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		5:04 (1) 150:16	9th (4)	
		502b (3) 41:6;43:10;52:8		

In Re:

LIGHTSQUARED INC., et al.

Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc

May 8, 2014

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1
2 UNITED STATES BANKRUPTCY COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 Case No. 12-12080-scc; Adv. Proc. No. 13-01390-scc

5 - - - - -x

6 In the Matter of:

7 LIGHTSQUARED INC., et al.,

8 Debtors.

9 - - - - -x

10 HARBINGER CAPITAL PARTNERS LLC, et al.,

11 Plaintiffs,

12 - against -

13 ERGEN, et al.,

14 Defendants.

15 - - - - -x

16 United States Bankruptcy Court

17 One Bowling Green

18 New York, New York

19
20 May 8, 2014

21 1:01 PM

22
23 B E F O R E:

24 HON. SHELLEY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1

2 Hearing: Bench decision in Adv. Proc. 13-01390-scc

3

4 Hearing: Bench decision on confirmation of plan of debtors
5 (12-12080-scc)

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon. Please have a seat.

3 How is everybody today?

4 All right. Thank you all for coming down, and thanks
5 to everybody who's dialed in. I have four pages of folks who
6 are listening on the phone, but I'm not going to go through and
7 identify them.

8 As I said a couple of days ago when I outlined this
9 event or this procedure, I absolutely do not hold it against
10 anybody who is not here personally. I understand that people
11 have other things to attend to and that's perfectly fine.

12 Let me take moment, though, before I formally start
13 reading to say a few things. One is to make sure that
14 everybody understands why I'm doing this somewhat unorthodox
15 procedure. So in a normal case, the Court would simply issue a
16 decision that would be filed on the docket.

17 This is a bench decision that I am going to read.
18 It's not a tentative ruling. It's the decision. The
19 difference between this and a formal decision which will
20 eventually be filed on the docket rests in the fact that there
21 is a tremendous amount of detail work that has to go into a
22 published decision. For example, the decision in the adversary
23 proceeding, which is what I will read first, now runs to 170
24 pages and is up to 201 footnotes, and it includes a lot of
25 detailed findings.

1 So the work that's involved in order to get it to what
2 we consider to be perfect and publishable is a lot. And I felt
3 very strongly that the time that it takes to do that was not
4 something that should cost the estate money.

5 Similarly with respect to the confirmation decision,
6 there will be a longer version of that, complete with findings,
7 footnotes, full citations, et cetera, that will, as soon as we
8 can finish it, will be published.

9 So I'm not doing this today because this case is
10 particularly special and important. Yes, it is both of those
11 things, but there is no significance to reading today other
12 than because I felt very strongly that I needed to get you
13 decisions so that the companies' funds were not depleted while
14 I did the work that I have to do. And that's the reason that
15 I'm doing it this way.

16 There is not going to be a copy of this available
17 other than the transcript that you will produce. And
18 eventually when the published decision and orders are ready,
19 what I say today will be superseded in all respects by those.

20 So I just wanted to set the table.

21 That being said, I apologize in advance for the fact
22 that you're going to have to listen to me talk for several
23 hours. And if anybody needs to take a break, just get up and
24 take a break. It's no problem.

25 I will take a break between the two decisions. The

1 first one is approximately -- I'm going to read about seventy
2 pages, take a break and then I'll read the second one which is
3 about fifty pages.

4 And it's great that I've got a musical accompaniment.
5 All right.

6 This is post-trial findings of fact and conclusions of
7 law in the adversary proceeding.

8 Between April 13th, 2012 and April 26, 2013, Charles
9 Ergen, through an entity named SPSO, purchased approximately
10 844 million dollars of the senior secured debt of LightSquared
11 LP, a debtor in these Chapter 11 cases.

12 Mr. Ergen, the founder, chairman of the board of
13 directors, and controlling shareholder of DISH, bought the
14 debt, he says, without any strategic intent to benefit DISH.
15 Rather, he was interested in acquiring LightSquared debt
16 personally because he "liked the investment" and because he had
17 been advised that DISH itself was not eligible to purchase the
18 debt, due to the restrictions in the LightSquared LP credit
19 agreement.

20 The "diligence" on the purchaser eligibility issue,
21 such as it was, was conducted by Mr. Ergen's long-time friend
22 Jason Kiser, the treasurer of DISH, who from time to time
23 worked on personal matters for Mr. Ergen. Mr. Kiser also
24 arranged the trades on behalf of Mr. Ergen on his own time
25 while at work at DISH.

1 Promptly after Mr. Ergen's initial debt purchases in
2 the face amount of 5 million dollars, on April 13th, 2012, and
3 particularly after his significant debt purchase in the face
4 amount of 247 million dollars on May 4th, 2012, the press began
5 to speculate about the identity of the SPSO purchaser,
6 publishing stories with headlines such as "LightSquared term
7 loan trades north of 70 as Ergen enters the picture," and
8 "Ergen builds cash pile amidst LightSquared restructuring
9 talks."

10 The trades in the press reports did not go unnoticed
11 by LightSquared, especially after the news that it was Carl
12 Icahn who had sold his nearly quarter billion dollar position
13 in the debt to SPSO. Philip Falcone, the founder and principal
14 owner of Harbinger Capital Partners, which is the principal
15 shareholder of LightSquared, reacted to the news swiftly and
16 strategically, writing in an e-mail message: Well, I'm working
17 on giving him a nice surprise," referring to Mr. Ergen and to
18 LightSquared's May 9th, 2012 modification of its credit
19 agreement's disqualified company's list to include DISH.

20 The game was afoot. Almost two years of moves and
21 countermoves has ensued with LightSquared's other stakeholders
22 sometimes watching from the sidelines and sometimes entering
23 the fray, all under the watchful gaze of the Federal
24 Communications Commission, which to this day, has not taken not
25 definitive action to clarify the status of LightSquared's

1 valuable spectrum assets.

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

10 The Court's analysis is as follows:

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

14 INTRODUCTION.

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

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

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

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

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

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

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

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

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

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

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

3 A disqualified company is defined in the credit
4 agreement in relevant part as any operating company which is a
5 direct competitor of the borrower, and set forth on schedule
6 101-A, as well as any known subsidiary thereof.

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

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

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

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

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

5 Similarly, courts have held that a subsidiary is
6 commonly understood to mean a corporation "that is controlled
7 by another corporation by reason of the latter's ownership of
8 at least a majority of the shares of the capital stock.
9 National Gear & Piston v. Cummins Power System, 2013 Westlaw
10 5434638 (S.D.N.Y.).

11 As the Delaware Supreme Court has observed, "The
12 ordinary and plain meaning of subsidiary requires ownership of
13 more than half the stock of the subsidiary by the parent."
14 Liggett Group Inc. v. ACE Property and Casualty, 798 A.2d.
15 1024, (Del. 2002).

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

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

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

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

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

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

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

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

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

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

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

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

25 The facts are these:

1 A) SPSO's LP debt purchase.

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

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

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

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

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

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

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

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

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

17 2. The LP debt is a "good investment". Between April
18 13th, 2012 and April 26th, 2013, Mr. Ergen through SPSO,
19 contracted to purchase over one billion dollars in par value of
20 LP debt of which SPSO actually closed trades for approximately
21 844 million in par value. Specifically, prior to
22 LightSquared's petition date on May 14th, 2012, SPSO purchased
23 a total of approximately 287 million dollars in par value of LP
24 debt with SPSO's largest purchase comprised of the May 4th,
25 2012 purchase of Carl Icahn's approximately 247-million-dollar

1 position.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 Regardless, it is notable that there were no further
9 inquiries. Mr. Ergen testified at trial that until the May
10 2nd, 2013 board presentation, he did not speak to anyone at
11 DISH besides Mr. Kiser regarding his purchases of LP debt.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Mr. Ergen testified that he had a general

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

7 1. 320 million dollars at ninety-six cents on the
8 dollar and confidence in the collateral.

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

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

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

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

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

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

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

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

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

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

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

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

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

1 open for DISH.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Ergen to do so for his personal account."

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

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

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

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

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

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

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

11 Under the heading entitled Implied Supplemental Asset
12 Value, the Ergen July 8th presentation lists a range of values
13 of between 1.833 billion and 3.783 billion, with a midpoint of
14 2.308 billion, for what it identifies as the total of: one, 5
15 megahertz of reclaimed unusable AWS-4; two, 5 megahertz of
16 reclaimed impaired AWS-4; and three, L-band downlink spectrum.

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

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

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

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

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

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

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

7 On July 22nd, 2013, DISH agreed to buy LBAC from Mr.
8 Ergen for one dollar without the special committee ever
9 reviewing the terms of the acquisition agreement. On July 23,
10 2013, DISH announced its intention to bid through LBAC for
11 LightSquared spectrum.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 The Ergen July 8th presentation and the valuation
11 contained therein demonstrate the significant benefit to DISH
12 from acquiring LightSquared spectrum, with the implied net
13 supplemental asset value to DISH which had a midpoint of 2.308
14 billion dollars alone, coming in above the LBAC bid amount of
15 2.2 billion dollars, without even looking at the total
16 aggregate value of the spectrum to DISH, which Mr. Ergen
17 estimated at a value of between 5.174 and 8.996 billion.
18 Such an enormous value could not simply have occurred to Mr.
19 Ergen in an epiphany in the days or weeks before making such a
20 detailed presentation to the DISH board. Rather, Mr. Ergen
21 must have perceived the synergistic value reflected in this
22 presentation much earlier, as he monitored the actions of the
23 FCC and the movement of the pieces on the wireless spectrum
24 chessboard, some of which he, himself, was moving.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Based on the foregoing, the Court concludes that the
18 conduct of Mr. Ergen and SPSO, undertaken on behalf of or for
19 the benefit of DISH, was an end run around the eligible
20 assignee provisions of the credit agreement that breached the
21 implied covenant of good faith and fair dealing arising under
22 the credit agreement. See *Standard Chartered Bank v. AWB Ltd.*,
23 210 WL 532515 (S.D.N.Y. 2010). Simply put, that which a
24 corporation is contractually unable to accomplish itself, in
25 its own name, cannot be accomplished by interposing a shell

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

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

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

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

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

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

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

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

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

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

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

9 It argued that the participation agreement was, for
10 all relevant purposes, "a disguised but unconsented-to
11 assignment" that breached the credit agreement or that "so
12 subverts the purpose underlying Cablevision's right to veto
13 assignments of the loan as to breach the covenant of good faith
14 and fair dealing implied by law in the credit agreement."

15 Judge Rakoff enjoined the transfer, finding that JPMorgan
16 violated the implied covenant of good faith and fair dealing by
17 attempting, through the "guise of a purported participation" to
18 effectuate a prohibited assignment that it could not have
19 implemented directly.

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

1 rights under the credit agreement.

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

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

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

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

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

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

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

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

1 purchases.

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

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

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

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

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

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

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

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

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

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

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

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

1 correct.

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

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

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

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

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

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

12 IV. SPSO'S CLAIMS SHOULD NOT BE DISALLOWED.

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

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

1 applicable law."

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

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

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

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

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

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

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

13 Contrary to plaintiff's argument, Section 10.04(d) of
14 the agreement makes clear that neither a breach of the express
15 terms of the credit agreement nor a breach of the implied
16 covenant of good faith and fair dealing renders wrongfully
17 transferred debt claims unenforceable against LightSquared and
18 therefore disallow it. SPSO also points out that similar
19 language has been found insufficient to invalidate transfers.
20 See LCE Lux HoldCo v. Entretenimiento GM de Mexico, 287 F.R.D.
21 30 (S.D.N.Y. 2012).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 In fact, the addition of DISH to the credit
11 agreement's list of disqualified companies on May 9th, 2012
12 appears to have been pursued by Mr. Falcone, at least partially
13 in spite, to trap Mr. Ergen in a minority position in the LP
14 debt after he had acquired Mr. Icahn's position. On May 6th,
15 2012, after learning of the purchase of Mr. Icahn's 247 million
16 dollar position in the LP debt, Mr. Falcone wrote to Ara Cohen
17 of Knighthead, "Well, I'm working on giving Ergen a nice
18 surprise by adding DISH to the list of disqualified companies."

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

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

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

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

19 Despite LightSquared's protestations that it attempted
20 to ascertain the identity of the purchaser and the efforts to
21 which it points, the fact remains that LightSquared, a Chapter
22 11 debtor, did nothing to seek to obtain that information
23 through the many tools available to it under the Bankruptcy
24 Code, including Bankruptcy Rule 2004, or to seek any relief
25 from this Court with respect to the debt purchases by SPSO,

1 LightSquared would have fared better in the plan negotiations
2 but for the purported interference by having -- whether DISH or
3 EchoStar and you in fact used those -- that example; the so-
4 called missed opportunity.

5 Same problem with this complaint; they haven't cured
6 that problem and then there's going to be an auction tomorrow
7 and then a plan confirmation in January. And as I understand
8 how Your Honor has set this up, the way it's set up is LBAC is
9 a stalking horse bidder, 2.2 billion dollars, bottom four.
10 It's a market test. If someone comes in with more money, and
11 Your Honor said that when Mr. Dugan raised the question, if
12 there's some future harm, well, the market's going to take away
13 their future harm. I mean, if there's an auction before Your
14 Honor, there's a process before Your Honor --

15 THE COURT: So let's go there now. Let's go back to
16 the subject of the release which I think I asked you about when
17 we were all together last time. You've got a bid by LBAC which
18 is now owned by DISH and that bid contains a release and a
19 condition that the debt holdings of SPSO be allowed in full.
20 And that condition was in the bid -- in the deal before DISH
21 acquired LBAC, was in from the very beginning and then DISH
22 acquired LBAC and that didn't fall away. And then you get to
23 the question of how much -- because I get conflicting signals
24 on this from all of you -- how much you want me to take into
25 account of what may or may not have occurred in Nevada because

1 that fact, that stubborn fact keeps reappearing and I'd like to
2 understand the path that I get that takes me away from that
3 fact in analyzing whether or not I should keep DISH and
4 EchoStar in here, the link between DISH via -- in its status as
5 the owner of the bidder for the spectrum with the condition
6 that the chairman have his debt claim be allowed in full.

7 MR. GIUFFRA: Okay. Several responses to that; first,
8 again Your Honor and not to beat a point again, the question is
9 have they pled a claim or have they not pled a claim? They
10 can't just be left in the case if they haven't pled a claim,
11 and Your Honor obviously knows that.

12 Second, and again I don't want to start -- now I am
13 sort of moving out of my hat as the -- on this motion and
14 bringing things in from Nevada, but the Nevada judge has
15 obviously issued an injunction as to how that should all be
16 dealt with with respect to the release and we intend to comply
17 with that. In addition, EchoStar intends to comply with that
18 injunction.

19 THE COURT: But that doesn't answer the substantive
20 question of what the release reflects or one can infer from the
21 release, vis-a-vis the relationship between Mr. Ergen and DISH.
22 I mean, I respect the Nevada court's ruling and you folks are
23 conducting yourselves consistent with that. Other than that,
24 it doesn't affect me. I'm doing what I'm doing and Nevada's
25 doing what they're doing.

1 MR. GIUFFRA: Well, in terms of the complaint that's
2 before the Court, there's nothing about the release in the
3 complaint that I see. So I don't think it's relevant to the
4 claim that's presently being pled. And how the release gets
5 dealt with and what the release said is something that would be
6 decided down the line.

7 THE COURT: But this is the part that I find
8 confusing. There are allegations that -- in essence, that
9 there's an identity of interest between Mr. Ergen and DISH and
10 you're not required to -- it's notice pleading, right? You're
11 not required to marshal every point of evidence that you'd
12 introduce. You're not required to win on the merits.

13 MR. GIUFFRA: You do have an obligation, though, to
14 plead sufficient facts to plausibly state a claim, and to
15 plausibly state a claim in connection with a one billion dollar
16 debt purchase, you have to do more than just say he's the
17 executive chairman and Kiser is the treasurer of the company,
18 which is all they say in this complaint at paragraph 86.

19 So the issue Your Honor is asking about the release is
20 I think is an issue for another day and I'm not trying to evade
21 the question but it's a complicated question vis-a-vis we've
22 got the Nevada injunction and I don't want to make a statement
23 to Your Honor that suddenly becomes ascribed to DISH or
24 EchoStar given that injunction as to what our position is with
25 respect to that release.

1 We intend to comply with the Court's injunction in
2 terms of how that release gets negotiated and that's something
3 that I think is an issue for another day but if there's no
4 mention of the release in the complaint, unless I missed it.

5 THE COURT: No.

6 MR. GIUFFRA: And I think -- but I go back to what I
7 said before again, they've got to -- Your Honor, you were
8 consistent both today and the last time I was here. On a
9 motion to dismiss, you look to the allegations of the
10 complaint, you don't look to things that are outside of the
11 complaint, and you ask has someone plausibly pled based on the
12 factual allegations in the complaint, a claim.

13 The only claim against DISH or EchoStar is this
14 tortious interference with UBS' contractual obligations as to
15 the credit agreement. We don't think there were any
16 contractual obligations. We don't think they were breached.
17 We don't think there's any injury. We don't think there's any
18 damages.

19 So as a technical legal matter, they have not pled a
20 tortious interference claim, and while yes, oh, it's nice to
21 have everybody in the courtroom or in the case, I think that
22 you have to, I think, under Rule 12(b)(6) grant the motion to
23 dismiss.

24 THE COURT: Okay.

25 MR. GIUFFRA: Okay.

1 THE COURT: Thank you.

2 MR. GIUFFRA: Thank you, Your Honor.

3 THE COURT: Does anybody need a break before we keep
4 going?

5 MR. GIUFFRA: Sure, we'll take a short break.

6 THE COURT: Ms. Strickland?

7 MS. STRICKLAND: On a completely unrelated note, we
8 have not been advised whether or not an auction is happening
9 tomorrow and I need to advise people whether to get on a plane
10 and fly through weather or not. So if we can just get that
11 answer, we must notify people before they decide whether to fly
12 across the country.

13 THE COURT: Okay. Mr. Sussberg?

14 MR. SUSSBERG: Yes, Your Honor, Joshua Sussberg from
15 Kirkland Ellis. We are planning to have an auction tomorrow.

16 THE COURT: All right.

17 MR. SUSSBERG: If --

18 THE COURT: If people can't get here because of the
19 weather, we're going to have to do something about that. I'm
20 not going to have something as important as the auction be
21 affected by the weather over which obviously none of us has any
22 control.

23 MS. STRICKLAND: They can get here. This is just the
24 first time -- we've been asking all morning and all week
25 whether or not it was happening and the answer was we don't

1 know. So that -- I just needed that definitive answer and then
2 they'll get on the plane.

3 THE COURT: Mr. Sussberg?

4 MR. SUSSBERG: Your Honor, if Your Honor would like to
5 get into more specifics and details, I'm happy to do that in a
6 closed session. There's a lot of --

7 THE COURT: I don't.

8 MR. SUSSBERG: -- things happening.

9 THE COURT: I don't. We're having a hearing on a
10 motion to dismiss now. I'm taking Ms. Strickland's inquiry at
11 face value. She's trying to tell people whether or not to get
12 on a plane.

13 MS. STRICKLAND: That's it, yes.

14 THE COURT: So if the answer is yes, but --

15 MR. SUSSBERG: That is our plan.

16 THE COURT: -- it's a fluid situation and I think it's
17 safe to say that if something were to happen and there was a
18 delay, this wouldn't be the first time that there are fits and
19 starts with respect to an auction. I have no idea what's
20 happening. He's telling you they should get on a plane. You
21 have to take that at face value. I don't know what else to
22 say.

23 MR. SUSSBERG: Your Honor, you said it well.

24 THE COURT: I would like to keep going on the motion
25 to dismiss, so that I don't -- I'm a simple sort -- I don't

1 lose my train of thought, okay? So would anybody like a brief
2 break, though, before we start? Mr. Stone, would you want a
3 brief break to collect your thoughts as to what everybody's
4 just said or no?

5 MR. STONE: I'm happy to have one but I don't need
6 one, Your Honor.

7 THE COURT: Okay. All right. Let's keep going.

8 MR. STONE: Okay.

9 THE COURT: Why don't you start by addressing Mr.
10 Giuffra's arguments about letting DISH and EchoStar out because
11 of the slim nature of the allegations that are in the complaint
12 against them.

13 MR. STONE: Sure. I'm happy to, Your Honor. And for
14 the record, Alan Stone, Milbank Tweed here on behalf of the
15 debtors.

16 Your Honor, I apologize, I guess, although I thought
17 our complaint was clear. In fact, paragraph 110 does allege
18 that DISH, EchoStar and Mr. Ergen intentionally interfered with
19 the credit agreement by controlling, directing, authorizing and
20 executing the LP debt trades that caused and resulted in the
21 breach of the credit agreement.

22 So the paragraph 109 looks at the first trade because
23 at that time, none of those parties were actual parties to the
24 contract. So the theory is that they caused UBS, which was a
25 party to the contract, to breach the agreement. But once SPSO

1 became a party to the contract, and as you can see, SPSO is not
2 listed in paragraph 110, they directly breached and the other
3 parties tortiously interfered with the contract by causing that
4 breach.

5 So I must say that when we briefed this in response to
6 their memorandum in support of the motion to dismiss, we
7 addressed the arguments that were contained in their brief and
8 it was a bit curious to us that they didn't address the other
9 breaches, and it only became clear to us when we got the reply
10 brief that they were really focused only on paragraph 109 and
11 not paragraph 110.

12 So we think that there's ample allegations in the
13 complaint to keep DISH and EchoStar in because for every single
14 one of the trades that happened after the first one, our theory
15 is they tortiously interfered.

16 THE COURT: Well, that's one part of it, but the other
17 part of it was that there's no allegation of -- specifically of
18 the creation of an agency or the authorization, and --

19 MR. STONE: Well, let me turn to that, Your Honor.

20 THE COURT: Okay.

21 MR. STONE: I'm actually quite surprised by the cases
22 that they cited in their reply brief because they're just
23 directly contrary to the authority that's out there.

24 THE COURT: Okay. Can you point me to which ones you
25 mean?

1 MR. STONE: I can, Your Honor. They cited two cases;
2 Cromer I and --

3 THE COURT: Are you in the main memorandum or the
4 reply?

5 MR. STONE: The reply, Your Honor.

6 THE COURT: Okay.

7 MR. STONE: They cited a case called Cromer I and
8 another case, Imburgio (ph.), for the proposition that, in
9 fact, at the pleading stage, you had to allege an actual
10 manifestation of intent on the part of the principal. That's
11 not the law at all, Your Honor.

12 In fact, our theory is that these purchases of debt
13 were disguised purchases, and so as for actual authority, we
14 don't yet have the facts. The true facts were hidden. That's
15 how disguises work. And the case law bears out, in fact, that
16 exact point. There's a case called Amusement Industry v. Stern
17 which is at 693 F.Supp 327. The Court held there -- this is
18 the Southern District of New York -- because "an outsider will
19 not be privy to the details of what conversations took place
20 between a principal and the agent," the plaintiff only need
21 raise an inference of the agency relationship.

22 THE COURT: But that's exactly the point. I mean in a
23 smaller, more ordinary situation that might be true, but the
24 point that DISH and EchoStar is making -- and it can't be
25 heightened to be a bootstrap argument, but the point that

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

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

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

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

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

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

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

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

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

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

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

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

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

13 THE COURT: Okay.

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

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

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

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

4 THE COURT: I skipped them.

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

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

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

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

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

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

7 MR. STONE: Yes.

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

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

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

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

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

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

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

13 THE COURT: Just at the LP.

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

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

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

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

21 MR. STONE: In the complaint?

22 THE COURT: In the plan.

23 MR. STONE: Oh, in the plan.

24 THE COURT: Mr. Barr?

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

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

5 THE COURT: Okay, thank you.

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. STONE: Well --

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

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

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

8 MR. STONE: Right.

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

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

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

20 MR. STONE: No.

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

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

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

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

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

1 THE COURT: Okay.

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

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

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

7 MS. STRICKLAND: I think that's fair.

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

9 MR. BARR: So I should hand it?

10 THE COURT: You can go whisper to him --

11 MR. BARR: Okay.

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

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

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

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

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

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

7 MR. STONE: Certainly, Your Honor.

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

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

16 MR. STONE: Yes.

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

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

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

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

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

10 MR. STONE: Correct.

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

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

16 THE COURT: From May, 2012.

17 MR. STONE: Yes.

18 THE COURT: Okay. Anything else?

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

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

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

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

1 UNIDENTIFIED SPEAKER: Great. Thank you, Your Honor.

2 UNIDENTIFIED SPEAKER: Thanks.

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. FRIEDMAN: Claim disallowance.

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

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

14 THE COURT: Right.

15 MR. FRIEDMAN: -- because I --

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

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

1 THE COURT: Right.

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

9 THE COURT: Right.

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

12 THE COURT: Right.

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

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

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

24 MR. FRIEDMAN: Exactly. Exactly.

25 THE COURT: Right?

1 MR. FRIEDMAN: Yes.

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

5 MR. FRIEDMAN: Oh, of course. Absolutely.

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

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

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

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

1 THE COURT: Right.

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

4 THE COURT: Right.

5 MR. FRIEDMAN: So --

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

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

17 THE COURT: Sure.

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

23 THE COURT: Right.

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

1 THE COURT: Right.

2 MR. FRIEDMAN: So --

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

4 MR. FRIEDMAN: Yes.

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

7 MR. FRIEDMAN: Yes.

8 THE COURT: Right?

9 MR. FRIEDMAN: Yes.

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

13 MR. FRIEDMAN: Yes. Yes.

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

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

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

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

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

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

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

19 MR. FRIEDMAN: No.

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

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

25 THE COURT: That one is --

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

2 THE COURT: Right.

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

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

7 MR. FRIEDMAN: Yes.

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

10 MR. FRIEDMAN: Right.

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

14 MR. FRIEDMAN: Right.

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

17 MR. FRIEDMAN: Right. Right.

18 THE COURT: So isn't that --

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

25 THE COURT: Right.

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

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

4 MR. FRIEDMAN: Right. Right.

5 THE COURT: Right?

6 MR. FRIEDMAN: But we'll --

7 THE COURT: So --

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

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

14 MR. FRIEDMAN: Yes.

15 THE COURT: -- on January 9th.

16 MR. FRIEDMAN: Yes. Yes.

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

19 MR. FRIEDMAN: Tomorrow.

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

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

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

1 MR. FRIEDMAN: No question.

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

4 MR. FRIEDMAN: Yes.

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

6 MR. FRIEDMAN: Right.

7 THE COURT: I mean, this all --

8 MR. FRIEDMAN: There --

9 THE COURT: The same set of transactions --

10 MR. FRIEDMAN: Right.

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

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

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

20 MR. FRIEDMAN: Right.

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

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

1 THE COURT: Right.

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

5 THE COURT: Okay.

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

7 THE COURT: Right.

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

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

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

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

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

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

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

4 MR. FRIEDMAN: Um-hum.

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

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

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

14 MR. FRIEDMAN: Right.

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

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

22 THE COURT: Okay.

23 MR. FRIEDMAN: But --

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

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

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

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

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

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

3 The other thing is about --

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

6 MR. FRIEDMAN: Right.

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

11 MR. FRIEDMAN: Right.

12 THE COURT: Right?

13 MR. FRIEDMAN: Right.

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

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

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

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

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

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

1 unauthorized, is what created the in pari delicto doctrine.

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

5 MR. FRIEDMAN: Um-hum, right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 MR. FRIEDMAN: Right.

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

22 MR. FRIEDMAN: Um-hum, well --

23 THE COURT: -- of DISH or EchoStar.

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

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

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

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

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

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

3 MR. FRIEDMAN: Right. But if --

4 THE COURT: So --

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

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

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

25 THE COURT: This is the free house.

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

2 THE COURT: Right.

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

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

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

8 MR. FRIEDMAN: Well, thank you.

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

10 THE COURT: Good afternoon.

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

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

16 THE COURT: Right.

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

19 THE COURT: Right.

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

24 THE COURT: Right.

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

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

7 THE COURT: It's --

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

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

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

13 THE COURT: Right.

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

16 THE COURT: Right.

17 MR. DUBLIN: So if --

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

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

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

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

25 THE COURT: Right. But why does equitable

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

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

5 THE COURT: Right.

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

7 THE COURT: Right.

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

9 THE COURT: Right. But --

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

16 THE COURT: Okay.

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

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

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

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

3 THE COURT: All claims.

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

6 THE COURT: Okay. So the --

7 MR. DUBLIN: So it's --

8 THE COURT: -- answer --

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

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

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

14 THE COURT: Yeah.

15 MR. DUBLIN: Yeah.

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

18 MR. DUBLIN: It may --

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

20 MR. DUBLIN: Exactly.

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

24 MR. DUBLIN: Okay.

25 THE COURT: -- made it clear --

1 MR. DUBLIN: Okay.

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

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

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

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

10 THE COURT: Right.

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

14 THE COURT: There is.

15 MR. BARR: Right. So --

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

18 MR. BARR: So there --

19 THE COURT: -- but not so much.

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

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

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

2 THE COURT: Sure.

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

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

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

17 THE COURT: Well, I --

18 MR. DUGAN: -- specific facts.

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

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

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

5 THE COURT: Okay.

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

8 THE COURT: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

22 THE COURT: Well, the theory --

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

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

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

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

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

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

1 saying.

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

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

12 THE COURT: I see what you're saying.

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

14 THE COURT: The peace in the valley point.

15 MR. DUGAN: Exactly, Your Honor.

16 THE COURT: Okay.

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

18 THE COURT: That's okay.

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

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

6 They didn't seek to stop these trades in any way.
7 We've made this point before. I will add that Harbinger's
8 complaint specifically references an inquiry in December of
9 2012 by Mr. Falcone in which he says I know you're buying the
10 debt. Now, he was writing to Tom Cullen, who was a senior
11 executive at DISH. Their point is that was an inquiry. We
12 were asking him. We weren't saying we -- I know we said we
13 knew. We didn't really know. We were just asking. Well, they
14 never sent an e-mail to Carlos Slim, I don't think. My only
15 point is, as much as they might want to sort of backpedal from
16 it, the identity of SPSO was not a big question mark in their
17 minds, I think, at any point during this.

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

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

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

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

3 THE COURT: Sure.

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

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

12 MR. GIUFFRA: 109, 109.

13 THE COURT: 109? Okay?

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

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

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

9 Now, what they've done, Your Honor, is they
10 essentially say -- they say in paragraph 86, SPSO is a
11 subsidiary of DISH, EchoStar. Okay. Well, if it's a
12 subsidiary of DISH, EchoStar, then you're bringing a breach of
13 contract action in Count II against a subsidiary of DISH,
14 EchoStar, and then you're trying to bring a tortious
15 interference case against, I guess, the parent or maybe just
16 another subsidiary of the Charlie Ergen enterprise in para --
17 in Count V. And just basic black letter law is you can't do
18 that. There's an inconsistency in the pleading in that
19 on the one hand, they want to say that SPSO is a subsidiary.
20 They want to bring a breach of contract claim in Count II.
21 Then, in Count V, by sort of just dropping SPSO from 109 and
22 110, they want to --

23 THE COURT: No, SPSO is in 109.

24 MR. GIUFFRA: It's --

25 THE COURT: SPSO is not --

1 MR. GIUFFRA: -- is dropped in 110.

2 THE COURT: -- in 110.

3 MR. GIUFFRA: So --

4 THE COURT: Okay?

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

9 THE COURT: Okay. But --

10 MR. GIUFFRA: -- Count --

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

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

16 THE COURT: Why? They're not --

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

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

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

25 THE COURT: Again --

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

4 THE COURT: Why not?

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

7 THE COURT: If you've got a --

8 MR. GIUFFRA: -- of the case --

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

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

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

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

17 THE COURT: Right.

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

19 THE COURT: And --

20 MR. GIUFFRA: -- separate --

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

22 MR. GIUFFRA: I don't --

23 THE COURT: -- interference claim against the parent?

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

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

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

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

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

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

1 Kiser works for DISH --

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

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

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

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

3 THE COURT: And a contract --

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

5 THE COURT: Correct.

6 MR. GIUFFRA: -- against SPSO.

7 THE COURT: Right, and --

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

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

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

24 THE COURT: That --

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

1 parent and sub; that's my only point.

2 THE COURT: Okay.

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

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

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

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

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

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

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

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

7 To turn to another --

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

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

21 THE COURT: Right, and now we have --

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

25 THE COURT: That's a difference.

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

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

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

12 THE COURT: Well, anything else?

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

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

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

8 THE COURT: Okay. Thank you.

9 MR. GIUFFRA: Thank you.

10 THE COURT: Anything else?

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

13 THE COURT: Sure.

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

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

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

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

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

17 THE COURT: Sure.

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

20 THE COURT: Yes.

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

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

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

13 THE COURT: But --

14 MS. STRICKLAND: It is a very broad --

15 THE COURT: But here's the part --

16 MS. STRICKLAND: -- general release --

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

20 MS. STRICKLAND: Correct.

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

23 MS. STRICKLAND: LBAC submitted an offer letter on May
24 15th --

25 THE COURT: Right.

1 MS. STRICKLAND: -- Your Honor.

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

4 MS. STRICKLAND: It leaves the possibility open.

5 THE COURT: Cor --

6 MS. STRICKLAND: At the time he bids --

7 THE COURT: Right.

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

10 THE COURT: That --

11 MS. STRICKLAND: -- at some point --

12 THE COURT: Right.

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

15 THE COURT: It --

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

18 THE COURT: Entirely owned by him.

19 MS. STRICKLAND: Correct.

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

22 MS. STRICKLAND: Your Honor, at the time that the May
23 15th letter went in, it was merely a letter. There was no
24 asset purchase agreement.

25 THE COURT: Okay.

1 MS. STRICKLAND: There was no --

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

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

10 THE COURT: Right.

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

13 THE COURT: Right.

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

19 THE COURT: Right.

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

23 THE COURT: Right.

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

1 THE COURT: Right.

2 MS. STRICKLAND: -- on anyone else.

3 THE COURT: Right.

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

8 THE COURT: But the ques --

9 MS. STRICKLAND: -- broadly worded agreement.

10 THE COURT: But the --

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

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

16 MS. STRICKLAND: Um-hum.

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

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

4 THE COURT: I know --

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

11 THE COURT: Right, and the question is --

12 MS. STRICKLAND: You are correct.

13 THE COURT: -- as it relates to what we're talking
14 about now and not the auction, the question is, is why is a bid
15 of DISH, which is a separate entity from SPSO -- say, the
16 defendants -- why does the bid of DISH care about whether or
17 not SPSO gets its claim in full? DISH has determined that it
18 wants to pay 2.2 billion dollars for the spectrum. It
19 shouldn't care what happens to that 2.2 billion dollars after
20 it gets into the debtors' hands, whether or not -- whoever's
21 claims are allowed. DISH wants the spectrum; it's going to pay
22 2.2 billion dollars, and there's going to be that switch. And
23 what happens after that should be of no concern to DISH.
24 That's the theory. That's what I'm focused on --

25 MS. STRICKLAND: I understand, Your Honor.

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

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

6 THE COURT: Sure.

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

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

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

19 THE COURT: Right.

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

23 THE COURT: Right.

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

1 as pled infer something --

2 THE COURT: Right.

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

10 THE COURT: Sure. I --

11 MS. STRICKLAND: That was --

12 THE COURT: I agree with you.

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

14 THE COURT: I --

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

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

5 THE COURT: Okay.

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

9 THE COURT: Look, I mean everybody --

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

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

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

1 complaint, right?

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

23 THE COURT: Okay. All right. Anyone else?

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

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

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

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

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

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

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

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

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

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

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

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

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

7 Let me skip Count III of the Harbinger complaint.

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

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

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

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

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

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

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

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

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

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

6 THE COURT: Is that --

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

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

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

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

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

17 THE COURT: Right.

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

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

21 MR. BARR: Thank you.

22 THE COURT: -- and --

23 MR. BARR: Can I ask one housekeeping --

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

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

3 THE COURT: Okay. Ms. Strickland?

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

7 THE COURT: Sure.

8 MS. STRICKLAND: -- about next steps.

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

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

15 MR. BARR: Thank you, Your Honor.

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



DAVID RUTT

AAERT Certified Electronic Transcriber CET**D-635

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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF DISH NETWORK
DERIVATIVE LITIGATION.

JACKSONVILLE POLICE AND FIRE
PENSION FUND,

Appellant,

vs.

GEORGE R. BROKAW; CHARLES M.
LILLIS; TOM A. ORTOLF; CHARLES
W. ERGEN; CANTEY M. ERGEN;
JAMES DEFRANCO; DAVID K.
MOSKOWITZ; CARL E. VOGEL;
THOMAS A. CULLEN; KYLE J. KISER;
AND R. STANTON DODGE,

Respondent.

Electronically Filed
SUPREME COURT No. 69012
May 27 2016 09:22 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**JOINT APPENDIX
VOLUME 21 of 44**

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

¹ JA = Joint Appendix

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

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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
2014-10-27	Appendix, Volume 6 of the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation (No exhibits attached)	Vol. 23	JA005675 – JA005679
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2015-02-20	Notice of Entry of Order Regarding Motion to Defer to The SLC's Determination that the Claims Should Be Dismissed	Vol. 26	JA006315 – JA006322
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2013-10-15	Order Granting, in Part, Plaintiffs Ex Parte Motion for Order to Show Cause and Motion to (1) Expedite Discovery and (2) Set a Hearing on Motion for Preliminary Injunction on Order Shortening Time and Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 7	JA001557 – JA001561
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2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 2 (Filed Under Seal)	Vol. 8 Vol. 9 Vol. 10	JA001956 – JA002001 JA002002 – JA002251 JA002252 – JA002403
2013-11-13	Plaintiff's Appendix of Exhibits to Supplement to Motion for Preliminary Injunction Vol. 1 Part 3 (Filed Under Seal)	Vol. 10 Vol. 11 Vol. 12 Vol. 13	JA002404 – JA002501 JA002502 – JA002751 JA002752 – JA003001 JA003002 – JA003065
2015-06-18	Plaintiff's Appendix of Exhibits to their Supplemental Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed (Filed Under Seal)	Vol. 27 Vol. 28 Vol. 29 Vol. 30 Vol. 31 Vol. 32 Vol. 33 Vol. 34 Vol. 35 Vol. 36 Vol. 37	JA006512 – JA006751 JA006752 – JA007001 JA007002 – JA007251 JA007252 – JA007501 JA007502 – JA007751 JA007752 – JA008251 JA008002 – JA008251 JA008252 – JA008501 JA008502 – JA008751 JA008752 – JA009001 JA009002 – JA009220
2013-09-13	Plaintiff's Motion for Preliminary Injunction and for Discovery on an Order Shortening Time	Vol. 1	JA000095 – JA000131
2015-11-03	Plaintiff's Motion to Retax	Vol. 43	JA010589 – JA010601

Date	Document Description	Volume	Bates No.
2014-09-19	Plaintiff's Opposition to the Director Defendants' Motion to Dismiss the Second Amended Complaint and Director Defendant's Motion to Dismiss the Second Amended Complaint (Filed Under Seal)	Vol. 18 Vol. 19	JA004453 – JA004501 JA004502 – JA004508
2014-12-10	Plaintiff's Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed (Filed Under Seal)	Vol. 24	JA005868 – JA005993
2014-09-19	Plaintiff's Opposition to the Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004509 – JA004539
2015-11-20	Plaintiff's Reply in Further Support of its Motion to Retax	Vol. 43	JA010644 – JA010658
2015-12-10	Plaintiff's Response to SLC's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010700 – JA010711
2013-10-03	Plaintiff's Status Report	Vol. 5	JA001098 – JA001114
2014-06-06	Plaintiff's Status Report	Vol. 14	JA003368 – JA003384
2014-10-30	Plaintiff's Status Report	Vol. 23	JA005680 - JA005749
2015-04-03	Plaintiff's Status Report	Vol. 26	JA006323 – JA006451
2013-11-18	Plaintiff's Supplement to its Supplement to its Motion for Preliminary Injunction	Vol. 13	JA003066 – JA003097

Date	Document Description	Volume	Bates No.
2013-11-08	Plaintiff's Supplement to Motion for Preliminary Injunction (Filed Under Seal)	Vol. 7	JA001571 – JA001606
2014-06-16	Plaintiff's Supplement to the Status Report	Vol. 16 Vol. 17	JA003951 – JA004001 JA004002 – JA004129
2014-12-15	Plaintiff's Supplemental Authority to its Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed	Vol. 24 Vol. 25	JA005994 – JA006001 JA006002 – JA006010
2015-06-18	Plaintiff's Supplemental Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed (Filed Under Seal)	Vol. 26 Vol. 27	JA006460 – JA006501 JA006502 – JA006511
2014-10-24	Report of the Special Litigation Committee (Filed Under Seal)	Vol. 19 Vol. 20	JA004613 – JA004751 JA004752 – JA004957
2014-07-25	Second Amended Complaint (Filed Under Seal)	Vol. 17 Vol. 18	JA004140 – JA004251 JA004252 – JA004267
2013-11-20	Special Litigation Committee Report Regarding Plaintiff's Motion for Preliminary Injunction (Filed Under Seal)	Vol. 13	JA003098 – JA003143
2015-01-06	Special Litigation Committee's Appendix of Exhibits Referenced in their Reply In Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006046 – JA006227

Date	Document Description	Volume	Bates No.
2015-07-02	Special Litigation Committee's Appendix of Exhibits to Supplemental Reply in Support of their Motion to Defer (Filed Under Seal) (Includes Exhibits: C, D, E, J and K)	Vol. 39	JA009553 – JA009632
2015-07-02	Special Litigation Committee's Appendix of Exhibits to their Supplemental Reply in Support of their Motion to Defer (Exhibits Filed Publicly) (Includes Exhibits: A, B, F, G, H, I, L and M)	Vol. 37 Vol. 38	JA009921 – JA009251 JA009252 – JA009498
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer (Exhibits Filed Under Seal) (Includes SLC Report Exhibits 298, 394, 443, 444, 446, 447 and 454)	Vol. 41	JA0010002 – JA010048
2015-07-02	Special Litigation Committee's Appendix of SLC Report Exhibits Referenced in Supplemental Reply in Support of the Motion to Defer (Exhibits Filed Publicly) (Includes SLC Report Exhibits 5, 172, and 195)	Vol. 39 Vol. 40	JA009633 – JA009751 JA009752 – JA010001
2015-10-19	Special Litigation Committee's Memorandum of Costs	Vol. 41 Vol. 42 Vol. 43	JA010185 – JA010251 JA010252 – JA010501 JA010502 – JA010588
2014-11-18	Special Litigation Committee's Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 23 Vol. 24	JA005750 – JA005751 JA005751 – JA005867

Date	Document Description	Volume	Bates No.
2014-08-29	Special Litigation Committee's Motion to Dismiss for Failure to Plead Demand Futility	Vol. 18	JA004351 – JA004452
2015-11-16	Special Litigation Committee's Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010602 – JA010643
2014-10-02	Special Litigation Committee's Reply in Support of Their Motion to Dismiss for Failure to Plead Demand Futility	Vol. 19	JA004555 – JA004612
2015-01-05	Special Litigation Committee's Reply in Support of their Motion to Defer to its Determination that the Claims Should Be Dismissed	Vol. 25	JA006011 – JA006045
2013-10-03	Special Litigation Committee's Status Report	Vol. 6 Vol. 7	JA001336 – JA001501 JA001502 – JA001554
2015-04-06	Special Litigation Committee's Status Report	Vol. 26	JA006452 – JA006459
2015-12-08	Special Litigation Committee's Supplement to Opposition to Plaintiff's Motion to Retax	Vol. 43	JA010690 – JA010699
2015-07-02	Special Litigation Committee's Supplemental Reply in Support of the Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed (Filed Under Seal)	Vol. 38 Vol. 39	JA009499 – JA009501 JA009502 – JA009552
2013-09-12	Verified Amended Derivative Complaint	Vol. 1	JA000049 – JA000094

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

EXHIBIT A

The Lightsquared Plan

Article VIII – Settlement, Release, Injunction and Related Provisions, pp. 58-60

D. Releases by Debtors

Pursuant to section 1123(b) of the Bankruptcy Code, and except as otherwise specifically provided in the Plan, for good and valuable consideration, including the service of the Released Parties to facilitate the expeditious implementation of the transactions contemplated by the Plan, on and after the Effective Date, the Released Parties are deemed released and discharged by the Debtors, the Wind Down Debtors, and the Estates from any and all claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, including any derivative claims asserted on behalf of the Debtors, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, whether for tort, contract, violations of federal or state securities laws, or otherwise, that the Debtors, the Wind Down Debtors, the Estates, or their Affiliates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim or Equity Interest or other Entity, based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any Security of the Debtors, the Sale, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of Claims or Equity Interests prior to or in the Chapter 11 Cases, the negotiation, formulation, or preparation of the Plan and the Debtors' Disclosure Statement, or related agreements, instruments, or other documents, upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, other than claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct (including fraud) or gross negligence.

E. Exculpation

Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from, any claim, obligation, Cause of Action, or liability for any exculpated Claim, except for willful misconduct (including fraud) or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have, and upon Confirmation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code with regard to the distributions of the Securities pursuant

to the Plan and the Sale, and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

F. Third-Party Releases by Holders of Claims or Equity Interests

Except as otherwise specifically provided in the Plan, on and after the Effective Date, to the fullest extent permissible under applicable law, (1) each Released Party, (2) each present and former Holder of a Claim or Equity Interest, and (3) each of the foregoing Entities' respective predecessors, successors and assigns, and current and former shareholders, affiliates, subsidiaries, members (including ex-officio members), officers, directors, principals, managers, trustees, employees, partners, attorneys, financial advisors, accountants, investment bankers, investment advisors, actuaries, professionals, consultants, agents, and representatives (in each case in his, her, or its capacity as such) (each of the foregoing parties in (1), (2), and (3), a "Releasing Party") shall be deemed to have conclusively, absolutely, unconditionally, irrevocably, and forever released and discharged the Released Parties from any and all claims, interests, obligations, rights, suits, damages, Claims, Equity Interests, Causes of Action, remedies, and liabilities whatsoever, including any derivative claims asserted on behalf of a Debtor, whether known or unknown, foreseen or unforeseen, existing or hereafter arising, in law, equity or otherwise, whether for tort, contract, violations of federal or state securities laws, or otherwise, that each Releasing Party would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the Chapter 11 Cases, the purchase, sale, or rescission of the purchase or sale of any Security of the Debtors, the Sale, the subject matter of, or the transactions or events giving rise to, any Claim or Equity Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the restructuring of Claims or Equity Interests prior to or in the Chapter 11 Cases, the negotiation, formulation, or preparation of the Plan and the Debtors' Disclosure Statement, or related agreements, instruments, or other documents, upon any other act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, other than claims or liabilities arising out of or relating to any act or omission of a Released Party that constitutes willful misconduct (including fraud) or gross negligence.

G. Injunction

Except as otherwise expressly provided in the Plan or for obligations issued pursuant to the Plan, all Entities who have held, hold, or may hold Claims or Equity Interests that have been released pursuant to Article VIII.D hereof or Article VIII.F hereof, discharged pursuant to Article VIII.A hereof, or are subject to exculpation pursuant to Article VIII.E hereof are permanently enjoined, from and after the Effective Date, from taking any of the following actions against the

Debtors or the Wind Down Debtors: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with, or with respect to any such Claims or Equity Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of, in connection with, or with respect to any such Claims or Equity Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or estates of such Entities on account of, in connection with, or with respect to any such Claims or Equity Interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property or Estates of such Entities on account of, in connection with, or with respect to any such Claims or Equity Interests unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Confirmation Date, and notwithstanding an indication in a Proof of Claim or proof of Equity Interest or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to section 553 of the Bankruptcy Code or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with, or with respect to any such Claims or Equity Interests released or settled pursuant to the Plan. Nothing in the Plan or Confirmation Order shall preclude any Entity from pursuing an action against one or more of the Debtors in a nominal capacity to recover insurance proceeds so long as the Debtors or Wind Down Debtors, as applicable, and any such Entity agree in writing that such Entity shall (1) waive all Claims against the Debtors, the Wind Down Debtors, and the Estates related to such action and (2) enforce any judgment on account of such Claim solely against applicable insurance proceeds, if any.

The Ad Hoc LP Secured Group Plan

Article XIII- Miscellaneous Provisions, pp. 31-33

13.1. Releases

- (a) Releases by the LP Debtors. For good and valuable consideration, the adequacy of which is hereby confirmed, and except as otherwise provided in this Plan or the Confirmation Order, as of the Effective Date, the LP Debtors, in their individual capacities and as debtors in possession shall be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of the LP Debtors to enforce this Plan, the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder and the Asset Purchase Agreement) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to

the LP Debtors, the parties released pursuant to this Section 13.1, the Chapter 11 Cases, this Plan or the Disclosure Statement, and that could have been asserted by or on behalf of the LP Debtors or their Estates, whether directly, indirectly, derivatively or in any representative or any other capacity.

(b) Releases by Holders of Claims and Equity Interests. Except as otherwise provided in this Plan or the Confirmation Order, on the Effective Date: (i) each of the Released Parties; (ii) each holder of a Claim or Equity Interest voting to accept the Plan or conclusively presumed to accept the Plan; (iii) each holder of a Claim or Equity Interest abstaining from voting to accept or reject the Plan, unless such abstaining holder checks the box on the applicable Ballot indicating that such holder opts not to grant the releases provided in this Section 13.1; and (iv) to the fullest extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, all holders of Claims and Equity Interests, in consideration for the obligations of the LP Debtors under this Plan and the other contracts, instruments, releases, agreements or documents executed and delivered in connection with this Plan, and each Person (other than the LP Debtors) that has held, holds or may hold a Claim or Equity Interest, as applicable, will be deemed to have consented to this Plan for all purposes and the restructuring embodied herein and deemed to forever release, waive and discharge all claims, demands, debts, rights, Causes of Action or liabilities (other than the right to enforce the obligations of any party under this Plan and the contracts, instruments, releases, agreements and documents delivered under or in connection with this Plan, including, without limitation, the Asset Purchase Agreement) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act or omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the LP Debtors, the LP Debtors' Chapter 11 Cases, the LP Sale, the transactions contemplated by the Asset Purchase Agreement, this Plan or the Disclosure Statement.

(c) Notwithstanding anything to the contrary contained herein: (i) except to the extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, the releases provided for in this Section 13.1 shall not release any LP Debtor from any liability arising under (x) the Internal Revenue Code or any state, city or municipal tax code, or (y) any criminal laws of the United States or any state, city or municipality; and (ii) the releases set forth in this Section 13.1 shall not release any (x) LP Debtor's claims, rights, or Causes of Action for money borrowed from or owed to an LP Debtor or its subsidiary by any of its directors, officers or former employees, as set forth in such LP Debtor's or subsidiary's books and records, (y) any claims against any Person to the extent such Person asserts a crossclaim, counterclaim and/or claim for setoff which seeks affirmative relief against an LP Debtor or any of its officers, directors, or representatives and (z) claims against any Person arising

from or relating to such Person's fraud, gross negligence or willful misconduct, each as determined by a Final Order of the Bankruptcy Court.

(d) Notwithstanding anything to the contrary contained herein, nothing herein: (i) discharges, releases, or precludes any (x) environmental liability that is not a Claim; (y) environmental claim of the United States that first arises on or after the Confirmation Date, or (z) other environmental claim or environmental liability that is not otherwise dischargeable under the Bankruptcy Code; (ii) releases the LP Debtors from any environmental liability that an LP Debtor may have as an owner or operator of real property owned or operated by an LP Debtor on or after the Confirmation Date; (iii) releases or precludes any environmental liability to the United States on the part of any Persons other than the LP Debtors; or (iv) enjoins the United States from asserting or enforcing any liability described in this paragraph.

13.2. Exculpation and Limitation of Liability

None of the Released Parties shall have or incur any liability to any holder of any Claim or Equity Interest or any other party in interest, or any of their respective agents, employees, representatives, financial advisors, attorneys, or agents acting in such capacity, or affiliates, or any of their successors or assigns, for any act or omission in connection with, or arising out of, the LP Debtors' Chapter 11 Cases, the Asset Purchase Agreement, the Disclosure Statement, the solicitation of votes for and the pursuit of confirmation of this Plan, the consummation of the Plan, or the implementation or administration of the Plan, the transactions contemplated by the Plan, or the property to be distributed under the Plan, including, without limitation, all documents ancillary thereto, all decisions, actions, inactions and alleged negligence or misconduct relating thereto, and all prepetition activities leading to the promulgation and confirmation of this Plan, except for fraud, willful misconduct or gross negligence as finally determined by a Final Order of the Bankruptcy Court, and, in all respects, the Released Parties shall be entitled to rely upon the advice of counsel and all information provided by other exculpated Persons herein without any duty to investigate the veracity or accuracy of such information with respect to their duties and responsibilities under the Plan.

13.3. Injunctions

(a) Except as otherwise provided in this Plan or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Persons who have held, hold or may hold Claims against or Equity Interests in the LP Debtors or their Estates are, with respect to any such Claims or Equity Interests, permanently enjoined after the Confirmation Date from: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including, without limitation, any

proceeding in a judicial, arbitral, administrative or other forum) against or affecting the LP Debtors, their Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order against the LP Debtors, or their Estates or any of their property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against the LP Debtors, or their Estates or any of their property, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons; (iv) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of this Plan to the full extent permitted by applicable law; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of this Plan; provided, however, that nothing contained herein shall preclude such Persons from exercising their rights, or obtaining benefits, pursuant to and consistent with the terms of this Plan; and provided, further, that nothing contained herein shall preclude the Purchaser from exercising any rights and remedies under the Asset Purchase Agreement.

(b) By accepting distributions pursuant to this Plan, each holder of an Allowed Claim or Equity Interest will be deemed to have specifically consented to the injunctions set forth in this Section 13.3.

(c) The Confirmation Order shall permanently enjoin the commencement or prosecution by any Person, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action, or liabilities released pursuant to this Plan, including but not limited to the Claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released in Sections 13.1 and 13.2 of this Plan. Such injunction shall extend to successors of the LP Debtors and their respective properties and interests in property.

The U.S.Bank/MAST Plan

Article X - Release, Injunction and Related Provisions, pp. 40-42

A. Releases

1. Releases by One Dot Six For good and valuable consideration, the adequacy of which is hereby confirmed, and except as otherwise provided in the One Dot Six Plan or the Confirmation Order, as of the Effective Date, One Dot Six, in its individual capacity and as debtor in possession, shall be deemed to forever release, waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action and liabilities (other than the rights of One Dot Six to enforce the One Dot Six Plan, the contracts, instruments, releases, indentures and other agreements or documents delivered thereunder and the Purchase Agreement) against the Released Parties, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to One Dot Six, the parties released pursuant to this Article X.A.1, the Chapter 11 Case of One Dot Six, the One Dot Six Plan, the General Disclosure Statement or the One Dot Six Specific Disclosure Statement, and that could have been asserted by or on behalf of One Dot Six or the One Dot Six Estate, whether directly, indirectly, derivatively or in any representative or any other capacity.
2. Notwithstanding anything to the contrary contained herein: (i) except to the extent permissible under applicable law, as such law may be extended or interpreted subsequent to the Effective Date, the releases provided for herein shall not release One Dot Six from any liability arising under (x) the Internal Revenue Code of 1986, as amended, or any state, city or municipal tax code or (y) any criminal laws of the United States or any state, city or municipality; and (ii) the releases set forth in Article X.A.1 shall not release (x) One Dot Six's claims, right or Causes of Action for money borrowed from or owed to any of its subsidiaries by any of its directors, officers or former employees, as set forth in One Dot Six's or any such subsidiary's books and records, (y) any claims against any Person to the extent such Person asserts a crossclaim, counterclaim and/or claim for setoff which seeks affirmative relief against One Dot Six or any of its officers, directors or representatives and (z) claims against any Person arising from or relating to such Person's fraud, gross negligence or willful misconduct, each as determined by a Final Order of the Bankruptcy Court.
3. Notwithstanding anything to the contrary contained herein, nothing herein: (i) discharges, releases or precludes any (x) environmental liability that is not a Claim; (y) environmental claim of the United States that first arises on or after the Confirmation Date or (z) other environmental claim or environmental liability that

is not otherwise dischargeable under the Bankruptcy Code; (ii) releases One Dot Six from any environmental liability that One Dot Six may have as an owner or operator of real property owned or operated by One Dot Six on or after the Confirmation Date; (iii) releases or precludes any environmental liability to the United States on the part of any Persons other than One Dot Six; or (iv) enjoins the United States from asserting or enforcing any liability described in this paragraph.

B. Exculpation and Limitation of Liability

None of the Released Parties shall have or incur any liability to any holder of any Claim against, or Equity Interest in, One Dot Six, or any other party in interest, or any of their respective agents, employees, representatives, financial advisors, attorneys or agents acting in such capacity, or affiliates, or any of their successors or assigns, for any act or omission in connection with, or arising out of, the Chapter 11 Case of One Dot Six, the Purchase Agreement, the General Disclosure Statement or the One Dot Specific Disclosure Statement, the solicitation of votes for and the pursuit of confirmation of the One Dot Six Plan, the consummation of the Plan, or the implementation or administration of the One Dot Six Plan, the transactions contemplated by the One Dot Six Plan or the property to be distributed under the One Dot Six Plan, including, without limitation, all documents ancillary thereto, all decisions, actions, inactions and alleged negligence or misconduct relating thereto and all prepetition activities leading to the promulgation and confirmation of the One Dot Six Plan, except for fraud, willful misconduct or gross negligence as determined by a Final Order of the Bankruptcy Court, and in all respects shall be entitled to rely upon the advice of counsel and all information provided by other exculpated Persons herein without any duty to investigate the veracity or accuracy of such information with respect to their duties and responsibilities under the One Dot Six Plan.

C. Injunction

1. Except as otherwise provided in the One Dot Six Plan or the Confirmation Order, as of the Confirmation Date, but subject to the occurrence of the Effective Date, all Persons who have held, hold or may hold Claims against One Dot Six or the One Dot Six Estate or Equity Interests in One Dot Six are, with respect to any such Claims or Equity Interests, permanently enjoined after the Confirmation Date from: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against or affecting One Dot Six, the One Dot Six Estate or any of its property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons or any property of any such transferee or successor; (ii) enforcing, levying, attaching (including, without limitation, any pre-judgment attachment), collecting or otherwise recovering by any manner or means, whether directly or indirectly, any judgment, award, decree or order

against One Dot Six, or the One Dot Six Estate or any of its property, or any direct or indirect transferee of any property of, or direct or indirect successor in interest to, any of the foregoing Persons, or any property of any such transferee or successor; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any encumbrance of any kind against One Dot Six, or the One Dot Six Estate or any of its property, or any direct or indirect transferee of any property of, or successor in interest to, any of the foregoing Persons; (iv) acting or proceeding in any manner, in any place whatsoever, that does not conform to or comply with the provisions of the One Dot Six Plan to the full extent permitted by applicable law; and (v) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the One Dot Six Plan; *provided, however*, that nothing contained herein shall preclude such Persons from exercising their rights, or obtaining benefits, pursuant to and consistent with the terms of the One Dot Six Plan; and *provided, further*, that nothing contained herein shall preclude the Purchaser from exercising any rights and remedies under the Purchase Agreement.

2. The Confirmation Order shall permanently enjoin the commencement or prosecution by any Person, whether directly, derivatively or otherwise, of any claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released pursuant to the One Dot Six Plan, including but not limited to the claims, obligations, suits, judgments, damages, demands, debts, rights, Causes of Action or liabilities released herein. Such injunction shall extend to successors of One Dot Six and its properties and interests in property.

The Harbinger Plan

Article VIII - Settlement, Release, Injunction, and Related Provisions, pp. 46-47

D. Exculpation

Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur, and each Exculpated Party is hereby released and exculpated from, any claim, obligation, Cause of Action, or liability for any exculpated Claim, except for willful misconduct (including fraud) or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have, and upon Confirmation of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable provisions of the Bankruptcy Code with regard to the distributions of the Securities pursuant to the Plan, and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

E. Injunction

Except as otherwise expressly provided in the Plan or for obligations issued pursuant to the Plan, all Entities who have held, hold, or may hold Claims or Equity Interests that have been discharged pursuant to Article VIII.A hereof or are subject to exculpation pursuant to Article VIII.D hereof are permanently enjoined, from and after the Effective Date, from taking any of the following actions against the Debtors or the Reorganized Debtors: (1) commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with, or with respect to any such Claims or Equity Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of, in connection with, or with respect to any such Claims or Equity Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or estates of such Entities on account of, in connection with, or with respect to any such Claims or Equity Interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property or Estates of such Entities on account of, in connection with, or with respect to any such Claims or Equity Interests unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Confirmation Date, and notwithstanding an indication in a Proof of Claim or Equity Interest or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to section 553 of the Bankruptcy Code or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of, in connection with, or with respect to any such Claims or Equity Interests released or settled pursuant to the Plan. Nothing in the Plan or Confirmation Order shall preclude any Entity from pursuing an action against one or more of the Debtors in a nominal capacity to recover insurance proceeds so long as the Debtors or Reorganized Debtors, as applicable, and any such Entity agree in writing that such Entity shall: (1) waive all Claims against the Debtors, the Reorganized Debtors, and the Estates related to such action; and (2) enforce any judgment on account of such Claim solely against applicable insurance proceeds, if any.

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

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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.

1 MR. DUGAN: We're sorry. Yeah, sorry.

2 So, Your Honor, I just wanted to focus, because we've
3 now been through several rounds of briefing, really in a death
4 march of briefing, if you will, for the last several weeks --

5 THE COURT: Oh, let's not get that -- let's not be
6 that dramatic.

7 MR. DUGAN: But it was quite intense. It was quite
8 intense. And we've been through quite a lot of briefing and
9 there's been a lot of pages submitted to the Court, and a lot
10 of arguments --

11 THE COURT: Can I just -- I just want to make sure I'm
12 going to do this for each of you. I just want to make sure
13 that I have everything --

14 MR. DUGAN: Sure.

15 THE COURT: -- that you think I have.

16 MR. DUGAN: Right.

17 THE COURT: So I have the original memorandum of law
18 in support of the motion to dismiss the LightSquared complaint,
19 and then I have a memorandum of a law in support of the motion
20 to dismiss the Harbinger complaint.

21 MR. DUGAN: Yes.

22 THE COURT: And then I have a reply for each of them.
23 And I have a declaration that you submitted. Right?

24 MR. DUGAN: Yes, Your Honor --

25 THE COURT: Okay.

1 MR. DUGAN: -- that's right. There might have been a
2 declaration in connection with both LightSquared --

3 THE COURT: Exact -- right.

4 MR. DUGAN: -- and Harbinger. Yeah. Okay.

5 THE COURT: Okay.

6 MR. DUGAN: So, Your Honor, let me just get right into
7 it, and I'm going to focus first on the LightSquared claims and
8 then on the Harbinger claims.

9 THE COURT: Okay.

10 MR. DUGAN: In essence, Your Honor, LightSquared
11 asserts three claims for relief, although it's styled as four:
12 breach of contract and declaratory relief I will treat as
13 one --

14 THE COURT: Okay.

15 MR. DUGAN: -- because I think essentially, as a
16 substantive matter, they are the same; tortious interference of
17 contract --

18 THE COURT: Right.

19 MR. DUGAN: -- and equitable subordination. They do
20 assert an equitable-disallowance claim, but I think Your Honor
21 has noted that's been dismissed with prejudice.

22 THE COURT: Right.

23 MR. DUGAN: So --

24 THE COURT: Although they -- and I'll ask LightSquared
25 about this when they stand; although there is an oddity that

1 there's a prayer for relief for equitable subordination but
2 there's no count for equitable subordination.

3 MR. DUGAN: Your Honor, you're right. I'm going to
4 assume that they intend to submit a claim for equitable
5 subordination and that's what they meant to do or that's what
6 in effect they have done, and address it in that way.

7 THE COURT: Okay.

8 MR. DUGAN: And we'll get to that in a moment.

9 But I did want to start off with the breach-of-
10 contract allegations, and I think that those really are the
11 most critical allegations that we're dealing with here,
12 because, in essence, almost all of the allegations that
13 LightSquared makes and all the claims that they assert come
14 back down to the notion that SPSO and Mr. Ergen breached the
15 contract -- or I should say SPSO is the one against whom the
16 claim is made -- but that they breached the contract when they
17 bought the loan debt.

18 And in essence, LightSquared looks at two, basically,
19 prongs to get there. I mean, the question really is, was SPSO
20 a subsidiary of a disqualified company? We obviously
21 concede --

22 THE COURT: Well, that's one formulation of how they
23 get there. I don't think that it's the only formulation of how
24 they get there.

25 MR. DUGAN: Exactly, Your Honor. I think that the

1 contract itself, under its terms, would preclude SPSO from
2 buying the debt or being an eligible assignee if it is a
3 disqualified company. And the way they get to that is by
4 saying that it was a subsidiary of a disqualified company,
5 which is DISH.

6 The other allegation they make -- and this may be what
7 you're suggesting, Your Honor; the other allegation they make
8 is that Mr. Ergen and Mr. Kiser were agents of DISH and that
9 when they were trading for SPSO and acting for SPSO, they were
10 acting as agents of DISH. And that's what I wanted to start
11 with, Your Honor; I wanted to --

12 THE COURT: Okay.

13 MR. DUGAN: -- start with that allegation, because I
14 think, when we look at the facts that are alleged and the
15 inferences that can be reasonably drawn from those facts, we
16 have to look not just at the allegations in the complaint. We
17 certainly have to start with the allegations of the complaint
18 but, Your Honor, as this litigation has progressed, and as the
19 briefing has progressed, more and more, Harbinger and
20 LightSquared have submitted into the court -- into the record
21 before Your Honor, documents from other proceedings, in
22 particular a Nevada proceeding.

23 THE COURT: But I'm not going to pay attention to
24 them.

25 MR. DUGAN: Well, Your Honor, I think the law is, on

1 this, that to the extent that the allegations of that
2 proceeding and the facts that are established in that
3 proceeding are put before Your Honor by the debtors to shore up
4 the claims in their complaint -- and that is what they've
5 done -- Your Honor, I think the law is clear that it is fair
6 for you to consider those documents as being part of the record
7 before you on this motion. I think the law is clear that when
8 a plaintiff attempts to attach documents from other
9 litigations, and attempts to augment their allegations by
10 inviting the Court's attention to allegations in other cases,
11 that those allegations in other cases that the plaintiff
12 themselves asked the Court to consider and entertain --

13 THE COURT: But then you're talking about --

14 MR. DUGAN: -- become part of their allegations.

15 THE COURT: Then you're talking about something that
16 feels more like a motion for summary judgment, because if I do
17 that, then I get into things that everybody has pointed to me
18 outside of a complaint, and then I don't know what I'm doing on
19 a 12(b)(6) motion anymore. So what I've been doing these past
20 couple weeks is reading a complaint and looking at what
21 inferences can be drawn from the face of the complaint and,
22 frankly, ignoring everything that all of you have to say about
23 Nevada, because, except to the extent that underlying facts are
24 alleged in the complaint, I'm not really interested.

25 MR. DUGAN: Well, Your Honor, I understand your

1 position on that, but I'd like to be heard at least --

2 THE COURT: Okay.

3 MR. DUGAN: -- on what we think we now have before us,
4 because we now have on this motion a pretty full record that
5 includes their allegations, the documents that they have
6 submitted -- and by "they" I mean both LightSquared and
7 Harbinger -- for the Court's consideration. And we also have
8 the findings that are in those documents, the allegations that
9 are in those documents, that they themselves are saying, Your
10 Honor, please consider this.

11 Now, the reason why I think it's relevant, the reason
12 why we should look at it, is because the point of a motion to
13 dismiss really is a gatekeeping function. The point is, has a
14 question of fact been raised that requires a trial? The
15 question really is, has a question of fact been raised with
16 respect to whether Mr. Ergen and Mr. Kiser were agents for DISH
17 when SPSO bought the debt? Has a fact been raised that would
18 require a trial on that point?

19 And we can look at, Your Honor -- in addition to the
20 allegations that LightSquared has made, they quote e-mails. We
21 can look at those e-mails. The law is clear that when a
22 plaintiff quotes an e-mail in their complaint -- quotes a
23 document --

24 THE COURT: Right, I --

25 MR. DUGAN: -- in their complaint --

1 THE COURT: I --

2 MR. DUGAN: -- you can look at that document.

3 THE COURT: Right.

4 MR. DUGAN: You can look in those e-mails.

5 THE COURT: I agree with that. That's in the
6 complaint, though.

7 MR. DUGAN: Right.

8 THE COURT: Right?

9 MR. DUGAN: Right, that is. But -- and also, let's
10 for a moment consider Harbinger. Harbinger has itself filed a
11 complaint in this matter, which they say they've done to
12 enhance -- to further the allegations of LightSquared. In that
13 complaint, Harbinger quotes from deposition testimony in the
14 Nevada proceeding; they quote from a report that the special
15 litigation committee filed in that proceeding; they quote from
16 court orders proceedings in that case that make certain
17 representations.

18 And I think, when you look at the overwhelming weight
19 of those matters, which the plaintiffs themselves -- and by
20 that I mean LightSquared and Harbinger --

21 THE COURT: Right.

22 MR. DUGAN: -- when you look at those documents that
23 the plaintiffs themselves have said, please rely on this, it is
24 part of our complaint, it is part of our theory, when you look
25 at those things, they completely undermine the claim that Kiser

1 and Ergen were agents for DISH, because the entire Nevada
2 proceeding is predicated on the fact -- and it's all over the
3 documents that they quote; it's all over the report that they
4 quote; it's all over the testimony that they quote -- it's
5 predicated on the fact that the board of DISH did not know that
6 Mr. Ergen was buying debt.

7 THE COURT: But that doesn't answer the question at
8 all, Mr. Dugan, because -- and I really was hoping to avoid
9 having to delve into the matters having to do with the Nevada
10 litigation, because I believe that, as between Mr. Ergen and
11 the DISH shareholders, that's the business of the Nevada court
12 and not here.

13 But I could articulate a theory under which that fact
14 doesn't matter one way or the other to the question that I
15 might have to decide, which is the identity of interest,
16 agency -- I can come up with any number of legal
17 formulations -- the relationship between Mr. Ergen -- again,
18 acting through SPSO here -- on the one hand, and DISH and
19 EchoStar on the other hand.

20 So if you're citing to me the fact that Mr. Ergen did
21 not inform the board until some date in whenever it was, as
22 evidence of the fact that there was no agency, that's not
23 persuasive.

24 MR. DUGAN: Well, Your Honor --

25 THE COURT: So that doesn't get you over the finish

1 line.

2 MR. DUGAN: Well, let me just put it this way, then,
3 Your Honor: I mean, if it were the case that Mr. Ergen was
4 acting as the agent for DISH, he would have had to -- and the
5 case law says this: the allegations have to show he would have
6 had to be authorized by DISH to do something for DISH. DISH
7 would have had to authorize him to buy this billion dollars'
8 worth of debt.

9 THE COURT: And perhaps by a course of conduct in the
10 past, he knew that he had the authority to do that, that he
11 knew that he had the authority ultimately to have whatever
12 series of transactions that he felt were in the best interests
13 of DISH, to occur.

14 MR. DUGAN: Well, Your Honor, I don't understand
15 exactly what conduct that necessarily was. I don't think that
16 LightSquared has pled a course of conduct involving Mr. Ergen
17 purchasing distressed-debt investments using --

18 THE COURT: You're defining it that way --

19 MR. DUGAN: -- his money.

20 THE COURT: -- I'm not, Mr. Dugan.

21 MR. DUGAN: But that is the conduct that we're looking
22 at now, Your Honor. That is the conduct where he's alleged to
23 have engaged in.

24 Frankly, I think the law is clear on this that the
25 titles of Mr. Ergen and the title of Mr. Kiser is not

1 dispositive of whether they were acting as agents for DISH. In
2 fact, it's what is referred to as a conclusory allegation. It
3 doesn't establish that they did anything at DISH's direction
4 with respect to these particular investments.

5 Now, there are e-mails that LightSquared has -- had in
6 its possession before they drafted this complaint, before they
7 put these e-mails in the complaint and quoted them. There are
8 e-mails -- and we can show them to Your Honor -- where
9 Mr. Ketchum of Sound Point says to his boss, about Mr. Ergen,
10 he is opening up a family account, family money to trade, his
11 money to trade; it's a family office, he's going to be buying
12 LightSquared -- he has bought LightSquared with this managed
13 family account, he's got someone helping him with this family
14 account. This is Ketchum.

15 In Harbinger's original pleading, they said he was in
16 on it; they said he was part of the conspiracy. LightSquared
17 doesn't use the term "conspiracy", but they're seeking
18 equitable subordination, Your Honor. They're not just saying
19 this was something that happened and it was a breach. They're
20 saying this was a conspiracy, it was something that happened,
21 it was bad, it was fraud. It has to be near that level; it has
22 to be akin to fraud.

23 And when you look at the participants in that fraud,
24 what they're saying -- they're not saying, this is for DISH and
25 we need to be careful, it's for DISH, don't say it, but that's

1 true, don't say it. What they're saying is, this is for Ergen,
2 there's a guy that's helping him, it's for his personal
3 account. These are e-mails that LightSquared had; they quote
4 from them. Do they quote from that part? No. But that's what
5 those e-mails say.

6 So, Your Honor, I think it's only fair to consider
7 that. When we're -- we're looking at the inferences --

8 THE COURT: Then I'm in --

9 MR. DUGAN: -- we ask them to make.

10 THE COURT: -- I'm in a summary judgment motion; I'm
11 not on a motion to dismiss. I just don't -- I don't know how
12 you -- I don't know how I go where you're inviting me to go,
13 and draw a reasonable line. This is quintessentially a
14 situation, then, where we move beyond a motion to dismiss and
15 we just have a factual record. And there's going to be a
16 winner and there's going to be a loser.

17 MR. DUGAN: I understand that that's your position,
18 Your Honor. And I just -- since I'm here, to be heard out on
19 the point --

20 THE COURT: Of course.

21 MR. DUGAN: -- yeah, I mean, that certainly there is
22 law, and we've cited it to Your Honor -- it's obviously Your
23 Honor's call. There is law, and we've cited it to Your Honor,
24 that when a plaintiff refers to a document, quotes a document
25 like they quote these e-mails, you can look at those e-mails

1 that the plaintiffs quote.

2 THE COURT: Well --

3 MR. DUGAN: It doesn't transform --

4 THE COURT: -- even --

5 MR. DUGAN: -- the motion into a motion for summary
6 judgment; it does not.

7 THE COURT: For the purposes of argument and moving
8 along, I'll accept your premise. But even if I accept your
9 premise, I don't believe that that compels the granting of the
10 motion to dismiss on that basis. So --

11 MR. DUGAN: Understood, Your Honor. Now, when we were
12 looking at Twombly and Iqbal, just to --

13 THE COURT: Right.

14 MR. DUGAN: -- bring those cases back into focus, I
15 mean, essentially what those cases say is that, yes, we'll give
16 you the benefit of inferences, but the inferences have to be
17 reasonable, they can't be conclusory and they can't be
18 contradicted by other documents in the record or that you
19 invite into the record by quoting them and referencing them.

20 There can be no question, Your Honor -- putting aside
21 how you feel about what we should do in terms of fact-finding,
22 which I totally understand and appreciate, there can be no
23 question that what these plaintiffs have done here is quote and
24 refer to -- but by the way, not point out -- the parts that
25 contradict their allegations in their complaints. There is no

1 question that the documents that they keep asking you to look
2 at -- which I understand you don't want to, but they keep
3 asking you to -- completely contradict the allegations that
4 they're making.

5 These documents and these findings say, without
6 question, not only that the board didn't know; they say, when
7 the board found out, they had an investigation done,
8 independent counsel, independent financial advisors. They had
9 a special committee, too, that they created to look into the
10 issue of corporate opportunity. What did this guy do? But --

11 THE COURT: But, Mr. Dugan, are you really inviting me
12 to take a look at how that all played out in Nevada? Because
13 last time you didn't want me to look at that.

14 MR. DUGAN: Your Honor, they're inviting you.

15 THE COURT: So if you -- do you want -- but are you
16 telling me right now that I should accept their invitation to
17 look at what happened in Nevada? Because --

18 MR. DUGAN: Yes, Your Honor, you should --

19 THE COURT: You are?

20 MR. DUGAN: -- accept their invitation, and here's
21 why: because they want to have a whole trial on something that
22 their own documents show is completely made up. And here's
23 what I'm saying is made up, Your Honor. What is made-up is the
24 notion that Mr. Ergen and Mr. Kiser got together and had a
25 conspiracy where Mr. Ergen and Mr. Kiser were going to buy debt

1 for DISH.

2 THE COURT: That --

3 MR. DUGAN: That's what's made up.

4 THE COURT: That's not what they're saying. That's
5 not what they're saying.

6 MR. DUGAN: They can't support an equitable-
7 subordination claim without fraud, Your Honor. Their
8 equitable-subordination claim can't be based on an innocent
9 breach of contract; it doesn't work that way.

10 THE COURT: That -- I agree with that.

11 MR. DUGAN: But --

12 THE COURT: But that's a completely different point
13 from the --

14 MR. DUGAN: Well, we'll get to that point.

15 THE COURT: -- from the three or four that you just
16 made.

17 MR. DUGAN: We'll get --

18 THE COURT: But that much I agree with you.

19 MR. DUGAN: We'll get to that point. But let me ask
20 you -- let me make this --

21 THE COURT: Although Mr. Friedman might disagree with
22 me --

23 MR. DUGAN: I'm sure he'll disagree with me.

24 THE COURT: -- but I can't tell.

25 MR. DUGAN: I have no doubt.

1 THE COURT: I'm going to start to pick on him early
2 today.

3 MR. DUGAN: I have no doubt he'll disagree with me.

4 UNIDENTIFIED SPEAKER: Take your time.

5 MR. DUGAN: I have no doubt he'll disagree with me,
6 Your Honor, and he should.

7 But the point is that -- I mean, when we talk about
8 agency -- I want to be clear about this -- I really think the
9 agency allegations are more relevant to the equitable-
10 subordination piece than to the breach-of-contract piece.
11 Here's how I get there: you have to have words in a contract
12 that you don't comply with, to have a breach. Words in a
13 contract have to be breached, to have a breach.

14 So what are the words in the contract that say DISH
15 and EchoStar and their agents can't buy this debt? The words
16 don't say that. Hear me on this. The words do say
17 "subsidiary". I know we've been up and down --

18 THE COURT: No, the word says that, subsequent to the
19 amendment, that DISH cannot buy the debt.

20 MR. DUGAN: That's true.

21 THE COURT: Right?

22 MR. DUGAN: Or any subsidiary of it.

23 THE COURT: Or any subsidiary. Put the subsidiary to
24 one side. It says DISH can't buy the debt, right?

25 MR. DUGAN: Right.

1 THE COURT: So in one of the first rounds of this, we
2 had some diagrams in a complaint that showed basically
3 Mr. Ergen controls SPSO, Mr. Ergen controls DISH, therefore,
4 DISH controls SPSO. It was triangular, if I'm remembering it.

5 MR. DUGAN: Right.

6 THE COURT: Okay. So put that to one side. So now at
7 least what I'm reading in the complaint is that they do argue
8 they're a subsidiary, that SPSO is a subsidiary, with a lower-
9 case S. I don't think they've entirely abandoned the upper-
10 case S definition, so --

11 MR. DUGAN: I agree, Your Honor.

12 THE COURT: -- there's those arguments. But I think
13 what they're saying now is Mr. Ergen/SPSO -- because clearly --
14 and I think there was some argument that, because he can't hold
15 the debt as a natural person, therefore, you should disregard
16 SPSO; but people form those vehicles all the time, so I'm not
17 interested in that -- but that Mr. Ergen is DISH; he's DISH.
18 This is Pepper v. Litton, ironically, and there's an identity
19 of interest and he is DISH and, therefore -- therefore, there
20 was a breach. Not that there's an equitable basis to disallow
21 it, but he's (sic) a breach, because he says he's SPSO but he's
22 really DISH. That's what they're saying. That's what they're
23 saying.

24 So whether he's an agent or there's an identity of
25 interest or they really are the same or it's a sham, that's

1 what they're trying to say. And in response to that in the
2 last couple of rounds -- and you'll forgive me, I can't
3 remember each time who exactly was here; I'm not sure if it was
4 you or Ms. Strickland or one of the folks from Sullivan &
5 Cromwell -- that, look, it's a public company, it's a public
6 company. They have filings, they would have to have disclosed
7 this, you can't say that a controlling shareholder is
8 necessarily same as the corporation. I agree with all of that.
9 But what they're saying in their complaint that they're asking
10 me to give the favorable inferences to is that, under the
11 circumstances here, Ergen is DISH, DISH can't buy, therefore,
12 he couldn't buy. And maybe I'm giving them too much credit,
13 but that's the way I'm reading what they're saying.

14 MR. DUGAN: And, Your Honor, let's read it that way,
15 then, and let's --

16 THE COURT: Okay.

17 MR. DUGAN: -- and let's unpack that, because there
18 are a number of elements to "DISH is Ergen, and Ergen is DISH".
19 I mean, there are a number of elements to that; the first is,
20 there's a piercing-the-corporate-veil argument, or an element
21 to that. I mean, it is not easy to allege a pierce-the-
22 corporate-veil claim. It's not easy to prove a pierce-the-
23 corporate-veil claim.

24 For DISH to be Ergen in the sense that Your Honor is
25 referring to and in the sense that you are positing that they

1 have alleged, they have to allege a pierce-the-corporate-veil
2 claim. And how do you allege a pierce-the-corporate-veil
3 claim? You have to allege a unity of interest not just on an
4 abstract metaphysical level but concretely: same bank
5 accounts, not really respecting the corporate separateness.

6 Here we have no allegation of same bank accounts. We
7 have no allegation that Ergen treated DISH like it was himself.
8 We don't have an allegation that anything Ergen wanted to do,
9 DISH had to do. We don't have an allegation that DISH always
10 did what Ergen wanted. In fact, it's quite the opposite;
11 that's why, Your Honor, I keep sort of referring to Nevada,
12 because they've put in their -- and also because, far from
13 Ergen being DISH, when Ergen told the board of DISH what he had
14 done, they said, hold on a second, you did what? And they
15 formed a special committee, not because they thought it was
16 great that he had done this thing to help them; it was because
17 they didn't know what he had done, and they needed to figure it
18 out. That's not an identity of interest.

19 Now, they hired independent legal advisors; they hired
20 independent financial advisors. They investigated it. They
21 did a report -- this is what the plaintiffs put in their papers
22 before you -- a report that was based on interviews, that was
23 based on an interview of documents with fact-finding and all
24 this other stuff.

25 Now, I know Your Honor is leery to go there but, on

1 the point of "DISH is Ergen, and Ergen is DISH", I don't see
2 how you can get there on that record, the record that they have
3 put before you. It just doesn't add up. Not only have they
4 not put in their allegations the "DISH is Ergen, Ergen is DISH"
5 predicate; they've put stuff in that undermines it completely.
6 And that is the problem with that claim. It's a claim that
7 they can't support, with their inferences that are plausible
8 and reasonable to make, on the record that they have created on
9 this motion. And that is our ultimate endpoint on that point.
10 I mean --

11 THE COURT: And it shouldn't give me any pause that
12 the treasurer of DISH was doing this for Mr. Ergen?

13 MR. DUGAN: Well, I think, Your Honor, what they
14 allege is that Mr. Kiser was acting on Mr. Ergen's behest.
15 Should it give you pause? You know, Your Honor, obviously it's
16 a fact; it's a fact that they point to. But it's one fact in a
17 sea of facts. It's one inference in a sea of inferences. If
18 you're going to single out that one inference, you have to do
19 it in the --

20 THE COURT: I'm trying not to --

21 MR. DUGAN: -- context of what else is there.

22 THE COURT: -- single out that one inference, but
23 that's why you have trials, because --

24 MR. DUGAN: Understood, Your Honor.

25 THE COURT: -- you have no dispute that the fellow who

1 was the treasurer of DISH was executing these trades. In
2 addition, you have allegations made repeatedly that there was
3 something going on with respect to the timing of the closing of
4 the trades at a critical time in this Chapter 11 proceeding.
5 You've got allegations that reasons were being given for the
6 fact that trades weren't closing, despite entreaties from the
7 counterparties on the trades. And those strike me as
8 allegations that call out for the development of a factual
9 record.

10 MR. DUGAN: Understood, Your Honor. Now, because
11 we've talked a lot about agency, I do want to address the
12 manipulation of trades for a moment. Clearly the manipulation-
13 of-trade allegation is not going to whether the contract was
14 breached, because there's nothing in the contract, even if
15 we're talking about whether it was DISH or it was Ergen.

16 THE COURT: No, we can assume for that purpose that
17 he's an eligible assignee.

18 MR. DUGAN: So then let's ask ourselves where are they
19 going with that and what exactly do those allegations show. I
20 mean, where they appear to be going -- where they have to be
21 going with it is equitable subordination, because what else
22 would it really be relevant to? It's not relevant to the
23 tort --

24 THE COURT: It'd be relevant to a damage claim.

25 MR. DUGAN: But only if those allegations attach

1 themselves to a claim -- to a cause of action. In other words,
2 those allegations, to give rise to a damages claim, have to
3 attach themselves to a cause of action. They don't attach
4 themselves to breach of contract, because they don't have to do
5 with the contract and, as you say, we can assume he was an
6 eligible assignee, before we get to those.

7 So what exactly are those allegations attached to?
8 They're not attached to tortious interference, because that
9 claim is limited to the very first trade Ergen did, for five
10 million dollars in April of 2002. Weeks before -- maybe over a
11 month before -- LightSquared was even in bankruptcy, he did a
12 trade for five million dollars. That's their tortious-
13 interference claim; it's based on that trade and only that
14 trade.

15 The only claim that's left that the manipulation of
16 trades can possibly be relevant to is equitable subordination.
17 And what we have to ask ourselves is this: do these
18 allegations of manipulation of trades -- do they really equate
19 to -- do they support to an equitable-subordination claim? Are
20 they anything like the kinds of allegations that we've seen
21 support an equitable-subordination claim? They don't use the
22 term "fraud". They don't say that there was fraud here, that
23 somehow there was an attempt to commit a fraud when Ergen or
24 SPSO didn't close the trades on time. Harbinger did allege
25 that, by the way, but that was thrown out. That claim couldn't

1 be supported. It couldn't support a fraud claim. They don't
2 allege fraud.

3 They don't allege tortious interference of creditors.
4 That was a claim Harbinger made. That was a claim Harbinger
5 made that got thrown out. The debtors didn't come in and say,
6 by the way, this manipulation of trades has caused us to lose
7 an expectancy of closing a contract that was firm enough to
8 give rise to a tortious-interference claim. They don't make
9 that allegation. They don't connect it that way. They just
10 put it out there that they think the trades took a long time to
11 close, that there's e-mail traffic that shows that the other
12 side of that trade asked to close and it couldn't get it closed
13 for weeks, sometimes, yes, for a month, sometimes for two
14 months. Yes, there are allegations, there are complaints,
15 there are e-mails about that.

16 Do the e-mails say the reason why these trades aren't
17 closing is because we want to screw up the debtors' ability to
18 negotiate with its creditors? No, the e-mails don't say that.
19 They have all the e-mails, but they would have quoted those
20 parts if they had those. They don't say that. All they say is
21 that these trades took a long time to close. And I don't see
22 that, Your Honor, under the law, as giving rise to the type of
23 fraud, to the type of breach-of-fiduciary-duty-like --

24 THE COURT: There's --

25 MR. DUGAN: -- allegations --

1 THE COURT: There's --

2 MR. DUGAN: -- that they need.

3 THE COURT: There's no way of knowing that. If we
4 take as a given that there was a delay in the closing of the
5 trades for a strategic purpose, I think that's something I'm
6 entitled to know.

7 MR. DUGAN: But they don't allege that, Your Honor.
8 They say it had the effect. They say it had the effect of
9 interfering with their creditor negotiations. They don't
10 say -- I looked hard for a part where it says they had the
11 purpose, the reason why these trades took so long to close is
12 because Ergen had the purpose, SPSO had the purpose, of
13 interfering with our negotiation with trades. No, they said it
14 had the effect. Effect and purpose --

15 THE COURT: Mr. Dugan --

16 MR. DUGAN: -- are very different things.

17 THE COURT: -- you have to remember that I was
18 actually here during this period of time, so I independently
19 have a recollection of what was occurring as those weeks
20 unfolded.

21 MR. DUGAN: Well, Your Honor, now you exactly know why
22 it is that we keep asking for matters that are not just in
23 their pleading to be considered, because there's a big mosaic
24 of facts that we're all dealing with here. It's a big mosaic.
25 I mean, now, Your Honor can't look at all of it, because the

1 law doesn't let you look at all of it. But Your Honor can look
2 at more than just what they say in their complaint, because
3 that's the record that they've invited and created. Your Honor
4 could also consider the record in the bankruptcy proceeding,
5 because, after all, you were here for that, as you say, Your
6 Honor. So yes, all that --

7 THE COURT: Well --

8 MR. DUGAN: -- you can consider.

9 THE COURT: -- it'd be a neat trick for me not to
10 consider what happens here, so --

11 MR. DUGAN: Yeah. I would agree.

12 THE COURT: But that's a different -- that's different
13 from importing everything that happens --

14 MR. DUGAN: Right, and --

15 THE COURT: -- in Nevada.

16 MR. DUGAN: -- I understand that but, if we're going
17 to look at what's happened in the bankruptcy proceeding on the
18 issue of manipulation of trades itself, we should consider what
19 happened in May of 2013 -- I'm sure Your Honor will recall --
20 when the debtor had a seemingly very different perspective on
21 SPSO and was actually actively monitoring the closing of trades
22 and was making arguments to try to get the benefit of
23 provisions in the exclusivity stipulation that were based on
24 SPSO's trading, and arguments based on SPSO's position.

25 THE COURT: That sounds like a defense. That doesn't

1 have a bearing on whether or not SPSO was intentionally
2 declining to close trades that were otherwise ready to close,
3 because there was a strategic advantage --

4 MR. DUGAN: But --

5 THE COURT: -- in doing so.

6 MR. DUGAN: But, Your Honor, if the relevance of
7 manipulation of trades is the equitable-subordination claim,
8 which is my supposition but I don't know what else it's
9 relevant to, then the debtors' conduct with respect to those
10 trades and the timing of those trades and the positions they
11 took certainly is relevant to whether or not it would be
12 equitable to subordinate --

13 THE COURT: Right, but --

14 MR. DUGAN: -- SPSO's claim.

15 THE COURT: -- I'm not having a trial on the merits of
16 equitable subordination right now.

17 MR. DUGAN: Well, I understand, Your Honor. We're
18 talking about inferences from facts. But in the world of
19 inferences from facts, we can discuss these things.

20 I'm sorry, Your Honor.

21 Okay, so, Your Honor, just one other thing about the
22 trade timing that I think is relevant to consider, which is,
23 the way that the debtors have set up their cause of action,
24 they make it appear that there is some right, during the
25 exclusivity period, to have creditors not trade, that they have

1 some right, during their exclusivity period, to --

2 THE COURT: No, that's --

3 MR. DUGAN: -- lock everything into place.

4 THE COURT: -- that's absolutely incorrect as a matter
5 of law.

6 MR. DUGAN: It is absolutely incorrect as a matter of
7 law. But if Your Honor were to find in their favor on this
8 claim of manipulation of trades, in effect, what would you be
9 saying -- what would the Court be saying to the participants in
10 the distressed-debt market, with respect to trading during an
11 exclusivity period? Are they always going to be open to the
12 claim that, by trading, they somehow made the identity of
13 creditors less knowable, more uncertain, to the extent where a
14 debtor can come in and say, you interfere with my ability to
15 negotiate with my creditors; I didn't know who they were; you
16 kept trading?

17 THE COURT: All right, well, that -- you're inviting
18 me down the slippery slope and I'm not going to follow you,
19 so --

20 MR. DUGAN: Your Honor, it's relevant to consider for
21 the claim that they're asserting. That's why we're making --

22 THE COURT: Okay.

23 MR. DUGAN: -- that argument.

24 THE COURT: Does it make any difference, Mr. Dugan, on
25 the issue of Nevada, if -- and I have no idea what the current

1 posture is, other than what you folks have told me in terms of
2 the limited injunctive relief that was entered, I think, the
3 day before Thanksgiving. But if that were to proceed and
4 ultimately the Nevada court were to rule that the profit that
5 Mr. Ergen gains on the debt holdings goes to the DISH
6 shareholders, is that any relevance to the issues that are
7 before me?

8 MR. DUGAN: I don't think so, Your Honor, because the
9 question then would be -- I think the question would be --
10 since we're talking about a present act affecting past conduct,
11 I think the question would be whether the Court's order in some
12 sense would be the equivalent of a ratification, if you will,
13 that the trades were for DISH in some way or for the DISH
14 shareholders in some way. And I think that theory is self-
15 defeating, Your Honor, because for there to be a ratification,
16 you have to start with the premise that when the trades first
17 happened, they were not for DISH. Ratification is backward-
18 looking.

19 So for some court to say, after the fact, you know,
20 looking back at these things that happened now a while ago, I'm
21 going to grant relief that would have the effect now of making
22 the economic benefit of those trades the benefit for DISH, that
23 almost has as its predicate that when the trades happened, they
24 didn't happen for DISH. It's a backward-looking -- in fact, it
25 changes things. It changes things.

1 THE COURT: But it also --

2 MR. DUGAN: So we don't --

3 THE COURT: -- it also highlights the fact that,
4 again, looking back in the beginning of the trading, way before
5 the bankruptcy, right?

6 MR. DUGAN: Right.

7 THE COURT: Because of Mr. Ergen's economic interest
8 in DISH, it kind of wasn't going to matter whether or not
9 ultimately he got to keep the spread or not. He either was
10 going to get to keep the spread for his own account, or the
11 spread was going to go to DISH shareholders, and maybe he got a
12 share of it that way.

13 MR. DUGAN: Well, what Your Honor is saying is
14 logical. I mean, I would think that as someone who spent a
15 billion dollars of his own money, he would have preferred to
16 get the benefit of it, but what Your Honor is saying is
17 logical.

18 THE COURT: Okay.

19 MR. DUGAN: Your Honor, I wanted to touch on a few
20 other claims that LightSquared makes. I mean, I do want to
21 note, Your Honor -- I mean, I know we've talked about a lot
22 about subsidiary. I think it's worth saying, because it just
23 seems like it is, that the position that LightSquared lays out
24 in their brief with respect to subsidiary kind of proves what
25 we're saying on that piece, just in the following sense.

1 What they're saying is, subsidiary in almost every
2 instance -- they certainly say it with respect to the
3 definition in the credit agreement, which is broader than
4 Merriam's, which is broader than Black's. They say -- looking
5 at the broadest definition of subsidiary in the credit
6 agreement, it's downstream looking. Downstream looking:
7 that's what makes it a subsidiary. You're always looking
8 downstream, as opposed to affiliate, which they say is
9 different, because it's upstream and downstream. It's both
10 ways. It's all directions.

11 Well, Your Honor, we think that proves our point on
12 the subsidiary piece of it, putting aside whether DISH is Ergen
13 and Ergen is DISH, and we think there are serious problems with
14 that, as I've said. But putting aside that one, we think that
15 proves our point, because unless DISH is Ergen and Ergen is
16 DISH, you have to go up before you go down. So you can't be in
17 the control situation that they're setting forth, unless Ergen
18 is DISH and DISH is Ergen. You have to go from DISH --

19 THE COURT: Go up, right.

20 MR. DUGAN: -- to Ergen and then back down. So it
21 can't be a subsidiary under their own argument. So I just
22 wanted to point that out on that piece, before I move to
23 tortious interference, unless you have other questions about
24 the breach of contract.

25 THE COURT: So you folks concede that an affiliate of

1 DISH could have bought the debt, correct?

2 MR. DUGAN: That an affiliate of DISH could buy the
3 debt.

4 THE COURT: Could buy the debt?

5 MR. DUGAN: Yes. As long as that affiliate is not a
6 subsidiary, because subsidiaries --

7 THE COURT: Okay, so 51 --

8 MR. DUGAN: -- are a form of affiliate.

9 THE COURT: Fifty-one, forty-nine, right? So an
10 Entity, capitalized, owned forty-nine percent by DISH, and
11 fifty-one percent by Mr. Ergen or SPSO could have bought the
12 debt, right?

13 MR. DUGAN: You know, I don't know that I would go
14 that far, because --

15 THE COURT: Why not?

16 MR. DUGAN: -- because I think if you're talking about
17 one entity being under another, you're kind of in a zone.
18 You're kind of in a zone. We're not talking here about one
19 entity being under another. We're talking about one entity
20 being under another who you have to go up to, to get down from.

21 THE COURT: The --

22 MR. DUGAN: There's a reason why we define terms the
23 way we do. I mean, affiliate is no -- by, without question,
24 broader than subsidiary. And frankly, Your Honor, I don't
25 think that -- I mean, it would be interesting how it would turn

1 out if it happened the way you're suggesting. But I don't
2 think that anyone on the Ergen side is necessarily interested
3 in playing with those kinds of ownership structures. I mean --

4 THE COURT: I'm just trying to --

5 MR. DUGAN: Yeah.

6 THE COURT: I'm just trying to understand --

7 MR. DUGAN: Right.

8 THE COURT: -- what the appropriate vehicles would
9 have -- are for having purchased the debt. So SPSO is an
10 affiliate of DISH?

11 MR. DUGAN: Well, by definition it has to be, because
12 Mr. Ergen controls it. I mean, so -- I think not just by the
13 definition in the credit agreement, but by the definition in
14 Webster's.

15 THE COURT: Okay.

16 MR. DUGAN: So, Your Honor, if I can move on to
17 tortious interference.

18 THE COURT: Sure.

19 MR. DUGAN: Now, there are a lot of problems with this
20 claim. Let's start out with the fact that I don't -- it's not
21 quite clear what relevance it has. I mean, it is addressing --
22 unless I'm missing something -- a very small piece of this debt
23 puzzle. It's addressing a five million dollar trade. So even
24 if the debtors were to prevail on it, it's far from clear what
25 their damages might be or what consequence it can have, given

1 that a five-million-dollar piece of debt in this big picture
2 doesn't have any leverage, doesn't have any real meaningful
3 impact on anything. But that is their claim.

4 THE COURT: Can you help me out, and show me where it
5 is that's it's limited to that?

6 MR. DUGAN: Okay, Your Honor.

7 THE COURT: I may have missed that.

8 MR. DUGAN: And maybe I'm misreading it, but it's also
9 in their motion --

10 THE COURT: Okay.

11 MR. DUGAN: -- to dismiss. But what I am looking
12 at -- I have to get there. I'm sorry, Your Honor. Give me one
13 moment.

14 Okay, so what I'm looking at is the cause of action
15 for tortious interference, which is the --

16 THE COURT: It's paragraph 10 --

17 MR. DUGAN: -- fifth claim for relief.

18 THE COURT: Paragraph 109?

19 MR. DUGAN: It's paragraph 109, I think. Maybe it's
20 not that one. Let's see. Oh, here it is. I think it's --
21 yeah, okay, it is paragraph 109. "SPSO, DISH, EchoStar, and
22 Mr. Ergen" --

23 THE COURT: Right.

24 MR. DUGAN: -- "intentionally caused GPS to breach the
25 credit agreement before SPSO itself became a party to that

1 agreement." That's what it says. That's the sentence that I'm
2 focusing on.

3 THE COURT: Okay, and then -- I'm sorry; I was reading
4 the subsequent paragraphs as additional acts.

5 MR. DUGAN: I thought that the subsequent paragraph
6 was referring to the misrepresentation and the assignment and
7 assumption that referred back to that first purchase, because
8 the documentation tends to come months later. So he's -- I
9 think what it's saying is on September 6th, 2012, Ergen
10 represented in the assignment and assumption about that trade
11 on April 13th, 2012. It's going back to April, which is when
12 the first purchases occurred. I mean, to the extent, Your
13 Honor, that --

14 THE COURT: But there's a -- I'm sorry; I just
15 completely -- I missed that. I read this as being relating to
16 the entire suite of trades because it refers to the LP debt
17 trades.

18 MR. DUGAN: And Your Honor, I'm sure LightSquared can
19 clarify what they meant, but they said it here, and they also
20 said in their brief, that this related to when -- before SPSO
21 became -- arguably became a party to the credit agreement. And
22 the reason why they would say it that way, Your Honor, at least
23 to my way of thinking, is pretty obvious, once you get into the
24 law, which is --

25 THE COURT: Right.

1 MR. DUGAN: -- you can't be a party to a contract,
2 breach it, and tortious interfere with it all at the same time.

3 THE COURT: At the same time, right.

4 MR. DUGAN: Right. Which I think the law is pretty
5 clear about.

6 THE COURT: Okay. All right. Mr. Stone, you can
7 clarify this at some point.

8 MR. STONE: Okay.

9 THE COURT: Okay.

10 MR. DUGAN: Okay. So, but Your Honor, that was one
11 reason why we thought the tortious interference claim didn't
12 work.

13 THE COURT: Okay, I got you; thank you.

14 MR. DUGAN: The other reason why we thought it didn't
15 work is that when you talk about the UBS breach, the
16 hypothetical UBS breach -- it's far from clear that there was
17 any obligation by UBS under this credit agreement to have a
18 gatekeeping function. They say they breached the gatekeeping
19 function.

20 THE COURT: Well, to that extent, also it's a --
21 there's not a claim against UBS.

22 MR. DUGAN: Well, there's no claim against UBS.

23 THE COURT: Right.

24 MR. DUGAN: And there's also no obligation that UBS
25 has to be a gatekeeper, under the credit agreement, because UBS

1 is entitled to rely on the representations of those two --
2 submit documents to it. And the agreement expressly exculpates
3 them from doing so. So I think that they're high and dry on
4 the breach by UBS argument which I just wanted to underscore
5 for Your Honor.

6 The 502(b) claim, if I can touch on that. I mean, we
7 have cited law that I think is very clear. That if, as they're
8 alleging, their position is this breach -- the acquisition of
9 debt by SPSO -- the result of it should be that their claim is
10 disallowed. That they get nothing.

11 New York law is clear, I think, that for you to argue
12 that transfer has that effect, if a transfer in violation of an
13 agreement -- a transfer restriction and agreement -- to have
14 that effect, it has to be clearly set forth in the agreement
15 itself, in language that is very clear.

16 The clearest language you can have is, this transfer
17 is null and void. In fact, that language is in the credit
18 agreement. But it's not talking about a transfer to a
19 noneligible assignee. It's talking about a transfer involving
20 a borrower, not a transfer involving a noneligible assignee.
21 There's nowhere in this credit agreement that says a transfer
22 to a noneligible assignee is null and void. In fact, it says
23 it should be treated as participation, which is a whole
24 different thing, but --

25 THE COURT: Right, but then that takes us down another

1 rabbit warren, because the participation section pulls in the
2 eligible assignee language. So that doesn't help. There is
3 nothing that says that a transfer in violation of 10.04 -- I
4 don't know if I have the section right -- is void or voidable.
5 Nothing. It doesn't say that.

6 MR. DUGAN: It doesn't, Your Honor.

7 THE COURT: Right.

8 MR. DUGAN: That's the point we're making there.

9 THE COURT: Right. But the fact that it says that the
10 transfer in violation of that prohibition doesn't effect the
11 obligations of the borrower, that doesn't get you there. That
12 just says that the money lent is still --

13 MR. DUGAN: Right.

14 THE COURT: -- owed.

15 MR. DUGAN: Right. But --

16 THE COURT: The company has to pay it back.

17 MR. DUGAN: But if under New York law, the credit
18 agreement is not clear enough to avoid the transfer, then in
19 some sense it must remain a transfer.

20 THE COURT: Well, I think that they -- and I think
21 that there is case law to the effect that you're citing,
22 clearly says that you have a claim for breach against the
23 transferor, original assignor. But the question then is, well,
24 maybe there's a claim for damages for the breach, right? In
25 other words, it's --

1 MR. DUGAN: Right. Well, Your Honor --

2 THE COURT: So if the claim is allowed, perhaps
3 there's a damage claim -- there's a damage claim for the
4 breach. Maybe that damage claim is for the same amount as the
5 transferred debt.

6 MR. DUGAN: Well, Your Honor, that's entirely
7 possible. I mean, the claim we're specifically addressing is
8 the equitable disallowance claim -- I'm sorry --

9 THE COURT: Right.

10 MR. DUGAN: -- the 502(b) disallowance claim as pled.

11 THE COURT: Right.

12 MR. DUGAN: I didn't see that damages theory pled in
13 the complaint. It's an interesting one. I guess one could ask
14 in a situation where the debtor is under any circumstance being
15 either recapitalized or the assets being sold, I guess it's
16 unclear to me how you can mount an argument that they've been
17 damaged to the extent of a billion dollars by a billion dollars
18 of debt in the hands of a competitor. I know that they hate
19 competitors in their capital structure, because they say it so
20 many times.

21 But it's unclear in the context of where we are in
22 this reorganization/sale setting that a competitor in the
23 capital structure is a serious concrete harm to them.

24 THE COURT: Right. But then again, that's another
25 defense fact to be developed at trial, not something that it's

1 appropriate for me to rely on in granting a motion to dismiss.

2 MR. DUGAN: Right. Well, Your Honor, I hear you on
3 that, but I think again, we're in the -- where you and I have a
4 disconnect, and I understand we have it, is the issue of what
5 are the inferences that can be drawn and how reasonable they
6 are. And I think part of the issue really is, when I say, what
7 are the inferences that can be drawn, I'm looking at A plus B
8 plus C. And the only reason why I'm looking at A plus B plus C
9 is because they put B and C in, not because I'm saying go look
10 at B and C.

11 So we're starting off with that issue, but I totally
12 get where you're coming from, Your Honor.

13 THE COURT: I mean, they do make a claim -- the second
14 count in the LightSquared complaint is for damages. And it's
15 been said before when I've pointed out that, as you said, I
16 have an auction process now; we have a bidding process now, and
17 the best and the highest bid will win. The suggestion was
18 made, well, maybe all of this conduct made it more expensive
19 for an alternative bidder plan proponent to prevail. That was
20 suggested as a measure of damages, as opposed to the complete
21 disallowance of the claim.

22 And again, so when you go there, that suggests
23 something that would be a matter for trial, not something I
24 could determine now.

25 MR. DUGAN: And Your Honor, just so I'm clear on what

1 you're suggesting. Are we referring back now to the
2 manipulation of trade issue? In other words, the lack of --
3 their alleged lack of knowing who their creditors were?

4 THE COURT: And the fact -- that and the fact that an
5 ineligible assignee got into the capital structure, and
6 therefore, rendered it harder to put a deal together at an
7 earlier part. I'm not saying I'm saying that any of this is
8 meritorious. I'm repeating to you what's been said to me --

9 MR. DUGAN: Right.

10 THE COURT: -- about a theory of recovery when I've
11 questioned before causation and damages, right? If you --

12 MR. DUGAN: Well, Your Honor, once you accept the fact
13 that I guess that there was some attempt to do something for
14 the purpose of interfering with creditors, which we think is a
15 hard stretch to make. I guess you can theorize things that
16 could hypothetically come from that. But we're not disagreeing
17 about that, Your Honor. I think what we're disagreeing about
18 is whether, in fact, the allegations that we have before us get
19 us over the hurdle on DISH being Ergen and Ergen being DISH on
20 the one hand --

21 THE COURT: Well, what about the --

22 MR. DUGAN: -- or a subsidiary.

23 THE COURT: -- what about the existence of the release
24 in the LBAC bid. So LBAC began life being fully owned by Mr.
25 Ergen and then was transferred to DISH for a dollar. And as

1 far as I know, there are certain provisions -- I don't want to
2 wander into anything that I shouldn't be, since we have an
3 ongoing auction, but there are certain provisions in the bid
4 that suggest a link.

5 MR. DUGAN: Well, Your Honor, I -- and I'm not sure
6 that I know what those provisions are other than the only one
7 that we've discussed in this room has been the release, which
8 frankly is a little, I guess -- we can understand why there's a
9 discussion, but it's not unusual in an asset purchase
10 agreement --

11 THE COURT: I'm not interested --

12 MR. DUGAN: -- to have that kind of release.

13 THE COURT: I know fully well what's usual and not
14 unusual. In this context, it's been made clear that a
15 condition is that there be a claim allowance and a release of
16 affirmative claims. So everybody knows the drill that
17 purchasers don't want to be sued after the fact. But given the
18 backdrop of the allegations as far as connection, identity of
19 interest, et cetera, that's in particular why I'm interested in
20 that provision in this case.

21 MR. DUGAN: Right. Well, Your Honor, I guess what I
22 could suggest to Your Honor, I mean there is a claim that's
23 been put out there, and I think that's an element of it, that
24 SPSO, LBAC and DISH are inextricably linked. You know, again,
25 it seems like that might be wandering into the equitable

1 subordination zone, maybe that's why that's out there. I don't
2 believe that's relevant to the breach of contract claim, but
3 let's just look at it.

4 You know, essentially, when they say inextricably
5 linked the conflict that we have here is SPSO in buying debt.
6 I know you don't want to look at Nevada, Your Honor, I
7 understand you don't. But if we have a trial in this case, and
8 it may be inevitable, but if we do, you're going to hear the
9 story. But be that as it may, the timing and how things
10 evolved, and it's a matter of public record as well, is that
11 when Ergen was buying this trade, when he was buying this
12 LightSquared debt, DISH was not considering LightSquared; it
13 was considering Clearwire and Sprint as acquisition vehicles.
14 Those were twenty billion dollars investments.

15 THE COURT: Okay. I'm going to stop you, because I
16 started this question being a question about the release.
17 And --

18 MR. DUGAN: Well, and the linkage, Your Honor. The
19 linkage --

20 THE COURT: Okay.

21 MR. DUGAN: -- between SPSO, LBAC and DISH. Whether
22 that linkage is adequately alleged on this record.

23 And the release, just to be clear about that, you
24 know, although we don't think there is linkage, to focus on the
25 release, that was included in this APA before there was any

1 cause of action that was made. It was publicly filed in this
2 case in July, before any claim by Harbinger. In other words,
3 it was part of this deal before there was anything to be
4 released from. It's been part of this deal from way before
5 there was any claims.

6 THE COURT: No, it -- well, that's fine, but the
7 release, as it's been explained to me, it's not just a release
8 of affirmative claims, it requires the full allowance of the
9 SPSO debt.

10 MR. DUGAN: Well, I think it would require a release
11 of claims for disallowance, right, yes.

12 THE COURT: Yes, claims for disallowance. So even
13 before there were allegations there was a clear link between
14 the desire of the bidder to proceed with the assurance that the
15 debt owner was going to be paid back in full.

16 Ms. Strickland --

17 MR. DUGAN: Ms. Strickland is refreshing my
18 recollection on something.

19 THE COURT: Okay.

20 MR. DUGAN: Because just in fairness, I was
21 misstating something to Your Honor.

22 The release -- I mean, just to get to your point,
23 there's nothing specific in the release, she refreshed my
24 recollection, about disallowance specifically; it's a broad
25 general release.

1 THE COURT: Yes. But, Mr. Dugan, I asked the question
2 repeatedly and pointedly one or two hearings ago, and it was
3 clarified to me that, in fact, what the release means is not
4 just a release of affirmative claims, which I agree with you
5 had not been alleged, but it requires that the debt claim be
6 allowed in full.

7 MR. DUGAN: I think that's a conclusion that was
8 reached because it is a broad release. It's a release of all
9 claims. It doesn't specifically require what Your Honor just
10 said. But I think because it is a broad release of all claims,
11 it arguably covers it, I mean, but it doesn't carve that out
12 and specifically recover it.

13 THE COURT: Mr. Dugan, now I'm going to start to a
14 little bit lose my patience.

15 MR. DUGAN: Okay.

16 THE COURT: It's in the document that LBAC put forward
17 as a bid. So somebody wrote it. And if somebody didn't
18 understand what they meant at the time, subsequent events have
19 forced them to clarify it. And it's been clarified to me
20 before that, in fact, it includes a full allowance, such that I
21 cannot just say you know what, we'll proceed on the bid, we'll
22 deal with the claims allowance later, that would not satisfy
23 the condition of the release.

24 MR. DUGAN: I -- I --

25 THE COURT: So if that's wrong you can tell me, but

1 that's what my understanding is of how that works.

2 MR. DUGAN: I understand, Your Honor.

3 THE COURT: And that fact, whether or not that changes
4 now, that fact is a fact that's out there, and that may or may
5 not have a bearing on the identity of interest inextricably
6 linked argument.

7 MR. DUGAN: I understand what you're saying, Your
8 Honor. And forgive me for the disconnect.

9 THE COURT: That's okay.

10 MR. DUGAN: I don't think I'm --

11 THE COURT: You all are working very hard and sharing
12 the responsibility; I understand. But it's not -- I have to
13 hold you to prior statements that were made when, perhaps, you
14 weren't standing at the podium.

15 MR. DUGAN: I understand perfectly, Your Honor. Let's
16 just move on if we may.

17 THE COURT: Sure.

18 MR. DUGAN: I don't know if you have any other
19 questions about the LightSquared complaint and what our
20 arguments are with respect to them.

21 THE COURT: Let me look at my notes if you don't mind.

22 MR. DUGAN: Sure.

23 THE COURT: I think most of my notes relate to
24 questions I want to ask the other folks.

25 MR. DUGAN: Okay.

1 THE COURT: So you can finish up what you have and
2 reserve for rebuttal.

3 MR. DUGAN: You don't know how happy I am to hear
4 that, Your Honor. I'm very happy to hear that, Your Honor.

5 Let me just, if I can, briefly touch on Harbinger --

6 THE COURT: Okay.

7 MR. DUGAN: -- if that's okay.

8 THE COURT: Sure.

9 MR. DUGAN: Just as long as I'm up here.

10 THE COURT: Sure.

11 MR. DUGAN: This will be brief.

12 Your Honor, our motion to dismiss Harbinger's claims
13 is to some extent procedural. We kind of think that when we
14 got their pleading we didn't understand exactly where it was
15 coming from given what we thought your order had --

16 THE COURT: Me too.

17 MR. DUGAN: -- Your Honor had ordered. It seemed like
18 a little bit --

19 THE COURT: Right.

20 MR. DUGAN: -- of left field lob, and maybe Hail Mary
21 pass and a combo of those. And so we would just posit before
22 you, first, that it doesn't appear to comply with what Your
23 Honor ordered.

24 THE COURT: I'm going to sort it out with them.

25 MR. DUGAN: Okay. We also believe that there's

1 some -- I mean, to the extent their complaint -- and it's
2 confusing -- alleges that they're not really seeking to
3 vindicate any rights for relief that they have themselves, it
4 appears to be pled derivatively which raises another host of
5 issues that I don't think they adequately explain in their
6 briefing, so I don't want to belabor that point.

7 And the only other thing I would say on that is to the
8 extent they've got the 502(b) claim which Your Honor I think
9 did say they could re-plead, our position on that claim is the
10 same as the one that we've asserted for LightSquared.

11 THE COURT: Okay. Okay. All right, thank you, Mr.
12 Dugan.

13 MR. DUGAN: Okay, thank you.

14 MR. GIUFFRA: Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. GIUFFRA: Robert Giuffra, Sullivan & Cromwell, for
17 DISH and EchoStar.

18 THE COURT: All right, Mr. Giuffra, let me just follow
19 along here and make sure I have everything that you filed.

20 I have a memorandum of law in support of the motion to
21 dismiss the LightSquared complaint and a reply.

22 MR. GIUFFRA: That's correct, Your Honor.

23 THE COURT: And you filed nothing with respect to the
24 Harbinger, correct?

25 MR. GIUFFRA: No, Your Honor.

1 THE COURT: Okay.

2 MR. GIUFFRA: We're not a party to that complaint.

3 THE COURT: Okay.

4 MR. GIUFFRA: Your Honor, this is a motion pursuant to
5 Rule 8 of the Federal Rules of Civil Procedure, and it focuses
6 on the plausibility of the complaint as pled. In our view,
7 they have not pled the single claim that they brought against
8 DISH and EchoStar, and that's a tortious interference with
9 contract claim.

10 Now, a tortious interference with contract claim
11 requires certain elements. You have to have a --

12 THE COURT: Can I just stop you for a minute?

13 MR. GIUFFRA: Yes, Your Honor.

14 THE COURT: Now I'm confused. So DISH and EchoStar
15 are defendants in the Harbinger complaint.

16 MR. GIUFFRA: Not in the Harbinger complaint; we're
17 defendants --

18 THE COURT: No.

19 MR. GIUFFRA: -- in the LightSquared complaint.

20 MR. FRIEDMAN: Your Honor, we only objected to the
21 plan and we joined in the subordination of the SPSO, but we're
22 not suing anybody.

23 THE COURT: Okay. So we're --

24 MR. GIUFFRA: One less thing for us to do today, Your
25 Honor. So we're only a defendant in the LightSquared

1 complaint --

2 THE COURT: Okay.

3 MR. GIUFFRA: -- Count V, which is the tortious
4 interference claim --

5 THE COURT: Hold on.

6 MR. GIUFFRA: -- which is a very specific claim that
7 has to be pled, and they've got to allege a breach of a
8 contract.

9 THE COURT: I got it, you're right.

10 MR. GIUFFRA: They've got to allege that DISH and
11 EchoStar intentionally --

12 THE COURT: Right.

13 MR. GIUFFRA: -- caused in the complaint, and this is
14 important, Your Honor, in paragraph 109 --

15 THE COURT: Right.

16 MR. GIUFFRA: -- that they say DISH -- "SPSO, DISH,
17 EchoStar and Mr. Ergen intentionally caused UBS to breach
18 Section 10.04 of the credit agreement." So that's what they've
19 got to plead. And then they've also go to plead some sort of
20 an injury and some sort of damages.

21 THE COURT: Right.

22 MR. GIUFFRA: Now, we believe, Your Honor, that
23 there's no basis to infer from this complaint that Ergen or Mr.
24 Kiser were acting as agents for DISH and EchoStar. And I
25 talked about this the last time I stood before Your Honor --

1 THE COURT: Right.

2 MR. GIUFFRA: -- about the fact that DISH is a public
3 company with 35,000 employees, more than 10,000 shareholders,
4 same for EchoStar, and there's virtually nothing in this
5 complaint about EchoStar at all.

6 And I think if Your Honor looks at paragraph 86 of the
7 complaint, because I think that paragraph may be -- we could
8 sort of speed up some of the points that Mr. Dugan was making,
9 and maybe look at them in a slightly different way.

10 Paragraph 86, which is in the breach of contract
11 claim, and I think the reason that they pled this in sort of an
12 odd way against DISH and EchoStar was because they wanted --
13 LightSquared wanted to bring a breach of contract claim against
14 Mr. Ergen and against SPSO, and they couldn't allege they were
15 tortiously interfering with the same contract, because you only
16 get one bite at the apple.

17 THE COURT: Right.

18 MR. GIUFFRA: You can only do a breach of contract
19 claim, or you can bring a tortious interference claim, which is
20 why they've come up with this sort of oddball claim involving
21 UBS, so they can basically drag everybody into a tortious
22 interference claim, and get their cake and eat it too.

23 But if you look at paragraph 86, and, again, it's a
24 Rule 8 motion, Twombly, Iqbal, you've got to plead it in a
25 plausible way.

1 Now, they plead in the complaint it's a public
2 company; there's no question about that. And they say -- they
3 just -- they have one sentence: "SPSO is a subsidiary of DISH
4 and EchoStar." That's a conclusory allegation in our view.

5 Then they go on to say "DISH and EchoStar controlled
6 SPSO, among other reasons because their executive chairman, Mr.
7 Ergen, acting within the scope" -- "and the treasurer, Mr.
8 Kiser, acting within the scope of their agency for the benefit
9 of DISH and EchoStar, directed the management in investment
10 policies of SPSO, specifically it's purchase of interest in LP
11 debt." That's the only allegation that I see in this entire
12 complaint supporting the notion that SPSO is a subsidiary of
13 DISH and EchoStar.

14 Now, what are we talking about here? We're talking
15 about a billion dollars of debt. And Your Honor hit on the
16 point before that public companies can't go buy a billion
17 dollars in debt in secret. They have boards of directors; they
18 have auditors; they've got obligations with the SEC. And in
19 particular, if they're using their own money, purchases of the
20 debt -- and here we're talking about purchases that went back
21 in time -- would be reflected in the financial statements of a
22 company that would have to be disclosed.

23 They obviously can't cite anything like that, and
24 maybe to put a different spin on what Mr. Dugan was saying,
25 there are no allegations in the complaint of board approval of

1 this conduct; there's no allegations in this complaint of a
2 board authorization of the conduct.

3 THE COURT: That's true, but I think their theory is
4 that because of the extent of the control that Mr. Ergen
5 exercises over DISH; fifty-three percent economic control,
6 ninety percent, almost, voting control, it didn't matter.

7 MR. GIUFFRA: Okay, but --

8 THE COURT: Just as it -- might I finish?

9 MR. GIUFFRA: Yeah, I'm sorry, Your Honor.

10 THE COURT: Okay. It just doesn't matter, so that --

11 MR. GIUFFRA: But that --

12 THE COURT: -- therefore, when the debt's purchased,
13 it doesn't matter because at the end of the day the chairman
14 knows that the company will just do what he wants them to do.
15 I'm not saying I'm finding that as a fact. I'm saying that
16 that's what their theory is, that that's what their theory is:
17 that at that point when the debt was purchased there was an
18 optionality about it. He could use it for his own account, or
19 if he subsequently decided that DISH would become involved,
20 then DISH would become involved. I mean, I think that's what
21 their theory is.

22 MR. GIUFFRA: That is their theory, Your Honor, but
23 it's not a plausible theory as a matter of law. And the reason
24 why it's not a plausible theory is if you accept that theory
25 and take it to its logical extreme, and let's look again at the

1 allegations of the compliant. If Mr. Ergen goes out with the
2 assistance of Mr. Kiser and buys a million acres of land in the
3 west, okay, and just uses his own money and buys that land, is
4 that suddenly that whatever that vehicle --

5 THE COURT: But it's context. It's context.

6 MR. GIUFFRA: Con --

7 THE COURT: I mean, if Mr. Ergen goes out and buys a
8 large flat screen TV, I mean, it's context, right? So he's
9 buying the debt of a -- distressed debt of a telecommunications
10 company, it's in the neighborhood of what DISH and EchoStar do.

11 MR. GIUFFRA: But, again, if he buys a billion dollars
12 of distressed debt he can't do it in secret. And if you read
13 the allegations of the complaint they go back to the same
14 arguments that Harbinger made that Mr. Ergen is DISH or Mr.
15 Ergen is EchoStar, and it's all sort of one and the same
16 without any specific pleadings, how in this particular case
17 there was some authorization by some principal to someone other
18 than the fact that Mr. Ergen is the executive chairman.

19 MR. GIUFFRA: That's the only --

20 THE COURT: Well, you have the treasurer --

21 MR. GIUFFRA: -- allegation they have.

22 THE COURT: The treasurer of DISH is executing the
23 trades.

24 MR. GIUFFRA: But there's no allegation that -- people
25 have multiple hats in this world, particularly corporate

1 executives and people who are involved in companies -- in
2 multiple companies, because the allegation is oh, he works for
3 EchoStar, too, and they just sort of plead it in a conclusory
4 way. They don't plead any specifics. I'm not disputing that
5 he is the treasurer; I'm not disputing the e-mails that they
6 attach in the complaint. But the point is there's no
7 allegation that they were authorized to engage in the conduct
8 that they are alleged to have engaged in here and specifically
9 buying the debt. Okay? There's got to be some authorization
10 to do something that big. Okay?

11 I could be the CEO of a major company; even if I
12 control it, I can't just go out and buy a billion dollars worth
13 of debt and have it be ascribed to the company that I'm a CEO
14 of. People have multiple hats. They don't allege in this
15 complaint, for example, that that debt is owned by DISH or
16 EchoStar. Those are public companies. That's an asset of a
17 public company. You would have to use -- if Mr. -- they don't
18 allege that money from DISH or EchoStar was used to buy the
19 debt. One could talk about optionality as much as one wants
20 but that still doesn't mean that in connection with these
21 purchases that DISH or EchoStar had authorized them. They're
22 not small purchases.

23 Now, let me focus, Your Honor, just on the elements.
24 Again, in Count V they focus on UBS, and I believe that was a
25 tactical decision because they could not allege that DISH or

1 EchoStar had tortiously interfered with LightSquared's debt
2 agreement because they wanted to be able to bring the claim
3 against Ergen for an act -- the Count II claim for breach of
4 the credit agreement. So they come up with this theory that
5 there is a breach by UBS in some way because that's what they
6 allege in paragraph 109 that "intentionally caused UBS to
7 breach 10.04." And again, tortious interference is an
8 intentional tort. It's not just a negligence based and they've
9 got to intentionally cause UBS to breach Section 10.04.

10 Now, they've got to allege some facts that support the
11 notion that UBS breached the credit agreement Section 10.04.
12 But UBS under the credit agreement itself, Section 9.03,
13 Section 9.04, Mr. Dugan talked about it, was under no
14 obligation to ascertain the accuracy of representations that
15 were made to UBS. And then in paragraph 9.04 it says, "No
16 liability for relying upon representations that are made."

17 So you need as a precursor to going back to basic
18 building-block pleading rules, you need to establish a breach
19 by UBS. That's what they pled in paragraph 109. If you can't
20 establish a breach by UBS, they've got no claim against DISH or
21 EchoStar for tortiously and intentionally causing UBS to breach
22 an agreement.

23 Now, number one, UBS could not have breached the
24 credit agreement because it had no obligation to ascertain the
25 bona fides of people who claim to be eligible assignees, and

1 that's straight out of the credit agreement.

2 Second, in our opinion Your Honor, in our view, SPSO
3 was an eligible assignee in any event and Your Honor, not to
4 beat an argument that's been made, just look to footnote 39 --
5 37, excuse me, of Your Honor's initial opinion on the last go
6 round we had. Your Honor made the point that -- and we think
7 it's correct -- that the Court did not find the argument that
8 subsidiary, small "s," and subsidiary, big "S," made the same
9 thing in a contract that was negotiated by separate folks.

10 So number one, I don't think that DISH and EchoStar
11 are an ineligible assignee. Even if they were, they haven't
12 pled that UBS breached any agreement and they haven't pled --
13 again it's very conclusory and they've got a Twombly-Iqbal
14 obligation -- they don't allege, Your Honor, that in some way
15 DISH or EchoStar, as they must, were the but-for cause for any
16 breach by UBS and that there was some intentional conduct by
17 DISH or EchoStar to cause that. And that goes back in part to
18 the agency argument that I've made before which is that you're
19 dealing with a public company. It's not plausible to say that
20 just because someone is the executive chairman -- and that's
21 really what they do; they take the titles and they say the
22 titles mean for all purposes, actions they take and I guess
23 Your Honor's point would be in the neighborhood, are actions of
24 the public companies.

25 And we don't believe, Your Honor, that's plausible

1 pleading when you're dealing with public companies that have
2 independent --

3 THE COURT: Well, what if I were to dismiss out DISH
4 and EchoStar and the rest of the complaints, in some fashion,
5 went forward or enough of the core allegations went forward and
6 at the end of the day, at the end of the trial, hypothetically,
7 I were to find that there is an identity of interest -- putting
8 aside the subsidiary upper case/lower case issue -- I were to
9 find for the plaintiffs on their theory that Mr. Ergen and DISH
10 have an identity of interest and, therefore, SPSO couldn't buy
11 the debt, just hypothetically, but I've let DISH and EchoStar
12 out. Isn't that problematic?

13 MR. GIUFFRA: No, they would still have a claim under
14 their breach of contract claim against Mr. Ergen. The only
15 claim they pled against DISH and EchoStar is this tortious
16 interference claim which is clearly just a convoluted theory
17 that's being put together --

18 THE COURT: But I guess the question that I am asking
19 you in terms of the efficiency, then, if there were to be a
20 finding that Ergen and DISH are one and the same, right, but we
21 don't have DISH as a party in the proceeding anymore, wouldn't
22 that require yet another trial of some kind? That's what I am
23 trying --

24 MR. GIUFFRA: Well, theoretically --

25 THE COURT: -- I'm just appealing to your

1 sophistication as a litigator to help me out.

2 MR. GIUFFRA: A couple of points; obviously they can
3 only have us participate in this party if they've pled a claim
4 against us.

5 THE COURT: Sure.

6 MR. GIUFFRA: We don't think they have. If the claim
7 is, okay, we bring a claim against Mr. Ergen for breach of
8 contract, they get a claim against Mr. Ergen for damages,
9 okay -- and I don't think they can for all the reasons that are
10 in all the papers, but let's just as a theoretical matter, they
11 would try to enforce a judgment against Mr. Ergen if you found
12 that Ergen and DISH were the same. Presumably they could try
13 to enforce that judgment against DISH or EchoStar. We would
14 make all the arguments about how we maintained separate
15 corporate ownership.

16 THE COURT: Right.

17 MR. GIUFFRA: There's no piercing of the corporate
18 veil, which they haven't pled in this complaint. So you're
19 talking about a theoretical issue and I think it's -- Mr.
20 Ergen, you would have to get past Mr. -- you would have to be
21 able to establish breach by Mr. Ergen, Mr. Ergen not paying on
22 the judgment and then you would have to be able to establish
23 that there was a basis for piercing the corporate veil between
24 Ergen and DISH and EchoStar: public companies with
25 shareholders, directors, accountants. And presumably if you're

1 a noncontrolling, he owns about fifty-two percent of the
2 company, you've got another forty plus percent of those
3 companies --

4 THE COURT: All right, but that's economic. That's
5 not -- voting is much higher; he's much higher.

6 MR. GIUFFRA: But you're focused on, well, they've got
7 a claim against Mr. Ergen. It's a money damages claim, right? .
8 So the question is who pays the money if there's a judgment and
9 does DISH or EchoStar and its noncontrolling shareholders have
10 a -- are they on the hook for this, which is part of the
11 problem with what we're dealing with and that's why we're
12 fighting this battle with Your Honor which is the mere fact
13 that someone is the executive chairman of a public company
14 doesn't make the noncontrolling shareholders, the passive
15 shareholders and their investment part of a litigation.
16 There's got to be some control that's been -- or some
17 authorization by the principal, the board of directors,
18 particularly given -- and again going back to plausibility -- a
19 transaction that involves a billion dollars.

20 So I don't see a problem if you went down that road.
21 I don't think you'll ever get there, but just as an academic
22 exercise, you would still -- you would go first to Mr. Ergen.
23 Then you would have to establish some sort of piercing of the
24 corporate veil and then you would try to go to the shareholders
25 of -- and the assets of DISH and EchoStar, I guess as a

1 theoretical matter.

2 So one, we don't think there's a breach by UBS. Two,
3 we don't think that DISH and EchoStar are the but-for cause of
4 that breach and they've got nothing other than this basically
5 agency theory by title.

6 And then the other point, Your Honor, which I just
7 want to talk about for a second, is they haven't alleged any
8 damages as a matter of law, any injury. And they come back and
9 they make the point, well, LightSquared alleges that they were
10 harmed by the fact that SPSO was in the capital structure and
11 had a blocking position. And there's no specific allegations
12 in this complaint. And they speculate in their brief about
13 impacts during the exclusivity period but there's no allegation
14 and as I -- going through the records, Your Honor, there was a
15 number of extensions on that exclusivity period; there's no
16 allegation that whatever plan was going to be put forward by
17 LightSquared or by Harbinger was going to succeed. There was
18 obviously a lot of contingencies like exit financing, creditor
19 votes, board approval. And there's a lot of reasons why
20 LightSquared was unable to negotiate a plan during the
21 exclusivity period. Your Honor's more aware of them even than
22 I am.

23 And in fact, Your Honor, at page 41 of the last
24 decision you issued in this case, you made the point that
25 there's no allegation in Harbinger's complaint that