comfortable with the entire record they're introducing. If they're not going to use it -- I mean, Mr. Stone was perhaps exaggerating a bit when he said there were a couple of bullet points. If you look at the exhibits, which are also attached to the complaint, there's reams of Nevada. And they were not new facts introduced by any defendant. They were all facts introduced by plaintiff. And all the defendants have said, in our pleadings and today, is if you're going to allow this snippet and that snippet, you can't take it out of context. That's part of their complaint; they have to live with the whole complaint.

THE COURT: Okay. All right. Anyone else?

All right. What I'd like to do is take another break and have you come back at 5 o'clock, and I need to give you a

disposition, I think. Is that -- why don't we make it ten minutes to 5, okay? And if I keep you waiting for a few minutes then I'll keep you waiting for a few minutes, okay?

(Recess from 4:27 p.m. until 4:55 p.m.)

THE COURT: Have a seat. Please have a seat. I realize that I'm hitting up against the 5 o'clock deadline around here, so let me see if I can get you folks out of here.

First of all, thank you for a long afternoon. It was very well done.

Just let me briefly state the law, which I know you all know, but for the purposes of making a record. Under Rule 12(b)(6), to survive a motion to dismiss, a complaint must allege facts sufficient "to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

A claim is plausible "when the plaintiff pleads factual content that allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged". Ashcroft v. Iqbal, 556 U.S. 662 (2009). On a motion to dismiss, the Court must "accept as true all factual allegations set out in the plaintiff's complaint, draw inferences from those allegations in the light most favorable to the plaintiff, and construe the complaint liberally". Rescuecom Corp. v. Google, 562 F.3d 123 (2nd Cir. 2009). Dismissal is only appropriate when "it appears beyond doubt

that the plaintiff can prove no set of facts which will entitle him or her to relief". Sweet v. Sheahan, 235 F.3d 80, (2d Cir. 2000).

So against that backdrop, I've reviewed both the Harbinger second amended complaint and the LightSquared complaint, and also taken into account, I think, what is also pretty standard law in the Second Circuit as to what is a court's mission when interpreting a written agreement.

And I can give you the following cites. First -- and this is a quote -- "A written agreement that is clear, complete, and subject to only one reasonable interpretation must be enforced according to the plain meaning of the language chosen by the contracting parties." Brad H. v. City of New York, 951 N.E.2d 743 (N.Y. 2011).

But a court does not read the words of a contract in a vacuum and must give "due consideration to the surrounding circumstances and apparent purpose which the parties sought to accomplish". Thompson v. Gjivoje, 896 F.2d 716 (2d Cir. 1990), quoting William C. Atwater & Co. v. Panama R. Co., 159 N.E. 418 (N.Y. 1927), quoting Development Specialists, Inc. v. Peabody. Energy Corp. (In re Coudert Bros.), 487 B.R. 375, stating that in analyzing a contractual text a court need not turn a blind eye to context.

Based on that, the following is the disposition of the motions to dismiss. Consistent with my colloquy with Mr.

Friedman, Counts I and II of the Harbinger complaint are dismissed. Harbinger's not a party to the contract. These are, in essence, derivative claims. Moreover, as was pointed out by some of the opposing parties, there was no permission granted to bring these claims. So those are dismissed, and the dismissal is with prejudice.

Let me skip Count III of the Harbinger complaint.

With respect to Count IV, equitable disallowance, that's dismissed, again, with prejudice again. It's not to be repleaded again.

With respect to Count V, equitable subordination, I think that the best thing to do with respect to the equitable subordination is have it be reflected in a plan of reorganization, if that's what Harbinger decides it wants to pursue.

And I think for the neatness of the record, then, Count III of the Harbinger complaint is going to stand, and the motion to dismiss Count III is denied. So what will be left of the Harbinger complaint will be Count III only. The reason for letting it stand and not completely folding it into the LightSquared complaint, there are some different allegations, I believe, that were made. So that's what that complaint is going to look like going forward.

With respect to the LightSquared complaint, the motion to dismiss is denied as to Counts I, II, and III, so those will

stand. Count IV, the equitable disallowance, is dismissed, again, with prejudice. And Count V is dismissed as to SPSO, but will stand as to DISH, EchoStar, and Mr. Ergen.

I think that disposes of the motions to dismiss with respect to both complaints.

So in the few minutes remaining, and not to put you on the spot, but I want to talk about next steps. And maybe the right next step is just to let you all get some sleep before the auction kicks off tomorrow. But sooner rather than later, I want to talk about how this is going to unfold, now that we've gotten past this stage.

And one thing that I do want to float is I saw some reference in some paper to motions for summary judgment. There are not going to be motions for summary judgment. There's going to be a trial. So when it's appropriate -- and I've said this every time I've seen you for the last couple of weeks -- you need to get together and decide what it's going to look like, what issue's going to go first, if there are stages at which you would ask the Court to render a ruling on certain matters. In other words, are we going to have a phase 1, a phase 2, a phase 3? I have my own ideas. I'd rather -- I said this before verbatim. I'd rather you tell me how you want it to look, and if you can't agree, I'll tell you how I expect it to go. But this is not an easy thing to figure out, and all the parts may not stop moving until we're beyond the auction

and closer to the confirmation hearing date. And people are going to scatter for the holidays. Now, did you want to keep the January 3rd date as a pre-trial?

MR. BARR: Yes, Your Honor, if we can. That would be great. And we'll work, as we mentioned last time --

THE COURT: Is that --

MR. GIUFFRA: -- with all the other parties.

THE COURT: I mean, that's only -- that's the Friday before the Thursday that we're going to start, right? Can you help me out at all by telling me how much time you think I ought to reserve?

MR. BARR: On the 3rd, Your Honor?

THE COURT: No, in the month of January. So you start on the 9th. So far I've reserved the whole week of the 13th.

MR. BARR: Your Honor, of course none of us can predict exactly how it plays it out --

THE COURT: Right.

MR. BARR: -- but I think that's a very good idea.

THE COURT: Okay. All right. Well, why don't I let you go, if people are traveling --

MR. BARR: Thank you.

THE COURT: -- and --

MR. BARR: Can I ask one housekeeping --

THE COURT: -- I need someone to draft an order or two.

MR. BARR: That's what I was going to ask, Your Honor. We'll take care of that, Your Honor. Thank you.

THE COURT: Okay. Ms. Strickland?

MS. STRICKLAND: Judge, it may be appropriate, if Your Honor has four more minutes or five more minutes, for us to have even an off-the-record conference --

THE COURT: Sure.

MS. STRICKLAND: -- about next steps.

THE COURT: Sure. Okay. All right. I think I'd like to do that off the record, and we'll just end today's session right there.

And Ms. Strickland, Mr. Barr and Mr. Sussberg, why don't you determine who should come in for the discussion? We'll go back here.

MR. BARR: Thank you, Your Honor.

(Whereupon these proceedings were concluded at 5:04 p.m.)

I N D E X

RULINGS

C E R T I F I C A T I O N

I, David Rutt, certify that the foregoing transcript is a true and accurate record of the proceedings.

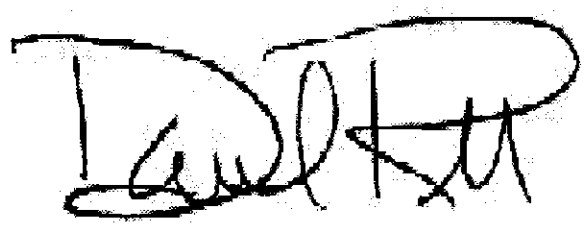

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EXHIBIT 3

EXHIBIT 3

In Re:

LIGHTSQUARED INC., et al.

Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc

May 8, 2014

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc

- -x

In the Matter of:

LIGHTSQUARED INC., et al.,

Debtors.

- -x

HARBINGER CAPITAL PARTNERS LLC, et al.,

Plaintiffs,

- against -

ERGEN, et al.,

Defendants.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

May 8, 2014

1:01 PM

B E F O R E:

HON. SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

Hearing: Bench decision in Adv. Proc. 13-01390-scc

Hearing: Bench decision on confirmation of plan of debtors (12-12080-scc)

Transcribed by: Dena Page

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P R O C E E D I N G S

THE COURT: Good afternoon. Please have a seat.

How is everybody today?

All right. Thank you all for coming down, and thanks to everybody who's dialed in. I have four pages of folks who are listening on the phone, but I'm not going to go through and identify them.

As I said a couple of days ago when I outlined this event or this procedure, I absolutely do not hold it against anybody who is not here personally. I understand that people have other things to attend to and that's perfectly fine.

Let me take moment, though, before I formally start reading to say a few things. One is to make sure that everybody understands why I'm doing this somewhat unorthodox procedure. So in a normal case, the Court would simply issue a decision that would be filed on the docket.

This is a bench decision that I am going to read. It's not a tentative ruling. It's the decision. The difference between this and a formal decision which will eventually be filed on the docket rests in the fact that there is a tremendous amount of detail work that has to go into a published decision. For example, the decision in the adversary proceeding, which is what I will read first, now runs to 170 pages and is up to 201 footnotes, and it includes a lot of detailed findings.

So the work that's involved in order to get it to what we consider to be perfect and publishable is a lot. And I felt very strongly that the time that it takes to do that was not something that should cost the estate money.

Similarly with respect to the confirmation decision, there will be a longer version of that, complete with findings, footnotes, full citations, et cetera, that will, as soon as we can finish it, will be published.

So I'm not doing this today because this case is particularly special and important. Yes, it is both of those things, but there is no significance to reading today other than because I felt very strongly that I needed to get you decisions so that the companies' funds were not depleted while I did the work that I have to do. And that's the reason that I'm doing it this way.

There is not going to be a copy of this available other than the transcript that you will produce. And eventually when the published decision and orders are ready, what I say today will be superseded in all respects by those.

So I just wanted to set the table.

That being said, I apologize in advance for the fact that you're going to have to listen to me talk for several hours. And if anybody needs to take a break, just get up and take a break. It's no problem.

I will take a break between the two decisions. The

first one is approximately -- I'm going to read about seventy pages, take a break and then I'll read the second one which is about fifty pages.

And it's great that I've got a musical accompaniment. All right.

This is post-trial findings of fact and conclusions of law in the adversary proceeding.

Between April 13th, 2012 and April 26, 2013, Charles Ergen, through an entity named SPSO, purchased approximately 844 million dollars of the senior secured debt of LightSquared LP, a debtor in these Chapter 11 cases.

Mr. Ergen, the founder, chairman of the board of directors, and controlling shareholder of DISH, bought the debt, he says, without any strategic intent to benefit DISH. Rather, he was interested in acquiring LightSquared debt personally because he "liked the investment" and because he had been advised that DISH itself was not eligible to purchase the debt, due to the restrictions in the LightSquared LP credit agreement.

The "diligence" on the purchaser eligibility issue, such as it was, was conducted by Mr. Ergen's long-time friend Jason Kiser, the treasurer of DISH, who from time to time worked on personal matters for Mr. Ergen. Mr. Kiser also arranged the trades on behalf of Mr. Ergen on his own time while at work at DISH.

Promptly after Mr. Ergen's initial debt purchases in the face amount of 5 million dollars, on April 13th, 2012, and particularly after his significant debt purchase in the face amount of 247 million dollars on May 4th, 2012, the press began to speculate about the identity of the SPSO purchaser, publishing stories with headlines such as "LightSquared term loan trades north of 70 as Ergen enters the picture," and "Ergen builds cash pile amidst LightSquared restructuring talks."

The trades in the press reports did not go unnoticed by LightSquared, especially after the news that it was Carl Icahn who had sold his nearly quarter billion dollar position in the debt to SPSO. Philip Falcone, the founder and principal owner of Harbinger Capital Partners, which is the principal shareholder of LightSquared, reacted to the news swiftly and strategically, writing in an e-mail message: Well, I'm working on giving him a nice surprise," referring to Mr. Ergen and to LightSquared's May 9th, 2012 modification of its credit agreement's disqualified company's list to include DISH.

The game was afoot. Almost two years of moves and countermoves has ensued with LightSquared's other stakeholders sometimes watching from the sidelines and sometimes entering the fray, all under the watchful gaze of the Federal Communications Commission, which to this day, has not taken not definitive action to clarify the status of LightSquared's

IN THE SUPREME COURT OF THE STATE OF NEVADA

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

JOINT APPENDIX
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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
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[1] JA = Joint Appendix

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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

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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

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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
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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

EXHIBIT 2

EXHIBIT 2

In Re:

LIGHTSQUARED INC., et al.

Case No. 12-12080-scc

December 10, 2013

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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc

- -x

In the Matter of:

LIGHTSQUARED, INC., et al.,

Debtors.

- -x

HARBINGER CAPITAL PARTNERS LLC, et al.,

Plaintiffs,

- against -

ERGEN, et al.,

Defendants.

- -x

United States Bankruptcy Court

One Bowling Green

New York, New York

December 10, 2013

1:19 PM

B E F O R E:

HON. SHELLEY C. CHAPMAN

U.S. BANKRUPTCY JUDGE

Doc# 69 Motion to Dismiss the Complaint-In-Intervention (related document(s)66) filed by James C. Dugan on behalf of Charles W. Ergen, SP Special Opportunities, LLC.

Doc# 72 Motion to Dismiss Adversary Proceeding Notice of Motion to Dismiss the Complaint-In-Intervention.

Doc# 83 Notice of Motion to Dismiss Second Amended Complaint (related document(s)74) filed by James C. Dugan on behalf of SP Special Opportunities, LLC.

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P R O C E E D I N G S

THE COURT: Good afternoon. How is everybody? Who'd like to start?

MR. DUGAN: Your Honor, that would be me. Thank you.

THE COURT: First order of business, Mr. Dugan, is to apologize to everybody for being twenty minutes late.

MR. DUGAN: Exactly. We are very sorry for that, Your Honor. We were stuck on the train and we do apologize, we very much do.

THE COURT: Second order of business is I'm going to identify who's on the phone. I have Ms. Iacob from DebtWire; Mr. Kronsberg from Cyrus Capital Partners; Mr. Pagels from Willkie Farr; Mr. Sanjana from Reorganization Research; Mr. Smalley from The Seaport Group; Mr. Wilson from Skadden Arps; and Mr. Brown from White & Case. Is there anyone else on the phone who wishes to note their appearance?

Okay, Mr. Dugan, we're ready for you.

MR. DUGAN: Thank you, Your Honor. Your Honor, thank you and good afternoon. Jim Dugan for Charles Ergen and SPSO. Your Honor, I do want to apologize again for how late we were in arriving to court this morning.

THE COURT: Okay.

MR. DUGAN: It is inexcusable. We felt very bad about it. We were stuck on a train, and that's no excuse.

THE COURT: Things happen.

MR. DUGAN: We're sorry. Yeah, sorry.

So, Your Honor, I just wanted to focus, because we've now been through several rounds of briefing, really in a death march of briefing, if you will, for the last several weeks --

THE COURT: Oh, let's not get that -- let's not be that dramatic.

MR. DUGAN: But it was quite intense. It was quite intense. And we've been through quite a lot of briefing and there's been a lot of pages submitted to the Court, and a lot of arguments --

THE COURT: Can I just -- I just want to make sure I'm going to do this for each of you. I just want to make sure that I have everything --

MR. DUGAN: Sure.

THE COURT: -- that you think I have.

MR. DUGAN: Right.

THE COURT: So I have the original memorandum of law in support of the motion to dismiss the LightSquared complaint, and then I have a memorandum of a law in support of the motion to dismiss the Harbinger complaint.

MR. DUGAN: Yes.

THE COURT: And then I have a reply for each of them. And I have a declaration that you submitted. Right?

MR. DUGAN: Yes, Your Honor --

THE COURT: Okay.

MR. DUGAN: -- that's right. There might have been a declaration in connection with both LightSquared --

THE COURT: Exact -- right.

MR. DUGAN: -- and Harbinger. Yeah. Okay.

THE COURT: Okay.

MR. DUGAN: So, Your Honor, let me just get right into it, and I'm going to focus first on the LightSquared claims and then on the Harbinger claims.

THE COURT: Okay.

MR. DUGAN: In essence, Your Honor, LightSquared asserts three claims for relief, although it's styled as four: breach of contract and declaratory relief I will treat as one --

THE COURT: Okay.

MR. DUGAN: -- because I think essentially, as a substantive matter, they are the same; tortious interference of contract --

THE COURT: Right.

MR. DUGAN: -- and equitable subordination. They do assert an equitable-disallowance claim, but I think Your Honor has noted that's been dismissed with prejudice.

THE COURT: Right.

MR. DUGAN: So --

THE COURT: Although they -- and I'll ask LightSquared about this when they stand; although there is an oddity that

there's a prayer for relief for equitable subordination but there's no count for equitable subordination.

MR. DUGAN: Your Honor, you're right. I'm going to assume that they intend to submit a claim for equitable subordination and that's what they meant to do or that's what in effect they have done, and address it in that way.

THE COURT: Okay.

MR. DUGAN: And we'll get to that in a moment.

But I did want to start off with the breach-of-contract allegations, and I think that those really are the most critical allegations that we're dealing with here, because, in essence, almost all of the allegations that LightSquared makes and all the claims that they assert come back down to the notion that SPSO and Mr. Ergen breached the contract -- or I should say SPSO is the one against whom the claim is made -- but that they breached the contract when they bought the loan debt.

And in essence, LightSquared looks at two, basically, prongs to get there. I mean, the question really is, was SPSO a subsidiary of a disqualified company? We obviously concede --

THE COURT: Well, that's one formulation of how they get there. I don't think that it's the only formulation of how they get there.

MR. DUGAN: Exactly, Your Honor. I think that the

contract itself, under its terms, would preclude SPSO from buying the debt or being an eligible assignee if it is a disqualified company. And the way they get to that is by saying that it was a subsidiary of a disqualified company, which is DISH.

The other allegation they make -- and this may be what you're suggesting, Your Honor; the other allegation they make is that Mr. Ergen and Mr. Kiser were agents of DISH and that when they were trading for SPSO and acting for SPSO, they were acting as agents of DISH. And that's what I wanted to start with, Your Honor; I wanted to --

THE COURT: Okay.

MR. DUGAN: -- start with that allegation, because I think, when we look at the facts that are alleged and the inferences that can be reasonably drawn from those facts, we have to look not just at the allegations in the complaint. We certainly have to start with the allegations of the complaint but, Your Honor, as this litigation has progressed, and as the briefing has progressed, more and more, Harbinger and LightSquared have submitted into the court -- into the record before Your Honor, documents from other proceedings, in particular a Nevada proceeding.

THE COURT: But I'm not going to pay attention to them.

MR. DUGAN: Well, Your Honor, I think the law is, on

this, that to the extent that the allegations of that proceeding and the facts that are established in that proceeding are put before Your Honor by the debtors to shore up the claims in their complaint -- and that is what they've done -- Your Honor, I think the law is clear that it is fair for you to consider those documents as being part of the record before you on this motion. I think the law is clear that when a plaintiff attempts to attach documents from other litigations, and attempts to augment their allegations by inviting the Court's attention to allegations in other cases, that those allegations in other cases that the plaintiff themselves asked the Court to consider and entertain --

THE COURT: But then you're talking about --

MR. DUGAN: -- become part of their allegations.

THE COURT: Then you're talking about something that feels more like a motion for summary judgment, because if I do that, then I get into things that everybody has pointed to me outside of a complaint, and then I don't know what I'm doing on a 12(b)(6) motion anymore. So what I've been doing these past couple weeks is reading a complaint and looking at what inferences can be drawn from the face of the complaint and, frankly, ignoring everything that all of you have to say about Nevada, because, except to the extent that underlying facts are alleged in the complaint, I'm not really interested.

MR. DUGAN: Well, Your Honor, I understand your

position on that, but I'd like to be heard at least --

THE COURT: Okay.

MR. DUGAN: -- on what we think we now have before us, because we now have on this motion a pretty full record that includes their allegations, the documents that they have submitted -- and by "they" I mean both LightSquared and Harbinger -- for the Court's consideration. And we also have the findings that are in those documents, the allegations that are in those documents, that they themselves are saying, Your Honor, please consider this.

Now, the reason why I think it's relevant, the reason why we should look at it, is because the point of a motion to dismiss really is a gatekeeping function. The point is, has a question of fact been raised that requires a trial? The question really is, has a question of fact been raised with respect to whether Mr. Ergen and Mr. Kiser were agents for DISH when SPSO bought the debt? Has a fact been raised that would require a trial on that point?

And we can look at, Your Honor -- in addition to the allegations that LightSquared has made, they quote e-mails. We can look at those e-mails. The law is clear that when a plaintiff quotes an e-mail in their complaint -- quotes a document --

THE COURT: Right, I --

MR. DUGAN: -- in their complaint --

THE COURT: I --

MR. DUGAN: -- you can look at that document.

THE COURT: Right.

MR. DUGAN: You can look in those e-mails.

THE COURT: I agree with that. That's in the complaint, though.

MR. DUGAN: Right.

THE COURT: Right?

MR. DUGAN: Right, that is. But -- and also, let's for a moment consider Harbinger. Harbinger has itself filed a complaint in this matter, which they say they've done to enhance -- to further the allegations of LightSquared. In that complaint, Harbinger quotes from deposition testimony in the Nevada proceeding; they quote from a report that the special litigation committee filed in that proceeding; they quote from court orders proceedings in that case that make certain representations.

And I think, when you look at the overwhelming weight of those matters, which the plaintiffs themselves -- and by that I mean LightSquared and Harbinger --

THE COURT: Right.

MR. DUGAN: -- when you look at those documents that the plaintiffs themselves have said, please rely on this, it is part of our complaint, it is part of our theory, when you look at those things, they completely undermine the claim that Kiser

and Ergen were agents for DISH, because the entire Nevada proceeding is predicated on the fact -- and it's all over the documents that they quote; it's all over the report that they quote; it's all over the testimony that they quote -- it's predicated on the fact that the board of DISH did not know that Mr. Ergen was buying debt.

THE COURT: But that doesn't answer the question at all, Mr. Dugan, because -- and I really was hoping to avoid having to delve into the matters having to do with the Nevada litigation, because I believe that, as between Mr. Ergen and the DISH shareholders, that's the business of the Nevada court and not here.

But I could articulate a theory under which that fact doesn't matter one way or the other to the question that I might have to decide, which is the identity of interest, agency -- I can come up with any number of legal formulations -- the relationship between Mr. Ergen -- again, acting through SPSO here -- on the one hand, and DISH and EchoStar on the other hand.

So if you're citing to me the fact that Mr. Ergen did not inform the board until some date in whenever it was, as evidence of the fact that there was no agency, that's not persuasive.

MR. DUGAN: Well, Your Honor --

THE COURT: So that doesn't get you over the finish

line.

MR. DUGAN: Well, let me just put it this way, then, Your Honor: I mean, if it were the case that Mr. Ergen was acting as the agent for DISH, he would have had to -- and the case law says this: the allegations have to show he would have had to be authorized by DISH to do something for DISH. DISH would have had to authorize him to buy this billion dollars' worth of debt.

THE COURT: And perhaps by a course of conduct in the past, he knew that he had the authority to do that, that he knew that he had the authority ultimately to have whatever series of transactions that he felt were in the best interests of DISH, to occur.

MR. DUGAN: Well, Your Honor, I don't understand exactly what conduct that necessarily was. I don't think that LightSquared has pled a course of conduct involving Mr. Ergen purchasing distressed-debt investments using --

THE COURT: You're defining it that way --

MR. DUGAN: -- his money.

THE COURT: -- I'm not, Mr. Dugan.

MR. DUGAN: But that is the conduct that we're looking at now, Your Honor. That is the conduct where he's alleged to have engaged in.

Frankly, I think the law is clear on this that the titles of Mr. Ergen and the title of Mr. Kiser is not

dispositive of whether they were acting as agents for DISH. In fact, it's what is referred to as a conclusory allegation. It doesn't establish that they did anything at DISH's direction with respect to these particular investments.

Now, there are e-mails that LightSquared has -- had in its possession before they drafted this complaint, before they put these e-mails in the complaint and quoted them. There are e-mails -- and we can show them to Your Honor -- where Mr. Ketchum of Sound Point says to his boss, about Mr. Ergen, he is opening up a family account, family money to trade, his money to trade; it's a family office, he's going to be buying LightSquared -- he has bought LightSquared with this managed family account, he's got someone helping him with this family account. This is Ketchum.

In Harbinger's original pleading, they said he was in on it; they said he was part of the conspiracy. LightSquared doesn't use the term "conspiracy", but they're seeking equitable subordination, Your Honor. They're not just saying this was something that happened and it was a breach. They're saying this was a conspiracy, it was something that happened, it was bad, it was fraud. It has to be near that level; it has to be akin to fraud.

And when you look at the participants in that fraud, what they're saying -- they're not saying, this is for DISH and we need to be careful, it's for DISH, don't say it, but that's

true, don't say it. What they're saying is, this is for Ergen, there's a guy that's helping him, it's for his personal account. These are e-mails that LightSquared had; they quote from them. Do they quote from that part? No. But that's what those e-mails say.

So, Your Honor, I think it's only fair to consider that. When we're -- we're looking at the inferences --

THE COURT: Then I'm in --

MR. DUGAN: -- we ask them to make.

THE COURT: -- I'm in a summary judgment motion; I'm not on a motion to dismiss. I just don't -- I don't know how you -- I don't know how I go where you're inviting me to go, and draw a reasonable line. This is quintessentially a situation, then, where we move beyond a motion to dismiss and we just have a factual record. And there's going to be a winner and there's going to be a loser.

MR. DUGAN: I understand that that's your position, Your Honor. And I just -- since I'm here, to be heard out on the point --

THE COURT: Of course.

MR. DUGAN: -- yeah, I mean, that certainly there is law, and we've cited it to Your Honor -- it's obviously Your Honor's call. There is law, and we've cited it to Your Honor, that when a plaintiff refers to a document, quotes a document like they quote these e-mails, you can look at those e-mails

that the plaintiffs quote.

THE COURT: Well --

MR. DUGAN: It doesn't transform --

THE COURT: -- even --

MR. DUGAN: -- the motion into a motion for summary judgment; it does not.

THE COURT: For the purposes of argument and moving along, I'll accept your premise. But even if I accept your premise, I don't believe that that compels the granting of the motion to dismiss on that basis. So --

MR. DUGAN: Understood, Your Honor. Now, when we were looking at Twombly and Iqbal, just to --

THE COURT: Right.

MR. DUGAN: -- bring those cases back into focus, I mean, essentially what those cases say is that, yes, we'll give you the benefit of inferences, but the inferences have to be reasonable, they can't be conclusory and they can't be contradicted by other documents in the record or that you invite into the record by quoting them and referencing them.

There can be no question, Your Honor -- putting aside how you feel about what we should do in terms of fact-finding, which I totally understand and appreciate, there can be no question that what these plaintiffs have done here is quote and refer to -- but by the way, not point out -- the parts that contradict their allegations in their complaints. There is no

question that the documents that they keep asking you to look at -- which I understand you don't want to, but they keep asking you to -- completely contradict the allegations that they're making.

These documents and these findings say, without question, not only that the board didn't know; they say, when the board found out, they had an investigation done, independent counsel, independent financial advisors. They had a special committee, too, that they created to look into the issue of corporate opportunity. What did this guy do? But --

THE COURT: But, Mr. Dugan, are you really inviting me to take a look at how that all played out in Nevada? Because last time you didn't want me to look at that.

MR. DUGAN: Your Honor, they're inviting you.

THE COURT: So if you -- do you want -- but are you telling me right now that I should accept their invitation to look at what happened in Nevada? Because --

MR. DUGAN: Yes, Your Honor, you should --

THE COURT: You are?

MR. DUGAN: -- accept their invitation, and here's why: because they want to have a whole trial on something that their own documents show is completely made up. And here's what I'm saying is made up, Your Honor. What is made-up is the notion that Mr. Ergen and Mr. Kiser got together and had a conspiracy where Mr. Ergen and Mr. Kiser were going to buy debt

for DISH.

THE COURT: That --

MR. DUGAN: That's what's made up.

THE COURT: That's not what they're saying. That's not what they're saying.

MR. DUGAN: They can't support an equitable-subordination claim without fraud, Your Honor. Their equitable-subordination claim can't be based on an innocent breach of contract; it doesn't work that way.

THE COURT: That -- I agree with that.

MR. DUGAN: But --

THE COURT: But that's a completely different point from the --

MR. DUGAN: Well, we'll get to that point.

THE COURT: -- from the three or four that you just made.

MR. DUGAN: We'll get --

THE COURT: But that much I agree with you.

MR. DUGAN: We'll get to that point. But let me ask you -- let me make this --

THE COURT: Although Mr. Friedman might disagree with me --

MR. DUGAN: I'm sure he'll disagree with me.

THE COURT: -- but I can't tell.

MR. DUGAN: I have no doubt.

THE COURT: I'm going to start to pick on him early today.

MR. DUGAN: I have no doubt he'll disagree with me.

UNIDENTIFIED SPEAKER: Take your time.

MR. DUGAN: I have no doubt he'll disagree with me, Your Honor, and he should.

But the point is that -- I mean, when we talk about agency -- I want to be clear about this -- I really think the agency allegations are more relevant to the equitable-subordination piece than to the breach-of-contract piece. Here's how I get there: you have to have words in a contract that you don't comply with, to have a breach. Words in a contract have to be breached, to have a breach.

So what are the words in the contract that say DISH and EchoStar and their agents can't buy this debt? The words don't say that. Hear me on this. The words do say "subsidiary". I know we've been up and down --

THE COURT: No, the word says that, subsequent to the amendment, that DISH cannot buy the debt.

MR. DUGAN: That's true.

THE COURT: Right?

MR. DUGAN: Or any subsidiary of it.

THE COURT: Or any subsidiary. Put the subsidiary to one side. It says DISH can't buy the debt, right?

MR. DUGAN: Right.

THE COURT: So in one of the first rounds of this, we had some diagrams in a complaint that showed basically Mr. Ergen controls SPSO, Mr. Ergen controls DISH, therefore, DISH controls SPSO. It was triangular, if I'm remembering it.

MR. DUGAN: Right.

THE COURT: Okay. So put that to one side. So now at least what I'm reading in the complaint is that they do argue they're a subsidiary, that SPSO is a subsidiary, with a lower-case S. I don't think they've entirely abandoned the upper-case S definition, so --

MR. DUGAN: I agree, Your Honor.

THE COURT: -- there's those arguments. But I think what they're saying now is Mr. Ergen/SPSO -- because clearly -- and I think there was some argument that, because he can't hold the debt as a natural person, therefore, you should disregard SPSO; but people form those vehicles all the time, so I'm not interested in that -- but that Mr. Ergen is DISH; he's DISH. This is Pepper v. Litton, ironically, and there's an identity of interest and he is DISH and, therefore -- therefore, there was a breach. Not that there's an equitable basis to disallow it, but he's (sic) a breach, because he says he's SPSO but he's really DISH. That's what they're saying. That's what they're saying.

So whether he's an agent or there's an identity of interest or they really are the same or it's a sham, that's

what they're trying to say. And in response to that in the last couple of rounds -- and you'll forgive me, I can't remember each time who exactly was here; I'm not sure if it was you or Ms. Strickland or one of the folks from Sullivan & Cromwell -- that, look, it's a public company, it's a public company. They have filings, they would have to have disclosed this, you can't say that a controlling shareholder is necessarily same as the corporation. I agree with all of that. But what they're saying in their complaint that they're asking me to give the favorable inferences to is that, under the circumstances here, Ergen is DISH, DISH can't buy, therefore, he couldn't buy. And maybe I'm giving them too much credit, but that's the way I'm reading what they're saying.

MR. DUGAN: And, Your Honor, let's read it that way, then, and let's --

THE COURT: Okay.

MR. DUGAN: -- and let's unpack that, because there are a number of elements to "DISH is Ergen, and Ergen is DISH". I mean, there are a number of elements to that; the first is, there's a piercing-the-corporate-veil argument, or an element to that. I mean, it is not easy to allege a pierce-the-corporate-veil claim. It's not easy to prove a pierce-the-corporate-veil claim.

For DISH to be Ergen in the sense that Your Honor is referring to and in the sense that you are positing that they

have alleged, they have to allege a pierce-the-corporate-veil claim. And how do you allege a pierce-the-corporate-veil claim? You have to allege a unity of interest not just on an abstract metaphysical level but concretely: same bank accounts, not really respecting the corporate separateness.

Here we have no allegation of same bank accounts. We have no allegation that Ergen treated DISH like it was himself. We don't have an allegation that anything Ergen wanted to do, DISH had to do. We don't have an allegation that DISH always did what Ergen wanted. In fact, it's quite the opposite; that's why, Your Honor, I keep sort of referring to Nevada, because they've put in their -- and also because, far from Ergen being DISH, when Ergen told the board of DISH what he had done, they said, hold on a second, you did what? And they formed a special committee, not because they thought it was great that he had done this thing to help them; it was because they didn't know what he had done, and they needed to figure it out. That's not an identity of interest.

Now, they hired independent legal advisors; they hired independent financial advisors. They investigated it. They did a report -- this is what the plaintiffs put in their papers before you -- a report that was based on interviews, that was based on an interview of documents with fact-finding and all this other stuff.

Now, I know Your Honor is leery to go there but, on

the point of "DISH is Ergen, and Ergen is DISH", I don't see how you can get there on that record, the record that they have put before you. It just doesn't add up. Not only have they not put in their allegations the "DISH is Ergen, Ergen is DISH" predicate; they've put stuff in that undermines it completely. And that is the problem with that claim. It's a claim that they can't support, with their inferences that are plausible and reasonable to make, on the record that they have created on this motion. And that is our ultimate endpoint on that point. I mean --

THE COURT: And it shouldn't give me any pause that the treasurer of DISH was doing this for Mr. Ergen?

MR. DUGAN: Well, I think, Your Honor, what they allege is that Mr. Kiser was acting on Mr. Ergen's behest. Should it give you pause? You know, Your Honor, obviously it's a fact; it's a fact that they point to. But it's one fact in a sea of facts. It's one inference in a sea of inferences. If you're going to single out that one inference, you have to do it in the --

THE COURT: I'm trying not to --

MR. DUGAN: -- context of what else is there.

THE COURT: -- single out that one inference, but that's why you have trials, because --

MR. DUGAN: Understood, Your Honor.

THE COURT: -- you have no dispute that the fellow who

was the treasurer of DISH was executing these trades. In addition, you have allegations made repeatedly that there was something going on with respect to the timing of the closing of the trades at a critical time in this Chapter 11 proceeding. You've got allegations that reasons were being given for the fact that trades weren't closing, despite entreaties from the counterparties on the trades. And those strike me as allegations that call out for the development of a factual record.

MR. DUGAN: Understood, Your Honor. Now, because we've talked a lot about agency, I do want to address the manipulation of trades for a moment. Clearly the manipulation-of-trade allegation is not going to whether the contract was breached, because there's nothing in the contract, even if we're talking about whether it was DISH or it was Ergen.

THE COURT: No, we can assume for that purpose that he's an eligible assignee.

MR. DUGAN: So then let's ask ourselves where are they going with that and what exactly do those allegations show. I mean, where they appear to be going -- where they have to be going with it is equitable subordination, because what else would it really be relevant to? It's not relevant to the tort --

THE COURT: It'd be relevant to a damage claim.

MR. DUGAN: But only if those allegations attach

themselves to a claim -- to a cause of action. In other words, those allegations, to give rise to a damages claim, have to attach themselves to a cause of action. They don't attach themselves to breach of contract, because they don't have to do with the contract and, as you say, we can assume he was an eligible assignee, before we get to those.

So what exactly are those allegations attached to? They're not attached to tortious interference, because that claim is limited to the very first trade Ergen did, for five million dollars in April of 2002. Weeks before -- maybe over a month before -- LightSquared was even in bankruptcy, he did a trade for five million dollars. That's their tortious-interference claim; it's based on that trade and only that trade.

The only claim that's left that the manipulation of trades can possibly be relevant to is equitable subordination. And what we have to ask ourselves is this: do these allegations of manipulation of trades -- do they really equate to -- do they support to an equitable-subordination claim? Are they anything like the kinds of allegations that we've seen support an equitable-subordination claim? They don't use the term "fraud". They don't say that there was fraud here, that somehow there was an attempt to commit a fraud when Ergen or SPSO didn't close the trades on time. Harbinger did allege that, by the way, but that was thrown out. That claim couldn't

be supported. It couldn't support a fraud claim. They don't allege fraud.

They don't allege tortious interference of creditors. That was a claim Harbinger made. That was a claim Harbinger made that got thrown out. The debtors didn't come in and say, by the way, this manipulation of trades has caused us to lose an expectancy of closing a contract that was firm enough to give rise to a tortious-interference claim. They don't make that allegation. They don't connect it that way. They just put it out there that they think the trades took a long time to close, that there's e-mail traffic that shows that the other side of that trade asked to close and it couldn't get it closed for weeks, sometimes, yes, for a month, sometimes for two months. Yes, there are allegations, there are complaints, there are e-mails about that.

Do the e-mails say the reason why these trades aren't closing is because we want to screw up the debtors' ability to negotiate with its creditors? No, the e-mails don't say that. They have all the e-mails, but they would have quoted those parts if they had those. They don't say that. All they say is that these trades took a long time to close. And I don't see that, Your Honor, under the law, as giving rise to the type of fraud, to the type of breach-of-fiduciary-duty-like --

THE COURT: There's --

MR. DUGAN: -- allegations --

THE COURT: There's --

MR. DUGAN: -- that they need.

THE COURT: There's no way of knowing that. If we take as a given that there was a delay in the closing of the trades for a strategic purpose, I think that's something I'm entitled to know.

MR. DUGAN: But they don't allege that, Your Honor. They say it had the effect. They say it had the effect of interfering with their creditor negotiations. They don't say -- I looked hard for a part where it says they had the purpose, the reason why these trades took so long to close is because Ergen had the purpose, SPSO had the purpose, of interfering with our negotiation with trades. No, they said it had the effect. Effect and purpose --

THE COURT: Mr. Dugan --

MR. DUGAN: -- are very different things.

THE COURT: -- you have to remember that I was actually here during this period of time, so I independently have a recollection of what was occurring as those weeks unfolded.

MR. DUGAN: Well, Your Honor, now you exactly know why it is that we keep asking for matters that are not just in their pleading to be considered, because there's a big mosaic of facts that we're all dealing with here. It's a big mosaic. I mean, now, Your Honor can't look at all of it, because the

law doesn't let you look at all of it. But Your Honor can look at more than just what they say in their complaint, because that's the record that they've invited and created. Your Honor could also consider the record in the bankruptcy proceeding, because, after all, you were here for that, as you say, Your Honor. So yes, all that --

THE COURT: Well --

MR. DUGAN: -- you can consider.

THE COURT: -- it'd be a neat trick for me not to consider what happens here, so --

MR. DUGAN: Yeah. I would agree.

THE COURT: But that's a different -- that's different from importing everything that happens --

MR. DUGAN: Right, and --

THE COURT: -- in Nevada.

MR. DUGAN: -- I understand that but, if we're going to look at what's happened in the bankruptcy proceeding on the issue of manipulation of trades itself, we should consider what happened in May of 2013 -- I'm sure Your Honor will recall -- when the debtor had a seemingly very different perspective on SPSO and was actually actively monitoring the closing of trades and was making arguments to try to get the benefit of provisions in the exclusivity stipulation that were based on SPSO's trading, and arguments based on SPSO's position.

THE COURT: That sounds like a defense. That doesn't

have a bearing on whether or not SPSO was intentionally declining to close trades that were otherwise ready to close, because there was a strategic advantage --

MR. DUGAN: But --

THE COURT: -- in doing so.

MR. DUGAN: But, Your Honor, if the relevance of manipulation of trades is the equitable-subordination claim, which is my supposition but I don't know what else it's relevant to, then the debtors' conduct with respect to those trades and the timing of those trades and the positions they took certainly is relevant to whether or not it would be equitable to subordinate --

THE COURT: Right, but --

MR. DUGAN: -- SPSO's claim.

THE COURT: -- I'm not having a trial on the merits of equitable subordination right now.

MR. DUGAN: Well, I understand, Your Honor. We're talking about inferences from facts. But in the world of inferences from facts, we can discuss these things.

I'm sorry, Your Honor.

Okay, so, Your Honor, just one other thing about the trade timing that I think is relevant to consider, which is, the way that the debtors have set up their cause of action, they make it appear that there is some right, during the exclusivity period, to have creditors not trade, that they have

some right, during their exclusivity period, to --

THE COURT: No, that's --

MR. DUGAN: -- lock everything into place.

THE COURT: -- that's absolutely incorrect as a matter of law.

MR. DUGAN: It is absolutely incorrect as a matter of law. But if Your Honor were to find in their favor on this claim of manipulation of trades, in effect, what would you be saying -- what would the Court be saying to the participants in the distressed-debt market, with respect to trading during an exclusivity period? Are they always going to be open to the claim that, by trading, they somehow made the identity of creditors less knowable, more uncertain, to the extent where a debtor can come in and say, you interfere with my ability to negotiate with my creditors; I didn't know who they were; you kept trading?

THE COURT: All right, well, that -- you're inviting me down the slippery slope and I'm not going to follow you, so --

MR. DUGAN: Your Honor, it's relevant to consider for the claim that they're asserting. That's why we're making --

THE COURT: Okay.

MR. DUGAN: -- that argument.

THE COURT: Does it make any difference, Mr. Dugan, on the issue of Nevada, if -- and I have no idea what the current

posture is, other than what you folks have told me in terms of the limited injunctive relief that was entered, I think, the day before Thanksgiving. But if that were to proceed and ultimately the Nevada court were to rule that the profit that Mr. Ergen gains on the debt holdings goes to the DISH shareholders, is that any relevance to the issues that are before me?

MR. DUGAN: I don't think so, Your Honor, because the question then would be -- I think the question would be -- since we're talking about a present act affecting past conduct, I think the question would be whether the Court's order in some sense would be the equivalent of a ratification, if you will, that the trades were for DISH in some way or for the DISH shareholders in some way. And I think that theory is self-defeating, Your Honor, because for there to be a ratification, you have to start with the premise that when the trades first happened, they were not for DISH. Ratification is backward-looking.

So for some court to say, after the fact, you know, looking back at these things that happened now a while ago, I'm going to grant relief that would have the effect now of making the economic benefit of those trades the benefit for DISH, that almost has as its predicate that when the trades happened, they didn't happen for DISH. It's a backward-looking -- in fact, it changes things. It changes things.

THE COURT: But it also --

MR. DUGAN: So we don't --

THE COURT: -- it also highlights the fact that, again, looking back in the beginning of the trading, way before the bankruptcy, right?

MR. DUGAN: Right.

THE COURT: Because of Mr. Ergen's economic interest in DISH, it kind of wasn't going to matter whether or not ultimately he got to keep the spread or not. He either was going to get to keep the spread for his own account, or the spread was going to go to DISH shareholders, and maybe he got a share of it that way.

MR. DUGAN: Well, what Your Honor is saying is logical. I mean, I would think that as someone who spent a billion dollars of his own money, he would have preferred to get the benefit of it, but what Your Honor is saying is logical.

THE COURT: Okay.

MR. DUGAN: Your Honor, I wanted to touch on a few other claims that LightSquared makes. I mean, I do want to note, Your Honor -- I mean, I know we've talked about a lot about subsidiary. I think it's worth saying, because it just seems like it is, that the position that LightSquared lays out in their brief with respect to subsidiary kind of proves what we're saying on that piece, just in the following sense.

What they're saying is, subsidiary in almost every instance -- they certainly say it with respect to the definition in the credit agreement, which is broader than Merriam's, which is broader than Black's. They say -- looking at the broadest definition of subsidiary in the credit agreement, it's downstream looking. Downstream looking: that's what makes it a subsidiary. You're always looking downstream, as opposed to affiliate, which they say is different, because it's upstream and downstream. It's both ways. It's all directions.

Well, Your Honor, we think that proves our point on the subsidiary piece of it, putting aside whether DISH is Ergen and Ergen is DISH, and we think there are serious problems with that, as I've said. But putting aside that one, we think that proves our point, because unless DISH is Ergen and Ergen is DISH, you have to go up before you go down. So you can't be in the control situation that they're setting forth, unless Ergen is DISH and DISH is Ergen. You have to go from DISH --

THE COURT: Go up, right.

MR. DUGAN: -- to Ergen and then back down. So it can't be a subsidiary under their own argument. So I just wanted to point that out on that piece, before I move to tortious interference, unless you have other questions about the breach of contract.

THE COURT: So you folks concede that an affiliate of

DISH could have bought the debt, correct?

MR. DUGAN: That an affiliate of DISH could buy the debt.

THE COURT: Could buy the debt?

MR. DUGAN: Yes. As long as that affiliate is not a subsidiary, because subsidiaries --

THE COURT: Okay, so 51 --

MR. DUGAN: -- are a form of affiliate.

THE COURT: Fifty-one, forty-nine, right? So an Entity, capitalized, owned forty-nine percent by DISH, and fifty-one percent by Mr. Ergen or SPSO could have bought the debt, right?

MR. DUGAN: You know, I don't know that I would go that far, because --

THE COURT: Why not?

MR. DUGAN: -- because I think if you're talking about one entity being under another, you're kind of in a zone. You're kind of in a zone. We're not talking here about one entity being under another. We're talking about one entity being under another who you have to go up to, to get down from.

THE COURT: The --

MR. DUGAN: There's a reason why we define terms the way we do. I mean, affiliate is no -- by, without question, broader than subsidiary. And frankly, Your Honor, I don't think that -- I mean, it would be interesting how it would turn

out if it happened the way you're suggesting. But I don't think that anyone on the Ergen side is necessarily interested in playing with those kinds of ownership structures. I mean --

THE COURT: I'm just trying to --

MR. DUGAN: Yeah.

THE COURT: I'm just trying to understand --

MR. DUGAN: Right.

THE COURT: -- what the appropriate vehicles would have -- are for having purchased the debt. So SPSO is an affiliate of DISH?

MR. DUGAN: Well, by definition it has to be, because Mr. Ergen controls it. I mean, so -- I think not just by the definition in the credit agreement, but by the definition in Webster's.

THE COURT: Okay.

MR. DUGAN: So, Your Honor, if I can move on to tortious interference.

THE COURT: Sure.

MR. DUGAN: Now, there are a lot of problems with this claim. Let's start out with the fact that I don't -- it's not quite clear what relevance it has. I mean, it is addressing -- unless I'm missing something -- a very small piece of this debt puzzle. It's addressing a five million dollar trade. So even if the debtors were to prevail on it, it's far from clear what their damages might be or what consequence it can have, given

that a five-million-dollar piece of debt in this big picture doesn't have any leverage, doesn't have any real meaningful impact on anything. But that is their claim.

THE COURT: Can you help me out, and show me where it is that's it's limited to that?

MR. DUGAN: Okay, Your Honor.

THE COURT: I may have missed that.

MR. DUGAN: And maybe I'm misreading it, but it's also in their motion --

THE COURT: Okay.

MR. DUGAN: -- to dismiss. But what I am looking at -- I have to get there. I'm sorry, Your Honor. Give me one moment.

Okay, so what I'm looking at is the cause of action for tortious interference, which is the --

THE COURT: It's paragraph 10 --

MR. DUGAN: -- fifth claim for relief.

THE COURT: Paragraph 109?

MR. DUGAN: It's paragraph 109, I think. Maybe it's not that one. Let's see. Oh, here it is. I think it's -- yeah, okay, it is paragraph 109. "SPSO, DISH, EchoStar, and Mr. Ergen" --

THE COURT: Right.

MR. DUGAN: -- "intentionally caused GPS to breach the credit agreement before SPSO itself became a party to that

agreement." That's what it says. That's the sentence that I'm focusing on.

THE COURT: Okay, and then -- I'm sorry; I was reading the subsequent paragraphs as additional acts.

MR. DUGAN: I thought that the subsequent paragraph was referring to the misrepresentation and the assignment and assumption that referred back to that first purchase, because the documentation tends to come months later. So he's -- I think what it's saying is on September 6th, 2012, Ergen represented in the assignment and assumption about that trade on April 13th, 2012. It's going back to April, which is when the first purchases occurred. I mean, to the extent, Your Honor, that --

THE COURT: But there's a -- I'm sorry; I just completely -- I missed that. I read this as being relating to the entire suite of trades because it refers to the LP debt trades.

MR. DUGAN: And Your Honor, I'm sure LightSquared can clarify what they meant, but they said it here, and they also said in their brief, that this related to when -- before SPSO became -- arguably became a party to the credit agreement. And the reason why they would say it that way, Your Honor, at least to my way of thinking, is pretty obvious, once you get into the law, which is --

THE COURT: Right.

MR. DUGAN: -- you can't be a party to a contract, breach it, and tortious interfere with it all at the same time.

THE COURT: At the same time, right.

MR. DUGAN: Right. Which I think the law is pretty clear about.

THE COURT: Okay. All right. Mr. Stone, you can clarify this at some point.

MR. STONE: Okay.

THE COURT: Okay.

MR. DUGAN: Okay. So, but Your Honor, that was one reason why we thought the tortious interference claim didn't work.

THE COURT: Okay, I got you; thank you.

MR. DUGAN: The other reason why we thought it didn't work is that when you talk about the UBS breach, the hypothetical UBS breach -- it's far from clear that there was any obligation by UBS under this credit agreement to have a gatekeeping function. They say they breached the gatekeeping function.

THE COURT: Well, to that extent, also it's a -- there's not a claim against UBS.

MR. DUGAN: Well, there's no claim against UBS.

THE COURT: Right.

MR. DUGAN: And there's also no obligation that UBS has to be a gatekeeper, under the credit agreement, because UBS

is entitled to rely on the representations of those two -- submit documents to it. And the agreement expressly exculpates them from doing so. So I think that they're high and dry on the breach by UBS argument which I just wanted to underscore for Your Honor.

The 502(b) claim, if I can touch on that. I mean, we have cited law that I think is very clear. That if, as they're alleging, their position is this breach -- the acquisition of debt by SPSO -- the result of it should be that their claim is disallowed. That they get nothing.

New York law is clear, I think, that for you to argue that transfer has that effect, if a transfer in violation of an agreement -- a transfer restriction and agreement -- to have that effect, it has to be clearly set forth in the agreement itself, in language that is very clear.

The clearest language you can have is, this transfer is null and void. In fact, that language is in the credit agreement. But it's not talking about a transfer to a noneligible assignee. It's talking about a transfer involving a borrower, not a transfer involving a noneligible assignee. There's nowhere in this credit agreement that says a transfer to a noneligible assignee is null and void. In fact, it says it should be treated as participation, which is a whole different thing, but --

THE COURT: Right, but then that takes us down another

rabbit warren, because the participation section pulls in the eligible assignee language. So that doesn't help. There is nothing that says that a transfer in violation of 10.04 -- I don't know if I have the section right -- is void or voidable. Nothing. It doesn't say that.

MR. DUGAN: It doesn't, Your Honor.

THE COURT: Right.

MR. DUGAN: That's the point we're making there.

THE COURT: Right. But the fact that it says that the transfer in violation of that prohibition doesn't effect the obligations of the borrower, that doesn't get you there. That just says that the money lent is still --

MR. DUGAN: Right.

THE COURT: -- owed.

MR. DUGAN: Right. But --

THE COURT: The company has to pay it back.

MR. DUGAN: But if under New York law, the credit agreement is not clear enough to avoid the transfer, then in some sense it must remain a transfer.

THE COURT: Well, I think that they -- and I think that there is case law to the effect that you're citing, clearly says that you have a claim for breach against the transferor, original assignor. But the question then is, well, maybe there's a claim for damages for the breach, right? In other words, it's --

MR. DUGAN: Right. Well, Your Honor --

THE COURT: So if the claim is allowed, perhaps there's a damage claim -- there's a damage claim for the breach. Maybe that damage claim is for the same amount as the transferred debt.

MR. DUGAN: Well, Your Honor, that's entirely possible. I mean, the claim we're specifically addressing is the equitable disallowance claim -- I'm sorry --

THE COURT: Right.

MR. DUGAN: -- the 502(b) disallowance claim as pled.

THE COURT: Right.

MR. DUGAN: I didn't see that damages theory pled in the complaint. It's an interesting one. I guess one could ask in a situation where the debtor is under any circumstance being either recapitalized or the assets being sold, I guess it's unclear to me how you can mount an argument that they've been damaged to the extent of a billion dollars by a billion dollars of debt in the hands of a competitor. I know that they hate competitors in their capital structure, because they say it so many times.

But it's unclear in the context of where we are in this reorganization/sale setting that a competitor in the capital structure is a serious concrete harm to them.

THE COURT: Right. But then again, that's another defense fact to be developed at trial, not something that it's

appropriate for me to rely on in granting a motion to dismiss.

MR. DUGAN: Right. Well, Your Honor, I hear you on that, but I think again, we're in the -- where you and I have a disconnect, and I understand we have it, is the issue of what are the inferences that can be drawn and how reasonable they are. And I think part of the issue really is, when I say, what are the inferences that can be drawn, I'm looking at A plus B plus C. And the only reason why I'm looking at A plus B plus C is because they put B and C in, not because I'm saying go look at B and C.

So we're starting off with that issue, but I totally get where you're coming from, Your Honor.

THE COURT: I mean, they do make a claim -- the second count in the LightSquared complaint is for damages. And it's been said before when I've pointed out that, as you said, I have an auction process now; we have a bidding process now, and the best and the highest bid will win. The suggestion was made, well, maybe all of this conduct made it more expensive for an alternative bidder plan proponent to prevail. That was suggested as a measure of damages, as opposed to the complete disallowance of the claim.

And again, so when you go there, that suggests something that would be a matter for trial, not something I could determine now.

MR. DUGAN: And Your Honor, just so I'm clear on what

you're suggesting. Are we referring back now to the manipulation of trade issue? In other words, the lack of -- their alleged lack of knowing who their creditors were?

THE COURT: And the fact -- that and the fact that an ineligible assignee got into the capital structure, and therefore, rendered it harder to put a deal together at an earlier part. I'm not saying I'm saying that any of this is meritorious. I'm repeating to you what's been said to me --

MR. DUGAN: Right.

THE COURT: -- about a theory of recovery when I've questioned before causation and damages, right? If you --

MR. DUGAN: Well, Your Honor, once you accept the fact that I guess that there was some attempt to do something for the purpose of interfering with creditors, which we think is a hard stretch to make. I guess you can theorize things that could hypothetically come from that. But we're not disagreeing about that, Your Honor. I think what we're disagreeing about is whether, in fact, the allegations that we have before us get us over the hurdle on DISH being Ergen and Ergen being DISH on the one hand --

THE COURT: Well, what about the --

MR. DUGAN: -- or a subsidiary.

THE COURT: -- what about the existence of the release in the LBAC bid. So LBAC began life being fully owned by Mr. Ergen and then was transferred to DISH for a dollar. And as

far as I know, there are certain provisions -- I don't want to wander into anything that I shouldn't be, since we have an ongoing auction, but there are certain provisions in the bid that suggest a link.

MR. DUGAN: Well, Your Honor, I -- and I'm not sure that I know what those provisions are other than the only one that we've discussed in this room has been the release, which frankly is a little, I guess -- we can understand why there's a discussion, but it's not unusual in an asset purchase agreement --

THE COURT: I'm not interested --

MR. DUGAN: -- to have that kind of release.

THE COURT: I know fully well what's usual and not unusual. In this context, it's been made clear that a condition is that there be a claim allowance and a release of affirmative claims. So everybody knows the drill that purchasers don't want to be sued after the fact. But given the backdrop of the allegations as far as connection, identity of interest, et cetera, that's in particular why I'm interested in that provision in this case.

MR. DUGAN: Right. Well, Your Honor, I guess what I could suggest to Your Honor, I mean there is a claim that's been put out there, and I think that's an element of it, that SPSO, LBAC and DISH are inextricably linked. You know, again, it seems like that might be wandering into the equitable

subordination zone, maybe that's why that's out there. I don't believe that's relevant to the breach of contract claim, but let's just look at it.

You know, essentially, when they say inextricably linked the conflict that we have here is SPSO in buying debt. I know you don't want to look at Nevada, Your Honor, I understand you don't. But if we have a trial in this case, and it may be inevitable, but if we do, you're going to hear the story. But be that as it may, the timing and how things evolved, and it's a matter of public record as well, is that when Ergen was buying this trade, when he was buying this LightSquared debt, DISH was not considering LightSquared; it was considering Clearwire and Sprint as acquisition vehicles. Those were twenty billion dollars investments.

THE COURT: Okay. I'm going to stop you, because I started this question being a question about the release. And --

MR. DUGAN: Well, and the linkage, Your Honor. The linkage --

THE COURT: Okay.

MR. DUGAN: -- between SPSO, LBAC and DISH. Whether that linkage is adequately alleged on this record.

And the release, just to be clear about that, you know, although we don't think there is linkage, to focus on the release, that was included in this APA before there was any

cause of action that was made. It was publicly filed in this case in July, before any claim by Harbinger. In other words, it was part of this deal before there was anything to be released from. It's been part of this deal from way before there was any claims.

THE COURT: No, it -- well, that's fine, but the release, as it's been explained to me, it's not just a release of affirmative claims, it requires the full allowance of the SPSO debt.

MR. DUGAN: Well, I think it would require a release of claims for disallowance, right, yes.

THE COURT: Yes, claims for disallowance. So even before there were allegations there was a clear link between the desire of the bidder to proceed with the assurance that the debt owner was going to be paid back in full.

Ms. Strickland --

MR. DUGAN: Ms. Strickland is refreshing my recollection on something.

THE COURT: Okay.

MR. DUGAN: Because just in fairness, I was misstating something to Your Honor.

The release -- I mean, just to get to your point, there's nothing specific in the release, she refreshed my recollection, about disallowance specifically; it's a broad general release.

THE COURT: Yes. But, Mr. Dugan, I asked the question repeatedly and pointedly one or two hearings ago, and it was clarified to me that, in fact, what the release means is not just a release of affirmative claims, which I agree with you had not been alleged, but it requires that the debt claim be allowed in full.

MR. DUGAN: I think that's a conclusion that was reached because it is a broad release. It's a release of all claims. It doesn't specifically require what Your Honor just said. But I think because it is a broad release of all claims, it arguably covers it, I mean, but it doesn't carve that out and specifically recover it.

THE COURT: Mr. Dugan, now I'm going to start to a little bit lose my patience.

MR. DUGAN: Okay.

THE COURT: It's in the document that LBAC put forward as a bid. So somebody wrote it. And if somebody didn't understand what they meant at the time, subsequent events have forced them to clarify it. And it's been clarified to me before that, in fact, it includes a full allowance, such that I cannot just say you know what, we'll proceed on the bid, we'll deal with the claims allowance later, that would not satisfy the condition of the release.

MR. DUGAN: I -- I --

THE COURT: So if that's wrong you can tell me, but

that's what my understanding is of how that works.

MR. DUGAN: I understand, Your Honor.

THE COURT: And that fact, whether or not that changes now, that fact is a fact that's out there, and that may or may not have a bearing on the identity of interest inextricably linked argument.

MR. DUGAN: I understand what you're saying, Your Honor. And forgive me for the disconnect.

THE COURT: That's okay.

MR. DUGAN: I don't think I'm --

THE COURT: You all are working very hard and sharing the responsibility; I understand. But it's not -- I have to hold you to prior statements that were made when, perhaps, you weren't standing at the podium.

MR. DUGAN: I understand perfectly, Your Honor. Let's just move on if we may.

THE COURT: Sure.

MR. DUGAN: I don't know if you have any other questions about the LightSquared complaint and what our arguments are with respect to them.

THE COURT: Let me look at my notes if you don't mind.

MR. DUGAN: Sure.

THE COURT: I think most of my notes relate to questions I want to ask the other folks.

MR. DUGAN: Okay.

THE COURT: So you can finish up what you have and reserve for rebuttal.

MR. DUGAN: You don't know how happy I am to hear that, Your Honor. I'm very happy to hear that, Your Honor.

Let me just, if I can, briefly touch on Harbinger --

THE COURT: Okay.

MR. DUGAN: -- if that's okay.

THE COURT: Sure.

MR. DUGAN: Just as long as I'm up here.

THE COURT: Sure.

MR. DUGAN: This will be brief.

Your Honor, our motion to dismiss Harbinger's claims is to some extent procedural. We kind of think that when we got their pleading we didn't understand exactly where it was coming from given what we thought your order had --

THE COURT: Me too.

MR. DUGAN: -- Your Honor had ordered. It seemed like a little bit --

THE COURT: Right.

MR. DUGAN: -- of left field lob, and maybe Hail Mary pass and a combo of those. And so we would just posit before you, first, that it doesn't appear to comply with what Your Honor ordered.

THE COURT: I'm going to sort it out with them.

MR. DUGAN: Okay. We also believe that there's

some -- I mean, to the extent their complaint -- and it's confusing -- alleges that they're not really seeking to vindicate any rights for relief that they have themselves, it appears to be pled derivatively which raises another host of issues that I don't think they adequately explain in their briefing, so I don't want to belabor that point.

And the only other thing I would say on that is to the extent they've got the 502(b) claim which Your Honor I think did say they could re-plead, our position on that claim is the same as the one that we've asserted for LightSquared.

THE COURT: Okay. Okay. All right, thank you, Mr. Dugan.

MR. DUGAN: Okay, thank you.

MR. GIUFFRA: Good afternoon, Your Honor.

THE COURT: Good afternoon.

MR. GIUFFRA: Robert Giuffra, Sullivan & Cromwell, for DISH and EchoStar.

THE COURT: All right, Mr. Giuffra, let me just follow along here and make sure I have everything that you filed.

I have a memorandum of law in support of the motion to dismiss the LightSquared complaint and a reply.

MR. GIUFFRA: That's correct, Your Honor.

THE COURT: And you filed nothing with respect to the Harbinger, correct?

MR. GIUFFRA: No, Your Honor.

THE COURT: Okay.

MR. GIUFFRA: We're not a party to that complaint.

THE COURT: Okay.

MR. GIUFFRA: Your Honor, this is a motion pursuant to Rule 8 of the Federal Rules of Civil Procedure, and it focuses on the plausibility of the complaint as pled. In our view, they have not pled the single claim that they brought against DISH and EchoStar, and that's a tortious interference with contract claim.

Now, a tortious interference with contract claim requires certain elements. You have to have a --

THE COURT: Can I just stop you for a minute?

MR. GIUFFRA: Yes, Your Honor.

THE COURT: Now I'm confused. So DISH and EchoStar are defendants in the Harbinger complaint.

MR. GIUFFRA: Not in the Harbinger complaint; we're defendants --

THE COURT: No.

MR. GIUFFRA: -- in the LightSquared complaint.

MR. FRIEDMAN: Your Honor, we only objected to the plan and we joined in the subordination of the SPSO, but we're not suing anybody.

THE COURT: Okay. So we're --

MR. GIUFFRA: One less thing for us to do today, Your Honor. So we're only a defendant in the LightSquared

complaint --

THE COURT: Okay.

MR. GIUFFRA: -- Count V, which is the tortious interference claim --

THE COURT: Hold on.

MR. GIUFFRA: -- which is a very specific claim that has to be pled, and they've got to allege a breach of a contract.

THE COURT: I got it, you're right.

MR. GIUFFRA: They've got to allege that DISH and EchoStar intentionally --

THE COURT: Right.

MR. GIUFFRA: -- caused in the complaint, and this is important, Your Honor, in paragraph 109 --

THE COURT: Right.

MR. GIUFFRA: -- that they say DISH -- "SPSO, DISH, EchoStar and Mr. Ergen intentionally caused UBS to breach Section 10.04 of the credit agreement." So that's what they've got to plead. And then they've also go to plead some sort of an injury and some sort of damages.

THE COURT: Right.

MR. GIUFFRA: Now, we believe, Your Honor, that there's no basis to infer from this complaint that Ergen or Mr. Kiser were acting as agents for DISH and EchoStar. And I talked about this the last time I stood before Your Honor --

THE COURT: Right.

MR. GIUFFRA: -- about the fact that DISH is a public company with 35,000 employees, more than 10,000 shareholders, same for EchoStar, and there's virtually nothing in this complaint about EchoStar at all.

And I think if Your Honor looks at paragraph 86 of the complaint, because I think that paragraph may be -- we could sort of speed up some of the points that Mr. Dugan was making, and maybe look at them in a slightly different way.

Paragraph 86, which is in the breach of contract claim, and I think the reason that they pled this in sort of an odd way against DISH and EchoStar was because they wanted -- LightSquared wanted to bring a breach of contract claim against Mr. Ergen and against SPSO, and they couldn't allege they were tortiously interfering with the same contract, because you only get one bite at the apple.

THE COURT: Right.

MR. GIUFFRA: You can only do a breach of contract claim, or you can bring a tortious interference claim, which is why they've come up with this sort of oddball claim involving UBS, so they can basically drag everybody into a tortious interference claim, and get their cake and eat it too.

But if you look at paragraph 86, and, again, it's a Rule 8 motion, Twombly, Iqbal, you've got to plead it in a plausible way.

Now, they plead in the complaint it's a public company; there's no question about that. And they say -- they just -- they have one sentence: "SPSO is a subsidiary of DISH and EchoStar." That's a conclusory allegation in our view.

Then they go on to say "DISH and EchoStar controlled SPSO, among other reasons because their executive chairman, Mr. Ergen, acting within the scope" -- "and the treasurer, Mr. Kiser, acting within the scope of their agency for the benefit of DISH and EchoStar, directed the management in investment policies of SPSO, specifically it's purchase of interest in LP debt." That's the only allegation that I see in this entire complaint supporting the notion that SPSO is a subsidiary of DISH and EchoStar.

Now, what are we talking about here? We're talking about a billion dollars of debt. And Your Honor hit on the point before that public companies can't go buy a billion dollars in debt in secret. They have boards of directors; they have auditors; they've got obligations with the SEC. And in particular, if they're using their own money, purchases of the debt -- and here we're talking about purchases that went back in time -- would be reflected in the financial statements of a company that would have to be disclosed.

They obviously can't cite anything like that, and maybe to put a different spin on what Mr. Dugan was saying, there are no allegations in the complaint of board approval of

this conduct; there's no allegations in this complaint of a board authorization of the conduct.

THE COURT: That's true, but I think their theory is that because of the extent of the control that Mr. Ergen exercises over DISH; fifty-three percent economic control, ninety percent, almost, voting control, it didn't matter.

MR. GIUFFRA: Okay, but --

THE COURT: Just as it -- might I finish?

MR. GIUFFRA: Yeah, I'm sorry, Your Honor.

THE COURT: Okay. It just doesn't matter, so that --

MR. GIUFFRA: But that --

THE COURT: -- therefore, when the debt's purchased, it doesn't matter because at the end of the day the chairman knows that the company will just do what he wants them to do. I'm not saying I'm finding that as a fact. I'm saying that that's what their theory is, that that's what their theory is: that at that point when the debt was purchased there was an optionality about it. He could use it for his own account, or if he subsequently decided that DISH would become involved, then DISH would become involved. I mean, I think that's what their theory is.

MR. GIUFFRA: That is their theory, Your Honor, but it's not a plausible theory as a matter of law. And the reason why it's not a plausible theory is if you accept that theory and take it to its logical extreme, and let's look again at the

allegations of the compliant. If Mr. Ergen goes out with the assistance of Mr. Kiser and buys a million acres of land in the west, okay, and just uses his own money and buys that land, is that suddenly that whatever that vehicle --

THE COURT: But it's context. It's context.

MR. GIUFFRA: Con --

THE COURT: I mean, if Mr. Ergen goes out and buys a large flat screen TV, I mean, it's context, right? So he's buying the debt of a -- distressed debt of a telecommunications company, it's in the neighborhood of what DISH and EchoStar do.

MR. GIUFFRA: But, again, if he buys a billion dollars of distressed debt he can't do it in secret. And if you read the allegations of the complaint they go back to the same arguments that Harbinger made that Mr. Ergen is DISH or Mr. Ergen is EchoStar, and it's all sort of one and the same without any specific pleadings, how in this particular case there was some authorization by some principal to someone other than the fact that Mr. Ergen is the executive chairman.

MR. GIUFFRA: That's the only --

THE COURT: Well, you have the treasurer --

MR. GIUFFRA: -- allegation they have.

THE COURT: The treasurer of DISH is executing the trades.

MR. GIUFFRA: But there's no allegation that -- people have multiple hats in this world, particularly corporate

executives and people who are involved in companies -- in multiple companies, because the allegation is oh, he works for EchoStar, too, and they just sort of plead it in a conclusory way. They don't plead any specifics. I'm not disputing that he is the treasurer; I'm not disputing the e-mails that they attach in the complaint. But the point is there's no allegation that they were authorized to engage in the conduct that they are alleged to have engaged in here and specifically buying the debt. Okay? There's got to be some authorization to do something that big. Okay?

I could be the CEO of a major company; even if I control it, I can't just go out and buy a billion dollars worth of debt and have it be ascribed to the company that I'm a CEO of. People have multiple hats. They don't allege in this complaint, for example, that that debt is owned by DISH or EchoStar. Those are public companies. That's an asset of a public company. You would have to use -- if Mr. -- they don't allege that money from DISH or EchoStar was used to buy the debt. One could talk about optionality as much as one wants but that still doesn't mean that in connection with these purchases that DISH or EchoStar had authorized them. They're not small purchases.

Now, let me focus, Your Honor, just on the elements. Again, in Count V they focus on UBS, and I believe that was a tactical decision because they could not allege that DISH or

EchoStar had tortiously interfered with LightSquared's debt agreement because they wanted to be able to bring the claim against Ergen for an act -- the Count II claim for breach of the credit agreement. So they come up with this theory that there is a breach by UBS in some way because that's what they allege in paragraph 109 that "intentionally caused UBS to breach 10.04." And again, tortious interference is an intentional tort. It's not just a negligence based and they've got to intentionally cause UBS to breach Section 10.04.

Now, they've got to allege some facts that support the notion that UBS breached the credit agreement Section 10.04. But UBS under the credit agreement itself, Section 9.03, Section 9.04, Mr. Dugan talked about it, was under no obligation to ascertain the accuracy of representations that were made to UBS. And then in paragraph 9.04 it says, "No liability for relying upon representations that are made."

So you need as a precursor to going back to basic building-block pleading rules, you need to establish a breach by UBS. That's what they pled in paragraph 109. If you can't establish a breach by UBS, they've got no claim against DISH or EchoStar for tortiously and intentionally causing UBS to breach an agreement.

Now, number one, UBS could not have breached the credit agreement because it had no obligation to ascertain the bona fides of people who claim to be eligible assignees, and

that's straight out of the credit agreement.

Second, in our opinion Your Honor, in our view, SPSO was an eligible assignee in any event and Your Honor, not to beat an argument that's been made, just look to footnote 39 -- 37, excuse me, of Your Honor's initial opinion on the last go round we had. Your Honor made the point that -- and we think it's correct -- that the Court did not find the argument that subsidiary, small "s," and subsidiary, big "S," made the same thing in a contract that was negotiated by separate folks.

So number one, I don't think that DISH and EchoStar are an ineligible assignee. Even if they were, they haven't pled that UBS breached any agreement and they haven't pled -- again it's very conclusory and they've got a Twombly-Iqbal obligation -- they don't allege, Your Honor, that in some way DISH or EchoStar, as they must, were the but-for cause for any breach by UBS and that there was some intentional conduct by DISH or EchoStar to cause that. And that goes back in part to the agency argument that I've made before which is that you're dealing with a public company. It's not plausible to say that just because someone is the executive chairman -- and that's really what they do; they take the titles and they say the titles mean for all purposes, actions they take and I guess Your Honor's point would be in the neighborhood, are actions of the public companies.

And we don't believe, Your Honor, that's plausible

pleading when you're dealing with public companies that have independent --

THE COURT: Well, what if I were to dismiss out DISH and EchoStar and the rest of the complaints, in some fashion, went forward or enough of the core allegations went forward and at the end of the day, at the end of the trial, hypothetically, I were to find that there is an identity of interest -- putting aside the subsidiary upper case/lower case issue -- I were to find for the plaintiffs on their theory that Mr. Ergen and DISH have an identity of interest and, therefore, SPSO couldn't buy the debt, just hypothetically, but I've let DISH and EchoStar out. Isn't that problematic?

MR. GIUFFRA: No, they would still have a claim under their breach of contract claim against Mr. Ergen. The only claim they pled against DISH and EchoStar is this tortious interference claim which is clearly just a convoluted theory that's being put together --

THE COURT: But I guess the question that I am asking you in terms of the efficiency, then, if there were to be a finding that Ergen and DISH are one and the same, right, but we don't have DISH as a party in the proceeding anymore, wouldn't that require yet another trial of some kind? That's what I am trying --

MR. GIUFFRA: Well, theoretically --

THE COURT: -- I'm just appealing to your

sophistication as a litigator to help me out.

MR. GIUFFRA: A couple of points; obviously they can only have us participate in this party if they've pled a claim against us.

THE COURT: Sure.

MR. GIUFFRA: We don't think they have. If the claim is, okay, we bring a claim against Mr. Ergen for breach of contract, they get a claim against Mr. Ergen for damages, okay -- and I don't think they can for all the reasons that are in all the papers, but let's just as a theoretical matter, they would try to enforce a judgment against Mr. Ergen if you found that Ergen and DISH were the same. Presumably they could try to enforce that judgment against DISH or EchoStar. We would make all the arguments about how we maintained separate corporate ownership.

THE COURT: Right.

MR. GIUFFRA: There's no piercing of the corporate veil, which they haven't pled in this complaint. So you're talking about a theoretical issue and I think it's -- Mr. Ergen, you would have to get past Mr. -- you would have to be able to establish breach by Mr. Ergen, Mr. Ergen not paying on the judgment and then you would have to be able to establish that there was a basis for piercing the corporate veil between Ergen and DISH and EchoStar: public companies with shareholders, directors, accountants. And presumably if you're

a noncontrolling, he owns about fifty-two percent of the company, you've got another forty plus percent of those companies --

THE COURT: All right, but that's economic. That's not -- voting is much higher; he's much higher.

MR. GIUFFRA: But you're focused on, well, they've got a claim against Mr. Ergen. It's a money damages claim, right? So the question is who pays the money if there's a judgment and does DISH or EchoStar and its noncontrolling shareholders have a -- are they on the hook for this, which is part of the problem with what we're dealing with and that's why we're fighting this battle with Your Honor which is the mere fact that someone is the executive chairman of a public company doesn't make the noncontrolling shareholders, the passive shareholders and their investment part of a litigation. There's got to be some control that's been -- or some authorization by the principal, the board of directors, particularly given -- and again going back to plausibility -- a transaction that involves a billion dollars.

So I don't see a problem if you went down that road. I don't think you'll ever get there, but just as an academic exercise, you would still -- you would go first to Mr. Ergen. Then you would have to establish some sort of piercing of the corporate veil and then you would try to go to the shareholders of -- and the assets of DISH and EchoStar, I guess as a

theoretical matter.

So one, we don't think there's a breach by UBS. Two, we don't think that DISH and EchoStar are the but-for cause of that breach and they've got nothing other than this basically agency theory by title.

And then the other point, Your Honor, which I just want to talk about for a second, is they haven't alleged any damages as a matter of law, any injury. And they come back and they make the point, well, LightSquared alleges that they were harmed by the fact that SPSO was in the capital structure and had a blocking position. And there's no specific allegations in this complaint. And they speculate in their brief about impacts during the exclusivity period but there's no allegation and as I -- going through the records, Your Honor, there was a number of extensions on that exclusivity period; there's no allegation that whatever plan was going to be put forward by LightSquared or by Harbinger was going to succeed. There was obviously a lot of contingencies like exit financing, creditor votes, board approval. And there's a lot of reasons why LightSquared was unable to negotiate a plan during the exclusivity period. Your Honor's more aware of them even than I am.

And in fact, Your Honor, at page 41 of the last decision you issued in this case, you made the point that there's no allegation in Harbinger's complaint that

LightSquared would have fared better in the plan negotiations but for the purported interference by having -- whether DISH or EchoStar and you in fact used those -- that example; the so-called missed opportunity.

Same problem with this complaint; they haven't cured that problem and then there's going to be an auction tomorrow and then a plan confirmation in January. And as I understand how Your Honor has set this up, the way it's set up is LBAC is a stalking horse bidder, 2.2 billion dollars, bottom four. It's a market test. If someone comes in with more money, and Your Honor said that when Mr. Dugan raised the question, if there's some future harm, well, the market's going to take away their future harm. I mean, if there's an auction before Your Honor, there's a process before Your Honor --

THE COURT: So let's go there now. Let's go back to the subject of the release which I think I asked you about when we were all together last time. You've got a bid by LBAC which is now owned by DISH and that bid contains a release and a condition that the debt holdings of SPSO be allowed in full. And that condition was in the bid -- in the deal before DISH acquired LBAC, was in from the very beginning and then DISH acquired LBAC and that didn't fall away. And then you get to the question of how much -- because I get conflicting signals on this from all of you -- how much you want me to take into account of what may or may not have occurred in Nevada because

that fact, that stubborn fact keeps reappearing and I'd like to understand the path that I get that takes me away from that fact in analyzing whether or not I should keep DISH and EchoStar in here, the link between DISH via -- in its status as the owner of the bidder for the spectrum with the condition that the chairman have his debt claim be allowed in full.

MR. GIUFFRA: Okay. Several responses to that; first, again Your Honor and not to beat a point again, the question is have they pled a claim or have they not pled a claim? They can't just be left in the case if they haven't pled a claim, and Your Honor obviously knows that.

Second, and again I don't want to start -- now I am sort of moving out of my hat as the -- on this motion and bringing things in from Nevada, but the Nevada judge has obviously issued an injunction as to how that should all be dealt with with respect to the release and we intend to comply with that. In addition, EchoStar intends to comply with that injunction.

THE COURT: But that doesn't answer the substantive question of what the release reflects or one can infer from the release, vis-a-vis the relationship between Mr. Ergen and DISH. I mean, I respect the Nevada court's ruling and you folks are conducting yourselves consistent with that. Other than that, it doesn't affect me. I'm doing what I'm doing and Nevada's doing what they're doing.

MR. GIUFFRA: Well, in terms of the complaint that's before the Court, there's nothing about the release in the complaint that I see. So I don't think it's relevant to the claim that's presently being pled. And how the release gets dealt with and what the release said is something that would be decided down the line.

THE COURT: But this is the part that I find confusing. There are allegations that -- in essence, that there's an identity of interest between Mr. Ergen and DISH and you're not required to -- it's notice pleading, right? You're not required to marshal every point of evidence that you'd introduce. You're not required to win on the merits.

MR. GIUFFRA: You do have an obligation, though, to plead sufficient facts to plausibly state a claim, and to plausibly state a claim in connection with a one billion dollar debt purchase, you have to do more than just say he's the executive chairman and Kiser is the treasurer of the company, which is all they say in this complaint at paragraph 86.

So the issue Your Honor is asking about the release is I think is an issue for another day and I'm not trying to evade the question but it's a complicated question vis-a-vis we've got the Nevada injunction and I don't want to make a statement to Your Honor that suddenly becomes ascribed to DISH or EchoStar given that injunction as to what our position is with respect to that release.

We intend to comply with the Court's injunction in terms of how that release gets negotiated and that's something that I think is an issue for another day but if there's no mention of the release in the complaint, unless I missed it.

THE COURT: No.

MR. GIUFFRA: And I think -- but I go back to what I said before again, they've got to -- Your Honor, you were consistent both today and the last time I was here. On a motion to dismiss, you look to the allegations of the complaint, you don't look to things that are outside of the complaint, and you ask has someone plausibly pled based on the factual allegations in the complaint, a claim.

The only claim against DISH or EchoStar is this tortious interference with UBS' contractual obligations as to the credit agreement. We don't think there were any contractual obligations. We don't think they were breached. We don't think there's any injury. We don't think there's any damages.

So as a technical legal matter, they have not pled a tortious interference claim, and while yes, oh, it's nice to have everybody in the courtroom or in the case, I think that you have to, I think, under Rule 12(b)(6) grant the motion to dismiss.

THE COURT: Okay.

MR. GIUFFRA: Okay.

THE COURT: Thank you.

MR. GIUFFRA: Thank you, Your Honor.

THE COURT: Does anybody need a break before we keep going?

MR. GIUFFRA: Sure, we'll take a short break.

THE COURT: Ms. Strickland?

MS. STRICKLAND: On a completely unrelated note, we have not been advised whether or not an auction is happening tomorrow and I need to advise people whether to get on a plane and fly through weather or not. So if we can just get that answer, we must notify people before they decide whether to fly across the country.

THE COURT: Okay. Mr. Sussberg?

MR. SUSSBERG: Yes, Your Honor, Joshua Sussberg from Kirkland Ellis. We are planning to have an auction tomorrow.

THE COURT: All right.

MR. SUSSBERG: If --

THE COURT: If people can't get here because of the weather, we're going to have to do something about that. I'm not going to have something as important as the auction be affected by the weather over which obviously none of us has any control.

MS. STRICKLAND: They can get here. This is just the first time -- we've been asking all morning and all week whether or not it was happening and the answer was we don't

know. So that -- I just needed that definitive answer and then they'll get on the plane.

THE COURT: Mr. Sussberg?

MR. SUSSBERG: Your Honor, if Your Honor would like to get into more specifics and details, I'm happy to do that in a closed session. There's a lot of --

THE COURT: I don't.

MR. SUSSBERG: -- things happening.

THE COURT: I don't. We're having a hearing on a motion to dismiss now. I'm taking Ms. Strickland's inquiry at face value. She's trying to tell people whether or not to get on a plane.

MS. STRICKLAND: That's it, yes.

THE COURT: So if the answer is yes, but --

MR. SUSSBERG: That is our plan.

THE COURT: -- it's a fluid situation and I think it's safe to say that if something were to happen and there was a delay, this wouldn't be the first time that there are fits and starts with respect to an auction. I have no idea what's happening. He's telling you they should get on a plane. You have to take that at face value. I don't know what else to say.

MR. SUSSBERG: Your Honor, you said it well.

THE COURT: I would like to keep going on the motion to dismiss, so that I don't -- I'm a simple sort -- I don't

lose my train of thought, okay? So would anybody like a brief break, though, before we start? Mr. Stone, would you want a brief break to collect your thoughts as to what everybody's just said or no?

MR. STONE: I'm happy to have one but I don't need one, Your Honor.

THE COURT: Okay. All right. Let's keep going.

MR. STONE: Okay.

THE COURT: Why don't you start by addressing Mr. Giuffra's arguments about letting DISH and EchoStar out because of the slim nature of the allegations that are in the complaint against them.

MR. STONE: Sure. I'm happy to, Your Honor. And for the record, Alan Stone, Milbank Tweed here on behalf of the debtors.

Your Honor, I apologize, I guess, although I thought our complaint was clear. In fact, paragraph 110 does allege that DISH, EchoStar and Mr. Ergen 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.

So the paragraph 109 looks at the first trade because at that time, none of those parties were actual parties to the contract. So the theory is that they caused UBS, which was a party to the contract, to breach the agreement. But once SPSO

became a party to the contract, and as you can see, SPSO is not listed in paragraph 110, they directly breached and the other parties tortiously interfered with the contract by causing that breach.

So I must say that when we briefed this in response to their memorandum in support of the motion to dismiss, we addressed the arguments that were contained in their brief and it was a bit curious to us that they didn't address the other breaches, and it only became clear to us when we got the reply brief that they were really focused only on paragraph 109 and not paragraph 110.

So we think that there's ample allegations in the complaint to keep DISH and EchoStar in because for every single one of the trades that happened after the first one, our theory is they tortiously interfered.

THE COURT: Well, that's one part of it, but the other part of it was that there's no allegation of -- specifically of the creation of an agency or the authorization, and --

MR. STONE: Well, let me turn to that, Your Honor.

THE COURT: Okay.

MR. STONE: I'm actually quite surprised by the cases that they cited in their reply brief because they're just directly contrary to the authority that's out there.

THE COURT: Okay. Can you point me to which ones you mean?

MR. STONE: I can, Your Honor. They cited two cases; Cromer I and --

THE COURT: Are you in the main memorandum or the reply?

MR. STONE: The reply, Your Honor.

THE COURT: Okay.

MR. STONE: They cited a case called Cromer I and another case, Imburgio (ph.), for the proposition that, in fact, at the pleading stage, you had to allege an actual manifestation of intent on the part of the principal. That's not the law at all, Your Honor.

In fact, our theory is that these purchases of debt were disguised purchases, and so as for actual authority, we don't yet have the facts. The true facts were hidden. That's how disguises work. And the case law bears out, in fact, that exact point. There's a case called Amusement Industry v. Stern which is at 693 F.Supp 327. The Court held there -- this is the Southern District of New York -- because "an outsider will not be privy to the details of what conversations took place between a principal and the agent," the plaintiff only need raise an inference of the agency relationship.

THE COURT: But that's exactly the point. I mean in a smaller, more ordinary situation that might be true, but the point that DISH and EchoStar is making -- and it can't be heightened to be a bootstrap argument, but the point that