IN THE SUPREME COURT OF THE STATE OF NEVADA

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

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NOTICE OF MOTION

TO: ALL INTERESTED PARTIES

PLEASE TAKE NOTICE that the MOTION TO DEFER TO THE SLC's DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED will come for hearing before Department XI of the above-entitled Court on the 15th day of December, 2014 at 8:00 a.m.

DATED this 17th day of November, 2014

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE MOTION TO DEFER TO THE SLC's DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED

PRELIMINARY STATEMENT[1]

Under Nevada law, a corporation's board of directors has full control over the affairs of the corporation, including over whether the corporation should assert legal claims. Like other business decisions, the decision as to whether the corporation should assert legal claims is therefore entrusted to the business judgment of the corporation's board of directors. By this action, the plaintiff, a stockholder of DISH, Jacksonville Police and Fire Pension Fund ("Jacksonville"), seeks to take for itself the authority to determine whether DISH should assert legal claims. It seeks to supplant the business judgment of DISH's Board with its own judgment.

Under Nevada law, a shareholder may never control the corporation's legal claims unless it satisfies the demand requirement. It must adequately *plead* and *prove* at an evidentiary hearing demand futility. As previously explained, by means of an earlier motion, Jacksonville has not satisfied even the pleading aspect of this requirement. Jacksonville therefore lacks standing to divest the DISH Board of control over DISH's legal claims.[2]

Even if Jacksonville had adequately pled and proven demand futility, and thus properly initiated the action, that would not entitle Jacksonville to pursue DISH's claims even if they were meritless, costly to DISH and harmful to DISH's collateral interests. A committee of the DISH Board may retain control of the claims, provided that the appropriate standard is satisfied. Specifically, even if a plaintiff has adequately pled and proven demand futility, the

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[1] Defined terms have the same meaning ascribed to them in the DISH Network Corporation Report of the Special Litigation Committee, October 24, 2014 (the "SLC Report"), unless otherwise defined herein. Exhibits referenced herein refer to exhibits attached to the Appendix to the Report of the Special Litigation Committee of DISH Network Corporation, unless otherwise indicated.

[2] The claims should be dismissed for at least this reason. If the claims were dismissed for this reason, the DISH Board – in this case, the SLC – would then retain plenary authority to determine whether the claims should be pursued. As explained in the SLC Report, the SLC has determined that the claims should not be pursued.

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corporation's board may establish a special litigation committee to investigate whether the claims are in the best interest of the corporation. If, after its investigation, the special litigation committee determines that the claims should be dismissed, and the appropriate standard is satisfied, the courts defer to the determination of the special litigation committee and dismiss the claims.

As the Court knows, the DISH Board did establish a special litigation committee, the SLC has investigated the claims, and the SLC has determined that pursuit of the claims is not in DISH's best interest. As detailed in the SLC Report, the claims lack merit, DISH almost certainly could not prevail on them and the pursuit of the claims would be costly to DISH and would risk undermining DISH's defenses of other litigation. Regardless of whether the claims satisfy the demand requirement, they should be dismissed based upon the SLC's determination that pursuing the claims is not in DISH's best interest. By this motion, on behalf of DISH, the SLC respectfully requests that the Court defer to the SLC's determination and enter judgment dismissing the claims.

As explained in further detail herein, the Court should consider this motion under the standard applied in a majority of the states, referred to as the *Auerbach* standard.[3] Under this standard, the Court does not review the substance of the SLC's determinations. It does not supplant the SLC's business judgment with its own business judgment. It rather defers to the business judgment of the SLC if it determines that (a) the SLC is independent and (b) the procedures and methodologies employed by the SLC in its investigation were thorough. As summarized below and detailed herein, both requirements are clearly satisfied. There is no genuine dispute that the SLC is independent and that the SLC conducted a thorough investigation.

First, there is no genuine dispute that the SLC is independent. All members of the SLC are deeply experienced, serious business professionals with well-earned reputations. As each member of the SLC explains in his declaration submitted in support of this Motion, he is

[3] *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979).

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independent of all defendants and would not sacrifice his integrity by taking action adverse to DISH to please one or more of the defendants. As each member explains, he did not sacrifice his integrity in concluding that the claims are not in DISH's best interest. Jacksonville conceded that SLC member Charles M. Lillis is independent of Charles Ergen, the principal defendant on the claims: It recently urged that Lillis serve on a proposed special transaction committee to *ensure its independence* from Ergen. The prior relationships between Lillis and defendants Vogel and Cullen, the relationship between Brokaw and his son and the Ergens and the relationship between Ortolf and his daughter and DISH do not suggest a lack of independence. It is through such relationships that most individuals become corporate directors. *See, e.g., In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1442 (N.D. Cal. 1994) ("Business dealings seldom take place between complete strangers and it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent."). As detailed herein, the existence of such relationships might establish a lack of independence only if coupled with additional facts concerning the relationships showing that the SLC member could not base his decisions on the merits in the best interest of DISH. The declarations, and the SLC Report, do not reflect any such additional facts. There is no evidence of any such facts, and they do not exist.

Second, there is no genuine dispute that the procedures and methodologies employed by the SLC were thorough. The SLC conducted with the utmost seriousness and good faith an exhaustive investigation and assessment of the claims. As detailed herein, and in the SLC Report, the SLC prepared itself thoroughly for its investigation, receiving legal advice concerning its fiduciary duties and the law applicable to the claims and reviewing and analyzing the Complaint multiple times. It met numerous times to evaluate the claims, receive additional legal advice, review information received and direct counsel to obtain additional information. The SLC personally or through counsel reviewed tens of thousands of documents and hundreds of thousands of pages, including the deposition transcripts and other discovery in this litigation and relevant records from LightSquared's bankruptcy proceedings, including filings, transcripts and decisions by the Bankruptcy Court. The SLC conducted interviews of

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13 individuals, including interviews of Ergen, the DISH Board, DISH management (including DISH's strategic opportunity and investment personnel and technical personnel) and Willkie Farr & Gallagher LLP (counsel to Ergen, to SPSO (the entity through which Ergen purchased Secured Debt of LightSquared) and to LBAC (only with respect to DISH's bids for the LightSquared Assets)). Based upon the information obtained in the investigation and, with the advice of counsel concerning the applicable law, the SLC thoroughly considered each of the claims of the Complaint, deliberated repeatedly and ultimately determined that the claims were not in DISH's best interest. It directed counsel to prepare a draft report describing the SLC's determinations and reasoning. Finally, the SLC reviewed and commented upon multiple drafts of the report before approving the final SLC Report. In the SLC Report, the SLC carefully detailed – across more than 300 pages – the facts found in the investigation, the SLC's analyses of the claims and the SLC's ultimate determinations.

The SLC and its investigation easily satisfy the *Auerbach* requirements. The Court therefore should defer to the SLC's business judgment and enter judgment dismissing the claims. Even if the Court were to apply the minority standard, referred to as the *Zapata* standard, and engage in a discretionary review of the substance of the SLC's determinations, the result should be the same.[4] The SLC's determinations are straightforward and easily seen to be correct. They are supported by well-settled legal principles, unambiguous provisions of the relevant Credit Agreement and DISH's Articles of Incorporation, and the documentary record, including the well-documented record of the bankruptcy proceedings. To the extent that the SLC's analyses involve business judgments by the SLC, they are intuitive and give no cause for disagreement.

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[4] *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

BACKGROUND

A. Formation of the SLC

On September 18, 2013, DISH formed the SLC, a special litigation committee consisting of Tom A. Ortolf and George R. Brokaw.[5] The SLC was empowered to:

> (1) review, investigate and evaluate the claims asserted in the Derivative Litigation; (2) file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith; (3) determine whether it is in the best interests of the Corporation and/or to what extent it is advisable for the Corporation to pursue any or all of the claims asserted in the Derivative Litigation taking into consideration all relevant factors as determined by the Special Litigation Committee; (4) prosecute or dismiss on behalf of the Corporation any claims asserted in the Derivative Litigation; and (5) direct the Corporation to formulate and file any and all pleadings and other papers on behalf of the Corporation which the Special Litigation Committee finds necessary or advisable in connection therewith, including, without limitation, the filing of other litigation and counterclaims or cross complaints, or motions to dismiss or stay the proceedings if the Special Litigation Committee determines that such action is advisable and in the best interests of the Corporation[.][6]

On December 9, 2013, the DISH Board added Charles M. Lillis to the SLC.[7]

B. The Members of the SLC

1. Charles M. Lillis

Lillis joined the DISH Board effective November 5, 2013. (Declaration of Charles M. Lillis ¶ 4 (Nov. 17, 2014), attached hereto as **Exhibit A** (hereinafter cited as the "Lillis Declaration")) He is a member of DISH's Executive Compensation Committee, Nominating Committee and Audit Committee. (*Id.*) Lillis satisfies the independence requirements of NASDAQ[8] and the SEC[9] to serve on these Committees. (*See* SLC Report, at 36 & n.85) Any decision by the SLC requires the affirmative vote of Lillis.[10]

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[5] (Status Report, at Ex. A (Oct. 3, 2013) (attaching Resolutions Forming SLC (Sept. 18, 2013)))

[6] (*Id.*)

[7] (Minutes of the Special Meeting of the Board of Directors of DISH Network Corporation, at 5-7 (Dec. 9, 2013) (Ex. 439))

[8] (NASDAQ Listing Rules, Rule 5605(a)(2), *available at* http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F))

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The Board concluded that Lillis should serve as a member of the Board due, among other things, to his financial and managerial experience. (SLC Report, at 18; Lillis Declaration ¶ 14) Lillis currently serves on the boards of two for-profit corporations, SomaLogic, Inc. and DISH. (Lillis Declaration ¶ 6) At the appointment of the Governor of Oregon, Lillis also currently serves as the Chair of the Board of Trustees of the University of Oregon. (*Id.*) In the past, Lillis has been an advisor to Wells Fargo Bank, N.A. ("Wells Fargo"). (SLC Report, at 18; Lillis Declaration ¶ 12) Lillis was a co-founder and managing member of Castle Pines Capital LLC, a private equity concern and a financial services entity, which was acquired by Wells Fargo in 2011. (SLC Report, at 18; Lillis Declaration ¶ 12) Lillis also was previously a co-founder and principal of LoneTree Capital Management LLC ("LoneTree Capital Management"), a private equity investing group formed in 2000. (SLC Report, at 18; Lillis Declaration ¶¶ 10-11) Prior to LoneTree Capital Management, Lillis served as President, Chairman of the board of directors and Chief Executive Officer of MediaOne Group, Inc. from its inception in 1997 through its acquisition by AT&T Inc. in 2000. (SLC Report, at 18; Lillis Declaration ¶ 9) Lillis has served on the boards of the following companies: Agilera, Inc., Ascent Entertainment Grp., Charter Communications, Inc. and various affiliates, Medco Health Solutions, Inc., MediaOne Group, Inc, On Command Corporation, SUPERVALU Inc., Time Warner Entertainment Company, L.P., Williams Companies, Inc. and Washington Mutual Inc. and affiliated entities. (Lillis Declaration ¶ 7)

2. George R. Brokaw

Brokaw joined the Board effective October 7, 2013. (Declaration of George R. Brokaw ¶ 4 (Nov. 17, 2014), attached hereto as **Exhibit B** (hereinafter cited as the "Brokaw Declaration")) He serves on DISH's Audit Committee, Compensation Committee and

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[9] (Electronic Code of Federal Regulations, Part 240—General Rules and Regulations, Securities Exchange Act of 1934, § 240.10A-3 ("Listing standards relating to audit committees), *available at* http://www.ecfr.gov/cgi-bin/text-idx?node=17:4.0.1.1.1&rgn=div5#se17.4.240_110a_62)

[10] (Minutes of the Special Meeting of the Board of Directors of DISH Network Corporation, at 6-7 (Dec. 9, 2013) (Ex. 439))

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Nominating Committee. (*Id.*) Brokaw satisfies the independence requirements of NASDAQ and the SEC to serve on these Committees. (*See* SLC Report, at 36 & n.85) Brokaw brings to the Board and to the SLC years of investment banking and board experience, including prior service on an independent audit committee. (SLC Report, at 18) Specifically, Brokaw has served on the boards of directors of multiple companies, including Capital Business Credit LLC, Exclusive Resorts, LLC, Ovation LLC, Timberstar Southwest LLC, Value Place Holdings LLC and North American Energy Partners Inc. (a NYSE-listed company, where Brokaw served on the audit committee). (SLC Report, 18-19; Brokaw Declaration ¶ 7)

Brokaw also is deeply experienced in investment and mergers and acquisitions matters, having most recently served as Managing Director of Highbridge Principal Strategies, LLC, until September 30, 2013. (SLC Report, at 19; Brokaw Declaration ¶ 8) Between 2005 and 2012, Brokaw was a Managing Partner and Head of Private Equity at Perry Capital, L.L.C. ("Perry Capital"). (SLC Report, at 19; Brokaw Declaration ¶ 8) Prior to joining Perry Capital in 2005, Brokaw was Managing Director (Mergers & Acquisitions) of Lazard Frères & Co. LLC. (SLC Report, at 19; Brokaw Declaration ¶ 8) Brokaw currently is a managing partner of Trafelet Brokaw & Co., LLC. (Brokaw Declaration ¶ 6) He also serves on the boards of two-for profit public corporations – Alico, Inc. and DISH – and one not-for-profit organization – The Carter Burden Center for the Aging. (*Id.*)

3. Tom A. Ortolf

Ortolf has been a member of the DISH Board since May 2005. (Declaration of Tom A. Ortolf ¶ 9 (Nov. 16, 2014), attached hereto as **Exhibit C** (hereinafter cited as the "Ortolf Declaration")) He serves on DISH's Audit Committee, Compensation Committee and Nominating Committee. (*Id.*) Ortolf satisfies the independence requirements of NASDAQ and the SEC to serve on these Committees. (*See* SLC Report, at 36 & n.85)

Ortolf also is a member of the board of directors of EchoStar Corporation ("EchoStar"). (SLC Report, at 19; Ortolf Declaration ¶ 9) Because he is a member of EchoStar's board, and because EchoStar had a potential interest in bidding on the LightSquared Assets, Ortolf recused himself from participation on DISH's STC. (*See* SLC Report, at 19; Ortolf

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Declaration ¶ 12) EchoStar later determined that it was not interested in submitting a bid, and the DISH/EchoStar conflict that existed at the formation of the STC ceased. (*See* SLC Report, at 19; Ortolf Declaration ¶ 4)

For nearly 20 years, Ortolf has been the President of Colorado Meadowlark Corp. ("CMC"), a private investment management firm, through which Ortolf has invested in, managed and sold numerous other operating businesses. (*See* SLC Report, at 19; Ortolf Declaration ¶¶ 5, 7) More than twenty years ago, before forming CMC Ortolf was one of the first employees of EchoSphere, LLC ("EchoSphere"), and later was President of EchoSphere, which then included the business that became DISH and EchoStar. (*See* SLC Report, at 19; Ortolf Declaration ¶ 4)

C. The SLC's Investigation

The SLC's investigation spanned thirteen months, commencing in September 2013 and concluding in October 2014, with the most intense efforts before the SLC's Interim Report in November 2013 and after the filing of the Second Amended Complaint in July 2014. (*See* SLC Report, at 20-22, 32-35) Each Member of the SLC invested more than a hundred hours in the investigation. (*See* Lillis Declaration ¶ 51; Brokaw Declaration ¶ 45; Ortolf Declaration ¶ 43)

During that time, the SLC obtained a solid foundation in the law applicable to the claims. The SLC hired independent counsel, Young Conaway Stargatt & Taylor, LLP ("Young Conaway"), with a depth of expertise in corporate governance, bankruptcy, and committee investigations, and Holland & Hart LLP ("Holland & Hart"), with depth of experience in corporate governance under Nevada law and committee investigations. (*See* SLC Report, at 20; Declaration of C. Barr Flinn, Esq. (Nov. 17, 2014), attached hereto as **Exhibit D** (hereinafter cited as the "Flinn Declaration"); Declaration of J. Stephen Peek, Esq. (Nov. 17, 2014), attached hereto as **Exhibit E** (hereinafter cited as the "Peek Declaration")) The SLC received advice of counsel concerning its fiduciary duties in conducting the investigation and assessing the claims. (*See* SLC Report, at 20-21; Flinn Declaration ¶ 9; Peek Declaration ¶ 9) The SLC received legal advice concerning the law applicable to the claims.

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(*See* SLC Report, at 20-21; Flinn Declaration ¶ 9; Peek Declaration ¶ 9) The SLC also repeatedly reviewed and analyzed the Complaint and its individual claims to fully understand them. (*See* SLC Report, at 35; Lillis Declaration ¶¶ 37-39; Ortolf Declaration ¶¶ 28-30; Brokaw Declaration ¶¶ 30-32)

Throughout the investigation, the SLC met frequently in person or by telephone. It met numerous times before its Interim Report. (SLC Report, at 35) Thereafter, the SLC met formally more than seventeen times, in addition it met in multiple less formal meetings and telephone discussions, and in multiple informal meetings before or after interviews of relevant individuals. (SLC Report, at 35)[11] During these meetings, the SLC repeatedly discussed and evaluated the claims, repeatedly requested and received additional legal advice, and reviewed the information relevant to the claims that was then available, including updates on the LightSquared Bankruptcy. (*See* SLC Report, at 32-35; Lillis Declaration ¶¶ 37-43; Brokaw Declaration ¶¶ 30-36; Ortolf Declaration ¶¶ 28-34) Also, during the meetings, the SLC directed counsel to obtain additional information and prepare additional legal advice and analyses. (*See* SLC Report, at 33 n.76, 35; Lillis Declaration ¶¶ 38-39; Brokaw Declaration ¶¶ 31-32; Ortolf Declaration ¶¶ 29-30) The SLC and its counsel also monitored developments in the LightSquared Bankruptcy. (*See* SLC Report, at 33-34) Counsel for the SLC attended many of the LightSquared Bankruptcy proceedings telephonically or in person. (SLC Report, at 34)

During the course of the investigation, the SLC reviewed personally or through counsel more than 39,000 documents amounting to more than 357,000 pages. (SLC Report, at 32) The documents included all discovery provided in this litigation, including multiple deposition transcripts. (*See* SLC Report, at 32-33; Lillis Declaration ¶ 40; Brokaw Declaration ¶ 33; Ortolf Declaration ¶ 31) They also included the relevant filings, deposition transcripts, and

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[11] In addition to less formal discussions and calls with counsel, the SLC met on October 15, 2013, November 20, 2013, December 11, 2013, January 8, 2014, January 21, 2014, February 25, 2014, May 21, 2014, July 13, 2014, July 30, 2014, August 14, 2014, August 20, 2014, August 27, 2014, September 19, 2014, September 25, 2014, October 3, 2014, October 15, 2014, and October 20, 2014. (SLC Report, at 35 n.81)

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other discovery and hearing and trial transcripts in the LightSquared Bankruptcy. (SLC Report, at 32-33) The SLC or its counsel reviewed transcripts of every deposition taken in the LightSquared Bankruptcy available for use in this proceeding under the confidentiality stipulation in the LightSquared Bankruptcy,[12] including transcripts of the LightSquared Bankruptcy depositions of Thomas Cullen, Ergen, Gary Howard, Stephen Ketchum, Jason Kiser, Joseph Roddy and Mariam Sorond.[13] (SLC Report, at 33) Similarly, the SLC or its counsel also reviewed transcripts of the testimony of witnesses in the trial on the Adversary Proceeding and Plan Confirmation Proceeding, including the testimony of Thomas Cullen, Ergen, Stephen Ketchum and Jason Kiser. (*See* SLC Report, at 34) The documents reviewed by the members of the SLC specifically included the decisions of the Bankruptcy Court in the Adversary Proceeding and the Plan Confirmation Proceeding. (*See* SLC Report, at 33-34; Lillis Declaration ¶ 40; Brokaw Declaration ¶ 33; Ortolf Declaration ¶ 31) The documents also included additional documents specifically requested and obtained by the SLC for purposes of its investigation. (SLC Report, at 32-33)[14] In this regard, the SLC sought and obtained

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[12] Under the Confidentiality Agreement governing confidential material in the LightSquared Bankruptcy, that material "shall be used only for purposes of the [Ad Hoc Secured Group's] Investigation [of certain claims and defenses] and any related adversary proceeding." (SLC Report, at 33 n.77 (quoting Stipulation and Agreed Order Establishing Procedures for the Protection of Confidential Information, ¶ 11, *In re LightSquared Inc.*, No. 12-12080 (SCC) (Bankr. S.D.N.Y. Nov. 28, 2012) (Bankruptcy Docket No. 437) (Ex. 116)))

[13] Mariam Sorond's deposition was provided in redacted form to comply with the confidentiality stipulation in the LightSquared Bankruptcy. (SLC Report, at 33 n.78)

[14] (*See* Documents that the Special Litigation Committee Requests from Charles W. Ergen (served Oct. 11, 2013) (Ex. 429); Documents that the Special Litigation Committee Requests from the Directors of DISH Network Corporation (served Oct. 11, 2013) (Ex. 427); Documents that the Special Litigation Committee Requests from DISH Network Corporation (served Oct. 11, 2013) (Ex. 428); Document Requests Directed to DISH (served Mar. 5, 2014) (Ex. 456); Potential [sic] Document Requests Directed to Mr. Ergen and Related Entities (served Mar. 10, 2014) (Ex. 457); Document Requests Directed to Messrs. Goodbarn and Howard (served May 9, 2014) (Ex. 458); Revised Document Requests Directed to Mr. Ergen (Personal Capacity) and Related Entities (served June 23, 2014) (Ex. 461); Additional Document Requests Directed to DISH (served June 23, 2014) (Ex. 460); Document Requests Directed to Mr. Ketchum and Sound Point (served June 24, 2014) (Ex. 462); Document Requests Directed to Willkie Farr & Gallagher LLP (served Aug. 5, 2014) (Ex. 464); Document Requests Directed to Mr. Goodbarn (served Aug. 8, 2014) (Ex. 466)) In addition to the formally requested documents, the SLC requested and received numerous additional documents, including documents concerning additional issues, from DISH and others. (SLC Report, at 33 n.76)

additional documents from Ergen, SPSO (the entity Ergen used to purchase the Secured Debt of LightSquared), Sound Point Capital Management LP (the investment advisor to SPSO), the members of the DISH Board, DISH, LBAC and Willkie Farr & Gallagher LLP (counsel for Ergen, SPSO and LBAC, in connection with bids for the LightSquared Assets). (SLC Report, at 32-33) At the SLC's request, counsel to the SLC passed along to the SLC members for review a subset of the documents analyzed by counsel, still thousands of pages of documents. (Lillis Declaration ¶ 40; Brokaw Declaration ¶ 33; Ortolf Declaration ¶ 31) Each SLC member personally reviewed the documents that he found most important to the investigation. (Lillis Declaration ¶ 40; Brokaw Declaration ¶ 33; Ortolf Declaration ¶ 31) Members of the SLC and its counsel reviewed and evaluated all of the briefing submitted in this action in connection with Defendants' motions to dismiss in this Nevada Litigation. (SLC Report, at 35; Lillis Declaration ¶ 38; Brokaw Declaration ¶ 31; Ortolf Declaration ¶ 29)

The SLC also interviewed numerous persons that the SLC expected to have information material to the claims under investigation (other than Jacksonville and its counsel who declined to provide the requested interviews). (SLC Report, at 32, 34-35) The SLC and its counsel conducted interviews of 13 individuals. (*See* SLC Report, at 34) The persons interviewed included Ergen, Jason Kiser (who assisted Ergen in purchasing the Secured Debt), other members of the DISH Board (Joseph Clayton, James DeFranco, Cantey Ergen, Steven Goodbarn, David Moskowitz and Carl Vogel), members of DISH management (Stanton Dodge (DISH's general counsel), Thomas Cullen (DISH's head of corporate development), Jeffrey Blum (DISH's Senior Vice President and Deputy General Counsel) and Mariam Sorond (DISH's Vice President of Technology Development)) and a representative of Willkie Farr & Gallagher LLP (Rachel Strickland). (SLC Report, at 34)[15]

[15] The SLC requested an interview with a representative of LightSquared, but the request was refused. (SLC Report at 282 n.898) The SLC does not consider its inability to review the testimony from LightSquared's experts or to obtain an interview of a representative of LightSquared as material deficiencies in its investigation. (*Id.*) This is so because what matters for purposes of evaluating the claims against the Director Defendants is their good faith, loyalty, intent and knowledge. (*Id.*) This requires an understanding of only what they knew or believed when they made their decision. (*Id.*) Information concerning the thoughts of LightSquared might be relevant only to the extent that the thoughts were disclosed by

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Based upon the information obtained during the investigation and the legal advice provided by the SLC's counsel concerning the law applicable to the claims, the SLC meticulously analyzed and evaluated each of the many claims of the Complaint and their material allegations to assess the potential merit of the claims. (*See* SLC Report, at 35; Lillis Declaration ¶¶ 37-43; Brokaw Declaration ¶¶ 30-36; Ortolf Declaration ¶¶ 28-34) The SLC further discussed additional considerations that weighed for or against the assertion of the claims, including the cost and distraction to DISH of asserting the claims and the impact of pursuing the claims on DISH's interests in the Adversary Proceeding and the Colorado Litigation. (*See* SLC Report, at 4, 15-16, 327-32) The SLC collectively determined whether the pursuit of the claims would be in DISH's best interest and agreed upon the reasons for such determinations. (*See* SLC Report, at 15-16; Lillis Declaration ¶¶ 52-54; Brokaw Declaration ¶¶ 46-48; Ortolf Declaration ¶¶ 44-46) Thereafter, the SLC directed counsel to prepare a draft report consistent with the SLC's determinations and analyses. (*See* Lillis Declaration ¶ 52; Brokaw Declaration ¶ 46; Ortolf Declaration ¶ 44) The SLC then reviewed and commented upon multiple drafts of the report and ultimately approved the final text of the SLC Report, which carefully detailed in more than 300 pages the SLC's factual findings, analyses and conclusions. (*See* Lillis Declaration ¶ 52; Brokaw Declaration ¶ 46; Ortolf Declaration ¶ 44)

D. The SLC's Determinations

The SLC's determinations are set forth at length in the SLC Report, which is incorporated herein by reference. The principal bases for its conclusions are summarized in the Executive Summary of the SLC Report. Although, for thoroughness, the SLC Report provides substantial detail concerning the facts that may be relevant to the claims, the SLC's analyses of the claims are straightforward. The analyses rely primarily upon well-settled principles of law, a few important documents, such as the relevant Credit Agreement governing the Secured Debt and the disclaimer of corporate opportunities in DISH's Articles

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LightSquared to DISH and brought to the attention of the DISH Board. (*Id.*) The SLC has obtained all relevant information concerning what DISH learned from LightSquared. (*Id.*)

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of Incorporation, and the well-documented chronology of the bankruptcy proceedings, DISH's Bid, including the negotiation of the releases, and the termination of the Bid.

The analyses are not subject to reasonable dispute. Many of the Complaint's allegations are simply incorrect, frequently contradicted by the very record that the Complaint cites. For example, the Complaint's allegation that an attorney from Willkie Farr & Gallagher, LLP terminated DISH's Bid for LightSquared to serve Ergen's personal interest is directly refuted by the record that the DISH Board approved the Bid termination and the termination affirmatively harmed Ergen's personal interests.[16] Similarly, the Complaint's allegation that DISH was entitled to purchase the Secured Debt is directly refuted by the Credit Agreement's provision barring DISH from purchasing the Secured Debt, which was confirmed by a decision by the Bankruptcy Court. (*See* SLC Report, Analysis and Conclusions, Section III(A)(1)) The Complaint's allegation that a lawyer from Willkie Farr & Gallagher LLP threatened to terminate DISH's Bid if Ergen's Secured Debt was not paid in full is directly refuted by the

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[16] The Complaint alleges that the termination of DISH's $2.22 billion bid for the LightSquared assets was harmful to DISH because the assets were "worth $7.085 billion." (SAC ¶ 22) It cites the Bankruptcy Court for support. (*See* SAC ¶ 71) In a recent bench decision issued after the SLC submitted its report, however, the Bankruptcy Court made clear that it has made no determination of value:

> [B]ecause no party has the ability to predict when and if regulatory approvals will be obtained, any assumptions regarding the timing or likelihood of such approvals are purely speculative. The Court's "guidance" in this regard has been, and continues to be, that valuations of the Debtors' assets remain uncertain, despite the parties' best efforts to submit evidence to the contrary; the Court has not "endorsed" any valuation. One thing that is certain, however, is that, despite its sweeping statements regarding the value of the LP assets, Harbinger has not offered to finance, nor has it secured a third party to finance, a plan of reorganization for the Debtors. Accordingly, there remains a risk that the LP Lenders will not be repaid in full.

(Bench Decision Denying Motion to (A) Expunge the Guaranty Claim Asserted by the LP Lenders or, in the Alternative, (B) Estimate the Guaranty Claim at Zero Pursuant to 11 U.S.C. § 502(c), at 14-15, *In re LightSquared Inc.*, No. 12-12080 (SCC) (Bankr. S.D.N.Y. Oct. 30, 2014) (Bankruptcy Docket No. 1898) (attached hereto as **Exhibit F**)) An expert for the Ad Hoc Secured Group indicated that the value of the assets might not be sufficient even to pay the amount of the Secured Debt. (SLC Report, at 243 (citing Declaration of Steven Zelin in Support of the Ad hoc Secured Group of LightSquared LP Lenders' Objection to Harbinger's Motion to (A) Expunge the Guaranty Claim Asserted by the LP Lenders (Claim No. 56) or, In the Alternative, (B) Estimate the Guaranty claim at Zero Pursuant to 11 U.S.C. § 502(c), at ¶ 8, *In re LightSquared Inc.*, No. 12-120808-scc (Bankr. S.D.N.Y. Oct. 7, 2014) (Bankruptcy Docket No. 1815) (Ex. 224)))

same transcripts cited by the Complaint, in which no such threat is made. (*See* SLC Report, at 285 and Background Sections VI.F(8)(c) and VI.F(10)) As a final example, the potential harm that pursuing the claims might involve is made clear by a comparison of the Complaint's allegations to the allegations of the Adversary Proceeding and the Colorado Litigation. (*See* SLC Report, Analysis and Conclusions, Section IX) Such a comparison shows that pursuing the claims of the Complaint would involve DISH attempting to prove the same baseless allegations asserted *against* DISH in the other litigations.

ARGUMENT

I. Nevada Should Follow the Uniform Practice of Deferring to Special Litigation Committees Under Appropriate Circumstances.

No Nevada court has yet had occasion to rule on whether Nevada follows the uniform practice of other jurisdictions of permitting the board of a corporation to reassert control over derivative litigation by forming a properly empowered and properly functioning special litigation committee. This Court should now hold that, if an independent special litigation committee determines that pursuit of claims asserted derivatively is not in the best interest of the corporation following a thorough investigation, a Nevada court should enter judgment dismissing the claims. This is so for at least two reasons: *First*, courts in other states that have addressed the question have uniformly held that, if the appropriate standard is satisfied, a court should dismiss claims based upon a special litigation committee's determination that they are not in the corporation's best interest. *See Boland v. Boland*, 31 A.3d 529, 551 (Md. 2011) ("In general, the use of SLCs has spread and is now widely recognized, and it is not disputed that an SLC may recommend termination of a derivative lawsuit."); 13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations* ("Fletcher Cyc. Corp.") § 6019.50 (West 2014) ("All jurisdictions permit the board of directors to act through committees of directors and regulate the powers that may be delegated to such a committee. The board of directors generally ha[s] authority to delegate the power to terminate derivative litigation to a special litigation committee.").[17] Other aspects of Nevada's corporation law are no less deferential to

[17] *See also Roberts v. Alabama Power Co.*, 404 So. 2d 629, 636 (Ala. 1981) ("There would be no purpose served by allowing a shareholder to bring a derivative suit after a

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corporate boards than their counterparts in other states.[18] Nevada corporate law is often more deferential than that of other states.[19] It therefore would be incongruous for Nevada law to

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thorough and good faith determination that such a suit would not be in the best interest of the corporation. To allow a suit under these circumstances would be to substitute the judgment of the court and the shareholder for that of the board of directors when it is obvious that the directors are best situated to make such a determination."); *Finley v. Superior Court*, 96 Cal. Rptr. 2d 128, 132 (Cal. Ct. App. 2000) ("[W]e hold that the special litigation committee defense is legally valid in California."); *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 637 (Colo. 1999) ("The SLC conducts a thorough investigation and, depending upon its findings, may make a decision to move to dismiss the litigation. That decision is subject to review by a court, and the extent of that review varies by jurisdiction.") (internal citation omitted); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 788-89 (Del. 1981); *Millsap v. American Family Corp.*, 430 S.E.2d 385, 386 (Ga. Ct. App. 1993), *cert denied* (July 15, 1993) ("[U]nder Georgia law both before and after the adoption of the new Business Corporation Code effective July 1, 1989, special litigation committees are authorized.") (internal quotation marks omitted); *Allied Ready Mix Co., Inc. v. Allen*, 994 S.W.2d 4, 9 (Ky. 1998) (affirming application of the *Zapata* standard to dismiss claims); *Houle v. Low*, 556 N.E.2d 51, 57 (Mass. 1990) ("[W]e join the majority of courts which hold that the special litigation committee device is permissible."); *In re UnitedHealth Grp. Inc. S'holder Deriv. Litig.*, 754 N.W.2d 544, 550-51 (Minn. 2008) ("Special litigation committees thus enable a corporation to dismiss or settle a derivative suit despite a conflict of interest on the part of some or all directors."); *In re PSE & G S'holder Litig.*, 801 A.2d 295, 310 (N.J. 2002) (finding "nothing in the New Jersey Business Corporation Act . . . that would preclude the use of a special litigation committee in this setting"); *Alford v. Shaw*, 358 S.E.2d 323, 327 (N.C. 1987) ("Although the recommendation of the special litigation committee is not binding on the court, in making this determination the court may choose to rely on such recommendation."); *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1343 (Ohio Ct. App. 1990) (Ohio law "empowers an SLC to determine whether to pursue or terminate a derivative suit filed on behalf of the nonprofit corporation[.]"); *Cuker v. Mikalauskas*, 692 A.2d 1042, 1048 (Pa. 1997) (If a board's decision to terminate litigation based on a special litigation committee's investigation "was made in accordance with the appropriate standards, then the court should dismiss the derivative action prior to litigation on the merits."); *Lewis ex rel. Citizens Sav. Bank & Trust Co. v. Boyd*, 838 S.W.2d 215, 218 (Tenn. Ct. App. 1992) (affirming dismissal "after a special litigation committee appointed by the bank's board determined that pursing the litigation would not be in the bank's best interests"). Many state legislatures have provided the same by statute. *See, e.g.*, Alaska Stat. Ann. § 10.06.435(f) (West 2014); Ariz. Rev. Stat. Ann. § 10-3634 (2014); Conn. Gen. Stat. Ann. § 33-724 (West 2014); D.C. Code Ann. § 29-305.54 (2014); Fla. Stat. Ann. § 607.07401(3) (West 2014); Ga. Code Ann. § 14-2-744 (West 2014); Haw. Rev. Stat. § 414-175 (West 2014); Idaho Code Ann. § 30-1-744 (West 2014); Ind. Code Ann. § 23-1-32-4(a) (West 2014); Iowa Code Ann. § 490.744 (West 2014); Mass. Gen. Laws Ann. ch. 156D, § 7.44 (West 2014); Me. Rev. Stat. Ann. tit. 13-C. § 755 (2014); Mich. Comp. Laws Ann. § 450.1495 (West 2014); Miss. Code Ann. § 79-4-7.44 (West 2014); Mont. Code Ann. § 35-1-545 (West 2014); Neb. Rev. Stat. Ann. § 21-2074 (West 2014); N.H. Rev. Stat. Ann. § 293-A:7.44 (2014); N.C. Gen. Stat. Ann. § 55-7-44 (West 2014); R.I. Gen. Laws Ann. § 7-1.2-711(e) (West 2014); S.D. Codified Laws § 47-1A-744, 47-1A-744.1 (2014); Tex. Bus. Orgs. Code Ann. § 21.558 (West 2014); Utah Code Ann. § 16-10a-740(4) (West 2014); Va. Code Ann. § 13.1-672.4 (West 2014); Wis. Stat. Ann. § 180.0744 (West 2014); Wyo. Stat. Ann. § 17-16-744 (West 2014).

[18] For example, in Nevada, as in other states, directors' decisions are "protected by the business judgment rule's presumption that the directors acted in good faith, with knowledge of the pertinent information, and with an honest belief that the action would serve the

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provide less deference to the business judgment of a special litigation committee than the deference provided by the laws of other states.

Second, there are good reasons for dismissing claims based upon a special litigation committee's determination that the claims should not proceed, where the appropriate standard for independence and process is satisfied. "[U]nder Nevada's corporations laws, a corporation's 'board of directors has full control over the affairs of the corporation.'" *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178 (2006) (quoting NRS 78.120(1)). Therefore, "[i]n managing the corporation's affairs, the board of directors may generally decide whether to take legal action on the corporation's behalf." *Shoen*, 122 Nev. at 632, 137 P.3d at 1179; *see also In re Amerco Deriv. Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 705 (2011) ("Among the matters entrusted to a corporation's directors is the decision to litigate—or not to litigate—a claim by the corporation against third parties."). Nevada law further permits a corporate board to delegate its authority to a committee of the board, such as a special litigation committee. *See* NRS 78.125 (providing that a board "may designate one or more committees which, to the extent provided in the resolution or resolutions or in the bylaws of

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corporation's interests." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 636, 137 P.3d 1171, 1181 (2006); *see also Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979) ("[The business judgment] doctrine bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.").

[19] For example, in Nevada, a derivative plaintiff must both plead and prove demand futility in order to proceed with litigation, but in other states, a derivative plaintiff may proceed with litigation upon merely pleading demand futility. *Compare Shoen v. SAC Holding Corp.*, 122 Nev. 621, 645, 137 P.3d 1171, 1187 (2006) ("If the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue."), *with Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) ("If the Court determines that the pleaded facts create a reasonable doubt that a majority of the board could have acted independently in responding to the demand, the presumption is rebutted for pleading purposes and demand will be excused as futile."). Additionally, in Nevada, "to hold 'a director or officer . . . individually liable,' the shareholder must prove that the director's breach of his or her fiduciary duty of loyalty 'involved intentional misconduct, fraud or a knowing violation of law.'" *In re Amerco Deriv. Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d 681, 701 (2011) (quoting NRS 78.138(7)(b)). In other states, the shareholder need only prove a breach of the duty of loyalty. *See, e.g.*, 8 *Del. C.* § 102(b)(7) (providing that Delaware corporations "shall not eliminate or limit the liability of a director . . . [f]or any breach of the director's duty of loyalty to the corporation or its stockholders").

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the corporation, have and may exercise the powers of the board of directors in the management of the business and affairs of the corporation."). Even after a derivative plaintiff has satisfied the demand requirement and thereby properly initiated the litigation on behalf of the corporation, the board should retain the authority to dismiss the litigation, if the appropriate standard is satisfied.

> There would be no purpose served by allowing a shareholder to bring a derivative suit after a thorough and good faith determination that such a suit would not be in the best interest of the corporation. To allow a suit under those circumstances would be to substitute the judgment of the court and the shareholder for that of the board of directors when it is obvious that the directors are best situated to make such a determination.

Roberts v. Alabama Power Co., 404 So. 2d 629, 636 (Ala. 1981).

> Guiding the SLC in its investigative and evaluative process is the principle that the continuation of the shareholder derivative suit may not be in the best interest of the corporation. The SLC investigation and report provide the corporation with an important tool to rid itself of meritless or harmful litigation.

Curtis v. Nevens, 31 P.3d 146, 151 (Colo. 2001) (internal citations omitted); *see also* 13 Fletcher Cyc. Corp. § 6019.50 (West 2014) ("The litigation committee provides the corporation with an important tool to rid itself of meritless or harmful litigation and strike suits."); *In re UnitedHealth Grp. Inc. S'holder Deriv. Litig.*, 754 N.W.2d 544, 557 (Minn. 2008) ("[A]llowing courts to second-guess the decision of an SLC undermines the SLC process itself, denying corporations a vital means of avoiding strike suits and other abusive derivative litigation."); *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786-87 (Del. 1981) ("If, on the other hand, corporations are unable to rid themselves of meritless or harmful litigation and strike suits, the derivative action, created to benefit the corporation, will produce the opposite, unintended result.").

II. The Court Should Apply the *Auerbach* Standard.

As a corollary to never having considered whether a special litigation committee may obtain dismissal of derivative litigation under Nevada law, no Nevada court has yet addressed the appropriate standard under Nevada law for reviewing a special litigation committee's

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decision that claims asserted on behalf of a corporation should be dismissed.[20] The states that have addressed this issue have generally applied one of two standards: (1) the *Auerbach* standard, which is named after the decision by the New York Court of Appeals, in which the standard was first articulated, *Auerbach v. Bennett*, 393 N.E.2d 994 (N.Y. 1979), or (2) the *Zapata* standard, which is named after the decision by the Delaware Supreme Court, in which that standard was first articulated, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981).

Under the *Auerbach* standard, a court defers to the business judgment of the special litigation committee that the claims should be dismissed, if the court determines that (a) the special litigation committee is independent and (b) its procedures and methodologies were not so deficient as to demonstrate a lack of good faith in the investigation.[21] The *Auerbach*

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[20] The United States District Court for the District of Massachusetts assumed that Nevada would apply the *Zapata* standard because Nevada has adopted aspects of Delaware's approach to a demand futility analysis. *See Sarnacki ex rel. Smith & Wesson Holding Corp. v. Golden*, 4 F. Supp. 3d 317, 323 (D. Mass. 2014) (citing *In re Amerco Deriv. Litig.*, 252 P.3d at 697). Other aspects of Nevada law concerning derivative litigation, such as Nevada's requirement of an evidentiary hearing to establish demand futility and Nevada's statutory business judgment presumption, however, differ significantly from Delaware law. As discussed in the text below, *see infra* p. 20 to 25, there are at least four reasons that Nevada should adopt the *Auerbach* standard, none of which were considered by the federal court. Though the federal court applied the *Zapata* standard, it declined to apply the second step, explaining: "As overwhelming evidence supports the conclusion that the SLC was independent and acted reasonably and in good faith, the court will not get into any separate independent exercise of business judgment as contemplated in the second, optional analytical step." *Id.* at 327. The United States District Court for the District of Nevada applied *Zapata* to hold that it was appropriate to stay the pending derivative litigation pending a special litigation committee's investigation. *Moradi v. Adelson*, No. 2:11–cv–00490–MMD–RJJ, 2012 WL 3687576 (D. Nev. Aug. 27, 2012). It did not address the standard of review applicable to a special litigation committee's motion to dismiss.

[21] The Model Business Corporation Act (the "MBCA") provides that "[a] derivative proceeding shall be dismissed by the court on motion by the corporation if one of the groups specified in subsection (b) . . . has determined in good faith, after conducting a reasonable inquiry upon which its conclusions are based, that the maintenance of the derivative proceeding is not in the best interests of the corporation." Model Bus. Corp. Act § 7.44 (2013 Revision). Subsection (b) provides that such a determination may be made by "a majority vote of a committee consisting of two or more qualified directors appointed by majority vote of qualified directors present at a meeting of the board of directors, regardless of whether such qualified directors constitute a quorum." *Id.* § 7.44(b)(2). Like the *Auerbach* standard, "section 7.44 does not authorize the court to review the reasonableness of the determination to reject a demand or seek dismissal." *Id.* § 7.44 cmt. 2. "This contrasts with the approach in some states that permits a court, at least in some circumstances, to review the merits of the determination (*see Zapata Corp. v. Maldonado*, 430 A.2d 779, 789 (Del. 1981)) and is similar to the approach taken in other states (*see Auerbach v. Bennett*, 393 N.E.2d 994, 1002-03 (N.Y. 1979))." *Id.*

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standard reflects an application of the business judgment rule. Under this standard, the court does not second guess the substantive merit of a special litigation committee's decision that claims should be dismissed. As the New York Court of Appeals explained in *Auerbach*,

> While the substantive aspects of a decision to terminate a shareholders' derivative action against defendant corporate directors made by a committee of disinterested directors appointed by the corporation's board of directors are beyond judicial scrutiny under the business judgment doctrine, the court may inquire as to the disinterested independence of the members of that committee and as to the appropriateness and sufficiency of the investigative procedures chosen and pursued by the committee.

393 N.E.2d at 996.

As to the inquiry concerning the procedures and methodologies employed by the special litigation committee, the *Auerbach* court explained that the procedures and methodologies must not be so inadequate as to demonstrate a lack of good faith, such that the *business judgment doctrine* would not apply:

> While the court may properly inquire as to the adequacy and appropriateness of the committee's investigative procedures and methodologies, it may not under the guise of consideration of such factors trespass in the domain of business judgment. At the same time those responsible for the procedures by which the business judgment is reached may reasonably be required to show that they have pursued their chosen investigative methods in good faith. . . . [The special litigation committee] may be expected to show that the areas and subjects to be examined are reasonably complete and that there has been a good-faith pursuit of inquiry into such areas and subjects. What has been uncovered and the relative weight accorded in evaluating and balancing the several factors and considerations are beyond the scope of judicial concern. Proof, however, that the investigation has been so restricted in scope, so shallow in execution, or otherwise so *pro forma* or halfhearted as to constitute a pretext or sham, consistent with the principles underlying the application of the business judgment doctrine, would raise questions of good faith or conceivably fraud which would never be shielded by that doctrine.

393 N.E.2d at 1002-03.

Under the *Zapata* standard, a court similarly reviews whether the special litigation committee was independent and whether its procedures and methodologies were so inadequate as to demonstrate a lack of good faith. *Zapata*, 430 A.2d at 789 ("If the Court determines either that the committee is not independent or has not shown reasonable bases for its conclusions, or, if the Court is not satisfied for other reasons relating to the process, including but not limited to the good faith of the committee, the Court shall deny the corporation's

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motion."). However, unlike the *Auerbach* standard, if the court concludes that the special litigation committee was independent and employed good faith procedures and methodologies, the court may nonetheless undertake a discretionary review of the substantive merit of the special litigation committee's decision. *Zapata*, 430 A.2d at 789 ("If, however, the Court is satisfied under Rule 56 standards that the committee was independent and showed reasonable bases for good faith findings and recommendations, the Court may proceed, in its discretion, to the next step."). If the court elects to do so, under the *Zapata* standard, the court may apply its own business judgment to determine whether the claims should be dismissed. *Id.* ("The Court should determine, applying its own independent business judgment, whether the motion should be granted."). By permitting the court to supplant the business judgment of the special litigation committee with its own business judgment, the *Zapata* standard departs from the business judgment doctrine. *See Auerbach*, 393 N.E.2d at 1002 (A special litigation committee's "substantive decision falls squarely within the embrace of the business judgment doctrine, involving as it did the weighing and balancing of legal, ethical, commercial, promotional, public relations, fiscal and other factors familiar to the resolution of many if not most corporate problems. . . . To permit judicial probing of such issues would be to emasculate the business judgment doctrine as applied to the actions and determinations of the special litigation committee. Its substantive evaluation of the problems posed and its judgment in their resolution are beyond our reach."); *see also In re Walt Disney Co. Deriv. Litig.*, 907 A.2d 693, 746 (Del. Ch. 2005) ("The business judgment rule serves to protect and promote the role of the board as the ultimate manager of the corporation. Because courts are ill equipped to engage in *post hoc* substantive review of business decisions, the business judgment rule operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.") (internal quotation marks and citations omitted), *aff'd*, *Brehm v. Eisner*, 906 A.2d 27 (Del. 2006).

This Court should hold that the *Auerbach* standard applies under Nevada law and apply the *Auerbach* standard in this case in reviewing the SLC's determination that the claims in this litigation should be dismissed for four reasons:

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First, the *Auerbach* standard is the majority rule. It has been adopted in a substantial majority of the states.[22] The *Zapata* standard has been adopted in only a minority of the

[22] *See, e.g.*, *Roberts v. Alabama Power Co.*, 404 So. 2d 629, 632 (Ala. 1981) ("Upon finding that a special committee of disinterested directors has determined in good faith and after a thorough investigation that it is not in the company's best interests to allow an action to proceed, [the 'business judgment' rule] would not allow the courts to interfere with the committee's determination.") (internal quotation marks and citation omitted); *Desaigoudar v. Meyercord*, 133 Cal. Rptr. 2d 408, 411-12 (Cal. Ct. App. 2003) ("We hold that judicial review of the decision of a special litigation committee is governed by the business judgment rule. When asserted in connection with a summary judgment motion the material issues of fact relevant to the special litigation committee defense are the independence of the committee members and their good faith in conducting their investigation. Neither the merits of the derivative claim nor the substance of the committee's decision to reject the claim is subject to judicial review at this stage."); *Hirsch v. Jones Intercable, Inc.*, 984 P.2d 629, 637-38 (Colo. 1999) ("We now adopt the New York rule as the standard for reviewing an SLC's decision in Colorado. We agree with the Court of Appeals of New York that because most courts are ill equipped and infrequently called on to evaluate what are and must be essentially business judgments, . . . the role of a Colorado trial court in reviewing an SLC's decision regarding derivative litigation should be limited to inquiring into the independence and good faith of the committee.") (internal quotation marks and citations omitted); *In re United Health Group Inc. S'Holder Deriv. Litig.*, 754 N.W.2d 544, 559 (Minn. 2008) ("Finding nothing in either our statutes or our case law that compels the level of scrutiny contemplated in *Zapata*, and concluding that the reasoning of *Auerbach* is more persuasive, we adopt a test modeled on the *Auerbach* standard."), 561 ("Under the Minnesota business judgment rule, a court must defer to an SLC's decision to settle a shareholder derivative action if the proponent of that decision demonstrates that (1) the members of the SLC possessed a disinterested independence and (2) the SLC's investigative procedures and methodologies were adequate, appropriate, and pursued in good faith."); *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1343 (Ohio Ct. App. 1990) ("[T]he courts will defer to [the SLC's] judgment where: (1) the SLC is comprised of independent, disinterested trustees; (2) the SLC conducts its inquiry in good faith; and (3) the committee's recommendation is the product of a thorough investigation."). Additionally, Indiana adopted a statute expressly "follow[ing] cases such as *Auerbach*," and many other jurisdictions have adopted statutes based on Section 7.44 of the MBCA, which as described in footnote 21 above, adopts an *Auerbach*-like standard. Ind. Code Ann. § 23-1-32-4(a), cmt. (c) (West 2014); *see also* Ariz. Rev. Stat. Ann. § 10-3634 (2014); Conn. Gen. Stat. Ann. § 33-724 (West 2014); D.C. Code Ann. § 29-305.54 (2014); Haw. Rev. Stat. § 414-175 (West 2014); Idaho Code Ann. § 30-1-744 (West 2014); Iowa Code Ann. § 490.744 (West 2014); Me. Rev. Stat. Ann. tit. 13-C. § 755 (2014); Mich. Comp. Laws Ann. § 450.1495 (West 2014); Miss. Code Ann. § 79-4-7.44 (West 2014); Mont. Code Ann. § 35-1-545 (West 2014); Neb. Rev. Stat. Ann. § 21-2074 (West 2014); N.H. Rev. Stat. Ann. § 293-A:7.44 (2014); N.C. Gen. Stat. Ann. § 55-7-44 (West 2014); R.I. Gen. Laws Ann. § 7-1.2-711(e) (West 2014); S.D. Codified Laws § 47-1A-744, 47-1A-744.1 (2014); Tex. Bus. Orgs. Code Ann. § 21.558 (West 2014); Utah Code Ann. § 16-10a-740(4) (West 2014); Va. Code Ann. § 13.1-672.4 (West 2014); Wis. Stat. Ann. § 180.0744 (West 2014); Wyo. Stat. Ann. § 17-16-744 (West 2014). Maryland has rejected the *Zapata* approach and adopted a standard it described as "enhanced *Auerbach*." *Boland v. Boland*, 31 A.3d 529, 560-61 (Md. 2011).

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states.[23] A number of judicial decisions that adopted the *Zapata* approach have been replaced by statutes that require application of a more deferential standard.[24]

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[23] *See, e.g.*, Alaska Stat. Ann. § 10.06.435(f) (West 2014) ("[D]isinterested, noninvolved directors acting as the board or a duly charged board committee may petition the court to dismiss the plaintiff's action on grounds that in their independent, informed business judgment the action is not in the best interests of the corporation. . . . If the court is satisfied that the petitioners are disinterested, independent, and informed it shall then exercise an independent appraisal of the plaintiff's action to determine whether, considering the welfare of the corporation and relevant issues of public policy, it should dismiss the action."); *Allied Ready Mix Co. v. Allen*, 994 S.W.2d 4, 9 (Ky. Ct. App. 1998) ("[T]he circuit court correctly applied the test from *Zapata* which includes independence to charges ten through twelve, because demand was excused based upon futility."). A federal court predicted that "Illinois would, in the proper case, apply the rule from *Zapata*" where there was no state law on point. *Weiland v. Illinois Power Co.*, No. 89-1088, 1990 WL 267364, at *13 (C.D. Ill. Sept. 17, 1990).

[24] *E.g.*, *compare Joy v. North*, 692 F.2d 880, 891 (2d Cir. 1982) (predicting that "Connecticut would adopt a similar rule" to the *Zapata* standard), *with* Conn. Gen. Stat. Ann. § 33-724 (West 2014) (adopting the MBCA's *Auerbach*-like standard); *compare Millsap v. American Family Corp.*, 430 S.E.2d 385, 387 (Ga. Ct. App. 1993) (Prior to 1989 Code, Georgia "appl[ied] the test of *Zapata*."), *with* Ga. Code Ann. § 14-2-744 (West 2014) (described in its official comment as "a compromise between the two principal lines of cases in this area[,] . . . [t]he Code does not clarify what grounds, beyond a determination made in good faith, after reasonable investigation, by a disinterested body, will be considered by a court"); *compare Watts v. Des Moines Register & Tribune*, 525 F. Supp. 1311, 1325 (S.D. Iowa 1981) (predicting "that the Iowa Supreme Court would apply the more stringent version of the deferential business judgment rule expounded by the Delaware Supreme Court in *Zapata*"), *with* Iowa Code Ann. § 490.744 (West 2014) (adopting the MBCA's *Auerbach*-like standard); *compare Alford v. Shaw*, 358 S.E.2d 323, 326 (N.C. 1987) ("We conclude from our analysis of the pertinent statutes that a modified *Zapata* rule, requiring judicial scrutiny of the merits of the litigation committee's recommendation, is most consistent with the intent of our legislature and is therefore the appropriate rule to be applied in our courts."), *with* N.C. Gen. Stat. Ann. § 55-7-44 (West 2014) (adopting the MBCA's *Auerbach*-like standard); *compare Abella v. Universal Leaf Tobacco Co.*, 546 F. Supp. 795, 799 (E.D. Va. 1982) (determining "that the *Zapata* approach adequately safeguards the competing interests at stake and that Virginia has no need for, nor would it follow, a more restrictive approach"), *with* Va. Code Ann. § 13.1-672.4 (West 2014) (adopting the MBCA's *Auerbach*-like standard with minor modification). Other jurisdictions have adopted standards that "steer a middle ground" between the *Auerbach* and *Zapata* standards. *See, e.g.*, Mass. Gen. Laws Ann. ch. 156D, § 7.44, cmt. 2 (West 2014) ("Section 7.44 adopts neither of the so-called New York or Delaware approaches to judicial scrutiny of the decisions of special litigation committees or other decision-makers. . . . Section 7.44 steers a middle ground, applying the business judgment rule when a majority of the board is independent[,] . . . with the burden of proof being on the plaintiff, and the "reasonable and principled" review standard[,] . . . with the burden of proof being on the corporation, when a majority of the board is not independent."); Fla. Stat. Ann. § 607.07401(3) (West 2014) (based on the MBCA but providing for discretionary rather than mandatory dismissal with the language "[t]he court *may dismiss*"); Ga. Code Ann. § 14-2-744 (West 2014) (same); *House v. Edmondson*, No. W2005-00092-COA-R3-CV, 2006 WL 1328810, at *4 (Tenn. Ct. App. May 16, 2006) ("[W]hen a special litigation committee is utilized, the party seeking to dismiss a derivative suit based upon the recommendation of a special litigation committee has the burden of proving the following to the trial court: (1) the special litigation committee's independence; (2) good faith on the part of the special litigation committee; (3) the special litigation committee's procedural fairness; and (4) the soundness of the special litigation committee's

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Second, the *Zapata* standard has been criticized by courts and legal commentators. As one article explained,

> The problem with the *Zapata* test is clear on its face: it is so open-ended, so complicated, and so subject to judicial whimsy—which it seems to encourage—that such motions can never be the simple, inexpensive and straightforward proceedings which a corporation needs if it is going to eliminate detrimental derivative litigations in a rational way. *Zapata* invites endless open-ended pretrial proceedings into such elusive issues as whether the board's action satisfies the "spirit" of step 1; whether termination would be "premature" because the action is "deserving of further consideration"; whether the corporate interest is "compelling"; whether the derivative action is "nonfrivolous"; and whether "matters of law and public policy" outweigh the corporate interest. . . .
>
> There can be no escaping the conclusion that step 2 of the *Zapata* rule implicates everything the business judgment rule was created to avoid. The very concept that courts have independent business judgment is, in fact, a contradiction of over 250 years of legal development.

Dennis J. Block & Adam Prussin, *The Business Judgment Rule and Shareholder Derivative Actions: Viva Zapata?*, 37 Bus. Law. 27, 62-63 (1981). The Supreme Court of Minnesota similarly criticized the *Zapata* standard in concluding that "[t]he reasons for adopting a test modeled on the *Auerbach* standard are numerous and compelling":

> [E]ven if courts were qualified to make business judgments, it is unclear how a court's "business judgment" should be defined for purposes of reviewing an SLC's decision. By its very nature, an individual's business judgment is a unique amalgamation of many factors, including but not limited to personal experience, education, and general business philosophy. The adoption of a nebulous "business judgment" standard allowing for unpredictable results would endorse a standard that is, in fact, no standard at all. Regardless of the good faith and independence of an SLC, the *Zapata* rule allows a court to set aside an SLC's decision based on little more than a disagreement concerning matters of business administration.

In re UnitedHealth Grp. Inc. S'holder Deriv. Litig., 754 N.W.2d at 556; *see also Cuker v. Mikalauskas*, 692 A.2d 1042, 1049 (Pa. 1997) ("Delaware law permits a court in some cases ('demand excused' cases) to apply its own business judgment in the review process when deciding to honor the directors' decision to terminate derivative litigation. In our view, this is a defect which could eviscerate the business judgment rule[.]").

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conclusions and recommendations."), *aff'd sub nom. House v. Estate of Edmondson*, 245 S.W.3d 372 (Tenn. 2008).

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Third, even courts applying the *Zapata* standard rarely use the discretionary, second, substantive review step of the *Zapata* standard. *See Atkins v. Topp Comm, Inc.*, 874 So. 2d 626, 628 (Fla. Dist. Ct. App. 2004) ("[E]ven under *Zapata*, the decision whether to apply the second step is a discretionary one, applicable only in rare circumstances."); *Kaplan v. Wyatt*, 484 A.2d 501, 520 (Del. Ch. 1984) ("I find that the Special Litigation Committee . . . has carried its burden and demonstrated that there is a reasonable basis for its recommendation that it is in the best interests of the corporation to have the derivative suit of the plaintiff dismissed. Having reached the foregoing conclusion, I find it unnecessary to proceed to the discretionary, second-step analysis authorized by *Zapata*."), *aff'd*, 499 A.2d 1184 (Del. 1985). As the Supreme Court of Delaware has explained, "[p]roceeding to the *Zapata* analysis is wholly within the discretion of the court[.]" *Kaplan v. Wyatt*, 499 A.2d 1184, 1192 (Del. 1985); *see also id.* ("[T]he Court of Chancery did not abuse its discretion when it declined to proceed to this step.").

Finally, it would be incongruous for Nevada to adopt the standard that is the least deferential to a decision of a board committee, the *Zapata* standard, when Nevada otherwise has adopted standards that are among the most deferential to corporate boards. For example, in contrast to most other states, Nevada's business judgment presumption is statutory. NRS 78.138(3) ("Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation."). The Nevada Legislature has therefore made clear the importance that Nevada places on respecting the business judgments of the boards of Nevada's corporations. In other states, the business judgment presumption is a feature of the common law. *See, e.g.*, *Zapata*, 430 A.2d at 782 ("The 'business judgment' rule is a judicial creation that presumes propriety, under certain circumstances, in a board's decision."); *Lewis ex rel. Citizens Sav. Bank & Trust Co. v. Boyd*, 838 S.W.2d 215, 220 (Tenn. Ct. App. 1992) ("Tennessee's courts have consistently followed a noninterventionist policy with regard to internal corporate matters. . . . These decisions squarely align Tennessee with the jurisdictions recognizing and following the 'business judgment rule.'"). Also, in contrast to other states, the Nevada Supreme Court has determined

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that, before a prospective derivative plaintiff may proceed with litigation on behalf of the corporation, it must not only *plead* demand futility, but also *prove* demand futility at an evidentiary hearing. *See Shoen*, 122 Nev. at 645, 137 P.3d at 1187 ("If the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue."). The Nevada Supreme Court has therefore made clear the importance that it places on a corporate board's prerogative to determine whether claims should be asserted on behalf of the corporation. In other states, a prospective derivative plaintiff need only plead demand futility before it may proceed; there is no requirement that it must also prove demand futility at an evidentiary hearing before it may proceed. *See, e.g., Beam v. Stewart*, 845 A.2d 1040, 1049 (Del. 2004) ("If the Court determines that the pleaded facts create a reasonable doubt that a majority of the board could have acted independently in responding to the demand, the presumption is rebutted for pleading purposes and demand will be excused as futile.").

This Court therefore should apply the *Auerbach* standard. If it determines that the SLC was independent and that its procedures and methodologies were not so inadequate as to demonstrate a lack of good faith, it should defer to the SLC's business judgment and enter judgment dismissing the claims.

III. The Applicable Burdens

The SLC does not believe that the allocation of the burden will affect the outcome of this motion because the SLC believes that is should prevail on the motion regardless of how the burden is allocated. Nonetheless, to assist the Court, the SLC sets forth below the authority relevant to the burden question. As explained below, most states place on the SLC the substantive burden to establish that the SLC is independent and conducted a good faith investigation. However, as explained further below, this does not appear to be possible in Nevada due to Nevada's statutory presumption by which the members of the SLC are presumed to have acted in good faith and on an informed basis.

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When considering a motion to defer to a special litigation committee's determination that claims should not be pursued, courts most frequently have placed on the special litigation committee the substantive burden on the issues relevant to the motion, the independence of the committee and the good faith thoroughness of its investigation. Having allocated to the special litigation committee the substantive burden, such courts have then placed on the committee an initial procedural burden like that placed on a party moving for summary judgment on issues for which the moving party bears the substantive burden. The courts therefore have required the special litigation committee to come forward with evidence showing its independence and the good faith thoroughness of its procedures and methodologies. *See, e.g., Niesar v. Zantaz, Inc.*, No. A111448, 2007 WL 2330789, at *11 (Cal. Ct. App. Aug. 16, 2007) ("Defendants clearly met their initial burden of producing evidence to establish the adequate investigation element of the special litigation committee defense."); *Desaigoudar v. Meyercord*, 133 Cal. Rptr. 2d 408, 423 (Cal. Ct. App. 2003) (On a motion for summary judgment, "defendants met their burden of producing evidence to establish the independence of the Committee and the appropriateness of its investigation.").

Once the special litigation committee comes forward with such evidence, the procedural burden then shifts to the derivative plaintiff to come forward with evidence sufficient to create a genuine issue of material fact as to the special litigation committee's independence and the good faith thoroughness of its procedures and methodologies. *See Auerbach*, 393 N.E.2d at 1003 ("In addition to the issue of the disinterested independence of the special litigation committee, addressed above, the disposition of the present appeal turns, then, on whether on defendants' motions for summary judgment predicated on the investigation and determination of the special litigation committee, [intervenor] by tender of evidentiary proof in admissible form has shown facts sufficient to require a trial of any material issue of fact as to the adequacy or appropriateness of the *modus operandi* of that committee or has demonstrated acceptable excuse for failure to make such tender."); *Desaigoudar*, 133 Cal. Rptr. 2d at 423-24 (Plaintiffs' opposition, which "generally disputed defendants' material facts" and "argued that the Committee was not disinterested, that the

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Committee's counsel was not independent, and that the investigation was not adequate," "was both procedurally and substantively deficient."); *Niesar*, 2007 WL 2330789, at *13 ("Plaintiff has not carried her burden of showing the existence of a triable issue of material fact as to the adequacy of the investigation.").

If the plaintiff does not come forward with such evidence, in the cases applying the *Auerbach* standard, the courts defer to the business judgment of the SLC and enter judgment dismissing the claims. *See, e.g.*, *Miller v. Bargaheiser*, 591 N.E.2d 1339, 1345 (Ohio Ct. App. 1990) ("We have already said that there is insufficient evidence to undermine the committee report. . . . Thus, the court was correct to grant summary judgment in favor of all the individual defendants as a matter of law."); *Desaigoudar*, 133 Cal. Rptr. 2d at 424 ("[G]iven that plaintiffs made no evidentiary showing to support either their opposition or their request for a continuance, the trial court did not err in granting the motion for summary judgment."); *Niesar*, 2007 WL 2330789, at *17 (affirming summary judgment where plaintiff "failed to raise a triable issue of material fact as to the adequacy of the investigation").[25]

Under Nevada law, however, placing the initial burden on the SLC to come forward with evidence that it is independent and acted in good faith on an informed basis would appear to violate the statutory presumption of NRS 78.138(3). It provides, "Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and

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[25] If the special litigation committee discharges its burden, but the plaintiff comes forward with evidence sufficient to create a genuine issue of material fact, the courts should resolve the factual dispute by means of an evidentiary hearing on the issue on which it has created a genuine issue of material fact, independence and/or the thoroughness of the investigation. *See Day v. Stascavage*, 251 P.3d 1225, 1229 (Colo. App. 2010) ("Any factual disputes must be resolved by a court after an evidentiary hearing."); *Houle v. Low*, 556 N.E.2d 51, 59 (Mass. 1990) ("Because we cannot say that there is no genuine issue as to the committee's bias, we reverse the summary judgment for the corporate defendant, and we remand the case for an evidentiary hearing before a judge without a jury to determine whether the committee [] was independent and unbiased. If the corporate defendant fails to sustain its burden of proof in that regard, the case should proceed to trial."). Alternatively, a court "may order evidentiary hearings *before* ruling on a motion to terminate," treating the motion like a settlement hearing. *Johnson v. Hui*, 811 F. Supp. 479, 485 n.5 (N.D. Cal. 1991); *see also Janssen v. Best & Flanagan*, 662 N.W.2d 876, 890 n.6 (Minn. 2003) (noting a court's "authority to continue a summary judgment motion to more fully develop the record"). There should be no need for an evidentiary hearing here because there is no evidence sufficient to create a genuine issue of material fact on the independence of the SLC and the thoroughness of its investigation.

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with a view to the interests of the corporation." NRS 78.138(3). There is no exception to the statutory presumption for decisions made by directors in their capacities as members of a special litigation committee. Because the SLC is statutorily presumed to have acted in good faith and on an informed basis, the initial burden cannot be placed on the SLC to establish these points. In the absence of evidence to the contrary, the statutory presumption should control the question of whether the SLC acted "in good faith, on an informed basis and with a view to the interests of the corporation." To place the initial burden on the SLC to establish these points would render the statutory presumption a nullity. Due to the statutory presumption, Jacksonville should bear the substantive burden to rebut the statutory presumption.

Because Jacksonville should bear the substantive burden to rebut the statutory presumption, the only burden that should be placed on the SLC is the procedural burden to point out that Jacksonville lacks evidence to rebut the presumption. This is the only burden that may be placed upon a movant for summary judgment, when the motion is based upon issues for which the movant does not bear the substantive burden. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) ("The manner in which each party may satisfy its burden of production depends on which party will bear the burden of persuasion on the challenged claim at trial."); *Id.* at 602-03, 134 ("[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by . . . 'pointing out . . . that there is an absence of evidence to support the nonmoving party's case.'") (quoting *Celotex Corp v. Catrett*, 477 U.S. 317, 325 (1986)). Once the SLC has discharged this limited burden, Jacksonville must come forward with evidence sufficient to create a genuine issue of material fact as to whether the presumption may be rebutted. *Id.* at 603 ("In such instances, in order to defeat summary judgment, the nonmoving party must transcend the pleadings and . . . introduce specific facts that show a genuine issue of material fact."). Jacksonville therefore must come forward with evidence sufficient to create a genuine issue of material fact as to the independence of the SLC and the good faith thoroughness of its investigation.

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This burden issue presented by the statutory presumption does not come up in most other jurisdictions. As explained above, in most other jurisdictions, the business judgment presumption is not statutory, but is a creation of the common law. (*See supra.* p. 24) The courts in these other jurisdictions therefore have not been bound by any statutory placement of the burden. In modifying the business judgment rule's presumption of good faith, informed action, these courts modified only common-law.[26] In contrast, placing the burden on a special litigation committee in Nevada would impermissibly modify statutory law. Because the Nevada Supreme Court has not addressed this issue, the SLC expresses less than complete certainty on this issue because, as explained in the footnote, the only state of which the SLC is aware that has a similar statutory presumption has nonetheless placed the burden on the SLC, albeit without a satisfactory explanation.[27]

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[26] *See, e.g.*, *Zapata*, 430 A.2d at 788 ("The corporation should have the burden of proving [a special litigation committee's] independence, good faith and a reasonable investigation, rather than presuming independence, good faith and reasonableness."); *Lewis*, 838 S.W.2d at 225 ("The party seeking dismissal of a derivative suit based on a special litigation committee's recommendation has the burden of satisfying the court of the committee's independence, good faith, and procedural fairness, as well as the soundness of the committee's conclusions and recommendations.").

[27] Maryland is the only state of which the SLC is aware that has a statutory business judgment presumption and whose courts have addressed whether it prevents the placement of the burden on the special litigation committee. In *Boland v. Boland*, 5 A.3d 106, 121 (Md. App. 2010), the Maryland Court of Special Appeals, an intermediate appellate court, explained that "by its plain language, the Maryland statutory business judgment rule places the burden on the derivative plaintiff to prove that a decision by a board of directors or by a committee of the board was not made independently and in good faith, was not investigated reasonably, or was not based upon reasonable conclusions" and "is directly contrary to the assignment of the burden of proof in *Zapata*." The court further explained that unlike "Delaware's business judgment rule [that] remains a creature of common law, liable to judicial alteration[,]" "Maryland's business judgment rule, being statutory, is a product of legislation and, absent ambiguity or constitutional infirmity, is not subject to interpretation or revision by judicial gloss." *Id.* Accordingly, the intermediate appellate court held that "it was [the plaintiff's] burden to produce evidence that the SLC either (1) was not independent, (2) did not operate in good faith, or (3) did not conduct a reasonable investigation that reached reasonable conclusions." *Id.* at 123. On appeal of this decision, a dissenting judge in the Maryland Court of Appeals agreed, noting that "the General Assembly expressly enacted the business judgment presumption" and explaining that the majority's "ruling is contrary to our jurisprudence and the goal of acknowledging the will of the majority, absent a showing of director abuse by the plaintiff shareholder; our standard, like New York's *Auerbach* standard, has placed the burden on the plaintiff shareholder to demonstrate that the director action, including a demand refusal, was made unreasonably, in bad faith, or while the director was on both sides of the transaction and thus interested." *Boland v. Boland*, 31 A.3d 529, 580-81 (Md. 2011) (Battaglia, J., dissenting). The majority in the Court of Appeals nonetheless placed the burden on the special

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Whether or not the SLC should bear the initial burden to establish that it is independent and conducted a good faith thorough investigation, and as discussed in the analysis above, the SLC should not bear that burden, the SLC supports this motion with an affirmative evidentiary showing, including declarations and the SLC Report, establishing that the SLC is independent and conducted a thorough investigation that in no way demonstrates a lack of good faith. Having made this showing, whether or not the initial burden is on the SLC, the burden is now on Jacksonville to come forward with evidence to create a genuine issue of material fact on these points. As detailed below, it cannot do so.

IV. The SLC's Determinations Satisfy the *Auerbach* Standard.

Whichever party bears the initial evidentiary burden on this motion, the motion should be granted. The record of evidence establishes that there is no genuine issue of material fact as to either the independence of the SLC or the good faith thoroughness of its investigation.

A. There Is No Genuine Dispute that the SLC Is Independent.

To the extent that the SLC bears the initial evidentiary burden on the issue of independence, the burden is easily satisfied by the declarations of the members of the SLC and its counsel. The members of an SLC are determined to be independent when they are "in a position to base [their] decision on the merits of the issue rather than being governed by extraneous considerations or influences." *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985) (citing *Aronson v. Lewis*, 473 A.2d 805, 816 (Del. 1983)). As detailed below, there is no evidence sufficient to create a genuine issue of material fact as to the independence of the SLC.[28]

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litigation committee. *Boland*, 31 A.3d at 561. However, in doing so, the majority did not address the statutory presumption, nor explain how it could place the burden on the SLC despite the statutory presumption.

[28] Even if there were evidence that could create a genuine issue of material fact as to one SLC member's independence, and there is not, it would not "rise to the level where the Court should conclude that the SLC is tainted" where "there is no indication that the objectivity of [the other members] or committee counsel were overborne by the arguments or conduct of [that member]." *Johnson v. Hui*, 811 F. Supp. at 487; *see also Strougo ex rel. The Brazil Fund, Inc. v. Padegs*, 27 F. Supp. 2d 442, 450 (S.D.N.Y. 1998) ("Even if [one of two members] did lack some degree of independence, because Maryland law requires only one director to form a special litigation committee, . . . such a finding would not deprive the SLC as a whole of its independence.") (internal citation omitted); *In re Oracle Sec. Litig.*, 852 F. Supp. at 1442

1. Charles M. Lillis

Lillis is clearly independent. Jacksonville has already conceded that Lillis does not lack independence from Ergen, who is the principal defendant on the claims. To the contrary, as Jacksonville does not dispute, it urged that Lillis serve on the special transaction committee that it unsuccessfully asked this Court to compel DISH to create through the motion for preliminary injunction. (Motion to Dismiss for Failure to Plead Demand Futility, at 12, 23 (Aug. 29, 2014) (hereinafter cited as "SLC Demand Mot.")) At the time, it took the position that Lillis was needed on the committee to *ensure* its independence from Ergen.

Lillis also does not lack independence from any other defendant. The Complaint alleges that he had prior "professional relationships" with Cullen and Vogel, but it is well-settled that prior professional relationships do not suffice to establish a lack of independence as a matter of law. *See Highland Legacy Ltd. v. Singer*, No. 1566-N, 2006 WL 741939, at *5 (Del. Ch. Mar. 17, 2006) ("It is well settled that the naked assertion of a previous business relationship is not enough to overcome the presumption of a director's independence.") (internal quotation marks omitted); *Ankerson v. Epik Corp.*, 2005 WI App 1, at *3, 690 N.W.2d 885 (Wis. Ct. App. 2004) ("A director may be independent even if he or she has had some personal or business relation with an individual director accused of wrongdoing."); *id.* at *5 (affirming dismissal where "the limited contacts [an SLC member] . . . had with [two of the defendants] d[id] not appear to have affected or impaired his ability to sit impartially as a special committee member"), *rev'd on other grounds* 727 N.W.2d 374 (Wis. Ct. App. 2006); *Johnson v. Hui*, 811 F. Supp. 479, 487 (N.D. Cal. 1991) (An SLC member who "presumably ha[d] business and personal contacts with other defendant directors" was independent because those connections "d[id] not demonstrate the sort of substantial bias or interest which would cause the Court to question the SLC's ability 'to base [its] decision on the merits of the issue

("Even, if [one SLC member's] background suggested some alleged interest, however, there is nothing to indicate that the SLC's judgment was tainted in any way. [That SLC member] was not the only member of the SLC and there is no evidence that [the other member's] objectivity was affected by [that member's] participation.").

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rather than . . . extraneous considerations or influences.'") (quoting *Kaplan v. Wyatt*, 499 A.2d 1184, 1189 (Del. 1985)).[29]

As detailed in the declaration submitted by Lillis, his prior professional experiences with Cullen and Vogel have not compromised his independence in any way. As Lillis explains in the declaration,

> . . . Mr. Vogel and Mr. Cullen, like me, each have long histories within the communications industry. I have supervised, overseen, or worked with both Mr. Vogel and Mr. Cullen in the course of my career. In each instance, I have had productive professional relationships with them and I respect their work. But, I am not indebted to either of them. My only business relationship with either of them currently involves our mutual work for DISH. . . .
>
> Based on my prior experience with Mr. Vogel and Mr. Cullen, I respect the diligence and business acumen of each of them. But, nothing in my prior interactions with Mr. Vogel or Mr. Cullen has made me feel indebted or beholden to either of them in any way.
>
> If I believed that Mr. Vogel or Mr. Cullen had breached a fiduciary duty to DISH, I would not hesitate to vote or advocate for DISH taking appropriate action to address that breach, including pursuing litigation against Mr. Vogel, Mr. Cullen, or both of them if that was the best step for DISH to take. . . .

(Lillis Declaration ¶¶ 23, 35-36) There is no evidence to the contrary.

While, as detailed below, Brokaw and Ortolf are also independent, Lillis' independence effectively ensured the independence of the SLC. Due to his obvious independence, the Board resolutions appointing Lillis to the SLC prevent the SLC from making any decision that is not approved by Lillis. (*See supra* p. 6 & n.10) The SLC's decision that the pursuit of the claims would not be in DISH's best interest was unanimous and therefore included Lillis' approval.

2. George R. Brokaw

Brokaw also is independent. Prior to his appointment to the DISH Board and the SLC, Brokaw had no prior business dealings with Ergen, except that he had given Ergen infrequent, unpaid professional advice and had previously advised a client that was adverse to DISH in one transaction. (*See* Brokaw Declaration ¶¶ 12, 27-28) As previously explained, such prior professional relationships do not establish a lack of independence as a matter of law. *See Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 177 (Del. Ch. 2005) ("[P]eople

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[29] (*See also* SLC Demand Mot., at 23-24)

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normally get appointed to boards through personal contacts."), *aff'd*, 906 A.2d 114 (Del. 2006); *In re Oracle Sec. Litig.*, 852 F. Supp. at 1442 ("Business dealings seldom take place between complete strangers and it would be a strained and artificial rule which required a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent.").

The existence of a godparent relationship between Brokaw's son and Cantey Ergen does not undermine Brokaw's independence. As previously explained, in the SLC's reply brief on the motion to dismiss for failure to plead demand futility, the mere existence of a godparent relationship, like the mere existence of a longstanding friendship, does not, standing alone, suggest a lack of independence.[30] (SLC's Reply in Support of Motion to Dismiss for Failure to Plead Demand Futility, at 14-17 (Oct. 2, 2014) (hereinafter cited as "SLC Demand Reply")) An Advisory Opinion concerning the Code of Conduct for United States Judges reflects this reality. As the Committee on Codes of Conduct explained,

> A godfather is not a "relative" within the meaning of Canon 3C(1)(d) and is not otherwise covered by any of the enumerated circumstances requiring recusal. Recusal may nonetheless be required if the *circumstances are such that the judge's impartiality could reasonably be questioned. No such question would be raised if the relationship were simply one of historical significance, the godfather being merely within the wide circle of the judge's friends, and the obligation having been perfunctorily assumed.* By contrast, if the godfather is a close friend whose relationship is like that of a close relative, then the judge's impartiality might reasonably be questioned.

Fed. Advisory Op. 11, 2009 WL 8484525 (June 2009) (emphasis added). As detailed in the declaration submitted by Brokaw, his son's godparent relationship with Cantey Ergen falls into

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[30] *See Beam*, 845 A.2d at 1051-52 ("Mere allegations that [directors] move in the same business and social circles, or a characterization that they are close friends, is not enough to negate independence for demand excusal purposes."); *In re Walt Disney Co. Deriv. Litig.*, 731 A.2d 342, 355 (Del. Ch. 1998) ("The fact that Eisner has long-standing personal and business ties to Ovitz cannot overcome the presumption of independence that all directors, including Eisner, are afforded."), *aff'd in part, rev'd in part on other grounds sub nom. Brehm v. Eisner*, 746 A.2d 244 (Del. 2000); *La. Mun. Police Emps. Ret. Sys. v. Wynn*, No. 2:12-CV-509 JCM (GWF), 2014 WL 994616, at *6 (D. Nev. Mar. 13, 2014) (Allegations that directors had "been friends for forty years and that [the interested director] has played a significant role in [the other director's] political success" did not establish lack of independence.); *id.* (Allegations of a thirty-year friendship did not establish lack of independence.); *id.* at *7 (Allegations that directors had "been close . . . since they were young" as a result of their fathers' business together and the interested director's past employment of the other director and the other director's siblings did not establish lack of independence.).

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the former category. It resulted from a relationship of historical significance between Brokaw's mother-in-law and Cantey Ergen. The Ergens are not like close relatives to the Brokaws. The Ergens rather are within the wide circle of the Brokaw's friends. As Brokaw puts it in his declaration,

> My son has three godparents. Our tradition is to have two godparents of the child's gender and one godparent of the opposite gender for the child. I chose my son's two godfathers; my wife chose my son's one godmother. My wife chose Mrs. Ergen to be my son's godmother because Mrs. Ergen grew up with and remains a friend of my mother-in-law; I supported her decision. My wife is from Australia and did not have an established network of old friends in this country when she picked Mrs. Ergen to be our son's godmother. When our daughter was born, my wife selected two different women to be our daughter's godmothers, and I selected our daughter's one godfather.
>
> Mrs. Ergen falls within my and my family's wide general social circle. When my wife sends pictures of our children to groups of people, Mrs. Ergen is sometimes included. As she does with other friends, my wife speaks with Mrs. Ergen from time to time by telephone. To my knowledge, Mrs. Ergen has never visited New York specifically to see my family. But, when Mrs. Ergen is in New York, she will sometimes visit our family in the course of her trip. My recollection is that Mrs. Ergen visits my family about once or twice a year. My family, with the possible exception of my wife, has never taken a trip to Colorado in order to visit Mrs. Ergen (or Mr. Ergen), but when we are in Colorado to ski, we may also visit Mrs. Ergen. Due to his schedule, Mr. Ergen is rarely involved in these visits. My relationship with Mr. Ergen is almost entirely focused on business.
>
> . . . My will specifies that, if my wife and I die, my brother would become my son's legal guardian.
>
> The Ergens would have no responsibility for either of my children in the event that something horrible happened to my wife and me. They have no financial responsibility for my son. There is no sense in which DISH recovering money from Mr. Ergen would equate to taking money from my son, as Jacksonville has suggested. . . . .
>
> Neither the social connection between my family and Mrs. Ergen nor my business interactions with Mr. Ergen is akin to the relationship of close relatives. I might consider the Ergens to be friends, but I take seriously my responsibilities as a fiduciary of DISH. I would never put the Ergens' interests ahead of my fiduciary duties, that is to say, ahead of the interests of DISH and its minority stockholders. Thus, I did not and I would not take the Ergens' personal interests into account in deciding whether DISH should pursue claims against them or any other person named a defendant in the Complaint. If I had concluded that it would have been in DISH's best interest to pursue claims against the Ergens or anyone else, I would have recommended that the claims be pursued and taken appropriate action as a director of DISH to see that DISH's best interests were served.

(Brokaw Declaration ¶¶ 22-25, 29) There is no evidence to the contrary.

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3. Tom A. Ortolf

Ortolf is similarly independent. As the SLC has previously explained, in the reply brief on its motion to dismiss for failure to plead demand futility, Ortolf's prior employment by EchoSphere, the entity that eventually became DISH, more than twenty years ago is irrelevant to the question of independence. (SLC Demand Reply, at 19); *see also In re Pfizer Inc. Deriv. Sec. Litig.*, 503 F. Supp. 2d 680, 686 (S.D.N.Y. 2007) (An "employee for many decades[] does not lack independence by way of his former employment."), *aff'd*, 307 Fed. Appx. 590 (2d Cir. 2009); *Disney*, 731 A.2d at 358, 361 (finding that "Plaintiffs have not raised a reasonable doubt as to the independence from [the allegedly dominating CEO]" of certain directors even though one of them was "a retired Disney executive" and another was formerly "Disney's executive vice president and chief financial officer").[31] Similarly, his daughter's employment with DISH does not suggest a lack of independence. *See In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 808, 823 (Del. Ch. 2005), *aff'd*, 906 A.2d 766 (Del. 2006) (finding that a director's independence was unaffected by his son's employment with the corporation, in part because the son was "not an executive officer"). As Ortolf explains in his declaration,

> I take seriously my responsibilities as a fiduciary of DISH and its minority stockholders. When I believe that it would be in DISH's best interest or in the best interest of DISH's minority stockholders for something to be done, I raise the issue with my fellow directors or committee members and ensure that it receives the discussion and action that it deserves. I do not and did not adjust my work for DISH on the DISH Board, on DISH Committees generally, or on the SLC in particular to curry favor with Charlie Ergen. I would never sacrifice the best interest of DISH to a fellow director's, or Mr. Ergen's, conflict of interest in order to preserve Meaghan's employment with this specific company. I would not

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[31] The same is true as to his receipt of modest director's fees from DISH and Echostar. *McSparran v. Larson*, Nos. 04-C-0041, 04 C 4778, 2006 WL 2052057, at *3 (N.D. Ill. May 3, 2006) ("If mere social acquaintances and prior business relationships with other board members coupled with the receipt of directorial fees destroyed a board member's independence, few boards would have any independent members."); *see also Disney*, 731 A.2d at 353, 359-60 (finding no lack of independence where plaintiff alleged that director's "salary as a teacher is low compared to her director's fees and stock options"); *Fosbre v. Matthews*, No. 3:09-CV-0467-ECR-RAM, 2010 WL 2696615, at *5 (D. Nev. July 2, 2010) (finding no lack of independence where plaintiffs made no "allegations of . . . any causal link[] between the challenged actions and omissions of the [corporation's] Board and the directors' compensation"), *aff'd sub nom. Israni v. Bittman*, 473 Fed. Appx. 548 (9th Cir. Apr. 2, 2012); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Lundgren*, 579 F. Supp. 2d 520, 535-36 (S.D.N.Y. 2008) (Directors' independence is not compromised simply "because they receive compensation as directors and wish to continue to do so.").

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> breach my fiduciary duties to advance some personal interests of the Ergens: I certainly did not do so as a member of the SLC.
>
> If I had concluded that it would have been in DISH's best interest to pursue any of the claims raised in the Complaint, I would have recommended that the claims be pursued. As explained more fully in the SLC's Report, I, along with Mr. Lillis and Mr. Brokaw, determined that it would not be in DISH's best interest to pursue claims with dubious merit, particularly where pursuing those claims might impair DISH's defense in other litigation.

(Ortolf Declaration ¶¶ 26-27) There is no evidence to the contrary.[32] In fact, Ortolf owns substantial DISH stock.[33] His interests are therefore well aligned with those of DISH and its minority stockholders. *E.g.*, *In re BioClinica, Inc. S'holder Litig.*, No. CV 8272-VCG, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) ("[S]tock ownership by decision-makers aligns those decision-makers' interests with stockholder interests; maximizing price.").[34]

4. The SLC Does Not Face a Substantial Risk of Material Liability.

Nor did the members of the SLC face a substantial risk of material liability on the claims that they investigated, such that they could not independently investigate them. As previously explained on the SLC's motion to dismiss for failure to plead demand futility, for all but the Bid Termination Claim, a majority of the members of the SLC consisting of Lillis and Brokaw had not yet even joined the DISH Board and therefore do not face any prospect of liability. (*See* SLC Demand Mot., at 20 n.10; SLC Demand Reply, at 21) For the Bid Termination Claim, since Ergen did not benefit personally from the decision to terminate the

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[32] On the motion to dismiss for failure to plead demand futility, Jacksonville had argued that, although each of Ortolf's relationships with DISH did not suffice to allege a lack of independence, they sufficed when combined. (Plaintiff's Opposition to the SLC's Motion to Dismiss for Failure to Plead Demand Futility, at 25 (Sept. 19, 2014)) As previously explained, this is not correct. The courts have held that substantially the same combination of relationships does not suffice to suggest a lack of independence. (SLC Demand Reply, at 17-20)

[33] Ortolf owns 60,200 DISH Class A Shares, which at the close of business on November 14, 2014 had a market value of $64.90 per share for a total value of $3,906,980. (*See* DISH Network Corp., Annual Report (Form 10-K/A), at 32-33 (Apr. 29, 2014) (Ex. 19) (listing Ortolf's beneficial ownership)) Ortolf also owns 20,000 Class A Shares subject to stock options. (*Id.*)

[34] As indicated in the declarations submitted by counsel for the SLC, Young Conaway and Holland & Hart are independent of all defendants in this litigation, have vigorously represented the best interests of DISH and have faithfully fulfilled their obligations to DISH.

DISH Bid, but rather was affirmatively harmed by the decision, as it eliminated the DISH Bid's support for his LightSquared Secured Debt, there was no conflict in the decision to terminate the Bid. (*See* SLC Demand Mot., at 21; SLC Demand Reply, at 21-22, 24 n.21) The decision is therefore protected by the business judgment rule. (*See* SLC Demand Mot., at 21-22; SLC Demand Reply, at 21-22) No member of the SLC therefore faces a substantial risk of material liability for even the Bid Termination Claim. (*See* SLC Demand Mot., at 20 n.10)[35] No member of the SLC faces a substantial risk of material liability on any of the claims for the additional reason that, for DISH to prevail on any claim for damages, it would be required to prove that the director intentionally engaged in misconduct or knowingly violated the law. *See In re Amerco Deriv. Litig.*, 127 Nev. Adv. Op. 17, 252 P.3d at 701 ("[T]o hold 'a director or officer . . . individually liable,' the shareholder must prove that the director's breach of his or her fiduciary duty of loyalty 'involved intentional misconduct, fraud or a knowing violation of law.'") (quoting NRS 78.138(7)(b)). The evidentiary record does not come close to suggesting that this was the case as to any member of the SLC.

5. The SLC Did Not Prejudge the Claims.

The SLC has previously addressed, on the motion to dismiss for failure to plead demand futility, the many assertions by Jacksonville that the SLC prejudged the claims or otherwise acted inappropriately. They are all demonstrably wrong, as made clear generally by the very same written record on which Jacksonville relies. The SLC will not repeat here its rebuttal to the assertions made by Jacksonville. It rather incorporates by reference its prior discussions on this subject. (SLC Demand Mot., at 26-29; SLC Demand Reply, at 25-28)

B. There Is No Genuine Dispute that the SLC's Investigation Was Thorough.

The procedures and methodologies employed by the SLC make abundantly clear that the SLC conducted with the utmost seriousness and good faith a thorough investigation and

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[35] As detailed in the Report, the Releases did not cause the cancellation of the auction of the LightSquared Assets. (*See* SLC Report, Analysis and Conclusions Section II) Nor was any director ever informed that the auction might be cancelled because of the Releases. (*Id.*) The members of the SLC therefore did not face a substantial risk of material liability for failing to reduce the scope of the Releases before the auction. (*Id.*)

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assessment of the claims.[36] The SLC conducted its investigation and assessment over the course of thirteen months, from September 2013 until October 2014. During that time, the SLC (1) prepared thoroughly for its investigation, repeatedly receiving advice of counsel concerning its fiduciary duties in the investigation and the substantive law applicable to the claims and repeatedly studying and analyzing the Complaint, (2) after its Interim Report, met formally more than seventeen times, in additional to multiple less formal meetings and telephone discussions, to discuss and evaluate the claims, evaluate information received during the investigation and direct counsel in obtaining additional information and providing additional legal advice and analyses, (3) obtained and reviewed personally or through counsel all documents potentially relevant to its investigation of the claims, amounting to more than 39,000 documents (and more than 357,000 pages) and including all discovery provided in this litigation, including multiple deposition transcripts, and the relevant filings, discovery, again including multiple deposition transcripts, hearing and trial transcripts and decisions of the Bankruptcy Court, (4) interviewed 13 individuals, including Ergen, members of the DISH Board, members of DISH management (including DISH's personnel responsible for strategic acquisitions and investments and DISH's technical experts on matters of spectrum analysis) and Willkie Farr & Gallagher LLP, counsel to Ergen, SPSO and LBAC (for limited purposes), (5) based upon all material information obtained during the investigation and the legal advice provided by counsel, analyzed and evaluated each of the many claims of the Complaint and

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[36] "The cornerstone of a court's review of the SLC's procedures rests on an evaluation of the thoroughness of that committee's investigation." *Curtis v. Nevens*, 31 P.3d 146, 152 (Colo. 2001); *see also In re UnitedHealth Grp. Inc. S'holder Deriv. Litig.*, 591 F. Supp. 2d 1023, 1029 (D. Minn. 2008) ("Having established the SLC's independence, the Courts consider its investigative procedures and methodology. Whether an SLC's methods demonstrate good faith depends on the nature of the particular investigation. Again, the Courts look to the totality of the circumstances.") (internal citation omitted); *Seidl v. Am. Century Cos.*, No. 10-4152-CV-W-ODS, 2014 WL 5463661, at *11 (W.D. Mo. July 2, 2014) (stating that, when examining procedures and methodologies, "factors to consider include whether (1) independent counsel was engaged to assist in the investigation, (2) the SLC reviewed the testimony and statements of those involved in the matter, and (3) relevant documents were reviewed"); *Lewis ex rel. Citizens Sav. Bank & Trust Co. v. Boyd*, 838 S.W.2d at 224 (explaining that a court assessing the adequacy of an SLC's investigation "should examine (1) the length and scope of the investigation, (2) the committee's use of independent counsel or experts, (3) the corporation's or the defendants' involvement, if any, in the investigation, and (4) the adequacy and reliability of the information supplied to the committee").

their individual components, considered the potential merit of each claim and any additional considerations that weighed for or against the assertion of the claims, collectively determined whether pursuit of the claims would be in DISH's best interest and agreed upon the reasons for such determinations and directed counsel to draft a report describing the SLC's factual findings, analyses and ultimate determinations, and (6) reviewed and commented upon multiple drafts of the SLC Report and ultimately agreed upon and approved, for submission to the Court, the text of a final SLC Report, which set forth in exhaustive detail, across more than 300 pages, the facts found in the investigation, the SLC's analyses of the claims and the SLC's ultimate determinations that pursuit of the claims would not be in DISH's best interest.

When faced with similarly thorough investigations by independent special litigation committees, the courts applying the *Auerbach* standard have uniformly deferred to the business judgment of the committees that the claims investigated should be dismissed and granted the committees' motions for judgment dismissing the claims. *See, e.g.*, *Desaigoudar*, 133 Cal. Rptr. 2d at 422-23;[37] *Drilling v. Berman*, 589 N.W.2d 503, 509-10 (Minn. Ct. App. 1999);[38] *see also In re UnitedHealth Grp. Inc. S'holder Deriv. Litig.*, 591 F. Supp. 2d 1023, 1028-31 (D. Minn. 2008) (granting a special litigation committee's motion for preliminary approval of settlement).[39] The SLC respectfully submits that this Court should do the same, by deferring to

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[37] In *Desaigoudar*, the court approved an SLC's investigation and affirmed the lower court's grant of summary judgment based on the SLC's report where the SLC (1) conducted its investigation "[b]eginning around the middle of the year 2000 and continuing until April 2001," (2) "met with its counsel at least 13 times," (3) "reviewed over 25,000 pages of relevant documents," (4) "interviewed 18 witnesses, including all of the individual defendants," (5) composed a report "103 pages in length," and (6) "retained an outside law firm with expertise to assist them." 133 Cal. Rptr. 2d at 422-23.

[38] In *Drilling*, the court approved an SLC's investigation and affirmed the lower court's dismissal of the action based on the SLC's report where the SLC (1) "retained highly respected counsel with prior experience as counsel to . . . special litigation committees," (2) conducted an investigation spanning approximately seven months, (3) met "as a full group . . . no less than nine times," (4) "received and reviewed thousands of pages of documents," and (5) interviewed four witnesses. 589 N.W.2d at 509-10.

[39] In *In re UnitedHealth*, the court approved an SLC's investigation and the terms of the settlement recommended in the SLC's report where the SLC (1) "began its investigation in July, 2006, concluding its work in December, 2007," (2) "prepared for and interviewed 50 witnesses," (3) "reviewed thousands of pages of documents, including materials submitted by plaintiffs," (4) "reviewed cases and other materials to develop an understanding of the law

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the SLC's business judgment that the claims are not in DISH's best interest and entering judgment dismissing the claims.

C. The SLC's Determinations Are Substantively Sound.

As explained above, the Court should apply the *Auerbach* standard and therefore should not supplant the SLC's business judgment with its own. (*See supra* Section II) However, if the Court instead applies the *Zapata* standard, and chooses to engage in a discretionary substantive review of the SLC's determinations, the result should be the same. The Court should agree with the SLC's business judgment that the claims are not in DISH's best interest: the claims lack merit, DISH could not prevail on them and pursuing them would involve DISH in costly litigation attempting to prove incorrect allegations asserted against DISH in other litigation. Even if this Court might have reached a different determination, viewing the matter ab initio, the SLC's determinations should only be rejected under the second prong of *Zapata* where they are "'irrational' or 'egregious'" such that they do not fall within the range of reasonableness. *See Carlton Invs. v. Tlc Beatrice Int'l Holdings*, No. 13950, 1997 WL 305829, at *2 (Del. Ch. May 30, 1997) ("As to the conceptually difficult second step of the *Zapata* technique, it is difficult to rationalize in principle; but it must have been designed to offer protection for cases in which, while the court could not consciously determine on the first leg of the analysis that there was no want of independence or good faith, it nevertheless 'felt' that the result reached was 'irrational' or 'egregious' or some other such extreme word. My opinion is that courts should not make such judgments but for reasons of legitimacy and for reasons of shareholder welfare.") (internal citations ommitted); *see also In re Primedia Inc.*, 67 A.3d 455, 468 (Del. Ch. 2013) ("[T]he trial court's task in the second step is to determine whether the SLC's recommended result falls within a range of reasonable outcomes that a disinterested and independent decision maker for the corporation, not acting under any compulsion and with the benefit of the information then available, could reasonably accept.").

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governing the derivative claims," and (5) "employed independent counsel and independent financial experts." 591 F. Supp. 2d at 1029.

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The SLC's determinations, which are detailed in the SLC Report, are straightforward. They are based primarily upon well-settled principles of law as well as (1) the well-documented chronology of events, including the proceedings in the Bankruptcy Court, concerning DISH's Bid for the LightSquared Assets and the release that was part of the DISH Bid, (2) the unambiguous provisions of the Credit Agreement for the Secured Debt and the corporate opportunity disclaimer in DISH's Articles of Incorporation and (3) a few over-arching factual determinations that are generally the same as those previously made by the Bankruptcy Court. To the extent that the SLC's analyses rely upon the SLC's business judgment and experience, they are intuitive and certainly do not provide any grounds for disagreement.

CONCLUSION

For the foregoing reasons, the SLC on behalf of DISH respectfully submits that the Court should enter judgment dismissing the Complaint with prejudice on the ground that the SLC has determined that the claims asserted in the Complaint are not in DISH's best interest.

DATED this 17th day of November, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of November, 2014, a true and correct copy of the foregoing **MOTION TO DEFER TO THE SLC's DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED** was served by the following method(s):

☒ Electronic: by submitting electronically for filing and/or service with the Eighth Judicial District Court's e-filing system and served on counsel electronically in accordance with the E-service list to the following email addresses:

Please see the attached E-Service Master List

☐ U.S. Mail: by depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

☐ Email: by electronically delivering a copy via email to the following e-mail address:

☐ Facsimile: by faxing a copy to the following numbers referenced below:

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EXHIBIT A

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION **DERIVATIVE LITIGATION**	**Case No. A-13-686775-B** **Dept. No. XI**

DECLARATION OF CHARLES M. LILLIS

I, Charles M. Lillis, pursuant to NRS 53.045, declare as follows:

1. I am over 18 years of age and am competent to testify to the matters set forth in this Declaration.

2. I have personal knowledge of the matters set forth in this Declaration.

3. I submit this Declaration in support of the SLC's Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed (the "Motion to Defer"), which asks this Court to dismiss the Second Amended Complaint (the "Complaint"), filed by Jacksonville Police and Fire Pension Fund ("Jacksonville"), based upon the investigation and conclusions reached by the Special Litigation Committee (the "SLC") of the board of directors (the "Board") of DISH Network Corporation ("DISH"), as documented in the DISH Network Corporation Report of the Special Litigation Committee, October 24, 2014 (the "SLC Report").

I. Expertise

4. I joined the Board of DISH effective as of November 5, 2013 and serve on the Audit Committee, Compensation Committee, and Nominating Committee of the DISH Board.

5. I have worked in the communications industry for many years, both as an officer and a director. I have also held various academic positions related to my business expertise.

6. I currently serve on the boards of directors of two for-profit corporations, SomaLogic, Inc. and DISH. I have also been appointed by the Governor of Oregon to serve as the Chair of the Board of Trustees of the University of Oregon, which is a position that I continue to hold.

7. In the past, I have served on the boards of directors for Agilera, Inc., Ascent Entertainment Grp., Charter Communications, Inc. ("Charter") and various affiliates, Medco Health Solutions, Inc., MediaOne Group, Inc. ("MediaOne"), On Command Corporation, SUPERVALU Inc., Time Warner Entertainment Company, L.P., Williams Companies, Inc., and Washington Mutual Inc. and affiliated entities. Generally, I acted as an independent, outside director for these companies. I have frequently served on audit and compensation committees for these boards.

8. I have also been the Dean of the University of Colorado's college of business and a professor at Washington State University. I also served on the University of Washington

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Business Advisory Board, the University of Washington Foundation Board, and the University of Colorado Foundation Board.

9. I spent the bulk of my career at MediaOne, which was initially a division of US West Diversified Group ("US West") with its own tracking stock and which later became an independent corporation when US West was spun off. I joined US West in 1985 and I held various senior management positions, including as President of US West Diversified Group and Executive Vice President of US West. Thereafter, from 1997 to 2000, I served as the President, CEO, and Chair of the Board of MediaOne. In 2000, MediaOne was acquired by AT&T.

10. After MediaOne's acquisition, in 2000, approximately twenty people who had been employed by MediaOne worked together to form LoneTree Capital Partners ("LoneTree"). LoneTree was a private equity firm specializing in the telecommunication, broadband, and Internet technologies sector. Rick Post, Franck Eichler, and I were LoneTree's principals. The other former MediaOne employees who helped to form LoneTree were employees of LoneTree.

11. Mr. Cullen was one of the former MediaOne employees employed by LoneTree. At LoneTree, Cullen was primarily involved in identifying potential investment opportunities in the cable industry. Due to the burst of the tech bubble shortly after LoneTree was formed, most of LoneTree's employees, including Mr. Cullen, moved on to other opportunities relatively quickly. LoneTree stopped making new investments in 2004.

12. In 2004, I co-founded Castle Pines Capital LLC ("Castle Pines"). I was one of the managing members of Castle Pines from 2004 until Castle Pines's acquisition by Wells Fargo Bank, N.A. ("Wells Fargo") in 2011. Following Castle Pines acquisition, I acted as an advisor to Wells Fargo for some time.

13. Prior to beginning my professional career, I earned a Bachelor of Arts and Master of Business Administration from the University of Washington. Thereafter, I earned a Doctor of Philosophy in business from the University of Oregon.

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II. Independence

14. In June of 2013, Mr. Cullen informally approached me about joining the Board of DISH. I was told that DISH was interested in gaining the benefit of my independent financial and managerial experience. Initially I was busy with other endeavors and I had not been looking to join another board. So, I did not immediately agree to join the DISH Board.

15. After considering the matter further, I eventually decided to agree to join DISH's Board because I find DISH's ongoing strategy with respect to the wireless industry interesting and it is an area in which I have substantial experience. Other than my role as a director of DISH, I have no financial ties to Mr. or Mrs. Ergen. I had only met Mr. Ergen once before joining the DISH Board.

16. As affirmed by DISH in its public filings, I satisfy the independence requirements of the NASDAQ exchange on which DISH's stock trades.

17. In my capacity as a director of DISH, I receive an annual retainer of $60,000 which is paid in equal quarterly installments, $1,000 for each Board meeting attended in person, and $500 for each Board meeting attended by telephone. I was paid a retainer of $25,000 for my service on the SLC. In total, I received $17,000 for my services as a director in 2013. My director fees for 2013 did not include any amounts for my service on the SLC, which I joined in December 2013. Additionally, in connection with my election to the Board in 2013, I was granted an option to acquire 7,500 Class A Shares of DISH at an exercise price of $57.92 per share under DISH's 2001 Nonemployee Director Stock Option Plan (the "2001 Director Plan"). Moving forward, pursuant to DISH's 2001 Director Plan, DISH will have discretion to grant me, as a continuing nonemployee director, an option to acquire Class A Shares annually.

18. The compensation that I receive as a director of DISH is not a material portion of my income or net worth. Moreover, while I am gratified to serve on DISH's Board, my DISH directorship is but one position among many in my long career.

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19. I am fully capable of considering the claims asserted by Jacksonville through the exercise of my own independent business judgment, considering only DISH's best interest, and have done so as a member of the SLC.

20. I would not be willing to take an action that I viewed as improper in order to retain my position on DISH's Board or to please Mr. Ergen, Mr. Cullen, Mr. Vogel, or anyone else. My self-respect and my longstanding reputation are far too important for me to tarnish.

21. I understand that, probably because of my experience and independence, Jacksonville proposed that I serve as a member of the special transaction committee that Jacksonville contended was needed to protect DISH from Mr. Ergen's control of DISH's bid for LightSquared. (Transcript of Hearing on Motion for Preliminary Injunction at 130-32 (Nov. 25, 2013)).

III. Challenged Relationships

22. I am an independent director, without any conflict of interest with respect to the claims asserted by Jacksonville. I am not aware of any basis on which my independence or disinterest can be legitimately challenged. Nonetheless, Jacksonville has alleged that I was not able to disinterestedly consider the best interests of DISH with respect to the claims that Jacksonville would like to pursue because of my business relationships with Carl Vogel and Tom Cullen. (SAC ¶ 309).

23. The Second Amended Complaint alleges that I have had "professional relationships" with Carl Vogel and Tom Cullen. (SAC ¶ 309). That is true. Mr. Vogel and Mr. Cullen, like me, each have long histories within the communications industry. I have supervised, overseen, or worked with both Mr. Vogel and Mr. Cullen in the course of my career. In each instance, I have had productive professional relationships with them and I respect their work. But, I am not indebted to either of them. My only business relationship with either of them currently involves our mutual work for DISH.

24. The Second Amended Complaint accurately alleges that, while I was chairman and chief executive of MediaOne, more than 15 years ago, I "worked closely with and supervised Cullen." (SAC ¶ 310). For a portion of my service as the President and chief

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executive of MediaOne, Mr. Cullen was the President of MediaOne Ventures Inc., a subsidiary of MediaOne. Mr. Cullen worked to develop MediaOne's high speed internet strategy.

25. MediaOne was acquired by AT&T in 2000. The Complaint alleges that Mr. Vogel had "just served" as an officer of AT&T when AT&T bought MediaOne (SAC ¶ 310), and that Mr. Vogel "spearheaded" the acquisition (SAC ¶ 31). In truth, to my knowledge, Mr. Vogel was not involved in AT&T's acquisition of MediaOne. If Mr. Vogel was involved in AT&T's acquisition of MediaOne behind the scenes, it was not something that I was aware of.

26. The Complaint alleges, "In July 2000, following AT&T's acquisition of MediaOne, Lillis and Cullen formed private equity firm LoneTree Capital." (SAC ¶ 310). That is only partially accurate. As I explain above, after AT&T's acquisition of MediaOne, Mr. Cullen was one of approximately 20 former MediaOne employees who went on to work at LoneTree, the private equity firm that I co-founded with two different former MediaOne executives, MediaOne's former Chief Financial Officer Rick Post and MediaOne's former General Counsel Frank Eichler. Mr. Cullen was not a principal or an owner of LoneTree.

27. After MediaOne's acquisition by AT&T, Mr. Cullen, Mr. Vogel, and I each eventually became professionally involved with Charter. From late 2001 to early 2005, Mr. Vogel was the President and Chief Executive Officer of Charter. From 2003 to 2005, Mr. Cullen was the Senior Vice President, and then the Executive Vice President, of Advanced Services and Business Development for Charter. And, from October 7, 2003 to March 28, 2005 I served on the board of directors of Charter (the "Charter Board").

28. I was asked to join the Charter Board by Paul Allen, Charter's controlling stockholder. I had known Mr. Allen for some time. Among other things, he and I had discussed combining MediaOne's and Charter's cable properties and I had spoken with Mr. Allen about various investment opportunities outside of Charter. It is entirely possible that Mr. Cullen suggested to Mr. Allen that I be added to Charter's Board. I did not have a relationship with Mr. Vogel before I joined Charter's Board. And, in any event, Mr. Allen, not Mr. Cullen or Mr. Vogel, determined that I should join the Charter Board.

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29. The Complaint alleges that when I was on the Charter Board, I "played a role" in "awarding Vogel a $500,000 special bonus in July 2004." (SAC ¶ 310). That is not accurate.

30. According to the SEC filings, in May of 2004, the compensation committee of the Charter Board awarded Mr. Vogel a bonus of $500,000 in recognition of his accomplishment of various objectives for Charter. I did not join Charter's compensation committee until July of 2004, after the compensation committee had approved Mr. Vogel's 2004 bonus. Mr. Allen, Charter's controlling stockholder would also have been involved in any decision to award Mr. Vogel a substantial bonus. I played no role with respect to the $500,000 bonus paid to Mr. Vogel in 2004; I do not even recall the question of Mr. Vogel's 2004 bonus being presented to the full Charter Board.

31. The Complaint also alleges that I "resigned from the Charter board to protest the termination of Vogel, and sent [my] fellow directors an email 'berating' them for a poor performance review of Vogel." (SAC ¶ 310) That allegation is also inaccurate. I did not resign to protest Mr. Vogel's termination.

32. On January 27, 2005, I informed the Charter Board that I would be resigning within the next 60 days. My resignation was effective on March 28, 2005. I resigned from the Charter Board because I felt that Mr. Allen rather than Charter's Board was in control of the company. I was not comfortable continuing to serve on the Charter Board under that circumstance.

33. When I resigned from the Charter Board, the directors' fees that I forewent by resigning did not play a role in my decision. Although Jacksonville has asserted that my willingness to resign and abandon these fees demonstrates some "owingness" to Mr. Vogel, (Opposition p. 25) in actuality, it is simply a prior instance in which I was more concerned with proper corporate governance than with continuing to receive standard directors' fees.

34. The Complaint notes that Mr. Vogel serves as a member of the board of directors of the National Cable & Telecommunications Association, and asserts that I am a member of that organization. (SAC ¶ 312). I have never attended a meeting of the National

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Cable & Telecommunications Association. I do not believe that I have been involved with this organization since prior to 2001.

35. Based on my prior experience with Mr. Vogel and Mr. Cullen, I respect the diligence and business acumen of each of them. But, nothing in my prior interactions with Mr. Vogel or Mr. Cullen has made me feel indebted or beholden to either of them in any way.

36. If I believed that Mr. Vogel or Mr. Cullen had breached a fiduciary duty to DISH, I would not hesitate to vote or advocate for DISH taking appropriate action to address that breach, including pursuing litigation against Mr. Vogel, Mr. Cullen, or both of them if that was the best step for DISH to take. Based on the SLC's investigation, I do not think that Mr. Vogel or Mr. Cullen breached any fiduciary duty owed to DISH, as explained more fully in the SLC's Report.

IV. SLC Investigation

37. As a member of the SLC, I and the other members of the SLC oversaw a thorough investigation of the claims alleged by Jacksonville. The SLC Report and the Motion to Defer accurately describe the procedures for and the scope of the SLC's investigation in more detail than I address here.

38. With respect to each claim asserted by Jacksonville, the SLC discussed the legal issues that would determine whether DISH might be able to recover on that claim with our counsel and directed that all necessary legal analysis be performed. I reviewed information provided by the SLC's counsel. I also reviewed the briefing in connection with all of the parties' motions to dismiss this action and considered those legal arguments, including the arguments made by Jacksonville.

39. With respect to each claim asserted, the SLC discussed what information would be necessary to accurately understand the factual background for the claim. Then, with the guidance of our counsel, we directed that the information be gathered and reviewed. Although I rely on counsel to confirm the precise number of pages of documents reviewed and each custodian from whom documents were collected, the specific numbers of documents and

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custodians described in the SLC Report seem consistent with the SLC's directions and my understanding of the process.

40. At the SLC's request, counsel to the SLC passed along to me and the other SLC members for review a subset of the documents analyzed by counsel, still thousands of pages of documents. I personally reviewed the documents that I found most important to the investigation, which included each of the deposition transcripts as well as the decisions of the Bankruptcy Court in the Adversary Proceeding and the Plan Confirmation Proceeding. At the SLC's request, counsel also provided multiple cogent summaries and timelines of the factual information relevant to the claims for the SLC's review, which I reviewed in particular detail.

41. After joining the SLC, I participated in almost all of the interviews conducted by the SLC, as did Mr. Brokaw and Mr. Ortolf. Although counsel led the questioning at the interviews, I and the other SLC members also asked questions that we felt needed to be answered. Where I felt that a question needed to be answered, I asked the question regardless of whether the question might have been asked in a prior interview of the person in question before I joined the SLC.

42. Each of my legal or factual questions was answered in the course of the investigation.

43. The SLC met numerous times over the course of our investigation to discuss (1) the information and legal advice that we had received, (2) what additional information or advice we believed would be useful for our investigation, and (3) the future steps necessary for the completion of our investigation.

V. The SLC's Interim Report

44. Jacksonville's assertion that the SLC had reached a conclusion with respect to DISH's monetary claims by November of 2013 (SAC ¶¶ 203, 314-317; Opposition, pp. 7-8) is not accurate.

45. When I joined the SLC, the SLC had concluded that the injunctive relief requested by Jacksonville would not be in DISH's best interests. As for the claims for monetary relief, the SLC had concluded that, if the claims had merit, DISH would be able to

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recover from the defendants any appropriate damages. However, the SLC had further concluded that, if the injunctive relief interfered with DISH's effort to acquire LightSquared's assets, DISH might not be able to recover any resulting damages from any person.

46. At that time, the SLC had not reached a conclusion with respect to whether it would be in DISH's best interest to assert monetary claims against Mr. Ergen or any other defendant. The merits of DISH's monetary claims remained a subject for investigation by the SLC.

VI. The SLC's Motion to Dismiss for Failure to Plead Demand Futility

47. During the course of the SLC's investigation, the members of the SLC evaluated each member's independence. We updated this evaluation upon the filing of the Second Amended Complaint. We concluded that each member of the SLC was independent. Based upon my observations, Mr. Ortolf and Mr. Brokaw took the SLC's investigation seriously, acted independently, and reached their determinations in good faith, based upon the best interests of DISH and its minority stockholders.

48. I do not believe that either I or any other member of the SLC faces a material risk of personal liability from the claims asserted in the Complaint. As detailed in the SLC Report, the claims asserted against the Director Defendants lack merit. Also, it is my understanding that under Nevada law, a director may only be held liable for damages where the director breached his or her fiduciary duties and "[t]he breach of those duties involved intentional misconduct, fraud or a knowing violation of the law." (Nev. Rev. Stat. Ann. § 78.138(7)). Knowing my own motivations, having investigated the claims, and having worked at length with Mr. Brokaw and Mr. Ortolf, I am confident that no SLC member engaged in intentional misconduct, fraud, or a knowing violation of the law.

49. I authorized the SLC's Motion to Dismiss for Failure to Plead Demand Futility (the "Motion to Dismiss") based on my confidence that the SLC was independent and fully capable of overseeing the litigation of any claims that our investigation determined should proceed.

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50. When I approved the SLC's Motion to Dismiss, I had not reached a final determination with respect to whether the claims asserted in the Complaint should be pursued by DISH; I had simply determined that Jacksonville was not needed for the pursuit of those claims, because I had determined that the members of the SLC were independent and capable of overseeing any appropriate litigation on behalf of DISH.

VII. The SLC's Report

51. Over the last 13 months, I estimate that I personally spent more than a hundred hours on the SLC's investigation.

52. At the close of the investigation, I reviewed several successive drafts of the SLC Report. The final SLC Report accurately reflects the SLC's findings, analysis, and determinations.

53. My assessment of the merits of each of the claims asserted by Jacksonville was based on the relevant facts and law as well as my many years of business experience. I reached that assessment based on my own good faith evaluation of the claims.

54. My decision that the SLC should recommend that DISH not pursue litigation with respect to any of the claims in the Complaint was not affected by my relationship with Mr. or Mrs. Ergen, Carl Vogel, or Tom Cullen or anything other than what I believe to be the best interest of DISH and its minority stockholders.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 17 th day of November, 2014 at _____, _____.

Charles M. Lillis

Charles M. Lillis

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EXHIBIT B

EXHIBIT B

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Attorneys for the Special Litigation Committee of Dish Network Corporation

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION **DERIVATIVE LITIGATION**	**Case No. A-13-686775-B** **Dept. No. XI**

DECLARATION OF GEORGE R. BROKAW

I, George R. Brokaw, pursuant to NRS 53.045, declare as follows:

1. I am over 18 years of age and am competent to testify to the matters set forth in this Declaration.

2. I have personal knowledge of the matters set forth in this Declaration.

3. I submit this Declaration in support of the SLC's Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed (the "Motion to Defer"), which asks this Court to dismiss the Second Amended Complaint (the "Complaint"), filed by Jacksonville Police and Fire Pension Fund ("Jacksonville"), based upon the investigation and conclusions reached by the Special Litigation Committee (the "SLC") of the board of directors (the "Board") of DISH Network Corporation ("DISH"), as documented in the DISH Network Corporation Report of the Special Litigation Committee, October 24, 2014 (the "SLC Report").

I. Expertise

4. I joined the Board of DISH effective October 7, 2013 and serve on the Audit Committee, Compensation Committee, and Nominating Committee of the DISH Board.

5. I have worked in the finance industry for two decades, including as a managing director and managing partner of investment banking and private equity firms. I have also served on the boards of directors of multiple companies.

6. I currently serve as a Managing Partner of Trafelet Brokaw & Co., LLC. I also serve on the boards of directors of two for-profit public corporations – Alico, Inc. and DISH – and one not-for-profit organization – The Carter Burden Center for the Aging.

7. In the past, I have served on several boards of directors, including among others, that of North American Construction Group, North American Energy Partners Inc., Capital Business Credit LLC, Exclusive Resorts, LLC, Ovation LLC, Timberstar Southwest LLC, and Value Place Holdings LLC. In some cases, I served as a director as a result of an investment made by capital invested by firms at which I worked. Generally, I served as an outside director for these companies.

8. I have spent the bulk of my career in the financial services industry. I began my career as an associate in Mergers & Acquisitions at Dillon Read Capital Management in 1994. In 1996, I joined Lazard Frères & Co. LLC, where I ultimately became a Managing Director. At Lazard, I provided corporations with financial advice concerning mergers & acquisitions, financing, and financial restructuring. Thereafter, I served as a Managing Partner

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and Head of Private Equity at Perry Capital, L.L.C. for six years and a Managing Director at Highbridge Capital Management, LLC for one year.

9. In the course of my career, I have become familiar with the mechanics of financial transactions broadly, including issues with respect to mergers and acquisitions, bankruptcy proceedings, and distressed and non-distressed investments.

10. Prior to beginning my professional career, I earned a Bachelor of Arts from Yale University and a Master of Business Administration from the University of Virginia Darden School of Business. I earned a Juris Doctor from the University of Virginia School of Law in 1994 and was admitted to the New York Bar in 1995. I remain a member of the New York Bar.

II. Independence

11. In the summer of 2013, I was approached by Mr. Ergen to join the DISH Board. It is my understanding that DISH wanted to add investment banking expertise to its Board because DISH anticipated pursuing other acquisitions, and could benefit from the insights of an experienced investment banker.

12. Previously, in February of 2013, I had provided Mr. Ergen with some general unpaid advice with respect to DISH's efforts to make various acquisitions. When Mr. Ergen asked me to join the DISH Board, he explained that that DISH could benefit from my experience, particularly my experience from my time at Lazard, and my insight for its future acquisition efforts.

13. When I agreed to join the DISH Board, I understood that I would also be joining the SLC. Contrary to Jacksonville's suggestion (Opposition, p. 23), the fact that I joined DISH's Board and contemporaneously joined the SLC does not in any way affect my ability to act independently in DISH's best interests as a member of the SLC.

14. Other than my role as a director of DISH, I have no financial ties to Mr. or Mrs. Ergen. I have not personally done business with either Mr. or Mrs. Ergen, with the exception of my service on DISH's Board.

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15. Contrary to Jacksonville's allegations, neither I nor my family has received monetary gifts or payments from the Ergens in the past and we expect none in the future.

16. As affirmed by DISH in its public filings, I satisfy the independence requirements of the NASDAQ exchange on which DISH's stock trades.

17. In my capacity as a director of DISH, I receive an annual retainer of $60,000 which is paid in equal quarterly installments, $1,000 for each Board meeting attended in person, and $500 for each Board meeting attended by telephone. I also receive a $5,000 annual retainer for my service as the Chairman of the Nominating Committee of DISH's Board and a retainer of $25,000 for my service on the SLC. In total, I received $32,250 for my services as a director and SLC member in 2013. Additionally, in connection with my election to the Board in 2013, I was granted an option to acquire 7,500 Class A Shares of DISH at an exercise price of $57.92 per share under DISH's 2001 Nonemployee Director Stock Option Plan (the "2001 Director Plan"). Moving forward, pursuant to DISH's 2001 Director Plan, DISH will have discretion to grant me, as a continuing nonemployee director, an option to acquire Class A Shares annually. The compensation that I receive as a director of DISH is not a material portion of my income or net worth.

18. I am fully capable of considering the claims asserted by Jacksonville through the exercise of my own independent business judgment, considering only DISH's best interest, and have done so as a member of the SLC.

19. I would not be willing to take an action that I viewed as improper in order to retain my position on DISH's Board or please Mr. or Mrs. Ergen. Not only would doing so be a violation of my own integrity, but by primary role is as a capital manager. In that role, I manage funds in a fiduciary capacity. Any breach of my fiduciary duties to DISH would reflect on my ability to act as an investment fund manager. My integrity and my reputation for integrity are far too important to cast aside by breaching my fiduciary duties to DISH and its minority stockholders.

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20. I would not hesitate to resign from the DISH Board if I felt that I could not serve on the Board in an independent manner or if I felt that I could not carry out my duties due to a conflict of interest.

III. Challenged Relationships

21. As noted in the Complaint (¶ 27), Mrs. Ergen is my son's godmother. In its Opposition to the SLC's Motion to Dismiss for Failure to Plead Demand Futility (the "Opposition"), Jacksonville asserts that I chose Mrs. Ergen to be the godmother to my son (Opposition pp. 5-6), and that I have "a close relationship[,]" with the Ergens. (Opposition, p. 23). This is only partially accurate.

22. My son has three godparents. Our tradition is to have two godparents of the child's gender and one godparent of the opposite gender for the child. I chose my son's two godfathers; my wife chose my son's one godmother. My wife chose Mrs. Ergen to be my son's godmother because Mrs. Ergen grew up with and remains a friend of my mother-in-law; I supported her decision. My wife is from Australia and did not have an established network of old friends in this country when she picked Mrs. Ergen to be our son's godmother. When our daughter was born, my wife selected two different women to be our daughter's godmothers, and I selected our daughter's one godfather.

23. Mrs. Ergen falls within my and my family's wide general social circle. When my wife sends pictures of our children to groups of people, Mrs. Ergen is sometimes included. As she does with other friends, my wife speaks with Mrs. Ergen from time to time by telephone. To my knowledge, Mrs. Ergen has never visited New York specifically to see my family. But, when Mrs. Ergen is in New York, she will sometimes visit our family in the course of her trip. My recollection is that Mrs. Ergen visits my family about once or twice a year. My family, with the possible exception of my wife, has never taken a trip to Colorado in order to visit Mrs. Ergen (or Mr. Ergen), but when we are in Colorado to ski, we may also visit Mrs. Ergen. Due to his schedule, Mr. Ergen is rarely involved in these visits. My relationship with Mr. Ergen is almost entirely focused on business.

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24. Jacksonville's assertion (SAC ¶ 308) that Mrs. Ergen or Mr. and Mrs. Ergen would become my son's guardian if something happened to my wife and me is baseless. My will specifies that, if my wife and I die, my brother would become my son's legal guardian.

25. The Ergens would have no responsibility for either of my children in the event that something horrible happened to my wife and me. They have no financial responsibility for my son. There is no sense in which DISH recovering money from Mr. Ergen would equate to taking money from my son, as Jacksonville has suggested.

26. The Complaint also alleges that I have "provided Ergen with free professional advice on multiple occasions." (SAC ¶ 308). That is accurate. I am a former investment banker, with decades of experience. In any given week, several business people will reach out for my advice on various matters. I answer their questions and build relationships without any expectation of compensation. It is not only typical, but expected, for professionals to provide uncompensated counsel within my industry.

27. I first interacted with Mr. Ergen more than a decade ago, while at Lazard, representing a Lazard client. Lazard was engaged to assist in sorting out a joint venture between the client and DISH. Thus, I was adverse to DISH in that engagement. Since then, Mr. Ergen has called occasionally and I have provided free professional advice. These conversations began before I married my wife and had nothing to do with my mother-in-law's friendship with Mrs. Ergen.

28. My most significant business discussion with Mr. Ergen, before I joined the DISH Board, was in February of 2013, when I had a general discussion with Mr. Ergen concerning DISH's strategic options related to acquisition activity at that time. I understand that this conversation may have led most directly to Mr. Ergen asking me to join DISH's Board.

29. Neither the social connection between my family and Mrs. Ergen nor my business interactions with Mr. Ergen is akin to the relationship of close relatives. I might consider the Ergens to be friends, but I take seriously my responsibilities as a fiduciary of DISH. I would never put the Ergens' interests ahead of my fiduciary duties, that is to say,

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ahead of the interests of DISH and its minority stockholders. Thus, I did not and I would not take the Ergens' personal interests into account in deciding whether DISH should pursue claims against them or any other person named a defendant in the Complaint. If I had concluded that it would have been in DISH's best interest to pursue claims against the Ergens or anyone else, I would have recommended that the claims be pursued and taken appropriate action as a director of DISH to see that DISH's best interests were served.

IV. SLC Investigation

30. As a member of the SLC, I and the other members of the SLC oversaw a thorough investigation of the claims alleged by Jacksonville. The SLC Report and the Motion to Defer accurately describe the procedures for and the scope of the SLC's investigation in more detail than I address here.

31. With respect to each claim asserted by Jacksonville, the SLC discussed the legal issues that would determine whether DISH might be able to recover on that claim with our counsel and directed that all necessary legal analysis be performed. I reviewed information provided by the SLC's counsel. I also reviewed the briefing in connection with all of the parties' motions to dismiss this action and considered those legal arguments, including the arguments made by Jacksonville.

32. With respect to each claim asserted, the SLC discussed what information would be necessary to accurately understand the factual background for the claim. Then, with the guidance of our counsel, we directed that the information be gathered and reviewed. Although I rely on counsel to confirm the precise number of pages of documents reviewed and each custodian from whom documents were collected, the specific numbers of documents and custodians described in the SLC Report seem consistent with the SLC's directions and my understanding of the process.

33. At the SLC's request, counsel to the SLC passed along to me and the other SLC members for review a subset of the documents analyzed by counsel, still thousands of pages of documents. I personally reviewed the documents that I found most important to the investigation, which included the deposition transcripts, some relevant filings from

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LightSquared's bankruptcy, including the decisions of the Bankruptcy Court in the Adversary Proceeding and the Plan Confirmation Proceeding, each of the significant filings in this action, and the documentation concerning Mr. Ergen's LightSquared Secured Debt trades. I performed my own analysis of those Secured Debt trades, based upon my personal experience with distressed bank debt. At the SLC's request, counsel also provided multiple cogent summaries and timelines of the factual information relevant to the claims for the SLC's review, which I similarly reviewed.

34. I participated in almost all of the interviews conducted by the SLC in the course of our investigation, as did Mr. Lillis and Mr. Ortolf. Although counsel led the questioning at the interviews, I and the other SLC members also asked questions that we felt needed to be answered.

35. Each of my legal or factual questions was answered in the course of the investigation.

36. The SLC met numerous times over the course of our investigation to discuss (1) the information and legal advice that we had received, (2) what additional information or advice we believed would be useful for our investigation, and (3) the future steps necessary for the completion of our investigation.

V. The SLC's Interim Report

37. In the initial stage of the SLC's investigation, when providing direction with respect to the SLC's Interim Report, the SLC considered whether the injunctive relief sought by Jacksonville would be in DISH's best interest. The SLC requested and received information related to its goal of answering that question on an expedited basis, while deferring its investigation of whether the pursuit of claims for monetary relief against Mr. Ergen and others would be in DISH's best interest.

38. Jacksonville's assertion that the SLC had reached a conclusion with respect to DISH's monetary claims by November of 2013 (SAC ¶¶ 203, 314-317; Opposition, pp. 7-8) is not accurate.

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39. At the time of the SLC's Interim Report, we concluded that the injunctive relief requested by Jacksonville would not be in DISH's best interests. As for the claims for monetary relief, we concluded that, if the claims had merit, DISH would be able to recover from the defendants any appropriate damages. However, we further concluded that, if the injunctive relief interfered with DISH's effort to acquire LightSquared's assets, DISH might not be able to recover any resulting damages from any person.

40. At that time, the SLC had not reached a conclusion with respect to whether it would be in DISH's best interest to assert monetary claims against Mr. Ergen or any other defendant. The merits of DISH's monetary claims remained a subject for investigation by the SLC.

VI. The SLC's Motion to Dismiss for Failure to Plead Demand Futility

41. During the course of the SLC's investigation, the members of the SLC evaluated each member's independence. We updated this evaluation upon the filing of the Second Amended Complaint. We concluded that each member of the SLC was independent. Based upon my observations, Mr. Ortolf and Mr. Lillis took the SLC's investigation seriously, acted independently, and reached their determinations in good faith, based upon the best interests of DISH and its minority stockholders.

42. I do not believe that either I or any other member of the SLC faces a material risk of personal liability from the claims asserted in the Complaint. As detailed in the SLC Report, the claims asserted against the Director Defendants lack merit. Also, it is my understanding that under Nevada law, a director may only be held liable for damages where the director breached his or her fiduciary duties and "[t]he breach of those duties involved intentional misconduct, fraud or a knowing violation of the law." (Nev. Rev. Stat. Ann. § 78.138(7)). Knowing my own motivations, having investigated the claims, and having worked at length with Mr. Lillis and Mr. Ortolf, I am confident that no SLC member engaged in intentional misconduct, fraud, or a knowing violation of the law.

43. I authorized the SLC's Motion to Dismiss for Failure to Plead Demand Futility (the "Motion to Dismiss") based on my confidence that the SLC was independent and fully

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capable of overseeing the litigation of any claims that our investigation determined should proceed.

44. When I approved the SLC's Motion to Dismiss, I had not reached a final determination with respect to whether the claims asserted in the Complaint should be pursued by DISH; I had simply determined that Jacksonville was not needed for the pursuit of those claims, because I had determined that the members of the SLC were independent and capable of overseeing any appropriate litigation on behalf of DISH.

VII. The SLC's Report

45. Over the last 13 months, I estimate that I personally spent hundreds of hours on the SLC's investigation.

46. At the close of the investigation, I reviewed several successive drafts of the SLC Report. The final SLC Report accurately reflects the SLC's findings, analysis, and determinations.

47. My assessment of the merits of each of the claims asserted by Jacksonville was based on the relevant facts and law as well as my many years of business experience. I reached that assessment based on my own good faith evaluation of the claims.

48. My decision that the SLC should recommend that DISH not pursue litigation with respect to any of the claims in the Complaint was not affected by my relationship with Mr. or Mrs. Ergen, or anything other than what I believe to be the best interest of DISH and its minority stockholders.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 17th day of November, 2014 at 1:36, pm.

George R. Brokaw

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EXHIBIT C

EXHIBIT C

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Attorneys for the Special Litigation Committee of Dish Network Corporation

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION **DERIVATIVE LITIGATION**	**Case No. A-13-686775-B** **Dept. No. XI**

DECLARATION OF TOM A. ORTOLF

I, Tom Ortolf, pursuant to NRS 53.045, declare as follows:

1. I am over 18 years of age and am competent to testify to the matters set forth in this Declaration.

2. I have personal knowledge of the matters set forth in this Declaration.

3. I submit this Declaration in support of the SLC's Motion to Defer to the SLC's Determination that the Claims Should Be Dismissed (the "Motion to Defer"), which asks this Court to dismiss the Second Amended Complaint (the "Complaint" or "SAC"), filed by Jacksonville Police and Fire Pension Fund ("Jacksonville"), based upon the investigation and conclusions reached by the Special Litigation Committee (the "SLC") of the board of directors (the "Board") of DISH Network Corporation ("DISH"), as documented in the DISH Network Corporation Report of the Special Litigation Committee, October 24, 2014 (the "SLC Report").

I. Expertise

4. From 1988 to 1991, I served as the President and Chief Operating Officer of EchoSphere, LLC ("Echosphere") the predecessor entity to DISH. Several years after resigning as an officer of EcoSphere, I became a director of EchoStar Communications Corporation ("Old EchoStar"), EchoSphere's successor entity. I remained a director of both DISH and EchoStar Corporation ("EchoStar") when Old EchoStar divided into DISH and EchoStar in 2008.

5. I left EchoSphere in 1991 in order to pursue diverse business ventures of my own. I formed Colorado Meadowlark Corp. ("CMC") to act as a holding company for those ventures.

6. Shortly after I left EchoSphere, I participated as a minority member and an employee in Titan Satellite Systems Corp. ("Titan"), a partnership among myself, the Titan Corp., and EchoSphere to develop an encryption product. After a year and a half, in 1992, we abandoned the project and terminated the partnership. The major providers of satellite programing decided against using Titan's encryption system for technical reasons. Titan's business was never up and running. I suffered a material investment loss because of my involvement with Titan.

7. In the past two decades, through CMC, I have invested in and managed numerous businesses, including 25 beauty salons, 5 shipping stores, and a substantial commercial real-estate business. I continue to serve as the President of CMC to this day.

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8. Prior to beginning my professional career, I earned a Bachelor of Arts from Washington State University and a Master of Business Administration from the Tuck School of Business at Dartmouth College.

II. Independence

9. I joined the DISH (then the Old EchoStar) Board on May 6, 2005. I serve on the Audit Committee, Compensation Committee, and Nominating Committee. I have served on both the EchoStar Board and the DISH Board since Old EchoStar separated in 2008. I am an independent outside director of both EchoStar and DISH.

10. Titan, which concluded in 1992, was the only business venture that I ever entered into with Mr. Ergen or any of the other individuals named as defendants in the Complaint. Other than my role as a director of DISH, I have no financial ties to Mr. or Mrs. Ergen.

11. As affirmed by DISH in its public filings, I satisfy the independence requirements of the NASDAQ exchange on which DISH's stock trades.

12. Although I am an outside independent director, I did not serve on the special transaction committee of DISH (the "STC") charged with evaluating whether DISH should submit a bid for LightSquared's assets because I also served on the board of EchoStar, which was considering the same opportunity. After the creation of the STC, EchoStar elected not to pursue LightSquared's assets.

13. In my capacity as a director of DISH, I receive an annual retainer of $60,000 which is paid in equal quarterly installments, $1,000 for each Board meeting attended in person, and $500 for each Board meeting attended by telephone. I also receive a $5,000 annual retainer for my service as Chairman of the Audit Committee of DISH's Board and received a total retainer of $25,000 for my service as a member of the SLC. Lastly, pursuant to DISH's 2001 Nonemployee Director Stock Option Plan, DISH has discretion to grant me, as a continuing nonemployee director, an option to acquire Class A Shares annually. I received $99,000 and an option to acquire 5,000 Class A Shares of DISH stock at an exercise price of $42.52 per share for my services as a director of DISH in 2013.

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14. Similarly, in my capacity as a director of EchoStar, I receive an annual retainer of $60,000 which is paid in equal quarterly installments, $1,000 for each meeting attended in person, and $500 for each meeting attended by telephone. I also receive a $5,000 annual retainer for my service as Chairman of the Compensation Committee of EchoStar's board of directors (the "EchoStar Board"), reimbursement of reasonable travel expenses related to attendance at meetings of the EchoStar Board and its committees, and reimbursement of expenses related to educational activities undertaken in connection with my service on the EchoStar Board and its committees. Lastly, in recent years, pursuant to EchoStar's nonemployee director stock option plan, EchoStar has made annual grants to its nonemployee directors, including me, of an option to acquire 5,000 Class A Shares of EchoStar stock. I received $70,000 and an option to acquire 5,000 Class A Shares of EchoStar stock at an exercise price of $39.11 per share for my services as a director of EchoStar in 2013.

15. Contrary to the allegations in the Complaint, (SAC ¶¶ 32, 306), the compensation that I receive as a director of DISH and EchoStar is not a material portion of my net worth. My fees as a director have no effect on my lifestyle or standard of living.

16. I am fully capable of considering the claims asserted by Jacksonville through the exercise of my own independent business judgment, considering only DISH's best interest, and have done so as a member of the SLC.

17. I would not be willing to take an action that I viewed as improper in order to retain my position on DISH's Board or to please the Ergens. My integrity is far too important to me for that. My position on DISH's Board and EchoStar's Board is but a small subset of my personal business activity.

III. Challenged Relationships

18. The Second Amended Complaint alleges that I am not independent because I worked at EchoSphere, as its president and chief operating officer, more than twenty years ago, from 1988 until 1991. (SAC ¶¶ 32, 306) The Complaint's claim is not correct. Since leaving EchoSphere, I have focused my energy on numerous other business ventures. My position as an officer of EchoSphere – more than two decades ago – is not an impediment to my

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exercising my independent business judgment with respect to the merits of the claims asserted in the Complaint.

19. The Complaint also alleges that I have a conflict of interest with respect to asserting claims against Mr. Ergen because DISH, at one time, employed my older son, and currently employs my older daughter. (SAC ¶¶ 32, 307). Again this assertion is not accurate.

20. My older son, Paul Ortolf, obtained his undergraduate degree in international finance and business in 2007. Thereafter, in 2008, he was recruited by DISH, through its typical recruitment channels, for an entry level position in DISH's international programing department. Paul left DISH in 2012 to attend graduate school. He is still in graduate school and has been interning elsewhere. I do not think that it is at all likely that Paul would have an interest in returning to work for DISH after he graduates.

21. My older daughter Meaghan Blevans was hired by DISH in 2010 or 2011 after applying through DISH's general hiring process. I did not even know that she was applying for a job with DISH when she applied. Meaghan applied to work for DISH because DISH is a substantial employer within the Denver market where she lives and because she was familiar with the company because of my position on DISH's Board. I did not discuss her hiring by DISH with anyone at DISH before she was hired.

22. Meaghan works for DISH in DISH's commercial division, managing DISH subscriptions for apartment complexes. Meaghan joined DISH in an entry level position. Meaghan has done a good job for DISH, but after three years of working at DISH, she is not part of DISH management.

23. I am confident that Meaghan could find comparable or better employment at a company other than DISH if she decided to change employers or if she were terminated.

24. Jacksonville has emphasized that I did not disclose Meaghan's employment by DISH in the SLC's initial report. (SAC ¶¶ 32, 204) But, neither Meaghan's employment by DISH, nor the amount of Meaghan's compensation from DISH, is material to me, such that it might bear upon my ability to independently evaluate the claims asserted in the Complaint.

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When counsel for the SLC prepared the SLC's initial report, disclosing potential conflicts of interest, it did not occur to me to mention Meaghan's employment by DISH.

25. Finally, Jacksonville has alleged that my vote to terminate the STC demonstrates a lack of independence. (SAC ¶ 298) I voted to terminate the STC after it provided its recommendation to the DISH Board because I believed that the STC's work was concluded. Given that I believed that the STC's work was completed, I thought that it would be in DISH's best interest to save money by terminating the STC until such time as its services were again needed. My decision to terminate the STC had nothing to do with any desire to somehow benefit Mr. Ergen. In terminating the STC, the Board discussed the possibility of forming a new special committee at a later point and, in forming the SLC, the Board in fact did so.

26. I take seriously my responsibilities as a fiduciary of DISH and its minority stockholders. When I believe that it would be in DISH's best interest or in the best interest of DISH's minority stockholders for something to be done, I raise the issue with my fellow directors or committee members and ensure that it receives the discussion and action that it deserves. I do not and did not adjust my work for DISH on the DISH Board, on DISH Committees generally, or on the SLC in particular to curry favor with Charlie Ergen. I would never sacrifice the best interest of DISH to a fellow director's, or Mr. Ergen's, conflict of interest in order to preserve Meaghan's employment with this specific company. I would not breach my fiduciary duties to advance some personal interests of the Ergens: I certainly did not do so as a member of the SLC.

27. If I had concluded that it would have been in DISH's best interest to pursue any of the claims raised in the Complaint, I would have recommended that the claims be pursued. As explained more fully in the SLC's Report, I, along with Mr. Lillis and Mr. Brokaw, determined that it would not be in DISH's best interest to pursue claims with dubious merit, particularly where pursuing those claims might impair DISH's defense in other litigation.

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IV. SLC Investigation

28. As a member of the SLC, I and the other members of the SLC oversaw a thorough investigation of the claims alleged by Jacksonville. The SLC Report and the Motion to Defer accurately describe the procedures for and the scope of the SLC's investigation in more detail than I address here.

29. With respect to each claim asserted by Jacksonville, the SLC discussed the legal issues that would determine whether DISH might be able to recover on that claim with our counsel and directed that all necessary legal analysis be performed. I reviewed information provided by the SLC's counsel. I also reviewed the briefing in connection with all of the parties' motions to dismiss this action and considered those legal arguments, including the arguments made by Jacksonville.

30. With respect to each claim asserted, the SLC discussed what information would be necessary to accurately understand the factual background for the claim. Then, with the guidance of our counsel, we directed that the information be gathered and reviewed. Although I rely on counsel to confirm the precise number of pages of documents reviewed and each custodian from whom documents were collected, the specific numbers of documents and custodians described in the SLC Report seem consistent with the SLC's directions and my understanding of the process.

31. At the SLC's request, counsel to the SLC passed along to me and the other SLC members for review a subset of the documents analyzed by counsel, still thousands of pages of documents. I personally reviewed the documents that I found most important to the investigation, which included the transcripts of various depositions, the summaries of each interview by the SLC, and all of the documents concerning LightSquared's bankruptcy proceedings, including the decisions of the Bankruptcy Court in the Adversary Proceeding and the Plan Confirmation Proceeding. At the SLC's request, counsel also provided multiple cogent summaries and timelines of the factual information relevant to the claims for the SLC's review, which I similarly reviewed.

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32. I participated in almost all of the interviews conducted by the SLC in the course of our investigation, as did Mr. Lillis and Mr. Brokaw. Although counsel led the questioning at the interviews, I and the other SLC members also asked questions that we felt needed to be answered.

33. Each of my legal or factual questions was answered in the course of the investigation.

34. The SLC met numerous times over the course of our investigation to discuss (1) the information and legal advice that we had received, (2) what additional information or advice we believed would be useful for our investigation, and (3) the future steps necessary for the completion of our investigation.

V. The SLC's Interim Report

35. In the initial stage of the SLC's investigation, when providing direction with respect to the SLC's Interim Report, the SLC considered whether the injunctive relief sought by Jacksonville would be in DISH's best interest. The SLC requested and received information related to its goal of answering that question on an expedited basis, while deferring its investigation of whether the pursuit of claims for monetary relief against Mr. Ergen and others would be in DISH's best interest.

36. Jacksonville's assertion that the SLC had reached a conclusion with respect to DISH's monetary claims by November of 2013 (SAC ¶¶ 203, 314-317; Opposition, pp. 7-8) is not accurate.

37. At the time of the SLC's Interim Report, we concluded that the injunctive relief requested by Jacksonville would not be in DISH's best interests. As for the claims for monetary relief, we concluded that, if the claims had merit, DISH would be able to recover from the defendants any appropriate damages. However, we further concluded that, if the injunctive relief interfered with DISH's effort to acquire LightSquared's assets, DISH might not be able to recover any resulting damages from any person.

38. At that time, the SLC had not reached a conclusion with respect to whether it would be in DISH's best interest to assert monetary claims against Mr. Ergen or any other

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defendant. The merits of DISH's monetary claims remained a subject for investigation by the SLC.

VI. The SLC's Motion to Dismiss for Failure to Plead Demand Futility

39. During the course of the SLC's investigation, the members of the SLC evaluated each member's independence. We updated this evaluation upon the filing of the Second Amended Complaint. We concluded that each member of the SLC was independent. Based upon my observations, Mr. Brokaw and Mr. Lillis took the SLC's investigation seriously, acted independently, and reached their determinations in good faith, based upon the best interests of DISH and its minority stockholders.

40. I do not believe that either I or any other member of the SLC faces a material risk of personal liability from the claims asserted in the Complaint. As detailed in the SLC Report, the claims asserted against the Director Defendants lack merit. Also, it is my understanding that under Nevada law, a director may only be held liable for damages where the director breached his or her fiduciary duties and "[t]he breach of those duties involved intentional misconduct, fraud or a knowing violation of the law." (Nev. Rev. Stat. Ann. § 78.138(7)). Knowing my own motivations, having investigated the claims, and having worked at length with Mr. Lillis and Mr. Brokaw, I am confident that no SLC member engaged in intentional misconduct, fraud, or a knowing violation of the law.

41. I authorized the SLC's Motion to Dismiss for Failure to Plead Demand Futility (the "Motion to Dismiss") based on my confidence that the SLC was independent and fully capable of overseeing the litigation of any claims that our investigation determined should proceed.

42. When I approved the SLC's Motion to Dismiss, I had not reached a final determination with respect to whether the claims asserted in the Complaint should be pursued by DISH; I had simply determined that Jacksonville was not needed for the pursuit of those claims, because I had determined that the members of the SLC were independent and capable of overseeing any appropriate litigation on behalf of DISH.

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VII. The SLC's Report

43. Over the last 13 months, I estimate that I personally spent several hundred hours on the SLC's investigation.

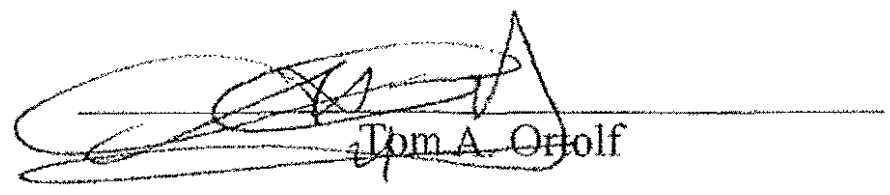
44. At the close of the investigation, I reviewed several successive drafts of the SLC Report. The final SLC Report accurately reflects the SLC's findings, analysis, and determinations.

45. My assessment of the merits of each of the claims asserted by Jacksonville was based on the relevant facts and law as well as my many years of business experience. I reached that assessment based on my own good faith evaluation of the claims.

46. My decision that the SLC should recommend that DISH not pursue litigation with respect to any of the claims in the Complaint was not affected by my relationship with Mr. or Ms. Ergen, or anything other than what I believe to be the best interest of DISH and its minority stockholders.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 16 th day of November, 2014 at Surprise, AZ.



Tom A. Ortolf

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EXHIBIT D

EXHIBIT D

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Attorneys for the Special Litigation Committee of Dish Network Corporation

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION **DERIVATIVE LITIGATION**	**Case No. A-13-686775-B** **Dept. No. XI**

DECLARATION OF C. BARR FLINN, ESQ.

I, C. Barr Flinn, pursuant to NRS 53.045, declare as follows:

1. I am over 18 years of age and am competent to testify to the matters set forth in this Declaration.

2. I have personal knowledge of the matters set forth in this Declaration.

3. I am a partner at the law firm of Young Conaway Stargatt & Taylor, LLP ("Young Conaway"), a firm based in Delaware. Young Conaway is a 107 lawyer firm, recognized by its peers and clients as one of the premiere law firms in Delaware, with a strong focus on its corporate governance and its bankruptcy practices.

4. Along with Holland & Hart LLP and my colleagues, including David C. McBride, and Robert S. Brady, I serve as counsel to the Special Litigation Committee (the "SLC") of the board of directors (the "Board") of DISH Network Corporation ("DISH"). The SLC has investigated the claims asserted by Jacksonville Police and Fire Pension Fund ("Jacksonville") in the Second Amended Complaint (the "Complaint") filed in in the above-captioned litigation (the "Nevada Litigation").

I. Expertise

5. Young Conaway has a substantial depth of expertise in bankruptcy, corporate law, and special committee investigations, among other practice areas. As a premiere law firm in Delaware, where over 50% of Fortune 500 corporations are incorporated, Young Conaway regularly represents publicly-traded companies and boards of directors of publicly-traded companies in significant litigation. Furthermore, Young Conaway regularly serves as counsel to independent special committees of boards of directors.

6. My colleague David C. McBride is a distinguished member of the Delaware corporate bar. He personally litigated many key cases shaping Delaware corporate law. He has been a partner at Young Conaway for thirty one years and serves as an Appointed Member of the Committee on Corporate Laws of the Section of Business Law of the American Bar Association. Since 2006, he has been recognized by Chambers USA as one of America's leading lawyers in the area of corporate counseling and litigation.

7. My colleague Robert S. Brady has been a partner at Young Conaway for sixteen years. At Young Conaway, Mr. Brady's practice focuses on chapter 11 restructuring cases. Since 2005, Mr. Brady has been consistently recognized for his work in bankruptcy and creditor-debtor rights law by The Best Lawyers in America, and since 2006, he has been

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recognized by Chambers USA as one of America's leading lawyers in the area of bankruptcy and restructuring.

8. I have been a partner at Young Conaway for fourteen years. My practice concentrates on corporate litigation. Among other matters, I have handled prominent special committee investigations, including several confidential matters and an investigation by a committee of the board of directors of the Financial Industry Regulatory Authority ("FINRA") concerning whether FINRA should assert claims against its existing and former directors based upon FINRA's 2008-2009 investment losses and compensation practices. Since 2009, I have been recognized for my work in the area of Mergers & Acquisitions Litigation by The Best Lawyers in America.

9. In representing the SLC, Young Conaway used its expertise in both corporate law and bankruptcy law to advise the SLC with respect to the SLC's investigation of the claims asserted by Jacksonville in its Complaint. Among other tasks, over the past thirteen months, Young Conaway reviewed more than 39,000 documents (consisting of more than 357,000 pages), monitored the LightSquared bankruptcy proceedings, and reviewed testimony, briefing, and hearing transcripts from the bankruptcy proceedings. Young Conaway also provided legal advice to the SLC regarding the SLC's fiduciary duties, best practices for SLC investigations, and the legal issues surrounding Jacksonville's claims.

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II. Independence

10. The SLC retained Young Conaway as counsel in September 2013. Before Young Conaway undertook this representation, it performed a search for conflicts of interest based upon the defendants named in the then-operative complaint and determined that Young Conaway was independent of George Brokaw, Tom Ortolf, Charles Ergen, Joseph P. Clayton, James DeFranco, Cantey M. Ergen, Steven R. Goodbarn, David K. Moskowitz, Carl E. Vogel, DISH, and EchoStar. Young Conaway subsequently confirmed that it is also independent of the additional persons added as defendants in the Second Amended Complaint: Charles M. Lillis, Thomas A. Cullen, Stanton Dodge, and Jason Kiser.

11. Young Conaway does not represent and has not previously represented Mr. Ergen, Mr. Clayton, Mr. DeFranco, Mrs. Ergen, Mr. Goodbarn, Mr. Moskowitz, Mr. Vogel, Mr. Cullen, Mr. Dodge, or Mr. Kiser. Young Conaway does not and has not previously represented Messrs. Brokaw and Ortolf except in their capacities as members of the SLC.

12. In the last ten years, Young Conaway has been involved in several matters in which DISH has also been involved, both minor matters on behalf of DISH and matters in which DISH's adversity to Young Conaway's client played a minor role. Due to the frequency of intellectual property litigation in Delaware and Young Conaway's prominence in Delaware, Young Conaway has had four minor engagements as local, Delaware counsel on behalf of DISH or EchoStar in the past ten years. Young Conaway has represented these companies solely as Delaware counsel in each of these matters. None of the attorneys principally responsible for advising the SLC were involved in these prior representations. These four representations collectively resulted in legal fees amounting to approximately $45,000, an amount that is not material to Young Conaway.

13. Young Conaway has represented at least one client adverse to DISH in the last decade. In that case, Young Conaway represented debtors in a bankruptcy where the resolution of DISH's contractual claims against the debtor was one issue requiring resolution prior to the debtor's reorganization.

14. Young Conaway has also represented Mr. Lillis once in the past. In 2005, Young Conaway acted as local counsel to Mr. Lillis and eighteen other former officers and directors of MediaOne in connection with a dispute with AT&T concerning AT&T's treatment of MediaOne stock options following its acquisition of MediaOne. Neither Mr. Cullen nor Mr. Vogel was a party to that litigation. The fees received in connection with that representation were not material to Young Conaway.

15. In November 2014, Young Conaway performed a confirmatory search for conflicts of interest and confirmed that Young Conaway remains independent of Mr. Ergen, DISH, EchoStar, Mr. Clayton, Mr. DeFranco, Mrs. Ergen, Mr. Goodbarn, Mr. Moskowitz, Mr.

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Vogel, Mr. Cullen, Mr. Dodge, and Mr. Kiser, as well as the members of the SLC (except in their capacities as members of the SLC).

16. Throughout the SLC's investigation, Young Conaway has always been independent of all defendants in the Nevada Litigation. Young Conaway has vigorously and independently represented the best interests of DISH and has faithfully fulfilled its obligations to DISH.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

EXECUTED this 17th day of November, 2014 at Wilmington, Delaware.

C. Barr Flinn

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EXHIBIT E

EXHIBIT E

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Attorneys for the Special Litigation Committee of Dish Network Corporation

DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION	Case No. A-13-686775-B Dept. No. XI

DECLARATION OF J. STEPHEN PEEK, ESQ.

I, J. Stephen Peek, pursuant to NRS 53.045, declare as follows:

1. I have personal knowledge of the matters set forth in this Declaration.

2. I am a partner at the law firm of Holland & Hart LLP ("Holland & Hart"). Holland & Hart is recognized by its peers and clients as one of the premiere law firms in Nevada, with a strong focus on its corporate governance litigation practice.

3. Along with my colleagues, including Holly Stein Sollod and Robert J. Cassity, I serve as counsel to the Special Litigation Committee (the "SLC") of the board of directors (the "Board") of DISH Network Corporation ("DISH") in the above-captioned litigation (the "Nevada Litigation"). The SLC has investigated the claims asserted by Jacksonville Police and Fire Pension Fund ("Jacksonville") in the Second Amended Complaint (the "Complaint") filed in the Nevada Litigation.

4. Holland & Hart, LLP is the largest law firm in the Mountain West Region, with over 470 attorneys in 15 offices, and has more lawyers among the Best Lawyers in America than any other law firm in the region. The firm represents a wide range of prominent clients on cutting edge legal issues and focuses upon creating superior legal product and delivering innovative legal service tailored to the needs of its clients.

5. I practice primarily in the areas of commercial and business litigation and have represented a variety of national, regional, and local companies, including hotel-casinos, financial institutions, gaming manufacturers, and suppliers, developers, and contractors in matters ranging from construction lien to securities litigation to labor and employment. I have over 40 years experience practicing law in Nevada. I have been recognized by Chambers USA, an independent organization ranking lawyers and law firms, as one of Nevada's top attorneys. I am also included in The Best Lawyers of America, Super Lawyers, Benchmark and In Business Las Vegas' Who's Who of Las Vegas.

6. I have tried more than 35 jury trials in my career. In addition to my trial experience, I have argued numerous cases before the Nevada Supreme Court and the Ninth Circuit Court of Appeals.

7. My colleague Holly Stein Sollod has a national trial practice based in Denver, Colorado with over 30 years of complex securities litigation experience. She has been a partner at Holland & Hart for twenty-five years and serves as Chair of the Colorado Bar Association

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Subcommittee on Securities Litigation. She has been recognized by The Best Lawyers in America as one of America's leading lawyers in the area of commercial litigation and securities/capital markets and by Colorado Super Lawyers, as one of Colorado's "Top 50 Women Lawyers." Ms. Sollod frequently acts as counsel to special litigation committees.

8. My colleague, Robert J. Cassity, is a partner at Holland & Hart who practices primarily in the area of commercial litigation. He represents a wide variety of business clients, including financial institutions, hotel/casinos, technology firms, land developers, commercial firms and small business owners in all manner of commercial disputes. He has been recognized by Mountain States Super Lawyers as a Rising Star in Business Litigation. Mr. Cassity has acted as counsel to special litigation committees in the past.

9. In this litigation, Holland & Hart used its expertise in both Nevada corporate law and shareholder litigation to advise the SLC with respect to the SLC's investigation of the claims asserted by Jacksonville in its Complaint. Among other things, over the past thirteen months, Holland & Hart, working with co-counsel Young Conaway, assisted in the review of more than 39,000 documents (consisting of more than 357,000 pages), monitored the LightSquared bankruptcy proceeding through the review of testimony elicited and briefing submitted in connection with the bankruptcy proceedings, and provided legal advice to the SLC regarding the SLC's fiduciary duties, best practices for SLC investigations, and the legal issues surrounding Jacksonville's claims.

10. The SLC retained Holland & Hart as counsel in September 2013. Before Holland & Hart undertook this representation, it performed a conflicts of interest check and determined that Holland & Hart was independent of Charles Ergen, DISH, and EchoStar. Holland & Hart does not represent and has not previously represented Mr. Ergen. Holland & Hart has been adverse to Charles Ergen, DISH, and/or EchoStar over 22 times in the past.

11. Holland & Hart has performed legal services to DISH or related parties in only two small matters, which have been closed. One matter involved tax advice provided to DISH and EchoStar that resulted in fees of $3,431. The other matter involved providing tax and estate planning advice to an attorney representing the Ergens that resulted in fees of $6,385.50. None

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of the attorneys principally responsible for advising the SLC were involved in these prior representations. Holland & Hart has not represented any members of the Board of Directors of DISH or Echostar, except for representing the members of the SLC in this matter.

12. In November 2014, Holland & Hart performed an additional conflicts of interest check and confirmed that Holland & Hart remains independent of Mr. Ergen, DISH, EchoStar, the Board of Directors of DISH, including the members of the SLC (aside from its representation of the members of the SLC in this matter).

13. Throughout the SLC's investigation, Holland & Hart has always been independent of all defendants in the Nevada Litigation. Holland & Hart has vigorously and independently represented the best interests of DISH and faithfully fulfilled its obligations to DISH.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this ___th day of November, 2014.

J. Stephen Peek

J. STEPHEN PEEK

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EXHIBIT F

EXHIBIT F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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

BENCH DECISION DENYING MOTION TO (A) EXPUNGE THE GUARANTY CLAIM ASSERTED BY THE LP LENDERS OR, IN THE ALTERNATIVE, (B) ESTIMATE THE GUARANTY CLAIM AT ZERO PURSUANT TO 11 U.S.C. § 502(c)

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SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Before the Court is the motion of Harbinger Capital Partners LLC ("Harbinger") to (a) expunge the guaranty claim asserted by the LP Lenders against the LP Parent Guarantors (the "Guaranty Claim") or, in the alternative, (b) estimate the Guaranty Claim at zero for purposes of allowance (the "Motion"). A statement in support of the Motion was filed by SIG Holdings, Inc. ("SIG"), together with the Declaration of Sandeep Qusba. Objections to the Motion were filed by (i) SP Special Opportunities, LLC ("SPSO"), which submitted the Declaration of James C. Dugan in support of its objection, and (ii) the Ad Hoc Secured Group of LightSquared LP Lenders (the "Ad Hoc Secured Group"), which filed the Declaration of Steven Zelin in support of its objection. Harbinger and SIG both filed replies to the objections on October 13, 2014, and Harbinger has submitted two declarations of David M. Friedman in support of the Motion. A hearing on the Motion was held on October 27, 2014. At the hearing, the Court elected to hear legal argument only and declined to hold an evidentiary hearing on the Motion. For the reasons that follow, the Motion is denied.[1]

I. Background

While the Court assumes familiarity with the extensive prior record of these proceedings and with the pleadings submitted by the parties with respect to the Motion, the Court will provide limited factual background for the purposes of this Bench Decision.

Pursuant to the October 1, 2010 Credit Agreement (the "LP Credit Agreement") among LightSquared LP, as borrower (the "Borrower"); LightSquared Inc. and the other parent guarantors party thereto (the "Parent Guarantors"); the subsidiary guarantors party thereto (the

[1] This decision was read into the record on October 30, 2014.

"Subsidiary Guarantors"); the administrative agent; and the lenders party thereto (the "LP Lenders"), the LP Lenders provided a term loan to LightSquared LP in the aggregate principal amount of $1.5 billion. Amounts outstanding under the LP Credit Agreement are secured by a first-priority security interest in, among other things, (i) substantially all of the assets of LightSquared LP and the LP Subsidiary Guarantors; (ii) the equity interests of LightSquared LP; and (iii) the equity interests of the LP Subsidiary Guarantors (collectively, the "LP Collateral"). Pursuant to Article VII of the LP Credit Agreement, the Subsidiary Guarantors and the Parent Guarantors (collectively, the "Guarantors") have each provided an unconditional joint and several guaranty (the "Guaranty") of what is defined in the LP Credit Agreement as the "Guaranteed Obligations." The Guaranteed Obligations include the payment in full in cash, when due, of the principal and interest on the LP Loans to, and the notes held by each LP Lender of, LightSquared LP, as well as all other obligations owing to the LP Lenders by any of LightSquared LP or the Guarantors under any loan document. (LP Credit Agreement § 7.01.)

Section 7.01 of the LP Credit Agreement further provides, in pertinent part, that "[t]he Guarantors hereby jointly and severally guarantee, as a primary obligor and not as a surety to each Secured Party and their respective successors and assigns, the prompt payment in full when due" of the principal and interest on the Loans. If LightSquared LP, as Borrower, or any of the Guarantors, which are all primary obligors, does not pay in full all of the Guaranteed Obligations when due, Section 7.01 provides that the Guarantors are jointly and severally liable to "promptly pay the same in cash." (LP Credit Agreement § 7.01.) The LP Credit Agreement also provides the LP Lenders with the right to seek recovery from the Guarantors even if the lenders do not first, or ever, seek it from the Borrower. (*See* LP Credit Agreement § 7.02.)

On May 14, 2012, the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, triggering an Event of Default under the LP Credit Agreement. On June 6, 2012, the Court entered a final agreed order approving the Debtors' Cash Collateral Motion (the "Cash Collateral Order"). The Cash Collateral Order defines "Prepetition Obligations" to include, *inter alia*, the $1,700,571,106 in aggregate principal amount outstanding under the LP Credit Agreement as of the Petition Date, and the defined term "Prepetition Obligations" encompasses the Guaranty. The Cash Collateral Order established August 11, 2012 as the "Investigation Termination Date" by which parties in interest could investigate the validity and enforceability of the Prepetition Obligations or would be forever barred from doing so after such date. No challenge to the Prepetition Obligations was filed on or before August 11, 2012. On September 6, 2012, the prepetition agents for the LP Lenders filed a master proof of claim, which was deemed to be filed against LightSquared LP and the Guarantors (the "Proof of Claim"). The Proof of Claim encompassed all claims for the Guaranteed Obligations under the LP Credit Agreement.

At this time, there are two pending plans of reorganization proposed for the Debtors; the Court has not yet held a confirmation hearing with respect to either Plan. The so-called "LP Only Plan" has been withdrawn, and the Ad Hoc Secured Group has filed its Second Amended Joint Plan, dated October 13, 2014,[2] which proposes a plan of reorganization for all of the Debtors; votes on this plan have not yet been solicited. Harbinger, a substantial equity holder and also a debt holder in LightSquared Inc., is the sponsor of a proposed plan of reorganization

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[2] The Court notes that the naming convention of the plans of reorganization filed in these cases has changed over time. The Court's Bench Decision read on May 8, 2014 and superseding published decision filed on July 11, 2014 denied confirmation of the Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code. On August 7, 2014, the Joint Plan Pursuant to Chapter 11 of Bankruptcy Code Proposed by Debtors and Ad Hoc Secured Group of LightSquared LP Lenders was filed. On October 13, 2014, the Ad Hoc Secured Group filed the Second Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code Proposed by Ad Hoc Secured Group of LightSquared LP Lenders.

for LightSquared Inc. and certain of its related Debtors. This plan, referred to as the "Inc. Plan" by the parties, is supported by the other major constituencies of LightSquared Inc. – SIG and MAST Capital Management LLC. It is a condition to confirmation of the Inc. Plan that the Court expunge or estimate the Guaranty Claim at zero. Although the Inc. Plan does not classify the Guaranty Claim at all, in its recently revised form it proposes to make a distribution to Holders of the Guaranty Claim by "surrender[ing] to the Prepetition LP Agent" the equity in LightSquared LP and LightSquared GP held by two of the Parent Guarantors, TMI Communications Delaware, Limited Partnership and LightSquared Investors Holdings Inc. The Inc. Plan also provides that, if the Court estimates a claim that has not yet been allowed, then the estimated amount shall constitute either the allowed amount of such claim or the maximum limitation on such claim.

II. The Motion

By the Motion, Harbinger argues that the Court can and should find that the LP Collateral is worth at least as much as the LP Debt plus the amount outstanding under the LP Debtors' DIP Facility and that, therefore, the LP Lenders will be paid in full under the terms of the LP Only Plan. Undaunted by the fact that the LP Only Plan has been withdrawn, Harbinger in its Reply argues that the Inc. Plan "accomplishes the very same thing" through its proposed surrender of 100% of the equity interests in LightSquared GP and LightSquared LP to the LP Lenders, the value of which, Harbinger submits, constitutes payment in full because its value exceeds the amount of the LP Debt. (Reply at ¶ 18.) Once the LP Lenders are "paid in full" in this way under the Inc. Plan, the Guaranty Claim would be discharged under the terms of the LP Credit Agreement. Accordingly, Harbinger and SIG submit that the Court can and should expunge the Guaranty Claim or, alternatively, estimate it at zero.

The Ad Hoc Secured Group and SPSO (together, the "Objectors") argue that the Motion should be denied because the Guaranty Claim cannot be expunged or estimated at zero **until** the LP Lenders are paid in full, and, aside from speculation that the LP Lenders will receive a full recovery sometime in the future, there has been no showing that the LP Debt can and will be satisfied. The LP Only plan has been withdrawn; the Second Amended Joint Plan has not been presented for confirmation; other than adequate protection payments, the LP Lenders have received no payment on the LP Debt since the Petition Date. Moreover, even though the Inc. Plan purports to pay the LP Lenders "in full" through the surrender of the equity of LightSquared LP and LightSquared GP, the Objectors point out that the value of such equity interests has not been monetized, or even determined, and the Inc. Plan has not yet been confirmed. The Objectors continuously emphasize that, under the LP Credit Agreement, the LP Lenders are entitled to assert the full amount of the Guaranty Claim against each of the Guarantors until the lenders are paid in full, which has not occurred; thus, there is no basis to expunge the Guaranty Claim. In addition, the Guaranty Claim is not subject to estimation, argue the Objectors, because the claim does not meet the requirements set forth in section 502(c) of the Bankruptcy Code.

DECISION

I. The Request to Estimate the Guaranty Claim at Zero

Section 502(c)(1) of the Bankruptcy Code provides that "[t]here shall be estimated for purposes of allowance under this section – (1) any contingent or unliquidated claim, the fixing or liquidation of which, as the case may be, would unduly delay the administration of the case. . . ." 11 U.S.C. § 502(c)(1). This Court has stated that, "when estimating claims, bankruptcy courts may use whatever method is best suited to the contingencies of the case, so long as the procedure is consistent with the fundamental policy of Chapter 11 that a reorganization 'must be

accomplished quickly and efficiently.'" *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 278 (Bankr. S.D.N.Y. 2007) (citations omitted). In order to seek estimation, however, a party must demonstrate that the gating requirements for estimation are met – namely, that the claim to be estimated is contingent or unliquidated and that the delay associated with the fixing or liquidation of such claim would be "undue." *See In re Dow Corning Corp.*, 211 B.R. 545, 562-63 (Bankr. E.D. Mich. 1997). Courts have observed that "it is within [the court's] sound discretion and not the obligation of [the court] to estimate a claim." *In re Apex Oil Co.*, 107 B.R. 189, 193 (Bankr. E.D. Mo. 1989).

a. The Guaranty Claim is Not Contingent

Harbinger argues that the Guaranty Claim is contingent, as a guaranty is a "classic illustration of a contingent claim." (Motion at ¶ 81 (citing to *In re Barnett*, 42 B.R. 254, 257 (Bankr. S.D.N.Y. 1984)).) While the Bankruptcy Code does not define the term "contingent" for purposes of section 502(c), courts have held that "a claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event" and "the occurrence or happening of [such] extrinsic event . . . will trigger . . . liability." *Mazzeo v. U.S. (In re Mazzeo)*, 131 F.3d 295, 303 (2d Cir. 1997) (citation omitted). Upon default of the principal on the underlying debt, liability on a guaranty becomes fixed and is no longer contingent because all predicates to enforcement have occurred. *See, e.g., In re Rhead*, 179 B.R. 169, 172 (Bankr. D. Ariz. 1994) (stating that, "but for the bankruptcy, SKW could seek a judgment against the Rheads for the full amount guaranteed, without the occurrence of any future event");[3] *In re F.B.F. Indus., Inc.*, 165 B.R. 544, 548-49 (Bankr. E.D. Penn. 1994) ("[t]he law is clear that a guaranty or surety claim is not contingent after a default by the primary obligor

[3] *See also* October 27, 2014 Hr'g Tr. at 111:12-18.

has occurred."). Because the Guarantors have primary obligations to pay the LP Loans when due, their liability is not contingent upon any future event.

While many words and pages have been devoted to the question of the existence or not of a prepetition default, the question is entirely beside the point. The LP Loans are now indisputably due and payable, and remain unpaid. The filing of the LightSquared chapter 11 cases was an Event of Default under the LP Credit Agreement which, pursuant to Section 7.01, triggered the Guarantors' obligation to pay the principal and interest in full and in cash and, pursuant to Section 8.01, entitled the Administrative Agent and the LP Lenders to exercise any and all remedies. The Guarantors' liability is no longer contingent on any future event. To borrow the words of the *Rhead* court, if LightSquared Inc. and the other Guarantors were not debtors, the LP Lenders could demand full payment – in cash – from LightSquared Inc. and the other Guarantors today.

Nor does the fact that the Borrower may be able to satisfy the claim render a guaranty claim contingent, as Harbinger attempts to argue. *See, e.g.*, *In re Rhead*, 179 B.R. at 172 (stating that "[a]dmittedly, it is possible, perhaps even probable, that the obligation due under the guarantee will be paid from another source. However, that fact alone does not make the debt either unliquidated []or contingent."); *In re F.B.F.*, 165 B.R. at 552 (stating that, in estimating guaranty claim of secured creditor, the court will not look to the collateral or the financial resources of other obligors and would instead estimate debtor's liability (as a surety) to be equal to 100 percent of the underlying liability, provided the creditor could not collect more than the total amount of the debt.).

Harbinger has cited several cases to this Court which it claims support the relief it seeks, including *In re Fox*, 64 B.R. 148 (Bankr. N.D. Ohio 1986); *In re Zucker*, 1979 Bankr. LEXIS

891 (Bankr. S.D.N.Y. July 2, 1979); and *In re Kaplan*, 186 B.R. 871 (Bankr. D.N.J. 1995). While the courts in each of these cases held that, when estimating a contingent guaranty claim, it is in fact appropriate to factor in the ability of the primary obligor to satisfy the obligation, the facts of each such case are notably distinguishable. In each case, the guarantees had not yet been triggered and the obligations remained conditional and contingent. In *Fox*, the debt on the obligations underlying the guaranty claim was current and the debt was not in default; in *Zucker*, the guarantors' obligations were contingent on both the default and the death of the primary obligor, neither of which had yet occurred; and, in *Kaplan*, the primary obligor was not in default on the loan, as the court found that there had been a waiver of a prior default. In contrast to these facts, as already discussed, no contingency remains here because a payment default has occurred and the Guarantors are guarantors of payment, and not collection – they are primary obligors under the LP Credit Agreement. The LP Credit Agreement provides the LP Lenders with the right to seek recovery from any Guarantors even if the lenders do not first, or ever, seek it from the Borrower. In addition, under New York law, the lender – not the obligor – has the right to decide what remedies to exercise, in what order, and against which co-obligor. *See, e.g., In re King*, 2010 Bankr. LEXIS 3830, at *9-10 (Bankr. N.D.N.Y. Oct. 20, 2010) ("[i]t is universally understood that the UCC does not require a secured creditor to elect a remedy . . . . Rather, the rights afforded a secured creditor are cumulative and may be exercised simultaneously.") (citations omitted).

Harbinger also attempts to rely on *Chemical Bank v. Meltzer*, 93 N.Y.2d 296 (N.Y. 1999), which it asserts "establishes the duty of LightSquared LP to LightSquared Inc. with respect to the discharge of the Guaranty Claim, thus further establishing a contingency to the claim." (Reply at ¶ 45.) In *Meltzer*, the New York Court of Appeals allowed a lender to pursue

its claims in full against a joint and several guarantor, holding that the guarantor would have the right to be subrogated to the lender upon payment in full by the guarantor. *Meltzer*, 93 N.Y.2d at 304. *Meltzer* dealt with the issue of subrogation rights, however, and its holding cannot be cited to create a requirement that LightSquared LP must pay the LP Debt prior to the LP Lenders seeking payment from any Guarantor, nor does its holding support the proposition that the Guaranty Claim is contingent. In fact, Harbinger cites to no case which holds that the LP Lenders must pursue payment from the Borrower first and waive their right to seek payment from the Guarantors rather than first asserting their full cash claim against the Guarantors, should they elect to do so. Finally, Harbinger's reliance on New York General Obligations Law Section 15-103 for the proposition that the value of consideration paid on account of a debt be credited to co-obligors, such that the Guaranty Claim can be reduced by the value of the equity collateral surrendered to the LP Lenders, is also unavailing. No payments on the LP Debt are being made by any obligor under the LP Credit Agreement, and the General Obligations Law does not require a "credit" because one or more co-obligors has *the ability* to pay or *will pay* in the future.

The parties disagree on the applicability of the Supreme Court's decision in *Ivanhoe Building & Loan Ass'n of Newark, N.J. v. Orr*, 295 U.S. 243 (1935). In *Ivanhoe*, the United States Supreme Court held that a creditor was permitted to assert the full value of its claim against a debtor co-obligor, unreduced by the stipulated value of the collateral, subject only to the "single-satisfaction rule" that the creditor could not retain value beyond payment in full. *Id.* at 245-46. Relying on *Ivanhoe*, the court in *In re F.W.D.C., Inc.* allowed a claimant to assert the full value of its claim against one obligor even after receiving collateral from a co-obligor, subject again to the rule that the claimant not retain more than 100 percent of the amount it was owed. *See In re F.W.D.C., Inc.*, 158 B.R. 523, 527-28 (Bankr. S.D. Fla. 1993). Harbinger

asserts that *Ivanhoe* and its progeny are inapplicable here because they do not involve scenarios in which a debtor-obligor is capable of satisfying a creditor's claim in full without looking to a guarantor, as Harbinger contends will be accomplished by the Inc. Plan's surrender of collateral to the LP Lenders in allegedly full satisfaction of the LP Debt. Again, Harbinger fails to recognize that nothing has yet been paid to the LP Lenders under any plan. Moreover, should the LP Lenders receive the equity interests of LightSquared LP and LightSquared GP as proposed by Harbinger, there are numerous risks and uncertainties related to the value of such equity. Those risks are properly borne by equityholders, not secured lenders.

b. The Guaranty Claim is Not Unliquidated

By the Motion, Harbinger asserts – without any legal support whatsoever – that, in addition to the fact that the Debtors scheduled the Guaranty Claim as contingent and unliquidated, "the likelihood that the LP Lenders will be repaid in full through the LP Collateral creates a contingency in the Guaranty Claim and renders the claim unliquidated." (Motion at ¶ 82.) Harbinger argues that, because New York law requires that the value of any consideration paid by one obligor on account of a debt be credited to a co-obligor, the satisfaction of the LP Debt through the Inc. Plan renders the Guaranty Claim unliquidated, as the claim is subject to reduction in an amount yet to be determined. In support of this argument, Harbinger relies on *In re Teigen*, in which the Bankruptcy Court for the District of South Dakota held that, where the primary obligor will satisfy an unknown portion of a claim pursuant to a confirmed plan of reorganization in a separate case, the corresponding guaranty claim is unliquidated, can be estimated under section 502(c), and can be reduced by the present value of the total payments to be received by the creditor pursuant to the confirmed plan. 228 B.R. 720, 723-24 (Bankr. D.S.D. 1998). *Teigen*, which is not binding on this Court, is unpersuasive. Its facts are readily

distinguishable from those present here, given that no plan has been confirmed in these cases, providing no definitive other source of payments by which to reduce the Guaranty Claim, as was the case in *Teigen*.

Moreover, Harbinger's circular argument that payment through surrender of the collateral creates a contingency that renders the Guaranty Claim unliquidated confuses and conflates the principles of "contingent" and "unliquidated." The Court has found that the Guaranty Claim is not contingent, as there is no future event that must occur to trigger the Guarantors' obligation to pay the LP Debt. Further, as the Ad Hoc Secured Group argues, there is no dispute regarding the amount and enforceability of the Guaranty Claim that renders such non-contingent claim unliquidated. Courts have held that "where the claim is determinable by reference to an agreement or by a simple computation" and where "the value of a claim is easily ascertainable," the claim is generally viewed as liquidated. *Mazzeo*, 131 F.3d at 304. The liquidated amount of the Guaranty Claim is set forth in the Cash Collateral Order as $1,700,571,106, and any additional interest is determinable by reference to the LP Credit Agreement.

c. Liquidation of the Guaranty Claim Would not Unduly Delay the Administration of the Cases

Even if the Guaranty Claim were contingent or unliquidated (and it is neither), estimation would still be improper because Harbinger has failed to demonstrate that the liquidation of the Guaranty Claim would unduly delay the administration of the Guarantors' chapter 11 cases, as it is required to show pursuant to section 502(c). This prong of section 502(c)(1) was not addressed at all in the Motion; Harbinger's Reply simply argues that estimation will help "avoid future gamesmanship and provide clarity to the parties that will ease the path to exit." (Reply at ¶ 60.) At the Hearing, counsel summarized this as a "classic" example of delay, stating that "we can't wait for them any longer to make up their mind what they want to do." (Oct. 27, 2014

Hr'g. Tr. at 38:16-20 (Friedman).) But the cause of this so-called delay is really the inability, in the absence of estimation at zero or expungement of the Guaranty Claim, to confirm a plan that allows Harbinger to effect LightSquared Inc.'s divorce from the LightSquared LP Debtors. In other words, "if the Court expunges this claim, we can confirm the Inc. Plan." The Court observes that this type of bootstrap reasoning is reminiscent of the argument made in support of the failed Third Amended Joint Plan regarding the "necessity" of treating SPSO in an unfairly discriminatory fashion. While the Court recognizes and shares the desire of all parties in interest to bring these cases to a successful conclusion as soon as possible, it declines to consider the failure to meet the parties' self-imposed deadlines and conditions to confirmation of the Inc. Plan as an appropriate factor to be considered in an undue delay analysis. Delay, undue or otherwise, is not a justification for ignoring applicable law or undermining the settled expectations of parties who transact every day in reliance on the belief, for example, that credit documents such as guarantees mean what they say.

Moreover, as already discussed and as argued by the Ad Hoc Secured Group, liquidation of the Guaranty Claim would not unduly delay the administration of the Guarantors' cases because the dollar amount of such claim can be easily determined by reference to the Cash Collateral Order. The "undue delay" prong of the inquiry under section 502(c)(1) cannot be satisfied.

II. The Request to Expunge the Guaranty Claim

Finally, the Court turns to the parties' arguments regarding whether the Guaranty Claim can be expunged in its entirety. Harbinger contends that, as long as the value of the transferred collateral exceeds the amount of the underlying debt, a transfer of collateral from a debtor to its secured creditor can satisfy the secured creditor's right to payment in full. Here, Harbinger

submits that this requirement is satisfied by the Inc. Plan's proposed surrender of a portion of the LP Collateral – the equity interests in LightSquared LP and LightSquared GP – to the LP Lenders through the Inc. Plan. This transfer "gives the LP Lenders complete control over the LP Debtors, which on an 'as-is' basis provides a payment in full to the LP Lenders." (Reply at ¶ 36.) No asset is incapable of valuation, argues Harbinger, and the valuation report prepared by Lazard Freres & Co., Harbinger's financial advisor, is consistent with the prior valuations in these cases that show that the LP Collateral is worth more than the LP Debt. Thus, Harbinger claims, because the value of the LP Debtors "far exceeds" the value of the LP Debt and because the transfer of the equity interests in LightSquared LP and LightSquared GP transfers control of this valuable collateral to the LP Lenders, the Inc. Plan satisfies the LP Debt in full.

Without even reaching the factual aspects of the arguments raised by Harbinger that (i) the LP Debt can be satisfied and the Guaranty Claim can be discharged through a return of collateral rather than solely by payment in cash and (ii) the collateral being returned to the LP Lenders is sufficiently valuable to satisfy the LP Debt in full, the Court again observes that, as an initial matter, the LP Lenders have not been paid at all, in cash or otherwise. No plan for the Debtors has been confirmed at this time which provides for any payments to the LP Lenders. And, prior to actual satisfaction of the LP Lenders' claims, the Guaranty Claim survives, unscathed. There is simply no basis for finding that, as a matter of law, the proposed treatment of secured lenders in a plan of reorganization that has yet to be confirmed is sufficient to constitute payment in full and discharge the secured lenders' guaranty claims against other obligors before any actual distributions to such lenders have been made. As SPSO succinctly states in its objection, "The only way to expunge the debt is to pay the claim." (SPSO Objection at ¶ 5.) Pursuant to Section 7.01 of the LP Credit Agreement, the Guarantors are primary

obligors with respect to the Guaranteed Obligations, which obligations must be paid in full when due. Prior to any payment to the LP Lenders in satisfaction of the LP Debt, each LP Lender continues to hold a claim against every Guarantor under the LP Credit Agreement for any amount that is unpaid when due, and each of the LP Lenders' claims continues to exist until the LP Debt is paid, in full.

The Court observes that many of the uncertainties causing delay in these cases are outside of the parties' control – in particular, the regulatory uncertainty that continues to plague the Debtors as they wait for the FCC to make a determination on the License Modification Application filed on September 28, 2012. In arguing that the LP Lenders are oversecured, Harbinger makes much of the Court's prior observations with respect to the value of the Debtors' assets, quoting three times in the Motion the Court's statement at an August 2014 status conference that there may well be enough value in the LP Lenders' collateral, with or without government action, to pay the LP Debt in full. As further support for its argument that the LP Collateral is sufficient to satisfy the LP Debt in full, Harbinger also relies on valuation ranges found in each of the three "credited" valuation reports submitted in connection with the Debtors' Third Amended Joint Plan (confirmation of which was denied in May 2014), two of which it argues "the Court itself has endorsed." (Motion at ¶¶ 30, 35; Reply at ¶ 62.) As the Court indicated in its Confirmation Decision, however, because no party has the ability to predict when and if regulatory approvals will be obtained, any assumptions regarding the timing or likelihood of such approvals are purely speculative. The Court's "guidance" in this regard has been, and continues to be, that valuations of the Debtors' assets remain uncertain, despite the parties' best efforts to submit evidence to the contrary; the Court has not "endorsed" any valuation. One thing that is certain, however, is that, despite its sweeping statements regarding the value of the

LP assets, Harbinger has not offered to finance, nor has it secured a third party to finance, a plan of reorganization for the Debtors. Accordingly, there remains a risk that the LP Lenders will not be repaid in full.

The Court makes one final observation, which was also noted by both SPSO and the Ad Hoc Secured Group in their Objections. If Harbinger is correct that the value of the LP estates is more than sufficient to pay the LP Debt in full, then it should not be troubled by the Court's refusal to expunge the Guaranty Claim; it could simply allow the Guaranty Claim in the Inc. Plan in its full face amount, confident that the Inc. Debtors will never be called upon to pay it. (SPSO Objection at ¶ 2; Ad Hoc Secured Group Objection at ¶¶ 9, 100.) Once again in these cases, holders of equity interests are attempting to leapfrog up the capital structure over secured creditors, inappropriately shifting downside risk to secured creditors that is properly borne by equity. This did not work in the Third Amended Joint Plan, and it does not work now.

III. Conclusion

In sum, Harbinger has cited no caselaw that supports the extraordinary relief it requests. Long-standing principles of commercial law would be overturned if, as Harbinger argues, a secured creditor with a contractual right to seek payment from multiple sources could be precluded from seeking recovery from a co-obligor merely because of an allegation that it is oversecured by the collateral of another co-obligor. Granting such relief would compromise the clear meaning and value of a guaranty such as the one issued in support of the LP Credit Agreement, which, by its terms, is a primary obligation that specifically promises payment in full and in cash without any condition that the lender look first to the borrower.

For all of these reasons, the Motion is denied.

IT IS SO ORDERED.

Dated: October 30, 2014
New York, New York

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

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REDACTED VERSION FILED

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DISTRICT COURT

CLARK COUNTY, NEVADA

IN RE DISH NETWORK CORPORATION DERIVATIVE LITIGATION

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

SUPPLEMENTAL AUTHORITY TO PLAINTIFF'S OPPOSITION TO THE SLC'S MOTION TO DEFER TO ITS DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED

Date of Hearing: January 12, 2015
Time of Hearing: 8:00 a.m.

On Wednesday, December 10, 2014, after Plaintiff Jacksonville Police and Fire Pension Fund ("Plaintiff") finalized and filed its Opposition to the SLC's Motion to Defer to its Determination that the Claims Should be Dismissed that same day, the U.S. District Court for the Western District of Washington issued its opinion in *Barovic v. Ballmer*, Case No. 2:14-cv-00540-JCC, which further supports Plaintiff's arguments in this matter.

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Plaintiff provides a copy of this aforementioned opinion attached hereto as **Exhibit "1"** and may refer to it at oral argument scheduled for January 12, 2015 at 8:00 a.m.

Dated this 15th day of December, 2014.

HOLLEY, DRIGGS, WALCH, PUZEY &THOMPSON

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing **SUPPLEMENTAL AUTHORITY TO PLAINTIFF'S OPPOSITION TO THE SLC'S MOTION TO DEFER TO ITS DETERMINATION THAT THE CLAIMS SHOULD BE DISMISSED** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 15th day of December, 2014. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:

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EXHIBIT 1

EXHIBIT 1

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM BAROVIC, *et al.*, *derivatively on behalf of Microsoft Corporation,* Plaintiffs, v. STEVEN A. BALLMER, *et al.*, Defendants.	CASE NO. C14-0540-JCC ORDER

This matter comes before the Court on Nominal Defendant Microsoft Corporation's Motion to Dismiss Complaint (Dkt. No. 19) and the Individual Defendants' Motion to Dismiss (Dkt. No. 23). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES both Motions for the reasons explained herein.

I. BACKGROUND

In December of 2009, European Union (EU) regulators dropped an antitrust case against Microsoft after nominal Defendant Microsoft Corporation agreed to offer European purchasers of Windows software a choice of several Web browsers, including competitors of Microsoft's Internet Explorer. (Verified Complaint, Dkt. No. 1 at 2.) This agreement, referred to by Plaintiffs as "the Settlement," obligated Microsoft to include "browser choice screens" (BCS) in

all Windows updates and new systems for the next five years. (*Id.* at 2, 11; *see also* Individual Defendants' Motion to Dismiss, Dkt. No. 23 at 2.) By stipulating to this Settlement, Microsoft was relieved of both the antitrust suit and avoided EU fines. (Complaint, Dkt. No. 1 at 11.) Pursuant to the terms of the Settlement, Microsoft was directly responsible for monitoring its own compliance with the Settlement during this five-year period. (*Id.*) Neither the Complaint nor any of the documents to which it refers offer in-depth information on the internal mechanisms by which Settlement compliance was monitored, verified, or ensured.

According to Plaintiffs, beginning in February 2011, Defendants ceased complying with the Settlement. (*Id.* at 2.) At this time, Microsoft released at least 15 million installations of Windows 7 in Europe that lacked the BCS, and on which Internet Explorer was the only web browser, in contravention of the Settlement's terms. (*Id.*)

Although Microsoft was responsible for self-monitoring its compliance with the Settlement, in the summer of 2012, almost a year and a half after the Settlement had first been breached, Microsoft was informed by the EU's antitrust chief, Joaquín Almunia, that the European Commission had received word that some Windows versions available in the EU were lacking the BCS Defendants had committed to include. (*Id.* at 3.) Microsoft offered an apology to Almunia and informed him that the omission was due to a technical error. (*Id.*) Plaintiffs allege that Defendants did not correct the problem, despite this admission and apology. (*Id.*)

Then, in October 2012, months after Almunia had first warned Defendants of the BCS omission, Almunia charged Microsoft with what Plaintiffs appear to allege was *continued* non-compliance with the Settlement terms, and ordered Microsoft to remedy the omission for the Windows 8 operating system then about to go on sale in the EU. (*Id.* at 16.)

On March 6, 2013, the EU decided to fine Microsoft the U.S. equivalent of $732.2 million dollars for violating the Settlement. (*Id.*) According to Plaintiffs, this marked the first time in history that the EU had punished a company for violating the terms of an antitrust settlement. (*Id.*)

In response, Microsoft issued another apology, taking "full responsibility" for the error, but maintaining that the omission was caused when an engineering team forgot to update the code that distributed the BCS on to a "service pack." (*Id.* at 19.)

In light of the omission and resultant monetary loss to the company, on March 22, 2013, one Plaintiff issued a pre-suit demand ("Demand") that Microsoft's Board investigate and commence an action against certain current and former directors and executive officers of the company. (*Id.; see also* Demand, Dkt. No. 1, Ex. A.) Ten months later, on January 28th, 2014, that Plaintiff's counsel received a letter ("the Refusal") from counsel for Microsoft's "Demand Review Committee" (DRC) stating that the DRC had investigated the merits of the suit and that the Board had decided that it would not be in the Corporation's interests to pursue the matter through litigation. (*Id.* at 4.) A "Resolution of the Board of Directors," included in the three-page Refusal, stated that the DRC had reviewed thousands of documents and conducted "relevant witness interviews," and that the Board had concluded, on the basis of this information, that the Demand did not assert facts that supported a viable claim for breach of fiduciary duty. (*Id.*) The Board added that the Corporation had already adopted significant remedial measures before it had received the Demand. (*Id.*)

That particular Plaintiff's counsel contacted the DRC's counsel in search of further details regarding the identities of the purported interviewees. (*Id.* at 5.) The DRC's counsel declined to identify any specific witnesses, but stated that the group was comprised of thirty-six employees, board members, and executives from various Microsoft departments and divisions. (*Id.*) The DRC never claimed, and does not now claim, to have interviewed Almunia or any member of the European Commission, or anyone external to Microsoft. (*Id.*)

Convinced that the omission of external interviewees, especially of interviewees from the EU, demonstrated the Board's lack of investigatory due diligence and good faith, Plaintiffs filed the instant suit on April 11, 2014, derivatively on behalf of nominal Defendant Microsoft Corporation, against various current and former executive officers and directors for breach of

fiduciary duty in connection with the violation of the Settlement. (*Id.* at 1-2.) Plaintiffs' specific claims include "Count I Against All Defendants for Breach of Fiduciary Duty for Disseminating Inaccurate Information" (based on alleged omissions in SEC filings), "Count II Against All Defendants for Breach of Fiduciary Duties for Failing to Maintain Internal Controls," "Count III Against All Defendants for Breach of Fiduciary Duties for Failing to Properly Manage the Company," "Count IV Against All Defendants for Unjust Enrichment," "Count V Against All Defendants for Abuse of Control," and "Count VI Against All Defendants for Gross Mismanagement." (*Id.* at 23-26.) On behalf of the Corporation, Plaintiffs seek damages from the individual Defendants in the amount that was lost as a result of the Settlement violation, equitable relief compelling Microsoft to reform and improve its internal legal compliance procedures, restitution from each of the named Defendants in the amount of the compensation they received while allegedly allowing the Settlement breach to occur, and attorneys' fees. (*Id.* at 26-27.) Before the Court today are nominal Defendant Microsoft Corporation's Motion to Dismiss Complaint (Dkt. No. 19) and the Individual Defendants' Motion to Dismiss (Dkt. No. 23).

II. DISCUSSION

A. Motion to Dismiss Legal Standard

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a party may move for dismissal when the opposing party "fail[s] to state a claim upon which relief can be granted." To grant a motion to dismiss, the court must conclude that the moving party is entitled to judgment as a matter of law, even after accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). There must be no genuine issues of material fact in dispute. *Id.*

However, to survive a motion to dismiss, a plaintiff must cite facts supporting a "plausible" cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).

B. Nominal Defendant Microsoft's Motion to Dismiss